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STATE OF CALIFORNIA
NEW MOTOR VEHICLE BOARD

In the Matter of the Protest of)
NUVO, INC. dba HYDE PARK MOTORS,)
Protestant,)
vs.)
BMW OF NORTH AMERICA, INC.,)
Respondent.)

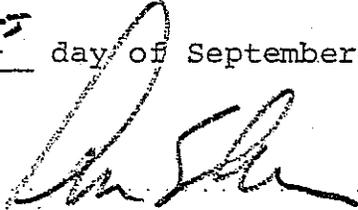
Protest No. PR-390-82

DECISION

The attached Proposed Decision of the Administrative Law Judge is hereby adopted by the New Motor Vehicle Board as its Decision in the above-entitled matter.

This Decision shall become effective forthwith.

IT IS SO ORDERED this 21st day of September, 1982.


~~E. BRADSHAW~~ ALLAN E. LONE
President ATTORNEY MEMBER
New Motor Vehicle Board

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BMW OF NORTH AMERICA, INC.,)
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Respondent.)
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PROTEST NO. PR-390-82

PROPOSED DECISION
RE: DISMISSAL

PROCEDURAL BACKGROUND

1. By letter dated April 7, 1982, respondent, BMW of North America, Inc. (BMWNA) gave notice to protestant, Nuvo, Inc. dba Hyde Park Motors (Hyde Park) of BMWNA's intention to terminate the BMW franchise of Hyde Park.

2. On May 24, 1982, Hyde Park filed a protest with the New Motor Vehicle Board (Board) pursuant to Vehicle Code Section 3060.^{1/}

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

3. Hyde Park was initially represented by the law firm of Pilot & Spar. BMWNA was represented by Roy M. Brisbois of Lewis, D'Amato, Brisbois & Bisgaard.

4. On June 19, 1982, a pre-hearing conference was held during which a stipulation was reached establishing a schedule for completing discovery.

5. The protest was set for a hearing to commence on August 2, 1982.

6. On June 17, 1982, protestant's attorneys filed a motion for expedited hearing.

7. The motion for expedited hearing was scheduled to be heard on June 28, 1982 with the hearing on the merits of the protest to commence immediately if the motion were granted.

8. On June 23, 1982 at the request of counsel for protestant and with the concurrence of counsel for respondent, the hearing on the motion for an expedited hearing was taken off the calendar and the original discovery schedule and hearing date of August 2, 1982 remained in effect.

9. On July 21, 1982, Pilot & Spar, attorneys for Hyde Park, filed with the Board a motion to be relieved as

Counsel of Record for protestant. The motion was based upon failure of Hyde Park to cooperate with its counsel in preparation for the hearing on the protest, and failure of Hyde Park to pay attorney fees. A copy of the motion was served on George Toy, principal of Hyde Park. The motion was scheduled to be heard on July 29, 1982.

10. On July 27, 1982, BMWNA filed a motion to dismiss the protest or in the alternative to continue the hearing date. The motion was based on protestant's alleged failure to comply with the discovery schedule previously established in that protestant's representatives failed to appear at noticed depositions, failed to produce requested documents and failed to produce timely the list of witnesses intended to be called.

11. On July 29, 1982, as scheduled, Pilot & Spar's motion to be relieved as counsel for protestant was heard. No appearance was made in behalf of Hyde Park in opposition thereto. BMWNA appeared through its attorneys and no objection to the motion was made. At the hearing on the motion A. Albert Spar, of Pilot & Spar; represented that he had made repeated attempts to contact or otherwise communicate with George Toy but without success. The attempts included letters, a telegram, phone calls to Mr. Toy's place of business and conversations with his secretary, personally stopping at the place of business and leaving his name. At no time did

Mr. Toy contact either his attorneys or the Board. Pilot & Spar's motion to be relieved as attorney for Hyde Park was granted.

12. The hearing was continued to September 2, 1982 to allow Hyde Park to obtain new counsel. On July 29, 1982, notice was mailed by certified mail to George Toy/Hyde Park Motors, 3443 West 43rd Street, Los Angeles, California, 90008. The receipt was returned showing delivery on August 2, 1982 and bearing an illegible signature.

13. As a result of the granting of the motion of Pilot & Spar, BMWNA's motion to dismiss was withdrawn and the motion to continue became moot.

14. On August 16, 1982, BMWNA again gave notice to Hyde Park of taking depositions of George Toy and other Hyde Park personnel. The depositions were scheduled for August 27, 1982.

15. On August 30, 1982, BMWNA filed a motion to dismiss the protest or continue the hearing on the protest. The motion was made based upon the failure of Hyde Park to comply with discovery in that none of the persons to be deposed appeared as scheduled and no communication was made with BMWNA.

16. On August 31, 1982, the Board, by telegram and mailgram, notified George Toy/Hyde Park of a hearing on BMWNA's motion to dismiss. The motion was scheduled to be heard at the same time the hearing on the protest was to commence.

17. On September 1, 1982, the hearing on the protest was commenced before Geoffrey N. Carter, Administrative Law Judge for the Board. The hearing was scheduled to commence at 10:00 a.m., but did not begin until 10:26 a.m.

18. BMWNA appeared through their attorney Roy Brisbois. No appearance was made in behalf of George Toy or Hyde Park.

19. BMWNA moved to dismiss the protest pursuant to the provisions of Section 3050.2(b) which reads in pertinent part, "The secretary may, at the direction of the board, upon a showing of failure to comply with authorized discovery without a showing of good cause for such failure, dismiss the protest or suspend the proceedings pending compliance."

RECOMMENDATION IN REGARD TO BMWNA'S
MOTION TO DISMISS

20. Hyde Park has not complied with the authorized discovery sought by BMWNA.

21. Hyde Park has not shown good cause for such failure. Hyde Park has not communicated with its previous attorneys, BMWNA's attorney or the Board.

22. Hyde Park did not appear to oppose the motion.

23. It is recommended that BMWNA's motion be granted and Hyde Park's protest dismissed.

24. Section 589 of the Board's regulations also provides that, "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 hearing officer within five days thereafter. The lack of such showing of good cause may, in the discretion of the board or the hearing officer, be interpreted as an abandonment of interest by such party in the subject matter of the proceeding."

I hereby submit the foregoing which constitutes my proposed decision in the above-entitled matter, as a result of a hearing had before me on the above date, and recommend its adoption as the decision of the New Motor Vehicle Board.

DATED: September 20, 1982



GEOFFREY N. CARTER
Administrative Law Judge
New Motor Vehicle Board