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11 STATE OF CALIFORNIA
12 NEW MOTOR VEHICLE BOARD

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14 In the Matter of the Protest of:

15 WEST COVINA MOTORS, INC., dba
16 CLIPPINGER CHEVROLET,

17 Protestant,

18 v.

19 GENERAL MOTORS LLC,

20 Respondent.

Protest Nos.: PR-2213-10 and PR-2248-12

**MOTION TO DISMISS FOR LACK OF
JURISDICTION PROTESTANT'S
REQUEST THAT THE BOARD
EXERCISE ITS CONTINUING
JURISDICTION OVER THE
CONFIDENTIAL STIPULATED
DECISION OF THE BOARD
RESOLVING PROTEST**

21 On February 9, 2015, instead of filing opposition to the motion by General Motors
22 LLC ("GM") to dismiss Protest No. PR-2248-12 ("Motion") -- thereby essentially
23 conceding that the Motion should be granted -- West Covina Motors, Inc. ("WCM") filed
24 a "Request That the Board Exercise Its Continuing Jurisdiction Over the Confidential
25 Stipulated Decision of the Board Resolving Protest [No. PR-2213-10]" under a caption
26 that included both protest numbers ("Request").

27 WCM lacks standing to file or prosecute the Request for the exact same reasons
28 argued before Judge Skrocki in support of GM's contention that WCM lacked standing to

1 prosecute Protest No. PR-2248-12. GM thus moves to dismiss the Request for lack of
2 jurisdiction and adopts and incorporates by reference its prior briefing in Protest No. PR-
3 2248-12 showing (1) that only WCM's chapter 7 bankruptcy Trustee has standing to
4 assert before the Board *any claim* against GM related to termination of WCM's Dealer
5 Agreement and that he has expressly declined to do so and (2) that WCM is collaterally
6 estopped to challenge the prior termination of the Dealer Agreement under section 2.6 of
7 the Settlement Agreement and Stipulated decision of the Board in Protest No. PR-2213-
8 10, as confirmed three times by the Bankruptcy Court.

9 Under the undisputed facts and settled law cited in GM's prior briefing WCM is
10 equally not the real party in interest in Protest No. PR-2213-10 and therefore lacks
11 standing to invoke the Board's jurisdiction by filing the unauthorized Request. The Board
12 therefore lacks jurisdiction and must dismiss the Request.

13 In addition to its prior briefing, GM takes this opportunity to comment upon the
14 nearly four-month-old letter that Mr. Flanagan withheld until the 100th minute of the
15 February 19, 2015 hearing on GM's Motion and that he finally submitted to the Board and
16 GM's counsel after the hearing concluded.

17 This letter, dated October 29, 2014, was sent to Mr. Flanagan by John Tedford,
18 counsel to David Gill, WCM's duly-appointed and acting chapter 7 bankruptcy trustee.
19 Contrary to Mr. Flanagan's position, the letter provides conclusive evidence that the
20 trustee (1) does not possess and does not intend to pursue any claim against GM regarding
21 the terminated Dealer Agreement and (2) has not transferred and, indeed, could not
22 transfer to WCM any such right of action regarding the Dealer Agreement.

23 In the letter, Mr. Tedford states that the trustee – who under the case law cited in
24 GM's Motion is vested *exclusively* with *all* of WCM's assets and rights of action against
25 third parties – accepts the October 28, 2014 ruling of the Bankruptcy Court that “the
26 relevant Dealer Agreement ceased to be property of the estate and that the estate no longer
27 has any interest in WCM's Chevrolet dealership.” Thus, under the case law cited by GM,
28 the only party who had standing at that time to challenge the termination of the Dealer

1 Agreement, either by directly appealing the Bankruptcy Court's order or by seeking to
2 collaterally attack the order by invoking the Board's jurisdiction, expressly declined to do
3 either of these things.

4 That leaves only the issue of whether the trustee could or did transfer to WCM any
5 right to challenge the termination. The Bankruptcy Court's ruling establishes that the
6 trustee *could not do so* and therefore Mr. Tedford's letter *did not even purport to do so*.

7 In this regard, the context of the October 28, 2014 ruling (which is attached to the
8 Tedford letter) is important. The Bankruptcy Court in that ruling denied WCM's motion
9 to compel the trustee to "abandon," *i.e.*, assign, his interest in the Dealer Agreement to
10 WCM as debtor-out-of-possession. The Bankruptcy Court ruled that the trustee *could not*
11 assign any such interest to WCM *because it had no such interest* after the Dealer
12 Agreement terminated and ceased to be property of the estate.

13 Therefore, the Tedford letter *did not* by its terms purport to assign any such interest
14 to WCM and, indeed, under the Bankruptcy Court's order it *could not* do so because no
15 such interest existed. Instead, Mr. Tedford merely told Mr. Flanagan that "the Trustee has
16 no objection to WCM pursuing any remedies *it believes it has* before the NMVB ... solely
17 on behalf of West Covina Motors not the Trustee" (emphasis added). This is not language
18 of assignment or conveyance of any property or right of action; indeed, in referring to
19 remedies that WCM "believes it has" the letter does not indicate in any way that any such
20 remedies even existed. Instead, the letter says the opposite: "Based on the Court's ruling,
21 we believe that the bankruptcy estate has no further interest in the matter" because, as
22 stated in the prior paragraph, the Bankruptcy Court ruled "that, in its opinion, *the relevant*
23 *Dealer Agreement ceased to be property of the estate* and that the estate no longer has any
24 interest in WCM's Chevrolet dealership" (emphasis added). If the trustee as stated by his
25 counsel has no further interest in the Dealer Agreement, he also has no right to "remedies"
26 relating to it, and ergo he had no remedies to assign or otherwise transfer to WCM.

27 In sum, the Tedford letter says that the bankruptcy estate *has no interest in the*
28 *terminated Dealer Agreement* and declines to claim that it does; the trustee therefore

1 could not, and the Tedford letter certainly did not, assign *any interest or right of action*
2 *under the Dealer Agreement to WCM*. Without more, WCM as *debtor-out-of-possession*,
3 is not a real party in interest, lacks standing and did not effectively trigger the Board's
4 jurisdiction by filing the unauthorized Request. As stated in In re Leird Church Furniture
5 Mfg. Co., 61 B.R. 444 (Bankr. E.D. Ark. 1986), "the debtor is no longer in possession.
6 The trustee is now vested with all property of the estate, including this adversary
7 proceeding and all causes of action the debtor formerly possessed. ... Therefore, the
8 debtor is not the proper party plaintiff in this cause of action." *Id.* at 446; *accord* Turner
9 v. Cook, 362 F.3d 1219, 1225-26 (9th Cir. 2003), *cert. denied* 543 U.S. 987 (2004);
10 Canterbury v. J.P. Morgan Acquisition Corp., 958 F.Supp.2d 637, 649 (W.D. Va. 2013),
11 *aff'd* 561 Fed. Appx. 293 (4th Cir.2014); Folz v. BancOhio Nat. Bank, 88 B.R. 149, 150
12 (S.D. Ohio 1987).

13 CONCLUSION

14 For all the foregoing reasons, GM respectfully requests that the Board grant its
15 motion and dismiss WCM's Request for lack of jurisdiction.

16 DATED: February 20, 2015

GREGORY R. OXFORD
ISAACS CLOUSE CROSE & OXFORD LLP

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19 By: 

Gregory R. Oxford
Attorneys for Respondent
General Motors LLC

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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 ELECTRONIC MAIL** on February 20, 2015 I served the foregoing documents described as **MOTION TO DISMISS FOR LACK OF JURISDICTION PROTESTANT’S REQUEST THAT THE BOARD EXERCISE ITS CONTINUING JURISDICTION OVER THE CONFIDENTIAL STIPULATED DECISION OF THE BOARD RESOLVING PROTEST** on the parties in this action by electronic mail to the electronic mailing addresses listed below.
- ✓ **VIA U.S. MAIL** on February 20, 2015, I served the foregoing document described as **MOTION TO DISMISS FOR LACK OF JURISDICTION PROTESTANT’S REQUEST THAT THE BOARD EXERCISE ITS CONTINUING JURISDICTION OVER THE CONFIDENTIAL STIPULATED DECISION OF THE BOARD RESOLVING PROTEST** on the parties in this action by U.S. mail, by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

Michael J. Flanagan Law Offices of Michael J Flanagan 2277 Fair Oaks Boulevard., Suite 450 Sacramento, CA 95825 LAWMJF@msn.com
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Executed on February 20, 2015 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