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10 **STATE OF CALIFORNIA**
11 **NEW MOTOR VEHICLE BOARD**

12 In the Matter of the Protest of:

13 WEST COVINA MOTORS, INC., dba
14 CLIPPINGER CHEVROLET

15 Protestant,

16 v.

17 GENERAL MOTORS, LLC,

18 Respondent.

Protest No: PR-2213-10

**PROTESTANT WEST COVINA
MOTORS, INC., dba
CLIPPINGER CHEVROLET'S
OPENING STATEMENT RE:
HEARING REGARDING ORDER
ADOPTING [PROPOSED]
CONFIDENTIAL STIPULATED
DECISION OF THE BOARD
RESOLVING PROTEST**

Hearing Date: May 17, 2012

Time: 10:00 a.m.

Honorable Lonnie Carlson

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22 OPENING STATEMENT

23 On or about February 2, 2010, Protestant, West Covina Motors, Inc., dba Clippinger Chevrolet
24 ("Clippinger"), received from Respondent, General Motors, LLC ("GM"), notice of GM's intent to
25 terminate Clippinger's franchise agreement ("NOT"). (Joint Exhibit 1) The NOT does not allege that
26 GM's decision to terminate Protestant was based upon inadequate sales performance, but sets forth as
27 the sole stated ground for the proposed termination of Protestant's GM franchise Protestant's alleged
28

1 inability to maintain an adequate and separate line of credit to finance the purchase of new GM
2 vehicles. In response, Protestant filed the instant Protest with the New Motor Vehicle Board
3 (“Board”), on February 22, 2010.

4 Prior to hearing, Protestant reestablished an acceptable line of credit and the parties entered into
5 a Confidential Stipulated Decision of the Board Resolving Protest (“Agreement”), executed by the
6 parties on November 8, 2010. (Joint Exhibit 2) The Agreement requires, in essence, that Clippinger
7 maintain adequate flooring through November 30, 2012, and in the event it is unable to do so,
8 Paragraph 2.3 of the Agreement provides Protestant 90 days to either restore its flooring source or
9 submit a buy-sell proposal for GM’s consideration. The Agreement does not set forth any conditions
10 or requirements involving sales performance. (Joint Exhibit 2B)

11 However, Paragraph 4.9 of the Agreement provides that: “*Any notice or other communication*
12 *to be given to any of the Parties hereto shall be delivered personally, or by United States registered or*
13 *certified mail, with signed receipt requested to the persons listed below at the addresses indicated. Any*
14 *period specified in this Agreement shall not commence until the first day after personal delivery or the*
15 *fifth business day after deposition in the United States mail, as the case may be.” (emphasis added)*
16 (Joint Exhibit 2B) Moreover, Paragraph 4.9 requires that counsel for the parties must also be copied
17 on any such notice or communication:

18 Notice to WCM shall be sent to:

19 West Covina Motors, Inc.
20 Attention: Ziad Alhassen
21 2000 East Garvey Avenue South
22 West Covina, California 91791

23 With a copy by U.S. Mail or facsimile to:

24 Michael J. Flanagan
25 Law Offices of Michael J. Flanagan
26 2277 Fair Oaks Boulevard, Suite 450
27 Sacramento, CA 95825
28 (916) 646-9138

29 This requirement was the result of a negotiated process whereby counsel for the parties
30 exchanged several revised proposed drafts before the final Agreement was executed and sent to the

1 Board for its approval and adoption. The Board issued its Order Adopting [Proposed] Confidential
2 Stipulated Decision of the Board Resolving Protest on December 15, 2011. (Joint Exhibit 2C)

3 Effective December 1, 2011, Protestant's flooring source was cancelled. By letter dated
4 December 23, 2011, GM Zone Manager, Chris Shane, notified Clippinger that, pursuant to the
5 Agreement, Clippinger would have 90 days in which to either reestablish adequate flooring or submit a
6 fully executed buy-sell agreement and complete "buy-sell" proposal for GM's review. (Joint Exhibit
7 5):

8 "Finally, your attention is called to the provisions of that certain Settlement and
9 Deferred Termination Agreement and Release which was executed as of November 8,
10 2011 and subsequently adopted as a Stipulated Decision of the New Motor Vehicle
11 Board (the "Decision").

12 Under the Decision, the December 1, 2011 loss of the dealership's \$3 million
13 dedicated floor plan line of credit which it agreed to maintain for Chevrolet until
14 November 30, 2012 ("Dedicated Floor plan"), triggered a ninety day period within
15 which the dealership must either (1) reestablish the lost Dedicated Floor plan with a
16 financial institution acceptable to GM or (2) submit a fully executed agreement to sell
17 the dealership or its assets to an unaffiliated third party along with a complete "buy-
18 sell" proposal for GM's review. If neither of these conditions is satisfied at the end of
19 90 days, i.e., by February 28, 2012, the Decision provides for the termination of the
20 Dealer Agreement effective thirty days later, i.e., by March 30, 2012 without any
21 Protest or other legal challenge to the termination, as the Board's Decision confirms."

22 Despite the fact that Paragraph 4.9 required that counsel be copied on *any notice or*
23 *communication* before *any time period under the agreement* could commence, GM failed to copy
24 Protestant's counsel, Law Office of Michael J. Flanagan ("LOMJF"), on this correspondence
25 concerning notice of the purported triggering of the 90 day period prescribed by Paragraph 2.3.

26 The obvious intent of Paragraph 4.9 is to provide the parties *and their counsel* notice of the
27 purported commencement of any time period set forth in the Agreement such that counsel will have the
28 opportunity to provide their clients timely advice regarding the client's legal rights and obligations
under the Agreement, and in this case, avoid the forfeiture of Protestant's GM franchise before it could
recoup its substantial and permanent investment. Simply put, Paragraph 4.9 was designed to avoid the
occurrence of the circumstances that have occurred here and could have, and should have, been
avoided.

1 Upon receipt of GM's December 23, 2011 letter, Protestant was already in discussions to sell
2 its GM franchise to a well-qualified buyer, Carlos Hidalgo, who currently owns and operates a
3 successful GM dealership in San Jose, California. Protestant executed a buy-sell agreement with Mr.
4 Hildago, which was submitted to GM for approval on or about January 26, 2012. (Joint Exhibit 6)

5 On March 19, 2012, GM notified Protestant that it was returning the proposed buy-sell,
6 claiming it lacked sufficient information to consider the proposed transfer. (Joint Exhibit 7) Once
7 again, GM failed to copy LOMJF on this notice and/or communication.

8 It was not until March 22, 2012, that GM provided any communication pertaining to the
9 Agreement to LOMJF. However, at this point GM had unilaterally determined that Protestant failed to
10 satisfy the requirements of Paragraph 2.3 of the Agreement and its franchise would be formally
11 terminated on April 3, 2012. (Joint Exhibit 8):

12 "As we have previously advised, without a complete proposal, GM cannot, and has no
13 obligation to, evaluate the proposed buy-sell. Thus, WCM has clearly failed to satisfy
14 the conditions contained in paragraph 2.3 of the Termination Agreement. As a result,
15 by the express terms of that Agreement and the Stipulated Decision of the Board, the
16 Chevrolet Dealer Agreement between GM and WCM voluntarily terminates on April 3,
17 2012, which is 120 days after WCM's loss of the required floorplan credit line."

18 This was the first occasion LOMJF became aware that the time period set forth in Paragraph
19 2.3 had purportedly begun to run against Protestant. In fact, according to GM, the 90 day time period
20 had *already* run. LOMJF was denied any opportunity to advise Protestant during the purported 90 day
21 period despite the fact that LOMJF negotiated the Agreement that specifically required it be provided
22 notice prior to the commencement of *any* time period under the Agreement.

23 GM takes the position that Paragraph 2.3 of the Agreement is self-executing, thus no notice of
24 the commencement of the 90 day period was required to be sent to Protestant or its counsel.
25 Remarkably, GM argues that Paragraph means something other than what it plainly says. Namely,
26 GM incorrectly asserts that Paragraph 4.9 merely specifies the manner of notice "*when notice is*
27 *required.*" (GM's Response 9:18-20.) *No such language* appears anywhere in the Agreement. In
28 support of its patently misleading assertion, GM attempts to provide new and different meaning to the
plain language contained in Paragraph 4.9 by arguing that the phrase "any notice or other

1 communication to be given” actually means “a notice or communication that the Agreement *requires*
2 ‘to be given.’” (GM’s Response 9:27-28.) GM’s attempt to read new meaning into the plain language
3 of the Agreement finds no support in California law.

4 California law is well settled regarding the interpretation of contractual language. California
5 Civil Code § 1638 provides that, “The language of a contract is to govern its interpretation, if the
6 language is clear and explicit, and does not involve an absurdity.” Moreover, Cal. Civ. Code § 1639
7 specifically addresses written contracts and further clarifies that, “when a contract is reduced to
8 writing, the intention of the parties is to be ascertained from the writing alone, if possible...”
9 Therefore, the Board must give the language of the Agreement its clear and explicit meaning. In
10 consideration of the plain language of Paragraph 4.9, there can be no doubt that the 90 day time period
11 set forth in Paragraph 2.3 did not commence to run against Protestant because GM failed to provide
12 notice to Protestant’s counsel, LOMJF.

13 The Agreement requires “the Board reserve jurisdiction to enforce its Order in the future if
14 requested by any party hereto in accordance with the terms of the Stipulated Decision and Order.”
15 (Joint Exhibit 2A) Further, Paragraph 4.6 of the Agreement entitled “Dispute Resolution” confirms the
16 Board’s limited jurisdiction in this matter: “GM and WCM agree to submit to the Board for final and
17 binding determination, upon either party’s written notice, any and all claims, disputes, and
18 controversies between them and *arising under* or relating to this Agreement and its negotiation,
19 execution, administration, modification, extension or enforcement (collectively, “Claims”).” (emphasis
20 added) Thus, the Board’s jurisdiction in this matter must be limited to the interpretation of the plain
21 language of the Agreement and whether or not GM complied with the requirements of the Agreement.

22 Nevertheless, GM seeks to submit evidence regarding Protestant’s sales performance for the
23 years 2009, 2010 and 2011, as well as certain documents pertaining to a bankruptcy proceeding to
24 which Protestant is not even a party.¹ Evidence regarding Protestant’s sales performance and the
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27 ¹ Hassen Imports Partnership (“HIP”) is the entity that owns the dealership
28 property. HIP is currently in Chapter 11 bankruptcy and must submit any proposed
lease for the property to the Bankruptcy Court for approval as part of HIP’s
reorganization plan.

1 referenced bankruptcy proceeding is beyond the Board's limited jurisdictional scope in these
2 proceedings and must not be admitted.

3 The evidence properly before the Board demonstrates that, under the clear and unambiguous
4 terms of the Agreement, GM was required to notify LOMJF of the purported commencement of the 90
5 day time period before said time period could commence. The evidence also shows that GM failed to
6 provide LOMJF the required notice and therefore the 90 day time period has not begun to run against
7 Protestant. Further, even the March 22, 2012, communication was provided well after GM claims the
8 90 day period had passed. Moreover, by this time GM was refusing to accept any information relating
9 to the buy-sell proposal, and it continues to date to refuse to accept any such information.

10 Protestant respectfully requests the Board issue an order determining that the Agreement
11 required notice be provided to Protestant and its counsel before the commencement of the 90 day
12 period set forth in Paragraph 2.3. Because GM failed to provide such notice to Protestant's counsel,
13 the 90 day period has not commenced to run against Protestant. As a result, the 90 day time period
14 shall begin to run no sooner than the date of the final order issued by the Board regarding Protestant's
15 request that the Board exercise its jurisdiction to rule on the disputed issues under the Board's Order
16 Adopting [Proposed] Confidential Stipulated Decision of the Board Resolving Protest.

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21 Dated: May 14, 2012

LAW OFFICES OF MICHAEL J. FLANAGAN

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23 By: 
24 Gavin M. Hughes
25 Attorneys for Protestant
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