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

11 In the Matter of the Protest of:

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

14 Protestant,

15 v.

16 GENERAL MOTORS LLC,

17 Respondent.
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Protest Nos.: PR-2348-12 and PR-2213-10

**PROTESTANT'S REQUEST THAT THE
BOARD EXERCISE ITS CONTINUING
JURISDICTION OVER THE
CONFIDENTIAL STIPULATED DECISION
OF THE BOARD RESOLVING PROTEST**

Date: February 19, 2015
Time: 10:00 a.m.

20 Protestant, West Covina Motors, Inc., dba Clippinger Chevrolet respectfully requests that the
21 California New Motor Vehicle Board ("Board") exercise its continuing jurisdiction over the Confidential
22 Stipulated Decision of the Board resolving PR-2213-10, and its own order regarding PR-2348-12.

23 Respondent has improperly relied upon decisions by the Bankruptcy Court (Hon. Ernest M.
24 Robles) in treating Protestant's General Motors Dealer Sales and Service Agreement ("Dealer
25 Agreement") as terminated. The Board is the only authority permitted to decide claims arising from the
26 Settlement and Deferred Termination Agreement and Release ("Settlement Agreement") and thus the
27 only authority to determine the status of the Dealer Agreement. Furthermore, the Bankruptcy Court,
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1 citing a lack of authority to do so, has refused to enjoin Protestant from pursuing this matter before the
2 Board.

3 At issue here is the true status of Protestant's General Motors franchise. Respondent asserts this
4 central issue has been resolved through several decisions of the Bankruptcy Court. Protestant contends
5 the Board is the exclusive authority to determine the status of Protestant's franchise. Through its
6 withdrawal of its latest Notice of Termination, Respondent seeks to eliminate the Board's right to resolve
7 this central dispute.

8 Protestant does not oppose Respondent's Motion to Dismiss Protest for Lack of Jurisdiction per
9 se, in light of its eleventh hour withdrawal of its Notice of Termination, but asserts that Protestant's
10 franchise has not been terminated as alleged by Respondent. Protestant respectfully requests the Board
11 exercise its continuing jurisdiction over the Confidential Settlement Agreement and Stipulated Decision
12 of the Board resolving PR-2213-10 and set a briefing schedule so that all matters may be resolved.

13 For the purposes of this Request, Protestant relies on Respondent's Exhibits to its Motion to
14 Dismiss (hereafter "Resp. Ex.") and has attached a chronological index of said exhibits for the
15 convenience of the Administrative Law Judge ("ALJ"). (Ex. 1).

16 **I. RESPONDENT'S WITHDRAWN NOTICE OF TERMINATION AND MOTION TO**
17 **DISMISS IS A SLEIGHT-OF-HAND INTENDED TO OBSCURE THE**
18 **FUNDAMENTAL QUESTION BEFORE THE BOARD; WHETHER PROTESTANT'S**
19 **FRANCHISE EXISTS**

20 The ultimate question before the Board is whether Protestant's franchise has in fact been
21 terminated. Respondent argues this question must be answered affirmatively. (Resp. Mot. 10:24-11:6).
22 The claimed support for this contention originates from the Bankruptcy Court's orders finding that the
23 automatic stay provision was not applicable to the Settlement Agreement and that a Trustee had no
24 property interest in the Dealer Agreement. (Resp. Exs. J and Q). Protestant does not dispute the
25 Bankruptcy Court's findings, but rather Respondent's interpretation of the effect of those findings.
26 (Resp. Mot. 10:20-22).

1 a. Collateral Estoppel does not apply here because Protestant's interest in the Dealer
2 Agreement was not an issue necessary to determining whether the automatic stay was
3 applicable

4 “Collateral estoppel applies when (1) the party against whom the plea is raised was a party or
5 was in privity with a party to the prior adjudication, (2) there was a final judgment on the merits in the
6 prior action and (3) **the issue necessarily decided** in the prior adjudication is identical to the one that is
7 sought to be relitigated.” Roos v. Red, 130 Cal.App.4th 870, 879 (2005) (internal citations removed,
8 emphasis added). Respondent bears the burden of establishing all elements. Lucido v. Super. Ct., 51
9 Cal. 3d 335, 341 (1990). The final element is not satisfied where a decision on the issue is “entirely
10 unnecessary” to reach a judgment. *Id.* at 342.

11 Respondent sought an order from the Bankruptcy Court that the automatic stay did not prevent
12 termination of the Dealer Agreement as opposed to whether the Board has exclusive jurisdiction to
13 determine good cause to terminate a franchise after considering the existing circumstances and the good
14 cause factors set forth in California Vehicle Code Section 3061. (Resp. Ex. I). The only issue for the
15 Bankruptcy Court to decide was whether the automatic stay prohibited action by Respondent to seek a
16 Board determination on the termination of Protestant's franchise. In deciding whether Respondent was
17 restrained by the automatic stay, the Bankruptcy Court stated, “the Court in this case need not determine
18 the precise nature of Debtor's interest in the Dealer Agreement in order to hold that the automatic stay
19 does not apply.” (Resp. Ex. J at 7). As such, anything the Bankruptcy Court found as to that status was
20 entirely unnecessary to reach a decision and cannot trigger collateral estoppel. Because the true status
21 of the Dealer Agreement was not an issue the Bankruptcy Court needed to resolve to reach a
22 determination, this Board is not prevented by collateral estoppel from making such a determination on
23 its own.

24 Furthermore, Respondent moving the Bankruptcy Court for an explicit determination on the
25 status of Protestant's franchise was expressly proscribed by the Settlement Agreement. (Resp. Ex. B §
26 4.6). By the terms of the Settlement Agreement, the Board is the exclusive authority for such a
27 determination and the Board has not made such a decision. *Id.* Under section 4.6, determinations of any
28 and all claims “shall be made by an Administrative Law Judge appointed by the Board.” *Id.* Judge

1 Robles is clearly not a Board appointed ALJ and therefore was not a proper judge and trier of fact to rule
2 upon Respondent's claim that the Dealer Agreement was terminated.

3 As the determination on the status of the Dealer Agreement was neither necessary to determine
4 application of the automatic stay nor within the Bankruptcy Court's jurisdiction, the Bankruptcy Court's
5 determination on the Dealer Agreement has no force or effect regarding the issues before the Board. The
6 Board remains the exclusive authority for determining whether the Dealer Agreement has been
7 terminated. Respondent was required to return to the Board once granted relief from the automatic stay
8 to obtain a determination on Protestant's franchise. It has failed to do so.

9 b. The Bankruptcy Court's orders did not terminate Protestant's franchise

10 Once Respondent was granted relief from the automatic stay it was obligated to seek a Board
11 order terminating the Dealer Agreement with Protestant. The Bankruptcy Court's decision merely
12 granted Respondent relief from the automatic stay and permitted Respondent to petition the Board for a
13 decision on the matter. The Bankruptcy Court's decisions did not affect a change to the Settlement
14 Agreement granting the Board exclusive jurisdiction to resolve any and all claims. (Resp. Ex. B, § 4.6).
15 Respondent argues in error that the Bankruptcy Court's determination on the Dealer Agreement was
16 controlling beyond the bankruptcy of West Covina Motors. (Resp. Ex. J). It was not. The Settlement
17 Agreement clearly indicates the Board retained exclusive jurisdiction to decide claims arising from the
18 agreement.

19 Respondent remains bound by the terms of the Settlement Agreement as incorporated in the
20 Board's December 15, 2010, Order. (Resp. Ex. D). Therein the Board ordered the parties "to submit to
21 the Board for final and binding determination, upon either party's written notice, any and all claims . . .
22 arising under or related to this Agreement." (Resp. Ex. B, § 4.6). Respondent failed to seek a Board
23 determination once granted relief from the automatic stay. As a result, the matter regarding the
24 termination of the Dealer Agreement remains unsettled.

25 c. Respondent's reliance on the Bankruptcy Court's interpretation of the Settlement
26 Agreement and Stipulated Order is misplaced

27 As previously stated, the Board, not the Bankruptcy Court, is the exclusive authority to resolve
28 any and all claims arising from the Settlement Agreement. The Bankruptcy Court's decision was merely

1 that the automatic stay did not prevent Respondent from pursuing actions adverse to Protestant's Dealer
2 Agreement. (Resp. Ex. J). The Bankruptcy Court did insert its interpretation of the Board's 2012
3 decision, the Settlement Agreement, and the effect of each on the Dealer Agreement. That interpretation,
4 however, does not control here. The Board is the exclusive authority to resolve any and all claims arising
5 from the Settlement Agreement or any attempt to terminate a California new motor vehicle Dealer's
6 franchise and therefore is the only body capable of providing a controlling interpretation. *see Hardin*
7 *Oldsmobile v. New Motor Vehicle Bd.*, 52 Cal. App. 4th 585, 597 (1997), as modified on denial of reh'g
8 (Feb. 28, 1997); Resp. Ex. B, § 4.6.

9 Respondent is attempting to skip an essential step in relying upon the findings and decisions of
10 the Bankruptcy Court. By the Settlement Agreement, Respondent must raise its claims before the Board
11 and be bound by the Board's resulting decisions on those claims. (Resp. Ex. B (stating ". . . GM and
12 WCM agree to submit to the Board for final and binding determination . . . any and all claims . . .")).
13 Instead, Respondent tries to entirely avoid these obligations by arguing the Bankruptcy Court's findings
14 and orders substitute for those of the Board. Respondent then attempts to avoid any Board involvement
15 through this Motion. The Board should not permit this attempt to deprive the Board of its exclusive
16 jurisdiction and should require that Respondent proceed according to the Settlement Agreement.

17 d. *The Bankruptcy Court makes clear that its orders have limits*

18 The Bankruptcy Court's final order leaves no doubt that its prior orders are limited in effect.
19 (Resp. Ex. R). In declining Respondent's invitation to exceed those limits, the Bankruptcy Court
20 acknowledges its prior orders grant it no authority to enjoin Board proceedings. (*Id.* at 14-15). The
21 Bankruptcy Court's determinations served only to guide the bankruptcy of WCM. Respondent,
22 however, insists that the explicitly limited reach of the Bankruptcy Court's orders somehow extend
23 beyond that closed universe. They do not.

24 The numerous rulings of the Bankruptcy Court serve only to establish law in managing the
25 bankruptcy of WCM. (*see* Resp. Ex. R at 13 (stating ". . . neither WCM nor GM appealed the 2013 Order
26 or the 2014 Order and the findings and conclusions therein are binding on the parties as law of the
27 case.")). Specifically, the Bankruptcy Court finding the Dealer Agreement terminated applied only to
28 the bankruptcy proceedings and subsequent appeals of such proceedings. (Resp. Ex. J); *see also Sargon*

1 Enterprises, Inc. v. Univ. S. Cal., 215 Cal.App.4th 1495, 1505 (2013) (holding law of case doctrine binds
2 parties to rulings of law in “subsequent retrial or appeal in the same case.”) (internal citations and
3 quotations omitted). Its further finding that the trustee did not hold a property right in the Dealer
4 Agreement was a natural extension of the previous finding, but again, applicable only to the bankruptcy
5 proceeding. (Resp. Ex. Q). Finally, if it had been unclear, the Bankruptcy Court specifically stated,
6 “[t]his court has issued its orders **and the NMVB can interpret those orders according to its own**
7 **rules and procedures.**” (Resp. Ex. R at 16) (emphasis added).

8 Those orders from the Bankruptcy Court controlled the proceeding before it, the bankruptcy of
9 WCM. The Board retained exclusive jurisdiction to determine any and all claims arising under the
10 Settlement Agreement, and Respondent continued to possess the right to petition this Board for a binding
11 determination on such claims. To date, the Board has not been asked to make such determination on the
12 Dealer Agreement although it is the exclusive mechanism for doing so. The Board has not issued, nor
13 has it been given the opportunity to issue, any order declaring Protestant’s franchise terminated. As
14 such, Protestant’s franchise has not been terminated.

15 II. CONCLUSION

16 For each and all of the above-stated reasons, Protestant requests the Board grant this Request and
17 issue an order prohibiting Respondent from taking action adverse to Protestant’s franchise without
18 proper submission to the Board as is required by the Settlement Agreement.

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23 Dated: February 9, 2015

LAW OFFICES OF
MICHAEL J. FLANAGAN

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25 By: 
26 Michael J. Flanagan

Exhibit 1

Date	Exhibit	Document
No Date	A	Dealer Sales and Service Agreement
11/08/2010	B	Settlement and Deferred Termination Agreement and Release
11/08/2010	C	PR-2213-10: [Proposed] Confidential Stipulated Decision of the Board Resolving Protest
12/16/2010	D	PR-2213-10: Order Adopting [Proposed] Confidential Stipulated Decision of the Board Resolving Protest
8/22/2012	E	PR-2213-10: Board Decision
10/03/2012	F	Notice of Termination
11/29/2012	G	GM Approval of buy-sell to Ferrara
12/28/2012	H	West Covina Motors, Inc. Bankruptcy Filing
1/22/2013	I	BK: Memorandum of Points and Authorities in Support of Motion for Order Confirming that Automatic Stay of 11 U.S.C. § 362(a) Does not Bar Termination of Debtor's General Motors Dealer Agreement [11 U.S.C. § 362(j)]
1/29/2013	K	BK: Debtor's Opposition to Motion for Order Confirming that Automatic Stay of 11 U.S.C. § 362(a) Does not Bar Termination of Debtor's General Motors Dealer Agreement; Memorandum of Points and Authorities and Declaration of Ziad Alhassen in Support Thereof
2/5/2013	L	BK: Reply Memorandum in Support of Motion for Order Confirming that Automatic Stay Does not Bar Termination of Debtor's General Motors Dealer Agreement [11 U.S.C. § 362(a)]
2/14/2013	J	BK: Order Granting Motion for Order Confirming that Automatic Stay Does not Bar Termination of Debtor's General Motors Dealer Agreement
3/4/2013	M	BK: Order on the City's Motion Under 11 U.S.C. § 1112(b) to Convert Case to One Under Chapter 7 or, in the Alternative, for the Appointment of a Trustee Under 11 U.S.C. § 1104(a) [Dkt. No. 86]
3/5/2013	N	BK: Notice of Appointment of Trustee and Fixing of Bond; Acceptance of Appointment as Interim Trustee
10/23/2014	O	BK: Emergency Motion to Compel the Trustee to Abandon the Chevrolet Agreement and Franchise; Memorandum of Points and Authorities; Declarations of Susan J. Montgomery and Michael J. Flanagan in Support Thereof; Exhibits
10/24/2014	P	BK: Memorandum of Points and Authorities is Opposition to Emergency Motion for Order Compelling Trustee to Abandon Estate's Alleged Interest in Terminated General Motors Dealer Agreement
10/28/2014	Q	BK: Order Denying Emergency Motion to Compel Trustee to Abandon Interest in Property of the Estate [D.E. 472]
1/15/2015	R	BK: Order Denying Motion for Enforcement of Prior Orders Determining that Debtor and Its Estate Have No Remaining Interest in Terminated GM Dealer Sales and Service Agreement

