

1 NEW MOTOR VEHICLE BOARD
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6 STATE OF CALIFORNIA
7 NEW MOTOR VEHICLE BOARD
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9 In the Matter of the Protest of
10 MCCONNELL CHEVROLET BUICK, INC.,
11 Protestant,
12 v.
13 GENERAL MOTORS, LLC,
14 Respondent.
15

Protest Nos. PR-2369-13 and PR-2370-13

PROPOSED DECISION

16
17 **PROCEDURAL BACKGROUND**

18 **Statement of the Case**

19 1. By letter dated June 18, 2013, General Motors, LLC gave notice to McConnell Chevrolet
20 Buick, Inc. pursuant to California Vehicle Code section 3060¹ of its intention to terminate the Chevrolet
21 and Buick franchises of McConnell Chevrolet Buick, Inc.² In error, this letter referred to both protestant's
22 line-makes, Chevrolet and Buick. On June 25, 2013, General Motors, LLC corrected the mistake and
23 mailed two separate termination letters to protestant, Exhibit 4 (Buick) and Exhibit 5 (Chevrolet), both of
24 which contained the same substantive language as the earlier letter. (RT 49:21-51:17)

25 2. The New Motor Vehicle Board (hereinafter sometimes "Board") received the initial
26 termination notice on June 19, 2013.

27
28 ¹ Unless otherwise indicated, all statutory references are to the California Vehicle Code.

² Such notice is required whenever a franchisor seeks to terminate an existing motor vehicle franchise. [Section 3060(a)]

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

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

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

8 **PROTESTANT'S CONTENTIONS**

9 16. No material challenges were made by protestant to respondent's contentions.⁸

10 **RESPONDENT'S CONTENTIONS**

11 17. In the Spring of 2013, McConnell "ceased to conduct customary sales and service
12 operations". On March 20, it had lost its floorplan financing for both line-makes and therefore its ability
13 to order inventory from GM. It had made few sales of new vehicles even before losing its wholesale
14 financing.

15 18. The last warranty work performed by McConnell was on March 26. On seven
16 consecutive business days in May (excluding Sunday), when GM representatives visited the dealership,
17 only routine "lube, oil and filter" ("LOF's") changes were being performed and warranty work was
18 being referred to other dealers. On several days, no technicians were present at the dealership.

19 19. On or about August 21, 2013 (after the filing of the protests), protestant was served with
20 an eviction notice regarding the dealership premises.

21 **FINDINGS OF FACT⁹**

22 **Preliminary Findings**

23 20. Effective June 14, 2012, McConnell and GM executed a "Dealer Sales and Service
24 Agreement" ("Dealer Agreement") authorizing McConnell to sell "Chevrolet Passenger Vehicles and
25

26 ⁸ See footnote 4, *supra*.

27 ⁹ 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.

28 Findings of Fact are organized under topical headings for readability only and are not to be considered relative to only the
particular topic under which they appear, but rather may apply to any of the "existing circumstances" or "good cause" factors
of section 3061.

1 Light Duty Trucks [and]...Buick Motor Vehicles” at its dealership on Highway 99 E in Gridley. The
2 Agreement would “...expire October 31, 2015, unless earlier terminated”. Michael A. McConnell was
3 stated to be “Dealer Operator and Dealer Owner” and holder of 100% of the ownership interest of
4 protestant. (Exhs 1:0857, 2, 3, 102; RT 18:12-20:3; 21:6-21)

5 21. The Dealer Agreement required the dealer to “sell and promote ... [GM motor vehicles,
6 parts and accessories]” and to “maintain an adequate staff of trained sales personnel” to do so. (Exh
7 1:0866, 0900; RT 21:22-22:7) The dealer promised to provide “...quality service to [GM] owners” and
8 to maintain “an adequate service and parts organization”. (Exh 1:0868; RT 22:8-16)

9 22. The dealer was also required by the Dealer Agreement to have and maintain a wholesale
10 floorplan “...available to finance the [d]ealer’s purchase of new vehicles...”. (Exh 1:0877; RT 22:17-
11 23:14) Floor plan financing is a third party line of credit which a dealership obtains to purchase vehicles
12 at wholesale from the manufacturer for retail sale to customers and, without such financing, it is difficult
13 for a dealership to purchase inventory. (RT 22:25-23:14)

14 23. Article 14 of the Dealer Agreement (“Termination of Agreement”) provided, among
15 other things, the following:

16 “If General Motors learns that any of the following has occurred, it may terminate this
17 Agreement by giving Dealer written notice of termination. Termination will be effective
18 on the date specified in the notice.”

18

19 “14.5.3 Failure of Dealer to conduct customary sales and service operations during
20 customary business hours for seven consecutive business days.” (Exh 1:0886-0887; RT
21 23:15-24:7)

22 24. On February 7, 2013, McConnell placed its final order for a vehicle from GM. (Exh 13;
23 RT 41:21-42:2)

24 25. “ALLY [Financial], the dealers financing source” notified GM that protestant’s
25 wholesale floor plan had been suspended, effective March 20, 2013. The suspension related to both
26 line-makes, Chevrolet and Buick. (Exh 10; RT 27:6-17, 70:12-71:3)

27 26. On March 26, 2013 and May 8, 2013, GM sent letters to protestant advising that its loss
28 of floorplan financing subjected its franchises to termination under the Dealer Agreement. McConnell
never did reestablish a wholesale floorplan line of credit. (Exhs 11, 12; RT 27:18-29:16)

1 27. In April, 2013, Saul Escalante visited the dealership and saw that no service personnel
2 were on hand and that customers coming in for service were being referred to other dealers. General
3 Manager Bill Marker told Mr. Escalante that the dealership could not hire service staff because of
4 financial difficulties. (RT 24:16-26:9)

5 28. Between May 2, 2013 and May 10, 2013, GM representatives made daily (except
6 Sunday, May 5) visits to protestant's dealership (Exh 6:0038-0040, 1113-1116; RT 30:17-23, 34:5-20),
7 as follows:

8 A. On May 2, 2013, Saul Escalante observed no regular day-to-day business activities being
9 conducted. The Sales and Service Managers were loitering in the office with no assigned tasks. The
10 dealership was not scheduling Chevrolet or Buick vehicle service (warranty or customer pay) and
11 instead was referring service customers to other dealerships. No service technicians were present and
12 the service department appeared closed. No vehicle sales activity was observed. (Exh 6:0038, 1115)

13 B. On May 3, 2013, Saul Escalante observed that the Sales and Service Managers were just
14 "hanging out", as before. Service customers again were being referred to other dealerships. No service
15 technicians were present and the service department appeared closed. Saul Escalante advised General
16 Manager Bill Marker that it was important to make sure that the dealership was servicing all warranty
17 types of repair as outlined in the Dealer Agreement. Bill Marker responded that, as he had previously
18 advised Mr. Escalante, the dealership had "limited financial resources" to operate the dealership as
19 expected by GM. (Exh 6:0038, 1115; RT 37:7-14)

20 C. On Saturday, May 4, 2013, Saul Escalante telephoned the dealership several times
21 throughout the day. At that time, protestant's website stated that the dealership was open Saturdays until
22 6 PM, but closed on Sundays. None of these calls were answered. (Exhs 6:0038, 1115, 7; RT 24:8-15,
23 40:11-22)

24 D. On May 6, 2013, GM District Manager Leonard Deprez visited the dealership. He
25 observed no business activity, although two employees in the service department were talking on cell
26 phones. Mr. Deprez asked about getting an oil change and was referred to Wittmeier Chevrolet in
27 Chico. He was further advised that the dealership was going through an ownership change and was
28 unable to perform any service work. (Exh 6:0038, 1115; Exh 8; RT 35:6-16)

1 E. On May 7, 2013, Saul Escalante visited the dealership. An employee (Pat) was in the
2 service department but said that they were not yet taking appointments; no service technicians were
3 present. Michael McConnell said that the dealership was planning to hire a new service technician who
4 would begin work the next day. (Exh 6:0038-0039, 1115)

5 F. On May 8, 2013, Saul Escalante observed that no service technician was present. He was
6 told that the new technician's start date had been delayed by a day. General Manager Bill Marker said
7 that the dealership would be taking appointments for minor jobs and, "a back-up tech...can come in if
8 anything major is requested...[but he] did not want to jeopardize [his] unemployment payments...".
9 (Exh 6:0039, 1115)

10 G. On May 9, 2013, GM District Manager George Kovacs observed that the service
11 department "looked like a ghost town". An unnamed person at the dealership told Mr. Kovacs that the
12 technician had left for lunch, and referred him to Wheeler Chevrolet and Dow Lewis GMC for an
13 intermittent engine light. (Exh 6:0039, 1115; Exh 9; RT 36:5-14)

14 H. Saul Escalante visited the dealership on May 10, 2013; Michael McConnell and Bill
15 Marker were present. Saul Escalante reported the following:

16 (1) He observed one service technician on duty (Chris). However, the only available
17 tools in the service area were for routine LOF's---he did not see any tools of the sort required for
18 warranty and other non-routine repairs (Exh 6:0039-0058, 1115-1116);

19 (2) Michael McConnell and Bill Marker told him that service work was limited to
20 LOF changes and tire rotations and that none of the dealership's former technicians could be
21 called back to work until the dealership obtained further funding. (Exh 6:0039-0058, 1115-
22 1116)

23 (3) In reviewing the dealership's service records, he determined that the last warranty
24 repair had been performed on March 26, 2013 (a fact which he confirmed with GM's Global
25 Warranty Management database which tracks warranty claims submitted by GM dealers) and
26 that other than LOF changes, the last dealership repair order was dated April 1, 2013. (Exhs
27 6:0058, 14; RT 31:11-32:16)

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1 28. On August 6, 2013, Saul Escalante visited the dealership, which appeared to be vacant.
2 No vehicle inventory was parked outside the dealership building where formerly GM trucks and Buicks
3 had been displayed. (Exh 20:0413-0417; RT 51:21-24, 52:17-53:6)

4 29. On August 22, 2013, Saul Escalante visited the dealership, finding an eviction notice
5 posted the day before by the Butte County Sheriff's Office. The building was locked and no vehicles
6 were on the lot. (Exh 21:0421-0424; RT 53:20-23, 60:14-23, 61:13-22, 62:13-23)

7 **Findings Relating to Amount of Business Transacted by the Franchisee, as Compared to the**
8 **Business Available to the Franchisee [Section 3061(a)]**

9 30. McConnell has sold no new vehicles since March 6, 2013 and has done no warranty
10 service work since March 26, 2013. (Exhs 6:0058, 13; RT 31:11-32:16, 43:22-44:10)

11 31. During the first three months of 2013, McConnell sold only 5 Chevrolet trucks and one
12 Buick car, a sales performance considered "unsatisfactory" by GM.¹⁰ (Exh 19:0979; RT 44:15-46:10)

13 **Findings Relating to Investment Necessarily Made and Obligations Incurred by the**
14 **Franchisee to Perform Its Part of the Franchise [Section 3061(b)]**

15 32. McConnell was initially appointed a GM dealer on September 7, 1994 when it was
16 "Gridley Country Chevrolet, Olds, Pontiac, Buick & Geo, Inc.". (Exhs 19:0980; 101)

17 33. In June, 2012 (when the Dealer Agreement was signed) the value of Michael
18 McConnell's 100% ownership interest in the dealership was stated to be \$533,985. (Exh 2)

19 34. At the time the current Dealer Agreement was signed, McConnell was leasing its
20 premises, devoted exclusively to the General Motors dealership; a large freestanding sign identified
21 McConnell as a Chevrolet and Buick dealer. The total building area was 25,494 square feet, with room
22 to display five new vehicles as well as a total of 23 "productive service" (mechanical and body) stalls.
23 The lot was an additional 86,890 square feet, with 65 new vehicle display stalls, 70 used vehicle display
24 stalls, 76 new vehicle storage stalls, plus 67 other parking spaces. The total dealership size was 112,384
25 square feet. (Exhs 3:0914-0915, 9:0014)

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28 ¹⁰ There was a slight discrepancy in the figures compared with Exhibit 13, which stated that 6 Chevrolets and no Buicks were sold; although the total was the same, apparently the Buick sale was retracted for an unknown reason. (RT 47:15-48:23)

1 **Findings Relating to the Permanency of the Investment [Section 3061(c)]**

2 35. After the filing of the protest, McConnell was evicted from the dealership premises. (Exh
3 21) No evidence was presented that McConnell is currently in business. (RT 62:17-20)

4 **Findings Relating to Whether it is Injurious or Beneficial to the Public Welfare for the Franchise**
5 **to be Modified or Replaced or the Business of the Franchisee Disrupted [Section 3061(d)]**

6 36. It would be beneficial to the public welfare to terminate protestant's Chevrolet and Buick
7 franchises. There was no evidence presented that McConnell is providing any services to the public as a
8 General Motors dealership.

9 **Findings Relating to Whether the Franchisee has Adequate Motor Vehicle Sales and Service**
10 **Facilities, Equipment, Vehicle Parts, and Qualified Service Personnel to Reasonably Provide for**
11 **the Needs of the Consumers for the Motor Vehicles Handled by the Franchisee and has been and**
12 **is Rendering Adequate Services to the Public [Section 3061(e)]**

13 37. No evidence was presented that McConnell currently has any sales and service facilities,
14 new vehicle inventory, equipment, vehicle parts, sales personnel or qualified service technicians to
15 provide for the needs of its GM customers.

16 38. Between May 2 and May 10, 2013, GM representatives observed "no activity to speak of
17 in the service department" and the only service tools available were those to perform LOF's and tire
18 rotations. (Exh 6:0038-0039, 1115-1116; RT 36:22-37:6)

19 39. Moreover, McConnell has not been rendering adequate services to the public since the
20 Spring of 2013. It lost its wholesale flooring plan on March 20 (which foreclosed it from making
21 purchases of new inventory from GM) and, in the first several months of 2013, has only sold six
22 Chevrolets and no Buicks. It has performed no warranty service for its customers since March 26.
23 Between May 2 and May 10, during the visits to the dealership by GM personnel, a technician was
24 observed at the dealership on only one day, and the GM representatives noted the lack of tools to
25 perform repairs and service other than routine LOF's. (Exhs 6:0038-0039, 1115-1116, 10, 13, 14; RT
26 27:6-17, 41:21-42:271)

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1 **Findings Relating to Whether the Franchisee Fails to Fulfill the Warranty Obligations of the**
2 **Franchisor to be Performed by the Franchisee [Section 3061(f)]**

3 40. Since at least March 26, 2013, McConnell has not fulfilled a warranty obligation, and
4 there is no evidence that it has the ability (in terms of a service facility, technicians, equipment and
5 parts) to service and repair vehicles under warranty. (Exh 14; RT 43:22-44:10, 91:10-92:4)

6 **Findings Relating to the Extent of Franchisee's Failure to Comply with**
7 **the Terms of the Franchise [Section 3061(g)]**

8 41. Effective March 20, 2013, when ALLY suspended its wholesale flooring line for both the
9 Chevrolet and Buick line-makes, McConnell was in violation of Article 13.1.11 of the Dealer
10 Agreement requiring it to maintain a line of credit, a "material breach" under the agreement. (Exh
11 1:0877, 0884-0885)

12 42. Article 14.5.3 of the Dealer Agreement provides that GM may terminate the agreement if
13 the dealer fails "...to conduct customary sales and service operations during customary business hours
14 for seven consecutive business days." (Exh 1:0886-0887) During the seven business days between May
15 2 and May 10, 2013, protestant's business operation was moribund and fell far short of "customary sales
16 and service operations" (RT 93:19-94:20), as follows:

17 Its service department only had the ability to perform routine LOF's and tire rotations and, for
18 most of those days, no service technician was present and tools were limited to those used for LOF's.
19 (Previous technicians were said to have taken their tools with them.) No warranty work had been
20 performed since March 26, 2013. On two occasions, GM representatives were directed to other GM
21 dealerships for service. There was no activity in the dealership's parts room and the parts annex, which
22 contained "only miscellaneous/scattered parts" and was a "pretty barren shop". (Exhs 6:0038-0039, 14;
23 RT 43:22-44:10, 91:10-92:4)

24 A. McConnell last ordered a new vehicle for wholesale purchase from GM on February 7,
25 2013, and last sold a vehicle to a retail customer on March 6, 2013. (Exh 13)

26 B. On Saturday, May 4, 2013, no one answered the telephone at the dealership, even though
27 its website said it was open on Saturdays. (Exhs 6:0038, 1115, 7; RT 24:8-15, 40:11-22)

28 C. The dealership appeared closed because of lack of displayed inventory and customer

1 activity. (RT 93:19-94:20)

2 43. No evidence has been offered that protestant is conducting business at the present time.

3 **DETERMINATION OF ISSUES**

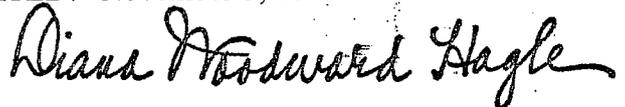
4 44. Respondent General Motors, LLC has sustained its burden of proof of establishing "good
5 cause" to terminate the Chevrolet and Buick franchises of McConnell Chevrolet Buick, Inc. [Vehicle
6 Code Sections 3061, 3066(b)]

7 **PROPOSED DECISION**

8 Based on the evidence presented and the findings herein, IT IS HEREBY ORDERED THAT the
9 Protests in *McConnell Chevrolet Buick, Inc. v. General Motors, LLC*, Protest Nos. PR-2369-13 and PR-
10 2370-13 are overruled.

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

17 DATED: November 6, 2013

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19 By: _____

20 DIANA WOODWARD HAGLE
21 Administrative Law Judge

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27 Jean Shiomoto, Director, DMV
28 Mary Garcia, Branch Chief,
Occupational Licensing, DMV