

1 NEW MOTOR VEHICLE BOARD
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CERTIFIED MAIL

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8 STATE OF CALIFORNIA
9 NEW MOTOR VEHICLE BOARD
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11 In the Matter of the Protest of
12 SORAYA, INC., DBA AUTO GALLERY
13 MITSUBISHI - MURRIETA,
14 Protestant,
15 v.
16 MITSUBISHI MOTORS NORTH AMERICA,
17 INC.,
18 Respondent.

Protest No. PR-2819-23

**PROPOSED ORDER GRANTING
RESPONDENT'S MOTION TO
DISMISS OR, IN THE
ALTERNATIVE, FOR SUMMARY
ADJUDICATION**

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1 This matter came on regularly for telephonic hearing on Thursday, August 10, 2023, before
2 Anthony M. Skrocki, Administrative Law Judge for the New Motor Vehicle Board (“Board”). Gavin M.
3 Hughes, Esq. of the Law Offices of Gavin M. Hughes represented Protestant. Dean A. Martoccia, Esq.
4 of Seyfarth Shaw LLP represented Respondent.

5 **FACTUAL AND PROCEDURAL BACKGROUND**

6 1. Soraya, Inc., dba Auto Gallery Mitsubishi – Murrieta (“Auto Gallery Mitsubishi” or
7 Protestant) is a “franchisee” within the definition of Vehicle Code section 331.1¹ and Mitsubishi Motors
8 North America, Inc. (“MMNA” or Respondent) is a “franchisor” within the definition of Section 331.2.
9 Auto Gallery Mitsubishi and MMNA are parties to a “franchise” as defined in Section 331.

10 2. Protestant and Respondent are also parties to two existing consolidated warranty protests
11 filed against MMNA (Protest Nos. PR-2754-21 Auto Gallery, Inc., dba Auto Gallery Mitsubishi –
12 Corona and PR-2755-21 Soraya, Inc., dba Auto Gallery Mitsubishi – Murrieta).² (Protest, ¶ 7) “Active
13 settlement discussions concerning these consolidated protests involved the closure of Protestant’s
14 Murrieta location. Believing a formal settlement agreement was imminent, Protestant began winding
15 down its operations at its Murrieta location, (the subject of this termination protest). However, before a
16 final settlement agreement was executed, Respondent issued” a notice of termination by letter dated April
17 19, 2023. (Protest, ¶ 7; Declaration of Steven Smidlein in Support of Respondent’s Motion to Dismiss or,
18 in the Alternative, for Summary Adjudication, Ex. G; Opposition, p. 3, lines 3-13)

19 3. Protestant sold and serviced new Mitsubishi vehicles and parts at 26825 Auto Mall Pkwy,
20 Murrieta, California (the “Dealership Premises”). (Protest, ¶ 1; Decl. Steven Smidlein, ¶ 6, Ex. A, § 6)

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

28 ² Auto Gallery currently has two Mitsubishi franchises. One at its Corona dealership located at 2550 Wardlow Rd.,
Corona, California. The other is at the Murrieta location at 26825 Auto Mall Pkwy, Murrieta, California, which is
the dealership at issue in this Protest. (Opposition, p. 3, fn. 2)

1 **Notice of Termination**

2 4. On April 19, 2023, pursuant to Section 3060, MMNA issued a 15-day notice of
3 termination³ alleging, in part, the following:

4 Auto Gallery Mitsubishi-Murrieta (“Dealer”) and Mitsubishi Motors North
5 America, Inc. (“MMNA”) are parties to a Mitsubishi Dealer Sales and Service Agreement
6 dated February 12, 2019 (the “Dealer Agreement”), which established Dealer as an
7 authorized dealer of Mitsubishi Products. Dealer agreed under the terms and conditions of
8 the Dealer Agreement to assume certain obligations and responsibilities as a Mitsubishi
9 dealer in exchange for the rights granted to it under the Dealer Agreement. Among other
10 things, Dealer agreed under Section IV.F. of the Dealer Sales and Service Agreement
11 Standard Provisions incorporated by reference into the Dealer Agreement (the “Standard
12 Provisions”) to keep its dealership premises open for business.

9 As further described below, Dealer has substantially and materially breached the
10 Dealer Agreement in a manner that constitutes good cause for termination of the Dealer
11 Agreement under the express provisions of the agreement and applicable California law.
12 This letter serves as MMNA’s statutory notice of its intent to terminate the Dealer
13 Agreement in compliance with the requirements of Cal. Veh. Code § 3060(a).

12 MMNA has learned that Dealer has not conducted its customary sales and service
13 operations during its customary hours of business for at least seven consecutive business
14 days. Specifically, Dealer’s employees advised MMNA that dealership operations in
15 Murrieta were closed and Dealer advised its vendors that it had ceased operations in
16 Murrieta on or about March 7, 2023. This is validated by observations made by MMNA’s
17 own personnel, who noted that a sign at the Murrieta dealership advertises the real estate as
18 being “AVAILABLE” and who observed that the dealership was closed for more than
19 seven consecutive business days in February 2023. This observation also is validated by a
20 review of the most recent financial information for Dealer, which shows that Dealer had no
21 new car sales in February and March 2023. Dealer has also disabled its website and
22 Facebook page.

18 Under Section X.B.1.a. of the Standard Provisions, MMNA may terminate the
19 Dealer Agreement immediately “[u]pon failure of Dealer to keep its MMNA dealership
20 operations, or any part thereof, open for business for a period in excess of five (5)
21 consecutive business days.” Recognizing the seriousness of this type of breach, Cal. Veh.

21 ³ A 15-day notice of termination may be issued only if one or more of the specified grounds outlined below exist,
22 otherwise the franchisor may issue only a 60-day notice of termination:

- 23 (i) Transfer of any ownership or interest in the franchise without the consent of the franchisor,
24 which consent shall not be unreasonably withheld;
- 25 (ii) Misrepresentation by the franchisee in applying for the franchise;
- 26 (iii) Insolvency of the franchisee, or filing of any petition by or against the franchisee under any
27 bankruptcy or receivership law;
- 28 (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 of Motor Vehicles. (Section 3060(a)(1)(B)(i)-(v))

Code § 3060(a)(1)(B)(v) states that a franchisor may terminate its franchise agreement with a motor vehicle dealer upon fifteen days written notice upon the “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.”

Accordingly, MMNA hereby gives notice of its intent to terminate the Dealer Agreement pursuant to Section X.B.1.a. of the Standard Provisions. The termination shall become effective on May 5, 2023, or 15 days from Dealer's receipt of this notice, whichever is later. This notice shall further serve as formal notice of MMNA's intent to terminate the Dealer Agreement in compliance with the requirements of Cal. Veh. Code § 3060(a)(1)(B)(v).

Separately, MMNA received notice from the financial institution providing Dealer’s wholesale credit line on April 18, 2023 advising that the wholesale credit lines for Dealer have been suspended until further notice. Under Section III.C.2 of the Standard Provisions, Dealer is obligated to maintain a wholesale credit line in an amount and with a financial institution acceptable to MMNA. Section III.C.4 of the Standard Provisions provides that “any failure of Dealer’s financial institution to maintain for a period of sixty (60) or more days the unrestricted availability to MMNA of Dealer’s credit line in an amount and in accordance with the terms approved by MMNA shall constitute grounds for termination of this Agreement.” MMNA reserves the right to issue a supplemental notice of termination in connection with Dealer's loss of wholesale floorplan financing. (Emphasis in original; Decl. Steven Smidlein, Ex. G)

...

The Protest⁴

5. In its protest, Auto Gallery Mitsubishi denies every allegation contained in the written Notice of Termination and contends Respondent does not have good cause to terminate the franchise because:

- (a) Protestant has made a substantial and permanent investment in the dealership.
- (b) Protestant has transacted and is transacting an adequate amount of Mitsubishi business compared to the business available to it.
- (c) Protestant fulfills the warranty obligations to be performed by it.
- (d) The extent of any failure of Protestant to comply with the terms of the franchise agreement is immaterial.
- (e) Protestant has adequate motor vehicle sales and service facilities, equipment, vehicle parts, and qualified service personnel to reasonably provide for the needs of Mitsubishi buyers and owners in the market area and is rendering adequate service to the public.

⁴ The protest was timely filed on April 20, 2023.

1 (f) It would be injurious to the public welfare for the franchise to be terminated or for
2 Respondent to refuse to continue the existing franchise.

3 (g) Protestant's failure to fulfill Respondent's sales and/or service expectations, if any, is in
4 whole or in part the result of Respondent's action or inaction, market analysis deficiencies, product
5 deficiencies, product scarcities and/or market conditions, and Respondent's unreasonable method of
6 evaluating performance. (Protest, ¶¶ 5-6)

7 6. However, Protestant also asserts that it "is prepared to resume full operations at the
8 Murrieta location. The winding down of Protestant's operations was done in reliance upon discussions
9 with Respondent whereby Protestant was to terminate the Murrieta franchise as consideration for the
10 resolution of the consolidated protests." (Protest, ¶ 8)

11 **MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY ADJUDICATION**

12 **Respondent's Assertions in its Motion to Dismiss or,**
13 **in the Alternative, for Summary Adjudication**⁵

14 7. On June 23, 2023, Respondent filed a "Motion to Dismiss or, in the Alternative, for
15 Summary Adjudication."⁶

16 8. The only basis for MMNA's exercise of its right to terminate the "Dealer Sales and
17 Service Agreement" ("Dealer Agreement") is the failure of Protestant to operate its Mitsubishi dealership
18 at its authorized location since at least March 7, 2023. (Motion, p. 2, lines 3-5) As noted above,
19 _____

20 ⁵ MMNA's motion references the Board's Decision in *Fairfield Imports Two, LLC, a California Limited Liability*
21 *Company v. Nissan North America, Inc., a California Corporation* (Protest Nos. PR-2587-18, PR-2588-18, PR-
22 2597-18, and PR-2598-18). This Decision has not been designated by the Board as a precedent decision pursuant to
23 Government Code Section 11425.60, so it will not be relied upon in this Proposed Order.

24 ⁶ MMNA relies on the informal hearing procedures in the Administrative Procedure Act ("APA") as authority for
25 the Board "to resolve an administrative proceeding without a full evidentiary hearing in such circumstances is
26 expressly granted to agencies in sections 11445.10 - 11445.40 of the California Government Code. In proceedings
27 'where there is no disputed issue of material fact,' an agency is expressly authorized to use an 'informal hearing
28 procedure' that 'provides a forum in the nature of a conference in which a party has an opportunity to be heard by
the presiding officer.' Cal. Gov't Code §§ 11[4]45.10(b)(2) & 11445.20(a). Parties may 'offer written or oral
comments on the issues,' while the use of witnesses, testimony, evidence, and discovery are limited or eliminated
altogether. . . ." The Board has not adopted any regulations implementing these discretionary provisions of the
APA. (Gov. Code § 11445.20(c) informal hearing proceedings "may" be used "where, by regulation, the agency
has authorized use of an informal hearing.") The "Order of Time and Place of Telephonic Hearing" dated June 28,
2023, did not reflect "selection of the informal hearing procedure," therefore this argument will not be relied on in
this Proposed Order. (Gov. Code § 11445.30(a))

1 Protestant admits it is “prepared to resume full operations” at the Dealership Premises. (Motion, p. 2,
2 lines 5-6; Protest, ¶ 8) The Dealer Agreement does not permit Protestant to cease “full operations.” In
3 May 2023, Hamid Ghadiri, the owner of Protestant, sold the Dealership Premises, so Protestant “is
4 unable to resume operations at the Dealership Premises in accordance with the express terms of the
5 Dealer Agreement.” (Motion, p. 2, lines 6-9)

6 9. MMNA contends that Protestant “has not sold a new motor vehicle to a customer since
7 November 22, 2022, has not performed a warranty repair since January 18, 2023, and its financial
8 statements for February and March 2023 evidence that Dealer had no new vehicle sales in February or
9 March 2023.” (Smidlein Decl., ¶¶ 10-11) In February 2023, MMNA personnel observed that Protestant
10 “was not conducting customary sales and service operations during customary hours of business for at
11 least seven consecutive business days at the Dealership Premises.” (*Id.*, ¶ 7) Additionally, MMNA
12 personnel observed that the Dealership Premises was “Available” for sale. (*Id.* and Ex. C) Protestant’s
13 employees confirmed to MMNA in March of 2023 that its operations were closed. (*Id.*, ¶ 8 and Ex. D)
14 Mr. Ghadiri confirmed this fact on March 14, 2023 in an email to a vendor that was forwarded to
15 MMNA. (*Id.*, ¶ 9 and Ex. E; Motion, p. 3, lines 12-20)

16 10. MMNA argues that Protestant is no longer operating a Mitsubishi dealership at the
17 Dealership Premises. (Motion, p. 3, lines 21-22)

18 11. In further evidence of Protestant’s financial problems, on April 18, 2023, “MMNA
19 received notice from the financial institution providing [Protestant’s] wholesale credit line that the
20 wholesale credit lines for [Protestant] have been suspended until further notice.” (*Id.*, ¶ 12 and Ex. F;
21 Motion, p. 3, lines 22-5)

22 12. Less than a month after Protestant filed its protest asserting that it “is prepared to resume
23 full operations at the Murrieta location” and requesting the Board order MMNA not to terminate its
24 Mitsubishi franchise, the Dealership Premises were sold in May 2023. (Protest, ¶ 8; Smidlein Decl., ¶ 15
25 and Ex. H). All new car inventory was transferred to another Mitsubishi dealership owned by Mr. Ghadiri
26 in Corona, California. (Smidlein Decl., ¶ 16; Motion, p. 4, lines 6-9) With the sale, Protestant is “now
27 unable to resume operations at the Dealership Premises in accordance with the express terms of the
28 Dealer Agreement. (Motion, p. 4, lines 9-12)

1 13. Relying on *Duarte & Witting, Inc. v. New Motor Vehicle Bd.* (2002) 104 Cal.App.4th 626,
2 637, 641, Respondent argues that “the Board has the inherent power to dismiss a protest or summarily
3 dismiss a protest (without a hearing on the merits of the protest)” where the undisputed facts provide a
4 basis on which the case may be adjudicated as a matter of law. Protestant ceased its operations and sold
5 the Dealership Premises so “no order of the Board could result in [Protestant] continuing to operate as a
6 Mitsubishi dealer. Going to a hearing would be pointless: no Mitsubishi sales have been made or will be
7 made in the future by [Protestant]; no warranty obligations are being performed by [Protestant] on
8 customers’ vehicles; [Protestant] is not providing any benefit to the public; and [Protestant] is not
9 contributing to the community and is not generating any tax revenue.” MMNA argues that based on the
10 undisputed evidence, good cause exists for the termination of Protestant’s Mitsubishi franchise. (Motion,
11 p. 4, lines 24-26; p. 6, line 22 through p. 7, line 5)

12 **Protestant’s Assertions in its Opposition to Respondent’s Motion to Dismiss,**
13 **or in the Alternative, for Summary Adjudication**

14 14. On July 19, 2023, Protestant filed its “Opposition to Respondent’s Motion to Dismiss, or
15 in the Alternative, for Summary Adjudication.”

16 15. Protestant contends dismissal is not warranted as there are disputed facts because it
17 submitted a buy-sell⁷ for its Mitsubishi dealership (i.e., facts are not undisputed as MMNA asserts).⁸
18 (Opposition, p. 2, lines 8-12; p. 3, lines 19-20; Ex. 1 Asset Purchase Agreement dated July 18, 2023)

19 16. The proposed buyer is currently occupying the Dealership Premises and according to
20 Protestant is “prepared to commence Mitsubishi operations upon Respondent’s approval of the proposed
21 buy-sell.”⁹ Protestant maintains that it will “temporarily resume operations until such time as Respondent
22 approves the franchise transfer. The temporary closure of a franchise alone does not provide good cause
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24 _____
25 ⁷ During the telephonic hearing, ALJ Skrocki indicated to counsel that the buy-sell was not an issue before the
26 Board. (Transcript, p. 7, lines 14-15)

27 ⁸ In a “buy-sell” with a dealer and a third-party, the franchise is not sold by the selling dealer. Assets or stock may
28 be sold. The franchise with the selling dealer is terminated, and the manufacturer or distributor issues a new
franchise to the buyer.

⁹ Section 2.1 of the Asset Purchase Agreement provides that only intangible assets and goodwill related to Auto
Gallery Mitsubishi were sold to the buyer Bravo Auto Collection, LLC., a California limited liability Company, for
a total of \$250,000. (Opposition, Ex. 1, § 1.9 (defining Intangible Assets); § 2.1)

1 for termination. Protestant argues that dismissal is inappropriate because the extent of Protestant’s failure
2 to comply with the terms of the franchise is to be weighed by the merits hearing administrative law judge
3 in light of the existing circumstances and Section 3061 good cause factors. (Opposition, p. 2, lines 13-21;
4 p. 3, lines 19-22)

5 17. According to Protestant’s interpretation of *Duarte*, “dismissal is only proper when the
6 undisputed facts demonstrate the Board may determine the issue as a matter of law without the need to
7 make factual determinations. Therefore, dismissal in a Section 3060 termination protest, such as this, is
8 only valid where the undisputed facts demonstrate good cause for termination exists as a matter of law
9 and there is no basis to prevent termination. (*Duarte* at pp. 637-638.)” In this protest, there are facts in
10 dispute rendering dismissal unwarranted. “As there are facts in dispute, the Board cannot determine the
11 issue of good cause without first issuing findings regarding the factual disputes, which should properly be
12 resolved at a merits hearing.” (Opposition, p. 5, lines 7-14)

13 18. Auto Gallery Mitsubishi disputes MMNA’s allegation that it does not have “the ability or
14 prospect of resuming dealership operations.” The buyer of the Dealership Premises “is willing to fully
15 cooperate to ensure the buy-sell is approved.” In order to resume operations at the authorized location,
16 Protestant could: (1) Execute a short-term sublease; (2) Enter into a management agreement that would
17 provide for the operation of the Mitsubishi franchise at the authorized location, with Mr. Ghadiri
18 remaining as the dealer principal until the buy-sell is approved. (Opposition, p. 5, lines 21-28)

19 19. Protestant claims the potential approval of the buy-sell or resumption of dealership
20 operations are “open questions of fact” that preclude the Board from dismissing this protest. (Opposition,
21 p. 6, line 1-3)

22 20. Protestant disputes MMNA’s contention that Protestant does not have inventory, facilities,
23 staff, or flooring. As noted above, Auto Gallery Mitsubishi transferred its new car inventory to Mr.
24 Ghadiri’s Mitsubishi franchise in Corona. Therefore, the inventory could be transferred back to the
25 Murrieta location “when operations resume.”¹⁰ The facilities still exist at the authorized location and are
26 usable when operations resume. Existing staff at the Corona dealership could be added to the Murrieta

27
28 ¹⁰ Any inventory transferred back would likely be new inventory that was purchased through the Corona
Mitsubishi dealership owned by Mr. Ghadiri.

1 dealership. Lastly, flooring can be added for the Murrieta location to an existing flooring source for the
2 Corona dealership or a separate flooring line could be reestablished. (Opposition, p. 6, lines 8-16)

3 21. Protestant maintains that it has the “opportunity and means to resume operations until such
4 time as the franchise transfer [buy-sell] is approved. This contention presents a question of fact that
5 should be reserved for the merits hearing.” (Opposition, p. 7, lines 11-13)

6 **Respondent’s Assertions in its Reply to the Opposition**

7 22. Respondent’s filed its Reply to the Opposition on July 31, 2023.

8 23. MMNA argues that Protestant does not dispute that it ceased all operations in early March
9 2023 and that it sold the Dealership Premises in May 2023. Yet, Protestant asserts that MMNA must wait
10 until an evidentiary hearing to determine there is good cause for termination. MMNA asserts that
11 “[b]ecause a closed and defunct dealership should not be allowed to maintain its franchise agreement,
12 good cause exists as a matter of law for termination of the Dealer Agreement. Based on the undisputed
13 facts, no evidentiary hearing is needed.” (Reply, p. 2, lines 3-9)

14 24. Protestant states that it was engaged in settlement discussions with MMNA and, as part of
15 those discussions, Protestant proposed to sell or close its Murrieta Mitsubishi dealership. MMNA notes
16 that Mr. Ghadiri’s Declaration does not contain any statement that Auto Galley Mitsubishi “ceased doing
17 business at the Murrieta location due to settlement discussions with MMNA. In any event, to the extent
18 settlement negotiations between the parties are admissible (they are not), [Protestant] had no contractual
19 right to cease operations while settlement negotiations were ongoing. MMNA certainly did not give
20 [Protestant] permission to close shop. That was a blatant breach of the Dealer Agreement.” (Reply, p. 2,
21 lines 9-16)

22 25. MMNA contends that Protestant “does not dispute that it sold the Dealership Premises and
23 thus has no facilities to resume permanent dealership operations.” (Reply, p. 2, lines 20-22) Nevertheless,
24 Protestant “contends there are mechanisms available to enable it to resume ‘temporary’ dealership
25 operations at its authorized location.” (Reply, p. 2, lines 23-24) First, Protestant asserts it “may execute a
26 short-term sublease for the purpose of resuming operations.” (Opposition, p. 5, lines 25-26; Reply, p. 2,
27 lines 24-25) MMNA argues that there is “no admissible evidence” demonstrating that the new owner of
28 the former Dealership Premises would allow such a sublease or that the current tenant would agree.

1 (Reply, p. 2, line 25 through p. 3, line 5) Even if Protestant could enter into a sublease, MMNA contends
2 that Protestant should not be allowed to close for five or more months and then avoid termination by
3 stating without evidentiary support that Protestant has the ability to temporarily resume its dealership
4 operations. (Reply, p. 3, lines 8-11) Second, Protestant contends that it “may also enter into a
5 management agreement that would provide for the operation of the franchise at the Authorized Location,
6 with Hamid Ghadiri remaining as the Dealer Principal until the franchise transfer is approved.”
7 (Opposition, p. 5, lines 26-28; Reply, p. 3, lines 13-14) No evidence of such a management agreement
8 was attached to Protestant’s opposition or Mr. Ghadiri’s declaration. Protestant did not provide any
9 statements from the current owner or tenant concerning a management agreement. (Reply, p. 3, lines 13-
10 18) Protestant’s statement that it could “enter into such a hypothetical agreement should not be enough to
11 avoid termination.” (Reply, p. 3, lines 19-20)

12 26. Protestant does not dispute in its opposition “that it has not sold a new Mitsubishi vehicle
13 since November 2022, has no new car inventory, no flooring arrangement to purchase new vehicles and
14 no dealership premises from which to operate (or reopen) its dealership.” (Reply, p. 3, lines 22-24)

15 27. In response to Protestant’s position that there remain open questions of fact concerning
16 whether it can resume its dealership operations, MMNA asserts this argument is contradicted by
17 the undisputed facts submitted by MMNA and confirmed by Protestant’s opposition. (Reply, p. 4, lines
18 7-9) Protestant has not taken any steps to resume its’ dealership operations since it was served with the
19 Notice of Termination. The only step Protestant took was to sell the Dealership Premises. (Reply, p. 4,
20 line 10) “Assuming, arguendo, that [Protestant] could resume operations at some unidentified point in the
21 future, it is undisputed that [Protestant] has failed to conduct customary sales and service operations at the
22 Dealership Premises since March 2023 (five months). That fact alone justifies termination of the Dealer
23 Agreement.” (Reply, p. 4, lines 11-14)

24 28. Protestant requests that the Board wait for MMNA to review the buy-sell prior to making a
25 determination on whether MMNA has good cause for termination. MMNA indicated that it will review
26 the buy-sell in good faith once it receives all of the required information. However, the submission of a
27 buy-sell “does not stay a termination proceeding under California Law.” (Reply, p. 4, lines 23-26)

28 29. In conclusion, MMNA argues that “[i]t is undisputed that [Protestant] has not been

operating since March 2023 and sold the Dealership Premises in May 2023—that constitutes good cause for termination.” The execution of the Asset Purchase Agreement the day before Protestant’s “opposition to MMNA’s motion to dismiss was due does not somehow mean MMNA no longer has good cause to terminate the [Protestant’s Dealer] Agreement.” (Reply, p. 5, lines 4-8) MMNA asserts that good cause exists for the termination of Protestant’s Mitsubishi franchise because Protestant breached the Dealer Agreement, ceased all operations months ago, sold the Dealership Premises, is providing no benefit to the public, and there is no likelihood that Protestant will be fully operational in the future. MMNA seeks a Board order dismissing the protest with prejudice or, in the alternative, summarily adjudicating the protest in MMNA’s favor. (Reply, p. 5, lines 10-15)

APPLICABLE LAW

30. Section 331 defines a franchise, in part, 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 . . . 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.”

...

31. Section 331.1 defines a franchisee as follows:

A “franchisee” is any person who, pursuant to a franchise, receives new motor vehicles subject to registration under this code, new off-highway motorcycles, as defined in Section 436, 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 or is granted the right to perform authorized warranty repairs and service, or the right to perform any combination of these activities.

32. Section 331.2 defines a franchisor as follows:

A “franchisor” is any person who manufactures, assembles, or distributes new motor vehicles subject to registration under this code, new off-highway motorcycles, as defined in Section 436, new all-terrain vehicles, as defined in Section 111, . . . and who grants a franchise.

33. Section 3050 provides, in part, as follows:

The board shall do all of the following:

...

///

1 (c) Hear and decide, within the limitations and in accordance with the procedure
2 provided, a protest presented by a franchisee pursuant to Section 3060...

3 (e) Notwithstanding subdivisions (b), (c), and (d), the courts have jurisdiction over all
4 common law and statutory claims originally cognizable in the courts. For those claims, a
5 party may initiate an action directly in any court of competent jurisdiction.

6 34. Section 3060 provides in part as follows:

7 (a) Notwithstanding Section 20999.1 of the Business and Professions Code or the terms
8 of any franchise, no franchisor shall terminate or refuse to continue any existing franchise
9 unless all of the following conditions are met:

10 (1) The franchisee and the board have received written notice from the franchisor as
11 follows:

12 (A) Sixty days before the effective date thereof setting forth the specific grounds for
13 termination or refusal to continue.

14 (B) Fifteen days before the effective date thereof setting forth the specific grounds with
15 respect to any of the following:

16 (i) Transfer of any ownership or interest in the franchise without the consent of the
17 franchisor, which consent shall not be unreasonably withheld.

18 (ii) Misrepresentation by the franchisee in applying for the franchise.

19 (iii) Insolvency of the franchisee, or filing of any petition by or against the franchisee
20 under any bankruptcy or receivership law.

21 (iv) Any unfair business practice after written warning thereof.

22 (v) Failure of the motor vehicle dealer to conduct its customary sales and service
23 operations during its customary hours of business for seven consecutive business days,
24 giving rise to a good faith belief on the part of the franchisor that the motor vehicle dealer
25 is in fact going out of business, except for circumstances beyond the direct control of the
26 motor vehicle dealer or by order of the department.

27 (2) Except as provided in Section 3050.7, the board finds that there is good cause for
28 termination or refusal to continue, following a hearing called pursuant to Section 3066....

(3) The franchisor has received the written consent of the franchisee, or the appropriate
period for filing a protest has elapsed.

35. In determining whether there is good cause for terminating a franchise, Section 3061
requires the Board to "... 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.

1 (d) Whether it is injurious or beneficial to the public welfare for the franchise to be modified
2 or replaced or the business of the franchisee disrupted.

3 (e) Whether the franchisee has adequate motor vehicle sales and service facilities, equipment,
4 vehicle parts, and qualified service personnel to reasonably provide for the needs of the consumers for the
5 motor vehicles handled by the franchisee and has been and is rendering adequate services to the public.

6 (f) Whether the franchisee fails to fulfill the warranty obligations of the franchisor to be
7 performed by the franchisee.

8 (g) Extent of the franchisee's failure to comply with the terms of the franchise."

9 **DEALER SALES AND SERVICE AGREEMENT STANDARD PROVISIONS**

10 36. Protestant and Respondent are parties to a Mitsubishi Dealer Sales and Service Agreement
11 dated February 12, 2019, which incorporates the Dealer Sales and Service Agreement Standard
12 Provisions ("Standard Provisions"). (Smidlein Decl., ¶ 5, Exs. A-B). This "written agreement" is the
13 "franchise" that MMNA seeks to terminate.

14 37. The pertinent provisions of the franchise referenced in the Notice of Termination and
15 pleadings are:

16 III. SALES OF MMNA PRODUCTS TO DEALER

17 C. Prices and Other Terms of Sales

18 2. Payment for MMNA Vehicles

19 Unless otherwise permitted by MMNA in writing, payment for
20 MMNA Vehicles shall be by cash draft issued prior to shipment of
21 each MMNA Vehicle from its port of entry against Dealer's then
22 applicable wholesale credit line, which line shall be approved by
23 MMNA and established in Dealer's name with a financial
24 institution acceptable to MMNA. The minimum amount of such
25 credit line must be expressly approved by MMNA and must be
26 sufficient to meet MMNA's estimate of Dealer's anticipated sales
27 volume, as the same may be revised from time to time in the Dealer
28 Development Plan.

MMNA may find it necessary, from time to time, to advise Dealer
that the amount of available credit required of Dealer must be
increased. Such decisions will be based upon criteria reasonably
established by MMNA, including the sufficiency of the existing
credit line and anticipated increases in sales. Dealer agrees to
cooperate fully with MMNA and to arrange promptly for all
required changes in its financial arrangements.

1 4. Failure of Financing Arrangements

2 It is Dealer's sole responsibility to institute appropriate controls to
3 ensure the uninterrupted availability of sufficient funds under its
4 approved credit line with Dealer's financial institution. Should
5 Dealer fail to pay for, or should any applicable financing
6 arrangement fail to provide credit for the payment of, any MMNA
7 Products ordered by Dealer when payment is due therefor, MMNA
8 may, with respect to any such MMNA Products (i) cause the same to
9 be stored at the sole risk and expense of Dealer; or (ii) cause such
10 MMNA Products to be shipped elsewhere (including returning the
11 same to MMNA) and Dealer shall pay to MMNA promptly upon
12 demand all expenses sustained by MMNA in storing, handling and
13 shipping occasioned thereby; or (iii) without obligation to pay any
14 sum to Dealer, sell such MMNA Products directly to any other
15 MMNA Dealer, person, firm or corporation, all expenses or losses
16 occasioned thereby to be borne by Dealer.

17 In addition to the foregoing, in the event of an oral or written refusal
18 by Dealer's financing institution to make payment against drafts for
19 any MMNA Vehicle ordered by Dealer, MMNA may impose a fixed
20 administrative charge for each MMNA Vehicle refused. The amount
21 of such charge, which shall be in addition to otherwise applicable
22 delivery, storage and demurrage charges, shall reflect a reasonable
23 estimate of the average administrative cost incurred by MMNA in
24 arranging for alternative disposition of the MMNA Vehicle so
25 refused. Furthermore, any failure of Dealer's financial institution to
26 maintain for a period of sixty (60) or more days the unrestricted
27 availability to MMNA of Dealer's credit line in an amount and in
28 accordance with the terms approved by MMNA shall constitute
grounds for termination of this Agreement under Section X.B.2.(f)
hereof. "Unrestricted availability" as used in this section shall mean
that upon presentment of MMNA's drafts to Dealer's financial
institution as contemplated hereunder, no approval of Dealer, the
financial institution itself or any other party will be required before
payment to MMNA is made.

...

20 VI. ACCOUNTS, RECORDS AND REPORTS

21 A. Uniform Accounting System

22 It is for the mutual benefit of Dealer and MMNA that uniform accounting
23 systems and practices be maintained by all Authorized MMNA Dealers.
24 Accordingly, Dealer agrees to maintain such systems and practices as
25 designated by MMNA in accordance with the uniform accounting system
26 and practices established by MMNA for use by all MMNA Dealers. Dealer
27 agrees that it will furnish to MMNA by the tenth (10th) day of each month,
28 in the form prescribed by MMNA, true, complete and accurate financial and
operating statements covering the preceding month and showing calendar-
year-to-date operations.

27 B. Sales Reporting

28 To assist in the evaluation of current market trends and other matters, Dealer

1 agrees to:

- 2 1. Immediately upon delivery of an MMNA Vehicle to the purchaser
3 thereof, complete and transmit to MMNA a report of the retail sale
4 called the "Retail Delivery Report"; and
5 2. Furnish MMNA with such other reports or records which may
6 reasonably be required by MMNA.

7 ...

8 VIII. SERVICING MMNA VEHICLES

9 A. Responsibilities of Dealer

10 Dealer agrees to provide service and parts to all MMNA Vehicles whether
11 or not under warranty and whether or not the MMNA Vehicle to be serviced
12 was purchased from Dealer.

13 1. Warranty Service

14 Warranty and policy service shall be performed in accordance with
15 the Warranty Manual and any related bulletins and directives issued
16 from time to time by MMNA to Dealer. Dealer shall furnish to the
17 purchaser of each MMNA Product, at the time each product is
18 delivered, copies of any applicable warranties. Dealer shall be
19 responsible for the timely submission of warranty claims in the
20 format required by MMNA. MMNA agrees to compensate Dealer
21 for all warranty and policy work in accordance with procedures and
22 rates established from time to time by MMNA and in accordance
23 with applicable law; and Dealer agrees that such rates shall
24 constitute full and complete payment to Dealer for such work. Dealer
25 agrees that where MMNA reimburses Dealer for warranty or policy
26 work, the customer shall not be obligated to pay any charges for
27 warranty or policy work except as required by law.

28 ...

29 X. TERMINATION OF AGREEMENT

30 ...

31 B. MMNA May Terminate This Agreement For Cause:

32 1. Immediately--

- 33 a. Upon failure of Dealer to keep its MMNA dealership
34 operations, or any part thereof, open for business for a period
35 in excess of five (5) consecutive business days as required
36 under Section IV.F. hereof, except in the event such closure
37 or cessation of operation is caused by some physical event
38 beyond the control of Dealer, such as civil war, riots, fires,
39 floods, earthquakes, or other acts of God; or

40 ...

41 (Smidlein Decl., Ex. B; without emphasis)

42 ///

43 ///

44 ///

**FACTS THAT HAVE BEEN ESTABLISHED BY THE EVIDENTIARY
SUBMISSIONS OF THE PARTIES**

38. In February 2023, MMNA observed that Protestant “was not conducting customary sales and service operations during customary hours of business for at least seven consecutive business days at the Dealership Premises.” Additionally, the real estate where Protestant operated its Mitsubishi dealership operations was available for sale. (Smidlein Decl., ¶ 7, Ex. C)

39. “On March 9, 2023, Linda Felix, MMNA’s District Parts & Service Manager, observed that Dealer’s remaining employees were working at Auto Gallery Corona in Corona, California, and these employees advised Ms. Felix that the Murrieta location was closed and they had fully moved out of the Murrieta store on March 7, 2023.” (Smidlein Decl., ¶ 8, Ex. D).

40. On March 14, 2023, Mr. Ghadiri advised a vendor by email that the Dealership Premises were closed. (Smidlein Decl., ¶ 9, Ex. E)

41. Protestant is required to report new vehicle sales and submit monthly financial statements to MMNA. Protestant has not sold a new motor vehicle since November 22, 2022. (Smidlein Decl., ¶ 10, Ex. B, Standard Provisions, Sections VI.A and VI.B)

42. Protestant’s financial statements for February and March of 2023 evidence that it had no new vehicle sales in either month. (Smidlein Decl., ¶ 10)

43. Protestant is also required to submit timely warranty claims to MMNA for reimbursement for warranty service provided by Protestant. Warranty repairs have not been performed by Protestant since January 18, 2023. (Smidlein Decl., ¶ 11, Ex. B, Standard Provision, Sections VIII.A.1)

44. The Standard Provisions require Protestant “to maintain a wholesale credit line in an amount and with a financial institution acceptable to MMNA.” By letter dated April 18, 2023, MMNA received notice from Protestant’s financial institution providing Protestant’s wholesale credit line that “the wholesale credit lines extended to [Auto Gallery Mitsubishi – Murrieta] have been suspended until further notice.” (Smidlein Decl., ¶ 12, Ex. B, Standard Provisions, Section III.C.2; Ex. F)

45. “On May 24, 2023, a Grant Deed for the sale of the Dealership Premises was recorded in [the] County of Riverside, Office of Assessor-County Clerk-Recorder. . .” Mr. Ghadiri sold the Dealership Premises to White Topi, LLC in May 2023. (Smidlein Decl., ¶ 15, Ex. H)

1 franchise, the written agreement, technically continues to exist¹¹ all of the adverse consequences that
2 would flow from such a loss or closure have already occurred and cannot be remedied or ameliorated by
3 any order of the Board that MMNA should not be permitted to terminate the written agreement.

4 51. If the Board has jurisdiction over the protest, the Board is without power to do anything
5 other than to overrule or sustain the protest. Sustaining the protest would mean only that Respondent
6 cannot terminate the franchise - the written agreement that contains the contractual rights and duties of
7 the parties. However, as stated above, ordering that the contractual relationship continue to exist will not
8 result in the re-opening of the dealership that has been closed for an excessive amount of time nor will
9 requiring Respondent to maintain its contractual relationship with Auto Gallery Mitsubishi change the
10 fact that Auto Gallery Mitsubishi has no assets that would be lost by the termination of the franchise.
11 Auto Gallery Mitsubishi has no location for the facility from which to operate the dealership and has
12 transferred its inventory to a different dealership. Sustaining the protest and preventing the termination of
13 the franchise (the written agreement) will result in maintaining the status quo which will leave the parties
14 and the consuming public where they have been since March 7, 2023 - with no Mitsubishi sales being
15 made, with no service available to the public, no warranty obligations of Respondent being performed on
16 customers' vehicles, and no benefits to the public that would accrue if the dealership had been
17 operational.

18 52. Sustaining the protest would not further the legislative intent of the statutes, which,
19 unless there is good cause to do so, is to prevent the loss of the benefit of the dealership to all of the
20 community interests affected by and dependent upon such ongoing enterprises. The loss of the dealership
21 has already occurred and it occurred before Respondent made its decision to issue the Notice of
22 Termination of the franchise. The existing circumstances are that the dealership is closed, and has been
23 closed since March 7, 2023.

24 53. Sustaining the protest would be a meaningless act as Protestant is unable to function as a
25 dealership operating as a Mitsubishi franchisee. An order of the Board requiring Respondent to continue
26 in its franchise relationship with Auto Gallery Mitsubishi would not protect Auto Gallery Mitsubishi

27
28 ¹¹ The dealership ceased to operate on March 7, 2023 when it closed its doors and sold the Dealership Premises in
May 2023.

1 from an unfair termination of its franchise nor would there be any protection of the interests of the public
2 or otherwise further the intention of the legislature in the enactment of the statutes at issue.

3 54. In summary, MMNA is correct in contending that the facts are such that there is no relief
4 available before the Board and thus going to a hearing to determine whether there is good cause to
5 terminate the franchise would be an exercise in futility. This is because Auto Gallery Mitsubishi has not
6 been, is not now and cannot in the future operate as a dealership conducting business as a Mitsubishi
7 franchisee. Consequently, a Board order that MMNA may not terminate the franchise will not operate to
8 further the legislative intent of requiring that a franchisor establish good cause to do so before allowing
9 termination of the franchise operations thus protecting the public interest in preserving the dealership and
10 maintaining its existence for serving the consuming public. Sustaining the protest in this situation will not
11 prevent the loss of the dealership, will not prevent any unfair forfeiture to Auto Gallery Mitsubishi or its
12 owners, will not protect the employees, the community or the consuming public that would be served by
13 the dealership.

14 55. Under the existing circumstances, deciding whether MMNA has good cause to terminate
15 the franchise is unneeded as a Board order would be meaningless. All of the adverse effects of the loss of
16 Auto Gallery Mitsubishi have already occurred and no order of the Board will prevent such adverse
17 effects or even mitigate against their result. Despite such allegation in the protest, there are no facts to
18 indicate that MMNA was in any way the cause of, or responsible for, the closure of the dealership.

19 56. Section 3061 requires that the franchisor establish good cause to terminate the franchise
20 taking into consideration “the existing circumstances” including several specific areas of inquiry as will
21 be discussed.

22 57. The most important “existing circumstances” here are that: Auto Gallery Mitsubishi
23 ceased all operations on March 7, 2023; termination of the franchise (the written document) will not
24 cause any additional loss to the franchisee; the consuming public has not had an operating Mitsubishi
25 dealership in Murrieta since March 7, 2023; MMNA will not be able to appoint a new franchisee who
26 will establish a new dealership in Murrieta until the Auto Gallery Mitsubishi franchise (the written
27 agreement) is terminated pursuant to an order of the Board; the franchisee no longer has any employees;
28 and, the franchisee is not contributing to the economy and is not generating any tax revenue for Murrieta

1 or the county.

2 58. MMNA has provided more than adequate evidentiary documentation to support the above
3 conclusions. Auto Gallery Mitsubishi did not object to MMNA’s evidence filed in support of its Motion.
4 None of the above factual circumstances are disputed.

5 59. Auto Gallery Mitsubishi’s vague contention of ever being able to reopen its dealership
6 was not supported and is so remote, it is deemed impossible.

7 60. In addition to the general language of “existing circumstances,” Section 3061 also lists
8 seven more specific circumstances that must be considered in determining whether good cause exists for
9 terminating a franchise. These circumstances and the facts as to them are as follows:

10 (a) Amount of business transacted by the franchisee, as compared to the business available to
11 the franchisee.

12 61. As indicated above, Protestant has conducted no operations at Auto Gallery Mitsubishi
13 since at least March 7, 2023.

14 (b) Investment necessarily made and obligations incurred by the franchisee to perform its part
15 of the franchise.

16 62. Whatever investments may have been made by Auto Gallery Mitsubishi were lost prior to
17 the Notice of Termination.

18 (c) Permanency of the investment.

19 63. Whatever investment Auto Gallery Mitsubishi may have had in the dealership no longer
20 exists.

21 (d) Whether it is injurious or beneficial to the public welfare for the franchise to be modified
22 or replaced or the business of the franchisee disrupted.

23 64. The harm to the public from the loss of the dealership already occurred prior to the Notice
24 of Termination being issued and the termination of the franchise will not cause any additional injury to
25 the public welfare. In fact, the termination of the franchise may benefit the public as it will allow MMNA
26 to replace Auto Gallery Mitsubishi with another franchisee, if it so desires.

27 ///

28 ///

1 (e) Whether the franchisee has adequate motor vehicle sales and service facilities, equipment,
2 vehicle parts, and qualified service personnel to reasonably provide for the needs of the
3 consumers for the motor vehicles handled by the franchisee and has been and is rendering
4 adequate services to the public.

5 65. Auto Gallery Mitsubishi has no vehicle sales or service facilities, no equipment or vehicle
6 parts, and no employees. Consequently, Auto Gallery Mitsubishi has not been rendering any services to
7 the public let alone services that are “adequate.”

8 (f) Whether the franchisee fails to fulfill the warranty obligations of the franchisor to be
9 performed by the franchisee.

10 66. Auto Gallery Mitsubishi has not been fulfilling any of MMNA’s warranty obligations and
11 therefore has failed in this regard. Owners or lessees of Mitsubishi vehicles have not been able to have
12 warranty work performed in the Murrieta market area since March 7, 2023.

13 (g) Extent of franchisee’s failure to comply with the terms of the franchise.

14 67. It is undisputed that Auto Gallery Mitsubishi has breached the terms of the franchise as
15 stated in the Notice of Termination.

16 68. MMNA has submitted more than sufficient evidentiary documents to support the above
17 and Auto Gallery Mitsubishi has submitted no documents or other evidence that would contest the above
18 facts.

19 69. It is therefore determined that MMNA has established as a matter of law that there is good
20 cause to terminate the Mitsubishi franchise of Auto Gallery Mitsubishi.

21 **ANALYSIS OF CLAIM THAT THE BOARD HAS IMPLIED AUTHORITY**
22 **TO DISMISS THE PROTEST**

23 70. The Board, relying on the opinion in *Duarte*, concludes that it has the implied authority to
24 dismiss this protest because the undisputed facts show good cause for termination of Auto Gallery
25 Mitsubishi’s franchise. It is therefore determined that there is good cause for dismissal of Auto Gallery
26 Mitsubishi’s protest with prejudice.

27 ///

28 ///

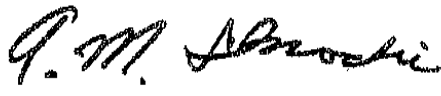
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1 **PROPOSED ORDER**

2 After consideration of the pleadings, exhibits and oral arguments of counsel, it is hereby ordered
3 that Respondent’s “Motion to Dismiss or, in the Alternative, for Summary Adjudication” is granted.
4 Protest No. PR-2819-23 *Soraya, Inc., dba Auto Gallery Mitsubishi – Murrieta v. Mitsubishi Motors*
5 *North America, Inc.* is overruled and dismissed with prejudice.
6
7

8 I hereby submit the foregoing which constitutes my
9 proposed order in the above-entitled matter, as the
10 result of a hearing before me, and I recommend this
11 proposed order be adopted as the decision of the
12 New Motor Vehicle Board.

13 DATED: November 14, 2023

14 By 
15 _____
16 ANTHONY M. SKROCKI
17 Administrative Law Judge
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19
20
21
22
23
24
25
26

27 Steve Gordon, Director, DMV
28 Ailene Short, Branch Chief,
Industry Service Branch, DMV