



STATE OF CALIFORNIA

DECISION COVER SHEET

☒ ACTION BY: Public Members Only

☐ ACTION BY: All Members

To : BOARD MEMBERS

Date: April 3, 2023

From : ADMINISTRATIVE LAW JUDGE: Anthony M. Skrocki

CASE: MICHAEL CADILLAC, INC., dba MICHAEL CHEVROLET CADILLAC v. GENERAL MOTORS LLC
Protest Nos. PR-2813-22 and PR-2814-22

TYPE: Vehicle Code section 3065.1 Franchise Incentive Program

PROCEDURAL SUMMARY:

- FILED ON CALENDAR: December 9, 2022
- MOTIONS FILED: Respondent's Motion to Dismiss
- COUNSEL FOR PROTESTANT: Gavin M. Hughes, Esq.
Robert A. Mayville, Jr., Esq.
Law Offices of Gavin M. Hughes
- COUNSEL FOR RESPONDENT: Ashley R. Fickel, Esq.
Dykema Gossett LLP

EFFECT OF PROPOSED ORDER:

The Proposed Order grants Respondent's Motion to Dismiss. The protests were filed more than five months after Michael Cadillac ceased being a franchisee of GM. As the protests were not filed by franchisees as required and defined in the Vehicle Code, the Board lacks jurisdiction to hear them. It is recommended both protests be dismissed with prejudice.

SUMMARY OF PROPOSED ORDER:

- Michael Cadillac and Michael Chevrolet (collectively “Michael”) were franchisees of General Motors (GM) until May 31, 2022, at which time they ceased operations at both locations and ceased being franchisees of GM. Both dealerships remain in operation now but under different ownership.
- Michael alleges that, while it was still a franchisee, it earned payment of funds under two incentive programs of GM but payment was not made prior to cessation of operations as a franchisee on May 31, 2022.
- Michael alleges it did not learn that GM was refusing to pay the incentives until more than two months after it had sold the dealership assets to the new owners. Because of this, the protests were not filed until December 9, 2022, more than five months after Michael ceased being a GM franchisee.
- Michael alleges that the Board should have jurisdiction over the protests as the incentive funds were earned while Michael was a franchisee.
- However, pursuant to Vehicle Code section 3050(c),¹ the Board is empowered to hear protests only if they are “presented by a franchisee” and there is no dispute that Michael was no longer a franchisee, as defined in Section 331.1, when it submitted the protests for filing on December 9, 2022. Section 3065.1 also requires that an incentive protest be submitted by a “franchisee.”
- The Board has, in the past, heard protests regarding disputes involving former franchisees but in those cases the protests had been filed while the dealer was still a franchisee, which is not the situation here.
- Protestant may seek relief by way of a civil action in court as permitted by Section 3050(e), which states: “Notwithstanding subdivisions (b), (c), and (d), the courts have jurisdiction over all common law and statutory claims originally cognizable in the courts. For those claims, a party may initiate an action directly in any court of competent jurisdiction.”

RELATED MATTERS:

- Related Case Law: None.
- Applicable Statutes and Regulations: Vehicle Code sections 331, 331.1, 331.2, 3050, 3065.1.

¹ All statutory references are to the California Vehicle Code.

1 NEW MOTOR VEHICLE BOARD
2 2415 1st Avenue, MS L242
3 Sacramento, California 95818
4 Telephone: (916) 445-1888

CERTIFIED MAIL

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8 STATE OF CALIFORNIA
9 NEW MOTOR VEHICLE BOARD
10

11 In the Matter of the Protest of
12 MICHAEL CADILLAC, INC., dba MICHAEL
13 CHEVROLET CADILLAC,
14 Protestant,
15 v.
16 GENERAL MOTORS LLC,
17 Respondent.

Protest Nos. PR-2813-22 and PR-2814-22

**PROPOSED ORDER GRANTING
RESPONDENT'S MOTION TO
DISMISS**

18 To: Gavin M. Hughes, Esq.
19 Robert A. Mayville, Jr., Esq.
20 Attorneys for Protestant
21 LAW OFFICES OF GAVIN M. HUGHES
22 4360 Arden Way, Suite 1
23 Sacramento, California 95864

24 Ashley R. Fickel, Esq.
25 Attorney for Respondent
26 DYKEMA GOSSETT LLP
27 444 South Flower Street, 22nd Floor
28 Los Angeles, California 90071

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1 This matter came on regularly for telephonic hearing on Wednesday, February 15, 2023, before
2 Anthony M. Skrocki, Administrative Law Judge for the New Motor Vehicle Board (“Board”). Gavin M.
3 Hughes, Esq. and Robert A. Mayville, Jr., Esq. represented Protestant. Ashley R. Fickel, Esq. of Dykema
4 Gossett LLP represented Respondent.

5 **FACTUAL AND PROCEDURAL BACKGROUND**

6 1. On December 9, 2022, Michael Cadillac, Inc., dba Michael Chevrolet Cadillac (“Michael
7 Cadillac” or “Protestant”) filed two protests with the Board against Respondent General Motors LLC
8 (“GM” or “Respondent”). These protests were filed pursuant to Vehicle Code¹ section 3065.1 (claims
9 arising out of a franchisor incentive program) when Protestant was a franchisee for Cadillac and
10 Chevrolet. (Protest Nos. PR-2813-22 and PR-2814-22, respectively) The Cadillac dealership was operated
11 by Michael Cadillac at 5787 N. Blackstone Avenue and the Chevrolet dealership was operated at 5735 N.
12 Blackstone Avenue in Fresno, California. (Protests, ¶ 1) The last day of Michael Cadillac’s operation of
13 these franchises was May 31, 2022. (Opposition, p. 3, lines 9-10; Transcript, p. 4, lines 5-9) Both
14 dealerships remain in operation under new ownership. (Protests, ¶ 1)

15 2. According to Protestant, “GM operates an incentive program called ‘PASE’ that provides
16 GM dealers the opportunity to earn incentives based upon the achievement of various metrics. One of the
17 incentives categories pertains to dealership purchases of GM factory parts, referred to as Purchase Loyalty
18 Funds.” (Protests, ¶ 5) Protestant contends that as of its final day of operations it had earned \$93,237 in
19 dealership incentives and these funds remain unpaid. (Protests, ¶¶ 6-7) An additional program operated by
20 GM is called “EBE.” This “program provides incentives to participating dealers based upon the sale of
21 eligible GM vehicles” with the funds paid quarterly. Protestant contends that GM refuses to pay EBE
22 incentives to Protestant that were earned during April and May of 2022, prior to May 31, 2022 when
23 Protestant ceased operations as a GM franchisee. (Protests, ¶ 8)

24 3. Protestants are represented by Gavin M. Hughes, Esq. and Robert A. Mayville, Jr., Esq. of
25 the Law Offices of Gavin M. Hughes.

26 4. Respondent is the former franchisor of Protestant. (Protests, ¶ 2)

27 _____
28 ¹ All statutory references are to the California Vehicle Code unless otherwise indicated.

5. Respondent is represented by Ashley Fickel, Esq. of Dykema Gossett LLP.

MOTION TO DISMISS²

Respondent's Assertions in its Motion to Dismiss

6. On January 25, 2023, GM filed its motion to dismiss the protests for lack of jurisdiction because the Protestant was not a franchisee, as defined in the Vehicle Code, at the time it filed the protests. (Motion, p. 3, lines 3-6). As stated, Protestant ceased being a franchisee as of May 31, 2022 and the protests were not filed until December 9, 2022.

7. Respondent argues that the “Board has jurisdiction to ‘[h]ear and decide, within the limitations and in accordance with the procedure provided, a protest presented by a *franchisee* . . .’ Cal. Veh. Code § 3050(c) (emphasis added). A franchisee ‘is any person who, pursuant to a franchise, receives new motor vehicles subject to registration under this code from the franchisor and who offers for sale or lease, or sells or leases the vehicles at retail or is granted the right to perform authorized warranty repairs and service, or the right to perform any combination of these activities.’ Cal. Veh. Code § 331.1. Here, Protestant was not a franchisee under Cal. Veh. Code § 331.1 at the time it filed this instant protest.³ Therefore, the Board does not have jurisdiction to hear the protest under Cal. Veh. Code § 3050(c).” (Motion, p. 3, lines 8-16)

8. Protestant was not a franchisee of GM at the time the protests were filed so it is unable to seek redress from the Board for its franchisor incentive program dispute. Admittedly, it “transferred ownership of its Chevrolet and Cadillac franchises on or about May 31, 2022” and its “last day as a GM dealer was May 31, 2022.” (Protests, ¶ 4) Consequently, “Protestant’s last day as a franchisee for GM was *over six months before* the date it filed the instant protest.” (Emphasis in original; Motion, p. 3, lines 24-28; p. 4, lines 2-4)

9. Respondent distinguishes this situation with the Board Decision in *West Covina Nissan*,

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² The merits of the allegations in these protests are not being addressed as the sole issue is whether the Board has jurisdiction to “hear and consider” a franchisor incentive program protest filed by a former franchisee.

³ As noted in paragraph 1, Michael Cadillac filed two protests. References to “protest” will be construed to mean “protests.”

1 *LLC v. Nissan North America, Inc.*, Protest No. PR-2478-16.⁴ “That protest, unlike the present matter,
2 was filed by a dealer that was an active dealer at the time the protest at issue was filed. GM is not aware
3 of any instance in which a former dealer has been permitted to file a protest.” (Motion, p. 4, fn. 1)

4 10. Respondent contends that the Board would exceed its “limited jurisdiction” if it presided
5 over these protests because there is no statutory authority to do so given that Michael Cadillac was not a
6 franchisee of GM when it filed the protests. There is no statutory authority for the Board to hear
7 complaints of former franchisees. These allegations against GM should be adjudicated in court and the
8 protests dismissed. (Motion, p. 4, lines 13-20)

9 **Protestant’s Assertions in its Opposition**

10 11. On February 3, 2023, Protestant filed its opposition to Respondent’s motion to dismiss.
11 Protestant maintains that it was a GM franchise “during the operative time period” for which Section
12 3065.1 “provides the Board exclusive jurisdiction over the subject matter at issue.” (Opposition, p. 1,
13 lines 24-26)

14 12. Protestant contends that Respondent did not advise it that GM was “refusing to pay these
15 incentives earned until more than two months after Protestant completed the transfer of its franchises.”
16 (Opposition, p. 1, line 28 through p. 2, line 1)

17 13. GM did not deny the incentive claims until after the sale and transfer of Protestant’s
18 Cadillac and Chevrolet franchises. Protestant argues that the Board should deny Respondent’s motion
19 “because to the (*sic*) sustain the Motion would sanction the ability of franchisors to achieve immunity
20 from the requirements of Section 3065.1, and likely Section 3065 protests as well, upon the sale or
21 termination of a new motor vehicle franchise.” (Opposition, p. 2, lines 2-9) Furthermore, “[t]he
22 Legislature could not have intended to free a franchisor from its statutory obligations simply because a
23 franchise sale was completed prior to an incentive claim being approved or denied.⁵ There is no policy
24 interest to be served by the creation of this window of franchisor immunity from Section 3065.1.”

25 _____
26 ⁴ This Decision has not been designated by the Board as a precedent decision pursuant to Government Code Section
27 11425.60.

28 ⁵ In a “buy-sell” with a dealer and a third-party, the franchise is not sold by the selling dealer. Assets or stock may
be sold. The franchise with the selling dealer is terminated, and the manufacturer or distributor issues a new
franchise to the buyer.

(Opposition, p. 3, lines 24-28)

14. Protestant contends it is “undisputed” that it was a GM franchisee at the time of the events that gave rise to the franchisor incentive program claims for payment. These claims were made by a franchisee within the meaning of Section 3065.1. “Moreover, the Board has previously determined that where the events giving rise to the claims arose when the Protestant was a franchisee, the Board’s exclusive jurisdiction continues subsequent to franchise termination. (*West Covina Nissan, LLC v Nissan North America, Inc.*, Protest No. PR-2478-16.) Nevertheless, Respondent argues the Board cannot maintain jurisdiction over this protest because Protestant was not a franchisee at the time of the filing of this protest. Respondent’s attempt to distinguish the Board’s ruling in *West Covina Nissan* is unavailing.”

(Opposition, p. 3, lines 12-19)

15. According to Protestant, the Board Decision in *Vallejo CJD, LLC, a California Limited Liability Company v. FCA US LLC, a Delaware Limited Liability Company*, Protest Nos. PR-2589-18 through PR-2592-18 and *Fairfield CJD LP, a California Limited Partnership v. FCA US LLC, a Delaware Limited Liability Company*, Protest Nos. PR-2593-18 through PR-2596-18,⁶ recognized the *West Covina Nissan* protest and confirmed its reasoning in Footnote 32, as follows:

Such a decision by the Board that the Section 3060 protests are moot as the dealership has ceased to operate should be distinguished from a protest filed pursuant to Section 3065 subsequent to which the dealership may cease operations for whatever reason. In a Section 3065 protest, the Board may still evaluate and pass upon whether the then franchisor complied with the provisions of Section 3065 at the time of the events alleged in the Section 3065 protest even though the dealership may be out of operation or has ceased to be a franchisee after the protest was filed. (Opposition, p. 4, lines 1-11)

16. Protestant contends the critical question in these matters, is “whether the incentives were earned by a franchisee while operating under the terms of a franchise. If these conditions are met, the Board maintains jurisdiction of the franchisor incentive program consistent with the Legislature’s mandate evidenced by the plain language of Section 3065.1.” (Opposition, p. 4, lines 14-17)

Respondent’s Assertions in its Reply to the Opposition

17. Respondent’s reply was filed on February 10, 2023. Respondent contends that Protestant admits in its opposition that “it was not a franchisee at the time it filed” these protests. (Reply, p. 2, lines

⁶ See footnote 4.

3-5) Additionally, “[i]n both cases cited by Protestant, the protests were filed by parties who were franchisees **at the time** the protests were filed.” (Emphasis in original.) As Protestant was not a franchisee as defined at the time it filed these protests, the Board lacks jurisdiction to hear this dispute and GM’s motion to dismiss should be granted. (Reply, p. 2, lines 5-10, 27-28; p. 3, lines 4-5)

18. According to Respondent, “the issue in *West Covina Nissan* was whether the Board has *continuing* jurisdiction over a protest that was filed by a franchisee at the time of filing, but who ended up no longer being a franchisee after the protest was filed. Here, the Board never had jurisdiction when the Protestant, a non-franchisee, filed the instant protest and there is no statutory basis for the Board to have any jurisdiction, let alone continuing jurisdiction over this dispute.” (Italics in original; Reply, p. 3, lines 8-13)

19. Respondent argues that *Vallejo CJD, LLC* is also distinguishable as “the Board dismissed a termination protest brought by a dealer subject to a receivership, because under the terms of the receivership, the dealer would not be permitted to resume operations.” The footnote cited by Protestant supports GM’s position that the Board does not have jurisdiction over these protests currently before the Board because the “Protestant did not cease to be a franchisee ‘*subsequent to*’ or ‘*after the protest was filed.*’ Rather, Protestant ceased being a franchisee over six months **before** it filed the instant protest. Therefore, Protestant did not submit to the jurisdiction of the Board by properly filing its protest when it was still a franchisee and the Board does not have jurisdiction to hear” these protests. (Emphasis in original; Reply, p. 3, lines 16-20, 27 through p. 4, line 3)

APPLICABLE LAW

20. Section 331 provides, in part, as follows:

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

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

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

(3) The franchisee constitutes a component of the franchisor’s distribution system.

(4) The operation of the franchisee’s business is substantially associated with the franchisor’s trademark, trade name, advertising, or other commercial symbol designating the franchisor.

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1 (5) The operation of a portion of the franchisee's business is substantially reliant on the
2 franchisor for a continued supply of new vehicles, parts, or accessories."

...

3 21. Section 331.1 defines a franchisee as follows:

4 A "franchisee" is any person who, pursuant to a franchise, receives new motor vehicles
5 subject to registration under this code, new off-highway motorcycles, as defined in Section
6 436, new all-terrain vehicles, as defined in Section 111, . . . from the franchisor and who
7 offers for sale or lease, or sells or leases the vehicles at retail or is granted the right to
8 perform authorized warranty repairs and service, or the right to perform any combination of
9 these activities.

10 22. Section 331.2 defines a franchisor as follows:

11 A "franchisor" is any person who manufactures, assembles, or distributes new motor
12 vehicles subject to registration under this code, new off-highway motorcycles, as defined in
13 Section 436, new all-terrain vehicles, as defined in Section 111, . . . and who grants a
14 franchise.

15 23. Section 3050 provides, in part, as follows:

16 The board shall do all of the following:

...

17 (c) Hear and decide, within the limitations and in accordance with the procedure
18 provided, a protest presented by a franchisee pursuant to Section . . . 3065.1 . . .

...

19 (e) Notwithstanding subdivisions (b), (c), and (d), the courts have jurisdiction over all
20 common law and statutory claims originally cognizable in the courts. For those claims, a
21 party may initiate an action directly in any court of competent jurisdiction.

...

22 24. Section 3065.1 provides, in part, as follows:

23 (a) All claims made by a franchisee for payment under the terms of a franchisor incentive
24 program shall be either approved or disapproved within 30 days after receipt of the
25 franchisor. . . .

26 (b) Franchisee claims for incentive program compensation shall not be disapproved unless
27 the claim is false or fraudulent, the claim is ineligible under the terms of the incentive
28 program as previously communicated to the franchisee, or for material noncompliance with
reasonable and nondiscriminatory documentation and administrative claims submission
requirements."

...

29 (e) Following the disapproval of a claim, a franchisee shall have six months from receipt of
30 the written notice described in either subdivision (a) or (d), whichever is later, to file a
31 protest with the board for determination of whether the franchisor complied with
32 subdivisions (a), (b), (c), and (d). . . .

...

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ISSUE

25. The issue in this matter is whether the Board has jurisdiction to “hear and consider” a franchisor incentive program protest pursuant to Section 3065.1 if, at the time the protest is filed, the Protestant is no longer a franchisee.

ANALYSIS

26. Section 3050(c) creates and limits the Board’s authority to consider protests brought before it. This provision empowers the Board to “[h]ear and decide, **within the limitations** and in accordance with the procedure provided, **a protest presented by a franchisee** pursuant to Section . . . 3065.1 . . . (Emphasis added.) Although the statute empowers the Board to “[h]ear and decide . . . a protest . . .,” the protest must be “presented by a franchisee . . .”

27. As of May 31, 2022, there was no longer a “franchise” as defined in Section 331 between Michael Cadillac and GM. Thus, Michael Cadillac and GM, ceased being a “franchisee” and “franchisor” as of that date.

28. The protests, filed on December 9, 2022, were not “presented by a franchisee” of GM.

29. If the protests had been presented when Protestant was a franchisee, the Board would have had continuing jurisdiction to resolve the dispute.

30. Also, Section 3065.1 requires that the protest be filed by a “franchisee,” (defined in Section 331.1).

31. Section 3050(c) unequivocally empowers the Board, to hear only “a protest presented by a franchisee.” As neither of these protests was presented by a “franchisee” the Board is without jurisdiction to hear and consider them.

32. Jurisdiction to hear this dispute does not rest with the Board, but rather in the courts. (See Section 3050(e))

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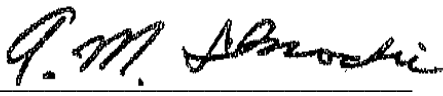
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1 **PROPOSED ORDER**

2 After consideration of the pleadings, exhibits, and oral arguments of counsel, it is hereby ordered
3 that Respondent's motion to dismiss is granted. As the protests were not filed by a franchisee, the Board
4 has no jurisdiction over these matters. *Michael Cadillac, Inc., dba Michael Chevrolet Cadillac v.*
5 *General Motors LLC*, Protest Nos. PR-2813-22 and PR-2814-22, are dismissed with prejudice.

6
7 I hereby submit the foregoing which constitutes my
8 proposed order in the above-entitled matters, as the
9 result of a hearing before me, and I recommend this
10 proposed order be adopted as the decision of the New
11 Motor Vehicle Board.

12 DATED: March 8, 2023

13 By 
14 ANTHONY M. SKROCKI
15 Administrative Law Judge
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27 Steve Gordon, Director, DMV
28 Ailene Short, Branch Chief,
Industry Service Branch, DMV

VIA EMAIL

New Motor Vehicle Board

Received
1-25-23

FILED

New Motor Vehicle Board

Date: 1-25-23

By: RPP

1 **DYKEMA GOSSETT LLP**
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9 Attorney(s) for Respondent,
10 GENERAL MOTORS LLC
11
12

7 **STATE OF CALIFORNIA**
8 **NEW MOTOR VEHICLE BOARD**
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10 In the Matter of the Protest of
11 MICHAEL CADILLAC, INC., dba MICHAEL
12 CHEVROLET CADILLAC,

13 Protestant,

14 v.

15 GENERAL MOTORS LLC,

16 Respondent.
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PROTEST NO. PR-2813-22 and PR-2814-22

**RESPONDENT GENERAL MOTORS
LLC'S NOTICE OF MOTION AND
MOTION TO DISMISS PROTESTANT
MICHAEL CADILLAC, INC. DBA
MICHAEL CHEVROLET CADILLAC'S
PROTEST; MEMORANDUM OF POINTS
AND AUTHORITIES**

Date: February 15, 2023
Time: 9:00 A.M.

1 **TO THE PARTIES HEREIN AND TO THEIR ATTORNEYS OF RECORD:**

2 **PLEASE TAKE NOTICE** that on February 15, 2023 at 9:00 a.m., or as soon thereafter as
3 the matter may be heard in the above-entitled board, located in Sacramento, California 95818,
4 Respondent GENERAL MOTORS LLC (“GM”) will, and hereby does, move this Board to dismiss
5 the above referenced protest.

6 This motion to dismiss is made pursuant to Cal. Veh. Code § 3050(c) for the Board’s lack
7 of jurisdiction to hear this protest.

8 This Motion to Dismiss is based upon this Notice of Motion, the Memorandum of Points
9 and Authority, as well as all documents on file herein and upon such other oral and documentary
10 evidence as may be presented to and at the time of hearing on this Motion.

11
12 DATED: January 25, 2023

DYKEMA GOSSETT LLP

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14 By: 

15 ASHLEY R. FICKEL
16 Attorneys for Respondent,
17 GENERAL MOTORS LLC
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 GM brings this Motion to Dismiss Protestant Michael Cadillac, Inc., d/b/a Michael
4 Chevrolet Cadillac's ("Michael Cadillac" or "Protestant") Protest because the Protestant was not a
5 franchisee as defined under the California Vehicle Code at the time it filed this protest. Therefore,
6 the Board does not have jurisdiction to hear this protest.

7 **II. APPLICABLE LAW**

8 The Board has jurisdiction to "[h]ear and decide, within the limitations and in accordance
9 with the procedure provided, a protest presented by a *franchisee* . . ." Cal. Veh. Code § 3050(c)
10 (emphasis added). A franchisee "is any person who, pursuant to a franchise, receives new motor
11 vehicles subject to registration under this code from the franchisor and who offers for sale or
12 lease, or sells or leases the vehicles at retail or is granted the right to perform authorized warranty
13 repairs and service, or the right to perform any combination of these activities." Cal. Veh. Code §
14 331.1. Here, Protestant was not a franchisee under Cal. Veh. Code § 331.1 at the time it filed this
15 instant protest. Therefore, the Board does not have jurisdiction to hear the protest under Cal. Veh.
16 Code § 3050(c).

17 **III. ARGUMENT**

18 **A. Protestant Was Not A Franchisee At The Time It Filed This Protest**

19 On December 9, 2022, Protestant filed the instant protest alleging that GM has failed to pay
20 Protestant certain PASE and EBE incentives that it claims were earned and due to Protestant.
21 Protestant further claims that GM failed to provide a reasonable appeal process to challenge the
22 withholding of the allegedly earned incentive payments. GM disputes these allegations, but will not
23 address the validity of Protestant's claims in this Motion.

24 The Board does not have jurisdiction to hear this protest because Protestant was not a
25 franchisee of GM at the time it filed this protest. Protestant admits that it "transferred ownership of
26 its Chevrolet and Cadillac franchises on or about May 31, 2022" and contends that its "last day as a
27 GM dealer was May 31, 2022." Protest, ¶ 4. Therefore, Protestant's last day as a franchisee for
28 GM was *over six months before* the date it filed the instant protest. As stated above, the Board only

1 has jurisdiction to hear protests that are brought by a franchisee. Cal. Veh. Code § 3050(c).
2 Protestant admits that its last day as a franchisee as contemplated under Cal. Veh. Code § 331.1 was
3 on or around May 31, 2022. As such, at the time that it filed this protest, Protestant was no longer
4 a franchisee and is unable to seek redress with the Board for this dispute.¹

5 “[T]he Board is a quasi-judicial administrative agency of limited jurisdiction. It does not
6 have plenary authority to resolve any and all disputes which may arise between a franchisor and a
7 franchisee. The Board’s jurisdiction to preside over claims is limited by its statutory authorization.
8 *Mazda Motor of America, Inc. v. New Motor Vehicle Bd.* (2003) 110 Cal.App.4th 1451, 1457 [2
9 Cal.Rptr.3d 866] (internal citations and punctuation omitted); *see also Vallejo CJD, LLC v FCA US*
10 *LLC*, Protest No PR 2589-18 (dismissing termination protest brought by a dealer subject to a
11 receivership, because under the terms of the receivership, the dealer would not be permitted to
12 resume operations. As such, there was no practical remedy available for the Board to award.).

13 Here, the Protestant admits it was not a franchisee when it filed the instant protest. Thus,
14 the Board would be exceeding its limited jurisdiction in presiding over this protest because there is
15 no statutory authorization for it to do so given that Protestant was not a franchisee when the protest
16 was filed and there is no statutory authorization for the Board to hear a complaint of a **former**
17 franchisee. Protestant’s allegations against GM sound entirely in contract and should be adjudicated
18 in a court of law.

19 Thus, this matter cannot proceed before the Board and should be dismissed. Petitioner must
20 seek any redress it alleges it is entitled to as a contract claim in a court of law.

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27 ¹ GM is aware of the decision in *West Covina Nissan, LLC v Nissan North America, Inc.*, Protest
28 No. PR-2478-16. That protest, unlike the present matter, was filed by a dealer that was an active
dealer at the time the protest at issue was filed. GM is not aware of any instance in which a former
dealer has been permitted to file a protest.

1 **IV. CONCLUSION**

2 Based on the foregoing, GM respectfully requests that the Board dismiss Protestant's protest
3 for lack of jurisdiction.

4
5 DATED: January 25, 2023

DYKEMA GOSSETT LLP

7
8 By: 
9 ASHLEY R. FICKEL
10 Attorneys for Respondent
11 GENERAL MOTORS LLC
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STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

On January 25, 2023, I served true copies of the following document(s) described as **RESPONDENT GENERAL MOTORS LLC'S NOTICE OF MOTION AND MOTION TO DISMISS PROTESTANT MICHAEL CADILLAC, INC. DBA MICHAEL CHEVROLET CADILLAC'S PROTEST; MEMORANDUM OF POINTS AND AUTHORITIES** on the interested parties in this action as follows:

☒ **BY E-MAIL OR ELECTRONIC TRANSMISSION:** I caused a copy of the document(s) to be sent from e-mail address AFeygin@dykema.com to the persons at the e-mail addresses listed in the Service List. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

Executed on January 25, 2023, at Los Angeles, California.

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SERVICE LIST
Michael Cadillac, Inc. v. General Motors LLC
Case No.: PR-2813-22 and PR-2814-22

Gavin M. Hughes
Robert A. Mayville, Jr.
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Attorneys for Protestant,
MICHAEL CADILLAC, INC. dba MICHAEL
CHEVROLET CADILLAC

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Received
2-3-23

VIA EMAIL

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FILED

New Motor Vehicle Board

Date: 2-3-23

By: RPP

ATTORNEYS FOR PROTESTANT

STATE OF CALIFORNIA

NEW MOTOR VEHICLE BOARD

In the Matter of the Protest of:

MICHAEL CADILLAC, INC., dba MICHAEL
CHEVROLET CADILLAC,

Protestant,

v.

GENERAL MOTORS LLC,

Respondent.

PROTEST NOS: PR-2813-22 and PR-2814-22

**PROTESTANT'S OPPOSITION TO
RESPONDENT GENERAL MOTORS
LLC'S NOTICE OF MOTION AND
MOTION TO DISMISS PROTEST**

Protestant, Michael Cadillac, Inc., dba Michael Chevrolet Cadillac ("Michael Cadillac"), a California corporation, qualified to do business in California, through its attorneys, files this opposition pursuant to the Board's January 17, 2023, ORDER AMENDING "ORDER ESTABLISHING BRIEFING SCHEDULE RE: RESPONDENT'S MOTION TO DISMISS PROTEST" as follows:

I. INTRODCUTION

Protestant was a franchisee of Respondent, General Motors, LLC ("GM"), during the operative time period for which Vehicle Code section 3065.1 provides the Board exclusive jurisdiction over the subject matter at issue.

At issue in these consolidated protests are two categories of incentives: 1.) Parts Loyalty Purchase incentives and 2.) EBE incentives. Respondent did not advise it was refusing to pay these

1 incentives earned until more than two months after Protestant completed the transfer of its franchises.

2 Respondent argues these consolidated protests should be dismissed because Protestant's
3 franchises terminated after GM approved the sale and transfer of Protestant's Cadillac and GM
4 franchises—before GM denied the incentive claims and before the Protests were filed. The Board has
5 consistently ruled the termination of a franchise does not extinguish the Board's jurisdiction over
6 protests brought pursuant to Section 3065—as is the case here.

7 The Board should deny Respondent's motion because to the sustain the Motion would sanction
8 the ability of franchisors to achieve immunity from the requirements of Section 3065.1, and likely
9 Section 3065 protests as well, upon the sale or termination of a new motor vehicle franchise.

10 II. FACTS

11 Protestant operated GM and Cadillac franchises until May 31, 2021. These franchises
12 terminated upon the transfer of the franchises to the GM approved purchaser. On its final day of
13 operation, Protestant accessed GM's data portal to confirm it had earned Parts Loyalty Purchase funds
14 in the amount of \$93,237. The Parts Loyalty Purchase incentives are earned by dealers purchasing
15 90% or more of their parts directly from GM. Protestant consistently earned these incentives, prior to
16 its termination.

17 By email dated August 18, 2022, GM advised Protestant its GM parts purchases dropped
18 below 90%, purportedly after the reporting of stale data on June 1, 2022—after Protestant's access to
19 GM's systems had been terminated. The August 18 notice of denial was well beyond the 30 days in
20 which GM was required to either approve or disapprove these incentive claims. (Cal. Veh. Code, §
21 3065.1 subd. (a).) GM did not provide Protestant reasonable, nor any, appeals process.

22 In addition, Protestant also seeks payment for incentives earned pursuant to Respondent's EBE
23 program. In general terms, GM dealers become eligible for EBE payments upon the achievement of
24 certain facility investment levels. GM dealers then earn incentives based upon the retail sale of
25 eligible GM vehicles in an amount determined by GM. Subsequent to the termination of its GM
26 franchises, Protest inquired as to when GM would provide payment for the EBE incentives earned. It
27 is not clear when or how GM notified Protestant it would not receive the EBE funds earned. GM did
28 not provide a final accounting and final payment until approximately December 1, 2022.

1 After unsuccessfully attempting to resolve these issues through negotiations with Respondent,
2 Protestant filed these consolidated protests on December 9, 2022.

3 III. APPLICABLE LAW

4 These consolidated protests were filed pursuant to Section 3065.1 governing Franchisor
5 incentive programs; claims; and audits. This Vehicle Code section sets forth the requirements for the
6 payment of and withholding of incentives. It also requires the franchisor provide a reasonable appeals
7 process. Finally, it provides a franchisee the right to file a protest with the Board to determine whether
8 the franchisor complied with this code section.

9 Section 330 defines a franchise while Section 331.1 defines a franchisee. There is no dispute
10 Protestant was a franchisee through May 31, 2022, pursuant to its GM and Cadillac franchises.

11 IV. DISCUSSION

12 It is undisputed protestant was a franchisee at the time of the events that gave rise to the claim
13 for payment. The incentives claims at issue were made by a franchisee within the meaning of Section
14 3065.1. Moreover, the Board has previously determined that where the events giving rise to the claims
15 arose when the Protestant was a franchisee, the Board's exclusive jurisdiction continues subsequent to
16 franchise termination. (*West Covina Nissan, LLC v Nissan North America, Inc.*, Protest No. PR-2478-
17 16.) Nevertheless, Respondent argues the Board cannot maintain jurisdiction over this protest because
18 Protestant was not a franchisee at the time of the filing of this protest. Respondent's attempt to
19 distinguish the Board's ruling in *West Covina Nissan* is unavailing.

20 Respondent ignores the Board's finding that "Not only did all events alleged in the protest
21 occur while protestant was a Nissan dealer, but the warranty reimbursement claims protest and protest
22 procedures are within the Board's exclusive statutory authority..... The Board has special expertise in
23 these matters to adjudicate the claim." (*Id* at p. 5 ¶ 19.) The same conclusion should be reached here.

24 Respondent's argument, if accepted, would encourage franchisors to ignore the clear statutory
25 mandate of Section 3065.1, subsequent to the sale of any franchise. The Legislature could not have
26 intended to free a franchisor from its statutory obligations simply because a franchise sale was
27 completed prior to an incentive claim being approved or denied. There is no policy interest to be
28 served by the creation of this window of franchisor immunity from Section 3065.1.

1 The Board recognized the *West Covina Nissan* protest and confirmed its reasoning in *Vallejo*
2 *CJD, LLC v. FCA LLC* Protest Nos. PR-2589-18, PR-2590-18, PR-2591-18, and PR-2592-18; and
3 *Fairfield LLC v. FCA LLC* Protest Nos. PR-2593-18, PR-2594-18, PR-2595-18, and PR-2596-18. In
4 the consolidated *Vallejo CJD* protests, the Board considered whether the protests were moot because
5 the dealership at issue had ceased to operate. The Board distinguished the facts of those consolidated
6 protests involving a Section 3060 termination protest from protests filed pursuant to Section 3065, at
7 footnote 32 of page 39:

8 Such a decision by the Board that the Section 3060 protests are moot as the dealership
9 has ceased to operate should be distinguished from a protest filed pursuant to Section
10 3065 subsequent to which the dealership may cease operations for whatever reason. In a
11 Section 3065 protest, the Board may still evaluate and pass upon whether the then
franchisor complied with the provisions of Section 3065 at the time of the events alleged
in the Section 3065 protest even though the dealership may be out of operation or has
ceased to be a franchisee after the protest was filed.


12 There is no support for Respondent's argument of whether or not a protest is filed before or
13 after franchise termination should be dispositive to the Board's jurisdictional analysis in this protest.
14 The critical factual question is whether the incentives were earned by a franchisee while operating
15 under the terms of a franchise. If these conditions are met, the Board maintains jurisdiction of the
16 franchisor incentive program consistent with the Legislature's mandate evidenced by the plain
17 language of Section 3065.1

18 V. CONCLUSION

19 Respondent's motion to dismiss should be denied because if granted, the result would be
20 contrary to the plain language of Section 3065.1, inconsistent with prior Board rulings, and against the
21 public policy of ensuring franchisor compliance with the requirements of Section 3065.1. The Board
22 should not open the door to franchisor abuse by sanctioning a window of franchisor immunity from the
23 requirements of Section 3065.1.

24 Dated: February 3, 2023

LAW OFFICES OF
GAVIN M. HUGHES

26 By: 
27 Gavin M. Hughes
28 Robert A. Mayville, Jr.
Attorneys for Protestant

1 **DECLARATION OF SERVICE BY ELECTRONIC MAIL**

2 I, John David Wooten, declare that I am employed in the County of Sacramento, State of
3 California, that I am over 18 years of age, and that I am not a party to the proceedings identified herein.
4 My business address is 4360 Arden Way, Suite 1, Sacramento, California 95864.

5 I declare that on February 3, 2023, I caused to be served a true and complete copy of:

6 ***PROTESTANT'S OPPOSITION TO RESPONDENT GENERAL MOTORS LLC'S NOTICE OF***
7 ***MOTION AND MOTION TO DISMISS PROTEST***

8
9 **MICHAEL CADILLAC, INC., dba MICHAEL CHEVROLET CADILLAC**

10 **v.**

11 **GENERAL MOTORS LLC**

12 **Protest Nos. PR-2813-22, PR-2814-22**

13
14 By Electronic Mail:

15 Ashley R. Fickel, Esq.
16 DYKEMA GOSSETT LLP
17 444 South Flower Street, 22nd Floor
18 Los Angeles, CA 90071
AFickel@dykema.com

19
20 I declare under penalty of perjury that the foregoing is true and correct.

21 Executed this 3 February 2023 Sacramento, California.

22 
23 John David Wooten

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

Received
2-3-23

STATE OF CALIFORNIA

NEW MOTOR VEHICLE BOARD

In the Matter of the Protest of

VALLEJO CJD, LLC, a California Limited
Liability Company,

Protestant,

v.

FCA US LLC, a Delaware Limited Liability
Company,

Respondent.

**Protest Nos. PR-2589-18, PR-2590-
18, PR-2591-18, and PR-2592-18**

In the Matter of the Protest of

FAIRFIELD CJD, LP, a California Limited
Partnership,

Protestant,

v.

FCA US LLC, a Delaware Limited Liability
Company,

Respondent.

**Protest Nos. PR-2593-18, PR-2594-
PR-2595-18, and PR-2596-18**

DECISION

At its regularly scheduled meeting of April 10, 2019, the Public Members of the Board met and considered the administrative record and Administrative Law Judge's "Proposed Order Granting Respondent's 'Motion to Dismiss Protests or, in the Alternative, for a Finding of Good Cause to Terminate Based on Uncontested Evidence,'" in the above-entitled matters. After such consideration, the Board adopted the Proposed Order as its final Decision in these matters.

This Decision shall become effective forthwith.

IT IS SO ORDERED THIS 10th DAY OF APRIL 2019.



KATHRYN ELLEN DOI
President
New Motor Vehicle Board

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

CERTIFIED MAIL

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5
6
7 STATE OF CALIFORNIA
8 NEW MOTOR VEHICLE BOARD
9

10
11 In the Matter of the Protest of
12 VALLEJO CJD, LLC, a California Limited
Liability Company,
13 Protestant,
14 v.
15 FCA US LLC, a Delaware Limited Liability
Company,
16 Respondent.

**Protest Nos. PR-2589-18, PR-2590-18,
PR-2591-18, and PR-2592-18**

**PROPOSED ORDER GRANTING
RESPONDENT'S "MOTION TO
DISMISS PROTESTS OR, IN THE
ALTERNATIVE, FOR A FINDING OF
GOOD CAUSE TO TERMINATE
BASED ON UNCONTESTED
EVIDENCE"**

17
18 In the Matter of the Protest of
19 FAIRFIELD CJD, LP, a California Limited
Partnership,
20 Protestant,
21 v.
22 FCA US LLC, a Delaware Limited Liability
Company,
23 Respondent.

**Protest Nos. PR-2593-18, PR-2594-18,
PR-2595-18, and PR-2596-18**

24
25 To: Christian J. Scali, Esq.
Halbert B. Rasmussen, Esq.
26 Attorneys for Protestants
SCALI RASMUSSEN
27 800 Wilshire Boulevard, Suite 400
Los Angeles, California 90017
28 ///

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6 Sacramento, California 95827-7010

7 Jack O. Snyder, Jr., Esq.
8 Roger H. Stetson, Esq.
9 David B. Lurie, Esq.
10 Attorneys for Respondent
11 BARACK FERRAZZANO KIRSCHBAUM & NAGELBERG LLP
12 200 West Madison Street, Suite 3900
13 Chicago, Illinois 60606

14 This matter came on regularly for telephonic hearing on Friday, March 1, 2019, before Anthony
15 M. Skrocki, Administrative Law Judge ("ALJ") for the New Motor Vehicle Board ("Board"). Halbert B.
16 Rasmussen, Esq. of Scali Rasmussen represented Protestants. Jack O. Snyder, Jr., Esq. and David B.
17 Lurie, Esq., of Barack Ferrazzano Kirschbaum & Nagelberg LLP represented Respondent.

18 FACTUAL AND PROCEDURAL BACKGROUND

19 Vallejo CJD, LLC

20 1. Vallejo CJD, LLC, a California Limited Liability Company doing business as Momentum
21 Chrysler Dodge Jeep RAM of Vallejo ("Vallejo Momentum") is a "franchisee" within the definition of
22 Vehicle Code section 331.1¹ and FCA US LLC, a Delaware Limited Liability Company ("FCA" or
23 "Respondent") is a "franchisor" within the definition of Section 331.2. Vallejo Momentum and FCA are
24 parties to four "franchises" as defined in Section 331, with separate franchises for each of the Chrysler,
25 Dodge, Jeep and RAM line-makes. (Motion and Notices of Termination, Exh. 3 B)

26 2. Vallejo Momentum sold and serviced all four line-makes at its dealership, which was
27 located at 1001 Admiral Callaghan Lane, Vallejo, California. (Protests PR-2589-18 to PR-2592-18, p. 1)

28 3. Vallejo Momentum also operated a RAM Truck Center at 4325 Sonoma Blvd., Vallejo,
California. (Motion and Notices of Termination, Exh. 3 B)

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¹ All statutory references are to the California Vehicle Code unless otherwise indicated.

Fairfield CJD, LP

4. Fairfield CJD, LP, dba Momentum Chrysler Dodge Jeep Ram of Fairfield ("Fairfield Momentum") is a "franchisee" within the definition of Vehicle Code section 331.1 and FCA is a "franchisor" within the definition of Section 331.2. Fairfield Momentum and FCA are parties to four "franchises" as defined in Section 331, with separate franchises for each of the Chrysler, Dodge, Jeep and RAM line-makes. (Motion and Notices of Termination, Exh. 3 A)

5. Fairfield Momentum sold and serviced all four line-makes at its dealership, which was located at 2595 Auto Mall Parkway, Fairfield, California. (Protests PR-2593-18 to PR-2596-18, p. 1)

6. Both Vallejo Momentum and Fairfield Momentum are part of the Momentum Auto Group which also operates several other dealerships, all of which are owned by Mr. Rahim Hassanally.² Many of Mr. Hassanally's dealerships were cross-guarantors of, or parties to, the flooring debts of his other dealerships and Mr. Hassanally was a personal guarantor of the flooring debts of all of the dealerships.³

Notice of Default: Vallejo Momentum

7. On October 19, 2018, FCA sent Vallejo Momentum a Notice of Default based on its failure to comply with "reasonable and material provisions of its Dealer Agreements with respect to sales performance and customer satisfaction." April 30, 2019, was the deadline to cure the defaults. A notice of default was not sent to Fairfield Momentum. (Notices of Termination, Vallejo Momentum)

**Financial Standing of Vallejo Momentum and Fairfield Momentum
Prior to the Issuance of the Notices of Termination**

8. In early November 2018, FCA became aware of the following information regarding the financial standing of Vallejo Momentum and Fairfield Momentum (jointly "Dealer"):

- **First**, in a letter dated November 2, 2018 (attached as Exhibit 1 [to the Notices of Termination]), BBVA Compass, Dealer's floor plan lender, informed FCA US that it had placed Dealer on financing hold.

///

² Rahim Hassanally is the President of Vallejo Momentum and Fairfield Momentum. In the franchises with FCA, he is identified as "Dealer Management" and executed the agreements. (Declaration of Rahim Hassanally, p. 2, lines 6-9)

³ Mr. Hassanally's other dealerships which are part of the Momentum Auto Group, include Fairfield Imports Two, LLC (Momentum Nissan and Momentum Infiniti), Fairfield Imports Three, LLC (Momentum Mitsubishi and Momentum Hyundai), Vallejo Imports, LLC (Momentum Kia), Fairfield Imports, LLC (Momentum Toyota), and Maverick Auto Group 2, LLC (Momentum Volkswagen), all located in Fairfield or Vallejo. All of these dealerships, in addition to Protestants, ceased operations in November 2018.

- **Second**, on November 6, 2018, BMO Harris Bank N.A. sued Dealer for breach of loan agreements and related contracts for floor plan financing at certain of [Mr. Hassanally's other] dealerships, as demonstrated by the complaint ("BMO Harris Complaint," attached as Exhibit 2 [to the Notices of Termination]) filed in the matter of *BMO Harris Bank N.A. v. Maverick Auto Group 2, LLC, et al.*⁴ ... The BMO Harris Complaint seeks over \$16 million in unpaid loan amounts, and also alleges that at least some of [the] dealerships have sold vehicles out of trust. Based on the documents attached to the BMO Harris Complaint, it appears that Dealer (through ... Mr. Hassanally) signed the loan agreements and related contracts as a borrower, even though BMO Harris Bank N.A. is not Dealer's floor plan lender.
- **Third**, the BMO Harris Complaint also seeks to recover from ... Mr. Hassanally, personally as a guarantor of the loan. According to [FCA's] records, [Mr. Hassanally is] personally the President and [an]⁵ owner of Dealer.
- **Fourth**, as demonstrated by the BMO Harris Complaint and various documents attached thereto, [Mr. Hassanally's] actions have led to the filing of a UCC Financing Statement that is concerning to [FCA]. That financing statement, filed by BMO Harris, claims a security interest in Dealer's "Blue Sky/Franchise" general intangibles" to secure debt incurred by other dealerships. ... While nothing in this Notice should be taken as an indication that FCA US agrees that such a security interest exists or is valid, it nevertheless appears that [Mr. Hassanally] permitted such a financing statement to be filed.
- **Fifth**, as demonstrated in a forbearance agreement attached to the BMO Harris Complaint, Dealer (through ... Mr. Hassanally) admitted in writing no later than March 9, 2018, that it defaulted under its agreements with BMO Harris Bank N.A. Despite this, neither [Mr. Hassanally] nor Dealer ever notified FCA US of the forbearance agreement or the acknowledged default. ...

(Emphasis in the original; Notices of Termination, Vallejo Momentum and Fairfield Momentum)

9. FCA attempted to deliver a Notice of Default on November 16, 2018, "based on the Dealer's loss of floor plan financing and impairment of its financial standing or that of its owners or executives." During the course of attempting to deliver the Notice of Default, FCA "discovered further information that reinforced the incurable financial and operational collapse of Dealer," which made it clear to FCA "that Dealer would not be able to cure the defaults identified in the November 16, 2018 Notice of Default."

- **First**, FCA discovered that Dealer had "gone dark." ... Dealer ceased to conduct business no later than November 16, 2018." ... [The Declaration of Eric Wong and exhibits thereto contain a number of pictures showing Vallejo Momentum and

⁴ Maverick Auto Group is a Volkswagen franchisee and is one of the other dealerships owned by Mr. Hassanally all of which were jointly liable on the debts of the Momentum Auto Group, along with Mr. Hassanally as a personal guarantor. (Notices of Termination, Exh. 2)

⁵ It is unclear if Mr. Hassanally is the "sole" owner of Vallejo CJD, LLC but he is "an" owner of Fairfield CJD, LP with 99% of the partnership interest and "RHMON" with 1%. (See Paragraph 45, *supra*; Motion and Notices of Termination, Exhs. 3 A and 3 B)

Fairfield Momentum were both closed for business from November 17-28, 2018; Exhibit 3 to the Notices of Termination.]

- **Second**, FCA US obtained a complaint filed against Dealer (among others) by BBVA Compass, Dealer's floor plan lender. That complaint, filed on November 8, 2018, raises claims for breach of Dealer's floor plan agreements, the "wide-spread practice of selling vehicles out of trust," and other causes of action, as demonstrated by the complaint ("BBVA Compass Complaint," attached as Exhibit 4 [to the Notices of Termination])... The BBVA Compass Complaint seeks more than \$36 million in damages, and also seeks to foreclose on Dealer. Moreover, the complaint also seeks to recover from [Mr. Hassanally] personally as a guarantor of the loan.
- **Third**, ... On November 14, 2018, the court in the BBVA Compass Case [*Compass Bank v. Fairfield CJD, LP, et al.*] granted BBVA Compass a temporary restraining order (the "TRO Order," attached as Exhibit 5 [to the Notices of Termination]), which prohibits Dealer from selling its vehicle inventory (including its [Chrysler, Dodge, Jeep, RAM] line vehicles), or transferring funds and other collateral until at least December 5, 2018. ...
- **Fourth**, FCA US learned from local news articles (attached as Exhibit 6 [to the Notices of Termination]) and independently verified [by Eric Wong] that each of the non-Chrysler, Dodge, Jeep and RAM dealerships named in the BMO Harris Complaint had also ceased operating. There is therefore no operating dealership whose revenue might even partially offset the vast amount of debt for which Dealer is potentially liable.
- **Fifth**, FCA US obtained a cross-complaint that Dealer, along with several other dealerships alleged to operate "in a coordinated fashion" (the "Momentum dealerships"), filed in the BMO Harris Case (attached as Exhibit 7 [to the Notices of Termination]) on November 16, 2018. The cross-complaint seeks appointment of a receiver with "authority over all of the Momentum [dealerships'] assets together with the power to sell those assets in one global transaction." The cross-complaint adds BBVA Compass and Toyota Motor Credit Corporation as cross-defendants, and alleges that a receiver is necessary to facilitate Dealer's (and the other entities') "efforts to repay all of the Floorplan Lenders all that they are due using the coordinated sale of all Momentum dealerships described above."
- **Sixth**, no later than November 21, 2018, the California Department of Motor Vehicles recognized that Dealer had closed, and therefore listed—and continues to list—Dealer's license as "Not Valid." [See Exhibit 8 to the Notices of Termination.] Dealer's loss of its license leaves Dealer legally unable to operate as a new motor vehicle dealership in California.

(Emphasis in the original; Notices of Termination, Vallejo Momentum and Fairfield Momentum)

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Notices of Termination⁶

10. On November 30, 2018, pursuant to Section 3060, FCA issued separate but nearly identical 15-day notices of termination⁷ for each of the four line-makes (Chrysler, Dodge, Jeep, and RAM) for Vallejo Momentum and Fairfield Momentum alleging the following:

Dealer's failure to Conduct Operations for Seven (7) Consecutive Business Days

Paragraph 28(c)(vi) of the Dealer Agreement provides for termination due to "the failure of DEALER to fully conduct its Dealership Operations for seven (7) consecutive business days." ... Dealer has been closed since at least November 16, 2018, the driveway gate is locked, and notices are posted in the sales and service facility doorways stating that Dealer is "CLOSED TILL (*sic*) FURTHER NOTICE." ...

As of the date of this Notice, Dealer has failed to conduct any dealership operations for more than seven consecutive business days, and is therefore in material breach of Paragraph 28(c)(vi) of the Dealer Agreement. Such breach cannot be cured, and there is

⁶ Each notice of termination with exhibits was over 500 pages so the parties entered into a stipulation dated February 6, 2019, that was filed by the Board on February 16, 2019, pertaining to the content of the exhibits as to FCA's Notices of Termination. The parties stipulated as follows:

1. FCA US sent Notices of Termination (the "Notices"), dated November 30, 2018, for each of the Chrysler, Dodge, Jeep, and RAM lines at Fairfield Vallejo (*sic*) [this should be "Vallejo Momentum" as there is no "Fairfield Vallejo"] and Fairfield Momentum. Attached to each Notice were eight (8) exhibits.

2. Pursuant to the January 17, 2019, telephonic hearing presided over by Judge Skrocki and the statements made by counsel during the same, FCA US represents, and Momentum agrees, that the exhibits are identical for each of the Notices, with the following exceptions:

a. Exhibit 1 to each of the [Fairfield Momentum] Notices is a letter from BBVA Compass regarding [Fairfield Momentum's] floorplan line of credit. The same letter is attached as Exhibit 1 to each of the [Fairfield Momentum] Notices.

b. Exhibit 1 to each of the [Vallejo Momentum] Notices is a letter from BBVA Compass regarding [Vallejo Momentum's] floorplan line of credit. The same letter is attached as Exhibit 1 to each of the [Vallejo Momentum] Notices.

c. Exhibit 8 to each of the [Fairfield Momentum] Notices is a document pertaining to [Fairfield Momentum's] occupational license status with the California Department of Motor Vehicles. The same document is attached as Exhibit 8 to [each of] the [Fairfield Momentum] Notices.

d. Exhibit 8 to each of the [Vallejo Momentum] Notices is a document pertaining to [Vallejo Momentum's] occupational license status with the California Department of Motor Vehicles. The same document is attached as Exhibit 8 to [each of] the [Vallejo Momentum] Notices.

⁷ A 15-day notice of termination may be issued only if one or more of the specified grounds outlined below exist otherwise the franchisor may issue only a 60-day notice of termination:

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

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

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

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

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

(Section 3060(a)(1)(B)(i)-(v))

1 nothing that Dealer can do to change the fact that it failed to operate during these seven (7)
2 consecutive business days.

3 Dealer's breach of the Dealer Agreement is also ongoing and incurable as a prospective
4 matter. ...Dealer is prohibited by court order from selling or transferring [Chrysler, Dodge,
5 Jeep and RAM] vehicles, funds, or other collateral. Indeed, because Dealer has ceased
6 business operations, the TRO Order gives BBVA Compass the right to "install security at
7 the dealership [] ... to protect and secure its Collateral...."

8 Moreover, dealer potentially faces \$52 million in total liability under the BMO Harris and
9 BBVA Compass Complaints, a substantial portion of which it (through ... Mr. Hassanally)
10 has admitted is due and owing Dealer has also alleged, via its cross-complaint in the
11 BMO Harris Case, that a sale of Dealer's assets will be necessary to pay down Dealer's
12 debts.

13 ... [T]he California Department of Motor Vehicles has recognized that Dealer has closed,
14 and therefore lists Dealer's license as "Not Valid." Under [Section] 11700, no person may
15 act as a new motor vehicle dealer without a valid license from the California Department of
16 Motor Vehicles.

17 In short, the possibility that Dealer will be able to reopen is so remote as to be deemed
18 impossible.

19 Dealer's Insolvency: Appointment of Receiver

20 Paragraph 28(c)(iv) of the Additional Terms and Conditions (*sic*)⁸ of the Dealer Agreement
21 provides for termination upon "the insolvency of DEALER" In addition, Paragraph
22 28(c)(iv) provides for termination upon "the appointment of a receiver or other officer
23 having similar powers for DEALER or DEALER'S business which is not removed within
24 ten (10) days from his/her appointment; or any levy under attachment, execution or similar
25 process which is not within ten (10) days vacated or removed by payment or bonding[.]"

26 ... [I]t is apparent that Dealer (i) has generally ceased to pay debts in the ordinary course of
27 its business, (ii) is unable to pay such debts when due, and (iii) has taken on debts greater
28 than the total value of Dealer's property. Indeed, Dealer alleges in its cross-complaint in
the BMO Harris Case that a sale of the dealership assets is necessary to pay down Dealer's
debts. Dealer is therefore insolvent, in material breach of Paragraph 28(c)(iv)....

In addition, the TRO Order appointed Evan Meyer ... as a *de facto* receiver, to administer
\$522,133 of your dealerships' funds, and effectively froze any other use of Dealer's funds
or collateral under the floor plan agreement Dealer also seeks indefinite appointment of
a receiver to oversee the sale of its assets Accordingly, Dealer is in material breach of
Paragraph 28(c)(iv) ... [I]t is clear that Dealer's breaches of its Dealer Agreement with
respect to insolvency and the appointment of a receiver are not curable.

24 Termination of the Dealer Agreement

25 Dealer has been and continues to be in material breach of its obligations under the Dealer
26 Agreement and such breaches are incurable. FCA US has the contractual right to terminate
27 the Dealer Agreement immediately pursuant to Paragraphs 28(c)(vi) and 28(c)(iv) of the
28 Additional Terms and Conditions (*sic*) of the Dealer Agreement.

⁸ There are no "Additional Terms and Conditions" attached to the franchise; only "Additional Terms and Provisions."

1 FCA US also has the statutory right to terminate the Dealer Agreement under California
2 Law. [Section] 3060 provides that FCA US may terminate the Dealer Agreement for "good
3 cause" on fifteen (15) days' written notice for certain grounds, including "[i]nsolvency of
4 the franchisee, or filing of any petition by or against the franchisee under any bankruptcy or
5 receivership law," and the "[f]ailure of the motor vehicle dealer to conduct its customary
6 sales and service operations during its customary hours of business for seven consecutive
7 business days, giving rise to a good faith belief on the part of the franchisor that the motor
8 vehicle dealer is in fact going out of business...."

9 FCA US has "good cause" to terminate under [Sections 3060 and 3061] based on the
10 information provided above and attached because, among other reasons:

11 (i) Dealer has failed and is failing to transact sufficient business compared with the
12 business available to it as evidenced by, among other things, Dealer's cessation of business
13 no later than November 16, 2018, and a court order forbidding the sale of vehicles and
14 transfer of assets;

15 (ii) Dealer's investment made and obligations incurred to perform its obligations under the
16 Dealer Agreement are inadequate, as evidenced by, among other things, Dealer's (and its
17 owner's and executive's) insolvency, a court order forbidding the sale of vehicles and
18 transfer of assets, the appointment of a *de facto* receiver to administer certain dealership
19 assets, Dealer's inability to meet its financial obligations, and the resulting failure of Dealer
20 to operate and loss of Dealer's license;

21 (iii) the non-permanency of Dealer's investment, as evidenced by, among other things,
22 Dealer's insolvency, its lack of unencumbered assets, the appointment of a *de facto*
23 receiver to administer certain dealership assets, and Dealer's cessation of business no later
24 than November 16, 2018 and loss of its license;

25 (iv) it is beneficial for the public welfare for the Dealer Agreement to be terminated and
26 replaced by a dealer that is capable of serving the consuming public, as evidenced by,
27 among other things, Dealer's inability and failure to serve the consuming public since at
28 least November 16, 2018, and Dealer's insolvency and inability to restore its dealership
operations;

(v) Dealer lacks adequate motor vehicle sales and service facilities, equipment, vehicle
parts, and qualified service personnel to reasonably provide for the needs of the consumers
of the [Chrysler, Dodge, Jeep and RAM] line[s], and has not been (and is not) rendering
adequate services to the public, as evidenced by, among other things, Dealer's inability and
failure to render services to the consuming public since at least November 16, 2018, a court
order forbidding the sale of vehicles and transfer of assets, and Dealer's inability to restore
its dealership operations;

(vi) Dealer is failing to fulfill its warranty obligations under the Dealer Agreement, as
evidenced by, among other things, Dealer's inability and failure to do so since at least
November 16, 2018, and Dealer's insolvency and inability to restore its dealership
operations; and

(vii) Dealer's breaches of and failures to comply with the terms of the Dealer Agreement
are extensive.

11. The notices for Vallejo CJD, LLC were sent Priority Mail Express, Return Receipt
Requested, addressed to Rahim Hassanally, President, Vallejo CJD LLC, d/b/a Momentum Chrysler

1 Dodge Jeep RAM of Vallejo, 2575 Auto Mall Pkwy, Fairfield, CA 94533. These notices were received
2 and signed for on December 4, 2018. The notices were also sent Priority Mail Express, Return Receipt
3 Requested to the office of Christian Scali, Agent for Service of Process on behalf of Vallejo Momentum,
4 as well as to Rahim Hassanally at, what appears to be, his home address in California. The notices to Mr.
5 Scali were received and signed for on December 3, 2018. The notices to Mr. Hassanally addressed to him
6 at his California residence were delivered in Dallas, Texas on December 13, 2018. (Motion, Exh. 2)⁹

7 12. The notices for Fairfield CJD were sent Priority Mail Express, Return Receipt Requested,
8 addressed to Rahim M. Hassanally, President, Fairfield CJD, LP d/b/a Momentum Chrysler Dodge Jeep
9 RAM of Fairfield, 2595 Auto Mall Pkwy, Fairfield, CA 94533. These notices were received and signed
10 for on December 4, 2018. The notices were also sent Priority Mail Express, Return Receipt Requested to
11 the office of Christian J. Scali, Agent for Service of Process on behalf of Fairfield Momentum, as well as
12 to Rahim Hassanally at, what appears to be, his home address in California. The notices to Mr. Scali were
13 received and signed for on December 3, 2018. The notices to Mr. Hassanally addressed to him at his
14 California residence were delivered in Dallas, Texas on December 13, 2018. (See footnote 9; Motion,
15 Exh. 2)

16 13. The Board received the Notices of Termination on December 3, 2018.

17 **The Protests and Protestants**

18 14. On December 18, 2018, Vallejo Momentum filed with the Board four Section 3060
19 termination protests¹⁰ against FCA. The protests do not state when the November 30, 2018 notices from
20 FCA were received. One protest was filed for each Vallejo Momentum franchise as follows:

- 21 ■ Protest No. PR-2589-18 (Chrysler).
- 22 ■ Protest No. PR-2590-18 (Jeep).
- 23 ■ Protest No. PR-2591-18 (Dodge).

24
25 ⁹ This notice was signed for in Dallas by "S. Ratchford" as "authorized agent" but does not have an address. Mr. Hassanally's
26 Declaration states that he is a "resident of the state of Texas," but provides no address and shows only that it was executed in
27 Dallas, Texas. The Opposition to the Motion states "Rahim Hassanally never received the notices of termination" (Opposition,
28 page 4, lines 21-22) and Mr. Hassanally's Declaration, states that "I did not receive the notices of termination from FCA ...
nor have I received them from any other source." (Declaration, p. 2, lines 10-11) The Opposition and the Declaration are both
dated February 12, 2019, more than 60 days from December 3 and December 4, 2018, the dates when the notices were received
by Mr. Hassanally's attorney and at his dealerships (franchisees).

¹⁰ Collectively referred to as the "Vallejo Momentum Protests."

- 1 ▪ Protest No. PR-2592-18 (RAM).

2 15. On December 18, 2018, Fairfield Momentum filed with the Board four Section 3060
3 termination protests¹¹ against FCA. Similar to the Vallejo Momentum Protests, the Fairfield Momentum
4 Protests do not state when the November 30, 2018 notices from FCA were received. One protest was
5 filed for each Fairfield Momentum franchise as follows:

- 6 ▪ Protest No. PR-2593-18 (Chrysler).
7 ▪ Protest No. PR-2594-18 (Jeep).
8 ▪ Protest No. PR-2595-18 (Dodge).
9 ▪ Protest No. PR-2596-18 (RAM).

10 16. The Vallejo Momentum Protests and Fairfield Momentum Protests are nearly identical and
11 will jointly be referred to as the “Protests.” Vallejo CJD, LLC and Fairfield CJD, LP will be jointly
12 referred to as “Momentum” or “Protestants,” unless otherwise indicated.

13 17. By Board Order dated January 7, 2019, the Protests were consolidated for purposes of
14 hearing.

15 18. In its Protests, Momentum denied every allegation contained in the written Notices of
16 Termination, asserts that the reasons for termination are misleading, and (contrary to what is shown by the
17 DMV records) maintains it is “a duly licensed California new motor vehicle dealer....”

18 19. Momentum contends Respondent does not have good cause to terminate the franchises
19 because:

20 (a) Protestants have transacted and are transacting an adequate amount of business compared
21 to the business available to it.

22 (b) Protestants have made a substantial and permanent investment in the dealerships that will
23 be damaged if termination is allowed.

24 (c) It would be injurious to the public welfare for the franchises to be terminated.

25 (d) Protestants have “adequate motor vehicle sales and service facilities, equipment, vehicle
26 parts, and qualified service personnel to reasonably provide for the needs of buyers and owners of FCA’s

27 _____
28 ¹¹ Collectively referred to as the “Fairfield Momentum Protests.”

1 same-make products in the market area and [are] rendering adequate services to the public.”

2 (e) The extent of Protestants’ “noncompliance, if any, with the terms of the franchise
3 agreement is legally privileged by virtue of provisions of the Vehicle Code and other applicable law
4 and/or excused and, in any event, lacks sufficient materiality to warrant termination.”

5 (f) Protestants are informed and believe and thereon allege “that the purported termination
6 runs contrary to numerous and substantial legal, equitable, and contractual obligations of FCA and rights
7 of [Momentum] including but not limited to those set forth in Vehicle Code, sections 3060, 11713.2,
8 11713.3, and 11713.13, including, but not limited to the following: FCA’s breach of the exclusivity
9 provisions of the franchise and applicable law by directly and unfairly competing with [Momentum];
10 FCA’s failure and refusal to recognize and treat [Momentum] as a dealer generally and as a dealer able to
11 represent certain models within the line-make and its notification to [Momentum’s] customers for FCA
12 that [Momentum] is no longer a dealer; and by FCA conducting its vehicle sales and other competitive
13 activities in California in contravention of applicable law, including required dealer licensure under the
14 Vehicle Code.” (Momentum Protests, pp. 3-4) There were no such allegations contained in Protestants’
15 Opposition to the Motion and there are no facts indicating any of the above.

16 **MOTION TO DISMISS PROTESTS, OR IN THE ALTERNATIVE,**
17 **FOR A FINDING OF GOOD CAUSE TO TERMINATE BASED**
ON UNCONTESTED EVIDENCE

18 **Respondent’s Assertions in its Motion to Dismiss**¹²

19 20. On January 11, 2019, Respondent filed a “Motion to Dismiss Protests or, in the
20 Alternative, for a Finding of Good Cause to Terminate Based on Uncontested Evidence.” This motion
21 asserts three grounds for dismissal of the protests: (1) untimeliness of the Protests; (2) mootness; and (3)
22 the existence of good cause to terminate the franchises. (Motion, p. 2, lines 24-27)

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27 ¹² FCA’s motion references several Board Decisions (Protest Nos. PR-2174-09 *Calabasas Euro Auto Group, LLC v.*
28 *Automobili Lamborghini, S.p.A.*, PR-2245-10 *Mega RV Corp., d/b/a McMahons RV v. Roadtrek Motorhomes, Inc.*, and PR-
2534-17 *Porter Auto Group, L.P. v. FCA US LLC*) that have not been designated by the Board as precedent decisions pursuant
to Government Code Section 11425.60, so they will not be relied upon in this Proposed Order.

1 **The Claim of Untimeliness**¹³

2 21. Relying on *Sonoma Subaru, Inc. v. New Motor Vehicle Bd.* (1987) 189 Cal.App.3d 13, 21,
3 FCA contends that under Section 3060(a), “a franchisee must file its protest with the Board within 10
4 calendar days after receiving a 15-day Notice of Termination or within 10 days after the end of any appeal
5 procedure provided by the franchisor, or the franchisee’s protest right will be waived. If the franchisee
6 does not file a protest within the ten-day window, the Notice of Termination becomes effective fifteen
7 days after the franchisee receives it.” This 10-day period does not allow for exceptions, even if the
8 franchisee has “good cause” for its tardiness. (Motion, p. 8, lines 7-17)

9 22. FCA argues that Momentum received the Notices of Termination on December 3, 2018
10 when the notices were delivered via United States Postal Service (“USPS”) Priority Express Mail to the
11 office of Christian Scali, Momentum’s agent for service of process. (Motion, p. 8, lines 21-23; Exhs. 1-2)
12 FCA also asserts that the Notices of Termination were received by Protestants when on December 4,
13 2018, the USPS delivered the Notices of Termination to the mailing address of Vallejo Momentum and
14 the mailing address of Fairfield Momentum. (Motion, p. 8, lines 23-25; Exh. 2)

15 23. According to FCA, Momentum was statutorily required to file the Protests on or before
16 December 13, 2018, using the date of receipt at Mr. Scali’s office, or by December 14, 2018, using the
17 date of receipt at Momentum’s mailing addresses. The Protests were not filed until December 18, 2018,
18 which is “*fifteen calendar days* after receiving the Notices of Termination at [Mr. Scali’s office] (and
19 fourteen calendar days after the Notices of Termination were received and signed for at Momentum’s
20 mailing addresses). Because Momentum failed to timely protest the Notices of Termination, it forfeited its
21 protest rights. These untimely Protests are therefore outside the Board’s jurisdiction, and must be
22 dismissed.” (Italics in original; Motion, p. 8, lines 26-28; p. 9, lines 1-4)

23 **The Claim of Mootness**

24 24. It is FCA’s position that the Board lacks jurisdiction to hear the Protests even if they were
25 timely submitted and should be dismissed as moot because: (1) there is no remedy within the Board’s
26 jurisdiction that can restore Momentum’s dealership operations; (2) Vallejo Momentum and Fairfield

27
28 ¹³ The heading in FCA’s motion is entitled “Vallejo Momentum’s Protest is Untimely.” The arguments under the heading
pertain to both Vallejo Momentum and Fairfield Momentum.

1 Momentum are not operating as new motor vehicle dealers in California; (3) Momentum is insolvent and
2 “subject to indefinite management by a receiver;” and, (4) Momentum has no desire or ability to resume
3 dealership operations. It has gone out-of-business. (Motion, p. 9, lines 7-11)

4 25. As stated above, FCA argues that because these Protests are moot, the Board does not need
5 to determine whether FCA has good cause to terminate Momentum’s Chrysler, Dodge, Jeep or RAM
6 franchises. However, alternatively, FCA contends that the undisputed facts plainly show that FCA has
7 good cause to terminate Momentum’s FCA franchises as a matter of law. (Motion, p. 11, lines 6-9)
8 Relying on *Duarte & Witting, Inc. v. New Motor Vehicle Bd.* (2002) 104 Cal.App.4th 626, 637,
9 Respondent argues that the Board has the authority to dismiss a protest “where the undisputed facts
10 demonstrate good cause for franchise termination as a matter of law and afford no basis for preventing
11 termination of the franchise.” (Motion, p. 8, lines 2-4)

12 26. FCA contends that “there would be no point to conducting an evidentiary hearing on issues
13 of whether the dealer was performing its obligations under the franchise agreement. Such an evidentiary
14 hearing would simply entail the wasteful expenditure of public funds.” (Motion, p. 10, lines 21-23 citing
15 *Duarte* at p. 637) There is no relief the Board might provide that could “reverse Momentum’s financial
16 collapse, cause the dealerships to reopen, resolve any encumbrances on its vehicles and other assets,
17 restore its licenses, or reverse the appointment of a receiver. Momentum’s Protests are therefore moot,
18 and must be dismissed.” (Motion, p. 11, lines 1-4)

19 **The Claim that the Undisputed Facts Establish Good Cause to Terminate the Franchises as**
20 **a Matter of Law**

21 27. As stated above, FCA argues that because these Protests are moot, the Board does not need
22 to determine whether FCA has good cause to terminate Momentum’s franchises. However, alternatively,
23 FCA contends that the “undisputed facts plainly show that FCA US has good cause to terminate
24 [Momentum’s franchises] as a matter of law.” (Motion, p. 11, lines 6-9) Relying on *Duarte*, Respondent
25 argues that the Board has the implied authority to dismiss a protest where “the undisputed facts show
26 good cause for termination of a franchise.” (See paragraphs 10 and 26, *supra*; Motion, p. 11, lines 10-12)
27 FCA contends it has good cause to terminate.

28 ///

Protestants' Assertions in their Opposition

28. Protestants filed their Opposition to the motion on February 12, 2019.

The Claim of Untimeliness

29. Protestants contend the Protests are timely because FCA's Notices of Termination were "not effective by the terms of the Vehicle Code, which requires actual receipt of the notices. FCA asserts that its delivery by US Mail of notices of termination to the dealerships establishes 'receipt' of the notices, while at the same time introducing evidence that the dealerships operated by Vallejo and Fairfield were not open during business hours, and the dealer principle (*sic*) was not there. FCA also argues it mailed copies to the agent for service of process, but the terms of the franchise agreements requires (*sic*) that notice be given to the dealer. Even if the notices FCA sent were in actuality a lawsuit or a subpoena, mail service would not have been effective, those papers would need to be personally served." (Opposition, p. 2, lines 9-17; p. 4, lines 13-16)

30. Momentum argues that FCA "should have and could have¹⁴ personally delivered the notices to the principle (*sic*) of Vallejo and Fairfield, Mr. Rahim Hassanally, who is identified as 'Dealer's Management' in the dealer agreements, and executed agreements." Accordingly, Protestants contend the Vehicle Code requires "receipt" of the Notices of Termination and because Mr. Hassanally did not receive the notices the Protests are timely. (Opposition, p. 2, lines 18-22; p. 4, line 8; Declaration of Rahim Hassanally, p. 2, lines 10-11) Protestants contend that FCA was giving "contractually required notice, which had to comply with the Vehicle Code's provisions, which mandate actual receipt."¹⁵ (Opposition, p. 4, lines 17-18) Furthermore, Protestants maintain that mailing the Notices of Termination to Christian Scali's office was not provided for in the terms of the franchise¹⁶ and does not constitute "valid service," assuming service is the standard. (Opposition, p. 4, lines 18-20)

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¹⁴ Momentum's Opposition does not suggest how there "could have" been personal delivery of the Notices to Mr. Hassanally if he was not present at his dealership or his residence and his whereabouts are presently unknown other than possibly being in Dallas, Texas as his Declaration states he is a "resident of Texas".

¹⁵ As discussed below, there is no "contractually required notice" under these facts. And, it would not matter even if there were as the only issue is whether the statutorily required notices were received.

¹⁶ What was provided for in the franchise as to notices is irrelevant.

1 **The Claim of Mootness**

2 31. Relying on *Powerhouse Motorsports Grp., Inc. v. Yamaha Motor Corp., U.S.A.* (2013) 221
3 Cal.App.4th 867, 874, Protestants maintain “[t]he law recognizes that franchises not in operation continue
4 to have value, and the protections of the Vehicle Code continue to apply.” (Opposition, p. 4, lines 24-27;
5 p. 5, lines 1-10) The Board Decisions cited by FCA, although not designated as precedent decisions, are
6 inapposite because in those cases none involved franchises with offers to purchase and all relied on the
7 belief it was not possible for the dealership to open. (Opposition, p. 5, lines 24-27) The court appointed
8 receiver, Michael Issa,¹⁷ has received offers in the form of letters of intent so there is value in Vallejo
9 Momentum and Fairfield Momentum. (Opposition, p. 3, lines 12-22)

10 32. Protestants contend that *Duarte* is factually distinguishable from the present matters
11 because in that case the brand the dealer was franchised to sell, Plymouth vehicles, “no longer existed, so
12 there were no products for the dealer to sell.” In these Protests, “all of the vehicle makes sold by
13 [Momentum] continue to be produced and offered for sale.” (Opposition, p. 6, line 11-18)

14 **The Claim that the Undisputed Facts Establish Good Cause to Terminate the Franchises as**
15 **a Matter of Law**

16 33. Protestants maintain that FCA failed to meet the burden articulated in *Duarte*; the Board
17 can only grant a motion to dismiss “where the undisputed facts demonstrate good cause for franchise
18 termination as a matter of law and afford no basis for preventing termination of the franchise.” Protestants
19 contend there is a factual dispute and discovery should be allowed to proceed on the investments made by
20 Momentum. Protestants contend that “there is a good cause factor that provides a basis for sustaining the
21 protest[s].”¹⁸ (Opposition, p. 6, lines 19-24, 26-27; p. 7, lines 1-3) The investments made by Momentum
22

23 ¹⁷ Mr. Issa was appointed as the receiver of Vallejo Momentum and Fairfield Momentum along with other Momentum Auto
24 Group dealerships on December 6, 2018. As the receiver, he prepared a solicitation memo for both dealerships and has
25 received various offers in the form of letters of intent. One offer includes both Vallejo Momentum and Fairfield Momentum,
26 and another offer only includes Fairfield Momentum. Mr. Issa is confident that the transactions would result in more than \$1
27 million in goodwill if both Vallejo Momentum and Fairfield Momentum were sold. These transactions require the approval of
28 FCA. Mr. Issa believes the transactions would be approved by FCA. (Declaration of Michael Issa, p. 2, lines 23-27; p. 3, lines
1-9) The court would also have to approve any such transactions.

¹⁸ Mr. Hassanally indicated he “invested over \$10 million in real property, improvements to that real property, equipment, and
good will to support the operations of Vallejo [Momentum] and Fairfield [Momentum].” (Declaration of Rahim Hassanally, p.
2, lines 12-12) This investment is not substantiated with any verifiable evidence. Nor was any evidence submitted that any
investments previously made by Mr. Hassanally remain in place and have not been spent, foreclosed upon, or are otherwise
available to Momentum at this time.

1 “still have value, and [Section] 11713.3 continues to protect them. Those investments are relevant to the
2 analysis of whether there is good cause for the termination of the franchises.” (Opposition, p. 6, lines 25-
3 27)

4 34. Protestants argue that in addition to considering Momentum’s investments, subdivision (b)
5 of Section 3060 requires consideration of “obligations incurred by the franchisee to perform its part of
6 the franchise.” FCA highlights the significant obligations incurred by Momentum “as justifications to
7 deny them the value of the assets they possess. The facts that [Momentum] incurred these obligations to
8 perform their franchises, weighs in favor, not against them. Because there is a basis for sustaining the
9 protest[s], discovery should proceed, and the Board should consider the evidence that is developed to
10 determine whether FCA has established good cause to terminate.” (Opposition, p. 7, lines 10-16)

11 **Respondent’s Assertions in its Reply to the Opposition**

12 35. Respondent filed its Reply on February 26, 2019. According to Respondent, Momentum
13 does not dispute that the Notices of Termination were delivered to Mr. Scali’s office on December 3,
14 2018. Nor does Momentum dispute that the Notices of Termination were delivered to the dealerships’
15 mailing addresses on December 4, 2018, or that the Protests would be untimely if Momentum’s 10-day
16 window to protest began on either December 3 or December 4. Momentum argues that Mr. Hassanally
17 never personally received the Notices of Termination and the signatures showing receipt at Mr. Scali’s
18 office and both dealership premises are insufficient to start the 10-day time to file a protest. (Reply, p. 2,
19 lines 25-28; p. 3, lines 1-3) Momentum’s argument is that its receipt of the notices is not determinative;
20 Mr. Hassanally must have personally received the Notices of Termination to start the 10-day clock to file
21 the protests. This argument, according to Respondent, is legally inaccurate and contradicted by
22 Protestants’ own pleadings. (Reply, p. 2, lines 3-4)

23 36. Respondent argues that “Momentum is wrong, because Rahim Hassanally is not the
24 ‘dealer’ or protesting ‘franchisee’ under Momentum’s dealers agreements and the California Vehicle
25 Code.” The parties to the dealer agreements with notice and protest rights are Vallejo Momentum and
26 Fairfield Momentum: two California business entities. (Reply, p. 3, lines 5-21) Respondent claims that
27 “[t]he December 3 delivery to Mr. Scali’s office constitutes receipt by Momentum, regardless of whether
28 Mr. Scali gave the Notices to Mr. Hassanally or not. Mr. Scali is Momentum’s registered agent for service

1 of legal documents, as well as one of Momentum's attorneys in this case, and California law is clear that
2 'notice to an agent is equivalent to notice to the principal' where the agent acts within the scope of his or
3 her authority." (Reply, p. 3, lines 22-28; p. 4, lines 1-6)

4 37. FCA asserts that Momentum cannot rely on the fact of its own receivership or the efforts
5 of Mr. Issa to avoid termination, because the receivership itself is grounds for termination under Section
6 3060(a)(1)(B)(iii). (Reply, p. 6, lines 15-25)

7 38. Momentum contends there is a genuine dispute as to one good cause factor ("investment"
8 and "obligations incurred") but does not contest the "overwhelming evidence" in the Notices of
9 Termination and the motion "regarding Momentum's failure to operate and its insurmountable financial
10 problems." (Reply, p. 7, lines 2-8) No authority is cited by Momentum for the proposition that "it can
11 preclude termination by pointing to a single 'good cause' factor that it claims weighs in its favor." (Reply,
12 p. 7, lines 8-10)

13 APPLICABLE LAW

14 39. Section 331 provides in part as follows:

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

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

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

22 (3) The franchisee constitutes a component of the franchisor's distribution system.

23 (4) The operation of the franchisee's business is substantially associated with the
24 franchisor's trademark, trade name, advertising, or other commercial symbol designating
25 the franchisor.

26 (5) The operation of a portion of the franchisee's business is substantially reliant on the
27 franchisor for a continued supply of new vehicles, parts, or accessories."

28 ...

29 40. Section 331.1 defines franchisee as follows:

30 A "franchisee" is any person¹⁹ who, pursuant to a franchise, receives new motor vehicles
31 subject to registration under this code, new off-highway motorcycles, as defined in Section
32 436, new all-terrain vehicles, as defined in Section 111, ... from the franchisor and who
33 offers for sale or lease, or sells or leases the vehicles at retail or is granted the right to

34 ¹⁹ Section 470 defines "person" to include "a natural person, firm, copartnership, association, limited liability company, or
35 corporation." The "persons" within the definition of a "franchisee" here are Momentum Fairfield and Momentum Vallejo, not
36 Mr. Hassanally.

perform authorized warranty repairs and service, or the right to perform any combination of these activities.

41. Section 331.2 defines a franchisor as follows:

A "franchisor" is any person who manufactures, assembles, or distributes new motor vehicles subject to registration under this code, new off-highway motorcycles, as defined in Section 436, new all-terrain vehicles, as defined in Section 111, ... and who grants a franchise.

42. Section 3050 provides, in part, as follows:

The board shall do all of the following:

...
(d) Hear and decide, within the limitations and in accordance with the procedure provided, a protest presented by a franchisee pursuant to Section 3060...

43. Section 3060 provides in part as follows:

(a) Notwithstanding Section 20999.1 of the Business and Professions Code or the terms of any franchise, no franchisor shall terminate or refuse to continue any existing franchise unless all of the following conditions are met:

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

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

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

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

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

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

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

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

...
(2) Except as provided in Section 3050.7, the board finds that there is good cause for termination or refusal to continue, following a hearing called pursuant to Section 3066....

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

...

44. In determining whether there is good cause for terminating a franchise, Section 3061 requires the Board to "... take into consideration the existing circumstances, including, but not limited to, all of the following:

1 (a) Amount of business transacted by the franchisee, as compared to the business available to
2 the franchisee.

3 (b) Investment necessarily made and obligations incurred by the franchisee to perform its part
4 of the franchise.

5 (c) Permanency of the investment.

6 (d) Whether it is injurious or beneficial to the public welfare for the franchise to be modified
7 or replaced or the business of the franchisee disrupted.

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

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

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

14 **SALES AND SERVICE AGREEMENTS (FRANCHISES)**

15 **Vallejo CJD, LLC**

16 45. On August 16, 2010, VALLEJO CJD LLC DBA MOMENTUM CHRYSLER DODGE
17 JEEP RAM and Chrysler Group LLC (now FCA) executed a "Sales and Service Agreement" for Chrysler
18 and Jeep with Ron L. Barber a 50.98% owner and Rahim Hassanally a 49.02% owner. This agreement
19 included what are called "Additional Terms and Provisions" marked "Form 91 (C-D)," although they
20 were not provided. (Declaration of Eric Wong, Exh. 3 B, ¶ 5) It is unclear whether this agreement was
21 superseded by the August 12, 2013, Term Sales and Service Agreement discussed below but it is not
22 necessary for purposes of ruling on this motion to dismiss.

23 46. On August 12, 2013, VALLEJO CJD LLC DBA MOMENTUM CHRYSLER DODGE
24 JEEP RAM and Chrysler Group LLC (now FCA) executed a Term Sales and Service Agreement

25 ///

26 ///

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1 (“franchise”)²⁰ for each of the four line-makes with Mr. Hassanally as President and 100% owner.
2 (Declaration of Eric Wong, Exh. 3 B) The franchise includes what are called “Additional Terms and
3 Provisions;” although, they were not provided in Exhibit 3 B to Eric Wong’s Declaration, which was
4 attached to each Notice of Termination and the motion to dismiss. (Declaration of Eric Wong, Exh. 3 B,
5 ¶ 5)²¹

6 **Fairfield CJD, LP**

7 47. On November 2, 2012, Fairfield CJD, LP DBA Momentum Chrysler Dodge Jeep Ram of
8 Fairfield and Chrysler Group LLC (now FCA) executed a Term Sales and Service Agreement for each of
9 the four line-makes with Mr. Hassanally as President and 99% owner. The “Additional Terms and
10 Provisions,”²² attached to Exhibit 3 A of the Declaration of Eric Wong, referenced in the Notices of
11 Termination are:

12 28. TERMINATION

13 ...

14 (b) [FCA] may terminate this Agreement on not less than sixty (60) days written notice
15 for the following reasons:

16 ...

17 (xiii) the notification of termination or termination, for any reason, of any other
18 [FCA] Dealer Agreement(s) which may be in effect between DEALER and [FCA] ...

19 ...

20 (c) Notwithstanding the provisions above, this Agreement will terminate automatically
21 without notice²³ from either party on:

22 ...

23 (iv) the insolvency of DEALER, or the preparation of any petition by or for
24 DEALER for voluntary institution of any proceeding under the Bankruptcy Act or under
25 any State insolvency law, whether or not such petition is ever filed; or the involuntary
26 institution against DEALER of any proceeding under the Bankruptcy Act or under any
27 State insolvency law which is not vacated within ten (10) days from the institution thereof;

28 ²⁰ It is noted that the “franchise,” as defined in Section 331(a), is the “written agreement” as compared to the physical dealership necessary for the sales and service of the vehicles that are within the scope of the franchise. As discussed herein, although the franchises, the written agreements, continue to exist, the dealerships no longer exist.

²¹ Paragraph 5 of the Term Sales and Service Agreement indicates that the “Chrysler Group LLC Sales and Service Agreement Additional Terms and Provisions” marked “Form CDJR 11” constitute a part of this Agreement and may be amended from time-to-time. As indicated above, no Additional Terms and Provisions were provided for the Vallejo Momentum franchises.

²² See Footnote 21. The “Chrysler Group LLC, Sales and Service Agreement, Additional Terms and Provisions, attached to the Fairfield Momentum franchise are not marked “Form CDJR 11” but are “Form CJD 09.” Upon request of the Board, Respondent provided a copy of the “Form CDJR 11.” The provisions of Section 28 referenced in the Notices of Termination are identical to those in “CJD 09.” The Additional Terms and Provisions marked “CDJR 11” were not considered in issuing this Proposed Order because they were submitted after the motion was briefed and the telephonic hearing was concluded.

²³ Discussed *infra*, in Paragraph 65.

1 or the appointment of a receiver or other officer having similar powers for DEALER or
2 DEALER'S business which is not removed within ten (10) days from his/her appointment;
3 or any levy under attachment, execution or similar process which is not within ten (10)
4 days vacated or removed by payment or bonding, or ...

5 ...

6 (vi) the failure of DEALER to fully conduct its Dealership Operations for seven
7 (7) consecutive business days, or

8 ...

9 **FACTS THAT HAVE BEEN ESTABLISHED BY FCA AND**
10 **NOT DISPUTED BY MOMENTUM**

11 **Momentum Ceased Dealership Operations**

12 48. Protestants have conducted no operations at either its dealership in Vallejo or Fairfield
13 since at least November 16, 2018. (Declaration of Eric Wong, ¶¶ 13-39)

14 49. "Vallejo Momentum has not reported the delivery of a new FCA vehicle since November
15 7, 2018 and has not processed any delivery reporting since November 12, 2018." (Declaration of Eric
16 Wong, ¶ 39 c.)

17 50. "Vallejo Momentum has not ordered an FCA vehicle since September 4, 2018."
18 (Declaration of Eric Wong, ¶ 39 d.)

19 51. "Fairfield Momentum has not reported the delivery of a new FCA vehicle since November
20 12, 2018 and has not processed any delivery reporting since November 14, 2018." (Declaration of Eric
21 Wong, ¶ 39 a.)

22 52. "Fairfield Momentum has not ordered an FCA vehicle since September 12, 2018."
23 (Declaration of Eric Wong, ¶ 39 b.)

24 53. As of at least November 21, 2018, Protestants' occupational licenses as new motor vehicle
25 dealers for Vallejo Momentum and Fairfield Momentum are designated by the DMV as "Not Valid".
26 (Motion, Exh. 13; Notices of Termination, Exh. 8)²⁴

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²⁴ Each of the Protests signed almost a month later inaccurately state that each dealer "... is a duly licensed California new motor vehicle dealer doing business at..."

1 **Momentum's Financial Situation**

2 54. As indicated above, Momentum is at least \$52 million in debt and its assets are being
3 controlled by a receiver. A court order forbids the sale of vehicles and the transfer of assets. (Notices of
4 Termination) The receiver was appointed by the Superior Court at the request of Momentum and its other
5 related non-FCA dealerships seeking to sell all of the dealerships' assets "in one global transaction."
6 (Motion, p. 6, line 22-24 and Exhibit 11)

7 **ANALYSIS OF THE CLAIM OF UNTIMELINESS**

8 **The Time within which a Protest must be Filed**

9 55. Because FCA's Notices of Termination listed the cessation of operations and insolvency/
10 appointment of a receiver as the reasons for termination of Momentum, Section 3060 permits the
11 franchisor to give what is termed a "15-day notice" of termination. This would allow the franchisor to
12 terminate the franchise 15 days after the notice is received by the franchisee unless the franchisee files a
13 protest with the Board "within 10 days after receiving a 15-day notice."²⁵ The legislative shortening of the
14 time for termination from 60 days to 15 days and, even more important, limiting the time to file a protest
15 to only 10 days from receipt of the notice (compared to 30 days if the termination is based upon other
16 reasons) are indications of the significance the legislature placed on the reasons for termination and the
17 prompt action needed by a franchisee if the reasons for termination were cessation of operations or
18 insolvency, as alleged here by FCA. As explained by the court in *Sonoma Subaru, Inc. v. New Motor*
19 *Vehicle Board* (1987) 189 Cal. App. 3d 13, the 10-day filing deadline is strictly applied:

20 Where no protest of the termination is filed within the allotted time, the Legislature's
21 obvious intent is to let the franchisor treat the termination as final and effective ...
22 Sanctioning late filings would undercut that finality and create uncertainty in the minds
23 of franchisors as to whether they may treat their relationship with unsatisfactory
franchisees as concluded. We conclude that the Legislature did not intend that the 10-day
filing deadline be extended.

24 *Sonoma Subaru, Inc.*, 189 Cal. 3d at 22 (affirming the Board's refusal to hear a protest that was untimely
25 by five days).

26
27 ²⁵ Section 3060(a)(2) provides in part: "... The franchisee may file a protest with the board within 30 days after receiving a 60-
28 day notice, satisfying the requirements of this section, or within 30 days after the end of any appeal procedure provided by the
franchisor, or within 10 days after receiving a 15-day notice, satisfying the requirements of this section, or within 10 days after
the end of any appeal procedure provided by the franchisor..." (Emphasis added.)

1 56. Despite the significance of these reasons for termination, if a timely protest is filed, the
2 franchise may not be terminated until after the Board has conducted a hearing and then only if the Board
3 finds that the franchisor has met its burden of proving good cause for the termination, taking into
4 consideration the existing circumstances including specified factors. However, if a protest is not filed
5 within 10 days of the franchisee's receipt of the notice of termination, the franchisee has no right to a
6 hearing before the Board, and the franchise terminates upon the passage of 15 days from the franchisee's
7 receipt of the notice of termination. This means that if no timely protest is filed the franchise terminates
8 automatically five days after the 10-day deadline to file a protest has expired.²⁶

9 57. Respondent has established (without dispute by Protestants) that the Notices of
10 Termination were delivered and signed for on behalf of both Vallejo Momentum and Fairfield Momentum
11 on December 4, 2018, at each dealership's mailing address (see Motion, Exh. 2) and it is clear that
12 Section 3060 requires that any protest to be timely must be filed within 10 days of the notice being
13 "received" by the "franchisee."

14 58. Contrary to the assertions in Protestants' Opposition, there is no requirement that the
15 notice be received by Mr. Hassanally, personally or otherwise. Mr. Hassanally is not the franchisee. The
16 franchise documents expressly state that the "Dealers" are "Fairfield CJD LP DBA Momentum Chrysler
17 Dodge Jeep Ram of Fairfield" and "VALLEJO CJD LLC DBA MOMENTUM CHRYSLER DODGE
18 JEEP RAM", and each of which would thus be the "franchisees" per the Vehicle Code definition.

19 59. Protestants' brief inaccurately states that the notices must be received by Mr. Hassanally
20 personally and asserts that mailing the notices is not appropriate even though they were "received" at "a
21 relevant location." (Opposition, p. 4, lines 9-22)

22 60. The only requirements in Section 3060 are that the notices be "received" by the
23 "franchisee" and the "board." As stated above, Mr. Hassanally is not the franchisee. The issue becomes
24 when did the "franchisees" (Vallejo Momentum and Fairfield Momentum) "receive" the notices.

25 61. Although the Vehicle Code does not contain a definition or other standard for "received,"
26 there is such a definition in the California Uniform Commercial Code (UCC), which would be applicable

27
28 ²⁶ Section 3060(a)(3) states that the franchise may be terminated if "[t]he franchisor has received the written consent of the franchisee, or the appropriate period for filing a protest has elapsed." (Emphasis added.)

1 to the Dealer Agreement/franchise as it is a contract for the sale of goods and thus within the scope of
2 Divisions 1 and 2 of the UCC.

3 62. UCC section 1202(e) states:

4 (e) Subject to subdivision (f), a person "receives" a notice or notification when:

5 (1) it comes to that person's attention; or

6 (2) it is duly delivered in a form reasonable under the circumstances at the place of business through which the contract was made or at another location held out by that person as the place for receipt of such communications. (Emphasis added.)

7 63. Here it is undisputed that the Notices of Termination were "duly delivered in a form
8 reasonable under the circumstances" and that no claim has been made that they were not delivered at "the
9 place for receipt of such communication."

10 64. Protestants' claims that the Notices of Termination were ineffective are not meaningful for
11 the following reasons:

12 a. Personal receipt by Mr. Hassanally is not required. As stated above, Mr. Hassanally is not
13 the franchisee. The Protests themselves state that "Vallejo CDJR" and "Fairfield CDJR" are each a
14 "'franchisee' as defined under Vehicle Code section 331.1 ..." (Protests, p. 2, lines 6-7) Mr. Hassanally
15 would not meet that definition.

16 b. The Protests also state that "Vallejo CDJR" and "Fairfield CDJR" each "received a letter
17 from FCA dated November 30, 2018, (the 'Notice') purporting to give [each Protestant a] 15-day notice
18 of termination..." (Protests, p. 2, lines 13-14) Although the Protests give no date for such receipt, the only
19 November 30 notices before the Board are those delivered to the franchisees on December 4, 2018.

20 65. The claim in the Protests that the notices "failed to comply with the requirements of ... the
21 franchise for giving notice of termination" is difficult to understand. (Protest, p. 2, line 15-16) Protestants
22 inaccurately assert in their Opposition that "... the terms of the franchise agreements requires (*sic*) that
23 notice be given to the dealer." (Opposition, p. 2, lines 14-15) In fact the franchise terms do not require any
24 notice (received by or given) to Dealer under these circumstances.

25 66. The franchise provisions state in Section 43: "Unless otherwise specifically required by the
26 terms of this Agreement, any notice required or permitted under this Agreement must be in writing and
27 will be sufficient if delivered personally, or sent through the United States mail system, postage prepaid,
28 addressed, as appropriate, either to DEALER at the place of business designated in this Agreement, or at

1 such other address as DEALER may designate in writing to [FCA]²⁷ (Emphasis added.)

2 67. However, this provision is applicable only if there is a “notice required ... under this
3 Agreement” and Section 28(c) of the Agreement expressly states that “... this Agreement will terminate
4 automatically without notice from either party on ... “insolvency” or the “appointment of a receiver” if
5 these are not vacated or removed within 10 days, or there is a failure to conduct Dealership Operations for
6 seven consecutive business days.

7 68. Thus Protestants’ claim that there was no compliance with the provisions relating to
8 written notices being required by the Agreement²⁸ is of no merit as the Agreement does not contain such
9 a requirement under these circumstances. Most important though is that the issue here involves the
10 notices required by the Vehicle Code not by the Agreement.

11 69. If Protestants are correct that the terms of the Agreement would apply to the notices
12 required, the outcome would be contrary to what Protestants would prefer as no notices of termination are
13 required by the Agreement under these circumstances and if they were the notices would be effective
14 when sent, not when received as required by the statute.

15 70. Protestants’ claim that the franchise language must be met as to notices is not tenable as
16 the Vehicle Code requires that the notice be received by the franchisee, not merely sent to the franchisee
17 (or dispensed with, as stated in the Agreement).

18 71. Despite Protestants’ claims in its Opposition, the absence of the word “mailing” in the
19 applicable statute does not preclude the use of mail to provide the required notice so long as the “mailing”
20 of the notices results in their being “received”.

21 72. It is undisputed that the notices were received at the franchisees’ mailing addresses on
22 December 4, 2018. This began the 10-day time period to file a protest, meaning the period would end on
23 December 14. No protests were filed until December 18, 2018.

24 73. As there are no timely protests, the Board has no power to order a hearing pursuant to
25 Section 3066.

26
27 ²⁷ Section 43 of the franchise is identical in “CJD 09” and “CDJR 11.” (See Footnote 22)

28 ²⁸ For purposes of this analysis, the term “Agreement” refers to the franchises for both Vallejo Momentum and Fairfield Momentum.

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76. And there is no dispute that the Board has the implied power to summarily dismiss a protest based upon the “existing circumstances” as was done by the Board and upheld in *Duarte*. In *Duarte*, the franchise for Plymouth vehicles was being terminated as the franchisor (one of the prior Chrysler entities) had ceased production of the Plymouth line-make.

78. The purpose of Section 3060 is to protect franchisees from unjustified terminations²⁹ of franchises that would result in the loss of the dealerships and loss of the investment of the owners as well as to protect the public's access to dealerships that are needed and doing a good job in providing for the essential needs of the public. Although a franchise is merely the written agreement between the parties it is essential for the franchisee to operate the dealership. Thus, in the case of an operating dealership, the loss of the franchise would result in the loss of the dealership with all of the possible adverse consequences that would flow from such a loss. Ordinarily, the dealership is in operation but will be

26

1 required to cease operation if the franchise is terminated. Here the situation is reversed. Although the
2 franchises, the written agreements, technically continue to exist³⁰ all of the adverse consequences that
3 would flow from such a loss or closure have already occurred and cannot be remedied or ameliorated by
4 any order of the Board that FCA should not be permitted to terminate the written agreements.

5 79. If the Board has jurisdiction over the Protests, the Board is without power to do anything
6 other than to overrule or sustain the Protests. Sustaining the Protests would mean only that Respondent
7 cannot terminate the franchises - the written agreements that contain the contractual rights and duties of
8 the parties. However, as stated above, ordering that the contractual relationships continue to exist will not
9 result in the re-opening of the dealerships that have been closed for an excessive amount of time nor will
10 requiring Respondent to maintain its contractual relationship with Momentum change the fact that
11 Momentum has no assets that would be lost by the termination of the franchises. Momentum has no
12 locations for the facilities from which to operate the dealerships, has lost its inventory, and has lost all of
13 its other assets to the claims of its creditors. In addition, Momentum no longer has "valid" occupational
14 licenses from the Department of Motor Vehicles and is insolvent.³¹ Sustaining the Protests and preventing
15 the termination of the franchises (the written agreements) will result in maintaining the status quo which

16
17 ³⁰ The dealerships had been lost as of November 16, 2018, when they were closed. Here, as no timely protests were filed, the
18 franchises (the written contracts between the parties) terminated on December 19, 2018; 15 days after the notices were
received.

19 ³¹ Section 1201(b)(23) of the UCC defines "insolvent" as follows:

- 20 (A) having generally ceased to pay debts in the ordinary course of business other than as a result of bona fide
21 dispute;
22 (B) being unable to pay debts as they become due; or
23 (C) being insolvent within the meaning of federal bankruptcy law."

24 The "federal bankruptcy law" contains the following relevant language in its definition of "insolvent" (11 U.S.C. § 101(32)):

- 25 (A) with reference to an entity other than a partnership and a municipality, financial condition such that the sum
26 of such entity's debts is greater than all of such entity's property, at a fair valuation, exclusive of--
27 (i) property transferred, concealed, or removed with intent to hinder, delay, or defraud such entity's creditors;
28 and
(ii) property that may be exempted from property of the estate under section 522 of this title;
(B) with reference to a partnership, financial condition such that the sum of such partnership's debts is greater than
the aggregate of, at a fair valuation--
(i) all of such partnership's property, exclusive of property of the kind specified in subparagraph (A)(i) of this
paragraph; and
(ii) the sum of the excess of the value of each general partner's nonpartnership property, exclusive of property of
the kind specified in subparagraph (A) of this paragraph, over such partner's nonpartnership debts; ...

Note that all of the definitions in the UCC are stated in the disjunctive and that Momentum is insolvent under all three of them.

1 will leave the parties and the consuming public where they have been for the four months - with no
2 Chrysler, or Dodge, or Jeep or RAM sales being made, with no service available to the public, no
3 warranty obligations of Respondent being performed on customers' vehicles, and no benefits to the public
4 that would accrue if the dealerships had been operational.

5 80. Sustaining the Protests would not further the legislative intent of the statutes, which,
6 unless there is good cause to do so, is to prevent the loss of the benefit of the dealerships to all of the
7 community interests affected by and dependent upon such ongoing enterprises. The loss of the dealerships
8 has already occurred and it occurred before Respondent made its decision to issue the Notices of
9 Termination of the franchises. Whether it was caused in whole or in part by circumstances beyond the
10 control of the franchisees is irrelevant to the issues before the Board as the existing circumstances are that
11 the dealerships are closed, have been closed for four months, and the franchisees are insolvent.

12 81. Sustaining the Protests would be a meaningless act as Protestants are unable to function as
13 dealerships operating as a franchisee as to any of the four line-makes in Vallejo or Fairfield. An order of
14 the Board requiring Respondent to continue in its franchise relationships with Momentum would not
15 protect Momentum from an unfair termination of its franchises nor would there be any protection of the
16 interests of the public or otherwise further the intention of the legislature in the enactment of the statutes
17 at issue.

18 82. In summary, FCA is correct in contending that the facts are such that there is no relief
19 available before the Board and thus going to a hearing to determine whether there is good cause to
20 terminate the franchises would be an exercise in futility. This is because Momentum has not been, is not
21 now and cannot in the future operate as dealerships conducting business as FCA franchisees. Thus, a
22 Board order that FCA may not terminate the franchises will not operate to further the legislative intent of
23 requiring that a franchisor establish good cause to do so before allowing termination of the franchise
24 operations thus protecting the public interest in preserving the dealerships and maintaining their existence
25 for serving the consuming public. Sustaining the Protests in this situation will not prevent the loss of the
26 dealerships, will not prevent any forfeiture to Momentum or its owners, will not protect the employees,
27 the community or the consuming public that would be served by the dealerships.

28 83. Under the existing circumstances, deciding whether FCA has good cause to terminate the

1 franchises is unneeded as a Board order would be meaningless. All of the adverse effects of the loss of the
2 Momentum dealerships have already occurred and no order of the Board will prevent such adverse effects
3 or even mitigate against their result.³² Despite such allegation in the Protests, there are no facts to indicate
4 that FCA was in any way the cause of, or responsible for, the closure of the dealerships.

5 **ANALYSIS OF THE CLAIM THAT THE UNCONTESTED FACTS DEMONSTRATE**
6 **GOOD CAUSE TO TERMINATE THE FRANCHISES AS A MATTER OF LAW**

7 84. FCA alleges that “The Uncontested Facts Demonstrate Good Cause to Terminate as a
8 Matter of Law.” (Motion, p. 11, line 5)

9 85. Section 3061 requires that the franchisor establish good cause to terminate the franchise
10 taking into consideration “the existing circumstances” including several specific areas of inquiry as will
11 be discussed.

12 86. The most important “existing circumstances ” here are that: The Momentum dealerships
13 ceased all operations on November 16, 2018; The franchisees have been removed from their premises;
14 The franchisees are insolvent; The franchisees no longer have a “valid” license to operate as new motor
15 vehicle dealerships; The franchisees’ investments in the dealerships and their assets, including their
16 vehicle inventory, have already been lost; Termination of the franchises (the written documents) will not
17 cause any additional loss to the franchisees; The consuming public has not had an operating FCA
18 dealership in Vallejo and Fairfield for over four months; FCA will not be able to appoint new franchisees
19 who will establish new dealerships in those markets until the Momentum franchises (the written
20 agreements) are terminated pursuant to an order of the Board; The franchisees no longer have any
21 employees; and, The franchisees are not contributing to the economy and are not generating any tax
22 revenue for Vallejo or Fairfield or the county.

23 87. FCA has provided more than adequate evidentiary documentation to support the above
24 conclusions. None of the above factual circumstances can be disputed.

25 _____
26 ³² Such a decision by the Board that the Section 3060 protests are moot as the dealership has ceased to operate should be
27 distinguished from a protest filed pursuant to Section 3065 subsequent to which the dealership may cease operations for
28 whatever reason. In a Section 3065 protest, the Board may still evaluate and pass upon whether the then franchisor complied
with the provisions of Section 3065 at the time of the events alleged in the Section 3065 protest even though the dealership
may be out of operation or has ceased to be a franchisee after the protest was filed.

1 88. The likelihood of Momentum ever being able to reopen its dealerships is so remote as to be
2 deemed impossible.

3 89. In addition to the general language of “existing circumstances,” Section 3061 also lists
4 seven more specific circumstances that must be considered in determining whether good cause exists for
5 terminating a franchise. These circumstances and the facts as to them are as follows:

6 (a) Amount of business transacted by the franchisee, as compared to the business available to
7 the franchisee.

8 90. As indicated above, Protestants have conducted no operations at Vallejo Momentum or
9 Fairfield Momentum since at least November 16, 2018, and a court order forbids the sale of vehicles and
10 transfer of assets.

11 (b) Investment necessarily made and obligations incurred by the franchisee to perform its part
12 of the franchise.³³

13 91. Whatever investments may have been made by Momentum were lost prior to the Notices
14 of Termination. Momentum’s interests in its inventory and other assets have also been lost. Momentum
15 and Mr. Hassanally are in debt for millions of dollars that they are unable to repay.

16 (c) Permanency of the investment.

17 92. Whatever investment Momentum may have had in the dealerships no longer exists.

18 (d) Whether it is injurious or beneficial to the public welfare for the franchise to be modified
19 or replaced or the business of the franchisee disrupted.

20 93. The harm to the public from the loss of the dealerships already occurred prior to the
21 Notices of Termination being issued and the termination of the franchises will not cause any additional
22 injury to the public welfare. In fact, the termination of the franchises may benefit the public as it will
23 allow FCA to replace the Momentum dealerships with another franchisee or franchisees, if it so desires.

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

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³³ Protestant’s assertion that its investments “still have value....” is unpersuasive in the analysis of this good cause factor. (See Paragraph 33; Opposition, p. 6, lines 25-26)

1 94. Momentum has no vehicle sales or service facilities, no equipment or vehicle parts, and no
2 employees. Consequently, Momentum has not been rendering any services to the public let alone services
3 that are "adequate."

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

6 95. Momentum has not been fulfilling any of FCA's warranty obligations and therefore has
7 failed in this regard. Owners or lessees of FCA vehicles have not been able to have warranty work
8 performed in the Vallejo or Fairfield market areas since November 2018.

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

10 96. It is undisputed that Momentum has breached the terms of the franchises as stated in the
11 Notices of Termination.

12 97. FCA has submitted more than sufficient evidentiary documents to support the above and
13 Momentum has submitted no documents or other evidence that would contest the above facts.

14 98. It is therefore determined that FCA has established as a matter of law that there is good
15 cause to terminate the franchises of Vallejo Momentum and Fairfield Momentum as to each of the FCA
16 franchises (Chrysler, Dodge, Jeep and RAM).

17 **ANALYSIS OF CLAIM THAT THE BOARD HAS IMPLIED AUTHORITY**
18 **TO DISMISS THE PROTESTS**

19 99. The Board, relying on the opinion in *Duarte*, concludes that it has the implied authority to
20 dismiss these Protests because the undisputed facts show good cause for termination of Momentum's
21 Chrysler, Dodge, Jeep and RAM franchises for Vallejo and Fairfield. It is therefore determined that there
22 is good cause for dismissal of Vallejo Momentum's Chrysler, Dodge, Jeep and RAM Protests with
23 prejudice and Fairfield Momentum's Chrysler, Dodge, Jeep and RAM Protests with prejudice.

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1 **PROPOSED ORDER**

2 After consideration of the pleadings, exhibits and oral arguments of counsel, it is hereby ordered
3 that Respondent's "Motion to Dismiss Protests or, in the Alternative, for a Finding of Good Cause to
4 Terminate Based on Uncontested Evidence" is granted for the following reasons.

5 1. The Protests are untimely. The Board is without jurisdiction and has no power to hear and
6 consider the Protests.

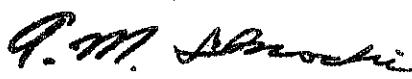
7 2. The dealerships have been closed since November 2018 and remain closed. Whether there
8 is good cause to terminate the "franchises," the written agreements, is moot.

9 3. As a matter of law, the existing circumstances are such that Respondent has good cause to
10 terminate the franchises.

11 Protest Nos. PR-2589-18, PR-2590-18, PR-2591-18, PR-2592-18 (*Vallejo CJD, LLC, a*
12 *California Limited Liability Company v. FCA US LLC, a Delaware Limited Liability Company*) and PR-
13 2593-18, PR-2594-18, PR-2595-18, and PR-2596-18 (*Fairfield CJD, LP a California Limited Liability*
14 *Company v. FCA US LLC, a Delaware Limited Liability Company*) are dismissed with prejudice.

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

19 DATED: March 21, 2019

20 By 
21 ANTHONY M. SKROCKI
22 Administrative Law Judge
23
24
25
26

27 Kathleen Webb, Acting Director, DMV
28 Elizabeth (Lisa) G. Humphreys, Branch Chief
Occupational Licensing, DMV

VIA EMAIL

Received

2-3-23

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

CERTIFIED MAIL

STATE OF CALIFORNIA

NEW MOTOR VEHICLE BOARD

In the Matter of the Protest of

WEST COVINA NISSAN, LLC,

Protestant,

v.

NISSAN NORTH AMERICA, INC.,

Respondent.

Protest No. PR-2478-16

**CORRECTED ORDER DENYING
RESPONDENT'S MOTION TO
DISMISS PROTEST FOR LACK OF
JURISDICTION AFTER SALE OF
DEALERSHIP ASSETS**

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Attorneys for Respondent
NELSON MULLINS RILEY & SCARBOROUGH LLP
19191 South Vermont Avenue, Suite 301
Torrance, California 90502

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2 Attorney for Respondent
3 LEADER, BULSO & NOLAN, PLC
4 414 Union Street, Suite 1740
5 Nashville, Tennessee 37219

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**ORDER DENYING RESPONDENT'S MOTION TO DISMISS PROTEST FOR
LACK OF JURISDICTION AFTER SALE OF DEALERSHIP ASSETS**

1. Respondent's Motion to Dismiss Protest for Lack of Jurisdiction After Sale of Dealership Assets came on regularly for hearing via telephonic conference on October 11, 2017 before Administrative Law Judge Diana Woodward Hagle.

2. Leader, Bulso & Nolan, PLC, by Gino Bulso, Esquire (*pro hac vice*) and Nelson Mullins Riley & Scarborough LLP, by Maurice Sanchez, Esquire, represented moving party Nissan North America, Inc. (hereinafter "respondent" or "Nissan NA.")

3. Arent Fox LLP, by Victor Danhi, Esquire and Franjo M. Dolenac, Esquire, represented responding party West Covina Nissan, LLC (hereinafter "protestant" or "West Covina Nissan.")

4. Also present were Administrative Law Judges Evelyn Matteucci and Dwight Nelsen.

Statement of the Case

5. Protestant filed Protest No. PR-2478-16 pursuant to Vehicle Code¹ section 3065 [warranty reimbursement claims] on August 11, 2016, alleging that respondent intended to reverse and charge back previously-approved warranty claims. According to protestant's counsel, "...we're talking about a lot of money." (Protest, p. 2:4-7; RT p. 35:16-17)²

6. Previously, on December 9, 2016 and March 29, 2017, an administrative law judge of the New Motor Vehicle Board (hereinafter sometimes "Board") denied respondent's motions to dismiss protest on grounds not relevant to the instant motion.

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¹ Hereinafter, unless otherwise indicated, all section references shall be to the Vehicle Code.

² "RT", as used herein, refers to the transcript of the October 11th motion hearing.

Statement of Facts

7. West Covina Nissan was a franchisee of Nissan NA when it timely filed the instant protest on August 11, 2016.

8. The declaration of Dennis O'Dwyer, Dealer Network Development Analyst, Dealer Agreements, Nissan NA, (hereinafter, "the declaration") states the following: On or about September 7, 2017, West Covina Nissan "... closed the sale of its assets in the Nissan dealership to Trophy Auto Group As part of that transaction, [West Covina Nissan] voluntarily terminated its Nissan Dealer Sales and Service Agreement, concurrent with the execution by [Nissan NA] of a new Dealer Agreement with Trophy As of September 7, 2017 [West Covina Nissan] ceased being a Nissan dealer."³ (Exhibit B to Motion)

Issue

9. Does the Board retain jurisdiction to hear and decide a warranty reimbursement claims protest pursuant to section 3065 after a transaction which divested protestant of its dealership?⁴

Respondent's Arguments

10. When, on or about September 7, 2017, West Covina Nissan ceased being a Nissan dealer, the Board's jurisdiction over the pending protest ended. (Motion, p. 1:16-18)⁵ Respondent relies on section 3051 and Board Decisions in *Stockton Automotive Development LLC dba Stockton Nissan v. Nissan North America, Inc.*, Protest No. PR-2351-12 (2014), and *Adrenaline Powersports v. Polaris Industries, Inc.*, Protest No. PR-2418-15 (2015) (Motion, p. 2:18-3:10; Reply Brief, pp. 2:8-3:21; Exhibit A to Motion; Exhibit A to Reply Brief).

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³ As discussed *infra*, the parts of the declaration which are ambiguous and lack a foundation showing personal knowledge will be disregarded.

⁴ Facts and arguments referencing the parties' litigation in Tennessee are irrelevant to this motion and will be disregarded. Similarly irrelevant and disregarded are all documents following page 9 in respondent's Supplemental Brief in Support of Motion; respondent's request for Official Notice under Government Code section 11515 (mischaracterized as a request for Judicial Notice under the Evidence Code) of certain documents contained in those documents is denied.

⁵ Respondent asserts, in its opening brief, that West Covina Nissan "... voluntarily terminated its franchise ..." (Motion, p. 1:16), but there is no mention of "franchise" in the declaration in support of the motion. Assertions of "facts" by attorneys in briefs will be disregarded, even if corroborated by opposing counsel's briefs. (Opposition Brief, pp. 2:15, 7:19-20)

11. Protestant's remedy to pursue its warranty reimbursement claim is by filing "... a claim in any court *with* jurisdiction ...", per sections 3050(f) and 11726. (Motion, pp. 3:11-4:3; Supplemental Brief, pp. 2-6; RT, p. 52:10-19)

Protestant's Arguments⁶

12. Since West Covina Nissan was a Nissan franchisee when it filed the protest, the Board has jurisdiction to hear and decide the protest since protestant met the statutory requirements of sections 3050(d) and 3065(e)(6). (Opposition Brief, pp. 5:13-6:15) Therefore, in spite of no longer being a Nissan dealer, section 3051 does not "... extinguish the Board's jurisdiction" (Opposition Brief, pp. 6:28-7:1)

13. Protestant distinguishes *Stockton Nissan* in that here, protestant's "...claims are not moot" (Opposition Brief, pp. 2:14-26, 7:4-28)

14. There is no statutory claim under section 3065 that is cognizable in the courts and no way to enforce obligations under section 3065 through a court of law. Those obligations may only be enforced by the Board. (RT, p. 50:1-9)

Discussion

15. The following facts are not at issue:

- When West Covina Nissan timely filed its section 3065 protest, the Board assumed exclusive personal jurisdiction over the parties and subject matter jurisdiction of the claim [Section 3050(d)];
- At issue in the protest is West Covina Nissan's claim for money based on Nissan NA's reversal and charge back of warranty claims it had previously approved;
- All events on which the claim for money is based occurred during the time that West Covina Nissan was a Nissan dealer, and arose out of that relationship;
- West Covina Nissan is no longer a Nissan dealer;⁷ and
- West Covina Nissan's claim for money has not been extinguished by its divestment of the Nissan dealership.

⁶ Protestant's mischaracterization of respondent's argument as a "standing" issue will be disregarded. (Supplemental Brief in Opposition to Motion, p. 2:4-7)

⁷ Respondent's argument that the divestment was "voluntary" is irrelevant to the resolution of this motion.

1 A. Respondent, as Moving Party, Has the Burden of Proof

2 16. The moving party has the burden of proof. *Mir v. Charter Suburban Hospital* (1994) 27
3 Cal.App.4th 1471, 1487.

4 17. “Evidence Code section 500 places the burden of proof in any contested matter on the
5 party who seeks relief. 'The burden of proof is to law what inertia is to physics—a built-in bias in favor of
6 the status quo That is, if you want the court to do something, you have to present evidence sufficient to
7 overcome the state of affairs that would exist if the court did nothing' [citation omitted].” *Vance v. Bizek*
8 (2014) 228 Cal.App.4th 1155, 1163.

9 B. Respondent Has Failed to Meet its Burden of Proof

10 18. The issue, as stated above, is whether the Board, having jurisdiction over a section 3065
11 warranty reimbursement claims protest at the time of its filing, retains jurisdiction when there is a later
12 transaction which divests protestant of its dealership. This issue is one of first impression. (RT, p. 62:10-
13 12)

14 19. Respondent has failed to meet its burden of proof. The Board has continuing jurisdiction
15 over the protest and may render a Decision in the matter, despite the fact that West Covina Nissan is no
16 longer a Nissan dealer. Not only did all events alleged in the protest occur while protestant was a Nissan
17 dealer, but the warranty reimbursement claims protest and protest procedures are within the Board's
18 exclusive statutory authority. The matter has been pending since August 11, 2016 and discovery has not
19 been stayed. The Board has special expertise in these matters to adjudicate the claim.

20 20. Respondent's reliance on Board Decisions in *Stockton Nissan* and *Adrenaline Powersports*
21 is misplaced in two respects: they are factually different from the instant matter because,
22 inter alia, neither deals with a section 3065 protest; and neither are precedential decisions pursuant to
23 Government Code section 11425.60.⁸ They are, therefore, disregarded.

24 21. Also disregarded are recitals and arguments in respondent's (and protestant's) briefs which
25 are not based on facts stated in the declaration in support of the motion.⁹

26 _____
27 ⁸ Official notice is taken pursuant to Government Code section 11515 that the Board has not designated any of its Decisions as
28 “precedential.”

⁹ As examples, the declarant makes no reference to “franchise” or “license” or any variant of those words.

1 22. Moreover, the declarant's reference to "assets" of protestant will be disregarded, not only
2 because the term is ambiguous, but because it is not possible to establish a foundation for this declarant to
3 have personal knowledge of the disposition of assets of a company in which he has no proprietary
4 interest.¹⁰

5 23. Respondent's argument that if this matter is dismissed, protestant may seek relief in civil
6 court, is also rejected. The narrow issue posed by the motion is whether the Board has continuing
7 jurisdiction over the matter, not whether alternative *fora* would be available to hear the dispute.

8 24. There is no doubt that the divestment of the Nissan dealership by protestant is a seminal
9 event in the relationship of the parties. However, respondent has made no legal or policy argument which
10 would compel interruption of the "status quo" in regard to adjudication of the parties' pending protest
11 before the Board.

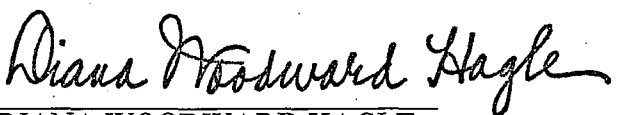
12 **ORDER**

13 After consideration of the pleadings and oral arguments of counsel, it is hereby ordered that
14 Respondent's Motion to Dismiss Protest for Lack of Jurisdiction After Sale of Dealership Assets is
15 denied.

16 SO ORDERED.

17
18 DATED: October 30, 2017

NEW MOTOR VEHICLE BOARD

19
20 By 
21 DIANA WOODWARD HAGLE
Administrative Law Judge

22
23
24
25 Jean Shiimoto, Director, DMV
26 Elizabeth (Lisa) G. Humphreys, Branch Chief,
27 Occupational Licensing, DMV

28 ¹⁰ For the same reason, the word "ASSETS" in the caption will be disregarded.

VIA EMAIL

New Motor Vehicle Board

Received
2-10-23

1 **DYKEMA GOSSETT LLP**
2 ASHLEY R. FICKEL, State Bar No. 237111
3 *AFickel@dykema.com*
4 444 South Flower Street, 22nd Floor
5 Los Angeles, California 90071
6 Telephone: (213) 457-1800
7 Facsimile: (213) 457-1850
8 Attorney(s) for Respondent,
9 GENERAL MOTORS LLC

FILED

New Motor Vehicle Board

Date: 2-10-23

By: RPP

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

10 In the Matter of the Protest of
11 MICHAEL CADILLAC, INC., dba MICHAEL
12 CHEVROLET CADILLAC,

13 Protestant,

14 v.

15 GENERAL MOTORS LLC,

16 Respondent.

PROTEST NO. PR-2813-22 and PR-2814-22

**RESPONDENT GENERAL MOTORS
LLC'S REPLY IN SUPPORT OF MOTION
TO DISMISS PROTESTANT MICHAEL
CADILLAC, INC. DBA MICHAEL
CHEVROLET CADILLAC'S PROTEST**

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Protestant Michael Cadillac, Inc., d/b/a Michael Chevrolet Cadillac (“Michael Cadillac” or
4 “Protestant”) admits in its Response to GM’s Motion to Dismiss (the “Response”) that it was not a
5 franchisee at the time it filed the instant protest. Protestant then cites to cases that are clearly
6 factually distinguishable from the situation at hand. In both cases cited by Protestant, the protests
7 were filed by parties who were franchisees *at the time* the protests were filed. As such, because
8 Protestant was not a franchisee as defined under the California Vehicle Code at the time it filed this
9 protest, the Board does not have jurisdiction to hear this dispute and should grant GM’s Motion to
10 Dismiss.

11 **II. APPLICABLE LAW**

12 The Board has jurisdiction to “[h]ear and decide, within the limitations and in accordance
13 with the procedure provided, a protest presented by a *franchisee* . . .” Cal. Veh. Code § 3050(c)
14 (emphasis added). A franchisee “is any person who, pursuant to a franchise, receives new motor
15 vehicles subject to registration under this code from the franchisor and who offers for sale or
16 lease, or sells or leases the vehicles at retail or is granted the right to perform authorized warranty
17 repairs and service, or the right to perform any combination of these activities.” Cal. Veh. Code §
18 331.1. Here, Protestant was not a franchisee under Cal. Veh. Code § 331.1 at the time it filed this
19 instant protest. Therefore, the Board does not have jurisdiction to hear the protest under Cal. Veh.
20 Code § 3050(c).

21 **III. ARGUMENT**

22 **A. The Cases Relied On By Protestant Are Clearly Distinguishable Because**
23 **Protestant Was Not A Franchisee At The Time The Protest Was Filed**

24 Protestant relies on *West Covina Nissan, LLC v Nissan North America, Inc.*, Protest No. PR-
25 2478-16, for the proposition that because events giving rise to the claims at issue arose when the
26 Protestant was still a franchisee, the Board’s jurisdiction continues subsequent to the franchise
27 termination. However, Protestant’s reliance is misplaced. In *West Covina Nissan*, the protestant
28 was a franchisee at the time it filed its protest. Therefore, the protest was timely and was filed by a

1 protestant who was indeed a franchisee at the time of filing. Given this, the Board correctly accepted
2 jurisdiction of the dispute when it was filed.

3 While the facts surrounding *West Covina Nissan* are somewhat similar to the case at hand,
4 they are not identical. The Board states numerous times in the *West Covina Nissan* opinion that the
5 protestant was a franchisee at the time it filed its protest. By Protestant's own admission, that is
6 simply not the case here. Protestant's last day as a franchisee was **over six months before** it filed
7 the instant protest. Therefore, the Board does not have jurisdiction to hear the protest because
8 Protestant does not meet the statutory requirements of sections 3050(d) and 3065(e)(6). Further, the
9 issue in *West Covina Nissan* was whether the Board has *continuing* jurisdiction over a protest that
10 was filed by a franchisee at the time of filing, but who ended up no longer being a franchisee after
11 the protest was filed. Here, the Board never had jurisdiction when the Protestant, a non-franchisee,
12 filed the instant protest and there is no statutory basis for the Board to have any jurisdiction, let
13 alone continuing jurisdiction over this dispute.

14 Protestant also cites *Vallejo CJD, LLC v FCA US LLC*, Protest No PR 2589-18 as confirming
15 *West Covina Nissan* and to argue that the Board has jurisdiction to hear this protest because it was
16 brought under Section 3065. As with *West Covina Nissan*, *Vallejo* is also distinguishable. In
17 *Vallejo*, the Board dismissed a termination protest brought by a dealer subject to a receivership,
18 because under the terms of the receivership, the dealer would not be permitted to resume operations.
19 Protestant attempts to cite the following footnote, which only serves to support GM's position that
20 the Board does not have jurisdiction over this protest:

21 Such a decision by the Board that the Section 3060 protests are moot
22 as the dealership has ceased to operate should be distinguished from
23 a protest filed pursuant to Section 3065 **subsequent to which** the
24 dealership may cease operations for whatever reason. In a Section
25 3065 protest, the Board may still evaluate and pass upon whether the
26 then franchisor complied with the provisions of Section 3065 at the
time of the events alleged in the Section 3065 protest even though the
dealership may be out of operation or has ceased to be a franchisee
after the protest was filed. (emphasis added).

27 Here, unlike as contemplated by the Board's footnote in *Vallejo*, Protestant did not cease to
28 be a franchisee "*subsequent to*" or "*after the protest was filed.*" Rather, Protestant ceased being a

1 franchisee over six months *before* it filed the instant protest. Therefore, Protestant did not submit
2 to the jurisdiction of the Board by properly filing its protest when it was still a franchisee and the
3 Board does not have jurisdiction to hear this Protest.

4 Here, the Protestant admits it was not a franchisee when it filed the instant protest. Thus,
5 the Board would be exceeding its limited jurisdiction in presiding over this protest because there is
6 no statutory authorization for it to do so given that Protestant was not a franchisee when the protest
7 was filed and there is no statutory authorization for the Board to hear a complaint of a *former*
8 franchisee. Protestant's allegations against GM sound entirely in contract and should be adjudicated
9 in a court of law.

10 Thus, this matter cannot proceed before the Board and should be dismissed. Protestant must
11 seek any redress it alleges it is entitled to as a contract claim in a court of law.

12 **B. Dismissing Protestant's Protest Would Not Have Any Policy Implications**

13 Protestant argues that dismissing its Protest would somehow "encourage franchisors to
14 ignore the clear statutory the clear statutory mandate of Section 3065.1, subsequent to the sale of
15 any franchise." Response at p. 3. This simply untrue and not what GM is attempting to do in
16 moving to dismiss the Protest. Rather, GM is moving to dismiss in order to have these contract
17 claims properly adjudicated in a court of law since the Board does not have jurisdiction to hear this
18 dispute. Protestant will still have the opportunity to bring whatever alleged grievances it has against
19 GM. However, Protestant must do so in the proper forum.

20 As such, there are no policy interest implications in dismissing Protestant's Protest that
21 would amount to "franchisor immunity" as argued by Protestant. Instead, the only policy interest
22 implications at play would be allowing future non-franchisees to seek redress from the Board when
23 there is clearly no statutory jurisdiction for the Board to hear the dispute. Allowing this to occur
24 would improperly impose an undue burden on an already busy Board docket.

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1 **IV. CONCLUSION**

2 Based on the foregoing, GM respectfully requests that the Board dismiss Protestant's protest
3 for lack of jurisdiction.

4 DATED: February 10, 2023

DYKEMA GOSSETT LLP

6
7 By: 

ASHLEY R. FICKEL

Attorneys for Respondent

GENERAL MOTORS LLC

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STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

On February 10, 2023, I served true copies of the following document(s) described as **RESPONDENT GENERAL MOTORS LLC'S REPLY IN SUPPORT OF MOTION TO DISMISS PROTESTANT MICHAEL CADILLAC, INC. DBA MICHAEL CHEVROLET CADILLAC'S PROTEST** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.


Anna Feygin

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SERVICE LIST
Michael Cadillac, Inc. v. General Motors LLC
Case No.: PR-2813-22 and PR-2814-22

Gavin M. Hughes
Robert A. Mayville, Jr.
LAW OFFICES OF GAVIN M. HUGHES
3436 American River Dr. Suite 10
Sacramento, CA 95864

Attorneys for Protestant,
MICHAEL CADILLAC, INC. dba MICHAEL
CHEVROLET CADILLAC

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Email: gavin@hughesdealerlaw.com
mayville@hughesdealerlaw.com

VIA EMAIL

LAW OFFICES OF GAVIN M. HUGHES
GAVIN M. HUGHES State Bar #242119
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E-mail: gavin@hughesdealerlaw.com
mayville@hughsdealerlaw.com

ATTORNEYS FOR PROTESTANT

STATE OF CALIFORNIA
NEW MOTOR VEHICLE BOARD

In the Matter of the Protest of:

MICHAEL CADILLAC, INC., dba MICHAEL
CHEVROLET CADILLAC,

Protestant,

v.

GENERAL MOTORS LLC,

Respondent.

PROTEST NO: PR-2813-22

PROTEST (Cadillac)
[Vehicle Code Section 3065.1]

Protestant, Michael Cadillac, Inc., dba Michael Chevrolet Cadillac (“Michael Cadillac” or “Dealer”), a California corporation, qualified to do business in California, through its attorneys, files this Protest under provisions of California Vehicle Code Section 3065.1 and alleges as follows:

1. Protestant operated as a new motor vehicle dealer selling Cadillac vehicles and parts, was duly licensed as a vehicle dealer by the State of California, and operated a Cadillac and Chevrolet franchises located at 5787 N. Blackstone Ave. and 5735 N. Blackstone Ave., respectively, in Fresno, CA 93710. These franchises remain in operation under new ownership.

2. Respondent, General Motors LLC (“GM”), distributes Cadillac products and is the former franchisor of Protestant. Respondent offered the franchisor incentive programs as referenced

New Motor Vehicle Board

Received
12-9-22

FILED

New Motor Vehicle Board

Date: 12-9-22

By: am

1 herein.

2 3. Protestant is represented in this matter by the Law Offices of Gavin M. Hughes, whose
3 address and telephone number are 3436 American River Drive, Suite 10, Sacramento, California
4 95864; (916) 900-8022.

5 4. Dealer transferred ownership of its Chevrolet and Cadillac franchises on or about May
6 31, 2022. Dealer's last day as a GM dealer was May 31, 2022.

7 5. GM operates an incentive program "PASE" that provides GM dealers the opportunity to
8 earn incentives based upon the achievement of various metrics. One of the incentives categories
9 pertains to dealership purchases of GM factory parts, referred to as Purchase Loyalty Funds. GM's
10 PASE policy provides "The selling dealer must meet PASE qualifiers the day of termination or
11 potential payout to incoming dealer."

12 6. On the final day of Michael Cadillac's operations as a Cadillac dealer, its Parts Manager
13 confirmed the dealership obtained the PASE objective to earn the dealership incentives in the amount
14 of \$93,237.

15 7. GM refuses to pay Protestant these incentives funds earned, alleging Protestant's PASE
16 attainment changed subsequent to the dealership's final day of operation. It is unreasonable for GM to
17 modify a dealer's incentives attainment after it has ceased operations.

18 8. Respondent GM also operates an additional incentive program called "EBE". The EBE
19 program provides incentives to participating dealers based upon the sale of eligible GM vehicles.
20 These funds are paid on a quarterly basis. However, GM refuses to pay EBE incentives Protestant
21 earned during the months of April and May of 2022.

22 9. GM claims the EBE program rules prohibit partial payment when a dealer transfers
23 ownership mid-quarter. This is an unreasonable program requirement and therefore an unreasonable
24 basis to withhold incentives earned.

25 10. GM's refusal to pay incentives earned by Protestant is in violation of Section 3065.1
26 due to GM's failure to provide written disapproval of these incentives within 30 days of submission.

27 11. GM's PASE program Purchase Loyalty Funds requirements are unreasonable because
28 they are misleading to dealers diligently working toward attainment—it is unreasonable for GM to

1 represent to a dealer it has obtained an objective on the final day of the month and subsequently revise
2 this data after the fact.

3 12. GM's EBE program contains an unreasonable requirement that funds only be provided
4 to dealers in operation for a full quarter. The closing dates on franchise buy-sells can be complicated
5 with the actual closing date often outside the control of the selling dealer.

6 13. HMA's failure to provide a reasonable appeal process to challenge the withholding of
7 incentive payments earned is a further violation of Section 3065.1.

8 WHEREFORE, Protestant prays as follows:

9 1. That the Board sustain this Protest and issue a decision supported by findings
10 determining GM failed to comply with Vehicle Code section 3065.1 through its refusal to pay
11 Protestant for PASE incentives funds earned including, but not limited to, Purchase Loyalty Funds.

12 2. That the Board sustain this Protest and issue a decision supported by findings
13 determining GM failed to comply with Vehicle Code section 3065.1 through its refusal to pay
14 Protestant EBE funds earned during April and May of 2022.

15 3. That the Board sustain this Protest and issue a decision supported by findings
16 determining the amount of incentive funds improperly withheld from payment to Protestant.

17 4. That the Board sustain this Protest and issue a decision supported by findings that GM
18 failed to provide Protestant a reasonable appeal process to challenge GM's withholding of incentives.


19 5. That a pre-hearing conference be set and the parties notified thereof.

20 6. That a mandatory settlement conference be set and the parties notified thereof.

21 8. That Protestant be awarded such other and further relief as the Board deems just and
22 proper.

23 Dated: December 9, 2022

LAW OFFICES OF
GAVIN M. HUGHES

24
25
26 By: 
Gavin M. Hughes
Robert A. Mayville, Jr.
Attorneys for Protestant
27
28

1 **DECLARATION OF SERVICE BY ELECTRONIC MAIL**

2 I, Robert A. Mayville, Jr., declare that I am employed in the County of Sacramento, State of
3 California, that I am over 18 years of age, and that I am not a party to the proceedings identified herein.
4 My business address is 3436 American River Drive, Suite 10, Sacramento, California 95864.

5 I declare that on December 9, 2022, I caused to be served a true and complete copy of:

6 ***PROTEST (Cadillac) [Vehicle Code Section 3065.1];***
7 ***PROTEST (Chevrolet) [Vehicle Code Section 3065.1]; and***
8 ***Application for Fee Waiver (Chevrolet)***

9 ***MICHAEL CADILLAC, INC., dba MICHAEL CHEVROLET CADILLAC***

10 **v.**

11 **GENERAL MOTORS LLC**

12
13
14 By Electronic Mail:

15 Alex Cavanaugh, Esq.
16 General Motors Legal Staff
17 Email: alex.cavanaugh@gm.com

18 I declare under penalty of perjury that the foregoing is true and correct.

19 Executed this 9 December 2022 Sacramento, California.

20 
21 Robert A. Mayville, Jr.

VIA EMAIL

LAW OFFICES OF GAVIN M. HUGHES
GAVIN M. HUGHES State Bar #242119
ROBERT A. MAYVILLE, JR. State Bar #311069
3436 American River Drive, Suite 10
Sacramento, CA 95864
Telephone: (916) 900-8022
E-mail: gavin@hughesdealerlaw.com
mayville@hughesdealerlaw.com

New Motor Vehicle Board

Received
12-9-22

FILED

New Motor Vehicle Board

Date: 12-9-22

By: am

ATTORNEYS FOR PROTESTANT

STATE OF CALIFORNIA

NEW MOTOR VEHICLE BOARD

In the Matter of the Protest of:

MICHAEL CADILLAC, INC., dba MICHAEL
CHEVROLET CADILLAC,

Protestant,

v.

GENERAL MOTORS LLC,

Respondent.

PROTEST NO: PR-2814-22

**PROTEST (Chevrolet)
[Vehicle Code Section 3065.1]**

Protestant, Michael Cadillac, Inc., dba Michael Chevrolet Cadillac ("Michael Cadillac"), a California corporation, qualified to do business in California, through its attorneys, files this Protest under provisions of California Vehicle Code Section 3065.1 and alleges as follows:

1. Protestant operated as a new motor vehicle dealer selling Chevrolet vehicles and parts, was duly licensed as a vehicle dealer by the State of California, and operated Cadillac and Chevrolet franchises located at 5787 N. Blackstone Ave. and 5735 N. Blackstone Ave., respectively, in Fresno, CA 93710. These franchises remain in operation under new ownership.

2. Respondent, General Motors LLC ("GM"), distributes Chevrolet products and is the former franchisor of Protestant. Respondent offered the franchisor incentive programs as referenced

1 herein.

2 3. Protestant is represented in this matter by the Law Offices of Gavin M. Hughes, whose
3 address and telephone number are 3436 American River Drive, Suite 10, Sacramento, California
4 95864; (916) 900-8022.

5 4. Dealer transferred ownership of its Chevrolet and Cadillac franchises on or about May
6 31, 2022. Dealer's last day as a GM dealer was May 31, 2022.

7 5. GM operates an incentive program "PASE" that provides GM dealers the opportunity to
8 earn incentives base upon the achievement of various metrics. One of the incentives categories
9 pertains to dealership purchases of GM factory parts, referred to as Purchase Loyalty Funds. GM's
10 PASE policy provides "The selling dealer must meet PASE qualifiers the day of termination or
11 potential payout to incoming dealer."

12 6. On the final day of Michael Cadillac's operations as a Chevrolet dealer, its Parts
13 Manager confirmed the dealership obtained the PASE objective to earn dealership incentives in the
14 amount of \$93,237.

15 7. GM refuses to pay Protestant these incentives funds earned, alleging Protestant's PASE
16 attainment changed subsequent to the dealership's final day of operation. It is unreasonable for GM to
17 modify a dealer's incentives attainment after it has ceased operations.

18 8. Respondent GM also operates an additional incentive program called "EBE." The EBE
19 program provides incentives to participating dealers based upon the sale of eligible GM vehicles.
20 These funds are paid on a quarterly basis. However, GM refuses to pay EBE incentives Protestant
21 earned during the months of April and May of 2022.

22 9. GM claims the EBE program rules prohibit partial payment when a dealer transfers
23 ownership mid-quarter. This is an unreasonable program requirement and therefore an unreasonable
24 basis to withhold incentives earned.

25 10. GM's refusal to pay incentives earned by Protestant is in violation of Section 3065.1
26 due to GM's failure to provide written disapproval of these incentives within 30 days of submission.

27 11. GM's PASE program Purchase Loyalty Funds requirements are unreasonable because
28 they are misleading to dealers diligently working toward attainment—it is unreasonable for GM to

1 represent to a dealer it has obtained objective on the final day of the month and subsequently revise
2 this data after the fact.

3 12. GM's EBE program contains an unreasonable requirement that funds only be provided
4 to dealers in operation for a full quarter. The closing dates on franchise buy-sells can be complicated
5 with the actual closing date often outside the control of the selling dealer.

6 13. HMA's failure to provide a reasonable appeal process to challenge the withholding of
7 incentive payments earned is a further violation of Section 3065.1.

8 WHEREFORE, Protestant prays as follows:

9 1. That the Board sustain this Protest and issue a decision supported by findings
10 determining GM failed to comply with Vehicle Code section 3065.1 through its refusal to pay
11 Protestant for PASE incentives funds earned including, but not limited to, Purchase Loyalty Funds.

12 2. That the Board sustain this Protest and issue a decision supported by findings
13 determining GM failed to comply with Vehicle Code section 3065.1 through its refusal to pay
14 Protestant EBE funds earned during April and May of 2022.

15 3. That the Board sustain this Protest and issue a decision supported by findings
16 determining the amount of incentive funds improperly withheld from payment to Protestant.

17 4. That the Board sustain this Protest and issue a decision supported by findings that GM
18 failed to provide Protestant a reasonable appeal process to challenge GM's withholding of incentives.

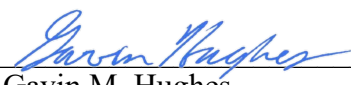
19 5. That a pre-hearing conference be set and the parties notified thereof.

20 6. That a mandatory settlement conference be set and the parties notified thereof.

21 8. That Protestant be awarded such other and further relief as the Board deems just and
22 proper.

23 Dated: December 9, 2022

LAW OFFICES OF
GAVIN M. HUGHES

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25
26 By: 
27 Gavin M. Hughes
28 Robert A. Mayville, Jr.
Attorneys for Protestant

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I declare that on December 9, 2022, I caused to be served a true and complete copy of:

MICHAEL CADILLAC, INC., dba MICHAEL CHEVROLET CADILLAC

v.

By Electronic Mail:

Alex Cavanaugh, Esq.
General Motors Legal Staff
Email: alex.cavanaugh@gm.com

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 9 December 2022 Sacramento, California.

Robert Mayville, Jr.
Robert A. Mayville, Jr.