Board Meeting Agenda Book
Vol 2.

Texas Department *of* Motor Vehicles

HELPING TEXANS GO. HELPING TEXAS GROW.

CONTESTED CASES

5. **Franchised Dealer's Complaint against Distributor under Occupations Code, §§2301.467, 2301.468, and 2301.478**
MVD Docket No. 14-0006.LIC; SOAH Docket No. 608-14-1208.LIC
New World Car Nissan, Inc., d/b/a World Car Hyundai, World Car Nissan; and New World Car Imports San Antonio, Inc., d/b/a World Car Hyundai, Complainants v. Hyundai Motor America, Respondent

6. **Franchised Dealer's Protest of Manufacturer's Notice of Termination**
MVD Docket No. 15-0015.LIC; SOAH Docket No. 608-15-4315.LIC
Cecil Atkission Orange, LLC, d/b/a Cecil Atkission Chrysler Jeep Dodge, Complainant v. FCA US, LLC, Respondent

August 17, 2017

Full Board Meeting, 8:00 a. m.

Texas Department of Motor Vehicles
HELPING TEXANS GO. HELPING TEXAS GROW.

Date: **August 17, 2017**

Action Requested: ISSUE ORDER ON REHEARING

To: **Texas Department of Motor Vehicles (TxDMV) Board**
From: **Daniel Avitia, Director, Motor Vehicle Division**
Agenda Item: **5**
Subject: **Order on Rehearing regarding Dealerships' complaint against Distributor under Texas Occupations Code §§2301.467, 2301.468, and 2301.478.**

New World Car Nissan, Inc. d/b/a World Car Hyundai, World Car Nissan; and New World Car Imports San Antonio, Inc., d/b/a World Car Hyundai, Complainants v. Hyundai Motor America, Respondent; **MVD Docket No. 14-0006 LIC; SOAH Docket No. 608-14-1208.LIC**

PURPOSE AND EXECUTIVE SUMMARY ON REHEAHRING

The State Office of Administrative Hearings (SOAH) issued the attached Proposal for Decision (PFD) for consideration by the Texas Department of Motor Vehicles Board. On November 3, 2016, the Board considered this matter and issued the attached Board Order.

Having considered Respondent's Motion for Rehearing (MFR) and Complainant's Response to the MFR, the Board granted the MFR and issued the attached Order on February 4, 2017. The Board's consideration of the contested case matter is now the subject of this rehearing.

FINANCIAL IMPACT

None to TxDMV

BACKGROUND AND DISCUSSION

On November 20, 2013, New World Car Nissan, Inc. d/b/a World Car Hyundai and New World Car Imports San Antonio, Inc. d/b/a World Car Hyundai (together, World Car) filed a complaint against Hyundai Motor America (Hyundai). World Car complained that Hyundai discriminates against World Car, uses disparate treatment against World Car, does not supply cars requested by World Car, and requires unreasonable sales standards of World Car. World Car complained that Hyundai violated Texas Occupations Code §2301.467, §2301.468, and §2301.478.

The Motor Vehicle Division (MVD) referred the contested case matter to SOAH on December 6, 2013. The ALJ conducted the hearing on the merits on September 21 through 25, 2015; closed the administrative record on January 11, 2016; and issued the proposal for decision (PFD) on March 10, 2016.

The ALJ found that World Car failed to meet its burden of proof to show that any of Hyundai's programs violate the Occupations Code. The ALJ recommended that World Car's complaints be denied. The parties filed exceptions to the PFD and replies to the exceptions. On May 31, 2016, the ALJ issued an exceptions letter, providing that—after having reviewed the exceptions and reply pleadings—the ALJ was making no changes to the March 10, 2016, PFD. SOAH returned this contested case matter to the TxDMV, giving the Board has jurisdiction to consider the contested case and to enter a final Order.

The Board considered the matter and on November 3, 2016, ordered the ALJ's decision be overturned and the ALJ erred in interpretation of Occupations Code §2301.468.

On December 6, 2016, Hyundai filed a MFR. Hyundai asserted that the Board should vacate its November 3, 2016, final Order and enter a new final Order following the recommendations of the ALJ or—in the alternative – should identify the findings of fact (FOFs) and conclusions of law (COLs) upon which the Order is based and explain the reason for rejecting the ALJ's FOFs and COLs, including how the ALJ misinterpreted Occupations Code §2301.468.

Hyundai argued that:

- The Board improperly acted as the ALJ;
- The Board's decision amounts to improper *ad hoc* rulemaking;
- The Board erred by failing to identify the FOFs and COLs that are the basis of its Order, as required by the Administrative Procedure Act and Occupations Code §2301.711.
- The Board failed to explain its rejection of the ALJ's FOFs and COLs as required by the Administrative Procedure Act under Government Code §2001.058(e);
- The Board failed to explain how the ALJ erred in interpreting Occupations Code §2301.468, as the Board is required to do by the Administrative Procedure Code;
- There is no basis for overturning the ALJ, based on misinterpretation of Occupations Code §2301.468.
- World Car pled a claim under the inapplicable 2001 version of Occupations Code §2301.468, but not the applicable 2003 version.
- World Car has no viable claim under Occupations Code §2301.468 (2003), even if World Car had pled claims under the correct version of the statute.
- The Board's final Order is not supported by substantial evidence.

On December 19, 2016, World Car filed a Reply to Hyundai's MFR. World car asserted that the Board should not reverse itself, but should uphold the Board's November 3, 2106, decision or should adopt the order proposed by World Car in May 2016. World Car argued that:

- Hyundai's arguments present no reason for the Board to reverse itself or reconsider its decision;
- The Board did not improperly act as the ALJ;
- The Board's decision is supported by substantial evidence because there was a reasonable basis for the Board's decision in the record.
- The Board has authority to decide how the Occupations Code should be applied to the facts;
- The Board may reject the ALJ's recommendations if the ALJ misinterpreted or misapplied the law.
- The Board did not act improperly , usurp the role of the ALJ, exceeds its authority , or engage in *ad hoc* rulemaking;
- The Board Order is sufficient and complies with the Administrative Procedure Act, Government Code §2301.058(e) because it contains the reason and basis for the Board's rejection of the ALJ's recommendation.

By Order dated February 4, 2017, the Board granted rehearing of the contested case, based on Hyundai's MFR and World Car's Reply to Hyundai's MFR.

The issue presented on rehearing is whether World Car established that Hyundai's actions or programs violate the Texas Occupations Code.

- **If World Car established – by a preponderance of the evidence—that Hyundai's actions violated the Occupations Code, then the Board may modify its November 2016 Order to clarify its decision for compliance with the requirements of the Administrative Procedure Act, specifically Government Code §2301.058(e).**
- **If World Car did not establish—by a preponderance of the evidence-- that Hyundai's actions violated the Occupations Code, then the Board may adopt the ALJ's findings of fact and conclusions of law.**

As the Complainant, World Car has the burden of proof to establish—by a preponderance of the evidence[1]—that Hyundai violated:

- Occ. Code §2301.467(a)(1), by requiring adherence to unreasonable sales or service standards;
- Occ. Code §2301.468(1), by directly or indirectly discriminating against a franchised dealer or otherwise treating franchised dealers differently as a result of a formula or other computation or process intended to gauge the performance of a dealership;
- Occ. Code §2301.468(2), by discriminating unreasonably between or among franchisees in the sale of a motor vehicle owned by the manufacturer or distributor; or
- Occ. Code §2301.478(b), by failing its duty of good faith and fair dealing owed to its franchisee.

Board Authority: The Board has authority over these parties and the decision in this contested case matter in accordance with Texas Occupations Code Chapter 2301, specifically §2301.151. The Administrative Procedure Act, Government Code §2001.058(e), allows an agency to vacate or modify an order proposed by the ALJ only if the ALJ:
(1) misapplied or misinterpreted applicable law, agency rules, or prior agency decisions;
(2) relied on a prior agency decision that is incorrect or should be changed; or
(3) made a technical error in a finding of fact.
The agency must state in writing the ***specific reason*** and ***legal basis*** for a change made to a finding or fact or conclusion of law.

Board's Options on Rehearing:
The Board has granted rehearing; therefore, the Board may consider the contested case matter again and:

1. Clarify its November 3, 2016, Order by providing the ***specific reason*** and ***legal basis*** for a change made to each finding of fact or a conclusion of law;
2. Reverse its November 3, 2016, decision and adopt the ALJ's FOFs and COLs;
3. Render a new decision, adopting the ALJ's FOFs and COLs in part and providing the ***specific reason*** and ***legal basis*** for a change made to each finding of fact or a conclusion of law; or
4. Some combination of these options.

SOAH ALJ's Recommendation: The SOAH ALJ found that World Car (dealership) failed to meet its burden of proof to show that Hyundai violated the Occupations Code. The ALJ recommended the Board deny World Car's complaint.

Documents: The following documents are attached to this Executive Summary for consideration by the Board:

1.	SOAH ALJ's Proposal for Decision	03/10/2016
2.	World Car's Exceptions to Proposal for Decision	04/08/2016
3.	Hyundai's Reply to World Car's Exceptions to Proposal for Decision	05/09/2016
4.	World Car's Reply in Support of Exceptions to Proposal for Decision	05/18/2016
5.	SOAH ALJ's Exceptions Letter	05/31/2016
6.	Board's Order (from November 3, 2016, open meeting deliberations)	11/03/2016
7.	Hyundai's MFR (& Exhibits)	12/6/2016
8.	World Car's Reply to Hyundai's MFR (& Exhibits)	12//19/2016
9.	Board's Decision and Order Granting Rehearing & Transmittal Letter	02/04/2017

[1] Black's Law Dictionary defines "preponderance of the evidence" to mean the greater weight of the evidence; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to include a fair and impartial mind to one side of the issue rather than the other. This is the burden of proof in a civil trial, in which the jury is instructed to find for the party that, on the whole, has the stronger evidence, however slight the edge may be. Also termed preponderance of proof or balance of probability.

REFER TO SEPARATE DOCUMENT

TXDMV BOARD BRIEFING NOTEBOOK

VOLUME 2

ALL RESPONSIVE MATERIAL FOR

AGENDA ITEM # 5

Franchised Dealer's Complaint against Distributor under Occupations Code, §§2301.467, 2301.468, and 2301.478

MVD Docket No. 14-0006.LIC; SOAH Docket No. 608-14-1208.LIC

New World Car Nissan, Inc., d/b/a World Car Hyundai, World Car Nissan; and New World Car Imports San Antonio, Inc., d/b/a World Car Hyundai, Complainants v. Hyundai Motor America, Respondent

SMYSER KAPLAN & VESELKA, L.L.P.

BANK OF AMERICA CENTER
700 LOUISIANA SUITE 2300 HOUSTON, TEXAS 77002
TELEPHONE 713.221.2300 FACSIMILE 713.221.2320

Direct Dial Number:
(713) 221-2323

Author's E-mail Address:
lkaplan@skv.com

July 27, 2017

Via Email David.Duncan@TxDMV.gov

Mr. David Duncan
General Counsel
Texas Department of Motor Vehicles
4000 Jackson Avenue
Austin, Texas 78731

Re: SOAH Docket No. 608-14-1208 LIC; MVD Docket No. 14-0006 LIC; New World Car Nissan, Inc., d/b/a World Car Hyundai, and New World Car Imports, San Antonio, Inc. d/b/a World Car Hyundai v. Hyundai Motor America

Dear Mr. Duncan:

On behalf of World Car Hyundai, we request 15 minutes per side for presentations to the Board during the August 17, 2017 Open Meeting.

Enclosed is a copy of the PowerPoint presentation that we intend to use during oral argument, if it is granted. We will have paper copies of this presentation available for the Board members, but also request the ability to display an electronic version on the screens as we did at the November 2016 Meeting. Also enclosed is a copy of our proposed order for the Board's consideration, which we believe encompasses and carries out the Board's November decision.

Please let me know if you have any questions.

Sincerely,

Lee L. Kaplan

LLK:td

Enclosures

cc: David Richards, David.Richards@TxDMV.gov
Michelle Lingo, Michelle.Lingo@TxDMV.gov

SKV
SMYSER KAPLAN
& VESELKA, L.L.P.

WORLD CAR HYUNDAI, et al, Complainants
v.
HYUNDAI MOTOR AMERICA, Respondent

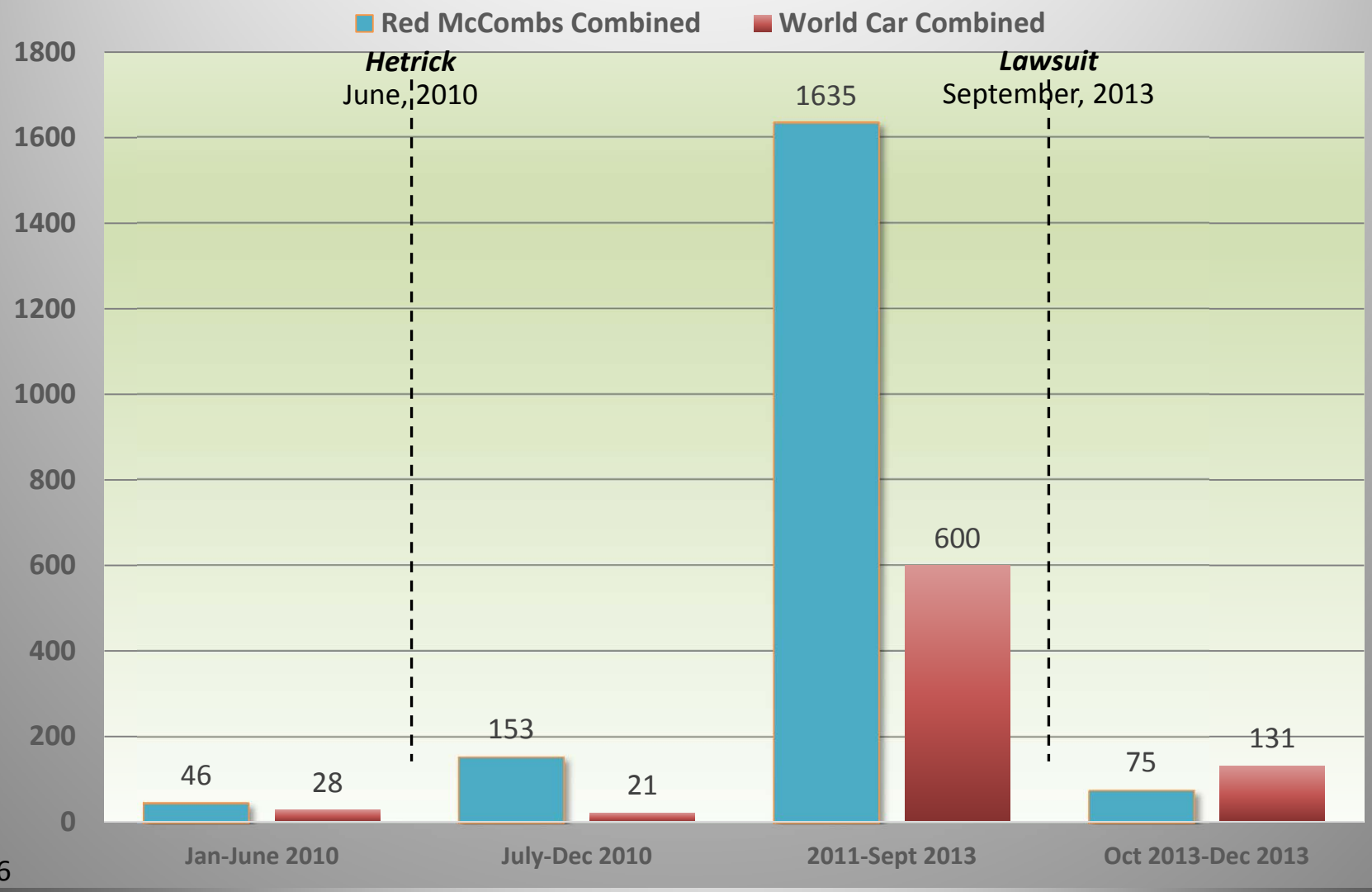
August 17, 2017 Presentation to
the Board of the Texas Department of Motor Vehicles

The Board Correctly Decided to Overturn the ALJ

- Tex. Occ. Code § 2301.468(2)
  - "A manufacturer, distributor, or representative may not . . . discriminate unreasonably between or among franchisees in the sale of a motor vehicle owned by the manufacturer or distributor."
- Undisputed that discrimination occurred – HMA provided Red McCombs with roughly 3 times as many discretionary allocations as World Car.
- The Board decided—correctly—that this discrimination was unreasonable.

HMA's Unreasonable Discrimination

Total Manual Allocations: 2010 - 2013



PTX 126

The Board Correctly Focused on Whether HMA's Discrimination Was Unreasonable

Chairman Palacios summarized the issue:

> Do you have any other questions, Mr. Walker? I want to follow up with a question Mr. Walker had, I guess, regarding the allocation. And you made a statement pretty much in my judgment that kind of summarizes this whole case here, and that is you acknowledge that there was discrimination, however, was it unreasonable. I guess I

Nov. 2016 Transcript, at 78

The Board Correctly Focused on Whether HMA's Discrimination Was Unreasonable

Chairman Palacios summarized the issue:

> To Board Member Walker's point regarding 2301.468, as I stated earlier, this hinges on this term whether or not Hyundai discriminated unreasonably. If you remit this back to SOAH, this is the opinion or finding of one ALJ, and I, quite frankly, don't see how this changes much. I mean, the facts don't change, it gets back to the term unreasonable, what is unreasonable. We have the facts in front of us, and that, in my assessment, is for us to determine what is unreasonable.

Nov. 2016 Trans., at 107:1-9

The Board Correctly Decided HMA's Discrimination Was Unreasonable

MR. WALKER: We need to be careful with respect to setting precedent. Raymond is a dealer, okay and his whole investment that he's put into in life is to build that dealership and put all of his earnings and capital into that, and that if a manufacturer were to be able to change the way he allocates cars to Raymond, basically he holds this big stick over Raymond's head and could put him out of business. And we need to be careful that we don't allow manufacturers to be able to come in and hold a big heavy stick and say, If you don't do it my way, then I'm just not going to give you cars. Because if Raymond don't have cars to sell at Bravo Chevrolet, he's out of business.

Am I not right, Raymond?

MR. PALACIOS: You are correct.

Nov. 2016 Trans., at 109:10-24

The Board Correctly Decided HMA's Discrimination Was Unreasonable

MR. WALKER: So there's a balance, but in Texas we have decided that we use franchises as a means of selling cars -- the Tesla location would like to turn that over -- but in Texas we use franchises, and when we use franchises there has to be a cooperation between the manufacturer and between the dealer so that they work together so that they both benefit from that. Because the car manufacturer wants to sell cars, obviously, and make as many cars as he can, and the dealer wants to make sure that he has access to cars so that he can sell as many cars as he possibly can too. They need each other, absolutely need each other, and we need to make sure that at all times there's a balance between the two.

Am I not right?

MR. PALACIOS: You are spot on.

Do I hear a motion?

Nov. 2016 Trans., at 109-110

The Board's Order Incorporated the Motion that Passed During the Meeting

MR. WALKER: My recommendation would be that we overturn the SOAH judge's ruling on this case and we find that they erred in the interpretation of the Occupation Code 2301.468, and that -- I'm not sure, David, whether we need to take and send it back to SOAH to take and rewrite it, or rather our staff rewrites the rule -- the determination. We've done this in the past, we've overturned two since I've been on this board since its inception, and we sent it back to our staff lawyers in order to rewrite.

MR. DUNCAN: No. We don't rewrite the PFD, we don't send it back to them to rewrite the PFD. Your motion is going to be what it incorporates.

Nov. 2016 Trans., at 110:16-111:3

The Board Correctly Decided HMA's Discrimination Was Unreasonable

- The term "unreasonable discrimination" had never been interpreted by the Board before.
- The Board has the final say on what "unreasonable discrimination" is, and whether that standard has been violated in a case.
- The Board correctly determined that the ALJ misapplied and misinterpreted the law with respect to "unreasonable discrimination" in Section 2301.468 of the Occupations Code.

The Issue Now is the Form of the Order

IT IS ORDERED:

That the conclusion of the State Office of Administrative Hearings Judge (ALJ) is overturned.

The Board finds that the ALJ erred in interpretation of Texas Occupations Code § 2301.468.

Date: NOV 03 2016

Raymond Palacios, Chairman
Board of the Texas Department of Motor Vehicles

HMA's Complaints About the Board's Nov. 2016 Order

- HMA argues that the Board did not identify the findings and conclusions that support its decision.
- HMA argues that the Board did not explain why it overturned the ALJ and how the ALJ misinterpreted the law.

To Address HMA's Complaints, the Board Should Adopt World Car's Proposed Order

- World Car's proposed order accepts the Board's ruling from the November 2016 meeting, i.e. overturning the ALJ with respect to Section 2301.468(2).
- The proposed order identifies the findings and conclusions that support the Board's decision.
- The proposed order explains the reasons for the changes to the ALJ's ruling.

The Board Made the Correct Decision – the Board Should Now Adopt World Car's Proposed Order

- Undisputed that HMA allocated roughly 3 times as many cars to Red McCombs as it did to World Car.
- The Board decided that this discrimination was unreasonable.
- To address HMA's complaints about the form of the order, the Board should adopt World Car's proposed order.

HMA Does Not Dispute the Numbers

- HMA admits that during the relevant time period, the HMA Regional Manager made significantly more discretionary allocations to World Car's nearest competitor.

MR. PALACIOS:

Do you dispute the allocation on this chart that he presented that shows 1,635 discretionary units allocated to McCombs and 600 to his dealership?

MR. YOUNG: No, I don't dispute that number.

Nov. 2016 Trans., at 78:13-16

HMA Does Not Dispute the Numbers

MR. PALACIOS: I guess another question, early on, I'm just kind of looking at the pattern here, when the new region manager came on, I think you said it was late June, from the submissions it shows that he then for the six months after he was on board in 2010, he allocated 134 discretionary units to Red McCombs and 20 units to World Car, and I guess is that in dispute as well?

MR. YOUNG: Not disputing that.

Nov. 2016 Trans., at 79

HMA Admits Discrimination

- HMA admits there was a difference in treatment in its discretionary allocations.

MR. YOUNG:

So that's the context. Yes, there was a difference in treatment and if you want to call that discrimination, the statute says it only has to be unreasonable discrimination, unreasonable discrimination is prohibited.

Nov. 2016 Trans., at 70:24-71:3

HMA's Regional GM Wanted to Get Rid of World Car From the Outset of His Tenure

Q. You literally brought them a letter to get signed authorization to sell the dealerships in late 2010; isn't that right?

A. To get assistance to help them find a buyer --

Q. Right. That's right.

A. -- if they wanted to.

Q. So that you could go out and kind of help them find a buyer?

A. Yes.

Q. And you can't think of anybody else you've ever done that for in the whole state of Texas?

A. No.

Q. Have you done it in the region?

A. I don't know.

Q. That's -- that's pretty extraordinary, right? I mean, you didn't even ask them first if they were interested in selling. You showed up with a letter that says, I'd like you to sign this letter to authorize me to help you find a buyer for the dealerships; is that right?

A. If you'd like to sell.

Sept. 2015 Hearing Transcript, at 1086-87

Purported Justifications for the Discrimination Didn't Hold Up

- HMA argued that its discrimination was justified because:
  - World Car reduced inventory in 2008-2009
  - McCombs later added the Equus promotion
  - McCombs renovated a facility
  - McCombs participated in the service loaner program
- There is not a scrap of paper that documented any of these justifications as the reason for HMA's much larger discretionary allocations to Red McCombs.

The "Reduced Inventory" Justification Didn't Hold Up

- Red McCombs reduced inventory more than World Car did:
  - McCombs closed an entire Hyundai dealership in 2009 (Sept. 2015 Transcript, at 726).
  - In first 6 months of 2010 alone, McCombs turned down 598 vehicles, nearly 3 times as many as World Car (DTX 46, DTX 47).

The "Equus" Justification Didn't Hold Up

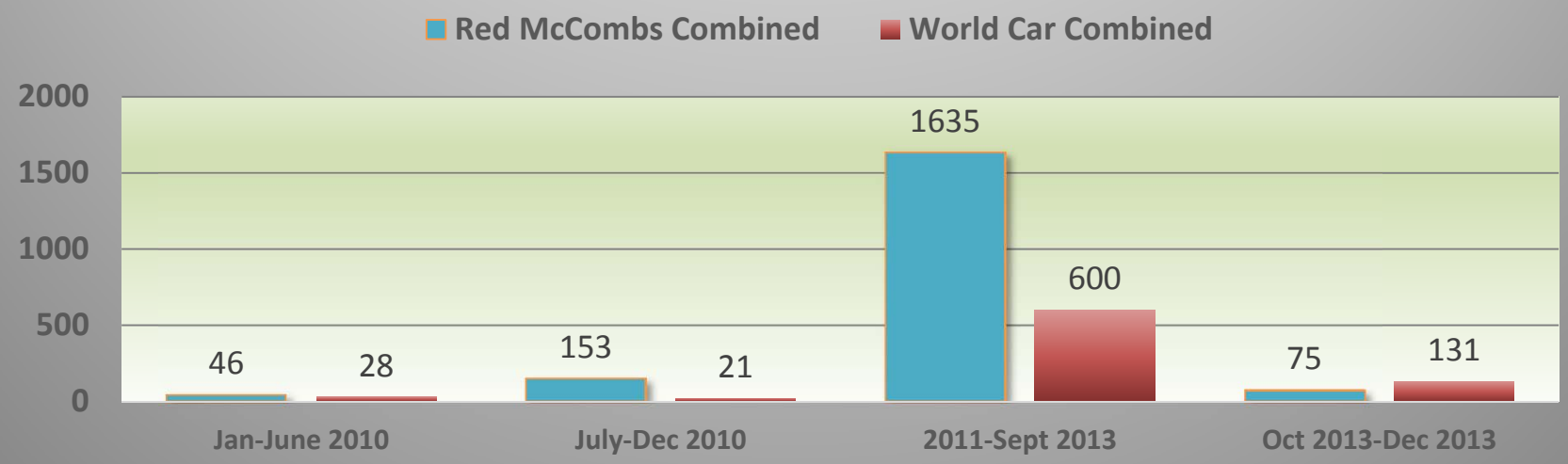
- Red McCombs received an allocation boost before signing the Equus agreement:
  - PTX 111, extra allocations in August-October 2010
  - DTX 201, Equus signed November 2010
- The large disparities in allocations continued for years.
  - PTX 126

The "Renovation" Justification Didn't Hold Up

- Unlike its treatment of Red McCombs, HMA did not provide World Car with extra allocations for renovating its (north) facility:
  - Sept. 2015 Transcript, at 184, 345-46, 495-97, 1062, 1113
  - PTX 72
- As for the Red McCombs "went exclusive" excuse, HMA also refused World Car's offer to build an exclusive facility for its south dealership that would have been strategically located right next to a Wal-Mart on a major freeway.
  - Sept. 2015 Transcript at 115, 121-23, 128-29, 199

The "Service Loaner" Justification Didn't Hold Up

- HMA continued to make disproportionate discretionary allocations to Red McCombs, but the discrimination abated after World Car filed suit even though World Car continued to decline service loaner participation. (PTX 126)



HMA Admits – No Standards for Discretionary Allocation

- Mr. Hetrick, the Regional GM, testified:

Q. Is there any guidance in writing for you as the regional general manager as to how to provide extra allocations through the 15 percent of the GM reserve pool?
A. No.
Q. Is there anything that requires you to document the reason you're providing a particular extra allocation to a particular dealership?
A. No.

Q. Well, if we wanted to go back and try to understand why you gave particular cars to a particular dealership, there's nothing that documents the reasons or the methodology that you used to provide cars to certain dealerships?
A. Not that I'm aware of.
Q. And so if some dealerships got more extra allocations than other dealerships, there's nothing in writing that tells us why that is?
A. Not that I'm aware of.

PTX 117, at 29-31

No Written Record of Any of the Purported Justifications

- The only contemporaneous written record explaining these disproportionate allocations to Red McCombs does not say anything about these 4 excuses that were offered for the first time at the SOAH hearing (PTX 21):

District Manager Concerns: District Manager contacted Tim Cliver in reference to the 47 vehicles allocated to the Dealership Friday August 13. The DM stated that the rationale for the allocation was to bring the dealerships inventory from 96 to a level in which faster reporting RDR's would increase allocations. The DM indicated that the sales goal should be 100 a month. The DM also stated that the dealership needed to review sales processes to continue to improve HPI as the sales score has been less than 900 for 5 of the last seven months. The Dealership

Both World Car and Red McCombs Needed a Boost in Inventory Allocations

Q. And why is this a -- a resource or a tool that helps you help underperforming dealers? Why is inventory adjustment a resource or a tool that helps you help underperforming dealers?

A. Well, based on the allocation system, an underperforming dealer may have lowered their travel rate and velocity to the point where they need a boost in inventory to break the cycle.

Q. What do you mean by break the cycle?

A. Well, the less they sell, the slower they sell against their peers, they will not earn the cars in the same manner as the more successful dealers.

Q. So how is that a cycle?

A. Well, if they're poor performing, it's a constant going backwards. If they take longer to sell their cars, they're selling less, their travel rate will slow down compared to their peers. And the way to change that would be give them an influx of additional cars and hope that they can sell them quickly so that they can change their travel rate.

Q. Okay. Well, can you name some of the dealers that you thought were underperforming in 2010, 2011, and 2012?

A. Your client.

Q. Okay. Any others?

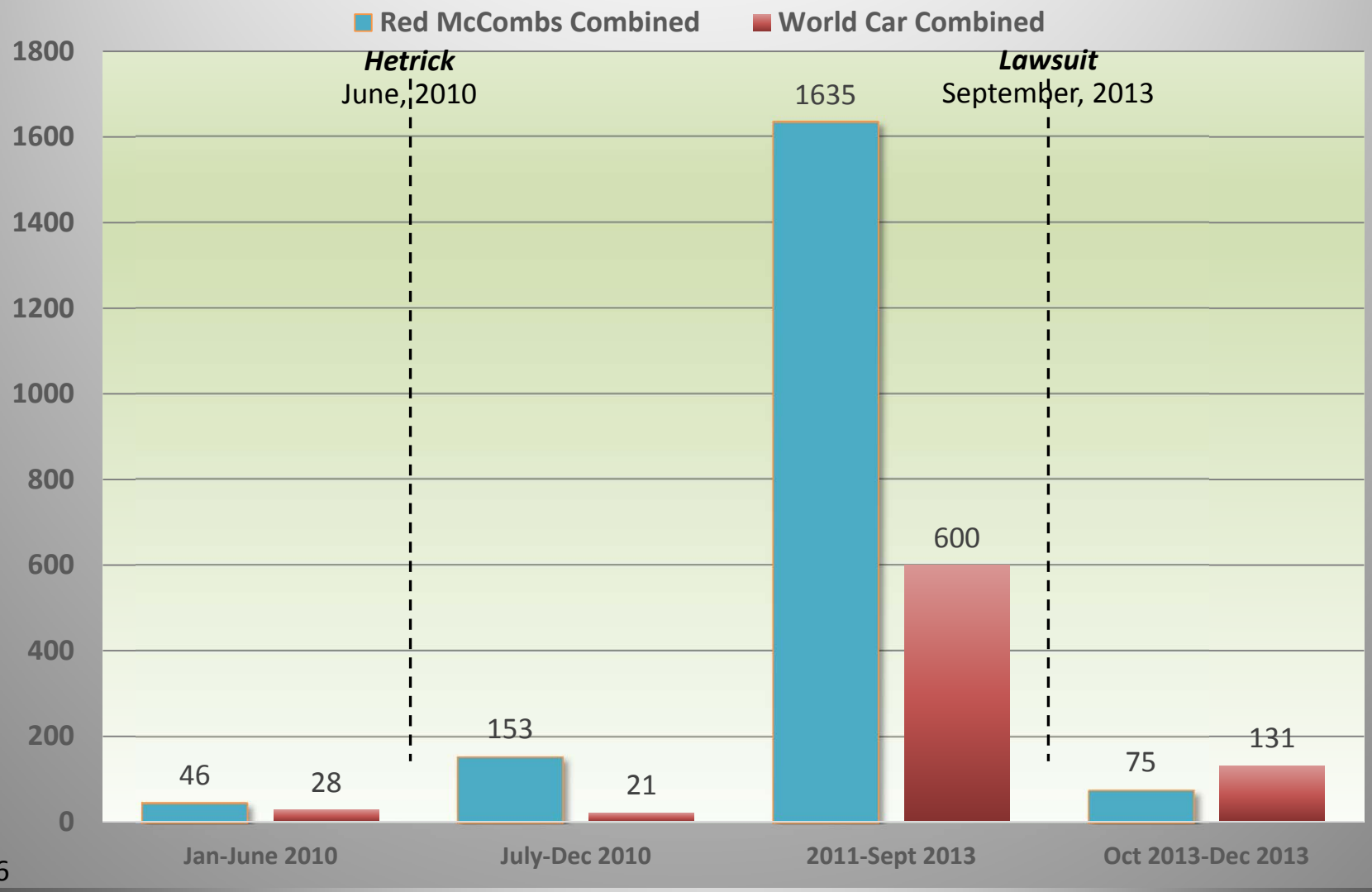
A. Yes. The Red McCombs stores were underperforming.

Deposition of Tom Hetrick

PTX 117, at 23, 25-26

HMA Gave Boosts to Red McCombs But Not to World Car

Total Manual Allocations: 2010 - 2013



PTX 126

World Car Sold Vehicles When it Had Inventory

When looking at competitive brand performance in your PMA thr
outsold in its primary market area by every competitor except tw
you by 18 to 1 (competitive group); Honda by 15 to 1; and even M

Most disturbing is the fact that Kia, with whom you operate as a d
location, outsells Hyundai by 6 to 1. Obviously, you do not suppor
close to adequately representing us in the South San Antonio market.

In view of the foregoing, and given these facts, your dealership is in material breach of the Dealer Agreement. Accordingly, perhaps a reassessment of your commitment to Hyundai is in order. Should you desire to do so, we believe we can assist you in locating a candid
Hyundai franchise in South San Antonio. Should you not wish to sell
us with details on how you plan to overcome the significant sales defi
your written recovery plan within the next 30 days. Any assistance w
performance, such as additional inventory, is predicated on you provi

Should you have any comment or questions about any of the informa
directly.

Regards,

Tom Hetrick
Regional General Manager

Most disturbing is the fact that Kia, with whom you operate as a dual franchise with us at this same location, outsells Hyundai by 6 to 1. Obviously, you do not support the Hyundai brand, nor do you come close to adequately representing us in the South San Antonio market.

In view of the foregoing, and given these facts, your dealership is in material breach of the Dealer Agreement. Accordingly, perhaps a reassessment of your commitment to Hyundai is in order. Should you desire to do so, we believe we can assist you in locating a candidate who would pay a premium for a Hyundai franchise in South San Antonio. Should you not wish to sell your store, we ask that you provide

PTX 67

The Boosts to Red McCombs Harmed World Car

Deposition of David Zuchowski, Chief Executive Officer of HMA

Q (By Mr. Stewart) So my question is: If an extra allocation, one vehicle or 50 vehicles, goes to Red McCombs through discretionary allocations in a time of short supply, isn't that more harmful to the World Car who's competing in the same market than if that extra vehicle had gone to another dealership outside of the market?

MR. PRICHARD: Object to the form.

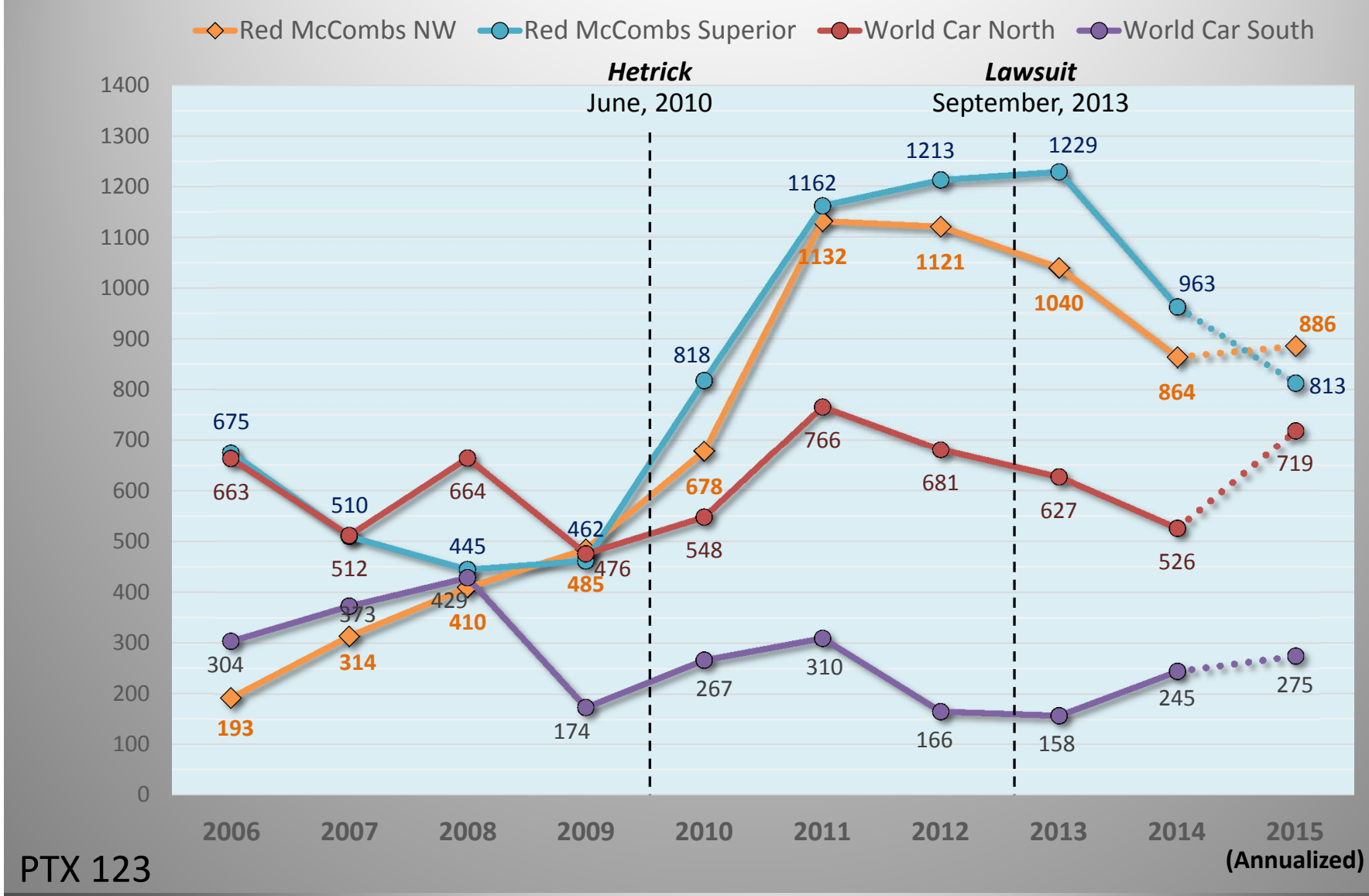
A Yes, based on geographic distance, it would have more impact.

Q (By Mr. Stewart) Has more impact 'cause the competitor has more cars to sell in the same market than World Car, right?

A Generally, yes.

PTX 120, at 171

SALES BY DEALER, 2006 – 2015 (ANNUALIZED)



PTX 123

The Board Made the Correct Decision – the Board Should Now Adopt World Car's Proposed Order

- Undisputed that HMA allocated roughly 3 times as many cars to Red McCombs as it did to World Car.
- The Board decided that this discrimination was unreasonable.
- To address HMA's complaints about the form of the order, the Board should adopt World Car's proposed order.

TEXAS DEPARTMENT OF MOTOR VEHICLES
MOTOR VEHICLE DIVISION

NEW WORLD CAR NISSAN, INC., d/b/a WORLD CAR HYUNDAI, and NEW WORLD CAR IMPORTS, SAN ANTONIO, INC., d/b/a WORLD CAR HYUNDAI	§	
Complainants,	§	
v.	§	**SOAH DOCKET NO. 608-14-1208 LIC**
	§	**MVD DOCKET NO. 14-0006 LIC**
HYUNDAI MOTOR AMERICA, **Respondent.**	§	

FINAL ORDER

The above-referenced matter is before the Board of the Texas Department of Motor Vehicles (Board) in the form of a Proposal for Decision (PFD) from the State of Office of Administrative Hearings (SOAH).

Overview

This case involves a complaint filed by New World Car Nissan, Inc. d/b/a World Car Hyundai and New World Car Imports, San Antonio Inc. d/b/a World Car Hyundai (collectively "World Car") against the United States distributor of Hyundai vehicles, Hyundai Motor America (HMA). World Car alleges that HMA violated Texas Occupations Code: (i) Section 2301.467(a)(1) by requiring adherence to unreasonable sales standards, (ii) Section 2301.468 by engaging in unreasonable discrimination, and (iii) Section 2301.478(b) by not acting fairly or in good faith.

Issues Presented

The issue before the Board is whether World Car has shown that HMA required adherence to unreasonable sales standards, unreasonably discriminated against World Car, and failed to comply with its duty of good faith and fair dealing.

Summary of Board's Decision

On March 10, 2016, an administrative law judge (ALJ) at SOAH issued a PFD in this matter. The Board considered the PFD during open meetings held on November 3, 2016 and August 17, 2017. Based on a review of the PFD, the record evidence, the parties' written briefing, and oral argument, the Board concludes that the ALJ misinterpreted and misapplied the law with respect to unreasonable discrimination in Section 2301.468 of the Occupations Code because HMA gave nearly three times as many discretionary allocations to World Car's closest competitor, even though the dealerships were similarly situated and all wanted more inventory.

Thus the Board finds that World Car met its burden to show that HMA unreasonably discriminated against World Car in violation of Section 2301.468(2) of the Occupations Code.

Specific Reasons & Legal Bases for Changes to Findings of Fact and Conclusions of Law

- **Finding of Fact Numbers 20 and 21** are rejected and replaced under Tex. Gov't Code § 2001.058(e)(1) because the ALJ did not properly apply or interpret the applicable law. Central to whether HMA's different treatment of World Car versus Red McCombs constitutes unreasonable discrimination in violation of Occupations Code Section 2301.468(2) is whether the dealerships were similarly-situated when the different treatment began. The ALJ improperly disregarded and failed to mention in the PFD the undisputed facts that Red McCombs closed an entire Hyundai dealership in 2009, turned down nearly three times as many allocations than World Car did during the first six months of 2010, and had a similar level of inventory as World Car in mid-2010. By ignoring these undisputed facts, the ALJ misinterpreted and misapplied the law with respect to unreasonable discrimination because the ALJ did not consider that the dealerships were similarly-situated when the different treatment began.

- **Finding of Fact Number 27** is rejected under Tex. Gov't Code § 2001.058(e)(1) because the ALJ did not properly apply or interpret the applicable law. The inquiry under Occupations Code Section 2301.468(2) is whether HMA unreasonably discriminated against World Car. There is no dispute that HMA treated World Car differently because it provided nearly three times as many discretionary allocations to Red McCombs than to World Car. The undisputed facts show that the discrimination was not reasonable.

- **Finding of Fact Number 30** is rejected and replaced under Tex. Gov't Code § 2001.058(e)(1) because the ALJ did not properly apply or interpret the applicable law. There is no dispute that HMA treated World Car differently because it provided nearly three times as many discretionary allocations to Red McCombs than to World Car. The undisputed facts show that the discrimination was not reasonable. HMA's discretionary inventory allocations to World Car as compared to Red McCombs between 2010 and 2013 were not rational, sensible, acceptable, or fair.

- **Conclusion of Law Number 8** is rejected and replaced under Tex. Gov't Code § 2001.058(e)(1) because the ALJ did not properly apply or interpret the applicable law. Based on the Board's adoption of Finding of Fact Numbers 20A and 30A, the Board finds that World Car met its burden to show HMA violated Occupations Code Section 2301.468(2) by unreasonably discriminating against World Car.

- **Conclusion of Law Number 9** is modified under Tex. Gov't Code § 2001.058(e)(1) because the ALJ did not properly apply or interpret the applicable law. Based on the Board's adoption of Finding of Fact Number 20A and 30A, HMA's discretionary allocations were not reasonable. The Board finds that World Car did not meet its burden to show HMA violated the duty of good faith and fair dealing through computer formula system allocation or through requiring World Car to meet 100% sales efficiency between 2010 and 2013.

Having considered the evidence, the arguments, and the findings of fact and conclusions of law presented in the PFD, the Board enters these findings of fact and conclusions of law. The ALJ's Findings of Fact 20, 21, 27, and 30 and Conclusions of Law 8 and 9 are rejected. The ALJ's Findings of Fact 1-19, 22-26, 28, 29, 31-53 and Conclusions of Law 1- 7 are adopted and are therefore not restated herein.

REVISED FINDINGS OF FACT

20A. In 2009 and 2010, World Car and Red McCombs voluntarily reduced their inventories, and in mid-2010 their inventories were at similar levels.

30A. It was not reasonable for Hyundai to provide nearly three times as many discretionary allocations to Red McCombs as to World Car between 2010 and 2013.

53A. The computer allocation formula and sales efficiency metric do not treat World Car unfairly.

REVISED CONCLUSIONS OF LAW

8A. World Car met its burden of proof to show that Hyundai violated the Occupations Code by engaging in unreasonable sales discrimination in the allocation of vehicle inventory between 2010 and 2013 because Hyundai provided disproportionate discretionary allocations of inventory to World Car's nearest competitor in San Antonio that were not justified by any material differences between the dealerships. Tex. Occ. Code § 2301.468(2) (2003).

9A. World Car failed to meet its burden of proof to show that Hyundai violated its duty of good faith and fair dealing through computer formula system allocations or through requiring World Car to meet 100% sales efficiency between 2010 and 2013. Tex. Occ. Code § 2301.478(b).

ACCORDINGLY, IT IS ORDERED:

1. That the findings of fact and conclusions of law in this Order are hereby adopted;

2. That World Car's complaints under Occupations Code Sections 2301.467(a)(1), 2301.468(1), and 2301.478(b) are hereby rejected.

3. That World Car's complaint under Occupations Code Section 2301.468(2) is hereby upheld.

Dated: August 17, 2017

Raymond Palacios
Chair, Board of Texas Department of Motor Vehicles

ATTESTED:

_____

3. Analysis

a. Discretionary allocation

The ALJ finds that the use of discretionary allocation did not violate the Occupations Code. World Car notes that in a six-month period Mr. Hetrick offered 134 cars through discretionary allocation for Red McCombs versus 20 for World Car.[43] World Car then makes the comparison that Red McCombs did not sell nearly seven times as many vehicles as World Car Hyundai.[44] World Car notes that at the time of the additional allocation, all four San Antonio Hyundai dealerships were considered by Hyundai to be underperforming.[45]

World Car's argument fails to take into account the differences between the Red McCombs' dealerships and World Car's dealerships. In 2010, Red McCombs Superior became an exclusive Hyundai dealer, whereas World Car South shares a dealership with Kia. Red McCombs' Northwest store added the luxury Equus line that required a facility upgrade, and then renovated the store. Red McCombs Superior also renovated its dealership in 2011-2012. World Car dealerships were not renovated during this time. It was not until 2014 that World Car North renovated its store. Red McCombs also participated in Hyundai's service loaner program. World Car did not participate in Hyundai's service loaner program.

World Car could have participated in all of these Hyundai programs, which would most likely have increased the sales rate and reduced the daily supply of vehicles, resulting in additional allocation. World Car chose not to participate. All dealers that chose to participate in the programs would have increased allocation and would have been eligible for discretionary allocation that was given by regional general managers to reward dealers for facility upgrades, renovations, and exclusivity. World Car's choice not to engage in those programs worked to its detriment in terms of receiving discretionary allocation. But Mr. Hetrick's decision to reward

---

[43] World Car Ex. 111.

[44] World Car Initial Brief at 37.

[45] World Car Initial Brief at 39.

Red McCombs was not unreasonably discriminatory. Rather, it was his reasonable business judgment to reward the Red McCombs dealerships for remodeling, becoming exclusive, adding the Equus line, and participating in the service loaner program. For these reasons, the ALJ finds that World Car failed to meet its burden of proof to show that Hyundai unreasonably discriminated against it in providing discretionary allocation.

World Car also reduced its inventory in 2009. Mr. Zabihian testified in his deposition that he pulled back in inventory in 2008-2009. At the hearing he agreed that he reduced inventory in 2009.[46] Mr. Zabihian also indicated that the Red McCombs stores kept their inventory at about the same levels during the 2008-2009 recession.[47]

In 2010, World Car turned down many vehicles offered by Hyundai. In the first six months of 2010, World Car North turned down 173 of 423 vehicles. World Car South turned down 32 of 100 offered vehicles.[48] Beginning in the second half of 2010 and continuing through mid-2013, there was a shortage of Hyundais. At that point, World Car had voluntarily reduced its inventory, resulting in a slower sales rate, and there were insufficient available cars to meet overall demand.

Although it was an unfortunate coincidence that the worldwide shortage of cars happened shortly after World Car had voluntarily reduced its inventory, World Car made the decision to do that. It was not the result of any discrimination on the part of Hyundai.

b. Gaming the allocation system

World Car alleges that submitting an RDR report for a spot delivery is a way for dealers to game the allocation system. A "spot delivery" refers to the practice of allowing a purchaser to take delivery of a vehicle after a sales contract is signed but before all final payment

[46] Tr. at 223-224, 228.

[47] Tr. at 228.

[48] Hyundai Ex. 47.

The sales efficiency standard is not a requirement, rather it is a measurement Hyundai uses to gauge dealer sales. Although World Car was not 100% sales efficient after 2009, Hyundai still allowed World Car's dealerships to remain Hyundai dealers. And both World Car dealerships are still in existence. Sales efficiency is determined the same way for all dealers. Treating some dealers differently, as World Car argues, could actually violate Hyundai's duty of good faith and fair dealing with respect to other dealers.

World Car argues that the duty of good faith and fair dealing should be defined as "requir[ing] the parties to deal fairly with one another."[76] Hyundai contends that a breach of the duty of good faith and fair dealing requires a showing of the "conscious doing of a wrong for a dishonest, discriminatory or malicious purpose."[77]

The ALJ finds that regardless of which standard is applied, Hyundai prevails. Even applying World Car's lower "not fair" standard, neither the allocation system nor the sales efficiency metric violate the provision in the Occupations Code that requires good faith and fair dealing. Although the discretionary allocation accounts for around 15% of the allocation any dealer receives, Hyundai informs dealers of how they can increase their allocation. World Car did not take advantage of many of those programs. Furthermore, Hyundai treats all dealers under the same sales efficiency formula and informs the dealers of how sales efficiency is calculated. There is no evidence Hyundai has any intent not to play fair with World Car or other dealers that did not meet 100% sales efficiency.

VI. CONCLUSION

Based on the evidence presented, World Car failed to prove any of its alleged violations of the Occupations Code.

---

[76] World Car Initial Brief at 46, *citing Humble Emergency Physicians, P.A. v. Mem'l Hermann Healthcare Sys., Inc.*, 01-09-00587-CV, 2011 WL 1584854, at *7 (Tex. App.—Houston [1st dist.] Apr. 1, 2011, no pet.).

[77] Hyundai Initial Brief at 56, *citing Bray v. Tejas Toyota, Inc.*, 363 S.W.3d 777, 780 (Tex. App.—Austin 2012, no pet.).

51. World Car stores have not been 100% sales efficient for several years, and both are operating under valid dealer agreements.

52. Measuring sales efficiency does not require adherence to unreasonable sales or service standards.

Duty of Good Faith and Fair Dealing

53. The allocation system and sales efficiency metric do not treat World Car unfairly.

VIII. CONCLUSIONS OF LAW

1. The Texas Department of Motor Vehicles has jurisdiction over this case. Tex. Occ. Code § 2301.001.

2. The State Office of Administrative Hearings (SOAH) has jurisdiction over all matters related to the contested case hearing in this case, including the authority to issue a proposal for decision with findings of fact and conclusions of law. Tex. Occ. Code § 2301.704.

3. The hearing was conducted pursuant to the Administrative Procedure Act and SOAH's procedural rules. Tex. Gov't Code ch. 2011 and 1 Tex. Admin. Code ch. 155.

4. Proper and timely notice of the hearing was provided. Tex. Occ. Code § 2301.705.

5. World Car has the burden of proof by a preponderance of the evidence. 1 Tex. Admin. Code § 155.427.

6. World Car failed to meet its burden of proof to show that Hyundai required adherence to unreasonable sales or service standards. Tex. Occ. Code § 2301.467(a)(1) (2003).

7. World Car failed to meet its burden of proof to show that Hyundai discriminated against World Car by treating them differently as a result of a formula or other process intended to gauge the performance of a dealership though allocation of vehicle inventory, sales efficiency calculations, or distribution of discretionary Co-Op advertising funds. Tex. Occ. Code § 2301.468(1) (2003).

8. World Car failed to meet its burden of proof to show that Hyundai engaged in unreasonable sales discrimination in the allocation of vehicle inventory because World Car did not participate in many of the programs that would have permitted additional discretionary allocation. Tex. Occ. Code § 2301.458(2).

9. World Car failed to meet its burden of proof to show that Hyundai violated its duty of good faith and fair dealing through allocations and sales efficiency because Hyundai

calculated sales efficiency in the same manner for all dealers, and World Car chose not to participate in many of the programs that could have led to additional discretionary allocation. Tex. Occ. Code § 2301.478(b).

SIGNED March 10, 2016.

WENDY K. L. HARVEL
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

Hyundai Motor America
South Central Region
1421 S. Belt Line Road, Suite 400
Coppell, TX 75019

PERPETUAL - "DUKE" IN P&S W/KIA

Interoffice Memo

TO: National Dealer Development

FROM: Rick Dorn

DATE: September 21, 2010

RE: RENEWAL OF DEALER SALES AND SERVICE AGREEMENT – World Car Hyundai (TX087)

This purpose of this communication is to process a perpetual renewal of World Car Hyundai's (TX087) Dealer Sales and Service Agreement.

DEALER INFORMATION

World Car Hyundai (TX087)
7915 IH 35 South
San Antonio, TX 78224
Planning Guide: 510
Date of last agreement: 10/3/08

MARKET/LOCATION

- World Car Hyundai is located in San Antonio, TX.
- San Antonio, TX is a metro point market and in the San Antonio HDAA.
- The PG for this point is 510.

OWNERSHIP/MANAGEMENT

- New World Car Imports-San Antonio, Inc. dba World Car Hyundai ownership structure remains as follows:
  - Ahmad Zabihian 100%
- Ahmad Zabihian remains the Dealer Principal and General Manager of this dealership.

DTX EXHIBIT 41

CAPITAL/PROFITS

- This dealership's net working capital is above guide.

Date	Guide	Actual	%
August 2010	$1,940,860	$3,347,266	172%

- The dealer's required flooring is $1,743,000. Dealer actual flooring is $2,500,000.
- The dealership is profitable $28,544 as of August 2010.

FACILITIES/LOCATION

- World Car Hyundai is dualled with Kia in fixed operations.

BRAND IDENTITY KIT/SIGNS

- World Car Hyundai does not have all of the HMA approved signage installed. They plan on purchasing the remainder of signs when a new sign company is elected.

SALES EFFICIENCY

- This dealer's sales efficiency through June 2010 was 42%.

CUSTOMER SATISFACTION PERFORMANCE

- The dealership's Customer Satisfaction scores are as follows:

	Dealer	Region	Nat'l	% Nat'l
SSI	831	833	849	98%
CSI	914	916	922	99%

RECOMMENDATION

- This dealer is profitable with average sales performance figures although his sales efficiency is below average. The dealer plans on doing more advertising during the 4th quarter to increase sales and profitability. He has been a Hyundai dealer for over 10 years. The South Central region recommends a perpetual agreement for the dealership based on his longevity with Hyundai.

Concurrence:

Tom Hetrick
Regional General Manager
South Central Region

CONFIDENTIAL

	2008	2009	2010	2011	2012	2013
RM-TX016	15%	24%	12%	48%	40%	11%
RM-TX127	20%	34%	16%	42%	47%	12%
WC-TX077	57%	22%	6%	46%	38%	16%
WC-TX087	62%	35%	6%	35%	24%	32%

DTX EXHIBIT 99A

Region Code	YEAR	ALLOCATED DEALER	TOTAL ALLOCATED	MANUAL ALLOCATION
SC	2008	TX016	405	52
SC	2008	TX027	344	71
SC	2008	TX050	101	30
SC	2008	TX077	634	268
SC	2008	TX081	609	41
SC	2008	TX087	455	198
SC	2008	TX095	876	103
SC	2008	TX117	215	62
SC	2008	TX125	80	12
SC	2008	TX127	477	82
SC	2008	TX139	363	111
SC	2009	TX016	469	102
SC	2009	TX027	266	46
SC	2009	TX050	116	29
SC	2009	TX077	434	74
SC	2009	TX081	324	52
SC	2009	TX087	165	39
SC	2009	TX095	1186	270
SC	2009	TX117	203	44
SC	2009	TX125	38	3
SC	2009	TX127	319	98
SC	2009	TX139	725	211
SC	2009	TX148	77	0
SC	2010	TX016	777	43
SC	2010	TX027	623	10
SC	2010	TX050	185	0
SC	2010	TX077	532	17
SC	2010	TX081	420	2
SC	2010	TX087	282	4
SC	2010	TX095	1364	93
SC	2010	TX117	124	4
SC	2010	TX125	73	2
SC	2010	TX127	676	10
SC	2010	TX139	1204	35
SC	2010	TX148	209	4
SC	2010	TX154	152	0
SC	2010	TX157	360	1
SC	2011	TX016	1206	384
SC	2011	TX027	925	164
SC	2011	TX050	180	51
SC	2011	TX077	731	249
SC	2011	TX081	505	87
SC	2011	TX087	313	74
SC	2011	TX095	1621	306
SC	2011	TX117	178	36

DTX EXHIBIT 99

SC	2011	TX125	99	22
SC	2011	TX127	1194	330
SC	2011	TX139	1854	353
SC	2011	TX148	167	51
SC	2011	TX154	183	64
SC	2011	TX157	921	247
SC	2012	TX016	1407	383
SC	2012	TX027	1524	332
SC	2012	TX050	26	2
SC	2012	TX077	717	177
SC	2012	TX081	507	34
SC	2012	TX087	147	30
SC	2012	TX095	1838	223
SC	2012	TX117	198	31
SC	2012	TX125	162	26
SC	2012	TX127	1159	368
SC	2012	TX139	2575	262
SC	2012	TX148	595	367
SC	2012	TX154	256	61
SC	2012	TX157	904	218
SC	2013	TX016	1255	127
SC	2013	TX027	1031	118
SC	2013	TX077	797	119
SC	2013	TX081	701	101
SC	2013	TX087	256	82
SC	2013	TX095	1842	539
SC	2013	TX117	237	19
SC	2013	TX125	292	122
SC	2013	TX127	1061	118
SC	2013	TX139	2994	384
SC	2013	TX148	637	165
SC	2013	TX154	226	45
SC	2013	TX157	1512	231

HYUNDAI

Sales Performance Summary (SEP Report)

WORLD CAR HYUNDAI (TX087)
District: SCC
San Antonio, TX Market
South San Antonio PMA
Appointment Date: 08/09/1999

Your Dealership's Percentage Below Expected for December 2016 YE is:

-66.47%

Your Dealership's sales are -456 units below expected for the period indicated, based on the average performance of Hyundai dealers in the State of TEXAS

December 2016 YE		(A)	(B)		(C)		(D)			
Segment	Hyundai Model	Total Competitive Retail Regs Within PMA	Hyundai's State Represented Market Share[1]	Dealer's Expected Retail Sales[2]	Dealer's Nationwide Retail Sales[3] *including* Equus	Dealer's Nationwide Retail Sales[3] *excluding* Equus for SEP	Dealer's Sales Efficiency	Relevant Nationwide Retail Sales Above/Below Expected	Dealer's Percent Above or Below Expected	Dealer's Retail Sales Efficiency Rank in TEXAS
Sub-Compact Car	Accent	606	12.67%	77	97	97	125.97%	20	25.97%	63 of 63
Compact Car	Elantra	2,551	8.34%	213	50	50	23.47%	-163	-76.53%	
Midsize Car	Sonata	1,863	6.48%	121	26	26	21.49%	-95	-78.51%	
Large Car	Azera	433	1.63%	7	0	0	0.00%	-7	-100.00%	
Mid Luxury Car	Genesis	46	12.74%	6	2	2	33.33%	-4	-66.67%	
Compact Sporty Car	Veloster	143	33.11%	47	25	25	53.19%	-22	-46.81%	
Midsize Sporty Car	Genesis Coupe	505	2.00%	10	1	1	10.00%	-9	-90.00%	
Green Vehicles	Ioniq	60	0.00%	0	0	0	n/a	0	n/a	
Sub-Compact SUV	Tucson	1,586	5.06%	80	16	16	20.00%	-64	-80.00%	
Compact SUV	Santa Fe	1,460	8.53%	125	13	13	10.40%	-112	-89.60%	
Memo: Premium Luxury Car[4]	Equus				0					
Total:		9,253		686	230	230	33.53%	-456	-66.47%	

Sales Efficiency (D) = Nationwide Sales (C) / [Competitive Registrations (A) * State Rep Market Share(B)]

December 2016 Rolling 12										
Segment	Hyundai Model	Total Competitive Retail Regs Within PMA	Hyundai's State Represented Market Share[1]	Dealer's Expected Retail Sales[2]	Dealer's Nationwide Retail Sales[3] *including* Equus	Dealer's Nationwide Retail Sales[3] *excluding* Equus for SEP	Dealer's Sales Efficiency	Relevant Nationwide Retail Sales Above/Below Expected	Dealer's Percent Above or Below Expected	Dealer's Retail Sales Efficiency Rank in TEXAS
Sub-Compact Car	Accent	606	12.67%	77	97	97	125.97%	20	25.97%	63 of 63
Compact Car	Elantra	2,551	8.34%	213	50	50	23.47%	-163	-76.53%	
Midsize Car	Sonata	1,863	6.48%	121	26	26	21.49%	-95	-78.51%	
Large Car	Azera	433	1.63%	7	0	0	0.00%	-7	-100.00%	
Mid Luxury Car	Genesis	46	12.74%	6	2	2	33.33%	-4	-66.67%	
Compact Sporty Car	Veloster	143	33.11%	47	25	25	53.19%	-22	-46.81%	
Midsize Sporty Car	Genesis Coupe	505	2.00%	10	1	1	10.00%	-9	-90.00%	
Green Vehicles	Ioniq	60	0.00%	0	0	0	n/a	0	n/a	
Sub-Compact SUV	Tucson	1,586	5.06%	80	16	16	20.00%	-64	-80.00%	
Compact SUV	Santa Fe	1,460	8.53%	125	13	13	10.40%	-112	-89.60%	
Memo: Premium Luxury Car[4]	Equus				0					
Total:		9,253		686	230	230	33.53%	-456	-66.47%	

Historical	Total Competitive Retail Regs Within PMA	Dealer's Expected Retail Sales[2]	Dealer's Nationwide Retail Sales[3] *including* Equus	Dealer's Nationwide Retail Sales[3] *excluding* Equus for SEP	Dealer's Sales Efficiency	Relevant Nationwide Retail Sales Above/Below Expected	Dealer's Percent Above or Below Expected	Dealer's Retail Sales Efficiency Rank in TEXAS
December 2015 YE	10,490	802	283	283	35.29%	-519	-64.71%	63 of 63
December 2014 YE	10,250	783	245	245	31.29%	-538	-68.71%	61 of 61

[1] State represented average is the standard utilized by Hyundai Motor America to determine whether a dealer is meeting its contractual obligation for minimum sales performance. Hyundai regularly utilizes other appropriate standards, including local, state, region and national market penetration by segment, to determine whether Hyundai as a line make is adequately represented in a market or other area.

[2] Expected Retail Sales is the minimum number of vehicles a dealer must achieve in order to comply with its sales performance obligations under the Dealer Agreement and is not the same as a sales objective. The minimum value of the Total Expected Retail Sales is 1.

[3] Based on dealer retail sales anywhere in the 50 United States and includes previous dealer's sales. Total dealer retail sales do not include the Veracruz.

[4] Premium Luxury Car shown as memo only. Sales Performance Summary does not consider the Premium Luxury Car segment.

Data Source: Experian and Hyundai data

Published on: 2/22/2017

Using Segmentation as of August 2016

State Office of Administrative Hearings

Cathleen Parsley
Chief Administrative Law Judge

March 10, 2016

Daniel Avitia, Director
Motor Vehicle Division
Texas Department of Motor Vehicles
4000 Jackson Avenue
Austin, TX 78731

VIA INTERAGENCY MAIL

RE: **Docket No. 608-14-1208.LIC; MVD Docket No. 14-0006 LIC; New World Car Nissan, Inc., d/b/a World Car Hyundai and New World Car Imports, San Antonio, Inc., d/b/a World Car Hyundai**

Dear Mr. Avitia:

Please find enclosed a Proposal for Decision in this case. It contains my recommendation and underlying rationale.

Exceptions and replies may be filed by any party in accordance with 1 Tex. Admin. Code § 155.507(c), a SOAH rule which may be found at www.soah.state.tx.us.

Sincerely,

Wendy K. L. Harvel
Administrative Law Judge

WKLH/ls
Enclosure

cc: Dan Downey, Dan Downey, P.C., 1609 Shoal Creek Blvd., Ste. #100, Austin, TX 78701 – **VIA REGULAR MAIL**
Lee L. Kaplan, Jarod R. Stewart, Smyser Kaplan & Veselka, L.L.P., 700 Louisiana, Ste. 2300, Houston, TX 77002 – **VIA REGULAR MAIL**
Kevin M. Young, David Prichard, Prichard Hawkins Young, 10101 Reunion Place, Ste. 600, San Antonio, TX 78216 – **VIA REGULAR MAIL**
Alice Carmona, Docket Clerk, Texas Department of Motor Vehicle, 4000 Jackson Avenue, Austin, Texas 78731 (with 1 - CD; Certified Evidentiary Record) - **VIA INTERAGENCY MAIL**

SOAH DOCKET NO. 608-14-1208.LIC
MVD DOCKET NO. 14-0006 LIC

NEW WORLD CAR NISSAN, INC., D/B/A WORLD CAR HYUNDAI and NEW WORLD CAR IMPORTS, SAN ANTONIO, INC., D/B/A WORLD CAR HYUNDAI, Complainants	§	BEFORE THE STATE OFFICE
v.	§	OF
HYUNDAI MOTOR AMERICA, Respondent	§	ADMINISTRATIVE HEARINGS

TABLE OF CONTENTS

SOAH DOCKET NO. 608-14-1208.LIC
MVD DOCKET NO. 14-0006 LIC

NEW WORLD CAR NISSAN, INC., D/B/A WORLD CAR HYUNDAI and NEW WORLD CAR IMPORTS, SAN ANTONIO, INC., D/B/A WORLD CAR HYUNDAI,	§	**BEFORE THE STATE OFFICE**
Complainants	§	**OF**
v.	§	
HYUNDAI MOTOR AMERICA,	§	
Respondent	§	**ADMINISTRATIVE HEARINGS**

PROPOSAL FOR DECISION

I. INTRODUCTION

New World Car Nissan, Inc. and New World Car Imports, San Antonio, Inc. (together, World Car) contend that Hyundai Motor America's (Hyundai) allocation system, sales efficiency metric, and advertising subsidies violate the Texas Occupations Code (Occupations Code) because they are discriminatory, discriminate among dealers, require World Car to adhere to unreasonable sales standards, and violate the duty of good faith and fair dealing.

The Administrative Law Judge (ALJ) finds that World Car failed to meet its burden of proof to show that any of Hyundai's programs violate the Occupations Code. Therefore, the ALJ recommends that World Car's complaint be denied.

II. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

The parties do not dispute jurisdiction, notice, or procedural history. Therefore, those matters are addressed in the findings of fact and conclusions of law without discussion.

The hearing convened on September 21, 2015, at the State Office of Administrative Hearings in Austin, Texas, with ALJ Wendy Harvel presiding. The record closed on January 11, 2016, following the submission of post-hearing briefs and an agreed record.[1]

III. APPLICABLE LAW

World Car alleges that Hyundai violated three sections of the Occupations Code. Under Section 2301.467, "a manufacturer or distributor . . . may not: (1) require adherence to unreasonable sale or service standards." Under Section 2301.468 (2003):

> A manufacturer, distributor, or representative may not:
>
> (1) notwithstanding the terms of any franchise, directly or indirectly discriminate against a franchised dealer or otherwise treat franchised dealers differently as a result of a formula or other computation or process intended to gauge the performance of a dealership; or
>
> (2) discriminate unreasonably between or among franchisees in the sale of a motor vehicle owned by the manufacturer or distributor.[2]

Texas Occupations Code § 2301.478 imposes on vehicle manufacturers and distributors a duty of good faith and fair dealing in their relationships with franchisees.

World Car, as the complainant, has the burden of proof.[3]

IV. FACTUAL BACKGROUND

Ahmad Zabihian owns World Car in San Antonio, Texas. World Car has two Hyundai dealerships in San Antonio. One is in north San Antonio next to Interstate 35 (World Car

---

[1] The ALJ commends the parties on their use of technology during and after the hearing and the professionalism exhibited by all participants in the case.

[2] The 2003 version of the statute applies to this case because the 2011 version applies only to an agreement entered into or renewed after the September 1, 2011 version of the statute was enacted. The franchise agreements between Hyundai and World Car were renewed in November 2010.

[3] 1 Tex. Admin. Code § 155.427.

North); the other is in south San Antonio (World Car South). They are part of the World Car Auto Group, which is comprised of 10 dealerships in the San Antonio area. Mr. Zabihian owns all of the World Car Auto Group dealerships. In addition to Hyundai, World Car Auto Group maintains Kia, Mazda, and Nissan dealerships.

World Car's primary Hyundai competitor is Red McCombs Hyundai (Red McCombs). Red McCombs owns two Hyundai dealerships in San Antonio – Red McCombs Superior and Red McCombs Northwest.

Prior to the 2008 recession, World Car North and Red McCombs Superior performed at approximately equal levels in terms of the number of vehicles sold. World Car South performed less well. It is in a lower-income area than World Car North. Red McCombs Northwest did not perform as well prior to the 2008 recession, but improved its sales during 2008-2009. The chart below illustrates the sales for the four dealerships.[4]

Dealer	**2006**	**2007**	**2008**	**2009**	**2010 (Jan.-June)**
World Car North	663	512	664	476	284
Red McCombs Superior	675	510	445	462	318
World Car South	304	373	429	174	90
Red McCombs Northwest	193	314	410	485	227

World Car notes that it sold the same volume or out-sold Red McCombs during most of these years. World Car contends its good sales were helped by Hyundai's regional general manager at the time (Rick Lueders), who provided World Car with sufficient inventory and Co-Op advertising assistance.[5]

[4] World Car Exs. 10, 82.

[5] Co-Op advertising assistance is money provided from Hyundai to its dealers to cover part of the cost of dealership advertising.

In June 2010, Tom Hetrick replaced Mr. Lueders as Hyundai's regional general manager. World Car asserts that Mr. Hetrick did not provide inventory at the same level and was not as responsive to World Car as Mr. Lueders had been. Beginning in June 2010 through September 2013, World Car contends that Mr. Hetrick did not assist World Car with requests for additional inventory. World Car also contends that Mr. Hetrick provided substantially more assistance with Co-Op funds to the Red McCombs dealerships than to World Car. World Car alleges this practice continued from the beginning of Mr. Hetrick's tenure through the end of the third quarter of 2013, when World Car initiated litigation against Hyundai.[6]

World Car also alleges that Red McCombs dealerships were able to game Hyundai's allocation system, resulting in Red McCombs unfairly obtaining additional inventory even though it was not entitled to receive it.

Hyundai agrees with the sales numbers World Car presents. Hyundai argues that World Car's poor sales were not due to Mr. Hetrick's division of inventory, but rather to World Car voluntarily reducing inventory during the recession of 2008-2009 by turning down hundreds of cars offered to it through the allocation system. Additionally, Hyundai notes that World Car did not participate in many of the Hyundai programs that could have helped World Car increase its sales, including adding the Equus product, remodeling, becoming an exclusive Hyundai dealership, and using Hyundais as service loaner vehicles. Those practices allowed the Red McCombs dealerships to qualify for additional inventory.

Hyundai also notes that in March 2011, a large earthquake and tsunami hit Japan, which resulted in fewer Japanese cars being available on the market in the United States. As a result of the shortage of Japanese cars, Hyundais became more popular and were in short supply as the manufacturer had not and could not have anticipated the increased demand. Hyundai asserts that during the time of short supply, all dealers were asking for additional inventory, and Hyundai was unable to supply any of its dealers with as much inventory as requested.

---

[6] The civil litigation is in Bexar County, Texas.

A. Allocation System

Hyundai's allocation system consists of formula allocations, discretionary allocations, and manual allocations. Formula allocations make up approximately 85% of the vehicles allocated and are allocated through a formula and computer program.[7] Hyundai uses a balanced days' supply system for its formula allocations.[8] The same formula is used for all Hyundai dealers nationwide.[9] Hyundai used the same formula allocation system from 2006 through 2013.[10] Under the allocation algorithm, vehicles are offered to dealers based on each dealer's inventory and the average number of vehicles sold by the dealer in the previous 90 days. The system allocates vehicles, one at a time, to the dealer in the region with the lowest days' supply for each respective model.[11] This system is not a pure "turn and earn" system because the turn and earn system considers only the number of vehicles sold and reported by each dealer, while the balanced days' supply considers the dealers' available inventories.[12] World Car is not challenging the mechanics of the formula allocation system. Rather, as part of its complaint that it was subject to unreasonable discrimination, World Car asserts that Red McCombs' dealerships were able to cheat and game the allocation system, which resulted in those dealerships improperly receiving additional allocation. Because World Car did not use the same methods of gaming the system, World Car alleges it was subject to unreasonable discrimination.[13]

Discretionary allocations are made by Hyundai's regional general manager, who may distribute up to 15% of total allocation. Manual allocations include turn downs, which are

---

[7] Tr. at 760, 1062-63, 1066.

[8] Tr. at 824-25.

[9] Tr. at 708, 1155.

[10] Tr. at 820-21. The formula used to determine allocation was changed after 2013, but the new formula is not the subject of this proceeding.

[11] Tr. at 819.

[12] Tr. at 825.

[13] World Car Initial Brief at 21-25.

vehicles allocated to a dealer under the formula that the dealer rejects that are then made available to other dealers in the region, and vehicles that have been re-customized or modified.[14]

It should be noted that the discretionary allocation does not always equal 15%. Particularly, during times of short supply, there may not be as much discretionary allocation.[15] Discretionary allocation can be, and usually is, provided for particular events or milestones at a dealership, such as facility renovations, grand openings, turning a multi-manufacturer dealership into a Hyundai-exclusive dealership, or agreeing to sell Hyundai's luxury vehicle, the Equus.[16]

Within the San Antonio market, when analyzing discretionary allocation among the dealerships, World Car received similar percentages of discretionary allocation when compared to Red McCombs.

Year[17]	McCombs Superior	McCombs NW	World Car North	World Car South
2008	2%	3%	15%	19%
2009	2%	3%	5%	11%
2010	6%	14%	3%	4%
2011	16%	14%	12%	12%
2012	13%	15%	13%	3%
2013	1%	1%	1%	0%

The parties agree that Hyundai offers 12 different models of vehicles, with distinct trim levels, which results in at least 96 different configurations before options and paint colors are chosen.[18] World Car asserts that it (and any other dealership) needs a certain minimum level of

[14] Tr. at 685, 1103-04, 1146.

[15] Tr. at 840-41.

[16] Tr. at 1060-60, 1080.

[17] Data in this chart is aggregated from information in Hyundai Ex. 99, which contains confidential information.

[18] World Car Ex. 130.

inventory to offer choice and selection to customers and to maintain or increase its sales rate.[19] Hyundai does not disagree.[20]

The inventory, sales, and allocation cycle can spiral downward as a result of poor sales and low inventory. If a dealership has low inventory, it will result in a lower sales rate because there is less selection. With fewer cars sold, the allocation system will not allocate as many new cars to the faltering dealership. World Car asserts that it needed a significant increase in its inventory in order to be able to sell more cars. With the low inventory, caused by reduced sales and lack of new inventory, World Car's sales rate declined.

Again, World Car does not challenge the formula that performs the 85% system allocations.[21] Rather, World Car challenges the 15% discretionary and manual allocations and the ability of dealerships to game the allocation system at the expense of other dealerships.

B. Sales Efficiency

Sales efficiency is a metric that Hyundai uses to measure dealer sales performance.[22] Sales efficiency compares a dealer's total sales to sales the brand expects to achieve in the dealer's primary market area. Hyundai calculates expected sales by applying Hyundai's national average sales penetration in each vehicle segment in which Hyundai competes to the actual number of vehicles registered in that segment in the dealer's primary market area. Thus, if Hyundai sells 5% of the subcompact vehicles sold nationwide during a particular time period, then Hyundai would expect that 5% of the subcompacts sold in a dealer's primary market area during that same time period would be Hyundais.[23] Hyundai then compares the dealer's total

---

[19] Tr. at 154, 650-51, 682-83.

[20] World Car Ex. 117 at 193; Tr. at 510, 512.

[21] World Car Initial Brief at 6.

[22] Almost every other car manufacturer uses the same or similar metric. Tr. at 73, 712, 453-54.

[23] Tr. at 1165-66.

sales to the expected sales number. So if expected sales are 200, and the dealer sold 200 cars, the dealer is 100% sales efficient.

C. Co-Op Advertising Funds

Hyundai's Co-op Advertising Commitment Program provides funds (Co-Op advertising funds) to dealers to assist with advertising. The funds do not pay for the total cost of advertisements the dealer purchases, but provide partial reimbursements.[24] Eligibility for the program and the amount of reimbursement are determined by a formula that considers sales and customer services scores.[25] Regional general managers also have some discretionary funds they can provide to dealers.[26]

V. ALLEGED VIOLATIONS

A. Discriminatory Treatment (Occupations Code § 2301.468 (2003))

1. World Car's Arguments

a. Discretionary allocation

i. Discrimination based on formula to gauge performance

World Car asserts that Hyundai violated Occupations Code § 2301.468(1) (2003) by treating World Car differently than Red McCombs in the discretionary allocation of vehicle inventory. World Car notes that Mr. Hetrick gave 98 discretionary allocations to Red McCombs Northwest and 36 to Red McCombs Superior during the first six months of his tenure as regional general manager. During the same time, he provided 10 cars through discretionary allocation to

[24] Tr. at 217-18.

[25] Tr. at 391.

[26] Tr. at 93.

each World Car dealership. Thus, Red McCombs two dealerships received a total of 134 discretionary cars, and World Car received a total of 20.[27] World Car further asserts that the large number of discretionary allocations to the Red McCombs dealerships allowed them to sell more cars because they had more inventory. Because they were able to sell more cars, they earned more through the 85% formula allocations. World Car characterizes the difference in allocation of vehicles by a comparative percentage. In other words, Hyundai allocated seven times more vehicles to the Red McCombs dealerships than it did to the World Car dealerships.[28]

ii. Unreasonable discrimination in sale of a motor vehicle

World Car contends that Hyundai unreasonably discriminated against World Car in violation of the second prong of Occupations Code § 2301.468(2) (2003) in the allocation of vehicle inventory. World Car alleges that the disparity in the discretionary allocation was unreasonable. World Car contends that it was not rational or fair for Mr. Hetrick to provide many more discretionary allocations to Red McCombs compared to World Car, particularly when World Car was making multiple requests for additional inventory from 2010 through 2013.[29] World Car also contends that Red McCombs received additional discretionary allocations when it renovated one of its facilities, whereas World Car did not receive discretionary allocation at its North Store when it was renovated.[30]

b. Gaming the formula allocation system

World Car argues that although the formula allocation system itself is not discriminatory, Red McCombs was able to game the system to its strategic advantage to improve formula allocations to its dealerships. World Car asserts that dealerships could game the allocation system by reporting vehicles as sold by submitting a Retail Delivery Report (RDR) even though

---

[27] World Car Ex. 111.

[28] World Car Initial Brief at 37.

[29] World Car Initial Brief at 38.

[30] World Car Initial Brief at 39, citing Tr. at 495-97.

the vehicle had not been sold and by putting vehicles into the service loaner program and reporting them as sold without actually using the vehicles as loaners.[31]

c. Sales efficiency

World Car also alleges a violation of Occupations Code § 2301.458(1) (2003) through the use of sales efficiency. To support its allegation, World Car notes that Mr. Hetrick used sales efficiency to reward dealerships with discretionary allocation, but treated World Car differently than Red McCombs. World Car also notes that it did not have enough inventory to reach 100% sales efficiency in the market, and Hyundai did not help World Car with additional inventory. Secondly, World Car argues that Mr. Hetrick proposed the sale of the World Car Hyundai dealerships because of poor sales efficiency and performance. Because Mr. Hetrick did not attempt to have other dealers sell their dealerships, and because Mr. Hetrick did not give World Car any assistance or inventory to help World Car improve its sales, World Car alleges discrimination under Texas Occupations Code § 2301.458(1).

d. Co-Op advertising

World Car asserts an additional violation of Occupations Code § 2301.468 (2003) through distribution of discretionary Co-Op advertising funds.[32] World Car notes that Hyundai distributes approximately 85% of Co-Op advertising funds through a formula that is predicated on reported sales.[33] The remaining funds are distributed at the discretion of the regional general manager.[34]

---

[31] World Car Initial Brief at 21.

[32] World Car Initial Brief at 40. World Car does not cite the specific subsection it is alleging was violated by the distribution of Co-Op advertising funds.

[33] World Car Ex. 120 at 19-20; Tr. at 93, 199-200.

[34] *Id.*

2. Hyundai's Response

a. Allocation

Hyundai argues that World Car cannot maintain its claim that the alleged discriminatory allocation of vehicles is a violation of the Occupations Code. Hyundai reads the statute narrowly to include only the sale of a motor vehicle. Thus, according to Hyundai, to prove a violation, the discrimination must have occurred in the sale of the vehicle, and not the allocation, measurement of sales efficiency, or the distribution of Co-Op funds.[35] Hyundai asserts that simply because a vehicle is allocated to a dealer, the dealer does not necessarily purchase it. The dealer may choose to purchase it or may turn it down. Allocation simply determines the number of vehicles the distributor offers the dealer.

Hyundai notes that the statute prohibits *unreasonable* discrimination, not discrimination for which Hyundai had a reasonable basis. Hyundai argues that unreasonable discrimination must be arbitrary, capricious, without substantial cause or reason, or lacking a legitimate business justification.[36] Hyundai argues that the formula allocations did not discriminate unreasonably. The formula is applied the same way to each dealer. Hyundai asserts that Red McCombs took advantage of optional programs that improved its position in the allocation system. Those programs were available to all dealers, including World Car, and World Car simply chose not to take advantage of the programs.[37] Those programs included: using Hyundais as service loaners; adding the luxury Equus line; remodeling; and making dealerships exclusively Hyundai-branded.[38] Another strategy to increase allocation was to report sales quickly. Some dealers submitted an RDR report after a spot delivery of a car, even if financing

---

[35] Hyundai Initial Brief at 36.

[36] Hyundai Initial Brief at 37, citing *Star Motorcars v. Mercedes-Benz USA*, SOAH Docket No. 601-09-3665, citing *Mitchell's Inc. v. Nelms*, 454 S.W.2d 809, 813-14 (Tex. App.—Dallas 1970, writ ref'd n.r.e.); *Burlington Northern & Santa Fe Ry. Co. v. South Plains Switching, Ltd. Co.*, 174 S.W.3d 349, 352-54 (Tex. App.—Fort Worth 2005, no writ); *Buddy Gregg Motor Homes, Inc. v. Marathon Coach, Inc.*, 320 S.W.3d 912, 924 (Tex. App.—Austin 2010, no pet.).

[37] Hyundai Initial Brief at 38.

[38] Tr. at 1182-83.

was not approved.[39] Reporting the sale quickly reduced the days' supply of that model and would show that the dealer might need additional formula allocation to maintain its supply. World Car did not submit RDR reports until financing was approved, which delayed the reported sale and slowed allocations.[40]

With respect to discretionary allocations, Hyundai argues that during the shortage following the tsunami, Mr. Hetrick focused the discretionary allocation on dealers that were committed to the Hyundai brand. Because Red McCombs maintained its inventory level during the recession, renovated one store, added the Equus line, and because its other store became a Hyundai-exclusive dealership, it received more discretionary allocation.[41]

b. Sales efficiency

Hyundai argues that measuring sales efficiency is not unreasonable discrimination. It is calculated the same way for all dealers. And it is used to identify dealers that perform below average so they can improve their performance.[42]

c. Co-Op advertising

Hyundai asserts that the use of Co-Op advertising funds cannot violate Occupations Code § 2301.468 because it does not relate to the sale of a motor vehicle. Rather, it is simply a mechanism to allow Hyundai as the manufacturer to contribute some money to the dealers to help the dealers purchase more advertising for the brand.

---

[39] Tr. at 101, 367.

[40] Tr. at 867.

[41] Tr. at 167, 1050-61.

[42] Hyundai Initial Brief at 45, 46.

3. Analysis

a. Discretionary allocation

The ALJ finds that the use of discretionary allocation did not violate the Occupations Code. World Car notes that in a six-month period Mr. Hetrick offered 134 cars through discretionary allocation for Red McCombs versus 20 for World Car.[43] World Car then makes the comparison that Red McCombs did not sell nearly seven times as many vehicles as World Car Hyundai.[44] World Car notes that at the time of the additional allocation, all four San Antonio Hyundai dealerships were considered by Hyundai to be underperforming.[45]

World Car's argument fails to take into account the differences between the Red McCombs' dealerships and World Car's dealerships. In 2010, Red McCombs Superior became an exclusive Hyundai dealer, whereas World Car South shares a dealership with Kia. Red McCombs' Northwest store added the luxury Equus line that required a facility upgrade, and then renovated the store. Red McCombs Superior also renovated its dealership in 2011-2012. World Car dealerships were not renovated during this time. It was not until 2014 that World Car North renovated its store. Red McCombs also participated in Hyundai's service loaner program. World Car did not participate in Hyundai's service loaner program.

World Car could have participated in all of these Hyundai programs, which would most likely have increased the sales rate and reduced the daily supply of vehicles, resulting in additional allocation. World Car chose not to participate. All dealers that chose to participate in the programs would have increased allocation and would have been eligible for discretionary allocation that was given by regional general managers to reward dealers for facility upgrades, renovations, and exclusivity. World Car's choice not to engage in those programs worked to its detriment in terms of receiving discretionary allocation. But Mr. Hetrick's decision to reward

---

[43] World Car Ex. 111.

[44] World Car Initial Brief at 37.

[45] World Car Initial Brief at 39.

Red McCombs was not unreasonably discriminatory. Rather, it was his reasonable business judgment to reward the Red McCombs dealerships for remodeling, becoming exclusive, adding the Equus line, and participating in the service loaner program. For these reasons, the ALJ finds that World Car failed to meet its burden of proof to show that Hyundai unreasonably discriminated against it in providing discretionary allocation.

World Car also reduced its inventory in 2009. Mr. Zabihian testified in his deposition that he pulled back in inventory in 2008-2009. At the hearing he agreed that he reduced inventory in 2009.[46] Mr. Zabihian also indicated that the Red McCombs stores kept their inventory at about the same levels during the 2008-2009 recession.[47]

In 2010, World Car turned down many vehicles offered by Hyundai. In the first six months of 2010, World Car North turned down 173 of 423 vehicles. World Car South turned down 32 of 100 offered vehicles.[48] Beginning in the second half of 2010 and continuing through mid-2013, there was a shortage of Hyundais. At that point, World Car had voluntarily reduced its inventory, resulting in a slower sales rate, and there were insufficient available cars to meet overall demand.

Although it was an unfortunate coincidence that the worldwide shortage of cars happened shortly after World Car had voluntarily reduced its inventory, World Car made the decision to do that. It was not the result of any discrimination on the part of Hyundai.

b. Gaming the allocation system

World Car alleges that submitting an RDR report for a spot delivery is a way for dealers to game the allocation system. A "spot delivery" refers to the practice of allowing a purchaser to take delivery of a vehicle after a sales contract is signed but before all final payment

---

[46] Tr. at 223-224, 228.

[47] Tr. at 228.

[48] Hyundai Ex. 47.

arrangements have been finalized.[49] World Car has decided not to record an RDR after a spot delivery because World Car thinks it does not constitute a sale until the sale is completed with approved financing.[50]

Spot deliveries are a common industry practice.[51] World Car spot delivers cars but does not submit an RDR report until the financing is approved. Because World Car does not immediately submit the RDR, the sale is reported later, thereby affecting the balanced days' supply of vehicles on its lot, and slowing formula allocation. Hyundai encouraged World Car to speed up its sales reporting by promptly submitting RDRs, but World Car chose not to do so.[52] Hyundai's dealer agreement requires dealers to report the delivery of each new motor vehicle to a purchaser by the end of the day the vehicle is delivered.[53]

World Car does not submit the RDR prior to the completed sale because once the RDR is submitted the warranty begins. So if the financing falls through, and the car is returned, the next purchaser would not have a full warranty.[54] World Car asserts that spot deliveries in Texas do not transfer ownership of the car from the dealer to the consumer, and thus submitting an RDR would be inaccurate.

Because spot deliveries are not illegal, and Hyundai had counseled World Car to submit RDR reports quickly once the car was delivered to the customer, World Car cannot now complain that not doing so was unreasonable discrimination. World Car had the same tools available to it as every other Hyundai dealer. In the event a warranty has started and the car is returned, World Car could sell the car to another purchaser at a reduced price to account for the shorter warranty period.

---

[49] Tr. at 967, 267, 520.

[50] Tr. at 103-05, 267-68, 566, 602.

[51] Tr. at 269.

[52] Tr. at 241-42.

[53] World Car Ex. 1.

[54] Tr. at 105, 108.

Importantly, although two expert witnesses testified about whether Red McCombs was gaming the allocation system by submitting RDR reports and then backing them out when the financing fell through, there was no evidence that this happened, only speculation.[55]

World Car also asserts that Red McCombs reported vehicles sold to the dealerships for use in the service loaner program even though the dealerships did not use the vehicles in the service loaner program.[56] World Car's evidence is that some of the service loaners came out of the service loaner program with "not too many miles on them."[57] The ALJ finds that there is insufficient evidence to show that Red McCombs gamed the allocation system by either falsely submitting RDR reports or not using service loaners. The ALJ finds that World Car failed to meet its burden of proof to show that any "gaming" of the allocation system violated the Occupations Code.

c. Sales efficiency

In 2008, both World Car North and South were over 100% sales efficient. In 2009, the north store dropped to 96.8% and continued to drop over time. In 2014, it was 65.7% sales efficient. The south store fared worse. It dropped to 17.9% sales efficient in 2013 but rebounded in 2014 to 31.2% sales efficient.[58]

World Car asserts that it did not have sufficient inventory to meet 100% sales efficiency. It argues that the sales efficiency expectation for World Car South was unreasonable because the south store saw a large drop in sales due to the opening of a Toyota manufacturing plant in the vicinity of the south store. Thus, it contends that Hyundai's sales efficiency calculation was

---

[55] Tr. at 732-33 (World Car expert Mr. Roesner testifying that he did not have any way to check whether spot deliveries were improper.)

[56] World Car Initial Brief at 22.

[57] Tr. at 782.

[58] Tr. at 1174; World Car Exs. 3, 4.

unfair because to achieve 100% sales efficiency, World Car would have had to have sold more cars than it was allocated.[59]

In 2009, Toyota opened a manufacturing plant and new dealership close to World Car South.[60] The manufacturing plant employs about 6,000 people. Those employees had incentives to purchase Toyota products.[61] World Car suggests that Hyundai should have recalculated its sales efficiency measures to account for the opening of the Toyota manufacturing plant and the resulting significant increase in Toyota sales in the area.

Because World Car was selling fewer cars out of the south store, it was receiving fewer cars through formula allocation. Combined with the shortage in supply due to the tsunami, it was difficult for World Car to maintain high enough inventory levels to be able to show customers a large selection. Hyundai was aware of the limited supply and knew that there was not enough manufacturing volume to provide dealers with sufficient inventory to allow the dealers to meet their sales targets. Hyundai's President and CEO testified that "[s]ome of the most difficult conversations that we had in 2011 and 2010 and – and 2013 were with dealers that couldn't get to their stated sales volumes with the inventory we were giving them. That's a tough conversation to have. It's a legitimate conversation, and there just isn't enough available volume – production volume to get to those numbers."[62]

World Car suggests that Hyundai had two choices to correct the issue, either sell more discretionary allocations to World Car or adjust the sales efficiency standard. Hyundai did neither.

Hyundai responds that sales efficiency was calculated in the same manner for World Car as it was for every other Hyundai dealer. The tsunami affected all dealers equally. Hyundai

---

[59] World Car Initial Brief at 29.

[60] Tr. at 438-40.

[61] Tr. at 442.

[62] World Car Ex. 20 at 243-44.

admits that in 2013, it sent World Car South a "Notice of Failure of Performance" based on the dealership's poor sales efficiency.[63] The letter advised the dealership of its deficient sales efficiency and asked the dealership to reassess its commitment by either pursuing a sale of the dealership or providing a written plan to improve performance.[64] World Car has done neither, but Hyundai has not sought to terminate the World Car South store as a dealer.

The ALJ agrees with Hyundai that to find a violation, World Car must prove that Hyundai treated dealers differently by the use of a formula to gauge sales performance. World Car argues that Mr. Hetrick rewarded discretionary allocations by looking at sales efficiency but that Red McCombs received several times as many cars through discretionary allocation when compared to World Car, even though the sales difference between the two dealers was not that high.

World Car's argument fails because all dealerships were in the same situation with regard to high demand and low supply. It is undisputed that following the Japanese tsunami, Hyundai manufacturing could not keep up with demand for the product. As a result, dealerships were unable to receive the number of cars they wanted. As discussed above, there were steps World Car could have taken to increase its sales numbers, but World Car made the business decision not to do so. The ALJ finds that World Car failed to meet its burden of proof to show that the use of a sales efficiency measure violates the Code.

d. Co-Op Advertising

The ALJ finds that Hyundai did not violate the Code through the discretionary use of Co-Op advertising funds. Co-Op advertising funds are sometimes provided to dealers by the manufacturer to increase the amount of money the dealer is able to spend on advertising.

---

[63] World Car Ex. 67.

[64] Tr. at 1124.

The Co-Op advertising funds must be used exclusively for advertising. Eligibility and the amount of reimbursement are determined by a formula that considers several factors including sales and customer service scores.[65] That formula does not discriminate in the sale of a motor vehicle. Rather it discriminates in the amount of money a dealership receives from Hyundai for advertising. The formula is not intended to gauge the performance of a dealership. It simply calculates how much additional advertising funding a particular dealership will receive. And notwithstanding the formula, the regional general manager has discretion to award additional Co-Op advertising funds. For example, in 2010, World Car South was not eligible under the formula to receive Co-Op advertising funds. However, Mr. Hetrick provided the store with $60,000 of discretionary Co-Op advertising funds over the third and fourth quarters of that year.[66] The Co-Op program formula is applied in the same manner to all dealers and is not intended as a way to gauge the dealer's performance. It is applied to determine which dealers are eligible for additional funding, and the amount of funding, but is unrelated to the sale of a motor vehicle. Above and beyond that funding, the regional general manager can award additional Co-Op dollars at his discretion. For these reasons, the ALJ finds that the Co-Op advertising program does not violate Occupations Code § 2301.468(1) or (2).

B. Unreasonable Sales Standards (Occupations Code § 2301.467(a)(1))

World Car alleges that Hyundai required World Car to adhere to unreasonable sales and service standards in violation of Occupations Code § 2301.467(a)(1). World Car asserts that the "sales efficiency requirements" for World Car South were unreasonable because World Car would have had to sell more cars than it was allocated. The facts that form the basis of this allegation are discussed above. World Car notes that Mr. Hetrick could have used his discretion to allocate more vehicles but chose not to do so.[67] Because Hyundai did not allocate additional inventory to World Car South or adjust the sales efficiency standard because of the increased

---

[65] Tr. at 391.

[66] Tr. at 259-60.

[67] Tr. at 1079, 1101-02.

competition from Toyota, World Car argues that Hyundai required it to adhere to an unreasonable sales standard.

With respect to World Car North, World Car asserts that the sales efficiency requirements were also unreasonable. World Car asserts that it did not receive enough allocation to be able to reach 100% sales efficiency. Hyundai recognized that World Car North needed to add additional inventory to be able to achieve 100% sales efficiency. However, World Car asserts that Hyundai did not provide additional inventory and that at the same time, the Red McCombs dealerships had sufficient inventory because they were receiving discretionary allocation from Mr. Hetrick.[68] Because Hyundai did not provide additional inventory, World Car contends that Hyundai required adherence to an unreasonable sales efficiency requirement.

Hyundai responds that sales efficiency is not a standard that World Car (or any other dealer) is required to adhere to. Rather, it is a measurement to compare each dealer's performance to other dealers and to the national average. Hyundai argues it has no requirement that dealers be 100% sales efficient.

Hyundai further argues that World Car's allocations are lower than its expected sales because World Car had not sold vehicles at a sufficient rate to earn greater allocations. If World Car had maintained its rate from the time it was over 100% sales efficient in 2008, it would have continued to earn sufficient vehicles through the allocation system.[69] Neither World Car store has been 100% sales efficient for several years. Hyundai has not sought to terminate either dealership. Mr. Hetrick recommended a renewal of the Dealer Agreement with World Car South in 2010 when the store had an average sales efficiency of 42%.[70]

The ALJ finds that World Car failed to meet its burden to show that Hyundai required adherence to an unreasonable sales or service standard based on the sales efficiency calculation.

---

[68] World Car Initial Brief at 45, *citing* World Car Ex. 109; at Tab 3; World Car Exs. 126, 127; Tr. at 1079.

[69] Hyundai Initial Brief at 50-51.

[70] Hyundai Ex. 41; Tr. at 261-62.

The word "require" is not defined in the statute. However, something is required when it is ordered or demanded as necessary.[71] There is no requirement in the Dealer Agreement between World Car and Hyundai that requires World Car to be 100% sales efficient.[72] There is a section in the standard provisions of the Dealer Agreement that identifies sales efficiency as a criterion that can be considered in evaluating dealer performance; it does not state that a dealer must be 100% sales efficient.[73] Thus, there is no requirement that World Car meet any standard for sales efficiency. Therefore, World Car failed to show that the sales efficiency metric requires it to meet an unreasonable sales standard.

C. Duty of Good Faith and Fair Dealing (Occupations Code § 2301.478(b))

World Car alleges that Hyundai violated the duty of good faith and fair dealing required by the Occupations Code by not supplying sufficient allocation and by evaluating World Car's sales performance based on sales efficiency. The allegations with respect to these claims are the same as those discussed above, and World Car alleges they also support a violation of the duty of good faith and fair dealing.[74]

Hyundai argues that it did not breach its duty of good faith and fair dealing because it did not violate any section of the Occupations Code. Hyundai asserts that World Car could have increased its allocation in the same manner as any other dealer – by recording spot deliveries, by participating in the service loaner program, by adding the Equus line, by renovating its dealerships, or by becoming an exclusive Hyundai dealer. Because World Car made the business decisions not to participate in those programs, any detriment to the allocation was caused by World Car's decisions.[75]

---

[71] *See* Merriam-Webster Dictionary; Black's Law Dictionary.

[72] Hyundai Exs. 28, 39; World Car Ex. 1.

[73] World Car Ex. 1.

[74] *See* Tex. Occ. Code § 2301.478(b).

[75] And the Japanese tsunami, which was outside of everyone's control.

The sales efficiency standard is not a requirement, rather it is a measurement Hyundai uses to gauge dealer sales. Although World Car was not 100% sales efficient after 2009, Hyundai still allowed World Car's dealerships to remain Hyundai dealers. And both World Car dealerships are still in existence. Sales efficiency is determined the same way for all dealers. Treating some dealers differently, as World Car argues, could actually violate Hyundai's duty of good faith and fair dealing with respect to other dealers.

World Car argues that the duty of good faith and fair dealing should be defined as "requir[ing] the parties to deal fairly with one another."[76] Hyundai contends that a breach of the duty of good faith and fair dealing requires a showing of the "conscious doing of a wrong for a dishonest, discriminatory or malicious purpose."[77]

The ALJ finds that regardless of which standard is applied, Hyundai prevails. Even applying World Car's lower "not fair" standard, neither the allocation system nor the sales efficiency metric violate the provision in the Occupations Code that requires good faith and fair dealing. Although the discretionary allocation accounts for around 15% of the allocation any dealer receives, Hyundai informs dealers of how they can increase their allocation. World Car did not take advantage of many of those programs. Furthermore, Hyundai treats all dealers under the same sales efficiency formula and informs the dealers of how sales efficiency is calculated. There is no evidence Hyundai has any intent not to play fair with World Car or other dealers that did not meet 100% sales efficiency.

VI. CONCLUSION

Based on the evidence presented, World Car failed to prove any of its alleged violations of the Occupations Code.

---

[76] World Car Initial Brief at 46, *citing Humble Emergency Physicians, P.A. v. Mem'l Hermann Healthcare Sys., Inc.*, 01-09-00587-CV, 2011 WL 1584854, at *7 (Tex. App.—Houston [1st dist.] Apr. 1, 2011, no pet.).

[77] Hyundai Initial Brief at 56, *citing Bray v. Tejas Toyota, Inc.*, 363 S.W.3d 777, 780 (Tex. App.—Austin 2012, no pet.).

VII. FINDINGS OF FACT

1. New World Car Nissan, Inc. d/b/a World Car Hyundai and New World Car Imports, San Antonio, Inc., d/b/a World Car Hyundai (together, World Car) are licensed, franchised dealers for Hyundai products and services.

2. Hyundai Motor America (Hyundai) is the wholesale distributor for Hyundai products and services in the United States.

3. On December 6, 2013, the Texas Department of Motor Vehicles (Department) issued a Notice of Hearing advising that World Car had filed a formal complaint with the Department.

4. The hearing on the merits convened on September 21, 2015, and concluded on September 25, 2016. The record closed on January 11, 2016, following the submission of written closing briefs and an agreed record.

Background

5. Ahmad Zabihian owns World Car in San Antonio, Texas. World Car owns two Hyundai dealerships in San Antonio.

6. World Car's primary Hyundai competitor is Red McCombs Hyundai. Red McCombs owns two Hyundai dealerships in San Antonio – Red McCombs Superior and Red McCombs Northwest.

7. Prior to the 2008 recession, World Car North and Red McCombs Superior performed at approximately equal levels in terms of the number of vehicles sold. World Car South performed less well. It is in a lower-income area than World Car North. Red McCombs Northwest did not perform as well prior to the 2008 recession, but improved its sales during 2008-2009.

8. Hyundai's allocation consists of formula allocations, discretionary allocations, and manual allocations.

9. Formula allocations make up approximately 85% of the vehicles allocated and are allocated through a formula and computer program.

10. Under the allocation algorithm, vehicles are offered to dealers based on each dealer's inventory and the average number of vehicles sold by the dealer in the previous 90 days. The system allocates vehicles, one at a time, to the dealer in the region with the lowest days' supply for each respective model.

11. Discretionary allocations are made by Hyundai's regional general manager, who may distribute up to 15%.

12. Manual allocations include turn downs, which are vehicles allocated to a dealer under the formula that the dealer rejects, which are then made available to other dealers in the region, and vehicles that have been re-customized or modified.

13. Sales efficiency is a metric that Hyundai uses to measure dealer sales performance.

14. Sales efficiency compares a dealer's total sales to sales the brand expects to achieve in the dealer's primary market area. Hyundai calculates expected sales by applying Hyundai's national average sales penetration in each vehicle segment in which Hyundai competes to the actual number of vehicles registered in that segment in the dealer's primary market area.

15. Hyundai's Co-Op Advertising Commitment Program (Co-Op) provides funds (Co-Op advertising funds) to dealers to assist with advertising. The funds do not pay for the total cost of advertisements the dealer purchases, but provide partial reimbursements.

16. Eligibility for Co-Op advertising funds and the amount of reimbursement are determined by a formula that considers sales and customer services scores. Regional general managers also have some discretionary funds they can provide to dealers.

17. In 2009, Hyundai's regional general manager responsible for the San Antonio region was Tom Hetrick, who replaced a different regional general manager that year.

Discrimination and gauging the performance of a dealership

Discretionary allocation

18. In 2009, during the first six months of Mr. Hetrick's tenure as regional general manager, he provided 134 cars through discretionary allocation to Red McCombs and 20 to World Car.

19. The differences in discretionary allocation between Red McCombs and World Car continued through 2013.

20. In 2009 and 2010, World Car voluntarily reduced its inventory.

21. Red McCombs dealerships maintained their high inventory levels during the 2008-2010 recession.

22. In 2010, Red McCombs Superior became an exclusive Hyundai dealership.

23. World Car South shares a dealership with the Kia brand.

24. Red McCombs Northwest added the luxury Equus line that required a facility upgrade and then renovated the store.

25. Red McCombs Superior renovated its dealership in 2011-2012.

26. Red McCombs participated in Hyundai's service loaner program.

27. World Car chose not to participate in the available programs provided by Hyundai that could have increased the allocation available to World Car.

28. World Car did not renovate a dealership until 2014, when it renovated World Car North.

29. World Car did not participate in Hyundai's service loaner program.

30. It was reasonable for Hyundai to reward dealers that participated in Hyundai-sponsored programs and renovated their facilities with extra discretionary allocation.

Gaming the formula allocation system

31. There was nothing improper or illegal about recording a Retail Delivery Report (RDR) for cars that had been spot delivered.

32. Hyundai encouraged World Car to speed up its sales reporting by promptly submitting RDRs once a car was delivered to a customer.

33. There was insufficient evidence to show that Red McCombs gamed the system by entering RDRs and then reversing them at a significantly higher rate than any other Hyundai dealership.

34. The service loaner program allowed dealerships to sell cars into the service loaner program, thereby reducing the inventory available for sale and increasing formula allocation.

35. The service loaner program was available to all Hyundai dealers.

36. World Car chose not to participate in the service loaner program.

37. Red McCombs participated in the service loaner program.

38. There was insufficient evidence to show that Red McCombs gamed the allocation system.

Sales efficiency

39. In 2008, both World Car North and South were over 100% sales efficient. In 2009, the north store dropped to 96.8% and continued to drop over time. In 2014, it was 65.7% sales efficient. The south store fared worse. It dropped to 17.9% sales efficient in 2013 but rebounded in 2014 to 31.2% sales efficient.

40. In 2009, Toyota opened a manufacturing plant and new dealership close to World Car South. The manufacturing plant employs about 6,000 people. Those employees had incentives to purchase Toyota products.

41. From 2010 until 2013, Hyundais were in short supply worldwide, primarily due to the high demand caused by the Japanese tsunami that devastated Japanese manufacturing.

42. Hyundai was aware that some dealers could not achieve 100% sales efficiency with the lower inventory.

43. Hyundai measured sales efficiency in the same manner for all dealers.

Co-Op Advertising Funds

44. Co-Op advertising funds must be used exclusively for advertising.

45. The distribution of Co-Op advertising funds is calculated by a formula that considers several factors including customer sales and service scores. The formula is not intended to gauge the performance of a dealership. It simply calculates how much additional advertising funding a particular dealership will receive.

46. The regional general manager has discretion to award additional Co-Op advertising funds.

47. In 2010, World Car South was not eligible under the formula to receive Co-Op advertising funds. Mr. Hetrick provided the store with $60,000 in Co-Op advertising funds over the third and fourth quarters of that year.

48. The Co-Op program formula is applied in the same manner to all dealers.

49. Co-Op advertising funds are unrelated to the sale of a motor vehicle.

Unreasonable Sales Standards

50. Maintaining 100% sales efficiency is not a requirement to be or to remain a licensed Hyundai dealer.

51. World Car stores have not been 100% sales efficient for several years, and both are operating under valid dealer agreements.

52. Measuring sales efficiency does not require adherence to unreasonable sales or service standards.

Duty of Good Faith and Fair Dealing

53. The allocation system and sales efficiency metric do not treat World Car unfairly.

VIII. CONCLUSIONS OF LAW

1. The Texas Department of Motor Vehicles has jurisdiction over this case. Tex. Occ. Code § 2301.001.

2. The State Office of Administrative Hearings (SOAH) has jurisdiction over all matters related to the contested case hearing in this case, including the authority to issue a proposal for decision with findings of fact and conclusions of law. Tex. Occ. Code § 2301.704.

3. The hearing was conducted pursuant to the Administrative Procedure Act and SOAH's procedural rules. Tex. Gov't Code ch. 2011 and 1 Tex. Admin. Code ch. 155.

4. Proper and timely notice of the hearing was provided. Tex. Occ. Code § 2301.705.

5. World Car has the burden of proof by a preponderance of the evidence. 1 Tex. Admin. Code § 155.427.

6. World Car failed to meet its burden of proof to show that Hyundai required adherence to unreasonable sales or service standards. Tex. Occ. Code § 2301.467(a)(1) (2003).

7. World Car failed to meet its burden of proof to show that Hyundai discriminated against World Car by treating them differently as a result of a formula or other process intended to gauge the performance of a dealership though allocation of vehicle inventory, sales efficiency calculations, or distribution of discretionary Co-Op advertising funds. Tex. Occ. Code § 2301.468(1) (2003).

8. World Car failed to meet its burden of proof to show that Hyundai engaged in unreasonable sales discrimination in the allocation of vehicle inventory because World Car did not participate in many of the programs that would have permitted additional discretionary allocation. Tex. Occ. Code § 2301.458(2).

9. World Car failed to meet its burden of proof to show that Hyundai violated its duty of good faith and fair dealing through allocations and sales efficiency because Hyundai

calculated sales efficiency in the same manner for all dealers, and World Car chose not to participate in many of the programs that could have led to additional discretionary allocation. Tex. Occ. Code § 2301.478(b).

SIGNED March 10, 2016.

WENDY K. L. HARVEL
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

TEXAS DEPARTMENT OF MOTOR VEHICLES
MOTOR VEHICLE DIVISION

NEW WORLD CAR NISSAN, INC., d/b/a WORLD CAR HYUNDAI, and NEW WORLD CAR IMPORTS, SAN ANTONIO, INC., d/b/a WORLD CAR HYUNDAI	§	
Complainants,	§	
v.	§	**SOAH DOCKET NO. 608-14-1208 LIC**
	§	**MVD DOCKET NO. 14-0006 LIC**
HYUNDAI MOTOR AMERICA, **Respondent.**	§	

WORLD CAR HYUNDAI'S EXCEPTIONS TO PROPOSAL FOR DECISION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

I. Overview and Summary of Argument

You can't sell what you don't have. Yet from 2010 through 2013 Hyundai Motor America ("HMA") required World Car Hyundai to do exactly that—sell more cars than it was allocated in order to be considered 100% sales efficient and avoid "material breach" of the franchise agreement. Not only did HMA impose an unreasonable sales standard, HMA knew that it would be impossible for World Car Hyundai to meet that standard because HMA did not provide the dealership enough inventory. Although HMA could have allocated additional cars to World Car so that the dealership had at least a chance to achieve HMA's sales standard, HMA instead chose to discriminate against World Car by extremely lopsided allocations to World Car's nearest competitor in San Antonio, without a plausible excuse.

In Texas, a dealership should be allocated at least as many vehicles as it is expected to sell. The Texas Occupations Code sets this baseline by requiring a distributor like HMA to impose only reasonable sales standards, not to discriminate in allocation of inventory, and to treat dealerships fairly and in good faith.

The Administrative Law Judge ("ALJ") disagreed. The ALJ found that HMA did not "require" World Car Hyundai to sell more cars than it was allocated because the requirement to meet 100% sales efficiency is not stated explicitly in the franchise agreement (although it is the metric used by HMA to judge whether dealers are complying with their franchise agreement). The ALJ also found that HMA's disproportionate discretionary allocations of vehicle inventory within the San Antonio market (between three and seven times as many cars went to the nearest competitor) did not violate the Texas Occupations Code and were purportedly made fairly and in good faith. As a result, the ALJ recommended that the Board deny World Car Hyundai's complaint.

The Board should reject the ALJ's recommendation and sustain World Car's complaint because:

- The ALJ misinterpreted and misapplied Section 2301.467(a)(1) of the Texas Occupations Code. The statute is not limited to prohibiting an unreasonable sales standard that is stated in a franchise agreement, but rather prohibits a manufacturer or distributor from requiring adherence to any unreasonable sales standard wherever and however it is imposed. HMA required adherence to 100% sales efficiency because the consequence for non-compliance was to be in "material breach" of the franchise agreement and risk losing the dealership franchise. HMA's required sales standard was unreasonable in violation of Section 2301.467(a)(1) because World Car had to sell more vehicles than it was allocated in order to achieve 100% sales efficiency, making it an impossible standard to meet;

- The ALJ improperly applied the concept of unreasonable discrimination in Code Section 2301.468(2). HMA unreasonably discriminated against World Car Hyundai in allocating inventory to the San Antonio market because HMA gave between three and seven times as much discretionary inventory to World Car's nearest competitor during time periods of high demand, when all dealerships in San Antonio were similarly-situated and all were asking for more inventory;

- The ALJ misapplied the statutory duty of good faith and fair dealing in Code Section 2301.478. HMA did not act fairly or in good faith with World Car Hyundai because HMA did not use its best efforts to provide inventory to World Car (and instead gave that inventory to World Car's competitor) and required World Car to sell more vehicles than it was allocated, then accused World Car of material breach of its dealer agreement, which is the epitome of unfair dealing.

This is a case of first impression because there are no reported decisions interpreting what it means to "require adherence" to a sales standard, what it means to "unreasonably discriminate" in allocation of vehicle inventory, or how a distributor complies (or does not comply) with its duty of good faith and fair dealing when allocating vehicle inventory and imposing sales standards. The ALJ misinterpreted and misapplied the statutory language for all three provisions of the Code at issue in this case.

If the Board accepts the ALJ's recommendation, that means (1) a distributor could allocate to a Texas dealership only 50% of the inventory that the dealership needs to meet the distributor's sales standard and (2) the distributor could then use the dealership's inability to

meet that impossible standard against the dealership by claiming "material breach" of the franchise agreement, allowing the distributor to contend it has grounds for terminating the franchise. If the Board accepts the ALJ's recommendation, then fairness and good faith mandated by the Occupations Code will be effectively stripped from the Code and the balance of power between distributor and dealer is overturned.

The Board should not allow this case to set a new standard for treatment of Texas dealerships because it is in direct conflict with the purposes and provisions of the Texas Occupations Code. The Code was enacted, in part, to protect Texas dealerships from the inherent one-sided nature of the franchise relationship. If a manufacturer or distributor could set the bar and then make sure that it is impossible for the dealership to meet that bar, with the end result being that the dealership risks losing the franchise for failure to meet the bar, then all power would be placed in the hands of the manufacturer or distributor. The Board should ensure that the Code is upheld by affirming that it is not reasonable, not fair, and not in good faith for a manufacturer or distributor to set an impossibly high sales bar and then ensure that the dealership cannot achieve that bar by refusing to provide the dealership with sufficient inventory to sell. In other words, the Board should reject the ALJ's recommendation and uphold World Car Hyundai's complaint.[1]

II. Legal Standards

A. Standard of Review

A proposal for decision is a recommendation — the Board is "statutorily authorized to modify or reject it." *See Pierce v. Texas Racing Comm'n*, 212 S.W.3d 745, 751-52, 754 n.7 (Tex. App.—Austin 2006, pet. denied) (citing Tex. Gov't Code § 2001.058(e)). The Board may change a

[1] Appendix 1 contains several of World Car Hyundai's demonstrative exhibits, which were admitted into the record without objection, for the Board's review.

finding of fact or conclusion of law if the Board determines that the ALJ improperly applied or interpreted the law, agency rules or policies, or prior administrative decisions. Tex. Gov't Code § 2001.058(e).

The Board has complete discretion to change the ALJ's findings and conclusions and reject the ALJ's recommendation if the ALJ's "findings and conclusions reflect a lack of understanding or a misapplication of the existing laws, rules, or policies." *See Smith v. Montemayor*, No. 03-02-00466-CV, 2003 WL 21401591 *7 (Tex. App.—Austin 2003, no pet.) (upholding agency's changes to ALJ's findings and conclusions where the agency "determined that the ALJ failed to properly weigh the factors listed in chapter 53 and in the Department's rules"). The Board must explain its specific reason and the legal basis for each change made. *Granek v. Tex. State Bd. Of Med. Examiners*, 172 S.W.3d 761, 780-81 (Tex. App.—Austin 2005, no pet.).

B. Applicable Statutes

The purpose of the Texas Occupations Code ("Code") is to, among other things, prevent "unfair practices, discrimination, impositions, or other abuse of the people of this state." Tex. Occ. Code § 2301.001. The Code must be "liberally construed to accomplish its purposes, including the exercise of the state's police power to ensure a sound system of distributing and selling motor vehicles." *Id.* In Section 2301.003, titled "Effect on Agreements," the Code also provides:

> (a) *The terms and conditions of a franchise are subject to this chapter.*
>
> (b) An agreement to waive the terms of this chapter is void and unenforceable. *A term or condition of a franchise inconsistent with this chapter is unenforceable.*

Tex. Occ. Code § 2301.003 (emphases added). Thus, the Texas Legislature enacted the Code to protect dealers from the inherently one-sided nature of the franchise relationship between dealer and manufacturer, and franchise agreements cannot override the Code.

There are three statutes at issue in this case, all of which fall under Subchapter J of Section 2301 of the Code:

1. Occupations Code § 2301.467 – Unreasonable Sales Standards

Under Section 2301.467 of the Code, "a manufacturer or distributor. . . may not: (1) require adherence to unreasonable sales or service standards." Tex. Occ. Code § 2301.467(a)(1). The Code does not define "unreasonable," but "[t]he use of legal or other well-accepted dictionaries is a permissible method of determining the ordinary meaning of certain words." *Learners Online, Inc. v. Dallas Indep. Sch. Dist.*, 333 S.W.3d 636, 641 (Tex. App.—Dallas 2009, no pet.). Such dictionaries define "unreasonable" to include: "not guided by or based on good sense,"[2] "beyond the limits of acceptability or fairness,"[3] and "not guided by reason" or "irrational."[4]

2. Occupations Code § 2301.468 – Discrimination Among Dealers

Section 2301.468 of the Code is titled "Discrimination Among Dealers or Franchisees." It says:

> A manufacturer, distributor, or representative may not:
>
> (1) notwithstanding the terms of any franchise, *directly or indirectly discriminate* against a franchised dealer or otherwise *treat franchised dealers differently* as a result of a formula or other computation or process intended to gauge the performance of a dealership; or
>
> (2) *discriminate unreasonably* between or among franchisees in the sale of a motor vehicle owned by the manufacturer or distributor.

[2] Oxford English Dictionary.

[3] *Id.*

[4] Black's Law Dictionary (9th ed. 2009).

Tex. Occ. Code § 2301.468 (2003) (emphases added). The word "discriminate" is not defined in the statute, but the ordinary meaning is "to unfairly treat a person or group of people differently from other people or groups." *See* Merriam-Webster Dictionary.

3. Occupations Code § 2301.478 – Duty of Good Faith and Fair Dealing

Every vehicle manufacturer or distributor that is in a franchise relationship with a vehicle dealership has a statutory "duty of good faith and fair dealing that is actionable in tort." Tex. Occ. Code § 2301.478. "A duty of good faith and fair dealing requires parties to deal fairly with one another." *Humble Emergency Physicians, P.A. v. Mem'l Hermann Healthcare Sys.*, Inc., 01-09-00587-CV, 2011 WL 1584854, at *7 (Tex. App.—Houston [1st Dist.] Apr. 21, 2011, no pet.).

III. Facts

A. World Car Hyundai is Part of the World Car Auto Group, a Successful Family of Dealerships in San Antonio

There are two World Car Hyundai dealerships in San Antonio, the "North" store (opened in 1997) and the "South" store (opened in 1999). Tr. at 65; PTX 121. These two stores are part of the World Car Auto Group, which is a successful family of dealerships that also includes 4 Kia stores, 3 Mazda stores, and a Nissan store, all located throughout the greater San Antonio area. The owner, Ahmad "Nader" Zabihian, began World Car Auto Group in 1993 with just one dealership. Tr. at 65. Unique in the industry, all 10 World Car dealerships (Hyundai, Kia, Mazda, and Nissan) provide a lifetime warranty and lifetime road assistance on every vehicle they sell. Tr. at 66-67.

B. All Hyundai Dealerships, Including World Car Hyundai, Need a Critical Mass of Inventory to Succeed.

Hyundai offers 12 different models of vehicles, but each has distinct trim levels which results in at least 96 different Hyundai vehicle configurations in the United States, setting aside add-on options and paint color, etc. PTX 130. Every Hyundai dealership, especially a

dealership like World Car in a major metropolitan market in the seventh largest city in America, needs a certain minimum level of inventory in order to offer choice and selection to consumers and to keep its sales rate constant or growing. Tr. at 650-51, 682-83, 686 (Roesner). The witnesses for HMA and for World Car Hyundai agree on this key point. Tr. at 154 (Zabihian) (if customer does not see enough inventory on website, customer will not visit dealership); PTX 117, Hetrick Dep., at 193 (same); *see also* Tr. at 510, 512 (Willis) (same).

Having a critical mass of inventory on the lot (and available for website viewing) has become even more critical as customer behavior has shifted more and more toward online browsing of vehicle inventory before visiting a dealership to make a purchase. Tr. at 156 (Zabihian). Even HMA's expert witness agreed. Tr. at 1189-90 (Frith) (in-person shopping is influenced by selection available on internet); *see also* Tr. at 669 (Roesner) ("easier to attract more customers with larger inventories"). Before the prevalence of internet shopping, the average customer drove to almost 4 different dealerships before buying a car. Tr. at 156 (Zabihian). Now the average is only about 1.6 actual visits, meaning that customers shop online more and in person less. *Id.* The result is that a dealership's customer traffic levels at the store are greatly affected by what inventory is available and advertised for viewing online. Tr. at 512 (Willis). The website is a virtual showroom.

When a dealership has little inventory available on the lot—and for viewing on the internet—that unquestionably decreases customer traffic to the store. Tr. at 512 (Willis). Under HMA's inventory allocation system, dealerships "earn" additional inventory by selling their existing inventory. In other words, by selling cars and trimming inventory, a dealership theoretically has a lower "days' supply" of inventory on hand; that allows it to earn more cars to build inventory back up to have enough cars on the lot. Tr. at 516-17 (Willis); Tr. at 646-47

(Roesner). But persistent low inventory levels thus result in a lower sales rate and lower sales totals overall, which increases a dealership's "days' supply" as determined by HMA's allocation system. Tr. at 650-51 (Roesner). A higher days' supply will result in fewer and fewer system allocations to the dealership under the nondiscretionary formula. *See* Tr. at 650, 694 (Roesner). Some call this the "dealer death spiral," while many at HMA call it a "cycle" of "low inventory and low sales" that needs to be "broken." PTX 117, Hetrick Dep., at 23-24; PTX 120, Zuchowski Dep., at 76. If the cycle is not broken through an influx of inventory, the dealership will earn very little inventory from the HMA system allocations and will not have the inventory needed to drive customer traffic to the store and maintain or increase sales. *Id.* Conversely, if a dealership has the "critical mass" of inventory on its lot that will drive customer traffic and maintain or increase sales, then a dealership will make more sales and earn more inventory under HMA's formulaic portion of the allocation system. Tr. at 680-81 (Roesner).

C. As of Mid-2010, World Car Hyundai and its Nearest Competitor in San Antonio Had Similar Inventory Levels and Similar Sales, and Both Were in Need of Additional Inventory.

The two World Car Hyundai dealerships and their nearest competitors in the San Antonio market, Red McCombs Hyundai Northwest and Red McCombs Hyundai Superior, had similar inventory levels in mid-2010. Tr. at 80-81 (Zabihian). As of July 21-22, 2010, the World Car stores had a total of 200 cars available while the Red McCombs stores had a total of 240 cars available. Tr. at 1046-47 (Hetrick); *id.* at 643 (Roesner); PTX 18; DTX 175; DTX 181; DTX 188. All four dealerships (along with other dealers in the region) were low on inventory and all four dealerships were asking for additional inventory. *See, e.g.*, Tr. at 1033-34, 1037, 1046 (Hetrick). They were very similarly situated as of mid-2010.

At this same time, all four Hyundai dealerships in San Antonio (the World Car dealerships and the Red McCombs dealerships) were considered "underperforming" by HMA.

Tr. at 934 (Hetrick); *see also* PTX 117, Hetrick Dep., at 25-26; PTX 120, Zuchowski Dep., at 171-172. All four dealerships needed a "boost in inventory to break the cycle" of lower inventory and sales. *See* PTX 120, Zuchowski Dep., at 76. In that situation, one might have expected relatively equal treatment from HMA.

D. After Tom Hetrick Became HMA's Regional General Manager in June 2010, He Gave World Car Hyundai's Nearest Competitor Nearly Seven Times More Inventory Than World Car in His First Six Months on the Job, A Boost that Helped the Competitor and Hurt World Car.

The relative parity among the four Hyundai dealerships in San Antonio disappeared starting in mid-2010. Mr. Zabihian did not suddenly become a bad car dealer, and his subordinates at World Car Hyundai—managers and sales personnel—did not suddenly become incompetent. *See, e.g.*, Tr. at 193-94 (World Car succeeded in selling Kias because it had enough Kias in inventory). One thing changed: HMA appointed a new Regional Manager, Tom Hetrick in June 2010. After that, the level of support and inventory that World Car received from HMA plummeted, while the McCombs dealerships received far more favorable treatment.

Hetrick had three tools to help "underperforming dealers" like World Car Hyundai and Red McCombs Hyundai "break the cycle" of lower inventory and lower sales: (1) extra vehicles through discretionary allocations, (2) extra Co-Op advertising funds provided on a discretionary basis, and (3) extra training for dealership personnel. PTX 117, Hetrick Dep., at 18, 22-23. Hetrick, however, did not use any of his three tools with World Car in any material way. Instead, starting very early in his tenure, Hetrick favored the Red McCombs dealerships with extra inventory in a grossly lopsided fashion as compared to the World Car dealerships.

In his first 6 months as Regional Manager, from July to December 2010, Hetrick gave 134 vehicles to the Red McCombs dealerships while providing only 20 such vehicles to the

World Car dealerships. PTX 111. There were no rules, guidelines, or standards governing these discretionary allocations. PTX 117, Hetrick Dep., at 29-30.

Although Hetrick was not required to and did not document any reason for why he allocated vehicles to a particular dealership, someone from HMA did in fact document why Hetrick gave extra vehicles to Red McCombs in 2010. *Id.* In July 2010, Red McCombs dealership management complained that they could not hit their sales goals with only 98 vehicles on the lot. PTX 18. The very next month, Hetrick sent 47 extra cars to that dealership. PTX 21. In a contemporaneous written report, HMA District Manager Jim Thompson explained that the purpose of this "boost in inventory" was to allow Red McCombs to grow its inventory to a level where it would be able to sell more vehicles and thus earn more system allocations in order to further increase its sales. PTX 21. In other words, Hetrick provided the additional 47 cars to assist the Red McCombs dealership in reaching its sales goals. *Id.* Again, one would have expected this rationale would have applied at least equally to World Car.

No such boost in inventory was provided to World Car Hyundai, however, even though at the exact same time (July 2010), World Car Hyundai had a very similar number of cars in inventory [106 cars for North and 72 cars for South] and was asking Hetrick for more inventory at both stores. Tr. at 516 (Willis) ("I wouldn't classify that one or two cars as a boost of inventory."); Tr. at 652-53, 669 (Roesner) (did not see boosts like those provided to Red McCombs). Even Hetrick conceded that the World Car Hyundai South store was the one that "most needed to break the cycle," but he did not do anything about it. *See* Tr. at 1076 (Hetrick). Hetrick abandoned the World Car Hyundai South store because he thought they should just sell Kias and get out of the Hyundai business. *See* Tr. at 1080 (Hetrick) (he did not help World Car South because it had a "better opportunity with the other brand to continue on" i.e. Kia); *id.* at

1101 (Hetrick) ("didn't feel there was any need to help them break the cycle at World Car" at that time).

A "boost in inventory" from the Regional GM such as the one given to the McCombs dealerships has a multiplier effect because it will allow a dealership to earn even more inventory when it sells those vehicles, which will help the dealership get into a better inventory cycle. Tr. at 1060 (Hetrick); *see also* Tr. at 680-81 (Roesner) (discretionary allocations have a "multiplier effect"). If a "boost" had been provided to World Car Hyundai similar to what was provided to Red McCombs Hyundai, it would have allowed World Car Hyundai to grow its inventory and sell more vehicles in a time of high demand. Tr. at 80-81 (Zabihian); Tr. at 652-63 (Roesner). Without that boost, World Car Hyundai never had the opportunity to sell those discretionary allocations and thus earn more cars from HMA, and thereby increase its sales during 2010-2013. Tr. at 659-60 (Roesner).

There was no legitimate basis for the significant disparity in discretionary allocations during the second half of 2010, in which Red McCombs received nearly seven times as many vehicles as World Car—and HMA offered no plausible excuse for this. Historically World Car Hyundai had been on par with or better than the Red McCombs Hyundai dealerships in terms of sales. Tr. at 500-01 (Willis); *see also* PTX 10; PTX 82. There was not a huge disparity in sales as of mid-2010 between the World Car stores and the Red McCombs stores, and certainly not a multiple of nearly seven. PTX 10; PTX 82; Tr. at 678-79 (Roesner) (Red McCombs did not sell seven times as many cars as World Car Hyundai in 2010).

The only material difference between Red McCombs and World Car in mid-2010 is that Red McCombs had tried to sell all three of its Hyundai dealerships to World Car, Tr. at 88, and had recently surrendered one of those Hyundai dealerships (North Central), Tr. at 63 (Zabihian).

Losing that dealership in a major metro market was a "blow to Hyundai." *Id.* at 996-97 (Hetrick). In fact, it made Hetrick question Red McCombs's commitment to the Hyundai brand and become afraid that McCombs would give up the other two Hyundai dealerships, which would be a further blow to HMA and to Hetrick in his new role as Regional GM. *See id.* at 1005-06 (Hetrick). When McCombs' principal Marsha Shields told Hetrick in June 2010 that she wanted to build a network of Hyundai stores, Hetrick thought that the Red McCombs group had "recommitted" to Hyundai, indicating his belief that they had not been committed to Hyundai for a period of time before his meeting with Ms. Shields. *Id.* Hetrick immediately became very interested in doing whatever he could to please the Red McCombs Hyundai dealerships. *Id.* at 944, 1017 (Hetrick). That included providing the Red McCombs dealerships with boosts of extra inventory.

Hetrick's discretionary boosts in inventory to Red McCombs were much more valuable during the second half of 2010 than they would be today, because demand for Hyundai vehicles was very high, and continued to be high throughout all of 2011, 2012 and much of 2013. Tr. at 680 (Roesner); *id.* at 1211-12 (Frith). Discretionary allocations during 2011 through 2013 also had a multiplier effect because when sold they helped the dealership to earn additional allocations that the dealership would not have otherwise received, but for the discretionary allocations. Tr. at 680-81 (Roesner); *see also id.* at 1060 (Hetrick).

Moreover, Hetrick's discretionary boosts in inventory to Red McCombs during a period of high demand (like 2010-2013) were more harmful to World Car Hyundai than if Hetrick had allocated those vehicles to a different dealer in a market outside of San Antonio. HMA's President and CEO testified that extra allocations to the nearest competitor have more impact

because the competitor has more cars to offer for sale in the same market area. PTX 120, Zuchowski Dep. at 171; *see also* Tr. at 681 (Roesner) (same).

The effect of Hetrick's disparate treatment of the San Antonio dealerships was clear: Red McCombs's inventory grew while World Car's did not. *See, e.g.*, PTX 124. Inventory levels at the Red McCombs Hyundai dealerships grew throughout the second half of 2010 so that by Spring 2011 the Red McCombs stores had over 50% more inventory than the World Car dealerships. *See* PTX 109, Tab 3 pg. 2 (showing 305 cars in pipeline for Red McCombs and 197 cars in pipeline for World Car). The inventory levels went from being at 240 for Red McCombs and 200 for World Car in July 2010 (a 20% difference) to 305 for Red McCombs and 197 for World Car in May 2011 (a 50% difference). *Id.* That jump in inventory for the McCombs dealerships was attributable to the extra allocations provided by Hetrick and the multiplier effect. *Id.*; *see also* PTX 111, 126, 127. These extra allocations allowed the Red McCombs dealerships to grow their inventories so that they could hit the sales goals set by HMA. *See* PTX 21.

E. Hetrick Tried to Get Rid of World Car Hyundai in Late 2010 So that He Could Build a Network of Hyundai Dealerships with World Car's Nearest Competitor.

In late 2010, Hetrick came to World Car and offered to "assist" Mr. Zabihian in finding a buyer for the Hyundai dealerships. PTX 117, Hetrick Dep., at 77. According to Hetrick, he made this offer because it was a good time to sell a dealership and make a profit. *Id.*, at 77-78. Significantly, Hetrick did not make a similar offer to other Hyundai dealership owners like Red McCombs during this time frame. Tr. at 1086 (Hetrick). He told World Car's representatives that if they would not sell their dealership, he would attempt to have their franchises terminated. World Car declined the invitation to sell its dealerships. PTX 117, Hetrick Dep., at 78.

There is no good explanation for Hetrick's effort to single out Mr. Zabihian to sell his dealerships other than to make room for the Red McCombs network of dealerships. Tr. at 944,

1017 (Hetrick). Hetrick knew that World Car Hyundai held a contractual right of first refusal for the next dealership point that HMA added anywhere in the greater San Antonio area during the next three years. Tr. at 89-90 (Zabihian); Tr. at 944, 1037 (Hetrick). Thus, Hetrick could not add another Red McCombs Hyundai dealership without first giving the opportunity to World Car Hyundai. *Id.*

Hetrick testified about this extraordinary event:

> Q. You literally brought them a letter to get signed authorization to sell the dealerships in late 2010; isn't that right?
>
> A. To get assistance to help them find a buyer --
>
> Q. Right. That's right.
>
> A. -- if they wanted to.
>
> Q. So that you could go out and kind of help them find a buyer?
>
> A. Yes.
>
> Q. And you can't think of anybody else you've ever done that for in the whole state of Texas?
>
> A. No.
>
> Q. Have you done it in the Region?
>
> A. I don't know.

Tr. at 1086 (Hetrick) (emphasis added). World Car had never told Hetrick it was interested in selling—to the contrary, World Car Hyundai was asking to buy more inventory from HMA, seeking to build new facilities, spending a lot of money on advertising, floorplanning its vehicles with Hyundai Motor Finance, etc. *See, e.g.*, Tr. at 115-16, 142-47, 172-75 (Zabihian); *id.* at 498-99 (Willis); *id.* at 414 (Kiolbassa). The only explanation for Hetrick's extraordinary conduct is

that he saw this as an opportunity to get rid of World Car so that it would not interfere with his business plans to support Red McCombs in building a network of dealers.

F. HMA Gave About Three Times More Inventory to World Car Hyundai's Nearest Competitor From 2011 to 2013, While Ignoring World Car's Continual Requests to Buy Inventory.

Notwithstanding the advantage that Hetrick had provided Red McCombs just as demand for Hyundai vehicles was starting to surge in late 2010, which gave Red McCombs the "critical mass" of inventory it needed at just the right time, Hetrick's discretionary boosts in inventory to Red McCombs Hyundai did not stop. *See* PTX 126; *see also* PTX 109-110. The rich got richer throughout 2011, 2012, and most of 2013. Tr. at 1102 (Hetrick). For example, from January 2011 through September 2013, total manual allocations to Red McCombs were 1,635 vehicles, while World Car Hyundai received only 600 manual allocations (a multiple of roughly 2.75). PTX 126.

The disparity in allocations by Hetrick to the Red McCombs dealerships versus the World Car dealerships is all the more stark considering that World Car Hyundai was repeatedly asking Hetrick to buy more inventory during this entire period. *See, e.g.*, Tr. at 360 (Zabihian). Hetrick largely ignored those requests. *Id.*; *see also* Tr. at 950 (Hetrick). After no responses or communication from Hetrick throughout 2011, in November of that year Mr. Zabihian sent a letter to David Zuchowski, then Executive Vice President of Sales and Mr. Hetrick's direct supervisor, outlining the lack of support and communication from the Region and asking for his assistance. PTX 44. Mr. Zabihian said:

> "Over the past 20 years of being a franchised dealer, I have never encountered such a lack of communication, attention to matters, assistance or help as I have with your Regional General Manager. . . . [H]ow can I possibly achieve competitive sales numbers without inventory? I have never passed on any and every month, I beg for more. This is just 1 question, of the many that I would seek Tom [Hetrick]'s assistance on—if given the opportunity to do so."

Id. Although Mr. Zuchowski agrees that this was a very serious communication from a concerned dealership, at the time he received the letter he wrote a note on it to Hetrick: "Tom – Fan Mail! Can you please draft a response that I can then personalize and send? Thx DLZ." *Id.* That's all he did. Zuchowski said that he called the letter "fan mail" because Hetrick "obviously has a person that's not a fan of his." PTX 120, Zuchowski Dep., at 145. *But despite Zuchowski's modest instructions, nothing happened; neither Zuchowski nor Hetrick even responded to Mr. Zabihian's letter.* PTX 51; *see also* PTX 120, Zuchowski Dep., at 123; PTX 117, Hetrick Dep., at 71-73.

After three months of silence, Mr. Zabihian sent another letter to Mr. Hetrick in February 2012 because he had neither heard from Hetrick nor seen him in about one year.

> Despite my attempts to contact you, both by mail, voice and text, even going as far as conveying this to my DSM to have you contact me, I still haven't heard from you.... How can other dealers get product and we can't? Am I expected to sell 100% of my product each month and not grow? How can I possibly execute a business plan to grow, when there is no support, dialog or assistance from Regional?

PTX 51. Hetrick called Zabihian on February 17 and asked him to come to Dallas the following Monday. Tr. at 171-72 (Zabihian). He did not offer any answers to Zabihian's questions, nor did he offer any assistance or inventory. *Id.* Zabihian wanted Hetrick to come see the low inventory at the World Car stores for himself, so he declined to go to Dallas. *Id.* He then repeated his request in a letter, asking Hetrick to visit San Antonio to see in person the small amount of Hyundai inventory at two metro dealerships in the seventh largest city in the United States:

> **As I write this letter, I have 42 Hyundai's at the South store and 56 at the North store. Conversely, compared to the paltry 98 Hyundai's I have in stock at 2 stores, I have over 1000 Nissan, 800 Mazda's and 700 Kia's in stock.**

PTX 52 (emphasis added); *see also* Tr. at 172-74 (Zabihian). Hetrick did not respond to this letter either, nor did he provide any extra inventory or assistance to World Car Hyundai. Tr. at 176-77, 180 (Zabihian).

Mr. Zabihian was not the only World Car Hyundai employee asking HMA for more inventory. World Car's Managers were constantly asking to buy additional vehicles from HMA. *See, e.g.*, Tr. at 498-99 (Willis). For example, the General Manager of World Car Hyundai North told HMA's District Manager that he would take up to 500 turndowns in order to make clear that "if there was anything out there, we wanted it." Tr. at 499 (Willis). World Car Hyundai North's Sales Manager also repeatedly requested additional inventory from HMA. *See, e.g.*, PTX 13; PTX 22. The constant requests by World Car Hyundai to buy more inventory from HMA did not result in any substantial response by HMA. *See* Tr. at 548 (Willis). From 2010 through 2013, HMA did not respond to these requests by providing World Car Hyundai with additional inventory, as HMA did for Red McCombs Hyundai. *See* Tr. at 360 (Zabihian) ("[T]hey call it 'stimulus,' and I never got the stimulus inventory.").

G. HMA Required World Car Hyundai to Sell More Vehicles Than it was Allocated by HMA in Order to be Considered 100% Sales Efficient and Not in Material Breach of the Franchise Agreement.

HMA measures dealership performance in terms of "sales efficiency." It is calculated by taking the total number of new vehicle registrations (regardless of make) in a dealership's Primary Market Area ("PMA") and applying HMA's average market share expressed as a percentage, to derive the total number of "Expected Registrations." For example, if total vehicle registrations in a dealer's PMA were 10,000 vehicles for the year 2014 and HMA's average market share was 5%, then the dealership's Expected Registration would be 500 vehicles (5% of 10,000), and the dealership was required to sell 500 vehicles in order to be considered 100% sales efficient.

When a dealership does not achieve 100% sales efficiency, HMA considers the dealership to be failing in its sales responsibilities and thus in material breach of the franchise agreement. PTX 67; Tr. at 437 (Kiolbassa). HMA also chooses not to provide additional inventory to dealerships who are below 100% sales efficiency. *See, e.g.*, Tr. at 1114 (Hetrick).

HMA imposed unreasonable sales standards on World Car because World Car did not receive enough inventory from HMA to be 100% sales efficient *even after World Car sold every single vehicle it received.* In other words, World Car "turned," but it did not "earn." For example, in 2011 HMA expected World Car Hyundai North to sell 877 vehicles in order to be considered 100% sales efficient. HMA then allocated only 731 vehicles to World Car Hyundai North, and ignored requests for more vehicles. PTX 3; PTX 81. Although World Car Hyundai North sold more vehicles (766) than it received from HMA in 2011, HMA still deemed World Car Hyundai North to be only 87% sales efficient. PTX 3.

For each year between 2010 and 2013, HMA imposed on World Car a level of "expected registrations" that was higher than the number of vehicles World Car Hyundai actually was allowed to purchase from HMA. *Compare* PTX 3 and PTX 4 *with* PTX 81; *see also* Tr. at 74-75 (Zabihian); Tr. at 544, 547-48 (Willis); Tr. at 418-428 (Kiolbassa). The following table illustrates the unreasonableness of HMA's sales efficiency standards as applied to World Car Hyundai North:

Year	Expected Sales	Vehicles Allocated	Vehicles Sold	Actual Sales Efficiency	HMA Sales Efficiency
2010	656	532	548	103%	83%
2011	877	731	766	104.5%	87%
2012	995	717	681	95%	68%
2013	868	797	627	79%	68%

PTX 3, 10, 81. In each of these four years, World Car Hyundai North was not allocated enough cars to reach 100% sales efficiency. The table for World Car Hyundai South paints the same picture:

Year	Expected Sales	Vehicles Allocated	Vehicles Sold	Actual Sales Efficiency	HMA Sales Efficiency
2010	474	282	267	94%	56.33%
2011	727	313	310	99%	42.64%
2012	814	147	166	113%	20.39%
2013	884	256	158	61%	17.87%

PTX 4, 10, 81; *see also* Tr. at 423-26 (Kiolbassa).

HMA's CEO recognized the inherent "difficulty" in this way of measuring dealer performance in a time of constrained supply. When asked whether it was fair to judge a dealership on a standard that was impossible to reach due to tight inventory supply, Zuchowski said (actually, stammered):

> "It's – again, the – the – it's – it's – the sales efficiency measure is a – is a – is a very fair measure. . . . If I don't have the ability to help you get from 60 percent to a hundred percent sales efficient, then it's a difficult argument to have."

Id. at 244-245. The only "difficulty" was one created by HMA, by refusing to allocate more vehicles to World Car and requiring World Car to sell more vehicles than it received in order to be considered 100% sales efficient, all the while providing its nearest competing dealerships in San Antonio with extra allocations.

H. Because World Car Hyundai Did Not Have Sufficient Inventory to be 100% Sales Efficient, HMA Again Tried to Get Rid of World Car in July 2013.

Fully aware that HMA did not provide sufficient inventory for World Car to meet 100% sales efficiency, in July 2013 Hetrick sent Mr. Zabihian a letter faulting the World Car Hyundai South store for failing to meet its level of "expected registrations." PTX 67. The letter states:

"Based on Hyundai's average market share through April of this year, your dealership should have sold 282 Hyundai vehicles. However, World Car's total sales through April were just 40 units." *Id.* What Hetrick omitted from his letter was that World Car South received only 41 vehicles from HMA during that same time period. In other words, World Car South sold 98% of its allocations but HMA deemed World Car only "14.2%" sales efficient. *Id.*

Based on this "underperformance"—a self-fulfilling prophecy caused by Hetrick's refusal to help the World Car organization but instead to favor the Red McCombs dealerships—Hetrick again told World Car that he wanted them out. His letter said HMA could "assist you in locating a candidate who would pay a premium for a Hyundai franchise in south San Antonio." *Id.* World Car Hyundai again declined to sell its franchises.

I. HMA Broke its Promise to Provide World Car Hyundai With Extra Vehicles When it Renovated, While Rewarding World Car's Nearest Competitor With Extra Vehicles for its Renovation.

One of HMA's improbable excuses for the disproportionate discretionary allocations was that Red McCombs renovated its facilities, leading HMA to give it extra cars in return. But World Car renovated its North store and did not receive any discretionary allocations as a result.

Hetrick continually promised World Car that if it built a new facility or upgraded its existing facility, he would give the dealership extra discretionary allocations of inventory. *See, e.g.*, Tr. at 495-97 (Willis). However, in July 2013 Hetrick sent Mr. Zabihian a letter that said, "[a]pproval of your facility proposal by HMA does not, in any way or manner, constitute assurance by HMA that you will be sold or receive any minimum number of vehicles." PTX 72. In other words, after promising World Car extra inventory if it upgraded its facility, Hetrick then told World Car there was no guarantee of any extra inventory.

Tellingly, Hetrick did *not* send such a letter to Red McCombs, or to any other Hyundai dealership in the Region that renovated its facility. Tr. at 1113 (Hetrick). Instead, he simply

provided Red McCombs (and other Hyundai dealerships) extra inventory when they upgraded their facilities, in addition to financial assistance to help defray the cost of the renovations and advertise the additional vehicles that Hetrick had given them. *See* Tr. at 1062 (Hetrick). No such financial assistance was provided to World Car when it renovated its North store. Tr. at 345-46 (Zabihian).

World Car Hyundai completed the renovation of its North store in 2014, but HMA did not provide any additional inventory or financial assistance to World Car. Tr. at 184 (Zabihian); Tr. at 496-97 (Willis). HMA provided no legitimate explanation for giving extra inventory to Red McCombs when it renovated its facility but denying extra inventory to World Car after its renovation.

IV. Argument and Authorities

A. The Board should reject the ALJ's recommendation because the ALJ misinterpreted and misapplied Code Section 2301.467(a)(1) – HMA required World Car to sell more cars than it was allocated in order to avoid being in material breach of the franchise agreement.

HMA violated Code Section 2301.467(a)(1), which prohibits unreasonable sales standards, because HMA required World Car Hyundai to meet 100% sales efficiency to avoid material breach of the dealer agreement even though HMA withheld from World Car Hyundai the cars that it would need to have in order to meet this sales standard.

However, in Conclusion of Law #6 the ALJ stated that "World Car failed to meet its burden of proof that Hyundai required adherence to unreasonable sales or service standards." PFD, at 27. The ALJ stated there was no violation of Code Section 2301.467(a)(1) because "[t]here is no requirement in the Dealer Agreement between World Car and Hyundai that requires World Car to be 100% sales efficient." PFD, at 21. But the statute does not say that a distributor is prohibited from requiring adherence to an unreasonable sales standard only if that

standard is found "in the Dealer Agreement." *See* Tex. Occ. Code § 2301.467(a)(1). The statute does not limit violations only to those express requirements found in a franchise agreement. *Id.* Instead, it provides that "a manufacturer or distributor . . . may not: (1) require adherence to unreasonable sales or service standards." Tex. Occ. Code § 2301.467(a)(1).

Thus, the proper question is whether the manufacturer or distributor has "required adherence" to an "unreasonable sales or service standard," regardless of where or in what manner that standard is set. *See id.* By limiting the inquiry to whether there was an express requirement of 100% sales efficiency contained in the Dealer Agreement, the ALJ misinterpreted and misapplied Code Section 2301.467(a)(1). The statute prohibits any required adherence to an unreasonable sales standard, wherever it is found.

In construing statutes, the primary objective is to give effect to the intent of the legislature. Tex. Gov't Code § 312.005 (Vernon 1998); *Mitchell Energy Corp. v. Ashworth,* 943 S.W.2d 436, 438 (Tex.1997); *City of Houston v. Morua,* 982 S.W.2d 126, 129 (Tex. App.—Houston [1st Dist.] 1998, no pet.). When statutes are clear and unambiguous, the legislature's intent is discerned by giving the words chosen their plain and common meaning and by giving effect to all of the statute's terms. Tex. Gov't Code §§ 311.011(a), 311.021(2), 312.022(a) (Vernon 1998 and Supp.1999); *St. Luke's Episcopal Hosp. v. Agbor,* 952 S.W.2d 503, 505 (Tex.1997); *Morua,* 982 S.W.2d at 129. In construing statutes as a whole, all provisions of an act are considered and interpretations that produce absurd results or render terms meaningless are to be avoided. *See Chevron Corp. v. Redmon,* 745 S.W.2d 314, 316 (Tex.1987); *Lundy v. State,* 891 S.W.2d 727, 729 (Tex. App.—Houston [1st Dist.] 1994, no pet.).

The phrase "require adherence to" is not defined in the Code so it must be given its ordinary meaning. *St. Luke's Episcopal Hosp.,* 952 S.W.2d at 505. Under generally-accepted

dictionary definitions, something is "required" when it is "demanded as necessary." *See* Merriam-Webster Dictionary. "Adherence" means "the act of adhering; especially: the act of doing what is required by a rule, belief, etc." *See id.* Thus, a manufacturer or distributor can and does "require adherence to" a particular sales standard without spelling out that standard in the franchise agreement. The sales standard can be required—demanded as necessary—by any number of actions by the manufacturer or distributor without being stated in the franchise agreement. Adherence to a standard is "required" whenever there are consequences for non-compliance, wherever and however those consequences are spelled out.

HMA required adherence to 100% sales efficiency because HMA uses "sales efficiency" as the metric for whether a Hyundai dealership is complying with its sales responsibilities. Tr. at 1013. The consequences for non-compliance with the 100% sales efficiency standard are significant and serious. HMA has the right to terminate the franchise agreement for cause if "HMA determines that DEALER has failed to perform adequately its sales . . . responsibilities." PTX 1 at 16.B.3 (pg. 19). HMA decided whether World Car Hyundai had adequately performed its sales responsibilities by whether the dealership was above or below 100% sales efficiency. Tr. at 113; Tr. at 1013; PTX 67. That is the performance metric HMA used during the entire relevant time period, 2010 to 2013.

The ALJ's finding of fact #50—"Maintaining 100% sales efficiency is not a requirement to be or to remain a licensed Hyundai dealer"—is a *non sequitur*. *See* PFD, at 26. Because Code Section 2301.467(a)(1) does not connect "adherence to the sales standard" to "remaining a licensed dealer," the correct inquiry is not whether HMA merely allowed World Car to "remain a licensed Hyundai dealer." *See id.* Rather, the question must also include whether a dealership had to meet an unreasonable sales standard in order to (1) avoid being in material breach of the

franchise agreement, (2) qualify for support and assistance from HMA, and/or (3) receive support and assistance from HMA. *See* PTX 67; Tr. at 437 (Kiolbassa). If it was "necessary" to meet the sales standard in order to achieve any of the foregoing, then adherence was required by HMA.

Importantly, HMA's management told dealerships like World Car that they were in material breach of the franchise agreement when they did not meet 100% sales efficiency. PTX 67. Meeting 100% sales efficiency is thus a requirement imposed by HMA for a dealer to avoid "material breach" of the franchise agreement. *See* PTX 67; Tr. at 437 (Kiolbassa). HMA "demands" that it is "necessary" for dealers to be 100% sales efficient unless they want to be considered in breach of the franchise agreement. Tr. at 113, 190, 192 (Zabihian). Breach of the franchise agreement and not meeting sales responsibilities can be "good cause" for terminating a dealership's franchise under Texas law. *See* Tex. Occ. Code § 2301.455(a)(1), (6). Thus, as a matter of law, there are serious and significant consequences for not meeting 100% sales efficiency as dictated by HMA.

HMA also required World Car to meet 100% sales efficiency in order to receive a larger share of discretionary inventory than it otherwise would. *See, e.g.*, Tr. at 1114 (Hetrick). HMA gave dealers who met or exceeded 100% sales efficiency the opportunity to buy more discretionary inventory than dealers who did not. *Id.* It was thus necessary to meet 100% sales efficiency to obtain additional inventory.

The "100% sales efficiency" standard was an unreasonable sales standard as applied to World Car Hyundai during 2010 through 2013 because HMA knew that World Car did not have sufficient vehicles to meet 100% sales efficiency, even if it sold every vehicle in inventory. *See* PTX 3; PTX 4; PTX 81; PTX 120, Zuchowski Dep. at 180-81; Tr. at 1004, 1033-34 (Hetrick).

The ALJ did not find that this standard was not unreasonable, only that it was not "required." Importantly, the ALJ found that "Hyundai was aware that some dealers could not achieve 100% sales efficiency with the lower inventory." FOF #42. Although HMA was aware that it was *impossible* for World Car to reach 100% sales efficiency based on its inventory levels, HMA nonetheless told World Car that it was in material breach of the franchise agreement and tried to get World Car to sell its franchise or face termination based on its inability to achieve the impossible goal – one that HMA had made impossible. PTX 3; PTX 4; PTX 67; PTX 81; PTX 120, Zuchowski Dep. at 180-81; Tr. at 1004, 1033-34 (Hetrick). HMA also chose not to give World Car as much discretionary allocation as its competitors based on the same excuse that World Car was not achieving 100% sales efficiency, even though HMA had made that impossible. *See id.*; *see also* Tr. at 1114 (Hetrick). HMA held World Car to an unreasonable sales standard.

Accordingly, World Car respectfully requests that the Board modify the PFD as follows:

- Modify Finding of Fact # 50 to read: "Maintaining 100% sales efficiency is a requirement to avoid being in material breach of the franchise agreement with Hyundai."
- Modify Finding of Fact #52 to read: "Requiring World Car to meet 100% sales efficiency in order to avoid material breach of the franchise agreement was requiring adherence to an unreasonable sales standard because Hyundai was aware that World Car did not have sufficient inventory to meet 100% sales efficiency."
- Modify Conclusion of Law #6 to read that "World Car met its burden of proof to show that Hyundai required adherence to unreasonable sales standards."

B. The Board should reject the ALJ's recommendation because the ALJ misapplied Code Section 2301.468 – HMA unreasonably discriminated against World Car in allocations of inventory to the San Antonio market.

HMA violated Code Section 2301.468 because it unreasonably discriminated against World Car in allocation of vehicle inventory by providing nearly seven times as much

discretionary inventory to World Car's nearest competitors in 2010 and about three times as much in 2011-2013, without justification.

However, in Conclusion of Law #8, the ALJ stated that "World Car failed to meet its burden of proof to show that Hyundai engaged in unreasonable sales discrimination in the allocation of vehicle inventory because World Car did not participate in many of the programs that would have permitted additional discretionary allocation." PFD, at 27. According to the ALJ, "World Car's argument fails to take into account the differences between the Red McCombs' dealerships and World Car's dealerships." PFD, at 13.

The ALJ misapplied the concept of "unreasonable discrimination" embedded in Code Section 2301.468 for several reasons:

First, there were *no* material differences between World Car Hyundai and Red McCombs during the latter half of 2010, the first six months of Hetrick's tenure as the new Regional General Manager, that would justify the ratio of nearly seven to one in discretionary allocations. The San Antonio Hyundai dealerships' inventory and sales levels were not materially different. *See, e.g.*, Tr. at 1046-47 (Hetrick); *see also* PTX 10, 17, 18, 82. The ALJ claimed that World Car "reduced its inventory in 2009" and "[i]n 2010, World Car turned down many vehicles offered by Hyundai." PFD at 14. But Red McCombs significantly reduced *its* inventory in 2009 by closing down an entire Hyundai dealership in 2009, going from three dealerships to two dealerships, an undisputed fact that the ALJ did not even mention in the PFD. Tr. at 726 (Roesner); Tr. at 1005-06 (Hetrick). Moreover, Red McCombs turned down more vehicles offered by Hyundai in 2010 than World Car. For January – June 2010, when these four dealerships had fairly close levels of inventory, the Red McCombs stores turned down a total of 598 vehicles while the World Car stores turned down a total of 205 vehicles. DTX 46, 47. So

the proffered excuse is directly contradicted by the record. World Car and Red McCombs had similar inventory levels when Hetrick started as Regional General Manager in mid-2010. Tr. at 80-81 (Zabihian); Tr. at 1046-47 (Hetrick); *id.* at 643 (Roesner); PTX 18; DTX 175; DTX 181; DTX 188. They were very similarly situated and there was no appropriate justification for the disparate treatment in allocation of vehicle inventory. Hetrick's disparate treatment turned the tide.

Second, the dealership's sales levels do not justify the disproportionate allocations from 2010 to 2013. During Hetrick's first six months as Regional GM he provided 134 vehicles to Red McCombs while providing just 20 vehicles to World Car. PTX 111. Red McCombs did not sell nearly seven times as many vehicles as World Car Hyundai during 2010. PTX 10; PTX 82. The large number of discretionary allocations to Red McCombs as compared to World Car had a multiplier effect for Red McCombs because it allowed Red McCombs to sell those vehicles in a time of high demand and thus earn more inventory than it otherwise would have without those discretionary allocations. Tr. at 680-81 (Roesner); *id.* at 1060 (Hetrick). Similarly, although Red McCombs had built up its inventory due to the extra allocations from Hetrick in the second half of 2010 and the attendant multiplier effect, for the years 2011 and 2012, Hetrick still provided Red McCombs with over three times as many discretionary allocations as World Car. PTX 110; PTX 123. Even with all of Hetrick's extra help, Red McCombs Hyundai did not sell over three times as many cars as World Car Hyundai in 2011 or 2012. *Id.*

Third, the ALJ improperly speculated about how much inventory World Car Hyundai might have received if it had participated in the service loaner program, renovated, and added the Equus line of vehicles, claiming that such actions "would most likely have increased the sales rate and reduced the daily supply of vehicles, resulting in additional allocation." PFD, at 13.

According to the ALJ, because World Car did not participate in these "programs," HMA was justified in giving between three (3) and seven (7) times as many discretionary allocations to Red McCombs as it did to World Car.

These conclusions by the ALJ are based on improper speculation and are contrary to the evidence. For one, the service loaner program does not justify the discriminatory allocations. According to HMA's expert, the number of cars that can be put in the service loaner program is minimal and thus participation in the service loaner program has a minimal impact on allocation. DTX 119; Tr. at 1182-84 (Frith). World Car Hyundai did not participate in the service loaner program because (1) it did not have sufficient inventory to devote to "true" service loaners that were actually used for that purpose and not just "punched" into the program and parked on the lot to be advertised for sale, and (2) HMA's service loaner program prematurely starts the customer's warranty on a vehicle. Tr. at 376-83 (Zabihian); *id.* at 534-35 (Willis); PTX 118, McLean Dep. at 34-35, 61-63. World Car was not interested in cheating customers out of a portion of the warranty advertised by HMA in order to help the dealership get more inventory from HMA. *See* Tr. at 382-83 (Zabihian); Tr. at 569-70 (Willis). But even if World Car had participated in HMA's service loaner program, the effect on allocation would have been minimal. DTX 119; Tr. at 1182-84 (Frith).

Nor do "renovation" or "being exclusive" justify the discriminatory treatment. World Car renovated its North store and yet HMA did not provide additional allocations, so there is no basis to claim that renovation would have meant additional inventory for World Car. Tr. at 495-97 (Willis). The World Car North store has always been exclusive and the World Car Hyundai South store asked to relocate to be exclusive on 11 acres next door to a Wal-Mart, but Hetrick rejected the request and did not provide either store with any boosts in inventory that were

comparable in any way to what he gave to Red McCombs Hyundai, *See* Tr. at 115, 121-23, 128-29, 199 (Zabihian). "Being exclusive" does not justify the differential treatment.

With respect to Equus, having one or two luxury vehicles at the $60,000+ price point in stock at a Hyundai dealership was not going to increase sales or inventory for World Car in any material respect. *See* Tr. at 945 (Hetrick). Moreover, the Equus issue was a post-hoc rationalization created by HMA that is contradicted by the contemporaneously-created documents about why Hetrick gave Red McCombs additional cars in the second half of 2010. *See* PTX 21; Tr. at 1057, 1060-61, 1077 (Hetrick). As documented at the time, Hetrick gave these cars to Red McCombs to help the dealership build its inventory at a critical time when new models were coming out, demand was high, and supply was tight, not because of the Equus progam. *Id.*

HMA unreasonably discriminated against World Car Hyundai by providing many times more discretionary allocations to World Car's nearest competitors during 2010 to 2013, when all San Antonio Hyundai dealerships were similarly situated and asking for more inventory. Accordingly, World Car respectfully requests that the Board modify the PFD as follows:

- Modify Finding of Fact # 20 to read: "In 2009 and 2010, World Car and Red McCombs voluntarily reduced their inventories, and in mid-2010 their inventories were at similar levels."
- Delete Finding of Fact #21.
- Delete Finding of Fact #27.
- Modify Conclusion of Law #8 to read: "World Car met its burden of proof to show that Hyundai engaged in unreasonable sales discrimination in the allocation of vehicle inventory between 2010 and 2013 because Hyundai provided disproportionate discretionary allocations of inventory to World Car's nearest competitor in San Antonio that were not justified by any material differences between the dealerships."

C. The Board should reject the ALJ's recommendation because the ALJ misapplied Code Section 2301.478 – HMA's treatment of World Car was not fair and was not in good faith as the Code requires.

HMA violated Code Section 2301.478 because HMA did not act fairly and in good faith with World Car Hyundai in allocating vehicle inventory and in imposing sales requirements.[5] HMA did not use its best efforts to provide inventory to World Car (and instead gave that inventory to World Car's competitor) and required World Car to sell more vehicles than it had available to sell in order to avoid "material breach" of the franchise agreement.

However, in Conclusion of Law #9 the ALJ stated that "World Car failed to meet its burden of proof to show that Hyundai violated its duty of good faith and fair dealing through allocations and sales efficiency because Hyundai calculated sales efficiency in the same manner for all dealers, and World Car chose not to participate in many of the programs that could have led to additional discretionary allocation." PFD, at 27-28. According to the ALJ, "neither the allocation system nor the sales efficiency metric violate the provision of the Occupations Code that requires good faith and fair dealing." PFD at 22 (emphasis added).

The ALJ misapplied Section 2301.478 because HMA's (1) discriminatory inventory allocations and (2) requirement that World Car Hyundai sell more cars than it was allocated show that HMA was not acting fairly or in good faith with World Car Hyundai. It was not the "allocation system" and the "sales efficiency metric" standing alone that were unfair, it was HMA's application and use of discretionary allocations and sales efficiency with World Car that were unfair and not in good faith.

[5] "A duty of good faith and fair dealing requires parties to deal fairly with one another." *Humble Emergency Physicians, P.A. v. Mem'l Hermann Healthcare Sys.*, Inc., 01-09-00587-CV, 2011 WL 1584854, at *7 (Tex. App.—Houston [1st Dist.] Apr. 21, 2011, no pet.) (citing *Bank One*, 967 S.W. 2d at 441); *see also* Tex. Bus. & Com. Code § 1.201 (in commercial agreements under the UCC, defining good faith as "honesty in fact and the observance of reasonable commercial standards of fair dealing").

HMA ignored World Car Hyundai's multiple, repeated requests for additional inventory, instead favoring the Red McCombs dealerships with extra inventory at the same time as World Car's requests. There were in fact enough cars to respond to World Car Hyundai's repeated requests to buy more inventory from HMA, but HMA decided to provide those cars to Red McCombs Hyundai instead, even after the Red McCombs dealerships had already built up their inventory with Hetrick's assistance. PTX 110, 111, 126, 127. Indeed, rather than supply World Car Hyundai with inventory, Hetrick took the unique and outrageous step of soliciting World Car's authorization for him to find a buyer for the World Car dealerships, only a few months after he started as Regional GM and without any indication that World Car was interested in selling. Tr. at 1086 (Hetrick). Hetrick admittedly chose not to provide additional inventory to World Car Hyundai to help it "break the cycle" of lower inventory and lower sales. *See, e.g.*, Tr. at 1102 (Hetrick). Hetrick did not abide by his promise to World Car that he would provide it with extra inventory upon completion of the showroom renovation—no extra cars were provided as a result. PTX 72; Tr. at 496-97 (Willis). None of these actions constitute good faith or fair dealing.

With respect to sales efficiency, HMA could have provided World Car with additional inventory (so that the dealerships had a chance to reach 100% sales efficiency) but HMA chose not to. Tr. at 1079, 1102 (Hetrick). HMA could have measured World Car's performance in any number of different ways, but HMA chose not to. PTX 67 at 10.E (pg. 9); *see also* Tr. at 426 (Kiolbassa). By continuing to require World Car to sell more inventory than it received in order to avoid being in "material breach" of the franchise agreement, and by refusing to allocate additional inventory to give World Car Hyundai the chance to be 100% sales efficient, HMA did not act fairly and in good faith in its dealings with World Car.

Accordingly, World Car respectfully requests that the Board modify the PFD as follows:

- Modify Finding of Fact #53 to read: "Hyundai's discretionary allocations to the San Antonio market between 2010 and 2013 were unfair, and Hyundai's requirement that World Car meet 100% sales efficiency despite the dealerships' known lack of inventory was also unfair."

- Modify Conclusion of Law # 9 to read: "World Car met its burden of proof to show that Hyundai violated its duty of good faith and fair dealing through discretionary allocations and through requiring World Car to meet 100% sales efficiency between 2010 and 2013."

V. Conclusion

The ALJ did not properly apply the concepts of "required adherence," "unreasonable discrimination," or "good faith and fair dealing" in this case. HMA's treatment of World Car Hyundai from 2010 to 2013 violated Sections 2301.467(a)(1), 2301.468(2), and 2301.478 of the Occupations Code. If the Board accepts the ALJ's recommendation, then manufacturers and distributors will be able to treat Texas dealerships unfairly with impunity because (1) setting a high sales bar, (2) ensuring that the dealership cannot meet that sales bar by not providing the dealership with sufficient inventory, and then (3) claiming "material breach" of the franchise agreement when the dealership cannot meet the sales standard will be a perfectly legal business strategy that would allow manufacturers and distributors to extract unfair concessions from dealerships and/or seek to terminate their franchises. The Board should modify the ALJ's Proposal for Decision as requested herein and sustain World Car Hyundai's complaint.

Respectfully submitted,

DAN DOWNEY, P.C.

By:*/s/ Dan Downey*
Dan Downey
State Bar No. 06085400
1609 Shoal Creek Blvd., Suite #100
Austin, Texas 78701
Telephone: 512/477-4444

SMYSER KAPLAN & VESELKA, L.L.P.

By: */s/ Lee L. Kaplan*
Lee L. Kaplan
State Bar No. 11094400
Jarod R. Stewart
State Bar No. 24066147
700 Louisiana, Suite 2300
Houston, Texas 77002
Telephone: 713/221-2300
Facsimile: 713/221-2320

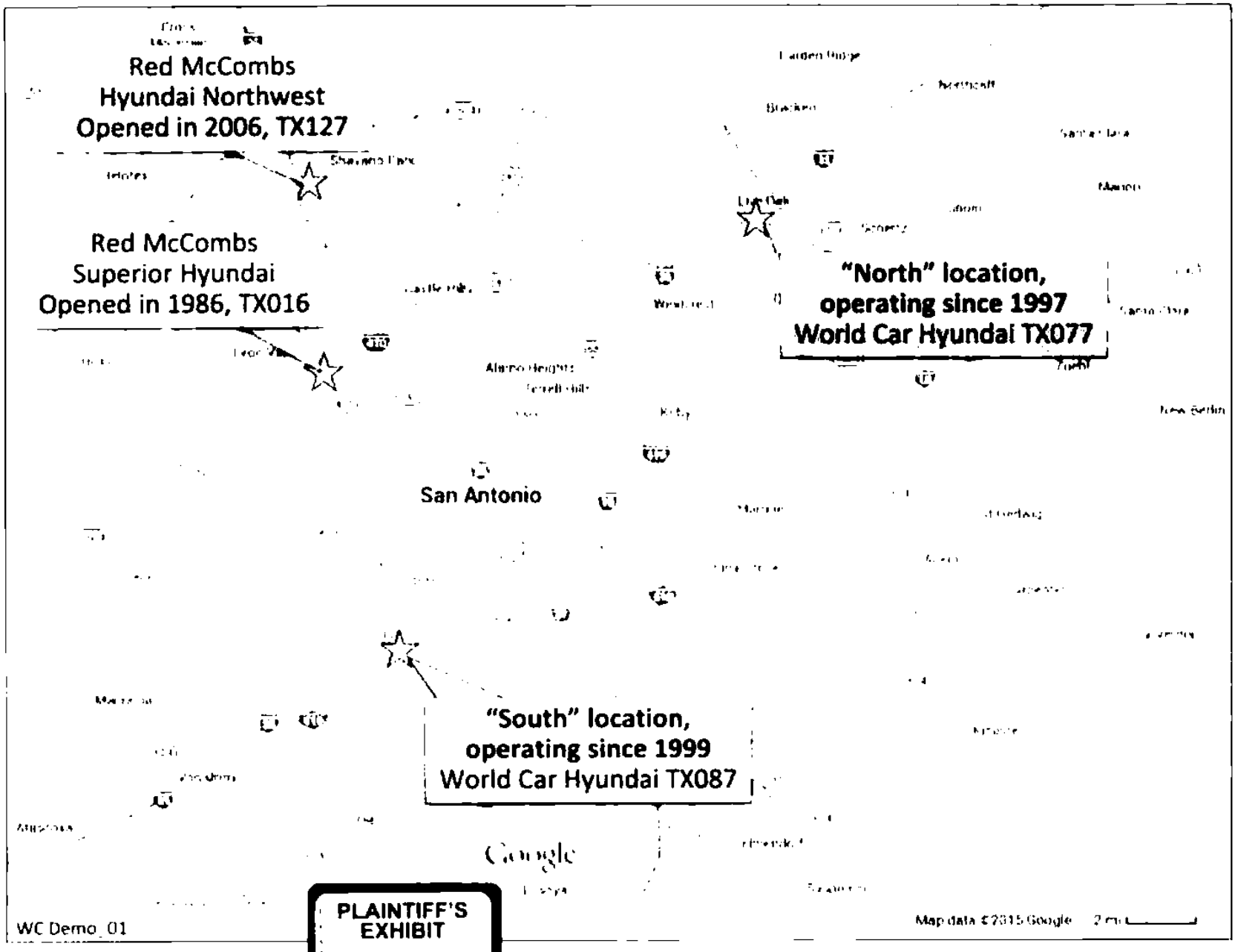
ATTORNEYS FOR COMPLAINANTS

CERTIFICATE OF SERVICE

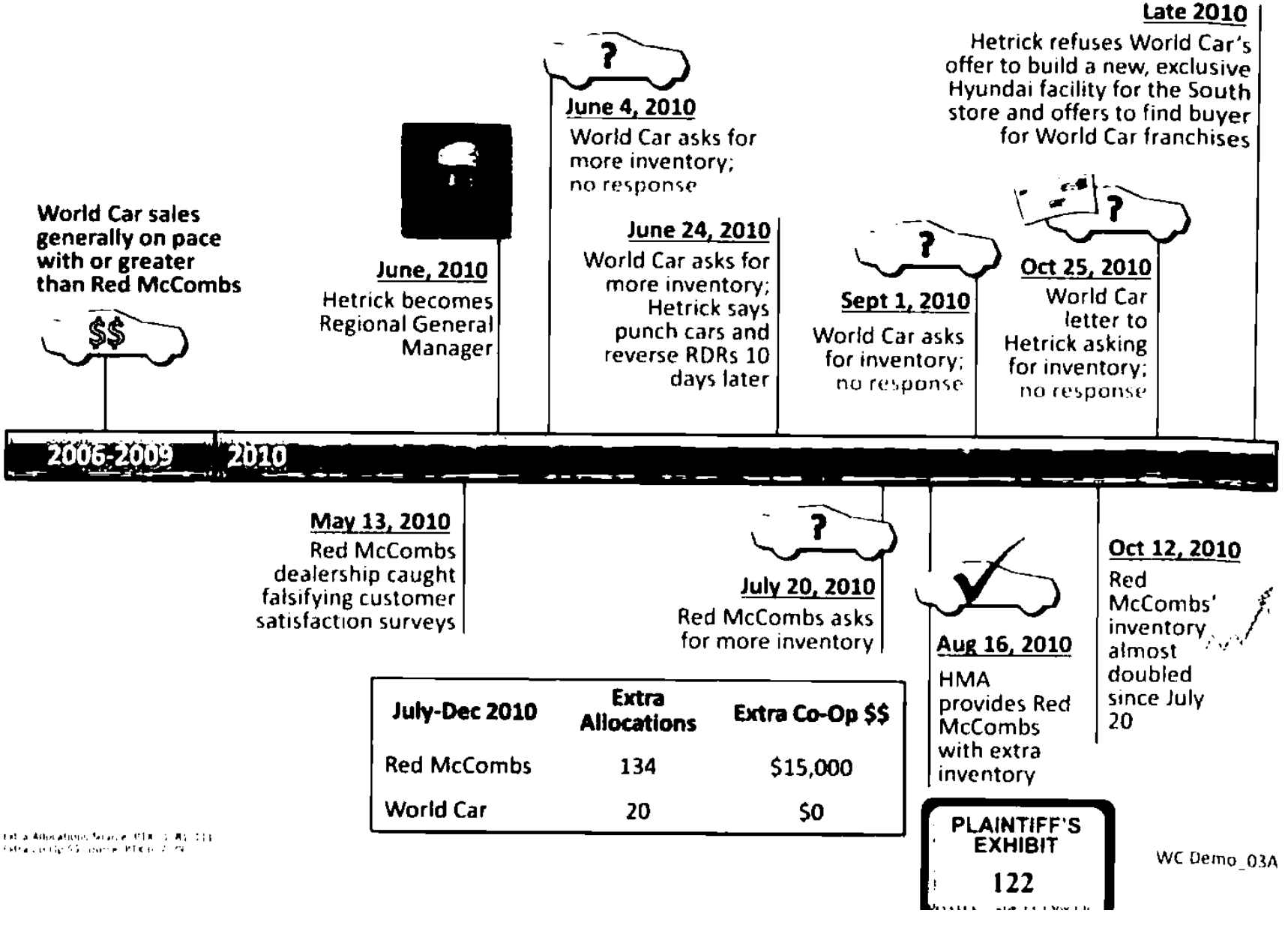
I hereby certify that, on this 8th day of April, 2016, a true and correct copy of the above and foregoing instrument has been served via email on all counsel of record.

/s/ Jarod R. Stewart
Jarod R. Stewart

APPENDIX 1


Red McCombs
Hyundai Northwest
Opened in 2006, TX127
Red McCombs
Superior Hyundai
Opened in 1986, TX016
"North" location,
operating since 1997
World Car Hyundai TX077
San Antonio
"South" location,
operating since 1999
World Car Hyundai TX087
Google
WC Demo_01
Map data ©2015 Google
PLAINTIFF'S
EXHIBIT
121

Timeline of Events: 2006 - 2010

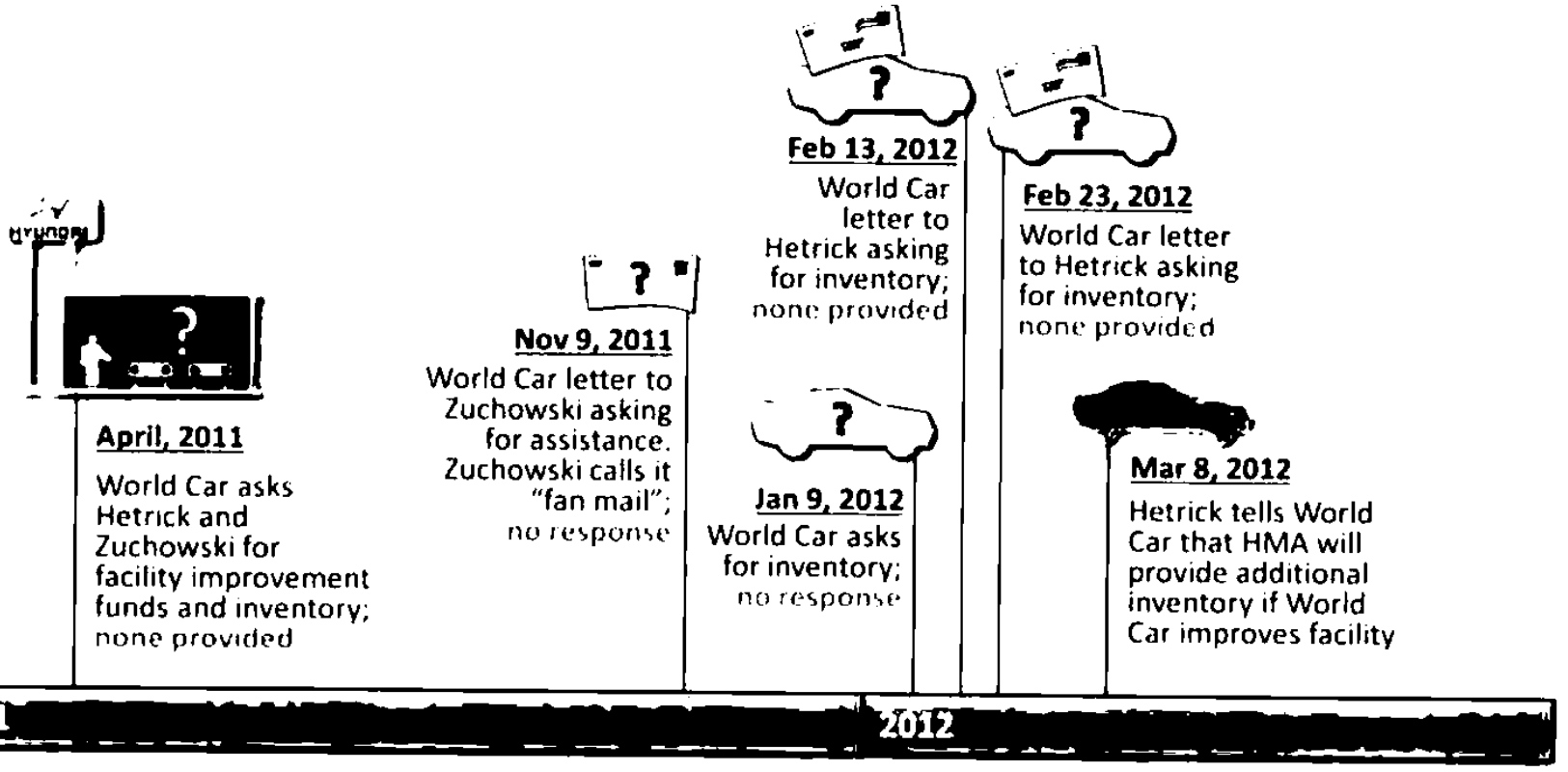


July-Dec 2010	Extra Allocations	Extra Co-Op $$
Red McCombs	134	$15,000
World Car	20	$0

PLAINTIFF'S EXHIBIT
122

WC Demo_03A

Timeline of Events: 2011 - 2012



2011	Extra Allocations	Extra Co-Op $$
Red McCombs	364	$39,000
World Car	124	$5,000

2012	Extra Allocations	Extra Co-Op $$
Red McCombs	355	$37,604
World Car	100	$0

Extra Allocations Source: ETK 31, 81, 111
Extra Co-Op $ Source: ETK p. 52

Timeline of Events: 2013 - 2014

July 10, 2013
Hetrick letter to Zabihian offering to locate buyer for South store

July 31, 2013
Hetrick letter that HMA's approval of facility upgrade does not guarantee additional inventory

Sept 26, 2013
World Car sues HMA in Bexar County re: breach of right of first refusal for New Braunfels point and for failure to provide inventory

October, 2013
World Car begins renovations at North Store despite "no guarantee" letter from Hetrick

Oct – Dec 2013
Majority of HMA's 2013 manual allocations to World Car made after a lawsuit was filed

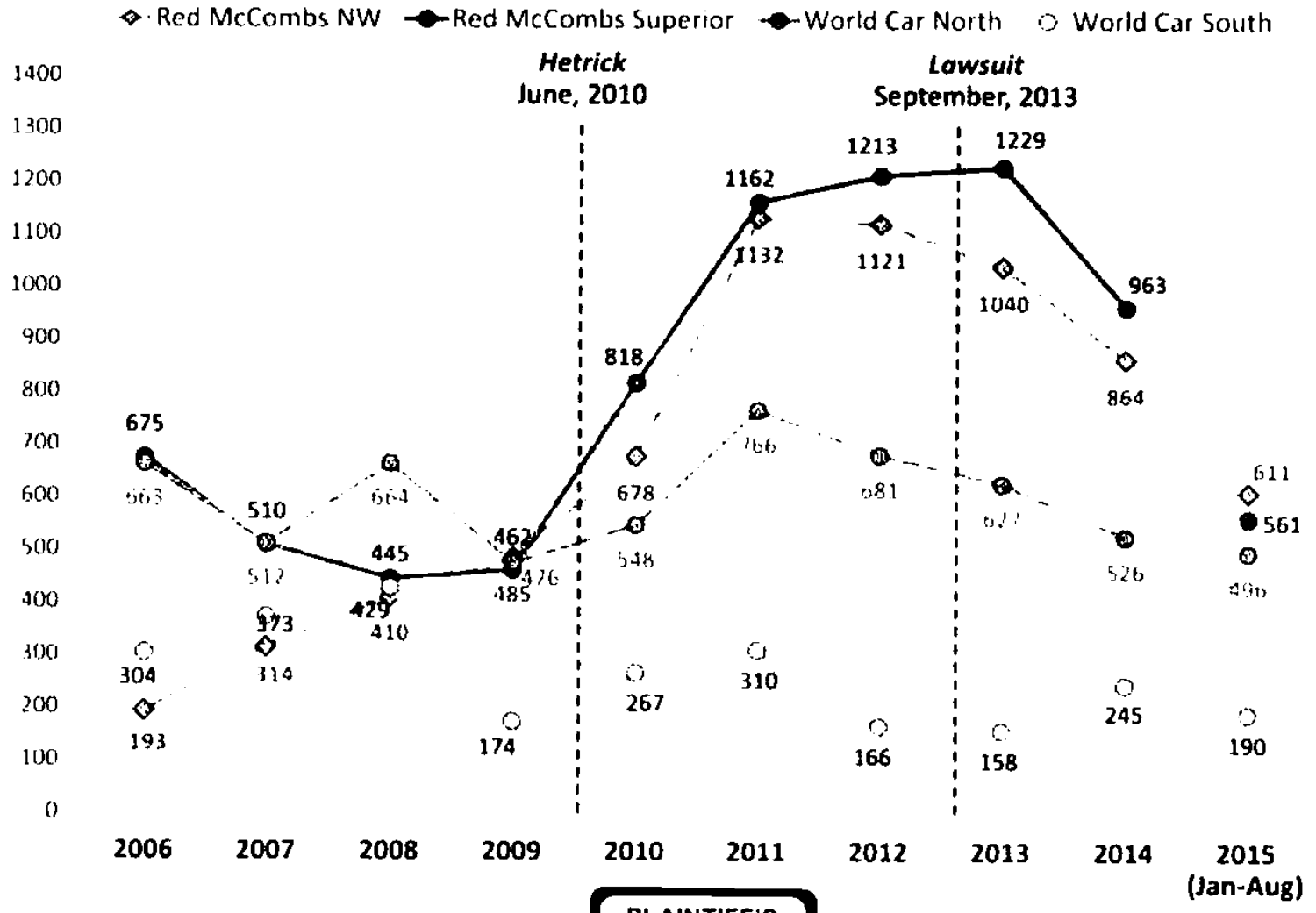
Oct 2014
World Car completes renovation; HMA does not provide additional inventory

2013 — 2014

Jan – Sept 2013	Extra Allocations	Extra Co-Op $$	Oct – Dec 2013	Extra Allocations	Extra Co-Op $$
Red McCombs	21	$17,646	Red McCombs	0	$0
World Car	1	$0	World Car	4	$52,965

WC Demo_03C

Sales by Dealer, 2006 – 2015 (YTD)

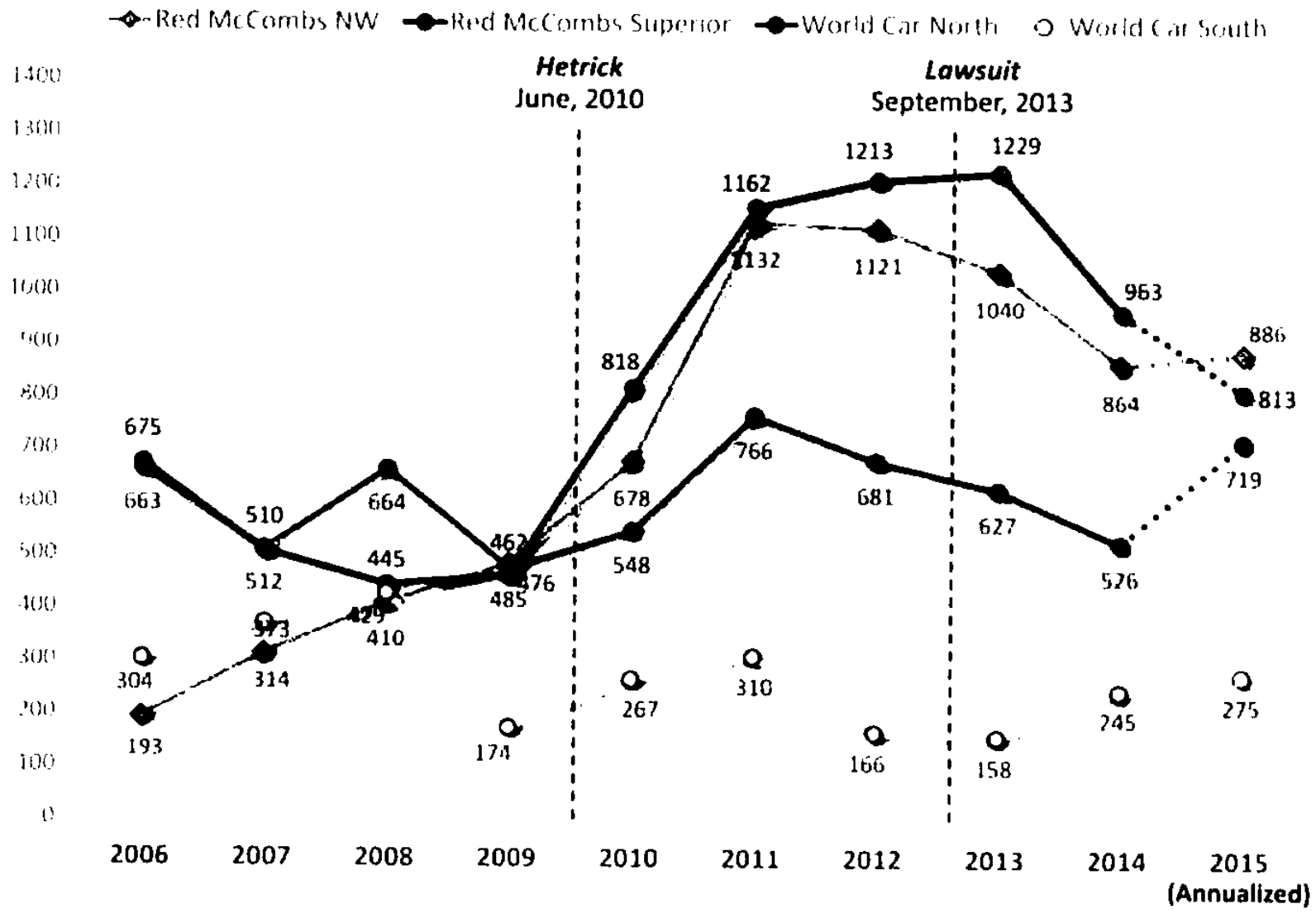


PLAINTIFF'S EXHIBIT 123

Source PTX 10, 109, 114, 115, 116

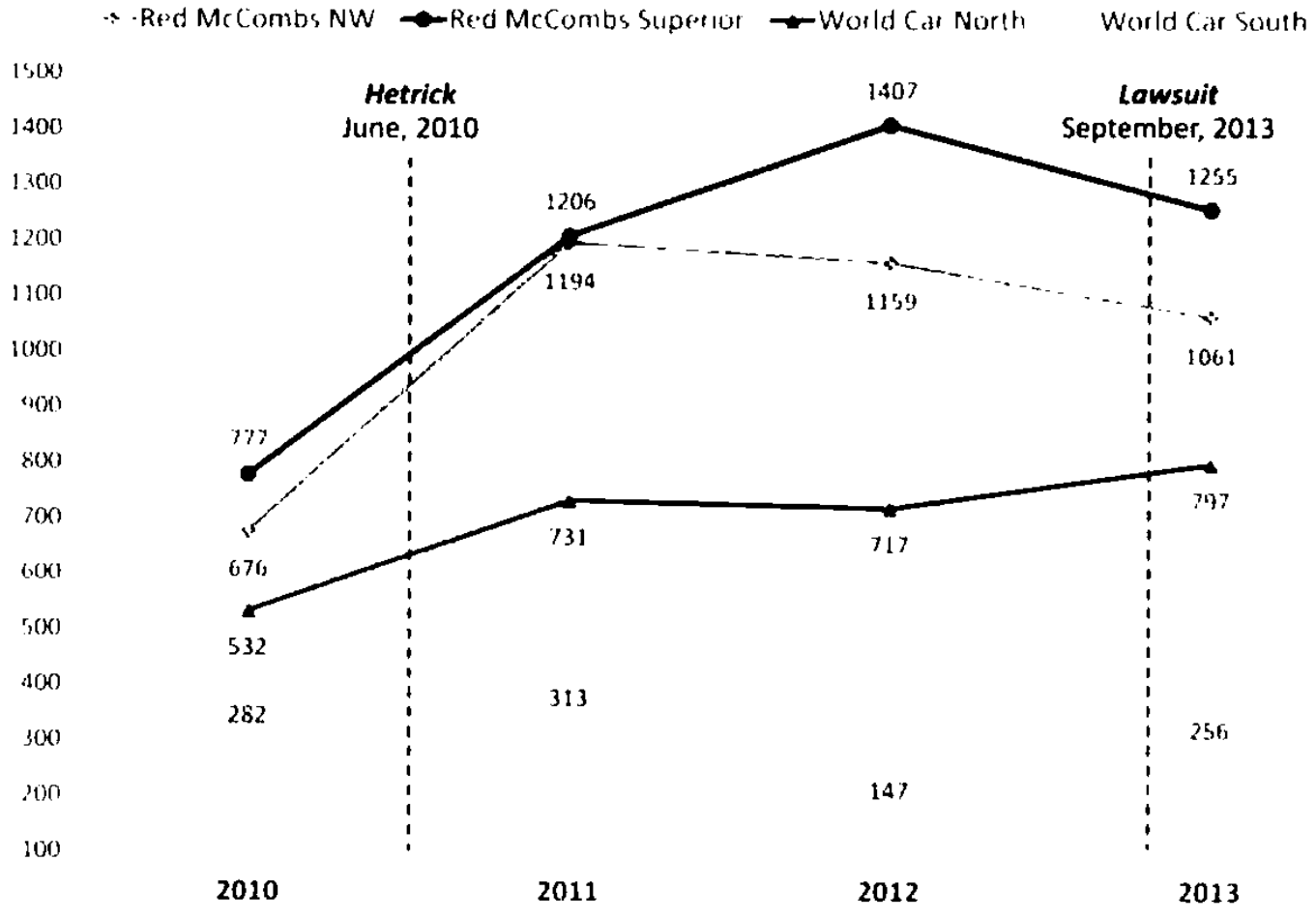
WC Demo_04A

Sales by Dealer, 2006 – 2015 (Annualized)



Source: PTX 109, 114, 115, 116

Total Allocations by Dealer, 2010 - 2013

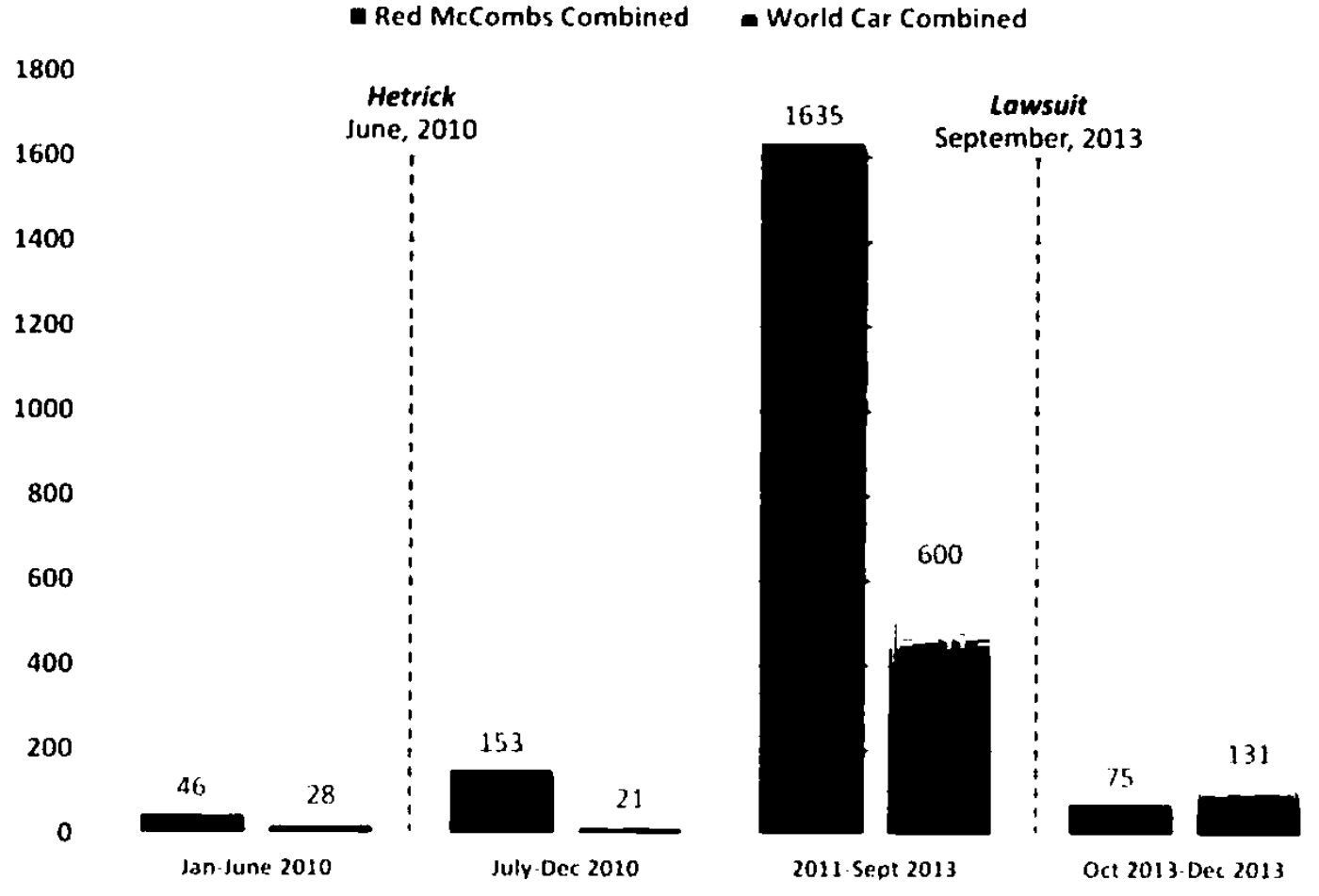


Source: PTX 111, 81

PLAINTIFF'S EXHIBIT 124

WC Demo_05

Total Manual Allocations: 2010 - 2013

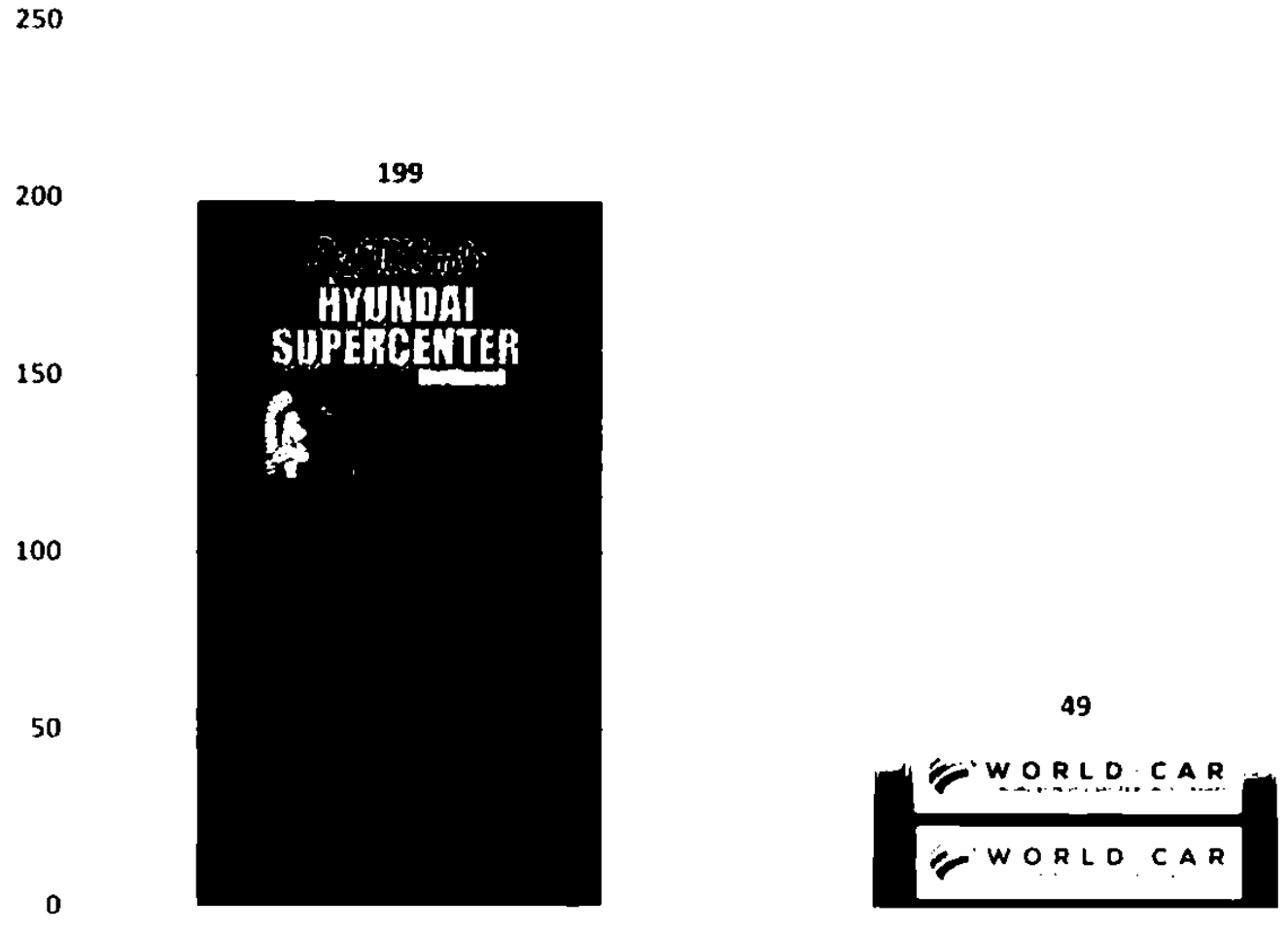


2010 Source: PTX 111
2011-2012 Source: PTX 110
2013 Source: PTX 109

PLAINTIFF'S EXHIBIT
126
SOAH No. 608-14-1208 LIC

WC Demo_07A

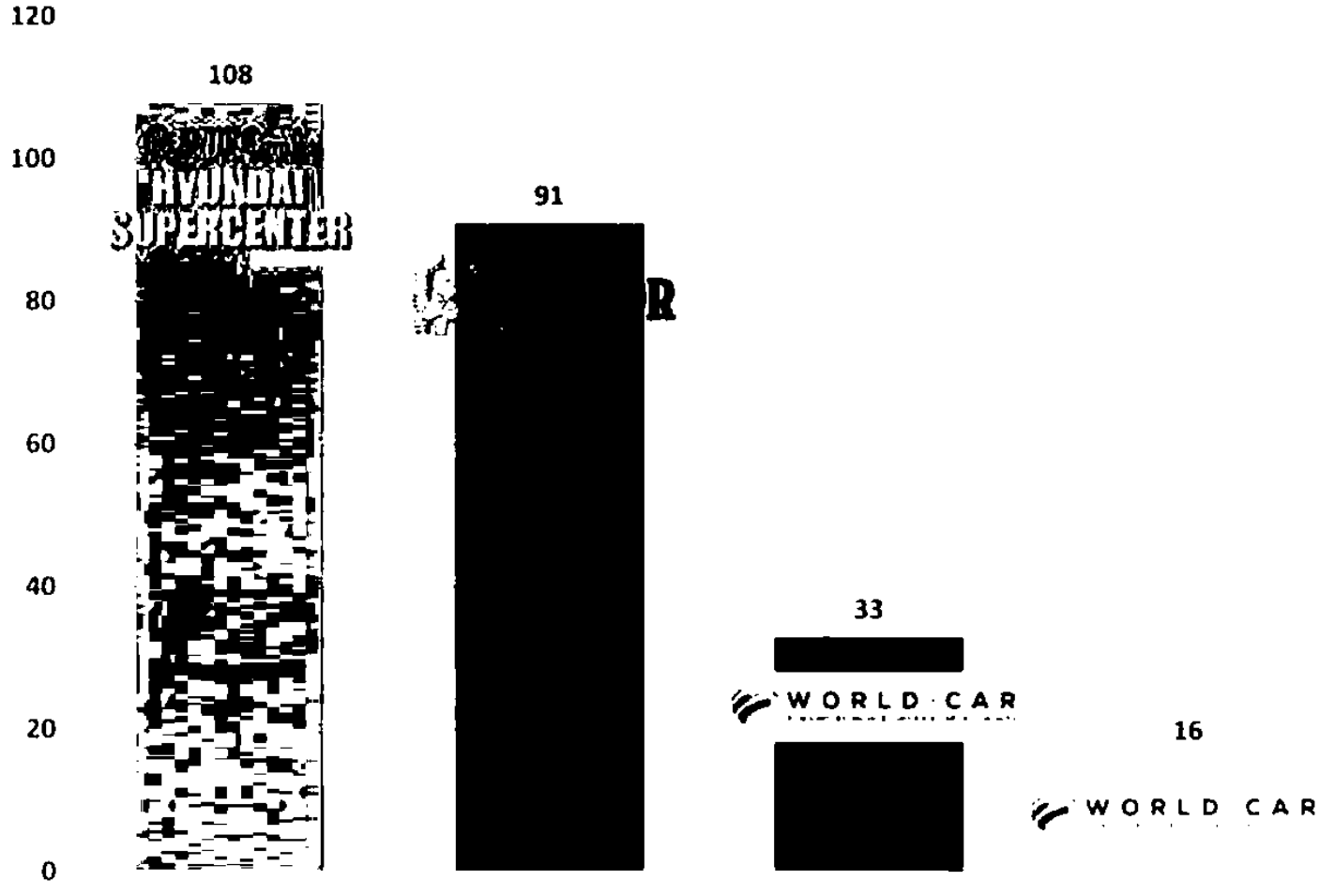
Total Manual Allocations: 2010



Source: PTX 111

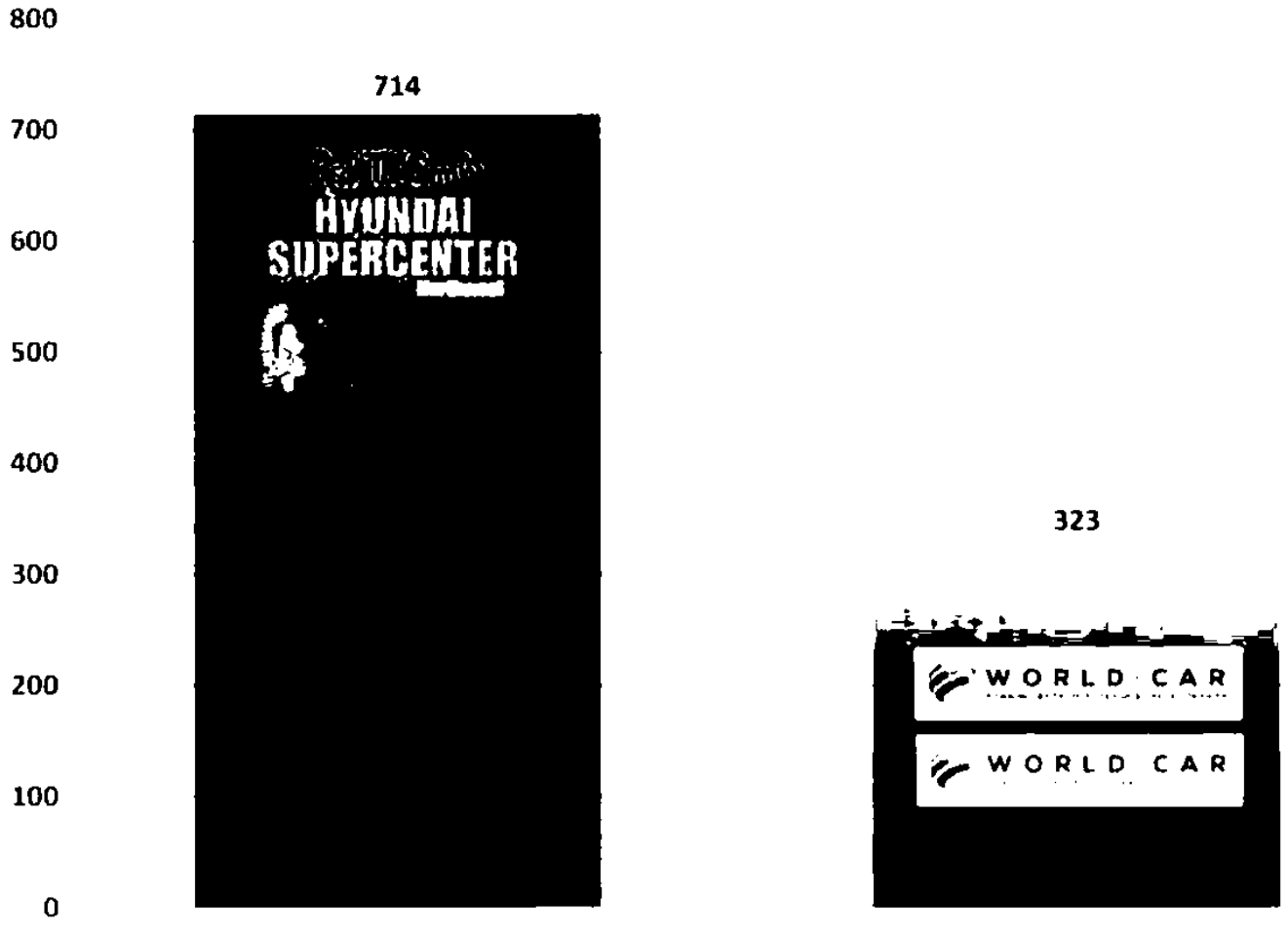
WC Demo_07B

Total Manual Allocations: 2010



Source: PTX 111

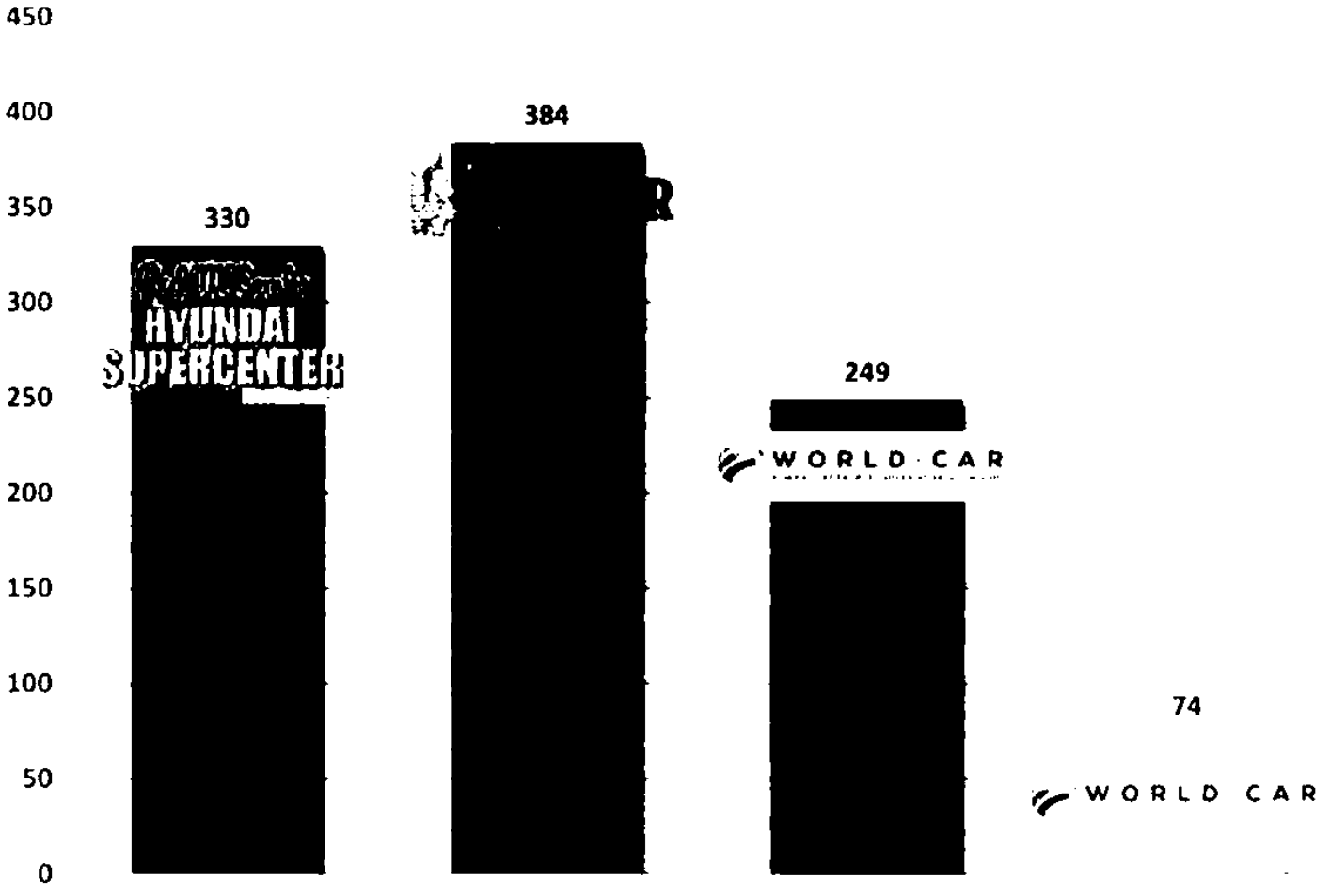
Total Manual Allocations: 2011



Source: PTX 110

WC Demo 07D

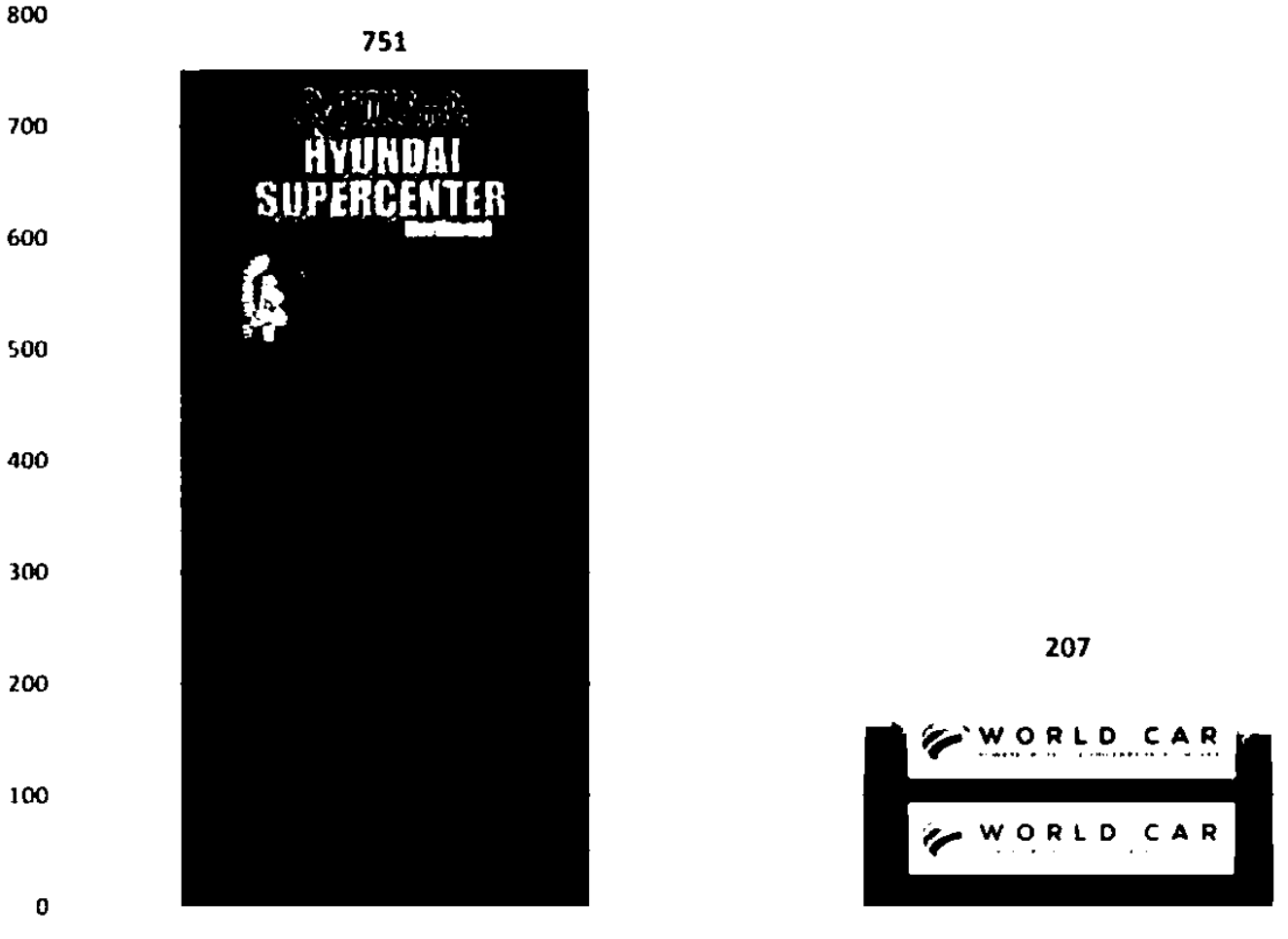
Total Manual Allocations: 2011



Source: PTX 110

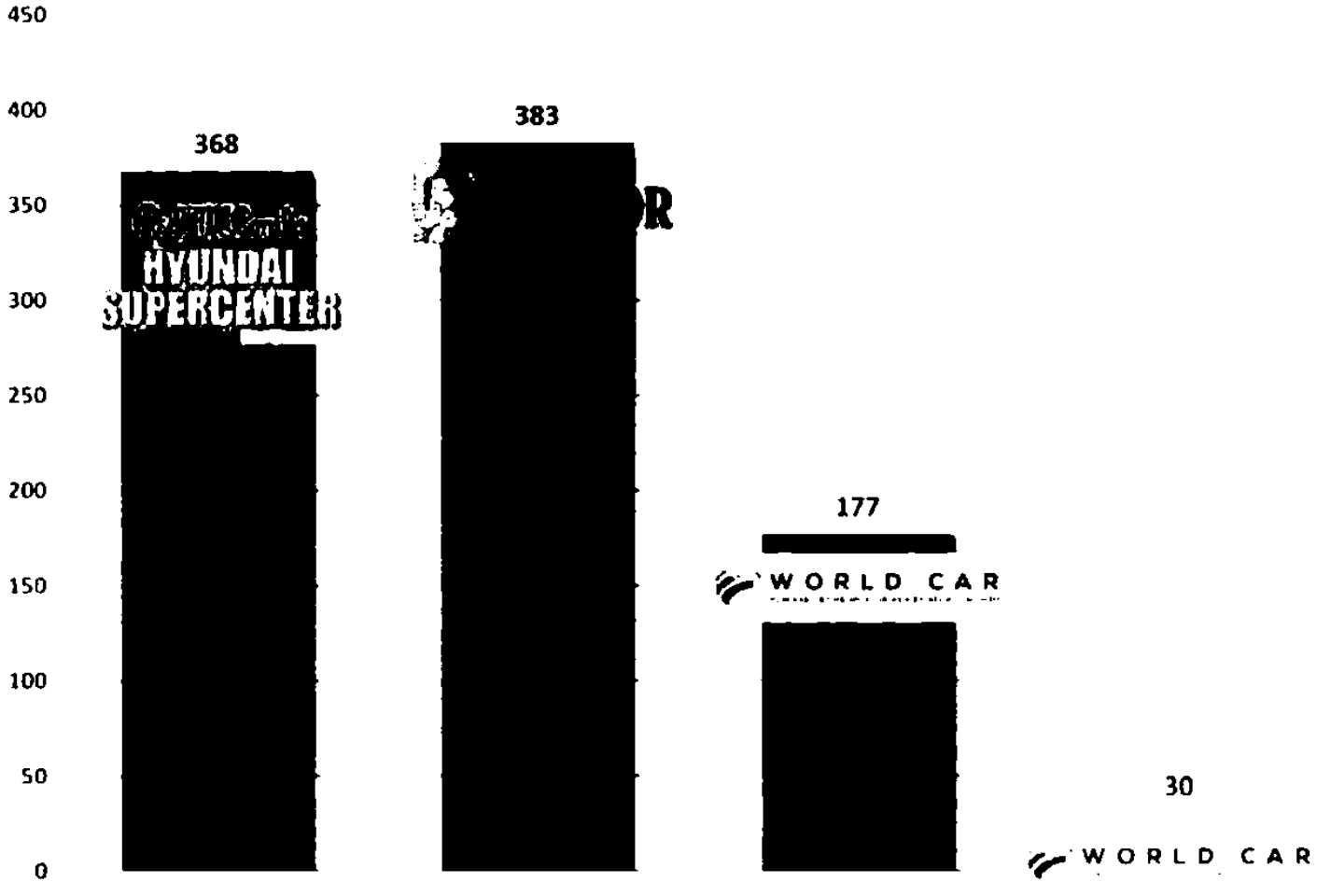
WC Demo_07E

Total Manual Allocations: 2012



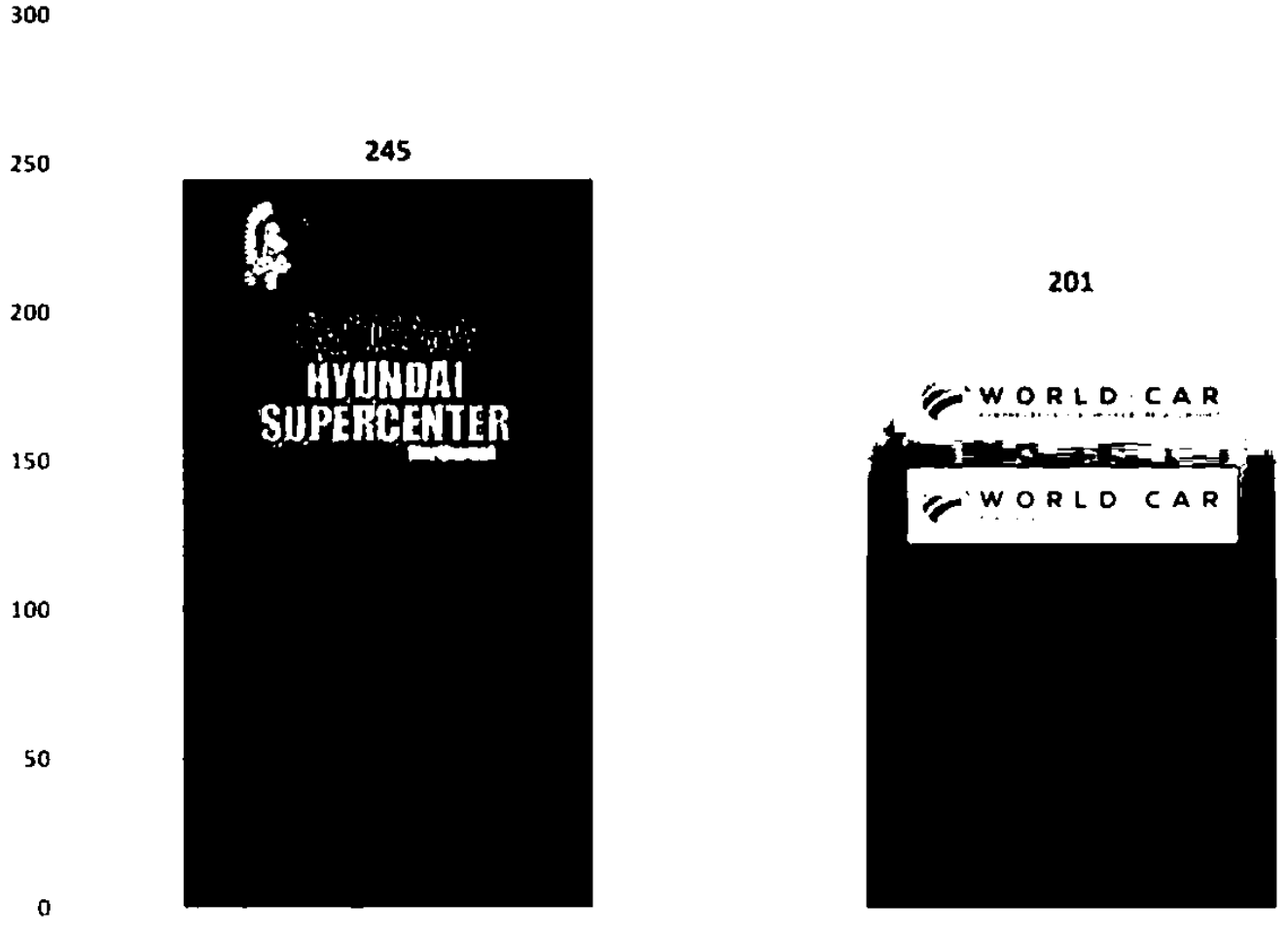
Source: P1X 110

Total Manual Allocations: 2012



Source: PTX 110

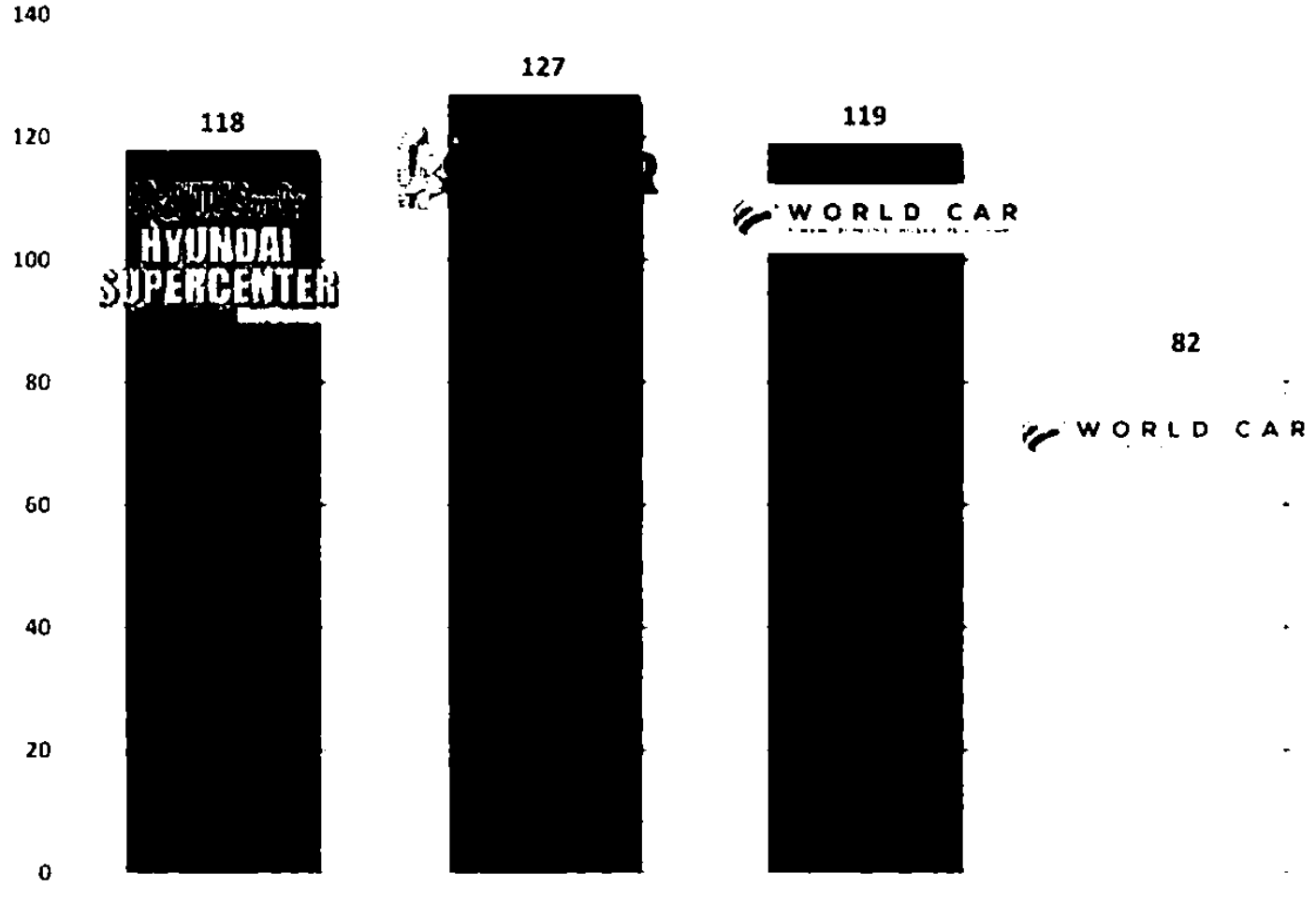
Total Manual Allocations: 2013



Source: PTX 110

WC Demo_07H

Total Manual Allocations: 2013



Source: PTX 110

WC Demo_071

Hyundai Vehicles

ACCENT (3)
GLS, GS, SPORT

HYUNDAI

ELANTRA (4)
SE, VALUE ED, SPORT, LIMITED

ELANTRA GT (1)

AZERA (1)

SONATA (4)
SE, SPORT, ECO, LIMITED

SONATA HYBRID (2)
BASE, LIMITED

GENESIS (2)
3.8L, 5.0L

GENESIS COUPE (3)
BASE, R-SPEC, ULTIMATE

VELOSTER (4)
1.6L, RE-FLEX, TURBO, TURBO R-SPEC

TUCSON (3)
GLS, SE, LIMITED

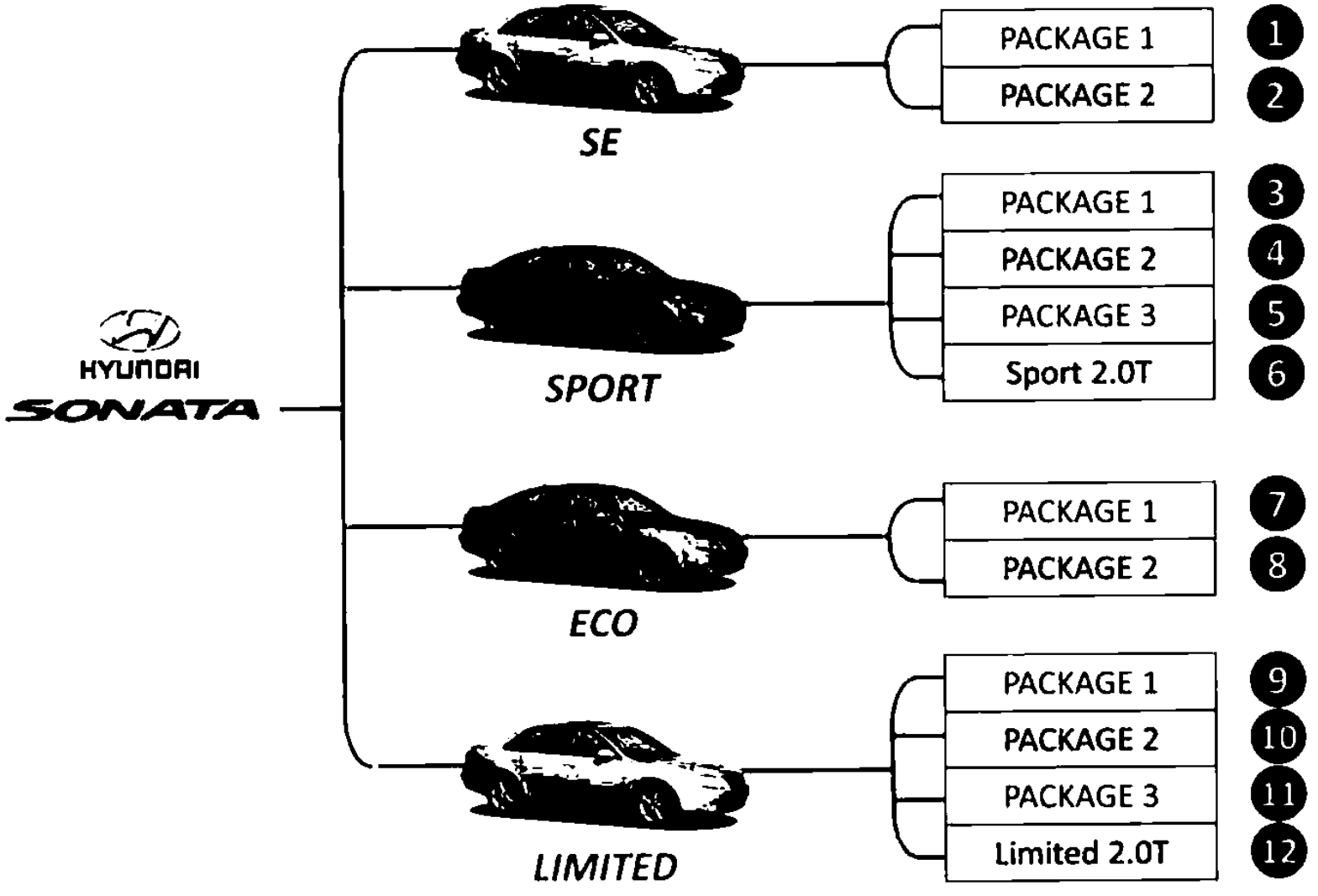
SANTA FE (2)
GLS, LIMITED

SANTA FE SPORT (2)
BASE, 2.0T

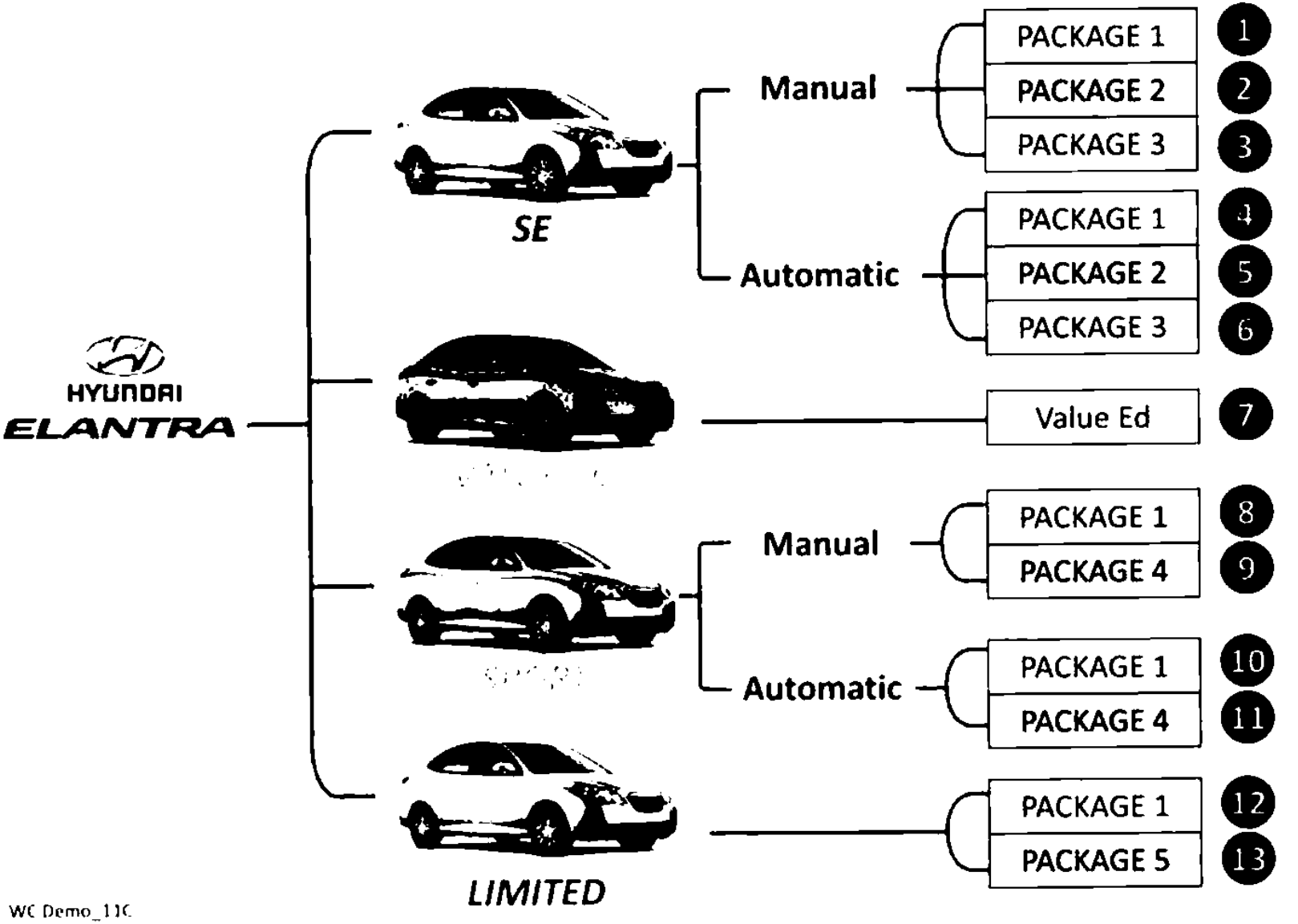
WC Demo 11A

PLAINTIFF'S EXHIBIT
130
OAH No. 608 14-1208 HC

There are 12 Different Sonatas



There are 13 Different Elantras



Hyundai Offers a Total of 96 Different Vehicles

	Name	Trim Levels	Number of Vehicles
1.	Accent	GLS, GS, Sport	10
2.	Elantra	SE, Value Ed, Sport, Limited	13
3.	Elantra GT	Elantra GT	6
4.	Sonata	SE, Sport, Eco, Limited	12
5.	Sonata Hybrid	Base, Limited	4
6.	Genesis	3.8L, 5.0L	9
7.	Genesis Coupe	Base, R-Spec, Ultimate	5
8.	Veloster	1.6L, Re-Flex, Turbo, Turbo R-Sepc	12
9.	Azera	Azera	2
10.	Tucson	GLS, SE, Limited	8
11.	Santa Fe Sport	Base, 2.0T	9
12.	Santa Fe	GLS, Limited	6
		Total:	**96**

TEXAS DEPARTMENT OF MOTOR VEHICLES
MOTOR VEHICLE DIVISION

NEW WORLD CAR NISSAN, INC., DBA WORLD CAR HYUNDAI, AND NEW WORLD CAR IMPORTS SAN ANTONIO, INC., DBA WORLD CAR HYUNDAI	§	
	§	SOAH DOCKET NO. 608-14-1208 LIC
Complainants,	§	MVD DOCKET NO. 14-0006 LIC
vs.	§	
HYUNDAI MOTOR AMERICA	§	
Respondent.	§	

HYUNDAI MOTOR AMERICA'S REPLY
TO WORLD CAR HYUNDAI'S EXCEPTIONS TO PROPOSAL FOR DECISION

TO THE BOARD OF THE TEXAS DEPARTMENT OF MOTOR VEHICLES:

NOW COMES Respondent, Hyundai Motor America and submits its Reply to World Car Hyundai's Exceptions to the Administrative Law Judge's Proposal for Decision. Hyundai Motor America uses the following abbreviations in this brief:

"HMA"	Hyundai Motor America
"RM"	Red McCombs
"WC"	World Car Hyundai
"PFD"	Proposal for Decision
"FOF"	Finding of Fact
"COL"	Conclusion of Law
"TX077"	World Car Hyundai North
"TX087"	World Car Hyundai South
"TX016"	Red McCombs Superior
"TX127"	Red McCombs Northwest
"DSSA"	Dealer Sales and Service Agreement
"RDR"	Retail Delivery Report

TABLE OF CONTENTS

I.
OVERVIEW – SUMMARY OF THE ARGUMENT

Judge Harvel's Proposal For Decision ("PFD") is the culmination of her comprehensive review of the considerable evidence presented in this case. Over five days, Judge Harvel heard live testimony from ten witnesses (approximately 1,200 pages of hearing transcript testimony). She also reviewed deposition testimony from seven witnesses as well as nearly 80 exhibits, submitted at the hearing,[1] comprising hundreds of pages of documents. Further, Judge Harvel considered over 240 pages of pre- and post-hearing briefing from the parties. From all of this evidence and briefing, Judge Harvel provided a thoroughly-reasoned PFD with detailed findings of fact and conclusions of law explaining precisely why WC failed to carry its burden of proof on its three claims under Section 2301 of the Occupations Code. The Board should accept and adopt Judge Harvel's proposal as its final decision in this matter.

WC offers no new arguments with its exceptions, but simply re-urges its previous complaints that were not supported by the evidence. WC contends "this is a case of first impression", but that is not true. Nor will adopting the ALJ's recommendations lead to widespread upheaval of manufacturer/dealer contractual relationships, as WC claims. WC's Exceptions at 2-3. And while it contends Judge Harvel misapplied the statutes at issue, that allegation is completely misplaced. WC really just disagrees with the ALJ's reading of the evidence and has not demonstrated any basis for modifying Judge Harvel's findings of fact or conclusions of law.

[1] In addition, the parties agreed to pre-admit into the record more than 250 additional exhibits.

First, with respect to WC's claim that HMA violated Section 2301.467, by requiring "unreasonable adherence" to sales efficiency as a metric of dealer performance, sales efficiency is not an unreasonable standard. Administrative agencies across the country, including this Board, have recognized sales efficiency as a reasonable standard for measuring a dealer's sales performance. Regardless, HMA never required WC to be 100% sales efficient. HMA's DSSAs with WC contain no provision requiring a dealer to be 100% sales efficient. Nor did HMA require 100% sales efficiency in practice. HMA did not terminate, nor threaten to terminate, WC's DSSAs because of low sales efficiency. In fact, HMA continued to provide WC with inventory and advertising support even though neither of WC's dealerships has been 100% sales efficient since 2009. Moreover, WC continued to be less than 100% efficient even when it admittedly had all the inventory it needed. WC continues to complain that HMA's regional manager required dealers to be 100% sales efficient in order to receive discretionary allocations, but the testimony shows this is not true and evidence proved these allegations to be groundless. WC continues to have a distorted view of the world, and instead of playing by the same rules as all other Hyundai dealers, WC wants the Board to require HMA to use a different standard for measuring WC's sales performance.

Second, WC claims HMA violated Section 2301.468 of the Occupations Code by committing "unreasonable discrimination" in allocating discretionary vehicles to WC. Discretionary vehicle allocations comprise no more than 15% of vehicle allocations to a dealer. WC's unreasonable discrimination claim also fails. WC never pleaded a claim for "unreasonable discrimination" under this statute (although they want the Board to overlook that pleading error). Instead, WC asserted a claim for "unfair and inequitable treatment" under a later version of Section 2301.468 that does not apply to this case. But even if WC had asserted a claim under the

correct statute, it only prohibits discrimination "in the sale of motor vehicles" by a distributor; it does not prohibit discrimination with respect to allocations. Judge Harvel gave WC the benefit of the doubt and reviewed WC's claim as if: (1) it had pleaded the correct statute; and (2) it applied to claims concerning allocations. Judge Harvel reviewed the evidence and correctly concluded there was no unreasonable discrimination because there were legitimate reasons for HMA to provide more discretionary allocations to those dealers who demonstrated extra commitment to the Hyundai brand. This includes dealers who became exclusive Hyundai dealers, renovated their facilities, took on a new Hyundai vehicle line, and utilized HMA's service loaner program. WC did none of those things, as the evidence clearly showed.

WC essentially wants the Board to adopt a rule that competing dealers in the same market, who sell the same brand of vehicle, must get exactly the same number of vehicles from the distributor regardless of whether one dealership is selling more vehicles than another similarly-situated dealer. The Legislature did not abandon free-market capitalism in adopting Section 2301 of the Occupations Code. The Legislature does not require distributors to provide competing dealers with the same amount of vehicles. Were the Board to effectively create such an extra-legislative requirement for vehicle allocations, it would be inundated with claims from dealers every time a cross-town competitor received more allocations.

Finally, WC's claim under Section 2301.478, for breach of the duty of good faith and fair dealing, merely repackages its other statutory claims and, therefore, fails for the same reasons. The Board has adopted a rigorous standard for such claims. Judge Harvel gave WC the benefit of the doubt again and considered WC's claim under a more relaxed standard than WC advocated. However, even under that more lenient standard, Judge Harvel correctly concluded that WC clearly still failed to meet its burden of proof.

For the reasons set forth below, the Board should overrule all of WC's exceptions to Judge Harvel's PFD, and the Board should adopt the PFD as its final decision in this matter.

II.
LEGAL STANDARDS

A. The standard of review.

The Board's authority to review decisions by an Administrative Law Judge is established by Section 2001.058 of the Government Code which states:

> (e) A state agency may change a finding of fact or conclusion of law made by the administrative law judge, or may vacate or modify an order issued by the administrative judge, only if the agency determines:
>
> (1) that the administrative law judge did not properly apply or interpret applicable law, agency rules, written policies provided under Subsection (c), or prior administrative decisions;
>
> (2) that a prior administrative decision on which the administrative law judge relied is incorrect or should be changed; or
>
> (3) that a technical error in a finding of fact should be changed.
>
> The agency shall state in writing the specific reason and legal basis for a change made under this subsection.

TEX. GOV'T CODE § 2001.058(e). WC only invokes sub-section (1) with its Exceptions.

If an agency changes an ALJ's finding of fact or conclusion of law, then "it is required to explain with particularity its specific reason and legal basis for each change made. The agency must 'articulate a rational connection between an underlying agency policy and the altered finding of fact or conclusion of law.'" *Sanchez v. Texas State Bd. of Med. Examiners*, 229 S.W.3d 498, 515-16 (Tex. App.—Austin 2007, no pet.); *Levy v. Texas State Bd. of Med.*

Exam'rs, 966 S.W.2d 813, 815 (Tex. App.—Austin 1998, no pet.). The term "*legal basis*" refers to the source from which the policy is derived. *Id.*

B. The applicable statutes.

WC asserts claims against HMA under Sections 2301.467, .468 and .478. HMA briefly recites those statutes here and discusses them in detail in Section IV.

1. Section 2301.467 – Adherence to unreasonable sales or service standards.

Section 2301.467(a) states:

> (a) Notwithstanding the terms of any franchise, a manufacturer, distributor, or representative may not:
>
> (1) require adherence to unreasonable sales or service standards;

TEX. OCC. CODE § 2301.467(a)(1).

2. Section 2301.468 – WC only pleaded a claim under the inapplicable 2011 version of this statute.

WC contends that HMA violated Section 2301.468's prohibition on discrimination among dealers and cites the 2003 version of the statute. WC's Exceptions at 5-6. This statute, titled "Discrimination among Dealers or Franchisees" states:

> A manufacturer, distributor, or representative may not: (1) notwithstanding the terms of any franchise, directly or indirectly discriminate against a franchised dealer or otherwise treat franchised dealers differently as a result of a formula or other computation or process intended to gauge the performance of a dealership; or (2) discriminate unreasonably between or among franchisees in the sale of a motor vehicle owned by the manufacturer or distributor.

TEX. OCC. CODE § 2301.468 (2003). However, this is not the version of the statute that WC pleaded or argued at the hearing. WC actually pleaded that HMA violated the 2011 version of the statute. *See* WC's Second Amended Complaint, ¶ 36 (alleging unfair and inequitable conduct). That statute, titled "Inequitable Treatment of Dealers or Franchisees" states:

> Notwithstanding the terms of a franchise, a manufacturer, distributor, or representative may not treat franchised dealers of the same line-make differently as a result of the application of a formula or other computation or process intended to gauge the performance of a dealership or otherwise enforce standards or guidelines applicable to its franchised dealers in the sale of motor vehicles if, in the application of the standards or guidelines, the franchised dealers are treated unfairly or inequitably in the sale of a motor vehicle owned by the manufacturer or distributor.

TEX. OCC. CODE § 2301.468 (2011). The 2011 version of the statute that WC pleaded applies only to agreements entered into or renewed ***on or after*** the effective date of the amendment – September 1, 2011. *See* 2011 Tex. Sess. Law Serv. Ch. 137 (S.B. 529), § 16. The DSSAs for both of WC's dealerships (TX077 and TX087) were executed prior to 2011 (DTX28; DTX30) and, thus, the 2011 statute alleged by WC is inapplicable.

3. Section 2301.478(b) – Duty of good faith and fair dealing.

Section 2301.478(b) states:

> Each party to a franchise owes to the other party a duty of good faith and fair dealing that is actionable in tort.

TEX. OCC. CODE § 2301.478(b).

III.
FACTUAL BACKGROUND

A. HMA fairly allocates vehicle inventory to its dealers.

To respond to WC's exceptions regarding allocations, it is necessary to first explain HMA's vehicle allocation system and the steps dealers can take to improve allocations. WC's complaints concern only a small component of the allocation system, discretionary allocations. And the evidence demonstrates that WC "pulled back on inventory (*i.e.*, actively reduced its allocations beginning in 2009), and failed to take actions – available to all dealers – to improve allocations, while other dealers in the San Antonio area actively engaged in efforts to enhance the Hyundai brand, resulting in more discretionary allocations.

1. HMA's vehicle allocation system.

HMA's system for allocating vehicles to its hundreds of dealers consists of: (1) formula (or "system") allocations; (2) discretionary allocations; and (3) manual allocations. PFD at 5, 23 (FOF #8). Formula allocations make up a minimum of 85% of the vehicles allocated, with the other 15% distributed through discretionary allocations by the regional general managers. TR760; PFD at 5, 23 (FOF #9). Formula allocations can compromise up to 100% of an allocation if the regional general manager chooses to place discretionary allocations through the formula allocation process or if the formula allocation uses all available vehicles in times of short supply. TR760; TR835. Manual allocations involve vehicles that were originally allocated by the allocation formula, but that were subsequently reallocated because the dealer to whom the vehicles were first allocated declined to purchase them or changes were made to accessories installed on the vehicles. TR1103-04; TR1146; TR685.

a. Formula allocations.

HMA uses a "balanced days' supply system" for its formula allocations. TR824-25; PFD at 5. The same formula is used for all Hyundai dealers and is similar to that used by other automobile manufacturers. TR708; TR1155; PFD at 5. HMA used the same system from 2006 to 2009 (when WC was not complaining about allocations) as it did from 2010 to 2013 (when WC did complain about its allocations). TR820-21; PFD at 5.

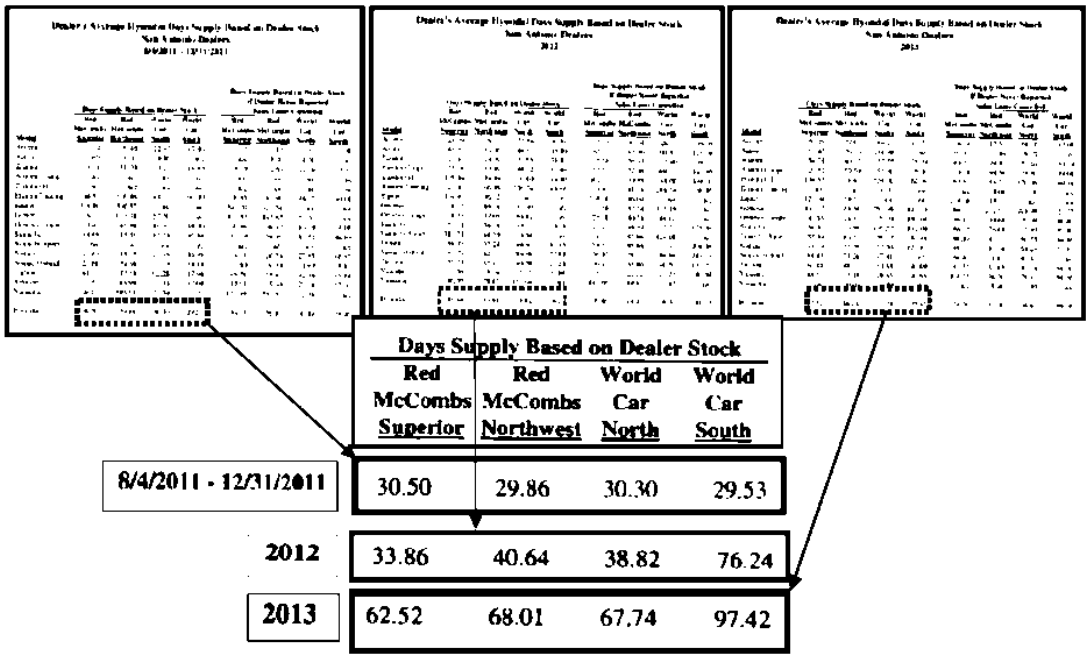
Under HMA's balanced days' supply algorithm, vehicles are offered to dealers based upon each dealer's inventory and the average number of vehicles sold by the dealer over the previous 90 days. PFD at 5, 23 (FOF #10). The system operates as a "poker chip method," allocating vehicles, one at a time, to the dealer in the region with the lowest days' supply for each respective model. TR819. Thus, for example, if vehicles were allocated between two

dealers, one with a 30-day supply and the other with a 60-day supply, the system would allocate one vehicle at a time to increase the days' supply rate of the first dealer until it reached the same rate as the second dealer or the system ran out of vehicles. TR824-25. The balanced days' supply system is not a pure "turn and earn" system because the latter considers only the number of vehicles sold and reported by each dealer, while the former also compares dealers' available inventories (both "on the lot" and in the supply pipeline).[2] TR825. The allocation system runs automatically and dealers cannot be excluded from the allocation formula. TR820. Sales efficiency, discussed below, is not a component of the formula allocation system. TR711-12.

There is no evidence that: (1) WC dealerships were not offered the vehicles they earned under the allocation formula; or (2) the allocation formula did not work as designed; namely, by balancing the days' supply of HMA's dealers. In fact, WC's own expert – Joseph Roesner – admitted that the WC dealerships' days' supply was either equivalent to or exceeded the days' supply of the RM dealerships. PTX109, (Tab 24, page 6); TR829. The actual days' supply figures from Mr. Roesner's report are summarized below:

[2] The "pipeline" refers to vehicles that have already been allocated to a dealer but that have not yet arrived at the dealership. TR1147.

Days' Supply Based on Dealer Stock



Days Supply Based on Dealer Stock	Red McCombs Superior	Red McCombs Northwest	World Car North	World Car South
8/4/2011 - 12/31/2011	30.50	29.86	30.30	29.53
2012	33.86	40.64	38.82	76.24
2013	62.52	68.01	67.74	97.42

Source: PTX109, Tab 24, pages 1-3

HMA's formula did exactly what it was designed to do – allocate vehicles so that dealers in the region have roughly the same days' supply. Moreover, WC's days' supply was equivalent to, or in the case of TX087 in 2012 and 2013 exceeded, the total days' supply of the RM dealerships.[3] In short, the HMA system provided WC with cars to sell, but WC was not selling them.

b. Discretionary allocations.

The use of discretionary vehicle allocations is common in the industry and, as WC's expert admitted, "makes sense." TR760. Having a discretionary allocation pool of vehicles

[3] The components of HMA's allocation system depend upon regional, not district or local, metrics or comparisons. Thus, while WC may focus on the RM dealerships, such comparisons are not relevant to the way the HMA system works or is designed to work. That system involves comparisons and competition among all HMA dealers in a multi-state region. The evidence shows that HMA's allocation system worked fairly and as intended.

provides flexibility so that HMA's regional management may distribute up to 15% of allocations for events and circumstances that the formula does not and cannot consider. PFD at 24 (FOF #11). This percentage can be reduced in times of short supply. TR840-41. Discretionary allocations can, for example, be provided for facility renovations, grand openings, for a dealer's decision to devote a facility exclusively to Hyundai or for a dealer's agreement to sell HMA's luxury vehicle, the Equus. TR1060-61, TR1080.

HMA's expert, John Frith, summarized, on a percentage basis, how discretionary allocations were distributed among dealers in WC's district from 2010 to 2013. DTX128 - DTX131. The data shows that both TX077 and TX087 typically received discretionary allocations. In some years, WC received a greater percentage of discretionary allocations than other dealers in the same district (DTX128); in other years less (DTX131); and sometimes they were in the middle of the group (DTX128). In 2013, availability of vehicles through formula allocations was greatly improved, so discretionary allocations were way down across the board, and TX087 received no discretionary allocations. DTX131.

When comparing discretionary allocations to total allocations on a percentage basis, from 2008 to 2013, the data shows that the percentages between WC and RM often favored WC or were similar to RM.

Percentage of Discretionary Allocations from GM Pool Compared to Total Allocations				
	TX016	**TX127**	**TX077**	**TX087**
2008	2%	3%	15%	19%
2009	2%	3%	5%	11%
2010	6%	14%	3%	4%
2011	16%	14%	12%	12%
2012	13%	15%	13%	3%
2013	1%	1%	1%	0%

Source: DTX99[4]

[4] *See* PFD at 6.

c. Manual allocations.

Generally speaking, "manual allocations" consist of all allocations that do not come through system allocations. Manual allocations can include the subset of discretionary allocations in some cases, but there are manual allocations separate and apart from discretionary allocations. These include "turn downs" (vehicles allocated to a dealer via the formula, but rejected and turned back to the region) and vehicles that have been re-customized or modified at the port for some reason. TR1103-04; TR1146; TR685; PFD at 6, 24 (FOF #12).

As with discretionary allocations, manual allocations to WC, as a percentage of total allocations, were typically comparable to RM from 2009 to 2013.

Percentage of Manual Allocations Compared to Total Allocations				
	TX016	**TX127**	**TX077**	**TX087**
2008	13%	17%	42%	43%
2009	22%	31%	17%	24%
2010	5%	1.4%	3%	1.4%
2011	32%	28%	34%	24%
2012	27%	32%	25%	20%
2013	10%	11%	15%	32%

Source: DTX99

The same is true when looking at manual and discretionary allocations combined. WC's percentages were usually on a par with RM.

Percentage of Manual & Discretionary Allocations Compared to Total Allocations						
	2008	**2009**	**2010**	**2011**	**2012**	**2013**
RM - TX016	15%	24%	12%	48%	40%	11%
RM - TX127	20%	34%	16%	42%	47%	12%
WC – TX077	57%	22%	6%	46%	38%	16%
WC – TX087	62%	35%	6%	35%	24%	32%

Source: DTX99 & DTX99A

WC complains about discretionary allocations. WC's Exceptions at 2, 11, 20 and 25. WC does not complain about the formula used to allocate at least 85% of all inventory. *Id.*; PFD at 7.

2. WC could have taken steps to increase it system allocations.

WC could have taken – but failed to take – steps that would have generated increased vehicle allocations.

a. Prompt reporting of deliveries is important.

WC's decision to not report (or "RDR") a vehicle when it has a signed contract, as authorized by HMA, has potentially significant consequences because WC's reporting process typically takes 3 to 5 days to complete. TR104-05 (Zabihian). But such delay in reporting a sale can be detrimental to formula allocations. An RDR takes a vehicle out of inventory and reduces the dealers' days' supply. The more reported sales, the lower the dealers' days' supply and the greater opportunity for allocations when an allocation period opens. *See* TR819-25 (Ms. Bryant explaining formula allocation system). TR525-26 (Willis); *see* TR925 (HMA's regional general manager Tom Hetrick explaining the importance of prompt RDRing to allocation system).[5] Because dealers do not know the precise allocation open date, TR963 (Hetrick), it is important to promptly report sales, so as to maximize potential allocations. HMA repeatedly encouraged WC to speed up its reporting. *See* TR241-42 (Mr. Zabihian admitting that HMA encouraged WC, for a long time, to speed up its RDR process); *see* PTX15, PTX17 (dealer contact reports advising WC to speed up its sales reporting). Prompt reporting of all deliveries not only helps with allocations; it is also contractually required. PTX1 (DSSA Standard Provisions, ¶ 14(B)(1)).

[5] Moreover, HMA's regions compete for allocations. TR774. Thus, prompt reporting helps regions obtain more allocations for their dealers.

b. HMA's service loaner program helped dealers increase formula allocations.

Servicing vehicles is an important part of HMA's business. HMA wants its customers to be taken care of when their vehicles are being serviced by its dealers, including having access to service loaners. HMA wants those loaners to be new Hyundais because customers driving new Hyundais as loaners may like and buy them. TR947; TR1184. HMA offers incentives to dealers through its service loaner program to achieve these goals. A participating dealer is allowed to RDR vehicles placed into the program, thus reducing its inventory and its days' supply. *See* TR248 (Mr. Zabihian stating program helps with allocations); TR748-49 (Mr. Roesner stating the loaner program is a way for dealers to increase sales in times of short supply); TR1215; PFD at 25 (FOF #34). In addition, HMA also provided a monetary incentive to dealers – typically $750 for each vehicle put into the program. TR747.

HMA's service loaner program is voluntary. TR745. WC never participated in the program, choosing instead to participate in Nissan's program. TR247; TR267; TR746; TR947; PFD at 25 (FOF #29). Thus, when a Hyundai customer takes his or her vehicle to WC for service, he/she gets a Nissan service loaner. TR246; TR377; TR746; TR948. The evidence showed WC knew about the service loaner program, how it worked, and the benefits it provided dealers – WC just chose to favor Nissan over Hyundai. RM, however, participated in the Hyundai service loaner program. TR745; TR947; PFD at 25 (FOF #37).

HMA's service loaner program was available to all dealers and provided a mechanism to help increase formula allocations. PFD at 25 (FOF #35). To justify its decision not to participate in the program, WC insinuated that it was improper to RDR a service loaner because it starts a vehicle's warranty period. Thus, the ultimate buyer for the vehicle will not get a full warranty. TR383 (Zabihian); TR534-535 (Willis). Although this is a "red herring" issue at best,

WC offered no evidence that any Hyundai customer who purchased a service loaner vehicle complained about receiving a shorter warranty or even complained of not being told about getting a shorter warranty. Moreover, as Mr. Hetrick explained, if the vehicle's warranty had started prior to sale, then the dealer could sell the vehicle for less and the customer would get a good deal. TR972-73; *see* TR1216-17 (Mr. Frith explaining that if vehicles had shorter warranty from use as service loaners, then that would be basis for a discount).

WC could have increased its formula allocations by timely RDRing sales and participating in Hyundai's vehicle loaner program, but it chose differently. PFD at 31, 25 (FOF #27). With 20/20 hindsight, WC now realizes that its poor decisions negatively impacted its ability to receive both discretionary and formula allocations, and it seeks to blame HMA. The evidence did not support WC's allegations as Judge Harvel correctly ruled.

3. WC actively reduced its inventory in 2009 and 2010, placing itself at a disadvantage when demand for Hyundai products spiked beginning in 2011 and vehicles became scarce.

a. WC pulled back on its inventory in 2009.

The recession hit in 2008, and all automobile dealers had to decide if they would continue buying inventory at the same rate or cut back to save costs. In 2009, WC chose the latter as its dealer principal, Ahmad "Nader" Zabihian, confirmed:

> Q. . . . But for whatever reason, you pulled back on your Hyundai inventory, didn't you?
>
> A. I did – I did not pull out in a sense to get it to the level it cut to, but it seems that way, yes.
>
> Q. But you told me that in your deposition. You told me that you pulled back on your inventory in 2008 and 2009.
>
> A. We may have, yes.
>
> ***
>
> Q. I believe it's on Page 34 [of the deposition]. Have you found Page 34?

A. Yes, sir.

Q. If you look at answer that you gave me, it started on Line 12. Just take a look at it and you can tell me whether or not you told me under oath earlier this year that you pulled back on inventory in 2008 and 2009.

A. It says yes. But on your – according to 2008, what you just showed me, the numbers actually increased. I had a lot of inventory. So what I said and also conflicts the report you just showed me. In 2009, I did.

TR223-24 (emphasis added); *see also* TR723-24 (Mr. Roesner agreeing that WC pulled back inventory because of poor economy). WC pulled back inventory at both TX077 and TX087.

Q. All right. So 2009 was – that was the bottom, right?

A. Yes, sir.

Q. Because you pulled back in your inventory?

A. Not for the North store. Oh, for – yes. For – for North store for 2008. We are looking 2009. Yes, I pulled – yes. I'm sorry.

TR228; PFD at 14, 24 (FOF #20). In comparison, Mr. Zabihian admitted that both RM dealerships kept up the same level of inventory during this time. TR228. Sales for 2009 also confirm this fact, as both RM stores remained about the same as 2008, while both WC stores significantly decreased sales.

Annual Sales for Red McCombs and World Car Dealerships 2008-2010

	TX016	TX127	TX077	TX087
2008	445	410	664	429
2009	462	485	476	174
2010	818	675	548	267

Source: DTX24

The effect of WC's decision was two-fold. First, pulling back on inventory contributed to its substantial sales drop in 2009, as Mr. Roesner conceded. TR723-24. Second, as HMA's Dee Dee Bryant explained, if a dealer chooses to reduce its inventory, it becomes harder to obtain future allocations under the system unless the dealer sells at an extremely high rate.

Q. Tell us what is the effect, from the allocation system perspective, what does the allocation system do in response to somebody who says, Hey, you know, I really don't want so much inventory anymore?

A. So if a dealer makes a conscious effort to pull back on inventory, meaning they're turning down cars, they can do one of two things. They can let their travel rate trickle away, also, and the allocation will respond to that scenario by offerings dwindling over time also.

If a dealer says, I'm going pull back on inventory just to stay lean but I'm still going to maintain my travel rate in relation to other dealers in the region, or I'm going to increase it, that at least forces the allocation to continue to see you as a dealer that needs replenishment.

So unless you're keeping that sales pace extremely high, you ultimately will not get offered cars eventually.

***

Q. And what if someone does that for 18 months or more, like World Car did?

A. Yeah, it could -- it can be devastating to a dealer where it's very difficult to -- to get back on track. And the allocation system, as many have said, it uses 90 days of historical sales. So to fight to get the allocation to respond to 18 months of a certain pattern is -- is very, very difficult to do. It takes awhile.

TR826-27.

b. WC turned down vehicles in 2010, just prior to the time of short supply.

After pulling back on inventory in 2009, WC continued that trend in the first half of 2010. Just prior to the beginning of the inventory shortage period, both WC dealerships turned down high percentages of vehicles offered by HMA. In the first six months of 2010, TX077 turned down 173 of 423 vehicles offered by HMA – approximately 41% of the offered vehicles. DTX47. Similarly, TX087 turned down 32 of 100 vehicles offered in the same period or 32%. *Id.* Mr. Zabihian acknowledged that WC turned down lots of vehicles in the first half of 2010, but could not explain why. TR231. Thus, in the span of 18 months, WC pulled back on its inventory, decreased sales, turned down large amounts of vehicles, and then an unprecedented

shortage of Hyundai vehicles began in the United States. Again, poor business decisions by WC led to predictable results.

c. The time of short supply.

It is undisputed that there was a shortage of Hyundai vehicles from the second half of 2010 through mid-2013. TR286; TR474; TR572; TR741; TR954; PFD at 4, 26 (FOF #41). The shortage was a result of increased demand for Hyundai vehicles and reduced demand and supply of competing products from Japan due to multiple factors, including the 2011 tsunami in Japan. TR956, PTX120, D. Zuchowski Dep., p. 29-30. As a result, for about two years, HMA did not have enough inventory to satisfy its dealers, all of whom wanted more inventory. *Id.* at 82, 169. While industry custom is to have a 60-days' supply of vehicles (TR742; TR1153), inventory levels were much tighter during this period. For example, in 2012, TX127 and TX077 had between 38- and 40-days' supply of vehicles, while slow-selling TX087 had a 76-days' supply (effectively twice the inventory of the others). TR1151-52 (Mr. Roesner discussing PTX109, Tab 24).

WC put itself in a position where it would receive far fewer allocations, and then the problem was compounded by a vehicle shortage everyone agrees affected all of HMA's dealers.

4. WC did not establish that it lacked a "critical mass" of inventory and, in any event, its own actions determined its inventory.

WC contends that it needed a "critical mass" of inventory to succeed. WC's Exceptions at 6. But the facts demonstrate that: (1) WC was selling its inventory at a much slower rate than other dealers and was, therefore, earning fewer vehicles under the allocation system; (2) WC had unreasonable expectations about the level of inventory it should have received from HMA; and (3) WC's decision to pull back on inventory in 2009, its decision to reject hundreds of vehicles

offered to it by HMA in 2010, its failure to promptly RDR vehicles, and its refusal to participate in HMA's service loaner program contributed to the inventory levels about which it complains.

Under HMA's "balanced days' supply" allocation system, a dealer earns vehicles based on its current inventory levels and the average number of vehicles it sold over the previous 90 days. *See* Section III(A)(1)(a), *supra*. WC was selling (*i.e.*, "turning") its inventory at a slower rate than RM in 2010-2012. When asked to explain WC's poor turn rate, Mr. Zabihian could only say, "I don't know." TR276.

Average of DAYS TO RETAIL FROM RECEIPT			
YEAR		DLR	Total
	2010	TX016	75.15
		TX077	78.31
		TX087	100.21
		TX127	69.74
2010 Total			80.85
	2011	TX016	35.46
		TX077	47.64
		TX087	49.71
		TX127	40.37
2011 Total			43.30
	2012	TX016	35.95
		TX077	43.41
		TX087	68.20
		TX127	49.43
2012 Total			49.25

Source DTX56, DTX56A

RM was selling its inventory faster than WC, improving its formula allocations, and earning more inventory than WC. WC's failure to turn its inventory faster dictated its inventory levels. WC had the appropriate amount of inventory based on its actual inventory levels and sales history.

Additionally, WC had unrealistic expectations about the amount of inventory it should have received from HMA. In its post-hearing brief, WC argued that HMA should have offered it as many of the "96 different Hyundai vehicle configurations … in order to offer choice and

selection to consumers and to keep its sales rate constant or growing." WC's Post Hearing Brief at 6. It goes on to state, for example, that in July 2010 "World Car Hyundai South management believed that the dealership could sell 40 cars a month with a 150 car inventory, but it could not sell 40 cars per month with only 68 cars available." *Id.* at 7-8. But a monthly sales rate of 40 vehicles based on 150-vehicle inventory would be a 112-day supply of vehicles.[6] WC's own expert testified that a typical dealer would "like to have" a 60-day supply of vehicles. TR742 (Roesner). Arguing that HMA should have provided WC with a 112-day supply of vehicles is unreasonable. Moreover, in the above example, WC had 68 vehicles in inventory, which would be a 51-day supply based on 40 sales per month.[7] While WC complains that it did not have a "critical mass" of inventory, the reality is that WC was demanding levels of inventory in excess of what it needed or had earned based on its performance.

Finally, assuming a "critical mass" of inventory is required to reach "certain" sales levels, the evidence showed that WC had that inventory in 2008 but gave it away when it pulled back on its inventory in 2009.

In 2008, WC sold more vehicles than RM, and both TX077 and TX087 were well above 100% sales efficiency for the year. TR1174; PTX3; PTX4. In 2009, however, WC deliberately pulled back on its inventory. TR223-24; TR228; TR723-24. WC had plenty of inventory but deliberately chose to shift focus away from Hyundai in 2009, making it more difficult to generate new inventory under the formula in subsequent years. TR826-27 (Bryant).

[6] Days' supply is calculated by dividing a dealer's inventory by its daily sales rate. A dealer selling 40 cars per month has a daily sales rate of 1.33 vehicles (40/30 = 1.33). If the dealer had 150 vehicles in inventory that would be a 112-day supply (150/1.3 = 112.8).
[7] 68 vehicles/1.33 daily sales rate = 51.1-day supply.

5. RM received more discretionary allocations because it showed brand commitment that WC did not show.

WC contends it did not receive the same amount of discretionary allocations as RM and that the "boost" of inventory RM received allowed it to build up its inventory and sales. WC's Exceptions at 9-10. There are legitimate business reasons for having discretionary allocations, as WC's expert admitted. TR760 (Roesner). During the time of shortage, Mr. Hetrick focused the bulk of his discretionary allocations on those dealers that were committed to the brand as shown by renovating facilities, becoming exclusive Hyundai dealers or taking on the Equus luxury line. TR1136-37; *see* PTX120; D. Zuchowski Dep., pp. 76-77 (stating additional allocations given when dealers show brand commitment with new locations, new facilities, and new management); *id.* at 177 (discussing ways dealers show brand commitment). RM demonstrated brand commitment during this period in several respects. *Id.* at 167.

RM spent $750,000 on renovations in 2012 at TX127. DTX203 (p. 110774). RM also started renovations of its facilities at TX016, at the cost of $1.8 million in 2011, and completed construction in 2012. DTX177 (p. 109983). In addition, RM took on the Equus line, and TX016 became an exclusive Hyundai dealership. TR1050-61; PFD at 24-25 (FOF #22, 24-26).[8] In comparison, WC acquired TX087 when it was "dualed" with the Kia franchise in 2002/2003. PFD at 24, (FOF #23). Although WC proposed a new, exclusive facility for TX087 to HMA's regional management as early at 2003, TX087 was still at the same, old facility twelve years later. TR353; TR878.

As for TX077, in 2001 WC relocated the dealership operations to the same location as WC's existing Nissan dealership. TR596. Jim Willis, general manager of TX077, admitted that

[8] Mr. Hetrick testified that it was RM's installation of the Equus showroom kit at TX0127 and TX016's decision to become an exclusive dealership, in the second half of 2010, that prompted him to provide the additional discretionary allocations to RM about which WC complains. *Compare* WC's Exceptions at 9-10 *with* TR1050, 1054-55, 1076.

by 2010 TX077's sales were being affected by its poor facilities. TR595-96. Messrs. Zabihian, Hetrick and David Zuchowski, HMA's president and CEO, discussed the possibility of a new facility to be constructed for TX077 in September 2010. TR141-43. However, WC dragged its feet. *See* DTX98A-98O (emails discussing the plans for new facility from December 2011 to July 2014). WC insisted on receiving financial assistance from HMA before construction of the facilities commenced, contrary to HMA's policy. *Compare* TR182, TR216 *with* TR941-42. WC did not begin construction of the new dealership facilities until October 2013, however, and the facilities were only completed in October or November of 2014. TR315; PFD at 25 (FOF #28). By that time, however, the supply shortage was over, and TX077 had sufficient inventory.

WC simply did not demonstrate brand commitment during the inventory shortage like RM did, as summarized below, that resulted in additional discretionary allocations.

BRAND COMMITMENT

Red McCombs	World Car
TX016 - Became Exclusive Hyundai dealer (2010)	TX087 – Not exclusive Hyundai dealer (dual with Kia)
TX127 – Exclusive Hyundai dealer prior to 2010	TX077 – Exclusive Hyundai dealer prior to 2010
Maintained/increased sales 2009	Decreased sales 2009
TX127 - Took on Equus Line that required facility upgrade	
TX016 - Renovated facility (2011-2012)	TX077 - Didn't renovate until 2014 (after lawsuit filed)
TX127 - Renovated facility (2011-2012)	TX087 - No renovation
Participated in Hyundai's service loaner program	Participated in Nissan's service loaner program (but not Hyundai's)

B. Mr. Hetrick did not threaten to terminate both DSSAs if WC refused to sell the dealerships; rather he recommended a renewal of TX087's DSSA.

WC contends that HMA's general manager proposed finding a buyer for WC's dealerships, in late 2010, in an attempt to get rid of WC and build a network of Hyundai dealers with other Hyundai dealers. WC's Exceptions at 13-15. Citing to his deposition, WC says Mr. Hetrick "told World Car's representatives that if they did not sell their dealership, he would attempt to have their franchises terminated." *Id.* at 13. This is patently false. Mr. Hetrick stated the exact opposite at his deposition.

> Q. Did you tell World Car that if they didn't sign the authorization to sell their dealership, that you'd terminate them?
>
> A. Definitely not.

PTX117, T. Hetrick Dep., p. 77 (emphasis added). Mr. Hetrick never threatened to terminate WC's DSSAs if they refused to sell. WC chose not to sell its dealerships and, five years later, it still has them.

Rather than attempt to terminate WC's DSSAs, in late 2010 Mr. Hetrick sought to help WC. In September 2010, Mr. Hetrick recommended HMA renew WC's TX087 DSSA "based on its longevity with Hyundai" and despite its below average sales efficiency. DTX41; TR261-62; PTX29. Moreover, at its request, Mr. Hetrick gave WC $30,000 in unearned co-op advertising to WC in Q4 of 2010. DTX54.

Finally, WC's assertion – that Mr. Hetrick's offer to help find a buyer for TX087 would somehow eliminate WC's right of first refusal – makes no sense (and is not part of any of the allegations in this case). WC's Exceptions at 14. WC's alleged right of first refusal was for a new point to be added to the "San Antonio area" (TR89), and even if WC had decided to sell its dealership (TX087), it would still have had the ability to exercise its first right of refusal through May 1, 2013. *Id.* Mr. Hetrick's offer to help find a buyer for the TX087 dealership was

intended to get WC out of a bad situation when the market would have brought the highest price. TR998, 1002, 1030. When WC declined, it became the goal of both Mr. Hetrick and WC to see the dealerships succeed. When that failed to happen, Mr. Hetrick sent a "Notice of Failure of Performance" to TX087, on July 10, 2013, and requested that WC provide a business plan for improving performance. PTX67. Mr. Hetrick was also concerned with the sales performance of another dealer in Texas (Frank Smith Hyundai in McAllen) and sent the dealer a separate "Notice of Failure of Performance". In stark contrast to WC's reaction – which was to ignore the request for a business plan and immediately file a lawsuit – the other dealer met with Mr. Hetrick to discuss its new business plan, enacted that plan, received assistance from HMA, and ultimately emerged with its sales performance improved. TR1121-24. Had Mr. Zabihian been similarly constructive and cooperative, by responding to Mr. Hetrick's letter, agreeing to meet with Mr. Hetrick and submitting a business plan, HMA had the desire and the resources to help improve TX087's situation. TR1125-26.

C. HMA never required WC to be 100% sales efficient, and WC's dealerships have been repeatedly less than 100% efficient even when there was plenty of inventory.

1. Sales efficiency is an objective measure of dealer performance used throughout the industry.

"Sales efficiency" (also known as "sales effectiveness") is a metric that HMA – and virtually every other car company – uses to measure dealer sales performance. TR712 (Mr. Roesner admits that "virtually every manufacturer" uses sales efficiency); TR73 (Mr. Zabihian testifies that "all other manufacturers" measure the dealer's performance by sales efficiency); TR453-54 (Art Kiolbassa, WC's COO, admits that all of the brands WC sells use sales efficiency as a metric); PFD at 7, 24 (FOF #13). As shown in Section IV(A)(2) below, sales efficiency has repeatedly been upheld by courts and administrative agencies as a fair and reasonable metric.

Sales efficiency compares a dealer's total sales (wherever made) to the sales the brand expects to achieve in the dealer's Primary Market Area ("PMA"). TR1164. HMA calculates expected sales by applying Hyundai's national average sales penetration in each vehicle segment in which Hyundai competes to the actual number of vehicles registered in that segment in the dealer's PMA. PFD at 7, 24 (FOF #14). Thus, if Hyundai captures 5% of the "subcompact" vehicles sold nationwide during a particular time period, then HMA would expect that 5% of the subcompacts sold in a dealer's PMA during that same time period would be Hyundais. TR1165-66; PFD at 7. HMA does this calculation for the PMA on a segment-by-segment basis and adds the expected numbers from each segment to calculate a total expected sales number. It then compares the dealer's total sales to the expected sales number. So, for example, if expected sales are 500 and the dealer's actual total sales are 500, then the dealer is "100% sales efficient." *See* TR1164-69; PFD at 8. Notably, 100% sales efficiency represents only "average" sales performance. TR930. Some dealers are above average and some are below average. HMA measures sales efficiency the same way for all of its dealers. TR1169-70; PFD at 26 (FOF #43).

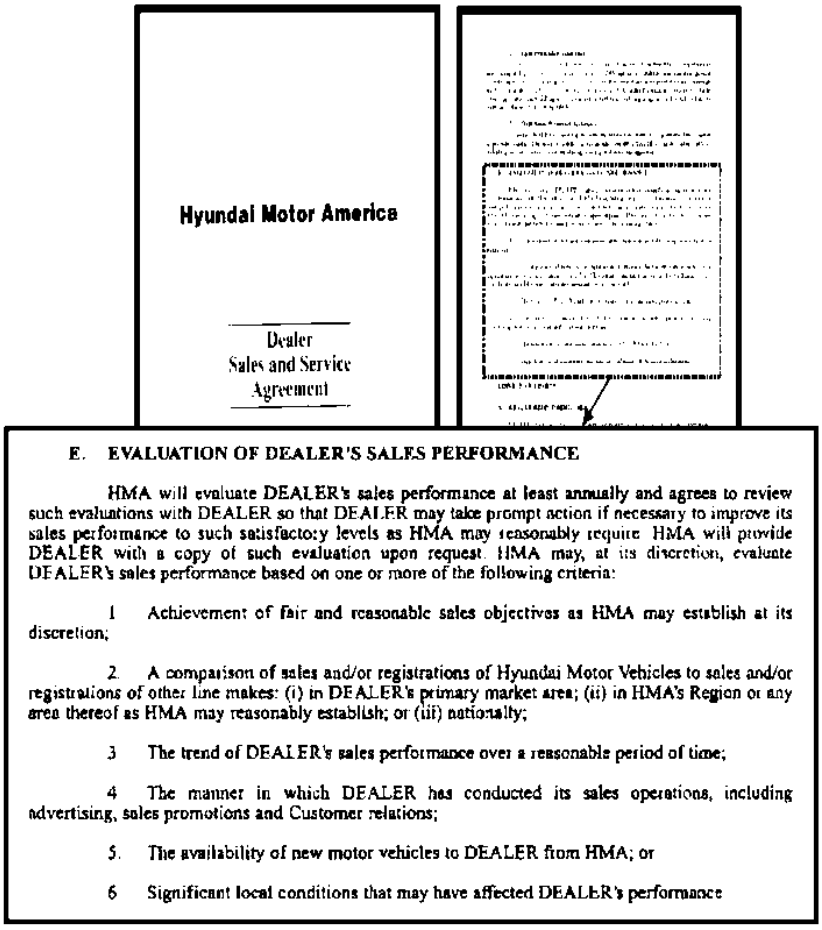
Sales efficiency information is also provided to individual dealers – including TX077 and TX087. TR1169; *see* DTX44 (example of MarketMaster report for TX077). The information allows dealers to compare their performance with other dealers. *See* TR1171 (Frith). Dealers can use sales efficiency data to target efforts to improve sales for specific models such as with increased training for sales staff or targeted advertising. TR1171-72; DTX44; *see* PTX91 (sales efficiency allows dealers to identify and quantify sales potential in their PMAs).

2. HMA's DSSAs with WC include no requirement that the dealerships be 100% sales efficient.

HMA has separate (but substantially the same) Dealer Sales and Service Agreements ("DSSAs") – with each Hyundai dealer. These agreements are the foundation of the parties'

relationship and bear directly on WC's statutory claims. A DSSA consists of an individual agreement with the respective dealer along with a set of Standard Provisions that are incorporated into the DSSA. *See* DTX28 (TX077 DSSA, ¶ 7); DTX30 (TX087 DSSA, ¶ 7); PTX1 (Standard Provisions).

The DSSAs obligate the dealer to "effectively promote and sell Hyundai Products . . . ." DTX28, ¶ 1; DTX30, ¶ 1. Paragraph 10(b)(1) of the Standard Provisions provides that the dealer "agrees to use its best efforts to effectively promote and sell Hyundai Products to Customers in DEALER's primary market area." PTX1. Paragraph 10(E) of the Standard Provisions, entitled "EVALUATION OF DEALER'S SALES PERFORMANCE", identifies sales efficiency as a criterion that can be considered in evaluating dealer performance. *Id.* However, as shown below, it does not state that a dealer must be 100% sales efficient.



Hyundai Motor America

Dealer
Sales and Service
Agreement

E. EVALUATION OF DEALER'S SALES PERFORMANCE

HMA will evaluate DEALER's sales performance at least annually and agrees to review such evaluations with DEALER so that DEALER may take prompt action if necessary to improve its sales performance to such satisfactory levels as HMA may reasonably require. HMA will provide DEALER with a copy of such evaluation upon request. HMA may, at its discretion, evaluate DEALER's sales performance based on one or more of the following criteria:

1. Achievement of fair and reasonable sales objectives as HMA may establish at its discretion;

2. A comparison of sales and/or registrations of Hyundai Motor Vehicles to sales and/or registrations of other line makes: (i) in DEALER's primary market area; (ii) in HMA's Region or any area thereof as HMA may reasonably establish; or (iii) nationally;

3. The trend of DEALER's sales performance over a reasonable period of time;

4. The manner in which DEALER has conducted its sales operations, including advertising, sales promotions and Customer relations;

5. The availability of new motor vehicles to DEALER from HMA; or

6. Significant local conditions that may have affected DEALER's performance

Source: PTX1, ¶ 10(E) of HMA DSSA Standard Provisions

Id.[9]

In sum, there is simply no contract provision in the DSSAs that requires WC to be 100% sales efficient. DTX28; DTX30; PTX1; PFD at 26 (FOF #50).

WC further cites to Mr. Hetrick's testimony and states that HMA "chooses not to provide additional inventory to dealerships who are below 100% sales efficiency." *See* WC's Exceptions at 18 (citing TR1114). But this assertion is misleading as Mr. Hetrick's actual testimony reveals:

[9] Mr. Hetrick testified that sales efficiency was used as a metric to evaluate dealers. TR1013. He did not testify that HMA required dealers to be 100% sales efficient. *Id.*

Q. Okay. Now, let's see if I understand part of this. You chose to use your discretion to reward dealers who meet sales efficiency targets, right?

A. Some.

Q. And those who don't, you don't reward?

A. Not necessarily.

TR1114.

3. WC's dealerships were less than 100% sales efficient even before the time of short supply and remained that way even when inventory was plentiful.

TX077 and TX087 each achieved above 100% sales efficiency in 2008. However, the sales efficiency of each dealership dropped below 100% in 2009 and has remained well below 100% through 2014 and beyond. PFD at 26 (FOF #39 and #51).

Sales Efficiency for WC Dealerships – 2008 to 2014

	TX077	**TX087**
2008	132.5%	110.3%
2009	96.8%	51.1%
2010	83.5%	58.0%
2011	87.3%	45.9%
2012	68.4%	21.3%
2013	71.2%	17.9%
2014	65.7%	31.2%

Source: TR1174; PTX3; PTX4

There is no evidence or allegation that HMA's calculation of sales efficiency for either TX077 or TX087 was inaccurate or was calculated differently from the way it was calculated for every other Hyundai dealer. There is also no claim that either dealership's PMA was

inappropriately constructed. Moreover, sales efficiency is not a component of the vehicle allocation formula. TR711; TR930.

a. WC failed to reach 100% sales efficiency when there was sufficient inventory in 2009, 2014 and 2015.

In 2009, there was no inventory shortage, but both WC dealerships were less than 100% sales efficient. TR1174; PTX3; PTX4. HMA's inventory shortage began in 2011 and then ended in 2013. After that time, there were sufficient vehicles available to satisfy dealer demand. In July 2014, Mr. Zabihian told Mr. Hetrick that TX087 had "received the inventory in new Hyundai's [sic] to meet the demand." PTX89; TR322 (Mr. Zabihian confirming statement). Mr. Zabihian also told Larry Caudill, HMA's regional Market Representation Manager, in October 2014, that "inventory isn't a problem now" and that he could get anything he needed from Andrea Webb, HMA's District Manager. TR875. Yet, despite having sufficient inventory, TX087's sales efficiency for 2014 was only 31% ***of average*** (PTX45 (p. 111905)), which was dead last in its district. *Id.* (p. 111906). Similarly, even though TX077 had "enough inventory to meet all the demand" (TR475), its sales efficiency in 2014 was only 65.7% ***of average***. DTX44 (p. 111884). As shown above, sales efficiency at both WC stores was better in 2013 (when WC claims to have been inventory deficient) than in 2014 (when WC had "sufficient" inventory). *See also* TR560 (Mr. Willis stating sales efficiency was still low in 2015 despite more inventory).

While WC blames its poor sales efficiency on its lack of inventory, this explanation is false, and Judge Harvel saw through this argument. WC suffered from poor sales efficiency when inventory was abundant in 2009, 2014 and 2015. WC has reversed cause and effect. Its inventory was low because it made and reported sales slower than the average dealer in its region and because it failed to take advantage of brand loyalty and investment opportunities that would

have boosted its allocation entitlement (at least temporarily; WC would still have had to reverse its slow sales and reporting or the advantage such programs would have afforded would have quickly been lost).

4. HMA did not state that WC was in material breach of the DSSA because it failed to achieve 100% sales efficiency.

WC states that HMA considers a dealership to be in material breach of its franchise agreement if it is not 100% sales efficient. WC's Exceptions at 18. HMA did send TX087 a "Notice of Failure of Performance," dated July 10, 2013, based on the dealership's poor sales performance. PTX67. HMA cited multiple factors in concluding that WC was in breach of its DSSA. *Id.* HMA did not state, however, that being less than 100% sales efficient constitutes a material breach of the DSSA, because the DSSA includes no such requirement. *Compare id. with* DTX28; DTX30; PTX1. Moreover, the letter simply advised TX087 of its deficient sales performance and asked the dealership to "reassess" its commitment to Hyundai by either (1) pursuing a sale of its store or (2) providing a written plan to improve its performance. TX087 did not respond to the letter and took neither action. TR1124. Nevertheless, there is no evidence that HMA has taken any adverse action against TX087 as a result. TX087 remains a Hyundai dealer and has not received a notice of termination from HMA.

5. "Actual" sales efficiency is a misleading metric created by WC.

WC invents a standard, "actual sales efficiency," to show the "unreasonableness" of HMA's sales efficiency standards. WC's Exceptions at 18. WC concludes that HMA had two choices with its "unreasonable" sales efficiency standard: (1) provide more discretionary allocations to WC so that it had sufficient inventory to meet the standard; or (2) adjust the sales efficiency standard for WC. WC's Exceptions at 31.

As an initial matter, "actual sales efficiency" is WC's own creation that measures the difference between the amount of vehicles allocated to a dealer and the amount it sells. WC's Exceptions at 18.[10] HMA has been unable to identify any motor vehicle administrative agency that uses the formula advocated by WC, and WC certainly presented no evidence that any other agency uses this formula. Moreover, WC's math is backwards because HMA's system uses a methodology, which "replenishes" a dealer's inventory once a sale is reported. HMA does not stock a dealer based on anticipated sales, as WC's theory suggests.[11] Accordingly, it is misleading and meaningless for WC to say it was 94% sales efficient because it sold 267 of the 288 cars allocated. *Id.* at 19. Not surprisingly, WC's "actual sales efficiency" is not a recognized dealer metric, and WC cites no legal or expert authority that adopts, endorses or even acknowledges it as a standard. *Id.* at 18-19, 31.

Additionally, neither of WC's proposed "choices" for addressing its low sales efficiency numbers is reasonable. WC's first option is that HMA should have allocated a sufficient number of vehicles for WC to be 100% sales efficient. This argument misses the point. HMA's allocation algorithm, which WC is not challenging, distributes vehicles to dealers based on each dealer's actual inventory and 90-day sales history. The system is reasonable and not designed to allocate vehicles based on any specified sales target. Moreover, considering WC's decision to pull back its inventory and its low turn rate, providing additional discretionary allocations to WC would have increased WC's days' supply of vehicles, which in turn would have hurt WC's vehicle earning under the allocation formula.

[10] Notably, this is not a metric adopted or even mentioned by WC's expert, Joe Roesner.

[11] Thus, when WC argues a dealership should be allocated "at least as many vehicles as it is expected to sell" (WC's Exceptions at 1), its argument is founded on the mistaken assumption that HMA allocates vehicles based on anticipated sales rather than on its past sales, to replenish sold inventory. *See* PFD at 23 (FOF #10) (finding that formula allocations are based on vehicles sold by dealer in previous 90 days, not on expected future sales).

As for the second option, WC suggests that, in order to treat it "fairly," HMA had to devise a special sales efficiency metric for WC different from the one it uses for its other 830 Hyundai dealers. In other words, rather than using the same methodology for all Hyundai dealers, WC is claiming that an exception should be made in its case – *and that such discrimination is fair*. WC's Exceptions at 31. Needless to say, there is no justification for extending special treatment to a poorly performing dealer that has rejected legitimate means of improving its sales performance. WC did not present any proof that HMA's sales efficiency standard is unfair or unreasonable or has been applied to them in a discriminatory way, or that they have suffered any real-world harm from HMA's use of this well-accepted industry metric.

D. WC broke its 2003 promise to timely renovate its facilities at TX087, and when it finally renovated its facilities at TX077 in 2014, WC no longer needed extra inventory.

WC claims HMA broke its promise to provide WC with inventory when it renovated its facilities. WC's Exceptions at 20. However, as a matter of policy, HMA does not make "promises" regarding facility assistance until the dealer submits a formal request in writing. TR882-85, 893, 941-42, 1093-94, 1096 (no up-front money or commitments). In contravention of HMA's policy, WC demanded that it be treated differently from all other Hyundai dealers and that HMA provide the dealer with financial assistance up front without having to submit a formal request. PTX15, PTX17. In sharp contrast, with no upfront funds from HMA, RM completed ***two*** renovations to Hyundai-exclusive dealerships by 2012. TR882, 892-93, 977; DTX177 (p. 109983); DTX203 (p. 110774).

It was, in fact, WC that broke its promise. In 2003, WC advised HMA in writing that it was going to build a new facility for TX087 "within the next 2 years" to create an exclusive Hyundai dealership. DTX91. In the letter, WC sought HMA's permission to relocate its

Hyundai operations from its current location in San Antonio and "temporarily house Hyundai" at the relocation site, along with its existing Kia operations, "until the new [Hyundai] facility has been completed to our mutual agreement." *Id.* Twelve years later, WC had not even submitted the plans to do so. Likewise, TX077 needed a new facility for a long time. TX077's general manger (Mr. Willis) admitted that, by 2010, he realized that WC was losing sales because of the poor facility there. TR595-96. WC finally offered to build a new facility for TX077 in 2011 (TR284-286), but later changed its mind and decided to renovate the existing facility, which it did not complete until near the end of 2014. TR305; TR197. Of course, by 2014 the inventory shortage had ended, and WC advised HMA it had all the inventory it needed for both dealerships. PTX89; TR322 (Zabihian); TR875 (Caudill); TR475 (Kiolbassa). Thus, WC did not need any additional inventory by the time it completed renovating the facilities at TX077.

IV.
ARGUMENTS AND AUTHORITIES

A. Judge Harvel correctly concluded that WC failed to meet its burden of proof to show that HMA required WC to adhere to an unreasonable sales standard in violation of Section 2301.467(a)(1).

WC argues that Judge Harvel misapplied Section 2301.467(a)(1) by: (1) finding that maintaining 100% sales efficiency is not a requirement to be or remain a licensed Hyundai dealer; (2) finding that measuring sales efficiency does not require adherence to an unreasonable sales standard; and (3) concluding that WC failed to meet its burden under Section 2301.467(a)(1). *Compare* WC's Exceptions at 21-25 *with* PFD (FOF #50 and #52; COL #6). Judge Harvel got it right. She properly applied the statute and, based on the evidence, correctly found there was no violation. Sales efficiency is an industry-accepted metric for evaluating dealer performance. Moreover, HMA never required WC to be 100% sales efficient under either the parties' DSSAs or in practice.

1. Section 2301.467(a)(1) prohibits requiring adherence to an unreasonable sales standard.

Section 2301.467(a)(1) states a manufacturer or distributor may not "require adherence to unreasonable sales or service standards". TEX. OCC. CODE § 2301.467(a)(1) (emphasis added). The Legislature did not define "require" or "unreasonable" in Section 2301.467. *Id.* A matter is generally "required" when it is ordered or demanded as necessary. *See* PFD at 21, n. 71 (citing MERRIAM-WEBSTER DICTIONARY and *Black's Law Dictionary*). A matter is "unreasonable" if it is "arbitrary, capricious, without substantial cause or reason, or lacking a legitimate business justification." *Star Houston, Inc. v. Mercedes-Benz* USA, LLC, SOAH Docket No. 601-09-3665.LIC at 45 (June 13, 2014) (proposal for decision) (defining "unreasonable" in applying Section 2301.468). Sales efficiency is not an unreasonable standard. Moreover, even if it was an unreasonable standard, HMA did not require adherence to it.

2. Sales efficiency is not an unreasonable standard.

Sales efficiency has repeatedly been held to be a fair and reasonable way to measure dealer performance for the legitimate business purpose of determining whether a dealer is complying with its sales performance obligations. *See, e.g., Brown Motor Sales Co. v. Hyundai Motor America*, No. 09-06-MVDB-358-D (Ohio Motor Veh. Dealers Bd. Jan. 15, 2010) (finding HMA's use of sales efficiency metric fair and reasonable and upholding termination of a dealer whose efficiency was approximately 46.3% over a 5-1/2 year period), *aff'd*, No. 10CVF-02-2816 (Ohio Common Pleas, Franklin Co. July 2, 2010), *aff'd*, 2011 Ohio 5053 (Ohio Ct. App. Sept. 30, 2011); *Superior Pontiac Buick GMC, Inc. v. Nissan North America, Inc.*, 2012 WL 1079719 (E.D. Mich. Mar. 30, 2012) (upholding termination based on low sales efficiency); *Hampton Auto Group v. Nissan North America, Inc.*, No. HSMV-12-853-FOF-MS (Fla. DHSMV Oct. 24, 2012) (same); *In the Matter of Ralph Gentile, Inc. v. Nissan North America, Inc.*, No. TR-07-

0001 (Wis. Div. of Hearings and Appeals, Feb. 4, 2010) (same), *aff'd sub nom. Ralph Gentile, Inc. v. State of Wisconsin Div. of Hearings & Appeals*, No. 10-cv-1050 (Wis. Cir. Ct. Sept. 13, 2010), *aff'd*, 800 N.W.2d 555 (Wis. App. 2011); *In the Matter of Seacoast Imported Auto, Inc. d/b/a Nissan of Stratham*, No. 04-06 (N.H. Motor Veh. Ind. Bd. Apr. 12, 2010) (same), *aff'd, Seacoast Imported Auto, Inc. v. Nissan North America, Inc.*, No. 218-2010-CV-471 (N.H. Super. Ct. Nov. 29, 2010). Thus, while Judge Harvel correctly found that HMA never required WC to adhere to a 100% sales efficiency standard, even if she had, such an industry standard is certainly reasonable.[12]

3. HMA did not "require" WC to be 100% sales efficient – in the parties' DSSAs or in practice.

a. There is no contractual requirement of 100% sales efficiency.

As shown above in Section III(C)(2), neither the DSSAs, nor the Standard Provisions incorporated by reference therein, include any requirement that demands or orders dealers be 100% sales efficient. DTX28 (TX077 DSSA); DTX30 (TX087 DSSA); PTX1 (Standard Provisions). While Paragraph 10(E) of the Standard Provisions identifies sales efficiency as a criterion that can be considered in evaluating dealer performance, it does not state that a dealer must be 100% sales efficient. *Id.*; PFD at 21. Sales efficiency is just one of several ways that dealer performance is measured. PTX120, D. Zuchowski Dep., p. 172; TR1013 (Mr. Hetrick indicating customer service scores also used to evaluate dealer performance); *see* PTX1, ¶ 10(E) (listing factors used to measure performance).[13] Accordingly, there is no provision in the DSSA that requires WC to be 100% sales efficient.

[12] WC states Judge Harvel "did not find that this standard [sales efficiency] was not unreasonable, only that it was not required." WC's Exceptions at 25. In fact, the ALJ expressly found that "[m]easuring sales efficiency does not require adherence to unreasonable sales or service standards." PFD at 27 (FOF #52).

[13] Among other factors HMA considered is customer service satisfaction. PTX1, § 11(D) ("Evaluation of Dealer's Service..."); TR1013 (Hetrick). From 2010 to the first quarter of 2014, TX077 was below average on its Hyundai Purchase Index ("HPI"), that measures customer satisfaction in the purchasing process, for 16 of 17 quarters.

WC contends Judge Harvel misapplied Section 2301.467 by limiting the inquiry to whether there was an express requirement of 100% sales efficiency in the DSSAs. WC's Exceptions at 21-22. WC accuses the ALJ of improperly narrowing her focus to just the language contained in the DSSAs. However, Judge Harvel is considering the DSSAs' provisions only because of WC's allegations. WC argues that HMA violated the statute because HMA required WC to be 100% sales efficient "to avoid a material breach of the dealer agreement." *Id.* at 21 (emphasis added); *id.* at 23 (stating HMA requires 100% sales efficiency to comply with the contractual responsibilities). Because WC is basing its claim on whether 100% sales efficiency is required to avoid a material breach of the parties' DSSAs, then the ALJ has to consider the DSSA's terms. Put differently, World Car's own theory of liability requires the ALJ to determine whether the DSSAs require 100% sales efficiency. Judge Harvel correctly found that there is no such requirement in the DSSAs. PFD at 21. Moreover, the ALJ did not limit her findings to just the terms of the DSSAs. Judge Harvel found that "[m]aintaining 100% sales efficiency is not a requirement to be or remain a licensed Hyundai dealer" (PFD at 26, FOF #50), and this finding is supported by the evidence.

b. There is no other requirement of 100% sales efficiency.

HMA never required WC to be 100% sales efficient. Certainly, 100% sales efficiency is not a *per se* requirement to keep a dealership. Neither TX077 nor TX087 have been 100% efficient since 2009, but HMA has not terminated, nor threatened to terminate, either DSSA. *See* Section III(C)(3), *supra* (sales efficiency history); PFD at 26 (FOF #50 and #51). Again, 100% sales efficiency represents an average, so there will often be dealers above and below this level.

DTX55. TX087 was below average for 14 of 17 quarters. *Id.* TX077 was below average on its Hyundai Service Index ("HSI"), that measures customer satisfaction with a dealer's service department, for all 17 quarters during the same period. *Id.*; *see* TR456-58 (Mr. Kiolbassa acknowledging WC's below average customer service scores).

Moreover, Mr. Hetrick recommended a renewal of TX087's DSSA in 2010 despite its below average sales efficiency of 42% at the time. DTX41; TR261-62.

One hundred percent sales efficiency is also not a requirement for vehicle allocations. Sales efficiency is not considered in the formula allocations that account for at least 85% of all allocations. TR711; TR930. As for discretionary and manual allocations, TX077 and TX087 continued to receive such allocations from 2009 to 2013 even though neither was 100% efficient during this period. *Compare* PTX81 (summary of allocations) *with* TR1174; PTX3; PTX4 (sales efficiency history). WC's own expert confirmed that neither WC nor any other dealer had to be 100% efficient in order to receive vehicles. TR712-13. WC states that HMA "chooses not to provide additional inventory to dealerships who are below 100% sales efficiency." WC's Exceptions at 18. This assertion is false. In addition to providing TX077 and TX087 with discretionary allocations despite being less than 100% efficient, HMA provided discretionary allocations to other dealers in the region that did not reach this level.[14]

Finally, 100% sales efficiency is not required to obtain co-op advertising funds. TX077 and TX087 received co-op funds from 2009 through 2014, despite neither being 100% efficient. *Compare* DTX54 (summary of co-op payments) *with* TR1174; PTX3; PTX4 (sales efficiency history).

c. The evidence WC cites does not support its argument.

Misstating Tom Hetrick's testimony – three times – WC contends that HMA required dealers to be 100% sales efficient "in order to receive a larger share of discretionary inventory

[14] *Compare* DTX154 (p. 110022) *with* DTX99 (showing Frank Smith Hyundai in McAllen (TX027) receiving discretionary allocations in 2011 while being only 73% efficient for the year). *Compare* DTX160 (p. 110320) *with* DTX99 (showing Champion Hyundai in Corpus Christi (TX081) receiving discretionary allocations in 2011 while not being 100% sales efficient). DTX154 and DTX160 were not discussed during the hearing, but the parties agreed they would be pre-admitted into the record. *See* Joint List of Final Hearing Exhibits Pre-Admitted by Agreement of the Parties.

than it otherwise would." WC's Exceptions at 24; *see also id.* at 18, 25. However, as HMA previously noted, Mr. Hetrick did not state this. Instead he stated:

> Q. Okay. Now, let's see if I understand part of this. You chose to use your discretion to reward dealers who meet sales efficiency targets, right?
>
> A. Some.
>
> Q. And those who don't, you don't reward?
>
> A. Not necessarily.

TR1114 (emphasis added). Mr. Hetrick never testified that 100% sales efficiency was a requirement to get additional discretionary allocations.

WC's other evidence is also lacking. WC quotes Mr. Hetrick's testimony that sales efficiency is a metric that HMA considers to determine if a dealer is complying with its dealer agreement, but he never stated that a dealer is required to be 100% sales efficient to comply with its DSSA. TR1013. The "cure" letter that Mr. Hetrick sent to TX087 (PTX67) also includes no such requirement. While Mr. Hetrick noted TX087's extremely low sale efficiency performance, he never stated that WC was required to be 100% sales efficient. PTX67. Similarly, none of the remaining evidence cited by WC states that it is required to be 100% sales efficient.[15]

Since HMA did not require WC to adhere to 100% sales efficiency as a sales standard, there can be no violation of Section 2301.467(a)(1).

4. The allocation system does not make the sales efficiency metric unreasonable.

WC contends that HMA's use of the sales efficiency metric was unreasonable because HMA did not allocate WC enough cars to be 100% sales efficient. WC's Exceptions at 24. According to WC, the allocation system must provide sufficient inventory to allow a dealer to be 100% sales efficient. But this agreement fundamentally misunderstands the allocation system.

[15] *See* WC's Exceptions at 25 (citing PTX3, PTX4, PTX81, PTX120 (Zuchowski Dep. at 243-45), TR113 (Zabihian) and TR423-25 (Kiolbassa).

Formula allocations, which comprise the majority of allocations, are based on ***historical sales***, not ***projected sales***. TR817, TR827. WC lacked inventory to be 100% sales efficient because of its own actions, including its decision to pull back on inventory in 2009. *Id.* *See* Section III(A)(3)(a), *supra*.

WC essentially argues the allocation system should be designed to give each dealer the number of vehicles it needs to achieve an average sales performance. Any such formula would be harmful to HMA, its dealers and its customers. It would deprive strong sales performers of vehicles that they have demonstrated they can sell (and which their customers are demanding) while providing additional vehicles to poorly-performing dealers which they cannot sell and which would sit on their lots (and cause them to incur substantial interest on their floor plans).

As the undisputed evidence demonstrated, HMA's allocation formula is similar to that used by other manufacturers and is designed so that all Hyundai dealers are offered, based on their own rate of sales, sufficient vehicles to "even out" their days' supply of vehicles. WC did not present any evidence that any manufacturer allocates vehicles in the manner they now suggest, because no manufacturer does. Any such system would be unfair and unreasonable because it would deprive dealers of vehicles that they have earned and it would create a mismatch between supply and demand.

a. WC had poor sales efficiency even after the inventory shortage ended.

WC argues that 100% sales efficiency was an unreasonable standard, as applied to it during the time of short supply, because HMA did not supply WC with enough inventory to reach that level, even if it sold all its inventory. WC's Exceptions at 24. Again, WC's argument wrongly presumes that HMA allocates vehicles based on anticipated sales rather than historical sales. Moreover, WC overlooks the fact that even when it had sufficient inventory – both before

and after the shortage – it still was not 100% sales efficient. Lack of inventory does not explain WC's poor sales performance. In 2009, there was no shortage of inventory (and WC actually reduced its inventory), but both its dealerships were less than 100% sales efficient. *See* Section III(C)(3)(a), *supra*. After the nationwide short supply situation ended in 2013, there were sufficient vehicles available to satisfy dealer demand. In July 2014, Mr. Zabihian advised Mr. Hetrick that TX087 had "received the inventory in new Hyundais to meet the demand." PTX89; TR322 (Mr. Zabihian confirming statement). Yet, despite having sufficient inventory, TX087's sales efficiency for 2014 was only 31%. PTX45 (p. 111905). By its own admission, TX087 had sufficient inventory in 2014 but it was last in the district for sales efficiency. *Id.* (p. 111906). Similarly, Mr. Willis admitted that TX077 had sufficient inventory in 2014. TR474. But in 2014, TX077's sales efficiency was only 65.7%. DTX44 (p. 111884); *see also* TR560 (Mr. Willis conceding sales efficiency went down in 2015 despite more inventory). Thus, the evidence demonstrates that even when WC has had plenty of inventory; it still has been far below 100% sales efficient.

Judge Harvel correctly found and concluded that HMA did not require WC to adhere to any unreasonable sales standards, and the Board should reject WC's request to modify the PFD.

B. Judge Harvel correctly concluded that WC failed to meet its burden of proof to show that HMA unreasonably discriminated against WC, in allocating vehicles, in violation of Section 2301.468(2)(2003).

WC contends that HMA unreasonably discriminated against it, through allocations of discretionary inventory, in violation of Section 2301.468(2) (2003). WC's Exceptions at 25-26. WC argues Judge Harvel misapplied the concept of "unreasonable discrimination" under that statute. *Id.* at 26. WC argument fails for multiple reasons. First, WC never pleaded a violation of Section 2301.468(2) (2003); it pleaded a violation of a later, inapplicable version of the statute

with a different standard. Second, even if WC had pleaded the correct statute, it only prohibits unreasonable discrimination, "in the sale of a motor vehicle" owned by the distributor and does not apply to vehicle allocations. Finally, even if vehicle allocations are covered by the statute, there was no unreasonable discrimination by HMA.

1. WC never pleaded a violation of the applicable statute – Section 2301.468(2) (2003).

The current version of Section 2301.468, titled "Inequitable Treatment of Dealers or Franchisees," prohibits manufacturers and distributors from treating dealers "unfairly or inequitably in the sale of a motor vehicle owned by the manufacturer or distributor." TEX. OCC. CODE § 2301.468 (2011) (emphasis added). This statute only applies to agreements entered or renewed after September 1, 2011. *See* 2011 Tex. Sess. Law Serv. Ch. 137 (S.B. 529), § 16 ("An agreement entered into or renewed before the effective date of this Act is governed by the law in effect on the date of the agreement was entered into or renewed, and the former law is continued in effect for that purpose."). The parties executed the DSSAs before September 1, 2011. DTX28; DTX30. Accordingly, this case is governed by the prior (2003) version of the statute, titled "Discrimination among Dealers or Franchisees," that states:

> A manufacturer, distributor, or representative may not: (1) notwithstanding the terms of any franchise, directly or indirectly discriminate against a franchised dealer or otherwise treat franchised dealers differently as a result of a formula or other computation or process intended to gauge the performance of a dealership; or (2) discriminate unreasonably between or among franchisees in the sale of a motor vehicle owned by the manufacturer or distributor.

TEX. OCC. CODE § 2301.468 (2003) (emphasis added).

WC did not plead a violation of the 2003 statute. In its Original, First Amended and Second Amended Complaints, WC asserted the same "Count 2 – Unfair and Inequitable Treatment" and alleged that HMA violated Section 2301.468 (2011) by providing WC "unfair

and inequitable vehicle inventory allocations . . . ." WC's Second Amended Complaint, ¶ 36. WC never alleged that HMA violated Section 2301.468 (2003) by unreasonably discriminating against a dealer in the sale of a motor vehicle. *Id.*[16] Judge Harvel, however, gave WC the benefit of the doubt. She correctly concluded that the 2003 statute applied (PFD at 2, n. 2) but then analyzed WC's claims as if it had actually pleaded a violation of that statute (which it had not). *Id.* at 13-14. However, Judge Harvel could have simply rejected WC's Section 2301.468 claim as a matter of law because WC only asserted a claim under the inapplicable 2011 statute.

2. Section 2301.468(2) (2003) is limited to "unreasonable discrimination" "in the sale of a motor vehicle" owned by a distributor and, thus, does not apply to allocations of vehicles.

WC contends HMA violated Section 2301.468(2) (2003) "because it unreasonably discriminated against [WC] in allocations of vehicle inventory . . . ." WC's Exceptions at 25 (emphasis added). But the scope of Section 2301.468(2) is limited. The statute does not govern all aspects of the relationship between automobile distributors and dealers. Rather, the narrowly-tailored provision states a distributor may not "discriminate unreasonably between or among franchisees in the sale of a motor vehicle owned by the manufacturer or distributor." TEX. OCC. CODE § 2301.468(2) (2003) (emphasis added). The "in the sale of a motor vehicle" clause in Section 2301.468(2) has been interpreted to relate to whether dealers pay the same wholesale price for vehicles. *See Star* at 44 ("any alleged discrimination would not involve the sale of a motor vehicle at the wholesale level … because all dealerships pay MBUSA the same invoice price paid by every other dealer for the same model configuration."). Accordingly, in order to constitute a violation of Section 2301.468(2) (2003), the alleged unreasonable discrimination

[16] WC never sought a post-hearing, pleading amendment to allege a violation of the 2003 statute, and the applicable rules preclude such an amendment now absent agreement of all parties. 1 TEX. ADMIN. CODE § 155.301(b).

must occur in the sale – not in the allocation – of a vehicle by the manufacturer/distributor to the dealer.

Allocating vehicles and selling vehicles are not the same thing. The allocation process merely determines the number of vehicles a dealer is offered by a distributor; an allocation does not mandate a purchase by a dealer or necessarily involve a sale by the manufacturer or distributor to the dealer. Just because HMA allocated a vehicle to a dealer, that did not mean that the vehicle was actually bought by the dealer or sold by HMA. Mr. Zabihian testified that he chose to reduce his inventory, at both dealerships, in 2009 by buying fewer cars in 2009. *See* TR225, 228 (Mr. Zabihian stating he chose to purchase fewer vehicles in 2009 and that it was better for him but not for HMA). This continued into the first half of 2010, when WC turned down (*i.e.*, chose not to purchase) over 200 vehicles that HMA allocated to WC. DTX47. Alleged "unreasonable discrimination" in allocating vehicles does not satisfy the requirements of the statute that the discrimination occur "in the sale of a vehicle."[17] "Allocating" and "selling" vehicles are not synonymous. Section 2301.468(2) is inapplicable to WC's claims.

Judge Harvel could have rejected WC's unreasonable discrimination claim as a matter of law because Section 2301.468(2) (2003) only prohibits unreasonable discrimination in the sale of vehicles not in the allocation of vehicles. Instead, Judge Harvel gave WC the benefit of the doubt that the statute applies to WC's claim. She then examined the evidence and found that WC failed to carry its burden, even assuming it could assert a claim under the statute based on allocations rather than sales.

[17] Discrimination in the "sale of a vehicle" could, for example, occur if a vehicle were sold to one dealer at a price different from the sale of an identical vehicle to another dealer. There is no evidence in this case that any such discrimination ever occurred.

3. There was no evidence of unreasonable discrimination, and there were legitimate business reasons for providing more discretionary allocations to RM.

Under Section 2301.468(2) (2003), discrimination is "unreasonable" when it is arbitrary, capricious, without substantial cause or reason, or lacking a legitimate business justification." *Star* at 44-45 (citing *Burlington N. & Santa Fe Ry. Co. v. S. Plains Switching, Ltd. Co.*, 174 S.W.3d 349, 352-54 (Tex. App.—Fort Worth 2005, no writ) and *Buddy Gregg Motor Homes, Inc. v. Marathon Coach, Inc.*, 320 S.W.3d 912, 924 (Tex. App.—Austin 2010, no pet.)). With respect to discretionary and manual allocations, there was no unreasonable discrimination against WC. The evidence showed that, from 2008 to 2013, TX077 and TX087 received discretionary and manual allocations. DTX128; DTX131. In some years, WC received a greater percentage of discretionary allocations than RM, and in some years WC received less. *Id.* TX087 received no discretionary allocations in 2013. DTX131. However, it was not uncommon for other dealers not to receive discretionary allocations during this period. *E.g.*, DTX128; DTX130 and DTX131.

Again, as discussed above in Section III(A)(5), RM received more discretionary allocations because of the numerous steps it took to show brand commitment to Hyundai – steps that WC did not take during the same period. TX016 became an exclusive Hyundai dealer in 2010. TX127 took on the Equus luxury line that required additional facility upgrades. Both TX016 and TX127 renovated their facilities in 2011 and 2012, and both participated in Hyundai's service loaner program. *See generally* Section III(A)(5). WC did not take comparable actions. TX087 remained (and still is) a dual dealership, and it has not renovated its facility. TX077 did not complete its renovations until 2014, after many delays, and by which time the inventory shortage had ended. Further, WC did not participate in Hyundai's service

loaner program. *Id.* WC simply did not demonstrate brand commitment during the inventory shortage as RM did. Judge Harvel correctly ruled that HMA's decision to allocate more discretionary vehicles to RM, compared to WC, had a legitimate basis and was not unreasonable. Accordingly, the Board should reject WC's request to modify the PFD.

C. Judge Harvel correctly concluded that WC failed to meet its burden of proof to show that HMA breached its duty of good faith and fair dealing in violation of Section 2301.478.

WC re-urges its allegations about discretionary vehicle allocation and sales efficiency, under Section 2301.468 and 2301.467, respectively, and argues that these allegations also constitute a breach of the duty of good faith and fair dealing under Section 2301.478. WC's Exceptions at 30. WC vaguely maintains Judge Harvel misapplied Section 2301.478. WC's arguments fail because there was no violation of the statute – even applying WC's improper standard for the duty of good faith and fair dealing. Moreover, applying the correct standard, there was no evidence that HMA consciously committed a wrong for a dishonest, discriminatory or malicious purpose.

1. WC applies the wrong standard.

Section 2301.478 states: "Each party to a franchise owes to the other party a duty of good faith and fair dealing that is actionable in tort." TEX. OCC. CODE § 2301.478(b). The statute lists no specific acts that constitute a violation of the statutory duty of good faith and fair dealing. *Id.* WC contends that the statutory duty "requires parties to deal fairly with one another." WC's Exceptions at 30, n. 5. However, this is not the standard the Board has adopted.

In *Bray v. Tejas Toyota, Inc.*, 363 S.W.3d 777, 780 (Tex. App.—Austin 2012, no pet.), a dealer accused a distributor of violating Section 2301.478(b) by requiring the dealer to be 100%

sales efficient. The ALJ rejected the dealer's claim for breach of good faith and fair dealing, and the Board accepted that recommendation.

> The ALJ rejected Tejas' claim that Gulf States violated the statutory duty of good faith and fair dealing on the ground that there was insufficient evidence that Gulf States engaged in "conscious doing of a wrong for a dishonest, discriminatory or malicious purpose."
>
> The Division adopted the ALJ's recommendation regarding disposition of the good faith and fair dealing claim . . . .

Id. at 782 (emphasis added).[18] Thus, the Board construed Section 2304.478 to require a conscious doing of a wrong for a dishonest, discriminatory or malicious purpose. *Id.*

A mere violation of a contract term or careless business practices does not constitute a violation of Section 2301.478. It is only when a party engages in intentional conduct – the conscious doing of a wrong for dishonest, discriminatory or malicious purposes – that liability will be found under that section. It is a two-part standard that requires: (1) the existence of a wrong; (2) that is consciously done for a dishonest, discriminatory or malicious purpose. If the activity complained of is not itself wrong, then there can be no "conscious doing" of a wrong.

In the PFD, Judge Harvel did not decide which standard applied. PFD at 22. Rather, the ALJ gave WC the benefit of the doubt – once again – and determined that even under WC's liberal interpretation of the statute, WC still failed to meet its burden of proof. There was no evidence that WC breached its statutory duty in either its allocation of discretionary vehicles or in its use of sales efficiency to measure dealer performance.

2. HMA did not violate Section 2301.478(b) through allocations of discretionary vehicle inventory.

WC is unable to establish a violation of Section 2301.478(b) because HMA did nothing wrong with respect to its allocations as previously shown. *See* Section IV(B)(3), *supra*. HMA

[18] The dealer challenged this standard on appeal, but the court found the argument was waived. *Id.* at 787.

did not unreasonably discriminate against WC in the sale of a motor vehicle owned by HMA under any version of Section 2301.468. HMA used discretionary allocations to incentivize dealers into taking actions that enhanced the Hyundai brand including renovating facilities, becoming exclusive Hyundai dealers, adding the Equus line and participating in HMA's service loaner program. *See* Section III(A)(5), *supra*; PFD at 21-22; 27-28 (COL # 9).[19] In short, WC did nothing wrong with regard to allocating discretionary vehicles.

WC argues HMA violated Section 2301.478(b) because it did not use its "best efforts" to provide WC with inventory. WC's Exceptions at 30. This is a reference to Paragraph 10(A)(1) of the Standard Provisions that states "HMA will use its best efforts to provide Hyundai products to DEALER subject to available supply . . . ." PTX1, ¶ 10(A)(1). WC maintains that the statute aims to effectuate the parties' agreement and, that because HMA did not use its best efforts in supplying discretionary vehicles, HMA violated the statute. WC Post-Hearing Brief at 46. In short, WC argues that the DSSAs should be enforced as written and the failure to do so amounts to a statutory violation. WC fails to note, however, that the same provision also states that when there is a short supply of inventory, as there was from 2011 through 2013, the parties agree that HMA will endeavor to allocate inventory in a "fair and reasonable manner" as HMA "may determine in its sole discretion." PTX1, ¶ 10(A)(1).

3. HMA did not violate Section 2301.478(b) by using sales efficiency as a dealer metric.

WC is also unable to establish an underlying wrong to support its claim that HMA's use of sales efficiency amounts to a breach of the duty of good faith and fair dealing. HMA did nothing wrong by using sales efficiency as a metric for dealer performance. *See* Section IV(A),

[19] WC again argues HMA broke its "promise" to provide WC with additional inventory upon completing renovations at TX077. HMA made no such promise and, even if it had, by the time WC completed its renovations in 2014, the inventory shortage was over and WC admittedly had all the inventory it needed. *See* Section III(D), *supra*.

supra; PFD at 21-22; 27-28 (COL # 9). Sales efficiency is a standard industry metric for evaluating dealer performance. It is determined the same way for all dealers based on objective data. It is not wrong to use such a metric nor does using it amount to a conscious doing of a wrong for a dishonest, discriminatory or malicious purpose. *Bray* confirms this. In *Bray*, the ALJ rejected the dealer's complaint that a requirement of 100% sales efficiency violated Section 2301.478(b). *Bray,* 363 S.W.3d at 786. The Board agreed with this decision. *Id.* Here, HMA never required WC to be 100% sales efficient. *See* Section III(C), *supra*. *Bray* demonstrates that HMA's use of a standard industry metric to measure sales performance cannot be a breach of the duty of good faith and fair dealing.

4. There is no evidence that HMA consciously engaged in any conduct for a dishonest, discriminatory or malicious purpose.

Under the Board-adopted construction of "good faith and fair dealing," WC is unable to satisfy the second requirement for Section 2301.478(b) claim. WC sought to demonstrate malicious and dishonest intent through extraneous and irrelevant evidence. Failing to respond to a dealer letter, referring to a dealer letter as "fan mail," and merely offering to assist a dealer in finding a potential buyer does not demonstrate that HMA acted for a dishonest, discriminatory or malicious purpose.[20] In fact, the evidence established the opposite. HMA did not engage in any policy or practices to discriminate or harm WC. TR988-89. Mr. Hetrick testified that he dealt fairly with WC and that it was in his best interests to do so.

> Q. I want you to tell Judge Harvel why you believe it's in Tom Hetrick and HMA's best interest to see that Mr. Zabihian fails as a dealership.
>
> A. There is no best interest for Hyundai to have a dealer fail. It doesn't matter if it's World Car or any other dealership. A failure is a failure.

[20] WC ignores the fact that Mr. Zabihian failed to respond to several letters from HMA. TR301.

Q. If Mr. Zabihian and Mr. Deltang and his dealerships fail, do you, as the regional general manager, fail?

A. Absolutely. I'm judged on dealerships that are struggling.

TR989-90. HMA did not engage in any conscious wrongdoing against WC for dishonest, discriminatory or malicious purpose. Accordingly, WC cannot prevail on its Section 2301.478 claim, and the Board should reject WC's request to modify the PFD.

V.
CONCLUSION

For all the reasons set forth above, Hyundai Motor America respectfully requests the Board overrule World Car's exceptions to the Proposal for Decision, and that it accept and adopt Judge Harvel's Proposal for Decision as its final ruling in this matter.

Respectfully submitted,

/s/ Kevin M. Young
David M. Prichard
State Bar No. 16317900
Direct Line: (210) 477-7401
E-mail: dprichard@phy-law.com

Kevin M. Young
State Bar No. 22199700
Direct Line: (210) 477-7404
Email: kyoung@phy-law.com

PRICHARD HAWKINS & YOUNG
Union Square, Suite 600
10101 Reunion Place
San Antonio, Texas 78216
(210) 477-7400 – Telephone
(210) 477-7450 – Facsimile

ATTORNEYS FOR RESPONDENT, HYUNDAI MOTOR AMERICA

CERTIFICATE OF SERVICE

I hereby certify that ***Hyundai Motor America's Reply to World Car Hyundai's Exceptions to Proposal for Decision*** has been forwarded to all counsel of record, via email, on this **9th day** of **May 2016.**

Dan Downey
DAN DOWNEY, P.C.
1609 Shoal Creek Blvd., Suite 100
Austin, Texas 78701
dan@dandowney.com

Lee L. Kaplan
Jarod R. Stewart
SMYSER KAPLAN & VESELKA, LLP
700 Louisiana, Suite 2300
Houston, Texas 77002
lkaplan@skv.com
jstewart@skv.com

/s/ Kevin M. Young
Kevin M. Young

TEXAS DEPARTMENT OF MOTOR VEHICLES
MOTOR VEHICLE DIVISION

NEW WORLD CAR NISSAN, INC., d/b/a WORLD CAR HYUNDAI, and NEW WORLD CAR IMPORTS, SAN ANTONIO, INC., d/b/a WORLD CAR HYUNDAI	§	
Complainants,	§	
v.	§	**SOAH DOCKET NO. 608-14-1208 LIC**
	§	**MVD DOCKET NO. 14-0006 LIC**
HYUNDAI MOTOR AMERICA, **Respondent.**	§	

WORLD CAR HYUNDAI'S REPLY IN SUPPORT OF EXCEPTIONS TO PROPOSAL FOR DECISION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

I. Introduction

HMA's reply contains numerous misstatements of fact that are critical to its position and the legal underpinnings of the ALJ's proposal for decision. The most egregious are addressed in Section II below.

HMA's position, and the PFD which supports its misconduct, would lead to adverse results for auto dealerships and for the public. If the Board accepts the PFD without modification, there will be no limits on what a distributor can do when setting sales standards and allocating vehicles, regardless of how the distributor's actions affect dealerships or consumers. Out of 48 pages of briefing (more than double the page limit[1]), HMA provided a single conclusory sentence addressing this point when it said—without any evidence or argument—that "adopting the ALJ's recommendations" will not "lead to widespread upheaval of manufacturer/dealer contractual relationships." Reply at 5. To the contrary, if a distributor like HMA can use sales efficiency as the measuring stick for dealerships' sales but then claim that adherence to that standard is somehow not "required," then Section 2301.467 of the Occupations Code will be gutted. If a distributor like HMA can allocate vehicles on a discretionary basis to favor one dealership over another by a huge margin, but not be considered "unreasonably discriminating" as long as the distributor comes up with any reason for the discrimination (no matter how pretextual), then Section 2301.468 of the Code will also be meaningless.

Accepting the PFD would also harm the consuming public because when a manufacturer or distributor is allowed to favor one out of two dealerships in the same market with significantly more inventory, that leads to (1) fewer choices for consumers (who have to drive farther to see the cars they want) and (2) decreased competition on price.

---

[1] *See* Tex. Admin. Code § 215.57(a) (replies to exceptions are limited to three-fourths of the total number of pages of the proposal for decision).

HMA argues–without explanation, let alone citation—that this is "not a case of first impression." Then where is the precedent allowing a distributor to require 100% sales efficiency when the dealership has not been allocated sufficient inventory to meet that standard? What case says that it is acceptable for a distributor to favor one dealership over another similarly-situated dealership in the same market with triple the discretionary allocations? HMA cannot identify such a case because these statutory concepts of "unreasonable sales standard" and "unreasonable discrimination" have not been specifically reviewed in Texas. As a result, the Board's decision in this case will set a standard, good or bad, that will apply to future cases involving the relationship between manufacturer/distributor and dealership. The standard that the Board promulgates should not be that a manufacturer or distributor can do whatever it pleases, just so long as it comes up with any justification for its actions when they are challenged. The Board should reject the PFD and adopt a standard that maintains the competitive balance between distributor and dealer by holding that discriminatory, unfair conduct like HMA's is not reasonable or acceptable under Texas law. A proposed Final Order is attached.

II. Factual Background

HMA's brief relies on factual misstatements, addressed below.

A. World Car Hyundai did not "pull back" on inventory any more than Red McCombs did—both had similar inventory levels when Hetrick became HMA's Regional General Manager in June 2010.

HMA argues that World Car Hyundai "actively reduced its inventory in 2009 and 2010, placing itself at a disadvantage when demand for Hyundai products spiked." Reply, at 18. Although HMA is wrong, if HMA were correct then this exact same argument would apply to Red McCombs, which significantly reduced its inventory in 2009 and turned down more cars

than World Car Hyundai in 2010.[2] But Red McCombs was not disadvantaged on inventory because Hetrick gave Red McCombs multiple "boosts" of vehicles that allowed Red McCombs to double its inventory in the second half of 2010, right when the demand for Hyundais was beginning to spike.

First, Red McCombs "pulled back substantially" on inventory because Red McCombs closed down an entire Hyundai dealership in 2009. Tr. at 726 (Roesner). By closing one of its three Hyundai dealerships, Red McCombs did not have "the inventory and fixed expenses and all the economic costs associated with three dealerships" but could instead "serve the same market with two dealerships." *Id.*; *see also* Tr. at 95 (Zabihian). Red McCombs was able to "cut back to save costs" because it did not have to buy inventory for that third store any longer.

Second, Red McCombs turned down almost three times as many vehicles as World Car Hyundai did between January and June 2010. During that time period, when inventory levels were fairly similar at all four Hyundai dealerships in San Antonio, the Red McCombs stores turned down a total of 598 vehicles while the World Car stores turned down a total of 205 vehicles. DTX 46, 47. Who pulled back more?

Third, and most important, World Car and Red McCombs had similar inventory levels when Hetrick started as Regional General Manager in mid-2010. Tr. at 80-81 (Zabihian). As of

[2] World Car Hyundai did not "actively reduce its inventory." To the contrary, sales at the South store dropped from 2008 to 2009, resulting in lower inventory, because during that time period Toyota sales in World Car's Primary Market Area ("PMA") exploded from 404 to 2,028 cars. PTX 4; Tr. at 438 (Kiolbassa). Toyota had built a manufacturing plant inside World Car's PMA and began pumping in money, advertising, and support to boost Toyota sales in that area of San Antonio. Tr. at 439-42 (Kiolbassa). HMA recognized that this was a real and unique challenge for World Car Hyundai South to be competing directly against big money and support from Toyota, as opposed to just another dealership ("the Toyota challenge"). Tr. at 997-98 (Hetrick). Yet HMA did nothing to assist World Car Hyundai South in maintaining its sales levels or market share in its PMA, let alone something similar to Toyota, despite repeated pleas from World Car. Tr. at 442 (Kiolbassa).

July 21-22, 2010, the World Car stores had a total of 200 cars available while the Red McCombs stores had a total of 240 cars available. Tr. at 1046-47 (Hetrick); *id.* at 643 (Roesner); PTX 18; DTX 175; DTX 181; DTX 188. All four dealerships were low on inventory and all four dealerships were asking for additional inventory. *See, e.g.*, Tr. at 1033-34, 1037, 1046 (Hetrick). They were very similarly situated as of June 2010.

B. Hetrick did not assist World Car Hyundai, instead favoring Red McCombs with disproportionate allocations even though the dealerships were similarly-situated.

HMA asserts that when World Car declined Hetrick's invitation to sell their dealerships in late 2010, it became Hetrick's "goal" to "see the dealerships succeed." Reply, at 27. The objective record directly contradicts that.

Hetrick did not assist World Car Hyundai; instead, he ignored World Car's repeated requests to buy more inventory from HMA. The evidence in the record shows constant and repeated, but unanswered, requests for more inventory. *See* PTX 122; *see also* Tr. at 171-77, 180, 360 (Zabihian); PTX 44; PTX 51; PTX 52; Tr. at 498-99, 548 (Willis); PTX 13; PTX 22. Hetrick did not respond to these requests and did not provide any "boosts" in inventory to World Car Hyundai. *Id.; see also* Tr. at 516 (Willis) ("I wouldn't classify that one or two cars as a boost of inventory."); Tr. at 652-53, 669 (Roesner) (did not see boosts like those provided to Red McCombs).

Hetrick conceded that between 2010 and 2013 the World Car Hyundai South store was the one that "most needed to break the cycle," but he admitted that he did not do anything about it. *See* Tr. at 1076 (Hetrick). Hetrick abandoned the World Car Hyundai South store because he thought they should get out of the Hyundai business. *See* Tr. at 1080 (Hetrick) (he did not help World Car South because it had a "better opportunity with the other brand to continue on" i.e. Kia); *id.* at 1101 (Hetrick) ("didn't feel there was any need to help them break the cycle at World

Car" at that time); *id.* at 1110 (Hetrick) (thought that World Car was "deliberately selling Kias" and "not selling Hyundais" in order to "spite" him).

Instead, Hetrick favored the Red McCombs dealerships with extra inventory that allowed those dealerships to increase their sales and get into a better inventory cycle. *See* PTX 21 (extra cars provided to Red McCombs so that it could grow its inventory and increase its sales). Hetrick's discretionary boosts in inventory to Red McCombs Hyundai did not stop after he helped McCombs double their inventory in 2010, but continued throughout 2011, 2012, and most of 2013. *See* PTX 126; *see also* PTX 109-110; Tr. at 1102 (Hetrick). Curiously, even though the McCombs stores already had more inventory than the World Car stores, HMA starved the World Car stores and gave their closest competitor, the McCombs stores, extra allocations—three times more. World Car Hyundai was not so lucky, and since its nearest competitor was getting the extra inventory, it was doubly prejudiced. PTX 120, Zuchowski Dep. at 171 (discretionary allocations to nearest competitor more harmful because competitor has more cars to sell in same market); *see also* Tr. at 681 (Roesner) (same).

C. HMA's "brand commitment" argument is groundless—World Car Hyundai was and has always been committed to the Hyundai brand.

HMA asserts that the disproportionate allocations to Red McCombs were justified because Red McCombs showed more "brand commitment" than World Car. Even if this were true, which it is not, HMA did not explain or provide a policy back in the real time that said "brand commitment" would get a dealership more inventory.

The objective record directly refutes HMA's claim. Red McCombs did not demonstrate commitment to the brand—it closed down an entire Hyundai dealership in 2009. Tr. at 63 (Zabihian). Hetrick conceded that the closure of this Red McCombs dealership was a "blow to Hyundai" that made Hetrick question Red McCombs' commitment to the Hyundai brand and

become afraid that McCombs would give up the other two Hyundai dealerships, which would be a further blow to HMA and to Hetrick in his new role as Regional GM. *See id.* at 1005-06 (Hetrick). The disproportionate favorable treatment by Hetrick happened because HMA feared losing more McCombs dealerships, not because of some alleged "brand commitment."

World Car Hyundai demonstrated its commitment to the Hyundai brand in many ways, including for example (1) continually asking to buy more inventory from Hyundai, PTX 22, PTX 28, PTX 44, PTX 45, PTX 51, PTX 52, PTX 77, Tr. at 172-74 (Zabihian), *id.* at 498-99 (Willis); (2) spending millions of dollars on advertising of Hyundai products and outspending Red McCombs on advertising by a 3-1 margin, even during the recession and even when HMA did not allocate sufficient inventory, PTX 104, Tr. at 414-15, 434 (Kiolbassa); (3) buying 11 acres of land next to a Wal-Mart for the purpose of building an exclusive Hyundai facility (which HMA rejected), Tr. at 127-28 (Zabihian); and (4) floorplanning its vehicles with Hyundai Motor Finance Company, resulting in an extra $500,000 per year in interest that World Car paid to Hyundai, Tr. at 174-76 (Zabihian). These are objective facts that directly contradict HMA's assertions. Not only that, they show a commitment to the consuming public that HMA disdained in order to drive a dealer out of business.

Despite all this, HMA argues that World Car was not "committed" to Hyundai because it did not participate in Hyundai's service loaner program. World Car did not participate in that program because (1) it did not have sufficient inventory to devote to "true" service loaners, and (2) HMA's service loaner program deceives the public by prematurely starting the customer's warranty on a vehicle. Tr. at 376-83 (Zabihian); *id.* at 534-35 (Willis); PTX 118, McLean Dep. at 34-35, 61-63. World Car refused to participate in a program that effectively cheated

customers out of a portion of the warranty advertised by HMA. *See* Tr. at 531-35 (Willis); *id.* at 1067-70 (Hetrick); PTX 60.

D. World Car Hyundai could not have reported sales any faster because it did not want to engage in fraud or cheat customers out of warranty.

HMA contends that World Car Hyundai did not report its sales fast enough and that this negatively affected its inventory levels. Reply, at 16. However, World Car Hyundai could not have reported sales any faster unless it falsely or prematurely reported sales. Tr. at 366-370 (Kiolbassa); *id.* at 523-26, 585-86 (Willis); *see also* PTX 2. World Car declined to do this because that would be a violation of HMA's Rules and Regulations and it would also cheat the customer out of a portion of the warranty. Tr. at 105, 108 (Zabihian); *id.* at 1074-75 (Hetrick).

Although HMA rationalizes that a customer "presumably" would get a price discount on a vehicle that was prematurely reported as sold, HMA has no policy and does nothing to ensure that the dealership even discloses to the customer that a prematurely-reported vehicle has less than a full 10-year warranty remaining. Tr. at 1074-75 (Hetrick); PTX 120, Zuchowski Dep. at 217-18, 222. In sum, HMA is aware that its own system for reporting sales and allocating inventory allows dealerships to start the warranty clock prematurely, and knows that dealerships are doing this, but yet HMA does nothing about that. This shows a disturbing indifference not only to dealerships, but to the ultimate consumers. The PFD would reward HMA for this deceptive conduct.

Moreover, HMA's arguments about the speed of sales reporting are irrelevant because, as HMA has conceded, it does not matter whether a vehicle is reported sold one day or ten days after the sales contract is executed as long as it is reported before an allocation event. *See* PTX 117, Hetrick Dep., at 127. World Car Hyundai completes an RDR as soon the sale is final and completed with all elements required by HMA's policies, including a completed finance

contract. Tr. at 366-370 (Kiolbassa); *id.* at 523-26, 585-86 (Willis); *see also* PTX 2. Submitting RDRs any faster than World Car Hyundai does would be reporting a vehicle as sold when the sale is not yet completed. *Id.* World Car was thus penalized by not engaging in these practices.

E. World Car is successful when it has sufficient inventory, but it still needed inventory in 2014 and 2015.

HMA asserts that World Car Hyundai had "all the vehicles it needed" but still did not reach 100% sales efficiency. Not true.

The World Car organization has been successful in selling vehicles, but only when it has them in inventory. *See, e.g.*, Tr. at 444-45 (Kiolbassa) (selling a lot of Kias "out of that same ratty store that Hyundai is complaining about" because "I have the inventory in Kias"); PTX 120, Zuchowski Dep., at 118 (assumed that World Car was doing "very well" as Mazda dealers because "they were supported by the regional manager from Mazda"). As Mr. Zabihian testified:

> Q. And he's complaining that you're outselling Hyundai by 6 to 1 with your Kias.
>
> A. Yes.
>
> Q. Did you suddenly, like, walk to a different showroom and become a bad dealer, be a good Kia dealer and a bad Hyundai dealer?
>
> A. No. No.
>
> Q. What was going on here?
>
> A. Difference of inventory. I've always had inventory with Kia.

Tr. at 193-94 (Zabihian). World Car Hyundai's "close" rate has historically been, on average, between 28 and 32 percent. Tr. at 514-15 (Willis). That means approximately 30 percent of people who show up on the lot at a World Car Hyundai store end up buying a car from World Car Hyundai. *Id.* That is two-thirds higher than the national average "close" rate of 18 percent. *Id.*

From 2006 to 2008, the World Car Hyundai dealerships had similar sales levels (some years better) as Red McCombs Hyundai. PTX 10; *see also* Tr. at 500 (Willis). Of course, World Car Hyundai did not have problems getting inventory during that time frame, which was prior to Hetrick's arrival. Tr. at 501 (Willis); *id.* at 635 (Roesner).

World Car Hyundai has improved its sales efficiency recently, but it still does not have "plenty of inventory" to meet 100%, as HMA asserts. *See* DTX 97 (June 2015 YTD sales efficiency of 78.34% for North); *id.* (June 2015 YTD sales efficiency of 29.76% for South). When asked about inventory from October 2014 going forward, Willis testified that "we've never been in a position where we said we didn't want cars." Tr. at 496-97. And Kiolbassa did not, as HMA asserts, say that World Car South had sufficient inventory to meet 100% sales efficiency, because it did not. *See* PTX 4 (2014's expected registrations were 784); PTX 97 (June 2015's YTD expected registrations were 410). HMA did not allocate 784 vehicles to World Car Hyundai South in 2014 nor did it allocate over 400 vehicles to World Car South in the first six months of 2015—as it did to Red McCombs.

III. Argument and Authorities

HMA's first argument is that the sales efficiency measure has been widely recognized as a valid measurement tool. This is a red herring. World Car does not challenge the concept of sales efficiency in general or using sales efficiency in a vacuum, but rather HMA's use of sales efficiency as applied to World Car.

A. The ALJ misapplied the legal test for Section 2301.467(a)(1)—HMA unreasonably required World Car to sell more cars than it was allocated.

1. HMA required 100% sales efficiency.

HMA insists that there is no requirement of 100% sales efficiency because the dealer sales and service agreement does not contain the magic words "dealer is required to achieve

100% sales efficiency." Reply at 28-30. According to HMA, the ALJ limited the inquiry to whether the dealer sales and service agreement contains such a requirement "only because of WC's allegations." Reply, at 39. HMA is wrong on both accounts. Its position ignores the definition of franchise under Texas law and the actual language used in HMA's communications to World Car Hyundai where it alleged "material breach."

First, Texas law defines "franchise" to include "a written communication from a franchisor to a franchisee in which a duty is imposed on the franchisee, under which . . . any right, duty, or obligation granted or imposed by this chapter is affected." Tex. Occ. Code § 2301.002(15). Thus, a franchise agreement is broader than the dealer sales and service agreement. It includes Hetrick's letter to World Car claiming "material breach" of the dealer agreement because that letter imposed a duty on World Car to sell a specific number of vehicles for a specific time period in order to meet its sales performance obligations—or face the real prospect of termination. PTX 67.

Second, Hetrick's "material breach" letter shows that HMA required adherence to 100% sales efficiency. Hetrick told World Car Hyundai that the dealership had not met its obligation to "effectively promote and sell Hyundai products," specifically because of its "sales efficiency." *Id.* Hetrick specified the sales efficiency obligation by stating that "through April of this year, your dealership should have sold 282 Hyundai vehicles." *Id.* (emphasis added). In other words, World Car needed to sell 282 Hyundai vehicles during that time period to be 100% sales efficient and comply with its sales obligations to HMA. Because World Car did not, Hetrick said that World Car Hyundai was in "material breach" of the dealer agreement for failing to comply with its sales obligations. *Id.*

Third, the testimony of witnesses for both sides shows that HMA required 100% sales efficiency to avoid being in material breach of the franchise. Art Kiolbassa, World Car's Vice President, testified:

> Q. [D]o you know about a letter that was sent by Mr. Hetrick to World Car that said your sales efficiency numbers were so bad that it was a violation of the agreement -- of the franchise agreement?
>
> A. Yes.
>
> Q. Are you aware of that? That's a pretty serious allegation, isn't it?
>
> A. Yes.
>
> Q. Isn't it true, if you know, isn't it true that that can be grounds for terminating a dealer, violation of the dealer service agreement, right?
>
> A. Yes, sir.

Tr. at 437 (emphasis added); *see also* Tr. at 547-48 (Willis) (testifying that HMA managers spoke with World Car about not meeting 100% sales efficiency every month during relevant time period). Hetrick also testified:

> Q. [S]ales efficiency is right there in the column for a dealer?
>
> A. Yes, it is.
>
> Q. Every year --
>
> A. Yes.
>
> Q. -- you-all look at that, and you talk about it?
>
> A. Yes, we do.
>
> Q. You talk about it with every dealer?
>
> A. Yes.
>
> Q. Okay. And you use it for a metric as to whether they're abiding by their contractual obligations?
>
> A. Yes, we do.

Tr. at 1013 (emphasis added).

Based on all of the above, it is indisputable that HMA focuses on sales efficiency as the metric for sales performance under the franchise and that HMA claims material breach when a dealership's sales efficiency is below 100%. The magic words "dealer must be 100% sales efficient" are not required, as HMA claims. Nor is World Car Hyundai supposed to have its franchise terminated in order for 100% sales efficiency to be a requirement. The facts and evidence show that World Car Hyundai was required to meet 100% sales efficiency in order to avoid being considered in material breach of the franchise agreement. HMA required adherence to this sales standard.

2. HMA's requirement was unreasonable.

It is undisputed that to be considered 100% sales efficient in each year from 2010 through 2013, World Car Hyundai had to sell more cars than it was allocated by HMA. *Compare* PTX 3-4 *with* PTX 81; *see also* Tr. at 544 (Willis); *id.* at 423-25 (Kiolbassa). That is the very definition of unreasonable. HMA, however, argues that the number of vehicles that were allocated to World Car was entirely within World Car's control, so any failure to achieve 100% sales efficiency was World Car's fault. Reply, at 22-23. Not so.

Just like Red McCombs in mid-2010, World Car did not have the "critical mass" of inventory required to attract customers, grow sales, and build inventory. Tr. at 80-81 (Zabihian); Tr. at 1046-47 (Hetrick); *id.* at 643 (Roesner); PTX 18; DTX 175; DTX 181; DTX 188. Notwithstanding a supposed lack of supply of Hyundai inventory, Hetrick provided the Red McCombs dealerships with plenty of extra inventory that allowed Red McCombs to meet 100% sales efficiency, but he did not for World Car. *See* PTX 126; *see also* PTX 109-110; Tr. at 1102 (Hetrick). When World Car Hyundai continually requested to buy more inventory from HMA, Hetrick repeatedly ignored or rejected the requests. *See, e.g.*, Tr. at 360 (Zabihian); *id.* at 950 (Hetrick). HMA knew that World Car Hyundai did not have sufficient inventory to reach 100%

sales efficiency during 2010 through 2013, and HMA knew that the Toyota challenge continually raised the bar for World Car Hyundai South's sales efficiency. PTX 53; Tr. at 489-95 (Willis); Tr. at 997-98 (Hetrick). HMA's district manager even told World Car Hyundai that the expected sales levels were "unrealistic." Tr. at 425 (Kiolbassa). However, HMA never allocated more cars so that World Car could meet the required standard. Tr. at 426, 442 (Kiolbassa). Hetrick conceded that he could have allocated more vehicles to World Car Hyundai but did not do so because he did not have an interest in helping it "break the cycle" in order improve its sales efficiency during 2010-2013. *See, e.g.*, Tr. at 1079, 1101-02 (Hetrick).

Based on HMA's knowledge of World Car's inventory situation and the Toyota challenge, it was unreasonable for HMA not to sell World Car at least enough vehicles to meet 100% sales efficiency (if it sold all of its inventory) while at the same time requiring adherence to 100% sales efficiency.

B. The ALJ misapplied the legal test for Section 2301.468—HMA unreasonably discriminated against World Car in allocations of inventory to the San Antonio market.

1. World Car Hyundai pleaded a claim for unreasonable discrimination.

HMA first contends that World Car "never pleaded a claim for 'unreasonable discrimination.'" Reply, at 6. This argument is frivolous. World Car Hyundai pleaded violations of Section 2301.468 of the Occupations Code and provided fair notice to HMA of the violations.[3]

Texas follows a "fair notice" standard for pleading, which looks to whether the opposing party can ascertain from the pleading the nature and basic issues of the controversy and what testimony will be relevant. *See Horizon/CMS Healthcare Corp. v. Auld*, 34 S.W.3d 887, 896-87

[3] The ALJ used the 2003 version of the statute to analyze World Car's claims, and HMA did not file any exceptions to the PFD on that basis.

(Tex. 2000) (holding that trial court correctly applied previous version of statute even though pleading referred to inapplicable current version of statute that had been amended). "A petition is sufficient if it gives fair and adequate notice of the facts upon which the pleader bases his claim. The purpose of this rule is to give the opposing party information sufficient to enable him to prepare a defense." *Roark v. Allen,* 633 S.W.2d 804, 810 (Tex. 1982).

Here, World Car Hyundai pleaded (and proved) sufficient facts to give adequate and fair notice to HMA of its claim that HMA violated Section 2301.468 through disparate and discriminatory allocations of inventory as compared to other Hyundai dealerships. *See, e.g.*, 2nd Am. Compl. at ¶ 8 ("HMA discriminated against World Car Hyundai by consistently providing more than sufficient inventory to similar Hyundai dealerships."); *id.* at ¶ 11 ("There is no reason for the disparate treatment in inventory."); *id.* at ¶ 13 ("HMA's disparate treatment of World Car Hyundai was compounded . . . ."); *id.* at pgs. 11-12 (HMA violated Section 2301.468 by "providing World Car Hyundai with much less inventory than World Car Hyundai needed and much less inventory than HMA provided to other Hyundai dealers in the competitive market area."). The entire thrust of the facts pleaded in the Second Amended Complaint is that HMA treated World Car Hyundai differently from other Hyundai dealerships (especially Red McCombs) by giving those dealerships additional allocations or other benefits and not giving them to World Car Hyundai, without a legitimate basis. *See generally* 2nd Am. Complaint. World Car Hyundai satisfied the fair notice pleading standard for a violation of Occupations Code Section 2301.468 (2003) and HMA had fair notice.[4]

[4] In addition, HMA did not specially except to World Car Hyundai's pleading of Section 2301.468. When a party fails to specially except, the pleadings must be construed liberally in favor of the pleader. *See Boyles v. Kerr,* 855 S.W.2d 593, 601 (Tex. 1993).

2. The discrimination happened "in the sale of a motor vehicle" because every allocation at issue was a sale of a motor vehicle.

HMA next argues that it did not violate Section 2301.468 because the discrimination between World Car and Red McCombs did not happen "in the sale of a motor vehicle." According to HMA, "[a]llocating vehicles and selling vehicles are not the same thing." Reply, at 46. These arguments are frivolous. Every time a vehicle is allocated to a dealership and that allocation is accepted, HMA sells the vehicle to the dealership. *See, e.g.*, Tr. at 73, 173-76 (Zabihian). Thus, every accepted allocation is a sale of a motor vehicle.

World Car Hyundai does not challenge unaccepted offers of inventory that were never sold to a dealership. This case is about the number of vehicles that World Car Hyundai was able to purchase from HMA as compared to the number of vehicles that other Hyundai dealerships were able to purchase from HMA, especially Red McCombs. Those vehicles were actually sold by HMA and actually purchased by dealerships. In this case, all of the allocations that World Car Hyundai challenges as unreasonably discriminatory were in fact sales of vehicles by HMA to Hyundai dealerships.

3. HMA's discrimination in allocating inventory was irrational and unfair, and disserves the public.

Next, HMA proposes that the "discrimination" prohibited by Occupations Code Section 2301.468 must be "arbitrary, capricious, without substantial cause or reason, or lacking a legitimate business justification." Using that proposed definition of "unreasonable" in this case is not supported by Texas law.

The ALJs in *Star Motor Cars v. Mercedes Benz USA, LLC* adopted the definition of "unreasonable" as proposed by counsel for Mercedes Benz, who cited as support *Mitchell's Inc. v. Nelms*, 454 S.W.2d 809, 813-14 (Tex. App.—Dallas 1970, writ ref'd n.r.e.) and *Burlington Northern & Santa Fe Ry. Co. v. South Plains Switching, Ltd. Co.*, 174 S.W.3d 349, 352-54 (Tex.

App.—Fort Worth 2005, no writ). Counsel for Mercedes Benz was mistaken. Neither of those cases used or adopted HMA's (or Mercedes Benz's) proposed definition of "unreasonable." Neither of those cases involved the Occupations Code. In fact, *Burlington* recognized that "no legal definition of 'unreasonable' has been adopted or approved by Texas courts," including the *Mitchell's* court. 174 S.W.3d at 354; *see also B.M.B. Corp. v. McMahan's Valley Stores*, 869 F.2d 865, 868 (5th Cir. 1989) (discussing *Mitchell's*).

"Unreasonableness is relative, and every case must be judged on its own particular facts." *Burlington*, 174 S.W.3d at 353. Because no legal definition of "unreasonable" has been adopted by Texas courts, the finder of fact must be "free to consider the ordinary meaning of [unreasonable] in light of the evidence presented." *Id.* at 354 (holding that trial court properly refused to instruct jury with legal definition of unreasonable).

As set forth in World Car Hyundai's Exceptions, the proper standard, which the ALJ should have applied to the facts, is the ordinary meaning of unreasonable—whether HMA's discrimination was not guided by reason, irrational, or beyond the limits of acceptability or fairness. *See* Exceptions, at 5-6.

4. The "reasons" that HMA now uses to justify the discrimination are after-the-fact excuses not supported by the record.

HMA's discriminatory inventory allocation to the San Antonio Hyundai dealerships was unreasonable—it was both irrational and unfair to provide Red McCombs with triple the discretionary allocations as were provided to World Car Hyundai, when there were no material differences between the dealerships.[5] This discrimination hurt competition and the consuming

[5] Even if the appropriate definition of "unreasonable" in Section 2301.468 "arbitrary and capricious," HMA's discrimination met that standard. It was arbitrary for Hetrick to provide over 6 ½ times as many discretionary allocations to Red McCombs as he did to World Car Hyundai during his first six months on the job. The justification that was documented at the time—giving Red McCombs additional cars as a boost to help Red McCombs meet its sales

public by creating disproportionate Hyundai inventory in San Antonio, concentrating the available selection of Hyundai vehicles at fewer stores thus creating less competition on price.

HMA claims that there were "legitimate reasons" for the disproportionate allocations, but all of these "reasons" are pretextual excuses that were not documented contemporaneously but surfaced for the first time during the hearing.

There was not one scrap of documentation showing that Hetrick gave Red McCombs between three and seven times as much discretionary allocation as he did to World Car because of (1) the Equus line, (2) the service loaner program, or (3) being exclusive. HMA did not provide any policy, memo, or email that showed Hetrick was providing these extra allocations to Red McCombs because it added Equus, participated in the service loaner program, or became exclusive. The documents created at the time of the allocations showed that Hetrick was providing Red McCombs with boosts in inventory to help the dealership meet its sales goals. PTX 18; PTX 21. Hetrick's oral explanations for his discriminatory treatment first appeared during the hearing and were contradicted by the documentary evidence. The ALJ improperly speculated that if World Car Hyundai had also added the Equus line, participated in the service loaner program, or became exclusive (at South store) then World Car Hyundai would have received more allocations as well. There was no basis for that speculation.

---

goals—would have applied equally to World Car Hyundai because both Red McCombs and World Car (1) were underperforming according to HMA, (2) had similar levels of inventory, and (3) were asking for more inventory. World Car Hyundai was in need of a "boost in inventory" just like Red McCombs, but Hetrick did not provide one at any time between 2010 and 2013. It was arbitrary and without substantial cause for Hetrick to continue to provide Red McCombs with over three times as many discretionary allocations as World Car when World Car did not even have enough inventory to meet 100% sales efficiency, was continually asking to buy more inventory, and had demonstrated a history of success when it was provided sufficient inventory. Regardless of the definition used, HMA unreasonably discriminated against World Car Hyundai.

HMA also argues that the discretionary allocations by Hetrick were fair because the *percentages* were "similar." Reply, at 14-15. These percentages are misleading and not an appropriate measuring stick, however, because they are based on denominators created by prior discriminatory allocations. The dealerships did not have similar-sized inventories in 2011-2013 due to the boosts in inventory that Hetrick provided to Red McCombs in 2010 that allowed Red McCombs to nearly double its inventory in the second half of 2010 and beyond. *See* PTX 18, 21. As Hetrick testified:

> Q. So if somebody is already doing really well and you're just doing it on percentages, the rich are going to get richer, right?
>
> A. Sometimes, yes.
>
> Q. Well, of course. If they're selling 1,000 cars a year and somebody is selling 400 a year and you say you're doing the same ratio, the other guys will get two and a half times as much allocation?
>
> A. Yes.
>
> Q. Even the extra allocation that you have the discretion to use, right?
>
> A. Yes.
>
> Q. To break the cycle?
>
> A. Yes.

Tr. at 1102. Thus, even though Hetrick acknowledged that World Car Hyundai most needed to "break the cycle" in 2010-2013, he provided Red McCombs with at least 3 times as many discretionary allocations as World Car Hyundai during 2010-2012. HMA's disparate allocations to the Hyundai dealerships in San Antonio were unreasonable and unfair.

C. The ALJ misapplied the legal test for Section 2301.478—HMA did not meet its duty of good faith and fair dealing.

1. The Code requires good faith and fair dealing—it does not merely prohibit bad faith.

HMA first argues that the question of whether HMA violated its statutory duty of good faith and fair dealing should be decided by whether World Car Hyundai proved that HMA acted in bad faith. That is wrong. Occupations Code Section 2301.478(b) does not prohibit "bad faith" practices, it requires "good faith and fair dealing." While a showing of "bad faith" would certainly demonstrate a lack of "good faith and fair dealing," it is merely a subset. The definition of "bad faith" that HMA proposes, which was used in the context of Rule 13 sanctions and the Deceptive Trade Practices Act ("DTPA"), does not apply to whether a party to a franchise agreement complied with its statutory duty of good faith and fair dealing.

HMA's reliance on *Bray v. Tejas Toyota, Inc.*, 363 S.W.3d 777 (Tex. App.—Austin 2012, no pet.) is misplaced. The *Tejas Toyota* court did not rule on the propriety of using a "bad faith" standard to define the duty of "good faith and fair dealing." As such, the Board is not bound by *Tejas Toyota* to determine the appropriate standard here.

Regardless, the ALJ's proposal for decision in *Tejas Toyota* was legally flawed. That ALJ relied on *Campos v. Ysleta Gen. Hosp.*, 879 S.W.2d 67 (Tex. App.—El Paso 1994, writ denied) to propose that the statutory duty of good faith and fair dealing should be defined in terms of bad faith. *Campos* was a case involving Rule 13 sanctions for filing a lawsuit in bad faith. *See* Tex. R. Civ. P. 13. The court in *Campos* defined "bad faith" in the Rule 13 context as "the conscious doing of a wrong for dishonest, discriminatory, or malicious purpose," citing *Elbaor v. Sanderson*, 817 S.W.2d 826, 829 (Tex. App.—Fort Worth 1991, no writ) for that definition. *Campos*, 879 S.W.2d at 71. *Elbaor* was a case filed under the DTPA, which also explicitly prohibits bringing an action "in bad faith." 817 S.W.2d at 829 (citing Tex. Bus. &

Com. Code § 17.50(c)). *Campos* and *Elbaor* do not provide any support for applying the "bad faith" standard to Section 2301.478(b) (which expressly requires "good faith") because the rule and statute involved in those two cases actually used the express term "bad faith."

The statute in this case uses the words "good faith and fair dealing." Tex. Occ. Code § 2301.478(b). Those are the words that must define the duty—not "bad faith." If the Legislature wanted to create a more limited duty by prohibiting only "bad faith" conduct under a franchise agreement, and thus requiring proof of bad faith, it could have drafted Section 2301.478(b) using the words "bad faith," as it has in other statutes where a showing of bad faith is required. *See, e.g.*, Tex. Bus. & Com. Code § 17.952 (bad faith claim of patent infringement); Tex. Ins. Code § 1467.101 (bad faith mediation); Tex. Prop. Code § 92.204 (bad faith disclosure of incorrect information); Tex. Labor Code § 61.053 (bad faith withholding of wages). The Legislature did not. The Board should use the plain meaning of the actual words used in the statute.[6]

2. HMA did not act fairly or in good faith with World Car Hyundai.

HMA argues that the "sole discretion" standard in the dealer agreement means that HMA did not do anything wrong in allocating vehicles. HMA is wrong on the law and the facts.

First, the "sole discretion" standard in the dealer agreement cannot trump the law of the State of Texas. One purpose of the Occupations Code, including Section 2301.478(b), is to prevent "fraud, unfair practices, discrimination, impositions, or other abuse of the people of this

[6] The Board can also look to the closest analogue, the duty of good faith and fair dealing in commercial agreements under the U.C.C. *See* Tex. Bus. & Com. Code § 1.304 ("Every contract or duty within this title imposes an obligation of good faith in its performance and enforcement."); *Merrill Lynch, Pierce, Fenner & Smith, P.C. v. Greystone Servicing Corp.*, Inc., 3:06-CV-0575-P, 2007 WL 2729935, at *13-14 (N.D. Tex. Sept. 18, 2007) ("[T]he parties to the Loan Agreement were bound to perform their obligations thereunder in good faith."); *Brookside Farms v. Mama Rizzo's, Inc.*, 873 F. Supp. 1029, 1034 (S.D. Tex. 1995) ("[S]tandard of good faith performance requires honesty in fact and observance of reasonable commercial standards of fair dealing in the trade.").

state." Tex. Occ. Code § 2301.001(2). That is why the Texas Legislature chose to expressly impose a statutory duty of "good faith and fair dealing" on the parties to a franchise (a duty that is not present in every contractual relationship). Thus, the Occupations Code requires good faith and fair dealing and makes the Board the ultimate arbiter of what constitutes good faith and fair dealing—not HMA acting in its "sole discretion." *See Jankowiak v. Allstate Prop. & Cas. Ins. Co.*, 201 S.W.3d 200, 205 (Tex. App.—Houston [14th Dist.] 2006, no pet.) ("[Contract] provisions that are inconsistent with express statutory requirements or purposes are invalid.").

Second, HMA's allocations were disproportionate and discriminatory. Given World Car Hyundai's repeated requests to buy more inventory and HMA's continual choices to reject those requests and allocate the inventory to World Car's competitor instead, HMA did not comply with its duty to act fairly and in good faith to World Car Hyundai.

Citing *Tejas Toyota*, HMA also argues that requiring 100% sales efficiency, given World Car Hyundai's inventory levels and HMA's choice not to provide it with substantial discretionary allocations, was not a breach of its duty to act fairly and in good faith. Reply, at 50. But *Tejas Toyota* did not involve a determination whether "a requirement of 100% sales efficiency violated § 2301.478(b)." *See* HMA Brief, at 58. Instead, the issue in *Tejas Toyota* was whether by proposing a franchise agreement that contained certain sales performance requirements, the distributor violated the statutory duty of good faith and fair dealing. 363 S.W.3d at 786. *Tejas Toyota* provides no support for the notion that HMA's sales efficiency requirements for World Car Hyundai were reasonable, or that HMA acted fairly and in good faith.

HMA violated its duty of good faith and fair dealing by continuing to use the same sales efficiency standards for World Car Hyundai while at the same time refusing to help World Car

"break the cycle" through additional discretionary allocations of inventory. *See* Exceptions, at 24-25, 31. The ALJ's failure to find that is a legal error.

IV. Conclusion

The ALJ misapplied the legal tests of "unreasonable sales standards," "unreasonable discrimination," and "good faith and fair dealing." From 2010 through 2013, HMA required World Car Hyundai to sell more vehicles than it received from HMA in order to be considered 100% sales efficient and not in breach of the franchise agreement. That was unreasonable. What made this unreasonable requirement even more egregious is that, notwithstanding the purported lack of supply, HMA in fact had the vehicles and could have supplied enough inventory to World Car Hyundai so that it had the chance to be 100% sales efficient by selling that inventory. That was unfair. HMA chose not to sell those vehicles to World Car Hyundai but instead decided to favor World Car Hyundai's closest competitor, Red McCombs Hyundai, through significant and lopsided discretionary allocations to Red McCombs between 2010 and 2013. That was discrimination.

If the PFD is accepted without modification, it will give manufacturers and distributors free rein to treat dealers unreasonably and unfairly in allocation and sales efficiency because there will be no floor, no minimum baseline of fairness that all manufacturers and distributors have to meet in order to comply with Texas law. Accordingly, the Board should reject the PFD. A proposed Final Order is attached for the Board's consideration.

Respectfully submitted,

DAN DOWNEY, P.C.

By:*/s/ Dan Downey*
Dan Downey
State Bar No. 06085400
1609 Shoal Creek Blvd., Suite #100
Austin, Texas 78701
Telephone: 512/477-4444

SMYSER KAPLAN & VESELKA, L.L.P.

By: */s/ Lee L. Kaplan*
Lee L. Kaplan
State Bar No. 11094400
Jarod R. Stewart
State Bar No. 24066147
700 Louisiana, Suite 2300
Houston, Texas 77002
Telephone: 713/221-2300
Facsimile: 713/221-2320

ATTORNEYS FOR COMPLAINANTS

CERTIFICATE OF SERVICE

I hereby certify that, on this 18th day of May, 2016, a true and correct copy of the above and foregoing instrument has been served via email on all counsel of record.

/s/ Jarod R. Stewart
Jarod R. Stewart

TEXAS DEPARTMENT OF MOTOR VEHICLES
MOTOR VEHICLE DIVISION

NEW WORLD CAR NISSAN, INC., d/b/a WORLD CAR HYUNDAI, and NEW WORLD CAR IMPORTS, SAN ANTONIO, INC., d/b/a WORLD CAR HYUNDAI	§	
Complainants,	§	
v.	§	**SOAH DOCKET NO. 608-14-1208 LIC**
	§	**MVD DOCKET NO. 14-0006 LIC**
HYUNDAI MOTOR AMERICA, **Respondent.**	§	

FINAL ORDER

The above-referenced matter is before the Board of the Texas Department of Motor Vehicles (Board) in the form of a Proposal for Decision (PFD) from the State of Office of Administrative Hearings (SOAH).

Overview

This case involves a complaint filed by New World Car Nissan, Inc. d/b/a World Car Hyundai and New World Car Imports, San Antonio Inc. d/b/a World Car Hyundai (collectively "World Car") against the United States distributor of Hyundai vehicles, Hyundai Motor America (HMA). World Car alleges that HMA violated Texas Occupations Code: (i) Section 2301.467(a)(1) by requiring adherence to unreasonable sales standards, (ii) Section 2301.468 by engaging in unreasonable discrimination, and (iii) Section 2301.478(b) by not acting fairly or in good faith.

Issues Presented

The issue before the Board is whether World Car has shown that HMA required adherence to unreasonable sales standards, unreasonably discriminated against World Car, and failed to comply with its duty of good faith and fair dealing.

Summary of Board's Decision

On March 10, 2016, an administrative law judge (ALJ) at SOAH issued a PFD in this matter. The Board considered the PFD during an open meeting held on _____, 2016. Based on a review of the PFD, the parties' exceptions and replies, and oral argument, the Board concludes that the ALJ misinterpreted and misapplied applicable law in the following ways:

1. The ALJ incorrectly assumed that Section 2301.467(a)(1) of the Texas Occupations Code limits the required adherence to a sales standard that is expressly stated in a dealer agreement.

2. The ALJ improperly applied the concept of unreasonable discrimination because HMA gave nearly three times the amount of discretionary allocations to World Car's closest competitor, even though the dealerships were similarly situated and all wanted more inventory.

3. The ALJ misapplied the statutory duty of good faith and fair dealing because HMA did not act fairly or in good faith in allocating inventory to World Car or in requiring World Car to meet 100% sales efficiency.

The ALJ's misapplication and misinterpretation of the applicable law so flawed her decision that the Board finds it cannot accept the ALJ's proposal for decision. The Board finds that World Car met its burden to show that HMA required adherence to unreasonable sales standards, unreasonably discriminated against World Car, and failed to comply with its duty of good faith and fair dealing.

Specific Reasons & Legal Bases for Changes to Findings of Fact and Conclusions of Law

- **Finding of Fact Numbers 20 and 21** are rejected and replaced under Tex. Gov't Code § 2001.058(e)(1) because the ALJ did not properly apply or interpret the applicable law. Central to whether HMA's different treatment of World Car versus Red McCombs constitutes unreasonable discrimination in violation of Occupations Code Section 2301.468(2) is whether the dealerships were similarly-situated when the different treatment began. The ALJ improperly disregarded and failed to mention in the PFD the undisputed facts that Red McCombs closed an entire dealership in 2009, turned down more allocations than World Car did during the first six months of 2010, and had a similar level of inventory as World Car in mid-2010. By ignoring these facts, the ALJ misinterpreted and misapplied the concept of unreasonable discrimination because the ALJ did not consider that the dealerships were similarly-situated when the different treatment began.

- **Finding of Fact Number 27** is rejected under Tex. Gov't Code § 2001.058(e)(1) because the ALJ did not properly apply or interpret the applicable law. The inquiry under Occupations Code Section 2301.468(2) is whether HMA unreasonably discriminated against World Car. Whether World Car "chose to participate" in the "programs" mentioned by the ALJ would not excuse HMA's discriminatory treatment and is therefore irrelevant. Moreover, the ALJ improperly speculated about the inventory that World Car might have received if it had participated in the "programs" mentioned by the ALJ. The ALJ's misapplication and misinterpretation of the test for "unreasonable discrimination" led to the ALJ's misplaced emphasis on possible inventory that World Car "might have" received rather than properly focusing on HMA's allocations to World Car as compared to Red McCombs.

- **Finding of Fact Number 30** is rejected and replaced under Tex. Gov't Code § 2001.058(e)(1) because the ALJ did not properly apply or interpret the applicable law, i.e. the statutory concept of "unreasonable discrimination." HMA's discretionary inventory allocations to World Car as compared to Red McCombs between 2010 and 2013 were not rational, sensible, acceptable, or fair.

- **Finding of Fact Number 50** is rejected and replaced under Tex. Gov't Code § 2001.058(e)(1) because the ALJ did not properly apply or interpret the applicable law. The ALJ improperly assumed that Occupations Code Section 2301.467(a)(1) is limited to unreasonable sales standards that are expressly stated in the dealer agreement. This statute is not so limited but rather prohibits a manufacturer or distributor from requiring adherence to any unreasonable sales standard wherever and however it is imposed. HMA "required adherence" to 100% sales efficiency as contemplated by Section 2301.467(a)(1) because the consequence for non-compliance was to be in "material breach" of the franchise and risk losing the dealership franchise.

- **Finding of Fact Number 52** is rejected and replaced under Tex. Gov't Code § 2001.058(e)(1) because the ALJ did not properly apply or interpret the applicable law. As seen in the Board's change to Finding of Fact Number 50 above, World Car's complaint is not that "measuring sales efficiency" was unreasonable, but rather that requiring 100% sales efficiency was unreasonable. This requirement was unreasonable because HMA knew that World Car did not have sufficient inventory to meet 100% sales efficiency and HMA ignored or rejected World Car's repeated requests to buy more inventory so that it could achieve 100% sales efficiency.

- **Finding of Fact Number 53** is rejected and replaced under Tex. Gov't Code § 2001.058(e)(1) because the ALJ did not properly apply or interpret the applicable law. The ALJ did not properly apply the concepts of fairness and good faith. HMA's discretionary inventory allocations to Red McCombs were nearly triple the amount provided to World Car, which was unfair based on the circumstances, i.e. similarly-situated dealerships all asking for more inventory. It was also unfair for HMA to know that World Car did not have enough inventory to meet 100% sales efficiency, to turn down World Car's requests for more inventory so that it could achieve 100% sales efficiency, and then tell World Car that it was in breach of the franchise for not meeting 100% sales efficiency.

- **Conclusion of Law Number 6** is rejected and replaced under Tex. Gov't Code § 2001.058(e)(1) because the ALJ did not properly apply or interpret the applicable law. Based on the Board's adoption of Finding of Fact Numbers 50A and 52A, the Board finds that World Car met its burden to show HMA violated Occupations Code Section 2301.467(a)(1) by requiring adherence to an unreasonable sales standard.

- **Conclusion of Law Number 8** is rejected and replaced under Tex. Gov't Code § 2001.058(e)(1) because the ALJ did not properly apply or interpret the applicable

law. Based on the Board's adoption of Finding of Fact Numbers 20A and 30A, the Board finds that World Car met its burden to show HMA violated Occupations Code Section 2301.468(2) by unreasonably discriminating against World Car.

- **Conclusion of Law Number 9** is rejected and replaced under Tex. Gov't Code § 2001.058(e)(1) because the ALJ did not properly apply or interpret the applicable law. Based on the Board's adoption of Finding of Fact Number 53A, the Board finds that World Car met its burden to show HMA violated Occupations Code Section 2301.478(b) by not acting fairly or in good faith with World Car.

Having considered the evidence, the arguments, and the findings of fact and conclusions of law presented in the PFD, the Board enters these findings of fact and conclusions of law. The ALJ's Findings of Fact 20, 21, 27, 30, 50, 52, and 53 and Conclusions of Law 6, 8, and 9 are rejected. The ALJ's Findings of Fact 1-19, 22-26, 28, 29, 31-49, and 51 and Conclusions of Law 1-5, and 7 are adopted.

FINDINGS OF FACT

1. New World Car Nissan, Inc. d/b/a World Car Hyundai and New World Car Imports, San Antonio, Inc., d/b/a World Car Hyundai (together, World Car) are licensed, franchised dealers for Hyundai products and services.

2. Hyundai Motor America (Hyundai) is the wholesale distributor for Hyundai products and services in the United States.

3. On December 6, 2013, the Texas Department of Motor Vehicles (Department) issued a Notice of Hearing advising that World Car had filed a formal complaint with the Department.

4. The hearing on the merits convened on September 21, 2015, and concluded on September 25, 2015. The record closed on January 11, 2016, following the submission of written closing briefs and an agreed record.

Background

5. Ahmad Zabihian owns World Car in San Antonio, Texas. World Car owns two Hyundai dealerships in San Antonio.

6. World Car's primary Hyundai competitor is Red McCombs Hyundai. Red McCombs owns two Hyundai dealerships in San Antonio-Red McCombs Superior and Red McCombs Northwest.

7. Prior to the 2008 recession, World Car North and Red McCombs Superior performed at approximately equal levels in terms of the number of vehicles sold. World Car South performed less well. It is in a lower-income area than World Car North. Red McCombs Northwest did not perform as well prior to the 2008 recession, but improved its sales during 2008-2009.

8. Hyundai's allocation consists of formula allocations, discretionary allocations, and manual allocations.

9. Formula allocations make up approximately 85% of the vehicles allocated and are allocated through a formula and computer program.

10. Under the allocation algorithm, vehicles are offered to dealers based on each dealer's inventory and the average number of vehicles sold by the dealer in the previous 90 days. The system allocates vehicles, one at a time, to the dealer in the region with the lowest days' supply for each respective model.

11. Discretionary allocations are made by Hyundai's regional general manager, who may distribute up to 15%.

12. Manual allocations include turn downs, which are vehicles allocated to a dealer under the formula that the dealer rejects, which are then made available to other dealers in the region, and vehicles that have been re-customized or modified.

13. Sales efficiency is a metric that Hyundai uses to measure dealer sales performance.

14. Sales efficiency compares a dealer's total sales to sales the brand expects to achieve in the dealer's primary market area. Hyundai calculates expected sales by applying Hyundai's national average sales penetration in each vehicle segment in which Hyundai competes to the actual number of vehicles registered in that segment in the dealer's primary market area.

15. Hyundai's Co-Op Advertising Commitment Program (Co-Op) provides funds (Co-Op advertising funds) to dealers to assist with advertising. The funds do not pay for the total cost of advertisements the dealer purchases, but provide partial reimbursements.

16. Eligibility for Co-Op advertising funds and the amount of reimbursement are determined by a formula that considers sales and customer services scores. Regional general managers also have some discretionary funds they can provide to dealers.

17. In 2009, Hyundai's regional general manager responsible for the San Antonio region was Tom Hetrick, who replaced a different regional general manager that year.

Discrimination and gauging the performance of a dealership

Discretionary allocation

18. In 2009, during the first six months of Mr. Hetrick's tenure as regional general manager, he provided 134 cars through discretionary allocation to Red McCombs and 20 to World Car.

19. The differences in discretionary allocation between Red McCombs and World Car continued through 2013.

~~20. In 2009 and 2010, World Car voluntarily reduced its inventory.~~

20A. In 2009 and 2010, World Car and Red McCombs voluntarily reduced their inventories, and in mid-2010 their inventories were at similar levels.

~~21. Red McCombs dealerships maintained their high inventory levels during the 2008-2010 recession.~~

22. In 2010, Red McCombs Superior became an exclusive Hyundai dealership.

23. World Car South shares a dealership with the Kia brand.

24. Red McCombs Northwest added the luxury Equus line that required a facility upgrade and then renovated the store.

25. Red McCombs Superior renovated its dealership in 2011-2012.

26. Red McCombs participated in Hyundai's service loaner program.

~~27. World Car chose not to participate in the available programs provided by Hyundai that could have increased the allocation available to World Car.~~

28. World Car did not remove a dealership until 2014, when it renovated World Car North.

29. World Car did not participate in Hyundai's service loaner program.

~~30. It was reasonable for Hyundai to reward dealers that participated in Hyundai sponsored programs and renovated their facilities with extra discretionary allocation.~~

30A. It was not reasonable for Hyundai to provide nearly three times as many discretionary allocations to Red McCombs as to World Car between 2010 and 2013.

Gaming the formula allocation system

31. There was nothing improper or illegal about recording a Retail Delivery Report (RDR) for cars that had been spot delivered.

32. Hyundai encouraged World Car to speed up its sales reporting by promptly submitting RDRs once a car was delivered to a customer.

33. There was insufficient evidence to show that Red McCombs gamed the system by entering RDRs and then reversing them at a significantly higher rate than any other Hyundai dealership.

34. The service loaner program allowed dealerships to sell cars into the service loaner program, thereby reducing the inventory available for sale and increasing formula allocation.

35. The service loaner program was available to all Hyundai dealers.

36. World Car chose not to participate in the service loaner program.

37. Red McCombs participated in the service loaner program.

38. There was insufficient evidence to show that Red McCombs gamed the allocation system.

Sales efficiency

39. In 2008, both World Car North and South were over 100% sales efficient. In 2009, the north store dropped to 96.8% and continued to drop over time. In 2014, it was 65.7% sales efficient. The south store fared worse. It dropped to 17.9% sales efficient in 2013 but rebounded in 2014 to 31.2% sales efficient.

40. In 2009, Toyota opened a manufacturing plant and new dealership close to World Car South. The manufacturing plant employs about 6,000 people. Those employees had incentives to purchase Toyota products.

41. From 2010 until 2013, Hyundais were in short supply worldwide, primarily due to the high demand caused by the Japanese tsunami that devastated Japanese manufacturing.

42. Hyundai was aware that some dealers could not achieve 100% sales efficiency with the lower inventory.

43. Hyundai measured sales efficiency in the same manner for all dealers.

Co-Op Advertising Funds

44. Co-Op advertising funds must be used exclusively for advertising.

45. The distribution of Co-Op advertising funds is calculated by a formula that considers several factors including customer sales and service scores. The formula is not intended to gauge the performance of a dealership. It simply calculates how much additional advertising funding a particular dealership will receive.

46. The regional general manager has discretion to award additional Co -Op advertising funds.

47. In 2010, World Car South was not eligible under the formula to receive Co-Op advertising funds. Mr. Hetrick provided the store with $60,000 in Co-Op advertising funds over the third and fourth quarters of that year.

48. The Co-Op program formula is applied in the same manner to all dealers.

49. Co-Op advertising funds are unrelated to the sale of a motor vehicle.

Unreasonable Sales Standards

~~50. Maintaining 100% sales efficiency is not a requirement to be or to remain a licensed Hyundai dealer.~~

50A. Maintaining 100% sales efficiency is a requirement to avoid being in material breach of the franchise agreement with Hyundai

51. World Car stores have not been 100% sales efficient for several years, and both are operating under valid dealer agreement.

~~52. Mearing sales efficiency does not require adherence to unreasonable sales or service standards.~~

52A. Requiring World Car to meet 100% sales efficiency in order to avoid material breach of the franchise agreement was requiring adherence to an unreasonable sales standard because Hyundai was aware that World Car did not have sufficient inventory to meet 100% sales efficiency.

Duty of Good Faith and Fair Dealing

~~53. The allocation system and sales efficiency metric do not treat World Car unfairly.~~

53A. Hyundai's discretionary allocations to the San Antonio market between 2010 and 2013 were unfair, and Hyundai's requirement that World Car meet 100% sales efficiency despite the dealerships' known lack of inventory was also unfair.

CONCLUSIONS OF LAW

1. The Texas Department of Motor Vehicles has jurisdiction over this case. Tex. Occ. Code § 2301.001.

2. The State Office of Administrative Hearings (SOAH) has jurisdiction over all matters related to the contested case hearing in this case, including the authority to issue a proposal for decision with findings of fact and conclusions of law. Tex. Occ. Code § 2301.704.

3. The hearing was conducted pursuant to the Administrative Procedure Act and SOAH's procedural rules. Tex. Gov't Code ch. 2011 and 1 Tex. Admin. Code ch. 155.

4. Proper and timely notice of the hearing was provided. Tex. Occ. Code § 2301.705.

5. World Car has the burden of proof by a preponderance of the evidence. 1 Tex. Admin. Code § 155.427.

6. ~~World Car failed to meet its burden of proof to show that Hyundai required adherence to unreasonable sales or service standards. Tex. Occ. Code § 2301.467(a)(1)(2003).~~

6A. World Car met its burden of proof to show that Hyundai required adherence to unreasonable sales standards. Tex. Occ. Code § 2301.467(a)(1).

7. World Car failed to meet its burden of proof to show that Hyundai discriminated against World Car by treating them differently as a result of a formula or other process intended to gauge the performance of a dealership though allocation of vehicle inventory, sales efficiency calculations, or distribution of discretionary Co-Op advertising funds. Tex. Occ. Code § 2301.468(1) (2003).

8. ~~World Car failed to meet its burden of proof to show that Hyundai engaged in unreasonable sales discrimination in the allocation of vehicle inventory because World Car did not participate in in many of the programs that would have permitted additional discretionary allocation. Texas Occ. Code § 2301.458(2.~~

8A. World Car met its burden of proof to show that Hyundai engaged in unreasonable sales discrimination in the allocation of vehicle inventory between 2010 and 2013 because Hyundai provided disproportionate discretionary allocations of inventory to World Car's nearest competitor in San Antonio that were not justified by any material differences between the dealerships. Tex. Occ. Code § 2301.468(1) (2003).

9. ~~World Car failed to meet it burden of proof to show that Hyundai violated its duty of good faith and fair dealing through allocations and sales efficiency because Hyundai calculated sales efficiency in the same manner for all dealers, World Car chose not to participate in many of the programs that could have led to additional discretionary allocation. Tex. Occ. Code § 2301.478(b).~~

9A. World Car met its burden of proof to show that Hyundai violated its duty of good faith and fair dealing through discretionary allocations and through requiring World Car to meet 100% sales efficiency between 2010 and 2013. Tex. Occ. Code § 2301.478(b).

ACCORDINGLY, IT IS ORDERED:

1. That the findings of fact and conclusions of law in this Order are hereby adopted; and

2. That World Car's complaints under Occupations Code Sections 2301.467(a)(1), 2301.468(2), and 2301.478(b) are hereby upheld.

Dated: _____

_____
Laura Ryan
Chair, Board of Texas Department of Motor Vehicles

ATTESTED:

_____

STATE OFFICE OF ADMINISTRATIVE HEARINGS

AUSTIN OFFICE
300 West 15th Street Suite 502
Austin, Texas 78701
Phone: (512) 475-4993
Fax: (512) 322-2061

DATE: **5/31/2016**

NUMBER OF PAGES INCLUDING THIS COVER SHEET: **5**

REGARDING: **EXCEPTIONS LETTER (BY ALJ)**

DOCKET NUMBER: **608-14-1208.LIC**

JUDGE WENDY KL HARVEL

FAX TO:	**FAX TO:**
DAN DOWNEY (DAN DOWNEY, P.C.)	(512) 477-4470
DAVID M. PRICHARD (PRICHARD, HAWKINS, MCFARLAND & YOUNG, LLP)	(210) 477-7450
KEVIN M. YOUNG (PRICHARD, HAWKINS, MCFARLAND & YOUNG, LLP)	VIA EMAIL
LEE L. KAPLAN	VIA EMAIL
JAROD R. STEWART (SMYSTER KAPLAN & VESELKA, L.L.P)	VIA EMAIL
DOCKET CLERK (TEXAS DEPARTMENT OF MOTOR VEHICLES)	(512) 465-3666

Docket Clerk, Fax Number 512/465-3666
NOTE: IF ALL PAGES ARE NOT RECEIVED, PLEASE CONTACT MELISSA ETHRIDGE(met) (512) 475-4993

State Office of Administrative Hearings

Lesli G. Ginn
Chief Administrative Law Judge

May 31, 2016

Daniel Avitia, Director
Motor Vehicle Division
Texas Department of Motor Vehicles
4000 Jackson Avenue
Austin, TX 78731

VIA FACSIMILE NO. (512) 465-3666

RE: Docket No. 608-14-1208.LIC; New World Car Nissan, Inc. dba World Car Hyundai and New World Car Imports, San Antonio, Inc. dba World Car Hyundai v. Hyundai Motor America

Dear Mr. Avitia:

On April 8, 2016, World Car Hyundai (World Car) filed exceptions to the Proposal for Decision (PFD). On May 9, 2016, Hyundai Motor America (Hyundai) filed replies to the exceptions. ON May 18, 2016, World Car filed a reply to Hyundai's reply.

I have reviewed the exceptions and replies and do not recommend any changes to the PFD. The arguments presented in the exceptions and replies address the same issues that are discussed in the PFD. Importantly, as noted in the replies, the applicable law in this case is not the 2011 version of Texas Occupations Code § 2301.468, but rather the 2003 version of the statute, because the dealer agreements between Hyundai and World Car were entered into prior to 2011. The facts in the record were analyzed under the 2003 statute.

Sincerely,

Wendy K. L. Harvel
Administrative Law Judge

cc: Dan Downey, Dan Downey, P.C., 1609 Shoal Creek Blvd., Ste. #100, Austin, TX 78701 – **VIA FACSIMILE NO. (512) 569-3400**
Lee L. Kaplan, Jarod R. Stewart, Smyser Kaplan & Veselka, L.L.P., 700 Louisiana, Ste. 2300, Houston, TX 77002 – **VIA FACSIMILE NO. (713) 221-2320**
Kevin M. Young, David Prichard, Prichard Hawkins Young, 10101 Reunion Place, Ste. 600, San Antonio, TX 78216 – **VIA FACSIMILE NO. (210) 477-7450**
Alice Carmona, Docket Clerk, Texas Department of Motor Vehicle, 4000 Jackson Avenue, Austin, TX 78731 (with 1 CD; Certified Evidentiary Record) - **VIA FACSIMILE NO. (512) 465-3666**

STATE OFFICE OF ADMINISTRATIVE HEARINGS

AUSTIN OFFICE
300 West 15th Street Suite 502
Austin, Texas 78701
Phone: (512) 475-4993
Fax: (512) 322-2061

SERVICE LIST

AGENCY:	**Motor Vehicles, Texas Department of (TDMV)**
STYLE/CASE:	**NEW WORLD CAR NISSAN, INC. dba WORLD CAR HYUNDAI, WORLD CAR NISSAN AND NEW WORLD CAR IMPORTS SAN ANTONIO, INC.**
SOAH DOCKET NUMBER:	**608-14-1208.LIC**
REFERRING AGENCY CASE:	**14-0006 LIC**

STATE OFFICE OF ADMINISTRATIVE HEARINGS	**ADMINISTRATIVE LAW JUDGE** **ALJ WENDY KL. HARVEL**
REPRESENTATIVE / ADDRESS	**PARTIES**
DAN DOWNEY DAN DOWNEY, P.C. 1609 SHOAL CREEK, #100 AUSTIN, TX 78701 (512) 569-3400 (PH) (512) 477-4470 (FAX) (713) 907-9700 (CELL)	NEW WORLD CAR NISSAN, INC. D/B/A WORLD CAR HYUNDAI
JAROD R. STEWART SMYSTER KAPLAN & VESELKA, L.L.P 700 LOUISAIANA SUITE 2300 HOUSTON, TX 77002 (713) 221-2300 (PH) (713) 221-2320 (FAX) jstewart@skv.com	NEW WORLD CAR NISSAN, INC. D/B/A WORLD CAR HYUNDAI

LEE L. KAPLAN
ATTORNEY
SMYSER KAPLAN & VESELKA, LLP
700 LOUISIANA ST., SUITE 2300
HOUSTON, TX 77002
(713) 221-2323 (PH)
(713) 221-2320 (FAX)
lkaplan@svk.com

NEW WORLD CAR NISSAN, INC. D/B/A WORLD CAR HYUNDAI

DOCKET CLERK
TEXAS DEPARTMENT OF MOTOR VEHICLES
MOTOR VEHICLE DIVISION
4000 JACKSON AVENUE
AUSTIN, TX 78731
(512) 465-7354 (PH)
(512) 465-3666 (FAX)

MOTOR VEHICLE DIVISION

DAVID M. PRICHARD
PRICHARD, HAWKINS, MCFARLAND & YOUNG, LLP
UNION SQUARE, SUITE 600
10101 REUNION PLACE
SAN ANTONIO, TX 78216
(210) 477-7400 (PH)
(210) 477-7450 (FAX)
dprichard@phmy.com

HYUNDAI MOTOR AMERICA

KEVIN M. YOUNG
PRICHARD, HAWKINS, MCFARLAND & YOUNG, LLP
UNION SQUARE, SUITE 600
10101 REUNION PLACE
SAN ANTONIO, TX 78216
(210) 477-7400 (PH)
(210) 477-7450 (FAX)
kyoung@phy-law.com

HYUNDAI MOTOR AMERICA

---

xc: Docket Clerk, State Office of Administrative Hearings
Docket Clerk TDMV, Fax No. 512-465-3666

Melissa Ethridge

From: XMediusFAX@soah.state.tx.us
Sent: Tuesday, May 31, 2016 1:30 PM
To: Melissa Ethridge
Subject: Broadcast Completed: EXC. LET; 608-14-1208
Attachments: 59922F28-2124-41E6-82D1-09CC4EBE55E5-4027-BR.pdf

Time Submitted : Tuesday, May 31, 2016 1:27:36 PM Central Daylight Time
Time Completed : Tuesday, May 31, 2016 1:30:25 PM Central Daylight Time
Nb of Success Items : 3
Nb of Failed Items : 0

Status	Time Sent	Pages Sent	Duration	Remote CSID	Destination	Error Code
Success	Tuesday, May 31, 2016 1:28:47 PM Central Dayli	5	70	5123208906	5124774470	0
Success	Tuesday, May 31, 2016 1:30:07 PM Central Dayli	5	149		12104777450	0
Success	Tuesday, May 31, 2016 1:30:15 PM Central Dayli	5	157	5124654135	5124653666	0

TEXAS DEPARTMENT OF MOTOR VEHICLES
MOTOR VEHICLE DIVISION

NEW WORLD CAR NISSAN, INC. D/B/A WORLD CAR HYUNDAI, WORLD CAR NISSAN; AND NEW WORLD CAR IMPORTS SAN ANTONIO, INC., D/B/A WORLD CAR HYUNDAI,	§	**MVD DOCKET NO. 14-0006 LIC**
Complainants	§	**SOAH DOCKET NO. 608-14-1208.LIC**
v.	§	
HYUNDAI MOTOR AMERICA,	§	
Respondent	§	

FINAL ORDER

The referenced contested case matter is before the Board of the Texas Department of Motor Vehicles (TxDMV) in the form of a Proposal for Decision (PFD) from the State Office of Administrative Hearings (SOAH) and involves the complaint by two World Car franchised dealerships against the distributor, Hyundai Motor America.

IT IS ORDERED:

That the conclusion of the State Office of Administrative Hearings Judge (ALJ) is overturned.

The Board finds that the ALJ erred in interpretation of Texas Occupations Code § 2301.468.

Date: NOV 03 2016

Raymond Palacios, Chairman
Board of the Texas Department of Motor Vehicles

ATTESTED:

Daniel Avitia, Director
Motor Vehicle Division
Texas Department of Motor Vehicles

TEXAS DEPARTMENT OF MOTOR VEHICLES
MOTOR VEHICLE DIVISION

NEW WORLD CAR NISSAN, INC., DBA WORLD CAR HYUNDAI, AND NEW WORLD CAR IMPORTS SAN ANTONIO, INC., DBA WORLD CAR HYUNDAI	§	
Complainants,	§	SOAH DOCKET NO. 608-14-1208 LIC MVD DOCKET NO. 14-0006 LIC
vs.	§	
HYUNDAI MOTOR AMERICA	§	
Respondent.	§	

HYUNDAI MOTOR AMERICA'S
MOTION FOR REHEARING ON THE BOARD'S FINAL ORDER
SIGNED NOVEMBER 3, 2016

TO THE BOARD OF THE TEXAS DEPARTMENT OF MOTOR VEHICLES:

NOW COMES Respondent, Hyundai Motor America ("HMA") and submits its Motion for Rehearing on the Board's Final Order Signed November 3, 2016. In support of this motion, HMA shows as follows.

TABLE OF CONTENTS

Cases

Statutes and Other Sources

I.
INTRODUCTION

The Board should grant HMA's Motion for Rehearing and vacate its Final Order signed on November 3, 2016 because:

- The Board improperly acted as the ALJ and engaged in improper *ad hoc* rule making. *See* Section IV(A), *infra*.
- The Board erred in failing to identify the Findings of Fact and Conclusions of Law that are the basis for its Final Order. *See* Section IV(B), *infra*.
- The Board erred in failing to explain why it apparently rejected the Administrative Law Judge's Findings of Fact and Conclusions of Law. *See* Section IV(C), *infra*.
- There was no basis for "overturning" the Proposal for Decision on a supposed misinterpretation of Section 2301.468 when the Administrative Law Judge interpreted the statute as WC requested. *See* Section IV(D), *infra*.
- There was no basis for "overturning" the Proposal for Decision on a supposed misinterpretation of Section 2301.468 when WC only pleaded a claim under the inapplicable version of the statute, and WC has no viable claims under the applicable version. *See* Section IV(E), *infra*.
- The Board's Final Order is not supported by substantial evidence. *See* Section IV(F), *infra*.

Upon vacating the Final Order of November 3, 2016, the Board should enter a Final Order that adopts the Administrative Law Judge's Proposal for Decision along with the non-substantive modifications proposed by the staff of the Motor Vehicle Division. Alternatively, the Board should identify the Findings of Fact and Conclusions of Law upon which the current Final Order is based and explain the reasons for each Finding of Fact and Conclusion of Law from the Administrative Law Judge that the Board has rejected or modified.

II.
FACTUAL BACKGROUND

Judge Harvel succinctly summarized the facts of this complex case in her PFD. Ex. 1 at 5-8. Further details about HMA's system for allocating vehicles (including discretionary allocations), its use of sales efficiency to measure dealer performance, and its use of co-op advertising funds are available in HMA's briefing. *See* HMA's Post-Hearing Brief at 10-31; HMA's Post-Hearing Response Brief at 8-28.

III.
PROCEDURAL BACKGROUND

WC filed its Original Complaint in this proceeding on November 20, 2013. WC filed its live complaint, its Second Amended Complaint, on August 27, 2015. WC maintained HMA violated thee sections of the Texas Occupations Code (the "Code"). WC alleged HMA engaged in unfair and inequitable treatment in violation of Section 2301.468 (2011) of the Code. *See* WC's Second Amended Complaint, ¶¶ 34-36. WC further alleged HMA applied unreasonable sales standards in violation of Section 2301.467(a)(1) of the Code. *Id.*, ¶¶ 37-39. Finally, WC alleged that HMA breached its duty of good faith and fair dealing in violation of Section 2301.478 of the Code. *Id.*, ¶¶ 40-41. HMA denied WC's allegations. *See* HMA's Second Amended Answer.

A hearing was held before Administrative Law Judge Wendy K. L. Harvel with live testimony and evidence submitted from September 21 – 25, 2015. Judge Harvel heard testimony from ten witnesses (approximately 1,200 pages of hearing transcript testimony). She also reviewed deposition testimony from seven witnesses as well as nearly 80 exhibits, submitted at

the hearing,[1] comprising hundreds of pages of documents. The parties subsequently submitted extensive briefing. Judge Harvel closed the record on January 11, 2016.

Judge Harvel issued her Proposal For Decision (the "PFD") on March 10, 2016. The 28-page PFD includes an extensive discussion of the facts and alleged violations. Ex. 1. Judge Harvel concluded that "[b]ased on the evidence presented, World Car failed to prove any of its alleged violations of the Occupations Code." *Id.* at 22. Judge Harvel then provided fifty-three Findings of Fact ("FOFs") and nine conclusions of law ("COLs"). *Id.* at 23-28.

WC filed exceptions to the PFD, and HMA replied to those exceptions. Judge Harvel considered the exceptions and recommended no changes to the PFD.

On October 27, 2016, the staff of the Motor Vehicle Division (the "Staff") circulated a proposed Final Order to the parties. The Staff recommended "the Board adopt the ALJ's findings of fact and conclusions of law". *See* Memo from Daniel Avita to Board, Ex. 2. The proposed Final Order adopted the PFD with only minor changes to correct misstated dates and typographical errors. *Id.*

The Board held a hearing on this matter on November 3, 2016. The Staff again recommended the Board adopt Judge Harvel's PFD with the minor modifications. *See* Hearing Transcript, Ex. 3 at 27. The Board heard arguments from counsel and asked questions. Member Walker recommended the Board "overturn the SOAH judge's ruling and we find that they erred in the interpretation of the Occupations Code 2301.468". *Id.* at 110. The Board voted six to three in favor of the recommendation. *Id.* at 111.

The Final Order was signed on November 3, 2016 and transmitted to the parties on November 4, 2016. Ex. 4. The Final Order only states:

[1] In addition, the parties agreed to pre-admit into the record more than 250 additional exhibits.

> That the conclusion of the State Office of Administrative Hearings (ALJ) is overturned.
>
> The Board finds that the ALJ erred in interpretation of Texas Occupations Code § 2301.468.

Id. The Final Order does not identify any specific FOFs or COLs that the Board accepted, rejected or modified or the reason for any rejections or modifications. *Id.* Nor does the Final Order include any FOFs or COLs from the Board. *Id.*

IV.
ARGUMENTS AND AUTHORITIES

A. The Board improperly acted as the ALJ.

The law recognizes a clear distinction between the roles of ALJs and agencies in contested cases. ALJs resolve conflicts in the evidence.

> While this Court has previously recognized that an administrative agency is not subject to the same rules and restrictions as a court of law, an agency must respect the due process rights of those persons who appear before it in contested cases. . . . The purpose of such a hearing is to give the litigants an opportunity to present evidence. Any conflicts in the evidence are resolved by the decision-maker by weighing the evidence and evaluating the credibility of witnesses. The resolution of disputed facts requires weighing the evidence and making credibility determinations. Accordingly, a neutral decision-maker is crucial to a fair adjudicatory hearing. Because the ALJ has heard the evidence and observed the demeanor of the witnesses, the ALJ is in a superior position than an agency head or board reviewing the proposed decision.

State v. Mid-South Pavers, Inc., 246 S.W.3d 711, 722–23 (Tex. App.—Austin 2007, pet. denied) (citations omitted); *Jordon Paving Corp. v. Tex. Dept. of Transp.*, 03-04-00782-CV, 2009 WL 1607916, at *8 (Tex. App.—Austin June 3, 2009, no pet.).[2]

[2] For example, whether certain conduct is "reasonable" is historically considered an issue for the trier of fact. *McMillin v. State Farm Lloyds*, 180 S.W.3d 183, 205 (Tex. App.—Austin 2005, pet. denied); *see Southwestern Bell Tel. Co. v. Garza*, 58 S.W.3d 214, 237 (Tex. App.—Corpus Christi 2001), *aff'd in part, rev'd in part on other grounds,* 164 S.W.3d 607 (Tex. 2004) (same).

Judge Harvel alone was responsible for weighing the evidence in this case. She observed the demeanor of the live witnesses and could assess their credibility. Judge Harvel not only had access to the hundreds of exhibits admitted in this case, critically, she had the time to thoroughly consider all of the evidence. Judge Harvel issued the PFD more than four months after the conclusion of live testimony. There was no rush to judgment. Judge Harvel thoughtfully considered the evidence in this case and found that WC failed to carry its evidentiary burden on all of its claims. Ex. 1 at 27-28.

The Board is, by design, not a neutral fact finder. The Board is an appointed body with members representing different and (sometimes) competing interests, and it is charged with implementing policy through rule-making procedures. Prior to the hearing, WC indicated its intention to re-argue the case to the Board. Ex. 5 (L. Kaplan Letter, Oct. 28, 2016). General Counsel for the Department of Motor Vehicles, David Duncan, responded and noted the Board was limited by statute to the matters it could consider at the hearing.

> Argument before the Board is not an opportunity to reargue the case and urge that the ALJ incorrectly weighed evidence. The only issues that may be argued are whether the ALJ misapplied or misinterpreted applicable law, agency rules, or prior agency decisions; made a technical error in a finding of fact; or relied upon a prior agency decision that is incorrect or should be changed.

Ex. 6 (D. Duncan Letter, Nov. 1, 2016); *see* TEX. GOV'T CODE § 2001.058(e) (identify limited matters Board may consider at hearing).

Nevertheless, at the November 3, 2016 hearing, the Board invited argument about certain facts of the case and turned the "ten minutes per side" pre-hearing guidance into almost two hours of wide open discussion about certain specific facts and testimony from the contested case hearing. Notably, not all of the facts were discussed or considered, only some of them. Therefore, the Board acted as the ALJ, ultimately and improperly reweighing the facts of the

case. *See e.g.*, Ex. 3 at 59 (Board member asking about factual basis for discriminatory conduct); *id.* at 76-77 (Board member inquiring about whether allocation formula was adhered to); *id.* at 84 (Board member indicating that dealers get more vehicles through discretionary allocations and if they are refused allocations for refusing to participate in programs "that's understandable"); *id.* at 88 (Board member inquiring into why HMA would care about how many allocations it provides if dealer is paying for cars); *id.* at 89 (Board member stating that WC needs product to sell and "it seems to me like that didn't happen here"); *id.* at 98 (Board member stating it is important to understand how well WC was selling its inventory); *id.* at 103 (Board member weighing facts in favor and against WC's position); *id.* at 105 (Board member stating "there is clear and plain evidence that there was discrimination between the two dealers" and "I don't think the administrative law judge was correct in her findings"). The Board cannot reweigh the evidence. *See Flores v. Employees Ret. Sys. of Tex.*, 74 S.W.3d 532, 540-41, 553 (Tex. App.—Austin 2002, pet. denied) (reversing decision of agency and noting agency acted contrary to principles of neutral fact finder, established by statute, when agency acted as fact finder and re-weighed evidence after ALJ issued its PFD).

Judge Harvel had the benefit of seeing all of the live witnesses, and months to consider all the evidence in this case. The Board, without any of these advantages, usurped the role of the ALJ and apparently determined that WC had met its burden of proof. The Board exceeded its authority and, accordingly, it should vacate its Final Decision and adopt Judge Harvel's PFD with the modifications proposed by the Staff.

Importantly, the Board cannot create a new, post-Order rationale to support its decision to "overturn" Judge Harvel's PFD. In *Flores*, the court of appeals took issue with agency's

deletion of a finding because it supported a supposedly erroneous conclusion and created the appearance that the agency's decision was predetermined.

> This explanation gives the *appearance* of the Board's arriving at a predetermined result, irrespective of the facts as determined by the ALJ, and then shaping new findings of fact to support its decision. This approach is at odds with the nature of the administrative process. "A basic purpose of requiring findings of fact is to ensure that an agency's decision comes *after,* not *before,* a careful consideration of the evidence. Agency conclusions should follow from its serious appraisal of the facts."

Flores, 74 S.W.3d at 542 (emphasis in original); *see Gulf States Util. Co v. Coalition of Cities for Affordable Util. Rates*, 883 S.W.2d 739, 750 (Tex. App.—Austin 1994), *rev'd on other grounds*, 947 S.W.2d 887 (Tex. 1997) (stating utility commission could not first decide a reasonable rate and then "back into" required FOFs to support the decision). Having already determined that Judge Harvel's PFD should be overturned, the Board cannot now offer new reasons for that decision. *Id.* Instead, the Board should adopt Judge Harvel's PFD.

1. WC's false characterization of the evidence at the Board hearing demonstrates why agencies are not allowed to reweigh evidence heard by ALJs.

Agencies may not re-weigh evidence in contested cases and may only change or modify FOFs and COLs under statutorily limited circumstances. *See* Section IV(C), *infra*. This case aptly shows why evidentiary determinations are left to ALJs. During the course of the hearing, WC's counsel misstated multiple facts. For example, WC's counsel stated that HMA used sales efficiency as an "impossible standard," and that Judge Harvel committed legal error by finding that 100% sales efficiency was not required because it was not contained in the parties' franchise agreement. Ex. 3 at 30-31. In fact, HMA's Dealer Sales and Service Agreement does not require any Hyundai dealer to be 100% sales efficient. *See* DTX28, Paragraph 1 (stating dealer agrees to "[e]ffectively promote and sell Hyundai Products" rather than "100% sales efficient"); DTX30, Paragraph 1 (same); PTX1, Paragraph10(b)(1) (Standard Provisions stating that dealer

agrees "to use its best efforts to effectively promote and sell Hyundai Products"). As noted in HMA's July 13, 2013 correspondence, WC was in material breach of the relevant provisions of the Dealer Sales and Service Agreement because it failed to use its best efforts to effectively promote and sell Hyundai vehicles. PTX67. WC's counsel also stated that punitive action was taken against WC "all along" because it was not 100% sales efficient. Ex. 3 at 36. That is not true. There is no evidence that HMA took any adverse action against either dealership due to its below average sales efficiency. The July 13, 2013 letter did not threaten the dealer with termination; it simply advised TX087 of its deficient sales performance and asked the dealership to "reassess" its commitment to Hyundai by either (1) pursuing a sale of the store or (2) providing HMA with a written plan to improve its sales performance. PTX67. The dealership took neither action and never requested a meeting to discuss its performance with regional personnel. Instead, it filed this lawsuit. In comparison, HMA renewed TX087's Dealer Agreement in 2010 despite its poor sales efficiency. DTX41; TR261-62; PTX29. WC also continued to receive formal and discretionary allocations, as well as co-op advertising funds, from 2009 through the present, despite both dealerships with sales efficiency well below 100% through 2016. PTX81; DTX41; TR261-62; DTX54.

Similarly, WC's counsel misstated that TX077's facility was upgraded in 2012 or 2013 (during the inventory shortage). Ex. 3 at 59; *see* TR286; TR474; TR572; TR741; TR954 (establishing inventory shortage from 2010 through 2013). Actually, WC completed its renovation of TX077's facility in late October or early November 2014, by which time WC advised HMA that it had adequate inventory at its dealerships. TR315; TR474; TR986. WC's disclosure to HMA's regional personnel in 2014, that it had adequate inventory and did not need extra allocations after the renovation was completed (TR875, L. Caudill), directly conflicts with

counsel's claim that "when [WC] renovated the north store, the evidence is undisputed that [WC] got no extra allocation, whereas, when Red McCombs did an exclusive facility and renovated their store, they got more allocation." Ex. 3 at 34. This statement is simply untrue and fails to support WC's claim of discriminatory treatment under the statute.

In addition, WC's counsel incorrectly stated that "there was an effort made" to make the South store "exclusive and move to a new property in 2010 and Hyundai declined." Ex. 3 at 59. The record simply does not support this statement. HMA never received any kind of written proposal from WC to relocate TX087 in 2010. TR1084 (T. Hetrick). As of today, TX087 is still dualed with the Kia franchise, even though WC wrote a letter to HMA back in 2003 and advised the region that it would provide HMA with an exclusive dealership. DX91. HMA is still waiting.

These are just a few examples, yet they illustrate why agencies may not reweigh evidence. Judge Harvel did not base her PFD on one, short hearing, with attorneys summarizing the evidence. She heard all the testimony, directly from the witnesses, and she had the benefit of all the exhibits as well as adequate time to consider all of the evidence. The Board did not have any of these advantages at its hearing. Instead, the Board chose to re-weigh a fraction of the evidence as mischaracterized by counsel. In a truncated setting like the Board's hearing, it is impossible for any agency to get a complete picture of all the facts. So when an agency improperly reweighs the evidence, it is making a decision on incomplete information. The Legislature has entrusted consideration of evidence to ALJs, and the Board's re-weighing of the evidence in this case demonstrates why agencies are prohibited from doing so.

2. The Board's decision amounts to improper *ad hoc* rule making.

Prior to the hearing, General Counsel Duncan advised the parties of the limited scope of the hearing and that policy creation through contested cases is "*ad hoc* rulemaking" that is disfavored. Ex. 6. At the hearing, Mr. Duncan reminded the Board that policy setting through contested cases is considered "*ad-hoc* rulemaking". Ex. 3 at 82-83. He properly counseled the Board that if it desired to specify what type of conduct constitutes "unreasonable discrimination", then the appropriate way to do so was under the Board's rule-making authority. *Id.* at 83. The Board acknowledged that it had not previously construed Section 2301.468. *Id.* at 49-50. The Board has had years to use its rule-making process to define what conduct amounts to "unreasonable discrimination" and clearly advise all dealers, manufacturers and distributors of this standard. It should not now use a contested case to retroactively define, for the first time, whether certain conduct amounts to "unreasonable discrimination".[3] Nevertheless, with its Final Order, the Board has apparently chosen to use a contested case to set standards for what conduct constitutes a violation of Section 2301.468 and engaged in improper *ad hoc* rule making.

Ad hoc rule making may be permitted in rare instances, such as a contested case involving a new statute for which an agency has yet to adopt rules. However, in the rare instances in which *ad hoc* rulemaking is allowed, due process still requires an agency to provide notice of the legal standard that will be applied at the hearing. It is not enough merely to quote the statute that will be used. *E.g.*, *Madden v. Tex. Bd. of Chiropractic Examiners*, 663 S.W.2d 622, 626-27 (Tex. App.—Austin 1983, writ ref'd n.r.e.); *Texas State Bd. of Pharmacy v. Seely*, 764 S.W.2d 806, 814-15 (Tex. App.—Austin 1988, writ denied). Therefore, even assuming that the Board could engage in *ad hoc* rulemaking in this case (it cannot), fundamental fairness and

[3] Rather, the ALJ is vested with the authority to determine what is reasonable under the specific facts of the case, and the ALJ's determinations in this regard cannot be later undone by an agency that simply desires a different outcome.

constitutional due process would require the Board to first give HMA notice, prior to the hearing, of the standards it would use to determine what conduct amounts to: "unreasonable discrimination" (Section 2301.468(2) (2003)); "treating franchised dealers differently" (Section 2301.468(1) (2003)); "requiring adherence to unreasonable sales standards" (Section 2301.467); or a violation of the "duty of good faith and fair dealing" (Section 2301.478).

The Board failed to provide notice of the legal standards it would use, if any, in assessing these statutory provisions and, thus, violated HMA's due process rights. *See Madden*, 663 S.W.2d at 626-27 (reversing agency decision and holding applicant was denied due process when agency failed to provide notice of how it would construe statutory term "'bona fide reputable chiropractic' school" prior to hearing); *Seely*, 764 S.W.2d at 814-15 (holding agency denied pharmacist due process by revoking license for conduct that was "unprofessional", not in "the usual course of professional practice", "not consistent with the public health and welfare" – all statutory terms – because Board failed to give advance notice of norms and standards it would use to determine if conduct at issue violated statutory language). The Board's failure to give advance notice is also an abuse of discretion and is arbitrary and capricious. *See Patton v. Employees Ret. Sys. of Tex.*, 03-07-00170-CV, 2007 WL 4462734, at *6-7 (Tex. App.—Austin Dec. 19, 2007, no pet.) (reversing agency decision and determining that agency abused its discretion and acted arbitrarily and capriciously when it failed to give benefits-recipient sufficient notice, prior to agency hearing, of how it would construe term "comparable pay").[4]

[4] Assuming, *arguendo*, that the Board could both engage in *ad hoc* rule making in this case, and provided adequate notice of the standards it would employ to assess the applicable statutory provisions, there is an additional due process concern. Even if the Board concluded there was a statutory violation, due process would preclude retrospectively penalizing HMA for such conduct – be it an agency assessed penalty or private cause of action. *E.g., Trinity Broad. of Florida, Inc. v. F.C.C.*, 211 F.3d 618, 628 (D.C. Cir. 2000). For example, prior to this contested case, the Board never issued any rules or decisions identifying what conduct constitutes "unreasonable discrimination", including differences in discretionary allocations among dealers. Thus, HMA never had notice that providing more discretionary allocations to one dealer (for articulated business considerations) compared to its cross-town rival could later be deemed "unreasonable discrimination".

B. The Board erred in failing to identify the FOFs and COLs that are the basis for its Final Order.

The requirements of a Final Order issued by the Board in a contested case are set forth in Section 2001.141 of the Administrative Procedures Act (the "APA") and Section 2301.711 of the Code. Section 2001.141 states a Final Order "must include findings of fact and conclusions of law, separately stated." TEX. GOV'T CODE § 2001.141(b). Findings of fact may be based only on the evidence. *Id.* at § 2001.141(c). Further, "[f]indings of fact, if set forth in statutory language, must be accompanied by a concise and explicit statement of the underlying facts supporting the findings." *Id.* at § 2001.141(d).

Similarly, the Code requires that Final Orders issued by the Board must:

> (1) include a separate finding of fact with respect to each specific issue required by law to be considered in reaching a decision;
>
> (2) set forth additional findings of fact and conclusions of law on which the order or decision is based;
>
> (3) give the reasons for the particular actions taken; . . .

TEX. OCC. CODE § 2301.711(b)(1)-(3) (emphasis added).

There are several reasons why an agency must include FOFs and COLs in a Final Order that sets out its reasoning. It insures the agency gives full consideration to the evidence and a serious appraisal of the facts before rendering a decision. In addition, it informs complaining parties of the facts found so that they may prepare and present intelligibly both a motion for rehearing to the agency and, if desired, an appeal to the courts. Further, it assists the courts in properly exercising the function of judicial review. *See Gibson v. Tex. Mun. Ret. Sys.*, 683 S.W.2d 882, 884 (Tex. App.—Austin 1985, no writ) (referring to predecessor to Section

2001.141). However, an agency may not first reach a conclusion, and then create findings to support the conclusion. *Flores*, 74 S.W.3d at 542.

In this instance, the Board's Final Order identifies no FOFs or COLs from the PFD that it has adopted or rejected. Ex. 4. The Board did not identify or include any FOFs or COLs in the Final Order.[5] *Id.* Simply put, the Board's Final Order includes no FOFs or COLs as required by Section 2001.141, and there is no explicit statement of the underlying facts supporting the Board's decision. TEX. GOV'T CODE § 2001.141(d). Similarly, the Final Order does not satisfy the requirements of Section 2301.711(b)(1)-(3).

On review, a court may reverse the final order of an agency "if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

(A) in violation of a constitutional or statutory provision;
(B) in excess of the agency's statutory authority;
(C) made through unlawful procedure;
(D) affected by other error of law;
(E) not reasonably supported by substantial evidence considering the reliable and probative evidence in the record as a whole; or
(F) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion."

TEX. GOV'T CODE § 2001.174(2). The Board's issuance of a Final Order that lacks FOFs and COLs prejudices HMA's substantial rights because it issued the Order: (1) in violation of Section 2001.141 of the APA and Section 2301.711 of the Code; (2) through unlawful procedure; and (3) is arbitrary and capricious and characterized by abuse of discretion. *See* TEX. GOV'T CODE § 2001.174(2)(A), (C) and (F); *see Jordon Paving Corp.*, 2009 WL 1607916, at *8-10 (stating that agency Final Order that did not comply with statutory requirements was arbitrary and capricious, an abuse of discretion, and raised due process concerns); *Mid-South Pavers, Inc.*, 246 S.W.3d at

[5] While the Board states the ALJ erred in interpreting Section 2301.468, it does not identify this statement as either a FOF or COL. Ex. 4.

722-27 (same). Accordingly, the Board should grant HMA's Motion for Rehearing and issue a Final Order which vacates its November 3, 2016 Order and affirms the findings and conclusions of Judge Harvel.

C. The Board erred in failing to explain why it apparently rejected Judge Harvel's FOFs and COLs.

A final order from an agency must not only include FOFs and COLs. If an ALJ includes FOFs and COLs in her PFD, and the agency decides to reject or modify any of the findings or conclusions, then it must specifically explain the reasons for its modification or rejection. Both the APA and the Code mandate that an agency explain its reasoning when rejecting or modifying an FOF or COL. Section 2001.058(e) of the APA states:

> A state agency may change a finding of fact or conclusion of law made by the administrative law judge, or may vacate or modify an order issued by the administrative judge, only if the agency determines:
>
> (1) that the administrative law judge did not properly apply or interpret applicable law, agency rules, written policies provided under Subsection (c), or prior administrative decisions;
>
> (2) that a prior administrative decision on which the administrative law judge relied is incorrect or should be changed; or
>
> (3) that a technical error in a finding of fact should be changed.
>
> The agency shall state in writing the specific reason and legal basis for a change made under this subsection.

TEX. GOV'T CODE § 2001.058(e) (emphasis added).[6] Similarly, Section 2301.711 of the Code provides that a final order of the Board must "give the reasons for the particular action taken". TEX. OCC. CODE § 2301.711(b)(3). Stated differently, the "agency is required to explain with particularity its specific reason and legal basis for each change made. The agency must

[6] General Counsel Duncan advised the Board of this requirement at the hearing. *See* Ex. 3 at 104.

'articulate a rational connection between an underlying agency policy and the altered finding of fact or conclusion of law.'" *Sanchez v. Tex. State Bd. of Medical Examiners*, 229 S.W.3d 498, 515 (Tex. App.—Austin 2007, no pet.); *see Texas State Bd. of Medical Examiners v. Dunn*, 03-03-00180-CV, 2003 WL 22721659, at *3 (Tex. App.—Austin Nov. 20, 2003, no pet.) (stating that if agency disagrees with FOFs or COLs, then agency must explain how the ALJ's findings or conclusions were erroneous); *see also Jordon Paving Corp.*, 2009 WL 1607916, at *1, 8-10 (holding that agency violated law when it declined to adopt FOFs or COLs contained in PFD, but failed to specifically explain its rationale and legal basis for decision).

The failure of an agency to specifically explain its reason for modifying or rejecting an ALJ's FOF or COL is a violation of Section 2001.174 of the APA. *See Heritage on San Gabriel Homeowners Ass'n v. Tex. Comm. on Envir. Qual.*, 393 S.W.3d 417, 440 (Tex. App.—Austin 2012, pet. denied) (stating that agency's failure to explain why it rejected FOFs, as required by Section 2001.058(e) and other statutes, amounted to violation of Section 2001.074); *Texas Health & Human Services Comm'n & Office of Inspector Gen. v. Antoine Dental Ctr.*, 487 S.W.3d 776 (Tex. App.—Texarkana 2016, no pet.); *see also Jordon Paving Corp.*, 2009 WL 1607916, at *8-10 (stating that agency final order that did not comply with statutory requirements was arbitrary and capricious, an abuse of discretion, and raised due process concerns under Section 2001.174). In this instance, the Board's failure to comply with Section 2001.058(e) of the APA and Section 2301.711 of the Code is two-fold. First, the Board does not explain its reason(s) for apparently rejecting all of Judge Harvel's FOFs and COLs. Second, for the one "reason" given in the Final Order – that Judge Harvel erred in interpreting Section 2301.468 of the Code – the Board does not explain how she erred in interpreting the statute. By

failing to provide the statutorily required explanation, the Board has violated Section 2001.174 of the APA with its Final Order.

1. The Board does not explain why it apparently rejected Judge Harvel's FOFs and COLs.

Again, the Final Order contains no denominated FOFs or COLs. Ex. 4. Based on the general statement that the "conclusion of the State Office of Administrative Hearings Judge (ALJ) is overturned" (Ex. 4), it appears that the Board has rejected some (if not all) of Judge Harvel's FOFs and COLs. However, the Board neither identifies which FOFs and COLs it is rejecting nor gives specific reasons for why it rejects particular FOFs or COLs as statutorily required. TEX. GOV'T CODE § 2001.058(e); TEX. OCC. CODE § 2301.711(b)(3). The Board's failure to comply with these requirements amounts to reversible error under Section 2001.174(2) of the APA because the Final Order is: (1) in violation of two statutory provisions; (2) made through unlawful procedure; and (3) is arbitrary and capricious and characterized by an abuse of discretion. TEX. GOV'T CODE § 2001.174(2)(A), (C) and (F). Accordingly, the Board should grant HMA's Motion for Rehearing, identify any and all FOFs and COLs in the PFD that the Board either rejects or modifies, and specifically explain the reason for each rejection and/or modification.

2. The Board fails to explain how Judge Harvel erred in interpreting Section 2301.468 of the Code.

The only stated basis for the Board's Final Order is Judge Harvel "erred" in interpreting Section 2301.468. Ex. 4. But the Board's Order does not explain how Judge Harvel's supposedly erroneous interpretation of Section 2301.468 applies to WC's claims under Sections 2301.467 or Section 2301.478. *Id.* Any error in interpreting Section 2301.468 cannot be the basis for vacating Judge Harvel's decision that WC failed to carry its burden of proof on its

claims under different provisions. Regardless, without an explanation for how the supposed misinterpretation of Section 2301.468 warrants the vacating Judge Harvel's decision on WC's other statutory claims, the Board's vacatur of her decision fails to satisfy the requirements of Section 2001.058(e) of the APA and Section 2301.711(b)(3) of the Code. Accordingly, the Board's apparent decision to vacate Judge Harvel's rulings, concerning WC's claims under Section 2301.467 and .478, violates Section 2001.174(2) of the APA because the Final Order is: (1) in violation of two statutory provisions; (2) made through unlawful procedure; and (3) is arbitrary and capricious and characterized by an abuse of discretion. TEX. GOV'T CODE § 2001.174(2)(A), (C) and (F); *see Heritage on San Gabriel Homeowners Ass'n*, 393 S.W.3d at 440; *Sanchez*, 229 S.W.3d at 515; *Jordon Paving Corp.*, 2009 WL 1607916, at *8-10. Thus, the Board should grant HMA's Motion for Rehearing, identify any and all FOFs and COLs in the PFD that the Board either rejects or modifies, and specifically explain the reason for each rejection and/or modification.

Finally, even if the Board's Final Order is limited only to WC's claim under Section 2301.468, its stated rationale still fails to satisfy the requirements of Sections 2001.058(e) and 2301.711.[7] The Board does not explain how the ALJ erred in interpreting Section 2301.468. Ex. 4. The Legislature requires FOFs and COLs to inform complaining parties so that they may prepare and present intelligibly both a motion for rehearing and to assist the courts in properly exercising the function of judicial review. *Gibson*, 683 S.W.2d at 884 (Tex. App.—Austin 1985, no writ). For the same reasons, an agency must explain why it rejects or modifies a FOF or COL. However, when the only reason given for overturning a PFD is that Judge Harvel erred in interpreting the law, and the agency fails to explain how she erred, then these purposes are

[7] As shown in Section IV(D), *infra*, Judge Harvel "interpreted" Section 2301.468 as WC asked it to, not as HMA advocated.

thwarted. A complaining party (or a reviewing court) is hampered in asserting or determining that an agency's own legal reasoning was erroneous, when the agency never provides its actual reasoning. The Board fails to explain how Judge Harvel supposedly erred in interpreting Section 2301.478. Ex. 4. Accordingly, the Board's Final Order violates Section 2001.174(2) of the APA because the order is: (1) in violation of two statutory provisions; (2) made through unlawful procedure; and (3) is arbitrary and capricious and characterized by an abuse of discretion. TEX. GOV'T CODE § 2001.174(2)(A), (C) and (F); *see Heritage on San Gabriel Homeowners Ass'n*, 393 S.W.3d at 440; *Sanchez*, 229 S.W.3d at 515; *Jordon Paving Corp.*, 2009 WL 1607916, at *8-10. Thus, in the alternative to adopting Judge Harvel's PFD, the Board should explain how Judge Harvel erred in interpreting Section 2301.468.

D. Judge Harvel interpreted Section 2301.468 as WC requested.

Even assuming, *arguendo*, that the Board's stated rationale for its decision is sufficiently adequate under Section 2001.058(e) of the APA and Section 2301.711 of the Code, the Board incorrectly based its ruling on Judge Harvel's supposed misinterpretation of Section 2301.468 of the Code. While the parties proposed different interpretations of Section 2301.468, Judge Harvel effectively used WC's interpretation of the statute, not HMA's interpretation. Utilizing WC's interpretation of the statute, Judge Harvel concluded that WC failed to carry its burden of proof on its statutory claim. Ex. 1 at 27.

Section 2301.468 (2003), "DISCRIMINATION AMONG DEALERS OR FRANCHISEES", states:

> A manufacturer, distributor, or representative may not:
>
> (1) notwithstanding the terms of any franchise, directly or indirectly discriminate against a franchised dealer or otherwise treat franchised dealers differently as a result of a

formula or other computation or process intended to gauge the performance of a dealership; or

(2) discriminate unreasonably between or among franchisees in the sale of a motor vehicle owned by the manufacturer or distributor.

TEX. GOVT. CODE § 2301.468 (2003) (emphasis added).[8] The parties offered competing interpretations of "unreasonable discrimination". Citing to a PFD from another case before the Board, HMA argued "unreasonable discrimination" is discrimination that is "arbitrary, capricious, without substantial cause or reason or lacking a legitimate business justification. *See* HMA's Post-Hearing Brief at 44 (citing *Star Houston, Inc. v. Mercedes-Benz* USA, LLC, SOAH Docket No. 601-09-3665.LIC, at 44-45 (June 13, 2014) (proposal for decision)). WC argued that Judge Harvel should "consider the ordinary meaning of unreasonable – not guided by reason, irrational, and beyond the limits of acceptability or fairness – in light of the circumstances of this case and the evidence presented at the hearing. . . ." WC's Post-Hearing Response Brief at 19.

In the PFD, Judge Harvel quotes Section 2301.468 (2003). Ex. 1 at 2. She then devotes a separate section of the PFD to WC's statutory claim in which she summarizes WC's arguments, summarizes HMA's arguments and then analyses the evidence. *Id.* at 8-19. In her analysis, however, Judge Harvel never adopts HMA's interpretation of "unreasonable discrimination". *Id.* at 13-19. Absent from Judge Harvel's analysis, FOFs, and COLs is any statement or suggestion that HMA's conduct was not arbitrary, capricious, without substantial cause or reason or lacking a legitimate business justification. *Id.* at 13-19, 23-28. Rather, Judge Harvel effectively considered the evidence under the ordinary meaning of "unreasonable discrimination" and simply concluded that WC failed to meet its burden of proof under Section 2301.468. *Id.* at 27 (COLs 27 and 28); *see also id.* at 14 (stating "the ALJ finds that World Car

[8] As discussed in Section IV(E)(1), *infra*, WC did not allege a claim under the 2003 version of Section 2301.468. Rather, WC asserted a claim under the 2011 version of the statute that is inapplicable to this case.

failed to meet its burden of proof to show that Hyundai unreasonably discriminated against it"). Having utilized the ordinary meaning of "unreasonable discrimination" as WC requested, the Board should not overturn the PFD based on Judge Harvel supposedly misinterpreting the statute.[9]

E. There is no basis for overturning the PFD based on Judge Harvel's supposed misinterpretation of Section 2301.468.

Next, even assuming, *arguendo*, that Judge Harvel misinterpreted Section 2301.468, this would not be a proper basis for overturning Judge Harvel's PFD because WC has no valid claim under the applicable statute. First, WC never pleaded a cause of action for "unreasonable discrimination" under Section 2301.468 (2003). WC only pleaded a claim for "unfair and inequitable treatment" under Section 2301.468 (2011) which does not apply to this case. Second, even if WC had pleaded the correct statute, its claim still fails as a matter of law.

1. WC only pleaded a claim against HMA under the inapplicable 2011 version of Section 2301.468 not the applicable 2003 version.

WC's claim under Section 2301.468 is set forth in Count 2 of its live pleading and states as follows:

[9] HMA maintains its interpretation of "unreasonable discrimination" is correct. Accordingly, because WC failed to carry its burden of proof under its liberal interpretation of the statute, it could not carry its burden under the correct interpretation of "unreasonable discrimination". Put differently, if the Board agrees with HMA's interpretation of "unreasonable discrimination", then Judge Harvel's ultimate conclusion is still correct.

COUNT 2 – UNFAIR AND INEQUITABLE TREATMENT

34. World Car Hyundai incorporates paragraphs 1-29 as if stated verbatim herein.

35. Under Section 2301.468 of the Texas Occupations Code, HMA is prohibited from treating World Car Hyundai unfairly or inequitably in the application of a standard or guideline as compared to other franchised Hyundai dealers.

36. HMA has violated Section 2301.468 by providing World Car Hyundai unfair and inequitable vehicle inventory allocations and disbursements of Co-Op advertising funds.

WC's Second Amended Complaint, ¶¶ 34-36. WC plainly alleged that HMA engaged in "unfair and inequitable conduct" not that it "unreasonably discriminated" against WC. *Id.*

WC based its claim on the current, 2011 version of Section 2301.468, entitled "Inequitable Treatment of Dealers or Franchisees", that provides:

> Notwithstanding the terms of a franchise, a manufacturer, distributor, or representative may not treat franchised dealers of the same line-make differently as a result of the application of a formula or other computation or process intended to gauge the performance of a dealership or otherwise enforce standards or guidelines applicable to its franchised dealers in the sale of motor vehicles if, in the application of the standards or guidelines, the franchised dealers are treated unfairly or inequitably in the sale of a motor vehicle owned by the manufacturer or distributor.

TEX. OCC. CODE § 2301.468 (2011). However, the 2011 version of the statute only applies to dealer agreements entered after the effective date of the amendment – September 1, 2011. *See* 2011 Tex. Sess. Law Serv. Ch. 137 (S.B. 529), § 16. HMA's Dealer Sales and Service Agreements with WC were entered in 2008 and 2010, respectively. DTX28, DTX30. Thus, WC is precluded from pleading a claim for unfair and inequitable treatment under the 2011 version of Section 2301.468.

The 2003 and 2011 versions of Section 2301.468 are different laws. "In the absence of some showing, either by legislative history or otherwise, that the intent of the legislature in

adopting the amendment was to clarify rather than change the statute in question, the presumption is of change rather than clarification." *Ex parte Ellis*, 279 S.W.3d 1, 28 (Tex. App.—Austin 2008), *aff'd,* 309 S.W.3d 71 (Tex. Crim. App. 2010); *see Adams v. Tex. State Bd. of Chiropractic Examiners,* 744 S.W.2d 648, 656 (Tex. App.—Austin 1988, no writ) (same); *see also Ford Motor Co. v. Motor Vehicle Bd. of Tex. Dept. of Transp./Metro Ford Truck Sales, Inc.*, 21 S.W.3d 744, 763 (Tex. App.—Austin 2000, pet. denied) (stating that when Legislature enacts an amendment, it is presumed to have intended to change the original act by creating a new right). Thus, a claim for "unfair and inequitable treatment" under the 2011 version of Section 2301.468 is not the same as a claim for "unreasonable discrimination" under the 2003 version of the statute. WC only pleaded the former, and it is inapplicable to WC.

HMA noted WC's failure to plead a claim for unreasonable discrimination under the 2003 version of 2301.468. *See* HMA's Post-Hearing Brief at 25. Judge Harvel recognized that the 2011 version did not apply to this case. Ex. 1 at 2, n. 2. Nevertheless, Judge Harvel gave WC the benefit of the doubt and analyzed WC's claim ***as if*** it had pleaded "unreasonable discrimination" under the 2003 version of the statute despite WC's failure to plead such a claim. Judge Harvel could have concluded, as a matter of law, that WC's claim for unfair and inequitable treatment failed because the claim was based on the 2011 version of Section 2301.468. Instead, she considered the evidence as if WC pleaded the applicable 2003 version of the statute and still concluded that WC could not meet its burden of proof.

Regardless, the fact remains that WC did not plead a claim against HMA for "unreasonable discrimination" under Section 2301.468 (2003). WC only pleaded a claim for "unfair and inequitable treatment" under the inapplicable Section 2301.468 (2011). WC is not entitled to relief on a claim it never pleaded. Therefore, even if Judge Harvel misinterpreted

"unreasonable discrimination" under Section 2301.468 (2003), the error was harmless and is not a proper basis for overturning the PFD.

2. WC has no viable claims under Section 2301.468 (2003) even if WC had pleaded claims under the statute.

Further assuming, *arguendo*, that Judge Harvel misinterpreted Section 2301.468, such error was harmless because WC could not prevail on any claim under the 2003 version of the statute, even if WC had pleaded the statute.

a. Section 2301.468(2) (2003).

The scope of Section 2301.468(2) (2003) is limited. The statute does not govern all aspects of the relationship between vehicle distributors and dealers. Rather, the narrowly-tailored provision states a distributor may not "discriminate unreasonably between or among franchisees in the sale of a motor vehicle owned by the manufacturer or distributor." TEX. OCC. CODE § 2301.468(2) (2003) (emphasis added). Accordingly, in order to constitute a violation of Section 2301.468(2) (2003), the alleged unreasonable discrimination must occur in the sale – not in the allocation – of a vehicle by the manufacturer/distributor to the dealer.

Allocating vehicles and selling vehicles is not the same thing. The allocation process merely determines the number of vehicles a dealer is offered by a distributor; an allocation does not mandate a purchase by a dealer or necessarily involve a sale by the manufacturer or distributor to the dealer. The evidence showed that just because HMA allocated a vehicle to a dealer, that did not mean that the vehicle was actually bought by the dealer or sold by HMA. WC's principal testified that he chose to reduce his inventory, at both dealerships, in 2009 by turning down vehicles (*i.e.*, choosing not to purchase vehicles allocated to WC). *See* TR225, 228 (Zabihian stating he chose to buy fewer cars in 2009). This continued into the first half of 2010, when WC turned down over 200 vehicles that HMA allocated to WC. DTX47. Accordingly,

alleged "unreasonable discrimination" in allocating vehicles does not satisfy the requirements of the statute that the discrimination occur "in the sale of a vehicle."[10]

Moreover, complaints about HMA's use of sales efficiency as a metric of dealer sales performance does not invoke Section 2301.468(2) (2003). The statute prohibits unreasonable discrimination in the sale of a motor vehicle owned by the manufacturer or distributor. TEX. OCC. CODE § 2301.468(2) (2003). Sales efficiency is a metric used to measure a dealer's retail sales performance, based on national registrations of vehicles sold by dealers to retail customers; it does not relate to sales from distributors to dealers. TR452-54; TR1164-65.[11] Sales efficiency compares a dealer's total sales (wherever made) to the sales the brand expect to achieve in the dealer's primary market area (PMA). TR1171. Notably, 100% sales efficiency represents only "average" sales performance and allows dealers to compare their performance with other dealers. TR930. It is not a sales objective. Dealers can use sales efficiency data to target efforts to improve sales for specific models such as with increased training for sales staff or targeting advertising. TR1171-72; DTX44.

[10] Discrimination in the "sale of a vehicle" could, for example, occur if a vehicle were sold to one dealer at a price different from the sale of an identical vehicle to another dealer. There is no evidence in this case that any such discrimination ever occurred.

[11] Moreover, sales efficiency has repeatedly been held to be a fair and reasonable way to measure dealer performance for the legitimate business purpose of determining whether a dealer is complying with its sales performance obligations. *See, e.g., Brown Motor Sales Co. v. Hyundai Motor America*, No. 09-06-MVDB-358-D (Ohio Motor Veh. Dealers Bd. Jan. 15, 2010) (finding HMA's use of sales efficiency metric fair and reasonable and upholding termination of a dealer whose efficiency was approximately 46.3% over a 5-1/2 year period), *aff'd*, No. 10CVF-02-2816 (Ohio Common Pleas, Franklin Co. July 2, 2010), *aff'd*, 2011 Ohio 5053 (Ohio Ct. App. Sept. 30, 2011); *Superior Pontiac Buick GMC, Inc. v. Nissan North America, Inc.*, 2012 WL 1079719 (E.D. Mich. Mar. 30, 2012) (upholding termination based on low sales efficiency); *Hampton Auto Group v. Nissan North America, Inc.*, No. HSMV-12-853-FOF-MS (Fla. DHSMV Oct. 24, 2012) (same); *In the Matter of Ralph Gentile, Inc. v. Nissan North America, Inc.*, No. TR-07-0001 (Wis. Div. of Hearings and Appeals, Feb. 4, 2010) (same), *aff'd sub nom. Ralph Gentile, Inc. v. State of Wisconsin Div. of Hearings & Appeals*, No. 10-cv-1050 (Wis. Cir. Ct. Sept. 13, 2010), *aff'd*, 800 N.W.2d 555 (Wis. App. 2011); *In the Matter of Seacoast Imported Auto, Inc. d/b/a Nissan of Stratham*, No. 04-06 (N.H. Motor Veh. Ind. Bd. Apr. 12, 2010) (same), *aff'd, Seacoast Imported Auto, Inc. v. Nissan North America, Inc.*, No. 218-2010-CV-471 (N.H. Super. Ct. Nov. 29, 2010).

b. Section 2301.468(1) (2003).

Section 2301.468(1) (2003) prohibits a distributor from treating a franchised dealer differently "as a result of a formula or other computation or process intended to gauge the performance of a dealership". TEX. OCC. CODE § 2301.468(1) (2003). The allocation of discretionary vehicles is not a formula, computation or process intended to gauge a dealer's performance. Thus, WC's complaints regarding vehicle allocations would not give rise to a claim under Section 2301.468(1) (2003).

With respect to sales efficiency, it is undisputed that sales efficiency is calculated the same for all Hyundai dealers. TR1164-70. WC's principal testified that "all other manufacturers" measure dealer performance by sales efficiency. TR453-54. Sales efficiency is not considered in formula allocations. TR711. Moreover, both WC dealerships continued to receive allocations despite having sales efficiencies well below 100% from 2009 to the present. *Compare* PTX81 (showing allocations to TX077 and TX087 from 2008 to 2009) *with* TR1174; PTX3; PTX4 (showing sales efficiencies figures below 100% for both TX077 and TX087 since 2009).

Accordingly, even if Judge Harvel misinterpreted Section 2301.468, the error was harmless. WC has no viable claim under Section 2301.468 (2003) even if WC had pleaded a claim under the statute (which it did not).

F. The Final Order is not supported by substantial evidence.

As noted in Sections IV(B) and (C), the Board's Final Order neither includes FOFs and COLs nor explains why Judge Harvel's FOFs and COLs were apparently rejected. The Board is required include FOFs and COLs in Final Order and specifically explain why it rejected the proposed FOFs and COLs. TEX. GOV'T CODE § 2001.141(b); TEX. OCC. CODE § 2301.711(b).

Because the Board fails to provide any explanation, its Final Order is not supported by substantial evidence (or any evidence). *See* TEX. GOV'T CODE § 2001.174(2)(E) (stating that agency's decision shall be reversed if it is "not reasonably supported by substantial evidence considering the reliable and probative evidence in the record as a whole"); *Mid-South Pavers, Inc.*, 246 S.W.3d at 724 (affirming reversal of final order and holding that agency's explanation for changing certain FOFs and COLs was not supported by substantial evidence); *Dunn*, 2003 WL 22721659, at *3 (affirming district court's reversal of final order and finding agency lacked substantial evidence for changing ALJ's FOF). The Board does not articulate any evidence that supports its decision.[12] Accordingly, the Board should vacate its Final Order and enter a new Final Order adopting Judge Harvel's PFD.

V.
CONCLUSION

For all the reasons set forth above, Hyundai Motor America respectfully requests the Board: 1) vacate its Final Order signed November 3, 2016; and 2) enter a new Final Order – which follows the recommendations of Judge Harvel and the Motor Vehicle Division Staff – accepting all of the Findings of Fact and Conclusions of Law from Judge Harvel's Proposal for Decision along with those non-substantive modifications proposed by the Motor Vehicle Division Staff on October 27, 2016. In the alternative, the Board should: 1) identify the Findings of Fact and Conclusions of Law upon which its Final Order is based; and 2) explain the reason for each of Judge Harvel's Findings of Fact and Conclusions of Law that it is rejecting or modifying, including explaining how Judge Harvel allegedly misinterpreted Section 2301.468.

[12] To the contrary, there is substantial evidence – as set forth in Judge Harvel's PFD – to support her proposed FOFs and COLs. *See generally* Ex. 1; *see also* HMA's Post-Hearing Brief (detailing evidence that HMA did not violate any statutory provisions alleged by WC).

Respectfully submitted,

/s/ Kevin M. Young
David M. Prichard
State Bar No. 16317900
Direct Line: (210) 477-7401
E-mail: dprichard@phy-law.com

Kevin M. Young
State Bar No. 22199700
Direct Line: (210) 477-7404
Email: kyoung@phy-law.com

PRICHARD HAWKINS & YOUNG
Union Square, Suite 600
10101 Reunion Place
San Antonio, Texas 78216
(210) 477-7400 – Telephone
(210) 477-7450 – Facsimile

ATTORNEYS FOR RESPONDENT, HYUNDAI MOTOR AMERICA

CERTIFICATE OF SERVICE

I hereby certify that ***Hyundai Motor America's Motion for Rehearing to the Board's Final Order Signed November 3, 2016*** has been forwarded to all counsel of record, via email, on this **6th day** of **December 2016.**

Dan Downey
DAN DOWNEY, P.C.
1609 Shoal Creek Blvd., Suite 100
Austin, Texas 78701
dan@dandowney.com

Lee L. Kaplan
Jarod R. Stewart
SMYSER KAPLAN & VESELKA, LLP
700 Louisiana, Suite 2300
Houston, Texas 77002
lkaplan@skv.com
jstewart@skv.com

/s/ Kevin M. Young
Kevin M. Young

EXHIBIT 1

State Office of Administrative Hearings

Cathleen Parsley
Chief Administrative Law Judge

March 10, 2016

Daniel Avitia, Director
Motor Vehicle Division
Texas Department of Motor Vehicles
4000 Jackson Avenue
Austin, TX 78731

VIA INTERAGENCY MAIL

RE: **Docket No. 608-14-1208.LIC; MVD Docket No. 14-0006 LIC; New World Car Nissan, Inc., d/b/a World Car Hyundai and New World Car Imports, San Antonio, Inc., d/b/a World Car Hyundai**

Dear Mr. Avitia:

Please find enclosed a Proposal for Decision in this case. It contains my recommendation and underlying rationale.

Exceptions and replies may be filed by any party in accordance with 1 Tex. Admin. Code § 155.507(c), a SOAH rule which may be found at www.soah.state.tx.us.

Sincerely,

Wendy K.L. Harvel
Administrative Law Judge

WKLH/ls
Enclosure

cc: Dan Downey, Dan Downey, P.C., 1609 Shoal Creek Blvd., Ste. #100, Austin, TX 78701 – **VIA REGULAR MAIL**
Lee L. Kaplan, Jarod R. Stewart, Smyser Kaplan & Veselka, L.L.P., 700 Louisiana, Ste. 2300, Houston, TX 77002 – **VIA REGULAR MAIL**
Kevin M. Young, David Prichard, Prichard Hawkins Young, 10101 Reunion Place, Ste. 600, San Antonio, TX 78216 – **VIA REGULAR MAIL**
Alice Carmona, Docket Clerk, Texas Department of Motor Vehicle, 4000 Jackson Avenue, Austin, Texas 78731 (with 1 - CD; Certified Evidentiary Record) - **VIA INTERAGENCY MAIL**

300 W. 15th Street, Suite 502, Austin, Texas 78701/ P.O. Box 13025, Austin, Texas 78711-3025
512.475.4993 (Main) 512.475.3445 (Docketing) 512.322.2061 (Fax)
www.soah.state.tx.us

SOAH DOCKET NO. 608-14-1208.LIC
MVD DOCKET NO. 14-0006 LIC

NEW WORLD CAR NISSAN, INC., D/B/A WORLD CAR HYUNDAI and NEW WORLD CAR IMPORTS, SAN ANTONIO, INC., D/B/A WORLD CAR HYUNDAI, Complainants	§	BEFORE THE STATE OFFICE
v.	§	OF
HYUNDAI MOTOR AMERICA, Respondent	§	ADMINISTRATIVE HEARINGS

TABLE OF CONTENTS

SOAH DOCKET NO. 608-14-1208.LIC
MVD DOCKET NO. 14-0006 LIC

NEW WORLD CAR NISSAN, INC., D/B/A WORLD CAR HYUNDAI and NEW WORLD CAR IMPORTS, SAN ANTONIO, INC., D/B/A WORLD CAR HYUNDAI,	§	**BEFORE THE STATE OFFICE**
Complainants	§	**OF**
v.	§	
HYUNDAI MOTOR AMERICA,	§	
Respondent	§	**ADMINISTRATIVE HEARINGS**

PROPOSAL FOR DECISION

I. INTRODUCTION

New World Car Nissan, Inc. and New World Car Imports, San Antonio, Inc. (together, World Car) contend that Hyundai Motor America's (Hyundai) allocation system, sales efficiency metric, and advertising subsidies violate the Texas Occupations Code (Occupations Code) because they are discriminatory, discriminate among dealers, require World Car to adhere to unreasonable sales standards, and violate the duty of good faith and fair dealing.

The Administrative Law Judge (ALJ) finds that World Car failed to meet its burden of proof to show that any of Hyundai's programs violate the Occupations Code. Therefore, the ALJ recommends that World Car's complaint be denied.

II. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

The parties do not dispute jurisdiction, notice, or procedural history. Therefore, those matters are addressed in the findings of fact and conclusions of law without discussion.

The hearing convened on September 21, 2015, at the State Office of Administrative Hearings in Austin, Texas, with ALJ Wendy Harvel presiding. The record closed on January 11, 2016, following the submission of post-hearing briefs and an agreed record.[1]

III. APPLICABLE LAW

World Car alleges that Hyundai violated three sections of the Occupations Code. Under Section 2301.467, "a manufacturer or distributor . . . may not: (1) require adherence to unreasonable sale or service standards." Under Section 2301.468 (2003):

> A manufacturer, distributor, or representative may not:
>
> (1) notwithstanding the terms of any franchise, directly or indirectly discriminate against a franchised dealer or otherwise treat franchised dealers differently as a result of a formula or other computation or process intended to gauge the performance of a dealership; or
>
> (2) discriminate unreasonably between or among franchisees in the sale of a motor vehicle owned by the manufacturer or distributor.[2]

Texas Occupations Code § 2301.478 imposes on vehicle manufacturers and distributors a duty of good faith and fair dealing in their relationships with franchisees.

World Car, as the complainant, has the burden of proof.[3]

IV. FACTUAL BACKGROUND

Ahmad Zabihian owns World Car in San Antonio, Texas. World Car has two Hyundai dealerships in San Antonio. One is in north San Antonio next to Interstate 35 (World Car

---

[1] The ALJ commends the parties on their use of technology during and after the hearing and the professionalism exhibited by all participants in the case.

[2] The 2003 version of the statute applies to this case because the 2011 version applies only to an agreement entered into or renewed after the September 1, 2011 version of the statute was enacted. The franchise agreements between Hyundai and World Car were renewed in November 2010.

[3] 1 Tex. Admin. Code § 155.427.

North); the other is in south San Antonio (World Car South). They are part of the World Car Auto Group, which is comprised of 10 dealerships in the San Antonio area. Mr. Zabihian owns all of the World Car Auto Group dealerships. In addition to Hyundai, World Car Auto Group maintains Kia, Mazda, and Nissan dealerships.

World Car's primary Hyundai competitor is Red McCombs Hyundai (Red McCombs). Red McCombs owns two Hyundai dealerships in San Antonio – Red McCombs Superior and Red McCombs Northwest.

Prior to the 2008 recession, World Car North and Red McCombs Superior performed at approximately equal levels in terms of the number of vehicles sold. World Car South performed less well. It is in a lower-income area than World Car North. Red McCombs Northwest did not perform as well prior to the 2008 recession, but improved its sales during 2008-2009. The chart below illustrates the sales for the four dealerships.[4]

Dealer	2006	2007	2008	2009	2010 (Jan.-June)
World Car North	663	512	664	476	284
Red McCombs Superior	675	510	445	462	318
World Car South	304	373	429	174	90
Red McCombs Northwest	193	314	410	485	227

World Car notes that it sold the same volume or out-sold Red McCombs during most of these years. World Car contends its good sales were helped by Hyundai's regional general manager at the time (Rick Lueders), who provided World Car with sufficient inventory and Co-Op advertising assistance.[5]

[4] World Car Exs. 10, 82.

[5] Co-Op advertising assistance is money provided from Hyundai to its dealers to cover part of the cost of dealership advertising.

In June 2010, Tom Hetrick replaced Mr. Lueders as Hyundai's regional general manager. World Car asserts that Mr. Hetrick did not provide inventory at the same level and was not as responsive to World Car as Mr. Lueders had been. Beginning in June 2010 through September 2013, World Car contends that Mr. Hetrick did not assist World Car with requests for additional inventory. World Car also contends that Mr. Hetrick provided substantially more assistance with Co-Op funds to the Red McCombs dealerships than to World Car. World Car alleges this practice continued from the beginning of Mr. Hetrick's tenure through the end of the third quarter of 2013, when World Car initiated litigation against Hyundai.[6]

World Car also alleges that Red McCombs dealerships were able to game Hyundai's allocation system, resulting in Red McCombs unfairly obtaining additional inventory even though it was not entitled to receive it.

Hyundai agrees with the sales numbers World Car presents. Hyundai argues that World Car's poor sales were not due to Mr. Hetrick's division of inventory, but rather to World Car voluntarily reducing inventory during the recession of 2008-2009 by turning down hundreds of cars offered to it through the allocation system. Additionally, Hyundai notes that World Car did not participate in many of the Hyundai programs that could have helped World Car increase its sales, including adding the Equus product, remodeling, becoming an exclusive Hyundai dealership, and using Hyundais as service loaner vehicles. Those practices allowed the Red McCombs dealerships to qualify for additional inventory.

Hyundai also notes that in March 2011, a large earthquake and tsunami hit Japan, which resulted in fewer Japanese cars being available on the market in the United States. As a result of the shortage of Japanese cars, Hyundais became more popular and were in short supply as the manufacturer had not and could not have anticipated the increased demand. Hyundai asserts that during the time of short supply, all dealers were asking for additional inventory, and Hyundai was unable to supply any of its dealers with as much inventory as requested.

---

[6] The civil litigation is in Bexar County, Texas.

A. Allocation System

Hyundai's allocation system consists of formula allocations, discretionary allocations, and manual allocations. Formula allocations make up approximately 85% of the vehicles allocated and are allocated through a formula and computer program.[7] Hyundai uses a balanced days' supply system for its formula allocations.[8] The same formula is used for all Hyundai dealers nationwide.[9] Hyundai used the same formula allocation system from 2006 through 2013.[10] Under the allocation algorithm, vehicles are offered to dealers based on each dealer's inventory and the average number of vehicles sold by the dealer in the previous 90 days. The system allocates vehicles, one at a time, to the dealer in the region with the lowest days' supply for each respective model.[11] This system is not a pure "turn and earn" system because the turn and earn system considers only the number of vehicles sold and reported by each dealer, while the balanced days' supply considers the dealers' available inventories.[12] World Car is not challenging the mechanics of the formula allocation system. Rather, as part of its complaint that it was subject to unreasonable discrimination, World Car asserts that Red McCombs' dealerships were able to cheat and game the allocation system, which resulted in those dealerships improperly receiving additional allocation. Because World Car did not use the same methods of gaming the system, World Car alleges it was subject to unreasonable discrimination.[13]

Discretionary allocations are made by Hyundai's regional general manager, who may distribute up to 15% of total allocation. Manual allocations include turn downs, which are

---

[7] Tr. at 760, 1062-63, 1066.

[8] Tr. at 824-25.

[9] Tr. at 708, 1155.

[10] Tr. at 820-21. The formula used to determine allocation was changed after 2013, but the new formula is not the subject of this proceeding.

[11] Tr. at 819.

[12] Tr. at 825.

[13] World Car Initial Brief at 21-25.

vehicles allocated to a dealer under the formula that the dealer rejects that are then made available to other dealers in the region, and vehicles that have been re-customized or modified.[14]

It should be noted that the discretionary allocation does not always equal 15%. Particularly, during times of short supply, there may not be as much discretionary allocation.[15] Discretionary allocation can be, and usually is, provided for particular events or milestones at a dealership, such as facility renovations, grand openings, turning a multi-manufacturer dealership into a Hyundai-exclusive dealership, or agreeing to sell Hyundai's luxury vehicle, the Equus.[16]

Within the San Antonio market, when analyzing discretionary allocation among the dealerships, World Car received similar percentages of discretionary allocation when compared to Red McCombs.

Year[17]	McCombs Superior	McCombs NW	World Car North	World Car South
2008	2%	3%	15%	19%
2009	2%	3%	5%	11%
2010	6%	14%	3%	4%
2011	16%	14%	12%	12%
2012	13%	15%	13%	3%
2013	1%	1%	1%	0%

The parties agree that Hyundai offers 12 different models of vehicles, with distinct trim levels, which results in at least 96 different configurations before options and paint colors are chosen.[18] World Car asserts that it (and any other dealership) needs a certain minimum level of

[14] Tr. at 685, 1103-04, 1146.

[15] Tr. at 840-41.

[16] Tr. at 1060-60, 1080.

[17] Data in this chart is aggregated from information in Hyundai Ex. 99, which contains confidential information.

[18] World Car Ex. 130.

inventory to offer choice and selection to customers and to maintain or increase its sales rate.[19] Hyundai does not disagree.[20]

The inventory, sales, and allocation cycle can spiral downward as a result of poor sales and low inventory. If a dealership has low inventory, it will result in a lower sales rate because there is less selection. With fewer cars sold, the allocation system will not allocate as many new cars to the faltering dealership. World Car asserts that it needed a significant increase in its inventory in order to be able to sell more cars. With the low inventory, caused by reduced sales and lack of new inventory, World Car's sales rate declined.

Again, World Car does not challenge the formula that performs the 85% system allocations.[21] Rather, World Car challenges the 15% discretionary and manual allocations and the ability of dealerships to game the allocation system at the expense of other dealerships.

B. Sales Efficiency

Sales efficiency is a metric that Hyundai uses to measure dealer sales performance.[22] Sales efficiency compares a dealer's total sales to sales the brand expects to achieve in the dealer's primary market area. Hyundai calculates expected sales by applying Hyundai's national average sales penetration in each vehicle segment in which Hyundai competes to the actual number of vehicles registered in that segment in the dealer's primary market area. Thus, if Hyundai sells 5% of the subcompact vehicles sold nationwide during a particular time period, then Hyundai would expect that 5% of the subcompacts sold in a dealer's primary market area during that same time period would be Hyundais.[23] Hyundai then compares the dealer's total

---

[19] Tr. at 154, 650-51, 682-83.

[20] World Car Ex. 117 at 193; Tr. at 510, 512.

[21] World Car Initial Brief at 6.

[22] Almost every other car manufacturer uses the same or similar metric. Tr. at 73, 712, 453-54.

[23] Tr. at 1165-66.

sales to the expected sales number. So if expected sales are 200, and the dealer sold 200 cars, the dealer is 100% sales efficient.

C. Co-Op Advertising Funds

Hyundai's Co-op Advertising Commitment Program provides funds (Co-Op advertising funds) to dealers to assist with advertising. The funds do not pay for the total cost of advertisements the dealer purchases, but provide partial reimbursements.[24] Eligibility for the program and the amount of reimbursement are determined by a formula that considers sales and customer services scores.[25] Regional general managers also have some discretionary funds they can provide to dealers.[26]

V. ALLEGED VIOLATIONS

A. Discriminatory Treatment (Occupations Code § 2301.468 (2003))

1. World Car's Arguments

a. Discretionary allocation

i. Discrimination based on formula to gauge performance

World Car asserts that Hyundai violated Occupations Code § 2301.468(1) (2003) by treating World Car differently than Red McCombs in the discretionary allocation of vehicle inventory. World Car notes that Mr. Hetrick gave 98 discretionary allocations to Red McCombs Northwest and 36 to Red McCombs Superior during the first six months of his tenure as regional general manager. During the same time, he provided 10 cars through discretionary allocation to

[24] Tr. at 217-18.

[25] Tr. at 391.

[26] Tr. at 93.

each World Car dealership. Thus, Red McCombs two dealerships received a total of 134 discretionary cars, and World Car received a total of 20.[27] World Car further asserts that the large number of discretionary allocations to the Red McCombs dealerships allowed them to sell more cars because they had more inventory. Because they were able to sell more cars, they earned more through the 85% formula allocations. World Car characterizes the difference in allocation of vehicles by a comparative percentage. In other words, Hyundai allocated seven times more vehicles to the Red McCombs dealerships than it did to the World Car dealerships.[28]

ii. Unreasonable discrimination in sale of a motor vehicle

World Car contends that Hyundai unreasonably discriminated against World Car in violation of the second prong of Occupations Code § 2301.468(2) (2003) in the allocation of vehicle inventory. World Car alleges that the disparity in the discretionary allocation was unreasonable. World Car contends that it was not rational or fair for Mr. Hetrick to provide many more discretionary allocations to Red McCombs compared to World Car, particularly when World Car was making multiple requests for additional inventory from 2010 through 2013.[29] World Car also contends that Red McCombs received additional discretionary allocations when it renovated one of its facilities, whereas World Car did not receive discretionary allocation at its North Store when it was renovated.[30]

b. Gaming the formula allocation system

World Car argues that although the formula allocation system itself is not discriminatory, Red McCombs was able to game the system to its strategic advantage to improve formula allocations to its dealerships. World Car asserts that dealerships could game the allocation system by reporting vehicles as sold by submitting a Retail Delivery Report (RDR) even though

---

[27] World Car Ex. 111.

[28] World Car Initial Brief at 37.

[29] World Car Initial Brief at 38.

[30] World Car Initial Brief at 39, citing Tr. at 495-97.

the vehicle had not been sold and by putting vehicles into the service loaner program and reporting them as sold without actually using the vehicles as loaners.[31]

c. Sales efficiency

World Car also alleges a violation of Occupations Code § 2301.458(1) (2003) through the use of sales efficiency. To support its allegation, World Car notes that Mr. Hetrick used sales efficiency to reward dealerships with discretionary allocation, but treated World Car differently than Red McCombs. World Car also notes that it did not have enough inventory to reach 100% sales efficiency in the market, and Hyundai did not help World Car with additional inventory. Secondly, World Car argues that Mr. Hetrick proposed the sale of the World Car Hyundai dealerships because of poor sales efficiency and performance. Because Mr. Hetrick did not attempt to have other dealers sell their dealerships, and because Mr. Hetrick did not give World Car any assistance or inventory to help World Car improve its sales, World Car alleges discrimination under Texas Occupations Code § 2301.458(1).

d. Co-Op advertising

World Car asserts an additional violation of Occupations Code § 2301.468 (2003) through distribution of discretionary Co-Op advertising funds.[32] World Car notes that Hyundai distributes approximately 85% of Co-Op advertising funds through a formula that is predicated on reported sales.[33] The remaining funds are distributed at the discretion of the regional general manager.[34]

---

[31] World Car Initial Brief at 21.

[32] World Car Initial Brief at 40. World Car does not cite the specific subsection it is alleging was violated by the distribution of Co-Op advertising funds.

[33] World Car Ex. 120 at 19-20; Tr. at 93, 199-200.

[34] *Id.*

2. Hyundai's Response

a. Allocation

Hyundai argues that World Car cannot maintain its claim that the alleged discriminatory allocation of vehicles is a violation of the Occupations Code. Hyundai reads the statute narrowly to include only the sale of a motor vehicle. Thus, according to Hyundai, to prove a violation, the discrimination must have occurred in the sale of the vehicle, and not the allocation, measurement of sales efficiency, or the distribution of Co-Op funds.[35] Hyundai asserts that simply because a vehicle is allocated to a dealer, the dealer does not necessarily purchase it. The dealer may choose to purchase it or may turn it down. Allocation simply determines the number of vehicles the distributor offers the dealer.

Hyundai notes that the statute prohibits *unreasonable* discrimination, not discrimination for which Hyundai had a reasonable basis. Hyundai argues that unreasonable discrimination must be arbitrary, capricious, without substantial cause or reason, or lacking a legitimate business justification.[36] Hyundai argues that the formula allocations did not discriminate unreasonably. The formula is applied the same way to each dealer. Hyundai asserts that Red McCombs took advantage of optional programs that improved its position in the allocation system. Those programs were available to all dealers, including World Car, and World Car simply chose not to take advantage of the programs.[37] Those programs included: using Hyundais as service loaners; adding the luxury Equus line; remodeling; and making dealerships exclusively Hyundai-branded.[38] Another strategy to increase allocation was to report sales quickly. Some dealers submitted an RDR report after a spot delivery of a car, even if financing

---

[35] Hyundai Initial Brief at 36.

[36] Hyundai Initial Brief at 37, citing *Star Motorcars v. Mercedes-Benz USA*, SOAH Docket No. 601-09-3665, citing *Mitchell's Inc. v. Nelms*, 454 S.W.2d 809, 813-14 (Tex. App.—Dallas 1970, writ ref'd n.r.e.); *Burlington Northern & Santa Fe Ry. Co. v. South Plains Switching, Ltd. Co.*, 174 S.W.3d 349, 352-54 (Tex. App.—Fort Worth 2005, no writ); *Buddy Gregg Motor Homes, Inc. v. Marathon Coach, Inc.*, 320 S.W.3d 912, 924 (Tex. App.—Austin 2010, no pet.).

[37] Hyundai Initial Brief at 38.

[38] Tr. at 1182-83.

was not approved.[39] Reporting the sale quickly reduced the days' supply of that model and would show that the dealer might need additional formula allocation to maintain its supply. World Car did not submit RDR reports until financing was approved, which delayed the reported sale and slowed allocations.[40]

With respect to discretionary allocations, Hyundai argues that during the shortage following the tsunami, Mr. Hetrick focused the discretionary allocation on dealers that were committed to the Hyundai brand. Because Red McCombs maintained its inventory level during the recession, renovated one store, added the Equus line, and because its other store became a Hyundai-exclusive dealership, it received more discretionary allocation.[41]

b. Sales efficiency

Hyundai argues that measuring sales efficiency is not unreasonable discrimination. It is calculated the same way for all dealers. And it is used to identify dealers that perform below average so they can improve their performance.[42]

c. Co-Op advertising

Hyundai asserts that the use of Co-Op advertising funds cannot violate Occupations Code § 2301.468 because it does not relate to the sale of a motor vehicle. Rather, it is simply a mechanism to allow Hyundai as the manufacturer to contribute some money to the dealers to help the dealers purchase more advertising for the brand.

---

[39] Tr. at 101, 367.

[40] Tr. at 867.

[41] Tr. at 167, 1050-61.

[42] Hyundai Initial Brief at 45, 46.

3. Analysis

a. Discretionary allocation

The ALJ finds that the use of discretionary allocation did not violate the Occupations Code. World Car notes that in a six-month period Mr. Hetrick offered 134 cars through discretionary allocation for Red McCombs versus 20 for World Car.[43] World Car then makes the comparison that Red McCombs did not sell nearly seven times as many vehicles as World Car Hyundai.[44] World Car notes that at the time of the additional allocation, all four San Antonio Hyundai dealerships were considered by Hyundai to be underperforming.[45]

World Car's argument fails to take into account the differences between the Red McCombs' dealerships and World Car's dealerships. In 2010, Red McCombs Superior became an exclusive Hyundai dealer, whereas World Car South shares a dealership with Kia. Red McCombs' Northwest store added the luxury Equus line that required a facility upgrade, and then renovated the store. Red McCombs Superior also renovated its dealership in 2011-2012. World Car dealerships were not renovated during this time. It was not until 2014 that World Car North renovated its store. Red McCombs also participated in Hyundai's service loaner program. World Car did not participate in Hyundai's service loaner program.

World Car could have participated in all of these Hyundai programs, which would most likely have increased the sales rate and reduced the daily supply of vehicles, resulting in additional allocation. World Car chose not to participate. All dealers that chose to participate in the programs would have increased allocation and would have been eligible for discretionary allocation that was given by regional general managers to reward dealers for facility upgrades, renovations, and exclusivity. World Car's choice not to engage in those programs worked to its detriment in terms of receiving discretionary allocation. But Mr. Hetrick's decision to reward

---

[43] World Car Ex. 111.

[44] World Car Initial Brief at 37.

[45] World Car Initial Brief at 39.

Red McCombs was not unreasonably discriminatory. Rather, it was his reasonable business judgment to reward the Red McCombs dealerships for remodeling, becoming exclusive, adding the Equus line, and participating in the service loaner program. For these reasons, the ALJ finds that World Car failed to meet its burden of proof to show that Hyundai unreasonably discriminated against it in providing discretionary allocation.

World Car also reduced its inventory in 2009. Mr. Zabihian testified in his deposition that he pulled back in inventory in 2008-2009. At the hearing he agreed that he reduced inventory in 2009.[46] Mr. Zabihian also indicated that the Red McCombs stores kept their inventory at about the same levels during the 2008-2009 recession.[47]

In 2010, World Car turned down many vehicles offered by Hyundai. In the first six months of 2010, World Car North turned down 173 of 423 vehicles. World Car South turned down 32 of 100 offered vehicles.[48] Beginning in the second half of 2010 and continuing through mid-2013, there was a shortage of Hyundais. At that point, World Car had voluntarily reduced its inventory, resulting in a slower sales rate, and there were insufficient available cars to meet overall demand.

Although it was an unfortunate coincidence that the worldwide shortage of cars happened shortly after World Car had voluntarily reduced its inventory, World Car made the decision to do that. It was not the result of any discrimination on the part of Hyundai.

b. Gaming the allocation system

World Car alleges that submitting an RDR report for a spot delivery is a way for dealers to game the allocation system. A "spot delivery" refers to the practice of allowing a purchaser to take delivery of a vehicle after a sales contract is signed but before all final payment

---

[46] Tr. at 223-224, 228.

[47] Tr. at 228.

[48] Hyundai Ex. 47.

arrangements have been finalized.[49] World Car has decided not to record an RDR after a spot delivery because World Car thinks it does not constitute a sale until the sale is completed with approved financing.[50]

Spot deliveries are a common industry practice.[51] World Car spot delivers cars but does not submit an RDR report until the financing is approved. Because World Car does not immediately submit the RDR, the sale is reported later, thereby affecting the balanced days' supply of vehicles on its lot, and slowing formula allocation. Hyundai encouraged World Car to speed up its sales reporting by promptly submitting RDRs, but World Car chose not to do so.[52] Hyundai's dealer agreement requires dealers to report the delivery of each new motor vehicle to a purchaser by the end of the day the vehicle is delivered.[53]

World Car does not submit the RDR prior to the completed sale because once the RDR is submitted the warranty begins. So if the financing falls through, and the car is returned, the next purchaser would not have a full warranty.[54] World Car asserts that spot deliveries in Texas do not transfer ownership of the car from the dealer to the consumer, and thus submitting an RDR would be inaccurate.

Because spot deliveries are not illegal, and Hyundai had counseled World Car to submit RDR reports quickly once the car was delivered to the customer, World Car cannot now complain that not doing so was unreasonable discrimination. World Car had the same tools available to it as every other Hyundai dealer. In the event a warranty has started and the car is returned, World Car could sell the car to another purchaser at a reduced price to account for the shorter warranty period.

---

[49] Tr. at 967, 267, 520.

[50] Tr. at 103-05, 267-68, 566, 602.

[51] Tr. at 269.

[52] Tr. at 241-42.

[53] World Car Ex. 1.

[54] Tr. at 105, 108.

Importantly, although two expert witnesses testified about whether Red McCombs was gaming the allocation system by submitting RDR reports and then backing them out when the financing fell through, there was no evidence that this happened, only speculation.[55]

World Car also asserts that Red McCombs reported vehicles sold to the dealerships for use in the service loaner program even though the dealerships did not use the vehicles in the service loaner program.[56] World Car's evidence is that some of the service loaners came out of the service loaner program with "not too many miles on them."[57] The ALJ finds that there is insufficient evidence to show that Red McCombs gamed the allocation system by either falsely submitting RDR reports or not using service loaners. The ALJ finds that World Car failed to meet its burden of proof to show that any "gaming" of the allocation system violated the Occupations Code.

c. Sales efficiency

In 2008, both World Car North and South were over 100% sales efficient. In 2009, the north store dropped to 96.8% and continued to drop over time. In 2014, it was 65.7% sales efficient. The south store fared worse. It dropped to 17.9% sales efficient in 2013 but rebounded in 2014 to 31.2% sales efficient.[58]

World Car asserts that it did not have sufficient inventory to meet 100% sales efficiency. It argues that the sales efficiency expectation for World Car South was unreasonable because the south store saw a large drop in sales due to the opening of a Toyota manufacturing plant in the vicinity of the south store. Thus, it contends that Hyundai's sales efficiency calculation was

---

[55] Tr. at 732-33 (World Car expert Mr. Roesner testifying that he did not have any way to check whether spot deliveries were improper.)

[56] World Car Initial Brief at 22.

[57] Tr. at 782.

[58] Tr. at 1174; World Car Exs. 3, 4.

unfair because to achieve 100% sales efficiency, World Car would have had to have sold more cars than it was allocated.[59]

In 2009, Toyota opened a manufacturing plant and new dealership close to World Car South.[60] The manufacturing plant employs about 6,000 people. Those employees had incentives to purchase Toyota products.[61] World Car suggests that Hyundai should have recalculated its sales efficiency measures to account for the opening of the Toyota manufacturing plant and the resulting significant increase in Toyota sales in the area.

Because World Car was selling fewer cars out of the south store, it was receiving fewer cars through formula allocation. Combined with the shortage in supply due to the tsunami, it was difficult for World Car to maintain high enough inventory levels to be able to show customers a large selection. Hyundai was aware of the limited supply and knew that there was not enough manufacturing volume to provide dealers with sufficient inventory to allow the dealers to meet their sales targets. Hyundai's President and CEO testified that "[s]ome of the most difficult conversations that we had in 2011 and 2010 and – and 2013 were with dealers that couldn't get to their stated sales volumes with the inventory we were giving them. That's a tough conversation to have. It's a legitimate conversation, and there just isn't enough available volume – production volume to get to those numbers."[62]

World Car suggests that Hyundai had two choices to correct the issue, either sell more discretionary allocations to World Car or adjust the sales efficiency standard. Hyundai did neither.

Hyundai responds that sales efficiency was calculated in the same manner for World Car as it was for every other Hyundai dealer. The tsunami affected all dealers equally. Hyundai

---

[59] World Car Initial Brief at 29.

[60] Tr. at 438-40.

[61] Tr. at 442.

[62] World Car Ex. 20 at 243-44.

admits that in 2013, it sent World Car South a "Notice of Failure of Performance" based on the dealership's poor sales efficiency.[63] The letter advised the dealership of its deficient sales efficiency and asked the dealership to reassess its commitment by either pursuing a sale of the dealership or providing a written plan to improve performance.[64] World Car has done neither, but Hyundai has not sought to terminate the World Car South store as a dealer.

The ALJ agrees with Hyundai that to find a violation, World Car must prove that Hyundai treated dealers differently by the use of a formula to gauge sales performance. World Car argues that Mr. Hetrick rewarded discretionary allocations by looking at sales efficiency but that Red McCombs received several times as many cars through discretionary allocation when compared to World Car, even though the sales difference between the two dealers was not that high.

World Car's argument fails because all dealerships were in the same situation with regard to high demand and low supply. It is undisputed that following the Japanese tsunami, Hyundai manufacturing could not keep up with demand for the product. As a result, dealerships were unable to receive the number of cars they wanted. As discussed above, there were steps World Car could have taken to increase its sales numbers, but World Car made the business decision not to do so. The ALJ finds that World Car failed to meet its burden of proof to show that the use of a sales efficiency measure violates the Code.

d. Co-Op Advertising

The ALJ finds that Hyundai did not violate the Code through the discretionary use of Co-Op advertising funds. Co-Op advertising funds are sometimes provided to dealers by the manufacturer to increase the amount of money the dealer is able to spend on advertising.

---

[63] World Car Ex. 67.

[64] Tr. at 1124.

The Co-Op advertising funds must be used exclusively for advertising. Eligibility and the amount of reimbursement are determined by a formula that considers several factors including sales and customer service scores.[65] That formula does not discriminate in the sale of a motor vehicle. Rather it discriminates in the amount of money a dealership receives from Hyundai for advertising. The formula is not intended to gauge the performance of a dealership. It simply calculates how much additional advertising funding a particular dealership will receive. And notwithstanding the formula, the regional general manager has discretion to award additional Co-Op advertising funds. For example, in 2010, World Car South was not eligible under the formula to receive Co-Op advertising funds. However, Mr. Hetrick provided the store with $60,000 of discretionary Co-Op advertising funds over the third and fourth quarters of that year.[66] The Co-Op program formula is applied in the same manner to all dealers and is not intended as a way to gauge the dealer's performance. It is applied to determine which dealers are eligible for additional funding, and the amount of funding, but is unrelated to the sale of a motor vehicle. Above and beyond that funding, the regional general manager can award additional Co-Op dollars at his discretion. For these reasons, the ALJ finds that the Co-Op advertising program does not violate Occupations Code § 2301.468(1) or (2).

B. Unreasonable Sales Standards (Occupations Code § 2301.467(a)(1))

World Car alleges that Hyundai required World Car to adhere to unreasonable sales and service standards in violation of Occupations Code § 2301.467(a)(1). World Car asserts that the "sales efficiency requirements" for World Car South were unreasonable because World Car would have had to sell more cars than it was allocated. The facts that form the basis of this allegation are discussed above. World Car notes that Mr. Hetrick could have used his discretion to allocate more vehicles but chose not to do so.[67] Because Hyundai did not allocate additional inventory to World Car South or adjust the sales efficiency standard because of the increased

---

[65] Tr. at 391.

[66] Tr. at 259-60.

[67] Tr. at 1079, 1101-02.

competition from Toyota, World Car argues that Hyundai required it to adhere to an unreasonable sales standard.

With respect to World Car North, World Car asserts that the sales efficiency requirements were also unreasonable. World Car asserts that it did not receive enough allocation to be able to reach 100% sales efficiency. Hyundai recognized that World Car North needed to add additional inventory to be able to achieve 100% sales efficiency. However, World Car asserts that Hyundai did not provide additional inventory and that at the same time, the Red McCombs dealerships had sufficient inventory because they were receiving discretionary allocation from Mr. Hetrick.[68] Because Hyundai did not provide additional inventory, World Car contends that Hyundai required adherence to an unreasonable sales efficiency requirement.

Hyundai responds that sales efficiency is not a standard that World Car (or any other dealer) is required to adhere to. Rather, it is a measurement to compare each dealer's performance to other dealers and to the national average. Hyundai argues it has no requirement that dealers be 100% sales efficient.

Hyundai further argues that World Car's allocations are lower than its expected sales because World Car had not sold vehicles at a sufficient rate to earn greater allocations. If World Car had maintained its rate from the time it was over 100% sales efficient in 2008, it would have continued to earn sufficient vehicles through the allocation system.[69] Neither World Car store has been 100% sales efficient for several years. Hyundai has not sought to terminate either dealership. Mr. Hetrick recommended a renewal of the Dealer Agreement with World Car South in 2010 when the store had an average sales efficiency of 42%.[70]

The ALJ finds that World Car failed to meet its burden to show that Hyundai required adherence to an unreasonable sales or service standard based on the sales efficiency calculation.

---

[68] World Car Initial Brief at 45, *citing* World Car Ex. 109; at Tab 3; World Car Exs. 126, 127; Tr. at 1079.

[69] Hyundai Initial Brief at 50-51.

[70] Hyundai Ex. 41; Tr. at 261-62.

The word "require" is not defined in the statute. However, something is required when it is ordered or demanded as necessary.[71] There is no requirement in the Dealer Agreement between World Car and Hyundai that requires World Car to be 100% sales efficient.[72] There is a section in the standard provisions of the Dealer Agreement that identifies sales efficiency as a criterion that can be considered in evaluating dealer performance; it does not state that a dealer must be 100% sales efficient.[73] Thus, there is no requirement that World Car meet any standard for sales efficiency. Therefore, World Car failed to show that the sales efficiency metric requires it to meet an unreasonable sales standard.

C. Duty of Good Faith and Fair Dealing (Occupations Code § 2301.478(b))

World Car alleges that Hyundai violated the duty of good faith and fair dealing required by the Occupations Code by not supplying sufficient allocation and by evaluating World Car's sales performance based on sales efficiency. The allegations with respect to these claims are the same as those discussed above, and World Car alleges they also support a violation of the duty of good faith and fair dealing.[74]

Hyundai argues that it did not breach its duty of good faith and fair dealing because it did not violate any section of the Occupations Code. Hyundai asserts that World Car could have increased its allocation in the same manner as any other dealer – by recording spot deliveries, by participating in the service loaner program, by adding the Equus line, by renovating its dealerships, or by becoming an exclusive Hyundai dealer. Because World Car made the business decisions not to participate in those programs, any detriment to the allocation was caused by World Car's decisions.[75]

---

[71] *See* Merriam-Webster Dictionary; Black's Law Dictionary.

[72] Hyundai Exs. 28, 39; World Car Ex. 1.

[73] World Car Ex. 1.

[74] *See* Tex. Occ. Code § 2301.478(b).

[75] And the Japanese tsunami, which was outside of everyone's control.

The sales efficiency standard is not a requirement, rather it is a measurement Hyundai uses to gauge dealer sales. Although World Car was not 100% sales efficient after 2009, Hyundai still allowed World Car's dealerships to remain Hyundai dealers. And both World Car dealerships are still in existence. Sales efficiency is determined the same way for all dealers. Treating some dealers differently, as World Car argues, could actually violate Hyundai's duty of good faith and fair dealing with respect to other dealers.

World Car argues that the duty of good faith and fair dealing should be defined as "requir[ing] the parties to deal fairly with one another."[76] Hyundai contends that a breach of the duty of good faith and fair dealing requires a showing of the "conscious doing of a wrong for a dishonest, discriminatory or malicious purpose."[77]

The ALJ finds that regardless of which standard is applied, Hyundai prevails. Even applying World Car's lower "not fair" standard, neither the allocation system nor the sales efficiency metric violate the provision in the Occupations Code that requires good faith and fair dealing. Although the discretionary allocation accounts for around 15% of the allocation any dealer receives, Hyundai informs dealers of how they can increase their allocation. World Car did not take advantage of many of those programs. Furthermore, Hyundai treats all dealers under the same sales efficiency formula and informs the dealers of how sales efficiency is calculated. There is no evidence Hyundai has any intent not to play fair with World Car or other dealers that did not meet 100% sales efficiency.

VI. CONCLUSION

Based on the evidence presented, World Car failed to prove any of its alleged violations of the Occupations Code.

---

[76] World Car Initial Brief at 46, *citing Humble Emergency Physicians, P.A. v. Mem'l Hermann Healthcare Sys., Inc.*, 01-09-00587-CV, 2011 WL 1584854, at *7 (Tex. App.—Houston [1st dist.] Apr. 1, 2011, no pet.).

[77] Hyundai Initial Brief at 56, *citing Bray v. Tejas Toyota, Inc.*, 363 S.W.3d 777, 780 (Tex. App.—Austin 2012, no pet.).

VII. FINDINGS OF FACT

1. New World Car Nissan, Inc. d/b/a World Car Hyundai and New World Car Imports, San Antonio, Inc., d/b/a World Car Hyundai (together, World Car) are licensed, franchised dealers for Hyundai products and services.

2. Hyundai Motor America (Hyundai) is the wholesale distributor for Hyundai products and services in the United States.

3. On December 6, 2013, the Texas Department of Motor Vehicles (Department) issued a Notice of Hearing advising that World Car had filed a formal complaint with the Department.

4. The hearing on the merits convened on September 21, 2015, and concluded on September 25, 2016. The record closed on January 11, 2016, following the submission of written closing briefs and an agreed record.

Background

5. Ahmad Zabihian owns World Car in San Antonio, Texas. World Car owns two Hyundai dealerships in San Antonio.

6. World Car's primary Hyundai competitor is Red McCombs Hyundai. Red McCombs owns two Hyundai dealerships in San Antonio – Red McCombs Superior and Red McCombs Northwest.

7. Prior to the 2008 recession, World Car North and Red McCombs Superior performed at approximately equal levels in terms of the number of vehicles sold. World Car South performed less well. It is in a lower-income area than World Car North. Red McCombs Northwest did not perform as well prior to the 2008 recession, but improved its sales during 2008-2009.

8. Hyundai's allocation consists of formula allocations, discretionary allocations, and manual allocations.

9. Formula allocations make up approximately 85% of the vehicles allocated and are allocated through a formula and computer program.

10. Under the allocation algorithm, vehicles are offered to dealers based on each dealer's inventory and the average number of vehicles sold by the dealer in the previous 90 days. The system allocates vehicles, one at a time, to the dealer in the region with the lowest days' supply for each respective model.

11. Discretionary allocations are made by Hyundai's regional general manager, who may distribute up to 15%.

12. Manual allocations include turn downs, which are vehicles allocated to a dealer under the formula that the dealer rejects, which are then made available to other dealers in the region, and vehicles that have been re-customized or modified.

13. Sales efficiency is a metric that Hyundai uses to measure dealer sales performance.

14. Sales efficiency compares a dealer's total sales to sales the brand expects to achieve in the dealer's primary market area. Hyundai calculates expected sales by applying Hyundai's national average sales penetration in each vehicle segment in which Hyundai competes to the actual number of vehicles registered in that segment in the dealer's primary market area.

15. Hyundai's Co-Op Advertising Commitment Program (Co-Op) provides funds (Co-Op advertising funds) to dealers to assist with advertising. The funds do not pay for the total cost of advertisements the dealer purchases, but provide partial reimbursements.

16. Eligibility for Co-Op advertising funds and the amount of reimbursement are determined by a formula that considers sales and customer services scores. Regional general managers also have some discretionary funds they can provide to dealers.

17. In 2009, Hyundai's regional general manager responsible for the San Antonio region was Tom Hetrick, who replaced a different regional general manager that year.

Discrimination and gauging the performance of a dealership

Discretionary allocation

18. In 2009, during the first six months of Mr. Hetrick's tenure as regional general manager, he provided 134 cars through discretionary allocation to Red McCombs and 20 to World Car.

19. The differences in discretionary allocation between Red McCombs and World Car continued through 2013.

20. In 2009 and 2010, World Car voluntarily reduced its inventory.

21. Red McCombs dealerships maintained their high inventory levels during the 2008-2010 recession.

22. In 2010, Red McCombs Superior became an exclusive Hyundai dealership.

23. World Car South shares a dealership with the Kia brand.

24. Red McCombs Northwest added the luxury Equus line that required a facility upgrade and then renovated the store.

25. Red McCombs Superior renovated its dealership in 2011-2012.

26. Red McCombs participated in Hyundai's service loaner program.

27. World Car chose not to participate in the available programs provided by Hyundai that could have increased the allocation available to World Car.

28. World Car did not renovate a dealership until 2014, when it renovated World Car North.

29. World Car did not participate in Hyundai's service loaner program.

30. It was reasonable for Hyundai to reward dealers that participated in Hyundai-sponsored programs and renovated their facilities with extra discretionary allocation.

Gaming the formula allocation system

31. There was nothing improper or illegal about recording a Retail Delivery Report (RDR) for cars that had been spot delivered.

32. Hyundai encouraged World Car to speed up its sales reporting by promptly submitting RDRs once a car was delivered to a customer.

33. There was insufficient evidence to show that Red McCombs gamed the system by entering RDRs and then reversing them at a significantly higher rate than any other Hyundai dealership.

34. The service loaner program allowed dealerships to sell cars into the service loaner program, thereby reducing the inventory available for sale and increasing formula allocation.

35. The service loaner program was available to all Hyundai dealers.

36. World Car chose not to participate in the service loaner program.

37. Red McCombs participated in the service loaner program.

38. There was insufficient evidence to show that Red McCombs gamed the allocation system.

Sales efficiency

39. In 2008, both World Car North and South were over 100% sales efficient. In 2009, the north store dropped to 96.8% and continued to drop over time. In 2014, it was 65.7% sales efficient. The south store fared worse. It dropped to 17.9% sales efficient in 2013 but rebounded in 2014 to 31.2% sales efficient.

40. In 2009, Toyota opened a manufacturing plant and new dealership close to World Car South. The manufacturing plant employs about 6,000 people. Those employees had incentives to purchase Toyota products.

41. From 2010 until 2013, Hyundais were in short supply worldwide, primarily due to the high demand caused by the Japanese tsunami that devastated Japanese manufacturing.

42. Hyundai was aware that some dealers could not achieve 100% sales efficiency with the lower inventory.

43. Hyundai measured sales efficiency in the same manner for all dealers.

Co-Op Advertising Funds

44. Co-Op advertising funds must be used exclusively for advertising.

45. The distribution of Co-Op advertising funds is calculated by a formula that considers several factors including customer sales and service scores. The formula is not intended to gauge the performance of a dealership. It simply calculates how much additional advertising funding a particular dealership will receive.

46. The regional general manager has discretion to award additional Co-Op advertising funds.

47. In 2010, World Car South was not eligible under the formula to receive Co-Op advertising funds. Mr. Hetrick provided the store with $60,000 in Co-Op advertising funds over the third and fourth quarters of that year.

48. The Co-Op program formula is applied in the same manner to all dealers.

49. Co-Op advertising funds are unrelated to the sale of a motor vehicle.

Unreasonable Sales Standards

50. Maintaining 100% sales efficiency is not a requirement to be or to remain a licensed Hyundai dealer.

51. World Car stores have not been 100% sales efficient for several years, and both are operating under valid dealer agreements.

52. Measuring sales efficiency does not require adherence to unreasonable sales or service standards.

Duty of Good Faith and Fair Dealing

53. The allocation system and sales efficiency metric do not treat World Car unfairly.

VIII. CONCLUSIONS OF LAW

1. The Texas Department of Motor Vehicles has jurisdiction over this case. Tex. Occ. Code § 2301.001.

2. The State Office of Administrative Hearings (SOAH) has jurisdiction over all matters related to the contested case hearing in this case, including the authority to issue a proposal for decision with findings of fact and conclusions of law. Tex. Occ. Code § 2301.704.

3. The hearing was conducted pursuant to the Administrative Procedure Act and SOAH's procedural rules. Tex. Gov't Code ch. 2011 and 1 Tex. Admin. Code ch. 155.

4. Proper and timely notice of the hearing was provided. Tex. Occ. Code § 2301.705.

5. World Car has the burden of proof by a preponderance of the evidence. 1 Tex. Admin. Code § 155.427.

6. World Car failed to meet its burden of proof to show that Hyundai required adherence to unreasonable sales or service standards. Tex. Occ. Code § 2301.467(a)(1) (2003).

7. World Car failed to meet its burden of proof to show that Hyundai discriminated against World Car by treating them differently as a result of a formula or other process intended to gauge the performance of a dealership though allocation of vehicle inventory, sales efficiency calculations, or distribution of discretionary Co-Op advertising funds. Tex. Occ. Code § 2301.468(1) (2003).

8. World Car failed to meet its burden of proof to show that Hyundai engaged in unreasonable sales discrimination in the allocation of vehicle inventory because World Car did not participate in many of the programs that would have permitted additional discretionary allocation. Tex. Occ. Code § 2301.458(2).

9. World Car failed to meet its burden of proof to show that Hyundai violated its duty of good faith and fair dealing through allocations and sales efficiency because Hyundai

calculated sales efficiency in the same manner for all dealers, and World Car chose not to participate in many of the programs that could have led to additional discretionary allocation. Tex. Occ. Code § 2301.478(b).

SIGNED March 10, 2016.

WENDY K.L. HARVEL
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

EXHIBIT 2

Texas Department of Motor Vehicles
HELPING TEXANS GO. HELPING TEXAS GROW.

DATE: November 3, 2016
Action Requested: APPROVAL & ORDER

To: Board of the Texas Department of Motor Vehicles
From: Daniel Avitia, Director, Motor Vehicle Division
Agenda Item: 10
Subject: **Dealerships' complaint against Distributor under Texas Occupations Code §§2301.467, 2301.468, and 2301.478. *New World Car Nissan, Inc. D/B/A World Car Hyundai, World Car Nissan; and New World Car Imports San Antonio, Inc., D/B/A World Car Hyundai, Complainants v. Hyundai Motor America, Respondent;* MVD Docket No. 14-0006 LIC; SOAH Docket No. 608-14-1208.LIC**

RECOMMENDATION

Staff recommends the Board adopt the ALJ's findings of fact and conclusions of law, as modified. A draft final Order is attached to this Executive Summary for the Board's consideration.

PURPOSE AND EXECUTIVE SUMMARY

The State Office of Administrative Hearings (SOAH) issued a Proposal for Decision (PFD) for consideration by the Board of the Texas Department of Motor Vehicles.

FINANCIAL IMPACT

None

BACKGROUND AND DISCUSSION

On November 20, 2013, New World Car Nissan, Inc. d/b/a World Car Hyundai and New World Car Imports San Antonio, Inc. d/b/a World Car Hyundai (together, World Car) filed a complaint against Hyundai Motor America (Hyundai). World Car complained that Hyundai discriminates against World Car, uses disparate treatment against World Car, does not supply cars requested by World Car, and requires unreasonable sales standards of World Car. World Car complained that Hyundai violated Texas Occupations Code §2301.467, §2301.468, and §2301.478.

The Motor Vehicle Division (MVD) referred the contested case matter to the State Office of Administrative Hearings (SOAH) on December 6, 2013. The ALJ conducted the hearing on the merits on September 21 through 25, 2015; closed the administrative record on January 11, 2016; and issued the proposal for decision (PFD) on March 10, 2016.

The ALJ found that World Car (i.e., the dealership Complainant) failed to meet its burden of proof to show that any of Hyundai's programs violate the Occupations Code. The ALJ recommended that World Car's complaints be denied. The parties filed exceptions to the PFD and replies to the exceptions. On May 31, 2016, the ALJ issued an exceptions letter, providing that—after having reviewed the exceptions and reply pleadings—the ALJ was making no changes to the March 10, 2016, PFD. SOAH returned this contested case matter to the TxDMV. The Board has jurisdiction to consider the contested case and to enter a final Order.

The issue presented in this case is whether World Car established that Hyundai's actions or programs violate the Texas Occupations Code.

As the Complainant, World Car has the burden of proof to establish—by a preponderance of the evidence[1]—that Hyundai violated:

- Occ. Code §2301.467(a)(1), by requiring adherence to unreasonable sales or service standards;
- Occ. Code §2301.468(1), by directly or indirectly discriminating against a franchised dealer or otherwise treating franchised dealers differently as a result of a formula or other computation or process intended to gauge the performance of a dealership;
- Occ. Code §2301.468(2), by discriminating unreasonably between or among franchisees in the sale of a motor vehicle owned by the manufacturer or distributor; or
- Occ. Code §2301.478(b), by failing its duty of good faith and fair dealing owed to its franchisee.

Board Authority

The Board has authority over these parties and the decision in this contested case matter in accordance with Texas Occupations Code Chapter 2301, specifically §2301.151.
Government Code §2001.058(e) allows an agency to vacate or modify an order proposed by the ALJ only if the ALJ:
(1) misapplied or misinterpreted applicable law, agency rules, or prior agency decisions;
(2) relied on a prior agency decision that is incorrect or should be changed; or
(3) made a technical error in a finding of fact.
The agency must state in writing the specific reason and legal basis for a change made to a finding or fact or conclusion of law.

SOAH ALJ's Recommendation

The SOAH ALJ found that World Car (dealership) failed to meet its burden of proof to show that Hyundai violated the Occupations Code. The ALJ recommended the Board deny World Car's complaint.

Staff's Notes

Staff notes that the SOAH ALJ's PFD contains harmless error of legal *citation*. This citation mistake is a harmless error and correcting it does not change the overall outcome of the hearing. The ALJ considered the correct and applicable statutory *language*. The draft final Order, presented for Board consideration, includes the specific reason and legal basis required by Texas Government Code §2001.058(e) necessary for the Board to correct the PFD.

Documents

The following documents are attached to this Executive Summary for consideration by the Board:

1.	Proposed Draft Final Order	
2.	SOAH ALJ's Proposal for Decision	03/10/2016
3.	World Car Hyundai's (Dealership) Exceptions to Proposal for Decision	04/08/2016
4.	Hyundai Motor America's (Distributor) Reply to World Car Hyundai's Exceptions to Proposal for Decision	05/09/2016
5.	World Car Hyundai's (Dealership) Reply in Support of Exceptions to Proposal for Decision	05/18/2016
6.	SOAH ALJ's Exceptions Letter	05/31/2016

[1] Black's Law Dictionary defines "preponderance of the evidence" to mean the greater weight of the evidence; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to include a fair and impartial mind to one side of the issue rather than the other. This is the burden of proof in a civil trial, in which the jury is instructed to find for the party that, on the whole, has the stronger evidence, however slight the edge may be. Also termed preponderance of proof or balance of probability.

TEXAS DEPARTMENT OF MOTOR VEHICLES
MOTOR VEHICLE DIVISION

NEW WORLD CAR NISSAN, INC. D/B/A WORLD CAR HYUNDAI, WORLD CAR NISSAN; AND NEW WORLD CAR IMPORTS SAN ANTONIO, INC., D/B/A WORLD CAR HYUNDAI,	§	**MVD DOCKET NO. 14-0006 LIC**
Complainants	§	**SOAH DOCKET NO. 608-14-1208.LIC**
v.	§	
HYUNDAI MOTOR AMERICA,	§	
Respondent	§	

FINAL ORDER

The referenced contested case matter is before the Board of the Texas Department of Motor Vehicles (TxDMV) in the form of a Proposal for Decision (PFD) from the State Office of Administrative Hearings (SOAH) and involves the complaint by two World Car franchised dealerships against the distributor, Hyundai Motor America.

In accordance with Texas Government Code §2001.058(e), the specific reasons and legal basis for the Board's changes to the administrative law judge's (ALJ's) Findings of Fact and Conclusions of Law follow:

Findings of Fact 2A and 2B are added in accordance with Texas Government Code § 2001.058(e)(1) because the ALJ misapplied applicable law. In determining the applicable law in this proceeding, the date the complaint was filed and the date the parties renewed their agreement are necessary findings. New Finding 2A establishes the date World Car filed its complaint with TxDMV. New Finding 2B is quoted directly from the ALJ's PFD Footnote 2.

- ***Finding of Fact 2A*:** World Car filed its complaint on November 20, 2013.
- ***Finding of Fact 2B*:** "The franchise agreements between Hyundai and World Car were renewed in November 2010."

Conclusion of Law 3 is modified in accordance with Texas Government Code §2001.058(e)(1) because the ALJ misapplied applicable law. The modification merely corrects the typographical error in the Government Code chapter citation from 2011 to 2001 to correctly reflect the Texas Administrative Procedure Act.

- ***Conclusion of Law 3:*** The hearing was conducted pursuant to the Administrative Procedure Act and SOAH's procedural rules. Tex. Gov't Code ch. 2001 and 1 Tex. Admin. Code ch. 155.

Conclusion of Law 6 is modified in accordance with Texas Government Code §2001.058(e)(1) because the ALJ misapplied applicable law. The modification corrects the year of the applicable law from 2003 to 2009, through application of (a) Texas Occupations Code § 2301.263, (b) the date the complaint was filed, (c) the date the parties renewed their agreement, and (d) the nonamendatory provisions in Sections 10 & 11 of H.B. 2640, 81st Leg. R.S. (2009). This is harmless error. Although the 2009 version of Texas Occupations Code § 2301.467 applies, the text of § 2301.467(a)(1) and (a)(2) has not changed since 2003.

- ***Conclusion of Law 6:*** World Car failed to meet its burden of proof to show that Hyundai required adherence to unreasonable sales or service standards. Tex. Occ. Code § 2301.467(a)(l) (2009).

Conclusion of Law 8 is modified in accordance with Texas Government Code §2001.058(e)(1) because the ALJ misapplied applicable law. The modification merely corrects the typographical error in the Occupation Code chapter citation from § 2301.458(2) (which is a section inapplicable to this proceeding because it applies to dealership transfers) to § 2301.468(2). The version of § 2301.468(2) applicable in this contested case proceeding provides that a "manufacturer, distributor, or representative may not: . . . (2) discriminate unreasonably between or among franchisees in the sale of a motor vehicle owned by the manufacturer or distributor."

- ***Conclusion of Law 8:*** World Car failed to meet its burden of proof to show that Hyundai engaged in unreasonable sales discrimination in the allocation of vehicle inventory because World Car did not participate in many of the programs that would have permitted additional discretionary allocation. Tex. Occ. Code § 2301.468(2).

The Board enters this Final Order, having considered the evidence, arguments, findings of fact and conclusions of law presented in the ALJ's PFD, exceptions to the PFD, replies to the exceptions to the PFD, and the ALJ's May 31, 2016, exceptions letter that makes no changes to the ALJ's March 10, 2016, PFD.

ACCORDINGLY, IT IS ORDERED:

1. That Findings of Fact numbers 1-53 and Conclusions of Law numbers 1-9 as set out in the ALJ's March 10, 2016, Proposal for Decision, as amended by this Order, are hereby adopted;

2. That World Car's requests for relief under the statute are denied and its complaints are dismissed;

3. That Findings of Fact and Conclusions of Law proposed by the parties that are not adopted in this Order are hereby rejected; and

4. That all remaining motions, exceptions, or objections, of any party, if any, are hereby denied.

Date: _____

_____
Raymond Palacios, Jr., Chairman
Board of the Texas Department of Motor Vehicles

ATTESTED:

_____
Daniel Avitia, Director
Motor Vehicle Division
Texas Department of Motor Vehicles

EXHIBIT 3

then the order of the presenters by the parties, the non-prevailing party, which is World Car, will go first, and Mr. Kaplan, who is going to argue for them, has requested that his time -- each party will be given 15 minutes -- Mr. Kaplan is going to split his time eleven and four, so he's going to do an initial presentation of eleven minutes and reserve four minutes for rebuttal, and then in the middle, Mr. Young for Hyundai just goes one block of 15 minutes, however much of that he uses.

MR. PALACIOS: Okay. Thank you.

Mr. Avitia.

MR. AVITIA: Chairman, Board members, Ms. Brewster, good morning. For the record, my name is Daniel Avitia. I have the pleasure of serving as the director of the Motor Vehicle Division. Alongside me this morning is Ms. Michelle Lingo. She is a staff attorney and the legal subject matter expert that was assigned to review this contested case.

Agenda item 10, which is found on page 107 of your board books, is a franchise contested case regarding World Car Hyundai and Hyundai Motor America. This item is being presented for the board's consideration to adopt a final order which aligns with the State Office of Administrative Hearing Judge's proposal and recommendations. This matter had a proceeding conducting

by a judge with the State Office of Administrative Hearings. The complainant, a licensed franchised dealer, filed a case against the respondent, a licensed manufacturer, both parties being present today, alleging violations of Texas Occupations Code.

Overall, the administrative law judge found that World Car failed to meet its burden of proof to show that Hyundai violated any part of the Occupations Code. The administrative law judge recommended that the board deny World Car's complaint.

By law, the board can change findings, conclusions or orders issued by the State Office of Administrative Hearings judge when change is justified under Texas Occupations Code 2001.058(e). That is to say change can be made if: (1) the judge misapplied or misinterpreted applicable law, agency rules or prior agency decisions; (2) the judge relied on a prior agency decision that is incorrect or should be changed; or (3) the judge made a technical error in a finding of fact.

The board's three options this morning in this contested case matter are as follows: (1) adopt the PFD as recommended by staff this morning; (2) amend the PFD beyond staff's recommendation, including reversal of the ALJ's conclusions; or (3) remand the PFD back to SOAH for further consideration of the facts or legal concepts as

directed by the board.

After staff's review of the all the documents that are before the board today, staff recommends the board concur with the ALJ's recommendations and adopt the ALJ's findings of fact and conclusions of law as modified. Staff has prepared a final order for your consideration which again aligns with the judge's proposal and recommendations to the board.

This concludes my remarks. Ms. Lingo and I are certainly happy to answer any questions that you may have regarding this legal matter.

MR. PALACIOS: Are there any questions for Mr. Avitia or Ms. Lingo?

(No response.)

MR. PALACIOS: If not, I know we have a few people that would like to present on behalf of the respective parties, and I'll start off with calling Mr. Lee Kaplan.

MR. KAPLAN: Thank you, Mr. Palacios.

I have, before I start my presentation, three things to hand out to members of the board. These are blow-downs of our presentation, the timeline which was plaintiff's exhibit 122 --

MR. PALACIOS: Mr. Kaplan, will you please state your name for the record?

MR. KAPLAN: Yes. I'm Lee Kaplan, K-A-P-L-A-N, representing the World Car entities.

If I may pass out to the board blow-downs of our very short power point presentation.

MR. PALACIOS: Sure.

MR. KAPLAN: I also have a timeline which was in evidence and it's in the record, plaintiff's exhibit 122, and I have a final order that we filed that we proposed that has not been adopted, but our proposed final order, and it's redlined in such a way that you can see what we believe is a correct ruling. When everybody has a copy and you're ready, I'll proceed. We have extra copies.

MR. PALACIOS: Okay, proceed.

MR. KAPLAN: Thank you, Mr. Chairman. I will speak quickly but I invite questions. I'll speak eleven minutes now and four later.

The relevant statutes are set out on page 3 of our power point, and these are statutes, two of which have never been construed, that is, the one prohibiting requiring adherence to unreasonable sales or service standards, and unreasonable discrimination. The question of good faith and fair dealing has sort of been peripherally construed and in other places, but we think in all three cases the ALJ made errors of law. We are

only going to talk about undisputed facts in our presentation, undisputed facts from which the ALJ reached the wrong conclusions.

If you turn to the next page, it's undisputed that in order to avoid being considered in material breach, World Car had to sell more vehicles than it was allocated. That's impossible. You can't answer all the questions on a 30-question test and be told that you have ea failing grade of 30 because there were really 100 questions and you didn't get the other 70. That's exactly what has happened here. Time and time again, World Car sold all the cars it got, asked for more, but because Hyundai had set a much higher standard for what it thought the dealer should sell there, even though Hyundai hadn't given them the cars, they said you're in material breach.

And the best proof of that is from the record, it's Mr. Hetrick himself, page 7 of our blow-down, this is a letter from the regional manager, plaintiff's exhibit 67, saying: Your sales efficiency measurement is 14.2 percent; in view of the foregoing and given these facts, your dealership is in material breach of the dealer agreement.

The mistake the ALJ made is saying if adherence to a sales efficiency standard is not in the dealer agreement, it's not a required standard. That's false,

it's just wrong, because the evidence is undisputed that that is the metric used by Hyundai to measure whether a manufacturer is adhering to its dealership agreement. That's what Mr. Hetrick said: you're in material breach.

Now, this is near the end of the three-year period in which these dealerships suffered. I'm going to tell you about what happened near the beginning in 2010. The regional manager almost immediately presented a letter to World Car and said, I want you to authorize me to help you sell your dealerships. Mr. Hetrick admitted, and I have this in my brief at page 14, he did not know of a single other dealer in Texas to whom he had ever presented such a letter, nor anyone in the region. He came to this dealer, a loyal dealer, who never gave back dealerships, and said, I want you to authorize me to go out and sell your dealerships. That's what got them off on a pretty bad footing.

The next three years then consisted of punishment and poor allocation. And remember, you can't sell what you don't have, and you certainly can't be held to account for not selling what you don't get. If you look at page 6 of our slide, we were required to sell more vehicles than allocated to achieve 100 percent. Can't do that if you don't get the vehicles. Sales efficiency, according to the ALJ, is not required because it's not in

the franchise agreement. That's an error of law. Requiring somebody to meet an impossible standard and using that as leverage to declare a breach of the dealership agreement is simply not allowed under the statute.

Now, in fact, the company had been asking for more cars, and we can talk about that a little bit more, but I want to turn to slide 9 because this is the unreasonable discrimination we've been talking about. And once again, we're only talking about undisputed facts in which the ALJ reached the wrong conclusions. It is undisputed that those two dealerships that Red McCombs franchise still kept, and which were the nearest competitors to our client, got in a three-year period early on seven times as many, but in that three-year period from June 2010 until World Car decided it had to take action to enforce its rights, the McCombs dealerships got almost 1,800 cars of discretionary allocation, whereas, we got 621. That's a three-to-one offset, despite the undisputed evidence in the record that a regional manager has the discretion to help struggling dealerships by giving them extra allocation.

And that mattered even more here because this is the time when Hyundais were in high demand because of the tsunami keeping Japanese manufacturers from really

shipping a lot of cars. So everybody is screaming for product. Somehow the nearest competitor, the competitor which had already given back a dealership -- they had once had three and walked away from one of them -- is getting three times as much. Hyundai is keeping one guy happy and punishing the other. That's the dealer that didn't want to sell his franchises, the loyal dealer who to this day wants to be a Hyundai dealer. That's the discrimination we're talking about.

Let's turn to the next slide. There are some alibis that simply don't hold up. These are the alibis that we have heard along the way for why that discretion was not unreasonably exercised -- why the discrimination was not unreasonable. They said, Well, World Car reduced its inventory in 2008 and 2009. The fact is McCombs reduced its inventory by walking away from a dealership. We've got two equal franchises, one of them walks away from a dealership, gives it back; the other one wants product and during the recession, just like every other dealer, somewhat reduced their inventory. But now we're in 2010 to 2013 when these cars are hot, and suddenly this dealer, our client, can't get cars.

The second excuse given is, well, the Red McCombs dealers were promoting the $60,000 Equus vehicle. Leaving aside the question whether that's a good business

practice, that happened after the fact. One of the most amusing moments in the hearing is when Mr. Hetrick trotted out that explanation in direct examination, and in cross, I said, I thought you'd say that. And we showed undisputably that the request that people participate in the Equus promotion and World Car's refusal to do so, came after they were already being discriminated against on a basis of at least seven to one early on in manual allocations.

MR. INGRAM: I'm sorry. Can I just interject real quick. You're saying after. Can you give me a specific date?

MR. KAPLAN: I don't remember the exact date of the Equus promotions, I think it was 2011 or '12, but we were already -- and I frankly cannot say, I believe it's in the briefing -- the testimony is clear that the discrimination in allocations had started in 2010.

MR. INGRAM: Well, you're just saying you can't be clear but I need a date to make it clear. So 2012?

MR. KAPLAN: 2012, yes. And we can supply that to the board by letter. It's in the transcript, and Mr. Hetrick claimed that, but we were already being discriminated against long before then.

Then there was an argument about renovating a dual facility. Well, if we go back to slide 9, you see at

the end here when World Car decided to enforce its rights, the discrimination ended. They still had a dual facility where they had Kias and Hyundais in one showroom or in one building. You know, Mr. Zabihian didn't suddenly walk into the Kia showroom and become a good dealer, walk over the Hyundai showroom and become a bad dealer. He was outselling -- and this is undisputed; in fact, Mr. Hetrick pointed that out in his letter in 2013 -- he was outselling Hyundai with his Kias six or seven to one, ignoring the fact that the record is also clear that in 2012 Mr. Zabihian had expressly said -- and we can look at page 11 of our slides -- I've got 98 Hyundais in stock and I've got 700 Kias in stock.

Now, these are sister companies from Korea: with one company he's getting allocations, with the other he's not. And so it was as self-fulfilling prophecy that his performance would not be as good. But that was used as a metric to claim that you're not sales efficient, you're not a loyal dealer. He sold what he had. He asked for more discretionary allocations and he didn't get it.

The other alibi that was given -- and by the way, when he renovated the north store, the evidence is undisputed that he got no extra allocation, whereas, when Red McCombs did an exclusive facility and renovated their store, they got extra allocation. All that is undisputed

in the record.

So the last thing is this service loaner program. Different companies do this in a different way, but a service loaner, when you take it, it's counted as a sale by Hyundai, and that means the warranty starts. Mr. Zabihian, who gives a lifetime warranty to purchasers, did not believe that it was right to sell a customer a car and not tell them: By the way, your warranty didn't start the day you bought it, it started earlier. He just didn't think that was a good program, but he never changed that feeling, and after he asserted his legal rights, somehow I guess that excuse no longer mattered because the discrimination that had occurred ended, ended.

But during that three-year period when these Hyundais were hot cars and you could make thousands of dollars on every sale, he lost gross profits from sales on at least 1,200 vehicles. This is just the manual allocations, because remember, the other allocations in the computer are goosed upward if you sell more of the things you do manually. The more sales you make, the better off you are. So there's no question that he was discriminated against and that it was unreasonable.

In fact, if we look at what happened after that discrimination, that incredible mis-allocation stopped after he began to assert his legal rights, we see that the

McCombs dealership sales started to decline and the World Car dealership sales started to increase because once the discrimination stopped, or slowed down at least, he could sell more cars. He could also affect the computer algorithm and get more cars. But the bottom line is you can't sell what you don't get. They created a catch-22 by using a metric to say you're in material breach of the dealer agreement.

Now, why does this matter? Because if you accept the recommendations of the ALJ, there's essentially no such thing as requiring adherence to an unreasonable standards, there's essentially no such things as unreasonable discrimination, and this will be cited to future boards as pretext for unfair actions.

If there are no questions.

MR. PALACIOS: Yes, Mr. Kaplan, I have a couple of question for you. Back to the issue of material breach of franchise agreement due to the fact that your client wasn't sales efficient, were there any punitive actions taken against your client because of the fact that they were not sales efficient?

MR. KAPLAN: Well, we maintain that the punitive actions were taken all along, but once World Car resorted to legal action, the allocation issue is somewhat eased. Now, it just so happens that the tsunami backlog

eased off, the Japanese manufacturers began to be able to continue delivery, so allocation was not as critical an issue. But still, assistance for facility renovation and for building a new facility has never been given to World Car while it was given to the McCombs dealership, so in that way there has continued to be discrimination.

I'm answering your question. Some of this is outside the record and I don't want to argue a point that's not in the record the ALJ had, but during that time there was discrimination, and in fact, sales efficiency was used as this threat. And of course, if they walked in and put a bull's-eye on your chest at the very beginning and said we want you to agree we can help you sell your dealerships, they never withdrew that request, they never said we're satisfied with you. That's something that presumably the regional manager, who is the incumbent, still wants to do. Nobody else has ever gotten a letter like that, apparently, at the outset of a relationship with a new regional manager, certainly Mr. Hetrick hadn't done it.

MR. PALACIOS: You're inferring then, I guess, that this discrimination that you allege took place had to do with the failure of your client to be sales efficient? You're making an issue of the breach of franchise agreement, and I'm just trying to understand how that

actually impacted your client.

MR. KAPLAN: Well, what I'm saying is that that is a threat that's out there. They could try to terminate him tomorrow, and we can't speculate on what's going to happen if the board upholds the ALJ's recommendations. But it is clear to us that that was used as a metric to declare a breach of the dealership agreement way back in July of 2013, I think is when that letter was issued. Yes, it's plaintiff's exhibit 67, the first page of it is on page 7. So they haven't given them the opportunity is what I would say.

MR. INGRAM: When you indicate that it was a metric, are you indicating that it's a metric that they changed their discretionary allocation? Because I don't see where it's a metric where it affected their actual allocation that they're in breach.

MR. KAPLAN: Well, there are two kinds of allocations: what the computer does and what the regional manager does. And the regional manager generally has about 15 percent discretion. That matters a lot because, among other things, it has a multiplier effect in your computer allocation ultimately. If you're getting more cars manually and you sell them and you're cutting down the supply -- once you sell them, you're cutting down the balanced days supplies on the lot, or some companies call

it turn and earn, you can't turn them if you don't have them so you can't earn more allocation in the computer, and it takes a long time to overcome that.

MR. INGRAM: So just to be clear, I'm trying to make sure I understand your point, and the point is that because the idea is that you were in breach or your client was in breach, therefore, the discretionary amounts were lower than ordinarily would be.

MR. KAPLAN: Actually, it's the other way around. The discretionary amounts were always lower, if we go back to slide 9, and we were discriminated against going back to the beginning of Mr. Hetrick's tenure as regional manager, and because of that -- Hyundai sets an amount of sales you're supposed to make in your region. They say we know there's all these manufacturers here, there's this kind of competition, you need to sell X number of cars to be 100 percent sales efficient.

It's not a measurement of how many cars you sell out of the ones you have on your lot because he sold all those, it's a measure of how many cars you sell out of what we think you ought to sell. And one way they can test that is give us the cars, don't give me 200 cars and say you didn't sell 877 cars and we think you should have. They say, well, you didn't earn them in the computer. You say, well, if you're giving other people the

discretionary allocation, among other things, you're starving me.

And the testimony is also undisputed that the closest dealers to you are the ones who can hurt you the most in terms of competition. If all those extra cars had gone out to El Paso and the Red McCombs dealerships were getting hurt as badly or were getting as little discretionary allocation as my clients, we'd have a different situation. And the record is totally undisputed on that, all the way up to Mr. Zuchowski, who is the president of Hyundai Motor America and he testified to that, that the nearby dealers, it will hurt you more.

Among other things, if people go on the internet and they want to look -- you know, people browse on the internet now, they don't just go to dealers, they'll see who's got the biggest stock on the lot and if one guy has 98 cars on the lot and the other has 700, they'll go where there are more choices. That is undisputed in the record by everybody who testified about it.

MR. INGRAM: Mr. Kaplan, let me ask you a followup question. So how do you respond to the point that during the recession that World Car refused the allocation to reduce their inventory while McCombs did not?

MR. KAPLAN: Two points. Number one, the evidence is undisputed that McCombs turned down more cars during every period than did my client, but even more, McCombs reduced its inventory and its exposure by walking away from a dealership. Our client wanted another dealership; McCombs surrendered a dealership. You want to get your inventory down? Just make it easy on yourself. I believe the other McCombs dealership was further to the west; they walked away from that dealership. Now, I can only speculate as to the motives for Mr. Hetrick discriminating in favor of McCombs over World Car. We think they were trying to lure McCombs back, make sure that they kept their loyalty, they didn't walk away from any more dealerships. That's not in the record, but the truth is, they reduced their inventory in a real easy way, they just gave up a dealership.

Now, which do you think hurts Hyundai more: losing an entire dealership location, or somebody refusing some inventory of cars at a time when Toyota -- this is also totally in the record -- Toyota built a new store in World Car's primary region or area of responsibility. And World Card begged for assistance to deal with that and got none. So the truth is you do have two equivalent franchises: one reduced inventory by walking away and showed less loyalty to Hyundai by walking away from a

dealership; one, to survive during 2008 and '09 reduced its inventory some.

But that doesn't explain -- that might explain some computer allocation issues, algorithms in the early time, but it doesn't explain all of the manual discrimination, the deliberate and unreasonable discrimination just in the manual allocations. They punished this dealer. They walked in in 2010 and said we want you to agree that we can help sell your dealerships, and they carried out a program designed to make that happen -- hasn't happened yet.

But we really fear what will happen if the board upholds this decision, which is wrong on the law, even if you accept the facts that are not mixed questions of law and fact, the facts are indisputable. And that's why we've sent the board a proposed order which we filed, I think, in May of this year, which we believe is correct and reaches the correct result. This is a dealer whose survival, like any dealer, depends on the beneficence of a regional manager -- or at least its profitably -- and they have hung on despite the three-year period.

MR. PALACIOS: Another question, Mr. Kaplan. You stated that the disparity in the allocation ceased in 2013 when your client asserted his rights. So that's when he filed a complaint?

MR. KAPLAN: Right. Well, actually, there's some litigation and this formal complaint, but that happened, the first action that was taken was in September 2013. And it really happened chronologically, Mr. Hetrick's letter declaring a material breach is dated, I think, July 10 -- that's on slide 7 -- July 10, if I'm reading it right, of 2013. That's plaintiff's exhibit 67. And then proving that those reasons that they claim as reasons for the discrimination were not really reasons, they're just alibis after the fact, they found a way to make allocation available.

Now, the record beyond then is really outside the record, what's happened since, but as soon as he showed that he had some backbone and took action, the tune changed. All the excuses they made still existed, they didn't go away, but apparently those excuses didn't cause them to discriminate once he asserted his rights.

MS. HARDY: So did the facility get renovated?

MR. KAPLAN: Which one? The north store had been renovated, the south store, I believe, a new store is being built across the street, it will be separate from the Kia facility.

But I want to emphasize out of that supposedly dilapidated store -- and I understand that manufacturers do not care to have duals, although they're prohibited

from terminating people because of that, but to me one of the best facts is that Mr. Hetrick himself recognized that Kia is outselling Hyundai in the same facility six to one. Now, unless Mr. Zabihian had it in for Hyundai and wanted to lose money on one side, he did not walk across the showroom and become a crappy Hyundai dealer while he was a fabulous Kia dealer. That's not the case.

He's trying to sell cars, he sells what he has, and as his letter showed, the letter he sent after two years of this when he sent that complaint letter in February of 2012, he said -- I'm on slide 11 -- compared to the paltry 98 Hyundais I have in stock at two stores, he listed the other vehicles, I have 700 Kias in stock. So why would it be surprising that Kia is outselling Hyundai six to one? You sell what you get, you can't sell what they won't give you, and that's the essence of this.

He had a wonderful relationship with the prior regional manager. Things changed, and for that three-year period, and we implore the board not to let this conduct just kind of go by because maybe it's not so bad now. We don't know what's going to happen in the future, but this will be used as precedent with respect to World Car and as precedent with respect to how dealers are treated. If the legislature wants to change the law, that's fine but the ALJ got the law wrong on all three fronts.

Any other questions?

MR. WALKER: Mr. Kaplan, one of the things I didn't understand is this computer allocation of cars. Can you explain that a little bit to me?

MR. KAPLAN: And I don't want to pretend to be the expert on this, I'm a social studies major, but in my years -- and I know that there are at least two dealers on the board and somebody from a manufacturer -- the phrase I've always have heard is turn and earn from the days in which is represented Chrysler and Ford, turn and earn, you sell cars and you earn more allocation in the future. There's a slightly different terminology at Hyundai, I think it's called balanced days supply. In other words, the speed with which you sell cars helps dictate which cars are going to be on the ship and coming to you, but it's essentially turn and earn, sell them, you get more.

And one way you sell them, particularly in the time of tight supply on the hot cars, you get the manual allocation and you sell that. When there's that big of a disparity with your nearest competitor, frankly, to use the vernacular, you're hosed. You can't get out of that problem because normally regional managers use manual discretionary allocations to help dealers that they think need a boost. This is, again, totally in the record, but Mr. Hetrick elected not to do that here, in contrast to

the normal practice.

And so if you'd gotten the manual allocations -- all we know is his track record, he sold what he go. Now, there's an argument about how fast he reported sales, it's not really an alibi but it's sort of an alibi, and that's what's called RDRs, and I think it's fair to answer your question in part on this. Mr. Hetrick wanted all the dealers to report their sales more quickly so the region would have more cars allocated to it. But Mr. Zabihian and World Car don't report as sales cars for which the financing is not yet in place. Maybe other dealers do, but he's the rules follower, he would not do that, because if the financing falls through, you don't have a sale.

But in their system -- and this, too, is undisputed in the record -- in their system once you report a sale you've got it in that 30-day period. If you back it out somewhat later, there's no real enforcement mechanism on that, and you've gotten the extra allocation or you've gotten it earlier to sell more, on a sale that didn't happen. And Mr. Zabihian knew, as all dealers know, sometimes the financing doesn't go through, so he'd wait a few days and make sure it went through. He never reported sales for which the financing was not in place, which he believes, and I think the record shows, is

Hyundai's actual policy and procedure, but the evidence is also that they never did anything to enforce that. There was some testimony we audited that and we didn't think it happened very much.

MR. WALKER: So I'm kind of foggy on this whole deal on this because I'm not a car dealer, I guess. I would assume, as a business person, that if I ran a car dealership, whether it's Chevrolet or Ford or Hyundai, whatever it might be, that I would take and call the manufacturer, put in an order, and it's my understanding from dealing with truck dealers is that when they order trucks they have so many days before they get there, the dealer has to floor plan that and finance that inventory. I don't know how it works at Hyundai; it sounds like it's different.

MR. KAPLAN: Well, you are buying a car.

MR. WALKER: The dealer is buying the car.

MR. KAPLAN: Right, and then selling it.

MR. WALKER: But you were talking about allotments now. An allotment says you can't buy the car, this is how much you get.

MR. KAPLAN: That's right. You're buying the cars they let you buy. Hyundai, in this time frame -- if we go back to slide 12 -- I'm sorry, slide 9 -- that's when they couldn't make them fast enough, and you had

dealers all over, not just World Car, but dealers all over wanted more Hyundais because the Japanese cars, which traditionally have sold very well in the U.S., were not available because of the tsunami, and these were hot cars. And one of the things that was happening is they'd say we only have so many cars to sell, and as a result, they would decide who was going to get these cars, and they made the decision to give them somewhere else.

One other thing that's in the record --

MR. WALKER: So your argument today is that you couldn't get enough cars because they were being impartial to your dealership and giving them to somebody else.

MR. KAPLAN: Yes. They were being unreasonably discriminatory and showing partiality to another dealer.

MR. WALKER: And how does the franchise agreement address that?

MR. KAPLAN: Well, the truth is the dealer agreement is a more standard agreement which is subject to the laws of 49 states. I'm not sure, I think one state may not have regulation. But the dealer agreement basically says we can do what we want, we get to exercise our discretion in selling you cars. That's subject, though, to our laws, our legislative scheme that says you cannot unreasonably discriminate between or among franchisees in the sale of a motor vehicle.

MR. WALKER: So Ms. Lingo, you tell me on these franchise laws of the State of Texas, because that's where we're really getting to, I think, what is the law with respect to allocating of inventories? Is there any address in the law that says in a franchise agreement how much they have to get or can't get.

MS. LINGO: Michelle Lingo, Motor Vehicle Division.

So the specifics of that is not addressed in the law, thus, the need for the hearing before the ALJ at SOAH, who heard the testimony, examined the veracity, and made a decision.

MR. WALKER: So that's the meat of this case is whether or not -- there is a law, whether the law has been broken or violated because they didn't get as many cars as they should have gotten and there was partiality to a different dealer. Is there or is there not a violation of the law there?

MS. LINGO: The ALJ, taking the facts from both parties, applying the law that's in place, made a recommendation that there had not been a violation.

MR. WALKER: So there's not a violation because there's not a rule, maybe, and your address to that. You're saying the Occupations Code addresses that differently.

MR. KAPLAN: What I would say is there's a statute that hasn't been construed that sets the rule. It is undisputed, and the ALJ agrees, everybody agrees, that they did discriminate, no question about that, the question is whether the discrimination was reasonable. That's a question of law. And what we have said is that the board, among other things, should simply set a standard that you cannot set sales standards that are in excess of what a dealer is given to sell. If they had given him the cars and he didn't sell them, maybe they'd be in a different position, but that's not what happened.

The dealer agreement cannot override Texas law; this is the Texas law, it hasn't been construed officially, but our point is we all know there was discrimination. Every alibi offered, even if you accepted that those are all true facts, show that there was no meaningful difference between two sets of dealers and one dealer was discriminated against. So those cannot be reasonable bases for the discrimination.

MR. WALKER: Okay. So Michelle, let's go back to you. If the law under the Occupations Code says that you cannot discriminate unreasonably amongst franchisees -- that is the law I assume to be correct.

MS. LINGO: Yes, sir, that is correct.

MR. WALKER: However, the administrative law

judge found that there was no discrimination but Red McCombs got three times as many cars as the others. Tell me why and how we interpret that there is or is not a discrimination between the dealers.

MS. LINGO: In this administrative process that we have, the law is written as is. There are, as you know, instances where we might have rules in place to implement law, but in this case, this is the law. The complainant is World Car, and Mr. Kaplan made arguments on behalf of World Car as to why he believes that there was discrimination, or unreasonable discrimination between or among the franchisees.

MR. WALKER: I get all that so far.

MS. LINGO: He made that argument.

MR. WALKER: So tell me how we found that there was not a discrimination.

MS. LINGO: Because the ALJ, who is the trier of fact, looked at the information, the exhibits, the legal arguments and the veracity of the witnesses, and made that recommendation. That's their responsibility.

MR. WALKER: But we're here today to find out whether or not the law has been followed, whether or not to overturn this case, send it back to SOAH to reevaluate it, or rule in their favor.

David, I don't care, pipe in any time you want

to.

MR. DUNCAN: I just wanted to clarify, especially since we have some newer members here, what Ms. Lingo is struggling with is the staff does not participate in these hearings, we don't go and watch the witnesses testify, we don't cross-examine, we don't offer evidence, and so we hesitate to say absolutely that the judge is right or that the judge is wrong. The judge heard what the judge heard and made a decision. We limit ourselves, we read 2001.058 and advise the board if you're going to change this, there are very limited reasons you can change this. That's the directive of the legislature.

MR. WALKER: A misapplication of the law is a way to overrule this.

MR. DUNCAN: Correct, however --

MR. WALKER: Here's an application of the law, and my question is did we interpret it wrong. I'm asking that question.

MR. DUNCAN: We haven't interpreted it. The staff doesn't do that, and the board is charged with doing that, however, keep in mind this is a mixed question of law and fact. The judge looked at the facts and said it doesn't meet that standard. So that's what you're looking at is can you revisit, can you say that the judge was absolutely wrong in the way the judge interpreted the

facts and applied the law to those facts.

MR. KAPLAN: I can respond to that, Mr. Walker.

MR. WALKER: Go ahead, Mr. Kaplan, I'll listen.

MR. KAPLAN: Well, we're not arguing credibility of any witnesses. As I said, I'm only going to talk about undisputed facts. We disagree with a lot of the findings of the ALJ but we've put all that aside for this appeal and stuck strictly to the legal question, and you have put your finger on it. There's no question they were treated differently, the question is were they discriminated unreasonably, as the law prohibits. And we have pointed out that every alibi which is offered is vapor. It's not a credibility question, it's just vapor. The record establishes what did and didn't happen.

The ALJ may not have made any findings on that or may have ignored it in making these mistakes of law, but everything I've told you I think is an undisputed fact. It's not just that Mr. Zabihian said so, it's things not contested. The numbers are not contested, the fact that there were these shortages is not contested, the letter that Hetrick sent that said I want you to let me help you sell your dealerships not contested, the fact that he didn't do the service loaners, he doesn't do that now, he didn't do it then, he doesn't do it now. All these things are not contested. The amount of assistance

he got, extra allocation for redoing the north store, that is to say none, nothing is contested.

MR. WALKER: Let me stop you there for a second. Let's go back to Mr. Hetrick trying to help you sell your store. And I don't want to try this case today, but what does selling the store have to do with it?

MR. KAPLAN: That means when you have a dealership you've got good will and you have assets, and what he's really saying is I want to get rid of you as a dealer, so let me -- he may have had a buyer lined up. Maybe, and we don't know, maybe the McCombs franchise said, you know, we're now willing to get back in the market if Hyundai treats us right, we don't know. But he didn't want World Car as a dealer.

Now, there are other things --

MR. WALKER: He being Hetrick.

MR. KAPLAN: Mr. Hetrick, the regional manager.

MR. WALKER: Hetrick works for Hyundai.

MR. KAPLAN: Yes. He is -- let's just say that he essentially is the most important person to a dealer in a region. Your district sales people or zone sales people, depending on the manufacturer, they're important, they have a lot more contact, but the regional manager is critical. The regional manager's recommendation for assistance is critical. The regional manager handles all

that discretionary allocation, and maybe the CEO of Hyundai wouldn't have done it this way, but this is the person that makes the Hyundai decisions that we suffered from.

And all we're asking here is the declaration that these actions violated the statute. And the real question is whether or not people are allowed to set a sales standard and judge you by that sales standard when you don't get the cars that that sales standard demands that you sell, and whether that discrimination was reasonable or unreasonable.

As Mr. Duncan says, those are mixed questions of law and fact. There really aren't any disputed facts that we've brought to you, we're only appealing the decisions of the ALJ based on the undisputed facts which we think are legally wrong. And frankly, you're setting a precedent here. No matter what people think, this is the first time the statutes -- I think that's slide 3 -- have come up really for review. We haven't talked as much about good faith and fair dealing, but however you define that, that kind of unreasonable discrimination is not good faith and fair dealing. And we know what their motive was, but this is just what's happened.

I really appreciate all this time. Are there any other questions?

MR. PALACIOS: I have one last question, Mr. Kaplan. From your submission and testimony, you said the disparity in allocations ceased in 2013, so I assume from that point forward now the disparity is up to date, is it evened out?

MR. KAPLAN: I'm very hesitant to talk outside the record, but manual allocation and discretionary allocation ceased to become very important after the tsunami because you can more or less get cars that you want.

MR. PALACIOS: Okay.

MR. KAPLAN: But please don't validate this kind of practice because then we're setting a precedent, not just for this dealer but all dealers and manufacturers in the state and we'd be really upending the legislature's mandate.

MR. PALACIOS: My question: What remedy is it that you are seeking?

MR. KAPLAN: Here it's to declare these things to have violated the statutes. Now, what's going to happen in the interim, World Car still wants to be a Hyundai dealer, they haven't walked away, they have acceded to the request that they try to sell their dealerships. So what remedies they may seek in state court, whether the parties talk later is something

completely outside the record and I don't want to speculate about this. As a trial lawyer and somebody who has been in many adverse proceedings, rulings from boards or judges or courts often have the effect of concentrating people's minds and forcing them to a resolution.

MR. INGRAM: I have a couple of questions. I'm sorry to keep going on this.

MR. KAPLAN: Look, we appreciate the opportunity to hear this with the board.

MR. INGRAM: So I heard your explanation on the Equus line. The McCombs store that are your competitors, are they Hyundai only stores?

MR. KAPLAN: No. They are owned by the McCombs organization.

MR. INGRAM: Right. But are they single point stores?

MR. KAPLAN: I believe they're now both single point stores. Yes.

MR. INGRAM: Now, being that they weren't at some point.

MR. KAPLAN: I think they were throughout that time frame, 2010 to 2013. One of them became exclusive during that time frame, it wasn't earlier. And now --

MR. INGRAM: So wait a minute, let me stop there. So one of them during this time frame became an

exclusive Hyundai store. Would that not perhaps justify the difference in allocation?

MR. KAPLAN: No. Why would it? You can't require somebody to be exclusive, and there's no justification -- if people are selling cars, they're selling cars, and there's no justification for that particularly when it's in the record, once again, that World Car requested an opportunity to move its south store, the one that was dual, to another location on a huge amount of acreage right on Loop 410 and was declined that opportunity. Hyundai decided, exercised its discretion to say no, you can't do that. And in fact, now -- and by the way, Red McCombs got assistance when it did that extra allocation, whereas, with the north store which was always exclusive, when it was upgraded, they got no assistance from Hyundai. So that's just more discriminatory treatment that we haven't really talked about. If they want to give help to somebody who agrees to be exclusive --

MR. INGRAM: Well, I mean, discriminatory is okay. Right?

MR. KAPLAN: If it's not unreasonable.

MR. INGRAM: So it just depends on your terminology of unreasonable.

MR. KAPLAN: Well, that's up to the board. We

have an exclusive store on the north side. When it was renovated, World Car got no extra allocation or assistance.

MR. INGRAM: And that remodeling was when?

MR. KAPLAN: That remodeling was in 2012 or '13, I believe.

MR. INGRAM: So relatively recently towards the end of this.

MR. KAPLAN: Right, but it was always in the works. And with the south store -- and he record again is full of this -- there was an effort made to make it exclusive and move to a new property and Hyundai --

MR. INGRAM: When was that, what's the date on that?

MR. KAPLAN: 2010 -- Hyundai declined -- well, that was through Mr. Hetrick and the organization declined that. Now World Car has found a different site -- I believe it's a different site -- and is building an exclusive store basically across the street from the Kia store.

MR. INGRAM: And then the last question I have, we didn't talk much about the service loaners, and so explain to me the service loaners concept and why World Car did not choose to do that. Tell me about the basis of that being discriminatory.

MR. KAPLAN: What I'm saying is they used that as one of their fig leaves after the fact. If you look at the slide of the differential treatment which is on page 12 -- I'm sorry -- slide 9, he still doesn't do the service loaner program because he personally doesn't believe it's a good thing for consumers. You put in a car in service loaner, and it's a little deceptive on sales. There are manufacturers that have gotten in trouble for reporting things as sales that maybe aren't sales -- I think there's an investigation of Chrysler right now. If you put a car in service loaner status, it counts as a sale and you theoretically are goosing your sales numbers to that the region can argue for more cars.

MR. INGRAM: But obviously Hyundai wanted you to increase the --

MR. KAPLAN: They wanted him to be in that program. He believes, and I think objective people outside this room might agree, it's a little bit unfair and there's no effort by Hyundai to make dealers tell a customer: Now, you bought this car, we have a -- whatever it is, say it's a three-year warranty, say it's a seven-year warranty -- you've got a seven-year warranty but you should know the warranty started running on this X months ago.

MR. INGRAM: Let me stop you there because

that's almost like a separate issue, so the issue here really is Hyundai wants this and World Car made a decision that they didn't want to do it.

MR. KAPLAN: They did want it, but the reason we know that's not a real excuse is before this discrimination began he wasn't in the service loaner program, afterwards he wasn't in the service loaner program, he's still not I the service loaner program. So you can come up with any alibi you want, he was mean to me, he was rude at the meeting, I don't think Mr. Zabihian's personality has changed much, neither has his business practices, he's a rules follower. He honestly believes, and the testimony is clear about this, that's not something you should do to customers. That's just how he is.

Now, discriminating against him on that basis not only is not reasonable but that's not a true excuse because he kept not being in the service loaner program and the discrimination didn't go on. If it were really an excuse or a reason, then that discrimination might have continued. That's just a fig leaf that they came up with after the fact. The record also shows that Mr. Hetrick agreed at a regional dealers meeting that this service loaner issue has a way of goosing sales, was a problem.

But you could argue these are credibility

issues, and we haven't really talked about them much. All we know is what the facts show: he never did the service loaner program and they didn't discriminate against him before and not after, but during this time frame when it really mattered, they did. So every alibi is a fig leaf.

MR. INGRAM: Thank you very much.

MR. WALKER: Mr. Kaplan, I have two questions.

MR. KAPLAN: Yes, sir.

MR. WALKER: Number one, for the record, you have referred to your right there, I guess, to somebody at the table here that is giving you some information. Would you please tell me for the record who this is.

MR. KAPLAN: He's one of my partners, Jarod Stewart, S-T-E-W-A-R-T. He was at the hearing, did most of the briefing work, and I would have to say I rely heavily on him.

MR. WALKER: And that's fine. I just wanted the record to reflect.

MR. KAPLAN: Thank you.

MR. WALKER: And is the dealer here?

MR. KAPLAN: Mr. Nader Zabihian is present in the room.

MR. WALKER: So the dealer is present.

MR. KAPLAN: He's been the person who's probably been nodding vigorously.

MR. WALKER: I haven't seen him.

MR. KAPLAN: I'll tell him not to shake his head vigorously when Mr. Young has his turn.

MR. WALKER: Thank you. I just wanted to know that he was present because he had an interest.

And the other thing is that what kind of relief are you looking for in your original petition?

MR. KAPLAN: The relief is in the order we've submitted, it's just a declaration by the board. The board doesn't award money damages; it could enjoin something but we haven't sought injunctive relief. We might come back some day if the practice reasserts itself. But what the remedy is for this here is just declarations that are in the order we've submitted to the board. We haven't argued to the ALJ that this has some monetary value. It may have a monetary value somewhere else, but as I say, I can't really speculate on what might happen after the board issues its ruling and this process is completed.

MR. WALKER: I guess my question goes back, again what is your relief, but what is -- I know why we are here today because we want to either find that there was an error in the finding or a misinterpretation, whatever, but what was the original intent of how we got here today. Is it just strictly this allotment?

MR. KAPLAN: I hate to start speculating about personalities and all, but I think the intent is this is a dealer who's been a loyal dealer, he's a successful dealer, he's a successful dealer for Kia right next door. Suddenly his life changed with somebody saying we want to run you off, and he doesn't want to be run off. I'm sorry, he's stubborn man, he's a rules follower, he will not be run off by this kind of behavior, and it violates the law. I don't know if it's an isolated incident or not among other Hyundai dealers, I'm only representing him and what he knows happened to him and what we have shown indisputably from the record happened, those are the events. Getting into people's hearts and minds is a little harder. I can talk about his because he's talked to me.

But he wants to be a dealer, continue as a dealer, but he wants these practices that were engaged declared to have violated these statutes, and that's what in the order we presented. It's very important to him and not just as a matter of principle, I think there's a legitimate concern that these rulings could be used by Hyundai at some later date. We need to put an end to this, and that's what the board is here for.

MR. WALKER: Thank you.

MR. PALACIOS: Any other questions for Mr.

Kaplan before we move on?

(No response.)

MR. KAPLAN: Thank you very much.

MR. PALACIOS: Thank you, Mr. Kaplan.

Next we have, on behalf of Hyundai Motor Company, Mr. Kevin Young. Would you please come forward?

MR. YOUNG: Thank you, Chairman Palacios and Board members, and Ms. Brewster. Thank you for listening to all of this today.

I am Kevin Young. I am representing Hyundai Motor America, and I'm proud that with me her today is Rosemary McDonald. She's a senior counsel with Hyundai Motor America in Fountain Valley, California, she's here today. Also with me is an associate from my law firm, Mark Wolfe. So the three of us are here today to address these matters.

Let me say right from the beginning, because listening to your questions, I'm sure you'll have some for me and I'll be happy to address them, but let me just be really clear, there is no violation of the Occupations Code, none. There has never been, and the ALJ accordingly found that, and she made the recommendation that she made, knowing these statutes and applying these statutes.

These arguments that you've just heard from Mr. Kaplan, I have been listening to them for three years.

There's nothing new, it's the same retread argument. This case involved Hyundai Motor America producing thousands of documents, electronic information about every Hyundai vehicle sold in America over a certain number of years, information regarding dealer contacts with all dealers in the South Central Region which covers eight states, thousands and thousands of documents. Hyundai put up personnel for deposition after deposition after deposition, the same things were trotted out over and over and over, it's nothing new.

These lawyers have a perspective on how they think things went down. They attempted to present evidence and they were given every opportunity to present evidence in support of those theories. The ALJ, who was very thorough -- and I don't think anybody would disagree with that -- she was a hardworking extremely thorough judge, she listened to everything, she reviewed all the documents, she listened to all the depositions, and then she made her reasoned decision.

Her decision can be reviewed by this board and can be modified or vacated under very limited circumstances, and I want to go over those in detail just so everyone is clear, and I know you know but just to be clear about it. But to start, the legislature has set up a pretty thorough system to handle complaints like this.

The complaint gets filed with the DMV, the DMV then refers it over to the State Office of Administrative Hearings, and then the State Office assigns an ALJ or more than one ALJ, as it was in this case, to resolve discovery disputes, to make preliminary rulings on what you can get into and what you cannot get into, and that process went on for two years, and just as the statute prescribes that it should happen.

And then the case was presented to the ALJ over a week's time, witnesses gave their testimony, and then after several months, after considering further briefing by the parties, after we presented all of our evidence, after that week was done, then the parties did briefs and then the parties responded to each other's briefs. And the ALJ had all of this at her disposal. So when she comes to this board with a recommended decision, it is a reasoned decision based on a lot, it's not a whimsical thing.

And so even though Mr. Kaplan -- and he's a great lawyer and I've come to really respect him over this process, I kind of like him, actually -- he's pretty crafty with his words, and although he says this is a misapplication of law, what he's really doing is saying I want you to see the facts differently than what Judge Harvel saw. Because all the facts that he says were

undisputed, it's not true. There was a dispute about most of them. Most of the things he just told you were undisputed, most of those things were disputed, and it's all in the ALJ's briefs. And I know you've had and I know most of you have probably looked at it, but it's all there.

So what I would just say briefly is that if you pull up plaintiff's exhibit 15 and go to the second page, if you would, I know it's difficult to read, I didn't make copies, but this is a document that was created June 24, 2010, you can see it right there near the top, June 24, 2010. That's right after Mr. Hetrick took over his job in this region as the Hyundai regional general manager. This is his first visit to World Car, this is his first meeting with Mr. Zabihian.

And what you can see, again, this comes from the record, this is plaintiff's or World Car's exhibit number 15. One of the very first things that Mr. Zabihian tells Mr. Hetrick: Hi, nice to meet you, hey, by the way, if you think you're going to put a Hyundai dealership in here, I'll sue you. This was like one of the very first things. So when Mr. Kaplan tells you he's a hardworking guy, really wants to cooperate, really wants to be a Hyundai guy, well, that's how the relationship started: If you try to do this, I'll sue you. And Mr. Hetrick

explained: I'm not looking to do that at all; in fact, we're now getting into pretty high demand for Hyundai vehicles, we're not going to be opening dealerships here or elsewhere.

If you read on down, you can see that Mr. Zabihian said, I want more money in co-op. And that is addressed in here. And then in this same meeting, Mr. Zabihian said, I want the Equus, I want to sell Equus cars, I want that dealership. And Mr. Hetrick explained: Well, okay, but that requires an investment in your facility and that requires that you purchase our architectural package and design package, and that's going to require some up-front investment from you if you want to do that. And Mr. Zabihian tells him: You need to change your requirements for that.

That's how this relationship started, and so I just want to be clear that we need to put it in context, and the ALJ had all of this in context, she heard all of this.

What this is really a story about, it even starts before 2010, it starts at the end of 2008 and in 2009, this is the evidence that was presented at the hearing that the ALJ heard. In 2008, the United States was undergoing a recession, and for legitimate business reasons, Mr. Zabihian said, You know, I don't think I want

as many of your Hyundai cars, I think I'll take less of your Hyundai cars. That's his right to do that, he's not penalized for that. But when you take less cars, then it's going to lead to lower sales.

And then when 2010 rolls around and the Toyota ignition problem begins and Hyundais are all of a sudden more popular, in the fall of 2010 Mr. Zabihian said, I want back in now. And Hyundai explains to him: Sell what you've got, the formula is a replenishment formula, if you sell cars then you'll be replenished and they'll continue to come, but I can't just give you a bunch of cars, I've got dealers everywhere, not just in San Antonio but I've got dealers everywhere and they're all calling me, I want cars, I want cars, I want cars. And so I'm sorry, but you asked to pull back, and so I'll give you some cars but I have other dealers, including Red McCombs, who in 2010 said I'll take one of my stores and make it an exclusive Hyundai store, and in 2010 said I'm going to commit to remodel one of my stores, and in 2011 said I'm going to purchase this Equus package and I want to sell the Equus cars. All of those things happened. And so yes, Red McCombs was selling more cars, and yes, Red McCombs got more discretionary allocations.

So that's the context. Yes, there was a difference in treatment and if you want to call that

discrimination, the statute says it only has to be unreasonable discrimination, unreasonable discrimination is prohibited. You know, someone might say that you've got discriminating taste. Well, that's not a bad thing, that just means you are able to make choices, and in fact, that's a compliment. And so the idea that someone makes different decisions between one dealer and the next, that's not prohibited. The idea that Hyundai wants to protect the rest of its dealers who are performing and doing well and say please continue, and then tell Mr. Zabihian: I'll give you some vehicles but I can't do everything you want because these people have been performing for a long time and they want more cars too and they're selling more cars, by the way. That's the context.

When Mr. Kaplan flashes up the letter from 2013 that he showed you in his power point, and it's slide number 7 and 8, when he flashes that up, he then highlights and he tells you that Hyundai said because you don't meet the sales efficiency, you're in breach of your contract. Well, if you read the letter, and if you're like me, you've got to take off your glasses, but you can read it, that's part of it, but part of it is, hey, you're just selling less vehicles. You sold this many in 2010 and you're selling this many in 2011 and you're selling

less than that now. That doesn't have anything to do with a sales efficiency standard, it has to do with you're just not selling any more, why is that.

And so it's not just a sales efficiency standard, and in fact, that same argument was presented at the hearing, and Judge Harvel made a specific finding of fact that it was not a requirement by Hyundai Motor America that you be 100 percent sales efficient, just not a requirement. And I know some of you know this because you're in the business, but it's a generic standard that's applied to all dealers around the country, it uses common data and market data and it treats everyone the same, and so the number you get, you may not like it but the same rules are being applied to you that are being applied to people everywhere else.

And if you look closely in that same letter that we just referred to that Mr. Kaplan gave you on slides 7 and 8, the letter is telling Mr. Zabihian that your store on the south side, we have 824 dealers in America and your store on the south side ranks 821st. Well, okay, I think that's a fair criticism. You're one of the lowest of the low. And this is in 2013, by the way.

When Mr. Kaplan flashes up his bar graph to say, well, look, they got more cars in 2013, and he says

it's because we filed a lawsuit. Well, the evidence shows, and what he even admitted, that that's when the World Car North store decided to renovate its facility. And once it made its commitment to do that, it received some more cars. And this testimony about how World Car never got money or co-op or extra allocations because it did its renovation in 2014, well, you know, that's not what the testimony in front of the ALJ was either. It's in the record. In the record you had testimony and documentation showing that while the litigation was going on, Hyundai was calling Mr. Zabihian to meet about these very issues. That's what the evidence was. But Mr. Zabihian didn't come meet, and that's the understandable too because the parties were clashing.

But this is not a one-handed sort of give you the back of my hand treatment. This is a business and Hyundai Motor America would love for World Car to be a more successful dealership. That's why they have these programs, like the service loaner program, which World Car has been encouraged to participate in. What the evidence showed at the hearing was not that the service loaner idea is a bad idea, the evidence showed that World Car chooses to use Nissan's program, Nissan's. Well, okay. So maybe he's getting some better benefit from Nissan for doing that. Well, good, that's his business decision. But

don't then come complain and say, well, guys that are doing the Hyundai program, they shouldn't get these things.

So I guess all this to say -- and I'm wrapping up here -- all this to say that this is a really complex set of facts that go into this. There is a lot of information, a lot of exhibits, a lot of testimony, and the ALJ heard all of it. And she's a bright judge, and what she said was there is no violation, and she stated it clearly for all these reasons.

So we're asking you to support and confirm the ALJ's proposed order. There have been some slight modifications that have been proposed by Mr. Avitia and counsel, Ms. Lingo, and there are three and they're all kind of typographical in nature. We also agree with those edits that she is proposing, those are correct.

Yes, sir.

MR. WALKER: Let's go back to the floor planning deal again that I asked over here, and I just heard you say earlier that you said that he doesn't want any more cars, he doesn't take any cars, but then he wants more cars and you say, well, sell what you have and we'll send you some more cars. My question to you is: Who pays for those cars when he says send me some more cars? Are you responsible for those car payments and floor plan, or

is it at his expense?

MR. YOUNG: Those become his responsibility once he takes the cars. The way the system works, generically is there's a formula allocation and it applies to all Hyundai dealers in the U.S. And I think every other manufacturer has something really similar. In fact, the testimony in this case was that the woman who kind of designed this system had come over from Toyota and she basically took some Toyota tweaks and made it part of Hyundai. But it's a replenishment system, so if you sell certain cars, it goes in and it's kind of automatic, and so then at the next time there's a shipment and there's going to be an allocation of vehicles --

MR. WALKER: So if Mr. Zabihian, if things are slow and I ran your dealership or was your franchisee, I would want to cut back my inventory also because I have to pay for that. If things turn around, I would want more of your cars and ask for them so that I could take and improve my profitability, but what I'm seeing is that -- and you just said, I heard you say, sell what you've got and we'll sell you some more. So you kind of restricted what you allowed him to get and you based that upon some formulation that you have internally at Hyundai, I guess, that says -- there's a conflict here, because you're saying at one point in time you're using some formula of

sales, but then you just made a statement that you said sell what you have and we'll send you some more. So why is there a conflict between what you speak on one side of your mouth and out on the other side?

MR. YOUNG: I hope that's not the case.

MR. WALKER: That's what I'm hearing.

MR. YOUNG: Okay. Thank you. Let me try to explain. When I make the statement sell what you've got and you'll get some more, what I'm talking about is this automatic program, you sell what you have and then the program is going to get you some more. That takes care of about 85 percent of all allocations or more, 85-90 percent of all allocations, this automatic program. So if you sell what you've got, then you will be replenished according to the formula, based on what's available, based on the way other dealers in America are performing. So it's all a formula.

There is this discretionary piece that is separate and apart from the allocation that's formulaic, and that is at the discretion of the general manager, and so that's where all of these other things came in about why he was awarding who which cars.

MR. WALKER: So during this hearing that was presented, was there evidence -- and I guess I need to go to our stuff here and ask if there was any evidence

presented that said that the formula that was used at Red McCombs stores was adhered to the same way it was performed over here at World Car? Was there any findings of those facts? Or did they discriminate against one dealer over the other? I didn't read those facts, so I don't know.

MS. LINGO: Michelle Lingo, Motor Vehicle Division staff attorney.

Yes, Board Member Walker, those issues were considered, developed, looked at, and recorded both in the findings of fact and in the PFD discussion.

MR. WALKER: That the formula was fair and it was exactly used over here at Red McCombs the same way it was used over at World Car?

MS. LINGO: To my recollection --

MR. WALKER: I want a yes or no answer, either it was or it wasn't. We need specifics.

MS. LINGO: The finding was that the use of the allocation was not discriminatory, that the allocations were being used across the board the same for everyone. That isn't exactly the question that you asked, but that's what the answer the ALJ addressed.

MR. INGRAM: Member Walker, that's how I remember reading it was that the allocation system itself was found to be followed for all dealers equally, it was

the discretionary portion, the manual.

MR. PALACIOS: Exactly. The allocation system, the 85 percent you refer to, is pretty standard across the board for all dealers.

Do you have any other questions, Mr. Walker? I want to follow up with a question Mr. Walker had, I guess, regarding the allocation. And you made a statement pretty much in my judgment that kind of summarizes this whole case here, and that is you acknowledge that there was discrimination, however, was it unreasonable. I guess I have a question. You had mentioned that there's some disputes with the facts that Mr. Kaplan presented earlier. Do you dispute the allocation on this chart that he presented that shows 1,635 discretionary units allocated to McCombs and 600 to his dealership?

MR. YOUNG: No, I don't dispute that number. That's a number of allocations that were -- vehicles that were allocated and accepted. So what that doesn't take into account is that people may have turned down vehicles for one reason or another.

MR. PALACIOS: Are you inferring that World Car turned cars down?

MR. YOUNG: They definitely turned cars down.

MR. PALACIOS: During the three-year period, so they could have had more than 600 but they deliberately --

so on one hand they're asking for more but then they really didn't want them. Is that what you're saying?

MR. YOUNG: That's absolutely the evidence and that's exactly what I'm saying. But to be fair, every dealer turns down some cars, even in this time period. When cars were really tight in this 2010 through end of 2012 time, the turn-downs were really minimal, but the evidence was that you could always find turn-downs from just about every dealer, you know, they didn't like the green model of something.

MR. PALACIOS: Okay. I'm just trying to ascertain that they weren't allocated 1,635 vehicles and turned them down. I mean, they weren't allocated the same level that McCombs was and they just chose to walk away.

MR. YOUNG: We definitely agree with that, that's true.

MR. PALACIOS: I guess another question, early on, I'm just kind of looking at the pattern here, when the new region manager came on, I think you said it was late June, from the submissions it shows that he then for the six months after he was on board in 2010, he allocated 134 discretionary units to Red McCombs and 20 units to World Car, and I guess is that in dispute as well?

MR. YOUNG: Not disputing that.

MR. PALACIOS: Just looking for the basis for

that, again, I understand discretion is literally just based on the judgment of whoever is in the field, but what was the basis? I guess it seems like right off the bat that this regional manager, for whatever reason, allocated units disproportionately to World Car's competitor.

MR. YOUNG: The testimony was that some of the manual allocations are reflective of the sales, so if you're selling more, I'll allocate you more of my discretion. The testimony also was that it was in 2010 that Red McCombs said I will take one of my dealerships and I'll go exclusive, and so the general manager rewarded them with some extra cars because they were going to go to be an exclusive dealership. Those are the two primary reasons that were given at trial.

MR. PALACIOS: Just by the statement that I plan to build a facility then it's automatically okay, great, you get more product because you say you're going to, they didn't wait until they actually built the facility?

MR. YOUNG: Well, they already had an existing facility and it was a combined facility with General Motors, GMC and Hyundai, and so what McCombs people said was we're going to take GMC out of there, we're going to make this a full Hyundai thing, and they began that process in 2010.

MR. PALACIOS: Any other questions for Mr. Young?

MR. INGRAM: Yes, I have one. Mr. Young, and again, I don't want to create new facts so I only want to talk about this if it's a finding of fact, but Mr. Kaplan mentioned that in 2010 World got declined a move to become an exclusive Hyundai store. Was that a finding of fact or was that talked about in the case?

MR. YOUNG: That is not a finding of fact. It was, I think, talked about a little bit during the case. I would just say that that's in the record. The reasons, I don't think I could articulate all of them accurately right now. There was some reason why --

MR. INGRAM: It doesn't sound like it's fleshed out enough for me to talk about it then, so we'll skip it.

Go ahead, Brett.

MR. GRAHAM: I think this might be a question for David. I think we've worked through a lot of the substantive issues here. The question I would have would be on the determination that there was actually not, at the end of the day, a violation based on the Code. Does that have to do with how the Code is written, whether the Code clearly defines what those expectations are? Do you see where I'm going? I'm just kind of wondering what basis would that be.

MR. DUNCAN: Is there enough clarity. As Ms. Lingo noted, they don't have a rule that further delineates unreasonable discrimination. We don't go and give examples, there's no numeric breakdown of, you know, you can't deviate by more than X percent. So that's actually a very good question.

MR. GRAHAM: Because if we're being asked to stand behind a decision by a judge who said I'm rolling this way because there's nothing in this Code that clearly defines this, then that could be an issue.

MR. DUNCAN: It could be, and something I would point the board to and I would urge, and especially based on there's a recent attorney general opinion about deference to agency actions that Mr. Paxton released a couple of weeks ago, and it has to do with how boards and commissions interpret and apply the statutes that are given to them by the legislature.

For many years there has been a concept discussed by administrative law professors -- there's one at Baylor, Professor Beal at Baylor -- others that are academics and longtime practitioners in this area that some boards and commissions have a practice of essentially setting policy or deciding policy case-by-case-by-case and over time to cite the cases to understand the law, and the AG's office and many of those papers and arguments say

that's ad-hoc rulemaking, that you're making rules by deciding cases.

Now, I'm not saying anything like that, that the board is headed that direction or that your decision on this case will or won't be that. But if it's the board's desire to be more specific about that, the best way to do it is notice and comment rulemaking, is for us to do a rule under the board's rulemaking authority and set that expectation once and for all and say when we see the words "unreasonable discrimination" here's what we think that means. That gives all the parties an opportunity to comment on that. It's difficult and somewhat disfavored to set policy by contested case decision. On the other hand, I understand we have to decide this case, it's in front of you, so it's a difficult struggle.

MR. GRAHAM: All right. Thank you.

I would like to ask one other question in regards to. I mean, I think you've made it clear that -- and I don't know if discrimination would be the most appropriate word, I'm going to use the word allocation, that allocation to this dealer was refused because of their lack of involvement in the plans and programs that your company had laid out. Correct?

MR. YOUNG: That was most of it. Part of it

was they also didn't sell cars, they sold less and less and less.

MR. GRAHAM: Well, but to their defense, I think their point is valid that when you get less and less and less, you're going to sell less and less and less. But the way you get more and more and more is allocation, and if the allocation is refused based on their involvement in these programs, then that's understandable. So my question would be was it clearly defined in the franchise agreements that if you don't do this you will not get this? Was that defined? Because when you come down to it, I think we just walked through it, the only way for them to get back ahead of the curve was to get in the game, but if they didn't know what the allocation was going to be, then I'm not sure that would be fair to them. So that would be my question.

MR. YOUNG: I understand your question. The dealer agreement and then the other communications that go between Hyundai Motor America and the dealers spell out in great detail how the systematic allocation works. As for the discretionary allocation, there is no specific detail as to how that works, but they are encouraged, as the evidence showed and what we talked about today, that to participate in these other things will help you get your vehicle sales up, will also show our commitment to the

Hyundai brand. And so discretionary really is discretionary but it's a small portion for the overall vehicles.

And just to clarify what I was saying a minute ago, when I say that they weren't selling as many cars, your point is correct, that if they're not given as much, they can't sell as much. But what the evidence showed was they weren't selling what they had, and so it wasn't a question of they needed more to sell more, anyone could say that, I guess, but they weren't selling what they had.

And then in this time of what everyone agrees, stipulates was a time of short supply, essentially what Mr. Zabihian was saying was: Hey, treat me differently than you're treating your other dealers; you're giving your other dealers who are performing well this limited supply, I want more of it for me. Without justification. And so to do what he wanted to have happen would be to take away from some other Hyundai dealers that are performing well, and Mr. Hetrick, in his discretion, declined to do that for the most part. It did allocate some vehicles but just didn't allocate as many as Mr. Zabihian wanted.

First of all, are there any more questions? I'm happy to answer.

MR. PALACIOS: I just want to follow up on what

you just stated. So am I understanding that the, I guess, declination of World Car's request for additional inventory had more to do with their sales rate than all these other factors that you presented, the lack of facility, the lack of participating in programs? Because that's something that I guess you didn't show, you didn't show the sales of their competitor, Red McCombs. Is that what the basis was?

MR. YOUNG: It's all of those things, Chairman. That's what the testimony was is that your sales rate matters, your commitment to the brand matters, your participation in the loaner program matters because by that you will get more allocations because you want some allocated to your loaner program. It's the commitment to have a single point dealership. It was all of those things kind of presented in context of this hearing that Mr. Hetrick said, These are the reasons for my decisions, it's all of these things, it's not just one or the other.

MR. INGRAM: So Mr. Young, just to follow up with that, and I see where we talk an awful lot in the documents about the sales efficiency, but the efficiency as it relates to the documents talks more or less about what is potentially possible in the market, not so much about how many of his cars he actually sells per month. And so is that in here somewhere that I'm not seeing where

we're talking about how well is he selling his cars, not related to what's possible in the entire market because there's other factors that influence that. Partly one of the things that influences it is how much cars he has. Right? But I'm just curious, how is he turning his current inventory?

MR. YOUNG: Well, the evidence at the trial showed that they can compute that in a couple of different ways, and one is average days to retail. In other words, how long does it take you from the time you get a car to the time it's sold, and the Zabihian World Car dealerships were some of the worst in the district. They had longer time periods than everyone else. And maybe that's one metric of that.

But at the hearing there was evidence about the sales each year, and I believe the ALJ even had a chart of that in her proposal for decision, but certainly that was discussed at the hearing and gone over in detail.

If you have the ALJ's proposal, if you look on page 3 of her proposal, what she shows is a chart about sales for the four dealerships leading up to 2010, and it illustrates the point that we were talking about earlier that the World Car stores dropped off the map in 2009 and then continued in 2010. So that is one measure of sales that I can just find in her proposal. But she certainly

dealt with that issue and she considered the sales that were being made year over year by each of the dealerships.

MR. WALKER: Mr. Young.

MR. YOUNG: Yes, sir.

MR. WALKER: So why does Hyundai care if your dealer says, hey, send me a thousand cars, I want to sell your cars, he's paying for them, you're not paying for them. Why do you care if he's buying a thousand of your cars, why would you make a statement to him and say: Well, sell what you have and we'll ship you some more. That's like me saying, well, pay for the bills you've got right now on the trucking that I've done for you before I do any more trucking for you. I'm going to do all the trucking I can for somebody. Why would you not give him cars if he's paying for them?

MR. YOUNG: That's a great question. So in the time period that we're talking about, the 2010 through 2013, that is what we've been talking about as this was the time of short supply, so there weren't enough Hyundai vehicles. So you've got ten people wanting cars, I've got 100 cars to give you, and you say I want 40 of them. And I say, I can't give you 40 because I'm going to give him 10, and he's been doing really well, I'm going to give him 15, and it comes down to it, I've got nine for you.

MR. WALKER: Yeah, but maybe I went to A&M and

he went to Texas and you went to Texas.

MR. YOUNG: Didn't go to Texas, I'm more of an Aggie.

(General laughter.)

MR. WALKER: But I just want to make sure -- I can see all kinds of problems with, hey, who do I like, and we've got to make sure that every dealer out here is protected and has the ability to have access to the product he sells. And you make the product, so he needs your product to get around, and if he doesn't sell your product, he's going to go broke and you're not going to go pick up his bills, I know that. So it seems to me like that didn't happen here.

But I have a question, Daniel, for you. So Daniel, the SOAH judge that heard this case, was this one of our SOAH judges that is working through the DMV, or was this prior to us having our ALJs?

MR. AVITIA: Daniel Avitia, for the record again.

This case is several years old. This case went to SOAH prior to the mediation program even beginning, so this case was not mediated by the DMV.

MR. WALKER: So I guess some of the new board members on here may be wondering what I'm asking. And so today in the agency we have -- David.

MR. DUNCAN: I was just going to clarify for the members. Sorry to interrupt.

MR. WALKER: Do you want to do it?

MR. DUNCAN: Yes. The legislature gave the agency the authority to have OAH, the Office of Administrative Hearings, which is run by Edward Sandoval -- who, I'm sure, is traveling today -- and they hear Lemon Law and warranty cases only. The dealership disputes, whether it's dealership location disputes or disputes like this over compliance with the Code, are and remain the sole purview of the State Office of Administrative Hearings. We have to refer those to SOAH.

MR. WALKER: So those aren't heard by our staff which knows the dealer laws.

MR. DUNCAN: Right.

MR. WALKER: This could be somebody that's never heard a dealer case before.

MR. DUNCAN: Quite possible.

MR. YOUNG: If I could address that real quickly, Mr. Walker.

MR. WALKER: Go ahead.

MR. YOUNG: I don't know her entire resume, but I do know that she's quite famous for rendering a proposed decision which was then adopted involving Mercedes Benz and a dealership in South Texas.

MR. WALKER: So she did the Star Motor case?

MR. YOUNG: She did. And found in favor of the dealer, I believe, in that case.

MR. WALKER: I think we overturned that case.

MR. YOUNG: In large part.

MR. WALKER: We overturned that case.

MR. YOUNG: I don't know how that ended up, but I do know that she was the one that kind of worked on that.

MS. HARDY: Just a quick question. When a dealer turns down inventory, and they all do, like you said, what happens to that allocation? I assume these vehicles are built. Are other dealers taking those or being asked to take what other dealers turn down?

MR. YOUNG: Absolutely. The terminology that you used is the correct terminology, they're called turn-downs. And so when someone is offered vehicles and they don't want them, it goes to a turn-down list that people can pick from. Another dealer might say, hey, I want some of those turn-downs. So they become available again to the pool.

MR. INGRAM: Mr. Young, there was some mention about Toyota, I guess, building a factory in the area.

MR. YOUNG: Correct.

MR. INGRAM: When was that?

MR. YOUNG: I believe that was 2009, I believe is correct. They build light trucks out of San Antonio.

MR. INGRAM: And was that near the World Car South dealership?

MR. YOUNG: Relatively. They're both in the south part of town. The Toyota dealership is -- they're not neighbors but they're in the same general area.

MR. INGRAM: So looking at the chart that you pointed out and I'm basically taking the 2010 and annualizing the sales, and really, their sales didn't drop off with the exception of World Car South. World Car South did drop off and so I was trying to figure out if maybe perhaps that had an impact. But in terms of World Car North, it looks like for the sales volume it doesn't look that far off.

MR. YOUNG: 2009 to 2010?

MR. INGRAM: I mean, obviously there's a slight dip in 2009, but '10 was trending up. That's all the question I had was Toyota. Thanks.

MR. TREVIÑO: Mr. Young, was there anything in the record about Hyundai's desire to terminate World Car? Was there ever any sort of background on that?

MR. YOUNG: Yes, there was testimony about that, and the testimony from Hyundai is we're not trying to terminate this dealer, we're trying to get this dealer

to improve its performance and these are standard type letters that would go out to someone. So they still exist as Hyundai dealerships today, even having received these letters.

MR. GRAHAM: I'm sorry to interrupt you, but just to confirm, you just said that by trying to improve the performance of the dealers you send them a letter that they need to sell?

MR. YOUNG: No. They to get them to improve their performance by a variety of ways, but then yes, in that one letter that we looked at, in the end he said, It doesn't look like you really want to be a Hyundai dealer, and if that's the case, let me know and I'll help you sell it. So that was in the 2013 letter.

MR. INGRAM: And I'm sorry. Are both World Car stores combination stores, are they both Hyundai-Kia?

MR. YOUNG: Word Car North is an exclusive. It's next to, I believe, a Mazda but it's its own separate dealership.

MR. INGRAM: Okay. And so then the south is a combo Kia-Hyundai store.

MR. YOUNG: You're correct.

MR. INGRAM: And that's where you're referring at one point, I guess in the letter it was like six to one Kia to Hyundai.

MR. YOUNG: Yes, that's right.

MR. PALACIOS: Any other questions for Mr. Young?

(No response.)

MR. PALACIOS: Thank you very much, Mr. Young. Appreciate your time.

We'll call Mr. Kaplan back. You have four minutes for rebuttal.

MR. KAPLAN: I'll try to make these points very briefly. In response to the question about the board's authority, you are the decider. The ALJ is not the final decider, you are the decider, you decide what these standards mean in the context of these facts, and so that's what we're looking to you for. And there are no real standards for discretion. The record is replete with testimony that there are no standards for the regional manager's exercise of discretion on manual allocation.

I want to talk about a number of things that were just discussed, because this is truly rebuttal, and that is, first of all, who turned down more cars. The record is undisputed that when Mr. Hetrick showed up in mid 2010, in those first six months of 2010, Red McCombs, which had already surrendered a dealership, also turned down 598 vehicles offered to it versus 205 turn-downs from World Car. They turned down almost three times as many

cars. Now, does that justify giving them more manual discretionary allocation? Not in my book. And that's in defendant's trial exhibits 46 and 47, it's from their own information.

Let me talk about the discovery process, which I wasn't going to get into. It took us two years because we had to fight them to get depositions. First, we had to fight them for documents. Then Mr. Hetrick got deposed and kept saying ask Mr. Zuchowski, ask Mr. Zuchowski. And we had to fight to get his deposition and had to get an extremely starchy order from the ALJs ordering that deposition. That's why the process took a long time.

Let me turn next to the issue of the dealer contact report. I don't have it in front of me, but it was written by Mr. Thompson, who accompanied Mr. Hetrick. He did not even know -- he had been the district manager for, I think, two years, he did not even know he was talking to Mr. Deltang, not Mr. Zabihian. Mr. Zabihian wasn't even in that meeting, and what caused the blowup there is because Mr. Hetrick didn't know that the previous regional sales manager had given World Car a right of first refusal on an extra dealership in a certain extra, and Mr. Hetrick apparently was outraged that his authority was being challenged because he was bound by something. That undoubted spurred the letter in December 2010, we'll

help you sell your dealership, if he could get rid of that dealer, that right of first refusal wouldn't be a problem. That's what happened.

That report, dealer contact report, identifies as Mr. Zabihian somebody who they had admitted on the record undisputably that wasn't even Mr. Zabihian. They didn't even know who they were talking to; they wrote down that it was Mr. Zabihian, but it was Hamid Deltang. And that's the dealer contact report which is plaintiff's exhibit 15. We put it in evidence because it showed how little they knew about their own dealer who had been there for years. And yes, they had a legal right, a right of first refusal. Mr. Deltang said, We'll have to sue if you do that.

Then let me turn to the question of assistance. We know the north store was updated, no assistance given. We know Red McCombs was promised assistance even before the renovation. Again, it's in the record. And there's never been assistance given. On the south store they tried to move the location right next to a Walmart. Hyundai exercised its discretion to say no, we don't want you to do that. And now they're complaining that we didn't update the store soon enough and do enough to satisfy them? That is shocking.

Sales efficiency. They set a standard, however

unrealistic, and that's how they measure you, and they can't deny it's a metric for whether you're a failure or not, and they use it to say you're in breach of the dealer agreement.

And then finally, let me turn to the question of manual discretion. Even Mr. Zuchowski, along with Mr. Hetrick, explicitly admitted sometimes dealers need a boost, that's what we use, the manual allocations for. He didn't get it. He needed the boost, not Red McCombs, but he didn't get it. And that's why we need your assistance to rectify this wrong.

Are there any questions that I need to answer for the board?

MR. INGRAM: Mr. Kaplan, there was a mention by Mr. Young that World was performing at the bottom of the market in basically days to turn. Do we have that information anywhere?

MR. KAPLAN: I don't believe it's in the record. That's what they said.

MR. INGRAM: Okay. That's not in the record?

MR. KAPLAN: But I can show you slide 12.

MR. STEWART: May I speak?

MR. INGRAM: Sure.

MR. STEWART: Jarod Stewart, also for World Car.

And it's days to turn for each dealership. In terms of the measurement for that, obviously when you're starting in 2009 at similar positions in World Car sales at that time you had a smaller inventory and selection, and the was the testimony from multiple witnesses. But the numbers there, the ALJ did not base the decision on days to turn.

MR. INGRAM: I understand they didn't base the decision on it, but I'm just curious because it's important to me to understand how well they were selling their existing inventory.

MR. KAPLAN: Let's look at slide 12, if we can, and I can answer that question. There's a chart in the ALJ's decision but I thought this is an easier way to visualize it. If you look, these are the two World Car dealerships, these are the Red McCombs dealerships. They were pretty much equal up until 2010. The south store, as you pointed out, really had great difficulty. That's when Toyota put in a facility, offered promotions, were selling like crazy. The record is clear, no assistance, no extra assistance given at all to the south store when they were pleading for help because Toyota had a massive presence there.

Then we get into the time when cars are hot, and during this time when World Car South store is still

limping along, limping along, they are nonetheless at the same location selling Kias six or seven to one over Hyundais. Why is that? Because Mr. Zabihian only puts on his working hard dealer that in this part of the showroom. There's no explanation for that other than their allocation process, and they admitted, it's on the record from Zuchowski and Hetrick, you're supposed to use that to help dealers who need help, you don't use it to help dealers who don't need help, and this is what they did. And that's unreasonable. We know it's discrimination; it's clearly unreasonable.

MR. INGRAM: I would slightly take exception just to the comment of if you have a hot dealership that's selling a lot of cars, I'd definitely want to keep them funded with as many discretionary units as I can.

MR. KAPLAN: That makes sense, except for the fact that the president of Hyundai Motor America explicitly contradicted that. I mean, listen, there's no question, you sell what you get. Mr. Zuchowski said, The manual system, we use that to help a dealer who may be struggling. Maybe, for example, if they did reduce inventory or had fewer sales, that's who we want to help. That's what it's supposed to be used for. But there are no standards for that anywhere within Hyundai, and Mr. Hetrick is the one who controlled it.

And when you look at -- you hear 15 percent, but that's 15 percent total of total allocations around the country or total in the region, but a regional manager has the ability to put that 15 percent on just a couple of dealers. If you look at the total sales by the McCombs dealerships in 2010 -- and really, we only have half of 2010 and half of 2013 -- we're looking about 6,000-7,000 cars.

When they get 1,800 cars just purely through the discretionary allocation and the other dealer gets only 600, you can see that makes a huge difference. It's not just 15 percent of Red McCombs' total allocation, it's a much higher percentage, 1,800 cars out of 7,000 is 25 percent, I haven't done the math exactly, but it's 25 or 30 percent. And they're goosing the dealer who didn't need the help as badly as the dealer who, according to the president of Hyundai Motor America, normally would get help through a manual allocation. Just throw your hands up, there's nothing else you can do when you're fighting against that current.

And particularly when this is the dealer who is turning down 598 cars and you're turning down 205. They turned down three times as many cars in the first half of 2010. That's the history that Mr. Hetrick had the day he walked in as regional manager, the day he first met with

actually Mr. Deltang and they thought they were meeting with Mr. Zabihian. They didn't even know who they were meeting.

MR. BARNWELL: Did Mr. Deltang identify himself, or did they just assume his name was Zabihian.

MR. KAPLAN: Well, he knew Mr. Thompson.

MR. BARNWELL: But did he identify himself?

MR. KAPLAN: I don't know.

MR. BARNWELL: I'm not going to blame somebody for that assumption if they thought they were meeting with the dealer and the fellow they were meeting with deceived them.

MR. KAPLAN: Well, Mr. Deltang said that he had met Mr. Thompson many times and there would be no confusion about that, but Mr. Thompson admitted -- I think what he said was I mis-spoke or I mis-typed it, I honestly don't remember what he said in the letter.

MR. BARNWELL: Okay.

MR. KAPLAN: But the point is that went to the regional manager too, so one way or another, they thought they were talking to Mr. Zabihian and they weren't even talking to him. That comment came from Mr. Deltang, and it was a response to somebody saying we're going to do something that was contrary to the legal rights of the dealer who had a written right of first refusal from the

regional manager who preceded Mr. Hetrick. They didn't know their own business, they hadn't even looked in their own files, and they didn't want to be bothered to do that, apparently, with this dealer. They treated Red McCombs differently all the way through. Extra turn-downs from Red McCombs don't matter, but they're used as an alibi here.

I want to say one thing about service loaners, if you want to hear about it. My time is expired.

MR. PALACIOS: Yes, your time is expired.

MR. KAPLAN: Fine. Thank you very much for your time. Unless there's any other questions, we really appreciate your patience and your questions.

MR. PALACIOS: Is there any other discussion on this matter?

MR. INGRAM: Discussion?

MR. PALACIOS: Hearing no other discussion --

MR. INGRAM: There's none? There's got to be some discussion.

MR. PALACIOS: Is there a motion?

MR. INGRAM: Brett, you look like you're just dying to say something.

MR. GRAHAM: I just need to be clear, this is my first one. Can we walk back through what those alternatives are? I know we discussed them back there.

MR. AVITIA: Member Graham, that's a great question. The board's three options in this contested case matter are as follows: (1) adopt the PFD as recommended by staff; (2) amend the PFD beyond staff's recommendation, including reversal of the ALJ's conclusion; or (3) remand the PFD back to SOAH for further consideration of facts or legal concepts as directed by the board.

MR. INGRAM: I find this to be very difficult, truly, and I find that there are a lot of decisions that World made that were business decisions that certainly I feel impacted his allocation on the discretionary, whether it be that he didn't use the service loaners, he didn't report the sales quickly as Hyundai suggested, or perhaps that even though he requested in 2010 about the Equus line, he didn't do much about it. So there's a lot of business decisions in here that World made that would have affected that discretionary amount. While on the other hand, I can see some of the other points that World made.

MR. WALKER: So would you read number 2 to me again.

MR. AVITIA: Certainly. Option 2 was amend the PFD beyond staff's recommendation, including reversal of the ALJ's conclusion.

MR. WALKER: Amend or reverse. So tell me how

we would do that.

MR. AVITIA: I'll defer to Mr. Duncan as that gets into board authority.

MR. DUNCAN: In order to do that and comply with .058(e), you'd have to specifically identify which findings of fact and conclusions of law you were changing and what your basis for that was, and you would need to specifically state we're changing this one because.

MR. INGRAM: I'm sorry. Member Treviño actually found this for me. It's actually on page 214 of your books. We talked about days supply on dealer's stock, and when you look at that, you can see that during the time periods of 2012 and 2013, definitely that number for World Car South got quite high, so from a performance side, that gets concerning. Certainly they were not selling the vehicles as quickly as they were getting them.

Is that something you can pull up, or you can navigate to it.

MR. WALKER: So why couldn't we conclude that under Texas Occupations Code 2301.468 that Red McCombs and World Car were both selling in 2010 -- we looked at the graph and I assume the graph is accurate here, that in 2010 both dealerships were selling roughly the exact same amount of cars. Move forward when the market changed, so to speak, and everybody wants more cars to sell, that the

Red McCombs dealers actually got more cars disproportionate even prior to -- if they were both selling the same amount in 2010, why wouldn't they both be getting the same allocation going forward in 2011 and 2012? The formulation should have matched up that they were both selling the same amount of cars, and it says right here under Occupations Code 2301.468 that a manufacturer, distributor or representative may not discriminate unreasonably between or among franchisees in the sale of a motor vehicle owned by the manufacturer or distributor.

In my mind, there is clear and plain evidence that there was discrimination between the two dealers as to -- and there may have been personal disputes, there could have been any reason that we don't know because we're not trying this case today, that the facts show that they were both selling the same amount of cars, the facts show that he got more cars when things turned around, the facts show that somebody came in and said, hey, why don't you sell your dealership, which throws suspicion on to me that maybe the manufacturer says maybe we don't like this guy and we want a different guy in here doing this, and so this is how we retaliate against him.

So I don't think the administrative law judge was correct in her findings.

MR. INGRAM: Well, I think the thing that concerns me -- and I don't really disagree with you, Member Walker -- the thing that concerns me is that we've just spent an hour, hour and a half, looking at a case that's spent years, and as much as we've asked questions and dove as deep as we could in this limited amount of time, I just don't think that we can accurately understand all the facts in this case. And so I don't think, honestly, that personally finding that there was -- I can see probably sending it back to SOAH.

MR. WALKER: And I thought about that, and I don't know that I would disagree with you on that. However, when we send that back, we're going to go back down the same old road we just went down and we're going to delay this for another year, two years, David? We have sent cases back -- Star Motors is a good example of that -- and it never comes back to us again because they mediate and work things out on their own somewhere down the way.

MR. INGRAM: That's a good thing.

I would rather take the extra year and get it right versus get it wrong.

MR. WALKER: And we have overturned some of these SOAH cases in the past.

MR. PALACIOS: I have a concern with that,

Member Ingram. To Board Member Walker's point regarding 2301.468, as I stated earlier, this hinges on this term whether or not Hyundai discriminated unreasonably. If you remit this back to SOAH, this is the opinion or finding of one ALJ, and I, quite frankly, don't see how this changes much. I mean, the facts don't change, it gets back to the term unreasonable, what is unreasonable. We have the facts in front of us, and that, in my assessment, is for us to determine what is unreasonable. We can send it back to SOAH, but I really don't see how this changes anything from the ALJ's perspective. I think this is a decision that was charged to us, and unless there's, I guess, some specific facts that we can point to that perhaps the ALJ failed to take into consideration, failed to look at, I don't see the reason for remanding this back to SOAH.

MR. KAPLAN: (Speaking from the audience.) Mr. Chairman, if I could make a suggestion.

MR. WALKER: I can't see you.

MR. INGRAM: If you're going to say anything, you're going to have to come to the mic.

MR. KAPLAN: I'm always worried that in an oral argument both sides are just talking, and we're doing the best we can, both sides, but the briefs are the results of fairly lengthy review of the record and consideration of the issues and what's in the ALJ's proposal for decision.

And I'm sure that everyone has read those briefs, but I don't know whether it might be helpful if the board took the opportunity to read them and make a decision at the next meeting or ask for additional argument or ask for additional briefing if there's something else the board wants.

MR. PALACIOS: Thank you, Mr. Kaplan.

MR. KAPLAN: Thank you.

MR. PALACIOS: In deference, would you like any time, Mr. Young?

Do we know how long Mr. Kaplan spoke?

MR. WALKER: Thirty seconds.

MR. YOUNG: I can be brief. I would simply say that yes, the briefs do have all of the information but the administrative law judge also has a really reasoned decision considering all of that, and I just believe the way the legislature has set this up to allow someone to do all of the fact-finding and the legwork and to present a reasoned decision, unless there's some reason based on what you've read that you think she's misapplied the law, I just don't think it meets one of these three exceptions.

So I would urge that I don't think additional briefing is needed and I don't think this needs to be overturned.

MR. PALACIOS: Thank you.

MR. GRAHAM: And I'll just add my two cents. I think we may be looking at more of a gap in the way that it's written than anything. It's clear both parties haven't really argued against the fact that there was some -- again, I hate to use that word "discrimination" -- the manufacturer made a conscious decision to not allocate units to that dealer, and that dealer has made the point that they believe that was wrong, and I don't think anybody is arguing those facts. So I don't know.

MR. WALKER: We need to be careful with respect to setting precedent. Raymond is a dealer, okay and his whole investment that he's put into in life is to build that dealership and put all of his earnings and capital into that, and that if a manufacturer were to be able to change the way he allocates cars to Raymond, basically he holds this big stick over Raymond's head and could put him out of business. And we need to be careful that we don't allow manufacturers to be able to come in and hold a big heavy stick and say, If you don't do it my way, then I'm just not going to give you cars. Because if Raymond don't have cars to sell at Bravo Chevrolet, he's out of business.

Am I not right, Raymond?

MR. PALACIOS: You are correct.

MR. WALKER: So there's a balance, but in Texas

we have decided that we use franchises as a means of selling cars -- the Tesla location would like to turn that over -- but in Texas we use franchises, and when we use franchises there has to be a cooperation between the manufacturer and between the dealer so that they work together so that they both benefit from that. Because the car manufacturer wants to sell cars, obviously, and make as many cars as he can, and the dealer wants to make sure that he has access to cars so that he can sell as many cars as he possibly can too. They need each other, absolutely need each other, and we need to make sure that at all times there's a balance between the two.

Am I not right?

MR. PALACIOS: You are spot on.

Do I hear a motion?

MR. WALKER: My recommendation would be that we overturn the SOAH judge's ruling on this case and we find that they erred in the interpretation of the Occupation Code 2301.468, and that -- I'm not sure, David, whether we need to take and send it back to SOAH to take and rewrite it, or rather our staff rewrites the rule -- the determination. We've done this in the past, we've overturned two since I've been on this board since its inception, and we sent it back to our staff lawyers in order to rewrite.

MR. DUNCAN: No. We don't rewrite the PFD, we don't send it back to them to rewrite the PFD. Your motion is going to be what it incorporates.

MR. PALACIOS: We have a motion from Board Member Walker to reverse the ALJ's decision regarding the Hyundai Motor America and World Car case. Is there a second?

MR. GRAHAM: I'll second.

MR. PALACIOS: We have a second from Board Member Graham. All in favor please signify by raising your right hand.

(A show of hands.)

MR. PALACIOS: We have Board Member Walker, Board Member Treviño, Board Member Barnwell, Board Member Graham, Board Member Ingram, and myself.

All opposed?

(A show of hands.)

MR. PALACIOS: Board Member Painter, Board Member Hardy and Board Member Caraway.

Motion passes.

Can we take a short recess? Five minutes.

(Whereupon, at 12:06 p.m., a brief recess was taken.)

MR. PALACIOS: It's 12:15, we're going to go ahead and resume with our agenda items. Next we're going

EXHIBIT 4

Texas Dept Motor Veh 11/4/2016 3:27:52 PM PAGE 1/003 Fax Server

Texas Department *of* Motor Vehicles
HELPING TEXANS GO. HELPING TEXAS GROW.

November 4, 2016

Mr. Lee L. Kaplan
Smyser, Kaplan & Veselka, LLP
700 Louisiana St. Ste. 2300
Houston, TX 77002-2740
CERTIFIED MAIL, FIRST CLASS MAIL, EMAIL AND FACSIMILE: (713) 221-2320

Mr. Kevin M. Young
Prichard Hawkins Young LLP
10101 Reunion Pl.
San Antonio, TX 78216-4160
CERTIFIED MAIL, FIRST CLASS MAIL, EMAIL AND FACSIMILE: (210) 477-7450

RE: ***New World Car Nissan, Inc. d/b/a World Car Hyundai, World Car Nissan; and New World Car Imports San Antonio, Inc., d/b/a World Car Hyundai, Complainants v. Hyundai Motor America, Respondent*;**
SOAH Docket No. 608-14-1208.LIC and MVD Docket No. 14-0006 LIC

To the Parties Addressed:

For your review, I have enclosed a copy of the final Order issued by the Board of the Texas Department of Motor Vehicles on November 3, 2016, in the referenced case.

A party that disagrees with the Order may file a motion for rehearing addressed to the Board of the Texas Department of Motor Vehicles. Such motion must state the specific reasons for disagreement with the decision. In accordance with Texas Government Code §2001.146,[1] a motion for rehearing must be received in our office not later than the 20th day after the date the party is notified of the decision. The presumption of notification provided by Texas Government Code §2001.142 is rebuttable.

A timely motion for rehearing is required to appeal the Board's decision. See Texas Government Code §2001.145.

If you file a motion for rehearing on behalf of your client, a copy of the motion must be sent to all opposing parties to allow for an opportunity to reply.

In accordance with the requirements of Texas Government Code §2001.146, replies to a motion for rehearing must be received in our office not later than the 30th day after the date the party is notified of the Board's decision.

[1] This matter was docketed by both TxDMV and SOAH in FY 2014. The motion for rehearing requirements in effect during FY 2014 are deemed to be applicable to this case.

4000 JACKSON AVENUE, AUSTIN, TEXAS 78731 | O 512.465.3000 ★ 888.368.4689 (888-DMVGOTX) ★ F 512.465.3088 www.TxDMV.gov

Replies to a motion rehearing must also be sent to the opposing parties. Please review the final order carefully. If you are unclear about any of the information provided, you may call me at (512) 465-1324.

Sincerely,

Marie Medina

Marie Medina
Docket Clerk

Attachment

cc: Hon. Wendy Harvel
Administrative Law Judge
State Office of Administrative Hearings
E-FILE

Mr. Jarod Stewart
Smyser Kaplan Veselka, L.L.P.
EMAIL

Mr. Mark D. Wolfe
Prichard Hawkins Young LLP
EMAIL

TEXAS DEPARTMENT OF MOTOR VEHICLES
MOTOR VEHICLE DIVISION

NEW WORLD CAR NISSAN, INC. D/B/A WORLD CAR HYUNDAI, WORLD CAR NISSAN; AND NEW WORLD CAR IMPORTS SAN ANTONIO, INC., D/B/A WORLD CAR HYUNDAI, **Complainants**	§	**MVD DOCKET NO. 14-0006 LIC** **SOAH DOCKET NO. 608-14-1208.LIC**
v.	§	
HYUNDAI MOTOR AMERICA, **Respondent**	§	

FINAL ORDER

The referenced contested case matter is before the Board of the Texas Department of Motor Vehicles (TxDMV) in the form of a Proposal for Decision (PFD) from the State Office of Administrative Hearings (SOAH) and involves the complaint by two World Car franchised dealerships against the distributor, Hyundai Motor America.

IT IS ORDERED:

That the conclusion of the State Office of Administrative Hearings Judge (ALJ) is overturned.

The Board finds that the ALJ erred in interpretation of Texas Occupations Code § 2301.468.

Date: NOV 03 2016

Raymond Palacios, Chairman
Board of the Texas Department of Motor Vehicles

ATTESTED:

Daniel Avitia, Director
Motor Vehicle Division
Texas Department of Motor Vehicles

EXHIBIT 5

SMYSER KAPLAN & VESELKA, L.L.P.

BANK OF AMERICA CENTER
700 LOUISIANA SUITE 2300 HOUSTON, TEXAS 77002
TELEPHONE 713.221.2300 FACSIMILE 713.221.2320

Direct Dial Number:
(713) 221-2323

Author's E-mail Address:
lkaplan@skv.com

October 28, 2016

Via Email

Mr. David Duncan
General Counsel
Texas Department of Motor Vehicles
4000 Jackson Avenue
Austin, Texas 78731
David.Duncan@TxDMV.gov

Re: SOAH Docket No. 608-14-1208 LIC; MVD Docket No. 14-0006 LIC; *New World Car Nissan, Inc., d/b/a World Car Hyundai, and New World Car Imports, San Antonio, Inc. d/b/a World Car Hyundai v. Hyundai Motor America*

Dear Mr. Duncan:

We understand that each side in the above-referenced case has been granted 10 minutes to make its presentation to the Board during the November 3 Open Meeting. On behalf of World Car Hyundai, we respectfully request that each side be allowed up to 30 minutes to make its presentation to the Board. Hyundai Motor America has informed us that it opposes this request.

This is a case of first impression that raises important issues for the franchised dealer-manufacturer relationship under the Occupations Code; the Board's decision will have far-reaching impact. There are no prior cases interpreting the statutes involved—as a result, the Board's decision will set the precedent for what constitutes unreasonable discrimination, unreasonable sales standards, and good faith and fair dealing in the franchised dealer-manufacturer relationship. The standard that the Board sets will be vitally important to all franchised dealers in Texas and their ability to have a fair working relationship with the factory. Given the lack of precedent and importance of the issues, a 20-minute discussion will not be sufficient to allow the Board (which has several recently-appointed members) to fully and fairly consider what standard the Board should set under the applicable statutes governing the franchised dealer-manufacturer relationship in Texas. Accordingly, we request 30 minutes per side.

Sincerely,

Lee L. Kaplan

599365.1

cc: David Richards, David.Richards@TxDMV.gov
Michelle Lingo, Michelle.Lingo@TxDMV.gov

All counsel of record

EXHIBIT 6

Texas Department *of* Motor Vehicles
HELPING TEXANS GO. HELPING TEXAS GROW.

November 1, 2016

Lee Kaplan
Smyser Kaplan & Veselka, L.L.P.
700 Louisiana Street | Suite 2300
Houston, Texas 77002
lkaplan@ksv.com

Kevin Young
Prichard Hawkins Young, LLP
Union Square, Suite 600
10101 Reunion Place
San Antonio, TX 78216
kyoung@phy-law.com

Re: *New World Car Nissan, Inc. D/B/A World Car Hyundai, World Car Nissan; and New World Car Imports San Antonio, Inc., D/B/A World Car Hyundai, Complainants v. Hyundai Motor America, Respondent*; MVD Docket No. 14-0006 LIC; SOAH Docket No. 608-14-1208.LIC

Messrs. Kaplan and Young:
I write in response to your letters regarding argument time and scope for the upcoming presentation of the referenced matter to the Board of the Texas Department of Motor Vehicles.

The Board is limited by statute in its review of, and action upon, a proposal for decision (PFD) following a contested case hearing conducted by the State Office of Administrative Hearings (SOAH). Once a SOAH administrative law judge (ALJ) has written a PFD and proffered it to the agency for a final action, the Board is limited to the factors in Texas Government Code §2001.058(e) to change any finding of fact or conclusion of law in that PFD.

In making arguments, the parties are limited to facts admitted in record evidence and may not rely on matters not in the record, such as policy outcomes or potential effects of the case on non-parties. Policy setting through contested cases is "ad hoc rulemaking," which is disfavored by courts and not entitled to deference, as noted in a recent Texas Attorney General Opinion (KP-0115).

Argument before the Board is not an opportunity to reargue the case and urge that the ALJ incorrectly weighed evidence. The only issues that may be argued are whether the ALJ misapplied or misinterpreted applicable law, agency rules, or prior agency decisions; made a technical error in a finding of fact; or relied upon a prior agency decision that is incorrect or should be changed.

With this backdrop, I am disinclined to agree to your request for extension of the time for argument beyond ten minutes per party. Because the scope is so narrowly focused on the PFD and the limited legal standard for affecting that document, ten minutes per party should be

sufficient. Also keep in mind that time spent answering questions from Board members does not count against the ten minutes. Our timekeeper will do her best to stop the clock while you answer questions, then restart once you return to your argument.

I look forward to seeing you all on Thursday November 3rd for the Board's consideration of the matter.

Sincerely,

David Duncan
General Counsel

TEXAS DEPARTMENT OF MOTOR VEHICLES
MOTOR VEHICLE DIVISION

NEW WORLD CAR NISSAN, INC., d/b/a WORLD CAR HYUNDAI, and NEW WORLD CAR IMPORTS, SAN ANTONIO, INC., d/b/a WORLD CAR HYUNDAI	§	
Complainants,	§	
v.	§	**SOAH DOCKET NO. 608-14-1208 LIC**
	§	**MVD DOCKET NO. 14-0006 LIC**
HYUNDAI MOTOR AMERICA, **Respondent.**	§	

WORLD CAR HYUNDAI'S RESPONSE TO HYUNDAI MOTOR AMERICA'S MOTION FOR REHEARING

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

I. Overview and Summary of Argument

After considering the Proposal for Decision ("PFD"), the parties' exceptions and replies, and the parties' oral arguments, the Board correctly concluded that the ALJ misinterpreted and misapplied the law because HMA in fact unreasonably discriminated against World Car Hyundai in discretionary allocation of vehicle inventory. Accordingly, the Board rejected the ALJ's recommendation that World Car Hyundai's complaint be denied. The Board's conclusions were memorialized in its Final Order signed on November 3, 2016.

HMA now wants the Board, after considering all these issues, to reverse itself and adopt the PFD that the Board already considered and rejected, which was issued by an ALJ with no real-world experience with the auto industry and who was interpreting the applicable statutes for the first time. The Board should deny HMA's Motion for Rehearing because:

- HMA presents no reason for the Board to reconsider its decision. Instead, HMA simply rehashes the arguments it already presented to the Board, unsuccessfully, and accuses the Board of failing to do its job and engaging in an improper "rush to judgment";
- The Board did not, as HMA alleges, "improperly act as the ALJ" because the Board did not weigh evidence nor judge the credibility of witnesses, but rather made its decision that the undisputed facts showed unreasonable discrimination in violation of Texas Occupations Code § 2301.468;
- The Board did not, as HMA alleges, engage in "improper *ad hoc* rule making" because the Board's Final Order does not contain a statement that applies generally to the public at large but rather a statement that determined the rights of the parties in the contested case before the Board;
- The Board's Final Order complies with Texas Government Code § 2001.058(e) because it contains the reason and basis for the Board's rejection of the ALJ's recommendation; and
- Contrary to HMA's assertion, the Board's decision is supported by substantial evidence, as that term is defined by Texas law, because there was a reasonable basis for the Board's decision in the record as a whole, including the undisputed material facts.

The Texas Legislature explicitly clothed the Board (not an ALJ) with the authority and duty to decide how the Texas Occupations Code should be applied to the undisputed facts in this case. HMA's recycled arguments and baseless accusations about the Board's allegedly improper actions are no basis for the Board to reverse its decision. However, out of an abundance of caution and to avoid the potential of this case having to come back before the Board again after any subsequent appeal, if the Board decides to amend its Final Order, the Board should adopt the proposed Final Order that World Car Hyundai submitted with its Exceptions to the PFD filed in May 2016, attached hereto.

II. Legal Standards

A. The Board, Not the ALJ, is the Final Decision Maker.

A proposal for decision is a recommendation — the Board is "statutorily authorized to modify or reject it." *See Pierce v. Texas Racing Comm'n*, 212 S.W.3d 745, 751-52, 754 n.7 (Tex. App.—Austin 2006, pet. denied) (citing Tex. Gov't Code § 2001.058(e)); *see also Aetna Cas. and Sur. Co. v. State Bd. of Ins.*, 898 S.W.2d 930, 935 (Tex. App.—Austin 1995, writ denied) ("A hearings officer has no power to bind an agency with a proposal for decision. Thus, an agency is free to reject a hearings officer's proposal for decision.") (citation omitted).

The Board "has the exclusive original jurisdiction to regulate those aspects of the distribution, sale, or lease of motor vehicles that are governed by" the Code and "may take any action that is specifically designated or implied under" the Code. Tex. Occ. Code § 2301.151. Accordingly, the Board is the final decision maker on how to interpret and apply the law:

> In the 'who decides' debate, there should be little argument that the agency is best suited to have the final say on issues of policy and law. . . . [T]he legislature creates and charges the agency to develop expertise and experience in the industry it regulates. Issues of law that arise in contested cases typically implicate regulatory policies embodied in the agency's statute. For this reason, the courts themselves, in resolving questions of law, frequently give some deference to an agency's interpretation of the agency's own enabling statute and regulations.

. . . .

> The agency reviewing the A.L.J. should always be empowered to have the final say in whether the A.L.J. got the law right.

F. Scott McCown and Monica Leo, *When Can an Agency Change the Findings or Conclusions of an Administrative Law Judge?*, 50 Baylor L. Rev. 65, 71 (1998) (citing *Public Util. Comm'n v. Gulf States Utils. Co.*, 809 S.W.2d 201, 207 (Tex. 1991)).

B. The Board May Reject the ALJ's Recommendation If, As Here, the ALJ Misinterpreted and Misapplied the Law.

The Board may change a finding of fact or conclusion of law if the Board determines that the ALJ misinterpreted or misapplied the law, agency rules or policies, or prior administrative decisions. Tex. Gov't Code § 2001.058(e). The Board has complete discretion to change the ALJ's findings and conclusions if, as here, the ALJ's "findings and conclusions reflect . . . a misapplication of the existing laws, rules, or policies." *See Smith v. Montemayor*, No. 03-02-00466-CV, 2003 WL 21401591 *7 (Tex. App.—Austin 2003, no pet.) (upholding agency's changes to ALJ's findings and conclusions where the agency "determined that the ALJ failed to properly weigh the factors listed in chapter 53 and in the Department's rules"). When changing an ALJ's finding of fact or conclusion of law, the Board must explain the reason and the legal basis for each change made. *See Granek v. Tex. State Bd. Of Med. Examiners*, 172 S.W.3d 761, 780-81 (Tex. App.—Austin 2005, no pet.). If the Board's Final Order explains the reason and legal basis, the Board may change the ALJ's findings and conclusions and reject the ALJ's recommendation. *See id.*; Tex. Gov't Code § 2001.058(e).

III. Arguments and Authorities

A. Contrary to HMA's Accusations, the Board Did Not Act Improperly at the November 3rd Board Meeting.

1. The Board Did Not "Usurp the Role of the ALJ" Nor "Exceed its Authority."

HMA argues that the Board should reverse its own decision and adopt the PFD that the Board already considered and rejected because the Board "usurped the role of the ALJ" and "exceeded its authority." Mtn. for Rehearing at 6. HMA's accusations about the Board's actions are baseless.

The Board did not "reweigh the evidence" during the November 3rd Board Meeting. Based on the case cited by HMA, an agency improperly reweighs evidence when it makes credibility determinations and chooses to believe one witness or one document over another witness or document, or when it makes a finding that is not supported by any evidence in the record. *See, e.g.*, *Flores v. Employees Retirement System of Texas*, 74 S.W.3d 532, 541 (Tex. App.—Austin 2002, pet. denied) ("The Board abused its discretion by making a finding that is not supported by any evidence.").[1] None of the examples offered by HMA on pages 5 and 6 of its Motion for Rehearing is an instance where the Board on November 3rd chose to believe one witness over another or chose to place more stock in a certain document over another.

Instead, what the Board did during the meeting was consider undisputed facts and decide whether those undisputed facts constituted "unreasonable discrimination" in violation of Section 2301.468. Given that the term "unreasonable discrimination" had never previously been interpreted, and the facts material to making that determination were not in dispute, the Board

[1] In *Flores*, the court held that the agency improperly reweighed evidence because in considering complex medical issues the agency decided to disregard some relevant evidence and made a new finding that was actually contradicted by the evidence in the record. 74 S.W.3d at 540-41.

correctly determined that it not only had the authority, but the duty, to determine whether that standard was violated in this case. The following highlights what happened at the meeting:

- **HMA admits that during the relevant time period, the HMA Regional Manager made 1,635 discretionary allocations to World Car's competitor versus only 600 to World Car.** Exhibit 1, at 78 (HMA's counsel: "No, I don't dispute that number."); *see also id.* at 79 (Chairman Palacios: "[F]or the six months after he was on board in 2010, he allocated 134 discretionary units to Red McCombs and 20 units to World Car, and I guess that is not in dispute as well?" HMA's counsel: "Not disputing that.").

- **HMA admits that there was "discrimination" in the discretionary allocations between the two dealerships.** *See, e.g.*, Exhibit 1, at 70-71 (HMA's counsel: "Yes, there was a difference in treatment and if you want to call that discrimination, the statute says it only has to be unreasonable discrimination."); *id.*, at 78 (Chairman Palacios: "And you made a statement pretty much in my judgment that kind of summarizes this whole case here, and that is you acknowledge that there was discrimination, however, was it unreasonable[?]").

- **HMA admits that there are no standards governing the HMA Regional Manager's discretionary allocations.** Exhibit 1, at 84 (In response to Board Member Graham asking if HMA's discretionary allocation standard was defined to its dealers, HMA's counsel said: "As for the discretionary allocation, there is no specific detail as to how that works . . . ."); *see also* PTX 117, Deposition of Tom Hetrick at 29-31 (Hetrick acknowledging that there is no written document that spells out the methodology for discretionary allocations, no written guidance, and no requirement that the reasons for allocation be documented in writing).

- **Based on these undisputed facts, the question for the Board was whether the undisputed discrimination was unreasonable.** Exhibit 1, at 107 (Chairman Palacios: "To Board Member Walker's point regarding 2301.468, as I stated earlier, this hinges on this term whether or not Hyundai discriminated unreasonably. . . . I mean, the facts don't change, it gets back to the term unreasonable, what is unreasonable. We have the facts in front of us, and that, in my assessment, is for us to determine what is unreasonable.").

- **The Board, exercising its authority as the final say on what the Code means, determined that the ALJ misinterpreted and misapplied the meaning of "unreasonable discrimination" in Section 2301.468.** *See* Exhibit 1, at 110 (Board Member Walker: "My recommendation would be that we overturn the SOAH judge's ruling on this case and we find that they erred in the interpretation of the Occupation Code 2301.468.").

By making a decision as to whether the undisputed facts constituted unreasonable discrimination in violation of Section 2301.468, the Board was within its authority to determine that the ALJ

misinterpreted and misapplied the meaning of "unreasonable discrimination" in Section 2301.468 of the Occupations Code. The Board did not, as HMA claims, reweigh evidence or make credibility determinations, but rather made its decision that—based on the same undisputed facts that were before the ALJ—the ALJ's conclusion of "no unreasonable discrimination" was a misinterpretation and misapplication of the law. That decision was within the Board's authority and was not a usurpation of the ALJ's role.

2. The Board Did Not Engage in "Ad Hoc Rulemaking."

HMA also argues that the Board "engaged in improper *ad hoc* rule making." Mtn. for Rehearing, at 10. HMA is wrong as a matter of Texas law because the Board's decision does not constitute a "rule" of general applicability.

The Texas Administrative Procedure Act defines a "rule" as a state agency statement of general applicability that implements or prescribes law or policy. Tex. Gov't Code Ann. §2001.003(6)(A)(i), (B). The Texas Supreme Court has made clear: "By 'general applicability', the APA definition references statements that affect the interest of the public at large such that they cannot be given the effect of law without public input. The definition does not reference statements made in determining individual rights . . . ." *R.R. Com'n of Texas v. WBD Oil & Gas Co.*, 104 S.W.3d 69, 79 (Tex. 2003). There is a difference between a statement made in a contested case where individual rights are determined (which is not a rule) and a statement made to the public at large that is intended to regulate or govern the public at large (which is a rule). *Compare Trinity Settlement Services, LLC v. Texas State Sec. Bd.*, 417 S.W.3d 494, 502–03 (Tex. App.—Austin 2013, pet. denied) ("Rather, the TSSB's statements were made in seeking an adjudication only of RV's individual rights based on the specific investments they sold under their Re–Sale Life Insurance Policy Program and are not statements of generally applicability."); *with El Paso Hosp. Dist. v. Texas Health & Human Services Com'n*, 247 S.W.3d 709, 714 (Tex.

2008) (concluding HHSC's cutoff date for submitting paid claims to determine Medicaid reimbursement rates was a "statement of general applicability because it applies to all hospitals").

Here, the Board's decision does not address any parties other than World Car Hyundai and HMA. It is a statement of individual rights that does not purport to apply to the public at large. As such, the Board's decision was not a "rule" as defined by the APA, and the Board was not required to engage in formal rulemaking through notice and public comment. *Compare Beacon Nat'l Ins. Co. v. Montemayor*, 86 S.W.3d 260, 269 (Tex. App.—Austin 2002, no pet.) (declining to view agency correspondence as a "rule" when policy was directed only at plaintiff); *with Teladoc, Inc. v. Texas Med. Bd.*, 453 S.W.3d 606, 615 (Tex. App.—Austin 2014, pet. denied) ("In short, the letter and the manner of its dissemination are plainly calculated to place the regulated public—Texas physicians—on notice of the agency's legal pronouncement and the accompanying threat of adverse consequences if they fail to comply."). The Board's decision to rule on the issue presented to it in a contested case was not improper *ad hoc* rulemaking.

B. The Board's Final Order is Sufficient.

HMA contends that the Board's Final Order is deficient because it (1) does not contain findings of fact and conclusions of law and (2) does not explain the reason for rejecting the ALJ's conclusion. HMA is wrong on both challenges to the Board's Order and ignores that the Board followed the advice of its counsel in adopting the Final Order.

First, the Board made two conclusions of law when stating (1) "the conclusion of the State Office of Administrative Hearings (ALJ) is overturned" and (2) "the ALJ erred in interpretation of Texas Occupations Code § 2301.468." Exhibit 2. Those are the conclusions of law that form the basis of the Board's decision. By stating that the ALJ's conclusion was "overturned," the Board rejected the ALJ's conclusions of law in the PFD. With respect to

findings of fact, the Board did not explicitly reject any of the ALJ's findings of fact in its Order, but the ALJ's conclusions were definitely rejected.

Second, the Board did explain its reason for rejecting the ALJ's conclusions: the ALJ erred in interpreting Texas Occupations Code § 2301.468. Exhibit 2. Texas law required the Board to specify a reason and provide a legal basis for changing the ALJ's conclusions. *See* Tex. Gov't Code § 2001.058(e). The Board complied with that requirement when it stated that the legal basis for overturning the ALJ's conclusions was misinterpretation of applicable law, namely Section 2301.468. Exhibit 2.

Finally, the Board formulated the text of the November 3rd Final Order by following the recommendation of the DMV's General Counsel:

> Mr. Walker: My recommendation would be that we overturn the SOAH judge's ruling on this case and we find that they erred in the interpretation of the Occupation Code 2301.468, and that – I'm not sure, David, whether we need to take and send it back to SOAH to take and rewrite it, or rather our staff rewrites the rule – the determination. We've done this in the past, we've overturned two since I've been on this board since its inception, and we sent it back to our staff lawyers in order to rewrite.
>
> Mr. Duncan: No. We don't rewrite the PFD, we don't send it back to them to rewrite the PFD. Your motion is going to be what it incorporates.

Exhibit 1, at 110-11. Based on that statement by the DMV's General Counsel, the November 3rd Final Order incorporates the motion that was passed during the meeting. The Board did not err in following the advice of its counsel.

C. The Board's Decision is Supported by Substantial Undisputed Evidence in the Record.

HMA also argues that the Board's Order is not supported by substantial evidence because there is no citation to evidence contained in the Order. This argument ignores the legal definition of "substantial evidence" as well as the undisputed, material facts that are in the record that support the Board's decision.

Under Texas law, "ssubstantial evidence does not mean 'a large or considerable amount of evidence'; rather, substantial evidence is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Buddy Gregg Motor Homes, Inc. v. Marathon Coach, Inc.*, 320 S.W.3d 912, 925 (Tex. App.—Austin 2010, no pet.). "The evidence in the record may preponderate against the agency's decision and still provide a reasonable basis for the decision to satisfy the substantial-evidence standard." *Id.* Moreover, a reviewing court does not just consider evidence that is cited in the Board's Final Order, but is required to consider "the reliable and probative evidence in the record as a whole." *See* Tex. Gov't Code § 2001.174(2)(E). "The issue for the reviewing court is not whether the agency's decision was correct, but only whether the record demonstrates some reasonable basis for the agency's action." *Cent. Power & Light Co./Cities of Alice v. Pub. Util. Com'n of Texas*, 36 S.W.3d 547, 559 (Tex. App.—Austin 2000, pet. denied).

Here, the evidence in the record as a whole demonstrates a reasonable basis for the Board's Final Order. The Board's decision was not just limited to the evidence that was cited in the PFD, but rather, consistent with the Board's duty to review the record, it was based on the evidence in the record as a whole. World Car's pre-meeting briefs cited to and included substantial evidence that was not mentioned in the PFD. *See* World Car's Exceptions to PFD, at 6-20; *see also* World Car's Reply in Support of Exceptions to PFD at 2-8. The Board considered that evidence and the record as a whole when it reviewed the parties' exceptions and replies in advance of the November 3rd meeting. The record as a whole shows that HMA discriminated against World Car Hyundai in discretionary allocation of vehicles, providing nearly three times as many vehicles to World Car's closest competitor from June 2010 to September 2013. The record as a whole shows that World Car Hyundai and the competitor were similarly situated in

June 2010 when the discrimination began. The record as a whole shows that HMA has no guidelines, rules, or standards governing discretionary allocations. The record as a whole shows that the discrimination stopped after World Car Hyundai filed this lawsuit. Considering the evidence in the record as a whole, it supports the Board's conclusion that HMA unreasonably discriminated against World Car Hyundai in violation of Section 2301.468 of the Occupations Code.[2]

D. HMA's Recycled Arguments Do Not Provide Any Reason for the Board to Reverse Itself and Reconsider its Decision.

Trotting out the same arguments that it made to the Board both in its pre-meeting brief and during the November 3rd Board meeting, HMA claims that there was no basis for the Board to reject the ALJ's recommendation because (1) the ALJ interpreted the statute "as WC requested," (2) World Car did not plead the correct version of the statute, and (3) the discrimination did not happen "in the sale" of a motor vehicle. *See* Mtn. for Rehearing, at 18-25. Although World Car Hyundai already addressed these arguments before, a brief response will be provided again.

First, the ALJ did not interpret the statute as World Car requested—if the ALJ had, the recommendation in the PFD would have been in World Car's favor. As the Board concluded, the ALJ misinterpreted and misapplied the concept of "unreasonable discrimination" found in Section 2301.468 of the Occupations Code because the undisputed facts in the record show that

[2] The "substantial evidence" cases cited by HMA are distinguishable. Unlike here, the agency in *State v. Mid-South Pavers, Inc.*, 246 S.W.3d 711 (Tex. App.—Austin 2007, pet. denied) made a decision that was not supported by a single shred of evidence in the record. The agency decided to make a "50% reduction to Mid-South's efficiency" when the only evidence in the record on that topic was that a 15% reduction was appropriate. *Id.* at 724; *see also Texas State Bd. of Med. Examiners v. Dunn*, 03-03-00180-CV, 2003 WL 22721659, at *4 (Tex. App.—Austin Nov. 20, 2003, no pet.) (finding that agency lacked substantial evidence to change finding from doctor was "clinically competent" to a finding that doctor was "not clinically competent" because there was zero evidence in the record to support the change).

the discretionary allocations to World Car as compared to its closest competitor were unreasonable.

Second, World Car Hyundai pleaded violations of Section 2301.468 of the Occupations Code and provided fair notice to HMA of the violations.[3] Texas follows a "fair notice" standard for pleading, which looks to whether the opposing party can ascertain from the pleading the nature and basic issues of the controversy and what testimony will be relevant. *See Horizon/CMS Healthcare Corp. v. Auld*, 34 S.W.3d 887, 896-87 (Tex. 2000) (holding that trial court correctly applied previous version of statute even though pleading referred to inapplicable current version of statute that had been amended). "A petition is sufficient if it gives fair and adequate notice of the facts upon which the pleader bases his claim. The purpose of this rule is to give the opposing party information sufficient to enable him to prepare a defense." *Roark v. Allen*, 633 S.W.2d 804, 810 (Tex. 1982).

World Car Hyundai pleaded (and proved) sufficient facts to give adequate and fair notice to HMA of its claim that HMA violated Section 2301.468 through disparate and discriminatory allocations of inventory as compared to other Hyundai dealerships. *See, e.g.*, 2nd Am. Compl. at ¶ 8 ("HMA discriminated against World Car Hyundai by consistently providing more than sufficient inventory to similar Hyundai dealerships."); *id.* at ¶ 11 ("There is no reason for the disparate treatment in inventory."); *id.* at ¶ 13 ("HMA's disparate treatment of World Car Hyundai was compounded . . . ."); *id.* at pgs. 11-12 (HMA violated Section 2301.468 by "providing World Car Hyundai with much less inventory than World Car Hyundai needed and much less inventory than HMA provided to other Hyundai dealers in the competitive market area."). The entire thrust of the facts pleaded in the Second Amended Complaint is that HMA

[3] The ALJ used the 2003 version of the statute to analyze World Car's claims, and HMA did not file any exceptions to the PFD on that basis.

treated World Car Hyundai differently from other Hyundai dealerships (especially Red McCombs) by giving those dealerships additional allocations or other benefits and not giving them to World Car Hyundai, without a legitimate basis. *See generally* 2nd Am. Complaint. World Car Hyundai satisfied the fair notice pleading standard for a violation of Occupations Code Section 2301.468 (2003) and HMA had fair notice.[4]

Finally, every discretionary allocation accepted by a dealership in this case was the sale of a motor vehicle by HMA to the dealership. It is undisputed that every time a vehicle is allocated to a dealership and that allocation is accepted, HMA sells the vehicle to the dealership. *See, e.g.*, Exhibit 1, at 74-75 (HMA's counsel: "They become his responsibility once he takes the cars."); *see also* ALJ Hearing Transcript at 73, 173-76. World Car Hyundai does not challenge unaccepted offers of inventory that were never sold to a dealership. This case has always been about the number of vehicles that World Car Hyundai was able to purchase from HMA as compared to the number of vehicles that other Hyundai dealerships were able to purchase from HMA, especially Red McCombs. Those vehicles were actually sold by HMA and actually purchased by dealerships. In this case, all of the allocations that World Car Hyundai challenged as unreasonably discriminatory were in fact sales of vehicles by HMA to Hyundai dealerships.

HMA's retread of these same arguments that were already considered by the Board is no basis for the Board to reverse itself and adopt the PFD that it has already rejected.

[4] In addition, HMA did not specially except to World Car Hyundai's pleading of Section 2301.468. When a party fails to specially except, the pleadings must be construed liberally in favor of the pleader. *See Boyles v. Kerr,* 855 S.W.2d 593, 601 (Tex. 1993).

E. Out of an Abundance of Caution, if the Board Decides to Amend its Final Order, it Should Adopt the Proposed Order Submitted by World Car Hyundai in May 2016.

World Car Hyundai does not maintain that the Board erred in its Final Order. However, given HMA's complaints about the Final Order there is a good possibility that HMA will appeal the Board's decision. Such an appeal carries with it the potential that this case could be sent back to the Board in the future to address some or all of HMA's complaints. Out of an abundance of caution, and as a belt-and-suspenders approach, if the Board decides to amend its Final Order to address some of HMA's criticisms, the Board should adopt the proposed order that World Car Hyundai submitted with its Exceptions to the PFD filed on May 18, 2016. The only changes that have been made to that proposed order are to include the specific date of the Board meeting (November 3) and to change the name of the Board's Chair from Laura Ryan to Raymond Palacios. *See* Exhibit 3, attached.

IV. Conclusion

HMA's Motion for Rehearing, full of both unfounded accusations and repackaged arguments that the Board has already considered, should be denied. If rehearing is granted, the Board should not reverse itself but rather should adopt World Car Hyundai's proposed order and uphold the Board's November 3rd decision.

Respectfully submitted,

DAN DOWNEY, P.C.

By: */s/ Dan Downey*
Dan Downey
State Bar No. 06085400
1609 Shoal Creek Blvd., Suite #100
Austin, Texas 78701
Telephone: 512/477-4444

SMYSER KAPLAN & VESELKA, L.L.P.

By: */s/ Lee L. Kaplan*
Lee L. Kaplan
State Bar No. 11094400
Jarod R. Stewart
State Bar No. 24066147
700 Louisiana, Suite 2300
Houston, Texas 77002
Telephone: 713/221-2300
Facsimile: 713/221-2320

ATTORNEYS FOR COMPLAINANTS

CERTIFICATE OF SERVICE

I hereby certify that, on this 19th day of December, 2016, a true and correct copy of the above and foregoing instrument has been served via email on all counsel of record.

/s/ Jarod R. Stewart
Jarod R. Stewart

EXHIBIT 1

then the order of the presenters by the parties, the non-prevailing party, which is World Car, will go first, and Mr. Kaplan, who is going to argue for them, has requested that his time -- each party will be given 15 minutes -- Mr. Kaplan is going to split his time eleven and four, so he's going to do an initial presentation of eleven minutes and reserve four minutes for rebuttal, and then in the middle, Mr. Young for Hyundai just goes one block of 15 minutes, however much of that he uses.

MR. PALACIOS: Okay. Thank you.

Mr. Avitia.

MR. AVITIA: Chairman, Board members, Ms. Brewster, good morning. For the record, my name is Daniel Avitia. I have the pleasure of serving as the director of the Motor Vehicle Division. Alongside me this morning is Ms. Michelle Lingo. She is a staff attorney and the legal subject matter expert that was assigned to review this contested case.

Agenda item 10, which is found on page 107 of your board books, is a franchise contested case regarding World Car Hyundai and Hyundai Motor America. This item is being presented for the board's consideration to adopt a final order which aligns with the State Office of Administrative Hearing Judge's proposal and recommendations. This matter had a proceeding conducting

by a judge with the State Office of Administrative Hearings. The complainant, a licensed franchised dealer, filed a case against the respondent, a licensed manufacturer, both parties being present today, alleging violations of Texas Occupations Code.

Overall, the administrative law judge found that World Car failed to meet its burden of proof to show that Hyundai violated any part of the Occupations Code. The administrative law judge recommended that the board deny World Car's complaint.

By law, the board can change findings, conclusions or orders issued by the State Office of Administrative Hearings judge when change is justified under Texas Occupations Code 2001.058(e). That is to say change can be made if: (1) the judge misapplied or misinterpreted applicable law, agency rules or prior agency decisions; (2) the judge relied on a prior agency decision that is incorrect or should be changed; or (3) the judge made a technical error in a finding of fact.

The board's three options this morning in this contested case matter are as follows: (1) adopt the PFD as recommended by staff this morning; (2) amend the PFD beyond staff's recommendation, including reversal of the ALJ's conclusions; or (3) remand the PFD back to SOAH for further consideration of the facts or legal concepts as

directed by the board.

After staff's review of the all the documents that are before the board today, staff recommends the board concur with the ALJ's recommendations and adopt the ALJ's findings of fact and conclusions of law as modified. Staff has prepared a final order for your consideration which again aligns with the judge's proposal and recommendations to the board.

This concludes my remarks. Ms. Lingo and I are certainly happy to answer any questions that you may have regarding this legal matter.

MR. PALACIOS: Are there any questions for Mr. Avitia or Ms. Lingo?

(No response.)

MR. PALACIOS: If not, I know we have a few people that would like to present on behalf of the respective parties, and I'll start off with calling Mr. Lee Kaplan.

MR. KAPLAN: Thank you, Mr. Palacios.

I have, before I start my presentation, three things to hand out to members of the board. These are blow-downs of our presentation, the timeline which was plaintiff's exhibit 122 --

MR. PALACIOS: Mr. Kaplan, will you please state your name for the record?

MR. KAPLAN: Yes. I'm Lee Kaplan, K-A-P-L-A-N, representing the World Car entities.

If I may pass out to the board blow-downs of our very short power point presentation.

MR. PALACIOS: Sure.

MR. KAPLAN: I also have a timeline which was in evidence and it's in the record, plaintiff's exhibit 122, and I have a final order that we filed that we proposed that has not been adopted, but our proposed final order, and it's redlined in such a way that you can see what we believe is a correct ruling. When everybody has a copy and you're ready, I'll proceed. We have extra copies.

MR. PALACIOS: Okay, proceed.

MR. KAPLAN: Thank you, Mr. Chairman. I will speak quickly but I invite questions. I'll speak eleven minutes now and four later.

The relevant statutes are set out on page 3 of our power point, and these are statutes, two of which have never been construed, that is, the one prohibiting requiring adherence to unreasonable sales or service standards, and unreasonable discrimination. The question of good faith and fair dealing has sort of been peripherally construed and in other places, but we think in all three cases the ALJ made errors of law. We are

only going to talk about undisputed facts in our presentation, undisputed facts from which the ALJ reached the wrong conclusions.

If you turn to the next page, it's undisputed that in order to avoid being considered in material breach, World Car had to sell more vehicles than it was allocated. That's impossible. You can't answer all the questions on a 30-question test and be told that you have ea failing grade of 30 because there were really 100 questions and you didn't get the other 70. That's exactly what has happened here. Time and time again, World Car sold all the cars it got, asked for more, but because Hyundai had set a much higher standard for what it thought the dealer should sell there, even though Hyundai hadn't given them the cars, they said you're in material breach.

And the best proof of that is from the record, it's Mr. Hetrick himself, page 7 of our blow-down, this is a letter from the regional manager, plaintiff's exhibit 67, saying: Your sales efficiency measurement is 14.2 percent; in view of the foregoing and given these facts, your dealership is in material breach of the dealer agreement.

The mistake the ALJ made is saying if adherence to a sales efficiency standard is not in the dealer agreement, it's not a required standard. That's false,

it's just wrong, because the evidence is undisputed that that is the metric used by Hyundai to measure whether a manufacturer is adhering to its dealership agreement. That's what Mr. Hetrick said: you're in material breach.

Now, this is near the end of the three-year period in which these dealerships suffered. I'm going to tell you about what happened near the beginning in 2010. The regional manager almost immediately presented a letter to World Car and said, I want you to authorize me to help you sell your dealerships. Mr. Hetrick admitted, and I have this in my brief at page 14, he did not know of a single other dealer in Texas to whom he had ever presented such a letter, nor anyone in the region. He came to this dealer, a loyal dealer, who never gave back dealerships, and said, I want you to authorize me to go out and sell your dealerships. That's what got them off on a pretty bad footing.

The next three years then consisted of punishment and poor allocation. And remember, you can't sell what you don't have, and you certainly can't be held to account for not selling what you don't get. If you look at page 6 of our slide, we were required to sell more vehicles than allocated to achieve 100 percent. Can't do that if you don't get the vehicles. Sales efficiency, according to the ALJ, is not required because it's not in

the franchise agreement. That's an error of law. Requiring somebody to meet an impossible standard and using that as leverage to declare a breach of the dealership agreement is simply not allowed under the statute.

Now, in fact, the company had been asking for more cars, and we can talk about that a little bit more, but I want to turn to slide 9 because this is the unreasonable discrimination we've been talking about. And once again, we're only talking about undisputed facts in which the ALJ reached the wrong conclusions. It is undisputed that those two dealerships that Red McCombs franchise still kept, and which were the nearest competitors to our client, got in a three-year period early on seven times as many, but in that three-year period from June 2010 until World Car decided it had to take action to enforce its rights, the McCombs dealerships got almost 1,800 cars of discretionary allocation, whereas, we got 621. That's a three-to-one offset, despite the undisputed evidence in the record that a regional manager has the discretion to help struggling dealerships by giving them extra allocation.

And that mattered even more here because this is the time when Hyundais were in high demand because of the tsunami keeping Japanese manufacturers from really

shipping a lot of cars. So everybody is screaming for product. Somehow the nearest competitor, the competitor which had already given back a dealership -- they had once had three and walked away from one of them -- is getting three times as much. Hyundai is keeping one guy happy and punishing the other. That's the dealer that didn't want to sell his franchises, the loyal dealer who to this day wants to be a Hyundai dealer. That's the discrimination we're talking about.

Let's turn to the next slide. There are some alibis that simply don't hold up. These are the alibis that we have heard along the way for why that discretion was not unreasonably exercised -- why the discrimination was not unreasonable. They said, Well, World Car reduced its inventory in 2008 and 2009. The fact is McCombs reduced its inventory by walking away from a dealership. We've got two equal franchises, one of them walks away from a dealership, gives it back; the other one wants product and during the recession, just like every other dealer, somewhat reduced their inventory. But now we're in 2010 to 2013 when these cars are hot, and suddenly this dealer, our client, can't get cars.

The second excuse given is, well, the Red McCombs dealers were promoting the $60,000 Equus vehicle. Leaving aside the question whether that's a good business

practice, that happened after the fact. One of the most amusing moments in the hearing is when Mr. Hetrick trotted out that explanation in direct examination, and in cross, I said, I thought you'd say that. And we showed undisputably that the request that people participate in the Equus promotion and World Car's refusal to do so, came after they were already being discriminated against on a basis of at least seven to one early on in manual allocations.

MR. INGRAM: I'm sorry. Can I just interject real quick. You're saying after. Can you give me a specific date?

MR. KAPLAN: I don't remember the exact date of the Equus promotions, I think it was 2011 or '12, but we were already -- and I frankly cannot say, I believe it's in the briefing -- the testimony is clear that the discrimination in allocations had started in 2010.

MR. INGRAM: Well, you're just saying you can't be clear but I need a date to make it clear. So 2012?

MR. KAPLAN: 2012, yes. And we can supply that to the board by letter. It's in the transcript, and Mr. Hetrick claimed that, but we were already being discriminated against long before then.

Then there was an argument about renovating a dual facility. Well, if we go back to slide 9, you see at

the end here when World Car decided to enforce its rights, the discrimination ended. They still had a dual facility where they had Kias and Hyundais in one showroom or in one building. You know, Mr. Zabihian didn't suddenly walk into the Kia showroom and become a good dealer, walk over the Hyundai showroom and become a bad dealer. He was outselling -- and this is undisputed; in fact, Mr. Hetrick pointed that out in his letter in 2013 -- he was outselling Hyundai with his Kias six or seven to one, ignoring the fact that the record is also clear that in 2012 Mr. Zabihian had expressly said -- and we can look at page 11 of our slides -- I've got 98 Hyundais in stock and I've got 700 Kias in stock.

Now, these are sister companies from Korea: with one company he's getting allocations, with the other he's not. And so it was as self-fulfilling prophecy that his performance would not be as good. But that was used as a metric to claim that you're not sales efficient, you're not a loyal dealer. He sold what he had. He asked for more discretionary allocations and he didn't get it.

The other alibi that was given -- and by the way, when he renovated the north store, the evidence is undisputed that he got no extra allocation, whereas, when Red McCombs did an exclusive facility and renovated their store, they got extra allocation. All that is undisputed

in the record.

So the last thing is this service loaner program. Different companies do this in a different way, but a service loaner, when you take it, it's counted as a sale by Hyundai, and that means the warranty starts. Mr. Zabihian, who gives a lifetime warranty to purchasers, did not believe that it was right to sell a customer a car and not tell them: By the way, your warranty didn't start the day you bought it, it started earlier. He just didn't think that was a good program, but he never changed that feeling, and after he asserted his legal rights, somehow I guess that excuse no longer mattered because the discrimination that had occurred ended, ended.

But during that three-year period when these Hyundais were hot cars and you could make thousands of dollars on every sale, he lost gross profits from sales on at least 1,200 vehicles. This is just the manual allocations, because remember, the other allocations in the computer are goosed upward if you sell more of the things you do manually. The more sales you make, the better off you are. So there's no question that he was discriminated against and that it was unreasonable.

In fact, if we look at what happened after that discrimination, that incredible mis-allocation stopped after he began to assert his legal rights, we see that the

McCombs dealership sales started to decline and the World Car dealership sales started to increase because once the discrimination stopped, or slowed down at least, he could sell more cars. He could also affect the computer algorithm and get more cars. But the bottom line is you can't sell what you don't get. They created a catch-22 by using a metric to say you're in material breach of the dealer agreement.

Now, why does this matter? Because if you accept the recommendations of the ALJ, there's essentially no such thing as requiring adherence to an unreasonable standards, there's essentially no such things as unreasonable discrimination, and this will be cited to future boards as pretext for unfair actions.

If there are no questions.

MR. PALACIOS: Yes, Mr. Kaplan, I have a couple of question for you. Back to the issue of material breach of franchise agreement due to the fact that your client wasn't sales efficient, were there any punitive actions taken against your client because of the fact that they were not sales efficient?

MR. KAPLAN: Well, we maintain that the punitive actions were taken all along, but once World Car resorted to legal action, the allocation issue is somewhat eased. Now, it just so happens that the tsunami backlog

eased off, the Japanese manufacturers began to be able to continue delivery, so allocation was not as critical an issue. But still, assistance for facility renovation and for building a new facility has never been given to World Car while it was given to the McCombs dealership, so in that way there has continued to be discrimination.

I'm answering your question. Some of this is outside the record and I don't want to argue a point that's not in the record the ALJ had, but during that time there was discrimination, and in fact, sales efficiency was used as this threat. And of course, if they walked in and put a bull's-eye on your chest at the very beginning and said we want you to agree we can help you sell your dealerships, they never withdrew that request, they never said we're satisfied with you. That's something that presumably the regional manager, who is the incumbent, still wants to do. Nobody else has ever gotten a letter like that, apparently, at the outset of a relationship with a new regional manager, certainly Mr. Hetrick hadn't done it.

MR. PALACIOS: You're inferring then, I guess, that this discrimination that you allege took place had to do with the failure of your client to be sales efficient? You're making an issue of the breach of franchise agreement, and I'm just trying to understand how that

actually impacted your client.

MR. KAPLAN: Well, what I'm saying is that that is a threat that's out there. They could try to terminate him tomorrow, and we can't speculate on what's going to happen if the board upholds the ALJ's recommendations. But it is clear to us that that was used as a metric to declare a breach of the dealership agreement way back in July of 2013, I think is when that letter was issued. Yes, it's plaintiff's exhibit 67, the first page of it is on page 7. So they haven't given them the opportunity is what I would say.

MR. INGRAM: When you indicate that it was a metric, are you indicating that it's a metric that they changed their discretionary allocation? Because I don't see where it's a metric where it affected their actual allocation that they're in breach.

MR. KAPLAN: Well, there are two kinds of allocations: what the computer does and what the regional manager does. And the regional manager generally has about 15 percent discretion. That matters a lot because, among other things, it has a multiplier effect in your computer allocation ultimately. If you're getting more cars manually and you sell them and you're cutting down the supply -- once you sell them, you're cutting down the balanced days supplies on the lot, or some companies call

it turn and earn, you can't turn them if you don't have them so you can't earn more allocation in the computer, and it takes a long time to overcome that.

MR. INGRAM: So just to be clear, I'm trying to make sure I understand your point, and the point is that because the idea is that you were in breach or your client was in breach, therefore, the discretionary amounts were lower than ordinarily would be.

MR. KAPLAN: Actually, it's the other way around. The discretionary amounts were always lower, if we go back to slide 9, and we were discriminated against going back to the beginning of Mr. Hetrick's tenure as regional manager, and because of that -- Hyundai sets an amount of sales you're supposed to make in your region. They say we know there's all these manufacturers here, there's this kind of competition, you need to sell X number of cars to be 100 percent sales efficient.

It's not a measurement of how many cars you sell out of the ones you have on your lot because he sold all those, it's a measure of how many cars you sell out of what we think you ought to sell. And one way they can test that is give us the cars, don't give me 200 cars and say you didn't sell 877 cars and we think you should have. They say, well, you didn't earn them in the computer. You say, well, if you're giving other people the

discretionary allocation, among other things, you're starving me.

And the testimony is also undisputed that the closest dealers to you are the ones who can hurt you the most in terms of competition. If all those extra cars had gone out to El Paso and the Red McCombs dealerships were getting hurt as badly or were getting as little discretionary allocation as my clients, we'd have a different situation. And the record is totally undisputed on that, all the way up to Mr. Zuchowski, who is the president of Hyundai Motor America and he testified to that, that the nearby dealers, it will hurt you more.

Among other things, if people go on the internet and they want to look -- you know, people browse on the internet now, they don't just go to dealers, they'll see who's got the biggest stock on the lot and if one guy has 98 cars on the lot and the other has 700, they'll go where there are more choices. That is undisputed in the record by everybody who testified about it.

MR. INGRAM: Mr. Kaplan, let me ask you a followup question. So how do you respond to the point that during the recession that World Car refused the allocation to reduce their inventory while McCombs did not?

MR. KAPLAN: Two points. Number one, the evidence is undisputed that McCombs turned down more cars during every period than did my client, but even more, McCombs reduced its inventory and its exposure by walking away from a dealership. Our client wanted another dealership; McCombs surrendered a dealership. You want to get your inventory down? Just make it easy on yourself. I believe the other McCombs dealership was further to the west; they walked away from that dealership. Now, I can only speculate as to the motives for Mr. Hetrick discriminating in favor of McCombs over World Car. We think they were trying to lure McCombs back, make sure that they kept their loyalty, they didn't walk away from any more dealerships. That's not in the record, but the truth is, they reduced their inventory in a real easy way, they just gave up a dealership.

Now, which do you think hurts Hyundai more: losing an entire dealership location, or somebody refusing some inventory of cars at a time when Toyota -- this is also totally in the record -- Toyota built a new store in World Car's primary region or area of responsibility. And World Card begged for assistance to deal with that and got none. So the truth is you do have two equivalent franchises: one reduced inventory by walking away and showed less loyalty to Hyundai by walking away from a

dealership; one, to survive during 2008 and '09 reduced its inventory some.

But that doesn't explain -- that might explain some computer allocation issues, algorithms in the early time, but it doesn't explain all of the manual discrimination, the deliberate and unreasonable discrimination just in the manual allocations. They punished this dealer. They walked in in 2010 and said we want you to agree that we can help sell your dealerships, and they carried out a program designed to make that happen -- hasn't happened yet.

But we really fear what will happen if the board upholds this decision, which is wrong on the law, even if you accept the facts that are not mixed questions of law and fact, the facts are indisputable. And that's why we've sent the board a proposed order which we filed, I think, in May of this year, which we believe is correct and reaches the correct result. This is a dealer whose survival, like any dealer, depends on the beneficence of a regional manager -- or at least its profitably -- and they have hung on despite the three-year period.

MR. PALACIOS: Another question, Mr. Kaplan. You stated that the disparity in the allocation ceased in 2013 when your client asserted his rights. So that's when he filed a complaint?

MR. KAPLAN: Right. Well, actually, there's some litigation and this formal complaint, but that happened, the first action that was taken was in September 2013. And it really happened chronologically, Mr. Hetrick's letter declaring a material breach is dated, I think, July 10 -- that's on slide 7 -- July 10, if I'm reading it right, of 2013. That's plaintiff's exhibit 67. And then proving that those reasons that they claim as reasons for the discrimination were not really reasons, they're just alibis after the fact, they found a way to make allocation available.

Now, the record beyond then is really outside the record, what's happened since, but as soon as he showed that he had some backbone and took action, the tune changed. All the excuses they made still existed, they didn't go away, but apparently those excuses didn't cause them to discriminate once he asserted his rights.

MS. HARDY: So did the facility get renovated?

MR. KAPLAN: Which one? The north store had been renovated, the south store, I believe, a new store is being built across the street, it will be separate from the Kia facility.

But I want to emphasize out of that supposedly dilapidated store -- and I understand that manufacturers do not care to have duals, although they're prohibited

from terminating people because of that, but to me one of the best facts is that Mr. Hetrick himself recognized that Kia is outselling Hyundai in the same facility six to one. Now, unless Mr. Zabihian had it in for Hyundai and wanted to lose money on one side, he did not walk across the showroom and become a crappy Hyundai dealer while he was a fabulous Kia dealer. That's not the case.

He's trying to sell cars, he sells what he has, and as his letter showed, the letter he sent after two years of this when he sent that complaint letter in February of 2012, he said -- I'm on slide 11 -- compared to the paltry 98 Hyundais I have in stock at two stores, he listed the other vehicles, I have 700 Kias in stock. So why would it be surprising that Kia is outselling Hyundai six to one? You sell what you get, you can't sell what they won't give you, and that's the essence of this.

He had a wonderful relationship with the prior regional manager. Things changed, and for that three-year period, and we implore the board not to let this conduct just kind of go by because maybe it's not so bad now. We don't know what's going to happen in the future, but this will be used as precedent with respect to World Car and as precedent with respect to how dealers are treated. If the legislature wants to change the law, that's fine but the ALJ got the law wrong on all three fronts.

Any other questions?

MR. WALKER: Mr. Kaplan, one of the things I didn't understand is this computer allocation of cars. Can you explain that a little bit to me?

MR. KAPLAN: And I don't want to pretend to be the expert on this, I'm a social studies major, but in my years -- and I know that there are at least two dealers on the board and somebody from a manufacturer -- the phrase I've always have heard is turn and earn from the days in which is represented Chrysler and Ford, turn and earn, you sell cars and you earn more allocation in the future. There's a slightly different terminology at Hyundai, I think it's called balanced days supply. In other words, the speed with which you sell cars helps dictate which cars are going to be on the ship and coming to you, but it's essentially turn and earn, sell them, you get more.

And one way you sell them, particularly in the time of tight supply on the hot cars, you get the manual allocation and you sell that. When there's that big of a disparity with your nearest competitor, frankly, to use the vernacular, you're hosed. You can't get out of that problem because normally regional managers use manual discretionary allocations to help dealers that they think need a boost. This is, again, totally in the record, but Mr. Hetrick elected not to do that here, in contrast to

the normal practice.

And so if you'd gotten the manual allocations -- all we know is his track record, he sold what he go. Now, there's an argument about how fast he reported sales, it's not really an alibi but it's sort of an alibi, and that's what's called RDRs, and I think it's fair to answer your question in part on this. Mr. Hetrick wanted all the dealers to report their sales more quickly so the region would have more cars allocated to it. But Mr. Zabihian and World Car don't report as sales cars for which the financing is not yet in place. Maybe other dealers do, but he's the rules follower, he would not do that, because if the financing falls through, you don't have a sale.

But in their system -- and this, too, is undisputed in the record -- in their system once you report a sale you've got it in that 30-day period. If you back it out somewhat later, there's no real enforcement mechanism on that, and you've gotten the extra allocation or you've gotten it earlier to sell more, on a sale that didn't happen. And Mr. Zabihian knew, as all dealers know, sometimes the financing doesn't go through, so he'd wait a few days and make sure it went through. He never reported sales for which the financing was not in place, which he believes, and I think the record shows, is

Hyundai's actual policy and procedure, but the evidence is also that they never did anything to enforce that. There was some testimony we audited that and we didn't think it happened very much.

MR. WALKER: So I'm kind of foggy on this whole deal on this because I'm not a car dealer, I guess. I would assume, as a business person, that if I ran a car dealership, whether it's Chevrolet or Ford or Hyundai, whatever it might be, that I would take and call the manufacturer, put in an order, and it's my understanding from dealing with truck dealers is that when they order trucks they have so many days before they get there, the dealer has to floor plan that and finance that inventory. I don't know how it works at Hyundai; it sounds like it's different.

MR. KAPLAN: Well, you are buying a car.

MR. WALKER: The dealer is buying the car.

MR. KAPLAN: Right, and then selling it.

MR. WALKER: But you were talking about allotments now. An allotment says you can't buy the car, this is how much you get.

MR. KAPLAN: That's right. You're buying the cars they let you buy. Hyundai, in this time frame -- if we go back to slide 12 -- I'm sorry, slide 9 -- that's when they couldn't make them fast enough, and you had

dealers all over, not just World Car, but dealers all over wanted more Hyundais because the Japanese cars, which traditionally have sold very well in the U.S., were not available because of the tsunami, and these were hot cars. And one of the things that was happening is they'd say we only have so many cars to sell, and as a result, they would decide who was going to get these cars, and they made the decision to give them somewhere else.

One other thing that's in the record --

MR. WALKER: So your argument today is that you couldn't get enough cars because they were being impartial to your dealership and giving them to somebody else.

MR. KAPLAN: Yes. They were being unreasonably discriminatory and showing partiality to another dealer.

MR. WALKER: And how does the franchise agreement address that?

MR. KAPLAN: Well, the truth is the dealer agreement is a more standard agreement which is subject to the laws of 49 states. I'm not sure, I think one state may not have regulation. But the dealer agreement basically says we can do what we want, we get to exercise our discretion in selling you cars. That's subject, though, to our laws, our legislative scheme that says you cannot unreasonably discriminate between or among franchisees in the sale of a motor vehicle.

MR. WALKER: So Ms. Lingo, you tell me on these franchise laws of the State of Texas, because that's where we're really getting to, I think, what is the law with respect to allocating of inventories? Is there any address in the law that says in a franchise agreement how much they have to get or can't get.

MS. LINGO: Michelle Lingo, Motor Vehicle Division.

So the specifics of that is not addressed in the law, thus, the need for the hearing before the ALJ at SOAH, who heard the testimony, examined the veracity, and made a decision.

MR. WALKER: So that's the meat of this case is whether or not -- there is a law, whether the law has been broken or violated because they didn't get as many cars as they should have gotten and there was partiality to a different dealer. Is there or is there not a violation of the law there?

MS. LINGO: The ALJ, taking the facts from both parties, applying the law that's in place, made a recommendation that there had not been a violation.

MR. WALKER: So there's not a violation because there's not a rule, maybe, and your address to that. You're saying the Occupations Code addresses that differently.

MR. KAPLAN: What I would say is there's a statute that hasn't been construed that sets the rule. It is undisputed, and the ALJ agrees, everybody agrees, that they did discriminate, no question about that, the question is whether the discrimination was reasonable. That's a question of law. And what we have said is that the board, among other things, should simply set a standard that you cannot set sales standards that are in excess of what a dealer is given to sell. If they had given him the cars and he didn't sell them, maybe they'd be in a different position, but that's not what happened.

The dealer agreement cannot override Texas law; this is the Texas law, it hasn't been construed officially, but our point is we all know there was discrimination. Every alibi offered, even if you accepted that those are all true facts, show that there was no meaningful difference between two sets of dealers and one dealer was discriminated against. So those cannot be reasonable bases for the discrimination.

MR. WALKER: Okay. So Michelle, let's go back to you. If the law under the Occupations Code says that you cannot discriminate unreasonably amongst franchisees -- that is the law I assume to be correct.

MS. LINGO: Yes, sir, that is correct.

MR. WALKER: However, the administrative law

judge found that there was no discrimination but Red McCombs got three times as many cars as the others. Tell me why and how we interpret that there is or is not a discrimination between the dealers.

MS. LINGO: In this administrative process that we have, the law is written as is. There are, as you know, instances where we might have rules in place to implement law, but in this case, this is the law. The complainant is World Car, and Mr. Kaplan made arguments on behalf of World Car as to why he believes that there was discrimination, or unreasonable discrimination between or among the franchisees.

MR. WALKER: I get all that so far.

MS. LINGO: He made that argument.

MR. WALKER: So tell me how we found that there was not a discrimination.

MS. LINGO: Because the ALJ, who is the trier of fact, looked at the information, the exhibits, the legal arguments and the veracity of the witnesses, and made that recommendation. That's their responsibility.

MR. WALKER: But we're here today to find out whether or not the law has been followed, whether or not to overturn this case, send it back to SOAH to reevaluate it, or rule in their favor.

David, I don't care, pipe in any time you want

to.

MR. DUNCAN: I just wanted to clarify, especially since we have some newer members here, what Ms. Lingo is struggling with is the staff does not participate in these hearings, we don't go and watch the witnesses testify, we don't cross-examine, we don't offer evidence, and so we hesitate to say absolutely that the judge is right or that the judge is wrong. The judge heard what the judge heard and made a decision. We limit ourselves, we read 2001.058 and advise the board if you're going to change this, there are very limited reasons you can change this. That's the directive of the legislature.

MR. WALKER: A misapplication of the law is a way to overrule this.

MR. DUNCAN: Correct, however --

MR. WALKER: Here's an application of the law, and my question is did we interpret it wrong. I'm asking that question.

MR. DUNCAN: We haven't interpreted it. The staff doesn't do that, and the board is charged with doing that, however, keep in mind this is a mixed question of law and fact. The judge looked at the facts and said it doesn't meet that standard. So that's what you're looking at is can you revisit, can you say that the judge was absolutely wrong in the way the judge interpreted the

facts and applied the law to those facts.

MR. KAPLAN: I can respond to that, Mr. Walker.

MR. WALKER: Go ahead, Mr. Kaplan, I'll listen.

MR. KAPLAN: Well, we're not arguing credibility of any witnesses. As I said, I'm only going to talk about undisputed facts. We disagree with a lot of the findings of the ALJ but we've put all that aside for this appeal and stuck strictly to the legal question, and you have put your finger on it. There's no question they were treated differently, the question is were they discriminated unreasonably, as the law prohibits. And we have pointed out that every alibi which is offered is vapor. It's not a credibility question, it's just vapor. The record establishes what did and didn't happen.

The ALJ may not have made any findings on that or may have ignored it in making these mistakes of law, but everything I've told you I think is an undisputed fact. It's not just that Mr. Zabihian said so, it's things not contested. The numbers are not contested, the fact that there were these shortages is not contested, the letter that Hetrick sent that said I want you to let me help you sell your dealerships not contested, the fact that he didn't do the service loaners, he doesn't do that now, he didn't do it then, he doesn't do it now. All these things are not contested. The amount of assistance

he got, extra allocation for redoing the north store, that is to say none, nothing is contested.

MR. WALKER: Let me stop you there for a second. Let's go back to Mr. Hetrick trying to help you sell your store. And I don't want to try this case today, but what does selling the store have to do with it?

MR. KAPLAN: That means when you have a dealership you've got good will and you have assets, and what he's really saying is I want to get rid of you as a dealer, so let me -- he may have had a buyer lined up. Maybe, and we don't know, maybe the McCombs franchise said, you know, we're now willing to get back in the market if Hyundai treats us right, we don't know. But he didn't want World Car as a dealer.

Now, there are other things --

MR. WALKER: He being Hetrick.

MR. KAPLAN: Mr. Hetrick, the regional manager.

MR. WALKER: Hetrick works for Hyundai.

MR. KAPLAN: Yes. He is -- let's just say that he essentially is the most important person to a dealer in a region. Your district sales people or zone sales people, depending on the manufacturer, they're important, they have a lot more contact, but the regional manager is critical. The regional manager's recommendation for assistance is critical. The regional manager handles all

that discretionary allocation, and maybe the CEO of Hyundai wouldn't have done it this way, but this is the person that makes the Hyundai decisions that we suffered from.

And all we're asking here is the declaration that these actions violated the statute. And the real question is whether or not people are allowed to set a sales standard and judge you by that sales standard when you don't get the cars that that sales standard demands that you sell, and whether that discrimination was reasonable or unreasonable.

As Mr. Duncan says, those are mixed questions of law and fact. There really aren't any disputed facts that we've brought to you, we're only appealing the decisions of the ALJ based on the undisputed facts which we think are legally wrong. And frankly, you're setting a precedent here. No matter what people think, this is the first time the statutes -- I think that's slide 3 -- have come up really for review. We haven't talked as much about good faith and fair dealing, but however you define that, that kind of unreasonable discrimination is not good faith and fair dealing. And we know what their motive was, but this is just what's happened.

I really appreciate all this time. Are there any other questions?

MR. PALACIOS: I have one last question, Mr. Kaplan. From your submission and testimony, you said the disparity in allocations ceased in 2013, so I assume from that point forward now the disparity is up to date, is it evened out?

MR. KAPLAN: I'm very hesitant to talk outside the record, but manual allocation and discretionary allocation ceased to become very important after the tsunami because you can more or less get cars that you want.

MR. PALACIOS: Okay.

MR. KAPLAN: But please don't validate this kind of practice because then we're setting a precedent, not just for this dealer but all dealers and manufacturers in the state and we'd be really upending the legislature's mandate.

MR. PALACIOS: My question: What remedy is it that you are seeking?

MR. KAPLAN: Here it's to declare these things to have violated the statutes. Now, what's going to happen in the interim, World Car still wants to be a Hyundai dealer, they haven't walked away, they have acceded to the request that they try to sell their dealerships. So what remedies they may seek in state court, whether the parties talk later is something

completely outside the record and I don't want to speculate about this. As a trial lawyer and somebody who has been in many adverse proceedings, rulings from boards or judges or courts often have the effect of concentrating people's minds and forcing them to a resolution.

MR. INGRAM: I have a couple of questions. I'm sorry to keep going on this.

MR. KAPLAN: Look, we appreciate the opportunity to hear this with the board.

MR. INGRAM: So I heard your explanation on the Equus line. The McCombs store that are your competitors, are they Hyundai only stores?

MR. KAPLAN: No. They are owned by the McCombs organization.

MR. INGRAM: Right. But are they single point stores?

MR. KAPLAN: I believe they're now both single point stores. Yes.

MR. INGRAM: Now, being that they weren't at some point.

MR. KAPLAN: I think they were throughout that time frame, 2010 to 2013. One of them became exclusive during that time frame, it wasn't earlier. And now --

MR. INGRAM: So wait a minute, let me stop there. So one of them during this time frame became an

exclusive Hyundai store. Would that not perhaps justify the difference in allocation?

MR. KAPLAN: No. Why would it? You can't require somebody to be exclusive, and there's no justification -- if people are selling cars, they're selling cars, and there's no justification for that particularly when it's in the record, once again, that World Car requested an opportunity to move its south store, the one that was dual, to another location on a huge amount of acreage right on Loop 410 and was declined that opportunity. Hyundai decided, exercised its discretion to say no, you can't do that. And in fact, now -- and by the way, Red McCombs got assistance when it did that extra allocation, whereas, with the north store which was always exclusive, when it was upgraded, they got no assistance from Hyundai. So that's just more discriminatory treatment that we haven't really talked about. If they want to give help to somebody who agrees to be exclusive --

MR. INGRAM: Well, I mean, discriminatory is okay. Right?

MR. KAPLAN: If it's not unreasonable.

MR. INGRAM: So it just depends on your terminology of unreasonable.

MR. KAPLAN: Well, that's up to the board. We

have an exclusive store on the north side. When it was renovated, World Car got no extra allocation or assistance.

MR. INGRAM: And that remodeling was when?

MR. KAPLAN: That remodeling was in 2012 or '13, I believe.

MR. INGRAM: So relatively recently towards the end of this.

MR. KAPLAN: Right, but it was always in the works. And with the south store -- and he record again is full of this -- there was an effort made to make it exclusive and move to a new property and Hyundai --

MR. INGRAM: When was that, what's the date on that?

MR. KAPLAN: 2010 -- Hyundai declined -- well, that was through Mr. Hetrick and the organization declined that. Now World Car has found a different site -- I believe it's a different site -- and is building an exclusive store basically across the street from the Kia store.

MR. INGRAM: And then the last question I have, we didn't talk much about the service loaners, and so explain to me the service loaners concept and why World Car did not choose to do that. Tell me about the basis of that being discriminatory.

MR. KAPLAN: What I'm saying is they used that as one of their fig leaves after the fact. If you look at the slide of the differential treatment which is on page 12 -- I'm sorry -- slide 9, he still doesn't do the service loaner program because he personally doesn't believe it's a good thing for consumers. You put in a car in service loaner, and it's a little deceptive on sales. There are manufacturers that have gotten in trouble for reporting things as sales that maybe aren't sales -- I think there's an investigation of Chrysler right now. If you put a car in service loaner status, it counts as a sale and you theoretically are goosing your sales numbers to that the region can argue for more cars.

MR. INGRAM: But obviously Hyundai wanted you to increase the --

MR. KAPLAN: They wanted him to be in that program. He believes, and I think objective people outside this room might agree, it's a little bit unfair and there's no effort by Hyundai to make dealers tell a customer: Now, you bought this car, we have a -- whatever it is, say it's a three-year warranty, say it's a seven-year warranty -- you've got a seven-year warranty but you should know the warranty started running on this X months ago.

MR. INGRAM: Let me stop you there because

that's almost like a separate issue, so the issue here really is Hyundai wants this and World Car made a decision that they didn't want to do it.

MR. KAPLAN: They did want it, but the reason we know that's not a real excuse is before this discrimination began he wasn't in the service loaner program, afterwards he wasn't in the service loaner program, he's still not I the service loaner program. So you can come up with any alibi you want, he was mean to me, he was rude at the meeting, I don't think Mr. Zabihian's personality has changed much, neither has his business practices, he's a rules follower. He honestly believes, and the testimony is clear about this, that's not something you should do to customers. That's just how he is.

Now, discriminating against him on that basis not only is not reasonable but that's not a true excuse because he kept not being in the service loaner program and the discrimination didn't go on. If it were really an excuse or a reason, then that discrimination might have continued. That's just a fig leaf that they came up with after the fact. The record also shows that Mr. Hetrick agreed at a regional dealers meeting that this service loaner issue has a way of goosing sales, was a problem.

But you could argue these are credibility

issues, and we haven't really talked about them much. All we know is what the facts show: he never did the service loaner program and they didn't discriminate against him before and not after, but during this time frame when it really mattered, they did. So every alibi is a fig leaf.

MR. INGRAM: Thank you very much.

MR. WALKER: Mr. Kaplan, I have two questions.

MR. KAPLAN: Yes, sir.

MR. WALKER: Number one, for the record, you have referred to your right there, I guess, to somebody at the table here that is giving you some information. Would you please tell me for the record who this is.

MR. KAPLAN: He's one of my partners, Jarod Stewart, S-T-E-W-A-R-T. He was at the hearing, did most of the briefing work, and I would have to say I rely heavily on him.

MR. WALKER: And that's fine. I just wanted the record to reflect.

MR. KAPLAN: Thank you.

MR. WALKER: And is the dealer here?

MR. KAPLAN: Mr. Nader Zabihian is present in the room.

MR. WALKER: So the dealer is present.

MR. KAPLAN: He's been the person who's probably been nodding vigorously.

MR. WALKER: I haven't seen him.

MR. KAPLAN: I'll tell him not to shake his head vigorously when Mr. Young has his turn.

MR. WALKER: Thank you. I just wanted to know that he was present because he had an interest.

And the other thing is that what kind of relief are you looking for in your original petition?

MR. KAPLAN: The relief is in the order we've submitted, it's just a declaration by the board. The board doesn't award money damages; it could enjoin something but we haven't sought injunctive relief. We might come back some day if the practice reasserts itself. But what the remedy is for this here is just declarations that are in the order we've submitted to the board. We haven't argued to the ALJ that this has some monetary value. It may have a monetary value somewhere else, but as I say, I can't really speculate on what might happen after the board issues its ruling and this process is completed.

MR. WALKER: I guess my question goes back, again what is your relief, but what is -- I know why we are here today because we want to either find that there was an error in the finding or a misinterpretation, whatever, but what was the original intent of how we got here today. Is it just strictly this allotment?

MR. KAPLAN: I hate to start speculating about personalities and all, but I think the intent is this is a dealer who's been a loyal dealer, he's a successful dealer, he's a successful dealer for Kia right next door. Suddenly his life changed with somebody saying we want to run you off, and he doesn't want to be run off. I'm sorry, he's stubborn man, he's a rules follower, he will not be run off by this kind of behavior, and it violates the law. I don't know if it's an isolated incident or not among other Hyundai dealers, I'm only representing him and what he knows happened to him and what we have shown indisputably from the record happened, those are the events. Getting into people's hearts and minds is a little harder. I can talk about his because he's talked to me.

But he wants to be a dealer, continue as a dealer, but he wants these practices that were engaged declared to have violated these statutes, and that's what in the order we presented. It's very important to him and not just as a matter of principle, I think there's a legitimate concern that these rulings could be used by Hyundai at some later date. We need to put an end to this, and that's what the board is here for.

MR. WALKER: Thank you.

MR. PALACIOS: Any other questions for Mr.

Kaplan before we move on?

(No response.)

MR. KAPLAN: Thank you very much.

MR. PALACIOS: Thank you, Mr. Kaplan.

Next we have, on behalf of Hyundai Motor Company, Mr. Kevin Young. Would you please come forward?

MR. YOUNG: Thank you, Chairman Palacios and Board members, and Ms. Brewster. Thank you for listening to all of this today.

I am Kevin Young. I am representing Hyundai Motor America, and I'm proud that with me her today is Rosemary McDonald. She's a senior counsel with Hyundai Motor America in Fountain Valley, California, she's here today. Also with me is an associate from my law firm, Mark Wolfe. So the three of us are here today to address these matters.

Let me say right from the beginning, because listening to your questions, I'm sure you'll have some for me and I'll be happy to address them, but let me just be really clear, there is no violation of the Occupations Code, none. There has never been, and the ALJ accordingly found that, and she made the recommendation that she made, knowing these statutes and applying these statutes.

These arguments that you've just heard from Mr. Kaplan, I have been listening to them for three years.

There's nothing new, it's the same retread argument. This case involved Hyundai Motor America producing thousands of documents, electronic information about every Hyundai vehicle sold in America over a certain number of years, information regarding dealer contacts with all dealers in the South Central Region which covers eight states, thousands and thousands of documents. Hyundai put up personnel for deposition after deposition after deposition, the same things were trotted out over and over and over, it's nothing new.

These lawyers have a perspective on how they think things went down. They attempted to present evidence and they were given every opportunity to present evidence in support of those theories. The ALJ, who was very thorough -- and I don't think anybody would disagree with that -- she was a hardworking extremely thorough judge, she listened to everything, she reviewed all the documents, she listened to all the depositions, and then she made her reasoned decision.

Her decision can be reviewed by this board and can be modified or vacated under very limited circumstances, and I want to go over those in detail just so everyone is clear, and I know you know but just to be clear about it. But to start, the legislature has set up a pretty thorough system to handle complaints like this.

The complaint gets filed with the DMV, the DMV then refers it over to the State Office of Administrative Hearings, and then the State Office assigns an ALJ or more than one ALJ, as it was in this case, to resolve discovery disputes, to make preliminary rulings on what you can get into and what you cannot get into, and that process went on for two years, and just as the statute prescribes that it should happen.

And then the case was presented to the ALJ over a week's time, witnesses gave their testimony, and then after several months, after considering further briefing by the parties, after we presented all of our evidence, after that week was done, then the parties did briefs and then the parties responded to each other's briefs. And the ALJ had all of this at her disposal. So when she comes to this board with a recommended decision, it is a reasoned decision based on a lot, it's not a whimsical thing.

And so even though Mr. Kaplan -- and he's a great lawyer and I've come to really respect him over this process, I kind of like him, actually -- he's pretty crafty with his words, and although he says this is a misapplication of law, what he's really doing is saying I want you to see the facts differently than what Judge Harvel saw. Because all the facts that he says were

undisputed, it's not true. There was a dispute about most of them. Most of the things he just told you were undisputed, most of those things were disputed, and it's all in the ALJ's briefs. And I know you've had and I know most of you have probably looked at it, but it's all there.

So what I would just say briefly is that if you pull up plaintiff's exhibit 15 and go to the second page, if you would, I know it's difficult to read, I didn't make copies, but this is a document that was created June 24, 2010, you can see it right there near the top, June 24, 2010. That's right after Mr. Hetrick took over his job in this region as the Hyundai regional general manager. This is his first visit to World Car, this is his first meeting with Mr. Zabihian.

And what you can see, again, this comes from the record, this is plaintiff's or World Car's exhibit number 15. One of the very first things that Mr. Zabihian tells Mr. Hetrick: Hi, nice to meet you, hey, by the way, if you think you're going to put a Hyundai dealership in here, I'll sue you. This was like one of the very first things. So when Mr. Kaplan tells you he's a hardworking guy, really wants to cooperate, really wants to be a Hyundai guy, well, that's how the relationship started: If you try to do this, I'll sue you. And Mr. Hetrick

explained: I'm not looking to do that at all; in fact, we're now getting into pretty high demand for Hyundai vehicles, we're not going to be opening dealerships here or elsewhere.

If you read on down, you can see that Mr. Zabihian said, I want more money in co-op. And that is addressed in here. And then in this same meeting, Mr. Zabihian said, I want the Equus, I want to sell Equus cars, I want that dealership. And Mr. Hetrick explained: Well, okay, but that requires an investment in your facility and that requires that you purchase our architectural package and design package, and that's going to require some up-front investment from you if you want to do that. And Mr. Zabihian tells him: You need to change your requirements for that.

That's how this relationship started, and so I just want to be clear that we need to put it in context, and the ALJ had all of this in context, she heard all of this.

What this is really a story about, it even starts before 2010, it starts at the end of 2008 and in 2009, this is the evidence that was presented at the hearing that the ALJ heard. In 2008, the United States was undergoing a recession, and for legitimate business reasons, Mr. Zabihian said, You know, I don't think I want

as many of your Hyundai cars, I think I'll take less of your Hyundai cars. That's his right to do that, he's not penalized for that. But when you take less cars, then it's going to lead to lower sales.

And then when 2010 rolls around and the Toyota ignition problem begins and Hyundais are all of a sudden more popular, in the fall of 2010 Mr. Zabihian said, I want back in now. And Hyundai explains to him: Sell what you've got, the formula is a replenishment formula, if you sell cars then you'll be replenished and they'll continue to come, but I can't just give you a bunch of cars, I've got dealers everywhere, not just in San Antonio but I've got dealers everywhere and they're all calling me, I want cars, I want cars, I want cars. And so I'm sorry, but you asked to pull back, and so I'll give you some cars but I have other dealers, including Red McCombs, who in 2010 said I'll take one of my stores and make it an exclusive Hyundai store, and in 2010 said I'm going to commit to remodel one of my stores, and in 2011 said I'm going to purchase this Equus package and I want to sell the Equus cars. All of those things happened. And so yes, Red McCombs was selling more cars, and yes, Red McCombs got more discretionary allocations.

So that's the context. Yes, there was a difference in treatment and if you want to call that

discrimination, the statute says it only has to be unreasonable discrimination, unreasonable discrimination is prohibited. You know, someone might say that you've got discriminating taste. Well, that's not a bad thing, that just means you are able to make choices, and in fact, that's a compliment. And so the idea that someone makes different decisions between one dealer and the next, that's not prohibited. The idea that Hyundai wants to protect the rest of its dealers who are performing and doing well and say please continue, and then tell Mr. Zabihian: I'll give you some vehicles but I can't do everything you want because these people have been performing for a long time and they want more cars too and they're selling more cars, by the way. That's the context.

When Mr. Kaplan flashes up the letter from 2013 that he showed you in his power point, and it's slide number 7 and 8, when he flashes that up, he then highlights and he tells you that Hyundai said because you don't meet the sales efficiency, you're in breach of your contract. Well, if you read the letter, and if you're like me, you've got to take off your glasses, but you can read it, that's part of it, but part of it is, hey, you're just selling less vehicles. You sold this many in 2010 and you're selling this many in 2011 and you're selling

less than that now. That doesn't have anything to do with a sales efficiency standard, it has to do with you're just not selling any more, why is that.

And so it's not just a sales efficiency standard, and in fact, that same argument was presented at the hearing, and Judge Harvel made a specific finding of fact that it was not a requirement by Hyundai Motor America that you be 100 percent sales efficient, just not a requirement. And I know some of you know this because you're in the business, but it's a generic standard that's applied to all dealers around the country, it uses common data and market data and it treats everyone the same, and so the number you get, you may not like it but the same rules are being applied to you that are being applied to people everywhere else.

And if you look closely in that same letter that we just referred to that Mr. Kaplan gave you on slides 7 and 8, the letter is telling Mr. Zabihian that your store on the south side, we have 824 dealers in America and your store on the south side ranks 821st. Well, okay, I think that's a fair criticism. You're one of the lowest of the low. And this is in 2013, by the way.

When Mr. Kaplan flashes up his bar graph to say, well, look, they got more cars in 2013, and he says

it's because we filed a lawsuit. Well, the evidence shows, and what he even admitted, that that's when the World Car North store decided to renovate its facility. And once it made its commitment to do that, it received some more cars. And this testimony about how World Car never got money or co-op or extra allocations because it did its renovation in 2014, well, you know, that's not what the testimony in front of the ALJ was either. It's in the record. In the record you had testimony and documentation showing that while the litigation was going on, Hyundai was calling Mr. Zabihian to meet about these very issues. That's what the evidence was. But Mr. Zabihian didn't come meet, and that's the understandable too because the parties were clashing.

But this is not a one-handed sort of give you the back of my hand treatment. This is a business and Hyundai Motor America would love for World Car to be a more successful dealership. That's why they have these programs, like the service loaner program, which World Car has been encouraged to participate in. What the evidence showed at the hearing was not that the service loaner idea is a bad idea, the evidence showed that World Car chooses to use Nissan's program, Nissan's. Well, okay. So maybe he's getting some better benefit from Nissan for doing that. Well, good, that's his business decision. But

don't then come complain and say, well, guys that are doing the Hyundai program, they shouldn't get these things.

So I guess all this to say -- and I'm wrapping up here -- all this to say that this is a really complex set of facts that go into this. There is a lot of information, a lot of exhibits, a lot of testimony, and the ALJ heard all of it. And she's a bright judge, and what she said was there is no violation, and she stated it clearly for all these reasons.

So we're asking you to support and confirm the ALJ's proposed order. There have been some slight modifications that have been proposed by Mr. Avitia and counsel, Ms. Lingo, and there are three and they're all kind of typographical in nature. We also agree with those edits that she is proposing, those are correct.

Yes, sir.

MR. WALKER: Let's go back to the floor planning deal again that I asked over here, and I just heard you say earlier that you said that he doesn't want any more cars, he doesn't take any cars, but then he wants more cars and you say, well, sell what you have and we'll send you some more cars. My question to you is: Who pays for those cars when he says send me some more cars? Are you responsible for those car payments and floor plan, or

is it at his expense?

MR. YOUNG: Those become his responsibility once he takes the cars. The way the system works, generically is there's a formula allocation and it applies to all Hyundai dealers in the U.S. And I think every other manufacturer has something really similar. In fact, the testimony in this case was that the woman who kind of designed this system had come over from Toyota and she basically took some Toyota tweaks and made it part of Hyundai. But it's a replenishment system, so if you sell certain cars, it goes in and it's kind of automatic, and so then at the next time there's a shipment and there's going to be an allocation of vehicles --

MR. WALKER: So if Mr. Zabihian, if things are slow and I ran your dealership or was your franchisee, I would want to cut back my inventory also because I have to pay for that. If things turn around, I would want more of your cars and ask for them so that I could take and improve my profitability, but what I'm seeing is that -- and you just said, I heard you say, sell what you've got and we'll sell you some more. So you kind of restricted what you allowed him to get and you based that upon some formulation that you have internally at Hyundai, I guess, that says -- there's a conflict here, because you're saying at one point in time you're using some formula of

sales, but then you just made a statement that you said sell what you have and we'll send you some more. So why is there a conflict between what you speak on one side of your mouth and out on the other side?

MR. YOUNG: I hope that's not the case.

MR. WALKER: That's what I'm hearing.

MR. YOUNG: Okay. Thank you. Let me try to explain. When I make the statement sell what you've got and you'll get some more, what I'm talking about is this automatic program, you sell what you have and then the program is going to get you some more. That takes care of about 85 percent of all allocations or more, 85-90 percent of all allocations, this automatic program. So if you sell what you've got, then you will be replenished according to the formula, based on what's available, based on the way other dealers in America are performing. So it's all a formula.

There is this discretionary piece that is separate and apart from the allocation that's formulaic, and that is at the discretion of the general manager, and so that's where all of these other things came in about why he was awarding who which cars.

MR. WALKER: So during this hearing that was presented, was there evidence -- and I guess I need to go to our stuff here and ask if there was any evidence

presented that said that the formula that was used at Red McCombs stores was adhered to the same way it was performed over here at World Car? Was there any findings of those facts? Or did they discriminate against one dealer over the other? I didn't read those facts, so I don't know.

MS. LINGO: Michelle Lingo, Motor Vehicle Division staff attorney.

Yes, Board Member Walker, those issues were considered, developed, looked at, and recorded both in the findings of fact and in the PFD discussion.

MR. WALKER: That the formula was fair and it was exactly used over here at Red McCombs the same way it was used over at World Car?

MS. LINGO: To my recollection --

MR. WALKER: I want a yes or no answer, either it was or it wasn't. We need specifics.

MS. LINGO: The finding was that the use of the allocation was not discriminatory, that the allocations were being used across the board the same for everyone. That isn't exactly the question that you asked, but that's what the answer the ALJ addressed.

MR. INGRAM: Member Walker, that's how I remember reading it was that the allocation system itself was found to be followed for all dealers equally, it was

the discretionary portion, the manual.

MR. PALACIOS: Exactly. The allocation system, the 85 percent you refer to, is pretty standard across the board for all dealers.

Do you have any other questions, Mr. Walker? I want to follow up with a question Mr. Walker had, I guess, regarding the allocation. And you made a statement pretty much in my judgment that kind of summarizes this whole case here, and that is you acknowledge that there was discrimination, however, was it unreasonable. I guess I have a question. You had mentioned that there's some disputes with the facts that Mr. Kaplan presented earlier. Do you dispute the allocation on this chart that he presented that shows 1,635 discretionary units allocated to McCombs and 600 to his dealership?

MR. YOUNG: No, I don't dispute that number. That's a number of allocations that were -- vehicles that were allocated and accepted. So what that doesn't take into account is that people may have turned down vehicles for one reason or another.

MR. PALACIOS: Are you inferring that World Car turned cars down?

MR. YOUNG: They definitely turned cars down.

MR. PALACIOS: During the three-year period, so they could have had more than 600 but they deliberately --

so on one hand they're asking for more but then they really didn't want them. Is that what you're saying?

MR. YOUNG: That's absolutely the evidence and that's exactly what I'm saying. But to be fair, every dealer turns down some cars, even in this time period. When cars were really tight in this 2010 through end of 2012 time, the turn-downs were really minimal, but the evidence was that you could always find turn-downs from just about every dealer, you know, they didn't like the green model of something.

MR. PALACIOS: Okay. I'm just trying to ascertain that they weren't allocated 1,635 vehicles and turned them down. I mean, they weren't allocated the same level that McCombs was and they just chose to walk away.

MR. YOUNG: We definitely agree with that, that's true.

MR. PALACIOS: I guess another question, early on, I'm just kind of looking at the pattern here, when the new region manager came on, I think you said it was late June, from the submissions it shows that he then for the six months after he was on board in 2010, he allocated 134 discretionary units to Red McCombs and 20 units to World Car, and I guess is that in dispute as well?

MR. YOUNG: Not disputing that.

MR. PALACIOS: Just looking for the basis for

that, again, I understand discretion is literally just based on the judgment of whoever is in the field, but what was the basis? I guess it seems like right off the bat that this regional manager, for whatever reason, allocated units disproportionately to World Car's competitor.

MR. YOUNG: The testimony was that some of the manual allocations are reflective of the sales, so if you're selling more, I'll allocate you more of my discretion. The testimony also was that it was in 2010 that Red McCombs said I will take one of my dealerships and I'll go exclusive, and so the general manager rewarded them with some extra cars because they were going to go to be an exclusive dealership. Those are the two primary reasons that were given at trial.

MR. PALACIOS: Just by the statement that I plan to build a facility then it's automatically okay, great, you get more product because you say you're going to, they didn't wait until they actually built the facility?

MR. YOUNG: Well, they already had an existing facility and it was a combined facility with General Motors, GMC and Hyundai, and so what McCombs people said was we're going to take GMC out of there, we're going to make this a full Hyundai thing, and they began that process in 2010.

MR. PALACIOS: Any other questions for Mr. Young?

MR. INGRAM: Yes, I have one. Mr. Young, and again, I don't want to create new facts so I only want to talk about this if it's a finding of fact, but Mr. Kaplan mentioned that in 2010 World got declined a move to become an exclusive Hyundai store. Was that a finding of fact or was that talked about in the case?

MR. YOUNG: That is not a finding of fact. It was, I think, talked about a little bit during the case. I would just say that that's in the record. The reasons, I don't think I could articulate all of them accurately right now. There was some reason why --

MR. INGRAM: It doesn't sound like it's fleshed out enough for me to talk about it then, so we'll skip it.

Go ahead, Brett.

MR. GRAHAM: I think this might be a question for David. I think we've worked through a lot of the substantive issues here. The question I would have would be on the determination that there was actually not, at the end of the day, a violation based on the Code. Does that have to do with how the Code is written, whether the Code clearly defines what those expectations are? Do you see where I'm going? I'm just kind of wondering what basis would that be.

MR. DUNCAN: Is there enough clarity. As Ms. Lingo noted, they don't have a rule that further delineates unreasonable discrimination. We don't go and give examples, there's no numeric breakdown of, you know, you can't deviate by more than X percent. So that's actually a very good question.

MR. GRAHAM: Because if we're being asked to stand behind a decision by a judge who said I'm rolling this way because there's nothing in this Code that clearly defines this, then that could be an issue.

MR. DUNCAN: It could be, and something I would point the board to and I would urge, and especially based on there's a recent attorney general opinion about deference to agency actions that Mr. Paxton released a couple of weeks ago, and it has to do with how boards and commissions interpret and apply the statutes that are given to them by the legislature.

For many years there has been a concept discussed by administrative law professors -- there's one at Baylor, Professor Beal at Baylor -- others that are academics and longtime practitioners in this area that some boards and commissions have a practice of essentially setting policy or deciding policy case-by-case-by-case and over time to cite the cases to understand the law, and the AG's office and many of those papers and arguments say

that's ad-hoc rulemaking, that you're making rules by deciding cases.

Now, I'm not saying anything like that, that the board is headed that direction or that your decision on this case will or won't be that. But if it's the board's desire to be more specific about that, the best way to do it is notice and comment rulemaking, is for us to do a rule under the board's rulemaking authority and set that expectation once and for all and say when we see the words "unreasonable discrimination" here's what we think that means. That gives all the parties an opportunity to comment on that. It's difficult and somewhat disfavored to set policy by contested case decision. On the other hand, I understand we have to decide this case, it's in front of you, so it's a difficult struggle.

MR. GRAHAM: All right. Thank you.

I would like to ask one other question in regards to. I mean, I think you've made it clear that -- and I don't know if discrimination would be the most appropriate word, I'm going to use the word allocation, that allocation to this dealer was refused because of their lack of involvement in the plans and programs that your company had laid out. Correct?

MR. YOUNG: That was most of it. Part of it

was they also didn't sell cars, they sold less and less and less.

MR. GRAHAM: Well, but to their defense, I think their point is valid that when you get less and less and less, you're going to sell less and less and less. But the way you get more and more and more is allocation, and if the allocation is refused based on their involvement in these programs, then that's understandable. So my question would be was it clearly defined in the franchise agreements that if you don't do this you will not get this? Was that defined? Because when you come down to it, I think we just walked through it, the only way for them to get back ahead of the curve was to get in the game, but if they didn't know what the allocation was going to be, then I'm not sure that would be fair to them. So that would be my question.

MR. YOUNG: I understand your question. The dealer agreement and then the other communications that go between Hyundai Motor America and the dealers spell out in great detail how the systematic allocation works. As for the discretionary allocation, there is no specific detail as to how that works, but they are encouraged, as the evidence showed and what we talked about today, that to participate in these other things will help you get your vehicle sales up, will also show our commitment to the

Hyundai brand. And so discretionary really is discretionary but it's a small portion for the overall vehicles.

And just to clarify what I was saying a minute ago, when I say that they weren't selling as many cars, your point is correct, that if they're not given as much, they can't sell as much. But what the evidence showed was they weren't selling what they had, and so it wasn't a question of they needed more to sell more, anyone could say that, I guess, but they weren't selling what they had.

And then in this time of what everyone agrees, stipulates was a time of short supply, essentially what Mr. Zabihian was saying was: Hey, treat me differently than you're treating your other dealers; you're giving your other dealers who are performing well this limited supply, I want more of it for me. Without justification. And so to do what he wanted to have happen would be to take away from some other Hyundai dealers that are performing well, and Mr. Hetrick, in his discretion, declined to do that for the most part. It did allocate some vehicles but just didn't allocate as many as Mr. Zabihian wanted.

First of all, are there any more questions? I'm happy to answer.

MR. PALACIOS: I just want to follow up on what

you just stated. So am I understanding that the, I guess, declination of World Car's request for additional inventory had more to do with their sales rate than all these other factors that you presented, the lack of facility, the lack of participating in programs? Because that's something that I guess you didn't show, you didn't show the sales of their competitor, Red McCombs. Is that what the basis was?

MR. YOUNG: It's all of those things, Chairman. That's what the testimony was is that your sales rate matters, your commitment to the brand matters, your participation in the loaner program matters because by that you will get more allocations because you want some allocated to your loaner program. It's the commitment to have a single point dealership. It was all of those things kind of presented in context of this hearing that Mr. Hetrick said, These are the reasons for my decisions, it's all of these things, it's not just one or the other.

MR. INGRAM: So Mr. Young, just to follow up with that, and I see where we talk an awful lot in the documents about the sales efficiency, but the efficiency as it relates to the documents talks more or less about what is potentially possible in the market, not so much about how many of his cars he actually sells per month. And so is that in here somewhere that I'm not seeing where

we're talking about how well is he selling his cars, not related to what's possible in the entire market because there's other factors that influence that. Partly one of the things that influences it is how much cars he has. Right? But I'm just curious, how is he turning his current inventory?

MR. YOUNG: Well, the evidence at the trial showed that they can compute that in a couple of different ways, and one is average days to retail. In other words, how long does it take you from the time you get a car to the time it's sold, and the Zabihian World Car dealerships were some of the worst in the district. They had longer time periods than everyone else. And maybe that's one metric of that.

But at the hearing there was evidence about the sales each year, and I believe the ALJ even had a chart of that in her proposal for decision, but certainly that was discussed at the hearing and gone over in detail.

If you have the ALJ's proposal, if you look on page 3 of her proposal, what she shows is a chart about sales for the four dealerships leading up to 2010, and it illustrates the point that we were talking about earlier that the World Car stores dropped off the map in 2009 and then continued in 2010. So that is one measure of sales that I can just find in her proposal. But she certainly

dealt with that issue and she considered the sales that were being made year over year by each of the dealerships.

MR. WALKER: Mr. Young.

MR. YOUNG: Yes, sir.

MR. WALKER: So why does Hyundai care if your dealer says, hey, send me a thousand cars, I want to sell your cars, he's paying for them, you're not paying for them. Why do you care if he's buying a thousand of your cars, why would you make a statement to him and say: Well, sell what you have and we'll ship you some more. That's like me saying, well, pay for the bills you've got right now on the trucking that I've done for you before I do any more trucking for you. I'm going to do all the trucking I can for somebody. Why would you not give him cars if he's paying for them?

MR. YOUNG: That's a great question. So in the time period that we're talking about, the 2010 through 2013, that is what we've been talking about as this was the time of short supply, so there weren't enough Hyundai vehicles. So you've got ten people wanting cars, I've got 100 cars to give you, and you say I want 40 of them. And I say, I can't give you 40 because I'm going to give him 10, and he's been doing really well, I'm going to give him 15, and it comes down to it, I've got nine for you.

MR. WALKER: Yeah, but maybe I went to A&M and

he went to Texas and you went to Texas.

MR. YOUNG: Didn't go to Texas, I'm more of an Aggie.

(General laughter.)

MR. WALKER: But I just want to make sure -- I can see all kinds of problems with, hey, who do I like, and we've got to make sure that every dealer out here is protected and has the ability to have access to the product he sells. And you make the product, so he needs your product to get around, and if he doesn't sell your product, he's going to go broke and you're not going to go pick up his bills, I know that. So it seems to me like that didn't happen here.

But I have a question, Daniel, for you. So Daniel, the SOAH judge that heard this case, was this one of our SOAH judges that is working through the DMV, or was this prior to us having our ALJs?

MR. AVITIA: Daniel Avitia, for the record again.

This case is several years old. This case went to SOAH prior to the mediation program even beginning, so this case was not mediated by the DMV.

MR. WALKER: So I guess some of the new board members on here may be wondering what I'm asking. And so today in the agency we have -- David.

MR. DUNCAN: I was just going to clarify for the members. Sorry to interrupt.

MR. WALKER: Do you want to do it?

MR. DUNCAN: Yes. The legislature gave the agency the authority to have OAH, the Office of Administrative Hearings, which is run by Edward Sandoval -- who, I'm sure, is traveling today -- and they hear Lemon Law and warranty cases only. The dealership disputes, whether it's dealership location disputes or disputes like this over compliance with the Code, are and remain the sole purview of the State Office of Administrative Hearings. We have to refer those to SOAH.

MR. WALKER: So those aren't heard by our staff which knows the dealer laws.

MR. DUNCAN: Right.

MR. WALKER: This could be somebody that's never heard a dealer case before.

MR. DUNCAN: Quite possible.

MR. YOUNG: If I could address that real quickly, Mr. Walker.

MR. WALKER: Go ahead.

MR. YOUNG: I don't know her entire resume, but I do know that she's quite famous for rendering a proposed decision which was then adopted involving Mercedes Benz and a dealership in South Texas.

MR. WALKER: So she did the Star Motor case?

MR. YOUNG: She did. And found in favor of the dealer, I believe, in that case.

MR. WALKER: I think we overturned that case.

MR. YOUNG: In large part.

MR. WALKER: We overturned that case.

MR. YOUNG: I don't know how that ended up, but I do know that she was the one that kind of worked on that.

MS. HARDY: Just a quick question. When a dealer turns down inventory, and they all do, like you said, what happens to that allocation? I assume these vehicles are built. Are other dealers taking those or being asked to take what other dealers turn down?

MR. YOUNG: Absolutely. The terminology that you used is the correct terminology, they're called turn-downs. And so when someone is offered vehicles and they don't want them, it goes to a turn-down list that people can pick from. Another dealer might say, hey, I want some of those turn-downs. So they become available again to the pool.

MR. INGRAM: Mr. Young, there was some mention about Toyota, I guess, building a factory in the area.

MR. YOUNG: Correct.

MR. INGRAM: When was that?

MR. YOUNG: I believe that was 2009, I believe is correct. They build light trucks out of San Antonio.

MR. INGRAM: And was that near the World Car South dealership?

MR. YOUNG: Relatively. They're both in the south part of town. The Toyota dealership is -- they're not neighbors but they're in the same general area.

MR. INGRAM: So looking at the chart that you pointed out and I'm basically taking the 2010 and annualizing the sales, and really, their sales didn't drop off with the exception of World Car South. World Car South did drop off and so I was trying to figure out if maybe perhaps that had an impact. But in terms of World Car North, it looks like for the sales volume it doesn't look that far off.

MR. YOUNG: 2009 to 2010?

MR. INGRAM: I mean, obviously there's a slight dip in 2009, but '10 was trending up. That's all the question I had was Toyota. Thanks.

MR. TREVIÑO: Mr. Young, was there anything in the record about Hyundai's desire to terminate World Car? Was there ever any sort of background on that?

MR. YOUNG: Yes, there was testimony about that, and the testimony from Hyundai is we're not trying to terminate this dealer, we're trying to get this dealer

to improve its performance and these are standard type letters that would go out to someone. So they still exist as Hyundai dealerships today, even having received these letters.

MR. GRAHAM: I'm sorry to interrupt you, but just to confirm, you just said that by trying to improve the performance of the dealers you send them a letter that they need to sell?

MR. YOUNG: No. They to get them to improve their performance by a variety of ways, but then yes, in that one letter that we looked at, in the end he said, It doesn't look like you really want to be a Hyundai dealer, and if that's the case, let me know and I'll help you sell it. So that was in the 2013 letter.

MR. INGRAM: And I'm sorry. Are both World Car stores combination stores, are they both Hyundai-Kia?

MR. YOUNG: Word Car North is an exclusive. It's next to, I believe, a Mazda but it's its own separate dealership.

MR. INGRAM: Okay. And so then the south is a combo Kia-Hyundai store.

MR. YOUNG: You're correct.

MR. INGRAM: And that's where you're referring at one point, I guess in the letter it was like six to one Kia to Hyundai.

MR. YOUNG: Yes, that's right.

MR. PALACIOS: Any other questions for Mr. Young?

(No response.)

MR. PALACIOS: Thank you very much, Mr. Young. Appreciate your time.

We'll call Mr. Kaplan back. You have four minutes for rebuttal.

MR. KAPLAN: I'll try to make these points very briefly. In response to the question about the board's authority, you are the decider. The ALJ is not the final decider, you are the decider, you decide what these standards mean in the context of these facts, and so that's what we're looking to you for. And there are no real standards for discretion. The record is replete with testimony that there are no standards for the regional manager's exercise of discretion on manual allocation.

I want to talk about a number of things that were just discussed, because this is truly rebuttal, and that is, first of all, who turned down more cars. The record is undisputed that when Mr. Hetrick showed up in mid 2010, in those first six months of 2010, Red McCombs, which had already surrendered a dealership, also turned down 598 vehicles offered to it versus 205 turn-downs from World Car. They turned down almost three times as many

cars. Now, does that justify giving them more manual discretionary allocation? Not in my book. And that's in defendant's trial exhibits 46 and 47, it's from their own information.

Let me talk about the discovery process, which I wasn't going to get into. It took us two years because we had to fight them to get depositions. First, we had to fight them for documents. Then Mr. Hetrick got deposed and kept saying ask Mr. Zuchowski, ask Mr. Zuchowski. And we had to fight to get his deposition and had to get an extremely starchy order from the ALJs ordering that deposition. That's why the process took a long time.

Let me turn next to the issue of the dealer contact report. I don't have it in front of me, but it was written by Mr. Thompson, who accompanied Mr. Hetrick. He did not even know -- he had been the district manager for, I think, two years, he did not even know he was talking to Mr. Deltang, not Mr. Zabihian. Mr. Zabihian wasn't even in that meeting, and what caused the blowup there is because Mr. Hetrick didn't know that the previous regional sales manager had given World Car a right of first refusal on an extra dealership in a certain extra, and Mr. Hetrick apparently was outraged that his authority was being challenged because he was bound by something. That undoubted spurred the letter in December 2010, we'll

help you sell your dealership, if he could get rid of that dealer, that right of first refusal wouldn't be a problem. That's what happened.

That report, dealer contact report, identifies as Mr. Zabihian somebody who they had admitted on the record undisputably that wasn't even Mr. Zabihian. They didn't even know who they were talking to; they wrote down that it was Mr. Zabihian, but it was Hamid Deltang. And that's the dealer contact report which is plaintiff's exhibit 15. We put it in evidence because it showed how little they knew about their own dealer who had been there for years. And yes, they had a legal right, a right of first refusal. Mr. Deltang said, We'll have to sue if you do that.

Then let me turn to the question of assistance. We know the north store was updated, no assistance given. We know Red McCombs was promised assistance even before the renovation. Again, it's in the record. And there's never been assistance given. On the south store they tried to move the location right next to a Walmart. Hyundai exercised its discretion to say no, we don't want you to do that. And now they're complaining that we didn't update the store soon enough and do enough to satisfy them? That is shocking.

Sales efficiency. They set a standard, however

unrealistic, and that's how they measure you, and they can't deny it's a metric for whether you're a failure or not, and they use it to say you're in breach of the dealer agreement.

And then finally, let me turn to the question of manual discretion. Even Mr. Zuchowski, along with Mr. Hetrick, explicitly admitted sometimes dealers need a boost, that's what we use, the manual allocations for. He didn't get it. He needed the boost, not Red McCombs, but he didn't get it. And that's why we need your assistance to rectify this wrong.

Are there any questions that I need to answer for the board?

MR. INGRAM: Mr. Kaplan, there was a mention by Mr. Young that World was performing at the bottom of the market in basically days to turn. Do we have that information anywhere?

MR. KAPLAN: I don't believe it's in the record. That's what they said.

MR. INGRAM: Okay. That's not in the record?

MR. KAPLAN: But I can show you slide 12.

MR. STEWART: May I speak?

MR. INGRAM: Sure.

MR. STEWART: Jarod Stewart, also for World Car.

And it's days to turn for each dealership. In terms of the measurement for that, obviously when you're starting in 2009 at similar positions in World Car sales at that time you had a smaller inventory and selection, and the was the testimony from multiple witnesses. But the numbers there, the ALJ did not base the decision on days to turn.

MR. INGRAM: I understand they didn't base the decision on it, but I'm just curious because it's important to me to understand how well they were selling their existing inventory.

MR. KAPLAN: Let's look at slide 12, if we can, and I can answer that question. There's a chart in the ALJ's decision but I thought this is an easier way to visualize it. If you look, these are the two World Car dealerships, these are the Red McCombs dealerships. They were pretty much equal up until 2010. The south store, as you pointed out, really had great difficulty. That's when Toyota put in a facility, offered promotions, were selling like crazy. The record is clear, no assistance, no extra assistance given at all to the south store when they were pleading for help because Toyota had a massive presence there.

Then we get into the time when cars are hot, and during this time when World Car South store is still

limping along, limping along, they are nonetheless at the same location selling Kias six or seven to one over Hyundais. Why is that? Because Mr. Zabihian only puts on his working hard dealer that in this part of the showroom. There's no explanation for that other than their allocation process, and they admitted, it's on the record from Zuchowski and Hetrick, you're supposed to use that to help dealers who need help, you don't use it to help dealers who don't need help, and this is what they did. And that's unreasonable. We know it's discrimination; it's clearly unreasonable.

MR. INGRAM: I would slightly take exception just to the comment of if you have a hot dealership that's selling a lot of cars, I'd definitely want to keep them funded with as many discretionary units as I can.

MR. KAPLAN: That makes sense, except for the fact that the president of Hyundai Motor America explicitly contradicted that. I mean, listen, there's no question, you sell what you get. Mr. Zuchowski said, The manual system, we use that to help a dealer who may be struggling. Maybe, for example, if they did reduce inventory or had fewer sales, that's who we want to help. That's what it's supposed to be used for. But there are no standards for that anywhere within Hyundai, and Mr. Hetrick is the one who controlled it.

And when you look at -- you hear 15 percent, but that's 15 percent total of total allocations around the country or total in the region, but a regional manager has the ability to put that 15 percent on just a couple of dealers. If you look at the total sales by the McCombs dealerships in 2010 -- and really, we only have half of 2010 and half of 2013 -- we're looking about 6,000-7,000 cars.

When they get 1,800 cars just purely through the discretionary allocation and the other dealer gets only 600, you can see that makes a huge difference. It's not just 15 percent of Red McCombs' total allocation, it's a much higher percentage, 1,800 cars out of 7,000 is 25 percent, I haven't done the math exactly, but it's 25 or 30 percent. And they're goosing the dealer who didn't need the help as badly as the dealer who, according to the president of Hyundai Motor America, normally would get help through a manual allocation. Just throw your hands up, there's nothing else you can do when you're fighting against that current.

And particularly when this is the dealer who is turning down 598 cars and you're turning down 205. They turned down three times as many cars in the first half of 2010. That's the history that Mr. Hetrick had the day he walked in as regional manager, the day he first met with

actually Mr. Deltang and they thought they were meeting with Mr. Zabihian. They didn't even know who they were meeting.

MR. BARNWELL: Did Mr. Deltang identify himself, or did they just assume his name was Zabihian.

MR. KAPLAN: Well, he knew Mr. Thompson.

MR. BARNWELL: But did he identify himself?

MR. KAPLAN: I don't know.

MR. BARNWELL: I'm not going to blame somebody for that assumption if they thought they were meeting with the dealer and the fellow they were meeting with deceived them.

MR. KAPLAN: Well, Mr. Deltang said that he had met Mr. Thompson many times and there would be no confusion about that, but Mr. Thompson admitted -- I think what he said was I mis-spoke or I mis-typed it, I honestly don't remember what he said in the letter.

MR. BARNWELL: Okay.

MR. KAPLAN: But the point is that went to the regional manager too, so one way or another, they thought they were talking to Mr. Zabihian and they weren't even talking to him. That comment came from Mr. Deltang, and it was a response to somebody saying we're going to do something that was contrary to the legal rights of the dealer who had a written right of first refusal from the

regional manager who preceded Mr. Hetrick. They didn't know their own business, they hadn't even looked in their own files, and they didn't want to be bothered to do that, apparently, with this dealer. They treated Red McCombs differently all the way through. Extra turn-downs from Red McCombs don't matter, but they're used as an alibi here.

I want to say one thing about service loaners, if you want to hear about it. My time is expired.

MR. PALACIOS: Yes, your time is expired.

MR. KAPLAN: Fine. Thank you very much for your time. Unless there's any other questions, we really appreciate your patience and your questions.

MR. PALACIOS: Is there any other discussion on this matter?

MR. INGRAM: Discussion?

MR. PALACIOS: Hearing no other discussion --

MR. INGRAM: There's none? There's got to be some discussion.

MR. PALACIOS: Is there a motion?

MR. INGRAM: Brett, you look like you're just dying to say something.

MR. GRAHAM: I just need to be clear, this is my first one. Can we walk back through what those alternatives are? I know we discussed them back there.

MR. AVITIA: Member Graham, that's a great question. The board's three options in this contested case matter are as follows: (1) adopt the PFD as recommended by staff; (2) amend the PFD beyond staff's recommendation, including reversal of the ALJ's conclusion; or (3) remand the PFD back to SOAH for further consideration of facts or legal concepts as directed by the board.

MR. INGRAM: I find this to be very difficult, truly, and I find that there are a lot of decisions that World made that were business decisions that certainly I feel impacted his allocation on the discretionary, whether it be that he didn't use the service loaners, he didn't report the sales quickly as Hyundai suggested, or perhaps that even though he requested in 2010 about the Equus line, he didn't do much about it. So there's a lot of business decisions in here that World made that would have affected that discretionary amount. While on the other hand, I can see some of the other points that World made.

MR. WALKER: So would you read number 2 to me again.

MR. AVITIA: Certainly. Option 2 was amend the PFD beyond staff's recommendation, including reversal of the ALJ's conclusion.

MR. WALKER: Amend or reverse. So tell me how

we would do that.

MR. AVITIA: I'll defer to Mr. Duncan as that gets into board authority.

MR. DUNCAN: In order to do that and comply with .058(e), you'd have to specifically identify which findings of fact and conclusions of law you were changing and what your basis for that was, and you would need to specifically state we're changing this one because.

MR. INGRAM: I'm sorry. Member Treviño actually found this for me. It's actually on page 214 of your books. We talked about days supply on dealer's stock, and when you look at that, you can see that during the time periods of 2012 and 2013, definitely that number for World Car South got quite high, so from a performance side, that gets concerning. Certainly they were not selling the vehicles as quickly as they were getting them.

Is that something you can pull up, or you can navigate to it.

MR. WALKER: So why couldn't we conclude that under Texas Occupations Code 2301.468 that Red McCombs and World Car were both selling in 2010 -- we looked at the graph and I assume the graph is accurate here, that in 2010 both dealerships were selling roughly the exact same amount of cars. Move forward when the market changed, so to speak, and everybody wants more cars to sell, that the

Red McCombs dealers actually got more cars disproportionate even prior to -- if they were both selling the same amount in 2010, why wouldn't they both be getting the same allocation going forward in 2011 and 2012? The formulation should have matched up that they were both selling the same amount of cars, and it says right here under Occupations Code 2301.468 that a manufacturer, distributor or representative may not discriminate unreasonably between or among franchisees in the sale of a motor vehicle owned by the manufacturer or distributor.

In my mind, there is clear and plain evidence that there was discrimination between the two dealers as to -- and there may have been personal disputes, there could have been any reason that we don't know because we're not trying this case today, that the facts show that they were both selling the same amount of cars, the facts show that he got more cars when things turned around, the facts show that somebody came in and said, hey, why don't you sell your dealership, which throws suspicion on to me that maybe the manufacturer says maybe we don't like this guy and we want a different guy in here doing this, and so this is how we retaliate against him.

So I don't think the administrative law judge was correct in her findings.

MR. INGRAM: Well, I think the thing that concerns me -- and I don't really disagree with you, Member Walker -- the thing that concerns me is that we've just spent an hour, hour and a half, looking at a case that's spent years, and as much as we've asked questions and dove as deep as we could in this limited amount of time, I just don't think that we can accurately understand all the facts in this case. And so I don't think, honestly, that personally finding that there was -- I can see probably sending it back to SOAH.

MR. WALKER: And I thought about that, and I don't know that I would disagree with you on that. However, when we send that back, we're going to go back down the same old road we just went down and we're going to delay this for another year, two years, David? We have sent cases back -- Star Motors is a good example of that -- and it never comes back to us again because they mediate and work things out on their own somewhere down the way.

MR. INGRAM: That's a good thing.

I would rather take the extra year and get it right versus get it wrong.

MR. WALKER: And we have overturned some of these SOAH cases in the past.

MR. PALACIOS: I have a concern with that,

Member Ingram. To Board Member Walker's point regarding 2301.468, as I stated earlier, this hinges on this term whether or not Hyundai discriminated unreasonably. If you remit this back to SOAH, this is the opinion or finding of one ALJ, and I, quite frankly, don't see how this changes much. I mean, the facts don't change, it gets back to the term unreasonable, what is unreasonable. We have the facts in front of us, and that, in my assessment, is for us to determine what is unreasonable. We can send it back to SOAH, but I really don't see how this changes anything from the ALJ's perspective. I think this is a decision that was charged to us, and unless there's, I guess, some specific facts that we can point to that perhaps the ALJ failed to take into consideration, failed to look at, I don't see the reason for remanding this back to SOAH.

MR. KAPLAN: (Speaking from the audience.) Mr. Chairman, if I could make a suggestion.

MR. WALKER: I can't see you.

MR. INGRAM: If you're going to say anything, you're going to have to come to the mic.

MR. KAPLAN: I'm always worried that in an oral argument both sides are just talking, and we're doing the best we can, both sides, but the briefs are the results of fairly lengthy review of the record and consideration of the issues and what's in the ALJ's proposal for decision.

And I'm sure that everyone has read those briefs, but I don't know whether it might be helpful if the board took the opportunity to read them and make a decision at the next meeting or ask for additional argument or ask for additional briefing if there's something else the board wants.

MR. PALACIOS: Thank you, Mr. Kaplan.

MR. KAPLAN: Thank you.

MR. PALACIOS: In deference, would you like any time, Mr. Young?

Do we know how long Mr. Kaplan spoke?

MR. WALKER: Thirty seconds.

MR. YOUNG: I can be brief. I would simply say that yes, the briefs do have all of the information but the administrative law judge also has a really reasoned decision considering all of that, and I just believe the way the legislature has set this up to allow someone to do all of the fact-finding and the legwork and to present a reasoned decision, unless there's some reason based on what you've read that you think she's misapplied the law, I just don't think it meets one of these three exceptions.

So I would urge that I don't think additional briefing is needed and I don't think this needs to be overturned.

MR. PALACIOS: Thank you.

MR. GRAHAM: And I'll just add my two cents. I think we may be looking at more of a gap in the way that it's written than anything. It's clear both parties haven't really argued against the fact that there was some -- again, I hate to use that word "discrimination" -- the manufacturer made a conscious decision to not allocate units to that dealer, and that dealer has made the point that they believe that was wrong, and I don't think anybody is arguing those facts. So I don't know.

MR. WALKER: We need to be careful with respect to setting precedent. Raymond is a dealer, okay and his whole investment that he's put into in life is to build that dealership and put all of his earnings and capital into that, and that if a manufacturer were to be able to change the way he allocates cars to Raymond, basically he holds this big stick over Raymond's head and could put him out of business. And we need to be careful that we don't allow manufacturers to be able to come in and hold a big heavy stick and say, If you don't do it my way, then I'm just not going to give you cars. Because if Raymond don't have cars to sell at Bravo Chevrolet, he's out of business.

Am I not right, Raymond?

MR. PALACIOS: You are correct.

MR. WALKER: So there's a balance, but in Texas

we have decided that we use franchises as a means of selling cars -- the Tesla location would like to turn that over -- but in Texas we use franchises, and when we use franchises there has to be a cooperation between the manufacturer and between the dealer so that they work together so that they both benefit from that. Because the car manufacturer wants to sell cars, obviously, and make as many cars as he can, and the dealer wants to make sure that he has access to cars so that he can sell as many cars as he possibly can too. They need each other, absolutely need each other, and we need to make sure that at all times there's a balance between the two.

Am I not right?

MR. PALACIOS: You are spot on.

Do I hear a motion?

MR. WALKER: My recommendation would be that we overturn the SOAH judge's ruling on this case and we find that they erred in the interpretation of the Occupation Code 2301.468, and that -- I'm not sure, David, whether we need to take and send it back to SOAH to take and rewrite it, or rather our staff rewrites the rule -- the determination. We've done this in the past, we've overturned two since I've been on this board since its inception, and we sent it back to our staff lawyers in order to rewrite.

MR. DUNCAN: No. We don't rewrite the PFD, we don't send it back to them to rewrite the PFD. Your motion is going to be what it incorporates.

MR. PALACIOS: We have a motion from Board Member Walker to reverse the ALJ's decision regarding the Hyundai Motor America and World Car case. Is there a second?

MR. GRAHAM: I'll second.

MR. PALACIOS: We have a second from Board Member Graham. All in favor please signify by raising your right hand.

(A show of hands.)

MR. PALACIOS: We have Board Member Walker, Board Member Treviño, Board Member Barnwell, Board Member Graham, Board Member Ingram, and myself.

All opposed?

(A show of hands.)

MR. PALACIOS: Board Member Painter, Board Member Hardy and Board Member Caraway.

Motion passes.

Can we take a short recess? Five minutes.

(Whereupon, at 12:06 p.m., a brief recess was taken.)

MR. PALACIOS: It's 12:15, we're going to go ahead and resume with our agenda items. Next we're going

EXHIBIT 2

TEXAS DEPARTMENT OF MOTOR VEHICLES
MOTOR VEHICLE DIVISION

NEW WORLD CAR NISSAN, INC. D/B/A WORLD CAR HYUNDAI, WORLD CAR NISSAN; AND NEW WORLD CAR IMPORTS SAN ANTONIO, INC., D/B/A WORLD CAR HYUNDAI,	§	**MVD DOCKET NO. 14-0006 LIC**
Complainants	§	**SOAH DOCKET NO. 608-14-1208.LIC**
v.	§	
HYUNDAI MOTOR AMERICA,	§	
Respondent	§	

FINAL ORDER

The referenced contested case matter is before the Board of the Texas Department of Motor Vehicles (TxDMV) in the form of a Proposal for Decision (PFD) from the State Office of Administrative Hearings (SOAH) and involves the complaint by two World Car franchised dealerships against the distributor, Hyundai Motor America.

IT IS ORDERED:

That the conclusion of the State Office of Administrative Hearings Judge (ALJ) is overturned.

The Board finds that the ALJ erred in interpretation of Texas Occupations Code § 2301.468.

Date: NOV 03 2016

Raymond Palacios, Chairman
Board of the Texas Department of Motor Vehicles

ATTESTED:

Daniel Avitia, Director
Motor Vehicle Division
Texas Department of Motor Vehicles

EXHIBIT 3

TEXAS DEPARTMENT OF MOTOR VEHICLES
MOTOR VEHICLE DIVISION

NEW WORLD CAR NISSAN, INC., d/b/a WORLD CAR HYUNDAI, and NEW WORLD CAR IMPORTS, SAN ANTONIO, INC., d/b/a WORLD CAR HYUNDAI	§	
Complainants,	§	
v.	§	**SOAH DOCKET NO. 608-14-1208 LIC**
	§	**MVD DOCKET NO. 14-0006 LIC**
HYUNDAI MOTOR AMERICA, **Respondent.**	§	

FINAL ORDER

The above-referenced matter is before the Board of the Texas Department of Motor Vehicles (Board) in the form of a Proposal for Decision (PFD) from the State of Office of Administrative Hearings (SOAH).

Overview

This case involves a complaint filed by New World Car Nissan, Inc. d/b/a World Car Hyundai and New World Car Imports, San Antonio Inc. d/b/a World Car Hyundai (collectively "World Car") against the United States distributor of Hyundai vehicles, Hyundai Motor America (HMA). World Car alleges that HMA violated Texas Occupations Code: (i) Section 2301.467(a)(1) by requiring adherence to unreasonable sales standards, (ii) Section 2301.468 by engaging in unreasonable discrimination, and (iii) Section 2301.478(b) by not acting fairly or in good faith.

Issues Presented

The issue before the Board is whether World Car has shown that HMA required adherence to unreasonable sales standards, unreasonably discriminated against World Car, and failed to comply with its duty of good faith and fair dealing.

Summary of Board's Decision

On March 10, 2016, an administrative law judge (ALJ) at SOAH issued a PFD in this matter. The Board considered the PFD during an open meeting held on November 3, 2016. Based on a review of the PFD, the parties' exceptions and replies, and oral argument, the Board concludes that the ALJ misinterpreted and misapplied applicable law in the following ways:

1. The ALJ incorrectly assumed that Section 2301.467(a)(1) of the Texas Occupations Code limits the required adherence to a sales standard that is expressly stated in a dealer agreement.

2. The ALJ improperly applied the concept of unreasonable discrimination because HMA gave nearly three times the amount of discretionary allocations to World Car's closest competitor, even though the dealerships were similarly situated and all wanted more inventory.

3. The ALJ misapplied the statutory duty of good faith and fair dealing because HMA did not act fairly or in good faith in allocating inventory to World Car or in requiring World Car to meet 100% sales efficiency.

The ALJ's misapplication and misinterpretation of the applicable law so flawed her decision that the Board finds it cannot accept the ALJ's proposal for decision. The Board finds that World Car met its burden to show that HMA required adherence to unreasonable sales standards, unreasonably discriminated against World Car, and failed to comply with its duty of good faith and fair dealing.

Specific Reasons & Legal Bases for Changes to Findings of Fact and Conclusions of Law

- **Finding of Fact Numbers 20 and 21** are rejected and replaced under Tex. Gov't Code § 2001.058(e)(1) because the ALJ did not properly apply or interpret the applicable law. Central to whether HMA's different treatment of World Car versus Red McCombs constitutes unreasonable discrimination in violation of Occupations Code Section 2301.468(2) is whether the dealerships were similarly-situated when the different treatment began. The ALJ improperly disregarded and failed to mention in the PFD the undisputed facts that Red McCombs closed an entire dealership in 2009, turned down more allocations than World Car did during the first six months of 2010, and had a similar level of inventory as World Car in mid-2010. By ignoring these facts, the ALJ misinterpreted and misapplied the concept of unreasonable discrimination because the ALJ did not consider that the dealerships were similarly-situated when the different treatment began.

- **Finding of Fact Number 27** is rejected under Tex. Gov't Code § 2001.058(e)(1) because the ALJ did not properly apply or interpret the applicable law. The inquiry under Occupations Code Section 2301.468(2) is whether HMA unreasonably discriminated against World Car. Whether World Car "chose to participate" in the "programs" mentioned by the ALJ would not excuse HMA's discriminatory treatment and is therefore irrelevant. Moreover, the ALJ improperly speculated about the inventory that World Car might have received if it had participated in the "programs" mentioned by the ALJ. The ALJ's misapplication and misinterpretation of the test for "unreasonable discrimination" led to the ALJ's misplaced emphasis on possible inventory that World Car "might have" received rather than properly focusing on HMA's allocations to World Car as compared to Red McCombs.

- **Finding of Fact Number 30** is rejected and replaced under Tex. Gov't Code § 2001.058(e)(1) because the ALJ did not properly apply or interpret the applicable law, i.e. the statutory concept of "unreasonable discrimination." HMA's discretionary inventory allocations to World Car as compared to Red McCombs between 2010 and 2013 were not rational, sensible, acceptable, or fair.

- **Finding of Fact Number 50** is rejected and replaced under Tex. Gov't Code § 2001.058(e)(1) because the ALJ did not properly apply or interpret the applicable law. The ALJ improperly assumed that Occupations Code Section 2301.467(a)(1) is limited to unreasonable sales standards that are expressly stated in the dealer agreement. This statute is not so limited but rather prohibits a manufacturer or distributor from requiring adherence to any unreasonable sales standard wherever and however it is imposed. HMA "required adherence" to 100% sales efficiency as contemplated by Section 2301.467(a)(1) because the consequence for non-compliance was to be in "material breach" of the franchise and risk losing the dealership franchise.

- **Finding of Fact Number 52** is rejected and replaced under Tex. Gov't Code § 2001.058(e)(1) because the ALJ did not properly apply or interpret the applicable law. As seen in the Board's change to Finding of Fact Number 50 above, World Car's complaint is not that "measuring sales efficiency" was unreasonable, but rather that requiring 100% sales efficiency was unreasonable. This requirement was unreasonable because HMA knew that World Car did not have sufficient inventory to meet 100% sales efficiency and HMA ignored or rejected World Car's repeated requests to buy more inventory so that it could achieve 100% sales efficiency.

- **Finding of Fact Number 53** is rejected and replaced under Tex. Gov't Code § 2001.058(e)(1) because the ALJ did not properly apply or interpret the applicable law. The ALJ did not properly apply the concepts of fairness and good faith. HMA's discretionary inventory allocations to Red McCombs were nearly triple the amount provided to World Car, which was unfair based on the circumstances, i.e. similarly-situated dealerships all asking for more inventory. It was also unfair for HMA to know that World Car did not have enough inventory to meet 100% sales efficiency, to turn down World Car's requests for more inventory so that it could achieve 100% sales efficiency, and then tell World Car that it was in breach of the franchise for not meeting 100% sales efficiency.

- **Conclusion of Law Number 6** is rejected and replaced under Tex. Gov't Code § 2001.058(e)(1) because the ALJ did not properly apply or interpret the applicable law. Based on the Board's adoption of Finding of Fact Numbers 50A and 52A, the Board finds that World Car met its burden to show HMA violated Occupations Code Section 2301.467(a)(1) by requiring adherence to an unreasonable sales standard.

- **Conclusion of Law Number 8** is rejected and replaced under Tex. Gov't Code § 2001.058(e)(1) because the ALJ did not properly apply or interpret the applicable

law. Based on the Board's adoption of Finding of Fact Numbers 20A and 30A, the Board finds that World Car met its burden to show HMA violated Occupations Code Section 2301.468(2) by unreasonably discriminating against World Car.

- **Conclusion of Law Number 9** is rejected and replaced under Tex. Gov't Code § 2001.058(e)(1) because the ALJ did not properly apply or interpret the applicable law. Based on the Board's adoption of Finding of Fact Number 53A, the Board finds that World Car met its burden to show HMA violated Occupations Code Section 2301.478(b) by not acting fairly or in good faith with World Car.

Having considered the evidence, the arguments, and the findings of fact and conclusions of law presented in the PFD, the Board enters these findings of fact and conclusions of law. The ALJ's Findings of Fact 20, 21, 27, 30, 50, 52, and 53 and Conclusions of Law 6, 8, and 9 are rejected. The ALJ's Findings of Fact 1-19, 22-26, 28, 29, 31-49, and 51 and Conclusions of Law 1-5, and 7 are adopted.

FINDINGS OF FACT

1. New World Car Nissan, Inc. d/b/a World Car Hyundai and New World Car Imports, San Antonio, Inc., d/b/a World Car Hyundai (together, World Car) are licensed, franchised dealers for Hyundai products and services.

2. Hyundai Motor America (Hyundai) is the wholesale distributor for Hyundai products and services in the United States.

3. On December 6, 2013, the Texas Department of Motor Vehicles (Department) issued a Notice of Hearing advising that World Car had filed a formal complaint with the Department.

4. The hearing on the merits convened on September 21, 2015, and concluded on September 25, 2015. The record closed on January 11, 2016, following the submission of written closing briefs and an agreed record.

Background

5. Ahmad Zabihian owns World Car in San Antonio, Texas. World Car owns two Hyundai dealerships in San Antonio.

6. World Car's primary Hyundai competitor is Red McCombs Hyundai. Red McCombs owns two Hyundai dealerships in San Antonio-Red McCombs Superior and Red McCombs Northwest.

7. Prior to the 2008 recession, World Car North and Red McCombs Superior performed at approximately equal levels in terms of the number of vehicles sold. World Car South performed less well. It is in a lower-income area than World Car North. Red McCombs Northwest did not perform as well prior to the 2008 recession, but improved its sales during 2008-2009.

8. Hyundai's allocation consists of formula allocations, discretionary allocations, and manual allocations.

9. Formula allocations make up approximately 85% of the vehicles allocated and are allocated through a formula and computer program.

10. Under the allocation algorithm, vehicles are offered to dealers based on each dealer's inventory and the average number of vehicles sold by the dealer in the previous 90 days. The system allocates vehicles, one at a time, to the dealer in the region with the lowest days' supply for each respective model.

11. Discretionary allocations are made by Hyundai's regional general manager, who may distribute up to 15%.

12. Manual allocations include turn downs, which are vehicles allocated to a dealer under the formula that the dealer rejects, which are then made available to other dealers in the region, and vehicles that have been re-customized or modified.

13. Sales efficiency is a metric that Hyundai uses to measure dealer sales performance.

14. Sales efficiency compares a dealer's total sales to sales the brand expects to achieve in the dealer's primary market area. Hyundai calculates expected sales by applying Hyundai's national average sales penetration in each vehicle segment in which Hyundai competes to the actual number of vehicles registered in that segment in the dealer's primary market area.

15. Hyundai's Co-Op Advertising Commitment Program (Co-Op) provides funds (Co-Op advertising funds) to dealers to assist with advertising. The funds do not pay for the total cost of advertisements the dealer purchases, but provide partial reimbursements.

16. Eligibility for Co-Op advertising funds and the amount of reimbursement are determined by a formula that considers sales and customer services scores. Regional general managers also have some discretionary funds they can provide to dealers.

17. In 2009, Hyundai's regional general manager responsible for the San Antonio region was Tom Hetrick, who replaced a different regional general manager that year.

Discrimination and gauging the performance of a dealership

Discretionary allocation

18. In 2009, during the first six months of Mr. Hetrick's tenure as regional general manager, he provided 134 cars through discretionary allocation to Red McCombs and 20 to World Car.

19. The differences in discretionary allocation between Red McCombs and World Car continued through 2013.

~~20. In 2009 and 2010, World Car voluntarily reduced its inventory.~~

20A. In 2009 and 2010, World Car and Red McCombs voluntarily reduced their inventories, and in mid-2010 their inventories were at similar levels.

~~21. Red McCombs dealerships maintained their high inventory levels during the 2008-2010 recession.~~

22. In 2010, Red McCombs Superior became an exclusive Hyundai dealership.

23. World Car South shares a dealership with the Kia brand.

24. Red McCombs Northwest added the luxury Equus line that required a facility upgrade and then renovated the store.

25. Red McCombs Superior renovated its dealership in 2011-2012.

26. Red McCombs participated in Hyundai's service loaner program.

~~27. World Car chose not to participate in the available programs provided by Hyundai that could have increased the allocation available to World Car.~~

28. World Car did not remove a dealership until 2014, when it renovated World Car North.

29. World Car did not participate in Hyundai's service loaner program.

~~30. It was reasonable for Hyundai to reward dealers that participated in Hyundai-sponsored programs and renovated their facilities with extra discretionary allocation.~~

30A. It was not reasonable for Hyundai to provide nearly three times as many discretionary allocations to Red McCombs as to World Car between 2010 and 2013.

Gaming the formula allocation system

31. There was nothing improper or illegal about recording a Retail Delivery Report (RDR) for cars that had been spot delivered.

32. Hyundai encouraged World Car to speed up its sales reporting by promptly submitting RDRs once a car was delivered to a customer.

33. There was insufficient evidence to show that Red McCombs gamed the system by entering RDRs and then reversing them at a significantly higher rate than any other Hyundai dealership.

34. The service loaner program allowed dealerships to sell cars into the service loaner program, thereby reducing the inventory available for sale and increasing formula allocation.

35. The service loaner program was available to all Hyundai dealers.

36. World Car chose not to participate in the service loaner program.

37. Red McCombs participated in the service loaner program.

38. There was insufficient evidence to show that Red McCombs gamed the allocation system.

Sales efficiency

39. In 2008, both World Car North and South were over 100% sales efficient. In 2009, the north store dropped to 96.8% and continued to drop over time. In 2014, it was 65.7% sales efficient. The south store fared worse. It dropped to 17.9% sales efficient in 2013 but rebounded in 2014 to 31.2% sales efficient.

40. In 2009, Toyota opened a manufacturing plant and new dealership close to World Car South. The manufacturing plant employs about 6,000 people. Those employees had incentives to purchase Toyota products.

41. From 2010 until 2013, Hyundais were in short supply worldwide, primarily due to the high demand caused by the Japanese tsunami that devastated Japanese manufacturing.

42. Hyundai was aware that some dealers could not achieve 100% sales efficiency with the lower inventory.

43. Hyundai measured sales efficiency in the same manner for all dealers.

Co-Op Advertising Funds

44. Co-Op advertising funds must be used exclusively for advertising.

45. The distribution of Co-Op advertising funds is calculated by a formula that considers several factors including customer sales and service scores. The formula is not intended to gauge the performance of a dealership. It simply calculates how much additional advertising funding a particular dealership will receive.

46. The regional general manager has discretion to award additional Co -Op advertising funds.

47. In 2010, World Car South was not eligible under the formula to receive Co-Op advertising funds. Mr. Hetrick provided the store with $60,000 in Co-Op advertising funds over the third and fourth quarters of that year.

48. The Co-Op program formula is applied in the same manner to all dealers.

49. Co-Op advertising funds are unrelated to the sale of a motor vehicle.

Unreasonable Sales Standards

~~50. Maintaining 100% sales efficiency is not a requirement to be or to remain a licensed Hyundai dealer.~~

50A. Maintaining 100% sales efficiency is a requirement to avoid being in material breach of the franchise agreement with Hyundai

51. World Car stores have not been 100% sales efficient for several years, and both are operating under valid dealer agreement.

~~52. Mearing sales efficiency does not require adherence to unreasonable sales or service standards.~~

52A. Requiring World Car to meet 100% sales efficiency in order to avoid material breach of the franchise agreement was requiring adherence to an unreasonable sales standard because Hyundai was aware that World Car did not have sufficient inventory to meet 100% sales efficiency.

Duty of Good Faith and Fair Dealing

~~53. The allocation system and sales efficiency metric do not treat World Car unfairly.~~

53A. Hyundai's discretionary allocations to the San Antonio market between 2010 and 2013 were unfair, and Hyundai's requirement that World Car meet 100% sales efficiency despite the dealerships' known lack of inventory was also unfair.

CONCLUSIONS OF LAW

1. The Texas Department of Motor Vehicles has jurisdiction over this case. Tex. Occ. Code § 2301.001.

2. The State Office of Administrative Hearings (SOAH) has jurisdiction over all matters related to the contested case hearing in this case, including the authority to issue a proposal for decision with findings of fact and conclusions of law. Tex. Occ. Code § 2301.704.

3. The hearing was conducted pursuant to the Administrative Procedure Act and SOAH's procedural rules. Tex. Gov't Code ch. 2011 and 1 Tex. Admin. Code ch. 155.

4. Proper and timely notice of the hearing was provided. Tex. Occ. Code § 2301.705.

5. World Car has the burden of proof by a preponderance of the evidence. 1 Tex. Admin. Code § 155.427.

6. ~~World Car failed to meet its burden of proof to show that Hyundai required adherence to unreasonable sales or service standards. Tex. Occ. Code § 2301.467(a)(1)(2003).~~

6A. World Car met its burden of proof to show that Hyundai required adherence to unreasonable sales standards. Tex. Occ. Code § 2301.467(a)(1).

7. World Car failed to meet its burden of proof to show that Hyundai discriminated against World Car by treating them differently as a result of a formula or other process intended to gauge the performance of a dealership though allocation of vehicle inventory, sales efficiency calculations, or distribution of discretionary Co-Op advertising funds. Tex. Occ. Code § 2301.468(1) (2003).

8. ~~World Car failed to meet its burden of proof to show that Hyundai engaged in unreasonable sales discrimination in the allocation of vehicle inventory because World Car did not participate in in many of the programs that would have permitted additional discretionary allocation. Texas Occ. Code § 2301.458(2.~~

8A. World Car met its burden of proof to show that Hyundai engaged in unreasonable sales discrimination in the allocation of vehicle inventory between 2010 and 2013 because Hyundai provided disproportionate discretionary allocations of inventory to World Car's nearest competitor in San Antonio that were not justified by any material differences between the dealerships. Tex. Occ. Code § 2301.468(1) (2003).

9. ~~World Car failed to meet it burden of proof to show that Hyundai violated its duty of good faith and fair dealing through allocations and sales efficiency because Hyundai calculated sales efficiency in the same manner for all dealers, World Car chose not to participate in many of the programs that could have led to additional discretionary allocation. Tex. Occ. Code § 2301.478(b).~~

9A. World Car met its burden of proof to show that Hyundai violated its duty of good faith and fair dealing through discretionary allocations and through requiring World Car to meet 100% sales efficiency between 2010 and 2013. Tex. Occ. Code § 2301.478(b).

ACCORDINGLY, IT IS ORDERED:

1. That the findings of fact and conclusions of law in this Order are hereby adopted; and

2. That World Car's complaints under Occupations Code Sections 2301.467(a)(1), 2301.468(2), and 2301.478(b) are hereby upheld.

Dated: _____

_____
Raymond Palacios
Chair, Board of Texas Department of Motor Vehicles

ATTESTED:

_____

Texas Department *of* Motor Vehicles
HELPING TEXANS GO. HELPING TEXAS GROW.

February 6, 2017

Mr. Lee L. Kaplan
Smyser, Kaplan & Veselka, LLP
700 Louisiana St. Ste. 2300
Houston, TX 77002-2740
CERTIFIED MAIL, FIRST CLASS MAIL, EMAIL AND FACSIMILE: (713) 221-2320

Mr. Kevin M. Young
Prichard Hawkins Young LLP
10101 Reunion Pl.
San Antonio, TX 78216-4160
CERTIFIED MAIL, FIRST CLASS MAIL, EMAIL AND FACSIMILE: (210) 477-7450

RE: ***New World Car Nissan, Inc. d/b/a World Car Hyundai, World Car Nissan; and New World Car Imports San Antonio, Inc., d/b/a World Car Hyundai, Complainants v. Hyundai Motor America, Respondent*;**
MVD Docket No. 14-0006 LIC and SOAH Docket No. 608-14-1208.LIC

To the Parties Addressed:

Enclosed please find a copy of the Decision and Order Granting Rehearing, which has been issued by the Board of the Texas Department of Motor Vehicles and attested by the Director of the Motor Vehicle Division.

If you have any questions regarding the Order, please feel free to contact me at (512) 465-1324 or Michelle Lingo at Michelle.Lingo@TxDMV.gov or (512) 465-4277.

Sincerely,

Marie Medina

Marie Medina
Docket Clerk

Attachment

cc: Mr. Jarod Stewart
Smyser Kaplan Veselka, L.L.P.
700 Louisiana St Ste 2300
Houston, TX 77002-2740
EMAIL

Mr. David D. Duncan
General Counsel
EMAIL

Ms. Michelle Lingo
Staff Attorney, Motor Vehicle Division
EMAIL

Mr. David D. Wolfe
Prichard Hawkins Young LLP
10101 Reunion Pl Ste 600
San Antonio TX 78216-4162
EMAIL

Mr. David Richards
Associate General Counsel
EMAIL

TEXAS DEPARTMENT OF MOTOR VEHICLES
MOTOR VEHICLE DIVISION

NEW WORLD CAR NISSAN, INC. D/B/A WORLD CAR HYUNDAI, WORLD CAR NISSAN; AND NEW WORLD CAR IMPORTS SAN ANTONIO, INC., D/B/A WORLD CAR HYUNDAI,	§	**MVD DOCKET NO. 14-0006 LIC**
Complainants	§	**SOAH DOCKET NO. 608-14-1208 LIC**
v.	§	
HYUNDAI MOTOR AMERICA,	§	
Respondent		

DECISION AND ORDER GRANTING REHEARING

The Board of the Texas Department of Motor Vehicles has considered Respondent's Motion for Rehearing and Complainants' Response to the Motion for Rehearing.

The Board finds that issues exist which require further consideration by the Board in a future open meeting.

A Board vote was taken by electronic mail as allowed under Texas Government Code §2001.146(d), and a majority of the Board Members voted to grant the rehearing.

ACCORDINGLY, IT IS ORDERED that the Motion for Rehearing is **GRANTED**.

Date: February 4, 2017

Raymond Palacios, Jr.
Board of the Texas Department of Motor Vehicles

ATTESTED:

Daniel Avitia, Director
Motor Vehicle Division
Texas Department of Motor Vehicles

Texas Department of Motor Vehicles
HELPING TEXANS GO. HELPING TEXAS GROW.

DATE: August 17, 2017
ACTION REQUESTED: ISSUE ORDER AFTER REMAND

To: Texas Department of Motor Vehicles (TxDMV) Board
From: Daniel Avitia, Director, Motor Vehicle Division
Agenda Item: 6
Subject: Dealerships' Protest against Manufacturer's Proposed Termination:
Cecil Atkission Orange, LLC d/b/a Cecil Atkission Chrysler Jeep Dodge, Complainant v. FCA US, LLC, Respondent;
MVD Docket No. 15-0015 LIC; SOAH Docket No. 608-15-4315.LIC

PURPOSE AND EXECUTIVE SUMMARY
The State Office of Administrative Hearings (SOAH) issued the attached Proposal for Decision (PFD) and Supplemental PFD Following Remand for consideration by the Board of the Texas Department of Motor Vehicles.

FINANCIAL IMPACT
None

BACKGROUND AND DISCUSSION
On December 19, 2014, FCA US, LLC (FCA) provided notice to Cecil Atkission, Orange, LLC d/b/a Cecil Atkission Chrysler Jeep Dodge (Atkission) of its decision to terminate the franchise.

The Motor Vehicle Division (MVD) referred the contested case matter to SOAH on June 15, 2015. The administrative law judges (ALJs) conducted the hearing on the merits February 8 through 12, 2016; closed the administrative record April 18, 2016; and issued the PFD on June 17, 2016.

The ALJs found that FCA established good cause for the termination of the franchise and recommended that the Board approve the franchise termination. Atkission filed Exceptions to the PFD. The Texas Automobile Dealers Association (TADA) filed an *amicus curiae* brief. FCA filed a Reply in response to Atkission's Exceptions.

On August 10, 2016, the ALJs issued an exceptions letter, providing that the ALJs were making no changes to the PFD and determining that TADA filed its *amicus curiae* brief timely. SOAH returned this contested case matter to the TxDMV. The Board had jurisdiction to consider the contested case during its January 5, 2017, open meeting, when the Board remanded the matter to SOAH to further clarify (A) the legal status of the dealer's financial contributions to the business and (B) how the money does--or does not--support the manufacturer's proposed termination under the manufacturer's December 19, 2014 termination letter.

On March 27, 2017, the ALJs issued a Supplement to the Proposal for Decision following Remand (Supplemental PFD). The Supplemental PFD reviewed the earlier findings and further explained the ALJs findings as to the legal status of the dealer's financial contributions to the business. Atkission filed Exceptions on April 7, 2017, and FCA filed Replies to the Exceptions on April 21, 2017. On April 21, 2017, the ALJs struck new testimony and did not admit new testimony into the evidentiary record. On May16, 2017, the ALJs issued their Exceptions Letter to the PFD and the Supplemental PFD. On May 17, 2017, the ALJs confirmed that jurisdiction over this contested case matter was returned to the Board of the TxDMV.

The issue presented in this case is whether FCA established—by a preponderance of the evidence[1]—that there is good cause for termination of its franchise with Atkission, in accordance with Texas Occupations Code §2301.455.

[1] Tex. Occ. Code §2301.453(g) requires the Board to determine whether the party seeking the termination has established by a preponderance of the evidence that there is good cause for the proposed termination. Black's Law Dictionary defines "preponderance of the evidence" to mean the greater weight of the evidence; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to include a fair and impartial mind to one side of the issue rather than the other. This is the burden of proof in a civil trial, in which the jury is instructed to find for the party that, on the whole, has the stronger evidence, however slight the edge may be.

In determining whether FCA demonstrated good cause for termination, the Board shall consider all existing circumstances, including the following statutory factors. For the Board's convenience and consideration, the ALJs findings are summarized in the table, followed by more detailed summaries of each of the required factors. Text in blue font is relevant to information from the Supplemental PFD.

ISSUE	LOCATION OF THIS DISCUSSION POINT	ALJs FOUND IN FAVOR OF:
FACTOR 1: Dealer's sales in relation to the sales in the market	(PFD pp. 14 – 22) (Supp. PFD p.3)	FCA
FACTOR 2: Dealer's investment and obligations	(PFD pp 23 – 29) (Supp. PFD p.3&7)	FCA
FACTOR 3: Injury or benefit to the public	(PFD pp 29 – 32) (Supp. PFD p. 3)	FCA
FACTOR 4: Adequacy of the dealer's service facilities, equipment, parts, and personnel in relation to those of other dealers of new motor vehicles of the same line-make	(PFD pp 32 –33) (Supp. PFD p. 4)	FCA
FACTOR 5: Whether warranties are being honored by the dealer	(PFD pp 33 –36) (Supp. PFD p. 4)	Neutral
FACTOR 6: Parties' compliance with the franchise, except to the extent that the franchise conflicts with Occupations Code Chapter 2301. The ALJs found Atkission violated its franchise agreement in 8 of 9 ways:	(PFD pp 37-64) (Supp. PFD p. 4-6)	FCA
6.1. Atkission breached its sales performance obligations	(PFD pp. 37-44) (Supp. PFD p. 4)	FCA
6.2. Atkission's warranty obligations	(PFD pp. 44-45) (Supp. PFD p. 4)	Neutral
6.3. Atkission breached its management obligations	(PFD pp. 45-47) (Supp. PFD p .4)	FCA
6.4. Atkission breached its personnel obligations	(PFD pp. 47-50) (Supp. PFD p. 5)	FCA
6.5. Atkission breached its facility obligations	(PFD pp. 50-52) (Supp. PFD p. 5)	FCA
6.6. Atkission breached its place of business obligations	(PFD pp. 52-54) (Supp. PFD p. 5)	FCA
6.7. Atkission breached its advertising obligations	(PFD pp. 54-55) (Supp. PFD p. 5)	FCA
6.8. Atkission breached its signage obligations	(PFD pp. 56-59) (Supp. PFD p. 5)	FCA
6.9 Atkission breached its working capital and net worth obligations	(PFD pp. 59-63) (Supp. PFD p. 5)	FCA
FACTOR 7: Enforceability of the franchise from a public policy standpoint, including issues of the reasonableness of the franchise's terms, oppression, adhesion, and the parties' relative bargaining power	(PFD pp 64)	FCA
Whether the desire for market penetration is the sole basis for termination	(PFD pp 64-65) (Supp. PFD p.11)	FCA (Not the sole basis)

1. ***FACTOR 1: Dealer's Sales in Relation to the Sales in the Market*** (PFD pp 14 – 22)
The ALJs decided this factor in favor of FCA. After consideration of the evidence and arguments presented by the parties at the hearing, the ALJs found that FCA established that Atkission has poor sales in relation to the market, a factor that supports termination.

2. ***FACTOR 2: Dealer's Investment and Obligations*** (PFD pp 23 – 29)
The ALJs decided this factor in favor of FCA. After consideration of the evidence and arguments presented by the parties at the hearing, the ALJs found that Atkission's investment is minimal, to the point of being inadequate to properly operate the business. The ALJs also found that Atkission's dealership obligations are equally minimal.

3. ***FACTOR 3: Injury or Benefit to the Public*** (PFD pp 29 – 32)
The ALJs decided this factor weighs heavily in favor of FCA. After consideration of the evidence and arguments presented by the parties at the hearing, the ALJs found that the termination of FCA's franchise with Atkission will have a positive impact on the public, because the majority of Chrysler customers are already driving 20-40 miles to avoid Atkission and because there are few employees who are not already shared with Atkission Toyota. These persons would likely become employees at the Toyota dealership. The ALJs also found that if a new Chrysler dealership is established, additional jobs will be created.

4. ***FACTOR 4: Adequacy of the Dealer's Service Facilities, Equipment, Parts, and Personnel in Relation to those of Other Dealers of New Motor Vehicles of the Same Line-Make*** (PFD pp 32 –33)
With regard to the adequacy of Atkission's ***service facilities***, the ALJs decided the factor in favor of FCA. After consideration of the evidence and arguments presented by the parties at the hearing, the ALJs pointed to Atkission's testimony, admitting its facility is in poor condition, is not conducive to a successful business, is an eye-sore, and is not comparable to surrounding dealer's facilities. Atkission has no plans to improve this facility. Atkission has not maintained a viable general manager, sales staff, or other dealership personnel. The ALJs found the evidence to support termination of FCA's franchise with the dealership.

   With regard to the adequacy of Atkission's ***equipment or parts*** in relation to those of other Chrysler dealers, the ALJs observed that neither party offered evidence. The ALJs found the factor to have a neutral impact on the god cause determination. The ALJs found that the adequacy of Atkission service facilities, equipment, parts, and personnel is a factor that weighs slightly in favor of termination.

5. ***FACTOR 5: Whether Warranties are Being Honored by the Dealer*** (PFD pp 33 –36)
The ALJs decided that this factor neither supports nor weighs against termination. After consideration of the evidence and arguments presented by the parties at the hearing, the ALJs noted that FCA never asserted that it desired to terminate the dealership due to warranty issues.

6. ***FACTOR 6: Parties' Compliance with the Franchise, Except to the Extent that the Franchise Conflicts with Occupations Code Chapter 2301*** (PFD pp 37-64)

   After consideration of the evidence and arguments presented by the parties at the hearing, the ALJs decided that this factor supports FCA's termination of its franchise with Atkission.

   6.1. The ALJs found that Atkission's ***breach of sales performance obligations*** favors FCA's termination of Atkission's franchise. The ALJs found Atkission to have a remarkably poor Minimum Sales Responsibility (MSR) achievement rate, the dealership ranks as the very worst performing FCA dealership in Texas, and the evidence does not demonstrate the poor sales performance was caused by *force majeure* (i.e., reconstruction on Interstate-10).

   6.2. The ALJs considered whether Atkission had ***breached warranty obligations*** and found that the evidence neither supports nor weighs against FCA's termination of Atkission.

   6.3. The ALJs found that Atkission's ***breach of management obligations*** favors FCA's termination of its franchise with Atkission. The ALJs found that Mr. Atkission failed to comply with his contractual obligation to manage the dealership and failed to comply with the 50% dealership presence requirement.

6.4. The ALJs found that Atkission's ***breach of personnel obligations*** favors FCA's termination of its franchise with Atkission. The ALJs found that Atkission contractually committed itself to employ a sufficient number of employees at its current location and that *force majeure* is not applicable in this contested case. The ALJs discussed that Atkission had five general managers since early 2012, resulting in a new sales manager and staff changes with each new general manager. The ALJs also considered the number of Atkission's employees who are also employees of Atkission Toyota, including the office manager, the finance and insurance employee, two office workers, an accounting department, and a comptroller.

6.5. The ALJs found that Atkission ***breached its facility obligations*** in the Dealer Agreements, thereby favoring FCA's termination of its franchise with Atkission. Mr. Atkission admitted that the facilities are in very poor repair, very outdated, not up to his standards, are very old, not laid out very well, are not very good, and do not compare favorably with other Chrysler dealerships or other dealerships in Orange, Texas.

FCA's witnesses testified that the facilities are woefully inadequate, outdated, improperly branded, improperly maintained, do not meet FCA's current design standards or signage requirements, and almost appear to be abandoned. The ALJs again found that *force majeure* is not applicable in this case.

The ALJs findings are based on Atkission's contractual commitments to operate in facilities that are relatively equivalent in their attractiveness, level of maintenance, and overall appearance to those of its competitors and contractually bound itself to the *current* location.

6.6. The ALJs found that Atkission's ***breach of business obligations*** favors FCA's termination of its franchise with Atkission. The ALJs found that FCA proved repeated violations of the place-of-business obligation in the Dealer Agreements, noting that the Chrysler brand is harmed when a Chrysler customer is made to travel to the facilities of another brand (i.e., to Atkission Toyota) to complete the transaction on Atkission's Chrysler products.

6.7. The ALJs found that Atkission's ***breach of advertising obligations*** favors FCA's termination of its franchise with Atkission. The ALJs found the evidence established that Atkission has not complied with its contractual obligation to promote FCA products and services vigorously and aggressively. The ALJs noted that Atkission does not devote vigorous effort to advertising, has not filled its advertising manager position, does not spend a fixed amount on advertising, and had not rented any of the available billboards near the dealership.

6.8. The ALJs found that Atkission's ***breach of signage obligations*** strongly supports FCA's termination of its franchise with Atkission. The dealership's inaction--since 2008--to repair the main pole-sign revealed a remarkable passivity and apathy by Atkission about its own dealership affairs. Atkission never repaired the main pole-sign that was damaged by Hurricane Ike in September 2008. Instead, Atkission placed a plastic bag over the sign with the dealership's name and brands printed on the bag.

The ALJs noted that the dealer agreement requires Atkission to display and maintain signs, fascia, and other signage in compliance with FCA's policies and guidelines. On April 9, 2013, Mr. Atkission obligated Atkission to purchase FCA's current Millennium Signage; however, the dealership did not comply with the requirement and the dealership never installed the Millennium Signage. Mr. Atkission testified that he never intended to install the signage at the current dealership location.

6.9. The ALJs found that Atkission ***breached its working capital and net worth obligations*** in the Dealer Agreements and this factor favors FCA's termination of its franchise with Atkission. The ALJs found Atkission's financial statements to show the dealership's net worth has been a steadily growing negative number, Atkission has lost money every year since 2010, Atkission has not maintained working capital and net worth, and that Atkission's proposal is unreasonable. To show sufficient constructive working capital and constructive net worth throughout the dealership's existence, Atkission proposed to merely reclassify "Cecil Money" on the dealership's financial statements from "notes payable" and "contracts" to become "subordinated notes."

ALJs Supplemental PFD

The ALJs Supplemental PFD reviewed record evidence and further clarified the legal status of the dealer's financial contributions to the business, in accordance with the Board's January 5, 2017, Order on Remand. In the Supplemental PFD, the ALJs found that:

- The evidence overwhelmingly establishes good cause to terminate Atkission's franchise.
- There exists a legal distinction between the individual (Mr. Atkission) and the dealer (Atkission Chrysler) that the Board is charged with enforcing. (Supp. PFD p. 7)
- By statute, the dealer is the "person who holds a GDN issued by the Board and "person" expressly includes a partnership, corporation, or other legal entity. (Supp. PFD p. 7)

- Mr. Atkission's checks are unsecured payments, treated as subordinated debt on the dealer's books. (Supp. PFD p. 6)
- The payments lack any of the paperwork that one would normally expect to see with a loan. (Supp. PFD p. 6)
- The payments are not the dealer's obligation. (Supp. PFD p. 7)
- The dealer records the money as loaned funds and then pays Mr. Atkission interest on the principle, but not on the principle itself. (Supp. PFD p. 6)
- The dealer's office manager and bookkeeper indicated that none of the principle has ever been repaid. (Supp. PFD p. 6)
- The dealer is under no obligation to repay the principle itself. (Supp. PFD p. 6)
- Mr. Atkission testified that he is not to be repaid the principle. (Supp. PFD p. 6)
- The dealer's accountant testified the payments are not debt, it's not money to be repaid to Mr. Atkission, it's never been repaid to Mr. Atkission, and it will likely never be repaid to Mr. Atkission. (Supp. PFD p. 6-7)
- The dealer's attorney asserted that Mr. Atkission does not want the money to be repaid. (Supp. PFD p. 7)
- From a legal and statutory perspective, the payments cannot be considered an investment. (Supp. PFD p. 7)
- The money is not the dealer's obligation, because the money need not be repaid. (Supp. PFD p. 7)
- The money is a capital contribution with no terms of repayment. (Supp. PFD p. 7)
- If the payments were deemed to be a $6.25 million investment in the dealership by the dealer, it would not change the fact that such a level of investment was too little to successfully run the business, as evidenced by the remainder of the PFD, which discusses the many ways in which the dealer has chronically underperformed.
- Atkission's financial statements show that since 2010, the dealership has not met working capital and net worth obligations, meaning the Atkission dealership has lost money every year since 2010. (Supp. PFD p. 8)
- The changes in accounting practices advocated by the dealership's accountant to "constructive net worth" and "constructive working capital" are not actual "net worth" and "working capital" amounts, are not terms imposed by the franchise agreements, and would be inconsistent with t to FCA and to the U.S. IRS. (Supp. PFD p. 8-11)
- The ALJs recommended the Board deny Atkission's protest and allow FCA to terminate the franchise. (Supp. PFD p. 8-11)

7. ***FACTOR 7: Enforceability of the Franchise from a Public Policy Standpoint, Including Issues of the Reasonableness of the Franchise's Terms, Oppression, Adhesion, and the Parties' Relative Bargaining Power*** (PFD pp 64)
The ALJs decided this factor in favor of FCA. Neither party asserted a public policy standpoint. After consideration of the evidence and arguments presented by the parties at the hearing, the ALJs discerned no public policy issues related to the enforceability of the franchise. Because the franchise is enforceable from a public policy standpoint and because Atkission is not in compliance with multiple requirements of the franchise, the ALJs decided this factor supports FCA's termination of its franchise with Atkission.

8. ***Whether the Desire for Market Penetration is the Sole Basis for Termination*** (pp 64-65)
After consideration of the evidence and arguments presented by the parties at the hearing, the ALJs found that a desire for market penetration is not FCA's sole basis for proposing termination of the franchise between FCA and Atkission. As other reasons for proposing termination, the ALJs pointed to Atkission's breaches of the franchise agreement, failure to take care of the interests of consumers in Orange, the high number of sales by surrounding Chrysler dealerships into the Atkission sales locality, the dealership's lack of effort to improve operations and to cure deficiencies, and Atkission's damage to the Chrysler brand.

Board Authority

Tex. Occ. Code Chapter 2301 provides the Board authority over these parties and the decision in this contested case matter.

A. **Tex. Occ. Code §2301.453** establishes requirements for a manufacturer's termination of its franchise with a franchised dealership.
   - **Tex. Occ. Code §2301.453(c)&(d)** provide requirements for a manufacturer's ***notice*** of termination of its franchise with a franchised dealership.
   - **Tex. Occ. Code §2301.453(e)** provides requirements for a dealership's ***protest*** of a manufacturer's notice of termination.
   - **Tex. Occ. Code §2301.453(g)** establishes that the burden of proof is on the manufacturer to establish by a preponderance of the evidence that there is good cause for the termination of the franchise with Atkission.

B. **Tex. Occ. Code §2301.455** provides factors the Board must consider when determining whether FCA established good cause for the proposed franchise termination.

C. **Tex. Occ. Code §2301.711** requires an order of the Board:
   1. to include a separate finding of fact for each of the specific issues in Tex. Occ. Code §2301.455; and
   2. to set forth additional findings of fact and conclusions of law on which the order is based.

D. **Tex. Gov't Code §2001.058(e)** allows the Board to change a finding of fact or conclusion of law made by the ALJs only if the Board determines:
   1. that the ALJs did not properly apply or interpret applicable law, agency rules, or prior administrative decisions;
   2. that a prior administrative decision on which the ALJ relied is incorrect or should be changed; or
   3. that a technical error in a finding of fact should be changed.

   The Board shall state, in writing, the ***specific reason*** and ***legal basis*** for a change made under this subsection.

SOAH ALJs' Recommendations

The SOAH ALJs found that FCA met its burden of proof (preponderance of the evidence) and found that the evidence overwhelmingly proved good cause for FCA's termination of Atkission's franchise agreement. The ALJs recommended the Board deny Atkission's protest and allow FCA to terminate the franchise.

Documents

The following documents are attached to this Executive Summary for consideration by the Board:

1.	SOAH ALJs' Proposal for Decision	06/17/2016
2.	Atkission's Exceptions to the Proposal for Decision	07/20/2016
3.	Texas Automobile Dealers Association's (TADA) Amicus Curiae Brief	07/20/2016
4.	FCA's Reply to Atkission's Exceptions to the Proposal for Decision	08/04/2016
5.	FCA's Reply to Amicus Curiae Brief of TADA	08/04/2016
6.	SOAH ALJs' Exceptions Letter	08/10/2016
7	Board Order on Remand & Transmittal	01/05/2017
8	ALJs Supplement to the PFD Following Remand	03/27/2017
9	Atkission's Exceptions [~~and New Testimony~~]	04/07/2017
10	FCA Replies to Exceptions to Supplemental PFD	04/21/2017
11	FCA's Motion to Strike New Testimony	04/21/2017
12	ALJs Order No. 12 Striking New Evidence	05/01/2017
13	ALJs Exceptions Letter to PFD and Supplemental PFD	05/16/2017

REFER TO SEPARATE DOCUMENT

TXDMV BOARD BRIEFING NOTEBOOK

VOLUME 2

ALL RESPONSIVE MATERIAL FOR

AGENDA ITEM # 6

Franchised Dealer's Protest of Manufacturer's Notice of Termination

MVD Docket No. 15-0015.LIC; SOAH Docket No. 608-15-4315.LIC

Cecil Atkission Orange, LLC, d/b/a Cecil Atkission Chrysler Jeep Dodge, Complainant v. FCA US, LLC, Respondent

GOVERNMENT CODE

Sec. 2001.058. HEARING CONDUCTED BY STATE OFFICE OF ADMINISTRATIVE HEARINGS.

(e) A state agency may **change a finding of fact or conclusion of law** made by the administrative law judge, or may vacate or modify an order issued by the administrative judge, **only if the agency determines**:

(1) that the administrative law judge **did not properly apply or interpret applicable law**, agency rules, written policies provided under Subsection (c), or prior administrative decisions;

(2) that a prior administrative decision on which the administrative law judge relied is incorrect or should be changed; or

(3) that a technical error in a finding of fact should be changed.

The agency shall **state in writing the specific reason and legal basis for a change** made under this subsection.

ARGUMENT
EXHIBIT #1

OCCUPATIONS CODE

Sec. 2301.453. TERMINATION OR DISCONTINUANCE OF FRANCHISE.

(c) Except as provided by Subsection (d), the manufacturer, distributor, or representative must provide **written notice** by registered or certified mail to the dealer and the board **stating the specific grounds for the termination** or discontinuance.

ARGUMENT
EXHIBIT #2

CHRYSLER GROUP LLC

December 19, 2014

VIA CERTIFIED MAIL – RETURN RECEIPT REQUESTED AND OVERNIGHT MAIL
Cecil R. Atkission, President
Cecil Atkission Orange, LLC
d/b/a Cecil Atkission Chrysler Jeep Dodge
4103 Interstate 10 E
Orange, TX 77630

Re: NOTICE OF TERMINATION – CHRYSLER, JEEP, DODGE AND RAM DEALER AGREEMENTS

NOTICE TO DEALER: YOU MAY BE ENTITLED TO FILE A PROTEST WITH THE TEXAS MOTOR VEHICLE BOARD IN AUSTIN, TEXAS, AND HAVE A HEARING IN WHICH YOU MAY PROTEST THE PROPOSED TERMINATION OR DISCONTINUANCE OF YOUR FRANCHISE UNDER THE TERMS OF CHAPTER 2301, OCCUPATIONS CODE, IF YOU OPPOSE THIS ACTION.

Dear Mr. Atkission:

As you know, Chrysler Group LLC ("CG") and Cecil Atkission Orange, LLC d/b/a Cecil Atkission Chrysler Jeep Dodge ("Dealer") are parties to the following Sales and Service Agreements:

- Chrysler Sales and Service Agreement, dated March 3, 2008;
- Jeep Sales and Service Agreement, dated March 3, 2008; and
- Dodge Sales and Service Agreement, dated March 3, 2008, with the RAM Amendment dated May 31, 2012.

These Agreements are referred to collectively herein as the "Dealer Agreements."

As we have previously informed you on numerous occasions, Dealer is in material breach of reasonable and material provisions of the Dealer Agreements with respect to sales performance, working capital, and net worth. Based on these breaches, CG sent to Dealer a Notice of Default under Paragraph 28(b)(i) and (ii) of the Additional Terms and Provisions, as amended (the "Additional Provisions"), of each of the Dealer Agreements and in accordance with Texas Occupations Code, Title 14, Subtitle A, Chapter 2301 (the "Statute"). The Notice of Default, dated December 17, 2013, provided Dealer the opportunity to cure these breaches by June 30, 2014, more than 180 days from Dealer's receipt of the Notice of Default.

The cure period has expired, and your dealership has failed to cure the breaches identified in the Notice of Default.

WE ARE WRITING TO PROVIDE DEALER WITH NOTICE THAT CG INTENDS TO TERMINATE, AND DOES HEREBY TERMINATE, EACH OF THE DEALER AGREEMENTS PURSUANT TO THE STATUTE (INCLUDING TEX. OCC. CODE § 2301.453) AND PARAGRAPH 28(B)(I) AND (II) OF THE ADDITIONAL PROVISIONS OF EACH DEALER AGREEMENT. THE TERMINATION OF EACH DEALER AGREEMENT SHALL TAKE EFFECT, WITHOUT FURTHER NOTICE, SIXTY (60) CALENDAR DAYS AFTER THE DATE OF DEALER'S RECEIPT OF THIS NOTICE.

ARGUMENT
EXHIBIT #3

YOUR DEALERSHIP'S FAILURE TO MEET ITS SALES PERFORMANCE OBLIGATIONS

Under the Dealer Agreements, your dealership agreed to use its "best efforts to promote energetically and sell aggressively and effectively at retail" each and every model of each vehicle line covered by the respective Dealer Agreement. Your dealership also agreed to "actively and effectively sell and promote the retail sale" of each vehicle line in its assigned Sales Locality. Your dealership also agreed to achieve its Minimum Sales Responsibility ("MSR") for each vehicle line. These obligations are set forth in Paragraph 4 of each Dealer Agreement and Paragraph 11(a) of the Additional Provisions of each Dealer Agreement.

MSR represents the *minimum* number of sales your dealership should have achieved for a vehicle line as a proportion of total sales opportunity for that line. Dealers that achieve 100% MSR are performing at an average level when compared to other dealers in the state. Dealers that fail to achieve 100% MSR are performing at a below average level. Achieving 100% MSR is a contractual requirement of each of the Dealer Agreements.

We calculate your dealership's MSR by first determining, by segment, the market share in your state (Texas) for each vehicle line, and the number of new vehicle registrations, by segment, in the Orange Sales Locality for each vehicle line's competitive set. We then compute the number of new vehicle retail sales necessary, by segment, for each vehicle line to achieve statewide market share in the Orange Sales Locality. This methodology determines your dealership's MSR for each vehicle line it represents.

YOUR DEALERSHIP'S SALES PERFORMANCE

As the following charts demonstrate, your dealership has failed to meet its contractual obligation to achieve 100% MSR for each of the vehicle lines it represents over the past several years.

All Lines:

Month/Year (YTD)	Dealer's Sales	Dealer's Sales Needed to Obtain 100% MSR	% MSR Attained	Sales Dealer Lost (vs MSR)
September 2014	98	412	23.8%	(314)
December 2013	188	473	39.7%	(285)
December 2012	98	415	23.6%	(317)
December 2011	155	315	49.2%	(160)
December 2010	153	241	63.5%	(88)

Chrysler:

Month/Year (YTD)	Dealer's Sales	Dealer's Sales Needed to Obtain 100% MSR	% MSR Attained	Sales Dealer Lost (vs MSR)
September 2014	6	22	27.3%	(16)
December 2013	16	39	41.0%	(23)
December 2012	14	36	38.9%	(22)
December 2011	14	21	66.7%	(7)
December 2010	5	12	41.7%	(7)

Dodge:

Month/Year (YTD)	Dealer's Sales	Dealer's Sales Needed to Obtain 100% MSR	% MSR Attained	Sales Dealer Lost (vs MSR)
September 2014	28	112	25.0%	(84)
December 2013	55	131	42.0%	(76)
December 2012	23	109	21.1%	(86)
December 2011	102	229	44.5%	(127)
December 2010	120	188	63.8%	(68)

Jeep:

Month/Year (YTD)	Dealer's Sales	Dealer's Sales Needed to Obtain 100% MSR	% MSR Attained	Sales Dealer Lost (vs MSR)
September 2014	30	102	29.4%	(72)
December 2013	40	106	37.7%	(66)
December 2012	15	81	18.5%	(66)
December 2011	39	65	60%	(26)
December 2010	28	41	68.3%	(13)

RAM:

Month/Year (YTD)	Dealer's Sales	Dealer's Sales Needed to Obtain 100% MSR	% MSR Attained	Sales Dealer Lost (vs MSR)
September 2014	34	176	19.3%	(142)
December 2013	77	197	39.1%	(120)
December 2012	46	189	24.3%	(143)

As the information above demonstrates, for each vehicle line that you represent, your dealership's sales are substantially below the dealership's contractual MSR requirement. Indeed, year-to-date through September 2014, your dealership is not even reaching a third of its MSR obligation for any

vehicle line. We are not writing to you about a minor deficiency. Rather, for 2014, your dealership's deficiency already represents *at least 314 lost sales.*

In addition, your dealership continues to fail to capitalize on the demand for CG line vehicles in its assigned Sales Locality, and as a result, your dealership's sales in relation to the sales in the Sales Locality are extremely low. Instead, other CG line dealers account for a significant number of registrations in your dealership's Sales Locality. Indeed, through August 2014 year-to-date, your dealership sold only 12.8% of new CG line vehicles registered in its Sales Locality.

We have previously addressed your dealership's materially deficient sales performance with you on numerous occasions in the hope that your dealership would take effective action to bring its sales performance into compliance with its contractual obligations in this critical area. Among other things, your Area Manager has discussed your MSR performance with you during your regular MSR reviews. We also met with you to discuss these issues on September 18, 2012, August 23, 2012, February 4, 2014 and September 4, 2014. We have also addressed this issue with you in writing, including in letters dated October 3, 2012, November 29, 2012, August 6, 2013, and October 29, 2013.

When these efforts failed to bring about the desired improvement in your dealership's sales performance, we sent your dealership a Notice of Default dated December 17, 2013, in which CG formally notified your dealership of its material breach of its sales performance obligations under each of its Dealer Agreements and provided your dealership with an opportunity to cure its default by achieving 100% of its MSR obligation during the period January 1, 2014 through June 30, 2014.

As indicated in the charts below, your dealership did not cure its sales performance breach during the cure period. Indeed, your dealership's sales performance *declined* during the cure period for three of the four vehicle lines it represents.

All Lines:

Month/Year (YTD)	Dealer's Sales	Dealer's Sales Needed to Obtain 100% MSR	% MSR Attained
December 2013 (month before start of cure period)	188	473	39.7%
June 2014 (final month of cure period)	78	248	31.5%

Chrysler:

Month/Year (YTD)	Dealer's Sales	Dealer's Sales Needed to Obtain 100% MSR	% MSR Attained
December 2013 (month before start of cure period)	16	39	41.0%
June 2014 (final month of cure period)	4	12	33.3%

Dodge:

Month/Year (YTD)	Dealer's Sales	Dealer's Sales Needed to Obtain 100% MSR	% MSR Attained
December 2013 (month before start of cure period)	55	131	42.0%
June 2014 (final month of cure period)	22	70	31.4%

Jeep:

Month/Year (YTD)	Dealer's Sales	Dealer's Sales Needed to Obtain 100% MSR	% MSR Attained
December 2013 (month before start of cure period)	40	106	37.7%
June 2014 (final month of cure period)	24	60	40.0%

RAM:

Month/Year (YTD)	Dealer's Sales	Dealer's Sales Needed to Obtain 100% MSR	% MSR Attained
December 2013 (month before start of cure period)	77	197	39.1%
June 2014 (final month of cure period)	28	106	26.4%

The above data points demonstrate that Dealer has failed to actively, effectively, energetically, and aggressively promote and sell at retail each vehicle line that it represents in its Sales Locality, as it agreed to do in Paragraphs 4 and 11(a) of its Dealer Agreements. As a result, Dealer is in material

breach of its sales performance obligations under its Dealer Agreements. Indeed, Dealer's contractual sales performance obligations are a basic requirement of being a dealer, separate and apart from any desire CG may have to increase market penetration.

Moreover, CG recently reviewed the geography comprising your dealership's Trade Zone. Based on our review, we may consider an adjustment to the census tracts that constitute your trade zone. Had we made such an adjustment prior to 2014, your dealership's MSR performance would have been marginally lower. For example, as of August 2014, your dealership's year-to-date sales performance would have been 20% of MSR, as opposed to 25% of MSR. For purposes of this Notice of Termination, however, we are evaluating your dealership's sales performance under the current Trade Zone definition.

OTHER FACTORS AFFECTING DEALER'S SALES PERFORMANCE

While several factors may be contributing to your dealership's failure to meet its contractual MSR obligations, we feel compelled to identify three specific factors: your dealership's failure to comply with its signage obligations, your dealership's failure to meet its management personnel obligations, and your dealership's failure to meet its advertising and sales promotion obligations.

- Dealer's Signage Obligations: We believe that your dealership's failure to meet the signage obligations it agreed to in its Dealer Agreements may be contributing to your dealership's failure to meet its contractual sales performance obligations. In Paragraph 11(g) of the Additional Provisions of each Dealer Agreement, your dealership agreed to display and maintain brand signs and fascia in accordance with the guidelines of CG's Dealership Identification Program. Your dealership has not complied with its signage obligation because the current Chrysler Group brand signs have not been acquired and are not being displayed at your dealership facility. As you know, your dealership is currently displaying signage that it has leased since April 2008, more than six years ago. While at that time, the leased signage was consistent with corporate identity standards and trademarks, CG's implementation of its Millennium signage program in 2010 caused that signage to become obsolete. Unfortunately, after more than four years, your dealership has refused to upgrade its signage in accordance with its contractual obligations under the Dealer Agreements to display current CG brand signs. Your dealership's continued display of obsolete and outdated signage is inconsistent with CG's corporate identity standards and trademarks, thereby damaging the CG brands, presenting an inconsistent message to your dealership's customers, and, we believe, has negatively impacted your dealership's sales performance.

- Dealer's Management and Sales Personnel Obligations: We believe that your dealership's failure to meet the management and sales personnel obligations it agreed to in its Dealer Agreements may be contributing to your dealership's failure to meet its contractual sales performance obligations. In Paragraph 11(f) of the Additional Provisions of the Dealer Agreements, your dealership agreed to employ and maintain the number of competent management and sales personnel necessary for your dealership to carry out successfully its obligations under its Dealer Agreements, including satisfying its MSR requirements. Your dealership has not done so. For example, we understand that your dealership has not hired a sufficient number of sales personnel to meet its MSR obligations. In addition, we understand that your dealership has not hired a general manager for the CG vehicle lines that has been able to bring your dealership's sales performance in line with its contractual MSR obligations. We believe this has negatively impacted your dealership's sales performance.

- Dealer's Advertising and Sales Promotion Obligations: We believe that your dealership's failure to meet the advertising and sales promotion obligations it agreed to in its Dealer Agreements may be contributing to your dealership's failure to meet its contractual sales performance obligations. In Paragraph 12 of your Dealer Agreements, your dealership agreed to engage in advertising and sales promotion programs to promote CG products and services "vigorously and aggressively." Your dealership has not done so. For example, your dealership's monthly advertising spend has been well below the average for your dealership's Sales Group in the Southwest Business Center. We believe that your dealership's failure to meet its advertising and sales promotion obligations has negatively impacted your dealership's sales performance.

Because Dealer is in material breach of its sales performance obligations under Paragraph 4 of each Dealer Agreement and Paragraph 11(a) of the Additional Provisions of each Dealer Agreement, and because Dealer has failed to cure its material breach of these sales performance obligations, CG has the right to terminate, and is hereby terminating, each Dealer Agreement.

YOUR DEALERSHIP'S FAILURE TO MEET ITS WORKING CAPITAL OBLIGATIONS

In Paragraph 11(e) of the Dealer Agreements, your dealership agreed to maintain the net working capital necessary to successfully carry out all of its obligations under each Dealer Agreement in accordance with the Working Capital Guide.

The following chart shows your dealership's working capital deficiencies:

Month/Year	Dealer's Working Capital	Working Capital Guide	Working Capital Deficiency
October 2014	$463,465	$1,191,400	($727,935)
December 2013	$1,058,514	$1,160,000	($101,486)
December 2012	$628,871	$1,120,000	($491,129)
December 2011	$593,332	$1,108,800	($515,468)
December 2010	$848,830	$1,080,000	($231,170)

As demonstrated above, your dealership is not meeting its working capital obligations, and the deficiency has grown steadily.

We have previously addressed your dealership's breach of its working capital obligations, including in our letters dated August 6, 2013 and October 29, 2013. When these efforts failed to bring about the desired improvement in your dealership's working capital, we sent your dealership a Notice of Default dated December 17, 2013, in which CG formally notified your dealership of its material breach of its working capital obligations under each of its Dealer Agreements and provided your dealership with an opportunity to cure its default by ensuring that its actual working capital meets the requirements of the Working Capital Guide by June 30, 2014.

Your dealership did not cure its working capital breach during the cure period, as indicated in the chart below:

Month/Year	Dealer's Working Capital	Working Capital Guide	Working Capital Deficiency
December 2013 (month before start of cure period)	$1,058,514	$1,160,000	($101,486)
June 2014 (final month of cure period)	$309,101	$1,191,400	($882,299)

As shown in the charts above, your dealership failed to bring its working capital into compliance with the Working Capital Guide and, thus, failed to cure its working capital default.

Because Dealer is in material breach of its working capital obligations under Paragraph 11(e) of the Additional Provisions of each Dealer Agreement, and because Dealer has failed to cure its material breach of these working capital obligations, CG has the right to terminate, and is hereby terminating, each Dealer Agreement.

YOUR DEALERSHIP'S FAILURE TO MEET ITS NET WORTH OBLIGATIONS IS GROUNDS FOR TERMINATION

In Paragraph 11(e) of your Dealer Agreements, your dealership agreed to maintain the net worth necessary to successfully carry out all of its obligations under each Dealer Agreement.

The following chart shows your dealership's continuing net worth deficiencies:

Month/Year	Dealer's Net Worth
October 2014	($2,540,250)
December 2013	($1,996,225)
December 2012	($1,723,136)
December 2011	($1,723,136)
December 2010	($1,143,468)

As demonstrated above, your dealership is not meeting its net worth obligations.

We have previously addressed your dealership's breach of its net worth obligations, including in our letters dated August 6, 2013 and October 29, 2013. When these efforts failed to bring about the desired improvement in your dealership's net worth, we sent your dealership a Notice of Default dated December 17, 2013, in which CG formally notified your dealership of its material breach of its net worth obligations under each of its Dealer Agreements and provided your dealership with an opportunity to cure its default by June 30, 2014.

Your dealership did not cure its net worth breach during the cure period, as indicated in the chart below:

Month/Year	Dealer's Net Worth
December 2013 (month before start of cure period)	($1,996,225)
June 2014 (final month of cure period)	($2,290,801)

Because Dealer is in material breach of its net worth obligations under Paragraph 11(e) of the Additional Provisions of each Dealer Agreement, and because Dealer has failed to cure its material breach of its net worth obligations, CG has the right to terminate, and is hereby terminating, each Dealer Agreement.

TERMINATION OF THE DEALER AGREEMENTS

Based on Dealer's material breach of the Dealer Agreements as set forth above, and based on Dealer's failure to cure its material breaches of the Dealer Agreements, CG has the right to terminate each of the Dealer Agreements pursuant to Paragraph 28(b)(i)-(ii) of the Additional Provisions of the Dealer Agreements. CG also has the contractual right to terminate each of the Dealer Agreements under Paragraph 28(b)(xiii) of the Additional Provisions, which provides as follows:

> [CG] may terminate this Agreement on not less than sixty (60) days written notice for . . . (xiii) the notification of termination or termination, for any reason, of any other [CG] Dealer Agreement(s) which may be in effect between DEALER and [CG.]

CG also has the statutory right to terminate the Dealer Agreements on the grounds stated above. Specifically, Tex. Occ. Code § 2301.453 provides that CG may terminate a dealer agreement for "good cause" upon 60 days' written notice. The grounds for termination identified herein constitute "good cause" for termination under Tex. Occ. Code §§ 2301.453 and 2301.455, and CG is acting in good faith in issuing this notice of termination.

THEREFORE, WE ARE PROVIDING DEALER WITH NOTICE THAT CG INTENDS TO TERMINATE, AND DOES HEREBY TERMINATE, EACH OF THE DEALER AGREEMENTS PURSUANT TO THE STATUTE (INCLUDING TEX. OCC. CODE § 2301.453) AND PARAGRAPH 28(B)(I) AND (II) OF THE ADDITIONAL PROVISIONS OF EACH DEALER AGREEMENT. THE TERMINATION OF EACH DEALER AGREEMENT SHALL TAKE EFFECT, WITHOUT FURTHER NOTICE, SIXTY (60) CALENDAR DAYS AFTER THE DATE OF DEALER'S RECEIPT OF THIS NOTICE.

Sincerely,

Christopher Chandler
National Dealer Placement Manager
Chrysler Group LLC

DC: 45419
BC: 63 – Southwest

cc: Shannon T. Carr, Business Center Director, Southwest Business Center
Todd Tunic, Dealer Network Manager, Southwest Business Center
Board of the Texas Department of Motor Vehicles

OCCUPATIONS CODE

Sec. 2301.455. DETERMINATION OF GOOD CAUSE FOR TERMINATION, DISCONTINUANCE, MODIFICATION, OR REPLACEMENT. **(a)** Notwithstanding the terms of any franchise, in determining whether **good cause** has been **established under Section 2301.453** or 2301.454, the board **shall consider all existing circumstances, including**:

(1) the dealer's sales in relation to the sales in the market;

(2) the dealer's investment and obligations;

(3) injury or benefit to the public;

(4) the adequacy of the dealer's service facilities, equipment, parts, and personnel in relation to those of other dealers of new motor vehicles of the same line-make;

(5) whether warranties are being honored by the dealer;

(6) the parties' compliance with the franchise, except to the extent that the franchise conflicts with this chapter; and

(7) the enforceability of the franchise from a public policy standpoint, including issues of the reasonableness of the franchise's terms, oppression, adhesion, and the parties' relative bargaining power.

(b) The desire of a manufacturer, distributor, or representative for market penetration does not by itself constitute good cause.

ARGUMENT
EXHIBIT #4

OCCUPATIONS CODE

Sec. 2301.803. STATUTORY STAY. (a) On the initiation of a proceeding under this chapter or Chapter 503, Transportation Code, whether by complaint, protest, or otherwise, **a person who receives notice from the board of a statutory stay imposed by this chapter may not allow or commit any act or omission that would**:

(1) violate this chapter, Chapter 503, Transportation Code, any rule, order, or decision of the board, or an order or decision of a person delegated power from the board under Section 2301.154;

(2) **affect a legal right, duty, or privilege of any party** to a proceeding under this chapter or Chapter 503, Transportation Code; or

(3) tend to render ineffectual an order in a pending proceeding.

(b) A statutory stay imposed by this chapter remains in effect until vacated or until the proceeding is concluded by a final order or decision.

(c) A person affected by a statutory stay imposed by this chapter may request a hearing to modify, vacate, or clarify the extent and application of the statutory stay.

ARGUMENT
EXHIBIT #5

STATE OFFICE OF ADMINISTRATIVE HEARINGS

AUSTIN OFFICE
300 West 15th Street Suite 504
Austin, Texas 78701
Phone: (512) 475-4993
Fax: (512) 322-2061

DATE: **5/16/2017**

NUMBER OF PAGES INCLUDING THIS COVER SHEET: **8**

REGARDING: **EXCEPTIONS LETTER (BY ALJ)**

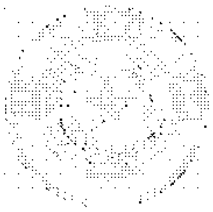
DOCKET NUMBER: **608-15-4315.LIC**

JUDGE HUNTER BURKHALTER

FAX TO:	**FAX TO:**
WILLIAM R. CROCKER (ATTORNEY AT LAW)	(512) 474-2540
MARK T. CLOUATRE	(303) 583-9999
KAREN PHILLIPS (TEXAS AUTOMOBILE DEALERS ASSOCIATION)	(512) 322-0561
JOHN CHAMBLESS, II (THOMPSON, COE, COUSINS & IRONS, L.L.P.)	(512) 708-8777
WEBSTER C. CASH	(303) 244-1879
JOHN P. STREELMAN	(303) 244-1879
J. BRUCE BENNETT	VIA EMAIL
NATHAN ALLEN, JR. (JONES, ALLEN & FUQUAY, LLP)	(214) 343-7455
MVD DOCKET CLERK (MOTOR VEHICLE DIVISION)	(512) 465-4135
DANIEL AVITIA (TEXAS DEPARTMENT OF MOTOR VEHICLES)	(512) 465-3666

Docket Clerk, Fax Number 512/465-4135
NOTE: IF ALL PAGES ARE NOT RECEIVED, PLEASE CONTACT DENISE KIMBROUGH(dki) (512) 475-4993

State Office of Administrative Hearings



Lesli G. Ginn
Chief Administrative Law Judge

May 16, 2017

Daniel Avitia, Director
Motor Vehicle Division
Texas Department of Motor Vehicles
4000 Jackson Avenue
Austin, TX 78731

VIA FACSIMILE NO. 512/465-3666

RE: SOAH Docket No. 608-15-4315.LIC; MVD Docket No. 15-0015.LIC; Cecil Atkission Orange, LLC, d/b/a Cecil Atkission Chrysler Jeep Dodge v. FCA US LLC

Dear Mr. Avitia:

On January 26, 2017, the governing board of the Texas Department of Motor Vehicles forwarded to the State Office of Administrative Hearings (SOAH) an "Interim Order Remanding to SOAH for Further Proceedings" (Remand Order). On March 27, 2017, we issued, in response to the Remand Order, a Supplement to the Proposal for Decision (Supplement PFD). Timely exceptions to the Supplement PFD were filed by Cecil Atkission Orange, LLC d/b/a Cecil Atkission Chrysler Jeep Dodge (Atkission Chrysler). Timely replies to Atkission Chrysler's exceptions were filed by FCA US LLC (Chrysler). This letter responds to Atkission Chrysler's exceptions and Chrysler's replies thereto.

At the outset, we note that Atkission Chrysler attempted, through its exceptions, to introduce new evidence. As we have already ruled in Order No. 12, the new documents attached to Atkission Chrysler's exceptions were not admitted into the evidentiary record in this case and were not considered.

Response to Atkission Chrysler Exception No. 4

In the Remand Order, the Board directed: "the case is remanded to the State Office of Administrative Hearings to further clarify" two issues. As explained in the Supplement PFD, we carefully reviewed the Remand Order and the Board's discussion of the PFD and concluded that

the Board sought additional explanation as to how we reached our conclusions on the two issues. Thus, we concluded there was no need to re-open the evidentiary record or to solicit additional briefing from the parties.

Atkission Chrysler asserts that the decision not to re-open the record "violated the letter and spirit of the remand and Atkission's right to due process of law, and constitutes unlawful procedure under the [Administrative Procedures Act]."[1] We disagree. The "letter" of the Remand Order does not direct us to re-open the record. Similarly, we did not violate the spirit of the Remand Order. A review of the Board's January 5, 2017 discussion of the PFD reveals that certain Board members had questions about our findings as to two issues: the legal status of Cecil Atkission's financial contributions to the business (the so-called "Cecil Money"), and how the Cecil Money bears on Atkission Chrysler's working capital and net worth obligations. The Board members did not suggest that we were hamstrung by a shortage of evidence. They simply suggested we might have decided those issues wrongly. Thus, the Remand Order directed us to "further clarify" our findings on those issues. The Supplement PFD does that. Moreover, we continue to believe that there is no need to re-open the record because there is no dispute over the sufficiency of the evidence, but merely a dispute about the proper meaning of that evidence. The parties have already had the opportunity to present their evidence, and they both took full advantage of that opportunity.

Atkission Chrysler asserts that our decision not to re-open the record violated its right to due process of law and constituted unlawful procedure under the Administrative Procedure Act.[2] The company, however, provides no explanation of its assertion and cites no legal authority to support its claim. We believe, instead, that Atkission Chrysler was provided due process by its participation in the contested case hearing when it had the opportunity to fully present its case and cross-examine all opposing witnesses.

Atkission Chrysler next asserts that our decision not to re-open the record violated "SOAH's regular practice and procedure."[3] We reject the notion that remands at SOAH are legally governed by any unstated "regular practice and procedure." We also reject the premise that Atkission Chrysler's evidence proves the existence of a regular practice and procedure. In support of its argument, the company cites to three contested cases before SOAH over the last 14 years involving three different referring agencies and subject matters. SOAH hears many thousands of cases for scores of referring agencies each year. The premise that the practice followed in three cases over 14 years establishes a regular practice and procedure is not tenable.

---

[1] Atkission Chrysler Exceptions at 4, 11.

[2] Atkission Chrysler Exceptions at 4, 11.

[3] Atkission Chrysler Exceptions at 11 n. 5.

Moreover, the cases cited by Atkission Chrysler are simply inapt. In all three, the referring agency issued a remand order in which it expressly directed the ALJ to re-open the record for the purpose of receiving additional evidence.[4]

Response to Atkission Chrysler Exception No. 1

As already noted, the Remand Order asked the ALJs to "clarify . . . the legal status of the dealer's financial contributions to the business [i.e., the Cecil Money]." In the Supplement PFD we did so, writing a lengthy explanation of why the $6.25 million in Cecil Money should be considered neither the dealer's investment nor its obligation. At the end of that explanation we included the following paragraph:

> The ALJs note that, even if the Cecil Money were re-classified as an investment of the dealer, the overall level of the dealer's investment would still clearly be insufficient and termination would still be warranted. That is, if the Cecil Money were deemed to be a $6.25 million investment in the dealership by the dealer, it would not change the fact that such a level of investment was obviously too little to successfully run the business, as evidenced by the remainder of the PFD which discusses the many ways in which the dealer has chronically underperformed. Stated differently, regardless of how it is classified, the $6.25 million was put to work in the running of the dealership, yet it was plainly not enough to prevent the business from being a poorly operated and money-losing enterprise.[5]

In their exceptions, Atkission Chrysler argues that this paragraph improperly exceeds the scope of the Remand Order:

> The ALJs' sole task on remand was to clarify (1) the "legal status" of the $6.25 million, and (2) how that money does – or does not – support [Chrysler's] proposed termination based on the working capital and net worth obligations. How the dealership was operated, whether it was or was not losing money and any other observations about the dealership or its operations were *irrelevant* to that task and violated the Remand Order.[6]

---

[4] SOAH Dkt. No. 458-14-5030, *Texas Alcoholic Bev. Comn'n v. Hernandez* (Order Granting Motion for Rehearing and Remanding to the State Office of Administrative Hearings); SOAH Dkt. No. 608-13-4599.LIC, *Budget Leasing, Inc. v. Volkswagen Group of America, Inc.* (Interim Order Remanding the Case to the State Office of Administrative Hearings for Further Proceedings); SOAH Dkt. No. 473-03-1282, *Application of Central Power and Light Company for Authority to Reconcile Fuel Costs* (Order on Remand).

[5] Supplement PFD at 8.

[6] Atkission Chrysler Exceptions at 7 (emphasis in original), *see also* at 9.

Atkission Chrysler argues that this is so because "whether the 'level of investment' was 'too little,' as the ALJs assert, is immaterial to the remand *and* to the Board's termination decision. The 'level of investment' in the dealership is not mentioned in the termination statute."[7]

Atkission Chrysler's assertions on this point are incorrect. It is true that the statute governing the termination of dealers does not include the phrase "level of investment." However, the statute does state that the ALJs (and the Board) must consider "the dealer's investment and obligations."[8] In other words, the amount (or level) of a dealer's investment is directly relevant to the issue of termination. In the PFD, we considered the $6.25 million in Cecil Money and concluded that it should not be considered an investment or obligation of Atkission Chrysler.[9] It is this conclusion that some Board members appear to have questioned. Thus, when asked in the Remand Order to "clarify . . . the legal status" of the Cecil Money, it was necessary to revisit the issue of whether, as a legal matter, the Cecil Money constitutes an investment or obligation of Atkission Chrysler. Moreover, we deemed it appropriate to point out that, regardless of how that money is classified, the overall amount of the dealer's investment would still be insufficient and termination would still be warranted.

Response to Atkission Chrysler Exception No. 5

Atkission Chrysler argues that the statement in the Supplement PFD that "the evidence overwhelmingly 'proves' or 'establishes' good cause to terminate the Atkission dealership" is untrue and outside the scope of the Remand Order.[10] Atkission Chrysler's disagreement with the statement has been previously addressed. With regard to the scope of the Remand Order, we believe the statement was appropriately made. The Remand Order asks whether termination was supported by "the legal status of the dealer's financial contributions to the business," and the Supplement PFD concludes that termination is overwhelmingly supported by the evidence.

Response to Atkission Chrysler Exception Nos. 2 and 3

The issues raised in Atkission Chrysler's Exception Nos. 2 and 3 were previously raised in post-hearing briefing and considered in preparation of the PFD and the Supplement PFD. As such, those issues are not re-visited here.

---

[7] Atkission Chrysler Exceptions at 9 (emphasis in original).

[8] Tex. Occ. Code § 2301.455(a)(2).

[9] PFD at 23-29.

[10] Atkission Chrysler Exceptions at 11.

For the foregoing reasons, we recommend no changes to the PFD or the Supplement PFD.

Sincerely,

Hunter Burkhalter
Administrative Law Judge

Meitra Farhadi
Administrative Law Judge

MF/HB/dk

cc: Karen Phillips, General Counsel/EVP, Texas Automobile Dealers Association, 1108 Lavaca St. Suite 800, Austin, TX 78701 - **VIA FACSIMILE**
Mark T. Clouatre, Nelson, Mullins, Riley & Scarborough LLP, 1400 Wewatta St., Ste. 500, Denver , CO 80202 – **VIA FACSIMILE**
Webster C. Cash and John P. Streelman, Wheeler Trigg O'Donnell, LLP, 370 Seventeenth Street, Suite 4500, Denver, CO 80202 - **VIA FACSIMILE**
John Chambless, II, Thompson, Coe, Cousins & Irons, LLP, 701 Brazos, Suite 1500, Austin, TX 78701 – **VIA FACSIMILE**
William R. Crocker, J. 807 Brazos, Suite 1014, Austin, TX 78701 - **VIA FACSIMILE**
J. Bruce Bennett, Cardwell, Hart & Bennett, LLP, 807 Brazos, Suite 1001, Austin, TX 78701 - **VIA EMAIL**
Nathan Allen, Jr., Jones, Allen & Fuquay, LLP, 8828 Greenville Ave., Dallas, TX 75234 - **VIA FACSIMILE**
MVD Docket Clerk, Motor Vehicle Division, Texas Department of Motor Vehicles, 4000 Jackson Avenue, Austin, Texas 78731 – **VIA FACSIMILE**

STATE OFFICE OF ADMINISTRATIVE HEARINGS

AUSTIN OFFICE
300 West 15th Street Suite 504
Austin, Texas 78701
Phone: (512) 475-4993
Fax: (512) 322-2061

SERVICE LIST

AGENCY:	**Motor Vehicles, Texas Department of (TDMV)**
STYLE/CASE:	**CECIL ATKISSION CHRYSLER JEEP DODGE v. FCA US LLC**
SOAH DOCKET NUMBER:	**608-15-4315.LIC**
REFERRING AGENCY CASE:	**15-0015-LIC**

STATE OFFICE OF ADMINISTRATIVE HEARINGS	**ADMINISTRATIVE LAW JUDGE ALJ HUNTER BURKHALTER**
REPRESENTATIVE / ADDRESS	**PARTIES**
MVD DOCKET CLERK MOTOR VEHICLE DIVISION TEXAS DEPARTMENT OF MOTOR VEHICLES 4000 JACKSON AVENUE AUSTIN, TX 78731 (512) 465-7354 (PH) (512) 465-4135 (FAX) marie.medina@txdmv.gov	MOTOR VEHICLE DIVISION
J. BRUCE BENNETT CARDWELL, HART & BENNETT, L.L.P. 807 BRAZOS, STE 1001 AUSTIN, TX 78701 (512) 322-0011 (PH) (512) 322-0808 (FAX) jbb.chblaw@sbcglobal.net	CARDWELL, HART & BENNETT, L.L.P.
MARK T. CLOUATRE ATTORNEY NELSON MULLINS RILEY & SCARBOROUGH LLP 1400 WEWATTA ST., SUITE 500 DENVER, CO 80202 (303) 583-9909 (PH) (303) 583-9999 (FAX) mark.clouatre@nelsonmullins.com	FCA US LLC

JOHN CHAMBLESS, II
ATTORNEY
THOMPSON, COE, COUSINS & IRONS, L.L.P.
701 BRAZOS, SUITE 1500
AUSTIN, TX 78701
(512) 708-8200 (PH)
(512) 708-8777 (FAX)
jchambless@thompsoncoe.com

FCA US LLC

NATHAN ALLEN, JR.
ATTORNEY
JONES, ALLEN & FUQUAY, LLP
8828 GREENVILLE AVENUE
DALLAS, TX 75243-7143
(214) 343-7400 (PH)
(214) 343-7455 (FAX)

JONES, ALLEN & FUQUAY, LLP

WILLIAM R. CROCKER
ATTORNEY AT LAW
807 BRAZOS, SUITE 1014
AUSTIN, TX 78701
(512) 478-5611 (PH)
(512) 474-2540 (FAX)
crockerlaw@earthlink.net

CECIL ATKISSION ORANGE, L.L.C. D/B/A CECIL ATKISSION CHRYSLER JEEP DODGE

DANIEL AVITIA
DIRECTOR
TEXAS DEPARTMENT OF MOTOR VEHICLES
MOTOR VEHICLE DIVISION
4000 JACKSON AVENUE
AUSTIN, TX 78731

(512) 465-3666 (FAX)

TEXAS DEPARTMENT OF MOTOR VEHICLES

WEBSTER C. CASH
WHEELER TRIGG O'DONNELL LLP
370 SEVENTEENTH STREET, SUITE 4500
DENVER, CO 80202
(303) 244-1924 (PH)
(303) 244-1879 (FAX)

FCA US LLC

JOHN P. STREELMAN
WHEELER TRIGG O'DONNELL, LLP
370 SEVENTEENTH STREET, SUITE 4500
DENVER, CO 80202
(303) 244-1865 (PH)
(303) 244-1879 (FAX)
streelman@wtotrial.com

FCA US LLC

KAREN PHILLIPS
TEXAS AUTOMOBILE DEALERS ASSOCIATION
1108 LAVACA, STE 800
AUSTIN, TX 78701
(512) 476-2686 (PH)
(512) 322-0561 (FAX)

TEXAS AUTOMOBILE DEALERS ASSOCIATION

---

xc: Docket Clerk, State Office of Administrative Hearings
Docket Clerk TDMV, Fax No. 512-465-4135

Denise Kimbrough

From: XMediusFAX@soah.state.tx.us
Sent: Tuesday, May 16, 2017 3:15 PM
To: Denise Kimbrough
Subject: Broadcast Completed: EXCEPTIONS LETTER 608-15-4315.LIC
Attachments: E4C47EEE-6B94-4B64-981B-239BB4FAB927-63167-BR.pdf

Time Submitted : Tuesday, May 16, 2017 3:05:03 PM Central Daylight Time
Time Completed : Tuesday, May 16, 2017 3:15:13 PM Central Daylight Time
Nb of Success Items : 6
Nb of Failed Items : 0

Status	Time Sent	Pages Sent	Duration	Remote CSID	Destination	Error Code
Success	Tuesday, May 16, 2017 3:06:59 PM Central Dayli	9	111		5127088777	0
Success	Tuesday, May 16, 2017 3:07:18 PM Central Dayli	9	129	5123220561	5123220561	0
Success	Tuesday, May 16, 2017 3:07:44 PM Central Dayli	9	157	214 343 7455	12143437455	0
Success	Tuesday, May 16, 2017 3:09:54 PM Central Dayli	9	282	5126101324	5124742540	0
Success	Tuesday, May 16, 2017 3:10:03 PM Central Dayli	9	297	5124654135	5124653666	0
Success	Tuesday, May 16, 2017 3:15:03 PM Central Dayli	9	296	5124654135	5124654135	0

Denise Kimbrough

From: XMediusFAX@soah.state.tx.us
Sent: Tuesday, May 16, 2017 3:22 PM
To: Denise Kimbrough
Subject: Broadcast Completed: EXCEPTIONS LETTER 608-15-4315.LIC
Attachments: E4C47EEE-6B94-4B64-981B-239BB4FAB927-63236-BR.pdf

Time Submitted : Tuesday, May 16, 2017 3:16:42 PM Central Daylight Time
Time Completed : Tuesday, May 16, 2017 3:21:33 PM Central Daylight Time
Nb of Success Items : 2
Nb of Failed Items : 0

Status	Time Sent	Pages Sent	Duration	Remote CSID	Destination	Error Code
Success	Tuesday, May 16, 2017 3:19:59 PM Central Dayli	9	194	Wheeler Trigg	13032441879	0
Success	Tuesday, May 16, 2017 3:21:23 PM Central Dayli	9	280	Nelson Mullins	13035839999	0

State Office of Administrative Hearings

Lesli G. Ginn
Chief Administrative Law Judge

June 17, 2016

Daniel Avitia, Director
Motor Vehicle Division
Texas Department of Motor Vehicles
4000 Jackson Avenue
Austin, TX 78731

VIA INTERAGENCY MAIL

RE: SOAH Docket No. 608-15-4315.LIC; MVD Docket No. 15-0015.LIC; Cecil Atkission Orange, LLC, d/b/a Cecil Atkission Chrysler Jeep Dodge v. FCA US LLC

Dear Mr. Avitia:

Please find enclosed a Proposal for Decision in this case. It contains our recommendation and underlying rationale.

Exceptions and replies may be filed by any party in accordance with 1 Tex. Admin. Code § 155.507(c), a SOAH rule which may be found at www.soah.state.tx.us.

Sincerely,

Meitra Farhadi
Administrative Law Judge

Hunter Burkhalter
Administrative Law Judge

MF/eh
Enclosure
cc: Mark T. Clouatre, Webster C. Cash and John P. Streelman, Wheeler Trigg O'Donnell, LLP, 370 Seventeenth Street, Suite 4500, Denver, CO 80202 - **VIA REGULAR MAIL**
John Chambless, II, Thompson, Coe, Cousins & Irons, LLP, 701 Brazos, Suite 1500, Austin, TX 78701 - **VIA REGULAR MAIL**
William R. Crocker, 807 Brazos, Suite 1014, Austin, TX 78701 - **VIA REGULAR MAIL**
MVD Docket Clerk, Motor Vehicle Division, Texas Department of Motor Vehicles, 4000 Jackson Avenue, Austin, Texas 78731 - **VIA INTERAGENCY MAIL**

SOAH DOCKET NO. 608-15-4315.LIC
MVD DOCKET NO. 15-0015.LIC

CECIL ATKISSION ORANGE, LLC, d/b/a CECIL ATKISSION CHRYSLER JEEP DODGE, Complainant	§	BEFORE THE STATE OFFICE
v.	§	OF
FCA US LLC, Respondent	§	ADMINISTRATIVE HEARINGS

TABLE OF CONTENTS

SOAH DOCKET NO. 608-15-4315.LIC
MVD DOCKET NO. 15-0015.LIC

CECIL ATKISSION ORANGE, LLC, d/b/a CECIL ATKISSION CHRYSLER JEEP DODGE, Complainant	§	**BEFORE THE STATE OFFICE**
	§	**OF**
v.	§	
FCA US LLC, Respondent	§	**ADMINISTRATIVE HEARINGS**

PROPOSAL FOR DECISION

Since 2008, Cecil Atkission Orange, LLC d/b/a Cecil Atkission Chrysler Jeep Dodge has operated a Chrysler dealership in Orange, Texas (Atkission Chrysler or the dealership) pursuant to Sales and Service Agreements and their Additional Terms and Provisions (the Dealer Agreements or the franchise agreement) with FCA US LLC (Chrysler or FCA). On December 19, 2014, Chrysler notified Atkission Chrysler of its decision to terminate the Dealer Agreements via a Notice of Termination, citing numerous reasons: (1) failure to meet sales performance obligations; (2) failure to comply with signage obligations; (3) failure to meet management and sales personnel obligations; (4) failure to meet advertising and sales promotion obligations; (5) failure to meet working capital obligations; and (6) failure to meet net worth obligations.[1] In response to the Notice of Termination, on February 20, 2015, Atkission Chrysler filed a protest with the Texas Department of Motor Vehicles (Department).[2] On June 15, 2015, the Department referred this case to the State Office of Administrative Hearings (SOAH) for a contested case hearing.

[1] FCA Ex. 67.

[2] The applicable statutes reference the "board" which, for purposes herein, is the Department and its governing board. Tex. Occ. Code (Code) §§ 2301.002(2), .005(a).

In referring this matter to SOAH, the Department identified the following issues to be addressed in the hearing:

(1) whether FCA's Notice of Termination complied with Texas Occupation Code (Code) § 2301.453;

(2) whether FCA established good cause for termination in accordance with Code § 2301.455;

(3) whether sanctions, penalties, or orders are appropriate under Code chapter 2301, including §§ 2301.651, 2301.801, and 2301.802; and

(4) whether declaratory decisions or orders are required in accordance with Code § 2301.153(a)(8).

After considering the evidence and arguments presented, the Administrative Law Judges (ALJs) find that FCA's Notice of Termination complied with Code § 2301.453 (the procedural process for termination), and FCA has established good cause to terminate the Dealer Agreements in accordance with Code § 2301.455. Accordingly, the ALJs recommend termination of Atkission Chrysler's franchise. Further, because good cause for termination has been determined, sanctions, penalties, and further orders are not appropriate in this case, and further declaratory decisions or orders are not required.

I. PROCEDURAL HISTORY AND JURISDICTION

The hearing on the merits was held on February 8-12, 2016, before ALJs Meitra Farhadi and Hunter Burkhalter in Austin, Texas. Atkission Chrysler appeared and was represented by attorneys William R. Crocker and Nathan Allen, Jr. FCA appeared and was represented by attorneys Mark T. Clouatre, John P. Streelman, and Webster C. Cash, III. The record closed on April 18, 2016, after the parties submitted written closing arguments.

Prior to the hearing on the merits, FCA filed a plea to the jurisdiction alleging Atkission Chrysler failed to timely file its protest, which was denied in SOAH Order No. 7. FCA again raises the same jurisdictional challenge in its closing brief—that, pursuant to Code

§ 2301.453(e), Atkission Chrysler had until February 20, 2015, to file a protest to the Notice of Termination but failed to meet that deadline.[3] Because the ALJs still find that Atkission Chrysler's protest was timely filed with the Department on February 20, 2015,[4] the jurisdictional challenge is again denied. No other notice or jurisdictional challenges were raised by the parties. Therefore, those matters are addressed in the findings of fact and conclusions of law without further discussion here.

II. APPLICABLE LAW

A. Regulatory Framework for Termination

Code chapter 2301 provides the regulatory framework for this case. Under the Code, the Department has the statutory authority to regulate franchise relationships between dealers and motor vehicle manufacturers. Among other things, the Code contains limits on a manufacturer's ability to terminate a franchise agreement with a dealership, requiring that any protested termination must first be approved by the Department.[5] Specifically, the Code provides:

> 2301.453. TERMINATION OR DISCONTINUANCE OF FRANCHISE. (a) Notwithstanding the terms of any franchise, a manufacturer, distributor, or representative may not terminate or discontinue a franchise with a franchised dealer or directly or indirectly force or attempt to force a franchised dealer to relocate or discontinue a line-make or parts or products related to that line-make unless the manufacturer, distributor, or representative provides notice of the termination or discontinuance as required by Subsection (c) and:
>
> (1) the manufacturer, distributor, or representative receives the dealer's informed written consent;
>
> (2) the appropriate time for the dealer to file a protest under Subsection (e) has expired; or
>
> (3) the board makes a determination of good cause under Subsection (g).

[3] FCA Initial Brief at 5.

[4] *See* Exhibit 1 to Atkission Chrysler's Opposition to Plea to Jurisdiction.

[5] Code § 2301.453.

In determining whether to approve a franchise termination after a protest has been filed, the Department must determine whether the manufacturer has established, by a preponderance of the evidence, that there is good cause for the proposed termination.[6] In determining good cause, the Department is mandated to consider all "existing circumstances," including:

(1) the dealer's sales in relation to the sales in the market;

(2) the dealer's investment and obligations;

(3) injury or benefit to the public;

(4) the adequacy of the dealer's service facilities, equipment, parts, and personnel in relation to those of other dealers of new motor vehicles of the same line-make;

(5) whether warranties are being honored by the dealer;

(6) the parties' compliance with the franchise, except to the extent that the franchise conflicts with this chapter; and

(7) the enforceability of the franchise from a public policy standpoint, including issues of the reasonableness of the franchise's terms, oppression, adhesion, and the parties' relative bargaining power.[7]

A desire for market penetration, standing alone, does not establish good cause for termination of a dealer's franchise.[8] If a dealer files a timely protest, then the Department is required to notify the manufacturer, a hearing must be held, and the manufacturer may not terminate the franchise until the Department issues a final decision finding good cause for the termination.[9]

---

[6] Code § 2301.453(g).

[7] Code § 2301.455(a)(1)-(7).

[8] Code § 2301.455(b).

[9] Code § 2301.453(a)(3), (f)(1)-(3).

B. Disputed Legal Issues

In evaluating whether good cause exists for termination of the Atkission Chrysler franchise, the parties disagree on the relevant time period to consider as well as the relevant factors.

1. Time Period

While not specifying an exact time period for evidence to be relevant in this proceeding, Atkission Chrysler argues that the Department is required to consider evidence from both before and after the Notice of Termination.[10] FCA argues, on the other hand, that the Code's use of the phrase "all existing circumstances" means the Department is to consider the information that existed at the time of the Notice of Termination, but should not consider information that did not exist at the time of the Notice of Termination.[11]

While the statute does not set out a specific time period to consider, it does require the Department to consider "all *existing* circumstances."[12] Given this language, the ALJs find the inquiry is not limited to the information in existence at the time of the Notice of Termination. Rather, the inquiry should include all information available to the Department at the time it makes a final decision. The ALJs find further support for this reading in an opinion by the Third Court of Appeals holding that "[t]he Board is authorized to evaluate the dealer's past and *current* performance with regard to sales, service, warranties, and compliance with franchise agreements."[13] FCA cited to this case for the statement that the Board cannot base its decision on "a speculative evaluation of what kind of relationship a manufacturer and dealer might have in the future," and the ALJs agree. However, the circumstances existing up until the time of

---

[10] Atkission Chrysler (AC) Reply Brief at 2-3.

[11] FCA Reply Brief at 2.

[12] Code § 2301.455(a) (emphasis added).

[13] *Ford Motor Co. v. Motor Vehicle Bd. of Texas Dept. of Transp./Metro Ford Truck Sales, Inc.*, 21 S.W.3d 744, 759 (Tex. App.—Austin 2000, pet. denied) (emphasis added).

hearing are not speculative in nature.[14] Because the Administrative Procedure Act requires that findings of fact be based upon evidence in the record or matters officially noticed,[15] the close of the evidentiary record serves as the natural end point for the relevant time period. Thus, the Department can take into account all available information from the evidentiary record when making its decision, giving the Department a better factual basis from which to make a decision. This comports with the language "all existing circumstances" found in the statute. At the same time, it also provides a defined "end point" to the inquiry—with such end point being the close of the evidentiary record. Therefore, the ALJs conclude that the Department should make its determination based on all of the evidence in the record, and this includes any information that bears upon the dealership's performance at any time, including after the Notice of Termination has issued.

2. Factors

Atkission Chrysler claims that when making a good cause determination, the Department should be limited to the grounds listed in the Notice of Termination, "viewed in light of all existing or current circumstances."[16] More specifically, Atkission Chrysler contends that, although the statutory good cause factors listed in Code § 2301.455 may support a termination on a ground identified in the Notice of Termination, they cannot support terminating the dealer's franchise on an unnoticed ground.[17] While Atkission Chrysler cites to a number of decisions in which the Department terminated based on a ground specified in the termination notice, it fails to cite the ALJs to any support for the interpretation that the Department cannot terminate a dealer's franchise on an unnoticed statutory good cause factor.

In contrast, FCA argues that, while the manufacturer must give notice of termination stating the grounds for termination, once a protest is filed the Department must then consider all

---

[14] FCA Reply Brief at 2.

[15] Tex. Gov't Code § 2001.141(c).

[16] AC Reply Brief at 3.

[17] AC Reply Brief at 4.

grounds stated in the Notice of Termination plus all factors listed in Code § 2301.455 to determine if the manufacturer has established good cause to terminate—even if the grounds in Code § 2301.455 include some not listed in the Notice of Termination. As support, FCA cites to a number of appellate cases wherein the inference is made that all of the statutory criteria must be considered by the Department to some degree.[18]

In construing the plain meaning of the Code, it is clear that the Department must consider the factors set forth in Code § 2301.455(a); however, the manufacturer may have additional reasons to terminate that they provide in the Notice of Termination. Thus, the ALJs conclude that the relevant factors for the Department to consider in making a good cause determination are both the grounds specified by the manufacturer in the Notice of Termination as well as the statutory factors set forth in Code § 2301.455(a).

III. BACKGROUND

A. The Dealership

FCA is the exclusive distributor of Chrysler, Jeep, Dodge, and Ram vehicles (Chrysler or FCA vehicles) in the United States. FCA sells Chrysler vehicles to a network of authorized dealers, and the dealers, in turn, sell Chrysler vehicles and provide service to the general public. Atkission Chrysler is an authorized Chrysler dealer located on the south side of Interstate Highway 10 (I-10) at 4103 I-10 East in Orange, Texas.[19] Since March 3, 2008, FCA and Atkission Chrysler have been parties to the Dealer Agreements, which set out the respective obligations of the parties.[20] Atkission Chrysler is one of roughly 170 Chrysler dealers in the State of Texas and is part of FCA's Southwest Business Center—a network of Chrysler dealers spanning six states in the Southwestern United States.[21] Atkission Chrysler is the sole Chrysler

[18] FCA Initial Brief at 50.

[19] FCA Ex. 10.

[20] FCA Exs. 27(b)-27(d), 27(f), 28(a)–28(b).

[21] Tr. at 38-39, 362-63.

dealer responsible for serving consumers in the township and rural areas surrounding Orange, Texas (the Orange Sales Locality).[22] The closest Chrysler dealer is approximately 22 miles away.[23] Atkission Chrysler is part of a dealership group that operates seven car dealerships throughout Texas, three of which are Chrysler dealerships. The group is controlled by Cecil Atkission, an owner and operator of car dealerships with over 30 years of experience in the industry.[24] In addition to the Atkission Chrysler dealership, Mr. Atkission also owns and operates a Toyota dealership in Orange (Atkission Toyota) located approximately 2 miles east of Atkission Chrysler.[25]

On December 17, 2013, FCA issued a Notice of Default to Atkission Chrysler, formally notifying it of its alleged breaches of the Dealer Agreements and allowing an opportunity to cure said breaches within the following 6-month period.[26] Twelve months later, on December 19, 2014, FCA issued the Notice of Termination.[27]

B. The Relocation Issue

Throughout this proceeding, Atkission Chrysler has sought to turn this case into something that it is not. This is a case in which FCA is seeking permission to terminate its Dealer Agreements with Atkission Chrysler. The dealership, however, would like it to be a forum in which it proves that, rather than being terminated, the dealership should be relocated. In order to understand why the ALJs decline to convert this case into a relocation case, it is helpful to understand the history of the relocation issue.

---

[22] FCA Exs. 27(b)-27(d), 27(f), 151 at 5; Tr. at 376. The Orange Sales Locality does not have separate sales zones within it. Tr. at 377.

[23] Tr. at 42.

[24] Tr. at 833-37. Mr. Atkission holds a 52% ownership interest in, and is President of, Atkission Chrysler. FCA Exs. 27(b)-27(d).

[25] Tr. at 833-37.

[26] FCA Exs. 64, 67 at 4.

[27] FCA Ex. 67. The cure deadline set out in the Notice of Default was June 30, 2014. However, FCA subsequently extended the deadline until December 19, 2014, for a total period of 12-months to cure. Tr. at 397.

For reasons that will be explained throughout the remainder of this PFD, Atkission Chrysler considers its current location to be "horrible" and wants to move the dealership to be co-located with the Atkission Toyota dealership. The dealership even takes the position that the move will be a "panacea" which will cure the many deficiencies in its performance.[28]

Mr. Atkission testified that he has never believed the dealership is in a good location, he has wanted to relocate since he bought it in 2008, and he has been working ever since then to relocate it.[29] Mr. Atkission testified that he has "always been committed to the relocation . . . from the time [I] bought it."[30] In 2011 through 2013, he purchased the land next to his Toyota dealership where he hopes to relocate the Chrysler dealership.[31]

In November 2013, Atkission Chrysler made its first-ever, tentative request to FCA for permission to relocate to a site adjacent to Atkission Toyota (the 11/13 Relocation Request). The request consisted of a one-page letter. The only detail provided as to the requested move was the address of the Toyota location.[32] FCA witnesses testified that, in order to evaluate a relocation request, FCA must be provided a number of details, such as the size and dimensions of the new property, blueprints, architectural drawings, and other detailed explanations of what the proposed new facilities would look like, an anticipated construction timeline, and so on. No such details were provided in the 11/13 Relocation Request.[33]

In December 2013, Daniel Fritz, FCA Regional Network Manager for FCA's Southwest, Mid-Atlantic, and Midwest Business Centers, called and emailed Mr. Atkission explaining that it was impossible for FCA to evaluate the 11/13 Relocation Request because it lacked all of the necessary information. Mr. Fritz asked for the additional information and promised that FCA

---

[28] Tr. at 916.

[29] Tr. at 838-40.

[30] Tr. at 903.

[31] Tr. at 840-42.

[32] FCA Ex. 63(a).

[33] Tr. at 185-86, 292-93.

would evaluate the request as soon as the information was received.[34] Mr. Fritz reminded Mr. Atkission in January 2014 that he needed more information.[35] In February 2014, Mr. Fritz and Mr. Atkission toured the proposed relocation site and Mr. Fritz again reminded Mr. Atkission that FCA needed more details about the requested relocation.

In July 2014, eight months after submitting the 11/13 Relocation Request and more than six years after acquiring the dealership, Mr. Atkission first provided to FCA a few details about the proposed relocation. Specifically, he provided a one-page plat of the proposed relocation site.[36] The plat was unsettling to FCA and still lacked the information (such as dimensions, interior layouts, etc.) needed to evaluate the relocation request. FCA was concerned that, as depicted in the plat, the Toyota and Chrysler dealerships would be closely interwoven in a manner that would be confusing to customers. It was also a different layout than had been explained to Mr. Fritz during his February 2014 tour.[37] Nevertheless, FCA evaluated the request and, by letter dated July 28, 2014, notified the dealership that it was denying its 11/13 Relocation Request because it was counter to FCA policies (the 7/14 Relocation Denial).[38] The dealership never challenged the 7/14 Relocation Denial, such as by filing a complaint with the Department.

On May 6, 2015, six months after FCA filed its Notice of Termination and on the day a mediation was being held in this termination case, Mr. Atkission emailed to FCA, without any further explanation, three architectural drawings that appear to represent the configuration of his hoped-for new location adjacent to the Toyota dealership (the 5/15 Relocation Request).[39] FCA treated the drawings as a request to relocate, promptly evaluated the request and, by letter dated May 19, 2015, notified the dealership that it was denying the 5/15 Relocation Request for the

---

[34] Tr. at 185-90; FCA Ex. 63(b).

[35] Tr. at 190-91.

[36] FCA Ex. 65(b) at 4; Tr. at 193-94.

[37] Tr. at 194-95.

[38] FCA Ex. 66; Tr. at 196-97.

[39] FCA Ex. 68.

same reasons it denied the prior one (the 5/15 Relocation Denial).[40] According to the FCA employee who signed the 5/15 Relocation Denial letter, National Dealer Placement Manager Christopher Chandler, the 5/15 Relocation Request was: (1) incomplete; (2) unreasonable because it "jammed" the Chrysler facilities into the Toyota facilities and left Toyota with many times the roadway frontage allotted to Chrysler; and (3) improper because it constituted a relocation request at a time when all proceeding regarding Atkission Chrysler should have been legally stayed in light of the pending termination proceeding.[41] The dealership never challenged the 5/15 Relocation Denial, such as by filing a complaint with the Department.

In early September 2015, nine months after FCA filed its Notice of Termination and three months after this termination case had been referred to SOAH, Mr. Atkission emailed to FCA new and different site plans for his hoped-for new location adjacent to the Toyota dealership (the 9/15 Relocation Request).[42] FCA again promptly evaluated the request and, by letter dated September 21, 2015, notified the dealership that it was denying the 9/15 Relocation Request for the same reasons (the 9/15 Relocation Denial).[43] By letter dated October 6, 2015, Mr. Atkission responded to the 9/15 Relocation Denial. This appears to be the first time the dealership ever responded to any of the relocation denials. In the letter, Mr. Atkission stated that the 9/15 Relocation Request "was never intended to be a formal proposal or request for approval of the relocation of the dealership" nor "was it ever intended to satisfy the applicable requirements of the Texas Occupations Code." Instead, its purpose was merely to show FCA the relocation "concept."[44]

Despite Mr. Atkission's insistence that he had never filed an actual relocation request, on December 31, 2015, Atkission Chrysler filed with the Department an Original Complaint appealing the 9/15 Relocation Denial. On February 10, 2016, the Department notified the

---

[40] FCA Ex. 69; Tr. at 294-95.

[41] Tr. at 408-09.

[42] FCA Exs. 72, 74; Tr. at 296, 411-12.

[43] FCA Ex. 75; Tr. at 412-13.

[44] FCA Ex. 76.

dealership that it was rejecting the Original Complaint on the grounds that it was barred by a statutory stay and, therefore, not ripe for adjudication.[45] Since the 9/15 Relocation Request, FCA has received no more relocation requests.[46]

Atkission Chrysler has never provided to FCA all of the information needed to fully evaluate a relocation request.[47] Mr. Atkission claimed to have received "tentative" approval from Toyota for the move, but agreed that he lacked "final" approval from Toyota.[48]

The ALJs present this history regarding the relocation issue to make two points. First, as a matter of law the dealership's desire to relocate has never been, and cannot legally be, a part of this case. By statute, as soon as FCA initiated this termination proceeding, the dealership was prohibited from committing any act that could affect the legal rights or duties of the parties.[49] Accordingly, on March 2, 2015, the Department issued an order imposing a stay in accordance with the statute. On December 31, 2015, Atkission Chrysler moved to have its appeal of the 9/15 Relocation Denial consolidated with this case. Because that appeal was stayed by operation of law and because the appeal had not been referred by the Department to SOAH as a contested case, the dealership's request was denied.[50] Moreover, on February 10, 2016, the Department notified the dealership that was rejecting the dealership's Original Complaint on the grounds that it is not ripe for adjudication.[51]

Second, the history of the relocation issue sheds an unflattering light on the dealership in a way that suggests termination is warranted. As will be seen throughout the rest of this PFD, Atkission Chrysler consistently has been a poorly performing dealership since its inception in

---

[45] FCA Ex. 163.

[46] Tr. at 415.

[47] Tr. at 291, 1004.

[48] Tr. at 1004-05.

[49] Code § 2301.803(a)(2).

[50] SOAH Order No. 8 issued January 8, 2016.

[51] FCA Ex. 163.

2008. In this case, the dealership has blamed its location as the sole cause of its poor performance. As will be discussed more below, the ALJs are not convinced that the location is a bad one, nor are they convinced that the dealership's poor performance can be blamed on the location.

Mr. Atkission repeatedly testified that he has always believed that the location was bad and has been working to move it since purchasing it in 2008. The evidence proves otherwise. The dealership's first request to move was made in late 2013. That request and all those that followed were incomplete, ineffective, and submitted without any urgency on the dealership's part. Despite repeated explanations from FCA as to what information was needed, none of the dealership's requests were complete, but consisted of only the barest of information. Moreover, most of the requests came after this termination proceeding had already begun. This suggests that the relocation issue was not being legitimately raised by the dealership but, rather, constitutes a defensive strategy to counter the termination proceeding. Even today, there is no complete relocation request, but only a bare-bones "concept."

Thus, taking the dealership's arguments at face value, that it is in a "horrible" location that has caused it to perform at a very sub-par level for eight years, it still has to correct the situation or even start the process with FCA whereby the situation might be corrected. This suggests that the dealership lacks the fundamental will or ability to manage its own affairs. This behavior leads to the conclusion that it is entirely reasonable for FCA to want to terminate its business relationship with the dealership.

IV. DISCUSSION OF THE ISSUES

Because all six of FCA's reasons for termination overlap with the statutory factors, they will be discussed within the context of the statutory factors.

A. Whether FCA's Notice of Termination Complied with Code § 2301.453

The evidence in the record shows the following. On December 19, 2014, FCA notified Atkission Chrysler of its decision to terminate the dealer franchise agreement, citing the following reasons: (1) failure to meet sales performance obligations; (2) failure to comply with signage obligations; (3) failure to meet management and sales personnel obligations; (4) failure to meet advertising and sales promotion obligations; (5) failure to meet working capital obligations; and (6) failure to meet net worth obligations.[52] The notice contained specific grounds for the termination, included the required "conspicuous statement," and specified that the termination would not take effect until 60 days after the date the dealer received the Notice of Termination.[53] In response, Atkission Chrysler filed a Notice of Protest of Franchise Termination with the Department on February 20, 2015.

Atkission Chrysler does not contend that FCA's Notice of Termination failed to comply with the requirements set forth in Code § 2301.453. The ALJs conclude that FCA's Notice of Termination complied with Code § 2301.453.

B. Atkission Chrysler's Sales in Relation to Sales in the Market

One of FCA's primary contentions in this case is that Atkission Chrysler has consistently underperformed in its market.[54] In addition to the Code's required analysis of the dealership's sales in relation to sales in the market, FCA's Notice of Termination identified Atkission Chrysler's failure to meet its sales performance obligations as one of the reasons it seeks to terminate the Dealer Agreements.[55] FCA based this reason on Paragraph 4 of each Dealer Agreement and Paragraph 11(a) of the Additional Provisions of each Dealer Agreement. These sections provide:

---

[52] FCA Ex. 67.

[53] Code § 2301.453(c); FCA Ex. 67.

[54] FCA Initial Brief at 19.

[55] FCA Ex. 67.

> Dealer will actively and effectively sell and promote the retail sale of [Chrysler] vehicles, vehicle parts and accessories in the Dealer's Sales Locality.[56]
>
> Dealer shall use its best efforts to promote energetically and sell aggressively and effectively . . . [Chrysler] vehicles . . . in Dealer's Sales Locality. Dealer will sell the number of new [Chrysler] vehicles necessary to fulfill Dealer's Minimum Sales Responsibility.[57]

FCA expert witness Sharif Farhat, Vice President of Expert Analytical Services for Urban Science Application,[58] evaluated Atkission Chrysler's sales performance as compared to its sales performance obligations, the reasonableness of FCA's determination that Atkission Chrysler failed to actively and effectively promote the sale of Chrysler vehicles, and whether FCA has good cause to terminate Atkission Chrysler's franchise for unsatisfactory sales performance.[59] To perform his analysis, Mr. Farhat identified the relevant area to be analyzed and the standard upon which to assess performance, measured actual performance to the standard identified, and determined the cause(s) of the dealer's performance variation.[60] Based on his analysis, Mr. Farhat concluded that good cause existed to terminate the Dealer Agreements.[61] He explained that FCA's method of evaluating dealer sales performance is reasonable, conservative, and consistent with industry standards; Atkission Chrysler has failed to capture anywhere near its available sales opportunities; and Atkission Chrysler's poor sales performance is due to factors under Atkission Chrysler's direct control.[62]

---

[56] "Sales Locality" means the area designated in writing as the territory of the dealer's responsibility for the sale of Chrysler vehicles, although the dealer is free to sell to customers wherever they may be located. FCA Exs. 27(b) at 2, 27(c) at 2, 27(d) at 2.

[57] FCA Exs. 28(a) at 3, 28(b) at 3.

[58] Urban Science Application is a consulting company that specializes in dealer network analysis in the automotive industry. FCA Ex. 151 at 1.

[59] FCA Ex. 151 at 1.

[60] FCA Ex. 151 at 3.

[61] FCA Ex. 151 at 4.

[62] FCA Ex. 151 at 4.

1. FCA's Method for Evaluating Dealer Sales Performance

Mr. Farhat explained that, similar to the vast majority of automotive manufacturers operating in the United States, FCA measures a dealer's "sales effectiveness" as a percentage of the dealer's Minimum Sales Responsibility (MSR)—a measure of the sales actually achieved by a dealer against an expected level of sales.[63] The expected level of sales for a dealer is derived from the number of sales a dealer must make to equal the state market share in the dealer's local market (in this case, the Orange Sales Locality).[64] Mr. Farhat testified that MSR is designed to measure whether a dealer's sales are proportional to the opportunity available to the dealer in its assigned area, and that the MSR methodology is commonly used in the automotive industry and is a reasonable benchmark for sales performance.[65] When a dealer's actual sales equal its MSR, its MSR percentage is 100%.[66] An MSR of 100% means that a dealer is meeting the amount of sales it is expected to capture. Atkission Chrysler did not dispute MSR as a reasonable method to evaluate sales in relation to sales in the market.

In calculating Atkission Chrysler's MSR, FCA accounts for consumer characteristics or economic conditions unique to the Orange Sales Locality that could negatively impact Atkission Chrysler's expected sales.[67] For instance, Atkission Chrysler's MSR is adjusted to reflect a larger local consumer preference for large pickup trucks and a weaker local demand for compact cars.[68]

---

[63] FCA measures Minimum Sales Responsibility (MSR) based on the ratio of the dealer's sales anywhere in the United States. FCA Ex. 151 at 4-5; Tr. at 378, 565-66.

[64] FCA Ex. 151 at 4-5.

[65] FCA Ex. 151 at 4-5; Tr. at 565, 599-602.

[66] FCA Ex. 151 at 7.

[67] FCA Ex. 151 at 17-18; Tr. at 566-69.

[68] FCA Ex. 151 at 18-20; Tr. at 575-81.

2. Atkission Chrysler's Poor Sales Performance

The evidence was undisputed that Atkission Chrysler has never met its annual MSR since the dealership commenced operations.[69] The following chart depicts Atkission Chrysler's percentage for MSR achieved since its inception:[70]

Month/Year (YTD)	% MSR Attained
December 2008	40.1%
December 2009	38.2%
December 2010	63.4%
December 2011	49.2%
December 2012	23.6%
December 2013	39.7%
December 2014	27.2%
October 2015	16.2%

Looking more specifically at data from the most recent complete year, 2014, Atkission Chrysler's MSR was 551 vehicles (based on Texas average sales penetration applied to actual consumer segment preferences in the Orange Sales Locality), yet Atkission Chrysler only sold 150 vehicles, representing 27.2% of its MSR.[71] However, in that same year, the Chrysler dealers immediately surrounding Atkission Chrysler reported the following MSR scores:[72]

---

[69] FCA Exs. 39(a)-(h), 129 at 32-33; Tr. at 268-73, 879, 925, 931; AC Initial Brief at 9-10.

[70] FCA Exs. 39(a)-(h); Tr. at 268-73, 879, 931.

[71] FCA Ex. 151 at 7, 30.

[72] FCA Ex. 151 at 32; Tr. at 585-88.

Surrounding Chrysler Dealer	% MSR Attained
Weaver Motors (Kirbyville, TX)	295.9%
Mid County (Port Arthur, TX)	145.5%
Mike Smith (Beaumont, TX)	91.4%
Mark Dodge (Lake Charles, LA)	84.9%

The evidence showed that the surrounding dealers were achieving a higher percentage of MSR than Atkission Chrysler and, unlike Atkission Chrysler, their sales increased correspondingly with the growth in market demand for Chrysler vehicles in Texas.[73]

The data also showed that the surrounding dealers are selling the majority of Chrysler vehicles registered in the Orange Sales Locality. This demonstrates that the residents of Orange are driving anywhere from 20 to 40 miles beyond Atkission Chrysler to purchase Chrysler vehicles. These are referred to as "pump-in" sales.[74] In December 2012, Atkission Chrysler sold only 13.3% of Chrysler vehicles registered in the Orange Sales Locality.[75] From January to August 2014, 88.2% of Chrysler vehicles registered in the Orange Sales Locality were purchased from the surrounding dealers rather than Atkission Chrysler.[76] Christopher Chandler, National Dealer Placement Manager with FCA, described the high degree of pump-ins in the Orange Sales Locality as "stunning" in light of the fact that Atkission Chrysler is the only dealer assigned to that territory.[77]

3. Factors Affecting Atkission Chrysler's Poor Sales Performance

FCA argued that Atkission Chrysler's poor sales performance is due to an insufficient and aging vehicle inventory; high employee and general manager turnover; understaffed sales

[73] Tr. at 62, 179, 306, 573-74, 585-88; FCA Ex. 151 at 25, 32.

[74] Tr. at 79-82, 622-26; FCA Exs. 57(a)-(m).

[75] FCA Ex. 57(b).

[76] Tr. at 399-400; FCA Ex. 67 at 4.

[77] Tr. at 399-400.

force; low advertising expenditures; poor internet promotion and presence; an aging facility with improper signage; and higher prices than surrounding Chrysler dealerships.[78] FCA offered extensive evidence on their efforts to help Atkission Chrysler improve its sales performance, including the opportunity to participate in its dealer upgrade program.[79] The program gives a low performing dealer the opportunity to obtain extra inventory based on the specific inventory shortfalls on that dealer's lot.[80] Despite multiple conversations and notifications from FCA representatives expressing concern that Atkission Chrysler was not achieving 100% of its MSR and urging it to improve its sales performance,[81] Atkission Chrysler declined all but one of the opportunities to participate in the dealer upgrade program, and it increased its inventory for one month only.[82] Terry Williams, FCA's Area Sales Manager for the portion of Texas that includes Orange and Atkission Chrysler, testified that he was surprised by Atkission Chrysler's refusal to participate in the program based on how many extra vehicles it could have obtained for its inventory.[83]

While acknowledging that its sales are far below MSR, Atkission Chrysler argued that the shortfall is caused by its "terrible location." The dealership also contends that FCA is not harmed by its poor performance because the expected market share is being achieved for the Orange Sales Locality—just through the surrounding dealers instead of Atkission Chrysler.[84] The dealership contends that because it is impossible for it to increase its sales from its current location, there is no reason to spend more money on advertising or to increase its inventory.[85]

---

[78] FCA Initial Brief at 8, 11-12, 55; Tr. at 43, 52, 55-62, 105-06, 136, 510-11.

[79] FCA Exs. 54(a)-(l), 54(a),(b),(d)-(g), 56, 58, 59, 61, 62, 64; Tr. at 46-47, 52, 56-58.

[80] Tr. at 114.

[81] FCA Exs. 54(a), 54(c)-(l), 55(a), (b), (d)-(g), 56, 58; Tr. at 52-54, 85-135, 925-26, 930-31.

[82] Tr. at 117; FCA Ex. 53(i).

[83] Tr. at 139-42.

[84] AC Initial Brief at 17; AC Reply Brief at 14.

[85] AC Initial Brief at 20-21.

In addition to pointing to its location as justification for its poor sales, Atkission Chrysler theorized its lack of sales could have been caused by Hurricane Ike, which hit the area in the fall of 2008; the Chrysler bankruptcy filing in 2009; the recession of 2008-2009; and the construction on I-10 that began in February 2010.[86] Mr. Atkission testified that, in his opinion, the hurricane affected the dealership positively at first, in that there was an uptick in sales by people who needed to replace cars damaged by the storm.[87] Mr. Atkission believed that, following the initial increase in sales, however, the market demand diminished due to shifting priorities in response to damage from the hurricane.[88] With regard to the Chrysler bankruptcy in 2009, Mr. Atkission testified that he believed it had a bad effect on the automotive industry as a whole.[89] In discussing the recession that hit the national economy shortly after Mr. Atkission purchased Atkission Chrysler, he explained that business got tough in general but that he did not know what impact it had on Atkission Chrysler.[90] Turning to the construction on I-10, Mr. Atkission stated that it began in February 2010 and took three years to complete in front of Atkission Chrysler. He explained that its major impact was to elevate the portion of I-10 that passes in front of the dealership.[91] Mr. Atkission testified that the access to Atkission Chrysler is worse now than it was before the construction began, and that in his opinion it has affected sales at the dealership because "[d]riving up and down Interstate 10, if you don't know [the dealership] is there, you don't know it's there."[92] When asked about the biggest reason for the poor sales performance of Atkission Chrysler, Mr. Atkission opined that it was due to its location. He does not believe the recession, hurricane, or Chrysler bankruptcy are having any lingering effects on sales.[93]

---

[86] AC Initial Brief at 7; Tr. at 662-63, 847-48, 851-53, 855, 880-82; FCA Ex. 129 at 22.

[87] Tr. at 853.

[88] Tr. at 854-55.

[89] Tr. at 855-56.

[90] Tr. at 847-48, 851.

[91] Tr. at 856-57.

[92] Tr. at 859.

[93] Tr. at 931.

FCA argues that Code § 2301.455 is straightforward and does not allow for a dealership to explain why its performance may be poor.[94] The ALJs agree that the Code does not provide for affirmative defenses to the good cause elements; yet, to the extent that the arguments raised by Atkission Chrysler can be shown to affect the analysis of the dealership's sales in relation to sales in the market, they are relevant.

Examining the evidence, however, demonstrates that none of the excuses offered by Atkission Chrysler were shown to affect the dealership's sales in relation to sales in the market. For example, as Mr. Farhat explained, MSR itself is designed to measure whether a dealer's sales are proportional to the opportunity available in its assigned area, and takes into account national and local changes in vehicle sales.[95] Therefore, any impact of the recession, Chrysler bankruptcy, or Hurricane Ike would be reflected in the MSR. In other words, if those factors affected sales in the market, then the dealership's MSR would be lower and, accordingly, easier for the dealership to achieve. This argument is also refuted by the fact that Atkission Chrysler's sales were at their highest immediately after the recession.[96] Notwithstanding the several reasons given by Atkission Chrysler for the sales deficits, the evidence shows that sales are continuing to decline. In 2012, for example, during a time period when Chrysler sales were increasing across the country, Atkission Chrysler was one of only two Chrysler dealers in the entire Southwest Business Center with declining sales.[97] Turning to Atkission Chrysler's argument that the I-10 construction and location of the dealership in general are the reason why it is one of the worst performing dealerships in Texas, the evidence does not establish that either factor affected the dealership's sales. Specifically, Atkission Chrysler's sales were poor before, during, and after the I-10 highway construction.[98] And nothing suggests that relocating the dealership adjacent to the Atkission Toyota dealership would have any impact on the sales domination by Chrysler

---

[94] FCA Reply Brief at 15.

[95] Tr. at 581-83.

[96] Tr. at 588-90.

[97] Tr. at 305-06.

[98] Tr. at 590, 608-10; FCA Ex. 151 at 11, 68.

dealerships 20-40 miles away.[99] These pump-in sales demonstrate that Chrysler customers are not basing their purchasing decisions on convenience of location.

While Atkission Chrysler's MSR scores alone are telling, they become even more significant when compared to the MSR scores of the Chrysler dealers immediately surrounding the Orange Sales Locality. Whereas Atkission Chrysler's sales have continued to decline, the demand for Chrysler vehicles has increased, and the sales of the surrounding Chrysler dealerships have reflected that increase. The opportunity for sales of Chrysler vehicles in the Orange Sales Locality is evident, but Atkission Chrysler is falling far short of capturing its expected share of these sales.

Additionally, FCA established that Atkission Chrysler received numerous warnings regarding its poor sales performance. FCA also gave Atkission Chrysler multiple opportunities to improve its sales performance, but the dealership failed to do so by not ordering and displaying sufficient product and by not aggressively marketing to compete with the other dealerships. Atkission Chrysler was not just a poor sales performer, it was the worst performing of all Chrysler dealers in Texas in sales.[100] As Mr. Farhat stated, "the difference between [Atkission Chrysler] and the next lowest performing dealer is dramatic."[101]

Although Atkission Chrysler offered multiple excuses for why its sales performance was so low, they do not adequately explain Atkission Chrysler's exceptionally low sales in relation to sales in the market. Therefore, based on the evidence and argument presented, the ALJs conclude that FCA has established that Atkission Chrysler has extremely poor sales in relation to the market, a factor supporting good cause for termination.

---

[99] Tr. at 608-613; FCA Ex. 151 at 69.

[100] FCA Ex. 151 at 40.

[101] Tr. at 586.

C. Atkission Chrysler's Investment and Obligations

Atkission Chrysler contends that it has substantial investments in the business. Mr. Atkission testified that when he purchased the dealership in March 2008, he paid $500,000 to acquire the tangible assets (existing buildings, furniture, fixtures, equipment, tools, etc) plus another $150,000 for the intangibles (business goodwill).[102] In the years since, he has loaned to Atkission Chrysler roughly $6.25 million.[103] Mr. Atkission estimates, if the dealership is terminated, he will personally lose roughly $4 million.[104] He further opined that the only way he can ever recoup his investment is for Atkission Chrysler to be relocated where it can become profitable.[105]

FCA takes issue with the numbers posited by Atkission Chrysler in two ways. First, it challenges their accuracy. For example, although Mr. Atkission may have paid $500,000 for the tangible assets in 2008, the value of those assets is now much lower. In an October 2015 financial statement, the dealership stated that the net value of its building and equipment totaled $88,512. Moreover, if the dealership was terminated, many of those assets could be sold, meaning that their total value would not be lost.[106] FCA also challenges the claim that Mr. Atkission would lose $4 million if the dealership was terminated. The dealership's October 2015 financial statement identified "retained earnings" of -$3,631,353, plus year-to-date earnings of -$613,346, for a total of -$4,244,699.[107] Mr. Atkission conceded that this means the dealership has already lost this value, such that if the dealership is terminated, the only value remaining to be lost is the value of the building and equipment.[108]

---

[102] Tr. at 837, 886-88.

[103] Tr. at 712, 886, 888.

[104] Tr. at 889, 1034.

[105] Tr. at 904-05.

[106] Tr. at 1001-02; FCA Ex. 38(k).

[107] FCA Ex. 38(k).

[108] Tr. at 1003.

Second, and more importantly, FCA contends that the investments and obligations of Mr. Atkission are completely irrelevant. In analyzing the investments and obligations, FCA draws a distinction between the individual (Mr. Atkission) and the dealership (Atkission Chrysler). FCA concedes that Mr. Atkission has made a substantial investment in the dealership, but it contends that his investment is irrelevant to this case. Pursuant to Code § 2301.455(a)(2), the factor to be considered is the "dealer's investment and obligations." By statute, the "dealer" is the "person who holds a general distinguishing number issued by the Board."[109] In turn, "person" expressly includes a "partnership, corporation . . . or any other legal entity."[110] In this case, it is Atkission Chrysler, not Mr. Atkission, which holds the general distinguishing number for the dealership.[111] For this reason, FCA argues, Mr. Atkission's investments and obligations have no bearing on the case as a matter of law.

Atkission Chrysler responds that FCA's argument on this point is "schizophrenic" and "hyper-technical." Essentially, the dealership argues that Mr. Atkission and Atkission Chrysler are one and the same, so that the individual's investments should also count as the entity's.[112] The ALJs disagree. FCA is not construing the statute in a hyper-technical manner. Rather, it is accurately applying the plain meaning of the statute. Moreover, it is Atkission Chrysler, not FCA, that is advocating an unreasonable interpretation. That is, the dealership is essentially arguing that the $6.25 million in loans made by Mr. Atkission should count as the dealership's investments *and* obligations. Logic dictates that it cannot be both. Thus, the ALJs conclude that the $6.25 million cannot be considered as an investment of Atkission Chrysler. As discussed below, however, those monies might be considered as an obligation of the dealership.

As to the other investments of Atkission Chrysler, FCA argues that they are minimal.

---

[109] Code § 2301.002(7).

[110] Code § 2301.002(27).

[111] Tr. at 928-29.

[112] AC Reply Brief at 10.

- Unique among all new car dealerships owned by Mr. Atkission, Atkission Chrysler leases the premises and does not own the land where the dealership is located. The lease expired in 2013, but the dealership remains on a month-to-month holdover tenancy.[113]

- By Mr. Atkission's own admission, the dealership has never been in a desirable location; the dealership's facilities are "in very poor repair, very outdated, not up to [Atkission's] standards at all," "very old" and not laid out very well, and "not very good;" the facilities do not compare favorably to other Chrysler dealerships, or to the Chevrolet, Toyota, and Ford dealerships in Orange; and the facilities need a lot of repairs, are not conducive to a successful business, and not compliant with FCA's image program.[114]

- Tyrone Allred, the current General Manager for Atkission Chrysler, agrees that the dealership's facilities are in poor condition, overdue for replacing, not worth updating, poorly located, and with "horrible" access problems that have lingered for years.[115]

- In January 2008 (at the time he was attempting to acquire the dealership), Mr. Atkission wrote a letter to FCA in which he "committed" to, within 24 months, complete several itemized construction projects in order to "enhance the facility."[116] At the hearing, Mr. Atkission admitted that none of the projects identified in his letter were ever constructed.[117]

- The main sign in front of the dealership was damaged by Hurricane Ike in 2008. The damage was never fixed. Rather, Atkission Chrysler merely placed a plastic bag over it with signage printed on the bag. For years, the dealership has declined to invest in a new sign because Mr. Atkission hopes to relocate.[118]

- As will be discussed in more detail in Section IV.G. below (regarding the dealership's compliance with the terms of the Dealer Agreements), FCA argues that Atkission Chrysler has consistently underfunded and declined to invest in adequate advertising and sales promotion programs.

---

[113] Tr. at 838-39.

[114] Tr. at 838-39, 984-87.

[115] Tr. at 662-63.

[116] FCA Ex. 3.

[117] Tr. at 989-91.

[118] Tr. at 866-70.

- Similarly, as will be discussed in more detail in Section IV.G. below (regarding the dealership's compliance with the terms of the Dealer Agreements), FCA argues that Atkission Chrysler's working capital and net worth have consistently been inadequate, which is further evidence of the minimal nature of the dealership's investments.

- Herbert Walter, FCA's financial and accounting expert, examined the dealership's financial statements and concluded that, as of October 31, 2015, the total value of the dealership's long-term assets was less than $100,000, which, in Mr. Walter's opinion, reflected a lack of permanent investment by the dealership.[119]

- According to Mr. Walter, the great majority of the dealership's assets (slightly more than $4 million) consists of the vehicle inventory, the value of which could largely be recouped by the dealership if its franchise were terminated.[120]

As to Atkission Chrysler's obligations, FCA argues that those obligations are also minimal. As noted above, the dealership is on a month-to-month lease, which frees it from the obligations of a long-term lease. Mr. Atkission has loaned to Atkission Chrysler roughly $6.25 million over the course of several years. On the surface then, this would appear to constitute an obligation of the dealership. FCA argues, however, that given the details of those loans, they should not be considered real obligations. Mr. Atkission's loans to the dealership are made through what he and the dealership employees call "Cecil Money." The funds for the loans come from Mr. Atkission's personal accounts. His long-term practice is to simply write checks to the dealership.[121] These loans are unsecured, treated as subordinated debt on the dealership's books, and apparently lack any of the paperwork that one would normally expect to see with a loan.[122] When the dealership receives a "Cecil Money" check, it records the money as loaned funds, and then pays Mr. Atkission interest on the loans.[123] According to Curtis Coleman, an accountant employed by the corporate group owned by Mr. Atkission, none of the principal of the $6.25 million in Cecil Money loaned to Atkission Chrysler has ever been repaid. However,

---

[119] Tr. at 514-16; FCA Ex. 152 at 63-64.

[120] Tr. at 514-15.

[121] Tr. at 708-10, 753-54.

[122] Tr. at 712, 1066. There was some testimony from Mr. Atkission suggesting that the loans are supported by written agreements, but that the agreements have all been lost or destroyed. Tr. at 979-80.

[123] Tr. at 749-50, 870-71.

interest has been paid on the loans.[124] According to Mr. Atkission, he is paid interest at the rate of around 4%. Thus, assuming loans in the amount of $6.25 million, Mr. Atkission receives annual interest payments from the dealership totaling $250,000.[125]

The dealership's evidence about the extent to which the principal on the loans constitutes an obligation for the dealership was inconsistent at the hearing. On the one hand, the dealership asserted that the loans might one day have to be repaid by Atkission Chrysler. For example, Mr. Coleman opined that if the dealership ever becomes profitable, then Mr. Atkission would begin to be repaid the principal.[126] Mr. Atkission testified that, in the best case scenario, he would ultimately be repaid the $6.25 million in principal.[127]

More often, however, the dealership indicated that it is under no obligation to repay the loans. Mr. Atkission testified that he expects to be paid interest on the principal, but not the principal itself.[128] Tyra Boram, the dealership's office manager and bookkeeper, testified that none of the principal has ever been repaid.[129] Regarding the $6.25 million, Mr. Coleman testified, "[I]t's not debt. It's not repaid to him. It's never been repaid to him. More than likely, it will never be repaid to him."[130] In his opening statement, the dealership's counsel asserted that Mr. Atkission does not want the $6.25 million to be repaid.[131] Based on this evidence, FCA argues that the $6.25 million is not an obligation of the dealership, but a "capital contribution with no terms of repayment."[132]

---

[124] Tr. at 750-51.

[125] Tr. at 977-79.

[126] Tr. at 750-51.

[127] Tr. at 1025.

[128] Tr. at 979-80.

[129] Tr. at 711.

[130] Tr. at 812.

[131] Tr. at 31-32.

[132] FCA Initial Brief at 25.

In sum, FCA argues that the dealership's obligations and investments are minimal or non-existent, and wholly inadequate to operate the business successfully. FCA contends that proof of the inadequacy of the dealership's investments is evidenced by the dealership's chronic sub-par performance, which is discussed throughout the remainder of this proposal for decision.[133]

After considering the evidence and arguments, the ALJ finds this factor supports good cause for termination of the dealership agreements. On the one hand, the dealership's investments are paltry. The dealership does not own the land where the dealership is located, and it only leases the land on a month-to-month basis. The net value of the dealership's building and equipment is less than $100,000. This reflects an almost complete refusal to permanently invest in the business. If the dealership is terminated, these assets could be sold, and much of that value recouped. The asset of greatest value to the dealership is the inventory of vehicles, the value of which appears to hover around $4 million. If the dealership is terminated, the vehicles in inventory could be sold, and much of that value recouped. Mr. Atkission's investments in the dealership cannot properly be considered to be the dealership's investments. The dealership has never been willing to invest a sufficient amount in itself, as evidenced by the fact that the facilities are in poor, outdated condition. The fact that Atkission Chrysler does not have significant investment shows the dealership's lack of commitment to its business and, as such, supports FCA's contention that the dealership should be terminated.

Similarly, the dealership's obligations are minimal. At any given time, Atkission Chrysler is obligated by a one-month tenancy on the land the land where it is located, and the dealership has an obligation to pay roughly 4% interest to Mr. Atkission each year. It is difficult, however, to conclude that the principal on which that interest is calculated (i.e., the $6.25 million in Cecil Money) constitutes a real obligation of the dealership. Essentially everyone, including Mr. Atkission, concedes that those "loans" will probably never be repaid. No principal has ever been repaid, or even demanded, and there is no documentation in the record to indicate that the principal must be repaid. As such, the ALJs cannot conclude that the dealership is under an actual obligation to repay the $6.25 million.

---

[133] FCA Reply Brief at 18-19.

After taking into account all relevant considerations, the ALJs conclude that: (1) Atkission Chrysler's investments are minimal, to the point of being inadequate to properly operate the business; (2) the dealership's obligations are equally minimal; and (3) these factors establish good cause to terminate.

D. Injury or Benefit to the Public

The Code requires an analysis concerning any injury or benefit to the public that might accrue due to termination. FCA argues that this factor weighs heavily in favor of termination because of Atkission Chrysler's failure to satisfy market demand in the Orange Sales Locality, its poor customer service, and its outdated facilities. Also FCA will replace Atkission Chrysler with a more competitive dealer, and the replacement dealer would presumably better satisfy customer needs in the Orange Sales Locality.

Christopher Chandler, National Dealer Placement Manager with FCA, testified that the Orange Sales Locality is a substantial market with a considerable customer base that needs to be taken care of.[134] Mr. Chandler explained that the Orange customers are already traveling past Atkission Chrysler to other Chrysler dealers outside Orange to satisfy their Chrysler needs.[135] Therefore, FCA reasons, the public is currently being inconvenienced by having to drive to other Chrysler dealerships 20-40 miles away from Orange to meet their needs.[136] Consequently, Mr. Chandler opined that, even if there is a time period with no Chrysler dealer in Orange, there would be minimal impact to the public.[137] Moreover, because it is FCA's intent to replace Atkission Chrysler with a stronger local dealer as soon as possible, FCA contends that the inconvenience consumers currently face will be remedied and the public will also have an added benefit of more jobs created in the community.[138]

---

[134] Tr. at 405-06.

[135] Tr. at 406.

[136] FCA Initial Brief at 25-26; Tr. at 329, 592-99.

[137] Tr. at 406.

[138] FCA Initial Brief at 26; Tr. at 405.

FCA also points to consumer dissatisfaction with the Atkission Chrysler dealership as further evidence of public harm that is being caused by the status quo. In customer satisfaction rankings for 2015, Atkission Chrysler was ranked among the worst in Texas. Specifically, it was ranked 88th out of 90 dealers in Texas for sales advocacy, and 85th out of 90 dealers for service advocacy.[139] FCA opined that the customer experience is diminished at Atkission Chrysler due to the dealership's current business practices, refusal to upgrade its signage, failure to maintain an adequate sales staff, and failure to operate from a modern facility.[140] With regard to Atkission Chrysler's current business practices, the testimony revealed that when customers want to purchase a Chrysler vehicle from Atkission Chrysler, they currently have to travel to Atkission Toyota to complete the paperwork and then return to Atkission Chrysler to take possession of the vehicle.[141] Also, Atkission Chrysler routinely charges higher prices for vehicles than other dealerships in the surrounding area and focuses on selling various insurance products and other add-ons to customers. Although beneficial to Atkission Chrysler, these practices pass additional, significant expenses onto the customer.[142] For all these reasons, FCA argues that termination is in the public interest.

Atkission Chrysler asserts, however, that the public has not been inconvenienced by having to drive further away to purchase Chrysler vehicles. Instead, the dealership argues that the only inconvenience shown is to FCA in not achieving its desire for a greater market share in the Orange Sales Locality.[143] As support for this argument, Atkission Chrysler points to the lack of evidence offered by FCA regarding complaints from customers about having to travel to other Chrysler dealerships further away.[144] However, the dealership also paradoxically argues that the

---

[139] Tr. at 277-78.

[140] FCA Initial Brief at 26.

[141] Tr. at 49-50, 896-98, 920-21.

[142] FCA Initial Brief at 28; Tr. at 921.

[143] AC Initial Brief at 22-23.

[144] AC Initial Brief at 23.

termination of its franchise would upset existing customers and require Orange residents to drive to dealerships in the surrounding communities to satisfy their Chrysler needs.[145]

Atkission Chrysler also claims that the injury to the public is derived from its current location, and that allowing Atkission Chrysler to relocate to a different location is the only way to make the dealership more convenient for customers.[146] With regard to its customer satisfaction rankings for 2015, Atkission Chrysler points out that rankings for "sales advocacy" and "service advocacy" are not the same as customer satisfaction scores, and that its customer dissatisfaction level for dealership service was only "sometimes lower than the . . . group average."[147]

After considering the arguments and evidence, the ALJs find that the termination of Atkission Chrysler would have a positive impact on the public. The evidence shows that the public will not be injured by the termination of Atkission Chrysler because the majority of Chrysler customers are already driving 20-40 miles away to avoid having to go to Atkission Chrysler.[148] Even if Atkission Chrysler's franchise were terminated and FCA never installed a new Chrysler dealer in Orange, the impact to the public would be negligible. However, the evidence showed that FCA intends to replace Atkission Chrysler with a new dealer, which would further benefit the public by increasing employment opportunities within Orange and allowing local customers to have their needs met without the inconvenience of driving 20-40 miles away. Regardless of whether Atkission Chrysler is the worst ranked dealership or an average ranked dealership in terms of customer satisfaction, customers are choosing to avoid the dealership altogether and instead travel between 20-40 miles, one way, to visit other Chrysler dealerships in lieu of purchasing from Atkission Chrysler.

---

[145] AC Initial Brief at 23-24.

[146] AC Initial Brief at 23.

[147] AC Reply Brief at 14-15; FCA Ex. 54(a) at 1.

[148] Atkission Chrysler agrees that traveling to surrounding communities is an inconvenience for the public. *See* AC Initial Brief at 23-24.

The evidence also established that, if FCA were to terminate the Atkission Chrysler franchise, the few current employees the dealership has that are not already shared employees with Atkission Toyota would likely be hired at the Toyota dealership.[149] Thus the impact on employment of terminating the Atkission Chrysler franchise in the short-run would be negligible, and in the long-run positive if a new Chrysler dealership is installed and additional jobs are created in Orange. Therefore, the ALJs find that the injury or benefit to the public factor weighs heavily in favor of termination.

E. Adequacy of Atkission Chrysler's Service Facilities, Equipment, Parts, and Personnel in Relation to Those of Other Dealers of New Motor Vehicles of the Same Line-Make

FCA argues that Atkission Chrysler has consistently failed to hire and retain competent sales and management personnel, failed to maintain a personnel force commensurate with other Chrysler dealers, and operates a facility that is significantly worse than those maintained by other Chrysler dealers.[150] While Atkission Chrysler agrees that its facility is generally old and outdated, it argues that FCA failed to produce any evidence to show that its service facilities, equipment, and parts inventory are inadequate in relation to other Chrysler dealers.[151] The dealership also agrees that it has a high turnover of management and personnel; but argues that the high turnover is the result of poor sales, which is caused by being in a bad location.[152]

Minimal evidence was offered with regard to the dealership's service facilities. The evidence that was presented consisted of MSR worksheets for 2013, which indicated that Atkission Chrysler was below its goal to varying degrees and below the average for the Southwest Business Center for service advocacy.[153] The dealership also conceded that it has not

---

[149] Tr. at 1019.

[150] FCA Initial Brief at 37, 39.

[151] AC Initial Brief at 24.

[152] AC Initial Brief at 24-25.

[153] The factors making up service advocacy appear to be customer satisfaction with the service advisor, the service arrival, and the service pickup processes. FCA Exs. 54(a)-(l); Tr. at 103-04, 113.

been able to maintain a viable general manager, sales staff, or other dealership personnel because of the dealership's poor sales.[154] Coupled with Atkission Chrysler's admission that its facility as a whole is in "poor condition," "not conducive to a successful business," an "eye-sore," not comparable to surrounding dealer facilities, and that there are no plans to improve the facility, the evidence leans in favor of termination with regards to the adequacy of the service facilities.[155] Because neither party offered evidence as to the adequacy of the dealership's equipment or parts in relation to those of other Chrysler dealers, this factor has a neutral impact on the good cause determination.

F. Whether Warranties are Being Honored by Atkission Chrysler

Atkission Chrysler contends that this factor favors it.[156] In his role as FCA Regional Network Manager (and his prior role as an FCA Dealer Placement Manager), Mr. Fritz visited Atkission Chrysler twice in 2014. He met both times with Mr. Atkission for the purpose of discussing the dealership's deficiencies. During those meetings, he never indicated that the dealership was not honoring warranties.[157] Mr. Fritz testified that a failure to honor warranties was not one of the reasons why FCA decided to terminate the dealership's franchise.[158] The Notice of Termination itself does not list a failure to honor warranties as a ground for termination.[159] Todd Tunic is FCA's Dealer Network Manager for the Southwest Business Center. He also participated in FCA's decision to issue the Notice of Termination, and he agreed that a failure to honor warranties was not among the reasons for issuing the notice.[160]

---

[154] Tr. at 680, 864-65.

[155] Tr. at 662, 667, 718, 728, 984-87.

[156] AC Initial Brief at 25.

[157] Tr. at 174-85.

[158] Tr. at 213.

[159] FCA Ex. 67.

[160] Tr. at 240-43, 246.

Mr. Williams testified that he was unaware of any customer complaints about warranty service at Atkission Chrysler.[161]

FCA, however, does point to two audits of Atkission Chrysler as evidence that the dealership was not properly honoring warranties. Pursuant to the Dealer Agreements, Atkission Chrysler is obligated to "comply with parts, service, and warranty guides established by [FCA] from time to time." The agreements also include a procedure whereby FCA can issue a "chargeback" to a dealer in order to recoup warranty payments that it made to the dealer if FCA discovers that the payments should not have been made due to a discrepancy caused by the dealer.[162]

FCA periodically audits its dealerships to ensure that they are complying with warranty policies and procedures.[163] In recent years, FCA conducted two audits at Atkission Chrysler, a formal one in 2012 and an informal one in 2014. In the 2012 audit, FCA found a number of errors or discrepancies in the dealership's charges to FCA for various warranty work it had performed. The value of the discrepancies totaled $31,172.86. As a result, FCA issued a chargeback (i.e., demanded reimbursement) for this amount. The dealership apparently paid the chargeback. The causes of the discrepancies are listed in the audit report and consist of the following: "customer signature missing," "tech. notes do not support repair," "labor not supported," "unsupported sublet repairs," "add on operations," "required specs not recorded," "parts unavailable," and "unsupported MOPAR claims." Of all the different causes, "customer signature missing" was far and away the most common cause of discrepancies.[164]

In the 2014 audit, Sheryl Broussard, FCA's service representative, reviewed the dealership's warranty records and identified four instances in which Atkission Chrysler violated FCA's warranty policy when submitting claims for reimbursement for warranty work. The four

---

[161] Tr. at 160.

[162] FCA Exs. 28(a) at 4; 28(b) at 4.

[163] Tr. at 149.

[164] FCA Ex. 41.

claims stated that technicians trained to perform warranty work did the work in question when, in reality, non-trained technicians performed the work.[165]

FCA argues that both of the audits are troubling, but stresses that the 2014 informal audit is especially worrisome because it demonstrates that the dealership used untrained technicians to perform warranty work, but was then reimbursed by FCA at trained technician rates. According to FCA:

> Not only is this conduct dishonest to [FCA] and a violation of the Dealer Agreements, it also creates an extreme danger to the public by allowing untrained technicians to repair vehicles they are not qualified to work on. In short, a technician untrained to perform vehicle repair services exposes . . . customers to undue danger or additional trips to the dealership for subsequent repairs.[166]

Atkission Chrysler responds by pointing out that these audits do not suggest that it is failing to honor the warranties of its customers (which is the relevant factor pursuant to Code § 2301.455(a)(5)). Rather, they merely show that the FCA procedures regarding warranties had not been followed in all respects.[167] Moreover, argues the dealership, the fact that FCA did not mention warranty issues in the Notice of Termination suggests that the company has not considered Atkission's handling of warranty issues to be a significant problem.[168]

The ALJs conclude that this factor is neutral and does not weigh in favor of termination. FCA asserts in briefing that the discrepancies discovered in the two audits are "serious failures" and "anything but typical,"[169] but there is little evidence in the record to support these claims. For example, Mr. Tunic could not offer an opinion as to whether the warranty issues were a "big problem."[170] The ALJs suspect that it is not uncommon for a warranty audit to identify

---

[165] FCA Ex. 43; Tr. at 152-53.

[166] FCA Initial Brief at 35.

[167] AC Initial Brief at 26.

[168] AC Initial Brief at 26.

[169] FCA Reply Brief at 23.

[170] Tr. at 319-21.

discrepancies. Indeed, a chargeback provision is included in the Dealer Agreements to account for discrepancies. If an audit reviews thousands of service records and identifies only a handful of discrepancies, then this might be evidence that the dealership in question is doing excellent work with regards to warranty issues. On the other hand, if an audit of a different dealership reviews thousands of service records and identifies hundreds of discrepancies, then this might be evidence that the dealership is doing a poor job. In this case, there is no yardstick by which the ALJs can measure the scale of the warranty problems at Atkission Chrysler. For the 2012 and 2014 audits, the ALJs cannot discern how many service records were reviewed or the time periods reviewed. Thus, the ALJs cannot know the dealership's accuracy rate in handling warranty issues. For example, with the informal 2014 audit, if Ms. Broussard had reviewed four warranty records and found that, in all four instances, the dealership identified the wrong technician, then this would suggest a 100% failure rate. If, on the other hand, Ms. Broussard had reviewed four thousand warranty records and found only four violations, this would suggest a 0.001% failure rate. Also, there is no evidence in the record as to what constitutes an acceptable discrepancy rate. For example, there is no evidence by which the ALJs can compare Atkission Chrysler's discrepancy rate against those of other dealerships.

The ALJs agree with FCA that the violations found in the 2014 audit are more serious because they demonstrate that warranty work was being performed by untrained technicians. Without more information, however, it is impossible to know how significant a problem this is. The most relevant evidence giving some context to the violations is the fact that FCA has never asserted that it wanted to terminate the dealership because of warranty concerns.

Clearly, there were some issues in which the dealership handled the warranty issues poorly when dealing with FCA, but most of those issues were minor and administrative in nature (such as not getting the customer's signature on the service form). Ultimately, the evidence establishes neither exceptionally good nor exceptionally bad performance by the dealership on warranty issues. Therefore, the ALJs conclude that this factor neither supports nor weighs against termination.

G. The Parties' Compliance with the Franchise, Except to the Extent that the Franchise Conflicts with Code ch. 2301[171]

FCA contends that Atkission Chrysler has breached the Dealer Agreements in no less than nine separate ways, each one of which, standing alone, warrants termination.[172] The nine alleged violations are discussed as follows.

1. Breach of Sales Performance Obligations

The Dealer Agreements obligate Atkission Chrysler to "actively and effectively sell and promote the retail sale of [FCA] vehicles . . . in [the dealership's] Sales Locality," and "use its best efforts to promote energetically and sell aggressively and effectively at retail . . . each and every model of [FCA] vehicles."[173] More concretely, the Dealer Agreements obligate the dealership to "sell the number of new [FCA] vehicles necessary to fulfill [the dealership's] Minimum Sales Responsibility for each passenger car line or truck line" sold by the dealership.[174] This latter requirement is colloquially referred to as the dealership's obligation to achieve 100% of its MSR.

The obligation to achieve 100% of MSR is not a requirement that is unique to Atkission Chrysler. Rather, as admitted to by Mr. Atkission, it is an industry-wide standard that is frequently utilized in auto dealer franchise agreements.[175] Mr. Farhat described the 100% of MSR requirement as a fundamental and long-used standard by many manufacturers in the auto dealership industry.[176] MSR equals the number of retail sales a dealer must sell to equal the state market share in the dealer's local market (in this case, the Orange Texas sales locality).[177]

---

[171] Neither party contends that any provision of the franchise agreement conflicts with Code ch. 2301.

[172] FCA Initial Brief at 36.

[173] FCA Exs. 27(b) at 2, 27(c) at 2, 27(d) at 2, 28(a) at 3.

[174] FCA Ex. 28(a) at 3.

[175] Tr. at 656.

[176] Tr. at 565, 656.

[177] FCA Ex. 151 at 4-5.

Achieving 100% of MSR is equivalent to earning a passing, but average, grade. Many dealers greatly exceed 100% of MSR.[178] For example, in 2014, 91 of the 157 FCA dealers in Texas met or exceeded (in many cases greatly exceeded) their MSR.[179] Atkission Chrysler never challenged the propriety of subjecting it to a MSR standard, nor did it argue that the standard was applied to it incorrectly.

Since its inception in 2008, Atkission Chrysler has achieved 100% of its MSR in only one month.[180] Mr. Atkission acknowledged the dealership's poor MSR performance at the hearing.[181] He also acknowledged that the dealership has never achieved a satisfactory sales volume.[182] Over the years, Mr. Atkission has had multiple conversations with FCA representatives in which those representatives have expressed concern that the dealership is not achieving 100% of its MSR and urged it to improve its performance. The dealership has also received a multitude of letters, reports, and other documents from FCA making the same points.[183]

The dealership's MSR achievement percentages have been quite low. In 2008, the year Mr. Atkission purchased the dealership, its monthly MSR achievement rate began at 70% and steadily declined such that its monthly achievement rate for December was 40%.[184] In 2009, the dealership's monthly MSR achievement percentages ranged in the forties in the months of January and February, and in the thirties every month thereafter.[185] In 2010, the monthly MSR

---

[178] FCA Ex. 151 at 7; Tr. at 52-54, 248, 655.

[179] FCA Ex. 151 at 7.

[180] FCA Ex. 39(d) at 1.

[181] Tr. at 925.

[182] Tr. at 879.

[183] FCA Exs. 54(a), 54(c), 54(d), 54(e), 54(f), 54(g), 54(h), 54(i), 54(j), 54(k), 54(l), 55(a), 55(b), 55(d), 55(e), 55(f), 55(g), 56, 58; Tr. at 52-54, 85-135.

Tr. at 925-26, 930-31.

[184] FCA Ex. 39(a).

[185] FCA Ex. 39(b).

achievement percentages ranged from the thirties to the sixties.[186] In 2011, the dealership began in January with a 113% MSR achievement rate. Thereafter, the rates were never again at or above 100% and steadily declined, such that the rate in December was 49%.[187] In 2012, the percentages were especially low, hovering in the teens and low twenties.[188] In 2013, the dealership began the year at 68% and then steadily declined to end the year at 40%.[189] In 2014, the dealership began in January at 50%, and then spent the rest of the year in the twenties and thirties.[190] In 2015, the percentages were again chronically low, hovering in the teens and twenties.[191] Mr. Chandler calls Atkission Chrysler "one of the worst-performing dealers in the State of Texas."[192] Mr. Fritz agrees and calls the dealership's MSR performance "grossly deficient."[193]

The remarkably poor MSR achievement rate of Atkission Chrysler can perhaps be best understood by comparing its MSR performance against all other FCA dealers in Texas. Over the past four years, out of all FCA dealers in Texas, Atkission Chrysler's MSR achievement rate has ranked as follows:

- In 2012: 148th out of 148
- In 2013: 155th out of 156;
- In 2014: 157th out of 157; and
- In 2015: 165th out of 165.[194]

Atkission Chrysler does not dispute these numbers. Rather, it blames its poor sales performance on what it claims is the poor location of the dealership, as exacerbated by the

[186] FCA Ex. 39(c).

[187] FCA Ex. 39(d).

[188] FCA Ex. 39(e).

[189] FCA Ex. 39(f).

[190] FCA Ex. 39(g).

[191] FCA Ex. 39(h).

[192] Tr. at 396.

[193] Tr. at 180, 183.

[194] FCA Ex. 151 at 40. The data for 2015 is year-to-date through August.

reconstruction of I-10 in front of the dealership that took place in 2010-13.[195] Mr. Atkission testified that, at the time he bought the dealership in 2008, he believed it was in a bad location, and he has always intended to move the dealership. Indeed, he testified that he has been reluctant to spend money improving the current location because his plan has always been to relocate.[196]

The dealership contends it is poorly located because it is in an area where there are no other vehicle dealerships or major retailers nearby. Moreover, in February 2010, the Texas Department of Transportation (TxDOT) began reconstructing I-10 in front of the dealership. That construction work ended in early 2013. Prior to the reconstruction, I-10 in front of the dealership was at ground level. The reconstruction raised the height of I-10 so that it would serve as an overpass over Martin Luther King Boulevard (MLK Blvd.), the cross-street near the dealership. According to Mr. Atkission, the result was that the elevated freeway now largely blocks the dealership from the view of travelers.[197] Prior to reconstruction, there was an MLK Blvd. exit ramp off the freeway that made it easy for customers to access the dealership. According to Mr. Atkission, during the two or three years of construction, all I-10 traffic was routed off the freeway and onto the access roads. The eastbound access road is directly in front of the dealership. Mr. Atkission opined that this was too much traffic in front of the dealership and it was frightening to customers. He testified that, once the construction was completed, road access to the dealership was "worse" but, other than the visibility of the dealership, he did not specify how access was worsened.[198]

The dealership's current General Manager, Tyrone Allred, testified that it is "almost impossible" to see the dealership when driving in front of it on I-10, and that customers have

---

[195] AC Initial Brief at 27.

[196] Tr. at 837-40.

[197] Tr. at 856-57.

[198] Tr. at 856-61.

complained about the difficulty of finding it.[199] Mr. Allred conceded, however, that there are still exit ramps off I-10 for MLK Blvd.[200]

> The Dealer Agreements include the following force majeure clause:
>
> INABILITY TO PERFORM
>
> [N]either DEALER nor [FCA] will be liable for failure to perform its part of this Agreement when the failure is due to . . . acts of government, . . . or other circumstances beyond the control of the parties.[201]

Atkission Chrysler contends that its failure to achieve 100% of MSR was caused by an act of government (TxDOT's reconstruction of I-10) and, therefore, the dealership should not be held accountable for its non-compliance with the MSR requirement.[202]

FCA responds to this force majeure argument in two ways. First, it challenges the notion that the current location is bad. Essentially all of FCA's witnesses testified that the current location is perfectly acceptable for an auto dealership. Mr. Tunic testified that, when he first visited the dealership in 2014, he had no difficulty seeing, finding, or accessing it. His opinion is that the dealership is in "a fine location."[203] He also stated that he is familiar with a number of auto dealers who have continued to meet their MSR requirements even as highway construction has been ongoing in front of their locations.[204] Mr. Fritz testified that, regardless of whether one is traveling east or west on I-10, the dealership is visible and easily accessed from the freeway. He also opined that the current location is conducive to selling cars because it is located on, and is visible from, a major highway, and it is close to population centers and other retail outlets.[205]

---

[199] Tr. at 666-67.

[200] Tr. at 669-70.

[201] FCA Ex. 28(a) at 17.

[202] AC Initial Brief at 27-28; AC Reply Brief at 6.

[203] Tr. at 254-56, 345, 357.

[204] Tr. at 303-04.

[205] Tr. at 197-99.

Mr. Williams does not believe the poor performance can be blamed on the location. He also believes that the public has easy access from the freeway by simply taking the MLK Blvd. exit, regardless of whether traveling east or west on I-10.[206] Mr. Farhat testified that the dealership is easily accessed from the MLK Blvd. exit and, if a customer traveling in either direction on I-10 misses the MLK Blvd. exit, the next exits are not far and finding the way to the dealership remains "very easy." The dealership's signage is visible from the freeway, regardless of the direction of travel. In Mr. Farhat's opinion, as compared to other dealerships Atkission Chrysler is "a very easily accessible dealership."[207]

Morcover, FCA argues that the dealership's actions over the years suggest that it does not really believe the location is as bad as it now contends. Mr. Williams testified that if Atkission Chrysler had really been concerned about visibility problems, it could have rented the several billboards that are near the dealership on both sides of the freeway and are available to rent, but the dealership has never done so.[208] Mr. Atkission agreed that billboards can increase sales, but admitted that the dealership currently has none rented. He also agreed that there is a billboard available to rent directly on the other side of I-10 from the dealership.[209] A photograph of that billboard was admitted in evidence. It depicts a large billboard with the words "ADVERTISE HERE" and a phone number.[210] Mr. Farhat testified that there are other such billboards along I-10 in proximity to the dealership.[211]

Mr. Atkission conceded that the dealership:

- Never spoke with or wrote to TxDOT before or during the construction to modify the design or obtain temporary signage to help customers find their location;

---

[206] Tr. at 43-46.

[207] Tr. at 613-14.

[208] Tr. at 45-46.

[209] Tr. at 946-47.

[210] FCA Ex. 160.

[211] Tr. at 618-22.

- Never asked FCA for any help or adjustments in response to the construction; and
- Never made any operational or advertising changes to deal with the changes (either during or after the construction).[212]

The Dealer Agreements include a provision whereby Atkission Chrysler may ask FCA to lower its required MSR percentage in order to "take into account extraordinary local conditions to the extent . . . such conditions are beyond DEALER's control and have affected DEALER's sales performance."[213] Atkission Chrysler has never asked FCA to adjust its MSR obligation in response to the freeway construction or for any other reason.[214] Mr. Tunic also stated that the dealership has never complained that the MSR requirement was unfair.[215]

As a second counterpoint to the dealership's force majeure claim, FCA argues that the dealership's contention that its poor performance is caused by the TxDOT reconstruction is simply not borne out by the facts. As pointed out by FCA, the dealership's sales "were terrible before the construction, terrible during the construction, and terrible after the construction."[216] FCA's expert witness, Mr. Farhat, examined the highway construction and concluded it could not be blamed for Atkission Chrysler's poor sales performance. He noted that the dealership's sales performance had been consistently bad since its inception. Moreover, its best sales performance periods (relatively speaking) occurred during the highway construction, which belied its claim that the construction was disruptive to business.[217]

The ALJs conclude that this factor favors termination. The dealership has chronically failed to achieve 100% of MSR since 2008, in violation of the terms of the Dealer Agreements.

---

[212] Tr. 987-89.

[213] FCA Exs. 28(a) at 3, 28(b) at 4.

[214] Tr. at 54, 304, 378-79.

[215] Tr. at 304-05.

[216] AC Reply Brief at 25.

[217] Tr. at 608-10; FCA Ex. 151 at 68.

These failures have almost always been by a wide margin, such that the dealership ranks as the very worst performing FCA dealership in the entire state.

The evidence does not prove that this failure was caused by the I-10 reconstruction. The dealership's testimony on this point was not credible. For example, the dealership contended that the reconstruction caused both too much access (i.e. during construction all eastbound traffic was routed onto the access road in front of the dealership, thereby "scaring" customers) and too little access (i.e., the dealership is not visible, post construction). Essentially all of the FCA witnesses testified that that the dealership was visible and easily accessed. The ALJs found this testimony to be credible. The dealership's actions throughout the construction and post-construction phases suggest that the freeway was not really the cause of the dealership's problems. In sum, the dealership failed to prove that its non-achievement of 100% of MSR, and all of its other breaches of the Dealer Agreements, were caused by the I-10 construction. For this reason, the force majeure clause is not applicable.

2. Breach of the Warranty Obligations

Pursuant to the Dealer Agreements, Atkission Chrysler is obligated to "comply with parts, service, and warranty guides established by [FCA] from time to time," as well as FCA's "then current" warranty policies and procedures.[218] As discussed more fully in Section IV.F., above, an audit of Atkission Chrysler in 2012 found that the dealership had committed errors or discrepancies in its charges to FCA for various warranty work it had performed. As a result, FCA issued a $31,172.86 chargeback.[219] A 2014 informal audit identified four instances in which Atkission Chrysler submitted claims for reimbursement to FCA for warranty work and the claims stated that technicians who are trained to perform warranty work did the work in question when, in reality, non-trained technicians actually performed the work, in violation of FCA's

[218] FCA Exs. 28(a) at 4, 28(b) at 4.

[219] FCA Ex. 41.

warranty policies.[220] For the same reasons as discussed in Section IV.F., above, the ALJs conclude that this factor is basically neutral, neither supporting nor weighing against termination.

3. Breach of the Management Obligations

In the Dealer Agreements, there is a section entitled "DEALER'S MANAGEMENT," which reads as follows:

> [FCA] has entered into this Agreement relying on the active, substantial and continuing personal participation in the management of DEALER's organization by:
>
> Cecil R. Atkission
>
> DEALER represents and warrants that at least one of the above-named individuals will be physically present at the DEALER's facility . . . during most of its operating hours and will manage all of DEALER's business relating to the sale and service of [FCA] products. DEALER shall not change the personnel holding the above described position(s) or the nature and extent of his/her/their management participation without the prior written approval of [FCA].[221]

Mr. Chandler testified that, oftentimes, dealers will insert more than one name in this paragraph of the Dealer Agreement, such as by adding the name of the dealership's general manager. This is particularly so in cases in which the owner of the dealership does not live in the town where the dealership is located. In this case, however, the dealership chose only to include Mr. Atkission's name in the provision. FCA leaves the decision regarding whose name(s) to insert completely up to the dealership.[222]

In other dealer agreements that Mr. Atkission has executed for the two other FCA dealership locations that he owns elsewhere in Texas, he chose to insert his name and his general manager's name in this contractual provision. As to Atkission Chrysler, however, Mr. Atkission

---

[220] FCA Ex. 43; Tr. at 152-53.

[221] FCA Exs. 27(b) at 1, 27(c) at 1, 27(d) at 1.

[222] Tr. at 366-67, 456-57.

admitted that he, and only he, made the decision to solely insert his name in the Dealer Agreements.[223] Mr. Atkission admitted that, when he signed the Dealer Agreements for Atkission Chrysler, he represented to FCA that: (1) he was going to be the manager of the dealership; and (2) he would be present during at least half of the dealership's business hours (the 50% presence requirement).[224]

The evidence is undisputed that Mr. Atkission failed to comply with the 50% presence requirement. Mr. Atkission lives in Kerrville, Texas, which is several hundred miles from Orange. He does not have an office at the dealership. He comes to Orange on most (but not all) Tuesdays and splits his time on that day between Atkission Chrysler and Atkission Toyota.[225] Mr. Atkission admitted that he has never been present at the dealership during at least half of its business hours, but estimated he has been present roughly 15% to 20% of business hours.[226] FCA argues that this constitutes a material breach of the agreement.[227]

Atkission Chrysler concedes that Mr. Atkission has failed to abide by the 50% presence requirement. However, it argues that the requirement is not binding. At the time Mr. Atkission signed the Dealer Agreements for Atkission Chrysler, FCA was aware that he owned multiple other dealerships. From these facts, Atkission Chrysler argues that it and FCA had an "understanding" that the 50% presence requirement was not binding.[228]

The dealership's argument is not convincing. As pointed out by FCA, Mr. Atkission has, on multiple occasions, included the names of general managers in the 50% presence requirement

---

[223] Tr. at 911-12.

[224] Tr. at 912-13.

[225] Tr. at 48, 683, 725-26, 909-10.

[226] Tr. at 912-13. The ALJs suspect that this is a too-generous estimation by Mr. Atkission. Mr. Atkission is present for a half day, one day a week. If one assumes a half day equals 4 hours, and the dealership is open 40 hours per week, then he is present only 10% of the time. However, the ALJs suspect the dealership is open substantially more than 40 hours per week.

[227] Tr. at 401-02; FCA Initial Brief at 37-38.

[228] AC Initial Brief at 36-37.

on other dealer agreements. Because he chose to insert only his name in the 50% presence requirement of the Atkission Chrysler Dealer Agreements, it was reasonable for FCA to assume that Mr. Atkission personally planned to comply with the 50% presence requirement.[229] The fact that he has not done so constitutes a breach of the Dealer Agreements, a factor that favors termination.

4. Breach of the Personnel Obligations

The Dealer Agreements obligate Atkission Chrysler to "employ and maintain for its retail business a number of trained and competent new and used motor vehicle sales . . . and general management personnel that are sufficient for DEALER to carry out successfully all of DEALER's undertakings in this Agreement."[230] Mr. Atkission admitted that it is very difficult to find, hire, and retain employees at the dealership. He attributes this problem to the dilapidated appearance of the dealership. He stated: "[I]f I was looking for a job, it's probably not one of the spots that I would want to work at."[231] He also blamed the poor location and poor sales of the dealership, which he believes makes it hard for employees "to make a living."[232] Mr. Atkission and the dealership's current general manager, Mr. Allred, conceded that the store experiences high employee turnover due to low sales.[233]

According to Mr. Williams, the National Dealer Association (NDA) publishes guidelines and recommendations regarding various aspects of the industry. NDA recommends that a salesman should be expected to make roughly eight sales per month. Because Atkission Chrysler's 100% MSR achievement rate works out to roughly 40 cars per month, Mr. Williams and FCA contend that the dealership should have on staff at least five salespeople.[234] The

---

[229] FCA Reply Brief at 38.

[230] FCA Exs. 28(a) at 5, 28(b) at 5.

[231] Tr. at 864.

[232] Tr. at 865.

[233] Tr. at 680, 939.

[234] Tr. at 76-77.

dealership has consistently had fewer salespeople on staff, typically three, but sometimes only two. For example, in August 2012, the dealership had one new car salesman and two used car salesmen. By contrast, the number of salesmen at other dealerships FCA considers Atkission Chrysler to be competitive with averaged nine for new car sales and eight for used car sales.[235]

On numerous occasions over the years, FCA has expressed to Atkission Chrysler concerns about the lack of a sufficient and competent sales force at the dealership. For example, in October 2012, FCA prepared and discussed with the dealership a MSR/Critical Review Worksheet which discussed what FCA considered to be numerous defects in the dealership's operations. At that time, the dealership had three car salesmen on staff, while FCA believed that 4 to 5 were needed in order to achieve 100% of MSR. Moreover, FCA noted that the dealership had "high turnover in sales force and mgmt."[236] Similar conversations were had over the course of many months.[237] In one report, Mr. Williams identified "personnel issues" as being among the causes of the dealership's failure to achieve 100% of MSR.[238]

The dealership has also had high turnover at the general manager (GM) position. Since its inception in March 2008, the dealership has had at least six GMs, a number that Mr. Atkission admits he is not proud of.[239] There have been five GMs just since early 2012. Each change of GM has typically also brought about a new sales manager and further changes in staff. The rate of change in GMs is excessive in comparison to other dealerships.[240] The high turnover of GMs has been disruptive to the business's operations and customer relations.[241] The fact that Mr. Atkission is not personally heavily involved or present at the dealership makes the absence of a steady hand in the GM position even more problematic for efficient operation of the

---

[235] FCA Ex. 53(b); Tr. at 85.

[236] FCA Ex. 53(b) at 1.

[237] *See, e.g.*, FCA Exs. 53(e), 53(j), 54(a), 54(d), 54(e), 54(f), 54(g), 54(h), 55(d).

[238] FCA Ex. 55(a).

[239] Tr. at 939, 947-49.

[240] Tr. at 51-52.

[241] Tr. at 251.

dealership.[242] The most recent, and current, GM is Mr. Allred. He started in that position roughly seven months after FCA issued the Notice of Termination, and he has been GM for less than a year.[243] He received no training for his new job.[244] Moreover, each GM has served a dual role—as the GM not only of Atkission Chrysler, but also of Atkission Toyota.[245] The dealership touts Mr. Allred's long years of experience in the auto sales industry and expresses optimism that, with Mr. Allred, they now have "the right guy" in the GM position. The ALJs find it notable, however, that Mr. Allred was not hired until many months after the Notice of Termination.

Atkission Chrysler also shares a number of other key employees with Atkission Toyota. Ms. Boram serves as the office manager for both businesses and spends most of her time at the Toyota location.[246] The two locations share an employee who handles Finance and Insurance (F&I), two office workers, an accounting department, and a comptroller.[247] Other management positions at the dealership also experience high turnover. For example, at the time Mr. Allred was deposed for this case, the dealership's sales manager had only been employed for a month, his predecessor had held that job for only eight months, the service advisor had held the position for only three months, and the position for advertising manager was vacant. The advertising manager position remained vacant at the time of the hearing.[248]

Atkission Chrysler does not dispute that the dealership is understaffed. Rather, it contends that it has the right number of employees to operate at a sub-par level: "Atkission has staffed the Dealership with the sales and service personnel necessary to meet the low demand

---

[242] Tr. at 278-79.

[243] Tr. at 949.

[244] Tr. at 680.

[245] Tr. at 681.

[246] Tr. at 950.

[247] Tr. at 918.

[248] Tr. at 679-80.

caused by the bad location."[249] The dealership argues that it should be excused, pursuant to the force majeure clause in the Dealer Agreements, from having any more staff on hand: "Requiring the Dealership to spend money . . . for more personnel at the current location would be senseless economically, which is why Section 37 [the force majeure clause] applies to this situation."[250]

The ALJs are unpersuaded by the dealership's arguments. As already discussed above, the ALJs have concluded that the force majeure clause is not applicable to this case. Atkission Chrysler contractually committed itself to employ a sufficient number of employees for it to successfully carry out all of its obligations under the Dealer Agreements. It admits that it has not done so. Instead, it has maintained only enough employees to operate at a level at which it is not carrying out all of its contractual obligations. Moreover, it has declared that it will do no more, because to do so would be "senseless." The dealership argues that it could do better if it moved to a new location, but it contractually bound itself to do better at the *current* location. For these reasons, the ALJs conclude that Atkission Chrysler has breached its personnel obligations in the Dealer Agreements, a factor that favors termination.

5. Breach of the Facility Obligations

The Dealer Agreements obligate Atkission Chrysler to "at all times maintain the Dealership Facilities so that they . . . are relatively equivalent in their attractiveness, level of maintenance, overall appearance and use to those facilities maintained by DEALER's principal competitors."[251] The evidence establishes that the dealership has not complied with this requirement.

By Mr. Atkission's own admission, the dealership's facilities are "in very poor repair, very outdated, not up to [Atkission's] standards at all," "very old" and not laid out very well, and "not very good;" the facilities do not compare favorably to other Chrysler dealerships, or to

---

[249] AC Reply Brief at 6.

[250] AC Reply Brief at 7.

[251] FCA Exs. 28(a) at 5, 28(b) at 5.

the Chevrolet, Toyota, and Ford dealerships in Orange; and the facilities need a lot of repairs, are not conducive to a successful business, and are not compliant with FCA's image program.[252] In January 2008 (at the time he was attempting to acquire the dealership), Mr. Atkission committed, in writing, to complete several construction projects in order to "enhance the facility."[253] At the hearing, Mr. Atkission admitted that none of these projects was ever undertaken.[254]

Mr. Allred agrees that the dealership's facilities are in poor condition, overdue for replacing, and not worth updating.[255] He also agrees that the poor condition of the facilities impacts the dealership's success and affects its customers.[256] Ms. Boram, the dealership's office manager, agrees that the dealership's facilities are worse than the other auto dealers in the area and that the main sign for the facility is "an eyesore."[257] Ms. Boram thinks the best approach for the needed updating of the facility is to simply "burn it" and replace it.[258]

FCA's witnesses agree that the facilities are woefully inadequate and outdated. Mr. Chandler described the dealership as "one of the worst facilities I've ever seen. . . . It's improperly branded, it's improperly maintained. It's old. It's – it's everything that we're trying to get away from as a company."[259] Mr. Fritz testified that the facility does not meet FCA's current design standards, uses obsolete signage, and is poorly maintained.[260] Mr. Tunic testified that the facility is old, dated, in need of repair, and not competitive with other dealers in the

---

[252] Tr. at 838-39, 984-87.

[253] FCA Ex. 3.

[254] Tr. at 989-91.

[255] Tr. at 662-63.

[256] Tr. at 686-87.

[257] Tr. at 728.

[258] Tr. at 718.

[259] Tr. at 381.

[260] Tr. at 199-200.

area.[261] Mr. Farhat described it as a "tired looking," "dated," "sleepy" facility that is in need of paving repairs in the lot, and almost appears to be abandoned.[262]

Atkission Chrysler concedes that it has not met it obligation to operate in facilities that are relatively equivalent in their attractiveness, level of maintenance, and overall appearance to those of its competitors. In his testimony, Mr. Atkission expressly acknowledged this fact.[263] Rather, the dealership argues that it should be excused, pursuant to the force majeure clause in the Dealer Agreements, from this obligation: "Requiring the Dealership to spend money . . . to upgrade its leased facility at the current location would be senseless economically, which is why Section 37 [the force majeure clause] applies to this situation."[264]

The ALJs remain unpersuaded by the dealership's arguments. The ALJs have concluded that the force majeure clause is not applicable to this case. Atkission Chrysler contractually committed itself to operate in facilities that are relatively equivalent in their attractiveness, level of maintenance, and overall appearance to those of its competitors. It admits that it has not done so and declared that it will not do so because it would be "senseless." The dealership argues that it could do better if it moved to a new location, but it contractually bound itself to do better at the current location. For these reasons, the ALJs conclude that Atkission Chrysler has breached its facility obligations in the Dealer Agreements, a factor that favors termination.

6. Breach of the Place of Business Obligations

The Dealer Agreements obligate Atkission Chrysler to conduct its operations "only from the dealership location" and prohibit it from, "either directly or indirectly establish[ing] any place or places of business for the conduct of its Dealership Operations other than from the Dealership's Facilities and Dealership Operations location as set forth in the Dealership Facilities

---

[261] Tr. at 256.

[262] Tr. at 616-18.

[263] Tr. at 932-33.

[264] AC Reply Brief at 7.

and Location Addendum."[265] The Dealership Facilities and Location Addendum, in turn, authorizes Atkission Chrysler to conduct operations solely at its place of business. Atkission Toyota is not identified as an approved location for operations associated with Atkission Chrysler.[266]

The preponderance of the evidence establishes that this "place of business obligation" has been repeatedly breached by the dealership. Typically, the business of completing a transaction for the sale of a new vehicle is handled at the business location of the dealership making the sale.[267] At Atkission Chrysler, the process is handled differently. Because the dealership does not have its own infrastructure as far as a business office or an F&I office, these things are taken care of at the Toyota store. Thus, an Atkission Chrysler customer will deal with a salesperson at the Chrysler location, but when he agrees to purchase an FCA vehicle, he has to travel to the Atkission Toyota location to sign the paperwork and contracts. He then returns to the Chrysler store to take delivery of the vehicle. Mr. Williams testified that this process is more difficult for the customer and makes Atkission Chrysler the "stepchild of" and "subservient to" Atkission Toyota.[268]

Mr. Atkission conceded that the F&I activities for sales of cars at the dealership are handled at the Atkission Toyota location, which is less convenient for the customers. He also agreed that F&I activities are a part of dealership operations.[269] He considers Atkission Chrysler's business office to be located at Atkission Toyota.[270] Mr. Tunic opined that, by making Chrysler customers travel the Toyota location to complete their purchases, Atkission Chrysler is undermining its customer relations.[271]

---

[265] FCA Exs. 28(a) at 5, 28(b) at 5.

[266] FCA Exs. 20, 21; Tr. at 931-35.

[267] Tr. at 279.

[268] Tr. at 49-51.

[269] Tr. at 897-98, 920-21, 936.

[270] Tr. at 897-98.

[271] Tr. at 279-802.

Atkission Chrysler does not dispute that it makes customers travel to the Toyota location to complete transactions. Rather, it makes a "no harm no foul" argument, asserting that this is not a meaningful violation of the terms of the Dealer Agreements because FCA "offered no evidence of any customer complaints about having to complete some paperwork at the Toyota dealership in connection with the purchase of a Chrysler vehicle."[272]

The ALJs find that FCA proved repeated violations of the place-of-business obligation set forth in the Dealer Agreements. Making Chrysler customers travel to the facilities of another brand to complete their transactions causes harm to the Chrysler brand. This fact is self-evident with or without evidence of customer complaints. The ALJs suspect this is precisely why FCA included the place of business obligation in the Dealer Agreements in the first place. The ALJs conclude that this is another factor favoring termination.

7. Breach of the Advertising Obligations

The Dealer Agreements obligate Atkission Chrysler to "promote [FCA] products and services vigorously and aggressively."[273] The evidence establishes that the dealership has not complied with this requirement.

The dealership does not devote vigorous effort to advertising. The dealership's advertising manager position is unfilled.[274] Mr. Atkission explained that the dealership does not spend a fixed amount on advertising. Instead, it aims to spend between 6% and 8% of its gross profits on advertising. Because the amount of gross profits varies over time, the amount spent on advertising also varies.[275] Moreover, because its sales are low and the dealership is a chronically money-losing business, the dealership's gross profits are low, resulting in low advertising expenditures. Based on the amounts spent on advertising as shown in the dealership's own

---

[272] AC Initial Brief at 37.

[273] FCA Exs. 28(a) at 6, 28(b) at 6.

[274] Tr. at 680.

[275] Tr. at 974-75.

financial reports, the dealership has, for years, spent less than half of what other dealers in the Orange area and other dealers of comparable size spend on advertising each month.[276] The dealership argues that its financial statements understate, by roughly $1,600 per month, the amount it spends on advertising.[277] Even assuming this claim is true, however, it does not alter the fact that the dealership greatly underspends on advertising. Even with the claimed amount added in, Mr. Atkission admitted that the dealership spends much less on advertising than its competitors and comparable other dealers.[278]

Since 2013, the dealership has not rented any of the several billboards that are near the dealership on both sides of the freeway and are available to rent.[279] Atkission Chrysler concedes that it has not met its advertising obligations. Again, it argues that it should be excused, pursuant to the force majeure clause, from the obligation of promoting FCA products and services vigorously and aggressively: "Requiring the Dealership to spend money . . . for more advertising . . . at the current location would be senseless economically, which is why Section 37 [the force majeure clause] applies to this situation."[280]

The force majeure clause is not applicable to this case. Atkission Chrysler contractually committed itself to engage in sufficient advertising. It admits that it has not and will not, because to do more would be "senseless." The dealership argues that it could do better if it moved to a new location, but it contractually bound itself to do better at the current location. For these reasons, the ALJs conclude that Atkission Chrysler has breached its advertising obligations in the Dealer Agreements, a factor that favors termination.

---

[276] Tr. at 70-71, 75, 251-52, 402-03; *see also, e.g.*, FCA Exs. 53(b) at 10, 53(e) at 1.

[277] Tr. at 901-02, 942-43.

[278] Tr. at 941.

[279] Tr. at 45-46, 687.

[280] AC Reply Brief at 7.

8. Breach of the Signage Obligations

The Dealer Agreements obligate Atkission Chrysler to "display and maintain brand signs, fascia and other signage in compliance with the policies and guidelines of [FCA's] Dealership Identification Program, including any modification or revisions to such policies and guidelines."[281] Consistent with this obligation, Mr. Atkission signed, on April 9, 2013, a Dealer Identity Program Consent and Participation Agreement (Dealer Identity Agreement) in which the dealership obligated itself to purchase and display FCA's current signage, called "Millennium Signage," which reflects the company's current brand logos and is intended to promote FCA's effort to maintain a recognizable and consistent image nationwide.[282] Millennium Signage has been in effect since 2010.[283]

The evidence establishes that the dealership has not complied with this requirement and has never installed the Millennium Signage. Signage in this context refers not only to the dealership's signs on poles, but also the "fascia," or brands signs that go on the walls of the dealership.[284] The dealership still uses old, out-of-date signage.[285] As stated previously, the main pole sign in front of the dealership was damaged by Hurricane Ike in September 2008, but never fixed.[286] Rather, Atkission Chrysler placed a plastic bag over it with the dealership's name and brands printed on the bag. For years, the dealership has declined to invest in a new sign.[287] According to Mr. Chandler, all of the dealership's current signage is not compliant with FCA policies,[288] and it is the only dealer in the Southwest Business Center whose signage is non-compliant.[289]

---

[281] FCA Exs. 28(a) at 6, 28(b) at 6.

[282] FCA Ex. 31(g); Tr. at 201-02, 415-17.

[283] Tr. at 420-21.

[284] Tr. at 256.

[285] Tr. at 256-57, 401.

[286] Tr. at 713.

[287] Tr. at 866-70, 1012.

[288] Tr. at 418-19.

[289] Tr. at 421-22; FCA Ex. 128.

In May and August 2013, the Principal Group, FCA's vendor responsible for installing Millennium Signage, sent Atkission Chrysler a detailed proposal to bring its signage into compliance. The dealership informed the Principal Group that they were not interested.[290] In May 2015, FCA wrote a letter again urging the dealership to update its signage by implementing the proposal from the Principal Group. The estimated cost of the proposal was roughly $53,000, of which roughly $30,000 was to be paid as a deposit and the remainder was to be paid prior to product shipment.[291] FCA wrote follow-up letters again urging the dealership to come into compliance in August and September 2015.[292] In meetings with Mr. Fritz during this time, Mr. Atkission reported that he had no intention of installing new, compliant signage because he wanted to relocate.[293]

Finally, in mid-September 2015, many months after the Notice of Termination had been issued, the dealership sent the deposit to Principal Group for the signage.[294] However, the dealership never paid the remainder, never sent in documentation needed by the Principal Group to prepare the signs, and never installed the new, required signage. Further, Mr. Atkission testified that he did not intend to do so at the current location.[295] As late as December 31, 2015, Mr. Atkission was told by the Principal Group that it needed additional documentation, but the dealership has not provided it.[296] The ALJs conclude that, by paying the deposit but not doing the other things necessary to complete the installation of the signage, the dealership was attempting to create, for the purposes of this hearing, the appearance of doing something with regard to signage, without really doing anything.

---

[290] FCA Exs. 31(h), 70; Tr. at 417-20.

[291] FCA Ex. 70; Tr. at 423-24.

[292] FCA Exs. 71, 73.

[293] Tr. at 204.

[294] FCA Ex. 144.

[295] Tr. at 211-12; 869-70.

[296] Tr. at 1012-13.

The dealership maintains that it is FCA's duty, not the dealership's, to fix the damaged pole sign. According to Ms. Boram, the sign is owned by FCA and the dealership pays monthly rent to FCA for its use.[297] Mr. Atkission also believes that FCA owns and is responsible for maintaining the pole sign.[298] He testified that the dealership tried unsuccessfully to find the parts needed to repair the sign. He admitted that, other than placing the bag over it and illuminating it, the sign has not been repaired since the 2008 hurricane.[299]

Atkission Chrysler concedes that it has not met its signage obligations. Again, it argues that, pursuant to the force majeure clause in the Dealer Agreements, it should be excused from having compliant signage: "Requiring the Dealership to spend money . . . for new signage . . . at the current location would be senseless economically, which is why Section 37 [the force majeure clause] applies to this situation."[300]

The force majeure clause is not applicable to this case. Atkission Chrysler contractually committed itself to have compliant signage. It admits that it lacks such signage and will not bring the signage up to compliance because to do so would be "senseless." The dealership argues that it could do better if it moved to a new location, but it is contractually bound to do better at the current location. For these reasons, the ALJs conclude that Atkission Chrysler has breached its signage obligations in the Dealer Agreements, a factor that favors termination.

The ALJs find the circumstances regarding the pole sign to be particularly troubling and illustrative. The sign was damaged by a hurricane in 2008. For the almost eight years since then, the sign has consisted of a plastic bag. The dealership claims that it is FCA's duty to repair the sign, but this is contradicted by the plain text of the Dealer Agreements. The dealership's assertion that it tried to fix the sign but was unsuccessful is not credible. The ALJs suspect that signs can be fixed in Orange, Texas just as capably as they can in any other part of the state. The

---

[297] Tr. at 713-15.

[298] Tr. at 865-66.

[299] Tr. at 867-68.

[300] AC Reply Brief at 7.

dealership's actions (or, more accurately, inactions) with respect to the pole sign reveal a remarkable passivity and apathy about its own affairs. This strongly supports FCA's entitlement to the termination it seeks.

9. Breach of the Working Capital and Net Worth Obligations

The Dealer Agreements obligate Atkission Chrysler to "maintain and employ in connection with DEALER's business such net working capital [and] net worth . . . necessary for DEALER to carry out successfully DEALER's undertakings pursuant to this Agreement and in accordance with guides therefore as may be issued by [FCA] from time to time."[301] The dealership also signed a Minimum Working Capital Agreement in which it expressly agreed: (1) that "Working Capital of $908,847 is necessary for DEALER to carry out said DEALER's undertakings;" (2) that the dealership's working capital at the time of the agreement (March 2008) equaled $1,033,200; and (3) that the dealership would maintain working capital of at least $908,847 at all times.[302] The Dealer Agreements further obligate the dealership to submit to FCA "complete and accurate" monthly financial statements which report, among other things, the dealership's net worth and working capital figures.[303]

The evidence establishes that the dealership has not complied with these requirements. The dealership's own financial statements indicate the following, with regard to working capital and net worth:

---

[301] FCA Ex. 28(a) at 5.

[302] FCA Ex. 20.

[303] FCA Ex. 28(a) at 6.

The Dealership's Working Capital[304]

Year-end	Dealership's Working Capital	Amount of Working Capital Required by FCA Guide[305]	Working Capital Deficiency
2010	$848,830	$1,080,000	($231,170)
2011	$593,332	$1,108,800	($515,468)
2012	$628,871	$1,120,000	($491,129)
2013	$1,058,514	$1,160,000	($101,486)
2014	$698,426	$1,191,400	($492,974)
2015 (thru October)	$545,263	$1,254,000	($708,737)

The Dealership's Net Worth[306]

Year-end	Dealership's Net Worth
2010	($637,667)
2011	($1,143,468)
2012	($1,723,136)
2013	($1,996,226)
2014	($2,609,882)
2015 (thru October)	($3,361,905)

The fact that the dealership's net worth has been a steadily growing negative number reflects that Atkission Chrysler has steadily lost money every year since 2010.[307] The numbers reported by the dealership to FCA prove that the dealership has violated the Dealer Agreements by not maintaining: (1) working capital in accordance with the mandatory FCA guides; and (2) net worth at levels necessary for it "to carry out successfully" its obligations under the Dealer

[304] FCA Exs. 33(l), 34(l), 35(l), 36(l), 37(l), 38(k).

[305] The amount of working capital required by the FCA guide varies over time because it is derived from a mathematical formula that takes into account numerous factors related to actual dealership operations. *See* FCA Ex. 20 at 2.

[306] FCA Exs. 33(l), 34(l), 35(l), 36(l), 37(l), 38(k).

[307] *See also* FCA Ex. 152 at 21; Tr. at 478-80.

Agreements. The parties agree that the only way the dealership has remained in operation despite these losses has been the periodic infusions of "Cecil Money."[308]

Atkission Chrysler agrees that, as reflected in the financial statements prepared by the dealership and submitted to FCA over the years, the company's net worth and working capital do not meet the requirements set out in the Dealer Agreements. However, the dealership now argues that, rather than relying on the "working capital" and "net worth" entries on the financial statements, the ALJs and the Department should consider the adequacy of the dealership's "constructive working capital" and "constructive net worth."[309] Specifically, the dealership contends that the "Cecil Money" Mr. Atkission has periodically poured into the dealership ought to be counted as a part of the dealership's working capital and net worth.

To do this, the dealership's accounting expert, Mr. Woodward, would reclassify the Cecil Money on the dealership's financial statements. As reported to FCA, the Cecil Money has been recorded in two entries, "Notes Payable" and "Other Notes and Contracts." Mr. Woodward testified that those entries should be deleted and, in their place, the entire amount of Cecil Money should be entered on the "Subordinated Notes" section of the financial statements. Mr. Woodward argues for this change because he considers "Subordinated Notes" to be a "quasi-capital-net worth account."[310] According to Mr. Woodward, when these changes are made, the dealership's numbers for 2015 (through October) would be:

- "Constructive Working capital": $2,226,237, instead of ($708,737) as reported to FCA; and
- "Constructive Net worth": $2,688,095, instead of ($3,361,905) as reported to FCA.[311]

---

[308] *See, e.g.*, AC Initial Brief at 29.

[309] Tr. at 763-75, 1070.

[310] AC Ex. 29 at 2. During most of the hearing, Atkission Chrysler contended that the Cecil Money totaled $6,250,000. However, the accounting performed by Mr. Woodward suggests that the true amount is $6,050,000.

[311] AC Ex. 29 at 2; Tr. at 1068-69.

With these same changes on all of the financial statements, the dealership would show sufficient working capital and net worth throughout its existence.[312] Mr. Woodward testified that, in the auto retail dealer industry, it is an accepted practice to treat money that an owner loans to his dealership as the dealership's equity, even though it is technically a loan.[313] With these changes, Atkission Chrysler argues that it has never been undercapitalized. It points out that it has always had sufficient capital on hand to pay its bills.[314] Mr. Coleman opined that it is appropriate to treat Cecil Money like working capital because, in practice, the dealership uses it like working capital, to pay the dealership's expenses.[315]

The ALJs find that the dealership's attempt to redefine its working capital and net worth at this stage is unreasonable. FCA points out that Mr. Woodward developed his theory many months after the Notice of Termination was issued, and his recommended changes to the dealership's accounting came about only in response to the Notice of Termination. Mr. Woodward was a credible witness and clearly has expertise in matters of accounting for auto dealerships. Nevertheless, for the eight years of its existence, Atkission Chrysler and FCA have agreed on a generally-accepted yardstick for measuring the dealership's working capital and net worth. During those eight years, the dealership's reported working capital and net worth have always come up short. Now that Atkission Chrysler is confronted with the consequences of not measuring up, it seeks to change the yardstick.

Moreover, the ALJs are convinced that the method of measuring working capital and net worth advocated by FCA (and as reported by the dealership for eight years) is the more standard and generally accepted practice and ought to govern here. For example, prior to this proceeding no one at the dealership ever complained to FCA that the working capital and net worth amounts it had reported over the years were inaccurate or needed to be changed, despite a thorough review by the GM, office manager, dealership accountant, and Mr. Atkission each month prior to

---

[312] Tr. at 763-75, 1082-83.

[313] Tr. at 1075, 1078.

[314] AC Initial Brief at 36; Tr. at 697, 722-23, 755-56.

[315] Tr. at 752-53.

submission to FCA.[316] Moreover, the terms "constructive working capital" and "constructive net worth," as now advocated by the dealership, are not terms of art used in the accounting profession, and the financial reporting forms used by FCA and the dealership do not use either of those terms.[317] The dealership reports its working capital and net worth to the United States Internal Revenue Service in exactly the same way it has always reported them to FCA.[318] Working capital is generally defined as current assets minus current liabilities.[319] A current liability, in turn, is any short-term obligation (i.e. any debt that is paid back within 12 months).[320] The infusions of Cecil Money are often (possibly primarily) used by the dealership to fund short-term loans for vehicle inventory, loans that are often paid down on a daily basis. As explained by FCA's accounting expert, Herbert Walter, because the loans are paid back quickly, they are not long-term obligations and, therefore, cannot be considered a part of working capital or net worth.[321]

Understandably, FCA believes it is important to keep an eye on the working capital and net worth amounts of its dealers. It does this so that it can monitor the financial health of those dealerships. In this case, the numbers paint a clear picture: the dealership has been a slowly dying patient for at least six years, and the only thing keeping it alive has been periodic infusions of Cecil Money. The dealership's attempted reclassification of the accounts would not change that reality. The dealership has lost between $5 million and $6 million since its inception in 2008,[322] and the evidence in the record suggests that this downward trend is only accelerating. The ALJs conclude that Atkission Chrysler has breached its working capital and net worth obligations in the Dealer Agreements, a factor that favors termination.

---

[316] Tr. at 262-63, 790-93.

[317] Tr. at 793-94.

[318] Tr. at 501-02, 995-96.

[319] Tr. at 489.

[320] Tr. at 1120.

[321] Tr. 490-502,

[322] Tr. at 820.

H. The Enforceability of the Franchise from a Public Policy Standpoint

Neither party has asserted that the franchise is unenforceable from a public policy standpoint,[323] and the ALJs can discern no public policy issues related to the enforceability of the franchise. The ALJs conclude that, because the franchise is enforceable from a public policy standpoint and Atkission Chrysler is not complying with multiple requirements of the franchise, this factor supports termination.

I. Whether the Desire for Market Penetration is the Sole Basis for Termination

Market penetration is the ratio of vehicle registrations for a specific brand to the number of vehicle registrations by competitors in a geographic area.[324] The market penetration for Chrysler vehicles in the Southwest Business Center was 11.3% in 2012, 12.2% in 2013, 12.9% in 2014, and 13.1% YTD for 2015, showing a steady increase in the demand for Chrysler vehicles over the past four years.[325] Code § 2301.455(b) provides that in determining whether the party seeking termination has established good cause, "[t]he desire . . . for market penetration does not by itself constitute good cause." In this case, Atkission Chrysler argues that the "true reason" FCA is seeking termination of the Atkission Chrysler franchise is to increase FCA's market penetration in the Orange Sale Locality.[326] As support for this argument, Atkission Chrysler points to the testimony of FCA witnesses wherein they acknowledge FCA's desire to have a dealer in the Orange Sales Locality who will achieve 100% of MSR and have a bigger market share.[327] Additionally, Atkission Chrysler points to the evidence that FCA is achieving 100% of its market share, or 100% registration effectiveness, in the Orange Sales Locality.[328]

---

[323] *See, e.g.*, FCA Ex. 129 at 31; Tr. at 1017.

[324] FCA Ex. 151 at 6.

[325] FCA Ex. 151 at 25.

[326] AC Initial Brief at 38.

[327] AC Initial Brief at 38; Tr. at 63, 329-30, 460-61.

[328] AC Initial Brief at 39; Tr. at 157.

FCA responds that its requested termination of the Atkission Chrysler franchise is bigger than simply a desire for increased market penetration. FCA points to the large amount of evidence expressing the many reasons why FCA is seeking termination of the Atkission Chrysler franchise:

- Atkission Chrysler's many breaches of the Dealer Agreements;
- Atkission Chrysler's failure to take care of the interests of the consumers in the Orange Sale Locality;
- the high amount of "pump in" sales by the surrounding Chrysler dealers into the Orange Sales Locality;
- the lack of efforts made by Atkission Chrysler to improve its operations and cure its deficiencies, and its continual worsening; and
- the damage to the Chrysler brand.[329]

Code § 2301.455(b) makes it clear that the desire to expand market share is, by itself, not sufficient good cause for a modification. However, FCA's concern is not simply a desire for greater market share, but rather a desire to match market performance to what is expected for a dealer in Atkission Chrysler's Sales Locality. In addition, FCA has established a myriad of other bases for termination, including the multiple violations of the Dealer Agreements by Atkission Chrysler, and the potential damage to the Chrysler brand. If Atkission Chrysler were meeting expectations, but FCA simply wanted greater market share, then that factor alone would not justify a modification. But, Atkission Chrysler's underperformance, *i.e.* the failure to meet expectations in regard to sales and sales efforts, is a factor that may be considered in support of good cause. Therefore, the ALJs find that a desire for market penetration is far from a sole basis for termination of the Atkission Chrysler franchise.

[329] FCA Initial Brief at 53-54; FCA Reply Brief at 36.

V. CONCLUSION

Based upon the evidence, FCA's notice of termination complied with Code § 2301.453. Additionally, the evidence overwhelmingly established that good cause exists to terminate Atkission Chrysler's franchise and, accordingly, no penalties, sanctions, or other orders are necessary to address. Therefore, the ALJs recommend that the Department deny Atkission Chrysler's protest and allow FCA to terminate the franchise.

VI. FINDINGS OF FACT

Background/Procedural History

1. FCA US LLC (Chrysler or FCA) is a licensed new motor vehicle distributor in the state of Texas.

2. Cecil Atkission Orange, LLC d/b/a Cecil Atkission Chrysler Jeep Dodge (Atkission Chrysler or the dealership) is a licensed new motor vehicle dealer of Chrysler vehicles and is located at 4103 I-10 E, Orange, Texas 77630.

3. Atkission Chrysler is part of FCA's Southwest Business Center—a network of Chrysler dealers spanning six states in the southwestern United States.

4. Atkission Chrysler is the sole Chrysler dealer responsible for serving consumers in the township and rural areas surrounding Orange, Texas (the Orange Sales Locality).

5. Atkission Chrysler is part of a dealership group that operates seven car dealerships throughout Texas, three of which are Chrysler dealerships, under the direction of Cecil Atkission—an owner and operator of car dealerships with over 30 years of experience in the industry.

6. Atkission Chrysler operates pursuant to Sales and Service Agreements and their Additional Terms and Provisions (the Dealer Agreements or franchise agreement) with FCA.

7. On December 17, 2013, FCA issued a Notice of Default to Atkission Chrysler, formally notifying Atkission Chrysler of its alleged breaches of the Dealer Agreements and allowing an opportunity to cure.

8. On December 19, 2014, FCA notified Atkission Chrysler of its decision to terminate the Dealer Agreements (Notice of Termination), citing Atkission Chrysler's: (1) failure to meet sales performance obligations; (2) failure to comply with signage obligations; (3) failure to meet management and sales personnel obligations; (4) failure to meet advertising and sales promotion obligations; (5) failure to meet working capital obligations; and (6) failure to meet net worth obligations.

9. The Notice of Termination contained specific grounds for the termination, included the required "conspicuous statement," and specified that the termination would not take effect until 60 days after the date the dealer received the Notice of Termination.

10. Atkission Chrysler's timely filed a protest of the Notice of Termination with the Texas Department of Motor Vehicles (Department or Board) on February 20, 2015.

11. On June 15, 2015, the staff (Staff) of the Department referred this case to the State Office of Administrative Hearings (SOAH) for a contested case hearing.

The Relocation Issue

12. Mr. Atkission also owns a Toyota dealership in Orange, Texas (Atkission Toyota). Atkission Chrysler and Atkission Toyota are both located on I-10, roughly two miles apart.

13. Over the years, Atkission Chrysler has made several informal overtures to FCA for permission to move the dealership to a location adjacent to Atkission Toyota. The first such request came in late 2013, and each subsequent request was made after FCA had issued its Notice of Termination.

14. Every relocation request made by Atkission Chrysler was cursory and lacked the information needed in order for FCA to evaluate it.

15. The dealership has never submitted a complete, formal relocation request to FCA, but has only raised the issue of relocation as a concept.

Atkission Chrysler's Sales in Relation to Sales in the Market

16. Minimum Sales Responsibility (MSR) is a measure of sales actually achieved by a dealer against an expected level of sales. The expected level of sales for a dealer is derived from the number of sales a dealer must make to equal the manufacturer's state market share in the dealer's local market.

17. MSR is designed to measure whether a dealer's sales are proportional to the opportunity available to the dealer in its assigned sales locality.

18. When a dealer's actual sales equal its MSR, its MSR percentage is 100%. An MSR of 100% means that a dealer is meeting the amount of sales it is expected to capture.

19. The MSR methodology is commonly used in the automotive industry and is a reasonable benchmark for sales performance.

20. Atkission Chrysler has never met its annual MSR since the dealership commenced operations.

21. FCA is achieving 100% of its market share, or 100% registration effectiveness, in the Orange Sales Locality.

22. The surrounding Chrysler dealers are selling the majority of Chrysler vehicles registered in the Orange Sales Locality. These are referred to as "pump-in" sales.

23. The majority of Orange residents purchasing Chrysler vehicles are driving 20 to 40 miles beyond Atkission Chrysler to purchase Chrysler vehicles.

24. The opportunity for sales of Chrysler vehicles exists in the Orange Sales Locality, but Atkission Chrysler is not capturing these sales.

25. Atkission Chrysler's sales performance has been consistently bad since its inception.

26. Atkission Chrysler MSR performance is reflected in the following statistics:

Month/Year (YTD)	% MSR Attained
December 2008	40.1%
December 2009	38.2%
December 2010	63.4%
December 2011	49.2%
December 2012	23.6%
December 2013	39.7%
December 2014	27.2%
October 2015	16.2%

27. Atkission Chrysler is the worst of all Chrysler dealers in Texas in regard to its sales.

28. Over the past four years, out of all FCA dealers in Texas, Atkission Chrysler's MSR achievement rate has ranked as follows:

- In 2012: 148th out of 148
- In 2013: 155th out of 156;
- In 2014: 157th out of 157; and
- In 2015: 165th out of 165.

29. Hurricane Ike hit the Orange area in the fall of 2008.

30. Chrysler filed bankruptcy in 2009.

31. The economy was in a recession from 2008 through 2009.

32. MSR takes into account national and local changes in vehicle sales.

33. Atkission Chrysler's sales were at its highest immediately after the recession.

34. I-10 underwent re-construction in front of Atkission Chrysler from 2010 through 2013.

35. Atkission Chrysler's sales were poor before, during, and after the I-10 re-construction project.

36. Atkission Chrysler's poor sales performance is not due to the re-construction on I-10.

37. Atkission Chrysler's location is an acceptable location for an auto dealership.

38. Atkission Chrysler refuses to spend more money on advertising or to increase its inventory.

39. From at least 2012 to the present, the demand for Chrysler vehicles has increased both nationally and state-wide, and the sales of the surrounding Chrysler dealerships have increased correspondingly.

40. Atkission Chrysler's sales performance is low and declining.

41. Atkission Chrysler's poor sales performance is not due to any impact from Hurricane Ike.

42. Atkission Chrysler's poor sales performance is not due to the impact from Chrysler's bankruptcy.

43. Atkission Chrysler's poor sales performance is not due to the recession.

44. Atkission Chrysler's poor sales performance is not due to its location.

45. Atkission Chrysler's poor sales performance is due to factors under Atkission Chrysler's direct control.

46. FCA established that Atkission Chrysler has extremely poor sales in relation to the market, which provides good cause for termination.

Atkission Chrysler's Investments and Obligations

47. The value of the dealership's building and equipment is less than $100,000, which reflects under-investment by the dealership.

48. Atkission Chrysler leases the land upon which it is located. The lease is expired, but the dealership remains on a month-to-month holdover tenancy.

49. Atkission Chrysler's asset of greatest value is the motor vehicle inventory, the value of which generally hovers around $4 million.

50. The dealership has never been willing to invest a sufficient amount in itself and, as a consequence, its facilities are in very poor, outdated condition.

51. Over the course of years, Mr. Atkission has loaned the dealership roughly $6.05 million. These funds are referred to as "Cecil Money" at the dealership. The Cecil Money is unsecured, subordinated debt, lacking the paperwork normally expected with a loan.

52. The dealership pays Mr. Atkission roughly 4% interest on the Cecil Money, but it has never repaid any of the principal, and it likely never will repay it.

53. The $6.05 million in Cecil Money is not an investment of the dealership's.

54. The $6.05 million in Cecil Money is not a binding obligation of the dealership.

55. Atkission Chrysler's investments are inadequate to properly operate the business. This is a factor that favors termination.

56. Atkission Chrysler's obligations are minimal. This is a factor that favors termination.

Injury or Benefit to the Public

57. The Orange Sales Locality is a substantial market with a considerable customer base.

58. The public is currently being underserved by Atkission Chrysler and inconvenienced by having to drive to other Chrysler dealerships 20-40 miles away from Orange to meet their needs.

59. In 2015, Atkission Chrysler was ranked among the worst in Texas for sales and service advocacy.

60. FCA intends to replace Atkission Chrysler with a more competitive dealer as soon as possible.

61. Replacing Atkission Chrysler with a new dealer will benefit the public by increasing employment opportunities within Orange and by allowing local consumers to have their needs met without the inconvenience of driving 20-40 miles away.

62. Atkission Chrysler shares many of its employees with Atkission Toyota.

63. If FCA were to terminate the Atkission Chrysler franchise, the few current employees the dealership has that are not already shared employees with Atkission Toyota would likely be hired at the Toyota dealership.

64. The impact on employment of terminating the Atkission Chrysler franchise in the short-run would be negligible, and in the long-run positive.

65. Termination of Atkission Chrysler would have positive benefits for the public, a factor that favors termination.

Adequacy of Atkission Chrysler's Service Facilities, Equipment, Parts, and Personnel in Relation to Those of Other Dealers of New Motor Vehicles of the Same Line-Make

66. Atkission Chrysler's facility as a whole is in poor condition, not conducive to a successful business, an eye-sore, and not comparable to surrounding dealer facilities.

67. Atkission Chrysler has no plans to improve the facility.

68. The evidence favors termination with regard to the adequacy of the service facilities.

69. There is no evidence as to the inadequacy of Atkission Chrysler's equipment or parts in relation to those of other Chrysler dealers.

70. For service advocacy in 2013, Atkission Chrysler was below its goal to varying degrees and below the average for the Southwest Business Center.

71. Atkission Chrysler has not been able to maintain a viable general manager, sales staff, or other dealership personnel.

72. The adequacy of Atkission Chrysler's service facilities, equipment, parts, and personnel is a factor that weighs slightly in favor of termination.

Whether Warranties are Being Honored by Atkission Chrysler

73. The evidence does not establish either particularly good or particularly bad performance by Atkission Chrysler with respect to honoring warranties.

74. This factor neither supports nor weighs against termination of Atkission Chrysler's franchise.

Parties' Compliance with the Franchise Agreement

75. Atkission Chrysler has violated the terms of its franchise agreement with FCA in eight separate ways, each one of which favors termination.

- **Breach of the Sales Performance Obligation**

76. Atkission Chrysler breached its contractual obligation to sell the number of FCA vehicles necessary to fulfill the dealership's MSR. This is referred to as the obligation to "achieve 100% of MSR."

77. Since its inception in 2008, Atkission Chrysler achieved 100% of MSR in only one month.

78. The dealership's MSR achievement percentages have been quite low, often in the teens and twenties.

79. Out of the roughly 160 FCA dealers in Texas, Atkission Chrysler has, for years, consistently ranked last or second-to-last in terms of its MSR achievement percentage.

80. The re-construction work on I-10 did not make Atkission Chrysler's current location untenable or bad.

81. Atkission Chrysler is in a fine location that is conducive to selling cars.

82. Atkission Chrysler's poor MSR achievement percentages cannot be blamed on the I-10 reconstruction.

83. The force majeure clause in the franchise agreement is not applicable in this case.

84. Atkission Chrysler chronically breached its contractual obligation to achieve 100% of MSR, a factor that favors termination.

- **Breach of the Warranty Obligations**

85. The evidence does not establish either particularly good or particularly bad performance by Atkission Chrysler with respect to honoring warranties.

86. This factor neither supports nor weighs against termination.

- **Breach of the Management Obligation**

87. Atkission Chrysler breached its contractual obligation to have Mr. Atkission physically present at the dealership during most of its operating hours.

88. During its entire existence, Mr. Atkission has never been physically present at the dealership during most of its operating hours. He has typically been present only roughly 10% or less of operating hours.

89. Atkission Chrysler's breach of this contractual obligation is a factor that favors termination.

- **Breach of the Personnel Obligations**

90. Atkission Chrysler breached its contractual obligation to employ a sufficient number of sales staff and general management to carry out successfully all of its obligations under the franchise agreement.

91. The dealership chronically experiences difficulty in hiring and retaining competent employees.

92. The dealership has chronically had too few salespeople to achieve 100% of its MSR.

93. The dealership has had excessively high turnover of employees and general managers.

94. The high turnover of general managers has been disruptive to the business's operations and customer relations.

95. Atkission Chrysler's general manager also serves as general manager of Atkission Toyota, and his time is divided between the two stores. As a result, his attention is insufficiently focused on the needs of Atkission Chrysler.

96. A number of other dealership employees serve as dual employees for the Chrysler and Toyota stores. As a result, their attention is insufficiently focused on the needs of the Chrysler store.

97. Atkission Chrysler's breach of this contractual obligation is a factor that favors termination.

98. Atkission Chrysler's failure to employ a sufficient number of employees and management personnel is not caused by the I-10 reconstruction.

- **Breach of the Facility Obligations**

99. Atkission Chrysler breached its contractual obligation to maintain its facilities so that they are relatively equivalent in attractiveness and overall appearance to the facilities used by the dealership's principal competitors.

100. Since Mr. Atkission acquired it, the dealership's facilities have been in very poor repair, very outdated, and not relatively equivalent in their attractiveness and overall appearance to the dealership's principal competitors.

101. The dealership's facilities are not conducive to a successful business and not compliant with FCA's image program.

102. The poor state of the dealership's facilities has negatively impacted the dealership's success and customer relations.

103. Atkission Chrysler's breach of this contractual obligation is a factor that favors termination.

104. Atkission Chrysler's failure to maintain adequate facilities cannot be blamed on the I-10 reconstruction.

- **Breach of the Place of Business Obligations**

105. Atkission Chrysler has chronically breached its contractual obligation to conduct its operations solely at the dealership location.

106. Because the dealership does not have its own business office and Finance and Insurance (F&I) office, these matters are handled at Atkission Toyota. A purchaser of an Atkission Chrysler vehicle must travel to Atkission Toyota to complete the transaction.

107. By conducting some of its dealership operations at Atkission Toyota, Atkission Chrysler is not only breaching the franchise agreement, but also undermining customer relations.

108. Atkission Chrysler's breach of this contractual obligation is a factor that favors termination.

- **Breach of the Advertising Obligations**

109. Atkission Chrysler breached its contractual obligation to promote FCA products and services vigorously and aggressively.

110. The dealership does not devote vigorous efforts to advertising.

111. The dealership chronically and substantially underspends its competitors with respect to advertising.

112. Atkission Chrysler's failure to vigorously and aggressively promote its products and services cannot be blamed on the I-10 reconstruction.

113. Atkission Chrysler's breach of this requirement is a factor that favors termination.

- **Breach of the Signage Obligations**

114. Atkission Chrysler breached its contractual obligation to display and use signage that complies with FCA policies and guidelines.

115. FCA's current signage guidelines and policies have, since 2010, required the use of "Millennium Signage."

116. The dealership has never installed Millennium Signage, but still uses old, out-of-date signage.

117. The main pole sign in front of the dealership was damaged by Hurricane Ike in 2008. Since then, the damage has never been fixed, and the sign merely consists of a plastic bag with the dealership's name and brands printed on it.

118. For years, the dealership has declined to invest in new signage because it hopes to relocate.

119. Atkission Chrysler, not FCA, is responsible for maintenance and repairs to signage at the dealership, including the pole sign.

120. Atkission Chrysler's failure to comply with its signage obligations cannot be blamed on the I-10 reconstruction.

121. Atkission Chrysler's breach of this requirement is a factor that favors termination.

- **Breach of the Working Capital and Net Worth Obligations**

122. Atkission Chrysler breached its contractual obligations to maintain adequate working capital consistent with FCA guides and adequate net worth.

123. For every year since 2010, the amount of the dealership's working capital has been substantially below the amount required by FCA guidelines.

124. For every year since 2010, the dealership has had a negative net worth, and each year's net worth has been a much larger negative number than the previous year.

125. As of October 2015, the dealership's net worth was a negative amount -- ($3,361,905).

126. Since its inception in 2008, the dealership has lost between $5 million and $6 million.

127. The only way the dealership has remained in operation despite these large losses has been the periodic infusions of Cecil Money.

128. The dealership's effort during the hearing to recalculate its working capital and net worth was not reasonable and should not be adopted.

129. Atkission Chrysler's breach of this contractual obligation is a factor that favors termination.

The Enforceability of the Franchise from a Public Policy Standpoint

130. The franchise is enforceable from a public policy standpoint, and Atkission Chrysler is not complying with multiple requirements of the franchise.

131. This factor supports termination.

Whether the Desire for Market Penetration is the Sole Basis for Termination

132. Market penetration is the ratio of vehicle registrations for a specific brand to the number of vehicle registrations by competitors in a geographic area.

133. A desire for market penetration is not the sole basis for termination of the Atkission Chrysler franchise.

VII. CONCLUSIONS OF LAW

1. The Department and its governing board has jurisdiction over this matter. Tex. Occ. Code ch. 2301.

2. SOAH has jurisdiction over the contested case hearing and the authority to issue a proposal for decision, including findings of fact and conclusions of law. Tex. Gov't Code ch. 2003; Tex. Occ. Code § 2301.704.

3. FCA properly notified Atkission Chrysler of the intent to terminate Atkission Chrysler's franchise pursuant to Texas Occupations Code § 2301.453(c).

4. Atkission Chrysler timely filed a protest with the Department. Tex. Occ. Code § 2301.453(e).

5. Notice of Atkission Chrysler's protest and of the hearing on the merits of the protest was properly provided as required by law. Tex. Gov't Code §§ 2001.051-.052; Tex. Occ. Code § 2301.705; 1 Tex. Admin. Code § 155.401; 43 Tex. Admin. Code §§ 215.105 and 215.307.

6. A "franchise" is one or more contracts between a franchised dealer and a manufacturer. Tex. Occ. Code § 2301.002(15).

7. A manufacturer may not terminate or discontinue a franchise with a franchised dealer unless the manufacturer provides notice of the termination and: (1) the franchised dealer consents in writing to the termination, (2) the appropriate time for the dealer to file a protest has expired, or (3) the Board makes a determination of good cause for the termination. Tex. Occ. Code § 2301.453(a), (g).

8. FCA has the burden of proving by a preponderance of the evidence that good cause exists for the proposed termination. Tex. Occ. Code § 2301.453(g).

9. In determining whether FCA established by a preponderance of the evidence that there is good cause for terminating Atkission Chrysler's franchise, the Board is required to consider all existing circumstances, including seven statutory factors. Tex. Occ. Code § 2301.455(a).

10. The Board has the exclusive jurisdiction to determine the issue of good cause, including the weight to be given each statutory factor. *Austin Chevrolet, Inc. v. Motor Vehicle Bd.*, 212 S.W.3d 425, 432 (Tex. App.—Austin 2006, pet. denied).

11. FCA has established good cause to terminate the Dealer Agreements in accordance with Texas Occupations Code § 2301.455.

12. No provision of the franchise agreement in this case conflicts with Texas Occupations Code ch. 2301.

13. FCA's proposed termination of Atkission Chrysler's franchise should be approved.

14. Sanctions, penalties, and further orders are not appropriate in this case, and further declaratory decisions or orders are not required. Tex. Occ. Code §§ 2301.153(a)(8), .651, .801, and .802.

SIGNED June 17, 2016.

MEITRA FARHADI
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

HUNTER BURKHALTER
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

CARDWELL, HART & BENNETT, L.L.P.
ATTORNEYS AT LAW
807 BRAZOS
SUITE 1001
AUSTIN, TEXAS 78701-2553
TELEPHONE: (512) 322-0011
FAX: (512) 322-0808

July 20, 2016

Via Electronic Upload
Hon. Meitra Farhadi
Hon. Hunter Burkhalter
Administrative Law Judges
State Office of Administrative Hearings
300 West 15th Street, Room 502
Austin, Texas 78701

Re: SOAH Docket No. 608-15-4315.LIC; MVD Docket No. 15-0015.LIC, *Cecil Atkission Orange, LLC, d/b/a/ Cecil Atkission Chrysler Jeep Dodge v. FCA US LLC.*

Dear Judges Farhadi and Burkhalter:

Enclosed please find Complainant's Exceptions to the Proposal for Decision.

Very truly yours,

J. Bruce Bennett

Enclosure

cc: Daniel Avitia, Director
Motor Vehicle Division
Texas Department of Motor Vehicles
P. O. Box. 2293
Austin, Texas 78768
Via Fax (512-465-3599)

Wm. R. Crocker
Via Email

Mark J. Clouatre
WHEELER TRIGG
O'DONNELL, LLP
370 Seventeenth Street,
Suite 4500
Denver, CO. 80202
Via Email

BEFORE THE BOARD
OF
THE TEXAS DEPARTMENT OF MOTOR VEHICLES

CECIL ATKISSION ORANGE, LLC, d/b/a CECIL ATKISSION CHRYSLER JEEP DODGE,	§	**SOAH DKT. NO. 608-15-4315.LIC**
Complainant	§	**MVD DKT. NO. 15-0015. LIC**
FCA US LLC,	§	
Respondent.	§	

COMPLAINANT'S EXCEPTIONS
TO THE PROPOSAL FOR DECISION

Complainant Cecil Atkission Orange, LLC d/b/a Cecil Atkission Chrysler Jeep Dodge ("Atkission") makes the following exceptions to the Proposal for Decision ("PFD") issued on June 17, 2016, which recommends the termination of Atkission's franchise by FCA US LLC ("Chrysler" or "FCA").

INTRODUCTION AND SUMMARY OF THE EXCEPTIONS

The PFD wrongly recommends terminating Atkission's franchised Chrysler-Jeep-Dodge dealership in Orange, Texas. Because franchise termination is a harsh and punitive action, which destroys most of a dealership's value, the Legislature intends for termination to occur only after a very careful and correct legal and factual assessment of "all existing circumstances, including" the "dealer's investment and obligations" and every other statutory factor set forth in § 2301.455(a) of the Tex. Occ. Code ("Code") which might be relevant. Because the Administrative Law Judges ("ALJs") failed to conduct such assessment in this case,

the Board should reject the PFD and sustain Atkission's protest. Alternatively, the Board should remand this matter to the ALJs so that a proper assessment of all the relevant, existing circumstances can be made in accordance with the correct legal interpretation and application of the statutory mandate.

I.
FAILURE TO CONSIDER THE IMPACT OF MR. ATKISSION'S $6.25 MILLION CAPITAL INFUSION INTO THE DEALERSHIP

The ALJs' recommendation to terminate rests substantially on their misinterpretation and misapplication of § 2301.455(a)'s requirement that "all existing circumstances, including . . . the dealer's investment and obligations" be considered. Cecil Atkission owns 100% of the dealership.[1] Since acquiring the dealership in 2008, he has plowed $6.25 million of his own money into it. Under basic accounting principles, this infusion of $6.25 million in capital constitutes either an equity investment in the dealership *or* a debt obligation of it.[2] Yet, the ALJs have treated it as neither equity nor debt, and therefore given the $6.25 million

[1] The ALJs incorrectly state that Mr. Atkission owns only 52% of the dealership entity. Mr. Atkission owned 52% when the dealership was purchased in 2008. However, Mr. Atkission now owns 100% of the dealership entity and is its sole member. [Testimony of Cecil Atkission, Tr. at 836, line 25 – 837, line 1].

[2] An "investment" is the outlay of funds for income or profit. *See* Merriam-Webster's Collegiate Dictionary 659 (11th ed. 2005). If such funds "have been advanced with reasonable expectations of repayment, they are loans; if as a matter of substantial economic reality they are risked upon the success of the venture, the funds are actual capital." *Matter of Transystems, Inc.*, 569 F.2d 1364, 1370 (5th Cir. 1978), *quoting*, Herzog & Zweibel, "The Equitable Subordination of Claims in Bankruptcy, 15 Vanderbilt L. Rev. 83, 94-95 (1961). The ALJs wrongly assert that Atkission contends that the $6.25 million "should count as the dealership's investments *and* obligations." (PFD at 24). *Atkission has never made such an argument.* Atkission's argument is that regardless of whether his cash contributions are called investments or obligations, they can and should be considered "capital" for calculating working capital and net worth.

no significance in their analysis. (PFD at 28-29). Their mistreatment of this substantial infusion of capital into the dealership – most of which will be lost if the dealership is terminated – not only is based on a distorted and legally incorrect interpretation of § 2301.455(a), but also violates basic accounting principles.[3]

Exalting form over substance, the ALJs interpret the word "dealer" in the phrase "dealer's investment and obligations" to mean only the entity holding the general distinguishing number, which in this case is Mr. Atkission's limited liability company, and not Mr. Atkission, its sole owner. Applying this interpretation, the ALJs concluded that the $6.25 million was not an investment made *by* the dealership – thus ignoring the fact that it was an investment of capital *in* the dealership by Mr. Atkission. By mandating the consideration of "all existing circumstances, including . . . the dealer's investment . . .", the Legislature intends for investments made *in* the dealership by its owner or owners to be analyzed in deciding whether termination is warranted. The vast majority of general distinguishing numbers in Texas are issued to franchised dealers conducting business as limited liability, corporate or partnership entities, rather than as individuals. This is done for a myriad of tax and business reasons. Acceptance of the ALJs' interpretation will create a dangerous and unfair precedent that will render millions of dollars in investments made in dealerships by their owners, like Mr. Atkission, meaningless.

[3] If the franchise is terminated, Mr. Atkission estimates that he will lose up to $4 million. [Testimony of Cecil Atkission, Tr. at 889, lines 15-18; 1034, lines 2-15].

If Mr. Atkission's $6.25 million is not treated as an equity investment in his dealership, then it must be treated as the dealership's debt obligation to him. The $6.25 million has always been recorded on the dealership's financial statements as short-term or long-term debt – on which interest has always been paid to Mr. Atkission.[4]

Chrysler itself recognized that Mr. Atkission's $6.25 million infusion constituted a debt of the dealership. (FCA Brief at 60, 61-62). However, the ALJs assert that the $6.25 million is not really a debt, and thus not a dealership "obligation," because they think Mr. Atkission does not expect the $6.25 million to be repaid. (PFD at 28). Assuming that were true, then the $6.25 million constitutes a capital contribution, *i.e.,* an equity investment.[5] In fact, Chrysler's "Dealer Financial Statement" contains a line item under "Net Worth" for "Investments (Proprietor Partner or Member)." Mr. Atkission is the sole member of the dealership entity, a limited liability company. Also, Chrysler's financial expert admitted that the $6.25 million was "invested capital," which constitutes an investment in the dealership.[6]

---

[4] Testimony of Tyra Boram, Tr. at 711, line 25; 712, lines 1-2; 744, lines 10-25; Testimony of Curtis Coleman, Tr. at 751, lines 3-15; Testimony of Cecil Atkission, Tr. at 870, lines 10-12; 871, lines 14-17; 977, lines 22-25; 978, lines 1-5; Testimony of Carl Woodward, Tr. at 1066, lines 7-15; Complainant Ex. 29, Exhibit 2; Respondent Ex. 33(l), 34(l), 35(l), 36(l), 37(l), 38(k), 38(l).

[5] In fact, Mr. Atkission testified that he expects the dealership to repay him if and when the dealership becomes profitable, which can only happen if the Dealership is relocated to a suitable site. [Testimony of Cecil Atkission, Tr. at 874, lines 24-25; 875, lines 1-16; 977, lines 22-25; 978, lines 1-2].

[6] Respondent Ex. 152-008, ¶ 31. Even if the $6.25 million were a gift to the dealership, it would still be classified as equity and would positively affect the dealership's working capital and net worth.

Based on their misinterpretation of the Code concerning the effect and impact of the $6.25 million on the dealership's finances, the ALJs erred in finding that the dealership violated Chrysler's working capital and net worth requirements. (PFD at 76). Because of Mr. Atkission's infusion of $6.25 million into the dealership – which Chrysler's expert admits is "invested capital" – the dealership has always exceeded Chrysler's working capital and net worth guides and continues to do so.[7] That $6.25 million also refutes the ALJs' disparaging assertions in the PFD that Mr. Atkission lacks commitment to his dealership and has refused to "permanently invest" in it. (PFD at 28). On the contrary, the $6.25 million conclusively shows his commitment to the dealership's survival and to its future in Orange.

II.
FAILURE TO CONSIDER THE NEED TO RELOCATE THE DEALERSHIP

The ALJs' recommendation to terminate the Atkission franchise is also based on their refusal to consider the need to relocate the dealership as an "existing circumstance" present in this case, and on their belief that "the Code does not provide for affirmative defenses to the good cause elements . . ." (PFD at 21). *The Code does **not** strip franchised dealers of defenses against termination.*

[7] Respondent Ex. 152-008, ¶ 31. However, the manner in which the dealership was reporting the $6.25 million infusion from Mr. Atkission on its financial statements materially understated both the dealership's actual working capital and its net worth. [Testimony of Curtis Coleman, Tr. at 754, lines 20-24; 759, lines 1-12; Complainant Ex. 29 at 2]. Accounting expert, Carl Woodward, advised the dealership to begin reporting those funds on its financial statements as subordinated notes. [Complainant Ex. 29 at 2].

The ALJs' assertion that "as a matter of law the dealership's desire to relocate has never been, and cannot legally be, part of this case" is both legally incorrect and untrue. (PFD at 12). The evidence conclusively establishes that the dealership cannot survive in its present location.[8] To survive, it must relocate.[9] That need is a circumstance falling within the legislative command in § 2301.455(a) to consider "all existing circumstances" and is required to be considered by the Board – even if a formal relocation application has not yet been submitted. The ALJs' refusal to consider the dealership's need to relocate constitutes a legal misinterpretation and violation of that statute.

The ALJs' error is compounded by their erroneous determination that the *force majeure* clause of the Atkission-Chrysler franchise agreements and other affirmative defenses do not apply to the adverse impact on the dealership and its franchise obligations of a massive and lengthy TxDOT reconstruction project – particularly those obligations concerning sales, personnel, signage, and advertising.[10] The ALJs cite no legal authority holding that a dealer cannot invoke affirmative defenses in a termination case. To the undersigned's knowledge, no such authority exists. Moreover, the statutory command to the Board is to consider

[8] Testimony of Tyrone Allred, Tr. at 666, lines 11-16; Testimony of Cecil Atkission, Tr. at 899, lines 8-19; 903, lines 6-14.

[9] Although the dealership has not submitted a formal relocation application, over the last several years, Mr. Atkission been acquiring land for a relocation site next to his Toyota dealership, which is located on I-10 in one of Orange's commercial areas. [Testimony of Cecil Atkission, Tr. at 841, lines 21-25; 842, lines 1, 9-12; 843, line 25; 844, lines 1-2; 891, lines 6-11, 15-17].

[10] *Force majeure* is recognized as an affirmative defense. 3 Tex. Prac. Guide Bus. & Com. Litig. § 19:160; 30 Williston on Contracts § 77:31.

"all existing circumstances" "*notwithstanding* the terms of any franchise . . ." Thus, circumstances constituting affirmative defenses – regardless of what the manufacturer has written in the franchise agreement – such as *force majeure*, waiver, estoppel, or any other matter that would provide grounds for avoiding a franchise termination, must be considered by the Board.[11]

The franchise agreements provide that Atkission will *not* "be liable for failure to perform its part of this Agreement when the failure is due to . . . *acts of government*, . . . or other circumstances beyond the control of the parties." [FCA Ex. 28(a) at 17). The dealership is located on the south side frontage road next to I-10 in an area devoted almost exclusively to light industry.[12] The TxDOT project, which lasted three years, had a significant negative impact on the dealership and has undermined its ability to perform its franchise obligations in two ways.[13]

First, the project eliminated convenient access to the dealership from the eastbound lanes of I-10.[14] Before the project, eastbound drivers could see the

[11] The seven statutory factors of § 2301.455(a) are in the nature of affirmative defenses to termination.

[12] Testimony of Tyrone Allred, Tr. at 662, lines 17-25; 663, lines 1-7; Testimony of Cecil Atkission, Tr. at 880, lines 20-25; 881, lines 1-12; 882, lines 3-16. Atkission bought the dealership's assets and goodwill value knowing that it was situated in a poor location, was housed in an outdated facility, and would need to be relocated. [Testimony of Cecil Atkission, Tr. at 838, lines 2-9; 880, lines 20-25; 881, lines 1-12; 882, lines 3-16]. Then, and now, no other motor vehicle dealerships are located nearby; nor are any major retailers located near the dealership. [Testimony of Tyrone Allred, Tr. at 662, lines 17-25; 663, lines 1-7]. The dealership has never been able to become profitable on a yearly basis at its current location. [Testimony of Cecil Atkission, Tr. at 861, lines 13-17; 1046, lines 10-12; Complainant Ex. 7, 8; Respondent Ex. 33(l), 34(l0, 35(l), 36(l), 37(l), 38(k).

[13] Testimony of Cecil Atkission, Tr. at 857, lines 1-7; 859, lines 306; 987, lines 19-24.

[14] Testimony of Tyrone Allred, Tr. at 663, lines 3-7.

dealership on the south side of I-10 shortly before coming to an exit located just west of the dealership and could use that exit to easily reach the dealership using the frontage road. Both I-10 and the dealership were then on ground level. But the TxDOT project not only substantially elevated I-10 in front of the dealership, it also removed the convenient exit from the eastbound lanes to the dealership.[15] Because a wooded area is located west of the dealership on the south side of I-10, drivers see the dealership as before, but they no longer have the convenient exit to access it.[16] Instead, they must take the next exit located east of the dealership, go under I-10 at the next exit, head back west, then take an exit from the westbound lanes, go under I-10, and stay on the frontage road back to the dealership.

Second, before the project, westbound drivers on I-10 could easily see the dealership, take the next exit, go under I-10 and remain on the frontage road back to the dealership. But the elevation of I-10 has made it almost impossible to see the dealership from the westbound lanes.[17] And *if* drivers do see the dealership, from that point they have to take the next exit, a mile or so farther west, go under I-10, and know to stay on the eastbound frontage road past the wooded area back to the dealership.[18]

---

[15] Testimony of Tyrone Allred, Tr. at 666, lines 20-25; 667, lines 1-4; Testimony of Cecil Atkission, Tr. at 856, lines12-22; 857, lines 15-25; 858, lines 1-9; 858, lines 24-25; 859, lines 1-2,14-17.

[16] Testimony of Tyrone Allred, Tr. at 670, lines 3-6.

[17] Testimony of Sharif Farhat, Tr. at 642, lines 3-8; Testimony of Cecil Atkission, Tr. at 882, lines 20-21.

[18] Testimony of Tyrone Allred, Tr. at 669, lines 8-17; Testimony of Cecil Atkission, Tr. at 863, lines 1-18.

The reconstruction left access to the dealership and its visibility in far worse shape than before.[19] As Mr. Atkission described the current situation: "Driving up and down Interstate 10, if you don't know [the dealership is] there, you don't know it's there." [Testimony of Cecil Atkission, Tr. at 859, lines 7-11]. *Yet, the ALJs make only a single reference to the removal of the eastbound exit in their PFD (at page 40) and only two references to the elevation of I-10 (PFD at 20, 40). They devote scarcely any attention – and almost no analysis – to the impact on the dealership of these major changes to its accessibility and visibility.*

Once the TxDOT project was completed in 2013, the dealership's sales plummeted and have never recovered, making relocation of the dealership essential to its viability.[20] The ALJs disregarded the significance of the objective, post-reconstruction sales data – the validity of which no one questions – and found that the reconstruction work did not make the dealership location bad or untenable. They even find that the dealership "is in a fine location that is conducive to selling cars." (PFD at 72). The basis for this incredible finding is the opinion testimony of several Chrysler witnesses. Significantly, two of those witnesses, who were

[19] Testimony of Cecil Atkission, Tr. at 857, lines 1-7; 859, lines 3-6; 987, lines 19-24.

[20] In January 2011, the Dealership had an MSR of 112.50%. [Respondent Ex. 39(d)-001]. As the TxDOT reconstruction progressed and impeded access to the dealership, its MSR fell sharply. After April 2011, it never again rose above 70% for any month and was almost always well below 50% on a monthly basis. [Respondent Ex. 39(d)-004 to 39(d)-012, 39(e), 39(f), 39(g), 39(h)]. Since the reconstruction in front of the Dealership ended in 2013, the Dealership's new vehicle sales and its percentage of MSR have plummeted from 181 sales in 2013 to 96 as of November 2015, and from an MSR of 39.7% in 2013 to 17.3% as of August 2015. [Respondent Ex. 36(l), 37(l), 38(l), 151-035)].

unfamiliar with the dealership's location, had to use a GPS to find the dealership.[21] This opinion testimony is entitled to no weight because it is contrary to the objective sales data and to the testimony of the persons who work at the dealership and make their living trying to sell cars there.

For these reasons, the ALJs erred in finding that the *force majeure* clause does not apply to this case. This error produced other findings about the dealership's performance of its obligations under the franchise agreements that are not reasonably supported by substantial evidence considering the reliable and probative evidence in the record as a whole.

III.

ERROR IN CONSIDERING GROUNDS NOT SPECIFIED IN THE NOTICE OF TERMINATION

Section 2301.453(c) of the Code requires a manufacturer to "provide written notice . . . to the dealer and the board stating the specific grounds for the termination or discontinuance. Over Atkission Chrysler's objection, the ALJs allowed FCA to introduce evidence of alleged five grounds for termination that were *never* mentioned in Chrysler's termination notice and have recommended termination based on such improper grounds. The ALJs' action constitutes a flagrant violation of the Code and renders their PFD unreliable. Section 2301.453(c) is a statute, not a mere guideline to be enforced or ignored at the whim of the ALJs.

---

[21] Testimony of Todd Tunic, Tr. at 358, lines 9-13; Testimony of Sharif Farhat, Tr. at 641, lines 16-19.

EXCEPTIONS

1. Atkission excepts to the ALJs' failure to consider all existing circumstances in determining whether "good cause" for the proposed termination exists. Section 2301.455(a) of the Code requires that "in determining whether good cause has been established . . . the board *shall* consider *all existing circumstances*, including" seven specifically identified elements.[22] The PFD shows, on its face, that the ALJs failed to consider "all existing circumstances" in determining good cause. Specifically, the ALJs erred in not considering:

- the impact of the $6.25 million Mr. Atkission invested in the dealership on the dealership's working capital and net worth because they erroneously view that money as neither an investment in the dealership nor an obligation of the dealership;
- the need to relocate the dealership, especially after completion of the I-10 reconstruction project and its devastating impact on the dealership's accessibility, visibility, and sales; and
- *force majeure* and other affirmative defenses raised by the evidence in this case.

2. Atkission excepts to the ALJs' interpretation and application of the "notice of termination" provisions of § 2301.453(c) of the Code. Specifically, the ALJs wrongly interpreted that statute to allow Chrysler to use the seven factors

[22] Section 311.011(a) of the Texas Gov't Code, the "Code Construction Act," provides that "[w]ords and phrases shall be read in context and construed according to the rules of grammar and common usage." When used as an adjective, as in "existing circumstances," the word "existing" means "[i]n existence or operation at the time under consideration; current . . ." Oxford Advanced Learner's Dictionary. *See also,* MacMillan Dictionary ("used for describing something that exists now . . ."); Collins Thesaurus of the English Language ("In existence now . . .").

listed in § 2301.455(a) of the Code as additional grounds for attempting to terminate Atkission's franchise even though those factors are not stated in Chrysler's notice of termination as grounds for termination. The Legislature requires the "*specific* grounds for the termination" to be stated in a manufacturer's notice of termination and provided both "to the dealer and the board" for a reason – so that (1) the dealer can decide whether or not to spend its resources fighting the proposed termination on the stated grounds; (2) the Board will know the exact grounds on which termination is sought; and (3) the issues for mandatory mediation and possible settlement are identified. The Code therefore confines the focus of the Board's "good cause" review to the "*specific grounds*" for termination "*stated*" in the termination notice viewed in light of all existing circumstances, including the specific factors of § 2301.455(a)(1)-(7) that are relevant to those specifically noticed grounds. New *grounds* for termination raised for the first time in the manufacturer's response to the protest should be disregarded or given little, if any, weight, and can never be the basis for franchise termination.

In this case, Chrysler identified only three specific grounds for termination in its notice of termination: (1) lack of sales or market penetration; (2) inadequate working capital; and (3) inadequate net worth. Any termination of Atkission's franchise must be based on one of those specifically stated grounds. The ALJs erred in recommending termination on other grounds that Chrysler raised in response to Atkission's protest. For these reasons, the following conclusion of law should be adopted:

- No. 3A. FCA stated the following three specific grounds for termination in its notice of termination: (1) lack of sales or market penetration; (2) inadequate working capital; and (3) inadequate net worth.

- No. 3B. The Board must decide whether termination is warranted on those specifically stated grounds for termination after considering all existing circumstances, including the factors listed in § 2301.455(a).

- No. 3C. FCA cannot rely on grounds for termination that were not specifically stated in its notice of termination.

- No. 3D. A notice of termination that does not state any specific grounds for a proposed termination does not satisfy the requirements of § 2301.453(c) of the Code.

- No. 3E. The factors listed § 2301.455(a)(1)-(7) do not provide grounds for terminating a franchise unless they are specifically identified as grounds for termination in the notice of termination .

- No. 3F. Because FCA did not list "poor customer service," low advocacy scores, warranty issues, the sharing of four employees with Atkission Toyota, or the amount of time Mr. Atkission spends at the dealership as specific grounds for termination in the termination notice, the Board may not consider them as grounds for termination.

3. Atkission excepts to Finding of Fact Nos. 35, 36, 37, 44, 45, and 46 concerning the adverse impact on the dealership of TxDOT's reconstruction project and the suitability of the dealership's location. Those findings are not reasonably supported by substantial evidence considering the reliable and probative evidence in the record as a whole and are the product of an incorrect application and interpretation of applicable law. In particular, the findings ignore and are contrary to the market data showing the plunge in the dealership's sales caused by the

TxDOT project.[23] They also ignore the applicability of the *force majeure* provision of the franchise agreement.[24] For these reasons, the foregoing Findings of Fact should be changed to provide as follows:

- No. 35. Atkission Chrysler's sales were poor before and during the I-10 re-construction, but its sales were far worse following the completion of the re-construction, which has made the current location unsuitable for the dealership.

- No. 36. Atkission Chrysler's poor sales performance is primarily due to the re-construction of I-10, especially after completion of that work.

- No. 37. Because of the re-construction of I-10, Atkission Chrysler's location, which was already a poor location in a light industrial area of Orange, Texas, is no longer an acceptable location for an auto dealership.

- No. 44. Atkission Chrysler's poor sales performance is due to its location, which the I-10 re-construction has made unsuitable for an auto dealership.

- No. 45. Atkission Chrysler's poor sales performance is due to factors that were not under its control.

- No. 46. Atkission Chrysler's poor sales in relation to the market have been caused by the dealership's poor location, which the TxDOT re-construction has made no longer suitable for an auto dealership.

4. Atkission excepts to Finding of Fact Nos. 50, 53, 54, 55, and 56 concerning the investments in the dealership and the dealership's obligations. Those findings are not reasonably supported by substantial evidence considering

[23] Respondent Ex. 39(d)-001; Respondent Ex. 39(d)-004 to 39(d)-012, 39(e), 39(f), 39(g), 39(h); Respondent Ex. 36(l), 37(l), 38(l), 151-035)].

[24] FCA Ex. 28(a) at 17.

the reliable and probative evidence in the record as a whole and are the product of an incorrect application and interpretation of applicable law. As shown above, Mr. Atkission has invested $6.25 million in the dealership to keep it adequately capitalized and operating.[25] This $6.25 million must be treated as either an investment in the dealership *or* a long-term "unsecured, subordinated debt" of the dealership, which has been more than adequate to fund dealership operations at its current location.[26] For these reasons, the foregoing Findings of Fact should be changed to provide as follows:

- No. 50. The amount invested in the dealership has been sufficient in view of its unsuitable location and the state of its leased facilities.
- No. 53. If the $6.25 million in "Cecil Money" is considered to be "invested capital" or a "capital contribution," then it is an investment in the dealership.
- No. 54. If the $6.25 million in "Cecil Money" is considered to be an "unsecured, subordinated debt" of the dealership, then it is a binding obligation of the dealership payable to the owner of the dealership.
- No. 55. The $6.5 million in "Cecil Money" placed by Cecil Atkission in Atkission Chrysler, whether considered debt or investment, provides, and has always provided, adequate capital for the operation of the business and sufficient capital to meet or exceed the capital requirements of FCA, which disfavors termination.

[25] Testimony of Tyra Boram, Tr. at 712, lines 7-19; Testimony of Cecil Atkission, Tr. at 874, lines 24-25; 875, lines 1-16; 886, lines 1-4; 888, lines 22-24.

[26] Complainant Ex. 29 at 2; Testimony of Curtis Coleman, Tr. at 752, lines 5-21; 753, lines 8-14; Testimony of Carl Woodward, Tr. at 1065, lines 21-25, 1006, lines 1-15; Respondent Ex. 152-008, ¶ 31.

- No. 56. Atkission Chrysler's obligations to its floor plan financing source and Cecil Atkission, however that obligation is characterized, are substantial, which disfavors termination.

5. Atkission excepts to Finding of Fact Nos. 61, 62, 63, 64, and 65 concerning the injury or benefit to the public. Those findings are not reasonably supported by substantial evidence considering the reliable and probative evidence in the record as a whole and are the product of an incorrect application and interpretation of applicable law. The public inconvenience that currently exists in the Orange Sales Locality is caused by the dealership's unsuitable location. Customers have complained of their inability to find it.[27] Relocating the dealership to a suitable location site – which Mr. Atkission already has bought, would solve the problem and increase employment opportunities in the Orange community. Mr. Atkission is ready, willing, and able to build a new facility for the dealership at a superior location.[28] But the ALJs erroneously refused to consider the need to relocate and erred in finding that Atkission Toyota would hire "many" of the dealership's employees. (PFD at 71). In fact, only four employees work at both dealerships.[29] Mr. Atkission "couldn't say that" he would hire all or

[27] Testimony of Tyrone Allred, Tr. at 667, lines 1-4; 668, lines 1-11.

[28] Testimony of Todd Tunic, Tr. at 316, lines 15-18; Testimony of Cecil Atkission, Tr. at 903, lines 10-14.

[29] Testimony of Cecil Atkission, Tr. at 918, lines 21-25; 1037, line 25; 1038, lines 1-25.

many of them, but would have to evaluate each one.[30] For these reasons, the foregoing Findings of Fact should be changed to provide as follows:

- No. 61. Replacing Atkission Chrysler with a new dealership at its current location will not benefit the public.
- No. 62. Atkission shares four of its employees with Atkission Toyota.
- No. 63. If FCA were to terminate the Atkission Chrysler franchise, some but not all of the dealership employees might be hired by Atkission Toyota.
- No. 64. The impact on employment of terminating the Atkission Chrysler franchise would be negative and substantial.
- No. 65. Termination of Atkission Chrysler would have negative benefits for the public, a factor that disfavors termination.

6. Atkission excepts to Finding of Fact Nos. 68, 71, and 72 concerning the adequacy of the dealership's facilities, equipment, parts, and personnel. Those findings are not reasonably supported by substantial evidence considering the reliable and probative evidence in the record as a whole and are the product of an incorrect application and interpretation of applicable law. The dealership's leased facilities are outdated and located on an unsuitable site, but this favors relocating the dealership, not terminating its franchise.[31] Other dealerships in Orange and nearby cities are housed in newer facilities and located close to major retail areas,

[30] Testimony of Cecil Atkission, Tr. at 1019, lines 9-18.

[31] Testimony of Tyrone Allred, Tr. at 662, lines 17-25; 663, lines 1-7; Testimony of Cecil Atkission, Tr. at 880, lines 20-25; 881, lines 1-12; 882, lines 3-16.

all of which helps a dealership increase its sales.[32] The high turnover of dealership personnel is caused by the dealership's bad location.[33] For these reasons, the foregoing Findings of Fact should be changed to provide as follows:

- No. 68. The evidence shows that the facilities of Atkission Chrysler are unsuitable and not adequate to serve its market area.

- No. 71. The evidence shows that Atkission Chrysler has not been able to maintain a viable general manager, sales staff, or other dealership personnel because of its unsuitable location.

- No. 72. The inadequacy of Atkission Chrysler's facilities, equipment and personnel is a factor that weighs in favor of relocation, not termination.

7. Atkission excepts to Finding of Fact Nos. 76, 80, 81, 82, 83, and 84 concerning the dealership's sales obligations. Those findings are not reasonably supported by substantial evidence considering the reliable and probative evidence in the record as a whole and are the product of an incorrect application and interpretation of applicable law. The findings are contrary to, and ignore, the objective market data showing the sharp drop in the dealership's sales caused by the TxDOT reconstruction project.[34] Those findings also ignore the applicability of the *force majeure* provision of the franchise agreement to that project. Any possible chance the dealership had of meeting MSR and of becoming profitable at the current

[32] Testimony of Terry Williams, Tr. at 42, line 25; 43, lines 1-3; 117, lines 1-6; Testimony of Todd Tunic, Tr. at 358, lines 2-4.

[33] Testimony of Tyrone Allred, Tr. at 680, lines 4-7.

[34] Respondent Ex. 39(d)-001; Respondent Ex. 39(d)-004 to 39(d)-012, 39(e), 39(f), 39(g), 39(h); Respondent Ex. 36(l), 37(l), 38(l), 151-035)].

location was destroyed by the *force majeure* event – the TxDOT reconstruction project. TxDOT's acts in removing the exit from I-10 to the frontage road on which the dealership is located, and in elevating I-10 in front of the dealership fall squarely within the *force majeure* provision of the franchise agreements. Those events and the new obstacles they created for the dealership were beyond Atkission's control, and they excuse the dealership's inability to meet the sales and performance, facility, and signage obligations imposed by the franchise agreements. The available market data confirms this fact, as Chrysler itself recognized: "Atkission's performance declined dramatically through 2013." (FCA Brief at 11). The findings also ignore the fact that the dealership has never been in a suitable location and that the need to relocate became essential once the TxDOT reconstruction project was over.[35] For these reasons, the foregoing Findings of Fact should be changed to provide as follows:

- No. 76. Atkission Chrysler's failure to meet its contractual obligation to sell the number of FCA vehicles necessary to fulfill its MSR was excused by the operation of the *force majeure* provision of the franchise agreement.

- No. 80. The re-construction work on I-10 made Atkission Chrysler's current location an untenable site for an auto dealership.

- No. 81. Atkission Chrysler is located on an unsuitable site that is not conducive to selling cars.

- No. 82. Atkission Chrysler's poor MSR achievement percentages are caused by its unsuitable location, which the I-10 re-construction project made untenable.

[35] Testimony of Cecil Atkission, Tr. at 838, lines 2-9; 880, lines 16-19.

- No. 83. The *force majeure* provision of the franchise agreement is applicable to the case.

- No. 84. Atkission Chrysler's failure to meet its contractual obligation to achieve 100% of MSR does not favor termination and cannot, by itself, constitute good cause for termination.

8. Atkission excepts to Finding of Fact Nos. 87 and 89 concerning the dealership's management obligations. Those findings are not reasonably supported by substantial evidence considering the reliable and probative evidence in the record as a whole and are the product of an incorrect application and interpretation of applicable law. The evidence is undisputed that when Chrysler approved Mr. Atkission's purchase of the Orange dealership that Chrysler knew that he owned other dealerships located in the Central Texas area and would not be physically present at the Orange dealership during most of its operating hours.[36] Furthermore, in multiple dealer situations, such provisions are interpreted to mean that the dealer principal will devote his full attention to his automotive businesses, including the Orange dealership. The evidence shows that Mr. Atkission has done so. He visits the dealership weekly, and stays in constant communication with the dealership's management personnel by telephone, texts, and emails.[37] Thus, any breach of the obligation in the agreement requiring Mr. Atkission's presence at the dealership during most of its hours of operation was waived, as further established by Chrysler's failure to raise this complaint in its notice of default, its notice of

[36] Testimony of Todd Tunic, Tr. at 278, lines 22-25; 279, lines 1-2; Testimony of Cecil Atkission, Tr. at 1036, lines 4-10; 1037, lines 2-6.

[37] Testimony of Cecil Atkission, Tr. at 909, lines 19-22; 1034, lines 16-25; 1035, lines 1-3.

termination or in its dealer contact reports. The ALJs wrongfully ignored this evidence. For these reasons, the foregoing Findings of Fact should be changed to provide as follows:

- No. 87. Atkission Chrysler knew that Mr. Atkission would not be physically present at the dealership during most of its operating hours, did not raise any concern about of lack of presence in its dealer contract reports, did not assert this concern in its notices of default and termination, and thus has waived any breach of the contractual provision requiring such presence.

- No. 89. Because any breach of the contractual obligation requiring Mr. Atkission's presence at the dealership during most of its operating hours was waived, this is not a factor that favors termination.

9. Atkission excepts to Finding of Fact Nos. 90, 95, 96, 97, and 98 concerning the dealership's personnel obligations. Those findings are not reasonably supported by substantial evidence considering the reliable and probative evidence in the record as a whole and are the product of an incorrect application and interpretation of applicable law. The findings ignore the market data showing the plunge in the dealership's sales caused by the TxDOT reconstruction project [38] as well as the applicability of the *force majeure* provision of the franchise agreement.[39] The findings further ignore the fact that the dealership was never in a suitable location and that the need to relocate became

[38] Respondent Ex. 39(d)-001; Respondent Ex. 39(d)-004 to 39(d)-012, 39(e), 39(f), 39(g), 39(h); Respondent Ex. 36(l), 37(l), 38(l), 151-035)]

[39] FCA Ex. 28(a) at 17.

essential once the reconstruction project was completed.[40] The evidence shows that these circumstances have caused personnel problems.[41] But the evidence also shows that the dealership always has employed a sufficient number of sales staff and managers commensurate with the limited demand for vehicles at the present location, and that those employees have devoted the attention necessary to fulfill that demand.[42] The ALJs' assert that the attention of the dealership's general manager and some other employees, who also work at Atkission Toyota, are "insufficiently" focused on the needs of the Atkission Chrysler dealership, but cite no evidence to support their assertion. (PFD at 73, 74). For these reasons, the foregoing Findings of Fact should be changed to provide as follows:

- No. 90. Atkission Chrysler employed a sufficient number of sales staff and general management to carry out its obligations under the franchise agreement.

- No. 95. The attention of Atkission Chrysler's general manager is sufficiently focused on the needs of the dealership to satisfy its obligations under the franchise agreement.

- No. 96. The attention of Atkission Chrysler's employees, including those also employed at the Atkission Toyota store, are sufficiently focused on the needs of the Atkission Chrysler's dealership to satisfy its obligations under the franchise agreement.

- No. 97. Any breach of Atkission Chrysler's personnel obligations was excused by the *force majeure* provision of the franchise agreement.

---

[40] Testimony of Cecil Atkission, Tr. at 838, lines 2-9; 880, lines 16-19.

[41] Testimony of Cecil Atkission, Tr. at 864, lines 6-25; 865, lines 1-3.

[42] Testimony of Cecil Atkission, Tr. at 865, lines 4-7.

- No. 98. The number of employees and management personnel required at the Atkission Chrysler dealership was reduced by the I-10 re-construction project and by the unsuitability of the current dealership location.

10. Atkission excepts to Finding of Fact Nos. 99, 102, 103, and 104 concerning the dealership's facility obligations. Those findings are not reasonably supported by substantial evidence considering the reliable and probative evidence in the record as a whole and are the product of an incorrect application and interpretation of applicable law. The findings are contradicted by, and ignore, the objective market data showing the sharp drop in the dealership's sales caused by the TxDOT reconstruction project.[43] The dealership's facilities are adequate for the limited market it is currently able to serve from its existing location.[44] The findings also ignore the applicability of the *force majeure* provision of the franchise agreement.[45] The findings further disregard the fact that the dealership was never in a suitable location and that the need to relocate became essential once the reconstruction project was completed.[46] For these reasons, the foregoing Findings of Fact should be changed to provide as follows:

- No. 99. Atkission Chrysler has sufficiently maintained its facilities given the limited demand for vehicles at its current location.

---

[43] Respondent Ex. 39(d)-001; Respondent Ex. 39(d)-004 to 39(d)-012, 39(e), 39(f), 39(g), 39(h); Respondent Ex. 36(l), 37(l), 38(l), 151-035)]

[44] Testimony of Cecil Atkission, Tr. at 884, lines 23-25.

[45] FCA Ex. 28(a) at 17.

[46] Testimony of Cecil Atkission, Tr. at 838, lines 2-9; 880, lines 16-19.

- No. 102. The state of the dealership's facilities has not negatively impacted its success and customer relations at its current location; any such negative impact has been caused by the current location's unsuitability, which the I-10 re-construction has made untenable.

- No. 103. Any breach of the dealership's facilities obligation was excused by the *force majeure* provision of the franchise agreement and favors relocation, not termination of the franchise.

- No. 104. Any failure of the dealership to maintain adequate facilities was due to its unsuitable location, which the I-10 re-construction has made much worse.

11. Atkission excepts to Finding of Fact Nos. 105, 106, 107, and 108 concerning the dealership's place of business obligations. Those findings are not reasonably supported by substantial evidence considering the reliable and probative evidence in the record as a whole and are the product of an incorrect application and interpretation of applicable law. The findings ignore the fact that although financing and insurance paperwork is occasionally handled off-site, the sales of Chrysler vehicles occur and are closed at the Atkission Chrysler dealership.[47] The lack of substance to the alleged breach of the franchise agreement on this point is shown by the fact that it was *never* mentioned in Chrysler's notices of default and termination, or raised as a concern in any of the dealer contact reports.[48] Furthermore, Chrysler offered no evidence of any customer complaints about having to complete some paperwork at the Toyota dealership in connection with the purchase of a Chrysler vehicle. Under these

[47] Testimony of Cecil Atkission, Tr. at 897, lines 22-25, 898, lines 1-6; Testimony of Tyrone Allred, Tr. at 684, lines 1-5.

[48] Testimony of Todd Tunic, Tr. at 332, lines 13-15.

circumstances, any breach of the franchise agreement was both excused and waived. For these reasons, the foregoing Findings of Fact should be changed to provide as follows:

- No. 105. Any breach of Atkission Chrysler's contractual obligation to conduct its operations solely at the dealership location was excused by the *force majeure* provision of the franchise agreement and waived by FCA.

- No. 106. All sales of FCA vehicles are completed and closed at the Atkission Chrysler dealership.

- No. 107. The conduct of financing operations at the Atkission Toyota store has not undermined any customer relationships with the Atkission Chrysler dealership, and any breach of the franchise agreement was waived by FCA and excused by the *force majeure* provision of the franchise agreement.

- No. 108. The conduct of financing operations at the Toyota store does not favor termination of Atkission Chrysler's franchise.

12. Atkission excepts to Finding of Fact Nos. 109, 110, 111, 112, and 113 concerning the dealership's advertising obligations. Those findings are not reasonably supported by substantial evidence considering the reliable and probative evidence in the record as a whole and are the product of an incorrect application and interpretation of applicable law. The findings contradict and ignore the objective market data in evidence showing the plunge in the dealership's sales caused by the TxDOT reconstruction project.[49] The findings also fail to account for the

[49] Respondent Ex. 39(d)-001; Respondent Ex. 39(d)-004 to 39(d)-012, 39(e), 39(f), 39(g), 39(h); Respondent Ex. 36(l), 37(l), 38(l), 151-035)]

applicability of the *force majeure* provision of the franchise agreement.[50] The findings further ignore the fact that the dealership was never in a suitable location and that that the need to relocate became essential once the reconstruction project was completed.[51] Under these circumstances, it is impossible for the dealership to increase sales to a satisfactory level from its current location no matter how much is spent on advertising.[52] For these reasons, the foregoing Findings of Fact should be changed to provide as follows:

- No. 109. Any breach of Atkission Chrysler's advertising obligation to promote FCA products and services was excused by the *force majeure* provision of the franchise agreement.

- No. 110. The dealership devotes efforts to advertising that is commensurate with its location and the limited ability to sell FCA vehicles at the present location.

- No. 111. Because of the dealership's unsuitable location, it spends less than its competitors on advertising.

- No. 112. Atkission Chrysler's efforts to promote FCA products and services has been substantially impaired and rendered ineffective by the re-construction of I-10.

- No. 113. The amount of Atkission Chrysler's advertising expenditures and efforts do not favor termination of the franchise.

---

[50] FCA Ex. 28(a) at 17.

[51] Testimony of Cecil Atkission, Tr. at 838, lines 2-9; 880, lines 16-19.

[52] Testimony of Cecil Atkission, Tr. at 880, lines 16-19; 901, lines 16-25; 902, lines 1-17; 942, lines 10-12; 942, lines 10-25; 943, lines 1-10].

13. Atkission excepts to Finding of Fact Nos. 114, 119, 120, and 121 concerning the dealership's signage obligations. Those findings are not reasonably supported by substantial evidence considering the reliable and probative evidence in the record as a whole and are the product of an incorrect application and interpretation of applicable law. The findings ignore the need to relocate the dealership, the *force majeure* provision of the franchise agreement, and Chrysler's requirement to repair the signage at the dealership. The dealership's main sign was badly damaged in Hurricane Ike.[53] In particular, the sign's internal lighting was broken.[54] Repairing and maintaining the sign is Chrysler's responsibility for which Atkission pays a monthly fee.[55] Despite several requests to repair the sign, Chrysler has never fixed it.[56] Atkission tried unsuccessfully to find the parts needed to repair the sign.[57] To make the sign serviceable, Atkission, at its own expense, installed outside lighting to illuminate it at night and placed a canvas bag, not a plastic bag, on the sign with the brand names of Chrysler, Jeep, and Dodge printed on it.[58] Because of its plan to relocate the dealership, Atkission has resisted buying and

[53] Testimony of Tyra Boram, Tr. at 713, lines 15-17; Testimony of Cecil Atkission, Tr. at 866, lines 4-5.

[54] Testimony of Cecil Atkission, Tr. at 866, lines 16-19; 867, lines 5-8.

[55] Testimony of Tyra Boram, Tr. at 712, line 25; 713, lines 1-10; 713, line 25; 714, line 1; Testimony of Cecil Atkission, Tr. at 865, lines 24-25; 866, lines 1-3.

[56] Testimony of Tyra Boram, Tr. at 714, lines 2-3; Testimony of Cecil Atkission, Tr. at 866, lines 20-25; 867, lines 9-10; 940, lines 15-21.

[57] Testimony of Cecil Atkission, Tr. at 868, lines 3-9.

[58] Testimony of Cecil Atkission, Tr. at 867, lines 1-4, 14-20.

installing a new sign and incurring the expense of relocating it.[59] However, in September 2015, Atkission paid the required deposit of $30,399.00 for the new sign.[60] The existing sign has not been removed, and Atkission is still paying the monthly maintenance fee for it. [Testimony of Cecil Atkission, Tr. at 868, lines 10-16]. For these reasons, the foregoing findings should be changed to provide as follows:

- No. 114. Atkission Chrysler did not breach its signage obligation to display and use signage that complies with FCA's policies and guidelines.
- No. 119. FCA is responsible for maintenance and repairs to signage at the dealership, including the pole sign.
- No. 120. Hurricane Ike, the I-10 re-construction, and need to relocate excused any failure to comply with its signage obligations.

14. Atkission excepts to Finding of Fact Nos. 122, 123, 124, 125, 128, and 129 concerning the dealership's working capital and net worth obligations. Those findings are not reasonably supported by substantial evidence considering the reliable and probative evidence in the record as a whole and are the product of an incorrect application and interpretation of applicable law. As shown above, since acquiring the dealership in 2008, Mr. Atkission has invested an additional $6.25 million in the dealership to keep it adequately capitalized and operating in

[59] Testimony of Daniel Fritz, Tr. at 204, lines 9-17; Testimony of Cecil Atkission, Tr. at 868, lines 20-25; 869, lines 1-25; 870, line 1.

[60] Respondent Ex. 144-002.

accordance with FCA's working capital and net worth guides.[61] This $6.25 million constitutes either an investment in the dealership *or* an "unsecured, subordinated debt" obligation of the dealership to its owner, which at all times, has been more than adequate to fund dealership operations at its current location.[62] Properly accounted for, the $6.25 million conclusively establishes that the dealership has always met FCA's working capital[63] and net worth requirements.[64]

The ALJs found Atkission's financial expert, Carl Woodward, who suggested and supported the reclassification, to be credible. (PFD at 62). But the ALJs disregarded Mr. Woodward's evidence because the reclassification was done after termination proceedings were instituted. (PFD at 62). The ALJs' action is yet another example of their penchant for favoring form over substance in this case. It is undisputed that Atkission put $6.25 million in cash into his dealership. That is not a "minimal" amount. The only issue is how those funds should be treated on the dealership's books. The $6.25 million is either a debt owed to Mr. Atkission or it is

---

[61] Testimony of Tyra Boram, Tr. at 712, lines 7-19; Testimony of Cecil Atkission, Tr. at 874, lines 24-25; 875, lines 1-16; 886, lines 1-4; 888, lines 22-24.

[62] Complainant Ex. 29 at 2; Testimony of Curtis Coleman, Tr. at 752, lines 5-21; 753, lines 8-14; Testimony of Carl Woodward, Tr. at 1065, lines 21-25, 1006, lines 1-15; Respondent Ex. 152-008, ¶ 31.

[63] Complainant Ex. C-29 at 2; Respondent Ex. 33(l), 34(l), 35(l), 36 (l), 37(l), 38(k), 38(l); Testimony of Curtis Coleman, Tr. at 762, lines 22-25; 763, lines 1-7; 766, lines 19-22; 768, lines 18-23; 771, lines 13-16,; 773, lines 10-17; 774, lines 7-13; 775, lines 3-17; Testimony of Cecil Atkission, Tr. at 879, lines 5-7; Testimony of Carl Woodward, Tr. at 1069, lines 8-15; 1074, lines 3-16; 1082, lines 21-25; 1083, lines 1-12; 1096, lines 19-25; 1098, lines 10-13.

[64] Complaint's Ex. 29 at 2; Respondent Ex. 33(l), 34(l), 35(l), 36 (l), 37(l), 38(k), 38(l); Testimony of Curtis Coleman, Tr. at 763, lines 8-17; 766, lines 23-25; 768, lines 24-25; 769, lines 1-21; 771, lines 24-25; 772, lines 1-8; 773, lines 2-9; 774, lines 14-16; Testimony of Carl Woodward, Tr. at 1082, lines 21-25; 1083, lines 1-12; 1097, lines 4-11; 1098, lines 18-21.

equity invested in the dealership by him. The dealership treated those funds as subordinated loans from the owner rather than contributions to capital. But whether classified as an investment or a debt obligation, the financial impact is the same: *Atkission has always satisfied Chrysler's working capital and net worth guides, as the dealership's survival shows.*

The ALJs' misunderstanding of basic accounting principles is again revealed on page 63 of the PFD. The two sentences in the paragraph ending in the middle of that page are fundamentally wrong. Since 2008, Mr. Atkission has provided, in the form of a loan, $6.25 million to the dealership to be used as its working capital. No part of that loan, which has been increasing since shortly after the dealership was purchased, has ever been repaid. The dealership regularly uses some of that loaned money to pay part of the dealership's floor plan loans on its new vehicle inventory. That use is *not* a loan of money *by the dealership*. No short-term use of the funds Mr. Atkission has loaned to the dealership by dealership can re-characterize the $6.25 million loan into a short-term loan. The ALJs should have stated in the PFD that:

> "The $6.25 million that Mr. Atkission has loaned to the dealership constitutes a long-term working capital loan, not a current liability of the dealership. Part of the money Mr. Atkission loaned to the dealership is regularly used by the dealership to fund new vehicle inventory on a short-term basis. Mr. Atkission's long-term working capital loan to the dealership, because it is a subordinated loan from the owner, should be considered to be the same as equity in any calculation of the dealership's working capital or net worth."

The ALJs should have found that the dealership has never failed to meet its working capital and net worth obligations in the franchise agreements, and termination on the basis of the allegations that working capital and net worth standards have not been met is not justified.

For these reasons, the foregoing Findings of Fact should be changed to provide as follows:

- No. 122. Atkission Chrysler has not breached its contractual obligations to maintain adequate working capital consistent with FCA guides and net worth.

- No. 123. For every year since 2010, the amount of the dealership's working capital has been above the amount required by FCA guidelines.

- No. 124. For every year since 2010, the dealership has had a positive net worth.

- No. 125. As of October 2015, the dealership's net worth was a positive number -- $ 2,688,095.00.

- No. 128. The dealership's recalculation of its working capital and net worth at the hearing was reasonable and should be adopted.

- No. 129. Atkission Chrysler's compliance with its working capital and net worth obligations is a factor that does not support termination.

15. Atkission excepts to Finding of Fact No. 133. This finding is not reasonably supported by substantial evidence considering the reliable and probative evidence in the record as a whole and is the product of an incorrect application and interpretation of applicable law. Chrysler's true reason for wanting to terminate the franchise is to increase its market penetration in the Orange Sales Locality – a

reason the Code forbids from constituting good cause for termination by itself. This desire was convincingly shown by the testimony of Chrysler's market expert, its area sales manager, its dealer network manager, and its national dealer placement manager.[65] But the ALJs never acknowledge that Chrysler's market share in the Atkission market area was 105% of the state average market share at the time of the hearing. This shows that the Atkission dealership is causing no harm to Chrysler, notwithstanding its poor sales performance.

When confronted with the fact that Chrysler was achieving more than its expected sales in the Orange Sales Locality, and thus losing no sales to competing brands, Chrysler's market expert, Mr. Farhat, countered that the standard on which MSR for the Dealership (and the rest of the Chrysler dealers in Texas) was based – and on which his expert report is based – is too low and thus inappropriate.[66] Chrysler's area sales manager, Mr. Williams, admitted that Chrysler was achieving 100% MSR in the Orange Sales Locality, but testified that Chrysler's intent was to replace Cecil Atkission with a dealer who would sell more product and "[t]ake market share."[67] Chrysler's dealer network manager, Mr. Tunic, testified that he did not want the dealership to take sales away from other Chrysler dealers, but to take them from Chrysler's competitors in order to have a bigger market share for

[65] Testimony of Terry Williams, Tr. at 63, lines 16-23; 81, lines 22-24; Testimony of Todd Tunic, Tr. at 329, lines 18-25; 330, lines 1-3; Testimony of Christopher Chandler, Tr. at 460, lines 24-25; 461, lines 1-2; Testimony of Sharif Farhat, Tr. at 636, lines 18-25; 637, lines 1-13; 640, lines 6-15].

[66] Testimony of Sharif Farhat, Tr. at 657, line 25; 658, lines 1-8.

[67] Testimony of Terry Williams, Tr. at 63, line 23; 157, lines 9-24; 158, lines 7-11.

Chrysler.[68] Chrysler's national dealer placement manager, Mr. Chandler, testified that Chrysler wanted "a higher market share" than was being achieved in the Orange Sales Locality.[69] For these reasons, the foregoing Finding of Fact should be changed to provide as follows:

- No. 133. FCA's desire for market penetration is the sole basis on which it seeks to terminate the Atkission Chrysler franchise.

16. Atkission excepts to the ALJs' statements at pages 26, 27, and 28 of the PFD concerning the impact of a termination on the dealership's assets and the expected loss to Mr. Atkission if termination occurs. The dealership's inventory of vehicles (both new and used), having a book value of over $4 million as shown by Respondent Ex. 38(k) and 38(l), is subject to new car floor plan loans from Ally Bank (or GMAC) of just under $2 million. A sale of those assets resulting from a termination of the franchise will net at best approximately $2 million -- *not* the $4 million the ALJs project to be recouped. (PFD at 26). The forced sale of the dealership's assets can be expected to produce the following, in rounded numbers:

New and used vehicle inventory	$4,000,000
Less floor plan debt (not Atkission)	$2,000,000
Net	$2,000,000
Plus parts	$300,000
Plus furniture, fixtures and equipment	$200,000 (generous estimate)

[68] Testimony of Todd Tunic, Tr. at 329, lines 18-25; 330, lines 1-3.

[69] Testimony of Christopher Chandler, Tr. at 460, lines 13-25; 461, lines 1-2.

Total proceeds of sale (at most) $2,500,000[70]

With the original dealership acquisition cost capitalized at $882,794 (as shown by Respondent Ex. 38(k) and 38(l)), plus the additional $6.25 million that Mr. Atkission invested in the dealership, he will be very fortunate to hold his total loss to $4 million in the event Atkission Chrysler is terminated. For these reasons, the following Finding of Fact should be added:

- No. 134. Termination of Atkission Chrysler's franchise would result in a financial loss to Mr. Atkission of no less than $4 million.

17. Atkission excepts to Conclusion of Law Nos. 11 and 13. Those legal conclusions are not reasonably supported by substantial evidence considering the reliable and probative evidence in the record as a whole and are the product of an incorrect application and interpretation of applicable law. For these reasons, the foregoing Conclusions of Law should be changed to provide as follows:

- No. 11. FCA has not established good cause to terminate the Dealer Agreements in accordance with Texas Occupations Code § 2301.455.
- No. 13. FCA's proposed termination of Atkission Chrysler's franchise should be denied.

CONCLUSION AND PRAYER

For the foregoing reasons, Atkission prays that its exceptions be in all things sustained; that the ALJs' findings and conclusions that Chrysler proved good cause for the proposed termination of Atkission's franchise be changed and modified to

[70] Respondent Ex. 38(l).

find and conclude that Chrysler failed to prove good cause for the proposed termination and that Atkission's protest be sustained. Alternatively, Atkission prays that this case be remanded to the ALJs for reconsideration and for such other relief to which it has shown itself to be entitled.

Respectfully submitted,

Wm. R. Crocker
Attorney at Law
807 Brazos, Ste. 1014 (78701)
Post Office Box 1418
Austin, Texas 78767
Telephone: 512-478-5611
Facsimile: 512-474-2540
State Bar No. 0591000
Email: crockerlaw@earthlink.net

Nathan Allen, Jr.
JONES, ALLEN & FUQUAY, L.L.P.
8828 Greenville Avenue
Dallas, Texas 75243-7143
Telephone: 214-343-7400
Facsimile: 214-343-7455
Email: nallen@jonesallen.com

By:
J. Bruce Bennett
Cardwell, Hart & Bennett, L.L.P.
807 Brazos, Suite 1001
Austin, Texas 78701
Telephone: (512) 322-0011
Facsimile: (512) 322-0808
Email: jbb.chblaw@me.com

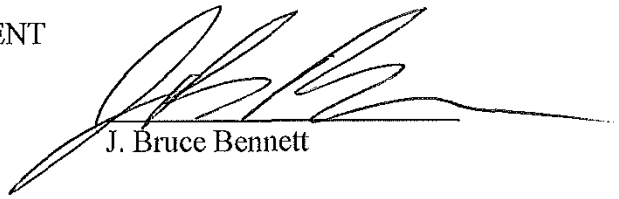
ATTORNEYS FOR COMPLAINANT

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Complainant's Closing Statement has been sent via electronic means on this 20th day of July 2016, to the following counsel of record in this contested case:

Mr. Mark J. Clouatre
Wheeler Trigg O'Donnell, LLP
370 Seventeenth Street, Suite 4500
Denver, CO. 80202
clouatre@wtotrial.com

ATTORNEYS FOR RESPONDENT



J. Bruce Bennett

** INBOUND NOTIFICATION : FAX RECEIVED SUCCESSFULLY **

TIME RECEIVED	REMOTE CSID	DURATION	PAGES	STATUS
July 20, 2016 12:10:45 PM CDT	5124765854	467	28	Received

5124765854 TX Automobile Dealers Assn 11:19:56 07-20-2016 1 /28

1108 Lavaca, Suite 800
Austin, Texas 78701
Phone: 512-476-2686
www.tada.org

FACSIMILE COVER SHEET

Date: July 20, 2016

To: The Hon. Meitra Farhadi
The Hon. Hunter Burkhalter
Administrative Law Judges
SOAH
VIA FAX: 512-322-2061

Re: SOAH Docket No. 608-15-4315.LIC
MVD Docket No. 15-0015.LIC

c: Mr. Daniel Avitia
Director
Motor Vehicle Division
VIA FAX: 512-465-4135

From: Karen Phillips
General Counsel/EVP
TADA

Total Pages, including cover: 28

If you do not receive all of the pages, please contact 512-476-2686, TADA Legal Department.

This facsimile is intended only for the use of the individual or entity to which it is addressed.

TADA
Texas Automobile Dealers Association

1108 Lavaca, Suite 800
Austin, Texas 78701
Phone: 512-476-2686
www.tada.org

July 20, 2016

The Hon. Meitra Farhadi
The Hon. Hunter Burkhalter
Administrative Law Judges
SOAH
300 West 15th St., Suite 502
Austin, TX 78701

Sent via facsimile: 512-322-2061

Re: SOAH Docket No. 608-15-4315.LIC
MVD Docket No. 15-0015.LIC

Cecil Atkission Orange, LLC d/b/a Cecil Atkission Chrysler Jeep Dodge,
Complainant
v.
FCA USA LLC,
Respondent

Dear Judges Farhadi and Burkhalter:

Enclosed is the Amicus Curiae Brief of the Texas Automobile Dealers Association for filing in the above-referenced cause of action.

A copy is being forwarded via electronic means as set out in the Certificate of Service to counsel.

If you have any question or difficulty with the transmission, please do not hesitate to contact me.

Sincerely,

Karen Phillips
General Counsel/EVP

c: Daniel Avitia

TEXAS DEPARTMENT OF MOTOR VEHICLES
MOTOR VEHICLE DIVISION

Cecil Atkission Orange, LLC d/b/a Cecil Atkission Chrysler Jeep Dodge,	§	
	§	SOAH Docket
Complainant	§	No. 608-15-4315.LIC
	§	
v.	§	
	§	MVD Docket
FCA US LLC,	§	No. 15-0015.LIC
	§	
Respondent	§	

AMICUS CURIAE BRIEF OF TEXAS AUTOMOBILE DEALERS ASSOCIATION

The Texas Automobile Dealers Association (hereinafter referred to as "TADA"), an association of franchised motor vehicle and truck dealers, files this amicus curiae brief in the above-styled cause of action. TADA's comments center around the process and the importance of the board's role as the decision-maker in a contested case filed under the Occupations Code, Chapter 2301 or under Transportation Code, Chapter 503, specifically regarding the termination process.

BOARD IS THE DETERMINER

The Texas Department of Motor Vehicle's board is the determiner as to whether good cause is established by a manufacturer, distributor, or representative for a proposed termination or discontinuance of a franchise. This responsibility does not fall upon "the department" as referenced in the Proposal for Decision (hereinafter referred to as "PFD")–this statutory mandate is given to the board.

The TEXAS OCCUPATIONS CODE states:

> § 2301.453(g): After a hearing, the board shall determine whether the party seeking the termination or discontinuance has established by a preponderance of the evidence that there is good cause for the proposed termination or discontinuance.[1]

The "board" means the board of the Texas Department of Motor Vehicles.[2] The board consists of nine members appointed by the governor with the advice and consent of the senate. Requirements for the board's make-up and appointment include public members; dealer members; a tax-assessor collector member; a law enforcement member; a motor carrier industry member; and a manufacturer or distributor member. Ineligibility for board appointment is succinctly spelled out in the statute.[3]

Although the board may delegate certain of its powers, the power to issue a final order is not delegated in a termination proceeding.[4] The rule adopted by the board regarding a final decision

---

[1]TEX. OCC. CODE ANN. § 2301.453(g) (Vernon 2012).

[2]*Id.*, § 2301.002(2); § 2301.005(a).
See also TEX. TRANSP. CODE ANN. § 1001.001(1) and (2): "'Board' means the board of the department." "'Department' means the Texas Department of Motor Vehicles." (Vernon Supp. 2015).

[3]TEX. TRANSP. CODE ANN. § 1001.021 (Vernon Supp. 2015).

[4]TEX. OCC. CODE ANN. § 2301.154(b) and (c):
(b) "The board by rule may delegate any power relating to a contested case hearing brought under this chapter or Chapter 503, Transportation Code, other than the power to issue a final order, to: (1) one or more of the board's members; (2) the executive director; (3) the director; or (4) one or more of the department's employees."
(c) "The board by rule may delegate the authority to issue a final order in a contested case hearing under this chapter or Chapter 503, Transportation Code, to: (1) one or more of the board's members; (2) the executive director; or (3) the director of a division within the department designated by the board or the executive director to carry out the requirements of this chapter."

states that the board has final order authority in this proceeding.[5]

The nine-member board is given great responsibility as its decisions impact the state and its citizens; thus, it is essential that a hearing and a proposal for decision accurately reflect the statute for the decision-maker's, i.e., the board's, consideration. The accountability for a final order is the nine-member board, not "the department."[6]

The PFD's Conclusions of Law (PFD at 77) recognize the board as the decision-maker in No. 7, No. 9 and No. 10:

> 7. A manufacturer may not terminate or discontinue a franchise with a franchised dealer unless the manufacturer provides notice of the termination and: (1) the franchised dealer consents in writing to the termination, (2) the appropriate time for the dealer to file a protest has expired, or (3) the Board makes a determination of good cause termination. TEX. OCC. CODE § 2301.453(a),(g).
>
> 9. In determining whether FCA established by a preponderance of the evidence that there is good cause for terminating Atkission Chrysler's franchise, the Board is required to consider all existing circumstances, including seven statutory factors. TEX. OCC. CODE § 2301.455(a).

---

[5]43 TAC § 215.55: (a) "The board has final order authority in a contested case under Occupations Code, § 2301.204 or §§ 2301.601 - 2301.613, initiated by a complaint filed before January 1, 2014."

(b) "The hearings examiner has final order authority in a contested case under Occupations Code, § 2301.204 or §§ 2301.601-2301.613, filed on or after January 1, 2014.

(c) Except as provided by subsections (a) and (b) of this section, the Board has final order authority in a contested case filed under Occupations Code, Chapter 2301, or under Transportation Code, Chapter 503."

(d) "An order shall be deemed final and binding on all parties and all administrative remedies are deemed to be exhausted as of the effective date, unless a motion for rehearing is filed with the appropriate motion for rehearing authority as provided by law." (Emphasis added.)

[6]PFD at 4, 5, 6, 7.

10. The Board has the exclusive jurisdiction to determine the the issue of good cause, including the weight to be given each statutory factor. *Austin Chevrolet, Inc. v. Motor Vehicle Bd.*, 212 S.W.3d 425, 432 (Tex. App.–Austin 2006, pet. denied).

There can be no misunderstanding regarding the board's consequential role in the livelihood and investment of one of its citizens as well as the board's reach on the dealership's employees, consumers, and community that their decision affects.

CODE REQUIREMENTS

In 1971, the 62nd Legislature adopted the Texas Motor Vehicle Commission Code. The language in the 1971 bill[7] referencing the required notice of termination by a manufacturer, distributor, or representative is all but identical to the statute's current language.

The 1971 adopted language stated:

> Sec. 5.02. It shall be ***unlawful*** for any manufacturer, distributor, or representative to:
>
> . . .
>
> (3) ***Notwithstanding the terms of any franchise agreement***, terminate or refuse to continue any franchise with a dealer unless (A) the ***dealer and the Commission have received written notice sixty days*** before the effective date thereof setting forth the ***specific grounds*** for termination or noncontinuance and (B) if the dealer files a protest with the Commission, it is established by a preponderance of evidence at a hearing called by the Commission that there is ***good cause*** for the termination or noncontinuance. The Commission[8] shall consider ***all the existing circumstances*** in determining good cause, including without limitation the dealer's sales in relation to the market, the dealer's investment and obligations, injury to public welfare, adequacy of service facilities, equipment, parts and personnel of the dealer and other dealers of new

[7]Texas Motor Vehicle Commission Code, 62nd Leg., R.S., ch. 51, 1971 Tex. Gen. Laws 89, 97.

[8]The "Commission" consisted of six persons appointed by the Governor with the advice and consent of the Senate. *Id.* at 90.

> motor vehicles of the same line-make, whether warranties are being honored, and compliance with the franchise agreement. Good cause shall not be shown solely by a desire for further market penetration. (Emphasis added.)
>
> . . .

The statute at issue today maintains that notwithstanding the franchise, a manufacturer, distributor, or representative must provide a notice of termination with the specific grounds to a dealer and to the board.[9] In addition, the circumstances to consider whether there is a good cause to terminate are retained as well as expanded from the initial 1971 Code adoption.

In 1971, the conditions or facts for consideration of good cause for a termination are, without limitation:

> 1. The dealer's sales in relation to the market;
> 2. The dealer's investment and obligations;
> 3. Injury to public welfare;
> 4. Adequacy of service facilities, equipment, parts and personnel of the dealer and other dealers of new motor vehicles of the same line-make;
> 5. Whether warranties are being honored; and,
> 6. Compliance with the franchise agreement.
>
> Good cause shall not be shown solely by a desire for further market penetration.

Today, the statute continues to list determinative factors the board is to consider for a finding of "good cause" to terminate and retains the elements from 1971 as well as expanding the enumerated considerations in 1989, as underlined below:

> 1. The dealer's sales in relation to the sales in the market;
> 2. The dealer's investment and obligations;
> 3. Injury or benefit to the public;
> 4. The adequacy of the dealer's service facilities, equipment, parts, and personnel in relation to those of other dealers of new motor vehicles of the same line-make;

---

[9] TEX. OCC. CODE ANN. § 2301.453(a).

5. Whether warranties are being honored by the dealer;
6. The parties' compliance with the franchise, except to the extent that the franchise conflicts with this chapter; and
7. The enforceability of the franchise from a public policy standpoint, including issues of the reasonableness of the franchise's terms, oppression, adhesion, and the parties relative bargaining power.[10]

The desire of a manufacturer, distributor, or representative for market penetration does not by itself constitute good cause.[11] (Emphasis added)

In addition to the 1989 underlined language above regarding "good cause," the "specific grounds" for the termination or discontinuance continue to be required to be given to the dealer.[12]

The requirement that a dealer be given the "specific grounds" for a termination or noncontinuance is a requirement placed on a manufacturer, distributor or representative since 1971 and continues to be required forty-five years later.

In order for a dealer to mount a defense to allegations regarding the dealer's investment, livelihood, and the dealership's employees and consumers, the dealer must know of what he or she is being accused.

The "specific grounds" requirement also gives a manufacturer the opportunity to analyze the veracity and seriousness of its allegations to terminate.

FCA US LLC December 19, 2014, Notice of Termination

The certified and return receipt and overnight letter of December 19, 2014, to the board and to Mr. Atkission gave the Chrysler, Jeep and Dodge required "Notice of Termination." On page 1

---

[10]Act of June 16, 1989, 71st Legislature, R.S., ch. 1130, 1989 Tex. Gen. Laws 4653, 4665 and now codified in TEX. OCC. CODE ANN. at § 2301.455(a).

[11]*Id.* § 2301.455(b).

[12]*Id.* § 2301.453(c).

of the December 19, 2014 letter, the outlined notice for material breach of the Dealer Agreements states:

> (1) sales performance (Dealer Agreements ¶ 4and ¶ 11(a) of Additional Provisions of each Dealer Agreement),
> (2) working capital (Dealer Agreements ¶ 11(e)), and,
> (3) net worth (Dealer Agreements ¶ 11(e)).

Under the noticed "sales performance" cause are "other factors" noticed in the December 19, 2014, letter at 6 and 7:

> (1) sales performance,
> (A) Dealer's Signage Obligations (¶ 11(g) of the Additional Provisions of each Dealer Agreement);
> (B) Dealer's Management and Sales Personnel Obligations (¶ 11(f) of the Additional Provisions of the Dealer Agreements);
> (C) Dealer's Advertising and Sales Promotion Obligations (Dealer Agreements ¶ 12).[13]

The board and Mr. Atkission have notice of the "specific grounds" for termination as of December 19, 2014, and those grounds specify that the sales performance– including his signage, management and sales personnel obligations, and advertising and sales promotion obligations; working capital; and, net worth are the specific grounds for termination.

If a manufacturer, distributor, or representative determines there are new or additional grounds beyond the noticed specific grounds given for termination, then a new notice must be sent; otherwise, the statutorily required notice of "specific grounds" is incomplete and non-compliant.

This new notice must comply with Section 2301.453. The new notice must be sent registered or certified mail to the board and to the dealer; list the "specific grounds" for the termination; be received no later than the 60th day before the effective date of the termination or discontinuance; and

---

[13]SOAH Exhibit R67.

contain the required notice.

Not only must a dealer know with specificity the reason for the termination prior to hearing, but the board must also be given this required information. This notice to the board is necessary as matters relating to a complaint or protest under Subchapter J of the Occupations Code are mediated through the agency's mediation procedure prior to a referral to SOAH.[14]

Adding new or additional reasons to terminate a dealer after sending a required Notice of Termination must start the process afresh. To do otherwise circumvents the "specific grounds" notice requirement as well as the agency's procedure and opportunity to mediate the dispute.

DETERMINING GOOD CAUSE

The statute requires the board to consider all existing circumstances in making a good cause determination for a dealer's termination, notwithstanding the franchise agreement.[15] The statute lists items for the board to consider when making a good cause determination.

In 1989, when the Legislature was debating amendments to the statute, new requirements were placed on the Commission, now board, to require that the franchise agreement's enforceability be taken into account. Mr. Gene Fondren, former President of TADA, made the following comments to the House Committee on Transportation on April 4, 1989, and which are still applicable today:

> . . .
> The amendments in H.B. 2552 and the committee substitute which more directly deal with the substantive rights and duties of the licensees of the Commission generally follow the same structure and pattern

---

[14]TEX. OCC. CODE ANN. § 2301.703(c) (Vernon Supp. 2015); 43 TAC § 215.305 and § 215.306.

[15]*Id.* § 2301.455(a).

> which have existed in the Code since its inception.
>
> As an example, both the new and revised provisions of Section 5.02 of the Code establish substantive and procedural rights of a dealer franchisee in his relationship with his manufacturer or distributor "notwithstanding the terms of any franchise agreement." In recognizing the relationship between a Texas dealer and his franchisor, the legislature has chosen not to require the franchisor to rewrite terms of a manufacturer's or distributor's agreement with the dealer. The legislature has clearly declared, however, that whenever a provision in such an agreement is in conflict with the laws of the state of Texas, then and in that event, a dealer may insist on the rights granted to him under the law "notwithstanding the terms of any franchise agreement." In taking this approach, the legislature recognizes that manufacturer and distributor agreements are generally written on a national basis and are undoubtedly subject to differing laws of the many jurisdictions in which dealers operate.
>
> Therefore, rather than imposing upon manufacturers the burden of writing an agreement in compliance with the laws of each jurisdiction, including Texas, this legislature has wisely declared that any provisions in these agreements which are contrary to the public policy and laws of this state, upon a licensee's action to secure his rights, must give way to the laws of this state.
> (Exhibit 1)

If a franchise agreement is relied upon as the source of the "specific grounds" for termination, the "specific grounds" must be stated in the written notice to the dealer as required by § 2301.453(c) and those grounds must first be determined to be a good cause in light of the consideration of "all existing circumstances." This analysis is necessary not because those grounds are a part of a franchise agreement, but because the statute looks at good cause "notwithstanding the franchise agreement."

The franchise provisions alleged to have been violated must also be analyzed "from a public policy standpoint, including issues of the reasonableness of the franchise's terms, oppression, adhesion, and the parties relative bargaining power" as required by § 2301.455(a)(7). The cause for

termination must be good cause under Texas law–not just because of an alleged violation of a stated franchise provision.

In determining whether an alleged violation of a franchise provision is good cause for termination, the board must be guided by "all existing circumstances," including the seven considerations in § 2301.455.

A dealer in receipt of a termination notice is given the opportunity to file a protest and have a hearing on whether there is a good cause. After a hearing, the board determines whether, by a preponderance of evidence, the manufacturer has met the burden of showing there is good cause. The board issues the final order or decision.[16]

In order for the board to determine whether good cause exists for a termination, it is necessary to hear the dealer's arguments. The board does not make a determination in a vacuum or with partial information as it is charged with reviewing "all existing circumstances."

In addition, if the breach of a franchise provision is the stated good cause reason for a proposed termination, an analysis must be made of each such franchise provision with respect to its enforceability from a public policy standpoint, including consideration of the reasonableness of the franchise's terms, oppression, adhesion, and the parties' relative bargaining power, as required by § 2301.455(7).

Termination based on an alleged breach of a franchise provision without the analysis required in subsection (7) is incomplete and not compliant with Government Code § 2001.058(e).[17]

---

[16] *Id.* § 2301.453(f) and (g).

[17] TEX. GOV'T CODE ANN. §2001.058(e): "A state agency may change a finding of fact or conclusion of law made by the administrative law judge, or may vacate or modify an order issued by the administrative judge, only if the agency determines:

Termination for a specific ground including one based on an alleged breach of a specific franchise provision without the benefit of a dealer's explanation and defense does not give the board the benefit of "all existing circumstances." Whether a dealer's explanation and defense refutes a specific ground for termination or shows that the alleged good cause is not proven is a decision for the board.

Any suggestion that a dealer may not explain or defend a termination ground takes away a party's potential defense and explanation and leaves the board with only partial knowledge–not the required consideration of all existing circumstances. To ask the board as the decision-maker to rule with incomplete information is contrary to the board's charge to consider "all existing circumstances" as set forth in § 2301.455(a).[18]

Whether a particular franchise provision is a good cause ground for termination must also be analyzed for its compliance with the code as required by § 2301.455(a)(6).[19] For example, sales

---

(1) that the administrative law judge did not properly apply or interpret applicable law, agency rules, written policies provided under Subsection (c), or prior administrative decisions;
(2) that a prior administrative decision on which the administrative law judge relied is incorrect or should be changed; or
(3) that a technical error in a finding of fact should be changed.
(Vernon 2016).

[18]FCA US LLC's Reply Closing Brief at 15: "Section 2301.455(a)(1) gives dealerships no opportunity to explain away poor performance; instead, its clear terms contemplate only sales performance itself, without investigating 'why.' Therefore, the analysis of this factor ends with Atkission's admission that its sales performance over its entire existence was dismissal [sic]. But even after indulging Atkission and evaluating its purported explanations, the undisputed evidence reveals its excuses are groundless."

[19]§ 2301.455(a)(6): "Notwithstanding the terms of any franchise, in determining whether good cause has been established under Section 2301.453 or 2301.454, the board shall consider all existing circumstances, including: . . .
(6) the parties' compliance with the franchise, ***except to the extent that the franchise conflicts with this chapter***; and . . ." (Emphasis added).

or service standards may not be unreasonable under § 2301.467(a)(1); the purchase of special tools or equipment must be reasonable according to § 2301.467(a)(2); relocation requirements must be reasonable as required by § 2301.467(b).

The consideration of a manufacturer's or distributor's compliance with the code may also be necessary to apprise the board of all existing circumstances, such as whether motor vehicles or parts are delivered as required by § 2301.452; whether the manufacturer or distributor is equitable in its application of standards or guidelines as well as its treatment of all dealers when applying a formula or other computation or process that gauges the performance of a dealership under § 2301.468 as well as satisfying the duty of acting in good faith and fair dealing as outlined in § 2301.478.

The legislature determined that the Code's provisions are inter-related and a thorough analysis be given to the decision-maker when making decisions that affect the general economy and citizenry of Texas.

CONCLUSION

The historical perspective regarding a statute is a valuable tool for a decision-maker. The inter-relationship of a statute with other statutes is also useful and may be required information in arriving at a decision.

The legislature adopts and amends laws as it finds necessary. In a termination cause of action, the statute is much the same today as in 1971. It is unlawful for a manufacturer, distributor, or representative to terminate or discontinue a franchise without providing a sixty days written notice to both the board and to the dealer. The specific grounds for the termination or discontinuance must be stated in the written notice.

Notwithstanding a franchise agreement's terms, a good cause determination for a termination

must be found by the board. The board is to consider all existing circumstances. The board's consideration must include the dealer's sales in relation to sales in the market; the dealer's investment and obligations; the injury or benefit to the public; the adequacy of the dealer's service facilities, equipment, parts, and personnel in relation to those of other dealers of new motor vehicles of the same line-make; whether warranties are being honored by the dealer; the parties' compliance with the franchise, except to the extent that the franchise conflicts with this chapter; and, the enforceability of the franchise from a public policy standpoint, including issues of the reasonableness of the franchise's terms, oppression, adhesion, and the parties' relative bargaining power. A manufacturer's, distributor's, or representative's desire for market penetration does not by itself, constitute good cause for a termination of a dealer.

If a termination is based upon a franchise agreement's provisions, those provisions must be analyzed and shown to be good cause for termination as required under the § 2301.455. An analysis of whether a franchise provision is in conflict with Chapter 2301, Occupations Code, as well as whether a franchise provision is enforceable from a public policy standpoint must be made if a franchise provision is the alleged good cause reason for termination as the statute specifically says "notwithstanding the franchise."

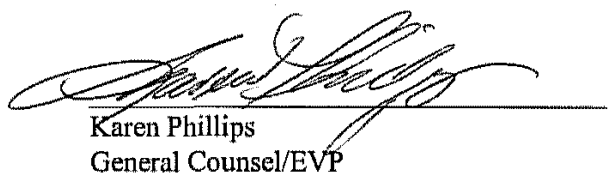
If the stated termination is based on a franchise provision that is not a good cause for termination considering all existing circumstances under § 2301.455, then the termination cannot be allowed. If the franchise provision is in conflict with Chapter 2301 or, if the franchise provision is not enforceable from a public policy standpoint, the board must weigh these findings with the other "existing circumstances."

The board must be given the requisite information to make a decision, including whether a

franchise provision is in conflict with state law or is not an enforceable provision. If there is a misapplication or an improper interpretation of law, the board may change a finding of fact or a conclusion of law in a PFD.

The board's responsibility and authority cannot be overstated as its decisions impact licensees, employees of licensees, motor vehicle owners and operators, communities, the citizenry, and this State.

Respectfully submitted,



Karen Phillips
General Counsel/EVP
Texas Automobile Dealers Association
1108 Lavaca St., Suite 800
Austin, TX 78701
Telephone: 512-476-2686
Facsimile: 512 476-5854
State Bar No.: 04487400

ATTORNEY FOR TADA, Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Amicus Curiae Brief of the Texas Automobile Dealers Association has been sent via electronic means on this 20th day of July, 2016, to the following counsel of record in this contested case:

Mr. Mark J. Clouatre
Wheeler Trigg O'Donnell, LLP
370 Seventeenth Street, Suite 4500
Denver, CO 80202
clouatre@wtotrial.com

Mr. John W. Chambless II
Thompson, Coe, Cousins & Irons, LLP
701 Brazos, Suite 1500
Austin, TX 78701
jchambless@thompsoncoe.com

ATTORNEYS FOR RESPONDENT,
FCA US LLC

Mr. William R. Crocker
807 Brazos, Suite 1014
Austin, TX 78701
crockerlaw@earathlink.net

Mr. Nathan Allen, Jr.
Jones, Allen & Fuquay, LLP
8828 Greenville Av.
Dallas, TX 75234
nallen@jonesallen.com

Mr. J. Bruce Bennett
Cardwell, Hart & Bennett, LLP
807 Brazos, Suite 1001
Austin, TX 78701
jbb.chblaw@me.com

ATTORNEYS FOR COMPLAINANT,
Cecil Atkission Orange, LLC, d/b/a Cecil Atkission Chrysler Jeep Dodge

Karen Phillips

Exhibit 1

House of Representatives
Committee on Transportation

May 9, 1990

I certify that the attached documents are correct copies of written testimony provided by Mr. Gene Fondren to the House Committee on Transportation at a Public Hearing held April 4, 1989.

STEVEN M. POLUNSKY
Chief Committee Clerk

STATE OF TEXAS)
(
COUNTY OF TRAVIS)
(

Before me, a Notary Public, on this day personally appeared Steven M. Polunsky, known to me to be the person whose name is subscribed to the foregoing instrument and acknowledged that he executed it for the purposes and consideration therein expressed.

Given under my hand and seal of office, this the 9th day of May, 19 90.

JAMES M. PETERSON NOTARY PUBLIC STATE OF TEXAS EXPIRES DEC. 18, 1991

Notary Public in and of the State of Texas

P.O. Box 2910 • Austin, Texas 78768-2910 • 512-463-0818

STATEMENT OF GENE FONDREN
H.B. 2552 and Committee Substitute

Mr. Chairman and members of the House Committee on Transportation, my name is Gene Fondren. I am President of the Texas Automobile Dealers Association, comprised of some 1450 new car and truck dealers who are licensed to do business in Texas, and I am here tonight to speak in support of H.B. 2552 and the committee substitute laid out at the request of Chairman Cain.

As Chairman Cain has pointed out, H.B. 2552, including the committee substitute, amends the Texas Motor Vehicle Commission Code in several particulars.

H.B. 2552 and the committee substitute contain both substantive and procedural amendments to the Code.

The amendments which I would generally classify as procedural are designed to reinsure and re-enforce the jurisdiction of the Texas Motor Vehicle Commission over the distribution and sale of new motor vehicles in Texas as set out in the policy and purpose clause (Section 1.02) and elsewhere throughout the act. Further, these procedural changes are designed to refine and re-enforce the authority of the Commission and its staff to carry out its licensing activities and to conduct hearings and enter orders and final decisions in as prompt and efficient a manner as is reasonably possible.

In the furtherance of these objectives, language has been drawn from a substantial number of other statutes governing Texas regulatory agencies and from statutes with similar objectives in one or two other jurisdictions.

While some of these procedural and jurisdictional changes are responsive to challenges raised in contested cases (all such challenges have been unsuccessful to date), they also represent a natural extension and delegation to an agency which has proven its worth in regulating an industry of vital importance to the social and economic good of this state and in preserving and protecting valuable property rights of its citizens.

A compendium of other statutes referenced in these amendments to the Code is attached for the purpose of this record.

The amendments in H.B. 2552 and the committee substitute which more directly deal with the substantive rights and duties of the licensees of the Commission generally follow the same structure and pattern which have existed in the Code since its inception.

STATEMENT OF GENE FONDREN
H.B. 2552 and Committee Substitute - page 2

As an example, both the new and revised provisions of Section 5.02 of the Code establish substantive and procedural rights of a dealer franchisee in his relationship with his manufacturer or distributor "notwithstanding the terms of any franchise agreement." In recognizing the relationship between a Texas dealer and his franchisor, the legislature has chosen not to require the franchisor to rewrite the terms of a manufacturer's or distributor's agreement with the dealer. The legislature has clearly declared, however, that whenever a provision in such an agreement is in conflict with the laws of the state of Texas, then and in that event, a dealer may insist on the rights granted to him under the law "notwithstanding the terms of any franchise agreement." In taking this approach, the legislature recognizes that manufacturer and distributor agreements are generally written on a national basis and are undoubtedly subject to differing laws of the many jurisdictions in which dealers operate.

Therefore, rather than imposing upon manufacturers the burden of writing an agreement in compliance with the laws of each jurisdiction, including Texas, this legislature has wisely declared that any provisions in these agreements which are contrary to the public policy and laws of this state, upon a licensee's action to secure his rights, must give way to the laws of this state.

It is to be noted that Subdivisions (1) and (2) of Section 5.02 proscribe certain conduct by manufacturers or distributors, making such proscribed conduct unlawful.

COMMENTS

Section 1.03.(10): The definition of "broker" has been clarified by adding language which exempts bona fide employees of dealers, representatives and distributors from the definition of broker only when they are acting on behalf of their employer.

Section 1.03.(16): This definition, adopted from the Administrative Procedure and Texas Register Act, serves to limit the scope of rule and/or regulation so that the agency may adopt internal rules and specify forms and take care of other miscellaneous internal administrative matters without having to go through a formal rulemaking and also provides a standard which serves to limit the extent to which an agency may engage in informal rulemaking through the use of internal memorandums.

Section 1.03.(17): A definition of "party", derived from the Administrative Procedure and Texas Register Act, was added to the Code so that "party" could be added as a necessary term of art to the Code.

Section 1.03.(18): A definition of "relocation" was added to provide a statutory definition of the term.

Section 1.04.: This section is a standard construction and severability provision which will serve to maintain the validity of the balance of the Texas Motor Vehicle Commission Code in the event that any portion of the Code should be held invalid.

Section 2.02A.: This section has been added because the Sunset Advisory Commission will require its addition in 1991 during Sunset review.

Section 2.08.(a): This section has been amended to grant the Chairman and the Executive Director the power to call special Commission meetings.

Section 2.09.(a): This section makes the Executive Director the chief executive and administrative officer of the agency and requires that he be a licensed attorney. He serves at the pleasure of the Commissioners.

Section 2.09.(b): This section requires the Executive Director to meet with the Commissioners in an advisory capacity in all proceedings of the Commission. It also requires the Executive Director to submit reports to the Commission as may be required by the Commission's rules or by this Act.

Section 2.09.(c): This section provides for maintaining minutes of Commission proceedings and for the custodianship of the Commission's files and records.

Section 2.09.(d): This section grants the Executive Director the power to, with the consent of a majority of the Commissioners, enter into contracts on behalf of the Commission.

Section 2.09.(e): This section grants the Executive Director the power to employ the Commission's staff.

Section 2.09.(f): This section carries forward the language which was previously set forth in section 2.09.(b).

Section 2.09.(g): This section carries forward the language which was previously set forth in section 2.09.(c).

Section 2.09.(h): This section creates a blanket indemnity by the State for all Commission officials and employees for all good faith acts in their official capacity. This is to insulate these officials from the chilling effect of the threat of personal liability for their good faith acts in performance of their duties. The general indemnity statutes of this state are more restricted and provide inadequate protection.

Section 2.09.(i): This section focuses the flow of documents into the Commission by requiring them to be directed to the Executive Director.

Section 2.09A.: This section requires hearing examiners to be licensed attorneys.

Section 2.12.: This section now contains certain complaint reporting requirements which will also be required by the Sunset Advisory Commission in 1991.

Section 2.13.: This section has been added to incorporate a number of provisions which will be required by the Sunset Advisory Commission in 1991.

Section 3.01.: This section has been created to provide a clear jurisdictional grant, and power to implement, over all issues involving the distribution and sale of new motor vehicles.

Section 3.02.: This section specifies the duties of the Commission.

Section 3.03.: This section grants the Commission the power to exercise its grant of jurisdiction.

Section 3.04.: Provides a clear and express delegation of powers structure within the Commission. This section allows more precise delegation of powers by the Commission.

Section 3.05.: Grants the power to investigate complaints and the power to dismiss unmeritorious complaints.

Section 3.06.: This section is a delegation of power to the Commission to adopt Rules.

Section 3.07.: This section delegates to the Executive Director the power to execute the final decisions of the agency.

Section 3.08.(a): This section sets up the general hearing procedure in contested cases and sets up the general prescription that the APA will control in contested cases to the extent that it "does not conflict" with this Code. It also delegates certain Commission powers to the presiding examiner including the authority to issue interlocutory, cease and desist orders.

Section 3.08.(b): This section specifies the contents of a hearing notice.

Section 3.08.(c): This section provides the notice procedure for rulemaking and requires the promulgation of rules to govern licensing proceedings.

Section 3.08.(d): Governs certain due process issues of notice in a contested case.

Section 3.08.(e): This section specifies the time and place for the conduct of hearings.

Section 3.08.(f): This section sets forth the rights of any person who is a party before the Commission.

Section 3.08.(g): Specifies the procedures for all contested cases.

Section 3.08.(h): Contains the mechanics for motion for rehearing practice in all contested cases.

Section 3.08.(i): This section provides for and specifies the detailed procedure for filing a complaint concerning defects in motor vehicles which are covered by a manufacturer's, converter's or distributor's warranty.

Section 3.08.(j): This section authorizes the Commission to dismiss a complaint or protest if it determines that a complaint or protest is frivolous or was made for purposes of harassment.

Section 3.08A.: This is a general statutory stay which estops all parties from disturbing the status quo once they receive notice of a complaint or protest against their actions. Subsection (b) allows aggrieved parties an intraagency challenge of the stay.

Section 3.09.: Allows the Code to preempt conflicting APA provisions.

Section 4.01.: Expressly makes all proceedings involving licenses contested cases. The Commission may, by rule, provide for published notice in Section 4.02 licensing proceedings.

Section 4.02.(a): This section has been grammatically corrected.

Section 4.02.(c): This section has received grammatical and stylistic corrections.

Section 4.02.(d): This section has been grammatically corrected.

Section 4.03.: This section has received grammatical and stylistic corrections.

Section 4.06.(a): This section has been revised to remove the element of subjective intent from several of the grounds for revoking or suspending an outstanding license.

Section 4.06.(c): This section has been modified to set forth the standards the Commission shall consider in determining whether an applicant has, after protest, failed to establish good cause for a new dealership application.

Section 4.06.(d): This section sets forth the standing requirements to protest a dealer's application to establish a dealership.

Section 4.06.(e): This section has received grammatical corrections.

Section 4.06.(f): This section has been amended to allow the Commission to inspect the books and records of a licensee in connection with the performance of its duties under this Act.

Section 4.08.(a): This section has had an internal citation corrected to harmonize with the rest of the Code.

Section 4.08.(c): This section has received grammatical corrections and has been adjusted to provide that failure to give the notice required by section 4.07 is a violation of the Act.

Section 5.02.(3): This is a specific statutory stay for franchise terminations. This section contains specific notice requirements and procedures which must be followed by any manufacturer or distributor and estops all parties from disturbing the status quo upon notice of protest of a franchise termination.

Section 5.02.(4): This is an additional, express statutory stay which operates when any manufacturer or distributor seeks to modify or replace a franchise.

Section 5.02.(5): This gives factors the Commission shall consider in determining good cause under Section 5.02. It includes a new factor regarding the enforceability, from a public policy standpoint, of the franchise in question and exculpates a dealer from failure to comply with "oppressive" franchise terms.

Section 5.02.(6): This section repeats the former language of section 5.02.(4).

Section 5.02.(7): This section now permits dealers to reasonably change the capital structure of their dealerships.

Section 5.02.(8): This adjustment was made so that the Commission does not have to give approval to all preventions of sales or transfers unless a dealer or other interested party has complained of the prevention of transfer.

Section 5.02.(9): This section was grammatically corrected so that it would integrate with the leading paragraph of section 5.02.

Section 5.02.(10): This section was grammatically corrected so that it would integrate with the leading paragraph of section 5.02.

Section 5.02.(11): This section received various grammatical corrections, including the adjustment to conform it to the leading paragraph of section 5.02, and was adjusted to extend this section to distributors.

Section 5.02.(12): This section repeats the language of former section 5.02.(10).

Section 5.02.(13): This section repeats the language of 5.02(11) and adjusts the test to be applied by the Commission so that a succession would be disallowed upon a showing that the succession would be detrimental to the public interest and to the representation of the manufacturer or distributor.

Section 5.02.(14): This section repeats the language of former section 5.02.(12) and adds the provision that this section would apply notwithstanding the terms of any franchise agreement.

Section 5.02.(15): This section repeats the language of the former section 5.02.(13).

Section 5.02.(16): This section essentially repeats the language of former section 5.02.(14) but with the addition of language which requires payment to a dealer or any lienholder in accordance with their respective interests after a franchise is terminated and, in subpart (F), the time periods for payments to a terminated franchisee are shortened.

Section 5.02.(17): This makes illegal a manufacturer's or distributor's attempt to terminate a franchise by changing business structure or method of distribution.

Section 5.02.(18): This section governs the usage of arbitration.

Section 5.02.(19): This section deals with a dealer's required relationship with any advertising association.

Section 5.03.: This section was grammatically corrected.

Section 5.04.(a) and (c): These subsections were grammatically corrected and the language of subsection (a)(2) was adjusted to declare that an agent of a licensee may not engage in the business of buying, selling or exchanging new motor vehicles.

Section 6.01.: Changes the Commission's civil penalty statute to bring it in line with other state agencies. Most notably it amends the penalty power to an amount not to exceed $10,000 per day per act of violation.

Section 6.01A.: Contains the mechanics and guidelines for implementing the Commission's injunction powers. It closely follows the statute authorizing and providing the factors for issuing district court injunctions (Tx. Civ. Prac. & Rem. Code §65.001 et seq.) but is tailored to the Commission's own needs. It provides for intraagency appeal of interlocutory, cease and desist orders prior to resorting to the courts.

Section 6.02.: This section was grammatically corrected and adjusted to allow suit for injunctive relief to be instituted in any court.

Section 6.03.: This section received various grammatical corrections.

Section 6.04: Creates additional venue options for actions brought to enforce Commission orders.

Section 6.05: This section was grammatically corrected and adjusted to allow a court to issue ex parte relief.

Section 6.06.(a): This section was grammatically corrected and was adjusted to require that due deference be given to findings of fact and conclusions of law which the Commission may have issued in any final order which forms the basis of a civil suit.

Section 6.06.(d): This section requires that all actions against a dealer be brought in an appropriate Texas forum and that Texas law be applied.

Section 6.07.(a) and (b): These sections were adjusted to extend coverage to converters.

Section 6.07.(c): This section was adjusted to extend coverage to converters and to provide that the Commission may not order a manufacturer, distributor or converter to refund or replace a defective vehicle until an opportunity has been given to cure the alleged defect or nonconformity.

Section 6.07.(d): This section was adjusted to incorporate a rebuttable presumption regarding a reasonable number of repair attempts and to provide that out of service for repair time does not accrue during any period of time that a manufacturer or distributor lends a comparable motor vehicle.

Section 6.07.(e): This section was adjusted to cover converters and was grammatically corrected. Trial de novo has also been deleted.

Section 6.07.(g): This section was adjusted to cover converters and provides that the Commission may only order a dealer to reimburse for items or options added to a vehicle by the dealer.

Section 6.07.(i): This section prohibits the contractual modification of the remedies provided by this Code unless done in accordance with a settlement agreement.

Section 7.01: Allows parties to appeal Commission orders to either the Travis County District Court or the Court of Appeals for the Third Supreme Judicial District. The objective is to provide a quick, efficient and relatively inexpensive forum for TMVC appeals.

This section also requires that citation be served on all record parties before the Commission by the appellant and allows dismissal of an appeal for failure to prosecute within a reasonable time.

TEXAS DEPARTMENT OF MOTOR VEHICLES
MOTOR VEHICLE DIVISION

Cecil Atkission Orange, LLC d/b/a Cecil Atkission Chrysler Jeep Dodge, Complainant v. FCA US LLC, Respondent	§	SOAH DOCKET NO. 608-15-4315.LIC MVD DOCKET DOCKET NO. 15-0015 LIC

FCA US LLC'S REPLY TO ATKISSION'S EXCEPTIONS TO THE PROPOSAL FOR DECISION

Respondent FCA US LLC ("FCA US") submits its Reply to Complainant Cecil Atkission Orange, LLC d/b/a Cecil Atkission Chrysler Jeep Dodge's ("Atkission" or "the dealership") Exceptions to the Administrative Law Judges' ("ALJs") Proposal for Decision ("Exceptions").

INTRODUCTION

In a comprehensive and carefully crafted 78-page Proposal for Decision ("PFD"), the ALJs detailed the overwhelming evidence establishing "good cause" to terminate Atkission. Finding that the "dealership lacks the fundamental will or ability to manage its own affairs," the ALJs recounted Atkission's *nine* separate breaches of contract and the nearly endless record underlying the dealership's woefully deficient sales, facilities, signage, management, personnel, advertising, working capital, and net worth. (PFD at 13.) The ALJs also addressed and rejected each of Atkission's various defenses as either not credible or—worse—a manufactured attempt by the dealership to avoid responsibility for years of "apathy about its own affairs." (*Id.* at 59.) Now, in an attempt to sidestep the governing legal standard, the overwhelming evidentiary record

of its poor performance, and its own lack of a viable defense, Atkission asks the ALJs for a wholesale reversal of these findings without acknowledging the overwhelming evidence that led to them. In doing so, Atkission simply rehashes the same arguments the ALJs expressly addressed and rejected in their Proposal for Decision. And in simply duplicating its prior arguments, Atkission has failed to provide the ALJs with any reason to revisit their well-reasoned findings and conclusions on these issues. Accordingly, the ALJs should disregard Atkission's Exceptions wholesale and leave the Proposal for Decision unchanged.

ATKISSION'S LEGAL ARGUMENT IS MERITLESS

Atkission's Exceptions are premised almost entirely on their unpersuasive contentions that the ALJs (1) erred in interpreting the statutory factor that considers the "dealer's investment" (though Attkisson itself has no investment), (2) failed to consider the dealership's relocation "concept" (despite having made no credible attempt to move locations in over seven years of operations), and (3) erred in considering grounds for termination not specified in the Notice of Termination (while simultaneously conceding the ALJs are obligated to consider any factors "which might be relevant" to termination). Atkission's arguments are meritless—factually and legally—and the ALJs should affirm their Proposal for Decision.

A. The ALJs Correctly Interpreted "Dealer's Investment" As Not Including Mr. Atkission's Personal Investment

The ALJs correctly concluded that Mr. Atkission's $6.25 million in personal loans to the dealership did not qualify as the "dealer's investment" under section § 2301.455(a)(2). The ALJs found that Atkission's investments are minimal, and the dealership's obligations are similarly minimal. (PFD at 29.) By statute, the "dealer" is the dealership (not Mr. Atkission) because the dealership holds the general distinguishing number issued by the Board. (PFD at 24.) The ALJs' interpretation of "dealer" "accurately appl[ies] the plain meaning of the statute" and any other

interpretation would render the statutory definition of "dealer" superfluous. *Id.* Ignoring the plain language of the statute altogether, Atkission insists that the ALJs erred because Mr. Atkission's $6.25 million in personal loans should have been treated as a capital investment in the dealership. This argument misses the point: Mr. Atkission's investment in the dealership is not the same thing as "*the dealer's* investment"—the inquiry that is highlighted under the statute.

Also unpersuasive is Atkission's contention that the term "dealer" was somehow intended to be broader than its statutory definition. Atkission's attempt to redefine the term "dealer" in a manner contrary to its plain statutory definition should be disregarded. *See Jaster v. Comet II Const., Inc.*, 438 S.W.3d 556, 574 (Tex. 2014) ("When interpreting the Legislature's words, we cannot revise them under the guise of interpreting them.") For the same reason, there is no merit to Atkission's claim that applying the statutory definition of "dealer" according to its plain meaning "will create a dangerous and unfair precedent that will render millions of dollars in investments made in dealerships by their owners, like Mr. Atkission, meaningless." (Exceptions at 3.) Under ordinary circumstances, the loans of an individual owner to a dealership would be given significant weight when considering the "dealer's . . . obligations." The ALJs recognized this exact point, opining that "those monies [invested by Mr. Atkission] might" normally "be considered as an obligation of the dealership." (PFD at 24.) Here, however, the circumstances surrounding Mr. Atkission's loans were anything but normal. Instead the undisputed evidence established that Mr. Atkission's personal loans did not qualify as actual obligations of the dealership because the loans did not require repayment:

> Essentially everyone, including Mr. Atkission, concedes that those "loans" will probably never be repaid. No principal has ever been repaid, or even demanded, and there is no documentation in the record to indicate that the principal must be repaid. As such, the

> ALJs cannot conclude that the dealership is under an actual obligation to repay the $6.25 million. (*Id.* at 28)

Because the ALJs' analysis of the investment and obligation factor is legally and factually sound, the ALJs should leave their Proposal for Decision unchanged.

B. Atkission's Relocation "Concept" Was Neither Legally Relevant Nor Credible

The ALJs expressly rejected Atkission's attempt to "blame[] its location as the sole cause of its poor performance," explaining that—in light of the evidence—they were "not convinced that the location is a bad one, nor . . . that the dealership's poor performance can be blamed on the location." (*Id.* at 13.) The ALJs also found "that the relocation issue was not being legitimately raised by the dealership" because the undisputed evidence showed that Atkission's requests to relocate "were incomplete, ineffective, and submitted without any urgency on the dealership's part." (*Id.*) In this regard, the ALJs concluded that "the history of the relocation issue shed an unflattering light on the dealership in a way that suggests termination is warranted" and that Atkission's attempts to manufacture a baseless relocation defense underscored exactly why "it is entirely reasonable for FCA [US] to want to terminate its business relationship with the dealership." (*Id.*) Although the voluminous evidence discrediting Atkission's relocation argument need not be repeated in detail here, the evidence fully supports the ALJs' conclusions and the ALJs were correct to "decline to convert this case into a relocation case." (*Id.* at 8.)

Notwithstanding the evidentiary record establishing that Atkission's relocation "concept" is not credible, Atkission's various claims that the ALJs erred in rejecting its relocation defenses are meritless as follows:

1. The Statutory Stay Prohibited the ALJs from Considering the Relocation "Concept"

Atkission claims that the ALJs erred in finding good cause for termination without first permitting the dealership to implement its relocation "concept." However, the ALJs were required to disregard this issue because approval of Atkission's relocation "concept" was, as the ALJ observed, "barred" by the mandatory and automatic statutory stay imposed by the Department and was otherwise "not ripe for adjudication." (*Id.* at 12.) Had the ALJs permitted Atkission to conflate this proceeding with its relocation "concept" then FCA US's legal rights would have been jeopardized in violation of the stay and in direct contravention of the Department's order that Atkission's relocation "concept" have no bearing on the question of termination.

2. The ALJs Properly Considered and Rejected Atkission's Arguments Attempting to Excuse Poor Performance

At the hearing, the dealership raised the relocation "concept" and many other arguments in an attempt to avoid termination. The ALJs heard extensive testimony on these arguments from Atkission's witnesses but ultimately determined they were either not credible or legally irrelevant. Atkission now seeks to paint the ALJs' decision to reject these arguments as a failure to consider the dealership's "affirmative defenses." (Exceptions at 6-7.) Aside from the fact that no affirmative defense could render Atkission's proffered arguments viable, Atkission again mistakes reality; the ALJs expressly clarified that nothing in the statutory framework prevented Atkission from raising any defense to termination and that good cause would turn "on all of the evidence in the record . . . includ[ing] any information that bears upon the dealership's performance at any time." (PFD at 6.) Consistent with the ALJs' clarification, the ALJs heard and considered all of Atkission's proffered evidence that the dealership's poor performance was caused—or excused by—outside forces. Although the ALJs rejected Atkission's proffered

evidence, the dealership had every opportunity to defend against termination. It just failed to do so credibly.

3. Atkission's Deficiencies Were Caused by Internal Deficiencies and Not Outside Forces

As a corollary to its affirmative defense argument, Atkission also argues that the ALJs erred in not considering its force majeure defense that "lengthy" highway construction excuses the dealership's poor performance and contractual breaches "concerning sales, personnel, signage, and advertising." (*Id.* at 6.) Atkission's claim once again mischaracterizes the Proposal for Decision. In reality, the ALJs' expressly addressed and rejected Atkission's force majeure argument, finding that "[t]he dealership's testimony on this point was not credible" and that the "force majeure clause is not applicable." (PFD at 44.) In support of these findings, the ALJs rejected Atkission's argument that the construction hindered the dealership's visibility and access and, instead, accepted as credible the testimony of "[e]ssentially all of the FCA witnesses that the dealership was visible and easily accessed." (*Id.*) The ALJs also noted that "the dealership's sales 'were terrible before the construction, terrible during the construction, and terrible after the construction'" and that Atkission's "best sales performance periods (relatively speaking) occurred during the highway construction, which belied [Atkission's] claim that the construction was disruptive to business." (*Id.* at 43.)

The evidence fully supports the ALJs findings and credibility determinations. As such, the ALJs should disregard Atkission's attempts to distort the record. Further, that the ALJs properly concluded outside forces did not cause Atkission's deficiencies is confirmed by Atkission's years-long failure to ever request a local-market adjustment to counter these supposed outside forces. (*See* Chandler, Tr. at 378, line 18 to 379, line 8, FCA Exs. 28(a), 28(b)

at ¶ 11(a) ("Upon dealer's written request, [FCA US] may adjust dealer's [MSR], if appropriate in [FCA US's] judgment, to take into account extraordinary local conditions"); Tunic, Tr. at 303, line 17 to 304, line 24; Williams, Tr. at 54, lines 6–20.)

C. The ALJs Correctly Considered "All Existing Circumstances" Rather than Just the Specific Grounds for Termination in the Notice

For the third time in this case, Atkission argues that the good cause determination is limited by the grounds specified in the Notice of Termination. This time, Atkission reasserts its strained interpretation while simultaneously conceding that termination is appropriate "only after a very careful and correct legal and factual assessment of 'all existing circumstances, including . . . every other statutory factor . . . ***which might be relevant.***" (Exceptions at 1.) Atkission's concession is entirely consistent with the ALJs' conclusion "that the relevant factors for the Department to consider in making a good cause determination are both the grounds specified by the manufacturer in the Notice of Termination as well as the statutory factors set forth in [section] 2301.455(a)." (PFD at 7.) Because the mandatory statutory language states that the ALJs "***shall consider all existing circumstances***"—and Atkission seemingly agrees—the ALJs' conclusion is the only correct one and should be reaffirmed. *See Columbia Med. Ctr. of Las Colinas, Inc. v. Hogue*, 271 S.W.3d 238, 256 (Tex. 2008) (courts must not interpret the statute "in a manner that renders any part of the statute meaningless or superfluous").

REPLY TO EXCEPTION NO. 1

Atkission claims the ALJs erred in not considering the $6.25 million in personal loans from Mr. Atkission, the impact of the highway construction, Atkission's force majeure defense, and other "affirmative defenses." As described above, however, Mr. Atkission's personal loans do not aid the dealership in this matter, no credible evidence supports Atkission's claim that the highway construction had any impact whatsoever on the dealership's operations, and the ALJs

expressly addressed and rejected Atkission's force majeure contention as well as its other arguments attempting to blame poor dealership operations on outside forces. The ALJs should deny Exception No. 1.

REPLY TO EXCEPTION NO. 2

The ALJs have already ruled twice previously (and correctly) that the termination statute mandates consideration of "all existing circumstances" rather than—as Atkisson insists—solely the deficiencies specified in the Notice. As described above, Atkission's interpretation of the statute is contrary to both the plain language of the statute and its own statement that the ALJs must consider all statutory factors "which might be relevant." (Exceptions at 1.) The ALJs should deny Exception No. 2 and Atkission's Proposed Conclusions of Law Nos. 3A through 3F.

REPLY TO EXCEPTION NO. 3

Atkission claims that the ALJs ignored evidence that the highway construction negatively impacted the dealership's sales. Again, the ALJs determined Atkission's construction defense was not credible and accepted the overwhelming evidence presented at the hearing that Atkission's performance was "terrible before the construction, terrible during the construction, and terrible after the construction." (PFD at 43.) The ALJs should deny Exception No. 3 and Atkission's proposed modifications to Findings of Fact Nos. 35 through 37 and 44 through 46.

REPLY TO EXCEPTION NO. 4

Atkission again argues that Mr. Atkission's personal loans to the dealership should be considered the "dealer's investment." As established above, the ALJs correctly ruled that Mr. Atkission's personal investment is not the "dealer's investment" and, in addition, that these loans are not an "obligation" of the dealership because they do not require repayment. The ALJs should

deny Exception No. 4 and Atkission's proposed modifications to Findings of Fact Nos. 50 and 53 through 56.

REPLY TO EXCEPTION NO. 5

Atkission contends that the ALJs wrongly concluded that the injury and benefit to the public weighed in favor of termination because any public inconvenience resulted exclusively from the dealership's poor location. However, as set forth above, Atkission's location argument is not credible and significant harm to the public occurred because Atkission lacks "the fundamental will or ability to manage its own affairs." (PFD at 13.) The record also supports the ALJs' finding that termination will benefit the public welfare, especially because "the evidence showed that FCA intends to replace Atkission Chrysler with a new dealer, which would further benefit the public by increasing employment opportunities within Orange and allowing local customers to have their needs met without the inconvenience of driving 20-40 miles away." (*Id.* at 31.) The ALJs should therefore deny Exception No. 5 and Atkission's proposed modifications to Findings of Fact Nos. 61 through 65.

REPLY TO EXCEPTION NO. 6

Atkission argues that its poor location caused the dealership's deficiencies with respect to facilities, equipment, parts, and personnel. Again, Atkission's attempt to blame its deficiencies on its location is not credible. Nor is Atkission's argument persuasive in light of the overwhelming evidence outlined in the Proposal for Decision that Atkission's facilities, equipment, parts, and personnel are unacceptable and among the worst in Texas—if not the nation. Indeed, even Mr. Atkission and the dealership personnel agreed that the facility is in "poor condition," "not conducive to a successful business," an "eye-sore," and that the dealership "has a high turnover of management and personnel." (PFD at 32-33.) The ALJs should therefore

deny Exception No. 6 and Atkission's proposed modifications to Findings of Fact Nos. 68, 71, and 72.

REPLY TO EXCEPTION NO. 7

Atkission contends its admittedly dismal sales should be excused by the highway construction and the poor location. These arguments are not credible and contrary to the overwhelming weight of the evidence: Atkission's "sales performance has been consistently bad since its inception," Atkission "is the worst of all Chrysler dealers in Texas in regard to its sales," Atkission "refuses to spend more money on advertising or to increase its inventory," and Atkission's "poor sales performance is due to factors under [Atkission's] direct control." (PFD at 70.) The ALJs should deny Exception No. 7 and Atkission's proposed modifications to Findings of Fact Nos. 76 and 80 through 84.

REPLY TO EXCEPTION NO. 8

Atkission asserts the ALJs wrongfully concluded that the dealership breached its contractual obligation requiring Mr. Atkission's physical presence at the dealership during most of its operating hours. The evidence fully supports the ALJs' conclusion that the dealership's argument on this point "is not convincing"—especially because Mr. Atkission testified he agreed to be personally present more than 50 percent of working hours but "estimated he has been present roughly 15% to 20% of business hours." (PFD at 46.) As the ALJs concluded, the fact that Mr. Atkission failed to comply with the 50% presence requirement "constitutes a breach of the Dealer Agreements, a factor that favors termination." (*Id.* at 47.) The ALJs should deny Exception No. 8 and Atkission's proposed modifications to Findings of Fact Nos. 87 and 89.

REPLY TO EXCEPTION NO. 9

Atkission next argues that the dealership's location caused (and excuses) its consistent failure to meet it personnel obligations. Once again, location is not a valid excuse and, as the ALJs observed, it is irrelevant that Atkission "could do better if it moved to a new location" because "it contractually bound itself to do better at the *current* location." (PFD at 50.) The evidence overwhelming supports termination on this point. The ALJs should deny Exception No. 9 and Atkission's proposed modifications to Findings of Fact Nos. 90 and 95 through 98.

REPLY TO EXCEPTION NO. 10

Atkission claims its outdated and noncompliant facilities are excused by the highway construction and the dealership's location. As with its other similar claims relative to its location, these arguments are not persuasive, lack credibility, and are contrary to the overwhelming evidence that the dealership's facilities are among the worst in the nation. The ALJs should deny Exception No. 10 and Atkission's proposed modifications to Findings of Fact Nos. 99 and 102 through 104.

REPLY TO EXCEPTION NO. 11

Atkission argues the evidence is insufficient to support the ALJs' finding that the dealership breached its place of business obligations, which require Atkission to conduct operations from its current location. In light of the significant evidence in the record, the ALJs should not modify the Proposal for Decision on this point. The evidence establishes that Atkission "repeatedly breached" this obligation by closing sales at the Toyota store, forced FCA US "customers [to] travel to the facilities of another brand" causing "harm to the Chrysler brand," and Atkission's breach of this obligation "is self-evident with or without evidence of customer complaints." (PFD at 53-54.) The ALJs should deny Exception No. 11 and Atkission's proposed modifications to Findings of Fact Nos. 105 through 108.

REPLY TO EXCEPTION NO. 12

Atkission argues the ALJs erred in finding the dealership failed to meet its advertising obligations because the highway construction and Atkission's location prevented meaningful advertising. As outlined above, highway construction and the dealership's location do not excuse Atkission's poor advertising—which the ALJs correctly determined was woefully insufficient. The ALJs were also correct to find unreasonable Atkission's argument that advertising at the current location was "senseless" because the dealership "contractually bound itself to" advertise vigorously at its current location. (PFD at 55.) The ALJs should deny Exception No. 12 and Atkission's proposed modifications to Findings of Fact Nos. 109 through 113.

REPLY TO EXCEPTION NO. 13

Atkission claims outside forces and FCA US are to blame for Atkission's failure to meet its signage obligations. The ALJs have already expressly addressed and rejected these arguments, finding them not credible and, to the contrary, concluding that "the circumstances regarding the pole sign [are] particularly troubling and illustrative," further revealing "a remarkable passivity and apathy about [Atkission's] own affairs." (PFD at 58-59.) The ALJs should deny Exception No. 13 and Atkission's proposed modifications to Findings of Fact Nos. 114 and 119 through 121.

REPLY TO EXCEPTION NO. 14

Although the ALJs carefully considered and ultimately rejected Atkission's contrived attempt to retroactively satisfy its 5-year failure to meet FCA US's working capital and net worth obligations, Atkission accuses the ALJs of "misunderstanding" basic accounting principles. (Exceptions at 30.) This accusation is misplaced (and inappropriate) as the ALJs correctly determined that Atkission's "working capital and net worth have always come up short" and,

once faced with termination, the dealership simply attempted to "change the yardstick" to avoid the "consequences" with its purported reclassification theory. (PFD at 59-62.) Nevertheless, the record supports the ALJs' holding that the "attempted reclassification of the accounts" does not change the reality that Atkission breached its net worth and working capital obligations. (*Id.* at 63.) Significant evidence—expert and otherwise—confirms the ALJs' findings, which should be affirmed. Accordingly, the ALJs should deny Exception No. 14 and Atkission's proposed modifications to Findings of Fact Nos. 122 through 129.

REPLY TO EXCEPTION NO. 15

As it unsuccessfully sought to argue before, during, and after the hearing, Atkission again claims without basis that FCA US's sole reason for terminating Atkission was a desire to increase market penetration. The ALJs correctly rejected this argument, finding that "FCA has established a myriad of other bases for termination, including the multiple violations of the Dealer Agreements by Atkission Chrysler, and the potential damage to the Chrysler brand." (*Id.* at 65.) The evidence clearly and unequivocally supports this conclusion. The ALJs should therefore deny Exception No. 15 and Atkission's proposed modifications to Findings of Fact No. 133.

REPLY TO EXCEPTION NO. 16

Atkission also contends the ALJs erred in not finding that termination would result in a personal loss to Mr. Atkission of "no less than $4 million." (Exceptions at 34.) The undisputed evidence squarely disproved this claim, however, as the dealership has already lost the $4 million in loans from Mr. Atkission and, irrespective of that loss, "the great majority of the dealership's assets (slightly more than $4 million) consists of the vehicle inventory, the value of which could

largely be recouped." (PFD at 26.) Accordingly, no evidence supports Atkission's claim and the ALJs should deny Exception No. 16 and Atkission's Proposed Finding of Fact No. 134.

REPLY TO EXCEPTION NO. 17

Finally, Atkission asks that the ALJs overturn their conclusion that good cause exists to terminate the dealership. In light of the overwhelming evidence outlined in the Proposal for Decision, the ALJs should deny Exception No. 17 and Atkission's proposed modifications to Conclusions of Law Nos. 11 and 13.

CONCLUSION

Atkission's Exceptions seek wholesale reversal of the ALJs' findings that good cause exists for termination without acknowledging the law and the facts supporting these findings. For the reasons stated above, FCA US respectfully requests that the ALJs deny all of Atkission's Exceptions and affirm their Proposal for Decision.

Respectfully submitted this 4th day of August , 2016.

By: _____

Mark T. Clouatre, Esq.
Texas State Bar No. 00793521
John P. Streelman, Esq.
Admitted Pro hac vice
Webster C. Cash, III, Esq.
Admitted Pro hac vice
Wheeler Trigg O'Donnell LLP
370 Seventeenth Street, Suite 4500
Denver, CO 80202
Telephone: 303-244-1800
Facsimile: 303-244-1879
Email: clouatre@wtotrial.com
Email: streelman@wtotrial.com
Email: cash@wtotrial.com

~and~

John W. Chambless II, Esq.
Texas State Bar No. 00796334
Thompson, Coe, Cousins & Irons, LLP
701 Brazos, Suite 1500
Austin, Texas 78701
Telephone: (512) 708-8200
Facsimile: (512) 708-8777
Email: jchambless@thompsoncoe.com

COUNSEL FOR FCA US LLC

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of this instrument was served upon the following in accordance with TEX. R. Civ. P. 21a on this 4th day of August, 2016:

William R. Crocker Attorney at Law 807 Brazos, Suite 1014 Austin, Texas 78701 Telephone: (512) 478-5611 Facsimile: (512) 474-2540 Email: crockerlaw@earthlink.net **Counsel for Complainant**	MVD Docket Clerk Motor Vehicle Division Texas Department of Motor Vehicles 4000 Jackson Avenue Austin, TX 78731 Telephone: (512) 465-7354 Facsimile: (512) 465-3666
Karen Phillips General Counsel/EVP Texas Automobile Dealers Association 1108 Lavaca St., Suite 800 Austin, TX 78701 Telephone: (512) 476-2686 Facsimile: (512) 476-5854 Email: kphillips@tada.org **Counsel for TADA**	MVD Docket Clerk P.O. Box 26487 Austin, Texas 8755 Facsimile: (512) 465-4135
Nathan Allen, Jr. Jones, Allen & Fuquay, LLP 8828 Greenville Avenue Dallas, Texas 75243-7143 Telephone: (214) 343-7400 Facsimile: (214) 343-7455 E-mail: nallen@jonesallen.com **Counsel for Complainant**	J. Bruce Bennett Cardwell, Hart & Bennett, L.L.P. 807 Brazos, Suite 1001 Austin, Texas 78701 Telephone: (512) 322-0011 Facsimile: (512) 322-0808 E-mail: jbb.chblaw@me.com **Counsel for Complainant**

John W. Chambless, II

TEXAS DEPARTMENT OF MOTOR VEHICLES
MOTOR VEHICLE DIVISION

Cecil Atkission Orange, LLC d/b/a Cecil Atkission Chrysler Jeep Dodge, Complainant v. FCA US LLC, Respondent	§	SOAH DOCKET NO. 608-15-4315.LIC MVD DOCKET DOCKET NO. 15-0015 LIC

FCA US LLC'S REPLY TO THE AMICUS CURIAE BRIEF OF TEXAS AUTOMOBILE DEALERS ASSOCIATION

Respondent FCA US LLC ("FCA US") submits its Reply to the Amicus Curiae Brief of the Texas Automobile Dealers Association ("TADA").

INTRODUCTION

An untimely amicus brief "will not be considered by the Board, unless good cause is shown." 43 Tex. Admin. Code § 215.311; *accord id.* § 215.56. Nonetheless, having made no attempt to show good cause, TADA asks this Board to consider its brief, which was filed after more than twice the standard statutory length of time had passed. § 215.311; *see id.* § 215.56; 1 Tex. Admin. Code § 155.507(c)(1). TADA attempts to shoehorn its deadline into an order entered pursuant to a motion for extension filed by Complainant in recognition of a death in the family of Complainant's counsel. The motion did not mention TADA or any amicus. TADA sought and received no extension. The brief, as a matter of law, should be ignored.

In addition to being untimely, however, the brief is meritless for several more reasons. First, Texas Occupational Code § 2301.455 mandates that in rendering a good cause

determination, the Board "shall consider all existing circumstances." *Id.* Despite that clear language, the Complainant in this matter has repeatedly (and unsuccessfully) argued that the Board should not "consider all existing circumstances." (*See, e.g.*, FCA US LLC's Reply to Exceptions to the Proposal for Decision at 7; FCA US LLC's Reply Closing Brief, filed Apr. 18, 2016, at 2-5; FCA US LLC's Closing Brief, filed Apr. 1, 2016, at 49-53.) In its untimely brief, TADA attempts the same tack again, which should fail like the similar, prior attempts.

In essence, the Amicus Brief attempts to work a magic trick: it blends irrelevant statutory history, comments by a lobbyist (that just so happens to be TADA's former President), and linguistic sleight of hand in an effort to contend that § 2301.455's "all existing circumstances" mandate applies only to evidence that benefits dealerships. In the place of § 2301.455's simplicity, TADA would have the Board perform cognitive gymnastics, considering just those limited circumstances regarding breaches of a franchise agreement, but refusing to hear other circumstances unless a manufacturer or distributor restarts the process by issuing a new notice of termination; the result of TADA's suggested process would be to effectively prolong the process and waste the resources of the Board, the State and the parties. TADA offers no mechanism for the Board to distinguish between the "all existing circumstances" that it allegedly can and cannot consider. This argument must be rejected.

The Amicus Brief also makes a hyper-technical but incorrect argument relating to the use of the term "department" in the proposal for decision. Even were there merit to the argument, it has no practical impact—there is no suggestion that the proper decision-making processes are not at play in the present matter. For all of these reasons, the untimely amicus brief should be ignored.

ARGUMENT

I. THE AMICUS BRIEF SHOULD NOT BE CONSIDERED BY THE BOARD

As an initial matter, the amicus brief is untimely and should not even be considered. The rules require "[a]ny interested person wishing to file an amicus brief for consideration in a contested case" to do so "not later than the deadline for exceptions." 43 Tex. Admin. Code § 215.311; *see id.* § 215.56. That deadline is fifteen days after the date of service of the PFD. 1 Tex. Admin. Code § 155.507(c)(1). An amicus brief "not filed with the Board and with SOAH within the period prescribed by this section will not be considered by the Board, unless good cause is shown why this deadline should be waived or extended." 43 Tex. Admin. Code § 215.311; *accord id.* § 215.56.

Here, TADA filed its brief on July 20, 2016, far more than fifteen days after service of the PFD on June 17, 2016. TADA offers no cause—good or otherwise—to justify its failure to meet the deadline. Pursuant to the plain language of the statute, the brief should not be considered.

Indeed, the only justification offered by TADA for its delay was that Atkission's counsel moved for, and received, an extension of time to file exceptions to the PFD. But neither the motion for extension nor the order granting an extension to Atkission referenced TADA or any other amicus. Rather, in his motion for extension of time, Atkission's counsel explained that he was unable to comply with the deadline due to, *inter alia*, a death in his family. (Mot. for Extension, filed June 30, 2016, at 1 ¶ 2.) The motion gave no indication that the same concern would somehow prevent TADA's separate counsel from complying with the statutory deadlines. TADA did not move for, or receive, a corresponding extension. Accordingly, TADA's untimely brief should not considered.

II. TADA'S PRIMARY ARGUMENT IS A STRAINED STATUTORY INTERPRETATION THAT HAS ALREADY BEEN REPEATEDLY REJECTED

A. TADA's Position Lacks Legal Support

It appears that the primary purpose of the amicus brief is to re-hash an argument that this tribunal has already rejected: that the Board, despite being required to "consider all existing circumstances," is somehow constrained from considering "all existing circumstances." Tex. Occ. Code § 2301.455. TADA's regurgitation of the rejected interpretation and its manipulation of § 2301.455 relies heavily on a self-serving statement prepared by its own former President. The position should be rejected yet again.

TADA seeks to weave a complicated—nearly incomprehensible—analysis out of a very simple mandate. Section 2301.455(a) provides:

> (a) Notwithstanding the terms of any franchise, in determining whether good cause has been established under Section 2301.453 or 2301.454, the board shall consider all existing circumstances, including:
> (1) the dealer's sales in relation to the sales in the market;
> (2) the dealer's investment and obligations;
> (3) injury or benefit to the public;
> (4) the adequacy of the dealer's service facilities, equipment, parts, and personnel in relation to those of other dealers of new motor vehicles of the same line-make;
> (5) whether warranties are being honored by the dealer;
> (6) the parties' compliance with the franchise, except to the extent that the franchise conflicts with this chapter; and
> (7) the enforceability of the franchise from a public policy standpoint, including issues of the reasonableness of the franchise's terms, oppression, adhesion, and the parties' relative bargaining power.

(Emphasis added.) "If the statute is clear and unambiguous, we must apply its words according to their common meaning without resort to rules of construction or extrinsic aids." *State v. Shumake*, 199 S.W.3d 279, 284 (Tex. 2006). A statute should be interpreted to "give effect to the Legislature's intent." *Entergy Gulf States, Inc. v. Summers*, 282 S.W.3d 433, 437 (Tex. 2009).

Where the statutory text is "clear, text is determinative of that intent." *Id.* (noting exception only when "enforcing the plain language of the statute as written would produce absurd results").

Here, the plain language of the statute is clear—as even TADA curiously concedes: "The statute requires the board to consider all existing circumstances in making a good cause determination for a dealer's termination . . . . The statute lists items for the board to consider when making a good cause determination." (Amicus Br. at 8.) Yet from that simple mandate, TADA attempts to weave a web of redundancies, none of which are supported by the law. Predominantly, TADA claims that "[i]f a manufacturer, distributor, or representative determines there are new or additional grounds" that could support a termination, "beyond the noticed specific grounds given for termination, then a new notice must be sent . . . ." (Amicus Br. at 7.) This cannot be the correct interpretation of the statute.

First, TADA interprets the language "the board shall consider all existing circumstances" to mean "the board shall consider all existing circumstances that favor the dealership." That is, TADA argues that a dealership should be able to "explain or defend" every termination ground with all existing circumstances. (*Id.* at 11.) But if there is an "existing circumstance" which supports termination but was not known at the time of or listed in a notice of termination, TADA contends "a new notice must be sent," re-initiating the entire protest cycle. (*Id.* at 7.) Thus, TADA would turn the "all existing circumstances" requirement from a mandate for the Board's good cause analysis into a unilateral tool for dealerships to string out termination determinations.

The Amicus Brief attempts to justify its departure from the statutory language by seeking to narrow § 2301.455 to issues that originate in a franchise agreement. (*Id.* at 8-10.) To support

the conclusion, it block quotes an inapt comment by its own lobbyist and former president.[1] (Amicus Br. at 8-9 & Ex. 1.) But even TADA's own comments on the bill do not justify the position TADA now seeks to take. The position is unsupported.

Second, TADA's entire position seems to be predicated on conveniently ignoring the discovery process. First, it ignores a dealer's ability to discover "all existing circumstances." For instance, in the present matter, TADA's fear "that a dealer may not explain or defend a termination" ignores not only the law, but the fact that the Complainant had the right to exchange statements of position with FCA US, to exchange witness lists, to serve written discovery requests, to serve Rule 194 disclosure requests, to submit and review expert reports, to take depositions, and to seek resolution through dispositive motions.[2] (*See* Order No. 4, Scheduling Order.) Dealerships, including the Complainant here, have ample opportunities to explore "all

---

[1] TADA's argument that § 2301.455 is somehow only applicable to termination grounds rooted in breach of a franchise agreement is difficult to understand, and to justify. (*See* Amicus Br. at 9.) The language "Notwithstanding the terms of any franchise" does not limit the applicability of the statute to disputes over the terms of a franchise agreement, as the Board "shall consider all existing circumstances" whenever it is "determining whether good cause has been established under Section 2301.453." § 2301.455. Rather, the "Notwithstanding" phrase simply clarifies that a franchise agreement cannot limit the good cause determination, exactly as TADA attempts to do here. *See, e.g.*, *Cont'l Cars, Inc. v. Mazda Motor of Am., Inc.*, No. C11-5266BHS, 2011 WL 4026793, at *5 (W.D. Wash. Sept. 9, 2011) (in another legal context, stating that "this phrase—'notwithstanding the terms of a franchise [agreement][']—is meant to set out the baseline [from] which a manufacturer cannot depart"); (*see also* Amicus Br. at 8-9). That is, a clause "notwithstanding the terms" of a franchise indicates the legislature's "intent that these provisions were to apply regardless of existing franchise agreements," *Scuncio Motors, Inc. v. Subaru of New England, Inc.*, 555 F. Supp. 1121, 1129 (D.R.I. 1982), *aff'd*, 715 F.2d 10 (1st Cir. 1983), not that they were to apply only to certain disputes regarding franchise agreements.

[2] Incidentally, Complainant almost entirely failed to engage in the discovery process in this Protest. For example, Complainant chose not to submit written discovery requests or Rule 194 disclosure requests to FCA US, even though such requests were expressly contemplated by the draft scheduling order agreed to and submitted by the parties and which the ALJs entered upon the parties' submission.

the existing circumstances" and to prepare for a hearing appropriately in the current statutory scheme. Thus, TADA's suggestion that a dealership could not prepare a defense without a new notice of termination is unjustified.

TADA's position also ignores that the respondent in this matter is similarly entitled to discovery. The Amicus Brief's position, however, would render discovery conducted by a manufacturer or distributor superfluous. According to TADA's position, any issues discovered during the discovery process that favor a manufacturer or distributor would either (1) require the manufacturer or distributor to go back to square one, and issue a new notice of termination to allow a new protest to begin; or (2) fall outside of the "all existing circumstances" that the Board can consider. TADA's position ignores the law and the process in place and would do nothing but introduce waste into the system.

In sum, TADA's position, when boiled down to its essence, is that § 2301.455 should be interpreted—despite no indicia in the text or otherwise to support the interpretation—as a one-way street: the Board should allegedly consider "all existing circumstances" that favor the dealership, but allegedly not consider all existing circumstances that mandate termination. Rather, those must be ignored, TADA claims, unless they are in the notice of termination. Although TADA's lobbyists would no doubt have appreciated such a unilateral position, it is not supported by the text.

Moreover, TADA does not even attempt to explain how the Board could draw the line between evidence of "all existing circumstances" that must be considered and evidence concerning alleged new grounds for termination that would purportedly require restarting the entire process. Rather, different evidence is likely to demonstrate or support more than one

conclusion, and TADA does not even attempt to explain how the Board could even draw the distinction that TADA insists it should.

It is no surprise, then, that the *only* case reference in TADA's entire brief is encapsulated within a quote from the Proposal for Decision. (Amicus Br. at 4.) Case law, instead, reflects the clear statutory language. *See, e.g., Lone Star R.V. Sales, Inc. v. Motor Vehicle Bd. of the Texas Dep't of Transp.*, 49 S.W.3d 492, 495 (Tex. App. 2001) (restating about previous codification that, "[i]n determining whether good cause has been established, the Board must consider 'all the existing circumstances . . .'"); *Ford Motor Co. v. Motor Vehicle Bd. of Texas Dep't of Transp./Metro Ford Truck Sales, Inc.*, 21 S.W.3d 744, 755 (Tex. App. 2000) (acknowledging specific notice requirement, but stating, without limitation, that "Board must consider 'all the existing circumstances,'" and that the statute (in its previous codification) "mandates a consideration of 'existing circumstances'"); *see also Meier Infiniti Co. v. Motor Vehicle Bd.*, 918 S.W.2d 95, 100 (Tex. App. 1996), writ denied (Jan. 17, 1997) (in case in relocation context, stating cases stand for proposition that Board must consider all of statutory criteria).

TADA's argument is meritless and repetitive of the failed arguments made by the Complainant. It contradicts the plain language of the statute it purports to interpret. The Brief should be ignored, and the PFD adopted.

B. Even if TADA's Complaints Were Meritorious (Which They Are Not), The Board Should Not Reach Them Because the Termination Is Supported by All of the Factors from the Notice of Termination

Even were the Board somehow inclined to consider TADA's position, TADA's argument regarding consideration of matters outside of the notice of termination is moot in this matter. In *Star Houston, Inc. v. Texas Dep't of Transp., Motor Vehicle Div.*, 957 S.W.2d 102 (Tex. App. 1997), the appellant argued that the Board improperly considered matters that were not in the

notice of termination. *Id.* at 110. The Court of Appeals held that it need not reach the argument because it could affirm the termination on a ground included in the termination. *Id.* The Court said that although the only reason for termination indicated in the notice of termination was for a failure to comply with the signage clause in the franchise agreement, the Board had "adopted an order effectively deciding Star failed to comply with the signage requirements and that Star performed poorly in its assigned market." *Id.* The Court concluded that, "[b]ecause we uphold the Commission's decision based on its resolution of the signage issue, we need not decide whether [the manufacturer or distributor] was required to give Star notice of the other performance issues the Board considered in its final order." *Id.*

Here, FCA US's notice of termination cited the following reasons for termination: "(1) failure to meet sales performance obligations; (2) failure to comply with signage obligations; (3) failure to meet management and sales personnel obligations; (4) failure to meet advertising and sales promotion obligations; (5) failure to meet working capital obligations; and (6) failure to meet net worth obligations." (PFD at 14.) The PFD effectively decided that FCA US was correct about each one of those reasons—that each one supported termination. (*See* PFD at 37-63, 72-76.) Under *Star Houston*'s logic, one of those many reasons would be enough to justify the termination. Even if TADA's statutory interpretation were correct (it is not), it is a moot point—even inappropriately limited to the grounds in the notice of termination, a court would conclude that there is no doubt that good cause for the termination was demonstrated here.

III. REFERENCES TO THE "DEPARTMENT" DO NOT CONSTITUTE ERROR

Finally, TADA opens its Amicus Brief with an oddly technical complaint that the PFD refers to the "department" where it allegedly should state "board." As the amicus notes, the "board" is the "board of the Texas Department of Motor Vehicles." Tex. Occ. Code § 2301.005.

The "department" is the "Texas Department of Motor Vehicles." Tex. Occ. Code Ann. § 2301.002. Reference to the "department" is thus reference to the larger entity, rather than the more specific "board." And this is appropriate where, as the Amicus Brief specifically recognizes, most tasks can be delegated by the Board and, as a practical matter, become work for the "department." (Amicus Br. at 2.) This complaint is nit-picky at best, particularly as the Amicus Brief specifically notes that the role of the Board is highlighted and respected in the PFD. (*Id.* at 3-4.) There is no suggestion that the Board will not be exercising its authority to render the final order in this case. The Amicus Brief's position—to the extent that there is one—lacks any practical impact and should be ignored.

CONCLUSION

The amicus brief was untimely and should not be considered. Even if it were to be considered, however, it is meritless. The Board should adopt the PFD as it is currently drafted.

Respectfully submitted this 4th day of August, 2016.

By: _____

Mark T. Clouatre, Esq.
Texas State Bar No. 00793521
John P. Streelman, Esq.
Admitted Pro hac vice
Webster C. Cash, III, Esq.
Admitted Pro hac vice
Wheeler Trigg O'Donnell LLP
370 Seventeenth Street, Suite 4500
Denver, CO 80202
Telephone: 303-244-1800
Facsimile: 303-244-1879
Email: clouatre@wtotrial.com
Email: streelman@wtotrial.com
Email: cash@wtotrial.com

~and~

John W. Chambless II, Esq.
Texas State Bar No. 00796334
Thompson, Coe, Cousins & Irons, LLP
701 Brazos, Suite 1500
Austin, Texas 78701
Telephone: (512) 708-8200
Facsimile: (512) 708-8777
Email: jchambless@thompsoncoe.com

COUNSEL FOR FCA US LLC

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of this instrument was served upon the following in accordance with TEX. R. Civ. P. 21a on this 4th day of August, 2016:

William R. Crocker Attorney at Law 807 Brazos, Suite 1014 Austin, Texas 78701 Telephone: (512) 478-5611 Facsimile: (512) 474-2540 Email: crockerlaw@earthlink.net **Counsel for Complainant**	MVD Docket Clerk Motor Vehicle Division Texas Department of Motor Vehicles 4000 Jackson Avenue Austin, TX 78731 Telephone: (512) 465-7354 Facsimile: (512) 465-3666
Karen Phillips General Counsel/EVP Texas Automobile Dealers Association 1108 Lavaca St., Suite 800 Austin, TX 78701 Telephone: (512) 476-2686 Facsimile: (512) 476-5854 Email: kphillips@tada.org **Counsel for TADA**	MVD Docket Clerk P.O. Box 26487 Austin, Texas 8755 Facsimile: (512) 465-4135
Nathan Allen, Jr. Jones, Allen & Fuquay, LLP 8828 Greenville Avenue Dallas, Texas 75243-7143 Telephone: (214) 343-7400 Facsimile: (214) 343-7455 E-mail: nallen@jonesallen.com **Counsel for Complainant**	J. Bruce Bennett Cardwell, Hart & Bennett, L.L.P. 807 Brazos, Suite 1001 Austin, Texas 78701 Telephone: (512) 322-0011 Facsimile: (512) 322-0808 E-mail: jbb.chblaw@me.com **Counsel for Complainant**

John W. Chambless, II

State Office of Administrative Hearings

Lesli G. Ginn
Chief Administrative Law Judge

August 10, 2016

Daniel Avitia, Director
Motor Vehicle Division
Texas Department of Motor Vehicles
4000 Jackson Avenue
Austin, TX 78731

VIA FACSIMILE NO. 512/465-3666

RE: SOAH Docket No. 608-15-4315.LIC; MVD Docket No. 15-0015.LIC; Cecil Atkission Orange, LLC, d/b/a Cecil Atkission Chrysler Jeep Dodge v. FCA US LLC

Dear Mr. Avitia:

This letter constitutes our response to: (1) the exceptions to the Proposal for Decision (PFD) filed by Cecil Atkission Orange, LLC d/b/a Cecil Atkission Chrysler Jeep Dodge (Atkission Chrysler); (2) the amicus curie brief of the Texas Automobile Dealers Association (TADA); and (3) the replies to both filed by FCA US LLC (Chrysler).

Chrysler argues that TADA's amicus brief was untimely filed and, therefore, should not be considered. We disagree. An amicus brief must be filed "not later than the deadline for exceptions."[1] SOAH Order No. 11 specified that the "deadline for filing exceptions to the PFD is now July 20, 2016." Because TADA's amicus brief was filed by that deadline, we believe it was timely filed and can appropriately be considered in this case. TADA focused much of its brief on explaining that the Board of the Texas Department of Motor Vehicles is who determines whether good cause for termination has been established, not the Department. The ALJs do not disagree, and point out that footnote 2 on page 1 of the PFD clarifies that references to the Department throughout the PFD include the governing board. Having considered the amicus brief and Chrysler's substantive responses to it, we conclude that the brief raises no issues that merit any further discussion here, nor do we believe it warrants any revisions to the PFD.

[1] 43 Tex. Admin. Code § 215.311(a).

Similarly, we consider all of the arguments made in Atkission Chrysler's exceptions to be redundant of arguments already considered, and rejected, in the PFD.

Accordingly, we recommend no changes to the PFD.

Sincerely,

Meitra Farhadi
Administrative Law Judge

Hunter Burkhalter
Administrative Law Judge

HB/dk
Enclosure

cc: Karen Phillips, General Counsel/EVP, Texas Automobile Dealers Association, 1108 Lavaca St. Suite 800, Austin, TX 78701 - **VIA FACSIMILE**
Mark T. Clouatre, Webster C. Cash and John P. Streelman, Wheeler Trigg O'Donnell, LLP, 370 Seventeenth Street, Suite 4500, Denver, CO 80202 - **VIA FACSIMILE**
John Chambless, II, Thompson, Coe, Cousins & Irons, LLP, 701 Brazos, Suite 1500, Austin, TX 78701 – **VIA FACSIMILE**
William R. Crocker, J. 807 Brazos, Suite 1014, Austin, TX 78701 - **VIA FACSIMILE**
J. Bruce Bennett, Cardwell, Hart & Bennett, LLP, 807 Brazos, Suite 1001, Austin, TX 78701 - **VIA EMAIL**
Nathan Allen, Jr., Jones, Allen & Fuquay, LLP, 8828 Greenville Ave., Dallas, TX 75234 - **VIA FACSIMILE**
MVD Docket Clerk, Motor Vehicle Division, Texas Department of Motor Vehicles, 4000 Jackson Avenue, Austin, Texas 78731 – **VIA FACSIMILE**

2016/08/10 15:04:03 4 /9

STATE OFFICE OF ADMINISTRATIVE HEARINGS

AUSTIN OFFICE
300 West 15th Street Suite 502
Austin, Texas 78701
Phone: (512) 475-4993
Fax: (512) 322-2061

SERVICE LIST

AGENCY:	**Motor Vehicles, Texas Department of (TDMV)**
STYLE/CASE:	**CECIL ATKISSION CHRYSLER JEEP DODGE v. FCA US LLC**
SOAH DOCKET NUMBER:	**608-15-4315.LIC**
REFERRING AGENCY CASE:	**15-0015-LIC**

STATE OFFICE OF ADMINISTRATIVE HEARINGS	**ADMINISTRATIVE LAW JUDGE** **ALJ HUNTER BURKHALTER**
REPRESENTATIVE / ADDRESS	**PARTIES**
MVD DOCKET CLERK MOTOR VEHICLE DIVISION TEXAS DEPARTMENT OF MOTOR VEHICLES 4000 JACKSON AVENUE AUSTIN, TX 78731 (512) 465-7354 (PH) (512) 465-4135 (FAX) marie.medina@txdmv.gov	MOTOR VEHICLE DIVISION
J. BRUCE BENNETT CARDWELL, HART & BENNETT, L.L.P. 807 BRAZOS, STE 1001 AUSTIN, TX 78701 (512) 322-0011 (PH) (512) 322-0808 (FAX) jbb.chblaw@sbcglobal.net	CARDWELL, HART & BENNETT, L.L.P.
MARK T. CLOUATRE ATTORNEY WHEELER TRIGG O'DONNELL, L.L.P 370 SEVENTEENTH STREET, SUITE 4500 DENVER, CO 80202 (303) 244-1800 (PH) (303) 244-1879 (FAX) CLOUATRE@WTOTRIAL.COM	FCA US LLC

JOHN CHAMBLESS, II
ATTORNEY
THOMPSON, COE, COUSINS & IRONS, L.L.P.
701 BRAZOS, SUITE 1500
AUSTIN, TX 78701
(512) 708-8200 (PH)
(512) 708-8777 (FAX)
jchambless@thompsoncoe.com

FCA US LLC

NATHAN ALLEN, JR.
ATTORNEY
JONES, ALLEN & FUQUAY, LLP
8828 GREENVILLE AVENUE
DALLAS, TX 75243-7143
(214) 343-7400 (PH)
(214) 343-7455 (FAX)

JONES, ALLEN & FUQUAY, LLP

WILLIAM R. CROCKER
ATTORNEY AT LAW
807 BRAZOS, SUITE 1014
AUSTIN, TX 78701
(512) 478-5611 (PH)
(512) 474-2540 (FAX)
crockerlaw@earthlink.net

CECIL ATKISSION ORANGE, L.L.C. D/B/A CECIL ATKISSION CHRYSLER JEEP DODGE

WEBSTER C. CASH
WHEELER TRIGG O'DONNELL LLP
370 SEVENTEENTH STREET, SUITE 4500
DENVER, CO 80202
(303) 244-1924 (PH)
(303) 244-1879 (FAX)

FCA US LLC

JOHN P. STREELMAN
WHEELER TRIGG O'DONNELL, LLP
370 SEVENTEENTH STREET, SUITE 4500
DENVER, CO 80202
(303) 244-1865 (PH)
(303) 244-1879 (FAX)
streelman@wtotrial.com

FCA US LLC

KAREN PHILLIPS
TEXAS AUTOMOBILE DEALERS ASSOCIATION
1108 LAVACA, STE 800
AUSTIN, TX 78701
(512) 476-2686 (PH)
(512) 322-0561 (FAX)

TEXAS AUTOMOBILE DEALERS ASSOCIATION

xc: Docket Clerk, State Office of Administrative Hearings
Docket Clerk TDMV, Fax No. 512-465-4135

2016/08/10 15:04:03 7 /9

STATE OFFICE OF ADMINISTRATIVE HEARINGS

AUSTIN OFFICE
300 West 15th Street Suite 502
Austin, Texas 78701
Phone: (512) 475-4993
Fax: (512) 322-2061

SERVICE LIST

AGENCY:	**Motor Vehicles, Texas Department of (TDMV)**
STYLE/CASE:	**CECIL ATKISSION CHRYSLER JEEP DODGE v. FCA US LLC**
SOAH DOCKET NUMBER:	**608-15-4315.LIC**
REFERRING AGENCY CASE:	**15-0015-LIC**

STATE OFFICE OF ADMINISTRATIVE HEARINGS	**ADMINISTRATIVE LAW JUDGE** **ALJ HUNTER BURKHALTER**
REPRESENTATIVE / ADDRESS	**PARTIES**
MVD DOCKET CLERK MOTOR VEHICLE DIVISION TEXAS DEPARTMENT OF MOTOR VEHICLES 4000 JACKSON AVENUE AUSTIN, TX 78731 (512) 465-7354 (PH) (512) 465-4135 (FAX) marie.medina@txdmv.gov	MOTOR VEHICLE DIVISION
J. BRUCE BENNETT CARDWELL, HART & BENNETT, L.L.P. 807 BRAZOS, STE 1001 AUSTIN, TX 78701 (512) 322-0011 (PH) (512) 322-0808 (FAX) jbb.chblaw@sbcglobal.net	CARDWELL, HART & BENNETT, L.L.P.
MARK T. CLOUATRE ATTORNEY WHEELER TRIGG O'DONNELL, L.L.P 370 SEVENTEENTH STREET, SUITE 4500 DENVER, CO 80202 (303) 244-1800 (PH) (303) 244-1879 (FAX) CLOUATRE@WTOTRIAL.COM	FCA US LLC

2016/08/10 15:04:03 8 /9

JOHN CHAMBLESS, II
ATTORNEY
THOMPSON, COE, COUSINS & IRONS, L.L.P.
701 BRAZOS, SUITE 1500
AUSTIN, TX 78701
(512) 708-8200 (PH)
(512) 708-8777 (FAX)
jchambless@thompsoncoe.com

FCA US LLC

NATHAN ALLEN, JR.
ATTORNEY
JONES, ALLEN & FUQUAY, LLP
8828 GREENVILLE AVENUE
DALLAS, TX 75243-7143
(214) 343-7400 (PH)
(214) 343-7455 (FAX)

JONES, ALLEN & FUQUAY, LLP

WILLIAM R. CROCKER
ATTORNEY AT LAW
807 BRAZOS, SUITE 1014
AUSTIN, TX 78701
(512) 478-5611 (PH)
(512) 474-2540 (FAX)
crockerlaw@earthlink.net

CECIL ATKISSION ORANGE, L.L.C. D/B/A CECIL ATKISSION CHRYSLER JEEP DODGE

DANIEL AVITIA
DIRECTOR
TEXAS DEPARTMENT OF MOTOR VEHICLES
MOTOR VEHICLE DIVISION
4000 JACKSON AVENUE
AUSTIN, TX 78731

(512) 465-3666 (FAX)

TEXAS DEPARTMENT OF MOTOR VEHICLES

WEBSTER C. CASH
WHEELER TRIGG O'DONNELL LLP
370 SEVENTEENTH STREET, SUITE 4500
DENVER, CO 80202
(303) 244-1924 (PH)
(303) 244-1879 (FAX)

FCA US LLC

JOHN P. STREELMAN
WHEELER TRIGG O'DONNELL, LLP
370 SEVENTEENTH STREET, SUITE 4500
DENVER, CO 80202
(303) 244-1865 (PH)
(303) 244-1879 (FAX)
streelman@wtotrial.com

FCA US LLC

KAREN PHILLIPS
TEXAS AUTOMOBILE DEALERS ASSOCIATION
1108 LAVACA, STE 800
AUSTIN, TX 78701
(512) 476-2686 (PH)
(512) 322-0561 (FAX)

TEXAS AUTOMOBILE DEALERS ASSOCIATION

xc: Docket Clerk, State Office of Administrative Hearings
Docket Clerk TDMV, Fax No. 512-465-4135

2016/08/10 15:04:03 1 /9

STATE OFFICE OF ADMINISTRATIVE HEARINGS

AUSTIN OFFICE
300 West 15th Street Suite 502
Austin, Texas 78701
Phone: (512) 475-4993
Fax: (512) 322-2061

DATE: **8/10/2016**

NUMBER OF PAGES INCLUDING THIS COVER SHEET: **9**

REGARDING: **EXCEPTIONS LETTER (BY ALJ)**

DOCKET NUMBER: **608-15-4315.LIC**

JUDGE HUNTER BURKHALTER

FAX TO:	**FAX TO:**
WILLIAM R. CROCKER (ATTORNEY AT LAW)	(512) 474-2540
KAREN PHILLIPS (TEXAS AUTOMOBILE DEALERS ASSOCIATION)	(512) 322-0561
JOHN CHAMBLESS, II (THOMPSON, COE, COUSINS & IRONS, L.L.P.)	(512) 708-8777
WEBSTER C. CASH	(303) 244-1879
MARK T. CLOUATRE	(303) 244-1879
JOHN P. STREELMAN	(303) 244-1879
J. BRUCE BENNETT	VIA EMAIL
NATHAN ALLEN, JR. (JONES, ALLEN & FUQUAY, LLP)	(214) 343-7455
MVD DOCKET CLERK (MOTOR VEHICLE DIVISION)	(512) 465-4135
DANIEL AVITIA (TEXAS DEPARTMENT OF MOTOR VEHICLES)	(512) 465-3666

Docket Clerk, Fax Number 512/465-4135
NOTE: IF ALL PAGES ARE NOT RECEIVED, PLEASE CONTACT DENISE KIMBROUGH(dki) (512) 475-4993

HARD COPY FILED. NOT SCANNED FOR ELECTRONIC ACCESS. COVER SHEET MAY BE ATTACHED.

Texas Department *of* Motor Vehicles
HELPING TEXANS GO. HELPING TEXAS GROW.

January 26, 2017

Hon. Meitra Farhadi *VIA HAND DELIVERY*
Administrative Law Judge
c/o Ms. Erin Hurley

Hon. Hunter Burkhalter
Administrative Law Judge
c/o Ms. Denise Kimbrough

State Office of Administrative Hearings
P. O. Box 13025
Austin, TX 78711-3025

Re: ***Cecil Atkission Orange, LLC d/b/a Cecil Atkission Chrysler Jeep Dodge, Complainant v. FCA US LLC (KNOWN IN TEXAS AS FCA GROUP US LLC), Respondent;*** **MVD Docket No. 15-0015 LIC; SOAH Docket No. 608-15-4315 LIC**

TO THE HONORABLE JUDGES FARHADI AND BURKHALTER:

Attached is the Interim Order of the Board of the Texas Department of Motor Vehicles, remanding the contested case matter to the State Office of Administrative Hearings (SOAH) for further proceedings.

Along with the Board's Order, I am returning to SOAH four boxes containing:

- Transcripts from Prehearing and Hearing on the Merits (HOM);
- Complainant's (Atkission's) Exhibits from the HOM;
- Respondent's (FCA's) Exhibits from the HOM;
- The ALJs' Exhibit List and Certification.

For your convenience, I am also providing a thumb drive, containing electronic copies of these referenced documents. If you have any questions, please do not hesitate to contact me at (512) 465– 1324 or Marie.Medina@TxDMV.gov or the Division's staff attorney, Michelle Lingo, at (512) 465-4277 or Michelle.Lingo@TxDMV.gov.

Sincerely,

Marie Medina

Marie Medina, Program Specialist
Motor Vehicle Division

Enclosure

cc: Mr. William R. Crocker *Via Email, without Enclosures*
Attorney At Law
P. O. Box 1418
Austin, TX 78767-1418

Mr. Mark Clouatre *Via Email, without Enclosures*
Nelson Mullins Riley & Scarborough LLP
1400 16th Street, Ste. 400
Denver, CO 80202

TEXAS DEPARTMENT OF MOTOR VEHICLES
MOTOR VEHICLE DIVISION

CECIL ATKISSION ORANGE, LLC D/B/A CECIL ATKISSION CHRYSLER JEEP DODGE,	§	
Complainant	§	
	§	**MVD DOCKET NO. 15-0015 LIC**
v.	§	**SOAH DOCKET NO. 608-15-4315.LIC**
	§	
FCA US, LLC,	§	
Respondent	§	

INTERIM ORDER REMANDING TO SOAH FOR FURTHER PROCEEDINGS

The referenced contested case matter came before the Board of the Texas Department of Motor Vehicles (TxDMV) in the form of a Proposal for Decision (PFD) from the State Office of Administrative Hearings (SOAH).

The contested case matter involves protest by Cecil Atkission Orange, LLC d/b/a Cecil Atkission Jeep Dodge (Atkission) against FCA US, LLC's (FCA) proposed termination of the franchise.

The Board considered the evidence, arguments, findings of fact, and conclusions of law presented in:

1. The Administrative Law Judges' (ALJs') June 17, 2016, PFD;
2. Atkission's Exceptions to the PFD,
3. The Texas Automobile Dealers Association's *Amicus Curiae* brief;
4. FCA's Replies to the Exceptions to the PFD; and
5. The ALJs' August 11, 2016, exceptions letter.

ACCORDINGLY, IT IS ORDERED that the case is remanded to the State Office of Administrative State Office of Administrative Hearings to further clarify:

(A) the legal status of the dealer's financial contributions to the business and

(B) how that money does – or does not – support the manufacturer's proposed termination under the manufacturer's December 19, 2014, termination letter:

- Section regarding Working Capital Obligation (beginning on page 7) and
- Section regarding Net Worth Obligations (beginning on page 8).

Date: 1/5/17

Raymond Palacios, Jr., Chairman
Board of the Texas Department of Motor Vehicles

ATTESTED:

Daniel Avitia, Director
Motor Vehicle Division
Texas Department of Motor Vehicles

State Office of Administrative Hearings

Lesli G. Ginn
Chief Administrative Law Judge

March 27, 2017

Daniel Avitia, Director
Motor Vehicle Division
Texas Department of Motor Vehicles
4000 Jackson Avenue
Austin, TX 78731

VIA INTERAGENCY MAIL

RE: SOAH Docket No. 608-15-4315.LIC; MVD Docket No. 15-0015.LIC; Cecil Atkission Orange, LLC, d/b/a Cecil Atkission Chrysler Jeep Dodge v. FCA US LLC

Dear Mr. Avitia:

Please find enclosed a Supplement to the Proposal for Decision Following Remand in this case. It contains our recommendation and underlying rationale.

Exceptions and replies may be filed by any party in accordance with 1 Tex. Admin. Code § 155.507(c), a SOAH rule which may be found at www.soah.texas.gov.

Sincerely,

Meitra Farhadi
Administrative Law Judge

Hunter Burkhalter
Administrative Law Judge

HB/MF/dk
Enclosure
cc: Mark T. Clouatre, Nelson Mullins Riley & Scarborough, LLP 1400 Wewatta St., Ste. 500, Denver, CO 80202 - **VIA REGULAR MAIL**
John Chambless, II, Thompson, Coe, Cousins & Irons, LLP, 701 Brazos, Suite 1500, Austin, TX 78701 - **VIA REGULAR MAIL**
William R. Crocker, 807 Brazos, Suite 1014, Austin, TX 78701 - **VIA REGULAR MAIL**
MVD Docket Clerk, Motor Vehicle Division, Texas Department of Motor Vehicles, 4000 Jackson Avenue, Austin, Texas 78731 - **VIA INTERAGENCY MAIL**

SOAH DOCKET NO. 608-15-4315.LIC
MVD DOCKET NO. 15-0015.LIC

CECIL ATKISSION ORANGE, LLC, d/b/a CECIL ATKISSION CHRYSLER JEEP DODGE,	§	**BEFORE THE STATE OFFICE**
Complainant	§	
	§	**OF**
v.	§	
	§	
FCA US LLC,	§	
Respondent	§	**ADMINISTRATIVE HEARINGS**

SUPPLEMENT TO THE PROPOSAL FOR DECISION FOLLOWING REMAND

Cecil Atkission Orange, LLC d/b/a Cecil Atkission Chrysler Jeep Dodge operates a Chrysler dealership in Orange, Texas (Atkission Chrysler or the dealership) pursuant to a franchise agreement with FCA US LLC (Chrysler). Chrysler is seeking to terminate its relationship with Atkission Chrysler. The undersigned Administrative Law Judges (ALJs) issued the Proposal for Decision (PFD) in this case on June 17, 2016. In the PFD, the ALJs found that Chrysler proved its case and recommended termination of Atkission Chrysler's franchise. On August 10, 2016, the ALJs submitted a letter responding to exceptions to the PFD filed by Atkission Chrysler and an *amicus curiae*.

On January 5, 2017, the governing board of the Texas Department of Motor Vehicles (Board) considered the PFD in an open meeting. After considerable discussion, the Board issued an "Interim Order Remanding to SOAH for Further Proceedings" (Remand Order) in which the Board directed as follows:

ACCORDINGLY, IT IS ORDERED that the case is remanded to the State Office of Administrative Hearings to further clarify:

(A) the legal nature of the dealer's financial contributions to the business and

(B) how that money does – or does not – support the manufacturer's proposed termination under the manufacturer's December 19, 2014, termination letter:

- Section regarding Working Capital Obligations (beginning on page 7) and
- Section regarding Net Worth Obligations (beginning on page 8).

The Board delivered the Remand Order to SOAH on January 26, 2017.

The ALJs have carefully reviewed the Remand Order and the Board's discussion of the PFD, and have concluded that the Board simply seeks additional explanation from the ALJs as to the bases for their conclusions on the topics listed above. Thus, the ALJs conclude there is no need to re-open the evidentiary record or to solicit additional briefing from the parties.

A. Background Regarding the PFD

The ALJs found at the time they issued the PFD, and they continue to find, that this was not a close or difficult case to decide. That is, the evidence overwhelmingly proves good cause for Chrysler to terminate its relationship with Atkission Chrysler.

The Department has the statutory authority to regulate franchise relationships between dealers and motor vehicle manufacturers. In determining whether to approve a franchise termination, the Department must determine whether the manufacturer has established, by a preponderance of the evidence, that there is "good cause" for the termination.[1] As explained more fully in the PFD,[2] when evaluating good cause, the Department is required to consider

[1] Tex. Occ. Code § 2301.453(g).

[2] PFD at 6-7.

seven statutorily listed factors, plus the six grounds[3] for termination stated in the Notice of Termination issued by Chrysler. Because Chrysler's six reasons for termination overlapped with the statutory factors, they were discussed within the context of the statutory factors. The finding as to each factor is summarized as follows:[4]

1) The dealer's sales in relation to the sales in the market

In the PFD, the ALJs concluded that the overwhelming evidence proved that, throughout its history, Atkission Chrysler had "exceptionally low sales in relation to sales in the market," thereby constituting a factor supporting good cause for termination.[5]

2) The dealer's investment and obligations

In the PFD, the ALJs concluded that:

> (1) Atkission Chrysler's investments are minimal, to the point of being inadequate to properly operate the business; (2) the dealership's obligations are equally minimal; and (3) these factors establish good cause to terminate.[6]

3) Injury or benefit to the public

In the PFD, the ALJs concluded that "the termination of Atkission Chrysler would have a positive impact on the public," and that this factor "weighs heavily in favor of termination."[7]

---

[3] During the discussion of the PFD by the Board, counsel for Atkission Chrysler and certain Board members posited that Chrysler's Notice of Termination stated only three grounds for termination. Transcript of Board's January 5, 2017 Discussion of the PFD (Board Transcript) at 94-95, 123, 144. This is incorrect. As explained in the PFD, the Notice of Termination identified six grounds for termination, specifically: Atkission Chrysler's failures to (1) meet sales performance obligations; (2) comply with signage obligations; (3) meet management and sales personnel obligations; (4) meet advertising and sales promotion obligations; (5) meet working capital obligations; and (6) meet net worth obligations. PFD at 14.

[4] The bases for the findings on each factor are discussed in considerable detail in the PFD.

[5] PFD at 22.

[6] PFD at 29.

[7] PFD at 31-32.

4) The adequacy of the dealer's service facilities, equipment, parts, and personnel in relation to those of other dealers of new motor vehicles of the same line-make

In the PFD, the ALJs concluded that: (1) the evidence demonstrates that the service facilities are inadequate, thereby supporting termination; and (2) as to equipment, parts, and personnel, the evidence was neutral as to termination because neither party offered evidence on those points.[8]

5) Whether warranties are being honored by the dealer

In the PFD, the ALJs concluded that the evidence established "neither exceptionally good nor exceptionally bad performance by the dealership on warranty issues" and, therefore, this factor "neither supports nor weighs against termination."[9]

6) The parties' compliance with the franchise, except to the extent that the franchise conflicts with Texas Occupations Code chapter 2301

In the PFD, the ALJs concluded that Atkission Chrysler repeatedly breached the franchise agreement in nine material ways, each one of which justifies termination:

- The dealership breached its **sales performance obligations**, by chronically failing to achieve 100% of its Minimum Sales Responsibility and ranking "as the very worst performing [Chrysler] dealership in the entire state;"[10]

- The dealership breached its **management obligations**, by Mr. Atkission's chronic failure to be present at the dealership during at least half of the dealership's business hours;[11]

---

[8] PFD at 33.

[9] PFD at 36.

[10] PFD at 43-44.

[11] PFD at 45-47.

- The dealership breached its **personnel obligations**, by being chronically understaffed;[12]

- The dealership breached its **facility obligations**, by chronically having facilities that are "in very poor repair," "not up to standards at all," "very old," "not conducive to a successful business," "overdue for replacing and not worth updating," "worse than the other auto dealers in the area," "due for burning and replacing," "woefully inadequate and outdated," "one of the worst facilities I've ever seen," "poorly maintained," and that "almost appear to be abandoned."[13]

- The dealership breached its **place of business obligations**, by requiring vehicle purchasers to travel to a distant Toyota dealership to complete their purchases;[14]

- The dealership breached its **advertising obligations**, by greatly underspending on advertising;[15]

- The dealership breached its **signage obligations**, by using old, out-of-date signage that is in such poor repair that it reveals a "remarkable passivity and apathy [on Atkission Chrysler's part] about its own affairs;"[16]

- The dealership chronically breached its **working capital obligations**;[17] and

- The dealership chronically breached its **net worth obligations**.[18]

In summary, the PFD identified 13 reasons supporting good cause for termination, one factor that was neutral, and no factors that weighed against termination. Given the weight of these facts, the ALJs conclude that Chrysler's request to terminate its franchise with

---

[12] PFD at 47-50.

[13] PFD at 50-52.

[14] PFD at 52-54.

[15] PFD at 54-56.

[16] PFD at 56-59.

[17] PFD at 59-63.

[18] PFD at 59-63.

Atkission Chrysler is tailor-made for the relief afforded by Texas Occupations Code §§ 2301.453-.445 and should be granted. The ALJs further note that the staff (Staff) of the Board appears to agree with all aspects of the PFD because they recommended no changes to it.[19]

B. The Issues Identified in the Remand Order

1. The Legal Status of the Dealer's Financial Contributions to the Business

The Remand Order asks the ALJs to "clarify . . . the legal status of the dealer's financial contributions to the business." From reading the transcript of their discussion of the PFD, the ALJs conclude that the Board members are referring to the issue of the so-called "Cecil Money."

Mr. Atkission has "loaned" to Atkission Chrysler roughly $6.25 million over the course of several years. Mr. Atkission's loans to the dealer are made through what he and the dealer's employees call "Cecil Money." He simply occasionally writes a check to the dealer.[20] These payments are unsecured, treated as subordinated debt on the dealer's books, and lack any of the paperwork that one would normally expect to see with a loan.[21] When the dealer receives a "Cecil Money" check, it records the money as loaned funds, and then pays Mr. Atkission interest on the principal.[22] None of the principal of the $6.25 million in Cecil Money has ever been repaid. The dealer repeatedly indicated that it is under no obligation to repay the principal. Mr. Atkission testified that he expects to be paid interest on the principal, but not the principal itself.[23] Tyra Boram, the dealer's office manager and bookkeeper, testified that none of the principal has ever been repaid.[24] Regarding the $6.25 million, Mr. Coleman, the dealer's

---

[19] Board Transcript at 20.

[20] Hearing Transcript at 708-10, 753-54.

[21] Hearing Transcript at 712, 1066; Board Transcript at 120.

[22] Hearing Transcript at 749-50, 870-71.

[23] Hearing Transcript at 979-80.

[24] Hearing Transcript at 711.

accountant, testified, "[I]t's not debt. It's not repaid to him. It's never been repaid to him. More than likely, it will never be repaid to him."[25] The dealer's counsel asserted that Mr. Atkission does not want the $6.25 million to be repaid.[26]

The ALJs concluded that the Cecil Money is not the dealer's investment. This finding was based on the legal distinction between the individual (Mr. Atkission) and the dealer (Atkission Chrysler) that is mandated by the statutes that the Board is charged with enforcing. During the Board's discussion of the PFD, a Board member stated, "In my world, the dealer is Mr. Atkission," and the ALJs made a "most egregious misinterpretation" in concluding otherwise, but he admitted that he was not familiar with the relevant statutory language.[27] Pursuant to Texas Occupations Code § 2301.455(a)(2), a factor to be considered in any proposed dealer termination is the "dealer's investment and obligations." By statute, the "dealer" is the "person who holds a general distinguishing number issued by the Board."[28] "Person" expressly includes a "partnership, corporation . . . or any other legal entity."[29] In this case, it is Atkission Chrysler, not Mr. Atkission, which holds the general distinguishing number. For this reason, based on the plain meaning of the statute, Atkission Chrysler, not Mr. Atkission, is the dealer. Consequently, from a legal and statutory perspective, the $6.25 million in Cecil Money invested by Mr. Atkission fundamentally cannot be considered an investment of the dealer (Atkission Chrysler).

The ALJs also concluded that the Cecil Money is not the dealer's obligation. The ALJs reached that conclusion because the evidence in this case established that the Cecil Money need never be repaid. As such, it cannot be considered an obligation of the dealer, but merely a capital contribution with no terms of repayment.

---

[25] Hearing Transcript at 812.

[26] Hearing Transcript at 31-32.

[27] Board Transcript at 62, 146.

[28] Tex. Occ. Code § 2301.002(7).

[29] Tex. Occ. Code § 2301.002(27).

The ALJs note that, even if the Cecil Money were re-classified as an investment of the dealer, the overall level of the dealer's investment would still clearly be insufficient and termination would still be warranted. That is, if the Cecil Money were deemed to be a $6.25 million investment in the dealership by the dealer, it would not change the fact that such a level of investment was obviously too little to successfully run the business, as evidenced by the remainder of the PFD which discusses the many ways in which the dealer has chronically underperformed. Stated differently, regardless of how it is classified, the $6.25 million was put to work in the running of the dealership, yet it was plainly not enough to prevent the business from being a poorly operated and money-losing enterprise.

2. How the Cecil Money Does—or Does Not—Support Termination with Respect to the Working Capital and Net Worth Obligations

As explained in the PFD,[30] the Dealer Agreements obligate Atkission Chrysler to maintain specified net working capital and net worth amounts. Based on Atkission Chrysler's financial statements, since 2010 the company has never met its working capital and net worth obligations. Indeed, the dealership's net worth has been an ever-increasing negative number, meaning that Atkission Chrysler has steadily lost money every year since 2010. The numbers reported by the dealership to Chrysler prove that the dealership has repeatedly violated the Dealer Agreements by not maintaining the required working capital and net worth levels. The parties agree that the only reason the dealership has remained in operation despite these losses has been the periodic infusions of Cecil Money.

Long after it received Chrysler's notice of termination, Atkission Chrysler developed a new argument to overcome the fact that its own financial reports prove its failure to meet the working capital and net worth requirements. The dealership argued that, rather than relying on the "working capital" and "net worth" entries on its financial statements, the ALJs and the Department should consider the adequacy of what the dealership variously calls its "constructive working capital" and "constructive net worth" or its "'real' working capital" and "'real' net

[30] PFD at 59-63.

worth" by counting the Cecil Money as a part of the dealership's working capital and net worth. To do this, the dealership's accounting expert, Carl Woodward, sought to reclassify the Cecil Money on the dealership's financial statements. As reported to Chrysler, the Cecil Money has historically been recorded in two entries, "Notes Payable" and "Other Notes and Contracts." Mr. Woodward advocated for deleting those entries and reclassifying the entire amount of Cecil Money as "Subordinated Notes" in the financial statements. Mr. Woodward argued for this change because he considers "Subordinated Notes" to be a "quasi-capital-net worth account."[31] It is critical to keep in mind that the dealership's financial statements have never ignored or omitted the Cecil Money. Instead, the statements have accounted for Cecil Money in a way that does not count toward the company's working capital or net worth figures.

The ALJs found, and they continue to find, that the dealership's attempt to redefine its working capital and net worth is unreasonable. Mr. Woodward's recommended change to the financial statements came about only in response to the Notice of Termination. However, for the eight years of its existence, Atkission Chrysler and Chrysler had agreed on a generally-accepted yardstick for measuring working capital and net worth. During those eight years, the dealership's reported working capital and net worth always came up short. It was only after being confronted with the consequences of not measuring up that Atkission Chrysler decided the yardstick should be changed.

The method of measuring working capital and net worth advocated by Chrysler (and as reported by the dealership for eight years) is the standard and generally accepted practice and it should govern here. For example, prior to this proceeding no one at the dealership ever complained that the working capital and net worth amounts it had reported over the years were inaccurate or needed to be changed, despite a thorough review by the general manager, office manager, dealership accountant, and Mr. Atkission each month prior to submission to Chrysler. Moreover, the dealership has always reported its working capital and net worth to the United States Internal Revenue Service in exactly the same way it has always reported them to Chrysler.

---

[31] Atkission Chrysler Ex. 29 at 2.

According to Curtis Coleman, Atkission Chrysler's accountant, the changes advocated by Mr. Woodward would yield the dealership's "constructive working capital" and "constructive net worth" amounts, yet these are not terms used in the accounting profession, and the financial reporting forms used by Chrysler and the dealership do not use either of those terms. Mr. Woodward himself stated that the changes he advocated would yield the dealership's "'real' working capital" and "'real' net worth." Specifically, he stated that he would describe his approach as yielding "real net worth [and real working capital], *with the 'real' in quote marks*."[32] But the addition of quote marks around the word "real" indicates that the word is being used in a dubious way. Ironically, the phrases "'real' net worth," and "'real' working capital" actually suggest *unreal* figures.

Atkission Chrysler's accounting expert, Mr. Woodward, was careful to use words like "real" and "quasi" during his testimony. Mr. Coleman conceded that the accounting changes he advocated would yield only "constructive net worth" and "constructive working capital" amounts, not actual "net worth" and "working capital" amounts. Yet the franchise agreements do not impose "constructive net worth," "'real' net worth," "constructive working capital," or "'real' working capital" requirements. Instead, they impose "net worth" and "working capital" requirements.

Working capital is generally defined as current assets minus current liabilities. A current liability, in turn, is any short-term obligation (i.e. any debt that is paid back within 12 months). The infusions of Cecil Money are primarily used by the dealership to fund short-term loans for vehicle inventory, loans that are often paid down on a daily basis. As explained by Chrysler's accounting expert, Herbert Walter, because the loans are paid back quickly, they are not long-term obligations and, therefore, the Cecil Money that funds the short-terms loans cannot be considered a part of working capital or net worth.

[32] Hearing Transcript at 1070, 1120 (emphasis added).

In this case, the numbers paint a clear picture: the dealership has been a slowly dying patient for at least six years, and the only thing keeping it alive has been periodic infusions of Cecil Money. The dealership's attempted reclassification of the accounts would not change that reality. The dealership has lost between $5 million and $6 million since its inception in 2008, and the evidence in the record suggests that this downward trend is only accelerating. Atkission Chrysler has breached its working capital and net worth obligations in the Dealer Agreements, factors that favor termination.

The evidence overwhelmingly establishes good cause to terminate Atkission Chrysler's franchise. Therefore, the ALJs recommend that the Department deny Atkission Chrysler's protest and allow Chrysler to terminate the franchise.

SIGNED March 27, 2017.

HUNTER BURKHALTER
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

MEITRA FARHADI
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

** INBOUND NOTIFICATION : FAX RECEIVED SUCCESSFULLY **

TIME RECEIVED	REMOTE CSID	DURATION	PAGES	STATUS
April 7, 2017 2:50:50 PM CDT		399	58	Received

Apr. 7. 2017 2:37PM No. 0139 P. 1

WM. R. CROCKER
ATTORNEY AT LAW
P. O. BOX 1418
AUSTIN, TEXAS 78767

TELEPHONE: 512-478-5611
FAX: 512-474-2540
E-MAIL: crockerlaw@earthlink.net

STE. 1014
807 BRAZOS
AUSTIN, TEXAS 78701

April 19, 2016

FACSIMILE COVER SHEET

TO: The Hon. Meitra Farhadi
The Hon. Hunter Burkhalter

FAX NO.: **(512) 322-2061**

COMMENTS: RE: SOAH Docket No. 608-15-4315.LIC

TOTAL PAGES, INCLUDING COVER:

(If you do not receive all of the pages, please contact this office at 512/478-5611.)

WM. R. CROCKER
ATTORNEY AT LAW
P. O. BOX 1418
AUSTIN, TEXAS 78767
WWW.WRCLAW.COM

TELEPHONE: 512-478-5611
FAX: 512-474-2540
E-MAIL: CROCKERLAW@EARTHLINK.NET

STE. 1014
807 BRAZOS
AUSTIN, TEXAS 78701

April 7, 2017

For Fax Transmission
(512) 322-2061

The Hon. Meitra Farhadi
The Hon. Hunter Burkhalter
Administrative Law Judges
State Office of Administrative Hearings
300 West 15th St., Suite 502
Austin, Texas 78701

Re: SOAH Docket No. 608-15-4315.LIC
MVD Docket No. 15-0015.LIC; Cecil Atkission Orange, LLC d/b/a Cecil Atkission Chrysler Jeep Dodge, Complainant, v. Chrysler Group LLC, Respondent

Dear Judges Farhadi and Burkhalter:

Enclosed is Complainant's Exceptions to the Supplement to the Proposal for Decision Following Remand for filing in the above-referenced proceeding.

By copy of this letter, copies of the enclosed document is being forwarded to opposing counsel.

Yours very truly,

Wm. R. Crocker

WRC:tc
Enclosure

cc: Mr. Cecil Atkission
Mr. Mark Clouatre

Apr. 7. 2017 2:37PM No. 0139 P. 3

BEFORE THE BOARD
OF
THE TEXAS DEPARTMENT OF MOTOR VEHICLES

CECIL ATKISSION ORANGE, LLC, d/b/a CECIL ATKISSION CHRYSLER JEEP DODGE,	§	**SOAH DKT. NO. 608-15-4315.LIC**
Complainant	§	**MVD DKT. NO. 15-0015. LIC**
FCA US LLC,	§	
Respondent.	§	

COMPLAINANT'S EXCEPTIONS
TO THE SUPPLEMENT TO THE PROPOSAL FOR
DECISION FOLLOWING REMAND

TO THE BOARD OF THE TEXAS DEPARTMENT OF MOTOR VEHICLES:

Complainant Cecil Atkission Orange, LLC d/b/a Cecil Atkission Chrysler Jeep Dodge ("Atkission") makes the following exceptions to the Supplement to the Proposal for Decision Following Remand ("Supplemental PFD" or "Supp. PFD") issued on March 27, 2017, which recommends the termination of Atkission's franchise by FCA US LLC ("FCA").

SUMMARY OF THE EXCEPTIONS

Before the Board voted to remand this case to SOAH, Chairman Palacios made the following statement:

> " . . . I have very grave concerns to remand this case back to the ALJs . . . Quite frankly, ***I think the ALJs completely misinterpreted basic accounting principles, basic understanding of how legal entities are formed, who's a dealer and who's not***, and to remand this back to these same people, I think we're going to be sitting right back where we are again with an explanation that none of us understand. That's my opinion. This is, I will say for the record, ***one of the most egregious misinterpretations of, again, basic accounting principles.*** I got my CPA 30 years ago here in Texas and ***this is basic accounting that the ALJs just completely missed, and I have grave concerns about sending this right back to those same people.***" (Emphasis added). (Board Tr. at 146-147).

Member Walker agreed:

> "I couldn't agree with you more on the ALJs just lack of not getting a lot of things, I thought." (Board Tr. at 147).

Unfortunately, the concerns of Chairman Palacios and of Member Walker have been fully realized. The ALJs have again applied the same "egregious" misinterpretations and misunderstandings of "basic" accounting and entity formation principles to the facts of this case. As a result, they once again concluded that Mr. Atkission's infusion of $6.25 million into his dealership is "not the dealer's investment" and "not the dealer's obligation." (Supp. PFD at 7). The ALJs also conclude that the $6.25 million – which they conceded is a "capital contribution" – had no impact whatever on working capital or net worth. A capital contribution, as its name clearly shows, is a contribution to working capital and net worth.

~~As of July 2016, only 81 of approximately 2,416 franchised dealerships in this State were sole proprietorships.~~[1] ~~The vast majority were limited liability entities, like Atkission~~. Those entities can be funded only through debt or capital contributions from their owners, as the Chair noted. (Board Tr. at 62).

Cecil Atkission is the sole owner of the Atkission dealership. It is undisputed that he has injected $6.25 million into the Atkission dealership. However, the ALJs completely disregard that money. In doing so, the ALJs transgress the bounds of the remand and their proper role in the Board's decision-making process.

The ALJs lecture the Board about the meaning of the statute the Board is legislatively charged with interpreting and administering. They even quarrel with the Board

[1] ~~This information was received by the undersigned from the IT Department of the Motor Vehicle Division in response to an open request (PIR 16-06-207). A chart received in response to the request is behind Tab 3 of the Appendix to these Exceptions.~~

about the number of grounds for termination set forth in the notice of termination. The ALJs demand Atkission's termination because, they argue, the dealership is a "poorly operated and money-losing enterprise," "a slowly dying patient," and thus "tailor-made" for termination." (Supp. PFD at 6, 8, 11). This would be so, the ALJs contend, even if the $6.25 million was treated as a dealership investment. (Supp. PFD at 8).

The ALJs' analysis assumes an expertise in franchised motor vehicle dealership accounting, which the ALJs clearly lack. Their analysis also misinterprets the termination statute and exceeds the scope of the remand order. Whether a franchised dealership is "tailor-made" for termination is a matter for the Board to decide using the Board's expertise. More importantly, a dealership can be poorly managed and losing money, but still be adequately capitalized, have a positive net worth, and *not* be subject to termination under Sections 2301.453 and 2301.455 of the Occupations Code. That is especially so when, as here, the dealership is stuck in a poor location made worse by recent highway reconstruction. FCA's true ground for termination is its desire for greater market penetration – *a ground for termination, which by statute, is insufficient by itself.* Nor are a dealership's unique accounting methods grounds for termination when, as here, the application of basic accounting principles indisputably proves that the $6.25 million Mr. Atkission invested in his dealership has enabled the dealership to meet FCA's working capital and net worth requirements at all times since he acquired the dealership in 2008.

Before remanding this case to SOAH, several Board members stressed its importance and the huge impact the decision will have on the lives of the people who would be affected by it. (Board Tr. at 76, 79, 130). Such a decision demands careful

Apr. 7. 2017 2:38PM No. 0139 P. 6

analysis of the two critical issues the Board remanded to SOAH for "**FURTHER PROCEEDINGS.**"

After the remand order was signed, Atkission reasonably expected the ALJs to set a scheduling conference to discuss the process for receiving additional evidence on the remanded issues and further briefing. The Board's general counsel shared that expectation.[2] ~~Atkission retained an additional accounting expert, Robert C. Davis, III, who has vast experience in automobile dealership accounting, to provide the ALJs with such evidence.[3]~~

Yet, without receiving any further evidence or briefing, the ALJs issued the Supplemental PFD, unsupported by any new findings, because they decided – without input from Atkission or FCA – that there was no need to reopen the record. This procedure violated the letter and the spirit of the remand and Atkission's right to due process of law, and constitutes unlawful procedure under the APA.

Because of the ALJs' determination to persevere in ignoring basic accounting principles and in misunderstanding how limited liability dealerships are funded and use those funds, the Board should grant Atkission's protest and deny FCA's request for franchise termination.

EXCEPTIONS TO SUPPLEMENTAL PFD

Exception No. 1: **The ALJs wrongly assessed the impact of Mr. Atkission's $6.25 million capital contribution on his dealership's working capital and net worth obligations, and in doing so, violated the remand order by their discussion of issues outside the scope of the remand.**

---

[2] Mr. Duncan stated that "I would say this motion (to remand) does ask a question that is sufficiently specific that I think the SOAH judges would be able to direct the parties to bring them additional evidence and argument." (Board Tr. at 148).

[3] ~~A copy of Mr. Davis's report is included in the Appendix behind Tab 1.~~

In the Supplemental PFD, the ALJs conclude that the $6.25 million is neither the "dealer's investment" nor the "dealer's obligation," but "merely" a "capital contribution." (Supp. PFD at 7). Then, by misinterpreting the termination statute, the ALJs decide that this "mere" $6.25 million capital contribution has no impact at all on the working capital and net worth of the dealership. They thus conclude that since 2010, the dealership "has never met its working capital and net worth obligations." (Supp. PFD at 8).

The ALJs reach this manifestly erroneous decision and conclusion by wrongly interpreting the way the dealership accounted for the $6.25 million on its past financial reports to FCA. (Supp. PFD at 6, 8-9). The past statements accounted for the $6.25 million in a way that did not readily show its impact on working capital and net worth. They think it now "unreasonable" for Atkission to account for the $6.25 million capital contribution in a way that more clearly shows the true impact of that money on the dealership's working capital and net worth, because the reclassification was done after the notice of termination was received. (Supp. PFD at 9). Yet, nothing in Chapter 2301 prevented Atkission from properly reclassifying the contributions on its financial statements to show that the working capital and net worth grounds for termination in FCA's termination notice lacked merit.

No matter how Atkission initially reported the $6.25 million on its dealership's books and financial statements, the bottom line is that the reclassification of the $6.25 million indisputably proves the dealership always has satisfied its working capital and net worth obligations, as the charts behind Tab 2 of the Appendix to these Exceptions demonstrate.

The ALJs wrongly accuse Atkission of changing FCA's "yardstick" for measuring working capital and net worth. (Supp. PFD at 9). Atkission has not done so. All Atkission

has done is perform a proper reclassification of the $6.25 million, which proves FCA's yardstick has been met. The ALJs simply concluded that the $6.25 million was "merely a capital contribution with no terms of repayment," and disregarded it. (Supp. PFD at 7).

And the ALJs assert that the $6.25 million "cannot be considered a part of working capital or net worth" because it was used primarily "to fund short-term loans for vehicle inventory" that are "often paid down on a daily basis." (Supp. PFD at 10). However, as the ALJs previously recognized, the $6.25 million constitutes a capital contribution. Capital contributions can be used by an entity for a variety of purposes, including financing the purchase of inventory. The Atkission dealership regularly uses capital contribution money to pay part of the dealership's floor plan loans on its new vehicle inventory. But such use does not change the fact that the capital contribution is part of the dealership's working capital and net worth. Again, the ALJs' misunderstanding of the concepts of capital contributions, working capital, net worth, and entity financing is responsible for their inability to properly analyze and assess the impact of the $6.25 million Mr. Atkission injected into his dealership.

The ALJs were bound by the scope of the remand order. *See e.g., Application of Brazos River Authority,* SOAH Dkt. No. 582-10-4181, 2016 WL 3213328 at *4 (June 3, 2016). However, they went beyond both the remand order and the termination statute in holding that "regardless of how it is classified, the $6.25 million was put to work in the running of the dealership, yet it was plainly not enough to prevent the business from being a poorly operated and money-losing enterprise." (Supp. PFD at 8). The ALJs add that the dealership is "a slowly dying patient" and that its attempted reclassification of the accounts would not change that reality." (Supp. PFD at 11).

The ALJs' sole task on remand was to clarify (1) "the legal status" of the $6.25 million, and (2) how that money does – or does not – support FCA's proposed termination based on the working capital and net worth obligations. How the dealership was operated, whether it was or was not losing money and any other observations about the dealership or its operation were *irrelevant* to that task and violated the remand order.

Properly considered, the $6.25 million proves that the dealership met its working capital and net worth obligations. Yet, the ALJs tell the Board it simply doesn't matter because, in their opinion, the dealership is "tailor-made" for termination and deserves to die. (Supp. PFD at 6, 8). That determination was outside of the ALJs' task under the remand order, and, in any event, it is not their call to make. Moreover, as discussed above, a dealership is not subject to termination even when it has operational and financial problems – especially if those problems are beyond the dealer's control but the dealership still meets the manufacturer's financial requirements and obligations.

For these reasons, Exception No. 1 should be sustained. The Supplemental PFD should be amended to delete the discussion of issues beyond the scope of the remand order and to provide that the $6.25 million Mr. Atkission invested in his dealership is a capital contribution, which when properly considered on the dealership's financial statements, proves the dealership has always satisfied its working capital and net worth obligations to FCA.

Exception No. 2: The ALJs wrongly concluded that the $6.25 million is not the dealer's investment.

The ALJs continue to interpret the word "dealer" in the phrase "dealer's investment and obligations" in Section 2301.455(a)(2) to mean only the entity holding the general distinguishing number, which in this case is Mr. Atkission's limited liability company, and

not Mr. Atkission, the dealer principal and sole owner of the dealership. Applying this erroneous interpretation of the statute, the ALJs conclude that the $6.25 million was not an investment made *by* the dealer. (Supp. PFD at 7).

At the Board's meeting, the Chair stated that "[i]n my world, the dealer is Mr. Atkission." He asked "[h]ow is this abstract entity (the limited liability company) going to pump money into itself . . ." (Board Tr. at 62). The Chair's interpretation of "dealer" and his view that the ALJs had misunderstood the meaning of "dealer" as used in Section 2301.455(a)(2) are correct .

Context matters. As used in Section 2301.455(a)(2), the words "dealer's investment" includes investments made *in* the dealership by its owner or owners, as the Chair observed. ~~The vast majority of general distinguishing numbers in Texas are issued to franchised dealers doing business as limited liability entities, rather than as individuals.~~[4] This is done for a myriad of tax and business reasons. The investment in the dealership by the owner or owners of a licensed dealership is a factor in the termination analysis.

To strictly apply the general definition of "dealer" in Section 2301.002(7) leads to nonsensical and absurd results because it defeats the purpose of the termination statute that "*all existing circumstances,* including . . . the dealer's investment and obligations" be considered. Acceptance of the ALJs' interpretation would create a dangerous precedent that would render meaningless millions of dollars of investments made in dealerships by their owners, like Mr. Atkission. The Supreme Court has made it clear that any "plain meaning" of a statute's words must not control when it "would produce an absurd result." *Hebner v. Reddy,* 498 S.W.3d 37, 41 (Tex. 2016). Construing the termination statute to

[4] ~~See Tab 3 of the Appendix to these Exceptions.~~

require a consideration of the investments in a dealership either as the dealer's investment or as an "existing" circumstance avoids such a result.

The ALJs dispute the Chair's interpretation, claiming he "admitted that he was not familiar with the relevant statutory language." (Supp. PFD at 7). The Chair made no such admission. The Chair simply disagreed with counsel for FCA's interpretation of the statutory definition.

The ALJs argue that "even if the [$6.25 million] were re-classified as an investment of the dealer, the overall level of the dealer's investment would still be clearly insufficient and termination would still be warranted." (Supp. PFD at 8). This statement is both untrue and violates the scope of the remand.

Treating the $6.25 million as an investment of the dealer (or an investment in the dealership by the dealer-principal) shows that the dealership always satisfied its working capital and net worth obligations to FCA. Whether the "level of investment" was "too little," as the ALJs assert, is immaterial to the remand *and* to the Board's termination decision. The "level of investment" in the dealership is not mentioned in the termination statute. It is relevant only to the specific grounds in FCA's termination notice that concern FCA's investment requirements. The only grounds in the notice concerning investment requirements are working capital and net worth obligations – both of which Atkission satisfied.

The ALJs' statement seems to reveal an underlying desire to see the dealership terminated. The ALJs reference "13 reasons supporting good cause for termination" – *nearly all of which are not the subject of the remand order* – to justify their conclusion that Atkission is "tailor-made" for termination. They even assert that the MVD staff appears to

agree with them. (Supp. PFD at 6). Such statements tread perilously near advocacy, which is not the role or prerogative of an ALJ.

For these reasons, Exception No. 2 should be sustained and the Supplemental PFD amended to provide that the $6.25 million constitutes an investment in the dealership by its dealer-principal, Mr. Atkission, which should be considered as an existing circumstance in determining whether the dealership should be terminated.

Exception No. 3: The ALJs wrongly concluded that the $6.25 million is not the dealer's obligation.

For the same reasons set forth in support of Exception No. 2, the ALJs' conclusion that the $6.25 million is not the dealer's obligation is erroneous. The ALJs fail to realize that the $6.25 million must be either equity or debt of the dealership. The $6.25 million is on one side of the balance sheet or the other. It cannot be treated as meaningless. If the $6.25 million is *not* treated as capital contribution, *i.e.*, an investment, then it must be considered a debt, an obligation, of the dealership.

For these reasons, Exception No. 3 should be sustained, and the Supplemental PFD amended to state that if the $6.25 million is not considered as an investment in the dealership, then it must be considered a debt of the dealership owed to Mr. Atkission.

Exception No. 4: The ALJs erred in not reopening the record to receive further evidence and briefing concerning the remanded issues.

Without asking for input from the parties, the ALJs decided not to reopen the record or to ask for additional briefing on the remanded issues. Their failure to do so, without prior notice or warning to the parties, violated the letter and the spirit of the remand, Atkission's right to due process of law, and SOAH's regular practice and procedure to provide such notice.[5] The ALJs' action also constitutes unlawful procedure under the APA.

Exception No. 5: The ALJs erred in finding that the evidence overwhelmingly proves and establishes good cause to terminate Atkission.

Twice in the Supplemental PFD the ALJs state that the evidence overwhelmingly "proves" or "establishes" good cause to terminate the Atkission dealership. (Supp. PFD at 2. 11). The statements are both outside the scope of the remand order and untrue, as shown in Atkission's Exceptions to the PFD filed on July 20, 2016, which are incorporated herein by reference. The Supplemental PFD should be amended to delete these statements.

CONCLUSION AND PRAYER

For the foregoing reasons, Atkission prays that its exceptions to the Supplemental PFD be sustained; that the ALJs' findings and conclusions that FCA proved good cause for the proposed termination of Atkission's franchise be changed and modified to find and conclude that FCA failed to prove good cause for the proposed termination; and that Atkission's protest be sustained. Alternatively, Atkission prays that this case be remanded to SOAH for the purpose of re-opening the record to receive additional evidence and

[5] *See e.g.*, SOAH Dkt. No. 608-13-4599.LIC, *Weitz et al. v. Volkswagen Group of America, Inc., et al.* ("Remand Order No. 1 Scheduling Prehearing Conference"); SOAH Dkt. No. 458-14-5030, *Texas Alcoholic Beverage Comm'n v. State Rep. Ana Hernandez et al.* ("Notice of Hearing on Remand"); SOAH Dkt. No. 473-03-1282, *Application of Central Power & Light Company* ("Prehearing Schedule and Notice of Hearing on Issues on Remand").

further briefing on the legal status and impact on working capital and net worth of the $6.25 million; and for such other relief to which Atkission may be entitled.

Respectfully submitted,

By: _____

Wm. R. Crocker
Attorney at Law
807 Brazos, Ste. 1014 (78701)
Post Office Box 1418
Austin, Texas 78767
Telephone: 512-478-5611
Facsimile: 512-474-2540
State Bar No. 0591000
Email: crockerlaw@earthlink.net

J. Bruce Bennett
Cardwell, Hart & Bennett, L.L.P.
807 Brazos, Suite 1001
Austin, Texas 78701
Telephone: (512) 322-0011
Facsimile: (512) 322-0808
Email: jbb.chblaw@me.com

Nathan Allen, Jr.
JONES, ALLEN & FUQUAY, L.L.P.
8828 Greenville Avenue
Dallas, Texas 75243-7143
Telephone: 214-343-7400
Facsimile: 214-343-7455
Email: nallen@jonesallen.com

ATTORNEYS FOR COMPLAINANT

Apr. 7. 2017 2:39PM No. 0139 P. 15

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing has been sent via electronic means on this 7th day of April 2017, to the following counsel of record:

Mr. Mark T. Clouatre
NELSON MULLINS RILEY & SCARBOROUGH LLP
1400 Wewatta Street, Suite 500
Denver, CO. 80202
mark.clouatre@nelsonmullins.com

John W. Chambless II
THOMPSON, COE, COUSINS & IRONS, LLP
701 Brazos, Suite 1500
Austin, Texas 78701
jchambless@thompsoncoe.com

ATTORNEYS FOR RESPONDENT

Wm. R. Crocker

** INBOUND NOTIFICATION : FAX RECEIVED SUCCESSFULLY **

TIME RECEIVED	REMOTE CSID	DURATION	PAGES	STATUS
April 21, 2017 3:08:12 PM CDT		217	16	Received

Apr 21 2017 02:06pm P001/016

THOMPSON COE

Thompson, Coe, Cousins & Irons, L.L.P.
Attorneys and Counselors

To:	Fax:	Phone:
Texas Motor Vehicle Division Att: Marie Medina	(512) 465-4135	(512) 465-1324
State Office of Administrative Hearings	(512) 475-4994	(512) 475-4993
Wm. R. Crocker	(512) 474-2540	(512) 478-5612
Mark Clouatre	(303) 583-9999	(303) 583-9915

From: John W. Chambless, II **Phone:** (512) 703-5073

Date: April 21, 2017 **Time:**

File No: 09664.017 **User ID:** CHAMJ

Re: SOAH DOCKET NO. 608-15-4315.LIC; MVD Docket No. 15-0015.LIC; Cecil Atkission Orange, LLC d/b/a Cecil Atkission Chrysler Jeep Dodge v. FCA US LLC; Texas Department of Motor Vehicles Motor Vehicle Division.

There are 16 pages being sent, including this page.

If you are having difficulty receiving this document, please call:

Rachel L. Yelderman **at** (512) 703-5088

☐ **Urgent** ☐ **For Review** ☐ **Please Comment** ☐ **Please Reply**

Message: Please see attached FCA US LLC's Reply to Complainant's Exceptions to the Supplement to the Proposal for Decision Following Remand.

TEXAS DEPARTMENT OF MOTOR VEHICLES
MOTOR VEHICLE DIVISION

Cecil Atkission Orange, LLC d/b/a Cecil Atkission Chrysler Jeep Dodge, Complainant v. FCA US LLC, Respondent	§ § § § § § § § § § § § § §	SOAH DOCKET NO. 608-15-4315.LIC MVD DOCKET DOCKET NO. 15-0015 LIC

FCA US, LLC'S REPLY TO COMPLAINANT'S EXCEPTIONS TO THE SUPPLEMENT TO THE PROPOSAL FOR DECISION FOLLOWING REMAND

Respondent FCA US, LLC ("FCA") submits this Reply to Complainant's Exceptions to the Supplement to the Proposal for Decision following Remand.

INTRODUCTION

Tex. Occ. Code § 2301.455 sets forth seven statutory factors that the New Motor Vehicle Board (the "Board") must consider in determining whether a manufacturer has shown good cause for termination of a dealer franchise.

The Administrative Law Judges who presided over the merits hearing in this case, found that, based on the evidence presented during the hearing, six out of the seven statutory factors weighed in favor of termination. *See* June 17, 2016 Proposal for Decision at pp. 14-64. The one remaining factor was merely neutral, and none of the statutory factors weighed against termination. *Id.*

Complainant Cecil Atkission Orange, LLC, d/b/a Cecil Atkission Chrysler Jeep Dodge ("Atkission") has, for the second time now, raised exceptions to the Administrative Law Judges' findings regarding funds referred to as "Cecil Money." *See* Complainant's Exceptions to the Supplement to the Proposal For Decision Following Remand dated April 7, 2017 (the "2017 Exceptions").

As explained below, the arguments about Cecil Money set forth in the 2017 Exceptions are erroneous and have already been rejected by the Administrative Law Judges. *See* June 17, 2016 Proposal for Decision at pp. 23-29 and 59-63 . Furthermore, even if Atkission were to prevail in its arguments, analysis of the seven statutory termination factors still would not weigh in favor of sustaining Atkission's termination protest. In other words, the arguments presented in Atkissions's 2017 Exceptions are futile because even if adopted, they should not affect the ultimate outcome of this case.

In addition, procedurally speaking, the 2017 Exceptions are improper because along with the Exceptions, Atkission submitted a brand new expert report and other new evidence upon which Atkission relied in making its arguments. None of this new evidence is part of the record, the record in this case has been closed since April 2016, and Atkission did not seek permission to present any new evidence. For these reasons, among others, all new evidence submitted by Atkission with the 2017 Exceptions should be stricken and should not be considered by the Administrative Law Judges or the Board. FCA's arguments against Atkission's improper submission of new evidence are fully addressed in FCA's Motion to Strike New Evidence filed contemporaneously herewith. All arguments made in the Motion to Strike are incorporated by this reference as if fully set forth herein.

BACKGROUND

Since 2008, Atkission has owned and operated a Chrysler Jeep and Dodge dealership in Orange, Texas (the "Dealership"). *See* June 17, 2016 Proposal For Decision at p. 7. FCA and Atkission entered into certain dealer agreements (collectively, the "Dealer Agreement") governing Atkission's operation of its Dealership. *Id.*

On December 19, 2014, after years of Atkission's failure to meet its obligations under the Dealer Agreement, FCA notified Atkission of FCA's decision to terminate the Dealer Agreement. *Id.* at pp. 8 and 12-13.

Atkission protested the termination and a hearing on the merits was held before Administrative Law Judges Meitra Farhadi and Hunter Burkhalter (the "ALJs") on February 8 through February 12, 2016 (the "Hearing").

The parties then submitted post-hearing briefs wherein they had the opportunity to argue their theories of the case once more. Upon each party's submission of their respective initial post-hearing brief and reply post-hearing brief, the record in this case closed on April 18, 2016.[1]

On June 17, 2016, the ALJs issued a thorough and detailed Proposal for Decision (hereinafter, the "PFD") finding that FCA had established good cause for terminating the Dealer Agreement and recommending that the Board approve the termination. *Id.* at p. 66.

On July 20, 2016, Atkission filed Exceptions to the PFD ("2016 Exceptions") arguing, among other things, that the ALJs failed to consider the $6.25 million purported investment that Atkission's dealer principal, Mr. Cecil Atkission, personally made in the Dealership. *See* 2016 Exceptions at p. 11. Atkission also argued that the ALJs improperly concluded that Atkission

[1] In its post-hearing briefs, Atkission made many of the same arguments that it has once again, raised in the 2017 Exceptions. *See e.g.* April 1, 2016 Complainant's Closing Statement at pp. 28-36. To be clear, not only were Atkission's arguments presented at the Hearing, Atkission has also had the opportunity to raise these issues in two post-hearing filings and in the Exceptions Atkission filed on July 20, 2016.

breached the Dealer Agreement by failing to meet working capital and net worth obligations under said Agreement. *Id.* at 28-31.

After considering Atkission's 2016 Exceptions, the ALJs found that the arguments made therein were "redundant of arguments already considered, and rejected, in the PFD." *See* August 10, 2016 SOAH Letter. Accordingly, the ALJs recommended no changes to the PFD. *Id.*

During the Board's January 5, 2017 meeting (the "Board Meeting"), the ALJs' PFD and a draft final order were presented to the Board for its consideration. The parties' respective attorneys were present for the Board Meeting and counsel for each party presented oral argument and took questions from the Board members regarding this case.

Members of the Board were attentive and posed a number of questions to the parties' counsel during the Board Meeting. In large part, the questions focused on the characterization of some $6.25 million (also known as "Cecil Money") that Mr. Atkission invested in the Dealership. *See* Transcript of January 5, 2017 Board Meeting.

Ultimately, the Board decided to remand the case back to the State Office of Administrative Hearings ("SOAH") for further proceedings. *See* January 5, 2017 Interim Order Remanding to SOAH for Further Proceedings (the "Remand Order"). Specifically, the Remand Order provides:

> **ACCORDINGLY, IT IS ORDERED** that the case is remanded to the State Office of Administrative Hearings to further clarify:
> (A) the legal status of the dealer's financial contributions to the business and
> (B) how that money does – or does not – support the manufacturer's proposed termination under the manufacturer's December 19, 2014 termination letter:
> - Section regarding Working Capital Obligation (beginning on page 7) and
> - Section regarding Net Worth Obligations (beginning on page 8).

The ALJs reviewed the Remand Order, and in response, issued a Supplement to the PFD on March 27, 2017 (the "Supplemental PFD"). Therein, the ALJs provided additional

explanation as to the bases of their findings regarding the topics specified in the Remand Order. The ALJs also concluded that the inquiry set forth in the Remand Order did not necessitate re-opening the evidentiary record or further briefing from the parties in this case. *See* Supplemental PFD at p. 2.

On April 7, 2017, Atkission filed the 2017 Exceptions. As set forth in more detail below, the 2017 Exceptions restate arguments previously presented by Atkission regarding Mr. Atkission's economic investment in the Dealership. Also as mentioned above, via the 2017 Exceptions, Atkission is improperly attempting to present entirely new evidence in support of its enduring contentions related to financial investments in its Dealership.

LAW AND ARGUMENT

Tex. Occ. Code § 2301.455 sets forth the factors to be considered in determining whether there is good cause for the termination of a motor vehicle franchise. Section 2301.455 provides:

> (a) Notwithstanding the terms of any franchise, in determining whether good cause has been established under Section 2301.453 or 2301.454, the board shall consider all existing circumstances, including:
> (1) the dealer's sales in relation to the sales in the market;
> (2) the dealer's investment and obligations;
> (3) injury or benefit to the public;
> (4) the adequacy of the dealer's service facilities, equipment, parts, and personnel in relation to those of other dealers of new motor vehicles of the same line□make;
> (5) whether warranties are being honored by the dealer;
> (6) the parties' compliance with the franchise, except to the extent that the franchise conflicts with this chapter; and
> (7) the enforceability of the franchise from a public policy standpoint, including issues of the reasonableness of the franchise's terms, oppression, adhesion, and the parties' relative bargaining power.
> (b) The desire of a manufacturer, distributor, or representative for market penetration does not by itself constitute good cause.

As stated above, the ALJs in this case found that six of the seven § 2301.455 factors (namely, factor numbers (1), (2), (3), (4), (6) and (7)) weighed in favor of terminating Atkission's Dealer Agreement. *See* PFD at pp. 14-64.

In connection with analyzing the statutory factors, the ALJs also considered whether Atkission committed several breaches of its Dealer Agreement that were listed in FCA's December 19, 2014 Notice of Termination. Specifically, the ALJs considered the following breaches:

(1) Failure to meet sales performance obligations;

(2) Failure to abide by warranty obligations;

(3) Failure to meet management obligations;

(4) Failure to meet personnel obligations;

(5) Failure to comply with facility obligations;

(6) Failure to comply with place of business obligations;

(7) Failure to meet advertising obligations;

(8) Failure to comply with signage obligations; and

(9) Failure to meet working capital and net worth obligations.

The Dealer Agreement breaches were considered by the ALJs as part of their analysis of statutory factor number (6) ("the parties' compliance with the franchise"), and the ALJs concluded that Atkission committed eight of the nine alleged breaches. *See* PFD at pp. 37-63. Overall, the ALJs found that the evidence "overwhelmingly established that good cause exists" to terminate Atkission's Dealer Agreement. *Id.* at p. 66.

I. Atkission's 2017 Exceptions

In Atkission's 2017 Exceptions, five specific exceptions were set forth and each one is addressed in detail below. In sum, the five exceptions relate to two main contentions: 1) that the $6.25 million in Cecil Money should have been considered as part of Atkission's working capital and net worth; and 2) that the $6.25 million should have been characterized as an "investment" by the dealer (Atkission) in the Dealership. *See* 2017 Exceptions at pp. 4-11.

Atkission's argument as to working capital and net worth goes to Dealer Agreement breach number (9) listed above. Even if Atkission were to prevail on this argument (which it should not), there would still be seven other Dealer Agreement breaches weighing heavily in support of termination as to statutory factor number (6) ("compliance with the franchise"). Simply put, proving that Atkission met working capital and net worth obligations does not tip the scale, as to statutory factor number (6), against termination, and this would not affect the overall outcome of the number of statutory factors favoring termination.

Similarly, Atkission's contention that the $6.25 million constituted an "investment" by Atkission in the Dealership goes to statutory factor number (2) ("the dealer's investment"). However, even if Atkission succeeded in convincing the ALJs on this point, there would be, at best, only one statutory factor weighing against termination, one neutral factor, and five factors weighing in favor of termination. As the ALJs concluded in the PFD, FCA has established a "myriad" of bases for termination. *See* PFD at p. 65. As such, a finding in Atkission's favor on the points raised in the 2017 Exceptions would not change the outcome of the good cause analysis in this case.

A. Reply to Exception No. 1

In Exception No. 1, Atkission argued that its recent reclassification of the Cecil Monies showed that Atkission in fact complied with its working capital and net worth obligations under the Dealer Agreement. *See* 2017 Exceptions at pp. 5-6.

By way of background and as set forth in both the PFD and the Supplemental PFD, the Dealer Agreement requires Atkission to maintain a certain minimum amount in working capital and net worth. *See* PFD at p. 59 and Supplemental PFD at p. 8.

The Dealer Agreement also requires Atkission to submit financial statements to FCA on a monthly basis, reporting Atkission's working capital and net worth figures. *See* PFD at. p. 59. The monthly financial statements that Atkission, itself, submitted to FCA showed, on their face, that Atkission's working capital and net worth figures were below the minimum required amounts from 2010 through 2015. *See* PFD at pp. 59-60 and Supplemental PFD at pp. 8-9. Furthermore, Atkission's tax documents filed with the Internal Revenue Service disclosed its working capital and net worth figures in the exact same way and amounts as they had been reported to FCA in the financial statements. *See* PFD at p. 63. The evidence presented during the Hearing established that the method of measuring working capital and net worth advocated by FCA and then followed by Atkission in submitting its financial statements, is the "standard and generally accepted practice" from an accounting perspective. *See* Supplemental PFD at p. 9.

At the Hearing, Atkission attempted to reclassify $6.25 million in funds reported in the financial statements for the purpose of retroactively increasing the working capital and net worth amounts. The ALJs found that the method for reclassifying the funds advocated by Atkission's expert witness, Mr. Woodward, is not the preferred accounting method, and was a method that had never been employed by Atkission in its past financial reporting. *See* PFD at p. 62.

In any event, it is not FCA's obligation or right to reinterpret or revise figures reported on the financial statements FCA receives from its motor vehicle dealers. FCA relied on the working capital and net worth figures submitted in Atkission's financial statements, the method of reporting conformed with the standard reporting practice, and Atkission had employed such method in its financial reporting for nearly a decade. *See* PFD at p. 62.

Moreover, Mr. Walter, FCA's accounting expert who testified at trial, established that because the $6.25 million was used to fund short term loans, this money was not used by the Dealership as a working capital and cannot be considered as part of net worth. *See* PFD at p. 63; and the December 17, 2015 Expert Report of Herbert E. Walter (R152). This is because under accounting principles, the substance of a transaction should determine its accounting treatment, not the form. Atkission is now attempting to rewrite history with Exception No. 1. *Id.* Accordingly, due to the way the funds were used in the Dealership's business, the $6.25 million should not be considered part of working capital or net worth.

Atkission also argued in Exception No. 1 that the ALJs went beyond the scope of the Remand Order by making general findings in the Supplemental PFD that the Dealership was undercapitalized and was a failing business. *See* 2017 Exceptions at pp. 6-7. In light of the fact that the Remand Order requested clarification on matters related to the finances of Atkission's Dealership, it is not clear to FCA how the ALJs could have exceeded the scope of the remand inquiry in the manner suggested by Atkission.

To that end, in setting forth their opinion in the Supplemental PFD the ALJs correctly relied on information contained in the record in this case. Atkission, on the other hand, is now attempting to submit entirely new evidence for consideration in connection with the Remand. If anyone could be accused of expanding the scope of the issues on Remand it is Atkission.

B. Reply to Exception No. 2

Atkission's second exception deals with interpreting the meaning of the word "dealer" under Tex. Occ. Code § 2301.455(a)(2), which provides "(a) Notwithstanding the terms of any franchise, in determining whether good cause has been established under Section 2301.453 or 2301.454, the board shall consider all existing circumstances, including...(2) ***the dealer's*** investment and obligations" (emphasis added). The definition of the word "dealer" under Tex. Occ. Code § 2301.002(7) is "a person who holds a general distinguishing number issued by the board under Chapter 503, Transportation Code."[2]

In this case it is undisputed that Atkission is the person who holds the general distinguishing number issued by the Board for the Dealership. *See* PFD a p. 24 and Supplemental PFD at p. 7. Accordingly, Tex. Occ. Code § 2301.455(a)(2), which concerns the "dealer's investment and obligations" refers to ***Atkission's*** investment and obligations.

Despite the clear and unambiguous definition of the term "dealer" under the Texas Occupations Code, Atkission has argued that the investment and obligations of persons who do not fall within the definition of "dealer," such as Mr. Atkission, should also be considered under Section 2301.455(a)(2). Atkission's argument on this point is belied by the express language of the statute and the absence of any statutory language suggesting that the investment and obligations of non-dealers should be taken into account under Section 2301.455. In addition, Atkission has not cited any legal authority demonstrating that consideration of non-dealer investments or obligations is appropriate or has ever been applied. Although during the Hearing, some Board members expressed interest in Atkission's expanded interpretation of the term "dealer," the Board members admitted that they were not familiar with the statutory language at

[2] The definition of "general distinguishing number" under Tex. Occ. Code § 2301.002(17) is a "dealer license issued by the board." Under Tex. Occ. Code § 2301.002(27), the term "Person" means "a natural person, partnership, corporation, association, trust, estate, or any other legal entity."

issue (Tex. Occ. Code § 2301.455(a)(2)). *See* Transcript of January 5, 2017 Board Meeting at p. 62 ("Mr. Palacios: Okay. Well, again, that's a totally new definition for me.").

Like all other judges, administrative law judges are charged with the duty of interpreting and applying applicable statutory and other legal provisions in the cases over which they preside. *See Flores v. Employees Ret. Sys. of Texas*, 74 S.W.3d 532, 545 (Tex. App. 2002). Like the Board and the parties, the ALJs are constrained by the statutes governing this proceeding. The ALJs did as they should have done – they followed the statute in determining that the investment and obligations of Mr. Atkission, personally, are irrelevant to an analysis of the investment and obligations of Atkission. The meaning of Tex. Occ. Code § 2301.455(a)(2) is clear and the ALJs appropriately interpreted and applied the statue in this case.

C. Reply to Exception No. 3

Atkission next argued, in its third exception, that the ALJs erred in concluding that the $6.25 million invested by Mr. Atkission was neither an investment nor an obligation of Atkission. According to Atkission, the $6.25 million must be recognized as either an investment of Atkission or an obligation of Atkission. *See* 2017 Exceptions at p. 10.

Atkission's contention on this point is incorrect for at least three reasons. First, the $6.25 million investment in the Dealership was not made by Atkission – it was made by Mr. Atkission from his own personal funds. *See* PFD at p. 23. Therefore, as discussed in FCA's Reply to Exception No. 2 above, an investment made by Mr. Atkission cannot be recognized as an investment made by Atkission because Atkission did not make the investment.

Second, the evidence presented during the Hearing established that Mr. Atkission has no expectation that the Dealership will repay the $6.25 million and the transaction was not treated as a loan to the Dealership with the obligation of repayment. *See* PFD at pp. 26-28 ("No principal

has ever been repaid, or even demanded, and there is no documentation in the record to indicate that the principal must be repaid. As such, the ALJs cannot conclude that the dealership is under an actual obligation to repay the $6.25 million"). Since the $6.25 million is not a true debt, it cannot be recognized as an obligation of Atkission.

Third, it has been established that the $6.25 million was often, if not primarily, used by the Dealership to fund its floor plan. *See* PFD at p. 63; and the December 17, 2015 Expert Report of Herbert E. Walter (R152) at p. 4, ¶ 12(d). These floor plan transactions are short-term transactions akin to short-term loans with Mr. Atkission in substance taking the place of the Dealership's floor plan lender. Funds from a floor plan lender are not considered working capital or a traditional investment in a dealership. Thus, Mr. Atkission's funds should be considered neither working capital nor an investment in the Dealership. *See* Expert Report of Herbert E. Walter (R152) at p. 4, ¶ 12(d) and (e) and pp. 7-8.

D. Reply to Exception No. 4

In its fourth exception, Atkission claimed that with regard to addressing the Remand Order, the AJLs erred in choosing not to solicit additional briefing or reopen the record. Atkission went as far as making the allegation that the "ALJs' action constitutes unlawful procedure," although Atkission did not provide any legal citation(s) to support this assertion. *See* 2017 Exceptions at p. 11. Remarkably, despite Atkission's claims in the fourth exception, Atkission never submitted any request to the ALJs to reopen the record or to seek permission for additional briefing. Indeed, there was a three-month period of time when Atkission could have requested such permission between the referral of the matter to SOAH in January 2017 and issuance of the ALJs' Supplemental PFD in April 2017.

Contrary to Atkission's contentions, the ALJs were not required to seek additional evidence in connection with addressing the matters presented by the Board in the Remand Order. *See* Tex. Admin. Code §§ 155.153, 155.155 and 155.507. The parties in this case have already had ample opportunity to present their arguments and evidence. Indeed, the merits Hearing took place in February 2016, the parties each submitted two post-hearing briefs, and the record was closed in April 2016. The record, as it currently stands, already contains sufficient evidence to address the matters at issue in the Remand Order and the ALJs' determination that additional evidence is unnecessary was a proper exercise of their judicial discretion. *See* Tex. Admin. Code § 155.153 This is especially true in light of the duplicative nature of Atkission's 2017 Exceptions and 2016 Exceptions.

E. Reply to Exception No. 5

Atkission's fifth and final exception is that the ALJs erred in finding that the evidence "overwhelmingly" establishes good cause to terminate Atkission's Dealer Agreement. In support of this argument, Atkission simply offered the unsubstantiated assertion that such a finding is "untrue." *See* 2017 Exceptions at p. 11.

As stated above, the ALJs in this case found that six of the seven statutory factors weighed in favor of terminating Atkission's Dealer Agreement and none of the factors weighed against termination. *See* PFD at pp. 14-64. The ALJs also concluded that Atkission committed eight breaches of its Dealer Agreement, providing further support for the ALJs' recommendation that the Board approve termination. *Id.* at pp. 37-63. The findings and conclusions set forth in the ALJs' PFD and Supplemental PFD clearly support the proposition that the evidence overwhelming establishes good cause to terminate. Indeed, the Supplemental PFD provides that "given the weight of these facts, the ALJs conclude that [FCA's] request to terminate its

franchise with [Atkission] is tailor-made for the relief afforded by the Texas Occupations Code §§ 2301.453-445 and should be granted."

CONCLUSION

For the reasons set forth above, FCA respectfully requests that: 1) the ALJs deny all of Atkission's exceptions asserted in the 2017 Exceptions; and 2) the ALJs affirm, and the Board adopt, both the June 17, 2016 Proposal for Decision and the March 27, 2017 Supplemental Proposal for Decision.

Dated this 21st day of April, 2017.

/s/ John W. Chambless II
John W. Chambless II, Esq.
Texas State Bar No. 00796334
Thompson, Coe, Cousins & Irons, LLP
701 Brazos, Suite 1500
Austin, Texas 78701
Telephone: (512) 708-8200
Facsimile: (512) 708-8777
Email: jchambless@thompsoncoe.com

~and~

Mark T. Clouatre, Esq.
Texas State Bar No. 00793521
Colo. State Bar No. 29892
Nelson Mullins Riley & Scarborough LLP
1400 Wewatta Street, Suite 500
Denver, Colorado 80202
Telephone: 303-583-9900
Facsimile: 303-583-9999
Email: mark.clouatre@nelsonmullins.com

Counsel for Respondent FCA US LLC

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of this instrument was served upon the following in accordance with TEX. R. Civ. P. 21a on this 21st day of April, 2017:

William R. Crocker Attorney at Law 807 Brazos, Suite 1014 Austin, Texas 78701 Telephone: (512) 478-5611 Facsimile: (512) 474-2540 Email: crockerlaw@earthlink.net **Counsel for Complainant**	MVD Docket Clerk Motor Vehicle Division Texas Department of Motor Vehicles 4000 Jackson Avenue Austin, TX 78731 Telephone: (512) 465-7354 Facsimile: (512) 465-3666
MVD Docket Clerk P.O. Box 26487 Austin, Texas 78755-0487 Facsimile: (512) 465-4135	

/s/ John W. Chambless II
John W. Chambless, II

** INBOUND NOTIFICATION : FAX RECEIVED SUCCESSFULLY **

TIME RECEIVED	REMOTE CSID	DURATION	PAGES	STATUS
April 21, 2017 3:46:31 PM CDT		281	22	Received

Apr 21 2017 02:43pm P001/022

THOMPSON COE

Thompson, Coe, Cousins & Irons, L.L.P.
Attorneys and Counselors

To:	Fax:	Phone:
Texas Motor Vehicle Division Att: Marie Medina	(512) 465-4135	(512) 465-1324
State Office of Administrative Hearings	(512) 475-4994	(512) 475-4993
Wm. R. Crocker	(512) 474-2540	(512) 478-5612
Mark Clouatre	(303) 583-9999	(303) 583-9915

From: John W. Chambless, II **Phone:** (512) 703-5073

Date: April 21, 2017 **Time:**

File No: 09664.017 **User ID:** CHAMJ

Re: SOAH DOCKET NO. 608-15-4315.LIC; MVD Docket No. 15-0015.LIC; Cecil Atkission Orange, LLC d/b/a Cecil Atkission Chrysler Jeep Dodge v. FCA US LLC; Texas Department of Motor Vehicles Motor Vehicle Division.

There are 22 **pages being sent, including this page.**

If you are having difficulty receiving this document, please call:

Rachel L. Yelderman **at** (512) 703-5088

☐ **Urgent** ☐ **For Review** ☐ **Please Comment** ☐ **Please Reply**

Message: Please see attached FCA US LLC's Motion to Strike New Evidence.

Bur701 Brazos | Suite 1500 | Austin, TX 78701 | (888) 708-8200 | Fax: (512) 708-8777

TEXAS DEPARTMENT OF MOTOR VEHICLES
MOTOR VEHICLE DIVISION

Cecil Atkission Orange, LLC d/b/a Cecil Atkission Chrysler Jeep Dodge,

Complainant

v.

FCA US LLC,

Respondent

SOAH DOCKET
NO. 608-15-4315.LIC

MVD DOCKET
DOCKET NO. 15-0015 LIC

FCA US LLC'S MOTION TO STRIKE NEW EVIDENCE

FCA US LLC ("FCA") requests that the Administrative Law Judges ("ALJs") strike all new evidence submitted by Complainant Cecil Atkission Orange, LLC d/b/a Cecil Atkission Chrysler Jeep Dodge's ("Atkission") in its Exceptions to the Supplement to the Proposal for Decision Following Remand ("2017 Exceptions"), including the report of new expert witness Robert C. Davis, III ("Mr. Davis") and the chart of franchised dealerships' corporate structures.

INTRODUCTION

This Motion arises from Atkission's decision to file the 2017 Exceptions and attach new evidence, including a newly-disclosed expert, in direct contravention of the instructions and findings of the ALJs overseeing this case on remand. The ALJs expressly concluded that neither new briefing nor new evidence is needed from the parties at this stage of the proceedings. Atkission disregarded this clear directive, and the new evidence submitted with its 2017 Exceptions should be excluded as a result.[1]

[1] FCA's substantive rebuttal of Atkission's Supplemental Exceptions is filed concurrently as FCA's Reply to Complainant's Exception to the Supplement to the Proposal for Decision Following Remand.

Even if Atkission's additional briefing were warranted, the new evidence accompanying the 2017 Exceptions is so untimely as to require exclusion. A year after a full hearing on the merits and the close of the evidentiary record, Atkission has attempted to designate Mr. Davis as its new automotive accounting expert. Since Atkission already has an automotive accounting expert, this is nothing more than a transparent attempt at a do-over of a hearing that Atkission already lost, a tactic made all the more clear by Atkission's refusal to explain why a new, duplicative expert could be needed at this stage of the proceedings. In addition, Atkission attached to its 2017 Exceptions a host of new, nearly indecipherable information, including a new, unauthenticated chart outside the evidentiary record.

Atkission's tactics are unreasonable and unfairly prejudicial to FCA. The untimely expert report of Mr. Davis, and the chart attached to Atkission's supplemental exceptions, must be excluded.

BACKGROUND

This case was initiated more than two years ago. On December 19, 2014, FCA sent a notice of termination to Atkission, which Atkission protested on February 20, 2015. On August 31, 2015, the Court adopted a pre-trial schedule submitted by the parties, which set a deadline of November 2, 2015 for production of Atkission's witness list, and November 16, 2015 for Atkission's expert reports. *See* **Ex. 1** (Aug. 31, 2015 Order No. 4 Adopting Procedural Schedule and Establishing Procedures for Hearing) ("Pre-Hearing Scheduling Order") at 1. Atkission disclosed Mr. Carl Woodward as an automotive accounting expert, and produced his expert report, untimely, on November 23, 2015. Mr. Woodward was deposed on December 11, 2015, and pursuant to the Pre-Hearing Scheduling Order, discovery closed on January 11, 2016. *Id.*

A hearing was held before the ALJs on February 8-12, 2016 on the merits of whether FCA had "good cause" to terminate Atkission's dealer agreement. Following the hearing, the Court issued a briefing schedule, stipulated to by the parties, which established April 18, 2016 as the date that the "Record closes." *See* **Ex. 2** (Feb. 24, 2016 Order No. 10 Establishing Briefing Deadline and Outline) ("Post-Hearing Scheduling Order") at 1. On June 17, 2016, on the basis of that closed record, the ALJs issued their Proposal for Decision ("PFD"), finding that "the evidence overwhelmingly established that good cause exists to terminate Atkission Chrysler's franchise . . . ." PFD at 66.

Atkission filed Exceptions to the PFD, and FCA submitted its Reply to Atkission's Exceptions on August 4, 2016. On August 10, 2016, the ALJs responded to the exceptions filed by Atkission and an *amicus curiae*, and found "all of the arguments made in Atkission Chrysler's exceptions to be redundant of arguments already considered, and rejected, in the PFD." August 10, 2016 SOAH Letter at 2. Thereafter, the PFD was considered by the governing board of the Texas Department of Motor Vehicles ("Board"), which remanded the case to the ALJs for clarification of discrete, limited issues relating to the dealer's financial contributions to the business and the dealership's net worth and working capital.[2]

After the remand from the Board, no party requested that the ALJs reopen the record or permit supplemental briefing or evidence.

The ALJs issued a Supplement to the Proposal for Decision Following Remand ("Supplemental PFD") on March 27, 2017, responding to the Board's request. The

[2] The Board's order states that the case was remanded "to further clarify: (a) the legal status of the dealer's financial contributions to the business and (B) how that money does – or does not – support the manufacturer's proposed termination under the manufacturer's December 19, 2014, termination letter:

- Section regarding Working Capital Obligation (beginning on page 7) and
- Section regarding Net Worth Obligations (beginning on page 8)."

January 5, 2017 Interim Order Remanding to SOAH for Further Proceedings ("Remand Order") at 1.

Supplemental PFD explains that the ALJs "carefully reviewed the Remand Order and the Board's discussion of the PFD," and determined that "the Board simply seeks additional explanation from the ALJs as to the bases for their conclusions" regarding the financial issues raised by the Board. Supplemental PFD at 2. The ALJs therefore found "no need to re-open the evidentiary record or to solicit additional briefing from the parties." *Id.* After a thorough examination and determination of the remand issues, the ALJs further concluded that the evidence still "overwhelmingly establishes good cause to terminate Atkission Chrysler's franchise." *Id.* at 11.

Despite the ALJs' express conclusion that there was no need for additional evidence or briefing, however, Atkission nonetheless submitted both. Specifically, on April 7, 2017, Atkission served the 2017 Exceptions, attaching in support the expert report of Mr. Davis, an expert never previously disclosed and entirely new to these proceedings. Atkission also attached a chart, again new to these proceedings and outside the evidentiary record, purporting to indicate the corporate structure of all franchised dealerships in Texas. *See* 2017 Exceptions at 2 n.1.

LAW & ARGUMENT

I. Texas Law Requires Exclusion of Atkission's New Expert Report

"When a party fails to timely designate an expert, exclusion is mandatory and automatic . . . ." *Pjetrovic v. Home Depot*, 411 S.W.3d 639, 646 (Tex. App. 2013) (internal quotation omitted). Texas courts routinely exclude late-disclosed experts, particularly if the disclosure occurs after discovery or a dispositive event. *Fort Brown Villas III Condo. Ass'n, Inc. v. Gillenwater*, 285 S.W.3d 879, 882 (Tex. 2009) (excluding expert disclosed "three days before the end of discovery and more than five months after the expert designation deadline"); *Brescia v. Slack & Davis, L.L.P.*, No. 03-08-00042-CV, 2010 WL 4670322, at *6 (Tex. App. Nov. 19, 2010) (upholding exclusion of experts designated "six months after the expert-designation

deadline had expired and only after [defendant] had filed its motion for summary judgment"). In addition, the Occupational Code requires exclusion of any untimely evidence in this administrative proceeding. *See* Tex. Occ. Code Ann. § 2301.709(a) ("In reviewing a case under this subchapter, the board or a person delegated power from the board . . . may consider only materials that are submitted timely.").

Atkission's new expert report is profoundly untimely, and the penalty of exclusion should be applied here. Atkission's original experts were disclosed in a preliminary witness list on November 2, 2015, and the expert report of Mr. Carl Woodward was served on November 23, 2015. Pursuant to the Pre-Hearing Scheduling Order, discovery closed on January 11, 2016. Ex. 1 (Pre-Hearing Scheduling Order) at 1. A hearing on the merits was held, and the evidentiary record was closed on April 18, 2016. Ex. 2 (Post-Hearing Scheduling Order) at 1. Atkission's new expert report, by Mr. Robert Davis, was not served until April 7, 2017, nearly a full year later.

Atkission has not attempted to justify its late disclosure of Mr. Davis's report. The Texas Rules permit late designation of an expert only where the court finds "there was good cause for the failure to timely make, amend, or supplement the discovery response," or "the failure to timely make, amend, or supplement the discovery response will not unfairly surprise or unfairly prejudice the other parties." Tex. R. Civ. P. 193.6(b). The burden to establish these factors rests on the party seeking to introduce the evidence. Tex. R. Civ. P. 193.6(c). However, Atkission made no motion based on good cause to introduce a new expert, nor has it attempted to show a lack of unfair surprise or prejudice. This alone is fatal to its submission. *See, e.g., Phan v. Addison Spectrum, L.P.*, 244 S.W.3d 892, 899 (Tex. App. 2008) (excluding undisclosed expert testimony where plaintiff "gave no reason and made no showing that her failure to disclose any

experts would not unfairly surprise or prejudice the" defendants); *Notice of Violation by HWY 3*, 2012 WL 1655062, at *3 (Tex. St. Off. Admin. Hgs. April 16, 2012) ("The additional document to which Hwy 3 made reference was not accompanied by a written motion based on good cause. The document is excluded from evidence."). Even were Atkission to move now for introduction of this evidence, however, it could not make the showing required.

A. Atkission Does Not Have Good Cause For Introduction of a New, Duplicative Expert

In its 2017 Exceptions, Atkission makes no effort to provide good cause for the introduction of a new automotive accounting expert a full year after the close of the evidentiary record, nor could it. Atkission states that it "retained an additional accounting expert . . . to provide the ALJs with" evidence related to the remand issues. 2017 Exceptions at 4. However, the ALJs "carefully reviewed the Remand Order and the Board's discussion of the PFD" and "concluded that the Board simply seeks additional explanation from the ALJs as to the bases for their conclusions" regarding the financial issues raised by the Board. Supplemental PFD at 2. The ALJs therefore already determined that there was "no need to re-open the evidentiary record or to solicit additional briefing from the parties." *Id.* Atkission's submission of new evidence is directly contrary to this instruction from the ALJs, and as discussed below, should be excluded as a sanction on those grounds.

Yet even assuming *arguendo* that additional expert testimony is needed on remand—and it is not—Atkission fails to explain why its *existing* automotive accounting expert, Mr. Carl Woodward, and his prior evidence and testimony would be insufficient to address these remand issues. Mr. Woodward testified to extensive experience in automobile accounting, stating that "[m]ost anything financial with new vehicle dealerships, either I or my office do and have done for 40 years." Testimony of Woodward, Tr. at 1049, line 14 to 1050, line 9. Furthermore, Mr.

Coleman, Atkission's CFO, testified that since Mr. Woodward's initial retention, he has become "an advisor on accounting for all of the Atkission dealerships." Testimony of Coleman, Tr. at 820, line 21 to 821, line 9. In fact, Mr. Woodward is the one who originally suggested Atkission make the accounting change at issue, Testimony of Woodward, Tr. at 1068, line 2 to line 6, yet his name is conspicuously absent from Atkission's 2017 Exceptions.

In actuality, no new automotive accounting expert is needed. Atkission is simply seeking a "do-over" on the expert it chose, Mr. Woodward, and the testimony that expert gave at trial. Texas law forbids this tactic, and it should be rejected here. *See PopCap Games, Inc. v. MumboJumbo, LLC*, 350 S.W.3d 699, 718–19 (Tex. App. 2011) (upholding exclusion of party's untimely supplemental expert disclosures on grounds of unfair surprise and unfair prejudice; even though initial expert was excluded as unreliable, "inadvertence of counsel is not good cause for late designation of new experts").

B. FCA Has Been Unfairly Prejudiced and Surprised By The Introduction of Atkission's New Expert

Atkission cannot show good cause for the designation of Mr. Davis, but the prejudice and surprise to FCA by the sudden introduction of a new expert is manifest. In isolation, FCA will have no opportunity to counter Mr. Davis or the new issues he raises in his report. Nor will FCA have an opportunity to depose or cross-examination Mr. Davis on his report or opinions.

FCA has built its post-hearing litigation strategy on the basis of a closed evidentiary record, with Mr. Woodward as Atkission's automotive accounting expert. Re-opening the record to permit introduction of a new expert with new opinions at this stage will require a significant and wasteful expenditure of time, effort, and money by the Court and the parties. As the ALJs have already noted, there was already sufficient evidence in the record to determine the remand issues, so any re-opening of the record will necessarily be a waste of the ALJs' and the parties'

resources. Atkission already had one attempt to explain and present its evidence on the statutory factors and existing circumstances; Mr. Davis's additional evidence will be duplicative, and serve only to give Atkission a second bite of the apple.

Furthermore, responding to Mr. Davis's new report will be expensive and time-consuming. At a minimum, FCA expects that its accounting expert, Mr. Walter, will need to scrutinize Mr. Davis's report and issue his own rebuttal report, with each expert then needing to be deposed in turn. FCA would then be entitled to another hearing to cross-examine Mr. Davis regarding his opinions.[3] An amendment to the Supplemental PFD would likely be necessary to incorporate Mr. Davis's testimony, followed by rounds of additional briefing. FCA's work to this point with respect to Mr. Woodward will have been wasted, all for an entirely duplicative and unnecessary expert witness.

FCA has already been prejudiced merely by incurring the costs and fees involved in responding to Atkission's frivolous, untimely submission of new evidence, as well as by the disruption to the post-hearing schedule Atkission's submission will inevitably create. The Texas Rules are designed specifically to avoid this type of unfair prejudice and surprise, *Alvarado v. Farah Mfg. Co.*, 830 S.W.2d 911, 914–15 (Tex. 1992), and additional time or depositions cannot cure the injustice. *Ersek v. Davis & Davis, P.C.*, 69 S.W.3d 268, 272 (Tex. App. 2002) (where expert was designated after filing of summary judgment, "simply granting [defendant] the right to depose the witness does not ensure that it is not unfairly surprised or prejudiced"). Consequently, Mr. Davis's report must be excluded.

C. Atkission's New Expert Report Is Contrary to the ALJs' Instructions and Should Be Excluded as a Sanction

[3] *See Richardson v. City of Pasadena*, 513 S.W.2d 1, 3 (Tex. 1974) (reversing ruling permitting affidavits to be added to the record after administrative hearing with no opportunity for cross-examination, as "[t]he right to cross examine adverse witnesses and to examine and rebut *all* evidence is not confined to court trials, but applies also to administrative hearings" (emphasis added)).

In addition to being untimely, Atkission's submission of 2017 Exceptions and new evidence is directly contrary to the ALJs' clear instructions regarding briefing and evidence on remand. Because the ALJs determined that the Board "simply seeks additional explanation from the ALJs as to the bases for their conclusions" regarding the financial issues raised by the Board, they concluded there was "no need to re-open the evidentiary record or to solicit additional briefing from the parties." Supplemental PFD at 2. Atkission's submission of a new expert report violates this directive.

The Administrative Code provides authority "to impose appropriate sanctions against a party or its representative for (1) filing a motion or pleading that is deemed by the judge to be groundless and brought: (A) in bad faith; (B) for the purpose of harassment; or (C) for any other improper purpose, such as to cause unnecessary delay or needless increase in the cost of the proceeding." Tex. Admin. Code § 155.157(a). Sanctions may also be imposed for "failure to obey an order of the judge or a SOAH or referring agency rule." *Id.* Possible sanctions that may be imposed for these violations include, *inter alia*, "prohibiting the party from introducing designated matters into the record," "disallowing in whole or in part requests for relief by the offending party and excluding evidence in support of those requests," and "striking pleadings or testimony in whole or in part." Tex. Admin. Code § 155.157(b).

Here, Atkission has attempted to introduce a new, duplicative expert report, against the express instructions of the ALJs, long after the close of the evidentiary record, and without any showing of good cause—or even an explanation as to why the new evidence was necessary. Given the failure to acknowledge governing law and the procedural posture of this case, Atkission cannot reasonably have expected its attempt to succeed. Nonetheless, their attempt has successfully prejudiced FCA, both in preparing its case for another hearing before the Board and

in the expense of preparing this motion. Accordingly, Atkission's submission of its new expert report is groundless, brought in bad faith, needlessly increases the cost of the proceeding, and directly contrary to a directive of the ALJs.

This conduct is sanctionable, and striking Atkission's new expert report from the record would be an appropriate response under the circumstances. *See Tex. Dep't of Agric. v. Acad. Sports + Outdoors*, 2017 WL 385915, at *4 (Tex. St. Off. Admin. Hgs. Jan. 19, 2017) (striking late-disclosed evidence as sanction under Tex. Admin. Code § 155.157). Because it is untimely, prejudicial, duplicative, and submitted in violation of a clear instruction by the ALJs, Mr. Davis's report must be excluded.

II. Atkission's Chart of Texas Dealership Corporate Structures Should Be Excluded

In addition to its new expert report, Atkission attached new evidence to its 2017 Exceptions in the form of an unlabeled chart, which Atkission claims shows the corporate structure of all the franchised dealerships in Texas. Atkission asserts, unsworn, that the chart was obtained from the Texas Motor Vehicle Division, 2017 Exceptions at 2 n.1, but the chart itself is unauthenticated, with no indication it came from any state agency. Furthermore, the chart appears to indicate that nearly 500 dealerships have their business type "missing."

Putting aside the questionable relevance and authenticity of the document,[4] this evidence is untimely and should be excluded. Tex. Occ. Code Ann. § 2301.709(a). The evidentiary record is long closed, Ex. 2 (Post-Hearing Scheduling Order) at 1, and Atkission has not attempted to show good cause why it could not have requested and submitted this chart earlier, during the discovery period. Evidence that could have been presented prior to a hearing or trial is inadmissible when submitted after. *See Rollins v. Texas Coll.*, No. 12-15-00121-CV, 2016

[4] FCA US has limited its objections to this chart to timeliness for purposes of this motion to strike; it reserves its rights to object to the chart on any and all other grounds, including relevance and authenticity.

WL 3703170, at *5 (Tex. App. July 12, 2016) (denying motion to reopen evidence and introduce expert affidavit, where proffering party had "not shown that the information contained in the affidavit was unavailable prior to the granting of the no evidence summary judgments" and "failed to show that they did not have an opportunity to present the evidence to the trial court").

As with its submission of a new expert report, Atkission's failure to meet or even acknowledge governing standards regarding the late submission of evidence—or the ALJs' instructions—exposes the submission as knowingly improper. Consequently, Atkission's attempt to introduce this chart is groundless, brought in bad faith, needlessly increases the cost of the proceeding, and directly contrary to the ALJs' directive. The chart should be excluded as untimely and as a sanction. *Tex. Dep't of Agric.*, 2017 WL 385915, at *4 (Tex. St. Off. Admin. Hgs. Jan. 19, 2017).

CONCLUSION

FCA respectfully requests that the ALJs exclude all new evidence submitted with Atkission's 2017 Exceptions, including Mr. Davis's opinions and report and the chart of franchised dealerships' corporate structures, and impose any and all such other sanctions as the ALJs deem just and proper.

CERTIFICATE OF CONFERENCE PURSUANT TO 1 TEX. ADMIN. CODE § 155.305

Counsel for FCA certifies that he e-mailed counsel for Complainant Atkission on April 9, 2017, about the relief requested herein. Counsel for Atkission denied the request.

Dated this 21st day of April, 2017

/s/ John W. Chambless II
John W. Chambless II, Esq.
Texas State Bar No. 00796334
Thompson, Coe, Cousins & Irons, LLP
701 Brazos, Suite 1500
Austin, Texas 78701
Telephone: (512) 708-8200
Facsimile: (512) 708-8777
Email: jchambless@thompsoncoe.com

~and~

Mark T. Clouatre, Esq.
Texas State Bar No. 00793521
Colo. State Bar No. 29892
Nelson Mullins Riley & Scarborough LLP
1400 Wewatta Street, Suite 500
Denver, Colorado 80202
Telephone: 303-583-9900
Facsimile: 303-583-9999
Email: mark.clouatre@nelsonmullins.com

Counsel for Respondent FCA US LLC

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of this instrument was served upon the following in accordance with TEX. R. Civ. P. 21a on this 21st day of April, 2017:

William R. Crocker Attorney at Law 807 Brazos, Suite 1014 Austin, Texas 78701 Telephone: (512) 478-5611 Facsimile: (512) 474-2540 Email: crockerlaw@earthlink.net **Counsel for Complainant**	MVD Docket Clerk Motor Vehicle Division Texas Department of Motor Vehicles 4000 Jackson Avenue Austin, TX 78731 Telephone: (512) 465-7354 Facsimile: (512) 465-3666
MVD Docket Clerk P.O. Box 26487 Austin, Texas 78755-0487 Facsimile: (512) 465-4135	

/s/ John W. Chambless II
John W. Chambless, II

EXHIBIT 1

to

FCA US LLC's Motion to Strike New Evidence

SOAH DOCKET NO. 608-15-4315.LIC
MVD DOCKET NO. 15-0015.LIC

CECIL ATKISSION ORANGE, LLC, d/b/a CECIL ATKISSION CHRYSLER JEEP DODGE, Complainant	§	**BEFORE THE STATE OFFICE**
v.	§	**OF**
FCA US LLC, Respondent	§	**ADMINISTRATIVE HEARINGS**

ORDER NO. 4 ADOPTING PROCEDURAL SCHEDULE AND ESTABLISHING PROCEDURES FOR HEARING

On August 28, 2015, the parties filed an agreed scheduling order. The Administrative Law Judge (ALJ) finds that the proposed procedural schedule is appropriate and should be adopted with certain modifications as noted below.

I. PROCEDURAL SCHEDULE

IT IS ORDERED that the following procedural schedule is hereby adopted and shall govern these proceedings:

EVENT	DEADLINE
Deadline to exchange and file statements of position[1]	October 9, 2015
Exchange and file preliminary witness lists[2]	November 2, 2015
Deadline to exchange written discovery	November 13, 2015
Deadline for Complainant to produce expert reports	November 16, 2015
Deadline for Respondent to produce expert reports	December 17, 2015
Deadline for completing all discovery, including depositions	January 11, 2016

1 A statement ofposition clarifies a party's position, it is not sworn-to and it is not evidence. It should identify the issues, and the party's position thereon, that the party believes should be addressed by the ALJ in the final proposal for decision.

2 Preliminary witness lists shall be promptly supplemented as additional witnesses are identified.

EVENT	DEADLINE
Deadline to exchange and file final witness lists and all documentary exhibits,[3] including deposition designations; deadline for filing dispositive motions	January 15, 2016
Deadline for filing objections to proposed exhibits and deposition designations and deadline for any counter deposition designations	January 29, 2016
Prehearing conference, if necessary	February 3, 2016
Hearing on the Merits	February 8 – 12, 2016

The parties may modify any deadline above (except for the prehearing and hearing settings) by agreement, without necessity of an order from the ALJ, simply by filing a letter with the ALJ advising of the agreed revisions.

II. NOTICE OF HEARING

Consistent with the above procedural schedule, the hearing on the merits will convene at **9:00 a.m. on February 8, 2016,** at the William P. Clements Office Building, Fourth Floor, 300 West 15th Street, Austin, Texas. The parties shall reserve five days for the hearing. If requested in writing no later than **January 29, 2016,** a prehearing conference shall be conducted in this case. If one is requested, the prehearing conference will occur at 10:00 a.m. on February 3, 2016. Parties may request to appear by telephone at any prehearing conference by filing a statement of intent to appear by telephone with the appropriate call-in number.

III. TIME LIMITS

To ensure that the hearing proceeds efficiently, the ALJ finds it appropriate to implement time limits for the parties. The ALJ estimates that a typical hearing day will have 6.5 hours of hearing time. Accordingly, over five days, there will be approximately 32.5 hours of hearing time. **Each party is allotted 16 hours of hearing time**. All hearing time used by a party—whether presenting arguments, asserting oral motions, questioning witnesses, asserting lengthy objections, or raising other matters that

3 The parties have agreed that a copy of each exhibit will be exchanged between counsel with the exhibit list, or overnighted for delivery the next day.

require time in the hearing—shall count against a party's time allotment. The ALJ will strictly enforce these limits and, accordingly, expects the parties to be prudent in planning the presentation of their cases and the examination of witnesses.

IV. TRANSCRIPT

As agreed to by the parties in their agreed scheduling order, the parties shall arrange for a court reporter to attend and transcribe the hearing each day, and the cost shall be shared equally by the parties.

On the initial day of the hearing, two copies of each exhibit, one of which will be marked as the "Record Set" and the other as the "ALJ Set," shall be provided to the court reporter before the hearing starts to allow the court reporter time to mark them without delaying the hearing.

SIGNED August 31, 2015.

MEITRA FARHADI
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

EXHIBIT 2

to

FCA US LLC's Motion to Strike New Evidence

SOAH DOCKET NO. 608-15-4315.LIC
MVD DOCKET NO. 15-0015.LIC

CECIL ATKISSION ORANGE, LLC, d/b/a CECIL ATKISSION CHRYSLER JEEP DODGE, **Complainant**	**BEFORE THE STATE OFFICE**
v.	**OF**
FCA US LLC, **Respondent**	**ADMINISTRATIVE HEARINGS**

ORDER NO. 10
ESTABLISHING BRIEFING DEADLINE AND OUTLINE

On February 8-12, 2016, a hearing on the merits was held in the above-referenced matter with Respondent FCA US LLC (FCA), represented by attorneys Mark T. Clouatre, John P. Streelman, and Webster C. Cash, and Cecil Atkission Orange, LLC, d/b/a Cecil Atkission Chrysler Jeep Dodge (Atkission), represented by attorneys William R. Crocker and Nathan Allen, Jr. At the conclusion ofthe hearing, the Administrative Law Judges (ALJs) requested briefing to be filed by the parties.[1] The parties agreed on the following schedule and outline and this order memorializes the agreement:

April 1, 2016	Deadline for submission/exchange of closing briefs (including proposed Findings of Fact and Conclusions of Law).
April 18, 2016	Deadline for submission/exchange of rebuttal closing briefs. Record closes.

The parties are requested to cite to supporting evidence in the transcript and exhibits using references to page and line of testimony. An example of how this should be cited for testimony is as follows: Testimony of Jane Doe, Tr. at 22, lines 5-6. Exhibits should be cited as FCA (or Respondent) Ex. 3 at 22-23.

[1] The parties are requested to also provide an electronic copy of the briefs with proposed findings and conclusions to the AL's' Administrative Assistant, Erin Hurley, at the following email address: erin.hurley@soah.texas.g.ov.

The initial and rebuttal closing briefs shall follow the outline below. Rebuttal briefs will be used solely to rebut and respond to the opposing party's initial closing brief, but must do so according to the outline:

Introduction/Background (Brief statement of the case presented and result sought bythe party.)

II. Statement of Applicable Law (Specification of the Texas statutes(s) and case law the party believes to be applicable to the case.)

III. Procedural History (Brief summary of the procedural history of the case, including notice, the protest, and applicable jurisdictional requirements.)

IV. Factual Background and Analysis of Issues (A detailed statement of the evidence in the record and an analysis of the statutes and case law applicable to each circumstance required to be considered in the determination of good cause for termination. Each circumstance to be considered must be separately addressed under a separate subheading.)

A. Whether FCA has established by a preponderance of the evidence that there is good cause for the proposed termination of the franchise of Atkission pursuant to Tex. Occ. Code Ann §§ 2301.453 and 2301.455. In determining good cause, the parties shall analyze all "existing circumstances," including:

1. Atkission's sales in relation to the sales in the market;
2. Atkission's investment and obligations;
3. injury or benefit to the public;
4. the adequacy of Atkission's service facilities, equipment, parts, and personnel in relation to those of other dealers of new motor vehicles of the same line-make;
5. whether warranties are being honored by Atkission;
6. the parties' compliance with the franchise, except to the extent that the franchise conflicts with this chapter; and
7. the enforceability of the franchise from a public policy standpoint, including issues of the reasonableness of the franchise's terms, oppression, adhesion, and the parties' relative bargaining power.

B. Other issues the parties may address any issue not covered above in this section that is relevant to the case.

V. Conclusion (A brief summary of the facts and arguments presented, and the decision sought by the party.)

SIGNED February 24, 2016.

MEITRA EARDADI
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

HUNTER LTER
ADAHNISTRKIIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

STATE OFFICE OF ADMINISTRATIVE HEARINGS

AUSTIN OFFICE
300 West 15th Street Suite 504
Austin, Texas 78701
Phone: (512) 475-4993
Fax: (512) 322-2061

DATE: **5/1/2017**

NUMBER OF PAGES INCLUDING THIS COVER SHEET: **6**

REGARDING: **ORDER NO. 12 - GRANTING MOTION TO STRIKE NEW EVIDENCE**

DOCKET NUMBER: **608-15-4315.LIC**

JUDGE HUNTER BURKHALTER

FAX TO:	FAX TO:
WILLIAM R. CROCKER (ATTORNEY AT LAW)	(512) 474-2540
MARK T. CLOUATRE	(303) 583-9999
KAREN PHILLIPS (TEXAS AUTOMOBILE DEALERS ASSOCIATION)	(512) 322-0561
JOHN CHAMBLESS, II (THOMPSON, COE, COUSINS & IRONS, L.L.P.)	(512) 708-8777
WEBSTER C. CASH	(303) 244-1879
JOHN P. STREELMAN	(303) 244-1879
J. BRUCE BENNETT	VIA EMAIL
NATHAN ALLEN, JR. (JONES, ALLEN & FUQUAY, LLP)	(214) 343-7455
MVD DOCKET CLERK (MOTOR VEHICLE DIVISION)	(512) 465-4135
DANIEL AVITIA (TEXAS DEPARTMENT OF MOTOR VEHICLES)	(512) 465-3666

Docket Clerk, Fax Number 512/465-4135
NOTE: IF ALL PAGES ARE NOT RECEIVED, PLEASE CONTACT DENISE KIMBROUGH(dki) (512) 475-4993

SOAH DOCKET NO. 608-15-4315.LIC
MVD DOCKET NO. 15-0015.LIC

CECIL ATKISSION ORANGE, LLC, d/b/a CECIL ATKISSION CHRYSLER JEEP DODGE, Complainant	§	**BEFORE THE STATE OFFICE**
v.	§	**OF**
FCA US LLC, Respondent	§	**ADMINISTRATIVE HEARINGS**

ORDER NO. 12
GRANTING MOTION TO STRIKE NEW EVIDENCE

On March 27, 2017, the undersigned Administrative Law Judges (ALJs) issued the Supplement to the Proposal for Decision Following Remand (Supplemental PFD). On April 7, 2017, Cecil Atkission Orange, LLC d/b/a Cecil Atkission Chrysler Jeep Dodge (Atkission) filed exceptions to the Supplemental PFD. Atkission attached to its exceptions substantial new evidence; specifically, a 22-page report from a purported new expert witness, Robert Davis, plus voluminous other documents, including what purports to be a chart of the ownership structure of franchised dealerships in Texas.

By motion filed April 21, 2017, FCA US LLC (Chrysler) moves to strike the new expert and evidence offered by Atkission. Chrysler correctly points out the following:

- Atkission's new expert designation and the new documentary evidence are extremely untimely, having been identified and provided roughly one-and-a-half years after the applicable deadlines set out in Order No. 4;
- The new evidence was filed more than a year after the evidentiary record in this case closed;
- Following the decision by the governing board of the Texas Department of Motor Vehicles (Board) to remand this matter, Atkission never asked to have the record reopened, never sought leave to submit new evidence, and never moved for admission of the new evidence attached to Atkission's exceptions;

- Atkission's proffer of the new expert and new evidence is contrary to the ALJs' conclusion, in the Supplemental PFD, that there was no need to re-open the evidentiary record in response to the remand;

- Atkission has failed to show good cause for its untimely offer of new evidence and a new expert; and

- Chrysler would be unfairly prejudiced by the admission of the new expert and evidence.

Atkission filed no response to Chrysler's motion to strike.

For the reasons set forth in Chrysler's motion, the motion is **GRANTED**; the new evidence attached to Atkission's exceptions to the Supplemental PFD is **NOT ADMITTED** in the evidentiary record of this case; and, to the extent the new evidence is discussed in Atkission's exceptions to the Supplemental PFD, it will not be considered.

SIGNED May 1, 2017.

HUNTER BURKHALTER
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

MEITRA FARHADI
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

STATE OFFICE OF ADMINISTRATIVE HEARINGS

AUSTIN OFFICE
300 West 15th Street Suite 504
Austin, Texas 78701
Phone: (512) 475-4993
Fax: (512) 322-2061

SERVICE LIST

AGENCY:	**Motor Vehicles, Texas Department of (TDMV)**
STYLE/CASE:	**CECIL ATKISSION CHRYSLER JEEP DODGE v. FCA US LLC**
SOAH DOCKET NUMBER:	**608-15-4315.LIC**
REFERRING AGENCY CASE:	**15-0015-LIC**

STATE OFFICE OF ADMINISTRATIVE HEARINGS	**ADMINISTRATIVE LAW JUDGE ALJ HUNTER BURKHALTER**
REPRESENTATIVE / ADDRESS	**PARTIES**
MVD DOCKET CLERK MOTOR VEHICLE DIVISION TEXAS DEPARTMENT OF MOTOR VEHICLES 4000 JACKSON AVENUE AUSTIN, TX 78731 (512) 465-7354 (PH) (512) 465-4135 (FAX) marie.medina@txdmv.gov	MOTOR VEHICLE DIVISION
J. BRUCE BENNETT CARDWELL, HART & BENNETT, L.L.P. 807 BRAZOS, STE 1001 AUSTIN, TX 78701 (512) 322-0011 (PH) (512) 322-0808 (FAX) jbb.chblaw@sbcglobal.net	CARDWELL, HART & BENNETT, L.L.P.
MARK T. CLOUATRE ATTORNEY NELSON MULLINS RILEY & SCARBOROUGH LLP 1400 WEWATTA ST., SUITE 500 DENVER, CO 80202 (303) 583-9909 (PH) (303) 583-9999 (FAX) mark.clouatre@nelsonmullins.com	FCA US LLC

JOHN CHAMBLESS, II
ATTORNEY
THOMPSON, COE, COUSINS & IRONS, L.L.P.
701 BRAZOS, SUITE 1500
AUSTIN, TX 78701
(512) 708-8200 (PH)
(512) 708-8777 (FAX)
jchambless@thompsoncoe.com

FCA US LLC

NATHAN ALLEN, JR.
ATTORNEY
JONES, ALLEN & FUQUAY, LLP
8828 GREENVILLE AVENUE
DALLAS, TX 75243-7143
(214) 343-7400 (PH)
(214) 343-7455 (FAX)

JONES, ALLEN & FUQUAY, LLP

WILLIAM R. CROCKER
ATTORNEY AT LAW
807 BRAZOS, SUITE 1014
AUSTIN, TX 78701
(512) 478-5611 (PH)
(512) 474-2540 (FAX)
crockerlaw@earthlink.net

CECIL ATKISSION ORANGE, L.L.C. D/B/A CECIL ATKISSION CHRYSLER JEEP DODGE

DANIEL AVITIA
DIRECTOR
TEXAS DEPARTMENT OF MOTOR VEHICLES
MOTOR VEHICLE DIVISION
4000 JACKSON AVENUE
AUSTIN, TX 78731

(512) 465-3666 (FAX)

TEXAS DEPARTMENT OF MOTOR VEHICLES

WEBSTER C. CASH
WHEELER TRIGG O'DONNELL LLP
370 SEVENTEENTH STREET, SUITE 4500
DENVER, CO 80202
(303) 244-1924 (PH)
(303) 244-1879 (FAX)

FCA US LLC

JOHN P. STREELMAN
WHEELER TRIGG O'DONNELL, LLP
370 SEVENTEENTH STREET, SUITE 4500
DENVER, CO 80202
(303) 244-1865 (PH)
(303) 244-1879 (FAX)
streelman@wtotrial.com

FCA US LLC

KAREN PHILLIPS
TEXAS AUTOMOBILE DEALERS ASSOCIATION
1108 LAVACA, STE 800
AUSTIN, TX 78701
(512) 476-2686 (PH)
(512) 322-0561 (FAX)

TEXAS AUTOMOBILE DEALERS ASSOCIATION

---

xc: Docket Clerk, State Office of Administrative Hearings
Docket Clerk TDMV, Fax No. 512-465-4135

Denise Kimbrough

From: XMediusFAX@soah.state.tx.us
Sent: Monday, May 01, 2017 11:21 AM
To: Denise Kimbrough
Subject: Broadcast Completed: ORDER NO. 12 608-15-4315.LIC
Attachments: E4C47EEE-6B94-4B64-981B-239BB4FAB927-55783-BR.pdf

Time Submitted : Monday, May 1, 2017 11:17:46 AM Central Daylight Time
Time Completed : Monday, May 1, 2017 11:20:35 AM Central Daylight Time
Nb of Success Items : 5
Nb of Failed Items : 0

Status	Time Sent	Pages Sent	Duration	Remote CSID	Destination	Error Code
Success	Monday, May 1, 2017 11:18:58 AM Central Daylig	6	68		5127088777	0
Success	Monday, May 1, 2017 11:19:09 AM Central Daylig	6	78	5123220561	5123220561	0
Success	Monday, May 1, 2017 11:19:35 AM Central Daylig	6	104	Wheeler Trigg	13032441879	0
Success	Monday, May 1, 2017 11:19:44 AM Central Daylig	6	114	Nelson Mullins	13035839999	0
Success	Monday, May 1, 2017 11:20:25 AM Central Daylig	6	156	5126101324	5124742540	0

Denise Kimbrough

From: XMediusFAX@soah.state.tx.us
Sent: Monday, May 01, 2017 11:28 AM
To: Denise Kimbrough
Subject: Broadcast Completed: ORDER NO. 12 608-15-4315.LIC
Attachments: E4C47EEE-6B94-4B64-981B-239BB4FAB927-55794-BR.pdf

Time Submitted : Monday, May 1, 2017 11:18:45 AM Central Daylight Time
Time Completed : Monday, May 1, 2017 11:27:52 AM Central Daylight Time
Nb of Success Items : 3
Nb of Failed Items : 0

Status	Time Sent	Pages Sent	Duration	Remote CSID	Destination	Error Code
Success	Monday, May 1, 2017 11:20:15 AM Central Daylig 6	89	214 343 7455	12143437455		0
Success	Monday, May 1, 2017 11:21:49 AM Central Daylig 6	180	5124654135	5124654135		0
Success	Monday, May 1, 2017 11:27:43 AM Central Daylig 6	233	5124654135	5124653666		0