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STATE OF CALIFORNIA
NEW MOTOR VEHICLE BOARD
NOTICE OF SPECIAL BOARD MEETING

Tuesday, February 16, 2021 at 1:00 p.m.
Via Zoom and Teleconference

On March 17, 2020, Governor Newsom issued Executive Order N-29-20, which removes the requirement that a meeting location be made available for the public to gather for purposes of observing and commenting at the meeting. The New Motor Vehicle Board Meeting will be conducted via Zoom and teleconference. Board members will participate in the meeting from individual remote locations.

Members of the public can attend the meeting remotely via one of several options listed below. Written comments, if any, can be submitted at nmvb@nmvb.ca.gov or during the meeting.

To request a reasonable modification or accommodation for individuals with disabilities at this or any future Board meeting or to request any modification or accommodation for individuals with disabilities necessary to receive agendas or materials prepared for Board meetings, please contact Robin Parker at Robin.Parker@nmvb.ca.gov or (916) 445-1888.

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Items of business scheduled for the meeting are listed on the attached agenda. Recesses may be taken at the discretion of the Chairperson and items may be taken out of order.

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STATE OF CALIFORNIA
NEW MOTOR VEHICLE BOARD

A G E N D A
SPECIAL MEETING

Tuesday, February 16, 2021 at 1:00 p.m.
Via Zoom and Teleconference

<https://us02web.zoom.us/j/87467692957?pwd=aE1oTWtNZVQ0T1d2c2p0TnhWaFErUT09>

Please note that Board action may be taken regarding any of the issues listed below. As such, if any person has an interest in any of these issues, he or she may want to attend.

The Board provides an opportunity for members of the public to comment on each agenda item before or during the discussion or consideration of the item as circumstances permit. (Gov. Code § 11125.7) However, comments by the parties or by their counsel that are made regarding any proposed decision, order, or ruling must be limited to matters contained within the administrative record of the proceedings. No other information or argument will be considered by the Board. Members of the public may not comment on such matters.

1. **1:00 p.m. -- Meeting called to order.**
2. **Roll Call.**
3. **Oral Presentation before the Public Members of the Board.**
 - a. MERCED TRUCK & TRAILER, INC., a California Corporation v. DAIMLER TRUCK NORTH AMERICA, LLC, and Does 1-50, inclusive
Protest No. PR-2671-20
 - b. BONANDER AUTO, TRUCK & TRAILER, INC., a California Corporation v. DAIMLER TRUCK NORTH AMERICA, LLC
Protest No. PR-2673-20
4. **Closed Executive Session deliberations.**

Pursuant to Government Code section 11126(c)(3), Vehicle Code section 3008(a), and Title 13, California Code of Regulations, sections 581 and 588, the Board convenes in closed Executive Session to deliberate the decisions reached upon the evidence introduced in proceedings that were conducted in accordance with Chapter 5 (commencing with section 11500) of Part 1 of Division 3 of Title 2 of the Government Code.

a. **Consideration of Proposed Order.**

MERCED TRUCK & TRAILER, INC., a California Corporation v. DAIMLER TRUCK NORTH AMERICA, LLC, and Does 1-50, inclusive
Protest No. PR-2671-20

Consideration of the Administrative Law Judge's Proposed Order Granting Respondent Daimler Truck North America, LLC's Motion to Dismiss Protest, by the Public Members of the Board.

b. **Consideration of Proposed Order.**

BONANDER AUTO, TRUCK & TRAILER, INC., a California Corporation v. DAIMLER TRUCK NORTH AMERICA, LLC
Protest No. PR-2673-20

Consideration of the Administrative Law Judge's Proposed Order Granting Respondent Daimler Truck North America, LLC's Motion to Dismiss Protest, by the Public Members of the Board.

5. **Open Session.**

6. **Consideration of Decision in light of Judgment on General Motors LLC's Petition for Writ of Administrative Mandate.**

FOLSOM CHEVROLET, INC., dba FOLSOM CHEVROLET v. GENERAL MOTORS, LLC
Protest No. PR-2483-16

Consideration of the Decision in light of the Los Angeles County Superior Court's Judgment commanding the Board to set aside that portion of its Decision, dated August 13, 2018, finding that General Motors LLC violated Vehicle Code section 11713.13(g)(1)(A) generally and in this specific case, by the Public Members of the Board. Otherwise, the petition for writ of administrative mandate was denied and the Board's Decision affirmed.

7. **Adjournment.**

To request special accommodations for persons with disabilities at this or any future Board meeting or to request any accommodation for persons with disabilities necessary to receive agendas or materials prepared for Board meetings, please contact Robin Parker at (916) 445-1888 or Robin.Parker@nmvb.ca.gov.

PRELIMINARY COVER SHEET

1. PR-2671-20 *Merced Truck & Trailer, Inc., a California Corporation v. Daimler Truck North America, LLC, and Does 1-50, inclusive*
2. PR-2673-20 *Bonander Auto, Truck & Trailer, INC., a California Corporation v. Daimler Truck North America, LLC*

The Board has two Proposed Order before it that relate to the above-referenced protests challenging an intended termination by Daimler Truck North America ("DTNA") of a Service Agreement (parts and service only) between Western Star Trucks ("Western") and Merced Truck & Trailer, Inc. ("Merced")

The Respondent in both protests is DTNA, the parent company that owns Western. The Protestants are Merced and Bonander Auto Truck & Trailer Inc. ("Bonander"). Bonander is the parent company and sole shareholder of Merced.

As to Merced's protest, the ALJ found that the Service Agreement with Merced was not a "franchise" and thus the intended termination of the Service Agreement does not give rise to a right to protest by Merced.

As to Bonander's protest, Bonander is located in Turlock, California, which is about 25 miles from Merced and is the parent company that owns all the stock of Merced. Although Bonander is a franchisee of DTNA with a dealer agreement for the sale of Western Star Trucks, DTNA does not seek to terminate Bonander's Western Star Truck franchise. The protest filed by Bonander is an attempt to prevent the termination of the Service Agreement between Merced and DTNA. In addition to finding that the Service Agreement was not a franchise, the ALJ found that Bonander was not a party to the Service Agreement and had no standing to file a protest challenging the intended termination of the Merced Service Agreement.



DECISION COVER SHEET

☒ ACTION BY: Public Members Only

☐ ACTION BY: All Members

To : BOARD MEMBERS

Date: December 18, 2020

From : ADMINISTRATIVE LAW JUDGE: Anthony M. Skrocki

CASE: MERCED TRUCK & TRAILER, INC., a California Corporation v. DAIMLER TRUCK NORTH AMERICA, LLC, and Does 1-50, inclusive
Protest No. PR-2671-20

TYPE: Vehicle Code section 3060 Termination

PROCEDURAL SUMMARY:

- FILED ON CALENDAR: June 3, 2020
- MOTIONS FILED: Respondent's "Motion to Dismiss Protest"
- COUNSEL FOR PROTESTANTS: Donald E. Bonander, In Pro Per
Merced Truck & Trailer, Inc.
- COUNSEL FOR RESPONDENT: Megan O. Curran, Esq.
Dyana K. Mardon, Esq.
Foley & Lardner LLP

EFFECT OF PROPOSED ORDER:

The Proposed Order grants Respondent's "Motion to Dismiss Protest" as it finds the Dealer Service Agreement is not a franchise, Protestant is not a franchisee, and Section 3060 is not applicable. The Proposed Order would dismiss the protest with prejudice.

SUMMARY OF PROPOSED ORDER:

- This protest involves the termination of a Dealer Service Agreement ("Agreement") between Merced Truck & Trailer, Inc. ("Merced") and Western Star Truck Sales, Inc., a subsidiary of Daimler Truck North America, LLC ("DTNA"). The Agreement expressly provides that it does not authorize Merced to engage in the sales of new Western Star Trucks.

- For Merced to have the protection of Vehicle Code section 3060,¹ the Agreement would have to meet the definition of a “franchise” in Section 331(a) and not be excluded by Section 331(b). Merced would have to be a franchisee as defined in Section 331.1 and Western Star Trucks would have to be a franchisor as defined in Section 331.2.
- Initially, it would appear that the Agreement is a “franchise” based on the provisions in Section 331(a). However, Section 331 continues with subdivision (b) and its provisions state that the Agreement is not a franchise if all of the following apply:
 - Merced is authorized to perform warranty repairs and service on Western Star Trucks. (Section 331(b)(1))
 - Merced is not a new motor vehicle dealer franchisee of Western Star Trucks. (Section 331(b)(2)) The Agreement specifically excludes Merced from acquiring any rights to engage in the sale of new Western Star Trucks.
 - Merced’s repair and service facility is not located within the relevant market area² of a new motor vehicle dealer franchisee of Western Star Trucks. (Section 331(b)(3)) A companion protest filed by *Bonander Auto, Truck & Trailer, Inc., a California Corporation v. Daimler Truck North America, LLC* (“Bonander”) is a franchisee of DTNA located approximately 25 miles from Merced’s facility. Merced and Bonander share common ownership.
- The Proposed Order concludes that the Agreement is not a “franchise” within the definition of Section 331 as it is excluded by Section 331(b). Because the Agreement is not a franchise, Merced is not a “franchisee” and neither Western Star Trucks nor DTNA are its “franchisor.” Therefore, Section 3060 is not applicable.

RELATED MATTERS:

- Related Case Law: None.
- Applicable Statutes and Regulations: Government Code section 11425.60; Vehicle Code sections 331, 331.1, 331.2, 3050, 3060.
- Related Board Case: PR-2673-20 *Bonander Auto, Truck & Trailer, Inc., a California Corporation v. Daimler Truck North America, LLC*.

¹ All statutory references are to the California Vehicle Code unless noted otherwise.

² Section 507 defines “relevant market area” or RMA as: “...any area within a radius of 10 miles from the site of a potential new dealership.” (Underline added.) The use of relevant market area in Subdivision (b)(3) of Section 331 (“[t]he person’s repair and service facility is not located within the relevant market area of a new motor vehicle dealer franchisee of the manufacturer or distributor) does not relate to the statutory definition of RMA as contained in Section 507.

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CERTIFIED MAIL

STATE OF CALIFORNIA
NEW MOTOR VEHICLE BOARD

In the Matter of the Protest of

MERCED TRUCK & TRAILER, INC., a
California Corporation,

Protestant,

v.

DAIMLER TRUCK NORTH AMERICA, LLC,
and Does 1-50, inclusive,

Respondent.

Protest No. PR-2671-20

**PROPOSED ORDER GRANTING
RESPONDENT DAIMLER TRUCK
NORTH AMERICA, LLC'S MOTION
TO DISMISS PROTEST**

To: Donald E. Bonander, in Pro Per
For the Protestant
MERCED TRUCK & TRAILER, INC.
231 South Center Street
Turlock, California 95380

Megan O. Curran, Esq.
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Roberta F. Howell, Esq.
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150 East Gilman Street, Suite 5000
Madison, Wisconsin 53703-1482

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1 This matter came on regularly for telephonic hearing on Thursday, September 10, 2020, before
2 Anthony M. Skrocki, Administrative Law Judge (“ALJ”) for the New Motor Vehicle Board (“Board”).¹
3 Donald E. Bonander, in Pro Per and Ryan Katzenbach, in Pro Per represented Protestant. Matthew
4 Bonander and Bob Houck were also present for Protestant. Roberta Howell, Esq., Megan Curran, Esq.
5 and Dyana Mardon, Esq. of Foley & Lardner LLP represented Respondent.

6 **FACTUAL AND PROCEDURAL BACKGROUND**

7 1. On June 3, 2020, Merced Truck & Trailer, Inc., a California corporation (hereinafter
8 “Merced” or “Protestant”) filed a termination protest with the Board pursuant to Vehicle Code section
9 3060² against Daimler Truck North America, LLC (hereinafter “DTNA” or “Respondent”). A related
10 protest, PR-2673-20 *Bonander Auto, Truck & Trailer, Inc., a California Corporation v. Daimler Truck*
11 *North America, LLC*, was also filed and will be discussed in a separate Proposed Order.

12 2. The protest alleges that Respondent sent Protestant a “Notice of Termination” dated May
13 11, 2020, stating “[t]his letter shall serve as Daimler Trucks North America LLC’s (DTNA) notice of the
14 termination of your dealership’s Western Star Trucks Dealer Service Agreement (Agreement) effective
15 June 30, 2020.” (Protest, Ex. J) The statutory “Notice to Dealer” language and reasoning for termination
16 were not included.³ Protestant contends the termination is arbitrary and “is being done out of collusion by
17 and between the factory and Protestant’s largest competitor. ... Protestant believes that DTNA is working
18 in collusion with the competitor to push it out of the truck business with the intent of awarding the
19 [market area] to competitor.” (Protest, ¶ 26)

20 **Parties and Counsel**

21 3. Protestant does business as a parts, service and warranty facility for Respondent’s heavy-
22 duty Western Star Trucks line at 625 Martin Luther King Way, Merced, California. (Protest, ¶ 1)
23 Protestant is not a franchisee of Respondent within the meaning of Section 331.1. (See Analysis, *infra*)

24 _____
25 ¹ After oral arguments, ALJ Skrocki indicated that the matter was taken under submission and that his ruling was
26 deferred pending Respondent’s determination on whether it would participate in a settlement conference. By letter
27 dated September 30, 2020, counsel for DTNA “respectfully decline[d] the proposal to mediate before a decision on
28 the pending motions to dismiss these matters based on the lack of jurisdiction.”

² All statutory citations are to the California Vehicle Code unless otherwise indicated.

³ Respondent alleges that the Dealer Service Agreement signed by the parties does not meet the statutory definition
of a “franchise” and therefore formal statutory notice of the termination was not required. (See discussion *infra*.)

1 termination to [Merced] not less than thirty (30) days prior to the effective date of termination.”
2 (Derbyshire Declaration dated July 23, 2020, ¶ 2, Ex. A, p. 7)

3 10. Under the Agreement in Section I. Appointment, Protestant was appointed as an authorized
4 Western Star Trucks Service Dealer, including the right to conduct parts and service operations.
5 (Derbyshire Declaration dated July 23, 2020, Ex. A, p. 2) The Agreement expressly provides that it does
6 not authorize Merced to engage in the sales of new Western Star Trucks and “[t]here has never been an
7 agreement between Merced and [] DTNA authorizing the sale of trucks.” (Derbyshire Declaration dated
8 July 23, 2020, ¶ 3, Ex. A, p. 2)

9 11. Section II. Acceptance by Service Dealer, subsection B. *No Sale of New Western Star*
10 *Trucks* provides: “[Merced] does not, by this Agreement, acquire any rights to engage in the sale of new
11 Western Star Trucks. The awarding of this Agreement does not obligate [Western Star Trucks] in any way
12 whatsoever, express or implied, to award [Merced] a sales agreement entitling [Merced] to sell new
13 Western Star Trucks at a later date.” (Derbyshire Declaration dated July 23, 2020, Ex. A, p. 2)

14 **MOTION TO DISMISS**

15 **Respondent’s Assertions in its Motion to Dismiss**⁵

16 12. On July 24, 2020, Respondent filed its Motion to Dismiss Protest alleging that the protest
17 must be dismissed because the Agreement at issue “does not fall under section 3060, or the Board’s,
18 purview. As an administrative agency with limited jurisdiction to resolve only those matters expressly
19 delegated to it, the Board does not have jurisdiction over this dispute unless Merced demonstrates that its
20 Protest is properly brought under section 3060. Merced can make no such showing, because section 3060
21 applies only to the termination of a ‘franchise’ as defined by the Vehicle Code, and Merced’s agreement
22 with Western Star falls within an express exclusion of that definition.” DTNA contends the Board lacks
23 jurisdiction over this protest. (Motion, p. 3, lines 6-14)

24 13. “Under the Agreement, Merced was appointed as an authorized Western Star Service
25 Dealer, including as an authorized warranty service provider...” (Motion, p. 4, lines 4-6; p. 5, line 26
26 _____

27 ⁵ DTNA’s motion references the Board’s Decision in *Advantage Loma Linda, LLC v. Saab Cars USA* (Protest No.
28 PR-1809-02). This Decision has not been designated by the Board as a precedent decision pursuant to Government
Code Section 11425.60, so it will not be relied upon in this Proposed Order.

1 through p. 6, line 2; Declaration dated July 23, 2020, ¶ 3, Ex. A, p. 2) The Agreement expressly provides
2 that it does not authorize Merced to engage in the sale of new Western Star Trucks and there has never
3 been an agreement between Merced and Western Star or DTNA authorizing the sale of trucks. (Motion, p.
4 4, lines 6-9; Derbyshire Declaration dated July 23, 2020, ¶ 3, Ex. A, p. 2, Section II. B.)

5 14. “Among the powers of the Board under section 3050 is the power to ‘[h]ear and decide,
6 within the limitations and in accordance with the procedure provided, a protest presented by a franchisee
7 pursuant to Section 3060,” which is the statute invoked by Merced when filing its protest. Section
8 3060 provides that “no franchisor shall terminate or refuse to continue any existing franchise unless” the
9 requirements of that section are met. Respondent maintains “the Agreement is not a ‘franchise’ within the
10 meaning of section 3060 and, therefore, Merced is not a ‘franchisee.’” According to Respondent, this
11 protest does not fall within the Board’s specifically enumerated powers and must be dismissed. (Motion,
12 p. 5, lines 8-14)

13 15. Section 331 defines what does and does not constitute a “franchise” for purposes of
14 Section 3060. (Motion, p. 5, lines 15-17) Respondent contends the Agreement meets each of the
15 conditions set forth in Section 331(b)(1)-(3) and that it is not a “franchise” because: (1) Merced is
16 authorized to perform warranty repairs and service on vehicles manufactured and distributed by DTNA;
17 (2) Merced is not a new motor vehicle dealer because it is not engaged in the sale of vehicles; and (3)
18 Merced is not located within the relevant market area of a Western Star dealer.⁶ The closest dealership to
19 Merced authorized to sell new Western Star Trucks is Bonander, which is approximately 25 miles from
20 Merced. (Motion, p. 5, lines 25-27; p. 6, lines 3-9, 16-20; Derbyshire Declaration dated July 23, 2020, ¶¶
21 2, 4, and 6, Ex. A, p. 2)

22 ///

23 ///

24 ///

25
26 ⁶ Section 507 defines “relevant market area” or RMA as: “...any area within a radius of 10 miles from the site of a
27 potential new dealership.” (Underline added.) The use of relevant market area in Subdivision (b)(3) of Section 331
28 (“[t]he person’s repair and service facility is not located within the relevant market area of a new motor vehicle
dealer franchisee of the manufacturer or distributor”) does not relate to the statutory definition of RMA as
contained in Section 507. (See Footnote 9, *infra*)

Protestant's Assertions in its Opposition⁷

16. On August 24, 2020, Protestant filed its opposition to the motion alleging that “Respondent does not have the ability and authority to terminate its relationship with the Merced corporate entity because the actual relationship is by and between Merced’s parent corporation, Bonander...” and not Merced. (Opposition p. 2, lines 16-19) Further, Protestant argues that Merced shares one occupational license with the Department of Motor Vehicles and therefore Merced has a “franchise under the umbrella of its parent operation, Bonander...” making the Board’s jurisdiction over this protest appropriate.⁸ (Opposition p. 5, lines 18-24; p. 7, line 21 through p. 8, line 12)

17. Protestant argues that because Respondent “impos[es] franchised new dealer responsibilities upon Merced...” by requiring Merced to conduct “Pre-Delivery Service” or “Pre-Delivery Inspections” of new vehicles under the Agreement, it “cannot deem the contract as a strictly parts and service agreement.” (Opposition p. 11, line 13 through p. 12, line 8; p. 12, lines 13-19)

18. In conclusion, Protestant maintains that Merced is a “satellite operation” of Bonander located in Turlock. “The agreements made between Western Star and Merced were not made with the Merced corporate entity” but, rather, with Bonander. “This has been the case dating back to the inception of the franchise, and thus Bonander has standing to be heard by the [Board] because Merced is a franchise (*sic*) as defined by the law.” According to Protestant, “DTNA failed to properly notice Merced via its Bonander parent under the California Vehicle Code of their intent to terminate the franchise and the Board most definitely has jurisdiction to hear the Protest.” (Opposition, p. 12, line 22 through p. 13, line 2)

Respondent's Assertions in its Reply to the Opposition

19. On September 3, 2020, Respondent filed its reply brief arguing that Protestant ignores the fundamental jurisdiction issues raised in its Motion. (Reply, p. 1, line 16) Specifically, “Merced is authorized only to sell parts and provide warranty service; it is not authorized or permitted to ‘sell[],

⁷ Merced’s Opposition references the Board’s Decision in *Bonander Pontiac, Inc. v. Daimler Trucks North America LLC* (Protest No. PR-2239-10). This Decision has not been designated by the Board as a precedent decision pursuant to Government Code Section 11425.60, so it will not be relied upon in this Proposed Order.

⁸ Michelle Derbyshire, Business Development Manager at DTNA, indicated that “[n]either DTNA or Western Star Trucks, Inc., has ever provided its authorization or signature to any Form OL 124 for the Merced location.” (Derbyshire Declaration dated September 3, 2020, ¶ 2)

exchange[], buy[], or offer[] for sale’ any Western Star ‘vehicle’ and is not authorized to ‘acquire for resale new...motor vehicles from [Western Star].’” (Reply, p. 3, lines 10-12) Further, the Agreement at issue is between Western Star and Merced, which is not authorized to sell new motor vehicles. (Reply, p. 3, line 24 through p. 4, line 3) Merced’s occupational license clearly states it is licensed as a “Used Auto/Commercial Vehicle Dealer,” a “New Trailer Vehicle Dealer,” a “New Recreational Trailer Vehicle Dealer” and a “New Motorhome Vehicle Dealer.” This is in contrast to Bonander’s license which is authorized as a “New Auto/Commercial Vehicle Dealer.” Therefore, Merced is not a dealer of new motor vehicles. (Reply, p. 5, lines 1-14)

20. Respondent argues that “Merced does not become a dealer or franchisee authorized to sell new Western Star Trucks simply because it performs service work for authorized dealers...” Rather, the provision which provides that Merced perform Pre-Delivery Service or Inspections is “*in support of any Western Star Trucks dealer, not as such a dealer.*” (Emphasis in original; Reply, p. 4, lines 18-24)

21. According to DTNA, Merced is not a “new motor vehicle dealer” as defined by the Vehicle Code. The Agreement between Merced and Western Star Trucks is not a “franchise” within the meaning of the Section 331; therefore, the provisions of Section 3060 do not apply and the Board lacks jurisdiction over this protest. (Reply, p. 5, line 15 through p. 6, line 2)

ANALYSIS

22. For Merced to have the protection of Section 3060, the Agreement would have to meet the definition of a “franchise” in Section 331(a) and not be excluded by Section 331(b). Merced would have to be a franchisee as defined in Section 331.1 and Western Star Trucks would have to be a franchisor as defined in Section 331.2.

Applicable Law

23. The relevant code sections, in part, are as follows:

3050. The board shall do all of the following:

...
(c) Hear and decide, within the limitations and in accordance with the procedure provided, a protest presented by a franchisee pursuant to Section 3060...

3060. (a)Notwithstanding Section 20999.1 of the Business and Professions Code or the terms of any franchise, no franchisor shall terminate or refuse to continue any existing franchise unless all of the following conditions are met...” (Underline added.)

331.1. A “franchisee” is any person who, pursuant to a franchise, receives new motor vehicles subject to registration under this code ... from the franchisor and who offers for sale or lease, or sells or leases the vehicles at retail or is granted the right to perform authorized warranty repairs and service, or the right to perform any combination of these activities. (Underline added.)

331.2 A “franchisor” is any person who manufactures, assembles, or distributes new motor vehicles subject to registration under this code, new off-highway motorcycles, as defined in Section 436, new all-terrain vehicles, as defined in Section 111, ... and who grants a franchise. (Underline added.)

24. All of these sections have as the fundamental requirement for their application that there be a “franchise,” which is defined in Section 331 as follows:

331. (a) A “franchise” is a written agreement between two or more persons having all of the following conditions:

(1) A commercial relationship of definite duration or continuing indefinite duration.

(2) The franchisee is granted the right to offer for sale or lease, or to sell or lease at retail new motor vehicles ... manufactured or distributed by the franchisor or the right to perform authorized warranty repairs and service, or the right to perform any combination of these activities.

(3) The franchisee constitutes a component of the franchisor’s distribution system.

(4) The operation of the franchisee’s business is substantially associated with the franchisor’s trademark, trade name, advertising, or other commercial symbol designating the franchisor.

(5) The operation of a portion of the franchisee’s business is substantially reliant on the franchisor for a continued supply of new vehicles, parts, or accessories.”

(b) The term “franchise” does not include an agreement entered into by a manufacturer or distributor and a person where all the following apply:

(1) The person is authorized to perform warranty repairs and service on vehicles manufactured or distributed by the manufacturer or distributor.

(2) The person is not a new motor vehicle dealer franchisee of the manufacturer or distributor.

(3) The person’s repair and service facility is not located within the relevant market area of a new motor vehicle dealer franchisee of the manufacturer or distributor.
(Underlined added.)

The Dealer Service Agreement

25. Therefore, it is necessary to analyze the terms of the Agreement to determine if it qualifies as a franchise.

I. Appointment

A. *General Rights of Service Dealer.* Company hereby appoints Service Dealer as an authorized Service Dealer subject to the terms and conditions stated in this Agreement, and the fulfillment by Service Dealer of its commitments to Company. As part of such appointment, Company grants to Service Dealer:

///

///

1. The right to conduct parts and service operations contemplated under this Agreement only at and from the dealership Location(s) described in this Agreement; and

2. The non-exclusive right to display and utilize Western Star Trucks Sales, Inc. trademarks and service marks in compliance with Company policy.

...

II. Acceptance by Service Dealer

A. *Service Dealer Acceptance.* Service Dealer accepts the appointment as an authorized service dealer and the rights herein granted subject to the terms and conditions under which they are granted and agrees to conduct its dealership operations accordingly.

B. *No Sale of New Western Star Trucks.* Service Dealer does not, by this Agreement, acquire any rights to engage in the sale of new Western Star Trucks. The awarding of this Agreement does not obligate Company in any way whatsoever, express or implied, to award the Service Dealer a sales agreement entitling the Service Dealer to sell new Western Star Trucks at a later date.

Application of the Statutory Definition of “Franchise” to the Agreement

26. The first issue is whether the Agreement satisfies all of the conditions of Section 331(a) for it to be a franchise.

a. There is a written agreement evidencing a commercial relationship of definite duration or continuing indefinite duration. (Section 331(a)(1))

b. Merced was granted the right to perform authorized warranty repairs and service. (Section 331(a)(2))

c. Merced does constitute a component (parts and service) of Western Star Trucks’ distribution system. (Section 331(a)(3))

d. The operation of Merced’s business is substantially associated with Western Star Trucks’ trademark, trade name, advertising, or other commercial symbol designating Western Star Trucks. (Section 331(a)(4))

e. The operation of a portion of Merced’s business is substantially reliant on Western Star Trucks for a continued supply of parts or accessories. (Section 331(a)(5))

27. Based on the above analysis, it would appear that the Agreement is a “franchise,” however, Section 331 continues with subdivision (b), as indicated above, and its provisions state that the Agreement is not a franchise if “all of the following apply:”

1 a. Merced is authorized to perform warranty repairs and service on Western Star Trucks.
2 (Section 331(b)(1))

3 b. Merced is not a new motor vehicle dealer franchisee of Western Star Trucks. (Section
4 331(b)(2)) Section 426 defines “New Motor Vehicle Dealer” to be “a dealer, as defined in Section 285,
5 who, in addition to the requirements of that section, either acquires for resale new and unregistered motor
6 vehicles from manufacturers or distributors of those motor vehicles or acquires for resale new off-
7 highway motorcycles, or all-terrain vehicles from manufacturers or distributors of the vehicles....” The
8 Agreement is limited to only authorizing Merced to “conduct parts and service operations contemplated
9 under this Agreement only at and from the dealership Location(s) described in this Agreement; and [t]he
10 non-exclusive right to display and utilize Western Star Trucks Sales, Inc. trademarks and service marks
11 in compliance with Company policy.” The Agreement goes on to specifically exclude Merced from
12 acquiring “any rights to engage in the sale of new Western Star Trucks. The awarding of this Agreement
13 does not obligate Company in any way whatsoever, express or implied, to award [Merced] a sales
14 agreement entitling [Merced] to sell new Western Star Trucks at a later date.” (Section 331(b)(2))

15 c. Merced’s repair and service facility is not located within the relevant market area⁹ of a new
16 motor vehicle dealer franchisee of Western Star Trucks. (Section 331(b)(3)) As stated in the uncontested
17 Declaration of Michelle Derbyshire: (1) “There has never been an agreement between Merced and
18 Western Star or DTNA authorizing the sale of trucks;” (2) Bonander’s “facility is approximately 25 miles
19 from Merced’s facility;” (3) “Merced does not engage in the sale of Western Star trucks and offers only
20 parts, accessories, and warranty work at the Merced location;” and (4) “The closest dealership to Merced
21 authorized to sell new Western Star Trucks is Bonander, located in Turlock, California,” which is 25
22 miles away. (Derbyshire Declaration dated July 23, 2020, ¶¶ 3-6; Section 331(b)(3))

23 _____
24 ⁹ As indicated above, Section 507 provides that “[t]he ‘relevant market area’ is any area within a radius of 10 miles
25 from the site of a potential new dealership.” This section typically applies to an establishment or relocation of a
26 dealership and allows franchisees of the same line-make, that are located within that 10-mile radius, the right to
27 protest pursuant to Section 3062. It may be that Western Star Trucks or DTNA intends to establish or relocate a
28 franchisee and that Merced would have been within 10 miles of the proposed new location. The anomalous result
could be that Merced may have been able to protest this pursuant to Section 3062, but Merced cannot protest its
own termination. This issue is not before the Board and any perceived inequity that may arise under this anomaly
would require legislative action to correct. Also, an analysis addressing the result if there was another Western Star
Trucks franchisee within 10 miles of Merced does not need to be addressed at this time.

1 **CONCLUSION**


2 28. The Dealer Service Agreement is not a “franchise” within the definition of Section 331 as
3 it is excluded by Section 331(b). Because the Service Agreement is not a franchise, Merced is not a
4 “franchisee” and neither Western Star Trucks nor DTNA are its “franchisor.” Therefore, Section 3060 is
5 not applicable.

6 **PROPOSED ORDER**

7 After consideration of the pleadings, exhibits and oral arguments of parties, it is hereby ordered
8 that the Motion of Respondent Daimler Truck North America, LLC is granted. Protest No. PR-2671-20
9 *Merced Tuck & Trailer, Inc., a California Corporation v. Daimler Truck North America, LLC, and Does*
10 *1-50, inclusive* is dismissed with prejudice.

11
12 I hereby submit the foregoing which constitutes my
13 proposed order in the above-entitled matter, as the
14 result of a hearing before me, and I recommend this
15 proposed order be adopted as the decision of the New
16 Motor Vehicle Board.

17 DATED: December 18, 2020

18 
19 By _____
20 ANTHONY M. SKROCKI
21 Administrative Law Judge
22
23
24
25
26

27 Steven Gordon, Director, DMV
28 Ailene Short, Acting Branch Chief,
Occupational Licensing, DMV

PRELIMINARY COVER SHEET

1. PR-2671-20 *Merced Truck & Trailer, Inc., a California Corporation v. Daimler Truck North America, LLC, and Does 1-50, inclusive*
2. PR-2673-20 *Bonander Auto, Truck & Trailer, INC., a California Corporation v. Daimler Truck North America, LLC*

The Board has two Proposed Order before it that relate to the above-referenced protests challenging an intended termination by Daimler Truck North America ("DTNA") of a Service Agreement (parts and service only) between Western Star Trucks ("Western") and Merced Truck & Trailer, Inc. ("Merced")

The Respondent in both protests is DTNA, the parent company that owns Western. The Protestants are Merced and Bonander Auto Truck & Trailer Inc. ("Bonander"). Bonander is the parent company and sole shareholder of Merced.

As to Merced's protest, the ALJ found that the Service Agreement with Merced was not a "franchise" and thus the intended termination of the Service Agreement does not give rise to a right to protest by Merced.

As to Bonander's protest, Bonander is located in Turlock, California, which is about 25 miles from Merced and is the parent company that owns all the stock of Merced. Although Bonander is a franchisee of DTNA with a dealer agreement for the sale of Western Star Trucks, DTNA does not seek to terminate Bonander's Western Star Truck franchise. The protest filed by Bonander is an attempt to prevent the termination of the Service Agreement between Merced and DTNA. In addition to finding that the Service Agreement was not a franchise, the ALJ found that Bonander was not a party to the Service Agreement and had no standing to file a protest challenging the intended termination of the Merced Service Agreement.



DECISION COVER SHEET

☒ ACTION BY: Public Members Only

☐ ACTION BY: All Members

To : BOARD MEMBERS

Date: December 18, 2020

From : ADMINISTRATIVE LAW JUDGE: Anthony M. Skrocki

CASE: BONANDER AUTO, TRUCK & TRAILER, INC., a California Corporation v.
DAIMLER TRUCK NORTH AMERICA, LLC
Protest No. PR-2673-20

TYPE: Vehicle Code section 3060 Termination

PROCEDURAL SUMMARY:

- FILED ON CALENDAR: June 4, 2020
- MOTIONS FILED: Respondent's "Motion to Dismiss Protest"
- COUNSEL FOR PROTESTANTS: Donald E. Bonander, In Pro Per
Merced Truck & Trailer, Inc.
- COUNSEL FOR RESPONDENT: Megan O. Curran, Esq.
Dyana K. Mardon, Esq.
Foley & Lardner LLP

EFFECT OF PROPOSED ORDER:

The Proposed Order grants Respondent's "Motion to Dismiss Protest" as it finds Vehicle Code section 3060 is not applicable because: The Dealer Service Agreement is not a franchise; Protestant Bonander is not a franchisee under the Service Agreement; Merced Truck & Trailer, Inc. is not a franchisee; Neither Western Star Trucks nor Respondent are Bonander's or Merced's franchisor under the Service Agreement; and Bonander lacks standing to pursue this protest on behalf of Merced. The Proposed Order would dismiss the protest with prejudice.

SUMMARY OF PROPOSED ORDER:

- This protest involves the termination of a Dealer Service Agreement ("Agreement") between Merced Truck & Trailer, Inc., a California Corporation ("Merced") and Western Star Truck Sales, Inc., a subsidiary of Daimler Truck North America, LLC ("DTNA"). The Agreement expressly provides that it does not authorize Merced to engage in the sales of new Western

Star Trucks.

- Bonander Auto, Truck & Trailer, Inc. a California Corporation (“Bonander”) filed this protest because of its legal ownership of Merced’s stock. Bonander argues that if Merced’s Agreement is shuttered by DTNA, Bonander’s corporate entity is the ultimate party irreparably damaged by the closure of Merced.
- For Merced to have the protection of Vehicle Code section 3060,¹ the Agreement would have to meet the definition of a “franchise” in Section 331(a) and not be excluded by Section 331(b). Merced would have to be a franchisee as defined in Section 331.1 and Western Star Trucks would have to be a franchisor as defined in Section 331.2.
- Initially, it would appear that the Agreement is a “franchise” based on the provisions in Section 331(a). However, Section 331 continues with subdivision (b) and its provisions state that the Agreement is not a franchise if all of the following apply:
 - Merced is authorized to perform warranty repairs and service on Western Star Trucks. (Section 331(b)(1))
 - Merced is not a new motor vehicle dealer franchisee of Western Star Trucks. (Section 331(b)(2)) The Agreement specifically excludes Merced from acquiring any rights to engage in the sale of new Western Star Trucks.
 - Merced’s repair and service facility is not located within the relevant market area² of a new motor vehicle dealer franchisee of Western Star Trucks. (Section 331(b)(3)) A companion protest filed by *Bonander Auto, Truck & Trailer, Inc., a California Corporation v. Daimler Truck North America, LLC* (“Bonander”) is a franchisee of DTNA located approximately 25 miles from Merced’s facility. Merced and Bonander share common ownership.
- Under Section 3060, the only entity that has standing to file a termination protest with the Board is a “franchisee.” Merced is not a “franchisee” and the Agreement is not a “franchise.” Bonander seeks to protest the termination of Merced’s Agreement to buy, stock and sell Western Star Trucks Parts and perform service and warranty repairs on Western Star Trucks even though Bonander is not a party to the Agreement and the Agreement is not a “franchise.” For these reasons, Bonander lacks standing to file this protest on behalf of Merced.
- The Proposed Order grants Respondent’s motion to dismiss the protest with prejudice.

¹ All statutory references are to the California Vehicle Code unless noted otherwise.

² Section 507 defines “relevant market area” or RMA as: “...any area within a radius of 10 miles from the site of a potential new dealership.” (Underline added.) The use of relevant market area in Subdivision (b)(3) of Section 331 (“[t]he person’s repair and service facility is not located within the relevant market area of a new motor vehicle dealer franchisee of the manufacturer or distributor) does not relate to the statutory definition of RMA as contained in Section 507.

RELATED MATTERS:

- Related Case Law:
Cohen v. TNP 2008 Participating Notes Program, LLC (2019) 31 Cal.App.5th 840, 855
Guarantee Forklift, Inc. v. Capacity of Texas, Inc. (2017) 11 Cal.App.5th 1066, 1079-80
- Applicable Statutes and Regulations: Government Code section 11425.60; Vehicle Code sections 331, 331.1, 331.2, 3050, 3060.
- Related Board Case: PR-2671-20 *Merced Truck & Trailer, Inc., a California Corporation v. Daimler Truck North America, LLC, and Does 1-50, inclusive.*

NEW MOTOR VEHICLE BOARD
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Sacramento, California 95818-8680
Telephone: (916) 445-1888

CERTIFIED MAIL

STATE OF CALIFORNIA
NEW MOTOR VEHICLE BOARD

In the Matter of the Protest of

BONANDER AUTO, TRUCK & TRAILER, INC.,
a California Corporation,

Protestant,

v.

DAIMLER TRUCK NORTH AMERICA, LLC,

Respondent.

Protest No. PR-2673-20

**PROPOSED ORDER GRANTING
RESPONDENT DAIMLER TRUCK
NORTH AMERICA, LLC'S MOTION
TO DISMISS PROTEST**

To: Donald E. Bonander, in Pro Per
For the Protestant
BONANDER AUTO, TRUCK & TRAILER, INC.
231 South Center Street
Turlock, California 95380

Megan O. Curran, Esq.
Dyana K. Mardon, Esq.
Attorneys for Respondent
FOLEY & LARDNER LLP
555 California Street, Suite 1700
San Francisco, California 94104

Roberta F. Howell, Esq.
Attorney for Respondent
FOLEY & LARDNER LLP
150 East Gilman Street, Suite 5000
Madison, Wisconsin 53703-1482

///

1 This matter came on regularly for telephonic hearing on Thursday, September 10, 2020, before
2 Anthony M. Skrocki, Administrative Law Judge (“ALJ”) for the New Motor Vehicle Board (“Board”).¹
3 Donald E. Bonander, in Pro Per and Ryan Katzenbach, in Pro Per represented Protestant. Matthew
4 Bonander and Bob Houck were also present for Protestant. Roberta Howell, Esq., Megan Curran, Esq.
5 and Dyana Mardon, Esq. of Foley & Lardner LLP represented Respondent.

6 **FACTUAL AND PROCEDURAL BACKGROUND**

7 1. On June 4, 2020, Bonander Auto, Truck & Trailer, Inc. a California corporation
8 (“Bonander” or “Protestant”) filed a termination protest with the Board pursuant to Vehicle Code section
9 3060² against Daimler Truck North America, LLC (hereinafter “DTNA” or “Respondent”). An amended
10 protest was filed on July 2, 2020. A related protest, PR-2671-20 *Merced Truck & Trailer, Inc., a*
11 *California Corporation v. Daimler Truck North America, LLC* was also filed (referred to as “Merced”)
12 and will be discussed in a separate Proposed Order.

13 2. The protest alleges that Respondent sent Merced a “Notice of Termination” dated May 11,
14 2020, stating “[t]his letter shall serve as Daimler Trucks North America LLC’s (DTNA) notice of the
15 termination of your [Merced’s] dealership’s Western Star Trucks Dealer Service Agreement (Agreement)
16 effective June 30, 2020.” (Protest, Ex. J) The statutory “Notice to Dealer” language and reasoning for
17 termination were not included.³ Bonander filed this Protest “because of its legal ownership of [Merced’s]
18 stock. If [Merced’s] Dealer Service franchise is shuttered by Respondent, Protestant [Bonander’s]
19 corporate entity...[is] the ultimate part[y] irreparably damaged by the closure of [Merced]...” (Amended
20 Protest, ¶ 28)

21 ///

22 ///

24 ¹ After oral arguments, ALJ Skrocki indicated that the matter was taken under submission and that his ruling was
25 deferred pending Respondent’s determination on whether it would participate in a settlement conference. By letter
26 dated September 30, 2020, counsel for DTNA “respectfully decline[d] the proposal to mediate before a decision on
the pending motions to dismiss these matters based on the lack of jurisdiction.”

27 ² All statutory citations are to the California Vehicle Code unless otherwise indicated.

28 ³ Respondent alleges that the Dealer Service Agreement signed by Merced (not Bonander) does not meet the
statutory definition of a “franchise” and therefore formal statutory notice of the termination was not required. (See
discussion *infra*.)

1 **Parties and Counsel**

2 3. Protestant does business as a sales and service dealer for Respondent's heavy-duty
3 Western Star Trucks line at its North Golden State location in Turlock, California. (Amended Protest, ¶ 1)
4 Protestant is a franchisee of Respondent within the meaning of Section 331.1

5 4. Protestant is represented in pro per by Donald E. Bonander, President of Bonander.

6 5. Respondent is the franchisor of Bonander within the meaning of Section 331.2.

7 6. Respondent is represented by Roberta F. Howell, Esq. of Foley & Lardner LLP, 150 East
8 Gilman Street, Madison, Wisconsin and Megan O. Curran, Esq. and Dyana K. Mardon, Esq. of Foley &
9 Lardner, LLP, 555 California Street, Suite 170, San Francisco, California.

10 **The Dealer Service Agreement**⁴

11 7. This protest involves the termination of a Dealer Service Agreement ("Agreement")
12 between Merced and Western Star Truck Sales, Inc., a subsidiary of DTNA. The Agreement was signed
13 by the parties on January 25, 2017. (Derbyshire Declaration dated July 23, 2020, ¶ 3, Ex. A)

14 8. The purpose of the Agreement is:

15 "[DTNA] desires to increase its potential to service Western Star Trucks through an
16 independent dealer network by appointing independent service dealers. [DTNA] relies
upon [Merced] to perform service directly for owners and users of Western Star Trucks.

17 [DTNA] also desires to increase its market share of the parts aftermarket. [DTNA] relies
18 on [Merced] to aggressively market Western Star Trucks Parts.

19 The purpose of this Agreement is to appoint [Merced] as an authorized Western Star
20 Trucks Service Dealer and to establish the standards and rules which will govern the
relationship between [Merced] and [DTNA]." (Derbyshire Declaration dated July 23,
2020, ¶ 3, Ex. A, p. 1)

21 Further, the definitions state: "'Service Dealer' shall mean a company, corporation, or person who has an
22 agreement with [DTNA] to buy, stock and sell Western Star Trucks Parts and perform service and
23 warranty repairs on Western Star Trucks." (Derbyshire Declaration dated July 23, 2020, ¶ 3, Ex. A, p. 2)

24 9. Section X. Termination of Agreement, subsection A. *Termination by Company* provides
25

26 ⁴ Respondent contends that Bonander filed this protest against DTNA, despite the fact that DTNA is not a party to
27 the Dealer Service Agreement nor is Bonander, "The only parties to the Dealer Service Agreement are Merced and
Western Star Truck Sales, Inc." (Motion to Dismiss, p. 3, Fn. 1) However, the termination letter was on Daimler
28 letterhead, signed by Kevin M. Bangston, General Manager Distribution Network Development, DTNA.
(Opposition, Ex. A) This is not an issue in this matter.

that: “[DTNA] may terminate this Service Agreement at any time by providing written notice of termination to [Merced] not less than thirty (30) days prior to the effective date of termination.” (Derbyshire Declaration dated July 23, 2020, ¶ 3, Ex. A, p. 7)

10. Under the Agreement in Section I. Appointment, Merced was appointed as an authorized Western Star Trucks Service Dealer, including the right to conduct parts and service operations. (Derbyshire Declaration dated July 23, 2020, Ex. A, p. 2) The Agreement expressly provides that it does not authorize Merced to engage in the sales of new Western Star Trucks and “[t]here has never been an agreement between Merced and [] DTNA authorizing the sale of trucks.” (Derbyshire Declaration dated July 23, 2020, ¶ 4, Ex. A, p. 2)

11. Section II. Acceptance by Service Dealer, subsection B. *No Sale of New Western Star Trucks* provides: “[Merced] does not, by this Agreement, acquire any rights to engage in the sale of new Western Star Trucks. The awarding of this Agreement does not obligate [Western Star Trucks] in any way whatsoever, express or implied, to award [Merced] a sales agreement entitling [Merced] to sell new Western Star Trucks at a later date.” (Derbyshire Declaration dated July 23, 2020, Ex. A, p. 2)

MOTION TO DISMISS

Respondent’s Assertions in its Motion to Dismiss⁵

12. On July 24, 2020, Respondent filed its Motion to Dismiss Protest alleging that the protest must be dismissed for two reasons: (1) The Board lacks jurisdiction because the Dealer Service Agreement between Merced and Western Star Trucks is not a franchise as defined by the Vehicle Code. Without a franchise, Section 3060 does not apply and there is no other applicable provision which establishes this Board’s jurisdiction; (2) “Bonander is a separate legal entity from Merced and is *not* a party to the Agreement. Thus, even if the Agreement were a franchise subject to this Board’s jurisdiction, Bonander is not the ‘franchisee’ with standing to protest its termination.” (Emphasis in original; Motion, p. 3, lines 6-12)

13. “Under the Agreement, Merced was appointed as an authorized Western Star Service

⁵ DTNA’s motion references the Board’s Decision in *Advantage Loma Linda, LLC v. Saab Cars USA* (Protest No. PR-1809-02). This Decision has not been designated by the Board as a precedent decision pursuant to Government Code Section 11425.60, so it will not be relied upon in this Proposed Order.

Dealer, including as an authorized warranty service provider...” (Motion, p. 4, lines 1-2; Derbyshire Declaration dated July 23, 2020, ¶ 3, Ex. A, p. 2) The Agreement expressly provides that it does not authorize Merced to engage in the sale of new Western Star Trucks and there has never been an agreement between Merced and Western Star or DTNA authorizing the sale of trucks. (Motion, p. 4, lines 3-6; Derbyshire Declaration dated July 23, 2020, ¶ 4 Ex. A, p. 2, Section II. B.)

14. Section 331 defines what does and does not constitute a “franchise” for purposes of Section 3060. (Motion, p. 5, lines 20-21) Respondent contends the Agreement meets each of the conditions set forth in Section 331(b)(1)-(3) and that it is not a “franchise” because: (1) Merced is authorized to perform warranty repairs and service on vehicles manufactured and distributed by DTNA; (2) Merced is not a new motor vehicle dealer because it is not engaged in the sale of vehicles; and (3) Merced is not located within the relevant market area of a Western Star dealer.⁶ The closest dealership to Merced authorized to sell new Western Star Trucks is Bonander, which is approximately 25 miles from Merced. (Motion, p. 6, lines 2-11, 23-27; Derbyshire Declaration dated July 23, 2020, ¶¶ 4-6, Ex. A, p. 2)

15. Respondent raises the issue of standing, which “derives from the principle that every action must be prosecuted in the name of the real party in interest.” (Citing *Cohen v. TNP 2008 Participating Notes Program, LLC* (2019) 31 Cal.App.5th 840, 855 (internal citations omitted.)) (Motion, p. 5, lines 8-10) “A party ‘must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.’ (*Id.* at 856) One who is ‘not a party to a contractual... provision generally lacks standing to enforce it.’ (*Id.*) When determining a party’s standing to sue, courts ‘look to the provision allegedly violated by the defendant and determine whether the plaintiff is a party the provision was intended to protect.’” (*Guarantee Forklift, Inc. v. Capacity of Texas, Inc.* (2017) 11 Cal.App.5th 1066, 1079-80; Motion, p. 5, lines 8-15) Respondent argues that “[g]enerally, a shareholder does not have standing to redress an injury to the corporation in which it holds stock. [Citations.] Here, Bonander has alleged nothing more than an injury resulting from the alleged wrong to Merced. It has not

⁶ Section 507 defines “relevant market area” or RMA as: “...any area within a radius of 10 miles from the site of a potential new dealership.” (Underline added.) The use of relevant market area in Subdivision (b)(3) of Section 331 (“[t]he person’s repair and service facility is not located within the relevant market area of a new motor vehicle dealer franchisee of the manufacturer or distributor) does not relate to the statutory definition of RMA as contained in Section 507. (See Footnote 9, *infra*)

1 alleged any direct injury independent of that to Merced. Thus, Bonander lacks standing to bring this
2 protest, even if the Board otherwise had jurisdiction.” (Motion, p. 7, lines 9-21)

3 16. According to Respondent, Section 3060 does not change the above analysis. A
4 “franchisee” can protest the termination of its “franchise.” In this matter, even if the Agreement were a
5 “franchise” (which DTNA argues it is not), Bonander is not the “franchisee” under the Agreement, is not
6 a party to the agreement, and is not authorized to protest its termination. (Motion, p. 7, lines 22-25; p. 8,
7 lines 3-4) Bonander’s allegation that it will suffer harm if the Agreement with Merced is terminated is not
8 sufficient to confer standing under Section 3060. (Motion, p. 8, lines 9-11)

9 **Protestant’s Assertions in its Opposition**⁷

10 17. On August 24, 2020, Protestant filed its opposition to the motion noting that Respondent
11 argues that Merced does not have a franchise under Section 331 and “that Bonander, despite being the
12 sole owner of their Merced satellite or subsidiary, lacks standing to bring the action before the Board
13 since they are not a party to the termination.” (Opposition p. 2, lines 8-10) Protestant continues that the
14 allegations in the motion demonstrate DTNA’s “complete lack of understanding as to the historical
15 arrangement between Bonander and Merced, and their relationship with [DTNA].” (Opposition, p. 2, lines
16 11-13) Protestant contends that its Turlock facility and Merced are “FACTUALLY one dealership, one
17 operation.” Therefore, “termination of any component” of the Agreement gives Bonander, as a new
18 Western Star vehicle dealer, the ability to seek redress before the Board. (Emphasis in original.)
19 (Opposition, p. 3, lines 10-12) Lastly, Bonander maintains it is a franchised dealer in compliance with the
20 Vehicle Code and Merced falls under the “Bonander umbrella” as its satellite operation.⁸ (Opposition p. 6,
21 lines 10-12)

22 18. Protestant contends that it is the controlling party. The satellite parts and service operation
23 with Western Star Trucks was not made with Merced but with Bonander. (Opposition, p. 8, lines 2-4; p.
24 10, lines 8-11; p. 11, line 21) Bonander argues that it is not bringing this protest as the sole shareholder of

25 ⁷ Merced’s Opposition references the Board’s Decision in *Bonander Pontiac, Inc. v. Daimler Trucks North*
26 *America LLC* (Protest No. PR-2239-10). This Decision has not been designated by the Board as a precedent
27 decision pursuant to Government Code Section 11425.60, so it will not be relied upon in this Proposed Order.

28 ⁸ Michelle Derbyshire, Business Development Manager at DTNA, indicated that “[t]here has never been an
agreement between Merced and Western Star or DTNA authorizing the sale of trucks.” (Derbyshire Declaration
dated July 23, 2020, ¶ 4)

Merced; it has initiated this action because it is the party to the contractual arrangement. Bonander made the Agreement for the Merced satellite operation; not the Merced corporate entity. Therefore, Protestant argues this gives Bonander standing in the protest. (Opposition, p. 10, line 27 through p. 11, line 3) Protestant claims the cancellation of the Agreement “stands to injure” Bonander directly as the owner of the satellite operation. (Opposition, p. 11, lines 24-25) To support its contention that Protestant has standing, it references the parent-subsidary relationship of Bonander and Merced and contends “[t]he agency doctrine may bind a parent to the contracts of its subsidiary where, in addition to owning the subsidiary, the parent company exercises ‘sufficient control over the [subsidiary’s] activities’ such that the subsidiary becomes a ‘mere agen[t] or ‘instrumentality’ of the parent.’” (Internal citations omitted; Opposition, p. 11, line 26 through p. 12, line 3)

19. Protestant asserts that even though Merced “may not sell trucks at its facility, the very fact that it performs new vehicle franchised dealership duties blurs the distinction between a strictly ‘parts and service’ operation and that of a ‘franchised’ dealership.” (Opposition, p. 14, lines 19-21) Additionally, because the Agreement “mandates contact with a new Western Star vehicle, Merced is no longer solely a Parts & Service operation.” (Opposition, p. 15, lines 3-4)

20. In conclusion, Protestant maintains that Merced is a “satellite operation” of Bonander located in Turlock. “The agreements made between Western Star and Merced were not made with the Merced corporate entity” but, rather, with Bonander. “This has been the case dating back to the inception of the franchise, and thus Bonander has standing to be heard by the [Board] because Merced is a franchise (*sic*) as defined by the law.” According to Protestant, “DTNA failed to properly notice Bonander under the California Vehicle Code of their intent to terminate the franchise and the Board most definitely has jurisdiction to hear the Protest.” (Opposition, p. 15, lines 8-14)

Respondent’s Assertions in its Reply to the Opposition

21. On September 3, 2020, Respondent filed its reply brief arguing that the Board lacks jurisdiction over this protest because the Agreement is not a “franchise” and even if the Board had jurisdiction, Bonander is not a party to the Agreement between Merced and Western Star Trucks so it has no standing. (Reply, p. 1, lines 3-9, 22-24) Specifically, “Merced is authorized only to sell parts and provide warranty service; it is not authorized or permitted to ‘sell[], exchange[], buy[], or offer[] for sale’

any Western Star ‘vehicle’ and is not authorized to ‘acquire for resale new...motor vehicles from [Western Star].’” (Reply, p. 3, lines 10-12) Further, the Agreement at issue is between Western Star and Merced, which is not authorized to sell new motor vehicles. (Reply, p. 3, lines 21-25) Merced’s occupational license clearly states it is licensed as a “Used Auto/Commercial Vehicle Dealer,” a “New Trailer Vehicle Dealer,” a “New Recreational Trailer Vehicle Dealer” and a “New Motorhome Vehicle Dealer.” This is in contrast to Bonander’s license which is authorized as a “New Auto/Commercial Vehicle Dealer.” Therefore, Merced is not a dealer of new motor vehicles. (Reply, p. 4, line 24 through p. 5, line 7)

22. Respondent argues that “Merced does not become a dealer or franchisee authorized to sell new Western Star Trucks simply because it performs service work for authorized dealers...” Rather, the provision which provides that Merced perform Pre-Delivery Service or Inspections is “*in support of any Western Star Trucks dealer, not as such a dealer.*” (Emphasis in original; Reply, p. 4, lines 12-18)

23. Even if the Board otherwise had jurisdiction, Respondent contends that “Bonander lacks standing to bring this Protest because it is not a party to the Agreement between Merced and Western Star. The terms of the Agreement are clear: the Agreement is between Merced and Western Star, it is fully integrated, and it contains an express anti-assignment provision. Contrary to Bonander’s assertions, it does not exert such control over and beyond that in a typical parent-subsidiary relationship such that it can stand in Merced’s shoes and assert a Protest of the termination of the Agreement.” (Derbyshire Declaration dated September 3, 2020, ¶¶ 2-4; Reply, p. 5, lines 11-17)

ANALYSIS

24. For Merced to have the protection of Section 3060, the Agreement would have to meet the definition of a “franchise” in Section 331(a) and not be excluded by Section 331(b). Merced would have to be a franchisee as defined in Section 331.1 and Western Star Trucks would have to be a franchisor as defined in Section 331.2.

Applicable Law

25. The relevant code sections, in part, are as follows:

3050. The board shall do all of the following:

...

(c) Hear and decide, within the limitations and in accordance with the procedure

provided, a protest presented by a franchisee pursuant to Section 3060...

3060. (a) Notwithstanding Section 20999.1 of the Business and Professions Code or the terms of any franchise, no franchisor shall terminate or refuse to continue any existing franchise unless all of the following conditions are met.

(1) The franchisee and the board have received written notice from the franchisor as follows:

(A) Sixty days before the effective date thereof setting forth the specific grounds for termination or refusal to continue.

(B) Fifteen days before the effective date thereof setting forth the specific grounds with respect to any of the following:

(i) Transfer of any ownership or interest in the franchise without the consent of the franchisor, which consent shall not be unreasonably withheld.

(ii) Misrepresentation by the franchisee in applying for the franchise.

(iii) Insolvency of the franchisee, or filing of any petition by or against the franchisee under any bankruptcy or receivership law.

(iv) Any unfair business practice after written warning thereof.

(v) Failure of the motor vehicle dealer to conduct its customary sales and service operations during its customary hours of business for seven consecutive business days, giving rise to a good faith belief on the part of the franchisor that the motor vehicle dealer is in fact going out of business, except for circumstances beyond the direct control of the motor vehicle dealer or by order of the department.

...

(2) Except as provided in Section 3050.7, the board finds that there is good cause for termination or refusal to continue, following a hearing called pursuant to Section 3066...

(3) The franchisor has received the written consent of the franchisee, or the appropriate period for filing a protest has elapsed.

...

(Underline added.)

331.1. A "franchisee" is any person who, pursuant to a franchise, receives new motor vehicles subject to registration under this code ... from the franchisor and who offers for sale or lease, or sells or leases the vehicles at retail or is granted the right to perform authorized warranty repairs and service, or the right to perform any combination of these activities. (Underline added.)

331.2 A "franchisor" is any person who manufactures, assembles, or distributes new motor vehicles subject to registration under this code, new off-highway motorcycles, as defined in Section 436, new all-terrain vehicles, as defined in Section 111, ... and who grants a franchise. (Underline added.)

26. All of these sections have as the fundamental requirement for their application that there be a "franchise," which is defined in Section 331 as follows:

331. (a) A "franchise" is a written agreement between two or more persons having all of the following conditions:

(1) A commercial relationship of definite duration or continuing indefinite duration.

(2) The franchisee is granted the right to offer for sale or lease, or to sell or lease at retail new motor vehicles ... manufactured or distributed by the franchisor or the right to perform authorized warranty repairs and service, or the right to perform any combination of these activities.

(3) The franchisee constitutes a component of the franchisor's distribution system.

(4) The operation of the franchisee's business is substantially associated with the

franchisor's trademark, trade name, advertising, or other commercial symbol designating the franchisor.

(5) The operation of a portion of the franchisee's business is substantially reliant on the franchisor for a continued supply of new vehicles, parts, or accessories.

(b) The term "franchise" does not include an agreement entered into by a manufacturer or distributor and a person where all the following apply:

(1) The person is authorized to perform warranty repairs and service on vehicles manufactured or distributed by the manufacturer or distributor.

(2) The person is not a new motor vehicle dealer franchisee of the manufacturer or distributor.

(3) The person's repair and service facility is not located within the relevant market area of a new motor vehicle dealer franchisee of the manufacturer or distributor.

(Underlined added.)

The Dealer Service Agreement

27. Therefore, it is necessary to analyze the terms of the Agreement to determine if it qualifies as a franchise.

I. Appointment

A. *General Rights of Service Dealer.* Company hereby appoints Service Dealer as an authorized Service Dealer subject to the terms and conditions stated in this Agreement, and the fulfillment by Service Dealer of its commitments to Company. As part of such appointment, Company grants to Service Dealer:

1. The right to conduct parts and service operations contemplated under this Agreement only at and from the dealership Location(s) described in this Agreement; and
2. The non-exclusive right to display and utilize Western Star Trucks Sales, Inc. trademarks and service marks in compliance with Company policy.

...

II. Acceptance by Service Dealer

A. *Service Dealer Acceptance.* Service Dealer accepts the appointment as an authorized service dealer and the rights herein granted subject to the terms and conditions under which they are granted and agrees to conduct its dealership operations accordingly.

B. *No Sale of New Western Star Trucks.* Service Dealer does not, by this Agreement, acquire any rights to engage in the sale of new Western Star Trucks. The awarding of this Agreement does not obligate Company in any way whatsoever, express or implied, to award the Service Dealer a sales agreement entitling the Service Dealer to sell new Western Star Trucks at a later date.

Application of the Statutory Definition of "Franchise" to the Agreement

28. The first issue is whether the Agreement satisfies all of the conditions of Section 331(a) for it to be a franchise.

a. There is a written agreement evidencing a commercial relationship of definite duration or

continuing indefinite duration. (Section 331(a)(1))

b. Merced was granted the right to perform authorized warranty repairs and service. (Section 331(a)(2))

c. Merced does constitute a component (parts and service) of Western Star Trucks' distribution system. (Section 331(a)(3))

d. The operation of Merced's business is substantially associated with Western Star Trucks' trademark, trade name, advertising, or other commercial symbol designating Western Star Trucks. (Section 331(a)(4))

e. The operation of a portion of Merced's business is substantially reliant on Western Star Trucks for a continued supply of parts or accessories. (Section 331(a)(5))

29. Based on the above analysis, it would appear that the Agreement is a "franchise," however, Section 331 continues with subdivision (b), as indicated above, and its provisions state that the Agreement is not a franchise if "all of the following apply:"

a. Merced is authorized to perform warranty repairs and service on Western Star Trucks. (Section 331(b)(1))

b. Merced is not a new motor vehicle dealer franchisee of Western Star Trucks. (Section 331(b)(2)) Section 426 defines "New Motor Vehicle Dealer" to be "a dealer, as defined in Section 285, who, in addition to the requirements of that section, either acquires for resale new and unregistered motor vehicles from manufacturers or distributors of those motor vehicles or acquires for resale new off-highway motorcycles, or all-terrain vehicles from manufacturers or distributors of the vehicles...." The Agreement is limited to only authorizing Merced to "conduct parts and service operations contemplated under this Agreement only at and from the dealership Location(s) described in this Agreement; and [t]he non-exclusive right to display and utilize Western Star Trucks Sales, Inc. trademarks and service marks in compliance with Company policy." The Agreement goes on to specifically exclude Merced from acquiring "any rights to engage in the sale of new Western Star Trucks. The awarding of this Agreement does not obligate Company in any way whatsoever, express or implied, to award [Merced] a sales agreement entitling [Merced] to sell new Western Star Trucks at a later date." (Section 331(b)(2))

///

c. Merced's repair and service facility is not located within the relevant market area⁹ of a new motor vehicle dealer franchisee of Western Star Trucks. (Section 331(b)(3)) As stated in the uncontested Declaration of Michelle Derbyshire: (1) "There has never been an agreement between Merced and Western Star or DTNA authorizing the sale of trucks;" (2) Bonander's "facility is approximately 25 miles from Merced's facility;" (3) "Merced does not engage in the sale of Western Star trucks and offers only parts, accessories, and warranty work at the Merced location;" and (4) "The closest dealership to Merced authorized to sell new Western Star Trucks is Bonander, located in Turlock, California," which is 25 miles away. (Derbyshire Declaration dated July 23, 2020, ¶¶ 3-6; Section 331(b)(3))

Bonander Lacks Standing to Bring this Protest on behalf of Merced

30. Under Section 3060, the only entity that has standing to file a termination protest with the Board is a "franchisee." As indicated above, Merced is not a "franchisee" and the Agreement is not a "franchisee."

31. Bonander seeks to protest the termination of Merced's Agreement to "buy, stock and sell Western Star Trucks Parts and perform service and warranty repairs on Western Star Trucks" even though Bonander is not a party to the Agreement and the Agreement is not a "franchisee." For these reasons, Bonander lacks standing to file this protest on behalf of Merced.

32. If DTNA or Western Star Trucks issued Bonander a notice seeking to terminate its Dealer Sales and Service Agreement then Bonander would have standing to file a protest with the Board because Bonander is a "franchisee" and the Dealer Sales and Service Agreement is a "franchisee." (See Derbyshire Declaration dated September 3, 2020, ¶ 5; Ex. A) However, that is not the case so Bonander is precluded from pursuing this protest.

///

⁹ As indicated above, Section 507 provides that "[t]he 'relevant market area' is any area within a radius of 10 miles from the site of a potential new dealership." This section typically applies to an establishment or relocation of a dealership and allows franchisees of the same line-make, that are located within that 10-mile radius, the right to protest pursuant to Section 3062. It may be that Western Star Trucks or DTNA intends to establish or relocate a franchisee and that Merced would have been within 10 miles of the proposed new location. The anomalous result could be that Merced may have been able to protest this pursuant to Section 3062, but Merced cannot protest its own termination. This issue is not before the Board and any perceived inequity that may arise under this anomaly would require legislative action to correct. Also, an analysis addressing the result if there was another Western Star Trucks franchisee within 10 miles of Merced does not need to be addressed at this time.

1 **CONCLUSION**


2 33. Section 3060 is not applicable because: (1) The Dealer Service Agreement is not a
3 “franchise” within the definition of Section 331 as it is excluded by Section 331(b); (2) Bonander is not a
4 “franchisee;” (3) Merced is not a “franchisee;” (4) Neither Western Star Trucks nor DTNA are
5 Bonander’s or Merced’s “franchisor;” and (5) Bonander lacks standing to pursue this protest on behalf of
6 Merced.

7 **PROPOSED ORDER**

8 After consideration of the pleadings, exhibits and oral arguments of parties, it is hereby ordered
9 that the Motion of Respondent Daimler Truck North America, LLC is granted. Protest No. PR-2673-20
10 *Bonander Auto, Truck & Trailer, Inc., a California Corporation v. Daimler Truck North America, LLC*, is
11 dismissed with prejudice.

12
13 I hereby submit the foregoing which constitutes my
14 proposed order in the above-entitled matter, as the
15 result of a hearing before me, and I recommend this
16 proposed order be adopted as the decision of the New
Motor Vehicle Board.

17 DATED: December 18, 2020

18 
19 By _____
20 ANTHONY M. SKROCKI
21 Administrative Law Judge
22
23
24
25
26

27 Steven Gordon, Director, DMV
28 Ailene Short, Acting Branch Chief,
Occupational Licensing, DMV

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14 *Attorneys for Respondent New Motor Vehicle Board*

FILED
Superior Court of California
County of Los Angeles
01/22/2021

Sherri R. Carter, Executive Officer / Clerk of Court
By: N. DiGiambattista Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

GENERAL MOTORS LLC,

Petitioner,

v.

**CALIFORNIA NEW MOTOR VEHICLE
BOARD,**

Respondent.

**FOLSOM CHEVROLET, INC. dba
FOLSOM CHEVROLET,**

Real Party in Interest.

Case No. BS175257

**[PROPOSED] JUDGMENT ON
PETITION FOR WRIT OF
ADMINISTRATIVE MANDATE**

Dept: 82
Judge: Hon. Mary H. Strobel
Action Filed: September 27, 2018

This matter came on regularly before the Court on July 30, 2020 and October 23, 2020 in Department 82, the Honorable Mary H. Strobel presiding.

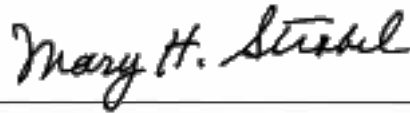
The Court having considered the administrative record, which was admitted into evidence, the papers of the parties, and the arguments of counsel,

1 IT IS ORDERED, ADJUDGED, AND DECREED that, in accordance with the Court's
2 final decision in this matter, as set forth in the Court's minute orders dated July 30, 2020 and
3 December 18, 2020, that are respectively Exhibits A and B to this Judgment:

4 1. A peremptory writ of administrative mandamus shall issue under seal of this Court,
5 commanding Respondent New Motor Vehicle Board to set aside that portion of its decision in
6 Protest No. PR-2483-16, *Folsom Chevrolet, Inc., dba Folsom Chevrolet v. General Motors, LLC*,
7 dated August 13, 2018, finding that Petitioner General Motors LLC violated section
8 11713.13(g)(1)(A) generally and in this specific case.

9 2. The petition for writ of administrative mandate filed by Petitioner is otherwise denied
10 and Respondent's decision is otherwise affirmed.

11 Date: 01/22/2021
12 _____



13 Hon. Mary H. Strobel

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SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

Civil Division

Central District, Stanley Mosk Courthouse, Department 82

BS175257

**GENERAL MOTORS LLC VS CALIFORNIA NEW MOTOR
VEHICLE BOARD**

July 30, 2020

1:30 PM

Judge: Honorable Mary H. Strobel
Judicial Assistant: N DiGiambattista
Courtroom Assistant: R Monterroso

CSR: LaShaun Thomas/CSR 8423
ERM: None
Deputy Sheriff: None

APPEARANCES:

For Petitioner(s): Mark T. Clouatre (Telephonic) and Jake Fischer (x)

For Respondent(s): Michael David Gowe (x) (Telephonic); Jade Faysal Jurdi and Halbert Rasmussen (x) (Telephonic)

NATURE OF PROCEEDINGS: HEARING ON PETITION FOR WRIT OF MANDATE

Matter comes on for hearing and is argued.

.
The court's tentative ruling on the issues of Board jurisdiction and whether the Board misapplied or misconstrued the language of Section 11713.13 is posted and read by all counsel.

.
Petitioner's exhibit 1 (administrative record) is admitted into evidence.

.
The court adopts its tentative ruling as the order of the court and is set forth in this minute order.

Petitioner General Motors, LLC ("Petitioner" or "GM") petitions for a writ of administrative mandate directing Respondent California New Motor Vehicle Board ("Board") "to set aside and vacate its Decision dated August 13, 2018, in Protest No. PR-2483-16, and to adopt and issue a new and different decision overruling the Protest." Board and Real Party in Interest Folsom Chevrolet, Inc. ("Folsom Chevrolet") oppose the petition.

Background

Statutory Scheme

"Section 3000 et seq. and section 11700 et seq. [of the Vehicle Code] establish a statutory scheme regulating the franchise relationship between vehicle manufacturers and distributors, and their dealers. [Citation.] The purpose of this scheme is 'to avoid undue control of the independent new motor vehicle dealer by the vehicle manufacturer or distributor and to insure that dealers fulfill their obligations under their franchises and provide adequate and sufficient

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ERM: None
Deputy Sheriff: None

service to consumers generally.’ The United States Supreme Court has recognized that the ‘disparity in bargaining power between automobile manufacturers and their dealers prompted Congress and some States to enact legislation to protect retail car dealers from perceived abusive and oppressive acts by the manufacturers.’ (New Motor Vehicle Bd. v. Orrin W. Fox Co. (1978) 439 U.S. 96, 100–101....)’ (Powerhouse Motorsports Group, Inc. v. Yamaha Motor Corp. (2013) 221 Cal.App.4th 867, 877.)

A franchisee that receives notice that its franchise is being terminated may file a “protest” with the Board. (Vehicle Code § 3060(a)(1).) 1 Section 3060(a)(2) provides that “no franchisor shall terminate or refuse to continue any existing franchise unless ... the board finds that there is good cause for termination or refusal to continue, following a hearing called pursuant to Section 3066.” At the hearing, the franchisor has the burden of establishing that good cause exists to terminate the franchise. (§ 3066(b).)

In determining whether good cause exists, the Board “shall take into consideration the existing circumstances, including, but not limited to, all of the following:

- (a) Amount of business transacted by the franchisee, as compared to the business available to the franchisee.
- (b) Investment necessarily made and obligations incurred by the franchisee to perform its part of the franchise.
- (c) Permanency of the investment.
- (d) Whether it is injurious or beneficial to the public welfare for the franchise to be modified or replaced or the business of the franchisee disrupted.
- (e) Whether the franchisee has adequate motor vehicle sales and service facilities, equipment, vehicle parts, and qualified service personnel to reasonably provide for the needs of the consumers for the motor vehicles handled by the franchisee and has been and is rendering adequate services to the public.
- (f) Whether the franchisee fails to fulfill the warranty obligations of the franchisor to be performed by the franchisee.
- (g) Extent of franchisee's failure to comply with the terms of the franchise.”

(§ 3061.)

Another statute relevant to the Board’s decision is Vehicle Code section 11713.13(g)(1)(A), which provides:

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ERM: None
Deputy Sheriff: None

It is unlawful and a violation of this code for any manufacturer, manufacturer branch, distributor, or distributor branch licensed under this code to do, directly or indirectly through an affiliate, any of the following:

...[¶]

(g)(1) Establish or maintain a performance standard, sales objective, or program for measuring a dealer's sales, service, or customer service performance that may materially affect the dealer, including, but not limited to, the dealer's right to payment under any incentive or reimbursement program or establishment of working capital requirements, unless both of the following requirements are satisfied:

(A) The performance standard, sales objective, or program for measuring dealership sales, service, or customer service performance is reasonable in light of all existing circumstances, including, but not limited to, the following:

- (i) Demographics in the dealer's area of responsibility.
- (ii) Geographical and market characteristics in the dealer's area of responsibility.
- (iii) The availability and allocation of vehicles and parts inventory.
- (iv) Local and statewide economic circumstances.
- (v) Historical sales, service, and customer service performance of the line-make within the dealer's area of responsibility, including vehicle brand preferences of consumers in the dealer's area of responsibility. (See AR 1416-19.)

Section 11713.13(g)(2) provides: "In any proceeding in which the reasonableness of a performance standard, sales objective, or program for measuring dealership sales, service, or customer service performance is an issue, the manufacturer, manufacturer branch, distributor, distributor branch, or affiliate shall have the burden of proof."

Dealer Agreement

Folsom Chevrolet and GM executed a Chevrolet Dealer Sales and Service Agreement (herein "Dealer Agreement.") (AR 1358.) 2 Relevant provisions of the Dealer Agreement include the following:

4.2 Area of Primary Responsibility

Dealer is responsible for effectively selling, servicing and otherwise representing General Motors Products in the area designated in a Notice of Area of Primary Responsibility. The Area of

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ERM: None
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Primary Responsibility is used by General Motors in assessing performance of dealers and the dealer network.....

5.1. Responsibility to Promote and Sell

5.1.1 Dealer agrees to effectively, ethically and lawfully sell and promote the purchase, lease and use of Products by consumers located in its Area of Primary Responsibility....

[¶¶]

5.1.4 It is General Motors policy not to sell or allocate new Motor Vehicles to dealers for resale to persons or parties (or their agents) engaged in the business of reselling, brokering ... or wholesaling Motor Vehicles.... Therefore, unless otherwise authorized in writing by General Motors, Dealer agrees that this Agreement authorizes Dealer to purchase Motor Vehicles only for resale to customers for personal use or primary business use other than resale....

....[¶¶]

ARTICLE 9. REVIEW OF DEALER'S SALES PERFORMANCE

General Motors willingness to enter into this Agreement is based in part on Dealer's commitment to effectively sell and promote the purchase, lease and use of Products in Dealer's Area of Primary Responsibility. The success of General Motors and Dealer depends to a substantial degree on Dealer taking advantage of available sales opportunities.

Given this Dealer commitment, General Motors will provide Dealer with a written report at least annually pursuant to the procedures then in effect evaluating Dealer's sales performance. The report will compare Dealer's retail sales to retail sales opportunities by segment in Dealer's Area of Primary Responsibility or Area of Geographical Sales and Service Advantage, whichever is applicable. General Motors will provide a written explanation of the sales review process to Dealer. Satisfactory performance of Dealer's sales obligations under Article 5.1 requires Dealer to achieve a Retail Sales Index equal or greater than 100. If Dealer's Retail Sales Index is less than 100, Dealer's sales performance will be rated as provided in the General Motors Sales Evaluation process. General Motors expects Dealer to pursue available sales opportunities exceeding this standard. Additionally, General Motors expectations of its sales and registration performance for a Line-Make in a particular area may exceed this standard for individual dealer compliance.

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Deputy Sheriff: None

In addition to the Retail Sales Index, General Motors will consider any other relevant factors in deciding whether to proceed under the provisions of Article 13.2 [¶¶]

13.2 Failure of Performance by Dealer

If General Motors determines that Dealer's Premises are not acceptable, or that Dealer has failed to adequately perform its sales or service responsibilities, including those responsibilities relating to customer satisfaction and training, General Motors will review such failure with Dealer.

.... General Motors will notify Dealer in writing of the nature of Dealer's failure and of the period of time (which shall not be less than six months) during which Dealer will have the opportunity to correct the failure.

If Dealer does correct the failure by the expiration of the period, General Motors will so advise the Dealer in writing. If, however, Dealer remains in material breach of its obligations at the expiration of the period, General Motors may terminate this Agreement by giving Dealer 90 days advance written notice.

(See AR 1358-1360; AR 2734-2806.)

Notice of Breach, and Notice of Termination

In May 2015, GM delivered a letter to Folsom Chevrolet's Dealer Operator, Marshal Crossan, informing him that the dealership was in breach of its obligations under the Dealer Agreement. (See AR 2911-13 ("Notice of Breach").) The Notice of Breach provided a six-month period for Folsom Chevrolet to cure the breaches. (Ibid.)

On November 3, 2016, GM sent Folsom Chevrolet a Notice of Termination for its Chevrolet franchise. GM found deficiencies in Folsom Chevrolet's sales performance based on Folsom Chevrolet's Retail Sales Index (RSI) scores. GM also found deficiencies with respect to customer satisfaction. (AR 2954-56; 1397.)

Administrative Proceedings and Decision

Folsom Chevrolet filed a termination protest pursuant to Vehicle Code sections 3060 and 3066. A merits hearing was held from January 29 to February 9, 2018. GM had the burden to establish good cause. (Veh. Code § 3066(b).) On July 27, 2018, the ALJ issued a Proposed Decision

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sustaining Folsom Chevrolet's protest. On August 13, 2018, the Board adopted the Proposed Decision as the Board's Decision. (AR 1346-1438.) Board made detailed findings under section 3061 in support of its determination that GM had not shown good cause to terminate Folsom Chevrolet's franchise. Among other findings, Board found that GM's use of RSI as a performance metric was unreasonable both generally and as applied to this case.

Writ Proceedings

On September 27, 2018, GM filed its petition for writ of administrative mandate. On November 27, 2018, Folsom Chevrolet filed an answer.

On January 27, 2020, GM filed its opening brief in support of the petition. The court has received Board's opposition, Folsom Chevrolet's opposition, GM's reply, the administrative record, and the joint appendix.

Standard of Review

The writ petition is brought pursuant to CCP section 1094.5. The pertinent issues are whether the respondent has proceeded without jurisdiction, whether there was a fair trial, and whether there was a prejudicial abuse of discretion. An abuse of discretion is established if the agency has not proceeded in the manner required by law, the decision is not supported by the findings, or the findings are not supported by the evidence. (CCP § 1094.5(b).)

The substantial evidence standard of review applies to Board's decision on a franchise termination protest. (Kawasaki Motors Corp. v. Superior Court (2000) 85 Cal.App.4th 200, 203.) Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion (California Youth Authority v. State Personnel Board (2002) 104 Cal. App. 4th 575, 584-85), or evidence of ponderable legal significance which is reasonable in nature, credible and of solid value. (Mohilef v. Janovici (1996) 51 Cal. App. 4th 267, 305 n. 28.) Accordingly, "[i]t is for the [agency] to weigh the preponderance of conflicting evidence, as [the court] may reverse its decision only if, based on the evidence before it, a reasonable person could not have reached the conclusion reached by it." (McAllister v. California Coastal Com. (2008) 169 Cal.App.4th 912, 921; Sierra Club v. California Coastal Com. (1993) 12 Cal.App.4th 602, 610.)

On questions of law arising in mandate proceedings, the court exercises its independent judgment. (Christensen v. Lightbourne (2017) 15 Cal.App.5th 1239, 1251.) "In the context of

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review for abuse of discretion, an agency's use of an erroneous legal standard constitutes a failure to proceed in a manner required by law." (City of Marina v. Bd. of Trs. of the Cal. State Univ. (2006) 39 Cal.4th 341, 355.)

The petitioner seeking administrative mandamus has the burden of proof and must cite to the administrative record to support its contentions. (See Bixby v. Pierno (1971) 4 Cal. 3d 130, 143; Steele v. Los Angeles County Civil Service Commission, (1958) 166 Cal. App. 2d 129, 137; see also Alford v. Pierno (1972) 27 Cal.App.3d 682, 691 ["[T]he burden of proof falls upon the party attacking the administrative decision to demonstrate wherein the proceedings were unfair, in excess of jurisdiction or showed prejudicial abuse of discretion."].)

"In reviewing the agency's decision, the trial court examines the whole record and considers all relevant evidence, including evidence that detracts from the decision." (McAllister v. California Coastal Com. (2008) 169 Cal.App.4th 912, 921.) However, "a trial court must afford a strong presumption of correctness concerning the administrative findings." (See Fukuda v. City of Angels (1999) 20 Cal. 4th 805, 817.) When an appellant challenges "the sufficiency of the evidence, all material evidence on the point must be set forth and not merely [its] own evidence." (Toigo v. Town of Ross (1998) 70 Cal.App.4th 309, 317.)

Analysis

Board's Jurisdiction to Determine that the Use of RSI by GM Violates Vehicle Code Section 11713.13(g)(1)(A)

In a section titled "Existing Circumstances" of its Decision, Board noted that "[t]he list of good cause factors set forth in Section 3061 for termination of a franchise is not exclusive" and that "it is the existing circumstances that must be considered." (AR 1416, ¶ 217.) Board then analyzed GM's use of Retail Sales Index (RSI) as a performance metric and concluded that "[t]he use of RSI generally by General Motors, and as applied in this case, violates Section 11713.13(g)(1)(A)." (AR 1418-19, ¶ 223 [emphasis added].)

GM challenges Board's jurisdiction to adjudicate, in a termination protest, alleged violations of section 11713.13(g)(1)(A) both generally and as applied to this case. (Opening Brief (OB) 8-10.)

Rules of Statutory Construction

GM raises questions of statutory construction. "The rules governing statutory construction are

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well settled. We begin with the fundamental premise that the objective of statutory interpretation is to ascertain and effectuate legislative intent. [Citations.] To determine legislative intent, we turn first to the words of the statute, giving them their usual and ordinary meaning. [Citations.] When the language of a statute is clear, we need go no further. However, when the language is susceptible of more than one reasonable interpretation, we look to a variety of extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part.” (Nolan v. City of Anaheim (2004) 33 Cal.4th 335, 340.)

“A statute must be construed 'in the context of the entire statutory system of which it is a part, in order to achieve harmony among the parts.’” (People v. Hall (1991) 1 Cal. 4th 266, 272.) The court “may neither insert language which has been omitted nor ignore language which has been inserted.” (See People v. National Auto. and Cas. Ins. Co. (2002) 98 Cal.App.4th 277, 282.)

Board Acted Within its Jurisdiction by Adjudicating Folsom Chevrolet’s Termination Protest, To Which the Reasonableness of RSI was Highly Relevant

“It is fundamental that an administrative agency has only such power as has been conferred upon it by the constitution or by statute and an act in excess of the power conferred upon the agency is void.” (BMW of N. Am., Inc. v. New Motor Vehicle Bd. (1984) 162 Cal. App. 3d 980, 995.)

“The Board’s jurisdiction to preside over claims is limited by its statutory authorization.” (Mazda Motor of Am., Inc. v. New Motor Vehicle Bd. (2003) 110 Cal.App.4th 1451, 1457.) Vehicle Code Section 3050 grants and defines the Board’s jurisdiction. 3 Section 3050(d) states, in relevant part, that the Board may “hear and decide, within the limitations and in accordance with the procedure provided, a protest presented by a franchisee pursuant to Section 3060” Folsom Chevrolet’s termination protest was filed pursuant to Section 3060. (AR 153.) Board’s jurisdiction over the protest arose under Section 3050(d).

The hearing for a termination protest under Section 3060 is governed by Section 3066 of the Vehicle Code. Section 3066 does not expressly refer to section 11713.13 as a matter for adjudication in a termination protest. 4

The Board has express jurisdictional authority with respect to Section 11713.13 under different statutes. Vehicle Code Section 3050(c) states that the Board may:

(b) Consider any matter concerning the activities or practices of any person applying for or

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July 30, 2020

1:30 PM

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ERM: None
Deputy Sheriff: None

holding a license as a new motor vehicle dealer, manufacturer, manufacturer branch, distributor, distributor branch, or representative pursuant to Chapter 4 (commencing with Section 11700) of Division 5 submitted by any person.... After that consideration, the board may do any one or any combination of the following:

- (1) Direct the department to conduct investigation of matters that the board deems reasonable, and make a written report on the results of the investigation to the board within the time specified by the board.
- (2)(A) Undertake to mediate, arbitrate, or otherwise resolve any honest difference of opinion or viewpoint existing between any member of the public and any new motor vehicle dealer [or] manufacturer ...
- (3) Order the department to exercise any and all authority or power that the department may have with respect to the issuance, renewal, refusal to renew, suspension, or revocation of the license of any new motor vehicle dealer [or] manufacturer ... as that license is required under Chapter 4 (commencing with Section 11700) of Division 5. (emphasis added.)

Thus, with respect to Section 11713.13(g), the Board has authority under section 3050(c) to (1) order the Department of Motor Vehicles to conduct an investigation and issue a written report; (2) resolve disputes between manufacturers or dealers and members of the public—but not between dealers and manufacturers; or (3) order the Department to take licensing actions against manufacturers, dealers, or other DMV licensees. (See generally *Mazda Motor*, supra, 110 Cal. App. 4th at 1460-61.)

Here, Folsom Chevrolet pleaded a termination protest under section 3060. (See AR 153.) Folsom Chevrolet did not seek investigation or license discipline against GM under section 3050(c). As stated by Board: “[S]ection 3050(c) is inapplicable because Folsom Chevrolet does not seek an investigation or license-related order from the Board referring the matter to the Department.” (Board Oppo. 11.) In its Decision, despite the broad finding under section 11713.13(g), Board did not purport to take action under section 3050(c), including against GM’s license. (See AR 1420; see Reply 11:8-10.) The Board did, however, make an express finding that GM’s use of RSI, generally and in this case, violates 11713.13(g). (AR1418-19, para 223). Board’s findings under section 11713.13(g) were made as part of Board’s analysis of the “existing circumstances” relevant to the Folsom Chevrolet franchise.

As set forth above, section 3066 requires the franchisor (GM) to prove that good cause exists to terminate the franchise. (§ 3066(b).) In determining whether good cause exists, the Board “shall take into consideration the existing circumstances, including, but not limited to, all of the

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following: (a) Amount of business transacted by the franchisee, as compared to the business available to the franchisee.... [and six other factors]." (§ 3061.)

The reasonableness of RSI as a performance metric was highly relevant to the first "good cause" factor under section 3061(a), as well as to the "existing circumstances." GM cited Folsom Chevrolet's RSI scores both in the Notice of Breach and in the Notice of Termination in alleging breach of the Dealer Agreement. (AR 2911-13, 2954-55.) In the administrative proceedings, GM offered into evidence Folsom's RSI scores and related "sales expectations" as metrics to support its termination decision. (See e.g. AR 879, 2103 (28-29), 2595-2599, 3182, fn. 2.) The importance of the RSI metric to GM's effort to meet its burden is evident from, inter alia, GM's post-hearing brief, which asserts that Folsom received a "failing grade" with RSI (AR 880); and also from the report and rebuttal report of GM's expert, Sharif Farhat. (AR 3175-3260, 3454-3542.)

It was reasonable for the Board to analyze RSI as a performance metric using standards already created by the Legislature in section 11713.13(g)(1)(A). Even if Board did not have jurisdiction in a termination protest to impose discipline on GM for alleged "unlawful acts" under section 11713.13(g)(1)(A), that does not mean that Board was precluded from using section 11713.13(g)(1)(A) in its "good cause" analysis.

GM cites no statutory language to the contrary. In fact, section 11713.13(g)(2) provides: "In any proceeding in which the reasonableness of a performance standard, sales objective, or program for measuring dealership sales, service, or customer service performance is an issue, the manufacturer, manufacturer branch, distributor, distributor branch, or affiliate shall have the burden of proof." This broad language suggests that the Legislature intended for the standards in section 11713.13(g)(1) to apply in "any proceeding" in which a performance metric is at issue, including a termination protest. Moreover, the factors set forth in section 11713.13(g)(1)(A) for assessing a performance standard – e.g. "demographics in the dealer's area of responsibility; geographical and market characteristics in the dealer's area of responsibility; the availability and allocation of vehicles and parts inventory" – are all fact issues that would arise in a dealer termination protest. 5

The cases cited by GM do not support the contention that Board lacked jurisdiction to consider standards set forth in section 11713.13(g)(1)(A) in a termination protest. These cases raise fundamental questions about Board's jurisdiction over certain disputes. (See e.g. Mazda Motor of Am., Inc. v. New Motor Vehicle Bd. (2003) 110 Cal.App.4th 1451, 1459-60 [no jurisdiction over dispute with distributor over sale of dealership to third party]; Hardin Oldsmobile v. New

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Motor Vehicle Bd. (1997) 52 Cal.App.4th 585, 598 [Board lacked jurisdiction over statutory and common law claims which sought money damages and alleged serious misconduct by manufacturer].) Here, Board had jurisdiction over the termination protest filed by Folsom Chevrolet, and Board's jurisdiction extended to a determination of the reasonableness of the RSI performance metric relied upon by GM to prove its case.

Based on the foregoing, GM does not show that Board lacked jurisdiction to adjudicate, as part of its "good cause" findings under section 3061, the reasonableness of the RSI performance metric relied upon by GM to prove its case. GM also does not show that Board lacked jurisdiction to use the standards set forth in section 11713.13(g)(1)(A). As discussed further below, it does not appear, however, that Board had jurisdiction to find that GM violated 11713.13(g)(1)(A) generally, or in this specific case.

Board Did Not Prejudicially Abuse Its Discretion in Using Standards Set Forth in Section 11713.13(g)(1)(A)

GM seems to contend that Board abused its discretion in using the standards in section 11713.13(g)(1)(A) in a termination protest. "A writ of administrative mandamus will not be issued unless the court is persuaded that an abuse of discretion was prejudicial. [Citation.] In other words, the reviewing court will deny the writ, despite abuse of discretion, if the agency's error did not prejudicially affect the petitioner's substantial rights.'" (Thornbrough v. Western Placer Unified School Dist. (2013) 223 Cal.App.4th 169, 200.)

Board does not show an abuse of discretion with respect to Board's use of section 11713.13(g)(1)(A) standards as applied to this case. As discussed above, the RSI performance metric was critical to GM's case against Folsom Chevrolet. Significantly, GM does not explain what different standard Board should have used to adjudicate the reasonableness of the RSI performance standard as applied to Folsom Chevrolet. By failing to address that issue, GM does not show an abuse of discretion. Moreover, GM makes no argument of prejudice from Board's use of the standards in section 11713.13(g)(1)(A), as compared to some other standard Board may have selected.

Board's Finding of Violation of Section 11713.13(g)(1)(A) Both Generally and in This Case

GM also contends that Board abused its discretion when it found that GM's use of RSI in this case and "generally" violates section 11713.13(g)(1)(A). To adjudicate the termination protest, there appears to have been no reason – either from its statutory mandate or practically – for

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Board to adjudicate as a general matter whether a manufacturer's performance standard violates section 11713.13(g)(1). Section 3061 plainly refers to specific "existing circumstances" of the franchisee. Moreover, in this case, Board found evidence that RSI was unreasonable "as applied" to Folsom Chevrolet. Thus, Board's finding of "violation" both here and in general finding appears to have been unnecessary.

GM makes no argument that Board's general finding under section 11713.13(g) was prejudicial in the context of Folsom Chevrolet's termination protest action under section 3060. Board also made an "as applied" finding under section 11713.13(g), and there is no reason to believe Board would have reached a different conclusion on the termination protest if its "general" finding under section 11713.13(g) was removed. As noted, section 3061 plainly refers to specific "existing circumstances" of the franchisee.

Other than asserting that Board exceeded its jurisdiction in making a "general" finding under section 11713.13(g), GM does not explain in the moving papers how this error was prejudicial as to the result of this case. (OB 10.) In reply, GM contends that the Board's Decision "has been repeatedly cited across the country." (Reply 11.) GM relies on a news article and a factual representation in its reply brief. GM does not move to augment the record (see CCP § 1094.5(e)), and the statement in the brief is unverified. GM also cites to one recent federal district court case, which cited the Decision and a prior New York appellate decision (Beck) as cases bearing on the viability of RSI, discussing them in detail. (GPI-AL, Inc. v. Nissan N. Am., Inc. (S.D. Ala. Oct. 17, 2019) 2019 WL 5269100, at *8.)

The court asks the parties to discuss further at the hearing what remedy, if any, would be appropriate to address that part of the Board's decision that finds GM to have violated 11713.13 in this case and generally.

Did Board Correctly Apply the Legal Standard Set Forth in Section 11713.13(g)(1)(A)?

GM contends that Board misapplied the language of section 11713.13(g)(1)(A) because Board "did not determine whether RSI was 'reasonable in light of'" the statutory factors. (OB 11-12.)

Under section 11713.13(g)(1)(A), the Board must determine whether a "performance standard, sales objective, or program for measuring dealership sales ... is reasonable in light of all existing circumstances, including, but not limited to, the following: ...

- (i) Demographics in the dealer's area of responsibility.
- (ii) Geographical and market characteristics in the dealer's area of responsibility.

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(iii) The availability and allocation of vehicles and parts inventory.
(iv) Local and statewide economic circumstances.
(v) Historical sales, service, and customer service performance of the line-make within the dealer's area of responsibility, including vehicle brand preferences of consumers in the dealer's area of responsibility.” (See AR 1416-19 [emphasis added].)

GM contends that Board improperly “determined that the RSI calculation itself did not ‘account for’ or ‘consider’ those factors—transforming the standard from one where the manufacturer or finder of fact considers the factors, to one where the metric itself must do so.” (OB 11-12.) GM further argues that Board misinterpreted the statute because “[t]he Board’s standard ... makes RSI per se unreasonable unless it somehow directly and expressly incorporates all of the ‘existing circumstances’ into the calculation—literally an impossibility.” (Ibid.) GM asserts that some of the enumerated factors, such as “market characteristics in the dealer’s area of responsibility,” “are so amorphous or fact-specific that there is no way to reduce them to a formula.” (Ibid.)

The court agrees that, as written, the Board decision at times appears to require that a manufacturer specifically incorporate the section 11713.13 factors in formulating its RSI, instead of using those factors as a basis to evaluate the application of the RSI to a specific situation. (e.g. AR 1417, para 220 [“The RSI does not consider the following: [[general list of factors]”]; AR 1418 para 222 “A metric based on a statewide average standard that fails to take into account local conditions is not an appropriate metric and not a reasonable performance indicator.”) However, when viewed as a whole, the decision demonstrates that the Board did not misinterpret or misunderstand the legal standard set forth in section 11713.13(g)(1(A).

The Board did not simply find that RSI was unreasonable because it did not “account for” each factor. Rather, the Board made extensive findings particular to application of RSI to Folsom Chevrolet. The Board weighed the evidence and made a factual determination regarding the reasonableness of RSI, as applied to Folsom Chevrolet, based on the “existing circumstances.” (See, e.g., AR 1418-1419, para 221 - 223 [detailing specific ways in which application of the RSI to Folsom was unfair and prevented Folsom from achieving 100 RSI].)

The plain language of section 11713.13(g)(1)(A) is clear. The Board must consider whether the performance standard “is reasonable in light of all existing circumstances,” including, but not limited to, the enumerated factors. By not limiting Board’s consideration to the enumerated factors, and by using the phrase “all existing circumstances,” the Legislature granted the Board substantial discretion in its determination of whether a performance standard is reasonable. 6

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GM's argument of impossibility is not persuasive. Board is not mandated by the statute to give any specific weight to each of the enumerated factors. The statute requires Board to weigh the evidence and make a factual determination based on the "existing circumstances." Thus, a manufacturer can argue, and Board can determine, that certain factors should be given less weight or disregarded under the existing circumstances of the case. If the manufacturer believes that the Board's weighing of the evidence is not supported by the record, the manufacturer has a remedy in CCP section 1094.5.

FOOTNOTES:

- 1- Unless otherwise stated, all statutory references are to the Vehicle Code.
- 2- For facts not in dispute, the court, like the parties, may cite only to the administrative decision.
- 3- Section 3050 was amended effective Jan. 1, 2020. The amendment changed the statutory lettering, as Section 3050(c) became Section 3050(b), and Section 3050(d) became Section 3050(c). (Ibid.) The Decision was issued pursuant to the old lettering scheme. To remain consistent with the parties' briefs, the court will use the old (pre-2020) lettering. (See OB 8, fn. 3; Board Oppo 13, fn. 3.)
- 4- Section 11713.13, entitled "Additional Unlawful Acts," is found in an article of the Vehicle Code concerning the issuance of licenses and certificates to manufacturers, transporters, and dealers.
- 5- Board contends that "newly enacted section 3065.3 is also relevant, as it provides the Board with jurisdiction over protests based on section 11713.13(g) and was intended to permit such protests in advance of termination." (Board Oppo. 9.) Section 3065.3 postdates the administrative proceedings and does not apply to this case. Contrary to GM's assertion, the Legislature's decision to enact section 3065.3 does not show that Board lacked authority or discretion to use the section 11713.13(g) standards in a "good cause" analysis under section 3061. (Reply 7-9.) The court does not rely on the brief excerpt from the legislative history of section 3065.3 cited by Board. (Board Oppo. 12.)
- 6- Board cites to certain legislative history to support its interpretation of the statute. (Board Oppo. 15:17-19.) However, Board has not requested judicial notice of nor submitted a copy of the cited materials, as required by rule. (Cal. Rules of Court, Rule 3.1306(c).) In any event, the court need not consider legislative history because the plain language of section 11713.13(g)(1)(A) is clear.

The hearing on the petition for writ of mandate is continued to October 9, 2020, at 10:00 a.m. in Department 82.

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Counsel are to supply their own reporter.

Notice is waived.

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December 18, 2020

2:09 PM

Judge: Honorable Mary H. Strobel
Judicial Assistant: N. DiGiambattista
Courtroom Assistant: None

CSR: None
ERM: None
Deputy Sheriff: None

APPEARANCES:

For Plaintiff(s): No Appearances

For Defendant(s): No Appearances

**NATURE OF PROCEEDINGS: HEARING ON PETITION FOR WRIT OF MANDATE
RULING ON SUBMITTED MATTER**

The court having taken the above matter under submission on October 23, 2020, now makes its ruling as follows:

Petitioner General Motors, LLC ("Petitioner" or "GM") petitions for a writ of administrative mandate directing Respondent California New Motor Vehicle Board ("Board") "to set aside and vacate its Decision dated August 13, 2018, in Protest No. PR-2483-16, and to adopt and issue a new and different decision overruling the Protest." Board and Real Party in Interest Folsom Chevrolet, Inc. ("Folsom Chevrolet") oppose the petition.

Procedural History

On July 30, 2020 the court heard argument on certain issues involved in the petition; the jurisdiction of the Board, and whether the Board misapplied or misconstrued the language of Section 11713.13 ("Phase I"). After considering the briefs, the record, and argument of counsel, the court found that it was reasonable for the Board to analyze RSI as a performance metric using the section 11713.13(g)(1)(A) standards as part of its analysis of "good cause" to terminate the Folsom franchise. The court found the Board did not incorrectly apply the legal standard set forth in Section 11713(g)(1)(a) when analyzing those factors as they pertained to termination of the Folsom franchise. However, the court found that Board did not have jurisdiction to find that GM violated section 11713.13(g)(1)(A) generally, or in this specific case.

On October 24, 2020 the court heard argument on the remaining issues, after which it took the matter under submission. The court now issues its final ruling.

Standard of Review

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The writ petition is brought pursuant to CCP section 1094.5. The pertinent issues are whether the respondent has proceeded without jurisdiction, whether there was a fair trial, and whether there was a prejudicial abuse of discretion. An abuse of discretion is established if the agency has not proceeded in the manner required by law, the decision is not supported by the findings, or the findings are not supported by the evidence. (CCP § 1094.5(b).)

The substantial evidence standard of review applies to Board's decision on a franchise termination protest. (Kawasaki Motors Corp. v. Superior Court (2000) 85 Cal.App.4th 200, 203.) Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion (California Youth Authority v. State Personnel Board (2002) 104 Cal. App. 4th 575, 584-85), or evidence of ponderable legal significance which is reasonable in nature, credible and of solid value. (Mohilef v. Janovici (1996) 51 Cal. App. 4th 267, 305 n. 28.) Accordingly, "[i]t is for the [agency] to weigh the preponderance of conflicting evidence, as [the court] may reverse its decision only if, based on the evidence before it, a reasonable person could not have reached the conclusion reached by it." (McAllister v. California Coastal Com. (2008) 169 Cal.App.4th 912, 921; Sierra Club v. California Coastal Com. (1993) 12 Cal.App.4th 602, 610.)

On questions of law arising in mandate proceedings, the court exercises its independent judgment. (Christensen v. Lightbourne (2017) 15 Cal.App.5th 1239, 1251.) "In the context of review for abuse of discretion, an agency's use of an erroneous legal standard constitutes a failure to proceed in a manner required by law." (City of Marina v. Bd. of Trs. of the Cal. State Univ. (2006) 39 Cal.4th 341, 355.)

The petitioner seeking administrative mandamus has the burden of proof and must cite to the administrative record to support its contentions. (See Bixby v. Pierno (1971) 4 Cal. 3d 130, 143; Steele v. Los Angeles County Civil Service Commission, (1958) 166 Cal. App. 2d 129, 137; see also Alford v. Pierno (1972) 27 Cal.App.3d 682, 691 ["[T]he burden of proof falls upon the party attacking the administrative decision to demonstrate wherein the proceedings were unfair, in excess of jurisdiction or showed prejudicial abuse of discretion."].)

"In reviewing the agency's decision, the trial court examines the whole record and considers all relevant evidence, including evidence that detracts from the decision." (McAllister v. California Coastal Com. (2008) 169 Cal.App.4th 912, 921.) However, "a trial court must afford a strong presumption of correctness concerning the administrative findings." (See Fukuda v. City of Angels (1999) 20 Cal. 4th 805, 817.) When an appellant challenges "the sufficiency of the

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evidence, all material evidence on the point must be set forth and not merely [its] own evidence.” (Toigo v. Town of Ross (1998) 70 Cal.App.4th 309, 317.)

Analysis

Findings Not Challenged by GM

Board’s detailed decision includes approximately 189 findings of fact that span 56 pages. (AR 1363-1419.) Board’s findings address, in detail, the good cause factors set forth in section 3061. In its writ briefs, GM does not specifically challenge the vast majority of the Board’s findings. Rather, GM’s writ briefs focus predominately on a subset of Board’s findings regarding the reasonableness of the RSI performance standard.

As noted, GM bears the burden of proof under CCP section 1094.5. (Alford v. Pierno (1972) 27 Cal.App.3d 682, 691.) A reviewing court “will not act as counsel for either party ... and will not assume the task of initiating and prosecuting a search of the record for any purpose of discovering errors not pointed out in the briefs.” (Fox v. Erickson (1950) 99 Cal.App.2d 740, 742.) The court is not a “tacit advocate” for the parties. (Quantum Cooking Concepts, Inc. v. LV Associates, Inc. (2011) 197 Cal.App.4th 927, 934; see also CRC Rule 3.1113(a); Nelson v. Avondale HOA (2009) 172 Cal.App.4th 857, 862-863 [argument waived if not supported by reasoned argument and citation to authorities]; Inyo Citizens for Better Planning v. Inyo County Board of Supervisors (2009) 180 Cal.App.4th 1, 14 [court does not serve as “backup” counsel].)

GM has failed to show a prejudicial abuse of discretion for any fact findings not specifically challenged in its writ briefs. The court concludes that those unchallenged findings are supported by substantial evidence.

Does Substantial Evidence Support Board’s Relevant Findings about GM’s Use of RSI?

GM contends that, for various reasons, Board’s findings regarding RSI were not supported by substantial evidence. (OB 13-24.)

Additional Factual Background – RSI

The administrative decision succinctly describes three terms – Area of Primary Responsibility (APR); Area of Geographic Sales and Service Advantage (AGSSA); and Retail Sales Index (RSI) – which are important to this writ petition. The following findings are not disputed:

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“In the regular course of business, General Motors assigns a geographic area to each dealer, whether as an APR [Area of Primary Responsibility] or an AGSSA [Area of Geographic Sales and Service Advantage] or both with periodic updates.” (AR 1369, ¶ 63.) “APRs and AGSSAs consist of a certain number of assigned census tracts, as those tracts are defined by the U.S. Census Bureau. The collection of census tracts assigned to a dealer is principally determined by the geographical proximity of the dealership location and the population center of each tract.” (Ibid.) “AGSSAs are based primarily on proximity of contiguous census tracts to the nearest dealership” (AR 1370 ¶ 65.)

“The Sacramento APR is a large geographic area shared by Folsom Chevrolet with four other Chevrolet dealers. These are: 1) John L. Sullivan Chevrolet (Roseville), 2) Performance Chevrolet (Sacramento), 3) Kuni Chevrolet (Sacramento) and, 4) Maita Chevrolet (Elk Grove).... The AGSSA assigned to Folsom Chevrolet, which is part of the APR, is specific to Folsom Chevrolet.” (AR 1370, ¶ 64.)

“Retail Sales Index or some variant of it has been used as a metric throughout the automotive industry.... General Motors' RSI metric is the ratio of dealer retail sales to expected retail dealer sales.” (AR 1376, ¶ 92.) “RSI compares the number of new retail vehicles sold by Folsom Chevrolet against the number that it was expected to sell as formulated by General Motors based on Chevrolet's statewide market penetration, and the number of new vehicles actually registered in Folsom Chevrolet's AGSSA by segments.” (AR 1377, ¶ 94.) “A RSI of 100 indicates a dealer achieved its sales expectations, i.e., state average performance.” (AR 1377, ¶ 93.)

“To determine RSI, General Motors first looks at new vehicle registrations, grouped by segments across California.... General Motors bases its calculations for RSI on California market share rather than national share.” (Id. ¶ 95.)

“As an example, General Motors looks at the vehicle segment ‘Large Pickup -Crew Cab’ total registrations for all manufacturers in an AGSSA. It does not matter where in the AGSSA the registration of the vehicle is located. Next, General Motors looks at the state average market share for Chevrolet for that segment. Then General Motors multiplies the registrations in the AGSSA by Chevrolet's California market share for that segment, for the number of sales to equal state average, i.e., expected sales, or in other words the product of that calculation is equal to the number of Chevrolet vehicles that would be registered in that AGSSA if General Motors' market share were at its state average level.” (Id. ¶ 96.)

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Substantial evidence supports these general findings about RSI, including the reports of GM's expert, Sharif Farhat (AR 3175-3260, 3454-3542) and Folsom Chevrolet's expert, Edward Stockton (AR 2559-2699, 2701-2733), as well as testimony from the hearing (see e.g. AR 2099-2100 [Stockton], 1508 [Michael Stinson].)

GM's Contention that RSI is Reasonable in Light of All Existing Circumstances

GM asserts various reasons that it believes that RSI is a reasonable performance metric. GM cites to evidence that RSI is "fundamental" to the auto industry, and that GM has used RSI since the late 1970s. (OB 13, citing AR 1376-77.) GM cites evidence that RSI is based on actual vehicle registration data, not projections or samples, and that RSI takes into account economic conditions, population changes, and changes in market share. (OB 13 citing AR 1900-01, 1910, 1925, 1651-52, 1744-45.) GM asserts that RSI does "a remarkable job at accounting for multiple potential causes of poor sales performance," although it is not "perfect." (OB 14.) In this part of its brief, GM does not identify a specific Board fact finding that GM contends is not supported by substantial evidence, which is the court's inquiry under CCP section 1094.5.

Evidence Regarding Variation in Chevrolet Market Share: Paragraphs 99 and 100 of Board's Decision

Board's determination that RSI is unreasonable as applied to Folsom Chevrolet was based, in part, on evidence that Folsom Chevrolet is disadvantaged by RSI due to its location. (AR 1378 ¶ 99.) GM challenges related fact findings made by Board in paragraphs 99 and 100 of the Decision. (See OB 15-17.)

Paragraph 99. In paragraph 99, Board cited evidence that "[t]he average RSI for dealers in the state of California (less Folsom Chevrolet) is 132.6, but the average for Sacramento area dealers, excluding Folsom Chevrolet, is 97; a more than 35 -point differential...." (AR 1378, ¶ 99.)

GM contends that Board abused its discretion by relying on the "simple average" of 132 RSI to support its finding that acceptance of Chevrolet is not uniform throughout California. (OB 15.) GM cites testimony of Stockton, Folsom Chevrolet's expert, that "the dealer body produces something very close to 100 percent RSI on average," and "the real average RSI" is not "132 for any given dealer." (AR 2100-01.) Rather, the 132 average is skewed by several smaller dealers with very low sales expectations and very high RSIs. (Ibid.) Mr. Stockton continued: "in all the comparisons that look at the bars of other dealers, next to Folsom, the difference between 132.6 and the real average of California dealers that's going to be closer to and just above a hundred,

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that doesn't have anything to do with what we would expect from Folsom, a dealer in a larger market. That's just reflecting the skew." (Ibid.) Stockton testified that the simple average of 132 RSI is "inflated by ... close to 30 percent." (Ibid.)

GM's arguments related to paragraph 99 of the Decision ignore the basic finding made by the Board: "Acceptance of Chevrolet is not uniform throughout California." (AR 1378, ¶ 99.) Substantial evidence supports that finding. (See Ibid., citing AR 2565 ¶ 29, 1911 at 56, 3183 ¶ 25.) Board appears to have cited a chart showing the 132.6 RSI average from 2015 to show the dispersion in California of actual sales compared to expected sales as reflected in the RSI metric. (See AR 3209 [chart].) GM's cited testimony from Stockton, as well as this chart, support Board's finding that acceptance of Chevrolet is not uniform throughout California. Paragraph 99 of Board's decision is supported by substantial evidence.

Paragraph 100. In paragraph 100, Board made the following finding: "Chevrolet's performance in California is not at the same level as in the United States.... [T]he California counties that exceed the U.S. average are very close together or 'clustered.' Mr. Stockton presented two sets of maps, the first group attached hereto as Attachment E shows Chevrolet's market share by California county compared to the national average (registrations over/under U.S. average) and the second group attached hereto as Attachment F shows California's market share by California county (registrations over/under California average) for the years 2012 through 2016.... The first group of maps shows only a cluster of counties, generally in the Central Valley, outperform the Chevrolet national average. Folsom Chevrolet is in northern California.... This clustering shows that the variation in market share is 'systematic,' as opposed to being checkerboard across the state, which would mean that the variation in market share is random.... The second group of maps, counties that exceed the California average market share, also show clustering. This result indicates Chevrolet does not have 'consistent, cohesive appeal' across the State of California, and the variation in appeal is not random. This clustering includes generally the Central Valley, some of the central coast counties, the Inland Empire of California and a few northern California counties, but not those in the Sacramento APR. Therefore, the sales expectation for Chevrolet vehicles cannot be uniformly applied across the state.... The clustering cannot be explained by dealer performance either because if dealer performance was causing the variation, it would appear more random; there is no reason all of the strong Chevrolet dealers would decide to locate in the Central Valley, and all of the weak dealers would choose to locate in northern California...." (AR 1378-79, ¶ 100.)

The essential Board finding in paragraph 100 is that "Chevrolet does not have 'consistent, cohesive appeal' across the State of California, and the variation in appeal is not random." In

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support, Board cited the maps discussed in paragraph 100 (see AR 2595-2604), as well as testimony from expert Stockton about the maps. (See AR 2102-04.) Stockton testified, for instance, that “the more you see clustering [in the maps], the more that tells you that there are systematic differences in how the brand is perceived.” (AR 2103.) The maps and Stockton’s testimony about the maps are substantial evidence that supports Board’s findings in paragraph 100.

GM’s arguments to the contrary with respect to paragraph 100 are not persuasive. (OB 15-17.) GM contends: “These maps do not take into account the types of vehicles purchased in each location. Chevrolet has higher market penetration in pickup truck than in car segments (compare AR 3033 with 3035), so any area with a high level of pickup truck purchases—such as the agricultural counties in the Central Valley—will appear to have higher overall Chevrolet market share than areas with more car purchases.” (OB 16.) GM does not support this argument with citation to the record. GM’s cited pages (AR 3033, 3035) do not appear related to the maps discussed by Stockton. As argued by Folsom Chevrolet, the map titles suggest that the maps take into account segment data, i.e. the types of vehicles purchased. (See Folsom Chevrolet Oppo. 17; see e.g. AR 2603 [average is “Based on Chevrolet as a Percent of Competitive by Polk Segment”].) GM does not respond to this argument in reply. Nor does GM cite any expert testimony to rebut Stockton’s testimony about the maps. In any event, even if there was contrary evidence, Stockton’s testimony and the maps are substantial evidence that “Chevrolet does not have ‘consistent, cohesive appeal’ across the State of California, and the variation in appeal is not random.” (See *In re Marriage of Mix* (1975) 14 Cal.3d 604, 614 [the testimony of a single witness may constitute substantial evidence].)

In its discussion of paragraph 100, GM appears to challenge certain broader findings made by Board with respect to GM’s use of RSI in paragraph 220. (OB 16-17.) Board concluded that RSI “does not consider the following: demographics in the dealer’s area of responsibility; geographical and market characteristics in the dealer’s area of responsibility (market competitiveness); the availability and allocation of vehicles and parts inventory; local and statewide economic circumstances; or historical sales, service, and customer service performance of the line -make within the dealer’s area of responsibility, including vehicle brand preferences of consumers in the dealer’s area of responsibility.” (AR 1417-18, ¶ 220.) Board’s findings in paragraphs 99 and 100, about variation in brand appeal across California, support this broad finding. Additional evidence, discussed below, also supports paragraph 220.

Board’s findings in paragraphs 99 and 100 are supported by substantial evidence.

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Paragraph 223: Did Board Mistake Correlation for Causation?

GM contends that Board incorrectly found a causative effect from a regression analysis performed by expert Stockton. (See OB 17-19, discussing ¶¶ 101-103, 220, 223 of Board's Decision; see also Reply 14-15.)

In the writ papers, GM cites the following findings made by Board about Stockton's regression analysis. "To discern more closely whether the market variation that appears as the clustering of certain counties is based on a variable other than market segment, ... Mr. Stockton used regression analysis on a census tract by census tract basis, comparing for a select five -county area surrounding Folsom Chevrolet to those outside of that area. The regression analysis indicates a) the market share component of RSI fails to take into account meaningful differences in market areas, and b) that even after taking these differences into account, the Folsom area is statistically different in terms of its acceptance of the Chevrolet brand. The factors that correlate with Chevrolet's market share elsewhere in California are different than those in the five -county area.... Mr. Stockton concluded that General Motors is incorrectly attributing sales performance to failure by Folsom Chevrolet to variations within its control, when it is due to factors outside Folsom Chevrolet's control." (AR 1379-80, ¶ 101.)

"Controlling for the demographic variables of age, median household income, education level (25 years or older with at least a 4 -year degree), and population density and whether the dealership is in the five -county area versus the state as a whole, results in a reduction of Folsom Chevrolet's RSI requirement for 2016 by approximately 30 percent, from 1,324 expected sales to 940." (Id. ¶ 102.)

In support of these findings, Board cited Stockton's testimony and report. (AR 2104-05; AR 2565, ¶ 30; AR 2605-07.) In his regression analysis, Stockton compared Chevrolet registrations against demographic variables (such as average age and income) and determined that there were four demographic variables that were correlated with statistical significance for Chevrolet registrations in the state of California as a whole: Median Age, Median Household Income, % of Population with a Degree, and Population Density. (AR 2607; see AR 2104-05.) Stockton found that only two of these variables – age and % degree – were statistically significant within the "5 County Area" that encompasses Sacramento. (AR 2606, AR 2104-05, AR 2410-11.) Based on P-value results, Stockton testified that the regression analysis established it is infinitesimally unlikely that the variations by area for sales performance on the RSI metric discerned in the statistical analysis were random. (AR 2105 at 36:11-17; see also AR 2114.)

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Board's findings in paragraphs 101-102 of the Decision are supported by substantial evidence. In all material respects, Board accurately summarized Stockton's testimony and report. GM does not show otherwise with discussion of the record. (See OB 17-18.) GM does not dispute that Stockton's regression analysis obtained the results to which he testified. (AR 2104-05, 2606, 2114.)

GM challenges findings Board made about GM's use of RSI which were based, in part, on Stockton's regression analysis. (OB 17-19, discussing ¶¶ 220, 223 of Decision.) 1 Specifically, GM challenges the following Board finding in paragraph 223:

Accounting for brand bias by controlling for demographic variables of age, income education level, and population density, and whether the dealership is in the five -county area, results in a reduction of the RSI requirement for Folsom Chevrolet by approximately 30 percent. (RT Vol. VII, 34:25-35:8) A metric that fails to account for the brand bias that the Vehicle Code requires it to account for, and which results in a sales requirement inflated by 30 percent, is not reasonable in light of all circumstances. (AR 1418-19, ¶ 223.)

GM contends that Board's reasoning in paragraphs 223 violates the rule that "correlation does not equal causation": "The Board has taken a correlation between several variables and applied that correlation as though it were causative. In other words, the Board asserts that because Chevrolet registrations correlate with median age within the state of California, the median age of an area causes Chevrolet registrations to rise or fall—and even worse, RSI is per se unreasonable because it does not take that 'fact' into account." (OB 18 [citing cases].)

Although it is well known that "correlation does not equal causation," GM suggests incorrectly that evidence of correlation cannot support a factual finding. "[W]here evidence of correlation itself is potentially relevant and unlikely to mislead the jury, an expert who reliably discerns this relationship can present such conclusions to the [trier of fact]." (U.S. v. Valencia (5th Cir. 2010) 600 F.3d 389, 425; see also U.S. v. W.R. Grace (9th Cir. 2007) 504 F.3d 745, 765 [holding that "the fact that a study is associational—rather than an epidemiological study intended to show causation—does not bar it from being used to inform an expert's opinion about the dangers of asbestos releases"].)

More importantly, Board's findings do not equate correlation with causation. Board does not find age or level of education causes a person to buy or not buy a GM vehicle. Rather, Board finds there is a correlation which is a factor which should have been included in predicting sales. To use GM's example of a correlation between sales of ice cream and drownings, it would not be

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inaccurate to predict that when ice creams sales are up, there will also be more drownings. This is not to say the sale of ice cream causes increased drownings. In that example, the causation factor is summertime. However, it does not matter what the causation is, the correlation is still accurate. Board could reasonably conclude that a statistical correlation between age and education level, and the sale of GM vehicles was likely to be predictive of future sales.

Folsom Chevrolet argues, correctly, that Stockton's regression analysis and related testimony are only some of the evidence that Board relied upon to conclude that GM's use of RSI as a performance metric, as applied to this case, is unreasonable. (Folsom Chevrolet Oppo. 23-24.) Stockton's statistical evidence is supported by non-statistical evidence, including the maps showing the clustering of over-performing counties, the underperformance of dealer sets with similarly sized geographies to Folsom, and the underperformance of dealers in the Sacramento APR, among other evidence. (AR 3209-10, 1911 (56:11-24), 1277 (¶ 99), 2103-04, 2595-2604, 3184.) Thus, Board's conclusion that RSI "fails to account for brand bias" is not based solely on Stockton's regression analysis.

Stockton was qualified as an expert, and he could testify as to the weight and inferences that should be given to the correlations he found. As found by Board, "[b]y using RSI, General Motors is taking the California statewide average of Chevrolet retail sales and applying it to every dealership in California, with only one adjustment to account for only one metric, the market segment preferred in the AGSSA." (AR 1378, ¶ 98; see also AR 1508, 2563.) As Stockton testified, the purpose of his regression analysis is to test the assumption in RSI "that the only thing that should cause a market share to vary is the types of vehicles registered." (AR 2104 (32-33).) Stockton explained the results of the analysis as follows:

And what I find is that statistically, we're told that to an extremely high degree of certainty, those counties [surrounding Folsom] are different from the state. So in other words, the factors that are – that correlate with Chevrolet market share elsewhere statewide are different. They're having a different affect than what they are having in the area including Folsom.

So from a statistical perspective, ... we would ... reject the hypothesis that the state average market share tells use something about Folsom's market, and that's to a very high degree of statistical certainty.

So this is a big problem for GM's assumption about uniform market share

And then the second thing we're seeing is that if I consider that five county area, if I derive the expectation for Folsom from that area [and control for demographics], it says that the market share expectation is declining by 30 percent. (AR 2104 [emphasis added].)

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Thus, Stockton testified about the correlations found by his analysis, and he explained reasonable inferences that could be made from the evidence. When combined with other non-statistical evidence summarized above, Stockton's regression analysis and expert testimony appear to be substantial evidence that support the findings made by Board in paragraph 223. Board did not confuse correlation for causation. Rather, Board made inferences from the evidence that (1) controlling for demographics would reduce the RSI requirement for Folsom Chevrolet by approximately 30 percent; and that (2) RSI does not accurately account for brand bias as applied to Folsom Chevrolet. Counsel for the Board reiterated at the hearing that it is not arguing causation, only that the correlations are a factor which can be considered in whether Petitioner had good cause to terminate the franchise.

GM contends that "the variables appear to have minimal to no impact on RSI in isolation (AR 1380–81 ¶ 103), and a chart of dealers and their demographics in the "5 County Area" does not reveal any apparent trends. (AR 3474.)" (OB 19.) GM cites to the following Board summary of the testimony of GM's expert, Farhat: "General Motors' counter to Mr. Stockton's regression analysis was to take each variable in isolation and review the performance to see if it showed significant deviations with respect to RSI." (AR 1380, ¶ 103.) Board gave more weight to Stockton's analysis, and GM does not show that Board's weighing of the expert testimony was unreasonable. The chart cited at page 3474 is not a regression analysis. Moreover, the chart shows a substantial difference in population density between Folsom Chevrolet and the John L. Sullivan dealer, to which GM compares Folsom Chevrolet.

Considering the briefs, the record, and argument at the hearing, the court concludes Board's findings in paragraph 223 are supported by substantial evidence. Board did not mistake correlation for causation.

Board's Findings that RSI was Unreliable Because Folsom Chevrolet's AGSSA Is "Flawed"

GM contends that substantial evidence does not support Board's finding that RSI was unreliable because "the assigned AGSSA in this case [is] flawed." (OB 19.) Specifically, GM challenges the following parts of paragraph 221 of Board's Decision:

[T]he General Motors RSI metric and the assigned AGSSA in this case are flawed.... As for Folsom Chevrolet's AGSSA, it was assigned an unfair AGSSA in size and distances of registrations from the dealership location, with, as noted above, required absorptions of portions of two poorly performing or underperforming terminated dealerships, the fact that it is part urban and part rural, and is an AGSSA which grew over 80 percent in registrations between 2010 and

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2014. (AR 1418, ¶ 221.)

Section 11713.13(g)(1)(A)(ii) requires that the standard be reasonable in light of “[g]eographical and market characteristics in the dealer's area of responsibility.” Relatedly, in determining whether GM has shown good cause for termination, Board must consider “the amount of business transacted by the franchisee, as compared to the business available to the franchisee.” (§ 3061(a).)

The Board’s relevant findings in paragraph 221 were based on more detailed findings made earlier in the Decision, including in paragraphs 165-169. (See AR 1397-99.) Because these findings are important to paragraph 221 and GM’s writ arguments, the court quotes them at length:

“Folsom Chevrolet is located relatively close to several Chevrolet competitors, and post -Old GM's bankruptcy, is not centrally located within its current AGSSA.... General Motors increased the number of census tracts in Folsom Chevrolet's AGSSA by more than double (32 to 72) from 2010 to 2014, and the majority of the area ‘inherited’ by Folsom Chevrolet comprised geography where the prior terminated dealers had not been selling many Chevrolets.” (AR 1397, ¶ 165.)

“The new additions to Folsom Chevrolet's AGSSA resulted in two problems with regard to the requirement to meet 100 of its assigned RSI: 1) Folsom Chevrolet had to increase penetration in areas in which the two prior Chevrolet dealers had been terminated for low Chevrolet registrations and, 2) The additions to Folsom Chevrolet's AGSSA were at a greater distance from its location which resulted in the so-called ‘geographic sales and service advantage’ being flawed.” (AR 1398, ¶ 166.)

“RSI makes no allowance for the size of the AGSSA and the distance of registrations from the dealership. Analysis by both experts showed that the greater the distance of the dealership from a registration, the less likely the dealership is to capture a sales opportunity.... Mr. Farhat, General Motors' expert, looked at a composite of the other four Sacramento dealers and the percent of sales captured based on proximity from each dealership by miles and compared it to what Folsom Chevrolet was capturing from its dealership at the same distance. Within two mile ‘rings’ of each dealership, the other four dealers were capturing 39.2 percent and Folsom Chevrolet was capturing only 19 percent; within a two to four mile ring, Folsom Chevrolet captured 21 percent compared to the other's 34.7 percent. For every increase in distance from each dealership, Folsom Chevrolet captured less than the average of the other four.... Mr. Farhat's conclusion from this analysis is that Folsom Chevrolet was not effectively capturing its

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sales opportunity, and additionally, that the analysis confirmed the reasonableness of the RSI and ‘did its job in identifying an ineffective dealer.’” (Id. ¶ 168.)

“Mr. Farhat's sales effectiveness by distance analysis showed that the other four dealers in the Sacramento APR, which are meeting close to the 100 RSI standard at an average of 97, capture only 8.5 percent of Chevrolet registrations that are between a distance of 12 and 14 miles from their dealership, and 7.5 percent of those between 14-16 miles away.... In Folsom Chevrolet's expanded AGSSA, the next closest population center on Highway 50, Shingle Springs, is over 15 miles from Folsom Chevrolet. At 15 miles, using Mr. Farhat's data of what the other four dealers were achieving at that distance, Mr. Stockton found in his ‘ring analysis’ that Folsom Chevrolet can only expect to capture 7.5 percent of the registrations there.... If the same effectiveness by distance of the other four dealers in the Sacramento APR were applied to Folsom Chevrolet's AGSSA for 2015, the result would have generated an RSI sales expectation of 617 units within 20 miles of the dealership, still some 525 sales short of their RSI sales expectation of 1,142 units.... Mr. Stockton attributed the ability of the other dealers in the Sacramento APR to be closer to 100 because their potential customers are closer to them than Folsom Chevrolet's potential customers are to it.... This would mean that Folsom Chevrolet's inability to capture many sales beyond 20 miles is not necessarily a ‘failure’ by Folsom Chevrolet because most dealers capture only seven percent of the sales at that distance. The RSI metric is creating a sales opportunity expectation that is not based on reality.” (AR 1398-99, ¶ 169.)

Except for the last sentence in paragraph 169, GM does not appear to challenge Board’s detailed findings in paragraphs 165-169 of the Decision and Board’s summary of the “ring” analyses performed by Farhat and Stockton. These findings are supported by substantial evidence, including the expert testimonies and reports of Stockton and Farhat. (See e.g. AR 1926, 3187, 3251-3252 [Farhat’s “ring” analysis]; AR 2108-09, 2705-06, 2714 [Stockton’s response to “ring” analysis].)

GM contends Board’s interpretation of the “ring” analyses was “clearly erroneous.” According to GM, Farhat’s ring analysis “was comparative, not prescriptive” and “cannot reasonably be used to model what Folsom Chevrolet’s performance should be at specific distances.” (OB 20.) As an example, GM contends that “the ring data only extends out 20 miles, and Folsom Chevrolet’s territory is much larger than that.” (Ibid.) GM’s short arguments are not persuasive as written. 2 GM does not cite to evidence to support these assertions. Nor does GM persuasively show that the fact the ring data only extends out 20 miles is material to the Board’s findings.

GM challenges Board’s finding that the “RSI metric and the assigned AGSSA in this case are

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flawed.... As for Folsom Chevrolet's AGSSA, it was assigned an unfair AGSSA in size and distances of registrations from the dealership location.” (AR 1418, ¶ 221.) That finding is supported by substantial evidence discussed at length in Board’s decision at paragraphs 165-169, much of which is not discussed or challenged by GM.

Board found, and GM does not dispute, that “RSI makes no allowance for the size of the AGSSA and the distance of registrations from the dealership.” (AR 1398 ¶ 168.) Based on the “ring” analyses of Farhat and Stockton, Board then found that “the RSI metric is creating a sales opportunity expectation that is not based on reality.” (AR 1398-99, ¶ 169.) This finding is also implied in Board’s conclusion, in paragraph 221, that the RSI metric and assigned AGSSA in this case are flawed.

In these findings, Board weighed the expert testimony and made inferences about the impact of the size of AGSSA on the usefulness of the RSI metric. For instance, in response to Farhat, Stockton testified the “ring” analyses showed that “how dealers capture sales is not anywhere close to how RSI derives expectations for dealers.” (AR 2108.) The testified that the “capture rate of these dealers is declining fairly substantially,” especially beyond 12 miles. (Ibid.) “[M]any of the census tracts assigned to Folsom in the AGSSA reassignment ... are well beyond 12 miles.... So it’s a terrible mismatch between RSI ... and how dealers actually capture sales.... And it’s ... particularly relevant to Folsom because the territory added is so far away [E]ven according to Mr. Farhat’s composite group of dealers [this large territory] is not really conveying much opportunity.” (AR 2108; see also 2705-06, 2714.) Stockton’s expert testimony, as supplemented by other evidence discussed in paragraphs 165-169 of the Decision, appears to be substantial evidence that “the RSI metric is creating a sales opportunity expectation that is not based on reality,” including because RSI does not account for the size of Folsom Chevrolet’s AGSSA. (AR 1398-99, ¶ 169.) The court cannot reweigh the evidence.

GM contends that “[t]he model also fails to account for contrary, real-world results within Folsom Chevrolet’s own AGSSA.” (OB 20.) Specifically, GM contends that “Folsom Chevrolet’s share of Chevrolet vehicles sold in Shingle Springs remained relatively stable, with 25.3% of the registrations in 2008, 22.5% in 2009, 32.4% in 2010, and 33.7% in 2011,” even though Shingle Springs is about 15 miles away and Folsom Chevrolet could be expected to capture about 7.5 percent of registrations there. (OB 20, citing 4317-21.) GM does not cite testimony explaining the chart at pages 4317-20. Nor does GM provide context for this data to show that it undermines findings from the more recent “ring” analyses. (See AR 2714, 3252.) At the hearing, Respondent and Real Party argued that the Shingle Spring data is dated, and that the statistics related to it only account for one area on the fringe of Real Party’s territory.

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Respondents argue that the record supports a reasonable inference that distance makes a difference in sales. GM's arguments in this regard do not undermine a finding that the Board's decision was supported by substantial evidence.

Finally, GM contends that "even if Folsom Chevrolet's AGSSA were found to be unreasonably defined, the sales expectations it generated—the only relevant effect from the AGSSA in RSI—were quite reasonable." (OB 21.) GM cites evidence that the other four dealers in Sacramento area performed at an average of 97.1 RSI. (Ibid.) GM misstates the Board finding. Board did not find that AGSSA was "unreasonably defined." Rather, it is the expansion of the AGSSA and the distance between Folsom Chevrolet and the registrations measured by RSI that formed the basis for the Board's conclusion. Moreover, other evidence supports Board's finding. GM's expert, Farhat, included in his report that the average RSI among approximately 10 dealers with the closest AGSSA size to Folsom in California, excluding Folsom, is 72. (AR 3184, AR 3223; AR 1376, ¶¶ 90-91.) Omitting the best-performing dealer in the Sacramento area, John Sullivan Chevrolet, substantially reduces the average RSI of the other Sacramento dealers to around 80. (AR 3217, 3210.) GM also does not address the evidence that each dealer in Sacramento has a unique AGSSA. (AR 1370, ¶ 64.)

The court finds substantial evidence supports Board's findings in paragraphs 169 and 221 that changes in Folsom Chevrolet's AGSSA made RSI an unreliable metric as applied in this case.

Board's Findings About Insufficient Inventory Allocation; Fleet Sales

GM contends that Board found that RSI "is unreasonable due to insufficient inventory allocation," and that this finding is not supported by substantial evidence. (OB 21.)

In opposition, Board argues, correctly, that the findings about inventory are not referenced in Board's discussion of good cause factors under section 3061. Nor did Board expressly incorporate its inventory findings into its discussion of RSI under section 11713.13(g)(1)(A). (See Board Oppo. 20-21; AR 1397-1419.) In reply, GM responds that inventory "was a major issue" in the case, and inventory availability is a factor under section 11713.13(g). (Reply 18, fn. 12.) Contrary to the opening brief, GM does not show that Board found that RSI, as applied to this case, was unreasonable due to insufficient inventory allocation. In that respect, GM incorrectly frames its arguments about inventory. Nonetheless, as GM points out, inventory availability is a factor under section 11713.13(g) and could also be relevant to the first good cause factor under section 3061. Thus, Board's detailed findings about inventory may have some relevance to its findings about RSI and good cause.

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On the merits, GM contends that it “presented a chart comparing vehicles available to Folsom Chevrolet during 2015 against the number of each vehicle model Folsom Chevrolet was expected to sell.” (OB 22.) GM contends that “Board chose to ignore every vehicle model where Folsom Chevrolet received more vehicles than it needed—the overwhelming majority—and count up only those vehicle models where the dealership was allocated—based upon its low sales rate—fewer vehicles than it needed to hit 100 RSI.” (OB 23; see AR 4129 [chart]; AR 1392-94 [Board inventory findings]; see also AR 1710-11 [Muter testimony about Exhibit 277].)

Board expressly rejected GM’s interpretation of the chart submitted as Exhibit 277. Board made the following relevant findings, among others, with citation to evidence:

146. Certain models sell well, and certain models do not sell well. In many instances, clearing out slow selling models by Folsom Chevrolet did not prompt General Motors to provide Folsom Chevrolet with units that are high in demand; it just prompted General Motors to allocate more of the slow -selling units. This occurred with the small sub -compact Spark, which is not a big seller in the Folsom or greater Sacramento area. (RT Vol. VII, 213:24-215:20) Folsom Chevrolet sold 10, and General Motors for the next month requested Folsom Chevrolet take multiples of that. (RT Vol. VII, 213:24-215:20) Mr. Muter's chart indicated that Folsom missed out on 21 Spark units because it did not request additional vehicles over its allocation. (Exh. R-277)

147. Mr. Muter's chart indicates that Folsom Chevrolet should have accepted 49 additional units of Chevrolet Malibu vehicles in 2015. (Exh. R-277) So out of a total of 249 vehicles, General Motors believes Folsom Chevrolet should have accepted or had the opportunity to request 70 more Spark and Malibu vehicles. (Id.) For 2015, the Spark vehicle achieved only 5.25 percent of competitive registrations in California and the Malibu achieved only 2.31 percent. In comparison, the Chevrolet Camaro was at 30.04 percent, the Suburban at 32.75 percent and the Silverado at 29.3 percent. (See Exh. P-185-126)

....[¶¶]

149. Protestant's expert Mr. Stockton, pointed out that Mr. Farhat's analysis only compared the inventory Folsom Chevrolet had to actual sales, which does not reflect whether Folsom Chevrolet had adequate inventory to sell more vehicles (i.e., achieve a higher sales rate) or to reach 100 RSI. (RT Vol. VII, 71:1-15, 199:21-202:12) Mr. Farhat failed to evaluate whether Folsom Chevrolet had enough inventory to support the sales rate needed to reach 100 RSI. (Exh. P-186-6 1119; RT Vol. VII, 71:16-21, 199:21-202:12)

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

Civil Division

Central District, Stanley Mosk Courthouse, Department 82

BS175257

**GENERAL MOTORS LLC VS CALIFORNIA NEW MOTOR
VEHICLE BOARD**

December 18, 2020

2:09 PM

Judge: Honorable Mary H. Strobel
Judicial Assistant: N. DiGiambattista
Courtroom Assistant: None

CSR: None
ERM: None
Deputy Sheriff: None

(AR 1392-93.)

In its writ briefs, GM does not sufficiently discuss the evidence cited by Board in these findings regarding inventory. When an appellant challenges “the sufficiency of the evidence, all material evidence on the point must be set forth and not merely [its] own evidence.” (Toigo v. Town of Ross (1998) 70 Cal.App.4th 309, 317.) GM does not show, with discussion of all material evidence, that Board’s inventory findings are not supported by substantial evidence. Moreover, Board did not find that insufficient inventory allocation made RSI unreliable as a performance metric. Thus, in that regard, GM’s arguments misconstrue the Board’s findings.

As part of its discussion of inventory allocation, GM contends that “[t]o the extent Folsom Chevrolet suffered from inventory shortages or imbalances, the Board’s own findings show it was due entirely to the dealership’s decision to use its inventory to make lucrative fleet sales.” (OB 23; see e.g. AR 1385-87, 1402-03 [Board findings about fleet sales].) In the opening brief, GM does not dispute that Folsom Chevrolet’s substantial fleet sales business was consistent with the terms of the Dealer Agreement. (OB 23.) 3 GM does not contend that Board’s detailed findings about fleet sales are not supported by substantial evidence. Contrary to GM’s position, these findings do not suggest that any issues with inventory shortages or underperforming RSI were caused by Folsom Chevrolet’s fleet sales.

Rather, Board noted that RSI only considered Folsom Chevrolet’s nonfleet sales to determine Folsom Chevrolet’s sales effectiveness. (See AR 1402 ¶ 176.) Folsom Chevrolet’s fleet sales were a significant portion of its business. (AR 1387 ¶¶ 130-133; AR 1389 ¶ 136.) Board found GM’s failure to account for fleet sales problematic because the parties’ franchise made no such distinction in its recitation of dealer sales obligations. (AR 1402, ¶ 177.) Thus, GM’s practice in excluding such sales from its determination of Folsom’s sales effectiveness meant that GM could not show that Folsom was inadequately transacting business as compared to that available to it. (AR 1403 ¶ 178.) Fleet sales also appear to have some relevance to Board’s finding that RSI was an unreliable performance metric, as applied to this case. GM does not show, with discussion of the record, that these findings are not supported by substantial evidence.

At the hearing, the parties disagreed about the relevance of fleet sales to the Board’s analysis. Respondent argued retail sales was not defined to exclude fleet sales in the dealership agreement. GM argues that the Board had to consider adherence to the franchise agreement, which set sales goals for retail, not fleet sales. In either event, substantial evidence supports that the Board could consider fleet sales as to its finding regarding whether there was good cause for

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Deputy Sheriff: None

termination of the franchise.

The Beck Decision

In its analysis of the reasonableness of RSI under section 11713.13(g)(1)(A), Board relied in part on a New York appellate decision, *Beck Chevrolet Co., Inc. v. General Motors LLC* (2016) 27 N.Y. 3d 379. (See AR 1416-17.) In a footnote, GM argues that Beck is not like this case because of “sharp and measurable differences in brand popularity between upstate (rural) New York and the downstate region near New York City.” (OB 16, fn. 5.) Board did not rest its analysis solely on Beck; Board went on to make its own factual determination that RSI is unreasonable based on the factors set forth in section 11713.13(g)(1)(A). In any event, Board’s analogy to Beck is supported by the record here. For instance, Beck concluded that “those dealers, like Beck, who service an assigned area in which Chevrolet is less popular are disadvantaged when measured against dealers in other parts of the state in which the Chevrolet brand is stronger and facilitates dealer sales performance.” (Beck, *supra* at 391.) Similarly here, there is substantial evidence that brand bias, demographics, and an enlarged AGSSA all negatively impacted Folsom Chevrolet’s RSI.

Based on the foregoing, Board’s findings related to RSI, including the reasonableness of RSI as applied to Folsom Chevrolet under section 11713.13(g)(1)(A), are supported by substantial evidence.

Board’s Application of the Good Cause Factors under Vehicle Code Section 3061

In its Decision, Board made detailed findings in support of its conclusion that the good cause factors in section 3061 weighed against termination. (See AR 1397-1419.) In its opening brief, GM devotes two short paragraphs to these findings, and incorporates arguments in the petition. 4 (OB 24-25.) GM’s conclusory arguments are insufficient to satisfy its burden of proof under CCP section 1094.5 to show a prejudicial abuse of discretion. (*Alford v. Pierno* (1972) 27 Cal.App.3d 682, 691; CRC 3.1113(a); *Nelson v. Avondale HOA* (2009) 172 Cal.App.4th 857, 862-863 [argument waived if not supported by reasoned argument and citation to authorities].) It is wholly inadequate for GM to assert, without any analysis or citation to the record, that findings made by Board are “one-sided” or “unsupported.” The court concludes that all of these findings are supported by substantial evidence.

GM also contends, by reference to the petition, “the Board invented its own standard for measuring fleet sales that fails to comply with the Vehicle Code because it ignores the statutory

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CSR: None
ERM: None
Deputy Sheriff: None

requirement that the business available to a dealer—i.e., potential fleet sales—also be considered.” (OB 24-25, citing Pet. ¶¶ 49-50.) GM provides no citation to the record in support of this terse argument. GM has the burden of proof to show good cause for the termination. Folsom Chevrolet’s fleet sales appear to be relevant to both to the reliability of RSI as a performance metric, and the adequacy of Folsom’s vehicle sales as compared to its sales opportunities. Board concluded: “As it has been concluded in this case that ‘sales’ includes both retail and fleet, General Motors did not meet its burden of proving that the ‘amount of business transacted’ by Folsom Chevrolet, ‘compared to the business available’ to it was inadequate.” (AR 1403, ¶ 178.) Board did not abuse its discretion in concluding that, when fleet sales are considered, GM did not meet its burden of proof of showing that Folsom Chevrolet’s sales were inadequate under section 3061(a).

GM’s Improper Incorporation by Reference of Constitutional and Other Arguments Made in Petition

In the last paragraph of its brief, GM incorporates by reference a host of constitutional arguments from the petition. (OB 25.) As noted above, GM’s incorporation by reference of arguments in the petition is improper because it exceeds applicable page limits. (See Cal. Rule of Court, Rule 3.1113.) The court rejects the arguments made in this part of GMs’ brief, as there is insufficient legal analysis. (Nelson v. Avondale HOA (2009) 172 Cal.App.4th 857, 862-863 [argument waived if not supported by reasoned argument and citation to authorities].)

Conclusion

None of the issues analyzed above in this portion of the court’s ruling support granting of the petition.

In its July 30, 2020 minute order, the court found that Board did not have jurisdiction to find that GM violated section 11713.13(g)(1)(A) generally, or in this specific case. The court otherwise upheld the Board’s decision.

The July 30, 2020 minute order, and this minute order constitute the final decision on the writ.

In accordance with Los Angeles Local Rules, Rule 3.231, Respondent is to prepare, serve, and lodge a proposed form of judgment and writ. The writ shall order the Board to set aside that portion of its decision finding that GM violated section 11713.13(g)(1)(A) generally, and in this specific case. Otherwise, the petition is denied.

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

Civil Division

Central District, Stanley Mosk Courthouse, Department 82

BS175257

**GENERAL MOTORS LLC VS CALIFORNIA NEW MOTOR
VEHICLE BOARD**

December 18, 2020

2:09 PM

Judge: Honorable Mary H. Strobel
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Courtroom Assistant: None

CSR: None
ERM: None
Deputy Sheriff: None

FOOTNOTES:

1- It is unclear from the opening brief whether GM challenges the following finding in paragraph 220: “General Motors' market share is sensitive to demographic differences in the California buying populations. (Exh. P-185-8 ¶ 29).” (AR 1417, ¶ 220; see OB 17.) This finding was based on paragraph 29 of Stockton’s report, as well as the maps discussed above, which are substantial evidence.

2- GM violates applicable page limits for GM by incorporating legal arguments made in the petition. (See Cal. Rule of Court, Rule 3.1113; see OB 20, citing Pet. ¶¶ 66-77.) The court considers the arguments in the brief, but disregards the arguments that are improperly incorporated by reference.

3- To the extent GM argues otherwise in reply, the court finds its interpretation of the Dealer Agreement unpersuasive. (Reply 19, fn. 14.) Also, this argument was improperly made in reply.

4- As noted above, GM’s incorporation by reference of arguments in the petition is improper because it exceeds applicable page limits. The court considers the arguments made in the brief.

Petitioner's exhibit 1 is ordered returned forthwith to the party who lodged it, to be preserved unaltered until a final judgment is rendered in this case and is to be forwarded to the court of appeal in the event of an appeal.

A copy of this minute order is mailed via U.S. Mail to counsel of record.

Certificate of Mailing is attached.

Electronically Received 01/14/2021 05:41 PM

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

GENERAL MOTORS LLC.

Petitioner,

v.

**CALIFORNIA NEW MOTOR VEHICLE
BOARD.**

Respondent.

**FOLSOM CHEVROLET, INC, dba
FOLSOM CHEVROLET,**

Real Party in Interest,

Case No. BS175257

~~PROPOSED~~ WRIT OF
ADMINISTRATIVE MANDAMUS

Dept: 82
Judge: Hon. Mary H. Strobel
Action Filed: September 27, 2018

THE PEOPLE OF THE STATE OF CALIFORNIA

TO RESPONDENT NEW MOTOR VEHICLE BOARD:

WHEREAS on 1-22-21 judgment was entered in this action ordering that a
peremptory writ of administrative mandamus issue from this Court,

YOU ARE HEREBY COMMANDED, upon receipt of this writ, to set aside that portion of
your decision in Protest No. PR-2483-16, *Folsom Chevrolet, Inc., dba Folsom Chevrolet* v.

1 *General Motors, LLC*, dated August 13, 2018, finding that Petitioner General Motors LLC
2 violated section 11713.13(g)(1)(A) generally and in this specific case.

3 YOU ARE FURTHER COMMANDED to file with this Court a return to this writ within
4 90 days from the date that the writ is issued stating what you have done to comply.

5
6 Date: 2-1-21

N. DiGiambattista
7 N. DiGiambattista
Hon. Mary H. Strobel



1 NEW MOTOR VEHICLE BOARD
1507 – 21ST Street, Suite 330
2 Sacramento, California 95811
Telephone: (916) 445-1888

CERTIFIED MAIL

3
4
5
6
7
8 STATE OF CALIFORNIA
9 NEW MOTOR VEHICLE BOARD
10

11 In the Matter of the Protest of

12 FOLSOM CHEVROLET, INC., dba FOLSOM
CHEVROLET,

13 Protestant,

14 v.

15 GENERAL MOTORS, LLC,

16 Respondent.
17

Protest No. PR-2483-16

PROPOSED DECISION

18 **PROCEDURAL BACKGROUND**

19 **Statement of the Case**

20 1. By letter dated November 3, 2016, General Motors LLC (“General Motors” or
21 “Respondent”), gave notice to Folsom Chevrolet, Inc., dba Folsom Chevrolet (“Folsom Chevrolet” or
22 “Protestant”) pursuant to California Vehicle Code section 3060¹ of its intention to terminate Protestant’s
23 General Motors Dealer Sales and Service Agreement² for Chevrolet. The New Motor Vehicle Board
24 (“Board”) received the notice on November 7, 2016.
25

26 ¹ Unless otherwise indicated, all statutory references are to the California Vehicle Code.

27 ² The Dealer Agreement or Dealer Sales and Service Agreement is defined as “[t]he agreement between a manufacturer and
its dealers respecting the relationship between the manufacturer and the dealers and authorizes the dealers to sell and service a
28 particular line-make of vehicles.” (Joint Glossary of Terms, p. 1) It includes the Dealer Sales and Service Agreement, the
Standard Provisions and all related Addenda. (Exh. R-201.034)

2. The notice indicates, in part, the following reasons for termination:

...

Sales Performance

Article 5.1.1 of the Dealer Agreement, entitled “Responsibility to Promote and Sell,” reads in part:

“Dealer agrees to effectively, ethically and lawfully sell and promote the purchase, lease and use of Products by consumers located in its Area of Primary Responsibility.”³

As provided in Article 9 of the Dealer Agreement, a Retail Sales Index (“RSI”)⁴ of 100 is the minimum level of retail sales performance required for Dealer to satisfy its commitment under Article 5.1.1 of the Dealer Agreement. Article 9 further provides: “In addition to the Retail Sales Index, General Motors will consider any other relevant factors in deciding whether to proceed under the provisions of Article 13.2 to address any failure by dealer to adequately perform its sales responsibilities.”

Dealer’s Retail Sales Index (“RSI”) for calendar year 2013 was 40.9, leaving it with a rank of 129 of the 133 Chevrolet dealers in California. For calendar year 2014, Dealer’s RSI was 44.4, ranking 124 of 128 California Chevrolet dealers. Following receipt of [General Motors’] May 19, 2015 notice that Dealer was in breach of the Dealer Agreement, Dealer had an RSI during the Cure Period of 64.7.⁵ For calendar year 2015, Dealer’s RSI was 57.1, ranking 115 of 131 Chevrolet dealers in the state. During the first half of 2016, Dealer’s RSI fell to 56.55. Dealer has thus consistently failed to achieve the level of retail sales performance required by the Dealer Agreement, and has failed to correct its sales performance deficiency during the Cure Period.

Pursuant to Article 9 of the Dealer Agreement, [General Motors] has considered other information that may be relevant to an evaluation of Dealer’s performance under Article 5.1.1 of the Dealer Agreement, including the overall sales of Chevrolet vehicles in Dealer’s Area of Geographic Sales and Service Advantage [AGSSA], Dealer’s sales performance as compared to other Chevrolet dealers in Dealer’s local

³ “Area of Primary Responsibility” or APR is “[t]he collection of census tracts assigned by General Motors to a particular dealer or group of dealers. In this case, Folsom Chevrolet’s APR is roughly the greater Sacramento market, and is shared with other dealerships in the area.” Area of Geographic Sales and Service Advantage or AGSSA is “[t]he collection of census tracts within the APR assigned to Folsom Chevrolet alone.” (Joint Glossary of Terms, pp. 1-2 and Exh. R-201.034)

⁴ “Retail Sales Index” or RSI is “[t]he number of retail sales reported by a dealer (made anywhere in the U.S.) divided by the number of Expected Sales, multiplied by 100. An RSI of 100 means the dealership made its Expected Sales number exactly, while a score of 50 means it made only half that number of its Expected Sales.” (Joint Glossary of Terms, p. 2) Expected Sales is “[a] calculation by [General Motors] of how many new vehicles a dealer is expected to sell over a particular time frame in order to achieve state average sales penetration, based on the number of vehicles actually registered in the dealer’s APR or AGSSA (whichever is applicable) for each segment and the applicable [General Motors’] market share.” (Joint Glossary of Terms, p. 2) Folsom Chevrolet’s RSI was calculated on its AGSSA, not the APR. (Exh. R-205.010-011 and R-244.007-.008 ¶ 20)

⁵ General Motors notified Folsom Chevrolet on May 19, 2015, that it was in breach of the Dealer Agreement because Folsom Chevrolet failed to meet its sales and customer satisfaction obligations. Folsom Chevrolet was given an opportunity to cure its sales and customer satisfaction deficiencies during the period July 1, 2015 through December 31, 2015 (the “Cure Period”). General Motors contends that Folsom Chevrolet did not correct its sales or customer satisfaction deficiencies during the Cure Period, and therefore remains in “substantial and material breach of the Dealer Agreement.” (November 3, 2016, Notice of Termination; Exh. R-221)

market area, the geographic area assigned to Dealer under Article 4.2 of the Dealer Agreement, as well as other issues raised by Dealer.

Customer Satisfaction Performance

Article 5.3 of the Dealer Agreement, entitled "Customer Satisfaction," reads in part:

"Dealer and General Motors recognize that appropriate care for the customer will promote customer satisfaction with General Motors Products and its dealers, which is critically important to our current and future business success. Dealer therefore agrees to conduct its operations in a manner which will promote customer satisfaction with the purchase and ownership experience. General Motors agrees to provide Dealer with reasonable support to assist Dealer's attainment of customer satisfaction.

General Motors will provide dealer with a written report at least annually ... in evaluating Dealer's purchase and delivery customer satisfaction and Dealer's service customer satisfaction. The report will compare Dealer's performance to other same Line-Make⁶ dealers in the Region."

As set forth in [General Motors'] May 19, 2015 notice, Dealer's 2014 Customer Satisfaction Index⁷ scores, as compared to the region, were as follows:

	PDS Region ⁸	PDS Dealer	SSS Region	SSS Dealer
Top Box Score	86.5	82.6	76.2	65.4
Blended Score	88.5	84.6	78.6	69.8

Dealer's Customer Satisfaction Index scores during the Cure Period, as compared to the region, were as follows:

	PDS Region	PDS Dealer	SSS Region	SSS Dealer
Top Box Score	86.5	77.0	76.3	87.2
Blended Score	88.3	81.2	78.5	88.5

These scores show that Dealer has failed to provide acceptable customer satisfaction for Purchase and Delivery as required by the Dealer Agreement, and thus failed to correct its customer satisfaction deficiencies during the Cure Period.⁹

///

///

⁶ "Line-Make" is defined as "[a] brand of General Motors Motor Vehicles, or a brand used to badge motor vehicles for another manufacturer." The General Motors brands are Chevrolet, Buick, GMC, and Cadillac. (Exh. R-201.034 and Joint Glossary of Terms, p. 1)

⁷ Customer Satisfaction Index (CSI) is "[a] metric of customer satisfaction based upon customer surveys." For General Motors, CSI is made up of two metrics:

1. Purchase and Delivery Satisfaction (PDS), which is "[a] customer satisfaction metric based on surveys of the customer experience during the purchase and delivery of a new vehicle." and,

2. Service Satisfaction Survey (SSS), which is "[a] customer satisfaction metric based on surveys of the customer experience during service events." (Joint Glossary of Terms, pp. 2-3)

⁸ Folsom Chevrolet is in General Motors' West Region, which is comprised of 15-plus states located west of Colorado. (Joint Glossary of Terms, p. 2; RT Vol. I, 65:22-24)

⁹ During the Cure Period, Folsom Chevrolet did raise its SSS scores above Region by a significant amount (65.4 v. 87.2). The notice of termination does not refer to a failure to cure SSS; only a failure to cure PDS.

1 **Termination of the Dealer Agreement**

2 Once notified by [General Motors] of sales or customer satisfaction performance
3 deficiencies, a dealer's failure to correct those deficiencies during the specified Cure
4 Period of at least six months authorizes [General Motors] to terminate the Dealer
5 Agreement. Article 13.2 provides:

6 ...

7 “If the Dealer does correct the failure by the expiration of the [cure] period,
8 General Motors will so advise the Dealer in writing. If, however, Dealer
9 remains in material breach of its obligations at the expiration of the period,
10 General Motors may terminate this Agreement by giving Dealer 90 days
11 advance written notice.”

12 ...

13 (November 3, 2016, Notice of Termination)

14 3. On November 10, 2016, Protestant filed a timely protest pursuant to Section 3060.

15 4. A hearing was held before Administrative Law Judge (“ALJ”) Evelyn Matteucci on
16 January 29, 2018 through February 9, 2018.

17 5. The matter was submitted on June 22, 2018.

18 **Parties and Counsel**

19 6. Folsom Chevrolet is located at 12655 Auto Mall Circle, Folsom, California. Folsom
20 Chevrolet is an authorized Chevrolet “franchisee” within the meaning of Sections 331.1 and 3060(a)(1).

21 7. Protestant was initially represented by The Law Offices of Michael J. Flanagan, then
22 Arent Fox, and next The Scali Law Firm. Protestant is currently represented by Scali Rasmussen, by
23 Christian J. Scali, Esq., Halbert B. Rasmussen, Esq., and Jade F. Jurdi, Esq., 800 Wilshire Boulevard,
24 Suite 400, Los Angeles, California 90017.

25 8. Respondent is located at 100 Renaissance Center, Detroit, Michigan and is a “franchisor”
26 within the meaning of Sections 331.2 and 3060(a)(1).

27 9. Respondent is represented by Nelson Mullins Riley & Scarborough LLP by Mark T.
28 Clouatre, Esq. and Jacob F. Fischer, Esq., 1400 Wewatta Street, Suite 500, Denver, Colorado and
Donahue Davies LLP, by Robert E. Davies, Esq. and Mary A. Stewart, Esq., 1 Natoma Street, Folsom,
California.

///

///

1 **Witnesses at Hearing**

2 **Respondent's Witnesses**¹⁰

3 10. Respondent called the following witnesses: Michael Stinson, Chevrolet Zone Manager
4 for northern California; Paul Ryan, District Manager for Commercial; Leonard Deprez, District Manager
5 for Aftersales (encompasses parts and service); Saul Escalante, District Sales Manager for Chevrolet;
6 Alvon Giguere, Manager of Dealer Network Planning and Analysis for General Motors; Bob Muijer,
7 Director of North America Order Fulfillment; and Ronald Meier, Regional Director for Chevrolet for the
8 Western Region.

9 **Protestant's Witnesses**

10 11. Protestant called the following witnesses: Marshal Crossan, President and dealer operator
11 of Folsom Chevrolet; Joe Gagliardi, President and CEO of the Greater Folsom Partnership, which is the
12 Chamber of Commerce, the Tourism Bureau, and the Economic Development Corporation in Folsom,
13 California; Lawrence "Larry" Crossan, Jr., brother of Marshal Crossan and retired (May 2017) General
14 Manager for Folsom Chevrolet; Andrew "Drew" Crossan, son of Marshal Crossan and General Sales
15 Manager for Folsom Chevrolet; Rene Schoonbrood, Fleet Manager for Folsom Chevrolet; and Brian
16 Kaestner, General Manager for Folsom Chevrolet.

17 **Expert Witnesses**

18 12. Respondent's expert witnesses were Brian Gaspardo, Managing Partner, O'Neill &
19 Gaspardo who was qualified as an expert regarding automotive financial and accounting matters, and
20 Sharif Farhat, Vice President of Expert Services, Urban Science Applications, Inc. who qualified as an
21 expert regarding dealer network analysis, including dealer sales effectiveness evaluation.

22 13. Protestant's expert witnesses were Carl Woodward, a Certified Public Accountant and
23 Edward "Ted" Stockton, Vice President and Director of Economic Services, The Fontana Group. Mr.
24 Woodward qualified as an expert regarding vehicle industry accounting and financing matters, vehicle
25 industry business practices and buy/sell evaluations of dealerships, and Mr. Stockton qualified as an
26 expert in retail automotive economics and dealer network analysis.

27 _____
28 ¹⁰ Respondent has the burden of proof so it put its case on first. (Section 3066)

Deposition Excerpts

14. Respondent lodged the following deposition designations:

Witness Name/Title	Date of Deposition	Exhibit Nos.
Joseph Gagliardi, President and CEO of Greater Folsom Partnership	January 15, 2018	R-250A; R-271 to R-275
Lawrence Crossan, Jr., Retired General Manager for Folsom Chevrolet	October 30, 2017	R-250B
Lisa Castro, Controller at Folsom Chevrolet	October 31, 2017	R-250C
Rene Schoonbrood, Fleet Manager at Folsom Chevrolet	October 31, 2017	R-250D

Protestant did not lodge any deposition designations, nor were any counter designations lodged. All deposition designations and related exhibits were admitted on February 2, 2018.

SITE VISIT

15. On February 13, 2018, at the request of Protestant, ALJ Matteucci conducted a site visit to Folsom Chevrolet, Thompson's Toyota of Placerville, John L. Sullivan Chevrolet in Roseville, Performance Chevrolet in Sacramento, Kuni Chevrolet in Sacramento, and Maita Chevrolet in Elk Grove. The route was memorialized in Joint Exhibit 1. Representatives of both parties and their counsel were present, but a court reporter was not.

BURDEN OF PROOF

16. In Section 3060 termination cases, the franchisor has the burden of proof pursuant to Section 3066(b) "... to establish that there is good cause to ... terminate ... a franchise." The standard is a "preponderance of the evidence", which is met if the proposition is more likely to be true than not true; i.e., if there is greater than 50 percent chance that the proposition is true.

ISSUE PRESENTED

17. Did General Motors sustain its burden of proof of establishing "good cause" to terminate Protestant's Chevrolet franchise?

18. In determining whether there is good cause for terminating a franchise, Section 3061 requires the Board "... to take into consideration the existing circumstances, including, but not limited to, all of the following:

(a) Amount of business transacted by the franchisee, as compared to the business available to

- 1 the franchisee;
- 2 (b) Investment necessarily made and obligations incurred by the franchisee to perform its part
- 3 of the franchise;
- 4 (c) Permanency of the investment;
- 5 (d) Whether it is injurious or beneficial to the public welfare for the franchise to be modified
- 6 or replaced or the business of the franchisee disrupted;
- 7 (e) Whether the franchisee has adequate motor vehicle sales and service facilities, equipment,
- 8 vehicle parts, and qualified service personnel to reasonably provide for the needs of the
- 9 consumers for the motor vehicles handled by the franchisee and has been and is rendering
- 10 adequate services to the public;
- 11 (f) Whether the franchisee fails to fulfill the warranty obligations of the franchisor to be
- 12 performed by the franchisee; and
- 13 (g) Extent of the franchisee's failure to comply with the terms of the franchise."

14 **RESPONDENT'S CONTENTIONS**

15 19. General Motors contends that "Folsom Chevrolet has been in continuous breach of the

16 sales performance obligations of its [Dealer Agreement] since at least 2011, and its failures are serious

17 enough to warrant termination on that factor alone. However, its sales performance is merely a

18 manifestation of the flaws in the dealership's business operations, which have ultimately rendered it

19 unwilling, and thus, unable, to provide acceptable retail sales performance and customer satisfaction and

20 effectively represent Chevrolet." General Motors cites the following reasons for Folsom Chevrolet's poor

21 sales:

- 22 (a) Inventory intended for retail customers was "robbed" in order to make fleet and
- 23 commercial sales;
- 24 (b) Consistent failure to provide adequate customer satisfaction particularly during the new
- 25 vehicle purchasing experience;
- 26 (c) "[M]arkedly low loyalty rates for the customers who do purchase [Chevrolet] vehicles at
- 27 the dealership, meaning the customers it does have are not likely to return to purchase their next vehicle;"
- 28 (d) Vehicles are not competitively priced;

1 (e) Failure to implement a “fully functional business development center (‘BDC’);”¹¹

2 (f) Failure to hold its personnel accountable for their job responsibilities.

3 (Respondent General Motors LLC’s Post-Hearing Brief, p. 4, lines 17-28; p. 5, lines 1-6)

4 20. Since 2012, Respondent contends that Folsom Chevrolet has consistently failed to capture
5 the retail business available to it. Protestant has not achieved its contractual obligation of achieving 100
6 RSI.¹² (Respondent General Motors LLC’s Post-Hearing Brief, p. 7, lines 15-25) During the period 2012-
7 2017, Folsom Chevrolet sold 3,410 vehicles at retail compared to 6,619 expected sales, which indicates,
8 according to Respondent, that Folsom Chevrolet failed to capture a combined total of 3,209 new retail
9 sales in a six-year period. (Respondent General Motors LLC’s Post-Hearing Brief, p. 8, lines 2-4) Chief
10 among the causes of Protestant’s poor sales performance is its practice of selling or trading its inventory
11 to satisfy fleet customers, which diminishes its ability to make retail sales and runs contrary to General
12 Motors’ “suggested practices.” (Respondent General Motors LLC’s Post-Hearing Brief, p. 9, lines 7-10)
13 In 2017, 31.5 percent of Folsom Chevrolet’s retail inventory was sold to fleet customers. “By
14 comparison, only 3.52 percent of Chevrolet sales are made that way overall by dealers nationwide ...”
15 (Respondent General Motors LLC’s Post-Hearing Brief, p. 10, lines 8-10) To satisfy its fleet customers,
16 Folsom Chevrolet’s inventory has “a significant number of units with trim and color choices that are
17 generally attractive to fleet customers, rather than retail customers.” (Respondent General Motors LLC’s
18 Post-Hearing Brief, p. 10, lines 15-17) Respondent maintains that this practice results in Folsom
19 Chevrolet’s inventory being imbalanced so it is less desirable to retail customers, who typically look at
20 the inventory before deciding to visit the dealership in person. (Respondent General Motors LLC’s Post-

21
22
23 ¹¹ “Business Development Center” or BDC is defined in the Joint Glossary of Terms as “[a] group of employees at the
24 dealership involved with customer relationship management and lead management, such as following up and setting
25 appointments with prospective buyers to visit the dealership.” (Joint Glossary of Terms, p. 3)

26 ¹² In response to Mr. Stockton’s argument that the RSI calculation is flawed, General Motors contends that: 1) RSI and
27 equivalent metrics have been used for decades in the auto industry; 2) the “RSI calculation is transparent, conservative and
28 objective;” 3) RSI takes into account economic factors, household income and vehicle type preference in addition to other
local conditions and consumer preferences; 4) Protestant’s RSI ranking is confirmed by other metrics, including its own
expert’s; and 5) “Folsom Chevrolet’s poor sales performance, as measured by RSI, is confirmed by [General Motors]
extensive counseling....” (Respondent General Motors LLC’s Post-Hearing Brief, p. 20, lines 16-28; p. 21, lines 1-5)
Respondent maintains that substantial evidence supports the reasonableness of RSI, including in light of each of the factors
listed in Section 11713.13(g). RSI in general, according to Respondent, is “‘fair,’ it uses a ‘rational’ approach that adjusts for
many different possible effects, and it is similar to the approach used by [General Motors’] competitors in the automotive
industry.” (Respondent General Motors LLC’s Reply to Protestant’s Post-Hearing Brief, p. 24, lines 14-15; p. 53, lines 8-11)

Hearing Brief, p. 11, lines 10-23; Respondent General Motors LLC's Reply to Protestant's Post-Hearing Brief, p. 55, lines 6-12; p. 67, lines 10-15)

21. Respondent contends that it has demonstrated good cause to terminate Protestant's Chevrolet franchise because:

- (a) "Folsom Chevrolet's sales in relation to the market are dismal;"
- (b) "Folsom Chevrolet's investment in its business is relatively minimal and impermanent;"
- (c) "The public welfare is harmed by allowing Folsom Chevrolet to remain as an ineffective dealer that does not serve the market;"
- (d) Protestant is not well-equipped in terms of sales and service facilities, personnel, equipment and parts to adequately serve the public;
- (e) "Folsom Chevrolet has occasionally failed to fulfill warranty obligations;"¹³ and,
- (f) The reasons identified by General Motors in Paragraph 19 for Folsom Chevrolet's poor sales "also constitutes a failure to comply with the express terms of the Dealer Agreement:"

- Sales (Articles 5.1.1 and 9 of the Dealer Agreement);
- Customer satisfaction (Articles 5.1.1(e), 5.2.1 and 5.3 of the Dealer Agreement);
- Inventory (Article 6.4.1 of the Dealer Agreement);
- Staffing (Article 5.1.1(a) of the Dealer Agreement); and
- Personal services (Article 2 of the Dealer Agreement).

(Respondent General Motors LLC's Post-Hearing Brief, p. 7, lines 4-5; p. 22, lines 12-13; p. 25, lines 21-23; p. 26, lines 20-24; p. 27, lines 8-11 and 26-28; and p. 28, lines 1-15; Respondent General Motors LLC's Reply to Protestant's Post-Hearing Brief, pp. 55-67)

PROTESTANT'S CONTENTIONS

22. Protestant contends that General Motors failed to establish good cause to terminate its Chevrolet franchise because:

- (a) The amount of business transacted by Folsom Chevrolet is substantial as compared to the business available to it and the sales standard used by General Motors "is not accurately measuring either

¹³ General Motors does not dispute that "generally" Folsom Chevrolet has fulfilled its service obligations. (Respondent General Motors LLC's Post-Hearing Brief, p. 27, lines 11-12)

1 the business available to Folsom Chevrolet, or the business transacted by Folsom Chevrolet;”

2 (b) The investments made and obligations incurred by Protestant to perform its part of the
3 Chevrolet franchise have been substantial;

4 (c) Folsom Chevrolet’s investment in its business is substantial and permanent, and “will be
5 significantly affected by termination;”

6 (d) It would be injurious to the public welfare if Protestant’s Chevrolet franchise is
7 terminated;

8 (e) “Folsom Chevrolet is providing more than adequate motor vehicle sales and service
9 facilities, equipment, vehicles parts and qualified service personnel to reasonably provide for the needs of
10 the consumers for the motor vehicles handled by Folsom Chevrolet and has been and is rendering
11 adequate services to the public ...;”

12 (f) The warranty obligations of General Motors have been fulfilled by Folsom Chevrolet; and

13 (g) The extent of Folsom Chevrolet’s failure to comply with the terms of the franchise are
14 limited to those set forth in the Notice of Termination (low RSI and CSI surveys or scores).¹⁴ The
15 performance metrics that General Motors relies on to meet its burden of proof violate subdivision (g) of
16 Section 11713.13 “and therefore cannot be asserted as grounds for termination or good cause.”

17 Additionally, any alleged failures to comply with the franchise “are insufficiently material to warrant
18 termination.” (Protestant’s Post-Hearing Opening Brief, p. 1 lines 6-28; p. 2, lines 1-18; p. 24, lines 3-5;
19 Protestant’s Post-Hearing Reply Brief, pp. 12-14, 24-29)

20 23. According to Protestant, RSI is unreasonable and violates subdivision (g) of Section
21 11713.13, which requires General Motors’ performance standard for measuring dealership sales, service,
22 or customer service performance be reasonable in light of all existing circumstances, including, but not
23 limited to vehicle brand preferences of consumers in Folsom Chevrolet’s area of responsibility.

24 Protestant contends that “brand preference has an impact on Folsom Chevrolet’s level of sales. General
25

26 ¹⁴ Protestant argues that the franchise provides that any basis for termination advanced by General Motors other than Folsom
27 Chevrolet’s “deficient RSI or CSI scores constitutes a breach of Article 13.2 on General Motors’ part, as General Motors
28 would not have given the required notice and provided the required opportunity to cure.” Section 3060 also limits the grounds
of termination to the specific grounds set forth in the written notice provided to both Folsom Chevrolet and the Board.
(Protestant’s Post-Hearing Opening Brief, p. 11, lines 8-21)

1 Motors' failure to consider differences in Chevrolet's brand acceptance based on regional differences in
2 California is unreasonable, as there is clear evidence that wide variations in brand preference exist across
3 the state." (Protestant's Post-Hearing Opening Brief, p. 19, lines 5-12; Protestant's Post-Hearing Reply
4 Brief, p. 5, lines 5-15) RSI, according to Protestant, "makes no allowance for the size of the AGSSA, and
5 the distance of registrations from the dealership, despite the fact that both the experts offered by [the
6 parties] agree that the greater the distance of the dealership from a registration, the less likely the
7 dealership is to capture the opportunity for a sale." (Protestant's Post-Hearing Opening Brief, p. 22, lines
8 7-10) Additionally, RSI does not account for the specific number and location of competitors of the same
9 line-make or of competing makes. (Protestant's Post-Hearing Opening Brief, p. 23, lines 3-4)

10 24. Protestant argues that RSI does not account for vehicles sold by it to purchasers of five or
11 more vehicles in a calendar year, or owners of 15 or more vehicles. (Protestant's Post-Hearing Opening
12 Brief, p. 24, lines 16-20) If RSI does not account for the true amount of business available to Protestant,
13 then "RSI cannot be used by General Motors to meet its burden, because the Vehicle Code requires
14 General Motors to make a showing of the true amount of business available to Folsom Chevrolet, relative
15 to the amount of business Folsom Chevrolet transacted. There is no exception in the Vehicle Code that
16 allows General Motors to exclude a portion of the business available to Folsom Chevrolet, or to exclude a
17 portion of the business transacted by Folsom Chevrolet, if General Motors uses a metric that applies such
18 exclusions for other purposes." (Protestant's Post-Hearing Opening Brief, p. 24, lines 23-28; p. 25, lines
19 1-2; Protestant's Post-Hearing Reply Brief, p. 131, lines 12-15) Article 5.1.4¹⁵ of the franchise, according
20 to Protestant, does not make a distinction between fleet and retail sales. (Protestant's Post-Hearing
21 Opening Brief, p. 42, lines 5-12) The Motor Vehicle Addendum to Protestant's franchise requires it to
22 keep vehicles in inventory that are only available for fleet sales. (Protestant's Post-Hearing Opening
23 Brief, p. 42, lines 17-20; Exh. R-201.062-069)

24 25. Protestant asserts that with respect to the below average CSI scores, the terms of the
25 Dealer Agreement do not require that Folsom Chevrolet be above average with respect to survey scores

26
27 ¹⁵ Article 5.1.4 provides, in part, that: "It is General Motors policy not to sell or allocate new Motor Vehicles to dealers for
28 resale to persons or parties (or their agents) engaged in the business of reselling, brokering ... or wholesaling Motor Vehicles.
... Therefore, unless authorized in writing by General Motors, Dealer agrees that this Agreement authorizes Dealer to purchase
Motor Vehicles only for resale to customers for personal use or primary business use other than resale. ..." (Exh. R-201.010)

1 to be in compliance. (Protestant's Post-Hearing Opening Brief, p. 44, lines 14-16) Both Folsom
2 Chevrolet's score and the regional average for the Purchase and Delivery Survey fall between the
3 response of "completely satisfied" and "very satisfied." (Protestant's Post-Hearing Opening Brief, p. 44,
4 lines 19-21) General Motors has failed to demonstrate that a score between "completely satisfied" and
5 "very satisfied" actually demonstrates any difference in consumer satisfaction at Folsom Chevrolet.
6 (Protestant's Post-Hearing Opening Brief, p. 45, lines 11-13) General Motors failed to meet its burden of
7 proof whether the survey scores are a valid basis for breach of the provision relating to satisfactory
8 customer experience with purchase and ownership, since there is no evidence on: 1) whether the
9 questions posed on the survey actually measure the consumer's satisfaction; 2) the impact of the non-
10 response bias on the survey; and 3) whether the sample size of the survey is sufficient to remove the
11 possibility of fluctuation in scores. (Protestant's Post-Hearing Opening Brief, p. 45, lines 11-28; p. 46,
12 lines 1-2)

13 **DEALER AGREEMENT/FRANCHISE**

14 26. On October 20, 2015, the parties, Folsom Chevrolet/GEO, Inc. and General Motors LLC
15 executed a Chevrolet Dealer Sales and Service Agreement, which included the Standard Provisions and
16 Addenda (herein "Dealer Agreement.") (Exh. R-201) The Dealer Agreement meets the definition of a
17 franchise in Section 331. The Dealer Agreement was effective November 1, 2015.

18 27. The pertinent provisions of the Dealer Agreement are:

19 4.2 ***Area of Primary Responsibility***

20 Dealer is responsible for effectively selling, servicing and otherwise representing
21 General Motors Products¹⁶ in the area designated in a Notice of Area of Primary
22 Responsibility. The Area of Primary Responsibility is used by General Motors in
23 assessing performance of dealers and the dealer network. General Motors retains the right
24 to revise Dealer's Area of Primary Responsibility at General Motors sole discretion
25 consistent with dealer network planning objectives. ... (Exh. R-201.007)

26 5.1. ***Responsibility to Promote and Sell***

27 5.1.1 Dealer agrees to effectively, ethically and lawfully sell and promote the
28 purchase, lease and use of Products by consumers located in its Area of Primary
Responsibility. To achieve this objective, Dealer agrees to:

- (a) maintain an adequate staff of trained sales personnel;

¹⁶ "Products" are defined as "Motor Vehicles, Parts and Accessories." (Exh. R-201.034)

- (b) explain to Product purchasers the items which make up the purchase price and provide purchasers with itemized invoices;
- (c) not charge customers for services for which Dealer is reimbursed by General Motors;
- (d) include in customer orders only equipment or accessories requested by customer or required by law;
- (e) ensure that the customer's purchase and delivery experience are satisfactory; and
- (f) comply with the retail sales standards¹⁷ established by General Motors, as amended from time to time. General Motors will consult with the appropriate dealer council and national dealer counsel before amending the retail sales standards.¹⁸ (Exh. R-201.009)

...

5.1.4 It is General Motors policy not to sell or allocate new Motor Vehicles¹⁹ to dealers for resale to persons or parties (or their agents) engaged in the business of reselling, brokering ... or wholesaling Motor Vehicles. ... Therefore, unless otherwise authorized in writing by General Motors, Dealer agrees that this Agreement authorizes Dealer to purchase Motor Vehicles only for resale to customers for personal use or primary business use other than resale. ... (Exh. R-201.010)

5.3 *Customer Satisfaction*

Dealer and General Motors recognize that appropriate care for the customer will promote customer satisfaction with General Motors Products and its dealers, which is critically important to our current and future business success. Dealer therefore agrees to conduct its operations in a manner which will promote customer satisfaction with the purchase and ownership experience. General Motors agrees to provide Dealer with reasonable support to assist Dealer's attainment of customer satisfaction, but Dealer remains responsible for promoting and maintaining customer satisfaction at the dealership.

General Motors will provide Dealer with a written report at least annually pursuant to the procedures then in effect in evaluating Dealer's purchase and delivery customer satisfaction and Dealer's service customer satisfaction. The report will compare Dealer's performance to other same Line-Make dealers in the Region. General Motors will provide a written explanation of the customer satisfaction review process to Dealer. ... (Exh. R-201.011)

///

¹⁷ There is no separate written set of standards; the standards are contained in the Dealer Agreement. (RT Vol. I, 217:5-219:25)

¹⁸ Retail sales standards refer to the "benchmarks that [General Motors uses] to measure a dealer's retail sales performance. Specifically, the metric [General Motors uses] is called a retail sales index, or often referred to as an RSI in [General Motors'] world of acronyms." (Vol. RT II, 460:23-25, 461:1-3)

¹⁹ "Motor vehicles" are defined as "[a]ll current model types or series of new motor vehicles specified in any Motor Vehicle Addendum incorporated into this Agreement and all past General Motors vehicles marketed through Motor Vehicle Dealers." (Exh. R-201.034)

ARTICLE 9. REVIEW OF DEALER'S SALES PERFORMANCE

General Motors willingness to enter into this Agreement is based in part on Dealer's commitment to effectively sell and promote the purchase, lease and use of Products in Dealer's Area of Primary Responsibility. The success of General Motors and Dealer depends to a substantial degree on Dealer taking advantage of available sales opportunities.

Given this Dealer commitment, General Motors will provide Dealer with a written report at least annually pursuant to the procedures then in effect evaluating Dealer's sales performance. The report will compare Dealer's retail sales to retail sales opportunities by segment in Dealer's Area of Primary Responsibility or Area of Geographical Sales and Service Advantage, whichever is applicable. General Motors will provide a written explanation of the sales review process to Dealer. Satisfactory performance of Dealer's sales obligations under Article 5.1 requires Dealer to achieve a Retail Sales Index equal or greater than 100. If Dealer's Retail Sales Index is less than 100, Dealer's sales performance will be rated as provided in the General Motors Sales Evaluation process. General Motors expects Dealer to pursue available sales opportunities exceeding this standard. Additionally, General Motors expectations of its sales and registration performance for a Line-Make in a particular area may exceed this standard for individual dealer compliance.

In addition to the Retail Sales Index, General Motors will consider any other relevant factors in deciding whether to proceed under the provisions of Article 13.2 to address any failure by Dealer to adequately perform its sales responsibilities. General Motors will only pursue its rights under Article 13.2 to address any failure by Dealer to adequately perform its sales responsibilities if General Motors determines that Dealer has materially breached its sales performance obligations under this Dealer Agreement.

...

(Exh. R-201.017)

13.2 *Failure of Performance by Dealer*

If General Motors determines that Dealer's Premises are not acceptable, or that Dealer has failed to adequately perform its sales or service responsibilities, including those responsibilities relating to customer satisfaction and training, General Motors will review such failure with Dealer.

As soon as is practical thereafter, General Motors will notify Dealer in writing of the nature of Dealer's failure and of the period of time (which shall not be less than six months) during which Dealer will have the opportunity to correct the failure.

If Dealer does correct the failure by the expiration of the period, General Motors will so advise the Dealer in writing. If, however, Dealer remains in material breach of its obligations at the expiration of the period, General Motors may terminate this Agreement by giving Dealer 90 days advance written notice. (Exh. R-201.023)

28. The term "retail" is not defined in the Dealer Agreement, is not in the Joint Glossary of Terms, nor in any other document provided, and the word is not mentioned in the Dealer Agreement until Article 5.1.1(f). Article 6.1 provides that "General Motors will periodically furnish Dealer one or more Motor Vehicle Addenda specifying the current model types or series of new Motor Vehicles which

1 Dealer may purchase under this Agreement.” (Exh. R-201.013) In various Motor Vehicle Addenda to
2 the Dealer Agreement, specific vehicles are denoted with an asterisk “for Fleet Delivery only, requires
3 valid Fleet Account Number.”²⁰ (Exh. R-201.062-069; RT Vol. I, 85:21-25)²¹

4 APPLICABLE LAW

5 29. Section 331 provides in part as follows:

6 (a) A “franchise” is a written agreement between two or more persons having all of the
7 following conditions:

8 (1) A commercial relationship of definite duration or continuing indefinite duration.

9 (2) The franchisee is granted the right to offer for sale or lease, or to sell or lease at
10 retail new motor vehicles ... manufactured or distributed by the franchisor or the right to
11 perform authorized warranty repairs and service, or the right to perform any combination
12 of these activities.

13 (3) The franchisee constitutes a component of the franchisor’s distribution system.

14 (4) The operation of the franchisee’s business is substantially associated with the
15 franchisor’s trademark, trade name, advertising, or other commercial symbol designating
16 the franchisor.

17 (5) The operation of a portion of the franchisee’s business is substantially reliant on the
18 franchisor for a continued supply of new vehicles, parts, or accessories.

19 ...

20 30. Section 520 provides that: “[a] ‘retail sale’ is a sale of goods to a person for the purpose
21 of consumption and use, and not for resale to others ...”²²

22 31. Section 3050 provides, in part, as follows:

23 The board shall do all of the following:

24 ...

25 (d) Hear and decide, within the limitations and in accordance with the procedure
26 provided, a protest presented by a franchisee pursuant to Section 3060...

27 ...

28 32. Section 3060 provides in part as follows:

(a) Notwithstanding Section 20999.1 of the Business and Professions Code or the terms
of any franchise, no franchisor shall terminate or refuse to continue any existing franchise
unless all of the following conditions are met: ...

(1) The franchisee and the board have received written notice from the franchisor
as follows:

²⁰ “Fleet Account Number” or FAN is defined as “[a] number given to a purchaser of vehicles under [General Motors] fleet
program. General Motors guidelines state a FAN is required when the customer 1) purchases more than 5 vehicles in a year,
or 2) has more than 15 vehicles in operation.” (Joint Glossary of Terms, p. 2)

²¹ References herein to Roman Numerals are to the transcript volumes of the proceedings.

²² “Person,” as defined in Section 470, “includes a natural person, firm, copartnership, association, limited liability company,
or corporation.”

1 ...
2 (2) Except as provided in Section 3050.7, the board finds that there is good cause for
3 termination or refusal to continue, following a hearing called pursuant to Section 3066. ...
4 (3) The franchisor has received the written consent of the franchisee, or the appropriate
5 period for filing a protest has elapsed.

6 ...
7
8 33. Subdivision (g) of Section 11713.13 provides as follows:

9 It is unlawful and a violation of this code for any manufacturer, manufacturer branch,
10 distributor, or distributor branch licensed under this code to do, directly or indirectly
11 through an affiliate, any of the following:
12 ...

13 (g) (1) Establish or maintain a performance standard, sales objective, or program for
14 measuring a dealer's sales, service, or customer service performance that may materially
15 affect the dealer, including, but not limited to, the dealer's right to payment under any
16 incentive or reimbursement program or establishment of working capital requirements,
17 unless both of the following requirements are satisfied:

18 (A) The performance standard, sales objective, or program for measuring dealership
19 sales, service, or customer service performance is reasonable in light of all existing
20 circumstances, including, but not limited to, the following:

21 (i) Demographics in the dealer's area of responsibility.

22 (ii) Geographical and market characteristics in the dealer's area of responsibility.

23 (iii) The availability and allocation of vehicles and parts inventory.

24 (iv) Local and statewide economic circumstances.

25 (v) Historical sales, service, and customer service performance of the line-make within
26 the dealer's area of responsibility, including vehicle brand preferences of consumers in
27 the dealer's area of responsibility.

28 (B) Within 30 days after a request by the dealer, the manufacturer, manufacturer
branch, distributor, distributor branch, or affiliate provides a written summary of the
methodology and data used in establishing the performance standard, sales objective, or
program for measuring dealership sales or service performance. The summary shall be in
detail sufficient to permit the dealer to determine how the standard was established and
applied to the dealer.

(2) In any proceeding in which the reasonableness of a performance standard, sales
objective, or program for measuring dealership sales, service, or customer service
performance is an issue, the manufacturer, manufacturer branch, distributor, distributor
branch, or affiliate shall have the burden of proof.

(3) As used in this subdivision, "area of responsibility" shall have the same meaning as
defined in subdivision (z) of Section 11713.3.²³

23 ///

24 ///

25 ///

26 ///

27 _____

28 ²³ Subdivision (z) of Section 11713.3 provides that "area of responsibility" means "a geographic area specified in a franchise
that is used by the franchisor for the purpose of evaluating the franchisee's performance of its sales and service obligations."

1 **FINDINGS OF FACT**²⁴

2 **Preliminary Findings**

3 **Brief History of the Manufacturer**

4 34. Following General Motors Corporation's (Respondent's predecessor; herein "Old GM")
5 bankruptcy in 2009, there was a "significant reduction" in the number of dealers for all four of Old GM's
6 lines (Chevrolet, Buick, General Motors Truck, and Cadillac), resulting in a restructured dealer network.
7 (Exhs. R-202, R-204) Old GM, because of its bankruptcy, was permitted to terminate hundreds of its
8 dealerships without regard to state franchise laws such as Section 3060.²⁵ (Exh. R-202.001)

9 35. Those dealerships selected to remain as franchisees, including Folsom Chevrolet, were
10 sent proposed letter agreements called Participation Agreements. (Exh. R-202) The Participation
11 Agreement required retained dealers to recognize that as a result of restructuring, dealers had
12 "substantially more sales opportunities and Dealer must substantially increase its sales of New Motor
13 Vehicles." The Participation Agreement also noted that dealers "recognized" that due to fewer dealers,
14 and expected sales increases, "Dealer will need to stock additional Motor Vehicles." (Exh. R-202.002)
15 Marshal Crossan signed the Participation Agreement on behalf of Folsom Chevrolet on June 4, 2009.
16 (Exh. R-202)

17 36. Chevrolet, for the last three years (2015-2017), on a national level and especially in
18 northern California, has increased its sales and retail market share. This is the first time Chevrolet had
19 three years of increased market growth since since 1990. (RT Vol. I, 120:1-121:14; Vol. X, 34:7-13)

20 37. Approximately 80 percent of all Chevrolet sales for General Motors are retail sales with
21 the remaining 20 percent being fleet sales. (RT Vol. II, 458:25-459:16; Vol. III, 8:24-9:8)

22 38. Fundamental among General Motors' operations is that the company's business model
23 focuses on retail sales from its dealers. (RT Vol. III, 8:24-9:8) General Motors has also put resources into
24 developing its dealership network to make retail sales. Retail sales are proximity-sensitive, so dealers

25
26 ²⁴ References to testimony, exhibits or other parts of the record are intended to be examples of evidence relied upon to reach a
27 finding, and not to be exhaustive. Findings of Fact are organized under topical headings for readability only, and not to
28 indicate an exclusive relationship to an issue denoted by the topic heading. The Board may apply a particular finding to any
"existing circumstance" or "good cause" factor under Section 3061.

²⁵ General Motors, Folsom Chevrolet's franchisor and the Respondent in this protest, is a new entity and a Limited Liability
Company. (Exh. R-201.002; RT Vol. VII, 194:22-195:1)

1 must be “located in a location that’s convenient for the customer with good visibility, accessible to
2 the customer, so that they can attract that retail customer ...” (RT Vol. III, 9:9-20) General Motors has
3 approximately 3,000 Chevrolet dealers in the United States. (RT Vol. III, 133:10-13)

4 **History, Description and Operation of Folsom Chevrolet**

5 39. Marshal Crossan, the dealer principal of Protestant, began working in the car dealership
6 industry after graduation from college. (RT Vol. VI, 93:18-94:18, 95:5-20) In late 1977, BMW of
7 Roseville was opened by Marshal Crossan’s brother, Larry Crossan, with Marshal owning 39 percent, his
8 father 10 percent, and Larry 51 percent. (RT Vol. VI, 98:4-14) After the BMW dealership was sold,
9 Marshal Crossan worked for the new owners as the General Manager for four years. (RT Vol. VI, 100:5-
10 25) He then worked as a Sales Manager for another dealership from 1986 until May 1992. (RT Vol. VI,
11 101:1-24)

12 40. The former Chevrolet dealership in Folsom, Love Chevrolet, failed in 1991 and there was
13 no longer a Chevrolet dealership in operation in Folsom. (RT Vol. VI, 102:1-3) General Motors
14 Acceptance Corporation (“GMAC”), the financial subsidiary of Old GM, had lost approximately \$17
15 million when Love Chevrolet went out of business, and GMAC was holding its property. (RT Vol. VI,
16 105:16-106:8, 106:18-21) In 1992, Marshal Crossan came to an agreement with Old GM for the
17 purchase of the dealership whereby he invested \$250,000, and Motors Holding division of Old GM
18 (“Motors Holding”) invested \$750,000. (RT Vol. VI, 107:5-108:13) On June 29, 1992, Marshal Crossan
19 opened Folsom Chevrolet, in the same location as the previously failed dealer. (RT Vol. VI, 105:14-25,
20 106:22-25) Twenty percent of Marshal Crossan’s profits from the dealership’s operations eventually
21 went to buying Motors Holding out. Marshal Crossan and his wife became sole owners of Folsom
22 Chevrolet in February 1998. (RT Vol. VI, 107:5-109:12, 112:9-24, 113:2-4)

23 41. In 1997, Marshal Crossan purchased a parcel of land in the newly created Folsom Auto
24 Mall, where Ford and Toyota dealerships had already relocated. (RT Vol. VI, 111:23-112:13) Marshal
25 Crossan estimated the purchase price of the property at \$3.9 million and the cost of the construction of
26 the facility, which met the requirements of General Motors’ Image 2000 design program, at a little over
27 \$2 million to “roughly \$3 million.” (RT Vol. VI, 113:14-114:13, 114:24-115:7, 146:8-147:4) The project
28 was financed by a personal loan from GMAC to Marshal Crossan and his wife at the time. (RT Vol. VI,

1 113:14-114:13; Exh. R-253)

2 42. As a condition of allowing Folsom Chevrolet to relocate to and purchase a new location,
3 Old GM required site control of the newly constructed dealership and the land. (RT Vol. VI, 149:8-150:2;
4 Exh. R-253) Marshal Crossan, with his then-wife, entered into a 25-year lease with Argonaut, an Old
5 GM subsidiary, with a term of February 1, 1998 through January 31, 2023, at an annual payment of
6 \$775,200. (RT Vol. VI, 149:8-150:3; Exhs. R-253, R-201.048) Currently, Marshal Crossan's trust owns
7 the building and the land, leases it to Argonaut, which then subleases it to Folsom Chevrolet. (RT Vol.
8 VI, 152:15-22)

9 43. In 2007 or 2010 Marshal Crossan purchased 9.2 acres adjacent to Folsom Chevrolet for a
10 storage lot at a cost of \$3.9 million dollars. (RT Vol. VI, 120:10-20, 147:17-25, 148:7-12; Vol. IX, 63:25-
11 64:2)

12 44. The recession beginning in 2007 had a dramatic impact on the Folsom Auto Mall; the
13 Hyundai and Chrysler dealerships closed (2 out of the 10 dealerships in the auto mall). (RT Vol. VI,
14 121:17-122:8) In 2007, Folsom Chevrolet lost \$1.007 million and was forced to conduct layoffs. (RT
15 Vol. VI, 122:12-21, 161:2-162:5) With the cost reductions and layoffs, in 2008 the dealership made
16 approximately \$80,000. (RT Vol. VI, 161:2-162:5) Folsom Chevrolet managed to remain in business
17 throughout the recession. (RT Vol. VI, 122:9-11)

18 45. In the period 2010-2011, Folsom Chevrolet was not able to get back to the volume of sales
19 it had from 2004-2006. Folsom Chevrolet faced additional competition: the Elk Grove Auto Mall in
20 Sacramento County opened and many manufacturers increased their truck and SUV offerings to compete
21 with Chevrolet. The pricing of Chevrolet trucks and SUVs also increased. (RT Vol. VIII, 41:20-44:10)

22 46. Folsom Chevrolet became part of General Motors voluntary Business Elite Dealer
23 program in 1998. This program is offered to dealers who make commitments to General Motors in terms
24 of service facility and a dedicated sales staff for sales to businesses. (RT Vol. II, 338:11-18; Vol. III,
25 72:8-20) Folsom Chevrolet provided facilities and equipment in its service department to be able to lift
26 heavier vehicles, including a 16,000 pound service hoist and taller service doors to accommodate these
27 vehicles. (RT Vol. II, 341:1-23; Vol. VI, 172:2-20) These Business Elite dealers wish to maximize sales
28 to businesses, i.e., fleet and small businesses. Business Elite dealers receive a supplemental allocation,

1 which they earn through an allocation formula in three vehicle lines: 1) Silverado light-duty truck, 2)
2 Silverado heavy-duty truck, and 3) Express Van (a cargo van). (RT Vol. II, 335:3-7; Vol. VIII, 58:21-25)
3 The supplemental allocation is invoiced as retail stock, and can be sold to any customer. Folsom
4 Chevrolet referred to this as its “fleet allocation.” (RT Vol. II, 326:19-21, 335:18-25; Vol. VIII, 58:6-
5 59:12, 60:22-61:8; Vol. IX, 171:19-25-172:16)

6 47. There are approximately 250 Business Elite Chevrolet dealers nationwide. (RT Vol. III,
7 72:8-20) There are 30 Business Elite dealers in the geographic boundaries of the district Folsom
8 Chevrolet is in, which encompasses Bakersfield to Reno/Carson City. There are four Chevrolet Business
9 Elite dealers in the Sacramento Area. (RT Vol. II, 327:8-14; 341:24-342:4)

10 48. There is an additional allocation called Strategic Target Market Initiative (“STMI”): which
11 is up to 15 percent of General Motors’ retail production. It is a discretionary allocation, designed for
12 special circumstances, such as promotions. Folsom Chevrolet has received the most STMI allocation of
13 the Business Elite dealers in the district since 2014. (RT Vol. II, 336:3-19; Vol III, 36:25-37:16; Exh. R-
14 276)

15 49. Folsom Chevrolet was profitable in 2013, recording a profit of \$157,922. (Exh. R-
16 243B.001 at line 63) Marshal Crossan received a salary of \$288,000, and the dealership paid \$1,140,100
17 in rent to Argonaut and \$46,411 in taxes to Marshal Crossan for the properties. (Exh. R- 243B.002 at
18 lines 8, 41, 45) Protestant sold 231 fleet trucks compared to 199 retail trucks and earned a gross profit per
19 truck for retail of \$2,078 compared to \$1,517 per truck for fleet. (Exh. R-243B.005 at lines 41, 43)
20 Approximately 41 percent of the dealership’s new vehicle gross profit in 2013 came from fleet sales.
21 (Exh. P-185-80)

22 50. Starting in 2013, Folsom Chevrolet renovated its facility at an estimated cost of \$800,000
23 to \$900,000. (RT Vol. IX, 30:1-7) The construction took about six months. (RT Vol. VI, 121:4-8)
24 Marshal Crossan asserted that construction was not finished until “late 2014” (see, e.g., Exh. R-
25 226.002), however, a March 2014 letter sent from Larry Crossan to Gensler, architects working with
26 General Motors to remodel dealership facilities, notes that construction was finished around March 2014,
27 stating “[a]s the pictures indicate, construction is complete.” (Exh. R-287; RT Vol. IX, 33:1-12) At times
28 during the construction, it was difficult to determine if the dealership was open due to the lack of signage,

1 and there were difficulties getting the new front entrance completed due to construction problems. (RT
2 Vol. IX, 49:10-50:15) The entire front of the building was fenced off and customers had to walk into the
3 dealership through the service department. (RT Vol. VIII, 75:25-77:6)

4 51. In 2014, Folsom Chevrolet made 428 retail sales against an expectation of 963, a shortfall
5 of 535 units. (Exh. R-242C.002) The result was an “unsatisfactory” RSI of 44.44, ranking it 124th of 128
6 dealers. (*Id.*)

7 52. In 2014, Folsom Chevrolet remained profitable, recording a profit of \$115,499. (R-
8 243C.001 at line 63.) Marshal Crossan continued to receive a salary of \$288,000 and the dealership paid
9 slightly more in rent -- \$1,143,600 to Argonaut, and paid \$70,400 in taxes for properties owned by
10 Marshal Crossan. (Exh. R-243C.002 at lines 8, 41, 45) Protestant continued to sell to fleet customers,
11 selling more fleet trucks (408) than retail trucks (256), and earned a gross profit per truck for retail of
12 \$1,914 and per truck for fleet of \$1,475. (Exh. R-243C.005 at lines 41, 43) More than half of the
13 dealership’s new vehicle gross profit in 2014 came from fleet sales. (Exh. P-185-80)

14 53. In 2015, Folsom Chevrolet earned the highest percentage of its gross profit through fleet
15 truck sales, selling more fleet trucks (434) than retail trucks (416), and at a higher profit per truck (\$1,744
16 for fleet vs. \$1,491 retail). As for fleet cars, Folsom Chevrolet sold more fleet cars (556) than retail cars
17 (194), but not at a higher profit per car (\$883 for fleet vs. \$1,476 retail). (Exh. R-243D.005 at lines 41,
18 43, 20, 22) Folsom Chevrolet’s fleet department earned \$1,247,792 in gross profits in 2015 (the year it
19 sold the Solar City fleet), approximately 58 percent of its total gross profits of \$2,154,274. (Exh. P-185-
20 80; see Paragraph 130, *infra*) Folsom Chevrolet recorded a net profit in 2015 of \$1,489,000 and a net
21 profit in 2016 of \$1,639,000. (Exhs. R-243D.001 at line 63, R-250C.024:22-25, R-243E.001 at line 63,
22 R-250C.021:24-022:4)

23 54. In 2015, Folsom Chevrolet began taking action to address some of the management issues
24 at the dealership by finally letting go of its longtime General Sales Manager, David Shirley. (RT Vol.
25 VIII, 135:1-20; RT Vol. II, 418:11-16) Mr. Shirley failed to implement changes at the dealership, and
26 according to Marshal Crossan, by the time Mr. Shirley was let go, he had openly stopped doing his job;
27 “he was not engaging in the way that he was supposed to.” (RT Vol. II, 410:21-411:16, 411:24-412:13;
28 Vol. VIII, 135:13-136:4) Apparently, even Mr. Shirley agreed that Folsom Chevrolet acted slowly; when

1 he was fired, he told Marshal Crossan that Folsom Chevrolet “should have let him go six months earlier.”
2 (RT Vol. VIII, 136:5-11)

3 55. In 2017, Folsom Chevrolet had \$1.643 million above the minimum net working capital
4 standard that General Motors determined to be necessary to effectively conduct dealership operations.
5 (Exh. P-103-4-5; RT Vol. VI, 156:13-158:1)

6 56. Drew Crossan, Marshal Crossan’s son, testified that when he started at Folsom Chevrolet,
7 as a salesperson in 2011 “all the marketing was running through David Shirley.” (RT Vol. IX, 93:15-18,
8 142:2-23) After Mr. Shirley left, Folsom Chevrolet brought in an outside marketing company, which
9 Drew Crossan described as “[o]ne of the biggest changes” and “a turning point.” (*Id.*) After the departure
10 of Mr. Shirley, phone calls, leads and sales all increased. (RT Vol. IX, 158:18-159:2) As indicated in
11 Paragraph 58, the other significant change was bringing Mr. Kaestner on board. (RT Vol. IX, 141:23-
12 142:23)

13 57. For several years, Folsom Chevrolet has earned incentive payments from General Motors
14 in its Standards for Excellence (SFE) incentive program based on achieving a separate retail sales goal of
15 selling at least one more retail vehicle than they did in the same month the prior year. Folsom Chevrolet’s
16 performance improved significantly in 2016, reaching that mark every month but one. From April 2013
17 to December 2016, Folsom Chevrolet received in compensation from the SFE program \$684,407, with
18 the majority of that money coming in from October 2015 through December 2016. (RT Vol. I, 198:5-
19 199:25; Exh. R-262)

20 58. When Larry Crossan retired as General Manager in 2017, Folsom Chevrolet hired Brian
21 Kaestner, a seasoned manager with experience in high volume new vehicle sales, as the new General
22 Manager in May of 2017. (RT Vol. VIII, 73:17-74:16; 111:1-24) Upon his arrival, Mr. Kaestner
23 implemented a number of changes. Most prominently, he altered the store’s sales model by eliminating
24 the assistant sales manager position. (RT Vol. VIII, 115:17-20; Vol. IX, 227:10-18) Mr. Kaestner also
25 designated certain personnel to monitor leads that come through the Internet department and increased
26 spending on the Internet. (*Id.*; RT Vol. VIII, 147:6-19) Additionally, he changed the pay plans for
27 dealership personnel by incentivizing them more on volume and less on gross profits, as well as adding
28 performance standards. (RT Vol. VIII, 146:22-147:5) Following Mr. Kaestner’s arrival and implementing

1 those changes, without firing anybody there was “almost ... a hundred percent turnover with the sales
2 force.” (RT Vol. IX, 243:9-25)

3 59. Folsom Chevrolet’s retail sales have risen since Mr. Kaestner’s arrival. Since he joined
4 Folsom Chevrolet, the dealership has posted an increase in sales for each month over the prior years’
5 sales for those months and in October and December 2017, 105 and 107 retail sales were made,
6 respectively. (Exh. R-270; RT Vol. IX, 247:15-19) However, that was below expected sales of
7 approximately 125 units per month in 2017. (*Id.*)

8 60. Drew Crossan has been working his way up through the ranks at Folsom Chevrolet and
9 currently is General Sales Manager. (RT Vol. IX, 91:9-10) Marshal Crossan would like to pass the
10 dealership on to Drew. (RT Vol. VIII, 109:23-110:7)

11 61. Folsom Chevrolet currently has between 80 and 90 employees. (RT Vol. VI, 122:22-24)
12 The sales department currently has 11 salespeople and three managers, with at least one additional
13 salesperson hired during the hearing. (RT Vol. VI, 179:16-180:22; RT Vol. IX, 257:25-258:12) The fleet
14 department has three additional sales personnel. (RT Vol. VI, 182:2-5) The dealership is open seven days
15 a week with the daily hours ranging from 12.5 hours on Saturdays to nine hours on Sundays. (RT Vol.
16 VI, 187:14-188:4)

17 62. Marshal Crossan has been involved with several volunteer programs at General Motors’
18 request, including as a volunteer in an arbitration and mediation program. (RT Vol. VI, 127:10-128:2) He
19 also sat on the National Truck Dealer Advisory Board and the OnStar Advisory Board. (Exh. P-101; RT
20 Vol. VI, 132:19-133:11; 129:7-23) Additionally, he was the President of the Local Marketing Area
21 group for many years, which is the group of dealers in the Sacramento, Stockton, and Modesto area
22 which meet at General Motors’ urging to coordinate marketing expenditures. (RT Vol. VI, 130:5-23)

23 **Area of Primary Responsibility and Region**

24 63. In the regular course of business, General Motors assigns a geographic area to each dealer,
25 whether as an APR or an AGSSA or both with periodic updates. (Exh. R-201.007, § 4.2; RT Vol. III,
26 136:6-21) APRs and AGSSAs consist of a certain number of assigned census tracts, as those tracts are
27 defined by the U.S. Census Bureau. The collection of census tracts assigned to a dealer is principally
28 determined by the geographical proximity of the dealership location and the population center of each

1 tract. (RT Vol. III, 136:6-21, 137:4-21) A census tract larger in area typically indicates less density of
2 population within that tract. (RT Vol. III, 152:14-21) The census tracts smaller in area indicate greater
3 population density in those areas.

4 64. The Sacramento APR is a large geographic area shared by Folsom Chevrolet with four
5 other Chevrolet dealers. These are: 1) John L. Sullivan Chevrolet (Roseville), 2) Performance Chevrolet
6 (Sacramento), 3) Kuni Chevrolet (Sacramento) and, 4) Maita Chevrolet (Elk Grove). (Exh. R-244.024)
7 The AGSSA assigned to Folsom Chevrolet, which is part of the APR, is specific to Folsom Chevrolet.²⁶

8 65. APR and AGSSA configurations reflect the areas where General Motors believes the
9 dealer has a competitive advantage over other dealerships due to customer convenience and geographical
10 proximity. (RT Vol. III, 210:7-18) An AGSSA does not prevent or restrict sales – dealerships are free to
11 sell vehicles to customers located anywhere in the country. (RT Vol. II, 473:7-16) AGSSAs are based
12 primarily on proximity of contiguous census tracts to the nearest dealership, absent any natural or man-
13 made barriers, or unusual traffic patterns. (RT Vol. III, 137:4-21; Exh. R-244.006 ¶ 14)

14 66. The competitive advantage is, however, not absolute. (Exh. R-244.006 ¶ 15; Exh. P-185-8
15 ¶31) “Factors under the direct control of the dealer such as price, selection, selling approach, service,
16 facilities, and advertising motivate consumers to travel beyond the most proximate dealer in search of a
17 better value proposition.” This buyer behavior or “cross-sell” phenomenon is a result of intra-brand
18 competition among Chevrolet dealers. (Exh. R-244.006 ¶ 15)

19 67. Significantly, statewide in California, Chevrolet dealerships make less than 41 percent of
20 their sales within their AGSSA; the remaining balance of sales, 59 percent, come from outside their
21 assigned territory. (RT Vol. VII, 38:21-39:19, 43:13-45:9; Exhs. P-186-5 ¶ 16; P-186-11; R-244.006
22 ¶ 15) This is also true for the Sacramento APR. (Exh. R-244.025) However, the RSI calculation does not
23 include any calculation of the opportunity to sell outside of the AGSSA. (RT Vol. VII, 38:21-39:19) The
24 entire RSI expectation is drawn from competitive registrations within a dealer's AGSSA and the state
25 average market share as applied to those competitive registrations.

26 68. During Old GM's bankruptcy, it terminated the franchises of two Chevrolet dealerships:
27 _____

28 ²⁶ There are some dealers located in a Single Dealer Area (“SDA”) where the APR consists of a single AGSSA. (Exh. R-206)

1 Family Chevrolet in Shingle Springs to the east of Folsom Chevrolet and Amador Motors²⁷ in Jackson to
2 the south of Folsom Chevrolet. (RT Vol. VI, 169:10-25; Vol. III 204:25-206:3) Amador Motors was
3 about a 45 to 60 minute drive south from Folsom depending on traffic, and the Shingle Springs
4 dealership was located 15 miles to the east. (RT Vol. VI, 170:1-6) The reason the two dealers were
5 terminated during the bankruptcy process was based, at least in part, on performance criteria of Old GM.
6 (RT Vol. III, 139:16-25; 204:25-206:3) During the bankruptcy proceedings, Old GM used as its standard
7 for possible termination or rejection any dealer with a score of 70 percent or lower on the Dealer
8 Performance Score (“DPS”). (RT Vol. VII, 103:5-105:12) The DPS is made up of 50 percent RSI, 30
9 percent CSI, 10 percent working capital and 10 percent profitability.²⁸ (RT Vol. VII, 105:13-106:3)

10 69. When a dealer is no longer “in the network,” General Motors determines whether to
11 designate the former dealer’s assigned area as an “open point” or to reassign the area to other already
12 existing dealers. (RT Vol. III, 98:25-99:22, 140:4-22)

13 70. Despite the closure of the Shingle Springs Chevrolet dealer to the east of Folsom
14 Chevrolet’s new AGSSA, there remained a Buick GMC dealer in Placerville to the east of Folsom
15 Chevrolet. (Exh. R-245.011-.014; RT Vol. VII, 206:12-208:8) GMC branded trucks are essentially the
16 same as Chevrolet trucks, with the differences largely being limited to branding and minor cosmetic
17 differences. (RT Vol. VII, 206:12-208:8; Vol. VI, 229:1-232:1)

18 71. Two changes were made to Folsom Chevrolet’s AGSSA by General Motors; one in
19 2010/2011 and one in 2013. (Exhs. R-204, R-205, and R-206)

20 72. On December 17, 2010, General Motors sent a letter to Folsom Chevrolet indicating that it
21 had completed a “comprehensive review” of the entire dealer network, arising out of, and related, to Old
22 GM’s bankruptcy in 2009. Because of the “significant reduction” in the number of dealers for all four of
23 General Motors’ lines-makes, which resulted in a restructured dealer network, General Motors decided to
24 issue new APR/AGSSA Addenda to all its dealers, including Folsom Chevrolet. (Exh. R-204) As
25 indicated below, the changes to the APR resulted in changes to Folsom Chevrolet’s AGSSA.

26 73. Before 2010, Folsom Chevrolet had 32 census tracts in its AGSSA, all of which were in
27

28 ²⁷ Sometimes this dealership is called Prospect Motors. (RT Vol. VIII, 169:15-25; 170:9-18)

²⁸ The DPS for Folsom Chevrolet for 2015 and 9/2016 Year To Date is shown on Exhibit P-185-68.

1 Sacramento County. (Exh. R-204; RT Vol. III, 150:4-8, 150:24-151:3) At that time, Folsom Chevrolet
2 was more centrally located within its former AGSSA, with 12 tracts south of it, and 20 tracts north or east
3 if it. (Exhs. P-186-6 ¶ 18, P-186-13; R-204.009) (See map attached hereto as Attachment A.)

4 74. The APR for Folsom Chevrolet and the other four Chevrolet dealers in the Sacramento
5 Area was proposed to be changed by adding two census tracts from Amador County, deleting one from
6 Yolo County (tract 104), adding all of El Dorado County's census tracts except 14 tracts, and all of
7 Placer County census tracts except 21 tracts. The census tracts for Sacramento County for the APR did
8 not change (all but two were previously included), and the one census tract from Sutter remained. (Exh.
9 R-204.007, .010, .059) (See map attached hereto as Attachment B.)

10 75. As part of the December 2010 letter, Folsom Chevrolet's proposed number of census
11 tracts in its AGSSA went from 32 to 56: an addition of 24. One was added and one deleted in Sacramento
12 County (deleted tract 82.11 and added tract 89.13) and two in Amador County and 22 in El Dorado
13 County were added. Some of the census tracts added to Folsom Chevrolet's AGSSA were previously
14 assigned to Family Chevrolet in Shingle Springs and Amador Motors in Jackson. (Exh. R-204; RT Vol.
15 III, 151:13-15)

16 76. On April 22, 2011, General Motors sent a letter to Folsom Chevrolet indicating it had
17 completed a review of information submitted by dealers to General Motors' 2010 tentative APR and/or
18 AGSSA notice and had decided to make modifications to the previous proposal. The APR for the
19 Sacramento area this time included all El Dorado County census tracts except 10 (four more tracts than
20 the 2010 letter) and all Placer County tracts except 20 (previously 21 excluded). Under this modification,
21 Folsom Chevrolet was assigned an AGSSA with 60 census tracts (28 more than previously assigned),
22 with 26 of those tracts in El Dorado County to the east. (Exh. R-205) The final APR/AGSSA decision
23 was sent to Folsom Chevrolet on June 29, 2011. (Exhs. R-257, R-204.010; See map attached hereto as
24 Attachment C.)

25 77. Folsom Chevrolet did not challenge or file a protest with the Board to the changed

26 ///

27 ///

28 ///

1 AGSSA in 2010/2011.²⁹

2 78. On January 22, 2013, General Motors completed another “comprehensive review and
3 analysis” of the General Motors network in order to allow for the conversion of dealers’ APR and
4 AGSSA to the U.S. Census Bureau’s 2010 census tract geography, to be implemented at the start of the
5 2014 calendar year. (Exhs. R-206, R-244.024; See map attached hereto as Attachment D.)

6 79. In 2013, Folsom Chevrolet’s AGSSA went from 60 census tracts to 74; nine more tracts in
7 Sacramento County for a total of 41 tracts plus 31 in El Dorado County (an additional five tracts) and the
8 same two tracts in Amador County. (Exh. R-206.008, .010)

9 80. The January 2013 letter indicated the notice regarding the APR/AGSSA was provided
10 pursuant to Article 4.2 of the Dealer Agreement, and “applicable” General Motors policy. (Exh. R-
11 206.001) The dealer had 30 days to submit information to General Motors that the dealer wanted General
12 Motors to consider regarding changes made to the APR. (Exh. R-201.007; RT Vol. I, 61:21-62:1)

13 81. On April 9, 2013, Folsom Chevrolet sent a late challenge of the AGSSA to General
14 Motors. (Exh. R-281) Folsom Chevrolet complained about 14 communities they claimed were now in
15 Folsom Chevrolet’s AGSSA, but which were “located great distances from [Folsom Chevrolet’s] location
16 in Folsom, off the Highway 50 Freeway.” However, the 14 communities Folsom Chevrolet questioned
17 were in the Sacramento APR, but were not in Folsom Chevrolet’s AGSSA in 2013, nor are they
18 currently. (Exh. R-281.001; RT Vol. III, 164:5-165:20)

19 82. Folsom Chevrolet also asserted that the census tracts previously assigned to Family
20 Chevrolet in Shingle Springs and Amador Motors in Jackson should not be assigned to Folsom
21 Chevrolet, but should be designated “open areas.” Folsom Chevrolet claimed that those areas “are in
22 strikingly different market areas” compared to Folsom Chevrolet’s market areas, and the shopping
23 patterns for those customers did not justify their assignment to Folsom Chevrolet. (Exhs. R-281, P-124)

24 83. General Motors reviewed the late challenge, and in September 2013 revised Folsom
25 Chevrolet’s AGSSA by deleting two census tracts from Sacramento County, resulting in a total of 72, 40
26 ///

27
28 ²⁹ Marshal Crossan testified he did not file a protest because “it was a little bit shaky time with coming out of the go-ahead letters and all ... I didn’t want to stir anything up....” (RT Vol. VIII, 187:22-188:19)

more census tracts than had been assigned to Folsom Chevrolet prior to the bankruptcy.³⁰ (Exh. R-208)
There was no challenge to that finalized revision by Folsom Chevrolet, nor a protest filed with the Board.³¹

84. A review of 2016 census tracts data of Folsom Chevrolet's revised 2010, 2011 and 2014 AGSSAs shows the number of competitive registrations within Folsom Chevrolet's AGSSA grew significantly as indicated in the chart below:

	Chevrolet	Industry	Chevrolet % Industry
2010 AGSSA	447	9,117	4.9%
2011 AGSSA	795	16,627	4.8%
2014 AGSSA	779	16,391	4.8%
2010 to 2011 Change	77.9%	82.4%	
2011 to 2014 Change	-2.0%	-1.4%	
2010 to 2014 Change	74.3%	79.8%	

(Exh. P-186-12)

85. As the chart above shows, there was an increase, on a net basis, of about 80 percent in the number of registrations within Folsom Chevrolet's AGSSA between 2010 and 2014. (Exhs. P-186-6 ¶ 18, P-186-12; RT Vol. VII, 46:17-47:12) Since Folsom Chevrolet's AGSSA size increased by 80 percent in terms of the number of competitive registrations, the expectation by General Motors was that Folsom Chevrolet's sales should increase accordingly. (RT Vol. VII, 46:14-47:23, 156:23-157:19)

86. Folsom Chevrolet has a fairly similar AGSSA to Folsom Lake Ford located in the same

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³⁰ Folsom Chevrolet was not the only dealership in California to see its territory increase following Old GM's bankruptcy. General Motors' Exhibit R-289 was admitted (although it had not been previously exchanged) as possibly relevant. (RT Vol. X, 40:18-25) The exhibit shows six dealers in the same northern California zone as Folsom Chevrolet, which are similar in size to Folsom Chevrolet that also had a large increase in expected sales between 2010 and 2011, and from 2011 to 2016 due to, at least in part, added territory. These dealers were able to increase their sales to compensate. (RT Vol. X, 30:18-40:25) For example, Capitol Chevrolet saw a 250 percent increase in its expected sales from 2010 to 2011 due to closure of two nearby dealerships. (Exh. R-289; RT Vol. X, 33:10-21) From 2010 to 2011, Folsom Chevrolet saw a 221 percent increase in its expected sales. (RT Vol. X, 37:2-40:12; Exh. R-289) However, these other dealers' sales accomplishments as compared to Folsom Chevrolet's sales cannot be given any weight without additional comparable information being provided, such as whether or not there was a change in ownership, number of other dealers in the area, rural versus urban, etc.

³¹ It is unclear from the record the exact number of census tracts that were added to each of the other four Sacramento Area Chevrolet dealership's AGSSAs following the bankruptcy. From the maps, it is obvious that none saw the huge geographical increase that Folsom Chevrolet did.

1 auto mall.³² Folsom Lake Ford in 2013 made over 1,600 retail sales. (Exh. R-210; RT Vol. I, 118:25-
2 119:5) Folsom Chevrolet, meanwhile, made 370 retail sales that year against an expectation of 904. (Exh.
3 R-242B.002) However, there is no evidence to show what similarities there are, if any, between Folsom
4 Lake Ford and Folsom Chevrolet other than proximity and geographically similar AGSSAs, so as to
5 determine the relevancy of this fact.³³ (Exh. P-186-7; RT Vol. VII, 188:23-190:5; 197:1-198:1)

6 87. Folsom Chevrolet was not centrally located within its new AGSSA, either in 2010/2011 or
7 2013. (Exhs. R-205.007, R-206.009, P-186-13) Folsom Chevrolet's geographically large AGSSA
8 includes the City of Folsom at its westerly edge and stretches east, along Highway 50, past El Dorado
9 Hills, Shingle Springs and Placerville, towards Lake Tahoe. (Exhs. R-244.026, J-1, R-290, p. 1; RT Vol.
10 V, 35:11-36:11; Vol. VII, 206:5-11, 206:21-207:5; Vol. VIII, 24:18-21, 45:9-11, 80:17-19, 164:7-16,
11 182:4-10; Vol. IX, 160:10-12) The thin black lines on the various maps introduced into evidence are the
12 outlines of the census tracts. (See e.g., Exh. R-244.024) Each census tract is intended to be approximately
13 4,000 people. As noted earlier, smaller census tracts geographically are more densely populated than the
14 large census tracts which have smaller populations. (RT Vol. V, 30:16-31:25, Vol. III, 206:4-12) The
15 other four Chevrolet dealers in the Sacramento Area in general all remained more centrally located within
16 their AGSSAs and with many more populous tracts. (Exh. R-244.024) There is a higher concentration of
17 population closer to those dealerships where they are able to capture sales. (RT Vol. VII, 53:1-54:6)
18 Folsom Chevrolet sells to customers throughout the Sacramento metro area, who are naturally more
19 susceptible to cross-sell, due to the nature of the urban area. (Exhs. R-244.077, P-185-52-66)

20 88. Folsom Chevrolet is located in close proximity to the four competing Chevrolet dealers.
21 Folsom Chevrolet is approximately a 10-mile drive from Performance Chevrolet and John L. Sullivan
22 Chevrolet, about a 17-mile drive from Kuni Chevrolet, and about 25 miles from Maita Chevrolet. (Exh.
23 P-185-52-66; Exhibit J-1; see Paragraph 15, *supra*) Census tracts which lie between Folsom Chevrolet
24 and those four dealerships are split, meaning that some tracts assigned to Folsom Chevrolet are as little as
25

26 ³² The Ford dealership is perhaps better located, since as one exits the freeway the right hand lane takes you directly to the
27 circle where the Ford and Toyota dealerships are located. Folsom Chevrolet is located on the next circle up from where the
28 Ford dealership is. (RT Vol. IX, 53:8-55:1)

³³ Ford outsells Chevrolet in every auto mall in Sacramento according to Drew Crossan, who believes this is because Ford has
more inventory. (RT Vol. IX, 146:15-24)

1 five or six miles from another Chevrolet dealer. (Exh. P-185-52-66)

2 89. Mr. Stockton, Folsom Chevrolet's expert, opined that rural areas tend to have less cross-
3 sell between markets than urban areas do. (RT Vol. VII, 42:9-14) In an urban AGSSA, with many
4 options, a dealer will both lose and gain more customers to competing dealers, while in a rural AGSSA
5 with fewer options, there is a greater likelihood that any individual dealer will be able to capture the sales
6 within that AGSSA because the alternatives are so far away. (RT Vol. VII, 42:18-43:4) However, Folsom
7 Chevrolet's AGSSA is part rural and part urban, so it does not fit either of these scenarios. And although
8 Folsom Chevrolet is positioned to capture sales from customers driving west along Highway 50, which
9 runs directly past the Folsom Auto Mall, the other Sacramento Area dealerships, as noted above, are
10 located as close as 10 miles away. Therefore, Folsom Chevrolet's proximity to Highway 50 is not as
11 compelling for capturing sales as General Motors asserts. In 2015, John L. Sullivan Chevrolet located 10
12 miles away in Roseville made 157 sales in Folsom Chevrolet's AGSSA, capturing 21.6 percent of
13 Folsom Chevrolet's sales. (Exhs. R-244.025, P-185-55-57; RT Vol. VIII, 80:20-81:3)

14 90. Folsom Chevrolet's retail sales expectations are similar to those of the other Sacramento
15 Area dealerships. For example, in 2016, Folsom Chevrolet was expected to sell 1,324 vehicles, while
16 John L. Sullivan was expected to sell 1,396, Kuni 1,355, and Maita 1,182. (Exh. R-246.015.) These other
17 four dealers are performing at an average of 97.1 RSI.³⁴ (Exh. R-244.036)

18 91. The average RSI among the 10 dealers with the closest AGSSA size geographically to
19 Folsom Chevrolet in California (excluding Folsom Chevrolet) is 72. (Exh. R-244.010) Folsom
20 Chevrolet's ranking in that group is 112 out of 129. (Exh. R-244.049)

21 **Retail Sales Index**

22 92. Though known by varying names, Retail Sales Index or some variant of it has been used
23 as a metric throughout the automotive industry. (RT Vol. V, 20:1-21) General Motors and its
24 predecessors have been using RSI since the late 1970s. (RT Vol. II, 461:17-22) General Motors' RSI
25 metric is the ratio of dealer retail sales to expected retail dealer sales. (Exh. R-246.002 ¶ 4) "The concept

26 _____
27 ³⁴ Exhibit R-244.025 also shows each Sacramento Chevrolet dealers' national sales added to each metro sales. Folsom
28 Chevrolet's total national and metro sales are higher than Performance Chevrolet's; 667 and 459 respectively, but lower than
the other three dealers.

of sales over expectations is fundamental.” (RT Vol. V, 20:11-21)

93. RSI is used by General Motors to determine the number of sales it expects from its dealers and therefore, according to General Motors, the sales effectiveness of its dealers in selling its vehicles to retail customers. (RT Vol. II, 461:11-16) The expected retail dealer sales are determined using a multi-step formula and calculated based on actual registrations. A RSI of 100 indicates a dealer achieved its sales expectations, i.e., state average performance. (Exh. R-246.008-.009 ¶ 24) Those dealers with less than 100 RSI are underperforming and by the conceptual design of the metric, General Motors causes approximately half of its dealerships to obtain RSI scores below 100. (Exh. P-185-3) Because the RSI metric is an average, a substantial amount of the dealer body will not meet the RSI target because some dealers must be below average, as some must be above. (Exh. P-185-6, 11; RT Vol. VII, 14:25-17:19)

94. RSI compares the number of new retail vehicles sold by Folsom Chevrolet against the number that it was expected to sell as formulated by General Motors based on Chevrolet’s statewide market penetration, and the number of new vehicles actually registered in Folsom Chevrolet’s AGSSA by segments.³⁵ (Exh. R-244.007-.008 ¶ 20)

95. To determine RSI, General Motors first looks at new vehicle registrations, grouped by segments across California. General Motors acknowledges the Chevrolet brand does not perform uniformly across the country, with Chevrolet having a lower market share in California than nationally. Therefore, General Motors bases its calculations for RSI on California market share rather than national share. (RT Vol. VII, 28:15-29:19; Exhs. P-185-38-42, R-244.008, fn. 2)

96. As an example, General Motors looks at the vehicle segment “Large Pickup-Crew Cab” total registrations for all manufacturers in an AGSSA. (Exh. R-242A.006) It does not matter where in the AGSSA the registration of the vehicle is located. (RT Vol. II, 241:14-242:6) Next, General Motors looks at the state average market share for Chevrolet for that segment. Then General Motors multiplies the registrations in the AGSSA by Chevrolet’s California market share for that segment, for the number of sales to equal state average, i.e., expected sales, or in other words the product of that calculation is equal to the number of Chevrolet vehicles that would be registered in that AGSSA if General Motors’ market

³⁵ A segment is “a grouping of types of vehicles for market comparison purposes, e.g., midsize SUV, or compact car.” (Joint Glossary of Terms, p.2)

1 share were at its state average level. (Exh. P-185-6)

2 97. The following is an example of how the expected sales for the segment “Large Pickup-
3 Crew Cab” (Chevrolet Silverado 1500 Crew Cab) was calculated for Folsom Chevrolet for 2012:

- 4 • Total registrations for all manufacturers for this segment in Folsom Chevrolet’s AGSSA was
5 666. (RT Vol. I, 78:10-20; Exh. R-242A.006)
- 6 • Next, the state average market share for Chevrolet for the large pickup crew cab segment
7 (Chevrolet Silverado 1500) was 15.76 percent. (Exh. R-242A.006)
- 8 • Then General Motors multiplied the 666 registrations times the Chevrolet market share (666 x
9 15.76), which provided the number of sales to equal state average of 105 for Folsom
10 Chevrolet for this vehicle segment. (RT Vol. I, 78:10-79:6; Exh. R-242A.006)

11 98. By using RSI, General Motors is taking the California statewide average of Chevrolet
12 retail sales and applying it to every dealership in California, with only one adjustment to account for only
13 one metric, the market segment preferred in the AGSSA. (*Id.*) The assumption of RSI is that
14 “geographical and market characteristics” for each Chevrolet dealership in California are average, with
15 the exception of market segment. (RT Vol. VII, 14:25-17:19, Exh. P-185-6) General Motors considers
16 that by adjusting for “local consumer product segment preferences,” it accounts for the “majority of local
17 economic, demographic, and market factors.” (Exh. R- 230.002) Basically, General Motors asserts that
18 considering the segments equals consideration of local preferences, including brand preferences. (Exh. R-
19 244.007 ¶ 18, R-244.008-009 ¶ 23)

20 99. As Mr. Stockton notes, General Motors’ RSI basically assumes “the state average market
21 share is equally applicable to every portion of the state, to every census tract.” (RT Vol. VII, 27:23-28:9)
22 However, a uniform statewide market share does not take into account the desirability of the Chevrolet
23 brand in different parts of the state. Acceptance of Chevrolet is not uniform throughout California. (Exh.
24 P-185-8 ¶ 29) The average RSI for dealers in the state of California (less Folsom Chevrolet) is 132.6, but
25 the average for Sacramento area dealers, excluding Folsom Chevrolet, is 97; a more than 35-point
26 differential. (Exhs. R-244.035, R-244.009 ¶ 25, R-244.036; RT Vol. V, 56:11-24)

27 100. Significantly, as explained by Mr. Stockton, the more a brand has consistent appeal
28 nationally, the more you can develop an expectation of sales for the brand. First, as General Motors

1 admits, Chevrolet's performance in California is not at the same level as in the United States. Second, the
2 California counties that exceed the U.S. average are very close together or "clustered." Mr. Stockton
3 presented two sets of maps, the first group attached hereto as Attachment E shows Chevrolet's market
4 share by California county compared to the national average (registrations over/under U.S. average) and
5 the second group attached hereto as Attachment F shows California's market share by California county
6 (registrations over/under California average) for the years 2012 through 2016. (Exhs. P-185-38-42, P-
7 185-43-47) The first group of maps shows only a cluster of counties, generally in the Central Valley,
8 outperform the Chevrolet national average. Folsom Chevrolet is in northern California. (RT Vol. VII,
9 28:19-29:19) This clustering shows that the variation in market share is "systematic," as opposed to
10 being checkerboard across the state, which would mean that the variation in market share is random. Mr.
11 Stockton explained "[s]o in terms of RSI, if it's random, then it's a question of just the error rate of
12 whether RSI is precise enough." (RT Vol. VII, 31:1-12) But the "clustering" shows that there are
13 "systematic differences" in how the Chevrolet brand is perceived in California. (Exh. P-185-38-42; RT
14 Vol. VII, 28:19-30:12) The second group of maps, counties that exceed the California average market
15 share, also show clustering. This result indicates Chevrolet does not have "consistent, cohesive appeal"
16 across the State of California, and the variation in appeal is not random. This clustering includes
17 generally the Central Valley, some of the central coast counties, the Inland Empire of California and a
18 few northern California counties, but not those in the Sacramento APR. Therefore, the sales expectation
19 for Chevrolet vehicles cannot be uniformly applied across the state. (Exh. P-185-43-47; RT Vol. VII,
20 27:23-32:11) The clustering cannot be explained by dealer performance either because if dealer
21 performance was causing the variation, it would appear more random; there is no reason all of the strong
22 Chevrolet dealers would decide to locate in the Central Valley, and all of the weak dealers would choose
23 to locate in northern California. (RT Vol. VII, 31:13-32:5)

24 101. To discern more closely whether the market variation that appears as the clustering of
25 certain counties is based on a variable other than market segment, Mr. Stockton utilized regression
26 analysis, which is a common statistical analytical technique that allows the effect of multiple variables to
27 be considered at once. (RT Vol. VII, 32:12-35:14) Mr. Stockton used regression analysis on a census
28 tract by census tract basis, comparing for a select five-county area surrounding Folsom Chevrolet to those

1 outside of that area.³⁶ The regression analysis indicates a) the market share component of RSI fails to
2 take into account meaningful differences in market areas, and b) that even after taking these differences
3 into account, the Folsom area is statistically different in terms of its acceptance of the Chevrolet brand.
4 The factors that correlate with Chevrolet's market share elsewhere in California are different than those
5 in the five-county area. (Exh. P-185-8 ¶ 30; RT Vol VII, 33:23-35:14) Mr. Stockton concluded that
6 General Motors is incorrectly attributing sales performance to failure by Folsom Chevrolet to variations
7 within its control, when it is due to factors outside Folsom Chevrolet's control.

8 102. Controlling for the demographic variables of age, median household income, education
9 level (25 years or older with at least a 4-year degree), and population density and whether the dealership
10 is in the five-county area versus the state as a whole, results in a reduction of Folsom Chevrolet's RSI
11 requirement for 2016 by approximately 30 percent, from 1,324 expected sales to 940.³⁷ (Exh. P-185-48-
12 50)

13	• Actual registrations	779
14	• Registrations at California Average	1,333
15	• Registration Effectiveness	58.44%
16	• Registrations at California Average After 17 Demographic Adjustment	940
18	• Registration Effectiveness After Demographic Adjustment	82.87%

19 (RT Vol. VII, 34:25-36:16, Exh. P-185-48)

20 103. General Motors' counter to Mr. Stockton's regression analysis was to take each variable in
21 isolation and review the performance to see if it showed significant deviations with respect to RSI. Mr.
22 Farhat, Respondent's expert, considered 10 of the most similar dealerships in California on each selected

23 ///

24 ///

25 _____
26 ³⁶ Mr. Stockton's five-county area includes a total of nine Chevrolet dealerships, including Folsom Chevrolet. The five
27 counties are those in the Sacramento APR: Sacramento, Amador, El Dorado, Placer and Yolo. (RT Vol. V, 102:6-9, Vol. VII,
32:12-35:14; Exh. R-246.021, P-185-48-50) Sutter County was in the APR in 2010, but is no longer. (Exhs. R-204.002, R-
206.002, R-208.002)

28 ³⁷ Folsom Chevrolet's expected sales were 1,324 for 2016; 940 is a reduction of 29 percent in expected sales. Folsom
Chevrolet had retail sales of 738 in 2016, which would have resulted in an RSI of 78.5. (Exh. R-290, p. 2; RT Vol. X, 65:8-19)

variable,³⁸ and then concluded that the variable was not the sole cause of Folsom Chevrolet's deficient RSI score. (RT Vol. VI, 76:17-77:19; Vol. V, 99:25-105:12; Exhs. R-246.006-.007 ¶ 17; R-246.017-.020) Such is the case according to Mr. Farhat, because dealerships that were similar with respect to the one selected variable had a higher average RSI score than Folsom Chevrolet. (RT Vol. VII, 76:17-77:20; Vol. V, 99:25-105:12; Exh. R-246.017-.020) Mr. Farhat explained that the average RSI for most of the dealers in those review groups was about 100, and Folsom Chevrolet's was much lower. For example, when the demographic variable of education is used, the other 10 dealers with similar education percentages achieve 101 percent and Folsom achieved 57. (RT Vol. V, 102:10-24; Vol. VII, 78:2-17)

104. Mr. Farhat, in his rebuttal report, in order to take into account differences in Chevrolet's brand acceptance, analyzed sales effectiveness in the five-county area as a benchmark and admitted that a "local area benchmark standard directly addresses concerns regarding brand acceptance." (Exh. R-246.004) The result was that Folsom Chevrolet's RSI rose, although still the lowest of the five dealers in the APR; for 2015 through June 2016 Folsom Chevrolet's RSI was 73.3 and 74.4, respectively. (Exh. R-246.014) In a further analysis, Mr. Farhat applied Mr. Stockton's demographic model for the five-county census tracts for the entire year of 2016 to all of the Sacramento dealers and sales expectations decreased and the overall performance (RSI) on average for all dealers improved by 30 points. Under this scenario, Folsom Chevrolet's RSI was 78.5, higher than Kuni Chevrolet's RSI of 75.8 and ranked fourth out of five dealers. (Exh. R-290, p. 2; RT Vol. X, 67:12-68:17)

Sales Performance Review (SPRs)

105. The sales performance evaluation categories are defined in General Motors' Sales Performance Review Reports cover letter. (RT Vol. I, 76:8-19; Exhs. R-242A.001, R-242B.001, R-242C.001, R-242D.001, R-242E.001) This process of review is provided for in Article 9 of the Dealer Agreement, which provides that the "[d]ealer's sales performance will be rated as provided in the General Motors Sales Evaluation process." (Exh. R-201.017) The sales performance review excludes sales and registrations sold to and registered by national fleet accounts.

106. General Motors' sales performance categories are:

³⁸The variables are median age, median household income (in \$1,000), percent of population (25 years or older) with at least a 4-year degree, and population density. (Exhs. P-185-8, P-185-50; RT Vol. VII, 35:15-20)

- Superior, which is when a dealer is 100 RSI or greater and in the top 15 percent of dealers in the state;
- Satisfactory, which is when a dealer is 100 RSI or greater, but not in the top 15 percent of dealers in the state;
- Needs Improvement, which is 85.0 to 99.9 RSI;
- Needs Significant Improvement which is 84.9 RSI or lower, but not in the bottom 15 percent of dealers in the state; and
- Unsatisfactory, which is 84.9 RSI or less and in the bottom 15 percent of dealers in the state.

(Exh. R-242A.001; RT Vol. I, 76:12-19)

107. While the terms of the Dealer Agreement provide that satisfactory performance of the dealer's sales obligations under Article 5.1 requires a dealer to achieve a Retail Sales Index of equal or greater than 100, for a dealer to be deemed unsatisfactory by General Motors and be subject to potential termination, the dealer needs to be below 84.9 RSI and in the bottom 15 percent of dealers in the state. (RT Vol. I, 223:24-224:5; 227:18-23; Vol. IV, 47:16-49:3) A dealer's state ranking, according to General Motors, is the critical factor determining whether it is put on an improvement plan and subject to potential termination (bottom 15 percent). (RT Vol. I, 223:24-224:5; 227:18-23; RT Vol. IV, 48:22-25, 49:1-3)

108. General Motors sent Folsom Chevrolet a letter dated March 15, 2013, providing Folsom Chevrolet with its sales performance for January 2012 through December 2012. This was in accordance with Article 9 of the Dealer Agreement, which requires that the report be provided at least annually. The dealer could also access the reports with the same information quarterly on DART (Dealer Analysis Reporting Tool.) (Exh. R-242A) For each category, Chevrolet car, truck and car/truck combined, Folsom Chevrolet's rating was "Unsatisfactory," meaning they were below 84.9 RSI and in the bottom 15 percent of dealers in the state. Folsom Chevrolet's combined ranking for 2012 was 123 out of 135 Chevrolet dealers. (Exh. R-242A)

109. General Motors sent Folsom Chevrolet a letter dated March 20, 2014, providing it with its sales performance for January 2013 through December 2013. For each category, Chevrolet car, truck and

1 car/truck combined, Folsom Chevrolet's rating was "Unsatisfactory," meaning they were below 84.9 RSI
2 and in the bottom 15 percent of dealers in the state. Folsom Chevrolet's combined RSI score was 40.93
3 with a ranking for 2013 of 129 out of 133 Chevrolet dealers. (Exh. R-242B.001-.002)

4 110. In June 2014, after advising Folsom Chevrolet that it was not selling the number of new
5 vehicles at retail that General Motors' RSI metric indicated it should be selling, General Motors placed
6 Folsom Chevrolet on a performance improvement plan. This primarily involved quarterly reviews with
7 Chevrolet representatives. (RT Vol. VI, 194:14-195:18) As part of that process, Folsom Chevrolet
8 created business plans with the assistance of Chevrolet's District Sales Representative, Saul Escalante,
9 and Zone Manager, Michael Stinson. (RT Vol. VI, 197:5-24) General Motors wanted the business plans
10 and the quarterly review process to result in Folsom Chevrolet meeting 100 percent of the RSI metric and
11 increase its CSI scores. (RT Vol. VI, 199:3-19, 210:18-23)

12 111. Folsom Chevrolet was receptive to the suggestions given by General Motors and made
13 some efforts to implement them during the quarterly review process. (RT Vol. VI, 218:15-21) General
14 Motors advised Folsom Chevrolet to re-establish a BDC³⁹ with a dedicated staff. (RT Vol. VI, 199:20-
15 201:4, Exh. R-233.002) The purpose of the BDC is to generate leads for the sales department by making
16 phone calls and appointments with potential buyers and other outreach; it is an indicator for potential
17 future sales. (RT Vol. II, 378:3-21; Vol. VI, 199:20-201:4) During the downturn, these kinds of duties
18 had fallen to the sales people themselves, who were supervised by the sales manager to ensure they were
19 making those efforts. (RT Vol. VI, 201:4-202:1) Folsom Chevrolet had some success in implementing a
20 fully functioning BDC (in September 2014 "BDC implementation process 85 percent complete"), but had
21 difficulties getting a Business Development Manager ("BDM") during the cure period. (Exhs. P-127-2,
22 P-129-2; R-254; RT Vol. II, 374:2-9, 376:3-14, 379:1-380:20) A BDM holds the sales consultants
23 accountable for setting appointments and verifying appointments, and the BDM confirms appointments.
24 (RT Vol. II, 379:1-25) Folsom Chevrolet did implement the suggestion that it formalize its efforts to have
25 someone in the sales department contact consumers who were bringing in vehicles for service, in order to
26 encourage them to buy a new vehicle. Folsom Chevrolet also hired a new advertising agency to develop
27

28 ³⁹ See Footnote 11.

1 cable and radio campaigns. (Exh. P-127-2; RT Vol. VI, 203:2-204:3)

2 112. During the performance improvement plan process, Folsom Chevrolet further increased its
3 advertising spending which was already above average for the state. (RT Vol. VI, 204:4-207:20; Exhs. R-
4 233, P-146) The additional spending was focused on truck sales which made up the vast majority of the
5 vehicles sold, and a higher proportion of the spending was directed at Internet advertising. (RT Vol. VI,
6 204:4-207:20; Exh. P-146) The average spend for a Chevrolet dealer in California for advertising was
7 about \$777 per unit, and Folsom was at about \$1,400. (RT Vol. VI, 208:2-22)

8 113. During the time Folsom Chevrolet was on the performance improvement plan, it was in
9 the midst of the \$900,000 General Motors directed remodel, and Marshal Crossan became aware of
10 several customers being confused by the lack of signage who ended up going to the GMC dealership
11 across the street and purchasing GMC trucks. (RT Vol. VI, 226:21-228:18; Exh. R-226) The entire front
12 nameplate board area (fascia) of the Folsom Chevrolet building was torn up to erect the Chevrolet iconic
13 blue arch, and people had to walk into the dealership through the service department. (RT Vol. VIII,
14 75:25-77:6) This was recounted to General Motors in correspondence, in which Folsom Chevrolet again
15 raised its objections regarding the enlargement of its AGSSA. (RT Vol. VI, 226:21-228:18; Exh. R-226)

16 114. By the second quarterly review meeting in September 2014, Folsom Chevrolet had
17 increased its CSI scores with correspondence memorializing the meeting, stating that “dealer is now
18 above a combined blended score of 185.7.” (Exh. P-127-2; RT Vol. VI, 213:3-214:1) The RSI score of
19 the dealership also increased to 45.5 for the first quarter of 2015. (Exhs. P-132-2, R-229)

20 **Customer Satisfaction Index**

21 115. The terms of the franchise do not require that Folsom Chevrolet be above average with
22 respect to CSI scores to be in compliance. The Dealer Agreement provides only that “Dealer ... agrees to
23 conduct operations to promote customer satisfaction ... General Motors will provide Dealer with a
24 written report at least annually pursuant to procedures then in effect evaluating Dealer’s purchase and
25 delivery customer satisfaction and Dealer’s service customer satisfaction. The report will compare
26 Dealer’s performance to other same Line-Make dealers in the Region.” (Exh. R-201.011, § 5.3)

27 116. Mr. Stinson, the Zone Manager, testified that the “most pivotal question is were you [the
28 customer] completely satisfied ... because retention within the customer base is so critical, that we want

every customer to be completely satisfied” (RT Vol. I, 103:19-22; Vol. VII, 82:23-83:12; Exh. R-268.001)

117. For the calendar year of 2015, the same year as the cure period, Folsom Chevrolet’s score for the Purchase and Delivery Satisfaction or PDS was 80.7 and the regional average was 86.4. (RT Vol. VII, 84:13-85:12; Exh. P-185-68) Both Folsom Chevrolet’s score and the regional average for the Purchase and Delivery Survey fall between the response of “completely satisfied” and “very satisfied.” (RT Vol. VII, 84:13-85:12, Exh. P-185-83)

118. For the Service Satisfaction Survey or SSS Score in 2015, Folsom Chevrolet’s score of 81.0 was almost five points above the regional average of 75.7, again falling between “completely satisfied” and “very satisfied.” (RT Vol. VII, 84:13-85:12; Exh. P-185-84) For 2011 through 2016, Folsom Chevrolet’s SSS score was above the regional score, except for 2014.⁴⁰ (Exh. P-185-84)

119. Mr. Kaestner testified that since his arrival in May 2017, Folsom Chevrolet’s CSI scores have not been below any General Motors standard – their CSI scores have been compliant. (RT Vol. X, 18:4-22)

Fleet Sales

120. The words “consumer” and “customer” are used frequently in the Dealer Agreement, but neither is defined. The word “consumer” is not limited to a fleet or retail purchaser. (RT Vol. II, 460:3-14) A fleet purchaser is considered a “consumer.” (RT Vol. I, 82:13-19) The Dealer Agreement authorizes the dealer to sell fleet. (Exh. R-201.062-.069; RT Vol. I, 83:6-16)

121. General Motors’ RSI does not take into account fleet sales. (RT Vol. I, 82:2-4)

122. To be considered a fleet sale by General Motors, the customer (usually a business or corporation) has to buy five or more vehicles in a given calendar year or be a business that owns at least 15 vehicles. (RT Vol. I, 82:17-20) A fleet customer can come from anywhere in the country. (RT Vol. I, 86:8-10) The latter will be given a FAN and are afforded special pricing, special incentive packages and extended warranties. (RT Vol. II, 328:15-19; see Footnote 20)

123. There are three kinds of fleet sales: 1) dealer fleet, which is small-to-medium sized

⁴⁰ The anomalous low SSS score in 2014 of 65.4 could be partly attributable to the construction at Folsom Chevrolet which went through at least March of 2014. (RT Vol. IX, 33:1-12)

1 companies, like a construction company; 2) the Competitive Assistance Program or CAP which is larger
2 more regional-or-national sized companies (e.g., Pacific Gas and Electric or AT&T), and 3) government
3 fleet. (RT Vol. II, 329:7-25) Dealer fleet departments have monthly sales objectives for dealer fleet sales.
4 (RT Vol. II, 330:22-25)

5 124. There is also another type of sales to businesses (retail small business) that do not buy
6 enough vehicles (1-4) to qualify for a FAN, often called "fleetail." That delivery type is identified as
7 type 018. (RT Vol. II, 330:3-15) These sales are identified as retail, but it is a sale to a commercial
8 customer. (RT Vol. IX, 172:21-173; Vol. II, 330:16-21, 346:5-14)

9 125. Folsom Chevrolet has a mix of all the types of sales to businesses. (RT Vol. II, 331:23-
10 332:1)

11 126. General Motors' system is set up so that the dealer generally places an order for the fleet
12 customer. (RT Vol. I, 147:15-25) Fleet orders are viewed as sold orders, and therefore, on a weekly basis
13 a preference is given for those units, and there is a priority to get those built. (RT Vol. I, 153:5-6)

14 127. Fleet orders have better pricing because they come without advertising and holdbacks and
15 receive start-of-production pricing, so depending how late in the year the order is placed, there could be
16 savings. (RT Vol. II, 342:9-21)

17 128. The time for retail and fleet deliveries is essentially the same: 6-to-8 weeks, except
18 Chevrolet Silverado trucks, which are approximately 8-to-10 weeks. (RT Vol. I, 148:22-25; 152:18-23;
19 Vol. II, 350:2-5) According to General Motors, a problem arises when the retail customer does not have
20 the product to look at if retail stock is used to fulfill fleet orders. This can have, in General Motors'
21 opinion, a negative impact on a dealer's retail sales rate numbers. (RT Vol. I, 153:8-16)

22 129. The Folsom Chevrolet Fleet Manager, Rene Schoonbrood, came to Folsom Chevrolet in
23 2009, having accumulated over the years his "own book of business," i.e., clients for whom he knows
24 their business, what they need and what they are looking for. (RT Vol. IX, 184:6-10, 20-25) According to
25 Paul Ryan, District Manager Commercial for General Motors, whose district includes Folsom Chevrolet,
26 Mr. Schoonbrood is an experienced salesperson who orders or finds work- or business-related vehicles,
27 provides equipment the business customer may need, and delivers the vehicle and the equipment to the
28 customer in a timely manner, at the right price. (RT Vol. II, 333:8-14; Exh. P-133-8)

1 130. General Motors provides incentives to dealers for fleet sales. (RT Vol. IX, 195:4-23)
2 Folsom Chevrolet was number 19 in the country for General Motors for fleet sales in 2015. (RT Vol. IX,
3 195:24-196:5) This was due in part to a large fleet sale of approximately 500 units to Solar City that
4 occurred as a result of a referral by representatives of General Motors. (RT Vol. VI, 233:21-237:18; Vol.
5 VIII, 199:21-200:3)

6 131. Folsom Chevrolet “crisscrossed” their inventory, which means that instead of using the
7 General Motors fleet ordering process, they frequently allowed a fleet customer to buy vehicles from
8 their existing inventory. (RT Vol. IX, 61:2-15, 189:4-25, 206:1-25) This process is not prohibited by
9 General Motors; there is no express rule against doing so. (RT Vol. II, 333:24-334:2) It is “highly not
10 recommended” according to Mr. Stinson, Chevrolet’s Zone Manager, but he could not identify who did
11 not recommend it, or any specificity as to where or how the dealer is so advised. (RT Vol. II, 287:9-14,
12 289:19-290:2)

13 132. General Motors’ allocation process is based upon 1) each dealer’s most recent retail sales
14 and 2) the calculated days’ supply of vehicles on the ground and in-process. (Exh. R-230.002; RT Vol. II,
15 288:5-9) (See discussion on allocation process below.) The sale by Folsom Chevrolet of a vehicle from
16 its inventory as a “fleet” vehicle resulted in its inventory becoming “unbalanced.” This was because its
17 days’ supply was reduced by the sale but it did not get credit for a retail sale as it was required to be
18 reported as a fleet sale. The result was that Folsom Chevrolet was “not earning enough product” to
19 replenish its inventory.⁴¹ (RT Vol. II, 287:15-289:1, 290:3-7, 292:15-293:16)

20 133. Folsom Chevrolet sells 25 to 30 fleet units per month or 300-400 per year on average.
21 Ninety percent of Folsom Chevrolet’s fleet sales come from the dealership’s retail stock or inventory.⁴²
22 (RT Vol. IX, 207:8-25, 208:15-19) If Folsom Chevrolet does not have in its inventory what the fleet
23 customer wants, Folsom Chevrolet trades with another dealer. (RT Vol. VIII, 60:1-6; Vol. IX, 206:4-
24 207:7) The majority of the time the fleet department wanted to make a trade out of retail stock, it was
25

26 ⁴¹ General Motors maintains a process where dealers are required to report a retail or fleet sale called retail delivery reporting.
27 (RT Vol. II, 292:3-293:20)

28 ⁴² Mr. Meier, Regional Director for Chevrolet’s Western Region, testified that “generally speaking, that was a situation
whereby the manager of the fleet operation was frequently engaging in a process of using retail stock to satisfy fleet demand.”
(RT Vol. IV, 34:15-20)

permitted to do so by the dealership and neither Marshal Crossan nor Larry Crossan requested a change to this procedure over the last five years. (RT Vol. IX, 209:6-22) When inventory got to certain levels, Marshal Crossan stopped sales from retail and would not approve the trade. (RT Vol. VIII, 60:22-61:17)

134. A dealer can stock “fleet units” in their inventory that are invoiced as retail by General Motors. (RT Vol. II, 392:3-8; 393:13-20) Dealers can order inventory that is more fleet-like with less features and benefits than what a retail customer would look for, such as more likely to be white and “stripped down.” (RT Vol. II, 394:14-395:2)

135. The charts below indicate the proportion of Retail Units to Fleet Units in Folsom Chevrolet’s inventory for 2014-2016. In 2015, the percentage of fleet ranged from 26 percent to 76 percent of inventory and for six of the 12 months, Folsom Chevrolet’s fleet inventory was 50 percent or greater of overall inventory.⁴³ (Exhs. R-264; P-112-1) Other dealers in the Business Elite Program would typically have from seven to nine percent of their inventory as these “fleet type” units. (RT Vol. II, 394:8-13)

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⁴³ The chart includes some vehicles which were true fleet orders for 2015 -- such as the 500 vehicles sold to Solar City and 140 sold to Ventura County in 2016. (Exh. R-264; RT Vol. VI, 233:21-241:17; Vol. II, 392:9-10)

2014	Jan	Feb	March	Apr	May	June	July	Aug	Sept	Oct	Nov	Dec
Retail Units	133	161	175	147	143	138	143	185	262	304	243	219
Fleet Units	121	91	87	106	114	112	109	105	121	97	140	119
Total NCI ⁴⁴	254	252	262	253	257	250	252	290	383	401	383	338
% Fleet	48%	36%	33%	42%	44%	45%	43%	36%	32%	24%	37%	35%

2015	Jan	Feb	March	Apr	May	June	July	Aug	Sept	Oct	Nov	Dec
Retail Units	236	244	208	170	130	96	113	225	215	189	107	119
Fleet Units	85	92	73	205	71	297	179	137	241	152	170	145
Total NCI	321	336	281	375	201	393	292	362	456	341	277	264
% Fleet	26%	27%	26%	55%	35%	76%	61%	38%	53%	45%	61%	55%

2016	Jan	Feb	March	Apr	May	June	July	Aug	Sept	Oct	Nov	Dec
Retail Units	160	182	176	180	158	158	143	197	229	304	285	257
Fleet Units	97	84	88	76	95	107	159	154	167	151	157	130
Total NCI	257	266	264	256	253	265	302	351	396	455	442	387
% Fleet	38%	32%	33%	30%	38%	40%	53%	44%	42%	33%	36%	34%

(Exhs. R-264; P-112-1)

136. Mr. Escalante testified that Mr. Schoonbrood informed him “that part of the successful fleet operation that Folsom [Chevrolet] has is that fleets will pay a premium to have the unit readily available as opposed to just waiting for the fleet unit to be ordered.” (RT Vol. II, 396:24-397:10) Folsom Chevrolet’s fleet gross profits often exceed its retail gross profits, both per unit and as a whole, which is “uncommon.” (RT Vol. VII, 117:9-118:10, 119:12-19) Folsom Chevrolet often sold more fleet units than retail units overall, another “uncommon” event. (*Id.*) A chart created by Mr. Stockton shows Folsom Chevrolet earned approximately \$3.6 million in gross profits from fleet sales from 2012 to 2016—more

⁴⁴ “NCI” is an acronym for new car inventory, which includes trucks.

1 than it made by selling retail vehicles. (Exh. P-185-80)

2 137. Fleet salespersons at Folsom Chevrolet, including Mr. Schoonbrood, had been primarily
3 compensated on commission, earning 30 percent⁴⁵ of the gross profit from the vehicles they sell, which is
4 even higher than that earned by retail salespeople. (RT Vol. IX, 78:13-79:4) When Larry Crossan was the
5 General Manager, he was also compensated by “a percentage of the gross” on the front end, including
6 fleet sales. (RT Vol. VIII, 40:4-10, 87:10-17)

7 138. Folsom Chevrolet decided to use much of its inventory in order to facilitate large numbers
8 of fleet sales and Folsom Chevrolet has been successful in facilitating those fleet sales. However,
9 Marshal Crossan acknowledged that the elite type fleet sales in particular were impacting his retail sales
10 performance. In a letter to General Motors dated July 14, 2015, Marshal Crossan stated that “[i]n a way
11 Folsom Chevrolet is a victim of its own success as an elite GM fleet sales dealership. Our fleet sales do
12 not count toward our objective, but if they did we would be sales effective. Further, our large number of
13 fleet sales diminishes our inventory levels and adversely impacts our ability to make additional retail
14 sales. While we appreciate that additional allocation made available to Folsom Chevrolet, with build
15 times and other constraints we consistently struggle to maintain the inventory necessary to achieve our
16 *retail* sales goals.” (Emphasis in original; Exh. R-226.002; RT Vol. VIII, 192:10-194:2) Marshal
17 Crossan testified that it should make little difference whether Folsom Chevrolet sells to a retail customer
18 or a fleet customer: “Folsom Chevrolet would do anything it could to put as many bow ties [Chevrolet’s
19 symbol] on the road as we could do that. And the differentiation of whether it’s a retail unit ... or the,
20 you know, commercial -- commercial fleet units that we were doing, or our regular big fleet account, it’s
21 all Chevrolet. ...” (RT Vol. VIII, 193:16-194:2)

22 139. Mr. Kaestner, Folsom Chevrolet’s General Manager since May 2017, testified that he has
23 not continued the previously routine practice of trading retail inventory to fill a fleet order. (RT Vol. X,
24 20:4-23:17) He does allow such a trade if Folsom Chevrolet has an abundance of inventory – over 90-100
25 days’ supply of inventory. (RT Vol. X, 22:9-23:17) Mr. Kaestner testified that “[t]he vehicles we have in
26 inventory are for retail sale.” (RT Vol. X, 20:10-11)

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28 ⁴⁵ That number was changed to 20 percent as of January 1, 2018, to comply with a change in California law. (RT Vol. IX, 78:22-79:20)

1 **Inventory Issues**

2 140. General Motors utilizes a math-based formula to determine which dealers should be
3 allocated, or offered, vehicles during each upcoming production run. (RT Vol. III, 11:19-13:20) There are
4 several steps to this process.

5 **Phase 1: Consensus**

6 141. The first phase of allocation is the consensus process, wherein General Motors makes an
7 initial offer of vehicles to each dealership. (Exh. R-252; see Exh. R-278 (PowerPoint explanation of
8 process)) The first step is to calculate the Available Days' Supply ("ADS") for each dealership, which is
9 determined by dividing a dealership's total availability of product (i.e., units in stock or in transit to the
10 dealer) by its average daily sales rate over the past 90 days. (RT Vol. III, 11:19-13:20; Exh. R-278.001-2)
11 That number is then adjusted or equalized by travel time from the plant regardless of proximity to the
12 plant. (*Id.*)

13 142. General Motors then begins allocating vehicles to the dealers with the lowest ADS, one
14 unit at a time. (Exh. R-278.003-7; RT Vol. III, 26:21-28:17) After each unit is allocated, the receiving
15 dealer's ADS is recalculated, and the next-lowest ADS dealer (which may be the same one) receives the
16 next unit. (*Id.*) When all of the available units are allocated, the ADS of the dealer who received the final
17 unit becomes the "ADS Bar." (Exh. R-278.008) Any dealer with a starting ADS below the ADS Bar will
18 have received at least one unit; any dealer with a starting ADS above the ADS Bar will not. (RT Vol. III,
19 20:24-22:20) This first part of phase 1, called estimated shipments, is to equalize product availability
20 across the dealer network. (See Exh. R-278.009-.010 showing equalization up to the ADS Bar; RT Vol.
21 III, 28:24-30:17)

22 143. After dealerships are offered vehicles by General Motors, they next engage in consensus,
23 wherein the dealers choose whether to 1) accept all of the units offered; 2) accept some or none of the
24 units offered; or 3) accept the units offered and request more. (RT Vol. III, 30:25-32:16) This is a dealer
25 business decision based upon their existing inventory. (*Id.*) Any declined allocation units are placed back
26 into a pool, and re-allocated based on ADS to any dealer that requested additional vehicles. (*Id.*) This is
27 generally performed twice per month. (RT Vol. III, 32:17-21)

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1 Phase 2: Dealer Order Submission Process

2 144. Twice per month, after the consensus process is complete, each dealership receives a
3 document that describes its final allocation. (RT Vol. III, 49:16-51:1) The dealer then weekly has to place
4 orders for the specific vehicles it wants (trim package, color, etc.), a process known as the Dealer Order
5 Submission Process (“DOSP”). During DOSP the dealership has flexibility in how many vehicles it
6 takes, with the option to 1) order all of the units offered; 2) order some or none of the units offered; or 3)
7 order the units offered and request more. (*Id.*) Any declined units are re-allocated to those dealerships
8 that requested more units. (*Id.*)

9 145. Mr. Muiter, the Director of North America Order Fulfillment, testified that General
10 Motors allocated a sufficient number of units to Folsom Chevrolet. Mr. Muiter’s chart of sales
11 performance, vehicle availability, and lost allocation for Folsom Chevrolet for 2015 (Exhibit R-277), is
12 attached hereto as Attachment G. (RT Vol. III, 59:14-65:22; Exh. R- 277)

13 146. Certain models sell well, and certain models do not sell well. In many instances, clearing
14 out slow selling models by Folsom Chevrolet did not prompt General Motors to provide Folsom
15 Chevrolet with units that are high in demand; it just prompted General Motors to allocate more of the
16 slow-selling units. This occurred with the small sub-compact Spark, which is not a big seller in the
17 Folsom or greater Sacramento area. (RT Vol. VII, 213:24-215:20) Folsom Chevrolet sold 10, and
18 General Motors for the next month requested Folsom Chevrolet take multiples of that. (RT Vol. VII,
19 213:24-215:20) Mr. Muiter’s chart indicated that Folsom missed out on 21 Spark units because it did not
20 request additional vehicles over its allocation. (Exh. R-277)

21 147. There were other times where Folsom Chevrolet accepted its allocation of slow selling
22 vehicles, including the Chevrolet Malibu. (RT Vol. IX, 131:17-132:13) Despite Folsom Chevrolet pricing
23 these vehicles at a losing price point and marketing them to get them off the lot as loss leaders, several of
24 the units “had birthdays,” i.e., they were on Folsom Chevrolet’s lot for over a year. (RT Vol. IX, 131:17-
25 132:13) Mr. Muiter’s chart indicates that Folsom Chevrolet should have accepted 49 additional units of
26 Chevrolet Malibu vehicles in 2015. (Exh. R-277) So out of a total of 249 vehicles, General Motors
27 believes Folsom Chevrolet should have accepted or had the opportunity to request 70 more Spark and
28 Malibu vehicles. (*Id.*) For 2015, the Spark vehicle achieved only 5.25 percent of competitive registrations

1 in California and the Malibu achieved only 2.31 percent. In comparison, the Chevrolet Camaro was at
2 30.04 percent, the Suburban at 32.75 percent and the Silverado at 29.3 percent. (See Exh. P-185-126)

3 148. Although Folsom Chevrolet admittedly used a fair amount of its inventory for fleet sales,
4 receiving sufficient inventory from General Motors necessary to make the RSI sales requirement for
5 certain market segments was likewise an issue. Mr. Muijer's chart was presented to show that Folsom
6 Chevrolet had the ability to acquire the inventory it needed to meet 100 RSI. Column 13 of Exhibit R-277
7 shows what Folsom Chevrolet had the ability to take into inventory minus the sales expectation for a
8 particular vehicle model. The chart shows that General Motors did not allocate enough of the following
9 vehicles to Folsom Chevrolet for it to achieve 100 RSI: 20 Camaros; one Corvette; 34 Volt; 15 Colorado;
10 11 Suburban; and 14 Traverse. (Exh. R-277) The shortfall for 2015 was 95 fewer units than necessary to
11 hit RSI. (*Id.*)

12 149. General Motors expert Mr. Farhat concluded that based on average days' supply, Folsom
13 Chevrolet had adequate inventory to reach 100 RSI and Folsom Chevrolet's poor RSI score was not
14 caused by a lack of inventory.⁴⁶ Based on its sales rate, Folsom Chevrolet's inventory averaged 200 days
15 (more than six months' supply) for 2013 through 2015.⁴⁷ (Exhs. R-244-13 ¶ 40, R-244.079; RT Vol. V,
16 120:7-121:22; RT Vol. VII, 70:16-71:21) However, Protestant's expert Mr. Stockton, pointed out that
17 Mr. Farhat's analysis only compared the inventory Folsom Chevrolet had to actual sales, which does not
18 reflect whether Folsom Chevrolet had adequate inventory to sell more vehicles (i.e., achieve a higher
19 sales rate) or to reach 100 RSI. (RT Vol. VII, 71:1-15, 199:21-202:12) Mr. Farhat failed to evaluate
20 whether Folsom Chevrolet had enough inventory to support the sales rate needed to reach 100 RSI. (Exh.
21 P-186-6 ¶ 19; RT Vol. VII, 71:16-21, 199:21-202:12) Mr. Stockton prepared charts for 2013 through
22 2016 showing the additional sales needed by Folsom Chevrolet to reach a RSI of 100. For the year 2015,
23 Folsom Chevrolet needed to sell at retail 1,142 vehicles to reach 100 RSI. For this to occur, Mr. Farhat
24 would have needed to incorporate 531 more vehicles into Folsom Chevrolet's inventory to meet the level
25 of inventory required to support the sales rate needed to reach 100 RSI. Folsom Chevrolet sold 610 and
26 needed to reach 1,142. So Mr. Farhat's conclusion that Folsom Chevrolet had sufficient inventory only

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28 ⁴⁶ A dealer earns product based off sales rate and days' supply. (RT Vol. II, 288:5-9)

⁴⁷ According to Mr. Farhat, industry standards for days' supply is 60 to 90 days. (Exh. R-244-13 ¶ 40)

1 substantiated that they had enough vehicles to sell what they sold, but not enough to sell 531 more
2 vehicles. (Exh. P-186-15-18; RT Vol. VII, 70:16-72:1, Vol. VII, 199:21-205:8)

3 **2015 Notice to Cure**

4 150. General Motors sent Folsom Chevrolet a letter dated April 3, 2015, providing Folsom
5 Chevrolet with its sales performance for January 2014 through December 2014. For each category,
6 Chevrolet car, truck and car/truck combined Folsom Chevrolet's rating was "Unsatisfactory," meaning
7 they were below 84.9 and in the bottom 15 percent of dealers in the state. Their combined ranking for
8 2014 was 124 out of 128 Chevrolet dealers. (Exh. R-242C.002)

9 151. Although Folsom Chevrolet had improved CSI and RSI scores during the performance
10 improvement plan, General Motors gave formal notice of breach to Folsom Chevrolet dated May 19,
11 2015, asserting that Folsom Chevrolet had breached the terms of the franchise for failing to meet the RSI
12 and CSI requirements. (RT Vol. VI, 216:15-217:16; Exh. R-221.001) Folsom Chevrolet was given a six
13 month cure period (July 1, 2015 through December 31, 2015) "during which the dealer will have the
14 opportunity to correct the failure," i.e., meet its sales performance and customer satisfaction obligations.
15 (Exh. R- 221.002; RT Vol. VI, 219:11-221:20) General Motors also informed Folsom Chevrolet that it
16 would receive an additional allocation of 115 vehicles during the six month period. (RT Vol. VI, 222:4-
17 11; Exhs. R-221.002, R-222.002-.003)

18 152. The majority of the supplemental allocation arrived around mid-August 2015, having
19 taken "almost 2-1/2 months [from June 1, 2015] before [Folsom Chevrolet] got all that type of inventory
20 in." (RT Vol. VII, 229:22-230:11) Mr. Stinson described in a quarterly letter that the majority of the
21 supplemental allocation had arrived by the time of an August 18, 2015 meeting. (R-231.001-2; see R-
22 229.003) That timing also aligns with the dealership-produced "Retail v. Fleet" chart, which shows a
23 large increase in retail units in August 2015 (225) and September 2015 (215). (Exhs. R-264, R-254)
24 Folsom Chevrolet did not seek an extension of the cure period due to late arrival of the allocation or for
25 any other reason because Marshal Crossan basically thought it was futile to ask. (RT Vol. IX, 75:4-76:1)

26 153. Folsom Chevrolet implemented efforts to increase sales during the cure period. For

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1 example, it offered 10 percent off MSRP⁴⁸ as its own discount on the most popular trucks, on top of
2 discounts General Motors offered from time to time. (RT Vol. VII, 218:20-221:24) This discounting was
3 coupled with an advertising push, which resulted in more sold vehicles. (RT Vol. VII, 222:6-225:5)
4 According to Drew Crossan, the promotion “[a]bsolutely” had an impact on sales, as well as a longer-
5 term effect of increasing the dealership’s sales rate, and therefore, its available inventory. (RT Vol. IX,
6 135:6-136:18) Marshal Crossan confirmed that the promotion worked as truck sales increased. (RT Vol.
7 VII, 221:20-223:1, 224:18-225:1)

8 154. As noted, during the cure period General Motors allocated an additional 115 units to
9 Folsom Chevrolet that included a large amount of trucks. The challenge then was when Folsom
10 Chevrolet decided to take 10 percent off MSRP, the supply diminished quickly but it took time to get
11 resupplied (45-to-60 days). (RT Vol. VII, 228:10-229:21)

12 155. Near the end of 2015, Folsom Chevrolet’s Dealer Agreement came due for renewal.
13 Folsom Chevrolet was in its cure period, but General Motors provided it with the opportunity to renew its
14 Dealer Agreement. (Exh. R-232; RT Vol. I, 176:22-177:14) The renewal letter noted that “General
15 Motors is not waiving any rights [General Motors] may have for Dealer’s fail[ure] to satisfy its
16 obligations under the current or replacement Dealer Agreement.” (Exh. R-232) Folsom Chevrolet agreed
17 to renew its Dealer Agreement at that time. (Exh. R-201.001)

18 156. Folsom Chevrolet’s gross profit per retail vehicle sale was \$1,486 in 2015, but decreased
19 to a below average \$877 in 2016. (RT Vol. IX, 88:19-90:1; Exh. P-185-80)

20 157. Folsom Chevrolet in 2015 was expected to sell 1,142 Chevrolets (354 cars and 788 trucks)
21 to retail customers to equal state average. (Exh. R-244.033-.034) Folsom Chevrolet reported retail sales
22 of 652 units for a total sales variance of 490 units. (RT Vol. III, 60:22-61:2; Exh. R-277.002)

23 158. The “Cure Period” ended December 31, 2015, and Folsom Chevrolet achieved a RSI of
24 64.7, an increase of 20.3 points over its 2014 RSI of 44.4. (Exhs. R-238.002, R-221.001) For the calendar
25 year 2015, Folsom Chevrolet’s RSI was 57.1, and ranked 115 out of 131. For all calendar year periods
26 that General Motors recounts a RSI score in the notice of termination (2013-2015), General Motors
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28 ⁴⁸ Manufacturers’ Suggested Retail Price.

1 includes Folsom Chevrolet's dealer rank in the state, with the exception of identifying Folsom
2 Chevrolet's rank during the cure period. (Exh. R-238) As noted earlier, the General Motors' sales
3 evaluation process includes dealers being "rated." A dealer's RSI of below 85 and state ranking in the
4 bottom 15 percent, according to General Motors, are the critical determining factors for a dealer being put
5 on an improvement plan and potentially triggering termination. (RT Vol. I, 223:24-224:5, 227:18-23)
6 This bottom 15 percent guideline or practice is in the cover letters to General Motors' Sales Performance
7 Review Reports and was testified to by General Motors' witnesses, in particular Mr. Meier, the person
8 who signed the notice of termination. (Exh. R-242A.001)

9 159. Folsom Chevrolet never received in writing its state ranking for that critical six month
10 cure period. General Motors is capable of providing rankings for less than a full year. (See Exh. R-242F
11 Folsom Chevrolet's ranking for the first quarter of 2017 and Paragraph 163) However, Exhibit
12 R-244.039, part of General Motors' expert's report, shows Folsom Chevrolet's ranking during the cure
13 period as 106 out of 131. The bottom 15 percent would have been a ranking of 111 out of 131 or lower.
14 At a rank of 106 out of 131, Folsom Chevrolet climbed out of that critical bottom 15 percent for the cure
15 period, and should have been rated as "Needs Significant Improvement," rather than "Unsatisfactory."⁴⁹

16 160. General Motors sent Folsom Chevrolet a letter dated March 23, 2016, providing it with its
17 sales performance for January 2015 through December 2015. For Chevrolet car, Folsom Chevrolet's
18 rating was "Needs Significant Improvement" and for Chevrolet truck and Chevrolet car/truck combined
19 Folsom Chevrolet's rating was "Unsatisfactory." Their combined ranking for 2015 was 115 out of 131
20 Chevrolet dealers. (Exh. R-242D) Thus, although Folsom Chevrolet satisfied the RSI requirement during
21 the cure period, it subsequently fell into the bottom 15 percent of the dealer ranking. However, General
22 Motors did not issue a notice pursuant to Article 13 of the Dealer Agreement, and did not give notice of
23 an opportunity to cure, with respect to this subsequent change in ranking. (Exh. R-201.022-.023)

24 161. Folsom Chevrolet was told it would be advised as to how well it had done during the cure
25

26 ⁴⁹As further confirmation that the ranking of 106 out of 131 should have given Folsom Chevrolet a rating of "Needs
27 Significant Improvement" for the cure period, Exhibit R-242D at page 242D.002 shows a RSI of 62.15 for car sales only for
28 Folsom Chevrolet for the year 2015 and a ranking of 110/131, with a dealer rating of "Needs Significant Improvement." (See
Exh. R-245.046; 64.7 percent, if maintained for an entire year, would have improved Folsom Chevrolet's ranking to 108 or
109/131.)

1 period by the end of the first quarter of 2016, but instead received correspondence that the results would
2 be forthcoming in June or July. (RT Vol. VII, 226:2-227:4) Folsom Chevrolet was finally provided with
3 the results nine months after the end of the cure period, in October of 2016. (*Id.*)

4 162. General Motors sent Folsom Chevrolet a letter dated March 30, 2017, providing it with its
5 sales performance for January 2016 through December 2016. For Chevrolet car, and car/truck combined
6 Folsom Chevrolet's rating was "Unsatisfactory;" for Chevrolet truck their rating was "Needs Significant
7 Improvement." Their combined ranking for 2016 was 113 out of 128 Chevrolet dealers. (Exh. R-242E)

8 163. General Motors sent Folsom Chevrolet a letter dated June 15, 2017, providing it with its
9 sales performance for January 2017 through March 2017. For Chevrolet car, and car/truck combined,
10 Folsom Chevrolet's rating was "Unsatisfactory;" but for Chevrolet truck their rating was "Needs
11 Significant Improvement," and their ranking was 110 out of 134. Their combined ranking for the first
12 quarter of 2017 was 119 out of 134 Chevrolet dealers. (Exh. R-242F.002)

13 **Notice of Termination**

14 164. On November 3, 2016, General Motors sent Folsom Chevrolet a Notice of Termination for
15 its Chevrolet franchise. (Exh. R-238; see Paragraph 2) The notice of termination stated that General
16 Motors deemed the increased RSI score of 64.7 during the cure period a breach of the terms of the
17 franchise, and considered the slightly below average CSI score compared to the region a breach as well.

18 **Findings Relating to the Amount of Business Transacted by the Franchisee,** 19 **as Compared to the Business Available to the Franchisee [§ 3061(a)]**

20 165. Folsom Chevrolet was optimally located within its former AGSSA. Folsom Chevrolet is
21 located relatively close to several Chevrolet competitors, and post-Old GM's bankruptcy, is not centrally
22 located within its current AGSSA. Although the western part of its AGSSA is the most populous part of
23 its AGSSA, it is also the area where Folsom Chevrolet has little advantage over the four nearby
24 competing Chevrolet dealers and no advantage over the General Motors dealer that is located across the
25 street in the same mall as Folsom Chevrolet and selling the sibling line make of nearly identical GMC
26 trucks. General Motors increased the number of census tracts in Folsom Chevrolet's AGSSA by more
27 than double (32 to 72) from 2010 to 2014, and the majority of the area "inherited" by Folsom Chevrolet
28 comprised geography where the prior terminated dealers had not been selling many Chevrolets.

1 166. The new additions to Folsom Chevrolet’s AGSSA resulted in two problems with regard to
2 the requirement to meet 100 of its assigned RSI: 1) Folsom Chevrolet had to increase penetration in areas
3 in which the two prior Chevrolet dealers had been terminated for low Chevrolet registrations and, 2) The
4 additions to Folsom Chevrolet’s AGSSA were at a greater distance from its location which resulted in the
5 so-called “geographic sales and service advantage” being flawed.⁵⁰

6 167. In addition to the GMC truck dealer across the street from Folsom Chevrolet, there also
7 remained a Buick GMC truck dealer in Placerville, which was competition to the east of Folsom
8 Chevrolet in the inherited portion of the new AGSSA. As stated, GMC trucks are essentially the same as
9 Chevrolet trucks, with the differences largely being limited to branding and cosmetic variances.

10 168. RSI makes no allowance for the size of the AGSSA and the distance of registrations from
11 the dealership. Analysis by both experts showed that the greater the distance of the dealership from a
12 registration, the less likely the dealership is to capture a sales opportunity. (Exh. R-244.078; RT Vol. VII,
13 48:25-50:3; Vol. V, 117:16-119:14) Mr. Farhat, General Motors’ expert, looked at a composite of the
14 other four Sacramento dealers and the percent of sales captured based on proximity from each dealership
15 by miles and compared it to what Folsom Chevrolet was capturing from its dealership at the same
16 distance. Within two mile “rings” of each dealership, the other four dealers were capturing 39.2 percent
17 and Folsom Chevrolet was capturing only 19 percent; within a two to four mile ring, Folsom Chevrolet
18 captured 21 percent compared to the other’s 34.7 percent. For every increase in distance from each
19 dealership, Folsom Chevrolet captured less than the average of the other four. (RT Vol. V, 118:4-120:6)
20 Mr. Farhat’s conclusion from this analysis is that Folsom Chevrolet was not effectively capturing its sales
21 opportunity, and additionally, that the analysis confirmed the reasonableness of the RSI and “did its job
22 in identifying an ineffective dealer. ...” (RT Vol. V, 119:15-120:6)

23 169. Mr. Farhat’s sales effectiveness by distance analysis showed that the other four dealers in
24 the Sacramento APR, which are meeting close to the 100 RSI standard at an average of 97, capture only
25 8.5 percent of Chevrolet registrations that are between a distance of 12 and 14 miles from their
26 _____

27 ⁵⁰ Folsom Chevrolet made sales in those census tracts in the years before being assigned those tracts and had advertised on the
28 radio and some TV within a 25-35 mile radius. (RT Vol. VI, 170:11-171:2) However, that is not the same as having the area
added to your AGSSA and having to meet RSI based on the registrations in the area.

dealership, and 7.5 percent of those between 14-16 miles away. (Exh. R-244.078) In Folsom Chevrolet's expanded AGSSA, the next closest population center on Highway 50, Shingle Springs, is over 15 miles from Folsom Chevrolet. At 15 miles, using Mr. Farhat's data of what the other four dealers were achieving at that distance, Mr. Stockton found in his "ring analysis" that Folsom Chevrolet can only expect to capture 7.5 percent of the registrations there. (Exh. P-186-6, 14) If the same effectiveness by distance of the other four dealers in the Sacramento APR were applied to Folsom Chevrolet's AGSSA for 2015, the result would have generated an RSI sales expectation of 617 units within 20 miles of the dealership, still some 525 sales short of their RSI sales expectation of 1,142 units. (RT Vol. VII, 49:4-52:24) Mr. Stockton attributed the ability of the other dealers in the Sacramento APR to be closer to 100 because their potential customers are closer to them than Folsom Chevrolet's potential customers are to it. (RT Vol. VII, 53:1-54:16) This would mean that Folsom Chevrolet's inability to capture many sales beyond 20 miles is not necessarily a "failure" by Folsom Chevrolet because most dealers capture only seven percent of the sales at that distance. The RSI metric is creating a sales opportunity expectation that is not based on reality. (RT Vol. VII, 53:1-21)

170. Al Giguere, Manager of Dealer Network Planning and Analysis for General Motors and the person responsible for Chevrolet dealers' geographies, testified concerning the December 2010 and January 2013 letters wherein General Motors issued the new APR/AGSSA Addenda. Where a dealer is located in a Multiple Dealer Area APR such as Folsom Chevrolet, the letter stated it was providing those dealers "with specific information regarding their current and proposed AGSSA." (Exhs. R-204, R-206; RT Vol. II, 457:25-458:17, RT Vol. III, 143:17-21, 148:10-153:19, 159:4-163:5) Both letters stated that the notice is provided pursuant to Article 4.2 of the Dealer Agreement (the first letter stated regarding the APR for your dealership, the second letter said regarding the APR and/or AGSSA for your dealership) and provided that if the dealer had any relevant information that they wanted General Motors to consider before making a final decision that such information had to be forwarded within 30 days. (Exhs. R-204.001, R-206.001) As noted above, Folsom Chevrolet did not provide any information or request any changes to General Motors on its APR/AGSSA territory within 30 days of either letter. (RT Vol. III, 153:3-5, 162:16-22) The letters clearly discuss both APR and AGSSA. Thus, although Article 4.2 mentions only APR, General Motors considers the AGSSA to be subsumed within the APR for purposes

1 of notice and objection.⁵¹

2 171. Article 4.2 of the Dealer Agreement states that General Motors has the “*sole discretion*”
3 and exclusive right to revise the APR. Per the Dealer Agreement, General Motors “will *consider* any
4 information Dealer submits,” but does not have to accept such information or objection. (Italics added.)
5 Only if General Motors “determines that market conditions warrant a change” will a revised Notice of
6 APR be issued. Thus, even if Folsom Chevrolet had timely objected to the change in its AGSSA, General
7 Motors did not have to accept those requests to change the territory assigned to it as its AGSSA.
8 Additionally, Folsom Chevrolet’s late objections were at least partially considered and rejected by
9 General Motors, and thus General Motors waived any issue of failure to timely object. Moreover, Folsom
10 Chevrolet’s request that some of those areas be kept as an “open point” was never answered, and
11 apparently rejected without explanation. Further, the good cause factors in Section 3061 require the
12 Board to take into account existing circumstances. Folsom Chevrolet’s current AGSSA is an “existing
13 circumstance” and as such its history and any objections to its creation are properly considered by the
14 Board as required by Section 3061.

15 172. The Dealer Agreement does not address “retail sales” exclusively. The Dealer Agreement
16 clearly contemplated business, commercial, and fleet sales. Article 9 of the Dealer Agreement states:
17 “[t]he success of General Motors and Dealer depends to a substantial degree on Dealer taking advantage
18 of available sales opportunities.” (Exh. R-201.017; underline added.)

19 173. Folsom Chevrolet was knowingly operating outside of the desired structure of General
20 Motors’ business model and its “suggested practices.” However, in determining the amount of business
21 transacted by the dealership compared to business available, it is appropriate to consider the total new
22 Chevrolet sales made by the dealer, which would include fleet sales, at least in the APR. Folsom
23 Chevrolet is selling Chevrolet vehicles, whether to businesses or individuals, which is the ultimate goal
24 ///

25 _____
26 ⁵¹ The New York Court of Appeals in *Beck Chevrolet, Co. Inc. v General Motors, LLC* (2016) 27 NY3d 379, in a case similar
27 to this one (see *infra*), noted that a change to a dealer’s AGSSA is a modification to the franchise agreement, and the fact that
28 the Dealer Agreement did not “contain details about the AGSSA” but only referenced the APR did not remove the revision to
the AGSSA from judicial review because “[t]he AGSSA is a subset of a dealer’s APR, which is specifically referenced in the
dealer agreement.” (*Id.* at 396)

of both parties.⁵² Folsom Chevrolet did not assert that all of its fleet sales should be added to its other sales for purposes of this good cause factor. (RT Vol. VII, 88:12-89:22) General Motors' expert Mr. Farhat, in his rebuttal report, conservatively found that at least 15.1 percent of Folsom Chevrolet's fleet sales from 2013 through June 2016, which generally are not proximity sensitive, were registered in the Sacramento APR. (Exh. R- 246.007-.008, R 246.022, RT Vol. V, 88:8-89:12)⁵³ ⁵⁴ The total fleet sales (cars and trucks) made by Folsom Chevrolet for each of those years is:⁵⁵

Year	Total Fleet Sales (cars and trucks)
2013	298
2014	489
2015	990
2016	517

(Exhs. R-243B.005, lines 22 and 43; R-243C.005, lines 22 and 43, R-243D.005, lines 22 and 43; 243E.005, lines 22 and 43) The total fleet sales for all of those four years is 2,294 and 15 percent is 344, divided by four equals 86 per year.⁵⁶

174. The total retail sales (cars and trucks) made by Folsom Chevrolet for 2013-2016 is:

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⁵² Mr. Giguere, Manager of Dealer Network Planning and Analysis for General Motors, noted that since RSI is based strictly on retail sales including fleet could have the effect of skewing the basis of comparison of the state expected sales. (RT Vol III, 130:20-134:3) However, here fleet sales are being considered not for RSI, but for determining the amount of business transacted compared to business available.

⁵³ Mr. Farhat's analysis did not determine where the vehicle was actually being used; for example all of the Solar City fleet vehicles (500) were registered in San Mateo County, so he did not include those in the 15 percent calculation. (RT Vol V, 195:3-25-197:2) Where a vehicle is registered may not be the same location as where the vehicle is used. (RT Vol. VII 88:15-17)

⁵⁴ Mr. Stockton opined that, for purposes of determining the amount of business transacted by the franchisee compared to business available, one could follow the logic of the RSI calculation. By taking Chevrolet's fleet market share in California and multiplying that by fleet vehicle registrations of all brands in Folsom's AGSSA, Mr. Stockton got a number of Chevrolet fleet units for each segment that were expected to be sold in Folsom Chevrolet's AGSSA for each applicable year. Mr. Stockton called this Total Sales Index or TSI. He did not advocate that TSI should be used in this case or that it was an appropriate performance measure. (Exh. P-185-67, RT Vol. VII 87:14-89:22, 112:7-11) However, Mr. Stockton's calculation of Folsom Chevrolet's sales effectiveness from the addition of these fleet sales numbers does not assist in determining the amount of business transacted by the dealership compared to business available.

⁵⁵ These yearly fleet sales numbers are consistent with what Rene Schoonbrood, Fleet Manager for Folsom Chevrolet, testified to as indicated in Paragraph 133, with the anomaly of the large number for 2015 attributable to the Solar City sale.

⁵⁶ Although Mr. Farhat's analysis only went through June 2016, all of the fleet sales are added for that year.

Year	Total Retail Sales (cars and trucks)
2013	370
2014	428
2015	652
2016	738

(Exhs. R-242B.002, R-242C.002, R-242D.002, R-242E.002)

175. Folsom Chevrolet's Sales to Equal State Average (expected sales) for 2013-2016 is:

Year	Sales to Equal State Average (expected sales)
2013	904
2014	963
2015	1,142
2016	1,324

(Exhs. R-242B.002, R-242C.002, R-242D.002, R-242E.002)

176. General Motors judged Folsom Chevrolet as not transacting as much business as was available to the dealership by using the RSI metric, but by not considering the fleet sales made in its APR, General Motors unfairly judged Folsom Chevrolet. When 86 sales are added to each of Folsom Chevrolet's retail sales by year it shows that Folsom Chevrolet transacted much more business compared to business available than General Motors gave it credit for and not an inadequate amount.

Year	Retail Sales Plus 86 Fleets Vehicle Sales
2013	456
2014	514
2015	738
2016	824

177. Additionally, General Motors encouraged Folsom Chevrolet to transact Business Elite and fleet sales even referring a very large fleet sale to them during the cure period, and rewarding Folsom Chevrolet for its fleet sales. The California Vehicle Code defines retail sale as a sale of goods to a

1 “person,” which is defined in the Vehicle Code to include businesses of all types, for the purpose of
2 consumption and use. Section 3061(a) requires the Board consider the amount of business transacted by
3 the franchisee compared to the business available. In doing so, it is appropriate to consider Folsom
4 Chevrolet’s fleet sales for at least the following reasons:

- 5 • The Dealer Agreement (franchise), written by General Motors, does not define “retail
6 sale;”
- 7 • The Vehicle Code does not limit “retail sale” to individuals or smaller businesses; and,
- 8 • The Addenda to the Dealer Agreement refers to “fleet sales.”

9 Although it may not be appropriate to give great weight to the fleet sales registered outside of the
10 Sacramento APR, the evidence shows, and General Motors admits, there was a substantial amount of
11 fleet sales by Folsom Chevrolet from 2011 through 2016.

12 178. Consideration of the “amount of business transacted by the franchisee, as compared to the
13 business available to the franchisee” is part of the burden of proof assigned to General Motors. As it has
14 been concluded in this case that “sales” includes both retail and fleet, General Motors did not meet its
15 burden of proving that the “amount of business transacted” by Folsom Chevrolet, “compared to the
16 business available” to it was inadequate. Thus, this factor weighs in Protestant’s favor and against
17 termination.

18 **Findings Relating to the Investment Necessarily Made and Obligations Incurred**
19 **by the Franchisee to Perform its Part of the Franchise [§ 3061(b)]**

20 179. The original investment paid by Marshal Crossan from his own funds was \$250,000, as
21 reflected on the financial statement. (RT Vol. VI, 12:11-14:5; Exh. P-184-3) Motors Holding Corporation
22 paid in \$750,000 and the agreement was structured so that a certain amount of profit made by Marshal
23 Crossan would be used to gradually buy-out Motors Holding Corporation. (RT Vol. VI, 107:5-108:13)
24 Marshal Crossan completed the buy-out and is now the sole owner of the franchisee. The dealership’s
25 equipment was purchased at a cost of \$1,010,264. Folsom Chevrolet is a very profitable business and
26 operates with a \$1.643 net working capital, which is above the minimum required by General Motors.
27 (Exh. P-103-4-5; RT Vol. VI, 156:13-158:1)

28 180. The property at the current location of Folsom Chevrolet was purchased by Marshal

1 Crossan at a cost of approximately \$4 million with the title held by the Marshal Crossan Trust. The
2 property is leased to Argonaut (a subsidiary of General Motors) and sub-leased to Folsom Chevrolet.
3 Additional property used as a storage lot was purchased by Marshall Crossan at a cost of \$3.9 million.
4 (See Paragraph 189; RT Vol. VI, 15:17-16:18)

5 181. General Motors contends that Folsom Chevrolet's investment is equal to its net worth
6 (assets reported over its liabilities) as reflected on the financial statement, which is approximately \$3.6
7 million dollars. (RT Vol. IV, 135:11-137:5) Of that \$3.6 million dollar amount some "significant
8 portion" of it (\$2.370 million from 2009-2016) came from Essential Brand Elements ("EBE") incentive
9 payments to Folsom Chevrolet from General Motors to incentivize dealership remodeling. Since the
10 source of the investment is from General Motors (less the \$900,000 Folsom Chevrolet spent to remodel)
11 and not from operating activities or selling cars, General Motors contends the EBE funds should not be
12 considered investment by Folsom Chevrolet and thus not part of its net worth. (RT Vol. IV, 159:22-
13 163:23) However, once the money is earned by Folsom Chevrolet it is part of its net worth. There is no
14 evidence that the money was not reinvested into the dealership operations by way of further
15 improvements to keep the facility modern or to add to equipment. If General Motors did not want
16 dealerships to keep the extra EBE money or be required to use it in a certain manner, they could have set
17 the rules that way, but they did not. It is not reasonable to conclude that the EBE funds should be
18 deducted from Folsom Chevrolet's net worth figure.

19 182. Folsom Chevrolet's current contingent liabilities including finance, insurance and service
20 contract chargebacks are estimated at \$89,000. (Exh. P-184-4; RT Vol. VI, 23:9-24:15, 66:12-67:2) A
21 long-term liability (obligation) is Folsom Chevrolet's lease with a computer vendor of 60-61 months
22 remaining on the lease as of the summer of 2017 at a cost of approximately \$6,000-\$7,000 per month.
23 (Exh. P-184-4; RT Vol. VI, 24:18-25:14, 67:11-25) Folsom Chevrolet, as of 2016, had an inventory
24 credit line ("floor plan") of over \$20 million, which Marshal Crossan personally guaranteed. (Exh. P-116;
25 RT Vol. VI, 154:8-155:16) The floor plan is a liability of the dealership against the value of the new
26 vehicles. (Exh. R-250C.020:14-021:20) In 2016, Folsom Chevrolet had used \$15.3 million of its floor
27 plan (amount of the note) to pay for new vehicles it bought from General Motors. (Exh. R-250C.019:6-
28 25) The value of the new cars and trucks was about \$14 million, a holdback difference of \$1.3 million.

(Exh. R-243E.001) Mr. Gaspardo agreed that personal guarantees are obligations. (RT Vol. IV, 218:13-24)

183. The amount of investment made and liabilities incurred is significant and this factor weighs in Folsom Chevrolet's favor and against termination.

Findings Relating to Permanency of the Investment [§ 3061(c)]

184. The term "permanency" is undefined in the Vehicle Code. Neither permanent nor permanency appears in the Generally Accepted Accounting Principles ("GAAP"). GAAP defines assets and liabilities relative to their current (less permanent) or non-current (more permanent) nature. Current assets are those most liquid and reasonably expected to be converted to cash or sold or consumed in a business operating cycle (generally one year). ("[A]current asset is something that is expected to be turned into cash within 12 months." (RT Vol. IV, 137:15-17) Current liabilities are those similarly expected to be settled within one year or one operating cycle. Permanency infers a quality about the investments and is thus a relative term or more of a "continuum," with certain assets being less permanent while others comparatively more permanent.⁵⁷

185. General Motors' expert Mr. Gaspardo testified that there is no permanent investment in the dealership, and "not only do[es] [Folsom Chevrolet] not have any permanent investment, but they would be able to more than recover the investment that they do have."⁵⁸ (RT Vol. IV, 127:10-21) Mr. Gaspardo found nothing on the financial statements (balance sheet and income statement) that evidenced a "permanent investment." (RT Vol. IV, 133:7-22; 138:4-11; Exhs. R-243E.001, R-249.004)

186. General Motors' expert's opinion is that permanency is whether or not you can convert an asset into cash; if there is a ready market for it, then it is not permanent. Mr. Gaspardo explained: "An investment is permanent when it cannot be recovered." (Exh. R-249.003; RT Vol. IV, 129:8-15, 195:5-15) It is only "something you've invested in and you're not likely to get it out," or "sunk costs" that are permanent. (RT Vol. IV, 129:16-22) His example of a permanent investment is something like a "highly specialized piece of signage ... that would not have a ready market." (RT Vol. IV, 130:15-23; Exh. R-

⁵⁷ General Motors' expert Mr. Gaspardo did not agree with this "continuum" concept but rather testified that in his mind the concept is "somewhat binary;" it is either permanent or it is not. (RT Vol. IV, 199:8-200:1)

⁵⁸ This was the first time Mr. Gaspardo has testified in California and the first time he has been involved in the issue of permanency. (RT Vol. IV, 192:14-19)

249.003) This extremely restrictive definition of permanency could not be what the legislature intended when this law was written since essentially there would be very little to consider.

187. General Motors asserts there is little permanency of investment by Folsom Chevrolet because the real property was not purchased by Folsom Chevrolet, and the buildings and other assets are not held by the dealership, but by the Marshal Crossan Trust. (RT Vol. IV, 152:1-23, 163:24-164:10, 234:2-18) There are tax reasons why investments such as land and buildings would be held in trust or by another entity.⁵⁹ Marshal Crossan is “the sole shareholder and therefore [the] sole owner of Folsom Chevrolet, Inc.” (See Declaration of Marshal Crossan Regarding Good Standing and Ownership of Folsom Chevrolet, Inc., dated January 20, 2018.) Marshal Crossan is the President of the corporation, the dealer operator and, if ownership of “the franchise” were possible, he would be considered the owner of that as well. Mr. Crossan is also the owner of the structures, the land and equipment of Folsom Chevrolet, Inc. (RT Vol. VI, 94:13-18) The Marshal Crossan Trust and Folsom Chevrolet for all intents and purposes are basically identical in regards to ownership by Marshal Crossan. To assert no permanency of investments based on the “dealership” not holding the investments in this instance is not reasonable.

188. The dealership’s equipment was purchased at a cost of \$1,010,264. Some of these fixed assets are more permanent than others but on a continuum they are a more permanent asset.⁶⁰ (Exh. P-184-3)

189. As stated earlier, the purchase price of the land on which the dealership sits was approximately \$4 million and the adjacent storage lot was purchased for \$3.9 million. (RT Vol. VI, 15:17-16:18) General Motors asserts there is no permanency of investment by the dealership because the land can be fairly quickly sold. (RT Vol. IV, 171:18-174:3) However, dealership facilities are single purpose facilities which can take some time to convert to cash. (RT Vol. VI, 34:20-35:10, 112:1-115:7) Because the uses of dealership land and facilities are limited, unless there is another new vehicle franchisee looking for a facility, it cannot easily be converted to cash. (RT Vol. VI, 34:20-35:10) A subsidiary of General Motors, Argonaut, holds the lease as the lessee from the Trust that gives it

⁵⁹ Interestingly, all the other subsections of Section 3061, except (c), use the word “franchisee.”

⁶⁰ Mr. Gaspardo agreed that there could be some components of the fixed assets that might be permanent. (RT Vol. IV, 197:8-198:10)

complete control over the dealership property, but allows Argonaut to walk away with 30 days' notice. (RT Vol. VI, 25:15-26:7, 43:5-44:13) The value of the real estate may decline 25 percent (to \$.75 on the dollar) if it does not have a buyer before a termination. (RT Vol. VI, 40:9-11)

190. The goodwill or "blue sky" of the business is a more permanent asset. (RT Vol. VI, 40:12-18, 47:7-25, 74:7-12) Goodwill in the automotive industry is generally considered the difference between what an arm's length buyer is willing to pay for the right to assume the dealer agreement and what the book value of those assets are worth. (RT Vol. IV, 51:15-19) Mr. Gaspardo characterized goodwill as a "market concept" or "the extent that the market [will] support a selling price higher than the net worth." (RT Vol. IV, 188:16-25)

191. General Motors' expert took the position that goodwill is not an investment and "any goodwill almost entirely relates to the dealer agreement with GM. And to the extent that the dealer agreement hasn't been fulfilled, there's no reason to expect ... goodwill" (RT Vol. IV, 187:9-188:25) Additionally, in his opinion, goodwill is not permanent because there is a "liquid market" for it because if Folsom Chevrolet was sold tomorrow and there is goodwill in the business, the buyer would pay it. (*Id.*)

192. General Motors' position is not reasonable. Developing goodwill required Folsom Chevrolet's effort over the course of 25 years to cultivate thousands of customers and establish its business reputation. (RT Vol. VI, 47:7-25) The financial statement of the dealership does not have much value reflected for goodwill because tax rules allow amortization of goodwill. (RT Vol. VI, 31:7-32:15) Amortization of goodwill over 15 years as permitted does not mean the goodwill does not have value. (*Id.*)

193. As to the franchise value or goodwill, Folsom Chevrolet's expert, Mr. Woodward, took several methods used to value new auto dealer franchises: 1) the Kerrigan Advisors approach uses an average multiple of 4.5 times pre-tax earnings (for Folsom Chevrolet for 2016, \$1,639,756 yields \$7,378,902), 2) the Haig Report approach uses an average multiple of 4.3 times pre-tax earnings (\$1,639,756 yields \$7,050,950), and 3) Mr. Woodward's own method based on return on capital

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1 investment, which resulted in a value of \$6,034,780.⁶¹ He then took an average of the three methods and
2 valued Folsom Chevrolet's franchise or goodwill value at \$6.8 million. (Exh. P-184-4; RT Vol. VI, 18:14-
3 22, 19:2-22:9) If the franchise were terminated the value of the goodwill would be \$0, as there would be
4 no business that could be sold. (RT Vol. VI, 40:12-18)

5 194. Folsom Chevrolet's expert found that the investment of at least \$14.7 million can be
6 considered permanent. (Exh. P-184-5; RT Vol. VI, 28:4-30:8, 35:11-36:16) The \$14.7 million is
7 comprised of the following amounts:

8 (a) Equipment \$400,000. (Exh. P-184-3; RT Vol. VI, 17:4-23, 58:18-62:22)⁶²

9 (b) Real estate value estimated at \$7.5 million. (RT Vol. VI, 160:4-23, 17:4-23)

10 (c) Franchise value \$6.8 million. (Exh. P-184-4; RT Vol. VI, 17:4-23, 19:2-22:9)

11 195. According to Protestant's expert, the loss that would be incurred by Folsom Chevrolet and
12 Marshal Crossan if the franchise were terminated would be approximately \$8.675 million, since the
13 goodwill of \$6.8 million would be lost and the real estate value of \$7.5 million dollars diminished by 25
14 percent or \$1.875 million. (Exh. P-184-6; RT Vol. VI, 39:14-41:3)

15 196. There was no independent appraisal performed on the real property. Protestant's estimate
16 of \$7.5 million may be high but using a reasonable figure for the City of Folsom of a two percent per
17 year increase on the original purchase price (\$4 million) of the land over 25 years would result in a value
18 of over \$6.5 million dollars.⁶³ A reduction of 25 percent on the real estate value would be a \$1.625
19 million loss. When the real estate loss of \$1.625 million is added to the \$6.8 million goodwill loss,
20 Folsom Chevrolet could incur a total loss of \$8.425 million if its Chevrolet franchise was terminated. The
21 permanency of Folsom Chevrolet's investment is significant and this factor weighs in Folsom
22 Chevrolet's favor and against termination.

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26 ⁶¹ Kerrigan and Haig regularly both use multiples of earnings and published charts valuing dealerships.

27 ⁶² Taking economic depreciation into account, Mr. Woodward valued the equipment at something less than half of the original
value of \$1.010 million at \$400,000. The book value (tax depreciated value) is \$218,568. (Exh. R-243E.001, line 57)

28 ⁶³ The population of the City of Folsom grew 39 percent from 2000 to 2010 and average household income is over \$100,000.
(RT Vol. VIII, 27:15-18, 27:25-28:4)

**Findings Relating to Whether it is Injurious or Beneficial to the Public Welfare
for the Franchise to be Modified or Replaced or the
Business of the Franchisee Disrupted [§ 3061(d)]**

197. Folsom Chevrolet currently has between 80 and 90 employees. (RT Vol.VI, 122:22-24) Loss of such employment would be detrimental to the community, in addition to being a great hardship on those employees. The size of the dealership is such that it cannot be readily replaced, nor could its sales, service, and other dealership functions be readily absorbed by other dealers within the APR, which would impact Chevrolet customers. The City of Folsom would lose a substantial source of tax revenue. (RT Vol.VI, 158:19-159:21; Exh. P-144) For the years 2012 through 2016, Folsom Chevrolet generated \$13,767,576.09 in tax revenue that went to state and local government. (*Id.*)

198. Marshal Crossan and Folsom Chevrolet are active in the local community, contributing to a vocational program at the local high school that exposes non-college bound students to different vocational careers, and to different career opportunities in the automotive industry. (RT Vol. VI, 135:22-137:20, 137:25-138:9) In addition to being involved with the area's youth at the high school level, Marshal Crossan also sits on the board of the Folsom Little League, and provides financial support. (RT Vol. VI, 139:7-17)

199. Marshal Crossan is also involved with promoting the City of Folsom. (RT Vol. VI, 138:12-139:6) He sits on the Chamber of Commerce Board, a position he has held for over 20 years and is also on the Tourism Board, and the Board of the Economic Development Corporation. (*Id.*) In his role on those boards, Marshal Crossan has provided insight and guidance on ongoing projects, has met with companies that are looking to do business in Folsom, and has worked on and provided financial support for the events that those entities organize. (RT Vol. VIII, 11:8-12:2) Folsom Chevrolet has been a financial sponsor of the biggest event in Folsom, the Rodeo, for over 15 years, and two years ago Marshal Crossan was its grand marshal. (RT Vol.VI, 139:18-140:23)

200. If Folsom Chevrolet's Dealer Agreement is terminated, General Motors intends to establish a new dealer in Folsom. (RT Vol. IV, 43:7-9; Vol. I, 204:13-21) General Motors has the contractual right to lease through Argonaut the existing Folsom Chevrolet property and facility until 2024, and therefore, would likely maintain the Chevrolet brand at the current location. (Exh. R-253; RT Vol. IV, 166:20-169:11) In addition, General Motors indicated the new dealer would likely interview the

1 existing employees and keep any that fit. (RT Vol. I, 204:25-205:8) Although inappropriate to currently
2 offer the franchise to a replacement dealer, General Motors maintains a list of vetted, “ready now”
3 candidates who would be willing and able to operate a Chevrolet franchise from the current location and
4 facility upon approval. (RT Vol. IV, 103:21-104:13) Even though some Folsom Chevrolet employees
5 may not be terminated and taxes will be generated if the dealership location is continued, Argonaut can
6 walk away from the lease with 30 days’ notice. Therefore, the continuance of a Chevrolet franchise at the
7 Folsom Chevrolet location and attendant mitigation of harm to employees, the public, and the City of
8 Folsom is speculative at this point.

9 201. In light of Folsom Chevrolet’s longevity, service to the public, community involvement
10 for over 25 years, the number of employees, and tax revenue generated, it is more likely that it will be
11 injurious to the public welfare if Folsom Chevrolet’s Chevrolet franchise is terminated. Folsom Chevrolet
12 is one of the top Business Elite dealers in the country and receives the most STMI allocation of the
13 Business Elite dealers in the district. These business customers, large and small, who depend on Folsom
14 Chevrolet will be severely impacted if Folsom Chevrolet is terminated. This factor weighs in favor of
15 Folsom Chevrolet and against termination.

16 **Findings Relating to Whether the Franchisee has Adequate Motor Vehicle**
17 **Sales and Service Facilities, Equipment, Vehicle Parts, and Qualified Service**
18 **Personnel to Reasonably Provide for the Needs of the Consumers**
19 **for the Motor Vehicles Handled by the Franchisee and has been and**
20 **is Rendering Adequate Services to the Public [§ 3061(e)]**

21 202. Folsom Chevrolet has a large and well-groomed facility that supports all aspects of sales
22 and service and completed an additional remodel at a cost of \$900,000 in 2014. (Exhs. P-148, P-149; RT
23 Vol. VI, 119:15-120:6, 121:1-8, 123:18-126:7) No evidence was offered by General Motors that Folsom
24 Chevrolet does not have sufficient vehicle parts.

25 203. Mr. Deprez, District Manager Aftersales for General Motors,⁶⁴ who has called on Folsom
26 Chevrolet approximately once a month for 12 years, testified that Folsom Chevrolet’s service has
27 generally been acceptable. (RT Vol. II, 354:10-18, 355:4-6; see Footnote 13, *supra*.)

28 204. Further, Folsom Chevrolet has adequate service and repair facilities, adequately trained

⁶⁴ Aftersales is anything after the sale of a vehicle, which encompasses parts and service, including warranty work. (RT Vol. II, 353:22-354:1)

1 service and other after sales personnel, adequate warranty service for its Chevrolet customers, and Mr.
2 Deprez has not given Folsom Chevrolet any notices of deficiencies that needed to be corrected for its
3 service department. (RT Vol. II, 367:9-368:7) Folsom Chevrolet's sales of service and parts are above
4 average. (RT Vol. VII, 198:8-199:2)

5 205. This factor weighs in favor of Folsom Chevrolet and against termination.

6 **Findings Relating to Whether the Franchisee Fails to Fulfill the Warranty Obligations**
7 **of the Franchisor to be Performed by the Franchisee [§ 3061(f)]**

8 206. In June 2016, Folsom Chevrolet performed warranty engine work on a Corvette that
9 resulted in "catastrophic engine damage" due to an issue with improper tolerances. (Exh. R-240; RT Vol.
10 II, 363:6-365:18) An investigation revealed this was likely an issue with the work performed by the
11 technician. (*Id.*) In October 2016, Folsom Chevrolet sold two vehicles that were subject to mandatory
12 recalls for defective airbags, which is a violation of federal law. (Exh. R-237) This has safety
13 implications for customers, and liability concerns for the customer, dealer, and General Motors. (RT Vol.
14 II, 361:12-362:10) Mr. Deprez counseled Folsom Chevrolet to put processes in place to prevent a
15 recurrence of the recall issue, which Folsom Chevrolet did. (RT Vol. II, 367:2-8)

16 207. There is no showing that these three instances in 25 years would be considered a
17 significant failure of warranty obligations and this factor weighs in favor of Folsom Chevrolet and
18 against termination.

19 **Findings Relating to the Extent of the Franchisee's Failure to Comply with**
20 **the Terms of the Franchise [§ 3061(g)]**

21 208. Folsom Chevrolet's performance during the cure period improved with a RSI score of
22 64.7, and it was no longer in the bottom 15 percent of Chevrolet dealers in California. (RT Vol. VI,
23 222:4-11; Exh. R-238) While the terms of the franchise may state that compliance with sales performance
24 requires an RSI score of 100, the testimony was that for a dealer to be deemed "unsatisfactory" and be
25 subject to termination, the dealer needs to be below 84.9 RSI and in the bottom 15 percent ranking of
26 dealers in the state. Folsom Chevrolet adequately cured its breach by achieving a RSI score and a ranking
27 that would not have resulted in it being deemed "Unsatisfactory," but rather "Needs Significant
28 Improvement."

1 209. General Motors contends that it does not employ a standard of being simply above the
2 bottom 15 percent as sufficient to cure a sales performance breach. However, this is inconsistent with
3 General Motors' practices, and is not borne out by the testimony. Mr. Meier, the Regional Director for
4 Chevrolet for the Western Region (which includes 13 states and some 400 dealers), testified that a dealer
5 in the "Needs Significant Improvement" category is "unlikely" to be put into a quarterly improvement
6 process, and would not be terminated.⁶⁵ (RT Vol. IV, 48:22-25, 49:1-3)

7 210. General Motors asserts that reaching a RSI score of 64.7 is still a failing grade because
8 Folsom Chevrolet failed to reach 100 or greater RSI during the cure period. (Exh. R-201.017 ¶ 9; RT
9 Vol. I, 69:12-70:8) If failure to meet 100 RSI or greater (which is a requirement of the Dealer Agreement
10 for all Chevrolet dealers) is the standard for termination, then many Chevrolet dealers would be facing
11 termination. However, this is clearly not how General Motors operates. Mr. Meier, who has been with
12 General Motors for 40 years, when asked why a dealer below 100 RSI would not be terminated given the
13 contractual requirement, noted that this was his first termination and said: "We're not in the dealer
14 termination business ..." (RT Vol. IV, 7:3-24, 49:7-14, 50:8-22)

15 211. Mr. Meier, who signed the termination letter, agreed that the dealer's performance for
16 termination should be significantly below 100 RSI ("profoundly unsatisfactory"), over a long period of
17 time, and include CSI deficiencies. (Exh. R-238.004; RT Vol. IV, 7:3-24, 49:7-14, 50:8-22) He
18 characterized the Folsom Chevrolet situation as a dealer who was terminated because it had been, for
19 both RSI and CSI, in terms of ranking,⁶⁶ "in the order of magnitude of fourth from the bottom" over a
20 very long period of time despite resources and counseling. (RT Vol. IV, 28:11-22, 49:14-22) Folsom
21 Chevrolet's RSI score went from 40.93 in 2013 to 56.6 in 2017,⁶⁷ an increase of 15.67 points. (Exhs. R-
22 242B.002, R-270; RT Vol. II, 264:19-265:6) Folsom Chevrolet's SSS was essentially consistently above
23 regional average. Folsom Chevrolet's ranking was fourth from the bottom in only two years, 2013 and
24 2014, not in other relevant years, nor during the cure period. Folsom Chevrolet RSI rankings were:

25 ///

26 _____
27 ⁶⁵ Mr. Meier said, in answer to whether termination would occur for a dealer in the "Needs Significant Improvement"
category: "No, we don't – no, of course not." (RT Vol. IV, 49:1-3)

28 ⁶⁶ Mr. Escalante, Chevrolet District Sales Manager, testified that only the PDS was found deficient. (RT Vol. II, 372:15-23)

⁶⁷ The 56.6 RSI score for 2017 is an extrapolated figure. (RT Vol. II, 264:19-22)

Year	RSI Ranking
2012	123 out of 135
2013	129 out of 133
2014	124 out of 128
2015	115 out of 131
2016	113 out of 128
2017 through March	119 out of 134

(Exhs. R-242A.002, R-242B.002, R-242C.002, R-242D.002, R-242E.002, R-242F.002)

212. Folsom Chevrolet adequately cured its breach by achieving a ranking of 106 out of 131, which would have resulted in it being in the category of “Needs Significant Improvement.” General Motors did not comply with the terms of the Dealer Agreement by not starting a new cure period after Folsom Chevrolet cured its breach.⁶⁸ General Motors did not issue a notice pursuant to Article 13 of the Dealer Agreement, and provide an opportunity to cure, with respect to Folsom Chevrolet’s subsequent change in ranking. Having provided notice of breach and an opportunity to cure for a breach of a similar nature in 2015, does not absolve General Motors of its obligation to provide notice of subsequent breaches, even if similar in nature.

213. General Motors did not offer any evidence, which is its burden, to establish that a score between “completely satisfied” and “very satisfied,” actually demonstrates any difference in consumer satisfaction at Folsom Chevrolet. (RT Vol. VII, 82:23-83:12) Although “completely satisfied” customers may be a goal, counting only those questionnaires that mark “completely satisfied” is not reasonable. There is no evidence on whether the questions posed on the survey actually measured the consumer’s satisfaction. (*Id.*) There is no evidence that the sample size of the survey is sufficient so as to remove the possibility of random fluctuation in scores based on a single response. (RT Vol. VII, 82:23-84:10)

214. There are five questions on both the PDS and SSS surveys with the first question on each related to overall satisfaction. The answers to the first question on each are the only ones used to calculate the CSI scores and are only counted if marked “completely satisfied.”⁶⁹ (Exh. R-268; RT Vol. I, 104:22-105:8; Vol. II, 269:19-271:21) Both PDS and SSS scores are important to General Motors. (RT Vol. I, 102:23-25) Folsom Chevrolet’s SSS scores were not deficient, but rather were above the regional

⁶⁸ It seems peculiar that General Motors did not provide the ranking to Folsom Chevrolet for the six month cure period in its termination letter.

⁶⁹ The other four questions are “there for a guide to really be able to do a deep dive of why [the customers] weren’t completely satisfied.” (RT Vol. II, 271:4-8)

1 score for all the six years of 2011 through 2016, except one year (2014). (Exhs. R-268, P-185-84; Vol. I,
2 106:4-109:24; Vol. II, 265:18-266:21) Folsom Chevrolet's PDS scores were consistently below the
3 regional score for those years. (Exh. R-268, Vol. I, 104:18-110:3) However, a review of a comparison of
4 PDS Q14 scores (the critical question of overall dealership purchase/delivery) for Folsom Chevrolet
5 shows very small differences compared to the region scores for completely satisfied: for 2012: Folsom
6 Chevrolet's score 3.73 (out of 4) versus the region score of 3.75, (.02 difference); for 2013: 3.66 versus
7 3.76 (.10 difference); for 2014: 3.70 versus 3.77 (.07 difference); for 2015: 3.67 versus 3.76 (.09
8 difference); for 2016: 3.54 versus 3.72 (.18 difference) and for January 2017: 3.51 versus 3.72 (.21
9 difference).⁷⁰ (Exh. R-286.001-.006)

10 215. Although General Motors asserts that Folsom Chevrolet's CSI scores place Folsom
11 Chevrolet in breach of contract (i.e., the franchise) because they were below regional average, nowhere
12 do the terms of the Dealer Agreement require that Folsom Chevrolet's CSI scores be above regional
13 average to be in compliance. (Exh. R-201.009, .011, § 5.1.1(e) and 5.3) Additionally, Folsom Chevrolet's
14 SSS scores were consistently above regional average, (except for 2014) and the differences between the
15 PDS region scores and Folsom Chevrolet's were not large. Article 5.1.1(e) states only that the dealer
16 agrees to "ensure that the customer's purchase and delivery experience are satisfactory," not
17 "completely" satisfactory or "very" satisfactory, or any other adjective. (Underline added.; Exh. R-
18 201.009) Likewise, Article 5.3 provides that dealer "agrees to conduct its operations in a manner that will
19 promote customer satisfaction with the purchase and ownership experience" and that the dealer will be
20 evaluated at least annually, "pursuant to the procedures then in effect," and compared to other Line-make
21 dealers' performances. (Exh. R-201.011) There is no standard or bar for performance either articulated or
22 referenced. Folsom Chevrolet's scores fell between "completely satisfied" and "very satisfied." It is
23 difficult to see how those scores evidence anything but that Folsom Chevrolet is conducting its operations
24 in a manner that is promoting customer satisfaction in accord with Article 5.3. (Exhs. P-185-83, P-185-
25 84) Folsom Chevrolet did not breach the customer satisfaction provisions of the Dealer Agreement.

26 216. Folsom Chevrolet met (a) through (e) of the objectives it agreed to in order to "effectively
27

28 ⁷⁰ General Motors' expert Mr. Farhat testified that in his experience it is not common that poor CSI performance alone warrants termination ("perhaps one dealer in one state over the last 30 years"). (RT Vol. V, 184:15-185:12)

... sell and promote ... the use of Products”⁷¹ as outlined in Article 5.1.1 of the Dealer Agreement by: (a) maintaining an adequate staff of trained sales personnel; (b) explaining to Product purchasers the items which make up the purchase price and provide purchasers with itemized invoices; (c) not charging customers for services for which dealer is reimbursed by General Motors; (d) including in customer orders only equipment or accessories requested by customer or required by law; and (e) ensuring that the customer’s purchase and delivery experience are satisfactory. (RT Vol. I, 215:5-216:24; see Paragraph 27) The only remaining objective is 5.1.1(f), which states: dealer agrees to “comply with the retail sales standards established by General Motors, as amended from time to time. ...” (Exh. R-201.009) Although General Motors asserts that the “focus” of the Dealer Agreement’s “is on retail” and that retail sales and performance is “an emphasis” in the Dealer Agreement, the subdivisions of Article 5.1.1 are not differentiated as one being more important than the other. (RT Vol. II, 458:25-459:8, 462:2-9) Additionally, General Motors treats each provision of Article 5.1.1 (a) through (f) as equal, asserting that Folsom Chevrolet’s poor CSI scores was as equal a breach of contract as an unsatisfactory RSI score and bottom 15 percent ranking. (RT Vol IV, 28:11-22, 49:14-22) Article 9 is basically a reiteration of Article 5.1.1(f) and a further elaboration of the RSI requirements. Additionally, Article 9 begins by stating that General Motors willingness to enter into the Dealer agreement is based in part on the “Dealer’s commitment to effectively sell and promote the purchase, lease and use of Products in Dealer’s Area of Primary Responsibility.” (Underline added.) “Products” are defined as any new motor vehicle specified in the incorporated Addenda, which included fleet sales. Folsom Chevrolet effectively sold and promoted the purchase and use of Chevrolet product in its APR. It is significant that the language of subsection (g) requires the consideration of the extent of the failure to comply, not any failure to comply. Even leaving aside RSI as a flawed metric (see below discussion) and finding General Motors’ RSI rating system acceptable, not fulfilling one out of six equal requirements is not sufficient under these existing circumstances to be deemed a material breach warranting termination of the franchise. This factor weighs in favor of Folsom Chevrolet and against termination.

///

⁷¹ See Footnote 16.

EXISTING CIRCUMSTANCES

217. The list of good cause factors set forth in Section 3061 for termination of a franchise is not exclusive. It is the existing circumstances that must be considered, which merely include, but are not limited to, the seven factors specifically set forth above.

218. The use of RSI generally by General Motors, and as applied in this case, violates Section 11713.13(g)(1)(A). RSI fails to account for the impact of circumstances unique to Folsom Chevrolet's market (other than segment popularity), including but not limited to demographics, geography and brand preferences. Instructive to this protest is the case of *Beck Chevrolet Co., Inc. v. General Motors LLC* (2d Cir. 2016) 845 F.3d 68; *Beck Chevrolet Co., Inc. v. General Motors LLC* (2016) 27 N.Y. 3d 379.⁷² The language of Section 463(2)(gg) of the New York Dealer Act is similar to California Vehicle Code section 11713.13(g). The New York Dealer Act Section 463(2)(gg) provides:

[i]t shall be unlawful for any franchisor, notwithstanding the terms of the franchise contract: ... [t]o use an unreasonable, arbitrary or unfair sales or other performance standard in determining a franchised motor vehicle dealer's compliance with a franchise agreement. ...

Section 11713.13, subdivision (g) comparably provides in part, that "[i]t is unlawful and a violation of this code for a manufacturer ... to do...any of the following: (g)(1) [e]stablish or maintain a performance standard ... that may materially affect the dealer, ... unless ... [t]he performance standard ... is reasonable in light of all existing circumstances, ..." including, but not limited to, those set forth in (A)(i) through (v), such as demographics in the dealer's area of responsibility, geographical and market characteristics in the dealer's area of responsibility, local economic circumstances, and historical sales, service and customer service performance of the line-make, including vehicle brand preference of consumers in the dealer's area of responsibility.

⁷² Beck Chevrolet appealed an order granting summary judgment to General Motors, as well as a final judgment denying the dealers remaining two claims, entered by the United States District Court for the Southern District of New York. The U.S. Court of Appeals for the Second Circuit had previously held that Beck Chevrolet's appeal raised two questions of unsettled New York law regarding the application of sections of New York's Franchised Motor Vehicle Dealer Act. Those questions were certified to the New York Court of Appeals. (*Beck Chevrolet Co., Inc. v. General Motors LLC* (2d Cir. 2015) 787 F.3d. 663)The Court of Appeals found in favor of Beck Chevrolet and therefore the U.S. Second Circuit Court of Appeals reversed the district court's judgments in favor of General Motors and remanded for further proceedings. Discussion hereafter includes reference to findings in the New York Court of Appeals decision answering the questions as certified by the Second Circuit Court of Appeals.

219. Beck Chevrolet filed suit after missing its first year RSI target and being told by General Motors its franchise would be terminated if it did not score 100 RSI by the end of a three-year period. (*Beck*, 27 N.Y.3d 379 at 387) The RSI performance standard found unlawful in *Beck* is the same one General Motors applied to Folsom Chevrolet. The Court of Appeals found in *Beck* that General Motors' standard that uses average performance based on statewide sales data in order to determine a dealer's compliance with a franchise agreement was not reasonable because it did not take into account local variations such as brand preferences and market competitiveness. The *Beck* court took issue with the brand popularity exclusion, noting that "customer purchases are influenced not solely by preferences for a type of vehicle, for which GM accounts through its segmentation formula, but also by brand popularity and import bias." (*Id.* at 391) The court ultimately held that "GM's exclusion of local brand popularity or import bias rendered the standard unreasonable and unfair because these preference factors constitute market challenges that impact a dealer's sales performance differently across the state" and rendered it unlawful. (*Id.* at 391) So too, in this case, RSI violates Section 11713.13(g); average performance based on statewide sales, tempered only by considering segments, i.e., general vehicle types that have particular characteristics. Failure to consider other factors such as demographics and brand preference, as well as the underperformance or low performance of the prior dealers in the newly assigned portions of Folsom Chevrolet's AGSSA, which implies previous low numbers of Chevrolet sales, is not reasonable in light of all existing circumstances.⁷³

220. Neither in calculating the size of the market nor in calculating the RSI for any particular market does General Motors consider what would cause a customer to purchase a certain car or a certain brand. (RT Vol. VII, 33:14-22) General Motors' market share is sensitive to demographic differences in the California buying populations. (Exh. P-185-8 ¶ 29) The RSI does not consider the following: demographics in the dealer's area of responsibility; geographical and market characteristics in the dealer's

⁷³ Following on the *Beck Chevrolet* decision, the State of Maryland in 2017 enacted a law, House Bill 1120, that requires that a performance standard, sales objective, or program for measuring dealership performance that may have a material effect on a dealer must meet certain requirements. The application of the standard, objective or program must 1) be fair, reasonable and equitable; 2) be based on accurate information; and 3) take into account the demographic characteristics and consumer preferences of the population in the dealer's assigned market area. The characteristics must include car and truck preferences of the consumers in the area, as well as geographic characteristics, such as natural boundaries, road conditions, and terrain that affect car and truck shopping patterns. (See Maryland Code of Transportation, Section 15-207. Coercion of dealer prohibited, particularly subdivision (e).)

1 area of responsibility (market competitiveness); the availability and allocation of vehicles and parts
2 inventory; local and statewide economic circumstances; or historical sales, service, and customer service
3 performance of the line-make within the dealer's area of responsibility, including vehicle brand
4 preferences of consumers in the dealer's area of responsibility. (Exhs. P-185-8 ¶ 30, P-185-48-50)

5 221. While it may be a legitimate concern that General Motors would like to measure its
6 dealers in a uniform method across the country and manufacturers do have a legitimate interest in
7 monitoring the sales outcomes and effectiveness of its dealerships and addressing weaknesses in its sales
8 force, the General Motors RSI metric and the assigned AGSSA in this case are flawed. RSI overstates
9 sales opportunity by assigning 100 percent of the registrations while Chevrolet dealerships in California
10 and in the Sacramento APR make less than 41 percent of their sales within their AGSSA. RSI also does
11 not include any calculation of the opportunity to sell outside Folsom Chevrolet's AGSSA, and does not
12 account for local conditions, such as demographics, market characteristics, and local economic
13 circumstances. As for Folsom Chevrolet's AGSSA, it was assigned an unfair AGSSA in size and
14 distances of registrations from the dealership location, with, as noted above, required absorptions of
15 portions of two poorly performing or underperforming terminated dealerships, the fact that it is part
16 urban and part rural, and is an AGSSA which grew over 80 percent in registrations between 2010 and
17 2014.⁷⁴ All of these factors had an impact on the ability of Folsom Chevrolet to capture the necessary
18 sales to meet 100 RSI.

19 222. RSI fails to account for the impact of circumstances unique to Folsom's market (other
20 than segment popularity), including but not limited to demographics, geography, and brand preferences.
21 General Motors' expert Mr. Farhat noted that "Toyota and Honda are very strong in this part of the
22 country," and agreed that "the more local the benchmark, the more sensitive it will be to local
23 conditions." (RT Vol. V, 172:25-173:22) A metric based on a statewide average standard that fails to take
24 into account local conditions is not an appropriate metric and not a reasonable performance indicator.

25 223. Accounting for brand bias by controlling for demographic variables of age, income,
26

27 ⁷⁴ General Motors asserts that local conditions are taken into account by the dealers' rankings and that since other Sacramento
28 area dealers generally perform well, there are no local conditions unduly affecting Sacramento sales. However, the rankings
are built off the flawed RSI.

1 education level, and population density, and whether the dealership is in the five-county area, results in a
2 reduction of the RSI requirement for Folsom Chevrolet by approximately 30 percent. (RT Vol. VII,
3 34:25-35:8) A metric that fails to account for the brand bias that the Vehicle Code requires it to account
4 for, and which results in a sales requirement inflated by 30 percent, is not reasonable in light of all
5 circumstances. The use of RSI generally by General Motors, and as applied in this case, violates Section
6 11713.13(g)(1) (A).

7 **DETERMINATION OF ISSUES**

8 224. General Motors has not established that Folsom Chevrolet is not conducting an adequate
9 amount of business as compared to the business available to it. [Section 3061(a)]

10 225. General Motors has not established that Folsom Chevrolet has not made the investment
11 necessary and not incurred the obligations necessary to perform its part of the Chevrolet franchise.
12 [Section 3061(b)]

13 226. General Motors has not established that Folsom Chevrolet's investment is not permanent.
14 [Section 3061(c)]

15 227. General Motors has not established that it would not be injurious to the public welfare for
16 the franchise to be replaced. [Section 3061(d)]

17 228. General Motors has not established that Folsom Chevrolet does not have adequate motor
18 vehicle sales and service facilities, equipment, vehicle parts, and qualified service personnel to
19 reasonably provide for the needs of the consumers for the motor vehicles handled by the franchisee and is
20 not rendering adequate services to the public. [Section 3061(e)]

21 229. General Motors has not established that Folsom Chevrolet failed to fulfill the warranty
22 obligations of General Motors to be performed by Folsom Chevrolet. [Section 3061(f)]

23 230. General Motors has not established that Folsom Chevrolet failed to comply with the terms
24 of the franchise. [Section 3061(g)]

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1
2 **PROPOSED DECISION**

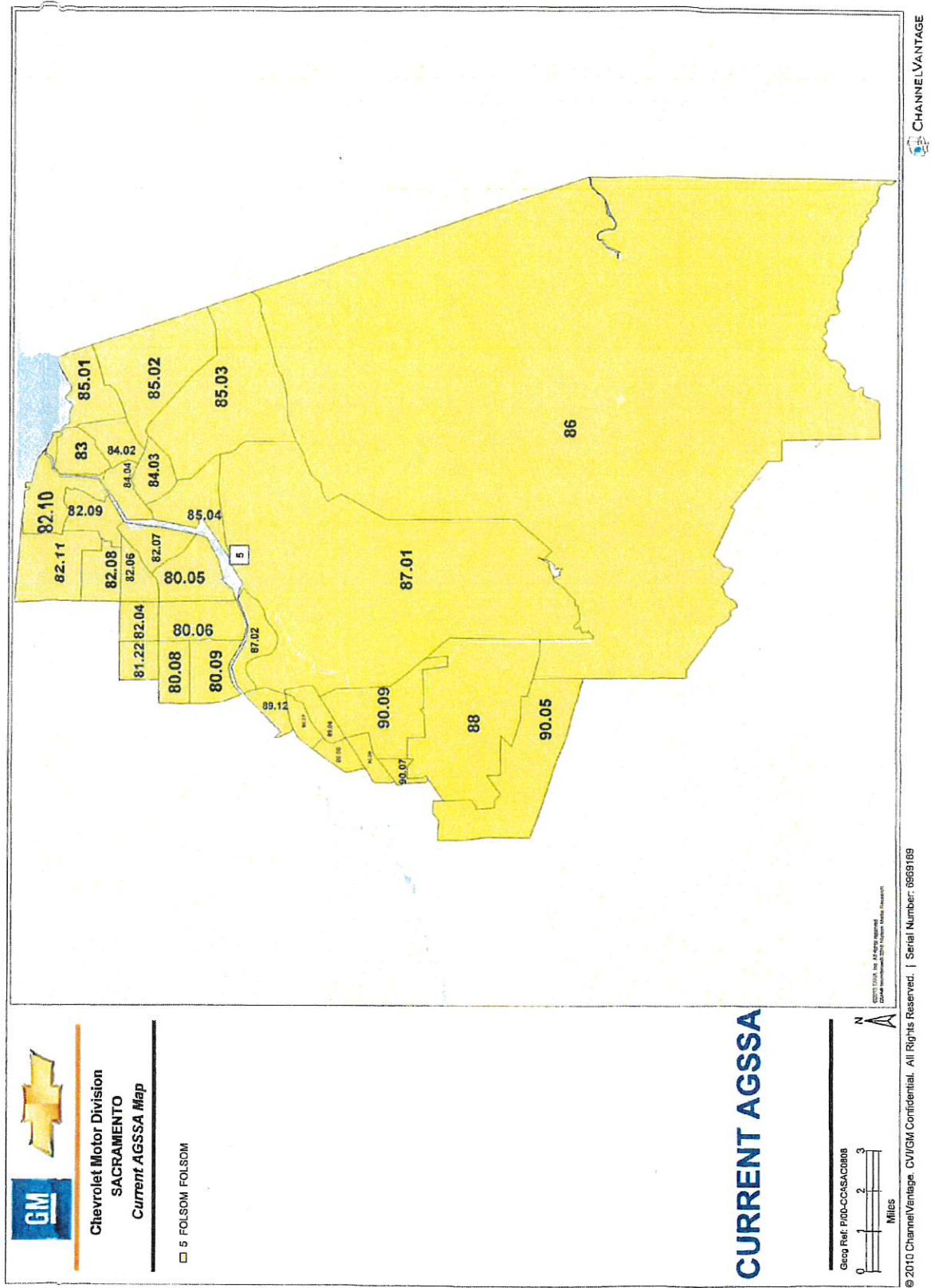
3 Based on the evidence presented and the findings herein IT IS HEREBY ORDERED THAT the
4 protest in *Folsom Chevrolet, Inc. dba Folsom Chevrolet v. General Motors LLC*, Protest No. PR-2483-
5 16, is sustained. Respondent has not met its burden of proof under Vehicle Code Section 3066(b) to
6 establish that there is good cause to terminate Protestant's Chevrolet franchise.
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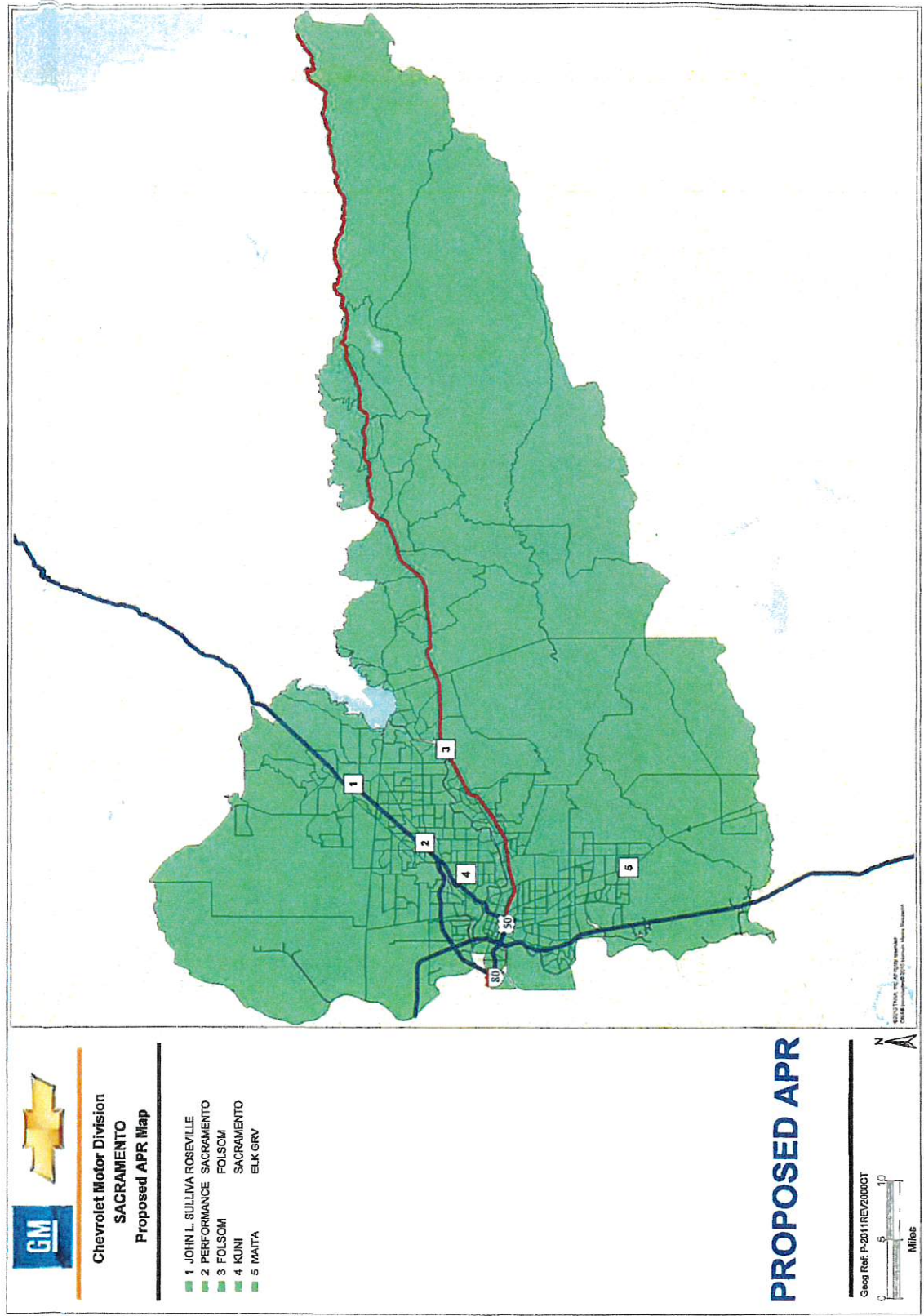
9 I hereby submit the foregoing which constitutes my
10 Proposed Decision in the above-entitled matter, as
11 the result of a hearing before me, and I recommend
12 this Proposed Decision be adopted as the decision of
13 the New Motor Vehicle Board.

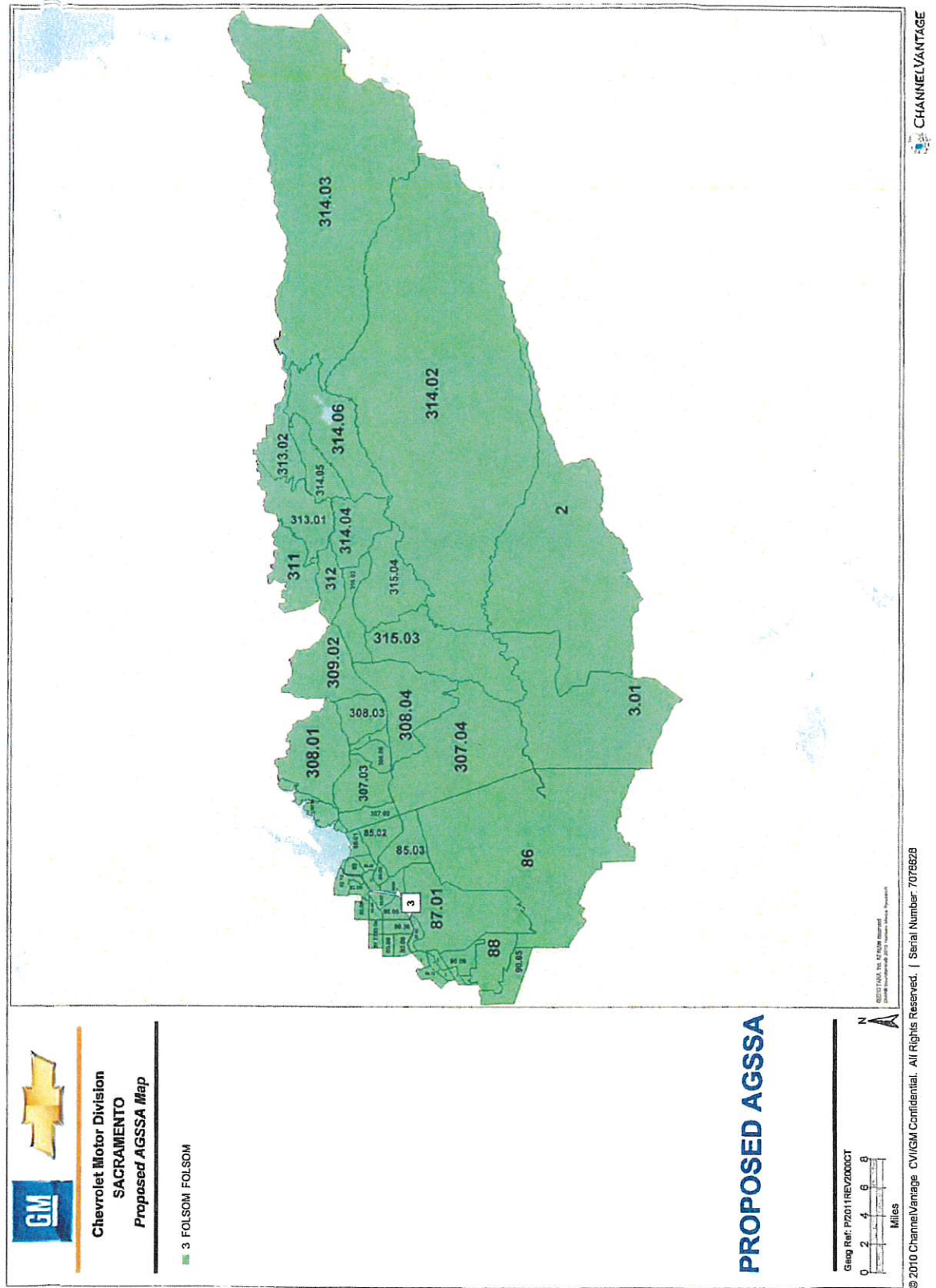
14 DATED: July 27, 2018

15 By: Evelyn M. Matteucci
16 EVELYN M. MATTEUCCI
17 Administrative Law Judge
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27 Jean Shiimoto, Director, DMV
28 Elizabeth (Lisa) G. Humphreys, Branch Chief,
Occupational Licensing, DMV





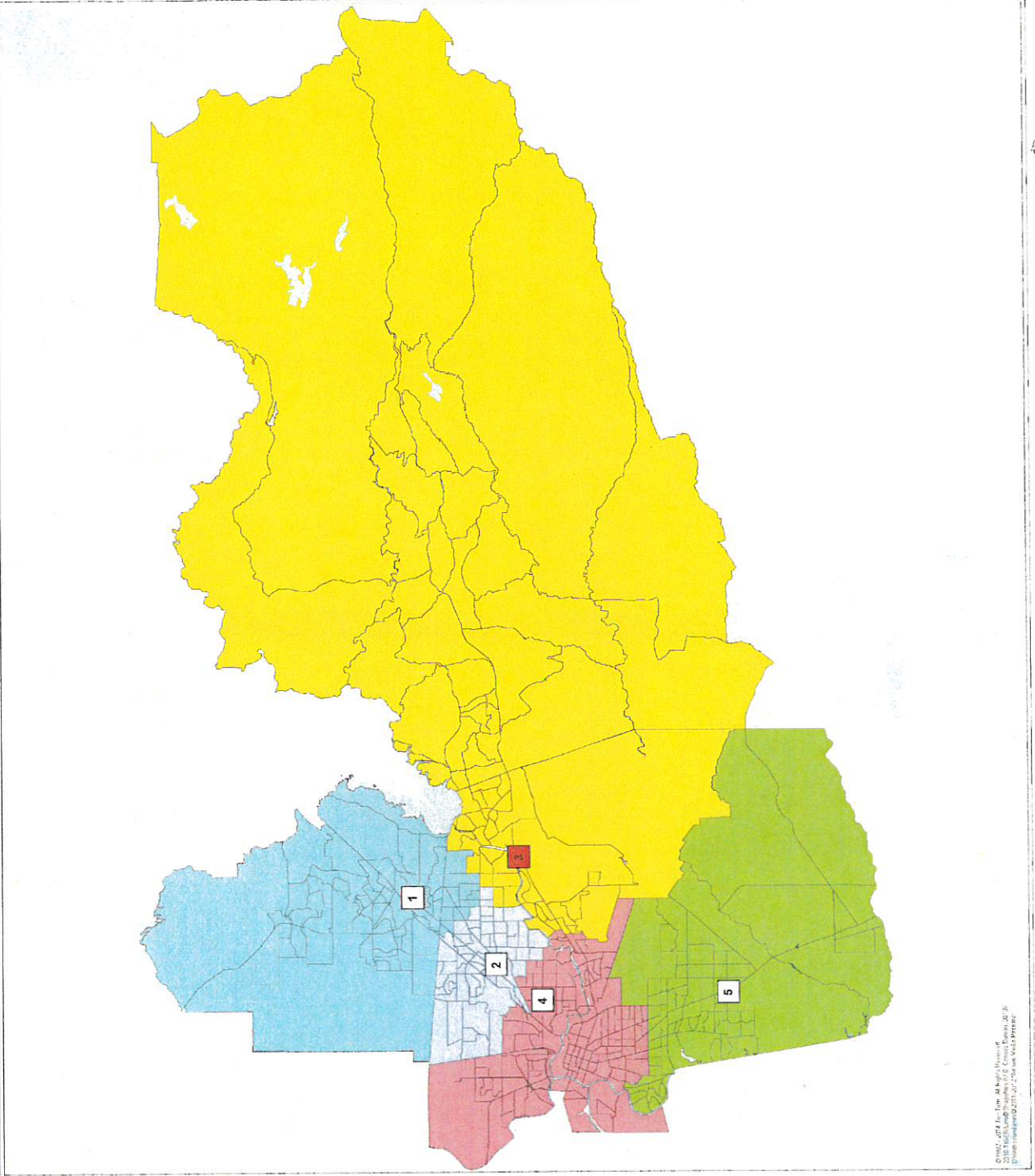




**Chevrolet Motor Division
SACRAMENTO
Current AGSSA Map**

- 1 JOHN L. SULLIVA ROSEVILLE
- 2 PERFORMANCE SACRAMENTO
- 3 FOLSOM FOLSOM
- 4 KUNI SACRAMENTO
- 5 MAITA ELK GROV

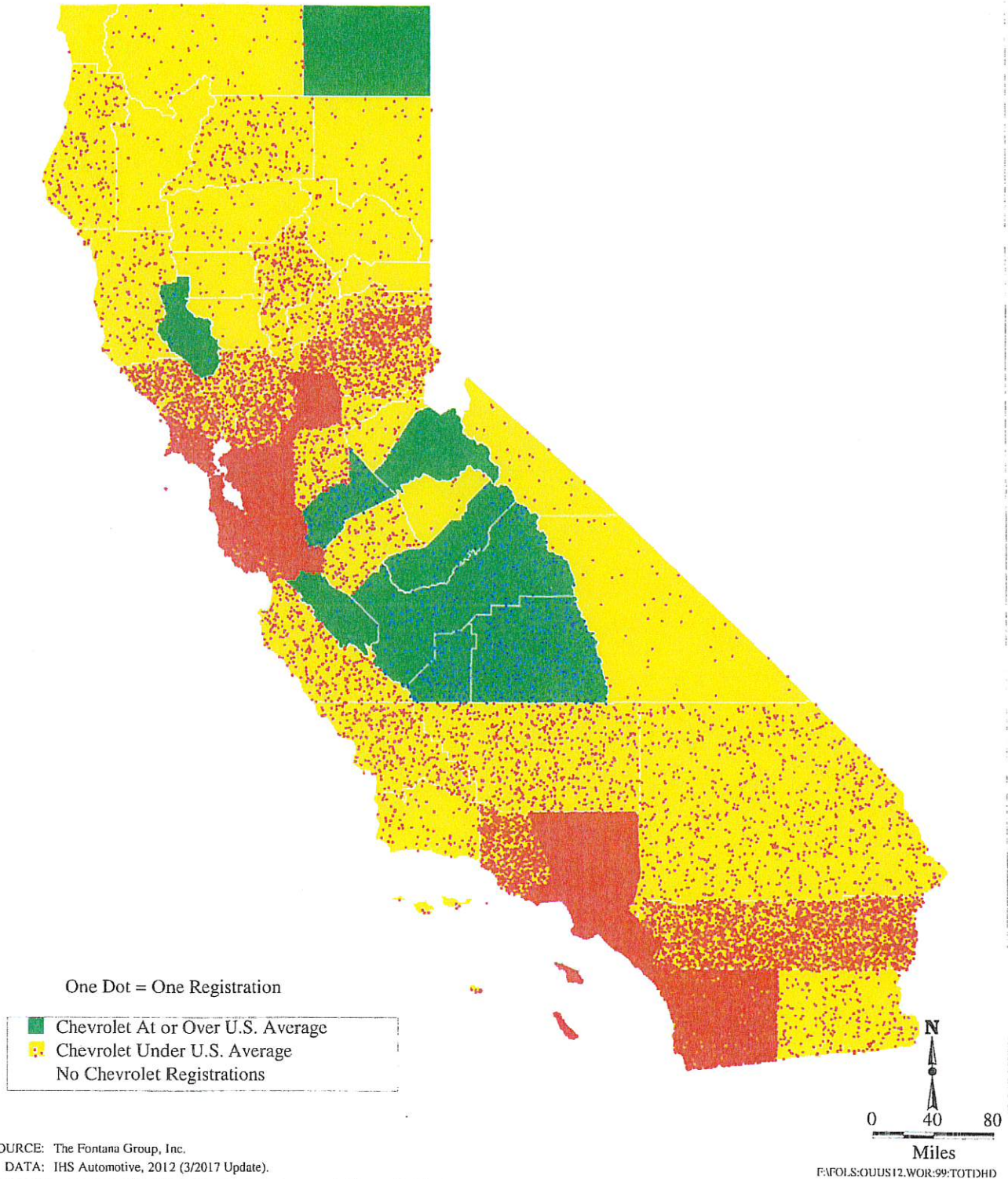
ATTACHMENT D



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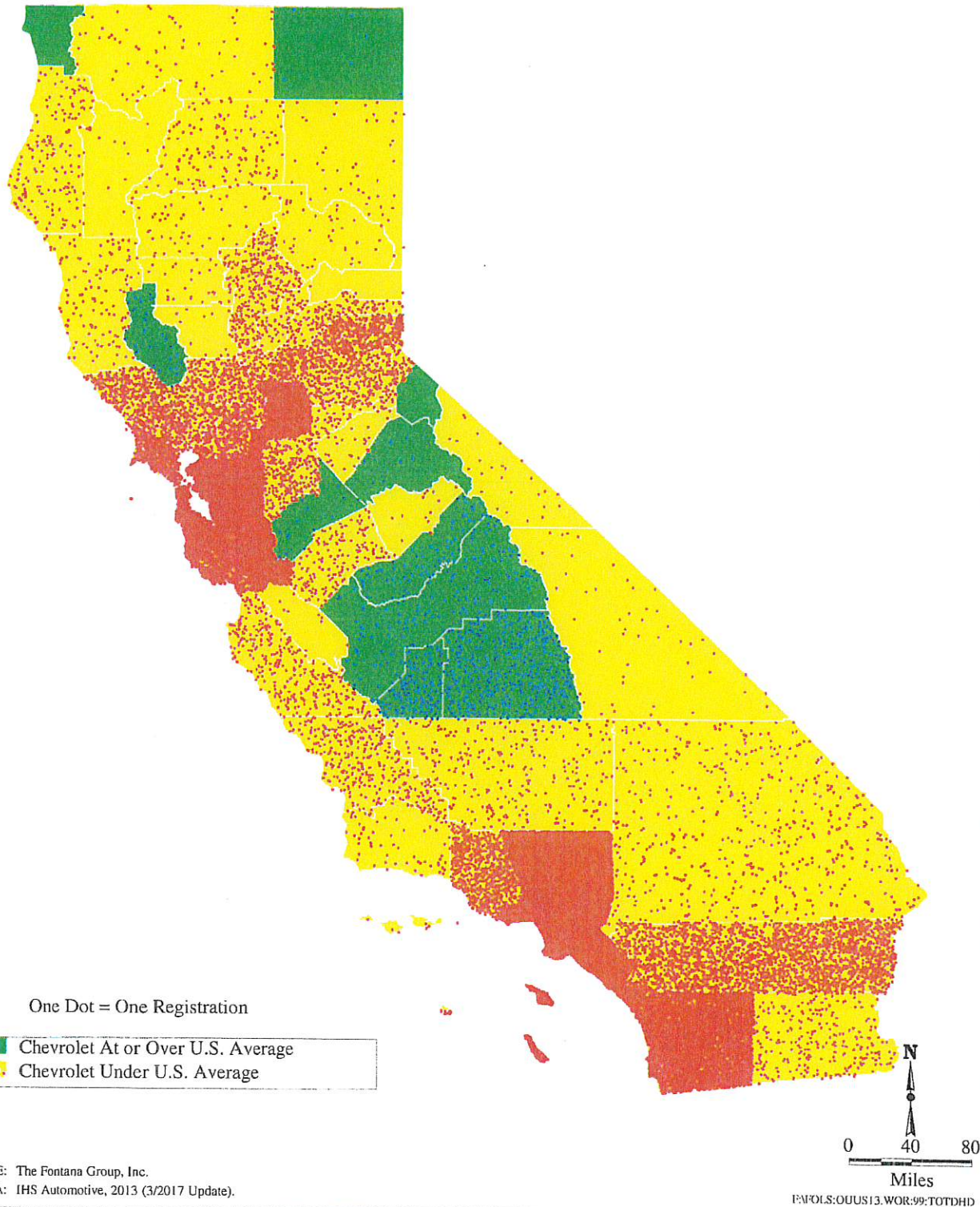
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**New Chevrolet Retail Car + Light Truck Registrations
Over/Under U.S. Average
Based on Chevrolet as a Percent of Competitive by Polk Segment
California by County
2012**



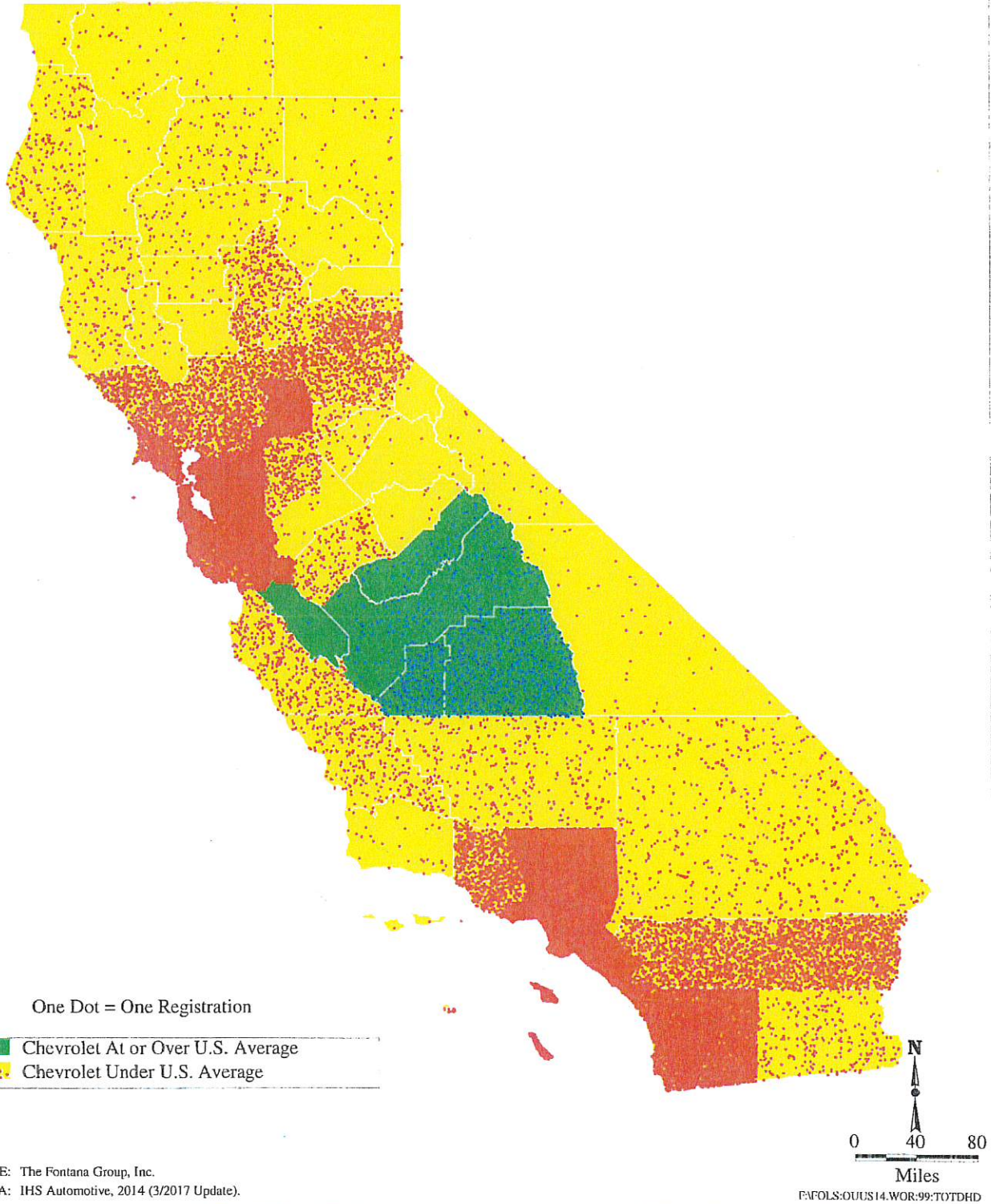
SOURCE: The Fontana Group, Inc.
DATA: IHS Automotive, 2012 (3/2017 Update).

**New Chevrolet Retail Car + Light Truck Registrations
Over/Under U.S. Average
Based on Chevrolet as a Percent of Competitive by Polk Segment
California by County
2013**



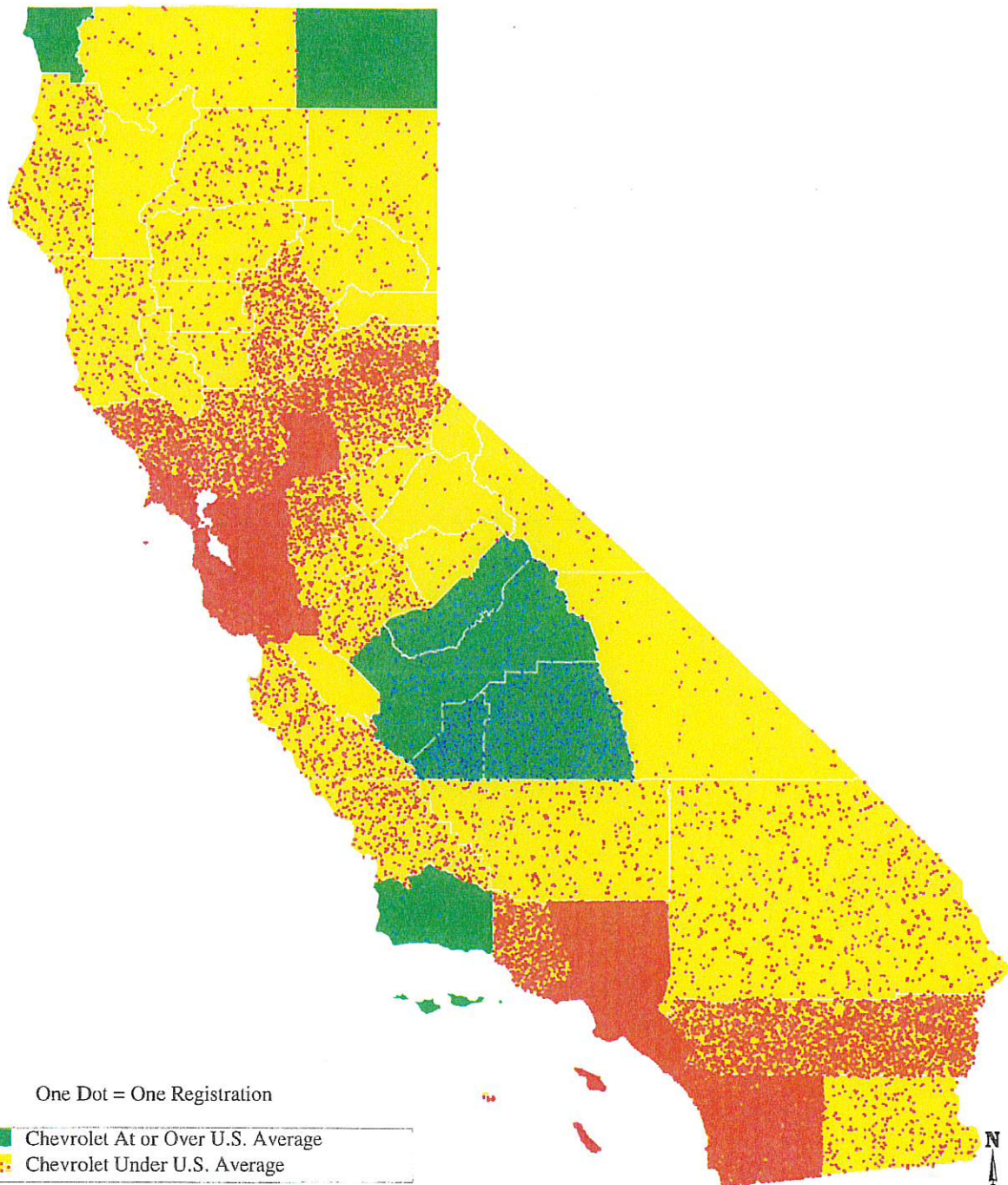
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DATA: IHS Automotive, 2013 (3/2017 Update).

**New Chevrolet Retail Car + Light Truck Registrations
Over/Under U.S. Average
Based on Chevrolet as a Percent of Competitive by Polk Segment
California by County
2014**

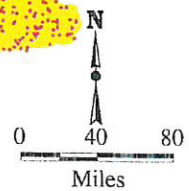


SOURCE: The Fontana Group, Inc.
DATA: IHS Automotive, 2014 (3/2017 Update).

**New Chevrolet Retail Car + Light Truck Registrations
Over/Under U.S. Average
Based on Chevrolet as a Percent of Competitive by Polk Segment
California by County
2015**

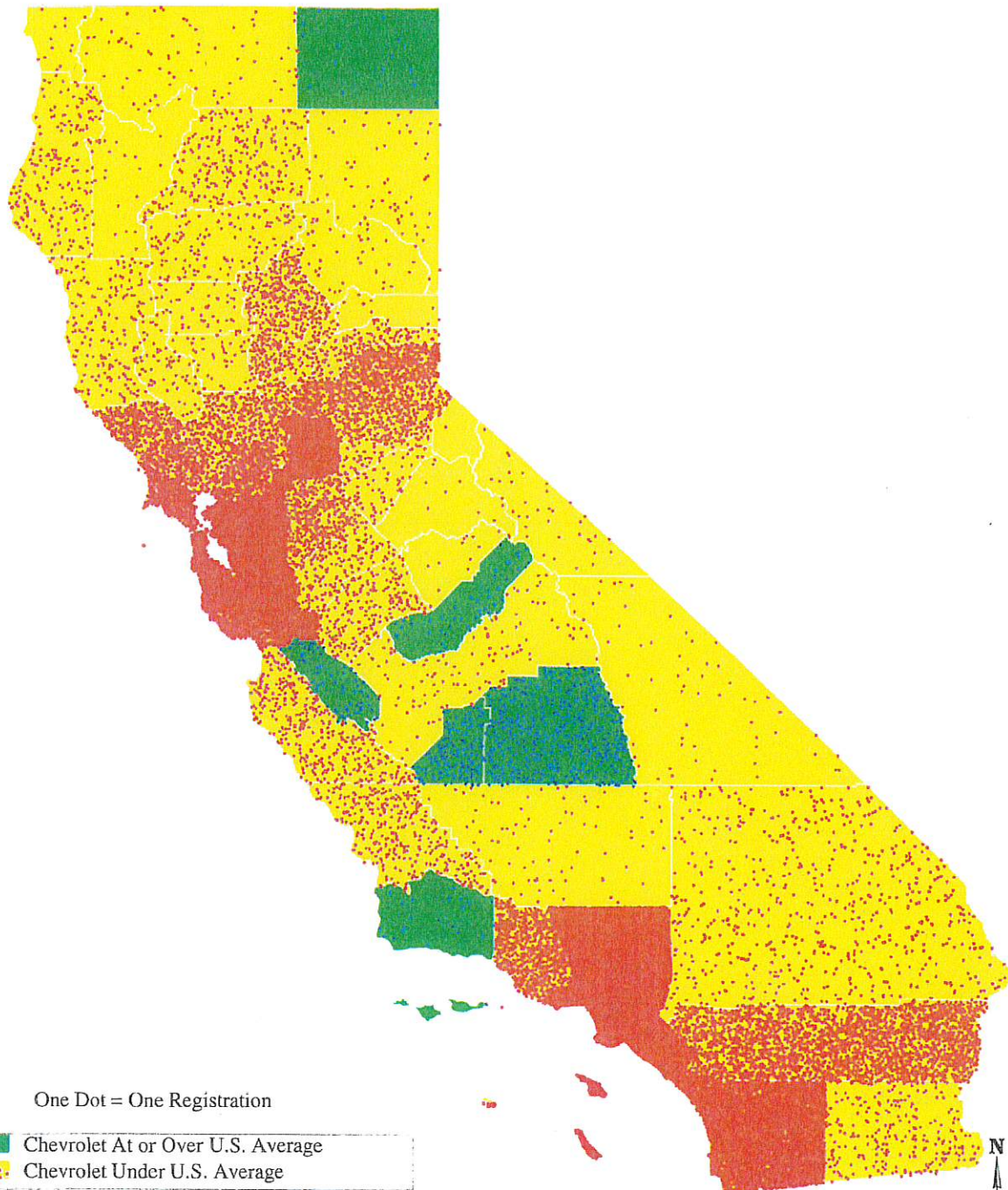


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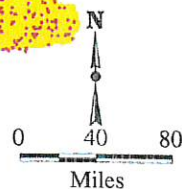


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**New Chevrolet Retail Car + Light Truck Registrations
Over/Under U.S. Average
Based on Chevrolet as a Percent of Competitive by Polk Segment
California by County
2016**

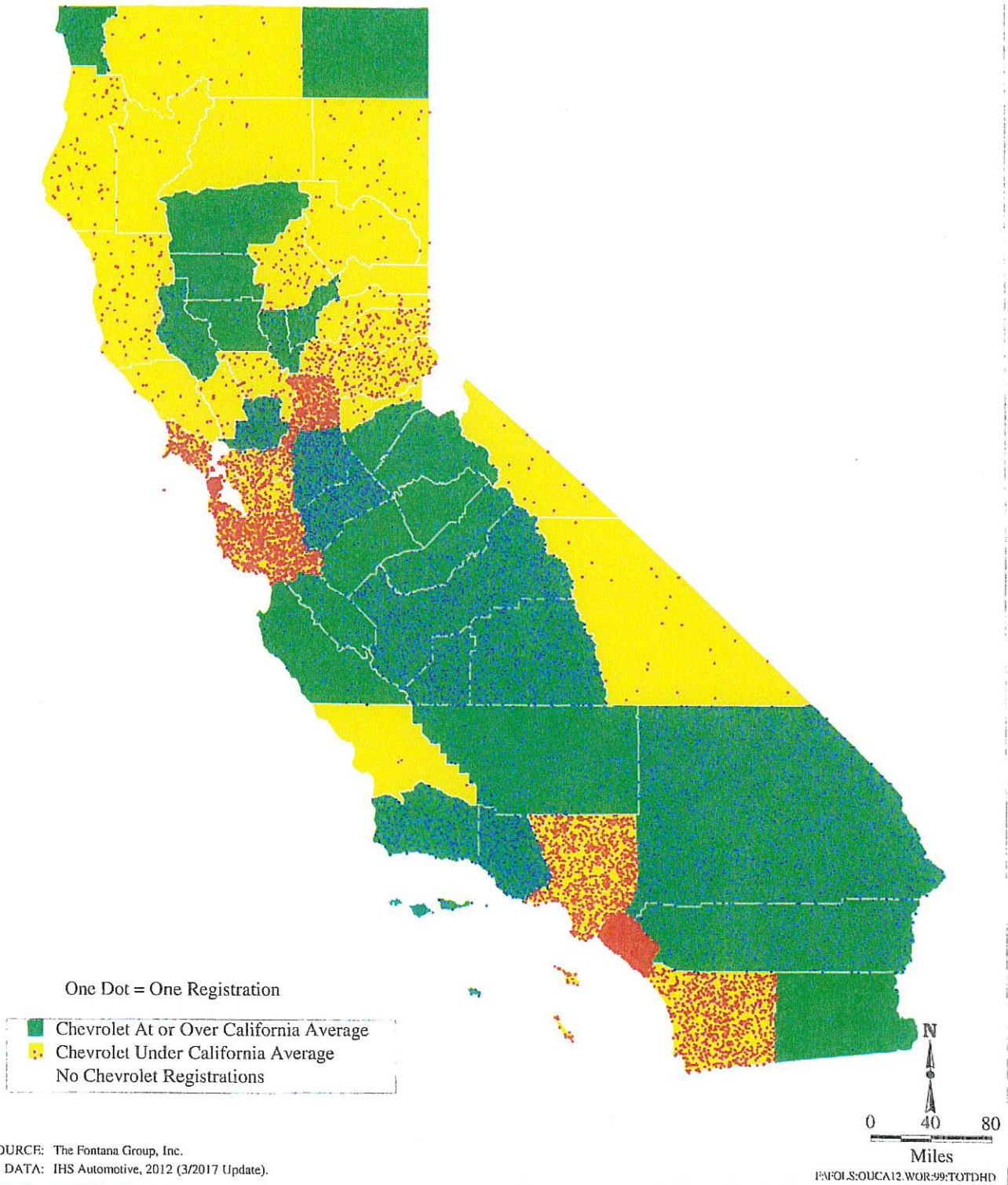


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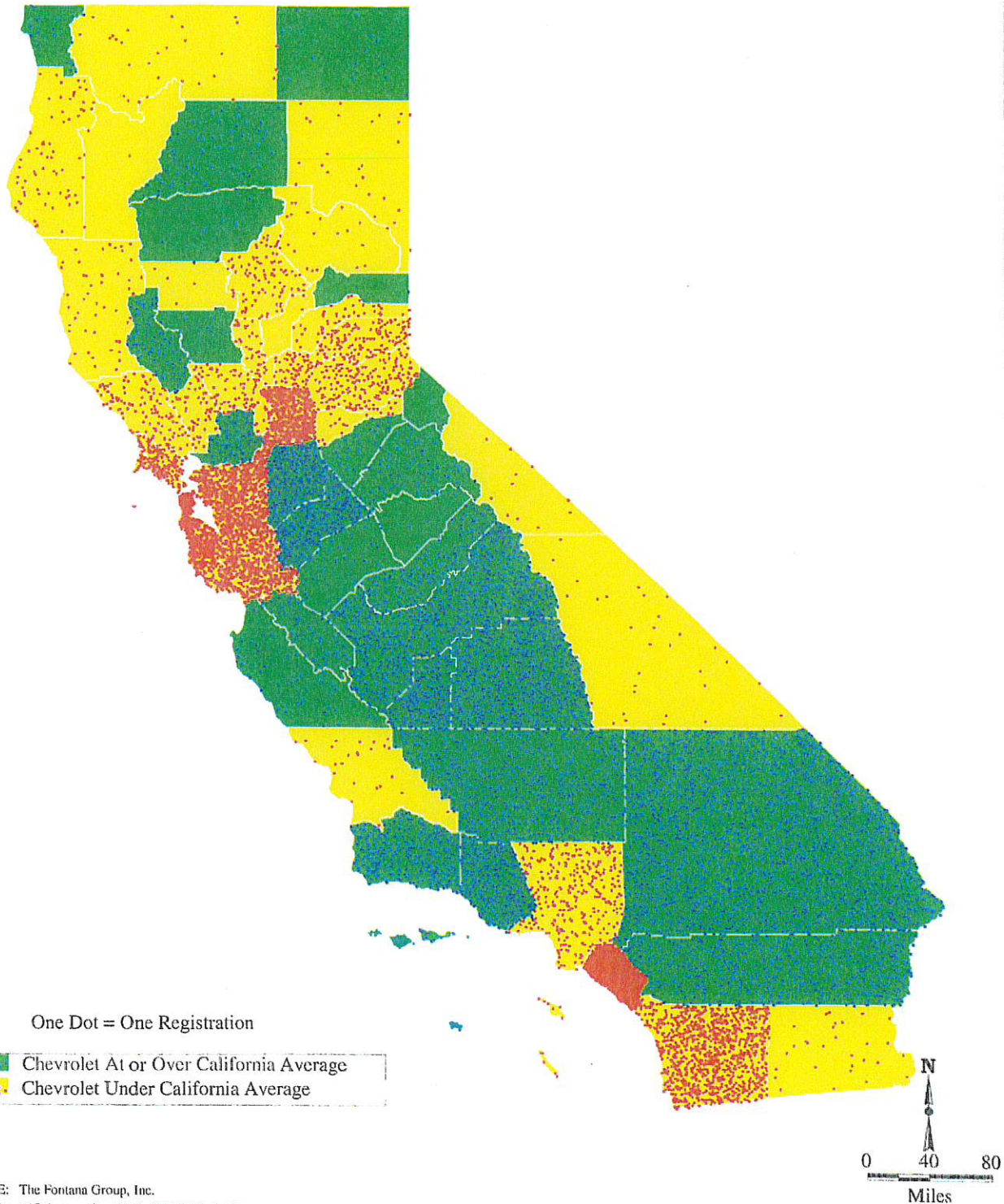
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**New Chevrolet Retail Car + Light Truck Registrations
Over/Under California Average
Based on Chevrolet as a Percent of Competitive by Polk Segment
California by County
2012**



SOURCE: The Fontana Group, Inc.
DATA: IHS Automotive, 2012 (3/2017 Update).

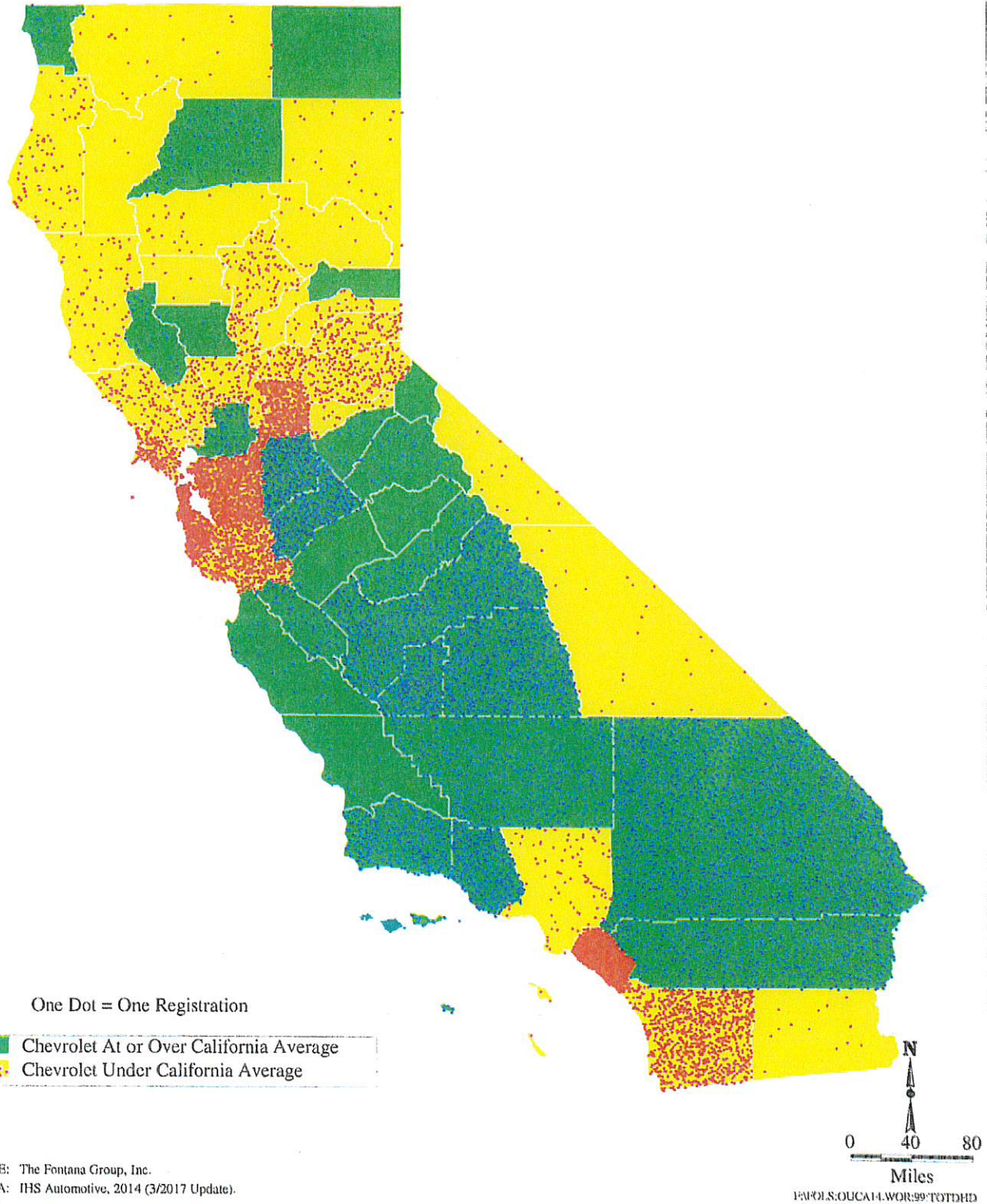
**New Chevrolet Retail Car + Light Truck Registrations
Over/Under California Average
Based on Chevrolet as a Percent of Competitive by Polk Segment
California by County
2013**



SOURCE: The Fontana Group, Inc.
DATA: IHS Automotive, 2013 (3/2017 Update).

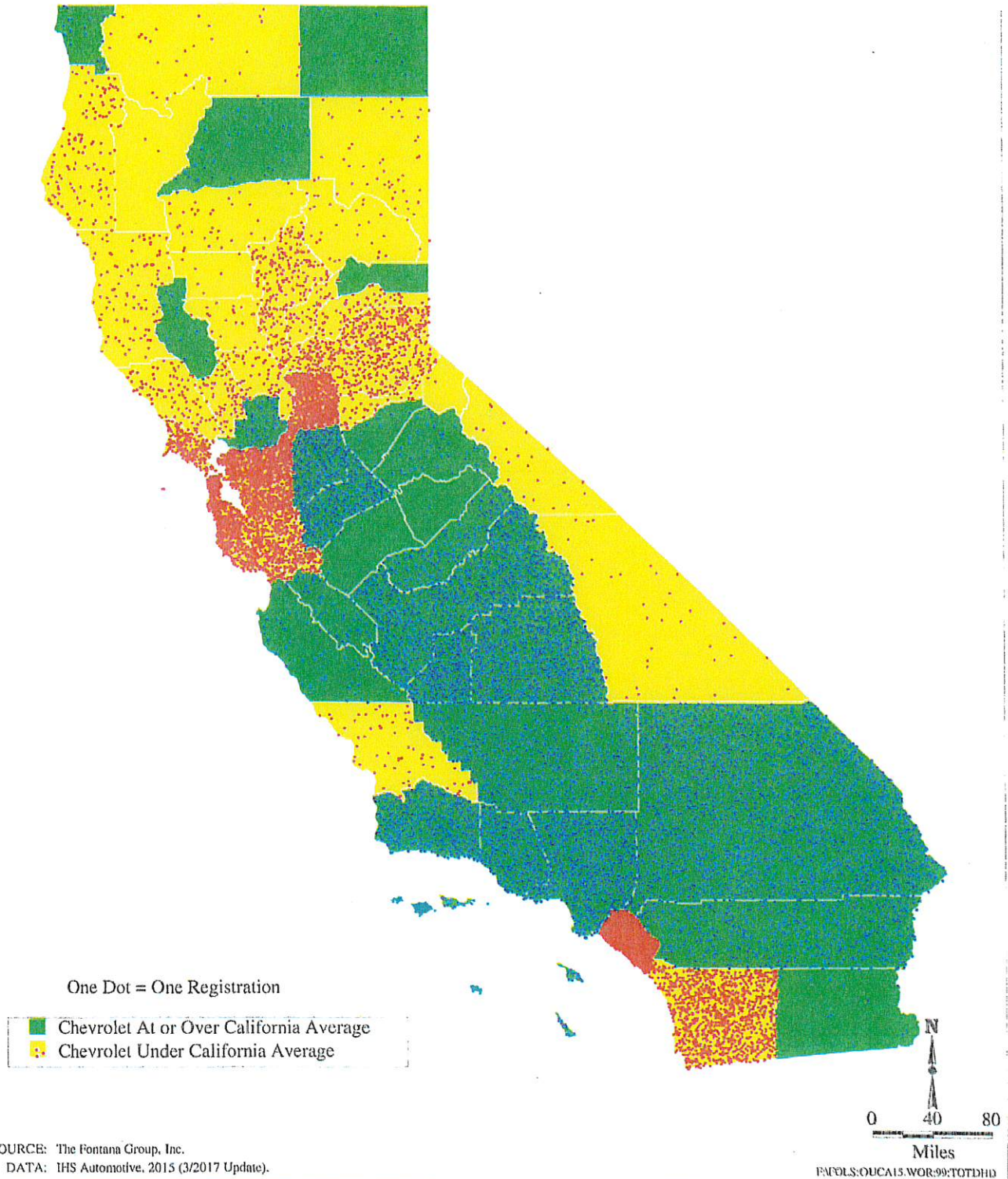
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**New Chevrolet Retail Car + Light Truck Registrations
Over/Under California Average
Based on Chevrolet as a Percent of Competitive by Polk Segment
California by County
2014**



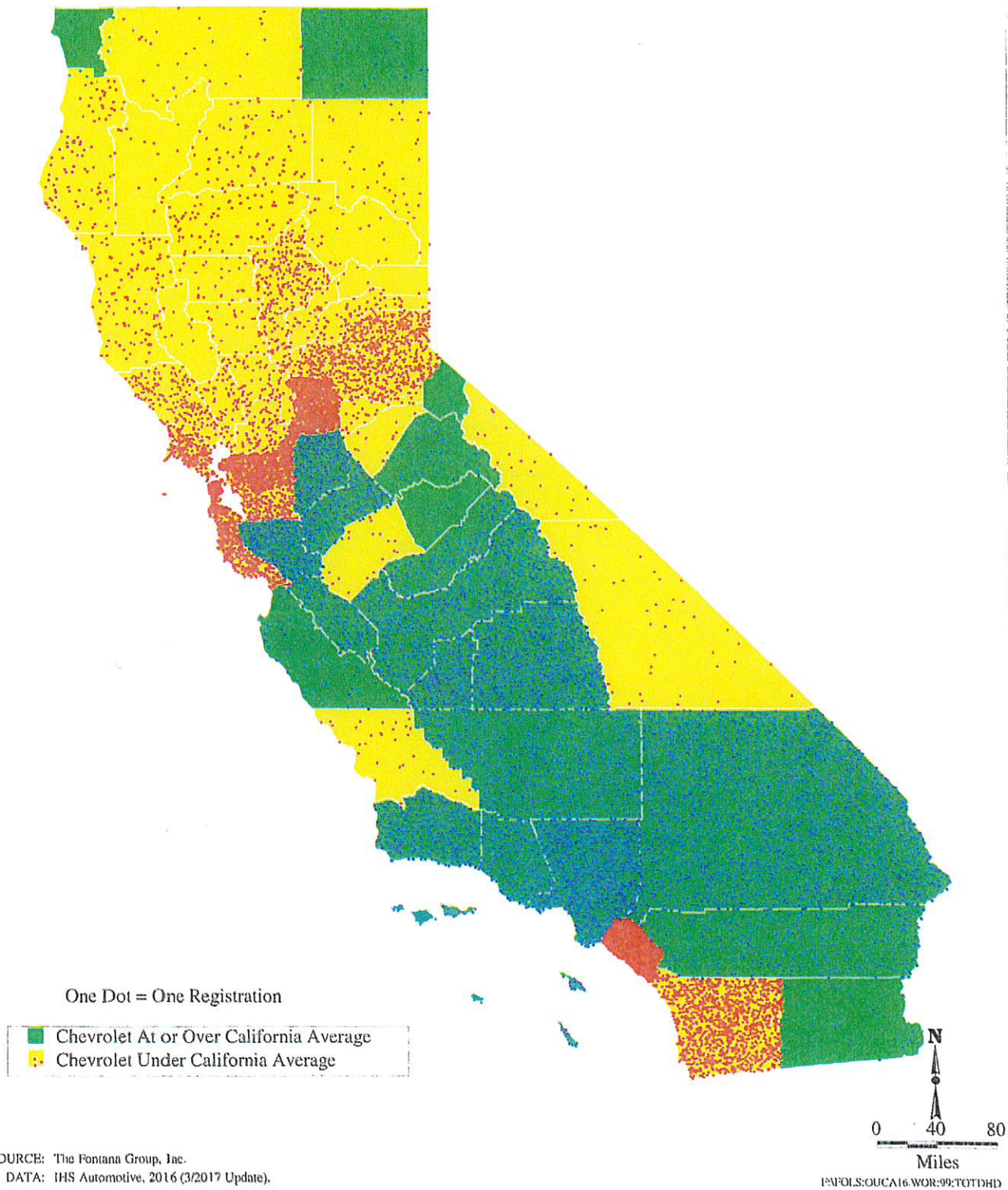
SOURCE: The Fontana Group, Inc.
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**New Chevrolet Retail Car + Light Truck Registrations
Over/Under California Average
Based on Chevrolet as a Percent of Competitive by Polk Segment
California by County
2015**



SOURCE: The Fontana Group, Inc.
DATA: IHS Automotive, 2015 (3/2017 Update).

**New Chevrolet Retail Car + Light Truck Registrations
Over/Under California Average
Based on Chevrolet as a Percent of Competitive by Polk Segment
California by County
2016**



SOURCE: The Pontana Group, Inc.

DATA: IHS Automotive, 2016 (3/2017 Update).

Vehicle Line	2015 DEALER RETAIL SALES PERFORMANCE REQUIREMENT				COMBINED 2015 CALENDAR YEAR VEHICLE AVAILABILITY AND LOST ALLOCATION OPPORTUNITY								CONCLUSION
	1 Dealer Reported Retail Sales (a)	2 Vehicle Line Registrations in APR / AGSSA (b)	3 Sales to Equal State Average (c)	4 Sales Variance from State Average (d)=(a)-(c)	5 Total Availability as of 1/1/2015	6 Final Allocation	7 DOSP Incr.	8 Allocation Declined (E.S.)	9 Min. Alloc. Lost - Failed to Request Incr. (E.S.)	10 Allocation Declined (DOSP)	11 Min. Alloc. Lost - Failed to Request Incr. (DOSP)	12 Total Inventory Opportunity	
Camaro	32	57	71	(39)	10	26	0	1	0	1	13	51	Var. between Sales to Equal State Avg. & Total Inventory Opportunity (20)
Corvette	16	45	25	(9)	3	21	0	0	0	0	0	24	(1)
Cruze	46	41	81	(35)	27	51	10	14	0	0	8	110	29
Impala	22	18	19	3	8	23	0	65	0	0	11	107	88
Malibu	39	27	50	(11)	36	63	0	42	0	0	7	148	98
Sonic	9	11	13	(4)	16	0	0	2	1	0	12	31	18
Spark	24	36	14	10	36	10	3	0	7	0	14	70	56
SS	3	3	3	0	1	3	1	0	0	0	5	10	7
Volt	29	52	78	(49)	3	36	0	0	1	0	4	44	(34)
Total	220	290	354	(134)	140	233	14	124	9	1	74	595	241
City Express	3	1	2	1	27	14	0	6	0	0	1	48	46
Colorado	45	40	63	(18)	12	32	4	0	0	0	0	48	(15)
Equinox	46	42	76	(30)	39	87	0	0	0	1	0	127	51
Express	12	20	17	(5)	10	32	0	0	0	0	0	42	25
Silverado 1500	181	166	385	(204)	90	303	0	4	0	0	4	401	16
Silverado 2500	73	77	104	(31)	39	93	3	0	0	0	8	143	39
Silverado 3500	10	15	27	(17)	4	12	0	0	0	0	0	16	(11)
Suburban	42	45	54	(12)	12	50	0	0	0	0	0	62	8
Tahoe	16	21	49	(33)	11	21	0	0	0	1	2	35	(14)
Traverse	4	10	11	(7)	5	8	0	7	0	2	5	27	16
Trax	432	437	788	(356)	249	652	7	17	0	4	20	949	161
Total	652	727	1,142	(490)	389	885	21	141	9	5	94	1,544	402
Grand Total						1,295			249				

1 NEW MOTOR VEHICLE BOARD
1507 – 21ST Street, Suite 330
2 Sacramento, California 95811
Telephone: (916) 445-1888

CERTIFIED MAIL

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8 STATE OF CALIFORNIA
9 NEW MOTOR VEHICLE BOARD
10

11 In the Matter of the Protest of

12 FOLSOM CHEVROLET, INC., dba FOLSOM
CHEVROLET,

13 Protestant,

14 v.

15 GENERAL MOTORS, LLC,

16 Respondent.
17

Protest No. PR-2483-16

PROPOSED DECISION

18 **PROCEDURAL BACKGROUND**

19 **Statement of the Case**

20 1. By letter dated November 3, 2016, General Motors LLC (“General Motors” or
21 “Respondent”), gave notice to Folsom Chevrolet, Inc., dba Folsom Chevrolet (“Folsom Chevrolet” or
22 “Protestant”) pursuant to California Vehicle Code section 3060¹ of its intention to terminate Protestant’s
23 General Motors Dealer Sales and Service Agreement² for Chevrolet. The New Motor Vehicle Board
24 (“Board”) received the notice on November 7, 2016.
25

26 ¹ Unless otherwise indicated, all statutory references are to the California Vehicle Code.

27 ² The Dealer Agreement or Dealer Sales and Service Agreement is defined as “[t]he agreement between a manufacturer and
28 its dealers respecting the relationship between the manufacturer and the dealers and authorizes the dealers to sell and service a
particular line-make of vehicles.” (Joint Glossary of Terms, p. 1) It includes the Dealer Sales and Service Agreement, the
Standard Provisions and all related Addenda. (Exh. R-201.034)

2. The notice indicates, in part, the following reasons for termination:

...

Sales Performance

Article 5.1.1 of the Dealer Agreement, entitled “Responsibility to Promote and Sell,” reads in part:

“Dealer agrees to effectively, ethically and lawfully sell and promote the purchase, lease and use of Products by consumers located in its Area of Primary Responsibility.”³

As provided in Article 9 of the Dealer Agreement, a Retail Sales Index (“RSI”)⁴ of 100 is the minimum level of retail sales performance required for Dealer to satisfy its commitment under Article 5.1.1 of the Dealer Agreement. Article 9 further provides: “In addition to the Retail Sales Index, General Motors will consider any other relevant factors in deciding whether to proceed under the provisions of Article 13.2 to address any failure by dealer to adequately perform its sales responsibilities.”

Dealer’s Retail Sales Index (“RSI”) for calendar year 2013 was 40.9, leaving it with a rank of 129 of the 133 Chevrolet dealers in California. For calendar year 2014, Dealer’s RSI was 44.4, ranking 124 of 128 California Chevrolet dealers. Following receipt of [General Motors’] May 19, 2015 notice that Dealer was in breach of the Dealer Agreement, Dealer had an RSI during the Cure Period of 64.7.⁵ For calendar year 2015, Dealer’s RSI was 57.1, ranking 115 of 131 Chevrolet dealers in the state. During the first half of 2016, Dealer’s RSI fell to 56.55. Dealer has thus consistently failed to achieve the level of retail sales performance required by the Dealer Agreement, and has failed to correct its sales performance deficiency during the Cure Period.

Pursuant to Article 9 of the Dealer Agreement, [General Motors] has considered other information that may be relevant to an evaluation of Dealer’s performance under Article 5.1.1 of the Dealer Agreement, including the overall sales of Chevrolet vehicles in Dealer’s Area of Geographic Sales and Service Advantage [AGSSA], Dealer’s sales performance as compared to other Chevrolet dealers in Dealer’s local

³ “Area of Primary Responsibility” or APR is “[t]he collection of census tracts assigned by General Motors to a particular dealer or group of dealers. In this case, Folsom Chevrolet’s APR is roughly the greater Sacramento market, and is shared with other dealerships in the area.” Area of Geographic Sales and Service Advantage or AGSSA is “[t]he collection of census tracts within the APR assigned to Folsom Chevrolet alone.” (Joint Glossary of Terms, pp. 1-2 and Exh. R-201.034)

⁴ “Retail Sales Index” or RSI is “[t]he number of retail sales reported by a dealer (made anywhere in the U.S.) divided by the number of Expected Sales, multiplied by 100. An RSI of 100 means the dealership made its Expected Sales number exactly, while a score of 50 means it made only half that number of its Expected Sales.” (Joint Glossary of Terms, p. 2) Expected Sales is “[a] calculation by [General Motors] of how many new vehicles a dealer is expected to sell over a particular time frame in order to achieve state average sales penetration, based on the number of vehicles actually registered in the dealer’s APR or AGSSA (whichever is applicable) for each segment and the applicable [General Motors’] market share.” (Joint Glossary of Terms, p. 2) Folsom Chevrolet’s RSI was calculated on its AGSSA, not the APR. (Exh. R-205.010-011 and R-244.007-.008 ¶ 20)

⁵ General Motors notified Folsom Chevrolet on May 19, 2015, that it was in breach of the Dealer Agreement because Folsom Chevrolet failed to meet its sales and customer satisfaction obligations. Folsom Chevrolet was given an opportunity to cure its sales and customer satisfaction deficiencies during the period July 1, 2015 through December 31, 2015 (the “Cure Period”). General Motors contends that Folsom Chevrolet did not correct its sales or customer satisfaction deficiencies during the Cure Period, and therefore remains in “substantial and material breach of the Dealer Agreement.” (November 3, 2016, Notice of Termination; Exh. R-221)

market area, the geographic area assigned to Dealer under Article 4.2 of the Dealer Agreement, as well as other issues raised by Dealer.

Customer Satisfaction Performance

Article 5.3 of the Dealer Agreement, entitled “Customer Satisfaction,” reads in part:

“Dealer and General Motors recognize that appropriate care for the customer will promote customer satisfaction with General Motors Products and its dealers, which is critically important to our current and future business success. Dealer therefore agrees to conduct its operations in a manner which will promote customer satisfaction with the purchase and ownership experience. General Motors agrees to provide Dealer with reasonable support to assist Dealer’s attainment of customer satisfaction.

General Motors will provide dealer with a written report at least annually ... in evaluating Dealer’s purchase and delivery customer satisfaction and Dealer’s service customer satisfaction. The report will compare Dealer’s performance to other same Line-Make⁶ dealers in the Region.”

As set forth in [General Motors’] May 19, 2015 notice, Dealer’s 2014 Customer Satisfaction Index⁷ scores, as compared to the region, were as follows:

	PDS Region ⁸	PDS Dealer	SSS Region	SSS Dealer
Top Box Score	86.5	82.6	76.2	65.4
Blended Score	88.5	84.6	78.6	69.8

Dealer’s Customer Satisfaction Index scores during the Cure Period, as compared to the region, were as follows:

	PDS Region	PDS Dealer	SSS Region	SSS Dealer
Top Box Score	86.5	77.0	76.3	87.2
Blended Score	88.3	81.2	78.5	88.5

These scores show that Dealer has failed to provide acceptable customer satisfaction for Purchase and Delivery as required by the Dealer Agreement, and thus failed to correct its customer satisfaction deficiencies during the Cure Period.⁹

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⁶ “Line-Make” is defined as “[a] brand of General Motors Motor Vehicles, or a brand used to badge motor vehicles for another manufacturer.” The General Motors brands are Chevrolet, Buick, GMC, and Cadillac. (Exh. R-201.034 and Joint Glossary of Terms, p. 1)

⁷ Customer Satisfaction Index (CSI) is “[a] metric of customer satisfaction based upon customer surveys.” For General Motors, CSI is made up of two metrics:

1. Purchase and Delivery Satisfaction (PDS), which is “[a] customer satisfaction metric based on surveys of the customer experience during the purchase and delivery of a new vehicle.” and,

2. Service Satisfaction Survey (SSS), which is “[a] customer satisfaction metric based on surveys of the customer experience during service events.” (Joint Glossary of Terms, pp. 2-3)

⁸ Folsom Chevrolet is in General Motors’ West Region, which is comprised of 15-plus states located west of Colorado. (Joint Glossary of Terms, p. 2; RT Vol. I, 65:22-24)

⁹ During the Cure Period, Folsom Chevrolet did raise its SSS scores above Region by a significant amount (65.4 v. 87.2). The notice of termination does not refer to a failure to cure SSS; only a failure to cure PDS.

1 **Termination of the Dealer Agreement**

2 Once notified by [General Motors] of sales or customer satisfaction performance
3 deficiencies, a dealer’s failure to correct those deficiencies during the specified Cure
4 Period of at least six months authorizes [General Motors] to terminate the Dealer
5 Agreement. Article 13.2 provides:

6 ...

7 “If the Dealer does correct the failure by the expiration of the [cure] period,
8 General Motors will so advise the Dealer in writing. If, however, Dealer
9 remains in material breach of its obligations at the expiration of the period,
10 General Motors may terminate this Agreement by giving Dealer 90 days
11 advance written notice.”

12 ...

13 (November 3, 2016, Notice of Termination)

14 3. On November 10, 2016, Protestant filed a timely protest pursuant to Section 3060.

15 4. A hearing was held before Administrative Law Judge (“ALJ”) Evelyn Matteucci on
16 January 29, 2018 through February 9, 2018.

17 5. The matter was submitted on June 22, 2018.

18 **Parties and Counsel**

19 6. Folsom Chevrolet is located at 12655 Auto Mall Circle, Folsom, California. Folsom
20 Chevrolet is an authorized Chevrolet “franchisee” within the meaning of Sections 331.1 and 3060(a)(1).

21 7. Protestant was initially represented by The Law Offices of Michael J. Flanagan, then
22 Arent Fox, and next The Scali Law Firm. Protestant is currently represented by Scali Rasmussen, by
23 Christian J. Scali, Esq., Halbert B. Rasmussen, Esq., and Jade F. Jurdi, Esq., 800 Wilshire Boulevard,
24 Suite 400, Los Angeles, California 90017.

25 8. Respondent is located at 100 Renaissance Center, Detroit, Michigan and is a “franchisor”
26 within the meaning of Sections 331.2 and 3060(a)(1).

27 9. Respondent is represented by Nelson Mullins Riley & Scarborough LLP by Mark T.
28 Clouatre, Esq. and Jacob F. Fischer, Esq., 1400 Wewatta Street, Suite 500, Denver, Colorado and
Donahue Davies LLP, by Robert E. Davies, Esq. and Mary A. Stewart, Esq., 1 Natoma Street, Folsom,
California.

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Witnesses at Hearing

Respondent's Witnesses¹⁰

10. Respondent called the following witnesses: Michael Stinson, Chevrolet Zone Manager for northern California; Paul Ryan, District Manager for Commercial; Leonard Deprez, District Manager for Aftersales (encompasses parts and service); Saul Escalante, District Sales Manager for Chevrolet; Alvon Giguere, Manager of Dealer Network Planning and Analysis for General Motors; Bob Muter, Director of North America Order Fulfillment; and Ronald Meier, Regional Director for Chevrolet for the Western Region.

Protestant's Witnesses

11. Protestant called the following witnesses: Marshal Crossan, President and dealer operator of Folsom Chevrolet; Joe Gagliardi, President and CEO of the Greater Folsom Partnership, which is the Chamber of Commerce, the Tourism Bureau, and the Economic Development Corporation in Folsom, California; Lawrence "Larry" Crossan, Jr., brother of Marshal Crossan and retired (May 2017) General Manager for Folsom Chevrolet; Andrew "Drew" Crossan, son of Marshal Crossan and General Sales Manager for Folsom Chevrolet; Rene Schoonbrood, Fleet Manager for Folsom Chevrolet; and Brian Kaestner, General Manager for Folsom Chevrolet.

Expert Witnesses

12. Respondent's expert witnesses were Brian Gaspardo, Managing Partner, O'Neill & Gaspardo who was qualified as an expert regarding automotive financial and accounting matters, and Sharif Farhat, Vice President of Expert Services, Urban Science Applications, Inc. who qualified as an expert regarding dealer network analysis, including dealer sales effectiveness evaluation.

13. Protestant's expert witnesses were Carl Woodward, a Certified Public Accountant and Edward "Ted" Stockton, Vice President and Director of Economic Services, The Fontana Group. Mr. Woodward qualified as an expert regarding vehicle industry accounting and financing matters, vehicle industry business practices and buy/sell evaluations of dealerships, and Mr. Stockton qualified as an expert in retail automotive economics and dealer network analysis.

¹⁰ Respondent has the burden of proof so it put its case on first. (Section 3066)

Deposition Excerpts

14. Respondent lodged the following deposition designations:

Witness Name/Title	Date of Deposition	Exhibit Nos.
Joseph Gagliardi, President and CEO of Greater Folsom Partnership	January 15, 2018	R-250A; R-271 to R-275
Lawrence Crossan, Jr., Retired General Manager for Folsom Chevrolet	October 30, 2017	R-250B
Lisa Castro, Controller at Folsom Chevrolet	October 31, 2017	R-250C
Rene Schoonbrood, Fleet Manager at Folsom Chevrolet	October 31, 2017	R-250D

Protestant did not lodge any deposition designations, nor were any counter designations lodged. All deposition designations and related exhibits were admitted on February 2, 2018.

SITE VISIT

15. On February 13, 2018, at the request of Protestant, ALJ Matteucci conducted a site visit to Folsom Chevrolet, Thompson's Toyota of Placerville, John L. Sullivan Chevrolet in Roseville, Performance Chevrolet in Sacramento, Kuni Chevrolet in Sacramento, and Maita Chevrolet in Elk Grove. The route was memorialized in Joint Exhibit 1. Representatives of both parties and their counsel were present, but a court reporter was not.

BURDEN OF PROOF

16. In Section 3060 termination cases, the franchisor has the burden of proof pursuant to Section 3066(b) "... to establish that there is good cause to ... terminate ... a franchise." The standard is a "preponderance of the evidence", which is met if the proposition is more likely to be true than not true; i.e., if there is greater than 50 percent chance that the proposition is true.

ISSUE PRESENTED

17. Did General Motors sustain its burden of proof of establishing "good cause" to terminate Protestant's Chevrolet franchise?

18. In determining whether there is good cause for terminating a franchise, Section 3061 requires the Board "... to take into consideration the existing circumstances, including, but not limited to, all of the following:

(a) Amount of business transacted by the franchisee, as compared to the business available to

- 1 the franchisee;
- 2 (b) Investment necessarily made and obligations incurred by the franchisee to perform its part
- 3 of the franchise;
- 4 (c) Permanency of the investment;
- 5 (d) Whether it is injurious or beneficial to the public welfare for the franchise to be modified
- 6 or replaced or the business of the franchisee disrupted;
- 7 (e) Whether the franchisee has adequate motor vehicle sales and service facilities, equipment,
- 8 vehicle parts, and qualified service personnel to reasonably provide for the needs of the
- 9 consumers for the motor vehicles handled by the franchisee and has been and is rendering
- 10 adequate services to the public;
- 11 (f) Whether the franchisee fails to fulfill the warranty obligations of the franchisor to be
- 12 performed by the franchisee; and
- 13 (g) Extent of the franchisee's failure to comply with the terms of the franchise."

14 **RESPONDENT'S CONTENTIONS**

15 19. General Motors contends that "Folsom Chevrolet has been in continuous breach of the

16 sales performance obligations of its [Dealer Agreement] since at least 2011, and its failures are serious

17 enough to warrant termination on that factor alone. However, its sales performance is merely a

18 manifestation of the flaws in the dealership's business operations, which have ultimately rendered it

19 unwilling, and thus, unable, to provide acceptable retail sales performance and customer satisfaction and

20 effectively represent Chevrolet." General Motors cites the following reasons for Folsom Chevrolet's poor

21 sales:

- 22 (a) Inventory intended for retail customers was "robbed" in order to make fleet and
- 23 commercial sales;
- 24 (b) Consistent failure to provide adequate customer satisfaction particularly during the new
- 25 vehicle purchasing experience;
- 26 (c) "[M]arkedly low loyalty rates for the customers who do purchase [Chevrolet] vehicles at
- 27 the dealership, meaning the customers it does have are not likely to return to purchase their next vehicle;"
- 28 (d) Vehicles are not competitively priced;

(e) Failure to implement a “fully functional business development center (‘BDC’);”¹¹

(f) Failure to hold its personnel accountable for their job responsibilities.

(Respondent General Motors LLC’s Post-Hearing Brief, p. 4, lines 17-28; p. 5, lines 1-6)

20. Since 2012, Respondent contends that Folsom Chevrolet has consistently failed to capture the retail business available to it. Protestant has not achieved its contractual obligation of achieving 100 RSI.¹² (Respondent General Motors LLC’s Post-Hearing Brief, p. 7, lines 15-25) During the period 2012-2017, Folsom Chevrolet sold 3,410 vehicles at retail compared to 6,619 expected sales, which indicates, according to Respondent, that Folsom Chevrolet failed to capture a combined total of 3,209 new retail sales in a six-year period. (Respondent General Motors LLC’s Post-Hearing Brief, p. 8, lines 2-4) Chief among the causes of Protestant’s poor sales performance is its practice of selling or trading its inventory to satisfy fleet customers, which diminishes its ability to make retail sales and runs contrary to General Motors’ “suggested practices.” (Respondent General Motors LLC’s Post-Hearing Brief, p. 9, lines 7-10) In 2017, 31.5 percent of Folsom Chevrolet’s retail inventory was sold to fleet customers. “By comparison, only 3.52 percent of Chevrolet sales are made that way overall by dealers nationwide ...” (Respondent General Motors LLC’s Post-Hearing Brief, p. 10, lines 8-10) To satisfy its fleet customers, Folsom Chevrolet’s inventory has “a significant number of units with trim and color choices that are generally attractive to fleet customers, rather than retail customers.” (Respondent General Motors LLC’s Post-Hearing Brief, p. 10, lines 15-17) Respondent maintains that this practice results in Folsom Chevrolet’s inventory being imbalanced so it is less desirable to retail customers, who typically look at the inventory before deciding to visit the dealership in person. (Respondent General Motors LLC’s Post-

¹¹ “Business Development Center” or BDC is defined in the Joint Glossary of Terms as “[a] group of employees at the dealership involved with customer relationship management and lead management, such as following up and setting appointments with prospective buyers to visit the dealership.” (Joint Glossary of Terms, p. 3)

¹² In response to Mr. Stockton’s argument that the RSI calculation is flawed, General Motors contends that: 1) RSI and equivalent metrics have been used for decades in the auto industry; 2) the “RSI calculation is transparent, conservative and objective;” 3) RSI takes into account economic factors, household income and vehicle type preference in addition to other local conditions and consumer preferences; 4) Protestant’s RSI ranking is confirmed by other metrics, including its own expert’s; and 5) “Folsom Chevrolet’s poor sales performance, as measured by RSI, is confirmed by [General Motors] extensive counseling....” (Respondent General Motors LLC’s Post-Hearing Brief, p. 20, lines 16-28; p. 21, lines 1-5) Respondent maintains that substantial evidence supports the reasonableness of RSI, including in light of each of the factors listed in Section 11713.13(g). RSI in general, according to Respondent, is “‘fair,’ it uses a ‘rational’ approach that adjusts for many different possible effects, and it is similar to the approach used by [General Motors] competitors in the automotive industry.” (Respondent General Motors LLC’s Reply to Protestant’s Post-Hearing Brief, p. 24, lines 14-15; p. 53, lines 8-11)

Hearing Brief, p. 11, lines 10-23; Respondent General Motors LLC’s Reply to Protestant’s Post-Hearing Brief, p. 55, lines 6-12; p. 67, lines 10-15)

21. Respondent contends that it has demonstrated good cause to terminate Protestant’s Chevrolet franchise because:

- (a) “Folsom Chevrolet’s sales in relation to the market are dismal;”
- (b) “Folsom Chevrolet’s investment in its business is relatively minimal and impermanent;”
- (c) “The public welfare is harmed by allowing Folsom Chevrolet to remain as an ineffective dealer that does not serve the market;”
- (d) Protestant is not well-equipped in terms of sales and service facilities, personnel, equipment and parts to adequately serve the public;
- (e) “Folsom Chevrolet has occasionally failed to fulfill warranty obligations;”¹³ and,
- (f) The reasons identified by General Motors in Paragraph 19 for Folsom Chevrolet’s poor sales “also constitutes a failure to comply with the express terms of the Dealer Agreement:”
 - Sales (Articles 5.1.1 and 9 of the Dealer Agreement);
 - Customer satisfaction (Articles 5.1.1(e), 5.2.1 and 5.3 of the Dealer Agreement);
 - Inventory (Article 6.4.1 of the Dealer Agreement);
 - Staffing (Article 5.1.1(a) of the Dealer Agreement); and
 - Personal services (Article 2 of the Dealer Agreement).

(Respondent General Motors LLC’s Post-Hearing Brief, p. 7, lines 4-5; p. 22, lines 12-13; p. 25, lines 21-23; p. 26, lines 20-24; p. 27, lines 8-11 and 26-28; and p. 28, lines 1-15; Respondent General Motors LLC’s Reply to Protestant’s Post-Hearing Brief, pp. 55-67)

PROTESTANT’S CONTENTIONS

22. Protestant contends that General Motors failed to establish good cause to terminate its Chevrolet franchise because:

- (a) The amount of business transacted by Folsom Chevrolet is substantial as compared to the business available to it and the sales standard used by General Motors “is not accurately measuring either

¹³ General Motors does not dispute that “generally” Folsom Chevrolet has fulfilled its service obligations. (Respondent General Motors LLC’s Post-Hearing Brief, p. 27, lines 11-12)

1 the business available to Folsom Chevrolet, or the business transacted by Folsom Chevrolet;”

2 (b) The investments made and obligations incurred by Protestant to perform its part of the
3 Chevrolet franchise have been substantial;

4 (c) Folsom Chevrolet’s investment in its business is substantial and permanent, and “will be
5 significantly affected by termination;”

6 (d) It would be injurious to the public welfare if Protestant’s Chevrolet franchise is
7 terminated;

8 (e) “Folsom Chevrolet is providing more than adequate motor vehicle sales and service
9 facilities, equipment, vehicles parts and qualified service personnel to reasonably provide for the needs of
10 the consumers for the motor vehicles handled by Folsom Chevrolet and has been and is rendering
11 adequate services to the public ...;”

12 (f) The warranty obligations of General Motors have been fulfilled by Folsom Chevrolet; and

13 (g) The extent of Folsom Chevrolet’s failure to comply with the terms of the franchise are
14 limited to those set forth in the Notice of Termination (low RSI and CSI surveys or scores).¹⁴ The
15 performance metrics that General Motors relies on to meet its burden of proof violate subdivision (g) of
16 Section 11713.13 “and therefore cannot be asserted as grounds for termination or good cause.”
17 Additionally, any alleged failures to comply with the franchise “are insufficiently material to warrant
18 termination.” (Protestant’s Post-Hearing Opening Brief, p. 1 lines 6-28; p. 2, lines 1-18; p. 24, lines 3-5;
19 Protestant’s Post-Hearing Reply Brief, pp. 12-14, 24-29)

20 23. According to Protestant, RSI is unreasonable and violates subdivision (g) of Section
21 11713.13, which requires General Motors’ performance standard for measuring dealership sales, service,
22 or customer service performance be reasonable in light of all existing circumstances, including, but not
23 limited to vehicle brand preferences of consumers in Folsom Chevrolet’s area of responsibility.
24 Protestant contends that “brand preference has an impact on Folsom Chevrolet’s level of sales. General

25
26 ¹⁴ Protestant argues that the franchise provides that any basis for termination advanced by General Motors other than Folsom
27 Chevrolet’s “deficient RSI or CSI scores constitutes a breach of Article 13.2 on General Motors’ part, as General Motors
28 would not have given the required notice and provided the required opportunity to cure.” Section 3060 also limits the grounds
of termination to the specific grounds set forth in the written notice provided to both Folsom Chevrolet and the Board.
(Protestant’s Post-Hearing Opening Brief, p. 11, lines 8-21)

Motors’ failure to consider differences in Chevrolet’s brand acceptance based on regional differences in California is unreasonable, as there is clear evidence that wide variations in brand preference exist across the state.” (Protestant’s Post-Hearing Opening Brief, p. 19, lines 5-12; Protestant’s Post-Hearing Reply Brief, p. 5, lines 5-15) RSI, according to Protestant, “makes no allowance for the size of the AGSSA, and the distance of registrations from the dealership, despite the fact that both the experts offered by [the parties] agree that the greater the distance of the dealership from a registration, the less likely the dealership is to capture the opportunity for a sale.” (Protestant’s Post-Hearing Opening Brief, p. 22, lines 7-10) Additionally, RSI does not account for the specific number and location of competitors of the same line-make or of competing makes. (Protestant’s Post-Hearing Opening Brief, p. 23, lines 3-4)

24. Protestant argues that RSI does not account for vehicles sold by it to purchasers of five or more vehicles in a calendar year, or owners of 15 or more vehicles. (Protestant’s Post-Hearing Opening Brief, p. 24, lines 16-20) If RSI does not account for the true amount of business available to Protestant, then “RSI cannot be used by General Motors to meet its burden, because the Vehicle Code requires General Motors to make a showing of the true amount of business available to Folsom Chevrolet, relative to the amount of business Folsom Chevrolet transacted. There is no exception in the Vehicle Code that allows General Motors to exclude a portion of the business available to Folsom Chevrolet, or to exclude a portion of the business transacted by Folsom Chevrolet, if General Motors uses a metric that applies such exclusions for other purposes.” (Protestant’s Post-Hearing Opening Brief, p. 24, lines 23-28; p. 25, lines 1-2; Protestant’s Post-Hearing Reply Brief, p. 131, lines 12-15) Article 5.1.4¹⁵ of the franchise, according to Protestant, does not make a distinction between fleet and retail sales. (Protestant’s Post-Hearing Opening Brief, p. 42, lines 5-12) The Motor Vehicle Addendum to Protestant’s franchise requires it to keep vehicles in inventory that are only available for fleet sales. (Protestant’s Post-Hearing Opening Brief, p. 42, lines 17-20; Exh. R-201.062-069)

25. Protestant asserts that with respect to the below average CSI scores, the terms of the Dealer Agreement do not require that Folsom Chevrolet be above average with respect to survey scores

¹⁵ Article 5.1.4 provides, in part, that: “It is General Motors policy not to sell or allocate new Motor Vehicles to dealers for resale to persons or parties (or their agents) engaged in the business of reselling, brokering ... or wholesaling Motor Vehicles. ... Therefore, unless authorized in writing by General Motors, Dealer agrees that this Agreement authorizes Dealer to purchase Motor Vehicles only for resale to customers for personal use or primary business use other than resale. ...” (Exh. R-201.010)

1 to be in compliance. (Protestant's Post-Hearing Opening Brief, p. 44, lines 14-16) Both Folsom
2 Chevrolet's score and the regional average for the Purchase and Delivery Survey fall between the
3 response of "completely satisfied" and "very satisfied." (Protestant's Post-Hearing Opening Brief, p. 44,
4 lines 19-21) General Motors has failed to demonstrate that a score between "completely satisfied" and
5 "very satisfied" actually demonstrates any difference in consumer satisfaction at Folsom Chevrolet.
6 (Protestant's Post-Hearing Opening Brief, p. 45, lines 11-13) General Motors failed to meet its burden of
7 proof whether the survey scores are a valid basis for breach of the provision relating to satisfactory
8 customer experience with purchase and ownership, since there is no evidence on: 1) whether the
9 questions posed on the survey actually measure the consumer's satisfaction; 2) the impact of the non-
10 response bias on the survey; and 3) whether the sample size of the survey is sufficient to remove the
11 possibility of fluctuation in scores. (Protestant's Post-Hearing Opening Brief, p. 45, lines 11-28; p. 46,
12 lines 1-2)

DEALER AGREEMENT/FRANCHISE

14 26. On October 20, 2015, the parties, Folsom Chevrolet/GEO, Inc. and General Motors LLC
15 executed a Chevrolet Dealer Sales and Service Agreement, which included the Standard Provisions and
16 Addenda (herein "Dealer Agreement.") (Exh. R-201) The Dealer Agreement meets the definition of a
17 franchise in Section 331. The Dealer Agreement was effective November 1, 2015.

18 27. The pertinent provisions of the Dealer Agreement are:

4.2 *Area of Primary Responsibility*

20 Dealer is responsible for effectively selling, servicing and otherwise representing
21 General Motors Products¹⁶ in the area designated in a Notice of Area of Primary
22 Responsibility. The Area of Primary Responsibility is used by General Motors in
23 assessing performance of dealers and the dealer network. General Motors retains the right
24 to revise Dealer's Area of Primary Responsibility at General Motors sole discretion
25 consistent with dealer network planning objectives. ... (Exh. R-201.007)

5.1. *Responsibility to Promote and Sell*

25 5.1.1 Dealer agrees to effectively, ethically and lawfully sell and promote the
26 purchase, lease and use of Products by consumers located in its Area of Primary
27 Responsibility. To achieve this objective, Dealer agrees to:

- (a) maintain an adequate staff of trained sales personnel;

28 ¹⁶ "Products" are defined as "Motor Vehicles, Parts and Accessories." (Exh. R-201.034)

- (b) explain to Product purchasers the items which make up the purchase price and provide purchasers with itemized invoices;
- (c) not charge customers for services for which Dealer is reimbursed by General Motors;
- (d) include in customer orders only equipment or accessories requested by customer or required by law;
- (e) ensure that the customer's purchase and delivery experience are satisfactory; and
- (f) comply with the retail sales standards¹⁷ established by General Motors, as amended from time to time. General Motors will consult with the appropriate dealer council and national dealer counsel before amending the retail sales standards.¹⁸ (Exh. R-201.009)

...

5.1.4 It is General Motors policy not to sell or allocate new Motor Vehicles¹⁹ to dealers for resale to persons or parties (or their agents) engaged in the business of reselling, brokering ... or wholesaling Motor Vehicles. ... Therefore, unless otherwise authorized in writing by General Motors, Dealer agrees that this Agreement authorizes Dealer to purchase Motor Vehicles only for resale to customers for personal use or primary business use other than resale. ... (Exh. R-201.010)

5.3 *Customer Satisfaction*

Dealer and General Motors recognize that appropriate care for the customer will promote customer satisfaction with General Motors Products and its dealers, which is critically important to our current and future business success. Dealer therefore agrees to conduct its operations in a manner which will promote customer satisfaction with the purchase and ownership experience. General Motors agrees to provide Dealer with reasonable support to assist Dealer's attainment of customer satisfaction, but Dealer remains responsible for promoting and maintaining customer satisfaction at the dealership.

General Motors will provide Dealer with a written report at least annually pursuant to the procedures then in effect in evaluating Dealer's purchase and delivery customer satisfaction and Dealer's service customer satisfaction. The report will compare Dealer's performance to other same Line-Make dealers in the Region. General Motors will provide a written explanation of the customer satisfaction review process to Dealer. ... (Exh. R-201.011)

///

¹⁷ There is no separate written set of standards; the standards are contained in the Dealer Agreement. (RT Vol. I, 217:5-219:25)

¹⁸ Retail sales standards refer to the "benchmarks that [General Motors uses] to measure a dealer's retail sales performance. Specifically, the metric [General Motors uses] is called a retail sales index, or often referred to as an RSI in [General Motors'] world of acronyms." (Vol. RT II, 460:23-25, 461:1-3)

¹⁹ "Motor vehicles" are defined as "[a]ll current model types or series of new motor vehicles specified in any Motor Vehicle Addendum incorporated into this Agreement and all past General Motors vehicles marketed through Motor Vehicle Dealers." (Exh. R-201.034)

ARTICLE 9. REVIEW OF DEALER'S SALES PERFORMANCE

General Motors willingness to enter into this Agreement is based in part on Dealer's commitment to effectively sell and promote the purchase, lease and use of Products in Dealer's Area of Primary Responsibility. The success of General Motors and Dealer depends to a substantial degree on Dealer taking advantage of available sales opportunities.

Given this Dealer commitment, General Motors will provide Dealer with a written report at least annually pursuant to the procedures then in effect evaluating Dealer's sales performance. The report will compare Dealer's retail sales to retail sales opportunities by segment in Dealer's Area of Primary Responsibility or Area of Geographical Sales and Service Advantage, whichever is applicable. General Motors will provide a written explanation of the sales review process to Dealer. Satisfactory performance of Dealer's sales obligations under Article 5.1 requires Dealer to achieve a Retail Sales Index equal or greater than 100. If Dealer's Retail Sales Index is less than 100, Dealer's sales performance will be rated as provided in the General Motors Sales Evaluation process. General Motors expects Dealer to pursue available sales opportunities exceeding this standard. Additionally, General Motors expectations of its sales and registration performance for a Line-Make in a particular area may exceed this standard for individual dealer compliance.

In addition to the Retail Sales Index, General Motors will consider any other relevant factors in deciding whether to proceed under the provisions of Article 13.2 to address any failure by Dealer to adequately perform its sales responsibilities. General Motors will only pursue its rights under Article 13.2 to address any failure by Dealer to adequately perform its sales responsibilities if General Motors determines that Dealer has materially breached its sales performance obligations under this Dealer Agreement.

...

(Exh. R-201.017)

13.2 *Failure of Performance by Dealer*

If General Motors determines that Dealer's Premises are not acceptable, or that Dealer has failed to adequately perform its sales or service responsibilities, including those responsibilities relating to customer satisfaction and training, General Motors will review such failure with Dealer.

As soon as is practical thereafter, General Motors will notify Dealer in writing of the nature of Dealer's failure and of the period of time (which shall not be less than six months) during which Dealer will have the opportunity to correct the failure.

If Dealer does correct the failure by the expiration of the period, General Motors will so advise the Dealer in writing. If, however, Dealer remains in material breach of its obligations at the expiration of the period, General Motors may terminate this Agreement by giving Dealer 90 days advance written notice. (Exh. R-201.023)

28. The term "retail" is not defined in the Dealer Agreement, is not in the Joint Glossary of Terms, nor in any other document provided, and the word is not mentioned in the Dealer Agreement until Article 5.1.1(f). Article 6.1 provides that "General Motors will periodically furnish Dealer one or more Motor Vehicle Addenda specifying the current model types or series of new Motor Vehicles which

Dealer may purchase under this Agreement.” (Exh. R-201.013) In various Motor Vehicle Addenda to the Dealer Agreement, specific vehicles are denoted with an asterisk “for Fleet Delivery only, requires valid Fleet Account Number.”²⁰ (Exh. R-201.062-069; RT Vol. I, 85:21-25)²¹

APPLICABLE LAW

29. Section 331 provides in part as follows:

(a) A “franchise” is a written agreement between two or more persons having all of the following conditions:

(1) A commercial relationship of definite duration or continuing indefinite duration.

(2) The franchisee is granted the right to offer for sale or lease, or to sell or lease at retail new motor vehicles ... manufactured or distributed by the franchisor or the right to perform authorized warranty repairs and service, or the right to perform any combination of these activities.

(3) The franchisee constitutes a component of the franchisor’s distribution system.

(4) The operation of the franchisee’s business is substantially associated with the franchisor’s trademark, trade name, advertising, or other commercial symbol designating the franchisor.

(5) The operation of a portion of the franchisee’s business is substantially reliant on the franchisor for a continued supply of new vehicles, parts, or accessories.

...

30. Section 520 provides that: “[a] ‘retail sale’ is a sale of goods to a person for the purpose of consumption and use, and not for resale to others ...”²²

31. Section 3050 provides, in part, as follows:

The board shall do all of the following:

...

(d) Hear and decide, within the limitations and in accordance with the procedure provided, a protest presented by a franchisee pursuant to Section 3060...

32. Section 3060 provides in part as follows:

(a) Notwithstanding Section 20999.1 of the Business and Professions Code or the terms of any franchise, no franchisor shall terminate or refuse to continue any existing franchise unless all of the following conditions are met: ...

(1) The franchisee and the board have received written notice from the franchisor as follows:

²⁰ “Fleet Account Number” or FAN is defined as “[a] number given to a purchaser of vehicles under [General Motors] fleet program. General Motors guidelines state a FAN is required when the customer 1) purchases more than 5 vehicles in a year, or 2) has more than 15 vehicles in operation.” (Joint Glossary of Terms, p. 2)

²¹ References herein to Roman Numerals are to the transcript volumes of the proceedings.

²² “Person,” as defined in Section 470, “includes a natural person, firm, copartnership, association, limited liability company, or corporation.”

1 ...
2 (2) Except as provided in Section 3050.7. the board finds that there is good cause for
3 (3) The franchisor has received the written consent of the franchisee, or the appropriate
4 period for filing a protest has elapsed.
5 ...

6 33. Subdivision (g) of Section 11713.13 provides as follows:

7 It is unlawful and a violation of this code for any manufacturer, manufacturer branch,
8 distributor, or distributor branch licensed under this code to do, directly or indirectly
9 through an affiliate, any of the following:
10 ...

11 (g) (1) Establish or maintain a performance standard, sales objective, or program for
12 measuring a dealer's sales, service, or customer service performance that may materially
13 affect the dealer, including, but not limited to, the dealer's right to payment under any
14 incentive or reimbursement program or establishment of working capital requirements,
15 unless both of the following requirements are satisfied:

16 (A) The performance standard, sales objective, or program for measuring dealership
17 sales, service, or customer service performance is reasonable in light of all existing
18 circumstances, including, but not limited to, the following:

19 (i) Demographics in the dealer's area of responsibility.

20 (ii) Geographical and market characteristics in the dealer's area of responsibility.

21 (iii) The availability and allocation of vehicles and parts inventory.

22 (iv) Local and statewide economic circumstances.

23 (v) Historical sales, service, and customer service performance of the line-make within
24 the dealer's area of responsibility, including vehicle brand preferences of consumers in
25 the dealer's area of responsibility.

26 (B) Within 30 days after a request by the dealer, the manufacturer, manufacturer
27 branch, distributor, distributor branch, or affiliate provides a written summary of the
28 methodology and data used in establishing the performance standard, sales objective, or
program for measuring dealership sales or service performance. The summary shall be in
detail sufficient to permit the dealer to determine how the standard was established and
applied to the dealer.

(2) In any proceeding in which the reasonableness of a performance standard, sales
objective, or program for measuring dealership sales, service, or customer service
performance is an issue, the manufacturer, manufacturer branch, distributor, distributor
branch, or affiliate shall have the burden of proof.

(3) As used in this subdivision, "area of responsibility" shall have the same meaning as
defined in subdivision (z) of Section 11713.3.²³

23 ///

24 ///

25 ///

26 ///

27 _____

28 ²³ Subdivision (z) of Section 11713.3 provides that "area of responsibility" means "a geographic area specified in a franchise
that is used by the franchisor for the purpose of evaluating the franchisee's performance of its sales and service obligations."

FINDINGS OF FACT²⁴

Preliminary Findings

Brief History of the Manufacturer

34. Following General Motors Corporation's (Respondent's predecessor; herein "Old GM") bankruptcy in 2009, there was a "significant reduction" in the number of dealers for all four of Old GM's lines (Chevrolet, Buick, General Motors Truck, and Cadillac), resulting in a restructured dealer network. (Exhs. R-202, R-204) Old GM, because of its bankruptcy, was permitted to terminate hundreds of its dealerships without regard to state franchise laws such as Section 3060.²⁵ (Exh. R-202.001)

35. Those dealerships selected to remain as franchisees, including Folsom Chevrolet, were sent proposed letter agreements called Participation Agreements. (Exh. R-202) The Participation Agreement required retained dealers to recognize that as a result of restructuring, dealers had "substantially more sales opportunities and Dealer must substantially increase its sales of New Motor Vehicles." The Participation Agreement also noted that dealers "recognized" that due to fewer dealers, and expected sales increases, "Dealer will need to stock additional Motor Vehicles." (Exh. R-202.002) Marshal Crossan signed the Participation Agreement on behalf of Folsom Chevrolet on June 4, 2009. (Exh. R-202)

36. Chevrolet, for the last three years (2015-2017), on a national level and especially in northern California, has increased its sales and retail market share. This is the first time Chevrolet had three years of increased market growth since since 1990. (RT Vol. I, 120:1-121:14; Vol. X, 34:7-13)

37. Approximately 80 percent of all Chevrolet sales for General Motors are retail sales with the remaining 20 percent being fleet sales. (RT Vol. II, 458:25-459:16; Vol. III, 8:24-9:8)

38. Fundamental among General Motors' operations is that the company's business model focuses on retail sales from its dealers. (RT Vol. III, 8:24-9:8) General Motors has also put resources into developing its dealership network to make retail sales. Retail sales are proximity-sensitive, so dealers

²⁴ References to testimony, exhibits or other parts of the record are intended to be examples of evidence relied upon to reach a finding, and not to be exhaustive. Findings of Fact are organized under topical headings for readability only, and not to indicate an exclusive relationship to an issue denoted by the topic heading. The Board may apply a particular finding to any "existing circumstance" or "good cause" factor under Section 3061.

²⁵ General Motors, Folsom Chevrolet's franchisor and the Respondent in this protest, is a new entity and a Limited Liability Company. (Exh. R-201.002; RT Vol. VII, 194:22-195:1)

1 must be “located in a location that’s convenient for the customer with good visibility, accessible to
2 the customer, so that they can attract that retail customer ...” (RT Vol. III, 9:9-20) General Motors has
3 approximately 3,000 Chevrolet dealers in the United States. (RT Vol. III, 133:10-13)

4 **History, Description and Operation of Folsom Chevrolet**

5 39. Marshal Crossan, the dealer principal of Protestant, began working in the car dealership
6 industry after graduation from college. (RT Vol. VI, 93:18-94:18, 95:5-20) In late 1977, BMW of
7 Roseville was opened by Marshal Crossan’s brother, Larry Crossan, with Marshal owning 39 percent, his
8 father 10 percent, and Larry 51 percent. (RT Vol. VI, 98:4-14) After the BMW dealership was sold,
9 Marshal Crossan worked for the new owners as the General Manager for four years. (RT Vol. VI, 100:5-
10 25) He then worked as a Sales Manager for another dealership from 1986 until May 1992. (RT Vol. VI,
11 101:1-24)

12 40. The former Chevrolet dealership in Folsom, Love Chevrolet, failed in 1991 and there was
13 no longer a Chevrolet dealership in operation in Folsom. (RT Vol. VI, 102:1-3) General Motors
14 Acceptance Corporation (“GMAC”), the financial subsidiary of Old GM, had lost approximately \$17
15 million when Love Chevrolet went out of business, and GMAC was holding its property. (RT Vol. VI,
16 105:16-106:8, 106:18-21) In 1992, Marshal Crossan came to an agreement with Old GM for the
17 purchase of the dealership whereby he invested \$250,000, and Motors Holding division of Old GM
18 (“Motors Holding”) invested \$750,000. (RT Vol. VI, 107:5-108:13) On June 29, 1992, Marshal Crossan
19 opened Folsom Chevrolet, in the same location as the previously failed dealer. (RT Vol. VI, 105:14-25,
20 106:22-25) Twenty percent of Marshal Crossan’s profits from the dealership’s operations eventually
21 went to buying Motors Holding out. Marshal Crossan and his wife became sole owners of Folsom
22 Chevrolet in February 1998. (RT Vol. VI, 107:5-109:12, 112:9-24, 113:2-4)

23 41. In 1997, Marshal Crossan purchased a parcel of land in the newly created Folsom Auto
24 Mall, where Ford and Toyota dealerships had already relocated. (RT Vol. VI, 111:23-112:13) Marshal
25 Crossan estimated the purchase price of the property at \$3.9 million and the cost of the construction of
26 the facility, which met the requirements of General Motors’ Image 2000 design program, at a little over
27 \$2 million to “roughly \$3 million.” (RT Vol. VI, 113:14-114:13, 114:24-115:7, 146:8-147:4) The project
28 was financed by a personal loan from GMAC to Marshal Crossan and his wife at the time. (RT Vol. VI,

1 113:14-114:13; Exh. R-253)

2 42. As a condition of allowing Folsom Chevrolet to relocate to and purchase a new location,
3 Old GM required site control of the newly constructed dealership and the land. (RT Vol. VI, 149:8-150:2;
4 Exh. R-253) Marshal Crossan, with his then-wife, entered into a 25-year lease with Argonaut, an Old
5 GM subsidiary, with a term of February 1, 1998 through January 31, 2023, at an annual payment of
6 \$775,200. (RT Vol. VI, 149:8-150:3; Exhs. R-253, R-201.048) Currently, Marshal Crossan's trust owns
7 the building and the land, leases it to Argonaut, which then subleases it to Folsom Chevrolet. (RT Vol.
8 VI, 152:15-22)

9 43. In 2007 or 2010 Marshal Crossan purchased 9.2 acres adjacent to Folsom Chevrolet for a
10 storage lot at a cost of \$3.9 million dollars. (RT Vol. VI, 120:10-20, 147:17-25, 148:7-12; Vol. IX, 63:25-
11 64:2)

12 44. The recession beginning in 2007 had a dramatic impact on the Folsom Auto Mall; the
13 Hyundai and Chrysler dealerships closed (2 out of the 10 dealerships in the auto mall). (RT Vol. VI,
14 121:17-122:8) In 2007, Folsom Chevrolet lost \$1.007 million and was forced to conduct layoffs. (RT
15 Vol. VI, 122:12-21, 161:2-162:5) With the cost reductions and layoffs, in 2008 the dealership made
16 approximately \$80,000. (RT Vol. VI, 161:2-162:5) Folsom Chevrolet managed to remain in business
17 throughout the recession. (RT Vol. VI, 122:9-11)

18 45. In the period 2010-2011, Folsom Chevrolet was not able to get back to the volume of sales
19 it had from 2004-2006. Folsom Chevrolet faced additional competition: the Elk Grove Auto Mall in
20 Sacramento County opened and many manufacturers increased their truck and SUV offerings to compete
21 with Chevrolet. The pricing of Chevrolet trucks and SUVs also increased. (RT Vol. VIII, 41:20-44:10)

22 46. Folsom Chevrolet became part of General Motors voluntary Business Elite Dealer
23 program in 1998. This program is offered to dealers who make commitments to General Motors in terms
24 of service facility and a dedicated sales staff for sales to businesses. (RT Vol. II, 338:11-18; Vol. III,
25 72:8-20) Folsom Chevrolet provided facilities and equipment in its service department to be able to lift
26 heavier vehicles, including a 16,000 pound service hoist and taller service doors to accommodate these
27 vehicles. (RT Vol. II, 341:1-23; Vol. VI, 172:2-20) These Business Elite dealers wish to maximize sales
28 to businesses, i.e., fleet and small businesses. Business Elite dealers receive a supplemental allocation,

1 which they earn through an allocation formula in three vehicle lines: 1) Silverado light-duty truck, 2)
2 Silverado heavy-duty truck, and 3) Express Van (a cargo van). (RT Vol. II, 335:3-7; Vol. VIII, 58:21-25)
3 The supplemental allocation is invoiced as retail stock, and can be sold to any customer. Folsom
4 Chevrolet referred to this as its “fleet allocation.” (RT Vol. II, 326:19-21, 335:18-25; Vol. VIII, 58:6-
5 59:12, 60:22-61:8; Vol. IX, 171:19-25-172:16)

6 47. There are approximately 250 Business Elite Chevrolet dealers nationwide. (RT Vol. III,
7 72:8-20) There are 30 Business Elite dealers in the geographic boundaries of the district Folsom
8 Chevrolet is in, which encompasses Bakersfield to Reno/Carson City. There are four Chevrolet Business
9 Elite dealers in the Sacramento Area. (RT Vol. II, 327:8-14; 341:24-342:4)

10 48. There is an additional allocation called Strategic Target Market Initiative (“STMI”): which
11 is up to 15 percent of General Motors’ retail production. It is a discretionary allocation, designed for
12 special circumstances, such as promotions. Folsom Chevrolet has received the most STMI allocation of
13 the Business Elite dealers in the district since 2014. (RT Vol. II, 336:3-19; Vol III, 36:25-37:16; Exh. R-
14 276)

15 49. Folsom Chevrolet was profitable in 2013, recording a profit of \$157,922. (Exh. R-
16 243B.001 at line 63) Marshal Crossan received a salary of \$288,000, and the dealership paid \$1,140,100
17 in rent to Argonaut and \$46,411 in taxes to Marshal Crossan for the properties. (Exh. R- 243B.002 at
18 lines 8, 41, 45) Protestant sold 231 fleet trucks compared to 199 retail trucks and earned a gross profit per
19 truck for retail of \$2,078 compared to \$1,517 per truck for fleet. (Exh. R-243B.005 at lines 41, 43)
20 Approximately 41 percent of the dealership’s new vehicle gross profit in 2013 came from fleet sales.
21 (Exh. P-185-80)

22 50. Starting in 2013, Folsom Chevrolet renovated its facility at an estimated cost of \$800,000
23 to \$900,000. (RT Vol. IX, 30:1-7) The construction took about six months. (RT Vol. VI, 121:4-8)
24 Marshal Crossan asserted that construction was not finished until “late 2014” (see, e.g., Exh. R-
25 226.002), however, a March 2014 letter sent from Larry Crossan to Gensler, architects working with
26 General Motors to remodel dealership facilities, notes that construction was finished around March 2014,
27 stating “[a]s the pictures indicate, construction is complete.” (Exh. R-287; RT Vol. IX, 33:1-12) At times
28 during the construction, it was difficult to determine if the dealership was open due to the lack of signage,

1 and there were difficulties getting the new front entrance completed due to construction problems. (RT
2 Vol. IX, 49:10-50:15) The entire front of the building was fenced off and customers had to walk into the
3 dealership through the service department. (RT Vol. VIII, 75:25-77:6)

4 51. In 2014, Folsom Chevrolet made 428 retail sales against an expectation of 963, a shortfall
5 of 535 units. (Exh. R-242C.002) The result was an “unsatisfactory” RSI of 44.44, ranking it 124th of 128
6 dealers. (*Id.*)

7 52. In 2014, Folsom Chevrolet remained profitable, recording a profit of \$115,499. (R-
8 243C.001 at line 63.) Marshal Crossan continued to receive a salary of \$288,000 and the dealership paid
9 slightly more in rent -- \$1,143,600 to Argonaut, and paid \$70,400 in taxes for properties owned by
10 Marshal Crossan. (Exh. R-243C.002 at lines 8, 41, 45) Protestant continued to sell to fleet customers,
11 selling more fleet trucks (408) than retail trucks (256), and earned a gross profit per truck for retail of
12 \$1,914 and per truck for fleet of \$1,475. (Exh. R-243C.005 at lines 41, 43) More than half of the
13 dealership’s new vehicle gross profit in 2014 came from fleet sales. (Exh. P-185-80)

14 53. In 2015, Folsom Chevrolet earned the highest percentage of its gross profit through fleet
15 truck sales, selling more fleet trucks (434) than retail trucks (416), and at a higher profit per truck (\$1,744
16 for fleet vs. \$1,491 retail). As for fleet cars, Folsom Chevrolet sold more fleet cars (556) than retail cars
17 (194), but not at a higher profit per car (\$883 for fleet vs. \$1,476 retail). (Exh. R-243D.005 at lines 41,
18 43, 20, 22) Folsom Chevrolet’s fleet department earned \$1,247,792 in gross profits in 2015 (the year it
19 sold the Solar City fleet), approximately 58 percent of its total gross profits of \$2,154,274. (Exh. P-185-
20 80; see Paragraph 130, *infra*) Folsom Chevrolet recorded a net profit in 2015 of \$1,489,000 and a net
21 profit in 2016 of \$1,639,000. (Exhs. R-243D.001 at line 63, R-250C.024:22-25, R-243E.001 at line 63,
22 R-250C.021:24-022:4)

23 54. In 2015, Folsom Chevrolet began taking action to address some of the management issues
24 at the dealership by finally letting go of its longtime General Sales Manager, David Shirley. (RT Vol.
25 VIII, 135:1-20; RT Vol. II, 418:11-16) Mr. Shirley failed to implement changes at the dealership, and
26 according to Marshal Crossan, by the time Mr. Shirley was let go, he had openly stopped doing his job;
27 “he was not engaging in the way that he was supposed to.” (RT Vol. II, 410:21-411:16, 411:24-412:13;
28 Vol. VIII, 135:13-136:4) Apparently, even Mr. Shirley agreed that Folsom Chevrolet acted slowly; when

1 he was fired, he told Marshal Crossan that Folsom Chevrolet “should have let him go six months earlier.”
2 (RT Vol. VIII, 136:5-11)

3 55. In 2017, Folsom Chevrolet had \$1.643 million above the minimum net working capital
4 standard that General Motors determined to be necessary to effectively conduct dealership operations.
5 (Exh. P-103-4-5; RT Vol. VI, 156:13-158:1)

6 56. Drew Crossan, Marshal Crossan’s son, testified that when he started at Folsom Chevrolet,
7 as a salesperson in 2011 “all the marketing was running through David Shirley.” (RT Vol. IX, 93:15-18,
8 142:2-23) After Mr. Shirley left, Folsom Chevrolet brought in an outside marketing company, which
9 Drew Crossan described as “[o]ne of the biggest changes” and “a turning point.” (*Id.*) After the departure
10 of Mr. Shirley, phone calls, leads and sales all increased. (RT Vol. IX, 158:18-159:2) As indicated in
11 Paragraph 58, the other significant change was bringing Mr. Kaestner on board. (RT Vol. IX, 141:23-
12 142:23)

13 57. For several years, Folsom Chevrolet has earned incentive payments from General Motors
14 in its Standards for Excellence (SFE) incentive program based on achieving a separate retail sales goal of
15 selling at least one more retail vehicle than they did in the same month the prior year. Folsom Chevrolet’s
16 performance improved significantly in 2016, reaching that mark every month but one. From April 2013
17 to December 2016, Folsom Chevrolet received in compensation from the SFE program \$684,407, with
18 the majority of that money coming in from October 2015 through December 2016. (RT Vol. I, 198:5-
19 199:25; Exh. R-262)

20 58. When Larry Crossan retired as General Manager in 2017, Folsom Chevrolet hired Brian
21 Kaestner, a seasoned manager with experience in high volume new vehicle sales, as the new General
22 Manager in May of 2017. (RT Vol. VIII, 73:17-74:16; 111:1-24) Upon his arrival, Mr. Kaestner
23 implemented a number of changes. Most prominently, he altered the store’s sales model by eliminating
24 the assistant sales manager position. (RT Vol. VIII, 115:17-20; Vol. IX, 227:10-18) Mr. Kaestner also
25 designated certain personnel to monitor leads that come through the Internet department and increased
26 spending on the Internet. (*Id.*; RT Vol. VIII, 147:6-19) Additionally, he changed the pay plans for
27 dealership personnel by incentivizing them more on volume and less on gross profits, as well as adding
28 performance standards. (RT Vol. VIII, 146:22-147:5) Following Mr. Kaestner’s arrival and implementing

1 those changes, without firing anybody there was “almost ... a hundred percent turnover with the sales
2 force.” (RT Vol. IX, 243:9-25)

3 59. Folsom Chevrolet’s retail sales have risen since Mr. Kaestner’s arrival. Since he joined
4 Folsom Chevrolet, the dealership has posted an increase in sales for each month over the prior years’
5 sales for those months and in October and December 2017, 105 and 107 retail sales were made,
6 respectively. (Exh. R-270; RT Vol. IX, 247:15-19) However, that was below expected sales of
7 approximately 125 units per month in 2017. (*Id.*)

8 60. Drew Crossan has been working his way up through the ranks at Folsom Chevrolet and
9 currently is General Sales Manager. (RT Vol. IX, 91:9-10) Marshal Crossan would like to pass the
10 dealership on to Drew. (RT Vol. VIII, 109:23-110:7)

11 61. Folsom Chevrolet currently has between 80 and 90 employees. (RT Vol. VI, 122:22-24)
12 The sales department currently has 11 salespeople and three managers, with at least one additional
13 salesperson hired during the hearing. (RT Vol. VI, 179:16-180:22; RT Vol. IX, 257:25-258:12) The fleet
14 department has three additional sales personnel. (RT Vol. VI, 182:2-5) The dealership is open seven days
15 a week with the daily hours ranging from 12.5 hours on Saturdays to nine hours on Sundays. (RT Vol.
16 VI, 187:14-188:4)

17 62. Marshal Crossan has been involved with several volunteer programs at General Motors’
18 request, including as a volunteer in an arbitration and mediation program. (RT Vol. VI, 127:10-128:2) He
19 also sat on the National Truck Dealer Advisory Board and the OnStar Advisory Board. (Exh. P-101; RT
20 Vol. VI, 132:19-133:11; 129:7-23) Additionally, he was the President of the Local Marketing Area
21 group for many years, which is the group of dealers in the Sacramento, Stockton, and Modesto area
22 which meet at General Motors’ urging to coordinate marketing expenditures. (RT Vol. VI, 130:5-23)

23 **Area of Primary Responsibility and Region**

24 63. In the regular course of business, General Motors assigns a geographic area to each dealer,
25 whether as an APR or an AGSSA or both with periodic updates. (Exh. R-201.007, § 4.2; RT Vol. III,
26 136:6-21) APRs and AGSSAs consist of a certain number of assigned census tracts, as those tracts are
27 defined by the U.S. Census Bureau. The collection of census tracts assigned to a dealer is principally
28 determined by the geographical proximity of the dealership location and the population center of each

tract. (RT Vol. III, 136:6-21, 137:4-21) A census tract larger in area typically indicates less density of population within that tract. (RT Vol. III, 152:14-21) The census tracts smaller in area indicate greater population density in those areas.

64. The Sacramento APR is a large geographic area shared by Folsom Chevrolet with four other Chevrolet dealers. These are: 1) John L. Sullivan Chevrolet (Roseville), 2) Performance Chevrolet (Sacramento), 3) Kuni Chevrolet (Sacramento) and, 4) Maita Chevrolet (Elk Grove). (Exh. R-244.024) The AGSSA assigned to Folsom Chevrolet, which is part of the APR, is specific to Folsom Chevrolet.²⁶

65. APR and AGSSA configurations reflect the areas where General Motors believes the dealer has a competitive advantage over other dealerships due to customer convenience and geographical proximity. (RT Vol. III, 210:7-18) An AGSSA does not prevent or restrict sales – dealerships are free to sell vehicles to customers located anywhere in the country. (RT Vol. II, 473:7-16) AGSSAs are based primarily on proximity of contiguous census tracts to the nearest dealership, absent any natural or man-made barriers, or unusual traffic patterns. (RT Vol. III, 137:4-21; Exh. R-244.006 ¶ 14)

66. The competitive advantage is, however, not absolute. (Exh. R-244.006 ¶ 15; Exh. P-185-8 ¶31) “Factors under the direct control of the dealer such as price, selection, selling approach, service, facilities, and advertising motivate consumers to travel beyond the most proximate dealer in search of a better value proposition.” This buyer behavior or “cross-sell” phenomenon is a result of intra-brand competition among Chevrolet dealers. (Exh. R-244.006 ¶ 15)

67. Significantly, statewide in California, Chevrolet dealerships make less than 41 percent of their sales within their AGSSA; the remaining balance of sales, 59 percent, come from outside their assigned territory. (RT Vol. VII, 38:21-39:19, 43:13-45:9; Exhs. P-186-5 ¶ 16; P-186-11; R-244.006 ¶ 15) This is also true for the Sacramento APR. (Exh. R-244.025) However, the RSI calculation does not include any calculation of the opportunity to sell outside of the AGSSA. (RT Vol. VII, 38:21-39:19) The entire RSI expectation is drawn from competitive registrations within a dealer's AGSSA and the state average market share as applied to those competitive registrations.

68. During Old GM’s bankruptcy, it terminated the franchises of two Chevrolet dealerships:

²⁶ There are some dealers located in a Single Dealer Area (“SDA”) where the APR consists of a single AGSSA. (Exh. R-206)

Family Chevrolet in Shingle Springs to the east of Folsom Chevrolet and Amador Motors²⁷ in Jackson to the south of Folsom Chevrolet. (RT Vol. VI, 169:10-25; Vol. III 204:25-206:3) Amador Motors was about a 45 to 60 minute drive south from Folsom depending on traffic, and the Shingle Springs dealership was located 15 miles to the east. (RT Vol. VI, 170:1-6) The reason the two dealers were terminated during the bankruptcy process was based, at least in part, on performance criteria of Old GM. (RT Vol. III, 139:16-25; 204:25-206:3) During the bankruptcy proceedings, Old GM used as its standard for possible termination or rejection any dealer with a score of 70 percent or lower on the Dealer Performance Score (“DPS”). (RT Vol. VII, 103:5-105:12) The DPS is made up of 50 percent RSI, 30 percent CSI, 10 percent working capital and 10 percent profitability.²⁸ (RT Vol. VII, 105:13-106:3)

69. When a dealer is no longer “in the network,” General Motors determines whether to designate the former dealer’s assigned area as an “open point” or to reassign the area to other already existing dealers. (RT Vol. III, 98:25-99:22, 140:4-22)

70. Despite the closure of the Shingle Springs Chevrolet dealer to the east of Folsom Chevrolet’s new AGSSA, there remained a Buick GMC dealer in Placerville to the east of Folsom Chevrolet. (Exh. R-245.011-.014; RT Vol. VII, 206:12-208:8) GMC branded trucks are essentially the same as Chevrolet trucks, with the differences largely being limited to branding and minor cosmetic differences. (RT Vol. VII, 206:12-208:8; Vol. VI, 229:1-232:1)

71. Two changes were made to Folsom Chevrolet’s AGSSA by General Motors; one in 2010/2011 and one in 2013. (Exhs. R-204, R-205, and R-206)

72. On December 17, 2010, General Motors sent a letter to Folsom Chevrolet indicating that it had completed a “comprehensive review” of the entire dealer network, arising out of, and related, to Old GM’s bankruptcy in 2009. Because of the “significant reduction” in the number of dealers for all four of General Motors’ lines-makes, which resulted in a restructured dealer network, General Motors decided to issue new APR/AGSSA Addenda to all its dealers, including Folsom Chevrolet. (Exh. R-204) As indicated below, the changes to the APR resulted in changes to Folsom Chevrolet’s AGSSA.

73. Before 2010, Folsom Chevrolet had 32 census tracts in its AGSSA, all of which were in

²⁷ Sometimes this dealership is called Prospect Motors. (RT Vol. VIII, 169:15-25; 170:9-18)

²⁸ The DPS for Folsom Chevrolet for 2015 and 9/2016 Year To Date is shown on Exhibit P-185-68.

1 Sacramento County. (Exh. R-204; RT Vol. III, 150:4-8, 150:24-151:3) At that time, Folsom Chevrolet
2 was more centrally located within its former AGSSA, with 12 tracts south of it, and 20 tracts north or east
3 if it. (Exhs. P-186-6 ¶ 18, P-186-13; R-204.009) (See map attached hereto as Attachment A.)

4 74. The APR for Folsom Chevrolet and the other four Chevrolet dealers in the Sacramento
5 Area was proposed to be changed by adding two census tracts from Amador County, deleting one from
6 Yolo County (tract 104), adding all of El Dorado County's census tracts except 14 tracts, and all of
7 Placer County census tracts except 21 tracts. The census tracts for Sacramento County for the APR did
8 not change (all but two were previously included), and the one census tract from Sutter remained. (Exh.
9 R-204.007, .010, .059) (See map attached hereto as Attachment B.)

10 75. As part of the December 2010 letter, Folsom Chevrolet's proposed number of census
11 tracts in its AGSSA went from 32 to 56: an addition of 24. One was added and one deleted in Sacramento
12 County (deleted tract 82.11 and added tract 89.13) and two in Amador County and 22 in El Dorado
13 County were added. Some of the census tracts added to Folsom Chevrolet's AGSSA were previously
14 assigned to Family Chevrolet in Shingle Springs and Amador Motors in Jackson. (Exh. R-204; RT Vol.
15 III, 151:13-15)

16 76. On April 22, 2011, General Motors sent a letter to Folsom Chevrolet indicating it had
17 completed a review of information submitted by dealers to General Motors' 2010 tentative APR and/or
18 AGSSA notice and had decided to make modifications to the previous proposal. The APR for the
19 Sacramento area this time included all El Dorado County census tracts except 10 (four more tracts than
20 the 2010 letter) and all Placer County tracts except 20 (previously 21 excluded). Under this modification,
21 Folsom Chevrolet was assigned an AGSSA with 60 census tracts (28 more than previously assigned),
22 with 26 of those tracts in El Dorado County to the east. (Exh. R-205) The final APR/AGSSA decision
23 was sent to Folsom Chevrolet on June 29, 2011. (Exhs. R-257, R-204.010; See map attached hereto as
24 Attachment C.)

25 77. Folsom Chevrolet did not challenge or file a protest with the Board to the changed

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1 AGSSA in 2010/2011.²⁹

2 78. On January 22, 2013, General Motors completed another “comprehensive review and
3 analysis” of the General Motors network in order to allow for the conversion of dealers’ APR and
4 AGSSA to the U.S. Census Bureau’s 2010 census tract geography, to be implemented at the start of the
5 2014 calendar year. (Exhs. R-206, R-244.024; See map attached hereto as Attachment D.)

6 79. In 2013, Folsom Chevrolet’s AGSSA went from 60 census tracts to 74; nine more tracts in
7 Sacramento County for a total of 41 tracts plus 31 in El Dorado County (an additional five tracts) and the
8 same two tracts in Amador County. (Exh. R-206.008, .010)

9 80. The January 2013 letter indicated the notice regarding the APR/AGSSA was provided
10 pursuant to Article 4.2 of the Dealer Agreement, and “applicable” General Motors policy. (Exh. R-
11 206.001) The dealer had 30 days to submit information to General Motors that the dealer wanted General
12 Motors to consider regarding changes made to the APR. (Exh. R-201.007; RT Vol. I, 61:21-62:1)

13 81. On April 9, 2013, Folsom Chevrolet sent a late challenge of the AGSSA to General
14 Motors. (Exh. R-281) Folsom Chevrolet complained about 14 communities they claimed were now in
15 Folsom Chevrolet’s AGSSA, but which were “located great distances from [Folsom Chevrolet’s] location
16 in Folsom, off the Highway 50 Freeway.” However, the 14 communities Folsom Chevrolet questioned
17 were in the Sacramento APR, but were not in Folsom Chevrolet’s AGSSA in 2013, nor are they
18 currently. (Exh. R-281.001; RT Vol. III, 164:5-165:20)

19 82. Folsom Chevrolet also asserted that the census tracts previously assigned to Family
20 Chevrolet in Shingle Springs and Amador Motors in Jackson should not be assigned to Folsom
21 Chevrolet, but should be designated “open areas.” Folsom Chevrolet claimed that those areas “are in
22 strikingly different market areas” compared to Folsom Chevrolet’s market areas, and the shopping
23 patterns for those customers did not justify their assignment to Folsom Chevrolet. (Exhs. R-281, P-124)

24 83. General Motors reviewed the late challenge, and in September 2013 revised Folsom
25 Chevrolet’s AGSSA by deleting two census tracts from Sacramento County, resulting in a total of 72, 40

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27 _____
28 ²⁹ Marshal Crossan testified he did not file a protest because “it was a little bit shaky time with coming out of the go-ahead letters and all ... I didn’t want to stir anything up....” (RT Vol. VIII, 187:22-188:19)

more census tracts than had been assigned to Folsom Chevrolet prior to the bankruptcy.³⁰ (Exh. R-208)

There was no challenge to that finalized revision by Folsom Chevrolet, nor a protest filed with the Board.³¹

84. A review of 2016 census tracts data of Folsom Chevrolet's revised 2010, 2011 and 2014 AGSSAs shows the number of competitive registrations within Folsom Chevrolet's AGSSA grew significantly as indicated in the chart below:

	Chevrolet	Industry	Chevrolet % Industry
2010 AGSSA	447	9,117	4.9%
2011 AGSSA	795	16,627	4.8%
2014 AGSSA	779	16,391	4.8%
2010 to 2011 Change	77.9%	82.4%	
2011 to 2014 Change	-2.0%	-1.4%	
2010 to 2014 Change	74.3%	79.8%	

(Exh. P-186-12)

85. As the chart above shows, there was an increase, on a net basis, of about 80 percent in the number of registrations within Folsom Chevrolet's AGSSA between 2010 and 2014. (Exhs. P-186-6 ¶ 18, P-186-12; RT Vol. VII, 46:17-47:12) Since Folsom Chevrolet's AGSSA size increased by 80 percent in terms of the number of competitive registrations, the expectation by General Motors was that Folsom Chevrolet's sales should increase accordingly. (RT Vol. VII, 46:14-47:23, 156:23-157:19)

86. Folsom Chevrolet has a fairly similar AGSSA to Folsom Lake Ford located in the same
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³⁰ Folsom Chevrolet was not the only dealership in California to see its territory increase following Old GM's bankruptcy. General Motors' Exhibit R-289 was admitted (although it had not been previously exchanged) as possibly relevant. (RT Vol. X, 40:18-25) The exhibit shows six dealers in the same northern California zone as Folsom Chevrolet, which are similar in size to Folsom Chevrolet that also had a large increase in expected sales between 2010 and 2011, and from 2011 to 2016 due to, at least in part, added territory. These dealers were able to increase their sales to compensate. (RT Vol. X, 30:18-40:25) For example, Capitol Chevrolet saw a 250 percent increase in its expected sales from 2010 to 2011 due to closure of two nearby dealerships. (Exh. R-289; RT Vol. X, 33:10-21) From 2010 to 2011, Folsom Chevrolet saw a 221 percent increase in its expected sales. (RT Vol. X, 37:2-40:12; Exh. R-289) However, these other dealers' sales accomplishments as compared to Folsom Chevrolet's sales cannot be given any weight without additional comparable information being provided, such as whether or not there was a change in ownership, number of other dealers in the area, rural versus urban, etc.

³¹ It is unclear from the record the exact number of census tracts that were added to each of the other four Sacramento Area Chevrolet dealership's AGSSAs following the bankruptcy. From the maps, it is obvious that none saw the huge geographical increase that Folsom Chevrolet did.

1 auto mall.³² Folsom Lake Ford in 2013 made over 1,600 retail sales. (Exh. R-210; RT Vol. I, 118:25-
2 119:5) Folsom Chevrolet, meanwhile, made 370 retail sales that year against an expectation of 904. (Exh.
3 R-242B.002) However, there is no evidence to show what similarities there are, if any, between Folsom
4 Lake Ford and Folsom Chevrolet other than proximity and geographically similar AGSSAs, so as to
5 determine the relevancy of this fact.³³ (Exh. P-186-7; RT Vol. VII, 188:23-190:5; 197:1-198:1)

6 87. Folsom Chevrolet was not centrally located within its new AGSSA, either in 2010/2011 or
7 2013. (Exhs. R-205.007, R-206.009, P-186-13) Folsom Chevrolet's geographically large AGSSA
8 includes the City of Folsom at its westerly edge and stretches east, along Highway 50, past El Dorado
9 Hills, Shingle Springs and Placerville, towards Lake Tahoe. (Exhs. R-244.026, J-1, R-290, p. 1; RT Vol.
10 V, 35:11-36:11; Vol. VII, 206:5-11, 206:21-207:5; Vol. VIII, 24:18-21, 45:9-11, 80:17-19, 164:7-16,
11 182:4-10; Vol. IX, 160:10-12) The thin black lines on the various maps introduced into evidence are the
12 outlines of the census tracts. (See e.g., Exh. R-244.024) Each census tract is intended to be approximately
13 4,000 people. As noted earlier, smaller census tracts geographically are more densely populated than the
14 large census tracts which have smaller populations. (RT Vol. V, 30:16-31:25, Vol. III, 206:4-12) The
15 other four Chevrolet dealers in the Sacramento Area in general all remained more centrally located within
16 their AGSSAs and with many more populous tracts. (Exh. R-244.024) There is a higher concentration of
17 population closer to those dealerships where they are able to capture sales. (RT Vol. VII, 53:1-54:6)
18 Folsom Chevrolet sells to customers throughout the Sacramento metro area, who are naturally more
19 susceptible to cross-sell, due to the nature of the urban area. (Exhs. R-244.077, P-185-52-66)

20 88. Folsom Chevrolet is located in close proximity to the four competing Chevrolet dealers.
21 Folsom Chevrolet is approximately a 10-mile drive from Performance Chevrolet and John L. Sullivan
22 Chevrolet, about a 17-mile drive from Kuni Chevrolet, and about 25 miles from Maita Chevrolet. (Exh.
23 P-185-52-66; Exhibit J-1; see Paragraph 15, *supra*) Census tracts which lie between Folsom Chevrolet
24 and those four dealerships are split, meaning that some tracts assigned to Folsom Chevrolet are as little as
25

26 ³² The Ford dealership is perhaps better located, since as one exits the freeway the right hand lane takes you directly to the
27 circle where the Ford and Toyota dealerships are located. Folsom Chevrolet is located on the next circle up from where the
Ford dealership is. (RT Vol. IX, 53:8-55:1)

28 ³³ Ford outsells Chevrolet in every auto mall in Sacramento according to Drew Crossan, who believes this is because Ford has
more inventory. (RT Vol. IX, 146:15-24)

five or six miles from another Chevrolet dealer. (Exh. P-185-52-66)

89. Mr. Stockton, Folsom Chevrolet's expert, opined that rural areas tend to have less cross-sell between markets than urban areas do. (RT Vol. VII, 42:9-14) In an urban AGSSA, with many options, a dealer will both lose and gain more customers to competing dealers, while in a rural AGSSA with fewer options, there is a greater likelihood that any individual dealer will be able to capture the sales within that AGSSA because the alternatives are so far away. (RT Vol. VII, 42:18-43:4) However, Folsom Chevrolet's AGSSA is part rural and part urban, so it does not fit either of these scenarios. And although Folsom Chevrolet is positioned to capture sales from customers driving west along Highway 50, which runs directly past the Folsom Auto Mall, the other Sacramento Area dealerships, as noted above, are located as close as 10 miles away. Therefore, Folsom Chevrolet's proximity to Highway 50 is not as compelling for capturing sales as General Motors asserts. In 2015, John L. Sullivan Chevrolet located 10 miles away in Roseville made 157 sales in Folsom Chevrolet's AGSSA, capturing 21.6 percent of Folsom Chevrolet's sales. (Exhs. R-244.025, P-185-55-57; RT Vol. VIII, 80:20-81:3)

90. Folsom Chevrolet's retail sales expectations are similar to those of the other Sacramento Area dealerships. For example, in 2016, Folsom Chevrolet was expected to sell 1,324 vehicles, while John L. Sullivan was expected to sell 1,396, Kuni 1,355, and Maita 1,182. (Exh. R-246.015.) These other four dealers are performing at an average of 97.1 RSI.³⁴ (Exh. R-244.036)

91. The average RSI among the 10 dealers with the closest AGSSA size geographically to Folsom Chevrolet in California (excluding Folsom Chevrolet) is 72. (Exh. R-244.010) Folsom Chevrolet's ranking in that group is 112 out of 129. (Exh. R-244.049)

Retail Sales Index

92. Though known by varying names, Retail Sales Index or some variant of it has been used as a metric throughout the automotive industry. (RT Vol. V, 20:1-21) General Motors and its predecessors have been using RSI since the late 1970s. (RT Vol. II, 461:17-22) General Motors' RSI metric is the ratio of dealer retail sales to expected retail dealer sales. (Exh. R-246.002 ¶ 4) "The concept

³⁴ Exhibit R-244.025 also shows each Sacramento Chevrolet dealers' national sales added to each metro sales. Folsom Chevrolet's total national and metro sales are higher than Performance Chevrolet's; 667 and 459 respectively, but lower than the other three dealers.

of sales over expectations is fundamental.” (RT Vol. V, 20:11-21)

93. RSI is used by General Motors to determine the number of sales it expects from its dealers and therefore, according to General Motors, the sales effectiveness of its dealers in selling its vehicles to retail customers. (RT Vol. II, 461:11-16) The expected retail dealer sales are determined using a multi-step formula and calculated based on actual registrations. A RSI of 100 indicates a dealer achieved its sales expectations, i.e., state average performance. (Exh. R-246.008-.009 ¶ 24) Those dealers with less than 100 RSI are underperforming and by the conceptual design of the metric, General Motors causes approximately half of its dealerships to obtain RSI scores below 100. (Exh. P-185-3) Because the RSI metric is an average, a substantial amount of the dealer body will not meet the RSI target because some dealers must be below average, as some must be above. (Exh. P-185-6, 11; RT Vol. VII, 14:25-17:19)

94. RSI compares the number of new retail vehicles sold by Folsom Chevrolet against the number that it was expected to sell as formulated by General Motors based on Chevrolet’s statewide market penetration, and the number of new vehicles actually registered in Folsom Chevrolet’s AGSSA by segments.³⁵ (Exh. R-244.007-.008 ¶ 20)

95. To determine RSI, General Motors first looks at new vehicle registrations, grouped by segments across California. General Motors acknowledges the Chevrolet brand does not perform uniformly across the country, with Chevrolet having a lower market share in California than nationally. Therefore, General Motors bases its calculations for RSI on California market share rather than national share. (RT Vol. VII, 28:15-29:19; Exhs. P-185-38-42, R-244.008, fn. 2)

96. As an example, General Motors looks at the vehicle segment “Large Pickup-Crew Cab” total registrations for all manufacturers in an AGSSA. (Exh. R-242A.006) It does not matter where in the AGSSA the registration of the vehicle is located. (RT Vol. II, 241:14-242:6) Next, General Motors looks at the state average market share for Chevrolet for that segment. Then General Motors multiplies the registrations in the AGSSA by Chevrolet’s California market share for that segment, for the number of sales to equal state average, i.e., expected sales, or in other words the product of that calculation is equal to the number of Chevrolet vehicles that would be registered in that AGSSA if General Motors’ market

³⁵ A segment is “a grouping of types of vehicles for market comparison purposes, e.g., midsize SUV, or compact car.” (Joint Glossary of Terms, p.2)

share were at its state average level. (Exh. P-185-6)

97. The following is an example of how the expected sales for the segment “Large Pickup-Crew Cab” (Chevrolet Silverado 1500 Crew Cab) was calculated for Folsom Chevrolet for 2012:

- Total registrations for all manufacturers for this segment in Folsom Chevrolet’s AGSSA was 666. (RT Vol. I, 78:10-20; Exh. R-242A.006)
- Next, the state average market share for Chevrolet for the large pickup crew cab segment (Chevrolet Silverado 1500) was 15.76 percent. (Exh. R-242A.006)
- Then General Motors multiplied the 666 registrations times the Chevrolet market share (666 x 15.76), which provided the number of sales to equal state average of 105 for Folsom Chevrolet for this vehicle segment. (RT Vol. I, 78:10-79:6; Exh. R-242A.006)

98. By using RSI, General Motors is taking the California statewide average of Chevrolet retail sales and applying it to every dealership in California, with only one adjustment to account for only one metric, the market segment preferred in the AGSSA. (*Id.*) The assumption of RSI is that “geographical and market characteristics” for each Chevrolet dealership in California are average, with the exception of market segment. (RT Vol. VII, 14:25-17:19, Exh. P-185-6) General Motors considers that by adjusting for “local consumer product segment preferences,” it accounts for the “majority of local economic, demographic, and market factors.” (Exh. R- 230.002) Basically, General Motors asserts that considering the segments equals consideration of local preferences, including brand preferences. (Exh. R-244.007 ¶ 18, R-244.008-009 ¶ 23)

99. As Mr. Stockton notes, General Motors’ RSI basically assumes “the state average market share is equally applicable to every portion of the state, to every census tract.” (RT Vol. VII, 27:23-28:9) However, a uniform statewide market share does not take into account the desirability of the Chevrolet brand in different parts of the state. Acceptance of Chevrolet is not uniform throughout California. (Exh. P-185-8 ¶ 29) The average RSI for dealers in the state of California (less Folsom Chevrolet) is 132.6, but the average for Sacramento area dealers, excluding Folsom Chevrolet, is 97; a more than 35-point differential. (Exhs. R-244.035, R-244.009 ¶ 25, R-244.036; RT Vol. V, 56:11-24)

100. Significantly, as explained by Mr. Stockton, the more a brand has consistent appeal nationally, the more you can develop an expectation of sales for the brand. First, as General Motors

1 admits, Chevrolet's performance in California is not at the same level as in the United States. Second, the
2 California counties that exceed the U.S. average are very close together or "clustered." Mr. Stockton
3 presented two sets of maps, the first group attached hereto as Attachment E shows Chevrolet's market
4 share by California county compared to the national average (registrations over/under U.S. average) and
5 the second group attached hereto as Attachment F shows California's market share by California county
6 (registrations over/under California average) for the years 2012 through 2016. (Exhs. P-185-38-42, P-
7 185-43-47) The first group of maps shows only a cluster of counties, generally in the Central Valley,
8 outperform the Chevrolet national average. Folsom Chevrolet is in northern California. (RT Vol. VII,
9 28:19-29:19) This clustering shows that the variation in market share is "systematic," as opposed to
10 being checkerboard across the state, which would mean that the variation in market share is random. Mr.
11 Stockton explained "[s]o in terms of RSI, if it's random, then it's a question of just the error rate of
12 whether RSI is precise enough." (RT Vol. VII, 31:1-12) But the "clustering" shows that there are
13 "systematic differences" in how the Chevrolet brand is perceived in California. (Exh. P-185-38-42; RT
14 Vol. VII, 28:19-30:12) The second group of maps, counties that exceed the California average market
15 share, also show clustering. This result indicates Chevrolet does not have "consistent, cohesive appeal"
16 across the State of California, and the variation in appeal is not random. This clustering includes
17 generally the Central Valley, some of the central coast counties, the Inland Empire of California and a
18 few northern California counties, but not those in the Sacramento APR. Therefore, the sales expectation
19 for Chevrolet vehicles cannot be uniformly applied across the state. (Exh. P-185-43-47; RT Vol. VII,
20 27:23-32:11) The clustering cannot be explained by dealer performance either because if dealer
21 performance was causing the variation, it would appear more random; there is no reason all of the strong
22 Chevrolet dealers would decide to locate in the Central Valley, and all of the weak dealers would choose
23 to locate in northern California. (RT Vol. VII, 31:13-32:5)

24 101. To discern more closely whether the market variation that appears as the clustering of
25 certain counties is based on a variable other than market segment, Mr. Stockton utilized regression
26 analysis, which is a common statistical analytical technique that allows the effect of multiple variables to
27 be considered at once. (RT Vol. VII, 32:12-35:14) Mr. Stockton used regression analysis on a census
28 tract by census tract basis, comparing for a select five-county area surrounding Folsom Chevrolet to those

outside of that area.³⁶ The regression analysis indicates a) the market share component of RSI fails to take into account meaningful differences in market areas, and b) that even after taking these differences into account, the Folsom area is statistically different in terms of its acceptance of the Chevrolet brand. The factors that correlate with Chevrolet's market share elsewhere in California are different than those in the five-county area. (Exh. P-185-8 ¶ 30; RT Vol VII, 33:23-35:14) Mr. Stockton concluded that General Motors is incorrectly attributing sales performance to failure by Folsom Chevrolet to variations within its control, when it is due to factors outside Folsom Chevrolet's control.

102. Controlling for the demographic variables of age, median household income, education level (25 years or older with at least a 4-year degree), and population density and whether the dealership is in the five-county area versus the state as a whole, results in a reduction of Folsom Chevrolet's RSI requirement for 2016 by approximately 30 percent, from 1,324 expected sales to 940.³⁷ (Exh. P-185-48-50)

• Actual registrations	779
• Registrations at California Average	1,333
• Registration Effectiveness	58.44%
• Registrations at California Average After Demographic Adjustment	940
• Registration Effectiveness After Demographic Adjustment	82.87%

(RT Vol. VII, 34:25-36:16, Exh. P-185-48)

103. General Motors' counter to Mr. Stockton's regression analysis was to take each variable in isolation and review the performance to see if it showed significant deviations with respect to RSI. Mr. Farhat, Respondent's expert, considered 10 of the most similar dealerships in California on each selected

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³⁶ Mr. Stockton's five-county area includes a total of nine Chevrolet dealerships, including Folsom Chevrolet. The five counties are those in the Sacramento APR: Sacramento, Amador, El Dorado, Placer and Yolo. (RT Vol. V, 102:6-9, Vol. VII, 32:12-35:14; Exh. R-246.021, P-185-48-50) Sutter County was in the APR in 2010, but is no longer. (Exhs. R-204.002, R-206.002, R-208.002)

³⁷ Folsom Chevrolet's expected sales were 1,324 for 2016; 940 is a reduction of 29 percent in expected sales. Folsom Chevrolet had retail sales of 738 in 2016, which would have resulted in an RSI of 78.5. (Exh. R-290, p. 2; RT Vol. X, 65:8-19)

variable,³⁸ and then concluded that the variable was not the sole cause of Folsom Chevrolet's deficient RSI score. (RT Vol. VI, 76:17-77:19; Vol. V, 99:25-105:12; Exhs. R-246.006-.007 ¶ 17; R-246.017-.020) Such is the case according to Mr. Farhat, because dealerships that were similar with respect to the one selected variable had a higher average RSI score than Folsom Chevrolet. (RT Vol. VII, 76:17-77:20; Vol. V, 99:25-105:12; Exh. R-246.017-.020) Mr. Farhat explained that the average RSI for most of the dealers in those review groups was about 100, and Folsom Chevrolet's was much lower. For example, when the demographic variable of education is used, the other 10 dealers with similar education percentages achieve 101 percent and Folsom achieved 57. (RT Vol. V, 102:10-24; Vol. VII, 78:2-17)

104. Mr. Farhat, in his rebuttal report, in order to take into account differences in Chevrolet's brand acceptance, analyzed sales effectiveness in the five-county area as a benchmark and admitted that a "local area benchmark standard directly addresses concerns regarding brand acceptance." (Exh. R-246.004) The result was that Folsom Chevrolet's RSI rose, although still the lowest of the five dealers in the APR; for 2015 through June 2016 Folsom Chevrolet's RSI was 73.3 and 74.4, respectively. (Exh. R-246.014) In a further analysis, Mr. Farhat applied Mr. Stockton's demographic model for the five-county census tracts for the entire year of 2016 to all of the Sacramento dealers and sales expectations decreased and the overall performance (RSI) on average for all dealers improved by 30 points. Under this scenario, Folsom Chevrolet's RSI was 78.5, higher than Kuni Chevrolet's RSI of 75.8 and ranked fourth out of five dealers. (Exh. R-290, p. 2; RT Vol. X, 67:12-68:17)

Sales Performance Review (SPRs)

105. The sales performance evaluation categories are defined in General Motors' Sales Performance Review Reports cover letter. (RT Vol. I, 76:8-19; Exhs. R-242A.001, R-242B.001, R-242C.001, R-242D.001, R-242E.001) This process of review is provided for in Article 9 of the Dealer Agreement, which provides that the "[d]ealer's sales performance will be rated as provided in the General Motors Sales Evaluation process." (Exh. R-201.017) The sales performance review excludes sales and registrations sold to and registered by national fleet accounts.

106. General Motors' sales performance categories are:

³⁸The variables are median age, median household income (in \$1,000), percent of population (25 years or older) with at least a 4-year degree, and population density. (Exhs. P-185-8, P-185-50; RT Vol. VII, 35:15-20)

- Superior, which is when a dealer is 100 RSI or greater and in the top 15 percent of dealers in the state;
- Satisfactory, which is when a dealer is 100 RSI or greater, but not in the top 15 percent of dealers in the state;
- Needs Improvement, which is 85.0 to 99.9 RSI;
- Needs Significant Improvement which is 84.9 RSI or lower, but not in the bottom 15 percent of dealers in the state; and
- Unsatisfactory, which is 84.9 RSI or less and in the bottom 15 percent of dealers in the state.

(Exh. R-242A.001; RT Vol. I, 76:12-19)

107. While the terms of the Dealer Agreement provide that satisfactory performance of the dealer's sales obligations under Article 5.1 requires a dealer to achieve a Retail Sales Index of equal or greater than 100, for a dealer to be deemed unsatisfactory by General Motors and be subject to potential termination, the dealer needs to be below 84.9 RSI and in the bottom 15 percent of dealers in the state. (RT Vol. I, 223:24-224:5; 227:18-23; Vol. IV, 47:16-49:3) A dealer's state ranking, according to General Motors, is the critical factor determining whether it is put on an improvement plan and subject to potential termination (bottom 15 percent). (RT Vol. I, 223:24-224:5; 227:18-23; RT Vol. IV, 48:22-25, 49:1-3)

108. General Motors sent Folsom Chevrolet a letter dated March 15, 2013, providing Folsom Chevrolet with its sales performance for January 2012 through December 2012. This was in accordance with Article 9 of the Dealer Agreement, which requires that the report be provided at least annually. The dealer could also access the reports with the same information quarterly on DART (Dealer Analysis Reporting Tool.) (Exh. R-242A) For each category, Chevrolet car, truck and car/truck combined, Folsom Chevrolet's rating was "Unsatisfactory," meaning they were below 84.9 RSI and in the bottom 15 percent of dealers in the state. Folsom Chevrolet's combined ranking for 2012 was 123 out of 135 Chevrolet dealers. (Exh. R-242A)

109. General Motors sent Folsom Chevrolet a letter dated March 20, 2014, providing it with its sales performance for January 2013 through December 2013. For each category, Chevrolet car, truck and

car/truck combined, Folsom Chevrolet's rating was "Unsatisfactory," meaning they were below 84.9 RSI and in the bottom 15 percent of dealers in the state. Folsom Chevrolet's combined RSI score was 40.93 with a ranking for 2013 of 129 out of 133 Chevrolet dealers. (Exh. R-242B.001-.002)

110. In June 2014, after advising Folsom Chevrolet that it was not selling the number of new vehicles at retail that General Motors' RSI metric indicated it should be selling, General Motors placed Folsom Chevrolet on a performance improvement plan. This primarily involved quarterly reviews with Chevrolet representatives. (RT Vol. VI, 194:14-195:18) As part of that process, Folsom Chevrolet created business plans with the assistance of Chevrolet's District Sales Representative, Saul Escalante, and Zone Manager, Michael Stinson. (RT Vol. VI, 197:5-24) General Motors wanted the business plans and the quarterly review process to result in Folsom Chevrolet meeting 100 percent of the RSI metric and increase its CSI scores. (RT Vol. VI, 199:3-19, 210:18-23)

111. Folsom Chevrolet was receptive to the suggestions given by General Motors and made some efforts to implement them during the quarterly review process. (RT Vol. VI, 218:15-21) General Motors advised Folsom Chevrolet to re-establish a BDC³⁹ with a dedicated staff. (RT Vol. VI, 199:20-201:4, Exh. R-233.002) The purpose of the BDC is to generate leads for the sales department by making phone calls and appointments with potential buyers and other outreach; it is an indicator for potential future sales. (RT Vol. II, 378:3-21; Vol. VI, 199:20-201:4) During the downturn, these kinds of duties had fallen to the sales people themselves, who were supervised by the sales manager to ensure they were making those efforts. (RT Vol. VI, 201:4-202:1) Folsom Chevrolet had some success in implementing a fully functioning BDC (in September 2014 "BDC implementation process 85 percent complete"), but had difficulties getting a Business Development Manager ("BDM") during the cure period. (Exhs. P-127-2, P-129-2; R-254; RT Vol. II, 374:2-9, 376:3-14, 379:1-380:20) A BDM holds the sales consultants accountable for setting appointments and verifying appointments, and the BDM confirms appointments. (RT Vol. II, 379:1-25) Folsom Chevrolet did implement the suggestion that it formalize its efforts to have someone in the sales department contact consumers who were bringing in vehicles for service, in order to encourage them to buy a new vehicle. Folsom Chevrolet also hired a new advertising agency to develop

³⁹ See Footnote 11.

1 cable and radio campaigns. (Exh. P-127-2; RT Vol. VI, 203:2-204:3)

2 112. During the performance improvement plan process, Folsom Chevrolet further increased its
3 advertising spending which was already above average for the state. (RT Vol. VI, 204:4-207:20; Exhs. R-
4 233, P-146) The additional spending was focused on truck sales which made up the vast majority of the
5 vehicles sold, and a higher proportion of the spending was directed at Internet advertising. (RT Vol. VI,
6 204:4-207:20; Exh. P-146) The average spend for a Chevrolet dealer in California for advertising was
7 about \$777 per unit, and Folsom was at about \$1,400. (RT Vol. VI, 208:2-22)

8 113. During the time Folsom Chevrolet was on the performance improvement plan, it was in
9 the midst of the \$900,000 General Motors directed remodel, and Marshal Crossan became aware of
10 several customers being confused by the lack of signage who ended up going to the GMC dealership
11 across the street and purchasing GMC trucks. (RT Vol. VI, 226:21-228:18; Exh. R-226) The entire front
12 nameplate board area (fascia) of the Folsom Chevrolet building was torn up to erect the Chevrolet iconic
13 blue arch, and people had to walk into the dealership through the service department. (RT Vol. VIII,
14 75:25-77:6) This was recounted to General Motors in correspondence, in which Folsom Chevrolet again
15 raised its objections regarding the enlargement of its AGSSA. (RT Vol. VI, 226:21-228:18; Exh. R-226)

16 114. By the second quarterly review meeting in September 2014, Folsom Chevrolet had
17 increased its CSI scores with correspondence memorializing the meeting, stating that “dealer is now
18 above a combined blended score of 185.7.” (Exh. P-127-2; RT Vol. VI, 213:3-214:1) The RSI score of
19 the dealership also increased to 45.5 for the first quarter of 2015. (Exhs. P-132-2, R-229)

20 **Customer Satisfaction Index**

21 115. The terms of the franchise do not require that Folsom Chevrolet be above average with
22 respect to CSI scores to be in compliance. The Dealer Agreement provides only that “Dealer ... agrees to
23 conduct operations to promote customer satisfaction ... General Motors will provide Dealer with a
24 written report at least annually pursuant to procedures then in effect evaluating Dealer’s purchase and
25 delivery customer satisfaction and Dealer’s service customer satisfaction. The report will compare
26 Dealer’s performance to other same Line-Make dealers in the Region.” (Exh. R-201.011, § 5.3)

27 116. Mr. Stinson, the Zone Manager, testified that the “most pivotal question is were you [the
28 customer] completely satisfied ... because retention within the customer base is so critical, that we want

every customer to be completely satisfied” (RT Vol. I, 103:19-22; Vol. VII, 82:23-83:12; Exh. R-268.001)

117. For the calendar year of 2015, the same year as the cure period, Folsom Chevrolet’s score for the Purchase and Delivery Satisfaction or PDS was 80.7 and the regional average was 86.4. (RT Vol. VII, 84:13-85:12; Exh. P-185-68) Both Folsom Chevrolet’s score and the regional average for the Purchase and Delivery Survey fall between the response of “completely satisfied” and “very satisfied.” (RT Vol. VII, 84:13-85:12, Exh. P-185-83)

118. For the Service Satisfaction Survey or SSS Score in 2015, Folsom Chevrolet’s score of 81.0 was almost five points above the regional average of 75.7, again falling between “completely satisfied” and “very satisfied.” (RT Vol. VII, 84:13-85:12; Exh. P-185-84) For 2011 through 2016, Folsom Chevrolet’s SSS score was above the regional score, except for 2014.⁴⁰ (Exh. P-185-84)

119. Mr. Kaestner testified that since his arrival in May 2017, Folsom Chevrolet’s CSI scores have not been below any General Motors standard – their CSI scores have been compliant. (RT Vol. X, 18:4-22)

Fleet Sales

120. The words “consumer” and “customer” are used frequently in the Dealer Agreement, but neither is defined. The word “consumer” is not limited to a fleet or retail purchaser. (RT Vol. II, 460:3-14) A fleet purchaser is considered a “consumer.” (RT Vol. I, 82:13-19) The Dealer Agreement authorizes the dealer to sell fleet. (Exh. R-201.062-.069; RT Vol. I, 83:6-16)

121. General Motors’ RSI does not take into account fleet sales. (RT Vol. I, 82:2-4)

122. To be considered a fleet sale by General Motors, the customer (usually a business or corporation) has to buy five or more vehicles in a given calendar year or be a business that owns at least 15 vehicles. (RT Vol. I, 82:17-20) A fleet customer can come from anywhere in the country. (RT Vol. I, 86:8-10) The latter will be given a FAN and are afforded special pricing, special incentive packages and extended warranties. (RT Vol. II, 328:15-19; see Footnote 20)

123. There are three kinds of fleet sales: 1) dealer fleet, which is small-to-medium sized

⁴⁰ The anomalous low SSS score in 2014 of 65.4 could be partly attributable to the construction at Folsom Chevrolet which went through at least March of 2014. (RT Vol. IX, 33:1-12)

1 companies, like a construction company; 2) the Competitive Assistance Program or CAP which is larger
2 more regional-or-national sized companies (e.g., Pacific Gas and Electric or AT&T), and 3) government
3 fleet. (RT Vol. II, 329:7-25) Dealer fleet departments have monthly sales objectives for dealer fleet sales.
4 (RT Vol. II, 330:22-25)

5 124. There is also another type of sales to businesses (retail small business) that do not buy
6 enough vehicles (1-4) to qualify for a FAN, often called “fleetail.” That delivery type is identified as
7 type 018. (RT Vol. II, 330:3-15) These sales are identified as retail, but it is a sale to a commercial
8 customer. (RT Vol. IX, 172:21-173; Vol. II, 330:16-21, 346:5-14)

9 125. Folsom Chevrolet has a mix of all the types of sales to businesses. (RT Vol. II, 331:23-
10 332:1)

11 126. General Motors’ system is set up so that the dealer generally places an order for the fleet
12 customer. (RT Vol. I, 147:15-25) Fleet orders are viewed as sold orders, and therefore, on a weekly basis
13 a preference is given for those units, and there is a priority to get those built. (RT Vol. I, 153:5-6)

14 127. Fleet orders have better pricing because they come without advertising and holdbacks and
15 receive start-of-production pricing, so depending how late in the year the order is placed, there could be
16 savings. (RT Vol. II, 342:9-21)

17 128. The time for retail and fleet deliveries is essentially the same: 6-to-8 weeks, except
18 Chevrolet Silverado trucks, which are approximately 8-to-10 weeks. (RT Vol. I, 148:22-25; 152:18-23;
19 Vol. II, 350:2-5) According to General Motors, a problem arises when the retail customer does not have
20 the product to look at if retail stock is used to fulfill fleet orders. This can have, in General Motors’
21 opinion, a negative impact on a dealer’s retail sales rate numbers. (RT Vol. I, 153:8-16)

22 129. The Folsom Chevrolet Fleet Manager, Rene Schoonbrood, came to Folsom Chevrolet in
23 2009, having accumulated over the years his “own book of business,” i.e., clients for whom he knows
24 their business, what they need and what they are looking for. (RT Vol. IX, 184:6-10, 20-25) According to
25 Paul Ryan, District Manager Commercial for General Motors, whose district includes Folsom Chevrolet,
26 Mr. Schoonbrood is an experienced salesperson who orders or finds work- or business-related vehicles,
27 provides equipment the business customer may need, and delivers the vehicle and the equipment to the
28 customer in a timely manner, at the right price. (RT Vol. II, 333:8-14; Exh. P-133-8)

1 130. General Motors provides incentives to dealers for fleet sales. (RT Vol. IX, 195:4-23)
2 Folsom Chevrolet was number 19 in the country for General Motors for fleet sales in 2015. (RT Vol. IX,
3 195:24-196:5) This was due in part to a large fleet sale of approximately 500 units to Solar City that
4 occurred as a result of a referral by representatives of General Motors. (RT Vol. VI, 233:21-237:18; Vol.
5 VIII, 199:21-200:3)

6 131. Folsom Chevrolet “crisscrossed” their inventory, which means that instead of using the
7 General Motors fleet ordering process, they frequently allowed a fleet customer to buy vehicles from
8 their existing inventory. (RT Vol. IX, 61:2-15, 189:4-25, 206:1-25) This process is not prohibited by
9 General Motors; there is no express rule against doing so. (RT Vol. II, 333:24-334:2) It is “highly not
10 recommended” according to Mr. Stinson, Chevrolet’s Zone Manager, but he could not identify who did
11 not recommend it, or any specificity as to where or how the dealer is so advised. (RT Vol. II, 287:9-14,
12 289:19-290:2)

13 132. General Motors’ allocation process is based upon 1) each dealer’s most recent retail sales
14 and 2) the calculated days’ supply of vehicles on the ground and in-process. (Exh. R-230.002; RT Vol. II,
15 288:5-9) (See discussion on allocation process below.) The sale by Folsom Chevrolet of a vehicle from
16 its inventory as a “fleet” vehicle resulted in its inventory becoming “unbalanced.” This was because its
17 days’ supply was reduced by the sale but it did not get credit for a retail sale as it was required to be
18 reported as a fleet sale. The result was that Folsom Chevrolet was “not earning enough product” to
19 replenish its inventory.⁴¹ (RT Vol. II, 287:15-289:1, 290:3-7, 292:15-293:16)

20 133. Folsom Chevrolet sells 25 to 30 fleet units per month or 300-400 per year on average.
21 Ninety percent of Folsom Chevrolet’s fleet sales come from the dealership’s retail stock or inventory.⁴²
22 (RT Vol. IX, 207:8-25, 208:15-19) If Folsom Chevrolet does not have in its inventory what the fleet
23 customer wants, Folsom Chevrolet trades with another dealer. (RT Vol. VIII, 60:1-6; Vol. IX, 206:4-
24 207:7) The majority of the time the fleet department wanted to make a trade out of retail stock, it was
25

26 ⁴¹ General Motors maintains a process where dealers are required to report a retail or fleet sale called retail delivery reporting.
27 (RT Vol. II, 292:3-293:20)

28 ⁴² Mr. Meier, Regional Director for Chevrolet’s Western Region, testified that “generally speaking, that was a situation
whereby the manager of the fleet operation was frequently engaging in a process of using retail stock to satisfy fleet demand.”
(RT Vol. IV, 34:15-20)

permitted to do so by the dealership and neither Marshal Crossan nor Larry Crossan requested a change to this procedure over the last five years. (RT Vol. IX, 209:6-22) When inventory got to certain levels, Marshal Crossan stopped sales from retail and would not approve the trade. (RT Vol. VIII, 60:22-61:17)

134. A dealer can stock “fleet units” in their inventory that are invoiced as retail by General Motors. (RT Vol. II, 392:3-8; 393:13-20) Dealers can order inventory that is more fleet-like with less features and benefits than what a retail customer would look for, such as more likely to be white and “stripped down.” (RT Vol. II, 394:14-395:2)

135. The charts below indicate the proportion of Retail Units to Fleet Units in Folsom Chevrolet’s inventory for 2014-2016. In 2015, the percentage of fleet ranged from 26 percent to 76 percent of inventory and for six of the 12 months, Folsom Chevrolet’s fleet inventory was 50 percent or greater of overall inventory.⁴³ (Exhs. R-264; P-112-1) Other dealers in the Business Elite Program would typically have from seven to nine percent of their inventory as these “fleet type” units. (RT Vol. II, 394:8-13)

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⁴³ The chart includes some vehicles which were true fleet orders for 2015 -- such as the 500 vehicles sold to Solar City and 140 sold to Ventura County in 2016. (Exh. R-264; RT Vol. VI, 233:21-241:17; Vol. II, 392:9-10)

2014	Jan	Feb	March	Apr	May	June	July	Aug	Sept	Oct	Nov	Dec
Retail Units	133	161	175	147	143	138	143	185	262	304	243	219
Fleet Units	121	91	87	106	114	112	109	105	121	97	140	119
Total NCI ⁴⁴	254	252	262	253	257	250	252	290	383	401	383	338
% Fleet	48%	36%	33%	42%	44%	45%	43%	36%	32%	24%	37%	35%

2015	Jan	Feb	March	Apr	May	June	July	Aug	Sept	Oct	Nov	Dec
Retail Units	236	244	208	170	130	96	113	225	215	189	107	119
Fleet Units	85	92	73	205	71	297	179	137	241	152	170	145
Total NCI	321	336	281	375	201	393	292	362	456	341	277	264
% Fleet	26%	27%	26%	55%	35%	76%	61%	38%	53%	45%	61%	55%

2016	Jan	Feb	March	Apr	May	June	July	Aug	Sept	Oct	Nov	Dec
Retail Units	160	182	176	180	158	158	143	197	229	304	285	257
Fleet Units	97	84	88	76	95	107	159	154	167	151	157	130
Total NCI	257	266	264	256	253	265	302	351	396	455	442	387
% Fleet	38%	32%	33%	30%	38%	40%	53%	44%	42%	33%	36%	34%

(Exhs. R-264; P-112-1)

136. Mr. Escalante testified that Mr. Schoonbrood informed him “that part of the successful fleet operation that Folsom [Chevrolet] has is that fleets will pay a premium to have the unit readily available as opposed to just waiting for the fleet unit to be ordered.” (RT Vol. II, 396:24-397:10) Folsom Chevrolet’s fleet gross profits often exceed its retail gross profits, both per unit and as a whole, which is “uncommon.” (RT Vol. VII, 117:9-118:10, 119:12-19) Folsom Chevrolet often sold more fleet units than retail units overall, another “uncommon” event. (*Id.*) A chart created by Mr. Stockton shows Folsom Chevrolet earned approximately \$3.6 million in gross profits from fleet sales from 2012 to 2016—more

⁴⁴ “NCI” is an acronym for new car inventory, which includes trucks.

1 than it made by selling retail vehicles. (Exh. P-185-80)

2 137. Fleet salespersons at Folsom Chevrolet, including Mr. Schoonbrood, had been primarily
3 compensated on commission, earning 30 percent⁴⁵ of the gross profit from the vehicles they sell, which is
4 even higher than that earned by retail salespeople. (RT Vol. IX, 78:13-79:4) When Larry Crossan was the
5 General Manager, he was also compensated by “a percentage of the gross” on the front end, including
6 fleet sales. (RT Vol. VIII, 40:4-10, 87:10-17)

7 138. Folsom Chevrolet decided to use much of its inventory in order to facilitate large numbers
8 of fleet sales and Folsom Chevrolet has been successful in facilitating those fleet sales. However,
9 Marshal Crossan acknowledged that the elite type fleet sales in particular were impacting his retail sales
10 performance. In a letter to General Motors dated July 14, 2015, Marshal Crossan stated that “[i]n a way
11 Folsom Chevrolet is a victim of its own success as an elite GM fleet sales dealership. Our fleet sales do
12 not count toward our objective, but if they did we would be sales effective. Further, our large number of
13 fleet sales diminishes our inventory levels and adversely impacts our ability to make additional retail
14 sales. While we appreciate that additional allocation made available to Folsom Chevrolet, with build
15 times and other constraints we consistently struggle to maintain the inventory necessary to achieve our
16 *retail* sales goals.” (Emphasis in original; Exh. R-226.002; RT Vol. VIII, 192:10-194:2) Marshal
17 Crossan testified that it should make little difference whether Folsom Chevrolet sells to a retail customer
18 or a fleet customer: “Folsom Chevrolet would do anything it could to put as many bow ties [Chevrolet’s
19 symbol] on the road as we could do that. And the differentiation of whether it’s a retail unit ... or the,
20 you know, commercial -- commercial fleet units that we were doing, or our regular big fleet account, it’s
21 all Chevrolet. ...” (RT Vol. VIII, 193:16-194:2)

22 139. Mr. Kaestner, Folsom Chevrolet’s General Manager since May 2017, testified that he has
23 not continued the previously routine practice of trading retail inventory to fill a fleet order. (RT Vol. X,
24 20:4-23:17) He does allow such a trade if Folsom Chevrolet has an abundance of inventory – over 90-100
25 days’ supply of inventory. (RT Vol. X, 22:9-23:17) Mr. Kaestner testified that “[t]he vehicles we have in
26 inventory are for retail sale.” (RT Vol. X, 20:10-11)

27
28 ⁴⁵ That number was changed to 20 percent as of January 1, 2018, to comply with a change in California law. (RT Vol. IX, 78:22-79:20)

1 **Inventory Issues**

2 140. General Motors utilizes a math-based formula to determine which dealers should be
3 allocated, or offered, vehicles during each upcoming production run. (RT Vol. III, 11:19-13:20) There are
4 several steps to this process.

5 **Phase 1: Consensus**

6 141. The first phase of allocation is the consensus process, wherein General Motors makes an
7 initial offer of vehicles to each dealership. (Exh. R-252; see Exh. R-278 (PowerPoint explanation of
8 process)) The first step is to calculate the Available Days' Supply ("ADS") for each dealership, which is
9 determined by dividing a dealership's total availability of product (i.e., units in stock or in transit to the
10 dealer) by its average daily sales rate over the past 90 days. (RT Vol. III, 11:19-13:20; Exh. R-278.001-2)
11 That number is then adjusted or equalized by travel time from the plant regardless of proximity to the
12 plant. (*Id.*)

13 142. General Motors then begins allocating vehicles to the dealers with the lowest ADS, one
14 unit at a time. (Exh. R-278.003-7; RT Vol. III, 26:21-28:17) After each unit is allocated, the receiving
15 dealer's ADS is recalculated, and the next-lowest ADS dealer (which may be the same one) receives the
16 next unit. (*Id.*) When all of the available units are allocated, the ADS of the dealer who received the final
17 unit becomes the "ADS Bar." (Exh. R-278.008) Any dealer with a starting ADS below the ADS Bar will
18 have received at least one unit; any dealer with a starting ADS above the ADS Bar will not. (RT Vol. III,
19 20:24-22:20) This first part of phase 1, called estimated shipments, is to equalize product availability
20 across the dealer network. (See Exh. R-278.009-.010 showing equalization up to the ADS Bar; RT Vol.
21 III, 28:24-30:17)

22 143. After dealerships are offered vehicles by General Motors, they next engage in consensus,
23 wherein the dealers choose whether to 1) accept all of the units offered; 2) accept some or none of the
24 units offered; or 3) accept the units offered and request more. (RT Vol. III, 30:25-32:16) This is a dealer
25 business decision based upon their existing inventory. (*Id.*) Any declined allocation units are placed back
26 into a pool, and re-allocated based on ADS to any dealer that requested additional vehicles. (*Id.*) This is
27 generally performed twice per month. (RT Vol. III, 32:17-21)

28 ///

1 Phase 2: Dealer Order Submission Process

2 144. Twice per month, after the consensus process is complete, each dealership receives a
3 document that describes its final allocation. (RT Vol. III, 49:16-51:1) The dealer then weekly has to place
4 orders for the specific vehicles it wants (trim package, color, etc.), a process known as the Dealer Order
5 Submission Process (“DOSP”). During DOSP the dealership has flexibility in how many vehicles it
6 takes, with the option to 1) order all of the units offered; 2) order some or none of the units offered; or 3)
7 order the units offered and request more. (*Id.*) Any declined units are re-allocated to those dealerships
8 that requested more units. (*Id.*)

9 145. Mr. Muiter, the Director of North America Order Fulfillment, testified that General
10 Motors allocated a sufficient number of units to Folsom Chevrolet. Mr. Muiter’s chart of sales
11 performance, vehicle availability, and lost allocation for Folsom Chevrolet for 2015 (Exhibit R-277), is
12 attached hereto as Attachment G. (RT Vol. III, 59:14-65:22; Exh. R- 277)

13 146. Certain models sell well, and certain models do not sell well. In many instances, clearing
14 out slow selling models by Folsom Chevrolet did not prompt General Motors to provide Folsom
15 Chevrolet with units that are high in demand; it just prompted General Motors to allocate more of the
16 slow-selling units. This occurred with the small sub-compact Spark, which is not a big seller in the
17 Folsom or greater Sacramento area. (RT Vol. VII, 213:24-215:20) Folsom Chevrolet sold 10, and
18 General Motors for the next month requested Folsom Chevrolet take multiples of that. (RT Vol. VII,
19 213:24-215:20) Mr. Muiter’s chart indicated that Folsom missed out on 21 Spark units because it did not
20 request additional vehicles over its allocation. (Exh. R-277)

21 147. There were other times where Folsom Chevrolet accepted its allocation of slow selling
22 vehicles, including the Chevrolet Malibu. (RT Vol. IX, 131:17-132:13) Despite Folsom Chevrolet pricing
23 these vehicles at a losing price point and marketing them to get them off the lot as loss leaders, several of
24 the units “had birthdays,” i.e., they were on Folsom Chevrolet’s lot for over a year. (RT Vol. IX, 131:17-
25 132:13) Mr. Muiter’s chart indicates that Folsom Chevrolet should have accepted 49 additional units of
26 Chevrolet Malibu vehicles in 2015. (Exh. R-277) So out of a total of 249 vehicles, General Motors
27 believes Folsom Chevrolet should have accepted or had the opportunity to request 70 more Spark and
28 Malibu vehicles. (*Id.*) For 2015, the Spark vehicle achieved only 5.25 percent of competitive registrations

1 in California and the Malibu achieved only 2.31 percent. In comparison, the Chevrolet Camaro was at
2 30.04 percent, the Suburban at 32.75 percent and the Silverado at 29.3 percent. (See Exh. P-185-126)

3 148. Although Folsom Chevrolet admittedly used a fair amount of its inventory for fleet sales,
4 receiving sufficient inventory from General Motors necessary to make the RSI sales requirement for
5 certain market segments was likewise an issue. Mr. Muiter's chart was presented to show that Folsom
6 Chevrolet had the ability to acquire the inventory it needed to meet 100 RSI. Column 13 of Exhibit R-277
7 shows what Folsom Chevrolet had the ability to take into inventory minus the sales expectation for a
8 particular vehicle model. The chart shows that General Motors did not allocate enough of the following
9 vehicles to Folsom Chevrolet for it to achieve 100 RSI: 20 Camaros; one Corvette; 34 Volt; 15 Colorado;
10 11 Suburban; and 14 Traverse. (Exh. R-277) The shortfall for 2015 was 95 fewer units than necessary to
11 hit RSI. (*Id.*)

12 149. General Motors expert Mr. Farhat concluded that based on average days' supply, Folsom
13 Chevrolet had adequate inventory to reach 100 RSI and Folsom Chevrolet's poor RSI score was not
14 caused by a lack of inventory.⁴⁶ Based on its sales rate, Folsom Chevrolet's inventory averaged 200 days
15 (more than six months' supply) for 2013 through 2015.⁴⁷ (Exhs. R-244-13 ¶ 40, R-244.079; RT Vol. V,
16 120:7-121:22; RT Vol. VII, 70:16-71:21) However, Protestant's expert Mr. Stockton, pointed out that
17 Mr. Farhat's analysis only compared the inventory Folsom Chevrolet had to actual sales, which does not
18 reflect whether Folsom Chevrolet had adequate inventory to sell more vehicles (i.e., achieve a higher
19 sales rate) or to reach 100 RSI. (RT Vol. VII, 71:1-15, 199:21-202:12) Mr. Farhat failed to evaluate
20 whether Folsom Chevrolet had enough inventory to support the sales rate needed to reach 100 RSI. (Exh.
21 P-186-6 ¶ 19; RT Vol. VII, 71:16-21, 199:21-202:12) Mr. Stockton prepared charts for 2013 through
22 2016 showing the additional sales needed by Folsom Chevrolet to reach a RSI of 100. For the year 2015,
23 Folsom Chevrolet needed to sell at retail 1,142 vehicles to reach 100 RSI. For this to occur, Mr. Farhat
24 would have needed to incorporate 531 more vehicles into Folsom Chevrolet's inventory to meet the level
25 of inventory required to support the sales rate needed to reach 100 RSI. Folsom Chevrolet sold 610 and
26 needed to reach 1,142. So Mr. Farhat's conclusion that Folsom Chevrolet had sufficient inventory only

27 ⁴⁶ A dealer earns product based off sales rate and days' supply. (RT Vol. II, 288:5-9)

28 ⁴⁷ According to Mr. Farhat, industry standards for days' supply is 60 to 90 days. (Exh. R-244-13 ¶ 40)

1 substantiated that they had enough vehicles to sell what they sold, but not enough to sell 531 more
2 vehicles. (Exh. P-186-15-18; RT Vol. VII, 70:16-72:1, Vol. VII, 199:21-205:8)

3 **2015 Notice to Cure**

4 150. General Motors sent Folsom Chevrolet a letter dated April 3, 2015, providing Folsom
5 Chevrolet with its sales performance for January 2014 through December 2014. For each category,
6 Chevrolet car, truck and car/truck combined Folsom Chevrolet's rating was "Unsatisfactory," meaning
7 they were below 84.9 RSI and in the bottom 15 percent of dealers in the state. Their combined ranking
8 for 2014 was 124 out of 128 Chevrolet dealers. (Exh. R-242C.002)

9 151. Although Folsom Chevrolet had improved CSI and RSI scores during the performance
10 improvement plan, General Motors gave formal notice of breach to Folsom Chevrolet dated May 19,
11 2015, asserting that Folsom Chevrolet had breached the terms of the franchise for failing to meet the RSI
12 and CSI requirements. (RT Vol. VI, 216:15-217:16; Exh. R-221.001) Folsom Chevrolet was given a six
13 month cure period (July 1, 2015 through December 31, 2015) "during which the dealer will have the
14 opportunity to correct the failure," i.e., meet its sales performance and customer satisfaction obligations.
15 (Exh. R- 221.002; RT Vol. VI, 219:11-221:20) General Motors also informed Folsom Chevrolet that it
16 would receive an additional allocation of 115 vehicles during the six month period. (RT Vol. VI, 222:4-
17 11; Exhs. R-221.002, R-222.002-.003)

18 152. The majority of the supplemental allocation arrived around mid-August 2015, having
19 taken "almost 2-1/2 months [from June 1, 2015] before [Folsom Chevrolet] got all that type of inventory
20 in." (RT Vol. VII, 229:22-230:11) Mr. Stinson described in a quarterly letter that the majority of the
21 supplemental allocation had arrived by the time of an August 18, 2015 meeting. (R-231.001-2; see R-
22 229.003) That timing also aligns with the dealership-produced "Retail v. Fleet" chart, which shows a
23 large increase in retail units in August 2015 (225) and September 2015 (215). (Exhs. R-264, R-254)
24 Folsom Chevrolet did not seek an extension of the cure period due to late arrival of the allocation or for
25 any other reason because Marshal Crossan basically thought it was futile to ask. (RT Vol. IX, 75:4-76:1)

26 153. Folsom Chevrolet implemented efforts to increase sales during the cure period. For
27 ///

28 ///

1 example, it offered 10 percent off MSRP⁴⁸ as its own discount on the most popular trucks, on top of
2 discounts General Motors offered from time to time. (RT Vol. VII, 218:20-221:24) This discounting was
3 coupled with an advertising push, which resulted in more sold vehicles. (RT Vol. VII, 222:6-225:5)
4 According to Drew Crossan, the promotion “[a]bsolutely” had an impact on sales, as well as a longer-
5 term effect of increasing the dealership’s sales rate, and therefore, its available inventory. (RT Vol. IX,
6 135:6-136:18) Marshal Crossan confirmed that the promotion worked as truck sales increased. (RT Vol.
7 VII, 221:20-223:1, 224:18-225:1)

8 154. As noted, during the cure period General Motors allocated an additional 115 units to
9 Folsom Chevrolet that included a large amount of trucks. The challenge then was when Folsom
10 Chevrolet decided to take 10 percent off MSRP, the supply diminished quickly but it took time to get
11 resupplied (45-to-60 days). (RT Vol. VII, 228:10-229:21)

12 155. Near the end of 2015, Folsom Chevrolet’s Dealer Agreement came due for renewal.
13 Folsom Chevrolet was in its cure period, but General Motors provided it with the opportunity to renew its
14 Dealer Agreement. (Exh. R-232; RT Vol. I, 176:22-177:14) The renewal letter noted that “General
15 Motors is not waiving any rights [General Motors] may have for Dealer’s fail[ure] to satisfy its
16 obligations under the current or replacement Dealer Agreement.” (Exh. R-232) Folsom Chevrolet agreed
17 to renew its Dealer Agreement at that time. (Exh. R-201.001)

18 156. Folsom Chevrolet’s gross profit per retail vehicle sale was \$1,486 in 2015, but decreased
19 to a below average \$877 in 2016. (RT Vol. IX, 88:19-90:1; Exh. P-185-80)

20 157. Folsom Chevrolet in 2015 was expected to sell 1,142 Chevrolets (354 cars and 788 trucks)
21 to retail customers to equal state average. (Exh. R-244.033-.034) Folsom Chevrolet reported retail sales
22 of 652 units for a total sales variance of 490 units. (RT Vol. III, 60:22-61:2; Exh. R-277.002)

23 158. The “Cure Period” ended December 31, 2015, and Folsom Chevrolet achieved a RSI of
24 64.7, an increase of 20.3 points over its 2014 RSI of 44.4. (Exhs. R-238.002, R-221.001) For the calendar
25 year 2015, Folsom Chevrolet’s RSI was 57.1, and ranked 115 out of 131. For all calendar year periods
26 that General Motors recounts a RSI score in the notice of termination (2013-2015), General Motors
27

28 ⁴⁸ Manufacturers’ Suggested Retail Price.

1 includes Folsom Chevrolet's dealer rank in the state, with the exception of identifying Folsom
2 Chevrolet's rank during the cure period. (Exh. R-238) As noted earlier, the General Motors' sales
3 evaluation process includes dealers being "rated." A dealer's RSI of below 85 and state ranking in the
4 bottom 15 percent, according to General Motors, are the critical determining factors for a dealer being put
5 on an improvement plan and potentially triggering termination. (RT Vol. I, 223:24-224:5, 227:18-23)
6 This bottom 15 percent guideline or practice is in the cover letters to General Motors' Sales Performance
7 Review Reports and was testified to by General Motors' witnesses, in particular Mr. Meier, the person
8 who signed the notice of termination. (Exh. R-242A.001)

9 159. Folsom Chevrolet never received in writing its state ranking for that critical six month
10 cure period. General Motors is capable of providing rankings for less than a full year. (See Exh. R-242F
11 Folsom Chevrolet's ranking for the first quarter of 2017 and Paragraph 163) However, Exhibit
12 R-244.039, part of General Motors' expert's report, shows Folsom Chevrolet's ranking during the cure
13 period as 106 out of 131. The bottom 15 percent would have been a ranking of 111 out of 131 or lower.
14 At a rank of 106 out of 131, Folsom Chevrolet climbed out of that critical bottom 15 percent for the cure
15 period, and should have been rated as "Needs Significant Improvement," rather than "Unsatisfactory."⁴⁹

16 160. General Motors sent Folsom Chevrolet a letter dated March 23, 2016, providing it with its
17 sales performance for January 2015 through December 2015. For Chevrolet car, Folsom Chevrolet's
18 rating was "Needs Significant Improvement" and for Chevrolet truck and Chevrolet car/truck combined
19 Folsom Chevrolet's rating was "Unsatisfactory." Their combined ranking for 2015 was 115 out of 131
20 Chevrolet dealers. (Exh. R-242D) Thus, although Folsom Chevrolet satisfied the RSI requirement during
21 the cure period, it subsequently fell into the bottom 15 percent of the dealer ranking. However, General
22 Motors did not issue a notice pursuant to Article 13 of the Dealer Agreement, and did not give notice of
23 an opportunity to cure, with respect to this subsequent change in ranking. (Exh. R-201.022-.023)

24 161. Folsom Chevrolet was told it would be advised as to how well it had done during the cure
25

26 ⁴⁹As further confirmation that the ranking of 106 out of 131 should have given Folsom Chevrolet a rating of "Needs
27 Significant Improvement" for the cure period, Exhibit R-242D at page 242D.002 shows a RSI of 62.15 for car sales only for
28 Folsom Chevrolet for the year 2015 and a ranking of 110/131, with a dealer rating of "Needs Significant Improvement." (See
Exh. R-245.046; 64.7 percent, if maintained for an entire year, would have improved Folsom Chevrolet's ranking to 108 or
109/131.)

1 period by the end of the first quarter of 2016, but instead received correspondence that the results would
2 be forthcoming in June or July. (RT Vol. VII, 226:2-227:4) Folsom Chevrolet was finally provided with
3 the results nine months after the end of the cure period, in October of 2016. (*Id.*)

4 162. General Motors sent Folsom Chevrolet a letter dated March 30, 2017, providing it with its
5 sales performance for January 2016 through December 2016. For Chevrolet car, and car/truck combined
6 Folsom Chevrolet's rating was "Unsatisfactory;" for Chevrolet truck their rating was "Needs Significant
7 Improvement." Their combined ranking for 2016 was 113 out of 128 Chevrolet dealers. (Exh. R-242E)

8 163. General Motors sent Folsom Chevrolet a letter dated June 15, 2017, providing it with its
9 sales performance for January 2017 through March 2017. For Chevrolet car, and car/truck combined,
10 Folsom Chevrolet's rating was "Unsatisfactory;" but for Chevrolet truck their rating was "Needs
11 Significant Improvement," and their ranking was 110 out of 134. Their combined ranking for the first
12 quarter of 2017 was 119 out of 134 Chevrolet dealers. (Exh. R-242F.002)

13 **Notice of Termination**

14 164. On November 3, 2016, General Motors sent Folsom Chevrolet a Notice of Termination for
15 its Chevrolet franchise. (Exh. R-238; see Paragraph 2) The notice of termination stated that General
16 Motors deemed the increased RSI score of 64.7 during the cure period a breach of the terms of the
17 franchise, and considered the slightly below average CSI score compared to the region a breach as well.

18 **Findings Relating to the Amount of Business Transacted by the Franchisee,** 19 **as Compared to the Business Available to the Franchisee [§ 3061(a)]**

20 165. Folsom Chevrolet was optimally located within its former AGSSA. Folsom Chevrolet is
21 located relatively close to several Chevrolet competitors, and post-Old GM's bankruptcy, is not centrally
22 located within its current AGSSA. Although the western part of its AGSSA is the most populous part of
23 its AGSSA, it is also the area where Folsom Chevrolet has little advantage over the four nearby
24 competing Chevrolet dealers and no advantage over the General Motors dealer that is located across the
25 street in the same mall as Folsom Chevrolet and selling the sibling line make of nearly identical GMC
26 trucks. General Motors increased the number of census tracts in Folsom Chevrolet's AGSSA by more
27 than double (32 to 72) from 2010 to 2014, and the majority of the area "inherited" by Folsom Chevrolet
28 comprised geography where the prior terminated dealers had not been selling many Chevrolets.

1 166. The new additions to Folsom Chevrolet’s AGSSA resulted in two problems with regard to
2 the requirement to meet 100 of its assigned RSI: 1) Folsom Chevrolet had to increase penetration in areas
3 in which the two prior Chevrolet dealers had been terminated for low Chevrolet registrations and, 2) The
4 additions to Folsom Chevrolet’s AGSSA were at a greater distance from its location which resulted in the
5 so-called “geographic sales and service advantage” being flawed.⁵⁰

6 167. In addition to the GMC truck dealer across the street from Folsom Chevrolet, there also
7 remained a Buick GMC truck dealer in Placerville, which was competition to the east of Folsom
8 Chevrolet in the inherited portion of the new AGSSA. As stated, GMC trucks are essentially the same as
9 Chevrolet trucks, with the differences largely being limited to branding and cosmetic variances.

10 168. RSI makes no allowance for the size of the AGSSA and the distance of registrations from
11 the dealership. Analysis by both experts showed that the greater the distance of the dealership from a
12 registration, the less likely the dealership is to capture a sales opportunity. (Exh. R-244.078; RT Vol. VII,
13 48:25-50:3; Vol. V, 117:16-119:14) Mr. Farhat, General Motors’ expert, looked at a composite of the
14 other four Sacramento dealers and the percent of sales captured based on proximity from each dealership
15 by miles and compared it to what Folsom Chevrolet was capturing from its dealership at the same
16 distance. Within two mile “rings” of each dealership, the other four dealers were capturing 39.2 percent
17 and Folsom Chevrolet was capturing only 19 percent; within a two to four mile ring, Folsom Chevrolet
18 captured 21 percent compared to the other’s 34.7 percent. For every increase in distance from each
19 dealership, Folsom Chevrolet captured less than the average of the other four. (RT Vol. V, 118:4-120:6)
20 Mr. Farhat’s conclusion from this analysis is that Folsom Chevrolet was not effectively capturing its sales
21 opportunity, and additionally, that the analysis confirmed the reasonableness of the RSI and “did its job
22 in identifying an ineffective dealer. ...” (RT Vol. V, 119:15-120:6)

23 169. Mr. Farhat’s sales effectiveness by distance analysis showed that the other four dealers in
24 the Sacramento APR, which are meeting close to the 100 RSI standard at an average of 97, capture only
25 8.5 percent of Chevrolet registrations that are between a distance of 12 and 14 miles from their
26 _____

27 ⁵⁰ Folsom Chevrolet made sales in those census tracts in the years before being assigned those tracts and had advertised on the
28 radio and some TV within a 25-35 mile radius. (RT Vol. VI, 170:11-171:2) However, that is not the same as having the area
added to your AGSSA and having to meet RSI based on the registrations in the area.

dealership, and 7.5 percent of those between 14-16 miles away. (Exh. R-244.078) In Folsom Chevrolet's expanded AGSSA, the next closest population center on Highway 50, Shingle Springs, is over 15 miles from Folsom Chevrolet. At 15 miles, using Mr. Farhat's data of what the other four dealers were achieving at that distance, Mr. Stockton found in his "ring analysis" that Folsom Chevrolet can only expect to capture 7.5 percent of the registrations there. (Exh. P-186-6, 14) If the same effectiveness by distance of the other four dealers in the Sacramento APR were applied to Folsom Chevrolet's AGSSA for 2015, the result would have generated an RSI sales expectation of 617 units within 20 miles of the dealership, still some 525 sales short of their RSI sales expectation of 1,142 units. (RT Vol. VII, 49:4-52:24) Mr. Stockton attributed the ability of the other dealers in the Sacramento APR to be closer to 100 because their potential customers are closer to them than Folsom Chevrolet's potential customers are to it. (RT Vol. VII, 53:1-54:16) This would mean that Folsom Chevrolet's inability to capture many sales beyond 20 miles is not necessarily a "failure" by Folsom Chevrolet because most dealers capture only seven percent of the sales at that distance. The RSI metric is creating a sales opportunity expectation that is not based on reality. (RT Vol. VII, 53:1-21)

170. Al Giguere, Manager of Dealer Network Planning and Analysis for General Motors and the person responsible for Chevrolet dealers' geographies, testified concerning the December 2010 and January 2013 letters wherein General Motors issued the new APR/AGSSA Addenda. Where a dealer is located in a Multiple Dealer Area APR such as Folsom Chevrolet, the letter stated it was providing those dealers "with specific information regarding their current and proposed AGSSA." (Exhs. R-204, R-206; RT Vol. II, 457:25-458:17, RT Vol. III, 143:17-21, 148:10-153:19, 159:4-163:5) Both letters stated that the notice is provided pursuant to Article 4.2 of the Dealer Agreement (the first letter stated regarding the APR for your dealership, the second letter said regarding the APR and/or AGSSA for your dealership) and provided that if the dealer had any relevant information that they wanted General Motors to consider before making a final decision that such information had to be forwarded within 30 days. (Exhs. R-204.001, R-206.001) As noted above, Folsom Chevrolet did not provide any information or request any changes to General Motors on its APR/AGSSA territory within 30 days of either letter. (RT Vol. III, 153:3-5, 162:16-22) The letters clearly discuss both APR and AGSSA. Thus, although Article 4.2 mentions only APR, General Motors considers the AGSSA to be subsumed within the APR for purposes

of notice and objection.⁵¹

171. Article 4.2 of the Dealer Agreement states that General Motors has the “*sole discretion*” and exclusive right to revise the APR. Per the Dealer Agreement, General Motors “will *consider* any information Dealer submits,” but does not have to accept such information or objection. (Italics added.) Only if General Motors “determines that market conditions warrant a change” will a revised Notice of APR be issued. Thus, even if Folsom Chevrolet had timely objected to the change in its AGSSA, General Motors did not have to accept those requests to change the territory assigned to it as its AGSSA. Additionally, Folsom Chevrolet’s late objections were at least partially considered and rejected by General Motors, and thus General Motors waived any issue of failure to timely object. Moreover, Folsom Chevrolet’s request that some of those areas be kept as an “open point” was never answered, and apparently rejected without explanation. Further, the good cause factors in Section 3061 require the Board to take into account existing circumstances. Folsom Chevrolet’s current AGSSA is an “existing circumstance” and as such its history and any objections to its creation are properly considered by the Board as required by Section 3061.

172. The Dealer Agreement does not address “retail sales” exclusively. The Dealer Agreement clearly contemplated business, commercial, and fleet sales. Article 9 of the Dealer Agreement states: “[t]he success of General Motors and Dealer depends to a substantial degree on Dealer taking advantage of available sales opportunities.” (Exh. R-201.017; underline added.)

173. Folsom Chevrolet was knowingly operating outside of the desired structure of General Motors’ business model and its “suggested practices.” However, in determining the amount of business transacted by the dealership compared to business available, it is appropriate to consider the total new Chevrolet sales made by the dealer, which would include fleet sales, at least in the APR. Folsom Chevrolet is selling Chevrolet vehicles, whether to businesses or individuals, which is the ultimate goal

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⁵¹ The New York Court of Appeals in *Beck Chevrolet, Co. Inc. v General Motors, LLC* (2016) 27 NY3d 379, in a case similar to this one (see *infra*), noted that a change to a dealer’s AGSSA is a modification to the franchise agreement, and the fact that the Dealer Agreement did not “contain details about the AGSSA” but only referenced the APR did not remove the revision to the AGSSA from judicial review because “[t]he AGSSA is a subset of a dealer’s APR, which is specifically referenced in the dealer agreement.” (*Id.* at 396)

of both parties.⁵² Folsom Chevrolet did not assert that all of its fleet sales should be added to its other sales for purposes of this good cause factor. (RT Vol. VII, 88:12-89:22) General Motors' expert Mr. Farhat, in his rebuttal report, conservatively found that at least 15.1 percent of Folsom Chevrolet's fleet sales from 2013 through June 2016, which generally are not proximity sensitive, were registered in the Sacramento APR. (Exh. R- 246.007-.008, R 246.022, RT Vol. V, 88:8-89:12)^{53 54} The total fleet sales (cars and trucks) made by Folsom Chevrolet for each of those years is:⁵⁵

Year	Total Fleet Sales (cars and trucks)
2013	298
2014	489
2015	990
2016	517

(Exhs. R-243B.005, lines 22 and 43; R-243C.005, lines 22 and 43, R-243D.005, lines 22 and 43; 243E.005, lines 22 and 43) The total fleet sales for all of those four years is 2,294 and 15 percent is 344, divided by four equals 86 per year.⁵⁶

174. The total retail sales (cars and trucks) made by Folsom Chevrolet for 2013-2016 is:

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⁵² Mr. Giguere, Manager of Dealer Network Planning and Analysis for General Motors, noted that since RSI is based strictly on retail sales including fleet could have the effect of skewing the basis of comparison of the state expected sales. (RT Vol III, 130:20-134:3) However, here fleet sales are being considered not for RSI, but for determining the amount of business transacted compared to business available.

⁵³ Mr. Farhat's analysis did not determine where the vehicle was actually being used; for example all of the Solar City fleet vehicles (500) were registered in San Mateo County, so he did not include those in the 15 percent calculation. (RT Vol V, 195:3-25-197:2) Where a vehicle is registered may not be the same location as where the vehicle is used. (RT Vol. VII 88:15-17)

⁵⁴ Mr. Stockton opined that, for purposes of determining the amount of business transacted by the franchisee compared to business available, one could follow the logic of the RSI calculation. By taking Chevrolet's fleet market share in California and multiplying that by fleet vehicle registrations of all brands in Folsom's AGSSA, Mr. Stockton got a number of Chevrolet fleet units for each segment that were expected to be sold in Folsom Chevrolet's AGSSA for each applicable year. Mr. Stockton called this Total Sales Index or TSI. He did not advocate that TSI should be used in this case or that it was an appropriate performance measure. (Exh. P-185-67, RT Vol. VII 87:14-89:22, 112:7-11) However, Mr. Stockton's calculation of Folsom Chevrolet's sales effectiveness from the addition of these fleet sales numbers does not assist in determining the amount of business transacted by the dealership compared to business available.

⁵⁵ These yearly fleet sales numbers are consistent with what Rene Schoonbrood, Fleet Manager for Folsom Chevrolet, testified to as indicated in Paragraph 133, with the anomaly of the large number for 2015 attributable to the Solar City sale.

⁵⁶ Although Mr. Farhat's analysis only went through June 2016, all of the fleet sales are added for that year.

Year	Total Retail Sales (cars and trucks)
2013	370
2014	428
2015	652
2016	738

(Exhs. R-242B.002, R-242C.002, R-242D.002, R-242E.002)

175. Folsom Chevrolet's Sales to Equal State Average (expected sales) for 2013-2016 is:

Year	Sales to Equal State Average (expected sales)
2013	904
2014	963
2015	1,142
2016	1,324

(Exhs. R-242B.002, R-242C.002, R-242D.002, R-242E.002)

176. General Motors judged Folsom Chevrolet as not transacting as much business as was available to the dealership by using the RSI metric, but by not considering the fleet sales made in its APR, General Motors unfairly judged Folsom Chevrolet. When 86 sales are added to each of Folsom Chevrolet's retail sales by year it shows that Folsom Chevrolet transacted much more business compared to business available than General Motors gave it credit for and not an inadequate amount.

Year	Retail Sales Plus 86 Fleets Vehicle Sales
2013	456
2014	514
2015	738
2016	824

177. Additionally, General Motors encouraged Folsom Chevrolet to transact Business Elite and fleet sales even referring a very large fleet sale to them during the cure period, and rewarding Folsom Chevrolet for its fleet sales. The California Vehicle Code defines retail sale as a sale of goods to a

1 “person,” which is defined in the Vehicle Code to include businesses of all types, for the purpose of
2 consumption and use. Section 3061(a) requires the Board consider the amount of business transacted by
3 the franchisee compared to the business available. In doing so, it is appropriate to consider Folsom
4 Chevrolet’s fleet sales for at least the following reasons:

- 5 • The Dealer Agreement (franchise), written by General Motors, does not define “retail
6 sale;”
- 7 • The Vehicle Code does not limit “retail sale” to individuals or smaller businesses; and,
- 8 • The Addenda to the Dealer Agreement refers to “fleet sales.”

9 Although it may not be appropriate to give great weight to the fleet sales registered outside of the
10 Sacramento APR, the evidence shows, and General Motors admits, there was a substantial amount of
11 fleet sales by Folsom Chevrolet from 2011 through 2016.

12 178. Consideration of the “amount of business transacted by the franchisee, as compared to the
13 business available to the franchisee” is part of the burden of proof assigned to General Motors. As it has
14 been concluded in this case that “sales” includes both retail and fleet, General Motors did not meet its
15 burden of proving that the “amount of business transacted” by Folsom Chevrolet, “compared to the
16 business available” to it was inadequate. Thus, this factor weighs in Protestant’s favor and against
17 termination.

18 **Findings Relating to the Investment Necessarily Made and Obligations Incurred**
19 **by the Franchisee to Perform its Part of the Franchise [§ 3061(b)]**

20 179. The original investment paid by Marshal Crossan from his own funds was \$250,000, as
21 reflected on the financial statement. (RT Vol. VI, 12:11-14:5; Exh. P-184-3) Motors Holding Corporation
22 paid in \$750,000 and the agreement was structured so that a certain amount of profit made by Marshal
23 Crossan would be used to gradually buy-out Motors Holding Corporation. (RT Vol. VI, 107:5-108:13)
24 Marshal Crossan completed the buy-out and is now the sole owner of the franchisee. The dealership’s
25 equipment was purchased at a cost of \$1,010,264. Folsom Chevrolet is a very profitable business and
26 operates with a \$1.643 million net working capital, which is above the minimum required by General
27 Motors. (Exh. P-103-4-5; RT Vol. VI, 156:13-158:1)

28 180. The property at the current location of Folsom Chevrolet was purchased by Marshal

1 Crossan at a cost of approximately \$4 million with the title held by the Marshal Crossan Trust. The
2 property is leased to Argonaut (a subsidiary of General Motors) and sub-leased to Folsom Chevrolet.
3 Additional property used as a storage lot was purchased by Marshall Crossan at a cost of \$3.9 million.
4 (See Paragraph 189; RT Vol. VI, 15:17-16:18)

5 181. General Motors contends that Folsom Chevrolet's investment is equal to its net worth
6 (assets reported over its liabilities) as reflected on the financial statement, which is approximately \$3.6
7 million dollars. (RT Vol. IV, 135:11-137:5) Of that \$3.6 million dollar amount some "significant
8 portion" of it (\$2.370 million from 2009-2016) came from Essential Brand Elements ("EBE") incentive
9 payments to Folsom Chevrolet from General Motors to incentivize dealership remodeling. Since the
10 source of the investment is from General Motors (less the \$900,000 Folsom Chevrolet spent to remodel)
11 and not from operating activities or selling cars, General Motors contends the EBE funds should not be
12 considered investment by Folsom Chevrolet and thus not part of its net worth. (RT Vol. IV, 159:22-
13 163:23) However, once the money is earned by Folsom Chevrolet it is part of its net worth. There is no
14 evidence that the money was not reinvested into the dealership operations by way of further
15 improvements to keep the facility modern or to add to equipment. If General Motors did not want
16 dealerships to keep the extra EBE money or be required to use it in a certain manner, they could have set
17 the rules that way, but they did not. It is not reasonable to conclude that the EBE funds should be
18 deducted from Folsom Chevrolet's net worth figure.

19 182. Folsom Chevrolet's current contingent liabilities including finance, insurance and service
20 contract chargebacks are estimated at \$89,000. (Exh. P-184-4; RT Vol. VI, 23:9-24:15, 66:12-67:2) A
21 long-term liability (obligation) is Folsom Chevrolet's lease with a computer vendor of 60-61 months
22 remaining on the lease as of the summer of 2017 at a cost of approximately \$6,000-\$7,000 per month.
23 (Exh. P-184-4; RT Vol. VI, 24:18-25:14, 67:11-25) Folsom Chevrolet, as of 2016, had an inventory
24 credit line ("floor plan") of over \$20 million, which Marshal Crossan personally guaranteed. (Exh. P-116;
25 RT Vol. VI, 154:8-155:16) The floor plan is a liability of the dealership against the value of the new
26 vehicles. (Exh. R-250C.020:14-021:20) In 2016, Folsom Chevrolet had used \$15.3 million of its floor
27 plan (amount of the note) to pay for new vehicles it bought from General Motors. (Exh. R-250C.019:6-
28 25) The value of the new cars and trucks was about \$14 million, a holdback difference of \$1.3 million.

(Exh. R-243E.001) Mr. Gaspardo agreed that personal guarantees are obligations. (RT Vol. IV, 218:13-24)

183. The amount of investment made and liabilities incurred is significant and this factor weighs in Folsom Chevrolet's favor and against termination.

Findings Relating to Permanency of the Investment [§ 3061(c)]

184. The term "permanency" is undefined in the Vehicle Code. Neither permanent nor permanency appears in the Generally Accepted Accounting Principles ("GAAP"). GAAP defines assets and liabilities relative to their current (less permanent) or non-current (more permanent) nature. Current assets are those most liquid and reasonably expected to be converted to cash or sold or consumed in a business operating cycle (generally one year). ("[A]current asset is something that is expected to be turned into cash within 12 months." (RT Vol. IV, 137:15-17) Current liabilities are those similarly expected to be settled within one year or one operating cycle. Permanency infers a quality about the investments and is thus a relative term or more of a "continuum," with certain assets being less permanent while others comparatively more permanent.⁵⁷

185. General Motors' expert Mr. Gaspardo testified that there is no permanent investment in the dealership, and "not only do[es] [Folsom Chevrolet] not have any permanent investment, but they would be able to more than recover the investment that they do have."⁵⁸ (RT Vol. IV, 127:10-21) Mr. Gaspardo found nothing on the financial statements (balance sheet and income statement) that evidenced a "permanent investment." (RT Vol. IV, 133:7-22; 138:4-11; Exhs. R-243E.001, R-249.004)

186. General Motors' expert's opinion is that permanency is whether or not you can convert an asset into cash; if there is a ready market for it, then it is not permanent. Mr. Gaspardo explained: "An investment is permanent when it cannot be recovered." (Exh. R-249.003; RT Vol. IV, 129:8-15, 195:5-15) It is only "something you've invested in and you're not likely to get it out," or "sunk costs" that are permanent. (RT Vol. IV, 129:16-22) His example of a permanent investment is something like a "highly specialized piece of signage ... that would not have a ready market." (RT Vol. IV, 130:15-23; Exh. R-

⁵⁷ General Motors' expert Mr. Gaspardo did not agree with this "continuum" concept but rather testified that in his mind the concept is "somewhat binary;" it is either permanent or it is not. (RT Vol. IV, 199:8-200:1)

⁵⁸ This was the first time Mr. Gaspardo has testified in California and the first time he has been involved in the issue of permanency. (RT Vol. IV, 192:14-19)

249.003) This extremely restrictive definition of permanency could not be what the legislature intended when this law was written since essentially there would be very little to consider.

187. General Motors asserts there is little permanency of investment by Folsom Chevrolet because the real property was not purchased by Folsom Chevrolet, and the buildings and other assets are not held by the dealership, but by the Marshal Crossan Trust. (RT Vol. IV, 152:1-23, 163:24-164:10, 234:2-18) There are tax reasons why investments such as land and buildings would be held in trust or by another entity.⁵⁹ Marshal Crossan is “the sole shareholder and therefore [the] sole owner of Folsom Chevrolet, Inc.” (See Declaration of Marshal Crossan Regarding Good Standing and Ownership of Folsom Chevrolet, Inc., dated January 20, 2018.) Marshal Crossan is the President of the corporation, the dealer operator and, if ownership of “the franchise” were possible, he would be considered the owner of that as well. Mr. Crossan is also the owner of the structures, the land and equipment of Folsom Chevrolet, Inc. (RT Vol. VI, 94:13-18) The Marshal Crossan Trust and Folsom Chevrolet for all intents and purposes are basically identical in regards to ownership by Marshal Crossan. To assert no permanency of investments based on the “dealership” not holding the investments in this instance is not reasonable.

188. The dealership’s equipment was purchased at a cost of \$1,010,264. Some of these fixed assets are more permanent than others but on a continuum they are a more permanent asset.⁶⁰ (Exh. P-184-3)

189. As stated earlier, the purchase price of the land on which the dealership sits was approximately \$4 million and the adjacent storage lot was purchased for \$3.9 million. (RT Vol. VI, 15:17-16:18) General Motors asserts there is no permanency of investment by the dealership because the land can be fairly quickly sold. (RT Vol. IV, 171:18-174:3) However, dealership facilities are single purpose facilities which can take some time to convert to cash. (RT Vol. VI, 34:20-35:10, 112:1-115:7) Because the uses of dealership land and facilities are limited, unless there is another new vehicle franchisee looking for a facility, it cannot easily be converted to cash. (RT Vol. VI, 34:20-35:10) A subsidiary of General Motors, Argonaut, holds the lease as the lessee from the Trust that gives it

⁵⁹ Interestingly, all the other subsections of Section 3061, except (c), use the word “franchisee.”

⁶⁰ Mr. Gaspario agreed that there could be some components of the fixed assets that might be permanent. (RT Vol. IV, 197:8-198:10)

complete control over the dealership property, but allows Argonaut to walk away with 30 days' notice. (RT Vol. VI, 25:15-26:7, 43:5-44:13) The value of the real estate may decline 25 percent (to \$.75 on the dollar) if it does not have a buyer before a termination. (RT Vol. VI, 40:9-11)

190. The goodwill or "blue sky" of the business is a more permanent asset. (RT Vol. VI, 40:12-18, 47:7-25, 74:7-12) Goodwill in the automotive industry is generally considered the difference between what an arm's length buyer is willing to pay for the right to assume the dealer agreement and what the book value of those assets are worth. (RT Vol. IV, 51:15-19) Mr. Gaspardo characterized goodwill as a "market concept" or "the extent that the market [will] support a selling price higher than the net worth." (RT Vol. IV, 188:16-25)

191. General Motors' expert took the position that goodwill is not an investment and "any goodwill almost entirely relates to the dealer agreement with GM. And to the extent that the dealer agreement hasn't been fulfilled, there's no reason to expect ... goodwill" (RT Vol. IV, 187:9-188:25) Additionally, in his opinion, goodwill is not permanent because there is a "liquid market" for it because if Folsom Chevrolet was sold tomorrow and there is goodwill in the business, the buyer would pay it. (*Id.*)

192. General Motors' position is not reasonable. Developing goodwill required Folsom Chevrolet's effort over the course of 25 years to cultivate thousands of customers and establish its business reputation. (RT Vol. VI, 47:7-25) The financial statement of the dealership does not have much value reflected for goodwill because tax rules allow amortization of goodwill. (RT Vol. VI, 31:7-32:15) Amortization of goodwill over 15 years as permitted does not mean the goodwill does not have value. (*Id.*)

193. As to the franchise value or goodwill, Folsom Chevrolet's expert, Mr. Woodward, took several methods used to value new auto dealer franchises: 1) the Kerrigan Advisors approach uses an average multiple of 4.5 times pre-tax earnings (for Folsom Chevrolet for 2016, \$1,639,756 yields \$7,378,902), 2) the Haig Report approach uses an average multiple of 4.3 times pre-tax earnings (\$1,639,756 yields \$7,050,950), and 3) Mr. Woodward's own method based on return on capital

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investment, which resulted in a value of \$6,034,780.⁶¹ He then took an average of the three methods and valued Folsom Chevrolet's franchise or goodwill value at \$6.8 million. (Exh. P-184-4; RT Vol. VI, 18:14-22, 19:2-22:9) If the franchise were terminated the value of the goodwill would be \$0, as there would be no business that could be sold. (RT Vol. VI, 40:12-18)

194. Folsom Chevrolet's expert found that the investment of at least \$14.7 million can be considered permanent. (Exh. P-184-5; RT Vol. VI, 28:4-30:8, 35:11-36:16) The \$14.7 million is comprised of the following amounts:

- (a) Equipment \$400,000. (Exh. P-184-3; RT Vol. VI, 17:4-23, 58:18-62:22)⁶²
- (b) Real estate value estimated at \$7.5 million. (RT Vol. VI, 160:4-23, 17:4-23)
- (c) Franchise value \$6.8 million. (Exh. P-184-4; RT Vol. VI, 17:4-23, 19:2-22:9)

195. According to Protestant's expert, the loss that would be incurred by Folsom Chevrolet and Marshal Crossan if the franchise were terminated would be approximately \$8.675 million, since the goodwill of \$6.8 million would be lost and the real estate value of \$7.5 million dollars diminished by 25 percent or \$1.875 million. (Exh. P-184-6; RT Vol. VI, 39:14-41:3)

196. There was no independent appraisal performed on the real property. Protestant's estimate of \$7.5 million may be high but using a reasonable figure for the City of Folsom of a two percent per year increase on the original purchase price (\$4 million) of the land over 25 years would result in a value of over \$6.5 million dollars.⁶³ A reduction of 25 percent on the real estate value would be a \$1.625 million loss. When the real estate loss of \$1.625 million is added to the \$6.8 million goodwill loss, Folsom Chevrolet could incur a total loss of \$8.425 million if its Chevrolet franchise was terminated. The permanency of Folsom Chevrolet's investment is significant and this factor weighs in Folsom Chevrolet's favor and against termination.

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⁶¹ Kerrigan and Haig regularly both use multiples of earnings and published charts valuing dealerships.

⁶² Taking economic depreciation into account, Mr. Woodward valued the equipment at something less than half of the original value of \$1.010 million at \$400,000. The book value (tax depreciated value) is \$218,568. (Exh. R-243E.001, line 57)

⁶³ The population of the City of Folsom grew 39 percent from 2000 to 2010 and average household income is over \$100,000. (RT Vol. VIII, 27:15-18, 27:25-28:4)

**Findings Relating to Whether it is Injurious or Beneficial to the Public Welfare
for the Franchise to be Modified or Replaced or the
Business of the Franchisee Disrupted [§ 3061(d)]**

197. Folsom Chevrolet currently has between 80 and 90 employees. (RT Vol.VI, 122:22-24) Loss of such employment would be detrimental to the community, in addition to being a great hardship on those employees. The size of the dealership is such that it cannot be readily replaced, nor could its sales, service, and other dealership functions be readily absorbed by other dealers within the APR, which would impact Chevrolet customers. The City of Folsom would lose a substantial source of tax revenue. (RT Vol.VI, 158:19-159:21; Exh. P-144) For the years 2012 through 2016, Folsom Chevrolet generated \$13,767,576.09 in tax revenue that went to state and local government. (*Id.*)

198. Marshal Crossan and Folsom Chevrolet are active in the local community, contributing to a vocational program at the local high school that exposes non-college bound students to different vocational careers, and to different career opportunities in the automotive industry. (RT Vol. VI, 135:22-137:20, 137:25-138:9) In addition to being involved with the area's youth at the high school level, Marshal Crossan also sits on the board of the Folsom Little League, and provides financial support. (RT Vol. VI, 139:7-17)

199. Marshal Crossan is also involved with promoting the City of Folsom. (RT Vol. VI, 138:12-139:6) He sits on the Chamber of Commerce Board, a position he has held for over 20 years and is also on the Tourism Board, and the Board of the Economic Development Corporation. (*Id.*) In his role on those boards, Marshal Crossan has provided insight and guidance on ongoing projects, has met with companies that are looking to do business in Folsom, and has worked on and provided financial support for the events that those entities organize. (RT Vol. VIII, 11:8-12:2) Folsom Chevrolet has been a financial sponsor of the biggest event in Folsom, the Rodeo, for over 15 years, and two years ago Marshal Crossan was its grand marshal. (RT Vol.VI, 139:18-140:23)

200. If Folsom Chevrolet's Dealer Agreement is terminated, General Motors intends to establish a new dealer in Folsom. (RT Vol. IV, 43:7-9; Vol. I, 204:13-21) General Motors has the contractual right to lease through Argonaut the existing Folsom Chevrolet property and facility until 2024, and therefore, would likely maintain the Chevrolet brand at the current location. (Exh. R-253; RT Vol. IV, 166:20-169:11) In addition, General Motors indicated the new dealer would likely interview the

1 existing employees and keep any that fit. (RT Vol. I, 204:25-205:8) Although inappropriate to currently
2 offer the franchise to a replacement dealer, General Motors maintains a list of vetted, “ready now”
3 candidates who would be willing and able to operate a Chevrolet franchise from the current location and
4 facility upon approval. (RT Vol. IV, 103:21-104:13) Even though some Folsom Chevrolet employees
5 may not be terminated and taxes will be generated if the dealership location is continued, Argonaut can
6 walk away from the lease with 30 days’ notice. Therefore, the continuance of a Chevrolet franchise at the
7 Folsom Chevrolet location and attendant mitigation of harm to employees, the public, and the City of
8 Folsom is speculative at this point.

9 201. In light of Folsom Chevrolet’s longevity, service to the public, community involvement
10 for over 25 years, the number of employees, and tax revenue generated, it is more likely that it will be
11 injurious to the public welfare if Folsom Chevrolet’s Chevrolet franchise is terminated. Folsom Chevrolet
12 is one of the top Business Elite dealers in the country and receives the most STMI allocation of the
13 Business Elite dealers in the district. These business customers, large and small, who depend on Folsom
14 Chevrolet will be severely impacted if Folsom Chevrolet is terminated. This factor weighs in favor of
15 Folsom Chevrolet and against termination.

16 **Findings Relating to Whether the Franchisee has Adequate Motor Vehicle**
17 **Sales and Service Facilities, Equipment, Vehicle Parts, and Qualified Service**
18 **Personnel to Reasonably Provide for the Needs of the Consumers**
19 **for the Motor Vehicles Handled by the Franchisee and has been and**
20 **is Rendering Adequate Services to the Public [§ 3061(e)]**

21 202. Folsom Chevrolet has a large and well-groomed facility that supports all aspects of sales
22 and service and completed an additional remodel at a cost of \$900,000 in 2014. (Exhs. P-148, P-149; RT
23 Vol. VI, 119:15-120:6, 121:1-8, 123:18-126:7) No evidence was offered by General Motors that Folsom
24 Chevrolet does not have sufficient vehicle parts.

25 203. Mr. Deprez, District Manager Aftersales for General Motors,⁶⁴ who has called on Folsom
26 Chevrolet approximately once a month for 12 years, testified that Folsom Chevrolet’s service has
27 generally been acceptable. (RT Vol. II, 354:10-18, 355:4-6; see Footnote 13, *supra*.)

28 204. Further, Folsom Chevrolet has adequate service and repair facilities, adequately trained

⁶⁴ Aftersales is anything after the sale of a vehicle, which encompasses parts and service, including warranty work. (RT Vol. II, 353:22-354:1)

1 service and other after sales personnel, adequate warranty service for its Chevrolet customers, and Mr.
2 Deprez has not given Folsom Chevrolet any notices of deficiencies that needed to be corrected for its
3 service department. (RT Vol. II, 367:9-368:7) Folsom Chevrolet's sales of service and parts are above
4 average. (RT Vol. VII, 198:8-199:2)

5 205. This factor weighs in favor of Folsom Chevrolet and against termination.

6 **Findings Relating to Whether the Franchisee Fails to Fulfill the Warranty Obligations**
7 **of the Franchisor to be Performed by the Franchisee [§ 3061(f)]**

8 206. In June 2016, Folsom Chevrolet performed warranty engine work on a Corvette that
9 resulted in "catastrophic engine damage" due to an issue with improper tolerances. (Exh. R-240; RT Vol.
10 II, 363:6-365:18) An investigation revealed this was likely an issue with the work performed by the
11 technician. (*Id.*) In October 2016, Folsom Chevrolet sold two vehicles that were subject to mandatory
12 recalls for defective airbags, which is a violation of federal law. (Exh. R-237) This has safety
13 implications for customers, and liability concerns for the customer, dealer, and General Motors. (RT Vol.
14 II, 361:12-362:10) Mr. Deprez counseled Folsom Chevrolet to put processes in place to prevent a
15 recurrence of the recall issue, which Folsom Chevrolet did. (RT Vol. II, 367:2-8)

16 207. There is no showing that these three instances in 25 years would be considered a
17 significant failure of warranty obligations and this factor weighs in favor of Folsom Chevrolet and
18 against termination.

19 **Findings Relating to the Extent of the Franchisee's Failure to Comply with**
20 **the Terms of the Franchise [§ 3061(g)]**

21 208. Folsom Chevrolet's performance during the cure period improved with a RSI score of
22 64.7, and it was no longer in the bottom 15 percent of Chevrolet dealers in California. (RT Vol. VI,
23 222:4-11; Exh. R-238) While the terms of the franchise may state that compliance with sales performance
24 requires an RSI score of 100, the testimony was that for a dealer to be deemed "unsatisfactory" and be
25 subject to termination, the dealer needs to be below 84.9 RSI and in the bottom 15 percent ranking of
26 dealers in the state. Folsom Chevrolet adequately cured its breach by achieving a RSI score and a ranking
27 that would not have resulted in it being deemed "Unsatisfactory," but rather "Needs Significant
28 Improvement."

209. General Motors contends that it does not employ a standard of being simply above the bottom 15 percent as sufficient to cure a sales performance breach. However, this is inconsistent with General Motors' practices, and is not borne out by the testimony. Mr. Meier, the Regional Director for Chevrolet for the Western Region (which includes 13 states and some 400 dealers), testified that a dealer in the "Needs Significant Improvement" category is "unlikely" to be put into a quarterly improvement process, and would not be terminated.⁶⁵ (RT Vol. IV, 48:22-25, 49:1-3)

210. General Motors asserts that reaching a RSI score of 64.7 is still a failing grade because Folsom Chevrolet failed to reach 100 or greater RSI during the cure period. (Exh. R-201.017 ¶ 9; RT Vol. I, 69:12-70:8) If failure to meet 100 RSI or greater (which is a requirement of the Dealer Agreement for all Chevrolet dealers) is the standard for termination, then many Chevrolet dealers would be facing termination. However, this is clearly not how General Motors operates. Mr. Meier, who has been with General Motors for 40 years, when asked why a dealer below 100 RSI would not be terminated given the contractual requirement, noted that this was his first termination and said: "We're not in the dealer termination business ..." (RT Vol. IV, 7:3-24, 49:7-14, 50:8-22)

211. Mr. Meier, who signed the termination letter, agreed that the dealer's performance for termination should be significantly below 100 RSI ("profoundly unsatisfactory"), over a long period of time, and include CSI deficiencies. (Exh. R-238.004; RT Vol. IV, 7:3-24, 49:7-14, 50:8-22) He characterized the Folsom Chevrolet situation as a dealer who was terminated because it had been, for both RSI and CSI, in terms of ranking,⁶⁶ "in the order of magnitude of fourth from the bottom" over a very long period of time despite resources and counseling. (RT Vol. IV, 28:11-22, 49:14-22) Folsom Chevrolet's RSI score went from 40.93 in 2013 to 56.6 in 2017,⁶⁷ an increase of 15.67 points. (Exhs. R-242B.002, R-270; RT Vol. II, 264:19-265:6) Folsom Chevrolet's SSS was essentially consistently above regional average. Folsom Chevrolet's ranking was fourth from the bottom in only two years, 2013 and 2014, not in other relevant years, nor during the cure period. Folsom Chevrolet RSI rankings were:

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⁶⁵ Mr. Meier said, in answer to whether termination would occur for a dealer in the "Needs Significant Improvement" category: "No, we don't – no, of course not." (RT Vol. IV, 49:1-3)

⁶⁶ Mr. Escalante, Chevrolet District Sales Manager, testified that only the PDS was found deficient. (RT Vol. II, 372:15-23)

⁶⁷ The 56.6 RSI score for 2017 is an extrapolated figure. (RT Vol. II, 264:19-22)

Year	RSI Ranking
2012	123 out of 135
2013	129 out of 133
2014	124 out of 128
2015	115 out of 131
2016	113 out of 128
2017 through March	119 out of 134

(Exhs. R-242A.002, R-242B.002, R-242C.002, R-242D.002, R-242E.002, R-242F.002)

212. Folsom Chevrolet adequately cured its breach by achieving a ranking of 106 out of 131, which would have resulted in it being in the category of “Needs Significant Improvement.” General Motors did not comply with the terms of the Dealer Agreement by not starting a new cure period after Folsom Chevrolet cured its breach.⁶⁸ General Motors did not issue a notice pursuant to Article 13 of the Dealer Agreement, and provide an opportunity to cure, with respect to Folsom Chevrolet’s subsequent change in ranking. Having provided notice of breach and an opportunity to cure for a breach of a similar nature in 2015, does not absolve General Motors of its obligation to provide notice of subsequent breaches, even if similar in nature.

213. General Motors did not offer any evidence, which is its burden, to establish that a score between “completely satisfied” and “very satisfied,” actually demonstrates any difference in consumer satisfaction at Folsom Chevrolet. (RT Vol. VII, 82:23-83:12) Although “completely satisfied” customers may be a goal, counting only those questionnaires that mark “completely satisfied” is not reasonable. There is no evidence on whether the questions posed on the survey actually measured the consumer’s satisfaction. (*Id.*) There is no evidence that the sample size of the survey is sufficient so as to remove the possibility of random fluctuation in scores based on a single response. (RT Vol. VII, 82:23-84:10)

214. There are five questions on both the PDS and SSS surveys with the first question on each related to overall satisfaction. The answers to the first question on each are the only ones used to calculate the CSI scores and are only counted if marked “completely satisfied.”⁶⁹ (Exh. R-268; RT Vol. I, 104:22-105:8; Vol. II, 269:19-271:21) Both PDS and SSS scores are important to General Motors. (RT Vol. I, 102:23-25) Folsom Chevrolet’s SSS scores were not deficient, but rather were above the regional

⁶⁸ It seems peculiar that General Motors did not provide the ranking to Folsom Chevrolet for the six month cure period in its termination letter.

⁶⁹ The other four questions are “there for a guide to really be able to do a deep dive of why [the customers] weren’t completely satisfied.” (RT Vol. II, 271:4-8)

1 score for all the six years of 2011 through 2016, except one year (2014). (Exhs. R-268, P-185-84; Vol. I,
2 106:4-109:24; Vol. II, 265:18-266:21) Folsom Chevrolet's PDS scores were consistently below the
3 regional score for those years. (Exh. R-268, Vol. I, 104:18-110:3) However, a review of a comparison of
4 PDS Q14 scores (the critical question of overall dealership purchase/delivery) for Folsom Chevrolet
5 shows very small differences compared to the region scores for completely satisfied: for 2012: Folsom
6 Chevrolet's score 3.73 (out of 4) versus the region score of 3.75, (.02 difference); for 2013: 3.66 versus
7 3.76 (.10 difference); for 2014: 3.70 versus 3.77 (.07 difference); for 2015: 3.67 versus 3.76 (.09
8 difference); for 2016: 3.54 versus 3.72 (.18 difference) and for January 2017: 3.51 versus 3.72 (.21
9 difference).⁷⁰ (Exh. R-286.001-.006)

10 215. Although General Motors asserts that Folsom Chevrolet's CSI scores place Folsom
11 Chevrolet in breach of contract (i.e., the franchise) because they were below regional average, nowhere
12 do the terms of the Dealer Agreement require that Folsom Chevrolet's CSI scores be above regional
13 average to be in compliance. (Exh. R-201.009, .011, § 5.1.1(e) and 5.3) Additionally, Folsom Chevrolet's
14 SSS scores were consistently above regional average, (except for 2014) and the differences between the
15 PDS region scores and Folsom Chevrolet's were not large. Article 5.1.1(e) states only that the dealer
16 agrees to "ensure that the customer's purchase and delivery experience are satisfactory," not
17 "completely" satisfactory or "very" satisfactory, or any other adjective. (Underline added.; Exh. R-
18 201.009) Likewise, Article 5.3 provides that dealer "agrees to conduct its operations in a manner that will
19 promote customer satisfaction with the purchase and ownership experience" and that the dealer will be
20 evaluated at least annually, "pursuant to the procedures then in effect," and compared to other Line-make
21 dealers' performances. (Exh. R-201.011) There is no standard or bar for performance either articulated or
22 referenced. Folsom Chevrolet's scores fell between "completely satisfied" and "very satisfied." It is
23 difficult to see how those scores evidence anything but that Folsom Chevrolet is conducting its operations
24 in a manner that is promoting customer satisfaction in accord with Article 5.3. (Exhs. P-185-83, P-185-
25 84) Folsom Chevrolet did not breach the customer satisfaction provisions of the Dealer Agreement.

26 216. Folsom Chevrolet met (a) through (e) of the objectives it agreed to in order to "effectively
27

28 ⁷⁰ General Motors' expert Mr. Farhat testified that in his experience it is not common that poor CSI performance alone warrants termination ("perhaps one dealer in one state over the last 30 years"). (RT Vol. V, 184:15-185:12)

1 ... sell and promote ... the use of Products”⁷¹ as outlined in Article 5.1.1 of the Dealer Agreement by: (a)
2 maintaining an adequate staff of trained sales personnel; (b) explaining to Product purchasers the items
3 which make up the purchase price and provide purchasers with itemized invoices; (c) not charging
4 customers for services for which dealer is reimbursed by General Motors; (d) including in customer
5 orders only equipment or accessories requested by customer or required by law; and (e) ensuring that the
6 customer’s purchase and delivery experience are satisfactory. (RT Vol. I, 215:5-216:24; see Paragraph
7 27) The only remaining objective is 5.1.1(f), which states: dealer agrees to “comply with the retail sales
8 standards established by General Motors, as amended from time to time. ...” (Exh. R-201.009) Although
9 General Motors asserts that the “focus” of the Dealer Agreement’s “is on retail” and that retail sales and
10 performance is “an emphasis” in the Dealer Agreement, the subdivisions of Article 5.1.1 are not
11 differentiated as one being more important than the other. (RT Vol. II, 458:25-459:8, 462:2-9)
12 Additionally, General Motors treats each provision of Article 5.1.1 (a) through (f) as equal, asserting that
13 Folsom Chevrolet’s poor CSI scores was as equal a breach of contract as an unsatisfactory RSI score and
14 bottom 15 percent ranking. (RT Vol IV, 28:11-22, 49:14-22) Article 9 is basically a reiteration of Article
15 5.1.1(f) and a further elaboration of the RSI requirements. Additionally, Article 9 begins by stating that
16 General Motors willingness to enter into the Dealer agreement is based in part on the “Dealer’s
17 commitment to effectively sell and promote the purchase, lease and use of Products in Dealer’s Area of
18 Primary Responsibility.” (Underline added.) “Products” are defined as any new motor vehicle specified
19 in the incorporated Addenda, which included fleet sales. Folsom Chevrolet effectively sold and promoted
20 the purchase and use of Chevrolet product in its APR. It is significant that the language of subsection (g)
21 requires the consideration of the extent of the failure to comply, not any failure to comply. Even leaving
22 aside RSI as a flawed metric (see below discussion) and finding General Motors’ RSI rating system
23 acceptable, not fulfilling one out of six equal requirements is not sufficient under these existing
24 circumstances to be deemed a material breach warranting termination of the franchise. This factor weighs
25 in favor of Folsom Chevrolet and against termination.

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27 _____
28 ⁷¹ See Footnote 16.

1 **EXISTING CIRCUMSTANCES**

2 217. The list of good cause factors set forth in Section 3061 for termination of a franchise is not
3 exclusive. It is the existing circumstances that must be considered, which merely include, but are not
4 limited to, the seven factors specifically set forth above.

5 218. ~~The use of RSI generally by General Motors, and as applied in this case, violates Section~~
6 ~~11713.13(g)(1)(A).~~ RSI fails to account for the impact of circumstances unique to Folsom Chevrolet's
7 market (other than segment popularity), including but not limited to demographics, geography and brand
8 preferences. Instructive to this protest is the case of *Beck Chevrolet Co., Inc. v. General Motors LLC* (2d
9 Cir. 2016) 845 F.3d 68; *Beck Chevrolet Co., Inc. v. General Motors LLC* (2016) 27 N.Y. 3d 379.⁷² The
10 language of Section 463(2)(gg) of the New York Dealer Act is similar to California Vehicle Code section
11 11713.13(g). The New York Dealer Act Section 463(2)(gg) provides:

12 [i]t shall be unlawful for any franchisor, notwithstanding the terms of the franchise
13 contract: ... [t]o use an unreasonable, arbitrary or unfair sales or other performance
14 standard in determining a franchised motor vehicle dealer's compliance with a franchise
agreement. ...

15 Section 11713.13, subdivision (g) comparably provides in part, that "[i]t is unlawful and a violation of
16 this code for a manufacturer ... to do...any of the following: (g)(1) [e]stablish or maintain a performance
17 standard ... that may materially affect the dealer, ... unless ... [t]he performance standard ... is
18 reasonable in light of all existing circumstances, ..." including, but not limited to, those set forth in (A)(i)
19 through (v), such as demographics in the dealer's area of responsibility, geographical and market
20 characteristics in the dealer's area of responsibility, local economic circumstances, and historical sales,
21 service and customer service performance of the line-make, including vehicle brand preference of
22 consumers in the dealer's area of responsibility.

23 _____
24 ⁷² Beck Chevrolet appealed an order granting summary judgment to General Motors, as well as a final judgment denying the
25 dealers remaining two claims, entered by the United States District Court for the Southern District of New York. The U.S.
26 Court of Appeals for the Second Circuit had previously held that Beck Chevrolet's appeal raised two questions of unsettled
27 New York law regarding the application of sections of New York's Franchised Motor Vehicle Dealer Act. Those questions
28 were certified to the New York Court of Appeals. (*Beck Chevrolet Co., Inc. v. General Motors LLC* (2d Cir. 2015) 787 F.3d.
663)The Court of Appeals found in favor of Beck Chevrolet and therefore the U.S. Second Circuit Court of Appeals reversed
the district court's judgments in favor of General Motors and remanded for further proceedings. Discussion hereafter includes
reference to findings in the New York Court of Appeals decision answering the questions as certified by the Second Circuit
Court of Appeals.

219. Beck Chevrolet filed suit after missing its first year RSI target and being told by General Motors its franchise would be terminated if it did not score 100 RSI by the end of a three-year period. (*Beck*, 27 N.Y.3d 379 at 387) The RSI performance standard found unlawful in *Beck* is the same one General Motors applied to Folsom Chevrolet. The Court of Appeals found in *Beck* that General Motors’ standard that uses average performance based on statewide sales data in order to determine a dealer’s compliance with a franchise agreement was not reasonable because it did not take into account local variations such as brand preferences and market competitiveness. The *Beck* court took issue with the brand popularity exclusion, noting that “customer purchases are influenced not solely by preferences for a type of vehicle, for which GM accounts through its segmentation formula, but also by brand popularity and import bias.” (*Id.* at 391) The court ultimately held that “GM’s exclusion of local brand popularity or import bias rendered the standard unreasonable and unfair because these preference factors constitute market challenges that impact a dealer’s sales performance differently across the state” and rendered it unlawful. (*Id.* at 391) ~~So too, in this case, RSI violates Section 11713.13(g); average performance based on statewide sales, tempered only by considering segments, i.e., general vehicle types that have particular characteristics.~~ Failure to consider other factors such as demographics and brand preference, as well as the underperformance or low performance of the prior dealers in the newly assigned portions of Folsom Chevrolet’s AGSSA, which implies previous low numbers of Chevrolet sales, is not reasonable in light of all existing circumstances.⁷³

220. Neither in calculating the size of the market nor in calculating the RSI for any particular market does General Motors consider what would cause a customer to purchase a certain car or a certain brand. (RT Vol. VII, 33:14-22) General Motors’ market share is sensitive to demographic differences in the California buying populations. (Exh. P-185-8 ¶ 29) The RSI does not consider the following: demographics in the dealer’s area of responsibility; geographical and market characteristics in the dealer’s

⁷³ Following on the *Beck Chevrolet* decision, the State of Maryland in 2017 enacted a law, House Bill 1120, that requires that a performance standard, sales objective, or program for measuring dealership performance that may have a material effect on a dealer must meet certain requirements. The application of the standard, objective or program must 1) be fair, reasonable and equitable; 2) be based on accurate information; and 3) take into account the demographic characteristics and consumer preferences of the population in the dealer’s assigned market area. The characteristics must include car and truck preferences of the consumers in the area, as well as geographic characteristics, such as natural boundaries, road conditions, and terrain that affect car and truck shopping patterns. (See Maryland Code of Transportation, Section 15-207. Coercion of dealer prohibited, particularly subdivision (e).)

1 area of responsibility (market competitiveness); the availability and allocation of vehicles and parts
2 inventory; local and statewide economic circumstances; or historical sales, service, and customer service
3 performance of the line-make within the dealer's area of responsibility, including vehicle brand
4 preferences of consumers in the dealer's area of responsibility. (Exhs. P-185-8 ¶ 30, P-185-48-50)

5 221. While it may be a legitimate concern that General Motors would like to measure its
6 dealers in a uniform method across the country and manufacturers do have a legitimate interest in
7 monitoring the sales outcomes and effectiveness of its dealerships and addressing weaknesses in its sales
8 force, the General Motors RSI metric and the assigned AGSSA in this case are flawed. RSI overstates
9 sales opportunity by assigning 100 percent of the registrations while Chevrolet dealerships in California
10 and in the Sacramento APR make less than 41 percent of their sales within their AGSSA. RSI also does
11 not include any calculation of the opportunity to sell outside Folsom Chevrolet's AGSSA, and does not
12 account for local conditions, such as demographics, market characteristics, and local economic
13 circumstances. As for Folsom Chevrolet's AGSSA, it was assigned an unfair AGSSA in size and
14 distances of registrations from the dealership location, with, as noted above, required absorptions of
15 portions of two poorly performing or underperforming terminated dealerships, the fact that it is part
16 urban and part rural, and is an AGSSA which grew over 80 percent in registrations between 2010 and
17 2014.⁷⁴ All of these factors had an impact on the ability of Folsom Chevrolet to capture the necessary
18 sales to meet 100 RSI.

19 222. RSI fails to account for the impact of circumstances unique to Folsom's market (other
20 than segment popularity), including but not limited to demographics, geography, and brand preferences.
21 General Motors' expert Mr. Farhat noted that "Toyota and Honda are very strong in this part of the
22 country," and agreed that "the more local the benchmark, the more sensitive it will be to local
23 conditions." (RT Vol. V, 172:25-173:22) A metric based on a statewide average standard that fails to take
24 into account local conditions is not an appropriate metric and not a reasonable performance indicator.

25 223. Accounting for brand bias by controlling for demographic variables of age, income,
26

27 ⁷⁴ General Motors asserts that local conditions are taken into account by the dealers' rankings and that since other Sacramento
28 area dealers generally perform well, there are no local conditions unduly affecting Sacramento sales. However, the rankings
are built off the flawed RSI.

1 education level, and population density, and whether the dealership is in the five-county area, results in a
2 reduction of the RSI requirement for Folsom Chevrolet by approximately 30 percent. (RT Vol. VII,
3 34:25-35:8) A metric that fails to account for the brand bias that the Vehicle Code requires it to account
4 for, and which results in a sales requirement inflated by 30 percent, is not reasonable in light of all
5 circumstances. ~~The use of RSI generally by General Motors, and as applied in this case, violates Section~~
6 ~~11713.13(g)(1)(A).~~

7 **DETERMINATION OF ISSUES**

8 224. General Motors has not established that Folsom Chevrolet is not conducting an adequate
9 amount of business as compared to the business available to it. [Section 3061(a)]

10 225. General Motors has not established that Folsom Chevrolet has not made the investment
11 necessary and not incurred the obligations necessary to perform its part of the Chevrolet franchise.
12 [Section 3061(b)]

13 226. General Motors has not established that Folsom Chevrolet's investment is not permanent.
14 [Section 3061(c)]

15 227. General Motors has not established that it would not be injurious to the public welfare for
16 the franchise to be replaced. [Section 3061(d)]

17 228. General Motors has not established that Folsom Chevrolet does not have adequate motor
18 vehicle sales and service facilities, equipment, vehicle parts, and qualified service personnel to
19 reasonably provide for the needs of the consumers for the motor vehicles handled by the franchisee and is
20 not rendering adequate services to the public. [Section 3061(e)]

21 229. General Motors has not established that Folsom Chevrolet failed to fulfill the warranty
22 obligations of General Motors to be performed by Folsom Chevrolet. [Section 3061(f)]

23 230. General Motors has not established that Folsom Chevrolet failed to comply with the terms
24 of the franchise. [Section 3061(g)]

25 ///

26 ///

27 ///

28 ///

1 **PROPOSED DECISION**

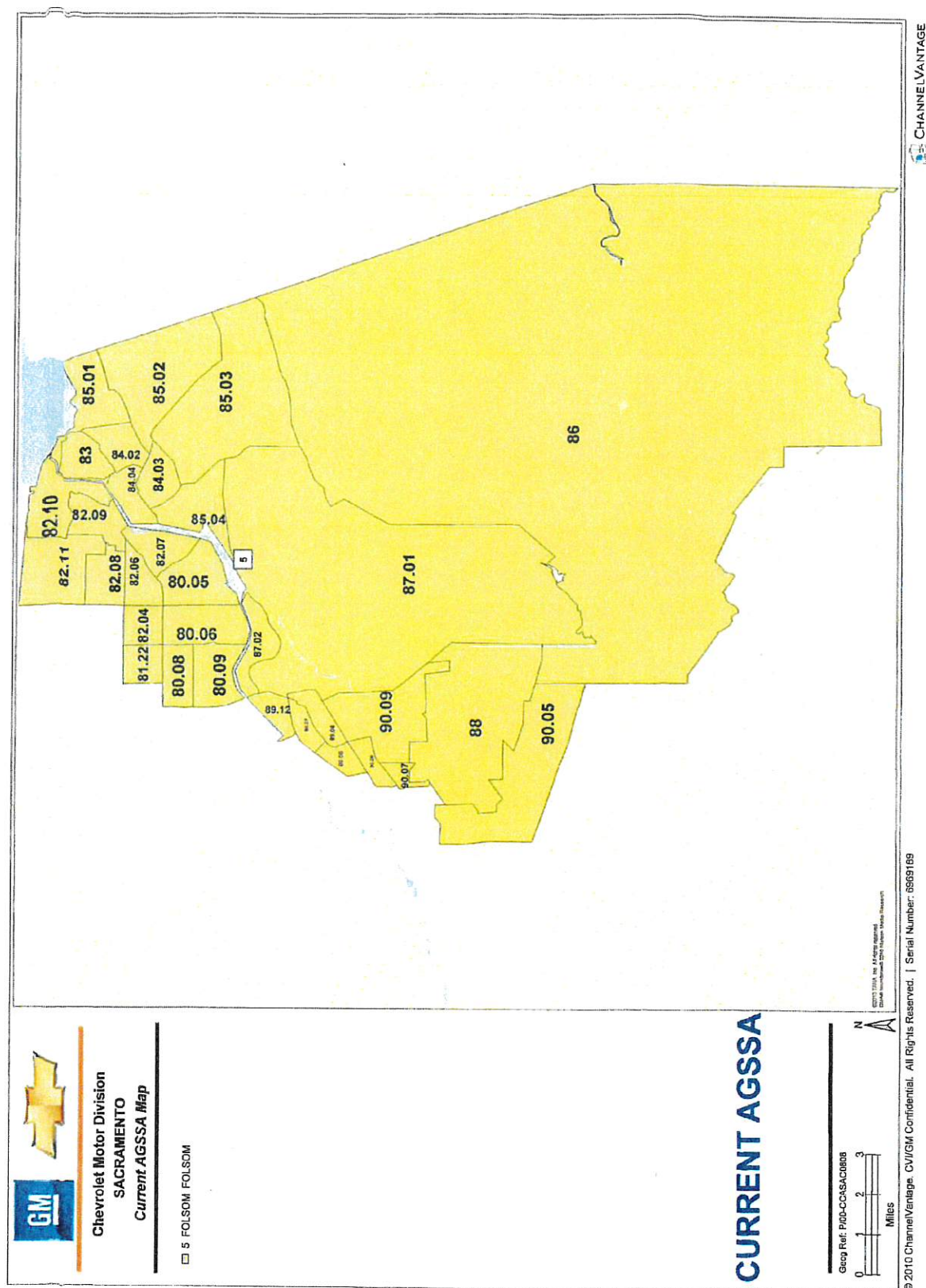
2 Based on the evidence presented and the findings herein IT IS HEREBY ORDERED THAT the
3 protest in *Folsom Chevrolet, Inc. dba Folsom Chevrolet v. General Motors LLC*, Protest No. PR-2483-
4 16, is sustained. Respondent has not met its burden of proof under Vehicle Code Section 3066(b) to
5 establish that there is good cause to terminate Protestant's Chevrolet franchise.
6
7

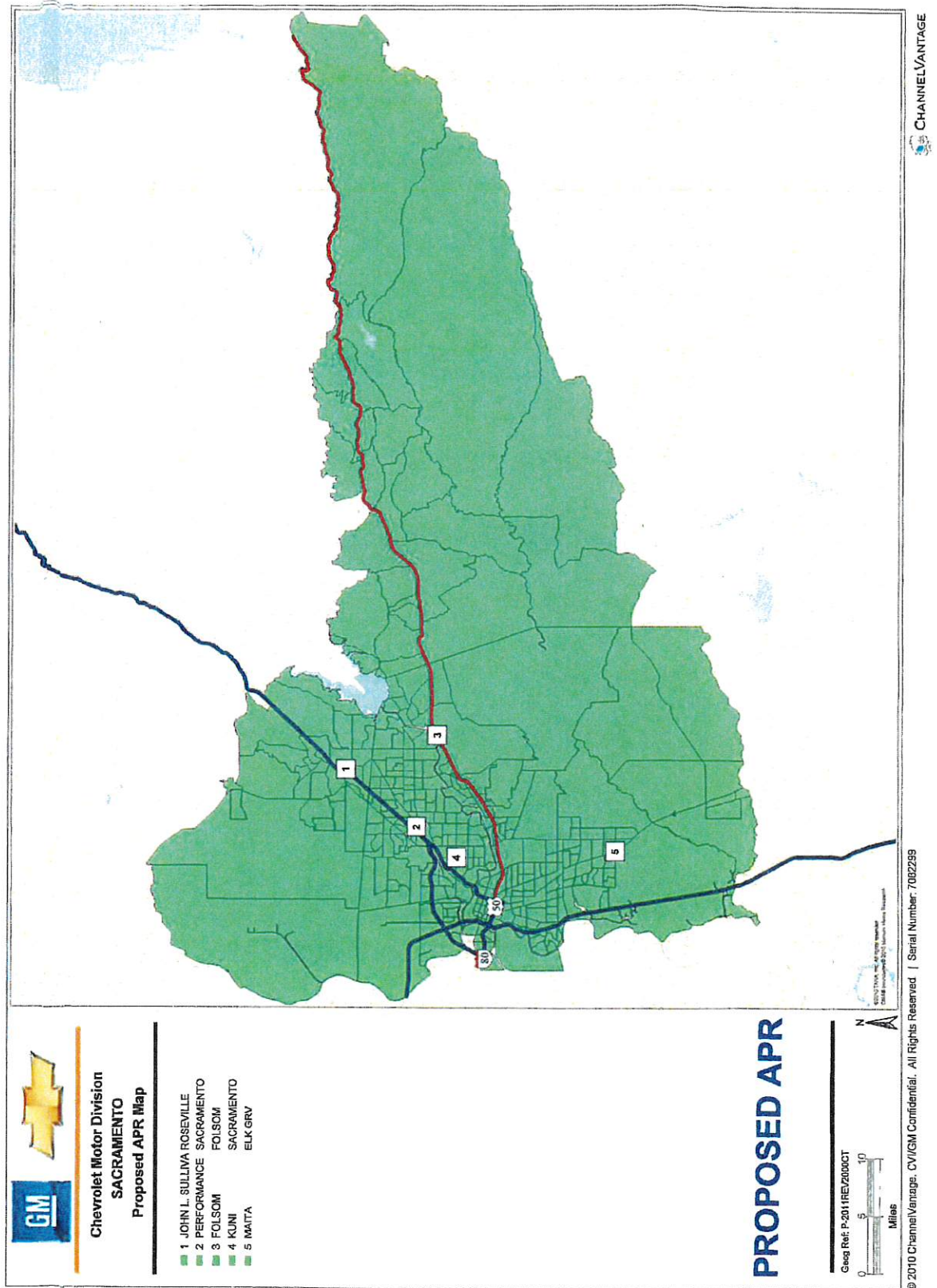
8 I hereby submit the foregoing which constitutes my
9 Proposed Decision in the above-entitled matter, as
10 the result of a hearing before me, and I recommend
11 this Proposed Decision be adopted as the decision of
12 the New Motor Vehicle Board.

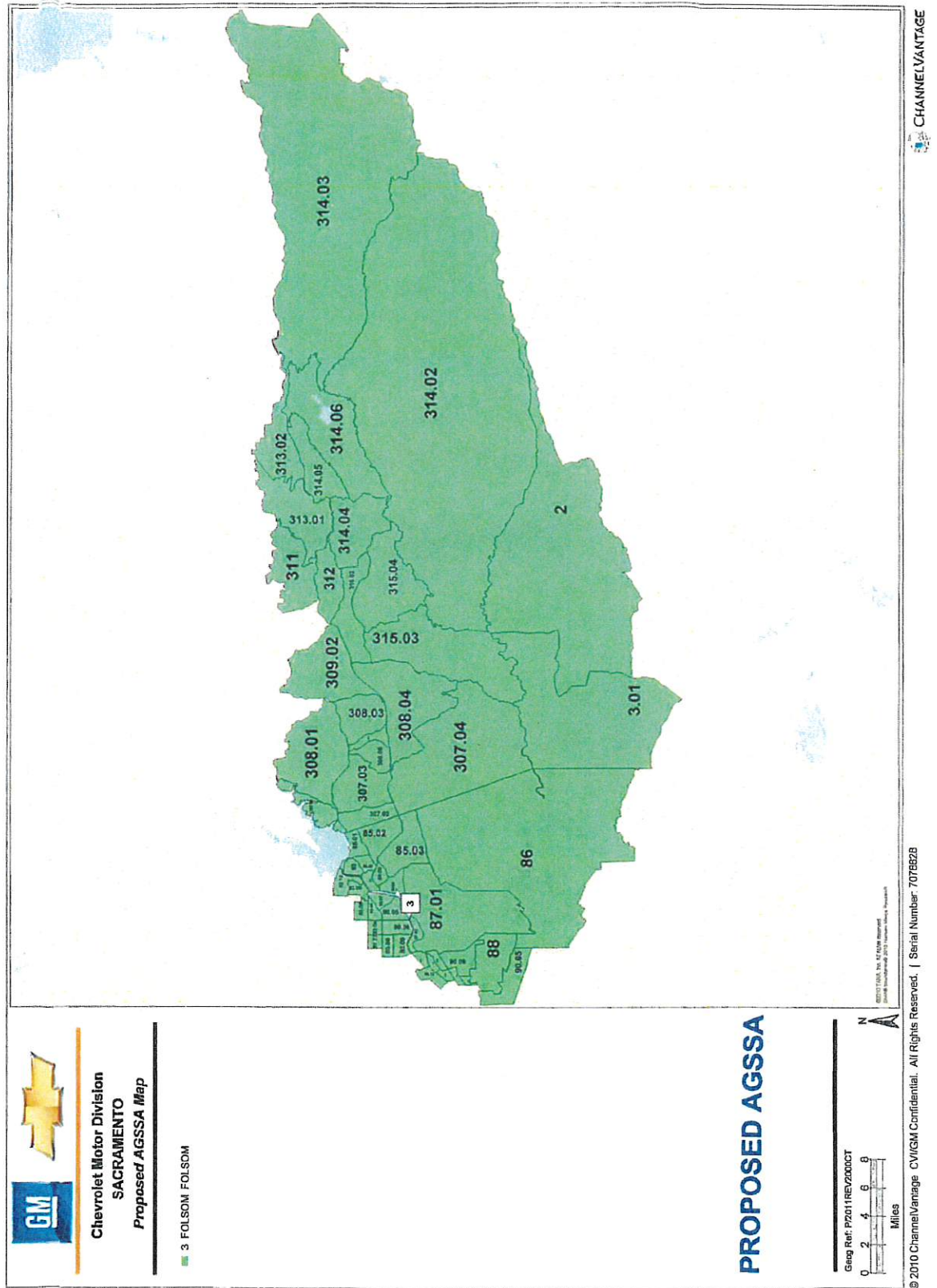
13 DATED: July 27, 2018

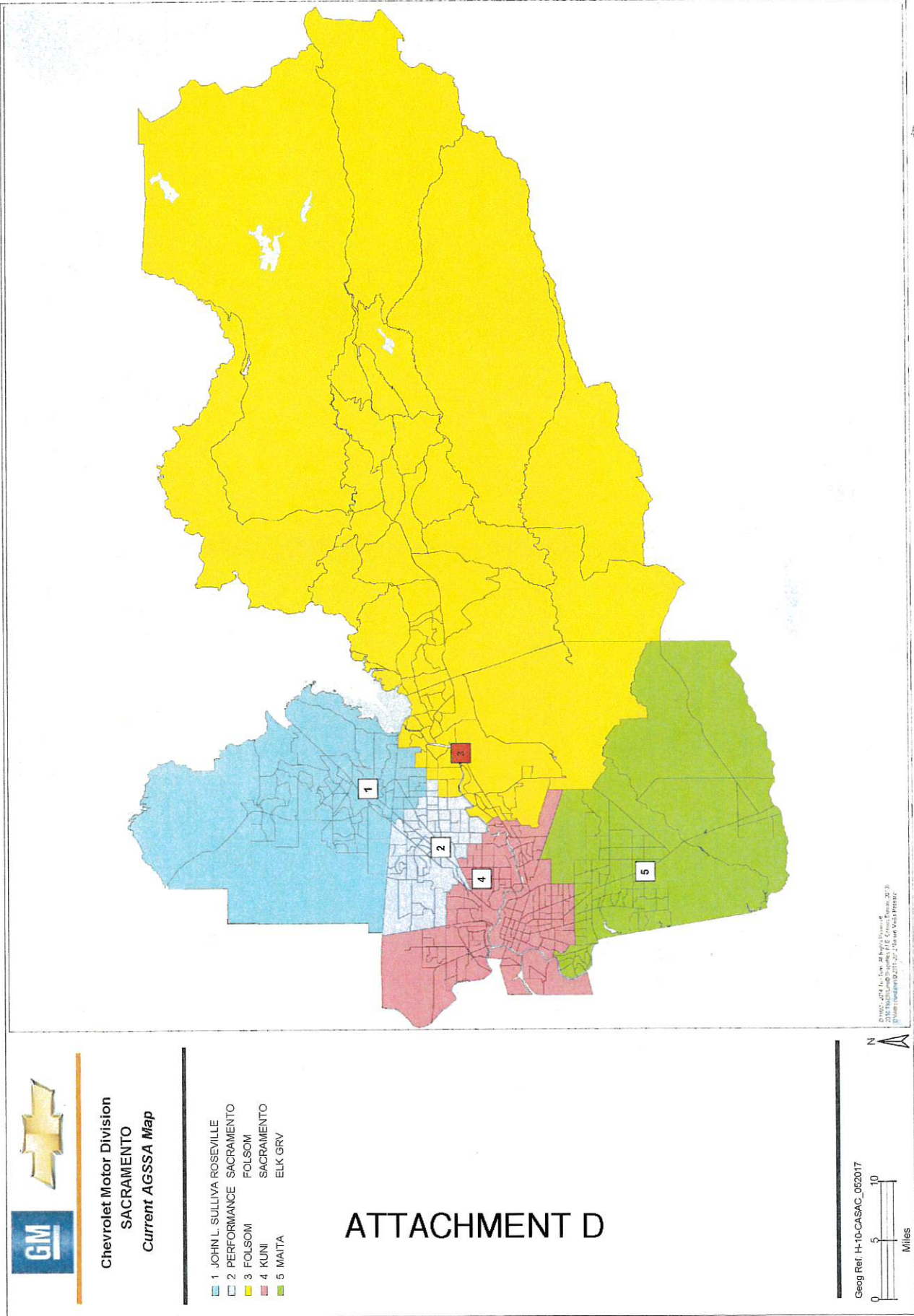
14 By: _____
15 EVELYN M. MATTEUCCI
16 Administrative Law Judge
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27 Jean Shiimoto, Director, DMV
28 Elizabeth (Lisa) G. Humphreys, Branch Chief,
Occupational Licensing, DMV

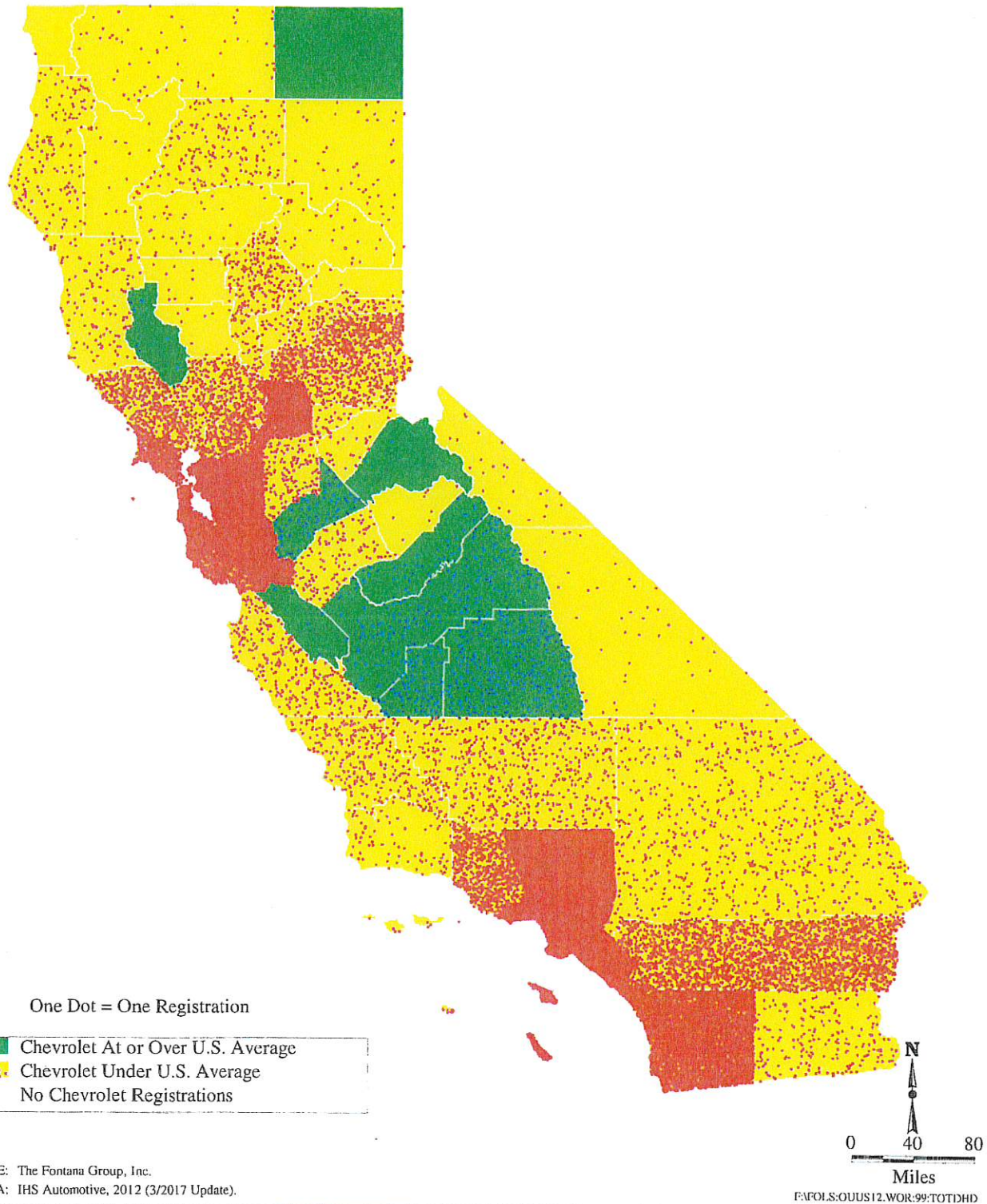






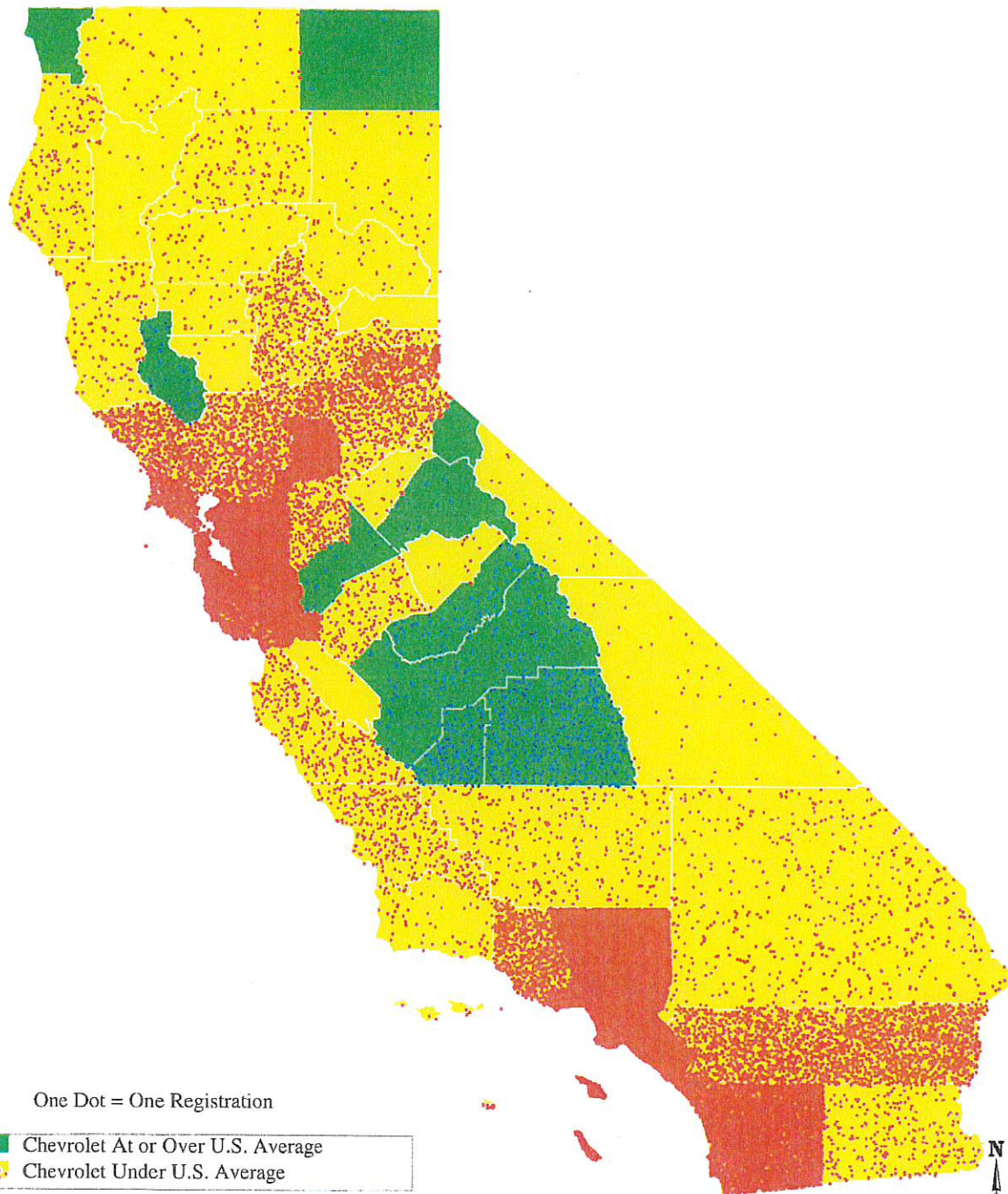


**New Chevrolet Retail Car + Light Truck Registrations
Over/Under U.S. Average
Based on Chevrolet as a Percent of Competitive by Polk Segment
California by County
2012**

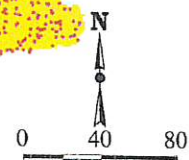


SOURCE: The Fontana Group, Inc.
DATA: IHS Automotive, 2012 (3/2017 Update).

**New Chevrolet Retail Car + Light Truck Registrations
Over/Under U.S. Average
Based on Chevrolet as a Percent of Competitive by Polk Segment
California by County
2013**

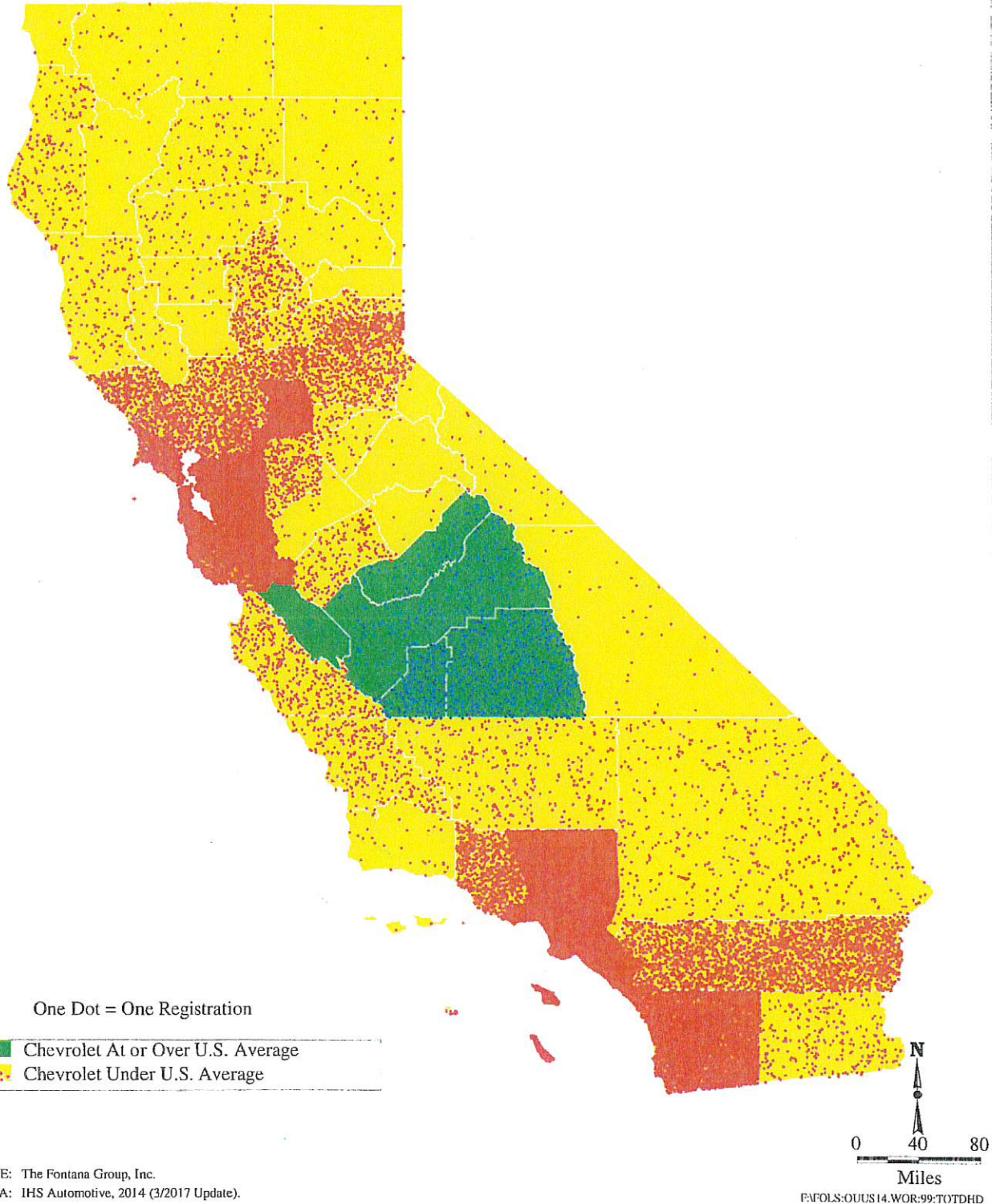


SOURCE: The Fontana Group, Inc.
DATA: IHS Automotive, 2013 (3/2017 Update).

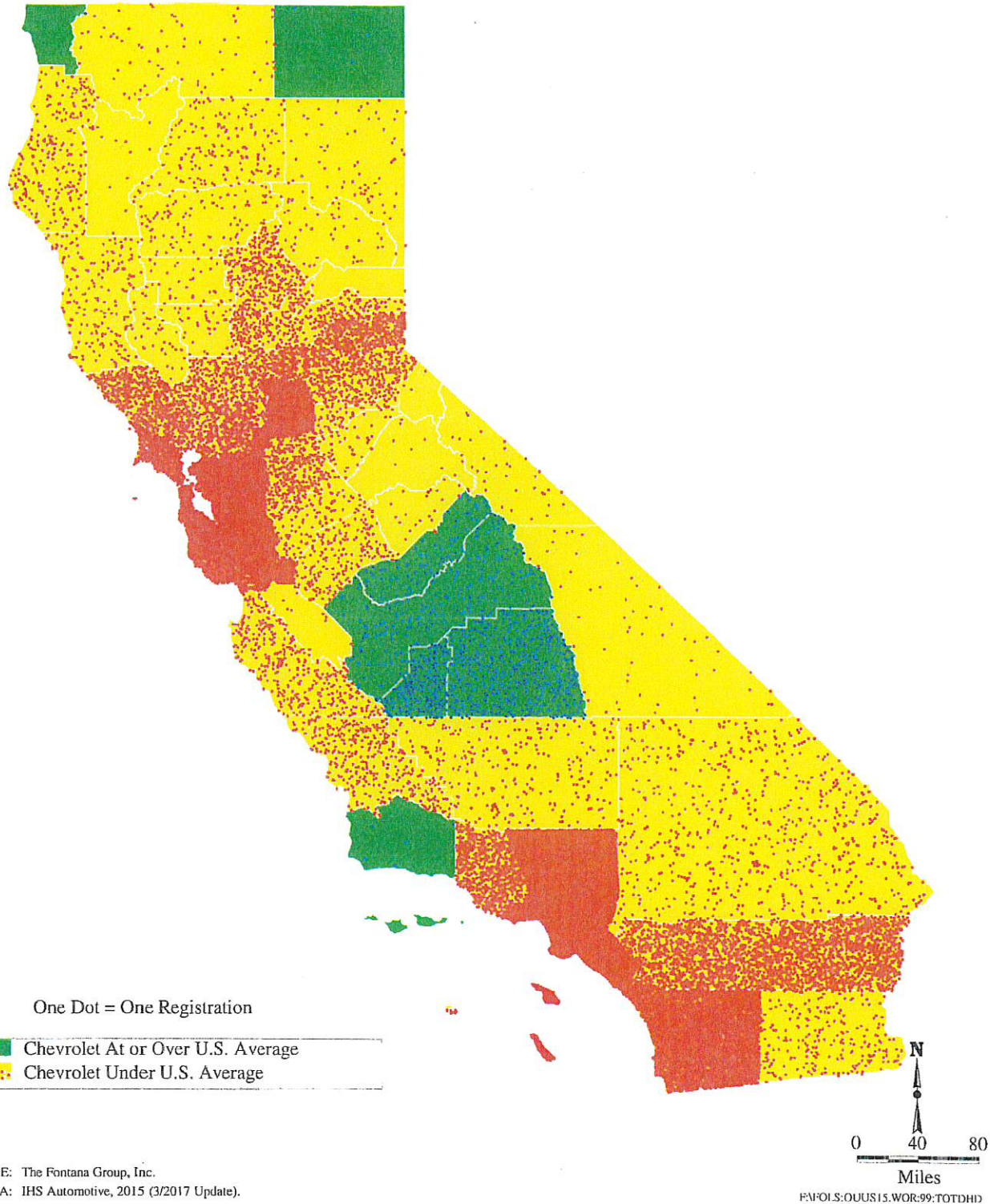


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**New Chevrolet Retail Car + Light Truck Registrations
Over/Under U.S. Average
Based on Chevrolet as a Percent of Competitive by Polk Segment
California by County
2014**



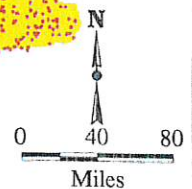
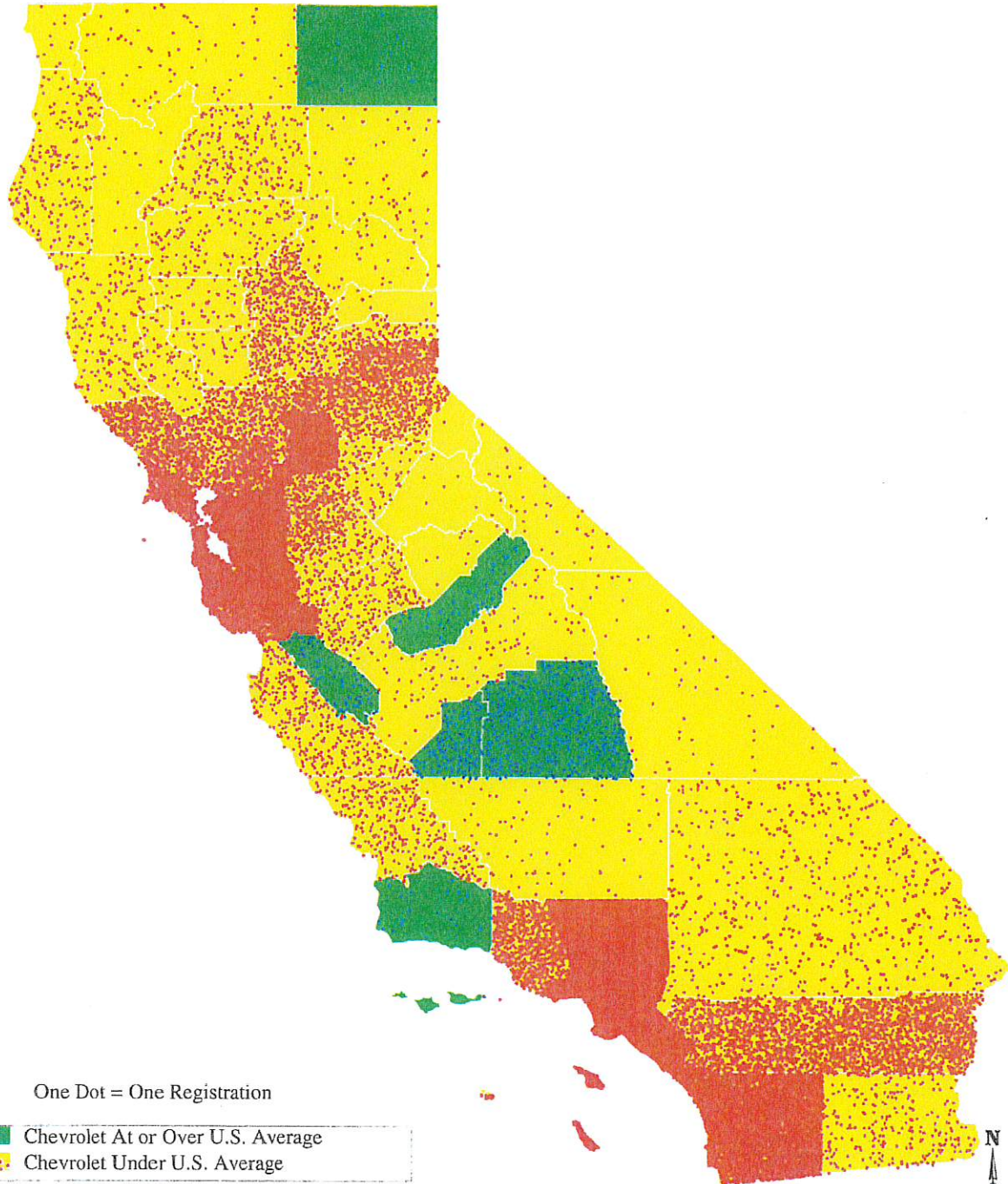
**New Chevrolet Retail Car + Light Truck Registrations
Over/Under U.S. Average
Based on Chevrolet as a Percent of Competitive by Polk Segment
California by County
2015**



SOURCE: The Fontana Group, Inc.

DATA: IHS Automotive, 2015 (3/2017 Update).

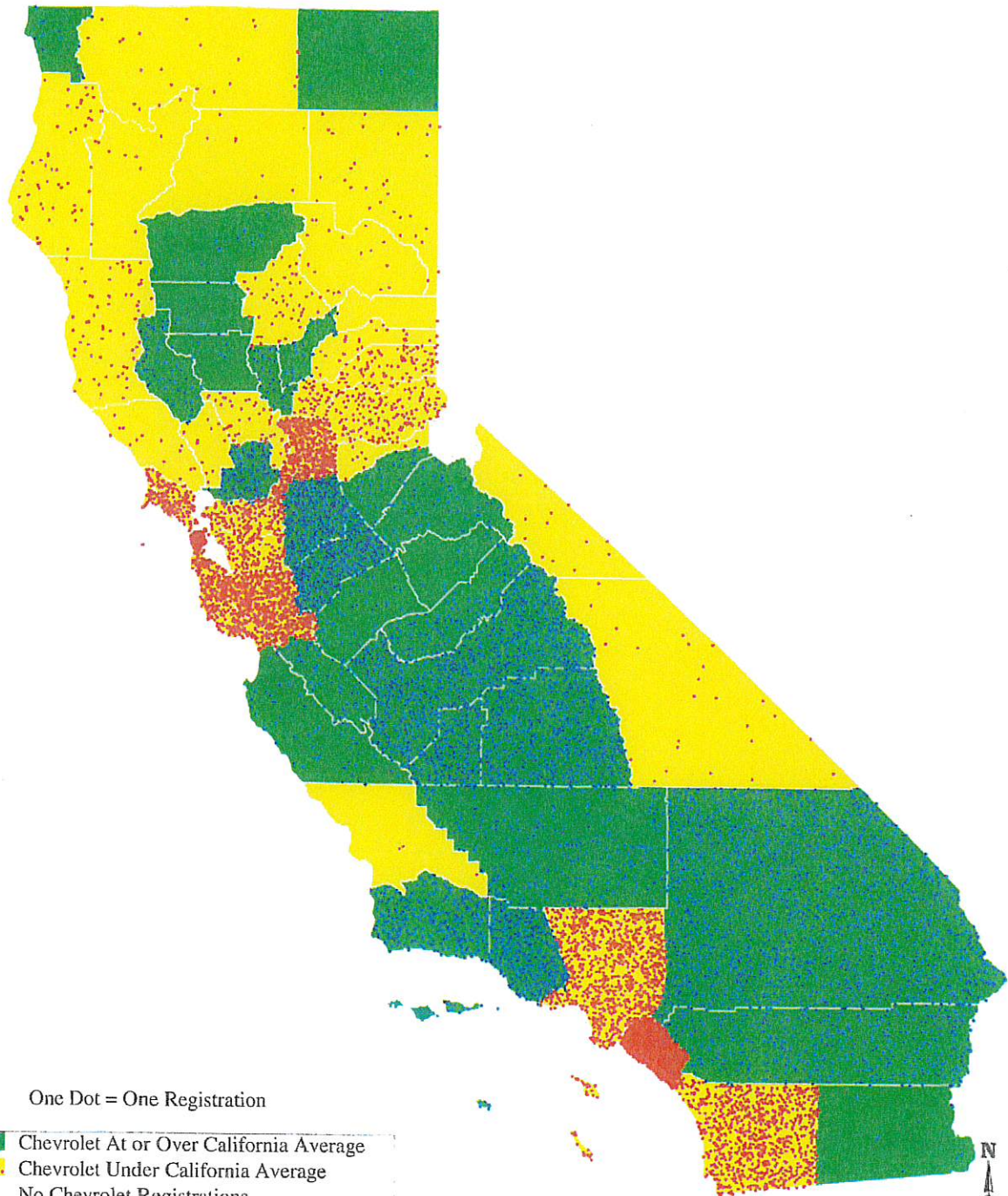
**New Chevrolet Retail Car + Light Truck Registrations
Over/Under U.S. Average
Based on Chevrolet as a Percent of Competitive by Polk Segment
California by County
2016**



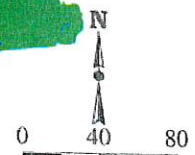
SOURCE: The Fontana Group, Inc.
DATA: IHS Automotive, 2016 (3/2017 Update).

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**New Chevrolet Retail Car + Light Truck Registrations
Over/Under California Average
Based on Chevrolet as a Percent of Competitive by Polk Segment
California by County
2012**

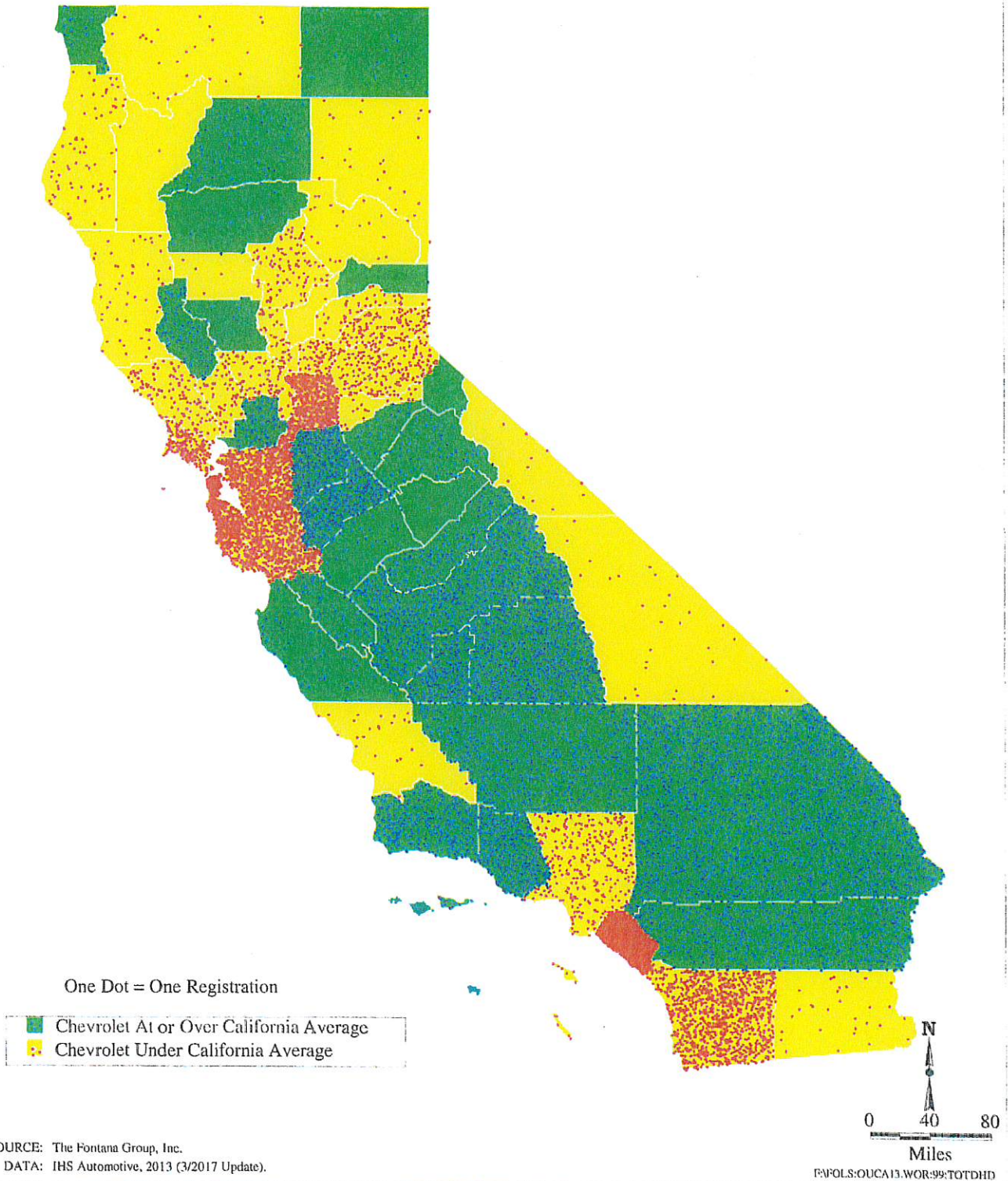


SOURCE: The Fontana Group, Inc.
DATA: IHS Automotive, 2012 (3/2017 Update).

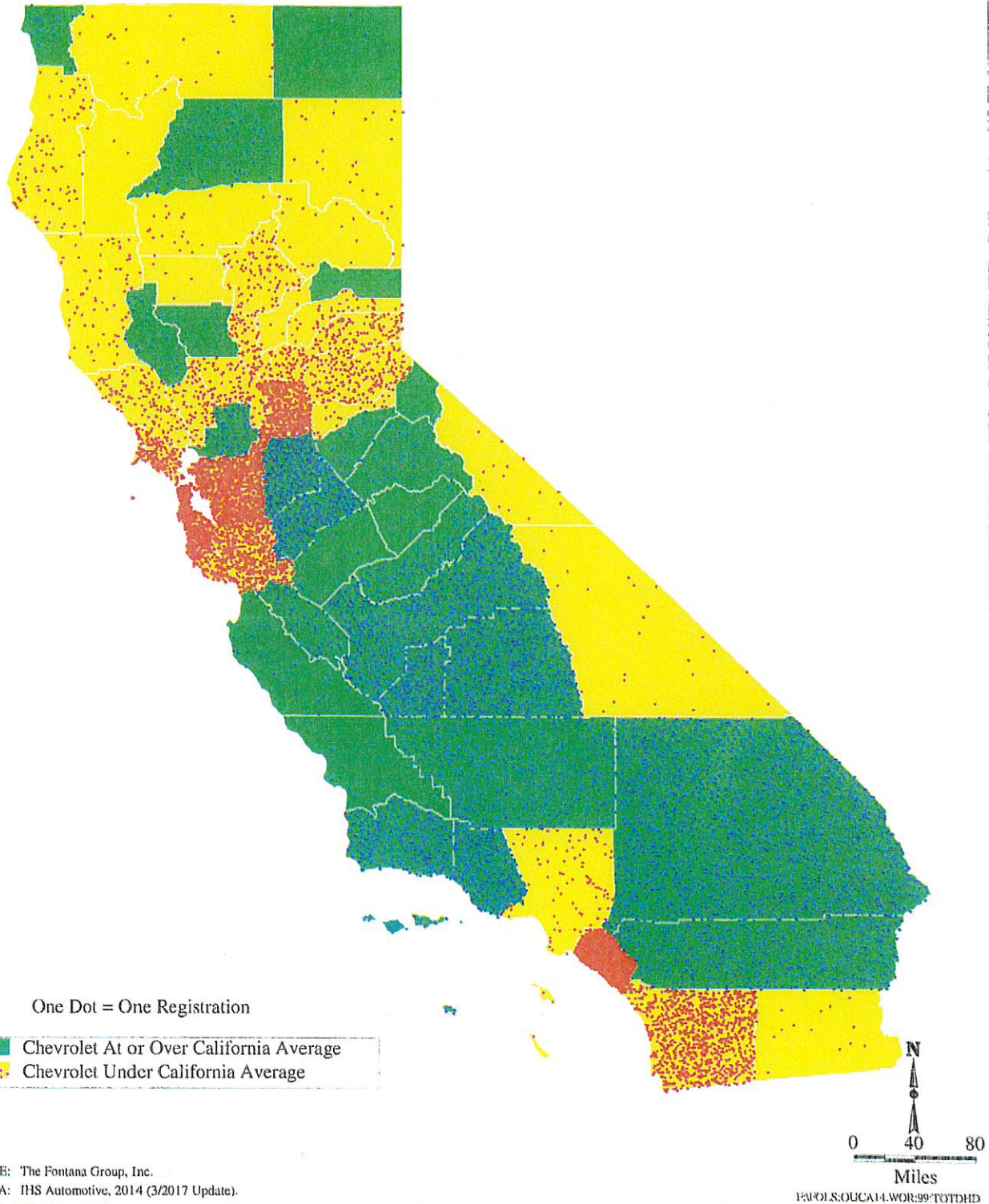


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**New Chevrolet Retail Car + Light Truck Registrations
Over/Under California Average
Based on Chevrolet as a Percent of Competitive by Polk Segment
California by County
2013**

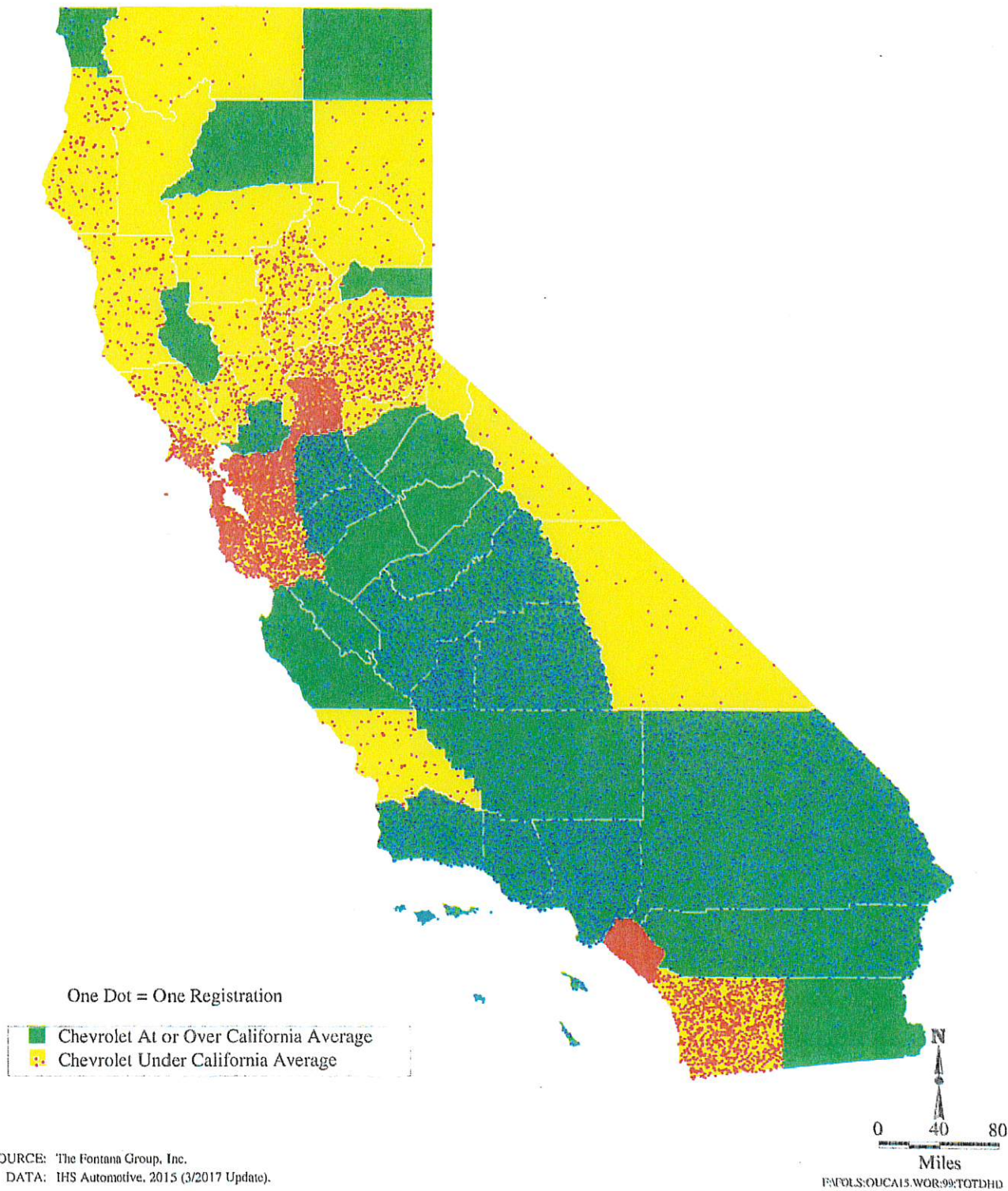


**New Chevrolet Retail Car + Light Truck Registrations
Over/Under California Average
Based on Chevrolet as a Percent of Competitive by Polk Segment
California by County
2014**

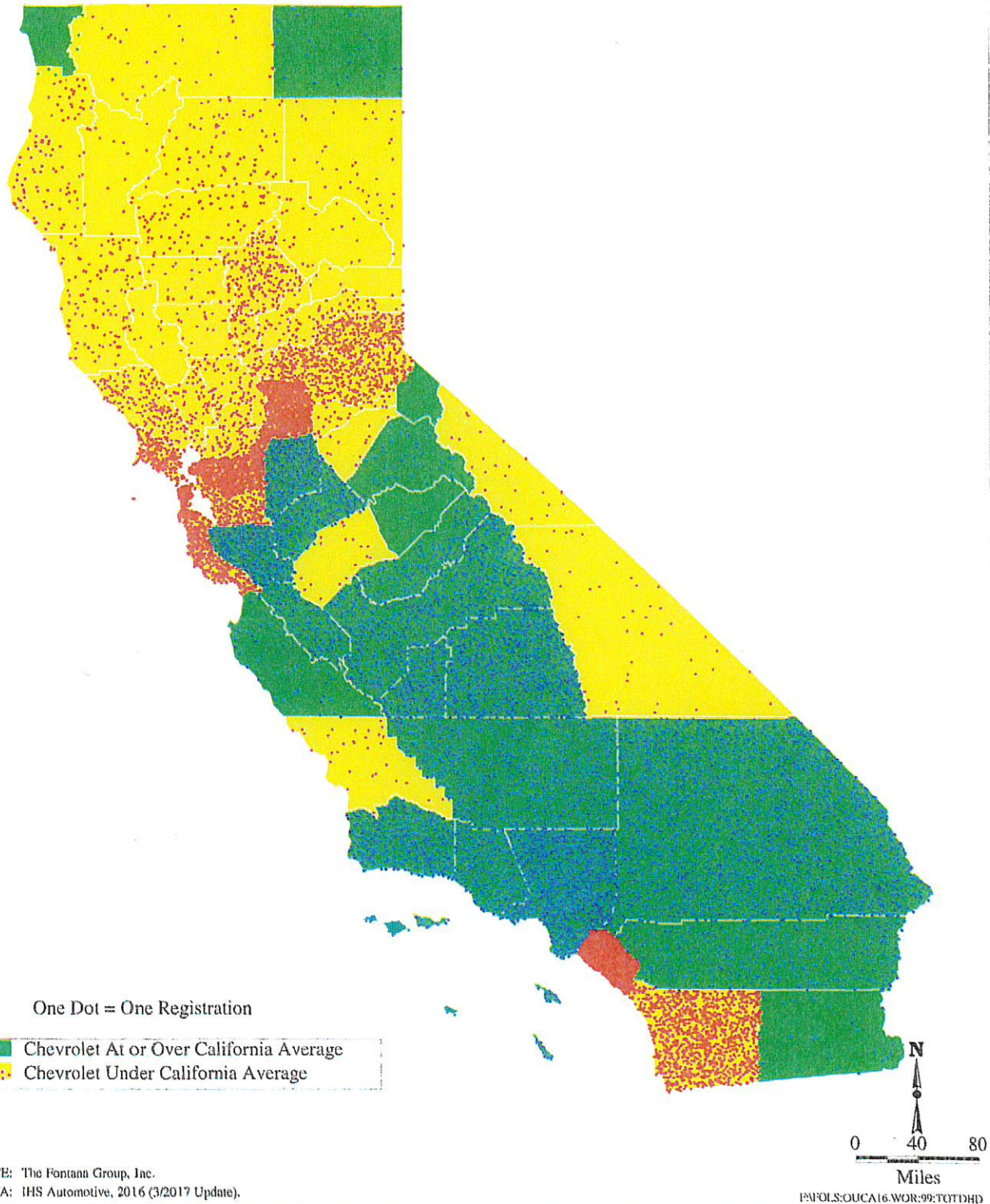


SOURCE: The Fontana Group, Inc.
DATA: IHS Automotive, 2014 (3/2017 Update).

**New Chevrolet Retail Car + Light Truck Registrations
Over/Under California Average
Based on Chevrolet as a Percent of Competitive by Polk Segment
California by County
2015**



**New Chevrolet Retail Car + Light Truck Registrations
Over/Under California Average
Based on Chevrolet as a Percent of Competitive by Polk Segment
California by County
2016**



SOURCE: The Fontana Group, Inc.
DATA: IHS Automotive, 2016 (3/2017 Update).

Vehicle Line	2015 DEALER RETAIL SALES PERFORMANCE REQUIREMENT				COMBINED 2015 CALENDAR YEAR VEHICLE AVAILABILITY AND LOST ALLOCATION OPPORTUNITY								CONCLUSION
	1	2	3	4	5	6	7	8	9	10	11	12	
	Dealer Reported Retail Sales (a)	Vehicle Line Registrations in APR / AGSSA (b)	Sales to Equal State Average (c)	Sales Variance from State Average (d)=(a)-(c)	Total Availability as of 1/1/2015	Final Allocation	DOSP Incr.	Allocation Declined (E.S.)	Min. Alloc. Lost - Failed to Request Incr. (E.S.)	Allocation Declined (DOSP)	Min. Alloc. Lost - Failed to Request Incr. (DOSP)	Total Inventory Opportunity	
Camaro	32	57	71	(39)	10	26	0	1	0	1	13	51	Var. between Sales to Equal State Avg. & Total Inventory Opportunity (20)
Corvette	16	45	25	(9)	3	21	0	0	0	0	0	24	(1)
Cruze	46	41	81	(35)	27	51	10	14	0	0	8	110	29
Impala	22	18	19	3	8	23	0	65	0	0	11	107	88
Malibu	39	27	50	(11)	36	63	0	42	0	0	7	148	98
Sonic	9	11	13	(4)	16	0	0	2	1	0	12	31	18
Spark	24	36	14	10	36	10	3	0	7	0	14	70	56
SS	3	3	3	0	1	3	1	0	0	0	5	10	7
Volt	29	52	78	(49)	3	36	0	0	1	0	4	44	(34)
Total	220	290	354	(134)	140	233	14	124	9	1	74	595	241
City Express	3	1	2	1	27	14	0	6	0	0	1	48	46
Colorado	45	40	63	(18)	12	32	4	0	0	0	0	48	(15)
Equinox	46	42	76	(30)	39	87	0	0	0	1	0	127	51
Express	12	20	17	(5)	10	32	0	0	0	0	0	42	25
Silverado 1500	181	166	385	(204)	90	303	0	4	0	0	4	401	16
Silverado 2500	73	77	104	(31)	39	93	3	0	0	0	8	143	39
Silverado 3500	10	15	27	(17)	4	12	0	0	0	0	0	16	(11)
Suburban	42	45	54	(12)	12	50	0	0	0	0	0	62	8
Tahoe	16	21	49	(33)	11	21	0	0	0	1	2	35	(14)
Traverse	4	10	11	(7)	5	8	0	7	0	2	5	27	16
Trax	432	437	788	(356)	249	652	7	17	0	4	20	949	161
Total	652	727	1,142	(490)	389	885	21	141	9	5	94	1,544	402
Grand Total						1,295			249				

NEW MOTOR VEHICLE BOARD
P.O. Box 188680
Sacramento, California 95818-8680
Telephone: (916) 445-1888

STATE OF CALIFORNIA
NEW MOTOR VEHICLE BOARD

In the Matter of the Protest of

FOLSOM CHEVROLET, INC., dba FOLSOM
CHEVROLET,

Protestant,

v.

GENERAL MOTORS, LLC,

Respondent.

Protest No. PR-2483-16

DECISION

In accordance with the Los Angeles County Superior Court's Judgment on General Motors LLC's Petition for Writ of Administrative Mandate, at its regularly scheduled meeting of February 16, 2021, the Public Members of the New Motor Vehicle Board set aside that portion of its Decision, dated August 13, 2018, finding that General Motors LLC violated Vehicle Code section 11713.13(g)(1)(A) generally and in this specific case, as follows:

1. Paragraph 218, lines 5-6 are deleted: "The use of RSI generally by General Motors, and as applied in this case, violates Section 11713.13(g)(1)(A)."
2. Paragraph 219, lines 13-15 are deleted: "So too, in this case, RSI violates Section 11713.13(g); average performance based on statewide sales, tempered only by considering segments, i.e., general vehicle types that have particular characteristics."
3. Paragraph 223, lines 5-6 are deleted: "The use of RSI generally by General Motors, and as applied in this case, violates Section 11713.13(g)(1)(A)."

Otherwise, the Board's Decision is affirmed. This includes changes approved at the August 13, 2018, General Meeting incorporated into the Decision as follows:

1. Paragraph 150, page 48, line 7, add the word "RSI" after 84.9 so it reads "84.9 RSI."

2. Paragraph 179, page 57, line 26, add the word "million" after \$1.643" so it reads "\$1.643 million."

This Decision shall become effective forthwith.

IT IS SO ORDERED THIS 16th DAY OF FEBRUARY 2021.

KATHRYN ELLEN DOI
President
New Motor Vehicle Board



MEMO

To: ALL BOARD MEMBERS

From: TIMOTHY M. CORCORAN
NEW MOTOR VEHICLE BOARD
(916) 445-1888

Subject: UPCOMING EVENTS

Date: February 4, 2021

The following highlights the upcoming Board events:

- February 9-11, 2021, NADA (Virtual)
- February 16, 2021, General Meeting (via Zoom and teleconference)
- February 16, 2021, Special Meeting (via Zoom and teleconference)
- April 8, 2021, General Meeting (via Zoom and teleconference)
- Industry Roundtable (date and location to be confirmed)
- June/July 2021, General Meeting (date and location to be determined)
- September/October 2021, General Meeting (date and location to be determined)
- September 2021 NAMVBC Annual Conference (date and location to be confirmed)
- November/December 2021, General Meeting (date and location to be determined)

If you have any questions or concerns about any of the upcoming Board meetings, please do not hesitate to call me at (916) 324-6197.