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10 **STATE OF CALIFORNIA**
11 **NEW MOTOR VEHICLE BOARD**

12 In the Matter of the Protest of:

13 WEST COVINA MOTORS, INC., dba
14 CLIPPINGER CHEVROLET

15 Protestant,

16 v.

17 GENERAL MOTORS, LLC,

18 Respondent.

19 **Protest No: PR-2213-10**

20 **PROTESTANT WEST COVINA**
21 **MOTORS, INC., dba**
22 **CLIPPINGER CHEVROLET'S**
23 **OPENING BRIEF**

24 INTRODUCTION

25 On or about February 2, 2010, Protestant, West Covina Motors, Inc., dba Clippinger Chevrolet
26 (“Clippinger”), received from Respondent, General Motors, LLC (“GM”), notice of GM’s intent to
27 terminate Clippinger’s franchise agreement. Protestant filed this Protest against the proposed
28 termination and a confidential settlement was ultimately agreed to, prior to a hearing before the Board.

The Confidential Stipulated Decision of the Board Resolving Protest (“Agreement”) was
executed by the parties on November 8, 2010. (See Attachment A) The Agreement required, in

1 essence, that Clippinger maintain adequate flooring through November 30, 2012 and in the event it
2 was unable to do so, it would have a defined period of time to either restore its flooring source or
3 submit a buy-sell for GM's consideration.

4 In December, 2011, Clippinger lost its flooring source. By letter dated December 23, 2011,
5 GM Zone Manager, Chris Shane, notified Clippinger that pursuant to the Agreement, Clippinger would
6 have ninety days in which to either reestablish adequate flooring or submit a fully executed buy-sell
7 agreement and complete "buy-sell" proposal for GM's review. (See Attachment B) Clippinger's
8 counsel was not copied on this correspondence and did not receive any notice of the purported
9 triggering of the ninety day period.

10 Clippinger executed a buy-sell agreement for the sale of its GM franchise on or about January
11 26, 2012. By letter dated January 31, 2012, Mr. Shane notified Clippinger that GM had been in
12 contact with Bruce Bercovich, counsel for the proposed buyer, and instructed Clippinger to review the
13 contents of the letter with the buyer, Carlos Hidalgo. (See Attachment C) The letter contained several
14 pages containing various GM disclaimers and the responsibilities of both buyer and seller. Again,
15 Clippinger's counsel did not receive a copy of this correspondence.

16 By letter dated March 19, 2012, GM notified Clippinger that it was unable to consent to the
17 proposed transfer of Protestant's franchise because GM had not received the required information
18 necessary to evaluate the purchase agreement. (See Attachment D) Clippinger's counsel was not
19 copied on this correspondence either.

20 On March 22, 2012, GM sent Clippinger written notice that, pursuant to the terms of the
21 Agreement, Clippinger's GM franchise would be terminated on April 3, 2012. This was the *first*
22 occasion that GM copied Protestant's counsel regarding matters pertaining to the Agreement. Thus, it
23 was the first opportunity for Protestant's counsel to advise Protestant of its rights under the Agreement.
24 (See Attachment E)

25 On April 2, 2012, counsel for Protestant submitted a written request that the Board exercise its
26 continuing jurisdiction to resolve the disagreement between the parties regarding the parties' rights and
27 obligations under the Agreement. Specifically, Protestant alleges that pursuant to paragraph 4.9 of the
28

1 Agreement GM was required to provide written notice to Protestant's counsel, before "any period
2 specified in this Agreement" would begin to run. Because GM failed to provide Protestant's counsel
3 notice of the purported commencement of the ninety day period until March 22, 2012, the ninety day
4 period did not begin to run until March 22, at the earliest. Moreover, GM is currently refusing to
5 accept a buy-sell package for consideration. Instead, GM is opting to maintain the status quo, pending
6 resolution of this matter by the Board. Under these circumstances, the 90 day period must be tolled
7 until this matter is resolved by the Board.

8 A telephonic Pre-Hearing conference with Administrative Law Judge Lonnie M. Carlson was
9 conducted on Tuesday, April 10, 2012, whereupon a briefing schedule and hearing date were set.

10
11 ARGUMENT

- 12 I. THE NINETY DAY PERIOD SET FORTH IN PARAGRAPH 2.3 NEVER BEGAN
13 TO RUN AGAINST PROTESTANT DUE TO GM'S FAILURE TO PROVIDE
14 PROTESTANT'S COUNSEL THE REQUIRED NOTICE OF THE TRIGGERING
15 EVENT.

16 The Agreement provides that Clippinger was to maintain a line of floor plan credit of at least
17 \$3 million from a source acceptable to GM, for the sole purpose of carrying Chevrolet vehicles,
18 through November 30, 2012. Paragraph 2.3 provides in part:

19 "If at any time before November 30, 2012, WCM loses its Dedicated Chevrolet
20 Flooring or its total amount decreases below \$3 million, WCM shall have ninety days to
21 either (a) provide written evidence of a commitment for replacement Dedicated
22 Chevrolet Flooring in an amount of at least \$3 million from GMAC or another GM-
23 approved financial institution or (b) present GM with a fully-executed "buy-sell"
24 agreement and complete proposal for the transfer of the stock or assets of WCM to a
25 person or entity not affiliated with WCM or Owner. If WCM does not satisfy either of
26 these conditions (a) or (b) within ninety days of the date it loses its Dedicated Chevrolet
27 Flooring or its total amount decreases below \$3 million, WCM agrees that its Dealer
28 Agreement will terminate voluntarily effective 30 days later..."

1 While it is true that Protestant lost its Chevrolet Dedicated Flooring source on or about
2 December 1, 2011, Protestant was already in discussions with the proposed buyer for the sale of its GM
3 franchise. The proposed buyer, Carlos Hidalgo, is an existing GM dealer who meets GM's dealer
4 candidate requirements in every respect. GM argues that Pursuant to paragraph 2.3, Clippinger had
5 ninety days from the loss of flooring to submit a completed buy-sell package, and failing to do so, its
6 franchise agreement terminated effective April 3, 2012.

7 However, paragraph 2.3 cannot be read in a vacuum. Paragraph 4.9 requires that any period
8 specified in the Agreement shall not commence until the first day after notice is provided in
9 accordance with the requirements of paragraph 4.9:

10 4.9 Notices. Any notice or other communication to be given to any of the Parties
11 hereto shall be delivered personally, or by United States registered or certified mail,
12 with signed receipt requested to the persons listed below at the addresses indicated. Any
13 period specified in this Agreement shall not commence until the first day after personal
14 delivery or the fifth business day after deposition in the United States mail, as the case
15 may be. (emphasis added)

16 Notice to WCM shall be sent to:

17 West Covina Motors, Inc.
18 Attention: Ziad Alhassen
19 2000 East Garvey Avenue South
20 West Covina, California 91791

21 With a copy by U.S. Mail or facsimile to:

22 Michael J. Flanagan
23 Law Offices of Michael J. Flanagan
24 2277 Fair Oaks Boulevard, Suite 450
25 Sacramento, CA 95825
26 (916) 646-9138
27
28

1 The clear and unambiguous language of paragraph 4.9 makes certain that the 90 day period
2 specified in paragraph 2.3 of the Agreement, shall not begin to run against Protestant until GM has
3 provided proper notice pursuant to the Agreement. It is undisputed that GM failed to provide to
4 Clippinger's counsel the required notice until March 22, 2012, thus the ninety day period did not begin
5 to run until March 22, 2012, at the earliest. However, by this time GM was refusing to accept a buy-
6 sell package for consideration as it was required to do under the terms of the Agreement.

7 II. GM'S ARGUMENT THAT PROTESTANT WOULD NEVER HAVE BEEN ABLE
8 TO SUBMIT AN ACCEPTABLE PROPOSAL FOR GM'S CONSIDERATION IS
9 IRRELEVANT TO THE ISSUES PRESENTLY BEFORE THE BOARD.

10 GM is expected to argue that given the several contingencies attached to Clippinger's buy-sell
11 proposal that, even without the benefit of due consideration, it determined that any buy-sell package
12 submitted by Protestant would not have been approved by GM. This argument misses the mark in
13 several areas and is entirely irrelevant to this proceeding.

14 First, Protestant is not requesting the Board make a determination that the proposed buy-sell
15 should be approved by GM. Instead, Protestant is seeking a determination by the Board that GM does
16 not have the right to exercise the provision of the Agreement that calls for the voluntary termination of
17 Protestant's franchise pursuant to paragraph 2.3, as a result of GM's failure to notify Protestant's
18 counsel of GM's decision to invoke the provisions of paragraph 2.3. Moreover, any such
19 determination is beyond the scope of the Agreement, which provides for the Board's continuing, but
20 limited, jurisdiction in this matter. Paragraph 4.6 of the Agreement provides in part:

21 "GM and WCM agree that the dispute resolution process outlined in this section shall
22 be the exclusive mechanism for resolving any Claims except for Claims pursuant to
23 sections 2.8 and 3.3 hereof which may be brought in any court of competent
24 jurisdiction. Further, any claim by WCM or Owner arising out of a rejection or
25 conditional approval by GM of a "buy-sell" proposal under sections 2.3, 2.5 or 2.6 may
26 *only* be brought in a court of competent jurisdiction." (emphasis added)

27 In light of the preceding, GM cannot now seek to expand the Board's jurisdiction beyond that
28 which is plainly set forth in the Agreement.

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2 III. GM'S "NO HARM – NO FOUL" ARGUMENT ALSO FAILS BECAUSE GM'S
3 FAILURE TO PROVIDE PROTESTANT'S COUNSEL THE REQUIRED NOTICE
4 DENIED COUNSEL THE OPPORTUNITY TO PROPERLY ADVISE
5 PROTESTANT.

6 The requirement of paragraph 4.9 requiring notice be given to each party and their counsel
7 prior to the commencement of any time period was included in the Agreement to ensure counsel for
8 each party would be provided the opportunity to advise their clients of their rights and obligations
9 under the agreement. Because the timing of certain events is of paramount importance under the
10 Agreement, it was critical that each party was assured that no period specified in the agreement would
11 begin to run until notice was received by the relevant party with a copy to counsel as well. The peril
12 paragraph 4.9 was designed to protect against is precisely what has now occurred as a direct result of
13 GM's failure to provide the notice required by paragraph 4.9. GM must not be permitted to benefit
14 from its decision to keep Protestant's counsel in the dark. GM must give due consideration to the
15 proposed buy-sell transaction that is currently stalled.

16 IV. GM MADE AFFIRMATIVE REPRESENTATIONS REGARDING PROTESTANT'S
17 LEGAL RIGHTS UNDER THE AGREEMENT.

18 GM's December 23, 2011, letter purports to advise Protestant of its rights and obligations under
19 the Agreement.

20 "Finally, your attention is called to the provisions of that certain Settlement and
21 Deferred Termination Agreement and Release which was executed as of November 8,
22 2011 and subsequently adopted as a Stipulated Decision of the New Motor Vehicle
23 Board (the "Decision")

24 Under the Decision, the December 1, 2011 loss of the dealership's \$3 million
25 dedicated floor plan line of credit which it agreed to maintain for Chevrolet until
26 November 30, 2012 ("Dedicated Floor plan"), triggered a ninety day period within
27 which the dealership must either (1) reestablish the lost Dedicated Floor plan with a
28 financial institution acceptable to GM or (2) submit a fully executed agreement to sell
the dealership or its assets to an unaffiliated third party along with a complete "buy-

1 sell” proposal for GM’s review. If neither of these conditions is satisfied at the end of
2 90 days, i.e., by February 28, 2012, the Decision provides for the termination of the
3 Dealer Agreement effective thirty days later, i.e., by March 30, 2012 without any
4 Protest or other legal challenge to the termination, as the Board’s Decision confirms.”
5

6 The letter’s author, Chris Shane, is not an attorney and even if he were, it was not his place to
7 advise Protestant of its rights and obligations under an agreement negotiated by counsel, which
8 requires notice be sent to counsel prior to the commencement of any time period. Moreover, Mr.
9 Shane’s statements regarding the commencement of ninety day time period were false due to GM’s
10 failure to provide the required notice to Protestant’s counsel.
11

12 CONCLUSION

13 It is undeniable that the Agreement required GM to provide notice to Protestant and its counsel
14 prior to the commencement of the ninety day time period in which Protestant could either reestablish
15 an acceptable flooring source or submit a buy-sell application. It is equally true that GM failed to
16 provide the required notice to counsel, thus the ninety day time period never began to run and
17 Protestant’s GM franchise is not subject to voluntary termination at this time. Pursuant to terms of the
18 Agreement, GM must now accept the proposed buy-sell package for due consideration. Any cause of
19 action that might arise from GM’s decision regarding the submitted buy-sell application must be
20 reserved for a forum other than the Board.
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23 Dated: April 24, 2012

LAW OFFICES OF MICHAEL J. FLANAGAN

24
25 By: 
26 Gavin M. Hughes
27 Attorneys for Protestant
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