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STATE OF CALIFORNIA
NEW MOTOR VEHICLE BOARD

A G E N D A
GENERAL MEETING

Glendale City Hall
Council Chamber Room
613 E. Broadway, 2nd Floor
Glendale, California 91206
(818) 548-2094

April 28, 2023

Please note that Board action may be taken regarding any of the issues listed below. As such, if any person has an interest in any of these issues, he or she may want to attend.

The Board provides an opportunity for members of the public to comment on each agenda item before or during the discussion or consideration of the item as circumstances permit. (Gov. Code § 11125.7) However, comments by the parties or by their counsel that are made regarding any proposed decision, order, or ruling must be limited to matters contained within the administrative record of the proceedings. No other information or argument will be considered by the Board. Members of the public may not comment on such matters.

1. **10:00 a.m. -- Meeting called to order.**
2. **Roll Call.**
3. **Pledge of Allegiance.**
4. **Approval of the Minutes from the January 25, 2023, General Meeting.**
5. **Presentation of Resolution to Nanxi Liu, former Public Member.**
6. **Consideration of presentation of Resolution to Ramon Alvarez C., former Dealer Member.**
7. **Discussion concerning the state of the automotive industry by manufacturer and dealer representatives - Board Development Committee.**

8. **Consideration of the revised *Guide to the New Motor Vehicle Board* to include information on statutory and regulatory changes - Administration Committee.**
9. **Update on Board Development Activities - Board Development Committee.**
10. **Board member education concerning the Administrative Procedure Act and Bagley-Keene Open Meeting Act - Board Development Committee.**
11. **Board member education concerning the Political Reform Act and Public Records Act - Board Development Committee.**
12. **Annual review of New Motor Vehicle Board mission and vision statements - Executive Committee.**
13. **Report on the Board's financial condition for the 2nd quarter of Fiscal Year 2022-2023 - Fiscal Committee.**
14. **Discussion concerning pending legislation - Legislative Committee.**
 - a. Pending Legislation of Special Interest:
 - (1) Assembly Bill 473 (Assembly Member Aguiar-Curry) - Motor vehicle manufacturers, distributors, and dealers.
 - b. Pending Legislation of General Interest:
 - (1) Senate Bill 544 (Senator Laird) - Bagley-Keene Open Meeting Act: teleconference.
 - (2) Assembly Bill 1617 (Assembly Member Wallis) – Vehicles: recreational off-highway vehicles.
 - c. Pending Federal Legislation of General Interest: None
15. **Discussion and consideration of proposed regulatory amendments to eliminate references to facsimile and residence addresses in Section 595 of Title 13 of the California Code of Regulations (Format of First Page; Format and Filing of Papers) and make gender neutral - Policy and Procedure Committee.**
16. **Discussion and consideration of proposed regulatory amendments - Policy and Procedure Committee.**
 - A. Challenge (13 CCR § 551.1)
 - B. Testimony by Deposition (13 CCR § 551.6)
 - C. Intervention; Grant of Motion; Conditions (13 CCR § 551.13)
 - D. Request for Informal Mediation (13 CCR § 551.14)
 - E. Informal Mediation Process (13 CCR § 551.16)

- F. Sanctions (13 CCR § 551.21)
 - G. Interpreters and Accommodation (13 CCR § 551.23)
 - H. Transmittal of Fees by Mail (13 CCR § 553.72)
 - I. Contents (13 CCR § 555)
 - J. Procedure at Hearings (13 CCR § 580)
 - K. Article 7. New Motor Vehicle Board – Conflict-of-Interest Code
17. **Discussion and consideration of temporary authorization of discretion to the Executive Director to assign additional merits hearings to the Office of Administrative Hearings outside the current “Merits Hearing Judge Assignment Log” - Policy and Procedure Committee.**
18. **Review and consideration of Board delegations in compliance with the 1996 Performance Audit conducted by Business, Transportation & Housing Agency - Executive Committee.**
19. **Executive Director's Report.**
- A. Administrative Matters.
 - B. Case Management.
 - C. Judicial Review.
 - D. Notices Filed Pursuant to Vehicle Code sections 3060/3070 and 3062/3072.
 - E. Other.
20. **Closed Executive Session.**
- Pursuant to Government Code section 11126(a)(1), all members of the Board shall convene in a closed Executive Session.
- a. **Discussion and consideration of personnel matters - Administration Committee.**
- Discussion and consideration of personnel matters, by all members of the Board.
- b. **Consideration of annual performance review for Executive Director - Executive Committee.**
- Consideration of annual performance review for Executive Director, by all members of the Board.
- c. **Oral interview of the Administrative Law Judge candidates via Zoom - Administration Committee.**
- Oral interview of the Administrative Law Judge candidates via Zoom, by all members of the Board.

d. **Consideration of the Administrative Law Judge nominee - Administration Committee.**

Consideration of the Administrative Law Judge nominee, by all members of the Board.

21. **Open Session.**

22. **Discussion and consideration of whether to designate the following Board Decisions as Precedent Decisions pursuant to Government Code section 11425.60, by the Public Members:**

- (1) Protest No. PR-2418-15 *Adrenaline Powersports v. Polaris Industries, Inc.*
- (2) Protest No. PR-2534-17 (consolidated) *Porter Auto Group, L.P. v. FCA US LLC*
- (3) Protest No. PR-2605-19 *R&H Automotive Group, Inc. v. American Honda Motor Co., Inc., Acura Automotive Division*
- (4) Protest No. PR-2180-09 *Jackson Ford-Mercury, Inc., dba The New Jackson Ford-Mercury v. Ford Motor Company*

23. **Oral Presentation before the Public Members of the Board.**

MICHAEL CADILLAC, INC., dba MICHAEL CHEVROLET CADILLAC v. GENERAL MOTORS LLC

Protest Nos. PR-2813-22 and PR-2814-22

24. **Closed Executive Session deliberations.**

Pursuant to Government Code section 11126(c)(3), Vehicle Code section 3008(a), and Title 13, California Code of Regulations, sections 581 and 588, the Board convenes in closed Executive Session to deliberate the decisions reached upon the evidence introduced in proceedings that were conducted in accordance with Chapter 5 (commencing with section 11500) of Part 1 of Division 3 of Title 2 of the Government Code.

Consideration of Proposed Order.

MICHAEL CADILLAC, INC., dba MICHAEL CHEVROLET CADILLAC v. GENERAL MOTORS LLC

Protest Nos. PR-2813-22 and PR-2814-22

Consideration of the Administration Law Judge's Proposed Order Granting Respondent's motion to dismiss.

25. **Open Session.**

26. **Public Comment. (Gov. Code § 11125.7)**

27. **Adjournment.**

To request special accommodations for persons with disabilities at this or any future Board meeting or to request any accommodation for persons with disabilities necessary to receive agendas or materials prepared for Board meetings, please contact Danielle Phomsopha at (916) 445-1888 or danielle.phomsopha@nmvb.ca.gov.



R O S T E R
NEW MOTOR VEHICLE BOARD

2415 1st Avenue, MS L242
Sacramento, California 95818

<u>NAME</u>	<u>APPOINTING AUTHORITY</u>	<u>STATUS</u>
Anne Smith Boland Term exp. 1-15-23	Governor's Office	Dealer Member
Kathryn Ellen Doi Term exp. 1-15-25	Governor's Office	Public Member
Ryan Fitzpatrick Term exp. 1-15-23	Governor's Office	Dealer Member
Ardashes (Ardy) Kassakhian Term exp. 1-15-26	Senate Rules Committee	Public Member
Bismarck Obando Term exp. 1-15-26	Governor's Office	Public Member
Brady Schmidt Term exp. 1-15-26	Governor's Office	Dealer Member
Jacob Stevens Term exp. 1-15-23	Governor's Office	Public Member
Vacant Term exp. 1-15-25	Governor's Office	Dealer Member
Vacant Term exp. 1-15-23	Speaker of the Assembly	Public Member



STATE OF CALIFORNIA

MEMO

To: ALL BOARD MEMBERS

**From: TIMOTHY M. CORCORAN
NEW MOTOR VEHICLE BOARD
(916) 445-1888**

Subject: UPCOMING EVENTS

Date: April 28, 2023

The following highlights the upcoming Board events:

- April 28, 2023, General Meeting (Glendale)
- June 4-8, 2023, Recreation Vehicle Industry Association (RVIA) Show 2023 (Washington D.C.)
- September 21, 2023, General Meeting (Sacramento)
- September 26-29, 2023, National Association of Motor Vehicle Boards and Commissions (NAMVBC) 2023 Fall Conference (Madison, Wisconsin)
- December 8, 2023, General Meeting (Riverside)

If you have any questions or concerns about any of the upcoming Board meetings, please do not hesitate to contact me at (916) 445-1888.

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STATE OF CALIFORNIA NEW MOTOR VEHICLE BOARD MINUTES

The New Motor Vehicle Board ("Board") held a General meeting on January 25, 2023, via Zoom and teleconference. Bismarck Obando, President and Public Member, called the meeting of the Board to order at 9:38 a.m.

President Obando welcomed everyone to the meeting and stated that the meeting materials are available on the Board's website and hard copies of the materials can be requested by contacting the Board's legal staff at (916) 445-1888 or nmvp@nmvp.ca.gov. President Obando also set forth the parameters for the meeting.

2. **ROLL CALL**

Board Members Present: Anne Smith Boland
Kathryn Ellen Doi
Ryan Fitzpatrick (left at 11:25 a.m.)
Ardashes "Ardy" Kassakhian (arrived at 10:02 a.m.)
Bismarck Obando
Brady Schmidt
Jacob Stevens

Board Staff Present: Timothy M. Corcoran, Executive Director
Dawn Kindel, Assistant Executive Officer
Robin P. Parker, Chief Counsel
Danielle R. Phomsopha, Senior Staff Counsel
Suzanne Luke, Administrative Services Analyst
Holly Victor, Mediation Analyst
Lee Moore, Mediation Analyst

3. **INTRODUCTION AND WELCOME OF NEWLY APPOINTED DEALER BOARD MEMBER BRADY SCHMIDT**

President Obando welcomed newly appointed Dealer Member Brady Schmidt. Before introducing Member Schmidt, President Obando invited former Dealer Member Ramon Alvarez to make comments.

Former Member Alvarez thanked Board staff and former colleagues for their work throughout his years on the Board. Former Member Alvarez welcomed new Member

Schmidt to the Board.

President Obando introduced Member Schmidt who was appointed by Governor Newsom in January.

Member Schmidt indicated it is a pleasure to be appointed to the Board and he looks forward to contributing to the Board's work. Member Schmidt thanked former Member Alvarez for his mentorship throughout the years.

Member Schmidt provided his background: he is a new car dealer in California and Hawaii. He has worked in the car business for 33 years, primarily at a brokerage company selling new car dealerships, negotiating buy-sells, and working with manufacturers to affect change of ownership of new car dealerships.

4. **APPROVAL OF THE MINUTES FROM THE SEPTEMBER 28-29, 2022, SPECIAL MEETING/INDUSTRY ROUNDTABLE AND NOVEMBER 7, 2022, GENERAL MEETING**

Member Doi moved to adopt the September 28-29, 2022, Special Meeting/Industry Roundtable minutes and the November 7, 2022, General Meeting minutes. Member Fitzpatrick seconded the motion. The motion carried unanimously.

5. **2023 ELECTION OF BOARD PRESIDENT AND VICE PRESIDENT**

This item was postponed until after agenda item 13.

6. **ANNUAL REVIEW AND APPOINTMENT OF COMMITTEE MEMBERS TO THE ADMINISTRATION COMMITTEE, BOARD DEVELOPMENT COMMITTEE, FISCAL COMMITTEE, GOVERNMENT AND INDUSTRY AFFAIRS COMMITTEE, LEGISLATIVE COMMITTEE, AND POLICY AND PROCEDURE COMMITTEE, AND AD HOC COMMITTEE (IF APPLICABLE), BY THE INCOMING BOARD PRESIDENT**

This item was postponed until after agenda item 13.

7. **APPOINTMENT OF BOARD MEMBER DESIGNEE IN COMPLIANCE WITH THE BOARD'S 1997 "REVISED BOARD POLICY REGARDING REPRESENTATION IN COURT ACTIONS" BY THE INCOMING BOARD PRESIDENT**

This item was postponed until after agenda item 13.

8. **DISCUSSION AND CONSIDERATION OF THE REVISED NEW MOTOR VEHICLE BOARD LOGO**

The members were provided a memorandum regarding the consideration of a revised New Motor Vehicle Board logo from Dawn Kindel, Lee Moore, and Holly Victor. Ms. Kindel provided an update that a few minor edits have been made to the logo at the direction of the Board Members at the November 7, 2022, General Meeting. Mr. Corcoran indicated that California State Transportation Agency communications team reviewed and supports the new logo design.

Member Stevens thanked staff for working to address the Board Members' concerns from the previous Board Meeting.

Member Doi raised a concern that the lines appear blurry. Mr. Corcoran clarified that the conversion of the logo from its original format to the PDF provided in this memorandum likely blurred the lines. Staff will ensure that blurry lines do not remain in the final product.



Member Stevens moved to adopt option one from the memorandum as displayed above. Member Smith Boland seconded the motion. The motion carried unanimously.

9. **DISCUSSION AND CONSIDERATION OF AMENDED BOARD ADOPTED POLICY CONCERNING THE BOARD'S DOCUMENT REQUEST POLICY, WAIVER REQUEST POLICY, AND FACSIMILE REQUEST POLICY TO REFLECT THE REORGANIZATION OF THE CALIFORNIA PUBLIC RECORDS ACT**

The members were provided a memorandum from Tim Corcoran and Robin Parker regarding the consideration of amended Board adopted policy in light of the reorganization and recodification of the California Public Records Act. As indicated in the memorandum and attached policies, staff are updating the legal authority in the Board's document request policy, waiver request policy, and facsimile request policy. There are no substantive changes being made to the policies.

Member Fitzpatrick moved to adopt the amendments as proposed in the memorandum. Member Smith Boland seconded the motion. The motion carried unanimously.

10. **CLOSED EXECUTIVE SESSION**

Pursuant to Government Code section 11126(a)(1), all members of the Board shall convene in a closed Executive Session.

DISCUSSION AND CONSIDERATION OF PERSONNEL MATTERS

Discussion and consideration of personnel matters, by all members of the Board.

This item was postponed until after agenda item 13.

11. **OPEN SESSION**

This item was postponed until after agenda item 13.

12. **CONSIDERATION OF NOMINEE FOR THE SOLON C. SOTERAS EMPLOYEE RECOGNITION AWARD RECIPIENT AS RECOMMENDED BY THE BOARD DEVELOPMENT COMMITTEE**

At the July 18, 2000, General Meeting, the members adopted an Employee Recognition Award Program to recognize staff for their accomplishments. The program was renamed the Solon C. Soteris Employee Recognition Award. The Board Development Committee recommended this year's Solon C. Soteris Employee Recognition Award be awarded to Senior Staff Counsel, Danielle Phomsopha, in recognition of her leadership in developing and coordinating the "virtual" 2021 and 2022 *New Motor Vehicle Board Industry Roundtable* events.

Mr. Corcoran commented that although roundtable preparations are a team effort, it is important to have staff that takes ownership and makes sure deadlines are met and everyone does what they need to do. A stellar group of participants were recruited for the past two virtual roundtables. Ms. Phomsopha thought outside the box to put on unique events, with the first virtual roundtable having record level attendance. Mr. Corcoran indicated Ms. Doi nominated Ms. Phomsopha for this award as a member of the Board Development committee.

Ms. Doi indicated that it has been a pleasure to watch Ms. Phomsopha grow into her role as staff counsel and is glad the Board can recognize Ms. Phomsopha for her work over the past few years.

President Obando thanked Ms. Phomsopha and congratulated her as well.

Ms. Phomsopha thanked her colleagues and the staff for all their input and work done behind the scenes. When events occur smoothly, she feels it is rewarding to put in work behind the scenes and have the event be a success. Ms. Phomsopha appreciated the recognition and thanked the Board.

A motion on this item was made after item 13.

13. **DISCUSSION CONCERNING BOARD DEVELOPMENT ACTIVITIES**

The members were provided a memorandum from Tim Corcoran and Danielle Phomsopha concerning Board development activities. Ms. Phomsopha reported that previous Board development activities have included Board Meetings and tours held at automobile dealerships and factories. Staff are suggesting a dealership and/or factory tour be scheduled for 2024, given that the locations for the 2023 Board Meetings have been chosen.

Board staff are also suggesting that short education presentations be made at each Board Meeting on common topics of interest regarding the Board's procedures. Topics were suggested in the memorandum and staff are interested in additional topics of interest to Board Members.

Member Doi recognized former Member Alvarez who was also on the Board Development committee and worked with Member Doi, Mr. Corcoran and Ms. Phomsopha to create a list of potential topics for education. Member Doi encouraged other Board Members to suggest any topics or ideas that might be of interest.

Member Fitzpatrick suggested that AC Transit in the Bay Area has done extensive research on renewable energy as related to transportation. AC Transit also recently retrofitted all its buses to hydrogen fuel. Member Fitzpatrick has a connection with the President of the Board of AC Transit and believes this would be a great opportunity for AC Transit to make a formal presentation to the Board.

Member Kassakhian joined the Board Meeting at 10:02 a.m.

President Obando inquired whether the Board Development committee considered continuing education virtually in an effort to recruit or engage stakeholders outside of California. Member Doi agreed with this suggestion.

Mr. Corcoran mentioned that new Board Member Schmidt has extensive experience with buy-sells and believes this would also be an interesting topic for Board education. Member Schmidt agreed that a presentation on buy-sells may be helpful and of interest to the Board. He previously made a related presentation 10 or 15 years prior and would be willing to make another presentation.

12. **CONSIDERATION OF NOMINEE FOR THE SOLON C. SOTERAS EMPLOYEE RECOGNITION AWARD RECIPIENT AS RECOMMENDED BY THE BOARD DEVELOPMENT COMMITTEE**

Member Doi moved to adopt the Committee's recommendation. Member Kassakhian seconded the motion. The motion carried unanimously.

5. **2023 ELECTION OF BOARD PRESIDENT AND VICE PRESIDENT**

At the inquiry of President Obando and Mr. Corcoran, Ms. Parker confirmed it was not necessary to take roll after Member Kassakhian joined the meeting because a quorum has already been established.

Ms. Parker explained the parliamentary procedures regarding motions for nominating a President and Vice President, moving to close the nominations, and then voting on such nominations.

Member Doi moved to nominate Member Kassakhian for President. Member Kassakhian accepted this nomination. No other nominations for President were made. Member Doi moved to close the nominations, with Member Stevens seconding the motion. This motion to close the nominations carried unanimously. Member Smith Boland seconded the motion to nominate Member Kassakhian for President. The motion to nominate Member Kassakhian for President carried unanimously.

President Obando noted that Member Kassakhian's term as President will start at the next meeting of the Board.

Member Kassakhian moved to nominate Member Stevens for Vice President. No other nominations for Vice President were made. Member Doi moved to close the nominations with Member Fitzpatrick seconding the motion. The motion to close the nominations carried unanimously. Member Doi seconded the motion to nominate Member Stevens as Vice President. The motion to nominate Member Stevens as Vice President carried unanimously.

Mr. Corcoran thanked President Obando for his leadership as Board President and congratulated him on his recent reappointment to the Board by the Governor. President Obando thanked Member Doi for taking the lead in instances as President during the pandemic. He also indicated his eagerness to continue working on the Board, in particular on the equity task force.

6. **ANNUAL REVIEW AND APPOINTMENT OF COMMITTEE MEMBERS TO THE ADMINISTRATION COMMITTEE, BOARD DEVELOPMENT COMMITTEE, FISCAL COMMITTEE, GOVERNMENT AND INDUSTRY AFFAIRS COMMITTEE, LEGISLATIVE COMMITTEE, AND POLICY AND PROCEDURE COMMITTEE, AND AD HOC COMMITTEE (IF APPLICABLE), BY THE INCOMING BOARD PRESIDENT**

After a brief discussion off the record, President Obando announced the following committee appointments:

ADMINISTRATION COMMITTEE

Ryan Fitzpatrick, Chair
Bismack Obando, Member

BOARD DEVELOPMENT COMMITTEE

Kathryn Ellen Doi, Chair
Brady Schmidt, Member

EXECUTIVE COMMITTEE

Ardy Kassakhian, President
Jake Stevens, Vice President

FISCAL COMMITTEE

Anne Smith Boland, Chair
Bismarck Obando, Member

GOVERNMENT AND INDUSTRY AFFAIRS COMMITTEE

Anne Smith Boland, Chair
Ryan Fitzpatrick, Member

LEGISLATIVE COMMITTEE

Ardy Kassakhian, Chair
Jake Stevens, Member

POLICY AND PROCEDURE COMMITTEE

Jake Stevens, Chair
Kathryn Ellen Doi, Member

AD HOC DELEGATED COMMITTEE ON EQUITY, JUSTICE AND INCLUSION

Anne Smith Boland, Chair
Kathryn Ellen Doi, Member
Bismarck Obando, Member
Jake Stevens, Member

7. **APPOINTMENT OF BOARD MEMBER DESIGNEE IN COMPLIANCE WITH THE BOARD'S 1997 "REVISED BOARD POLICY REGARDING REPRESENTATION IN COURT ACTIONS" BY THE INCOMING BOARD PRESIDENT**

This matter was pulled from the agenda since the incoming President is a Public Member and the incoming Vice President is a Public Member. If both the incoming President and Vice President were Dealer Members, this designation would be necessary to comply with the Board adopted policy.

10. **CLOSED EXECUTIVE SESSION**

Pursuant to Government Code section 11126(a)(1), all members of the Board shall convene in a closed Executive Session.

DISCUSSION AND CONSIDERATION OF PERSONNEL MATTERS

Discussion and consideration of personnel matters, by all members of the Board.

The Public and Dealer Members convened in Closed Executive Session to discuss personnel matters. No action was taken.

Member Fitzpatrick left at 11:25 a.m. during closed executive session.

11. **OPEN SESSION**

The Board Members returned to Open Session. President Obando announced there was no Board action to report in regard to Agenda Item 10.

14. **DISCUSSION AND CONSIDERATION OF AMENDED BOARD ADOPTED POLICY CONCERNING THE BOARD'S LEGISLATIVE POLICY TO REFLECT THE REORGANIZATION OF THE CALIFORNIA PUBLIC RECORDS ACT**

The members were provided a memorandum from Tim Corcoran and Robin Parker regarding the consideration of amended Board adopted legislative policy in light of the reorganization and recodification of the California Public Records Act. Ms. Parker explained that similar to the prior memorandum regarding document requests, the amendments to the legislative policy are also non-substantive and only related to the new numbering of the California Public Records Act.

Member Doi moved to adopt the amendments as proposed in the memorandum. Member Stevens seconded the motion. The motion carried unanimously.

15. **DISCUSSION AND CONSIDERATION OF AMENDED BOARD ADOPTED POLICY CONCERNING CONFIDENTIAL PROPOSED STIPULATED DECISIONS AND ORDERS PURSUANT TO VEHICLE CODE SECTION 3050.7 TO REFLECT THE REORGANIZATION OF THE CALIFORNIA PUBLIC RECORDS ACT**

The members were provided a memorandum from Tim Corcoran and Robin Parker regarding the consideration of amended Board adopted policy concerning proposed Stipulated Decisions and Orders in light of the reorganization and recodification of the California Public Records Act. Ms. Parker reported that these amendments are similar to those reported on the two previous related memos.

Member Doi did not have any objections to these amendments but mentioned that she has general questions regarding the confidential Stipulated Decision process as raised by the petition matter on the agenda.

Member Kassakhian moved to adopt the amendments as proposed in the memorandum. Member Smith Boland seconded the motion. The motion carried unanimously.

16. **REPORT ON THE BOARD'S FINANCIAL CONDITION FOR THE 1ST QUARTER OF FISCAL YEAR 2022-2023**

The members were provided with a memorandum from Tim Corcoran, Dawn Kindel and Suzanne Luke. As indicated in the memorandum, the Board began the first quarter of fiscal year 2022-2023 with a budget appropriation of \$1.98 million and ending with a reserve balance of \$2.6 million. The Board has expended 20% of its appropriated budget for the first quarter. Staff do not see a need for a fee adjustment at this time given the current reserve balance.

The Board's Annual Fee collection is complete. Staff collected \$881,919 from manufacturers and distributors in the Board's jurisdiction.

In order to provide more timely information, staff will expand on the budget information provided in the Administrative Matters Report.

Mr. Corcoran acknowledged that vehicle sales may be uncertain for the near future, but staff are mindful of the number of vehicles distributed in the state even though the Board gets those numbers in arrears. Vehicle sales account for approximately half the Board's revenue. Mr. Corcoran also reminded the Board that because it has more than 12 months in reserve, there would be ample time to address any need for change in fee structure.

President Obando also mentioned as background information that a fee increase is approximately a year-long process, so staff and the Board monitor the Board's fiscal health with that timeframe in mind.

Member Doi inquired as to whether any other salaries in addition to the Administrative Law Judges are included in the part-time salaries under payroll expenditures. Ms. Kindel confirmed that part-time salaries include the Administrative Law Judges as well as Board Member per diem pay.

There was no Board action as this matter was for information only.

17. **CONSIDERATION OF OUT-OF-STATE TRAVEL PLANS FOR FISCAL YEAR 2023-2024**

The members were provided with a memorandum from Suzanne Luke concerning the out-of-state travel plans for fiscal year 2023-2024. Ms. Luke indicated that the Board staff are proposing attendance at the following events:

- Recreation Vehicle Industry Association (RVIA) Show 2023
Washington, D.C.
June 4-8, 2023
- National Association of Motor Vehicle Boards and Commissions (NAMVBC) 2023
Fall Conference
Madison, Wisconsin
September 26-29, 2023

Staff proposed sending the Executive Director to represent the Board and any Board member that may want to attend these events for educational purposes. Once the Board approves the travel requests and they are formally submitted, they cannot be changed. President Obando inquired as to whether Wisconsin is on a list of banned states that California state employees cannot travel to. Mr. Corcoran confirmed Wisconsin is not a banned state.

Mr. Corcoran also indicated that there is not a limit to the number of Board Members that staff can request for travel to an event. There are several new Board Members that have not yet attended the NAMVBC conference and Mr. Corcoran suggested that the Board open the travel request to any Board Member who has not previously attended the NAMVBC conference.

Ms. Kindel stated that she is no longer an officer with NAMVBC but still involved with the association. She indicated that this year's NAMVBC conference will hold a joint session with the American Association of Motor Vehicle Administrators (AAMVA) group, which is approximately four or five times larger than NAMVBC. The joint session will relate to vehicle titling, registrations, and investigations, as well as the manufacturer and dealership side of the industry.

Ms. Kindel clarified that travel requests will need to be submitted to the Department of Motor Vehicles by April. The requests will also need to be approved by the California State Transportation Agency and ultimately the Governor's Office. Therefore, Board Members should advise staff of the out-of-state trips they wish to attend by March 15 to allow time for approval.

Member Kassakhian moved to approve the requests for out-of-state travel with the condition that Board Members who are interested in attending events advise Mr. Corcoran and Ms. Kindel by March 15. Member Doi seconded the motion. The motion carried unanimously.

18. **ANNUAL REPORT CONCERNING BOARD ADOPTED POLICIES**

The members were provided with a memorandum from Tim Corcoran and Robin Parker concerning the annual review of Board adopted policies. Ms. Parker highlighted the following changes from 2022:

- The adjusted annual gift limit was increased from \$520 to \$590 from January 1, 2023, through December 31, 2024.
- For “Acceptance of Credit Card Payments,” it was noted that in 2022 the Board began allowing online credit card payments.

There was no Board action as this matter was for information only.

19. **CONSIDERATION OF 2023 RULEMAKING CALENDAR**

The members were provided with a memorandum and 2023 Rulemaking Calendar from Tim Corcoran and Danielle Phomsopha. Ms. Phomsopha reported that the Rulemaking Calendar has been sent to the California State Transportation Agency for approval. Ms. Phomsopha indicated that if the calendar is approved by the Board, it will be submitted to the Office of Administrative Law for publication in the California Regulatory Notice Register.

Member Stevens moved to adopt the 2023 Rulemaking Calendar. Member Smith Boland seconded the motion. The motion carried unanimously.

20. **ANNUAL REPORT ON THE ASSIGNMENT OF CASES TO BOARD ADMINISTRATIVE LAW JUDGES**

The members were provided with a memorandum from Tim Corcoran and Danielle Phomsopha concerning the assignment of cases to Board Administrative Law Judges in 2022. Ms. Phomsopha reported that there were five law and motion hearings, six discovery hearings (rulings on objections) and five mandatory settlement conferences. There were no merits hearings held in 2022.

There was no Board action as this matter was for information only.

21. **CONSIDERATION OF THE *EXPORT OR SALE-FOR-RESALE PROHIBITION POLICY PROTEST GUIDE (VEHICLE CODE SECTION 3085, ET SEQ.)***

The members were provided with a memorandum and *Export or Sale-for-Resale Prohibition Policy Protest Guide*. Ms. Parker reported that there were no substantive changes to the Guide this year. Once the 2023 Guide is approved, it will be posted on the website and made available.

Member Smith Boland moved to adopt the 2023 *Export or Sale-for-Resale Prohibition Policy Protest Guide* as amended. Member Schmidt seconded the motion. The motion carried unanimously.

22. **CONSIDERATION OF REVISIONS TO THE INFORMATIONAL GUIDE FOR MANUFACTURERS AND DISTRIBUTORS, WHICH OUTLINES THEIR OBLIGATIONS TO PROVIDE NOTICES, SCHEDULES, AND FORMULAS MANDATED BY THE CALIFORNIA VEHICLE CODE AND CIVIL CODE TO THE NEW MOTOR VEHICLE BOARD AND/OR IMPACTED DEALERS**

The members were provided with a memorandum and a revised *Informational Guide for Manufacturers and Distributors* from Tim Corcoran and Robin Parker. Ms. Parker indicated that the changes from the prior version adopted in March 2022 are as follows:

- The reference to contacting the local Department of Motor Vehicles Occupational Licensing Inspections office was removed at the request of Ailene Short, Branch Chief, Occupational Licensing.
- The citations to the California Public Records Act were changed to reflect the new numbering.

Member Stevens moved to adopt the 2023 *Informational Guide for Manufactures and Distributors* as amended. Member Kassakhian seconded the motion. The motion carried unanimously.

23. **DISCUSSION AND CONSIDERATION OF PROPOSED REVISIONS TO THE ASSIGNMENT OF CASES TO BOARD ADMINISTRATIVE LAW JUDGES BY ADDING THE OFFICE OF ADMINISTRATIVE HEARINGS TO THE MERITS JUDGE ASSIGNMENT LOG IN LIGHT OF CALPERS PROPOSED REGULATION 574.1 (CAL. CODE REGS., TIT. 2, § 574.1)**

The members were provided with a memorandum from Tim Corcoran and Robin Parker regarding proposed revisions to the assignment of cases to Board Administrative Law Judges (ALJs) by adding the Office of Administrative Hearings (OAH) to the Merits Judge Assignment Log in light of CalPERS proposed regulation 574.1 of Title 2 of the California Code of Regulations. Ms. Parker provided a historical background of the Board's use of ALJs and OAH. As indicated in the memorandum, CalPERS is proposing a new regulation that would define a "limited duration employee." In the event the definition has an impact on the Board's use of its Retired Annuitant ALJs, staff thought it would be prudent to add OAH to the merits hearing assignment log.

If OAH were added to the log, the next merits hearing that has not been assigned to a judge would be assigned to OAH. The Board will then be able to evaluate the process involving OAH should the Board not be able to utilize its own judges. This will also allow for any changes to the Board's regulations or statutes to be addressed.

Member Doi inquired whether any merits hearing are scheduled for 2023. Ms. Parker indicated that a hearing that has been assigned to Judge Smith is going forward on February 6 (the hearing was subsequently taken off calendar) and a subsequent tentative hearing has also been assigned to a Board ALJ. Board staff will determine if that case will proceed to a merits hearing on March 6 (this hearing was subsequently amended).

Ms. Parker further explained that merits hearings are assigned to an ALJ approximately 45 to 60 days before the tentative hearing date because there are several pre-hearing

matters, including conference calls, which need to occur. There are many additional tentative merits hearings already on calendar.

Member Doi moved to add OAH to the “Merit Hearings Judge Assignment Log,” so OAH is the next in line to preside over a protest hearing. Member Schmidt seconded the motion. The motion carried unanimously.

24. **EXECUTIVE DIRECTOR'S REPORT**

- A. Administrative Matters.
- B. Case Management.
- C. Judicial Review.
- D. Notices Filed Pursuant to Vehicle Code sections 3060/3070 and 3062/3072.
- E. Other.

Mr. Corcoran explained for the newest Board Members that the Executive Director's Report identifies all pending projects Board leadership and staff are working on. Mr. Corcoran indicated that he is interested in getting back to meeting with each Board Member individually in person since such meetings were temporarily stopped the previous three years due to COVID restrictions. Upcoming in-person meetings will be done annually in order to address the personal goals and interests of each Board Member in their service on the Board. This will also allow for the Board Members to discuss worthy projects in furtherance of the Board's mission.

Ms. Parker reported that the merits hearing scheduled for February 6 will be the first hearing pertaining to Section 3065.4 protests regarding retail labor rates. In regard to judicial matters, the court made the following rulings in *Subaru of America v. New Motor Vehicle Board* with Courtesy Automotive Group, Courtesy Subaru of Chico as the interested party:

- The court denied Subaru's motion to compel the Board's staff summary prepared with the proposed Stipulated Decision and Order.
- The court sustained with leave to amend Courtesy's demurrer to the writ. Subaru has until February 3 to file its first amended petition.
- The court granted Subaru's request for official notice and both parties' requests to seal a portion of the record.

Member Doi commended Board staff for protecting the attorney-client privilege enjoyed by the Board with its counsel in regard to the motion to compel.

Ms. Parker also indicated that staff continue to monitor the litigation mentioned at the November Board Meeting filed by the attorney and judges' union (CASE) against the Department of Human Resources (CalHR) regarding the use of retired annuitants by several state agencies. CalHR filed a demurrer on January 20, and it will be heard on March 28. The next update will be provided to the Board at the April 28 Board Meeting.

At Member Doi's request, Ms. Parker summarized the lawsuit as follows: CASE is seeking to end, “the unlawful employment of retired annuitants,” as to the attorneys and judges. CASE also contends that their employment takes away civil servant positions and reduces union membership by those retired annuitants not belonging to the union.

In regard to case management, Ms. Phomsopha indicated that there were 13 consolidated protests dismissed since the publication of the Executive Director's Report. Those included four termination protests, four incentive program protests and five warranty reimbursement protests. In addition, there were two establishment protests that were also dismissed. Ms. Phomsopha also shared that the first protest of the year was filed January 24. It was a termination protest. In response to Member Doi's inquiry, Ms. Phomsopha confirmed that the protests that were dismissed were because the parties resolved their cases.

Member Doi requested an update in regard to the Board's move to the Department of Motor Vehicles. Ms. Kindel shared that the Board's actual move date is February 10, which is when the lease terminates. The staff will be in hoteling or flex spaces until the renovated suite is ready later this year. Board staff will have adequate space and access to daily files and the photocopier in the interim.

Mr. Corcoran commended Ms. Kindel and the team for all the work in packing and moving the office on time. Ms. Kindel indicated the Board has been at the 21st street location for approximately 30 years.

There was no Board action as this matter was for information only. A lunch break was subsequently taken until 12:30 p.m.

25. **CONSIDERATION OF THE FOLLOWING BY THE PUBLIC MEMBERS OF THE BOARD IN:**

COURTESY AUTOMOTIVE GROUP, INC., dba COURTESY SUBARU OF CHICO v. SUBARU OF AMERICA, INC.
Petition No. P-463-22

a. **CONSIDERATION OF RESPONDENT'S MOTION TO CONSIDER THE SUPPLEMENTAL DECLARATION OF RAYMOND SMIT AND SIGN SPECIFICATIONS REQUESTED BY PETITIONER IN SUPPORT OF OPPOSITION TO PETITION AND DECLARATION OF LISA M. GIBSON IN SUPPORT THEREOF**

Consideration of Respondent's Motion to consider the Supplemental Declaration of Raymond Smit and sign specifications requested by Petitioner in Support of Opposition to Petition and Declaration of Lisa M. Gibson in support thereof.

b. **CONSIDERATION OF PROTESTANT'S MOTION TO CONSIDER THE DECLARATION OF SHAHRAM MIHANPAJOUH (JERRY PAJOUH) IN SUPPORT OF PETITION**

Consideration of Protestant's Motion to consider the Declaration of Shahram Mihanpajouh (Jerry Pajouh) in Support of Petition.

c. **CONSIDERATION OF PETITION REQUESTING THAT THE BOARD DIRECT THE DEPARTMENT OF MOTOR VEHICLES (DMV) TO CONDUCT AN INVESTIGATION OF THE MATTERS CONTAINED THEREIN AND/OR MAKE A DETERMINATION TO ORDER DMV TO TAKE ACTION AGAINST RESPONDENT'S OCCUPATIONAL LICENSE PURSUANT TO VEHICLE CODE SECTION 3050(b)(1) AND (3)**

Consideration of Petition requesting that the Board direct DMV to conduct an investigation of the matters contained therein and/or make a determination to order DMV to take action against Respondent's Occupational License pursuant to Vehicle Code section 3050(b)(1) and (3), by the Public Members of the Board.

President Obando reminded the Dealer Members in attendance that they cannot participate in or engage in any conversations associated with this matter. Further, given the overlapping facts in both motions to consider the declarations and the petition, President Obando asked counsel to address all three matters in their presentations. Lastly, even though these matters pertain to the Board adopted Stipulated Decision and ALJ Matteucci's Confidential Decision, both filed under Board seal, all discussions and deliberations will be held in open session, as there is no authority authorizing a closed session discussion.

Roll call was taken to establish a quorum of the Public Members. All Public Members were present.

President Obando indicated that parties would have 30 minutes to make their presentations addressing the two motions and the petition. Parties would have another five minutes for rebuttal. Both parties stated their agreement to the timing. Ms. Parker also indicated that if the parties requested additional time, the Board President could grant more time in his discretion.

Oral comments were presented before the Public Members of the Board. Gavin M. Hughes, Esq. and Robert A. Mayville, Jr., Esq. of the Law Offices of Gavin M. Hughes represented Petitioner. Lisa M. Gibson, Esq. and Amy Toboco, Esq. of Nelson Mullins Riley & Scarborough LLP represented Respondent.

No public comment was presented.

Member Doi moved to grant the motion and accept the Declaration of Raymond Smit. Member Kassakhian seconded the motion. The motion carried unanimously.

Member Doi moved to grant the motion and accept the Declaration of Jerry Pajouh. Member Stevens seconded the motion. The motion carried unanimously.

In response to President Obando's inquiry as to the treatment of the confidential, sealed documents should the petition be referred to the Department of Motor Vehicles for investigation, Ms. Parker stated that the same procedure will be followed as all other petitions involving licensees that resulted in the Board asking the Department of Motor Vehicles to do an investigation.

Ms. Parker explained that the Department of Motor Vehicles would be provided with all documents in the administrative record, including unsealed documents. It will need all unsealed documents in the administrative record to do its investigation, just as the Board Members needed all unsealed documents to make a determination as to the petition.

Ms. Parker emphasized that the Board controls its own administrative record. The confidentiality of the documents will be ensured, and a mechanism will be in place so that only those persons who need access to the unsealed documents will have access.

Neither party made any comment or objection to the information provided in response to President Obando's inquiry.

Member Stevens moved to send the petition to the Department of Motor Vehicles to conduct an investigation of the matters contained therein and make a determination for Vehicle Code section 3050(b)(1) and (3). After some discussion, Member Stevens amended his motion to grant Petitioner's request for relief that the Board direct the Department of Motor Vehicles conduct an investigation pursuant to subdivision (b)(1) of Vehicle Code section 3050 and issue a written report on the results of the investigation within 180 days or a reasonable time as requested by the Department. Member Kassakhian seconded the motion. The motion carried unanimously.

26. Public Comment. (Gov. Code § 11125.7)

No additional public comment was presented.

27. Adjournment.

With no further business to discuss, the meeting was adjourned at approximately 1:57 p.m.

Submitted by

TIMOTHY M. CORCORAN
Executive Director

APPROVED: _____
Ardy Kassakhian
President
New Motor Vehicle Board



New Motor Vehicle Board **RESOLUTION**

W*HEREAS*, Mr. Ramon Alvarez C. was duly appointed by Governor Arnold Schwarzenegger in March 2007, and reappointed in November 2010, to serve as a dealer member of the **NEW MOTOR VEHICLE BOARD**. He was reappointed by Governor Edmund G. Brown Jr. in April 2014, and reappointed in July 2018; and,

W*HEREAS*, Mr. Alvarez C. served on numerous committees, most recently as a member of the Board Development Committee, Government and Industry Affairs Committee, Policy and Procedure Committee, and Ad Hoc Committee on Equity, Justice and Inclusion; served four terms as the Board's President in 2011, 2012, 2017, and 2018, and four terms as Vice President in 2009, 2010, 2016, and 2020; assisted the Board in many other capacities including his work on the Industry Roundtable and distinguished himself thereby; and

W*HEREAS*, Mr. Alvarez C. actively engaged in the Board's business by providing sound advice and leadership, was thoughtful, friendly and outgoing to staff and fellow members; and

W*HEREAS*, the foremost concern of Mr. Alvarez C. is public service to the people of the State of California, being active in political and community affairs, with exemplary service and dedication in the best interest of his fellow citizens, which merits the highest praise and recognition, and

W*HEREAS*, Mr. Alvarez C. has given with great unselfishness and dedication of his time and expertise to matters concerning the motor vehicle industry and helped direct and protect the welfare of the automotive industry in this State, which is vital to California's economy and public welfare, thereby enhancing the respect of the auto industry and public for the Board; and,

T*HEREFORE BE IT RESOLVED* that each and every member of the **NEW MOTOR VEHICLE BOARD** joins in expressing their profound appreciation to Mr. Ramon Alvarez C. for his contribution to the Board, to the motor vehicle industry, and to the people of the State of California.

Dated this 28th day of April 2023

ARDASHES "ARDY" KASSAKHIAN, PRESIDENT

JACOB STEVENS, VICE PRESIDENT

ANNE SMITH BOLAND, MEMBER

KATHRYN ELLEN DOI, MEMBER

RYAN FITZPATRICK, MEMBER

BISMARCK OBANDO, MEMBER

BRADY SCHMIDT, MEMBER



Memorandum

Date : APRIL 3, 2023

**To : ADMINISTRATION COMMITTEE
RYAN FITZPATRICK, CHAIR
BISMARCK OBANDO, MEMBER**

**From : TIMOTHY M. CORCORAN
ROBIN P. PARKER**

Subject : CONSIDERATION OF THE REVISED *GUIDE TO THE NEW MOTOR VEHICLE BOARD* TO INCLUDE INFORMATION ON STATUTORY AND REGULATORY CHANGES

The *Guide to the New Motor Vehicle Board* was most recently approved at the March 30, 2022, General Meeting. Each year it is thoroughly reviewed for accuracy.

The table of contents and all page references were updated. The Board's address was changed throughout. The section entitled "New as of 2023" on page 3 was updated to reflect regulations that were effective October 1, 2022, and legislative changes that deleted obsolete provisions relating to appeals and made technical changes.

The following additional edits are highlighted yellow in underline and strikeout font:

- With the relocation to the Department of Motor Vehicles, the Board does not have a landline or fax machine. In the event a party would like to file a protest via facsimile, the Board would accommodate this request. Footnote 5 on page 8 was added to request a franchisee seeking to file a protest via facsimile contact the Board's legal staff in advance at (916) 445-1888 or nmvb@nmvb.ca.gov.
- The addition of online credit card payments was added on page 9.
- Footnote 6 was added on page 9 to reflect that at the January 25, 2023, General Meeting, the Board approved adding the Office of Administrative Hearings to the "Merit Hearings Judge Assignment Log."
- New footnote 6 is referenced in footnote 25 on page 63.
- References to Vehicle Code section "3050(b)(2)" were changed to "3050(b)(2)(A)" on pages 67, 70, and 71 and in the sample petition form in the Appendix.

- Gender specific language was replaced with gender neutral language in the sample forms in the Appendix.

This topic is being agendaized for discussion and consideration at the April 28, 2023, General Meeting. If you have any questions or require additional information, please do not hesitate to contact us at (916) 445-1888.

Attachment

cc: Ardashes "Ardy" Kassakhian



State of California

NEW MOTOR VEHICLE BOARD

***Guide to the
New Motor Vehicle Board***

April 2023

STATE OF CALIFORNIA

NEW MOTOR VEHICLE BOARD

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Sacramento, California 95818
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GAVIN NEWSOM, GOVERNOR

California State Transportation Agency
TOKS OMISHAKIN, SECRETARY

BOARD MEMBERS

Public Members

KATHRYN ELLEN DOI
ARDASHES (ARDY) KASSAKHIAN
BISMARCK OBANDO
JACOB STEVENS

Dealer Members

ANNE SMITH BOLAND
RYAN FITZPATRICK
BRADY SCHMIDT

EXECUTIVE STAFF

TIMOTHY M. CORCORAN
Executive Director

LEGAL STAFF

ROBIN P. PARKER
Chief Counsel
DANIELLE R. PHOMSOPHA
Senior Staff Counsel

TABLE OF CONTENTS

PREAMBLE	i
PREFACE	ii
INTRODUCTION	1
Purpose.....	1
Organization.....	1
Meetings	2
Jurisdiction	2
NEW AS OF 2023	3
Legislation.....	3
Case Law	3
Regulations	3
POWERS AND DUTIES IN GENERAL	4
Enforcement of Board Orders	4
Mandatory Settlement Conferences.....	4
DISPUTES BETWEEN THE DEALER AND THE FRANCHISOR	5
PROTESTS IN GENERAL	7
Statutory Authority	7
Statutory Bases for Protest	7
Separate Protests	8
Filing Protest.....	8
Franchisor's Notice of Appearance	8
Filing Fee	8
Interested Individuals	9
Motion for Intervention	9
Challenge to Presiding Officer	9
Amicus Curiae Briefs	9
Table of Contents for Protest Section	10
TERMINATION OF FRANCHISE	11
Statutory Authority for Protest.....	11
Franchisor's Notice of Termination	11
Time for Filing a Protest.....	12
Required Elements of Protest	14
Good Cause.....	15
Determination of Protest	15
MODIFICATION OF FRANCHISE	16
Statutory Authority for Protest.....	16
Franchisor's Notice of Modification	16
Time for Filing a Protest.....	16
Required Elements of Protest	18
Good Cause.....	18
Determination of Protest	19
ADDITIONAL OR RELOCATED FRANCHISE	20
Statutory Authority for Protest.....	20
Franchisor's Notice of Additional or Relocated Franchise.....	20

TABLE OF CONTENTS -continued-

Exceptions to the Right to Protest	21
New Motor Vehicle Dealers (including RVs)	21
Recreational Vehicle Dealers Only	22
Time for Filing a Protest	22
Required Elements of Protest	23
Good Cause	24
Determination of Protest	24
ADDITIONAL OR RELOCATED SATELLITE WARRANTY FACILITY	25
Statutory Authority for Protest	25
Franchisor's Notice of Additional or Relocated Satellite Warranty Facility	25
Time for Filing a Protest	25
Required Elements of Protest	27
Good Cause	27
Determination of Protest	28
COMPENSATION FOR DELIVERY AND PREPARATION	29
Statutory Authority	29
Franchisor's Notice of Compensation for Delivery and Preparation	29
Time for Filing a Protest	29
Required Elements of Protest	30
Determination of Protest	30
WARRANTY CLAIMS - Motor Vehicle Dealers	31
Franchisor's Notice of Compensation for Warranty Reimbursement	31
Reasonableness of the Warranty Reimbursement Schedule	31
Protest of Pre-Repair Challenges to the Reduction in Time and Compensation (Labor Time Guides) Applicable to Specific Parts or Labor Operations	31
Approval of Warranty Claims	32
Disapproval of Warranty Claims for a Defective Part	32
Disapproval of Warranty Claims	32
Protest of Initial Disapproval of Warranty Claims	33
Franchisor Provided "Reasonable" Appeal Process	33
Final Denial of Warranty Claim	33
Protest of Final Denial of Warranty Claim Following a Franchisor's Appeal Process ..	33
Audits of Franchisee Warranty Records	33
Disapproval of Previously Approved Warranty Claims	34
Protest of Warranty Claim Disapproval of a Previously Approved Claim Following an Audit	34
Franchisor Provided "Reasonable" Appeal Process	34
Final Denial of Warranty Claim Following an Audit	35
Protest of Final Denial of Warranty Claim following an Audit Following the Franchisor's Appeal Process	35
Franchisor Chargeback for Warranty Claims	35
Required Elements of a Protest	36
Warranty Claims Protests Chart	37

TABLE OF CONTENTS -continued-

RETAIL LABOR RATE OR RETAIL PARTS RATE - Motor Vehicle Dealers	38
Establishment or Modification of a Franchisee's Retail Labor Rate or Retail Parts Rate	38
How a Franchisee Calculates its Retail Labor Rate?	38
How a Franchisee Calculates its Retail Parts Rate?	38
Statutorily Required Notice to the Franchisor by the Franchisee of its Retail Labor Rate and Retail Parts Rate	38
How Repair Orders are Submitted Pursuant to Section 3065.2	38
What Types of Charges Included in a Repair Order Should be Omitted in Calculating a Franchisee's Retail labor Rate and Retail Parts Rate	39
A Franchisor may Contest to the Franchisee the "Material Accuracy" of the Retail Labor Rate or Retail Labor Parts Rate by Submitting a "Notification" to the Franchisee	40
The Franchisor's Proposed Adjusted Retail Labor Rate or Retail Parts Rate is Effective if the Franchisee Agrees	40
If the Franchisee does not Agree with the Proposed Adjusted Rate then a Protest can be Filed with the Board.....	41
If the Franchisor Determines that the Franchisee's Retail Labor Rate or Retail Parts Rate is "Substantially Higher" than the Franchisee's Current Warranty Rate, the Franchisor can Request Supplemental Repair Orders	41
What if the Franchisor does not Contest the Retail Labor Rate or Retail Parts Rate ..	41
Considerations in Calculating the Retail Labor Rate and Retail Parts Rate	42
Considerations when the Franchisor is Compensating the Franchisee for the Retail Parts Rate.....	42
The Method of Establishing or Modifying a Franchisee's Retail Labor Rate, Retail Parts Rate, or Both	43
What Actions Franchisors are Precluded from Undertaking.....	43
Protest for Franchisor's Failure to Comply with Section 3065.2 or if Franchisee Disputes the Franchisor's Proposed Adjusted Retail Labor Rate or Retail Parts Rate	44
Time for Filing a Protest.....	44
Required Elements of Protest	45
Determination of Protest	45
Retail Labor Rate or Retail Parts Rate Protests Chart	47
WARRANTY CLAIMS - RV Dealers	48
Statutory Authority	48
Franchisor's Notice of Compensation for Warranty Reimbursement	48
Approval of Warranty Claims	48
Disapproval of Warranty Claims.....	48
Audits of Franchisee Warranty Records	48
Time for Filing a Protest.....	49
Required Elements of a Protest	49
Good Cause.....	50
Determination of Protest	50
FRANCHISOR INCENTIVE PROGRAM CLAIMS - Motor Vehicle Dealers	51
Statutory Authority	51
Franchisor's Notice of Denial of Franchisor Incentive Program Reimbursement	51

TABLE OF CONTENTS -continued-

Approval/Disapproval of Franchisor Incentive Program Reimbursement	51
Disapproval of Franchisor Incentive Program Claims	51
Protest of Initial Disapproval of Franchisor Incentive Program Claims.....	51
Franchisor Provided “Reasonable” Appeal Process	52
Final Denial of Franchisor Incentive Program Claim	52
Protest of Final Denial of Franchisor Incentive Program Claim Following a Franchisor’s Appeal Process	52
Audits of Franchisee Incentive Program Records	52
Disapproval of Previously Approved Franchisor Incentive Program Claims	53
Protest of Franchisor Incentive Program Claim Disapproval of a Previously Approved Claim Following an Audit	53
Franchisor Provided “Reasonable” Appeal Process	53
Final Denial of Franchisor Incentive Program Claim Following an Audit	54
Protest of Final Denial of Franchisor Incentive Program Claim Following an Audit Following the Franchisor’s Appeal Process	54
Franchisor Chargeback for Incentive Program Claims.....	54
Required Elements of Protest	55
Franchisor Incentive Program Protests Chart	56
FRANCHISOR INCENTIVE PROGRAM CLAIMS - RV Dealers.....	57
Statutory Authority	57
Franchisor’s Notice of Denial of Franchisor Incentive Program Reimbursement	57
Approval/Disapproval of Franchisor Incentive Program Reimbursement.....	57
Audits of Franchisee Incentive Program Records	57
Time for Filing a Protest.....	57
Required Elements of Protest	58
Good Cause.....	58
Determination of Protest	58
PERFORMANCE STANDARDS, SALES OBJECTIVES, OR PROGRAMS FOR MEASURING A DEALER’S SALES, SERVICE, OR CUSTOMER SERVICE	
PERFORMANCE - Motor Vehicle Dealers	59
Statutory Authority	59
Franchisor’s Performance Standard, Sales Objective or Program.....	59
Time for Filing a Protest.....	60
Required Elements of Protest	60
Determination of Protest	60
HEARING PROCEDURES.....	61
Pre-Hearing Procedure	61
Discovery	61
Subpoenas.....	61
Summary of Board Action	63
Stipulation of Fact	64
Stipulated Decisions	64
Hearings Open to the Public; Protective Orders	64
Failure to Appear at a Hearing	64
Decision of the Board.....	64
Court Reporting and Transcripts of Board Proceedings.....	65
PETITIONS.....	67
Statutory Authority for Petitions.....	67
Filing a Petition with the Board.....	67
Time for Filing a Petition	68

TABLE OF CONTENTS -continued-

Petition Filing Fee	68
Required Elements of Petition.....	69
First Consideration.....	70
Resolution of Petitions without a Hearing	70
Challenge to Presiding Officer	70
Motion for Intervention	70
Amicus Curiae Briefs	71
Summary of Board Action	71
Hearing Procedures	71
Informal Mediation	71
Members of the Public in Relation to New Recreational Vehicle Transactions	72
JUDICIAL REVIEW	73
Appeal to Superior Court	73
APPENDIX	A-1
Sample Form A - Pleading Format of Protest	A-2
Sample Form B1 - Pleading Format of Petition (Veh. Code § 3050(b)(2)).....	A-4
Sample Form B2 - Pleading Format of Petition (Veh. Code § 3050(b)(1) or (3))	A-6

PREAMBLE

This publication provides general information only as to the most pertinent Vehicle Code sections as they relate to practice before the New Motor Vehicle Board ("Board"). There are many other important Vehicle Code sections and Department of Motor Vehicles ("Department") regulations not covered in this publication. The materials contained herein are intended to be informative and not advisory, limited in scope, and are not intended to be a substitute for careful reading of the specific statutes and regulations that may apply to your particular situation. Practitioners as well as the general public are invited to comment on the forms and contents of procedures. **Please note the Board's address is different from the address of the Department.** The Board only has one office in Sacramento. All correspondence, protests, and petitions should be sent to:

New Motor Vehicle Board
ATTN: Legal Department
2415 1st Avenue, MS L242
Sacramento, California 95818

Correspondence can also be sent via email at nmvp@nmvp.ca.gov **or facsimile at (916) 323-1632**. The telephone number of the Board is (916) 445-1888 and the website address is www.nmvp.ca.gov. Detailed information can be found on the Board's website. Please feel free to contact the Board's staff for further information.

PREFACE

The purpose of this publication is to familiarize the reader with the organization and jurisdiction of the Board, including the Board's operations and procedures. All statutory references are to pertinent sections of the Vehicle Code unless otherwise specified. The full text of pertinent sections of the Vehicle Code is available at <http://leginfo.legislature.ca.gov/faces/codes.xhtml> or on the Board's website. References to regulations are to Title 13 of the California Code of Regulations ("CCR"). The referenced sections will be noted in the following manner, for example, 13 CCR § 550, et seq. The regulations are also available on the Board's website or at the Office of Administrative Law's ("OAL") website (www.oal.ca.gov). Once you reach the OAL site, select California Code of Regulations. You will be taken to the California Code of Regulations and can search by title; the Board's regulations are in Title 13. As the Board is a quasi-judicial agency that holds administrative hearings, statutes comprising the administrative adjudication provisions of the Administrative Procedure Act ("APA"; Gov. Code §§ 11400 through 11529) are applicable. Citations to relevant court decisions are interspersed throughout. The provisions of the APA are available at <http://leginfo.legislature.ca.gov/faces/codes.xhtml>.

The Board also publishes the *Informational Guide for Manufacturers and Distributors* to assist manufacturers and distributors in clarifying California's vehicle franchise laws. It is designed for personnel in manufacturer or distributor market representation departments, dealer development departments, or legal departments. The *Informational Guide for Manufacturers and Distributors* is available free from the Board's offices at the above address, or can be accessed and downloaded from the Board's website at www.nmvb.ca.gov.

INTRODUCTION

Purpose

The Board is a program within the Department. The Board was originally created in 1967 as the New Car Dealers Policy and Appeals Board. At that time, the Board's only function was hearing appeals¹ from final decisions of the Director of the Department adverse to the occupational license of a new motor vehicle dealer, manufacturer, distributor, or representative.² In 1973, the Legislature passed the California Automobile Franchise Act (Stats. 1973, Ch. 966, § 1, p. 2), which gave the Board its present name and created a broad statutory framework and a forum for regulating and settling disputes in the new vehicle industry. The constitutionality of this regulatory scheme has survived a due process challenge in the United States Supreme Court (*New Motor Vehicle Board v. Orrin W. Fox Co.* (1978) 439 U.S. 96).

Organization

The organization of the Board is prescribed in Vehicle Code sections 3000 to 3016. The Board is comprised of nine members. The chart below identifies the composition of the Board.

Who	Qualifications	Appointment
Four licensed new motor vehicle dealers. (Dealers that deal exclusively in motorcycles, ATVs, or recreational vehicles are excluded from membership on the Board.)	Must have been licensed as a new motor vehicle dealer for not less than five years.	All by the Governor.
Five members from the general public.	One must be an attorney who has been a member of the California Bar for at least 10 years.	Three by the Governor. One by the Senate Rules Committee. One by the Speaker of the Assembly.

¹ Effective January 1, 2020, the Board's jurisdiction to hear appeals was repealed. (Assembly Bill 179, Ch. 796)

² Throughout this Guide, the terms dealer, protestant, and franchisee are used interchangeably, as are the terms manufacturer/distributor, respondent, and franchisor.

Meetings

The Board meets at least twice during each calendar year, with supplemental meetings held as necessary. Board meetings are open to the public with the exception of executive sessions, which are held to deliberate on pending matters before the Board. As public meetings conducted by a state entity, the Bagley-Keene Open Meeting Act (Gov. Code §§ 11120 through 11132) covers all requirements for public notice, agendas, public testimony and the conduct of Board meetings. To the extent practicable, the Board conducts business at meetings using a modern interpretation of procedures set forth in *Robert's Rules of Order*.

Jurisdiction

The Board's statutory jurisdiction under Vehicle Code section 3050(b) extends over any person applying for or holding a license as a new motor vehicle dealer, manufacturer, manufacturer branch, distributor, distributor branch, or representative. In the past, the courts construed this jurisdiction as primary and exclusive, meaning an aggrieved licensee must bring any dispute arising out of the franchise relationship before the Board prior to seeking judicial relief (*Yamaha Motor Company v. Superior Court* (1986) 185 Cal.App.3d 1232; *Yamaha Motor Company v. Superior Court* (1987) 195 Cal.App.3d 652; *Ray Fladeboe Lincoln-Mercury, Inc. v. New Motor Vehicle Board* (1992) 10 Cal.App.4th 51; *Mathew Zaheri Corp. v. Mitsubishi Motor Sales of America, Inc.* (1993) 17 Cal.App.4th 288.) However, subsequent court decisions have held otherwise (*Miller v. Superior Court* (1996) 50 Cal.App.4th 1665; *Hardin Oldsmobile v. New Motor Vehicle Board* (1997) 52 Cal.App.4th 585; *Tovas v. American Honda Motor Company, Inc.* (1997) 57 Cal.App.4th 506; *Kemp v. Nissan Motor Corporation in U.S.A.* (1997) 57 Cal.App.4th 1527.) As a consequence of these judicial decisions, subdivision (e) of Vehicle Code section 3050 was added by the Legislature in 1997 and became effective in 1998. It provides that the courts have jurisdiction over all common law and statutory claims originally cognizable in the courts. For those claims, a party may initiate an action directly in any court of competent jurisdiction.

In 2003, the Board's petition jurisdiction was further narrowed by the Third District Court of Appeal in *Mazda Motor of America, Inc. v. California New Motor Vehicle Board; David J. Phillips Buick-Pontiac, Inc., Real Party in Interest* (2003) 110 Cal.App.4th 1451. The court held that the Board's jurisdiction for licensee versus licensee petitions is limited to those in which the petitioner seeks relief under Vehicle Code section 3050, subdivision (c)(1) or (3) [Effective January 1, 2020, this relief is now in subdivision (b)(1) and (b)(3)]. Subdivision (c)(1) allows the Board to direct the Department to conduct an investigation of matters that the Board deems reasonable. Subdivision (c)(3) permits the Board to order the Department to "exercise any and all authority or power that the department may have with respect to the issuance, renewal, refusal to renew, suspension, or revocation" of the occupational license of a manufacturer or distributor. The Board's jurisdiction under Vehicle Code section 3050, subdivision (c)(2) [Effective January 1, 2020, this relief is now in subdivision (b)(2)], which provides that the Board may "undertake to mediate, arbitrate, or otherwise resolve any honest difference of opinion or viewpoint [i.e., hold a hearing] existing between any member of the public and any new motor vehicle dealer, manufacturer, ... distributor ...", is now limited to petitions brought by members of the public, and does not include licensees as petitioners.

Effective January 1, 2004, the Vehicle Code was amended to bring new recreational vehicles (“RVs”) as defined in Health and Safety Code section 18010(a) under the jurisdiction of the Board for purposes of dispute resolution and fee collection (Senate Bill 248, Stats. 2003, Ch. 703 § 11). This Guide integrates current Board processes and procedures to the extent they can be used to resolve disputes in the RV segment of the new motor vehicle industry and sets forth unique procedures that pertain to RV issues exclusively.

Effective January 1, 2020, the Board’s jurisdiction over appeals was repealed.

NEW AS OF 2023

Legislation

Technical changes were made as follows:

- (1) Subdivisions (b) and (c) were deleted in Vehicle Code section 3008 to remove obsolete references to appeals.
- (2) Section 3069.1 was amended to encompass Section 3065.3 (Performance Standard) and Section 3065.4 (Retail Labor Rate and Retail Parts Rate) protests.

Case Law

There were no new opinions impacting the Board’s jurisdiction that were final in 2022.

Regulations

The Board recently promulgated several regulatory amendments pertaining to case management that were operative October 1, 2022. The Board’s regulations, Sections 550 through 598, are under Title 13 (Motor Vehicles), Division 1 (Department of Motor Vehicles), Chapter 2 (New Motor Vehicle Board) of the California Code of Regulations (“CCR”). There are separate and different regulation provisions for petitions (Articles 2 and 4) and protests (Article 5). The following summarizes these regulatory changes:

13 CCR § 550.20 Use of Certified Mail in Lieu of Registered Mail - this section was repealed as there are no longer any statutory references to use registered mail.

13 CCR § 564 Decisions (in Petitions) - this section was amended to delete the reference to registered mail.

POWERS AND DUTIES IN GENERAL

The powers and duties of the Board are set out in Vehicle Code sections 3050 and 3051. New motor vehicle dealers, manufacturers, and distributors under the jurisdiction of the Board are charged fees to fund the Board's activities. (Veh. Code § 3016; 13 CCR § 553) In addition to delegating rulemaking authority to the Board, Vehicle Code section 3050 empowers the Board to resolve disputes arising in the form of protest or petitions.

As a quasi-judicial body, the Board has authority under Vehicle Code section 3050.1(a) to:

- Administer oaths;
- Take depositions;
- Certify to official acts; and,
- Issue subpoenas to compel attendance of witnesses and the production of documents.

Enforcement of Board Orders

There are provisions for sanctions and penalties for violating orders of the Board or the requirements of those sections of the Vehicle Code within the Board's authority. Obedience to subpoenas and the compliance with discovery procedures can be enforced by application to the Superior Courts. (Veh. Code § 3050.2(a)) Vehicle Code section 3050.2(b) gives the Executive Director authority, at the direction of the Board, upon a showing of failure to comply with authorized discovery without substantial justification, to dismiss a protest or petition or suspend the proceedings pending compliance. Vehicle Code section 11726 provides for enforcement of Board orders by permitting any licensee to recover damages, attorney fees, and injunctive relief in any court of competent jurisdiction for a willful failure to comply with a Board order.

Mandatory Settlement Conferences

In any protest or petition filed with the Board, the Board, its Executive Director, or an Administrative Law Judge ("ALJ") may order a mandatory settlement conference. (Veh. Code § 3050.4) For any proceeding, the settlement conference judge is precluded from hearing the proceeding on the merits or other motions in the case without stipulation by the parties. (13 CCR § 551.11) The failure of a party to appear, to be prepared, or to have the authority to settle the matter at such a conference may result in the Board taking action adverse to that party. (Veh. Code § 3050.4)

DISPUTES BETWEEN THE DEALER AND THE FRANCHISOR

The Vehicle Code gives the Board jurisdiction to resolve disputes involving the following:

Type of Case	Vehicle Code Authority	Page Nos.
Attempts by the franchisor to terminate, modify, or refuse to continue (renew) the franchise.	3060, 3070	11-19
Attempts by the franchisor to establish a new, or relocate an existing, dealer (of the “same line-make”) if the current franchisee is within a radius of 10 air miles of the proposed location (called the “relevant market area”).	3062(a)(1), 3072(a)(1)	20-24
Attempts by the franchisor to establish a satellite warranty facility at, or relocate an existing satellite warranty facility to, a location that is within 2 miles of any dealership of the same line-make. (<u>Note</u> : there are no comparable provisions for RV dealers.)	3062(a)(2)	25-28
Disputes relating to the dealers’ delivery and preparation obligations, and compensation for such services.	3064, 3074	29-30
Disputes relating to reimbursement for warranty work performed by motor vehicle dealers.	3065	31-37
Disputes relating to a franchisee’s retail labor rate or retail parts rate. (<u>Note</u> : there are no comparable provisions for RV dealers.)	3065.4	38-47
Disputes relating to reimbursement for warranty work performed by RV dealers.	3075	48-50
Disputes relating to reimbursement for franchisor incentive programs by motor vehicle dealers.	3065.1	51-56
Disputes relating to reimbursement for franchisor incentive programs by RV dealers.	3076	57-58
Disputes relating to a franchisor’s compliance with subdivision (g) of Section 11713.13. (<u>Note</u> : there are no comparable provisions for RV dealers.)	3065.3	59-60
All other disputes concerning the activities or practices of any person applying for or holding a license as a new motor vehicle dealer, manufacturer, or distributor submitted by any member of the public ³ or disputes between a franchisor and a franchisee seeking an investigation or a licensing action by the Department.	3050(b)	67-72

³ Members of the public have the option to seek informal mediation of their disputes (13 CCR § 551.14, et seq.) as well as administrative hearings on the merits pursuant to the Board’s petition process.

NOTE: Vehicle Code section 3050(c) prohibits a dealer member from participating, hearing, commenting, advising other members upon, or deciding any matter that involves a protest filed “pursuant to Article 4 (commencing with Section 3060), unless all parties to the protest stipulate otherwise.”

Vehicle Code section 3066(f) states: “[a] member of the board who is a new motor vehicle dealer may not participate in, hear, comment, or advise other members upon, or decide, a matter involving a protest filed pursuant to this article [Article 4, i.e., protests involving motor vehicles other than RVs] unless all parties to the protest stipulate otherwise.” These constraints ensure procedures that preclude any suggestion of bias or partiality of Board decisions.

The dealer members may participate in those matters not involving a dispute between a franchisee and franchisor such as a petition filed by a member of the public. For matters before the Board in which relief is sought pursuant to Vehicle Code section 3050(b), dealer members may not participate and there are no provisions to allow parties to stipulate and permit participation.

In Article 4 protests (involving cars, motorcycles, and ATVs), dealer members may participate if both parties so stipulate. Dealer members participate in Article 5 recreational vehicle protests unless the dealer Board member also owns and/or has a financial interest in a recreational vehicle dealership. Both parties can stipulate to allow the dealer member to participate in this instance.

PROTESTS IN GENERAL

Statutory Authority

Vehicle Code section 3050(c) provides for the Board to hear and decide any protest presented by a franchisee against a franchisor.

Statutory Bases for Protest

A protest can arise as a result of disputes contemplated by the following statutory provisions:

Vehicle Code Section	Provision
3060, 3070	The franchisor attempts to terminate, modify, or refuses to continue the franchise.
3062(a)(1), 3072(a)(1)	The franchisor attempts to establish an additional dealer or relocate an existing dealer within the relevant market area (any area within a radius of 10 miles from the site of a potential new dealership) where the same line-make is already represented.
3062(a)(2)	The franchisor attempts to establish an additional satellite warranty facility or relocate an existing satellite warranty facility within 2 miles of any dealership of the same line-make. (Note: there are no comparable provisions for RV dealers.)
3064, 3074	Disputes relating to the dealer's delivery and preparation obligations, and compensation for such services.
3065, 3075	Disputes relating to reimbursement for warranty work performed by the dealer.
3065.4	Disputes relating to a franchisee's retail labor rate or retail parts rate or its franchisor's proposed adjusted retail labor rate or retail parts rate. (Note: there are no comparable provisions for RV dealers.)
3065.1, 3076	Disputes relating to reimbursement for franchisor incentive programs.
3065.3	Disputes relating to a franchisor's performance standard, sales objective or program for measuring a dealer's sales, service, or customer service performance. Disputes relating to whether a franchisor complied with subdivision (g) of Section 11713.13. (Note: there are no comparable provisions for RV dealers.)

Separate Protests

A separate protest is required if there is more than one franchise.⁴ For example, if a franchised dealer files a single protest to the attempted termination of its Chrysler, Dodge, Jeep, and RAM franchises, consistent with Vehicle Code section 3050 and 13 CCR § 583, the Board would require the dealer to file an amended protest for one of its franchises, i.e., Chrysler, and new protests for the other three franchises, i.e., Dodge, Jeep, and RAM.

Filing Protest

Most protests have specific statutorily imposed time limits for filing. A protest is deemed filed upon its receipt by the Board via regular mail, email or facsimile,⁵ or upon mailing of the protest, if it is sent by either certified or registered mail. Accordingly, it is suggested that all protests be emailed to the Board at nmvp@nmvp.ca.gov or mailed by certified or registered to 2415 1st Avenue, MS L242, Sacramento, CA 95818.

Franchisor's Notice of Appearance

The respondent shall file a written notice of appearance within 15 days of receipt of the protest (13 CCR § 585.1). Failure to timely file a notice of appearance shall result in the proceedings being suspended until such time as a notice of appearance is filed.

Filing Fee

A filing fee of \$200, which should be in the form of a check, money order or an authorized credit

⁴ Vehicle Code section 331 defines a "franchise" in part as follows: "a written agreement between two or more persons having all of the following conditions:

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

A recreational vehicle franchise is defined in Vehicle Code section 331.3 as "a written agreement between two or more persons having both of the following conditions: (a) A commercial relationship of definite duration or continuing indefinite duration; and (b) The franchisee is granted the right to offer for sale or lease, or to sell or lease at retail, new recreational vehicles, as defined in subdivision (a) of Section 18010 of the Health and Safety Code, that are manufactured or distributed by the franchisor, or the right to perform authorized warranty repairs and service, or the right to perform any combination of these activities."

⁵ A franchisee seeking to file a protest via facsimile (fax) is requested to contact the Board's legal staff in advance at (916) 445-1888 or nmvp@nmvp.ca.gov.

card charge payable to the New Motor Vehicle Board, must accompany the protest and notice of appearance. Information on paying by credit online is available by contacting the Board at (916) 445-1888 or via email at nmvb@nmvb.ca.gov. In the event of a financial hardship, either the protestant or respondent may submit a request for a fee waiver, requesting that the Executive Director, upon a showing of good cause, waive the \$200 filing fee (13 CCR § 553.40). (Samples are available on the Board's website.)

Interested Individuals

Per Vehicle Code sections 3066 and 3080, any interested individual may apply to the Board for permission to appear at the hearing on any protest for the purpose of submitting direct evidence concerning the issues raised in the protest.

Motion for Intervention

Any person, including a Board member, concerned with the activities or practices of any person applying for or holding a license as a new motor vehicle dealer, manufacturer, manufacturer branch, distributor, distributor branch or representative may file a motion to intervene in a pending protest subject to the conditions set forth in 13 CCR § 551.13.

Challenge to Presiding Officer

A party may request disqualification of a Board member or an ALJ for cause prior to the taking of evidence by filing an affidavit stating the grounds for the request (13 CCR § 551.1). Further, 13 CCR § 551.12(b) entitles a party, excluding an intervenor, in a protest to one disqualification without cause (peremptory challenge) of the assigned merits ALJ by filing the peremptory challenge with the Board no later than either 20 days from the date of the order of time and place of hearing identifying the merits ALJ or 20 days prior to the date scheduled for commencement of the merits hearing, whichever is earlier (13 CCR § 551.12(b)(1)). In the event a Board ALJ is unavailable to preside over the merits hearing, an ALJ from the Office of Administrative Hearings ("OAH") will be assigned.⁶ A peremptory challenge of the assigned administrative law judge is not authorized for law and motion hearings, settlement conferences, and rulings on discovery disputes. Except for the convenience of the Board or for good cause shown, no merits hearing shall be continued by the filing of a peremptory challenge.

Amicus Curiae Briefs

The Board, its Executive Director, or an ALJ may, in his or her discretion, allow the filing of amicus curiae briefs. (13 CCR § 551.13)

⁶ At the January 25, 2023, General Meeting, the Board added OAH to the "Merit Hearings Judge Assignment Log." This will allow the Board to determine whether OAH is an effective alternative if the Board is unable to retain its merits ALJs.

Table of Contents for Protest Section

The chart below identifies the section and page numbers for procedural requirements particular to each type of protest but should be relied on only as a guide.

Protest Section of Guide	Page Nos.
Termination of the Franchise	11-15
Modification of the Franchise	16-19
Additional or Relocated Franchise	20-24
Additional or Relocated Satellite Warranty Facility (Motor Vehicle Dealers)	25-28
Compensation for Delivery and Preparation	29-30
Compensation for Warranty Reimbursement (Motor Vehicle Dealers)	31-37
Retail Labor Rate or Retail Parts Rate	38-47
Compensation for Warranty Reimbursement (RV Dealers)	48-50
Compensation for Franchisor Incentive Program Reimbursement (Motor Vehicles Dealers)	51-56
Compensation for Franchisor Incentive Program Reimbursement (RV Dealers)	57-58
Franchisor Compliance with Section 11713.13(g)	59-60
Hearing Procedures	61-66

TERMINATION OF FRANCHISE

Statutory Authority for Protest

Vehicle Code sections 3060 and 3070 give the dealer the right to protest an attempt by the manufacturer or distributor to terminate or refuse to continue an existing franchise agreement.

Franchisor's Notice of Termination

Vehicle Code sections 3060 and 3070 provide that no franchisor (manufacturer or distributor) shall terminate or refuse to continue a franchise (sales and service agreement) unless written notice of the franchisor's intent to terminate has been received by both the franchisee (dealer) and the Board. The notice must set forth the specific grounds for termination and must contain, on the first page thereof in at least 12-point bold type and circumscribed by a line, one of the following statements:

(When a 60-day notice of termination or refusal to continue is given.)

NOTICE TO DEALER: You have the right to file a protest with the NEW MOTOR VEHICLE BOARD in Sacramento and have a hearing in which you may protest the termination of your franchise under provisions of the California Vehicle Code. You must file your protest with the board within 30 calendar days after receiving this notice or within 30 days after the end of any appeal procedure provided by the franchisor or your protest right will be waived.

(When a 15-day notice of termination is given.)

NOTICE TO DEALER: You have the right to file a protest with the NEW MOTOR VEHICLE BOARD in Sacramento and have a hearing in which you may protest the termination of your franchise under provisions of the California Vehicle Code. You must file your protest with the board within 10 calendar days after receiving this notice or within 10 days after the end of any appeal procedure provided by the franchisor or your protest right will be waived.

Termination notices are required to be separately issued to each franchisee and separately issued for each line-make represented by a franchisee. This is consistent with the Vehicle Code and 13 CCR § 593.1. Notices should not be combined to include more than one franchisee nor combined to include more than one line-make. For example, if American Honda seeks to terminate a motorcycle/ATV/scooter dealership and has a separate franchise for each line-make, then there should be three separate termination notices sent to the franchisee and the Board.

Time for Filing a Protest

It is essential not to confuse the time within which to file a protest with the Board with the time at which a termination becomes effective. The time at which the termination will become effective is governed by the reasons for termination. The chart below identifies the reasons for termination, corresponding protest filing periods, and effective dates of termination.

Reason for Termination	Filing Period	Effective Date of Termination
Transfer of any ownership or interest in the franchise without the consent of the franchisor. The consent shall not be unreasonably withheld.	10 days from dealer's receipt of notice or 10 days after the end of any appeal procedure provided by the franchisor.	15 days after dealer's receipt of notice.
Misrepresentation by the franchisee in applying for the franchise.	As above.	As above.
Insolvency of the franchisee, or the filing of any petition by or against the franchisee under any bankruptcy or receivership law.	As above.	As above.
Any unfair business practice after written warning thereof.	As above.	As above.
Failure of the motor vehicle dealer to conduct its customary sales and service operations during its customary hours of business for seven consecutive business days, giving rise to a good faith belief on the part of the franchisor that the motor vehicle (recreational vehicle) dealer is in fact going out of business, except for circumstances beyond the direct control of the motor vehicle (recreational vehicle) dealer or by order of the Department.	As above.	As above.
Any other reason.	30 days from dealer's receipt of notice or 30 days after the end of any appeal procedure provided by the franchisor.	60 days after dealer's receipt of notice.

The protest shall be considered filed on the date of receipt via regular mail, email or facsimile by the Executive Director of the Board or on the date of certified or registered mailing. A document which purports to be a protest will not be "filed" until the Executive Director has reviewed it for compliance with the Board's enabling statutes and regulations. If the Executive Director deems the document complies, it shall be filed as a protest (13 CCR § 598).

Failure of a dealer to file a timely protest with the Board will result in a loss of the right to a hearing before the Board. This could result in automatic termination of the franchise as of the time indicated in the notice of termination. Filing a timely protest will prevent the termination from becoming effective until the protest is resolved by the Board.

Required Elements of a Protest

The required content of a protest under Vehicle Code sections 3060 and 3070 is described in 13 CCR § 585. A protest to the proposed termination or non-renewal of a franchise must contain all of the following (see Appendix for sample Form A):

Content Requirements	Regulatory Authority
Must be in writing and be signed by a franchisee or its attorney. ⁷	13 CCR § 583
Must be responsive to the specific grounds of the termination set forth in the notice and set forth clearly and concisely the factual contentions of the franchisee with respect to the matter referred to in the notice.	13 CCR § 585(b)
Must set forth the franchisee's mailing address and telephone number, and the name, mailing address and telephone number of its attorney or authorized agent, if any. All correspondence and notices to the franchisee shall thereafter be addressed to said address, if the dealer principal is presenting its own case, or to the address of the dealer's attorney or agent, if so represented.	13 CCR § 585(d)
Shall indicate either that the franchisee does or does not desire to appear before the Board.	13 CCR § 585(e)
Franchisee shall set forth an estimate of the number of days required to complete the hearing.	13 CCR § 585(f)
Franchisee shall request a pre-hearing conference if one is desired.	13 CCR § 585(g)
Franchisee may submit, as exhibits to the protest, photographic, documentary, or similar physical evidence relevant to the matter with an appropriate description in the protest.	13 CCR § 585(c)
Franchisee shall simultaneously deliver a \$200 filing fee in the form of a check, money order or authorize a credit card charge payable to the New Motor Vehicle Board, or a request for a fee waiver.	13 CCR § 553.40
Franchisee shall serve a copy of the protest on the franchisor and proof of service shall accompany the protest submitted to the Board.	13 CCR § 584 13 CCR § 551.24

⁷ If the franchisee is a natural person, not a corporation or other legal entity, the protest shall be signed by that person or by the franchisee's attorney or representative. If the franchisee is a corporation or other legal entity, the protest shall be signed by an attorney representing the entity, or by an authorized representative of the entity (13 CCR § 583).

Good Cause

If a timely protest is filed, the manufacturer or distributor cannot terminate the franchise until a hearing has been held and the Board acts on the proposed decision. At a hearing, the manufacturer or distributor will have the burden of proving “good cause” for termination. In making a determination of good cause under Vehicle Code sections 3061 or 3071, the Board shall take into consideration the existing circumstances, including, but not limited to all of the following:

Circumstances	Vehicle Code Section
Amount of business transacted by the franchisee, as compared to the business available to the franchisee.	3061(a), 3071(a)
Investment necessarily made and obligations incurred by the franchisee to perform its part of the franchise.	3061(b), 3071(b)
Permanency of the investment.	3061(c), 3071(c)
Whether it is injurious or beneficial to the public welfare for the franchise to be modified or replaced or the business of the franchisee disrupted.	3061(d), 3071(d)
Whether the franchisee has adequate motor vehicle or recreational vehicle sales and service facilities, equipment, vehicle parts, and qualified service personnel to reasonably provide for the needs of the consumers for the motor vehicles or recreational vehicles handled by the franchisee and has been and is rendering adequate services to the public. (Note: In the case of RVs, not all franchise agreements require service facilities, equipment, vehicle parts, and qualified service personnel.)	3061(e), 3071(e)
Whether the franchisee fails to fulfill the warranty obligations of the franchisor to be performed by the franchisee. (Note: In the case of RVs, not all franchise agreements require franchisees to have warranty obligations.)	3061(f), 3071(f)
Extent of the franchisee’s failure to comply with the terms of the franchise.	3061(g), 3071(g)

Determination of Protest

If the franchisor, having the burden, cannot establish good cause for terminating the franchise, the protest will be sustained, and the termination will not be permitted.

MODIFICATION OF FRANCHISE

Statutory Authority for Protest

Vehicle Code sections 3060(b) and 3070(b) give the dealer the right to protest an attempt by the manufacturer or distributor to modify or replace an existing franchise such that the modification substantially affects the dealer's sales or service obligations or investment.

Franchisor's Notice of Modification

Vehicle Code sections 3060 and 3070 provide that no franchisor shall modify or replace an existing franchise with a succeeding franchise if the modification or replacement would substantially affect the existing franchisee's sales or service obligations or investment, unless written notice of modification or replacement is given to each affected franchisee and the Board at least 60 days prior to the modification or replacement.⁸

The written notice shall contain, on the first page thereof in at least 12-point bold type and circumscribed by a line, the following statement:

NOTICE TO DEALER: Your franchise agreement is being modified or replaced. If the modification or replacement will substantially affect your sales or service obligations or investment, you have the right to file a protest with the NEW MOTOR VEHICLE BOARD in Sacramento and have a hearing in which you may protest the proposed modification or replacement of your franchise under provisions of the California Vehicle Code. You must file your protest with the board within 30 calendar days of your receipt of this notice or within 30 days after the end of any appeal procedure provided by the franchisor or your protest rights will be waived.

Modification notices are required to be separately issued to each franchisee and separately issued for each line-make represented by a franchisee. This is consistent with the Vehicle Code and 13 CCR § 593.1. Notices should not be combined to include more than one franchisee nor combined to include more than one line-make.

Time for Filing a Protest

Filing a timely protest will prevent the modification from becoming effective until the protest is resolved by the Board. It is essential not to confuse the time within which to file a protest with the Board with the time at which a modification becomes effective. The chart below identifies the protest filing period and effective date of modification:

⁸ Despite the franchisor's decision that the notices to the franchisee and the Board are not required, to avoid a claim that it has violated any of the Vehicle Code provisions, a franchisor may decide to issue notices that comply with the statutes. The franchisor also may at the same time expressly state, along with the notices or in the notices themselves, that the franchisor believes that the notices were not required and also claim that there is no right in the franchisee to file a protest despite the notices stating to the contrary (as required by the statutory language).

Reason for Modification	Filing Period	Effective Date of Modification
As stated by franchisor.	30 days from dealer's receipt of notice or 30 days after the end of any appeal procedure provided by the franchisor.	60 days after dealer's receipt of notice.

The protest shall be considered filed on the date of receipt via regular mail, email or facsimile by the Executive Director of the Board or on the date of certified or registered mailing. A document which purports to be a protest will not be "filed" until the Executive Director has reviewed it for compliance with the Board's enabling statutes and regulations. If the Executive Director deems the document complies, it shall be filed as a protest (13 CCR § 598).

Failure of a dealer to file a timely protest with the Board will result in a loss of the right to a hearing before the Board. This could result in the modification becoming effective as stated in the notice. Filing a timely protest will prevent the modification or replacement from becoming effective until the protest is resolved by the Board.

Required Elements of Protest

The required content of a protest under Vehicle Code sections 3060 and 3070 is described in 13 CCR § 585. A protest of modification or replacement of an existing franchise must contain all of the following (see Appendix for sample Form A):

Content Requirements	Regulatory Authority
Must be in writing and be signed by a franchisee or its attorney. ⁹	13 CCR § 583
Must be responsive to the specific grounds of the modification or replacement set forth in the notice and set forth clearly and concisely the factual contentions of the franchisee with respect to the matter referred to in the notice.	13 CCR § 585(b)
Must set forth the franchisee's mailing address and telephone number, and the name, mailing address and telephone number of its attorney or authorized agent, if any. All correspondence and notices to the franchisee shall thereafter be addressed to said address, if the dealer principal is presenting its own case, or to the address of the dealer's attorney or agent, if so represented.	13 CCR § 585(d)
Shall indicate either that the franchisee does or does not desire to appear before the Board.	13 CCR § 585(e)
Franchisee shall set forth an estimate of the number of days required to complete the hearing.	13 CCR § 585(f)
Franchisee shall request a pre-hearing conference if one is desired.	13 CCR § 585(g)
Franchisee may submit, as exhibits to the protest, photographic, documentary, or similar physical evidence relevant to the matter with an appropriate description in the protest.	13 CCR § 585(c)
Franchisee shall simultaneously deliver a \$200 filing fee in the form of a check, money order or authorize a credit card charge payable to the New Motor Vehicle Board, or a request for a fee waiver.	13 CCR § 553.40
Franchisee shall serve a copy of the protest on the franchisor and proof of service shall accompany the protest submitted to the Board.	13 CCR § 584 13 CCR § 551.24

Good Cause

If a timely protest is filed, the manufacturer or distributor cannot modify the franchise if such modification would substantially affect a dealer's sales or service obligations or investment until a hearing has been held by the Board. At the hearing, the dealer has the initial burden to establish that there is a proposed modification, which would substantially affect the dealer's sales or service obligations or investment. If the dealer meets this burden, the burden of proof shifts to the manufacturer or distributor to prove "good cause" for the modification. In making a determination of good cause pursuant to Vehicle Code sections 3061 or 3071, the Board shall take into consideration the existing circumstances, including, but not limited to, all of the following:

⁹ See footnote 7.

Circumstances	Vehicle Code Section
Amount of business transacted by the franchisee, as compared to the business available to the franchisee.	3061(a), 3071(a)
Investment necessarily made and obligations incurred by the franchisee to perform its part of the franchise.	3061(b), 3071(b)
Permanency of the investment.	3061(c), 3071(c)
Whether it is injurious or beneficial to the public welfare for the franchise to be modified or replaced or the business of the franchisee disrupted.	3061(d), 3071(d)
Whether the franchisee has adequate motor vehicle or recreational vehicle sales and service facilities, equipment, vehicle parts, and qualified service personnel to reasonably provide for the needs of the consumers for the motor vehicles or recreational vehicles handled by the franchisee and has been and is rendering adequate services to the public. (<u>Note:</u> In the case of RVs, not all franchise agreements require service facilities, equipment, vehicle parts, and qualified service personnel.)	3061(e), 3071(e)
Whether the franchisee fails to fulfill the warranty obligations of the franchisor to be performed by the franchisee. (<u>Note:</u> In the case of RVs, not all franchise agreements require franchisees to have warranty obligations.)	3061(f), 3071(f)
Extent of the franchisee's failure to comply with the terms of the franchise.	3061(g), 3071(g)

Determination of Protest

The modification will not be permitted if the Board decides the manufacturer or distributor failed to establish good cause for the intended modification.

If a replacement franchise is the successor franchise to an expiring or expired term franchise, the prior franchise shall continue in effect until resolution of the protest by the Board. In the event of multiple protests, hearings shall be consolidated to expedite the disposition of the issue.

ADDITIONAL OR RELOCATED FRANCHISE

Statutory Authority for Protest

Vehicle Code sections 3062(a)(1) and 3072(a)(1) give a dealer the right to protest the establishment of an additional dealership or relocation of an existing dealership of the same line-make within a ten-mile radius of the proposed new or relocating dealership. Any protest filed pursuant to this section is, by statute, filed against the manufacturer or distributor that is attempting to establish or relocate one of its dealers.

NOTE: The proposed new dealer, or the existing dealer seeking to relocate, may appear in the proceedings as an interested individual. The rights of an interested individual to participate in the proceedings are somewhat limited, and subject to the ALJ's management of the hearing. In general, interested individuals have no right to formal discovery or right of cross-examination at the hearing.

Franchisor's Notice of Additional or Relocated Franchise

Vehicle Code sections 3062(a)(1) and 3072(a)(1)¹⁰ require that the manufacturer or distributor must first give written notice to the Board and to dealerships of the "same line-make" within the "relevant market area" of the proposed new or relocating dealership.

The written notice shall contain, on the first page thereof in at least 12-point bold type and circumscribed by a line, the following statement:

NOTICE TO DEALER: You have the right to file a protest with the NEW MOTOR VEHICLE BOARD in Sacramento and have a hearing on your protest under the terms of the California Vehicle Code if you oppose this action. You must file your protest with the board within 20 days of your receipt of this notice, or within 20 days after the end of any appeal procedure that is provided by us to you. If within this time you file with the board a request for additional time to file a protest, the board or its executive director, upon a showing of good cause, may grant you an additional 10 days to file the protest.

Establishment and relocation notices are required to be separately issued to each franchisee and separately issued for each line-make represented by a franchisee. This is consistent with the Vehicle Code and 13 CCR § 593.1. Notices should not be combined to include more than one franchisee nor combined to include more than one line-make. For example, if General Motors LLC seeks to establish an additional Buick/Cadillac/GMC dealership and has a separate franchise for each line-make, then there should be separate establishment notices sent to each franchisee of any of the three line-makes within the relevant market area of the proposed new location (as defined in Vehicle Code section 507) and the Board.

For motor vehicles other than RVs, "line-make" is not defined in the code. What is or is not a same

¹⁰ The last sentence in the "Notice to Dealer" language in Section 3072(a) contains commas as follows: "If, within this time, you file with the board..."

“line-make” is obvious in most situations. However, gray areas can exist. In this Guide, the working definition of “line-make” for the automobile industry corresponds to that used by the Department as a classification system for registering vehicles, licensing dealers, and resolving questions related to OL-124 Form (Certificate of Proposed Franchise) relevant market area requirements. For instance, in the automotive industry, a manufacturer such as General Motors would have several “makes” including Buick, Chevrolet, and Cadillac. Each “make”, in turn, would be comprised of several “lines” or models, e.g., Chevrolet has Silverado, Impala, and Tahoe “lines” or models.

For the RV industry, which lacks uniformity, “recreational vehicle line-make” is defined in Vehicle Code section 3072.5 as: “a group or groups of recreational vehicles defined by the terms of a written agreement that complies with Section 331.3.” It is essential that RV franchisors are precise when defining a line-make in RV franchise agreements and ensure that their makes are registered with the Department.

Relevant market area is defined in Vehicle Code section 507 as “any area within a radius of 10 miles from the site of a potential new dealership.” The distance is determined by a straight-line measurement between the nearest points of the new dealership’s location and the protesting dealership’s location. There are times when a survey will be necessary to determine whether a dealer desiring to protest is within the relevant market area.

Exceptions to the Right to Protest

New Motor Vehicle Dealers (including RVs)

There are exceptions to the requirement of notice to existing dealers within the relevant market area of a franchisor’s intent to establish or relocate a dealership. These exceptions are located in Vehicle Code sections 3062 and 3072, and provide that no notice is required to be given, and there is no right to protest, if:

1. The relocation is of an existing dealership to a location that is both within the same city as, and is within one mile from, the existing (relocating) dealership location;
2. The establishment of a dealership at the same location of a dealership that has been out of operation for less than one year;
3. The relocation entails the establishment at a location of a dealership that is both within the same city as, and is within one-quarter mile from, the location of a dealership of the same line-make that has been out of operation for less than 90 days; or
4. The establishment entails a display of vehicles at fairs, expositions, or similar exhibits provided that no actual sales are made at the event and the display does not exceed 30 days.

Vehicle Code sections 3062 and 3072 require that if an “off-site sale” is intended, the manufacturer or distributor must give notice to all dealers of the same line-make within 10 miles of the proposed site. Such dealers would have a right to protest the off-site sale, even though a financial institution and a licensed dealer sponsor the event.

Recreational Vehicle Dealers Only

For RVs, the exceptions to notice requirements are found in Vehicle Code section 3072. The exceptions are essentially the same as provided in Vehicle Code 3062 as stated above with the addition of one more exception. That one exception is for an annual show sponsored by a national trade association of recreational vehicle manufacturers that complies with all of the requirements of subdivision (d) of Vehicle Code section 11713.15.¹¹ (Veh. Code § 3072(b)(4))

Time for Filing a Protest

Filing a timely protest will preclude the manufacturer or distributor from establishing or relocating the dealership until the Board resolves the protest.

The chart below identifies the protest filing period and effective date of the relocation or establishment of a dealership.

Type of Notice	Filing Period	Effective Date of Relocation/ Establishment
A notice by franchisor of intent to establish or relocate franchisee.	20 days from dealer's receipt of notice or 20 days after the end of any appeal procedure provided by the franchisor, whichever is later.	As stated by franchisor.

If, within the above filing period, a franchisee files with the Board a request for additional time to file a protest, the Board or its Executive Director, on a showing of good cause, may grant an additional 10 days to file the protest.

If no protest is filed, or if the protest is not filed within the statutory filing period, the manufacturer or distributor will be able to establish the proposed dealership or relocate the existing dealership without proceeding before the Board.

¹¹ Effective September 19, 2018, subdivision (d) of Vehicle Code section 11713.15 was amended to except a recreational vehicle dealer being issued a temporary branch license from the notice requirements if the show is located in a county with a population of 9,000,000 or more persons, or at a location within 30 miles from the prior approved location of the show, and at least 10 manufacturers are participating in the show. (Assembly Bill 2330, Stats. 2018, Ch. 537)

Required Elements of Protest

The required content of a protest pursuant to Vehicle Code sections 3062 and 3072 is set forth in detail in 13 CCR § 585. A protest of the relocation or establishment of a franchise must contain all of the following (see Appendix for sample Form A):

Content Requirements	Regulatory Authority
Must be in writing and be signed by a franchisee or its attorney. ¹²	13 CCR § 583
Must be responsive to the specific grounds of the establishment or relocation set forth in the notice and set forth clearly and concisely the factual contentions of the franchisee with respect to the matter referred to in the notice.	13 CCR § 585(b)
Must set forth the franchisee's mailing address and telephone number, and the name, mailing address and telephone number of its attorney or authorized agent, if any. All correspondence and notices to the franchisee shall thereafter be addressed to said address, if the dealer principal is presenting its own case, or to the address of the dealer's attorney or agent, if so represented.	13 CCR § 585(d)
Shall indicate either that the franchisee does or does not desire to appear before the Board.	13 CCR § 585(e)
Franchisee shall set forth an estimate of the number of days required to complete the hearing.	13 CCR § 585(f)
Franchisee shall request a pre-hearing conference if one is desired.	13 CCR § 585(g)
Franchisee may submit, as exhibits to the protest, photographic, documentary, or similar physical evidence relevant to the matter with an appropriate description in the protest.	13 CCR § 585(c)
Franchisee shall simultaneously deliver a \$200 filing fee in the form of a check, money order or authorize a credit card charge payable to the New Motor Vehicle Board, or a request for a fee waiver.	13 CCR § 553.40
Franchisee shall serve a copy of the protest on the franchisor and proof of service shall accompany the protest submitted to the Board.	13 CCR § 584 13 CCR § 551.24

¹² See footnote 7.

Good Cause

If a timely protest is filed, the manufacturer or distributor cannot establish an additional franchise or relocate an existing franchise until the protest is resolved by the Board. At the hearing, the protesting dealer has the burden of proving that there is good cause to prevent the establishment of the additional dealer or relocation of an existing dealership. In making a determination of good cause pursuant to Vehicle Code sections 3063 or 3073, the Board shall take into consideration the existing circumstances, including, but not limited to, all of the following:

Circumstances	Vehicle Code Section
Permanency of the investment.	3063(a), 3073(a)
Effect on the retail motor vehicle (recreational vehicle) business and the consuming public in the relevant market area.	3063(b), 3073(b)
Whether it is injurious to the public welfare for an additional franchise to be established or an existing dealership to be relocated.	3063(c), 3073(c)
Whether the franchisees of the same line-make or same recreational vehicle line-make in the relevant market area are providing adequate competition and convenient consumer care for the motor vehicles of the line-make or recreational vehicle line-make in the market area. This includes the adequacy of motor vehicle or recreational vehicle sales and service facilities, equipment, supply of vehicle parts, and qualified service personnel. (Note: For RVs, adequate sales shall be considered, however, not all RV franchise agreements require service facilities, equipment, supply of vehicle parts, and qualified service personnel.)	3063(d), 3073(d)
Whether the establishment of an additional franchise would increase competition and therefore be in the public interest.	3063(e), 3073(e)

Determination of Protest

If the Board decides the protesting dealer cannot prove good cause to prevent the establishment or relocation, the manufacturer or distributor will be permitted to proceed with its intended action.

ADDITIONAL OR RELOCATED SATELLITE WARRANTY FACILITY

Statutory Authority for Protest

Vehicle Code section 3062(a)(2) gives a new motor vehicle dealer the right to protest an additional satellite warranty facility or the relocation of an existing satellite warranty facility within 2 miles of any dealership of the same line-make. Satellite warranty facility is defined as “a facility operated by a franchisee where authorized warranty repairs and service are performed and the offer for sale or lease, the display for sale or lease, or the sale or lease of new motor vehicles is not authorized to take place.” (Veh. Code § 3062(e)(2)) Any protest filed pursuant to this section is, by statute, filed against the manufacturer or distributor that is attempting to establish or relocate one of its satellite warranty facilities. There are no comparable statutory provisions for RV dealers for such protests.

Franchisor’s Notice of Additional or Relocated Satellite Warranty Facility

Vehicle Code section 3062(a)(2) requires that the manufacturer or distributor must first give written notice to the Board and to dealerships of the same line-make within 2 miles of the proposed location.

The written notice shall contain, on the first page thereof in at least 12-point bold type and circumscribed by a line, the following statement:

NOTICE TO DEALER: You have the right to file a protest with the NEW MOTOR VEHICLE BOARD in Sacramento and have a hearing on your protest under the terms of the California Vehicle Code if you oppose this action. You must file your protest with the board within 20 days of your receipt of this notice, or within 20 days after the end of any appeal procedure that is provided by us to you. If within this time you file with the board a request for additional time to file a protest, the board or its executive director, upon a showing of good cause, may grant you an additional 10 days to file the protest.

The notices are required to be separately issued to each franchisee and separately issued for each line-make represented by a franchisee. This is consistent with the Vehicle Code and 13 CCR § 593.1. Notices should not be combined to include more than one franchisee nor combined to include more than one line-make.

Time for Filing a Protest

Filing a timely protest will preclude the manufacturer or distributor from establishing or relocating the satellite warranty facility until the protest is resolved by the Board. The chart on the next page identifies the protest filing period and effective date of the relocation or establishment of a satellite warranty facility.

If, within the filing period set forth in the table, a franchisee files with the Board a request for additional time to file a protest, the Board or its Executive Director, on a showing of good cause, may grant an additional 10 days to file the protest.

If no protest is filed, or if the protest is not filed in time, the manufacturer or distributor will be able to establish the proposed satellite warranty facility or relocate the existing satellite warranty facility without proceeding before the Board.

Type of Notice	Filing Period	Effective Date of Relocation/ Establishment
A notice by franchisor of intent to establish or relocate franchisee.	20 days from dealer's receipt of notice or 20 days after the end of any appeal procedure provided by the franchisor, whichever is later.	As stated by franchisor.

Required Elements of Protest

The required content of a protest under Vehicle Code section 3062(a)(2) is described in 13 CCR § 585. A protest of the relocation or establishment of a satellite warranty facility must contain all of the following (see Appendix for sample Form A):

Content Requirements	Regulatory Authority
Must be in writing and be signed by a franchisee or its attorney. ¹³	13 CCR § 583
Must be responsive to the specific grounds of the establishment or relocation of the satellite warranty facility set forth in the notice and set forth clearly and concisely the factual contentions of the franchisee with respect to the matter referred to in the notice.	13 CCR § 585(b)
Must set forth the franchisee's mailing address and telephone number, and the name, mailing address and telephone number of its attorney or authorized agent, if any. All correspondence and notices to the franchisee shall thereafter be addressed to said address, if the dealer principal is presenting its own case, or to the address of the dealer's attorney or agent, if so represented.	13 CCR § 585(d)
Shall indicate either that the franchisee does or does not desire to appear before the Board.	13 CCR § 585(e)
Franchisee shall set forth an estimate of the number of days required to complete the hearing.	13 CCR § 585(f)
Franchisee shall request a pre-hearing conference if one is desired.	13 CCR § 585(g)
Franchisee may submit, as exhibits to the protest, photographic, documentary, or similar physical evidence relevant to the matter with an appropriate description in the protest.	13 CCR § 585(c)
Franchisee shall simultaneously deliver a \$200 filing fee in the form of a check, money order or authorize a credit card charge payable to the New Motor Vehicle Board, or a request for a fee waiver.	13 CCR § 553.40
Franchisee shall serve a copy of the protest on the franchisor and proof of service shall accompany the protest submitted to the Board.	13 CCR § 584 13 CCR § 551.24

Good Cause

If a timely protest is filed, the manufacturer or distributor cannot establish an additional satellite warranty facility or relocate an existing satellite warranty facility until the protest is resolved by the Board. At the hearing, the protesting dealer has the burden of proving that there is good cause to prevent the establishment of the additional satellite warranty facility or relocation of an existing satellite warranty facility.

¹³ See footnote 7.

In making a determination of good cause pursuant to Vehicle Code section 3063, the Board shall take into consideration the existing circumstances, including, but not limited to, all of the following:

Circumstances	Vehicle Code Section
Permanency of the investment.	3063(a)
Effect on the retail motor vehicle business and the consuming public in the relevant market area.	3063(b)
Whether it is injurious to the public welfare for an additional franchise to be established or an existing dealership to be relocated.	3063(c)
Whether the franchisees of the same line-make in the relevant market area are providing adequate competition and convenient consumer care for the motor vehicles of the line-make in the market area, which shall include the adequacy of motor vehicle sales and service facilities, equipment, supply of vehicle parts, and qualified service personnel.	3063(d)
Whether the establishment of an additional franchise would increase competition and therefore be in the public interest.	3063(e)

Determination of Protest

If the Board decides the protesting dealer is unable to prove good cause not to allow the establishment or relocation of the satellite warranty facility, the manufacturer or distributor will be permitted to proceed with its intended action.

COMPENSATION FOR DELIVERY AND PREPARATION

Statutory Authority

Vehicle Code sections 3064 and 3074 require every new motor vehicle or recreational vehicle manufacturer and distributor to specify the dealer's delivery and preparation obligations prior to the delivery of new motor vehicles or new recreational vehicles to retail buyers.

Franchisor's Notice of Compensation for Delivery and Preparation

Manufacturers and distributors are required to file with the Board a copy of the delivery and preparation obligations and a schedule of compensation to be paid to the dealers for the work and services they are required to perform in connection with the delivery and preparation obligations. The schedule of compensation must be reasonable with the issue of reasonableness being subject to the approval of the Board. In order to initiate Board action, a franchisee must file a protest with the Board.

Time for Filing a Protest

There is no specific statutory time period in the Vehicle Code within which to file a protest involving delivery and preparation obligations and compensation. Failure to file a protest within a reasonable time, however, could result in a dealer losing the right to a hearing by the Board.

Required Elements of Protest

The required content of a protest under Vehicle Code sections 3064 and 3074 is described in 13 CCR § 586. A protest involving delivery and preparation obligations must contain all of the following (see Appendix for sample Form A):

Content Requirements	Regulatory Authority
Must be in writing and be signed by a franchisee or its attorney. ¹⁴	13 CCR § 583
Must set forth in clear and concise language the factual contentions of the franchisee with respect to the protest.	13 CCR § 586(a)(1)
Must set forth the franchisee's mailing address and telephone number, and the name, mailing address and telephone number of its attorney or authorized agent, if any. All correspondence and notices to the franchisee shall thereafter be addressed to said address, if the dealer principal is presenting its own case, or to the address of the dealer's attorney or agent, if so represented.	13 CCR § 586(a)(3)
Shall indicate either that the franchisee does or does not desire to appear before the Board.	13 CCR § 586(a)(4)
Franchisee may submit, as exhibits to the protest, photographic, documentary, or similar physical evidence relevant to the matter with an appropriate description in the protest.	13 CCR § 586(a)(2)
Franchisee shall simultaneously deliver a \$200 filing fee in the form of a check, money order or authorize a credit card charge payable to the New Motor Vehicle Board, or a request for a fee waiver.	13 CCR § 553.40
Franchisee shall serve a copy of the protest on the franchisor and proof of service shall accompany the protest submitted to the Board.	13 CCR § 584 13 CCR § 551.24

Determination of Protest

If a dealer files a protest challenging the reasonableness of the schedule, the Board will resolve the dispute in light of all the relevant circumstances including, but not limited to, the time required to perform each function.

If there is a hearing, the dealer has the burden of proving that the schedule of compensation is not reasonable (Veh. Code §§ 3066(c) and 3080(c)).

¹⁴ See footnote 7.

WARRANTY CLAIMS - Motor Vehicle Dealers

Franchisor's Notice of Compensation for Warranty Reimbursement

Vehicle Code section 3065(a) requires every new motor vehicle manufacturer or distributor (franchisor) to properly fulfill every warranty agreement made by it and to adequately and fairly compensate its dealers (franchisees) for labor and parts used to satisfy the warranty obligations of the franchisor, including but not limited to diagnostics, repair, service, and all other conditions of the obligation, including costs directly associated with the disposal of hazardous materials that are associated with a warranty repair. (Veh. Code § 3065(a))

Franchisors are required to use time allowances for the diagnosis and performance of work and service that are reasonable and adequate for a qualified technician to perform the work or services. (Veh. Code § 3065(a)(1))

Additionally, “[a] franchisor shall not unreasonably deny a written request submitted by a franchisee for modification of a franchisor’s uniform time allowance for a specific warranty repair, or a request submitted by a franchisee for an additional time allowance for either diagnostic or repair work on a specific vehicle covered under warranty, provided the request includes any information and documentation reasonably required by the franchisor to assess the merits of the franchisee’s request.” (Veh. Code § 3065(a)(1))

Manufacturers and distributors are required to file copies of their warranty reimbursement schedules with the Board, which must be reasonable with respect to the time and compensation allowed to the dealer for the performance of warranty diagnostics, repair, and service. (Veh. Code § 3065(a))

Reasonableness of the Warranty Reimbursement Schedule

Subdivision (b) of Section 3065 was amended to clarify what constitutes a reasonable warranty reimbursement schedule: “a franchisor shall compensate each of its franchisees for parts and labor at rates equal to the franchisee’s retail labor rate and retail parts rate, as established pursuant to Section 3065.2.” Effective January 1, 2020, a franchisee no longer has a protest right to contest the reasonableness of its franchisor’s warranty reimbursement schedule or formula. (Veh. Code § 3065(b))

A franchisee and a franchisor can enter into a “voluntary written agreement signed by both parties that compensates for labor and parts used to satisfy the warranty obligations of the franchisor at rates other than the franchisee’s retail rates, provided that the warranty reimbursement schedule adequately and fairly compensates the franchisee.” (Veh. Code § 3065(b))

Protest of Pre-Repair Challenges to the Reduction in Time and Compensation (Labor Time Guides) Applicable to Specific Parts or Labor Operations

Manufacturers and distributors are prohibited from imposing a fixed percentage or other reduction in the time or compensation allowed to the dealer for warranty repairs not attributable to a specific

repair. (Veh. Code § 3065(a)(2))

The time or compensation applicable to a specific warranty repair may be reduced only upon 15 days' prior written notice to the dealer. (Veh. Code § 3065(a)(2))

A franchisee can file a protest to challenge the reduction in time or compensation applicable to specific parts or labor operations. The protest needs to be filed within 6 months "following the franchisee's receipt of notice of the reduction." If there is a hearing, the franchisor has the burden of "establishing the reasonableness of the reduction and adequacy and fairness of the resulting reduction in time or compensation." (Veh. Code § 3065(a)(3))

Approval of Warranty Claims

Vehicle Code section 3065(d)(1) requires that warranty claims be approved or disapproved within 30 days after their receipt by the franchisor. Any claim not specifically disapproved in writing within 30 days from receipt by the franchisor shall be deemed approved on the 30th day.

Approved warranty claims must be paid within 30 days of approval. However, Vehicle Code section 3065(d)(5) provides that failure to approve or pay within these time limits, in individual instances for reasons beyond the reasonable control of the franchisor, do not violate Article 4 (pertains to motor vehicles other than RVs).

Disapproval of Warranty Claims for a Defective Part

Vehicle Code section 3065(c) requires the franchisor that disallows a franchisee's warranty claim for a defective part on the basis that the part was not defective must return the part to the franchisee at the franchisor's expense, or reimburse the franchisee for the part, at the franchisor's option.

Disapproval of Warranty Claims

A franchisor shall not disapprove a claim unless the claim meets one of the following categories:

1. False;
2. Fraudulent;
3. Repairs were not properly made;
4. Repairs were inappropriate to correct a warranty failure due to an improper act or omission of the franchisee; or
5. Material noncompliance with reasonable and nondiscriminatory documentation and administrative claims submission requirements. (Veh. Code § 3065(d)(2))

A franchisor who disapproves a claim is required to notify the franchisee in writing of the disapproval 30 days after receipt by the franchisor and each notice shall state the specific grounds upon which the disapproval is based. (Veh. Code § 3065(d)(3))

Protest of Initial Disapproval of Warranty Claims

A franchisee can file a protest of the initial disapproval of a warranty claim within 6 months after receipt of the written notice. If there is a hearing, the franchisor has the burden of proof. (Veh. Code § 3065(d)(6))

Franchisor Provided “Reasonable” Appeal Process

Vehicle Code section 3065(d)(3) requires franchisors to provide a reasonable appeal process that allows the franchisee at least 30 days after receipt of the written disapproval notice to provide additional supporting documentation or information rebutting the disapproval.

If the disapproval is based upon noncompliance with documentation or administrative claims submission requirements, the franchisor shall allow the franchisee at least 30 days from the date of receipt of the notice to cure any material noncompliance.

If the disapproval is rebutted and material noncompliance is cured before the applicable deadline, the franchisor shall approve the claim.

There are potentially two 30-day time periods: (1) reasonable appeal; and (2) opportunity to cure.

Final Denial of Warranty Claim

If the franchisee provides additional supporting documentation or information purporting to rebut the disapproval, attempts to cure noncompliance relating to the claim, or otherwise appeals denial of the claim and the franchisor continues to deny the claim, the franchisor shall provide the franchisee with a written notification of the final denial within 30 days of completion of the appeal process, which shall conspicuously state “Final Denial” on the first page. (Veh. Code § 3065(d)(4))

Protest of Final Denial of Warranty Claim following a Franchisor’s Appeal Process

A franchisee can file a protest of the final denial of a warranty claim following a franchisor’s appeal process within 6 months after receipt of the written notice. If there is a hearing, the franchisor has the burden of proof. (Veh. Code § 3065(d)(6))

Audits of Franchisee Warranty Records

Audits of franchisee warranty records may be conducted by the franchisor on a reasonable basis, and for a period of 9 months after a claim is paid or a credit issued.

A franchisor shall not select a franchisee for an audit, or perform an audit, in a punitive, retaliatory, or unfairly discriminatory manner.

A franchisor may conduct no more than one random audit of a franchisee in a 9-month period.

The franchisor’s notification to the franchisee of any additional audit within a 9-month period shall

be accompanied by written disclosure of the basis for that additional audit. (Veh. Code § 3065(e)(1))

If a false claim was submitted by a franchisee with the intent to defraud the franchisor, a longer period for audit and any resulting chargeback may be permitted if the franchisor obtains an order from the Board. (Veh. Code § 3065(f))

Disapproval of Previously Approved Warranty Claims

Previously approved claims shall not be disapproved or charged back to the dealer unless the claim meets one of the following categories:

1. False;
2. Fraudulent;
3. Repairs were not properly made;
4. Repairs were inappropriate to correct a warranty failure due to an improper act or omission of the franchisee; or
5. Material noncompliance with reasonable and nondiscriminatory documentation and administrative claims submission requirements. (Veh. Code § 3065(e)(2))

A franchisor shall not disapprove or chargeback a claim based upon an extrapolation from a sample of claims, unless the sample of claims is selected randomly, and the extrapolation is performed in a reasonable and statistically valid manner.

If the franchisor disapproves of a previously approved claim following an audit, within 30 days after the audit, the franchisor shall provide to the franchisee a written disapproval notice stating the specific grounds upon which the claim is disapproved. (Veh. Code § 3065(e)(3))

Protest of Warranty Claim Disapproval of a Previously Approved Claim Following an Audit

A franchisee can file a protest of the warranty claim disapproval of a previously approved claim following an audit within 6 months after receipt of the written notice. If there is a hearing, the franchisor has the burden of proof. (Veh. Code § 3065(e)(6))

Franchisor Provided “Reasonable” Appeal Process

Vehicle Code section 3065(e)(3) requires franchisors to provide a reasonable appeal process that allows the franchisee a reasonable period of not less than 30 days after receipt of the written disapproval notice to respond to any disapproval with additional supporting documentation or information rebutting the disapproval and to cure noncompliance, with the period commensurate with the volume of claims under consideration.

If the franchisee rebuts any disapproval and cures any material noncompliance relating to a claim before the applicable deadline, the franchisor shall not chargeback the franchisee for that claim.

Final Denial of Warranty Claim Following an Audit

If the franchisee provides additional supporting documentation or information purporting to rebut the disapproval, attempts to cure noncompliance relating to the claim, or otherwise appeals denial of the claim and the franchisor continues to deny the claim, the franchisor shall provide the franchisee with a written notification of the final denial within 30 days of completion of the appeal process, which shall conspicuously state "Final Denial" on the first page. (Veh. Code § 3065(e)(4))

Protest of Final Denial of Warranty Claim Following an Audit Following the Franchisor's Appeal Process

A franchisee can file a protest of the final denial of a warranty claim following an audit following the franchisor's appeal process within 6 months after receipt of the written notice. If there is a hearing, the franchisor has the burden of proof. (Veh. Code § 3065(e)(6))

Franchisor Chargeback for Warranty Claims

Vehicle Code section 3065(e)(5) provides that the franchisor shall not chargeback the franchisee until 45 days after receipt of the written disapproval of a previously approved claim following an audit or final denial of warranty claim following an audit following the franchisor's appeal process, whichever is later.

Any chargeback to a franchisee for warranty parts or service compensation shall be made within 90 days of receipt of that written notice.

If the franchisee files a protest pursuant to this subdivision prior to the franchisor's chargeback for denied claims, the franchisor shall not offset or otherwise undertake to collect the chargeback until the Board issues a final order on the protest.

If the Board sustains the chargeback or the protest is dismissed, the franchisor shall have 90 days following issuance of the final order or the dismissal to make the chargeback, unless otherwise provided in a settlement agreement.

In summary, days 45-90 are the only days to chargeback a dealer for warranty claims. A manufacturer or distributor cannot chargeback a dealer before day 44, or after day 91. But if a protest is filed prior to a chargeback, then the franchisor cannot chargeback the dealer during the above time period. It must wait until the Board decides the protest and if the protest is dismissed or the Board sustains the chargeback, then the franchisor can chargeback the dealer but must do so within 90 days after the Board action (or within time period allowed by settlement agreement, if any).

However, if a false claim was submitted by a franchisee with the intent to defraud the franchisor, a longer period for an audit and any resulting chargeback may be permitted if the franchisor obtains an order from the Board. (Veh. Code § 3065(f))

Required Elements of Protest

The required content of a protest under Vehicle Code section 3065 is described in 13 CCR § 586. A protest involving warranty claims must contain all of the following (see Appendix for sample Form A):

Content Requirements	Regulatory Authority
Must be in writing and be signed by a franchisee or its attorney. ¹⁵	13 CCR § 583
Must set forth in clear and concise language the factual contentions of the franchisee with respect to the protest.	13 CCR § 586(a)(1)
Must set forth the franchisee's mailing address and telephone number, and the name, mailing address and telephone number of its attorney or authorized agent, if any. All correspondence and notices to the franchisee shall thereafter be addressed to said address, if the dealer principal is presenting its own case, or to the address of the dealer's attorney or agent, if so represented.	13 CCR § 586(a)(3)
Shall indicate either that the franchisee does or does not desire to appear before the Board.	13 CCR § 586(a)(4)
Franchisee may submit, as exhibits to the protest, photographic, documentary, or similar physical evidence relevant to the matter with an appropriate description in the protest.	13 CCR § 586(a)(2)
Franchisee shall simultaneously deliver a \$200 filing fee in the form of a check, money order or authorize a credit card charge payable to the New Motor Vehicle Board, or a request for a fee waiver.	13 CCR § 553.40
Franchisee shall serve a copy of the protest on the franchisor and proof of service shall accompany the protest submitted to the Board.	13 CCR § 584 13 CCR § 551.24

¹⁵ See footnote 7.

WARRANTY CLAIMS PROTESTS
Motor Vehicle Dealers

Vehicle Code Section	Type of Protest	Notice to Dealer	Time to File Protest	Burden of Proof if there is a Hearing
3065(a)	Pre-Repair Challenge to the reduction in time and compensation (labor time guides) applicable to specific parts or labor operations	Written notice of reduction provided by the franchisor to the franchisee.	Within 6 months following the franchisee's receipt of the written notice of reduction	Franchisor has burden to establish the reasonableness of the reduction and adequacy and fairness of the resulting compensation (3065(a))
3065(d)(3)	Post-Repair Initial disapproval of warranty claims	Franchisor provides a written notice of disapproval within 30 days after the franchisor's receipt of a warranty claim submitted by a franchisee.	Within 6 months after receipt of the written notice	Franchisor has the burden (3065(d)(6))
3065(d)(4)	Post-Repair/Post-Appeal Final denial of warranty claim following franchisor's appeal process	Notice of Final Denial to the franchisee.	Within 6 months after receipt of the written notice	Franchisor has the burden (3065(d)(6))
3065(e)(3)	Post-Audit Warranty claim disapproval of a previously approved claim following an audit	Franchisor provides a written Notice of Disapproval within 30 days after the audit stating the specific grounds.	Within 6 months after receipt of the written notice	Franchisor has the burden (3065(e)(6))
3065(e)(4)	Post-Audit/Post-Appeal Final denial of warranty claim following an audit following franchisor's appeal process	Notification of the Final Denial to the franchisee.	Within 6 months after receipt of the written notice	Franchisor has the burden (3065(e)(6))

RETAIL LABOR RATE OR RETAIL PARTS RATE - Motor Vehicle Dealers

Establishment or Modification of Franchisee's Retail Labor Rate or Retail Parts Rate

A franchisee can establish or modify its retail labor rate or retail parts rate no more often than once per calendar year by submitting in writing to its franchisor whichever of the following is ***fewer*** in number:

- 100 sequential qualified repair orders, including any nonqualified repair orders in the same time period.¹⁶
- All repair orders completed during any 90-consecutive-day period.

(Veh. Code § 3065.2(a)(1)(A)-(B))

How a Franchisee Calculates its Retail Labor Rate?

To calculate its ***retail labor rate***, a franchisee shall determine the total charges for labor from the qualified repairs orders submitted as indicated above in Vehicle Code section 3065.2(a)(1)(A)-(B) and divide that amount by the total number of hours. (Veh. Code § 3065.2(a)(2))

How a Franchisee Calculates its Retail Parts Rate?

To calculate its ***retail parts rate***, a franchisee shall determine the total charges for parts from the qualified repair orders submitted as indicated above in Vehicle Code section 3065.2(a)(1)(A)-(B) and divide that amount by the franchisee's total cost of the purchase of those parts, then subtract one, and multiply by 100 to produce a percentage. (Veh. Code § 3065.2(a)(3))

Statutorily Required Notice to the Franchisor by the Franchisee of its Retail Labor Rate and Retail Parts Rate

The franchisee is statutorily required to provide its franchisor with ***notice*** of its retail labor rate and retail parts rate as calculated above. (Veh. Code § 3065.2(a)(4))

How Repair Orders are Submitted Pursuant to Section 3065.2?

A franchisee may submit any of the following to its franchisor:¹⁷

1. For calculating both its retail labor rate and retail parts rate, a franchisee can submit

¹⁶ As used in Vehicle Code section 3065.2(a), a "qualified repair order" is defined as "a repair order, closed at the time of submission, for work that was performed outside of the period of the manufacturer's warranty and paid for by the customer, but that would have been covered by a manufacturer's warranty if the work had been required and performed during the period of the warranty." (Veh. Code § 3065.2(j)) Qualified repair orders submitted under Vehicle Code section 3065.2(a) shall be from a period occurring not more than 180 days before the submission. (Veh. Code § 3065.2(b))

¹⁷ For purposes of Vehicle Code section 3065.2, a franchisee may submit its repair orders electronically to its franchisor. (Veh. Code § 3065.2(b))

a single set of qualified repair orders; or

2. For calculating only its retail labor rate or only its retail parts rate, a franchisee can submit a set of qualified repair orders.

(Veh. Code § 3065.2(b)(1)-(2))

What Types of Charges included in a Repair Order should be Omitted in Calculating a Franchisee's Retail Labor Rate and Retail Parts Rate?

In calculating its retail labor rate and retail parts rate, the franchisee shall omit any charges included in a repair order from the calculation that do not reflect the franchisee's retail customer-pay labor and parts rates including, but not limited to, any of the following:

1. Manufacturer, manufacturer branch, distributor, or distributor branch special events, specials, or promotional discounts for retail customer repairs.
2. Parts sold, or repairs performed, at wholesale.
3. Routine maintenance, including, but not limited to, the replacement of bulbs, fluids, filters, batteries, and belts that are not provided in the course of, and related to, a repair.
4. Items that do not have individual part numbers including, but not limited to, nuts, bolts, and fasteners.
5. Vehicle reconditioning.
6. Accessories.
7. Repairs of conditions caused by a collision, a road hazard, the force of the elements, vandalism, theft, or owner, operational, or third-party negligence or deliberate act.
8. Parts sold or repairs performed for insurance carriers.
9. Vehicle emission inspections required by law.
10. Manufacturer-approved goodwill or policy repairs or replacements.
11. Repairs for government agencies or service contract providers.
12. Repairs with aftermarket parts, when calculating the retail parts rate, but not the retail labor rate.
13. Repairs with aftermarket parts.

14. Replacement of or work on tires, including front-end alignments and wheel or tire rotations.
15. Repairs of motor vehicles owned by the franchisee or an employee thereof at the time of the repair.

(Veh. Code § 3065.2(c)(1)-(15))

A Franchisor may Contest to the Franchisee the “Material Accuracy” of the Retail Labor Rate or Retail Parts Rate by Submitting a “Notification” to the Franchisee

A franchisor may contest to the franchisee the “material accuracy” of the retail labor rate or retail parts rate within 30 days after receiving the statutorily required notice from the franchisee discussed above or, if the franchisor requests supplemental repair orders pursuant to paragraph (4) of Vehicle Code section 3065.2(d), within 30 days after receiving the supplemental repair orders. (Veh. Code § 3065.2(d)(1))

If the franchisor seeks to contest the retail labor rate, retail parts rate, or both, it shall submit no more than one **notification** to the franchisee. (Veh. Code § 3065.2(d)(1))

The notification is limited to the assertion that the rate is “materially inaccurate” or fraudulent, and **shall** include the following:

1. A full explanation of any and all reasons for the allegation;
2. Evidence substantiating the franchisor’s position;
3. A copy of all calculations used by the franchisor in determining the franchisor’s position; and,
4. A proposed **adjusted retail labor rate or retail parts rate**, as applicable, on the basis of the repair orders submitted by the franchisee, or if applicable, on the basis of supplemental repair orders submitted pursuant to Vehicle Code section 3065.2(d)(5).

After submitting the notification, the franchisor shall not add to, expand, supplement, or otherwise modify any element of that notification, including, but not limited to, its grounds for contesting the retail parts rate, retail labor rate, or both under Vehicle Code section 3065.2(a). (Veh. Code § 3065.2(d)(1))

The Franchisor’s Proposed Adjusted Retail Labor Rate or Retail Parts Rate is Effective if the Franchisee Agrees

If the franchisee agrees with the conclusions of its franchisor and any corresponding adjustment to the retail labor rate or retail parts rate then no further action is required. The new adjusted rate is effective as of the 30th calendar day after the franchisor’s receipt of the notice submitted

pursuant to Vehicle Code section 3065.2(a). (Veh. Code § 3065.2(d)(2))

If the Franchisee does not Agree with the Proposed Adjusted Rate then a Protest can be Filed with the Board

In the event the franchisor provides all of the information required in its notification as indicated above, and the franchisee does not agree with the adjusted rate proposed by the franchisor, the franchisor shall pay the franchisee at the franchisor's proposed adjusted retail labor rate or retail parts rate until the Board issues a decision on a protest filed pursuant to Vehicle Code section 3065.4, or until any mutual resolution between the franchisor and the franchisee.

The franchisor's proposed adjusted rate shall be deemed to be effective as of the 30th day after the franchisor's receipt of the notice submitted pursuant to Vehicle Code section 3065.2(a). (Veh. Code § 3065.2(d)(3))

If the Franchisor Determines that the Franchisee's Retail Labor Rate or Retail Parts Rate is "Substantially Higher" than the Franchisee's Current Warranty Rate, the Franchisor can Request Supplemental Repair Orders

Based on the franchisee's set of repair orders submitted, if the franchisor determines that the franchisee's submission for a retail labor rate or retail parts rate is substantially higher than the franchisee's current warranty rate, the franchisor may request, in writing, all repair orders closed within the period of 30 days immediately preceding, or 30 days immediately following, the set of repair orders submitted by the franchisee. The written request should be made within 30 days after the franchisor's receipt of the notice submitted pursuant to Vehicle Code section 3065.2(a). (Veh. Code § 3065.2(d)(4))

If the franchisee fails to provide the ***supplemental repair orders***, all time periods under this section shall be suspended until the supplemental repair orders are provided. (Veh. Code § 3065.2(d)(4))

If the franchisor requests supplemental repair orders, the franchisor may calculate a ***proposed adjusted retail labor rate or retail parts rate***, as applicable, based upon any set of the qualified repair orders submitted by the franchisee, if the franchisor complies with the requirements outlined in Vehicle Code section 3065.2(d)(5)(A)-(C)

What if the Franchisor does not Contest the Retail Labor Rate or Retail Parts Rate?

If the franchisor does not contest the retail labor rate or retail parts rate, or if the franchisor fails to timely contest the rate submitted by the franchisee, the uncontested retail labor rate or retail parts rate takes effect on the 30th day after the franchisor's receipt of the notice.

The franchisor shall use the new retail labor rate or retail parts rate, or both, if applicable, to determine compensation to fulfill warranty obligations by the franchisee. (Veh. Code § 3065.2(e))

Considerations in Calculating the Retail Labor Rate and Retail Parts Rate

When calculating the retail parts rate and retail labor rate, all of the following shall apply:

1. Promotional reward program cash-equivalent pay methods shall not be considered discounts.
2. The franchisor is prohibited from establishing or implementing a special part or component number for parts used in warranty work, if the result of the special part or component lowers compensation to the franchisee below that amount calculated pursuant to this section.

This paragraph does not apply to parts or components that are subject to a recall and are issued a new special part or component number.

This paragraph does not prohibit a franchisor from changing prices of parts in the ordinary course of business.

(Veh. Code § 3065.2(f)(1)-(2)(A)-(B))

Considerations when the Franchisor is Compensating the Franchisee for the Retail Parts Rate

When the franchisor is compensating the franchisee for the **retail parts rate**, all of the following shall apply:

1. If the franchisor furnishes a part to a franchisee at no cost for use in performing warranty obligations, the franchisor shall compensate the franchisee the amount resulting from multiplying the wholesale value of the part by the franchisee's retail parts rate determined pursuant to Vehicle Code section 3065.2.
2. If the franchisor furnishes a part to a franchisee at a reduced cost for use in performing warranty obligations, the franchisor shall compensate the franchisee the amount resulting from multiplying the wholesale value of the part by the franchisee's retail parts rate determined pursuant Vehicle Code section 3065.2, plus the franchisee's cost of the part.
3. The **wholesale value of the part**, for purposes of Vehicle Code section 3065.2(g), shall be the greater of:
 - A. The amount the franchisee paid for the part or a substantially identical part if already owned by the franchisee.
 - B. The cost of the part shown in a current franchisor's established price schedule.

- C. The cost of a substantially identical part shown in a current franchisor's established price schedule.

(Veh. Code § 3065.2(g)(1)-(3)(A)-(C))

The Method for Establishing or Modifying a Franchisee's Retail Labor Rate, Retail Parts Rate, or Both

A franchisee's retail labor rate, retail parts rate, or both shall be calculated only using the method prescribed in Vehicle Code section 3065.2.

A franchisor shall not use or require a franchisee to use any other method including, but not limited to, any of the following:

1. Substituting any other "purported repair sample" for that submitted by a franchisee.
2. Imposing any method related to the establishment of a retail labor rate or retail parts rate that is unreasonable or time consuming, or require the use of information that is unreasonable or time consuming to obtain, including part-by-part or transaction-by-transaction calculations or utilization of the franchisee's financial statement.
3. Unilaterally calculating a retail labor rate or retail parts rate for a franchisee, except as provided in Vehicle Code section 3065.2(d).
4. Using a franchisee's sample, submitted for establishing or increasing its retail parts rate, to establish or reduce the franchisee's retail labor rate or using a franchisee's sample, submitted for establishing or increasing its retail labor rate, to establish or reduce the franchisee's retail parts rate.

(Veh. Code § 3065.2(h)(1)-(4))

What Actions Franchisors are Precluded from Undertaking?

Subdivision (i) of Vehicle Code section 3065.2 precludes a franchisor from:

1. Attempting to influence a franchisee to implement or change the prices for which the franchisee sells parts or labor in retail repairs because the franchisor is seeking compensation or exercising any right pursuant to this section.
2. Directly or indirectly, taking or threatening to take any adverse action against a franchisee for seeking compensation or exercising any right pursuant to Vehicle Code section 3065.2, by any action including, but not limited to, the following:
 - A. Assessing penalties, surcharges, or similar costs to a franchisee.
 - B. Transferring or shifting any costs to a franchisee.

- C. Limiting allocation of vehicles or parts to a franchisee.
- D. Acting or failing to act other than in good faith.
- E. Hindering, delaying, or rejecting the proper and timely payment of compensation due under Vehicle Code section 3065.2 to a franchisee.
- F. Establishing, implementing, enforcing, or applying any discriminatory policy, standard, rule, program, or incentive regarding compensation due under Vehicle Code section 3065.2.
- G. Conducting or threatening to conduct nonroutine or nonrandom warranty, nonwarranty repair, or other service-related audits in response to seeking compensation or exercising any right pursuant to Vehicle Code section 3065.2.

(Veh. Code § 3065.2(i)(1)-(2)(A)-(G))

Subdivision (i) does not prohibit a franchisor from increasing prices of vehicles or parts in the ordinary course of business. (Veh. Code § 3065.2(i)(3))

Protest for Franchisor's Failure to Comply with Section 3065.2 or if Franchisee Disputes the Franchisor's Proposed Adjusted Retail Labor Rate or Retail Parts Rate

If a franchisor ***fails to comply*** with Vehicle Code section 3065.2, or if a franchisee disputes the franchisor's ***proposed adjusted retail labor rate or retail parts rate***, the franchisee may file a protest with the Board for a declaration of the franchisee's retail labor rate or retail parts rate.

If there is a hearing, the franchisor has the burden of proof that it complied with Vehicle Code section 3065.2 and that the franchisee's determination of the retail labor rate or retail parts rate is materially inaccurate or fraudulent. (Veh. Code § 3065.4(a))

Time for Filing a Protest

Protests pertaining to compliance with Section 3065.2 or franchisee disputes of the franchisor's proposed adjusted retail labor rate or retail parts rate are not subject to any specific statutory time limitations for filing. However, failure to file a protest within a reasonable time could result in a dealer losing the right to a hearing before the Board.

Required Elements of Protest

The required content of a protest under Vehicle Code section 3065.4 is described in 13 CCR § 586.¹⁸ A protest involving retail labor rate or retail parts rate must contain all of the following (see Appendix for sample Form A):

Content Requirements	Regulatory Authority
Must be in writing and be signed by a franchisee or its attorney. ¹⁹	13 CCR § 583
Must set forth in clear and concise language the factual contentions of the franchisee with respect to the protest.	13 CCR § 586(a)(1)
Must set forth the franchisee's mailing address and telephone number, and the name, mailing address and telephone number of its attorney or authorized agent, if any. All correspondence and notices to the franchisee shall thereafter be addressed to said address, if the dealer principal is presenting its own case, or to the address of the dealer's attorney or agent, if so represented.	13 CCR § 586(a)(3)
Shall indicate either that the franchisee does or does not desire to appear before the Board.	13 CCR § 586(a)(4)
Franchisee may submit, as exhibits to the protest, photographic, documentary, or similar physical evidence relevant to the matter with an appropriate description in the protest.	13 CCR § 586(a)(2)
Franchisee shall simultaneously deliver a \$200 filing fee in the form of a check, money order or authorize a credit card charge payable to the New Motor Vehicle Board, or a request for a fee waiver.	13 CCR § 553.40
Franchisee shall serve a copy of the protest on the franchisor and proof of service shall accompany the protest submitted to the Board.	13 CCR § 584 13 CCR § 551.24

Determination of Protest

In a decision, the Board may determine the difference between the amount the franchisee has actually received from the franchisor for fulfilled warranty obligations and the amount that the franchisee would have received if the franchisor had compensated the franchisee at the retail labor rate and retail parts rate as determined in accordance with Vehicle Code section 3065.2 for a period beginning 30 days after receipt of the franchisee's initial submission under Vehicle Code section 3065.2(a). (Veh. Code § 3065.4(b))

The franchisee may submit a request to the franchisor to calculate the unpaid warranty reimbursement compensation and the franchisor shall provide this calculation to the franchisee

¹⁸ Effective January 1, 2022, Section 586 was amended to incorporate Section 3065.4 protests.

¹⁹ See footnote 7.

within 30 days after receipt of the request. The request for the calculation will also be deemed a request for payment of the unpaid warranty reimbursement compensation. (Veh. Code § 3065.4(b))

If the franchisor fails to make full payment within 30 days after the franchisee submits a request for payment, the franchisee may file an action in superior court for injunctive and other relief to enforce the determination or order of the Board. The franchisee may also recover in superior court its actual expenses in bringing and maintaining an enforcement action. (Veh. Code § 3065.4(c))

Either the franchisor or the franchisee may seek judicial review of the Board's determination pursuant to Vehicle Code section 3068. (Veh. Code § 3065.4(d))

RETAIL LABOR RATE OR RETAIL PARTS RATE PROTESTS
Motor Vehicle Dealers

Vehicle Code Section	Type of Protest	Notice	Time to File Protest	Burden of Proof if there is a Hearing
3065.4(a)	Franchisee contends its franchisor failed to comply with Section 3065.2 pertaining to the establishment or modification of the franchisee's retail labor rate, retail parts rate, or both	Franchisee provides notice to the franchisor of its retail labor rate and retail parts rate calculated in accordance with Section 3065.2(a)	None specified	Franchisor has the burden of proof that it complied with Section 3065.2 (3065.4(a))
3065.4(a)	Franchisee disputes the franchisor's proposed adjusted retail labor rate or retail parts rate	Franchisor may contest to the franchisee the material accuracy of the retail labor rate or retail parts rate that was calculated by the franchisee under Section 3065.2(d) within 30 days after receiving notice from the franchisee or, if the franchisor requests supplemental repair orders pursuant to Section 3065.2(d)(4), within 30 days after receiving the supplemental repair orders (3065.2(d)(1))	None specified	Franchisor has the burden of proof that the franchisee's determination of the retail labor rate or retail parts rate is "materially inaccurate or fraudulent" (3065.4(a))

WARRANTY CLAIMS - RV Dealers

Statutory Authority

Vehicle Code section 3075 requires every new recreational vehicle manufacturer or distributor to properly fulfill every warranty agreement made by it and adequately and fairly compensate its dealers for labor and parts used to perform warranty repairs and service.

Franchisor's Notice of Compensation for Warranty Reimbursement

The manufacturers and distributors are required to file copies of their warranty reimbursement schedules or formulas with the Board. The schedule or formula must be reasonable with respect to the time and compensation allowed for the performance of warranty work.

Approval of Warranty Claims

Vehicle Code section 3075(d) also requires that warranty claims be approved or disapproved within 30 days after their receipt by the franchisor. Any claim not specifically disapproved in writing within 30 days from receipt by the franchisor shall be deemed approved on the 30th day.

Approved warranty claims must be paid within 30 days of approval. However, Vehicle Code section 3075(d) states: "Failure to approve or pay within the above specified time limits, in individual instances for reasons beyond the reasonable control of the franchisor, do not constitute a violation of this article [Article 5 RV protests]."

Disapproval of Warranty Claims

Vehicle Code section 3075(c) requires that the franchisor that disallows a franchisee's warranty claim for a defective part on the basis that the part was not defective must return such part to the dealer at the franchisor's expense, or reimburse the dealer for the part, at the franchisor's option.

The dealer is also entitled to written notice of disapproval within 30 days after the warranty claims are received by the franchisor. The notice must contain the specific grounds for disapproval (Veh. Code § 3075(d)).

Audits of Franchisee Warranty Records

Audits of franchisee warranty records may be conducted by the franchisor on a reasonable basis, and for a period of 12 months after a claim is paid or a credit issued. Any chargeback to a franchisee for warranty parts or service compensation shall be made within 90 days of the completion of the audit. However, if a false claim was submitted by a franchisee with the intent to defraud the franchisor, a longer period for an audit and any resulting chargeback may be permitted if the franchisor obtains an order from the Board. (Veh. Code § 3075(e))

Time for Filing a Protest

Protests involving warranty disputes are not subject to any specific statutory time limitations for filing. However, failure to file a protest within a reasonable time could result in a dealer losing the right to a hearing before the Board.

Required Elements of Protest

The required content of a protest under Vehicle Code section 3075 is described in 13 CCR § 586. A protest involving warranty claims must contain all of the following (see Appendix for sample Form A):

Content Requirements	Regulatory Authority
Must be in writing and be signed by a franchisee or its attorney. ²⁰	13 CCR § 583
Must set forth in clear and concise language the factual contentions of the franchisee with respect to the protest.	13 CCR § 586(a)(1)
Must set forth the franchisee's mailing address and telephone number, and the name, mailing address and telephone number of its attorney or authorized agent, if any. All correspondence and notices to the franchisee shall thereafter be addressed to said address, if the dealer principal is presenting its own case, or to the address of the dealer's attorney or agent, if so represented.	13 CCR § 586(a)(3)
Shall state either that the franchisee does or does not desire to appear before the Board.	13 CCR § 586(a)(4)
Franchisee may submit, as exhibits to the protest, photographic, documentary, or similar physical evidence relevant to the matter with an appropriate description in the protest.	13 CCR § 586(a)(2)
Franchisee shall simultaneously deliver a \$200 filing fee in the form of a check, money order or authorize a credit card charge payable to the New Motor Vehicle Board, or a request for a fee waiver.	13 CCR § 553.40
Franchisee shall serve a copy of the protest on the franchisor and proof of service shall accompany the protest submitted to the Board.	13 CCR § 584 13 CCR § 551.24

²⁰ See footnote 7.

Good Cause

Franchisee claims for warranty compensation shall not be disapproved except for good cause such as performance of non-warranty repairs, lack of material documentation, or fraud. (Veh. Code § 3075(e))

Determination of Protest

If a protest is filed, the Board shall determine whether the schedule or formula is reasonable, taking into account the dealer's labor rate to its retail customers. If there is a hearing, the franchisee has the burden of proving that the warranty reimbursement schedule is not reasonable, but the franchisor has the burden of proof to establish that a franchisee acted with intent to defraud the franchisor when the issue is material (Veh. Code § 3080(c)).

FRANCHISOR INCENTIVE PROGRAM CLAIMS - Motor Vehicle Dealers

Statutory Authority

Pursuant to Vehicle Code section 3065.1, all claims made by a new motor vehicle franchisee for payment under the terms of a franchisor incentive program shall be approved or disapproved within 30 days after receipt by the franchisor.

Franchisor's Notice of Denial of Franchisor Incentive Program Reimbursement

Vehicle Code section 3065.1(a) requires that a franchisor who denies payment under the terms of a franchisor incentive program shall notify the franchisee within 30 days after receipt by the franchisor and provide specific grounds on which the disapproval was based.

Approval/Disapproval of Franchisor Incentive Program Reimbursement

Any claim not specifically disapproved in writing within 30 days from receipt shall be deemed approved on the 30th day. If incentive program compensation claims are approved, they must be paid within 30 days of approval. However, Vehicle Code section 3065.1(f) provides that the failure to approve or pay within the above specified time limits, in individual instances for reasons beyond the reasonable control of the franchisor, do not constitute a violation of Article 4 (pertains to motor vehicles other than RVs).

Disapproval of a Franchisor Incentive Program Claims

A franchisor shall not disapprove a claim unless the claim meets one of the following categories:

1. False;
2. Fraudulent;
3. The claim is ineligible under the terms of the incentive program as previously communicated to the franchisee; or
4. Material noncompliance with documentation and administrative claims submission requirements, if the requirements are reasonable and nondiscriminatory. (Veh. Code § 3065.1(b))

Protest of Initial Disapproval of Franchisor Incentive Program Claims

A franchisee can file a protest of the initial disapproval of a franchisor incentive program claim within 6 months after receipt of the written notice. If there is a hearing, the franchisor has the burden of proof. (Veh. Code § 3065.1(e))

Franchisor Provided “Reasonable” Appeal Process

Vehicle Code section 3065.1(c) requires franchisors to provide a reasonable appeal process that allows the franchisee at least 30 days after receipt of the written disapproval notice to provide additional supporting documentation or information rebutting the disapproval.

If the disapproval is based upon noncompliance with documentation or administrative claims submission requirements, the franchisor shall allow the franchisee at least 30 days from the date of receipt of the disapproval notice to cure any material noncompliance.

If the disapproval is rebutted, and material noncompliance is cured before the applicable deadline, the franchisor shall approve the claim.

There are potentially two 30-day time periods: (1) reasonable appeal; and (2) opportunity to cure.

Final Denial of Franchisor Incentive Program Claim

If the franchisee provides additional supporting documentation or information purporting to rebut the disapproval, attempts to cure noncompliance relating to the claim, or otherwise appeals denial of the claim and the franchisor continues to deny the claim, the franchisor shall provide the franchisee with a written notification of the final denial within 30 days of completion of the appeal process, which shall conspicuously state “Final Denial” on the first page. (Veh. Code § 3065.1(d))

Protest of Final Denial of Franchisor Incentive Program Claim following a Franchisor’s Appeal Process

A franchisee can file a protest of the final denial of a franchisor incentive program claim following a franchisor’s appeal process within 6 months after receipt of the written notice. If there is a hearing, the franchisor has the burden of proof. (Veh. Code § 3065.1(e))

Audits of Franchisee Incentive Program Records

Audits of franchisee incentive program records may be conducted by the franchisor on a reasonable basis, and for a period of 9 months after a claim is paid or a credit issued.

A franchisor shall not select a franchisee for an audit, or perform an audit, in a punitive, retaliatory, or unfairly discriminatory manner.

A franchisor may conduct no more than one random audit of a franchisee in a 9-month period.

The franchisor’s notification to the franchisee of any additional audit within a 9-month period shall be accompanied by written disclosure of the basis for that additional audit. (Veh. Code § 3065.1(g)(1))

Disapproval of Previously Approved Franchisor Incentive Program Claims

Previously approved claims shall not be disapproved or charged back to the dealer unless the claim meets one of the following categories:

1. False;
2. Fraudulent;
3. The claim is ineligible under the terms of the incentive program as previously communicated to the franchisee; or
4. Material noncompliance with documentation and administrative claims submission requirements, if the requirements are reasonable and nondiscriminatory.

These are the same categories for initial disapproval of a franchisor incentive program claim. (Veh. Code § 3065.1(g)(2))

A franchisor shall not disapprove or chargeback a claim based upon an extrapolation from a sample of claims, unless the sample of claims is selected randomly, and the extrapolation is performed in a reasonable and statistically valid manner.

If the franchisor disapproves of a previously approved claim following an audit, within 30 days after the audit, the franchisor shall provide to the franchisee a written disapproval notice stating the specific grounds upon which the claim is disapproved. (Veh. Code § 3065.1(g)(3))

Protest of Franchisor Incentive Program Claim Disapproval of a Previously Approved Claim Following an Audit

A franchisee can file a protest of the franchisor incentive program claim disapproval of a previously approved claim following an audit within 6 months after receipt of the written notice. If there is a hearing, the franchisor has the burden of proof. (Veh. Code § 3065.1(g)(6))

Franchisor Provided “Reasonable” Appeal Process

Vehicle Code section 3065.1(g)(3) requires franchisors to provide a reasonable appeal process that allows the franchisee a reasonable period of not less than 30 days after receipt of the written disapproval notice to respond to any disapproval with additional supporting documentation or information rebutting the disapproval and to cure any material noncompliance, with the period commensurate with the volume of claims under consideration.

If the franchisee rebuts any disapproval and cures any material noncompliance relating to a claim before the applicable deadline, the franchisor shall not chargeback the franchisee for that claim.

Final Denial of Franchisor Incentive Program Claim Following an Audit

If the franchisee provides additional supporting documentation or information purporting to rebut the disapproval, attempts to cure noncompliance relating to the claim, or otherwise appeals denial of the claim and the franchisor continues to deny the claim, the franchisor shall provide the franchisee with a written notification of the final denial within 30 days of completion of the appeal process, which shall conspicuously state “Final Denial” on the first page. (Veh. Code § 3065.1(g)(4))

Protest of Final Denial of Franchisor Incentive Program Claim Following an Audit Following the Franchisor’s Appeal Process

A franchisee can file a protest of the final denial of a franchisor incentive program claim following an audit following the franchisor’s appeal process within 6 months after receipt of the written notice. If there is a hearing, the franchisor has the burden of proof. (Veh. Code § 3065.1(g)(6))

Franchisor Chargeback for Franchisor Incentive Program Claims

Vehicle Code section 3065.1(g)(5) provides that the franchisor shall not chargeback the franchisee until 45 days after receipt of the written disapproval of a previously approved claim following an audit or final denial of a franchisor incentive program claim following an audit following the franchisor’s appeal process, whichever is later.

If the franchisee cures any material noncompliance relating to a claim, the franchisor shall not chargeback the dealer for that claim.

Any chargeback to a franchisee for incentive program compensation shall be made within 90 days of receipt of that written notice.

If the Board sustains the chargeback or the protest is dismissed, the franchisor shall have 90 days following issuance of the final order or the dismissal to make the chargeback, unless otherwise provided in a settlement agreement.

If the franchisee files a protest pursuant to this subdivision prior to the franchisor’s chargeback for denied claims, the franchisor shall not offset or otherwise undertake to collect the chargeback until the Board issues a final order on the protest. (Veh. Code § 3065.1(g)(6))

In summary, days 45-90 are the only days to chargeback a dealer for franchisor incentive program claims. A manufacturer or distributor cannot chargeback a dealer before day 44, or after day 91. But if a protest is filed prior to a chargeback, then the franchisor cannot chargeback the dealer during the above time period. It must wait until the Board decides the protest and if the protest is dismissed or the Board sustains the chargeback, then the franchisor can chargeback the dealer but must do so within 90 days after the Board action (or within time period allowed by settlement agreement, if any).

However, if a false claim was submitted by a franchisee with the intent to defraud the franchisor, a longer period for an audit and any resulting chargeback may be permitted if the franchisor

obtains an order from the Board. (Veh. Code § 3065.1(h))

Required Elements of Protest

The required content of a protest under Vehicle Code section 3065.1 is described in 13 CCR § 586. A protest involving franchisor incentive program claims must contain all of the following (see Appendix for sample Form A):

Content Requirements	Regulatory Authority
Must be in writing and be signed by a franchisee or its attorney. ²¹	13 CCR § 583
Must set forth in clear and concise language the factual contentions of the franchisee with respect to the protest.	13 CCR § 586(a)(1)
Must set forth the franchisee's mailing address and telephone number, and the name, mailing address and telephone number of its attorney or authorized agent, if any. All correspondence and notices to the franchisee shall thereafter be addressed to said address, if the dealer principal is presenting its own case, or to the address of the dealer's attorney or agent, if so represented.	13 CCR § 586(a)(3)
Shall state either that the franchisee does or does not desire to appear before the Board.	13 CCR § 586(a)(4)
Franchisee may submit, as exhibits to the protest, photographic, documentary, or similar physical evidence relevant to the matter with an appropriate description in the protest.	13 CCR § 586(a)(2)
Franchisee shall simultaneously deliver a \$200 filing fee in the form of a check, money order or authorize a credit card charge payable to the New Motor Vehicle Board, or a request for a fee waiver.	13 CCR § 553.40
Franchisee shall serve a copy of the protest on the franchisor and proof of service shall accompany the protest submitted to the Board.	13 CCR § 584 13 CCR § 551.24

²¹ See footnote 7.

FRANCHISOR INCENTIVE PROGRAM PROTESTS
Motor Vehicle Dealers

Vehicle Code Section	Type of Protest	Notice to Dealer	Time to File Protest	Burden of Proof if there is a Hearing
3065.1(a)	Initial Disapproval Initial disapproval of franchisor incentive program claims	Franchisor provides a written notice of disapproval within 30 days after the franchisor's receipt of a claim submitted by a franchisee.	6 months from receipt of the written notice	Franchisor has the burden (3065.1(e))
3065.1(d)	Final Denial/Post-Appeal Final denial of franchisor incentive program claim following a franchisor's appeal process	Written notice of Final Denial to the franchisee.	6 months from receipt of the written notice	Franchisor has the burden (3065.1(e))
3065.1(g)(3)	Post-Audit Franchisor incentive program claim disapproval of a previously approved claim following an audit	Franchisor provides a written notice of disapproval within 30 days after the audit stating the specific grounds.	6 months after receipt of the written notice	Franchisor has the burden (3065.1(g)(6))
3065.1(g)(4)	Post-Audit/Post-Appeal/Final Denial Final denial of a franchisor incentive program claim following an audit following the franchisor's appeal process	Written notification of the Final Denial.	6 months after receipt of the written notice	Franchisor has the burden (3065.1(g)(6))

FRANCHISOR INCENTIVE PROGRAM CLAIMS - RV Dealers

Statutory Authority

Pursuant to Vehicle Code section 3076, all claims made by a recreational vehicle franchisee for payment under the terms of a franchisor incentive program shall be approved or disapproved within 30 days after receipt by the franchisor.

Franchisor's Notice of Denial of Franchisor Incentive Program Reimbursement

Vehicle Code section 3076(a) requires that a franchisor who denies payment under the terms of a franchisor incentive program, shall notify the franchisee within 30 days and provide specific grounds on which the disapproval was based.

Approval/Disapproval of Franchisor Incentive Program Reimbursement

Any claim not specifically disapproved in writing within 30 days from receipt shall be deemed approved on the 30th day. If incentive program compensation claims are approved, they must be paid within 30 days of approval. However, Vehicle Code section 3076(a) provides that the failure to approve or pay within the above specified time limits, in individual instances for reasons beyond the reasonable control of the franchisor, do not constitute a violation of Article 5, pertaining to RVs.

Audits of Franchisee Incentive Program Records

Vehicle Code section 3076(b) provides for audits of franchisee incentive program records if reasonable and for a period of 18 months after a claim is paid or a credit issued. Any chargeback to a franchisee for incentive program compensation shall be made within 90 days of completion of the audit. However, if a false claim was submitted by the franchisee with the intent to defraud the franchisor, a longer period for the audit and any resulting chargeback may be permitted if the franchisor obtains an order to that effect from the Board.

Time for Filing a Protest

Following the disapproval of a claim, a franchisee shall have one year from receipt of the notice of disapproval in which to appeal and file a protest with the Board.

Required Elements of Protest

The required content of a protest under Vehicle Code section 3076 is described in 13 CCR § 586. A protest involving franchisor incentive program claims must contain all of the following (see Appendix for sample Form A):

Content Requirements	Regulatory Authority
Must be in writing and be signed by a franchisee or its attorney. ²²	13 CCR § 583
Must set forth in clear and concise language the factual contentions of the franchisee with respect to the protest.	13 CCR § 586(a)(1)
Must set forth the franchisee's mailing address and telephone number, and the name, mailing address and telephone number of its attorney or authorized agent, if any. All correspondence and notices to the franchisee shall thereafter be addressed to said address, if the dealer principal is presenting its own case, or to the address of the dealer's attorney or agent, if so represented.	13 CCR § 586(a)(3)
Shall indicate either that the franchisee does or does not desire to appear before the Board.	13 CCR § 586(a)(4)
Franchisee may submit, as exhibits to the protest, photographic, documentary, or similar physical evidence relevant to the matter with an appropriate description in the protest.	13 CCR § 586(a)(2)
Franchisee shall simultaneously deliver a \$200 filing fee in the form of a check, money order or authorize a credit card charge payable to the New Motor Vehicle Board, or a request for a fee waiver.	13 CCR § 553.40
Franchisee shall serve a copy of the protest on the franchisor and proof of service shall accompany the protest submitted to the Board.	13 CCR § 584 13 CCR § 551.24

Good Cause

Franchisee claims for incentive program compensation shall not be disapproved except for good cause, such as ineligibility under the terms of the incentive program, lack of material documentation, or fraud. (Veh. Code § 3076(b))

Determination of Protest

The franchisee has the burden of proof, but the franchisor has the burden of proof to establish that a franchisee acted with intent to defraud the franchisor when the issue is material (Veh. Code § 3080(c)).

²² See footnote 7.

**PERFORMANCE STANDARDS, SALES OBJECTIVES, OR PROGRAMS
FOR MEASURING A DEALER'S SALES, SERVICE, OR CUSTOMER
SERVICE PERFORMANCE - Motor Vehicle Dealers**

Statutory Authority

Vehicle Code section 3065.3 created a new protest pertaining to alleged violations of subdivision (g) of Section 11713.13.

Franchisor's Performance Standard, Sales Objective or Program

Subdivision (a) of Vehicle Code section 3065.3 provides that "[n]o franchisor shall establish or maintain a performance standard, sales objective, or program for measuring a dealer's sales, service, or customer service performance that is inconsistent with the standards set forth in subdivision (g) of Section 11713.13."²³

²³ Section 11713.13 provides that:

It is unlawful and a violation of this code for any manufacturer, manufacturer branch, distributor, or distributor branch licensed under this code to do, directly or indirectly through an affiliate, any of the following:

...

(g) (1) Establish or maintain a performance standard, sales objective, or program for measuring a dealer's sales, service, or customer service performance that may materially affect the dealer, including, but not limited to, the dealer's right to payment under any incentive or reimbursement program or establishment of working capital requirements, unless both of the following requirements are satisfied:

(A) The performance standard, sales objective, or program for measuring dealership sales, service, or customer service performance is reasonable in light of all existing circumstances, including, but not limited to, the following:

- (i) Demographics in the dealer's area of responsibility.
- (ii) Geographical and market characteristics in the dealer's area of responsibility.
- (iii) The availability and allocation of vehicles and parts inventory.
- (iv) Local and statewide economic circumstances.

(v) Historical sales, service, and customer service performance of the line-make within the dealer's area of responsibility, including vehicle brand preferences of consumers in the dealer's area of responsibility.

(B) Within 30 days after a request by the dealer, the manufacturer, manufacturer branch, distributor, distributor branch, or affiliate provides a written summary of the methodology and data used in establishing the performance standard, sales objective, or program for measuring dealership sales or service performance. The summary shall be in detail sufficient to permit the dealer to determine how the standard was established and applied to the dealer.

(2) In any proceeding in which the reasonableness of a performance standard, sales objective, or program for measuring dealership sales, service, or customer service performance is an issue, the manufacturer, manufacturer branch, distributor, distributor branch, or affiliate shall have the burden of proof.

...

Time for Filing a Protest

There is no specific statutory time period in the Vehicle Code within which to file a protest pertaining to a franchisor's performance standard. Failure to file a protest within a reasonable time, however, could result in a dealer losing the right to a hearing by the Board.

Required Elements of Protest

The required content of a protest under Vehicle Code section 3065.3 is described in 13 CCR § 586.5. A protest involving a challenge of a franchisor's performance standard must contain all of the following (see Appendix for sample Form A):

Content Requirements	Regulatory Authority
Must be in writing and be signed by a franchisee or its attorney. ²⁴	13 CCR § 583
Must set forth in clear and concise language the factual contentions of the franchisee with respect to the protest.	13 CCR § 586.5(a)(1)
Must set forth the franchisee's mailing address and telephone number, and the name, mailing address and telephone number of its attorney or authorized agent, if any. All correspondence and notices to the franchisee shall thereafter be addressed to said address, if the dealer principal is presenting its own case, or to the address of the dealer's attorney or agent, if so represented.	13 CCR § 586.5(a)(3)
Shall indicate either that the franchisee does or does not desire to appear before the Board.	13 CCR § 586.5(a)(4)
Franchisee may submit, as exhibits to the protest, photographic, documentary, or similar physical evidence relevant to the matter with an appropriate description in the protest.	13 CCR § 586.5(a)(2)
Franchisee shall simultaneously deliver a \$200 filing fee in the form of a check, money order or authorize a credit card charge payable to the New Motor Vehicle Board, or a request for a fee waiver.	13 CCR § 553.40
Franchisee shall serve a copy of the protest on the franchisor and proof of service shall accompany the protest submitted to the Board.	13 CCR § 584 13 CCR § 551.24

Determination of Protest

If there is a hearing, the franchisor has the burden of proof that its performance standard, sales objective or program is not inconsistent with the standards set forth in subdivision (g) of Section 11713.13 (Veh. Code § 3065.3(b)).

²⁴ See footnote 7.

HEARING PROCEDURES

Pre-Hearing Procedure

Upon receiving a protest, the Board shall institute hearing proceedings similar to those of a formal civil trial, including the scheduling of various pre-hearing conferences, settlement conferences, arrangements for discovery, identification of witnesses, and so on. The Board may impose sanctions if a party fails to comply with the Board's discovery orders or fails to participate properly in a settlement conference.

Discovery

Pursuant to Vehicle Code section 3050.1, the Board may authorize the parties to engage in the civil discovery process. Discovery is limited to requests for depositions and demands for production of documents (Code Civ. Pro. § 2016.010, et seq.), with the exception of provisions for written interrogatories (Code Civ. Proc. § 2030.010). Section 551.6 of the Board's regulations implements and makes specific the Board's procedures for requesting depositions where the witness resides within California or outside of California.

The enactment of the Electronic Discovery Act (Assembly Bill 5, Stats. 2009, Ch. 5, "Act"), effective June 29, 2009, broadened the categories of discoverable materials (documents, tangible things, land or other property) by adding "electronically stored information" (ESI).

Effective January 1, 2013, sections of the Civil Discovery Act relating to ESI were amended in order to address several inconsistencies (Senate Bill 1574, Stats. 2012, Ch. 72). ESI is now included among the things under a witnesses control that the witness would be bound by law to produce pursuant to a subpoena. Additionally, when any method of discovery permits, compels, prevents, or limits the production, inspection, copying, testing, or sampling of documents or tangible things, the same method would also apply to ESI. In general, if a demand for production does not specify a form or forms for producing a type of ESI, the responding party would be required to produce the information in the form or forms in which it is ordinarily maintained or in a form that is reasonably usable, but need not produce the same ESI in more than one form.

Subpoenas

Authority for issuing subpoenas in Board proceedings is found in Vehicle Code section 3050.1 and 13 CCR § 551.2.

Section 551.2(b) of the Board's regulations specifically incorporates Code of Civil Procedure section 1985, et seq., excepting the provisions of subdivision (c) of section 1985. Section 1985.8 of the Code of Civil Procedure imposes additional requirements on the parties, (or the court, if necessary), to resolve ESI issues as to the form, burdens and expenses of production, shifting or allocation of costs, and issues arising from other characteristics of ESI. The Act requires the parties, or the court, to weigh various cost/benefit factors in light of the amount in controversy in the proceeding to shape and limit the scope and nature of requests to produce ESI.

Unlike the civil courts, the parties cannot issue their own subpoenas. On the request of any party, the Board, its Executive Director or an ALJ may issue subpoenas for the production of papers, records, and books by a witness or a deponent, and the appearance of a non-party witness or deponent. Hearing subpoenas are issued in accordance with 13 CCR § 551.2(b) and an affidavit is not required to support the request. For a hearing subpoena duces tecum, an affidavit must accompany the request.

Subpoenas for the attendance and testimony of a non-party deponent, or for a subpoena duces tecum for deposition of a non-party, are issued by the Board in accordance with Code of Civil Procedure section 2016.010, et seq., excepting the provisions of section 2020.210, subdivisions (a) and (b). (13 CCR § 551.2(c)) No affidavits are required. Counsel for the parties can issue notices of depositions to parties. (Code Civ. Proc. § 2025.010, et seq.) Subpoenas for out-of-state, non-party witnesses or deponents will be issued by the Board but need to be enforced in the out-of-state court. (Code Civ. Proc. § 2026.010, et seq.)

Government Code section 11450.30 and 13 CCR § 551.2(e) permit a person served with a subpoena or a subpoena duces tecum to object to its terms by a motion for a protective order, including a motion to quash. The assigned ALJ would resolve the objection. The ALJ may make another order that is appropriate to protect the parties or the witness from unreasonable or oppressive demands, including violations of the right to privacy.

Following service of the subpoena on the witness or deponent, a copy of the subpoena and executed proof of service shall be filed with the Board. (13 CCR § 551.2(d))

Summary of Board Action

All hearings on protests filed pursuant to Vehicle Code sections 3060, 3062, 3064, 3065, 3065.1, 3065.3, 3065.4, 3070, 3072, 3074, 3075, or 3076, may be considered by the entire Board²⁵ or may, at its discretion be conducted by one of the Board's ALJs. At the hearing, oral argument is heard, evidence is admitted, testimony is received, and a written decision is rendered. The procedures are described in detail in Vehicle Code sections 3066 and 3080. The Board on receiving a protest does the following:

Step	Action
1	By order fix a time within sixty (60) days of the order and place of hearing. ²⁶
2	<p>Send a copy of the order to the franchisor, the protesting franchisee, and all individuals and groups that have requested notification by the Board of protests and decisions by the Board.</p> <ul style="list-style-type: none">• Except in the case of a franchisee who deals exclusively in motorcycles, the Board or its Executive Director may accelerate or postpone the date initially established for the hearing.• For the purpose of accelerating or postponing the hearing date, good cause must be established and in no event may the rescheduled hearing date be more than 90 days after the Board's initial order.• "Good cause" for accelerating or postponing a hearing includes, but is not limited to, the effects on, and any irreparable harm to, the parties or interested persons or groups if the request for a change in hearing date is not granted.• Application for continuance shall be in writing and filed with the Executive Director at least 10 days prior to the date of hearing. No continuances otherwise will be granted except in extreme emergencies such as serious accident or death. (13 CCR § 592)
3	The Board or an ALJ designated by the Board presides over merits hearings on protests. ²⁷

²⁵ Board ALJs generally preside over merits hearings not the Board itself. (**See footnote 6 pertaining to OAH and** the discussion on page 6 pertaining to dealer member participation in Article 4 protests.)

²⁶ In practice, the parties stipulate to a date for the merits hearing and the Board issues the order of time and place of hearing approximately 45 days prior to the hearing.

²⁷ See footnote 24.

Stipulation of Fact

A hearing initiated by the filing of a protest may be held in whole or in part on a stipulation of fact, which is essentially an agreement between the parties defining points that are not in contention, and other parts of the dispute that have been resolved. Stipulations are of value in that they tend to facilitate and expedite conflict resolution. (See 13 CCR § 587 for procedural details of stipulation of fact before the Board.)

Stipulated Decisions

The Board may adopt stipulated decisions and orders without a hearing pursuant to Vehicle Code sections 3066 and 3080 to resolve one or more issues raised by a protestant or petitioner before the Board. If the Board adopts a stipulated decision and order to resolve a protest filed under Vehicle Code section 3060 or 3070, and the parties stipulate that good cause exists to terminate, a hearing requiring a determination of good cause will not be required. (Veh. Code § 3050.7(b))

Hearings Open to the Public; Protective Orders

Hearings before the Board or an ALJ designated by the Board are open to the public. For good cause shown, a party may seek an order closing all or part of the hearing or for other protective orders as set forth in Government Code section 11425.20 and 13 CCR § 551.20. The motion may be in writing or made orally on the record. It may be made at the commencement of or during the course of the hearing but must be made as early as is practicable. The motion shall clearly identify the relief sought; the facts, circumstances, and legal authority; and shall include declarations or evidence that support the motion. The ALJ has discretion to allow an oral or written opposition to the motion. When ruling on the motion, the ALJ shall specifically set forth the facts, legal basis, and findings that support any protective order, order to seal parts of the record, or order to close the hearing to the public. The motion, opposition, and any resulting orders then become part of the record.

Failure to Appear at a Hearing

Any party who fails to appear at a hearing will not be entitled to a further opportunity to be heard unless good cause for such failure is shown to the Board or to the ALJ within five (5) days thereafter. The lack of such a showing may, in the discretion of the Board or the ALJ, be interpreted as an abandonment of interest by the party in the subject matter of the proceeding. (13 CCR § 589)

Decision of the Board

When matters are submitted to the Board for decision, or the Board receives a proposed decision of the ALJ, the Board shall take the matter under submission and conduct deliberations in executive session. The deliberations of the Board shall be in private and shall not be reported. (Veh. Code § 3008; 13 CCR § 588)

The decision of the Board shall be in writing, contain findings of fact, and a determination of the

issues presented. The Board shall sustain, conditionally sustain, overrule, or conditionally overrule the protest. The decision becomes final when delivered or mailed to the parties and there are no provisions for reconsideration or rehearing. If the Board fails to act within 30 days after the close of the hearing, within 30 days after the Board receives a proposed decision where the case is heard before an ALJ, or within a period which may be mutually agreed on by the parties, then the proposed action of the franchisor shall be deemed to be approved. (Veh. Code §§ 3067 and 3081)

Court Reporting and Transcripts of Board Proceedings

The Board arranges for a court reporter for all Board meetings, all hearings on the merits of a protest or a petition, and for all hearings on motions that may be dispositive. Parties to actions before the Board may order transcripts of hearings and arrange for delivery and payment directly from the court reporter.

Under the authority of 13 CCR § 551.7 the Board may assume all or part of the cost of reporting any proceedings or may allocate costs entirely to one of the parties or apportion it among the various parties at its discretion. For all merits hearings and dispositive motions, reporting costs will be allocated as follows:

Circumstances	Reporting Costs including Appearance and Transcript Delivery Fees, Per Diem Costs, Realtime Set-Up Fees, Expedite Rates, Cancellation Fees and any other Costs	Transcript Fees
Hearings on the merits and dispositive motions ²⁸ - First Day	Board (excluding Realtime set-up fees)	Board (requesting party or parties may order and pay for copies of official transcripts)
Hearings on the merits and dispositive motions - After First Day	Participating parties	Participating parties
Other motions (venue, consolidation, continuation, etc.)	Requesting party or parties	Requesting party or parties
Pre-hearing conference	Requesting party or parties	Requesting party or parties
Discovery disputes (ruling on objections to production, motions to quash, etc.)	Requesting party or parties	Requesting party or parties

As indicated above, for the first hearing day (merits or dispositive motion), the Board will be responsible for arranging reporting services, paying for the reporter's appearance fee, the delivery fee and any other costs excluding the Realtime set-up fees, and the Board's cost of the hearing

²⁸ "Dispositive motions" are those that result in a final determination of the protest or petition before the Board.

transcript. Counsel will remain responsible for purchasing their own transcript, if desired. For each subsequent day, the Board or counsel, at the Board's discretion, will arrange reporting services and the Board will order the parties, on an equal basis, to pay the court reporter service for the reporter's appearance fee, the delivery fee and any other costs including Realtime set-up fees, and the Board's cost of the hearing transcript. Counsel will remain responsible for purchasing their own transcript(s), if desired.

In any other instance, where any party or parties deem reporting services necessary (including requests for reporter's appearance and for transcripts), the requesting party (or parties on any basis they agree upon) will be responsible for arranging reporter services and will be responsible for payment to the reporting service of the reporter's appearance fee, the delivery fee, and any other costs. Counsel can utilize the Board's contracted reporting service but are not required to do so. The requesting party or parties will also be responsible for providing the Board with a certified copy of the transcript. Counsel will remain responsible for purchasing their own transcript(s), if desired.

PETITIONS

Statutory Authority for Petitions

Vehicle Code section 3050(b) provides for any person to petition the Board to “[c]onsider any matter concerning the activities or practices of any person applying for or holding a license as a new motor vehicle dealer, manufacturer, manufacturer branch, distributor, distributor branch, or representative pursuant to Chapter 4 (commencing with Section 11700) of Division 5 submitted by any person....”

New Subdivision (b)(2)(B) of Section 3050, in which the relief sought is adjudication, only pertains to petitions filed with the Board by any member of the public, including a consumer, or other person that is not applying for or holding a license as a new motor vehicle dealer, manufacturer, manufacturer branch, distributor, distributor branch or representative pursuant to Chapter 4 (commencing with Section 11700) of Division 5. It is intended that, for the Board to have jurisdiction over a petition pursuant to this subdivision, the petitioner must have filed the petition or consent to the jurisdiction by the Board. This subdivision does not affect petitions filed by licensees nor does it affect respondents (see Vehicle Code section 3051 identifying the licensees within the Board’s jurisdiction).

Filing a Petition with the Board

A licensee or member of the public wishing to bring a dispute before the Board pursuant to Vehicle Code section 3050(b) is required to file a petition (see Appendix for sample Forms B1 and B2). The petition shall clearly identify the facts, legal authority, and relief sought and include declarations or other evidence or documents that support the petition. (13 CCR § 556)

In the past, petitions filed with the Board have alleged such things as the unreasonable refusal of a franchisor to approve a change in ownership, unreasonable refusal of a franchisor to approve a relocation, discrimination in allocation of products, failure to supply products authorized to be sold under the terms of the franchise, and other violations of the Vehicle Code. Such petitions requested a hearing before the Board and sought relief in the form of a Board order that required the respondent to either do, undo, or refrain from doing some action that caused harm to the licensee petitioner.

However, as a result of *Mazda Motor of America, Inc. v. California New Motor Vehicle Board; David J. Phillips Buick-Pontiac, Inc., Real Party in Interest* (2003) 110 Cal.App.4th 1451, the Board’s jurisdiction to hold hearings and issue such orders is now limited to petitioners who are members of the public under Vehicle Code section 3050(b)(2)(A). In all instances where licensees are the petitioners, the Board may only direct the Department to investigate or take licensing action against the respondent under Vehicle Code section 3050(b)(1) and (3).

In all circumstances, the petition shall be served on the respondent and proof of service filed with the Board.

Time for Filing a Petition

There are no specific statutory time limits in the Vehicle Code within which a petition must be filed, but failure to file the petition within a reasonable time after the occurrence of events giving rise to the basis for the petition could result in the Board refusing to take any action. The respondent shall file a written answer within 30 days of the date the petition is served on the respondent. By declaration, the respondent may submit, as exhibits to the answer, photographic, documentary or similar physical evidence relevant to the matter in support of the answer with an appropriate description thereof in the answer sufficient to identify them and to explain their relevancy. (13 CCR § 558).

Petition Filing Fee

A filing fee of \$200, which should be in the form of a check, money order or authorized credit card charge payable to the New Motor Vehicle Board, must accompany the petition and answer. In the event of a financial hardship, either the petitioner or respondent may submit a request for a fee waiver, requesting that the Executive Director, upon a showing of good cause, waive the \$200 filing fee (13 CCR § 553.40). (Samples are available on the Board's website.)

Required Elements of Petition

The required content of a petition under Vehicle Code section 3050(b) is described in 13 CCR § 555 (see Appendix for sample Forms B1 and B2).

Content Requirements	Regulatory Authority
Must set forth in clear and concise language the nature of the matter, which the petitioner wishes the Board to consider.	13 CCR § 555
Must contain the petitioner's name, mailing address and telephone number; the name, mailing address and telephone number of the petitioner's attorney or authorized agent, if any; and the name and address of the licensee or applicant for license (respondent) whose activities or practices are in question. All correspondence and notices to the petitioner shall thereafter be addressed to petitioner's address, if the petitioner appears in person, or to the address of the petitioner's attorney or agent, if so represented.	13 CCR § 555(a)
Must include the names, residence addresses and business addresses of persons and the dates, places and specific actions or practices involved.	13 CCR § 555(b)
Shall include a concise recitation of applicable law and citation to the applicable statutes and authorities if the actions or practices described in the petition are alleged to be a violation of law.	13 CCR § 555(c)
For petitioners who are members of the public only, petitioner shall state if the petitioner desires that the Board mediate, arbitrate, or resolve a difference between the petitioner and respondent, and describe the relief sought.	13 CCR § 555(d)
Petitioner may submit, as exhibits to the petition, photographic, documentary, or similar physical evidence relevant to the matter with an appropriate description in the petition.	13 CCR § 555(e)
For petitioners who are members of the public only, petitioner shall set forth an estimate of the number of days required to complete the hearing.	13 CCR § 555(f)
For petitioners who are members of the public only, petitioner shall request a pre-hearing conference if one is desired.	13 CCR § 555(g)
Petitioner shall simultaneously deliver a \$200 filing fee in the form of a check, money order or authorize a credit card charge payable to the New Motor Vehicle Board, or a request for a fee waiver.	13 CCR § 553.40
Petitioner shall serve a copy of the petition on the respondent and proof of service shall accompany the petition submitted to the Board.	13 CCR § 555.1 13 CCR § 551.24

First Consideration

If the petitioner is a member of the public seeking relief under Vehicle Code section 3050(b)(2)(A), upon the filing of a petition with the Board, a copy shall be forwarded by the Executive Director of the Board to each Board member for consideration. Within 10 days of receipt of a copy of the petition, unless any member of the Board notifies the Executive Director of an objection, the Executive Director shall set the matter for a hearing.

Resolution of Petitions without a Hearing

If the petitioner is a licensee or member of the public seeking relief under Vehicle Code section 3050(b)(1) and/or (3), these petitions would not be submitted to the Board for first consideration, as the authority for first consideration (13 CCR § 557), limits first consideration to matters in which a hearing is sought, i.e., Vehicle Code section 3050(b)(2)(A) petitions. These petitions would be agendized for consideration of the relief requested by the Petitioner at the next regularly scheduled meeting. Such petitions are not assigned to an ALJ and are not subject to the normal evidentiary hearing process. The Board members, at a noticed meeting, would hear from the parties by way of written and oral arguments, and consider granting the relief requested. After consideration, the public members of the Board shall take final action and issue a written order that either grants the appropriate relief pursuant to Vehicle Code section 3050(b)(1) or (b)(3), or orders the petition dismissed (13 CCR § 562(b), (d), and (e)). The public members of the Board may also request further briefing and/or the submission of further evidence and continue the matter to a later open meeting for consideration and final action.

Challenge to Presiding Officer

A party may request disqualification of a Board member or an ALJ for cause prior to the taking of evidence by filing an affidavit stating the grounds for the request (13 CCR § 551.1). Further, 13 CCR § 551.12(b) entitles a party, excluding an intervenor, in a petition to one disqualification without cause (peremptory challenge) of the assigned merits ALJ by filing the peremptory challenge with the Board no later than either 20 days from the date of the order of time and place of hearing identifying the merits ALJ or 20 days prior to the date scheduled for commencement of the merits hearing, whichever is earlier (13 CCR § 551.12(b)(1)). In the event a Board ALJ is unavailable to preside over the merits hearing, an ALJ from the Office of Administrative Hearings will be assigned. A peremptory challenge of the assigned administrative law judge is not authorized for law and motion hearings, settlement conferences, and rulings on discovery disputes. Except for the convenience of the Board or for good cause shown, no merits hearing shall be continued by the filing of a peremptory challenge.

Motion for Intervention

Any person, including a Board member, concerned with the activities or practices of any person applying for or holding a license as a new motor vehicle dealer, manufacturer, manufacturer branch, distributor, distributor branch or representative may file a motion to intervene in a pending petition subject to the conditions set forth in 13 CCR § 551.13.

Amicus Curiae Briefs

The Board, its Executive Director, or an ALJ may, in his or her discretion, allow the filing of amicus curiae briefs. (13 CCR § 551.13)

Summary of Board Action

For petitions seeking relief under Vehicle Code section 3050(b)(1) and/or (3) brought by a franchisee, including RV franchisees, a member of the Board who is a new motor vehicle dealer may not participate in, hear, comment, advise other members upon, or decide any petition. (Veh. Code § 3050(b)) For petitions brought by members of the public seeking Vehicle Code section 3050(b)(1) and/or (3) relief, all members of the Board may participate.

After considering this type of petition, the Board may do any one or any combination of the following:

- (1) Direct the Department to conduct an investigation and submit a written report;
- (2) Order the Department to exercise any and all authority or power that the Department may have with respect to the issuance, renewal, refusal to renew, suspension, or revocation of the license of respondent; and/or
- (3) Order the petition dismissed, with or without prejudice.

As stated above, if the petitioner is a member of the public seeking relief under Vehicle Code section 3050(b)(2), the Board retains the authority to hear and/or mediate the matter.

Hearing Procedures

The Board's powers in relation to petitions are discretionary, and there is no automatic right to a hearing for a member of the public seeking relief under Vehicle Code section 3050(b)(2)(A). If the Board orders a hearing, the pre-hearing procedures are similar to those involving protests. For procedural details for hearings on petitions, see 13 CCR § 580.

Informal Mediation

Prior to a member of the public initiating a petition seeking relief under Vehicle Code section 3050(b)(2)(A), a party or parties may request the Board informally mediate the potential dispute, that is, the activities or practices of a licensee or applicant for a license that are in question (13 CCR §§ 551.14-551.17). If both parties consent to informal mediation, then a mutually agreeable date for the mediation is calendared. Each party files and serves a pre-mediation statement setting forth the facts, issues and proposed resolution of the matter. The Board, its Executive Director, or an ALJ designated by the Board or its Executive Director preside over the informal mediation and may authorize discovery (other than interrogatories) as appropriate. Evidence in the form of declarations may also be considered. All communications, negotiations, and settlement discussions between the participants of an informal mediation are confidential. At any time during this process, either party may request that the informal mediation be converted to a formal petition.

Members of the Public in Relation to New Recreational Vehicle Transactions

Members of the public have all the rights and remedies available in disputes with licensees in new recreational vehicle transactions as they do in transactions with other types of new motor vehicles under the jurisdiction of the Board with one distinction. Vehicle Code section 3078(a) states:

If the board receives a complaint from a member of the public seeking a refund involving the sale or lease of, or a replacement of, a recreational vehicle, as defined in subdivision (a) of Section 18010 of the Health and Safety Code, from a recreational vehicle dealership, as defined in subdivision (d) of Section 3072, the board shall recommend that the complainant consult with the Department of Consumer Affairs.

Thus, if a member of the public specifically seeks a refund or a replacement of a new recreational vehicle, the Board shall recommend that the complaint be referred to the Department of Consumer affairs, rather than the Board. However, nothing precludes a member of the public from seeking help from the Board in resolving the dispute as is available for any other new motor vehicle purchaser.

JUDICIAL REVIEW

Appeal to Superior Court

Judicial review of final orders and decisions of the Board may be sought in Superior Court pursuant to Code of Civil Procedure section 1094.5 via a petition for writ of administrative mandamus. A petition for writ of administrative mandamus questions whether the Board proceeded without or in excess of jurisdiction, whether there was a fair hearing, and whether there was any prejudicial abuse of the Board's discretion. Parties seeking judicial review of a final order or decision should refer to Vehicle Code sections 3068 and 3082 and local rules of court.

APPENDIX

Form A - Protest

Form B1 - Petition (Veh. Code § 3050(b)(2)(A))

Form B2 - Petition (Veh. Code § 3050(b)(1) or (b)3))

SAMPLE FORM A -**PLEADING FORMAT OF PROTEST**

The information contained in this sample form is intended to be informative and not advisory, limited in scope, and not intended to be a substitute for a careful reading of the specific statutes and/or regulations which may apply to your situation. For information on the format of filings and notices with the New Motor Vehicle Board, see 13 CCR § 593.1, et seq. **Sample forms can be obtained from the Board's website, www.nmvb.ca.gov.**

Identification of Attorney or Party Representing Self:

In the top left-hand corner beginning with line one, place the name of the attorney (include state bar number) or individual representing him/herself, office address or residence address, telephone number, and email address, if available. Single space this section. Skip one line then add which party is filing this document. In the case of a protest, the individual filing the protest is known as the "Protestant," whereas the individual responding would be the "Respondent."

- 1 _____ [name of attorney and state bar number, or name of party representing self]
- 2 _____ [address]
- 3 _____ [telephone number, fax number and email address, if available]
- 4 _____ Attorney for [Protestant] or in pro per [if party representing him/herself]

Leave the upper right-hand corner blank between lines 1 and 7 for the use of the Board.

Title of the Court:

On lines 8-9, place the title of the agency and the state in which the action is brought.

8 NEW MOTOR VEHICLE BOARD
9 STATE OF CALIFORNIA

Title of the Case:

Below the title of the court, flushed left, place the title of the case in the caption. The title of the case consists of the names of all of the parties.

Case Number:

The number of the case should be placed to the right of the title of the case or caption. Parties may leave the actual number blank until the Board has assigned the case a number.

Nature of Filing and Name of Action:

Below the number of the case, place the type of action filed along with the particular code section pursuant to which the action is filed.

Footer:

Except for exhibits, each paper filed with the Board must bear a footer in the bottom margin of each page, placed below the page number and divided from the rest of the document page by a printed line. The footer must contain the title of the paper or some clear and concise abbreviation in at least 10-point font.

11	In the Matter of the Protest of)	
)	
12	NAME OF FRANCHISEE,	)	Protest No. PR-
)	
13	Protestant,	)	PROTEST
)	
14	v.	)	[Vehicle Code section 3060, 3062,
		)	3064, 3065, 3065.1, 3065.3, 3065.4, 3070,
15	NAME OF FRANCHISOR,	)	3072, 3074, 3075, and 3076]
		)	[Dates of the hearing and any future
16	Respondent.	)	pre-hearing or settlement
		)	conferences, if known]

Introduction:

State the name of the party filing the document, the type of document filed (e.g., protest, response, motion) and the applicable statutory authority.

20 Protestant, [NAME OF PARTY/DEALERSHIP NAME], files this protest under the
 21 provisions of the California Vehicle Code section [applicable code section] with
 22 reference to the following facts:

Body:

Using numbered paragraphs, state the allegations in a clear and chronological order.

- 23 1. Protestant is a new motor vehicle dealer selling [type of new motor vehicle or recreational vehicle] and is located at [address]. Protestant's telephone number is [telephone number].
2. Respondent distributes/manufacturers [type/model of product] and is the franchisor of Protestant.
3. Protestant is represented in this matter by [attorney/law firm], whose address and telephone number are [address and telephone number].
4. On or about [date of occurrence(s)], Protestant received from Respondent a notice that Respondent intends to [terminate/modify/relocate/establish] its existing franchise agreement effective [number of days] from Protestant's receipt of said notice. A copy of said letter is attached as Exhibit A.
5. Protestant generally denies each and every allegation contained in the written notice of [termination/modification/relocation/establishment].
6. Respondent does not have good cause to [terminate/modify/relocate/establish] the franchise by reason of the following facts:
 - (a) [Specific facts upon which Protestant bases the allegations].
7. Protestant and its attorneys of record desire to appear before the Board. The estimated length of hearing on this matter will take [number of days] to complete.
8. A Pre-Hearing Conference is requested.

Dated:

Signed:

SAMPLE FORM B1 - PLEADING FORMAT OF PETITION (Veh. Code § 3050(b)(2)(A))

The information contained in this sample form is intended to be informative and not advisory, limited in scope, and not intended to be a substitute for a careful reading of the specific statutes and/or regulations which may apply to your situation. For information on the format of filings and notices with the New Motor Vehicle Board, see 13 CCR § 593.1, et seq. **Sample forms can be obtained from the Board's website, www.nmvb.ca.gov.**

Identification of Attorney or Party Representing Self:

In the top left-hand corner beginning with line one, place the name of the attorney (include state bar number) or individual representing **him/her**self, office address or residence address, telephone number, and email address, if available. Single space this section. Skip one line then add which party is filing this document. In the case of a petition, the individual filing the petition is known as the "Petitioner," and the party responding would be the "Respondent."

1 _____ [name of attorney and state bar number, or name of party representing self]

2 _____ [address]

3 _____ [telephone number, fax number and email address, if available]

4 _____ Attorney for [Petitioner] or in pro per [if party representing **him/her**self]

Leave the upper right-hand corner blank between lines 1 and 7 for the use of the Board.

Title of the Court:

On lines 8-9, place the title of the agency and the state in which the action is brought.

8 NEW MOTOR VEHICLE BOARD

9 STATE OF CALIFORNIA

Title of the Case:

Below the title of the court, flushed left, place the title of the case in the caption. The title of the case consists of the names of all of the parties.

Case Number:

The number of the case should be placed to the right of the title of the case or caption. Parties may leave the actual number blank until the Board has assigned the case a number.

Nature of Filing and Name of Action:

Below the number of the case, place the type of action filed along with the particular code section pursuant to which the action is filed.

Footer:

Except for exhibits, each paper filed with the Board must bear a footer in the bottom margin of each page, placed below the page number and divided from the rest of the document page by a printed line. The footer must contain the title of the paper or some clear and concise abbreviation in at least 10-point font.

11	In the Matter of the Petition of)	
)	
12	NAME OF INDIVIDUAL,	)	Petition No. P-
)	
13	Petitioner,)	
)	
14	v.	)	PETITION
		)	[Vehicle Code section 3050(b)(2)(A)]
15	NAME OF LICENSEE,)	
)	
16	Respondent.	)	[Dates of the hearing and any future
		)	pre-hearing or settlement
		)	conferences, if known]

20 [NAME OF INDIVIDUAL], petitions the New Motor Vehicle Board, pursuant to Vehicle Code section 3050(b)(2)(A), with reference to the following facts:

1. Petitioner is, and at all times mentioned herein, an individual and consumer of a new motor vehicle or vehicles in the State of California.
2. Respondent is, and at all times mentioned herein, a licensee authorized to do business and doing business in the State of California.
3. Petitioner is represented in this matter by (name, address, and telephone number of law firm, or other representative).
4. Petitioner's mailing address and telephone number are as follows:
5. Respondent's mailing address and telephone number are as follows:
6. (Outline the particulars of the dispute).
7. WHEREFORE, Petitioner prays as follows: (A hearing and relief available under Vehicle Code section 3050(b)(2)(A)).

Dated:

Signed:

Petition (Veh. Code § 3050(b)(2)(A))

SAMPLE FORM B2 - PLEADING FORMAT OF PETITION (Veh. Code § 3050(b)(1) or (3))

The information contained in this sample form is intended to be informative and not advisory, limited in scope, and not intended to be a substitute for a careful reading of the specific statutes and/or regulations which may apply to your situation. For information on the format of filings and notices with the New Motor Vehicle Board, see 13 CCR § 593.1, et seq. **Sample forms can be obtained from the Board's website, www.nmvb.ca.gov.**

Identification of Attorney or Party Representing Self:

In the top left-hand corner beginning with line one, place the name of the attorney (include state bar number) or individual representing **him/her**self, office address or residence address, telephone number, and email address, if available. Single space this section. Skip one line then add which party is filing this document. In the case of a petition, the individual filing the petition is known as the "Petitioner," and the party responding would be the "Respondent."

1 _____ [name of attorney and state bar number, or name of party representing self]

2 _____ [address]

3 _____ [telephone number, fax number and email address, if available]

4 _____ Attorney for [Petitioner] or in pro per [if party representing **him/her**self]

Leave the upper right-hand corner blank between lines 1 and 7 for the use of the Board.

Title of the Court:

On lines 8-9, place the title of the agency and the state in which the action is brought.

8 NEW MOTOR VEHICLE BOARD

9 STATE OF CALIFORNIA

Title of the Case:

Below the title of the court, flushed left, place the title of the case in the caption. The title of the case consists of the names of all of the parties.

Case Number:

The number of the case should be placed to the right of the title of the case or caption. Parties may leave the actual number blank until the Board has assigned the case a number.

Nature of Filing and Name of Action:

Below the number of the case, place the type of action filed along with the particular code section pursuant to which the action is filed.

Footer:

Except for exhibits, each paper filed with the Board must bear a footer in the bottom margin of each page, placed below the page number and divided from the rest of the document page by a printed line. The footer must contain the title of the paper or some clear and concise abbreviation in at least 10-point font.

11	In the Matter of the Petition of)	
)	
12	NAME OF INDIVIDUAL/LICENSEE,	)	Petition No. P-
)	
13	Petitioner,)	
)	
14	v.	)	PETITION
		)	[Vehicle Code section 3050(b)(1)]
15	NAME OF LICENSEE,	)	[Vehicle Code section 3050(b)(3)]
)	
16	Respondent.)	
)	

19 [NAME OF INDIVIDUAL/LICENSEE], petitions the New Motor Vehicle Board, pursuant to Vehicle Code section 3050(b), with reference to the following facts:

1. Petitioner is, and at all times mentioned herein, a licensee of the Department of Motor Vehicles authorized to do business and doing business in the State of California or is an individual and consumer of a new motor vehicle or vehicles in the State of California.
2. Respondent is, and at all times mentioned herein, a licensee of the Department of Motor Vehicles authorized to do business and doing business in the State of California.
3. Petitioner is represented in this matter by (name, address, and telephone number of law firm).
4. Petitioner's mailing address and telephone number are as follows:
5. Respondent's mailing address and telephone number are as follows:
6. (Outline the particulars of the dispute).
7. WHEREFORE, Petitioner prays as follows: (That the Board provides relief available under Vehicle Code section 3050(b)(1) and/or 3050(b)(3).)

Dated:

Signed:

Petition (Veh. Code § 3050(b)(1) or (3))



Memorandum

Date : April 3, 2023

To : BOARD DEVELOPMENT COMMITTEE
KATHRYN ELLEN DOI, CHAIR
BRADY SCHMIDT, MEMBER

From : TIMOTHY M. CORCORAN
DANIELLE R. PHOMSOPHA

Subject : UPDATE ON BOARD DEVELOPMENT ACTIVITIES

In an effort to have on-going discussions regarding Board Member education and activities of interest, the Board Development Committee has suggested agendizing this topic at each Board Meeting.

In addition, educational presentations will be agendized for each Board Meeting. Board Members can advise staff of any topics on which they wish to receive more information or training, which will be added to the following list:

- Presentation on buy-sell transactions by Dealer Member, Brady Schmidt
- Presentation on implementation of alternative fuel vehicles in mass transit
- Topics on Board procedure, including:
 - Writs of Administrative Mandate
 - Stipulated Decisions and Orders
 - Dealer Member Participation
 - Foundational Board published cases and their common application
 - Petitions
 - Case management procedures:
 - Paths a protest can take (law and motion, settlement, merits hearing)
 - Types of protests and the various burdens of proof
 - Role of the statutorily required notices and time to file a protest
 - Protests that do not require a notice

Update on Board Development Activities
Page 2
April 3, 2023

The information in this memorandum is provided for informational purposes only at the April 28, 2023, General Meeting. No Board action is required.

cc: Ardy Kassakhian, President



Memorandum

Date : APRIL 3, 2023

**To : BOARD DEVELOPMENT COMMITTEE
KATHRYN ELLEN DOI, CHAIR
BRADY SCHMIDT, MEMBER**

**From : TIMOTHY M. CORCORAN
ROBIN P. PARKER**

**Subject : BOARD MEMBER EDUCATION CONCERNING CHANGES TO THE
ADMINISTRATIVE PROCEDURE ACT AND BAGLEY-KEENE OPEN
MEETING ACT**

Attached are detailed summaries of the Administrative Procedure Act and Bagley-Keene Open Meeting Act that encompass changes effective after June 30, 2022 through January 1, 2023. A brief summary of the Acts and changes are as follows:

Administrative Procedure Act

The Administrative Procedure Act ("APA"), Government Code section¹ 11340, et seq., is the basic law controlling administrative agencies in California. The APA consists of three chapters of the Government Code. Chapter 3.5 (Gov. Code §§ 11340-11361) establishes the Office of Administrative Law and sets forth the law covering the quasi-legislative function of administrative agencies, i.e., the promulgation of regulations. When the Board elects to amend, adopt, or repeal regulations, it does so in compliance with Chapter 3.5. Chapter 4.5 (Gov. Code §§ 11400-11475.70) applies to any adjudicative proceeding required to be conducted under Chapter 5 (Gov. Code §§ 11500-11529). These statutes are the basic authority or "rules of procedure" governing administrative quasi-judicial proceedings. They govern administrative hearing procedures unless the statutes relating to a specific agency's proceedings provide otherwise. (Gov. Code §§ 11410.50, 11415.10, and 11415.20)

The Board's specific authority to conduct administrative hearings is found in statute in Vehicle Code section 3000, et seq. and in the Board's regulations in Title 13 of the California Code of Regulations ("Board's Regulations"), section 550, et seq. Specific Board procedures set forth with particularity in the Vehicle Code and the Board's Regulations are controlling over the APA. Also, Vehicle Code sections 3066(a), 3080(a),

¹ All statutory references are to the Government Code.

and 3085.2(a) expressly incorporate Government Code sections 11507.3, 11507.6, 11507.7, 11511, 11511.5, 11513, 11514, 11515, and 11517 into Board procedures for hearings on protests only. No provisions in the Vehicle Code or the Board's Regulations exempt the Board from the APA. Any provisions of

the APA not in conflict or inconsistent would supplement the Vehicle Code and the Board's Regulations. To the extent it is subject to the APA, the Board is in compliance with all applicable provisions.

The substantive changes to the summary of the Administrative Procedure Act are as follows:

- In *California DUI Lawyers Assn. v. Department of Motor Vehicles* (2022) 77 Cal.App.5th 517, 532-533, the court concluded that combining the roles of advocate and adjudicator in a single person employed by the DMV violates due process under the Fourteenth Amendment and Article I, Section 7 of the California Constitution. (Summary, p. 9)
- The sample Board Order of Time and Place of Hearing was updated to reflect the current language for Zoom hearings. (Summary, p. 11)
- Section 11512 was amended effective June 30, 2022. In addition to replacing gender specific language with gender neutral language, subdivision (d) was amended to allow the Board flexibility in how its hearings are reported. Subdivision (d) requires hearings to be reported by a stenographic reporter. However, upon the consent of the parties, or if a stenographic reporter is unavailable and upon a finding of good cause by the Administrative Law Judge, the proceedings may be recorded electronically. (Summary, p. 22)

The Bagley-Keene Open Meeting Act

The Bagley-Keene Open Meeting Act ("Act"), at Government Code section 11120 -11133, is one of the "sunshine laws" that ensures citizens have knowledge of the activities and workings of government. A democratic government assumes that those who elect public officials will have free access to what those public officials are doing. Access to government meetings and records provides citizens with the information they need to participate in the democratic process and to insist that government officials are held accountable for their actions. The best way to emphasize the intent of open meeting laws is to set forth the first section of the Act as follows:

- ❖ It is the public policy of this state that public agencies exist to aid in the conduct of the people's business and the proceedings of public agencies be conducted openly so that the public may remain informed.
- ❖ In enacting this article, the Legislature finds and declares that it is the intent of the

- ❖ law that actions of state agencies be taken openly and that their deliberation be conducted openly.
- ❖ The people of this state do not yield their sovereignty to the agencies which serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created. (Gov. Code § 11120)

The changes to the Bagley-Keene Open Meeting Act in the attached summary are:

- There were conforming changes to reflect the reorganization and recodification of the California Public Records Act. (Summary, pp. 5-6)
- Effective July 1, 2022 through July 1, 2023, Section 11133 authorized the Board to hold meetings through teleconference and to make public meetings accessible telephonically, or otherwise electronically, to all members of the public seeking to observe and to address the Board. The requirements that each teleconference location be accessible to the public and that members of the public be able to address the Board at each teleconference location have temporarily been suspended. (Summary, p. 7, fn. 5)

If you have any questions or comments, please contact me or Robin at (916) 445-1888. This matter is being agendized for information only at the April 28, 2023, General Meeting.

Attachments

cc: Ardashes "Ardy" Kassakhian, President



Memorandum

Date : April 6, 2023

To : BOARD DEVELOPMENT COMMITTEE
KATHRYN ELLEN DOI, CHAIR
BRADY SCHMIDT, MEMBER

From : TIMOTHY M. CORCORAN
DANIELLE R. PHOMSOPHA

Subject : BOARD MEMBER EDUCATION CONCERNING CHANGES TO THE POLITICAL REFORM ACT AND PUBLIC RECORDS ACT

Attached are detailed summaries of the Political Reform Act and Public Records Act that encompass changes effective after January 1, 2023¹. A brief summary of the Acts and changes are as follows:

The Political Reform Act

The Political Reform Act ("PRA"), Government Code² section 81000, et seq., is the basic ethics law in California. Although a significant focus of the PRA is on campaign financing, election committees and lobbying, the main purpose of the PRA, in relation to the Board's operations, is to ensure that Board decisions are made fairly without regard to who is affected by those decisions. The PRA provides that Board members and staff are required to publicly disclose their financial interests in entities specified in the Board's conflict of interest regulation (Form 700 or Statement of Economic Interests) and to refrain from participating in decisions in which there is such an interest.

For 2023, the following relevant changes were made:

1. The gift limit was adjusted to \$590 for the period of January 1, 2023 through December 31, 2024.

¹ At the March 30, 2022, General Meeting, the Board Members requested that resource materials be provided only upon request and not be included in the Board Meeting materials.

² All statutory references are to the Government Code.

Public Records Act

The California Public Records Act ("CPRA"), Government Code section 7920.000 et seq., was reorganized and recodified, effective January 1, 2022. The changes became operative on January 1, 2023. There were no substantive changes made to the CPRA when it was reorganized.

The CPRA provides public access to state and local government information. It is the other major "sunshine law" that ensures citizens have knowledge of the activities and workings of government. The policy supporting the CPRA is expressed by the legislative intent of the law as follows: "the Legislature...finds and declares that access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state." (Gov. Code § 7921.000)

The CPRA favors disclosure unless there is a specific reason not to, which is usually based on confidentiality and privacy considerations. These reasons, set forth as specific statutory exemptions, have been interpreted and evaluated by the courts over the years. Nondisclosure can also be justified if it can be established that the public interest in nondisclosure outweighs the public interest in disclosure. The state policy favoring disclosure was emphasized with the passage of Proposition 59, which states in part as follows: "A statute, court rule, or other authority, including those in effect on the effective date of this subdivision, shall be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access."

If you have any questions or comments, please contact me or Danielle at (916) 445-1888. This matter is being agendaized for information only at the April 28, 2023, General Meeting.

Attachments as stated.

cc: Ardy Kassakhian, President



Memorandum

Date : MARCH 14, 2023

**To : EXECUTIVE COMMITTEE
ARDASHES “ARDY” KASSAKHIAN, CHAIR
JACOB STEVENS, MEMBER**

From : TIMOTHY M. CORCORAN

Subject : ANNUAL REVIEW OF NEW MOTOR VEHICLE BOARD MISSION AND VISION STATEMENTS

At the December 2, 2019, General Meeting, the Board approved its present mission and vision statements. In order to ensure their ongoing accuracy and relevance, they are scheduled for annual review. The statements are as follows:

Mission

To enhance relations between dealers and manufacturers throughout the state by resolving disputes in the new motor vehicle industry in an efficient, fair and cost-effective manner.

Vision

To demonstrate professionalism, integrity, and accountability in securing fair resolutions to motor vehicle industry disputes.

This matter is being agendaized for the April 28, 2023, General Meeting, to allow full Board review and is for informational purposes only. No Board action is required.

If you have any questions or require additional information, please do not hesitate to contact me at (916) 445-1888.



Memorandum

Date : April 7, 2023

To : FISCAL COMMITTEE
ANNE SMITH BOLAND, CHAIR
BISMARCK OBANDO, MEMBER

From : SUZANNE LUKE
TIMOTHY CORCORAN
DAWN KINDEL

Subject : REPORT ON THE BOARD'S FINANCIAL CONDITION FOR THE 2ND QUARTER OF FISCAL YEAR 2022-2023

The following is a financial summary of the Board's expenditures and revenue through the 2nd quarter of Fiscal Year (FY) 2022-2023. This information was also provided in the March Quarterly Administrative report.

Expenditures Fiscal Year 2022-23

Annual Appropriation	Quarter 1 Expenditures	Quarter 2 Expenditures	Quarter 3 Expenditures	Quarter 4 Expenditures	Appropriation Remaining	Appropriation Remaining %
\$2,028,000	\$398,894	\$422,273	TBD	TBD	\$1,206,833	60%

Revenue Fiscal Year 2022-23

Beginning Reserve Balance	Revenue Fiscal Year-to-Date	Total Resource Balance	Total Revenue in Prior Fiscal Year
*\$2,258,303	\$1,273,346	\$3,531,649	\$1,639,042

Current Reserve Balance - \$2,710,482 balance after 2nd Quarter Expenditures.
The Board expended 40% of its appropriated budget as of the 2nd quarter.

For further information, I've attached revenue and expenditure details as well as the Board's fund condition breakdown.

Given the current reserve balance, staff does not see a need for an adjustment to the Board's fee structure at this time. Staff will continue to closely monitor new vehicle sales along with expenditures and report any need for adjustments of industry fees at future meetings.

- Arbitration Certification Program (ACP) Annual Fee – This collection is nearly complete with one remaining manufacturer payment to be collected.

This memorandum is being provided for informational purposes only, and no Board action is required. If you have any questions prior to the Board Meeting, please contact me at (916) 244-6778 or Dawn Kindel at (916) 244-6775.

Attachments as stated

cc: Ardy Kassakhian, President

Second Quarter Revenue and Expenditure Summary

Fiscal Year 2022-2023

Covers July 1, 2022 to December 31, 2022

REVENUES

New Dealer Licensing Fee:	\$380,902
Manufacturer and Distributor Fee	\$881,919
NMVB Filing Fee	\$7,000
Miscellaneous Services	\$2,019
Arbitration Program	\$1,506
Year-to-date total:	\$1,273,346

EXPENDITURES

Payroll

Full-Time staff salaries:	Budgeted Amount \$1,079,954	Expended \$438,893	Remaining Balance \$641,061
Part-Time staff salaries:	Budgeted Amount \$82,914	Expended \$22,128	Remaining Balance \$60,786
Benefits:	Budgeted Amount \$570,941	Expended \$229,093	Remaining Balance \$341,848

Operating Expense and Equipment

General Expense (includes equipment, office supplies, dues, legal library, etc.)
Budgeted Amount \$24,003 Expended \$3,677 Remaining Balance \$20,326

Rent: Budgeted Amount \$165,000 Expended \$79,068 Remaining Balance \$85,932

Facilities Planning: Budgeted Amount \$10,000 Expended \$506 Remaining Balance \$9,494

Professional Services (Attorney General): Budgeted Amount \$12,000 Expended \$37,554
Remaining Balance \$-25,554

Professional Services (Court Reporters): Budgeted Amount \$18,000 Expended \$1,479
Remaining Balance \$16,521

TOTAL OPERATING EXPENSE AND EQUIPMENT

Budgeted Amount \$263,191; Expenditure Year to Date \$123,513 – 47%; Balance
Remaining \$139,678 – 53%

GRAND TOTAL – Fiscal Year 2022-2023

Budgeted Amount \$2,028,000; Expenditure Year to Date \$821,167 - 40%; Balance Remaining
\$1,206,833 - 60%



Memorandum

Date : April 5, 2023

To : LEGISLATIVE COMMITTEE
ARDY KASSAKHIAN, CHAIR
JAKE STEVENS, MEMBER

From : TIMOTHY M. CORCORAN
DANIELLE R. PHOMSOPHA

Subject : DISCUSSION CONCERNING PENDING LEGISLATION

The following provides a summary of pending State legislation that is of interest to the New Motor Vehicle Board ("Board"). The criteria for reporting on "legislation of general interest" is that the bill impacts the Vehicle Code, the Board, and/or the automotive industry in general and does not directly impact the Board or its enabling statute. For purposes of this report "legislation of special interest" is that which directly affects the Board's laws or functions.

Bill summaries include a brief overview of the bill as provided by the Legislative Counsel's Digest or the Congressional Research Service, if available, as well as the current status of the bill.¹

a. Pending Legislation of Special Interest:

- (1) **Assembly Bill 473 – Assembly Member Aguiar-Curry** (Introduced February 6, 2023)
Status: In Assembly Judiciary Committee
Support: California New Car Dealers Association, California Motorcycle Dealers Association, California Conference of Machinists
Opposition: Alliance for Automotive Innovation, Civil Justice Association of California, California Manufacturers and Technology Association
Oppose Unless Amended: Motorcycle Industry Council, Recreational Off-highway Vehicle Association (ROHVA), Specialty Vehicle Institute of America (SVIA)
Legislative Counsel's Digest: Motor Vehicle manufacturers, distributors, and dealers.

¹ All statutory references are to the Vehicle Code, unless otherwise indicated.

Existing law establishes the New Motor Vehicle Board in the Department of Motor Vehicles and requires the board to hear and decide certain protests presented by a motor vehicle franchisee in regard to a dispute with the vehicle manufacturer. Existing law requires a franchisor to fairly compensate for labor and parts used to fulfill warranty obligations of the franchisor, including, but not limited to, diagnostics, repair, and servicing and to file a copy of its warranty reimbursement schedule with the board. Existing law requires the warranty reimbursement schedule to be reasonable with respect to the time and compensation allowed to the franchisee for warranty diagnostics, repair, and servicing. Existing law requires the franchisor to use time allowances for the diagnosis and performance of work and service that are reasonable and adequate for a qualified technician to perform the work or services.

If elected by the franchisee, this bill would require a franchisor to use the labor and time guide used by the franchisee for nonwarranty work to determine a reasonable time allowance for the diagnosis and performance of work and service. The bill would clarify that a franchisee is authorized to file a protest for a violation of this provision and would place the burden of proof on the franchisor that it is in compliance.

Existing law prohibits a franchisor from engaging in specified proscribed business practices. A violation of the Vehicle Code is punishable as an infraction.

This bill would prohibit additional acts, including allocating vehicles, parts, accessories, and other items inconsistent with specified standards. The bill would also require the board to make a franchisor's vehicle allocation schedule available for inspection by any franchisee.

Existing law prohibits a licensed manufacturer, manufacturer branch, distributor, distributor branch, or affiliate from engaging in specified proscribed business practices, including establishing or maintaining a performance standard, sales objective, or program for measuring a dealer's sales, service, or customer service performance, unless specified requirements are satisfied. A violation of the Vehicle Code is punishable as an infraction.

This bill would prohibit additional acts, including making it unlawful to attempt to impose a right of first refusal and to establish or maintain an incentive program in violation of the statute. In order to establish or maintain a performance standard, sales objective, or program for measuring dealer's sales, service, or customer service performance, the bill would require an additional requirement, that the standard, objective, or program not be designed to influence how the franchisee determines the price of the vehicle, be satisfied.

This bill would additionally prohibit a licensed manufacturer, manufacturer branch, distributor, distributor branch, or affiliate to use any public funds, as specified, to construct, maintain, or operate any network of proprietary DC electric vehicle fast charging stations, as described.

b. Pending Legislation of General Interest:

(1) **Senate Bill 544 – Senator Laird** (Gut-and-Amend March 20, 2023)

Status: In Senate Government Organization Committee

Support: Unknown

Opposition: Unknown

Legislative Counsel's Digest: Bagley-Keene Open Meeting Act: teleconference.

Existing law, the Bagley-Keene Open Meeting Act, requires, with specified exceptions, that all meetings of a state body be open and public and all persons be permitted to attend any meeting of a state body. The act authorizes meetings through teleconference subject to specified requirements, including, among others, that the state body post agendas at all teleconference locations, that each teleconference location be identified in the notice and agenda of the meeting or proceeding, that each teleconference location be accessible to the public, that the agenda provide an opportunity for members of the public to address the state body directly at each teleconference location, and that at least one member of the state body be physically present at the location specified in the notice of the meeting.

Existing law, until July 1, 2023, authorizes, subject to specified notice and accessibility requirements, a state body to hold public meetings through teleconferencing and suspends certain requirements of the act, including the above-described teleconference requirements.

This bill would amend existing law that will remain operative after July 1, 2023, to remove indefinitely the teleconference requirements that a state body post agendas at all teleconference locations, that each teleconference location be identified in the notice and agenda of the meeting or proceeding, and that each teleconference location be accessible to the public. The bill would require a state body to provide a means by which the public may remotely hear audio of the meeting, remotely observe the meeting, or attend the meeting by providing on the posted agenda a teleconference telephone number, an internet website or other online platform, and a physical address for at least one site, including, if available, access equivalent to the access for a member of the state body participating remotely. The bill would require any notice required by the act to specify the applicable teleconference telephone number, internet website or other online platform, and physical address indicating how the public can access

the meeting remotely and in person. The bill would revise existing law to no longer require that members of the public have the opportunity to address the state body directly at each teleconference location, but would continue to require that the agenda provide an opportunity for members of the public to address the state body directly. The bill would require a member or staff to be physically present at the location specified in the notice of the meeting.

This bill would require a state body that holds a meeting through teleconferencing pursuant to the bill and allows members of the public to observe and address the meeting telephonically or otherwise electronically to implement and advertise, as prescribed, a procedure for receiving and swiftly resolving requests for reasonable modification or accommodation from individuals with disabilities, consistent with the federal Americans with Disabilities Act of 1990.

Existing constitutional provisions require that a statute that limits the right of access to the meetings of public bodies or the writings of public officials and agencies be adopted with findings demonstrating the interest protected by the limitation and the need for protecting that interest.

- (2) **Assembly Bill 1617 – Assembly Member Wallis** (Introduced February 17, 2023)
Status: In Assembly Transportation Committee
Support: Unknown
Opposition: Unknown
Legislative Counsel's Digest: Vehicles: recreational off-highway vehicles.

Existing law regulates the operation of recreational off-highway vehicles, including that the driver be no less than 16 years of age or directly supervised by a parent or guardian, and that the driver and any passengers wear a helmet and seatbelt, as specified. A violation of these provisions is punishable as an infraction. Existing law defines "recreational off-highway vehicle" for purposes of these and other Vehicle Code provisions. Existing law limits the definition of "recreational off-highway vehicle" to those described vehicles that have an engine displacement of no more than 1,000cc.

This bill would remove the limitation on engine size from the definition of a "recreational off-highway vehicle." By expanding the application of existing crimes, this bill would impose a state-mandated local program.

c. Pending Federal Legislation of General Interest: None.

This matter is for information only at the April 28, 2023, General Meeting. If you have any questions or require additional information, please contact me or Danielle at (916) 445-1888.



Memorandum

Date : APRIL 3, 2023

**To : POLICY AND PROCEDURE COMMITTEE
JACOB STEVENS, CHAIR
KATHRYN ELLEN DOI, MEMBER**

**From : TIMOTHY M. CORCORAN
ROBIN P. PARKER**

Subject : DISCUSSION AND CONSIDERATION OF PROPOSED REGULATORY AMENDMENTS TO ELIMINATE REFERENCES TO FACSIMILE AND RESIDENCE ADDRESSES IN SECTION 595 OF TITLE 13 OF THE CALIFORNIA CODE OF REGULATIONS (FORMAT OF FIRST PAGE; FORMAT AND FILING OF PAPERS) AND MAKE GENDER NEUTRAL

Most case management documents are submitted to the Board via email or overnight delivery like Fed Ex or UPS. It has been many years since any documents have been sent via fax. With the Board's recent move to the Department of Motor Vehicles in Sacramento, our hoteling space and planned permanent facility do not have a landline so litigants seeking to file a protest via fax would need to contact the Board's legal staff in advance to make the necessary arrangements.

In light of this, staff are proposing amending Section 595 of Title 13 of the California Regulations to delete references to "facsimile." Additionally, staff are recommending that all references to "residence address" be removed and gender specific language be gender neutral.

The proposed amendments are as follows:

13 CCR § 595. Format of First Page; Format and Filing of Papers.

(a) The first page of all papers shall be in the following form:

(1) Commencing in the upper left hand corner and to the left of the center of the page, the name, office address (or if none, the residence address), mailing address (if different from the office or residence address), electronic-mail address (if available), and the telephone number and facsimile number (if available) of the attorney or agent for the party in whose behalf the paper is presented, or of the party if he or she is appearing in person. If the party is represented by an attorney, the state bar number of the attorney shall be beside the name of the attorney.

(2) Below the name, address and telephone number, and centered on the page, the title of the board. Below the title of the board, in the space to the left of the center of the page, the title of the proceeding, e.g., John Doe, petitioner (or protestant) v. Richard Roe, respondent, as the case may be.

(3) To the right of and opposite the title, the number of the proceeding which shall be assigned consecutively by the executive director in the order of filing in petition and protest proceedings. The same number shall not be assigned to more than one petition or protest.

(4) Immediately below the number of the proceeding, the nature of the paper, e.g., "Request for Informal Mediation," "Petition," "Protest," "Answer," "Request for Hearing," "Petitioner's Opening Brief," etc. If the paper is a "Petition", the first allegation of the petition shall state the name and address of the respondent and whether the respondent is the holder of or an applicant for an occupational license of the type issued by the department such that the respondent is subject to the jurisdiction of the board.

(5) The dates of the hearing and any future pre-hearing or settlement conferences, if known.

(b) In addition to a paper copy, the board may direct a party to submit pleadings or other papers by electronic means if the party is able to do so.

(c) A party may obtain proof of the filing of a paper by submitting either an extra copy of the paper or a copy of the first page only, with a self-addressed, return envelope, postage prepaid. The copy will be returned to the party with the date of filing indicated.

(d) Papers may be filed with the board by ~~facsimile or~~ electronic-mail transmission. Unless required by the ALJ or by order of the board, the original paper need not be filed with the board if the party obtains telephonic or other confirmation from the board that a complete and legible copy of the papers was received.

(e) Notwithstanding Code of Civil Procedure Section 1013(a), papers delivered to the board by the U.S. Postal Service or other means are deemed filed on the date actually received by the board. Papers hand delivered to the board and complete papers received by ~~facsimile or~~ electronic-mail transmission during regular business hours (8 a.m. to 5 p.m.) will be filed on the date received. Papers received after regular business hours are deemed filed on the next regular business day.

(f) Protests sent by U.S. Postal Service certified or registered mail are deemed received by the board on the date of certified or registered mailing and will be filed as of the date of the certified or registered mailing.

NOTE: Authority cited: Section 3050(a), Vehicle Code. Reference: Sections 3050 and 3051, Vehicle Code.

If the Board adopts the proposed regulatory changes, the staff will proceed with the rulemaking process as delineated in Government Code section 11340, et seq. Updates concerning the status of the rulemaking process will be provided at future Board meetings during the Administrative Matters portion of the Executive Director's Report.

Proposed Regulatory Amendments
Page 3
April 3, 2023

This matter is being agendized for consideration at the April 28, 2023, General Meeting. If you have any questions or require additional information, please do not hesitate to contact me or Robin at (916) 445-1888.

cc: Ardashes "Ardy" Kassakhian



Memorandum

Date : APRIL 3, 2023

**To : POLICY AND PROCEDURE COMMITTEE
JACOB STEVENS, CHAIR
KATHRYN ELLEN DOI, MEMBER**

**From : TIMOTHY M. CORCORAN
ROBIN P. PARKER**

Subject : DISCUSSION AND CONSIDERATION OF PROPOSED REGULATORY AMENDMENTS

- A. Challenge (13 CCR § 551.1)**
- B. Testimony by Deposition (13 CCR § 551.6)**
- C. Intervention; Grant of Motion; Conditions (13 CCR § 551.13)**
- D. Request for Informal Mediation (13 CCR § 551.14)**
- E. Informal Mediation Process (13 CCR § 551.16)**
- F. Sanctions (13 CCR § 551.21)**
- G. Interpreters and Accommodation (13 CCR § 551.23)**
- H. Transmittal of Fees by Mail (13 CCR § 553.72)**
- I. Contents (13 CCR § 555)**
- J. Procedure at Hearings (13 CCR § 580)**
- K. Article 7. New Motor Vehicle Board – Conflict-of-Interest Code**

The legal staff is proposing a number of regulatory amendments as indicated in the attachment to eliminate references to “residence addresses,” update the Board’s address, and make language gender neutral where possible.

If the Board adopts the proposed regulatory changes, the staff will proceed with the rulemaking process as delineated in Government Code section 11340, et seq. Updates concerning the status of the rulemaking process will be provided at future Board meetings during the Administrative Matters portion of the Executive Director’s Report.

This matter is being agendaized for consideration at the April 28, 2023, General Meeting. If you have any questions or require additional information, please do not hesitate to contact me or Robin at (916) 445-1888.

Attachment: as stated

cc: Ardashes “Ardy” Kassakhian

§ 551.1. Challenge.

An administrative law judge or board member shall voluntarily disqualify ~~himself or herself~~ **themselves** and withdraw from any hearing or deliberation in which ~~he or she~~ **cannot be accorded** a fair and impartial hearing or consideration **cannot be accorded**. Any party may request the disqualification of any administrative law judge or board member by filing an affidavit, prior to the taking of evidence at a hearing, stating with particularity the grounds upon which it is claimed that a fair and impartial hearing cannot be accorded. Where the request concerns a board member, the issue shall be determined by the other members of the board. Where the request concerns the administrative law judge, the issue shall be determined by the board if the board itself hears the case with the administrative law judge, otherwise the issue shall be determined by the administrative law judge.

NOTE: Authority cited: Section 3050, Vehicle Code. Reference: Sections 11425.40 and 11512, Government Code.

§ 551.6. Testimony by Deposition.

On verified petitions of any party, the board may order that the testimony of any material witness residing within or without the state be taken by deposition in the manner prescribed by law for depositions in civil actions. Petition shall set forth the nature of the pending proceedings; the name and address of the witness whose testimony is desired; the showing of the materiality of ~~his or her~~ **the** testimony; a showing that the witness shall be unable or cannot be compelled to attend; and shall request an order requiring the witness to appear and testify before an officer named in the petition for that purpose. Where the witness resides outside the state and where the board has ordered the taking of ~~his or her~~ testimony by deposition, the board shall obtain an order of court to that effect by filing a petition therefor in the Superior Court in Sacramento County. The proceedings thereon shall be in accordance with the provisions of Section 11189 of the Government Code.

NOTE: Authority cited: Section 3050, Vehicle Code. Reference: Section 11189, Government Code.

§ 551.13. Intervention; Grant of Motion; Conditions.

Any person, including a board member, concerned with the activities or practices of any person applying for or holding a license as a new motor vehicle dealer, manufacturer, manufacturer branch, distributor, distributor branch, or representative, may file a motion with the executive director of the board (or designee) requesting that the movant be allowed to intervene in a pending proceeding. The motion to intervene may be granted subject to the following:

- (a) The motion shall be submitted in writing, with copies served on all parties named in the pending proceeding.
- (b) The motion shall be filed as early as practicable in advance of the hearing.

(c) The motion shall state facts demonstrating that the applicant's legal rights, duties, privileges, or immunities will be substantially affected by the proceeding.

(d) The board, its executive director, or an administrative law judge designated by the board or its executive director, shall determine that the interests of justice and the orderly and prompt conduct of the proceeding will not be impaired by allowing the intervention.

(e) The board, its executive director, or an administrative law judge designated by the board or its executive director, may impose conditions on the intervenor's participation in the proceeding, either at the time that intervention is granted or at a subsequent time. Such conditions shall be at the sole discretion of the board, its executive director, or an administrative law judge designated by the board or its executive director, based on the knowledge and judgment at that time, so as to promote the interests of justice. Conditions include, but are not limited to, the following:

(1) Limiting the intervenor's participation to designated issues;

(2) Limiting or excluding the intervenor's participation in discovery and cross-examination; and

(3) Limiting or excluding the intervenor's participation in settlement negotiations.

(f) The board, its executive director, or an administrative law judge designated by the board or its executive director, shall issue an order granting or denying the motion for intervention as early as practicable in advance of the hearing, specifying any conditions, and briefly stating the reasons for the order. The board, its executive director, or an administrative law judge designated by the board or its executive director, may modify the order at any time by giving notice to all parties, stating the reasons for the modification. The determination of the board, its executive director, or an administrative law judge designated by the board or its executive director, in granting or denying the motion for intervention, or the determination modifying the order previously issued, is not subject to administrative or judicial review.

The board, its executive director, or an administrative law judge designated by the board or its executive director, may, in ~~their~~ ~~his or her~~ discretion, allow the filing of amicus curiae briefs.

NOTE: Authority cited: Section 3050(a), Vehicle Code. Reference: Section 3050(a), Vehicle Code; and Section 11440.50, Government Code.

§ 551.14. Request for Informal Mediation.

(a) Prior to initiating a petition pursuant to section 3050(b) of the Vehicle Code, either party may request that the board mediate any honest difference of opinion or viewpoint existing between any member of the public and any new motor vehicle dealer, manufacturer, manufacturer branch, distributor, distributor branch, or representative.

(b) Participation in informal mediation is voluntary, informal, and nonadversarial.

(c) The request for informal mediation shall set forth the nature of the matter which the board is requested to mediate. The request for informal mediation shall comply substantially with the following requirements:

(1) Include the name, mailing address and telephone number of the person requesting informal mediation; the name, mailing address and telephone number of ~~their~~ ~~his or her~~

attorney or authorized agent if any, and the name and address of the licensee or applicant for license whose activities or practices are in question.

(2) Insofar as is known to the person requesting informal mediation, include the names, ~~residence addresses~~ and ~~business~~ addresses of persons and the dates, places and specific actions or practices involved in the matter.

(3) Describe the relief or disposition of the matter which the person requesting informal mediation would consider acceptable.

(d) A copy of the request for informal mediation shall be served on the licensee or applicant for license whose activities or practices are in question and proof of service (in compliance with Sections 1013a, 1013b and 2015.5, Code of Civil Procedure) thereof shall accompany the request for informal mediation filed with the executive director of the board.

(e) The form of the request for informal mediation shall substantially conform with the provisions of Article 6 herein.

(f) Article 1, section 553.40 shall apply to all requests for informal mediation.

NOTE: Authority cited: Section 3050(a), Vehicle Code. Reference: Section 3050, Vehicle Code.

§ 551.16. Informal Mediation Process.

(a) Upon receipt of the request for informal mediation, the Board staff will initiate a conference call with the parties to ascertain whether the licensee or applicant for license whose activities or practices are in question is agreeable to participating in informal mediation.

(b) If the licensee or applicant for license whose activities or practices are in question is not agreeable to participating in informal mediation, either party may request that this matter be converted to a petition proceeding pursuant to Article 1, section 551.17.

(c) If the licensee or applicant for license whose activities or practices are in question is agreeable to participating in informal mediation, a mutually agreeable date for informal mediation will be calendared.

(1) Upon order of the board, and at least five business days prior to participating in informal mediation, the parties shall file and serve a premediation statement which includes a detailed statement of facts, statement of issues, and a realistic proposal for resolving the dispute.

(2) The board, its executive director, or an administrative law judge designated by the board or its executive director, shall preside over the informal mediation.

(3) Evidence set forth in declarations of expert or percipient witnesses made under penalty of perjury may be considered by the board, its executive director, or an administrative law judge designated by the board or its executive director, in ~~their~~ ~~his or her~~ discretion.

(4) At any time during informal mediation, either party may request that this matter be converted to a petition proceeding pursuant to Article 1, section 551.17

(5) All communications, negotiations, or settlement discussions by and between participants in the course of informal mediation shall remain confidential.

NOTE: Authority cited: Section 3050(a), Vehicle Code. Reference: Section 3050, Vehicle Code.

§ 551.21. Sanctions.

- (a) In any proceeding before the board or an ALJ, no party or representative of a party shall engage in or participate in any actions or tactics that are frivolous, or that are intended to cause or will result in unnecessary delay.
- (b) For purposes of this section, “party” or “representative of a party” includes, but is not limited to, a party's officer, director, managing agent, dealer principal or the equivalent, or their attorney.
- (1) “Actions or tactics” include, but are not limited to, the making or opposing of motions or the failure to comply with a lawful order or ruling of the board or an ALJ, including a failure to comply timely with a pre-hearing conference order or discovery order.
- (2) “Frivolous” includes, but is not limited to:
 - (A) Totally without merit as there is an absence of reasonable support, under the facts or law, for making or opposing the motion(s), or for the failure to comply; or
 - (B) For the purpose of harassing an opposing party or counsel.
 - (C) Actions or tactics, whether consisting of affirmative conduct or failure to act or respond, that will result or do result in unnecessary delay or costs, or are otherwise not in good faith.
- (c) A party asserting a violation of this section may, by way of written motion in compliance with Article 1, section 551.19, or oral motion made on the record during reported proceedings, request that the board or an ALJ recommend that the board impose sanctions upon a party, or party's representative, or both.
- (d) An ALJ presiding over the matter who believes there has been a violation of this section may on their ~~his or her~~ own initiative recommend that the board impose sanctions upon a party, or party's representative, or both.
- (e) The board shall not order sanctions, or an ALJ shall not recommend an award of sanctions, without providing the party or party's representative against whom sanctions are sought notice and an opportunity to be heard.
- (f) The board or ALJ shall make determinations as to whether the actions or tactics were frivolous based upon the administrative record and any additional testimony or documentary evidence presented.
- (g) Any proposed order recommending sanctions by the ALJ or board order imposing sanctions shall be on the record, or in writing, setting forth the factual findings on which the recommended or board ordered sanctions are based, as well as setting forth the factual findings as to the reasonableness of the sanctions, including the reasonableness of any amount(s) to be paid.
- (h) A proposed order recommending an award of sanctions shall be considered by the board members at their next regularly scheduled meeting. A determination not to award sanctions shall not be considered by the board members and is final upon issuance by the ALJ.
- (i) The board members' consideration to affirm, reject or modify the ALJ's award of sanctions does not alone constitute grounds for continuance of any previously scheduled dates in the proceeding.

(j) If the motion for sanctions is granted, the board may order or an ALJ may recommend that the party or party's representative or both pay the movant's reasonable expenses and attorney's fees incurred in bringing and pursuing the motion. However, payment of attorney's fees and expenses will not be ordered if:

(1) The movant filed the motion before attempting in good faith to obtain compliance by the opposing party without board action;

(2) The opposing party's noncompliance, nondisclosure, response, or objection was substantially justified; or

(3) Other circumstances make an award unjust.

(k) If the motion for sanctions is denied, the board may order or an ALJ may recommend, after giving an opportunity to be heard, the movant or movant's representative or both to pay the party or party's representative who opposed the motion reasonable expenses and attorney's fees in opposing the motion for sanctions as well as bringing and pursuing the motion for expenses and attorney's fees. However, payment of attorney's fees and expenses will not be ordered if the motion for sanctions was substantially justified or other circumstances make an award unjust.

(l) If the motion for sanctions is granted in part and denied in part, the board may order or an ALJ may recommend that an award of reasonable expenses and attorney's fees incurred in connection with bringing or opposing the motion be apportioned.

NOTE: Authority cited: Section 3050(a), Vehicle Code. Reference: Section 128.5, Code of Civil Procedure; Section 11455.30, Government Code; and Section 3050.2, Vehicle Code.

§ 551.23. Interpreters and Accommodation.

(a) Each party and each party's attorney are responsible for timely communicating to the board any needs of the party, the party's agent or a witness for the following:

(1) Language assistance, including sign language.

(2) Accommodation for a disability.

(3) Electronic amplification for hearing impairment.

(4) Any other special accommodation.

(b) In accordance with Government Code section 11435.25, the board may direct that the cost of providing an interpreter shall be paid by the board or by the party at whose request the interpreter is provided. The board's decision to direct payment shall be based upon an equitable consideration of all the circumstances, such as the ability of the party in need of the interpreter to pay.

(c) An interpreter at a hearing or other proceeding shall be sworn by oath or affirmation to perform **their** ~~his or her~~ duties truthfully. The oath or affirmation shall be in substantially the following form:

"Do you swear or affirm that, to the best of your skill and judgment, you will make a true interpretation of the questions asked and the answers given and that you will make a true translation of any documents which require translation?"

(d) Any interpreter used at the hearing must have an oath on file with the Superior Court, and be certified and registered in accordance with Article 4 (commencing with Section 68560) of Chapter 2 of Title 8 of the Government Code. However, if an

interpreter certified pursuant to Government Code section 11435.30 cannot be present at the hearing, the board shall have discretionary authority to provisionally qualify and use another interpreter.

NOTE: Authority cited: Section 3050(a), Vehicle Code. Reference: Section 751, Evidence Code; and Sections 11435.05, 11435.10, 11435.25, 11435.55, 11435.65 and 68560, et seq., Government Code.

§ 553.72. Transmittal of Fees by Mail.

No penalty shall be imposed for delinquent payment of any fee required to be paid under this article in the event any instrument for effective payment of such fee is placed in the United States mail or in any postal box maintained by the United States Postal Service with sufficient identification, in an envelope with postage thereon prepaid and addressed to the New Motor Vehicle Board, ~~1507 21st Street, Suite 330~~ **2415 1st Avenue, MS L242**, Sacramento, California, ~~95811~~ **95818** prior to the date the fee becomes delinquent.

Note: Authority cited: Section 472.5(f), Business and Professions Code. Reference: Sections 472.5(b) and (d), Business and Professions Code.

§ 555. Contents.

The petition shall set forth in clear and concise language the nature of the matter which the petitioner wishes the board to consider. The petition shall comply substantially with the following requirements:

- (a) Include the name, mailing address and telephone number of the petitioner; the name, mailing address and telephone number of ~~his or her~~ attorney or authorized agent if any, and the name and address of the licensee or applicant for license (hereinafter referred to as "respondent") whose activities or practices are in question. All correspondence with petitioner and notices to petitioner shall be addressed to petitioner's said address, if ~~he or she appears~~ **appearing** in person, or to the address of ~~his or her~~ **petitioner's** attorney or agent, if ~~he or she is~~ represented by an attorney or agent. Petitioner shall promptly give the executive director and respondent written notice by mail of all subsequent changes of address or telephone number.
- (b) Insofar as is known to petitioner, include the names, ~~residence addresses and business~~ addresses of persons and the dates, places and specific actions or practices involved in the matter.
- (c) If the actions or practices described in the petition are believed to be in violation of law, a concise recitation of applicable law and citation to the applicable statutes or other authorities.
- (d) If the petitioner desires that the board mediate, arbitrate or resolve a difference between the petitioner and respondent, recite that fact and describe the relief or disposition of the matter which petitioner would consider acceptable.
- (e) The petitioner may submit, as exhibits to the petition, photographic, documentary or similar physical evidence relevant to the matter referred to in the petition, in which event

an appropriate description of the exhibits shall be set forth in the petition sufficient to identify them and to explain their relevancy.

(f) The petitioner shall set forth in the petition an estimate of the number of days required to complete the hearing.

(g) The petitioner shall set forth in the petition a request for a prehearing conference if one is desired.

NOTE: Authority cited: Section 3050(a), Vehicle Code. Reference: Section 3050, Vehicle Code.

§ 580. Procedure at Hearings.

(a) Evidence. The hearing need not be conducted according to technical rules relating to evidence and witnesses. Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence over objection in civil actions. Evidence that is irrelevant or unduly repetitious shall be excluded.

(b) Official Notice. Before or after submission of a matter for decision, official notice may be taken by the board of any generally accepted technical or scientific matter within the board's special area of competence or of such facts as may be judicially noticed by the courts of this state.

(c) Examination of Witnesses. Oral evidence shall be taken only on oath or affirmation. Each party shall have the right to call and examine witnesses; to introduce exhibits, to cross-examine opposing witnesses on any matter relevant to the issues even though that matter was not covered in the direct examination; to impeach any witness regardless of which party first called him or her to testify; to rebut the evidence against him **or her**; and to call and examine an adverse party or adverse witness as if under cross-examination without being bound by his or her testimony. Board members and, at the direction of the chairman of the board presiding at the hearing or of any member of the board, representatives of the staff of the board, may participate as appropriate, using their knowledge and experience for the primary purpose of developing a full, fair and accurate record. Questioning of witnesses will be controlled by the board and will generally be permitted only by the attorneys or agents of parties so represented, or by the parties who appear on their own behalf, members of the board and its staff. The board may in its discretion, during the examination of a witness, exclude from the hearing, any or all other witnesses in the same matter.

NOTE: Authority cited: Section 3050, Vehicle Code. Reference: Sections 11512 and 11513, Government Code; and Section 3050, Vehicle Code.

Article 7. New Motor Vehicle Board – Conflict-of-Interest Code

NOTE: Pursuant to a regulation of the Fair Political Practices Commission (Title 2, CCR, section 18750(k)(2)), an agency adopting a conflict of interest code has the options of requesting that the code either be (1) printed in the CCR in its entirety or (2) incorporated by reference into the CCR. Here, the adopting agency has requested

incorporation by reference. However, the full text of the regulations is available to the public for review or purchase at cost at the following locations:

NEW MOTOR VEHICLE BOARD
~~1507 — 21ST STREET, SUITE 330~~
~~2415 1st AVENUE, MS L242~~
SACRAMENTO, CALIFORNIA ~~95814~~ 95818

FAIR POLITICAL PRACTICES COMMISSION
428 J STREET, SUITE 620
SACRAMENTO, CALIFORNIA 95814

ARCHIVES
SECRETARY OF STATE
1020 O STREET
SACRAMENTO, CALIFORNIA 95814

The conflict-of-interest code is designated as Article 7 of Chapter 2 of Division 1 of Title 13 of the California Code of Regulations, and consists of sections numbered and titled as follows:

Article 7. New Motor Vehicle Board – Conflict of Interest Code

Section
599. General Provisions
 Appendix A
 Appendix B

Note: Authority cited: Section 3050(a), Vehicle Code; and Sections 87300, 87304 and 87306, Government Code. Reference: Section 81000, et seq., Government Code.



Memorandum

Date : APRIL 3, 2023

**To : POLICY AND PROCEDURE COMMITTEE
JACOB STEVENS, CHAIR
KATHRYN ELLEN DOI, MEMBER**

**From : TIMOTHY M. CORCORAN
ROBIN P. PARKER**

**Subject : DISCUSSION AND CONSIDERATION OF TEMPORARY AUTHORIZATION OF
DISCRETION TO THE EXECUTIVE DIRECTOR TO ASSIGN ADDITIONAL
MERITS HEARINGS TO THE OFFICE OF ADMINISTRATIVE HEARINGS
OUTSIDE THE CURRENT “MERITS HEARINGS JUDGE ASSIGNMENT LOG”**

At the January 25, 2023, General Meeting, the Board added the Office of Administrative Hearings (“OAH”) to the “Merit Hearings Judge Assignment Log,” so OAH would be next in line to preside over a protest hearing between a franchisee and franchisor.

This action was taken in response to a regulation CalPERS is proposing that would, for purposes of the Government Code, define “limited duration” employment “as a limit of twenty-four consecutive months per appointment of a retired person in the employ of a CalPERS-covered public employer, regardless of how many months or hours in those months the retired person served in the appointment during that twenty-four consecutive month period.”¹ (Cal. Code Regs., tit. 2, § 574.1))

Adding OAH to the assignment log will allow the Board to evaluate if this is an effective alternative if the Board is unable to retain its retired annuitant merits Administrative Law Judges. Additionally, it will highlight any statutory or regulatory changes that may be necessary if, in the future, the Board’s merits hearings are heard by OAH.

Given the limited number of matters that proceed to a merits hearing each year,² it may not be possible to timely evaluate the effectiveness of OAH. Therefore, the staff recommends the Executive Director be given temporary discretion (not to exceed 3 years) to assign additional merits hearings to OAH outside the current assignment log. Prior to submitting a hearing to OAH that is outside the normal rotation, the Executive Director would seek Executive Committee permission. The use of OAH in general and any additional assignments would be reported to the Board in the Executive Director’s Report.

¹ A maximum extension of an additional 24 months is being proposed. (See Attachment 1)

² From 2003-2022, the Board averaged two merits hearings per year. Although, in some years there were no hearings and in other years there were three or four.

Assignment of Judges

Page 2

April 3, 2023

This matter is being agendized for consideration at the April 28, 2023, General Meeting. If you have any questions or require additional information, please do not hesitate to contact me or Robin at (916) 445-1888.

Attachment: as stated

cc: Ardashes "Ardy" Kassakhian

Title 2. Administration

Proposed Adoption of Section 574.1 of Article 4 of Subchapter 1 of Chapter 2 of Division 1 of Title 2 of the California Code of Regulations

§574.1 Definition of Limited Duration Employment

(a) For purposes of clarifying Government Code sections 7522.56, 21224, and 21229, “limited duration” is defined as a limit of twenty-four consecutive months per appointment of a retired person in the employ of a CalPERS-covered public employer, regardless of how many months or hours in those months the retired person served in the appointment during that twenty-four consecutive month period.

(1) The first day the retired person serves any hours in the appointment or the effective date of this subdivision, whichever is later, shall be the appointment start date and initiates time counted towards the twenty-four consecutive month limit. Employment by a retired person prior to the effective date of this subdivision will not count towards the limit of twenty-four consecutive months.

(2) A CalPERS-covered public employer must notify CalPERS of an appointment end date not to exceed twenty-four consecutive months from the appointment start date and any changes to the appointment end date, including but not limited to the end date of an extension as prescribed in paragraph (3) of this subdivision and end date of an extension authorized under an exemption as prescribed in paragraph (6) of this subdivision.

(3) A CalPERS-covered public employer may extend the appointment no more than twice, up to twelve consecutive months per extension, beyond the limit of twenty-four consecutive months under paragraph (a) of this subdivision, if the applicable conditions below are met:

(A) The CalPERS-covered public employer’s governing body certifies by resolution at a public meeting each of the following:

- (i) The position title,
- (ii) The description of the duties to be performed during the extension,
- (iii) The reason the appointment needs to be extended,
- (iv) The reason the duties under subparagraph (ii) above cannot be performed by non-retired employees,
- (v) That a plan is in place to transition the duties under subparagraph (ii) above to non-retired employees or another retired person,
- (vi) The anticipated end date for the extension, and
- (vii) Its approval of the extension.

(B) (i) Except as otherwise provided in this paragraph, for an appointment with the state, the Department of Human Resources certifies by memorandum each of the items in subparagraph (A) above.

(ii) For an appointment with the California State University, the Trustees of the California State University certifies by resolution at a public meeting each of the items in subparagraph (A) above.

(iii) For an appointment with the legislature, the Senate Committee on Rules or the Assembly Rules Committee certifies by resolution at a public meeting each of the items in subparagraph (A) above.

(4) The first extension period under paragraph (3) of this subdivision starts the day after the end of the twenty-four consecutive month period under paragraph (a) of this subdivision and the second extension period under paragraph (3) of this subdivision starts the day after the end of the first extension period, thirty-six consecutive months from the appointment start date, regardless of whether or when the CalPERS-covered public employer extended the appointment and regardless of how many months or hours in those months the retired person served during either extension period. The retired person may not continue serving in the appointment beyond the end of the twenty-four consecutive month or thirty-six consecutive month periods described above until the CalPERS-covered public employer satisfies the applicable conditions as prescribed in paragraph (3) of this subdivision per extension.

(5) The CalPERS-covered public employer shall retain the records reflecting the certifications required in paragraph (3) of this subdivision for the position. The CalPERS-covered public employer shall provide this information to CalPERS during the exemption request process described in paragraph (6) of this subdivision and upon request during any future investigations or audits.

(6) If a CalPERS-covered public employer determines the appointment is needed beyond forty-eight consecutive months from the appointment start date, as calculated under paragraph (4) of this subdivision, the CalPERS-covered public employer may request one of two exemptions per appointment to the limit of two extensions prescribed in paragraph (3) of this subdivision by filing a written request with the board as prescribed below. The written request for an exemption must be received by CalPERS for review within twelve consecutive months following the end of the second extension period under paragraph (3). The board shall grant or deny the exemption request within 60 days of receiving the request, which must include records reflecting all of the certifications required in subparagraphs (B) and (C) below, as applicable. The retired person may not continue serving in the appointment beyond the end of the forty-eight consecutive month period or any subsequent twelve consecutive month period authorized under a previous board-approved exemption until the board approves an exemption for the appointment as prescribed below.

(A) A request for an exemption shall be either:

(i) For an exemption authorizing a continuous extension if the appointment does not exceed 120 hours per fiscal year, or

(ii) For an exemption authorizing an extension of twelve consecutive months, regardless of how many months or hours in those months the retired person served during that extension period. The date on which the exemption request is granted by the board or the first day following the end of the prior extension limit of twelve consecutive months for which the exemption request is granted by the

board, whichever is later, initiates time counted towards the subsequent extension limit of twelve consecutive months for the exemption. A CalPERS-covered public employer may request this exemption more than once, in accordance with the requirements of subparagraphs (B) and (C) below, as applicable. Any written exemption request for a subsequent extension of twelve consecutive months pursuant to this subparagraph must be received by CalPERS for review within twelve consecutive months following the end of the most recent extension limit of twelve consecutive months.

(B) The board will grant one of the exemptions described in subparagraph (A) above per appointment if the applicable conditions in this subparagraph and subparagraph (C) below are met. The CalPERS-covered public employer's governing body must certify by resolution at a public meeting each of the items in subparagraphs (i) through (viii) below, and CalPERS must receive records reflecting both those certifications and the certifications required in paragraph (3) of this subdivision for each prior extension approved pursuant to that paragraph, if applicable. The exemption may not be placed on a consent calendar.

- (i) The position title,
- (ii) The description of the duties to be performed,
- (iii) The reason the appointment needs to be extended,
- (iv) The reason the duties under subparagraph (ii) above cannot be performed by either non-retired persons or another retired person,
- (v) Either the reason a plan to transition one or more of the duties under subparagraph (ii) above to non-retired employees or another retired person was not successful or the reason that such a plan cannot be implemented,
- (vi) Either that the CalPERS-covered public employer completed a recruitment within the twelve consecutive months prior to the date of the exemption request for the duties under subparagraph (ii) above and was unable to fill the position with that recruitment or the reason that such a recruitment cannot be completed,
- (vii) The anticipated end date for an exemption, and
- (viii) Its approval of the exemption.

(C) (i) Except as otherwise provided in this paragraph, for an appointment with the state, the Department of Human Resources must certify by memorandum each of the items in subparagraph (B) above, and CalPERS must receive records reflecting both those certifications and the certifications required in paragraph (3) of this subdivision for each prior extension approved pursuant to that paragraph, if applicable.

- (ii) For an appointment with the California State University, the Trustees of the California State University must certify by resolution at a public meeting each of the items in subparagraph (B) above, and CalPERS must receive records reflecting both those certifications and the certifications required in paragraph (3) of this subdivision for each prior extension approved pursuant to that paragraph, if applicable. The exemption may not be placed on a consent calendar.

(iii) For an appointment with the legislature, the Senate Committee on Rules or the Assembly Rules Committee must certify by resolution at a public meeting each of the items in subparagraph (B) above, and CalPERS must receive records reflecting both those certifications and the certifications required in paragraph (3) of this subdivision for each prior extension approved pursuant to that paragraph, if applicable. The exemption may not be placed on a consent calendar.

(7) A report of the exemptions granted pursuant to paragraph (6) of this subdivision will be provided to the board annually and publicly available.

(8) For purposes of this subdivision, an appointment is defined as either a post-retirement position under which no duties overlap with the duties of another post-retirement position subject to this regulation with the same CalPERS-covered public employer that the retired person performed after retirement, or a post-retirement position for a different CalPERS-covered public employer from any previous CalPERS-covered public employer the retired person performed duties for after retirement while in a position subject to this regulation.

(9) Retired persons and CalPERS-covered public employers in violation of this subdivision will be subject to Government Code sections 21202, 21220, and 7522.56, as applicable.

(b) For purposes of clarifying Government Code sections 7522.56, 21224, and 21229, if the terms of a collective bargaining agreement explicitly provide the duration of permissible employment for the retired person, then subdivision (a) shall not apply to the CalPERS-covered public employer and retired person subject to that collective bargaining agreement but shall instead be subject to "limited duration" defined in this subdivision. "Limited duration" is defined as the duration provided in the applicable collective bargaining agreement, not to exceed sixty consecutive months, for the post-retirement appointment of a retired person in the employ of a CalPERS-covered public employer. The appointment duration is consecutive regardless of how many months or hours in those months the retired person served in the appointment during that appointment duration.

(1) The first day the retired person serves any hours in the appointment shall be the appointment start date and initiates time counted towards the duration limit defined in the applicable collective bargaining agreement or sixty consecutive months, whichever is less.

(2) A CalPERS-covered public employer must notify CalPERS of an appointment end date not to exceed the duration defined in the applicable collective bargaining agreement or sixty consecutive months from the appointment start date, whichever is less, and provide CalPERS a copy of the applicable collective bargaining agreement specifying the duration of that post-retirement appointment.

(3) Notwithstanding paragraphs (1) and (2) of this subdivision, for post-retirement appointments in effect prior to the effective date of this subdivision, the appointment start and end dates shall be the start and end dates established in accordance with the collective bargaining agreement prior to the effective date of this subdivision.

(4) A retired person serving in a post-retirement appointment in accordance with this subdivision cannot serve in another post-retirement appointment with the same CalPERS-covered public employer subject to this regulation.

(5) Retired persons and CalPERS-covered public employers in violation of this subdivision will be subject to Government Code sections 21202, 21220, and 7522.56, as applicable.

(c) For purposes of clarifying paragraph (3) of subdivision (a) of section 571, "limited duration" is defined as a limit of twenty-four consecutive months for an employee to serve in an upgraded position/classification, regardless of how many months or hours in those months the employee served in the upgraded position/classification during that twenty-four consecutive month period.

(1) The first day the individual serves any hours in the upgraded position/classification or the effective date of this subdivision, whichever is later, initiates time counted towards the twenty-four consecutive month limit. Employment in an appointment to an upgraded position/classification prior to the effective date of this subdivision will not count towards the limit of twenty-four consecutive months.

(2) An individual may serve in the same upgraded position/classification more than once within the twenty-four consecutive month period but may not exceed a time period of twenty-four consecutive months. A new twenty-four consecutive month period is not initiated unless the conditions set forth in paragraph (3) of this subdivision are met.

(3) An individual may serve in the same upgraded position/classification more than once and initiate a new twenty-four consecutive month period if the appointment to the upgraded position/classification is:

(A) The individual's first appointment subsequent to a permanent appointment held by a different individual for the same upgraded position/classification, or

(B) The individual's first appointment subsequent to a different individual that retained the permanent appointment for the same upgraded position/classification returning to the permanent appointment from an approved leave.

Authority Cited: Sections 7522.02(j) and 20121, Government Code.

Reference: Sections 7522.56, 20636, 20636.1, 21202, 21220, 21224, and 21229 Government Code; section 571 of Title 2, California Code of Regulations.



Memorandum

Date : APRIL 3, 2023

**To : EXECUTIVE COMMITTEE
ARDASHES "ARDY" KASSAKHIAN, CHAIR
JACOB STEVENS, MEMBER**

**From : TIMOTHY M. CORCORAN
ROBIN P. PARKER**

**Subject : REVIEW AND CONSIDERATION OF BOARD DELEGATIONS IN
COMPLIANCE WITH THE 1996 PERFORMANCE AUDIT CONDUCTED BY
BUSINESS, TRANSPORTATION & HOUSING AGENCY**

The 1996 Performance Audit conducted by Business, Transportation & Housing Agency¹ recommended that "Delegation authorities should be formally adopted by the Board. Delegations which include signature authority should specify transaction type or dollar limits where applicable and should distinguish between the granting of powers reserved to the Board and duties arising from existing statutory provisions already reserved to individuals." In November 1996, the Budget and Finance Committee (Joe Drew and Lucille Mazeika) prepared an analysis of the duties of the Board members and staff that was adopted by the Board at its March 18, 1997, General Meeting. The Committee considered all of the duties of the Board and staff, and recognized those which, by statute or regulation, are retained by the Board or are already delegated to designated individuals.

At its November 20, 2008, General Meeting, the members adopted revised delegations with updated statutory language and formal Board delegations of duties that occurred at noticed meetings. From 2008 through 2011, the Board delegations were reviewed by the Board. At the May 26, 2011, General Meeting, the members made this an exception report. The legal staff continues to review these delegations each year.

At the February 10, 2016, General Meeting, the members revised the delegations to reflect changes separating provisions pertaining to Article 5 RV protests from Article 4 vehicle protests, and Article 6 was added to allow an association, as defined, to file an export or sale-for-resale prohibition policy protest on behalf of two or more impacted dealers.

At the January 18, 2017, General Meeting, the members revised the delegations to reflect amendments to Vehicle Code section 3065² that require the warranty reimbursement

¹ Effective July 1, 2013, California State Transportation Agency superseded Business, Transportation & Housing Agency.

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

schedule or formula be reasonable with respect to the time and compensation allowed to the franchisee for the warranty diagnostics, repair, servicing, and all other conditions of the obligation which now includes costs directly associated with the disposal of hazardous materials that are associated with a recall repair.

At the June 7, 2019, General meeting, the members revised the delegations to reflect the repeal of Article 6 Export or Sale-for-Resale Prohibition Policy protests and the recently revised Legislative Policy, which included three delegations to the Executive Director.

At the February 16, 2021, General Meeting, the members revised the delegations to reflect the re-lettering of Section 3050, the repeal of appeals, the methodology for calculating a franchisee's "retail labor rate" or "retail parts rate" in Section 3065.2, the addition of two new protests in Sections 3065.3 and 3065.4, the restored authority for the Board to hear Article 6 Export or Sale-for-Resale Prohibition Policy protests, along with many conforming changes. (Assembly Bill 179, Stats. 2019, Ch. 796; effective January 1, 2020) The "Delegation of Administrative Duties" replaced references of Staff Services Manager I to Staff Services Manager II.

Effective January 1, 2023, Assembly Bill 2956 deleted obsolete references to appeals in Section 3008. (Stats. 2022, Ch. 295)

At the April 28, 2023, General Meeting, the members are considering delegating to the Executive Director temporary discretion (not to exceed 3 years) to assign additional merits hearings to the Office of Administrative Hearings ("OAH") outside the current assignment log. Prior to submitting a hearing to OAH that is outside the normal rotation, the Executive Director would seek Executive Committee permission. The use of OAH in general and any additional assignments would be reported to the Board in the Executive Director's Report. If the Board adopts this delegation, then these Board Delegations would be updated accordingly so as to avoid the need to consider this matter at a future meeting.

These revised delegations are being considered at the April 28, 2023, General Meeting.

If you have any questions or require additional information, please contact me or Robin at (916) 445-1888.

NEW MOTOR VEHICLE BOARD

RECOGNITION OF STATUTORY DUTIES AND DELEGATION OF ADMINISTRATIVE DUTIES

The following analysis was prepared as a result of a review of Board duties performed by the Budget and Finance Committee at its meeting held on November 22, 1996. The Committee considered all of the duties of the Board and staff, and recognized those which, by statute or regulation, are retained by the Board or are already delegated to designated individuals. In addition, this analysis recommends which administrative duties should be delegated to staff and the level of Board oversight over these activities. The recommendation also contains an indication as to transaction type and dollar limit for procurement, where applicable.

In 2008, the Board legal staff revised the delegations with updated statutory language but did not modify the existing delegations. It also added formal Board delegations of duties that occurred at noticed meetings. These revised delegations were adopted at the November 20, 2008, General Meeting. From 2008 through 2011, the Board delegations were reviewed by the Board at a noticed meeting. At the May 26, 2011, General Meeting, the members made this an exception report. The legal staff continues to review these delegations each year.

Senate Bill 155 (chaptered October 3, 2013 and effective January 1, 2014) made a number of non-substantive and substantive changes that were adopted by the Board at the July 15, 2014, General meeting and are incorporated throughout. Assembly Bill 759 (chaptered October 1, 2015 and effective January 1, 2016) cleaned up a number of inconsistencies in the Vehicle Code¹ and separated Article 5 RV protests from Article 4 vehicle protests. Article 6 (export or sale-for-resale prohibition policy protests filed by an association) was added to the Vehicle Code by Assembly Bill 1178 (chaptered October 6, 2015 and effective January 1, 2016). These changes were adopted by the Board at the February 10, 2016, General Meeting. Assembly Bill 287 (chaptered September 27, 2016 and effective January 1, 2017) amended Section 3065; these changes were adopted at the January 18, 2017, General Meeting.

At the June 7, 2019, General meeting, the members revised the delegations to reflect the repeal of Article 6 Export or Sale-for-Resale Prohibition Policy protests and the recently revised Legislative Policy, which included three delegations to the Executive Director.

Assembly Bill 179 (Stats 2019, Ch. 796; effective January 1, 2020) re-lettered Section 3050, repealed Article 3 Appeals, added the methodology for calculating a franchisee's "retail labor rate" or "retail parts rate" in Section 3065.2, added two new protests in Sections 3065.3 and 3065.4, restored the Board's authority to hear Export or Sale-for-Resale Prohibition Policy protests in Article 6, and made many conforming changes updating recent staff promotions. The revised delegations were adopted at the February 16, 2021, General Meeting.

Effective January 1, 2023, Assembly Bill 2956 deleted obsolete references to appeals in Section 3008. (Stats. 2022, Ch. 295)

¹ All statutory references are to the California Vehicle Code unless noted otherwise.

At the April 28, 2023, General Meeting, the members are considering delegating to the Executive Director temporary discretion (not to exceed 3 years) to assign additional merits hearings to the Office of Administrative Hearings ("OAH") outside the current assignment log. Prior to submitting a hearing to OAH that is outside the normal rotation, the Executive Director will seek Executive Committee permission. The use of OAH in general and any additional assignments will be reported to the Board in the Executive Director's Report. The revised delegations are being considered at the April 28, 2023, General Meeting.

- A. Statutory Duties. The following is a list of the statutory duties of the Board and staff, with an indication as to individual or entity to whom these duties have been delegated. Only those code sections which contain a specific duty are listed below.

Section 3004. Oath of Office

Members of the board shall take an oath of office as provided in the Constitution and the Government Code.

Duties Relating to Section 3004

1. Pursuant to Section 3004, each Board member has a duty to personally take an oath as described in this section. This is a duty of the members of the Board.

Section 3006. Board to Elect President

The board shall organize and elect a president from among its members for a term of one year at the first meeting of each year. The newly elected president shall assume his or her duties at the conclusion of the meeting at which he or she was elected. Reelection to office during membership is unrestricted.

Duties Relating to Section 3006

1. Pursuant to Section 3006, the Board members have a duty to elect a president during the first meeting of the year. This is a duty of the members of the Board.
2. Pursuant to Section 3006, the newly elected Board president has a duty to assume the duties of the position at the conclusion of the meeting through the next election the following year. This is a duty of the President of the Board.

Section 3007. Frequency of Meetings

The board shall meet at least twice during each calendar year.

Special meetings may be called at any time by the president or by any five members of the board upon notice for such time and in such manner as the board may provide.

Duties Relating to Section 3007

1. Pursuant to Section 3007, the Board members have a duty to make themselves available at least twice a year to conduct the business of the New Motor Vehicle Board. This is a duty of the members of the Board.
2. Pursuant to Section 3007, the President or any five Board members have the right to call special meetings.

Section 3008. Meetings: Open and Executive

(a) All meetings of the board shall be open and public, and all persons shall be permitted to attend any meeting of the board, except that the board may hold executive sessions to deliberate on the decision to be reached upon the evidence introduced in a proceeding conducted in accordance with Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code.

~~(b) At all meetings of the board, open or executive, involving an appeal from a decision of the Director of Motor Vehicles, the director or his or her authorized representative may attend, present the position of the department² and then shall absent himself or herself from any executive session at the request of any member of the board.~~

~~(c) Within the limitations of its powers and authority, and in the event of disagreement between the board and the director regarding the decision to be reached, the decision of the board shall be final.~~

Duties Relating to Section 3008

1. Pursuant to Section 3008(a), the Board has a duty to hold open and public meetings, with the exception of the Board's executive sessions held in accordance with Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code. This is a duty of the members of the Board.
2. ~~Pursuant to Section 3008(b), the Board has a duty to allow the Director of the Department, or the authorized representative, to present the position of the Department in an appeal at all meetings, open or executive. Any Board member, in an executive meeting, shall then have the right to request the Director, or representative, absent himself from the session. These are duties of the members of the Board.~~
3. ~~Pursuant to Section 3008(c), in the event of disagreement between the Board and Department Director regarding the decision to be reached in an appeal, the decision of the Board shall be final. This is a duty of the members of the Board.~~

Section 3013. Board's Seal

The board shall adopt a seal and such other device as the members may desire

² All references to the "department" refer to the Department of Motor Vehicles unless otherwise stated.

thereon, by which they shall authenticate all papers and documents under their control.

Copies of all records and papers in the board's office shall be received in evidence in all cases when certified under the hand and seal of the board, equally and with like effect as the originals.

Duties Relating to Section 3013

1. Pursuant to Section 3013, the Board has the duty to adopt a seal and "such other devices" that the members deem necessary to authenticate all papers and documents. This is a duty of the members of the Board.

Section 3014. Department Support

The board may appoint an executive director, who shall be exempt from civil service requirements, and who shall devote as much time as may be necessary to discharge the functions of the board as herein provided. The department shall provide the board with the necessary personnel, office space, equipment, supplies, and services that, in the opinion of the board, may be necessary to administer this chapter. However, the board may contract with the department or another state agency for office space, equipment, supplies, and services, as determined by the board to be appropriate, for the administration of this chapter.

Duties Relating to Section 3014

1. Pursuant to Section 3014, the Board may appoint an Executive Director who shall be exempt from civil service requirements. This is a duty of the members of the Board.
2. Pursuant to Section 3014, the Executive Director of the Board has a duty to devote as much time as may be necessary to discharge the functions of the Board. This is a duty of the Executive Director of the Board.
3. Pursuant to Section 3014, the Board has the duty to submit to the Department its opinion of what personnel, office space, equipment, supplies, and services may be necessary to administer this chapter. This is a duty which has been delegated to the staff of the Board, with oversight over these activities retained by the Board. The extent of the delegation and the degree of Board oversight are discussed under the headings of Procurement and Personnel, *infra*.
4. Pursuant to Section 3014, the Board has an optional duty to contract with the Department or another state agency for office space, equipment, supplies, and services, as determined by the Board to be appropriate, for the administration of this chapter. This is a duty of the members of the Board.

Section 3015. Headquarters Office – Meeting Rooms

In addition to the office of the executive director in Sacramento, the department shall, as the need therefor occurs, secure adequate rooms for the meetings of the board in Los Angeles, San Francisco, Sacramento, or other locations in the state as may be required in the discretion of the board, to administer this chapter.

Duties Relating to Section 3015

1. Pursuant to Section 3015, the Board has a duty to provide adequate information to the Department about what requirements the Board has relating to Board meetings so that the Department can perform its above-mentioned duty. This is a duty which has been delegated to the staff of the Board.

Section 3016. Fees

(a) New motor vehicle dealers and other licensees under the jurisdiction of the board shall be charged fees sufficient to fully fund the activities of the board other than those conducted pursuant to Section 472.5 of the Business and Professions Code. The board may recover the direct cost of the activities required by Section 472.5 of the Business and Professions Code by charging the Department of Consumer Affairs a fee which shall be paid by the Department of Consumer Affairs with funds appropriated from the Certification Account in the Consumer Affairs Fund. All fees shall be deposited, and held separate from other moneys, in the Motor Vehicle Account in the State Transportation Fund, and shall not be transferred to the State Highway Account pursuant to Section 42273.

(b) The fees shall be available, when appropriated, exclusively to fund the activities of the board. If, at the conclusion of any fiscal year, the amount of fees collected exceeds the amount of expenditures for this purpose during the fiscal year, the surplus shall be carried over into the succeeding fiscal year.

Duties Relating to Section 3016

1. Pursuant to Section 3016, the Board has a duty to charge new motor vehicle dealers and other licensees, under the jurisdiction of the Board, fees sufficient to fully fund the Board's activities other than those conducted pursuant to Section 472.5 of the Business and Professions Code. Establishment of the fee by regulation is a duty of the members of the Board. Ensuring that the fees have been collected in a timely manner is a duty which has been delegated to the staff of the Board.
2. Pursuant to Section 3016, the Board has the right to recover the direct cost of the activities required by Section 472.5 of the Business and Professions Code by charging the Department of Consumer Affairs a fee. This is a duty which has been delegated to the staff of the Board.

3. Pursuant to Section 3016, the Board has a duty to deposit all fees collected in a separate Motor Vehicle Account in the State Transportation Fund. This is a duty which has been delegated to the staff of the Board.

Section 3050. Powers and Duties, Generally

The board shall do all of the following:

(a) Adopt rules and regulations in accordance with Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code governing those matters that are specifically committed to its jurisdiction.

(b) Consider any matter concerning the activities or practices of any person applying for or holding a license as a new motor vehicle dealer, manufacturer, manufacturer branch, distributor, distributor branch, or representative pursuant to Chapter 4 (commencing with Section 11700) of Division 5 submitted by any person. A member of the board who is a new motor vehicle dealer may not participate in, hear, comment, advise other members upon, or decide any matter considered by the board pursuant to this subdivision that involves a dispute between a franchisee and franchisor. After that consideration, the board may do any one or any combination of the following:

(1) Direct the department to conduct investigation of matters that the board deems reasonable, and make a written report on the results of the investigation to the board within the time specified by the board.

(2)(A) Undertake to mediate, arbitrate, or otherwise resolve any honest difference of opinion or viewpoint existing between any member of the public and any new motor vehicle dealer, manufacturer, manufacturer branch, distributor, distributor branch, or representative.

(B) The board does not have jurisdiction over a dispute pursuant to this paragraph involving any member of the public, including a consumer or other person who is not applying for or holding a license as a new motor vehicle dealer, manufacturer, manufacturer branch, distributor, distributor branch, or representative pursuant to Chapter 4 (commencing with Section 11700) of Division 5, unless that person has filed the dispute with the board or consents to jurisdiction by the board.

(3) Order the department to exercise any and all authority or power that the department may have with respect to the issuance, renewal, refusal to renew, suspension, or revocation of the license of any new motor vehicle dealer, manufacturer, manufacturer branch, distributor, distributor branch, or representative as that license is required under Chapter 4 (commencing with Section 11700) of Division 5.

(c) Hear and decide, within the limitations and in accordance with the procedure provided, a protest presented by a franchisee pursuant to Section 3060, 3062, 3064, 3065, 3065.1, 3065.3, 3065.4, 3070, 3072, 3074, 3075, or 3076. A member of the board who is a new motor vehicle dealer may not participate in, hear, comment, advise other members upon, or decide, any matter involving a protest filed pursuant to Article 4 (commencing with Section 3060), unless all parties to the protest stipulate otherwise.

(d) Hear and decide, within the limitations and in accordance with the procedure provided, a protest presented by an association challenging a policy of a manufacturer, manufacturer branch, distributor, or distributor branch pursuant to Section 3085. A member of the board who is a new motor vehicle dealer may not participate in, hear,

comment, advise other members upon, or decide, any matter involving a protest filed pursuant to Article 6 (commencing with Section 3085), unless all participants to the protest stipulate otherwise.

(e) Notwithstanding subdivisions (b), (c), and (d), the courts have jurisdiction over all common law and statutory claims originally cognizable in the courts. For those claims, a party may initiate an action directly in any court of competent jurisdiction.

(f) This section shall remain in effect only until January 1, 2030, and as of that date is repealed.

Duties Relating to Section 3050

1. Pursuant to Section 3050(a), the Board has a duty to adopt rules and regulations in accordance with Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code governing such matters as are specifically committed to its jurisdiction. This is a duty of the members of the Board.
2. Pursuant to Section 3050(b), the Board has a duty to consider any matter concerning the activities or practices of any person applying for or holding a license pursuant to Chapter 4 (commencing with Section 11700) of Division 5 submitted by any person. This provision contains duties which are retained by the Board as well as duties which have been delegated to staff. The staff is responsible for the administration of petitions filed under this section, including the proceedings up to and including the evidentiary hearing and preparation of the proposed decision. The members of the Board have the duty of first considering these matters, pursuant to Section 557 of the Board's regulations, as well as rendering the final decision on the merits of the dispute.
3. Pursuant to Section 3050(b), the dealer members of the Board have a duty not to participate in, hear, comment, advise other members upon, or decide any matter considered pursuant to Section 3050(c) that involves a dispute between a franchisee and franchisor. This is a duty of the members of the Board.
4. Pursuant to Section 3050(b)(1), the Board has a right to direct the Department to conduct an investigation of matters that the Board deems reasonable, and make a written report on the results to the Board. This is a duty of the members of the Board.
5. Pursuant to Section 3050(b)(2)(A), the Board has a right to undertake to mediate, arbitrate, or otherwise resolve any honest difference of opinion or viewpoint existing between any member of the public and any new motor vehicle dealer, manufacturer, manufacturer branch, distributor, distributor branch, or representative. This is a duty of the members of the Board. This provision contains duties which are retained by the Board as well as duties which have been delegated to staff. The duty to mediate these matters has been delegated to the staff of the Board. The staff also has the responsibility for the administration of

petitions filed under this section, including the proceedings up to and including the evidentiary hearing and preparation of the proposed decision. The members of the Board have the duty of rendering the final decision on the merits of the disputes.

6. Pursuant to Section 3050(b)(2)(B), the Board does not have jurisdiction over a petition involving any member of the public, including a consumer or other person who is not an applicant for or a licensed new motor vehicle dealer, manufacturer, or distributor, unless that person has filed the dispute with the board or consents to jurisdiction by the board. This provision contains duties which are retained by the Board as well as duties which have been delegated to staff. The staff has the responsibility for the administration of petitions filed under this section, including ensuring all non-licensee parties have consented to the Board's jurisdiction, the proceedings up to and including the evidentiary hearing and preparation of the proposed decision. The members of the Board have the duty of rendering the final decision on the merits of the dispute.
7. Pursuant to Section 3050(b)(3), the Board has a right to order the Department to exercise any and all authority or power that the Department may have with respect to the issuance, renewal, refusal to renew, suspension, or revocation of the license of any new motor vehicle dealer, manufacturer, manufacturer branch, distributor, distributor branch, or representative as that license is required under Chapter 4 (commencing with Section 11700) of Division 5. This is a duty of the members of the Board.
8. Pursuant to Section 3050(c), the Board has a right to hear and decide a protest presented by a franchisee pursuant to Sections 3060, 3062, 3064, 3065, 3065.1, 3065.3, 3065.4, 3070, 3072, 3074, 3075, or 3076. This provision contains duties which are retained by the Board as well as duties which have been delegated to staff. The staff is responsible for the administration of protests filed under this section, including the proceedings up to and including the evidentiary hearing and preparation of the proposed decision. The members of the Board have the duty to render the final decision on the merits of the protest.
9. Pursuant to Section 3050(c), the dealer members of the Board have a duty not to participate in, hear, comment, advise other members upon, or decide, any matter involving a protest filed pursuant to Article 4 (commencing with Section 3060), unless all parties to the protest stipulate otherwise. This is a duty of the members of the Board.
10. Pursuant to Section 3050(d), the Board has a right to hear and decide a protest presented by an association challenging a policy of a manufacturer or distributor pursuant to Section 3085. This provision contains duties which are retained by the Board as well as duties which have been delegated to staff. The staff is responsible for the administration of protests filed under this section, including the proceedings up to and including the evidentiary hearing and preparation of the

proposed decision. The members of the Board have the duty to render the final decision on the merits of the protest.

11. Pursuant to Section 3050(d), the dealer members of the Board have a duty not to participate in, hear, comment, advise other members upon, or decide, any matter involving a protest filed pursuant to Article 6 (commencing with Section 3085), unless all parties to the protest stipulate otherwise. This is a duty of the members of the Board.
12. Pursuant to Section 3050(e) notwithstanding Section 3050 subdivisions (b), (c), and (d) above, the courts have jurisdiction over all common law and statutory claims originally cognizable in the courts. The members of the Board have a duty not to require the exhaustion of administrative remedies over all common law and statutory claims originally cognizable in the courts. For those claims, a party may initiate an action directly in any court of competent jurisdiction.

Section 3050.1. Oaths, Depositions, Certification to Official Acts, and Issuance of Subpoenas

(a) In any proceeding, hearing, or in the discharge of duties imposed under this chapter, the board, its executive director, or an administrative law judge designated by the board may administer oaths, take depositions, certify to official acts, and issue subpoenas to compel attendance of witnesses and the production of books, records, papers, and other documents in any part of the state.

(b) For purposes of discovery, the board or its executive director may, if deemed appropriate and proper under the circumstances, authorize the parties to engage in the civil action discovery procedures in Title 4 (commencing with Section 2016.010) of Part 4 of the Code of Civil Procedure, excepting the provisions of Chapter 13 (commencing with Section 2030.010) of that title. Discovery shall be completed no later than 15 days prior to the commencement of the proceeding or hearing before the board. This subdivision shall apply only to those proceedings or hearings involving a petition filed pursuant to subdivision (b) of Section 3050 or protest filed pursuant to subdivision (c) or (d) of Section 3050. The board, its executive director, or an administrative law judge designated by the board may issue subpoenas to compel attendance at depositions of persons having knowledge of the acts, omissions, or events that are the basis for the proceedings, as well as the production of books, records, papers, and other documents.

(c) This section shall remain in effect only until January 1, 2030, and as of that date is repealed.

Duties Relating to Section 3050.1

1. Pursuant to Section 3050.1(a), the Board, the Executive Director, or the Board's administrative law judges have the right, in any proceeding, hearing, or in the discharge of any duties imposed under this chapter to (a) administer oaths, (b) take depositions, (c) certify to official acts, (d) issue subpoenas to compel attendance of witnesses, and (e) issue subpoenas duces tecum. This is a duty which has been delegated to the staff of the Board.

2. Pursuant to Section 3050.1(b), the Board or the Executive Director have the right to authorize the parties to engage in such discovery procedures as are provided for in civil actions in Title 4 (commencing with Section 2016.010) of the Code of Civil Procedure, excepting the provisions of Chapter 13 (commencing with Section 2030.010) of that title. This is a duty which has been delegated to the staff of the Board.
3. Pursuant to Section 3050.1(b), the Board has the duty to end discovery no later than 15 days prior to the commencement of the proceeding or hearing before the Board. This is a duty which has been delegated to the staff of the Board.
4. Pursuant to Section 3050.1(b), the Board, the Executive Director, or the Board's administrative law judges have the right to (a) issue subpoenas to compel attendance at depositions, and (b) issue subpoenas duces tecum for production at depositions. This is a duty which has been delegated to the staff of the Board.

Section 3050.2. Enforcement of Subpoenas and Discovery

(a) Obedience to subpoenas issued to compel attendance of witnesses, or the production of books, records, papers, and other documents at the proceeding or hearing, may be enforced by application to the superior court as set forth in Article 2 (commencing with Section 11180) of Chapter 2 of Part 1 of Division 3 of Title 2 of the Government Code.

(b) Compliance with discovery procedures authorized pursuant to subdivision (b) of Section 3050.1 may be enforced by application to the executive director of the board. The executive director may, at the direction of the board, upon a showing of failure to comply with authorized discovery without substantial justification for that failure, dismiss the protest or petition or suspend the proceedings pending compliance. The executive director may, at the direction of the board, upon a failure to comply with authorized discovery without substantial justification for that failure, require payment of costs incurred by the board, as well as attorney's fees and costs of the party who successfully makes or opposes a motion to compel enforcement of discovery. Nothing in this section precludes the executive director from making application to the superior court to enforce obedience to subpoenas or compliance with other discovery procedures authorized pursuant to subdivision (b) of Section 3050.1.

Duties Relating to Section 3050.2

1. Pursuant to Section 3050.2(b), the Board has a right to decide whether or not to dismiss a protest or petition or suspend proceedings upon a showing of failure to comply with authorized discovery without substantial justification. This is a duty of the members of the Board.
2. Pursuant to Section 3050.2(b), the Board has a duty to direct the Executive Director of the Board to dismiss a protest or petition or suspend the proceedings upon a showing of failure to comply with authorized discovery without substantial

justification. This is a duty of the members of the Board.

3. Pursuant to Section 3050.2(b), the Executive Director of the Board has a duty to dismiss a protest or petition or suspend the proceedings upon the direction of the Board. The duty to direct the Executive Director to dismiss or suspend the proceedings has been retained by the Board. The duty to follow the Board's direction in this regard has been delegated to the Executive Director.
4. Pursuant to Section 3050.2(b), the Board has a right to decide whether or not to require payment of costs incurred by the Board, as well as attorney's fees and costs of the party who successfully makes or opposes a motion to compel enforcement of discovery, without substantial justification for that failure. This is a duty of the members of the Board.
5. Pursuant to Section 3050.2(b), the Board has a duty to direct the Executive Director of the Board to require payment of costs incurred by the Board, as well as attorney's fees and costs of the party who successfully makes or opposes a motion to compel enforcement of discovery, without substantial justification for that failure. The duty to direct the Executive Director to require payment of costs incurred by the Board has been retained by the Board. The duty to follow the Board's direction in this regard has been delegated to the Executive Director.
6. Pursuant to Section 3050.2(b), the Executive Director of the Board has the right to make application to the superior court to enforce obedience to subpoenas or compliance with other discovery procedures authorized pursuant to subdivision (b) of Section 3050.1. This is a duty which has been statutorily delegated to the staff of the Board.

Section 3050.3. Witness Fees and the Mileage Allowance

A witness, other than an officer or employee of the state or of a political subdivision of the state, who appears by order of the board or its executive director, shall receive for his or her attendance the same fees and the same mileage allowed by law to witnesses in civil cases. The amount shall be paid by the party at whose request the witness is subpoenaed. The mileage and fees, if any, of a witness subpoenaed by the board or its executive director, but not at the request of a party, shall be paid from the funds provided for the use of the board in the same manner that other expenses of the board are paid.

Duties Relating to Section 3050.3

1. Pursuant to Section 3050.3, the Board has a duty to pay the mileage and fees of a witness subpoenaed by the Board or the Executive Director of the Board, but not at the request of a party. This is a duty which has been delegated to the staff of the Board.

Section 3050.4. Mandatory Settlement Conference

In any protest or petition before the board, the board, its executive director, or an administrative law judge designated by the board or its executive director, may order a mandatory settlement conference. The failure of a party to appear, to be prepared, or to have authority to settle the matter may result in one or more of the following:

(a) The board, its executive director, or an administrative law judge designated by the board or its executive director, may suspend all proceedings before the board in the matter until compliance.

(b) The board, its executive director, or an administrative law judge designated by the board or its executive director, may dismiss the proceedings or any part thereof before the board with or without prejudice.

(c) The board, its executive director, or an administrative law judge designated by the board or its executive director, may require all the board's costs to be paid by the party at fault.

(d) The board, its executive director, or an administrative law judge designated by the board or its executive director, may deem that the party at fault has abandoned the matter.

Duties Relating to Section 3050.4

1. Pursuant to Section 3050.4, the Board, the Executive Director, or a Board Administrative Law Judge may order a mandatory settlement conference. This is a duty which has been delegated to the staff of the Board.
2. Pursuant to Section 3050.4, the Board, the Executive Director, or a Board Administrative Law Judge has the right to (a) suspend all proceedings before the Board in the matter until compliance, (b) dismiss the proceedings or any part thereof before the Board with or without prejudice, (c) require all the Board's costs to be paid by the party at fault, or (d) deem that the party at fault has abandoned the matter, if any party fails to appear, to be prepared, or to have authority to settle the pending action. This is a duty which has been delegated to the staff of the Board.

Section 3050.5. Fees for Appeal, Protest or Petition

Pursuant to Section 3016, the board shall establish a fee for the initial filing by any party in regard to any protest or petition filed pursuant to this chapter.

Duties Relating to Section 3050.5

1. Pursuant to Section 3050.5, the Board has a duty to establish a fee for the initial filing by any party in regard to any protest or petition filed pursuant to this chapter. Establishment of the fee by regulation is a duty of the members of the Board. Ensuring that the fees have been collected in a timely manner is a duty which has been delegated to the staff of the Board.

Section 3050.6. Cost Assessment

The board or its executive director may, in the event of a granting of a continuance of a scheduled matter, assess costs of the board upon the party receiving the continuance.

Duties Relating to Section 3050.6

1. Pursuant to Section 3050.6, the Board or the Executive Director have the right to assess costs of the Board upon a party receiving a continuance of a scheduled matter if the matter is actually continued. This is a duty which has been delegated to the staff of the Board.

Section 3050.7. Stipulated Decisions and Orders

(a) The board may adopt stipulated decisions and orders, without a hearing pursuant to Section 3066, 3080, or 3085.2, to resolve one or more issues raised by a protest or petition filed with the board. Whenever the parties to a protest or petition submit a proposed stipulated decision and order of the board, a copy of the proposed stipulated decision and order shall be transmitted by the executive director of the board to each member of the board. The proposed stipulated decision and order shall be deemed to be adopted by the board unless a member of the board notifies the executive director of the board of an objection thereto within 10 days after that board member has received a copy of the proposed stipulated decision and order.

(b) If the board adopts a stipulated decision and order to resolve a protest filed pursuant to Section 3060 or 3070 in which the parties stipulate that good cause exists for the termination of the franchise of the protestant, and the order provides for a conditional or unconditional termination of the franchise of the protestant, paragraph (2) of subdivision (a) of Section 3060 and paragraph (2) of subdivision (a) of Section 3070, which require a hearing to determine whether good cause exists for termination of the franchise, is inapplicable to the proceedings. If the stipulated decision and order provides for an unconditional termination of the franchise, the franchise may be terminated without further proceedings by the board. If the stipulated decision and order provides for the termination of the franchise, conditioned upon the failure of a party to comply with specified conditions, the franchise may be terminated upon a determination, according to the terms of the stipulated decision and order, that the conditions have not been met. If the stipulated decision and order provides for the termination of the franchise conditioned upon the occurrence of specified conditions, the franchise may be terminated upon a determination, according to the terms of the stipulated decision and order, that the stipulated conditions have occurred.

(c) This section shall remain in effect only until January 1, 2030, and as of that date is repealed.

Duties Relating to Section 3050.7

1. Pursuant to Section 3050.7(a), when the parties to a protest or petition submit a

proposed stipulated decision and order of the Board, the Executive Director has a duty to transmit a copy of the proposed stipulated decision and order to each Board member.

2. Pursuant to Section 3050.7(b), upon request by a party to a stipulation, if the stipulated decision and order provides for the termination of the franchise, conditioned upon the failure of a party to comply with specified conditions, or the occurrence of specified conditions, the Board has a duty to determine whether or not the terms and conditions have been met. This duty has been delegated to the staff of the Board to the extent that the provisions of the stipulated decision and order delegate the duty to make such determination to specified individuals.

Section 3060. Termination of Franchise

(a) Notwithstanding Section 20999.1 of the Business and Professions Code or the terms of any franchise, no franchisor shall terminate or refuse to continue any existing franchise unless all of the following conditions are met:

(1) The franchisee and the board have received written notice from the franchisor as follows:

(A) Sixty days before the effective date thereof setting forth the specific grounds for termination or refusal to continue.

(B) Fifteen days before the effective date thereof setting forth the specific grounds with respect to any of the following:

(i) Transfer of any ownership or interest in the franchise without the consent of the franchisor, which consent shall not be unreasonably withheld.

(ii) Misrepresentation by the franchisee in applying for the franchise.

(iii) Insolvency of the franchisee, or filing of any petition by or against the franchisee under any bankruptcy or receivership law.

(iv) Any unfair business practice after written warning thereof.

(v) Failure of the motor vehicle dealer to conduct its customary sales and service operations during its customary hours of business for seven consecutive business days, giving rise to a good faith belief on the part of the franchisor that the motor vehicle dealer is in fact going out of business, except for circumstances beyond the direct control of the motor vehicle dealer or by order of the department.

(C) The written notice shall contain, on the first page thereof in at least 12-point bold type and circumscribed by a line to segregate it from the rest of the text, one of the following statements, whichever is applicable:

(To be inserted when a 60-day notice of termination is given.)

"NOTICE TO DEALER: You have the right to file a protest with the NEW MOTOR VEHICLE BOARD in Sacramento and have a hearing in which you may protest the termination of your franchise under provisions of the California Vehicle Code. You must file your protest with the board within 30 calendar days after receiving this notice or within 30 days after the end of any appeal procedure provided by the franchisor or your protest right will be waived."

(To be inserted when a 15-day notice of termination is given.)

"NOTICE TO DEALER: You have the right to file a protest with the NEW MOTOR VEHICLE BOARD in Sacramento and have a hearing in which you may protest the termination of your franchise under provisions of the California Vehicle Code. You must file your protest with the board within 10 calendar days after receiving this notice or within 10 days after the end of any appeal procedure provided by the franchisor or your protest right will be waived."

(2) Except as provided in Section 3050.7, the board finds that there is good cause for termination or refusal to continue, following a hearing called pursuant to Section 3066. The franchisee may file a protest with the board within 30 days after receiving a 60-day notice, satisfying the requirements of this section, or within 30 days after the end of any appeal procedure provided by the franchisor, or within 10 days after receiving a 15-day notice, satisfying the requirements of this section, or within 10 days after the end of any appeal procedure provided by the franchisor. When a protest is filed, the board shall advise the franchisor that a timely protest has been filed, that a hearing is required pursuant to Section 3066, and that the franchisor may not terminate or refuse to continue until the board makes its findings.

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

(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 requirements 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. If, however, a replacement franchise is the successor franchise to an expiring or expired term franchise, the prior franchise shall continue in effect until resolution of the protest by the board. In the event of multiple protests, hearings shall be consolidated to expedite the disposition of the issue.

(2) The written notice shall contain, on the first page thereof in at least 12-point bold type and circumscribed by a line to segregate it from the rest of the text, the following statement:

"NOTICE TO DEALER: Your franchise agreement is being modified or replaced. If the modification or replacement will substantially affect your sales or service obligations or investment, you have the right to file a protest with the NEW MOTOR VEHICLE BOARD in Sacramento and have a hearing in which you may protest the proposed modification or replacement of your franchise under provisions of the California Vehicle Code. You must file your protest with the board within 30 calendar days of your receipt of this notice or within 30 days after the end of any appeal procedure provided by the franchisor or your protest rights will be waived."

Duties Relating to Section 3060

1. Pursuant to Section 3060(a)(1) and (b)(1), the Board has a duty to receive written notice from the franchisor in accordance with Section 3060. This is a duty which has been delegated to the staff of the Board.
2. Pursuant to Section 3060(a)(2), the Board has a duty to advise the franchisor that a timely protest has been filed, that a hearing is required pursuant to Section 3066, and that the franchisor may not terminate or refuse to continue until the Board makes its findings. This is a duty which has been delegated to the staff of the Board.

Section 3061. Good Cause

In determining whether good cause has been established for modifying, replacing, terminating, or refusing to continue a franchise, the board shall take into consideration the existing circumstances, including, but not limited to, all of the following:

- (a) Amount of business transacted by the franchisee, as compared to the business available to the franchisee.
- (b) Investment necessarily made and obligations incurred by the franchisee to perform its part of the franchise.
- (c) Permanency of the investment.
- (d) Whether it is injurious or beneficial to the public welfare for the franchise to be modified or replaced or the business of the franchisee disrupted.
- (e) Whether the franchisee has adequate motor vehicle sales and service facilities, equipment, vehicle parts, and qualified service personnel to reasonably provide for the needs of the consumers for the motor vehicles handled by the franchisee and has been and is rendering adequate services to the public.
- (f) Whether the franchisee fails to fulfill the warranty obligations of the franchisor to be performed by the franchisee.
- (g) Extent of franchisee's failure to comply with the terms of the franchise.

Duties Relating to Section 3061

1. Pursuant to Section 3061, the Board has a duty, in determining whether good cause has been established for modifying, replacing, terminating, or refusing to continue a franchise, to take into consideration the existing circumstances, including, but not limited to, all of the following subsections delineated in Section 3061 (a) through (g). The staff is responsible for the administration of protests filed under this section, including the proceedings up to and including the evidentiary hearing and preparation of the proposed decision. The members of the Board have the duty to render the final decision on the merits of the protest.

Section 3062. Establishing or Relocating Dealerships

- (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 then 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. If, within this time, a franchisee files with the board a request for additional time to file a protest, the board or its executive director, upon a showing of good cause, may grant an additional 10 days to file the protest. When a protest is filed, the board shall inform the franchisor that a timely protest has been filed, that a hearing is required pursuant to Section 3066, and that the franchisor may not establish the proposed dealership or relocate the existing dealership until the board has held a hearing as provided in Section 3066, nor thereafter, if the board has determined that there is good cause for not permitting the establishment of the proposed dealership or relocation of the existing dealership. In the event of multiple protests, hearings may be consolidated to expedite the disposition of the issue.

(2) If a franchisor seeks to enter into a franchise that authorizes a satellite warranty facility to be established at, or relocated to, a proposed location that is within two miles of a dealership of the same line-make, the franchisor shall first give notice in writing of the franchisor's intention to establish or relocate a satellite warranty facility at the proposed location to the board and each franchisee operating a dealership of the same line-make within two miles of the proposed location. 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 establishing or relocating of the satellite warranty facility. If, within this time, a franchisee files with the board a request for additional time to file a protest, the board or its executive director, upon a showing of good cause, may grant an additional 10 days to file the protest. When a protest is filed, the board shall inform the franchisor that a timely protest has been filed, that a hearing is required pursuant to Section 3066, and that the franchisor may not establish or relocate the proposed satellite warranty facility until the board has held a hearing as provided in Section 3066, nor thereafter, if the board has determined that there is good cause for not permitting the satellite warranty facility. In the event of multiple protests, hearings may be consolidated to expedite the disposition of the issue.

(3) The written notice shall contain, on the first page thereof in at least 12-point bold type and circumscribed by a line to segregate it from the rest of the text, the following statement:

"NOTICE TO DEALER: You have the right to file a protest with the NEW MOTOR VEHICLE BOARD in Sacramento and have a hearing on your protest under the terms of the California Vehicle Code if you oppose this action. You must file your protest with the board within 20 days of your receipt of this notice, or within 20 days after the end of any appeal procedure that is provided by us to you. If within this time you file with the board a request for additional time to file a protest, the board or its executive director, upon a

showing of good cause, may grant you an additional 10 days to file the protest."

(b) Subdivision (a) does not apply to either of the following:

(1) The relocation of an existing dealership to any location that is both within the same city as, and within one mile from, the existing dealership location.

(2) The establishment at a location that is both within the same city as, and within one-quarter mile from, the location of a dealership of the same line-make that has been out of operation for less than 90 days.

(c) Subdivision (a) does not apply to a display of vehicles at a fair, exposition, or similar exhibit if actual sales are not made at the event and the display does not exceed 30 days. This subdivision may not be construed to prohibit a new vehicle dealer from establishing a branch office for the purpose of selling vehicles at the fair, exposition, or similar exhibit, even though the event is sponsored by a financial institution, as defined in Section 31041 of the Financial Code or by a financial institution and a licensed dealer. The establishment of these branch offices, however, shall be in accordance with subdivision (a) where applicable.

(d) For the purposes of this section, the reopening of a dealership that has not been in operation for one year or more shall be deemed the establishment of an additional motor vehicle dealership.

(e) As used in this section, the following definitions apply:

(1) "Motor vehicle dealership" or "dealership" means an authorized facility at which a franchisee offers for sale or lease, displays for sale or lease, or sells or leases new motor vehicles.

(2) "Satellite warranty facility" means a facility operated by a franchisee where authorized warranty repairs and service are performed and the offer for sale or lease, the display for sale or lease, or the sale or lease of new motor vehicles is not authorized to take place.

Duties Relating to Section 3062

1. Pursuant to Section 3062(a)(1), the Board has a duty to receive written notice from the franchisor in accordance with Section 3062(a)(1). This is a duty which has been delegated to the staff of the Board.
2. Pursuant to Section 3062(a)(1), the Board or the Executive Director has the right to grant an additional 10 days to file a protest, upon receipt of a request for additional time, and upon a showing of good cause. This is a duty which has been delegated to the staff of the Board.
3. Pursuant to Section 3062(a)(1), the Board has the duty to inform the franchisor that a timely protest has been filed, that a hearing is required pursuant to Section 3066, and that the franchisor may not establish or relocate the proposed dealership until the Board has held a hearing as provided in Section 3066, nor thereafter, if the Board has determined that there is good cause for not permitting the dealership. This is a duty which has been delegated to the staff of the Board.
4. Pursuant to Section 3062(a)(2), the Board has a duty to receive written notice

from the franchisor in accordance with Section 3062(a)(2). This is a duty which has been delegated to the staff of the Board.

5. Pursuant to Section 3062(a)(2), the Board or the Executive Director has the right to grant an additional 10 days to file a protest, upon receipt of a request for additional time, and upon a showing of good cause. This is a duty which has been delegated to the staff of the Board.
6. Pursuant to Section 3062(a)(2), the Board has the duty to inform the franchisor that a timely protest has been filed, that a hearing is required pursuant to Section 3066, and that the franchisor may not establish or relocate the proposed satellite warranty facility until the Board has held a hearing as provided in Section 3066, nor thereafter, if the Board has determined that there is good cause for not permitting the satellite warranty facility. This is a duty which has been delegated to the staff of the Board.

Section 3063. Good Cause

In determining whether good cause has been established for not entering into a franchise or relocating an existing dealership of the same line-make, the board shall take into consideration the existing circumstances, including, but not limited to, all of the following:

- (a) Permanency of the investment.
- (b) Effect on the retail motor vehicle business and the consuming public in the relevant market area.
- (c) Whether it is injurious to the public welfare for an additional franchise to be established or an existing dealership to be relocated.
- (d) Whether the franchisees of the same line-make in the relevant market area are providing adequate competition and convenient consumer care for the motor vehicles of the line-make in the market area which shall include the adequacy of motor vehicle sales and service facilities, equipment, supply of vehicle parts, and qualified service personnel.
- (e) Whether the establishment of an additional franchise would increase competition and therefore be in the public interest.
- (f) For purposes of this section, the terms “motor vehicle dealership” and “dealership” shall have the same meaning as defined in Section 3062.

Duties Relating to Section 3063

1. Pursuant to Section 3063, the Board has the duty, in determining whether good cause has been established for not entering into a franchise or relocating an existing dealership of the same line-make, to take into consideration the existing circumstances, including, but not limited to, all of the following subsections delineated in Section 3063 (a) through (e). The staff is responsible for the administration of the protests filed under this section, including the proceedings up to and including the evidentiary hearing and preparation of the proposed decision. The members of the Board have the duty to render the final decision on

the merits of the protest.

Section 3064. Delivery and Preparation Obligations

(a) Every franchisor shall specify to its franchisees the delivery and preparation obligations of the franchisees prior to delivery of new motor vehicles to retail buyers. A copy of the delivery and preparation obligations, which shall constitute the franchisee's only responsibility for product liability between the franchisee and the franchisor but shall not in any way affect the franchisee's responsibility for product liability between the purchaser and either the franchisee or the franchisor, and a schedule of compensation to be paid franchisees for the work and services they shall be required to perform in connection with those delivery and preparation obligations shall be filed with the board by franchisors, and shall constitute the compensation as set forth on the schedule. The schedule of compensation shall be reasonable, with the reasonableness thereof being subject to the approval of the board, if a franchisee files a notice of protest with the board. In determining the reasonableness of the schedules, the board shall consider all relevant circumstances, including, but not limited to, the time required to perform each function that the dealer is obligated to perform and the appropriate labor rate.

(b) Upon delivery of the vehicle, the franchisee shall give a copy of the delivery and preparation obligations to the purchaser and a written certification that the franchisee has fulfilled these obligations.

Duties Relating to Section 3064

1. Pursuant to Section 3064(a), the Board has a duty to receive a copy of the delivery and preparation obligations, and a schedule of compensation to be paid franchisees for the work and services they shall be required to perform in connection with such delivery and preparation obligations. This is a duty which has been delegated to the staff of the Board.
2. Pursuant to Section 3064(a), if a franchisee files a notice of protest with the Board, the Board has a duty to determine the reasonableness of the schedule of compensation. This is a duty of the members of the Board.
3. Pursuant to Section 3064(a), in determining the reasonableness of the schedules, the Board has a duty to consider all relevant circumstances, including, but not limited to, the time required to perform each function that the dealer is obligated to perform and the appropriate labor rate. This is a duty of the members of the Board.
4. The staff is responsible for the administration of protests filed under this section, including the proceedings up to and including the evidentiary hearing and preparation of the proposed decision. The members of the Board have the duty to render the final decision on the merits of the protest.

Section 3065. Warranty Reimbursement

(a) Every franchisor shall properly fulfill every warranty agreement made by it and adequately and fairly compensate each of its franchisees for labor and parts used to satisfy the warranty obligations of the franchisor, including, but not limited to, diagnostics, repair, and servicing and shall file a copy of its warranty reimbursement schedule with the board. The warranty reimbursement schedule shall be reasonable with respect to the time and compensation allowed to the franchisee for the warranty diagnostics, repair, servicing, and all other conditions of the obligation, including costs directly associated with the disposal of hazardous materials that are associated with a warranty repair.

(1) The franchisor shall use time allowances for the diagnosis and performance of work and service that are reasonable and adequate for a qualified technician to perform the work or services. A franchisor shall not unreasonably deny a written request submitted by a franchisee for modification of a franchisor's uniform time allowance for a specific warranty repair, or a request submitted by a franchisee for an additional time allowance for either diagnostic or repair work on a specific vehicle covered under warranty, provided the request includes any information and documentation reasonably required by the franchisor to assess the merits of the franchisee's request.

(2) A franchisor shall not replace, modify, or supplement the warranty reimbursement schedule to impose a fixed percentage or other reduction in the time or compensation allowed to the franchisee for warranty repairs not attributable to a specific repair. A franchisor may reduce the allowed time or compensation applicable to a specific warranty repair only upon 15 days' prior written notice to the franchisee.

(3) Any protest challenging a reduction in time or compensation applicable to specific parts or labor operations shall be filed within six months following the franchisee's receipt of notice of the reduction, and the franchisor shall have the burden of establishing the reasonableness of the reduction and adequacy and fairness of the resulting reduction in time or compensation.

(b) In determining what constitutes a reasonable warranty reimbursement schedule under this section, a franchisor shall compensate each of its franchisees for parts and labor at rates equal to the franchisee's retail labor rate and retail parts rate, as established pursuant to Section 3065.2. Nothing in this subdivision prohibits a franchisee and a franchisor from entering into a voluntary written agreement signed by both parties that compensates for labor and parts used to satisfy the warranty obligations of the franchisor at rates other than the franchisee's retail rates, provided that the warranty reimbursement schedule adequately and fairly compensates the franchisee.

(c) If any franchisor disallows a franchisee's claim for a defective part, alleging that the part, in fact, is not defective, the franchisor shall return the part alleged not to be defective to the franchisee at the expense of the franchisor, or the franchisee shall be reimbursed for the franchisee's cost of the part, at the franchisor's option.

(d)(1) All claims made by franchisees pursuant to this section shall be either approved or disapproved within 30 days after their receipt by the franchisor. Any claim not specifically disapproved in writing within 30 days from receipt by the franchisor shall be deemed approved on the 30th day. All claims made by franchisees under this section and Section 3064 for labor and parts shall be paid within 30 days after approval.

(2) A franchisor shall not disapprove a claim unless the claim is false or fraudulent, repairs were not properly made, repairs were inappropriate to correct a nonconformity with the written warranty due to an improper act or omission of the franchisee, or for material noncompliance with reasonable and nondiscriminatory documentation and administrative claims submission requirements.

(3) When any claim is disapproved, the franchisee who submits it shall be notified in writing of its disapproval within the required period, and each notice shall state the specific grounds upon which the disapproval is based. The franchisor shall provide for a reasonable appeal process allowing the franchisee at least 30 days after receipt of the written disapproval notice to provide additional supporting documentation or information rebutting the disapproval. If disapproval is based upon noncompliance with documentation or administrative claims submission requirements, the franchisor shall allow the franchisee at least 30 days from the date of receipt of the notice to cure any material noncompliance. If the disapproval is rebutted, and material noncompliance is cured before the applicable deadline, the franchisor shall approve the claim.

(4) If the franchisee provides additional supporting documentation or information purporting to rebut the disapproval, attempts to cure noncompliance relating to the claim, or otherwise appeals denial of the claim and the franchisor continues to deny the claim, the franchisor shall provide the franchisee with a written notification of the final denial within 30 days of completion of the appeal process, which shall conspicuously state "Final Denial" on the first page.

(5) Failure to approve or pay within the above specified time limits, in individual instances for reasons beyond the reasonable control of the franchisor, shall not constitute a violation of this article.

(6) Within six months after either receipt of the written notice described in paragraph (3) or (4), whichever is later, a franchisee may file a protest with the board for determination of whether the franchisor complied with the requirements of this subdivision. In any protest pursuant to this subdivision, the franchisor shall have the burden of proof.

(e)(1) Audits of franchisee warranty records may be conducted by the franchisor on a reasonable basis for a period of nine months after a claim is paid or credit issued. A franchisor shall not select a franchisee for an audit, or perform an audit, in a punitive, retaliatory, or unfairly discriminatory manner. A franchisor may conduct no more than one random audit of a franchisee in a nine-month period. The franchisor's notification to the franchisee of any additional audit within a nine-month period shall be accompanied by written disclosure of the basis for that additional audit.

(2) Previously approved claims shall not be disapproved or charged back to the franchisee unless the claim is false or fraudulent, repairs were not properly made, repairs were inappropriate to correct a nonconformity with the written warranty due to an improper act or omission of the franchisee, or for material noncompliance with reasonable and nondiscriminatory documentation and administrative claims submission requirements. A franchisor shall not disapprove or chargeback a claim based upon an extrapolation from a sample of claims, unless the sample of claims is selected randomly and the extrapolation is performed in a reasonable and statistically valid manner.

(3) If the franchisor disapproves of a previously approved claim following an audit, the franchisor shall provide to the franchisee, within 30 days after the audit, a written

disapproval notice stating the specific grounds upon which the claim is disapproved. The franchisor shall provide a reasonable appeal process allowing the franchisee a reasonable period of not less than 30 days after receipt of the written disapproval notice to respond to any disapproval with additional supporting documentation or information rebutting the disapproval and to cure noncompliance, with the period to be commensurate with the volume of claims under consideration. If the franchisee rebuts any disapproval and cures any material noncompliance relating to a claim before the applicable deadline, the franchisor shall not chargeback the franchisee for that claim.

(4) If the franchisee provides additional supporting documentation or information purporting to rebut the disapproval, attempts to cure noncompliance relating to the claim, or otherwise appeals denial of the claim and the franchisor continues to deny the claim, the franchisor shall provide the franchisee with a written notification of the final denial within 30 days of completion of the appeal process, which shall conspicuously state "Final Denial" on the first page.

(5) The franchisor shall not chargeback the franchisee until 45 days after receipt of the written notice described in paragraph (3) or paragraph (4), whichever is later. Any chargeback to a franchisee for warranty parts or service compensation shall be made within 90 days of receipt of that written notice. If the franchisee files a protest pursuant to this subdivision prior to the franchisor's chargeback for denied claims, the franchisor shall not offset or otherwise undertake to collect the chargeback until the board issues a final order on the protest. If the board sustains the chargeback or the protest is dismissed, the franchisor shall have 90 days following issuance of the final order or the dismissal to make the chargeback, unless otherwise provided in a settlement agreement.

(6) Within six months after either receipt of the written disapproval notice or completion of the franchisor's appeal process, whichever is later, a franchisee may file a protest with the board for determination of whether the franchisor complied with this subdivision. In any protest pursuant to this subdivision, the franchisor shall have the burden of proof.

(f) If a false claim was submitted by a franchisee with the intent to defraud the franchisor, a longer period for audit and any resulting chargeback may be permitted if the franchisor obtains an order from the board.

Duties Relating to Section 3065

1. Pursuant to Section 3065(a), the Board has a duty to receive a copy of a franchisor's warranty reimbursement schedule. This is a duty which has been delegated to the staff of the Board.
2. Pursuant to Section 3065(a)(3), if a protest challenging a reduction in time or compensation applicable to specific parts or labor operations is filed with the Board, the Board has a duty to determine the reasonableness of the reduction and adequacy and fairness of the resulting reduction in time or compensation. This is a duty for the members of the Board.
3. Pursuant to Section 3065(d)(3), if a protest challenging the initial disapproval of a warranty claim is filed with the Board, the Board has a duty to determine whether

the franchisor complied with the requirements of Section 3065(d). This is a duty for the members of the Board.

4. Pursuant to Section 3065(d)(4), if a protest challenging the final denial of a warranty claim following the franchisor's appeal process is filed with the Board, the Board has a duty to determine whether the franchisor complied with the requirements of Section 3065(d). This is a duty for the members of the Board.
5. Pursuant to Section 3065(e)(3), if a protest challenging the warranty claim disapproval of a previously approved claim following an audit is filed with the Board, the Board has a duty to determine whether the franchisor complied with the requirements of Section 3065(e). This is a duty for the members of the Board.
6. Pursuant to Section 3065(e)(4), if a protest challenging the final denial of a warranty claim following an audit following the franchisor's appeal process is filed with the Board, the Board has a duty to determine whether the franchisor complied with the requirements of Section 3065(e). This is a duty for the members of the Board.
7. Pursuant to Section 3065(f), the Board has a duty to receive filings relating to a request for an order in accordance with Section 3065(f). This is a duty which has been delegated to the staff of the Board.
8. Pursuant to Section 3065(f), the Board has the duty to review any request for an extension of time to conduct the warranty audit. This duty is for the members of the Board.
9. The staff is responsible for the administration of protests filed under this section, including the proceedings up to and including the evidentiary hearing and preparation of the proposed decision. The members of the Board have the duty to render the final decision on the merits of the protest.

Section 3065.1. Franchisor Incentive Program

(a) All claims made by a franchisee for payment under the terms of a franchisor incentive program shall be either approved or disapproved within 30 days after receipt by the franchisor. When any claim is disapproved, the franchisee who submits it shall be notified in writing of its disapproval within the required period, and each notice shall state the specific grounds upon which the disapproval is based. Any claim not specifically disapproved in writing within 30 days from receipt shall be deemed approved on the 30th day. Franchisee claims for incentive program compensation shall not be disapproved unless the claim is false or fraudulent, the claim is ineligible under the terms of the incentive program as previously communicated to the franchisee, or for material noncompliance with reasonable and nondiscriminatory documentation and administrative claims submission requirements.

(b) Franchisee claims for incentive program compensation shall not be disapproved unless the claim is false or fraudulent, the claim is ineligible under the terms

of the incentive program as previously communicated to the franchisee, or for material noncompliance with reasonable and nondiscriminatory documentation and administrative claims submission requirements.

(c) The franchisor shall provide for a reasonable appeal process allowing the franchisee at least 30 days after receipt of the written disapproval notice to respond to any disapproval with additional supporting documentation or information rebutting the disapproval. If disapproval is based upon noncompliance with documentation or administrative claims submission requirements, the franchisor shall allow the franchisee at least 30 days from the date of receipt of the written disapproval notice to cure any material noncompliance. If the disapproval is rebutted, and material noncompliance is cured before the applicable deadline, the franchisor shall approve the claim.

(d) If the franchisee provides additional supporting documentation or information purporting to rebut the disapproval, attempts to cure noncompliance relating to the claim, or otherwise appeals denial of the claim, and the franchisor continues to deny the claim, the franchisor shall provide the franchisee with a written notification of the final denial within 30 days of completion of the appeal process, which shall conspicuously state "Final Denial" on the first page.

(e) Following the disapproval of a claim, a franchisee shall have six months from receipt of the written notice described in either subdivision (a) or (d), whichever is later, to file a protest with the board for determination of whether the franchisor complied with subdivisions (a), (b), (c), and (d). In any hearing pursuant to this subdivision or subdivision (a), (b), (c), or (d), the franchisor shall have the burden of proof.

(f) All claims made by franchisees under this section shall be paid within 30 days following approval. Failure to approve or pay within the above specified time limits, in individual instances for reasons beyond the reasonable control of the franchisor, do not constitute a violation of this article.

(g)(1) Audits of franchisee incentive records may be conducted by the franchisor on a reasonable basis, and for a period of nine months after a claim is paid or credit issued. A franchisor shall not select a franchisee for an audit, or perform an audit, in a punitive, retaliatory, or unfairly discriminatory manner. A franchisor may conduct no more than one random audit of a franchisee in a nine-month period. The franchisor's notification to the franchisee of any additional audit within a nine-month period shall be accompanied by written disclosure of the basis for that additional audit.

(2) Previously approved claims shall not be disapproved and charged back unless the claim is false or fraudulent, the claim is ineligible under the terms of the incentive program as previously communicated to the franchisee, or for material noncompliance with reasonable and nondiscriminatory documentation and administrative claims submission requirements. A franchisor shall not disapprove a claim or chargeback a claim based upon an extrapolation from a sample of claims, unless the sample of claims is selected randomly and the extrapolation is performed in a reasonable and statistically valid manner.

(3) If the franchisor disapproves of a previously approved claim following an audit, the franchisor shall provide to the franchisee, within 30 days after the audit, a written disapproval notice stating the specific grounds upon which the claim is disapproved. The franchisor shall provide a reasonable appeal process allowing the franchisee a reasonable period of not less than 30 days after receipt of the written disapproval notice

to respond to any disapproval with additional supporting documentation or information rebutting the disapproval and to cure any material noncompliance, with the period to be commensurate with the volume of claims under consideration. If the franchisee rebuts any disapproval and cures any material noncompliance relating to a claim before the applicable deadline, the franchisor shall not chargeback the franchisee for that claim.

(4) If the franchisee provides additional supporting documentation or information purporting to rebut the disapproval, attempts to cure noncompliance relating to the claim, or otherwise appeals denial of the claim, and the franchisor continues to deny the claim, the franchisor shall provide the franchisee with a written notification of the final denial within 30 days of completion of the appeal process, which shall conspicuously state "Final Denial" on the first page.

(5) The franchisor shall not chargeback the franchisee until 45 days after the franchisee receives the written notice described in paragraph (3) or (4), whichever is later. If the franchisee cures any material noncompliance relating to a claim, the franchisor shall not chargeback the dealer for that claim. Any chargeback to a franchisee for incentive program compensation shall be made within 90 days after the franchisee receives that written notice. If the board sustains the chargeback or the protest is dismissed, the franchisor shall have 90 days following issuance of the final order or the dismissal to make the chargeback, unless otherwise provided in a settlement agreement.

(6) Within six months after either receipt of the written notice described in paragraph (3) or (4), a franchisee may file a protest with the board for determination of whether the franchisor complied with this subdivision. If the franchisee files a protest pursuant to this subdivision prior to the franchisor's chargeback for denied claims, the franchisor shall not offset or otherwise undertake to collect the chargeback until the board issues a final order on the protest. In any protest pursuant to this subdivision, the franchisor shall have the burden of proof.

(h) If a false claim was submitted by a franchisee with the intent to defraud the franchisor, a longer period for audit and any resulting chargeback may be permitted if the franchisor obtains an order from the board.

Duties Relating to Section 3065.1

1. Pursuant to Section 3065.1(a), if a protest challenging the initial disapproval of a franchisor incentive program claim is filed with the Board, the Board has a duty to determine whether the franchisor complied with the requirements of Section 3065.1(a)-(d). This is a duty for the members of the Board.
2. Pursuant to Section 3065.1(d), if a protest challenging the final denial of a franchisor incentive program claim following the franchisor's appeal process is filed with the Board, the Board has a duty to determine whether the franchisor complied with the requirements of Section 3065.1(a)-(d). This is a duty for the members of the Board.
3. Pursuant to Section 3065.1(g)(3), if a protest challenging franchisor incentive program claim disapproval of a previously approved claim following an audit is filed with the Board, the Board has a duty to determine whether the franchisor complied with the requirements of Section 3065.1(g). This is a duty for the

members of the Board.

4. Pursuant to Section 3065.1(g)(4), if a protest challenging the final denial of a franchisor incentive program claim following an audit following the franchisor's appeal process is filed with the Board, the Board has a duty to determine whether the franchisor complied with the requirements of Section 3065.1(g). This is a duty for the members of the Board.
5. Pursuant to Section 3065.1(h), the Board has a duty to receive filings relating to a request for an order in accordance with Section 3065.1(h). This is a duty which has been delegated to the staff of the Board.
6. Pursuant to Section 3065.1(h), the Board has the duty to review any request for an extension of time to conduct the franchisor incentive program audit. This duty is for the members of the Board.
7. The staff is responsible for the administration of protests filed under this section, including the proceedings up to and including the evidentiary hearing and preparation of the proposed decision. The members of the Board have the duty to render the final decision on the merits of the protest.

Section 3065.3. Limitation on performance standards or sales objectives of dealer sales, service, or customer service performance

(a) No franchisor shall establish or maintain a performance standard, sales objective, or program for measuring a dealer's sales, service, or customer service performance that is inconsistent with the standards set forth in subdivision (g) of Section 11713.13.

(b) A franchisee may file a protest with the board for determination of whether a franchisor has complied with this section and in that proceeding the franchisor shall have the burden of proof.

Duties Relating to Section 3065.3

1. If a protest is filed pursuant to Section 3065.3, the Board has a duty to determine whether the franchisor complied with the requirements of Section 11713.13(g). This is a duty for the members of the Board.
2. The staff is responsible for the administration of protests filed under this section, including the proceedings up to and including the evidentiary hearing and preparation of the proposed decision. The members of the Board have the duty to render the final decision on the merits of the protest.

Section 3065.4. Filing a protest with board for declaration of franchisee's retail labor rate or retail parts rate; Judicial review

(a) If a franchisor fails to comply with Section 3065.2, or if a franchisee disputes

the franchisor's proposed adjusted retail labor rate or retail parts rate, the franchisee may file a protest with the board for a declaration of the franchisee's retail labor rate or retail parts rate. In any protest under this section, the franchisor shall have the burden of proof that it complied with Section 3065.2 and that the franchisee's determination of the retail labor rate or retail parts rate is materially inaccurate or fraudulent.

(b) Upon a decision by the board pursuant to subdivision (a), the board may determine the difference between the amount the franchisee has actually received from the franchisor for fulfilled warranty obligations and the amount that the franchisee would have received if the franchisor had compensated the franchisee at the retail labor rate and retail parts rate as determined in accordance with Section 3065.2 for a period beginning 30 days after receipt of the franchisee's initial submission under subdivision (a) of Section 3065.2. The franchisee may submit a request to the franchisor to calculate the unpaid warranty reimbursement compensation and the franchisor shall provide this calculation to the franchisee within 30 days after receipt of the request. The request for the calculation will also be deemed a request for payment of the unpaid warranty reimbursement compensation.

(c) If the franchisor fails to make full payment within 30 days after the franchisee submits a request for payment, the franchisee may file an action in superior court for injunctive and other appropriate relief to enforce the determination or order of the board. The franchisee may also recover in superior court its actual reasonable expenses in bringing and maintaining an enforcement action in superior court.

(d) Either the franchisor or the franchisee may seek judicial review of the board's determination pursuant to Section 3068

Duties Relating to Section 3065.4

1. A franchisee may file a protest pursuant to Section 3065.4(a) seeking a declaration of the franchisee's retail labor rate or retail parts rate. This is a duty for the members of the Board.
2. Pursuant to Section 3065.4(b), upon a decision by the Board pursuant to subdivision (a), the Board may determine the difference between the amount the franchisee has actually received from the franchisor for fulfilled warranty obligations and the amount that the franchisee would have received if the franchisor had compensated the franchisee at the retail labor rate and retail parts rate as determined in accordance with Section 3065.2 for a period beginning 30 days after receipt of the franchisee's initial submission under subdivision (a) of Section 3065.2. This is a duty for the members of the Board.
3. The staff is responsible for the administration of protests filed under this section, including the proceedings up to and including the evidentiary hearing and preparation of the proposed decision. The members of the Board have the duty to render the final decision on the merits of the protest.

Section 3066. Hearings on Protests

(a) Upon receiving a protest pursuant to Section 3060, 3062, 3064, 3065, 3065.1, 3065.3, or 3065.4 the board shall fix a time within 60 days of the order, and place of hearing, and shall send by certified mail a copy of the order to the franchisor, the protesting franchisee, and all individuals and groups that have requested notification by the board of protests and decisions of the board. Except in a case involving a franchisee who deals exclusively in motorcycles, the board or its executive director may, upon a showing of good cause, accelerate or postpone the date initially established for a hearing, but the hearing shall not be rescheduled more than 90 days after the board's initial order. For the purpose of accelerating or postponing a hearing date, "good cause" includes, but is not limited to, the effects upon, and any irreparable harm to, the parties or interested persons or groups if the request for a change in hearing date is not granted. The board or an administrative law judge designated by the board shall hear and consider the oral and documented evidence introduced by the parties and other interested individuals and groups, and the board shall make its decision solely on the record so made. Chapter 4.5 (commencing with Section 11400) of Part 1 of Division 3 of Title 2 of the Government Code and Sections 11507.3, 11507.6, 11507.7, 11511, 11511.5, 11513, 11514, 11515, and 11517 of the Government Code apply to these proceedings.

(b) In a hearing on a protest filed pursuant to Section 3060 or 3062, the franchisor shall have the burden of proof to establish that there is good cause to modify, replace, terminate, or refuse to continue a franchise. The franchisee shall have the burden of proof to establish that there is good cause not to enter into a franchise establishing an additional motor vehicle dealership or relocating an existing motor vehicle dealership.

(c) Except as otherwise provided in this chapter, in a hearing on a protest alleging a violation of, or filed pursuant to, Section 3064, 3065, or 3065.1, the franchisee shall have the burden of proof, but the franchisor has the burden of proof to establish that a franchisee acted with intent to defraud the franchisor when the issue is material to a protest filed pursuant to Section 3065 or 3065.1.

(d) In a hearing on a protest filed pursuant to Section 3065.3, the franchisor shall have the burden of proof to establish that the franchisor complied with subdivision (g) of Section 11713.13.

(e) In a hearing on a protest filed pursuant to Section 3065.4, the franchisor shall have the burden of proof to establish that the franchisor complied with Section 3065.2 and that the franchisee's determination of the retail labor rate or retail parts rate is materially inaccurate or fraudulent.

(f) A member of the board who is a new motor vehicle dealer may not participate in, hear, comment, or advise other members upon, or decide, a matter involving a protest filed pursuant to this article unless all parties to the protest stipulate otherwise.

Duties Relating to Section 3066

1. Pursuant to Section 3066(a), the Board has a duty, upon receiving a protest pursuant to Sections 3060, 3062, 3064, 3065, 3065.1, 3065.3, or 3065.4, to fix a

time within 60 days of the order, and place of hearing, and shall send by certified mail a copy of the order to the franchisor, the protesting franchisee, and all individuals and groups that have requested notification by the Board of protests and decisions of the Board. This is a duty which has been delegated to the staff of the Board.

2. Pursuant to Section 3066(a), the Board, upon a showing of good cause, has the right to accelerate or postpone the date initially established for a hearing, but in no event shall the hearing be rescheduled more than 90 days after the Board's initial order. This is a duty which has been delegated to the staff of the Board.
3. Pursuant to Section 3066(a), except in any case involving a franchisee who deals exclusively in motorcycles, the Board or its Executive Director, upon a showing of good cause, has the right to accelerate or postpone the date initially established for a hearing, but the hearing shall not be rescheduled more than 90 days after the Board's initial order. This is a duty which has been delegated to the staff of the Board.
4. Pursuant to Section 3066(a), the Board or an administrative law judge of the Board has a duty to hear and consider the oral and documented evidence introduced by the parties and other interested individuals and groups in accordance with Government Code sections 11507.3, 11507.6, 11507.7, 11511, 11511.5, 11513, 11514, 11515, and 11517. This is a duty which has been delegated to the staff of the Board.
5. Pursuant to Section 3066(a), the Board has the duty to make its decision solely on the record established at a hearing conducted in accordance with Government Code sections 11507.3, 11507.6, 11507.7, 11511, 11511.5, 11513, 11514, 11515, and 11517. This is a duty of the members of the Board.
6. Pursuant to Section 3066(f), unless all parties to the protest stipulate otherwise, a new motor vehicle dealer member may not participate in, hear, comment, or advise other members upon, or decide, a matter involving a protest filed pursuant to Article 4. This is a duty of the dealer members of the Board. The staff of the Board is delegated with the duty of determining whether or not the parties to an Article 4 protest want to stipulate to allow dealer Board member participation.

Section 3067. Decision

(a) The decision of the board shall be in writing and shall contain findings of fact and a determination of the issues presented. The decision shall sustain, conditionally sustain, overrule, or conditionally overrule the protest. Conditions imposed by the board shall be for the purpose of assuring performance of binding contractual agreements between franchisees and franchisors or otherwise serving the purposes of this article. If the board fails to act within 30 days after the hearing, within 30 days after the board receives a proposed decision when the case is heard before an administrative law judge

alone, or within a period necessitated by Section 11517 of the Government Code, or as may be mutually agreed upon by the parties, then the proposed action shall be deemed to be approved. Copies of the board's decision shall be delivered to the parties personally or sent to them by certified mail, as well as to all individuals and groups that have requested notification by the board of protests and decisions by the board. The board's decision shall be final upon its delivery or mailing and a reconsideration or rehearing is not permitted.

(b) Notwithstanding subdivision (c) of Section 11517 of the Government Code, if a protest is heard by an administrative law judge alone, 10 days after receipt by the board of the administrative law judge's proposed decision, a copy of the proposed decision shall be filed by the board as a public record and a copy shall be served by the board on each party and his or her attorney.

Duties Relating to Section 3067

1. Pursuant to Section 3067(a), the Board has a duty to provide its decisions in writing, with findings of facts and a determination of the issues presented. This is a duty for the members of the Board.
2. Pursuant to Section 3067(a), the Board has a duty to provide a conclusion in its decision that shall sustain, conditionally sustain, overrule, or conditionally overrule the protest. This is a duty for the members of the Board.
3. Pursuant to Section 3067(a), the Board has a duty to only provide conditions that are for the purpose of assuring performance of binding contractual agreements between franchisees and franchisors or otherwise serving the purposes of this article. This is a duty for the members of the Board.
4. Pursuant to Section 3067(a), the Board has a duty to act within 30 days after a hearing, within 30 days after the Board receives a proposed decision where the case is heard before an administrative law judge alone, or within such period as may be necessitated by Section 11517 of the Government Code or as may be mutually agreed upon by the parties. This is a duty for the members of the Board.
5. Pursuant to Section 3067(a), the Board has a duty to deliver copies of the decision to the parties personally or send it to them by certified mail, as well as to all individuals and groups that have requested notification by the Board of protests and decisions by the Board. This is a duty which has been delegated to the staff of the Board.
6. Pursuant to Section 3067(b), notwithstanding Government Code section 11517(c), if a protest is heard by an administrative law judge alone, 10 days after receipt by the Board of the administrative law judge's proposed decision, a copy of the proposed decision shall be filed by the Board as a public record and a copy shall be served by the Board on each party and his or her attorney. This is a duty which has been delegated to the staff of the Board.

Section 3070. Termination of Franchise

(a) Notwithstanding Section 20999.1 of the Business and Professions Code or the terms of any franchise, a franchisor of a dealer of new recreational vehicles, as defined in subdivision (a) of Section 18010 of the Health and Safety Code, except a dealer who deals exclusively in truck campers, may not terminate or refuse to continue a franchise unless all of the following conditions are met:

(1) The franchisee and the board have received written notice from the franchisor as follows:

(A) Sixty days before the effective date thereof setting forth the specific grounds for termination or refusal to continue.

(B) Fifteen days before the effective date thereof setting forth the specific grounds with respect to any of the following:

(i) Transfer of any ownership or interest in the franchise without the consent of the franchisor, which consent may not be unreasonably withheld.

(ii) Misrepresentation by the franchisee in applying for the franchise.

(iii) Insolvency of the franchisee, or filing of any petition by or against the franchisee under any bankruptcy or receivership law.

(iv) Any unfair business practice after written warning thereof.

(v) Failure of the dealer to conduct its customary sales and service operations during its customary hours of business for seven consecutive business days, giving rise to a good faith belief on the part of the franchisor that the recreational vehicle dealer is in fact going out of business, except for circumstances beyond the direct control of the recreational vehicle dealer or by order of the department.

(C) The written notice shall contain, on the first page thereof in at least 12-point bold type and circumscribed by a line to segregate it from the rest of the text, one of the following statements, whichever is applicable:

(i) To be inserted when a 60-day notice of termination is given.

"NOTICE TO DEALER: You have the right to file a protest with the NEW MOTOR VEHICLE BOARD in Sacramento and have a hearing in which you may protest the termination of your franchise under provisions of the California Vehicle Code. You must file your protest with the board within 30 calendar days after receiving this notice or within 30 days after the end of any appeal procedure provided by the franchisor or your protest right will be waived."

(ii) To be inserted when a 15-day notice of termination is given.

"NOTICE TO DEALER: You have the right to file a protest with the NEW MOTOR VEHICLE BOARD in Sacramento and have a hearing in which you may protest the termination of your franchise under provisions of the California Vehicle Code. You must file your protest with the board within 10 calendar days after receiving this notice or within 10 days after the end of any appeal procedure provided by the franchisor or your protest right will be waived."

(2) Except as provided in Section 3050.7, the board finds that there is good cause for termination or refusal to continue, following a hearing called pursuant to Section 3080. The franchisee may file a protest with the board within 30 days after receiving a 60-day notice, satisfying the requirements of this section, or within 30 days after the end of any appeal procedure provided by the franchisor, or within 10 days after

receiving a 15-day notice, satisfying the requirements of this section, or within 10 days after the end of any appeal procedure provided by the franchisor. When a protest is filed, the board shall advise the franchisor that a timely protest has been filed, that a hearing is required pursuant to Section 3080, and that the franchisor may not terminate or refuse to continue until the board makes its findings.

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

(b)(1) Notwithstanding Section 20999.1 of the Business and Professions code or the terms of any franchise, a franchisor of a dealer of recreational vehicles may not 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 a notice satisfying the requirements 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. If, however, a replacement franchise is the successor franchise to an expiring or expired term franchise, the prior franchise shall continue in effect until resolution of the protest by the board. In the event of multiple protests, hearings shall be consolidated to expedite the disposition of the issue.

(2) The written notice shall contain, on the first page thereof in at least 12-point bold type and circumscribed by a line to segregate it from the rest of the text, the following statement:

"NOTICE TO DEALER: Your franchise agreement is being modified or replaced. If the modification or replacement will substantially affect your sales or service obligations or investment, you have the right to file a protest with the NEW MOTOR VEHICLE BOARD in Sacramento and have a hearing in which you may protest the proposed modification or replacement of your franchise under provisions of the California Vehicle Code. You must file your protest with the board within 30 calendar days of your receipt of this notice or within 30 days after the end of any appeal procedure provided by the franchisor or your protest rights will be waived."

Duties Relating to Section 3070

1. Pursuant to Section 3070(a)(1) and (b)(1), the Board has a duty to receive written notice from the franchisor in accordance with Section 3070. This is a duty which has been delegated to the staff of the Board.
2. Pursuant to Section 3070(a)(2), the Board has a duty to advise the franchisor that a timely protest has been filed, that a hearing is required pursuant to Section 3080, and that the franchisor may not terminate or refuse to continue until the Board makes its findings. This is a duty which has been delegated to the staff of the Board.

Section 3071. Good Cause

In determining whether good cause has been established for modifying, replacing, terminating, or refusing to continue a franchise of a dealer of new recreational vehicles, the board shall take into consideration the existing circumstances, including, but not limited to, all of the following:

- (a) The amount of business transacted by the franchisee, as compared to the business available to the franchisee.
- (b) The investment necessarily made and obligations incurred by the franchisee to perform its part of the franchise.
- (c) The permanency of the investment.
- (d) Whether it is injurious or beneficial to the public welfare for the franchise to be modified or replaced or the business of the franchisee disrupted.
- (e) Whether the franchisee has adequate new recreational vehicle sales and, if required by the franchise, service facilities, equipment, vehicle parts, and qualified service personnel, to reasonably provide for the needs of the consumers of the recreational vehicles handled by the franchisee and has been and is rendering adequate services to the public.
- (f) Whether the franchisee fails to fulfill the warranty obligations agreed to be performed by the franchisee in the franchise.
- (g) The extent of franchisee's failure to comply with the terms of the franchise.

Duties Relating to Section 3071

1. Pursuant to Section 3071, the Board has a duty, in determining whether good cause has been established for modifying, replacing, terminating, or refusing to continue a franchise, to take into consideration the existing circumstances, including, but not limited to, all of the following subsections delineated in Section 3071 (a) through (g). The staff is responsible for the administration of protests filed under this section, including the proceedings up to and including the evidentiary hearing and preparation of the proposed decision. The members of the Board have the duty to render the final decision on the merits of the protest.

Section 3072. Establishing or Relocating Recreational Vehicle Dealerships

(a)(1) Except as otherwise provided in subdivision (b), if a franchisor seeks to enter into a franchise establishing an additional recreational vehicle dealership, or seeks to relocate an existing recreational vehicle dealership, that has a relevant market area in which the same recreational vehicle line-make is represented, the franchisor shall, in writing, first notify the board and each franchisee in that recreational vehicle 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 any appeal procedure provided by the franchisor, any 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. If, within this time, a franchisee files with the board a request for additional time to file a protest, the board or its executive director, upon a showing of

good cause, may grant an additional 10 days to file the protest. When a protest is filed, the board shall inform the franchisor that a timely protest has been filed, that a hearing is required pursuant to Section 3080, and that the franchisor shall not establish the proposed dealership or relocate the existing dealership until the board has held a hearing as provided in Section 3080, nor thereafter, if the board has determined that there is good cause for not permitting the establishment of the proposed recreational vehicle dealership or relocation of the existing recreational vehicle dealership. In the event of multiple protests, hearings may be consolidated to expedite the disposition of the issue.

(2) The written notice shall contain, on the first page thereof in at least 12-point bold type and circumscribed by a line to segregate it from the rest of the text, the following statement:

"NOTICE TO DEALER: You have the right to file a protest with the NEW MOTOR VEHICLE BOARD in Sacramento and have a hearing on your protest under the terms of the California Vehicle Code if you oppose this action. You must file your protest with the board within 20 days of your receipt of this notice, or within 20 days after the end of any appeal procedure that is provided by us to you. If, within this time, you file with the board a request for additional time to file a protest, the board or its executive director, upon a showing of good cause, may grant you an additional 10 days to file the protest."

(b) Subdivision (a) does not apply to any of the following:

(1) The relocation of an existing dealership to any location that is both within the same city as, and within one mile of, the existing dealership location.

(2) The establishment at any location that is both within the same city as, and within one-quarter mile of, the location of a dealership of the same recreational vehicle line-make that has been out of operation for less than 90 days.

(3) A display of vehicles at a fair, exposition, or similar exhibit if no actual sales are made at the event and the display does not exceed 30 days. This paragraph may not be construed to prohibit a new vehicle dealer from establishing a branch office for the purpose of selling vehicles at the fair, exposition, or similar exhibit, even though that event is sponsored by a financial institution, as defined in Section 31041 of the Financial Code, or by a financial institution and a licensed dealer. The establishment of these branch offices, however, shall be in accordance with subdivision (a) where applicable.

(4) An annual show sponsored by a national trade association of recreational vehicle manufacturers that complies with all of the requirements of subdivision (d) of Section 11713.15.

(c) For the purposes of this section, the reopening of a dealership that has not been in operation for one year or more shall be deemed the establishment of an additional recreational vehicle dealership.

(d) For the purposes of this section and Section 3073, a "recreational vehicle dealership" or "dealership" is any authorized facility at which a franchisee offers for sale or lease, displays for sale or lease, or sells or leases new recreational vehicles, as defined in subdivision (a) of Section 18010 of the Health and Safety Code. A "recreational vehicle dealership" or "dealership" does not include a dealer who deals exclusively in truck campers.

Duties Relating to Section 3072

1. Pursuant to Section 3072(a)(1), the Board has a duty to receive written notice from the franchisor in accordance with Section 3072(a)(1). This is a duty which has been delegated to the staff of the Board.
2. Pursuant to Section 3072(a)(1), the Board or the Executive Director has the right to grant an additional 10 days to file a protest, upon receipt of a request for additional time, and upon a showing of good cause. This is a duty which has been delegated to the staff of the Board.
3. Pursuant to Section 3072(a)(1), the Board has the duty to inform the franchisor that a timely protest has been filed, that a hearing is required pursuant to Section 3080, and that the franchisor may not establish or relocate the proposed dealership until the Board has held a hearing as provided in Section 3080, nor thereafter, if the Board has determined that there is good cause for not permitting the establishment of the proposed recreational vehicle dealership or relocation of the existing recreational vehicle dealership. This is a duty which has been delegated to the staff of the Board.

Section 3073. Good Cause

In determining whether good cause has been established for not entering into a recreational vehicle franchise or relocating an existing dealership of the same recreational vehicle line-make, the board shall take into consideration the existing circumstances, including, but not limited to, all of the following:

- (a) The permanency of the investment.
- (b) The effect on the retail recreational vehicle business and the consuming public in the relevant market area.
- (c) Whether it is injurious to the public welfare for an additional recreational vehicle franchise to be established or an existing dealership be relocated.
- (d) Whether the franchisees of the same recreational vehicle line-make in the relevant market area are providing adequate competition and convenient consumer care for the motor vehicles of the recreational vehicle line-make in the market area. In making this determination, the board shall consider the adequacy of recreational vehicle sales and, if required by the franchise, service facilities, equipment, supply of vehicle parts, and qualified service personnel.
- (e) Whether the establishment of an additional franchise would increase competition and therefore be in the public interest.

Duties Relating to Section 3073

1. Pursuant to Section 3073, the Board has the duty, in determining whether good cause has been established for not entering into a recreational vehicle franchise or relocating an existing dealership of the same recreational vehicle line-make, to take into consideration the existing circumstances, including, but not limited to, all

of the following subsections delineated in Section 3073 (a) through (e). The staff is responsible for the administration of protests filed under this section, including the proceedings up to and including the evidentiary hearing and preparation of the proposed decision. The members of the Board have the duty to render the final decision on the merits of the protest.

Section 3074. Delivery and Preparation Obligations

(a) A franchisor shall specify to its franchisees the delivery and preparation obligations of the franchisees prior to delivery of new recreational vehicles to retail buyers. A copy of the delivery and preparation obligations, which shall constitute the franchisee's only responsibility for product liability between the franchisee and the franchisor but which shall not in any way affect the franchisee's responsibility for product liability between the purchaser and either the franchisee or the franchisor, and a schedule of compensation to be paid franchisees for the work and services they shall be required to perform in connection with the delivery and preparation obligations shall be filed with the board by franchisors, and shall constitute the compensation as set forth on the schedule. The schedule of compensation shall be reasonable, with the reasonableness thereof being subject to the approval of the board, if a franchisee files a notice of protest with the board. In determining the reasonableness of the schedules, the board shall consider all relevant circumstances, including, but not limited to, the time required to perform each function that the dealer is obligated to perform and the appropriate labor rate.

(b) Upon delivery of the vehicle, the franchisee shall give a copy of the delivery and preparation obligations to the purchaser and a written certification that the franchisee has fulfilled these obligations.

Duties Relating to Section 3074

1. Pursuant to Section 3074(a), the Board has a duty to receive a copy of the delivery and preparation obligations, and a schedule of compensation to be paid franchisees for the work and services they shall be required to perform in connection with the delivery and preparation obligations. This is a duty which has been delegated to the staff of the Board.
2. Pursuant to Section 3074(a), if a franchisee files a notice of protest with the Board, the Board has a duty to determine the reasonableness of the schedule of compensation. This is a duty of the members of the Board.
3. Pursuant to Section 3074(a), in determining the above-referenced reasonableness of the schedules, the Board has a duty to consider all relevant circumstances, including, but not limited to, the time required to perform each function that the dealer is obligated to perform and the appropriate labor rate. This is a duty of the members of the Board.
4. The staff is responsible for the administration of protests filed under this section,

including the proceedings up to and including the evidentiary hearing and preparation of the proposed decision. The members of the Board have the duty to render the final decision on the merits of the protest.

Section 3075. Warranty Reimbursement

(a) A franchisor shall properly fulfill every warranty agreement made by it and adequately and fairly compensate each of its franchisees for labor and parts used to fulfill that warranty when the franchisee has fulfilled warranty obligations of repair and servicing and shall file a copy of its warranty reimbursement schedule or formula with the board. The warranty reimbursement schedule or formula shall be reasonable with respect to the time and compensation allowed the franchisee for the warranty work and all other conditions of the obligation. The reasonableness of the warranty reimbursement schedule or formula shall be determined by the board if a franchisee files a notice of protest with the board.

(b) In determining the adequacy and fairness of the compensation, the franchisee's effective labor rate charged to its various retail customers may be considered together with other relevant criteria.

(c) If a franchisor disallows a franchisee's claim for a defective part, alleging that the part, in fact, is not defective, the franchisor shall return the part alleged not to be defective to the franchisee at the expense of the franchisor, or the franchisee shall be reimbursed for the franchisee's cost of the part, at the franchisor's option.

(d) All claims made by franchisees pursuant to this section shall be either approved or disapproved within 30 days after their receipt by the franchisor. A claim not specifically disapproved in writing within 30 days from receipt by the franchisor shall be deemed approved on the 30th day. When a claim is disapproved, the franchisee who submits it shall be notified in writing of its disapproval within the required period, and the notice shall state the specific grounds upon which the disapproval is based. All claims made by franchisees under this section and Section 3074 for labor and parts shall be paid within 30 days following approval. Failure to approve or pay within the above specified time limits, in individual instances for reasons beyond the reasonable control of the franchisor, do not constitute a violation of this article.

(e) Audits of franchisee warranty records may be conducted by the franchisor on a reasonable basis, and for a period of 12 months after a claim is paid or credit issued. Franchisee claims for warranty compensation shall not be disapproved except for good cause, including, but not limited to, performance of nonwarranty repairs, lack of material documentation, or fraud. Any chargeback to a franchisee for warranty parts or service compensation shall be made within 90 days of the completion of the audit. If a false claim was submitted by a franchisee with intent to defraud the franchisor, a longer period for audit and any resulting chargeback may be permitted if the franchisor obtains an order from the board.

Duties Relating to Section 3075

1. Pursuant to Section 3075(a), the Board has a duty to receive a copy of a franchisor's warranty reimbursement schedule or formula. This is a duty which

has been delegated to the staff of the Board.

2. Pursuant to Section 3075(a), if a notice of protest is filed with the Board, the Board has a duty to determine the reasonableness of the warranty reimbursement schedule or formula. This is a duty for the members of the Board.
3. Pursuant to Section 3075(e), the Board has a duty to receive filings relating to a request for an order in accordance with Section 3075(e). This is a duty which has been delegated to the staff of the Board.
4. Pursuant to Section 3075(e), the Board has the duty to review any request for an extension of time to conduct the warranty audit. This duty is for the members of the Board.
5. The staff is responsible for the administration of protests filed under this section, including the proceedings up to and including the evidentiary hearing and preparation of the proposed decision. The members of the Board have the duty to render the final decision on the merits of the protest.

Section 3076. Franchisor Incentive Program

(a) All claims made by a franchisee for payment under the terms of a franchisor incentive program shall be either approved or disapproved within 30 days after receipt by the franchisor. When a claim is disapproved, the franchisee who submits it shall be notified in writing of its disapproval within the required period, and each notice shall state the specific grounds upon which the disapproval is based. A claim not specifically disapproved in writing within 30 days from receipt shall be deemed approved on the 30th day. Following the disapproval of a claim, a franchisee shall have one year from receipt of the notice of disapproval in which to appeal the disapproval to the franchisor and file a protest with the board. All claims made by franchisees under this section shall be paid within 30 days following approval. Failure to approve or pay within the above specified time limits, in individual instances for reasons beyond the reasonable control of the franchisor, do not constitute a violation of this article.

(b) Audits of franchisee incentive records may be conducted by the franchisor on a reasonable basis, and for a period of 18 months after a claim is paid or credit issued. Franchisee claims for incentive program compensation shall not be disapproved except for good cause, such as ineligibility under the terms of the incentive program, lack of material documentation, or fraud. Any chargeback to a franchisee for incentive program compensation shall be made within 90 days of the completion of the audit. If a false claim was submitted by a franchisee with the intent to defraud the franchisor, a longer period for audit and any resulting chargeback may be permitted if the franchisor obtains an order from the board.

Duties Relating to Section 3076

1. Pursuant to Section 3076(a), the Board has a duty to receive a protest relating to

a disapproval of a claim in accordance with Section 3076(a). This is a duty which has been delegated to the staff of the Board.

2. Pursuant to Section 3076(b), the Board has a duty to receive filings relating to a request for an order in accordance with Section 3076(b). This is a duty which has been delegated to the staff of the Board.
3. Pursuant to Section 3076(b), the Board has the duty to review any request for an extension of time to conduct the franchisor incentive program audit. This duty is for the members of the Board.
4. The staff is responsible for the administration of protests filed under this section, including the proceedings up to and including the evidentiary hearing and preparation of the proposed decision. The members of the Board have the duty to render the final decision on the merits of the protest.

Section 3078. Consumer Complaints: Referral to Department of Consumer Affairs

(a) If the board receives a complaint from a member of the public seeking a refund involving the sale or lease of, or a replacement of, a recreational vehicle, as defined in subdivision (a) of Section 18010 of the Health and Safety Code, from a recreational vehicle dealership, as defined in subdivision (d) of Section 3072, the board shall recommend that the complainant consult with the Department of Consumer Affairs.

(b) This chapter does not affect a person's rights regarding a transaction involving a recreational vehicle as defined in subdivision (a), to maintain an action under any other statute, including, but not limited to, applicable provisions of Title 1.7 (commencing with Section 1790) of Part 4 of Division 3 of the Civil Code.

Duties Relating to Section 3078

1. Pursuant to Section 3078(a), if the Board receives a complaint from a member of the public seeking a refund involving the sale or lease of, or a replacement of, a recreational vehicle, as defined, from a motor vehicle dealership as defined in Section 3072(d), the Board has a duty to recommend that the complainant consult with the Department of Consumer Affairs. This is a duty which has been delegated to the staff of the Board.

Section 3080. Recreational Vehicle Hearings on Protests

(a) Upon receiving a protest pursuant to Section 3070, 3072, 3074, 3075, or 3076, the board shall fix a time and place of hearing within 60 days of the order, and shall send by certified mail a copy of the order to the franchisor, the protesting franchisee, and all individuals and groups that have requested notification by the board of protests and decisions of the board. The board or its executive director may, upon a showing of good cause, accelerate or postpone the date initially established for a hearing, but the hearing shall not be rescheduled more than 90 days after the board's initial order. For the

purpose of accelerating or postponing a hearing date, “good cause” includes, but is not limited to, the effects upon, and any irreparable harm to, the parties or interested persons or groups if the request for a change in hearing date is not granted. The board or an administrative law judge designated by the board shall hear and consider the oral and documented evidence introduced by the parties and other interested individuals and groups, and the board shall make its decision solely on the record so made. Chapter 4.5 (commencing with Section 11400) of Part 1 of Division 3 of Title 2 of the Government Code and Sections 11507.3, 11507.6, 11507.7, 11511, 11511.5, 11513, 11514, 11515, and 11517 of the Government Code apply to these proceedings.

(b) In a hearing on a protest filed pursuant to Section 3070 or 3072, the franchisor shall have the burden of proof to establish that there is good cause to modify, replace, terminate, or refuse to continue a franchise. The franchisee shall have the burden of proof to establish that there is good cause not to enter into a franchise establishing an additional recreational vehicle dealership or relocating an existing recreational vehicle dealership.

(c) Except as otherwise provided in this chapter, in a hearing on a protest alleging a violation of, or filed pursuant to, Section 3074, 3075, or 3076, the franchisee shall have the burden of proof, but the franchisor has the burden of proof to establish that a franchisee acted with intent to defraud the franchisor when that issue is material to a protest filed pursuant to Section 3075 or 3076.

Duties Relating to Section 3080

1. Pursuant to Section 3080(a), the Board has a duty, upon receiving a protest pursuant to Sections 3070, 3072, 3074, 3075, or 3076, to fix a time and place of hearing within 60 days of the order, and shall send by certified mail a copy of the order to the franchisor, the protesting franchisee, and all individuals and groups that have requested notification by the Board of protests and decisions of the Board. This is a duty which has been delegated to the staff of the Board.
2. Pursuant to Section 3080(a), the Board, upon a showing of good cause, has the right to accelerate or postpone the date initially established for a hearing, but in no event shall the hearing be rescheduled more than 90 days after the Board's initial order. This is a duty which has been delegated to the staff of the Board.
3. Pursuant to Section 3080(a), the Board or its Executive Director, upon a showing of good cause, has the right to accelerate or postpone the date initially established for a hearing, but the hearing shall not be rescheduled more than 90 days after the Board's initial order. This is a duty which has been delegated to the staff of the Board.
4. Pursuant to Section 3080(a), the Board or an administrative law judge of the Board has a duty to hear and consider the oral and documented evidence introduced by the parties and other interested individuals and groups in accordance with Government Code sections 11507.3, 11507.6, 11507.7, 11511, 11511.5, 11513, 11514, 11515, and 11517. This is a duty which has been

delegated to the staff of the Board.

5. Pursuant to Section 3080(a), the Board has the duty to make its decision solely on the record established at a hearing conducted in accordance with Government Code sections 11507.3, 11507.6, 11507.7, 11511, 11511.5, 11513, 11514, 11515, and 11517. This is a duty of the members of the Board.

Section 3081. Recreational Vehicle Decisions

(a) The decision of the board shall be in writing and shall contain findings of fact and a determination of the issues presented. The decision shall sustain, conditionally sustain, overrule, or conditionally overrule the protest. Conditions imposed by the board shall be for the purpose of assuring performance of binding contractual agreements between franchisees and franchisors or otherwise serving the purposes of this article. If the board fails to act within 30 days after the hearing, within 30 days after the board receives a proposed decision when the case is heard before an administrative law judge alone, or within a period necessitated by Section 11517 of the Government Code, or as may be mutually agreed upon by the parties, then the proposed action shall be deemed to be approved. Copies of the board's decision shall be delivered to the parties personally or sent to them by certified mail, as well as to all individuals and groups that have requested notification by the board of protests and decisions by the board. The board's decision shall be final upon its delivery or mailing and a reconsideration or rehearing is not permitted.

(b) Notwithstanding subdivision (c) of Section 11517 of the Government Code, if a protest is heard by an administrative law judge alone, 10 days after receipt by the board of the administrative law judge's proposed decision, a copy of the proposed decision shall be filed by the board as a public record and a copy shall be served by the board on each party and his or her attorney.

Duties Relating to Section 3081

1. Pursuant to Section 3081(a), the Board has a duty to provide its decisions in writing, with findings of facts and a determination of the issues presented. This is a duty for the members of the Board.
2. Pursuant to Section 3081(a), the Board has a duty to provide a conclusion in its decision that shall sustain, conditionally sustain, overrule, or conditionally overrule the protest. This is a duty for the members of the Board.
3. Pursuant to Section 3081(a), the Board has a duty to only provide conditions that are for the purpose of assuring performance of binding contractual agreements between franchisees and franchisors or otherwise serving the purposes of this article. This is a duty for the members of the Board.
4. Pursuant to Section 3081(a), the Board has a duty to act within 30 days after a hearing, within 30 days after the Board receives a proposed decision where the

case is heard before an administrative law judge alone, or within such period as may be necessitated by Section 11517 of the Government Code or as may be mutually agreed upon by the parties. This is a duty for the members of the Board.

5. Pursuant to Section 3081(a), the Board has a duty to deliver copies of the decision to the parties personally or send it to them by certified mail, as well as to all individuals and groups that have requested notification by the Board of protests and decisions by the Board. This is a duty which has been delegated to the staff of the Board.
6. Pursuant to Section 3081(b), notwithstanding Government Code section 11517(c), if a protest is heard by an administrative law judge alone, 10 days after receipt by the Board of the administrative law judge's proposed decision, a copy of the proposed decision shall be filed by the Board as a public record and a copy shall be served by the Board on each party and his or her attorney. This is a duty which has been delegated to the staff of the Board.

Section 3085. Protest of Export or Sale-for-Resale Prohibition Policy

(a) An association may bring a protest challenging the legality of an export or sale-for-resale prohibition policy of a manufacturer, manufacturer branch, distributor, or distributor branch at any time on behalf of two or more dealers subject to the challenged policy pursuant to subdivision (y) of Section 11713.3.

(b) For the purpose of this article, an association is an organization primarily owned by, or comprised of, new motor vehicle dealers and that primarily represents the interests of dealers.

(c) Relief for a protest pursuant to this section is limited to a declaration that an export or sale-for-resale prohibition policy of a manufacturer, manufacturer branch, distributor, or distributor branch violates the prohibitions of subdivision (y) of Section 11713.3. No monetary relief may be sought on behalf of the association or any dealers represented by the association.

(d) In a protest pursuant to this section, the association shall have the burden of proof to show that the challenged export or sale-for-resale prohibition policy violates subdivision (y) of Section 11713.3.

Duties Relating to Section 3085

1. Pursuant to Section 3085(a), if a protest is filed with the Board, the Board has a duty to make sure it is filed by an association as defined on behalf of two or more dealers subject to the challenged export or sale-for-resale prohibition policy. This is a duty which has been delegated to the staff of the Board. The staff is responsible for the administration of protests filed under this section, including the proceedings up to and including the evidentiary hearing and preparation of the proposed decision.
2. Pursuant to Section 3085(c), the Board has a duty to limit the relief awarded to

protestant to a declaration that an export or sale-for-resale prohibition policy violates subdivision (y) of Section 11713.3. The Board is not authorized to award monetary relief. The members of the Board have the duty to render the final decision on the merits of the protest that does not exceed these limits.

Section 3085.2. Hearings on Protest

(a) Upon receiving a protest pursuant to Section 3085, the board shall fix a time and place of hearing within 60 days, and shall send by certified mail a copy of the order to the manufacturer, manufacturer branch, distributor, distributor branch, the protesting association, and all individuals and groups that have requested notification by the board of protests and decisions of the board. The board or an administrative law judge designated by the board shall hear and consider the oral and documented evidence introduced by the parties and other interested individuals and groups, and the board shall make its decision solely on the record so made. Chapter 4.5 (commencing with Section 11400) of Part 1 of Division 3 of Title 2 of the Government Code and Sections 11507.3, 11507.6, 11507.7, 11511, 11511.5, 11513, 11514, 11515, and 11517 of the Government Code apply to these proceedings.

(b) In a hearing on a protest filed pursuant to Section 3085, the association shall have the burden of proof to establish a violation of the applicable section by the subject manufacturer, manufacturer branch, distributor, or distributor branch.

(c) A member of the board who is a new motor vehicle dealer may not participate in, hear, comment, or advise other members upon, or decide, a matter involving a protest filed pursuant to this article unless all parties to the protest stipulate otherwise.

Duties Relating to Section 3085.2

1. Pursuant to Section 3085.2(a), the Board has a duty, upon receiving a protest pursuant to Section 3085 to fix a time and place of hearing within 60 days, and shall send by certified mail a copy of the order to the manufacturer or distributor, the protesting association, and all individuals and groups that have requested notification by the Board of protests and decisions of the Board. This is a duty which has been delegated to the staff of the Board.
2. Pursuant to Section 3085.2(b), the Board or an administrative law judge of the Board has a duty to hear and consider the oral and documented evidence introduced by the parties and other interested individuals and groups in accordance with Government Code sections 11507.3, 11507.6, 11507.7, 11511, 11511.5, 11513, 11514, 11515, and 11517. This is a duty which has been delegated to the staff of the Board.
3. Pursuant to Section 3085.2(b), the Board has the duty to make its decision solely on the record established at a hearing conducted in accordance with Government Code sections 11507.3, 11507.6, 11507.7, 11511, 11511.5, 11513, 11514, 11515, and 11517. This is a duty of the members of the Board.
4. Pursuant to Section 3085.2(d), unless all parties to the protest stipulate

otherwise, a new motor vehicle dealer member may not participate in, hear, comment, or advise other members upon, or decide, a matter involving a protest filed pursuant to Article 6. This is a duty of the dealer members of the Board. The staff of the Board is delegated with the duty of determining whether or not the parties to an Article 6 protest want to stipulate to allow dealer Board member participation.

Section 3085.4. Decision

(a) The decision of the board shall be in writing and shall contain findings of fact and a determination of the issues presented. The decision shall sustain, conditionally sustain, overrule, or conditionally overrule the protest. Conditions imposed by the board shall be for the purpose of assuring performance of binding contractual agreements between franchisees and franchisors or otherwise serving the purposes of this article. The board shall act within 30 days after the hearing, within 30 days after the board receives a proposed decision when the case is heard before an administrative law judge alone, or within a period necessitated by Section 11517 of the Government Code, or as may be mutually agreed upon by the parties. Copies of the board's decision shall be delivered to the parties personally or sent to them by certified mail, as well as to all individuals and groups that have requested notification by the board of protests and decisions by the board. The board's decision shall be final upon its delivery or mailing and a reconsideration or rehearing is not permitted.

(b) Notwithstanding subdivision (c) of Section 11517 of the Government Code, if a protest is heard by an administrative law judge alone, 10 days after receipt by the board of the administrative law judge's proposed decision, a copy of the proposed decision shall be filed by the board as a public record and a copy shall be served by the board on each party and his or her attorney.

Duties Relating to Section 3085.4

1. Pursuant to Section 3085.4(a), the Board has a duty to provide its decisions in writing, with findings of facts and a determination of the issues presented. This is a duty for the members of the Board.
2. Pursuant to Section 3085.4(a), the Board has a duty to provide a conclusion in its decision that shall sustain, conditionally sustain, overrule, or conditionally overrule the protest. This is a duty for the members of the Board.
3. Pursuant to Section 3085.4(a), the Board has a duty to only provide conditions that are for the purpose of assuring performance of binding contractual agreements between franchisees and franchisors or otherwise serving the purposes of this article. This is a duty for the members of the Board.
4. Pursuant to Section 3085.4(a), the Board has a duty to act within 30 days after a hearing, within 30 days after the Board receives a proposed decision where the

case is heard before an administrative law judge alone, or within such period as may be necessitated by Section 11517 of the Government Code or as may be mutually agreed upon by the parties. This is a duty for the members of the Board.

5. Pursuant to Section 3085.4(a), the Board has a duty to deliver copies of the decision to the parties personally or send it to them by certified mail, as well as to all individuals and groups that have requested notification by the Board of protests and decisions by the Board. This is a duty which has been delegated to the staff of the Board.
6. Pursuant to Section 3085.4(b), notwithstanding Government Code section 11517(c), if a protest is heard by an administrative law judge alone, 10 days after receipt by the Board of the administrative law judge's proposed decision, a copy of the proposed decision shall be filed by the Board as a public record and a copy shall be served by the Board on each party and his or her attorney. This is a duty which has been delegated to the staff of the Board.

B. Delegation of Administrative Duties. The following is a list of the non-statutory or administrative duties of the Board and staff, with an indication as to individual or entity to whom these duties have been delegated.

1. Personnel.

- a. The members of the Board have the duty to recruit, interview, and hire for the positions of Executive Director as well as the General Counsel and Administrative Law Judges.
- b. The Executive Director has been delegated with the responsibility of recruiting, interviewing, and hiring all individuals associated with the legal operations of the Board.
- c. The Staff Services Manager II has been delegated with the responsibility of recruiting, interviewing, and hiring all individuals associated with the clerical operations of the Board. Any candidate selected by the Staff Services Manager II shall be approved by the Executive Director prior to processing the hiring documents.
- d. Any hiring done by the staff of the Board in accordance with the procedures as set forth above shall be reported to the Board at the next General Meeting of the Board which ensues such hiring.

2. Procurement.

Subject to the limitations set forth below, the Executive Director has been delegated with the responsibility of procuring all necessary equipment, supplies, and services which are deemed necessary to administer the responsibilities of the

Board.

a. Limitations on procurement authority.

The Executive Director is delegated the authority to procure of any necessary equipment, supplies, and services up to the amount budgeted in a line item of the Board's approved budget. If, due to extenuating circumstances, the necessary expenditure exceeds the amount budgeted, the Executive Director shall contact the members of the Fiscal Committee by telephone and discuss this matter. The Committee may authorize the procurement which may then be ratified by the full Board at its next regularly scheduled meeting.

3. Budget Change Proposals.

All budget change proposals shall be submitted with the concurrence of the Fiscal Committee, and ultimately considered by the full Board at its next regularly scheduled meeting.

4. Formal Board Delegations at Noticed Meetings.³

a. Amicus Curiae Briefs.

The Board will not file any amicus briefs without the consent of Business, Transportation & Housing Agency⁴ ("Agency") and approval of the Governor's Office of Legal Affairs. As a prerequisite to requesting the consent of Agency, the Board must (a) discuss and approve the consent request at a noticed public meeting, or (b) in the case where time constraints do not permit the foregoing the President may authorize the request for consent. In any instance when the President authorizes the request, a notice shall be immediately sent to Board members. If any member seeks immediate review of this action, the member may request that the President call a special meeting of the Board to discuss the matter. If there is no such immediate review requested, the matter will be included in the agenda of the next regularly scheduled Board meeting. If the Board determines that it does not want to file the amicus brief, the request for consent will be withdrawn.

(July 12, 1996 - Business, Transportation & Housing Agency Audit Recommendation 4)

³ The Board Meeting(s) in which the delegation occurred is noted in parenthesis after the formal delegation.

⁴ Business, Transportation & Housing Agency was superseded by the California State Transportation Agency on July 1, 2013.

b. Assignment of Merits Hearings to Office of Administrative Hearings.

For a period not to exceed three years, the Executive Director has discretion to assign additional merits hearings to OAH outside the current assignment log. Prior to submitting a hearing to OAH that is outside the normal rotation, the Executive Director will seek Executive Committee permission. The use of OAH in general and any additional assignments will be reported to the Board in the Executive Director's Report.

(April 28, 2023)

c. Audit Compliance Officer.

The Board has designated the General Counsel⁵ to service as its Audit Compliance Officer to ensure compliance with all facets of the 1996 Agency Performance Audit. This includes the Corrective Action Plan Committee's proposal which was adopted by the Board at its December 8, 1998, General meeting, and the Audit Review Committee's recommendations concerning restructuring the senior management positions which were adopted at the May 25, 2000, General meeting. An annual report shall be provided to the Board each June updating the Board's compliance. This report was subsequently made an exception report.

(July 12, 1996; December 8, 1998; May 25, 2000; November 20, 2008; and May 26, 2011)

d. Bagley-Keene Open Meeting Act Compliance Officer.

The General Counsel⁶ is the Bagley-Keene Open Meeting Act Compliance Officer.

(July 12, 1996; May 25, 2000)

e. Bagley-Keene Opening Meeting Act: Closed Meeting Minutes.

The Bagley-Keene Open Meeting Act requires that all state bodies designate a clerk or other officer or employee of the state body, who shall then attend each closed session of the state body and keep and enter in a minute book a record of topics discussed and decisions made at the meeting. In order to ensure compliance, the General Counsel⁷ is responsible for maintaining the closed meeting minutes in accordance with the Bagley-Keene Open Meeting Act.

⁵ Robin Parker, Chief Counsel, is performing all of the duties previously assigned to the Board's General Counsel including but not limited to the Audit Compliance Officer, the Bagley-Keene Compliance Officer, and maintaining the closed meeting minutes in accordance with the Bagley-Keene Open Meeting Act.

⁶ See footnote 5.

⁷ See footnote 5.

(July 12, 1996; May 25, 2000)

f. Decision Cover Sheet.

The presiding Administrative Law Judge shall prepare a decision cover sheet/analysis which is provided to the Board members with their meeting materials when a proposed decision or ruling (order) is agendized. The decision cover sheet should be limited to two pages and not contain a recommendation.

(December 8, 1998; May 25, 2000)

g. Court Participation on Issues of Interest to the Board.

The Board, as a general rule, should not substantively participate in mandamus actions in which a Board decision is challenged. When the Board renders a final decision which is challenged by way of a petition for writ of administrative mandamus, and an important State interest is not raised in the mandamus proceeding, then the Board shall notify the parties to the proceeding of the Board's policy not to appear in the mandamus action, and request that the parties so notify the court and keep it on the proof of service list. As such, unless the court specifically requests otherwise, the Board would not file any pleadings in the court action, which would obviate the necessity of involvement by the office of the Attorney General.

However, in mandamus actions in which an important State issue is raised, the Board would have the option to participate by the filing of pleadings opposing the petition and by presenting oral arguments on only those limited issues affecting the State interest. In such situations, prior to Board participation, the matter would be presented to the full Board for review at a regularly scheduled meeting of the Board. In the absence of sufficient time for consideration at a noticed Board meeting, the President, or a Board member designated by the President, can authorize the filing of appropriate pleadings in opposition to the petition and/or the presentation of oral arguments. When this occurs, a copy of the petition and supporting documents would be mailed to each Board member with an indication that the President, or his or her designee, has authorized Board participation. Any Board member who objects to Board participation would then immediately so notify staff and the matter would be scheduled for discussion at either the next general meeting of the Board or, if three public members request, then at a special meeting of the Board. Any appearance by the Board would be made by the office of the Attorney General or, with the consent of the Attorney General, by the Board's own counsel.

(October 22, 1996, February 12, 1997; March 18, 1997 - Business, Transportation & Housing Agency Audit Recommendation 5)

h. Document Requests – Waiver of Fees.

The Board will charge fees for document requests that are consistent with Evidence Code section 1563, and all fees for document requests that total \$10.00 or less (less than 40 pages and less than 15 minutes of actual labor) will be waived by the Board, subject to review and approval by the Executive Director.

(October 22, 1996; September 6, 2001; December 13, 2006)

i. Legislative Policy

If there is insufficient time for Legislative Committee approval, the Board delegated to the Executive Director the power to approve legislative analyses pertaining to Legislation of Special Interest that are submitted to California State Transportation Agency and the Department of Motor Vehicles. The Legislative Committee delegates to the Executive Director the ability to discuss pending Legislation of Special Interest with stakeholders or sponsors regarding technical input without prior committee approval.

(June 7, 2019)

j. Liaison Information Security Officer.

The Executive Director is the Liaison Information Security Officer and responsible for ensuring compliance with information security procedures. This ensures that the Board complies with the Government Code that requires that each agency have an officer who is responsible for ensuring that the organization's systems and procedures are in compliance.

(August 20, 1996; December 12, 2000)

k. Promulgating Regulations.

The Board delegated to the Executive Director the ministerial duty of proceeding through the rulemaking process in compliance with the Administrative Procedure Act. All substantive changes to the proposed text suggested by Board staff, the public, or the Office of Administrative Law ("OAL") would be brought before the members at the next meeting. Non-substantive changes suggested by OAL or staff would be submitted to the Executive Committee for consideration and ultimately reported to the Board at the next meeting.

(April 26, 2002)

l. Public Member Designee if President is Dealer Member.

When a Dealer Member is President, only those matters in which a Dealer Member would be disqualified from having heard in the first place are

delegated. Furthermore, if a Dealer Member is Board President, and a Public Member is Vice President, then the designation would automatically go to the Vice President.

(October 22, 1996, February 12, 1997; March 18, 1997 - Business, Transportation & Housing Agency Audit Recommendation 5; June 26, 2008)



***EXECUTIVE
DIRECTOR'S
REPORT***

April 28, 2023

A.

**ADMINISTRATIVE
MATTERS**

Project Title/Manager	Project Goal (Description)	Estimated Completion Date	Status
ADMINISTRATION COMMITTEE			
1. <u>Update Guide to the New Motor Vehicle Board</u> Robin Parker	Update the <i>Guide to the New Motor Vehicle Board</i> to incorporate statutory and regulatory changes.	April 2023	In progress. The revised Guide will be considered at the April 28, 2023, General Meeting.
2. <u>Report on Annual Training Programs</u> Dawn Kindel	Update the Board on training attended by staff in 2022.	April 2023	In progress. An update will be given at the April 28, 2023, General Meeting.
3. <u>Update concerning moving the Board's Offices to DMV Headquarters</u> Tim Corcoran, Dawn Kindel	Update regarding moving of the Board's Offices upon the expiration of the current lease to DMV Headquarters.	Ongoing	In progress.
<u>Revise the Board's Logo</u> Dawn Kindel, Lee Moore, Holly Victor	Consider whether to revise the Board's current logo that is on publications and letterhead to reflect the logo used in the Industry Roundtable marketing materials.	January 2023	<u>Completed.</u> A new logo was adopted at the January 25, 2023, General Meeting.
<u>Amend Board Document Request Policy, Waiver Request Policy, and Facsimile Request Policy</u> Robin Parker	Amend the Board adopted Document Request Policy, Waiver Request Policy, and Facsimile Request Policy to reflect changes to the California Public Records Act that were operative on January 1, 2023.	January 2023	<u>Completed.</u> The Board amended the policies at the January 25, 2023, General Meeting.

Project Title/Manager	Project Goal (Description)	Estimated Completion Date	Status
BOARD DEVELOPMENT COMMITTEE			
<u>1. Schedule Board Member Education Presentations</u> Board Development Committee	Develop a schedule for prioritizing topics and speakers for Board member education presentations for upcoming meetings.	Ongoing	In progress.
<u>Solon C. Soteris Employee Recognition Award Recipient</u> Tim Corcoran	Compile the nominations provided by staff and select a nominee for the Solon C. Soteris Employee Recognition Award.	January 2023	<u>Completed.</u> At the January 25, 2023, General Meeting, the members approved Danielle Phomsopha as the recipient.
EXECUTIVE COMMITTEE			
<u>1. Annual review of Mission and Vision Statements</u> Tim Corcoran	Board will annually review its mission and vision statements.	April 2023	In progress. The Board's mission and visions statements will be reviewed at the April 28, 2023, General Meeting.
<u>2. Consider amendments to Board delegations</u> Tim Corcoran, Robin Parker	Review and consider amendments to the Board adopted delegations in compliant with the 1996 Performance Audit	April 2023	In progress. Amendments to the Board adopted delegations will be considered at the April 28, 2023, General Meeting.

Project Title/Manager	Project Goal (Description)	Estimated Completion Date	Status
<u>Amend Board Legislative Policy</u> Robin Parker	Amend the Board adopted Legislative Policy to reflect changes to the California Public Records Act that were operative on January 1, 2023.	January 2023	<u>Completed.</u> The legislative policy was amended at the January 25, 2023, General Meeting.
<u>Amend Board Policy Concerning Confidential Proposed Stipulated Decisions and Orders</u> Robin Parker	Amend the Board adopted policy concerning confidential proposed Stipulated Decisions and Orders to reflect changes to the California Public Records Act that were operative on January 1, 2023.	January 2023	<u>Completed.</u> The PSDO policy was amended at the January 25, 2023, General Meeting.
FISCAL COMMITTEE			
<u>1. Quarterly Financial Reports</u> Dawn Kindel, Suzanne Luke	Quarterly reports on the Board's financial condition and related fiscal matters.	Ongoing	In progress.
<u>2. Status Report on the Collection of Fees for the Arbitration Certification Program</u> Dawn Kindel, Suzanne Luke	The staff will provide a report concerning the annual fee collection for the Department of Consumer Affairs, Arbitration Certification Program.	September 2023	In progress. A status report will be provided at the September 21, 2023, General Meeting.

Project Title/Manager	Project Goal (Description)	Estimated Completion Date	Status
3. <u>Proposed Board Budget for the Next Fiscal Year</u> Dawn Kindel, Suzanne Luke	The staff, in conjunction with the Fiscal Committee, will discuss and consider the Board's proposed Budget for fiscal year 2023-2024.	September 2023	In progress. The 2023-2024 Budget will be presented for consideration at the September 21, 2023, General Meeting.
<u>Consideration of Out-of-State Travel Plans</u> Dawn Kindel, Suzanne Luke	The Board will discuss out-of-state travel plans for the upcoming fiscal year.	January 2023	<u>Completed.</u> Travel plans for fiscal year 2023-2024 were approved at the January 25, 2023, General Meeting.
GOVERNMENT AND INDUSTRY AFFAIRS COMMITTEE			
1. <u>Host Board Administrative Law Judge Roundtable</u> Robin Parker, Danielle Phomsopha	Host a Board Administrative Law Judge ("ALJ") Roundtable for purposes of education and training. Provide an opportunity for ALJs to meet in an informal setting, exchange ideas, and offer suggestions to improve the case management hearing process.	TBD	In progress. An ALJ Roundtable will be scheduled in 2023.
LEGISLATIVE COMMITTEE			
1. <u>Review of Pending Legislation</u> Danielle Phomsopha	The staff will provide an overview of pending legislation of special interest and general interest.	April 2023	In progress. A report will be provided at the April 28, 2023, General Meeting.

Project Title/Manager	Project Goal (Description)	Estimated Completion Date	Status
POLICY AND PROCEDURE COMMITTEE			
1. <u>Promulgate new regulation Section 551.26 of Title 13 of the California Code of Regulations</u> Danielle Phomsopha	In compliance with the Administrative Procedure Act, add Section 551.26 to the Board's regulations regarding representation in protests or petitions.	Summer 2023	In progress. The Board approved the text at the November 7, 2022, General Meeting. The staff will proceed with rulemaking.
2. <u>Draft proposed regulations in several sections of Title 13 of the California Code of Regulations</u> Danielle Phomsopha	In compliance with the Administrative Procedure Act, amend Sections 551.1, 551.6, 551.13, 551.14, 551.16, 551.21, 551.23, 553.72, 555, 580, 595 and 599 of the Board's regulations to eliminate references to facsimile and residence addresses, update the Board's address and make language gender neutral where possible.	April 2023	In progress. The proposed amendments will be considered at the April 28, 2023, General Meeting.

Project Title/Manager	Project Goal (Description)	Estimated Completion Date	Status
<u>3. Consider temporary authorization of discretion to Executive Director regarding the assignment of merits hearings to the Office of Administrative Hearings</u> Tim Corcoran, Robin Parker	The Board will consider granting temporary authorization of discretion to the Executive Director to assign additional merits hearings to the Office of Administrative Hearings outside the current "Merits Hearings Judge Assignment Log."	April 2023	In progress. The proposed temporary authorization will be considered at the April 28, 2023, General Meeting.
<u>Report on the Assignment of Cases to Board Administrative Law Judges</u> Danielle Phomsopha	Annual report on the assignment of cases to Board Administrative Law Judges ("ALJs").	January 2023	<u>Completed.</u> A report on the assignment of cases to Board ALJs was presented at the January 25, 2023, General Meeting.
<u>Annual Rulemaking Calendar</u> Danielle Phomsopha	Consideration of the annual rulemaking calendar.	January 2023	<u>Completed.</u> The annual rulemaking calendar was approved at the January 25, 2023, General Meeting.
<u>Update the Informational Guide for Manufacturers and Distributors</u> Robin Parker	Update the <i>Informational Guide for Manufacturers and Distributors</i> .	January 2023	<u>Completed.</u> The revised Guide was approved at the January 25, 2023, General Meeting.

Project Title/Manager	Project Goal (Description)	Estimated Completion Date	Status
<u>Draft the <i>Export or Sale-For-Resale Prohibition Policy Guide</i></u> Robin Parker	Draft the <i>Export or Sale-For-Resale Prohibition Policy Guide</i> for Vehicle Code section 3085 protests filed by an association, as defined.	January 2023	<u>Completed.</u> The revised Guide was approved at the January 25, 2023, General Meeting.
<u>Revise the Merits Judge Assignment Log</u> Tim Corcoran, Robin Parker	Revise the assignment of cases to Board Administrative Law Judges to include the Office of Administrative Hearings.	January 2023	<u>Completed.</u> The merits judge assignment log was revised at the January 25, 2023, General Meeting.

Project Title/Manager	Project Goal (Description)	Estimated Completion Date	Status
AD HOC COMMITTEE ON EQUITY, JUSTICE AND INCLUSION			
1. <u>Develop Strategies for Board Consideration</u> Tim Corcoran, Danielle Phomsopha	Develop strategies for the Board's consideration, which advance California State Transportation Agency's stated goal of "Enhancing the lives of all Californians – particularly people of color and disadvantaged communities..." Draft a Mission Statement for consideration by the full Board.	Ongoing	In progress. At the February 16, 2021, General Meeting, the full Board revised the Mission Statement previously adopted by the Ad Hoc Committee at its January 19, 2021, meeting. This statement was reviewed and amended at the August 27, 2021, Special Meeting. The 2022 Industry Roundtable encompassed discussions on Equity and EVs.

B. CASE MANAGEMENT

CASE VOLUME

JANUARY 10, 2022, THROUGH APRIL 11, 2023

VEHICLE CODE SECTION	CASE TYPE	NUMBER OF NEW CASES	NUMBER OF RESOLVED CASES	NUMBER OF PENDING CASES
3060	Termination	2	5	9
3060	Modification	1	1	12
3062	Establishment	0	2	1
3062	Relocation	0	0	0
3062	Off-Site Sale	0	0	0
3064	Delivery/Preparation Obligations	0	0	0
3065	Warranty Reimbursement	0	6	3
3065.1	Incentive Program Reimbursement	0	5	3
3065.3	Performance Standard	0	0	0
3065.4	Retail Labor Rate or Retail Parts Rate	0	4	3
3070	Termination	0	0	0
3070	Modification	0	0	0
3072	Establishment	0	0	0
3072	Relocation	0	0	0
3072	Off-Site Sale	0	0	0
3074	Delivery/Preparation Obligations	0	0	0
3075	Warranty Reimbursement	0	0	0
3076	Incentive Program Reimbursement	0	0	0
3085	Export or Sale-For Resale	0	0	0
3050(b)	Petition	0	0	1
TOTAL CASES:		3	23	32

PENDING CASES

BY CASE NUMBER

ABBREVIATIONS			
ALJ	Administrative Law Judge	Bd. Mtg.	Board Meeting
HRC	Hearing Readiness Conference	IFU	Informal Follow-Up
MH	Merits Hearing	CMH	Continued Merits Hearing
RMH	Resumed Merits Hearing	MSC	Mandatory Settlement Conference
CMSC	Continued Mandatory Settlement Conference	RMSC	Resumed Mandatory Settlement Conference
MTCP	Motion to Compel Production	MTC	Motion to Continue
MTD	Motion to Dismiss	PHC	Pre-Hearing Conference
CPHC	Continued Pre-Hearing Conference	RPHC	Resumed Pre-Hearing Conference
PD	Proposed Decision	RFPD	Requests for Production of Documents
PSDO	Proposed Stipulated Decision and Order	ROB	Rulings on Objections
CROB	Continued Rulings on Objections	RROB	Resumed Rulings on Objections
SC	Status Conference	CSC	Continued Status Conference
* Consolidated, non-lead case			

PROTESTS

	CASE NUMBER/ DATE FILED	STATUS	PROTEST NAME	COUNSEL	CASE TYPE
1.	PR-2501-17 1-19-17	Parties working on settlement agreement	Stevens Creek Luxury Imports, Inc. dba AutoNation Maserati Stevens Creek v. Maserati North America, Inc.	Protestant: Gavin M. Hughes, Robert A. Mayville, Jr. Respondent: Randy Oyler, Bob Davies, Mary Stewart	Modification

April 2023 Executive Director's Report

	CASE NUMBER/ DATE FILED	STATUS	PROTEST NAME	COUNSEL	CASE TYPE
2.	PR-2506-17* 1-23-17	Parties working on settlement agreement	Rusnak/Pasadena, dba Rusnak Maserati of Pasadena v. Maserati North America, Inc.	Protestant: Christian Scali Respondent: Randy Oyler, Bob Davies, Mary Stewart	Modification
3.	PR-2673-20 6-4-20	Parties working to settle this matter without Board consideration of the ALJ's recommended order	Bonander Auto, Truck & Trailer, Inc., a California Corporation v. Daimler Truck North America, LLC	Protestant: Andrew Stearns Respondent: Megan O. Curran, Dyana K. Mardon, Roberta F. Howell	Termination
4.	PR-2754-21 12-7-21	CHRC: 4-17-23 CPHC with ALJ: 4-17-23 MH: 5-15-23 (5 days)	Auto Gallery, Inc., dba Auto Gallery Mitsubishi - Corona v. Mitsubishi Motors North America, Inc.	Protestant: Gavin M. Hughes, Robert A. Mayville, Jr. Respondent: Dean A. Martoccia, William F. Benson, Brandon L. Bigelow	Warranty
5.	PR-2755-21* 12-7-21	CHRC: 4-17-23 CPHC with ALJ: 4-17-23 MH: 5-15-23 (5 days)	Soraya, Inc., dba Auto Galley Mitsubishi – Murrieta v. Mitsubishi Motors North America, Inc.	Protestant: Gavin M. Hughes, Robert A. Mayville, Jr. Respondent: Dean A. Martoccia, Brandon L. Bigelow	Warranty

April 2023 Executive Director's Report

	CASE NUMBER/ DATE FILED	STATUS	PROTEST NAME	COUNSEL	CASE TYPE
6.	PR-2759-21 12-30-21	Motion to Exclude Untimely Expert Rebuttal Report hearing: 4-18- 23 MH: Date pending	KPAuto, LLC, dba Putnam Ford of San Mateo v. Ford Motor Company	Protestant: Gavin M. Hughes, Robert A. Mayville, Jr. Respondent: Steven M. Kelso, Gwen J. Young, H. Camille Papini-Chapla	Retail Labor Rate
7.	PR-2765-22 2-15-22	HRC: 7-14-23 MH: 8-28-23 (9 days)	Rally Auto Group, Inc. v. Kia America, Inc.	Protestant: Victor P. Danhi, Franjo M. Dolenac, Michael Garcia Respondent: Michael L. Turrill, Jonathan R. Stulberg, John J. Sullivan	Termination
8.	PR-2769-22 3-25-22	Parties are working on settlement IFU: 6-26-23	Motorrad LLC, a California limited liability company dba BMW Motorcycles of San Francisco v. BMW Motorrad USA Division of BMW of North America, LLC, a Delaware limited liability company	Protestant: Halbert B. Rasmussen Respondent: Stephen M. Bledsoe, Eric Y. Kizirian	Modification

	CASE NUMBER/ DATE FILED	STATUS	PROTEST NAME	COUNSEL	CASE TYPE
9.	PR-2770-22* 3-25-22	Parties are working on settlement IFU: 6-26-23	Moto Miyako Inc., a California Corporation dba BMW Motorcycles of Burbank v. BMW Motorrad USA Division of BMW of North America, LLC, a Delaware limited liability company	Protestant: Halbert B. Rasmussen Respondent: Stephen M. Bledsoe, Eric Y. Kizirian	Modification
10.	PR-2771-22* 3-25-22	Parties are working on settlement IFU: 6-26-23	O & O Motorrad, Incorporated, a California Corporation dba San Diego BMW Motorcycles v. BMW Motorrad USA Division of BMW of North America, LLC, a Delaware limited liability company	Protestant: Halbert B. Rasmussen Respondent: Stephen M. Bledsoe, Eric Y. Kizirian	Modification
11.	PR-2773-22* 3-25-22	Parties are working on settlement IFU: 6-26-23	Central Coast Powersports LLC, a California limited liability company dba BMW Motorcycles of Ventura County v. BMW Motorrad USA Division of BMW of North America, LLC, a Delaware limited liability company	Protestant: Halbert B. Rasmussen Respondent: Stephen M. Bledsoe, Eric Y. Kizirian	Modification

	CASE NUMBER/ DATE FILED	STATUS	PROTEST NAME	COUNSEL	CASE TYPE
12.	PR-2774-22* 3-25-22	Parties are working on settlement IFU: 6-26-23	San Jose Motosport, Inc., a California Corporation dba San Jose BMW Motorcycles v. BMW Motorrad USA Division of BMW of North America, LLC, a Delaware limited liability company	Protestant: Halbert B. Rasmussen Respondent: Stephen M. Bledsoe, Eric Y. Kizirian	Modification
13.	PR-2775-22* 3-25-22	Parties are working on settlement IFU: 6-26-23	Ride on Powersports, Inc., a California Corporation dba BMW Motorcycles of Riverside v. BMW Motorrad USA Division of BMW of North America, LLC, a Delaware limited liability company	Protestant: Halbert B. Rasmussen Respondent: Stephen M. Bledsoe, Eric Y. Kizirian	Modification
14.	PR-2776-22* 3-25-22	Parties are working on settlement IFU: 6-26-23	Motorrad LLC, a California limited liability company dba BMW Motorcycles of Concord v. BMW Motorrad USA Division of BMW of North America, LLC, a Delaware limited liability company	Protestant: Halbert B. Rasmussen Respondent: Stephen M. Bledsoe, Eric Y. Kizirian	Modification
15.	PR-2777-22* 3-25-22	Parties are working on settlement IFU: 6-26-23	Powersports Unlimited, Inc., a California corporation dba BMW Motorcycles of Escondido	Protestant: Halbert B. Rasmussen Respondent: Stephen M. Bledsoe, Eric Y. Kizirian	Modification

April 2023 Executive Director's Report

	CASE NUMBER/ DATE FILED	STATUS	PROTEST NAME	COUNSEL	CASE TYPE
16.	PR-2778-22* 3-25-22	Parties are working on settlement IFU: 6-26-23	Winner Motorcycles, Limited Liability Company dba BMW Motorcycles of Santa Rosa v. BMW Motorrad USA Division of BMW of North America, LLC, a Delaware limited liability company	Protestant: Halbert B. Rasmussen Respondent: Stephen M. Bledsoe, Eric Y. Kizirian	Modification
17.	PR-2788-22 5-5-22	Renewed MTD/Motion to Seal hearing: 4-18-23 Motion for Protective Order and Motion to Continue Hearing: 4-21-23 HRC: 6-9-23 MH: 7-17-23 (7 days)	CJ's Road to Lemans Corp dba Audi Fresno, a California v. Volkswagen Group of America, Inc., a New Jersey corporation, dba Audi of America, Inc.	Protestant: Johnathan Michaels, Matthew Van Fleet Respondent: Owen H. Smith, Connor A. Gants, Nicholas W. Laird, David B. Lurie	Termination
18.	PR-2789-22* 5-11-22	Parties are working on settlement IFU: 6-26-23	SEAVCO, a California corporation dba Irv Seaver Motorcycles v. BMW Motorrad USA Division of BMW of North America, LLC, a Delaware limited liability company	Protestant: Halbert B. Rasmussen Respondent: Stephen M. Bledsoe, Eric Y. Kizirian	Modification

April 2023 Executive Director's Report

	CASE NUMBER/ DATE FILED	STATUS	PROTEST NAME	COUNSEL	CASE TYPE
19.	PR-2802-22 9-1-22	Parties working on settlement	Puente Hills Hyundai, LLC, dba Puente Hills Hyundai v. Hyundai Motor America	Protestant: Gavin M. Hughes, Robert A. Mayville, Jr.	Warranty
20.	PR-2803-22 9-15-22	HRC: 7-28-23 MH: 9-11-23 (7 days)	KM3G Inc., d/b/a Putnam Kia of Burlingame v. Kia America Inc.	Protestant: Gavin M. Hughes, Robert A. Mayville, Jr. Respondent: Jonathan R. Stulberg, John J. Sullivan	Retail Labor Rate
21.	PR-2805-22 9-29-22	HRC: 6-12-23 MH: 7-31-23 (7 days)	Putnam Automotive, Inc., dba Volvo of Burlingame v. Volvo Car USA, LLC	Protestant: Gavin M. Hughes, Robert A. Mayville, Jr. Respondent: Colm Moran, Robert Feyder	Retail Labor Rate
22.	PR-2806-22 10-12-22	ROB: 7-20-23 HRC: 10-26-23 MH: 12-5 to 12-7; 12-12 to 12-15; 12-19-23	LJT Holdings LLC dba Infiniti of Mission Viejo, a Limited Liability Company v. Infiniti Division of Nissan North America, Inc., a Delaware corporation	Protestant: Halbert B. Rasmussen Respondent: Steven Kelso, Camille Papini-Chapla, Elayna Fiene	Termination

	CASE NUMBER/ DATE FILED	STATUS	PROTEST NAME	COUNSEL	CASE TYPE
23.	PR-2807-22 11-14-22	Preliminary Hearing on limited issues per MTD order: 6-20-23	Universal Auto Group d/b/a Subaru of Glendale a California Corporation v. Subaru of America, Inc., New Jersey corporation	Protestant: Halbert B. Rasmussen Respondent: Lisa M. Gibson, Amy M. Toboco Intervenor: Gavin M. Hughes, Robert A. Mayville, Jr.	Establishment
24.	PR-2808-22 11-14-22	ROB: 4-13-23 HRC: 9-22-23 MH: 11-6-23 (7 days)	Martin Saturn of Ontario, Inc. dba Subaru of Ontario v. Subaru of America, Inc.	Protestant: Timothy D. Robinett, Gary H. Prudian Respondent: Lisa M. Gibson, Amy M. Toboco	Termination
25.	PR-2809-22 11-28-22	ROB: 5-26-23 HRC: 9-1-23 MH: 10-23-23 (2 days) MSC: 5-24-23	Carmaddie LLC v. General Motors LLC	Protestant: Steve Barnhill Respondent: Ashley Fickel	Termination
26.	PR-2811-22* 11-29-22	ROB: 7-20-23 HRC: 10-26-23 MH: 12-5 to 12-7; 12-12 to 12-15; 12-19-23	LJT Holdings LLC dba Infiniti of Mission Viejo, a Limited Liability Company v. Infiniti Division of Nissan North America, Inc., a Delaware corporation	Protestant: Halbert B. Rasmussen Respondent: Steven Kelso, Camille Papini-Chapla, Elayna Fiene	Termination

	CASE NUMBER/ DATE FILED	STATUS	PROTEST NAME	COUNSEL	CASE TYPE
27.	PR-2812-22 11-30-22	Parties working on settlement	San Luis Obispo Hyundai LLC dba Hyundai San Luis Obispo v. Hyundai Motor America	Protestant: Gavin M. Hughes, Robert A. Mayville, Jr. Respondent: Shaun Kim, Sarah Rathke, Nathan Leber	Franchisor Incentive
28.	PR-2813-22 12-9-22	Board consideration of Proposed Order Granting MTD: 4-28-23	Michael Cadillac, Inc., dba Michael Chevrolet Cadillac v. General Motors LLC [Cadillac]	Protestant: Gavin M. Hughes, Robert A. Mayville, Jr. Respondent: Ashely Fickel	Franchisor Incentive
29.	PR-2814-22* 12-9-22	Board consideration of Proposed Order Granting MTD: 4-28-23	Michael Cadillac, Inc., dba Michael Chevrolet Cadillac v. General Motors LLC [Chevrolet]	Protestant: Gavin M. Hughes, Robert A. Mayville, Jr. Respondent: Ashley Fickel	Franchisor Incentive
30.	PR-2815-23 1-24-23	MTD hearing: 5-18-23	Let's Ride Motorsports Inc v. Textron Specialized Vehicles Inc. ("TSV")	Protestant: Gavin M. Hughes, Robert A. Mayville, Jr. Respondent: Amy M. Toboco, Paul T. Collins, Patrick D. Quinn	Termination

	CASE NUMBER/ DATE FILED	STATUS	PROTEST NAME	COUNSEL	CASE TYPE
31.	PR-2817-23* 2-17-23	ROB: 7-20-23 HRC: 10-26-23 MH: 12-5 to 12-7; 12-12 to 12-15; 12-19-23	LJT Holdings LLC dba Infiniti of Mission Viejo, a Limited Liability Company v. Infiniti Division of Nissan North America, Inc., a Delaware corporation	Protestant: Halbert B. Rasmussen Respondent: Steven Kelso, Camille Papini-Chapla, Elayna Fiene	Termination

PETITIONS

	CASE NUMBER/ DATE FILED	STATUS	PETITION NAME	COUNSEL
1.	P-463-22 6-20-22	Referred to DMV Investigations Petitioner's relief granted pursuant to Section 3050(b)(1)	Courtesy Automotive Group, Inc., dba Courtesy Subaru of Chico v. Subaru of America, Inc.	Petitioner: Gavin M. Hughes, Robert A. Mayville, Jr. Respondent: Lisa M. Gibson, Amy M. Toboco

C. JUDICIAL REVIEW

Either the Protestant/Petitioner/Appellant or Respondent seeks judicial review of the Board's Decision or Final Order by way of a petition for writ of administrative mandamus (Code of Civil Procedure section 1094.5). The writ of mandamus may be denominated a writ of mandate (Code of Civil Procedure section 1084).

1. BARBER GROUP, INC., dba BARBER HONDA, a California corporation v. CALIFORNIA NEW MOTOR VEHICLE BOARD, a California state agency; AMERICAN HONDA MOTOR CO., INC., a California corporation, and GALPINSFIELD AUTOMOTIVE, LLC
Court of Appeal, Third Appellate District No. C095058
Sacramento County Superior Court No. 34-2020-80003479
New Motor Vehicle Board No. CRT-279-20
Protest No. PR-2539-17

At the July 10, 2020, Special Meeting, the Public Members of the Board adopted ALJ Dwight Nelsen's Proposed Decision as the Board's final Decision. The Decision overruled the protest and permitted American Honda to proceed with the establishment of Galpinsfield Automotive, LLC at the proposed location in North Bakersfield.

On August 27, 2020, Barber Honda filed a "Verified Petition for Writ of Administrative Mandate, Traditional Mandate and Seeking Stay." The writ was served on September 14, 2020. A copy of the record has been requested.

Barber Honda contends that the Board's actions in adopting the Proposed Decision constitute an abuse of discretion because: (1) The Board's Decision is not supported by the evidence; (2) The Decision is not supported by the findings; (3) Barber Honda was not provided a fair hearing; and (4) The Board's hearing did not proceed in a manner required by law.

Barber Honda requests that the Superior Court consider additional evidence that could not have been produced during the merits hearing or that was improperly excluded at the hearing including the COVID-19 pandemic, higher unemployment in Bakersfield, sharp declines in automotive sales, and the impact to the oil and gas industry in Bakersfield.

Barber Honda seeks the issuance of a peremptory writ of administrative mandate directing the Board to set aside and vacate its Decision and to adopt and issue a new and different decision sustaining the protest. In the alternative, the issuance of a writ of traditional mandate directing the Board to set aside and vacate its Decision and to adopt and issue a new and different decision sustaining the protest. Also, alternatively, Barber Honda seeks the issuance of a writ of administrative or traditional mandate directing the Board to set aside and vacate its Decision and to "consider evidence improperly excluded from the underlying hearing and to issue findings required by Sections 3063 and 11713.13(b)." Barber Honda also seeks the issuance of a stay

pending the judgment of the writ of administrative mandate directing the Board to stay the operation of the Decision until judgment by the court.

Kathryn Doi, Board President, determined that there is an interest in participating in the writ via the Attorney General's Office to address several procedural issues.

The Board's counsel, Michael Gowe, received the bates stamped record on November 30, 2020. Therefore, the Board's answer was filed December 30, 2020. Barber Honda's opening brief was filed Tuesday, April 6, 2021. American Honda's and the Board's opposition briefs were filed Monday, April 26, 2021. Barber Honda's reply briefs were filed Thursday, May 6, 2021. On May 20, 2021, the Court issued a tentative ruling denying the writ. At the May 21, 2021, hearing, the Court took the matter under submission.

On May 26, 2021, the Court requested additional briefing from the Board and Barber Honda on what appears to be an issue of first impression. One of Barber Honda's arguments is that Section 11713.13 required the Board to determine whether certain performance standards established by American Honda are reasonable before it could rely on those standards in reaching its decision. According to the Court, it appears that "registration effectiveness" was critical to both American Honda and to the Board, and was used to establish, at least in part, that there was sufficient opportunity in the Bakersfield market to support a second Honda dealership. The issues to be addressed are:

- Whether an open point protest like the one at issue here is a "proceeding" within the meaning of section 11713.13.
- Whether the Board believes that section 11713.13 is applicable or relevant to this case.
- If the Board believes that section 11713.13 is applicable or relevant to this case, whether section 11713.13 required Honda to prove at the protest hearing that the two performance measures it established – i.e., "registration effectiveness" and, to a lesser extent, "retail sales effectiveness" – are reasonable in light of the factors identified in section 11713.13.
- If the Board believes that section 11713.13 is applicable to this case and that it required Honda to prove that the two performance measures are reasonable, whether the Board's decision must specifically include an analysis of reasonableness or whether the Court may rely on other matters within the Board's decision to conclude that the Board either did or did not determine the reasonableness of the two performance measures.

The Board's supplemental brief was filed on June 18, 2021, and Barber Honda's response was filed June 25. American Honda already addressed this issue in its opposition brief and Galpinsfield had the opportunity to do so they were not permitted to file supplemental briefs.

On July 26, 2021, the Court issued its final order denying the petition for writ of mandate. The following provides an overview of the Court's conclusions:

- a. The Board did not err in allowing Galpinsfield to exercise a peremptory challenge.
- b. The Board was not required to take official notice of the pandemic and its effects and was not required to grant Barber Honda's request for official notice.
- c. Vehicle Code section 3065.3 did not and could not apply to Barber Honda's protest because it did not go into effect until January 1, 2020, and Barber Honda's protest was filed in 2017.
- d. The reasonableness of American Honda's performance standards is not one of the circumstances or issues the Board is directed to consider when determining whether Barber Honda met its burden of proof. Similarly, the Board is not directed to consider whether Barber Honda is or is not meeting American Honda's performance standards. Instead, the critical issue in this case is whether the market can support another dealer. Section 3066 assigns Barber Honda the burden of proof to establish there is good cause not to allow American Honda to open another dealership in the area, and that burden remains with Barber Honda at all times. The Court found that "the Board was not required to explicitly determine or make findings about whether American Honda's performance standards are reasonable before relying on them - at least in part - when deciding this case."
- e. The findings and decision are supported by the evidence. The Court was unpersuaded by Barber Honda's arguments and spent a number of pages detailing why.

The Notice of Entry of Judgment was served on August 23, 2021. The time to file a Notice of Appeal was October 23, 2021.

On October 13, 2021, the Board received Barber Honda's Notice of Appeal. In general, Barber Honda's Opening brief is due 40 days after the record on appeal is completed and filed with the Appellate Court. The Board's brief is due 30 days after Barber Honda's brief is filed. Barber Honda's reply brief is due 20 days after the Board's brief is filed. If oral argument is requested, then the Appellate Court will schedule it and the decision would follow within 90 days thereafter. The appeal could take six months or longer.

By notice dated January 27, 2022, the Court determined that this case is not suitable for mediation. The Court issued an order dated January 27, 2022, in this regard and all proceedings in the appeal are to recommence as if the notice of appeal had been filed on January 27, 2022.

The record was filed with the Court of Appeal on June 28, 2022. On August 12, 2022, Barber Honda associated with Douglas J. Collodel, Esq. of Clyde & Co US LLP.

April 2023 Executive Director's Report

Barber Honda requested a 30-day extension to file its brief, which was granted on September 6, 2022. Barber Honda's opening brief was filed October 7, 2022, American Honda, Galpinsfield, and the Board's briefs were due on November 7, 2022, but continued to December 7, 2022, at the Board's request. The Board's brief was filed within the grace period on December 16, 2022. Barber Honda's combined reply brief was due on December 27, 2022, but continued to February 6, 2023.

By letter dated April 11, 2023, the Court of Appeal indicated that it is prepared to render a decision without hearing oral argument but parties can request oral argument by April 21, 2023.

2. WESTERN TRUCK PARTS & EQUIPMENT COMPANY LLC DBA WESTERN TRUCK CENTER, a California limited liability company v. NEW MOTOR VEHICLE BOARD; VOLVO TRUCKS NORTH AMERICA, a division of VOLVO GROUP NORTH AMERICA, LLC, a Delaware limited liability company
Sacramento County Superior Court No. 34-2022-80003827
New Motor Vehicle Board No. CRT-281-22
Protest No. PR-2740-21

At the January 12, 2022, General Meeting, the Public Members of the Board adopted ALJ Anthony M. Skrocki's Proposed Order Granting Respondent's Motion to Dismiss as the Board's final Decision. The Decision dismissed the protest because it was not timely filed and therefore, the Board had no jurisdiction over the matter.

On February 28, 2022, Western Truck filed a "Petition for Writ of Administrative Mandate." The writ was served on February 28, 2022. A copy of the record has been requested.

Petitioner contends that the Board's Decision is not supported by substantial evidence in light of the whole administrative record.

Petitioner disputes several of the Board's findings. It argues that it timely filed its protest within 30 days after the end of the appeal procedure provided by Real Party in Interest, Volvo Trucks. However, the Decision found that the Alternative Dispute Resolution ("ADR") provisions in the dealer agreement between the parties did not constitute an "appeal procedure" as contemplated by the Vehicle Code.

Specifically, Petitioner argues, the record does not support the Decision's narrow interpretation of an "appeal procedure" and claims that portions of the ADR procedure are an appeal procedure and Petitioner was required to comply with that procedure pursuant to the terms of the dealer agreement.

Further, the Decision also concluded that Petitioner did not pursue the ADR Procedure to an "end." However, Petitioner argues this is not supported by any evidence. It writes that since parties could not resolve the dispute in the initial stages of the ADR

procedure, it was not required to submit the dispute for further steps through the ADR procedure.

Petitioner requests that the Superior Court issue a peremptory writ of administrative mandate directing the Board to set aside and vacate its Decision and remand the matter to the Board with instructions to deny the Motion to Dismiss.

Following further staff review of the writ, Bismarck Obando, Board President, will determine whether the Board will participate via the Attorney General's Office if there is a state interest at issue in the writ.

On March 21, 2022, Bismarck Obando determined that there is not an important state interest at issue and the Board will not participate via the Attorney General's Office.

On April 1, 2022, Real Party in Interest, Volvo Trucks, filed its Answer.

On August 26, 2022, Petitioner filed its Memorandum in Support of Petition for Writ of Administrative Mandate and supporting declaration.

On September 19, 2022, Real Party in Interest, Volvo Trucks, filed its Brief in Opposition to Petition for Writ of Administrative Mandate and supporting declaration.

On September 29, 2022, Petitioner filed its Reply in Support of Petition for Writ of Administrative Mandate.

The Petition for Writ of Mandate is set to be heard on October 14, 2022, at 2:30 p.m.

The court issued its tentative ruling denying the Petition for Writ of Mandate. After oral arguments on October 14, the court took the matter under submission. On November 16, 2022, the court adopted its tentative ruling as its final ruling and denied the Petition for Writ of Administrative Mandate.

The Order Denying Petitioner's Writ of Mandate was served on December 14, 2022. The deadline to file a Notice of Appeal is approximately February 10, 2023. *This matter will no longer be reported on the Executive Director's Report.*

3. SUBARU OF AMERICA, INC. v. NEW MOTOR VEHICLE BOARD; COURTESY AUTOMOTIVE GROUP, INC. dba COURTESY SUBARU OF CHICO
Alameda County Superior Court No. 22CV010968
New Motor Vehicle Board No. CRT-282-22
Protest No. PR-2570-18

On March 20, 2019, pursuant to Vehicle Code sections 3050.7, 3060, 3061, 3066, and 3067, the parties sought to resolve their termination protest by entering into a Confidential Agreement and Stipulated Decision and Order (Stipulated Decision).

The Public Members of the Board approved the terms of the Stipulated Decision by order dated April 9, 2019. The Board retained continuing jurisdiction over this matter solely to determine if there has been a failure by Courtesy Automotive Group, Inc. dba Courtesy Subaru of Chico (Courtesy) to materially comply with any of the conditions of the Stipulated Decision after a timely request.

In 2020, a dispute arose between Courtesy and Subaru of America, Inc. (SOA) concerning Courtesy's compliance with the terms of the Stipulated Decision.

ALJ Evelyn Matteucci was assigned to this matter. After extensive briefing, multiple witness' testimony was taken on September 14-16, 2021, and October 18-19, 26, and 28, 2021.

On March 24, 2022, ALJ Matteucci issued a "Confidential Decision Resolving Stipulated Decision and Order Dispute." The Parties expressly waived any claim that the Board itself should consider the ALJ's Decision. This Decision is not subject to a document request or Public Records Act Request.

On May 9, 2022, SOA filed a confidential "[un-redacted] Petition for Writ of Administrative Mandate" (Petition) and redacted version. A copy of the administrative record has been requested.

In general, SOA contends the ALJ's determination is not supported by the evidence or the ALJ's findings. SOA maintains it was denied a fair hearing. SOA seeks, in part, the following relief: (1) An order reversing ALJ Matteucci's determination; (2) For an order finding that SOA is the prevailing party in this matter; and (3) For such other and further relief as the Court deems just and proper.

On May 31, 2022, Bismarck Obando, Board President, determined that there is an interest in participating in the writ via the Attorney General's Office. This matter will be agendized for the November 7, 2022, General Meeting for a closed Executive Discussion with the Public Members.

The Hearing on SOA's Motion to Seal portions of its Petition and Exhibits 1 and 2 thereto was scheduled for June 21, 2022, but continued to July 5, 2022, because SOA did not lodge the unredacted records with the Court in compliance with the Rules of Court 2.550 and 2.551. SOA is to lodge the records no later than June 24, 2022. The hearing was continued until July 7, 2022, and then again until July 12, 2022. The Court granted the motion and ordered that SOA's Petition and Exhibits 1 and 2 be sealed consistent with the redacted versions filed with the Court.

A Case Management Conference was held on June 28, 2022. The Board had until August 15, 2022, to prepare the administrative record; it was completed on July 14, 2022.

On August 11, 2022, SOA filed a motion to seal the entire administrative record. The September 2, 2022, Tentative Ruling granted the “unopposed motion to seal and intends to file the proposed order provided by” SOA. “The Court does not make any findings with regard to whether documents in the Administrative Record might be subject to disclosure under the California Public Records Act ("CPRA"), and this Order is not intended to alter any party or entity's duties or rights under the CPRA. The Motion to Seal Notice of Motion and Motion To Seal Administrative Record; Declaration of Lisa M. Gibson in Support Thereof filed by Subaru Of America, Inc. on 08/11/2022 is Granted.”

The administrative record was filed by SOA with the Court on August 12, 2022, so the Board’s Answer was filed on September 12, 2022.

Courtesy filed a Demurrer on August 29, 2022, which will be heard on October 18, 2022, at 10:00 a.m. The Board will not participate in the demurrer.

A subsequent Case Management Conference was held on August 30, 2022. Due to the Demurrer filed by Courtesy, the Court continued the Case Management Conference to October 18 (the date for the hearing on the Demurrer). SOA raised its arguments about the Board’s withholding of the staff summary of the Stipulated Decision provided to the Public Members on the basis of privilege. After some discussion, it was agreed that the Board will provide a privilege log by September 7, 2022, that provides the basic information about the document in question and if SOA wishes to contest privilege, then SOA can file a motion, which would be heard the same day as the Demurrer. SOA’s motion to compel was filed on September 22, 2022. On October 11, 2022, SOA filed a request for judicial notice in support of its reply to the motion to compel.

The hearing set for October 18 was continued to November 1 by the Court as both SOA and Courtesy need to make corrections in order to properly submit their filings under seal. By way of Tentative Rulings, the Court reminded the parties that they must concurrently file a motion to seal relevant portions of each subsequent filing referring to the materials sealed by the July 12, 2022, order. The Court did not intend to grant blanket authorization to submit filings under seal going forward. The Court noted that discovery motions are exempt from the sealing rules and a motion to seal is not required. SOA filed a Motion to Seal its unredacted opposition to demurrer to the writ petition that was also heard on November 1.

On October 31, 2022, the Court issued the following tentative rulings:

- “The Demurrer filed by Courtesy Automotive Group, Inc. on 08/29/2022 is Sustained with Leave to Amend.”
- Petitioner’s Motion to Compel Production of Staff Summary Withheld by Respondent New Motor Vehicle Board from Administrative Record or, In the Alternative, for Privilege Determination is denied. The Staff Summary at issue

is protected from disclosure by the attorney-client privilege and by the deliberative process exception; it may also be protected by the work product doctrine.

- “The Motion to Seal Notice of Motion and Motion of Petitioner Subaru of America, Inc. to Seal Unredacted Opposition to Demurrer to Writ Petition; Declaration of Lisa M. Gibson in Support thereof filed by Subaru of America, Inc. on 10/19/2022 is Granted.”
- The Motion to Seal Notice of Motion and Motion to Seal [Un-Redacted] Memorandum of Points and Authorities in Support of Real Party in Interests Demurrer to Petition and [Un-Redacted] Reply in Support of Demurrer Filed by Courtesy Automotive Group, Inc. on 10/20/2022 is Granted.

Oral arguments were submitted by the parties on November 1, 2022, and the matters were taken under submission.

On January 11, 2023, the Court filed the following orders:

- (1) Courtesy Subaru of Chico’s Demurrer to the Petition for Writ of Administrative Mandate is sustained with leave to amend. Petitioner has until Friday, February 3, 2023 to file a First Amended Petition.*
- (2) Subaru’s Motion to Compel Production of Staff Summary is denied.*
- (3) Subaru’s Request for Judicial Notice is granted.*
- (4) Courtesy Subaru of Chico’s Motion to Seal portions of its Demurrer and Reply is granted.*
- (5) Subaru’s Motion to Seal portions of its opposition to the Demurrer is granted.*

On February 3, 2023, Subaru filed its First Amended Petition for Writ of Administrative Mandate. On March 1, 2023, Courtesy filed its Demurrer to Subaru’s amended petition. With President Kassakhian’s permission, on March 6, 2023, the Board filed a demurrer limited to Subaru’s allegations that the Board lacked or acted in excess of its subject matter or fundamental jurisdiction and that it deprived Subaru of procedural due process. The Board also requested judicial notice of the legislative history of Senate Bill 3515, which was the 1990 legislation that added subdivision (b) to Vehicle Code section 3050.7. In conjunction with these pleadings, each party filed motions to seal that will be heard with the demurrer on April 4, 2023.

During the March 14, 2023, Case Management Conference, the Court continued Subaru’s motion to seal to April 4 (the Demurrer hearing date). The Court set the hearing on the merits, in the event that the demurrers are overruled. The hearing date is

September 26, 2023, with Subaru's moving papers due July 7, 2023, oppositions due September 1, 2023, and reply due September 15, 2023.

On April 3, 2023, Judge Kahn issued tentative rulings sustaining both demurrers without leave to amend and denying all four motions to seal. During the April 4, 2023 hearing, Judge Kahn indicated that he is prepared to confirm his tentative rulings. These orders were issued on April 4, 2023. Subaru has until June 5, 2023, to file a Notice of Appeal.

NOTICES FILED

PURSUANT TO VEHICLE CODE SECTIONS

3060/3070 AND 3062/3072

JANUARY 10, 2023, THROUGH APRIL 11, 2023

These are generally notices relating to termination or modification (Sections 3060 and 3070) and establishment, relocation, or off-site sales (Section 3062 and 3072).

SECTION 3060/3070

Manufacturer	Number of Notices
BMW/Mini	
Ford	
GM (Buick, Cadillac, Chevrolet, GMC)	1
Honda/Acura	
Hyundai/Genesis	
Kia	
Nissan/Infiniti	1
Stellantis (Chrysler, Jeep, Dodge, RAM,)	
Stellantis (Alfa Romeo, FIAT)	
Stellantis (Maserati)	
Subaru	
Toyota/Lexus	8
Volkswagen/Audi	
Miscellaneous Car	
Miscellaneous Motorcycles	
Miscellaneous Recreational Vehicle	1
Total	11

SECTION 3062/3072

Manufacturer	Number of Notices
BMW	
Ford	
GM (Buick, Cadillac, Chevrolet, GMC)	
Honda/Acura	
Hyundai/Genesis	
Kia	1
Nissan/Infiniti	
Stellantis (Chrysler, Jeep, Dodge, RAM)	4
Stellantis (Alfa Romeo, FIAT)	
Stellantis (Maserati)	
Subaru	
Toyota/Lexus	6
Volkswagen/Audi	
Miscellaneous Car	
Miscellaneous Motorcycles	
Miscellaneous Recreational Vehicle	
Total	11



Memorandum

Date : APRIL 3, 2023

To : PUBLIC MEMBERS

**From : TIMOTHY M. CORCORAN
ROBIN P. PARKER**

Subject : DISCUSSION AND CONSIDERATION OF WHETHER TO DESIGNATE THE FOLLOWING BOARD DECISIONS AS PRECEDENT DECISIONS PURSUANT TO GOVERNMENT CODE SECTION 11425.60:

- (1) Protest No. PR-2418-15 *Adrenaline Powersports v. Polaris Industries, Inc.***
- (2) Protest No. PR-2534-17 (consolidated) *Porter Auto Group, L.P. v. FCA US LLC***
- (3) Protest No. PR-2605-19 *R&H Automotive Group, Inc. v. American Honda Motor Co., Inc., Acura Automotive Division***
- (4) Protest No. PR-2180-09 *Jackson Ford-Mercury, Inc., dba The New Jackson Ford-Mercury v. Ford Motor Company***

Background

The Administrative Procedure Act ("APA") provides that a "decision¹ may not be expressly relied on as precedent unless it is designated as a precedent decision by the . . ." Board. (Gov. Code § 11425.60(a); see Attachment 1) The Board "may designate as a precedent decision a decision or part of a decision that contains a significant legal or policy determination of general application that is likely to recur." (Gov. Code § 11425.60(b))

The APA requires the Board to maintain an index of significant legal and policy determinations made in precedent decisions and to update the index at least annually unless no precedent decision has been designated since the last update. The index shall be made available to the public by subscription and its availability publicized annually in the California Regulatory Notice Register. (Gov. Code § 11425.60(c))

To date, the Board has not designated any decision as a precedent decision. This is something the legal staff and Administrative Law Judges ("ALJs") have discussed during

¹ "Decision" is defined as "an agency action of specific application that determines a legal right, duty, privilege, immunity, or other legal interest of a particular person." (Gov. Code § 11405.50(a))

previous ALJ Roundtables. After careful consideration and review by the ALJs, we wanted to bring this matter to the Board for its review and consideration.

The staff is recommending the Public Members consider designating as precedent decisions in which the manufacturer/distributor filed a motion to dismiss in a pending protest because: (1) The franchised dealer sells a product that is not within the Board's jurisdiction; (2) The dealership has been shuttered with no ability to resume its operations; (3) The dealer fails to comply with authorized discovery without substantial justification for that failure (Veh. Code § 3050.2) and fails to appear at the Mandatory Settlement Conference, to be prepared, or to have authority to settle the matter (Veh. Code § 3050.4); and (4) The protest was not filed within the statutorily mandated time period.

Summary of Decisions

(1) Protest No. PR-2418-15 *Adrenaline Powersports v. Polaris Industries, Inc.* (§ 3062 Establishment) - Vehicles in Franchise are not within the Board's Jurisdiction

The Proposed Order in *Adrenaline Powersports v. Polaris Industries, Inc.* was adopted as the Board's Decision at the June 17, 2015, General Meeting. The *Adrenaline* Decision (Attachment 2) provides that:

- The issue of the Board's jurisdiction is determined not by whether there is a franchise but by: (1) Whether there is a franchise as to the vehicles that come within the Board's jurisdiction as limited by Vehicle Code¹ section 3051;² (2) Whether the persons are licensees as new motor vehicle dealers, motor vehicle manufacturers, manufacturer branches, new motor vehicle distributors, or distributor branches also as stated in Section 3051; and (3) Whether the parties to the franchise are franchisors and franchisees as defined in Sections 331.2 and 331.1, respectively. (Attachment 2, ¶ 33)
- Even if there is a "franchise" within the general definition contained in Section 331, the Board's statutes would not apply to that franchise unless it was a franchise involving persons and vehicles that are included or not excluded by the language in Section 3051. (Attachment 2, ¶ 35) As to persons, the parties to be subject to the Board's statutes must be "a new motor vehicle dealer, motor vehicle manufacturer, manufacturer branch, new motor vehicle distributor, distributor branch." (Veh. Code § 3051) This is considerably more limited than what is needed for a "franchise" as

¹ All statutory references are to the California Vehicle Code.

² Section 3051 provides in part: "This chapter does not apply to any person licensed as a transporter under Article 1 (commencing with Section 11700) or as a salesperson under Article 2 (commencing with Section 11800) of Chapter 4 of Division 5, or to any licensee who is not a new motor vehicle dealer, motor vehicle manufacturer, manufacturer branch, new motor vehicle distributor, distributor branch, or representative. . . ."

defined in Section 331.¹ (Attachment 2, ¶ 36) As to vehicles, Section 3051 limits the types of vehicles that would be included within a “franchise subject to the Board’s statutes” as compared to just a “franchise” as defined in Section 331. (Attachment 2, ¶ 37)

- In Section 331, there is no requirement that the “franchise” in fact be in operation as a “dealer” before the written agreement will be effective as a “franchise.” All of the language speaks in terms of the “rights” that are granted under the “written agreement.” (Attachment 2, ¶ 61)

(2) Protest No. PR-2534-17 (consolidated) *Porter Auto Group, L.P. v. FCA US LLC* (§ 3060 Termination) - Shuttered Dealership

At the June 29, 2018, Special Meeting, the Public Members of the Board adopted the Proposed Order as amended in *Porter Auto Group, L.P. v. FCA US LLC*. Porter Auto Group had no facilities from which to operate, no inventory, no Dealer’s License, and was insolvent. These facts were uncontested by Porter. The *Porter* Decision (Attachment 3) provides that:

- Ordinarily, the dealership is in operation but will be required to cease operation if the franchise is terminated. Here the situation is reversed. Although the franchises, the written agreements, technically continue to exist, it is the dealership that has already been lost and all of the adverse consequences that would flow from such a loss or closure have already occurred and cannot be remedied or ameliorated by any order of the Board that the franchisor should not be permitted to terminate the written agreements. (Attachment 3, ¶ 42)
- Sustaining the protests and preventing the termination of the franchises (the written agreements) will result in maintaining the status quo which will leave the parties and the consuming public where they have been for the last year or more - with no vehicle sales being made, with no service available to the public, no warranty obligations of Respondent being performed on customers’ vehicles, and no benefits to the public that would accrue if the dealership had been operational. (Attachment 3, ¶ 43)
- Sustaining the protests would be a meaningless act as the dealer is unable to function

¹ Subdivision (a) of Section 331 provides that: “A ‘franchise’ is a written agreement between two or more persons having all of the following conditions:”

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

as a dealership operating as a franchisee as to any of its line-makes. An order of the Board requiring Respondent to continue in its franchise relationships would not protect the dealer from an unfair termination of its franchises nor would there be any protection of the interests of the public or otherwise further the intention of the legislature in the enactment of the statutes at issue. (Attachment 3, ¶ 45)

- Going to a hearing to determine whether there is good cause to terminate the franchises would be an exercise in futility. Sustaining the protests in this situation will not prevent the loss of the dealerships, will not prevent any forfeiture to the dealer or its owners, will not protect the employees, the community or the consuming public that would be served by the dealership. (Attachment 3, ¶ 46)
- Under the existing circumstances, deciding whether the Respondent has good cause to terminate the franchises is unneeded as a Board order sustaining the protests would not prevent the occurrence of all that has already occurred. All of the adverse effects of the loss of the dealership have already occurred and no order of the Board will prevent such adverse effects or even mitigate against their result. (Attachment 3, ¶ 47)
- As a matter of law, the Respondent established good cause to terminate the franchises taking into consideration the existing circumstances and all of the specific factors listed in Section 3061. The Board relied on the opinion in *Duarte & Witting, Inc. v. New Motor Vehicle Bd.* (2002) 104 Cal.App.4th 626 that it has the implied authority to dismiss these consolidated protests because the undisputed facts show good cause for termination of the dealer's franchises.

(3) Protest No. PR-2605-19 *R&H Automotive Group, Inc. v. American Honda Motor Co., Inc., Acura Automotive Division* (§ 3065.1 Franchisor Incentive Program) - Disregard of the Board's Statutes, Regulations, and Orders

The Proposed Order in *R&H Automotive Group, Inc. v. American Honda Motor Co., Inc., Acura Automotive Division* was adopted as amended as the Board's Decision at the March 5, 2020, Special Meeting. The *R&H Automotive* Decision (Attachment 4) provides that:

- Protestant and its counsel engaged in a pattern of conduct that demonstrated consistent disregard for the Board's statutes, regulations, and orders as detailed in the Decision. (Attachment 4, ¶ 2) Protestant's pattern of conduct resulted in repeated, but not always successful, calls and emails from the Board's staff seeking submission of required documents that had not been timely submitted for filing. (Attachment 4, ¶ 4)
- Protestant's counsel's conduct wasted the time of the Board's ALJs, the Board's attorneys and counsel for Respondent not only with the telephonic conferences but also with regard to the Mandatory Settlement Conference. (Attachment 4, ¶ 5)
- Section 3050.2(b) provides: "Compliance with discovery procedures authorized pursuant to subdivision (b) of Section 3050.1 may be enforced by application to the executive director of the board. The executive director may, at the direction of the

- board, upon a showing of failure to comply with authorized discovery without substantial justification for that failure, dismiss the protest . . . or suspend the proceedings pending compliance. . . .” (Attachment 4, ¶ 33)
- Section 3065.1(g)(6) places the burden of proof as to the issues in this protest upon Respondent so Protestant knew that discovery was critical for Respondent. (Attachment 4, ¶ 34)
- The Court of Appeal has upheld the Board’s authority to dismiss a protest because of the failure of the protestant to comply with authorized discovery. (See *Nader Automotive Group, LLC, et al. v. New Motor Vehicle Board* (2009) 178 Cal.App.4th 1478) (Attachment 4, ¶ 35) As to whether dismissal of the protest is too harsh a sanction, the *Nader* opinion is illuminating:

As to Nader's argument the board should have considered a lesser sanction than dismissal, the plain language of the statute defeats his argument. The Legislature has vested in the executive director (at the direction of the board) power to “dismiss the protest” upon a showing of failure to comply with authorized discovery without substantial justification. (§ 3050.2(b).) The statutory scheme does not require the board to consider a lesser sanction first. (*Nader Automotive Group, LLC, et al. v. New Motor Vehicle Board* (2009) 178 Cal. App. 4th 1478, 1485-1486) (Attachment 4, ¶ 63)

- Protestant failed to comply with authorized discovery without substantial justification. (Attachment 4, ¶ 61)
- Protestant chronically failed to comply with the Board’s Pre-Hearing Conference Orders and Ruling on Objections to Requests for Production of Documents, in that Protestant failed to: (1) Timely file and serve requests for production, a Statement of Disputed Discovery Requests, and its Preliminary Witness List; (2) File and serve a copy of the operative Franchise Agreement; (3) Timely produce documents and when it did produce documents, Protestant only produced 152 pages in response to 50 requests; (4) Produce documents or electronically stored information to over 25 requests; (5) Produce any electronically stored information in response to any of the requests; (6) Provide substantial justification or evidence supporting its claim that certain documents and electronic information were destroyed in a flood and/or could not otherwise be obtained. (Attachment 4, ¶ 62)
- Protestant failed to comply with the Notice of Mandatory Settlement Conference (MSC), Section 3050.4, and Section 551.11 of Title 13 of the California Code of Regulations without substantial justification, in that: (1) Protestant’s counsel failed to file and serve the mandatory MSC Statement; (2) Protestant’s counsel was late in arriving at the MSC; (3) The Dealer Principal, failed to appear at the MSC or send a dealer representative to appear on its behalf; (4) Protestant and its counsel failed to be prepared for, or meaningfully participate in, the MSC process; and (5) Protestant and its counsel engaged in actions or tactics that are frivolous and intended to cause or result in unnecessary delay of the proceedings to the detriment of Respondent.

(Attachment 4, ¶ 81)

(4) Protest No. PR-2180-09 *Jackson Ford-Mercury, Inc., dba The New Jackson Ford-Mercury v. Ford Motor Company* (§ 3060 Termination) - Untimely Protest

The Proposed Order in *Jackson Ford-Mercury, Inc., dba The New Jackson Ford-Mercury v. Ford Motor Company* was adopted as the Board's Decision at the August 24, 2010, Special Meeting. Beginning at paragraph 52, the *Jackson Ford* Decision (Attachment 5) provides the following concerning whether the protest was untimely:

- What must be proven to show that the time to file a protest has expired is not that notice was “provided” but that the notice was “received” and the critical date is not the “date of notice” but the date when the notice was “received.” (Attachment 5, ¶ 53)
- Section 3060(a) provides: “Notwithstanding . . . the terms of any franchise, no franchisor shall terminate or refuse to continue any existing franchise unless all of the following conditions are met: (1) The franchisee and the board have received written notice from the franchisor . . .” Section 3060(a)(2) further states that “[t]he franchisee may file a protest with the board . . . within 10 days after receiving a 15-day notice, satisfying the requirements of this section . . .” (Attachment 5, ¶ 55)
- As explained by the court in *Sonoma Subaru, Inc. v. New Motor Vehicle Board* (1987) 189 Cal.App.3d 13, 22, the 10-day filing deadline is strictly applied:

Where no protest of the termination is filed within the allotted time, the Legislature's obvious intent is to let the franchisor treat the termination as final and effective... Sanctioning late filings would undercut that finality and create uncertainty in the minds of franchisors as to whether they may treat their relationship with unsatisfactory franchisees as concluded. We conclude that the Legislature did not intend that the 10-day filing deadline be extended. (Attachment 5, ¶ 56)

- The franchise involves the sale of goods or transactions in goods, so Divisions 1 and 2 of the Uniform Commercial Code (UCC) would be applicable. (Attachment 5, footnote 12) Although the Vehicle Code does not define the term “received,” the UCC contains the following definitions:

UCC section 1202 provides in part:

. . .

(e) Subject to subdivision (f), a person¹ “receives” a notice or notification when:

(1) it comes to that person's attention; or

(2) it is duly delivered in a form reasonable under the circumstances at

¹ “Person” is defined in section 1201(b)(27) of the UCC to include a “corporation” as well as an “individual.”

the place of business through which the contract was made or at another location held out by that person as the place for receipt of such communications.

(f) Notice, knowledge, or a notice or notification received by an organization is effective for a particular transaction from the time it is brought to the attention of the individual conducting that transaction and, in any event, from the time it would have been brought to the individual's attention if the organization had exercised due diligence. An organization exercises due diligence if it maintains reasonable routines for communicating significant information to the person conducting the transaction and there is reasonable compliance with the routines. Due diligence does not require an individual acting for the organization to communicate information unless the communication is part of the individual's regular duties or the individual has reason to know of the transaction and that the transaction would be materially affected by the information. (Attachment 5, ¶ 58)

- Respondent confronted three difficult tasks that have been imposed upon franchisors by the legislature: (1) Take steps to see that the dealer “received” the notice of termination; (2) Prove that the notice was in fact “received” by the dealer; and (3) Prove when the notice was received by the dealer. (Attachment 5, ¶ 76)
- Typically, this can be accomplished by use of the United States Postal Service (“USPS”) or some other carrier utilizing the “return receipt requested” procedure. Such a procedure, when it functions normally, is effective in satisfying all three of the above requirements. However, when the franchisee closes its doors or in some cases may be deliberately attempting to avoid receipt of some notices, the “usual” method of complying with the above three requirements becomes much more difficult. (Attachment 5, ¶ 77)
- The policy and purpose underlying the requirement of the statutes that the notice be “received” by the dealer is unquestionably more likely to be more effectively accomplished by delivering it to the home of its CEO than leaving it under a door at the dealership’s address if the dealership had “closed” (per the dealer) and had “moved with no forwarding address” (per the USPS). (Attachment 5, ¶ 88)
- The delivery to CEO’s home address constituted “receipt” of the notice of termination by an authorized agent. (Attachment 5, ¶ 89)

Procedure for Designating Decisions as Precedent

At the July 17, 1997, General Meeting, the Board adopted the following language for designating decisions as precedent. (Attachment 6)

At its regularly scheduled meeting of _____, the public (or all) members of the Board met and considered the administrative record and Proposed Decision in the above-entitled matter. After such consideration, the Board adopted the Proposed Decision as its final Decision in this matter.

The Decision (or a designated portion of the Decision) adopted by the members of the Board shall be relied on by the Board as a precedent decision because the Decision contains significant legal and policy determinations of general application.

This Decision shall become effective forthwith.

If the Board designates any of the Decisions as precedent, the staff will comply with Government Code section 11425.60(c) by maintaining “an index of significant legal and policy determinations made in precedent decisions” that will be updated annually (unless no precedent decision has been designated since the last preceding update). The index will be made available to the public by subscription, and its availability will be publicized annually in the California Regulatory Notice Register. A public mailing would be sent regarding the Board’s action and allow individuals to be added to precedent decision subscription list. The Board’s website would also be updated.

Recommendation

The staff recommends that the decisions in *Adrenaline*, *Porter*, and *R&H Automotive* be designated as Precedent Decisions in their entirety. In the *Jackson Ford* Decision, the staff recommends paragraphs 52-89 and 94 be designated as precedent.

This topic is being agendaized for discussion and consideration at the April 28, 2023, General Meeting. If you have any questions or require additional information, please do not hesitate to contact us at (916) 445-1888.

Attachments: as stated

Attachment 1

2023 Government Code

Precedential Decision Provisions

11405.50.

(a) "Decision" means an agency action of specific application that determines a legal right, duty, privilege, immunity, or other legal interest of a particular person.

(b) Nothing in this section limits any of the following:

(1) The precedential effect of a decision under Section 11425.60.

(2) The authority of an agency to make a declaratory decision pursuant to Article 14 (commencing with Section 11465.10).

(Added by Stats. 1995, Ch. 938, Sec. 21. Effective January 1, 1996. Operative July 1, 1997, by Sec. 98 of Ch. 938 and Section 11400.10.)

11425.10.

(a) The governing procedure by which an agency conducts an adjudicative proceeding is subject to all of the following requirements:

(1) The agency shall give the person to which the agency action is directed notice and an opportunity to be heard, including the opportunity to present and rebut evidence.

(2) The agency shall make available to the person to which the agency action is directed a copy of the governing procedure, including a statement whether Chapter 5 (commencing with Section 11500) is applicable to the proceeding.

(3) The hearing shall be open to public observation as provided in Section 11425.20.

(4) The adjudicative function shall be separated from the investigative, prosecutorial, and advocacy functions within the agency as provided in Section 11425.30.

(5) The presiding officer is subject to disqualification for bias, prejudice, or interest as provided in Section 11425.40.

(6) The decision shall be in writing, be based on the record, and include a statement of the factual and legal basis of the decision as provided in Section 11425.50.

(7) A decision may not be relied on as precedent unless the agency designates and indexes the decision as precedent as provided in Section 11425.60.

(8) Ex parte communications shall be restricted as provided in Article 7 (commencing with Section 11430.10).

(9) Language assistance shall be made available as provided in Article 8 (commencing with Section 11435.05) by an agency described in Section 11018 or 11435.15.

(b) The requirements of this section apply to the governing procedure by which an agency conducts an adjudicative proceeding without further action by the agency, and prevail over a conflicting or inconsistent provision of the governing procedure, subject to Section 11415.20. The governing procedure by which an agency conducts an adjudicative proceeding may include provisions equivalent to, or more protective of the rights of the person to which the agency action is directed than, the requirements of this section.

(Added by Stats. 1995, Ch. 938, Sec. 21. Effective January 1, 1996. Operative July 1, 1997, by Sec. 98 of Ch. 938 and Section 11400.10.)

11425.60.

(a) A decision may not be expressly relied on as precedent unless it is designated as a precedent decision by the agency.

(b) An agency may designate as a precedent decision a decision or part of a decision that contains a significant legal or policy determination of general application that is likely to recur. Designation of a decision or part of a decision as a precedent decision is not rulemaking and need not be done under Chapter 3.5 (commencing with Section 11340). An agency's designation of a decision or part of a decision, or failure to designate a decision or part of a decision, as a precedent decision is not subject to judicial review.

(c) An agency shall maintain an index of significant legal and policy determinations made in precedent decisions. The index shall be updated not less frequently than annually, unless no precedent decision has been designated since the last preceding update. The index shall be made available to the public by subscription, and its availability shall be publicized annually in the California Regulatory Notice Register.

(d) This section applies to decisions issued on or after July 1, 1997. Nothing in this section precludes an agency from designating and indexing as a precedent decision a decision issued before July 1, 1997.

(Amended by Stats. 1996, Ch. 390, Sec. 8. Effective August 19, 1996. Operative July 1, 1997, by Sec. 11 of Ch. 390.)

11475.30.

For the purpose of this article, the following terms used in the Code of Judicial Ethics have the meanings provided in this section:

(a) "Appeal" means administrative review.

(b) "Court" means the agency conducting an adjudicative proceeding.

(c) "Judge" means administrative law judge or other presiding officer to which this article applies. Related terms, including "judicial," "judiciary," and "justice," mean comparable concepts in administrative adjudication.

(d) "Law" includes regulation and precedent decision.

(Added by Stats. 1998, Ch. 95, Sec. 1. Effective January 1, 1999.)

Attachment 2

NEW MOTOR VEHICLE BOARD
1507 – 21st Street, Suite 330
Sacramento, California 95811
Telephone: (916) 445-1888

STATE OF CALIFORNIA
NEW MOTOR VEHICLE BOARD

In the Matter of the Protest of

ADRENALINE POWERSPORTS,

Protestant,

v.

POLARIS INDUSTRIES, INC.,

Respondent.

Protest No. PR-2418-15

DECISION

At its regularly scheduled meeting of June 17, 2015, the Public Members of the Board met and considered the administrative record and Administrative Law Judge's "Proposed Order Granting Respondent's Motion to Dismiss Protest for Lack of Jurisdiction", in the above-entitled matter. After such consideration, the Board adopted the Proposed Order as its final Decision in this matter.

This Decision shall become effective forthwith.

IT IS SO ORDERED THIS 17th DAY OF JUNE 2015.



GLENN STEVENS
President

New Motor Vehicle Board

ATTACHMENT 2

1 NEW MOTOR VEHICLE BOARD
1507 - 21st Street, Suite 330
2 Sacramento, California 95811
Telephone: (916) 445-1888

CERTIFIED MAIL

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8 STATE OF CALIFORNIA
9 NEW MOTOR VEHICLE BOARD

10
11 In the Matter of the Protest of
12 ADRENALINE POWERSPORTS,
13 Protestant,
14 v.
15 POLARIS INDUSTRIES, INC.,
16 Respondent.

Protest No. PR-2418-15

**PROPOSED ORDER GRANTING
RESPONDENT'S MOTION TO
DISMISS PROTEST FOR LACK OF
JURISDICTION**

17
18 To: Michael M. Sieving, Esq.
ATTORNEY AT LAW
19 8865 La Riviera Drive, Suite B
Sacramento, California 95826

20 Gregory R. Oxford, Esq.
21 ISAACS CLOUSE CROSE & OXFORD LLP
22 21515 Hawthorne Boulevard, Suite 950
Torrance, California 90503

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24 ///

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27 ///

28 ///

1 **FACTUAL AND PROCEDURAL BACKGROUND**

2 1. Adrenaline Powersports ("Adrenaline" or "Protestant") is a "franchisee" of Polaris Sales,
3 Inc. ("PSI" or "Respondent")¹ authorized to sell Polaris Ranger vehicles (utility-terrain vehicles - UTVs)
4 and Polaris LSV vehicles (said to be recreational off-highway vehicles - ROHVs) pursuant to a Dealer
5 Agreement with PSI.²

6 2. Respondent, located at 2100 Highway 55, Medina, Minnesota, is a distributor of Polaris
7 vehicles. (Exhibit A to Declaration of Anthony Thomas (Tom) Triano)

8 3. The telephonic hearing on Respondent's Motion to Dismiss Protest for Lack of Jurisdiction
9 was conducted on March 27, 2015, as scheduled, before Anthony M. Skrocki, an Administrative Law
10 Judge ("ALJ") of the Board.

11 4. Protestant was represented by Michael M. Sieving, Esq.

12 5. Respondent was represented by Gregory R. Oxford, Esq. of Isaacs Clouse Crose & Oxford
13 LLP.

14 6. Adrenaline filed this protest on January 22, 2015, after discovering that PSI intended to
15 establish an additional dealership for Polaris LSV vehicles and Polaris Ranger vehicles at the existing
16 motorcycle dealership location of Granite Bay Motorcycle Partners, Inc., dba Roseville Yamaha, 2014
17 Taylor Road, Roseville, California ("GBMP"). (This dealership is also sometimes referred to as "New
18 Dealer" in the pleadings.)

19 7. Although Adrenaline is within the relevant market area³ of GBMP's location, for reasons
20 stated below, PSI did not give notice pursuant to Section 3062(a)(1) to either Adrenaline or the Board.

21 8. PSI filed its "Motion to Dismiss Protest for Lack of Jurisdiction" on March 4, 2015.

22 9. Adrenaline filed its "Opposition to Motion to Dismiss Protest for Lack of Jurisdiction" on
23 March 16, 2015.

24 10. PSI filed its "Reply Memorandum in Support of Motion to Dismiss Protest for Lack of
25

26 ¹ The Motion at issue indicates that the proper name for Respondent is "Polaris Sales, Inc." rather than "Polaris Industries,
Inc." (Motion, page 1, lines 18)

27 ² As will be discussed, Adrenaline did not become a "franchisee" of PSI until January 1, 2015. Whether the vehicles are in fact
"recreational off-highway vehicles" is unclear and will be discussed.

28 ³ All references to statutory sections are to the Vehicle Code unless otherwise indicated. 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."

1 Jurisdiction" on March 23, 2015.

2 **MOTION TO DISMISS**

3 **Respondent's Assertions in its Motion to Dismiss**

4 11. PSI claims that the Dealer Agreement between PSI and GBMP authorizing the sale of
5 Polaris Ranger and Polaris LSV vehicles became effective on November 26, 2014. (Motion, page 1, lines
6 23-24) At that time, because the Ranger and LSV vehicles (UTVs and ROHVs) were not included in the
7 definition of "all-terrain vehicles" (ATVs) set forth in Section 111, Dealer Agreements for the Ranger and
8 LSV vehicles were not subject to Section 3062. Thus PSI was not required to give notice to Adrenaline
9 or the Board and Adrenaline has no right to protest the establishment of GBMP as a Polaris dealer.⁴
10 (Motion, page 1, lines 25-28)

11 12. PSI explains its arguments as follows:

- 12 ▪ Polaris Ranger vehicles are "utility-terrain vehicles" within the definition of Section
13 531 and Polaris LSV vehicles are "recreational off-highway vehicles" within the
14 definition of Section 500. (Motion, page 2, lines 1-4)
- 15 ▪ However, in November 2014, when the Dealer Agreement between PSI and GBMP
16 became effective, neither of these vehicles were within the definition of "all-terrain
17 vehicles" as defined in Section 111, thus the Board's statutes were not applicable to
18 Dealer Agreements for either Ranger or LSV vehicles. (Motion, page 2, lines 1-4)
- 19 ▪ It was not until January 1, 2015 that the definition of "all-terrain vehicles" in Section
20 111 was expanded to include UTVs and ROHVs by adding subdivision (b) to Section
21 111. (Motion, page 2, lines 5-12)

22 13. This new subdivision, effective January 1, 2015, states:

23 (b) Notwithstanding subdivision (a), for purposes of Chapter 6 (commencing with
24 Section 3000) of Division 2 and Chapter 4 (commencing with Section 11700) of
25 Division 5, "all-terrain vehicle" also means a recreational off-highway vehicle as
26 defined in Section 500 and a utility-terrain vehicle as defined in Section 531.

27 ⁴ As will be discussed, prior to the amendment of the statutes effective January 1, 2015, dealers selling UTVs and OHVs were
28 not within the definition of "franchisees" as contained in Section 331.1, and, as to those vehicles, PSI was not a "franchisor" as
defined in Section 331.2.

1 14. According to Respondent, it was only upon the effective date of this amendment, January
2 1, 2015, that Adrenaline's Dealer Agreement became a "franchise" under Section 331(a)(2) and it was not
3 until that date that future Dealer Agreements for the vehicles defined in Sections 500 and 531 (the Ranger
4 UTVs and LSV RHOVs) became subject to Section 3062.⁵ (Motion, page 2, lines 17-23)

5 15. The Dealer Agreement between PSI and GBMP was effective as of November 26, 2014, a
6 time when UTVs and ROHVs were not within the definition of "all-terrain vehicles". Respondent
7 contends that at that time there was no "franchise" between PSI and Adrenaline for these vehicles.⁶
8 Adrenaline was not a "franchisee" and PSI was not a "franchisor" under Sections 331, 331.1 and 331.2.
9 (Motion, page 3, lines 5-12)

10 16. Accordingly, Respondent argues that Section 3062(a)(1) did not obligate PSI to give
11 notice, and Adrenaline was not "required to be given" notice of the intended establishment of GBMP.
12 (Motion, page 3, lines 13-17) Because Adrenaline has no right to protest the establishment of GBMP, the
13 Board lacks jurisdiction to consider the protest. (Motion, page 3, lines 17-19)

14 17. It was only when the amendment to Section 111 became effective (January 1, 2015) that,
15 according to Respondent, Adrenaline became a "franchisee" under its Dealer Agreement for the Ranger
16 and LSV vehicles. Because GBMP's Dealer Agreement was effective in November 2014, there was no
17 action of PSI subject to Section 3062.

18 **Protestant's Assertions in its Opposition**

19 18. Adrenaline asserts that Section 3062 is applicable as more is required than the mere
20 execution of a "franchise" as "the execution of a franchise is only one step required for the establishment
21 of a new dealership." (Opposition, page 2, lines 8-12)

22 19. The documents Adrenaline obtained from PSI purported to show that prior to January 1,
23 2015, a "franchise" had been executed between GBMP and PSI and that GBMP had acquired flooring for
24 the new line-make. Adrenaline argues that it is undisputed that prior to January 1, 2015, GBMP did not
25 have an occupational license issued by DMV for the Polaris line and did not have Polaris products at its

26
27 ⁵ ALJ Skrocki found that there was a "franchise" prior to January 1, 2015, but that Adrenaline was not a "franchisee" until
January 1, 2015. (See discussion below.)

28 ⁶ ALJ Skrocki determined that as of November 26, 2014, there was a "franchise" but PSI was not yet a "franchisor" required to
provide notice.

1 location. (Opposition, page 2, lines 13-24)

2 20. Adrenaline contends GBMP "...was not a 'franchisee' for the Polaris line as of January 1,
3 2015.⁷ GBMP did not 'receive new motor vehicles' from Polaris prior to that time, and did not sell or
4 lease, or offer to sell or lease, Polaris vehicles until some time after the amendments to Section 111
5 became effective." (Opposition, page 3, lines 1-5)

6 21. Adrenaline also asserts that certain Occupational Licensing forms are required to be
7 submitted to DMV; that "Section 11700 makes it unlawful to act as a new motor vehicle dealer without
8 first having procured a license from DMV as such"; and that there was no signage at GBMP as required
9 by Section 11709(a) and Section 270.06 of Title 13 of the California Code of Regulations. (Opposition,
10 page 3, lines 6-23)

11 22. In sum, Adrenaline asserts that "[w]ithout a license issued by DMV for GBMP to sell
12 Polaris vehicles, there was no dealership 'established' prior to January 1, 2015 as contemplated by
13 Section 3062(a) and (e)(1), nor was there a 'franchisee' as defined by Section 331.1." (Opposition, page
14 4, lines 4-6) Accordingly, Adrenaline contends that "GBMP was clearly not a 'franchisee' on the effective
15 date of the statute (sic) as required by the relevant Vehicle Code sections and DMV regulations, and many
16 of the substantive requirements for the establishment of a 'dealership' had not been met." (Opposition,
17 page 4, lines 12-15)

18 **Respondent's Assertions in its Reply to the Opposition**

19 23. According to Respondent, Adrenaline "conflates two separate regulatory schemes: (1)
20 regulation of dealership locations pursuant to Veh. Code § 3062 and (2) occupational licensing." (Reply
21 page 1, lines 19-20) Adrenaline "also ignores the regulatory sequencing." (Reply, page 1, line 21)

22 24. Respondent argues that, "Occupational licensing regulation does not kick in until after the
23 manufacturer certifies on the DMV's Form OL-124 that section 3062 does not apply or that its
24 requirements have been complied with. That occurred in this case when Polaris [PSI] executed the
25 ///

26
27 ⁷ "Section 331.1 defines 'franchisee' as: '... any person who, pursuant to a franchise, *receives new motor vehicles* subject to
28 registration under this code, ... new all-terrain vehicles, as defined in Section 111, ... from the franchisor *and who offers for
sale or lease, or sells or leases the vehicles at retail ...*' (Opposition, page 2, lines 22-25; emphasis in original)

OL-124 on December 3, 2014.”⁸ (Reply, page 2, lines 3-4 and Exhibit C to Declaration of Sean Coplen)

25. Respondent asserts that “[i]t is the granting of the right to sell and service vehicles at a specified location in the franchise agreement that is the subject of regulation under section 3062, not the actual establishment of dealership operations that, of necessity, must await completed occupational licensing review.” (Reply, page 2, lines 15-18) In this case, GBMP submitted its licensing application to DMV in early December 2014, but as a result of a backlog of applications, DMV Occupational Licensing Operations was not able to complete its review of GBMP’s application until mid-January 2015. (Reply, page 2, lines 22-24)

26. PSI states, “[s]imply put, the delays in obtaining licensing approval to sell and service Polaris Vehicles until January 16, 2015, and in obtaining municipal approval for permanent Polaris signage, have nothing to do with regulation under section 3062.” (Reply, page 3, lines 15-17).

APPLICABLE STATUTES

27. It is important to analyze the applicable statutes and attempt to understand the definitions of the terms contained therein, but first some additional explanation of the issues, facts and statutes is warranted.

28. First, a distinction must be recognized between a “franchise” and a “franchise that is within the Board’s statutes”. This is critical as not all “franchises” result in “franchisees” or “franchisors” subject to the Board’s statutes. This is because the definition of a “franchise” in Section 331 is much broader than are the definitions of “franchisee” and “franchisor” in Sections 331.1 and 331.2 respectively.

29. Section 331 defines a “franchise” as follows:

(a) A “franchise” is a written agreement between two or more persons having all of the following conditions:

(1) A commercial relationship of definite duration or continuing indefinite duration.

(2) The franchisee is granted the right to offer for sale or lease, or to sell or lease at retail new motor vehicles or new trailers subject to identification pursuant to Section 5014.1 manufactured or distributed by the franchisor or the right to perform authorized warranty repairs and service, or the right to perform any combination of these activities.

(3) The franchisee constitutes a component of the franchisor’s distribution system.

⁸ The completion of and need for the OL-124 will be discussed below.

(4) The operation of the franchisee's business is substantially associated with the franchisor's trademark, trade name, advertising, or other commercial symbol designating the franchisor.

(5) The operation of a portion of the franchisee's business is substantially reliant on the franchisor for a continued supply of new vehicles, parts, or accessories.

(b) The term "franchise" does not include an agreement entered into by a manufacturer or distributor and a person where all the following apply:

(1) The person is authorized to perform warranty repairs and service on vehicles manufactured or distributed by the manufacturer or distributor.

(2) The person is not a new motor vehicle dealer franchisee of the manufacturer or distributor.

(3) The person's repair and service facility is not located within the relevant market area of a new motor vehicle dealer franchisee of the manufacturer or distributor.

(Underline added.)

30. It is noted that all that is required as subject matter vehicles are "new motor vehicles" or "new trailers subject to identification pursuant to Section 5014.1."

31. Section 415 defines a "motor vehicle" as follows:

(a) A "motor vehicle" is a vehicle that is self-propelled.

(b) "Motor vehicle" does not include a self-propelled wheelchair, motorized tricycle, or motorized quadricycle, if operated by a person who, by reason of physical disability, is otherwise unable to move about as a pedestrian.

32. If all that was required for the application of the Board's statutes would be a "franchise" pursuant to Section 331, then the Board's jurisdiction would also extend to the franchises for the "trailers" listed in Section 5014.1 which include the following: logging dolly; pole or pipe dolly; semitrailer; trailer; and trailer bus.

33. As can be seen from the very broad definition of "franchise", the issue of the Board's jurisdiction is determined not by "whether there is a franchise" but by (1) "whether there is a franchise as to the vehicles that come within the Board's jurisdiction" (as limited by Section 3051); (2) whether the persons are "licensees" as "new motor vehicle dealers, motor vehicle manufacturers or motor vehicle distributors" (also as stated in Section 3051); and (3) "whether the parties to the franchise are

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1 'franchisors' and 'franchisees'" (as defined in Sections 331.2 and 331.1 respectively).⁹

2 **The Board's Jurisdiction as Limited by Section 3051 as to the Persons and Vehicles**

3 34. Section 3051 lists the persons and types of vehicles to which the Board's statutes apply and
4 do not apply. It provides, in part, as follows:

5 This chapter does **not apply** to any person licensed as a transporter under Article 1
6 (commencing with Section 11700) or as a salesperson under Article 2 (commencing with
7 Section 11800) of Chapter 4 of Division 5, or **to any licensee who is not a new motor**
8 **vehicle dealer, motor vehicle manufacturer, manufacturer branch, new motor vehicle**
9 **distributor, distributor branch, or representative. This chapter does not apply to**
10 **transactions involving "mobilehomes," as defined in Section 18008 of the Health and**
11 **Safety Code, "recreational vehicles," as defined in subdivision (b) of Section 18010 of the**
12 **Health and Safety Code, truck campers, "commercial coaches," as defined in Section**
13 **18001.8 of the Health and Safety Code, or off-highway motor vehicles subject to**
14 **identification, as defined in Section 38012, except off-highway motorcycles, as defined in**
15 **Section 436, and all-terrain vehicles, as defined in Section 111. ...**
16 (Bold and underline added.)

17 35. As can be seen from this section, even if there is a "franchise" within the general definition
18 contained in Section 331, the Board's statutes would not apply to that franchise unless it was a franchise
19 involving persons and vehicles that are included or not excluded by the language in Section 3051.

20 36. As to persons, the parties to be subject to the Board's statutes must be "a new motor
21 vehicle dealer, motor vehicle manufacturer, manufacturer branch, new motor vehicle distributor,
22 distributor branch." This is considerably more limited than what is needed for a "franchise" as defined in
23 Section 331.

24 37. And, Section 3051 limits the types of vehicle that would be included within a "franchise
25 subject to the Board's statutes" as compared to just a "franchise" as defined in Section 331.

26 38. Again, the two vehicles involved in the Dealer Agreements at issue here are called "utility-
27 terrain vehicles" and "recreational off-highway vehicles".

28 39. Note that Section 3051 expressly includes what are called "all-terrain vehicles as defined
in Section 111" but makes no reference to "utility-terrain vehicles" or "recreational off-highway

⁹ Not all Dealer Agreements, even if meeting the basic definition of a "franchise", are "franchises subject to the Board's jurisdiction". Likewise, not all franchises result in the relationship of "franchisor" and "franchisee" subject to the Board's statutes. The Dealer Agreements for UTVs and ROHVs could be "franchises" when first executed between the parties but would not be "franchises subject to the Board's statutes" until January 1, 2015. It was not until then that the vehicles at issue came within the Board's statutes so it was not until then that PSI became a "franchisor" and Adrenaline and GBMP became "franchisees".

1 vehicles”.

2 40. Although Section 3051 brings “all-terrain vehicles, as defined in Section 111” within the
3 Board’s statutes, it was not until January 1, 2015, that Section 111 was effectively amended to include
4 both UTVs and ROHVs within the definition of “all-terrain vehicles” for the purposes of the Board’s
5 statutes. Said another way, because of the amendment to Section 111 effective January 1, 2015, the
6 vehicles at issue here were no longer excluded by Section 3051.

7 **As to the Parties to a Franchise who would be “Franchisors” and “Franchisees”**
8 **to whom the Board’s Statutes would Apply**

9 41. Section 331.1 defines “franchisee” as follows:

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

14 42. Section 331.2 defines “franchisor” as follows:

15 A “franchisor” is any person who manufactures, assembles, or distributes new
16 motor vehicles subject to registration under this code, new off-highway motorcycles, as
17 defined in Section 436, new all-terrain vehicles, as defined in Section 111, or new trailers
subject to identification pursuant to Section 5014.1 and who grants a franchise.
(Underline added.)

18 43. Again, the mere fact there is a “franchise” as defined in Section 331, does not mean that
19 the parties to that franchise are “franchisees” and “franchisors” to whom the Board’s statutes would apply.
20 As stated above, the Board’s statutes apply to “franchisors” and “franchisees”. It is critical to apply these
21 terms because:

- 22 a. Only “franchisors” are required to provide the notices as stated in Section 3062;
23 b. It is only “franchisees” and the Board that must receive the notices; and,
24 c. The Board must hear a protest only if it is filed by a “franchisee” that is required to receive
25 the notices.

26 44. As explained, although there may be a “franchise”, it may be that the parties to it are not
27 “franchisor” or “franchisee” within the scope of the Board’s statutes. The definitions for “franchisor” and
28 “franchisee” are narrower than the definition of a “franchise”.

1 45. Just as all "franchises" are not subject to the Board's statutes, likewise not all parties to a
2 "franchise" are subject to the Board's statutes as "franchisors" or "franchisees". To come within the
3 jurisdiction of the Board's statutes, there must be a "franchise" that results in the parties being
4 "franchisor" and "franchisee" and the vehicles must be within those specified in or not excluded by
5 Section 3051, which in this case includes ATVs as defined in Section 111.

6 **Prior to January 1, 2015**

7 46. Even if the Dealer Agreement was a "franchise" in 2014 under the general definition of
8 "franchise" contained in Section 331, it was not a franchise subject to the Board's statutes as UTVs and
9 ROHVs were not within the Board's statutes. Therefore, in 2014, PSI would not be a "franchisor" (as
10 defined in 331.2) required to provide notice, Adrenaline would not be a "franchisee" (as defined in 331.1)
11 with a right to protest, and appointing GBMP as a Polaris dealer in November 2014 for the two vehicle
12 types would not be establishing GBMP as an additional "franchisee".

13 47. The Dealer Agreement between PSI and GBMP, even though a "franchise" in 2014, would
14 not have been within the Board's statutes at that time and would have been effective to appoint GBMP as
15 an authorized dealer for the PSI Ranger and LSV vehicles as of the date of its execution (November 26,
16 2014). Again, although Adrenaline and GBMP may be Polaris dealers as of 2014 with a "franchise",
17 neither of them were "franchisees" as the vehicles covered by the franchise were not subject to the
18 Board's statutes, as they were not within the definition of Section 111 until January 1, 2015.

19 48. What must be considered in addressing and resolving these issues is the unique set of facts
20 pertaining to the types of vehicles that are the subject of the Dealer Agreements. These facts are:

- 21 ■ That the Dealer Agreement for GBMP (the new dealer) was executed in November 2014.
- 22 ■ Per the statutes then in effect, neither the Ranger vehicles (UTVs) nor the LSV vehicles
23 (ROHVs) were within the statutes under which the Board operates. Thus, the Dealer
24 Agreement, even though a "franchise" per Section 331, would not be for vehicles within the
25 ATV definition in Section 111, as stated in Section 3051, and the Dealer Agreements for
26 those vehicles would not result in "franchisor" status for PSI or "franchisee" status for either
27 Adrenaline or GBMP.
- 28 ■ If Adrenaline (Protestant) was not a "franchisee" at that time PSI would not be required to give

notice per Section 3062 to Adrenaline because Adrenaline was not a "franchisee" in the relevant market area and GBMP was not being established as an additional "franchisee". Adrenaline would not have a right to file a protest pursuant to Section 3062.

As of January 1, 2015

49. The statutes were modified effective January 1, 2015 to include UTVs (Rangers) and ROHVs (LSVs);

50. As of January 1, 2015, it was possible for PSI to then be a "franchisor", and Adrenaline and GBMP to then become "franchisees".

51. The effect of the amended statute to include these types of vehicles within the applicable definitions would be that the Dealer Agreements (a franchise under the basic definition of Section 331) would be as follows:

- As of January 1, 2015, Adrenaline (Protestant) for the first time became a "franchisee" of PSI as to the two types of vehicles (UTVs and ROHVs);
- As of January 1, 2015, PSI would for the first time become a "franchisor" as to the two types of vehicles;
- As of January 1, 2015, GBMP (New Dealer) would for the first time become a "franchisee" as to the two types of vehicles.

52. If GBMP was empowered by the Dealer Agreement to sell the two types of vehicles as of November or December 2014, then there would not be a need for PSI to comply with Section 3062 at any time after January 1, 2015. GBMP by then was already authorized to sell the vehicles pursuant to the franchise that was effective as of November 26, 2014.

53. The same is true as to Adrenaline. Adrenaline was empowered by the terms of its Dealer Agreement (executed prior to January 1, 2015) to sell the two types of vehicles. Although Adrenaline's Dealer Agreement was a "franchise" when it was first executed, it was not a "franchise" subject to the Board's statutes until the effective date of the statutory amendments. Adrenaline then too became a "franchisee" on January 1, 2015.

54. As GBMP and Adrenaline became "franchisees" simultaneously as of January 1, 2015, (by operation of law upon the amendment of the statute) it would make no sense to conclude that PSI would

1 have to give any notice to either of them of the appointment of the other as a "franchisee". It would make
2 no more sense to allow Adrenaline to protest the January 1, 2015 "establishment" of GBMP as an
3 additional "franchisee" than it would to allow GBMP to protest the establishment of Adrenaline as an
4 additional "franchisee".

5 55. There is no doubt that, after January 1, 2015, either Adrenaline or GBMP could protest the
6 intent of PSI to establish another franchisee (if Adrenaline or GBMP were in the relevant market area of
7 the proposed additional franchisee) but until January 1, 2015, neither was a "franchisee" and PSI was not
8 a "franchisor" required to provide notice per Section 3062.

9 ANALYSIS

10 56. The following are the statutes that must be applied together with some comments as to the
11 terminology used. As will be seen, the focus is upon the existence of Adrenaline as a "franchisee"; PSI as
12 a "franchisor"; the intent of PSI to enter into an additional "franchise"; the vehicles being of the type that
13 would bring them within the Board's statutes as stated in Section 3051; and that the UTVs and ROHVs
14 are included within the definition of ATV as stated in Section 111. That the two types of vehicles come
15 within Section 111 is needed in order to satisfy the definitions of "franchisor" (Section 331.2) and
16 "franchisee" (Section 331.1) as well as the language of 3051 as to the jurisdiction of the Board.

17 Legislative Grant of Power to the Board

18 57. Section 3050 provides that the Board shall do all of the following:

19 ...
20 (d) Hear and decide, within the limitations and in accordance with the procedure
21 provided, a protest presented by a franchisee pursuant to Section 3060, 3062, 3064,
22 3065, 3065.1...
(Emphasis added.)

23 58. As can be seen, Section 3050 requires that the protest must be presented by a "franchisee"
24 and in this case filed pursuant to Section 3062.

25 The Statutory Obligation of a "Franchisor" to Existing "Franchisees"

26 59. Section 3062(a)(1) reads in part as follows:

27 Except as otherwise provided in subdivision (b), if a franchisor seeks to enter into
28 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

1 line-make is represented, the franchisor shall, in writing, first notify the board and each
2 franchisee in that line-make in the relevant market area of the franchisor's intention to
3 establish an additional dealership or to relocate an existing dealership.
(Emphasis added.)

4 60. For Section 3062 to be applicable, (1) PSI must be a "franchisor"; (2) that "seeks to enter
5 into a franchise"; and (3) Adrenaline must be an existing "franchisee" in the "relevant market area". If all
6 three of these are satisfied, then PSI must give notice to Adrenaline and the Board of PSI's "intention to
7 establish" GBMP as an additional dealership and Adrenaline would have the right to file a protest.

8 61. In Section 331 (see Paragraph 29), there is no requirement that the "franchisee" in fact be
9 in operation as a "dealer" before the written agreement will be effective as a "franchise". All of the
10 language speaks in terms of the "rights" that are granted under the "written agreement."

11 62. As indicated above in Paragraph 41, the definition of a "franchisee" requires a "franchise",
12 that the franchisee receives new "all-terrain vehicles" from the "franchisor," and the franchisee offers for
13 sale or lease, or sells or leases the vehicles at retail.

14 63. It is not possible to reconcile this requirement with the definition of either "franchise" or
15 "franchisor". To say that there is no "franchise" until the person is in fact receiving the vehicles and
16 offering them for sale or lease would in effect be allowing the tail to wag the dog. The "franchise" is the
17 written agreement that confers the rights stated in Section 331.

18 64. In this case, Adrenaline is a "franchisee" but only as of January 1, 2015. Prior to then, PSI
19 was not obligated to comply with Section 3062 as to Adrenaline.

20 65. Whether GBMP did not become a "franchisee" until some time after January 1, 2015, as
21 alleged by Adrenaline, is irrelevant for the following reasons: Section 3062 is applicable to PSI as a
22 "franchisor" and to Adrenaline as a "franchisee" only as of January 1, 2015, whereas the franchise
23 between PSI and GBMP (although not subject to the Board's statutes) was effective on November 26,
24 2014.

25 The Significance of and Need for the OL-124

26 66. There is mention by the parties of the completion of the Form OL-124 by PSI on
27 December 3, 2014. The following is not intended to imply that either the drafters of the OL-124 or the
28 representatives of PSI were at fault for any uncertainty in the language of the OL-124, as prepared or as

1 completed.¹⁰ Anyone who has suffered through the reading of this will recognize that it is unrealistic to
2 expect that even sophisticated business people will have both the time and the ability to apply the statutes
3 to the facts and evaluate not only "whether" Section 3062 is applicable, and if not, "why not". Here, this
4 may well be a situation when no OL-124 may have been required. Or, if one should be required, the form
5 perhaps should have had more alternative reasons why notices per Section 3062 would not be required.

6 67. PSI completed the OL-124 for the "Polaris RGR (Ranger) & LSV" vehicles. (Exhibit C to
7 Declaration of Sean Coplen)

8 68. The OL-124 has two alternative boxes to check. Not checked was the second box that
9 Section 3062 has been complied with but no protests have been filed. The box that was checked (the first
10 box) certified that "Written notification to the New Motor Vehicle Board and each franchisee is not
11 required pursuant to Vehicle Code section 3062(b) or 3072(b), or there are no other franchised dealers
12 within (sic) the same line-make located within the relevant market area." (Underline added.)

13 69. The underlined first clause of the checked box is not applicable to the facts here as these
14 are exceptions provided in subdivision (b) of Section 3062. PSI was not exempt from complying with
15 Section 3062(a) because of the exceptions contained in 3062(b) (relocations in the same city and within
16 one mile from the existing location, or establishment within the same city and within one-quarter mile of
17 a dealership of the same line-make out of operation for less than 90 days).

18 70. The second clause in the first alternative that was checked on the OL-124 may or may not
19 be accurate. It states that notices per Section 3062 are not required as "... there are no other franchised
20 dealers within (sic) the same line-make located within the relevant market area." This would be accurate
21 in this situation only if the language "no other franchised dealers" was limited to the interpretation as
22 explained above: that it means "no other franchisees as defined in Section 331.1", that is "no other
23 franchisees subject to the Board's jurisdiction". Here, under the general definition of a "franchise"
24 contained in Section 331, Adrenaline was a "franchised dealer" of Polaris vehicles, but notice to
25 Adrenaline pursuant to Section 3062 was not required as Adrenaline was not a "franchisee" as defined in
26 Section 331.1 to which notice was required to be provided per Section 3062(a). This is because, in 2014,

27 ¹⁰ Of course, the Board does not intend in any way to inform Occupational Licensing what their requirements or procedures
28 should be regarding their functions.

1 the Polaris vehicles "RGR" (UTVs) and "LSV" (ROHVs) were not within the definition of ATVs as
2 stated in Section 111.

3 **The Claim of Adrenaline that Establishing an Additional Motor Vehicle**
4 **Dealership Requires More than Just Execution of the "Franchise"**

5 71. Even if the statute requiring notice had applied, it would apply only when "the franchisor
6 seeks to enter into a franchise establishing an additional motor vehicle dealership" and that it state only
7 "the franchisor's intention to establish an additional dealership". (Section 3062(a); underline added)
8 There is nothing in Section 3062 that imposes an obligation on the franchisor to see that the new dealer
9 begins the actual operation of the dealership.

10 72. The "franchise" is the contract between the parties. The "dealership" is the physical
11 facility and operation of the business that is subject to control of the dealer and subject to regulation by
12 Occupational Licensing.

13 **The Extent of a Franchisor's Obligation to comply with Section 3062 (if it is applicable)**

14 73. All that is required for a "franchise" is the written agreement which meets the "conditions"
15 contained in Section 331, one of which is the "right" to sell or lease or offer to sell or lease the vehicles
16 stated. When the dealer becomes a "franchisee" within the statutory definition as urged by Adrenaline,
17 with the right to receive notices under Section 3062 and the right to file protests, is subject to many
18 circumstances beyond the control of the manufacturer or distributor.

19 74. It is noted that, as to the notice requirements, Section 3062 does not make reference to an
20 "actual establishment" but only that the "franchisor" "seeks to enter into a franchise establishing." It also
21 states the franchisor must "first" notify the Board and each franchisee of the "intention to establish" an
22 additional dealership. All the language is prospective. If Section 3062 is applicable, the sequence of
23 events would be: (a) Notice from the franchisor to the Board and the existing franchisee; (b) If no timely
24 protest is filed, or upon resolution of a protest if one is filed and overruled, the franchisor may then enter
25 into the "franchise"; and (c) The new dealership may be established in accordance with the procedures
26 and requirements of Occupational Licensing Division of DMV.

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28 ///

**Whether PSI was Required to Provide Notice per Section 3062 Prior to
Execution of the Dealer Agreement with GBMP**

75. The undisputed facts before the Board are that the Dealer Agreement between PSI and GBMP was executed and intended to become effective as of November 26, 2014. As Section 3062 was not applicable, there was nothing prohibiting PSI from entering into the franchise with GBMP on November 26, 2014. As of that time, there was a "franchise", as defined by Section 331, in existence between PSI and GBMP. The fact that the amendments to the statute regarding the two vehicles included within the franchise became effective on January 1, 2015 should not have any effect upon the Dealer Agreement/franchise already in existence.

76. Likewise, there was a "franchise" in existence between PSI and Adrenaline from the time their Dealer Agreement was effective and there is no contention that Adrenaline was not receiving the products and in operation as a dealership from the time its Dealer Agreement was effective. But, as explained, it was not until January 1, 2015, that Adrenaline became a "franchisee" entitled to notice under Section 3062.

77. The "additional franchise" had already been executed between PSI and GBMP as of November 26, 2014; at a time when Adrenaline was not a "franchisee" and PSI was not a "franchisor" within the Board's statutes.

78. In addition to requiring that there be a "franchise", these two definitions, "franchisor" and "franchisee", both specify the types of vehicles that must be within the scope of the written agreement for it to be a franchise. In particular here, the types of vehicles specified include "new all-terrain vehicles, as defined in Section 111."

79. Prior to January 1, 2015, Section 111 consisted only of (a) as shown below. Section 111 was amended, effective January 1, 2015, to include (b) as shown in italics below.

(a) "All-terrain vehicle"¹¹ means a motor vehicle subject to subdivision (a) of Section 38010 that is all of the following:

(1) Designed for operation off of the highway by an operator with no more than one passenger.

¹¹ It is undisputed that UTVs and OHRVs do not come within this definition of ATVs in Section 111(a). Among other reasons, such vehicles do not have a seat that must be straddled by the operator, will seat more than one passenger, and are not steered by handle bars.

- 1 (2) Fifty inches or less in width.
2 (3) Nine hundred pounds or less unladen weight.
3 (4) Suspended on three or more low-pressure tires.
4 (5) Has a single seat designed to be straddled by the operator, or a single seat designed to
5 be straddled by the operator and a seat for no more than one passenger.
6 (6) Has handlebars for steering control.
7 (b) *Notwithstanding subdivision (a), for purposes of Chapter 6 (commencing with Section*
8 *3000) of Division 2¹² and Chapter 4 (commencing with Section 11700) of Division 5, "all-*
9 *terrain vehicle" also means a recreational off-highway vehicle as defined in Section 500*
10 *and a utility-terrain vehicle as defined in Section 531. (Italics added.)*

11 80. In November and December 2014, PSI was not a "franchisor" as to UTVs or ROHVs as
12 they were not within the definition of ATVs as stated in Section 111; for the same reasons Adrenaline was
13 not a "franchisee required" to be provided notice; and for the same reason GBMP was not a "franchisee"
14 as to these vehicles. Thus in November or December 2014, prior to execution of the Dealer Agreement
15 with GBMP, PSI was not required to provide notice pursuant to Section 3062 to the Board or to
16 Adrenaline.

17 **Facts and Law Not in Dispute**

18 81. It is undisputed that the Dealer Agreements at issue here are for only the Polaris Ranger
19 and Polaris LSV vehicles.

20 82. It is undisputed that neither the Ranger vehicles nor the LSV vehicles were within the
21 definition of "all-terrain vehicles" as defined in Section 111 as that section existed prior to January 1,
22 2015.

23 83. It is undisputed that Section 111 was amended, effective January 1, 2015, to include both
24 "utility-terrain vehicles" (UTVs) as defined in Section 531, and "recreational off-highway vehicles"
25 (ROHVs) as defined in Section 500, as being "all-terrain vehicles" for the purposes of the Board's
26 statutes.

27 84. It is undisputed that Polaris Ranger vehicles are within the definition of "utility terrain
28 vehicles" as defined in Section 531 and Dealer Agreements relating to them became subject to the
Board's statutes as of January 1, 2015.

///

¹² These are the statutes under which the Board operates. The effect of subdivision (b) of Section 111, as of January 1, 2015, is to include ROHVs and UTVs as being within the definition of ATVs for the "purposes" of the Board's statutes.

Whether Polaris LSV Vehicles are ROHVs as Defined in Section 500

85. Although not addressed by the parties, it is unclear whether Polaris LSV vehicles are now (as of January 1, 2015) within the definition of "recreational off-highway vehicles" as defined in Section 500. The parties' seeming concurrence that Polaris LSVs are within the definition of "recreational off-highway vehicles" is irrelevant as this would be a jurisdictional requisite and the parties cannot confer jurisdiction upon the Board by their agreement or consent.

86. As this is a jurisdictional question, it can be raised at any time by the ALJ, the Board, or a reviewing court on its own motion.

87. If the LSV vehicles are within the definition of "recreational off-highway vehicles" (ROHVs) the findings herein and proposed order as to the Ranger UTVs and ROHVs in general would be applicable as well to the LSVs and to the Dealer Agreement regarding both of them. However, as pointed out by the ALJ at the hearing on the Motion to Dismiss, the Polaris LSV vehicles may not be within the definition of "recreational off-highway vehicles" and, if not, the Dealer Agreements as to the LSV vehicles may not be subject to the Board's statutes.¹³ If the LSVs are not ROHVs then the LSVs would not be ATVs within Section 111(b) and Adrenaline would have no right to protest any dealer agreement for LSV vehicles regardless of the January 1, 2015 amendment to Section 111. If the LSVs are not "recreational off-highway vehicles", a dealer agreement for LSV vehicles would not be within Section 3062 as PSI would not be a "franchisor" and Adrenaline would not be a "franchisee" as to the LSV vehicles.

88. Although it is uncertain, it appears as though the Polaris LSV¹⁴ vehicles are battery-powered only. If this is in fact the situation, then the Polaris LSV vehicles may not come within the definition of "recreational off-highway vehicles" as contained in Section 500.

¹³ It may be that the LSVs may be included in some other statute that would result in the Dealer Agreement as to them coming within the Board's statutes. Neither side has provided any other information pro or con. Whatever the conclusion as to the status of the LSVs, it does not impact the issues and rulings regarding the Ranger UTVs. In the event the LSV vehicles are subject to the Board's statutes the rulings on this motion will apply to them as well. If the LSV vehicles are not within the Board's statutes, the issues raised as to them are moot as the Board would have no jurisdiction as to the franchise for LSVs either before or after January 1, 2015.

¹⁴ Polaris LSV vehicles are also known as "GEM" vehicles, a trade-name for Global Electric Motorcars, a company acquired by Polaris Industries. LSV vehicles are also known as "low-speed vehicles" and at times "NEVs" ("neighborhood electric vehicles").

89. Section 500 defines "recreational off-highway vehicles" as follows.

"Recreational off-highway vehicle" means a motor vehicle meeting all of the following criteria:

- (a) Designed by the manufacturer for operation primarily off of the highway.
- (b) Has a steering wheel for steering control.
- (c) Has nonstraddle seating provided by the manufacturer for the operator and all passengers.
- (d) (1) Has a maximum speed capability of greater than 30 miles per hour.
(2) A vehicle designed by the manufacturer with a maximum speed capability of 30 miles per hour or less but is modified so that it has a maximum speed capability of greater than 30 miles per hour satisfies the criteria set forth in this subdivision.
- (e) Has an engine displacement equal to or less than 1,000cc (61 ci).
(Underline added.)

90. Although no evidence was presented as to "all of the ... criteria" above, it is subdivision (e) that causes the patent uncertainty whether the Polaris LSV is within this definition. If the LSV is an electric-only vehicle, it would be a "motor vehicle" but it would have an electric motor (likely rated by watts) rather than an "engine displacement equal to or less than 1,000cc (61 ci)" as required by Section 500(e). "Engine displacement" by cubic centimeters or cubic inches usually refers to the ratings or sizes of internal combustion engines.

91. If the Polaris LSV vehicles are not within the definition of a "recreational off-highway vehicle," then the protest as it relates to the Polaris LSV vehicles should be dismissed regardless of the issues triggered by the amendment to Section 111. If the LSVs are not ROHVs they would not come within the definition of ATVs and would not be subject to the Board's statutes even after January 1, 2015.

92. However, it is clear that the Polaris Ranger vehicles are within the definition of "utility-terrain vehicle" as defined in Section 531, and thus within the definition of an "all-terrain vehicle" for the purposes of the Board's statutes. Although the issues raised as to the LSV vehicles may be moot, the issues regarding the Dealer Agreements as to the Ranger vehicles remain.

DETERMINATIONS

93. It is determined that there was a "franchise" between PSI and Adrenaline prior to January 1, 2015 for the Ranger and LSV vehicles.

94. It is determined that, because the Ranger and LSV vehicles were not included in the definition of "all-terrain vehicles" prior to January 1, 2015, the PSI and Adrenaline franchise was not subject to the statutes under which the Board operates.

1 95. It is determined that in 2014, PSI was not a "franchisor" as to the Ranger and LSV vehicles
2 and thus PSI was not required to provide notices to Adrenaline pursuant to Section 3062.

3 96. It is determined that in 2014, Adrenaline was not a "franchisee" as to the Ranger and LSV
4 vehicles and thus Adrenaline would not be entitled to receive notices pursuant to Section 3062.

5 97. It is determined that the Dealer Agreement between PSI and GBMP, executed on
6 November 26, 2014, resulted in a "franchise" as of that date between PSI and GBMP for the Ranger and
7 LSV vehicles.

8 98. It is determined that because the Ranger and LSV vehicles were not included in the
9 definition of "all-terrain vehicles", prior to January 1, 2015, PSI was not a "franchisor" and GBMP was
10 not a "franchisee" as to those vehicles even though the Dealer Agreement between PSI and GBMP was
11 effective as a "franchise" as of November 26, 2014.

12 99. It is determined that, as of January 1, 2015, both franchises (that between PSI and
13 Adrenaline and that between PSI and GBMP) for the Ranger (UTVs), and possibly also for the LSV (if
14 they are ROHVs), became subject to the statutes under which the Board operates.

15 100. It is determined that, as of January 1, 2015, because the Dealer Agreement between PSI
16 and GBMP was already effective as a "franchise" for the Ranger and LSV vehicles, PSI was not required
17 to comply with Section 3062.

18 101. It is determined that, prior to January 1, 2015, as Adrenaline was not yet a "franchisee",
19 Adrenaline was not entitled to receive a notice from PSI of PSI's intent to establish GBMP as an
20 additional franchisee. As Adrenaline was not a "franchisee" required to receive notice prior to January 1,
21 2015, Adrenaline would not have the right to protest the intended establishment of GBMP (under Section
22 3062; see also Section 3050(d) empowering the Board to hear a protest filed by a "franchisee").

23 102. It is determined that, as of January 1, 2015, at least as to Ranger UTVs, Adrenaline was a
24 "franchisee" entitled to receive notices from PSI pursuant to Section 3062 and that Adrenaline could file a
25 protest pursuant to that section as to intended establishments after January 1, 2015. However, as GBMP
26 was granted a "franchise" effective November 26, 2014, PSI was not required to provide a notice to
27 Adrenaline either prior to or subsequent to January 1, 2015 of the intention of PSI to establish GBMP as
28 an additional dealership. It is also determined that Adrenaline had no right to file a protest post January 1,

1 2015 under Section 3062 as the "franchise" between PSI and GBMP had already been legally entered into
2 as of November 26, 2014.

3 **PROPOSED ORDER**

4 After consideration of the pleadings, exhibits and oral arguments of counsel, it is hereby ordered
5 that Respondent, Polaris Industries [Sales], Inc.'s "Motion to Dismiss Protest for Lack of Jurisdiction" is
6 hereby granted. *Adrenaline Powersports v. Polaris Industries, Inc.*, Protest No. PR-2418-15 is dismissed
7 with prejudice.

8
9
10 I hereby submit the foregoing which constitutes my
11 proposed order in the above-entitled matter, as the
12 result of a hearing before me, and I recommend this
13 proposed order be adopted as the decision of the
14 New Motor Vehicle Board.

15 DATED: May 28, 2015

16 

17 By: ANTHONY M. SKROCKI
18 Administrative Law Judge
19
20
21
22
23
24
25
26

27 Jean Shiimoto, Director, DMV
28 Tim Corcoran, Branch Chief,
Occupational Licensing, DMV

Attachment 3

NEW MOTOR VEHICLE BOARD
1507 – 21st Street, Suite 330
Sacramento, California 95811
Telephone: (916) 445-1888

STATE OF CALIFORNIA

NEW MOTOR VEHICLE BOARD

In the Matter of the Protests of

PORTER AUTO GROUP, L.P.,

Protestant,

v.

FCA US LLC,

Respondent.

Protest Nos. PR-2534-17, PR-2535-17,
PR-2536-17, PR-2537-17, PR-2555-18,
PR-2556-18, PR-2557-18 and PR-2558-18

DECISION

At its regularly scheduled meeting of June 29, 2018, the Public Members of the Board met and considered the administrative record and Administrative Law Judge's "Proposed Order Granting Respondent's 'Motion to Dismiss Protests or, in the Alternative, for a Finding of Good Cause to Terminate Based on Uncontested Evidence' and Overruling Protests" in the above-entitled matters. After such consideration, the Board adopted the Proposed Order as its final Decision in these matters with the following amendments:

1. After Paragraph 62, on page 18, line 13, the following heading is added:

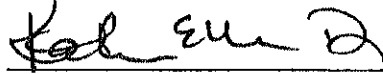
**ANALYSIS OF CLAIM THAT THE BOARD HAS IMPLIED AUTHORITY
TO DISMISS THE PROTESTS**

2. Immediately following the heading noted above, Paragraph 63 is added as follows: "The Board, relying on the opinion in *Duarte*, concludes that it has the implied authority to dismiss these protests because the undisputed facts show good cause for termination of Porter's Chrysler, Dodge, Jeep and RAM franchises. It is therefore

determined that there is good cause for termination of Porter's Chrysler, Dodge, Jeep and RAM protests with prejudice."

This Decision shall become effective forthwith.

IT IS SO ORDERED THIS 3rd DAY OF JULY 2018.

A handwritten signature in black ink, appearing to read 'Kathryn Ellen DOI', is written over a horizontal line.

KATHRYN ELLEN DOI
Vice President
New Motor Vehicle Board

1 NEW MOTOR VEHICLE BOARD
1507 - 21ST Street, Suite 330
2 Sacramento, California 95811
3 Telephone: (916) 445-1888

CERTIFIED MAIL

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5
6
7 STATE OF CALIFORNIA
8 NEW MOTOR VEHICLE BOARD
9

10
11 In the Matter of the Protest of
12 PORTER AUTO GROUP, L.P.,

13 Protestant,

14 v.

15 FCA US LLC,

16 Respondent.
17

**Protest Nos. PR-2534-17, PR-2535-17,
PR-2536-17, PR-2537-17, PR-2555-18,
PR-2556-18, PR-2557-18 and PR-2558-18**

**PROPOSED ORDER GRANTING
RESPONDENT'S "MOTION TO
DISMISS PROTESTS OR, IN THE
ALTERNATIVE, FOR A FINDING OF
GOOD CAUSE TO TERMINATE
BASED ON UNCONTESTED
EVIDENCE" AND OVERRULING
PROTESTS**

18
19 To: Michael M. Sieving, Esq.
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28 Chicago, Illinois 60606

1 This matter came on regularly for telephonic hearing on Wednesday, April 25, 2018, before
2 Anthony M. Skrocki, Administrative Law Judge ("ALJ") for the New Motor Vehicle Board ("Board").
3 Michael M. Sieving, Esq. represented Protestant. Jack O. Snyder, Jr., Esq. of Barack Ferrazzano
4 Kirschbaum & Nagelberg LLP represented Respondent.

5 FACTUAL AND PROCEDURAL BACKGROUND

6 1. Porter Auto Group, L.P. ("Porter" or Protestant) is a "franchisee" within the definition of
7 Vehicle Code section 331.1¹ and FCA US LLC ("FCA" or Respondent) is a "franchisor" within the
8 definition of Section 331.2. Porter and FCA are parties to four "franchises" as defined in Section 331,
9 with separate franchises for each of the Chrysler, Dodge, Jeep and RAM line-makes.

10 2. Porter sold and serviced all four line-makes at its former dealership located at 13411 Mono
11 Way, Sonora, California.

12 3. On September 5, 2017, pursuant to Section 3060, FCA issued separate but nearly identical
13 15-day notices of termination² for each of the four line-makes alleging the following:

14 Dealer is in material breach of its obligations under the Dealer Agreement with regard to
15 operations of its dealership. Dealer has been operating without sufficient net working
16 capital and/or wholesale credit and financing arrangements necessary to allow Dealer to
17 successfully conduct business in violation of the Dealer Agreement, Section 11(e).

18 Furthermore, Dealer has failed and continues to fail to conduct any dealership operations
19 for more than seven (7) consecutive days beginning, at a minimum, on August 23, 2017
20 and continuing without any dealership operations to the present. ... in violation of the
21 Dealer Agreement, Additional Terms and Provisions, Section 28 (c) (vi).

22 ...

23 On August 23, 2017, Dealer's landlord executed an eviction and assumed possession of the
24 Dealer premises and has been in continuous possession since then. As a result Dealer has
25 been and remains unable to conduct dealership operations continuously since at least
26 August 23, 2017. ... Dealer's defaults are, by definition, incurable and constitute cause

27 ¹ All statutory references are to the California Vehicle Code unless otherwise indicated.

28 ² A 15-day notice of termination may be issued only if one or more of the specified grounds outlined below exist otherwise the
franchisor may issue only a 60-day notice of termination:

(1) Transfer of any ownership or interest in the franchise without the consent of the franchisor, which consent shall not be
unreasonably withheld;

(2) Misrepresentation by the franchisee in applying for the franchise;

(3) Insolvency of the franchisee, or filing of any petition by or against the franchisee under any bankruptcy or receivership
law;

(4) Any unfair business practice after written warning thereof;

(5) Failure of the motor vehicle dealer to conduct its customary sales and service operations during its customary hours of
business for seven consecutive business days, giving rise to a good faith belief on the part of the franchisor that the motor
vehicle dealer is in fact going out of business, except for circumstances beyond the direct control of the motor vehicle dealer
or by order of the Department of Motor Vehicles.

1 pursuant to the terms of the Dealer Agreement, Section 28(c) and California Vehicle Code
2 for termination, effective fifteen (15) days after receipt of this Notice. (September 5, 2017,
Notice of Termination (15-day) - Chrysler Vehicle Lines (*sic*"))

3 The notices were addressed to Porter Auto Group, L.P., 13411 Mono Way, Sonora, CA 95370.

4 4. On September 22, 2017, Porter filed with the Board four Section 3060 termination protests
5 against FCA. The protests state that the September 5, 2017 notices from FCA were received by Porter "on
6 or after September 14, 2017." One protest was filed for each franchise as follows:

7 (1) Protest No. PR-2534-17 (Chrysler).

8 (2) Protest No. PR-2535-17 (Dodge).

9 (3) Protest No. PR-2536-17 (Jeep).

10 (4) Protest No. PR-2537-17 (RAM).

11 5. The protests are nearly identical for each franchise and the four protests were consolidated
12 on October 10, 2017. Porter denied every allegation contained in the written notices of termination and
13 contended it is "a new motor vehicle dealer selling and servicing [Chrysler, Dodge, Jeep and RAM] brand
14 motor vehicles, and is located at 13411 Mono Way, Sonora, California 95370." (Protests filed September
15 22, 2017, p. 1, lines 19-20)

16 6. Protestant contends Respondent does not have good cause to terminate the franchises
17 because:

18 "(a) Protestant has transacted and is transacting an adequate amount of FCA business compared
19 to the business available to it.

20 (b) Protestant has made all necessary investments and incurred all necessary obligations to
21 perform its part of the franchise[s].

22 (c) Protestant has made a substantial and permanent investment in the dealership.

23 (d) It would be injurious to the public welfare for the franchise[s] to be terminated ...

24 (e) Protestant has adequate motor vehicle sales and service facilities, equipment, vehicle parts,
25 and qualified service personnel to reasonably provide for the needs of FCA consumers and owners in the
26 market area and is rendering adequate services to the public.

27 (f) Protestant has fulfilled the warranty obligations to be performed by it.

28 (g) The extent of any failure of Protestant to comply with the terms of the franchise

1 agreement[s] is immaterial.” (Protests filed September 22, 2017, p. 2, lines 3-19)

2 7. On October 20, 2017, FCA filed a Motion to Dismiss Protests contending that the protests
3 failed to comply with Section 585(b) of the Board’s regulations in that they were not responsive to the
4 specific grounds set forth in the notices of termination and did not set forth in clear language Porter’s
5 factual contentions with respect to the matters referenced in the notices. (October 20, 2017, Motion to
6 Dismiss, p. 3, lines 4-6) This matter was briefed and oral arguments were presented at a hearing on
7 November 9, 2017, before ALJ Skrocki.

8 8. ALJ Skrocki denied FCA’s October 20, 2017 motion because there were no affidavits,
9 declarations or other evidence presented in support of the motion that would factually establish the
10 grounds for termination as stated in the notices.

11 9. On February 15, 2018, FCA issued 60-day notices of termination³ for each franchise
12 (Chrysler, Dodge, Jeep and RAM). These notices contained six additional grounds for termination:

13 (1) Porter’s failure to maintain its license necessary to fulfill its obligations under the Dealer
14 Agreements;

15 (2) Porter’s failure to maintain adequate net worth;

16 (3) Porter’s failure to timely submit financial statements;

17 (4) The impairment of Porter’s financial standing and the financial standing of its owners
18 and/or executives; the insolvency of Porter;

19 (5) Porter’s failure to meet its advertising and sales promotion obligations; and

20 (6) Porter’s failure to meet its service personnel obligations.

21 10. The 60-day notices of February 15, 2018, go on to update and provide additional
22 information pertaining to the grounds identified in the 15-day notices issued on September 5, 2017, more
23 than 5 months earlier. As indicated in Exhibit 2 of the of the February 15, 2018 notices, Protestant had not
24 paid its rent and had defaulted in a lawsuit filed by the lessors of the dealership premises for non-payment
25 of rent and for eviction of Protestant from the premises. The notices also stated that Protestant and its
26 president Vincent E. Porter have been sued by Centerra Capitol (a creditor) for non-payment of loans in

27
28 ³ A 60-day notice of termination is issued when the statutory grounds allowing a 15-day notice do not apply.

1 excess of \$1 million (these loans were personally guaranteed by Mr. Porter). (February 15, 2018, 60-day
2 Notice of Termination - Chrysler Vehicle Line; and Exhibit 2 thereto) An additional lawsuit involving
3 Santander Bank, N.A. ("Santander") against Protestant and Mr. Porter seeks over \$2 million in unpaid
4 loans. (Exhibits 3 and 4 to the February 15, 2018, 60-day Notice of Termination - Chrysler Vehicle Line)

5 11. On March 14, 2018, Protestant filed four additional protests in regard to its Chrysler,
6 Dodge, Jeep and RAM franchises generally denying every allegation contained in the 60-day notices of
7 termination. The assertions in these protests of March 14, 2018, are identical to the assertions in the
8 protests of September 22, 2017, filed in response to the 15-day notices. The protests of March 14, 2018
9 were assigned the following numbers:

- 10 (1) Protest No. PR-2555-18 (Chrysler).
11 (2) Protest No. PR-2556-18 (Dodge).
12 (3) Protest No. PR-2557-18 (Jeep).
13 (4) Protest No. PR-2558-18 (RAM).

14 12. All eight protests were consolidated on March 27, 2018.

15 **PRESENT MOTION TO DISMISS PROTESTS, OR IN THE ALTERNATIVE,**
16 **FOR A FINDING OF GOOD CAUSE TO TERMINATE BASED**
ON UNCONTESTED EVIDENCE

17 **Respondent's Assertions in its Motion to Dismiss**

18 13. On March 30, 2018, Respondent filed a "Motion to Dismiss Protests or, in the Alternative,
19 for a Finding of Good Cause to Terminate Based on Uncontested Evidence."

20 14. This motion asserts two grounds for dismissal of the protests. The first ground is that of
21 mootness. The second is that, as a matter of law, the undisputed facts establish good cause to terminate
22 the franchises.

23 **The Claim of Mootness**

24 15. FCA contends that it is entitled to dismissal of these protests as moot for the following
25 reasons:

- 26 ■ Porter is not operating as a motor vehicle dealer. (Motion, p. 6, lines 15-16)
27 ■ Porter's dealer license has been suspended.
28 ■ Porter is "deeply in debt to both its landlord [Centerra Capitol, Inc. ("Centerra")] and its

1 lender Santander.”

2 ■ It is inconceivable that Porter could resume its operations much less at its Dealership
3 Premises.

4 ■ There is no relief that the Board could provide to restore Porter’s license, Dealership
5 Premises, or assets necessary to resume operations. (Motion, p. 8, lines 4-24)

6 **The Claim that the Undisputed Facts Establish Good Cause to Terminate the Franchises**

7 16. As stated above, FCA argues that because these protests are moot, the Board does not need
8 to determine whether FCA has good cause to terminate Porter’s Chrysler, Dodge, Jeep or RAM
9 franchises. However, alternatively, FCA contends that the “undisputed facts plainly show that FCA has
10 good cause to terminate Porter[’s FCA franchises] as a matter of law.” (Motion, p. 8, lines 26-28) Relying
11 on *Duarte & Witting, Inc. v. New Motor Vehicle Bd.* (2002) 104 Cal.App.4th 626, 637, Respondent argues
12 that the Board has the authority to dismiss a protest “where the undisputed facts demonstrate good cause
13 for franchise termination as a matter of law and afford no basis for preventing termination of the
14 franchise.” (Motion, p. 6, lines 4-6)

15 **Protestant’s Assertions in its Opposition**

16 17. Protestant filed its Opposition to the present motion on April 13, 2018. Protestant contends
17 that *Duarte* is factually distinguishable from the present matters since that case involved the
18 discontinuation of the production and distribution of Plymouth brand vehicles. The court, according to
19 Protestant, determined that the remedy sought by the dealer, that DaimlerChrysler be forced to continue
20 the production of Plymouth solely for the benefit of the single protesting dealer, is not within the authority
21 of the Board under its enabling statutes. Protestant contends that the remedy sought in these protests,
22 which is to sustain the protests, is specifically within the Board’s jurisdiction. (Opposition, p. 4, line 6-19)

23 18. Protestant maintains that there is no statutory or case law that supports the Board’s ability
24 to summarily find good cause to terminate Porter’s FCA franchises. (Opposition, p. 4, lines 24-25)
25 Section 3060 outlines the requirements to terminate a franchise: (1) statutory notice by the franchisor of
26 its intent to terminate the franchise, which was given in these protests; and (2) the Board finds that there is
27 “good cause for termination or refusal to continue, **following a hearing called pursuant to Section**
28 **3066,**” which has not occurred in these protests. (Bold in original; Opposition, p. 4, line 28; p. 5, lines 1-

1 4) Accordingly, Protestant contends that “the statutory process for a determination that ‘good cause’
2 exists for termination has not been met.” (Opposition, p. 5, lines 5-6)

3 19. Vincent Porter, general partner and dealer principal of Protestant, submitted a declaration
4 in opposition to the motion. Mr. Porter indicated that Protestant began to experience financial difficulties
5 in its operations in mid-to-late 2017; it fell behind in its monthly obligations to the landlord of the
6 dealership property and Santander, the wholesale flooring source for Protestant. (Declaration of Vincent
7 Porter, p. 1, lines 18-19, 24-26) Without any supporting documentation, Mr. Porter alleged that he has
8 “commitments from four (4) qualified dealers from Kentucky, Iowa, North Carolina and Florida who are
9 willing to infuse sufficient capital to enable the dealership to satisfy its financial obligations and remain
10 viable.” He is also negotiating with a fifth “well-qualified” California dealer. (Declaration of Vincent
11 Porter, p. 2, lines 8-12)

12 **Respondent’s Assertions in its Reply to the Opposition**

13 20. Respondent filed its Reply on April 20, 2018. According to Respondent, Mr. Porter “offers
14 no signed agreements, third-party affidavits, or other concrete evidence substantiating any prospect that
15 Porter has any ability to pay down its staggering debt, recapitalize, acquire a dealership premises and
16 inventory, and resume operations as a motor vehicle dealer.” (Reply, p. 2, lines 10-12) Respondent
17 contends that Mr. Porter’s declaration “does not contest any of the evidence presented by FCA US, let
18 alone any of the evidence about Porter’s failure to operate, its eviction, its unpaid debts, or its licensing.”
19 (Underline in original; Reply, p. 5, lines 3-4) No evidence relevant to the good cause factors is offered by
20 Porter. (Reply, p. 7, lines 12-13)

21 21. With regards to Porter’s interpretation of *Duarte*, Respondent contends Protestant is
22 reading that decision too narrowly; it is not limited to the notion that the Board offers no remedy in a
23 vehicle-line discontinuation protest. (Reply, p. 5, lines 26-27) *Duarte*, according to Respondent, applies to
24 the instant situation where the undisputed facts warrant termination. (Reply, p. 5, line 27; p. 6, lines 1-2)

25 **APPLICABLE LAW**

26 22. Section 331 provides in part as follows:

27 (a) A “franchise” is a written agreement between two or more persons having all of the
28 following conditions:

///

- 1 (1) A commercial relationship of definite duration or continuing indefinite duration.
2 (2) The franchisee is granted the right to offer for sale or lease, or to sell or lease at retail
3 new motor vehicles ... manufactured or distributed by the franchisor or the right to perform
4 authorized warranty repairs and service, or the right to perform any combination of these
5 activities.
6 (3) The franchisee constitutes a component of the franchisor's distribution system.
7 (4) The operation of the franchisee's business is substantially associated with the
8 franchisor's trademark, trade name, advertising, or other commercial symbol designating
9 the franchisor.
10 (5) The operation of a portion of the franchisee's business is substantially reliant on the
11 franchisor for a continued supply of new vehicles, parts, or accessories."
12 ...

13 23. Section 3050 provides, in part, as follows:

14 The board shall do all of the following:

- 15 ...
16 (d) Hear and decide, within the limitations and in accordance with the procedure
17 provided, a protest presented by a franchisee pursuant to Section 3060...
18 ...

19 24. Section 3060 provides in part as follows:

20 (a) Notwithstanding Section 20999.1 of the Business and Professions Code or the terms
21 of any franchise, no franchisor shall terminate or refuse to continue any existing franchise
22 unless all of the following conditions are met:

23 (1) The franchisee and the board have received written notice from the franchisor as
24 follows:

25 ...
26 (2) Except as provided in Section 3050.7, the board finds that there is good cause for
27 termination or refusal to continue, following a hearing called pursuant to Section 3066....

28 (3) The franchisor has received the written consent of the franchisee, or the appropriate
period for filing a protest has elapsed.

29 25. In determining whether there is good cause for terminating a franchise, Section 3061
30 requires the Board to "...take into consideration the existing circumstances, including, but not limited to,
31 all of the following:

32 (a) Amount of business transacted by the franchisee, as compared to the business available to
33 the franchisee.

34 (b) Investment necessarily made and obligations incurred by the franchisee to perform its part
35 of the franchise.

36 (c) Permanency of the investment.

37 (d) Whether it is injurious or beneficial to the public welfare for the franchise to be modified
38 or replaced or the business of the franchisee disrupted.

(e) Whether the franchisee has adequate motor vehicle sales and service facilities, equipment, vehicle parts, and qualified service personnel to reasonably provide for the needs of the consumers for the motor vehicles handled by the franchisee and has been and is rendering adequate services to the public.

(f) Whether the franchisee fails to fulfill the warranty obligations of the franchisor to be performed by the franchisee.

(g) Extent of the franchisee's failure to comply with the terms of the franchise.

SALES AND SERVICE AGREEMENTS (FRANCHISES)

26. On February 25, 2016, Porter and FCA executed a Term Sales and Service Agreement ("franchise"⁴) for each of the four line-makes. At that time, Porter was doing business as Sonora Chrysler Dodge Jeep RAM at 13411 Mono Way, Sonora, California. The franchises include what are called "Additional Terms and Provisions."

27. The pertinent provisions of the franchise referenced in the Notices of Termination are:

11. SELLING, SERVICE, COMPLIANCE, FACILITIES AND LOCATION, FINANCES, PERSONNEL AND SIGNAGE

(a) SELLING

DEALER shall use its best efforts to promote energetically and sell (which includes leasing) aggressively and effectively at retail ... each and every model of FCA US vehicle ... and FCA US vehicle parts, accessories and other FCA US products and services to customers wherever they may be located. ... DEALER will sell at retail the number of new FCA US vehicles necessary to fulfill DEALER's Minimum Sales Responsibility for each passenger car line or truck line represented by the vehicles listed on the Motor Vehicle Addendum...

...

(b) SERVICE

DEALER shall service FCA US vehicles actively and effectively and provide and maintain, for servicing FCA US vehicles, adequate facilities equipped with the basic tools common to the trade and with special tools and equipment peculiar to FCA US products and necessary for servicing and repairing specified FCA US vehicles properly, efficiently, and competitively. ...

...

(e) FINANCES

⁴ It is noted that the "franchise", as defined in Section 331(a), is the "written agreement" as compared to the physical dealership necessary for the sales and service of the vehicles that are within the scope of the franchise. As discussed herein, although the franchises, the written agreements, continue to exist, the dealership no longer exists.

1 DEALER shall maintain and employ in connection with DEALER's business such net
2 working capital, net worth, and wholesale credit and retail financing arrangements
3 necessary for DEALER to carry out successfully DEALER's undertakings pursuant to this
4 Agreement. ...

5 (f) PERSONNEL

6 DEALER shall employ in accordance with the volume of DEALER's business such
7 number of competent technicians in DEALER's repair shops as may be required to assure
8 prompt, satisfactory and competitive customer service for all owners of FCA US vehicles
9 who may request such service form (*sic*) DEALER. ...

10 (g) SIGNAGE

11 DEALER shall display and maintain brand signs, fascia and other signage in compliance
12 with the policies and guidelines of FCA US LLC's Dealership Identification Program...

13 12. ADVERTISING

14 ...
15 DEALER shall engage in advertising and sales promotion programs and shall use effective
16 showroom displays to help fulfill DEALER's responsibility to promote FCA US products
17 and services vigorously and aggressively. ...

18 13. REPORTS, RECORDS AND BUSINESS SYSTEMS

19 DEALER shall submit to FCA US for confidential use by FCA US and its affiliates ...
20 complete and accurate reports of sales and stocks of new and used vehicles on hand and
21 other reports, including monthly financial statements and operating reports.
22 ...

23 28. TERMINATION

24 ...
25 (b) FCA US may terminate this Agreement on not less than sixty (60) days written
26 notice for the following reasons:
27 ...

28 (ii) the failure of DEALER to perform fully any of DEALER's undertakings or
obligations as set forth in this Agreement including, but not without limiting the generality
of the foregoing, the undertakings and obligations set forth in Paragraphs 11(b) through
11(g) or Paragraphs 12, 13, 14, 23, 26(c) or 35 of this Agreement, or
...

(ix) impairment of the reputation or financial standing of DEALER or any of
DEALER's owners or executives or discovery by FCA US of any facts existing prior to or
at the time of signing this Agreement, which, in FCA US's opinion, tend to impair such
reputation or financial standing, or
...

(xiii) the notification of termination or termination, for any reason, of any other

1 FCA US LLC Dealer Agreement(s) which may be in effect between DEALER and FCA
2 US LLC ...

3 (c) Notwithstanding the provisions above, this Agreement will terminate automatically
4 without notice from either party on:

5 (iv) the insolvency of DEALER ..., or

6 ...
7 (vi) the failure of DEALER to fully conduct its Dealership Operations for seven
8 (7) consecutive business days, or

9 (vii) the loss, termination or expiration of any license or permit required by law
10 for DEALER to perform DEALER's obligations under this Agreement or otherwise
conduct business as a new vehicle dealer for FCA US products.

11 (Wong Declaration, Exh. A)⁵

12 **FACTS THAT HAVE BEEN ESTABLISHED BY FCA AND**
13 **NOT DISPUTED BY PORTER**

14 **Porter Is No Longer in Possession of the Realty Upon Which the Dealership Was Located**

15 28. Porter operated its dealership at 13411 Mono Way, Sonora, California as the lessee of the
16 property. Porter ceased making rental payments starting with the payment due in April 2017 (over a year
17 ago). The landlord brought suit seeking to evict Porter from the premises. Porter did not respond to the
18 suit. On July 31, 2017, the Superior Court in Tuolumne County entered a default judgment and on August
19 4, 2017, issued a Writ of Possession. On August 23, 2017, the Sheriff issued an eviction/restoration notice
20 restoring possession of the leased premises to the landlord and on that same day the landlord changed the
21 locks on the premises. (Draper Declaration, p. 1, lines 26-27; p. 2, lines 1-12)⁶

22 29. Since August 2017, Santander, Porter's financing institution, has posted an "around the
23 clock" security guard on the premises. (Draper Declaration, p. 2, lines 13-14)

24 30. No one representing Porter has contacted the landlord's property manager seeking to
25 resolve the debts or reopen the dealership. (Draper Declaration, p. 2, lines 18-25)

26
27 ⁵ The Declaration of Eric Wong, a Dealer Network Manager in FCA's California Business Center, is attached as Exhibit 4 to
the February 15, 2018 notices of termination and as Exhibit 3 to the Motion.

28 ⁶ The Declaration of Paul B. Draper, Chief Executive Officer and Secretary, Centerra Capitol, Inc. (Porter's landlord and
property manager) is Exhibit 2 to the February 15, 2018 notices of termination and Exhibit 2 to the Motion.

1 **The Failure of Porter to Conduct Dealership Operations**

2 31. The last sale of a vehicle by Porter occurred in May 2017. (Wong Declaration, p. 7, line 1)

3 32. The last part order submitted by Porter was in July 2017. (Wong Declaration, p. 6, line 23)

4 33. The last claim for warranty service submitted by Porter was dated in August 2017. (Wong
5 Declaration, p. 6, lines 19-20)

6 34. Porter has conducted no operations at the dealership since at least August 2017. (Wong
7 Declaration, p. 7, line 3-4)

8 35. As of at least October 2017, Porter's occupational license as a new motor vehicle dealer is
9 designated by the DMV as "Not Valid". (Motion, Exh. 3)

10 **Porter's Financial Situation**

11 36. In addition to the unpaid rent, Porter also owes over \$1,000,000 for other loans made by
12 the property manager (Centerra Capitol, Inc.) to Porter and for which Mr. Porter is a personal guarantor.
13 The property manager has filed suit against Porter and Mr. Porter on these unpaid loans. (Draper
14 Declaration,, p. 2, lines 26-27; p. 3, lines 1-2)

15 37. Santander, Porter's flooring lender, in October 2017, filed suit against Porter for over \$3
16 million in debt and on March 26, 2018, the court entered a Default Judgment for Santander. The judgment
17 ordered Porter to turn over all new and used vehicle inventory, parts, service equipment, etc., and
18 authorized Santander to take possession of all other assets of Porter. The court found Porter solely liable
19 for over \$1.5 million under its contract with Santander and jointly and severally liable for over \$3 million.
20 (Motion, Exhs. 5-7)

21 **ANALYSIS OF THE CLAIM OF MOOTNESS**

22 38. FCA asserts that "Porter Cannot Resume Dealership Operations, So the Protests Are
23 Moot." (Motion, page 6, line 14)

24 39. There is no dispute that the Board has the inherent power to dismiss a protest (without a
25 hearing on the merits of the protest) if the Board lacks jurisdiction over the parties or the protest. This
26 may be due to the absence of a "franchise" (as defined in the Vehicle Code) or because the protest was not
27 timely filed.

28 40. And there is no dispute that the Board has the implied power to summarily dismiss a

1 protest based upon the "existing circumstances" as was done by the Board and upheld in *Duarte*. In
2 *Duarte*, the franchise for Plymouth vehicles was being terminated as the franchisor (one of the prior
3 Chrysler entities) had ceased production of the Plymouth line-make.

4 41. In *Duarte*, a Board order sustaining the protest would have been a useless act and
5 meaningless as the franchisor could not, by order of the Board, resume providing Plymouth vehicles to
6 the franchisee. No order of the Board could prevent the loss of the Plymouth franchise and allow it to
7 continue to serve the public in that market area. This matter is similar to *Duarte*, in that no order of the
8 Board could result in Porter resuming operations. In the instant case, a Board order sustaining the protests
9 cannot prevent the loss of the Porter dealership for the Chrysler, Dodge, Jeep, and RAM line-makes,
10 cannot protect the investment of the owners and cannot allow the dealership to continue to serve the
11 public in the market area.

12 42. The purpose of Section 3060 is to protect franchisees from unjustified terminations⁷ of
13 franchises that would result in the loss of the dealerships and loss of the investment of the owners as well
14 as to protect the public's access to dealerships that are needed and doing a good job in providing for the
15 essential needs of the public. Although a franchise is merely the written agreement between the parties it
16 is essential for the franchisee to operate the dealership. Thus, in the case of an operating dealership, the
17 loss of the franchise would result in the loss of the dealership with all of the possible adverse
18 consequences that would flow from such a loss. Ordinarily, the dealership is in operation but will be
19 required to cease operation if the franchise is terminated. Here the situation is reversed. Although the
20 franchises, the written agreements, technically continue to exist, it is the dealership that has already been
21 lost and all of the adverse consequences that would flow from such a loss or closure have already
22 occurred and cannot be remedied or ameliorated by any order of the Board that FCA should not be
23 permitted to terminate the written agreements.

24 43. The Board is without power to do anything other than to overrule or sustain the protests.
25 Sustaining the protests would mean only that Respondent cannot terminate the franchises - the written
26

27 ⁷ There is nothing to indicate that FCA was responsible for the closure of the dealerships. And, as alleged by FCA and as will
28 be discussed below, there is no issue of whether the termination of the franchises is unjustified but rather that FCA has, as a
matter of law, good cause to terminate the franchises.

1 agreements that contain the contractual rights and duties of the parties. However, as stated above, ordering
2 that the contractual relationships continue to exist will not result in the re-opening of the dealership that
3 has been closed for an inordinate amount of time nor will requiring Respondent to maintain its contractual
4 relationship with Porter change the fact that Porter has no assets that would be lost by the termination of
5 the franchises. Porter has no location for the facilities from which to operate the dealership as it has been
6 judicially evicted from its leased premises, has lost its inventory and has lost all of its other assets to
7 Santander. In addition Porter no longer has the needed occupational license from the Department of
8 Motor Vehicles and is insolvent.⁸ Sustaining the protests and preventing the termination of the franchises
9 (the written agreements) will result in maintaining the status quo which will leave the parties and the
10 consuming public where they have been for the last year or more - with no Chrysler, or Dodge, or Jeep or
11 RAM sales being made, with no service available to the public, no warranty obligations of Respondent
12 being performed on customers' vehicles, and no benefits to the public that would accrue if the dealership
13 had been operational.

14 44. Sustaining the protests would not further the legislative intent of the statutes, which,
15 unless there is good cause to do so, is to prevent the loss of the benefit of the dealership to all of the
16 community interests affected by and dependent upon such an ongoing enterprise. The loss of the

17

⁸ Section 1201(b)(23) of the California Uniform Commercial Code defines "insolvent" as follows:

- 18 (A) having generally ceased to pay debts in the ordinary course of business other than as a result of bona fide
19 dispute;
20 (B) being unable to pay debts as they become due; or
21 (C) being insolvent within the meaning of federal bankruptcy law."

22 The "federal bankruptcy law" contains the following relevant language in its definition of "insolvent" (11 U.S.C. § 101(32)):

- 23 (A) with reference to an entity other than a partnership and a municipality, financial condition such that the sum
24 of such entity's debts is greater than all of such entity's property, at a fair valuation, exclusive of--
25 (i) property transferred, concealed, or removed with intent to hinder, delay, or defraud such entity's creditors;
26 and
27 (ii) property that may be exempted from property of the estate under section 522 of this title;
28 (B) with reference to a partnership, financial condition such that the sum of such partnership's debts is greater than
the aggregate of, at a fair valuation--
(i) all of such partnership's property, exclusive of property of the kind specified in subparagraph (A)(i) of this
paragraph; and
(ii) the sum of the excess of the value of each general partner's nonpartnership property, exclusive of property of
the kind specified in subparagraph (A) of this paragraph, over such partner's nonpartnership debts; ...

Note that all of the definitions are stated in the disjunctive. Porter is insolvent under all three of the definitions as stated in the California Uniform Commercial Code.

1 dealership has already occurred and it occurred long before Respondent made its decision to issue the
2 notices of termination of the franchises. Whether it was caused in whole or in part by circumstances
3 beyond the control of the franchisee is irrelevant to the issues before the Board as the existing
4 circumstances are that the dealership is closed, has been closed for an inordinate amount of time, and
5 Porter (the franchisee) is insolvent with its leased premises back in the possession of the landlord and its
6 other assets now owned by its creditor, Santander.

7 45. Sustaining the protests would be a meaningless act as Protestant is unable to function as a
8 dealership operating as a franchisee as to any of the four line-makes. An order of the Board requiring
9 Respondent to continue in its franchise relationships with Porter would not protect Porter from an unfair
10 termination of its franchises nor would there be any protection of the interests of the public or otherwise
11 further the intention of the legislature in the enactment of the statutes at issue.

12 46. In summary, FCA is correct in contending that the facts are such that there is no relief
13 available before the Board and thus going to a hearing to determine whether there is good cause to
14 terminate the franchises would be an exercise in futility. This is because Porter has not been, is not now
15 and cannot in the future operate as a dealership conducting business as an FCA franchisee. Thus, a Board
16 order that FCA may not terminate the franchises will not operate to further the legislative intent of
17 requiring that a franchisor establish good cause to do so before allowing termination of the franchise
18 operations thus protecting the public interest in preserving the dealership and maintaining its existence for
19 serving the consuming public. Sustaining the protests in this situation will not prevent the loss of the
20 dealerships, will not prevent any forfeiture to Porter or its owners, will not protect the employees, the
21 community or the consuming public that would be served by the dealership.

22 47. Under the existing circumstances, deciding whether FCA has good cause to terminate the
23 franchises is unneeded as a Board order sustaining the protests would not prevent the occurrence of all
24 that has already occurred. All of the adverse effects of the loss of the Porter dealership have already
25 occurred and no order of the Board will prevent such adverse effects or even mitigate against

26 ///

27 ///

28 ///

1 their result.⁹ There are no allegations that FCA was in any way the cause of, or responsible for, the
2 closure of the dealership.

3 **ANALYSIS OF THE CLAIM THAT THERE IS GOOD CAUSE TO**
4 **TERMINATE THE FRANCHISES AS A MATTER OF LAW**

5 48. FCA alleges that "The Uncontested Facts Demonstrate Good Cause to Terminate Porter as
6 a Matter of Law." (Motion, page 8, line 25)

7 49. Section 3061 requires that the franchisor establish good cause to terminate the franchise
8 taking into consideration "the existing circumstances" including several specific areas of inquiry as will
9 be discussed.

10 50. The most important "existing circumstances" here are that the Porter dealership has ceased
11 all operations as a franchisee since August 2017 at the latest; the franchisee has been evicted from its
12 leased premises; the franchisee is insolvent; the franchisee no longer has a license to operate as a new
13 motor vehicle dealership; the franchisee's investment in the dealership and its assets have already been
14 lost; termination of the franchises will not cause any additional loss to the franchisee; the consuming
15 public has not had an operating FCA dealership in the Sonora market for over a year; FCA will not be
16 able to appoint a new franchisee who will establish a new dealership for that market until the Porter
17 franchises (the written agreements) are terminated pursuant to an order of the Board; the franchisee no
18 longer has any employees; the franchisee is not contributing to the economy and is not generating any tax
19 receipts for the community.

20 51. FCA has provided more than adequate evidentiary documentation to support the above.
21 None of the above factual circumstances are in dispute.

22 52. The likelihood of Porter ever being able to reopen its dealership is so remote as to be
23 deemed impossible.

24 53. In addition to the general language of "existing circumstances," Section 3061 also lists
25

26 ⁹ Such a decision by the Board that the Section 3060 protests are moot as the dealership has ceased to operate should be
27 distinguished from a protest filed pursuant to Section 3065 subsequent to which the dealership may cease operations for
28 whatever reason. In a Section 3065 protest, the Board may still evaluate and pass upon whether the then franchisor complied
with the provisions of Section 3065 at the time of the events alleged in the Section 3065 protest even though the dealership
may be out of operation or has ceased to be a franchisee after the protest was filed.

seven more specific circumstances that must be considered in determining whether good cause exists for terminating a franchise. These circumstances and the facts as to them are as follows:

- (a) Amount of business transacted by the franchisee, as compared to the business available to the franchisee.

54. Porter has not transacted any business since approximately August of 2017. Its last sale of a vehicle was in May 2017. It has ordered no parts from FCA since July 2017 and last submitted a claim for warranty service in August 2017. As stated by FCA, "[i]n short, Porter is conducting zero business." (Motion, p. 11, line 12; Wong Declaration, p. 6, lines 17-27 and p. 7, lines 1-2)

- (b) Investment necessarily made and obligations incurred by the franchisee to perform its part of the franchise.

55. Whatever investment may have been made by Porter was lost prior to the notices of termination. Its leasehold interest no longer exists as the lessor has been restored to possession by judicial order. Porter's interests in its inventory and other assets have also been lost. As evidenced by a default judgment in favor of Santander, Porter is in debt for millions of dollars that it is unable to repay. (Motion, page 11, lines 14-20)

- (c) Permanency of the investment.

56. Whatever investment Porter may have had in the dealership no longer exists.

- (d) Whether it is injurious or beneficial to the public welfare for the franchise to be modified or replaced or the business of the franchisee disrupted.

57. The harm to the public from the loss of the dealership had already occurred prior to the notices of termination and the termination of the franchises will not cause any additional injury to the public welfare. In fact, the termination of the franchises may benefit the public as it will allow FCA to replace the Porter dealership with another franchisee if it so desires.

- (e) Whether the franchisee has adequate motor vehicle sales and service facilities, equipment, vehicle parts, and qualified service personnel to reasonably provide for the needs of the consumers for the motor vehicles handled by the franchisee and has been and is rendering adequate services to the public.

58. Porter has no vehicle sales or service facilities, has no equipment or vehicle parts and has no employees. Thus, Porter has not been rendering any services to the public let alone services that are "adequate."

(f) Whether the franchisee fails to fulfill the warranty obligations of the franchisor to be performed by the franchisee.

59. Porter has not been fulfilling any of FCA's warranty obligations and thus has failed in this regard.

(g) Extent of franchisee's failure to comply with the terms of the franchise.

60. It is undisputed that Porter has breached all of the terms of the franchises as stated above in paragraph 27.

61. It is again noted that FCA has submitted more than sufficient evidentiary documents to support the above and that Porter has submitted no documents or other evidence that would contest the above facts.

62. It is therefore determined that FCA has established as a matter of law that there is good cause to terminate the franchises of Porter as to each of the FCA franchises.

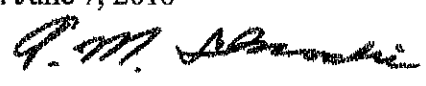
PROPOSED ORDER

After consideration of the pleadings, exhibits and oral arguments of counsel, it is hereby ordered that Respondent's "Motion to Dismiss Protests or, in the Alternative, for a Finding of Good Cause to Terminate Based on Uncontested Evidence" is granted. Protest Nos. PR-2534-17, PR-2535-17, PR-2536-17, PR-2537-17, PR-2555-18, PR-2556-18, PR-2557-18, and PR-2558-18 (*Porter Auto Group, L.P. v. FCA US LLC*) are overruled and dismissed with prejudice.

I hereby submit the foregoing which constitutes my proposed order in the above-entitled matters, 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: June 7, 2018

By


ANTHONY M. SKROCKI
Administrative Law Judge

Jean Shiimoto, Director, DMV
Elizabeth (Lisa) G. Humphreys, Branch Chief
Occupational Licensing, DMV

Attachment 4

NEW MOTOR VEHICLE BOARD
1507 - 21st Street, Suite 330
Sacramento, California 95811
Telephone: (916) 445-1888

STATE OF CALIFORNIA

NEW MOTOR VEHICLE BOARD

In the Matter of the Protest of
R & H AUTOMOTIVE GROUP, INC.,

Protestant,

v.

AMERICAN HONDA MOTOR CO., INC.,
ACURA AUTOMOTIVE DIVISION,

Respondent.

Protest No. PR-2605-19

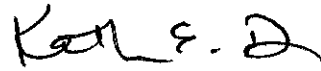
DECISION

At its regularly scheduled meeting of March 5, 2020, the Public Members of the Board met and considered the administrative record and Administrative Law Judge's "Recommendation that Respondent's Motion to Dismiss be Granted" and "Proposed Order Granting Respondent's Motion to Dismiss," in the above-entitled matter. After such consideration, the Board adopted the Proposed Order as its final Decision in this matter with the following amendment:

1. In Paragraph 80, line 10: "Nissan" is changed to "Nissani."

This Decision shall become effective forthwith.

IT IS SO ORDERED THIS 5th DAY OF MARCH 2020.



KATHRYN ELLEN DOI
President
New Motor Vehicle Board

1 NEW MOTOR VEHICLE BOARD
1507 - 21ST Street, Suite 330
2 Sacramento, California 95811
Telephone: (916) 445-1888

CERTIFIED MAIL

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8 STATE OF CALIFORNIA
9 NEW MOTOR VEHICLE BOARD
10

11 In the Matter of the Protest of

12 R & H AUTOMOTIVE GROUP, INC.,

13 Protestant,

14 v.

15 AMERICAN HONDA MOTOR CO., INC.,
16 ACURA AUTOMOTIVE DIVISION,

17 Respondent.

Protest No. PR-2605-19

**RECOMMENDATION THAT
RESPONDENT'S MOTION TO
DISMISS BE GRANTED**

**PROPOSED ORDER GRANTING
RESPONDENT'S MOTION TO
DISMISS**

18
19 To: Duncan J. McCreary, Esq.
Attorney for Protestant
20 McCREARY, PC
11601 Wilshire Boulevard, 5th Floor
21 Los Angeles, California 90025

22 Lauren A. Deeb, Esq.
Attorney for Respondent
23 NELSON MULLINS RILEY & SCARBOROUGH LLP
19191 South Vermont Avenue, Suite 900
24 Torrance, California 90502

25 Melissa Fletcher Allaman, Esq.
Attorney for Respondent
26 NELSON MULLINS RILEY & SCARBOROUGH LLP
215 South Monroe Street, Suite 400
27 Tallahassee, Florida 32301

28 ///

1 1. This matter came on regularly for telephonic hearing on Wednesday, November 13, 2019
2 and Thursday, December 19, 2019, before Anthony M. Skrocki ("ALJ Skrocki"), Administrative Law
3 Judge for the New Motor Vehicle Board ("Board"). Duncan McCreary, Esq. represented Protestant R& H
4 Automotive Group, Inc. Lauren A. Deeb, Esq. and Melissa Fletcher Allaman, Esq. of Nelson Mullins
5 Riley & Scarborough LLP represented Respondent American Honda Motor Co., Inc., Acura Automotive
6 Division.

7 **REASONS FOR RECOMMENDATION AND PROPOSED ORDER**
8 **THAT THE PROTEST BE DISMISSED**

9 2. R & H Automotive Group, Inc. ("Protestant") and its counsel have engaged in a pattern of
10 conduct that has demonstrated consistent disregard for the Board's statutes, regulations and orders. The
11 conduct has included:

- 12 (a) Being late for scheduled telephonic conferences;
- 13 (b) Failing to file the required Settlement Conference Statement;
- 14 (c) Failing to file other required documents in a timely manner;
- 15 (d) Failing to produce documents during the discovery process (As stated below, this is the
16 most significant.)
- 17 (e) Failure of the dealer principal to appear at the Mandatory Settlement Conference or send
18 an authorized representative;
- 19 (f) Counsel for Protestant appearing late for the Mandatory Settlement Conference; and,
- 20 (g) Failure of Protestant or its counsel to participate meaningfully in the Mandatory Settlement
21 Conference.

22 3. The unexplained and unverifiable failure of Protestant to produce documents during
23 discovery has prejudiced American Honda Motor Co., Inc., Acura Automotive Division's ("Respondent"
24 or "AHM") ability to prepare for the hearing of the protest during which Respondent has the burden of
25 proof.

26 4. Protestant's pattern of conduct necessitated repeated, but not always successful, calls and
27 emails from the Board's staff seeking submission of required documents that had not been timely
28 submitted by Protestant for filing.

1 5. Protestant's counsel's conduct wasted the time of the Board's ALJs, the Board's attorneys
2 as well as counsel for Respondent not only with regard to the telephonic conferences but also with regard
3 to the Mandatory Settlement Conference. The Board's Settlement Conference ALJ and Respondent's
4 counsel and representatives had traveled to the site of the settlement conference only to have counsel for
5 Protestant appear late and without the dealer principal or other authorized representative of Protestant.

6 6. Despite the urgings of the Board's staff and representations of counsel for Protestant, no
7 Settlement Conference Statement was ever filed in behalf of Protestant and no meaningful settlement
8 discussions were conducted.

9 **FACTUAL AND PROCEDURAL BACKGROUND**

10 7. Protestant is located at 5750 Mesmer Ave., Los Angeles, California. Protestant is a new
11 motor vehicle dealer and franchisee of Respondent authorized to sell new Acura vehicles.

12 8. Protestant is represented by Duncan J. McCreary, Esq. of McCreary, PC.

13 9. Mr. Hooman Nissani is the dealer principal for Protestant.

14 10. On January 8, 2019, Mr. McCreary on behalf of Protestant filed a Vehicle Code section
15 3065.1¹ protest to challenge a proposed chargeback of sales incentive claims stemming from a routine
16 audit conducted by Respondent. Protestant claims that the audit was conducted "in a punitive, retaliatory,
17 or unfairly discriminatory manner by taking more than two (2) years to complete" and that "Respondent
18 has also failed to notify [Protestant] of its final denial within thirty (30) days of the completion of the
19 appeal process." (Protest, p. 2)

20 11. AHM is the licensed and authorized distributor of new Acura motor vehicles in California
21 and is the franchisor of Protestant. AHM is located at 1919 Torrance Boulevard, Torrance, California.
22 Respondent is represented by Lauren A. Deeb, Esq. and Melissa Fletcher Allaman, Esq. of Nelson
23 Mullins Riley & Scarborough LLP.

24 ///

25 ///

26 ///

27 _____
28 ¹All statutory citations are to the California Vehicle Code unless otherwise indicated.

THE AUDIT, APPEAL, AND PROPOSED CHARGEBACK²

12. In August 2016, AHM conducted a routine audit of Protestant's sales incentive claims for the time period of November 2015 through August 2016. (Declaration of Daniel Tang (Tang Decl.), ¶ 4)

13. At the end of the audit, AHM identified what it considered to be 75 instances of ineligible exceptions for sales of vehicles and proposed a chargeback of \$189,250. (Tang Decl., ¶ 4) The proposed chargebacks fell into three primary categories (1) the "deal jacket" containing relevant documents to substantiate the transaction was unavailable, (2) the vehicle was sold to Protestant or Protestant owner owned/controlled entity, and (3) questionable Department of Motor Vehicles ("DMV") registration application forms. (*Id.*)

14. On August 29, 2016, AHM sent Protestant a letter summarizing the audit process and AHM's findings. The letter set forth that the amount of \$155,250 of the proposed chargeback was for ineligible exceptions for vehicles sold to Protestant or Protestant owned/controlled entities. (Tang Decl., ¶ 4, Ex. A)

15. In its August 29, 2016 letter, AHM informed Protestant of its right to appeal the audit and provide further information to AHM regarding the audit's findings and the proposed chargeback. (Tang Decl., ¶ 5)

16. Protestant filed an appeal of AHM's audit and findings on September 8, 2016, contesting each proposed chargeback. (Tang Decl., ¶ 6, Ex. B)

17. In support of its appeal, Protestant provided copies of DMV Desk Registration reports for some (but not all) of the vehicles identified in the audit. (Tang Decl., ¶ 7)

18. AHM reviewed the DMV information provided by Protestant and undertook an extensive and time-consuming investigation into the DMV Desk Registration reports provided to determine the

² The merits of the factual issues relating to the audit, chargeback and protest are not before the Board as the only issue to be decided now is whether the protest should be dismissed without a hearing on its merits due to the failure of Protestant to comply with the Board's statutes, regulations and orders regarding discovery and settlement conferences. However, the factual allegations relating to the issues are presented to indicate the scope and importance of discovery to AHM as in a protest filed pursuant to Vehicle Code section 3065.1(g) the burden of proof is expressly allocated to the franchisor. The factual allegations of the dispute also indicate the issues that may have been resolved by an effective settlement conference had Protestant participated in the settlement conference as required by Section 3050.4 and Section 551.11 of Title 13 of the California Code of Regulations.

subsequent sales and ownership history of those vehicles. (Tang Decl., ¶ 8)

19. AHM alleges that its investigation revealed that the information reported by Protestant to the DMV and AHM was false and that the vehicles were not, in fact, sold as reported (and claimed) by Protestant. (Tang Decl., ¶ 8) AHM's investigation further concluded that Protestant had engaged in an elaborate scheme to conceal the fact that vehicles were not sold to retail customers, as claimed by Protestant, but were falsely reported to AHM and the DMV as being sold to defraud AHM to obtain the incentive payments. (Tang Decl., ¶ 9)

20. For example, AHM alleges that its investigation uncovered that as part of Protestant's scheme, Protestant was combining names or portions of names from businesses and individuals associated with Protestant and its owner's other entities with addresses affiliated with Protestant or its owner. (Tang Decl., ¶ 9) AHM alleges that this "splitting" process allowed Protestant to invent a retail customer to give the impression of a legitimate sale, all while allowing Protestant to readily identify its falsely reported sales for other purposes, such as keeping track of its inventory. (*Id.*)

21. AHM alleges that as part of this scheme, Protestant retained control of the vehicles for later sale as used vehicles through Protestant's used car business and subsequently sold the vehicles as used with little or no change in mileage. (Tang Decl., ¶ 9)

22. On December 21, 2018, AHM provided Protestant with its final decision on Protestant's September 8, 2016 appeal. (Tang Decl., ¶ 11, Ex. D) As explained to Protestant in its December 21, 2018 letter and supporting documentation, AHM's investigation into Protestant's appeal reaffirmed that the vast majority of the incentive exceptions identified in the initial audit were ineligible under AHM's sales incentive programs and proposed a final chargeback of \$186,000 (a reduction from the original amount of \$189,250). (*Id.*)

THE MOTION TO DISMISS

23. Respondent is seeking dismissal of the protest for two reasons:

(a) The failure of Protestant to participate in the discovery process, including the failure to comply with the discovery schedule contained in the Board's Pre-Hearing Conference Orders dated February 27, 2019 and May 31, 2019; and the April 25, 2019 Ruling on Objections to Requests for Production of Documents (See Section 3050.2(b)); and

1 (b) The failure of Protestant's Dealer Principal or other representative to appear or otherwise
2 participate in the September 11, 2019 Mandatory Settlement Conference in violation of the Board's
3 Notice of Settlement Conference. (See Section 3050.4)

4 **PROCEDURAL FACTS AS TO RESPONDENT'S MOTION TO DISMISS**
5 **LEADING TO THE DECEMBER 19, 2019 HEARING**

6 24. Respondent filed its Motion to Dismiss Protest on September 26, 2019.³

7 25. Upon receipt of the Motion to Dismiss, the Board's staff, on September 27, 2019,
8 contacted counsel for Protestant and Respondent proposing a briefing schedule and hearing date for the
9 Motion to Dismiss. Receiving no objection to the proposed briefing schedule and hearing date, the Board
10 issued its September 27, 2019 Order Establishing Briefing Schedule Re: Respondent's Motion to Dismiss
11 and Order of Time and Place of Telephonic Hearing.

12 26. Protestant was ordered to file and serve its Opposition to the Motion to Dismiss no later
13 than Friday, October 25, 2019. Protestant timely filed its Opposition on October 25, 2019.

14 27. Respondent was ordered to file and serve its Reply to Protestant's Opposition no later than
15 November 8, 2019. Respondent timely filed and served its Reply on November 8, 2019.

16 28. On November 13, 2019, the telephonic hearing on the Motion to Dismiss commenced at
17 9:00 a.m. as scheduled, with ALJ Skrocki presiding. Respondent was represented by Ms. Deeb and Ms.
18 Allaman. Protestant was represented by Mr. McCreary. Mr. McCreary, who as discussed below had
19 already exhibited a pattern of tardiness with regard to filings, was approximately 10 minutes late in
20 joining the telephonic hearing, which required the Board's Staff to attempt to reach him via phone and
21 email to remind him of the hearing.⁴

22 29. At the November 13, 2019 hearing, ALJ Skrocki inquired into Protestant's failure to
23

24 ³ On September 27, 2019, Respondent filed an Amended Declaration of Lauren A. Deeb, which included an exhibit
25 that was inadvertently left out of the Declaration filed on September 26, 2019.

26 ⁴ These efforts included two phone calls to Mr. McCreary. The first call was at about 11:03 a.m. and resulted in a
27 message that the "mail box" was full and there was no alternate number. The second call at about 11:06 a.m. was
28 answered by a receptionist and a message was left to have Mr. McCreary call in to join the hearing. The second call
was followed by an e-mail to Mr. McCreary at about 11:07 a.m. Mr. McCreary joined the hearing at about 11:10
a.m. The following persons were all on the call on or before 11:00 a.m. waiting for Mr. McCreary: Ms. Deeb and
Ms. Allaman, counsel for AHM; ALJ Skrocki; Robin Parker, Senior Staff Counsel for the Board; Danielle
Phomsopha, Staff Counsel for the Board; Board ALJ Evelyn Matteucci (observing); and the court reporter.

1 produce electronically stored information (“ESI”) and its failure to address said deficiencies in its
2 Opposition to the Motion to Dismiss.

3 30. Without addressing the remaining substance of Respondent’s Motion to Dismiss, ALJ
4 Skrocki ordered Protestant to produce its ESI responsive to Respondent’s requests or, in the alternative,
5 “a pleading explaining the inability to produce ESI” and continued the hearing on the Motion to Dismiss
6 until December 19, 2019 at 11:00 a.m. (Pacific Time).

7 31. On December 4, 2019, in lieu of producing its ESI, Protestant filed a two-page declaration
8 from Mr. Nissani purporting to explain Protestant’s inability to produce any of its ESI.

9 32. Respondent filed a supplemental brief in response to Protestant’s December 4, 2019
10 declaration and Protestant filed a further response on December 18, 2019.

11 **APPLICABLE LAW AS TO THE FAILURE OF PROTESTANT TO**
12 **COMPLY WITH AUTHORIZED DISCOVERY**

13 33. Section 3050.2(b) provides: “Compliance with discovery procedures authorized pursuant
14 to subdivision (b) of Section 3050.1 may be enforced by application to the executive director of the board.
15 *The executive director may, at the direction of the board, upon a showing of failure to comply with*
16 *authorized discovery without substantial justification for that failure, dismiss the protest* or petition or
17 suspend the proceedings pending compliance....”⁵ (Emphasis added.)

18 34. Protestant is aware that discovery is critical for AHM as Section 3065.1(g)(6) places the
19 burden of proof as to the issues in this protest upon AHM.

20 35. The Court of Appeal has upheld the Board’s authority to dismiss a protest because of the
21 failure of the protestant to comply with authorized discovery. (See *Nader Automotive Group, LLC, et al.*

22
23
24 ⁵ The alternative sanction of the power to “suspend the proceedings pending compliance” is not appropriate when
25 the conduct of the franchisee is at issue. This sanction may be used when it is the franchisor that has failed to
26 comply with authorized discovery. Suspending proceedings when the franchisee fails to comply with authorized
27 discovery would result in franchisees routinely failing to engage in discovery. In such case, the franchisee would
28 benefit from its own misconduct as suspending proceedings would preserve the status quo and summarily prevent
franchisors from accomplishing what the franchisors desire. Likewise, the sanction of dismissal of the protest is a
sanction applicable only when it is a franchisee that fails to comply with authorized discovery. A franchisee
complaining about the failure of a franchisor to engage in discovery would not be seeking dismissal of its own
protest as a sanction for the misconduct of the franchisor. If dismissal of the protest were the appropriate sanction
for the failure of a franchisor to participate in discovery, no franchisor would engage in discovery.

1 *v. New Motor Vehicle Board* (2009) 178 Cal.App.4th 1478)

2 **ANALYSIS OF WHETHER PROTESTANT HAS FAILED TO**
3 **COMPLY WITH AUTHORIZED DISCOVERY**

4 36. Three orders of the Board were not complied with by Protestant. The orders at issue are:
5 (1) the Pre-Hearing Conference Order dated February 27, 2019; (2) the Second Amended Pre-Hearing
6 Conference Order dated May 31, 2019; and (3) the April 25, 2019 Rulings on Objections to Requests for
7 Production of Documents.

8 **The Board's Pre-Hearing Conference Orders**

9 37. A scheduled telephonic Pre-Hearing Conference with Board's staff was conducted on
10 February 19, 2019. Protestant was represented by Mr. McCreary.⁶ Respondent was represented by Ms.
11 Deeb and Ms. Allaman.

12 38. The following shows what discovery procedures were stipulated to by counsel and ordered
13 by the Board in the Pre-Hearing Conference Order dated February 27, 2019. What was done or not done
14 is indicated in brackets.

- 15 ■ File and serve all requests for identification and production of documents no later than Friday,
16 March 8, 2019 by 5:00 p.m. (Pacific Time).
 - 17 ○ [AHM served its requests timely. Protestant served its requests for production at 7:54
18 p.m. nearly three hours past the 5:00 p.m. deadline so the Board did not file it until the
19 next business day, Monday, March 11, 2019. (Cal. Code Regs., tit. 13, § 595, subd.
20 (e))]
- 21 ■ File a stipulated copy of the of the entire franchise agreement, including standard provisions or
22 additional terms and provisions or any other additional documents that constitute the terms of
23 the parties' franchise, no later than Friday, March 8, 2019 by 5:00 p.m. (Pacific Time). If
24 counsel for the parties cannot stipulate to a copy, then separate copies shall be filed and served
25 on or before the above date.

26 ///

27 _____
28 ⁶ Mr. McCreary was late in joining in on the call and did so only after a phone call was made to him by Staff
Counsel for the Board, "to ask if he is joining the call."

- [A copy of the franchise agreement was timely filed by AHM; Protestant never submitted a franchise agreement despite multiple requests and follow-up by Staff Counsel of the Board.]⁷
- Submit a Statement of Disputed Discovery Requests, if any, by 12:00 p.m. (Pacific Time), on Tuesday April 23, 2019.
 - [AHM filed its Statement timely; Protestant's Statement was received over 5 hours late and only after the Board contacted him to inquire as to its whereabouts. It was not filed until Wednesday, April 24, 2019.]⁸
- Hearing on parties' Disputed Discovery Requests scheduled for April 25, 2019.
 - [Both parties appeared through their respective counsel.]
- On April 25, 2019, ALJ Skrocki issued his "Rulings on Objections to Requests for Production of Documents," as an Order of the Board.
- On May 20, 2019, Protestant requested an extension of the parties' May 24, 2019 deadline to exchange documents. (Amended Declaration of Lauren A. Deeb (Deeb Decl.), ¶ 7, Exs. K-M) After agreement to the extension by Respondent, the Board issued its First Amended Pre-Hearing Conference Order on May 23, 2019. (*Id.*) The First Amended Pre-Hearing Order required the parties to exchange documents requested and not objected to, and documents ordered to be produced no later than Friday May 31, 2019 at 5:00 pm (Pacific Time).
- On May 30, 2019, Protestant again requested to extend the production date to June 5, 2019. Respondent agreed and on May 31, 2019, the Board issued the Second Amended Pre-Hearing Conference Order. (Deeb Decl., ¶ 8, Ex. N)

39. The following shows what discovery procedures were stipulated to by counsel and ordered

⁷ On March 11, 2019, the Board's Staff Counsel sent an e-mail to Mr. McCreary indicating the Board "did not receive a copy of the franchise from Protestant, as required by paragraph 2 of the Pre-Hearing Conference Order (attached). Please provide a copy of the franchise and any additional terms and provisions, as it is now untimely." On March 13, 2019, the Board's Staff Counsel sent an e-mail to Mr. McCreary which, in part, stated: "In addition, we still need a copy of the franchise from Protestant, as it was ordered by the Board and was due last Friday." On March 21, 2019, another e-mail was sent by Staff Counsel which stated in part: "Protestant has not provided the required copy of the entire franchise. Please forward it as it is untimely."

⁸ Staff Counsel, on April 23, 2019, at 4:07 p.m. sent an e-mail to Mr. McCreary asking him "to file his [Statement of Disputed Discovery Requests] or advise if he has none since they were due at noon."

by the Board in the Second Amended Pre-Hearing Conference Order dated May 31, 2019. What was done or not done is indicated in brackets.

- Produce all documents requested and not objected to, and documents ordered to be produced following the ruling on objections no later than Wednesday, June 5, 2019 at 5:00 p.m. (Pacific Time).
 - [AHM served its documents timely; Protestant served its documents on June 5, 2019 at 7:21 p.m.; over 2 hours past the ordered deadline.] (Deeb Decl., ¶ 9, Ex. P)
- File and serve Preliminary Witness Lists no later than Friday, June 14, 2019 at 5:00 p.m. (Pacific Time).
 - [AHM filed and served its Preliminary Witness list timely; Protestant served its witness list on June 14th but past the 5:00 p.m. deadline so it was not filed until Monday, January 17, 2019.]⁹

40. Protestant conceded that it failed to comply with the Board's orders in a timely fashion and offers no justification for its conduct. Rather, Protestant argues that any tardiness is irrelevant and was not prejudicial to Respondent. (Protestant's Opposition to Motion to Dismiss, p. 3, lines 11-17)

**PROTESTANT'S FAILURE TO PRODUCE DOCUMENTS
IN RESPONSE TO AHM'S REQUESTS**

41. The following gives some perspective as to what is discussed in more detail below relating to the time line regarding the claim of Protestant that its records, including ESI, were destroyed in a flood.

- August 2016 - Audit commenced. (Tang Decl., ¶ 4)
- August 29, 2016 - Notice of audit results and intended chargeback sent to Protestant. (Tang Decl., ¶ ¶ 4-5, Ex. A)
- September 8, 2016 - Appeal of audit results filed by Protestant. (Tang Decl., ¶ 6, Ex. B)
- December 21, 2018 - Final chargeback notice to Protestant. (Tang Decl., ¶ 11, Ex. D)
- January 7, 2019 - Flood at 970 W. Manchester Blvd., Inglewood, CA. (Declaration of

⁹ The Preliminary Witness List was not filed with the Board on June 14, 2019 as required. On June 17, 2019 Staff Counsel sent an e-mail to Mr. McCreary stating the "... Preliminary Witness List was due on Friday and they need to file it because it is untimely." Mr. McCreary subsequently stated that his assistant "forgot to send the document" to the Board.

1 Hooman Nissani dated October 22, 2019 (Nissani Decl.), ¶ 2) However, the January 16, 2019
2 letter from the insurance company shows the location of the "Client" to be 970 W. Manchester
3 Blvd. and "Location of Loss" to be 333 Hindry Ave., Inglewood, CA but remediation repairs
4 were shown to be made at the W. Manchester Blvd. location. The Dealership is located at 5750
5 Mesmer Ave., Los Angeles, CA.¹⁰ The fact that three locations are referred to increases the
6 uncertainty as to where the hard copies of the records and ESI were stored and whether they
7 were damaged or destroyed by the flood.

- 8 ■ January 8, 2019 - Protest filed.
- 9 ■ January 31, 2019 - Completion of flood repairs as shown on repair invoice dated February 13,
10 2019. (Nissani Decl., Ex. A)
- 11 ■ February 27, 2019 - Prehearing Conference Order issued establishing discovery schedule.
- 12 ■ March 8, 2019 - Respondent's requests for document production filed and served. Protestant's
13 requests served.
- 14 ■ March 11, 2019, Protestant's requests for document production filed.
- 15 ■ June 5, 2019 - Documents were produced and the first time that Protestant raised its claim that
16 physical records were destroyed in the flood that occurred five months earlier and more than
17 four months after flood repairs were completed.
- 18 ■ December 4, 2019 - This was first time Protestant alleged that the computers and ESI were
19 also destroyed in the flood. (Supplemental Declaration of Hooman Nissani dated November
20 21, 2019 but filed December 4, 2010 (Supp. Nissani Decl.), ¶ 11)

21 42. Protestant's June 5, 2019 document production consisted of only 152 pages of documents.
22 This was in response to 50 separate requests from AHM. (Deeb Decl., ¶ 9, Ex. P)

23 43. Protestant's June 5, 2019 production can be broken down into 7 documents: (i) an
24 employee handbook (R&H 000001-000067), (ii) a list of former and current sales employees (R&H

25 ¹⁰ Although Protestant refers to the flooded location as a "storage facility," the insurance documents indicate that
26 repairs were made to a facility with a conference room, hallway, sales office, women's room, men's room, another
27 hallway, eight offices, storage area, break room, accounting room, a "Main Office," "Hoomans office" (*sic*),
28 "Hoomans office 2" (*sic*), Hyundai reception room, another hallway, "Assistant office" (*sic*), mail room, "Sales
manager office," closet, "ShowRoom rear" (*sic*), Showroom front, Fire panel room, janitor closet, with 26 rooms on
what is described as the "main level." (Nissani Decl., Ex. A)

000068-000069), (iii) Secretary of State filed Statements of Information for Protestant (R&H 000070-000072), (iv) AHM's audit letters (R&H 000073-000079), (v) Protestant's appeal letter¹¹ (R&H 000080-000081), (vi) selected financial statements for Protestant (R&H 000082-000091), and (vii) the franchise agreement and letter of intent (R&H 000092-000152). (Deeb Decl., ¶ 9, Ex. P) No electronic records or communications were included in Protestant's production. (*Id.*)

44. Upon providing AHM with its document production on June 5, 2019, Protestant claimed, for the first time, that its documents "were mostly destroyed during a flood this winter" meaning January 7, 2019 and stated that it would be amending its March 29, 2019 discovery responses accordingly. (Deeb Decl., ¶ 9, Ex. P)

45. After multiple requests by AHM, Protestant, on July 23, 2019, provided AHM with its amended discovery responses to Respondent's Request for Production and Identification of Documents. Out of the 50 Requests, Protestant claimed that documents responsive to 10 of those Requests were "destroyed" in the flood. (Deeb Decl., ¶ 11, Exs. Q and R; Request Nos. 12-13, 15, 16-19, 30, 37-38)

46. Protestant's July 23, 2019 Amended Responses failed to provide any specific information (e.g., description of documents and communications destroyed, date of destruction, names of persons with knowledge of facts surrounding destruction) relating to the alleged destruction of Protestant's documents as to those 10 Requests. (Deeb Decl., Ex. R)

47. The documents that would have been responsive to the 10 Requests that were allegedly destroyed in a flood dealt with requests that directly related to the alleged sale of the vehicles that are subject to the proposed chargeback and at the heart of Protestant's protest. (Deeb Decl. Ex. R)

48. In its Opposition to Respondent's Motion to Dismiss, Protestant claimed that it moved most of its hard-copy documents (including customer sales information) to an off-site storage facility in June 2017 when Protestant relocated its dealership. (See Footnote 10; Supp. Nissani Decl., ¶¶ 4-6)

49. Protestant does not claim that it entered into a buy-sell agreement in June 2017 or that it ceased operations of its dealership in June 2017 when it moved its records to the off-site location. The only thing that happened in June 2017 was that Protestant changed its dba from Hooman Acura of Santa

¹¹ While Protestant produced a copy of its appeal letter, Protestant did not produce any of the alleged records it claims support its appeal or its position that the chargebacks are improper.

1 Monica to Nissani Bros. Acura when it relocated. The business entity operating the dealership (*i.e.*, R &
2 H Automotive Group, Inc.) never changed hands and remained an ongoing business. (Supp. Nissani
3 Decl., ¶¶ 4-6)

4 50. Protestant provides no reasonable explanation as to why it removed documents relating to
5 its operations (*i.e.*, information on its employees, sales and service customers, finances, etc.) to an off-site
6 location simply because it changed its dba.

7 51. Protestant claims there was a flood at the storage off-site facility on January 7, 2019, one
8 day before it filed its Protest, that destroyed its hardcopy documents. Protestant claims this flood
9 destroyed “tens of thousands” of documents. (Nissani Decl., ¶ 3)

10 52. Protestant failed to address what specific documents were stored there; the facts and
11 circumstances surrounding the flood; and when the destruction was discovered. (See Nissani Decl. and
12 Supp. Nissani Decl.) The only “support” for the flood provided by Protestant is a letter from an insurance
13 company in January 2019 merely acknowledging receipt of a “claim” for the property located at 333
14 Hindry Ave. and informing Mr. Nissani that the claim has been assigned to one of its representatives.
15 (Nissani Decl., Ex. A) Protestant did not provide the actual claim submitted to the insurance company or
16 any subsequent follow-up or report by the insurance company addressing its “claim” or the alleged flood.
17 The flood claim documents that were submitted appear to relate to the repairs made to the facility itself.
18 There are no documents that were submitted to show any claim for personal property such as desks, file
19 cabinets and more important, computers, servers, or other electronic equipment that might contain the ESI
20 or relate to any destruction of the ESI.

21 53. This flood or the claim that some of Protestant’s documents had been destroyed was never
22 raised during the parties’ meet and confer conference, the April 25, 2019 discovery hearing, or during
23 Protestant’s two requests to extend its production date.

24 54. Protestant provides no explanation as to why it waited until June 5, 2019 to first raise this
25 issue of the flood with the Board and Respondent.

26 55. In its December 4, 2019 Declaration of Mr. Nissani, Protestant claimed (for the first time)
27 that it also moved its physical computers to the off-site facility and that the ESI contained on those
28 computers was also destroyed. (Supp. Nissani Decl., ¶¶ 6-7, 11; see Paragraph 52 regarding the absence

of any insurance claim documents relating to computers or other equipment.)

56. Protestant did not provide the requested information on how the ESI from Protestant's computers was maintained, stored, backed-up, shared among employees (*e.g.*, networked), and transmitted to third parties – particularly since much of the requested documents and information is transmitted to the DMV, AHM, and/or third-parties electronically.

57. Protestant failed to provide information or evidence on its dealer management system ("DMS"); outside vendors providing data services such as its DMS and email domain providers; or its computer network servers. There is no evidence that Protestant has attempted to contact its vendors to retrieve its ESI or the requested communications.

58. The documents and ESI allegedly destroyed in the flood only comprised documents and information responsive to 10 of the 50 separate requests. There is no claim by Protestant that documents and information responsive to the remaining 40 Requests were affected by the flood. (Deeb Decl., Ex. R)

59. Of these remaining 40 Requests, Respondent identified over 25 Requests that Protestant has not produced a single responsive document in compliance with its discovery responses or the April 25, 2019 Ruling on Objections to Requests for Production of Documents. (Respondent's Supplemental Reply in Support of Motion to Dismiss Protest, Attachment A) Nor did Protestant claim the documents were "destroyed in flood."

60. Protestant has not provided any excuse or reasonable justification for its failure to produce documents and ESI in response to these Requests.

**CONCLUSIONS AS TO WHETHER PROTESTANT HAS FAILED
TO COMPLY WITH AUTHORIZED DISCOVERY**

61. It is determined that Protestant has failed to comply with authorized discovery without substantial justification.

62. Protestant chronically failed to comply with the Board's Pre-Hearing Conference Orders of February 27, 2019 and May 31, 2019, and the Order regarding the Ruling on Objections to Requests for Production of Documents dated April 25, 2019, in that Protestant:

- (a) Failed to timely file and serve Requests for Production;
- (b) Failed to file and serve a copy of the operative Franchise Agreement;

- 1 (c) Failed to timely file and serve a Statement of Disputed Discovery Requests;
- 2 (d) Failed to timely produce documents;
- 3 (e) Failed to timely file and serve its Preliminary Witness List;
- 4 (f) Produced minimal documents on June 5, 2019, with a total production amounting to only
- 5 152 pages in response to 50 separate requests from AHM. As set forth in the chart attached to AHM's
- 6 Supplemental Reply Brief as Attachment A, Protestant failed, without any justification, to produce a
- 7 single responsive document or ESI to over 25 Requests that Protestant either agreed to produce or was
- 8 ordered to produce in the April 25, 2019 Order. Protestant did not claim that responsive documents or ESI
- 9 to any of the over 25 Requests outlined in Attachment A were allegedly destroyed in the flood;
- 10 (g) Failed to produce any ESI in response to any of the Requests;
- 11 (h) Failed to provide substantial justification or evidence supporting its claim that certain
- 12 documents and electronic information were destroyed in the flood and/or could not otherwise be obtained.

13 63. As to whether dismissal of the protest is too harsh a sanction, the following language

14 from the appellate court in the *Nader* opinion is illuminating:

15 As to Nader's argument the board should have considered a lesser sanction than

16 dismissal, the plain language of the statute defeats his argument. The Legislature has

17 vested in the executive director (at the direction of the board) power to "dismiss the

18 protest" upon a showing of failure to comply with authorized discovery without

19 substantial justification. (§ 3050.2(b).) The statutory scheme does not require the board

20 to consider a lesser sanction first. (*Nader Automotive Group, LLC, et al. v. New Motor*

21 *Vehicle Board* (2009) 178 Cal. App. 4th 1478, 1485-1486)

22 **APPLICABLE LAW AS TO THE FAILURE OF PROTESTANT TO COMPLY WITH**

23 **MANDATORY SETTLEMENT CONFERENCE REQUIREMENTS**

24 64. Section 3050.4 is applicable to settlement conferences. The statute states as follows:

25 In a protest or petition before the board, the board, its executive director, or an

26 administrative law judge designated by the board or its executive director, may order a

27 mandatory settlement conference. The failure of a party to appear, to be prepared, or to

28 have authority to settle the matter may result in one or more of the following:

... (b) The board, its executive director, or an administrative law judge designated by the

board or its executive director, may dismiss the proceedings or any part thereof before the

board with or without prejudice.

(c) The board, its executive director, or an administrative law judge designated by the

board or its executive director, may require all the board's costs to be paid by the party at

fault.

1 (d) The board, its executive director, or an administrative law judge designated by the
2 board or its executive director, may deem that the party at fault has abandoned the matter.
(Underline added.)

3 65. Section 551.11(b) of the Board's regulations pertaining to Settlement Conferences, states
4 in part, as follows: "Each party shall file a written settlement conference statement that must be received
5 by the board no later than five business days before the settlement conference. The settlement conference
6 statement shall contain a detailed statement of facts, a statement of issues, and a good faith settlement
7 proposal...." (Cal. Code Regs., tit. 13 § 551.11)

8 66. Section 551.21(a) of the Board's regulations provides that "[i]n any proceeding before the
9 board or an ALJ, no party or representative of a party shall engage in or participate in any actions or
10 tactics that are frivolous, or that are intended to cause or will result in unnecessary delay." The Board or
11 an ALJ, by way of written motion, may impose sanctions upon "a party, or party's representative, or
12 both" for violation of this section. (Cal. Code Regs., tit. 13, § 551.21)

13 **ANALYSIS OF WHETHER PROTESTANT HAS FAILED TO COMPLY WITH**
14 **MANDATORY SETTLEMENT CONFERENCE REQUIREMENTS**

15 67. The Mandatory Settlement Conference ("MSC") was initially set for June 26, 2019, but
16 was rescheduled to August 19, 2019, to accommodate Mr. Nissani's schedule as he was not able to attend
17 in person on June 26, 2019.¹²

18 68. On August 12, 2019, the day the parties' MSC statements were due, Protestant requested
19 another continuance of the MSC because Mr. McCreary stated he was starting a trial. The MSC was
20 ultimately rescheduled to September 11, 2019, after Protestant's counsel confirmed his and Mr. Nissani's
21 availability to attend in person.

22 69. As agreed to by counsel for the parties and ordered by the Board, the MSC statements for
23

24
25 ¹² In response to requests from counsel to allow the principals to be available by phone, the Board's Staff Counsel,
26 on June 18, 2019, sent the following to all counsel: "Judge Wong [the settlement ALJ] feels an MSC is most
27 productive when all parties and counsel are available in person. Therefore, please provide a date or dates when you
28 and your clients are both readily available for an MSC." After email exchanges regarding dates, the Board's Staff
Counsel, also wrote as follows: "Duncan [Mr. McCreary], just to be clear, both you and your client are available on
the dates provided below?" Mr. McCreary replied, "Yes. August 19, 20, 21 are preferable." The MSC was
scheduled for August 19, 2019. However, at Mr. McCreary's subsequent request and after more exchanges of
emails, the MSC was rescheduled for September 11.

1 the September 11, 2019 MSC (which had been rescheduled again at Mr. McCreary's request) were due by
2 September 4, 2019 at 4:00 p.m. (Pacific Time).¹³ (Notice of Mandatory Settlement Conference, dated
3 September 3, 2019)

4 70. Protestant failed to file a timely MSC Statement.

5 71. The Board contacted Mr. McCreary on September 5, 2019, regarding the status of
6 Protestant's MSC Statement and directed him to file it immediately.¹⁴ Mr. McCreary never responded.
7 (Deeb Decl., ¶ 13, Ex. U)

8 72. On September 9, 2019, AHM's counsel contacted the Board and Mr. McCreary to inquire
9 as to the filing of Protestant's MSC Statement and was informed by the Board that Protestant had yet to
10 submit one. (Deeb Decl., ¶ 13, Ex. U)

11 73. On the afternoon of September 9, 2019, Mr. McCreary finally responded and informed the
12 Board and AHM's counsel that he would be providing Protestant's MSC Statement the following day
13 (i.e., September 10th).¹⁵ (Deeb Decl., ¶ 13, Ex. U)

14 74. Despite all of the above, Protestant never filed its MSC Statement.

15 75. On September 10, 2019 (less than 24 hours before the MSC), Protestant informed the
16 Board and AHM that the dealer principal, Mr. Nissani, would not be personally appearing because "he is
17 unable to fly due to medication that he is taking." (Deeb Decl., ¶ 14, Ex. V)

18 76. The MSC was scheduled to start at 10:00 a.m. on September 11, 2019. Protestant's counsel
19 did not arrive until after 10:15 a.m., while ALJ Wong, AHM's representative, and AHM's counsel waited.
20 (Deeb Decl., ¶ 15)

21 77. Protestant did not send an authorized business representative (in lieu of Mr. Nissani) to the
22

23 ¹³ Mr. McCreary did not confirm Protestant's availability for the September 11 MSC until Friday, August 30, 2019
24 (Labor Day weekend).

25 ¹⁴ On September 9, 2019, the Board's Staff Counsel emailed Mr. McCreary as follows: "The New Motor Vehicle
26 Board has not received a filing of Protestant's Mandatory Settlement Conference Statement." Mr. McCreary replied
27 that "I will provide our response tomorrow. I [apologize] for the delay." No MSC was ever received from Mr.
28 McCreary on behalf of Protestant.

¹⁵ On September 10, 2019, the Board received a phone call from Mr. McCreary stating that due to health reasons
his client would not be able to attend the MSC the next day. After Mr. McCreary made inquiry about the location
and timing of the MSC (a somewhat belated inquiry as the MSC was scheduled for the next morning), Staff
Counsel "confirmed that he [Mr. McCreary] still needs to submit his MSC statement. He stated he will do so."

1 MSC.

2 78. Protestant, in response to AHM's Motion to Dismiss, claims that Mr. Nissani suffers from
3 a prior back injury that flared up about a week prior to the MSC. (Nissani Decl., ¶¶ 7-8) Protestant
4 provided no explanation as to why it waited until the day before the MSC to inform the Board and AHM's
5 counsel that Mr. Nissani could not attend. Nor has Protestant provided any explanation as to why it could
6 not arrange for another representative to attend the MSC on its behalf.

7 79. According to Ms. Deeb, at the MSC, ALJ Wong asked Mr. McCreary why Protestant
8 failed to file the mandatory MSC Statement, Protestant's counsel stated that he "did not have time" to
9 prepare one. (Deeb Decl., ¶ 15)

10 80. Mr. Nissan claims that the medication for his back and neck condition precluded him from
11 flying; however, no declaration or statement from Mr. Nissani's physician or other health care provider
12 regarding his physical condition, medication and inability to fly was provided confirming this.

13 **CONCLUSIONS AS TO WHETHER PROTESTANT FAILED TO COMPLY WITH**
14 **REGULATORY AND STATUTORY REQUIREMENTS FOR**
MANDATORY SETTLEMENT CONFERENCES

15 81. It is determined that Protestant failed to comply with the Notice of Mandatory Settlement
16 Conference, Section 3050.4, and Section 551.11 of Title 13 of the California Code of Regulations without
17 substantial justification, in that:

- 18 (a) Protestant's counsel failed to file and serve the mandatory MSC Statement;
19 (b) Protestant's counsel was late in arriving at the MSC;
20 (c) Mr. Nissani failed to appear at the September 11, 2019, MSC or send a Dealer
21 representative to appear on its behalf;
22 (d) Protestant and its counsel failed to be prepared for, or meaningfully participate in, the
23 MSC process;
24 (e) Protestant and its counsel engaged in actions or tactics that are frivolous and intended to
25 cause or result in unnecessary delay of the proceedings to determine whether AHM's proposed
26 chargeback would be permitted, to the detriment of AHM.

27 ///

28 ///

1 **RECOMMENDATION**

2 It is recommended that the Executive Director seek direction from the Board that the Protest of
3 *R&H Automotive Group, Inc. v. American Honda Motor Co., Inc., Acura Automotive Division*, Protest
4 No. PR-2605-19, be dismissed with prejudice.

5
6 **PROPOSED ORDER**

7 Respondent American Honda Motor Co., Inc.'s Motion to Dismiss Protest is hereby granted.
8 The Protest of *R&H Automotive Group, Inc. v. American Honda Motor Co., Inc., Acura Automotive*
9 *Division*, Protest No. PR-2605-19, is dismissed with prejudice.

10
11
12
13
14 I hereby submit the foregoing which constitutes my
15 proposed order in the above-entitled matters, as the
16 result of a hearing before me, and I recommend this
17 proposed order be adopted as the decision of the New
18 Motor Vehicle Board.

19 DATED: February 18, 2020

20 

21 By _____
22 ANTHONY M. SKROCKI
23 Administrative Law Judge
24
25
26

27 Steven Gordon, Director, DMV
28 Elizabeth (Lisa) G. Humphreys, Branch Chief
Occupational Licensing, DMV

Attachment 5

NEW MOTOR VEHICLE BOARD
1507 - 21st Street, Suite 330
Sacramento, California 95811
Telephone: (916) 445-1888

STATE OF CALIFORNIA

NEW MOTOR VEHICLE BOARD

In the Matter of the Protest of

JACKSON FORD-MERCURY, INC., dba THE
NEW JACKSON FORD-MERCURY,

Protestant,

v.

FORD MOTOR COMPANY,

Respondent.

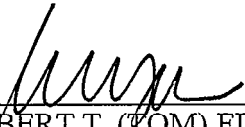
Protest No. PR-2180-09

DECISION

At its regularly scheduled meeting of August 24, 2010, the Public and Dealer Members of the Board met and considered the administrative record and Administrative Law Judge's "Proposed Order Granting Respondent's Motion to Dismiss Protest", in the above-entitled matter. After such consideration, the Board adopted the Proposed Order.

This Decision shall become effective forthwith.

IT IS SO ORDERED THIS 24th DAY OF AUGUST 2010.



ROBERT T. (TOM) FLESH
President
New Motor Vehicle Board

1 NEW MOTOR VEHICLE BOARD
1507 - 21ST Street, Suite 330
2 Sacramento, California 95811
Telephone: (916) 445-1888

CERTIFIED MAIL

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6
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8 STATE OF CALIFORNIA
9 NEW MOTOR VEHICLE BOARD
10

11 In the Matter of the Protest of

12 JACKSON FORD-MERCURY, INC., dba THE
13 NEW JACKSON FORD-MERCURY,

14 Protestant,

15 v.

16 FORD MOTOR COMPANY,

17 Respondent.

Protest No. PR-2180-09

**PROPOSED ORDER GRANTING
RESPONDENT'S MOTION TO
DISMISS PROTEST**

18
19 To: Charles L. Smith, President
In Pro Per
JACKSON FORD-MERCURY, INC.
20 dba THE NEW JACKSON FORD-MERCURY
909 Erie Street
21 Oakland, California 94610

22 Mark Joseph Kenney, Esq.
23 Duane M. Geck, Esq.
Donald H. Cram, Esq.
24 Attorneys for Respondent
SEVERSON & WERSON
25 One Embarcadero Center, Suite 2600
San Francisco, California 94111
26

27 ///

28 ///

IDENTITY AND STATUS OF THE PARTIES

1. On September 8, 2009, the Board received a letter from Mr. Charles Smith, identifying himself as "CEO" of New Jackson Ford with an address hand printed in the upper left corner (home address redacted) Sutter Creek, CA 95685. The letter had the printed letterhead of The New Jackson Ford/Mercury at the top with the address shown on the bottom as "11400 Highway 49, Martell, California 95645, and Post Office Box 968, Jackson, California 95642."

2. The entirety of the letter reads as follows:

I would like to protest the termination of my Ford Motor Co. franchise, under the provision of the Calif. Vehicle Code # 3060A.

I am late in responding to this letter, because I did not receive it until Aug 29.09.

It was delivered by regular mail.

Due to the fact that the dealership is closed, there was no one to accept the letter delivered by fedx (sic) dated July 23.09.

Thank you

s/ Charles Smith

3. The letter is undated however, the envelope indicated that it had been sent to the Board by Certified Mail on September 3, 2009.

4. There was no indication of a copy being sent to Ford Motor Company.

5. By letter dated September 9, 2009, the day after Mr. Smith's letter was received by the Board, William G. Brennan, the Board's Executive Director, sent a letter to Mr. Smith at the return address shown on the letter from him.

6. As Mr. Smith's letter stated that the dealership was closed, the Board's letter was sent only to the address that had been hand-printed as shown above.

7. As stated in the Board's letter, there were several attempts to contact Mr. Smith by phone at the number shown in his letter but the phone number was not valid.

8. The Board's letter to Mr. Smith stated that his letter did not comply with the Board's regulations "for filing a protest as set forth in Title 13, Chapter 1, Subchapter 2, Articles 5 and 6

///

(commencing with section 583) of the California Code of Regulations.”¹ Mr. Brennan expressly stated that “[p]ursuant to section 598² of the regulations, your letter has not been accepted for filing. We are returning a copy of your letter, along with a copy of the relevant Vehicle Code sections, a copy of the Board’s regulations, and a sample protest.”³

9. Subsequent to the letter from the Board, there were two protests received from Mr. Smith in behalf of Jackson Ford.

THE FIRST PROTEST RECEIVED BY THE BOARD

10. One protest was received by the Board via UPS on September 16, 2009, filed on that date, and assigned Protest No. PR-2180-09. This document identifies the Protestant as: Jackson Ford-Mercury, Inc., dba The New Jackson Ford-Mercury and states that it is “located at” 11400 Highway 49, Martel, California 95654 which is also the address shown in the upper left corner of the first page of the document. It is signed in behalf of Protestant by: Charles L. Smith, President. This Protest indicates a signing date of “September 11, 2009” and that the filing is “In Pro Per”.

THE SECOND PROTEST RECEIVED BY THE BOARD

11. The other protest document was received by the Board via UPS, a day later, on September

¹ Although reciting a string of words and numbers may be required for technical specificity, doing so is recognized by the Board as not being meaningful in many cases. Therefore, as is stated, the Board included with its letter, as is its practice, not only a copy of the statutes and regulations, but also a copy of a sample protest that could be used as a guide.

² Section 598 of Title 13 of the California Code of Regulations provides as follows:

(a) A document which purports to be a protest pursuant to Vehicle Code section 3060, 3062, 3070, or 3072, which is received at the offices of the Board shall not be filed until the executive director has reviewed it for compliance with the Board's enabling statutes and Title 13, Subchapter 2 of the California Code of Regulations. If the executive director deems the document to comply, said document shall be filed. The executive director may reject any document that does not comply with the Board's enabling statutes and Title 13, Subchapter 2 of the California Code of Regulations. (Emphasis added.) [Note that the regulation mandates that the “document...shall not be filed until the executive director reviews it for compliance...” and that thereafter the “document shall be filed” only if the Executive Director deems the document to comply with the statutes and regulations.]

(b) A protest accepted for filing by the executive director shall be recorded as filed as of the date it was received at the Board's offices or the date of certified or registered mailing.

(c) The executive director may, for good cause shown, accept for filing any papers that do not comply with the Board's enabling statutes and Title 13, Subchapter 2 of the California Code of Regulations. Good cause issues and challenges to the executive director's compliance determinations may be resolved by law and motion proceedings before an administrative law judge. [There was no claim in behalf of Jackson Ford that there was “good cause shown” to accept the letter for filing nor were there any “challenges to the Executive Director’s compliance determinations”.]

³ The Board’s practice and what was done here comports with the requirements as stated in footnote 2. Filing of the document by the Board’s staff without first submitting it to the Executive Director would be a violation of the regulations. The Executive Director is mandated to review the document and in doing so must make a determination as to whether it may properly be filed. There is no question that the document failed to comply with the Board’s regulations and was properly rejected.

1 17, 2009. This second document also identifies the Protestant as: Jackson Ford-Mercury, Inc., dba The
2 New Jackson Ford-Mercury, but rather than showing its location, it states that "its mailing address" is 909
3 Erie Street, Oakland, California 94610 which is also the address shown in the upper left corner of the first
4 page of the document. No other address is shown. This document was also signed in behalf of Protestant
5 by: Charles L. Smith, President. It too indicates "pro per" but has a signing date of September 16, 2009
6 (compared to September 11, 2009, on the first document).

7 12. With the exception of the addresses and the dates signed, the content of the two protests is
8 identical. Because they are identical, only the first protest was assigned a protest number.

9 13. The protests assert that Protestant is Jackson Ford-Mercury, Inc., dba The New Jackson
10 Ford-Mercury ("Jackson Ford" or "Protestant"). The first protest states it is located at 11400 Highway
11 49, Martel, California. The second protest gives no location but states a mailing address of 909 Erie
12 Street, Oakland, California. They both provide the same phone number for Protestant (510) 882-2750.
13 Both allege that Protestant is a new motor vehicle dealer and franchisee authorized to sell Ford vehicles
14 and parts. (Protests, page 1, lines 20-22)

15 14. Both protests indicate that Charles L. Smith is the President of Jackson Ford and that Mr.
16 Smith is representing Jackson Ford in pro per before the Board.

17 15. The Respondent and franchisor of Jackson Ford is Ford Motor Company headquartered in
18 Dearborn, Michigan. (Notice, page 1) Ford Motor Company is licensed by the Department of Motor
19 Vehicles as a manufacturer.

20 16. By letter dated July 23, 2009, Ford Motor Company issued a 15-day notice of termination
21 ("Notice") to Protestant because of "Insolvency of the Dealer - inability to meet debts as they mature" and
22 "Failure of the Dealer to function in the ordinary course of business." (Notice, page 1) Among other
23 assertions, the Notice also stated that: "the dealership has been on finance hold with FMCC since
24 October 2, 2007; and is in an out of trust position when [it] ceased operations on March 24, 2009; and
25 "that that dealer filed for Chapter 11 bankruptcy on December 15, 2008..."

26 **THE NOTICE AS GIVEN AND THE PROTESTS AS RECEIVED BY THE BOARD**

27 17. The Notice from Ford Motor Company expressly applies to both a "Ford" franchise and a
28 "Mercury" franchise of Protestant.

1 18. The Notice stated that termination was being "...given by Ford Motor Company
2 ('Company') of the Ford Sales and Service Agreement ('Agreement') dated January 14, 2002 and
3 Mercury Sales and Service Agreement dated January 14, 2002..." The letterhead on the Notice carries
4 the names and logos for "Ford", "Lincoln" and "Mercury" and also indicates that it came from the
5 "Market Representation Office, Ford and Lincoln Mercury, Marketing and Sales" as well as "Ford Motor
6 Company, 16800 Executive Plaza Dr., 8 SWC, Dearborn, MI 48126". It was signed by "A.J. Said,
7 Assistant Secretary, FORD MOTOR COMPANY". Based only upon this information, it appears that the
8 "franchisor" giving the notice of termination of both the Ford franchise and the Mercury franchise is
9 "Ford Motor Company".

10 19. Although it appears there is just one franchisor, Ford Motor Company and one franchisee,
11 Jackson Ford, there are two franchises sought to be terminated, one for the "Ford" line-make and the other
12 for the "Mercury" line-make. The Notice as issued was a single notice applicable to both franchises.⁴

13 **WHETHER THE PROTESTS REFER ONLY TO THE "FORD" FRANCHISE**

14 20. As stated above, the Board assigned a protest number only to the protest received on
15 September 16, 2009. Both it, and the protest received on September 17, 2009, allege that Jackson Ford is
16 filing them with the New Motor Vehicle Board ("Board") pursuant to Vehicle Code⁵ section 3060.

17 21. Both protests by their terms refer to a "franchise agreement" in the singular and use only
18 the term "Ford" with no reference to the Mercury line-make or Mercury franchise. There is nothing to
19 differentiate the two protests substantively or to indicate that one is to apply to the Ford franchise and the
20 other to the Mercury franchise. However, it is possible that the use of the name "Ford" in the protests
21 meant vehicles manufactured by the parent "Ford Motor Company", including the Mercury line-make. It
22 appears that both line-makes are administratively handled by the "Ford Motor Company" through the
23 same office and personnel.

24 22. Alternatively, it is also possible to interpret the protests by their terms to be limited only to
25 the franchise for the Ford line-make, especially because of the reference to the singular "franchise". The

26 ⁴ There has been no claim made that the notice was not adequate or not in compliance with the Vehicle Code requirements
27 regarding form and content as to the Ford franchise or the Mercury franchise. Whether and when the notice was "received" by
28 Protestant will be discussed later.

⁵ All statutory references are to the California Vehicle Code unless noted otherwise.

only apparent reason for the two protests is the difference in the address shown for Protestant.

23. If the first interpretation is correct, then, although there should have been a separate protest filed applicable to the Mercury franchise, the protests as received and the protest as filed can be deemed sufficient for both the Ford franchise and the Mercury franchise. However, if the second interpretation is correct, then there was no protest filed regarding the Mercury franchise and the time to do so has expired.

**WHETHER FORD MOTOR COMPANY IN ITS MOTION TO DISMISS IS TREATING
THE PROTEST WHICH WAS FILED AS BEING APPLICABLE TO BOTH THE
FORD FRANCHISE AND THE MERCURY FRANCHISE⁶**

24. The Motion to Dismiss Protest was filed in behalf of "Ford Motor Company", the Respondent. It refers to both the "Ford and Mercury Sales and Service Agreements" (Motion, page 2, line 3); and refers to the "Mercury Sales and Service Agreement" or Mercury franchise (Memorandum of Points and Authorities "Memorandum", page 1, lines 13-14 and 23) as follows:

- "franchises" in the plural (for example, Memorandum, page 1, line 23, page 2, line 24, and page 4, lines 2 and 7);
- "The franchise agreements at issue in the instant protest..." (Memorandum, page 4, line 19);
- the "Ford and Mercury franchises" (Memorandum, page 5, lines 17-18, and 24);
- that Jackson Ford failed to exhaust its administrative remedies as required by "Paragraph 18(b) of the Ford and Mercury Sales and Service Agreements..." (Memorandum, page 6, lines 16-20, and page 7, line 7)

25. It therefore appears that Ford Motor Company is treating the single protest referred to by Ford Motor Company in its pleadings as applicable to both the franchise for the Ford line-make as well as

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⁶ It is unknown if Ford Motor Company received both versions of the protests. Each proof of service attached to the protests was improperly completed. Rather than showing the protests were addressed to Ford Motor Company, each proof of service states that the protests were addressed to: "UPS Store, 4096 Piedmont Ave, P.O. Box 259, Oakland, CA 94511-5221", which is likely their place of mailing. One proof of service is dated September 15, and the other is dated September 16, 2009. The documents submitted by Ford Motor Company along with the motion to dismiss included Exhibit H, which is a copy of the protest received and filed by the Board on September 16, 2009 with the proof of service dated September 15, 2009.

1 the franchise for the Mercury line-make.⁷ To avoid confusion and cumbersome language, unless
2 indicated otherwise, the remainder of this proposed order will also refer to the protest in the singular.

3 26. Regardless of whether the protest and motion to dismiss are applicable only to the Ford
4 franchise or applicable to both the Ford and Mercury franchises, the result will be the same as to the
5 Mercury franchise. If the notice of termination was effective as to both franchises as having been
6 "received" by Jackson Ford (discussed below), and if the protest challenged only the termination of the
7 Ford franchise, then no protest has ever been filed as to Mercury. As the time to file a protest as to the
8 Mercury franchise has expired, the Mercury franchise has already terminated. If the protest is applicable
9 to the Mercury franchise (as well as the Ford franchise), and if the Board adopts the recommendation as
10 stated in this proposed order, the Mercury franchise (along with the Ford franchise) will terminate as of
11 the date stated in the Board's order.

12 27. Unless otherwise indicated, all references hereafter to "Jackson Ford" will mean the
13 corporation, "Jackson Ford-Mercury, Inc.", as both the Ford franchisee and the Mercury franchisee.

14 **PROCEDURAL BACKGROUND**

15 28. On December 15, 2008, Jackson Ford filed for relief under Chapter 11 of the Bankruptcy
16 Code (Case No. 08-38452-A-7). (Request for judicial notice, Exhibit A)

17 29. On March 24, 2009, Jackson Ford's bankruptcy case was converted to a Chapter 7
18 proceeding and a Chapter 7 trustee was appointed. (Request for judicial notice, Exhibit A)

19 30. On September 16, 2009, the protest was filed with the Board. However, the proceedings
20 before the Board are of the type subject to the "automatic stay" as mandated by the Bankruptcy Code and
21 no action can be taken regarding the protest unless the stay is lifted by the Bankruptcy Court.

22 31. On April 19, 2010, the Bankruptcy Court entered a Final Decree closing the bankruptcy
23 case. (Request for judicial notice, Exhibit D)

24 _____
25 ⁷ If it is determined, as a matter of law, that the protest cannot be interpreted to include the Mercury franchise, the fact that Ford
26 Motor Company is treating it as such is of no significance. The filing of a timely protest challenging the termination of the
27 Mercury franchise is necessary for the Board to have jurisdiction as to the termination of the Mercury franchise. The parties
28 cannot, by consent, conduct, waiver, or otherwise, confer or create jurisdiction in the Board if it does not exist under the
statutes enacted by the legislature. If the protest as filed did not include the Mercury franchise, the Board would have no
jurisdiction as to the termination of the Mercury franchise and the lack of jurisdiction cannot be waived by Ford Motor
Company.

1 32. During the Board's June 8, 2010, telephonic Status Conference re: Status of Bankruptcy,
2 the parties (Charles L. Smith on behalf of Protestant and Donald Cram on behalf of Respondent) indicated
3 that the bankruptcy case had been concluded. Counsel for Ford Motor Company stated that he intended
4 to file a motion to dismiss and a briefing schedule was established, with the dates agreeable to both sides.

5 33. By order dated June 9, 2010, Ford Motor Company was to file and serve its motion to
6 dismiss by June 16, 2010, Jackson Ford was to file and serve its opposition by June 30, and Ford Motor
7 Company was to file and serve its reply by July 7.

8 34. On June 16, 2010, the Board filed Ford Motor Company's "Notice of Motion and Motion
9 to Dismiss Protest..." and "Request for Judicial Notice in Support of Motion to Dismiss Protest".

10 35. Jackson Ford did not file an opposition on June 16, 2010, the time agreed to and as ordered
11 by the Board. On July 6, 2010, Polly Rigggenbach, Staff Counsel/Administrative Law Judge ("ALJ"), was
12 informed by Charles Smith, pro per for Jackson Ford that he did not intend to file an opposition or appear
13 for the telephonic hearing. (Transcript, page 6, lines 3-18)

14 36. Ford Motor Company did not file a reply as no opposition was filed. The reply would
15 have been due on July 7.

16 37. As had been scheduled, on July 14, 2010, a telephonic hearing on the motion to dismiss
17 was held before ALJ Anthony M. Skrocki. At the commencement of the telephonic hearing, Robin
18 Parker, Senior Staff Counsel, attempted to contact Mr. Smith concerning his participation. The attempt to
19 contact Mr. Smith was not successful. As no one answered Ms. Parker's phone call, a voicemail message
20 was left. There has been no reply to the voicemail message. No appearance was made on behalf of
21 Jackson Ford. Ford Motor Company was represented by Donald H. Cram, Esq. of Severson & Werson.

22 38. During the hearing, the ALJ expressed concern that there was nothing submitted to
23 indicate that the notice of termination had in fact been "received"⁸ by Jackson Ford as is required by the
24 Vehicle Code.

25 39. Counsel for Ford Motor Company stated that there was a document indicting when this

26
27 ⁸ Section 3060(a)(2) provides in part: "...The franchisee may file a protest with the board within 30 days after receiving a 60-
28 day notice, satisfying the requirements of this section, or within 30 days after the end of any appeal procedure provided by the
franchisor, or within 10 days after receiving a 15-day notice, satisfying the requirements of this section, or within 10 days after
the end of any appeal procedure provided by the franchisor." (Emphasis added.)

1 had occurred and that it would be provided. Ford Motor Company was given until July 23, 2010, to file
2 and serve documentation and declarations establishing when and where the Notice had been received by
3 Jackson Ford.

4 **PRELIMINARY STATEMENT OF ISSUES**

5 **THE ALLEGATIONS OF THE PROTEST FILED BY JACKSON FORD**

6 40. Jackson Ford contends that Ford Motor Company does not have good cause to terminate
7 “the franchise” based upon the good cause factors contained in Section 3061. (Protest, page 2, lines 2-20)
8 (See earlier discussion as to whether this could refer to both the Mercury franchise as well as the Ford
9 franchise.)

10 **THE MOTION TO DISMISS FILED BY FORD MOTOR COMPANY**

11 41. Ford Motor Company seeks dismissal of the protest on the following grounds:

12 a. “Jackson Ford lacks standing to prosecute the instant protest.” (Motion, page 1, line 25;
13 Memorandum, page 1, lines 5-6) Ford Motor Company contends that “Jackson Ford has no standing to
14 pursue these claims. The Chapter 7 trustee is the only party with standing.” (Memorandum, page 5, lines
15 1-3)

16 b. “Jackson Ford is prohibited from pursuing the instant protest under the doctrine of judicial
17 estoppel.” (Motion, page 1, lines 26-27; Memorandum, page 1, line 6) Respondent Ford Motor Company
18 maintains that Jackson Ford did not list its Ford and Mercury franchises or any claims arising from the
19 franchises as assets on its Bankruptcy Schedules. (Memorandum, page 5, lines 17-19; Request for
20 judicial notice, Exhibit C) As such, the trustee relied upon the “...inaccurate schedules in issuing its
21 Report of No Distribution” and the “...court relied upon the inaccurate schedules in entering a Final
22 Decree.” (Memorandum, page 5, lines 19-25, and page 6, lines 1-3) Therefore, Ford Motor Company
23 argues that judicial estoppel applies.

24 c. “Jackson Ford’s protest is barred by [its] failure to initiate and complete an appeal of the
25 termination to Ford’s Dealer Policy Board, as required under paragraph 18(b) of the Ford and Mercury
26 Sales and Service Agreements.” (Motion, page 2, lines 1-6; Memorandum, page 1, lines 7-9)
27 Furthermore, “Jackson Ford has failed to comply with a condition precedent to bringing this protest and
28 the franchises have terminated. Completion of the internal appeal is an express precondition to the

1 dealer's pursuit of any other remedy available under [the] law, Jackson Ford's protest is premature.
2 Jackson Ford is contractually barred from pursuing it." (Memorandum, page 8, lines 7-10)

3 d. "The filing of Jackson Ford's protest is untimely." (Motion, page 2, line 7; Memorandum,
4 page 1, lines 9-10) Ford Motor Company alleges that it provided Jackson Ford with a 15-day Notice on
5 July 23, 2009. Jackson Ford did not file the protest until September 16, 2009 – 55 days after the Notice
6 was dated. (Memorandum, page 8, lines 15-18)

7 **FORD MOTOR COMPANY'S REQUEST FOR JUDICIAL NOTICE**

8 42. Ford Motor Company, on June 16, 2010, filed with the Board a "Request for Judicial
9 Notice in Support of Motion to Dismiss Protest" requesting that the Board take judicial notice of certain
10 documents identified in the Request. Proof of service, submitted by Ford Motor Company, indicated
11 service by mail was made to the following addresses:⁹

12 Jackson Ford-Mercury, Inc.
13 c/o Charles L. Smith, President
14 909 Erie Street
Oakland, CA 94610¹⁰

15 Jackson Ford-Mercury, Inc.
16 c/o Charles L. Smith, President
(home address redacted)
Sutter Creek, CA 95685

17 43. The proof of service also indicated service by electronic transmission to "e-mail addresses
18 designated for each party identified above." The Oakland address was identified as Jackson Ford's
19 mailing address in the second protest received by the Board on September 17, 2009. There has been no
20 opposition to the Request for Judicial Notice. Ford Motor Company's Request for Judicial Notice is
21 granted.

22 **FORD MOTOR COMPANY'S CONTENTIONS IN ITS MOTION TO DISMISS**

23 **JACKSON FORD LACKS STANDING TO INITIATE AND PROSECUTE THE PROTEST**

24 44. Ford Motor Company claims that the rights under the franchises became the property of
25 the bankruptcy estate and that only the bankruptcy trustee may assert any claims relating to the franchises.
26 Therefore Jackson Ford lacks standing to pursue the protest. (Memorandum, pages 3-5)

27 ⁹ These are the same as shown on the proof of service of the motion to dismiss and supporting documents attached to it.

28 ¹⁰ This is the address shown in the second protest which was received by the Board on September 17, 2009.

1 45. As no opposition was filed in behalf of Jackson Ford in response to these contentions Ford
2 Motor Company's position is uncontested.

3 **THE DOCTRINE OF JUDICIAL ESTOPPEL PRECLUDES JACKSON FORD FROM PROCEEDING**

4 46. Ford Motor Company claims that when Jackson Ford filed for bankruptcy protection in
5 December 2008: Jackson Ford did not properly list the two franchises nor any claims arising from them
6 as assets in the Bankruptcy Schedules; Jackson Ford did not amend the Schedules after the protest was
7 filed on September 16, 2009; the Bankruptcy Court relied upon the Schedules as submitted when it
8 entered a final decree closing the case; and that judicial estoppel precludes Jackson Ford from pursuing
9 any post-bankruptcy claims relating to the franchises. (Memorandum, pages 5- 6)

10 47. As no opposition was filed in behalf of Jackson Ford in response to these contentions Ford
11 Motor Company's position is uncontested.

12 **JACKSON FORD HAS FAILED TO EXHAUST ITS CONTRACTUAL REMEDIES**

13 48. Ford Motor Company claims that "Paragraph 18(b) of the Ford and Mercury Sales and
14 Service Agreements..." requires that "In any dispute about dealer termination, the dealer must appeal to
15 the [Ford] Dealer Policy Board as a condition precedent to pursuing any other remedy." (Memorandum,
16 page 6, lines 20-21, page 7, lines 7-9) Ford Motor Company then contends that "Jackson Ford has failed
17 to comply with a condition precedent to bringing this protest and the franchises have terminated."
18 (Memorandum, page 8, lines 7-8) Ford Motor Company also contends that "Jackson Ford is contractually
19 barred from pursuing [the protest]." (Memorandum, page 8, line 6-10)

20 49. No opposition was filed in behalf of Jackson Ford in response to these contentions.

21 50. However, on its face, this contention is not meritorious because of Section 3060(a) which
22 in part states: "Notwithstanding ...the terms of any franchise, no franchisor shall terminate or refuse to
23 continue any existing franchise unless all of the following conditions are met: ..."

24 51. Therefore, even though the language of the franchises may permit termination as stated by
25 Ford Motor Company, the Vehicle Code provides a right to Jackson Ford to file a protest before the Board
26 "Notwithstanding ...the terms of any franchise."

27 **JACKSON FORD'S PROTEST IS UNTIMELY**

28 52. In its motion Ford Motor Company alleged that Jackson Ford had only 10 days within

1 which to file a protest (citing Section 3060(a)(2)); that Ford Motor Company had "... provided Jackson
2 Ford with a...notice of termination on July 23, 2009"; that "Jackson Ford did not file the instant protest
3 until on or about September 16, 2009 - 55 days after the date of notice"; and that "Jackson Ford's protest
4 is untimely and should be dismissed. (Memorandum, page 8, lines 13-18)

5 53. Although no opposition to this contention was filed in behalf of Jackson Ford, the
6 contention as made and the initial documents submitted were not sufficient to conclude that the protest
7 was "untimely". The contention is that Ford Motor Company "provided Jackson Ford" with a notice of
8 termination and the focus in the motion is upon the "date of notice". What must be proven to show that
9 the time to file a protest has expired is not that notice was "provided" but that the notice was "received"
10 and the critical date is not the "date of notice" but the date when the notice was "received".

11 ANALYSIS

12 54. The analysis is going to focus on this last contention of Ford Motor Company, which is the
13 claim that the protest was not timely filed. If the protest was not timely filed with the Board then the
14 other grounds alleged for granting Respondent's motion to dismiss are moot.

15 APPLICABLE STATUTORY PROVISIONS

16 55. Section 3060(a) provides: "Notwithstanding ... the terms of any franchise, no franchisor
17 shall terminate or refuse to continue any existing franchise unless all of the following conditions are met:
18 (1) The franchisee and the board **have received** written notice from the franchisor...." (Emphasis added).
19 Section 3060(a)(2) further states that "[t]he franchisee may file a protest with the board...within 10 days
20 after **receiving** a 15-day notice, satisfying the requirements of this section...." (Emphasis added).

21 56. Because the Notice from Ford Motor Company listed the "insolvency of the dealer" and
22 "failure of the dealer to function in the ordinary course of business [cessation of business]" as the reasons
23 for termination of Jackson Ford, Section 3060 permits the franchisor to give what is termed a "15-day
24 notice" of termination. This would allow the franchisor to terminate the franchise 15 days after the notice
25 is received by the franchisee unless the franchisee files a protest with the Board "within 10 days after
26 receiving a 15-day notice." The legislative shortening of the time for termination from 60 days (if
27 termination is for other reasons) to 15 days and, even more important, limiting the time to file a protest to
28 only 10 days from receipt of the notice (compared to 30 days if the termination is based upon other

reasons) is an indication of the significance the legislature placed on the reasons for termination and the prompt action needed by a franchisee if the reasons for termination were cessation of operations or insolvency, as alleged here by Ford Motor Company. As explained by the court in *Sonoma Subaru, Inc. v. New Motor Vehicle Board*, 189 Cal. App. 3d 13, 234 Cal. Rptr. 226 (Cal. Ct. App. 1987), the 10-day filing deadline is strictly applied:

Where no protest of the termination is filed within the allotted time, the Legislature's obvious intent is to let the franchisor treat the termination as final and effective... Sanctioning late filings would undercut that finality and create uncertainty in the minds of franchisors as to whether they may treat their relationship with unsatisfactory franchisees as concluded. We conclude that the Legislature did not intend that the 10-day filing deadline be extended.

Sonoma Subaru, Inc., 189 Cal. 3d at 22 (affirming the Board's refusal to hear a protest that was untimely by five days).

57. Because the time to file a protest is very short, 10 days, there is no doubt that the legislature chose the terms "within 10 days after receiving" such a notice rather than "the date of the notice" or the date the notice was "sent" or when it was "given".

58. The Vehicle Code does not define the term "received". However, the California Uniform Commercial Code ("UCC")¹¹ contains the following definitions:¹²

Section 1202 provides in part:

(e) Subject to subdivision (f), a person¹³ "receives" a notice or notification when:
(1) it comes to that person's attention; or
(2) it is duly delivered in a form reasonable under the circumstances at the place of business through which the contract was made or at another location held out by that person as the place for receipt of such communications.

(f) Notice, knowledge, or a notice or notification received by an organization is effective for a particular transaction from the time it is brought to the attention of the individual conducting that transaction and, in any event, from the time it would have been brought to the individual's attention if the organization had exercised due diligence. An organization

¹¹ Section 1101 of California code states: "This code may be cited as the Uniform Commercial Code."

¹² Copies of the franchises were not provided to the Board. In the absence of any indication to the contrary as to choice of law, it is assumed that California law will apply to the franchise. And, because the franchise would be one that involves a sale of goods or transactions in goods, Division 2 of the UCC would be applicable, as would the definitions in Division 1 of the UCC. Michigan has also adopted the Uniform Commercial Code and language similar to UCC section 1202 is contained in Michigan's statutes at Section 440.1201(26) and (27). Therefore even if the franchise called for application of Michigan law, the analysis as to when a notice is "received" will be the same.

¹³ "Person" is defined in section 1201(b)(27) of the UCC to include a "corporation" as well as an "individual".

1 exercises due diligence if it maintains reasonable routines for communicating significant
2 information to the person conducting the transaction and there is reasonable compliance
3 with the routines. Due diligence does not require an individual acting for the organization
4 to communicate information unless the communication is part of the individual's regular
duties or the individual has reason to know of the transaction and that the transaction
would be materially affected by the information.

5 59. Ford Motor Company, in its Memorandum, stated only that "On July 23, 2009, Ford
6 sent Jackson Ford a Notice of Termination of the franchises..." (Memorandum, page 2, line 24, and
7 Request for judicial notice, Exhibit G)

8 60. This information did not establish if or when the notice had been "received" which is
9 required by the Vehicle Code to begin the running of the 10-day period within which Jackson Ford could
10 timely file its protest with the Board. The notice itself indicated only that it had been sent via Certified
11 Mail - Return Receipt Requested to:

12 Mr. Charles L. Smith, President
13 Jackson Ford-Mercury, Inc.
14 dba The New Jackson Ford-Mercury
11400 Highway 49
Martell, CA 95654

15 And to: Mr. Charles L. Smith (home address)

16 61. As stated earlier, neither the return receipts nor the information they may have contained
17 had been provided to the Board as of the time of the hearing of the motion on July 14, 2010. ALJ Skrocki
18 expressed his concern that although there was documentation stating when the notice was sent or "given",
19 there was nothing indicating when it had been "received" or even that it had been "received".

20 62. Mr. Cram, counsel for Ford Motor Company, stated that such documents existed and could
21 be provided. The ALJ agreed to allow additional time to Ford Motor Company to supplement its motion
22 with evidence regarding the receipt of the notice of termination.

23 **THE SUPPLEMENTAL DOCUMENTATION FROM FORD MOTOR COMPANY**

24 63. On July 22, 2010, the Board received a "Declaration of Anthony J. Said in Support of
25 Motion to Dismiss Protest" with exhibits.

26 64. Mr. Anthony J. Said is the person who signed the notice of intent to terminate, dated July
27 23, 2009, that had been referred to above. He is "a Dealer Contracts Supervisor" and "Assistant Secretary
28 for Ford and Lincoln Mercury Marketing and Sales Division".

ANALYSIS AS TO WHETHER THE PROTEST WAS TIMELY FILED

65. As stated above, the date of sending of the notice of termination is not the controlling date as to the commencement of the 10 days within which Jackson Ford could file a timely protest. Section 3060 clearly requires that the notice be “received” and that a protest would be timely only if filed “within 10 days after receiving” the notice.¹⁴

66. Both protests state that “Protestant received from Respondent a notice that Respondent intends to terminate Protestant’s franchise agreement (Protests, page 1, line 25), but neither of them state when the notice was “received”. Therefore, the question really is narrowed down to “when” the notice was received.

67. The notice dated July 23, 2009, was sent via Certified Mail, Return Receipt Requested to “Mr. Charles L. Smith, President, Jackson Ford-Mercury, Inc., dba The New Jackson Ford Mercury, 11400 Highway 49, Martell, CA 95654. (Declaration, Exhibit A) This letter was returned to Ford Motor Company. The envelope had a label¹⁵ from the Postal Service with a date of “07/24/09” and indicating “Return to Sender - The New Jackson Ford Mercury Moved - Left No Address - Unable to Forward - Return to Sender”. (Declaration, Exhibit B)

68. The same notice sent to “Mr. Charles L. Smith, (home address redacted) Sutter Creek, CA” was also returned to Ford Motor Company. (Declaration, Exhibit A) This letter had on its envelope a label¹⁶ from the post office “08/25/09 - Return to Sender – No such number¹⁷ – Unable to forward)”. (Declaration, Exhibit B)

69. Neither of these notices could be deemed to have been “received” by Jackson Ford as required by the Vehicle Code.

70. On August 11, 2009, Ford resent the notice by Certified Mail, Return Receipt Requested to “Mr. Charles Smith, c/o Mr. David Foyil, 18 Bryson Lane, Sutter Creek, CA 95685.” (Declaration, Exhibit C) Mr. Foyil was Jackson Ford’s bankruptcy counsel. (Declaration, page 2, lines 14-17) The

¹⁴ Section 3060 alternatively allows for a protest to be filed “within 10 days after the end of any appeal procedure provided by the franchisor”, but the facts here indicate Jackson Ford did not utilize Ford Motor Company’s internal appeal procedure.

¹⁵ This label obscured what is likely the “49” after “11400 Highway” and also the numbers after “9” in the zip code.

¹⁶ This label obscured part of “Creek, CA” as well as the zip code”.

¹⁷ As discussed later, the notice was resent on August 20, 2009, to Mr. Smith at this same address via Federal Express and was delivered on August 24, 2009, with no indication of “No such number”.

1 "Track & Confirm" from the Postal Service indicates this letter was delivered at the address shown on
2 August 14, 2009, at 10:03 a.m. (Declaration, Exhibit D) Although it is possible that the notice, which
3 was addressed to Mr. Smith, could have been brought to the attention of Mr. Smith as the person
4 representing Jackson Ford,¹⁸ or that receipt by Mr. Foyil as attorney for Jackson Ford would be deemed
5 "received" by Jackson Ford, there is insufficient information to so conclude.

6 71. Also on August 11, 2009, Ford resent the notice by Certified Mail, Return Receipt
7 Requested to "Mr. Charles L. Smith, c/o Mr. Ed Wright, 112 J Street, Second Floor, Sacramento, CA
8 95814. (Declaration, Exhibit C) Mr. Wright was Mr. Smith and Jackson Ford's "state law counsel."
9 (Declaration, page 2, lines 14-17) The "Track & Confirm" from the Postal Service indicates this letter
10 was delivered at the address shown on August 14, 2009, at 1:45 p.m. There is a hand-written note on the
11 "Track & Confirm" that says "c/o Ed Wright (court counsel) returned – no longer representing Mr.
12 Smith." (Declaration, Exhibit D) As with the notice delivered to Mr. Foyil's office, this notice was
13 addressed to Mr. Smith, however, there is insufficient information to conclude that this notice would
14 operate as "received" by Jackson Ford. And, as above, it is not necessary to decide this in order to rule on
15 this motion to dismiss.

16 72. On August 20, 2009, Ford Motor Company resent the Notice by Federal Express to "Mr.
17 Charles L. Smith, (home address redacted), Sutter Creek, CA. (Declaration, Exhibit E) Federal Express
18 provided a "Proof of Delivery" indicating that the envelope had been delivered at the location shown on
19 August 24, 2009, at 11:36 a.m. (Declaration, Exhibit F) There was no signature for the delivery as none
20 had been requested.

21 73. Also on August 20, 2009, Ford resent the notice by Federal Express to "Mr. Charles Smith,
22 c/o Mr. David Foyil, 18 Bryson Drive, Sutter Creek, CA 95685". (Declaration, Exhibit E) Federal
23 Express provided a "Proof of Delivery" indicating that the envelope had been delivered on August 24,
24 2009, at 11:21 a.m., and that it had been signed for by "L. FOYIL". (Declaration, Exhibit F)

25 74. As stated above, the protest must be filed within 10 days of when this notice of termination
26

27 ¹⁸ This would satisfy the need for the notice having been received by Jackson Ford per UCC section 1202(f) which provides in
28 part: "(f) Notice, knowledge, or a notice or notification received by an organization is effective for a particular transaction from
the time it is brought to the attention of the individual conducting that transaction and,..."

1 was received by Jackson Ford. As the protest was filed on Wednesday, September 16, 2009, for it to be
2 deemed timely would require the notice to have been received at some time on or after September 6,
3 2009. Said another way, if the notice was received by Jackson Ford on or before September 5, 2009, then
4 the protest would be untimely.

5 75. The facts before the Board establish that a notice of termination, proper in form and
6 content was delivered to the following locations on the dates indicated:¹⁹

	ADDRESSEE	PLACE DELIVERED	DATE DELIVERED
1	Mr. Charles Smith c/o Mr. David Foyil	18 Bryson Lane Sutter Creek, CA	August 14, 2009
2	Mr. Charles Smith c/o Mr. Ed Wright	112 J Street Sacramento, CA	August 14, 2009
3	Mr. Charles Smith c/o Mr. David Foyil	18 Bryson Lane Sutter Creek, CA	August 24, 2009
4.	Mr. Charles Smith	(home address redacted) Sutter Creek, CA	August 24, 2009

12 76. Ford Motor Company was confronting three difficult tasks that have been imposed upon
13 franchisors by the legislature. Here, these are: (1) Take steps to see that Jackson Ford "received" the
14 notice of termination; (2) Prove that the notice was in fact "received" by Jackson Ford; and (3) Prove
15 when the notice was received by Jackson Ford.

16 77. In a typical case, this can be accomplished by use of the Postal Service or some other
17 carrier utilizing the "return receipt requested" procedure they all have established. Such a procedure,
18 when it functions normally, is effective in satisfying all three of the above requirements. However, when
19 the franchisee closes its doors (or in some cases may be deliberately attempting to avoid receipt of some
20 notices), the "usual" method of complying with the above three requirements becomes much more
21 difficult.

22 78. This appears to be one of the difficult times. It must be remembered that the first two
23 attempts to have the notice delivered (one to the dealership address and one to Mr. Smith's home address)
24 were not successful as they were not "delivered", but were returned to Ford Motor Company.

25 79. Taking in the order listed above the four "deliveries" that had occurred, we must
26 determine if any of them can be deemed to have resulted in the notice being "received" by Mr. Smith

27 ¹⁹ The other two earlier attempts are not included here as the envelopes were returned to Ford Motor Company and not
28 delivered.

1 representing Jackson Ford “in pro per”, within the definition of “received” as stated above. If they do not
2 establish actual “receipt”, do they establish at least a rebuttable presumption of having been “received”
3 within the statutory definition?

4 80. For ease of reference, the definition of “received” as contained in the UCC is repeated here
5 and is as follows:

6 (e) Subject to subdivision (f), a person²⁰ “receives” a notice or notification when:

7 (1) it comes to that person's attention; or
8 (2) it is duly delivered in a form reasonable under the circumstances at the place of
9 business through which the contract was made or at another location held out by that
10 person as the place for receipt of such communications.

11 (f) Notice, knowledge, or a notice or notification received by an organization is effective
12 for a particular transaction from the time it is brought to the attention of the individual
13 conducting that transaction and, in any event, from the time it would have been brought to
14 the individual's attention if the organization had exercised due diligence. An organization
15 exercises due diligence if it maintains reasonable routines for communicating significant
16 information to the person conducting the transaction and there is reasonable compliance
17 with the routines. Due diligence does not require an individual acting for the organization
18 to communicate information unless the communication is part of the individual's regular
19 duties or the individual has reason to know of the transaction and that the transaction
20 would be materially affected by the information.

21 81. Per the standards in the statute, the notice could be received by Jackson Ford c/o Mr. Smith
22 per subdivision (e)(1) when it comes to Mr. Smith’s attention; or under subdivision (e)(2) when it is duly
23 delivered at the place of business through which the contract was made or at another location held out by
24 that person as the place for receipt of such communications.²¹ And, as Jackson Ford is an “organization”,
25 the notice would be deemed “effective” under subdivision (f) “for a particular transaction” when it is
26 “brought to the attention of the individual conducting that transaction”. None of these have been clearly
27 established to have occurred as to receipt by Jackson Ford or Mr. Smith.

28 **Delivery #1**

82. This was addressed to Mr. Smith c/o of Mr. Foyil, his bankruptcy attorney. The letter was
delivered to the attorney’s address. What is unknown is whether that notice came to Mr. Smith’s attention
and if so when. And, it is unknown if this was the place held out by Jackson Ford, or Mr. Smith acting in
its behalf, as the place for sending communications as the dealership had closed.

²⁰ “Person” is defined in section 1201(b)(27) of the UCC to include a “corporation” as well as an “individual”.

²¹ It is unknown what the Sales and Service Agreement(s) may say about the place for receipt of notices.

1 **Delivery #2**

2 83. This was addressed to Mr. Smith c/o another of his attorneys. This letter too was delivered
3 to the attorney's address. What is unknown, is whether this notice came to Mr. Smith's attention and if so
4 when. And, as above, it is unknown if this was the place held out by Jackson Ford, or Mr. Smith acting in
5 its behalf, as the place for sending communications as the dealership had closed.

6 **Delivery #3**

7 84. This, like Delivery #1, was addressed to Mr. Smith c/o of his bankruptcy attorney and was
8 delivered to the attorney's address. Like, the other two deliveries, it is unknown whether the notice came
9 to Mr. Smith's attention and if so when or if this place had been held out as the place for sending such
10 communications.

11 **Delivery #4**

12 85. This notice was addressed to Mr. Smith at what is purportedly his home address. It too
13 was delivered but it is unlikely that the place of delivery was the place of business through which the
14 contract was made. However, it is unknown if this was the place held out by Jackson Ford as another
15 location for receipt of such communications per subdivision (e)(2).

16 **The addresses "held out" by Jackson Ford**

17 86. It is noted that the protest filed on September 16 states Jackson Ford "is located at 11400
18 Highway 49, Martel California 95634". This is the address to which the notice was initially sent but not
19 delivered as it was returned to Ford Motor Company with the label that read: "Return to Sender - The
20 New Jackson Ford Mercury Moved - Left No Address - Unable to Forward - Return to Sender". It is also
21 noted that the "second protest" which was received by the Board on September 17, 2009, stated only
22 Jackson Ford's mailing address and that it was "909 Erie Street, Oakland, California".

23 87. Although it may be understandable, there was no apparent attempt to make delivery of the
24 notice at the "Erie Street" address in Oakland.²² And there was no attempt to make personal delivery to
25 Mr. Smith or to "manually" deliver or leave a copy of the notice at the dealership's premises.

26 _____
27 ²² As stated earlier, it is unknown if this second protest was received by Ford Motor Company. The only protest attached to
28 Ford Motor Company's pleading was the first protest received by the Board. Also, see discussion re: Proof of service being
inaccurately completed as to both protests.

1 88. The documents submitted pertaining to the 4th delivery show that there was delivery to the
2 address shown, which is purported to be Mr. Smith's home address. There is no doubt that Mr. Smith is
3 an authorized agent of Jackson Ford in his capacity as President. It would be illogical to conclude that the
4 requirement that the notice be "received" could be satisfied by leaving a copy of the notice at the
5 dealership (that has been admitted by Mr. Smith to have been closed, and indicated by the Postal Service
6 to have moved with no forwarding address) but that delivering a copy of the notice to the home address of
7 the CEO of the company would not constitute the notice being "received". The policy and purpose
8 underlying the requirement of the statutes that the notice be "received" by Jackson Ford is unquestionably
9 more likely to be more effectively accomplished by delivering it to the home of its CEO, Mr. Smith, than
10 leaving it under a door at the dealership's address if the dealership had "closed" (per Mr. Smith) and had
11 "moved with no forwarding address" (per the U.S. Postal Service).

12 89. Therefore, it is determined that the delivery to Mr. Smith's home address constituted
13 "receipt" of the notice of termination by an authorized agent for the receipt of the Notice. This delivery
14 occurred on August 24, 2009. The protest was not filed until September 16, 2009, which is more than 10
15 days from August 24, 2009.

16 **WHETHER THE PROTEST SHOULD BE DISMISSED DUE TO THE FAILURE**
17 **OF JACKSON FORD TO SUBMIT ITS BRIEF IN OPPOSITION AS ORDERED**
18 **BY THE BOARD AND DUE TO ITS FAILURE TO APPEAR AT THE**
19 **SCHEDULED HEARING ON THE MOTION TO DISMISS THE PROTEST**

20 **WHETHER JACKSON FORD SHOULD BE DEEMED TO HAVE ABANDONED ITS PROTEST?**

21 90. The Board's regulations as contained in Title 13 of the California Code of Regulations
22 provide as follows:

23 Section § 589. Failure to Appear.

24 Any party who fails to appear at a hearing will not be entitled to a further opportunity to be
25 heard unless good cause for such failure is shown to the board or to the administrative law
26 judge within five days thereafter. The lack of such showing of good cause may, in the
27 discretion of the board or the administrative law judge, be interpreted as an abandonment
28 of interest by such party in the subject matter of the proceeding.

29 91. Following the telephonic conference held on June 8, 2010, during which Mr. Smith
30 participated in behalf of Jackson Ford, the Board issued its order setting a briefing schedule and a hearing
31 date for the motion to dismiss. Jackson Ford made no objection to the dates (and in fact participated in

1 selecting them). However, subsequent to that conference, Mr. Smith advised the Board's staff that he did
2 not intend to file an opposition or appear for the telephonic hearing. (Transcript, page 6, lines 3-18)
3 Jackson Ford did not file its brief in opposition (due on June 30) nor did Mr. Smith or anyone else in
4 behalf of Jackson Ford participate in the scheduled hearing on the motion held on July 14, 2010.

5 92. The ALJ, counsel for Ford Motor Company, the Board's staff, and a Reporter were
6 "connected" and ready to proceed on July 14, 2010, at the time set for hearing of the motion to dismiss.
7 The parties, in the Board's Order of June 9, 2010, had been given instructions for the procedure to do so
8 and none had any difficulty joining the hearing. As Mr. Smith had not "dialed-in" as instructed, the
9 Board's staff attempted to contact him at the phone number the Board had for him, but the call was
10 "taken" by a voice-mail system. A message was left asking that Mr. Smith contact the Board if he wanted
11 to participate in the telephonic hearing which was about to begin. There was no return call or other
12 response from Mr. Smith or anyone else in behalf of Jackson Ford. The hearing commenced without an
13 appearance by Jackson Ford. It concluded with the instructions from the ALJ to Ford Motor Company to
14 provide the additional information concerning the issue of whether the notice of termination had been
15 received by Jackson Ford.

16 93. Therefore, the failure to file an opposition brief, the statement of Mr. Smith that the brief
17 would not be filed and that he would not appear for the telephonic hearing, followed by the actual failure
18 to participate in the hearing on the motion to dismiss, and the failure to respond to the message left on the
19 day of the hearing are sufficient to conclude that Jackson Ford has manifested an abandonment of interest
20 in the proceedings.

21 94. It is therefore recommended that the protest be dismissed for the following reasons:

22 The protest was not timely filed.

23 Jackson Ford has manifested an abandonment of interest in the proceedings.

24 ///

25 ///

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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.

[Signature]

By: ANTHONY M. SKROCKI
Administrative Law Judge

22

Attachment 6

NEW MOTOR VEHICLE BOARD
2415 1st Avenue, MS L242
Sacramento, California 95818
Telephone: (916) 445-1888

STATE OF CALIFORNIA

NEW MOTOR VEHICLE BOARD

In the Matter of the Protest of

ADRENALINE POWERSPORTS,

Protestant,

v.

POLARIS INDUSTRIES, INC.,

Respondent.

Protest No. PR-2418-15

PRECEDENT DECISION

At its regularly scheduled meeting of June 17, 2015, the Public Members of the Board met and considered the administrative record and Administrative Law Judge's "Proposed Order Granting Respondent's Motion to Dismiss Protest for Lack of Jurisdiction," in the above-entitled matter. After such consideration, the Board adopted the Proposed Order as its final Decision in this matter.

At its regularly scheduled meeting of April 28, 2023, it was determined by the Public Members that the above-referenced Decision shall be designated by the Board as a Precedent Decision in compliance with the Administrative Procedure Act (Gov. Code § 11425.60.) This Decision contains significant legal determinations of general application that are likely to recur.

This Decision shall become a designated Precedent Decision effective forthwith.

IT IS SO ORDERED THIS 28th DAY OF APRIL 2023.

ARDASHES "ARDY" KASSAKHIAN
President
New Motor Vehicle Board

NEW MOTOR VEHICLE BOARD
2415 1st Avenue, MS L242
Sacramento, California 95818
Telephone: (916) 445-1888

STATE OF CALIFORNIA

NEW MOTOR VEHICLE BOARD

In the Matter of the Protests of

PORTER AUTO GROUP, L.P.,

Protestant,

v.

FCA US LLC,

Respondent.

**Protest Nos. PR-2534-17, PR-2535-17,
PR-2536-17, PR-2537-17, PR-2555-18,
PR-2556-18, PR-2557-18, and PR-2558-
18**

PRECEDENT DECISION

At its regularly scheduled meeting of June 29, 2018, the Public Members of the Board met and considered the administrative record and Administrative Law Judge's "Proposed Order Granting Respondent's Motion to Dismiss Protest for Lack of Jurisdiction," in the above-entitled matter. After such consideration, the Board adopted the Proposed Order as amended as its final Decision in this matter.

At its regularly scheduled meeting of April 28, 2023, it was determined by the Public Members that the above-referenced Decision shall be designated by the Board as a Precedent Decision in compliance with the Administrative Procedure Act (Gov. Code § 11425.60.) This Decision contains significant legal determinations of general application that are likely to recur.

This Decision shall become a designated Precedent Decision effective forthwith.

IT IS SO ORDERED THIS 28th DAY OF APRIL 2023.

ARDASHES "ARDY" KASSAKHIAN
President
New Motor Vehicle Board

NEW MOTOR VEHICLE BOARD
2415 1st Avenue, MS L242
Sacramento, California 95818
Telephone: (916) 445-1888

STATE OF CALIFORNIA

NEW MOTOR VEHICLE BOARD

In the Matter of the Protest of
R & H AUTOMOTIVE GROUP, INC.,

Protestant,

v.

AMERICAN HONDA MOTOR CO., INC.,
ACURA AUTOMOTIVE DIVISION,

Respondent.

Protest No. PR-2605-19

PRECEDENT DECISION

At its regularly scheduled meeting of March 5, 2020, the Public Members of the Board met and considered the administrative record and Administrative Law Judge's "Recommendation that Respondent's Motion to Dismiss be Granted" and "Proposed Order Granting Respondent's Motion to Dismiss," in the above-entitled matter. After such consideration, the Board adopted the Proposed Order as amended as its final Decision in this matter.

At its regularly scheduled meeting of April 28, 2023, it was determined by the Public Members that the above-referenced Decision shall be designated by the Board as a Precedent Decision in compliance with the Administrative Procedure Act (Gov. Code § 11425.60.) This Decision contains significant legal determinations of general application that are likely to recur.

This Decision shall become a designated Precedent Decision effective forthwith.

IT IS SO ORDERED THIS 28th DAY OF APRIL 2023.

ARDASHES "ARDY" KASSAKHIAN
President
New Motor Vehicle Board

NEW MOTOR VEHICLE BOARD
2415 1st Avenue, MS L242
Sacramento, California 95818
Telephone: (916) 445-1888

STATE OF CALIFORNIA

NEW MOTOR VEHICLE BOARD

In the Matter of the Protest of

JACKSON FORD-MERCURY, INC., dba THE
NEW JACKSON FORD-MERCURY,

Protestant,

v.

FORD MOTOR COMPANY,

Respondent.

Protest No. PR-2180-09

PRECEDENT DECISION

At its regularly scheduled meeting of August 24, 2010, the Public and Dealer Members of the Board met and considered the administrative record and Administrative Law Judge's "Proposed Order Granting Respondent's Motion to Dismiss Protest," in the above-entitled matter. After such consideration, the Board adopted the Proposed Order.

At its regularly scheduled meeting of April 28, 2023, it was determined by the Public Members that paragraphs 52-89 and 94 in the above-referenced Decision shall be designated by the Board as Precedent in compliance with the Administrative Procedure Act (Gov. Code § 11425.60.) This Decision contains significant legal determinations of general application that are likely to recur.

This Decision shall become a designated Precedent Decision effective forthwith.

IT IS SO ORDERED THIS 28th DAY OF APRIL 2023.

ARDASHES "ARDY" KASSAKHIAN
President
New Motor Vehicle Board