

NEW MOTOR VEHICLE BOARD
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STATE OF CALIFORNIA

NEW MOTOR VEHICLE BOARD

In the Matter of the Petition of)
)
DAVIDSON CHEVROLET/GEO, INC.,) Petition No. P-351-96
)
) Petitioner,)
)
) vs.)
)
) GENERAL MOTORS CORPORATION,)
) GENERAL MOTORS ACCEPTANCE)
) CORPORATION,)
) Respondents.)
)

DECISION

At its regularly scheduled meeting of March 17, 1998, and continued Executive Session on March 23, 1998, the Public members of the Board met and considered the administrative record and Proposed Decision After Board Remand in the above-entitled matter. After such consideration, the Board adopted the Proposed Decision After Board Remand as its final Decision in this matter.

This Decision shall become effective forthwith.

IT IS SO ORDERED THIS 24th DAY OF MARCH 1998.



DANIEL M. LIVINGSTON
President
New Motor Vehicle Board

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9 NEW MOTOR VEHICLE BOARD
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11 In the Matter of the Petition of)
12 DAVIDSON CHEVROLET/GEO, INC.,) Petition No. P-351-96
13 Petitioner,)
14 vs.)
15 GENERAL MOTORS CORPORATION,) PROPOSED DECISION AFTER
and DOES 3 through 15, inclusive,) BOARD REMAND
16 Respondents.)
17

18
19 PROCEDURAL BACKGROUND

20 1. Petitioner DAVIDSON CHEVROLET/GEO, INC., ("Davidson") is a
21 franchisee of Respondent GENERAL MOTORS CORPORATION ("GM").
22 2. Gerald William Davidson has been the dealer principal of
23 Davidson since 1990. The dealership is located at 20955 Stevens Creek
24 Boulevard, Cupertino, California.

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1 3. On January 12, 1996, Petitioner filed its action under Vehicle
2 Code Section 3050¹.

3 4. The matter was heard on April 22-25, 1997, and
4 August 13, 1997, before Administrative Law Judge Marilyn Wong.

5 5. On January 22, 1998, the Public members of the Board met and
6 considered the Administrative Law Judge's Proposed Decision. After such
7 consideration, the Board remanded the matter back to the Administrative
8 Law Judge to make findings analyzing the effect, if any, of paragraph
9 5.1.2 of Article 5 of the Standard Provisions of the Dealer Sales and
10 Service Agreement on the factual determinations as contained in the
11 Proposed Decision.

12 6. Patrick K. Tillman of the Law Office of Patrick K. Tillman,
13 16285 Los Gatos Boulevard, Los Gatos, California, appeared on behalf of
14 Davidson.

15 7. GM was represented by L. Joseph Lines, III, General Motors
16 Corporation, Office of the General Counsel, New Center One Building,
17 3031 West Grand Boulevard, Detroit, Michigan, with Marco L. Quazzo of
18 McCutchen, Doyle, Brown & Enersen LLP, 3 Embarcadero Center, San
19 Francisco, California, appearing.

20 ISSUES PRESENTED

21 8. In August 1995, GM conducted a sales and service audit of
22 Davidson. The audit period covered 18 months from February 1994 through
23 August 1995.

24 9. The GM auditors found that Davidson had received incentives,
25 allowances, and savings on specially priced vehicles for 232 vehicles
26

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

1 which were ineligible units. The GM auditors recommended a chargeback
2 to Davidson of \$418,603. GM has recovered \$69,797; it now seeks to
3 recover the outstanding balance of \$348,836.

4 10. GM seeks additional payment in the amount of \$505,613 for 28
5 units which were released to Davidson's floor plan.

6 11. The issues presented at hearing are:

7 a). Whether or not Davidson improperly received incentives and
8 allowances offered by GM for 232 units and is therefore
9 required to repay GM; and

10 b). Whether GM is entitled to receive payment for 28 units
11 released to Davidson.

12 12. Petitioner contends that section 5.1.2 of Article 5 of the GM
13 Dealer Sales and Service Agreement is ambiguous and inconsistent with
14 subsequent GM documents relating to GM's export policy.

15 13. Petitioner further contends that this Board lacks jurisdiction
16 to consider the issue of the 28 units which were placed on Davidson's
17 flooring and from which GM seeks payment of \$505,613.

18 14. Respondent contends that it has "good cause" under Section
19 3065.1 for disallowing the sales incentives paid to Davidson on the
20 exported units.

21 15. Section 3065.1(b) provides in part:

22 "Audits of Franchisee incentive records may be
23 conducted by the franchisor on a reasonable basis,
24 and for a period of 18 months after a claim is paid
25 or credit issued. Franchisee claims for incentive
26 program compensation shall not be disapproved
27 except for good cause, such as ineligibility under
28 the terms of the incentive program, lack of
material documentation, or fraud..."

FINDINGS OF FACT

16. GM produces manuals for the uniform handling and processing of

1 claims under its incentive and allowance programs. GM manuals produced
2 in 1991 and 1995 relevant to this inquiry were distributed to all
3 dealers, including Davidson. (Saturn dealers were not included.)

4 17. The 1995 North American Operations ("NAO") dealer manual and
5 the 1991 GM manual contain almost identical provisions regarding the
6 resale of vehicles and export sales.

7 18. The 1991 manual under "GM General Guidelines for Incentives,"
8 subheading "Resale of Vehicles," states:

9 "Vehicles delivered to purchasers for domestic
10 resale purposes or export will not be eligible
11 vehicles under any allowance or incentive
12 programs."

13 19. GM produced the "General Motors Dealer Sales Allowance and
14 Incentive Manual" in January 1995, which standardized operations for all
15 GM divisions (e.g. Chevrolet, Buick, Pontiac, Oldsmobile, Cadillac and
16 GMC Trucks) within its NAO.

17 20. The 1995 NAO dealer manual at Article 2, "GM General
18 Guidelines for Incentives" at section 2.19, "Resale of Vehicles,"
19 also has specific export sales restrictions as well as "safe harbor"²
20 provisions if certain conditions are met. The section provides:

21 "Vehicles delivered to purchasers for domestic
22 resale purposes or export will not be eligible
23 vehicles under any allowance or incentive program,
24 with possible exceptions noted in Illustration I.3.

25 It is the dealers' responsibility to protect
26 themselves through careful investigation of their
27 purchaser's intentions and by providing for
28 enforceable performance assurances in their sales
documents. This responsibility remains with the

27 ² "Safe Harbor" is defined in GM's "Dealer Sales and Allowance
28 and Incentive Manual" as a method of protection for dealers who sell
vehicles which ultimately are exported.

1 dealer even for purchasers who have established
2 fleet account numbers.

3 However, as stated elsewhere in this document, it
4 is GM's intent to look at the totality of the
5 transaction when discrepancies are noted. If
6 dealer was completely unaware of the intent of the
7 purchaser to misrepresent the action, obtained all
8 supporting documentation, and nothing should have
9 prompted further inquiry, GM will not debit the
10 dealer because the purchaser resold the vehicle.
11 Discretion here, of course, is predicated upon the
12 number of vehicles sold, the transaction terms, and
13 other processes, including disclosure under state
14 statutes."

15 21. The Standard Provisions of the GM Dealer Sales and Service
16 Agreement at Article 5, "Dealer's Responsibility to Promote, Sell, and
17 Service Products" at section 5.1.2 states:

18 "Dealer is authorized to sell new Motor Vehicles
19 only to customers located in the United States.
20 Dealer agrees that it will not sell new Motor
21 Vehicles for resale or principal use outside the
22 United States. Dealer also agrees not to sell any
23 new Motor Vehicles which were not originally
24 manufactured for sale and distribution in the
25 United States."

26 22. The Dealer Agreement neither prohibits GM from offering
27 incentive or allowance programs to its dealers, nor does it require
28 dealers to participate in these programs.

29 23. However, should a dealer participate in any of the incentive
30 or allowance programs offered or avail itself to the benefits of the
31 programs offered by GM, that dealer is then required to abide by the
32 eligibility rules of the program or run the risk of having the
33 incentives on ineligible units charged back under Section 3065.1.

34 24. Section 3065.1(b) states in part:

35 ". . . Franchisee claims for incentive program
36 compensation shall not be disapproved except for
37 good cause, such as ineligibility under the terms
38 of the incentive program . . ."
(emphasis added).

1 25. It is the eligibility rules of the incentive and allowance
2 programs that Davidson violated which are the basis for GM's
3 chargebacks, and not section 5.1.2 of the Dealer Agreement. Ineligible
4 units under GM's incentive programs include exported units regardless of
5 the dealer's intention or buyer's representation.

6 26. Petitioner contends that section 5.1.2 addresses the dealers
7 intention and as long as the dealer does not "intend" to export, then
8 the dealer is not in violation of the Dealer Agreement. In conjunction
9 with this argument, Petitioner contends that so long as the dealer does
10 not actually place the unit on the ship, it has not exported under
11 section 5.1.2. There was no evidence presented to support either of
12 these contentions.

13 27. Alternatively, Petitioner argues that it is not required under
14 section 5.1.2 of the Dealer Agreement to determine the buyers intent.
15 While this statement may be correct, nevertheless, under the eligibility
16 rules of the incentive programs, the dealer is liable for chargebacks if
17 a unit is exported, regardless of the buyer's stated intent. The only
18 exception occurs if the dealer has availed itself to the "safe harbor"
19 provisions, which Davidson did not do.

20 28. GM does not allege violation of section 5.1.2 of the Dealer
21 Agreement as the basis for its chargebacks, but alleges Davidson
22 violated the eligibility rules of the incentive programs.

23 29. For several years there has been a market in Asia for American
24 made vehicles which have not been sold through a proper dealer
25 distribution network. Upfitted vans have been particularly popular in
26 Asia.

27 30. GM euphemistically refers to the unauthorized shipping of
28 vehicles overseas as "leakage." There were over 25,000 unauthorized

1 vehicle exports in 1994 and 1995. This figure is compared with an
2 annual authorized distribution of approximately 2,000 vehicles.

3 31. The problem of "leakage" has been and continues to be so
4 widespread that GM's corporate managers had to issue letters to dealers
5 in 1991, 1994, and 1995 reminding them that they are prohibited under
6 the dealer agreement from selling vehicles for export.

7 32. The export policy is intended to preserve GM's overseas
8 distribution system and to protect GM's brand name. The sale of
9 unauthorized vehicles poses potential problems such as, lack of warranty
10 coverage, use of improper fuels such as leaded fuel in China in vehicles
11 designed to accept only unleaded fuel, and steering columns on the wrong
12 side of unauthorized vehicles shipped to Japan.

13 33. GM periodically offers incentive programs in reaction to
14 competition and to generate vehicle sales to eligible customers.

15 34. Dealers are advised of new programs through bulletins which
16 are frequently communicated to the dealer through the electronic dealer
17 communication system (DCS). The DCS allows communication between
18 dealers and divisions. These bulletins both announce a new program and
19 set forth the rules and guidelines for the program.

20 35. There are two methods by which a dealer can obtain incentives
21 offered on the sale of vehicles. When a dealer sells a unit and reports
22 the delivery to GM via the DCS, the dealer can insert the incentive code
23 and GM will either credit the dealer's account or issue a check in the
24 amount of the incentive. In other cases, such as the R6J incentive, it
25 is included on the invoice when the dealer orders the unit.

26 36. As stated in the dealer manual, GM reserves the right to audit
27 dealership records for which allowances or incentives are claimed and
28 further reserves the right to chargeback any improperly obtained

1 allowances or incentives.

2 37. There are approximately 10 incentive programs involved in the
3 chargeback to Davidson. All of the programs disallow incentives and
4 allowances on vehicles which are sold for export.

5 38. The audit revealed three categories where the Davidson
6 vehicles were found to be ineligible sales. The categories are: sales
7 for resale/export; not fleet/not retail; and ineligible fleet.

8 39. The 1995 NAO dealer manual defines Fleet Account Number (FAN)
9 at Article 3, "Definitions" as:

10 "A number assigned by GM to identify a specific
11 fleet customer who agrees, by signature, to abide
12 by explicit GM purchase and retention terms and
13 conditions. Fleet customer possession of an active
14 FAN does not preclude dealer responsibility of
15 establishing ultimate customer use of vehicle."

16 40. Sales classified as neither fleet nor retail delivery were
17 made to parties who purchased more than 10 vehicles a year but did not
18 have a FAN. In these cases, it was further determined that these
19 vehicles were also exported and were therefore ineligible sales.

20 41. During the audit period the following purchasers were
21 classified not fleet/not retail:

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1	Resort Services	56 vehicles	payment Big Bear Leasing & Tandem
2	JAD Rentals	16 vehicles	payment Big Bear Leasing & Tandem
3	ABC Rentals	38 vehicles	payment Diamond Conversions
4	Central Automotive	11 vehicles	payment Diamond Conversions
5	Century Leasing	29 vehicles	payment Big Bear Leasing
6	Outer Bank Leasing	14 vehicles	payment Northern Star
7	South Bank Leasing	14 vehicles	payment Northern Star
8	Holiday Leasing	19 vehicles	payment Big Bear Leasing
9	Pacific Rental Resort	10 vehicles	payment Big Bear Leasing
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14 42. Payment for most of the 232 units involved in the audit
15 primarily came from just three sources: Big Bear Leasing; Diamond
16 Conversions; and Northern Star. In addition to the above listed, Big
17 Bear Leasing paid for an additional 15 units. This is significant in
18 that GM considers the customer to be the person who is paying for the
19 unit, and if another party is involved in payment it indicates that the
20 unit could be resold:

21 43. In some instances, sales designated as fleet sales by the
22 Davidson dealership were sales to Centaur Leasing, a company with a FAN
23 owned by the dealer principal, Mr. Davidson.

24 44. In some cases, the buyers registered the vehicles in Oregon in
25 an attempt to have them qualify as eligible vehicles under the incentive
26 programs. The vehicles registered in Oregon were ultimately shipped and
27 resold overseas.

28 45. All of the sales of ineligible vehicles were handled by

1 Davidson's Fleet Manager who was employed at Davidson from October 1993
2 to June 1996. Most of the units were exported to Japan, although a few
3 of the units were exported to China.

4 46. The Fleet Manager of Davidson was aware of the fact that one
5 of the upfitters to whom it had between 50 and 75 transactions was
6 exporting the vehicles. The Fleet Manager was also aware of the fact
7 that several of its customers were likewise purchasing vehicles for
8 export.

9 47. With respect to the units ineligible for incentives and
10 allowances, Davidson has failed to show that the "safe harbor"
11 provisions apply to its ineligible transactions. Even if the Fleet
12 Manager was completely ignorant of the export sales, he was required to
13 make a reasonable investigation and to adequately protect Davidson from
14 sales to exporters.

15 48. The Fleet Manager developed a relationship with upfitters,
16 whereby the upfitter would obtain customers who wished to export
17 vehicles and would perform the van conversions. The upfitter would call
18 the Fleet Manager for a sales price and the sales transaction would then
19 be reported to GM as a sale by Davidson.

20 49. The initial sale to the upfitter's customer was done through a
21 written authorization from the Fleet Manager. Once a business
22 relationship was established, the Fleet Manager gave authorizations
23 orally, usually by telephone.

24 50. Over an 18 month period, Davidson sold approximately 180-200
25 vans. The Fleet Manager conducted these transactions without adequate
26 controls or supervision.

27 51. Most, if not all, of the upfitted van sales came to Davidson
28 by way of upfitters or third parties. Actual showroom sales were almost

1 non-existent.

2 52. Authorized van upfitters work with the Chevrolet Quality
3 Approved Converter Program ("CQACP"). The relationship between
4 Chevrolet and the approved upfitters in the CQACP program includes a
5 contractual relationship whereby Chevrolet provides vans with special
6 equipment and special pricing and the upfitters convert the vans.

7 53. The upfitted van market is extremely competitive and
8 purchasers of luxury conversions have high expectations. Luxury
9 conversions include such items as power windows and door locks, tilt
10 steering columns, cruise control and other similar equipment.

11 54. One particular upfitter with whom the Fleet Manager did
12 business with was Starflight Manufacturing which is owned by Michael
13 Buchanan. Starflight Manufacturing was an upfitter authorized by
14 Chevrolet and a participant in the CQACP program.

15 55. At the time of GM's August 1995 audit, 28 units of Starflight
16 Manufacturing were on Davidson's floor plan. The dollar amount claimed
17 by GM based on the original invoices for the units is \$505,613. Neither
18 GM nor Davidson received any payment for these units.

19 56. The 28 units were initially on Starflight Manufacturing's
20 floor plan. The units were subsequently transferred to Davidson's floor
21 plan. Davidson's Fleet Manager eventually called Chevrolet to have the
22 units removed from its floor plan and transferred back to Starflight's
23 floor plan. Chevrolet removed the amount from Starflight's floor plan
24 but was unable to place it again on Davidson's floor plan.

25 57. The owner of Starflight Manufacturing, Mr. Buchanan, stated
26 that he received the funds for the 28 units from his customers and
27 further stated that he used these funds to solve his own financial
28 problems rather than forwarding the funds to Davidson.

1 58. It appears that Mr. Buchanan would receive funds on the sale
2 of vehicles and use these funds to pay previous debts with the idea that
3 there would always be future sales to cover past debts. No one at
4 Davidson was aware of Mr. Buchanan's financial troubles, nor was anyone
5 aware of the fact that Mr. Buchanan was using customers' funds to solve
6 his financial problems.

7 59. Mr. Buchanan told General Motors Acceptance Corporation
8 ("GMAC"), the flooring company, that he had received funds for the 28
9 vehicles but had not forwarded these funds to Davidson. Michael
10 Buchanan also promised both GMAC and GM that he would pay for the 28
11 units.

12 60. Based on Mr. Buchanan's admission that he received funds for
13 the 28 units and his subsequent assurances of repayment, GM's remedy is
14 against Mr. Buchanan and not Davidson.

15 DETERMINATION OF ISSUES

16 61. Section 5.1.2 of the Dealer Agreement is not relevant to this
17 case. However, even if section 5.1.2 was relevant, this provision is
18 neither ambiguous nor inconsistent with GM's eligibility rules regarding
19 exported units.

20 62. Petitioner failed to prove that the Dealer Agreement between
21 Petitioner and Respondent is ambiguous regarding its export policy.

22 63. Petitioner failed to establish that this Board lacks
23 jurisdiction to consider the issue of 28 units from which Respondent
24 seeks recovery.

25 64. Respondent established the 232 units were ineligible under the
26 terms of the incentive programs and thereby established "good cause" for
27 Respondent's disapproval of Petitioner's claims.

28 65. Respondent established that Petitioner had improperly received

1 incentives, allowances, and special priced vehicle savings offered by
2 Respondent.

3 66. Respondent established that it is entitled to a chargeback in
4 the amount of \$348,836 to Petitioner.

5 67. Respondent failed to prove that it is entitled to receive from
6 Petitioner the amount of \$505,613 for the 28 units.

7 PROPOSED DECISION

8 Good cause having been shown for the incentive and allowance
9 disapprovals for 232 vehicles, the relief sought by the Petitioner is
10 denied. Respondent shall be allowed to recover the disallowed payments
11 in the amount of \$348,836 on and after the thirty-first day from the day
12 on which this Decision becomes effective.

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1 I hereby submit the foregoing which
2 constitutes my proposed decision in the
3 above-entitled matter, as a result of a
4 hearing held before me adoption of this
5 proposed decision as the decision of the
6 New Motor Vehicle Board.

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8 Dated: March 10, 1998

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11 *Marilyn Wong*

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MERILYN WONG
Administrative Law Judge