

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

STATE OF CALIFORNIA  
NEW MOTOR VEHICLE BOARD

In the Matter of the Protest of

SANTA MONICA GROUP, INC.,

Protestant,

v.

GENERAL MOTORS LLC,

Respondent.

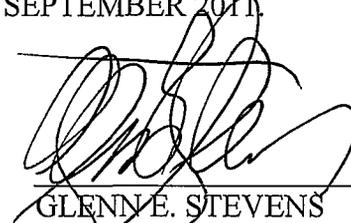
**Protest Nos. PR-2263-10 and  
PR-2264-10**

DECISION

At its regularly scheduled meeting of September 27, 2011, the Public Members of the Board met and considered the administrative record and "Proposed Decision Re: Cross Motions by Protestant and Respondent" in the above-entitled matter. After such consideration, the Board adopted the "Proposed Decision Re: Cross Motions by Protestant and Respondent" as its final Decision in this matter.

This Decision shall become effective forthwith.

IT IS SO ORDERED THIS 27<sup>th</sup> DAY OF SEPTEMBER 2011.



GLENN E. STEVENS  
Vice President  
New Motor Vehicle Board

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

**CERTIFIED MAIL**

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

11 In the Matter of the Protest of  
12 SANTA MONICA GROUP, INC.,  
13 Protestant,  
14 v.  
15 GENERAL MOTORS LLC,  
16 Respondent.

**Protest Nos. PR-2263-10 and PR-2264-10**

**PROPOSED DECISION RE: CROSS  
MOTIONS BY PROTESTANT AND  
RESPONDENT**

**[Vehicle Code section 3050.7(b)]**

17  
18 **PRELIMINARY STATEMENT**

19 1. This special proceeding, denominated "Cross Motions by Protestant and Respondent"  
20 culminates a complicated history of litigation between the parties arising out of the bankruptcy of General  
21 Motors Corporation in 2009.

22 2. By agreement of the parties and in the Board's discretion, jurisdiction to hear these cross  
23 motions has been assumed by the New Motor Vehicle Board (hereinafter, "Board").<sup>1</sup>

24  
25  
26 <sup>1</sup> The Board had previously made its Order pursuant to Vehicle Code section 3050.7(a) (adopting the parties' confidential  
27 settlement agreement) which resolved these protests, as more particularly described below in Paragraphs 3 and 4. No statute or  
28 regulation confers jurisdiction on the Board to decide later controversies between the parties arising from "stipulated decisions  
and orders" based upon section 3050.7(a) Board orders. Here, however, the Board explicitly retained jurisdiction over the  
protests to hear the evidence and arguments of the parties on the issue of compliance with the Board Order. Cf., *Mazda Motor  
of America, Inc. v. California New Motor Vehicle Board* (2003) 110 Cal.App.4th 1451; *Hardin Oldsmobile v. New Motor  
Vehicle Board* (1997) 52 Cal.App.4th 585.

1           3.       Vehicle Code section 3050.7(a)<sup>2</sup> provides, in pertinent part, that "[t]he board may adopt  
2 stipulated decisions and orders, without a hearing pursuant to Section 3066, to resolve one or more  
3 issues raised by a protest or petition filed with the board.

4           4.       On September 15, 2010, pursuant to section 3050.7(a), the Board, at the request of the  
5 parties, issued its "Order Adopting [Proposed] Confidential Stipulated Decision and Order of the Board  
6 Resolving Protests" (hereinafter referred to as "Board Order") in Santa Monica Group, Inc. v. General  
7 Motors, LLC (Protest Nos. PR-2203-10, PR-2262-10, PR-2263-10 and PR-2264-10). The Board Order  
8 contemplated a complete resolution of all issues in the four protests.<sup>3</sup> At the time, the settlement  
9 agreement negotiated by the parties which was the subject of the Board Order was confidential.

10          5.       Subsequently, a dispute arose between the parties concerning compliance with the terms  
11 of the parties' confidential settlement agreement which became the Board Order concluding the  
12 protests.<sup>4</sup>

13          6.       Section 3050.7(b) provides, in part, that "[i]f the stipulated decision and order provides  
14 for the termination of the franchise, conditioned upon the failure of a party to comply with specified  
15 conditions, the franchise may be terminated upon a determination, according to the terms of the  
16 stipulated decision and order, that the conditions have not been met" and that "[i]f the stipulated  
17 decision and order provides for the termination of the franchise conditioned upon the occurrence of  
18

19  
20 <sup>2</sup> Hereinafter, all section references are to the California Vehicle Code unless otherwise indicated.

21 <sup>3</sup> The settlement agreement had been executed by the parties in June 2010 to settle the federal arbitration case and "the Buick  
22 [establishment] Protest" (Protest No. PR-2203-10, filed on February 3, 2010). Three of the four protests had not been filed at  
23 the time the settlement agreement was signed: Protest Nos. PR-2262-10 (Chevrolet establishment), PR-2263-10 (Buick  
24 termination) and PR-2264-10 (Chevrolet termination)] were filed later, on August 12, 2010. The parties orally agreed to the  
25 consolidation of the four protests on August 26, 2010, and on September 1, 2010, the Board ordered the cases consolidated  
26 for purposes of hearing.

27 <sup>4</sup> In letters dated October 18, 2010, GM advised SMG that since SMG had violated the Board Order by permitting Infiniti  
28 operations at the dealership premises which were the subject of the settlement agreement, SMG's Buick and Chevrolet  
franchises would be terminated, as provided in the settlement agreement (Board Order). Not only did GM's letters not include  
the statutory warning in section 3060(a)(1)(C) that the dealer had a right to protest the terminations, there is no evidence that  
GM intended, by these letters, to trigger protest rights. The letters appear to have been written to tell SMG that GM considered  
the Board Order to have been breached, the consequences thereof, and the expected date of the "voluntary termination"  
(October 31, 2010).

Nonetheless, on October 29, 2010, SMG filed two Board protests (Santa Monica Group, Inc. v. General Motors, LLC,  
Protest Nos. PR-2276-10 and PR-2277-10), alleging that GM was improperly terminating its Buick and Chevrolet franchises.  
On February 4, 2011, the Board adopted ALJ Skrocki's Proposed Order granting GM's Motion to Dismiss Protests; this Board  
Decision relied on the terms of the Board Order precluding SMG from filing protests challenging the Board Order. References  
herein to this Board Decision shall be designated as "Board Decision Feb 4".

1 specified conditions, the franchise may be terminated upon a determination, according to the terms of  
2 the stipulated decision and order, that the stipulated conditions have occurred.”<sup>5</sup>

3 7. Pursuant to section 3050.7(b), the parties filed motions with the Board, as follows:

4 A. On November 19, 2010, General Motors, LLC (hereinafter “GM” or “General Motors”)  
5 filed a Motion to Enforce Confidential Stipulated Decision of the Board;<sup>6</sup> and

6 B. In a letter<sup>7</sup> to the Board dated January 7, 2011, Santa Monica Group, Inc. (hereinafter  
7 “Santa Monica Group” or “SMG”) raised an issue of compliance with the terms of the Board Order and  
8 requested an evidentiary hearing on the matter.

9 C. Both GM’s motion and SMG’s letter addressed only the portions of the Board Order  
10 settling the two protests filed under section 3060 (termination). Protest No. PR-2263-10 concerned the  
11 termination of SMG’s Buick franchise and Protest No. PR-2264-10 concerned the termination of SMG’s  
12 Chevrolet franchise.

13 D. The Board, in its discretion, appointed an administrative law judge to hear the evidence  
14 and arguments of the parties in regard to their dispute concerning compliance with the terms of the Board  
15 Order.

16 8. On January 13, 2011, a telephonic conference was held before Administrative Law Judge  
17 Diana Woodward Hagle. Pursuant to the parties’ stipulations, the Board’s prior order consolidating the  
18 four protests was vacated and an Order of Consolidation of Protest Nos. PR-2263-10 and PR-2264-10 was  
19 made, clarifying that the parties’ cross motions related only to the provisions of the Board Order  
20 concerning termination of the two franchises.

21 9. For purposes of this hearing only, the parties stipulated to disclose some---but not all---of  
22 the terms of their confidential settlement agreement which became the Board Order. There are two  
23 stipulations in evidence (both entitled "Stipulation Re Confidential Settlement Agreement"), each  
24 disclosing parts of the confidential settlement agreement: the first, Exhibit P-17, was introduced at the

25  
26 <sup>5</sup> SMG makes an argument based upon the first sentence of section 3050.7(b), which is quoted and discussed below in paragraphs 73 to 77.

27 <sup>6</sup> Although there is nothing in Board statutes or regulations, or in the California Administrative Procedure Act, authorizing such a motion, it is proper as it gives adequate notice to the opposing party and the resulting hearing accords due process rights. See Automotive Management Group v. New Motor Vehicle Board (1993) 20 Cal.App.4th 1002, 1012.

28 <sup>7</sup> SMG’s letter to the Board was deemed to be a “motion” for purposes of the hearing.

1 beginning of the hearing, and the second, Exhibit R-48, was submitted after the hearing and contained  
2 additional clauses from the settlement agreement.<sup>8</sup>

3 10. An evidentiary hearing on the cross-motions was heard before Administrative Law Judge  
4 Diana Woodward Hagle on March 14 and 15, 2011, in Sacramento, California, and telephonically on  
5 April 7, 2011.

6 **PARTIES AND COUNSEL**

7 11. Santa Monica Group is a Buick and Chevrolet dealership located at 3223 Santa Monica  
8 Boulevard in Santa Monica, California. It is a corporation owned by Kayvan Naimi, Farinaz Naimi,  
9 Kamran Naimi and Nilofar Naimi. SMG is a “franchisee” within the meaning of sections 331.1 and  
10 3062(a)(1).

11 12. SMG is represented by Callahan Thompson Sherman & Caudill, LLP, by Michael M.  
12 Sieving, Esquire, 1545 River Park Drive, Suite 405, Sacramento, California 95815.

13 13. General Motors LLC is a “franchisor” within the meaning of sections 331.2 and  
14 3062(a)(1).

15 14. GM is represented by Isaacs, Clouse, Crose & Oxford, LLP, by Gregory R. Oxford,  
16 Esquire, 21515 Hawthorne Boulevard, Suite 950, Torrance, California 90503.

17 **CONTENTION OF GENERAL MOTORS**

18 15. General Motors argues that Santa Monica Group violated the Board Order (the parties’  
19 confidential settlement agreement) by establishing an Infiniti franchise at the same location as that of the  
20 existing Buick and Chevrolet dealership facility.

21 **CONTENTIONS OF SANTA MONICA GROUP**

22 16. Santa Monica Group acknowledges that there has been an Infiniti franchise established,  
23 but argues that its establishment does not violate the Board Order because it is not located within the  
24 existing dealership premises contemplated by the confidential settlement agreement; it is owned by an  
25 entity (“Santa Monica Auto Group”) different from Santa Monica Group, Inc.; and Infiniti is not a  
26

27 <sup>8</sup> There are several discrepancies in language between Exhibits P-17 and R-48. In a telephonic conference with the parties’  
28 counsel on July 29, 2011, both counsel agreed that the discrepancies were minor, immaterial to the resolution of the case, and  
arose from inadvertence.

1 “competitive” line-make to either Buick or Chevrolet. Moreover, SMG argues, any possible violation  
2 must be excused because General Motors failed to give SMG access to vehicles, or to a “fair and  
3 reasonable” allocation of vehicles.

4 **ISSUE PRESENTED**

5 17. The issue presented is whether there has been compliance with specified conditions of the  
6 Board Order concluding the prior protests. Specifically, did Santa Monica Group use its existing Buick  
7 and Chevrolet facility for variable operations (sales of new and used vehicles) for a competitive line-  
8 make and thereby violate Paragraph 2.6 of the confidential settlement agreement<sup>9</sup> between the dealership  
9 and General Motors?

10 18. If the answer to the above issue is in the affirmative, SMG has raised a second issue: if  
11 GM failed or refused to allow SMG to receive vehicles, or a reasonable allocation of vehicles, was the  
12 conduct of Santa Monica Group thereby excused?

13 **SUMMARY OF WITNESSES’ TESTIMONY AT HEARING**<sup>10</sup>

14 **Testimony of General Motors’ Witness**

15 19. Dale Sullivan, GM’s Regional Director for Business Operations for the Western Region,  
16 testified about the bankruptcy of General Motors; the effects of the bankruptcy on “wind-down” dealers;  
17 negotiations leading up to the signing of the confidential settlement agreement; litigation between SMG  
18 and GM; SMG’s dealership facility before and after the establishment of the Infiniti franchise; and GM’s  
19 method for allocating vehicles to its dealers. [RT I pp. 18-146; RT II pp. 69-107]<sup>11</sup>

20 **Santa Monica Group’s Witnesses’ Testimony**

21 20. Kayvan Naimi, the President of Santa Monica Group, Inc., testified about the history of  
22 the dealership; the settlement negotiations; and the allocation of GM vehicles to the dealership. [RT II  
23 pp. 6-68]

24 21. Farinaz Naimi, the wife of Kayvan Naimi, testified about the history and ownership of  
25 Santa Monica Group, Inc., and its finances (which she manages); the acquisition of the land and the

26 \_\_\_\_\_  
27 <sup>9</sup> Paragraph 2.6 of the confidential settlement agreement is set forth below in Paragraph 50.

28 <sup>10</sup> This Summary does not refer to all exhibits in the record, nor does it include all matters testified to by the witnesses.

<sup>11</sup> References to “RT I” are to the transcript of the proceedings on March 14, 2011, and references to “RT II” are to the transcript of the March 15, 2011 proceedings.

1 building of the facility; the effect of the GM bankruptcy and the dealership's "wind-down" status; the  
2 negotiations resulting in the signing of the confidential settlement agreement; the formation of the entity  
3 "Santa Monica Auto Group"; and the establishment of the Infiniti franchise. [RT I pp. 146-229]

4 **FINDINGS OF FACT**<sup>12</sup>

5 **History and Description of the Dealership**

6 Santa Monica Group, Inc.

7 22. Santa Monica Group was incorporated in California in February 1995 as a franchisee of  
8 General Motors. At all times, the corporate officers have been the following: Kayvan Naimi, president;  
9 Farinaz Naimi (wife of Kayvan), secretary; Kamran Naimi (brother of Kayvan), member of board of  
10 directors; and Nilofar Naimi (wife of Kamran), corporate officer. [Exhs. P-1, P-2]<sup>13</sup> The four  
11 individuals are the owners of the corporation. [RT I p. 149]

12 23. SMG is presently a franchisee for the Buick and Chevrolet line-makes. The dealership is  
13 located at 3223 Santa Monica Boulevard. [Exh. P-2; RT I pp. 148-149, 188, 189]

14 24. In June 2009, "old" General Motors declared bankruptcy and, as part of the proceedings,  
15 determined that the Buick and Chevrolet franchises of Santa Monica Group would be terminated under  
16 what were called "wind-down" agreements. Subsequently, federal legislation permitted "wind-down"  
17 dealers such as SMG the right to seek reinstatement as franchisees through arbitration, and SMG did so.  
18 [RT I pp. 29-30, 175; RT II pp. 100-102] During the arbitration hearing in June 2010, SMG and GM  
19 entered into the confidential settlement agreement which (with minor modifications presumably not  
20 relevant here) later became the Board Order on September 15, 2010. [Exhs. P-17, R-48; RT I pp. 30,  
21 64-67, 79]

22 ///

23 \_\_\_\_\_  
24 <sup>12</sup> References herein to testimony, exhibits or other parts of the record are examples of evidence relied upon to reach a finding  
25 and are not intended to be all-inclusive.

26 <sup>13</sup> Since most exhibits were marked for identification by the parties prior to the hearing, they were not offered or introduced in  
27 numerical order; also, some pre-marked items may not have been used in the hearing at all, so there may be numerical gaps in  
28 the Exhibit List. Some single exhibit numbers may contain many different, but related, documents. Protestant's exhibit  
numbers are preceded by "P"; respondent's exhibit numbers are preceded by "R". Photographic exhibits are numbered  
separately from documents and the numbers are also prefaced by "P" or "R". Exhibits attached to GM's Motion filed on  
November 19, 2010 are preceded by "Motion Exh.". Exhibits attached to GM's Supplemental Declaration of Ruby Henderson  
filed on March 2, 2011 are preceded by "Henderson Exh.".

1           3223 Santa Monica Boulevard ("Existing Dealership Premises")

2           25.     In 1995 or 1996, Santa Monica Group completed construction of a General Motors  
3 dealership building at 3223 Santa Monica Boulevard. At the time, SMG had four GM franchises:  
4 Buick, Chevrolet, Oldsmobile and Aurora (a luxury line). [RT I pp. 25, 181-183, 188; RT II  
5 pp. 8-9] The dealership location was designated "100 per cent" for GM use. [RT I p. 26]

6           26.     The 3223 Santa Monica Boulevard dealership is a three-story architecturally-designed  
7 building constructed on five contiguous lots along Santa Monica Boulevard. [Exhs. R-5, R-34, R-47 &  
8 P-9; RT I pp. 21-22, 24, 26, 31-33, 96, 102, 107, 166, 181-191, 205; RT II pp. 8-9]

9           27.     The five lots on which the dealership building sits are owned by the two Naimi brothers  
10 and their wives. The lots are identified as follows, with the addresses assigned to each lot when  
11 acquired and before the construction of the dealership building:

12           A.     Lot 10, the "corner lot" (the largest lot) carried the address "3223 Santa Monica  
13 Boulevard". [RT I pp. 187, 198]

14           B.     Lots 5 and 6, which were tied together, were acquired in mid-1995 and carried no known  
15 street addresses. [RT I pp. 186-187]

16           C.     Lot 4 carried "3219 Santa Monica Boulevard" as an address. [RT I p. 186]

17           D.     Lot 3 had been acquired in 1991 and, when purchased, carried the address "3211 Santa  
18 Monica Boulevard". [Exh. R-47; RT I pp. 152,185]

19           28.     The main front door of the dealership building, where prospective customers enter, opens  
20 to the second floor (hereinafter, "main showroom" or "floor 2"), which contains a showroom with high  
21 ceilings and a waiting area; on the same level, but in the back and separate from the showroom/waiting  
22 room area, is the service area. [Photo Exh. R-49] Stairs lead down to the first floor (hereinafter, "lower  
23 level showroom" or "floor 1"), which contains a showroom and a storage area and has a lower ceiling.  
24 [Photo Exh. P-18] The third floor is devoted to office space and is smaller in square footage than the  
25 other two floors, as it has a balcony overlooking the main showroom. [Photo Exh. P-20] A decorative  
26 waterfall located near the main front door is intended to visually tie the three floors together, the water  
27 falling from the third floor into a shallow pool on the first floor. [Photo Exhs. P-19, P-20; RT I pp. 156-  
28 157, 159; RT II pp. 9, 12-14, 16, 18-19, 63-65, 67-68]

1           29.     The dealership building, when built and continuing at least through June 2010, was  
2 known as “3223 Santa Monica Boulevard”. [RT I pp. 188, 190-191] There were no fewer than four  
3 “3223” addresses on the building---and one was chiseled into the stone façade of the building.  
4 [Photo Exhs. R-39, R-40, R-41, R-53; Henderson Exhs. 39, 40; Exh. R-47; RT I p. 33, 36-39]

5           30.     Although the main showroom and waiting area on floor 2 is smaller in square footage  
6 than the lower level showroom and storage area on floor 1, it is a more desirable showcase for vehicles  
7 because it is the floor onto which the main front door opens to display vehicles and has a higher ceiling  
8 than floor 1. Additionally, the main showroom has an impressively large expanse of glass windows.  
9 Customers must walk down a flight of stairs to reach floor 1, where the lower level showroom shares  
10 space with a vehicle storage area. [Photo Exhs. P-11, P-12; Exhs. R-49, R-54; RT I pp. 103-104, 109-  
11 110; 216-217; RT II pp. 66-67, 90-91]

12           3205 Santa Monica Boulevard (“Separate Premises”)

13           31.     In about 1997 (after the GM dealership building had been constructed), SMG bought a  
14 lot---unimproved with the exception of a small structure at the back of the property---adjacent to the five  
15 contiguous lots described above. In June 2010, this lot carried the address “3205 Santa Monica  
16 Boulevard”. The parties referred to this lot as an “expansion lot” because GM and SMG had discussed  
17 “expanding” the GM dealership to include that lot, although those plans never came to fruition. [Exhs.  
18 P-9, R-41, R-47; Photo Exh. P-10; Motion Exhs. 6, 10; RT I pp. 44, 92-93, 98-99, 107-108, 182]

19           32.     In June 2010, SMG used this lot for vehicle storage and for vehicle access to its service  
20 department at the back of the dealership building, and displayed the address “3205” on free-standing  
21 signage next to the building and visible from Santa Monica Boulevard. [Exh. R-41; Henderson Exhs.  
22 41, 47, 48; RT I p. 166]

23           33.     Paragraph 2.6 of the confidential settlement agreement allowed SMG to submit a  
24 proposal to GM for “variable operations for a competitive line-make” on the 3205 lot. [Exhs. P-17, R-  
25 48; RT I p. 44-45] Thereafter, the parties executed a Letter of Intent on September 9, 2010, relative to  
26 that agreement:

27           “Additional Obligations. Within five (5) days of Dealer Company’s execution of the  
28 Wind-Down Amendment, Dealer Company shall submit a full and complete proposal to  
GM to modify the use of the property located at 3205 Santa Monica Boulevard, in

1 accordance with the terms set forth in Section 2.6 of the Settlement and Deferred  
2 Termination Agreement [the confidential settlement agreement].” [Exh. R-28: ¶9; RT I  
pp. 46, 47-48]

3 34. SMG never submitted to GM a proposal to develop the 3205 lot for another franchise, nor  
4 did SMG ever use the 3205 lot for another franchise. [RT I pp. 45, 52, 94-95, 96, 123]

5 Establishment of the Infiniti Franchise

6 35. SMG had been negotiating with Infiniti to acquire a franchise since at least June 30,  
7 2009. In a letter dated July 31, 2009, addressed to Kayvan Naimi at 3223 Santa Monica Boulevard,  
8 Infiniti informed Mr. Naimi that the Infiniti dealership had been awarded to “another candidate”.  
9 However, negotiations were resurrected on or about March 1, 2010.<sup>14</sup> [Exh. P-6; RT I pp. 160, 172,  
10 228]

11 36. Santa Monica Auto Group (hereinafter, “SMAG”) was incorporated on August 18, 2010.  
12 SMAG’s address on its Articles of Incorporation and Statement of Information filed with the Secretary  
13 of State is stated to be 3219 Santa Monica Boulevard. The corporate officers are Kayvan Naimi  
14 (President), Kamran Naimi (Vice-President), Farinaz Shayan Naimi (Secretary), and Nilofar Naimi  
15 (Treasurer). It is owned by two family trusts: the Kayvan and Farinaz Naimi Trust and the Kamran and  
16 Nilofar Naimi Trust. [Exhs. P-3, P-4; RT I p. 226] The ownership of SMG and SMAG is “almost  
17 identical”. [RT I pp. 200-201] SMAG was created to acquire and operate the Infiniti franchise. [RT I  
18 pp. 151, 153-154]

19 37. In a letter dated September 1, 2010, Infiniti Financial Services wrote SMAG at 3219  
20 Santa Monica Boulevard of its “conditional approval of ... lines of credit”. [Exh. P-6]

21 38. On September 23, 2010, Infiniti signed a dealer agreement with “Santa Monica Auto  
22 Group dba Santa Monica Infiniti” which included the following clauses:

23 **A. Exclusivity**

24 ...

- 25 a) The only line-make of new...motor vehicles which Dealer shall display,  
26 sell, advertise or promote at or from the Dealership Facilities shall be the

27 <sup>14</sup> Although Farinaz Naimi testified that SMG’s negotiations with Infiniti were reinstated “about June or July of 2010”, SMG’s  
28 Infiniti franchise application was signed by Kayvan Naimi on March 29, 2010 and contained financial statements as of March  
1, 2010. [Exh. P-6; RT I p. 228]

1 Infiniti line and make of motor vehicles. Dealer agrees not to conduct any  
2 dealership operations for any other make or line of new, unused vehicles  
3 from the Dealership Facilities. Dealer agrees to market, promote, and sell  
4 all Infiniti Products from the Dealership Facilities.

5 ...

6 c) Dealer shall not install or maintain any signage at the Dealership Facilities  
7 which would detract or conflict with the IREDI program or Infiniti Brand  
8 image or might lead any consumer into believing that any line or make of  
9 vehicles other than the Infiniti line is sold at the Dealership Facilities.<sup>15</sup>  
10 [Exh. P-5:¶A; RT I pp. 162-163, 173-174]

11 39. On October 1, 2010, the Department of Motor Vehicles, Occupational Licensing Section,  
12 issued to "Santa Monica Infiniti" at 3219 Santa Monica Boulevard a temporary dealer permit to sell new  
13 and used vehicles. [Exh. P-5; RT I pp. 173-174]

14 40. SMAG owns "Santa Monica Infiniti". The address of SMAG is 3219 Santa Monica  
15 Boulevard. [RT I, pp. 150, 151, 162-163]

16 41. Since the ownership of SMG and SMAG is "almost identical", any action or omission of  
17 SMAG is that of SMG or its owners (for the purposes of this proceeding only). Any argument by SMG  
18 to the contrary is expressly rejected. [RT I p. 201]

19 42. SMG never notified GM that it intended to add Infiniti to the dealership location. [RT I  
20 p. 29]

21 43. After the Infiniti franchise was established, SMG used the main showroom on floor 2 of  
22 the dealership building for the display of Infiniti vehicles and assigned to that floor the address "3219  
23 Santa Monica Boulevard". SMG used floor 1, the lower level showroom in the dealership building, for  
24 displaying Buick and Chevrolet vehicles and assigned to that floor the address "3223 Santa Monica  
25 Boulevard". [RT I pp. 152, 153, 156, 209]

26 44. After the Infiniti franchise was established, SMG moved Buick and Chevrolet vehicles  
27 which had been displayed in the main showroom on floor 2 downstairs to the lower level showroom on  
28 floor 1 [Photo Exhs. P-11, P-12; RT I pp. 192, 217; RT II p. 50]

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<sup>15</sup> GM requested in discovery the Infiniti facilities addendum, which GM asserts would have identified with particularity the "Dealership Facilities", thereby presumably giving GM information to determine whether the GM facilities agreement with SMG overlapped the Infiniti facilities agreement with SMAG. The document was not produced; Farinaz Naimi testified she copied everything in the file for GM. [RT I pp. 203-204, 206-207]

1 45. In June 2010, when the confidential settlement agreement was signed, no part of the  
2 existing dealership building was known as “3219 Santa Monica Boulevard” or carried the address “3219  
3 Santa Monica Boulevard” on the exterior of the building. [RT I pp. 54, 188]

4 46. After the Infiniti franchise was established, SMG installed, or permitted SMAG to install,  
5 the address “3219 Santa Monica Boulevard” on the dealership building above the main front door. [RT  
6 II p. 50] The “3219” address had not previously appeared on the dealership building. [RT I pp. 53-54,  
7 211]

8 47. SMG removed some Buick and Chevrolet signs from the dealership building after the  
9 Infiniti franchise was established. The distinctive Chevrolet “bow-tie” insignia over the main front door  
10 which led into the main showroom was partially obscured by an Infiniti “Grand Opening” banner.  
11 Later, the Chevrolet insignia was replaced by a “Santa Monica Infiniti” sign and Infiniti logo. [Motion  
12 Exhs. 1, 5, 7, 8, 11, 12, 16, 19-23, 28, 29, 30, 32, 33, 35, 36; Henderson Exhs. 44, 46, 49, 50; Exh. R-49;  
13 RT I pp. 213, 215; RT II p. 51]

14 **The Confidential Settlement Agreement**

15 48. The parties to the confidential settlement agreement as of June 9, 2010, were the  
16 following: Santa Monica Group, Inc., and its Owners Kayvan Naimi, Farinaz Naimi, Kamran Naimi  
17 and Nilofar Naimi, on the one hand, and General Motors LLC, on the other hand. [Exhs. P-17, R-48;  
18 RT I p. 176; RT II p. 32]

19 49. The settlement agreement encompassed two pending actions between the parties: the  
20 arbitration arising out of the bankruptcy of General Motors and subsequent federal legislation, and “the  
21 Buick establishment Protest” (PR-2203-10) which had been previously filed before the Board.<sup>16</sup> [Exhs.  
22 P-17, R-48]

23 50. Paragraph 2.6 of the settlement agreement stated the following:

24 Notwithstanding [contrary provisions contained in] paragraphs 1, 2, 3 and 4 of the  
25 Letter of Intent, GM agrees to approve a proposal by SMG to permit variable operations  
26 for a competitive line-make at 3205 Santa Monica Boulevard (“Separate Premises”) and  
fixed operations for a competitive line-make at 3223 Santa Monica Boulevard (“Existing  
Dealership Premises”). However, SMG and Owners agree not to use any portion of the

27  
28 <sup>16</sup> As noted above in footnote 3, the agreement prospectively covered three additional protests, subsequently filed on August 12, 2010, two of which are the instant protests.

1 Existing Dealership Premises for variable operations for the competitive line-make prior  
2 to or during the period in which the Dealer Agreement remains in effect.... If SMG or  
3 Owners permit any competitive line-make variable operations at the Existing Dealership  
4 Premises prior to the time the Dealer Agreement terminates, SMG shall be deemed  
5 without more to have voluntarily and immediately terminated its Dealer Agreements by  
6 written agreement pursuant to Article 14.2 and shall be eligible to receive termination  
7 assistance pursuant to Article 15 except Article 15.3. It is the intent of the Parties that the  
8 res judicata effect of the Confidential Stipulated Decision of the Board provided for  
9 below shall preclude the filing of any such protest or other legal challenge to the  
10 termination. SMG and Owners further agree not to protest said voluntary termination  
11 pursuant to section 3060 of the Vehicle Code or to challenge said termination in any  
12 judicial or administrative forum and hereby agree that they will have no legal right to do  
13 so.” [Exhs. P-17, R-48]

8 51. In Paragraph 2.6, the phrase “3223 Santa Monica Boulevard (‘Existing Dealership  
9 Premises’)” means SMG’s dealership building, described above in paragraphs 25 through 30.  
10 [Exhs. R-34, R-47; RT I pp. 43, 94, 97, 116, 190-191] It encompasses the entire dealership building,  
11 including “...the main floor showroom which now houses Infiniti...” which was formerly “...used for  
12 GM showroom purposes...” [RT pp. 190-192]

13 52. In Paragraph 2.6, the phrase “3205 Santa Monica Boulevard (‘Separate Premises’)”  
14 means the partially-improved lot (with the small structure at the back and the service entrance) adjacent  
15 to SMG’s dealership building which the parties called the “expansion lot”. [Exh. R-5; RT I pp. 44, 45]

16 53. In Paragraph 2.6, the phrase “variable operations” means “sales of new and used  
17 vehicles”. [RT I p. 116, 131-132]

18 54. In Paragraph 2.6, the phrase “fixed operations” means “service and parts”. [RT I pp.  
19 131-132]

20 55. In Paragraph 2.6, the phrase “competitive line-make” means vehicle line-makes other  
21 than those manufactured by General Motors (i.e., any line-make other than Buick, Chevrolet, Cadillac  
22 and GMC trucks). [RT I pp. 128, 129] SMG’s argument that the phrase, as used in the settlement  
23 agreement, refers only to those line-makes or models in more direct competition with Buick and  
24 Chevrolet for the same demographic customers as identified by a technical market segmentation  
25 analysis, is expressly rejected.

26 56. The same four individuals (the two Naimi families) are the sole owners of both SMG and  
27 SMAG, although SMG is a closely-held corporation and SMAG is a corporation owned by two family  
28 trusts. [RT I pp. 149, 200-201, 226] As identical individuals have ownership interests in both

1 companies, the terms of Paragraph 2.6 bind not only SMG, but also SMAG. SMG's argument to the  
2 contrary is expressly rejected.

3 57. Moreover, portions of Paragraph 2.6 expressly apply to the four individuals, as follows:

4 ...SMG and Owners [previously identified as Kayvan Naimi, Farinaz Naimi, Kamran  
5 Naimi, and Nilofar Naimi] agree not to use any portion of the Existing Dealership  
6 Premises for variable operations for the competitive line-make... [and] [i]f SMG or  
7 Owners permit any competitive line-make variable operations at the Existing Dealership  
8 Premises..., SMG shall be deemed without more to have voluntarily and immediately  
9 terminated its Dealer Agreements... (Emphasis added.) [Exhs. P-17, R-48]

10 58. GM advised SMG during negotiations leading to the signing of the settlement agreement  
11 that GM would not agree to permit "dualing" in the dealership building. [RT I p. 31]

12 59. During negotiations leading up to the signing of the settlement agreement, SMG asked  
13 for the Cadillac franchise and was told "no" by GM. Other than that, no specific line-makes were  
14 discussed or identified by the parties relative to Paragraph 2.6. [RT I pp. 129-131] Specifically, the  
15 line-make "Infiniti" was not discussed as a possible additional franchise, even though SMG's owners  
16 had been in contact with Infiniti to establish an Infiniti franchise before the settlement agreement was  
17 signed. [RT I p. 130, 172]

18 60. There was no discussion during negotiations leading up to the signing of the settlement  
19 agreement in regard to the "two-level showroom" configuration of the dealership building. [RT II pp.  
20 109-110]

21 61. GM's intent in agreeing to Paragraph 2.6 was to maintain the dealership building at 3223  
22 Santa Monica Boulevard exclusively for the sales of GM brand vehicles. No portion of the dealership  
23 was to be used for "variable operations" (sales) of another line-make. [RT I p. 53]

24 62. When SMG began (or permitted SMAG to begin) using the dealership building at 3223  
25 Santa Monica Boulevard for the sale of Infiniti vehicles ("variable operations"), it violated Paragraph  
26 2.6 of the Board Order and voluntarily terminated its Buick and Chevrolet dealership franchises.  
27 [RT I p. 57] SMG's argument that it has not violated the Board Order because it designated the lower  
28 level showroom within the dealership building as "3223 Santa Monica Boulevard" for display of  
General Motors vehicles for sale is expressly rejected. [RT I p. 169]

63. When SMG displaced the Buick and Chevrolet vehicles displayed in the main showroom

1 of the dealership building at 3223 Santa Monica Boulevard and replaced them with Infiniti vehicles, it  
2 violated Paragraph 2.6 of the Board Order and voluntarily terminated its Buick and Chevrolet dealership  
3 franchises. [RT I p. 192; RT II p. 50] At the time of the hearing, new Buick and Chevrolet vehicles  
4 were being displayed in the lower level showroom of the dealership building and on the partially-  
5 improved lot (3205 Santa Monica Boulevard) adjacent to the dealership building while new Infiniti  
6 vehicles were being displayed in the main showroom of the dealership building and on a paved lot  
7 directly in front of the dealership building. [Photo Exhs. R-54, R-55, P-11, P-12; RT I pp. 166, 198,  
8 217]

9 64. SMG never submitted a proposal to GM for “fixed operations” (service and parts) at 3223  
10 Santa Monica Boulevard. [RT I p. 123]

11 65. In Paragraph 2.5 of the settlement agreement, GM agreed to release its rights to “site  
12 control” of the “dealership property”, including terminating a lease and sublease by which SMG’s lease  
13 payments were made to a GM subsidiary, which in turn paid SMG’s individual owners. [RT I pp. 119-  
14 121] Neither the language of Paragraph 2.5 nor the descriptions of the negotiations preceding the  
15 signing of the settlement agreement support SMG’s argument that GM’s release of “site control”  
16 allowed SMG to establish the Infiniti franchise in the dealership building without violating the (more  
17 specific) terms of Paragraph 2.6; SMG’s argument in this respect is expressly rejected. [RT I p. 210; RT  
18 II pp. 45]

19 **Allegation that General Motors Failed to Supply Vehicles or a Reasonable Allocation of Vehicles**

20 66. SMG contends that GM’s failure to reinstate its dealership status in a timely fashion after  
21 the confidential settlement agreement was executed hampered SMG’s ability to order vehicles and later,  
22 that GM failed to allocate to SMG a reasonable number of vehicles and models (particularly the  
23 Chevrolet Volt). These actions of GM, SMG argues, excuse any violation of Paragraph 2.6 by SMG  
24 which may have occurred by it becoming an Infiniti franchisee.

25 67. SMG’s argument is expressly rejected. SMG’s violation of Paragraph 2.6---using the  
26 dealership building for an Infiniti franchise---preceded in time any real or perceived difficulty SMG had  
27 with ordering, delivery or allocation of GM vehicles. This being so, there is no need here to reach the  
28 issue of whether GM failed to allow SMG to order vehicles, or to offer a reasonable number of vehicles

1 or models to SMG. The timeline, as it relates to the ordering of vehicles by SMG, is the following:

2 A. Since June 2009, SMG could not order new Buick and Chevrolet vehicles directly from  
3 GM; its status as a “wind-down” dealer meant that its GM franchises would end on October 31, 2010.  
4 “Wind-down” dealers such as SMG had two options to acquire new GM vehicles: they could purchase  
5 new vehicles from other dealers, and they could order a vehicle if it was already sold to a customer. [RT  
6 I pp. 174-176; RT II pp. 37, 102-103]

7 B. The SMG-GM federal arbitration hearing commenced in early June 2010. The  
8 legislation giving GM’s “wind-down” dealers the right to arbitration required all arbitrations and  
9 settlements to be completed by July 15, 2010. [RT I pp. 65, 71]

10 C. The parties’ “Settlement and Deferred Termination Agreement”<sup>17</sup> was signed during the  
11 arbitration, with an effective date of June 9, 2010. Shortly thereafter, the owners of SMG wished to  
12 abandon the settlement agreement and to return to arbitration.<sup>18</sup> GM filed a federal lawsuit to compel  
13 SMG to proceed with the agreement which, among other things, required SMG to dismiss the arbitration  
14 and file three protests with the Board (SMG had done none of these things). GM prevailed in the lawsuit  
15 and in SMG’s appeal to the Ninth Circuit, the latter decision filed on July 13, 2010. [Exhs. R-26, R-27;  
16 RT I pp. 62-72, 172]

17 D. On August 12, 2010, SMG filed the three protests which it had agreed to file in the  
18 settlement agreement: PR-2262-10, protesting the establishment of an additional Chevrolet dealer in  
19 Culver City; PR-2263-10, protesting the termination of SMG’s Buick franchise; and PR-2264-10,  
20 protesting the termination of SMG’s Chevrolet franchise. The parties agreed to consolidate the four  
21 protests and submitted the confidential settlement agreement to the Board. The Board, on September 15,  
22 2010, issued its Order, which “...meant that the terms of the Settlement Agreement became a ‘Decision’  
23 and ‘Order of the Board’, with the effect being ... that it was ‘Resolving [the] Protests’, which at that time  
24 were the two ‘establishment protests’ and the two ‘termination protests’...”. [Board Decision Feb 4, p. 4,  
25 ¶¶ 11, 12.

26  
27 <sup>17</sup> This “Settlement and Deferred Termination Agreement” is, with presumably minor modifications, the confidential settlement  
agreement adopted by the Board.

28 <sup>18</sup> No evidence was presented as to why SMG wished to withdraw from the agreement and return to arbitration. It therefore  
cannot be assumed that Paragraph 2.6 played any role in SMG’s action in this regard.

1 E. The Board Order required the parties to execute a Letter of Intent before the status of SMG  
2 could be restored. The Letter of Intent was executed by SMG's owners on September 9, 2010, and  
3 received by GM on September 17, 2010. Following receipt of the signed Letter of Intent and SMG's  
4 compliance with the various terms contained in the Letter of Intent, GM had 15 days to "execute and  
5 deliver to [SMG]..." a document which would "...allow [SMG] to resume normal dealership  
6 operations..." [Exh. R-28]

7 F. On October 1, 2010, GM "activated" SMG's dealership, thereby reinstating the vehicle  
8 "ordering" status of SMG, excluding the Volt, although SMG reported difficulty placing orders on the  
9 computer for about two weeks after that date. [Exhs. R-30, P-16; RT I pp. 52-53, 174, 180, 224-225;  
10 RT II pp. 34, 35, 39-40] SMG received its first delivery of new cars from GM at the end of November or  
11 early December 2010. [RT I p. 181] The time lag between a vehicle order and delivery is approximately  
12 six weeks. [RT I p. 180; RT II p. 81]

13 G. GM's online acknowledgment to SMG that it qualified to order Chevy Volts (a "Y" in a  
14 critical box) was misleading to SMG, as it appeared to signify that SMG could order the Volts when, in  
15 fact, the "Y" did not carry that meaning. [Exh. R-39A]

16 68. SMAG became an Infiniti dealer on October 1, 2010. SMG's alleged problems with  
17 ordering Buick and Chevrolet vehicles and its vehicle allocation would have occurred after October 1,  
18 2010, the earliest date it became eligible to order new GM vehicles.

19 **ANALYSIS**

20 69. This case, from the beginning, never fit the mold of the typical termination protest before  
21 the Board (where the scenario is a franchisor seeking to terminate a franchisee for alleged poor business  
22 actions or performance set forth in a written notice of termination). Here, the breakdown of the  
23 franchisor-franchisee relationship had little or nothing to do with the conduct of SMG: it was the  
24 bankruptcy of General Motors. Within the bankruptcy case, GM designated Santa Monica Group as a  
25 "wind-down" dealer (terminating SMG's Buick and Chevrolet franchises while giving some

26 ///

27 ///

28 ///

1 compensation).<sup>19</sup> This case arose because SMG availed itself of the passage of a federal law giving  
2 “wind-down” GM dealers access to arbitration to retain their franchises.

3 70. The settlement agreement (“Settlement and Deferred Termination Agreement”) which  
4 later became the Board Order was negotiated and executed during the federal arbitration hearing before  
5 Arbitrator Kaplan. When it was signed by the parties in June 2010, the impending termination of  
6 SMG’s franchises was exclusively within the federal jurisdiction of the bankruptcy court.

7 71. The settlement agreement which the parties presented to the Board shifted the jurisdiction  
8 to terminate SMG’s franchises to the Board, and the Board accepted the jurisdiction in its Board Order.  
9 [RT I pp. 73, 80] Moreover, having accepted jurisdiction, the Board then retained jurisdiction over all  
10 broadly-defined claims and controversies of the parties arising out of their settlement agreement.

11 [Exh. R-48: “Dispute Resolution” ¶ 5.6]

12 72. Since the issue in this case is narrowly-defined, discovery also was expressly limited to  
13 the issue of compliance with the non-confidential conditions of the Board Order. SMG is therefore  
14 correct in its argument that dealer agreements or contracts between the parties other than those made in  
15 the Board Order, or pursuant to the Board Order, are outside the scope of this case (e.g., notice to GM of  
16 the use of the dealership facilities, square footage devoted to GM operations).

17 **The “Good Cause” Issue**

18 73. Since the parties’ settlement agreement did not expressly stipulate that there was “good  
19 cause” for the voluntary termination of its Buick and Chevrolet franchises, SMG argues that it is entitled  
20 to a hearing on the “good cause” factors in section 3061. SMG relies on the first sentence of section  
21 3050.7(b), which states the following:

22 ///

23 \_\_\_\_\_  
24  
25 <sup>19</sup> No evidence was presented as to why GM designated SMG a “wind-down” dealer in bankruptcy. Note, however, that while  
26 the non-confidential portions of the Board Order reveal the promise of SMG to file three additional protests after the settlement  
27 agreement was executed in June 2010, it is silent on the pre-protest statutory obligation of GM to give written notices of  
28 termination “...setting forth the specific grounds for termination...” [section 3060(a)]. Nonetheless, GM did so, in August 4,  
2010 letters to SMG with the section 3060(a) advisements, each of which stated that in all three sales years from 2006 to 2008,  
SMG’s sales performance “has consistently been substantially deficient” and that SMG’s “...continued poor sales performance  
eventually led to [GM’s] decision to issue SMG a Wind-Down Agreement in June 2009. GM most recently discussed these  
continued performance issues with SMG during the arbitration process.” [Santa Monica Group, Inc. v. General Motors, LLC,  
Protest Nos. PR-2262-10, PR-2263-10 and 2277-10]

1 If the board adopts a stipulated decision and order to resolve a protest filed pursuant to  
2 Section 3060 in which the parties stipulate that good cause exists for the termination of  
3 the franchise of the protestant, and the order provides for a conditional or unconditional  
4 termination of the franchise of the protestant, subdivision (b) of Section 3060, which  
5 requires a hearing to determine whether good cause exists for the termination of the  
6 franchise, is inapplicable to the proceedings.

7 74. SMG has no right to a hearing which would include consideration of “good cause”  
8 factors for termination. SMG is estopped from raising this issue because it has already been adjudicated  
9 by the February 4, 2011 Board Decision in Santa Monica Group v. General Motors, LLC (PR-2276-10  
10 and PR-2277-10),<sup>20</sup> as follows:

11 A. The Board Decision characterized the protests as follows: “SMG...is seeking a hearing  
12 on the merits of the protest, with determinations to be made in accordance with Section 3061. SMG is  
13 seeking to require that GM establish good cause for the termination in accordance with the factors stated  
14 in the Vehicle Code” and “...the protests are seeking a hearing as to whether there is good cause for GM  
15 to terminate the franchises with the standards stated in Section 3061.” [Board Decision Feb 4, p. 17, ¶47  
16 and p. 18, ¶51]

17 B. The Board Decision observed that “...the Board’s Order provides that termination would  
18 occur immediately upon the occurrence or non-occurrence of the stated condition. The Board’s Order,  
19 issued under the authority of Section 3050.7, not only obviates the need for a hearing pursuant to  
20 Section 3061, but also specifically contains language that bars the filing of a protest by SMG.”  
21 (Emphasis added.) [Board Decision Feb 4, p. 17, ¶48]

22 C. The Board Decision held that the parties’ confidential settlement agreement (Board  
23 Order) “...bars the claimed right of SMG to have a hearing on the merits of SMG’s [termination]  
24 protests...” [Board Decision Feb 4, p. 19, ¶54(4)]

25 D. Moreover, referring to the instant special proceeding, the Board Decision stated the  
26 following:

27 The only evidentiary hearing that might be needed is to determine whether the condition  
28 of SMG permitting the Existing Dealership Premises to be used for the sale of a  
competing line-make of vehicle has occurred [which is] a term of the Board’s Order of  
September 15, 2010.” (Emphasis added.) [Board Decision Feb 4, pp. 15-16, ¶43(c)]

<sup>20</sup> See footnote 4 above.

1 and,

2 ...These matters are being treated as 'Cross Motions by Protestant and Respondent.' An  
3 in-person hearing with limited discovery is scheduled to commence on March 17 [sic],  
4 2011, before ALJ Diana Woodward Hagle. The issue to be decided is whether there has  
5 been compliance with the terms of the confidential settlement that became the Board's  
6 Order concluding the prior protests." (Emphasis added.) [Board Decision Feb 4, p 16,  
7 ¶43(c), n. 12]

8 75. SMG's counsel waived this argument at the hearing, stating that "[t]his is not the hearing  
9 pursuant to Section[s] 3061 and 3066 where the Board has to determine whether there is good cause  
10 existing for the termination of the franchise". [RT I pp. 137-139]

11 76. Subsumed under the right to file a protest are certain procedural rights, one of which is  
12 compelling the franchisor to prove "good cause". When SMG agreed to waive its right to protest, other  
13 rights---such as having a hearing during which "good cause" is litigated---were also waived.

14 77. Simply because a stipulated settlement agreement resolving a protest does not contain the  
15 words "good cause" does not mean that it could not contain other language---as here---reflecting the  
16 contracting parties' clear intention to settle their dispute and to avoid a full-blown hearing on the merits.

17 **The "Parol Evidence Rule" Issue**

18 78. Paragraph 5.8 of the Board Order contained an integration clause, which states the  
19 following:

20 Complete Agreement of the Parties. This Agreement and the Stipulated Decision of the  
21 Protests by the Board [sic] together contain the entire agreement and understanding of the  
22 Parties relating to the subject matter of this Agreement.... [Exhs. P-17, R-48].

23 79. The integration clause does not preclude the admission of relevant, extrinsic evidence to  
24 explain the meaning of a written instrument. The intention of the parties as expressed in the contract is  
25 the source of contractual rights and duties; a court must ascertain and give effect to this intention by  
26 determining what the parties meant by the words they used. Pacific Gas & Electric Company v. G.W.  
27 Thomas Drayage & Rigging Company, Inc. (1968) 69 Cal.2d 33, 37-38; *accord*, Civil Code section  
28 1636 ("A contract must be so interpreted as to give effect to the mutual intention of the parties as it  
existed at the time of contracting, so far as the same is ascertainable and lawful.")

80. Moreover, the Board Order is so threaded through with references to other documents  
(and other documents similarly reference the Board Order) that it would be impossible to read the

1 document without reference to those other documents. (see, e.g., Exhs. P-17 & R-48, ¶¶ 2.1, 2.6, 3.1;  
2 Exh. R-29)

3 81. In June 2010, when the confidential settlement agreement was signed, Paragraph 2.6  
4 reflected the following intentions of the parties:

5 A. While agreeing to release SMG from its status as a “wind-down” dealer and to defer  
6 termination of SMG’s Buick and Chevrolet franchise contracts, General Motors wanted to preserve its  
7 brand primacy in SMG’s dealership building at 3223 Santa Monica Boulevard by obligating SMG to use  
8 the building exclusively for sales of GM-brand vehicles. GM would agree to SMG acquiring another  
9 franchise, as long as the operation was located on the lot adjacent to the GM dealership building---  
10 clearly identified as “3205 Santa Monica Boulevard”---and subject to GM’s approval of SMG’s  
11 proposal to modify the lot. GM was willing to share service facilities located in the back of the existing  
12 dealership building with another line-make, because this would not detract from the sales of Buick and  
13 Chevrolet vehicles. [RT II pp. 104-105]

14 B. Following the bankruptcy of General Motors and GM’s designation of SMG as a “wind-  
15 down” dealer, Santa Monica Group wanted to maximize the potential of its substantial investments in  
16 real estate holdings and its existing automotive facilities by acquiring and developing an additional new-  
17 vehicle franchise (and the Infiniti line-make was in its “contemplation” although not expressed during  
18 negotiations), while still continuing as a GM dealer. [RT I p.172]

19 82. There are three phrases used in Paragraph 2.6 of the Board Order which “... have acquired  
20 a particular meaning by trade usage...” and “...extrinsic evidence of trade usage or custom...” is  
21 admissible to explain the parties’ understanding of the words. *Pacific Gas & Electric Company v. G.W.*  
22 *Thomas Drayage & Rigging Company, Inc.* (1968) 69 Cal.2d 33, 39, n.6. The phrases are “variable  
23 operations”, “fixed operations” and “competitive line-make”. The first two are uniquely used in the  
24 automotive industry and have the meanings stated above in paragraphs 53 and 54, “sale of new and used  
25 vehicles” and “service and parts” respectively. There is no real dispute between the parties about these  
26 two meanings.

27 83. The meaning of the third phrase, “competitive line-make”, also used in Paragraph 2.6, is  
28 disputed by the parties, and while “line-make” is an automotive industry term, it is the meaning of the

1 adjective “competitive” which is contested. SMG argues for a narrow definition: that “competitive line-  
2 make” means those vehicle brands directly competing with Buick or Chevrolet for the same demographic  
3 customers and that Infiniti is “non-competitive”, attracting totally different customers than the GM  
4 brands. GM argues for the broadest possible definition of “competitive”: it contends that the parties  
5 intended “competitive line-make” to mean any vehicle brand other than the four GM line-makes.<sup>21</sup>

6 84. The parties’ definitional dispute over the adjective “competitive” may be irrelevant:  
7 Paragraph 2.6 gives permission to SMG to submit a proposal for variable operations only in respect to  
8 the lot at 3205 Santa Monica Boulevard and gives permission to SMG to submit a proposal for fixed  
9 operations only in respect to the dealership building at 3223 Santa Monica Boulevard. This is true no  
10 matter how “competitive” is defined: clearly, the import of Paragraph 2.6 is that if SMG acquires  
11 another franchise, it will be located on the 3205 lot.

12 85. However, SMG’s argument that “competitive line-make” as used in the settlement  
13 agreement means only those brands which directly compete with one another in a technical market  
14 segmentation analysis enunciated by expert firms such as Urban Science is expressly rejected, for the  
15 following reasons:

16 A. Since GM had bargained for exclusive use of the dealership building for GM products, to  
17 adopt SMG’s argument (which, in effect, is that the settlement agreement was silent in respect to “non-  
18 competitive” brands) would make the settlement agreement illusory, since one or more “non-competitive”  
19 brands could be located in the dealership building at SMG’s sole discretion and without GM’s approval or  
20 acquiescence.

21 B. The Urban Science market segmentation analysis strives to identify line-makes and  
22 models which compete most directly for the same demographic customers, i.e., are within the same  
23 “segment”. If the parties had wished to put this more technical and complicated interpretation<sup>22</sup> on the  
24 term “competitive” in the settlement agreement, they would have clearly and unambiguously done so.

25 [RT I pp. 99-100]

26  
27  
28 <sup>21</sup> In addition to Buick and Chevrolet, GM makes Cadillac and GMC trucks.

<sup>22</sup> The interpretation presumably could change from year to year, as manufacturers unveil new models.

1 C. The Letter of Intent signed by the parties on September 9, 2010 uses the phrase “non-GM  
2 products”. [Exh. R-28]

3 86. Therefore, the phrase “competitive line-make”, as used in the Board Order, means “non-  
4 GM vehicles” as stated above in paragraph 55.

5 87. SMG is correct that alleged violations by SMG of the Buick and Chevrolet dealer  
6 agreements are outside the scope of this proceeding. However, the “parol evidence” rule is not the basis  
7 for this conclusion; rather, this limited “special proceeding” encompasses only those matters raised by  
8 the issue of compliance with the Board Order and is not a freewheeling examination of all the  
9 contractual obligations of the parties.

10 **The Vehicle Code Section 11713.13 Issue**

11 88. SMG contends that Paragraph 2.6 of the negotiated settlement agreement is voided by  
12 Vehicle Code section 1171.13.

13 89. Section 11713.13 provides, in part, the following:

14 It is unlawful and a violation of this code for any manufacturer...to do, directly or  
15 indirectly..., any of the following:

16 (a) Prevent, or attempt to prevent, by contract or otherwise, a dealer from acquiring,  
17 adding, or maintaining a sales or service operation for another line make of motor  
18 vehicles at the same or expanded facility at which the dealer currently operates a  
19 dealership if the dealer complies with any reasonable facilities and capital requirements  
20 of the manufacturer....

21 (b) Require a dealer to establish or maintain exclusive facilities, personnel, or display  
22 space if the imposition of the requirement would be unreasonable in light of all existing  
23 circumstances, including economic conditions. In any proceeding under this subdivision  
24 or subdivision (a) in which the reasonableness of a facility or capital requirement is an  
25 issue, the manufacturer or distributor shall have the burden of proof.

26 ...

27 90. SMG’s argument that section 11713.13 makes Paragraph 2.6 “unlawful and  
28 unenforceable” is rejected. When SMG and GM submitted the confidential settlement agreement they  
had negotiated to the Board for its adoption as a Board Order, both parties implicitly agreed to be bound  
by the Board Order. SMG, in particular, agreed that it had “reviewed [the] [a]greement with its legal,  
tax or other advisors, and is fully aware of all of its rights and alternatives”. [Exhs. P-17 & R-48]  
Moreover, there is nothing in the record to suggest that “the reasonableness of a facility” was not  
considered by the parties in their negotiations, nor does SMG identify any particular “unreasonableness”

1 of any facility requirements in the settlement agreement.

2 91. In somewhat confusing language, the parties appear to have agreed to "...waive  
3 application of any...statute..." which would, of course, include section 11713.13. [Exhs. P-17 and  
4 R-48, ¶5.8]

5 **Whether Board Should Hear Proposed Decision**

6 92. SMG argues that the Board should render the final decision in this case; GM's position is  
7 that the decision should be rendered by the administrative law judge assigned by the Board, not by the  
8 Board. SMG is correct. Any decision in this case must be the ultimate decision of the Board,<sup>23</sup> for the  
9 reasons set forth below.

10 93. In Paragraph 5.6 of the Board Order entitled "Dispute Resolution", the Board assumed  
11 jurisdiction over broadly-defined controversies arising out of the Board Order, as follows:

12 ... GM and SMG agree to submit to the Board for final and binding determination, upon  
13 either party's written notice, any and all claims, disputes, and controversies between them  
14 arising under or relating to this Agreement and its negotiation, execution, administration,  
15 modification, extension, or enforcement (collectively, "Claims"). Such determination  
16 shall be made by an Administrative Law Judge appointed by the Board in accordance  
17 with its customary procedures as they may exist from time to time...  
18 [Exhs. P-17, R-48]

19 A. Paragraph 5.6 may be read two ways. On the one hand, the parties agree to submit all  
20 disputes "...to the Board for final and binding determination..." (Emphasis added.) On the other hand,  
21 they agree that "[s]uch determination shall be made by an Administrative Law Judge appointed by the  
22 Board in accordance with its customary procedures as they may exist from time to time..." (Emphasis  
23 added.) Since the proposed decision by the appointed ALJ is dispositive, i.e., that SMG will lose its  
24 franchises, the resolution of the ambiguity in the language should tip in favor of the dealer.

25 B. Since the consequence of the findings of the proposed decision---that SMG has not  
26 complied with the Board Order---is that SMG's Buick and Chevrolet franchises will be "voluntarily  
27 terminated", there are strong policy reasons for Board action here: although SMG has been given  
28 adequate notice and due process rights by an evidentiary hearing,<sup>24</sup> the Board's review is "a relatively

27 <sup>23</sup> Although this determination comports with SMG's argument, it has nothing to do with the "good cause" issue, discussed  
28 above in paragraphs 73 to 77.

<sup>24</sup> As in the Automotive Management Group case, no statute or regulation authorizes this special proceeding.

1 simple matter...to give the Board an opportunity to review any errors by the ALJ...” and to avoid “harm  
2 [that] might result [from] an incorrect decision...”. Moreover, “[i]t makes more sense to give the Board  
3 an opportunity to review any errors by the ALJ, than it does to require an aggrieved party to seek relief  
4 through the courts. Indeed, this is the essence of the doctrine of exhaustion of administrative remedies.”  
5 Automotive Management Group v. New Motor Vehicle Board (1993) 20 Cal.App. 4th 1002, 1012,  
6 1013-1015.

7 C. The Board, in considering the parties’ confidential settlement agreement in the first  
8 instance, was privy to the entire agreement which was made the Board Order. Only selected portions of  
9 the Board Order were made available to the administrative law judge hearing the case. Therefore, the  
10 Board is in a superior position to evaluate the testimony, the evidence and the proposed decision in light  
11 of the complete Board Order.

12 D. There is nothing in the record (or in the non-confidential portions of the Board Order) to  
13 indicate that the Board intended to delegate its power to make the final decision in the event of a dispute  
14 between the parties concerning compliance with the Board Order.

#### 15 DETERMINATION OF ISSUES

16 94. Santa Monica Group is using the Existing Dealership Premises at 3223 Santa Monica  
17 Boulevard for Infiniti variable operations (sales of new and used cars). In so doing, SMG is violating  
18 Paragraph 2.6 of the Board Order, thereby subjecting its Buick and Chevrolet franchises to voluntary  
19 termination.

20 95. Section 3050.7(b) authorizes such terminations. It is irrelevant which of the last two  
21 sentences of section 3050.7(b) controls, since SMG either failed “to comply with specified conditions”  
22 by using the dealership building for Infiniti operations, or that “stipulated conditions have occurred”  
23 because SMG has allowed a line-make other than Buick or Chevrolet to conduct new and used vehicle  
24 sales in the dealership building. These semantic niceties have already been observed by the Board, as  
25 follows:

26 A. “Whether the terms of the Board’s Order are such that the franchises may be terminated  
27 because ‘the conditions have not been met’ (the premises are to be used only for the sale of Buick and  
28 Chevrolet) or that ‘the stipulated conditions have occurred’ (the premises are being used for the sale of a

1 competing line-make), both are encompassed within Section 3050.7(b), and the result should be the  
2 same.” (Emphases in original.) [Board Decision Feb 4, p. 14, ¶38, n.11]

3 B. “...the condition contained in the Board’s Order was directed at not using the Existing  
4 Dealership Premises for a competing line-make. Whether Chevrolet and Buick are also being sold at  
5 another or the same location would be irrelevant as to the occurrence or non-occurrence of this  
6 condition.” [Board Decision Feb 4, p. 14, ¶40]

7 C. “The [Board Order] precludes the use of the Existing Dealership Premises for a  
8 competing line-make. Thus the issue is whether the Existing Dealership Premises is being used for  
9 Infiniti sales, regardless of whether it is or is not also being used for Buick and Chevrolet.” [Board  
10 Decision Feb 4, p. 11, ¶27, n.9]

11 D. “The provisions of the Board’s Order state that termination of the franchises will not be  
12 permitted to occur so long as the Existing Dealership Premises are not used for the sale of a competing  
13 line-make of vehicles. Said another way, if the condition does occur then there will be a voluntary  
14 termination of the franchises. No matter how it is said, if this condition occurs, the result will be a  
15 termination of the franchises without any further action by GM...The purpose of the Stipulated Decision  
16 and Order of the Board was to conclude the protests filed by SMG. The Board’s Order operated in favor  
17 of SMG. It precluded the termination of SMG’s franchises, but was conditioned upon the Existing  
18 Dealership Premises not being used for the sale of a competing line-make.” [Board Decision Feb 4,  
19 pp. 16-17]

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1 PROPOSED DECISION

2 As Santa Monica Group violated the Board Order, its Buick and Chevrolet franchises are  
3 voluntarily terminated.

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

11 DATED: September 6, 2011

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13 By: DIANA WOODWARD HAGLE  
14 Administrative Law Judge  
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27 George Valverde, Director, DMV  
28 Mary Garcia, Branch Chief,  
Occupational Licensing, DMV