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

10 In the Matter of the Protest of:

11 HC AUTOMOTIVE, INC., dba HOOMAN
12 CHRYSLER JEEP DODGE RAM,

13 Protestant,

14 v.

15 FIAT CHRYSLER AUTOMOBILES,

16 Respondent.

**PROTEST NO: PR-2429-15, PR-2430-15,
PR-2431-15, AND PR-2432-15**

**PROTESTANT’S POST-HEARING
OPENING BRIEF**

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12 **I. INTRODUCTION**

13 Protestant, HC Automotive, Inc., dba Hooman Chrysler Jeep Dodge Ram (“Protestant” or
14 “Hooman”) filed this protest pursuant to Vehicle Code Section 3065.1 against Respondent’s, Fiat
15 Chrysler Automobiles (“FCA”), proposed chargeback of \$283,445. Respondent’s attempts to collect
16 the proposed chargeback amount are in violation of Section 3065.1.

17 The clear legislative intent for the enactment of Section 3065.1 is evidenced by the statute’s
18 plain language. Section 3065.1 is intended to protect dealers from onerous franchisor incentives
19 requirements and to provide franchisees an opportunity to cure any noncompliance with reasonable
20 requirements. These protections are necessary because franchisees must rely upon offered incentives
21 in pricing their vehicles for retail sale to the public and in making other business decisions.
22 Franchisors provide dealer sales incentives to induce franchisees to offer more competitive pricing. A
23 dealer can offer vehicles at lower retail prices when the manufacturer provides sales incentives.
24 Section 3065.1 is designed to protect dealers who act in reliance on these incentives from unreasonable
25 attempts by the franchisor to chargeback previously paid incentives.

26 Section 3065.1 explicitly states that Respondent shall have the burden of proof in any protest
27 filed pursuant to this subdivision. (Cal. Veh. Code § 3065.1(g)(6).) In this Protest Respondent must
28 demonstrate that the incentives claims are either false or fraudulent, the claims are ineligible under the

1 terms of incentives program *previously communicated* to Protestant, or the claims suffer from material
2 noncompliance with *reasonable* and nondiscriminatory claims submission requirements. (Cal. Veh.
3 Code § 3065.1(g)(2).) Moreover, Respondent must demonstrate that it provided Protestant a
4 *reasonable* appeals process and an opportunity to submit documentation to *cure any material*
5 *noncompliance*. (Cal. Veh. Code § 3065.1(g)(3).) The record reflects that FCA did not meet its
6 burden on any of these factors.

7 There is no evidence the chargebacks are the result of the submission of false or fraudulent
8 claims—the vehicles were purchased by Protestant. There is no evidence the submitted claims are
9 ineligible under the terms of the incentive program—purchase was the only requirement. The alleged
10 noncompliance of Protestant’s failure to register the vehicles to the dealership at the time of reported
11 sale was cured when Protestant registered the vehicles to the dealership and provided Respondent
12 evidence of this. (Exhs 217, 232, 238.)

13 In addition, Respondent was unable to show it provided Protestant a reasonable appeals
14 process. Respondent failed to provide a reasonable appeals process when it required Protestant to
15 provide evidence unrelated to the claimed incentives and ultimately made its decision on Protestant’s
16 appeal based upon criterion that its auditor did not mention in the initial audit because the requirement
17 did not exist. (Exhs 246, 264.) It was unreasonable on its face for Respondent to require Protestant to
18 provide evidence that customers used the Audit vehicles on at least five occasions when the claimed
19 incentives did not include a requirement that Hooman use the vehicles for *any* specific purpose.
20 Moreover, Respondent was unreasonable in its consideration, or lack thereof, of the extensive
21 documentation Hooman provided.

22 Further, Respondent’s claim the requirement to title a vehicle at the time of reported sale is
23 necessary to serve an important public interest, and therefore it cannot be cured, is without merit. The
24 record shows it is impossible for a customer to receive a shortened warranty because any prior reported
25 sale must first be unwound before it can be reported sold as a new vehicle on a subsequent occasion.
26 (RT Vol. 5, 42:18-43:10.) The new report of sale date restarts the warranty period. Moreover, when
27 Hooman titled the vehicles identified in the Audit, it paid all state fees and late fee penalties on these

28 ///

1 vehicles. (RT Vol. 5, 97:7-14.) There is no public policy goal that would justify ignoring the plain
2 language of Section 3065.1.

3 Similarly, Respondent's claim that the requirement to title a vehicle at the time of reported sale
4 is necessary to protect Respondent's interest is also without merit. It is impossible for dealers to claim
5 multiple incentives for the same new vehicle reported sold on different dates. Respondent admits that
6 a vehicle cannot have more than one report of sale date and any subsequent report of sale cannot be
7 done without first unwinding any prior report of sale. (RT Vol. 4, 196:10-14; RT Vol. 5, 68:14-15.)
8 The unwinding of the prior report of sale automatically reverses any prior incentives paid by FCA and
9 applies any new incentives that might be applicable to the new date of sale. Respondent was unable to
10 offer any other credible interest it sought to protect by its requirement.

11 Not only has Respondent failed to meet its burden in this protest, it was unable to show any
12 harm it seeks to redress through the proposed chargebacks. Respondent benefitted from each vehicle
13 purchased by the dealership and it acknowledges the fact that Hooman operates an extensive customer
14 loaner fleet, which benefits FCA vehicle owners. There is no justification to permit the proposed
15 chargebacks and as a matter of law, the protest must be sustained.

16 **II. STATEMENT OF FACTS**

17 Hooman has been a licensed FCA new vehicle dealer since January 2014 and, at the time of the
18 Hearing, owned and operated franchises for Nissan, Toyota, Acura, Hyundai, Chevy, and FCA. (RT
19 Vol. 1, 61:12-15, 37:21-38:9.) Hooman executed a franchise agreement to become a FCA dealer in
20 November 2013, but did not begin operations until mid to late January 2014. (Exh 202:0005; RT Vol.
21 1, 61:12-15; RT Vol. 4, 265:8-13; RT Vol. 5, 6:17-7:8.)

22 Protestant purchased the FCA franchises from a struggling dealer, LAX Chrysler Jeep Dodge
23 Ram. (RT Vol. 4, 231:16-22.) The prior dealer operated from a trailer without a dedicated showroom
24 or business office. (*Id.*) Hooman purchased these franchises with the intent to relocate them to a state
25 of the art facility that it is in the process of constructing. (RT Vol. 4, 233:19-234:19.) In the interim,
26 Hooman has made every effort to provide the highest level of customer service from this location,
27 despite the many challenges that it must overcome on a daily basis. (*See* RT Vol. 1, 66:6-14; Vol. 4,

28 ///

1 232:7-233:18.) The FCA franchises share space with the adjacent Hyundai franchise and operate from
2 multiple off site locations. (RT Vol. 1, 64:18-19; Vol. 4, 233:5-18.)

3 Hooman operates its “VIP” program at each of its dealerships. Protestant’s VIP program
4 provides its customers a number of benefits including free loaner vehicles for service visits. (Exh
5 102:HOOM 00053-00060.) Hooman’s VIP program incentivizes customers to purchase new vehicles
6 from Hooman and results in significant customer loyalty and satisfaction. (See RT Vol. 1, 174:13-12,
7 185:6-10; Exh 102:HOOM 00060.) Providing a sufficient number of service loaner vehicles for the
8 FCA franchises was critical due to the difficulties associated with operating from the current location.
9 (RT Vol. 4, 226:24-227:6, 230:8-11.) The fragmentation of Hooman’s FCA operations adds to service
10 wait times. (*Id.*) The provision of service loaner vehicles is essential to Hooman’s ability to provide
11 FCA customers a high level of customer service from the current Hooman location. (*See Id.*)

12 From the time it commenced FCA operations in January 2014, Hooman began the process of
13 incrementally building its loaner fleet. (RT Vol. 4, 230:6-11, 230:14-18.) There were few if any
14 vehicles in the loaner fleet when Hooman took over for the prior dealer. (RT Vol. 4, 229:24-230:5.)
15 Unlike most manufacturers, FCA did not provide a separate allocation stream for loaner vehicles in
16 2014. (RT Vol. 4, 230:23-231:1.) In fact, FCA did not operate any manner of loaner vehicle program
17 at that time. (RT Vol. 1, 185:11-19; RT Vol. 5, 37:23-25.) While FCA was late to the game, it now
18 provides a loaner vehicle program as of the third quarter of 2015. (RT Vol. 1, 185:11-19.) The current
19 loaner program provides clear guidance and incentives specific to dealer loaner vehicles through
20 Program Rules. (*See Id.*; *see also* RT Vol. 1, 186:20.)

21 FCA operates a Volume Growth Program (“VGP” – an objective incentive program) that pays
22 dealers a per unit incentive for each vehicle sold, but only if the dealer achieves the monthly sales
23 objective set by FCA, in its sole discretion. (RT Vol. 3, 17:9-14, 122:6-16.) The VPG number and
24 payment per vehicle fluctuates from month to month and is communicated to dealers by FCA
25 representatives. (RT Vol. 3, 122:6-16.) It is critical that dealers hit their monthly VGP objectives.
26 (*See* RT Vol. 3, 17:9-14, 122:6-16.) By way of example, if FCA assigns a dealer a monthly objective
27 of 50 vehicles and it sells 60, it will be paid incentives on a per unit basis for all 60 sales. (*See also* RT
28 Vol. 3, 122:21-25 (describing a similar example).) Conversely, if a dealer sells 49 vehicles, the dealer

1 will not receive any VGP incentives money. (*See Id.*) As a result, Dealers cannot be certain of the
2 amount of incentive money it might have in a vehicle, which creates uncertainty when pricing vehicles
3 for retail sale to the public. (*See RT Vol. 3, 17:9-14, 122:6-16.*) This is an example of why it is so
4 important for FCA dealers to achieve their monthly VGP programs. FCA Dealers are dependent upon
5 VGP incentives in order to offer competitive pricing and to operate profitably. (*See Id.*)

6 FCA representatives routinely advised dealers they could purchase service loaner vehicles to
7 achieve their monthly VGP objective. (*RT Vol. 1, 167:4-12, 168:17-19, 190:22-25.*) The only
8 requirement for achieving VGP incentives is that the minimum number of sales be made and reported
9 within the relevant monthly incentive period. (*RT Vol. 3, 17:9-14.*) Both reported sales to customers
10 and dealers are treated the same for purposes of VGP incentives money. (*Id.; see also Exh*
11 *207(a):0006, 207(b):0006.*) FCA never required that vehicles sold to dealers be used as loaner vehicles
12 nor be used for *any* specified purpose during the audit period. (*RT Vol. 3, 12:9.*)

13 On or about December 1, 2014, FCA conducted a sales incentives audit of Hooman's FCA
14 operations ("Audit"); the Audit covered the time period of March 2014 through November 2014.
15 (Exhs 210:0001, 213:0002.) In the course of the Audit it was discovered that each of the reported sales
16 to the dealership for this nine-month time period had not been titled to the dealership. (*See Exhs 213,*
17 *264:0001.*) The FCA auditor, Matt Gabel, informed Hooman that FCA required these vehicles ("Audit
18 Vehicles") to be titled at the time of sale in order to be eligible for any incentive. (*RT Vol. 2, 190:2-*
19 *15.*) Mr. Gabel went on to conclude that Hooman's failure to title these vehicles at the time of reported
20 sale rendered each sale ineligible towards Hooman's VGP incentives for the prior nine months and that
21 all VGP monies paid to Hooman would be charged back for each month Hooman's monthly sales
22 would now be below its monthly VGP objective. (Exh 213.)

23 When Mr. Gabel informed Protestant of this alleged noncompliance, Hooman Nissani told Mr.
24 Gabel that Protestant was not aware of the requirement to register vehicle sales to the dealership and
25 that it would immediately register the vehicles to the dealership.¹ (*RT Vol. 1, 125:21-24; RT Vol. 2,*

26
27 ¹ FCA attempts to draw a distinction between "titling" a vehicle and "registering" a vehicle. There is
28 no meaningful distinction for the purposes of the issues in this Protest. One cannot title a vehicle with
DMV without registering the vehicle with DMV. (*RT Vol. 2, 179:2-180:8; RT Vol. 4, 92:8-16, 236:9-*
10; RT Vol. 5, 91:15-18.)

1 187:9-11, 190:2-15.) Mr. Gabel issued a preliminary audit report finding \$385,115 in proposed
2 chargebacks on December 5, 2014, but he also requested that Hooman provide evidence of the
3 subsequent titling of the vehicles to the dealership; he asked that the information be received prior to
4 the close of the audit. (Exh 213:0001.) Homan titled the loaner vehicles to the dealership and
5 provided evidence of this fact on January 9, 2015, prior to the close of the audit. (RT Vol. 1, 125:7-24;
6 RT Vol. 4, 125:3-12, 146:13-20; RT Vol. 4, 257:2-4; Exh 217:0003.)

7 However, even after receiving demonstrable evidence that Hooman had titled the Audit
8 Vehicles to the dealership, Mr. Gabel issued a final Audit report on January 14, 2015 for the full
9 chargeback amount of \$385,115. (Exh 223.) Mr. Gabel advised Hooman that because the dealership
10 had not titled the vehicles at the time of reported sale, FCA would not count the vehicles as sales
11 towards the achievement of the VGP incentives. (Exh 222:0001, RT Vol. 2, 132:4-8.) At this point
12 FCA had no reason to believe these sales were false or fraudulent. (*See Id.*) FCA received conclusive
13 evidence the vehicles identified in the Audit had been purchased by the Hooman dealership. (RT Vol.
14 4, 257:2-4; Exh 217:0003; *see also* RT Vol. 4, 257:15-20, 261:10-262:12; RT Vol. 5, 90:20-91:3,
15 90:22-25, 101:8-18.) In addition to the documentation received from Hooman, Mr. Gabel also
16 verified the titling and registration of these vehicles through his own source, Auto Check. (RT Vol. 2,
17 133:1-20, 167:6-21; RT Vol. 3, 19:21-23, 159:9-17; *see also* Exhs 234; 236:0004-0006; 259:0003-
18 0005; 264:0002-0004.)

19 On or about February 12, 2015, Protestant requested a review of the Audit and the proposed
20 chargebacks. (Exh 232.) FCA conducted an Audit Manager Review and confirmed that Hooman had
21 titled the Audit Vehicles to the dealership. (RT Vol. 2, 133:1-20; RT Vol. 3, 19:21-23, 159:9-17; *see*
22 *also* Exhs 234, 236:0004-0006, 259:0003-0005, 264:0002-0004.) Nevertheless, FCA refused to
23 accept the subsequent titling and registration of these vehicles as evidence of cure for the alleged
24 noncompliance. (Exh 236:0002-0006.)

25 On March 20, 2016, Hooman requested an appeal of the Audit. (Exh 238.) FCA conducted an
26 Audit Appeal Meeting (“Appeal”) on July 9, 2015 at FCA’s corporate headquarters in Detroit,
27 Michigan. (Exh 243:0001.) At this point, it is clear FCA was satisfied Hooman had titled and
28 registered the Audit Vehicles to the dealership. (*See* RT Vol. 4, 146:3-8.) However, the focus of the

1 Appeal was almost exclusively on the scope of Hooman’s VIP program and its extensive customer
2 loaner fleet. (RT Vol. 4, 152:20-153:12; RT Vol.5, 14:7-16.) Despite conclusive evidence the Audit
3 vehicles were purchased by and titled to Protestant, the Audit Appeal committee determined it would
4 require Hooman to provide evidence of loaner vehicle use by customers as a condition to reversing the
5 proposed chargebacks identified in the Audit. (Exh 246; RT Vol. 4, 154:16-22.) It is undisputed and
6 important to note that the Audit did *not* involve a single incentive program that required evidence of
7 loaner vehicle use. (RT Vol. 3, 12:9.)

8 On or about July 13, 2015, FCA asked Hooman to provide copies of actual rental/loaner
9 agreements for the Audit vehicles. (Exh 246.) Specifically, FCA asked Protestant to provide the first
10 and four most recent customer agreements and a usage log if available. (*Id.*) Again, none of the
11 incentives identified in the Audit required evidence of loaner vehicle use by customers. (RT Vol. 3,
12 12:9.) The VGP program does not provide incentives specifically for vehicles used in a dealer’s loaner
13 fleet. (*Id.*; *see also* RT Vol. 3, 17:9-14.) Nevertheless, Protestant provided the requested information
14 on July 17, 2015 and July 20, 2015. (RT Vol. 5, 27:21-23, 47:6-9; RT Vol. 3, 185:13-25; *see also* Exh
15 284:0001-0003.)

16 On or about July 27, 2015, FCA’s Geoff Edmonds contacted Hooman and asked what
17 additional documentation Hooman might be able to provide to demonstrate customer use of the Audit
18 Vehicles. (Exh 250; *see also* RT Vol. 4, 119:12-20, 121:7-10, RT Vol. 5, 19:11-14.) Protestant
19 offered that it might have copies of California Drivers Licenses and proofs of insurance. (Exh 250, RT
20 Vol. 5, 19:25-20:22.) Mr. Edmonds sent a follow up email requesting this information for ten vehicles.
21 (Exh 250.) Hooman provided this information on July 31, 2015. (Exhs 251-258; RT Vol. 5, 39:20-
22 40:8.)

23 By letter dated August 13, 2015, Respondent notified Hooman that FCA received sufficient
24 information for only 53 of the 97 Audit Vehicles. (Exh 264:0001.) Respondent informed Protestant
25 that it would chargeback the remaining amount of \$283,445. (*Id.*)

26 Protestant filed this Protest on or about September 9, 2015, alleging that FCA’s proposed
27 chargeback was a violation of Vehicle Code Section 3065.1. A five-day merits hearing was conducted
28 before the New Motor Vehicle Board’s (“Board”) Administrative Law Judge Diana Woodward-Hagle

1 (“ALJ Hagle”) from May 16 through May 20, 2016. Prior to the start of the hearing ALJ Hagle
2 considered Protestant’s Motion in Limine, which urged the Board to limit the issues to whether or not
3 Protestant cured the alleged noncompliance identified in the Audit when it titled and registered the
4 vehicles to the dealership and provided documentation of this fact. Protestant’s motion was denied.
5 (RT Vol. 1, 8:5-9.)

6 **III. STANDARD OF REVIEW**

7 The issues to be determined in this Protest are set forth in Vehicle Code Section 3065.1. (Cal.
8 Veh. Code § 3065.1(g).) It is Respondent’s burden to demonstrate the proposed chargebacks are
9 justified because they are based upon the submission of false or fraudulent claims, or the claims are
10 ineligible under the terms of the incentive program previously communicated to Protestant, or for
11 material noncompliance with reasonable and nondiscriminatory documentation and administrative
12 claims submission requirements—Respondent failed to meet its burden on any of these issues. (Cal.
13 Veh. Code § 3065.1(g)(6).)

14 In addition, Respondent must show it provided Protestant a reasonable appeals process and
15 opportunity to submit documentation to rebut any alleged noncompliance and to cure the same. (Cal.
16 Veh. Code § 3065.1(g)(3).) It is Respondent’s burden to demonstrate that it provided a *reasonable*
17 appeals process and that Protestant failed to submit documentation evidencing a cure of the alleged
18 noncompliance. (*Id.*; Veh. Code § 3065.1(g)(6).) Again, Respondent failed to meet its burden on
19 these issues as well.

20 **IV. ARGUMENT**

21 A. THE PROPOSED CHARGEBACKS ARE NEITHER FALSE NOR FRAUDULENT.

22 Respondent failed to introduce evidence the claims it now seeks to chargeback to Protestant
23 were false or fraudulent. The only requirement for the incentives at issue was that Protestant actually
24 sold each vehicle. (RT Vol. 3, 17:9-14) The fact that Protestant made payment to the State of
25 California for each Audit Vehicle and provided evidence of title and registration for these vehicles
26 renders this fact inarguable. (RT Vol. 4, 238:11-15; RT Vol. 4, 257:2-4; Exh 217:0003.)

27 While it is true these vehicles were not titled to the Hooman dealership at the time of the
28 reported sale, Protestant did ultimately title these vehicles to the dealership and provide evidence of

1 such prior to the close of the audit, again at the time of the Audit Manager Review, and again prior to
2 the Audit Appeal Meeting. (Exhs 217, 232, 238; *see also* RT Vol. 2, 133:1-20, 167:6-21; RT Vol. 3,
3 19:21-23, 159:9-17; Exhs 234, 236:0004-0006, 259:0003-0005, 264:0002-0004.) Once Respondent
4 received evidence that Hooman titled the Audit Vehicles to the dealership, which it also verified
5 through independent means, it was impossible to claim these sales were false or fraudulent. (*Id.*)

6 B. PROTESTANT COMPLIED WITH THE TERMS OF THE INCENTIVES PROGRAM PREVIOUSLY
7 COMMUNICATED TO IT.

8 The only requirement for the Volume Growth Program incentives was that Hooman sell and
9 report a vehicle sold during the time of the relevant incentive period. (RT Vol. 3, 17:9-14.) No other
10 eligibility requirement existed. (*Id.*; *see also* RT Vol. 3, 17:3-18:19, 122:6-16.) The fact that these
11 vehicles were purchased by the dealership for use in its loaner fleet is entirely irrelevant to the terms of
12 the incentive program—the only requirement was a sale. (RT Vol. 2, 114:9-12; *see also* RT Vol. 3,
13 12:9.) At no time did there exist *any* issue with a requirement concerning the purchaser of the vehicle
14 or the intended use of the Audit Vehicles. (*Id.*) Respondent’s purported “Final Denial”² of Hooman’s
15 appeal was based upon unreasonable criteria that had no bearing on the reasons for the proposed
16 chargebacks that FCA identified in the Audit. (Exh 264:0001.)

17 1. *The “Gold Book.”*

18 Respondent argues that its policies and procedures are contained in documents referred to as
19 the Dealer Policy Manual and the Incentive Rules Manual or the “Gold Book.” (*See* Exhs 206(a),
20 207(a), 207(b); *see also* RT Vol. 2, 98:10-22.) Respondent claims the Gold Book required every Audit
21 Vehicle be titled at the time of reported sale. (*See, e.g.*, RT Vol. 2, 98:23-99:2.) Further, Respondent
22 claims this requirement was previously communicated to Hooman because it was made available
23 through its online website “Dealer Connect.” (*See, e.g.*, RT Vol. 2, 98:10-11.) Nevertheless, it is
24 undisputed that Respondent did not provide Hooman a hard copy of the “Gold Book” prior to the
25 Audit. (RT Vol. 1, 106:18-19; RT Vol. 3, 48:3-15.)

26 ///

27 ² Vehicle Code Section 3065.1(g)(4) requires a franchisor to provide written notification of the final
28 denial “which shall conspicuously state ‘Final Denial’ on the first page.” (Cal. Veh. Code §
3065.1(g)(4).) The words “Final Denial” were not included in the August 13, 2015 notice to Hooman.
(Exh 264:0001.)

1 Respondent argues this policy provides a single moment in time to comply with this
2 requirement and that by its very nature a dealer cannot cure it if missed. However, this interpretation is
3 impermissible based upon the plain language of Vehicle Code Section 3065.1, which requires a
4 reasonable appeals process and the ability of the dealer to cure *any* material noncompliance.³ (Cal.
5 Veh. Code § 3065.1(g)(3).) Further, Respondent could have required dealers to provide
6 documentation evidencing the dealer’s submission of registration and title information for each
7 reported sale at the time of reported sale—it did not. (See RT Vol. 3, 55:1-3.) Respondent’s efforts to
8 ensure compliance with this requirement do not mirror the claimed importance in this proceeding.

9 Section 3065.1(3) requires the franchisor shall provide a *reasonable* appeal process allowing
10 the franchisee a reasonable period to submit additional documentation or information and to cure *any*
11 *material* noncompliance. (Cal. Veh. Code § 3065.1(g)(3).) Respondent must not be permitted to write
12 its way around this requirement of Section 3065.1.

13 *2. The requirements of the “Gold Book” were not previously communicated to*
14 *Protestant.*

15 It cannot be said that the requirement to title vehicles sold to the dealership at the time of sale
16 was previously communicated to Hooman. Prior to the Audit, Hooman had never been provided a
17 copy of the “Gold Book” nor was it ever instructed that it must register vehicles sold to the dealership.
18 (RT Vol. 1, 106:18-19; RT Vol. 3, 48:3-15; RT Vol. 5, 36:21-38:16; *see also* RT Vol. 1, 181:24-182:3
19 (Julio Sebastiani indicating that he never talked to anyone at Hooman about the Gold Book).)
20 Respondent argues that Hooman acknowledged receipt of the “Gold Book” when it executed
21 Respondent’s form DAP-27, “Dealer Acknowledgment of Receipt of Chrysler Group LLC Incentive
22 Program Rules Manual.”⁴ (See Exh 204.) This document on its own fails to establish that FCA

23
24 ³ The statute’s words are “cure any material noncompliance.” (Cal. Veh. Code § 3065.1(g)(3).) The
25 legislature chose to include material noncompliance and not to limit the cure to only noncompliance
26 that are not material. Moreover, the legislature chose to include the word “any” suggesting that there
should not be any documentation noncompliance, as here, that a dealer cannot fix as long as it is not
reporting false or fraudulent claims.

27 ⁴ Despite the name, the DAP-27 form does not actually acknowledge that Hooman received the
28 Incentive Program Rules Manual. (Exh 204.) Instead, the document describes an acknowledgement
that, at some unspecified time in the future, “upon receiving access to the CG DealerCONNECT
website it is my responsibility to read and thoroughly understand the contents of the Manual.” (*Id.*)

1 communicated the terms of the incentives or the submission and documentation requirements to
2 Hooman—FCA never actively communicated this information until the Audit. (Exh 204.)

3 The DAP-27 form was one of many documents executed by Protestant as a prerequisite to
4 becoming a FCA franchisee. (RT Vol. 1, 103:3-10, 55:6-8.) Respondent instructed Protestant to
5 execute this document more than a month prior to executing its franchise agreement and three months
6 before Hooman began operations as a FCA dealer.⁵ It would be unreasonable to accept this
7 acknowledgment as evidence that the terms of the incentive program identified in the Audit were
8 previously communicated to Protestant. (See Exh 204.) There is no evidence that additional incentive
9 terms in Respondent’s Gold Book were ever directly communicated to Protestant. (See Exh 204; see
10 also RT Vol. 1, 181:24-182:3.) If the requirement to title vehicles sold to the dealership at the time of
11 sale was so important to Respondent, why is there no evidence that FCA directly communicated the
12 terms of Gold Book to Protestant? Each time Mr. Sebastiani suggested that Protestant could “pull the
13 lever” to report loaners vehicles as sold to meet its monthly objective was a missed opportunity to
14 communicate FCA’s requirement to title these vehicles at the time of sale.

15 In addition, the franchise agreement executed on November 19, 2016, provides that no other
16 agreements not specifically mentioned in the agreement shall be included. (Exh 202:0002.)
17 Respondent’s practice, if it is such, of requiring prospective dealers to agree to an unknown series of
18 terms that might impact a contract that does not exist is unusual to say the least. It has long been
19 common practice in the industry to provide franchisees the standard terms and provisions governing
20 the franchise agreement at the time of execution and to go over important terms with a dealer. (See RT
21 Vol. 1, 113:6-9.) Respondent’s departure from this practice is peculiar and unreasonable.

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26 As such, even on DAP-27’s face, it does not actually describe an acknowledgement that Hooman has
27 ever read or understood the Manual. (*Id.*)

28 ⁵ DAP-27 was executed on October 15, 2013. (Exh 204.) Hooman executed the franchise agreement
on November 19, 2013. (Exh 202:0005.) Hooman did not commence operations as a FCA dealer until
mid to late January 2014. (RT Vol. 4, 265:8-13; RT Vol. 5, 6:17-7:8.)

1 3. *Even if the DAP-27 acknowledgment form were sufficient to satisfy the requirement*
2 *that the additional terms of the incentive programs be communicated to Protestant, it*
3 *is superseded and canceled by the Dealer Agreement’s merger clause.*

4 A document merges all prior agreements when it cancels, supersedes, or annuls prior
5 agreements or understandings. (*See, e.g., American Isuzu Motors, Inc. v. New Motor Vehicle Bd.*
6 (1986) 186 Cal. App. 3d 464, 475 (hereinafter “*Isuzu Motors*”).) California courts and the Board
7 enforce merger clauses in Terms Sales and Service Agreements (“Dealer Agreement”). (*Id.*) In *Isuzu*
8 *Motors*, the manufacturer argued that there was substantial evidence supporting a requirement that a
9 dealer maintain a dedicated showroom. (*Id.* at 474.) This evidence consisted of agreements and
10 understandings that occurred before the parties executed a Dealer Agreement; the Dealer Agreement
11 contained a merger clause. (*Id.* at 474.) The court considered if the Dealer Agreement contained a
12 reference of these prior understandings related to the dedicated showroom, and after finding no such
13 reference, the court found that the prior agreements and understandings had merged and been rendered
14 canceled, superseded, and annulled by the merger clause. (*Id.*) The court therefore found that it was
15 not a requirement of the Dealer Agreement for Isuzu Motors to maintain a dedicated showroom despite
16 the manufacturer’s insistence that the showroom was important to the agreement. (*Id.* at 475, 478
17 (finding that “[g]iven the purported importance of the separate showroom to Isuzu it would certainly
18 have been the type of agreement that would have been included in the Sales and Service Agreement
19 had Isuzu so desired.”).)

20 Similarly, the Dealer Agreement in the instant Protest includes a merger clause under section
21 number six. (Exh 202:0002-0003.) The clause describes that the Dealer Agreement and any
22 documents “*specifically* incorporated by reference is the entire agreement between the parties” – the
23 Dealer Agreement “cancels and supersedes all earlier agreements, written or oral, between CG and
24 Dealer relating to the purchase by Dealer of specified CG vehicles, parts, and accessories...” (*Id.*
25 (emphasis added) (The merger clause goes on to list exceptions related to amounts owed between the
26 parties not relevant here.)) Finally, to make the point clear, the Dealer Agreement states that “No
27 representations or statements, other than those *expressly* set forth herein ... are made or relied upon by
28 *any* party hereto in entering into this Term Agreement.” (*Id.* at 0003 (emphasis added).) The parties
signed the Dealer Agreement on November 19, 2013. (*Id.* at 0005.)

1 As was the case in *Isuzu Motors*, the parties to this Protest entered into an agreement that
2 merges prior agreements between the parties. (*Isuzu Motors* at 475.) The effect is the same as in the
3 *Isuzu Motors* case – specifically, that the prior agreements and understandings are superseded and
4 canceled. (*Id.* at 475.) The prior agreement relevant in the instant Protest is the agreement Hooman
5 and FCA entered into that purported to require Hooman to access the DealerCONNECT website (when
6 it gained access to the system) and review and understand FCA’s Dealer Policy Manual. (Exh 204.)
7 The parties signed the DAP-27 form (Exhibit 204) on October 15, 2013 – over a month before the
8 parties signed the Dealer Agreement. (*Id.*)

9 The merger clause in the Dealer Agreement applies to written agreements relating to the
10 purchase of vehicles. (Exh 202:0003) Exhibit 204 relates to the purchase of vehicles because Hooman
11 purchased vehicles for resale to customers and FCA rewarded Hooman for these sales through the
12 issuance of incentive payments. (*See* RT Vol. 2, 46:4-9; Exh 213:0002 (showing that Hooman sold
13 1000 cars and FCA paid Hooman over \$1 million in incentive money for the effort).) Therefore, the
14 agreement to access and review policies connected to incentive payments is related to Hooman’s
15 purchase of vehicles for resale as described in the merger clause.

16 The Dealer Agreement’s merger clause supersedes and cancels any effect of the DAP-27 form
17 because the DAP-27 form was executed more than a month before the Dealer Agreement. (Exh
18 202:0002-0003; *Isuzu Motors* at 478.) Moreover, the Dealer Agreement does not incorporate the
19 DAP-27 form by reference as the Dealer Agreement does with the “Chrysler Group LLC Sales and
20 Service Agreement Additional Terms and Provisions.” (*See* Exh 202:0002.) This incorporation shows
21 FCA was aware of how to incorporate additional agreements into the Dealer Agreement, but did not do
22 so with the DAP-27 form agreement. (*Id.*) As in the *Isuzu Motors* case, if the requirements to title
23 vehicles and create contracts for vehicles upon sale, as described in the Dealer Policy Manual and Gold
24 Book, was so important to FCA, FCA “would certainly” have incorporated DAP-27 by reference in the
25 Dealer Agreement. (*See Isuzu Motors* at 475.)

26 Because the parties executed the DAP-27 form agreement before the Dealer Agreement
27 (Exhibit 202) and the Dealer Agreement contains a merger clause that cancels and supersedes all
28 earlier agreements, the DAP-27 form agreement is canceled and superseded by the Dealer Agreement.

1 Therefore, even if the Board is convinced that the DAP-27 form satisfies the requirement that the
2 additional terms requiring titling at the time of sale be “previously communicated” to Protestant, the
3 DAP-27 form should be given no legal effect as a result of the Dealer Agreement’s merger clause.

4 C. FCA WAS REQUIRED TO PROVIDE PROTESTANT THE OPPORTUNITY TO SUBMIT
5 ADDITIONAL SUPPORTING DOCUMENTATION OR INFORMATION REBUTTING THE
6 DISAPPROVAL AND TO CURE ANY MATERIAL NONCOMPLIANCE.

7 As discussed above, Section 3065.1 required FCA to provide Hooman, or any California FCA
8 franchisee, a reasonable appeal process and the opportunity to submit additional supporting
9 documentation or information rebutting the disapproval. (Cal. Veh. Code § 3065.1(g)(3).) Moreover,
10 if a dealer rebuts any disapproval and cures *any material noncompliance* the franchisor *shall not*
11 chargeback the franchisee for that claim. (*Id.*) The record shows that Protestant cured the alleged
12 noncompliance when it titled the vehicles to the dealership and provided Respondent evidence of this.
13 (*See* RT Vol. 1, 125:7-24; RT Vol. 4, 125:3-12, 146:13-20; RT Vol. 4, 257:2-4; Exh 217:0003) The
14 analysis must necessarily end here. The plain language of Section 3065.1 does not allow the proposed
15 chargeback because Hooman cured the alleged noncompliance. (RT Vol. 1, 125:7-24; RT Vol. 4,
16 125:3-12, 146:13-20; Cal. Veh. Code § 3065.1(g)(3).)

17 D. THERE IS NO PUBLIC INTEREST SERVED THAT WOULD JUSTIFY A DETERMINATION THAT
18 THE FAILURE TO TIMELY REGISTER A VEHICLE SOLD TO A DEALER IS INCURABLE
19 NONCOMPLIANCE.

20 Respondent offered several concerns its requirement to title vehicles at the time of sale is
21 intended to address—each of these purported concerns ceased to exist once Hooman cured the alleged
22 noncompliance when it registered and titled the Audit Vehicles to the dealership. (RT Vol. 3, 162:21-
23 24; RT Vol. 4, 41:1-13; *see also* RT Vol. 2, 107:11-23; RT Vol. 3, 162:11-20; RT Vol. 4, 41:1-4; RT
24 Vol. 3, 162:13-16; RT Vol. 4, 41:10-13; RT Vol. 3, 162:16-20; RT Vol. 4, 41:5-9; RT Vol. 2, 116:4-7;
25 RT Vol. 4, 86:1-12.) Further, Respondent failed to show any meaningful correlation between the
26 registration requirement and these concerns. (*See Id.*)

27 1. *Customers are not in danger of receiving a shortened warranty period.*

28 Respondent started the hearing claiming Hooman’s failure to title the vehicles purchased by the
dealership placed customers in danger of receiving shortened warranty periods for new FCA vehicles.
(*See* RT Vol. 1, 22:16.) This concern was shown to be without merit because FCA’s system makes

1 this scenario impossible. (See RT Vol. 5, 42:18-43:10.) The testimony from witnesses for both
2 Respondent and Protestant confirm this. (RT Vol. 2, 118:17-23, 157:11-12 (Matt Gabel describing
3 that an unwind resets the sale date and warranty period); RT Vol. 4, 196:10-14 (“a sale can only count
4 once”); RT Vol. 5, 68:14-15 (Christopher Glenn describing, “You cannot report a car twice to
5 Chrysler”); RT Vol. 5, 42:18-43:10 (Hooman Nissani describing that Maria Hernandez did not receive
6 a shortened warranty for her vehicle).) Any FCA vehicle can only have one report of sale date. (RT
7 Vol. 5, 68:14-15.) The warranty period runs from the time of reported sale. (RT Vol. 2, 158:25-
8 159:1.) A dealer cannot make a subsequent report of sale unless the prior report of sale is unwound.
9 (RT Vol. 2, 118:17-23, 157:11-12; RT Vol. 4, 196:10-14.) The most recent report of sale date starts
10 the warranty period for any new FCA vehicle sold to a customer. (See RT Vol. 2, 118:17-23, 157:11-
11 12.)

12 *2. FCA’s failure to communicate its titling on sale requirement and the absence of a*
13 *loaner vehicle program undercuts any argument concerning FCA’s desire to*
14 *maintain consistency between dealers.*

15 At the time of the Audit, Hooman was unaware of the requirement to register and title vehicles
16 purchased by the dealership. (RT Vol. 1, 125:21-24; RT Vol. 2, 187:9-11.) The record reflects that,
17 subsequent to the Audit, Hooman now consistently adheres to this requirement. (RT Vol. 5, 95:19-22.)
18 This was the first FCA audit of a dealer in business for less than a year. (RT Vol. 2, 165:13-24.)
19 Despite FCA’s knowledge concerning the volume of service loaners Hooman purchased for the
20 dealership’s use, no one, including Mr. Sebastiani, ever discussed the requirement that Hooman title
21 these vehicles to the dealership at the time of sale. (RT Vol. 1, 127:11-18; RT Vol. 4, 263:10-17.) In
22 fact, Mr. Nissani testified that he asked several times about the process and procedures for loaner
23 vehicles and FCA provided no guidance—because no policy was in place. (RT Vol. 4, 263:10-264:7.)
24 Mr. Sebastiani’s suggestion that he must have told the dealership to title the loaner vehicles at the time
25 of sale is not credible.⁶

26 ⁶ Julio Sebastiani suggested that he talked to Rayan Nissani about titling the loaner cars. (RT Vol. 1,
27 190:10-17.) However, he made clear in his testimony that he never talked about the Gold Book with
28 anyone at the Hooman dealership. (RT Vol. 1, 181:24-182:3.) Moreover, Sebastiani’s recollection
was that this was something he “always” tells dealers the first time they are going to put vehicles into
their loaner pool. (RT Vol. 1, 190:10-17.) He could not answer when he talked to Rayan Nissani
about it. (RT Vol. 1, 192:3-5.) He only remembers mentioning it to Rayan and no one else was

1 FCA did not operate a loaner vehicle program at the time of the Audit. (RT Vol. 1, 185:11-19.)
2 This is undoubtedly the reason FCA representatives were unable to provide any guidance to Hooman.
3 (See RT Vol. 4, 263:10-264:7.) Nevertheless, Mr. Sebastiani routinely advised Hooman that it could
4 purchase loaner vehicles to obtain its monthly VGP sales objectives. (RT Vol. 1, 168:12-19.) Mr.
5 Sebastiani advised Protestant on a monthly basis that one of the “levers it could pull” to reach its
6 monthly sales objectives was to sell vehicles to the dealership as loaner vehicles and report those
7 vehicles as sold. (*Id.*; see also Vol. 1, 199:7-9 (describing that he discussed loaners at months’ end
8 with dealers).) The 93 loaner vehicles purchased by Protestant substantially benefitted FCA and Mr.
9 Sebastiani because they represented 93 sold units beyond actual consumer demand. (Exh 264; RT Vol.
10 1, 168:25-169:2.)

11 3. *Respondent failed to show any evidence that Protestant’s failure to title and register*
12 *the Audit Vehicles at the time of sale facilitated broker sales or even how this might*
13 *be possible.*

14 Respondent failed to provide credible evidence of any correlation between a failure to title
15 vehicles at the time of sale and broker sales as a general proposition. (RT Vol. 4, 44:19-45:18.) The
16 record shows Respondent’s assertion that a dealer might report a sale to claim an incentive has no
17 rational relationship to broker sales and titling. (See RT Vol. 4, 46:14-16.)

18 4. *The Audit Vehicles were legally driven on California’s roads and properly insured*
19 *at all times.*

20 The record shows that at the time of the Audit each of the Audit Vehicles had a temporary
21 registration sticker. (RT Vol. 1, 82:24-83:7; see also RT Vol. 4, 90:1-16, 239:21-24.) Moreover, the
22 dealership held the MSO for each of these vehicles showing it was the legal owner of these vehicles.
23 (See RT Vol. 4, 94:20-23.) It is simply not true to claim these vehicles could not be legally driven on
24 California roads. (See RT Vol. 1, 82:22-83:2; RT Vol. 5, 237:3-6.)

25 Similarly, each customer provided evidence of insurance before Hooman provided a service
26 loaner vehicle. (See RT Vol. 5, 63:9-64:9, 26:4-7, 63:9-64:9, 63:9-64:9.) In addition to requiring
27 customers to provide evidence of insurance, Hooman also maintained its own insurance policy for
28 present for the alleged conversation. (RT Vol. 1, 192:14-17, 120:12-13.) He even admitted that he
never spoke to the dealer principle, Hooman Nissani, about titling the vehicles at the time of sale. (RT
Vol. 1, 192:18-19.)

1 these vehicles. (RT Vol. 5, 26:4-7; RT Vol. 5, 63:9-64:9.) There is little to no merit to FCA’s
2 purported concern. Moreover, any concern ceased to exist after Protestant registered and titled the
3 Audit Vehicles to the dealership.

4 *5. California Law provides franchisees the opportunity to cure any failure to timely*
5 *register a new vehicle sale.*

6 Requirements for registering a new motor vehicle with California’s DMV after it is sold are
7 governed by the California Vehicle Code. (Cal. Veh. Code § 4456(a)(2).) The code describes a dealer
8 “shall submit to the department an application accompanied by all fees and penalties due for
9 registration or transfer of registration of the vehicle within ... 20 days [from the date of sale] if the
10 vehicle is a new vehicle.” (*Id.*) The code then goes on to state that “[p]enalties due for noncompliance
11 with this paragraph shall be paid by the dealer.” (*Id.*) The penalties so described are administrative
12 service fees for each violation. (Cal. Veh. Code § 4456.1(a).)

13 Respondent incorrectly claims its stringent requirement that a dealer must title a vehicle at the
14 time of sale to receive incentive money is consistent with California law. (RT Vol. 1, 20:2-4) (*See* Cal.
15 Veh. Code § 4456(a)(2).) Instead, the code requires only that vehicles be titled within 20 days of a
16 new vehicle sale—not at the time of sale. (Cal. Veh. Code § 4456(a)(2).) Moreover, the Vehicle Code
17 anticipates there will be instances where vehicles are titled beyond 20 days from the date of sale and it
18 provides a mechanism for cure. (*See* Cal. Veh. Code § 4456(a)(2).) In these instances the code
19 describes and sets forth the additional penalty a dealer must pay when registering the vehicle. (Cal.
20 Veh. Code § 4456.1(a).) Respondent’s assertion that titling upon sale is a defect that cannot be cured
21 is contrary to the provisions of the Vehicle Code. (*See Id.*) Hooman registered each of the vehicles
22 identified in the Audit and paid all required penalties and fees, as described by the California Vehicle
23 Code. (RT Vol. 5, 98:20-99:19.)

24 Further, the question of whether Hooman registered the vehicles purchased by the dealership
25 more than 20 days after sale is not before the Board. The Board lacks jurisdiction to enforce the
26 provisions of Vehicle Code Section 4456. As stated above, the Board’s inquiry in this protest must be
27 limited to findings pursuant to Section 3065.1. This Board is not charged with enforcement of Section
28 4456, nor is Respondent. Instead, this task falls to the appropriate department of the Department of

1 Motor Vehicles. Moreover, this issue has already been cured pursuant to the applicable statutory
2 scheme because Hooman backdated registration of these vehicles and paid the required late fees and
3 penalties. (RT Vol. 2, 194:3-5; RT Vol. 5, 99:5-12 (indicating that Hooman backdated the registration
4 for the Audit Vehicles as of the NVDR dates for each vehicle); *see also* RT Vol. 5, 98:20-99:19.)

5 Respondent's position is not consistent with California law regarding the timing of registration
6 and titling of a new vehicle. If Respondent's position was consistent with California law, it would
7 accept the late titling and registration of the vehicles sold to the dealership as evidence of a cure of the
8 alleged noncompliance identified in the Audit. When Hooman registered and titled the Audit Vehicles,
9 the State of California retroactively titled and registered those vehicles to the date of reported sale. (RT
10 Vol. 5, 98:2-99:17; *see also* RT Vol. 2, 194:3-5.) There is no policy reason to permit a franchisor to
11 treat the date of sale differently than the date recognized by the State of California.

12 E. THE REQUIREMENT TO TITLE VEHICLES AT THE TIME OF SALE IS DEMONSTRABLY
13 CURABLE.

14 Respondent's characterization of its requirement to title vehicles at the time of sale as incurable
15 is without support. (*See, e.g.*, RT Vol. 3, 18:15-24.) As well as the lack of a policy reason to justify
16 the treatment of this requirement as incurable, the record reflects the many ways the alleged
17 noncompliance is cured.⁷

18 As discussed above, the State of California presumes there will be instances of late titling, for
19 which it provides a mechanism to cure. (*See* Cal. Veh. Code § 4456(a)(2).) Protestant titled the Audit
20 Vehicles and paid all taxes, fees, and late penalties. (RT Vol. 5, 98:2-99:17; *see also* RT Vol. 2, 194:3-
21 5.) Respondent's concerns were each eliminated when Protestant registered and titled the vehicles—
22 this is evidence of cure. (RT Vol. 3, 33:4-11; *see also* RT Vol. 3, 166:20-25.)

23 ///

24 ⁷ When Hooman titled the Audit Vehicles, they could no longer be sold as new, their value decreased,
25 and the warranty period continued to run as of the date of sale. (*See* RT Vol. 2, 106:23-107:3.) None
26 of Respondent's supposed policy concerns continued for the Audit Vehicles once they were titled to
27 the dealership. (RT Vol. 3, 33:4-11; *see also* RT Vol. 3, 166:20-25.) California law provides a process
28 for a dealer to title a new motor vehicle sale later than 20 days after the reported sale date. (Cal. Veh.
Code § 4456(a)(2).) Hooman paid retroactively for registering the Audit Vehicles to the date of sale
Hooman reported (NVDR'd) to Respondent for each vehicle. (RT Vol. 5, 98:2-99:17; *see also* RT
Vol. 2, 194:3-5.)

1 F. FCA’S ARGUMENTS THAT PROTESTANT FAILED TO COMPLY WITH VGP CLAIMS
2 REQUIREMENTS FOR FAILING TO CREATE CONTRACTS FOR VEHICLES SOLD TO ITSELF
3 ARE EQUALLY WITHOUT MERIT.

4 FCA asserts the proposed chargebacks are proper because Protestant did not create contracts
5 with itself at the time of sale. (RT Vol. 1, 162:2-4; see Exhs 206(a):0042, 207(a):0016, 207(b):0016.)
6 Neither the audit manager review nor the FCA Appeal makes mention of Protestant’s failure to create
7 contracts for the Audit Vehicles. (Exhs 236:0003, 264:0001.) Therefore, the focus of the Protest
8 should not be on whether Protestant created contracts with itself, but instead on titling as discussed
9 above.

10 For the sake of completeness, any chargeback FCA continues to pursue based on the failure of
11 Hooman to create contracts with itself is unreasonable in light of the information Hooman provided
12 FCA—the screen shots contained the same information that would be included in any contract.
13 Moreover, under California Law, Hooman, or any other dealership for that matter, could not create a
14 valid contract with itself. Additionally, for reasons similar to those regarding the failure to title at the
15 time of sale in the discussion above, the requirement that contracts be created at the time of sale was
16 not previously communicated to Hooman. Finally, Respondent’s own Incentive Manual and Policy
17 Manual acknowledge that a contract was not required for sales within the Hooman dealership. For at
18 least these four reasons, any chargeback based on a failure of Hooman to create contracts for vehicles
19 it sold to itself is prohibited by Section 3065.1.

20 1. *The FCA requirement that Hooman create contracts with itself is unreasonable and
21 was rebutted and cured by the information Hooman provided.*

22 The Vehicle Code requires that Respondent’s incentive appeals process must be reasonable.
23 (Cal. Veh. Code § 3065.1(g)(3).) FCA failed to identify any policy reason in support of its
24 requirement that a contract must be created on sale when a vehicle is purchased by a dealer for loaner
25 use. (See, e.g., RT Vol. 2, 185:11-24 (instead focusing on the titling concern).)

26 It is unreasonable for FCA to require contracts in instances of a dealer sale to itself. Hooman
27 provided the same information that would be contained a contract, and sufficient to evidence a sale,
28 when it provided FCA the “screen shots” as they were referred to during the hearing. (See Exh
211:0005, 238:0093-0094; RT Vol. 4, 250:23-251:1; see also RT Vol. 4, 253:6-13 (describing that the

1 screen shots provide the same information as the information printed on the sales contracts).) When
2 Hooman prints sales contracts, it uses the information contained in the screen shots to populate the
3 form contracts. (RT Vol. 4, 254:13-16.) Moreover, FCA admitted it does not require any specific
4 form for the sales contract or other documents. (RT Vol. 3, 167:18-20.)

5 Protestant described it did not print retail sale contracts for deals it made to itself because it did
6 not believe they were necessary. (RT Vol. 1, 72:3-6.) The retail sales contract discloses information
7 regarding legal protections and disclosures from the dealer to public customers; moreover, the retail
8 contract requires disputes between the buyer and seller to be settled through arbitration. (RT Vol. 1,
9 72:7-15.) These protections and disclosures are simply not relevant when a dealer sells a vehicle to
10 itself. It is therefore unreasonable for FCA to continue to require retail contracts for vehicles Hooman
11 sold to itself.

12 *2. A valid contract cannot be created between a dealer and itself under California Law.*

13 California’s Civil Code describes the essential elements of a contract. (Cal. Civ. Code § 1550.)
14 The first essential element is “*Parties* capable of contracting.” (*Id.* (emphasis added).) The code
15 specifies “party” in the plural. (*Id.*) One cannot create a valid contract with oneself.

16 Therefore, the FCA requirement for Hooman to create contracts with itself is not legally
17 possible. If Hooman had printed and signed a retail “contract” with itself, whatever Hooman might
18 have created would not have been a contract, but instead, just another document for record keeping
19 purposes. Therefore, Hooman’s screen shots are just as effective to evidence that a sale occurred in
20 lieu of the inability of a party to contract with itself under California Law.

21 *3. FCA’s asserted incentive term in Respondent’s Gold Book to create contracts for*
22 *sales from Hooman to itself was not previously communicated to Hooman.*

23 As discussed above, Section 3065.1 requires that FCA prove it previously communicated the
24 incentive term that requires Hooman to create contracts with itself for sales to the dealership, in order
25 to chargeback incentives on this basis. (Cal. Veh. Code § 3065.1(g)(2).) FCA’s requirement to create
26 contracts for vehicles sold to the dealership is stated in the Gold Book. (*See* Exhs 206(a), 207(a),
27 207(b); *see also* RT Vol. 2, 98:10-22.) As discussed above in section B, the terms of the Gold Book
28 were not previously communicated to Hooman as required by section 3065.1(g)(2). (*See, supra*, Part

1 IV(B.) Specifically, Hooman was never given a copy of the Gold Book – hard copy or otherwise –
2 and even if the DAP-27 form acknowledgement was sufficient to establish the terms were
3 communicated to Protestant, the DAP-27 form is cancelled and superseded by the Dealer Agreement
4 (Exhibit 202). (RT Vol. 1, 106:18-19; RT Vol. 3, 48:3-15; Exhs 202, 204:0002-0003.)

5 4. *FCA’s Policy Manual and Incentive Manual fails to indicate a contract is required*
6 *when a dealership sells a vehicle to itself.*

7 A document whose interpretation is uncertain “should be interpreted most strongly against the
8 party who caused the uncertainty to exist.” (Cal. Civ. Code § 1654.) In Respondent’s Policy Manual
9 and Incentive Manual, it describes that a Contract or Lease Agreement is necessary when claiming an
10 incentive “if applicable.” (Exhs 206(a):0042, 207(a):0016, 207(b):0016.)

11 When Hooman sold a vehicle from itself to itself, the creation of a contract was not applicable
12 as the Manuals describe. This is because the protections normally created by the contract would not
13 have been relevant or legally binding. (RT Vol. 1, 72:7-15.) Moreover, a party cannot contract with
14 themselves. (*See* Cal. Civ. Code § 1550 and discussion, *supra*.)

15 Other times the manuals use the words “if applicable” also indicate situations in which
16 documents are not necessary when claiming incentives. Specifically, the words “if applicable” are
17 used for “Customer Certificate/Coupon,” “Proof of customer eligibility for incentive program,”
18 “Finance Contract,” and “Lease/Short-term Finance Worksheets.” (Exhs 206(a):0042, 207(a):0016,
19 207(b):0016.) In the case of a customer coupon, a customer may not have a coupon so the words “if
20 applicable” indicate that a dealer may not need to keep a certain document. In the case of a proof of
21 eligibility, a customer may not be claiming any eligibility incentive so the words “if applicable”
22 indicate that a document may not need to be kept. In the case of a finance contract, a customer may
23 not be financing the vehicle so the words “if applicable” indicate that a document may not need to be
24 kept. Finally, in the case of a lease or short-term finance worksheet, a customer may not be agreeing to
25 short term financing or entering into a lease so the words “if applicable” indicate that a document may
26 not need to be kept. Therefore, as indicated by the other uses of the words “if applicable,” a contract
27 was not something that the Manuals always require – particularly when selling a vehicle from the
28 dealership to the dealership.

1 Matthew Gabel confirmed that “Lease Agreement/Contract (if applicable)” was the language
2 FCA pointed to requiring contracts for the Audit Vehicles. (RT Vol. 2, 197:12-14) He attempted to
3 explain away the words “if applicable” with regard to contracts by saying that “if they’re applying for
4 incentives, then it would be applicable.” (RT Vol. 2, 197:22-23.) However, this explanation is
5 unconvincing because the entire series of bullet points in FCA’s Manual only apply when a dealer sells
6 a vehicle and claims incentives. (Exhs 207(a):0016, 207(b):0016.) Therefore, if the “if applicable”
7 language only meant when a dealer was claiming incentives, there would be no need to include those
8 words. The words must instead have another meaning and that meaning is, most reasonably, that the
9 requirement of a contract does not apply when a dealer sells a vehicle to itself.

10 To the extent an ambiguity exists in FCA’s Manuals regarding the language “if applicable”
11 next to the requirement of a contract when a dealer sells a vehicle to itself, the language should be
12 interpreted most strongly against FCA. (Cal. Civ. Code § 1654.) Therefore, in addition to the above
13 arguments, FCA’s Manuals cannot be interpreted to require contracts for all sales, in particular, when a
14 dealer makes a sale to itself.

15 For at least the foregoing reasons, even if FCA continues to assert that Hooman failed to create
16 contracts with itself, Hooman should not be charged back for this alleged defect because it is an
17 unreasonable requirement. The record shows that Hooman provided evidence of what it uses to create
18 contracts upon sale. (See Exh 211:0005, 238:0093-0094; RT Vol. 4, 250:23-251:1; see also RT Vol. 4,
19 253:6-13.) Moreover, Hooman could never have created a contract with itself under California Law.
20 (Cal. Civ. Code § 1550.) Additionally, for all the reasons discussed above with regard to FCA’s
21 requirement that Hooman title vehicles upon sale, the terms of its Gold Book requiring Hooman to
22 create contracts with itself were not previously communicated to Hooman. (See, *supra*, Part IV(B).)
23 Finally, Respondent’s Incentive Manual and Policy Manual do not require a contract when a dealer
24 sells a vehicle to itself. (See Exhs 206(a):0042, 207(a):0016, 207(b):0016.)

25 V. CONCLUSION

26 This protest must be sustained. The proposed chargeback is prohibited by the plain language of
27 Vehicle Code Section 3065.1. (See Cal. Veh. Code § 3065.1(g)(3).) Respondent failed to meet its
28 burden to establish its attempts to collect the proposed chargeback are permissible under the terms of

1 Section 3065.1. (Cal. Veh. Code § 3065.1(g)(6).)

2 The evidence in the record demonstrates that the terms of the incentives sought to be charged
3 back were never previously communicated to Protestant. (See RT Vol. 1, 128:19-24; RT Vol. 1,
4 106:18-19; RT Vol. 3, 48:3-15) Instead, these terms were first communicated to Protestant at the time
5 of the Audit. (See RT Vol. 2, 190:2-15) In response, Protestant immediately registered and tiled the
6 Audit Vehicles and effectively cured the alleged noncompliance when FCA received, confirmed, and
7 acknowledged evidence of this. (RT Vol. 2, 190:2-15; Exhs 217, 232, 238; see also RT Vol. 2, 133:1-
8 20, 167:6-21; RT Vol. 3, 19:21-23, 159:9-17; Exhs 234, 236:0004-0006, 259:0003-0005, 264:0002-
9 0004 (indicating that Respondent knew the Audit Vehicles were titled before the end of the Audit).)
10 Based upon the demonstrable fact that Protestant cured any and all material noncompliance identified
11 in the December 2014 audit, FCA must not be permitted to proceed with the proposed chargeback.
12 (Cal. Veh. Code § 3065.1(g)(3).) A decision overruling this Protest would be contrary to the clear
13 legislative intent and plain meaning of Section 3065.1. (*Id.*)

14 In addition, respondent failed to show it provided Protestant a reasonable appeal process. (Cal.
15 Veh. Code § 3065.1(g)(3).) Respondent's consideration of Protestant's appeal was entirely dependent
16 on new and additional requirements that were not a part of the incentives at issue in the Audit. (See
17 Exh 246 (to consider a reversal of any of the chargeback, the appeals committee required Hooman to
18 provide "the first [rental] agreement and then the four most recent [rental] agreements for each
19 vehicle" and "if you have a usage log please provide that, too.")) FCA's requirement that Protestant
20 submit evidence to satisfy terms and conditions beyond those required by the incentives themselves is
21 unreasonable on its face.

22 For these reasons Protestant respectfully requests the Board issue a decision sustaining these
23 consolidated protests.

24
25 Dated: July 1, 2016

LAW OFFICES OF
GAVIN M. HUGHES

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27 By: 
28 Gavin M. Hughes
Attorneys for Protestant

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DECLARATION OF SERVICE BY ELECTRONIC MAIL

I, Robert A. Mayville, Jr., declare that I am employed in the County of Sacramento, State of California, that I am over 18 years of age, and that I am not a party to the proceedings identified herein. My business address is 3436 American River Drive, Suite 10, Sacramento, California 95864.

I declare that on July 1, 2016, I caused to be served a true and complete copy of:

***PROTESTANT'S POST-HEARING OPENING BRIEF and PROPOSED FINDINGS OF
FACT AND PORPOSED DECISION***

HC Automotive, Inc., dba Hooman Chrysler Jeep Dodge Ram

v.

FCA US LLC

Protest Nos. PR-2429-15; PR-2430-15; PR-2431-15; and PR-2432-15

By Electronic Mail:

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I declare under penalty of perjury that the foregoing is true and correct.

Executed this 1 July, 2016, Sacramento, California.


Robert A. Mayville, Jr.