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STATE OF CALIFORNIA
NEW MOTOR VEHICLE BOARD

In the Matter of the Protest of)
49er CHEVROLET, (# 2))
Protestant,)
vs.)
CHEVROLET MOTOR DIVISION,)
GENERAL MOTORS CORPORATION,)
Respondent.)

Protest No. PR-348-81

DECISION

The attached Proposed Decision of the Administrative Law Judge is hereby adopted by the New Motor Vehicle Board as its Decision in the above-entitled matter.

This Decision shall become effective forthwith.

IT IS SO ORDERED this 11th day of December, 1981.

Kathleen O. Turner
KATHLEEN O. TURNER
President
New Motor Vehicle Board

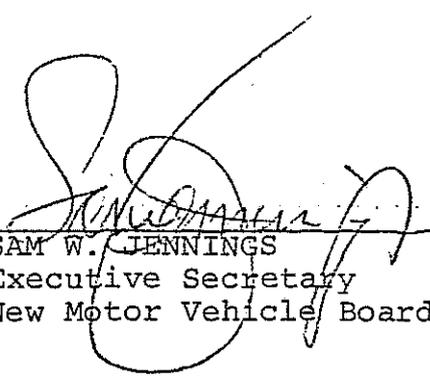
I, SAM W. JENNINGS, Executive Secretary of the New Motor Vehicle Board, do hereby certify as follows:

Attached is a true and correct copy of the Board's decision in the matter of the protest of 49er Chevrolet vs. Chevrolet Motor Division, General Motors Corporation, Protest No. PR-348-81.

This Decision was adopted by the New Motor Vehicle Board on December 11, 1981, to become effective immediately.

The above certification is made under penalty of perjury.

Executed this 11 th day of December, 1981, in South San Francisco, California.



SAM W. JENNINGS
Executive Secretary
New Motor Vehicle Board

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STATE OF CALIFORNIA
NEW MOTOR VEHICLE BOARD

In the Matter of the Protest of)	
49er CHEVROLET, INC.,)	Protest No. PR-348-81
)	
Protestant,)	
)	
vs.)	<u>PROPOSED DECISION</u>
)	
CHEVROLET MOTOR DIVISION,)	
GENERAL MOTORS CORPORATION,)	
)	
Respondent.)	

Procedural Background

1. On September 18, 1981, Chevrolet Motor Division, General Motors Corporation (Chevrolet), notified 49er Chevrolet, Inc. (49er), that Chevrolet had decided that it would not do business with 49er after November 30, 1981.

2. On October 9, 1981, 49er filed a protest with the New Motor Vehicle Board (Board), pursuant to the provisions of Vehicle Code Section 3060.^{1/}

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

3. A hearing on the protest was held before Sam W. Jennings, Administrative Law Judge for the Board, commencing on November 9, 1981 and concluding on November 11, 1981.

4. Chevrolet was represented by J. Thomas Rosch and Robin Paige Donoghue of the law firm of McCutchen, Doyle, Brown and Enersen. 49er was represented by Richard Wilmshurst, president of 49er In Pro Per and by Attorney Richard A. Robyn.

Status of Prior Protest

5. The parties to this proceeding had previously appeared before the Board in connection with a prior protest, PR-271-80, filed by 49er in April, 1980 (1980 protest). The 1980 protest was filed following a notice by Chevrolet that it would "not enter into a new Dealer Sales and Service Agreement with 49er," when the then current five-year agreement between the parties expired on October 31, 1980.

6. Chevrolet moved to dismiss the 1980 protest on the ground that the Board lacked jurisdiction to hear the matter in that Section 3060 was applicable only if Chevrolet was attempting to "terminate or refuse to continue" 49er's franchise. Chevrolet contended that the franchise agreement was to terminate by its terms on October 31, 1980, and that Chevrolet was not obligated to offer a new Sales and Service Agreement to 49er. It was determined that Chevrolet's proposed action was within Section 3060, and the motion to dismiss the protest was denied at the pre-hearing conference. Chevrolet filed a Petition for Writ of Mandamus in the Superior Court

in San Francisco, seeking a judicial determination that the Board was without jurisdiction. A demurrer was filed in response to Chevrolet's writ. On July 19, 1980, the Superior Court sustained the demurrer without leave to amend.

7. The Board, by its order dated January 28, 1981, sustained 49er's protest on the grounds that Chevrolet had failed to establish good cause to terminate or refuse to continue the 49er franchise.

8. Following the Board's decision, Chevrolet petitioned the Superior Court in San Francisco for a Writ of Mandamus vacating the decision of the Board.

9. On August 20, 1981, the San Francisco Superior Court granted the Writ of Mandamus ordering the protest be remanded to the Board for disposition not inconsistent with the Court's determinations.

10. An appeal was taken from the Superior Court judgment to the Court of Appeals of the State of California in and for the First Appellate District, Division 1.

11. The Court of Appeals issued an order on November 6, 1981, which temporarily reinstated the Board's decision in the 1980 protest. The order also temporarily stayed the current protest proceedings insofar as the current protest proceedings involve issues determined in the Board's 1980 protest decision.

12. At the hearing on the current protest, filed on October 9, 1981 (1981 protest), the proceedings were limited to what has transpired since the hearing on the 1980 protest. The final day of hearing on the 1980 protest was October 8, 1980.

13. On November 17, 1981, the Court of Appeals granted the Petition for Writ of Supersedeas and/or Prohibition filed by 49er. The petition was granted to the extent that it requested reinstatement of the January 28, 1981 Decision of the Board in the 1980 protest, pending the outcome of the appeal before the Court.

Issues Presented

14. Vehicle Code Section 3061 provides that in determining whether there is good cause for refusing to continue a franchise,

The Board shall take into consideration the existing circumstances, including, but not limited to:

- 1) Amount of business transacted by the franchisee, as compared to the business available to the franchisee;
- 2) Investment necessarily made and obligations incurred by the franchisee to perform its part of the franchise;
- 3) Permanency of the investment;
- 4) Whether it is injurious or beneficial to the public welfare for the franchise to be modified or replaced or the business of the franchisee disrupted;
- 5) Whether the franchisee has adequate motor vehicles, sales and service facilities, equipment, vehicle parts, and qualified service personnel to reasonably provide for the needs of the consumers for the motor vehicles handled by the franchisee and has been and is rendering adequate services to the public;
- 6) Whether the franchisee failed to fulfill the warranty obligations of the franchisor to be performed by the franchisee;

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- 7) Extent of the franchisee's failure to comply with the terms of the franchise.

15. Chevrolet contends that the business relationship of Chevrolet and 49er has been destroyed as a result of the conduct of 49er's principal, Richard E. Wilmshurst (Wilmshurst).

Findings of Fact

Facts Relating to the Amount of Business Transacted
By 49er as Compared to the Business Available to It
[§ 3061(1)]

16. In October 1980, 49er made a decision to focus its efforts on selling used vehicles rather than new Chevrolet vehicles. This decision was based upon a belief by Wilmshurst that, under the market conditions, 49er could not generate a sufficient gross profit on the sale of new Chevrolet vehicles to maintain a profitable dealership.

17. The following chart depicts 49er's Chevrolet sales performance for the first nine months of 1981 compared to the first nine months of 1980.

	<u>49er Sales</u>	
	<u>1/81 - 9/81</u>	<u>1/80 - 9/80</u>
Retail Car	12	32
Retail Truck	20	84
Total Retail	32	116
Fleet (Car & Truck)	2	46
Total Sales	34	162

18. The following indicates the total number of Chevrolets registered in 49er's area of sales responsibility (Angels Camp area), as well as the number of sales by 49er, for the period of January 1981 to August 1981:

	<u>Number of New Chevrolets Registered in 49er's Area of Sales Responsibility</u>	<u>Number of New Chevrolets Sold by 49er</u>
Cars	26	11
Trucks	32	18
Total	58	29

19. 49er became a Subaru dealer in May of 1981.

20. The chart below indicates the number of new cars in 49er's inventory for the months indicated.

<u>1981</u>	<u>Chevrolet</u>	<u>Subaru</u>
January	8	0
February	6	0
March	3	0
April	5	0
May	7	11
June	6	14
July	4	16
August	4	18
September	6	20

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21. From January 1981 through April 1981, 49er spent \$907 on advertising. From May 1981, when 49er acquired the Subaru franchise, through September 1981, 49er spent \$3,862 on advertising.

22. From May 1981 through September 1981, 49er sold 42 new Subarus and five new Chevrolet cars.

Facts Relating to the Investment Necessarily
Made and Obligations Incurred by 49er to
Perform Its Part of the Franchise
 [§ 3061(2)]

23. 49er is a corporation, the entire stock of which is owned by Wilmshurst. Wilmshurst is President of 49er and Chairman of the Board of Directors.

24. 49er was initially incorporated in April 1960, and Wilmshurst has been president since that time. Wilmshurst was first listed as one of the owners on the Dealer's Sales and Service Agreement in 1960 and has been the only person so listed since 1965.

25. The predecessor dealer of 49er was Wilmshurst Chevrolet, a business which was owned and operated by Wilmshurst's father.

26. Wilmshurst Chevrolet and 49er have been Chevrolet franchisees for a total of 48 years.

27. No additional evidence was introduced concerning investments made or obligations incurred by 49er.

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Facts Relating to the Permanency
of Investment
..... [§ 3061(3)]
.....

28. 49er is located on approximately two acres in the community of Angels Camp. The dealership site contains a body shop, sales office, sales lot, service facility, gas station, and employee parking lot.

29. The land on which 49er is located is owned by Wilmshurst.

30. The value of the dealership land and facilities is estimated to be in excess of \$400,000.

Facts Relating to Whether It is Injurious or Beneficial
to the Public Welfare for the Franchise to be Modified
or Replaced or the Business of the Franchisee Disrupted
..... [§ 3061(4)]
.....

31. There are presently Chevrolet dealers located in Jamestown and Jackson, approximately 18 miles and 24 miles, respectively, from Angels Camp.

32. Chevrolet has entered into an oral agreement with Livery Stable Independent Service (Livery) to perform Chevrolet warranty and service repairs in the event 49er does not continue to be a Chevrolet franchisee.

33. The Chevrolet agreement with Livery is contingent upon Chevrolet discontinuing business with 49er.

34. Livery is an independent auto shop in Angels Camp, located approximately one-quarter of a mile from 49er.

35. The Livery facility has 17 service stalls. Livery's service facility exceeds Chevrolet's requirements for the area served by 49er.

36. Livery has a well-equipped service and parts department and a complete machine shop. Any Chevrolet parts not in stock can be obtained from a Chevrolet dealer within a 30-minute drive.

37. Chevrolet intends to continue having a dealership in the Angels Camp area and has contacted and interviewed three viable candidates for the dealership in the event 49er is terminated.

Facts Relating to Whether the Franchisee Has
Adequate Motor Vehicle Sales and Service Facilities,
Equipment, Vehicle Parts, and Qualified Service
Personnel to Reasonably Provide for the Needs
of the Consumers for the Motor Vehicles Handled
by the Franchisee and Has Been and Is Rendering
Adequate Services to the Public
[§ 3061(5)]

38. Chevrolet stipulated that it would not contest the adequacy of 49er's sales or service facilities.

39. 49er's mechanics have been trained at the General Motors Training Center to service 1982 products.

40. No additional evidence was presented.

Facts Relating to Whether the Franchisee Fails
to Fulfill the Warranty Obligations of the Franchisor
to be Performed by the Franchisee
[§ 3061(6)]

41. No evidence was presented regarding 49er's failure to fulfill the warranty obligations of Chevrolet.

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Extent of Franchisee's Failure to Comply With
The Terms of the Franchise
..... [S. 3061(7)]

42. Chevrolet did not introduce evidence demonstrating 49er had failed to comply with the general terms of the franchise. However, Chevrolet contends that the entire franchise relationship has been destroyed as a result of Wilmshurst's conduct. Chevrolet's contentions will be addressed below.

Facts Relating to the Conduct of Wilmshurst
and Its Effect Upon the Business Relationship of 49er
..... and Chevrolet

43. By letter dated May 22, 1978, Chevrolet requested that Wilmshurst direct any correspondence containing references to California or federal law, or any charges of civil or criminal violations to Chevrolet's legal counsel in San Francisco. Chevrolet renewed its request in a letter to Wilmshurst dated February 27, 1981. Despite these requests, Wilmshurst, a law school graduate, continued to direct such accusations to Chevrolet's personnel.

44. On October 11, 1980, Wilmshurst sent a mailgram to John Hesler, Assistant Zone Manager for Chevrolet, regarding alleged overcharges to 49er. Wilmshurst accused Chevrolet of violating Section 11713.3(h) of the California Vehicle Code and demanded prompt payment.

45. On January 21, 1981, Wilmshurst sent a messagegram to D. S. West (West), Zone Manager for Chevrolet, regarding credits allegedly due 49er. In this correspondence Wilmshurst

attacked Chevrolet's system of credits due dealers from Chevrolet because of overbilling, alleging the practice was illegal and imposed unnecessary expense on 49er.

46. In response to several of Chevrolet's letters to 49er, Wilmshurst attached a piece of red tape with the words "red tape" inscribed on it. Wilmshurst would do this when he felt the paperwork was unnecessary. This appears to be little more than an attempt to further antagonize Chevrolet and its personnel.

47. On January 23, 1981, Wilmshurst sent a letter to West, notifying Chevrolet that 49er was increasing its retail labor rate. Wilmshurst requested Chevrolet send 49er the "necessary (unnecessary)" form so that 49er could again advise Chevrolet that 49er was raising its retail labor rate. On February 3, 1981, Wilmshurst partially completed the change of warranty labor rate form, and submitted it to Chevrolet with red tape attached to it.

48. On January 23, 1981, Wilmshurst sent a letter to West regarding refunds of overbilling on new vehicles. In this letter Wilmshurst attacked Chevrolet's procedures regarding payment of credits due to dealers because of overbillings, and accused Chevrolet of illegal overbilling. Wilmshurst also attacked Chevrolet's established procedures as being ineffective, inaccurate and unworkable.

49. On April 8, 1981, Wilmshurst sent a letter to Robert E. Cook (Cook), Chevrolet's General Sales Manager, regarding Chevrolet's appeal from the Board's 1980 protest

decision. Wilmshurst charged that Chevrolet's appeal would result in protracted litigation and was an intentional attempt by Chevrolet to injure 49er and Wilmshurst personally. Wilmshurst also accused Chevrolet's witnesses at the previous Board hearing of not telling the truth.

50. On July 1, 1981, Wilmshurst sent a letter to Cook regarding Chevrolet's non-payment of warranty billings by 49er. Wilmshurst accused Chevrolet of attempting to evade payment for legitimate work performed by 49er and of misusing its corporate power.

51. Between the last hearing and the present protest hearing, Wilmshurst directed approximately 60 letters to West. All correspondence from Wilmshurst was referred to Chevrolet's attorneys for responses.

52. Chevrolet personnel are reluctant to visit 49er unless accompanied by at least one other Chevrolet employee.

53. Wilmshurst engaged in the above conduct since the previous protest hearing even though he knew there were other avenues of redress available to him. Wilmshurst has pursued at least one other avenue of redress by filing an action in the United States District Court against Chevrolet on October 30, 1980. Wilmshurst sought a preliminary injunction, permanent injunction, damages, and jury trial.

54. Wilmshurst was aware that in addition to the courts, the Board's petition process is available as a forum to resolve dealer-manufacturer disputes which are not covered by the protest provisions of the Vehicle Code.

55. In addition to communications with Chevrolet's personnel, Wilmshurst also communicated to third parties concerning his dispute with Chevrolet.

56. In the following letter dated February 2, 1981, sent to Gary McCool, Claims Director, Insured Transporters, Inc., Wilmshurst represented that the Board had ruled for 49er on 49er's petition and that a price-fixing element had been established.

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NEW MOTOR
VEHICLE BOARD

Exhibit # 9-229
PR
File No. 348-81

February 2, 1981

Mr. Gary McCool
Claims Director
Insured Transporters, Inc.
100 Industrial Way
Benicia, California 94510

Re: DR. 328994, I. D. #CLN1498296118

Dear Mr. McCool:

The New Motor Vehicle Board has found for 49er Chevrolet on its Petition.

Therefore, this letter is a final billing and demand for the repairs to the above-referenced LUV truck delivered to our dealership.

Estimate of Repair \$ 960.52

Interest for one year
on the outstanding amount
through 1/31/81 144.08

\$1,104.60

If we are not in receipt of your check by February 15, 1981, we will bring an action in the Calaveras County Justice Court for treble that amount, \$3,313.80. We will ask for the treble damages based upon the price fixing element established at the Chevrolet hearings.

Very truly yours,

Richard E. Wilmshurst

REW/sld

57. On February 19, 1981, the Board sent a letter to Wilmshurst, cautioning him against misrepresenting the action taken by the Board. There was no petition decision by the Board since the petition filed by 49er was withdrawn, although a protest was subsequently heard. The Board did not make any determinations concerning the alleged price-fixing by Chevrolet, and Insured Transporters, Inc. was not a party to the 1980 protest hearing. Wilmshurst was advised that if he sought judicial relief by improperly misrepresenting the Board's action, the Board would request permission of the Court to appear to correct any misrepresentations of the Board's decision.

58. On March 17, 1981, Wilmshurst sent a letter to R. L. Cote, Jr. (Cote), President of Courtesy Chevrolet and Chairman of the Chevrolet National Dealer Council. Wilmshurst informed Cote of Chevrolet's appeal of the Board's 1980 protest decision and that Chevrolet was willing to invest over one million dollars in an attempt to put 49er out of business. Wilmshurst accused all of Chevrolet's witnesses of not telling the truth at the Board's 1980 protest hearing.

59. There were not sufficient facts established which would provide a basis for a reasonable belief by Wilmshurst that his accusations in paragraphs 43-58 above were justified.

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Determination of Issues

It is determined that there is good cause for Chevrolet to "terminate or refuse to continue" the 49er franchise, in that:

- (1) Chevrolet did establish that the amount of business transacted by 49er was inadequate as compared to the business available to 49er; [§ 3061(1)]
- (2) Chevrolet did not establish that 49er does not have a material investment and Chevrolet did not establish that 49er has not incurred material obligations in the performance of its part of the franchise; Chevrolet did establish, however, that the investment made and obligations incurred have been directed toward the sale of new Subaru vehicles and used cars rather than new Chevrolet vehicles; [§ 3061(2)]
- (3) Chevrolet did not establish that 49er's investment is not permanent; Chevrolet did establish, however, that 49er's permanent investment is now primarily being utilized for the promotion and sale of new Subaru vehicles and used cars rather than Chevrolet products; [§ 3061(3)]
- (4) Chevrolet did establish that it would not be injurious to the public welfare for the franchise to be replaced and the business of 49er to be disrupted; [§ 3061(4)]

- (5) Chevrolet did not establish that 49er does not have adequate motor vehicle sales and service facilities, equipment, vehicle parts, and qualified service personnel to reasonably provide for the needs of consumers of Chevrolet vehicles and did not establish that 49er has not been and is not rendering adequate services to the public; [§ 3061(5)]
- (6) Chevrolet did not establish that 49er has failed to fulfill the warranty obligations of Chevrolet; [§ 3061(6)]
- (7) Chevrolet did not establish that 49er has failed to comply with the general terms of the franchise. [§ 3061(7)]

Chevrolet did establish that Wilmshurst engaged in a course of conduct attacking Chevrolet's policies and procedures as well as the conduct and character of the Chevrolet personnel charged with implementing such policies.

Since the Board's hearing on the 1980 protest, Wilmshurst has continued to engage in conduct which the Board previously found to be disruptive of the relationship between the parties. The Board's prior decision indicated that the Board did not condone the manner and method chosen by Wilmshurst to attempt to rectify what he perceived to be inequities. In spite of the Board's statements, Wilmshurst persisted in his disruptive course of conduct.

Wilmshurst used threats of criminal, economic, and moral sanctions in his attempts to coerce and intimidate Chevrolet's personnel. Wilmshurst did this, despite the fact that he did not believe Chevrolet's personnel or practices were in any way discriminating against 49er or himself personally.

This conduct by Wilmshurst was unjustified and inexcusable in light of all the circumstances. Wilmshurst's conduct effectively precluded the rebuilding of any viable business relationship between 49er and Chevrolet personnel.

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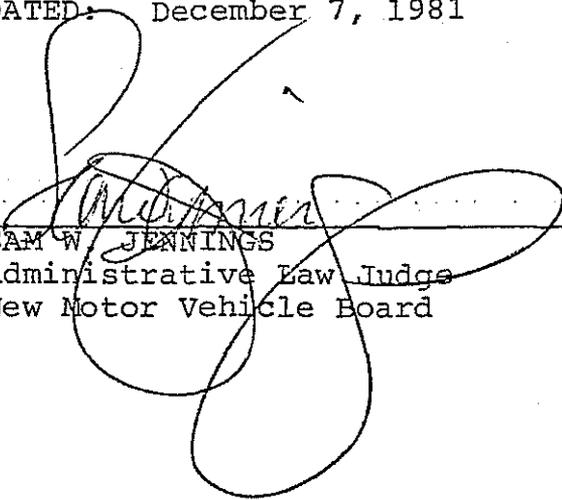
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The following proposed decision is respectfully submitted;

The Protest is overruled. Chevrolet has established good cause to "terminate or refuse to continue" the 49er franchise.

I hereby submit the foregoing which constitutes my proposed decision in the above-entitled matter, as a result of a hearing had before me on the above dates at Sacramento, California, and recommend its adoption as the decision of the New Motor Vehicle Board.

DATED: December 7, 1981



SAM W. JENNINGS
Administrative Law Judge
New Motor Vehicle Board