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8 STATE OF CALIFORNIA
9 NEW MOTOR VEHICLE BOARD

10 In the Matter of the Protest of
11 WEST COVINA MOTORS, INC., dba
12 CLIPPINGER CHEVROLET,
13 Protestant,
14 v.
15 GENERAL MOTORS LLC,
16 Respondent.

Protest No. PR-2348-12

**PROPOSED ORDER GRANTING
RESPONDENT'S "MOTION TO
DISMISS PROTEST FOR LACK OF
JURISDICTION" (PR-2348-12)**

17 In the Matter of the Protest of
18 WEST COVINA MOTORS, INC., dba
19 CLIPPINGER CHEVROLET,
20 Protestant,
21 v.
22 GENERAL MOTORS LLC,
23 Respondent.

Protest No. PR-2213-10

**PROPOSED ORDER DENYING
"PROTESTANT'S REQUEST THAT
THE BOARD EXERCISE ITS
CONTINUING JURISDICTION OVER
THE CONFIDENTIAL STIPULATED
DECISION OF THE BOARD
RESOLVING PROTEST" (PR-2213-10)**

**PROPOSED ORDER GRANTING
RESPONDENT'S "MOTION TO
DISMISS FOR LACK OF
JURISDICTION PROTESTANT'S
REQUEST THAT THE BOARD
EXERCISE ITS CONTINUING
JURISDICTION OVER THE
CONFIDENTIAL STIPULATED
DECISION OF THE BOARD
RESOLVING PROTEST" (PR-2213-10)**

**STATUS OF FRANCHISE AND
DISMISSAL OF PROTEST NO.
PR-2213-10**

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12 FACTUAL AND PROCEDURAL BACKGROUND

13
14 1. Protestant is West Covina Motors, Inc. ("WCM" or "Protestant"), dba Clippinger
15 Chevrolet. Respondent is General Motors LLC ("GM" or "Respondent"). Protestant's dealership was
16 formerly located at 1932 East Garvey Avenue South in West Covina, California.

17 2. There have been two protests filed relating to the intended termination of Protestant's
18 Chevrolet franchise: the first was filed on February 22, 2010 (PR-2213-10) and will be referred to as the
19 "First Protest"; and the second was filed on October 12, 2012 (PR-2348-12) and will be referred to as the
20 "Second Protest."

21 3. On February 19, 2015, Administrative Law Judge ("ALJ") Anthony M. Skrocki presided
22 over a telephonic hearing originally set to address Respondent's Motion to Dismiss Protest for Lack of
23 Jurisdiction regarding the Second Protest, PR-2348-12. However, on February 9, 2015, prior to this
24 telephonic hearing, Protestant filed "Protestant's Request that the Board Exercise Its Continuing
25 Jurisdiction Over the Confidential Stipulated Decision of the Board Resolving Protest" (the First Protest,
26 PR-2213-10). As can be seen from the title of this motion, the First Protest was previously resolved by
27 the Board by way of a "Confidential Stipulated Decision of the Board".

28 4. Michael J. Flanagan, Esq. and Torin M. Heenan, Esq. of the Law Offices of Michael J.

1 Flanagan represented Protestant. Gregory R. Oxford, Esq. of Isaacs Clouse Crose & Oxford LLP
2 represented Respondent.

3 5. Because both protests involve the same parties, same counsel and same franchise with
4 common facts and overlapping issues, counsel, during the February 19, 2015 hearing, argued both
5 Respondent's motion to dismiss the Second Protest as well as Protestant's Request that the Board
6 continue exercising jurisdiction over the Stipulated Decision that had resolved the First Protest.¹

7 6. On February 20, 2015, the day after the February 19, 2015 hearing, Respondent filed a
8 Motion to Dismiss Protestant's Request. On March 3, 2015, Protestant filed its response. Counsel for
9 the parties agreed that no further hearing was necessary regarding this motion.

10 7. The Proposed Orders address:

11 A. Respondent's "Motion to Dismiss [the Second] Protest for Lack of Jurisdiction";

12 B. "Protestant's Request that the Board Exercise Its Continuing Jurisdiction Over the
13 Confidential Stipulated Decision of the Board Resolving [the First] Protest";

14 C. Respondent's "Motion to Dismiss for Lack of Jurisdiction Protestant's Request that the
15 Board Exercise its Continuing Jurisdiction Over the Confidential Stipulated Decision of the Board
16 Resolving [the First] Protest"; and,

17 D. Status of the Chevrolet franchise and dismissal of the First Protest.

18 **PENDING MOTIONS**

19 8. As stated above, there are two motions and one request (being treated as a motion)
20 concerning two protests at issue relating to the termination of WCM's Chevrolet franchise. These
21 pleadings will be addressed in the order in which they were filed.

22 **GM's Motion to Dismiss the Second Protest (Protest No. PR-2348-12)**

23 9. On January 27, 2015, GM filed its "Motion to Dismiss Protest For Lack of Jurisdiction".
24 Although this motion is directed solely at the Second Protest, GM's assertion is that the Board lacks
25 jurisdiction to act on the Second Protest due to the Board's resolution of the First Protest.

26
27 ¹ On November 22, 2010, the parties submitted a [Proposed] Confidential Stipulated Decision of the Board Resolving Protest
28 ("Stipulated Decision" or "Settlement Agreement"). The Board adopted the Stipulated Decision on December 15, 2010, and
issued an "Order Adopting Confidential Stipulated Decision of Board Resolving Protest" ("Board's Order of December 15,
2010").

1 10. GM asserts that:

- 2 ■ The second protest is moot as WCM's Dealer Agreement terminated in December 2012
3 pursuant to the Settlement Agreement and Stipulated Decision of the Board regarding the
4 First Protest; (Motion, p. 10, lines 24-28; p. 11, lines 1-7)
- 5 ■ WCM is collaterally estopped from contesting the prior termination of the Dealer
6 Agreement as the Bankruptcy Court found (in three orders) that the Dealer Agreement had
7 terminated in December 2012 due to non-compliance with the terms of the Board's Order
8 of December 15, 2010 that had resolved the First Protest; (Motion, page 11, lines 16-26)
- 9 ■ As there is no longer a franchise in existence, GM withdrew its notice of termination on
10 January 14, 2015;
- 11 ■ There is no proposed termination for WCM to protest; and,
- 12 ■ Thus, the Board lacks jurisdiction to proceed on the Second Protest. (Motion to Dismiss
13 Protest, p. 1, lines 21-28; p. 2, lines 1-3)

14 11. GM also contends that WCM lacks standing to pursue the protest before the Board. This is
15 because: The Bankruptcy Court ordered WCM's bankruptcy case be converted to a Chapter 7
16 (liquidation) proceeding and appointed a Trustee for WCM's Bankruptcy Estate; any right to proceed
17 before the Board is thus vested in the Trustee (and not WCM); and the Trustee had decided not to pursue
18 this protest before the Board. (Motion to Dismiss Protest, p. 2, lines 4-8; p. 13, lines 1-28)

19 **Protestant's Request as to the First Protest (Protest No. PR-2213-10)**

20 12. On February 9, 2015, rather than file the expected opposition to the motion to dismiss the
21 Second Protest, WCM filed "Protestant's Request that the Board Exercise its Continuing Jurisdiction
22 Over the Confidential Stipulated Decision of the Board Resolving Protest" (the First Protest).

23 13. Although stating that it did not dispute the findings of the Bankruptcy Court, Protestant
24 claimed that the Bankruptcy Court's determinations that the franchise had terminated are not binding
25 upon the parties in the actions before the Board, that only the Board has the authority to determine the
26 status of the franchise, and "[t]he Board has not issued, nor been given the opportunity to issue, any order
27 declaring Protestant's franchise terminated." (Request, p. 6, lines 12-14)

28 14. Protestant also stated that it "...does not oppose Respondent's Motion to Dismiss [the

1 Second] Protest for Lack of Jurisdiction per se, in light of its eleventh hour withdrawal of its Notice of
2 Termination [that gave rise to the Second Protest], but asserts that Protestant's franchise has not been
3 terminated...". Protestant claimed that the franchise continues to exist and sought proceedings before the
4 Board "so that all matters [regarding the First Protest and the Stipulated Decision of the Board] may be
5 resolved." (Request, p. 2 lines 8-12)

6 **Respondent's Reply Memorandum**

7 15. On February 17, 2015, Respondent filed its "Reply Memorandum in Support of Motion to
8 Dismiss Protest for Lack of Jurisdiction". Although Respondent's motion to dismiss was directed at the
9 Second Protest, this pleading addressed both protests as well as Protestant's Request, which also
10 addressed both protests.

11 16. GM contends that since WCM did not file an opposition and expressly stated it does not
12 oppose the motion to dismiss, the motion should be granted. (Reply, p. 1, lines 26-28)

13 **The Telephonic Hearing of February 19, 2015**

14 17. On February 19, 2015, a telephonic hearing was held before ALJ Skrocki, during which
15 counsel addressed Respondent's Motion to Dismiss Protest No. PR-2348-12 and Protestant's Request re:
16 PR-2213-10. At the conclusion of the telephonic hearing, counsel agreed that no further briefing would
17 be necessary.

18 18. Near the conclusion of the hearing, counsel for Protestant made reference to a letter, dated
19 October 29, 2014 (almost four months prior) from Mr. John Tedford, counsel for Mr. Gill who is the
20 Trustee of WCM's Bankruptcy Estate. Neither GM nor the Board had previously been advised of this
21 letter. Protestant claimed that this letter evidenced an abandonment by the Trustee of the rights under the
22 franchise so that Protestant could then assert the franchise rights in its own name (in the name of WCM –
23 not the Bankruptcy Estate of WCM) in the protest proceedings before the Board. If this assertion is
24 factually and legally correct, WCM contends it would then have standing to pursue the protests before the
25 Board.

26 **Respondent's Motion to Dismiss Protestant's Request as to the First Protest**
27 **(Protest No. PR-2213-10)**

28 19. On February 20, 2015, notwithstanding the agreement of counsel on February 19, 2015,

1 that no further briefing was necessary, Respondent filed its “Motion to Dismiss for Lack of Jurisdiction
2 Protestant’s Request that the Board Exercise its Continuing Jurisdiction over the Confidential Stipulated
3 Decision of the Board Resolving the [First] Protest”, with references to both PR-2213-10 (the First
4 Protest) and PR-2348-12 (the Second Protest).

5 20. As to the Second Protest, GM asserted that because Protestant failed to file an opposition
6 to GM’s Motion to Dismiss the Second Protest (PR-2348-12), Protestant was “essentially conceding that
7 the Motion should be granted”. (Motion to Dismiss Request, p. 1, lines 21-28)

8 21. As to the First Protest, GM again asserted that WCM lacks standing and GM incorporated
9 by reference into this pleading its prior arguments. These arguments included that only the Trustee of
10 WCM’s bankruptcy estate has standing to assert claims before the Board relating to termination of the
11 franchise, and that WCM is collaterally estopped to challenge the finding of termination of the franchise,
12 as confirmed three times by the Bankruptcy Court. (Motion to Dismiss Request, p. 2, lines 1-8)

13 22. In particular, GM challenged WCM’s interpretation and claimed effect of the 11th hour
14 submission of the letter WCM asserted was an abandonment by the Trustee of the claims under the
15 franchise that WCM wished to pursue before the Board. (Motion to Dismiss Request, p. 3, lines 7-12)

16 **Protestant’s Response to GM’s Motion to Dismiss Protestant’s Request**

17 23. This pleading, filed on March 3, 2015, urged that the Board refuse to consider GM’s
18 motion filed on February 20, 2015 as being “unauthorized and GM has already conceded there is no
19 further briefing necessary and nothing further to argue.” (Response, p. 2, lines 13-20)

20 **ANALYSIS**

21 24. On April 13, 2015, the United States District Court, Central District of California issued a
22 detailed order pertaining to WCM and GM which addressed the above issues. Counsel for both parties
23 agreed to submit the District Court Order to the Board for its consideration² and did not request additional

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27 _____

28 ² The parties agree that the District Court Order is interlocutory pending entry of any final judgment in the case.

1 briefing or hearing before the ALJ.³ (The District Court's Order is attached as Exhibit A)

2 25. Upon review of the District Court Order, the ALJ has determined that the District Court
3 Judge, the Honorable John F. Walter, has analyzed the same issues that are before the Board in these
4 proceedings, and has written a comprehensive and accurate recitation of what has transpired. In addition,
5 the factual and legal conclusions of the District Court Judge, even if not conclusive or not binding upon
6 the Board as to the outcome of the issues before the Board, are at the least persuasive, and further are
7 identical to those reached by the ALJ.

8 26. Therefore, because the ALJ is of the belief that Judge Walters' order is well analyzed and
9 well written, rather than prepare separate but identical findings and conclusions, the following excerpts
10 from the District Court's Order are hereby recognized as being applicable to the issues before the Board
11 and incorporated into this Proposed Order and adopted as the findings and conclusions of the ALJ.

12 27. As will be seen, the District Court Order determined that, in accordance with the Stipulated
13 Decision and December 15, 2010 Order, the Dealer Agreement/Franchise had terminated as of December
14 31, 2012. Thus there is no longer any right in WCM to proceed on either of its protests before the Board.
15 (District Court Order, p. 13)

16 28. The following paragraphs are from the District Court Order:

17 **I. Factual and Procedural Background** [footnote omitted]

18 This action arises out of a dispute between GM and a former authorized Chevrolet
19 dealership operated by Defendant West Covina Motors, Inc. ("WCM"). WCM operated
20 the Chevrolet dealership in West Covina, California pursuant to a General Motors Sales
21 and Service Agreement ("Dealer Agreement") for several years. As a result of WCM's
22 failure to maintain its wholesale floor plan credit line used to finance its purchase of new
23 vehicles from GM as required by Article 10.2 of the Dealer Agreement and its inadequate
24 sales performance in violation of Articles 6.4.1 and 9 of the Dealer Agreement, GM
25 served WCM with a Notice of Intent to Terminate WCM's Dealer Agreement. In
26 response, WCM filed a protest of GM's intended termination with California's New
27 Motor Vehicle Board ("Board") pursuant to Section 3060 of the California Vehicle Code
28 (Protest No. PR 2213-10) ("First Protest"). GM and WCM settled the First Protest, and
the terms of their settlement agreement were memorialized in a Settlement and Deferred
Termination Agreement entered into as of November 8, 2010 "Settlement Agreement".
The Board was presented with and adopted the Settlement Agreement on December 15,

³ This federal court action was filed by GM on January 30, 2015, alleging breach of contract and four other claims against WCM and other defendants. In addition, GM filed a Motion for Preliminary Injunction seeking injunctive relief because WCM had failed and refused to remove GM brand signs from WCM's former locations near the site of GM's newly authorized dealer, Sage Chevrolet. WCM moved to dismiss GM's claims with WCM asserting, among other things, that the Board action was still pending and raising the same arguments as are now before the Board.

1 2010 in an Order Adopting Confidential Stipulated Decision of Board Resolving Protest
2 (“December 15, 2010 Order”).

3 Pursuant to Section 2.3 of the Settlement Agreement, WCM was required to
4 establish and maintain a new \$3 million floor plan credit line and further agreed that if
5 WCM lost its new financing and did not regain it within 90 days, WCM would either
6 terminate the Dealer Agreement voluntarily or present a “buy-sell” proposal to GM to sell
7 its dealership to an unaffiliated third party. Specifically, Section 2.3 of the Settlement
8 Agreement provided:

9 2.3 If at any time before November 30, 2012, WCM loses its Dedicated
10 Chevrolet Flooring or its total amount decreases below \$3 million, WCM shall
11 have ninety days to either (a) provide written evidence of a commitment for
12 replacement Dedicated Chevrolet Flooring in the amount of at least \$3 million
13 from GMAC or another GM-approved financial institution or (b) present GM
14 with a fully-executed “buy-sell” agreement and complete proposal for the
15 transfer of the stock or assets of WCM to a person or entity not affiliated with
16 WCM or Owner. If WCM does not satisfy either of these conditions (a) or (b)
17 within ninety days of the date it loses its Dedicated Chevrolet Flooring or its
18 total amount decreases below \$3 million, WCM agrees that its Dealer
19 Agreement will terminate voluntarily effective 30 days later (*i.e.*, 120 days
20 after the loss of the Dedicated Chevrolet Flooring or its decrease below \$3
21 million) pursuant to Article 14.2 of the Dealer Agreement; upon such
22 termination, WCM shall be entitled to termination assistance pursuant to
23 Article 15 of the Dealer Agreement with the exception of Article 15.3. WCM
24 and Owners agree not to protest said voluntary termination pursuant to section
25 3060 of the Vehicle Code or to challenge said termination in any judicial or
26 administrative forum and hereby agree that they will have no legal right to do
27 so. For purposes of this section and section 2.5 below, a person or entity shall
28 be deemed affiliated with WCM or Owner if it meets the definition of
Affiliate set forth in paragraph 3.5 below.

17 In December 2011, WCM again lost its floor plan credit line, and was unable to
18 regain it in the time provided by Section 2.3 of the Settlement Agreement. WCM also
19 failed to submit the buy-sell proposal to GM as required by Section 2.3 of the Settlement
20 Agreement. Because WCM had failed to either regain its floor plan credit line or submit
21 the required buy-sell proposal to GM as required by Section 2.3 of the Settlement
22 Agreement, GM notified WCM that it was terminating the Dealer Agreement pursuant to
23 Section 2.3 of the Settlement Agreement.

21 Because the parties had agreed that the Board retained exclusive jurisdiction to
22 enforce its December 15, 2010 Order, WCM complained to the Board about GM’s
23 threatened termination, and the Board determined that GM failed to give WCM proper
24 notice of termination. As a result, the Board granted WCM additional time to submit a
25 buy-sell proposal. Specifically, the Board ruled that WCM’s Dealer Agreement would
26 remain in effect pending the timely occurrence of one of two alternatives available to
27 WCM, namely: (1) obtaining floor plan financing as required by the Settlement Agreement;
28 or (2) the submission by WCM to GM of the complete buy-sell package as required by the
Settlement Agreement. In its decision, the Board concluded that “if neither of these
alternatives occur, [WCM’s] franchise shall terminate on the 81st day after the mailing, to
the parties and their counsel by U.S. Postal Service Certified Mail, a copy of the Board’s
Order adopting this Proposed Decision.”

27 On October 3, 2012, GM sent a second “back-up” 15 day termination notice
28 pursuant to Vehicle Code section 3060(a)(1)(B)(v) due to WCM’s alleged failure to
conduct customary sales and service operations for seven consecutive days in violation of

1 Article 14.5.3 of the Dealer Agreement. WCM responded to the October 3, 2012
2 Termination Notice by filing a second protest with the Board (Protest No. 2348-12)
3 (“Second Protest”).

4 Before the eighty day period expired, WCM presented a buy-sell proposal which
5 was approved by GM on November 29, 2012. However, it is undisputed that the
6 transaction contemplated in the buy-sell proposal did not close within the 30 days required
7 by Section 2.6 which provides in relevant part as follows:

8 If a GM-approved “buy-sell” transaction does not close within thirty days of
9 GM’s notifying WCM of the approval, then WCM agrees that its Dealer
10 Agreement will terminate voluntarily pursuant to Article 14.2 of the Dealer
11 Agreement.... WCM agrees not to protest said voluntary termination pursuant
12 to section 3060 of the Vehicle Code or file any other litigation of any nature
13 whatsoever concerning termination of the Dealer Agreement.

14 On December 28, 2012, the day prior to the expiration of the 30 day closing period
15 for the buy-sell agreement, WCM filed a Chapter 11 [re-organization] bankruptcy petition
16 in the United States Bankruptcy Court for the Central District of California, Case No.
17 2:12bk52197 ER. On January 22, 2013, GM filed a Motion for Relief from Automatic
18 Stay with the Bankruptcy Court in which it requested a determination that WCM’s
19 bankruptcy filing and the automatic stay under 11 U.C (sic) §362 did not bar the voluntary
20 termination of the Dealer Agreement under the Settlement Agreement and December 15,
21 2010 Order upon expiration of the thirty day period provided in Section 2.6 of the
22 Settlement Agreement. On February 14, 2013, the Bankruptcy Court granted GM’s motion
23 and held in relevant part:

24 [I]t is undisputed that [WCM] did not satisfy the condition set forth in Section
25 2.6 of the Settlement Agreement which provides that Debtor will voluntarily
26 and without protest terminate the Dealer Agreement... [T]he Debtor and GM
27 mutually and voluntarily entered in the Settlement Agreement, by which
28 Debtor’s failure to satisfy the condition of Section 2.6 triggered a termination
of the Dealer Agreement... For these reasons the Court finds that the Dealer
Agreement terminated upon Dealer’s failure to close the YTransport buy-sell
transaction and hereby GRANTS GM’s motion.

On March 4, 2013, [on motion of the City of West Covina, one of the largest
creditors of WCM], WCM’s bankruptcy case was converted from a Chapter 11
[reorganization] to a Chapter 7 [liquidation], and David Gill was appointed Trustee of
WCM’s bankruptcy estate. On October 23, 2014, WCM filed an emergency motion in the
Bankruptcy Court seeking an order compelling the Trustee to abandon any interest that the
Bankruptcy estate had in the Dealership Agreement or the GM franchise to WCM. GM
opposed WCM’s emergency motion on the grounds that the Dealer Agreement had
terminated and “was not property of the estate.” In its Opposition, GM argued that because
the Bankruptcy Court had previously determined that no interest in the terminated Dealer
Agreement remained in WCM’s bankruptcy estate, the Trustee had nothing to abandon,
and the Bankruptcy Court could not compel him to take such action. The Bankruptcy
Court denied WCM’s motion and held in its October 28, 2014 Order that any interest
WCM’s estate may have had in the Dealer Agreement had terminated and ceased to be
property of the estate, and therefore, it could not be abandoned by the Trustee.
Specifically, the October 28, 2014 Order provided:

Where property ceases to be property of the estate, 11 U.S.C. § 554 does not
provide authority for abandonment.

///

1 The Court agrees with GM that the issue of whether the bankruptcy estate has
2 an interest in the Dealer Agreement has been decided against WCM. This
3 Court, in the 2013 Order, held that the “Debtor did not satisfy the condition
4 set forth in Section 2.6 of the Settlement Agreement, which provide[d] that the
5 Debtor will voluntarily and without protest terminate the Dealer Agreement.”
6 2013 Order, 7 [citations omitted] This Court found that “the Dealer
7 Agreement terminated upon Debtor’s failure to close the YTransport buy-sell
8 transaction[.]” 2013 Order, 10. Implicit in the Court’s decision was that the
9 Dealer Agreement had, at the time that it terminated upon its own terms,
10 ceased to be property of the estate. WCM did not appeal this decision nor did
11 it move for reconsideration of this Order, and it is now binding on the parties
12 as law of the case. [Citations omitted] (“[T]he law of the case doctrine
13 generally precludes reconsideration of an issue that has already been decided
14 by the same court.”)

15 Based on the Court’s prior conclusion that the Dealer Agreement ceased to be
16 property of the estate when it terminated by its own terms, the Court finds that
17 it cannot now be abandoned. The Debtor cannot challenge this Court’s prior
18 decision now.

19 Notwithstanding the October 28, 2014 Order of the Bankruptcy Court, WCM
20 attempted to proceed before the Board on its Second Protest, which had been stayed by the
21 Board based on a stipulation between GM and WCM. In light of WCM’s attempt to pursue
22 its Second Protest, on December 14, 2014, GM filed a Motion in the Bankruptcy Court
23 seeking an order that would enjoin WCM from prosecuting its [sic] Second Protest.
24 Although the Bankruptcy Court reaffirmed its prior holding that the Dealer Agreement had
25 terminated, it declined under its discretionary absence [sic] powers to grant injunctive
26 relief to GM stating as follows:

27 This Court has issued two lengthy decisions regarding the Dealer Agreement
28 and concluded twice that it terminated pursuant to its terms and ceased to be
property of the estate. The Court first concluded that the automatic stay did
not bar the termination of the Dealer Agreement and that it had terminated
pursuant to its own terms. D.E. 150

Significantly later, the Court determined that – as the Dealer Agreement had
terminated – it ceased to be property of the estate and there was nothing to
abandon.

The Court did not, as WCM contends, “effectively abandon” the estate’s
interest to WCM. Rather, in denying WCM’s motion for order compelling
abandonment of the estate’s interest, if any, in the Dealer Agreement, the
Court found that WCM was bound by its unappealed and final determination
that the Dealer Agreement. D.E. 487. 6 ...

Similarly, the Court did not find, as WCM characterizes, “that the Bankruptcy
Court had no role in the termination of the franchise.” Opposition, 2: 19-20.
To the contrary, this Court reached the question of whether the Dealer
Agreement had terminated and concluded that it terminated pursuant to its
own terms. [D.E. 487, 6].

...

Efficient administration of this case requires that the Court abstain: this Court
has issued its order and the NMVB can interpret those orders according to its
own rules and procedures. As the Court has held that the Dealer Agreement

1 has terminated and is not property of the estate and could not be abandoned to
2 any party, the Court exercises its discretion to no longer entertain these issues.

3 On January 27, 2015, GM filed a Motion to Dismiss the Second Protest on the
4 grounds the Board lacked jurisdiction to adjudicate it because GM had withdrawn the
5 Second Termination Notice sent on October 3, 2012, and GM argued in the alternative that
6 WCM did not have standing because any right to proceed before the Board was held solely
7 by the bankruptcy trustee and he had refused to pursue the Second Protest. WCM advised
8 the Board that in light of GM's withdrawal of the Second Termination, WCM would not
9 oppose dismissal of the Second Protest, but argued that the Board should exercise
10 jurisdiction reserved under its December 15, 2010 Order. ...

11 (District Court Order, pp. 1-7)

12 **III. Discussion**

13 ...
14 Defendants argue that GM's Complaint should be dismissed or this action should be
15 stayed because the underlying dispute is the subject of two administrative proceeding[s]
16 currently pending before the Board and it would be improper to litigate the claims alleged
17 by GM in this forum. Specifically, Defendants contend that that the WCM Dealer
18 Agreement has not terminated and that GM is required to prove good cause for termination
19 in a new Board hearing pursuant to Vehicle Code Sections 3060-61.

20 **A. Motion to Dismiss**

21 **1. GM's Claims are Ripe for Adjudication**

22 ...
23 In this case, the Court concludes that GM's claims are ripe for adjudication.
24 Despite Defendants' arguments to the contrary, GM's claims do not rest on "contingent
25 future events," but on the historical fact that WCM's Dealer Agreement terminated in
26 December 2012 pursuant to the express terms of a stipulated adjudication by the Board that
27 provided for voluntary, non-protestable termination of the Dealer Agreement if, as is
28 undisputed, WCM failed to satisfy the conditions set forth in Section 2.6 of the Settlement
29 Agreement. ... The Settlement Agreement by its terms did not require any action by GM to
30 trigger the agreed voluntary termination after WCM failed to satisfy that condition set forth
31 in Section 2.6, and, as the Bankruptcy Court has already found, on three different
32 occasions, that the Dealership Agreement terminated because WCM did not timely satisfy
33 the condition. Moreover, WCM told the Board recently that it "does not dispute the
34 Bankruptcy Court's findings." Thus, for WCM to now argue that GM's claim[s] are not
35 ripe for adjudication because it is unclear if the Dealer Agreement has been terminated is
36 simply disingenuous.⁴

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1 Accordingly, Defendants' Motion to Dismiss is denied with respect to ripeness.

2 **2. Exhaustion**

3 Despite Defendants' arguments to the contrary, GM is not required to "exhaust" any
4 administrative remedies before the Board because no such remedies exist. The Board made
5 its final administrative determination on the First Protest when it adopted the Settlement
6 Agreement in its December 15, 2010 Order. Under that final adjudication, the failure of
7 WCM to satisfy the conditions set forth in Section 2.6 resulted in the automatic termination
8 of the Dealer Agreement.⁵

9 ...
10 Accordingly, Defendants' Motion to Dismiss is denied with respect to exhaustion.

11 (District Court Order, pp. 11-14)

12 **CONCLUSIONS**

13 **The Second Protest is Moot**

14 29. GM asserts that the Second Protest is moot. (Motion to Dismiss, p. 2, lines 11-15; p. 10,
15 lines 24-28; p. 11, lines 1-7) WCM states that "Protestant does not oppose Respondent's Motion to
16 Dismiss Protest for Lack of Jurisdiction per se..." (Protestant's Request, p. 2, lines 8-9)

17 30. The District Court has concluded that this protest is moot. (District Court Order, Footnote
18 7, p. 13)

19 31. The ALJ likewise finds that the Second Protest, PR-2348-12, is moot.

20 **As to Both Protests, WCM is Collaterally Estopped from Contesting the**
21 **Prior Termination of the Dealer Agreement**

22 32. GM asserts that the Bankruptcy Court has ruled three times that the Dealer Agreement had
23 terminated by operation of non-bankruptcy law, to wit, Section 2.6 of the Settlement Agreement and
24 Stipulated Decision. (Motion to Dismiss Protest, p. 11, lines 18-26) WCM has stated that it "does not
25 dispute the Bankruptcy Court's findings ..." (Request, p. 2, lines 25-26)

26 33. The District Court agreed with GM and, just as the Bankruptcy Court has ruled three times
27 prior, the District Court also ruled that the Dealer Agreement had terminated in December 2012. (District
28 Court Order, p. 12)

⁵ "It is undisputed that the Second Protest is moot." (District Court Order, Footnote 7, pp. 13)

1 34. The District Court stated that “[i]n addition, it appears that WCM is collaterally estopped
2 from proceeding before the Board because it litigated and lost the Section 2.6 termination issue in three
3 separate proceedings before the Bankruptcy Court.” (District Court Order, Footnote 6, pp. 12-13)

4 35. The ALJ also finds that the Dealer Agreement terminated for the reasons stated by the
5 Bankruptcy Court and the District Court. The termination occurred in December 2012 in accordance with
6 the Board’s Order of December 15, 2010, without the need for further action by GM or the Board. As of
7 December 2012, WCM ceased being a franchisee of GM.

8 36. The ALJ likewise finds that WCM is collaterally estopped from claiming that the franchise
9 had not terminated in December 2012.

10 **WCM is not the Real Party in Interest and Lacks Standing to**
11 **Appear as a Party to these Protests**

12 37. GM alleges that when the bankruptcy case was converted from a Chapter 11 (re-
13 organization) to a Chapter 7 (liquidation) proceeding, the only person with standing to enforce any rights
14 of WCM is the Trustee for the Bankruptcy Estate of WCM. (Motion to Dismiss Protest, p. 2, lines 4-8)

15 38. The Bankruptcy Court has so ruled. (District Court Order, footnote 6, p. 13)

16 39. The District Court agreed that the Trustee would be the only person with standing to
17 pursue any claims that may exist under the Dealer Agreement. The District Court stated: “Furthermore,
18 because WCM is the debtor in a Chapter 7 bankruptcy case, the Trustee is vested with the exclusive right
19 to challenge retroactively the termination of WCM’s Dealer Agreement in 2012, and, thus, WCM lacks
20 standing to initiate or prosecute proceedings before the Board. ... In this case, the Trustee has determined,
21 in his business judgment, not to proceed before the Board, and, **thus, the Board lacks jurisdiction to**
22 **make any ruling on behalf of WCM.”** (District Court Order, Footnote 6, p. 13; emphasis added)

23 40. The ALJ likewise finds that WCM is not the real party in interest and lacks standing to
24 appear as a party to these protests. Only Mr. Gill, as the Trustee of WCM’s Bankruptcy Estate, would
25 have a right to pursue any claims of WCM before the Board. Mr. Gill has declined to do so.

26 **The Trustee Did not Abandon the Rights in the Dealer Agreement so**
27 **as to Revest them in WCM**

28 41. The Bankruptcy Court found and ruled that because the Dealer Agreement had terminated

1 (free of the bankruptcy stay), there were no longer any rights in the Dealer Agreement as it had ceased to
2 exist as of December 2012, and thus there were no rights that could be abandoned by the Trustee.

3 (Motion to Dismiss Protest, Declaration of Gregory R. Oxford, Exhibits Q, p. 6 and R, pp. 13-16)

4 42. The ALJ likewise finds that because the Dealer Agreement had terminated in December
5 2012, there were no rights that could have been the subject of an “abandonment” by the Trustee. Thus the
6 claim of WCM that the Trustee had abandoned the rights under the Dealer Agreement so as to retest them
7 in WCM is without merit.

8 **Denial of Protestant’s Request that the Board Exercise Its Continuing Jurisdiction**
9 **Over the Confidential Stipulated Decision of the Board Resolving [the First] Protest**
10 **(Protest No. PR-2213-10)**

11 43. All of the above is applicable to Protestant’s Request regarding the First Protest.

12 44. As stated, there have been three rulings by the Bankruptcy Court that the Dealer
13 Agreement had terminated and one ruling by the Federal District Court that the Dealer Agreement had
14 terminated in December 2012.

15 45. This Board Order will be the fifth ruling that the franchise terminated as of that date.

16 46. The ALJ finds that the undisputed failure of WCM to comply with the terms of the Board’s
17 December 15, 2010 “Order Adopting Confidential Stipulated Decision of Board Resolving Protest”
18 resulted in the termination of the franchise in December 2012.

19 47. The ALJ finds that WCM is collaterally estopped from claiming that the franchise had not
20 yet terminated as alleged in its Request.

21 48. Even if the franchise had not terminated, and even if WCM is not collaterally estopped
22 from asserting that the franchise had not been terminated, the ALJ finds that WCM has no standing to
23 seek relief from the Board regarding the Board’s Order of December 15, 2010 or enforce the terms of the
24 franchise. Only the Trustee of the Bankruptcy Estate of WCM would have standing to proceed before
25 the Board. The Trustee has chosen not to do so.

26 49. The ALJ finds, as above, that WCM’s claim of “abandonment” by the Trustee of the rights
27 under the Dealer Agreement is unfounded as there has been no Dealer Agreement in existence since
28 December 2012.

49. “Protestant’s Request that the Board Exercise Its Continuing Jurisdiction Over the

1 Confidential Stipulated Decision of the Board Resolving [the First] Protest” is denied.

2 **Respondent’s Motion to Dismiss Protestant’s Request that the Board Exercise Its**
3 **Continuing Jurisdiction over the Confidential Stipulated Decision Resolving [the First]**
4 **Protest (Protest No. PR-2213-10)**

5 51. As there have been findings and conclusions above that resulted in the denial of
6 Protestant’s Request, there is no need to separately address Respondent’s Motion to Dismiss this Request.
7 The findings, conclusions and rulings regarding the Denial of WCM’s Request are equally applicable to
8 Respondent’s Motion to Dismiss the Request.

9 52. For the reasons stated above regarding the Denial of WCM’s Request, and although it may
10 be redundant, it is ordered that Respondent’s Motion to Dismiss Protestant’s Request that the Board
11 Exercise Its Continuing Jurisdiction over the Confidential Stipulated Decision Resolving [the First]
12 Protest (Protest No. PR-2213-10) is granted.

13 **Status of Franchise and Dismissal of PR-2213-10 (First Protest)**

14 53. So there is no uncertainty, and in an effort to preclude any further claims of WCM that the
15 franchise continues to exist, the following additional findings and conclusions are made.

16 54. Neither an order of dismissal of the First Protest (PR-2213-10) nor another order of the
17 Board is necessary to establish the termination of the franchise. However, one of Protestant’s claims in its
18 Request, is that, “The Board has not issued, nor has it been given the opportunity to issue, any order
19 declaring Protestant’s franchise terminated. As such, Protestant’s franchise has not been terminated.”
(Request, p. 6, lines 12-14)

20 55. WCM relies upon the language of Section 4.6 of the Settlement Agreement which says in
21 part “... GM and WCM agree to submit to the Board for final and binding determination, upon either
22 party’s written notice, any and all claims, disputes, and controversies between them arising under or
23 relating to this Agreement and its negotiation, execution, administration, modification, extension or
24 enforcement (collectively ‘Claims’).” (Request, p. 4, lines 19-24; Motion to Dismiss Protest, Declaration
25 of Gregory R. Oxford, Exhibit B)

26 56. However, WCM presents no information as to what “Claims” WCM is presenting or
27 submitting to the Board other than the general claim that the Board had not issued an order declaring the
28 franchise terminated.

1 57. The Board's Order of December 15, 2010 and the Settlement Agreement provided for
2 termination of the Dealer Agreement if the stated conditions had not occurred on or before December 31,
3 2012. Although WCM concedes that the conditions had not occurred, WCM in its Request asserts that it
4 is GM that "must raise its claims before the Board and be bound by the Board's resulting decisions on
5 those claims." (Request, p. 5, lines 9-16) and that GM "failed to seek a Board determination [regarding
6 the termination of the franchise] once granted relief from the automatic stay.⁶ As a result, the matter
7 regarding the termination of the Dealer Agreement remains unsettled." (Request, p. 4, lines 22-24)

8 58. There is nothing in the Board's Order of December 15, 2010 or the Settlement Agreement
9 that require GM take any further action before the Board to establish the termination of the franchise if
10 WCM fails to meet the terms imposed therein.

11 59. As indicated above and incorporated herein, "...Despite Defendants' [WCM's] arguments
12 to the contrary, GM's claims do not rest on 'contingent future events,' but on the historical fact that
13 WCM's Dealer Agreement terminated in December 2012 pursuant to the express terms of a stipulated
14 adjudication by the Board that provided for voluntary, non-protestable termination of the Dealer
15 Agreement if, as is undisputed, WCM failed to satisfy the conditions set forth in Section 2.6 of the
16 Settlement Agreement. [Citations omitted.] The Settlement Agreement by its terms did not require any
17 action by GM to trigger the agreed voluntary termination after WCM failed to satisfy that condition set
18 forth in Section 2.6, and, as the Bankruptcy Court has already found, on three different occasions, that the
19 Dealership Agreement terminated because WCM did not timely satisfy the condition. Moreover, WCM
20 told the Board recently that it 'does not dispute the Bankruptcy Court's findings.' Thus, for WCM to now
21 argue that GM's claim[s] are not ripe for adjudication because it is unclear if the Dealer Agreement has
22 been terminated is simply disingenuous." (Footnote 6 pointing out that WCM is collaterally estopped
23 from proceeding before the Board is omitted.) (District Court Order, p. 12)

24 60. It has been determined that the franchise terminated in December 2012 (and even if
25 it had not), only the Trustee and not WCM has standing to pursue the claims before the Board. As of the

27 ⁶ It is uncertain whether this terminology is accurate. It may be that the automatic stay under the Bankruptcy Code never
28 applied to the terms of the Settlement Agreement as incorporated into the Board's Order of December 15, 2010 as the
bankruptcy stay was not applicable and never prevented the running of the time for WCM to comply with the conditions of the
Settlement Agreement/Board Order.

1 termination of the franchise in December 2012, WCM ceased being a franchisee of GM and GM ceased
2 being a franchisor of WCM.

3 **PROPOSED ORDERS**

4 After consideration of the pleadings, exhibits, and oral arguments of counsel, it is hereby ordered
5 that:

6 A. Respondent's "Motion to Dismiss [the Second] Protest for Lack of Jurisdiction" is
7 granted. *West Covina Motors, Inc., dba Clippinger Chevrolet v. General Motors LLC.*, Protest No. PR-
8 2348-12 is dismissed with prejudice;

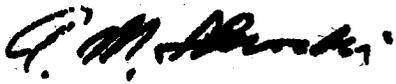
9 B. "Protestant's Request that the Board Exercise Its Continuing Jurisdiction Over the
10 Confidential Stipulated Decision of the Board Resolving [the First] Protest" in *West Covina Motors, Inc.,*
11 *dba Clippinger Chevrolet v. General Motors LLC.*, Protest No. PR-2213-10 is denied;

12 C. Respondent's "Motion to Dismiss for Lack of Jurisdiction Protestant's Request that the
13 Board Exercise its Continuing Jurisdiction over the Confidential Stipulated Decision of the Board
14 Resolving [the First] Protest" is granted; and,

15 D. The Protest of *West Covina Motors, Inc., dba Clippinger Chevrolet v. General Motors*
16 *LLC.*, Protest No. PR-2213-10 is dismissed with prejudice, as the franchise terminated on December 31,
17 2012.

18 I hereby submit the foregoing which constitutes my
19 proposed orders in the above-entitled matters, as the
20 result of a hearing before me, and I recommend these
21 proposed orders be adopted as the decision of the
22 New Motor Vehicle Board.

23 DATED: May 5, 2015

24 By: 
25 ANTHONY M. SKROCKI
26 Administrative Law Judge

27 Attachment

28 Jean Shiomoto, Director, DMV
Tim Corcoran, Branch Chief,
Occupational Licensing, DMV

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES -- GENERAL

Case No. **CV 15-705-JFW (AGRx)**

Date: April 13, 2015

Title: General Motors LLC -v- West Covina Motors, Inc., et al.

PRESENT:

HONORABLE JOHN F. WALTER, UNITED STATES DISTRICT JUDGE

**Shannon Reilly
Courtroom Deputy**

**None Present
Court Reporter**

ATTORNEYS PRESENT FOR PLAINTIFFS:

None

ATTORNEYS PRESENT FOR DEFENDANTS:

None

PROCEEDINGS (IN CHAMBERS):

**ORDER DENYING PLAINTIFF'S MOTION FOR
PRELIMINARY INJUNCTION [filed 2/2/15;
Docket No. 9]; and**

**ORDER DENYING SPECIALLY APPEARING
DEFENDANTS' MOTION TO DISMISS
COMPLAINT PURSUANT TO RULE 12(b) OF
THE FEDERAL RULES OF CIVIL PROCEDURE
[filed 3/2/15; Docket No. 34]**

On February 2, 2015, Plaintiff General Motors, LLC ("GM") filed a Motion for Preliminary Injunction. On March 9, 2015, Specially Appearing Defendants West Covina Motors, Inc., Bently Real Estate, LLC, Dighton America, Inc., and Ziad Alhassen (collectively, "Defendants") filed their Opposition. On March 16, 2015, GM filed a Reply. On March 2, 2015, Defendants filed a Motion to Dismiss Complaint Pursuant to Rule 12(b) of the Federal Rules of Civil Procedure ("Motion to Dismiss"). On March 9, 2015, GM filed its Opposition. On March 16, 2015, Defendants filed a Reply. Pursuant to Rule 78 of the Federal Rules of Civil Procedure and Local Rule 7-15, the Court found the matters appropriate for submission on the papers without oral argument. The matters were, therefore, removed from the Court's March 30, 2015 hearing calendar and the parties were given advance notice. After considering the moving, opposing, and reply papers, and the arguments therein, the Court rules as follows:

I. Factual and Procedural Background¹

This action arises out of a dispute between GM and a former authorized Chevrolet dealership operated by Defendant West Covina Motors, Inc. ("WCM"). WCM operated the Chevrolet dealership in West Covina, California pursuant to a General Motors Sales and Service Agreement ("Dealer Agreement") for several years. As a result of WCM's failure to maintain its wholesale floor plan credit line used to finance its purchase of new vehicles from GM as required by Article 10.2 of the Dealer Agreement and its inadequate sales performance in violation of Articles 6.4.1 and 9 of the Dealer Agreement, GM served WCM with a Notice of Intent to Terminate WCM's Dealer Agreement. In response, WCM filed a protest of GM's intended termination with California's New Motor Vehicle Board ("Board") pursuant to Section 3060 of the California Vehicle Code (Protest No. PR 2213-10) ("First Protest"). GM and WCM settled the First Protest, and the terms of their settlement were memorialized in a Settlement and Deferred Termination Agreement entered into as of November 8, 2010 ("Settlement Agreement"). The Board was presented with and adopted the Settlement Agreement on December 15, 2010 in an Order Adopting Confidential Stipulated Decision of Board Resolving Protest ("December 15, 2010 Order").

Pursuant to Section 2.3 of the Settlement Agreement, WCM was required to establish and maintain a new \$3 million floor plan credit line and further agreed that if WCM lost its new financing and did not regain it within 90 days, WCM would either terminate the Dealer Agreement voluntarily or present a "buy-sell" proposal to GM to sell its dealership to an unaffiliated third party. Specifically, Section 2.3 of the Settlement Agreement provided:

2.3 If at any time before November 30, 2012, WCM loses its Dedicated Chevrolet Flooring or its total amount decreases below \$3 million, WCM shall have ninety days to either (a) provide written evidence of a commitment for replacement Dedicated Chevrolet Flooring in the amount of at least \$ 3 million from GMAC or another GM-approved financial institution or (b) present GM with a

¹ The Court finds it is unnecessary to rule on the objections to the evidence. To the extent the Court has relied on evidence to which Defendants have objected, at this early stage of the proceedings, GM is entitled to submit evidence which might not otherwise be admissible in support of its Motion for Preliminary Injunction, and; thus, the Court has considered the evidence to which Defendants have objected and has given it the appropriate weight under all of the circumstances of this case. GM's unopposed February 2, 2015 Request for Judicial Notice in Support of Motion for Entry of Preliminary Injunction, Defendants' unopposed March 2, 2015 Request for Judicial Notice in Support of Motion to Dismiss Complaint Pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, and Defendants' unopposed March 9, 2015 Request for Judicial Notice in Support of Opposition to GM's Motion for Entry of Preliminary Injunction are granted.

fully-executed "buy-sell" agreement and complete proposal for the transfer of the stock or assets of WCM to a person or entity not affiliated with WCM or Owner. If WCM does not satisfy either of these conditions (a) or (b) within ninety days of the date it loses its Dedicated Chevrolet Flooring or its total amount decreases below \$3 million, WCM agrees that its Dealer Agreement will terminate voluntarily effective 30 days later (*i.e.*, 120 days after the loss of the Dedicated Chevrolet Flooring or its decrease below \$ 3 million) pursuant to Article 14.2 of the Dealer Agreement; upon such termination, WCM shall be entitled to termination assistance pursuant to Article 15 of the Dealer Agreement with the exception of Article 15.3. WCM and Owners agree not to protest said voluntary termination pursuant to section 3060 of the Vehicle Code or to challenge said termination in any judicial or administrative forum and hereby agree that they will have no legal right to do so. For purposes of this section and section 2.5 below, a person or entity shall be deemed affiliated with WCM or Owner if it meets the definition of Affiliate set forth in paragraph 3.5 below.

In December 2011, WCM again lost its floor plan credit line, and was unable to regain it in the time provided by Section 2.3 of the Settlement Agreement. WCM also failed to submit the buy-sell proposal to GM as required by Section 2.3 of the Settlement Agreement. Because WCM had failed to either regain its floor plan credit line or submit the required buy-sell proposal to GM as required by Section 2.3 of the Settlement Agreement, GM notified WCM that it was terminating the Dealer Agreement pursuant to Section 2.3 of the Settlement Agreement.

Because the parties had agreed that the Board retained exclusive jurisdiction to enforce its December 15, 2010 Order, WCM complained to the Board about GM's threatened termination, and the Board determined that GM failed to give WCM proper notice of termination. As a result, the Board granted WCM additional time to submit a buy-sell proposal. Specifically, the Board ruled that WCM's Dealer Agreement would remain in effect pending the timely occurrence of one of two alternatives available to WCM, namely: (1) obtaining floor plan financing as required by the Settlement Agreement; or (2) the submission by WCM to GM of the complete buy-sell package as required by the Settlement Agreement. In its decision, the Board concluded that "if neither of these alternatives occur, [WCM's] franchise shall terminate on the 81st day after the mailing, to the parties and their counsel by U.S. Postal Service Certified Mail, a copy of the Board's Order adopting this Proposed Decision."

On October 3, 2012, GM sent a second "back up" 15 day termination notice pursuant to Vehicle Code § 3060(a)(1)(B)(v) due to WCM's alleged failure to conduct customary sales and service operations for seven consecutive days in violation of Article 14.5.3 of the Dealer Agreement. WCM responded to the October 3, 2012 Termination Notice by filing a second protest with the Board (Protest No. 2348-12) ("Second Protest").

Before the eighty day period expired, WCM presented a buy-sell proposal which was approved by GM on November 29, 2012. However, it is undisputed that the transaction contemplated in the buy-sell proposal did not close within the 30 days required by Section 2.6 which provides in relevant part as follows:

If a GM-approved "buy-sell" transaction does not close within thirty days of GM's notifying WCM of the approval, then WCM agrees that its Dealer Agreement will terminate voluntarily pursuant to Article 14.2 of the Dealer Agreement.... WCM agrees not to protest said voluntary termination pursuant to section 3060 of the Vehicle Code or file any other litigation of any nature whatsoever concerning termination of the Dealer Agreement.

On December 28, 2012, the day prior to the expiration of the 30 day closing period for the buy-sell agreement, WCM filed a Chapter 11 bankruptcy petition in the United States Bankruptcy Court for the Central District of California, Case No. 2:12bk52197 ER. On January 22, 2013, GM filed a Motion for Relief from Automatic Stay with the Bankruptcy Court in which it requested a determination that WCM's bankruptcy filing and the automatic stay under 11 U.C. §362 did not bar the voluntary termination of the Dealer Agreement under the Settlement Agreement and December 15, 2010 Order upon expiration of the thirty day period provided in Section 2.6 of the Settlement Agreement. On February 14, 2013, the Bankruptcy Court granted GM's motion and held in relevant part:

[I]t is undisputed that [WCM] did not satisfy the condition set forth in Section 2.6 of the Settlement Agreement which provides that Debtor will voluntarily and without protest terminate the Dealer Agreement [T]he Debtor and GM mutually and voluntarily entered in the Settlement Agreement, by which Debtor's failure to satisfy the condition of Section 2.6 triggered a termination of the Dealer Agreement For these reasons the Court finds that the Dealer Agreement terminated upon Dealer's failure to close the YTransport buy-sell transaction and hereby GRANTS GM's motion.

On March 4, 2013, WCM's bankruptcy case was converted from a Chapter 11 to a Chapter 7, and David Gill was appointed Trustee of WCM's bankruptcy estate. On October 23, 2014, WCM filed an emergency motion in the Bankruptcy Court seeking an order compelling the Trustee to abandon any interest that the bankruptcy estate had in the Dealership Agreement or the GM franchise to WCM. GM opposed WCM's emergency motion on the grounds that the Dealer Agreement had terminated and "was not property of the estate." In its Opposition, GM argued that because the Bankruptcy Court had previously determined that no interest in the terminated Dealer Agreement remained in WCM's bankruptcy estate, the Trustee had nothing to abandon, and the Bankruptcy Court could not compel him to take such action. The Bankruptcy Court denied WCM's

motion, and held in its October 28, 2014 Order that any interest WCM's estate may have had in the Dealer Agreement had terminated and ceased to be property of the estate, and, therefore, it could not be abandoned by the Trustee. Specifically, the October 28, 2014 Order provided:

Where property ceases to be property of the estate, 11 U.S.C. § 554 does not provide authority for abandonment.

The Court agrees with GM that the issue of whether the bankruptcy estate has an interest in the Dealer Agreement has been decided against WCM. This Court, in the 2013 Order, held that the "Debtor did not satisfy the condition set forth in Section 2.6 of the Settlement Agreement, which provide[d] that the Debtor will voluntarily and without protest terminate the Dealer Agreement." 2013 Order, 7 (citing *In re Gull Ari, Inc.*, 890 F.2d 1255, 1261-62 (1st Cir.1989)). This Court found that "the Dealer Agreement terminated upon Debtor's failure to close the YTransport buy-sell transaction[.]" 2013 Order, 10. Implicit in the Court's decision was that the Dealer Agreement had, at the time that it terminated upon its own terms, ceased to be property of the estate. WCM did not appeal this decision nor did it move for reconsideration of this Order, and it is now binding on the parties as law of the case. *In re Tsurukawa*, 287 B.R. 515, 518 n.2 (B.A.P. 9th Cir. 2002) ("[T]he law of the case doctrine generally precludes reconsideration of an issue that has already been decided by the same court.").

Based on the Court's prior conclusion that the Dealer Agreement ceased to be property of the estate when it terminated by its own terms, the Court finds that it cannot now be abandoned. The Debtor cannot challenge this Court's prior decision now.

Notwithstanding the October 28, 2014 Order of the Bankruptcy Court, WCM attempted to proceed before the Board on its Second Protest, which had been stayed by the Board based on a stipulation between GM and WCM. In light of WCM's attempt to pursue its Second Protest, on December 14, 2014, GM filed a Motion in the Bankruptcy Court seeking an order that would enjoin WCM from prosecuting its Second Protest. Although the Bankruptcy Court reaffirmed its prior holding that the Dealer Agreement had terminated, it declined under its discretionary absence powers to grant injunctive relief to GM stating as follows:

This Court has issued two lengthy decisions regarding the Dealer Agreement and concluded twice that it terminated pursuant to its terms and ceased to be property of the estate. The Court first concluded that the automatic stay did not bar the termination of the Dealer Agreement and that it had terminated pursuant to its own terms. D.E. 150.

Significantly later, the Court determined that—as the Dealer Agreement had terminated—it ceased to be property of the estate and that there was nothing to abandon.

The Court did not, as WCM contends, "effectively abandon" the estate's interest to WCM. Rather, in denying WCM's motion for order compelling abandonment of the estate's interest, if any, in the Dealer Agreement, the Court found that WCM was bound by its unappealed and final determination that the Dealer Agreement had terminated. D.E. 487, 6 ("Implicit in the Court's decision was that the Dealer Agreement had, at the time that it terminated upon its own terms, ceased to be property of the estate. WCM did not appeal this decision nor did it move for reconsideration of this Order, and it is now binding on the parties as law of the case. *In re Tsurukawa*, 287 B.R. 515, 518 n.2 (B.A.P. 9th Cir. 002) ("[T]he law of the case doctrine generally precludes reconsideration of an issue that has already been decided by the same court.'"). WCM did not appeal this second decision and it is now binding on the parties.

Similarly, the Court did not find, as WCM characterizes, "that the Bankruptcy Court had no role in the termination of the franchise." Opposition, 2:19–20. To the contrary, this Court reached the question of whether the Dealer Agreement had terminated and concluded that it terminated pursuant to its own terms. [D.E. 487, 6].

The Court rejects WCM's contention that these decisions were outside of the scope of jurisdiction of the Bankruptcy Court. The Court has authority to determine what is and what is not property of the estate, even when this determination includes interpreting state law. See 28 U.S.C. § 157(b)(2)(A); *In re Salander-O'Reilly Galleries, LLC*, 475 B.R. 9, 29 (S.D.N.Y. 2012); *BankUnited Fin. Corp. v. FDIC (In re Bank United Fin. Corp.)*, 462 B.R. 885, 893–94 (Bankr.S.D.Fla.2011) ("[W]hat is or is not property of a bankruptcy estate is an issue that stems from the bankruptcy itself, one that can only arise in a bankruptcy proceeding, since the concept of what is property of a bankruptcy estate does not exist outside of a bankruptcy case."). All of this Court's relevant decisions were determinations of whether the Dealer Agreement was property of the estate or whether certain actions were barred by the automatic stay. These decisions are both core matters squarely within this Court's jurisdiction. . . .

Efficient administration of this case requires that the Court abstain: this

Court has issued its orders and the NMVB can interpret those orders according to its own rules and procedures. As the Court has held that the Dealer Agreement has terminated and is not property of the estate and could not be abandoned to any party, the Court exercises its discretion to no longer entertain these issues.

On January 27, 2015, GM filed a Motion to Dismiss the Second Protest on the grounds the Board lacked jurisdiction to adjudicate it because GM had withdrawn the Second Termination Notice sent on October 3, 2012, and GM argued in the alternative that WCM did not have standing because any right to proceed before the Board was held solely by the bankruptcy trustee and he had refused to pursue the Second Protest. WCM advised the Board that in light of GM's withdrawal of the Second Termination, WCM would not oppose dismissal of the Second Protest, but argued that the Board should exercise the jurisdiction reserved under its December 15, 2010 Order. On February 19, 2015, Administrative Law Judge ("ALJ") Anthony Skrocki conducted a hearing on GM's Motion to Dismiss, and in its Order of February 23, 2015 established a briefing schedule.²

In light of the termination of WCM's Dealer Agreement, on October 27, 2014, GM's counsel notified WCM's counsel by letter that GM had discovered that three properties formerly or currently owned by Ziad Alhassen ("Alhassen") or his entities continued to display signage that included registered trademarks and trade names such as "Chevrolet," "Hummer," and "Oldsmobile." GM advised that under Article 17.5 of the terminated Dealer Agreement WCM was required to remove such signage. Specifically, 17.5 provides:

Upon termination of this Agreement, Dealer agrees to immediately discontinue, at its expense, all use of Marks, including but not limited to removal of all Marks from any and all Dealer owned signs. Thereafter, Dealer will not use, either directly or indirectly, any Marks or any other confusingly similar marks in a manner that General Motors determines is likely to cause confusion or mistake or deceive the public.

Dealer will reimburse General Motors for all legal fees and other

² The briefing schedule required WCM to file its Opposition to GM's Motion to Dismiss by March 3, 2015, and GM to file its Reply by March 6, 2015. WCM's counsel, Michael J. Flanagan, states in his March 2, 2015 declaration that the ALJ advised the parties that the earliest date the full Board could consider the matter was June 2015. In its Opposition to WCM's Motion to Dismiss, GM states that WCM sought to reopen the Second Protest after GM withdrew its Termination Notice, and then sought to reopen the First Protest. GM has filed a Motion to Dismiss both of these proceedings. Although the recommended decision is expected shortly from the ALJ, final Board action in GM's motions may not come until after June 2015.

expenses incurred in connection with action to require Dealer to comply with this Article 17.5.³

In the October 24, 2015 letter, GM's counsel also enclosed recent photographs of the infringing signs. The letter closed with a demand to remove or at least cover up the offending signage.

When GM's demands regarding the signage were ignored, GM filed this action on January 30, 2015, alleging the following claims against Defendants: (1) breach of contract; (2) infringement of registered trademarks (15 U.S.C. § 1114); (3) violation of Lanham Act (15 U.S.C. § 1125(a)); (4) trademark dilution (15 U.S.C. § 1125(c)); (5) unfair competition (Cal. Bus. & Prof. Code § 17200 *et seq.*); and (6) false advertising (Bus. & Prof. Code § 17500 *et seq.*).

On February 2, 2015, GM filed a Motion for Preliminary Injunction.⁴ In its Motion for Preliminary Injunction, GM argues that injunctive relief is necessary because the infringing signs at WCM's two former dealership locations are near the site of GM's newly authorized dealer, Sage Covina Chevrolet⁵, which results in actual and potential confusion of Chevrolet customers. This actual and potential confusion allegedly damages the goodwill and general business reputation of Chevrolet in the Covina-West Covina area and the business of its new dealership, non-party Sage Covina Chevrolet, upon which GM is depending to provide authorized Chevrolet sales and services to public, and, thereby, increase Chevrolet sales in the area.

On March 2, 2015, Defendants filed a Motion to Dismiss. In their Motion to Dismiss, Defendants argue that: (1) the claims alleged by GM in its Complaint are not ripe for adjudication; (2) GM failed to exhaust its administrative remedies; (3) *Younger* abstention applies because there is an administrative proceeding currently pending before another tribunal; (4) the Complaint fails to state a claim upon which relief can be granted; and (5) certain of the Defendants have not been properly served and/or have been improperly named as Defendants in this litigation.

³ The letter also advised that it was GM's understanding that two of the three properties, 137 West San Bernardino Road and 141 Geneve Avenue in Covina, California, were purchased from the bankruptcy estate of Hassen Imports Partnership in 2013 by Dighton America Inc. ("Dighton"), which is an entity controlled by Alhassen. In addition, GM advised that the third property located at 1900 and 1932 East Garvey, West Covina, California was purchased by Bently Real Estate LLC ("Bently"), which is a wholly owned subsidiary of Dighton.

⁴ The Motion for Preliminary Injunction was originally set for hearing on March 9, 2015. Based on the Stipulation of the parties filed on February 13, 2015, the hearing on the Motion for Preliminary Injunction was continued to March 30, 2015 (Docket No. 31).

⁵ Sage Covina Chevrolet commenced sales and service operations on October 28, 2014 at 635 S. Citrus Ave., Covina, California, a location that is not visible from the I-10 freeway. Sage Covina Chevrolet has paid substantial sums to advertise and promote its new dealership.

II. Legal Standard

A. Motion to Dismiss

1. Rule 12(b)(1)

The party mounting a Rule 12(b)(1) challenge to the Court's jurisdiction may do so either on the face of the pleadings or by presenting extrinsic evidence for the Court's consideration. See *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000) ("Rule 12(b)(1) jurisdictional attacks can be either facial or factual"). "In a facial attack, the challenger asserts that the allegations contained in a complaint are insufficient on their face to invoke federal jurisdiction." *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). In ruling on a Rule 12(b)(1) motion attacking the complaint on its face, the Court accepts the allegations of the complaint as true. See, e.g., *Wolfe v. Strankman*, 392 F.3d 358, 362 (9th Cir. 2004). "By contrast, in a factual attack, the challenger disputes the truth of the allegations that, by themselves, would otherwise invoke federal jurisdiction." *Safe Air*, 373 F.3d at 1039. "With a factual Rule 12(b)(1) attack . . . a court may look beyond the complaint to matters of public record without having to convert the motion into one for summary judgment. It also need not presume the truthfulness of the plaintiff[s] allegations." *White*, 227 F.3d at 1242 (internal citation omitted); see also *Thornhill Pub. Co., Inc. v. General Tel & Electronics Corp.*, 594 F.2d 730, 733 (9th Cir. 1979) ("Where the jurisdictional issue is separable from the merits of the case, the judge may consider the evidence presented with respect to the jurisdictional issue and rule on that issue, resolving factual disputes if necessary. . . . '[N]o presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims.") (quoting *Mortensen v. First Fed. Sav. & Loan Ass'n*, 549 F.2d 884, 891 (9th Cir. 1977)). "However, where the jurisdictional issue and substantive issues are so intertwined that the question of jurisdiction is dependent on the resolution of factual issues going to the merits, the jurisdictional determination should await a determination of the relevant facts on either a motion going to the merits or at trial." *Augustine v. U.S.*, 704 F.2d 1074, 1077 (9th Cir. 1983). It is the plaintiff who bears the burden of demonstrating that the Court has subject matter jurisdiction to hear the action. See *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994); *Stock West, Inc. v. Confederated Tribes*, 873 F.2d 1221, 1225 (9th Cir. 1989).

2. Rule 12(b)(6)

A motion to dismiss brought pursuant to Federal Rule of Civil Procedure 12(b)(6) tests the legal sufficiency of the claims asserted in the complaint. "A Rule 12(b)(6) dismissal is proper only where there is either a 'lack of a cognizable legal theory' or 'the absence of sufficient facts alleged under a cognizable legal theory.'" *Summit Technology, Inc. v. High-Line Medical Instruments Co., Inc.*, 922 F. Supp. 299, 304 (C.D. Cal. 1996) (quoting *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1988)). However, "[w]hile a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of

his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (internal citations and alterations omitted). "[F]actual allegations must be enough to raise a right to relief above the speculative level." *Id.*

In deciding a motion to dismiss, a court must accept as true the allegations of the complaint and must construe those allegations in the light most favorable to the nonmoving party. *See, e.g., Wyler Summit Partnership v. Turner Broadcasting System, Inc.*, 135 F.3d 658, 661 (9th Cir. 1998). "However, a court need not accept as true unreasonable inferences, unwarranted deductions of fact, or conclusory legal allegations cast in the form of factual allegations." *Summit Technology*, 922 F. Supp. at 304 (citing *Western Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981) *cert. denied*, 454 U.S. 1031 (1981)).

"Generally, a district court may not consider any material beyond the pleadings in ruling on a Rule 12(b)(6) motion." *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1555 n. 19 (9th Cir. 1990) (citations omitted). However, a court may consider material which is properly submitted as part of the complaint and matters which may be judicially noticed pursuant to Federal Rule of Evidence 201 without converting the motion to dismiss into a motion for summary judgment. *See, e.g., id.; Branch v. Tunnel*, 14 F.3d 449, 454 (9th Cir. 1994).

Where a motion to dismiss is granted, a district court must decide whether to grant leave to amend. Generally, the Ninth Circuit has a liberal policy favoring amendments and, thus, leave to amend should be freely granted. *See, e.g., DeSoto v. Yellow Freight System, Inc.*, 957 F.2d 655, 658 (9th Cir. 1992). However, a Court does not need to grant leave to amend in cases where the Court determines that permitting a plaintiff to amend would be an exercise in futility. *See, e.g., Rutman Wine Co. v. E. & J. Gallo Winery*, 829 F.2d 729, 738 (9th Cir. 1987) ("Denial of leave to amend is not an abuse of discretion where the pleadings before the court demonstrate that further amendment would be futile.").

B. Motion for Preliminary Injunction

"A preliminary injunction is an extraordinary and drastic remedy." *Munaf v. Geren*, 553 U.S. 674, 689 (2008) (citation and internal quotation marks omitted). In *Winter v. Natural Resources Defense Council, Inc.*, the Supreme Court announced a four-part test that a party seeking a preliminary injunction must satisfy. *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7 (2008). Under the *Winter* test, the moving party must establish that: (1) it is likely to succeed on the merits; (2) it is likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in its favor; and (4) an injunction is in the public interest. *Id.*

With respect to a trademark infringement claim, to establish a likelihood of success on the merits a plaintiff must show that it is: (1) the owner of a valid, protectable mark; and (2) that the alleged infringer is using a confusingly similar mark. *Pom Wonderful LLC v. Hubbard*, 775 F3d

1118, 1124 (9th Cir. 2014); see also *Dep't of Parks & Recreation v. Bazaar Del Mundo Inc.*, 448 F.3d 1118, 1124 (9th Cir. 2006).

As to the element of irreparable injury, the Ninth Circuit recently held that, in light of the Supreme Court's holdings in *Winter* and *eBay Inc. v. MercExchange, L.L.C.*, irreparable injury cannot be presumed, but, instead, a plaintiff must establish irreparable injury to obtain a preliminary injunction in a trademark case. *Herb Reed Enterprises, LLC v. Florida Entertainment Management, Inc.*, 736 F.3d 1239, 1249 (9th Cir. 2013); *Winter*, 555 U.S. 22 (holding that a plaintiff seeking a preliminary injunction must "demonstrate that irreparable injury is likely in the absence of an injunction" and reversing a preliminary injunction based only on a "possibility" of irreparable injury because that standard was "too lenient"); *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006) (holding that it "has consistently rejected . . . a rule that an injunction automatically follows a determination that a copyright has been infringed," and emphasized that a departure from the traditional principles of equity "should not be lightly implied").

With respect to balancing the equities, a court must balance the competing claims of injury and must consider the effect on each party of granting or withholding of the requested relief." *Amoco Prod. Co. v. Village of Gambrell, Alaska*, 480 U.S. 531, 542 (1987). In determining if an injunction is in the public interest, "[t]he usual public concern in trademark cases [is] avoiding confusion to consumers" (*Internet Specialties West, Inc. v. Million-DiGiorgio Enterprises, Inc.*, 559 F.3d 985, 991 (9th Cir. 2009), as well as "the synonymous right of the trademark owner to control his products' reputation." *CytoSport, Inc. v. Vital Pharms., Inc.*, 617 F. Supp. 2d 1051, 1081 (E.D. Cal. 2015).

III. Discussion

Because GM must establish a likelihood of success on the merits of its claims, the Court will first rule on Defendants' Motion to Dismiss. Although a ruling in favor of Defendants on the Motion to Dismiss will necessarily defeat GM's Motion for Preliminary Injunction, a ruling in favor of GM on the Motion to Dismiss will not entitle GM to a Preliminary Injunction unless GM can satisfy all the required elements for injunctive relief.

Defendants argue that GM's Complaint should be dismissed or this action should be stayed because the underlying dispute is the subject of two administrative proceeding currently pending before the Board and it would therefore be improper to litigate the claims alleged by GM in this forum. Specifically, Defendants contend that the WCM Dealer Agreement has not terminated and that GM is required to prove good cause for termination in a new Board hearing pursuant to Vehicle Code § 3060-61. In the alternative, Defendants argue that if the Court denies the Motion to Dismiss, GM cannot show that it is entitled to injunctive relief citing *Winters v. Natural Resource Defense Council, Inc.*, 555 U.S. 720 (2008).

A. Motion to Dismiss

1. GM's Claims Are Ripe for Adjudication

Defendants move to dismiss GM's claims on the grounds that those claims are not ripe for adjudication. "The Article III case or controversy requirement limits federal courts' subject matter jurisdiction, by requiring, inter alia, that plaintiffs have standing and that claims be 'ripe' for adjudication." *Chandler v. State Farm Mut. Auto. Ins. Co.*, 598 F.3d 1115, 1121 (9th Cir. 2010). "Because standing and ripeness pertain to federal courts' subject matter jurisdiction, they are properly raised in a Rule 12(b)(1) motion to dismiss." *Id.* at 1122.

"[R]ipeness is peculiarly a question of timing, designed to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1138 (2000) (quotations and citations omitted). "For a suit to be ripe within the meaning of Article III, it must present concrete legal issues, presented in actual cases, not abstractions." *Colwell v. Department of Health and Human Services*, 558 F.3d 1112, 1123 (9th Cir. 2009). "[T]he ripeness inquiry contains both a constitutional and prudential component." *Thomas*, 220 F.3d at 1138 (quotations and citations omitted). "[T]he constitutional component of the ripeness inquiry . . . , in many cases, . . . coincides squarely with standing's injury in fact prong." *Sacks v. Office of Foreign Assets Control*, 466 F.3d 764, 773 (9th Cir. 2006) (quotations and citations omitted). Prudential ripeness requires the evaluation of "both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967).

In this case, the Court concludes that GM's claims are ripe for adjudication. Despite Defendants' arguments to the contrary, GM's claims do not rest on "contingent future events," but on the historical fact that WCM's Dealer Agreement terminated in December 2012 pursuant to the express terms of a stipulated adjudication by the Board that provided for voluntary, non-protestable termination of the Dealer Agreement if, as is undisputed, WCM failed to satisfy the conditions set forth in Section 2.6 of the Settlement Agreement. *Texas v. United States*, 523 U.S. 296, 300 (1998) (holding that a "claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all"). The Settlement Agreement by its terms did not require any action by GM to trigger the agreed voluntary termination after WCM failed to satisfy the condition set forth in Section 2.6, and, as the Bankruptcy Court has already found, on three different occasions, that the Dealership Agreement terminated because WCM did not timely satisfy that condition. Moreover, WCM told the Board recently that it "does not dispute the Bankruptcy Court's findings." Thus, for WCM to now argue that GM's claim are not ripe for adjudication because it is unclear if the Dealer Agreement has been terminated is simply disingenuous.⁶

⁶ In addition, it appears that WCM is collaterally estopped from proceeding before the Board because it litigated and lost the Section 2.6 termination issue in three separate proceedings

Accordingly, Defendants' Motion to Dismiss is denied with respect to ripeness.

2. Exhaustion

Despite Defendants' arguments to the contrary, GM is not required to "exhaust" any administrative remedies before the Board because no such remedies exist. The Board made its final administrative determination on the First Protest when it adopted the Settlement Agreement in its December 15, 2010 Order. Under that final adjudication, the failure of WCM to satisfy the conditions set forth in Section 2.6 resulted in the automatic termination of the Dealer Agreement.⁷

In addition, the Board, as an administrative agency, has no jurisdiction to grant injunctive or monetary relief for violation of federal or state law, or for breach of contract. Therefore, there is no administrative remedy for the harm to GM caused by WCM's trademark infringement, unfair competition and false advertising, or by the conduct of the other Defendants who are not subject to Board jurisdiction.⁸ See, e.g., *South Bay Creditors Trust v. General Motors Acceptance Corp.*, 69

before the Bankruptcy Court. See, e.g., *Roos v. Red*, 130 Cal. App. 4th 870, 878-79 (2005), *cert. denied* 546 U.S. 1174 (2006) (holding that bankruptcy court ruling adverse to the debtor on state law issue in finding non-dischargeability collaterally estopped relitigation of that issue in a subsequent state court personal injury suit). Furthermore, because WCM is the debtor in a Chapter 7 bankruptcy case, the Trustee is vested with the exclusive right to challenge retroactively the termination of WCM's Dealer Agreement in 2012, and, thus, WCM lacks standing to initiate or prosecute proceedings before the Board. *Turner v. Cook*, 362 F.3d 1219, 1225-26 (9th Cir. 2003), *cert. denied* 543 U.S. 987 (2004) (appellant who had filed chapter 7 bankruptcy was "no longer a real party in interest" and therefore "ha[d] no standing" to pursue an appeal in a pending action absent the bankruptcy trustee's formal abandonment of the case). In this case, the Trustee has determined, in his business judgment, not to proceed before the Board, and, thus, the Board lacks jurisdiction to make any ruling on behalf of WCM.

⁷ It is undisputed that the Second Protest is moot.

⁸ The Court finds Defendants' argument that GM has failed to state a claim with respect to certain of the Defendants unpersuasive. In its Complaint, GM alleges that Alhassen owns and controls WCM, Bently, and Dighton, and that Alhassen is the alter ego of the bankrupt and now defunct WCM. GM also alleges that Bently and Dighton own property upon which infringing signage containing the Chevrolet Marks are displayed. The Court concludes that the fact that Defendants refused GM's demand to remove the infringing signage is sufficient to provide a plausible basis for concluding that these Defendants are participating in trademark infringement, unfair competition, trademark dilution, and false advertising in violation of federal and state law, and these claims are completely independent from WCM's obligations to take down the infringing signage under the Dealer Agreement. In addition, the Court finds that Defendants failed to demonstrate that service should be quashed with respect to Bently and Dighton, and it appears

Cal. App. 4th 1068, 1078 (1999) ("That a litigant must exhaust administrative remedies before seeking relief in the courts does not bestow upon the administrative agency the jurisdiction to consider and resolve all common law and statutory remedies. Prior resort to the administrative agency does not take away from the litigant the right to allege and prove claims not under the jurisdiction of the agency and does not expand the jurisdiction of the agency to hear and consider those claims"); *Miller v. Superior Court*, 50 Cal. App. 4th 1665, 1678 n. 8 (1996) ("The absence of any provision for damages in the statutory scheme governing the Board is. . . some confirmation of our conclusion that the Legislature never intended the Board to completely occupy the field of disputes between dealers and manufacturers").

Accordingly, Defendants' Motion to Dismiss is denied with respect to exhaustion.

3. *Younger* Absention

In *Younger v. Harris*, 401 U.S. 37 (1971), the plaintiff brought suit under 42 U.S.C. § 1983 to enjoin a criminal prosecution against him on the grounds that the criminal statute was unconstitutional. The Supreme Court held that a federal court may not enjoin a pending state criminal proceeding in the absence of special circumstances such as bad faith, harassment, or a biased state judiciary. *Id.* at 54. The *Younger* doctrine espouses a "strong federal policy against federal-court interference with pending state judicial proceedings, absent extraordinary circumstances." *Middlesex County Ethics Committee v. Garden State Bar Association*, 457 U.S. 423, 431 (1982). "The policy rests on notions of comity and respect for state functions and was born of the concern that federal court injunctions might unduly hamper state criminal prosecutions." *Champion International Corp. v. Brown*, 731 F.2d 1406, 1408 (9th Cir.1984) (citing *Younger v. Harris*, 401 U.S. at 44, 91 S.Ct. at 750-51).

"*Younger*'s central meaning is that a federal district court may not, save in exceptional circumstances, enjoin, at the behest of a person who has actually or arguably violated a state statute, a state court proceeding to enforce the statute against that person." *Nevada Entertainment Industries v. City of Henderson*, 8 F.3d 1348, 1351 (9th Cir.1993) (quoting *Alleghany Corp. v. Haase*, 896 F.2d 1046, 1050-51 (7th Cir.1990), *vacated as moot*, 499 U.S. 933 (1991)). Although the *Younger* case involved criminal proceedings, the doctrine has been extended to civil and administrative proceedings. *Middlesex County Ethics Committee*, 457 U.S. at 431-32. The Supreme Court has stated that concerns of comity and federalism are fully applicable to civil and administrative proceedings in which important state interests are involved. *Ohio Civil Rights Commission v. Dayton Christian Schools, Inc.*, 477 U.S. 619, 627-28 (1986); *Middlesex County Ethics Committee*, 457 U.S. at 431-32 (applying *Younger* to administrative bar proceedings).

In deciding whether *Younger* abstention applies, the Ninth Circuit applies the three-pronged

that Bently has been subsequently re-served.

test outlined by the Supreme Court in *Middlesex*: (1) the state proceedings are ongoing; (2) the proceedings implicate important state interests; and (3) the state proceedings provide an adequate opportunity to raise the federal issues. *Fresh International Corp. v. Agricultural Labor Relations Board*, 805 F.2d 1353, 1357–58 (9th Cir.1986) (citing *Middlesex*, 457 U.S. at 432).

In this case, *Younger* absence does not apply because the proceedings before the Board do not provide “an adequate opportunity to raise federal questions,” such as trademark infringement and violation of the Lanham Act’s proscription on unfair competition. *Id.* *Younger* absence also does not apply to the proceedings before the Board because those proceedings do not constitute an “exceptional circumstance.” *Sprint Communications, Inc. v. Jacobs*, 134 S.Ct. 584, 588 (2013) (holding that *Younger* absence applies only to “exceptional circumstances,” such as an “ongoing criminal prosecution,” a civil enforcement action that is “akin to a criminal prosecution” in “important respects,” and a civil proceeding “involving certain orders . . . uniquely in furtherance of the state courts’ ability to perform their judicial functions,” and “no further”).

Accordingly, Defendants’ Motion to Dismiss is denied with respect to *Younger* absence. For all the foregoing reasons, Defendants’ Motion to Dismiss is denied.

B. Motion for Preliminary Injunction

GM seeks a preliminary injunction to enjoin Defendants from continuing to use or display registered GM trademarks, service marks, or trade names (“GM Marks”), including registered Chevrolet trademarks, service marks and trade names (“Chevrolet Marks”), at or upon their business premises, including display signage at the businesses located at 1932 East Garvey Avenue South, West Covina, California and 137 West San Bernardino Road, Covina, California. The Court concludes that GM has not satisfied the requirements for the issuance of a preliminary injunction because although it has demonstrated that it is likely to prevail on the merits, it has failed to demonstrate the requisite irreparable injury.

1. GM Is Likely to Prevail on the Merits.

To establish a likelihood of success on the merits a plaintiff must show that it is: (1) the owner of a valid, protectable mark; and (2) that the alleged infringer is using a confusingly similar mark.⁹ *Pom Wonderful LLC v. Hubbard*, 775 F.3d 1118, 1124 (9th Cir. 2014); see also *Dep’t of*

⁹ As an initial matter, the Court rejects Defendants’ argument that GM’s Motion for Preliminary Injunction is barred by laches. First, laches does not bar a claim against a deliberate infringer. *Danjaq v. Sony Corp.*, 263 F.3d 942, 957 (9th Cir. 2001) (“laches does not bar a suit against a deliberate infringer. This principle . . . remains the law of this circuit”). Second, where a plaintiff brings an action within the relevant statute of limitations, there is a “strong presumption

Parks & Recreation v. Bazaar Del Mundo Inc., 448 F.3d 1118, 1124 (9th Cir. 2006).

a. GM Has Valid and Protectable Trademarks.

Registration of a mark is prima facie evidence of the validity of the mark, the registrant's ownership of the mark, and the registrant's exclusive right to use the mark in connection with the goods specified in the registration. See 15 U.S.C. § 1115(a). When proof of registration is uncontested, the ownership interest element of a trademark infringement claim is met. See *Sengoku Works Ltd. v. RMC Int'l, Ltd.*, 96 F.3d 1217, 1219 (9th Cir.1996).

In this case, GM has clearly established its rights to the GM Marks, including the Chevrolet Marks, through both federal registration and continuous, nationwide use. Because the GM Marks have been registered and in continuous use for more than five years, they are incontestable. Incontestable registration is "conclusive evidence of the validity of the registered mark and of the registration of the mark, of the registrant's ownership of . . . and . . . exclusive right to use the registered mark in commerce." 15 U.S.C. § 1115. Therefore, GM has demonstrated that it is the owner of the GM Marks, and that the GM Marks are valid, protectable marks.

b. Defendants' Actions Create a Likelihood of Confusion.

To demonstrate a likelihood of success on the merits, GM also must demonstrate that a reasonably prudent consumer in the marketplace is likely to be confused as to the origin of the marks being used by Defendants and to associate those marks with GM. See *Dreamwerks Prod. Group, Inc. v. SKG Studio*, 142 F.3D 1127, 1129 (9th Cir. 1998). The likelihood of consumer confusion is determined by evaluating the eight *Sleekcraft* factors: (1) strength of the protected mark; (2) proximity and relatedness of the goods; (3) type of goods and the degree of consumer care; (4) similarity of the protected mark and the allegedly infringing mark; (5) marketing channel convergence; (6) evidence of actual consumer confusion; (7) defendant's intent in selecting the allegedly infringing mark; and (8) likelihood of product expansion. *AMF Inc. v. Sleekcraft Boats*, 599 F.2d 341, 348-49 (9th Cir.1979), *abrogated on other grounds by Mattel Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 810 n. 19 (9th Cir.2003).

Although the *Sleekcraft* factors "channel the analytical process," they do not necessarily dictate a result. *Entrepreneur Media, Inc. v. Smith*, 279 F.3d 1135, 1141 (9th Cir.2002). Because the factors are "fluid," a "plaintiff need not satisfy every factor, provided that strong showings are made with respect to some of them." *Survivor Media, Inc. v. Survivor Prods.*, 406 F.3d 625, 631 (9th Cir.2005). Therefore, despite the important role that the *Sleekcraft* factors play in determining whether a likelihood of confusion exists, it is "the totality of facts in a given case that is dispositive."

that laches is inapplicable." *Jarrow Formulas, Inc. v. Nutrition Now, Inc.*, 304 F.3d 829, 835 (9th Cir. 2002).

Entrepreneur Media, 279 F.3d at 1140 (internal quotation marks omitted).

(i) Strength of the Chevrolet Marks

In determining the strength of marks, marks “are generally classified in one of five categories of increasing distinctiveness: (1) generic, (2) descriptive, (3) suggestive, (4) arbitrary or (5) fanciful.” *Zobmondo Entertainment, LLC v. Falls Media, LLC*, 602 F.3d 1108, 1113 (9th Cir. 2010). “Suggestive, arbitrary, and fanciful marks are considered ‘inherently distinctive’ and are automatically entitled to federal trademark protection because ‘their intrinsic nature serves to identify a particular source of a product.’” *Id.*; see also *Network Automation, Inc. v. Advanced Sys. Concepts, Inc.*, 638 F.3d 1137, 1149 (9th Cir. 2011) (“The stronger a mark – meaning the more likely it is to be remembered and associated in the public mind with the mark’s owner – the greater the protection it is accorded by the trademark laws”).

In this case, the Chevrolet Marks are presumed to be inherently distinctive, and, thus, strong marks that are automatically entitled to federal trademark protection because the U.S. Patent and Trademark Office (“PTO”) registered the GM Marks without proof of secondary meaning. *Id.* at 1113-14; see also *Sensient Techs. Corp. v. Sensory Effects Flavor Co.*, 613 F.3d 754, 763 (8th Cir. 2010) (holding that CHEVROLET is “a fanciful word coined to function as a trademark for the company. As a result, [it is] entitled to the broadest protection”); *Caliber Auto. Liq. v. Premier Chrysler, Jeep, Dodge*, 605 F.3d 931, 939 (11th Cir. 2010) (an incontestable mark “is presumed to be at least descriptive with secondary meaning, and therefore a relatively strong mark”).

(ii) Similarity of Marks

“The more similar the marks in terms of appearance, sound and meaning, the greater the likelihood of confusion.” *Network Automation*, 638 F.3d at 1150. In this case, the marks displayed on WCM’s signage are not merely similar, but, in fact, are identical to GM’s Chevrolet Marks. Other courts have found that such continued use of a franchisor’s trademarks following the franchise termination demonstrates not only a strong likelihood of confusion, but is dispositive by itself on the issue of infringement. See, e.g., *Burger King Corp. v. Majeed*, 805 F. Supp. 994, 1002-03 (S.D. Fla. 1992) (holding that it is “well-settled doctrine that a terminated franchisee’s continued use of its former franchisor’s trademarks, by its very nature, constitutes trademark infringement”); see also, J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition*, § 25.07[1] (4th ed. 2004) (commenting that continued use of a mark by an ex-licensee “constitutes a fraud on the public, since they are led to think that the ex-licensee is still connected with the licensor” and that such continued use can “clearly . . . be enjoined”).

Therefore, the Court finds that Defendants’ continued use and display of the Chevrolet Marks creates a high likelihood of confusion. *Mid-List Press v. Nora*, 374 F.3d 690, 693 (8th Cir. 2004) (“[I]n the typical Lanham Act case, the wrongdoer uses a mark similar to the plaintiff’s mark,

but “[f]ew are the cases demonstrating a more obvious and imminent likelihood of confusion” than when the case “involves a situation where the wrongdoer used the plaintiff’s actual mark, not merely a similar mark”) (quotation omitted); see also *Downtowner/Passport Int’l Hotel Corp. v. Nowlew, Inc.*, 841 F.2d 214 (8th Cir. 1988) (holding that “common sense compels the conclusion that a strong risk of consumer confusion arises when a terminated franchisee continues to use the former franchisor’s trademarks”) (citation omitted).

In this case, given the strength of the Chevrolet Marks and the fact that Defendants are using the identical Chevrolet Marks (as opposed to marks that are similar), the Court finds that Defendants’ actions in continuing to use the Chevrolet Marks creates a likelihood of confusion.¹⁰ *Dr. Seuss Enterprises, L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394, 1404 n. 14 (9th Cir. 1996) (holding that courts may infer likelihood of confusion based on comparison of the infringed and infringing marks).

2. GM Has Failed to Demonstrate That It Is Likely to Suffer Irreparable Injury.

To warrant equitable relief in a trademark infringement claim in the Ninth Circuit, a plaintiff must proffer evidence sufficient to establish a likelihood of irreparable harm. *Herb Reed Enterprises, LLC v. Florida Entm’t Mgmt., Inc.*, 736 F.3d 1239, 1251 (9th Cir.2013) *cert. denied*, --- U.S. ---, 135 S.Ct. 57 (2014). The Ninth Circuit has recently clarified that plaintiffs are not entitled to a presumption of irreparable harm once they have shown a likelihood of success on the merits. *Id.* at 1250 (“Gone are the days when once the plaintiff in an infringement action has established a likelihood of confusion, it is ordinarily presumed that the plaintiff will suffer irreparable harm if injunctive relief does not issue”) (internal quotations omitted). In addition, the Supreme Court has repeatedly held that “the basis for injunctive relief in the federal courts has always been irreparable injury and the inadequacy of legal remedies.” *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311–12 (1982) (citing *Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49, 61 (1975); *Sampson v. Murray*, 415 U.S. 61, 88 (1974); *Beacon Theaters, Inc. v. Westover*, 359 U.S. 500, 506–507 (1959); *Hecht Co. v. Bowles*, 321 U.S. 321 (1944)).

In this case, in late 2014, the Sage Covina Chevrolet dealership opened at 635 South Citrus Avenue in Covina, and began spending substantial advertising dollars to promote its business and raise the profile of the Chevrolet brand in the Covina-West Covina area. Sage Covina Chevrolet is located approximately 1.3 miles north of the infringing signage displayed at WCM’s 1932 East

¹⁰ In this case, the other *Sleekcraft* factors do not apply. For example, because WCM’s dealerships are no longer in business, the *Sleekcraft* factors that relate to the goods being sold using the allegedly infringing marks (including the proximity and relatedness of the goods, the type of goods and the degree of consumer care, marketing channel convergence, and likelihood of product expansion) are not applicable.

Garvey site and less than one mile south of the infringing signage at WCM's 137 West San Bernardino Road site. GM argues that Defendants' improper display of the infringing signage at locations that bracket Sage Covina Chevrolet to the north and the south has caused irreparable damage to Sage Covina Chevrolet's business, and GM's goodwill and business reputation generally.

In the recent *Herb Reed* case, the Ninth Circuit acknowledged that "evidence of loss of control over business reputation and damage to goodwill could constitute irreparable harm," but it also held that the district court's findings in that case with respect to irreparable injury were "grounded in platitudes rather than evidence, and relate[d] neither to whether 'irreparable injury' is likely in the absence of an injunction," nor to "whether legal remedies, such as money damages, are inadequate in this case." *Herb Reed*, 736 F.3d at 1250 (emphasis in original). The Ninth Circuit clarified that "it may be that [Herb Reed] could establish the likelihood of irreparable harm," but "missing from this record is any such evidence." *Id.*

Similarly, in this case, the Court finds that GM's arguments regarding irreparable injury are based on the same type of "unsupported and conclusory statements regarding harm [GM] might suffer" that the Ninth Circuit rejected in *Herb Reed*. As in *Herb Reed*, GM's arguments regarding the effect Defendants' improper display of the signage containing the Chevrolet Marks may have on GM's business reputation and goodwill are mere assertions, and consist of "platitudes rather than evidence."

In fact, the only potentially relevant evidence of irreparable injury presented by GM was in the February 2, 2015 declaration of Michael A. Navari ("Navari"), who is an Area Manager of Dealer Network Planning and Investment for GM. In his declaration, Navari makes the statement that "[t]he infringing signage at WCM's two former dealership locations that bracket the site of the Sage dealership is confusing to actual and potential Chevrolet customers and is doing incalculable damage to, and unless restrained will continue to damage, the goodwill and general business reputation of Chevrolet in the Covina-West Covina area and the business of the Sage dealership upon which GM is depending to provide authorized Chevrolet sales and service to the public and to increase Chevrolet sales in the area." Declaration of Michael A. Navari in Support of Motion for Preliminary Injunction, ¶ 7. However, GM must do more than simply submit a declaration insisting in conclusory fashion that its reputation and goodwill have been harmed. The general assertions made by Navari could apply in any case where a trademark holder had established a likelihood of success on the claim of infringement, and, thus, do not constitute the type of evidence required by *Herb Reed*.¹¹ *Herb Reed*, 736 F.3d at 1251 ("Those seeking injunctive relief must proffer evidence

¹¹ The *Herb Reed* court acknowledged that it may be difficult for parties to obtain such evidence at the preliminary injunction stage of the case, which is why it made clear that "the rules of evidence do not apply strictly to preliminary injunction proceedings." *Herb Reed*, 736 F.3d at 1250, n.5. However, even under this relaxed evidentiary standard, GM offers no evidence of any

sufficient to establish a likelihood of irreparable harm”).

Therefore, the Court concludes that although GM may be able to establish the likelihood of irreparable injury, it has failed to present sufficient evidence of irreparable injury in its Motion for Preliminary Injunction. Accordingly, GM's Motion for Preliminary Injunction is denied without prejudice.¹²

IV. Conclusion

For all the foregoing reasons, Defendants' Motion to Dismiss is **DENIED**, and GM's Motion for Preliminary Injunction is **DENIED without prejudice**.

IT IS SO ORDERED.

harm to its reputation, brand, or goodwill, and instead offers only “platitudes” of the type rejected in *Herb Reed*.

¹² The Court is quite surprised that Defendants rejected GM's eminently reasonable proposed resolution that the infringing signage containing the Chevrolet Marks be covered up *pendente lite* rather than taken down.