NEW MOTOR VEHICLE BOARD
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STATE OF CALIFORNIA

NEW MOTOR VEHICLE BOARD

In the Matter of the Protest of MCCONNELL CHEVROLET BUICK, INC., Protestant, v. GENERAL MOTORS, LLC, Respondent.	**Protest Nos. PR-2369-13 and PR-2370-13**

DECISION

At its regularly scheduled meeting of November 12, 2013, the Public Members of the Board met and considered the administrative record and Proposed Decision in the above-entitled matters. After such consideration, the Board adopted the Proposed Decision as its final Decision in these matters.

This Decision shall become effective forthwith.

IT IS SO ORDERED THIS 12th DAY OF NOVEMBER 2013.

BISMARCK OBANDO
President
New Motor Vehicle Board

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PROCEDURAL BACKGROUND

Statement of the Case

1. By letter dated June 18, 2013, General Motors, LLC gave notice to McConnell Chevrolet Buick, Inc. pursuant to California Vehicle Code section 3060[1] of its intention to terminate the Chevrolet and Buick franchises of McConnell Chevrolet Buick, Inc.[2] In error, this letter referred to both protestant's line-makes, Chevrolet and Buick. On June 25, 2013, General Motors, LLC corrected the mistake and mailed two separate termination letters to protestant, Exhibit 4 (Buick) and Exhibit 5 (Chevrolet), both of which contained the same substantive language as the earlier letter. (RT 49:21-51:17)

2. The New Motor Vehicle Board (hereinafter sometimes "Board") received the initial termination notice on June 19, 2013.

[1] Unless otherwise indicated, all statutory references are to the California Vehicle Code.
[2] Such notice is required whenever a franchisor seeks to terminate an existing motor vehicle franchise. [Section 3060(a)]

3. On June 27, 2013, McConnell Chevrolet Buick, Inc. filed a timely protest.[3] On July 1, 2013, protestant filed an Amended Protest (PR-2369-13) and a new Protest (PR-2370-13). Protest No. PR-2369-13 related to protestant's Chevrolet franchise and Protest No. PR-2370-13 to its Buick franchise.

4. On July 12, 2013, Protest Nos. PR-2369-13 and PR-2370-13 were ordered consolidated for the purposes of hearing.

5. A hearing on the merits of the consolidated protests was held on October 22, 2013, before Administrative Law Judge Diana Woodward Hagle.

6. The matter was submitted on October 22, 2013.

Parties and Counsel

7. Protestant McConnell Chevrolet Buick, Inc. (herein "McConnell" or "Protestant") is a Chevrolet and Buick dealership located at 1646 Highway 99 E, Gridley, California. It is a California corporation owned by Michael A. McConnell.[4] Protestant is a "franchisee" within the meaning of sections 331.1 and 3060(a).

8. Protestant is represented by the Carter Law Offices, John Jeffrey Carter, Esquire, 329 Flume Street, Post Office Box 3606, Chico, California.

9. Respondent General Motors, LLC (herein "GM" or "Respondent") is a "franchisor" within the meaning of sections 331.2 and 3060(a).

10. Respondent is represented by Isaacs Clouse Crose & Oxford, LLP, by Gregory R. Oxford, Esquire, 21515 Hawthorne Boulevard, Suite 950, Torrance California.

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[3] Reflecting the error in respondent's initial termination letter, the protest covered both line-makes.

[4] Note discussion on the record regarding the disputed corporate ownership of protestant and the explanation of protestant's strategy to proceed with a "good cause" hearing. Michael A. McConnell was present during the hearing, as was Bill Marker, Jr. (RT 7:7-12; 9:6-11:23; 18:24-19:3)

Summary of Witness's Testimony and Exhibits Introduced at Hearing

Protestant's Exhibits

11. Protestant offered corporate documents in evidence, but called no witnesses. (Exhs 100-104; RT 10:3-6)[5]

Respondent's Witness's Testimony and Exhibits[6]

12. GM District Manager Saul Escalante identified the GM-McConnell Dealer Agreement and other documents, photos and a video. He testified to his observations and the observations of other GM employees of the McConnell dealership in April and from May 2, 2013 to May 10, 2013.[7] (RT 14:9-78:15, 89:23-92:4)

13. Respondent's exhibits included the GM-McConnell Dealer Agreement, photographs and a video of the dealership, and documents (letters and emails).

ISSUE PRESENTED

14. Has respondent GM sustained its burden of proof of showing "good cause" under section 3066(b) to terminate protestant McConnell's Chevrolet and Buick franchises?

15. In determining whether good cause has been established 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 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.

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[5] References herein to "RT" are to the transcript of the hearing. References to "Exh" are to Exhibits; references to pages within Exhibits are to the last four digits of the page number and exclude the preceding zeros.

[6] Note discussion on the record regarding presentation of the testimony of Mr. Escalante and the introduction into evidence of documents offered by respondent. (RT 63:9-65:19)

[7] It is noted that uncontradicted testimony may be disbelieved. That, however, is not the case here.

(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 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.

PROTESTANT'S CONTENTIONS

16. No material challenges were made by protestant to respondent's contentions.[8]

RESPONDENT'S CONTENTIONS

17. In the Spring of 2013, McConnell "ceased to conduct customary sales and service operations". On March 20, it had lost its floorplan financing for both line-makes and therefore its ability to order inventory from GM. It had made few sales of new vehicles even before losing its wholesale financing.

18. The last warranty work performed by McConnell was on March 26. On seven consecutive business days in May (excluding Sunday), when GM representatives visited the dealership, only routine "lube, oil and filter" ("LOF's") changes were being performed and warranty work was being referred to other dealers. On several days, no technicians were present at the dealership.

19. On or about August 21, 2013 (after the filing of the protests), protestant was served with an eviction notice regarding the dealership premises.

FINDINGS OF FACT[9]

Preliminary Findings

20. Effective June 14, 2012, McConnell and GM executed a "Dealer Sales and Service Agreement" ("Dealer Agreement") authorizing McConnell to sell "Chevrolet Passenger Vehicles and

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[8] See footnote 4, *supra*.

[9] References herein to testimony, exhibits or other parts of the record are examples of evidence relied upon to reach a finding and are not intended to be all-inclusive.

Findings of Fact are organized under topical headings for readability only and are not to be considered relative to only the particular topic under which they appear, but rather may apply to any of the "existing circumstances" or "good cause" factors of section 3061.

Light Duty Trucks [and]...Buick Motor Vehicles" at its dealership on Highway 99 E in Gridley. The Agreement would "...expire October 31, 2015, unless earlier terminated". Michael A. McConnell was stated to be "Dealer Operator and Dealer Owner" and holder of 100% of the ownership interest of protestant. (Exhs 1:0857, 2, 3, 102; RT 18:12-20:3; 21:6-21)

21. The Dealer Agreement required the dealer to "sell and promote ... [GM motor vehicles, parts and accessories]" and to "maintain an adequate staff of trained sales personnel" to do so. (Exh 1:0866, 0900; RT 21:22-22:7) The dealer promised to provide "...quality service to [GM] owners" and to maintain "an adequate service and parts organization". (Exh 1:0868; RT 22:8-16)

22. The dealer was also required by the Dealer Agreement to have and maintain a wholesale floorplan "...available to finance the [d]ealer's purchase of new vehicles...". (Exh 1:0877; RT 22:17-23:14) Floor plan financing is a third party line of credit which a dealership obtains to purchase vehicles at wholesale from the manufacturer for retail sale to customers and, without such financing, it is difficult for a dealership to purchase inventory. (RT 22:25-23:14)

23. Article 14 of the Dealer Agreement ("Termination of Agreement") provided, among other things, the following:

> "If General Motors learns that any of the following has occurred, it may terminate this Agreement by giving Dealer written notice of termination. Termination will be effective on the date specified in the notice."
>
> ....
>
> "**14.5.3** Failure of Dealer to conduct customary sales and service operations during customary business hours for seven consecutive business days." (Exh 1:0886-0887; RT 23:15-24:7)

24. On February 7, 2013, McConnell placed its final order for a vehicle from GM. (Exh 13; RT 41:21-42:2)

25. "ALLY [Financial], the dealers financing source" notified GM that protestant's wholesale floor plan had been suspended, effective March 20, 2013. The suspension related to both line-makes, Chevrolet and Buick. (Exh 10; RT 27:6-17, 70:12-71:3)

26. On March 26, 2013 and May 8, 2013, GM sent letters to protestant advising that its loss of floorplan financing subjected its franchises to termination under the Dealer Agreement. McConnell never did reestablish a wholesale floorplan line of credit. (Exhs 11, 12; RT 27:18-29:16)

27. In April, 2013, Saul Escalante visited the dealership and saw that no service personnel were on hand and that customers coming in for service were being referred to other dealers. General Manager Bill Marker told Mr. Escalante that the dealership could not hire service staff because of financial difficulties. (RT 24:16-26:9)

28. Between May 2, 2013 and May 10, 2013, GM representatives made daily (except Sunday, May 5) visits to protestant's dealership (Exh 6:0038-0040, 1113-1116; RT 30:17-23, 34:5-20), as follows:

A. On May 2, 2013, Saul Escalante observed no regular day-to-day business activities being conducted. The Sales and Service Managers were loitering in the office with no assigned tasks. The dealership was not scheduling Chevrolet or Buick vehicle service (warranty or customer pay) and instead was referring service customers to other dealerships. No service technicians were present and the service department appeared closed. No vehicle sales activity was observed. (Exh 6:0038, 1115)

B. On May 3, 2013, Saul Escalante observed that the Sales and Service Managers were just "hanging out", as before. Service customers again were being referred to other dealerships. No service technicians were present and the service department appeared closed. Saul Escalante advised General Manager Bill Marker that it was important to make sure that the dealership was servicing all warranty types of repair as outlined in the Dealer Agreement. Bill Marker responded that, as he had previously advised Mr. Escalante, the dealership had "limited financial resources" to operate the dealership as expected by GM. (Exh 6:0038, 1115; RT 37:7-14)

C. On Saturday, May 4, 2013, Saul Escalante telephoned the dealership several times throughout the day. At that time, protestant's website stated that the dealership was open Saturdays until 6 PM, but closed on Sundays. None of these calls were answered. (Exhs 6:0038, 1115, 7; RT 24:8-15, 40:11-22)

D. On May 6, 2013, GM District Manager Leonard Deprez visited the dealership. He observed no business activity, although two employees in the service department were talking on cell phones. Mr. Deprez asked about getting an oil change and was referred to Wittmeier Chevrolet in Chico. He was further advised that the dealership was going through an ownership change and was unable to perform any service work. (Exh 6:0038, 1115; Exh 8; RT 35:6-16)

E. On May 7, 2013, Saul Escalante visited the dealership. An employee (Pat) was in the service department but said that they were not yet taking appointments; no service technicians were present. Michael McConnell said that the dealership was planning to hire a new service technician who would begin work the next day. (Exh 6:0038-0039, 1115)

F. On May 8, 2013, Saul Escalante observed that no service technician was present. He was told that the new technician's start date had been delayed by a day. General Manager Bill Marker said that the dealership would be taking appointments for minor jobs and, "a back-up tech…can come in if anything major is requested…[but he] did not want to jeopardize [his] unemployment payments…". (Exh 6:0039, 1115)

G. On May 9, 2013, GM District Manager George Kovacs observed that the service department "looked like a ghost town". An unnamed person at the dealership told Mr. Kovacs that the technician had left for lunch, and referred him to Wheeler Chevrolet and Dow Lewis GMC for an intermittent engine light. (Exh 6:0039, 1115; Exh 9; RT 36:5-14)

H. Saul Escalante visited the dealership on May 10, 2013; Michael McConnell and Bill Marker were present. Saul Escalante reported the following:

(1) He observed one service technician on duty (Chris). However, the only available tools in the service area were for routine LOF's---he did not see any tools of the sort required for warranty and other non-routine repairs (Exh 6:0039-0058, 1115-1116);

(2) Michael McConnell and Bill Marker told him that service work was limited to LOF changes and tire rotations and that none of the dealership's former technicians could be called back to work until the dealership obtained further funding. (Exh 6:0039-0058, 1115-1116)

(3) In reviewing the dealership's service records, he determined that the last warranty repair had been performed on March 26, 2013 (a fact which he confirmed with GM's Global Warranty Management database which tracks warranty claims submitted by GM dealers) and that other than LOF changes, the last dealership repair order was dated April 1, 2013. (Exhs 6:0058, 14; RT 31:11-32:16)

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28. On August 6, 2013, Saul Escalante visited the dealership, which appeared to be vacant. No vehicle inventory was parked outside the dealership building where formerly GM trucks and Buicks had been displayed. (Exh 20:0413-0417; RT 51:21-24, 52:17-53:6))

29. On August 22, 2013, Saul Escalante visited the dealership, finding an eviction notice posted the day before by the Butte County Sheriff's Office. The building was locked and no vehicles were on the lot. (Exh 21:0421-0424; RT 53:20-23, 60:14-23, 61:13-22, 62:13-23)

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

30. McConnell has sold no new vehicles since March 6, 2013 and has done no warranty service work since March 26, 2013. (Exhs 6:0058, 13; RT 31:11-32:16, 43:22-44:10)

31. During the first three months of 2013, McConnell sold only 5 Chevrolet trucks and one Buick car, a sales performance considered "unsatisfactory" by GM.[10] (Exh 19:0979; RT 44:15-46:10)

Findings Relating to Investment Necessarily Made and Obligations Incurred by the Franchisee to Perform Its Part of the Franchise [Section 3061(b)]

32. McConnell was initially appointed a GM dealer on September 7, 1994 when it was "Gridley Country Chevrolet, Olds, Pontiac, Buick & Geo, Inc.". (Exhs 19:0980; 101)

33. In June, 2012 (when the Dealer Agreement was signed) the value of Michael McConnell's 100% ownership interest in the dealership was stated to be $533,985. (Exh 2)

34. At the time the current Dealer Agreement was signed, McConnell was leasing its premises, devoted exclusively to the General Motors dealership; a large freestanding sign identified McConnell as a Chevrolet and Buick dealer. The total building area was 25,494 square feet, with room to display five new vehicles as well as a total of 23 "productive service" (mechanical and body) stalls. The lot was an additional 86,890 square feet, with 65 new vehicle display stalls, 70 used vehicle display stalls, 76 new vehicle storage stalls, plus 67 other parking spaces. The total dealership size was 112,384 square feet. (Exhs 3:0914-0915, 9:0014)

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[10] There was a slight discrepancy in the figures compared with Exhibit 13, which stated that 6 Chevrolets and no Buicks were sold; although the total was the same, apparently the Buick sale was retracted for an unknown reason. (RT 47:15-48:23)

Findings Relating to the Permanency of the Investment [Section 3061(c)]

35. After the filing of the protest, McConnell was evicted from the dealership premises. (Exh 21) No evidence was presented that McConnell is currently in business. (RT 62:17-20)

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 [Section 3061(d)]

36. It would be beneficial to the public welfare to terminate protestant's Chevrolet and Buick franchises. There was no evidence presented that McConnell is providing any services to the public as a General Motors dealership.

Findings Relating to 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 [Section 3061(e)]

37. No evidence was presented that McConnell currently has any sales and service facilities, new vehicle inventory, equipment, vehicle parts, sales personnel or qualified service technicians to provide for the needs of its GM customers.

38. Between May 2 and May 10, 2013, GM representatives observed "no activity to speak of in the service department" and the only service tools available were those to perform LOF's and tire rotations. (Exh 6:0038-0039, 1115-1116; RT 36:22-37:6)

39. Moreover, McConnell has not been rendering adequate services to the public since the Spring of 2013. It lost its wholesale flooring plan on March 20 (which foreclosed it from making purchases of new inventory from GM) and, in the first several months of 2013, has only sold six Chevrolets and no Buicks. It has performed no warranty service for its customers since March 26. Between May 2 and May 10, during the visits to the dealership by GM personnel, a technician was observed at the dealership on only one day, and the GM representatives noted the lack of tools to perform repairs and service other than routine LOF's. (Exhs 6:0038-0039, 1115-1116, 10, 13, 14; RT 27:6-17, 41:21-42:271)

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Findings Relating to Whether the Franchisee Fails to Fulfill the Warranty Obligations of the Franchisor to be Performed by the Franchisee [Section 3061(f)]

40. Since at least March 26, 2013, McConnell has not fulfilled a warranty obligation, and there is no evidence that it has the ability (in terms of a service facility, technicians, equipment and parts) to service and repair vehicles under warranty. (Exh 14; RT 43:22-44:10, 91:10-92:4)

Findings Relating to the Extent of Franchisee's Failure to Comply with the Terms of the Franchise [Section 3061(g)]

41. Effective March 20, 2013, when ALLY suspended its wholesale flooring line for both the Chevrolet and Buick line-makes, McConnell was in violation of Article 13.1.11 of the Dealer Agreement requiring it to maintain a line of credit, a "material breach" under the agreement. (Exh 1:0877, 0884-0885)

42. Article 14.5.3 of the Dealer Agreement provides that GM may terminate the agreement if the dealer fails "...to conduct customary sales and service operations during customary business hours for seven consecutive business days." (Exh 1:0886-0887) During the seven business days between May 2 and May 10, 2013, protestant's business operation was moribund and fell far short of "customary sales and service operations" (RT 93:19-94:20), as follows:

Its service department only had the ability to perform routine LOF's and tire rotations and, for most of those days, no service technician was present and tools were limited to those used for LOF's. (Previous technicians were said to have taken their tools with them.) No warranty work had been performed since March 26, 2013. On two occasions, GM representatives were directed to other GM dealerships for service. There was no activity in the dealership's parts room and the parts annex, which contained "only miscellaneous/scattered parts" and was a "pretty barren shop". (Exhs 6:0038-0039, 14; RT 43:22-44:10, 91:10-92:4)

A. McConnell last ordered a new vehicle for wholesale purchase from GM on February 7, 2013, and last sold a vehicle to a retail customer on March 6, 2013. (Exh 13)

B. On Saturday, May 4, 2013, no one answered the telephone at the dealership, even though its website said it was open on Saturdays. (Exhs 6:0038, 1115, 7; RT 24:8-15, 40:11-22)

C. The dealership appeared closed because of lack of displayed inventory and customer

activity. (RT 93:19-94:20)

43. No evidence has been offered that protestant is conducting business at the present time.

DETERMINATION OF ISSUES

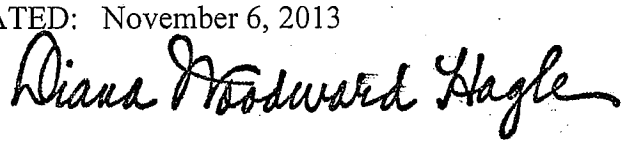
44. Respondent General Motors, LLC has sustained its burden of proof of establishing "good cause" to terminate the Chevrolet and Buick franchises of McConnell Chevrolet Buick, Inc. [Vehicle Code Sections 3061, 3066(b)]

PROPOSED DECISION

Based on the evidence presented and the findings herein, IT IS HEREBY ORDERED THAT the Protests in *McConnell Chevrolet Buick, Inc.* v. *General Motors, LLC*, Protest Nos. PR-2369-13 and PR-2370-13 are overruled.

I hereby submit the foregoing which constitutes my Proposed Decision in the above-entitled matters, as the result of a hearing before me, and I recommend this Proposed Decision be adopted as the Decision of the New Motor Vehicle Board.

DATED: November 6, 2013



By: _____
DIANA WOODWARD HAGLE
Administrative Law Judge

Jean Shiomoto, Director, DMV
Mary Garcia, Branch Chief,
Occupational Licensing, DMV