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STATE OF CALIFORNIA

NEW MOTOR VEHICLE BOARD

WEST COVINA MOTORS, INC., dba CLIPPINGER CHEVROLET, Protestant, v. GENERAL MOTORS LLC Respondent.	Protest No. PR-2213-10 **OPENING STATEMENT OF RESPONDENT GENERAL MOTORS LLC** Hearing Date: May 17, 2012 Time: 10:00 a.m. Honorable Lonnie Carlson

Respondent General Motors LLC ("GM") as required by the Order Regarding Pre-Hearing Matters, hereby submits its Opening Statement for the hearing to be held on May 17, 2012.

OPENING STATEMENT OF RESPONDENT GENERAL MOTORS LLC

This case requires the Board to construe and enforce the parties' Settlement Agreement, entered as a Stipulated Decision of the Board under Veh. Code § 3050.7.

The applicable principles of contract interpretation are set forth in the cases cited by the Protestant, West Covina Motors ("WCM"), in its reply brief:

- 'The fundamental goal of contract interpretation is to give effect to the parties' mutual intentions, which, if possible, should be inferred solely from the written terms of the [contract]."
- "If that language is clear and explicit, it governs."
- "[Contracts] must be interpreted as a whole, giving force and effect to every provision where possible."
- "The [contact] terms must be construed in the context of the whole [contract] *and the circumstances of the case* and cannot be deemed ambiguous in the abstract," and any ambiguity should be "eliminated by the *language and context* of the [contract]," if possible.
- "[The Board's] function is to determine what, in terms and substance, is contained in the contract, *not to insert what has been omitted.*" The Board does not have "the power *to ... insert language that one party now wishes were there.*"

Vons Companies, Inc. v. U.S. Fire Ins. Co., 78 Cal.App.4th 52, 58-59 (2000). Further, "if the meaning a layperson would ascribe to contract language is not ambiguous, [courts – and the Board – should] apply that meaning." *Block v. Golden Eagle Ins. Corp.*, 121 Cal.App.4th 186, 192 (2004) (emphasis added). Finally, "[a contract] provision is ambiguous only when it is capable of two or more constructions, *both of which are reasonable.* 'Courts will not adopt a strained or absurd interpretation in order to create an ambiguity where none exists.' " *General Star Indem. Co. v. Superior Court*, 47 Cal.App.4th 1586, 1592 (1996) (emphasis added; citations omitted).

The key provision at issue here is section 2.3 of the Settlement Agreement, which provides in pertinent part as follows:

> 2.3. If at any time before November 30, 2012, WCM loses its Dedicated Chevrolet Flooring..., WCM shall have ninety days to either (a) provide written evidence of a commitment for replacement Dedicated Chevrolet Flooring in the amount of at least $ 3 million from GMAC or another GM-approved financial institution or (b) present GM with a fully-executed "buy-sell" agreement and complete proposal for the transfer of the stock or assets of WCM to a person or entity not affiliated with WCM or Owner. If WCM does not satisfy either of these conditions (a) or (b) within ninety days of the date it loses its Dedicated Chevrolet Flooring..., WCM agrees that its Dealer Agreement will terminate voluntarily effective 30 days later (*i.e.* 120 days after the loss of the Dedicated Chevrolet Flooring ...) pursuant to Article 14.2 of the Dealer Agreement....

This provision is clear and unambiguous. It is undisputed that WCM lost its Flooring on December 1, 2012. It was on that date that the prescribed 90-day period in which WCM was required either to restore adequate Flooring or present a complete buy-sell proposal began running.

WCM does not and cannot claim that it was not aware that it lost its Flooring on December 1, 2011. GM's Exhibit B is a written notice of that event dated November 30, 2011 that both GM and WCM received from GMAC (now Ally) on or shortly after that date. WCM does not and cannot claim that it was not aware of the legal consequences of that event. Section 4.3 of the Settlement Agreement and Stipulated Decision of the Board states that WCM and its Owner, Mr. Alhassen, "have reviewed this Agreement with their legal, tax, or other advisors, and are fully aware of all of their rights and alternatives." There cannot be any doubt that Mr. Flanagan explained and made sure Mr. Alhassen fully understood the Settlement Agreement,

including section 2.3, before Mr. Alhassen signed it and it was submitted to the Board for approval.

Under these circumstances it makes perfect sense that section 2.3 was intentionally drafted to be self-executing in the sense that the 90-day period would begin to run on the date WCM lost its Flooring. That is what the words say. There was no need for GM to send another notice to WCM. After all, Ally, not GM, had provided the Flooring and it was up to Ally, not GM, whether to cease doing so. After WCM received notice of the loss of its Flooring from Ally, the clear terms of section 2.3 automatically came into play. Any further notice would have been surplusage. Therefore, the parties intentionally did not include any notice requirement in section 2.3. The words "notice" or "notify" do not even appear in section 2.3. If the parties had intended to require GM to give notice to trigger the running of the 90-day period, they could have easily included that trigger in section 2.3. They did not.

Applying the principles of contractual interpretation noted above, the provisions of section 2.3 are clear and unambiguous and would be interpreted by a lay person to mean that the 90-day period began to run on the date WCM lost its Flooring. Neither a Court nor the Board has any power to create a new notice provision that doesn't appear in section 2.3 and that the parties didn't agree to.

WCM points to section 4.9 which governs notice procedures with respect to those sections of the Settlement Agreement under which notice is required "to be given." Section 4.9 does not apply to those sections of the Settlement Agreement under which notice is *not* required "to be given." Section 2.3 by its express terms does not provide for any notice "to be given" by GM. In contrast, notice was "to be given" by GM under section 2.5 which required it to approve or reject a complete buy-sell proposal if one had been submitted within the 90-day period prescribed by section 2.3, so there is no question that GM's interpretation of the entire contract

"gives force and effect" to section 4.9, as required by the principles set forth in the *Vons Companies* case.

In other words, section 4.9 comes into play only when another provision of the agreement provides that notice is "to be given" by GM and there is a period of time specified for the performance of other terms of the contract, for example the specification that WCM close a buy-sell transaction within 30 days of GM's giving notice of its approval of the proposed purchaser under section 2.5. This is the most reasonable construction of section 4.9, which provides as follows:

> 4.9 Notices. Any notice or other communication to be given to any of the Parties hereto shall be delivered personally, or by United States registered or certified mail, with signed receipt requested to the persons listed below at the addresses indicated. Any period specified in this Agreement shall not commence until the first day after personal delivery or the fifth business day after deposition in the United States mail, as the case may be.

If no notice or communication is "to be given," the second sentence of this provision simply does not apply. The phrase "until the first day after personal delivery or the fifth business day after deposition in the United States mail" does not explicitly say what is to be delivered or mailed, but this phrase most logically refers to the notice "to be given" mentioned in the first sentence, and not to any other notice or communication, and certainly not to any notice that the remainder of the Settlement Agreement does not require, or even contemplate. Section 4.9 therefore does not somehow create a "back door" notice requirement in the face of the parties' decision not to include any notice provision in section 2.3.

GM believes that the Board need go no further than the plain language of section 2.3, which on its face would tell a layperson that the running of the 90-day period commenced on the date that WCM lost its Flooring. But even assuming

arguendo that section 4.9 creates some small quantum of ambiguity, the cases that WCM has brought to the Board's attention indicate that any ambiguity should be resolved in the first instance based on the language and structure of the contract as a whole and the context in which the parties negotiated it. *Vons Companies*, 78 Cal. App.4th at 58.

It is undisputed that WCM was without Flooring on a cumulative basis for the better part of two years, and that without Flooring it could not satisfy its new vehicle inventory and retail sales obligations. During the lengthy periods in which WCM was without Flooring, therefore, Chevrolet as a brand was essentially out of business in West Covina. In this context, there is and can be no dispute that the Settlement Agreement was intended to provide GM with a definitive "end-point" to the Dealer Agreement with WCM if it breached its promise to maintain sufficient Flooring going forward. In that event, section 2.3 gave WCM a short period of time either to restore its Flooring or submit an acceptable buy-sell proposal that would permit GM either to maintain or quickly find adequate dealer representation in the West Covina market, either because adequate Flooring would permit WCM to meet its inventory and sales obligations or because GM could enfranchise a new dealer without first litigating a termination protest with WCM. As a result, the parties agreed in section 2.3 to a streamlined timetable that was self-executing and entailed a minimum of legal complications. That explains why formal "notice and cure" provisions were not included in any section of the Agreement. Instead, the only sections that contemplated any kind of notice at all were sections 2.5 and 4.6.

Notice was required by section 2.5 for the simple reason that this provision, like Article 12.2.2 of the parties' Dealer Agreement, required GM to make a decision to approve or reject a proposed buy-sell transaction, and WCM would have no way of learning of that the decision without receiving notice from GM. Notice therefore was required "to be given to [one] of the Parties" to the Agreement. That, of course,

is not true with respect to section 2.3, under which WCM could only receive notice of the loss of its Flooring from Ally and already knew the legal consequences of that event. Going back to section 2.5, if GM were to approve a buy-sell proposal, WCM would be required to close the transaction within 30 days, and therefore would require notice to determine the last day for closing. Again, this is the opposite of section 2.3, where simple arithmetic permitted WCM to compute the end of the 90-day period based on the date upon which its Flooring was suspended.

Moreover, WCM's interpretation of section 4.9 would lead to odd results. For example, the first sentence of section 2.5 provides as follows:

> 2.5. If prior to the expiration of 90 days after WCM loses the Dedicated Chevrolet Flooring or its amount declines below $3 million, WCM submits a fully-executed "buy-sell" agreement and complete proposal for the transfer of the stock or assets of the dealership to a person or entity not affiliated with WCM or Owner, GM will consider WCM's proposal pursuant to its normal business policies and respond with either an approval, a conditional approval or a rejection of the proposal ***within sixty days*** in accordance with its normal business practices. [Emphasis added.]

The sixty-day period obviously is a "period specified in this Agreement" within the meaning of section 4.9. Under WCM's interpretation of section 4.9 this would mean that in order for the 60-day review period to begin to run against GM, WCM would have to personally deliver to GM and its counsel, or send by registered mail, a notice separate and apart from buy-sell proposal itself. Otherwise, on WCM's theory, GM would have no obligation to consider and make a decision concerning a proposed buy-sell transaction. Avoiding this odd result requires a reasonable limitation on the language of section 4.9, *i.e.*, limiting it to situations in which the Settlement Agreement elsewhere requires notice "to be given to [one] of the Parties hereto."

Finally, GM submits that for any of the above arguments about contractual interpretation to matter in the end, even assuming *arguendo* that GM was required (as it was not) to notify WCM or its counsel of the loss of Flooring pursuant to section 4.9, there would have to be evidence that such notice would have enabled WCM to restore its Flooring or submit a "complete proposal" as required by section 2.3 within ninety-one, or ninety-five, days after the service of such notice. There is no such evidence. Indeed, all available evidence is to the contrary.

First, while WCM does not deny knowing about the loss of its Flooring on December 1, 2011 (and, further, received a letter from GM that month noting this event and the legal consequences under the Settlement Agreement), its Reply Brief suggests that if only *its counsel* had known about the loss of Flooring (assuming, for the moment, the unsworn statement in the reply brief that its counsel did not know of the loss), WCM somehow could have obtained replacement Flooring prior to expiration of the 90-day period. With all respect to WCM's well-respected and highly-qualified counsel, they are not floor plan lenders. Simply put, it would have been *impossible* for WCM to obtain replacement flooring during the prescribed 90-day period given the bankruptcy of its real estate affiliate, Hassen Imports Partnership ("HIP"), the remarkably "tight" credit market that persists to this day, and WCM's own singularly unimpressive earnings (loss) history shown below:

2006:	($ 1,104,788)
2007:	($ 1,693,835)
2008:	($ 3,279,201)
2009:	($ 874,766)
2010:	($ 1,810,113)
2011/6	($ 376,578)
Total:	($ 9,139,281) for 5-1/2 years, average loss ~$1.66 million/year.

Source: WCM's Dealer Financial Statements. Note: WCM has not submitted financial information to GM since June 2011. In today's environment, a floor plan lender certainly would have required up to date – if not CPA-audited – financial statements as a condition of even considering the extension of floor plan credit.

The available figures obviously indicate that there was a sound financial basis for GMAC's decision to withdraw Flooring repeatedly, and in the absence of any current financial information provided to GM by WCM, there is certainly no evidence that WCM's credit-worthiness significantly improved after June 2011, or after November 30, 2011 when Ally permanently suspended Flooring. Absent such evidence, which GM believes does not exist, any claim that WCM somehow could have come up with replacement Flooring within 90 days if only its counsel had been notified of the suspension is unfounded speculation.

Second, the submission of a "complete proposal" for the sale of the dealership to an unaffiliated party, as required by section 2.3, would have necessitated a binding lease commitment for WCM's existing Chevrolet dealership premises. But HIP, the lessor of that property, has since July 2011 been the debtor in a hotly contested Chapter 11 bankruptcy case involving two secured creditors who claim to be owed nearly $41 million between them. As a result HIP lacked the ability during the prescribed 90-day period (essentially December 2011 and January and February 2012) to offer a binding lease commitment to the proposed purchaser, without which WCM and the proposed purchaser could not have submitted a timely "complete proposal" as required by section 2.3 *regardless of any notice they or their counsel may or may not have been entitled to receive from GM.*

This is no mere technical defect. As HIP admitted in the bankruptcy case, it was premature *in March 2012* – after the 90-day period had expired – for HIP to submit the lease for approval by the Bankruptcy Court, among other reasons because both of its large secured creditors would be required to subordinate their

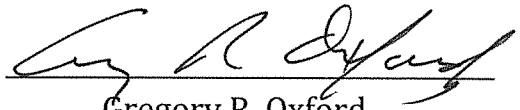
security interests to the new lease, and at least one of them (the City of West Covina) has never agreed to do so. In fact, in a memorandum supporting HIP's proposed reorganization plan filed just last week in the Bankruptcy Court, HIP's counsel stated that absent the City's consent, HIP would have to ask the Bankruptcy Court to *force* such subordination as part of plan confirmation proceedings in the face of the City's objections. Further, the confirmation hearing, even assuming timely approval of HIP's proposed Disclosure Statement by the Bankruptcy Court, *will not take place until August 2012 at the earliest.* Thus, far from being able to comply with section 2.3 in early March 2012, WCM and the proposed purchaser as of today still have not obtained – and depending on what happens in Bankruptcy Court may never obtain – the binding lease commitment they need to (1) submit a complete proposal to GM and (2) close the proposed transaction within thirty days of GM's approval, as required by section 2.5, if, as they hope, GM were to approve the as-yet-not-finalized transaction and lease terms.

In conclusion, GM plainly agreed to forego its right to litigate and win this termination protest nearly eighteen months ago based on WCM's agreement in section 2.3 to quickly terminate its Dealer Agreement voluntarily if it failed to maintain adequate Flooring. GM insisted on that provision to avoid being placed in exactly the situation in which it finds itself here – its Chevrolet brand is out of business in West Covina and WCM is attempting to perpetuate its absence from the marketplace with asserted legal complications. WCM should not be permitted to insert a new, thirteenth hour notice provision that does not appear in the agreement and thereby delay even further GM's right to find a replacement dealer and put the Chevrolet brand back in business in West Covina. The Board therefore should confirm that WCM's Dealer Agreement has been terminated voluntarily in accordance with the clear and unambiguous provisions of section 2.3 of the Settlement Agreement and Stipulated Decision.

Respectfully submitted,

Dated: May 14, 2012

ISAACS CLOUSE CROSE & OXFORD LLP

By: 

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PROOF OF SERVICE

I am employed in the county of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 21515 Hawthorne Blvd., Suite 950, Torrance, California 90503.

☑ **VIA FEDERAL EXPRESS OVERNIGHT DELIVERY** on May 14, 2012, I served the foregoing document described as **OPENING STATEMENT OF RESPONDENT GENERAL MOTORS LLC** on the parties in this action by, by placing a true copy thereof enclosed in an envelope or package designated by the express service carrier for overnight delivery with delivery fees provided for, and deposited in a box or other facility regularly maintained by the express service carrier on May 14, 2012, which envelope or package was addressed as follows:

☑ **VIA ELECTRONIC MAIL** on May 14, 2012 I served the foregoing documents described as **OPENING STATEMENT OF RESPONDENT GENERAL MOTORS LLC** on the parties in this action by electronic mail to the electronic mailing addresses listed below.

Michael J. Flanagan Law Offices of Michael J Flanagan 2277 Fair Oaks Boulevard., Suite 450 Sacramento, CA 95825 LAWMJF@msn.com

Executed on May 14, 2012 at Torrance, California. I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Gwendolyn Oxford