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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
REPLY BRIEF**

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12 **I. INTRODUCTION**

13 Respondent’s Closing Brief demonstrates Respondent’s failure to meet its burden in this

14 Protest. The plain language of Vehicle Code Section 3065.1 is clear and unambiguous. (Cal. Veh.

15 Code § 3065.1.) Pursuant to Section 30651, Respondent bears the burden to demonstrate the

16 following:

- 17 • Respondent communicated the terms of the incentive program that are the basis for the
- 18 proposed chargebacks—it did not;
- 19 • Respondent’s requirement to title vehicles purchased for use in Protestant’s loaner fleet and
- 20 to create contracts with itself is reasonable—it is not;
- 21 • Respondent provided Protestant a reasonable appeals process—it did not;
- 22 • Protestant failed to submit documentation rebutting and curing the alleged noncompliance—
- 23 the evidence shows Protestant provided conclusive evidence it purchased and titled the
- 24 vehicles involved in the proposed chargebacks;
- 25 • Respondent provided Protestant written notification of the final denial that conspicuously
- 26 stated “Final Denial” on the first page—it did not.

27 In its Closing Brief Respondent ignores or distorts the actual evidence in the record and the

28 plain language of Section 3065.1. Respondent stops short of stating it unequivocally communicated

1 the terms of the incentive program to Protestant; it characterizes its appeals process as an act of “good
2 will” and a “request for leniency”; it argues the noncompliance with incentives requirements is
3 incurable—despite evidence to the contrary and the requirements of Section 3065.1; and Respondent
4 argues it substantially complied with the required statutory notice provision of Section 3065.1(g)(4).¹

5 In addition to failing to meet its burden with regard to 3065.1, Respondent failed to show any
6 actual harm to itself or the public—FCA and FCA customers substantially benefitted from Protestant’s
7 actions.² Similarly, it failed to show any way that Protestant has been unjustly enriched. Instead, the
8 record shows Protestant was going above and beyond its franchise obligations in an effort to provide
9 FCA customers a high level of customer service and convenience. Further, Respondent fails to address
10 that it did not have a loaner program in place in 2014, which is at the root of the communication
11 breakdown between the parties. For these reasons, there is no justification for the New Motor Vehicle
12 Board (“Board”) to look beyond the language of Section 3065.1. Instead, the Board must sustain the
13 Protest in accordance with the intent and plain meaning of the statute.

14 **II. ARGUMENT**

15 **A. RESPONDENT’S ATTEMPTS TO CREATE ITS OWN LEGAL STANDARD ARE WITHOUT**
16 **MERIT.**

17 Respondent cites Protestants opening brief—which is not a part of the record—and
18 Protestant’s motion in limine—which was denied—in support of its argument that the only issue to be
19 determined is whether Protestant cured the alleged noncompliance identified in the Audit. (Res. Br.
20 19:17-27.)³ It does so to advance its argument that the Board should somehow relieve Respondent of
21 its burden under Section 3065.1. (Res. Br. 20:8-13.) The Board must reject this argument.

23 ¹ The inconsistency of FCA’s position is inescapable when it argues its noncompliance should be
24 excused because it “substantially complied” with the plain language requirement of Section
25 3065.1(g)(4). Nevertheless, FCA made no attempt to cure this violation by providing the required
26 notice.

26 ² Protestant’s purchase of loaner vehicles represented sales beyond actual consumer demand. FCA
27 benefitted from each of the loaner vehicles purchased by Protestant. (See RT Vol. 4, 94:20-23
28 (indicating Hooman paid FCA for the Audit Vehicles).) FCA customers also significantly benefitted
from the dealership’s choice to makes these vehicles available as free service loaners.

³ Citations to Respondent’s Post Hearing Opening brief will be indicated “Res. Br. Page Number:Line
Number.”

1 As legal authority for its argument, Respondent cites *Estate of Luke*. (Res. Br. 19:9-16.) *Estate*
2 *of Luke*, as Respondent acknowledges, deals with signed interrogatory responses from the
3 Petitioner/Appellant (not the Defendant as Respondent describes – there is no defendant in the case).
4 (*Estate of Luke* (1987) 194 Cal.App.3d 1006, 1020-21.) The Petitioner (Raymond’s Heirs) answered
5 several interrogatories stating that it did not have contentions at the present time. *Id.* Unlike, the
6 *Estate of Luke* case, Respondent does not cite facts that Protestant signed, but instead tries to cite
7 arguments made by Protestant’s counsel *before* Protestant was even sure what evidence Respondent
8 would present at the hearing. (Res. Br. 19:20.) Therefore, because protests before the Board do not
9 permit Interrogatories or Requests for Admissions, Respondent’s legal authority does not apply.

10 Moreover, when Respondent cites Protestant’s opening brief as evidence of its position, it
11 omits Protestant’s prefatory phrase describing that “*consistent with Protestant’s motion in limine*, the
12 only issue the Board should determine is whether Respondent can demonstrate that Protestant failed to
13 cure any material noncompliance....” (Pro. Opening Br. 6:17-20 (emphasis added).) This makes clear
14 any limitation the language had was premised on a favorable ruling on Protestant’s Motion in Limine.
15 However, Respondent opposed Protestant’s motion to limit the scope of relevant evidence and ALJ
16 Hagle denied the motion. (RT Vol. 1, 8:6-7.)⁴

17 The Protest was filed pursuant to Section 3065.1. The Board must necessarily issue a decision
18 pursuant to this code section, which plainly states “In any protest pursuant to this subdivision, the
19 franchisor shall have the burden of proof.” (Cal. Veh. Code § 3065.1(g)(6).)

20
21 B. RESPONDENT FAILED TO SHOW IT PREVIOUSLY COMMUNICATED THE TERMS OF THE
INCENTIVES TO PROTESTANT.

22 Respondent argues dealers are required to acknowledge in writing that it is a dealers’
23 responsibility to read and understand the Incentives Rules Manual. (Res. Br. 8:17-18.) This highlights

24 ⁴ It should be noted that from time to time, Respondent chose to cite statements by ALJ Hagle in its
25 Closing Brief. While the Board is certainly aware that a judge does not make an ultimate decision
26 until the close of evidence (*See* RT Vol. 3, 89:2-3 (ALJ indicating that the facts are what they are until
27 additional witnesses are called)), Respondent’s repeated use of the ALJ’s preliminary statements bore
28 mentioning. (*See, e.g.*, Res. Br. 21:17-19, 30:1-5, 41:18-20.) Moreover, Respondent takes these
citations out of the context ALJ Hagle was ruling on. (*Compare, e.g.*, Res. Br. 21:17-19 (referring to
the judges statement about the saddest words – what might have been) *with* RT Vol. 3, 89:2-3
(describing that “we’re stuck with it right now *until you call him as a witness*”).)

1 the fact that these terms were *never previously communicated* to Protestant, as required by Section
2 3065.1. At the time Mr. Nissani⁵ executed the form acknowledgment he had not executed an FCA
3 franchise, he did not have access to the web site where the Incentives Rules Manual was located, and
4 he was not provided a copy of the Incentives Rules manual. Respondent cannot claim, nor can the
5 Board find, the actual incentives terms were previously communicated to Protestant.

6 Respondent could have easily provided Protestant a copy of the incentives rules at the time
7 Protestant executed the franchise agreement in November 2013. In the alternative, it could have even
8 more easily sent Protestant a copy of the incentives rules by certified mail or FedEx delivery requiring
9 a signature of receipt—it chose not to do this. FCA’s actions created the circumstances now before the
10 Board where Protestant did not receive the incentives terms and FCA cannot demonstrate otherwise.

11 Respondent’s efforts to show the incentives terms were previously communicated to Protestant
12 are limited to: 1.) the form acknowledgement Mr. Nissani executed prior to even becoming an FCA
13 franchisee; and 2.) its claim that it routinely advised dealers to consult the Incentives Rules Manual
14 referenced in every set of program rules. (Res. Br. 8:17-21.) In making these arguments, Respondent
15 necessarily acknowledges that it never previously communicated these terms to Protestant. Moreover,
16 as Protestant argued in its opening brief, the testimony of Julio Sebastiani is not credible when it comes
17 to informing Rayan Nissani and only Rayan Nissani about the requirement to title a loaner vehicle.
18 (Pro. Br. 17:23-18:10; *See also* Pro. Br. 17:FN6.)

19 The prospective form acknowledgment executed by Mr. Nissani does not satisfy the
20 requirement that the terms of any incentive were previously communicated to Protestant. The
21 incentives terms contained within FCA’s DealerCONNECT website were subject to change, and in
22 fact did change. (*Compare* Exh 207(a) *with* Exh 207(b).) Given that these terms were subject to
23 change, it is even more unreasonable to attempt to hold a dealer responsible for knowledge of
24 incentives terms through the execution of a generic form acknowledgment. However, it is perfectly
25 reasonable to require—as Section 3065.1 does—these terms be actually communicated to dealers.

26 ///

27 _____
28 ⁵ All references to Mr. Nissani shall refer to Protestant’s Dealer Principal, Hooman Nissani. Any
reference to Hooman refers to Protestant.

1 1. *The notice requirements of the Vehicle Code are strictly construed.*

2 The Notice requirements of the Vehicle Code provide guidance for how Section 3065.1 must
3 be interpreted. For example, Sections 3060 and 3062 require the manufacturer to include specific
4 language set forth in the statutes and also require that notice be *received*. (Cal. Veh. Code § 3060(a)(1)
5 and (a)(1)(C); Cal. Veh. Code § 3062(a)(1) and (a)(3).) A franchisor cannot terminate a franchise until
6 the franchisee and the Board have *received* written notice. (Cal. Veh. Code § 3060(a)(1).) A
7 franchisee may file a protest within 20 days of *receiving* written notice. (Cal. Veh. Code § 3062(a)(1).)
8 It is entirely consistent that Respondent be required to demonstrate the terms of its incentives program
9 were actually *communicated* to Protestant.

10 In *British Motor Cars Dist., Ltd. v. New Motor Vehicle Bd.* (1987) 194 Cal.App.3d 81, the
11 Court examined the notice requirements set forth in Section 3060. The Court determined no franchisee
12 may be terminated until the proper notices have been sent. (*Id.* at 93.) The Court concluded “[a]ny
13 other interpretation of the statute would reward franchisors who send out defective notices.” (*Id.*) It
14 follows that California law would require the terms of any incentive program be actually
15 communicated to a franchisee before they may form the basis for a chargeback pursuant to Section
16 3065.1. (*See* Cal. Veh. Code § 3065.1(g)(2); *see also* Cal. Veh. Code § 3060; *British Motor Cars Dist.*
17 194 Cal.App.3d at 93.) Any other interpretation of the plain language of Section 3065.1 would be fatal
18 to the protections of the statute. Moreover, there is little to no burden in requiring a franchisor to
19 actually communicate the terms of any incentive to a franchisee.

20 2. *The training Julio Sebastiani provided Hooman did not include advice about loaner*
21 *vehicles and Julio Sebastiani acknowledged he never talked to anyone at the*
22 *dealership about the Gold Book’s requirements.*

23 Respondent asserts that Julio Sebastiani told Rayan Nissani the loaner cars needed to be titled
24 upon sale and he provided Hooman training on how to process incentives. (Res. Br. 12:9-17.)
25 However, as Protestant argued in its Post-Hearing Opening Brief, this testimony is not credible. (Pro.
26 Br. 17:23-24, FN6.) Additionally, Sebastiani admitted that he had never talked to anyone at the
27 Hooman dealership about the requirements of the Gold Book. (RT Vol. 1. 181:24-182:3 (When
28 Protestant’s counsel asked, “[D]id you ever talk to anybody at the dealership about the Gold Book?”

1 Sebastiani replied “No.” When asked to confirm that he did not talk with anyone at the dealership
2 about the Gold Book, Sebastiani said, “No, I did not.”) Finally, the training Sebastiani provided to
3 Hooman employees early in the dealership’s operation concerned vehicles that were subject to
4 automatic rejection in FCA’s incentive system for *customer incentives* and not the types of incentives
5 that were subject to the audit chargeback at issue here. (See RT Vol. 1, 160:23-161:6.)⁶

6 C. RESPONDENT FAILED TO SHOW ITS REQUIREMENTS THAT PROTESTANT TITLE VEHICLES
7 SOLD TO ITSELF, AT THE TIME OF SALE, AND CREATE CONTRACTS FOR THESE SALES
8 WAS REASONABLE.

9 Before the Board can even consider Respondent’s arguments on this issue, it must first
10 determine FCA previously communicated the Incentives Rules Manuals to Protestant—Respondent
11 concedes it did not. (Res. Br. 11:2-21 (in a section purportedly describing the dealer “acknowledged
12 receipt” but going on to describe the manuals are merely “available to dealers” and not communicated
13 to Hooman).) Nevertheless, Protestant agrees it is a reasonable requirement that new vehicles sold to
14 *public consumers* be titled at the time of sale. This has always been Protestant’s practice in regard to
15 every consumer sale made, as well as creating a contract with the *public* customer. (RT Vol. 1, 127:7-
16 11; RT Vol. 5, 13:24.) However, the facts and circumstances involved in this Protest are unique.
17 Here, Protestant was a new dealer in its first year of operation that was reporting a large number of
18 vehicle sales to itself for use in its extensive loaner fleet—both of these facts were well known to
19 Respondent. (RT Vol. 2, 165:13-23; RT Vol. 1, 176:10-17; RT Vol. 3, 8:13-18; RT Vol. 4, 153:22-
20 154:2; Exh 102.) Further, each sale at issue was made by the dealership to the dealership⁷—there were
21 not two parties capable of contracting or receiving customer disclosures.

22 As discussed above, Respondent’s requirement that Protestant title the loaner vehicles and
23 create contracts for the vehicles sold to itself was never previously communicated to Protestant. Had it

24 ⁶ FCA attempts to cite Mr. Danforth’s testimony to support the idea that this customer incentive
25 training somehow was applicable to the dealer-cash based incentives at issue here. (Res. Br. 13:11-
26 13.) It should be noted first that even if the training was equally applicable to both incentives, from an
27 experienced Audit Manager’s perspective, FCA would have needed to tell Hooman specifically that
28 the training was equally applicable to enable Hooman to reach such a conclusion. Moreover, ALJ
Hagle appropriately struck Mr. Danforth’s testimony on this topic. (RT Vol. 3, 124:15-19, 125:14-15.)

⁷ The sales at issue are the vehicles Respondent seeks to chargeback that Hooman sold to the
dealership and titled to the dealership before the close of the audit period. (See Exhs 213, 223.)
Protestant refers to these vehicles as the “Audit Vehicles.”

1 been, Protestant would have complied with these requirements, as is does now. (RT Vol. 1, 72:16-25;
2 RT Vol. 5, 95:19-22.) However, Protestant was previously unaware of this requirement and based
3 upon Mr. Nissani’s experience with his other franchises; Protestant had no reason to anticipate these
4 requirements.⁸ (RT Vol. 1, 72:21-25; RT Vol. 1, 127:3-7; RT Vol. 1, 37:18-38:14.)

5 It is unreasonable to require a dealer to create a contract with itself. The customer contracts are
6 required by California law to provide customers notice of certain rights and obligations. (RT Vol. 1,
7 72:9-11.) This notice is entirely unnecessary when the dealership is both the seller and the buyer. (*Id.*)
8 Moreover, under these circumstances the contract is of no legal significance because a party cannot
9 contract with itself. (Cal. Civ. Code § 1550 (requiring “*parties*”—plural—“capable of contracting”
10 as an essential element to the existence of a contract).) It is reasonable for Respondent to require
11 customer contracts to evidence eligibility for various *customer* incentives. For example, a claimed
12 conquest incentive should require evidence of the identity of the customer purchasing the vehicle. The
13 same is true for other incentives like college graduate, military, and other customer incentives. (*See*
14 *generally* RT Vol. 3, 118:22-121:17 (Mr. Danforth describing customer incentives); *see also* RT Vol.
15 3, 168:11-169:3.) However, none of those concerns exist when a dealer purchases a vehicle from its
16 own inventory.⁹ This is further evidence why it is unreasonable to require Protestant to produce
17 contracts for sales to itself—they have no relevance to any claimed incentive thus, their requirement is
18 unreasonable because it serves no purpose.

19 ///

20 ///

21 ⁸ Protestant’s lack of knowledge with respect to Respondent’s requirements is attributable to
22 Respondent’s failure to communicate those requirements. (RT Vol. 5, 66:22-24.) Respondent asserts
23 that Protestant’s failure to read the Incentives Manual has no bearing on the merits of the Protest (Res.
24 Br. 35:2-3.), but this is merely an attempt to shirk FCA’s responsibility to *communicate* the terms of
25 Respondent’s incentive program.

26 ⁹ FCA asserted customer contracts are necessary as “a way to finalize a sale” and to describe the
27 purchasing consumer, the type of sale (lease or retail), and whether the vehicle is going to a business.
28 (RT Vol. 3, 168:11-14, 168:22-25.) When a vehicle is sold from the Hooman dealership to the
Hooman dealership, there are other ways to equally finalize the sale such as Hooman’s screen shots
and titling the vehicles to the dealership with the associated NVDR date. Moreover, when the vehicle
is sold from the dealership to the dealership, the facts about the purchasing customer, type of sale, and
if the buyer is a business are already known to FCA—specifically, Hooman is the customer, the sale is
a retail sale not a lease, and the buyer is a business and dealer of motor vehicles.

1 Respondent argues it requires these contracts to evidence the occurrence of an actual sale.
2 (Res. Br. 24:11-15.)¹⁰ However, the fact that Protestant titled these vehicles to the dealership is
3 conclusive evidence of a sale. The requirement that Protestant create a contract, with no legal
4 significance whatsoever, is unreasonable on its face. Respondent fails to advance any argument for
5 why a contract is necessary for dealer sales to itself. If the requirement serves no purpose it cannot be
6 considered a reasonable basis for a proposed chargeback.

7 D. RESPONDENT FAILED TO DEMONSTRATE THE ALLEGED NONCOMPLIANCE IS
8 INCURABLE.

9 As argued above, Respondent failed to communicate the terms of the incentives to Protestant
10 prior to the issuance of the proposed chargebacks. (*See, supra*, Part II(B).) Moreover, it was
11 unreasonable to require Protestant to create contracts with itself and to title vehicles it intended to offer
12 as customer loaner vehicles. (*See* RT Vol. 1, 90:13-15.) Nevertheless, even if the Board were to find
13 some basis to conclude these terms were reasonable and previously communicated to Protestant, these
14 terms were satisfied once Protestant titled the Audit Vehicles.¹¹ Respondent's claim that the
15 requirement to title a vehicle upon sale cannot be cured, is without merit and contrary to Section
16 3065.1.

17 Section 3065.1 is intended to permit franchisor chargebacks of false or fraudulent claims, but
18 where a claim is neither false nor fraudulent, franchisees must be permitted a reasonable opportunity to
19 cure *any* material noncompliance. (Cal. Veh. Code § 3065.1(g)(3).) Nevertheless, Respondent takes

20 ¹⁰ Respondent seems to imply that there is something wrong when the dealership reports a sale via
21 DealerCONNECT when it cites Mr. Danforth's testimony. (Res. Br. 24:13-15.) Mr. Danforth is
22 actually talking about the normal procedure FCA follows—Dealers normally report a vehicle to
23 indicate that the vehicle qualifies for a program and that the dealership sold the vehicle without
24 providing FCA with documentation for those facts. (RT Vol. 3, 168:14-17; *see also* RT Vol. 1,
194:24-195:1 (describing that the way a dealer places a vehicle into its loaner fleet and gets credit for
the sale is by reporting the vehicle through DealerCONNECT).)

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

1 the unreasonable position that Protestant simply could not cure the FCA titling requirement. (Res. Br.
2 25:21-22.) Respondent makes this assertion based on nothing more than the language of its own
3 Incentives Manual purporting to require all vehicle sales to be titled at the time of reported sale—
4 again, the Manual that was never communicated to Protestant. (*Id.*; *see also, supra*, Part II(B).) While
5 Respondent attempts to explain the reasons for its requirement to title vehicles at the time of sale and
6 the concerns it sought to address, each of these hypothetical concerns was shown to be without merit
7 and none were shown to be at issue in this Protest.

8 1. *FCA did not show shortened customer warranties to be a factual concern.*

9 Respondent argues customers are in danger of receiving a shortened warranty period when a
10 dealer does not title a vehicle at the time it is reported sold. (Res. Br. 25:28-26:14.) Respondent’s
11 arguments are vastly overstated and inconsistent with the evidence. The testimony of both Mr. Nissani
12 and FCA’s witnesses show this theoretical concern to be impossible.

13 First, Respondent’s claim “the dealership *repeatedly* took cars it had NVDR’d as ‘sold’ to
14 itself, and then turned around and sold them as new to customers even though the warranty was already
15 running” is patently false and without any support in the record. (Res. Br. 26:6-9 (emphasis added).)
16 Respondent cites testimony that three or four vehicles were reported as sold to the dealership and later
17 resold as new. (*Id.*) One of Protestant’s owners, Nicholas Moss, purchased one of these vehicles, and
18 the others could only have been resold as new if the prior report of sale had been unwound.¹² (RT. Vol
19 5, 44:19-22; 107:7-109:2.) Respondent’s claim that Protestant “repeatedly” resold the 97 vehicles
20 reported sold to the dealership is a disingenuous attempt to mislead the Board.¹³

21 The warranty begins to run on a new FCA vehicle when it is reported sold. (RT Vol. 2, 116:1-
22 3.) The same vehicle cannot be reported sold a second time unless the first report of sale is unwound.
23 (RT Vol. 2, 157:11-12; RT Vol. 4, 199:18-200:6; RT Vol. 5, 68:7-15.) When a reported sale is
24 unwound the warranty period is reset and does not begin to run until it is reported sold a second time.
25 (RT Vol. 4, 48:13-25, 199:18-20.) Only FCA dealers can report new FCA vehicles sold. (RT Vol. 4,

26
27 ¹² Moreover, FCA’s own document, referred to as its substantially complying “Final Denial” letter,
indicates the sale to Ms. Hernandez was a used vehicle sale. (Exh 264:0002.)

28 ¹³ Of the 97 Audit Vehicles, FCA only claims that four of them were titled to other individuals besides
the dealership. (Exh 264:0001.)

1 195:8-9.) The testimony from witnesses for both Respondent and Protestant confirm this. (RT Vol. 2,
2 118:17-23, 157:11-12 (Matt Gabel describing that an unwind resets the sale date and warranty period);
3 RT Vol. 4, 196:10-14 (“a sale can only count once”); RT Vol. 5, 68:14-15 (Christopher Glenn
4 describing, “You cannot report a car twice to Chrysler”); RT Vol. 5, 42:18-43:10 (Hooman Nissani
5 describing that Maria Hernandez did not receive a shortened warranty for her vehicle).)¹⁴ The record
6 is clear that any FCA vehicle can only have one report of sale date. (*See, e.g.*, RT Vol. 5, 68:14-15.)
7 The warranty period runs from the time of reported sale. (RT Vol. 2, 158:25-159:1.) A dealer cannot
8 make a subsequent report of sale unless the prior report of sale is unwound. (RT Vol. 2, 118:17-23,
9 157:11-12; RT Vol. 4, 196:10-14.) The most recent report of sale date starts the warranty period for
10 any new FCA vehicle sold to a customer. (*See* RT Vol. 2, 118:17-23, 157:11-12.)

11 Respondent claims there is no evidence that the prior reports of sales were unwound prior to
12 being sold to public customers. (Res. Br. 35:28-36:1.) Respondent relies upon the suspect testimony of
13 Mr. Gabel and his boss, Mr. Danforth.¹⁵ The cited portion of Mr. Gabel’s testimony that there was no
14 evidence of sales being unwound raises a number of unanswered questions. Namely, why doesn’t this
15 appear in his report or any other document? (*See* Exhs 213, 223.) Mr. Gabel’s Final Audit Report
16 shows a different “Sale Date per Claim” versus “Sale Date per Review” on a total of two vehicles
17 (‘7686 and ‘6026.)¹⁶ (Exh 223:0005-006.) His report makes no reference to any vehicle that was
18 subsequently sold as new to a customer. Mr. Gabel’s testimony concerning the four vehicles alleged to
19 have been sold with shortened warranties is not credible.

20 Similarly, Respondent cites Mr. Danforth’s testimony wherein he claims to have researched the
21 issue of whether the reported sales were unwound. Curiously, Mr. Danforth testified he did not make

22 ¹⁴ Moreover, FCA’s auditor Matt Gabel himself even admitted that the second sale to Ms. Hernandez
23 “may have been appropriate.” (RT Vol. 2, 157:11.)

24 ¹⁵ Respondent also tries to call into question Mr. Nissani’s testimony about how unwinds work at the
25 dealership. (Res. Br. 36:FN13 (calling Mr. Nissani’s testimony confused and contradictory).)
26 Respondent argues Mr. Nissani’s testimony that Hooman is not able to go back and make changes to
27 its system once transaction are finalized contradicts the testimony that four people in Hooman’s
28 organization could unwind a transaction. (*Id.*) Upon review of the record, there is no contradiction.
Hooman testifies that changes cannot be made except in the case of an unwind and that an unwind is
actually a subsequent report and not an action of the high ranking Hooman employees to “go back into
the system” to make a change. (RT Vol. 5, 43:21-44:18; *see also* RT Vol. 5, 44:16-17 (specifically
describing the unwind as a report).)

¹⁶ For convenience only last four digits of the VIN numbers are referenced.

1 any attempt to document this alleged review because “it wasn’t a concern” at the time. (RT Vol. 4,
2 51:7-11.) If it wasn’t a concern, then why was he purportedly investigating whether the prior reports
3 of sales were unwound? Mr. Danforth’s testimony is at odds with Respondent’s current position. The
4 testimony of Mr. Gabel and Mr. Danforth do not establish any vehicle was sold to a customer with a
5 shortened warranty. Instead, their testimony reinforces that the purported warranty concern is a fiction
6 created for the Board.

7 Respondent misrepresents the evidence in an attempt to convince the Board there is some
8 valuable public welfare concern that can only be protected through rigid adherence to FCA’s policy of
9 requiring dealers to title vehicles at the time of reported sale, but this simply is not true. It is a
10 demonstrable fact that FCA dealers cannot sell a new vehicle with a shortened warranty—FCA’s own
11 system prevents this. (RT Vol. 4, 199:15-200:10.) Protestant’s Reynolds and Reynolds interface with
12 FCA’s DealerCONNECT system prevents this. (RT Vol. 5, 54:4-17; 67:19-24; 102:4-104:2.) If any
13 customer actually received a shortened warranty on the purchase of a new FCA vehicle, Respondent
14 could have presented actual evidence of this harm instead of the theoretical potential for harm that the
15 witness testimony shows to be a factual impossibility.

16 *2. FCA concern about uniformity among dealers does not supersede the Vehicle Code.*

17 Respondent argues its titling and record retention requirements are important to ensure
18 uniformity among FCA dealers. (Res. Br. 26:15-16.) While reasonable on its face, this interest does
19 not justify Respondent’s attempts to ignore the requirements of Section 3065.1. Namely, Respondent
20 is legally required to provide dealers a reasonable opportunity to cure *any* material noncompliance.
21 (Cal. Veh. Code § 3065.1(g)(3).) Simply put, Respondent’s interest in uniformity among FCA dealers
22 does not permit Respondent to declare certain incentives terms and conditions incurable.

23 Further, FCA requires dealers to use a dealership management software provider for use in day-
24 to-day dealership operations. (RT Vol. 5, 59:10-60:2.) In this instance, Protestant uses Reynolds and
25 Reynolds to interact with FCA’s DealerCONNECT system. (RT Vol. 5, 57:21-24, 102:25-104:2.)
26 The Incentives Rules Manual is not available through Reynolds and Reynolds, a system Protestant is
27 contractually obligated to use. (RT Vol. 5, 105:13-106:5.) Additionally, if uniformity among FCA
28 dealers was as important as FCA claims, it could have, and should have, provided the Incentives Rules

1 Manual directly to Protestant. (*See* RT Vol. 3, 48:9-12 (describing FCA did not provide Hooman with
2 a hard copy of the Incentives Rules Manual).) Instead, Respondent provided Protestant a form
3 acknowledgment stating it was Protestant’s responsibility to access a website it does not directly use in
4 the regular course of business and to read and understand the rules that FCA might post there. (Exh
5 204.)¹⁷ Moreover, at the time of the acknowledgment, FCA did not even grant Protestant access to the
6 DealerCONNECT system and would not do so until several months later. (RT Vol. 4, 265:8-13; RT
7 Vol. 5, 6:17-7:8.) Respondent’s actions do not correspond to its purported strong interest in ensuring
8 FCA dealers are aware of and follow its policies and procedures.

9 In addition, Respondent references a concern that dealers not be rewarded for failure to adhere
10 to the rules. (Res. Br. 26:18-20.) However, Respondent fails to cite what this purported benefit might
11 be. Not only is this claim uncited to the record, at no point does Respondent’s brief establish any
12 manner in which Hooman was unfairly rewarded for its failure to timely title the reported loaner
13 vehicles and create unenforceable consumer contracts with itself. Moreover, Protestant operates one of
14 the largest customer loaner fleets in the country. (*See* RT Vol. 5, 15:14-20.) The purchase of these
15 vehicles befitted FCA through additional purchases beyond actual consumer demand and befitted FCA
16 service customers by making these vehicles readily available. (RT Vol. 1, 88:6-8; Exh 102 (indicating
17 that Protestant provided free loaner vehicles to service customers).) Moreover, Protestant incurred
18 substantial cost on each vehicle it chose to transfer to its loaner fleet. (RT Vol. 5, 7:22-8:5.) Denying
19 Protestant the opportunity to cure the alleged noncompliance would result in an unfair penalty to
20 Protestant.¹⁸

21 ///

22 ///

24 ¹⁷ Moreover, Exhibit 204 is canceled and superseded by the merger clause in Exhibit 202 as Protestant
25 argued in its Post-Hearing Opening Brief. (*See* Exhibit 202:0002-0003; *see also* Pro. Br. Part
26 IV(B)(3).)

27 ¹⁸ Respondent also makes an appeal to fairness to argue that the Board should not rewrite its policies
28 and procedures for audits. (Res. Br. 32:25-26.) First, Protestant is not asking the board to rewrite
Respondent’s policies and procedures, but to require them to comply with 3065.1(g) when auditing a
dealer. Second, Protestant’s actions were reviewed by both Respondent and now the Board. However,
if the Board does not review Respondent’s policies and procedures and require that they conform to
Section 3065.1(g), no one will be reviewing Respondent’s policies and procedures.

1 3. *Dealer accountability was not an issue in this case.*

2 Respondent disingenuously argues the titling requirement is necessary to prevent dealers from
3 reporting as many sales as it likes to hit sales objectives and later selling the vehicle as new in a
4 subsequent month. (Res. Br. 26:23-28.) Again, Respondent fails to provide any citation to the record
5 and the argument falls flat for a number of reasons.

6 First, a dealer could not operate this way because it would be unable to achieve VGP incentives
7 in the future. Selling new vehicles at a later date and failing to report the sale to FCA would severely
8 impact a dealer's ability to achieve VGP objectives in the future. Presumably a dealer might engage in
9 this hypothetical practice if it was having difficulties capturing an adequate number of sales. No doubt
10 this shortsighted practice would catch up to the dealer eventually and result in substantial losses.

11 Second, there is no evidence Protestant was engaged in this theoretical shell game. Of the
12 approximately 100 Audit Vehicles, Respondent alleges *four* vehicles may have been resold as new.¹⁹
13 Moreover, the evidence demonstrates Protestant titled the Audit Vehicles to the dealership and now
14 titles all loaner vehicles purchased by the dealership. (Exhs 222:0001, 264:0002-0004; RT Vol. 1,
15 94:9-14; RT Vol. 5, 95:19-22.)

16 4. *There is no evidence of broker and export sales.*

17 Respondent next argues the title requirement discourages the brokering and export of FCA
18 vehicles. (Res. Br. 27:2-5.) The connection between titling a vehicle at the time of reported sale and
19 limiting broker or export sales is tenuous, if it exists at all. FCA witness testimony that a broker and
20 dealer might share incentive money is pure speculation. All manufacturers have separate policies on
21 broker and export sales. Most importantly, there is *no* evidence Protestant was engaged in broker or
22 exporter sales. (*See* RT Vol. 3, 164:11 (describing no brokering in the Hooman Audit).) Instead, there
23 is uncontroverted evidence Protestant operates a substantial customer loaner vehicle fleet. (*See* RT
24 Vol. 5, 15:14-20; *see also* Exh 102.)

25 In addition, only a licensed FCA dealer can convert an MSO into a title. (RT Vol. 4, 89:7-90-7,
26 91:19-92:16, 195:8-9.) This is the only means to sell and title a new FCA vehicle to a customer. (RT

27 ¹⁹ Mr. Nissani testified the prior report of sales for these vehicle sales were unwound because
28 Protestant's Reynolds and Reynolds system will not permit a vehicle to be sold as new unless the prior
report of sales is first unwound. (RT Vol. 5, 107:7-109:2.)

1 Vol. 4, 195:8-9.) Respondent’s suggestion that a dealer might sell a vehicle to a broker and the broker
2 might later sell the vehicle as new is therefore factually impossible. This is the reason Respondent’s
3 evidence on the subject is limited to hypothetical, speculative, and self-serving testimony from FCA
4 employees.

5 None of the purported concerns addressed above render the failure to title the loaner vehicles at
6 the time of sale incurable. This is evidenced by the fact that each of these concerns ceased to exist
7 when the vehicles were titled. (RT Vol. 3, 33:4-11; *see also* Pro. Br. Part IV(D)(1).)

8 E. RESPONDENT’S AUTHORITY FOR WHY THE ALLEGED NONCOMPLIANCE SHOULD BE
9 CONSIDERED INCURABLE IS UNPERSUASIVE.

10 Respondent’s statement that permitting Protestant to cure a failure to title a vehicle at the time
11 of sale by titling the vehicle and backdating the registration to the original date of reported sale “would
12 beget absurdities” is unpersuasive and contrary to California law. (Res. Br. 30:22.) Cure in the law is
13 separate and apparent from any timing requirement. (*See* U.C.C. § 2-508.)²⁰ The provision of the
14 UCC Respondent cites makes the cure time-sensitive by other specific language that is connected with
15 delivering conforming goods. (*Id.*; *see also* Respondent’s Closing Brief 30:4.) Cure on its own means
16 to deal with a breach in such a manner that eliminates the breach or corrects the breach. (*See* William
17 H. Lawrence, *Cure After Breach of Contract Under the Restatement (Second) of Contracts: An*
18 *Analytical Comparison with the Uniform Commercial Code*, 70 Minn. L. Rev. 713, 714 (1986); *see*
19 *also* CURE, Black’s Law Dictionary (10th ed. 2014); *see also* J.J. White and R.S. Summers, *Uniform*
20 *Commercial Code* (St. Paul: West Publishing Co, 6th Ed. 2010) at 415-16.)

21 Respondent asserts that failing to title a vehicle on sale is a defect that cannot be cured and
22 something that one cannot belatedly fulfill. (Respondent’s Closing Brief 30:7-14 (citing *Lippo v.*
23 *Mobil Oil Corp.*, 776 F.2d 706, 724 (7th Cir. 1985) (Posner, J.) (dissenting in part)).) However, the
24 majority opinion of *Lippo* actually makes clear that certain unintentional failures on the part of a
25 franchisee can be corrected even if an intentional fraud cannot. (*Lippo v. Mobil Oil Corp.* (7th Cir.
26 1985) 776 F.2d 706.)

27
28 ²⁰ California law has a parallel section that describes cure with respect to the sale of goods. (Cal. Com.
Code § 2508.)

1 In *Lippo v. Mobil Oil*, the franchisee had sold non-Mobil gasoline from Mobil pumps for over
2 a 24 hour period of time. (*Lippo v. Mobil Oil Corp.* (7th Cir. 1985) 776 F.2d 706, 708.) After that
3 period of time, the franchisee covered Mobil’s trademark on the pumps and signs to no longer
4 associate the gasoline with Mobil. (*Id.*) In comparing the case to *Wisser Co. v. Mobil Oil Corp.*, (2d
5 Cir. 1984) 730 F.2d 54, the court described a distinction between a situation where a franchisee
6 violated its contractual obligations on one occasion as opposed to violating those obligations
7 repeatedly and in an ongoing manner.²¹ (*Lippo v. Mobil Oil Corp.*, 776 F.2d at 715.) The court held
8 that in the former it would hold a franchisee’s actions to be evidence of a cure or at least correct a
9 deficiency, while in the later it would hold the series of violations to be a continued sequence of
10 violations and not merely individual periods of noncompliance. (*Id.*) Moreover, the court held the
11 franchisee’s actions in covering Mobil’s trademark to be a cure despite Mobil’s assertion of the
12 contrary or at the very least, the franchisee’s actions were sufficient to constitute a correction under the
13 franchise agreement. (*Id.* at 716.)

14 Similarly, Respondent argues that a dealer might continuously refuse to title vehicles sold to
15 itself until audited if the Board adopts Protestant’s position on cure. (Res. Br. 30:25-31:5.) However,
16 this argument has been considered and dealt with in the very case Respondent cites. In a situation
17 where a franchisee was determined to be noncompliant with incentive rules on a single occasion
18 (during the first audit of the dealership), the franchisor and the Board should give the franchisee the
19 opportunity to cure the deficiency—which Protestant did when it titled the Audit Vehicles. If a
20 franchisee continues to not title vehicles upon sale after the first violation of the rule, this would be
21 akin to an ongoing noncompliance and would not be subject to cure since the dealership would then be
22 aware of the rules and still not complying. While cure is certainly not *always* possible under 3065.1,
23 Protestant’s actions eliminated and cured FCA’s concerns tied to Protestant’s failure to title the
24 vehicles on sale just as the franchisee’s actions in *Lippo* eliminated and corrected Mobil’s concerns
25

26
27 ²¹ Respondent also cites *Wisser Co. v. Mobil Oil Corp.*, 730 F.2d 54, 59 (2d Cir. 1984) for authority
28 directly. (Res. Br. 29:5-8.) However, as just described, *Lippo v. Mobil Oil Corp.* distinguishes *Wisser
Co. v. Mobil Oil Corp.* and rules in the franchisee’s favor. (See text before this footnote; see also
Lippo v. Mobil Oil Corp., 776 F.2d at 715.)

1 about non-Mobil gasoline being sold from Mobil pumps even if neither solution covered the period of
2 time of noncompliance. (*Lippo v. Mobil Oil Corp.*, 776 F.2d at 716.)

3 Respondent misstates Protestant's position in regard to Section 3065.1(g)(3) and the ability to
4 cure. Protestant acknowledges this code section limits a franchisee's ability to cure any material
5 noncompliance to instances that do not involve **false or fraudulent claims**. (Cal. Veh. Code §
6 3065.1(g)(3) (describing the ability of a franchisee to cure any material *noncompliance* – not to correct
7 any false, fraudulent or fictitious claims).) There is no allegation any of the reported sales were false
8 or fraudulent. The fact these vehicles were subsequently titled to the dealership with a date of sale
9 corresponding to the NVDR date renders this fact unassailable. (RT Vol. 2, 194:3-5; RT Vol. 4,
10 255:18-256:11; RT Vol. 5, 99:5-12.)

11 Additionally, FCA's efforts to enforce the requirement to title at the time of sale are similar to
12 Chevron's attempt to terminate a Franchisee because it did not comply with a sales-tax requirement.
13 (*Chevron U.S.A. Inc. v. El-Khoury* (9th Cir. 2002) 285 F.3d 1159.) In *El-Khoury*, Chevron sought to
14 terminate a franchisee even though the franchisee had later paid the sales-tax in question. *Id.* Even
15 though the court did not directly address whether paying the sale's tax late was a sufficient cure for the
16 non-compliance, the court found there to be an issue regarding the materiality of terminating the
17 franchisee based solely on the franchisee's failure to comply strictly with the state law. *Id.* at 1165.
18 Similarly, to the extent FCA is merely reinforcing state requirements to title a vehicle upon sale, the
19 Board should accept Protestant's efforts to correct its initial noncompliance with FCA's incentive
20 program as a cure in the same way California law allows Protestant to correct and cure late titling.
21 (*See* Cal. Veh. Code § 4456(a)(2); *El-Khoury*, 285 F.3d at 1165.)

22 Respondent's assertion that Protestant's reading of 3065.1 would "beget absurdities" is not
23 supported by the record or the very case Respondent cites. This protest does not involve a situation
24 where Protestant is fabricating sales or avoiding fees, but is instead one where Protestant was
25 understandably unaware of how FCA would require Protestant to administer its customer loaner fleet.
26 Once Protestant learned of FCA's requirement to title the Audit Vehicles it proceeded to do so
27 immediately and any concerns FCA had regarding titling were eliminated – i.e. cured. (RT Vol. 3,
28 33:4-11; *see also* Pro. Br. Part IV(D)(1).)

1 Respondent attempts to draw the distinction between the types of incentive noncompliance that
2 can be cured and the types that cannot. (Res. Br. 27:15-25.) Respondent refers to a conquest incentive
3 and a dealer’s ability to cure by providing missing documentation. This distinction misses the mark.
4 In the case of a conquest sale, incentive documentation is required to show a sale occurred to a
5 customer who previously leased a competitor’s vehicle. The qualifying term is that the customer
6 previously leased a competing make vehicle. At issue with the chargebacks in this protest is whether a
7 sale occurred. Respondent claims title is necessary to demonstrate a sale. When Protestant titled the
8 vehicles to the dealership with the time of reported sale and provided evidence of this, FCA had
9 sufficient documentation to evidence a sale for each vehicle titled to the dealership. There is no
10 justification that would permit FCA to treat these sales as having never been made to the dealership.
11 The titling of the vehicles to Protestant is conclusive evidence these vehicles were sold to and
12 purchased by the dealership.

13 Additionally, Respondent has compared a failure to title the Audit Vehicles on sale with a
14 failure to meet customer incentive requirements, such as the graduate incentive or conquest lease
15 incentive. (Res Br. 27:20-23.) Respondent made similar arguments, such as comparing an attempt to
16 title vehicles late to enlisting an individual in the military after a sale to meet a military incentive. The
17 comparison is flawed because both incentives purportedly must comply with the titling on sale
18 requirement. (*See* Exhs 207(a) and 207(b).) The only unique requirements of each program are the
19 customer requirements for the one and the month and number of sales necessary for meeting the VGP
20 program. (RT Vol. 3, 17:12-14 (describing the date of reported sale as import for VGP).) Protestant is
21 not arguing that the month of the sale be changed—in fact Hooman titled and registered the vehicles
22 retroactively to the NVDR date for each vehicle. (RT Vol. 2, 194:3-5; RT Vol. 4, 255:18-256:11; RT
23 Vol. 5, 99:5-12.)

24 Moreover, Respondent’s analogy illustrates the inequities of its position that the requirement to
25 title at the time of reported sale is incurable. FCA’s witness described, “[e]ach incentive has a specific
26 set of rules for adhering to at that time ... And to adhere to them later on does not make them qualify at
27 that time that they’re asked for.” (RT Vol. 3, 118:15-18.) A few pages later, the transcript shows this
28 is not the case. If a dealer does not collect documents proving a graduate incentive at the time of sale,

1 it can go back and ask the customer to obtain a document (that might not even exist at the time of sale)
2 to cure the failure to obtain a document proving the customer’s qualification at the time of sale. (RT
3 Vol. 3, 121:7-14.)

4 If FCA rewrote its policy manual, program rules, or Gold Book to require this supporting
5 documentation only at the time of sale, FCA could then argue that the failure to obtain the documents
6 at the time of sale was incurable—as it seeks to do in this protest. A dealer’s statutory right to cure
7 under Section 3065.1(g) cannot be made subject to how a manufacturer chooses to write its program
8 rules or incentives manual. To rule otherwise enables a manufacturer to write its way around the
9 statutory requirements of Section 3065.1(g) and is something the Board should not permit.

10 Finally, it should be noted that it was within Respondent’s power to unwind the prior reports of
11 sales identified in the Audit and report the Audit vehicles sold contemporaneous with the time of title.
12 Mr. Glenn testified this would automatically reverse all prior incentives paid and apply new incentives
13 applicable to the new report of sale dates. (RT Vol. 4, 202:7-203:15; *see also* RT Vol. 4, 205:2-10.)
14 However, this option was never discussed with Protestant.²² (RT Vol. 4, 204:2-205:10.) While it may
15 be true Protestant could have unwound the prior reported sales and reported the vehicles sold
16 contemporaneous with the time of title, it was unaware of this option and instead, Protestant registered
17 and titled the vehicles retroactively to the times of reported sales, per its discussions with the auditor,
18 Mr. Gabel. (RT Vol. 2, 194:3-5.)

19 F. THE SCREEN SHOTS HOOMAN PROVIDED TO FCA CONTAIN THE SAME INFORMATION
20 THAT PROTESTANT WOULD OTHERWISE USE TO POPULATE A SALES CONTRACT.

21 Respondent contends the screen shots Hooman provided do not contain the same information
22 line by line. (Res. Br. 22:13-23:5) A closer review shows that the information does line up:

<u>Number</u>	<u>Exh 221, page 5</u>	<u>Location on Exh 281, pages 1-3</u>
1	Deal #	Top left of the first page
2	Deal Date	Last page at the bottom

27 _____
28 ²² Regardless, Mr. Glenn’s testimony illustrates the various options available to address any
discrepancy between sale dates and title dates.

3	Stock #	Top right of first page
4	Price	The right top box of the Federal Truth-In-Lending Disclosures box on the first page
5	Term	Number of monthly payments in the Federal Truth-In-Lending Disclosures box (59) on the first page
6	Rate	The left top box of the Federal Truth-In-Lending Disclosures box on the first page showing “Annual Percentage Rate”

“And so on,” as Respondent says. (Res. Br. 22:5.) The information in the documents does line up.²³ To the extent that generic disclosures are contained on the screen shots, these disclosures do not change from contract to contract and are not separately printed on Exhibit 281 unlike the information from the screen shots. (See Exh 281.)

Respondent also attempts to call into question the veracity of the specific information displayed on Exhibit 281 when compared to the screen shot of the same VIN. (Res. Br. 25:1-8.) Respondent is incorrectly assuming the accuracy of the “contract” over the information on the screen shots. The “contracts” that Hooman employees printed early in the operation of the Hooman dealership were printed in error and Hooman did not make it a procedure to print contracts for sales to itself during the Audit period. (RT Vol. 1, 76:24-77:2; see also RT Vol. 5, 73:9-11.) We do not know if the information on Exhibit 281 is therefore even accurate and Respondent’s attempts to discredit the screen shots Hooman actually used is unconvincing.

Finally, as Protestant argues above, FCA’s requirement that Protestant create contracts at the time of sale for vehicles sold to itself was never previously communicated to Protestant.²⁴ (See, *supra*, Part II(B).) Therefore, if the Board concludes Respondent failed to communicate this term to

²³ Respondent might point out that the numbers do not line up based on this analysis. The numbers are not meant to line up – the numbered items on 281 deal exclusively with financing and are a form of organization. A careful reading of the record shows Hooman only asserted “those items line up to the contract.” (RT IV 253:12-13 (correcting himself when he said “those numbers” to “those items”).) Moreover, it is irrelevant if the numbers actually line up; the important part about the comparison is that the information is the same.

²⁴ Additionally, unlike what Respondent describes (Res. Br. 21:14-15.), not all the Audit Vehicles subject to the proposed chargeback are subject to chargeback based on both reason codes D and K and therefore some of the chargebacks are invalid even if Protestant cured only reason code D. (See, *e.g.*, Exh 213:0009 (indicating that VIN 1C3CCCBG0FN515628 has a proposed chargeback based on reason code D alone.)

1 Respondent, the Board does not even need to decide this issue.

2 G. RESPONDENT’S ATTACKS ON MR. NISSANI’S CREDIBILITY ARE MISLEADING.

3 Respondent’s attacks on Mr. Nissani’s credibility are misplaced. The record reflects Mr.
4 Nissani’s active involvement in this process from the Audit through the hearing. The record reflects
5 Mr. Nissani’s direct involvement at the conclusion of the Audit, in the requested AMR, in requesting
6 and attending the Audit Review Meeting, his subsequent involvement in providing the requested rental
7 vehicle usage documentation and customer information, and the fact that Mr. Nissani provided
8 testimony on three days of the five-day hearing. (Exhs 232:0001, 238:0001-0003, 243, 248:0001, 251-
9 258, 266; RT Vol. 1, 37:8-134:24; RT Vol. 4, 225:1-267:19; RT Vol. 5, 6:11-110:9.)

10 Much of the allegations and inferences Respondent offers the Board involve facts and
11 circumstances outside the record and not relevant to the issues to be determined in this proceeding.
12 For example, there is no evidence of the communications between Respondent and Hooman in regard
13 to the facility project underway other than the fact that Mr. Nissani is moving forward with an
14 ambitious facility project that has FCA’s full support and approval. (RT Vol. 1, 61:24-62:25, 66:6-14;
15 RT Vol. 4, 233:19-234:9, 234:16-235:10.)

16 Among the long list of Respondent’s inflammatory claims beginning at page 32 of its brief is
17 its allegation Mr. Nissani decided it was not worth the time and money to attend much of the hearing.
18 (Res. Br. 33:20-22.) Mr. Nissani testified he was required to attend meetings involving the facility
19 project designed to benefit the FCA brands. (RT Vol. 4, 233:23-234:9.) It is evident this protest is not
20 necessarily about the money value at stake as much as it is about Mr. Nissani’s fervent desire to prove
21 his actions bore no ill intent or unlawful purpose. Mr. Nissani’s actions throughout demonstrate his
22 commitment to proving the proposed chargebacks are unreasonable and he did nothing wrong.
23 Respondent’s attempts to paint Mr. Nissani as some manner of bad actor amount to little more than
24 zealous advocacy.

25 1. *Mr. Nissani’s testimony is consistent throughout.*

26 Mr. Nissani consistently informed FCA that Protestant was never made aware of the
27 requirement to title vehicles purchased for the dealership and create contracts with itself. (Exh.
28 238:0002-0003.) Respondent’s allegation that “new stories emerged” is misleading. (Res. Br. 35:21-

1 36:10.) Mr. Nissani testified a new FCA sale can only be reported sold once in FCA’s system. (RT
2 Vol. 5, 68:7-15.) Mr. Nissani also testified Protestant’s Reynolds and Reynolds system will not allow
3 it to report the same vehicle sold on two separate occasions. (RT Vol. 5, 42:18-43:10.) Mr. Nissani
4 testified this way in response to FCA testimony that three public customers may have received
5 shortened warranty periods. (*Id.*) Respondent advanced a newly emerged argument—not Protestant.

6 Prior to the hearing Mr. Nissani was not aware of this purported FCA concern. The record
7 clearly reflects FCA’s concerns were focused on whether Protestant was actually using the vehicles it
8 reported sold to the dealership for customer loaner vehicle purposes. (*See, e.g.*, RT Vol. 4, 87:4-24.) It
9 was not until these proceedings that FCA confronted Mr. Nissani with this allegation. At no point in
10 the Audit process and appeal did FCA ask Protestant to provide evidence that any report of sale had
11 been unwound. There was no reason why Mr. Nissani would have previously discussed this issue.
12 Moreover, Mr. Nissani’s testimony was corroborated by FCA witness testimony that a vehicle can only
13 have one report of sale date and any prior report of sale must be unwound before a new report of sale
14 can occur. (RT Vol. 4, 199:15-20 (Christopher Glenn describing that FCA’s system automatically
15 unwinds a deal when a dealer reports a sale a second time); *see also* RT Vol. 2, 157:11-12 (Matthew
16 Gabel describing that the second sale to Ms. Hernandez “may have been appropriate”).)

17 Additionally with respect to FCA’s contention Hooman was required to pay off its flooring line
18 upon reporting a vehicle sold to FCA (*See* Res. Br. 24:20-25:13), Mr. Nissani testified that Hooman
19 only pays off flooring when a vehicle leaves the dealership’s possession. (RT Vol. 5, 93:18-24.)
20 There was no testimony about a requirement to pay off flooring when the vehicle was still in
21 Hooman’s possession. (*See* RT Vol. 5, 9:9-15 (instead describing seven to ten days to pay off flooring
22 when a vehicle is sold to a *customer*).) Therefore, independent of the facts of the *Hawaii* case
23 Respondent cites, Hooman’s contract with its flooring line lender indicates it does not need to pay off
24 flooring until the vehicle leaves Hooman’s possession and Hooman did not deprive its flooring line of
25 any rights, protections, or payments. (RT Vol. 5, 93:18-24.) In fact, the flooring line lender was
26 earning interest (and making money) on each flooring line loan at a rate of 4 to 5 percent over the life
27 of the loan until the vehicle left Hooman’s possession. (RT Vol. 5, 8:18-9:2.) Upon leaving
28 Hooman’s possession, Hooman pays its lender in full for the vehicle. (RT Vol. 5, 93:23-24.) There is

1 no evidence Hooman was ever considered to be out of trust with its flooring lender nor is it relevant to
2 the Board's determination of the issues in this protest.

3 Outside of this litigation Mr. Nissani is the white knight who saved the Inglewood point from
4 going dark and immediately provided FCA significant improvement to new vehicle sales and FCA
5 customers a significantly enhanced level of customer service. Most importantly, Protestant is in the
6 process of providing FCA what is expected to be one of highest caliber FCA facilities in California.
7 (RT Vol. 1, 61:24-62:25, 66:6-14; RT Vol. 4, 233:19-234:9, 234:16-235:10.) Respondent's criticisms
8 of Mr. Nissani are limited solely to its attempts to sway the Board in this Protest and must be provided
9 appropriate weight.

10 *2. There are genuine reasons to question the credibility of FCA witnesses.*

11 It is concerning that Respondent chose to have each of its testifying witnesses present for each
12 FCA witnesses' testimony.²⁵ It is impossible not to conclude certain FCA witnesses' testimony was
13 influenced by the presence of high-ranking FCA employees. This is of particular concern in regard to
14 the testimony of Mr. Gable and Mr. Edmonds, wherein each gave testimony in the presence of their
15 direct supervisor and co-worker, William Danforth. (RT Vol. 3, 71:20-25; Vol. 4, 2:16-21.)

16 Respondent claims Mr. Gabel never told Mr. Nissani he could submit evidence of the Audit
17 vehicles being titled prior to the close of the Audit and Mr. Nissani raised this issue for the first time at
18 the hearing. (Res Br. 36:11-16.) In view of the FCA witnesses in attendance, it is not surprising Mr.
19 Gabel testified he did not instruct Hooman to provide evidence of the Audit vehicles being titled and
20 that he would hold the Audit open pending receipt of this information. (RT Vol. 3, 28:3-13.)
21 Nevertheless, the evidence tells a different story.

22 Mr. Gabel testified he informed Protestant the proposed chargebacks were due to the
23 dealership's failure to title the loaner vehicles at the time of reported sales. Protestant advised Mr.
24 Gabel it would immediately title the vehicles. (RT Vol. 3, 26:3-32:14.) By email dated December 5,
25

26 ²⁵ In contrast to what Respondent asserts, Protestant did not "force" many high ranking FCA members
27 to attend. (See Res. Br. 34:20-21.) For one, Respondent could have chosen not to oppose the Protest.
28 Moreover, as it arranged on the final day of the hearing, Respondent did not need all its witnesses
present during the whole hearing and could have only had witnesses present when it expected to call
them. (Compare RT Vol. 1, 7:11-18 with RT Vol. 5, 2:17-20.)

1 2014 Mr. Gabel advised Protestant it would have 30 days to submit additional information or
2 documentation to reverse the proposed chargebacks. (Ex. 213.) The evidence shows Mr. Nissani’s
3 testimony that Mr. Gable asked him to provide evidence of subsequent title is more credible. (RT Vol.
4 1, 125:10-20.) Mr. Gabel was aware the dealership had not titled the loaner vehicles; he was aware the
5 dealership intended to title the vehicles; and he requested Protestant provide this information to reverse
6 the proposed chargebacks. (*Id.*; *see also* Exh 213; RT Vol. 2, 193:13-194:5.) Additionally, Mr. Gabel
7 admitted that he at least told Hooman that it would be a good idea to go out and title the vehicles
8 immediately. (RT Vol. 2, 190:15.)

9 Moreover, Respondent describes that Mr. Gabel “unilaterally” chose to extend the period
10 allowed for the dealership to submit documents “as a courtesy.” (Res. Br. 15:19-24.) His own
11 supervisor stated that it was not a unilateral decision. Mr. Danforth described that he had a
12 conversation with Mr. Gabel in which he suggested that the initial 30-day period be extended. (RT
13 Vol. 3, 135:15-24.)

14 Similarly, Mr. Edmonds testimony was not credible. Mr. Nissani testified that after he
15 submitted the rental vehicle documentation he was later contacted by Mr. Edmonds who informed Mr.
16 Nissani FCA had received the requested agreements and would like any additional information he
17 might be able to provide to demonstrate customer usage. (Exh 250; *see also* RT Vol. 4, 119:12-20,
18 121:7-10, RT Vol. 5, 19:11-14.) Mr. Edmonds testimony that he discussed any potential problem with
19 the rental vehicle documentation previously submitted is not credible. (*See Id.*)

20 H. RESPONDENT FAILED TO ESTABLISH IT PROVIDED PROTESTANT A REASONABLE
21 APPEALS PROCESS.

22 Respondent’s appeal process was unreasonable on its face in that it required Protestant to
23 provide evidence the Audit Vehicles had been used by customers on at least five occasions. (Exh
24 264:0001-0003; *see also* 259:0001.) It is undisputed that there is no incentive term that required
25 Protestant use the vehicles as loaner vehicles. (*See* RT Vol. 1, 127:7-8.) When FCA raised the bar by
26 requiring the submission of evidence documenting customer loaner vehicle use, the appeal process
27 became *per se* unreasonable.

28 The Vehicle Code required Respondent to provide Protestant a reasonable appeals process to

1 provide additional supporting documentation or information rebutting the disapproval and to cure *any*
2 material noncompliance. (Cal. Veh. Code § 3065.1(g)(3).) This required Respondent to consider the
3 information provided and make a determination of whether this information rebutted the disapproval
4 and cured *any* material noncompliance. (*See Id.*) Respondent concedes it did not consider this
5 information as required. (RT Vol. 4, 59:8-60:12.)

6 Respondent persists in its argument that the failure to timely title a vehicle at the time of sale
7 cannot be cured. (Res. Br. 25:21-22.) As a result, it takes the position there was no opportunity to
8 cure. (*Id.*) There is no evidence showing any meaningful consideration of the information and
9 documentation Protestant submitted and its efforts to cure the alleged noncompliance. (RT Vol. 4,
10 59:8-60:12.) Instead, Respondent argues Mr. Nissani acknowledged Protestant did not create contracts
11 for or title the Audit Vehicles at the time of sale. (Res. Br. 18:13-16.) Section 3065.1 does not permit
12 Respondent to end the consideration here. (Cal. Veh. Code § 3065.1(g)(3).) It was required to
13 consider whether the information provided cured the alleged noncompliance. (*Id.*)

14 The record shows FCA was unaware of the requirements of 3065.1. It's failure to provide the
15 statutorily required "Final Denial" notice confirms this. (Cal. Veh. Code § 3065.1(g)(4); *see also* Res.
16 Br. 41:12-13 (admitting the Respondent did not comply with the text of 3065.1(g)(4)).) Respondent
17 characterizes the Audit Appeal it was required to provide Protestant as "Mr. Nissani's request for
18 leniency." (Res. Br. 18:17.) Further, FCA's strange departure into the details of Protestant's customer
19 loaner program establishes FCA was entirely unaware of its obligations pursuant to 3065.1(g)(3). (Exh
20 264:0001-0003; *see also* 259:0001.)

21 The purpose of the title and contract requirements is to ensure an actual sale occurred. (RT
22 Vol. 3, 168:11-14, 168:22-25.) The fact that Protestant ultimately titled the Audit vehicles to the
23 dealership is evidence of cure. (RT Vol. 2, 194:3-5; RT Vol. 4, 255:18-256:11; RT Vol. 5, 99:5-12;
24 *see also* (RT Vol. 3, 33:4-11; Pro. Br. Part IV(D)(1)).) It is unreasonable to claim otherwise. At the
25 time of the Audit Appeal meeting, it was impossible to say there existed any ambiguity as to whether
26 or not the Audit vehicles were purchased by the dealership.

27 ///

28 ///

1 **III. CONCLUSION**

2 Respondent failed to establish its burden under Section 3065.1. Respondent failed to
3 demonstrate it communicated to Protestant FCA’s requirement to title and create contracts for dealer
4 sales to itself. Respondent failed to establish these requirements were reasonable in regard to dealer
5 sales to itself. It failed to show it provided Protestant a reasonable appeals process. It failed to
6 demonstrate FCA complied with the notice requirements of Section 3065.1 (g)(4). Moreover,
7 Respondent failed to demonstrate any harm occurred that has not been cured by Protestant’s
8 registration and titling of the loaner vehicles at issue.

9 Protestant respectfully requests the Board issue a decision sustaining this protest and ordering
10 that Respondent is prohibited from proceeding with any of the proposed chargebacks identified in the
11 Audit.

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13
14
15 Dated: July 15, 2016

LAW OFFICES OF
GAVIN M. HUGHES

16
17 By: 
18 Gavin M. Hughes
19 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 15, 2016, I caused to be served a true and complete copy of:

PROTESTANT'S POST-HEARING REPLY BRIEF

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

v.

Fiat Chrysler Automobiles

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 15 July, 2016, Sacramento, California.


Robert A. Mayville, Jr.