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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 No.: PR-2348-12

**REPLY MEMORANDUM IN
SUPPORT OF MOTION TO
DISMISS PROTEST FOR LACK OF
JURISDICTION**

Date: February 19, 2015
Time: 10:00 a.m.
Hon. Anthony M. Skrocki

21 General Motors LLC (“GM”) respectfully submits this memorandum in support
22 of its Motion To Dismiss Protest [No. PR-2348-12] for Lack of Jurisdiction (“Motion”)
23 and in reply to “Protestant’s Request That the Board Exercise Its Continuing Jurisdiction
24 Over the Confidential Stipulated Decision of the Board Resolving Protest” [No. PR-2213-
25 10] (“Request”).

26 Protestant West Covina Motors, Inc. (“WCM”) has not filed any opposition to the
27 Motion and, indeed, states expressly that it does not oppose it. Request, p. 2. Without
28 more, the Motion should be granted on all grounds advanced in the moving papers.

1 First, WCM concedes that withdrawal of GM's termination notice eliminates the
2 Board's jurisdiction over Protest No. PR-2348-12.¹

3 Second, WCM also does not and cannot contest GM's evidence and authorities
4 demonstrating that WCM is the debtor in a chapter 7 bankruptcy and that the trustee of its
5 bankruptcy estate, Mr. Gill, is therefore vested *exclusively* with the right of WCM (if it
6 has any, which it doesn't) to challenge retroactively the termination of WCM's Dealer
7 Agreement in 2012 pursuant to the Board's Stipulated Decision in Protest No. PR-2213-
8 10. WCM therefore is not the real party in interest and lacks standing to file the Request
9 for the same reasons set forth in GM's moving papers. See Turner v. Cook, 362 F.3d
10 1219, 1225-26 (9th Cir.2003), *cert. denied* 543 U.S. 987 (2004); Canterbury v. J.P.
11 Morgan Acquisition Corp., 958 F.Supp.2d 637, 649 (W.D. Va. 2013), *aff'd* 561 Fed.
12 Appx. 293 (4th Cir.2014); Folz v. BancOhio Nat. Bank, 88 B.R. 149, 150 (S.D. Ohio
13 1987); In re Leird Church Furniture Mfg. Co., 61 B.R. 444, 446 (Bankr. E.D. Ark. 1986).
14 The Trustee's discretionary decision not to file such a challenge is conclusive and renders
15 WCM's Request a nullity; WCM and its counsel were not authorized to file it and the
16 Board should not consider it.

17 Third, even if WCM were able somehow to persuade the Trustee to reverse his
18 decision not to proceed before the Board to challenge retroactively the two-year-old
19 termination of the Dealer Agreement, WCM's Request would be barred by the doctrine of
20 collateral estoppel, or "issue preclusion." It was undisputed in the Bankruptcy Court –
21 and it remains undisputed here – that the proposed buy-sell transaction did not close
22 within thirty days of GM's approval; thus, the Dealer Agreement automatically
23 terminated. As Judge Robles explained:

24 [I]t is undisputed that [WCM] did not satisfy the condition set forth in
25 Section 2.6 of the Settlement Agreement which provides *that Debtor will*
26 *voluntarily and without protest terminate the Dealer Agreement.*

27 ¹ Far from "sleight of hand," GM's withdrawal of the second termination notice merely
28 recognized that the termination of WCM's Dealer Agreement already has occurred,
cannot occur again, and is no longer subject to protest under Veh. Code § 3060.

1 *****

2 [T]he Debtor and GM mutually and voluntarily entered in the
3 Settlement Agreement, by which *Debtor's failure to satisfy the condition of*
4 *Section 2.6 triggered a termination of the Dealer Agreement....*

5 For these reasons *the Court finds that the Dealer Agreement*
6 *terminated upon Dealer's failure to close the YTransport buy-sell*
7 *transaction* and hereby GRANTS GM's motion.

8 Exhibit J, pp. 7, 10 (emphasis added). WCM has *never* disputed its failure to satisfy the
9 condition set forth in Section 2.6. In fact, the Request concedes expressly (p. 2) that
10 WCM "does not dispute the Bankruptcy Court's findings," which obviously include the
11 finding that WCM did not satisfy the section 2.6 condition. Thus, even if the Bankruptcy
12 Court's decision finding that the Dealer Agreement terminated two years ago had been
13 subject to attack before the Board back then (which it was not) there certainly was – and
14 still is – no factual or legal basis for any other decision by the Board. Further, WCM did
15 not appeal Judge Robles' decision, and WCM cannot now point to anything new that
16 would alter the failure of the section 2.6 condition that caused termination of the Dealer
17 Agreement two years ago.

18 WCM's attempt to avoid the bar of collateral estoppel by claiming that the
19 Bankruptcy Court's finding was "entirely unnecessary" to the granting GM's motion
20 under 11 U.S.C. § 362(j) (Exhibit J) falls flat. The issue before the Bankruptcy Court was
21 whether the automatic stay applied to block termination of the Dealer Agreement. That
22 issue necessarily depended on an antecedent bankruptcy law issue: whether the Dealer
23 Agreement or rights under it were "property of the estate." That issue in turn depended on
24 an antecedent issue of state law, to wit: whether the Dealer Agreement had terminated
25 under non-bankruptcy law, *i.e.*, section 2.6 of the Settlement Agreement. Indeed, as the
26 Bankruptcy Court recognized, the precise basis for GM's motion was that "termination of
27 the Dealer Agreement [was] not barred by the automatic stay *because the Dealer*
28 *Agreement terminated by operation of non-bankruptcy law and therefore ceased to be*
property of the estate." Exhibit J, p. 4 (emphasis added). In other words, there was no
way that the Bankruptcy Court could have determined whether the Dealer Agreement was

1 property of the estate without adjudicating the state (“non-bankruptcy”) law issue of
2 whether the Dealer Agreement had terminated. That is exactly what Judge Robles did:

3 [T]he Court did not find, as WCM characterizes, “that the Bankruptcy
4 Court had no role in the termination of the franchise.” Opposition, 2:19–20.
5 To the contrary, this Court reached the question of whether the Dealer
6 Agreement had terminated and concluded that it terminated *pursuant to its
own terms*. [D.E. 487, 6].

7 The Court rejects WCM’s contention that these decisions were outside
8 of the scope of jurisdiction of the Bankruptcy Court. The Court has authority
9 to determine what is and what is not property of the estate, even when this
10 determination includes interpreting state law. *See* 28 U.S.C. § 157(b)(2)(A);
11 *In re Salander-O'Reilly Galleries, LLC*, 475 B.R. 9, 29 (S.D.N.Y. 2012);
12 *BankUnited Fin. Corp. v. FDIC (In re Bank United Fin. Corp.)*, 462 B.R.
13 885, 893–94 (Bankr.S.D.Fla.2011) (“[W]hat is or is not property of a
14 bankruptcy estate is an issue that stems from the bankruptcy itself, one that
15 can only arise in a bankruptcy proceeding, since the concept of what is
property of a bankruptcy estate does not exist outside of a bankruptcy case.”).
All of this Court’s relevant decisions were determinations of whether the
Dealer Agreement was property of the estate or whether certain actions were
barred by the automatic stay. These decisions are both core matters squarely
within this Court’s jurisdiction.

16 Exhibit R, p. 8 of 11 (emphasis added). Thus, the Bankruptcy Court had jurisdiction to,
17 and did, decide the state law termination issue, and in fact it has done so in three separate
18 orders over the actively litigated objections of WCM. Under the doctrine of collateral
19 estoppel, or “issue preclusion,” these orders have undeniable preclusive effect. *Levy v.*
20 *Cohen*, 19 Cal.3d 165, 171 (1997) (“Any issue necessarily decided in [prior] litigation is
21 conclusively determined as to the parties ... involved in a subsequent lawsuit on a
22 different cause of action”); *Roos v. Red*, 130 Cal.App.4th 870, 886 (2005), *cert. denied*
23 546 U.S. 1174 (2006) (affording full collateral estoppel effect of Bankruptcy Court
24 findings on an issue of California law).

25 The Bankruptcy Court’s statement (quoted at page 3 of the Request) that it did not
26 need to “determine the precise nature of [WCM’s] interest in the Dealer Agreement” is
27 beside the point. Judge Robles found that he didn’t need to determine exactly what
28 WCM’s interest in the Dealer Agreement was *before the termination* precisely because

1 *any and all* interest of WCM in the Dealer Agreement ceased to be property of the estate
2 *after the termination*, as a result of which the automatic stay did not apply: “[T]he court
3 in this case need not determine the precise nature of Debtor’s interest in the Dealer
4 Agreement ***in order to hold that the automatic stay does not apply***” because WCM’s
5 interest in the Dealer Agreement was no longer property of the estate. Exhibit J, p. 7
6 (emphasis added).

7 Also without merit is WCM’s argument that the Bankruptcy Court’s orders invaded
8 the Board’s “exclusive jurisdiction,” for two reasons.

9 *First*, while it is true that the Board initially had jurisdiction to determine whether
10 there was “good cause” for franchise termination under Veh. Code § 3060, WCM after
11 invoking that jurisdiction ***agreed to resolve Protest No. PR-2213-10 and waive its right to***
12 ***a good cause determination by entering into the Settlement Agreement and Stipulated***
13 ***Decision***. Thereafter WCM no longer has any rights, and the Board no longer has any
14 jurisdiction (let alone exclusive jurisdiction), under section 3060.

15 *Second*, WCM’s argument that GM was obligated *after the Bankruptcy Court’s*
16 *ruling* to seek further relief from the Board before the Dealer Agreement could be
17 terminated collides head on with the pertinent language of both section 2.6 and section 4.6
18 of the Settlement Agreement. To begin with, section 2.6 was expressly and intentionally
19 made self-executing:

20 “If a GM-approved ‘buy-sell’ transaction does not close within thirty
21 days of GM’s notifying WCM of the approval, ***then WCM agrees that is Dealer***
22 ***Agreement will terminate voluntarily*** pursuant to Article 14.2 of the Dealer
23 Agreement.... WCM agrees not to protest said voluntary termination pursuant
to section 3060 of the Vehicle Code or file any other litigation of any nature
whatsoever concerning termination of the Dealer Agreement.”

24 Exhibit B, § 2.6 (emphasis added). Section 2.6 did not impose upon GM any further
25 obligation to seek Board review once WCM failed to close the buy-sell transaction within
26 30 days of GM’s approval. This analysis finds direct support in the Board’s interpretation
27 of section 2.3 of the Settlement Agreement – which contains virtually the same language
28

1 that appears in section 2.6 – in its August 22, 2012 Decision in Protest No. PR-2213-10
2 (Exhibit E). Section 2.3 provided in pertinent part as follows.

3 If ... WCM loses its Dedicated Chevrolet Flooring or its total amount
4 decreases below \$3 million, WCM shall have ninety days to either (a) provide
5 written evidence of a commitment for replacement Dedicated Chevrolet
6 Flooring in the amount of at least \$3 million from GMAC or another GM-
7 approved financial institution or (b) present GM with a fully-executed ‘buy
8 sell’ agreement and complete proposal for the transfer of the stock or assets of
9 WCM to a person or entity not affiliated with WCM of Owner. ***If WCM does
10 not satisfy either of these conditions (a) or (b) within ninety days of the date
11 it loses its Dedicated Chevrolet Flooring or its total amount decreases below
12 \$3 million, WCM agrees that its Dealer Agreement will terminate voluntarily
13 ... pursuant to Article 14.2 of the Dealer Agreement.... WCM and Owners
14 agree not to protest said voluntary termination pursuant to section 3060 of the
15 Vehicle Code or to challenge said termination in any judicial or administrative
16 forum and hereby agree that they will have no legal right to do so.***

12 Exhibit B, § 2.3, quoted at Exhibit E, ¶ 23 (pp. 6-7) (emphasis added). In its August 22,
13 2012 Decision, the Board expressly interpreted this language as causing termination of the
14 Dealer Agreement without more if the prescribed conditions were not satisfied:

15 ... IT IS HEREBY ORDERED THAT Protestant’s franchise shall continue in
16 existence pending the timely occurrence of one of the two alternatives
17 available to it, that are: (1) Obtaining floor-plan financing as required by the
18 Settlement Agreement; or, (2) The submission by WCM to GM of the
19 complete buy-sell package as required by the Settlement Agreement. ***If
20 neither of these alternatives occur, Protestant’s franchise shall terminate on
21 the 81st day after the date of mailing to the parties and their counsel by U.S.
22 Postal Service Certified Mail a copy of the Board’s Order adopting this
23 Proposed Decision.***

21 Exhibit E, p. 18 (emphasis added). Thus, under the same self-executing language that
22 appears in section 2.6, the Board found that voluntary termination would be automatic if
23 one of the prescribed conditions was not satisfied. The same analysis applies to section
24 2.6. Once the GM-approved buy-sell transaction failed to close within thirty days,
25 WCM’s Dealer Agreement terminated automatically.

26 Nor did section 4.6 of the Settlement Agreement require GM to seek confirmation
27 by the Board that the Dealer Agreement had terminated once WCM failed to satisfy the
28 section 2.6 condition. Section 4.6 provides in pertinent part as follows:

1 GM and WCM agree to submit to the Board for final and binding
2 determination upon either party's written notice, any and all *claims,*
3 *disputes or controversies* between them arising under or relating to this
4 Agreement and its negotiation, execution, administration, modification,
5 extension or enforcement....

6 Exhibit B, § 4.6 (emphasis added). After the Bankruptcy Court's ruling on February 14,
7 2013 finding that the Dealer Agreement had terminated under section 2.6 of the
8 Settlement Agreement "by its own terms," GM was not aware of any "claim" to the
9 contrary, nor was GM aware of any "dispute" or "controversy" on that issue. There was,
10 accordingly, no disputed issue to bring before the Board (and, in fact, there still is no
11 dispute about the non-occurrence of the condition set forth in section 2.6).

12 Moreover, at the time of the Bankruptcy Court's Order, WCM was still acting as
13 debtor-in-possession under the control of Mr. Alhassen. If it believed at that time that
14 there was any disputed issue concerning termination of the Dealer Agreement, it could
15 either have appealed Judge Robles' February 14, 2013 order or taken upon itself the task
16 of bringing any disputed issue before the Board. It did neither, thereby either admitting by
17 its conduct that there was no disputed issue or waiving any such issue. (Of course, on top
18 of all of the other jurisdictional defects, following the conversion of the WCM bankruptcy
19 case from chapter 11 to chapter 7 in March 2013 and the appointment of Mr. Gill as
20 Trustee, WCM as discussed above no longer had, and still does not have, any right or
21 standing to bring *any* claim against GM before the Board unless authorized by Mr. Gill,
22 who contrariwise has expressly decided *not* to invoke the Board's jurisdiction. Exhibit O,
23 Montgomery Decl., ¶ 3. Under the case law cited above, WCM has no power under
24 federal bankruptcy law to override the Trustee's discretionary and authoritative decision
25 that doing so would not benefit WCM's bankruptcy estate.)

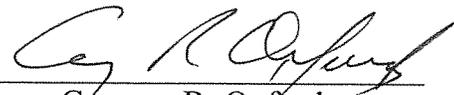
26 CONCLUSION

27 For all the foregoing reasons, GM respectfully requests that the Board grant its
28 motion, dismiss this protest for lack of jurisdiction and decline to consider WCM's request
because it is not the real party in interest and lacks standing or authorization to file it.

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DATED: February 17, 2015

GREGORY R. OXFORD
ISAACS CLOUSE CROSE & OXFORD LLP

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 17, 2015 I served the foregoing documents described as **REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS PROTEST FOR LACK OF JURISDICTION** on the parties in this action by electronic mail to the electronic mailing addresses listed below.
- ✓ **VIA U.S. MAIL** on February 17, 2015, I served the foregoing document described as **REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS PROTEST FOR LACK OF JURISDICTION** 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 17, 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