

No. 40357-9-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

MB AUTO WHOLESALE AND LEASING, LLC,
a Washington limited liability company, F/K/A NISSAN OF FIFE, LLC

Petitioner/Appellee

vs.

NISSAN NORTH AMERICA, INC.,

Respondent/Appellant.

APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

This appeal arises out of MB Auto Wholesale and Leasing, LLC's ("MB Auto Wholesale" or Appellee) attempt to sell its Nissan dealership assets to Bruce Titus ("Titus"). Titus had historically been among the worst performing Nissan dealers in the State of Washington in sales performance and consumer satisfaction. Titus already owned and operated two Nissan dealerships in markets that adjoined the existing MB Auto Wholesale Nissan dealership. The proposed sale would have added a third contiguous market area for Titus, thereby granting control of most of the Olympia/Tacoma market place to a poor performing dealer.

Pursuant to its dealer agreement with MB Auto Wholesale, Nissan North America ("NNA") exercised its right to review the proposed sale based on its uniformly applied guidelines, and ultimately denied the proposal due to Titus's failure to meet NNA guidelines to obtain a new Nissan dealership. In order to establish a dealer network that will best serve the interests of the owners and purchasers of Nissan products, NNA conducts a detailed review of all candidates for Nissan dealerships, which includes a review of the personal qualifications, expertise, reputation, integrity, experience, ability and representations of the individual who will be named as the new principal owner, in this case Bruce Titus.

This review includes a review of performance of the applicant at existing dealerships, both for Nissan and other manufacturers, in order to insure that the best possible candidate is appointed as a new Nissan dealer. NNA also considers the existence of common ownership in contiguous market areas. Consumer choice, sales, service, and customer satisfaction suffer under such monopoly ownership, and the risk is raised that one dealer going out of business could deprive all customers of access to a local dealership.

Nissan utilized its normal, uniform standards in evaluating the proposal, and ultimately denied the proposed transfer of a third adjoining dealership to Titus. MB Auto Wholesale filed an administrative protest of NNA's decision, and then moved for summary judgment, contending that as a matter of law NNA could not turn down the proposed sale because Titus had a dealer's license, and because Titus had at one point met NNA's standard to be appointed as a new dealer.

The administrative law judge charged with hearing this petition on behalf of the Department of Licensing reviewed the legislative history and language of RCW 46.96.200 as it existed before recent amendment. (All references herein are to the statute pre-amendment, unless otherwise noted.) This included statutory language describing the reasonableness standard the manufacturer must meet, and allocation of the burden of

proof. NNA also presented legal arguments, as well as extensive evidence justifying its decision, which was not contravened by MB Auto Wholesale. The ALJ concluded that there were at minimum questions of fact that would prevent the entry of summary judgment. Accordingly, the ALJ denied MB Auto Wholesale's motion.

MB Auto Wholesale had waived any hearing on the merits of NNA's decision, and had explicitly stipulated to the ALJ's Order that the denial of its summary judgment motion was final and immediately appealable. This meant that MB Auto Wholesale was required to appeal this decision within 30 days. Instead, MB Auto Wholesale waited two months to appeal to superior court. When NNA moved to dismiss for lack of jurisdiction, MB Auto Wholesale argued that its appeal was timely if the date upon which the ALJ made clerical corrections to her final order was used to calculate the appeal period.

The superior court erroneously concluded that this rendered MB Auto Wholesale's appeal timely. The court then compounded this error by reversing the ALJ's final order, concluding that solely because Titus was capable of obtaining a Washington State dealer's license, no automobile manufacture could turn him down as a purchaser of a dealership. This erroneous ruling ignored the language of the statute and precluded any consideration of the qualifications of a dealer candidate, or the potential

injury to the brand or consumers that might result from such a proposed sale.

NNA respectfully requests that this Court dismiss MB Auto Wholesale's appeal of the ALJ's decision for lack of jurisdiction. Alternatively, the Court should reverse the trial court and affirm the ALJ's denial of summary judgment. This would normally result in a remand for further proceedings on the merits. However, since MB Auto Wholesale has waived any review of the merits of the proposed sale, this would conclude its Petition to the Department of Licensing.

II. ASSIGNMENTS OF ERROR

1. The superior court erred by denying NNA's motion to dismiss MB Auto Wholesale's untimely appeal for lack of subject matter jurisdiction.

2. The superior court erred by granting MB Auto Wholesale's motion for summary judgment on the basis that NNA could not turn down Titus as a dealer because he had a Washington State dealer's license.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

A. Issues Relating to Assignment of Error No. 1.

1. Whether the thirty day period to appeal began to run from the date of the ALJ's final and appealable order denying summary judgment.

2. Whether MB Auto Wholesale's petition can be rendered timely by corrections to an order that did not alter the legal relationship between the parties.

B. Issues Relating to Assignments of Error No. 2.

1. Whether RCW 49.96.200(1) as then enacted should be read as requiring an automobile manufacturer to approve as a matter of law the sale of a dealership to anyone capable of being licensed as a Washington new motor vehicle dealer.

2. Whether RCW 49.96.200(1) as then enacted must also be read as written to include an analysis of whether a manufacturer has “unreasonably with[held] consent to the sale, transfer, or exchange of a franchise to a qualified buyer who meets the normal, reasonable, and uniformly applied standards established by the manufacturer for the appointment of a new dealer”

3. Whether an automobile manufacturer is entitled to provide evidence to rebut the presumption that a denial of a proposed sale was unreasonable, as explicitly allowed by RCW 46.96.200(5), as enacted during the relevant time period.

4. Whether a manufacturer may review performance data related to other dealerships owned by the proposed purchaser in

attempting to show that its decision was reasonable and in accordance with uniform standards.

IV. STATEMENT OF THE CASE

A. NNA's Dealer Sales and Service Agreement Detailed How Dealer Candidates Would be Reviewed.

Nissan North America was a party to a Dealer Sales and Service Agreement (“Dealer Agreement”) with Nissan of Fife, now known as MB Auto Wholesale.¹ CP 146-205. As is standard in such agreements, and pursuant to Washington’s statutory scheme, MB Auto Wholesale was required to submit any subsequent proposed sale of its dealership assets to NNA for review pursuant to established NNA standards. CP 201-02. Accordingly, in February 2008, MB Auto Wholesale submitted an Asset Purchase Agreement as part of a proposed sale of its dealership to Titus. CP 207-69, 286-87. This was received by the NNA Northwest Region, and was reviewed by NNA personnel in accordance with normal procedures, including by NNA Northwest Regional Vice President Walter H. Burchfield, Jr. (“Burchfield”) CP 289-294, 334-65.

B. The Proposed Asset Purchase Agreement.

Titus was (and remains) a Nissan dealer, and his two dealerships had ranked among the worst performing Nissan dealerships in the State of

¹ For ease of reference, the name “MB Auto Wholesale” is used throughout this brief to refer to Appellee’s company. Such references are intended to also encompass MB Auto Wholesale’s prior name, Nissan of Fife.

Washington in the years leading up to the proposed sale. CP 334-65. Titus already owned two Nissan dealerships in adjacent markets—known as Primary Market Areas, or PMA’s—when the sale was proposed. CP 337-39; AR 249-50.² This included Capital Car Center, d/b/a Olympia Nissan, which is located in Olympia, and opened in 2000, and Bruce Titus Automotive Group, d/b/a Bruce Titus Tacoma Nissan, which opened in April 1992. CP 335. Both of these dealerships were in contiguous Primary Market Areas and thus shared a common market boundary line. CP 335-40; AR 245-49. Titus’s poor performance as an existing Nissan dealer, plus ownership of two adjoining dealerships, were among the factors considered that resulted in a rejection of the proposed sale. CP 289-291, 335-40; AR 245-49.

C. Titus Was Not Qualified Due to the Historically Poor Performance of the Existing Titus Dealerships.

Titus’s performance as an existing Nissan dealer was evaluated when the proposed APA was submitted, in accordance with NNA policy and practice. CP 335-37. This review confirmed that Titus had performed well below average in operating his two dealerships for an extended period of time. CP 335-37; AR 249-50. Both dealerships consistently ranked near the bottom of all Washington Nissan dealerships in standard

² For the convenience of the Court, NNA has numbered the administrative record pages that have already been transmitted to the Court of Appeals in conjunction with the Clerk’s Papers, and has submitted the numbered set along with this brief.

NNA performance measurements such as Regional Sales Effectiveness (“RSE”), which measures how well the dealer meets the needs of consumers. CP 335-37, 352-57.

Titus’s Regional Sales Effectiveness indicated that his dealerships operated at a “D” or “F” grade level. CP 338. Titus’s dealerships also failed to comply with NNA performance requirements by consistently obtaining well below average customer satisfaction scores, failing to employ a qualified executive manager, and failing to comply with parts and service training requirements. CP 335-37, 353-57; AR 249-50. As a result, Titus had received warnings from NNA regarding his poor performance. CP 338, 353-57.

Titus clearly failed to meet the qualifications to obtain a new Nissan dealership, both generally and under specific provisions of NNA Guide 103 (the “Guide”). The Guide details “the policy and guidelines governing ownership interest in a Nissan brand dealership,” and provides standards as to many different ownership scenarios. CP 335-51. Titus could not show proven performance or capacity to successfully operate multiple dealerships, or consistent compliance with both his dealer agreement and NNA requirements and performance measures. CP 289-91, 337-39. This prevented NNA from approving of Titus as a new dealer at the Fife location. *Id.*

NNA also has a policy regarding ownership of contiguous dealerships generally. CP 335-38, 349. Proven superior performance over an 18 month period—including compliance with the dealer agreements and performance measurements—is required before dealers will be approved to operate dealerships in contiguous Primary Market Areas. *Id.* The reason for this is obvious: if a dealer is not adequately representing the brand and providing good customer service, then adding adjoining dealerships for an already poor performing dealer only magnifies the performance problems. CP 338-39, 341; AR 250. Titus failed to meet this standard as well.

In short, Titus was operating at a significantly below average level in his effort or ability to represent the Nissan brand, and to meet consumer needs in the Olympia/Tacoma area. Therefore, Titus could not meet NNA's uniform standards to be approved as a new Nissan dealer for the Fife dealership. NNA detailed the reasons for its exercise of its contractual right to deny the proposed Asset Purchase Agreement, but attempted to explore alternatives with Titus, and also offered to assist MB Auto Wholesale in finding an alternative purchaser. CP 298-91, 296-97, 358, 364-65.

D. NNA Guidelines Barred Titus from Monopolizing the Tacoma/Olympia Market by Purchasing a Third Adjoining Dealership.

The Guide also addressed the standards for contiguous market ownership and multiple dealer ownership in detail. CP 335-40, 346-50. Relevant here, it provided that “no dealer may own more than two contiguous PMA’s in any market.” CP 348 (at 4.3.1.3). However Titus *already* owned two contiguous Purchase Market Areas before MB Auto Wholesale proposed selling its dealership to Titus. The MB Auto Wholesale dealership would have added a third contiguous Primary Market Area to Titus’s poorly performing dealership group, and was plainly barred by the Guide. *Id.*

There are important reasons for this prohibition on dealers monopolizing geographic regions. CP 339-40; AR 245-51. If the dealership group went out of business, Nissan customers would be left without sales or service access in their area. CP 339-40; AR 246. That is more than a theoretical concern in the current economy; other Nissan dealers have gone out of business, and Titus was among the lowest performing Nissan dealers in the state. *Id.* The negative impact on customers of a dealer closing its doors is greatly magnified if dealer ownership is concentrated in the hands of one individual. *Id.* In the instant case, seventy percent of the current or potential Nissan customers

in the Tacoma/Olympia market would be affected if Titus owned three adjoining Primary Market Areas and ceased operations. AR 246.

Unsurprisingly, control of an entire geographic region by one dealer also decreases intra-brand competition by eliminating competing Nissan dealers. CP 340; AR 247-50. This also means that customers cannot easily comparison shop for new Nissan cars or repairs and service. *Id.* With respect to the proposed Titus purchase, one of the worst Nissan dealers would have been able to eliminate its competition by swallowing up one of the best performing dealers in the State. CP 338-39; AR 249-50. This would mean that customers would have to travel significantly further in order to comparison shop at a second or third separate Nissan dealer, as most customers strongly prefer to do when purchasing a vehicle. CP 340; AR 247. This harms consumers by eliminating intra-brand competition on dealer service, price, and convenience, and would be particularly problematic given Titus's low sales and customer satisfaction ratings. CP 338- 41; AR 247-50. This negative effect is also born out by past experience in California with multiple market ownership by dealers under prior NNA policies in place in the mid 1990's. AR 250.

E. MB Auto Wholesale Files a Protest of NNA's Turn Down.

MB Auto Wholesale filed an administrative protest of NNA's denial of the proposed Asset Purchase Agreement with the Washington

State Department of Licensing, pursuant to RCW 46.96.200. AR 2-4. As required by Washington's administrative scheme, this protest was assigned to an Administrative Law Judge, Judge Barbara Boivin of the Office of Administrative Hearings. *See* RCW 46.96.200(4)-(7); RCW 46.96.050(2); RCW 34.05.

At the outset of this Petition, MB Auto Wholesale made it clear that it intended only to test legal theories on summary judgment. The theory at issue in this appeal was that anyone that can successfully obtain a Washington dealer's license can demand that any manufacturer approve him or her to purchase and operate a dealership. CP 380-81. Accordingly, MB Auto Wholesale stipulated that it had no intention of being heard on the merits, and that the denial of its anticipated summary judgment motion due to the existence of issues of fact would resolve the protest as a final and appealable order. CP 37-39.

On October 17, 2008, MB Auto Wholesale moved for summary judgment on its legal theories, arguing that NNA violated RCW 46.96.200 as a matter of law by withholding consent to the Asset Purchase Agreement. AR 29-40. In support MB Auto Wholesale also submitted a declaration of Mary C. Byrne, which included exhibits relating to the proposed sale. AR 41-198. On November 3, 2008, NNA responded, asserting that at minimum issues of fact would exist as to the

reasonableness of its denial of the proposed Asset Purchase Agreement. AR 200-209. In support NNA provided Judge Boivin with a Declaration from the Regional Vice President of the Northwest Region, Walter H. Burchfield, which included exhibits reflecting NNA guidelines, NNA correspondence regarding the APA, and details of Titus's performance. AR 210-41. NNA also submitted a declaration from Sharif Farhat, the Vice President of Analytical Services for Urban Science Applications, Inc., with attached exhibits, in which Mr. Farhat analyzed Titus's performance and the proposed sale in detail. AR 242-375. MB Auto Wholesale submitted a reply on November 10, 2008. AR 376-82.

Judge Boivin heard oral argument on November 14, 2008. AR 383. On November 17, 2008, Judge Boivin issued an order denying MB Auto Wholesale's motion for summary judgment. AR 383-86. She held: "RCW 46.96.200 plainly, on its face, and in light of the legislative intent, protects [MB Auto Wholesale] by making this refusal presumptively unreasonable and placing the burden on NNA to rebut that presumption by showing that the refusal is reasonable." AR 385. At the same time Judge Boivin also concluded that whether NNA could rebut this presumption by showing that its "refusal was reasonable is a question of material fact. Petitioner's motion therefore cannot be granted." *Id.* Accordingly, Judge

Boivin denied MB Auto Wholesale's summary judgment motion. AR 386.

F. Judge Boivin Makes Clerical Corrections to the Order.

As noted above, the parties had filed a Joint Stipulation Establishing Briefing Schedule for Summary Judgment, and proposed Order, on October 7, 2008. AR 23-25. The Order was signed by Judge Boivin on the same day. *Id.* In that stipulated Order the parties acknowledged "Should [MB Auto Wholesale's] Motion not be granted, the parties further stipulate that the denial shall be deemed a final decision denying the relief requested in the Petition and the Order entered a final Order subject to judicial review." AR 24. When Judge Boivin's November 17, 2008 Order denying MB Auto Wholesale's motion for summary judgment was issued, it was described as a "Final Order." AR 383 ("Findings of Fact, Conclusions of Law, Decision and Final Order herein . . ."). Pursuant to the October 7, 2008 stipulated Order, this was a final determination of MB Auto Wholesale's Petition, and was also immediately a final order subject to judicial review. AR 24.

Counsel for NNA concluded that as a housekeeping matter the language from the stipulated Order, and post-hearing remedy language, could be added to Judge Boivin's November 17 Order. CP 121-23. This was intended to assure that Judge Boivin was aware that no further dates

would be scheduled, and took the form of a request for clarification. CP 122-23. Accordingly, after obtaining the agreement of counsel for MB Auto Wholesale, counsel for NNA sent a letter to Judge Boivin to make sure she was aware that the case was over, given the earlier stipulated order. CP 45, 122-23. In response the Court issued a Corrected Decision and Order on December 10, 2008, which added the language referencing the stipulated order, as suggested by the parties. CP 47-51. On January 7, 2009, at the suggestion of counsel, the Court issued a Second Corrected Decision and Order which simply corrected a transposed number in the docket number listed on the Order. CP 56-60.

G. MB Auto Wholesale Appeals to Superior Court.

On January 9, 2009, MB Auto Wholesale filed a petition in Pierce County Superior Court for review of Judge Boivin's decision. CP 1-23. NNA filed a motion to dismiss the petition for lack of subject matter jurisdiction on January 20, 2009, because it was filed more than thirty days after Judge Boivin's November 17, 2008 final order. CP 27-33. NNA submitted the declaration of James R. Hermsen, with attached exhibits, in support. CP 34-62. MB Auto Wholesale filed an opposition on February 17, 2009, and submitted the declaration of Randall P. Beighle, with exhibits, in support. CP 66-76, 80-112. Nissan filed a reply and a supplemental declaration of James R. Hermsen on February 20,

2009. CP 113-20, 121-25. Judge Thomas P. Larkin denied NNA's motion to dismiss on February 27, 2009. CP 124-25.

On November 04, 2009, MB Auto Wholesale submitted a motion for summary judgment arguing that ALJ Boivin had committed reversible error in denying its motion, and asking the Superior Court to enter summary judgment in its favor. CP 126-40. MB Auto Wholesale also submitted the declaration of Mary Byrne, with exhibits. CP 141-298. NNA filed an opposition on November 20, 2009, which incorporated by reference the opposition and the declarations that it had filed in the administrative proceeding. CP 315-65. MB Auto Wholesale filed a reply on November 30, 2009. CP 366-73. On January 22, 2010, Judge Larkin granted MB Auto Wholesale's motion, and reversed Judge Boivin. He concluded that NNA's denial was improper as a matter of law, and that no reasonableness inquiry was necessary, because: "Bruce Titus was capable of being licensed as a new motor vehicle dealer." CP 374-75.

H. NNA Appeals the Superior Court's Decisions to This Court.

NNA timely appealed both the Superior Court's Order denying its motion to dismiss MB Auto Wholesale's petition for lack of subject matter jurisdiction, and the Superior Court's Order reversing Judge Boivin and entering summary judgment in favor of MB Auto Wholesale. *See* Notice of Appeal.

V. ARGUMENT

A. **The Superior Court Lacked Subject Matter Jurisdiction to Consider MB Auto Wholesale's Petition for Judicial Review.**

1. **This Court Reviews Motions to Dismiss for Lack of Subject Matter Jurisdiction *De Novo*.**

MB Auto Wholesale's appeal from a Washington State administrative tribunal decision invoked the limited appellate jurisdiction of the superior court. *Union Bay Preservation Coalition v. Cosmos Dev. & Admin. Corp.*, 127 Wn.2d 614, 617, 902 P.2d 1247 (1995). When acting in this role the superior court is a court of limited statutory jurisdiction, and all statutory procedural requirements must be met before its jurisdiction may be invoked. *Fay v. Northwest Airlines, Inc.*, 115 Wn.2d 194, 197, 796 P.2d 412 (1990); *Clymer v. Employment Sec. Dep 't*, 82 Wn. App. 25, 27, 917 P.2d 1091 (1996). Whether the superior court properly exercised such jurisdiction is a question of law reviewed *de novo* on appeal. *Conom v. Snohomish County*, 155 Wn.2d 154, 157, 118 P.3d 344 (2005).

2. **MB Auto Wholesale's Petition for Review Was Untimely, Depriving the Superior Court of its Limited Appellate Jurisdiction.**

The Administrative Procedures Act provides that "[a] petition for judicial review of an order shall be filed with the court and served on the agency, the office of the attorney general, and all parties of record within

thirty days after service of the final order.” RCW 34.05.542 (emphasis added). It is well established that this is a jurisdictional prerequisite to triggering a superior court’s limited jurisdiction to review administrative decisions. See *Diehl v. W. Wash. Growth Mgmt. Hearings Bd.*, 153 Wn.2d 207, 218, 103 P.3d 193 (2004) (untimely petition for judicial review “preclude[s] subject matter jurisdiction under RCW 34.05.542”); *Skagit Surveyors & Engineers, LLC v. Friends of Skagit County*, 135 Wn.2d 542, 555, 958 P.2d 962 (1998) (all statutory procedural requirements must be met to invoke appellate jurisdiction under the APA); *Clymer*, 82 Wn. App. at 28-29 (belated compliance not sufficient for petition for judicial review); *Union Bay Preservation Coalition*, 127 Wn.2d at 617-18 (timely filing and service of petition for judicial review is necessary to create jurisdiction under the APA); *City of Seattle v. Public Employment Relations Com’n*, 116 Wn.2d 923, 928-29, 809 P.2d 1377 (1991) (failure to strictly comply with 30 day deadline to serve petition on all parties necessarily failed to invoke superior court’s appellate jurisdiction). In other words, MB Auto Wholesale had to file its petition within the 30 days required by RCW 34.05.542(2) for the superior court to have subject matter jurisdiction to hear its petition.

The administrative law judge served her final order denying MB Auto Wholesale’s motion for summary judgment on November 17, 2008.

CP 14. The order specifically stated that it was a “Final Order.” *Id.* Moreover, as the stipulated order entered in the docket at the outset of the proceeding makes clear, it was the final conclusion of the litigation. CP 37-39. That Order explicitly provided: “Should [MB Auto Wholesale’s] Motion not be granted, the parties further stipulate that the denial shall be deemed a final decision denying the relief requested in the Petition and the Order entered a final Order subject to judicial review.” CP 38. As requested, the ALJ gave continuing legal effect to this stipulation at the beginning of the administrative proceeding, concluding: “The parties having so stipulated, the above is **SO ORDERED.**” (emphasis in the original). *Id.* This stipulated Order inarguably made the ALJ’s decision to deny summary judgment a Final Order as a matter of law.

The ALJ’s denial was also described as a “final order” by its explicit terms, and it fixed the legal relationship between the parties. Washington Courts have long held that this alone is sufficient to constitute a final order, even where informal letters or tie votes were all that memorialized the administrative determination. *See A.W. Bock v. State Board of Pilotage Commissioners*, 91 Wn.2d 94, 98-100, 586 P.2d 1173 (1978) (petition for review was untimely as it was filed more than thirty days after informal agency letter that had the effect of fixing the parties legal relationship); *Department of Ecology v. City of Kirkland*, 84 Wn.2d

25, 29-30, 523 P.2d 1181 (1974) (tie vote by board fixed parties legal relationship and was thus a final action or order). Accordingly, MB Auto Wholesale had 30 days after the ALJ's November 17, 2008 final order to petition the district court for review, *i.e.*, until December 17, 2008. MB Auto Wholesale failed to do so—instead waiting until January 9, 2009, making the petition patently untimely and without subject matter jurisdiction based on the date of the final order.

a. The ALJ's Corrections Were Not Substantive, and Did Not Toll the Time to Seek Review.

MB Auto Wholesale sought to paper over the jurisdictional timeliness issues by seeking review of the ALJ's January 7, 2009 Second Corrected Final Order, rather than the November 17, 2008 Final Order. Analysis of whether "corrections" to an order can toll the applicable appellate deadline is governed by the long-established standard set forth by the United States Supreme Court in *Federal Trade Commission v. Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206, 73 S. Ct. 245 (1952) ("*Honeywell*"). In *Honeywell* the Court narrowly circumscribed such tolling to instances where a court substantively changes a judgment, typically through a motion to reconsider, providing:

[T]he mere fact that a judgment previously entered has been reentered or revised in an immaterial way does *not* toll the time within which review must be sought. Only when

the lower court changes matters of substance, or resolves a genuine ambiguity, in a judgment previously rendered should the period within which an appeal must be taken or a petition for certiorari filed begin to run anew. The test is a practical one. The question is whether the lower court, in its second order, has disturbed or revised legal rights and obligations which, by its prior judgment, had been plainly and properly settled with finality.

Id. at 211-12 (emphasis added). The *Honeywell* case is particularly on point as it involved wording changes to a judgment to make it clear that it was “final.” *Id.* at 212-13. The Court concluded that such alterations did not change its legal effect, or alter it in any substantive manner, precluding any tolling argument. *Id.*

Over the last sixty years, the *Honeywell* standard has been adopted and applied by federal and state courts throughout the country, including in the administrative-law context. *See, e.g., People ex rel. Madigan v. Illinois Commerce Comm’n*, 231 Ill.2d 370, 899 N.E.2d 227 (Ill. App. Ct. 2008) (Illinois Commerce Commission’s later order correcting original order did not extend deadline to seek rehearing of order).

In the present case ALJ Boivin’s corrections simply: (1) referenced the stipulated order already entered in the docket; (2) memorialized post-hearing remedies the parties were well aware of; and (3) revised a transposed docket number in the caption. These corrections neither “change[d] matters of substance” nor “resolve[d] a genuine ambiguity.”

Honeywell, 344 U.S. at 212. The “controversy between the parties related only to matters which had been adjudicated” on November 17, 2008, and thus the later orders “cannot [be] ascrib[ed] any significance, as far as timeliness is concerned.” *Id.*

While MB Auto Wholesale has nonetheless argued that NNA’s letter to Judge Boivin suggesting these changes was a motion to reconsider, it was neither styled as such, nor did it have such an effect. As counsel for NNA detailed in two declarations, a letter was sent to the judge at the suggestion of NNA, *and by agreement of the parties*, so that it was clear from the final docket entry that nothing else should be scheduled. CP 34-35, 121-23. There was no reconsideration, as not one of the parties’ legal rights under the original Final Order were “disturbed.” *Honeywell* is again instructive in addressing the effect of such a submission, in emphasizing that changes that do not affect the merits of the decision do not change the final nature of the determination:

Moreover, the memorandum was labeled neither as a petition for a rehearing nor as a motion to amend the previous judgment, and in no manner did it purport to seek such relief. . . . [W]e cannot hold that the time for filing a petition for certiorari was enlarged simply because this paper may have prompted the court below to take some further action which had no effect on the merits of the decision that we are now asked to review in the petition for certiorari.

Honeywell, 344 U.S. at 210-11.

The parties legal rights were fixed in place, and the ALJ's corrections could not toll the December 17 deadline for MB Auto Wholesale to file a petition for judicial review. The fact that the November 17, 2008 final order was in fact stated to be a "final order," and the fact that the stipulated October 7, 2008 Order *already* entered in the docket indisputably spelled out that the ALJ's decision was final and immediately appealable as a matter of law, eliminates any possible doubt. Therefore, NNA respectfully requests this Court to overturn the superior court's denial of NNA's motion to dismiss, and dismiss MB Auto Wholesale's petition for judicial review for lack of subject matter jurisdiction.

B. The ALJ Correctly Concluded that Questions of Material Fact Existed Regarding the Reasonableness of NNA's Turn Down Decision.

1. The ALJ's Decision Is Presumed Correct.

Judge Boivin's denial of MB Auto Wholesale's motion for summary judgment based on the existence of questions of material fact must be "presumed correct," and MB Auto Wholesale bears the burden of proving otherwise in this appeal. *Univ. Med. Ctr. v. Dep't of Health*, 164 Wn.2d 95, 102, 187 P.3d 243 (2008); *see also* RCW 34.05.570(1)(a) ("burden of demonstrating the invalidity of agency action is on the party asserting invalidity"). While considering this appeal, this Court "reviews

the [agency's] decision, not the decision of the superior court.” *King County v. Central Puget Sound Growth Mgmt. Hearings Bd.*, 142 Wn.2d 543, 552-53, 14 P.3d 133 (2000); *Galvis v. State, Dept. of Transp.*, 140 Wn. App. 693, 708-09, 167 P.3d 584 (2007). In doing so it “appl[ies] the standards of RCW 34.05 directly to the record before the agency, sitting in the same position as the superior court.” *King County*, 142 Wn. 2d at 553 (internal citation omitted). The agency’s decision on a legal question is reviewed *de novo*, however, substantial weight is given to the agency’s interpretation of the statute if the statute is ambiguous, or if the agency is charged with administering and enforcing the statute. *See Seattle Bldg. Trades Council v. Washington State Apprenticeship & Training Council*, 129 Wn.2d 787, 799, 920 P.2d 581 (1996).

It must also be emphasized that this appeal is unique, as the only issue is whether the ALJ was correct in concluding that some review of the evidence would be necessary to determine whether NNA’s decision to turn down the proposed sale was reasonable. MB Auto Wholesale did not challenge the ALJ’s determination that there were material issues of fact precluding summary judgment, and sought to avoid any review of the facts at the outset of this proceeding by waiving any hearing on the merits.

2. The ALJ Correctly Denied Summary Judgment Based on Questions of Material Fact.

a. Washington's Statutory Scheme.

Like all states, Washington has adopted legislation that regulates the relationship between automobile manufacturers and dealers, such as MB Auto Wholesale. These regulations are set forth in RCW 46.96, and the specific provision at issue is RCW 46.96.200. The legislative history of Chapter 46.96 indicates that the overriding goal was to assure that manufacturers and dealers would conduct business in a “fair, efficient, and competitive manner.” RCW 46.96.010. Accordingly, Chapter 46.96 was designed, in relevant part, to protect dealers from “*unreasonable interference*” in their “ability to transfer ownership of their business without *undue* constraints.” *Id.* (emphasis added)

This is further reflected throughout the text of RCW 46.96.200, as it existed at the time of MB Auto Wholesale’s petition to the Department of Licensing, following NNA’s denial of the proposed sale. This provision specifically governs the sale of new motor vehicle dealerships, and contained the following language:

(1) Notwithstanding the terms of a franchise, a manufacturer shall not unreasonably withhold consent to the sale, transfer, or exchange of a franchise to a qualified buyer who meets the normal, reasonable, and uniformly applied standards established by the manufacturer for the appointment of a new dealer or is capable of being licensed as a new motor vehicle dealer in the state of Washington. .

. . . A manufacturer may request, and, if so requested, the applicant for a franchise (a) shall promptly provide such personal and financial information as is reasonably necessary to determine whether the sale, transfer, or exchange should be approved, and (b) shall agree to be bound by all reasonable terms and conditions of the franchise.

* * * *

(5) In determining whether the manufacturer unreasonably withheld its approval to the sale, transfer, or exchange, the manufacturer has the burden of proof that it acted reasonably. A manufacturer's refusal to accept or approve a proposed buyer who otherwise meets the normal, reasonable, and uniformly applied standards established by the manufacturer for the appointment of a new dealer, or who otherwise is capable of being licensed as a new motor vehicle dealer in the state of Washington, is presumed to be unreasonable.

RCW 46.96.200(1)&(5) (emphasis added) (as written at the time of the Petition).³ As the above language makes clear, the statute anticipated an inquiry into the qualifications of the proposed purchaser. This includes a request by a manufacturer for financial and other data from the proposed

³ Following the ALJ's ruling, MB Auto Wholesale, through Mary Byrne, successfully lobbied the legislature for changes to this statute. See January 15, 2010 House Commerce and Labor Committee Public Hearing, accessible on-line at Washington State Public Affairs TV Network. RCW 46.96.200(1) now eliminates language regarding the reasonableness of the manufacturer's determination, and dictates that the standards applied must be those that apply to dealers who do not hold a franchise with the manufacturer. RCW 46.96.200(5), which spelled out the procedure for determining whether a manufacturer acted unreasonably, including allocation of the burden of proof and presumptions, is eliminated entirely. In short, the language that MB Auto Wholesale has tried to read out of the statute with inapposite legal arguments is now actually removed from the current statute. This is telling, as it is obvious through these actual revisions that the statute as formerly drafted cannot be read as MB Auto Wholesale has suggested, without wholesale revisions.

purchaser, to aid in determining whether the proposed purchaser meets the manufacturer's normal, reasonable, and uniformly applied standards.

If the manufacturer did not approve the sale, it was required to state the specific grounds for its refusal. RCW 46.96.200(2)&(3). If a hearing was held on whether the manufacturer's decision was reasonable, the manufacture was given the burden of proof. RCW 46.96.200(5). A refusal to approve the sale was presumed unreasonable until the manufacturer could show otherwise. *Id.* Put another way, a manufacturer could withhold approval if it could prove that this decision was a reasonable one.

MB Auto Wholesale moved for summary judgment shortly after filing its petition with the Department of Licensing pursuant to RCW 46.96.200. MB Auto Wholesale had no interest in addressing the merits of NNA's refusal to approve Titus as a proposed purchaser of a third adjoining Nissan Dealership. Instead, it decided to proceed solely on two legal theories. First, that no review was appropriate so long as Titus had completed the minimal requirements necessary to obtain a Washington State dealer's license. Second, that NNA had stated that Titus did not meet its requirements for an additional dealership, but that NNA had to ignore Titus's performance problems and monopoly concerns and should have pretended that Titus had no dealerships.

ALJ Boivin reviewed the parties' briefs, declarations, and exhibits, and also heard oral argument. At the conclusion of this process ALJ Boivin issued a thorough Final Order including detailed findings of fact and conclusions of law. Judge Boivin carefully parsed the statute and legislative history described above, which repeatedly indicated that a manufacturer's decision must not be unreasonable, and that the manufacturer had the burden of proving the reasonableness of its decision. In other words, that a factual inquiry—far from being foreclosed by the statute as MB Auto Wholesale argued—was necessary. Judge Boivin then correctly concluded that “Whether NNA’s refusal was reasonable is a question of material fact. Petitioner’s motion therefore cannot be granted.” CP 9-12

b. The Statute Allows Inquiry of More Than Just Whether a Proposed Purchaser Is Capable of Obtaining a License.

The argument advanced by MB Auto Wholesale, and accepted by the superior court, was simply that because Titus was capable of obtaining a license, the statute mandated acceptance by NNA of the proposed sale. MB Auto Wholesale advanced this argument based on the inclusion of the word “or” in the final clause of the first sentence of RCW 46.96.200(1), which provides: “or is capable of being licensed as a new motor vehicle dealer in the state of Washington.”

According to MB Auto Wholesale, because of the use of the word “or,” the rest of the discussion throughout RCW 46.96.200(1)-(5) about reasonableness, uniform standards, reasons for denial, and burdens of proof can simply be ignored. Instead, according to MB Auto Wholesale, if someone is capable of obtaining a dealer’s license, any refusal to approve a sale to that individual is irrebuttably presumed unreasonable. The ALJ rejected this reasoning based on the language of the statutory scheme and the legislative history. This is the argument, however, that was accepted by the superior court.

When examined in context, it becomes apparent that this argument makes little sense. Anyone who wants to operate a dealership is legally required to have a dealer’s license. *See* RCW 46.70.021(1). If a license was all that was required to force approval of a sale, there would be no reason to have included any of the further statutory language about analysis of a manufacturer’s uniform standards, reasonableness, burdens of proof, or presumptions. The only inquiry would begin and end with whether the proposed purchaser was able to obtain a dealer license. The rest of the lengthy and detailed provisions that RCW 46.96.200(1)-(6) contained would be almost entirely irrelevant, and unnecessary.

It is a fundamental premise of statutory construction that a statute should be interpreted in a way that avoids rendering any portion of the

statute meaningless or superfluous. *See Seto v. American Elevator, Inc.*, 159 Wn.2d 767, 774, 154 P.3d 189 (2007). Rather than isolating individual phrases, the statute must be read and properly understood in its entirety. *Id.* at 774. Each provision is viewed in relation to other provisions and harmonized, if at all possible. *State v. Keller*, 143 Wn.2d 267, 277, 19 P.3d 1030 (2001). In the process the Court should avoid constructions “that yield unlikely, strange or absurd consequences.” *State v. Contreras*, 124 Wn.2d 741, 747, 880 P.2d 1000 (1994).

MB Auto Wholesale’s construction would contravene all of these principals of statutory construction. The entire scheme contemplated a manufacturer reviewing financial and personal data, and then articulating the basis for its decision. It provided in detail for an examination of the reasonableness of that decision, and set up burdens of proof and rebuttable presumptions. All of this would be superfluous if the proposed purchaser simply had to be able to obtain the required dealer’s license to end the inquiry.

When all of the provisions of 46.96.200 are examined, the “or is capable of being licensed” clause can only be given coherent meaning if it is interpreted to be conjunctive (“and”) rather than disjunctive. This is consistent with the manner in which Washington Courts have resolved other statutory ambiguities. *See Childers v. Childers*, 89 Wn.2d 592, 595-

96, 575 P.2d 201 (1978) (construing “or” in child support statute); *State v. Sigman*, 118 Wn.2d 442, 448, 826 P.2d 144 (1992) (construing “or” in criminal statute); *Town of Clyde Hill v. Rodriguez*, 65 Wn. App. 778, 782, 831 P.2d 149 (construing “or” in DUI statute), *rev. denied*, 119 Wn.2d 1022, 838 P.2d 692 (1992); *See State v. Jones*, 32 Wn. App. 359, 372, 647 P.2d 1039 (1982) (substituting “and” for “or” in a criminal statute). Indeed, as the Supreme Court observed in *State v. Keller*, 98 Wn.2d 725, 657 P.2d 1384 (1983):

In fact, the very word at issue here, “and,” has been frequently interpreted by courts to mean “or.” As noted by one leading commentator:

[t]here has been, however, so great laxity in the use of these [“and” and “or”] terms that courts have generally said that the words are interchangeable and that one may be substituted for the other, if to do so is consistent with the legislative intent.

Id. at 729. Similar reasoning applies here to harmonize the provisions of RCW 46.96.200.

Moreover, if the word “or” were considered to be used disjunctively, and MB Auto Wholesale’s “matter of law” argument were viable, NNA could never refuse to approve an unqualified dealer candidate as long as that dealer candidate could obtain a dealer’s license. This would bestow upon the Washington Department of Licensing the

absolute power to select NNA's dealers.⁴ Because the contract between manufacturer and dealer forms the foundation for the entire relationship and distribution network, removing the ability of the manufacturer to participate in the selection process of its dealer body would be absurd. If that was the legislative intent, words such as "unreasonable," "reasonable," "undue constraint," "balance" and "fairness" would appear nowhere in RCW 46.96.010 and 46.96.200, nor would there be a burden of proof to allocate, or a rebuttable "presumption" of "unreasonableness" to overcome.⁵ The ALJ's interpretation of this statute on behalf of the Department of Licensing was correct, warrants deference, and should be affirmed.

c. NNA Properly Utilized its Uniformly Applied Guidelines in Evaluating Titus's Performance and Qualifications.

While not its primary argument, MB Auto Wholesale also argued in the alternative that NNA applied standards applicable to existing

⁴ Indeed, it seems likely that such a construction would raise issues as to the constitutionality of RCW 46.96.200. However, that issue is not raised here, and need not be addressed under the statutory scheme at issue in this appeal.

⁵ MB Auto Wholesale essentially attempted to argue that "presumption" should mean "irrebuttable presumption." This argument is not well founded, as it is firmly established as a matter of Washington law that a presumption is just that: a burden shifting mechanism, which may be rebutted on a proper evidentiary showing. *See, e.g., In re Indian Trail Trunk Sewer v. City of Spokane*, 35 Wn. App. 840, 843, 670 P.2d 675 (1983) (sole purpose of a presumption is to establish which party has the burden of proof, "To hold otherwise would make the presumptions . . . conclusive and render the hearing and statutory appeal process" useless).

dealers—which Titus was—rather than the standard applicable to an individual that had never been a dealer. According to MB Auto Wholesale, this meant that NNA did not reasonably turn down the proposed sale to Titus, because it applied the wrong standards. This argument was rejected by the ALJ, and was not accepted by the superior court. To the extent that it may still be considered on appeal, NNA addresses it herein.

The basis of MB Auto Wholesale’s position was the statutory reference to “new dealer” set forth below:

[A] manufacturer shall not unreasonably withhold consent to the sale, transfer, or exchange of a franchise to a qualified buyer who meets the normal, reasonable, and uniformly applied standards established by the manufacturer for the appointment of a new dealer.

RCW 46.96.200(1) (emphasis added). From this reference MB Auto Wholesale argued that an existing dealer would have to be evaluated under standards for someone who never had a dealership in determining whether the dealer was a qualified purchaser. In other words, MB Auto Wholesale argued that NNA should pretend that Titus’s poor performance, poor track record, and monopolization of the market did not exist, and it should ignore its uniformly applied standards in doing so. However, NNA’s evaluation of any dealer includes a review of performance at other

dealerships owned by the candidate.⁶ Thus, there is no differing standard for “new” dealers, and NNA properly evaluated Titus.

This is another argument that contravenes the overall statutory language, and quickly becomes nonsensical. First, the statute does not define “new dealer.” The most logical reading would be appointment as a “new dealer” at the location in question. NNA would prevail under this plain reading of the statute, as NNA applied its uniform standards in evaluating Titus’s request to be appointed as the new dealer for the Fife location. These standards included an analysis of Titus based on his performance at other dealerships, and the fact that he already owned two adjoining dealerships. This is how NNA would evaluate any similarly situated applicant.

If the Court concludes that there is nevertheless some ambiguity in the phrase “new dealer,” then it must be interpreted in accordance with the same standards of statutory construction discussed above, *i.e.*, the statute must be read in a way that makes sense. *Contreras*, 124 Wn.2d at 747 (Court should avoid constructions that “yield unlikely, strange or absurd consequences.”) It would make little sense for the statute to be read as

⁶ For example, if Titus was a Honda dealer rather than a Nissan dealer, his performance at the Honda dealership would have been reviewed to determine his qualifications. The standard for a “new” dealer requires that the candidate has demonstrated the ability to perform as an automotive dealer, whether as an existing Nissan dealer or another manufacturer.

requiring a manufacturer to pretend that an applicant for a new dealership does not have a track record or other dealerships, when they in fact do. That information is obviously relevant to determine “qualifications” as allowed by statute, and impossible to ignore if a reasonableness hearing is to be conducted. Indeed, the guidelines would hardly be uniformly applied if the manufacturer could selectively ignore applicable guidelines and performance data.

In conclusion, the statute did not foreclose application of uniform NNA standards that apply to pre-existing dealers that seek to purchase a new dealership. At minimum, a hearing would be required to determine what NNA’s uniform standards were, and whether they were reasonable—both in the abstract and as applied.⁷ However, MB Auto Wholesale decided to waive any such hearing. Therefore, the Court should affirm the ALJ, who was appointed to interpret the statute on behalf of the Department of Licensing, and should be given deference if the Court concludes there is any statutory ambiguity.

⁷ Even if MB Auto Wholesale’s strained reading were accepted, a hearing would still be required to determine how NNA’s standards for approving brand new dealers (who may have owned other dealerships in the past) compare to its standards for approving new dealers who own other NNA dealerships. Put another way, a question of material fact would still exist as to the reasonableness of NNA’s decision, which would still require the Court to affirm the ALJ’s ruling.

d. NNA's Denial of the APA Based on Uniformly Applied Guidelines Was Reasonable.

As detailed in the declaration of Walter Burchfield, Jr., NNA's Northwest Region Vice-President, NNA carefully evaluated MB Auto Wholesale's proposed Asset Purchase Agreement. As evidenced by Mr. Burchfield's Declaration and NNA's letter of March 18, 2008, NNA concluded that Titus failed to meet the normal and reasonable standards for evaluation and approval of a proposed new dealer for MBA Auto Wholesale's dealership. CP 289-91, 334-65.

As Mr. Burchfield's Declaration and the attached exhibits show, Titus' two adjoining NNA dealerships had been significantly underperforming for a considerable period of time. Rather than attaining an "above average level of performance," "superior performance," or "proven superior performance on a consistent basis," Titus' two dealerships have remained near the bottom of all Washington NNA dealers under applicable performance measures. CP 334-65. Titus had also been out of compliance with NNA dealer agreement provisions, including parts and service training, management standards, and customer satisfaction.⁸ *Id.*

⁸ Other statutes such as RCW 46.96.060 render dealer terminations extremely problematic. As a result, allowing an existing dealer that is performing poorly to become a new dealer at additional locations magnifies the negative impact on

NNA's uniform ownership standards, found in Guide 103 were followed by the Northwest Region ("Region"). After applying NNA's uniform performance measurements, Titus failed under NNA's multiple dealership policy—by a wide margin—to qualify for ownership of another NNA dealership. Titus also failed to qualify for an additional NNA dealership under NNA's contiguous market policy, as ownership of the Fife dealership would have given him control over three contiguous markets: Olympia, Tacoma and Fife. Mr. Burchfield's Declaration addressed these points in detail, as did the detailed Declaration of Urban Science Applications Vice President of Analytical Services, Sharif Farhat. CP 334-65, AR 242-372.

NNA's evaluation of MB Auto Wholesale's Asset Purchase Agreement with Titus was thorough and in accordance with NNA's Guide. NNA's disapproval was supported by Titus' failure to perform consistent with NNA's uniformly applied performance standards, both generally and relating to multiple ownership. While MB Auto Wholesale did not contest the merits of NNA's decision, there can be no doubt on this

consumers. This negative impact can take many forms: (1) a risk that a bankruptcy will harm consumers over a broad region is created; (2) a monopoly is granted, reducing competition on price and performance; (3) decrease in competition leaves little incentive for an under-performing dealer to improve; (4) consumers are deprived of opportunities to comparison shop; and (5) customer satisfaction inevitably suffers. *See* AR 245-50.

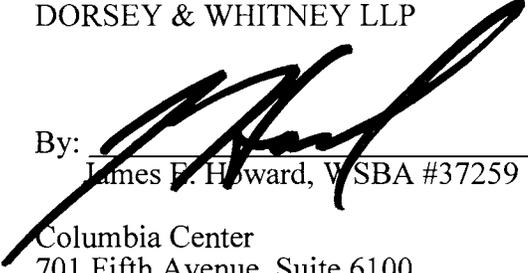
record that NNA had raised a question of material fact in response to MB Auto Wholesale's motion for summary judgment.

VI. CONCLUSION

For the forgoing reasons, this Court should conclude that MB Auto Wholesale lacked jurisdiction to appeal the ruling of ALJ Boivin to the superior court. To the extent that the Court concludes that jurisdiction nonetheless exists, it should affirm the ALJ's denial of summary judgment due to the existence of a question of material fact. Given MB Auto Wholesale's waiver of its right to a hearing on the merits of NNA's decision, that would conclude its Petition.

Respectfully submitted this 2nd day of July 2010.

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PROOF OF SERVICE

I caused a copy of the foregoing APPELLANT'S OPENING
BRIEF to be served today, by legal messenger, on:

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DATED this 2nd day of July 2010.

Kelly Nakata

Kelly Nakata

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