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STATE OF CALIFORNIA
NEW MOTOR VEHICLE BOARD

In the Matter of the Protest of)
SUNNYDAY CHEVROLET, INC.) Protest No. PR 1407-94
Petitioner,)
vs.)
GENERAL MOTORS CORPORATION,)
CHEVROLET MOTOR DIVISION, PONTIAC)
MOTOR DIVISION, BUICK MOTOR)
DIVISION, OLDSMOBILE MOTOR)
DIVISION, CADILLAC MOTOR DIVISION,)
GMAC,)
Respondents.)

DECISION

The attached Proposed Decision of the Administrative Law Judge is hereby adopted by the New Motor Vehicle Board as its Decision in the above entitled matter.

This Decision shall become effective forthwith.

IT IS SO ORDERED THIS 25th day of January 1995.


MANNING J. POST
President
New Motor Vehicle Board

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9 STATE OF CALIFORNIA

10 NEW MOTOR VEHICLE BOARD
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12 In the Matter of the Protest of)
13 SUNNYDAY CHEVROLET, INC.,) Protest No. PR-1407-94
14 Protestant,)
15 vs.) PROPOSED DECISION
16 GENERAL MOTORS CORPORATION,)
17 CHEVROLET MOTOR DIVISION, PONTIAC)
18 MOTOR DIVISION, BUICK MOTOR)
19 DIVISION, OLDSMOBILE MOTOR)
20 DIVISION, CADILLAC MOTOR DIVISION,)
GMAC,)
Respondents.)

21
22 PROCEDURAL BACKGROUND

23 1. By letter dated April 19, 1994, Respondent General Motors
24 Corp. (herein, GM) notified Protestant Sunnyday Chevrolet, Inc.,
25 (Sunnyday or Latham GM Center) pursuant to Vehicle Code section 3060¹ of
26 GM's intent to terminate all five franchises for General Motors products
27

28 ¹All statutory references are to the Vehicle Code unless otherwise indicated.

1 then held by Sunnyday. This Board received a copy of the notice of
2 termination on April 21, 1994.

3 2. Sunnyday is a California corporation doing business as Latham
4 GM Center at 1221 West Main Street, Barstow, California. Latham GM
5 Center sells Pontiac, Buick, Oldsmobile and Cadillac cars in addition to
6 Chevrolet cars and trucks.

7 3. GM is a licensed manufacturer and distributor of new motor
8 vehicles based in Michigan. At all times relevant hereto, GM acted
9 through its Chevrolet Division which was the designated contact division
10 for all of Latham's GM line franchises.

11 4. General Motors Acceptance Company (GMAC) is a lending
12 institution which finances dealer purchases of new vehicles. GMAC is
13 owned by GM².

14 5. GM's April 19, 1994 notice of termination cited Protestant's
15 failure to maintain inventory financing and its consequent lack of new
16 vehicle inventory and sales as material breaches of GM's Dealer Sales
17 and Service Agreement (*DSSA* or *dealer agreement*) as grounds for the
18 termination.

19 6. Sunnyday filed this protest pursuant to section 3060 on May
20 23, 1994.³

21 7. Hearing in this matter was held during September 13, 1994 to
22 September 20, 1994, before Administrative Law Judge (ALJ), Kenneth
23

24
25 ²In its briefs and opening statement, Respondent argued that
26 because GMAC is not a dealer as defined at Vehicle Code sections 285 and
27 286, the Board does not have express statutory jurisdiction over GMAC.
This contention, however, does not constrain the Board from making
findings of fact as to the issues presented in this proceeding.

28 ³Because May 21, 1994 fell on a Saturday, the Protest was timely
filed under section 3060(b) on Monday, May 23, 1994.

1 Wilson in the Board's Hearing Room in Sacramento.

2 8. Protestant was represented by Mr. Keith L. Higgins, Esq. and
3 Mr. Henry Kraft, Esq. of Kraft and Higgins, 14350 Civic Drive, Suite
4 270, Victorville, California.

5 9. Appearing for Respondent were Mr. Wallace M. Allan, Esq. and
6 Mr. Gregory R. Oxford, Esq. of O'Melveny and Meyers, 400 South Hope
7 Street, Los Angeles, California and Mr. L. Joseph Lines, III, Esq.,
8 attorney for GM, 3031 West Grand Boulevard, New Center One Building,
9 Detroit, Michigan.

10 UNCONTESTED FACTS

11 10. Mr. Robert Latham is the owner and dealer principal of the
12 Sunnyday dealership. He acquired the Chevrolet franchise in Barstow in
13 1981, following a period of employment with GM which began in 1970. By
14 1985, Mr. Latham added Buick, Cadillac, Oldsmobile and Pontiac
15 franchises to his Barstow establishment. In 1991, Mr. Latham acquired
16 a second dealership for Mazda, Subaru, Isuzu and Daihatsu vehicles
17 located in Victorville, California, and operated under the corporate
18 name of Latham Imports.⁴ Inventory financing (flooring) for both the
19 Barstow and Victorville dealerships was provided under wholesale
20 financing agreements with GMAC.

21 11. The operation of Latham GM Center was subject to contractual
22 arrangements with GM and GMAC. The GM dealer agreements expressly
23 required Protestant to have and maintain a line of credit from a
24 financial institution to finance the purchase of new vehicle inventory.
25 The agreements also made the failure to comply with this requirement
26

27 ⁴Latham Imports ceased operations in early 1994 pursuant to a
28 Stipulated Decision and Order of the Board adopted March 8, 1994 in
Victor Valley Mazda v. Mazda Motor of America, Protest No. PR-1382-93.

1 grounds for termination of the contracts.

2 12. Protestant's Wholesale Security Agreements with GMAC
3 required, among other things, that Protestant promptly pay back
4 wholesale advances upon the sale of new vehicles and authorized GMAC to
5 inspect the vehicles and the dealers books and records at all times.

6 13. In September 1991, Mr. Danny L. Kramer became GMAC's San
7 Bernardino branch manager and assumed responsibility for administering
8 GMAC's flooring contracts. Over the following two and one-half years, a
9 series of events occurred at both Latham GM Center and Latham Imports
10 which caused Mr. Kramer and his staff concern that Mr. Latham was not
11 performing satisfactorily under the GMAC wholesale financing agreement.
12 These events ultimately led GMAC to cancel Latham's wholesale credit on
13 February 16, 1993.⁵

14 14. Upon receiving notification that GMAC had cancelled its
15 flooring agreement with Latham GM Center, GM advised Protestant that it
16 was in breach of its GM Dealer Agreement. During the ensuing fourteen
17 months, Mr. Latham was unable to secure another wholesale credit source.

18 As a result, on April 19, 1994, GM notified the Protestant and the
19 Board of it's intent to terminate Protestant's GM franchises.

20 POSITIONS OF THE PARTIES

21 15. GM alleges that Protestant committed a material breach of its
22 GM Dealer Sales and Service Agreement in that Protestant failed to
23 maintain wholesale credit as required. GM also alleges that as the
24

25 ⁵Throughout the hearing Protestant repeatedly objected to the
26 introduction of any evidence concerning Latham Valley Imports on grounds
27 of relevance. The ALJ overruled the objections, determining that the
28 evidence was relevant because GMAC cancelled Protestant's flooring on
the basis of his creditworthiness and performance at both dealerships
and because Mr. Latham was guarantor and dealer principal for both
accounts.

1 result of Protestant's breach, Protestant's new vehicle inventory and
2 sales declined to an unacceptable level.

3 16. In its defense, Protestant claims that performance of its
4 duties under the dealer agreement is excused because GM, acting with or
5 through GMAC, harassed Protestant and breached its implied covenant of
6 good faith and fair dealing with Protestant. Protestant alleges that GM
7 and GMAC ultimately sought to remove Mr. Latham as a dealer because he
8 is an African-American and that they acted in concert to deprive
9 Protestant of its flooring plan in order that the termination of the
10 franchise by GM would appear justified.

11 ISSUES PRESENTED

12 17. The contentions of the parties raise the following issues to
13 be resolved:

14 1. Did GMAC unreasonably harass Protestant in administering
15 Protestant's wholesale financing between September 1991 and
16 February 1993? Specifically, did GMAC act unreasonably in
17 terms of the timing, frequency or methods used in auditing
Protestant's floored inventory, making requests for the
inspection of documents, and demanding payment for vehicles
sold?

18 2. Did Protestant materially breach its wholesale financing
19 contract with GMAC by (a) failing to allow GMAC access to
20 Protestant's inventory and files, (b) failing or refusing to
21 promptly pay GMAC from the proceeds of its sales of GMAC-
22 financed inventory, (c) falsifying dealer add-ons financed by
GMAC, (d) failing to pay allowances for excess mileage on
floored vehicles, (e) manipulating records to conceal the
actual dates of vehicle sales, (f) withholding or
misrepresenting financial information requested by GMAC?

23 3. Did GMAC act unreasonably in cancelling Protestant's
24 wholesale credit?

25 4. Did Mr. Latham threaten to take physical action against
26 Mr. Kramer?

27 5. Did GM and GMAC discriminate against Mr. Latham because
28 he is an African-American?

6. Did GMAC interfere with Protestant's post-cancellation
efforts to replace its flooring through another financial

1 institution?

2 7. Was the notice of termination issued on April 19, 1994,
3 legally sufficient as to Protestant's non-Chevrolet GM
4 franchises?

5 18. In addition to the above, Vehicle Code section 3061 requires
6 that the Board consider the following facts and circumstances
7 surrounding the termination:

8 8. The amount of business transacted by the franchisee, as
9 compared to the amount of business available to the
10 franchisee. (Section 3061(a))

11 9. Investment necessarily made and obligations incurred by
12 the franchisee to perform its part of the franchise. (Section
13 3061(b))

14 10. Permanency of the investment. (Section 3061(c))

15 11. Whether it is injurious or beneficial to the public
16 welfare for the franchise to be modified or replaced or the
17 business of the franchisee disrupted. (Section 3061(d))

18 12. Whether the franchisee has adequate motor vehicle sales
19 and service facilities, equipment, vehicle parts, and
20 qualified service personnel to reasonably provide for the
21 needs of the consumers for the motor vehicles handled by the
22 franchisee and [whether the franchisee] has been and is
23 rendering adequate service to the public. (Section 3061(e))

24 13. Whether the franchisee fails to fulfill the warranty
25 obligations of the franchisor to be performed by the
26 franchisee. (Section 3061(f))

27 14. Extent of franchisee's failure to comply with the terms
28 of the franchise. (Section 3061(g))

FINDINGS OF FACT

1. Findings Pertaining To Whether GMAC Unreasonably Harassed Protestant.

19. When Mr. Kramer explained that when he became branch manager
at GMAC's San Bernardino office in September 1991, he was shown a
memorandum-to-file dated February 22, 1991, which was written by his
predecessor. This memorandum described various problems GMAC had
encountered with Latham GM Center during 1990. Subsequently, Mr. Kramer

1 himself noted a high incidence of "wholesale performance irregularities"
2 in periodic reports on Protestant's dealerships prepared by GMAC
3 employees. Mr. Kramer also became concerned about Protestant's
4 creditworthiness as indicated by the entries for "cash-in-bank credit
5 balance" and "contracts in transit" in Protestant's financial operating
6 reports to GMAC.

7 20. Over the ensuing months Mr. Kramer and his staff continued to
8 observe a pattern of delays in payments to GMAC for vehicles sold by
9 Protestant. Dealership audits by GMAC personnel were frequently delayed
-10 and frustrated by Mr. Latham's insistence that he be present. On
11 numerous occasions, auditors were unable to locate vehicles and to
12 accurately determine from Protestant's records the date a vehicle was
13 sold. Protestant frequently refused to issue checks for sold units when
14 asked to do so by auditors. Despite numerous contacts and meetings
15 between Protestant and GMAC, the pattern persisted.

16 21. In response, GMAC followed standard procedures applicable to
17 dealers showing signs of financial instability, and increased the
18 frequency of dealer audits at Protestant's Victory Valley dealership
19 from one to two times each month. Although GMAC rotated its auditors
20 assigned to Protestant's dealerships, all but one of sixteen auditors
21 reported difficulties in dealing with Protestant. In July 1992,
22 following a meeting with Mr. Latham at which Mr. Latham complained of
23 GMAC audit practices, GMAC brought in its business development manager
24 from its Pasadena office to conduct an audit. This audit also met with
25 continuing problems.

26 22. GMAC's concerns over Protestant's creditworthiness increased
27 after reviewing Protestant's financial report of June 30, 1992. The
28 financial report showed a net working capital of \$443,000, but GMAC,

1 after taking into consideration appropriate adjustments, suspected that
2 the actual figure was close to zero.⁶ These concerns were confirmed and
3 several other non-standard accounting practices were demonstrated
4 through the testimony of Respondent's expert witness, Mr. Victor
5 Nelawake, CPA.

6 23. The situation did not improve in the following months. On
7 October 15, 1992, Mr. Kramer sent letters to both Mr. Latham's
8 dealerships advising him that unless his dealerships immediately begin
9 complying with GMAC's requirements and correct all deficiencies with
10 thirty days, GMAC would withdraw its financing.

11 24. Despite GMAC's warning, Protestant's performance did not
12 improve. As the result of an audit of Latham Imports conducted two
13 weeks after Mr. Kramer's letter, GMAC obtained documents which indicated
14 that Protestant's Reports of Sale (which GMAC took to be the dates on
15 which its advances became unsecured) and the dates on checks paid to
16 GMAC were being manipulated. When GMAC asked Mr. Latham for an
17 explanation of the dates, he claimed that he had no knowledge, even
18 though he had signed the original checks.

19 25. Finally, after personal visits to Mr. Latham's dealerships on
20 November 20, 1992, January 7, 1993 and February 12, 1993, to complete
21 frustrated audits and collect payments on sold vehicles, and following a
22 confrontation between Mr. Kramer and Mr. Latham, GMAC notified
23 Protestant of its demand for immediate payment of all outstanding
24

25 ⁶GMAC believed that the report improperly listed \$28,000 in
26 contracts more than 90 days overdue as accounts receivable rather than
27 as bad debt. GMAC also factored in a \$170,000 judgement against
28 Protestant and corrected for overstated contracts in transit and an
adjustment for valuation of old model inventory. GMAC was also aware
that dealers in financial difficulty may resort to delaying flooring
paybacks in order to substitute the float on the loans for deficient
working capital.

1 accounts and the cancellation of Protestant's wholesale credit and sight
2 draft privileges. When Protestant refused to comply, GMAC immediately
3 filed a claim in San Bernardino Superior Court for possession of its
4 secured interest in Protestant's vehicle inventory. The suit was
5 resolved by a "work out agreement" allowing Protestant to sell off its
6 inventory and to pay GMAC from the proceeds.

7 26. GMAC worked with Protestant over a period of some eighteen
8 months to assist Protestant to overcome its poor, and worsening
9 performance. GMAC's concerns over Protestant's financial condition were
10 justified in light of the fact repeated wholesale irregularities, bulk
11 releasing, unsatisfactory credit reports, delayed or faulty financial
12 reports, slow trade-in payoffs, duplicate financing, all of which
13 occurred at Protestant's dealership, are included in a list of "danger
14 signals" contained in GMAC's Branch Operations Manual.

15 27. Protestant did not directly deny the existence of wholesale
16 irregularities at his dealerships. Instead Protestant attempted to
17 justify its performance by claiming that its dealerships were small and
18 could not always meet the demands of GMAC. Nevertheless, Protestant's
19 claims that audits were conducted too frequently, that GMAC asked for
20 more documentation than was necessary, and Mr. Latham's objection to
21 having his company car audited at his residence were all primarily the
22 result of Protestant's own failure to abide by the wholesale finance
23 agreement. Protestant offered no substantial evidence to show that GMAC
24 acted with any design or motive other than to protect its security
25 interests and to control its administrative costs.

26 2. Findings Pertaining To Whether Protestant Materially Breached The
27 GMAC Wholesale Finance Agreement.

28 28. GMAC's standard Wholesale Security Agreement provided that

1 "GMAC shall at all times have the right of access to and inspection of
2 the vehicles and the right to examine . . . books and records pertaining
3 to the vehicles." Under the contract Protestant was bound to
4 "faithfully and promptly remit to (GMAC) the amount . . . advanced". The
5 agreement required payment to GMAC within 48 hours after the retail sale
6 of the floored vehicle.

7 29. Respondent presented documentary evidence showing 18 instances
8 of delays or interference by Protestant in the course of auditing his
9 dealerships. Mr. Latham admitted that he instructed his staff at both
10 his dealerships not to cooperate with GMAC auditors unless he was
11 present to oversee their work.

12 30. During the thirteen-month period between January 1992 and
13 February 1993, GMAC's auditors found 148 vehicles missing in inventory
14 but for which GMAC had not been paid. Of these, 68 constituted
15 wholesale payment delays. In addition, 27 other wholesale
16 irregularities were discovered for a total of 95. At the Victor Valley
17 dealership during the same period, there were 170 delayed payments and a
18 total of 225 irregularities. The irregularity rate as percentage of
19 vehicles inventoried was 5.2% for Latham GM and 6.9% for Victor Valley;
20 the average for the San Bernardino Branch as a whole was 1.8%.⁷

21 31. In light of nature of the contract giving GMAC a security
22 interest in Protestant's inventory, access to that inventory was an
23 essential concern. Audit delays increased GMAC's administrative costs
24 threefold and consequently reduced its profits. Wholesale payment
25 delays exposed GMAC to increased loss potential during the periods in
26 which GMAC effectively had nothing to secure its loans except the

27
28 ⁷Prior to the hearing, and as of August 1994, Protestant had repaid
GMAC for all but the remaining four unsold vehicles.

1 possibility of repossession from Protestant's retail customers. In such
2 circumstances Protestant's unresponsiveness to GMAC's concerns and the
3 length of time over which these problem occurred, the irregularities
4 constituted a material breach of the Wholesale Finance Agreement.

5 32. Mr. Kramer testified that in late 1991, he received reports
6 from his auditors advising that Protestant had refused to pay GMAC for
7 reductions in the loans for new vehicles with more than 200 odometer
8 miles. Mr. Kramer contacted Mr. Latham and waived the charges in return
9 for Mr. Latham's promise to pay the charges in the future. Despite his
10 promise, Mr. Latham continued to refuse to pay the reductions.

11 33. Respondents presented documentary evidence in the form of a
12 report of contact alleging that a GMAC employee received a telephone
13 call from an employee of Latham Imports informing GMAC that the
14 dealership was falsifying dealer "equipment add-ons" in order to
15 increase the amounts advanced by GMAC to retail customers. Copies of
16 two invoices for dealer add-ons related to the telephone conversation
17 accompanied the report of contact.

18 34. While the GMAC report of contact is a business document, the
19 information it contains is based on the hearsay statement of the Latham
20 Import employee. The supporting invoices do not themselves contain any
21 indication that the add-on equipment was not actually installed on the
22 vehicles. Respondent's witness, Mr. Kramer, testified that GMAC did not
23 investigate the allegations and did not independently determine whether
24 the alleged falsifications occurred. Without supporting evidence,
25 hearsay statements alone cannot support a finding by the Board⁸.

26
27 ⁸The only other evidence suggesting the falsifying of due bills was
28 contained in Exhibit R-34, a memorandum to file drafted by Mr. Kramer's
predecessor. The memorandum alluded to his belief that Protestant had

1 Therefore, the evidence presented fails to prove that Protestant
2 falsified the subject due bills.

3 35. GM produced as Exhibit R-37, a file containing, among other
4 things, two sets of photocopies of checks. The first set consisted of
5 six carbon duplicates of checks issued by Latham Imports to GMAC upon
6 the sale of various floored vehicles. The duplicates were given to GMAC
7 by the Latham Valley Import office manager during an audit of the
8 dealership on October 29, 1993. The second set consisted of six
9 photocopies of the original checks mailed on October 28, 1993 and
10 received by GMAC on October 30, 1993.

11 36. The dates on each of the check carbons obtained from
12 Protestant are earlier by several days than the dates shown on the
13 copies of the checks actually received by GMAC.⁹ Differences between
14 the typing of the dates on the carbons and the dates typed on the
15 originals indicate that the dates were not typed at the same time.

16 37. The effect of the differing dates is to suggest that,
17 according to the carbons, the checks were issued later than they
18 actually were. If these dates were accurate, then they would have been
19 mailed within the two-day payment period required by GMAC. If, on the
20 otherhand, the dates on the original checks are correct, it follows that
21 they were mailed several days after the two-day payment period. Mr.

22 _____
23 falsified due bills in earlier accounts, not related to the evidence
24 relied on by Respondent at hearing.

25 ⁹For example, check number 5494 is dated "10/23" but the carbon
26 receipt is dated "10/27". The later date which was shown to the auditor
27 during the October 29, 1993, audit would have made it appear that the
28 vehicle had been sold two days before the audit when, in actuality the
vehicle had been sold as early as October 23, 1993. Taking the check
date as true, payment on the vehicle should have been made
by October 25, 1993, but was not received until November 5, 1993.

1 Latham testified that he was unaware of any alterations made to the
2 dates on the filed copies of these checks.

3 38. The evidence and testimony concerning the check carbons
4 supports an inference that the carbons were altered while in
5 Protestant's possession and that they were intended to conceal the
6 delayed payments for automobiles which were the subject of the audit.

7 39. Mr. Kramer testified that Protestant had refused to comply
8 with GMAC's requests for financial information from both his GM and
9 import dealerships and for his personal financial statements as
10 guarantor. Protestant admitted that he had refused to provide his
11 personal financial information, but sought to explain that he did so
12 because he was concerned that GMAC was disclosing the information to his
13 competitors. On cross-examination, Mr. Latham could not substantiate
14 his belief and admitted that he could not produce any writings to prove
15 that he had brought his concerns to GMAC's attention.

16 40. While GMAC's wholesale security agreement does not expressly
17 require that Protest furnish personal financial data, Protestant was
18 required to provide operating statements. In light of GMAC's reasonable
19 concerns over Protestant's financial status, Protestant's refusal
20 without adequate justification to provide guarantor financial
21 information was a breach of its obligation to furnish books and records
22 concerning the security for GMAC's examination.

23 **3. Findings Pertaining To Whether GMAC Acted Reasonably In Cancelling**
24 **Protestant's Wholesale Flooring Credit.**

25 41. The findings of fact pertaining to the issue of whether GMAC
26 harassed Protestant are also relevant to whether GMAC acted in good
27 faith in cancelling Protestant's wholesale flooring line. Protestant
28 failed to prove that either GM or GMAC prevented Protestant from

1 fulfilling the obligations imposed by the flooring agreement, and,
2 therefore, Protestant's duties were not excused.

3 42. Protestant's claims that GMAC acted unreasonably were premised
4 upon his personal opinion as to which procedures GMAC should employ and
5 also upon the limited capacities of his dealerships to comply.
6 Protestant presented no evidence that GMAC acted in violation of its
7 agreement with Protestant nor that GMAC had ever waived its right to
8 require Protestant to perform.

9 **4. Findings Pertaining To Whether Mr. Latham Threatened To Take**
10 **Physical Action Against Mr. Kramer.**

11 43. The evidence presented on this issue consisted solely of the
12 conflicting testimony of the witnesses, Mr. Kramer and Mr. Latham.¹⁰ Mr.
13 Kramer's account of these events was drawn from his recollection
14 together with his contemporaneous notes and writings and Mr. Kramer's
15 declaration in GMAC's suit for possession Protestant's inventory,
16 Exhibit R-42. He testified that he and his auditor had been unable to
17 complete an audit on Friday, February 12, 1993 because, with Mr. Latham
18 not present, Latham Imports employees refused to provide certain
19 information and told the auditor to leave. Mr. Kramer had, in fact,
20 gone to Latham Imports later that day, and again on the following
21 Saturday, and completed the physical audit, despite Mr. Latham's express

22
23 ¹⁰Mr. Latham's wife was called as a witness to corroborate Mr.
24 Latham's testimony as to the events of the morning of February 15, 1993.
25 She testified that on the morning of February 15, she was in the
26 hospital due to an acute case of Meniere's disease. Meniere's is an
27 inner ear disorder that was causing her to experience disorientation,
28 vertigo, nausea and vomiting. According to Mrs. Latham, Mr. Latham
came to the hospital at approximately 8:00 that morning and attended a
meeting with Mrs. Latham and her physician at about 8:30 a.m. She
claimed that Mr. Latham was with her "continuously during the morning
hours of February 15, 1993," and that during that time, Mr. Latham did
not mention any telephone conversation with Mr. Kramer, nor did she see
Mr. Latham make a telephone call that morning.

1 wishes. On the morning of Monday, February 15, 1993, Mr. Kramer
2 returned to Latham Imports hoping to have Mr. Latham account for 16
3 missing vehicles. Mr. Latham was not there that morning, but he called
4 the dealership and spoke with Mr. Kramer on the telephone. During that
5 conversation, Mr. Latham stated that unless GMAC reduced the frequency
6 of its audits, he (Latham) would "take physical action" against Mr.
7 Kramer and his (Kramer's) employees.¹¹

8 44. The following morning, Mr. Kramer discussed the events of the
9 previous day with his supervisors. They notified GMAC's counsel and
10 security coordinator and instructed Mr. Kramer to not to speak with Mr.
11 Latham further.

12 45. That afternoon, Mr. Latham called Mr. Kramer concerning their
13 meeting which was to have occurred at 3:00 p.m. Mr. Kramer referred to
14 the threat Mr. Latham had made the previous day and told Mr. Latham that
15 meeting was cancelled and that GMAC was going to terminate its flooring
16 arrangements with Mr. Latham. Mr. Latham responded with "Okay" at
17 several points in the conversation and stated that he could not pay the
18

19 ¹¹In support of Mr. Kramer's oral testimony, Respondent GM
20 introduced Exhibits R-35.72 and R-35.73. The first consists of a
21 contemporaneous memorandum written by Mr. Kramer to GMAC Control Branch
22 manager R.W. Greenwood and the latter is a memorandum to file. Mr.
23 Kramer testified that R-35.72 is incorrectly dated and that the true
24 date on which it was prepared was February 15, 1993. R-35.73 contains
25 the following excerpted passage:

26 "...he [Mr. Latham] stated, 'I'm not going to take your harassment
27 any longer. If you don't do what I tell you to, then I'm going to take
28 physical action against you.' When I questioned this statement, he
29 said, 'You heard what I said. Either you reduce your audits and not
30 take audits when I tell you not to take them or I'm going to take
31 physical action against you and also your employees.' I asked him to
32 further clarify his statement. He replied, 'If you're smart enough to
33 be a GMAC Branch Manager then you're smart enough to figure it out.
34 I've told you several times not to take audits and you've taken them
35 anyway. It's obvious you don't take me seriously. I'm now telling you
36 for the last time and you better listen. You set the number of audits
37 [sic] and you can reduce them. If you can't do it, then you best
38 convince those who can.'"

1 outstanding accounts and did not want his employees to know about GMAC's
2 action.

3 46. Mr. Latham's testimony as to the events of Monday, February
4 16, 1993 differs substantially from that of Mr. Kramer and the evidence
5 presented in Exhibit R-35.73. Mr. Latham testified that he spent the
6 morning of Monday, February 15, 1993 with his wife who was hospitalized
7 due to a sudden serious illness. He did not attempt to contact Mr.
8 Kramer because he believed that February 15 was a holiday for GMAC, and
9 he further denied that any telephone conversation took place between Mr.
10 Kramer and himself that morning. Mr. Latham stated that he did not
11 contact Mr. Kramer until the next morning February 16, 1993, to discuss
12 the February 12, 1993 audit. During this conversation, Mr. Latham
13 agreed to meet with Mr. Kramer at 3:00 that afternoon.

14 47. Mr. Latham admitted that he telephoned Mr. Kramer again at
15 about 2:30 that day to cancel their meeting and that this conversation
16 transpired as described in Mr. Kramer's testimony. Mr. Latham added
17 that when he responded "Okay" to Mr. Kramer's statements, he was not
18 indicating agreement, but merely acknowledging the remarks. Mr. Latham
19 testified that at the time of the conversation he was using his cellular
20 telephone while driving his wife home from her doctor's office and did
21 not wish to have an unpleasant conversation with Mr. Kramer with his
22 wife present in the car.¹²

23 48. On cross-examination, Mr. Latham appeared uncertain as to
24 whether he had spoken with Mr. Kramer on February 15, 1993, but he was
25 certain that he had not made any threat. After this conversation with
26 Mr. Kramer on February 16, 1994, Mr. Latham did not explain or deny the

27
28 ¹²Mr. Kramer's account stated that the call did not sound as though
it was a cellular call. No telephone records were produced in evidence.

1 threat until this proceeding was commenced.¹³ On the otherhand, Mr.
2 Kramer's testimony included considerable detail, and he testified that
3 he was certain that the events occurred as he recalled them. Mr.
4 Kramer's course of conduct following the February 15, 1993 telephone
5 conversation is consistent with his version of the facts. On balance,
6 the evidence presented shows that it is more likely than not that these
7 events occurred as described by Mr. Kramer.

8 5. Findings Pertaining To Whether GM and GMAC Discriminated Against
9 Protestant Because He Is An African-American.

10 49. In support of its claim that GM and GMAC discriminated against
11 Mr. Latham because he is an African-American, Protestant offered the
12 testimony of Mr. Latham and his wife of twenty-four years, Maureen
13 Latham.

14 50. As to GMAC, Mr. Latham testified that he told Mr. Kramer, on a
15 number of occasions, that he thought that Mr. Kramer was discriminating
16 against him. However, Mr. Latham also testified that he did not know
17 whether Mr. Kramer's actions were "racially motivated or not."

18 51. Mr. Latham described an occasion when he telephoned GMAC's
19 regional manager, Mr. Handley, to discuss the lawsuit GMAC filed against
20 Protestant in February 1993. Mr. Handley declined to discuss the
21 matter, and when Mr. Latham persisted, Mr. Handley relied as follows and
22 as quoted by Mr. Latham, "Boy, you can't make me talk to you. And this
23 conversation, as far as I'm concerned is terminated right now." At that
24 point, Mr. Handley hung up on Mr. Latham.

25 52. Mr. Latham recounted two instances of alleged racial
26 discrimination involving GM employees. The more recent occurred in 1984

27 ¹³Mr. Latham testified that he attempted to telephone Mr. Kramer
28 once, but the call did not go through, and he did not attempt to follow-
up in writing.

1 or 1985 during an argument between Mr. Latham and GM's Chevrolet zone
2 manager for San Diego, Jack Sherman. According to Mr. Latham, Mr.
3 Sherman stated, "I do not have to listen to your watermelon talk
4 anymore. I've had enough of all this watermelon talk you're giving me."

5 53. The other occasion allegedly occurred in 1979 or 1980 during a
6 discussion between Mr. Latham and Mr. Bill Stacey who was the regional
7 manager for Chevrolet's Midwest Region. At that time, Mr. Latham was
8 seeking to become a GM dealer, and when he was not interested in a
9 particular point suggested by GM, Mr. Stacey said, "Boy, you're lucky we
10 let you work for us. And I'll be damned if I'm going to let you dictate
11 to me what dealerships you're going to look at. You're going to do
12 whatever we ask you to do."

13 54. Mrs. Maureen Latham testified that in 1980, just before Mr.
14 Latham was appointed to the Barstow dealership, GM employee, Bob
15 Fickling told her about a dealership which was open in Minnesota and
16 said, "You people--you guys would really like it, it's really liberal in
17 Minnesota. I don't know what you guys want. There's a lot of
18 interracial couples in Minnesota, you'd be happy there." Mrs. Latham
19 related another instance involving Mr. Jack Sherman shortly after their
20 arrival in Barstow and after a fire occurred at the dealership. Mrs.
21 Latham testified as follows:

22
23 ..."he [Sherman] called and inquired. He had prior to
24 that made extremely racially derogatory remarks more
25 than once, most notably the watermelon talk remark, and
26 made the reference, 'Well, I know that you guys
probably don't believe this, but I am really sorry that
this [fire] happened,' and my [Mrs. Latham's] response
was, 'Yes, I would find it hard to believe that you
really are concerned that this has happened.'"

27 55. The above testimony does not support a finding that GM and
28 GMAC discriminated against Mr. Latham. The events involving Mr. Stacey

1 and Mr. Sherman are remote in time and unconnected in any way with the
2 facts of this proceeding. The statements of Mr. Fickling and Mr.
3 Sherman to Mrs. Latham are not only remote and unrelated, but are of any
4 bare trace of discrimination. The statement of Mr. Handley, coming as
5 alleged, during an argument and after GMAC had already cancelled the
6 flooring and initiated a suit against Mr. Latham, and containing only
7 the introductory word "boy", is not sufficient to support a finding that
8 GMAC's entire course of conduct was inspired by any racism on the part
9 of Mr. Handley.

10 6. Findings Pertaining To Whether GMAC Unreasonably Interfered With
11 Protestant's Post-Cancellation Efforts To Obtain Alternative
12 Flooring.

13 56. Protestant claimed that there two instances in which GMAC
14 frustrated his attempts to secure inventory financing from other
15 lenders.¹⁴ The first instance involved a credit application for Victor
16 Valley Mazda which Mr. Latham had filed with Mazda American Credit prior
17 to the cancellation of his GMAC credit. GMAC drafted a response dated
18 March 4, 1993 to a request for a floorplan credit rating from a credit
19 review agency called Equifax. The response advised Equifax that GMAC
20 did not provide floorplan ratings, but provided general information on
21 Protestant's floorplans for both Latham GM Center and Latham Imports.
22 The letter ended with the following paragraph: "Both the above
23 dealerships have been notified and have agreed to locate alternative
24 floorplan financing."

25 57. Before sending the response, GMAC submitted an unsigned copy

26 ¹⁴Mr Latham testified that he had discussed financing with Bank of
27 America and G.E. Capital but was not able to secure a satisfactory plan
28 "because of some very adverse circumstances that they had to look at--
one being not receiving any type of credit rating." No evidence was
introduced to show that GMAC was involved in these efforts.

1 of the letter to Mr. Latham for his approval. Mr. Latham returned it
2 asking that the ending be deleted. GMAC refused to omit the paragraph,
3 and when Mr. Latham would not agree to the language, did nothing
4 further. Subsequently, Equifax contacted Mr. Latham directly and Mr.
5 Latham himself disclosed the statement in GMAC's response and furnished
6 Equifax a copy of the letter.

7 58. Mr. Latham's second allegation of interference claims that the
8 lawsuit filed on February 18, 1993 seeking a writ of possession for its
9 security interest in Mr. Latham's remaining inventory was intended to
10 limit his ability to attract alternate financing.

11 59. The evidence presented fails to support a finding that GMAC
12 unreasonably hindered Protestant in obtaining alternate financing.
13 GMAC's insistence that Mr. Latham agree to the content of its March 4,
14 1993 letter to Equifax was not unreasonable in light of the litigation
15 and the stipulated settlement agreement between GMAC and Latham GM and
16 Latham Imports.¹⁵ Protestant offered no evidence to prove that GMAC
17 filed the litigation for the purpose of frustrating the Protestant
18 rather than recovering approximately \$4,000,000 loaned to Protestant.
19

20 7. Findings Pertaining To Whether The Notice Of Termination Issued On
21 April 19, 1994, Was Legally Sufficient As To Protestant's Non-
22 Chevrolet GM Franchises.

23 60. Vehicle Code 3060 provides that no franchisor shall terminate
24 a franchise unless the Board and the franchisee receive advance notice
25 within specified time periods and also requires a specified advisement
26 of the franchisee's right to protest the termination. Beyond these

27 ¹⁵Paragraph 14 of the stipulation forbade GMAC or its employees from
28 speaking "disparagingly about Latham to any third party."

1 specific statutory provisions, a notice of termination must be provide a
2 clear and unequivocal statement of a franchisor's intent as well as
3 notice of the grounds for the termination. GM's April 19, 1994 notice
4 met each of these requirements.

5 61. Protestant's claim that the notice was insufficient as to its
6 Oldsmobile, Cadillac, Pontiac, and Buick franchises is premised on the
7 fact that it was issued by GM's Chevrolet Division and that separate
8 notices were not issued by the other line makes. This claim fails,
9 because the notice clearly stated GM's intent to terminate all the
10 franchises. Protestant was advised by letter as early as May 12, 1993
11 that GM's Chevrolet Division was acting as "Division with Business
12 Management responsibility on behalf of itself and" the other GM
13 divisions. The April 19, 1994 notice contained the same advisement and
14 stated "you are hereby notified that your General Motor (sic) Dealer
15 Sales and Service Agreements will terminate 60 days from receipt of this
16 letter." Each of Protestant's GM franchises operated under identical
17 standard dealer agreements. Protestant was certainly aware that it had
18 lost its GMAC financing for each of its line-makes. The letter leaves no
19 uncertainty as to the fact that GM intended to terminate all of
20 Protestant's line-make franchises.

21
22 8. Findings Pertaining To The Amount Of Business Transacted By The
23 Franchisee, As Compared To The Business Available To The Franchisee.

24 [Vehicle Code section 3061(a)]

25 62. Respondent presented the expert testimony of Mr. John Frith,
26 Western Regional Manager of Urban Science Applications, Inc., to
27 establish the amount of business available and the amount of business
28 transacted by Protestant. His testimony presented a determination of

1 the potential sales of GM vehicles for Protestant's Area of Primary
2 Responsibility (APR) by applying GM's available market share to total
3 vehicle registrations for 1993. Mr. Firth then compared this data to
4 Protestant's actual sales performance. Mr. Firth also presented GM's
5 internal sales effectiveness ratings for Protestant for the period 1990
6 through the first quarter of 1994.

7 63. The total number of new vehicle (car and truck) registrations
8 in Protestant's APR for 1993 was 2,135. The total available market
9 share for the five GM linemakes represented by Protestant was 29.3% that
10 year. Therefore, the potential business available to Protestant was 626
11 retail vehicle sales. Protestant's actual performance was 163 total
12 retail sales, including sales outside the APR.

13 64. GM's sales effectiveness ratings compares the performance of a
14 given dealer to the average of all dealers nation-wide and to the
15 average for dealers within a given distribution zone. GM considers a
16 performance rating below the 40th percentile as unsatisfactory.

17 65. Protestant's zone sales effectiveness for each GM line-make
18 except Pontiac shows a general pattern of decline from acceptable levels
19 in 1990 to unacceptable levels by early 1994. By 1994 Protestant was
20 ranked last or near last in the zone for every make it represented.
21 During the first half of 1994, Protestant sold only 11 new GM vehicles.

22 66. Protestant's only evidence on this issue was the testimony of
23 Mr. Latham indicating that Protestant's low sales performance after the
24 first quarter of 1993 coincided with his loss of GMAC flooring.

25 67. The evidence and testimony presented support the finding that
26 the amount of business transacted by the Protestant generally declined
27 after 1990 and declined steeply after 1993. Undoubtedly, Protestant's
28 business was drastically reduced by the loss of its GMAC flooring, but

1 as found above, that loss was caused by Protestant's own conduct. Thus
2 it must be concluded that the Protestant is not transacting sufficient
3 business in comparison to the amount of business available.

4 9. Findings Pertaining To Investment Necessarily Made And Obligations
5 Incurred By The Franchisee To Perform Its Part Of The Franchise.

6 [Vehicle code section 3061(b)]

7 68. According to Protestant's monthly operating report for June
8 1994, Protestant's total undepreciated assets were \$1,045,492. No
9 evidence was presented as to the extent these assets represent
10 Protestant's investment. The only obligations incurred by the
11 Protestant are the dealer sales and service agreement and an oral
12 understanding with Protestant's lessor continuing Protestant's lease
13 which expired in 1993.

14 10. Findings Pertaining To Permanency Of The Investment.

15 [Vehicle Code section 3061(c)]

16 69. Protestant's permanent investment as shown in it's June 1994
17 operating report shows a depreciated permanent investment of \$64,820, or
18 7.6% of the total assets of \$1,045,492. Permanent investments are those
19 which are normally not converted into cash within one year, consisting,
20 for example, of furniture, fixtures and leasehold improvements and
21 company vehicles. Based on a thorough analysis of Protestant's
22 financial statements, the expert witness, Mr. Nelawake concluded that
23 Protestant is operating "in a liquidation mode."

24 11. Findings Pertaining To Whether It Is Injurious Or Beneficial To The
25 Public Welfare For The Franchise To Be Modified Or Replaced Or The
26 Business Of The Franchisee Disrupted.

27 [Vehicle Code section 3061(d)]

28 70. Since the loss of Protestant's wholesale flooring,

1 Protestant's new vehicle inventory has been "sold off". As of the date
2 of the hearing in this proceeding, Latham GM Center's inventory
3 consisted of but four vehicles, a 1994 Chevrolet Blazer, a 1991 Cadillac
4 Allante, and two company vehicles not available for sale. During the
5 first half of 1994, Protestant sold only nine Chevrolets, two Cadillacs,
6 and no Buick, Oldsmobile or Pontiac vehicles.

7 71. The most recent Customer Satisfaction Index (CSI) survey,
8 conducted after September 1993, ranked Protestant's Chevrolet franchise
9 4,344 out of 4,444 Chevrolet dealers nationwide. Protestant's CSI for
10 its other GM franchises were likewise ranked near the bottom since
11 1991.¹⁶

12 72. These facts show that Protestant is not adequately serving the
13 public. No evidence was presented to the contrary. Since GM's Network
14 2000 Plan identifies Barstow as a viable point, GM intends to maintain
15 representation in the area through the appointment of new dealer. For
16 these reasons, the termination of Protestant's GM franchises would not
17 be detrimental to the public welfare.

18 12. Findings Pertaining To Whether The Franchisee Has Adequate Motor
19 Vehicle Sales And Service Facilities, Equipment, Vehicle Parts,
20 And Qualified Service Personnel To Reasonable Provide For The Needs
Of The Consumers For The Motor Vehicles Handled By The Franchisee
And Has Been And Is Rendering Adequate Service.

21 [Vehicle Code section 3061(e)]
22

23 73. Pursuant to findings made above, Protestant is not rendering
24 adequate service to the public, due principally to Protestant's lack of
25 flooring and inability to maintain an adequate inventory of vehicles,
26

27 ¹⁶Protestant earned a ranking of 1 in 1994 for Oldsmobile, but since
28 the ranking was based on only one sale, it is not statistically
significant.

1 and due to its historically poor CSI. No evidence was presented as to
2 the adequacy of Protestant's facilities, equipment, parts and personnel.

3 13. Findings Pertaining to Whether The Franchisee Has Failed To Fulfill
4 The Warranty Obligations Of The Franchisor To Be Performed By The
5 Franchisee.

6 [Vehicle Code section 3061(f)]

7 74. No issue or evidence of warranty performance was raised in
8 this proceeding.

9 14. Findings Pertaining to the Extent Of The Franchisee's Failure To
10 Comply With The Terms Of The Franchise.

11 [Vehicle Code section 3061(g)]

12 75. In failing to maintain a separate line of credit from a
13 financial institution to finance its purchases of new vehicles,
14 Protestant has failed to comply with Article 10 of the GM Dealer Sales
15 and Service Agreement for each of its GM franchises. Article 13.1 and
16 13.11 provide that the failure to maintain flooring is a material breach
17 of the dealer agreement, and Article 13.2 provides that failure to cure
18 a defect in performance of that obligations entitles the franchisor to
19 terminate the franchise.

20 76. Following its loss of flooring on February 16, 1993,
21 Protestant has been unable to maintain an adequate inventory of new
22 vehicles and has, therefore, failed to comply with Article 6.4.1 of the
23 dealer agreement which requires Protestant to order and stock vehicles
24 in quantities adequate to enable to the dealer to fulfill its
25 obligations in its Area of Primary Responsibility.

26 DETERMINATION OF THE ISSUES

27 Based upon the foregoing, it is hereby determined that:

28 1. Protestant failed to establish that GMAC unreasonably harassed
Protestant in administering Protestant's wholesale financing agreement

1 between September 1991 and February 1993.

2 2. Protestant materially breached its wholesale financing
3 agreement with GMAC by: failing to allow GMAC access to Protestant's
4 inventory and files, failing to promptly pay GMAC from the proceeds of
5 its sales of GMAC financed inventory, failing to pay allowance for
6 excess mileage on floored vehicles, manipulating records to conceal the
7 actual dates of vehicle sales and failing to provide financial
8 information requested by GMAC.

9 3. Protestant failed to establish that GMAC acted unreasonably in
10 cancelling Protestant's wholesale credit line.

11 4. Respondent established that Mr. Latham threatened to take
12 physical action against Mr. Kramer.

13 5. Protestant failed to establish that either Respondent or GMAC
14 discriminated against Mr. Latham because he is an African-American.

15 6. Protestant failed to establish that either Respondent or GMAC
16 interfered with Protestant's post-cancellation efforts to replace its
17 flooring with another financial institution.

18 7. Respondent's notice of termination, dated April 19, 1994, was
19 a legally sufficient notice of Respondent's intention to terminate all
20 of Protestant's General Motors' franchises.

21 8. Respondent established that the amount of business transacted
22 by the franchisee, as compared to the amount of business available to
23 the franchisee, was insufficient.

24 9. Respondent failed to establish the that the investment
25 necessarily made and obligations incurred by the franchisee to perform
26 its part of the franchise were inadequate.

27 10. Respondent established that Protestant's investments are not
28 permanent.

1 11. Respondent established that it would not be injurious and
2 would be beneficial to the public welfare for the franchise to be
3 modified or replaced or the business of the franchisee disrupted.

4 12. Respondent established that the franchisee has been rendering
5 inadequate service to the public. Respondent failed to establish that
6 the franchisee has inadequate service facilities, equipment, vehicle
7 parts, and qualified service personnel to reasonably provide for the
8 needs of the consumers for the motor vehicles handled by the franchisee.

9 13. Respondent failed to establish that the franchisee has failed
10 to fulfill the warranty obligations of the franchisor to be performed by
11 the franchisee.

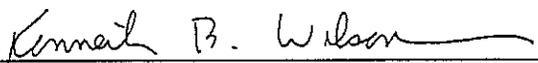
12 14. Respondent established that the franchisee has failed to
13 comply with the terms of the franchise.

14 PROPOSED DECISION

15 The protest of Sunnyday, Inc. is overruled. Respondent has
16 established that there is good cause to terminate each of Protestant's
17 General Motors' franchises. General Motors shall be permitted to
18 terminate these franchises upon the effective date of this decision.

19
20
21 I hereby submit the foregoing
22 which constitutes my proposed
23 decision in the above-entitled
24 matter, as a result of a hearing
25 held before me on the above date
26 and recommend adoption of this
27 proposed decision as the decision
28 of the New Motor Vehicle Board.

Dated: December 14, 1994


KENNETH B. WILSON
Administrative Law Judge
New Motor Vehicle Board