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CERTIFIED MAIL

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8 **STATE OF CALIFORNIA**
9 **NEW MOTOR VEHICLE BOARD**

10
11 In the Matter of the Protest of

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

14 Protestant,

15 v.

16 GENERAL MOTORS, LLC,

17 Respondent.

Protest No. PR-2213-10

PROPOSED DECISION

18
19 **PRELIMINARY STATEMENT**

20 1. Vehicle Code section 3050.7(a)¹ provides, in pertinent part, that “[t]he board may adopt
21 stipulated decisions and orders, without a hearing pursuant to Section 3066, to resolve one or more
22 issues raised by a protest or petition filed with the board.”

23 2. On December 15, 2010, pursuant to Section 3050.7(a), the New Motor Vehicle Board
24 (“Board”), at the request of the parties, issued its “Order Adopting [Proposed] Confidential Stipulated
25 Decision of the Board Resolving Protest” (hereinafter referred to as “Board Order”) in *West Covina*
26 *Motors, Inc, dba Clippinger Chevrolet v. General Motors, LLC* (Protest No. PR-2213-10). The Board
27 _____

28 ¹ Unless otherwise indicated, all statutory references are to the California Vehicle Code.

1 Order contemplated a complete resolution of all issues. The "Settlement and Deferred Termination
2 Agreement and Release" (hereafter "Settlement Agreement"; Exhibit A to the "[Proposed] Confidential
3 Stipulated Decision of the Board Resolving Protest") was confidential and filed under Board seal. The
4 Settlement Agreement which was the subject of the Board Order remains confidential and filed under
5 Board seal.

6 3. Subsequently, a dispute arose between the parties concerning compliance with the terms
7 of the Board Order which included the parties' confidential Settlement Agreement. There is no dispute
8 that the Board is empowered to impose and enforce the conditions contained in the Board's Order.²

9 4. In a letter dated December 23, 2011, General Motors, LLC (herein "GM" or
10 "Respondent") through its Zone Manager, Chris Shane, notified Ziad Alhassen, President of West
11 Covina Motors, Inc. dba Clippinger Chevrolet (herein "WCM" or "Protestant") that due to WCM's loss
12 of floor plan financing,³ WCM "must either (1) reestablish the lost Dedicated Floor plan with a financial
13 institution acceptable to GM or (2) submit a fully executed agreement to sell the dealership or its assets
14 to an unaffiliated third party along with a complete 'buy-sell' proposal for GM's review. If neither of
15 these conditions is satisfied at the end of 90 days, *i.e.*, by February 28, 2012, the [Board Order] provides
16 for termination of the Dealer Agreement effective thirty days later, *i.e.*, by March 30, 2012 without any
17 protest or other legal challenge to the termination, as the [Board Order] confirms."

18 5. It is noted that in the December 23, 2011 letter, GM has calculated that WCM has until
19 February 28, 2012, to comply with the conditions contained in the Board's Order or the franchise
20 termination will occur on March 30, 2012. It is also noted that GM calculated the 90-day time period
21 from the time that WCM lost its flooring line (November 30, 2011), and not 90 days from the December
22 23, 2011, date of its letter to Mr. Alhassen. Using the date of GM's letter to Mr. Alhassen as the starting
23 time for the 90 days (as WCM now wishes to do with regard to the first letter to Mr. Flanagan) would
24 have given WCM until March 22, 2012 to meet the needed conditions. It is clear that GM's letter of
25

26 ² Because the Settlement Agreement was deemed confidential and under seal, the Board Order although it includes the
27 Settlement Agreement does not recite its terms. For ease of reference, the terms at issue will be referred to as those contained
28 in the Settlement Agreement which became part of the Board Order now sought to be enforced.

³ On November 30, 2011, Ally, the successor to GMAC, sent a letter to GM that "the wholesale credit lines extended to
[WCM] have been suspended as of this date..." (Joint Exhibit 4) As indicated in paragraph 21, counsel for the parties
stipulated that the flooring line ceased on or about December 1, 2011.

1 December 23, 2011 was a reminder or cautionary letter rather than a “notice” letter that would start the
2 90-day time period running.

3 6. On March 29, 2012, a letter from Norman J. Hoffman, counsel on behalf of WCM, was
4 sent to L. Joseph Lines, III, counsel for GM. It provided an account of the activities and efforts to
5 complete a buy-sell with Carlos Hidalgo.

6 7. Additionally, the letter of March 29, 2012, from Mr. Hoffman referenced section 4.9 of
7 the Settlement Agreement which pertains to Notices. The letter from counsel for WCM stated that GM
8 had not sent a copy of its December 23, 2011 letter to Michael J. Flanagan, who was also counsel for
9 WCM. Mr. Hoffman stated, “As such, the default notification embodied in GM’s December 23, 2011
10 letter did not act as proper notification of a default under the [Board Order].” Thus WCM claimed that
11 the 90-day period for submission of the buy-sell proposal would not have started to run until March 28,
12 2012.

13 8. It is noted that it was not until Mr. Hoffman’s letter of March 29, 2012 (the 89th day after
14 WCM lost its flooring with Ally) that there was any claim by a representative of WCM that there had
15 not been proper notice to counsel for WCM. Mr. Hoffman’s letter, raising the lack of notice to Mr.
16 Flanagan, was dated the day prior to March 30, 2012, which was the date that GM had calculated in its
17 letter of December 23, 2011 as the date that the franchise would terminate.

18 9. On April 2, 2012, Greg Oxford, counsel for GM, sent a letter to Norm Hoffman (WCM
19 counsel) with a copy to Michael Flanagan (also WCM counsel). GM contends that WCM did not re-
20 establish the required floor plan line of credit within 90 days but instead sent a copy of a proposed buy-
21 sell agreement that was not a “complete proposal” as required by section 2.3 of the Settlement
22 Agreement and by Article 12.2 of the Dealer Agreement. After the 90-day period expired without
23 further documentation having been submitted by WCM, the buy-sell agreement was returned to WCM.
24 As a result of these events, GM contends that WCM’s Dealer Agreement will terminate voluntarily
25 effective 30 days later, i.e., 120 days after the loss of the flooring or April 3, 2012,⁴ pursuant to Article
26 14.2 of the Dealer Agreement. GM contends that the Settlement Agreement did not obligate it to
27

28 ⁴ This date is different than the March 30, 2012, termination date in GM’s December 23, 2011, letter.

1 provide any notice to WCM of default under section 2.3 or the potential consequences of such default,
2 or provide notice to Mr. Flanagan. GM maintains that section 2.3 is self-executing in providing that if
3 WCM loses its flooring and fails to satisfy the conditions of either (a) written evidence of a commitment
4 for replacement Dedicated Chevrolet Flooring in the amount of at least \$3 million, or (b) presents GM
5 with a fully-executed buy-sell agreement and complete proposal for the transfer of the stock or assets of
6 WCM to a person or entity not affiliated with WCM or its owner, WCM will terminate voluntarily.

7 10. Section 3050.7(b) provides, in part, that “[i]f the stipulated decision and order provides
8 for the termination of the franchise, conditioned upon the failure of a party to comply with specified
9 conditions, the franchise may be terminated upon a determination, according to the terms of the
10 stipulated decision and order, that the conditions have not been met” and that “[i]f the stipulated
11 decision and order provides for the termination of the franchise conditioned upon the occurrence of
12 specified conditions, the franchise may be terminated upon a determination, according to the terms of
13 the stipulated decision and order, that the stipulated conditions have occurred.”

14 11. Section 3050.7(b) does not state which party should be allocated the burden of proof as to
15 the occurrence or nonoccurrence of any conditions allegedly giving rise to the termination sought by a
16 franchisor. However because this is a termination proceeding to which Section 3060 was initially
17 applicable, it is believed that it would be appropriate for the language in Section 3066(b)⁵ to be
18 determinative in this regard so that the burden of proof to establish that termination is proper should
19 remain on the franchisor.

20 12. By agreement of the parties and in the Board’s discretion, jurisdiction to hear this dispute
21 has been assumed by the Board.⁶

22 13. On April 10, 2012, a telephonic conference was held before Administrative Law Judge
23 Lonnie M. Carlson (“ALJ Carlson”).

24
25 ⁵ Section 3066(b) states in part: “In a hearing on a protest filed pursuant to Section 3060...the franchisor shall have the burden
of proof to establish that there is good cause to modify, replace, terminate, or refuse to continue a franchise.”

26 ⁶ The Board had previously made its Order pursuant to Section 3050.7(a) (adopting the parties’ confidential settlement
27 agreement) which resolved this protest. No statute or regulation confers jurisdiction on the Board to decide later controversies
28 between the parties arising from “stipulated decisions and orders” based upon Section 3050.7(a). Here, however, the Board
explicitly **retained** jurisdiction over the protests to hear the evidence and arguments of the parties on the issue of compliance
with the Board Order. Cf., *Mazda Motor of America, Inc. v. California New Motor Vehicle Board* (2003) 110 Cal.App.4th
1451; *Hardin Oldsmobile v. New Motor Vehicle Board* (1997) 52 Cal.App.4th 585.

1 14. Pursuant to Section 3050.7(b), the parties filed briefs with the Board, as follows:

2 a. Protestant's opening brief was filed on April 24, 2012.

3 b. Respondent's response to protestant's opening brief was filed on May 4, 2012.

4 c. Protestant's confidential reply brief was filed under seal on May 11, 2012.

5 d. Protestant and Respondent each filed opening statements on May 14, 2012.

6 15. For purposes of this hearing only, the parties stipulated to allow ALJ Carlson to have a
7 copy of the confidential terms of the Settlement Agreement.

8 16. An evidentiary hearing on the dispute was held before ALJ Carlson on May 17, 2012, in
9 Sacramento, California.

10 **PARTIES AND COUNSEL**

11 17. WCM is a Chevrolet dealership located at 1932 East Garvey Avenue South in West
12 Covina, California. WCM is a "franchisee" within the meaning of Sections 331.1 and 3060(a)(1).

13 18. WCM is represented by Michael J. Flanagan, Esq. and Gavin M. Hughes, Esq. of the Law
14 Offices of Michael J. Flanagan, 2277 Fair Oaks Boulevard, Suite 450, Sacramento, California.

15 19. GM is a "franchisor" within the meaning of Sections 331.2 and 3060(a)(1).

16 20. GM is represented by Gregory R. Oxford, Esq. of Isaacs Clouse Crose & Oxford LLP,
17 21515 Hawthorne Boulevard, Suite 950, Torrance, California.

18 **STIPULATIONS**

19 21. Protestant lost its \$3 million Dedicated Chevrolet Flooring on or about December 1, 2011.
20 (Protestant's Opening Brief, p. 4, lines 1-2; RT 31:15-22)⁷

21 22. "Good Cause" under Section 3061 is not at issue. (RT 85:16-20)

22 **THE CONFIDENTIAL SETTLEMENT AGREEMENT**

23 23. The Settlement Agreement (incorporated into the Board's Order) contains the following
24 pertinent language regarding the conditions and the effect of their occurrence or non-occurrence.

25 Section 2.3 of the Settlement Agreement provides:

26 If at any time before November 30, 2012, WCM loses its Dedicated Chevrolet
27 Flooring or its total amount decreases below \$3 million, WCM shall have ninety days to

28 ⁷ References to "RT" are to the transcript of the proceeding on May 17, 2012.

1 either (a) provide written evidence of a commitment for replacement of Dedicated
2 Chevrolet Flooring in the amount of at least \$3 million from GMAC or another GM-
3 approved financial institution or (b) present GM with a fully-executed "buy-sell"
4 agreement and complete proposal for the transfer of the stock or assets of WCM to a person
5 or entity not affiliated with WCM or Owner. If WCM does not satisfy either of these
6 conditions (a) or (b) within ninety days of the date it loses its Dedicated Chevrolet Flooring
7 or its total amount decreases below \$3 million, WCM agrees that its Dealer Agreement will
8 terminate voluntarily effective 30 days later (*i.e.*, 120 days after the loss of the Dedicated
9 Chevrolet Flooring or its decreased below \$3 million) pursuant to Article 14.2 of the Dealer
10 Agreement; upon such termination, WCM shall be entitled to termination assistance
11 pursuant to Article 15 of the Dealer Agreement with the exception of Article 15.3. WCM
12 and Owners agree not to protest said voluntary termination pursuant to section 3060 of the
13 Vehicle Code or to challenge said termination in any judicial or administrative forum and
14 hereby agree that they will have no legal right to do so. For purposes of this section and
15 section 2.5 below, a person or entity shall be deemed affiliated with WCM or Owner if it
16 meets the definition of Affiliate set forth in paragraph 3.5 below.⁸ (Confidential Joint
17 Exhibit 2b, Pages 2 and 3) (Referenced in part at Joint Exhibit 5, Pages 1 and 2, December
18 23, 2011 letter from Chris Shane, Zone Manager, General Motors LLC, to West Covina
19 Motors, Attention: Mr. Ziad Alhassen, President)

20 24. Section 2.4 of the Settlement Agreement provides:

21 If prior to the expiration of 90 days after WCM loses the Dedicated Chevrolet
22 Flooring or it decreases below \$3 million, WCM obtains a new Dedicated Chevrolet
23 Flooring commitment in at least that amount from a financing source acceptable to GM
24 under its normal business policies, it shall continue to be subject to the condition that it
25 maintain that Flooring commitment for the remainder of the period to and including
26 November 30, 2012. If WCM again loses its Dedicated Chevrolet Flooring or it again
27 decreases below \$3 million, the provisions of paragraph 2.3 above, this paragraph and
28 paragraphs 2.5 and 2.6 below will again apply.⁹ (Confidential Joint Exhibit 2b, Page 3)

29 25. Section 2.5 of the Settlement Agreement provides:

30 If prior to the expiration of 90 days after WCM loses the Dedicated Chevrolet
31 Flooring or its amount declines below \$3 million, WCM submits a fully-executed "buy-
32 sell" agreement and complete proposal for the transfer of the stock or assets of the
33 dealership to a person or entity not affiliated with WCM or Owner, GM will consider
34 WCM's proposal pursuant to its normal business policies and respond with either an
35 approval, a conditional approval or a rejection of the proposal within sixty days in
36 accordance with its normal business practices. If GM approves or conditionally approves
37 the proposal, and the "buy-sell" transaction closes within thirty days of the date that WCM
38 is notified of such approval, this Agreement shall be of no further force or effect. If GM
39 rejects the proposal, WCM agrees that its Dealer Agreement will terminate voluntarily
40 pursuant to Article 14.2 of the Dealer Agreement and that said termination will be effective
41 150 days after the date it loses its Dedicated Chevrolet Flooring or it decreases below \$3
42 million; upon such termination, WCM shall be entitled to termination assistance pursuant
43 to Article 15 of the Dealer Agreement with the exception of Article 15.3. WCM agrees not
44 to protest said voluntary termination pursuant to section 3060 of the Vehicle Code, but
45 WCM and Owner reserve the option of instituting litigation seeking damages but not

46 ⁸ It is noted that nowhere in the above provision is there any language that indicates there must be a notice from GM to
47 WCM and its counsel for the time periods to commence to run.

48 ⁹ See footnote 8.

1 injunctive relief concerning GM's decision pursuant to Vehicle Code §§ 11713.3(d) or (e)
2 or any other applicable law.¹⁰ (Confidential Joint Exhibit 2b, Page 3)

3 26. Section 2.6 of the Settlement Agreement provides:

4 If a GM-approved "buy-sell" transaction does not close within thirty days of GM's
5 notifying WCM of the approval, then WCM agrees that its Dealer Agreement will
6 terminate voluntarily pursuant to Article 14.2 of the Dealer Agreement and that said
7 termination will be effective 150 days after the date it loses its Dedicated Chevrolet
8 Flooring or it decreases below \$3 million; upon such termination, WCM shall be entitled to
9 termination assistance pursuant to Article 15 of the Dealer Agreement with the exception of
10 Article 15.3. WCM agrees not to protest said voluntary termination pursuant to section
11 3060 of the Vehicle Code or file any other litigation of any nature whatsoever concerning
12 termination of the Dealer Agreement.¹¹ (Confidential Joint Exhibit 2b, Page 3)

13 27. Section 4.6 of the Settlement Agreement provides:

14 Dispute Resolution. Subject to the following provisions, and only in the event the
15 Board issues the Confidential Stipulated Decision, GM and WCM agree to submit to the
16 Board for final and binding determination, upon either party's written notice, any and all
17 claims, disputes, and controversies between them arising under or relating to this
18 Agreement and its negotiation, execution, administration, modification, extension or
19 enforcement (collectively, "Claims"). Such determination shall be made by an
20 Administrative Law Judge appointed by the Board in accordance with its customary
21 procedures as they may exist from time to time. Under no circumstances shall any Claim
22 be combined with, joined with, or adjudicated in, a common proceeding with Claims
23 involving persons in addition to the Parties. GM and WCM agree that the dispute
24 resolution process outlined in this section shall be the exclusive mechanism for resolving
25 any Claims except for Claims pursuant to sections 2.8 and 3.3 hereof which may be
26 brought in any court of competent jurisdiction. Further, any claim by WCM or Owner
27 arising out of rejection or conditional approval by GM of a "buy-sell" proposal under
28 section 2.3, 2.5 or 2.6 may only be brought in a court of competent jurisdiction.
(Confidential Joint Exhibit 2b, Pages 6 and 7)

19 28. If all that was present as to when any time limits were to commence were the sections
20 quoted above, the language would have to be interpreted as advocated by GM, that is that the time
21 periods commence to run from the time the flooring was lost, which was stipulated to be on or about
22 December 1, 2011, and not from the time of the notices to WCM and its counsel.

23 29. However, the following provision in the Settlement Agreement provides as follows:

24 4.9 Notices. Any notice or other communication to be given to any of the
25 Parties hereto shall be delivered personally, or by United States registered or certified mail,
26 with signed receipt requested to the persons listed below at the addresses indicated. Any
27 period specified in this Agreement shall not commence until the first day after personal

28 ¹⁰ See footnote 8.

¹¹ See footnote 8.

1 delivery or the fifth business day after deposition in the United States mail, as the case may
2 be.

3 Notices to GM shall be sent to:

4 L. Joseph Lines, III
5 General Motors LLC
6 Mail Code 482-026-601
7 400 Renaissance Center
8 P.O. Box 400
9 Detroit, Michigan 48265-4000
10 With a copy by U.S. Mail or facsimile to:

11 Gregory R. Oxford, Esq.
12 Isaacs Clouse Crose & Oxford LLP
13 21515 Hawthorne Boulevard, Suite 950
14 Torrance, California 90503
15 (310) 316-1330 facsimile

16 Notice to WCM shall be sent to:

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

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

22 Michael J. Flanagan
23 Law Offices of Michael J. Flanagan
24 2277 Fair Oaks Boulevard, Suite 450
25 Sacramento, California 95825
26 (916) 646-9138 facsimile

27 (Confidential Joint Exhibit 2b, Pages 7 and 8)

28 30. There is no dispute that providing the required flooring or submission of a complete buy-
sell proposal were conditions that if not met within a stated time period would result in termination of the
franchise.

CONTENTIONS OF GM

31. After GM had received a November 30, 2011 notice from Ally (successor to GMAC) that
WCM's flooring had been suspended, GM sent WCM a "serious concern" letter dated December 23, 2011
concerning its loss of flooring with a concise reminder that section 2.3 of the Settlement Agreement
provided that WCM had agreed to voluntarily "terminate its Dealer Agreement if it did not either obtain
replacement Flooring or submit a complete 'buy-sell' proposal to GM within ninety days of the date
(December 1, 2011) that WCM lost its Flooring." (GM's Response to Protestant's Opening Brief, p. 3,

1 lines 13-23)

2 32. WCM did not obtain replacement flooring but submitted “a ‘buy-sell’ agreement to GM in
3 late January 2011” (sic 2012). GM determined the “buy-sell” agreement was incomplete and returned it
4 to WCM on March 19, 2012 because the agreement failed to contain an application from the buyer, a
5 signed lease or binding lease commitment, or sales and financial projections that GM normally requires of
6 the proposed purchaser’s application. (GM’s Response to Protestant’s Opening Brief, p. 3, lines 24-28; p.
7 4, lines 1-5; p. 7, lines 9-10, lines 21-28; p. 8, lines 1-2)

8 33. Because WCM failed to satisfy the two conditions of section 2.3 within 90 days after it
9 lost its flooring, its agreement to voluntarily terminate its Dealer Agreement became effective
10 automatically 30 days after the 90-day period expired. On March 22, 2012, GM sent WCM notice of the
11 mechanics of termination setting April 3, 2012 as the administrative termination date. (GM’s Response to
12 Protestant’s Opening Brief, p. 4, lines 6-13)

13 34. GM argues that section 2.3 of the Settlement Agreement is self-executing and did not
14 require GM to provide a redundant notice to WCM about its loss of flooring and the event that triggered
15 the running of the 90-day period was the loss of flooring and not any notice from GM. The fact that GM
16 did not send a copy of the notice of WCM’s loss of flooring and the consequences thereof to WCM’s
17 counsel was not relevant. Section 2.3 on its face did not require GM to provide any notice to WCM, let
18 alone to its counsel. (GM’s Response to Protestant’s Opening Brief, p. 6, lines 17-24; p. 7, lines 1-2; p. 8,
19 lines 25-28 and p. 9, lines 1-2)

20 35. GM argues further that because section 2.3 is self-executing and does not require GM to
21 give any notice, section 4.9 does not apply. The first sentence of section 4.9, any notice or
22 communication “to be given” plainly refers to a notice of communication that the Settlement Agreement
23 *requires* “to be given.” Sections 2.5 and 2.7 require a response from GM and notice to be given by GM to
24 WCM of the actions covered by those provisions. Therefore, while section 4.9 would apply to these
25 sections, it does not apply to section 2.3 because section 2.3 does not require any notice. (GM’s Response
26 to Protestant’s Opening Brief, p. 10, lines 1-23)

27 36. While GM was not required to provide notice to WCM of its loss of Dedicated Chevrolet
28 Flooring, it provided a detailed statement in its letter of December 23, 2011 of the application of the

1 provisions in section 2.3 of the Settlement Agreement, specifically stating, “*Under the Decision [the*
2 *Board Order], the December 1, 2011 loss of the dealership’s \$3 million dedicated floor plan line of credit*
3 *which it agreed to maintain for Chevrolet until November 30, 2012 (‘Dedicated Floor plan’) triggered a*
4 *ninety day period within which the dealership must either (1) reestablish the lost Dedicated Floor plan*
5 *with a financial institution acceptable to GM or (2) submit a fully executed agreement to sell the*
6 *dealership or its assets to an unaffiliated third party along with a complete ‘buy-sell’ proposal for GM’s*
7 *review. If neither of these conditions is satisfied at the end of 90 days, i.e., by February 28, 2012, the*
8 *Decision provides for termination of the Dealer Agreement effective thirty days later, i.e., March 30,*
9 *2012....”* (Emphasis added by Protestant.) Therefore, while WCM received actual notice that was not
10 required by section 2.3, the fact that GM did not notice WCM’s counsel with a copy of the letter
11 “somehow ‘tolls’ the ninety-day period within which WCM was required to satisfy conditions (a) or (b)
12 of section 2.3 finds no support in the language of the Settlement Agreement and, simply put, makes no
13 sense.” (GM’s Response to Protestant’s Opening Brief, p. 11, lines 6-23)

14 37. Therefore, “GM respectfully urges that the Board reject WCM’s challenge to the voluntary
15 termination of its Dealer Agreement and confirm the termination pursuant to section 2.3 of the Settlement
16 Agreement” and the Board Order. (GM’s Response to Protestant’s Opening Brief, p. 15, lines 11-14)

17 CONTENTIONS OF WCM

18 38. WCM argues that it lost its flooring source in December 2011. WCM received a letter
19 from Chris Shane, GM Zone Manager, dated December 23, 2011 notifying WCM that pursuant to the
20 Settlement Agreement it would have 90 days “to either reestablish adequate flooring or submit a fully
21 executed buy-sell agreement and complete ‘buy-sell’ proposal for GM’s review.” WCM’s counsel was
22 not copied on this correspondence and did not receive notice of the purported triggering of the 90-day
23 period. (Protestant’s Opening Brief, p. 2, lines 4-9)

24 39. WCM executed a buy-sell agreement for the sale of its GM franchise on January 26, 2012.
25 On March 19, 2012, “GM notified [WCM] that it was unable to consent to the proposed transfer of
26 Protestant’s franchise because GM had not received the required information necessary to evaluate the
27 purchase agreement.” WCM’s counsel was not copied on this correspondence. (Protestant’s Opening
28 Brief, p. 2, lines 16-19)

1 40. On March 22, 2012, GM sent notice to WCM that pursuant to the terms of the Settlement
2 Agreement its GM franchise would be terminated on April 3, 2012. Protestant's counsel received a copy
3 of this communication. This was the first opportunity for Protestant's counsel to advise Protestant of its
4 rights under the Settlement Agreement. (Protestant's Opening Brief, p. 2, lines 20-24)

5 41. On April 2, 2012, counsel for Protestant invoked the provisions of section 4.6 of the
6 Settlement Agreement and requested that the Board exercise its continuing jurisdiction to resolve the
7 parties' dispute. (Protestant's Opening Brief, p. 2, lines 25-27)

8 42. WCM alleges that pursuant to section 4.9 of the Settlement Agreement, "GM was required
9 to provide written notice to Protestant's counsel before 'any period specified in this Agreement' would
10 begin to run. Because GM failed to provide Protestant's counsel notice of the *purported commencement*
11 *of the ninety day period* until March 22, 2012, the ninety day period did not begin to run until March 22,
12 at the earliest. Moreover, GM is currently refusing to accept a buy-sell package for consideration."
13 Accordingly, the 90-day period must be tolled until the matter is resolved by the Board. (Italics
14 added; Protestant's Opening Brief, p. 2, line 27 and p. 3, lines 1-7)

15 43. While WCM agrees it lost its Dedicated Chevrolet Flooring , and while section 2.3 of the
16 Agreement provides that WCM submit a buy-sell package acceptable to GM during the subsequent 90-
17 day period, section 4.9 requires that "Any notice or other communication to be given to any of the Parties
18 hereto shall be delivered personally, or by United States registered or certified mail, with signed receipt
19 requested to the persons listed below at the addresses indicated. *Any period specified in this Agreement*
20 *shall not commence until* the first day after personal delivery or the fifth business day after deposition in
21 the United States mail, as the case may be." (Emphasis added by Protestant). Notice shall be given to
22 WCM with a copy by U.S. Mail or facsimile to Michael J. Flanagan. (Protestant's Opening Brief, p. 4,
23 lines 1-28)

24 44. Under section 4.6 of the Settlement Agreement, the Board has continuing but limited
25 jurisdiction to hear and resolve disputes under the terms of the Agreement. Matters that go beyond the
26 scope of the Agreement are irrelevant. (Protestant's Opening Brief, p. 5, lines 7-25)

27 45. In conclusion, GM was required to give notice to Protestant's counsel "prior to the
28 commencement of the ninety day time period in which Protestant could either reestablish an acceptable

1 flooring source or submit a buy-sell application...GM failed to provide the required notice to counsel,
2 thus the ninety day period never began to run and Protestant's GM franchise is not subject to voluntary
3 termination at this time. Pursuant to terms of the Agreement, GM must now accept the proposed buy-sell
4 package for due consideration." (Protestant's Opening Brief, p. 7, lines 13-18)

5 **ISSUE PRESENTED**

6 46. The issues presented are whether there has been compliance with the specified conditions
7 of the Board Order concluding the protest including the following:

8 a. Whether GM was required to give notice to WCM and its counsel before the 90-day time
9 period to obtain replacement flooring or submit a complete buy-sell proposal would begin to run?

10 (1) If so, when did the 90-day time period to obtain alternative financing or submit a complete
11 buy-sell proposal begin to run?

12 (2) When did the 90-day time period expire?

13 b. Was notice to Protestant alone that, absent alternative flooring or the submission of an
14 appropriate buy-sell package, the loss of floor plan financing would result in the automatic or self-
15 executing voluntary termination of Protestant's Dealer Agreement?

16 c. Does section 4.9 of the Settlement Agreement mean that the 90-day period would begin to
17 run only when notice was given by GM to Protestant and its named counsel, Mr. Flanagan?

18 d. Is the 90-day period suspended or tolled while the matter is before the Board?

19 **SUMMARY OF WITNESSES' TESTIMONY AT HEARING**¹²

20 **TESTIMONY OF GENERAL MOTORS' WITNESS**

21 **Testimony under Direct Examination:**

22 47. In response to a question posed by Respondent's counsel about GM's concern about
23 WCM's ability to maintain Dedicated Chevrolet Flooring that led to the Settlement Agreement, Dale
24 Sullivan, GM's Regional Director of Business Operations for the Western Region, testified that because
25 the dealership had lost its flooring a couple of times leading to GM being out of business in that location,
26 GM wanted to make sure that its interests were protected should WCM lose its flooring again. (RT

27 _____
28 ¹² This Summary does not refer to all exhibits in the record, nor does it include all matters testified to by the witnesses.

1 68:19-25, 69:1-2)

2 48. Mr. Sullivan testified that flooring is basically a dealer getting and maintaining an
3 adequate line of credit so that when GM ships a vehicle to a dealer, GM will draft on the credit line and
4 pay itself. (RT 61:4-23)

5 49. Mr. Sullivan testified that Section 10.2, 6.4.2, and Article 9 of the Dealer Agreement
6 require the dealer to maintain adequate flooring, maintain performance requirements in terms of sales, and
7 to promote the sales of GM's vehicles. The loss of the financing means the dealer will not have vehicles
8 to sell and there will be no sales performance to measure. (RT 62:7-10, 63:3-25, 64:1-10)

9 50. Mr. Sullivan testified that Joint Exhibit 5, the December 23, 2011 communication by Chris
10 Shane was a standard form letter sent to dealers who lose their flooring. GM was concerned because this
11 dealership had lost its flooring and was out of business a couple of times. If a GM dealer does not have
12 cars on WCM's lot, then it cannot sell GM vehicles to its customers. The Settlement Agreement was
13 executed so GM's brand was represented by WCM. (RT 67:19-25; 68:1-25, 69:1-25)

14 51. Mr. Sullivan further testified that GM never made a decision on the buy-sell agreement
15 because it never received a complete buy-sell agreement from the Protestant. Three things must be
16 presented: (1) a sales forecast and a profit forecast from the prospective dealer. GM "Never got that." (2)
17 GM usually looks for the source of funds. Mr. Sullivan acknowledged that Mr. Hidalgo is a GM dealer
18 "but every time a dealer buys another dealership, it takes more money. So you (sic) got to make sure they
19 have source of funds to run the dealership." (3) And probably the most important, GM was "really
20 worried about ... a binding lease agreement for a facility to do business. And we [did not] get any of that.
21 We [did not] get any of that in two days, 30 days, or 60 days. We did not get any of that." (RT 70:18-25,
22 71:1-6)

23 **Testimony Under Cross-examination:**

24 52. Protestant's counsel referenced page 20 of Joint Exhibit 6 as to the following language,
25 "Purchaser and Hassen Imports Partnership, a California limited partnership ("Landlord") shall have
26 entered into a lease for the property commonly known as 1932 East Garvey Avenue South, West Covina,
27 California." He then asked Mr. Sullivan the following question, "But in any case, this—is this in your
28 judgment a commitment to a lease with conditions as you read it? Mr. Sullivan's response was, "Yes".

1 (RT 83:10-25, 84:1-16)

2 *Santa Monica Group's Witnesses' Testimony*

3 53. Protestant did not offer any witness testimony.

4 **FINDINGS OF FACT**¹³

5 54. GM returned the "buy-sell" agreement because it was incomplete. As indicated above,
6 there was no sales and profit forecast, no information as to the source of funds for the new dealer, and no
7 binding lease agreement. This finding is based on the uncontroverted testimony of Dale Sullivan. (RT
8 70:18-25, 71:1-6)

9 55. Protestant's counsel, Michael J. Flanagan, was first notified of GM's intended action on
10 March 22, 2012 when he received a copy of a letter from GM to Protestant notifying Protestant that its
11 GM franchise would be terminated on April 3, 2012. This finding is based on Protestant's Opening
12 Brief and the absence of a specific rebuttal by Respondent as to the receipt date as contended by
13 Protestant. Respondent's position was that no notice to Protestant or Protestant's counsel was required
14 as section 2.3 is automatic or self-executing. (GM's Response to Protestant's Opening Brief, p. 6, lines
15 17-24; p. 7, lines 1-2; p. 8, lines 25-28 and p. 9, lines 1-2; Protestant's Opening Brief, p. 2, lines 20-21)

16 56. Although GM received the buy-sell proposal in late January 2012, it was returned to
17 WCM on March 19, 2012, almost three weeks after February 28, 2012, which is the date GM had
18 calculated as the cut-off date for compliance with the conditions in the Board's Order. Thereafter, GM
19 sent a follow-up notice on March 22, 2012 to Mr. Alhassen with a copy to Mr. Alhassen's counsel,
20 Michael J. Flanagan, that WCM's GM franchise would be terminated on April 3, 2012.

21 57. Respondent's counsel has argued that the two conditions in section 2.3 of the Settlement
22 Agreement were sufficient notice to the Protestant to effectuate the automatic or self-executing voluntary
23 termination of Protestant's Dealer Agreement. However, Protestant's counsel argued that section 4.9 of
24 the Confidential Agreement requires notice to it before operation of the 90-day period set forth in section
25 2.3 began to run.

26
27
28 ¹³ References herein to testimony, exhibits or other parts of the record are examples of evidence relied upon to reach a finding and are not intended to be all-inclusive.

1 58. Protestant's counsel's argument was most persuasive and it is accordingly found that the
2 consequence of the Protestant's loss of its Dedicated Chevrolet Flooring was a critical stage in terms of
3 the Settlement Agreement. Most convincingly, Protestant's counsel argued that it was at this stage that
4 Protestant needed advice as to its rights under the Settlement Agreement. The relationship of the
5 Protestant and its counsel was critical in terms of providing legal advice on how to proceed. Accordingly,
6 it is found that the voluntary termination provision in section 2.3 of the Settlement Agreement is not
7 automatic or self-executing in the absence of notice. Notice was not provided to Protestant's counsel
8 bringing into consideration the application of section 4.9 of the Settlement Agreement.

9 59. Section 4.9 specifically states, "Any notice or **communication** to be given to any of the
10 Parties hereto shall be delivered personally, or by United States registered or certified mail, with signed
11 receipt requested to the **persons listed below** at the addresses indicated. **Any period specified in this**
12 **Agreement shall not commence until the first day after personal delivery or the fifth business day**
13 **after deposition** in the United States mail, as the case may be." Persons listed below included, "**Michael**
14 **J. Flanagan.**" (Emphasis added). Section 4.9 references any communication to the parties must be
15 delivered personally or mailed to the persons listed below that included Mr. Flanagan as Mr. Alhassen's
16 counsel. The only communication that Mr. Flanagan received was the March 22, 2012 notice. Under the
17 provisions of section 4.9, the first day that the 90-day period could begin to run was March 22, 2012, if
18 the communication was delivered personally to Mr. Flanagan, or, if it was mailed to Mr. Flanagan, the 90-
19 day period would begin to run five days after the letter was deposited in the U.S. Mail. Accordingly, the
20 notices to Mr. Alhassen dated December 23, 2011 and March 19, 2012, because they failed to copy Mr.
21 Flanagan, were not effective to begin the running of the 90-day time period set forth in sections 2.3, 2.4
22 and 2.5. Therefore, because effective notice as to when the 90 days would begin to run, as required by
23 section 4.9, was not provided to Mr. Flanagan until March 22, 2012, the 90-day period under section 2.3
24 did not begin to run until that date, or perhaps later.

25 60. As stated above, section 4.9 of the Settlement Agreement states that any period specified in
26 this Agreement shall not commence until the first day after personal delivery has been made or 5 days
27 after mailing to the named persons. Therefore, pursuant to the above cited authorities, notice or
28 communication of the intended action by GM to terminate Protestant's franchise did not occur until

1 March 22, 2012 and the 90-day period set forth in sections 2.3, 2.4 and 2.5 did not begin to run until
2 March 23, 2012 (or perhaps later). Furthermore, the time within which the alternative conditions were
3 required to occur was suspended by the timely filing of Protestant's April 2, 2012, request that the Board
4 exercise its continuing jurisdiction to resolve the parties' dispute pursuant to section 4.6.

5 61. The 90-day time period for the occurrence of the conditions should not be tolled for the
6 time between the notice to Mr. Flanagan (perhaps March 23, 2012) and April 2, 2012, the date WCM
7 sought the Board's assistance in resolving this dispute. Therefore, assuming that March 23, 2012 is the
8 relevant date, 10 days of the 90-day period for Protestant to comply with the conditions in sections 2.3,
9 2.4 and 2.5 have elapsed leaving 80 days remaining to either provide written evidence of a commitment
10 for replacement of Dedicated Chevrolet Flooring in the amount of at least \$3 million from GMAC or
11 another GM approved financial institution or present GM with a fully-executed "buy-sell" agreement
12 and complete proposal for the transfer of stock or assets of WCM to a person or entity not affiliated to
13 WCM or its owner.

14 DETERMINATION OF ISSUES

15 62. Section 4.9 of the Settlement Agreement expressly applies to "Any period specified..." in
16 the Settlement Agreement and states that such time periods "... shall not commence until the first day
17 after personal delivery or the fifth business day after deposition in the United States mail, as the case may
18 be."

19 63. In addition to agreeing upon when the times would commence, the parties also specifically
20 agreed upon the persons to whom the notices or communications must be directed, which for Protestant
21 was Mr. Alhassen as well as Protestant's counsel identified specifically as Mr. Flanagan.

22 64. GM was required to give notice to WCM and its counsel before the 90-day time period to
23 obtain replacement flooring or submit a complete buy-sell proposal commenced.

24 65. The 90-day time period to obtain alternative financing or submit a complete buy-sell
25 proposal began to run at the earliest on March 22, 2012, when WCM's counsel, Mr. Flanagan, first
26 received a communication from GM regarding the expiration of the time limits.

27 66. The 90-day period for WCM to comply with the conditions in sections 2.3, 2.4 and 2.5 of
28 the Settlement Agreement has not expired.

1 67. The notice from GM to WCM that absent alternative flooring or the submission of a
2 complete buy-sell package would result in the automatic or self-executing voluntary termination of its
3 GM Dealer Agreement but only if the time period specified in the Settlement Agreement had commenced
4 to run and had expired.

5 68. However, the time period had not expired as the 90-day period commences to run only
6 when notice is given by GM to Protestant and its named counsel, Mr. Flanagan. This did not occur until
7 March 22, 2012, at the earliest.

8 69. The 90-day period in section 2.3 was tolled effective April 2, 2012.

9 70. The 90-day period should be reduced by the 10 days that elapsed between March 22, 2012
10 (the earliest date Mr. Flanagan received the communication from GM as stated in section 4.9) and April 2,
11 2012, the time Protestant sought relief before the Board. Therefore, there remains 80 days for Protestant
12 to either: (a) provide written evidence of a commitment for replacement Dedicated Chevrolet Flooring in
13 amount of at least \$3 million from GMAC or another GM-approved financial institution or (b) present
14 GM with a fully-executed "buy-sell" agreement and complete proposal for the transfer of the stock or
15 assets of WCM to a person or entity not affiliated with WCM or its owner.

16 71. Accordingly, it is determined that while the Protestant lost its \$3 million Dedicated
17 Chevrolet Flooring and the 90-day period in the terms and conditions of the Settlement Agreement were
18 imposed by GM, GM's failure to provide earlier notice to Protestant's counsel as required by section 4.9
19 of the Settlement Agreement, results in a finding that WCM has 80 days to meet the conditions set forth
20 in sections 2.3, 2.4 and 2.5 of the Settlement Agreement.

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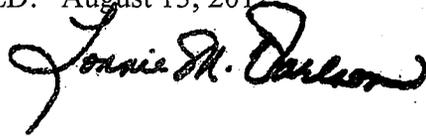
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1 PROPOSED DECISION

2 After consideration of the pleadings, exhibits, oral arguments and the transcript of this
3 proceeding, IT IS HEREBY ORDERED THAT Protestant's franchise shall continue in existence pending
4 the timely occurrence of one of the two alternatives available to it, that are: (1) Obtaining floor-plan
5 financing as required by the Settlement Agreement; or, (2) The submission by WCM to GM of the
6 complete buy-sell package as required by the Settlement Agreement. If neither of these alternatives
7 occur, Protestant's franchise shall terminate on the 81st day after the date of mailing to the parties and
8 their counsel by U.S. Postal Service Certified Mail a copy of the Board's Order adopting this Proposed
9 Decision.

10
11 I hereby submit the foregoing which constitutes my
12 Proposed Decision in the above-entitled matter, as
13 the result of a hearing before me, and I recommend
14 this Proposed Decision be adopted as the decision of
15 the New Motor Vehicle Board.

16 DATED: August 13, 2012

17 By: 
18 _____
19 LONNIE M. CARLSON
20 Administrative Law Judge
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22
23
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25
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27 George Valverde, Director, DMV
28 Mary Garcia, Branch Chief,
Occupational Licensing, DMV