STATE OF CALIFORNIA

MEMO

To : POLICY AND PROCEDURE COMMITTEE
BISMARCK OBANDO, CHAIR
KATHRYN ELLEN DOI, MEMBER

Date: May 27, 2015

From : WILLIAM G. BRENNAN
ROBIN PARKER

Subject: CONSIDERATION OF REVISED TEXT TO PROPOSED RULEMAKING CONCERNING SANCTIONS (13 CCR § 551.21)

At the February 4, 2014, General Meeting, the members adopted proposed regulatory amendments to Section 551.21, which clarify that sanctions could also be ordered by the Board in addition to the ALJ (see Attachment 1).

At the April 9, 2014, Special Meeting, the Public Members considered the "Proposed Order Granting Respondent's Motion to Dismiss for Lack of Jurisdiction" in *McConnell Chevrolet Buick, Inc.* v. *General Motors, LLC*, Protest Nos. PR-2382-14 and PR-2383-14. The motion to dismiss also included a motion for sanctions. This was the first time a motion for sanctions was filed pursuant to Section 551.21. As indicated in the ALJ's Proposed Order, there were a number of ambiguities with the regulation that made it difficult to rule on General Motors' motion without an evidentiary hearing. Therefore, the ALJ recommended that the portion of the motion seeking an award of sanctions be remanded to an ALJ for further proceedings, and the dismissal be issued once the issue of sanctions was determined by the Board. After considering the administrative record and the comments of counsel, the Board ultimately dismissed the protests with prejudice and denied the motion for sanctions (see Attachment 2).

Before proceeding with the approved regulatory amendments, the staff asked ALJ Skrocki to review the text of the regulation and make suggestions to address the ambiguities encountered in the *McConnell* motion. The proposed amendments, which were adopted by the Board at the July 15, 2014, General Meeting, are contained in Attachment 3 and summarized, in part, as follows:

- Eliminates a reference to bad faith because it is open to many interpretations and difficult to define;
- Defines a "party" or "representative of a party" for purposes of this regulation;
- Enhances the meaning of "actions or tactics" and "frivolous";
- Clarifies that a motion for sanctions can be on the record or in writing;
- Authorizes an ALJ on his or her own motion to recommend that the Board impose

sanctions;

- Authorizes the Board to order or an ALJ to recommend that the party or party's representative or both pay the movant's reasonable expenses and attorney's fees incurred in bringing and pursuing the motion for sanctions, if the motion is granted.
- Specifies when attorney's fees and expenses will not be ordered even if the motion for sanctions is granted.
- Authorizes the Board to order or an ALJ to recommend that the movant or movant's representative or both pay the party or party's representative who opposed the sanctions motion reasonable expenses and attorney's fees incurred in bringing and pursuing the motion for such expenses and attorney's fees, if the motion for sanctions is denied.
- Authorizes the Board to order or an ALJ to recommend that an award of reasonable expenses and attorney's fees incurred in connection with bringing or opposing the motion for sanctions be apportioned if the motion is granted in part and denied in part.

The staff proceeded with the initial rulemaking packet; the notice was published on February 6, 2015, and the public comment period closed on March 23, 2015. No public comments were submitted. However, ALJ Skrocki recommended revisions that would further clarify the sanctions regulation. He also suggested that it more closely track Code of Civil Procedure section 2023.010, which pertains to misuses of the discovery process.[1] If the Board adopts the proposed revisions (see Attachment 4), a 15-day notice modifying the proposed text will be issued to allow public comment. Additionally, a 15-day notice adding this memo to the rulemaking file will be issued allowing public comment. If no comments are submitted to either 15-day notice, then the final rulemaking packet will be submitted to the Department of Finance, California State Transportation Agency, and ultimately the Office of Administrative Law.

This matter is being agendized for consideration at the June 17, 2015, General Meeting. If you have any questions or require additional information, please do not hesitate to contact me at (916) 324-6197 or Robin at (916) 323-1536.

cc: Glenn Stevens, President

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[1] Code of Civil Procedure section 2023.010 provides as follows:

> Misuses of the discovery process include, but are not limited to, the following:
> (a) Persisting, over objection and without substantial justification, in an attempt to obtain information or materials that are outside the scope of permissible discovery.
> (b) Using a discovery method in a manner that does not comply with its specified procedures.
> (c) Employing a discovery method in a manner or to an extent that causes unwarranted annoyance, embarrassment, or oppression, or undue burden and expense.
> (d) Failing to respond or to submit to an authorized method of discovery.
> (e) Making, without substantial justification, an unmeritorious objection to discovery.
> (f) Making an evasive response to discovery.
> (g) Disobeying a court order to provide discovery.
> (h) Making or opposing, unsuccessfully and without substantial justification, a motion to compel or to limit discovery.
> (i) Failing to confer in person, by telephone, or by letter with an opposing party or attorney in a reasonable and good faith attempt to resolve informally any dispute concerning discovery, if the section governing a particular discovery motion requires the filing of a declaration stating facts showing that an attempt at informal resolution has been made.

Proposed Amendments Approved by the Board at the February 4, 2014, General Meeting

§ 551.21. Sanctions - Bad Faith Actions.

(a) The board may order, or an ALJ designated by the board may recommend ordering a party, a party's representative or both, to pay reasonable sanctions, including attorney's fees and costs, incurred by another party as a result of bad faith actions or tactics that are frivolous or solely intended to cause unnecessary delay.

(1) "Actions or tactics" include, but are not limited to, the making or opposing of motions or the failure to comply with a lawful order or ruling of the board.

(2) "Frivolous" means:

(A) Totally without merit; or

(B) For the sole purpose of harassing an opposing party.

(b) The board shall not order sanctions, or an ALJ designated by the board shall not recommend an award of sanctions, without providing notice and an opportunity to be heard.

(c) Whether there has been bad faith by a party shall be determined by the ALJ based upon testimony under oath or other evidence. Any proposed order recommending sanctions by the ALJ shall be on the record, or in writing, setting forth the factual findings on which the sanctions are based, as well as setting forth the factual findings as to the reasonableness of the amount(s) to be paid.

(d) A proposed order recommending an award of sanctions shall be considered by the board members at their next regularly scheduled meeting. A determination not to award sanctions ~~is~~ shall not be considered by the board members and is final upon issuance by the ALJ.

(e) The board members' consideration to affirm, reject or modify the ALJ's award of sanctions does not alone constitute grounds for continuance of any previously scheduled dates in the proceeding.

Note: Authority cited: Section 3050(a), Vehicle Code. Reference: Section 128.5, Code of Civil Procedure; Section 11455.30, Government Code; and Section 3050.2, Vehicle Code

Attachment 1

NEW MOTOR VEHICLE BOARD
1507 – 21st Street, Suite 330
Sacramento, California 95811
Telephone: (916) 445-1888

STATE OF CALIFORNIA

NEW MOTOR VEHICLE BOARD

In the Matter of the Protest of MCCONNELL CHEVROLET BUICK, INC., Protestant, v. GENERAL MOTORS, LLC, Respondent.	**Protest Nos. PR-2382-14 and PR-2383-14**

DECISION

At its regularly scheduled meeting of April 9, 2014, the Public Members of the Board met and considered the administrative record and Administrative Law Judge's "Proposed Order Granting Respondent's Motion to Dismiss Protests for Lack of Jurisdiction", in the above-entitled matters. After such consideration, the Board adopted the Proposed Order as its final Decision in these matters with the following amendments.

1. The word "fact" in Paragraph 28, page 8, line 9 is replaced with the word "face".

2. Paragraphs 80-102 are stricken.

3. The Proposed Order of Remand Regarding the Motion for Award of Sanctions on page 23, lines 13-16 is stricken.

4. The Proposed Order Adopting the Recommendation Regarding the Motion to Dismiss the Protests on page 23, lines 17-20 is stricken.

ATTACHMENT 2

After consideration of the pleadings, exhibits, and oral arguments, IT IS HEREBY ORDERED that Respondent's Motion to Dismiss is granted. Protest Nos. PR-2382-14 and PR-2383-14 (*McConnell Chevrolet Buick, Inc.* v. *General Motors, LLC*) are dismissed with prejudice.

After consideration of the pleadings, exhibits, and oral arguments of counsel, IT IS HEREBY ORDERED that Respondent's Motion for an Award of Sanctions is denied.

This Decision shall become effective forthwith.

IT IS SO ORDERED THIS 10th DAY OF APRIL 2014.

GLENN STEVENS
President
New Motor Vehicle Board

NEW MOTOR VEHICLE BOARD
1507 – 21ST Street, Suite 330
Sacramento, California 95811
Telephone: (916) 445-1888

CERTIFIED MAIL

STATE OF CALIFORNIA

NEW MOTOR VEHICLE BOARD

In the Matter of the Protest of McCONNELL CHEVROLET BUICK, INC., Protestant, v. GENERAL MOTORS, LLC, Respondent.	**Protest Nos. PR-2382-14 and PR-2383-14** **PROPOSED ORDER GRANTING RESPONDENT'S MOTION TO DISMISS PROTESTS FOR LACK OF JURISDICTION**

To: Kent Steffes
In Pro Per for Protestant
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1. This matter came on regularly for telephonic hearing on Monday, March 17, 2014, before Anthony M. Skrocki ("ALJ Skrocki"), Administrative Law Judge for the New Motor Vehicle Board ("Board"). Kent Steffes[1] in Pro Per represented Protestant. Gregory R. Oxford, Esq. of Isaacs Clouse Crose & Oxford LLP represented Respondent. Also present during the telephonic hearing was Mr. Terry Libbon, who identified himself as a "25% owner" of Protestant.

2. The matter before the Board is whether the Board should grant Respondent's motion to dismiss the protests for lack of jurisdiction and award sanctions.

FACTUAL AND PROCEDURAL BACKGROUND

Protest Nos. PR-2382-14 and PR-23834-14 - New Protests

3. Protestant McConnell Chevrolet Buick, Inc. in these new protests contends it "is a new motor vehicle dealer selling Chevrolets, Buicks, and Pontiacs[2] and is located at 1646 Hwy 99E, Gridley, California." (Protest Nos. PR-2382-14, p. 1 (Buick), and PR-2383-14, p. 1 (Chevrolet))

4. Protestant is represented by Kent Steffes, in Pro Per.

5. General Motors, LLC ("GM" or "Respondent") is a licensed manufacturer of new motor vehicles. GM is located at 100 Renaissance Center, Detroit, Michigan.

6. Respondent is represented by Gregory R. Oxford, Esq. of Isaacs Clouse Crose & Oxford LLP.

7. Protestant contends that on or about January 17, 2014, it received a notice from GM that GM intends to terminate Protestant's franchises to sell Chevrolet and Buick vehicles.[3] (Protest Nos. PR-2382-14, p. 2 and PR-2383-14, p. 2)

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[1] Mr. Steffes is a shareholder, a member of the Board of Directors, and the Chairman of the Board of Directors of McConnell Chevrolet Buick, Inc. See minutes of meeting held on January 14, 2013, Attachment D to Opposition.

[2] As Pontiac vehicles are no longer being manufactured, there is no franchise in existence for the Pontiac line-make. As stated below, Respondent asserts that the remainder of this statement is factually inaccurate as Protestant no longer has a license from the Department of Motor Vehicles, its franchises for Chevrolet and Buick were terminated on November 14, 2013, and Protestant has been evicted from the stated premises six months ago. (Motion, page 4, lines 1-10)

[3] It is uncertain to which letter or letters Protestant refers and whether the notice referred to was a notice of termination or some other correspondence. None of the letters before the Board sent on or about January 17, 2014, from GM or its counsel contain the statutorily required "notice to dealer" language. The letter referred to is likely that of Mr. Oxford's that was sent to Mr. Steffes' attorney, Mr. Donald F. Woods, Jr. This letter contains a "Received" stamp of Mr. Woods' law firm, showing the date of January 17, 2014. It is not however a notice of termination. Its topic was a response to inquiries by Mr. Steffes as to the "procedures for requesting parts return pursuant to Article 15 of the Dealer Agreements" upon termination of the franchises. (Attachment H to Opposition)

8. On February 14, 2014, Protestant filed two separate protests (one for Buick and one for Chevrolet) pursuant to the provisions of Vehicle Code section 3060.[4]

9. By order dated March 3, 2014, the protests were consolidated for purposes of hearing.

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

10. The termination of the two McConnell franchises has been before the Board in prior proceedings bearing Protest Nos. PR-2369-13 and PR-2370-13. These protests were the subject of an evidentiary hearing on their merits conducted before ALJ Diana Woodward Hagle.

11. These prior proceedings came before the Board when GM, by letter dated June 18, 2013, GM gave notice to Protestant pursuant to Section 3060 of GM's intention to terminate the Chevrolet and Buick franchises of Protestant.[5] In error, this letter referred to both Protestant's franchises for the Chevrolet and Buick line-makes. On June 25, 2013, GM corrected the mistake and mailed two separate termination letters to Protestant, one for Buick and one for Chevrolet.

12. On June 27, 2013, Protestant filed a timely protest.[6] On July 1, 2013, Protestant filed an Amended Protest (PR-2369-13) and a new Protest (PR-2370-13). Protest No. PR-2369-13, as amended then related only to Protestant's Chevrolet franchise and Protest No. PR-2370-13 to its Buick franchise.

13. On July 12, 2013, Protest Nos. PR-2369-13 and PR-2370-13 were ordered consolidated for purposes of hearing.

14. A hearing on the merits of the consolidated protests was held on October 22, 2013, before Administrative Law Judge Diana Woodward Hagle.

15. At the November 12, 2013, Special Meeting, the Public Members of the Board adopted the Proposed Decision overruling Protest Nos. PR-2369-13 and PR-2370-13, and found that GM had "... sustained its burden of proof of establishing 'good cause' to terminate the Chevrolet and Buick franchises of McConnell Chevrolet Buick, Inc. ...". (Board Decision dated November 12, 2013)

The New Protests Presently Before The Board

16. The protests presently before the Board (PR-2382-14 and PR-2383-14) bear the exact

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[4] Unless otherwise indicated, all statutory references are to the California Vehicle Code.
[5] Such notice is required whenever a franchisor seeks to terminate an existing motor vehicle franchise. (Section 3060(a))
[6] Reflecting the error in Respondent's initial termination letter, the protest covered the franchises for both line-makes.

same caption as did the prior protests (PR-2369-13 and PR-2370-13), that is all four protests are "McConnell Chevrolet Buick, Inc. v. General Motors, LLC", with PR-2369-13 and PR-2383-14 for the Chevrolet franchise, and PR-2370-13 and PR-2382-14 for the Buick franchise.

17. Among the differences between the two Buick protests and the two Chevrolet protests are that the prior two protests (from June and July 2013) were filed by the "Carter Law Office" and contained statements that, "Protestant is represented in this matter by the John Jeffery Carter Law Office, whose address is P.O. Box 3606, Chico, California..."[7], whereas the two new protests (filed over six months later, on February 14, 2014) were filed by "Kent Steffes" and contained statements that, "Protestant is represented in this matter In Pro Per by Kent Steffes, the President and Chairman of the Board of McConnell Chevrolet Buick, Inc., whose address is 366 N. Skyewiay Rd. Los Angeles, California, 90049..."[8]

18. In response to the two new protests, on February 28, 2014, Respondent filed a "Motion to Consolidate and Dismiss Protests for Lack of Jurisdiction, and for an Award of Sanctions". The Motion was filed with Respondent's notices of appearance.

19. As the caption of the Motion indicates, there are three motions contained within the pleading.

(a) The first is the "Motion to Consolidate" the new protests.[9]

(b) The second is the Motion to Dismiss for Lack of Jurisdiction.

(c) The third is the Motion for An Award of Sanctions.

THE MOTION TO DISMISS FOR LACK OF JURISDICTION

20. This portion of Respondent's Motion asserts that, since the Board already "found that GM had demonstrated that there was 'good cause' for termination", GM terminated McConnell's dealer agreements on November 14, 2013. (Motion, p. 2) Therefore, Respondent contends that the new protests

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[7] See Amended Protest PR-2369-13, page 1, lines 26-28.

[8] See Protest PR-2382-14, page 2, lines 1-3. Prior to the filing of the protests, Mr. Steffes (and perhaps McConnell Chevrolet Buick, Inc.) was represented by Donald F. Woods, Jr., Esq. of the law firm of McKool Smith Hennigan LLC, 865 South Figueroa Street, Suite 2900, Los Angeles, California 90017, with phone calls, e-mails and letters between counsel for GM and Mr. Woods.

[9] No Board action is needed at this time as, on March 3, 2014, prior to the hearing of this motion, the Board's Executive Director had already issued an order consolidating these two protests.

"improperly seek to challenge the termination of Dealer Agreements *that already have been terminated pursuant to a final decision of the Board.* Whether by reason of the fact that the Dealer Agreements are no longer in effect or by reason of the res judicata bar created by the Board's Decision, or both, the Board has no jurisdiction of (sic) the New Protests and must dismiss them." (Motion, p. 2, italics in original)

21. Although the new protests contend that Protestant "***is*** a new motor vehicle dealer selling Chevrolets, Buicks, and Pontiacs and ***is located at 1646 Hwy 99E, Gridley, California***..." GM contends in its motion that the McConnell dealership:

- is not a Chevrolet or Buick dealership because its franchises were terminated for those line-makes in 2013;
- has not conducted business operations at 1646 Hwy 99E since its eviction six months ago;
- according to the DMV Occupational Licensing website, the McConnell dealership closed on July 31, 2013 and its dealership license is no longer valid;
- is not "transacting an adequate amount of sales and service business";
- has not "fulfilled its warranty obligations"; and,
- "does not have *any*, let alone 'adequate,' 'motor vehicle sales and service facilities, equipment, vehicle parts and qualified service personnel."

(Motion, pp. 4-5, bold in original; Exhibit D to Motion; Protest Nos. PR-2382-14, p. 2 and PR-2383-14, p. 2)

22. For these reasons and out of respect for the integrity and finality of Board proceedings, GM argues that the new protests are "'totally without merit' and that their filing and continuing prosecution constitute a 'failure to comply with a lawful order or ruling of the board,' *i.e.*, the final Decision in the prior protests that permitted GM to terminate the Dealer Agreements." (Motion, p. 5, lines 19-33)

PROTESTANT'S OPPOSITION TO RESPONDENT'S MOTION TO DISMISS FOR LACK OF JURISDICTION

23. On March 12, 2014, Protestant filed its "Opposition to Respondent's Motion to Dismiss for Lack of Jurisdiction".

24. Protestant's Opposition states the following unsupported conclusions: That the Board does

have jurisdiction "...pursuant to Vehicle Code Section 3050"; That "Section 3060 entitles McConnell Chevrolet to file Protests to prevent its termination; and, V.C. Section 3066 entitles it to a merits hearing on such Protests." (Opposition, page 1, lines 24-25; page 2, lines 3-6)

25. After stating that the above "adequately addressed the issue of jurisdiction" (Opposition, page 3, lines 11-15), Protestant then makes the following assertions:[10]

(a) GM had unreasonably withheld approval for a change of ownership of Protestant and that GM's conduct of injecting itself into a minor shareholder dispute "was the proximate cause of the failure of the Dealership and the destruction of corporate value." (Opposition, page 3, lines 16-22)

(b) Protestant "believes that notice of termination was improperly delivered or not delivered at all" and that the termination proceedings "should rightly proceed under Veh. Code §3060(a)(1)(B)(i)", rather than "§3060(a)(1)(B)(v)")[11] (Opposition, page 3, lines 24-27)

(c) GM was made aware of various transfers of stock ownership and control of the corporation during the time period from January 2013 through April 2013, and that "GM denied Protestant's Change Request". (Opposition, page 5, lines 3-22)

(d) Sometime after April 10, 2013, GM refused to deal with the new shareholders and that "...GM would only 'deal' with the Dealer Operator Michael McConnell instead of the authorized Officers and Directors of the Dealer Company" even though the franchise stated that the "... Dealer Company is the only party to the Dealer Agreement with GM." (Opposition, page 6, lines 8-22)

(e) The initial notices of termination (that resulted in Protest Nos. PR-2369-13 and PR-2370-13 and the Board Decision of November 12, 2013 finding good cause for termination of the franchises):

- "[were] not properly served on Protestant"; and,
- "GM improperly filed notice under Vehicle Code §3060(a)(1)(B)(v) when they should

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[10] These assertions, to be discussed later, are apparently being made in support of the claims that, as to the intended termination, GM should have been dealing with and giving notices to the new shareholders personally.

[11] Vehicle Code section 3060(a)(1)(B)(i)-(v) provides the grounds for issuing a 15-day notice of termination, as follows:

(i) Transfer of any ownership or interest in the franchise without the consent of the franchisor, which consent shall not be unreasonably withheld.

...

(v) Failure of the motor vehicle dealer to conduct its customary sales and service operations during its customary hours of business for seven consecutive business days, giving rise to a good faith belief on the part of the franchisor that the motor vehicle dealer is in fact going out of business, except for circumstances beyond the direct control of the motor vehicle dealer or by order of the department.

have been filed under Vehicle Code §3060(a)(1)(B)(i)"; (Opposition, page 7, lines 1-6)

(f) "It is improper that GM's failure to perform under the **Dealer Sales & Service Agreement** that directly led to the financial crisis at Protestant would allow them to terminate the franchise agreement on the basis of the financial state of Protestant which GM had caused." (Bold in original; Opposition, page 7, lines 6-10)

(g) On January 17, 2014, Protestant received a letter from Respondent's attorney stating "...that Protestant's Dealer Agreement had been terminated. Although improperly noticed, in order to protect our rights, Protestant filed a timely Protest on February 14, 2014." (Opposition, page 7, lines 16-20; see footnote 3)

RESPONDENT'S REPLY IN SUPPORT OF MOTION TO CONSOLIDATE AND DISMISS PROTESTS FOR LACK OF JURISDICTION, AND FOR AN AWARD OF SANCTIONS

26. On March 14, 2014, GM filed its "Reply In Support of Motion...to Dismiss Protests for Lack of Jurisdiction..." Respondent alleges that "... it remains undisputed that:"

(1) GM "... gave[12] the required registered mail[13] notice *last summer* that it intended to terminate the McConnell dealership's Chevrolet and Buick Dealer Agreements;

(2) The McConnell dealership [the franchisee] timely invoked the Board's jurisdiction by filing two termination protests pursuant to Veh. Code § 3060;

(3) On October 23, 2013, representatives of GM and the McConnell dealership appeared at a hearing on the protests that Administrative Law Judge Diana Woodward Hagle conducted in accordance with the Board's normal procedures;

(4) Judge Hagle subsequently prepared a proposed Decision overruling the protests;

(5) The Board considered and adopted Judge Hagle's proposed Decision as the Board's final Decision at its regular meeting on November 12, 2013; and

(6) Two days later, on November 14, 2013, GM terminated the McConnell dealership's

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[12] As discussed, Section 3060 requires that the notices not just be "given" but that they be "received" by the franchisee.

[13] The notices, at the top of the first page, each contain language indicating they were sent "CERTIFIED MAIL" "RETURN RECEIPT REQUESTED", rather than "registered mail", as stated in the pleadings and as pointed out by Protestant. However, as there is no requirement that the notices be sent by either method, whether they were sent by certified mail or registered mail is not material. So long as the notice is "received", the manner of transmission, whether by mail or by hand delivery, is not material.

Chevrolet and Buick Dealer Agreements." (Italics in original; Reply, page 1, line 28; page 2, lines 1-14)

27. Respondent agrees that the Board has jurisdiction to hear termination protests pursuant to Section 3060 but "***the present protests are <u>not</u> authorized by section 3060 because GM already has terminated the Dealer Agreements in question as permitted by a final decision of the Board.***" (Italics, bold, and underline in original) "Without more, the Board lacks jurisdiction to proceed. A contrary ruling disregarding the Board's Decision would affront the most elementary principles of finality under the salutary doctrine of res judicata." (Reply, page 2, lines 15-20)

28. Respondent characterizes Mr. Steffes' assertion that GM failed to give proper notice to Protestant as "unsubstantiated" and "flies in the fact of judicially noticeable documents showing that the address to which GM's termination notices were delivered by registered mail was the authorized Department of Motor Vehicles address for Protestant." (Reply, page 2, lines 21-15; Motion, Exhibit D; and Golusin Declaration, paragraph 3)

29. The address to which the notices from GM were sent "also is the same dealership address given by Mr. Steffes in the current protests." (Reply to Opposition, page 2, lines 25-26)

30. "And, while [Mr. Steffes] says 'Protestant will offer proofs and testimony that statutory notice was not properly served on Protestant'..., [Mr. Steffes] has failed conspicuously to present any such evidence to the Board and does not even hint what alleged 'proofs and testimony' he might be talking about." (Reply, page 2, lines 26-28; page 3, line 1)

31. Respondent also asserts that Mr. Steffes cites no authority for "holding that GM in serving termination notices last summer had a duty to look behind the terms of the Dealer Agreements, including the designation of Mr. McConnell as the dealership's sole owner and Dealer-Operator, or to provide additional or different notices to Mr. Steffes or other people that Veh. Code §3060 does not require." (Reply, page 3, lines 2-5)

32. Respondent asserts that Mr. Steffes "knew about the prior Board proceedings long before the October 22, 2013 hearing before Judge Hagle" and could have intervened or taken other action to advise the Board of his position. Instead Mr. Steffes chose to do nothing and now seeks to relitigate an "adverse decision" after "the time for seeking judicial review has expired." (Reply, page 3, lines 13-21)

33. In addition, Respondent asserts that relitigation would not "serve any purpose or permit

any different result" as the "McConnell dealerships *had-past tense-been closed for months* and therefore did not and could not conduct customary sales and service operations in violation of Article 14.5.3 of the Dealer Agreement." (Italics in original; Reply, page 3, lines 22-26) This constitutes "a historical fact" that cannot be cured. Even though Mr. Steffes now claims the dealership could be re-opened he admits the dealership has been closed and remains closed. (Reply, page 4, lines 3-7)

34. Respondent disputes the assertion that it wrongfully denied approval of several proposed purchasers of the McConnell dealership and that even if Respondent had, this issue is not only not before the Board but the Board has no jurisdiction over such disputes. "... to be effective any such changes in dealership ownership would have required written approval of GM under Article 12.2 of the Dealer Agreements, which GM never gave. In fact, only the third proposed change was ever even submitted to GM. ***GM declined to approve that change because it did not receive complete and accurate information concerning the proposed share owners and their proposed share ownings.*** Specifically, the proposal sought approval for the sale of 55 percent of the dealership to Mr. Marker and 30 percent to Mr. Steffes, yet GM was informed by Mr. Libbon that he still owned 25 percent. Thus, together with Mr. McConnell's retained 15 percent interest, the purported owners together claimed to own 125 percent of the dealership! Under these circumstances Mr. Steffes' claim that GM unreasonably declined approval is just silly." (Bold, underline and italic in original; Reply, page 4, lines 23-28; page 5, lines 1-6)

35. Respondent also points out that Mr. Steffes' claim that GM should not have relied upon Section 3060 (a)(1)(B)(v) (the closure of the dealership) but rather could have sought to terminate the Dealer Agreements pursuant to Section 3060(a)(1)(B)(i) (the unauthorized change of ownership) is an acknowledgment of the right to terminate the Dealer Agreements for violation of Article 12.2.1 of the Dealer Agreements. However, GM's decision to terminate the Dealer Agreements due to closure of the dealership (in violation of Article 14.5.3) means that "any issue about the purported change in ownership without GM's approval is simply moot." (Reply, page 5, lines 7-18)

ISSUES RE: JURISDICTION OF THE BOARD

36. There are two major issues that relate to the jurisdiction of the Board over the protests presently before the Board. These are:

A. The legal significance of the Board's Decision of November 12, 2013, that overruled the

prior protests and permitted the termination of the two franchises; and,

B. Even if the Board's Decision of November 12, 2013, is of no legal significance, whether the new protests were timely filed.[14]

A.

The Legal Significance of the Board's Decision of November 12, 2013, that Overruled the Prior Protests and Permitted the Termination of the Two Franchises

37. In order to determine the legal significance of the Board's Decision regarding the prior protests it will be necessary to determine if the requirements of the Vehicle Code were met as to the notices required to be provided by GM, and then, whether the prior protests were properly before the Board.

38. This will require an examination of the applicable statutes starting with Section 3050 and Section 3060 and continuing with other statutes that are relevant. Specific terms contained in these statutes will be highlighted in bold and underlined as deemed necessary and may be further defined and/or discussed.

39. As will be seen from the statutes, the "Board" is empowered to hear a protest presented by a "franchisee" and, as to this situation, the notices of termination are required from GM only if there is a "franchise" in existence under which GM is the "franchisor" and McConnell Buick Chevrolet, Inc. is the "franchisee".

40. As the statutes will indicate, the crucial terms are "franchise", "franchisee" and "franchisor".

41. Section 3050 provides in applicable part:

> 3050. The **board**[15] shall do all of the following:
>
> ...
>
> (d) Hear and decide, within the limitations and in accordance with the procedure provided, a protest presented by a **franchisee** pursuant to **Section 3060,** ...

42. Section 3060 states in part:

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[14] If a protest is not timely filed the Board would not have jurisdiction to act upon it. As this is a jurisdictional issue, it may be raised by a court, or in this case, the Board, on its own volition.

[15] Section 232 defines the "board" as the New Motor Vehicle Board.

3060. (a) Notwithstanding... the terms of any **franchise**, no **franchisor** shall terminate or refuse to continue any **existing franchise** unless all of the following conditions are met:

(1) The **franchisee** and the **board** have **received** written notice from the **franchisor** as follows:

(A) Sixty days before the effective date thereof setting forth the specific grounds for termination or refusal to continue.

(B) Fifteen days before the effective date thereof setting forth the specific grounds with respect to any of the following:

(i) Transfer of any ownership or interest in the franchise without the consent of the franchisor, which consent shall not be unreasonably withheld.

(ii) Misrepresentation by the franchisee in applying for the franchise.

(iii) Insolvency of the franchisee, or filing of any petition by or against the franchisee under any bankruptcy or receivership law.

(iv) Any unfair business practice after written warning thereof.

(v) Failure of the motor vehicle dealer to conduct its customary sales and service operations during its customary hours of business for seven consecutive business days, giving rise to a good faith belief on the part of the franchisor that the motor vehicle dealer is in fact going out of business, except for circumstances beyond the direct control of the motor vehicle dealer or by order of the department.

...

(2) ...The **franchisee may file a protest with the board** within 30 days after receiving a 60-day notice, satisfying the requirements of this section, or within 30 days after the end of any appeal procedure provided by the franchisor, or **within 10 days after receiving a 15-day notice,** satisfying the requirements of this section, or within 10 days after the end of any appeal procedure provided by the franchisor. When a protest is filed, the board shall advise the franchisor that **a timely protest has been filed**, that a hearing is required pursuant to Section 3066, and that the franchisor may not terminate or refuse to continue until the board makes its findings.

(3) The franchisor has received the written consent of the franchisee, or the appropriate period for filing a protest has elapsed.

...

43. Section 331.1 defines a franchisee as "...any **person**[16] who, pursuant to a **franchise,** receives new motor vehicles...from the **franchisor** and who offers for sale or lease, or sells or leases the vehicles at retail or is granted the right to perform authorized warranty repairs and service, or the right to perform any combination of these activities.

44. Section 331 defines a franchise as follows:

(a) A "franchise" is a **written agreement** between two or more **persons** having all of the following conditions:

(1) A commercial relationship of definite duration or continuing indefinite duration.

(2) The **franchisee** is granted the right to offer for sale or lease, or to sell or lease at retail new motor vehicles...manufactured or distributed by the **franchisor** or the right to perform authorized warranty repairs and service, or the right to perform any combination of these activities.

...

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[16] Under this statute, one cannot be a "franchisee" unless one has the status of a "person". Although McConnell Chevrolet Buick, Inc. is not a "natural person" it is a "person" as defined in Section 470 of the Vehicle Code which states that a "person" includes a natural person, firm, copartnership, association, limited liability company, or corporation."

45. It is undisputed that at the time the prior protests were filed, there was a Chevrolet "franchise" and a Buick "franchise" in existence between McConnell Chevrolet Buick, Inc., the "franchisee", and GM the "franchisor". Under the definitions above, it is clear that the only "franchisee" was McConnell Chevrolet Buick, Inc. and the only "person" that would have needed to have "received" notice of the termination of the franchises was the "franchisee", McConnell Chevrolet Buick, Inc. It is also clear that the Board would have the power to hear and consider any protests that were timely and properly filed by or in behalf of McConnell Chevrolet Buick, Inc. if there were any "franchises" in existence.

46. Thus, if the requirements of Sections 3050 and 3060 were satisfied, the Board's Decision dated November 12, 2013, resulted in the right of GM to terminate both the Chevrolet and Buick franchises of McConnell Chevrolet Buick, Inc.

47. It was determined in the Board's Decision of November 12, 2013, that the notices of termination from Respondent had been received by Protestant, the franchisee (as admitted in the protests themselves), that the protests were timely filed, and that Respondent had established good cause for the termination.

48. As a result thereof, both the Chevrolet franchise and the Buick franchise were legally and effectively terminated shortly thereafter, on November 14, 2013, as stated by Respondent.

The Effect of the Termination of the Franchises in November 2013

49. The legally effective termination of the franchises in November 2013, leads to the legal conclusion that the "franchise(s)" (as defined in Section 331) ceased to exist. Thus, McConnell Chevrolet Buick was no longer a "franchisee" of Respondent.

As to the Second Set of Protests Filed on February 14, 2014 and Presently Before the Board

50. Respondent was not obligated to again give notice of termination pursuant to Section 3060 for two reasons:

1) There was no franchise to terminate; and,

2) McConnell Chevrolet Buick was no longer a franchisee.

51. Thus there is no right in McConnell Chevrolet Buick Inc. to file a protest pursuant to Section 3060.

52. And, the Board has no jurisdiction pursuant to Section 3050(d) to conduct a hearing on the protests that were filed in behalf of McConnell Chevrolet Buick, Inc. on February 14, 2014.

53. As the Chevrolet and Buick franchises had terminated on November 14, 2013, as of February 14, 2014, when the new protests were submitted by Mr. Steffes in behalf of McConnell Chevrolet Buick, Inc., there was no longer a "franchise" in existence between McConnell Chevrolet Buick Inc. and GM. Although McConnell Chevrolet Buick Inc., may remain a "person", it would no longer be a "franchisee", as defined in the Vehicle Code and required by Sections 3050 and 3060. McConnell Chevrolet Buick, Inc. would not have the right to file a protest challenging whether there is good cause to terminate the franchises that no longer exist. The franchises had already been terminated. Thus, when the new protests were filed (on February 14, 2014) the Board would be without power to notify Respondent that it could not terminate the franchises until a hearing was held and the Board would be without power to conduct a hearing on the protests.

54. However, the contention has been made by Mr. Steffes, in bringing the new protests before the Board, that (as to the notices of termination dated June, 2013) "Protestant believes that notice of the termination was improperly delivered or not delivered at all and Protestant will argue that the proceedings should rightly proceed under Veh. Code 3060(a)(1)(B)(i)." (Opposition, page 3, lines 24-27)

55. Although Mr. Steffes did not, either in his pleadings or in the telephonic hearing on the motion to dismiss, present any factual information as to the reasons for what are stated above as "Protestant believes...", it is necessary to evaluate whether as a matter of law, Respondent has established that the protests should be dismissed. In this case, the claim of Respondent is that the franchises had already been properly terminated in compliance with the Vehicle Code requirements.

56. Again, it is noted that Section 3060 provides in part:

> 3060. (a) Notwithstanding...the terms of any franchise, no franchisor shall terminate or refuse to continue any existing franchise unless all of the following conditions are met:
> ....
> (1) The franchisee and the board have **received** written notice from the franchisor as follows: ... (Bold and underline added.)

57. Thus, it must first be determined whether the notices of termination dated June 25, 2013, had been "received" by the franchisor, McConnell Chevrolet Buick, Inc.

58. The Vehicle Code does not define the term "received". However, there are definitions in the California Uniform Commercial Code ("UCC").[17] UCC section 1202 provides in part:

> ...
>
> (e) Subject to subdivision (f), a person[18] "receives" a notice or notification when:
> (1) it comes to that person's attention; or
> (2) it is duly delivered in a form reasonable under the circumstances at the place of business through which the contract was made or at another location held out by that person as the place for receipt of such communications.

59. It is undisputed that the notices dated June 18, 2013 and June 25, 2013 were sent to the franchisee at that time, McConnell Chevrolet Buick, Inc., and that they were sent to 1646 Hwy 99 E, Gridley, CA 95948. This is the business address of the franchisee and is the address shown in the Dealer Sales and Service Agreement (the franchise). The records of the DMV Occupational Licensing show the licensee "main location" to be 1646 Hwy 99, Gridley, CA 95948 (without the word "East"). (Exhibit D to motion)

60. Mr. Steffes, in the protests submitted by him, also states that Protestant is located at "1646 Hwy 99E, Gridley, California 95948-2611". (Protests, page 1, lines 21-23)

61. The notice dated June 25, 2013, for the Chevrolet franchise, contains on the first page the following:

> CERTIFIED MAIL: 7002 2410 0006 5390 9341 [19]
>
> RETURN RECEIPT REQUESTED

(Similar information is contained on the notice regarding the Buick franchise.)

62. The prior protests filed on July 1, 2013, in behalf of McConnell Chevrolet Buick, Inc.

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[17] The franchises at issue are contracts for the sale of goods and would likely come within Division 2 of the California Uniform Commercial Code ("UCC"), and thus the definitions in Article 1 of the UCC would be applicable. Even if the UCC is found not to apply to these contracts, the definitions contained in Article 1 are persuasive even if not mandatory that they be applied here.

[18] "Person" is defined in UCC section 1201(b)(27) as follows:

> (27) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government, governmental subdivision, agency, or instrumentality, public corporation, or any other legal or commercial entity."

As is the case with the Vehicle Code, the definition includes a corporation.

[19] Mr. Steffes points out that the information from GM submitted in connection with this motion indicates that the notices were sent "registered mail". (Declaration of Milan Golusin, page 2, lines 6-8) Whether they were sent certified or registered is irrelevant. The Vehicle Code does not require a manner of sending. The only requirement is that the notice be received.

expressly state that the notices of termination were "received" by the franchisee. These first protests were filed by the "Carter Law Office", stated that "Protestant is represented by the John Jeffrey Carter Law Office", and were signed by Maximilian G. Barteau, Attorney for Protestant, with the date of June 28, 2012. The protests expressly state that the notices were "received" in the following language:

"4. On or about June 19, 2013, **Protestant received** from Respondent written notice that Respondent intended to terminate its franchise agreement to sell Chevrolet [Buick] vehicles with Protestant effective 15 days from Protestant's receipt of said notice. **A copy of this notice is attached as Exhibit "A"**." (Emphasis added; Protest Nos. PR-2369-13 and PR-2370-13, page 2, lines 1-4)

63. There is sufficient evidence to conclude as a matter of law that the notices required by Section 3060 were received in June (or July) by the franchisee, McConnell Chevrolet Buick, Inc. There was no issue raised in the prior proceedings before the Board and there was no claim to the contrary until the unsupported claim of Mr. Steffes, in the Opposition to the Motion to Dismiss, dated March 12, 2014.

64. To the extent that Mr. Steffes is claiming that the notices should have been directed to him or the Board of Directors or other shareholders, or that the notices were "not properly served on Protestant", his position is unfounded. As Mr. Steffes has stated, the franchisee was the corporate entity. (Opposition, page 6, lines 8-22) Service is not required. All that is needed is that the "franchisee" "receive" the notice.

65. The proper notices were sent to and received at the address of the corporate entity (the franchisee), in June and July 2013. To the extent that there had been a change in the ownership of the stock of the entity, with new natural persons in control, does not change the fact that the "franchisee" is McConnell Chevrolet Buick, Inc. It would be up to those individuals claiming to be in control of the corporation to take steps to be sure they were aware of what communications were being received by the corporate entity that they allegedly controlled.

66. GM, by statute, was required only to be certain that the notices mandated by Section 3060 were "received by the franchisee", which was McConnell Chevrolet Buick, Inc. This GM had done.

67. Thereafter there was a hearing before an ALJ of the Board. At that hearing, McConnell Chevrolet Buick, Inc. was represented by John Jeffrey Carter, Esq., of the law firm that had filed the

protests in behalf of Protestant. Also present during the hearing was Mr. Michael A. McConnell, the dealer operator named as such under the franchise, and Mr. Bill Marker, a shareholder of the corporation.

68. Even though Mr. Steffes, as of at least October 7, 2013 (or perhaps earlier) had actual knowledge of the upcoming hearing on the merits of the termination (held on October 22, 2013), there was no appearance by Mr. Steffes or anyone representing him. Nor was there any claim made by anyone asserting that Mr. Carter was not authorized to represent the corporate entity that was the franchisee. (See Exhibit B to Motion, and Declaration of Gregory R. Oxford).

B.

Even if the Board's Decision of November 12, 2013 is of No Legal Significance, the New Protests were Not Effective as they were Not Timely Filed

69. Vehicle Code section 3060 states in part that:

> (2) ...The franchisee may file a protest with the board ,...within 10 days after receiving a 15-day notice, satisfying the requirements of this section, or within 10 days after the end of any appeal procedure provided by the franchisor. When a protest is filed, the board shall advise the franchisor that a timely protest has been filed, that a hearing is required pursuant to Section 3066, and that the franchisor may not terminate or refuse to continue until the board makes its findings.
> ...

70. The notices of termination here (received by McConnell Chevrolet Buick, Inc. in June and July 2013) gave reasons that are specifically included among those within Section 3060(A)(1)(b). This gives rise to what are called "15-day notice(s)", meaning that the franchises could terminate after 15 days unless McConnell Chevrolet Buick, Inc. filed its protests within only 10 days from receipt of the notices.[20]

71. Respondent has raised this as an issue in its motion where it states: "Also, of course, the right to file a protest is triggered by statutory notices of termination that were given in this case in June 2013; to invoke the Board's jurisdiction under Veh. Code §3060(a)(1)(B)(v), a dealership must file a protest within fifteen (sic) days of receiving the termination notice, which Mr. Steffes obviously did not

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[20] The grounds for termination were within Section 3060(A)(1)(b)(v). Mr. Steffes has asserted that GM should have utilized Section 3060(A)(1)(b)(i). (See paragraph 42) There are two problems with this assertion: (1) GM is free to choose whichever basis for termination exists and could have chosen both; and (2) Mr. Steffes' contention is akin to an admission that there was good cause to terminate the franchises due to the unauthorized transfers of "any ownership or interest...without the consent of the franchisor."

do here.". (Motion, page 2, lines 15-19)

72. It has been found that the notices of termination were "received" by the "franchisee" in June and July 2013. Mr. Steffes did not file the second set of protests until February 14, 2014, which is certainly not within 10 days of when the notices were received by McConnell Chevrolet Buick, Inc. February 14, 2014 is more than 7 months from the time when McConnell Chevrolet Buick, Inc. received them.

73. Contrary to the above, Mr. Steffes stated in the new protests that:

"4. On or about January 17, 2014, Protestant received from Respondent a notice that Respondent intends to terminate its existing franchise agreement to sell Buick [Chevrolet] vehicles."

74. However, there is nothing before the Board to indicate such notices were sent by Respondent and counsel for GM is unaware of any such notices. Mr. Steffes, in the Opposition, did include as Attachment H, a letter from GM's counsel, Mr. Oxford, dated January 16, 2014, to Mr. Woods, the attorney then representing Mr. Steffes. This letter indicates it was received by Mr. Woods on January 17, 2004, but, as stated earlier, it addresses the possible buy-back of parts in connection with the terminations that had already occurred. It is inconceivable that GM or its counsel would send out "notices of termination" in January 2014 when from their perspective the franchises had been legally and effectively terminated in November 2013 after a finding by the Board of good cause to terminate both franchises. In addition, it is difficult to understand how one could refer to the letter identified in Attachment H as a "notice of termination" even though it was characterized by Mr. Steffes as "improperly noticed".

75. If Mr. Steffes is correct that Mr. Carter was not authorized to represent McConnell Chevrolet Buick, Inc., the result must be that the protests filed by Mr. Carter were not authorized. However, if the only authorized protests are those filed by Mr. Steffes on February 14, 2014, as Mr. Steffes now contends, these protests were filed long after the 10-day time period from when the notices were received by the "franchisee" in June and July 2013. This would bring into operation the language of Section 3060(a)(3) which permits termination of a franchise without a hearing before the Board if "the appropriate period for filing a protest has elapsed."

76. Mr. Steffes' contentions that GM should have been dealing with the new shareholders or

the Directors of the corporation are not well taken. The only "franchisee" is the corporate entity, McConnell Chevrolet Buick, Inc. and the Vehicle Code requires only that notices be "received" by the "franchisee".

77. GM is not required to be certain that the shareholders or directors of a franchisee corporation receive the notices of termination. The difficulties and impracticability of doing so have been recognized by the legislature. The statutes require only that the notices be "received" by the "franchisee", not its officers, not its directors, not its shareholders. Due delivery at the proper address of the franchisee could satisfy the requirement that the notices were "received" as of that time, whether anyone in control of the dealership read the notices or was even aware of their existence.

78. Clearly the legislature intended to allocate to the franchisor the risks inherent in the transmission of notices to the franchisee. The risks of delay in delivery or loss of the notices prior to their receipt has been allocated to the franchisor. This is evident in the statutes as the notices will not be effective until the notices are "received" by the franchise. However, the legislature has allocated to the franchisee the risk of a failure to "read the mail". Under the circumstances here, a franchisee has only 10 days from the time the notice is "received" to file a protest. The statutes clearly indicate that, once the notices have been "received", any delay in reading them, or even loss of them, is a risk allocated to the franchisee, with the consequence being that the franchisee will lose the right to file a protest with the Board.

CONCLUSIONS

79. It is concluded that:

- The prior protests (Protest Nos. PR-2369-13 and PR-2370-13) were properly before the Board, as the notices of termination were received by the franchisee at that time, McConnell Chevrolet Buick, Inc.;
- The Board's Decision of November 12, 2013, overruled these protests and permitted the Chevrolet franchise and the Buick franchise of McConnell Chevrolet Buick, Inc. to be terminated;
- The Chevrolet franchise and the Buick franchise of McConnell Chevrolet Buick, Inc. terminated on or about November 14, 2013;

- As of the date of termination, there was no longer a "franchise" relationship between McConnell Chevrolet Buick, Inc. and General Motors, LLC;
- When the new protests (Protest Nos. PR-2382-14 and PR-2383-14) were filed on February 14, 2014, McConnell Chevrolet Buick, Inc. was no longer a "franchisee" of General Motors, LLC. and General Motors, LLC was not a "franchisor" of McConnell Chevrolet Buick, Inc. There was no "franchise" in existence between them; and,
- As there is no "franchise" between the parties and because McConnell Chevrolet Buick, Inc. is no longer a "franchisee", the Board lacks jurisdiction to hear Protest No. PR-2382-14 and Protest No. PR-2383-14.

RECOMMENDATION

80. It is recommended that Protest Nos. PR-2382-14 and. PR-2383-14 be dismissed with prejudice but that the order of dismissal be held in abeyance pending resolution of Respondent's Motion for an Award of Sanctions.

81. For the reasons stated below, there is no present recommendation from the ALJ regarding the Motion for an Award of Sanctions.

RESPONDENT'S MOTION FOR AN AWARD OF SANCTIONS

82. Respondent's Motion for an Award of Sanctions is based upon the Board's regulation which states as follows:

Section 551.21 Sanctions - Bad Faith Actions

(a) The ALJ may recommend ordering a party, a party's representative or both, to pay reasonable sanctions, including attorney's fees and costs, incurred by another party as a result of bad faith actions or tactics that are frivolous or solely intended to cause unnecessary delay.
(1) "Actions or tactics" include, but are not limited to, the making or opposing of motions or the failure to comply with a lawful order or ruling of the board.
(2) "Frivolous" means:
(A) Totally without merit; or
(B) For the sole purpose of harassing an opposing party.
(b) The ALJ shall not recommend an award of sanctions without providing notice and an opportunity to be heard.
(c) Whether there has been bad faith by a party shall be determined by the ALJ based upon testimony under oath or other evidence. Any proposed order recommending sanctions by the ALJ shall be on the record, or in writing, setting forth the factual findings on which the sanctions are based, as well as setting forth the factual findings as to the reasonableness of the amount(s) to be paid.
(d) A proposed order recommending an award of sanctions shall be considered by the

board members at their next regularly scheduled meeting. A determination not to award sanctions is not considered by the board members and is final upon issuance by the ALJ.

(e) The board members' consideration to affirm, reject or modify the ALJ's award of sanctions does not alone constitute grounds for continuance of any previously scheduled dates in the proceeding.

83. During the hearing on the Motion, the ALJ stated the following concerns regarding the application of this regulation to what was a "law and motion" proceeding during which no testimony was being taken.

84. The above section allows an ALJ to recommend sanctions be imposed if the ALJ finds that the moving party has incurred attorney's fees or costs "...as a result of bad faith actions or tactics that are frivolous or solely intended to cause unnecessary delay."

85. Subsection (a) of the regulation can be interpreted to apply to three classes of conduct:

1) "bad faith actions" or
2) "tactics that are frivolous" or
3) "tactics ... solely intended to cause unnecessary delay"

There are no commas in the regulation.

86. The regulation could also be interpreted to be limited to two situations, so that it applies to:

1) "bad faith actions or tactics that are frivolous" or
2) "bad faith actions or tactics that are ... solely intended to cause unnecessary delay".

If these latter two interpretations are correct, then "bad faith" is a necessary element of either of them.

87. Some examples of "actions or tactics" are provided in the regulation as is a definition of what is "frivolous". However, there is no guidance as to what standard should be applied for evaluating the "bad faith" (or the absence of good faith) of a party.

88. In addition, subsection (b) of the regulation prohibits an ALJ from making a recommendation for an award of sanctions "without providing notice and an opportunity to be heard." This provision may require more than just the notice of the hearing.

89. And, somewhat tangentially tied to the need for "notice and an opportunity to be heard" under (b) is the language in (c) which states:

///

(c) Whether there has been bad faith by a party shall be determined by the ALJ based upon testimony under oath or other evidence. Any proposed order recommending sanctions by the ALJ shall be on the record, or in writing, setting forth the factual findings on which the sanctions are based, as well as setting forth the factual findings as to the reasonableness of the amount(s) to be paid. (Underline added.)

90. As can be seen from the underlined portion of the first sentence, if "bad faith" is at issue, there must be an opportunity for the presentation of "testimony under oath" (which was not available in the hearing on the motion). And, the second sentence requires that "Any proposed order…" (whether there has been "bad faith" or not?) must contain two sets of factual findings (presumed to be based on the "testimony under oath or other evidence"). These factual findings must be as to both the basis for the awarding of the sanctions as well as the reasonableness of the amounts of the sanctions recommended. Neither of these could have been accomplished during or as a result of the hearing on the motion held before the ALJ on March 17, 2014. If nothing else, Mr. Steffes did not have an opportunity to address the reasonableness of the amounts of the sanctions sought by GM as the amounts were not mentioned until the Reply had been filed on the Friday before the Monday hearing.

91. There is also the possibility of interpreting that portion of the language in (c) as requiring "testimony under oath or other evidence" only if the claim is that there has been "bad faith" but not if the claim is that the "action or tactics" were "frivolous or solely intended to cause unnecessary delay". This could be so as the language in (c) expressly states "whether there has been bad faith…." but makes no reference to the need for "testimony under oath or other evidence" if the claim is that of "frivolous or solely intended to cause unnecessary delay." Of course, "bad faith" could be implicitly included in either of these situations.

92. Complicating things somewhat further is the possibility of interpreting the regulation to determine if the monetary sanctions sought should be limited to the fees and costs incurred solely in bringing the motion to dismiss the protests (that GM asserts was "totally without merit" and thus "frivolous") or whether the monetary sanctions sought should also include the fees and costs incurred in bringing the motion for sanctions and doing so in compliance with the requirements of the regulation.

93. It may well be that the attorney's fees and costs incurred in pursuing the claim for monetary sanctions will be significantly greater than the claim for attorney's fees and costs in seeking to obtain dismissal of the protests. GM's claim for attorney's fees and costs incurred in connection seeking

dismissal of the protests is in the amount of $6,745 which includes 17 hours of attorney's fees and a $200 filing fee. It is quite possible that, due to the emphasis on "live testimony" and the need for two sets of findings of facts, that, in pursuing the claim for monetary sanctions, there will be the need for discovery (including depositions). The additional attorney's fees and costs for pursuing the claim for monetary sanctions could greatly exceed $6,745.

94. Whether an award of sanctions can or cannot include the costs of pursuing the motion for sanctions may be a major factor in any decision of the parties to continue to pursue the claim or continue to defend against the claim.

95. The ALJ stated that, based upon what was before him as of the time of the hearing, he was of the opinion GM had established prima facie that the filing of the two protests was "totally without merit" and therefore would be "frivolous" within the definition contained in Section 551.21 of the regulation. However, the ALJ is not permitted to make such a recommendation to the Board as there must first be an opportunity for both sides, and especially Protestant and Mr. Steffes, to introduce evidence as to the decision to file the new protests. And, in addition, the ALJ cannot make a recommendation without specific "factual findings on which the sanctions are based" along with specific "factual findings as to the reasonableness of the amount(s) to be paid." (13 CCR § 551.21(c))

96. In support of the likelihood that sanctions may be appropriate here are that rather than waiting for months prior to filing these new protests, there was ample opportunity for Mr. Steffes and the others claiming an ownership interest in the franchisee to seek to be heard <u>before</u> the hearing on the merits of the prior protests, or <u>during</u> the hearing on the merits of the protest, or even <u>before the Board</u> when it was considering the Proposed Decision.

97. Mr. Steffes had knowledge of the prior protests, and the upcoming hearing on them, no later than October 7, 2013, approximately two weeks prior to the hearing held on October 22, 2013, before ALJ Hagle.

98. Mr. Steffes could have filed a motion to intervene pursuant to Section 551.13 of the Board's regulations. If granted, Mr. Steffes may have been permitted to engage in discovery as well as putting on evidence and cross-examination of witnesses, perhaps participating in settlement negotiations, and including the filing of an amicus curiae brief.

99. And, Mr. Steffes may have sought to present evidence before ALJ Hagle, both oral and documented, as "other interested individuals and groups" as stated in Section 3066.

100. In addition, Mr. Steffes could have sought to make an appearance before the Board itself when it was considering the Proposed Decision of ALJ Hagle on November 12, 2013.

101. It is difficult to believe that Mr. Steffes was not aware of the Decision of the Board issued on November 12, 2013 at some time far in advance of February 14, 2013, when he filed the two new protests. Although Mr. Steffes filed the new protests on February 14, 2014, in pro per, as stated earlier, Mr. Steffes had been represented by counsel who had exchanged communications with counsel for Respondent.

RECOMMENDATION AS TO THE MOTION FOR AN AWARD OF SANCTIONS

102. It is recommended that this portion of the Motion be remanded to an ALJ of the Board for further consideration taking into account the language of the Board's regulation.

PROPOSED ORDER OF REMAND REGARDING THE MOTION FOR AWARD OF SANCTIONS

It is hereby ordered that the portion of the motion seeking an award of sanctions is remanded to an ALJ of the Board for further proceedings in accordance with the provisions of 13 CCR § 551.21.

PROPOSED ORDER ADOPTING THE RECOMMENDATION REGARDING THE MOTION TO DISMISS THE PROTESTS

It is hereby determined that the portion of the motion regarding dismissal of the protests shall be adopted and orders of dismissal be issued upon the determination by the Board of the issues regarding that portion of the motion seeking an award of sanctions.

I hereby submit the foregoing which constitutes my proposed order in the above-entitled matters, as the result of a hearing before me, and I recommend this proposed order be adopted as the decision of the New Motor Vehicle Board.

DATED: March 27, 2014

By: _____
ANTHONY M. SKROCKI
Administrative Law Judge

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

Proposed Amendments Approved by the Board at the July 15, 2014, General Meeting

§ 551.21. Sanctions ~~- Bad Faith Actions~~.

(a) In any proceeding before the board or an ALJ, no party or representative of a party shall engage in or participate in any actions or tactics that are frivolous, or that are intended to cause or will result in unnecessary delay.

(b) For purposes of this section, “party” or “representative of a party” includes, but is not limited to, a party’s officer, director, managing agent, dealer principal or the equivalent, or their attorney.

~~(a) The ALJ may recommend ordering a party, a party's representative or both, to pay reasonable sanctions, including attorney's fees and costs, incurred by another party as a result of bad faith actions or tactics that are frivolous or solely intended to cause unnecessary delay.~~

(1) "Actions or tactics" include, but are not limited to, the making or opposing of motions or the failure to comply with a lawful order or ruling of the board or an ALJ, including a failure to comply timely with a pre-hearing conference order or discovery order.

(2) "Frivolous" includes, but is not limited to ~~means~~:

(A) Totally without merit as there is an absence of reasonable support, under the facts or law, for making or opposing the motion(s), or for the failure to comply; or

(B) For the ~~sole~~ purpose of harassing an opposing party or counsel.

(C) Actions or tactics, whether consisting of affirmative conduct or failure to act or respond, that will result or do result in unnecessary delay or costs, or are otherwise not in good faith.

(c) A party asserting a violation of this section may, by way of written motion in compliance with Article 1, section 551.19, or oral motion made on the record during reported proceedings, request that the board or an ALJ recommend that the board impose sanctions upon a party, or party’s representative, or both.

(d) An ALJ presiding over the matter who believes there has been a violation of this section may on his or her own initiative recommend that the board impose sanctions upon a party, or party’s representative, or both.

~~(b)~~ (e) The board shall not order sanctions, or an ALJ shall not recommend an award of sanctions, without providing the party or party’s representative against whom sanctions are sought notice and an opportunity to be heard.

(f) The board or ALJ shall make determinations as to whether the actions or tactics were frivolous based upon the administrative record and any additional testimony or documentary evidence presented.

~~(c)~~ (g) ~~Whether there has been bad faith by a party shall be determined by the ALJ based upon testimony under oath or other evidence.~~ Any proposed order recommending sanctions by the ALJ or board order imposing sanctions shall be on the record, or in writing, setting forth the factual findings on which the recommended or board ordered sanctions are based, as well as setting forth the factual findings as to the reasonableness of the sanctions, including the reasonableness of any amount(s) to be paid.

Attachment 3

~~(d)~~ (h) A proposed order recommending an award of sanctions shall be considered by the board members at their next regularly scheduled meeting. A determination not to award sanctions ~~is~~ shall not be considered by the board members and is final upon issuance by the ALJ.

~~(e)~~ (i) The board members' consideration to affirm, reject or modify the ALJ's award of sanctions does not alone constitute grounds for continuance of any previously scheduled dates in the proceeding.

(j) If the motion for sanctions is granted, the board may order or an ALJ may recommend that the party or party's representative or both pay the movant's reasonable expenses and attorney's fees incurred in bringing and pursuing the motion. However, attorney's fees and expenses will not be ordered if:

(A) The movant filed the motion before attempting in good faith to obtain compliance by the opposing party without board action;

(B) The opposing party's noncompliance, nondisclosure, response, or objection was substantially justified; or

(C) Other circumstances make an award unjust.

(k) If the motion for sanctions is denied, the board may order or an ALJ may recommend, after giving an opportunity to be heard, the movant or movant's representative or both to pay the party or party's representative who opposed the motion reasonable expenses and attorney's fees in bringing and pursuing the motion for such expenses and attorney's fees. However, attorney's fees and expenses will not be ordered if the motion for sanctions was substantially justified or other circumstances make an award unjust.

(l) If the motion for sanctions is granted in part and denied in part, the board may order or an ALJ may recommend that an award of reasonable expenses and attorney's fees incurred in connection with bringing or opposing the motion be apportioned.

Note: Authority cited: Section 3050(a), Vehicle Code. Reference: Sections 128.5, 20230.10, 2023.020, 2023.030, and 2023.040, Code of Civil Procedure; Section 11455.30, Government Code; and Section 3050.2, Vehicle Code.

The changes to the original text are illustrated in the following manner:

- Text proposed to be deleted for the 45-day comment period is displayed in ~~strikeout~~ type.
- Text proposed to be added for the 45-day comment period is displayed in underline type.
- Text proposed to be deleted for the 15-day comment period is displayed in ~~*italicized double strikeout*~~ type using a " – ".
- Text proposed to be added for the 15-day comment period is displayed in *italicized double underline* using a " – ".

§ 551.21. Sanctions ~~- Bad Faith Actions~~.

(a) In any proceeding before the board or an ALJ, no party or representative of a party shall engage in or participate in any actions or tactics that are "*misuses of the discovery process"*, frivolous, or that are intended to cause or will result in unnecessary delay.

(b) For purposes of this section, "party" or "representative of a party" includes, but is not limited to, a party's officer, director, managing agent, dealer principal or the equivalent, or their attorney.

~~(a) The ALJ may recommend ordering a party, a party's representative or both, to pay reasonable sanctions, including attorney's fees and costs, incurred by another party as a result of bad faith actions or tactics that are frivolous or solely intended to cause unnecessary delay.~~

(1) "Actions or tactics" "*that are misuses of the discovery process*" include, but are not limited to":" "~~*, the making or opposing of motions or the failure to comply with a lawful order or ruling of the board or an ALJ, including a failure to comply timely with a pre-hearing conference order or discovery order"*~~.

"(A) Persisting, over objection and without substantial justification, in an attempt to obtain information or materials that are outside the scope of permissible discovery;

(B) Using a discovery method in a manner that does not comply with its specified procedures;

(C) Employing a discovery method in a manner or to an extent that causes unwarranted annoyance, embarrassment, or oppression, or undue burden and expense;

(D) Failing to respond or to submit to an authorized method of discovery;

(E) Making, without substantial justification, an unmeritorious objection to discovery.

(F) Making an evasive response to discovery;

(G) Disobeying a board order to provide discovery;

(H) Making or opposing, unsuccessfully and without substantial justification, a motion to compel or to limit discovery;

(I) Failing to confer in person, by telephone, or by letter with an opposing party or attorney in a reasonable and good faith attempt to resolve informally any dispute concerning discovery, if the section governing a particular discovery motion requires the filing of a declaration stating facts showing that an attempt at informal resolution has been made."

(2) "Frivolous" includes, but is not limited to ~~means~~:

(A) Totally without merit as there is an absence of reasonable support, under the facts or

law, for making or opposing the motion(s), or for the failure to comply; or

(B) For the ~~sole~~ purpose of harassing an opposing party or counsel.

(C) Actions or tactics, whether consisting of affirmative conduct or failure to act or respond, that will result or do result in unnecessary delay or costs, or are otherwise not in good faith.

(c) A party asserting a violation of this section may, by way of written motion in compliance with Article 1, section 551.19, or oral motion made on the record during reported proceedings, request that the board or an ALJ recommend that the board impose sanctions upon a party, or party's representative, or both.

(d) An ALJ presiding over the matter who believes there has been a violation of this section may on his or her own initiative recommend that the board impose sanctions upon a party, or party's representative, or both.

~~(b)~~ (e) The board shall not order sanctions, or an ALJ shall not recommend an award of sanctions, without providing the party or party's representative against whom sanctions are sought notice and an opportunity to be heard.

(f) The board or ALJ shall make determinations as to whether the actions or tactics were frivolous based upon the administrative record and any additional testimony or documentary evidence presented.

~~(c)~~ (g) ~~Whether there has been bad faith by a party shall be determined by the ALJ based upon testimony under oath or other evidence.~~ Any proposed order recommending sanctions by the ALJ or board order imposing sanctions shall be on the record, or in writing, setting forth the factual findings on which the recommended or board ordered sanctions are based, as well as setting forth the factual findings as to the reasonableness of the sanctions, including the reasonableness of any amount(s) to be paid.

~~(d)~~ (h) A proposed order recommending an award of sanctions shall be considered by the board members at their next regularly scheduled meeting. A determination not to award sanctions ~~is~~ shall not be considered by the board members and is final upon issuance by the ALJ.

~~(e)~~ (i) The board members' consideration to affirm, reject or modify the ALJ's award of sanctions does not alone constitute grounds for continuance of any previously scheduled dates in the proceeding.

(j) If the motion for sanctions is granted, the board may order or an ALJ may recommend that the party or party's representative or both pay the movant's reasonable expenses and attorney's fees incurred *"as a result of the misuse of the discovery process and also"* in bringing and pursuing the motion. However, *"payment of"* attorney's fees and expenses will not be ordered if:

(1) The movant filed the motion before attempting in good faith to obtain compliance by the opposing party without board action;

(2) The opposing party's noncompliance, nondisclosure, response, or objection was substantially justified; or

(3) Other circumstances make an award unjust.

(k) If the motion for sanctions is denied, the board may order or an ALJ may recommend, after giving an opportunity to be heard, the movant or movant's representative or both to pay the party or party's representative who opposed the motion reasonable expenses and attorney's fees in *"opposing the motion for sanctions as well as"* bringing and pursuing the

motion for *"~~such~~"* expenses and attorney's fees. However, *"payment of"* attorney's fees and expenses will not be ordered if the motion for sanctions was substantially justified or other circumstances make an award unjust.

(l) If the motion for sanctions is granted in part and denied in part, the board may order or an ALJ may recommend that an award of reasonable expenses and attorney's fees incurred in connection with bringing or opposing the motion be apportioned.

Note: Authority cited: Section 3050(a), Vehicle Code. Reference: Sections 128.5, 2023.010, 2023.020, 2023.030, and 2023.040, Code of Civil Procedure; Section 11455.30, Government Code; and Section 3050.2, Vehicle Code.

Clean Version of Proposed Revisions

§ 551.21. Sanctions.

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(b) For purposes of this section, "party" or "representative of a party" includes, but is not limited to, a party's officer, director, managing agent, dealer principal or the equivalent, or their attorney.

(1) "Actions or tactics" that are misuses of the discovery process include, but are not limited to:

(A) Persisting, over objection and without substantial justification, in an attempt to obtain information or materials that are outside the scope of permissible discovery;

(B) Using a discovery method in a manner that does not comply with its specified procedures;

(C) Employing a discovery method in a manner or to an extent that causes unwarranted annoyance, embarrassment, or oppression, or undue burden and expense;

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(I) Failing to confer in person, by telephone, or by letter with an opposing party or attorney in a reasonable and good faith attempt to resolve informally any dispute concerning discovery, if the section governing a particular discovery motion requires the filing of a declaration stating facts showing that an attempt at informal resolution has been made.

(2) "Frivolous" includes, but is not limited to:

(A) Totally without merit as there is an absence of reasonable support, under the facts or law, for making or opposing the motion(s), or for the failure to comply; or

(B) For the purpose of harassing an opposing party or counsel.

(C) Actions or tactics, whether consisting of affirmative conduct or failure to act or respond,

that will result or do result in unnecessary delay or costs, or are otherwise not in good faith.

(c) A party asserting a violation of this section may, by way of written motion in compliance with Article 1, section 551.19, or oral motion made on the record during reported proceedings, request that the board or an ALJ recommend that the board impose sanctions upon a party, or party's representative, or both.

(d) An ALJ presiding over the matter who believes there has been a violation of this section may on his or her own initiative recommend that the board impose sanctions upon a party, or party's representative, or both.

(e) The board shall not order sanctions, or an ALJ shall not recommend an award of sanctions, without providing the party or party's representative against whom sanctions are sought notice and an opportunity to be heard.

(f) The board or ALJ shall make determinations as to whether the actions or tactics were frivolous based upon the administrative record and any additional testimony or documentary evidence presented.

(g) Any proposed order recommending sanctions by the ALJ or board order imposing sanctions shall be on the record, or in writing, setting forth the factual findings on which the recommended or board ordered sanctions are based, as well as setting forth the factual findings as to the reasonableness of the sanctions, including the reasonableness of any amount(s) to be paid.

(h) A proposed order recommending an award of sanctions shall be considered by the board members at their next regularly scheduled meeting. A determination not to award sanctions shall not be considered by the board members and is final upon issuance by the ALJ.

(i) The board members' consideration to affirm, reject or modify the ALJ's award of sanctions does not alone constitute grounds for continuance of any previously scheduled dates in the proceeding.

(j) If the motion for sanctions is granted, the board may order or an ALJ may recommend that the party or party's representative or both pay the movant's reasonable expenses and attorney's fees incurred as a result of the misuse of the discovery process and also in bringing and pursuing the motion. However, payment of attorney's fees and expenses will not be ordered if:

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(k) If the motion for sanctions is denied, the board may order or an ALJ may recommend, after giving an opportunity to be heard, the movant or movant's representative or both to pay the party or party's representative who opposed the motion reasonable expenses and attorney's fees in opposing the motion for sanctions as well as bringing and pursuing the motion for expenses and attorney's fees. However, payment of attorney's fees and expenses will not be ordered if the motion for sanctions was substantially justified or other circumstances make an award unjust.

(l) If the motion for sanctions is granted in part and denied in part, the board may order or an ALJ may recommend that an award of reasonable expenses and attorney's fees incurred in connection with bringing or opposing the motion be apportioned.

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