NEW MOTOR VEHICLE BOARD
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STATE OF CALIFORNIA

NEW MOTOR VEHICLE BOARD

HC AUTOMOTIVE, INC., dba HOOMAN CHRYSLER JEEP DODGE RAM, Protestant, v. FIAT CHRYSLER AUTOMOBILES, Respondent.	**Protest Nos. PR-2429-15, PR-2430-15, PR-2431-15, and PR-2432-15**

DECISION

At its regularly scheduled meeting of September 13, 2016, the Public Members of the Board met and considered the administrative record and Proposed Decision in the above-entitled matter. After such consideration, the Board adopted the Proposed Decision as its final Decision in this matter.

This Decision shall become effective forthwith.

IT IS SO ORDERED THIS 13th DAY OF SEPTEMBER 2016

GLENN STEVENS
President
New Motor Vehicle Board

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In the Matter of the Protest of HC AUTOMOTIVE, INC., dba HOOMAN CHRYSLER JEEP DODGE RAM, Protestant, v. FIAT CHRYSLER AUTOMOBILES, Respondent.	**Protest Nos. PR-2429-15, PR-2430-15, PR-2431-15, and PR-2432-15** **PROPOSED DECISION**

PROCEDURAL BACKGROUND

Statement of the Case

1. On September 9, 2015, "Hooman Automotive Group, dba Hooman Chrysler Jeep Dodge Ram"[1] filed four protests[2] against Fiat Chrysler Automobiles with the New Motor Vehicle Board pursuant to California Vehicle Code section 3065.1[3] [claims arising out of franchisor incentive program].

2. The protests alleged that "…[p]rotestant received from [r]espondent a letter dated August 13, 2015, regarding a sales incentive and chargeback, but [r]espondent has not complied with the timing

[1] "Hooman Automotive Group" is not a California corporation in good standing.
[2] This was the second filing on September 9th, correcting protestant's error of filing a single protest instead of four, since four line-makes are involved; a non-substantive error was corrected on September 10th.
[3] Hereinafter, unless otherwise indicated, all section references are to the Vehicle Code.

or substance of Vehicle Code section 3065.1 concerning a recent sales incentive audit, and [r]espondent still has not done so".

3. The four protests relate to the following line-makes:

A. Protest No. PR-2429-15 (Chrysler).

B. Protest No. PR-2430-15 (Jeep).

C. Protest No. PR-2431-15 (Dodge).

D. Protest No. PR-2432-15 (Ram).

4. The protests were ordered consolidated on September 29, 2015.[4]

5. On April 22, 2016, HC Automotive, Inc., doing business as Hooman Chrysler Jeep Dodge Ram[5], filed four Amended Protests against Fiat Chrysler Automobiles, with the New Motor Vehicle Board pursuant to section 3065.1 [claims arising out of franchisor incentive program].

6. A hearing on the merits was held May 16 through 20, 2016, before Administrative Law Judge Diana Woodward Hagle.

7. The matter was submitted on July 15, 2016.

Parties and Counsel

8. HC Automotive, Inc., doing business as Hooman Chrysler Jeep Dodge Ram (hereinafter "HC Automotive", "Hooman's" or "protestant") is a Chrysler, Dodge, Jeep and Ram dealership located in Inglewood, California. Each dealership is a "franchisee" of respondent within the meaning of sections 331.1 and 3065.1.

9. Protestant is represented by the Law Offices of Gavin M. Hughes by Gavin M. Hughes, Esquire, 3436 American River Drive, Suite 10, Sacramento, California 95864.

10. Respondent Fiat Chrysler Automobiles (hereinafter "Fiat Chrysler", "FCA" or "respondent") is a "franchisor" of protestant within the meaning of sections 331.2 and 3065.1.

11. Respondent is represented by Wheeler Trigg O'Donnell LLP by Mark T. Clouatre, Esquire; John P. Streelman, Esquire; and Benjamin Kapnik, Esquire, 370 Seventeenth Street, Suite 4500, Denver,

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[4] A Corrected Order of Consolidation was issued on July 6, 2016.

[5] The four protests re-filed on April 22, 2016 corrected protestant's corporate name. Only the captions and protestant's counsel were changed; no substantive changes were made.

Colorado 80202-5647; and by Donahue Davies LLP by Robert E. Davies, Esquire, Post Office Box 277010, Sacramento, California 95827-7010.

JURISDICTION

12. No documentary evidence was presented by the parties of a current franchise agreement.

13. On November 19, 2013, protestant became "...an authorized [Fiat Chrysler][6] dealer [with] a non-exclusive right to purchase" new models of Chrysler, Dodge, Jeep and RAM cars and trucks from respondent. The document creating this relationship was captioned "Term Sales and Service Agreement" (TSSA). [Exh 202][7]

14. By its terms, the TSSA expired on November 19, 2014. [Exh 202-0004] However, during the hearing, the parties referred to the TSSA as their "Dealer Agreement" and that the document "...governs the parties' rights and responsibilities." [Joint Glossary of Terms, 2:12-13]

15. The parties also represented that Hooman's is "[a] new motor vehicle dealer that sells and services [Chrysler, Jeep, Dodge and Ram] vehicles and products at 333 Hindry Avenue in Inglewood, California" and that Fiat Chrysler "...is the United States distributor of Chrysler, Jeep, Dodge and Ram vehicles and products." [Joint Glossary of Terms, 2:4-7; Joint Stipulation of Facts, ¶¶1, 2]

16. There is therefore sufficient evidence of the existence of a franchise as defined in section 331 to conclude that the Board has jurisdiction to hear this matter.

ISSUE PRESENTED

17. Did Fiat Chrysler comply with Vehicle Code section 3065.1 (Franchisor Incentive Program) in making its determination to disapprove and chargeback claims totaling $385,115.00 (later reduced to $283,445) previously paid to Hooman's pursuant to its "Volume Growth Program" (VGP) sales incentive promotion, which rewards dealers based upon the number of sales during a calendar month?

BURDEN OF PROOF

18. In protests relating to claims arising out of franchisor incentive programs, the franchisor has the burden of proof. [§3065.1(g)(6)]

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[6] In 2013, FCA was "Chrysler Group LLC". (Joint Stipulation of Facts ¶3; Joint Glossary of Terms 1:26)

[7] Exhibits are referenced as "Exh". Since most exhibits were marked for identification by the parties prior to the hearing, they were not offered or introduced in numerical order; also, some pre-marked items may not have been used in the hearing at all, so there will be numerical gaps in the Exhibit List.

19. The standard is "preponderance of the evidence", which is met if the proposition is more likely to be true than not true---i.e., if there is greater than 50 percent chance that the proposition is true.

APPLICABLE LAWS

Franchisor Incentive Program (Vehicle Code section 3065.1)

20. Section 3065.1 (**Franchisor Incentive Program**) governs incentive programs offered by franchisors to franchisees in California. Pertinent parts of section 3065.1 to this case are the following:

A. Franchisee claims for payment under the terms of a franchisor incentive program shall be either approved or disapproved within 30 days after submission. If not disapproved in writing within the 30-day period, the claims shall be deemed approved. [§3065.1(a)]

B. All claims made by franchisees shall be paid within 30 days following approval. [§3065.1(f)]

C. Audits of franchisee incentive records may be conducted by the franchisor on a reasonable basis, and for a period of nine months after a claim is paid. A franchisor shall not select a franchisee for an audit, or perform an audit, in a punitive, retaliatory, or unfairly discriminatory manner. [§3065.1(g)(1)]

D. Previously approved claims shall not be disapproved and charged back unless the claim is false or fraudulent, the claim is ineligible under the terms of the incentive program as previously communicated to the franchisee, or for material noncompliance with reasonable and nondiscriminatory documentation and administrative claims submission requirements. [§3065.1(g)(2)]

E. If the franchisor disapproves of a previously approved claim following an audit, the franchisor shall provide to the franchisee, within 30 days after the audit, a written disapproval notice stating the specific grounds upon which the claim is disapproved. The franchisor shall provide a reasonable appeal process allowing the franchisee a reasonable period of not less than 30 days after receipt of the written disapproval notice to respond with additional supporting documentation or information rebutting the disapproval and to cure any material noncompliance, with the period to be commensurate with the volume of claims under consideration. If the franchisee rebuts any disapproval and cures any material noncompliance relating to a claim before the applicable deadline, the franchisor shall not chargeback the franchisee for that claim. [§3065.1(g)(3)]

F. If the franchisee provides additional supporting documentation or information purporting

to rebut the disapproval, attempts to cure noncompliance relating to the claim, or otherwise appeals denial of the claim, and the franchisor continues to deny the claim, the franchisor shall provide the franchisee with a written notification of the final denial within 30 days of completion of the appeal process, which shall conspicuously state "Final Denial" on the first page. [§3065.1(g)(4)]

G. The franchisor shall not chargeback the franchisee until 45 days after the franchisee receives the written notice of denial.[8] If the franchisee cures any material noncompliance relating to a claim, the franchisor shall not chargeback the dealer for that claim. [§3065.1(g)(5)]

H. Within six months after receiving the written notice of denial, a franchisee may file a protest with the Board for determination of whether the franchisor complied with this statute. If the protest is filed prior to the franchisor's chargeback for denied claims, the franchisor shall not offset or undertake to collect the chargeback until the Board issues a final order on the protest. In any such protest, the franchisor shall have the burden of proof. [§3065.1(g)(6)]

Sections of the Vehicle Code Relative to "Titling" and Registration of New Vehicles in California

21. No person may drive or park a vehicle on a California highway "...unless it is registered and the appropriate fees have been paid...". [Section 4000] Fees must be paid "...within 20 days of [the vehicle's] first operation". (Emphasis added.) [Sections 9552(a); 9553(a)]

22. The process of "titling" and registration of a new vehicle sold in California is initiated by the selling dealer. Within 20 days from the date of sale, the selling dealer must submit to the DMV an application for registration for the new vehicle. [Section 4456(a)(2)]

A. The application for registration is DMV REG 397, described by DMV as a Report of Sale. Form 397 is a "...numbered report-of-sale form issued by the [DMV]". [Section 4456.4(a); Exh 281-005]

B. The selling dealer is responsible for completing the information required by DMV in the Report of Sale, including an identification of the purchaser and the "lienholder or legal owner" (if applicable); a detailed description of the vehicle, including the odometer reading; and an identification of the selling dealer and the salesperson, as well as other information. [Section 4456; Exh 281-005]

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[8] Measured by the later of either of the two time periods stated in section 3065.1(g)(3) or (g)(4).

C. The selling dealer is also responsible for transmitting to the DMV registration and titling fees, vehicle license fees, and CA tire fees.[9] [Section 4456(a)(2)]

23. The Report of Sale is a single page, divided into two sections:

A. The top section of the Report of Sale is the "Application for Registration of New Vehicle" which the dealer prepares with the information set forth above in paragraph 22.B. and electronically submits to DMV;

B. The bottom section of the Report of Sale is captioned "New Vehicle Dealer Notice Temporary Identification". The selling dealer must fill in the blanks on the form and must affix it to the windshield of the vehicle before delivery to the purchaser.

(1) The form states the make, body type and VIN of the vehicle; the purchaser's name and address, the "date first sold as a new vehicle", the vehicle's odometer reading at the time of sale, and the dealer's and salesperson's DMV license numbers.

(2) A vehicle displaying a copy of its Report of Sale may be operated without license plates or registration card until either of the following, whichever occurs first: the license plates and registration card are received by the purchaser; or a 90-day period, commencing with the date of sale of the vehicle, has expired.

(3) The form "...is a notice of purchase of vehicle" and may not be used "...as an application for registration or title." [Sections 4456, 4456.4(a); Exh 281-005]

24. After receiving the registration application and fees for a new vehicle, the DMV assigns the vehicle a registration number and a license plate, and issues two documents:

A. A "certificate of ownership" (i.e., a Certificate of Title) to the "legal owner". The Certificate of Title is known as the "pink slip" in California.[10] If there is a lienholder financing the purchase, the lienholder is the "legal owner" and holds the "pink slip" until the buyer pays off the loan. If there is no lienholder, the buyer is the "legal owner" and holds the "pink slip". The DMV advises that it be kept in a safe place since it is essential in transferring ownership of the vehicle. [Sections 370, 4450,

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[9] The dealer has other fiscal responsibilities in connection with the sale (i.e., transmission of State and local sales taxes it has collected from the buyer). (Exh 281-002)

[10] Even though the California certificate of title is no longer pink. [V: 101:25 to 102:1-3]

4451]

B. A "registration card" to the "owner". The "owner" is listed on the registration card as the "Registered Owner"; if applicable, the "Lienholder" is also identified. The original or a facsimile of the registration card must be kept in the vehicle at all times, and must be presented to any peace officer on demand. The "owner" also receives the license plates issued to the vehicle. [Sections 460, 4450, 4453, 4454(a), 4462(a)]

25. The failure of a selling dealer to timely apply to the DMV for registration subjects it to a $5 "administrative service fee" per violation. [Section 4456.1(a)] If the initial application is submitted 40 days or more following the date of sale of a new vehicle, this failure may subject the dealer to disciplinary action. [Section 4456.1(d)]

26. Moreover, "[w]henever any vehicle is operated upon any highway of this state without the fees first having been paid as required by [the Vehicle Code], and those fees have not been paid within 20 days of its first operation, those fees are delinquent...". (Emphasis added.) Not only are penalties added to delinquent applications for registration but, "[i]n addition to the imposition of monetary fines or fees...delinquent registration may result in impoundment of the vehicle...". [Sections 9552(a); 9553, subsections (d) and (e)]

IDENTIFICATION OF WITNESSES

Respondent's Witnesses

27. Hooman Nissani was called as an adverse witness by respondent pursuant to Evidence Code section 776(a). As owner and Dealer Principal of Hooman's, he testified to the dealership's ownership and history, its current facilities, and his plans for the dealership's future location in an auto mall co-located with other automobile franchises he owns or in which he has an interest. He described his "VIP Program" for dealership customers. He testified to his understanding of the dealership's responsibilities under the Volume Growth Program, and his participation in the audit and appeal of FCA's disallowance of amounts previously paid pursuant to that program. [I: 36-134][11]

28. The following Fiat Chrysler employees were called as witnesses:

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[11] References herein to Roman Numerals are to the transcripts of the proceedings.

A. Julio Sebastiani (Area Sales Manager for FCA's Orange County and LA. South District in 2014) testified about his visits to Hooman's where, among other things, he provided training to employees on how to process and submit sales incentive claims to FCA. [I: 135-203]

B. Matt Gabel (FCA Dealer Auditor) testified about his audit of Hooman's sales incentive records in December 2014 and January 2015, including the procedures he followed, the results of the audit, and his conclusion that a $385,115 chargeback was proper, since it was supported by two independent grounds (no "titling" or registration of sold vehicles and failure of documentation), each of which justified the chargeback. [II: 6-205 to III: 4-111]

C. William Danforth (FCA Dealer Audit Manager) testified concerning his Audit Manager Review of protestant's incentive claims and his conclusion that the chargeback was proper. [III: 115-186 to IV: 6-65]

D. Geoffrey Edmonds (FCA Manager of Dealer Relations) described FCA's Audit Appeal Committee. He testified about its request to Hooman's to produce documents relating to vehicles and customers in the dealership's service customer loaner program, and about Hooman Nissani's personal appearance before the committee at FCA Headquarters in Michigan. [IV: 67-126]

E. Christopher Glenn (FCA's Director of U.S. Dealer Relations and Retail Strategies) was the senior member of the Audit Appeal Committee which considered protestant's appeal. He testified about the committee's consideration of documents produced by protestant and the statements by Hooman Nissani in support of the appeal. He testified that the committee agreed to reduce the chargeback by $101,660, which he called a "goodwill offset". [IV: 126-221]

Protestant's Witness

29. Protestant's only witness, Hooman Nissani, testified about his dealership's acquisition of the vehicles it had sold to itself for use in the "VIP Program" for service customers. He also testified about his participation in FCA's audit and his audit appeal. [IV: 225-267; V: 6-110]

RESPONDENT'S CONTENTIONS[12]

30. Fiat Chrysler complied with Vehicle Code section 3065.1 in regard to its Volume Growth

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[12] "Respondent's Contentions" are placed first in order because respondent has the burden of proof.

Program sales incentive promotion for dealers.

31. Amounts totaling $385,115 (later reduced to $283,445)[13] previously paid to Hooman's pursuant to the promotion were properly disallowed and charged back following an audit of dealership records.

32. Hooman's did not qualify for the incentives since it failed to comply with the terms of the VGP promotion in the following respects:

A. Protestant did not "title" and register the vehicles it sold to itself at or near the time of sale;

B. Protestant failed to create contracts documenting sales of the vehicles to itself; and

C. Protestant failed to properly document the sales of vehicles which it claimed qualified it for incentives.

33. It is not possible for protestant to "cure" the defect of failing to "title" the vehicles at or near the time of sales to itself.

34. During the audit, Hooman's failed to produce supporting documentation or information to substantiate entitlement to the incentive amounts. Despite this failure, FCA reduced the chargeback by $101,660 as a "good will" gesture to the dealership.

PROTESTANT'S CONTENTIONS

35. The sales of vehicles to itself qualified Hooman's for the VGP incentive payments, even though Hooman's thought that the usual "titling" and registration requirements of every sale did not apply to it because the vehicles were for use in the dealership's VIP Program.

36. Hooman's "cured" any noncompliance with the terms of the VGP promotion by "titling" and registering the vehicles and submitting documentation to FCA supporting its claims for the sales incentive payments.

37. Fiat Chrysler failed to comply with section 3065.1 in the following respects:

A. Hooman's was ignorant of the "titling" and registration requirements of the VGP incentive program because FCA did not communicate to it the terms of the program.

B. The term of the promotion requiring contracts was unreasonable where, as here, the buyer

[13] A $10 error in protestant's favor was made in the final calculation. [Exhibit 264-0001] Since the offset was $101,660, the final chargeback should have been $283,455.

and the seller are the same.

C. FCA failed to provide the dealership a reasonable appeals process because it asked for information about Hooman's VIP Program for loaner vehicles, which information had no bearing on the reasons for the chargeback identified in the audit.

D. Fiat Chrysler's written notice of denial of Hooman's audit appeal lacked the conspicuous phrase "Final Denial" on page one, required by Vehicle Code section 3065.1(g)(4).

FINDINGS OF FACT[14]

Protestant HC Automotive, Inc. dba Hooman Chrysler Jeep Dodge Ram

The Dealership as a Franchisee of Fiat Chrysler

38. HC Automotive, Inc. was incorporated in California on October 24, 2013. The application for corporate status submitted to the Secretary of State's Office was signed by Hooman Nissani as President and listed Hooman Nissani as Chief Executive Officer, Secretary, Chief Financial Officer and the sole Director of the corporation. [Exh 133]

39. On November 19, 2013, HC Automotive, doing business as Hooman Chrysler Dodge Jeep RAM, with Hooman Nissani as Dealer Principal, became "...an authorized [Fiat Chrysler Automobiles] dealer..." of four FCA line-makes, Chrysler, Dodge, Jeep and RAM.[15] The agreement finalized by the parties on that date was captioned "Term Sales and Service Agreement" (TSSA). [Exh 202]

40. The TSSA was a "Term Agreement" allowing protestant "...an opportunity to qualify for the standard [Fiat Chrysler] Sales and Service Agreement...". [Exh 202-0001]

41. Although, by its terms, the TSSA expired on November 19, 2014 and no documentary evidence has been presented of a current franchise agreement, the parties refer to the TSSA as their "dealer agreement" and agree that the TSSA "...governs the parties' rights and responsibilities." [Exhs 202-0004, 206a-0002; I 6:21, 63:24-25; II 84:8-9, 85:3-6, 17-21; 96:20-21; IV 21:14-18; Joint Glossary of Terms, 2:12-13]

42. Among other things, the TSSA recited the following:

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[14] References herein to testimony, exhibits or other parts of the record are examples of evidence relied upon to reach a finding and are not intended to be all-inclusive. Findings of Fact are organized under topical headings for readability only and are not to be considered relative to only the particular topic under which they appear.

[15] Hooman's is also authorized to service FCA vehicles. [Joint Glossary of Terms, 2:4-7]

A. That FCA's "Sales and Service Agreement - Additional Terms and Provisions" is incorporated by reference. That document, among other things, gives FCA the right to inspect a dealer's books and records "to verify...claims [a dealer] may render to [FCA]." [Exh 203; Joint Stipulation of Facts, ¶4; Joint Glossary of Terms 1:24-25]

B. That Hooman Nissani promises to "expand and renovate" the dealership facility at 333 Hindry Avenue in Inglewood to an "Exclusive Facility" for the four FCA line-makes, and to submit to FCA "complete architectural plans and specifications" for the project within the next three months. [Exh 202-0006-0008]

C. That FCA "has placed its trust in the personal abilities, expertise, knowledge and integrity of [protestant's] principal owners and management personnel..." and is "...relying on the active, substantial and continuing participation in the management of [protestant's] organization by Hooman M. Nissani [Hooman Nissani signature]". [Exh 202-0001]

43. On October 15, 2013 (approximately a month before executing the TSSA), Hooman Nissani, as a prospective Fiat Chrysler Dealer Principal, had signed a one-page FCA document entitled "Dealer Acknowledgement of Receipt of [Fiat Chrysler Automobiles] Incentive Program Rules Manual DAP-27". [Exh 204]

44. In signing the dealer acknowledgement, Hooman Nissani agreed to the following responsibilities as an FCA Dealer Principal:

A. That he would have on-line access to FCA's DealerCONNECT website which contains, among other things, respondent's Dealer Policy Manual [Exh 206a], and Incentive Program Rules Manual (the "Gold Book"). [Exhs 207a, 207b][16]

B. That he would read and thoroughly understand the contents of the "Gold Book".

C. That he was responsible for requiring his employees involved in any way in the processing of sales incentive claims to read and thoroughly understand the contents of the "Gold Book".

D. That incentive claims made by his dealership may be audited and charged back if he failed

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[16] Exhibit 206a is the Dealer Policy Manual in effect when Hooman Nissani signed the dealer acknowledgment. Exhibit 207a is the 9/20/2011 "Gold Book", in effect when Hooman Nissani signed the dealer acknowledgement. Exhibit 207b is the "Gold Book" effective 6/12/2014. There are only one or two changes in the later version.

to comply with the rules in the "Gold Book".

Description of the Dealership

45. As described above, in late 2013 Hooman Nissani signed a Dealer Agreement with FCA; his dealership would be selling Chrysler, Jeep, Dodge and RAM vehicles at 333 Hindry Avenue in Inglewood. The location was an existing FCA franchise ("LAX Chrysler Dodge Jeep"), which he purchased. [Exh 202; I 41:11-12]

46. However, Hooman's did not begin operations as a Fiat Chrysler dealer until mid to late January 2014. [IV 265:8-13; V 6:17-7:8]

47. 333 Hindry Avenue is also the location of a Hyundai franchise owned by Hooman Nissani, who is co-president and owner of both the Hyundai and Fiat Chrysler dealerships.[17] Fiat Chrysler and Hyundai are "pretty much the same store" with Rayan Nissani (Hooman Nissani's brother) the General Manager of both dealerships. No evidence was presented of the identity of the general manager of the FCA franchises in 2014 and 2015, but it is presumed that it was Hooman Nissani. [Exh 202; I 41:11-12, 58:12-23]

48. Hooman Nissani is also co-president, owner and general manager of Toyota, Nissan, Acura, and Chevrolet franchises, with Volvo "coming on line". Hooman Nissani owns or has an interest in several other non-automotive businesses. His "organization" employs "800-plus" people. [I 37:14 to 39:1, 40: 9-19; V 44:14-15]

49. The previous "LAX" dealership was distressed: its sales were poor, it operated out of a trailer with two desks, and did not have a building, business office or showroom. [I 61:1-5, IV 231:16 to 232:17] Fiat Chrysler was looking to Hooman Nissani to turn the operation around. [IV 187:11 to 118:13]

50. Hooman's Fiat Chrysler operation is spread out over several locations. [I 62:17-19] There are four or five small offices at 333 Hindry but the dealership must share space with the Hyundai

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[17] Hooman Nissani testified that he is protestant's owner. [I 58:17-18] Later, however, he identified Nicholas Moss as "...my partner in the dealership". [V 45:1] Nicholas Moss is listed in the TSSA as holding 33% of the voting stock of HC Automotive, Inc., but with no partnership interest identified. [Exh 202-0002] He is also one of four persons identified by FCA in its allegation that consumers bought vehicles from protestant as "new" but with shortened warranties since the vehicles had been previously NVDR'd. [Exh 264-0003; V 44:23 to 45:6]

showroom, and limited space means that sales documents are kept in different locations. [I 58:12 to 59:6; 60:14 to 61:8; 64:9-13, 18-19; IV 233:5-18]

51. Hooman Nissani's descriptive testimony paints a picture of the premise:

"Currently still, Your Honor, there is absolutely not even one sign on any one of our premises that says there is a Chrysler Dodge Jeep dealership there. There is a banner that I had to beg Hyundai to allow me to put up on one of the entrances that says that there is a Chrysler dealership here. There is absolutely no showroom. There [are] about seven desks in total at the very end of the Hyundai dealership that we've put up some of the staff that sell cars to work out of.

A customer driving into the service center... would drive into a tent with no waiting area whatsoever. The parts room consists of five different locations offsite.... So if you were to come and service your vehicle with us, for us to change your filter, we would have to go offsite to get that filter and bring it back.... Part of the reason that we have the loaner cars... [are] the issues that we have with lack of space to service customers, and we have to give people free cars to drive around with because it takes too long to service their car[s]." [I 62:9-25]

52. Nevertheless, in 2014, Hooman's sold roughly 1,000 Fiat Chrysler vehicles. [II 46: 7-9] And, as a new dealer starting operations in January 2014, it received over $1.445 million in FCA incentive payments during the year.[18] [Exh 213-0002; II 43-44]

53. During the first six months of the dealership's operation, Julio Sebastiani provided training to employees Mary Garcia and Beth Abriani regarding incentive claims on several occasions, even accessing an FCA "hotline" with them. [I 120:25 to 121:6, 12-15; 150:22 to 151:21] Additionally, he told Rayan Nissani, "the decision maker at the store", that any vehicle Hooman's sold to itself as a service loaner needed to be titled at the time of sale. [I 138:18-19; 172:19 to 173:12; 190:5 to 191:3, 200:5-10]

54. Hooman Nissani is a strong believer in customer service. As part of making the customer happy, all Hooman Nissani's dealerships offer "VIP Customer Privileges" for those who buy vehicles from one of his stores. Among other things, the VIP Program offers its customers complimentary car washes (one per week for the first 5 years of ownership); complimentary flat tire repair (for the life of the

[18] Although not in the record, this figure presumably included the chargeback amount at issue here. Also, this figure may include customer incentives which the dealer passes on to customers, although no evidence was offered on this point either.

vehicle); and complimentary lube, oil and filter changes (for the life of the vehicle, based on three oil changes per year for five years). [Exh 102]

55. One of the benefits of Hooman's VIP Program is its "Courtesy Loaner Vehicle" privilege. Hooman's promises its service customers complimentary loaner vehicles for up to two days (based on two service visits a year for five years). [Exh 102]

56. When Hooman Nissani became a Fiat Chrysler dealer, FCA did not have a special program allowing dealers to buy new vehicles for use in loaner programs for service customers. Hooman Nissani, familiar with other franchisor's special programs in this regard (since loaner vehicles for service customers builds brand loyalty), was concerned about several issues: whether FCA did, in fact, have such a special program; if so, the process for accessing the special program and its benefits to the dealer; and, once the vehicles were purchased by the dealer, whether FCA bore the ongoing cost of insurance.[19] He did inquire of one or two FCA employees, but they had no answer for him since FCA did not, at that time, have such a special program. [Exh 272-0001; IV 229:24 to 230:2; V 36:25 to 38:16, 63:16-18]

57. Since Hooman's service facilities are fragmented and service customers may have lengthy waits for their vehicles, complimentary loaner vehicles are an important part of Hooman's goal of providing a high level of service to its customers. [IV 226:24 to 227:6, 230:8-11]

58. At an unknown time, Hooman's began selecting vehicles from its new vehicle inventory and offering most, if not all of them, as loaners to its customers whose FCA vehicles were being serviced. Depending on the time of year, the number of loaner vehicles ranged from 60 to 110. [IV 228:23 to 229:1, 229:2-14]

59. However, protestant's loaner vehicles were neither "titled" nor registered when put in service and driven by its customers. [I 125:21-24, II 68:18-20] In fact, but for the information which Hooman Nissani received during the audit, the vehicles would not have been "titled" and registered in late December 2014 and early January 2015. [I 125:4-20] Moreover, without preparing the paperwork to submit to the DMV to "title" and register the vehicles, no temporary identification to affix to the

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[19] Hooman Nissani testified that in regard to loaner programs, other "...manufacturers...take title to the cars themselves". [I 126:14-17]

windshield could have been prepared.[20] [I 83:5-7; IV 236:19 to 237:1-11; V 92:9-14]

60. Protestant not only was noncompliant with the terms of the VGP promotion, but also violated state law, in that unregistered vehicles may not be driven indefinitely on California roadways. A vehicle may only be driven a maximum of 90 days with a temporary identification, while the owner is awaiting receipt of the vehicle's registration card and license plates, and possibly certificate of title. [Section 4456(c)] The following are two examples of protestant's use of its loaner vehicles:

A. Protestant's customer Suzette R. drove a loaner vehicle (a Dodge Journey with partial VIN #ET242784) from December 5th to 6th, 2014, with "Mileage Out" of 4,617 miles but with "Temp" entered as a license number. This vehicle was NVDR'd by protestant on April 30, 2014 and protestant received a $2,000 VGP incentive payment, but it was not "titled" until December 24, 2014. [Exhs 218-0037-0038, 253-0014, 264-0003]

B. Protestant's customer Tremaine E. drove a loaner vehicle (a Chrysler 300 with partial VIN #EH186232) from November 26th to 27th, 2014, with "Mileage Out" of 4,847 miles but with "Temp" entered as a license number. This vehicle was NVDR'd by protestant on April 30, 2014 and protestant received a $1,500 VGP incentive payment, but it was not "titled" until December 24, 2014. [Exhs 218-0022-0023, 254-0012, 264:0002]

61. Hooman Nissani's misunderstanding of the terms of the VGP---at least initially---was possibly poor communication between the parties. [Exh 272-0001; I 113:6-9; IV 146:2-3; V 36:25 to 38:16] He testified that he thought that "titling" of loaner vehicles was unnecessary because of his experience as a franchisee of other manufacturers. [I 126:5-17] But no further evidence was offered in regard to his statement, either by protestant to corroborate his testimony, or by respondent to refute it.

Reporting Vehicle Sales to Fiat Chrysler via DealerCONNECT

62. Fiat Chrysler's DealerCONNECT is "[t]he software package and system by which dealers and FCA US communicate electronically." [Joint Glossary of Terms, 1:28-2:1] It is available to dealers twenty-four hours a day, seven days a week. [I 162:12-20; II 98:4-14; IV 11:18 to 12:2]

63. FCA issues passwords to its dealers to allow them access to DealerCONNECT. Hooman

[20] No evidence was offered by either party describing the "temporary registrations" affixed to the windshields of these loaner vehicles during the months that they were driven by Hooman's customers. [V 92:9-14]

Nissani received his dealership's password from FCA in January 2014. [IV 265:8-13]

64. FCA's Dealer Policy Manual, found on the DealerCONNECT website, covers the reporting of vehicle sales to FCA. Dealers must report each vehicle sale within two days, using the website. The reports are called "New Vehicle Delivery Reports" which is often shortened to "NVDR". All records of sale (expansively defined) must be retained by the dealer for a minimum of two years. [Exh 206a-0041-0043]

65. A vehicle sale previously NVDR'd by the dealer to FCA may be "unwound" and, if the dealer received from FCA an incentive payment for that sale, it would automatically be "charged back" by FCA from the dealer's account. [Exhs 207a-0014, 207b-0014; II 118:17-23, 157:11 to 158:2]

Fiat Chrysler's Sales Incentive Programs

66. Fiat Chrysler's sales incentive programs can generate substantial sums for dealers. For example, during 2014, the first year that Hooman's had been an FCA dealer, it had not only sold roughly 1,000 retail units, it had also received over $1.445 million in incentive payments. [Exh 213-0002; II 43-44]

67. Fiat Chrysler offers two kinds of dealer incentive programs to stimulate sales to consumers and to reward dealers based upon their sales performance: "dealer" incentives and "customer" incentives. [III 118]

68. "General program rules" governing all incentive programs are in the Incentive Rules Manual (the "Gold Book") [Exhs 207a, 207b] and the Dealer Policy Manual [Exh 206a] and include the following:

A. Incentive claims are made by the dealer separately from the NVDR reporting the sale, and no later than 90 days after the sale.

B. Only "eligible vehicles", as described in the "Gold Book", qualify dealers for incentives. According to the "Gold Book", eligible vehicles may be the following: "New and unused vehicles sold or leased to any entity with a dealer license that are titled at the time of sale. Title must be retained on these vehicles for a minimum of six months[21] after the reported NVDR delivery date. The selling dealership

[21] Reduced to three (3) months in the 6/12/2014 version of the "Gold Book". [Exh 207b-0006]

must ensure these requirements are fulfilled. The selling dealership is also responsible for compliance with state tax, licensing and registration requirements. Any violation will result in the chargeback of all incentives." [Exhs 207a-0006, 207b-0006]

C. The dealer must retain all documents and records pertaining to the sale for at least two years from the date of the incentive payment or end of the program, whichever is later. In the "Gold Book", the documents include "Title and Registration Documents including a copy of the actual title and/or official state confirmation thereof" and "Signed Buyer's Order/Purchase Contract". [Exhs 207a-0016, 207b-0016] In the Dealer Policy Manual, documents listed are both "installment sales contracts" and "department of motor vehicle registration records". [Exh 206a-0007]

D. All incentive claims are subject to eligibility review and may be denied; if previously paid claims are later determined to be ineligible, they "may be subject to chargeback". [Exhs 207a-0005, 207b-0005]

E. The dealer must submit to an audit of its records, and must produce all documents (expansively defined, as noted above) requested by the FCA auditor. [Exhs 206a-0004, 207a-0004, 207b-0004]

F. At the conclusion of the audit, the auditor will conduct a meeting with the dealer to discuss the "preliminary audit results" and will "answer any questions". [Exh 206a-0008]

(1) If the situation calls for it, the auditor will make "suggestions for changes" that the dealer should consider in the claims process. [Exh 206a-0008]

(2) If, however, "exceptions are noted that require a chargeback..." of incentive amounts previously paid to the dealer is required, the auditor will give the dealer a written notice of disallowance, with a documented explanation. [Exh 206a-0008]

G. If justification for a "chargeback" has been identified by the auditor, the dealer has the right to ask for an audit review, and may submit to the auditor "any statements or documents...that might refute the chargeback", after which consideration the auditor issues an audit report. [Exh 206a-0009]

H. "If the dealer has additional explanation and or documentation [sic] that would change the audit findings", the dealer may ask for an Audit Manager Review, which must be "accompanied by all documents and the details supporting all positions that the dealer intends to present"; this review is

conducted by a second FCA auditor, who issues a "final audit report" after consideration of the documents. [Exh 206a-0009-0010]

I. The dealer may file an Audit Appeal of the determination made in the Final Audit Report. The appeal ultimately involves an in-person presentation by the dealer before FCA's Audit Appeal Committee (composed of senior management) at the company's headquarters in Michigan. Dealers are cautioned to thoroughly review the facts of their case before filing an appeal. The dealer's letter of appeal must include "...a concise statement of the reason for the appeal", specific information about the chargebacks and "all documents which may be relevant to the [dealer's] claims...". Based on the evidence and arguments presented, the committee can uphold the final audit report or make adjustments to it. The committee will issue a written statement of its decision. [Exh 206a-0011-0013]

J. If, in reporting a sale via NVDR or in submitting an incentive claim, a dealer submits information that is found to be "inaccurate, ineligible or unsupported", the sale "...will not be eligible for any further incentive payments". [Exhs 207a-0004, 207b-0004]

K. The "Gold Book" applies to <u>all</u> sales transactions, "...unless specifically excluded or amended in the Official Program Rules for a specific program". [Exhs 207a-0005, 207b-0005]

(1) In regard to rules for specific incentive programs, the "Gold Book" states:

"Program Announcements & Dealer Incentive Programs"

"When new programs are announced, [FCA] provides your dealership with instructions and Official Program Rules with regard to those matters that are specific to each program via DealerCONNECT. The Official Program Rules are in addition to this Incentive Rules Manual. You are responsible for properly implementing these instructions and all applicable program rules. You must insure that your employees understand and follow these rules." [Exhs 207a-0005, 207b-0005]

(2) In addition, the Dealer Policy Manual also refers dealers to DealerCONNECT under the Sales Tab---Dealer Incentives Communications for specific incentive programs rules. These supplement the general program rules contained in the Gold Book." [Exh 206a-0041]

<u>Fiat Chrysler's "Volume Growth Program" (VGP)</u>

69. The Volume Growth Program (VGP) was a "dealer incentive" sales promotion. It

rewarded dealers for reaching certain monthly sales goals, stated in terms of numbers of "eligible vehicles" sold. [Exh 282-0011 to 0051; I 145:20 to 146:7; II 48:3-4, 93:24 to 94:1; III 17:9-14, 118:19-21, 121:21 to 123:8]

70. Incentive payments to dealers were calculated on a per-vehicle basis. As an illustration, if a given month's objective was 75 units and the incentive was $500 per unit, retroactive to the first unit, selling the 74th unit would not result in any incentive payment, but selling the 75th would result in $37,500 in incentive payments (75 x $500). The 76th eligible unit would result in an additional $500 payment.

71. Since incentive payments were retroactive to the first unit sold during the month, the sale at the end of the month that allowed the dealer to reach the volume objective had a high incremental value. [III 122]

72. Each month, FCA would post on its DealerCONNECT website the VGP "Official Program Rules" for the next calendar month. [Exhs 282-0011 to 0051, 283]

73. As shown by VGP's "Official Program Rules" for the months at issue here, only "active" franchised dealers who agreed to abide by the rules were eligible for incentive payments. Eligible models for the month were listed, with the requirement that vehicles "...must be delivered during the program period". [Exhs 282:0011 to 0051, 283]

74. The number of vehicles a dealer needed to sell during a particular month in order to qualify for the VGP incentive payment was its "individual calculated 'Market Performance Level' (MPL)", a number based on its past sales history over the last 3 or 12 months, together with some other variables. Program ID's are assigned monthly to each separate program. The individual MPL for each dealer was available through FCA's Business Center, presumably because the calculation was complex. [Exhs 282:0011 to 0051, 283:0002-0005]

75. The number of vehicles dealers must sell to qualify for the VGP incentive may vary each month, for two reasons: first, FCA may change the rules; and second, the variants in the calculation of the dealer's MPL will always change (because the time frames will always be different), possibly producing a different numerical result even though FCA's rules may remain the same. [Exh 282-0011 to 0051]

76. There was no prohibition against a dealership purchasing vehicles itself and counting those

sales toward its qualification for incentive payments. Moreover, after purchase (by a dealership), FCA placed no limitation on the use the dealership made of the vehicles so purchased. [Exh 282-0011 to 0051]

77. Auditing of dealers' records after the claims have been paid is the exclusive method used by FCA to monitor dealers' compliance with the Volume Growth Program and its rules. [Exhs 206a-0014, 207a-0004, 207b-0004; II 95:23 to 96:17]

78. Because of the nature of the VGP promotion which paid dealers for each vehicle sold during the month if the monthly qualifying sales number was met, a chargeback of a single sale will result in negating the total amount paid to the dealer for all vehicles sold during the month. Using the example above, in a month where the incentive is $500 per vehicle and the sales goal is 75 vehicles, if the 75th sale is charged back, the total chargeback will be $37,500.[22]

FCA's Audit of Hooman's Sales Data and Hooman's Audit Appeal

December 1, 2014 to January 14, 2015

79. Respondent's audit covered Hooman's sales reported ("NVDR'd") to FCA during the months of March through November of 2014, a nine-month period allowed by section 3065.1(g)(1). FCA has conducted no other audits of the dealership. [Joint Stipulation of Facts, ¶10]

80. During that time, when the number of sales so reported in a calendar month qualified Hooman's for a VGP promotion bonus, claims for incentive payments would be made to FCA by protestant. FCA does not disapprove dealers' sales incentive claims when they are initially submitted, relying instead on later audits of dealers' records for verification. [Exhs 206a-0014, 207a-0004, 207b-0004; II 95:23 to 96:17]

81. FCA electronically credited the incentive amounts to Hooman's account, each monthly payment presumably being paid within 30 days after the claims had been submitted, as required by section 3065.1(a).

82. On Monday, December 1, 2014, Matt Gabel, a Dealer Auditor for Fiat Chrysler, began a week-long sales incentive audit at Hooman's dealership at 333 Hindry Avenue in Inglewood. [Exhs 208, 209, 210]

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[22] The same result will occur if the dealer "unwinds" the sale, if the sale had qualified for the dealer for incentives that month.

83. The purpose of the inspection of Hooman's books and records was to verify the dealer's compliance with the rules of the VGP sales incentive promotion.[23] It was also "first dealer's first audit" and, although there was no "leniency...from an audit standpoint", it was an opportunity for the auditor to explain FCA's policies and procedures. [IV 55:20 to 57:1]

84. Before the audit, Matt Gabel searched Fiat Chrysler's records for Hooman's sales reporting and incentive claims history. One of the reasons for his search was the following:

> ..." I was looking at [Hooman's] information...[on the FCA computer system].
>
> Q. All right. And again, your interest in looking at this information was to see how close they were to the monthly objective on any given month?
>
> A. Yes.
>
> Q. And why was that again?
>
> A. If they're close to their monthly objective, it would cause us to look at the last day of the month, or a couple days before the end of month to see that the sales are eligible.
>
> Q. And why is the last day of the month a concern to you?
>
> A. Because historically that's where changes are made to achieve an objective.
>
> Q. Okay. What kind of changes are made to achieve an objective?
>
> A. Sometimes dates are misreported. Sometimes vehicles are not titled, but they're reported sold. In other words, they're just a [sic] reported sold. They're not an actual sale." [II 199:4-19]

85. Matt Gabel's search of Hooman's sales and incentive reports in FCA files produced a chart showing some or all of the instances where Hooman's had received VGP payments: it listed "Program ID", "Program Name", "Sales Objective", "Eligible VINs" and "% Objective Achieved". A "potential out of line caution is flagged" on the chart if the dealer's monthly "sales objective is achieved by 5 units or

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[23] Joint Statement of Facts, ¶ 5.

less". Ten of the 27 Program ID's were flagged in Hooman's record. [Exh 273]

86. In an email to Rayan Nissani before the audit, Matt Gabel had prepared a "pull list", requesting deal jackets for a total of 94 sales made during the audit period, 33 to Hooman's and 61 to others. [Exh 211] Roughly half the list was generated randomly by computer and the other half represented VIN's in which Matt Gabel had identified a particular interest. [II 16:18-25 to 17:1-15]

87. A "deal jacket" is typically a manila folder containing all the relevant documents for a car deal, kept on every vehicle that is sold by a dealership. [II 22:5-10] The contents of a "deal jacket" are those documents required to be kept for a minimum of two years by both the Dealer Policy Manual and the "Gold Book". Both the Dealer Policy Manual and the "Gold Book" require the dealer to keep "Title and Registration Documents"--- the "Gold Book" even expands this requirement, as follows: "Title and Registration Documents including a copy of the actual title and/or official state confirmation thereof." (Emphasis added) Both the Dealer Policy Manual and the "Gold Book" also require the dealer to keep the "Purchase Contract" evidencing the sale of the vehicle, as well as a number of other listed documents. [Exh 206a-0040-0042, 207a-0016, 207b-0016]

88. The dealership was unprepared for Matt Gabel's visit; no deal jackets were available upon his arrival, nor was he allowed into any area which might be designated a business office. He conducted the audit sitting across the desk from Rayan Nissani, who handed him pages from deal jackets, but did not allow him access to the deal jackets. This was unlike his experience with other dealership audits, where he was provided the deal jackets and allowed to review them on his own in an office. [II 17:20-25 to 19:1-15, 20:14-22]

89. During the audit, Matt Gabel discovered that "virtually 100 percent of the [33] deals to the dealership were missing". [II 21:13-14]

90. Matt Gabel had authority to ask for an expanded list of deal jackets; six weeks before the audit began, he had emailed Hooman Nissani that "[s]ubsequent deals may be requested based upon the results of the initial review list". [Exh 208]

91. During the audit, he "came up with the expansion list", asking Rayan Nissani "for the remainder of the deals to the dealership that fell within the nine-month audit period." The number of those sales was approximately 68. [Exh 272-0002; II 20:3-8]

92. None of the deal jackets from the expanded list was provided. Matt Gabel's testimony was the following:

Q. "And when you would ask for deal jackets, would Rayan bring them to you?

A. No.

Q. What would he do?

A. With regard to the expanded list, he didn't produce anything." [II 20:9-13]

93. The audit at the store ended on Friday, December 5, 2014. On that day, Matt Gabel conducted an exit interview with Rayan Nissani personally and Hooman Nissani by phone. In regard to the sales which Rayan Nissani had identified as their "loaner" cars, Matt Gabel informed both men that FCA required each of these vehicles be "titled" at the time of sale in order to be eligible for any incentive payments and that Hooman's failure to do so rendered each sale ineligible for the promotion bonus. Both men "...claimed that they would fix the situation immediately." [Exh 272-0001; II 190:3-15] He did not tell them that if they "titled" the vehicles, he would "adjust the audit" or "reverse the chargebacks". [II: 190:16-18, 191:2-4]

94. And, as noted above, most, if not all, of the deal jackets were missing in regard to Hooman's deals to the dealership itself.

95. Also on December 5, 2014, Matt Gabel emailed Hooman Nissani and Rayan Nissani the exit meeting report he had prepared showing a "potential chargeback" of $385,115.00. He advised that Hooman's would have 30 days to provide "additional information or documentation to reverse the potential chargebacks that were identified during the audit". [Exh 213]

96. The exit meeting report (44 pages) stated, among other things, the following:

A. The number of VIN's reviewed during the audit: 163

B. The number of VIN's charged back: 108

C. The total amount to be charged back: $385,115.00

[Exh 213]

97. The two main chargeback reasons were Code D (Ineligible Customer - Wholesale/Broker)

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and Code K (Deal File Not Located).[24] [Exh 213]

98. Matt Gabel extended the audit closing date, set at January 5, 2015, as a courtesy to Hooman Nissani to allow him to submit additional information. [Exh 220-0001]

99. On January 9, 2015, Hooman Nissani scanned and emailed Matt Gabel numerous DMVdesk reports. [Exh 217] To Matt Gabel, the DMVdesk reports appeared to be "registration inquiry reports". DMVdesk reports are not a resource that he uses. He had requested the title and registration documents described in FCA's Dealer Policy Manual and the "Gold Book", but he did not receive them. [II 131:6-12; 119:25 to 121:4]

100. The DMVdesk reports, submitted by protestant in lieu of contracts [Exh 217-003][25], are a reliable secondary source of vehicle registration information[26]; they did reveal, however, protestant's failure to timely "title" and register the loaner vehicles at or near the time of sale. Even though the information may be reliable, however, DMVdesk reports are not a substitute for "Purchase Contracts" required by the Dealer Policy Manual and "Gold Book" because they do not reflect the contractual obligations of the parties.

101. During the audit period, Matt Gabel independently verified for himself that, in late December 2014 and early January 2015, Hooman's had "titled" all of the vehicles which had been identified during the audit as the dealership's loaner vehicles. His testimony in this regard is the following:

> Q. ... When you say the vehicle title activity was processed after the audit had begun, what are you saying?
>
> A. That all of the titles were after the audit had begun, meaning After December 1st.
>
> Q. Meaning that the vehicles had not been titled prior to the

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[24] It appears that one, and possibly two, of the chargebacks were for a program other than VGP.

[25] This was a representative sample of numerous DMVdesk reports offered by protestant and marked for identification as Exhibits 217-004 through 217-085, but not admitted.

[26] Matt Gabel also used an unnamed "...3rd party system..." in concluding that the vehicles were "titled". [II 133:11-14]

audit beginning?

A. That's right.

Q. And hadn't been titled at the time of sale?

A. That's correct.

[II 131:25 to 132:8]

Q. How, at this point in time, do you know when the vehicles were titled?

A. I ran a check myself through a system that -- a 3rd party system.

Q. And so did you run that check for each of the vehicles that were contained as a chargeback in your audit?

A. Yes.

Q. And what were you able to confirm as to each of those vehicles?

A. That title had occurred after the start date for the audit rather than at the time of sale.

[II 133:11-20]

102. On January 14, 2015, Matt Gabel wrote that "...the vehicle title activity was processed after the audit had begun. Also when a vehicle is sold to the dealer we still require a contract and all other associated paperwork just as any other deal. Even though the vehicle is sold to yourself all the same requirements for a car deal apply." [Exh 222-0003-0004; II 131:17-21]

103. Hooman Nissani produced no sales contracts for the loaner vehicles. He emailed that "...we don't print contracts between cars that are going to rental as the agreement would be between ourselves..." and posed the question, "[w]hy do we need to waste paper and $4 for each contract...?". [Exhs 221-0001, 222-0002] Matt Gabel did not know this before, and considered it a violation of the "Gold Book" rules. No other dealer in his experience had "[done] it [that] way". [Exh 222-0003; II 130:4-17]

104. Instead of sales contracts, Hooman Nissani submitted documents which Matt Gabel called

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"some type of screen shots", half-page documents which were clearly computer print-outs.[27] Called "F & I - Deal Worksheets", each described an apparent vehicle transaction, since "deal #" and "deal date" were populated with data, but the information was scant: the make and model of the vehicle (no VIN#), the price, the rebate, "govt fees", MSRP, "doc fee", "amt financed", "pymt date" and only a few other items were on the "screen shots". [Exh 221-0005; II 170:3-16]

105. Matt Gabel concluded that Hooman's had failed to show that the dealership's loaner vehicles which were the subject of the audit were "titled" and registered at or near the time of sale, and had failed to produce contracts supporting the sales. [II 131:24 to 132:12; 173:16-17]

106. On January 14, 2015, Matt Gabel emailed Hooman Nissani the following message: "There have been no changes to the chargeback's as a result of your submissions. The titling for the subject vehicles was processed after the date the audit began and not at the time of sale as required by the program rules and the chargebacks for missing deals remains in place because you have not provided me with any deal documents on the subject VIN's. Below is an excerpt from the incentive rules manual regarding document requirements this can be found on page 15 of the manual (Gold Book). There are no exceptions to these requirements for vehicles sold to the dealership. [Listing of sales documents required to be kept by dealers for a minimum of two years, from the "Gold Book"]" [Exhs 222-0001-0002, 272:0003-0004]

107. Matt Gabel closed the audit on January 14, 2015, with a final chargeback amount of $385,115.00. He advised Hooman Nissani of this determination and provided him with the 56-page review meeting report and informing him of his right to request an audit manager review. [Exhs 123, 223, 225]

Audit Manager Review (February 12, 2015 - March 2, 2015)

108. On or about February 12, 2015, Hooman's requested a "review of the audit". William Danforth was assigned to conduct the Audit Manager Review. [Exhs 232, 233]

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[27] Later in the hearing, during Hooman Nissani's testimony, it turns out that these "screen shots" revealed incomplete information from the computer screen from which they were printed, that there was, in fact, a second page which could have been printed out, but was not. [Exh 238; V 85, 88-90] However, even if all the information from the computer screen had been presented, this would not have changed the audit results, since Hooman's did not produce original documents showing timely "titling" and registration at or near the time of each sale.

109. Hooman's submitted two sets of documents for the review: the DMVdesk reports and the "screen shots", the same documents that Matt Gabel had disallowed in upholding his recommended chargeback. [Exhs 217, 221, 232]

110. Among other things, William Danforth's review included an AutoCheck sampling. [Exhs 234, 235] His "Final Audit Report" dated March 2, 2015, upheld the prior decision to charge back $385,115.00 from Hooman's dealership account, and included the following:

A. A cover letter in which he explained to Hooman Nissani his appeal rights;

B. A one-page narrative of the Audit Manager Review with the following synopsis:

"Upon review of the DMV Vehicle Registration Inquiry Reports sent in by the dealership the information does not show the title date but does indicate that the vehicles were registered to the dealership. Upon review of the title information through [an] independent title search company completed at the time of the audit it was determined that 1 vehicle was registered in August 2014, 2 vehicles in November 2014, 87 vehicles in December 2014, and 5 vehicles in January 2015. Two vehicles do not show any record of being titled. None of the vehicles charged back were titled at the time of sale. See information below. [Three pages of charts prepared by William Danforth or at his direction, showing the stated information.] (Emphasis added.) [Exhs 236, 237]

The Audit Appeal (March 19, 2015 - August 13, 2015)

111. Hooman Nissani's letter requesting an audit appeal was dated March 19, 2015. Among other things, he stated that "...at no time did we ever receive a Dealer Policy Manual" and "at no time did we receive a copy of the document [you refer to] as "The Gold Book". He cited the "unusual" circumstances by which he acquired the franchise, with the "...existing dealer...operating very poorly, and with no showroom or office". He opined that "[t]he transfer process occurred in a highly expedited manner and as such it seems there were some steps left out." He concluded by noting that 2014 was Hooman's first year of operation and that "...it complied with procedures to the best of [its] ability without having been properly instructed on them." [Exh 238]

112. Hooman Nissani included no new documents in the appeal packet. [Exhs 238, 239]

113. Hooman Nissani appeared personally before the Audit Appeals Committee at FCA Headquarters in Michigan on July 9, 2015. [Exh 245]

114. Although the Audit Appeals Committee sustained the chargeback of $385,115, the committee did offer Hooman's the possibility of discounting the chargeback if he submitted "...actual rental/loaner agreements for the vehicles that were charged back...", plus "usage logs". [Exhs 246, 250]

115. Hooman Nissani submitted fewer than half of the rental/loaner agreements on the VIN's the committee had requested, as well as some usage logs. [Exhs 248, 249, 260, 262-0002]

116. FCA's request for the rental/loaner agreements was justified. Although vehicle rental forms (including customer identification cards) are not normally found in "deal jackets", here, however, that information was important in allowing FCA to determine the bona fides of Hooman's use of the vehicles as loaners, especially since both the contracts and the applications to DMV for new vehicle registrations, which documents normally are in the deal files, were missing. Also, the overwhelming majority of the reported "sales" to the dealership were accomplished on the last day of the month, thereby suggesting that this was to qualify for the purpose of hitting the dealership's VGP sales objectives target, as opposed to any preexisting need for a loaner fleet. [Exh 236:0004-6; II 153-154]

117. Moreover, Fiat Chrysler has legitimate interests in preventing "brokering" and exporting of its new vehicles and in ensuring that customers receive the full benefits of its manufacturer's warranties (since the warranties run from the NVDR date). [III 162:7 to 165:9] The titling requirement puts "accountability and credibility" into the sales incentive program. [IV 85:24 to 86:12]

118. The committee members, after considering options, voted to reduce the chargeback by $101,660. [Exh 263]

119. In a letter dated August 13, 2015, the Chair of the Audit Appeals Committee wrote Hooman Nissani that although the committee found no basis for any adjustment of the chargeback (with details recited both in the letter and in attachments to the letter), the committee voted nonetheless to credit $101,660 against the original chargeback of $385,115. The letter concluded: "Your appeal is now closed...". [Exh 264]

120. The credit was a gesture of "good will" toward Hooman's. [IV 185:14-16][28]

121. State-issued Certificates of Title and registration cards for the loaner vehicles were never

[28] Since Hooman's never produced contracts, registration cards or certificates of title, FCA's characterization of the credit as "goodwill" is accurate.

produced during the audit or the audit appeal, even though, as putative owner of the vehicles, the documents would be in the custody of protestant:

Q. [Protestant's counsel] "I think the record's fairly clear, but you would agree that all of the vehicles had been titled at the time of the [Audit Appeal committee] meeting?

A. [Christopher Glenn] I would agree that the information that we were able to identify indicated that to be the case. We never did receive any kind of proof from the dealer." [IV 191:16-21]

122. Several days later, Hooman Nissani emailed Geoffrey Edmonds, asking what the "next step" would be, presumably in an appeal. Mr. Edmonds responded on August 19th that "...the Committee decision is final" and on August 21st that "[t]here will be no further consideration or adjustments to this chargeback". [Exh 266]

ANALYSIS

123. Although Hooman Nissani professed personal lack of knowledge about the "titling" and registration requirements of the Volume Growth Program, it is clear that Fiat Chrysler had effectively communicated the terms of the promotion within the meaning of section 3065.1.

124. The terms of the VGP were clearly stated in both the Dealer Policy Manual and the "Gold Book" and acknowledged by Hooman Nissani in signing the TSSA.[29] It is immaterial that Hooman Nissani did not receive a "hard copy" of the "Gold Book".

125. Julio Sebastiani briefed the employees responsible for submitting the claims on the terms of the promotion.

126. There was never any statement or implication made by FCA that vehicles used in a dealer's loaner program (or for any other purpose) would be exempt from the "titling" and registration requirements of every vehicle sale.

127. Since protestant knew the complicated Market Performance Level calculation necessary to determine the target number of vehicles it must sell each month to qualify for the incentive payments, it is reasonable to conclude that it knew the "titling" and registration requirements of the program (and of every other vehicle sale).

[29] Protestant's "merger" argument is based upon a misreading of the clause in question and its "contract of adhesion" argument is misplaced in a business context.

128. Hooman's did not prepare contracts when it selected vehicles from its new vehicle inventory for use as customer rentals. It is not true, as Hooman's argues, that contracts with oneself are prohibited or illegal.[30] There was no impediment whatsoever to Hooman's contracting with itself, either with a pre-printed retail installment sale contract or a "Purchase Contract" of its own drafting.

CONCLUSIONS OF LAW

129. In regard to the allegations of the protests filed by protestant HC Automotive, doing business as Hooman Chrysler Jeep Dodge RAM, respondent Fiat Chrysler Automobiles has sustained its burden of proof pursuant to Vehicle Code section 3065.1(g)(6), as follows:

A. FCA's audit of Hooman's sales incentive records submitted pursuant to the Volume Growth Program (VGP) was conducted on a reasonable basis and limited to a nine-month period. Protestant was not selected for the audit, nor was the audit performed, in a "punitive, retaliatory, or unfairly discriminatory manner". Respondent has therefore sustained its burden of proof in regard to section 3065.1(g)(1).

B. FCA communicated the terms of the VGP sales promotion to Hooman's. There is no statutory requirement that the terms be "reasonable", as protestant argues. Even so, the terms of the VGP promotion advanced FCA's legitimate interests, including the prevention of "brokering" vehicles, compliance with State laws, and its financial interest in paying only legitimate incentive claims. The dealership's claims were ineligible under the terms of the promotion as the vehicles were neither "titled" nor registered at or near the time of "sale", nor were contracts prepared, resulting in vehicles being driven by Hooman's customers in violation of State law and FCA policy. Hooman's failed to materially comply with reasonable and nondiscriminatory documentation (the aforementioned lack of title and registration documents, and contracts). Hooman's did not follow administrative claims submission requirements by failing to produce "deal jackets" during the audit. Respondent has therefore sustained its burden of proof in regard to section 3065.1(g)(2)

C. Following its disapproval of Hooman's incentive claims pursuant to the VGP promotion, FCA was specific in its written disapproval notice and accorded Hooman's a reasonable appeal process

[30] Protestant bases its argument on Civil Code section 1550, which simply recites the elements of a contract, including "parties capable of contracting".

and an opportunity to "cure" noncompliance with the terms of the program. "Cure" was not possible, because the requirement to "title" and register the documents was time-sensitive (within 20 days of sale in the State of California) and protestant's failure to do so resulted in its customers driving unregistered vehicles on public roads, among other possible harms. Respondent has therefore sustained its burden of proof in regard to section 3065.1(g)(3)

D. Although FCA failed to conspicuously state "Final Denial" on its written notification to Hooman's of its final decision and therefore has not sustained its burden of proof in regard to section 3065.1(g)(4), this does not call for a resolution of these protests in Hooman's favor.

(1) Section 3065.1(g)(4) requires the franchisor to "...conspicuously state 'Final Denial' on the first page" of its written notification to the dealer of its final decision to deny an incentive claim.

(2) The emphasis is important, because the dealer has only six months after receiving the Final Denial to "...file a protest with the [B]oard for determination of whether the franchisor complied with [section 3065.1]". A protest is the only administrative legal remedy a dealer has to challenge the denial of its claim, and gives the dealer the right to make its case before an impartial board, in a proceeding where the franchisor has the burden of showing compliance with the statute.

(3) Furthermore, if the franchisor has not already charged back the claim at the time the protest is filed, the filing acts as a stay order stopping the franchisor from debiting the dealer's account; the franchisor may not offset or undertake to collect a chargeback until a final Board order. [Section 3065.1(g)(6)]

(4) However, there is no statutory obligation on the part of the franchisor to tell the dealer of its right to file a protest, or the time in which to do so.

(5) Here, there was no prejudice to Hooman's because of FCA's omission. Not only did Hooman's file a timely protest, it still has the disputed amount in its account, as FCA did not complete the chargeback before Hooman's filed its protests.

(6) Protestant is apparently arguing that because of the omission, its protests should be sustained. This argument is rejected. Although protestant has a statutory right (the right to have received a written notice of denial with the words "Final Denial" conspicuously displayed on page one of the

document) it has no administrative remedy, since it suffered no harm by the omission.

PROPOSED DECISION

Based on the evidence presented and the findings herein, IT IS HEREBY ORDERED that the consolidated protests filed herein in *H C Automotive, Inc. doing business as Hooman Chrysler Jeep Dodge RAM* v. *Fiat Chrysler Automobiles*, Protest Nos. PR-2429-15, PR-2430-15, PR-2431-15 and PR-2432-15, are overruled.

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

DATED: August 15, 2016

By: _____
DIANA WOODWARD HAGLE
Administrative Law Judge

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