

NEW MOTOR VEHICLE BOARD
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STATE OF CALIFORNIA

NEW MOTOR VEHICLE BOARD

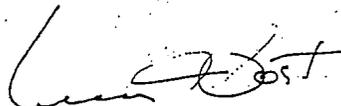
In the Matter of the Petition of)
)
VINCE WIESE CHEVROLET, INC., dba) **Petition No. P-317-94**
SCOTT IRVIN CHEVROLET, a)
California corporation,)
)
) **Petitioner,**
)
) **vs.**
)
GENERAL MOTORS CORPORATION,)
)
) **Respondent.**
_____)
)

DECISION

The attached Proposed Decision of the Administrative Law Judge was considered by the Public members of the New Motor Vehicle Board at its special meeting of January 28, 1997. After such consideration, the Public members of the Board adopted the Proposed Decision as its Decision in the above-entitled matter.

This Decision shall become effective forthwith.

IT IS SO ORDERED THIS 28 day of January 1997.



MANNING J. POST
President Emeritus
New Motor Vehicle Board

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8 STATE OF CALIFORNIA
9 NEW MOTOR VEHICLE BOARD
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11 In the Matter of the Petition of)
12 VINCE WIESE CHEVROLET, INC., dba) **Petition No. P-317-94**
13 SCOTT IRVIN CHEVROLET, a)
California corporation,)
14 Petitioner,) **PROPOSED DECISION**
15 vs.)
16 GENERAL MOTORS CORPORATION,)
17 Respondent.)
18

19 PROCEDURAL BACKGROUND
20

21 1. Petitioner, VINCE WIESE CHEVROLET, INC., dba SCOTT IRVIN
22 CHEVROLET, ("Scott Irvin") is a franchisee of Respondent GENERAL
23 MOTORS CORPORATION ("GM").

24 2. On December 9, 1994, petitioner Scott Irvin filed its
25 petition under Vehicle Code section 3050, subdivision (c) and
26 protest under Vehicle Code Section 3065.1. By order dated April
27 26, 1995, the protest under Vehicle Code section 3065.1 was
28 dismissed with the finding that the issues raised in the protest

1 may properly be subject to the petition filed under Vehicle Code
2 section 3050 (c), and that Vehicle Code section 3065.1 would not be
3 applied retroactively.

4 3. The matter was heard on Monday, June 26, 1995, before
5 Administrative Law Judge Marilyn Wong. Sheldon Cohen of the Law
6 Offices of Sheldon Cohen, 23175 La Cadena Drive, Laguna Hills,
7 California appeared on behalf of petitioner. Respondent GM was
8 represented by L. Joseph Lines, III of 3031 West Grand Boulevard,
9 Detroit, Michigan with Marco L. Quazzo of McCutchen, Doyle, Brown
10 & Enersen, 3 Embarcadero Center, San Francisco, California,
11 appearing.

12 **ISSUES PRESENTED**

13 4. GM conducted a warranty and sales audit of Scott Irvin in
14 December 1993. The audit period included the 13 to 14 months prior
15 to the audit.

16 5. The GM auditors found that Scott Irvin had failed to
17 comply with certain rules and regulations of GM's allowance and
18 incentive programs thus rendering 297 vehicles ineligible for
19 allowances and incentives offered by GM.

20 6. Specifically, it was determined by the auditors that 214
21 units were sold for resale, 75 units were non-retail/non-fleet
22 deliveries and 8 units were export/resale. The amounts of monies
23 which GM seeks to chargeback total \$482,951.69.

24 7. Scott Irvin appealed the results of the audit which were
25 upheld by the management of GM. Scott Irvin then filed its
26 petition and protest with this Board.

27 8. The issue presented at hearing is whether or not
28 petitioner Scott Irvin properly took the incentives and allowances

1 offered by GM.

2 CONTENTIONS OF THE PARTIES

3 9. Petitioner contends that by disallowing some incentives
4 and allowances GM penalizes the dealers who, like Scott Irvin, used
5 automobile brokers to sell new motor vehicles.

6 10. Petitioner further contends that the incentive and
7 allowance guidelines are vague and ambiguous and that the audit of
8 its dealership by GM has been unfair.

9 11. Respondent contends that petitioner failed to comply with
10 GM's rules and regulations for incentives and allowances.

11 12. Respondent further contends that it has a contractual
12 right to conduct audits and to chargeback any amounts improperly
13 obtained.

14 13. The total monies claimed of \$482,951.69 is undisputed by
15 the parties.

16 FINDINGS OF FACT

17 14. During the model year GM offers various dealer allowance
18 and incentive programs. These programs are designed to stimulate
19 vehicle sales and to benefit consumers in the form of reduced
20 prices.

21 15. An administrative manual entitled "Chevrolet Dealer and
22 Allowance and Incentive Programs" ("Dealer Manual") was produced by
23 GM for the uniform handling and processing of claims under its
24 incentive and allowance programs.

25 16. The Dealer Manual defines incentive programs and
26 allowances as follows:

27 "An incentive program may be designed to enhance dealer
28 vehicle sales, or to reduce inventories of specific car or truck

1 vehicle lines. An allowance, on the other hand is governed by the
2 Chevrolet Terms of Sale, i.e., Model Close-Out and Price Reductions
3 which focus on vehicles in dealer inventory, Price Protection and
4 Price Assurance which are designed to protect eligible orders
5 obtained prior to a price change or announcement of new model
6 prices."

7 17. Updates to the Dealer Manual are distributed to the
8 dealers through periodic bulletins which announce new programs and
9 set forth the rules and guidelines of the new programs as they are
10 introduced.

11 18. The Dealer Manual along with its periodic bulletins were
12 received by Scott Irvin.

13 19. During the audit period Scott-Irvin obtained various
14 incentives and allowances for 297 vehicles under four different
15 allowance and incentive programs offered by GM.

16 20. The vehicles sold by Scott Irvin were claimed under one
17 or more of the following programs:

- 18 1) the "1994 RECREATIONAL VEHICLE SPECIAL MODEL
19 INCENTIVE" (RV Upfitter Incentive Program);
- 20 2) "MOMENTUM '93 Chevrolet Truck Incentives";
- 21 3) "BREAK AWAY '93" Corvette Dealer Delivery Incentive
22 (Break Away '93 Corvette Incentive Program); and
- 23 4) "1993 Model Year Closeout Allowance".

24 21. The bulk of the chargebacks (283 units) to Scott-Irvin
25 were claimed under the RV Upfitter Incentive Program. The total
26 amount of incentives received by Scott Irvin under this program was
27 \$368,282.24.

28 22. Under the RV Upfitter Incentive Program, a "stripped"

1 recreational vehicle is typically sent to a GM approved upfitter
2 company. The upfitter company then adds its own equipment, which
3 could include, upgraded seats and TVs, which is, in turn, warranted
4 by the upfitter. GM warrants the chassis but not the added-on
5 equipment.

6 23. When the unit is shipped to the upfitter company, GM
7 creates an invoice to the company which includes the RV incentive.
8 When the vehicle is ordered by the dealer from the upfitter's pool
9 of vehicles, GM issues a credit for the entire invoice amount to
10 the upfitter company. GM then issues the invoice to the dealer
11 with the pass-through of the incentive to the dealer.

12 24. Under this program the incentives appeared as credits on
13 the invoice rather than an incentive which the dealers were
14 required to apply for.

15 25. Scott Irvin unpersuasively argued that the incentives
16 were, in fact, credits for items which GM deleted such as seats and
17 trim. However, the deleted options were already reflected in a
18 reduction of the MSRP.

19 26. In addition to the RV Upfitter Program, five units were
20 claimed under the Break Away '93 Corvette Incentive Program
21 amounting to \$10,000.00.

22 27. There were 69 units claimed by Scott Irvin under the
23 Momentum '93 Chevrolet Truck Incentives Program for a total of
24 \$69,000.00.

25 28. There were 41 units claimed by Scott Irvin under the 1993
26 Model Year Closeout Allowance totaling \$35,669.45.

27 29. The grand total claimed under all of these programs is
28 \$482,951.69.

1 30. The units claimed under the programs were ineligible for
2 the incentives and allowances because the units were resale units
3 or were sales that were neither retail nor fleet deliveries.

4 31. The auditor determined that of 297 ineligible
5 transactions, 214 units were "hold for resale" transactions.

6 32. The term "hold for resale" is defined in the Dealer
7 Manual as: "A term that refers to a sales transaction involving a
8 purchaser who is not buying for their own use, but who is buying
9 with the intention of reselling the vehicle to the ultimate
10 purchaser. Units involved in these types of transactions are not
11 eligible for GM incentives and/or allowance payments."

12 33. The auditors found that the Scott Irvin dealership sales
13 files contained written notations that the transactions were "hold
14 for resale," and therefore ineligible under the guidelines set
15 forth in the Dealer Manual.

16 34. The dealer files also showed other evidence that the
17 sales were for resale purposes. The files showed that Scott Irvin
18 had not collected any sales taxes, license fees, or registration
19 fees on any of the 214 transactions.

20 35. Sales which are eligible for incentives and allowances
21 are limited to sales to retail customers or sales to fleet
22 customers with approved fleet account numbers.

23 36. A "retail customer" is defined in the Dealer Manual as:
24 "A customer, who has not been assigned a Fleet Account Number
25 (FAN), purchases or leases less than ten (10) new cars and/or
26 trucks solely for their own use during the current or preceding
27 model or calendar year or preceding twelve (12) month period. Use
28 of the vehicle is restricted for purposes of this definition to

1 personal or business use excluding resale."

2 37. An eligible retail customer must take and register title
3 and use the vehicles for their transportation needs.

4 38. A "fleet customer" is defined in the Dealer Manual as:
5 "Any company, that purchases and registers or leases ten (10) or
6 more new cars and/or trucks, any combination of manufacture (sic),
7 solely for use in its operation during the current or preceding
8 model or calendar year or preceding twelve (12) month period or who
9 owns or leases thirty (30) or more cars or trucks."

10 39. An eligible fleet customer must apply to GM for a fleet
11 account number and "agree to abide by certain purchase and
12 retention terms and conditions established by GM."

13 40. Scott Irvin sold 75 units to companies that were neither
14 retail customers nor fleet customers. The companies did not
15 purchase the vehicles for personal use nor did they take title to
16 the vehicles, therefore they were not retail deliveries.

17 41. The companies buying from Scott Irvin had purchased more
18 than 10 vehicles per year, however none of these companies had
19 fleet account numbers as required by GM, therefore these sales did
20 not qualify as fleet sales.

21 42. Sales to automobile brokers are eligible for incentives,
22 provided that the ultimate consumer is a retail customer and
23 appropriate documentation is included and reported in the sales
24 transaction.

25 43. The required documentation includes: "... (A) Issuance of
26 a document, either a purchase order, a letter, or something in
27 writing from that customer authorizing someone to act for the
28 purchaser as their representative in the purchase transaction with

1 the dealer. (B) Evidence that the customer received benefit of an
2 available manufacturer's rebate. And (C) the GM vehicle has not
3 been displayed at an unauthorized location."

4 44. Scott Irvin was unable to provide appropriate
5 documentation to qualify the 75 brokered sales under the incentive
6 and allowance programs.

7 45. According to the requirements contained in the Dealer
8 Manual, vehicles sold for domestic resale or export are not
9 eligible vehicles under any allowance or incentive program.

10 46. GM established that 297 sales were ineligible for
11 incentives and allowances either because the sales were for resale
12 or the sales were to non-retail customers. Most of the disallowed
13 sales were deemed ineligible for more than one reason.

14 47. All of the ineligible transactions were handled by only
15 two salespersons, who were hired to increase sales to Asians.

16 48. Scott Irvin failed to properly train and supervise these
17 two salespersons who were subsequently terminated from employment
18 at Scott Irvin.

19 **DETERMINATION OF ISSUES**

20 49. Petitioner failed to prove that GM incentives and
21 allowances discriminated against dealers who sold to automobile
22 brokers.

23 50. Petitioner failed to prove that GM's audit was unfair.

24 51. Petitioner failed to prove that GM's incentive and
25 allowance guidelines are vague and ambiguous.

26 52. Respondent established that petitioner had improperly
27 taken incentives and allowances offered by respondent.

28 53. Respondent established that it was entitled to chargeback
the amount of \$482,951.69 to petitioner.

1 PROPOSED DECISION

2 Good cause having been shown for the incentive and allowance
3 disapprovals for 297 vehicles, the relief sought by the petitioner
4 is denied. Respondent shall be allowed to recover the disallowed
5 payments in the amount of \$482,951.69 on and after the thirty-first
6 day from the day on which this order becomes effective.

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

18 DATED: September 26, 1995

19 By Merilyn Wong
20 MERILYN WONG
21 Administrative Law Judge
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