

1 GREGORY R. OXFORD (S.B. #62333)
2 ISAACS CLOUSE CROSE & OXFORD LLP
3 21515 Hawthorne Boulevard, Suite 950
4 Torrance, California 90503
5 goxford@icclawfirm.com
6 Telephone: (310) 316-1990
7 Facsimile: (310) 316-1330

8 Attorneys for Respondent
9 General Motors LLC

10 Of Counsel
11 BRIAN K. CULLIN
12 GENERAL MOTORS LLC
13 Mail Code 482-028-205
14 400 Renaissance Center
15 P.O. Box 400
16 Detroit, Michigan 48265-4000
17 Telephone: (313) 665-7494
18 Facsimile: (248) 267-4304

19 **STATE OF CALIFORNIA**
20 **NEW MOTOR VEHICLE BOARD**

21 In the Matter of the Protests of
22 MCCONNELL CHEVROLET BUICK,
23 INC.

24 Protestant,

25 v.

26 GENERAL MOTORS LLC,
27 Respondent.

28 Protest Nos.: PR 2369-13
PR 2370-13

**[PROPOSED] FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
DETERMINATION OF ISSUE
SUBMITTED BY RESPONDENT
GENERAL MOTORS LLC**

Hearing Date: October 22, 2013
Time: 10:00 a.m.
Honorable Diana Woodward Hagle

29 Respondent General Motors LLC respectfully proposes the following Findings of
30 Fact, Conclusions of Law and Determination of Issues based on the evidence to be
31 submitted at the hearing in this matter on October 22, 2013.

32 **FINDINGS OF FACT**

33 **I. THE PARTIES AND THEIR DEALER AGREEMENT**

34 1. Protestant McConnell Chevrolet Buick, Inc. formerly operated an authorized
35 Chevrolet and Buick dealership in Gridley, California pursuant to a General Motors

1 Dealer Sales and Service Agreement (“Dealer Agreement”) between Protestant and
2 Respondent General Motors LLC (“GM”). Exh. 1.

3 2. Pursuant to Article 2 of the Standard Provisions of the Dealer Agreement,
4 Protestant designated Michael A. McConnell as Dealer-Operator. Exh. 1, cover sheet
5 (-0857) and Standard Provisions, page 2 (-0862).

6 3. The Dealer Statement of Ownership annexed to the Dealer Agreement states
7 that Mr. McConnell owns 100 percent of Protestant’s outstanding stock. Exh. 2.

8 4. The Location and Premises Addendum of the Dealer Agreement authorizes
9 Protestant to conduct Dealership Operations at 1646 HWY 99-E, Gridley, California
10 (“Dealership Premises”). Exh. 3.

11 5. Article 5.1 of the Dealer Agreement obligates Protestant “to effectively,
12 ethically and lawfully sell and promote the purchase, lease and use of [GM] Products,”
13 including new Chevrolet and Buick vehicles, and to “maintain an adequate staff of trained
14 sales personnel.” Exh. 1, p. 6 (-0866, -0900).

15 6. Article 5.2.1 of the Dealer Agreement obligates Protestant “to maximize
16 customer satisfaction by providing courteous, convenient, prompt, efficient and quality
17 service to owners of [GM] Motor Vehicles....” Exh. 1, p. 8 (-0868). Article 5.2.2
18 requires Protestant “to maintain an adequate service and parts organization....” *Id.*

19 7. Article 10.2, entitled “**Wholesale Floorplan**” requires Protestant “to have
20 and maintain a separate line of credit from a creditworthy financial institution reasonably
21 acceptable to General Motors and available to finance the Dealer’s purchase of new
22 vehicles in conformance with the policies and procedures established by General Motors.”
23 Exh. 1, pp. 17-18 (-0877-78).

24 8. Article 14.5 of the Dealer Agreement provides in pertinent part as follows:

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

28 **14.5.3** Failure of Dealer to conduct customary sales and service operations
during customary business hours for seven consecutive business days.

1 Exh. 1, p. 27 (-0887).

2 9. On June 25, 2013, GM served Protestant with notices of termination of the
3 Chevrolet and Buick Dealer Agreements pursuant to Article 14.5 thereof and Vehicle
4 Code § 3060. Exhs. 4, 5. GM asserted in these notices among other things that Protestant
5 had not conducted customary sales and service operations during customary business
6 hours for seven consecutive business days, from May 2 through May 10, 2013.

7 10. In response to the termination notices, Protestant timely filed the present
8 protests under Veh. Code § 3060 and they have been consolidated for hearing.

9 11. A hearing was held on October 22, 2013 at the New Motor Vehicle Board's
10 offices at 1507 21st Street, Sacramento, California before the Honorable Diana Woodward
11 Hagel, Administrative Law Judge. Protestant was represented by John Jeffrey Carter and
12 the Carter Law Office. Respondent was represented by Gregory R. Oxford and the firm of
13 Isaacs Clouse Crose & Oxford LLP.

14 **II. CHRONOLOGY OF RELEVANT EVENTS**

15 12. On March 20, 2013, GM received notice that Protestant's floorplan credit
16 line had been suspended. As a result, Protestant could not make wholesale purchases of
17 new Chevrolet or Buick vehicles from GM for sale or lease to retail customers. Exh. 10.

18 13. GM subsequently sent two letters requesting that Protestant re-establish a
19 satisfactory line of floorplan credit as required by Article 10.2 of the Dealer Agreement.
20 Exhs. 11 and 12. Protestant did not re-establish a satisfactory line of floorplan credit.

21 14. On May 2, 3, 4, 6, 7, 8, 9 and 10 (Sunday, May 5 was not a customary
22 business day for Protestant), GM representatives visited the Dealership Premises to
23 observe and document the status of dealership operations. Exhs. 6, 7, 8, 9. Exh. 7 is a
24 video recording of some of these visits.

25 15. On May 2, 2013, Saul Escalante, GM District Manager, visited the
26 Dealership Premises. Consistent with his previous routine visits to the dealership, he
27 observed no regular day-to-day business activities being conducted. The Sales and
28 Service Managers were loitering in the office with no assigned tasks. The dealership was

1 not scheduling Chevrolet or Buick vehicle service (warranty or customer pay) and instead
2 was referring service customers to other dealerships. No service technicians were present
3 and the service department appeared closed. No vehicle sales activity was observed. Exh.
4 6 (-0038, -1115).

5 16. On May 3, 2013, Mr. Escalante again visited the Dealership Premises. The
6 Sales and Service Managers still were just “hanging out.” Service customers still were
7 being referred to other dealerships. No service technicians were present and the service
8 department appeared closed. Mr. Escalante advised Protestant’s General Manager, Bill
9 Marker, that it was important to make sure that the dealership was servicing all warranty
10 types of repair as outlined in the Dealer Agreement. Mr. Marker responded that, as he
11 previously had advised Mr. Escalante, the dealership had “limited financial resources” to
12 operate the dealership as expected by GM. Exh. 6 (-0038, -1115).

13 17. On Saturday, May 4, 2013, Mr. Escalante, telephoned the dealership several
14 times throughout the day. At that time, Protestant’s website stated that the dealership was
15 open Saturdays until 6 pm but closed on Sundays. None of these calls was answered.
16 Exh. 6 (-0038, -1115).

17 18. On May 6, 2013, Leonard Deprez, GM District Manager, visited the
18 Dealership Premises. He observed no business activity, although two dealership
19 employees in the service department were talking on cell phones. Mr. Deprez asked about
20 getting an oil change and was referred to Wittmeier Chevrolet in Chico, California,
21 approximately 29 miles from Gridley. He was further advised that the dealership was
22 going through an ownership change and was unable to perform any service work. Exh. 8
23 (-0005); *see also* Exh. 6 (-0038, -1115).

24 19. On May 7, 2013, Mr. Escalante again visited the Dealership Premises. No
25 service technicians were present at the dealership. The dealership appeared to be closed.
26 Mr. Escalante spoke with the Dealer-Operator, Mr. Michael McConnell. Mr. McConnell
27 stated that the dealership was planning to hire a new service technician who would begin
28 work on May 8, 2013. Exh. 6 (-0038-39, -1115).

1 20. On May 8, 2013, Mr. Escalante once again visited the Dealership Premises.
2 No service technicians were present. Mr. Escalante was advised that the new technician's
3 start date had been delayed until the next day. The dealership appeared to be closed. Bill
4 Marker, Protestant's General Manager, stated that the dealership would be taking
5 appointments for minor jobs such as lube, oil and filter ("LOF") changes and tire
6 rotations. Exh. 6 (-0039, -1115).

7 21. On May 9, 2013, George Kovacs, District Manager, visited the Dealership
8 Premises. The service department was deserted; it "looked like a ghost town." The only
9 dealership employee present advised Mr. Kovacs that a technician had just "gone to
10 lunch." The dealership referred Mr. Kovacs to Wheeler Chevrolet and Dow Lewis GMC
11 in Yuba City for an intermittent engine light. According to Google Maps, Yuba City is
12 approximately 17 miles from Gridley. Exh. 9; *see also* Exh. 6 (-0039, -1115).

13 22. On May 10, 2013, Mr. Escalante again visited the Dealership Premises. A
14 single service technician was present. No service technician tools of the sort required for
15 warranty and other non-routine repairs were observed. The only available tools in the
16 service department were for routine LOFs. In reviewing the dealership's service records,
17 Mr. Escalante learned that other than LOF changes the last dealership repair order was
18 dated April 1, 2013, and the last warranty repair had been performed on March 26, 2013, a
19 fact confirmed by GM's Global Warranty Management database which tracks warranty
20 claims submitted by dealers. Consistent with these facts. Mr. McConnell and Mr. Marker,
21 who both were present at the dealership on this day, informed Mr. Escalante that service
22 work was limited to LOF changes and tire rotations and that none of the dealership's
23 former technicians could be called back to work until further funding could be obtained
24 for dealership operations. Exh. 6 (-0039-58, -1115-16)

25 23. GM's records of dealer sales and service activity verify that Protestant as of
26 mid-May 2013 had not conducted customary sales and service operations since at least
27 April 1, 2013. GM's records show that Protestant sold or leased no more than one new
28 Buick and no more than six new Chevrolets to retail customers during all of 2013. Exhs.

1 13, 19 (-0979). This compares with approximately 35 new vehicles that Protestant
2 reported selling or leasing to retail customers during 2012. Exhibit 18 (-0994). Protestant
3 last ordered a new vehicle for wholesale purchase from GM on February 7, 2013, last sold
4 a vehicle to a retail customer on March 6, 2013, and last submitted a warranty service
5 claim to GM on March 28, 2013. Exh. 13. Further, GM's records show that Protestant
6 did not perform any warranty or policy work of any kind after April 1, 2013. Exh. 14.

7 24. On August 6, 2013, Mr. Escalante visited the Dealership Premises and
8 found them vacant. Exh. 20 (photographs of vacant dealership).

9 25. On August 22, 2013, Mr. Escalante again visited the vacant Dealership
10 Premises and found a formal eviction notice attached to the door, dated August 21, 2013
11 and signed by the Butte County Sheriff's Office. Exh. 21.

12 26. Because Protestant's dealership has, for all practical purposes, ceased to
13 exist, the reputation of Chevrolet and Buick products in the Gridley area has suffered
14 serious harm. Chevrolet and Buick owners in that area cannot obtain convenient warranty
15 or other authorized service for their vehicles or purchase genuine GM parts locally.

16 **CONCLUSIONS OF LAW – GOOD CAUSE FACTORS (VEH. CODE § 3061)**

17 **(a) Amount of business transacted by the franchisee, as compared to the**
18 **business available to the franchisee.**

19 27. Protestant has sold no new vehicles to retail customers since March 2013
20 and has done no warranty or customer pay service work (other than routine lube, oil and
21 filter service) since April 1, 2013. Further, it currently is incapable of conducting *any*
22 customary dealership sales or service operations because it has no dealership facility.

23 **(b) Investment necessarily made and obligations incurred by the franchisee**
24 **to perform its part of the franchise.**

25 **(c) Permanency of the investment.**

26 28. Protestant currently has no dealership facility and therefore is not
27 performing any of its contractual obligations under the Dealer Agreement. There is no
28

1 evidence of any investment made (permanent or otherwise) or obligations incurred by
2 Protestant following its eviction from the Dealership Premises.

3 **(d) Whether it is injurious or beneficial to the public welfare for the**
4 **franchise to be modified or replaced of the business of the franchisee**
5 **disrupted.**

6 29. Protestant is not engaged in any ongoing business operations that would be
7 disrupted by termination of the Dealer Agreement. Until it is terminated, GM cannot
8 appoint a replacement dealer to provide warranty or other authorized vehicle service and
9 parts to Chevrolet and Buick owners in the Gridley area.

10 **(e) Whether the franchisee has adequate motor vehicle sales and service**
11 **facilities, equipment, vehicle parts, and qualified service personnel to**
12 **reasonably provide for the needs of the consumers for the motor**
13 **vehicles handled by the franchisee and has been and is rendering**
14 **adequate services to the public.**

15 30. Protestant has no sales or service facilities, equipment, vehicle parts or
16 qualified service personnel and therefor is not rendering adequate services to the public.

17 **(f) Whether the franchisee fails to fulfill the warranty obligations of the**
18 **franchisor to be performed by the franchisee.**

19 31. Protestant has not fulfilled its warranty obligations under the Dealer
20 Agreement since at least April 2013, and presently has no service facility where it could
21 fulfill those obligations.

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

24 32. Protestant is in material breach of the Dealer Agreement, including without
25 limitation Articles 5.1, 5.2, 10.2 and 14.5.3 thereof. It is, further, unable to perform any of
26 its obligations under the Dealer Agreement because it has no dealership facility.
27
28

1 **DETERMINATION OF ISSUE**

2 GM has met its burden of proving that there is good cause for the termination of
3 Protestant's Chevrolet and Buick Dealer Agreements pursuant to Article 14.5.3 thereof
4 and Vehicle Code §§ 3060 and 3611.

5 Therefore both of these consolidated protests are overruled and GM may terminate
6 Protestant's Chevrolet and Buick Dealer Agreements.

7
8 Dated: October 21, 2013

9 Submitted by:
10 ISAACS CLOUSE CROSE & OXFORD LLP

11 By: _____

12 Gregory R. Oxford
13 Attorneys for Respondent
14 General Motors LLC

15 Of Counsel
16 Brian K. Cullin
17 General Motors LLC
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