

TEXAS DEPARTMENT OF MOTOR VEHICLES

BOARD MEETING

Texas Department of Motor Vehicles
4000 Jackson Avenue
Building 1
Lone Star Room
Austin, Texas 78731

Thursday,
February 9, 2023
9:00 a.m.

BOARD MEMBERS:

Charles Bacarisse, Chair
Christian Alvarado
Stacey Gillman
Brett Graham
Tammy McRae
Sharla Omumu
John Prewitt
Paul R. Scott

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P R O C E E D I N G S

1
2 MR. BACARISSE: Good morning. My name is
3 Charles Bacarisse, and I am pleased to open the Board
4 meeting of the Texas Department of Motor Vehicles.

5 It is 8:59 a.m., and I am now calling the Board
6 to order for our meeting of February 9, 2023. I want to
7 note for the record that the public notice of this
8 meeting, containing all items on the agenda, was filed
9 with the Office of Secretary of State on February 1, 2023.

10 And before we begin today's meeting, please
11 place all cell phones and other communications in a silent
12 mode, and please, as a courtesy to others, do not carry on
13 side conversations or other activities in the meeting
14 room.

15 I want to welcome those who are with us for
16 today's Board meeting. If you wish to address the Board
17 or speak on an agenda item during today's meeting, please
18 complete a speaker's sheet at the registration table just
19 outside here or send an email to GCO_General@TxDMV.gov.
20 Please identify in your email the specific item you're
21 interested in commenting on, your name and address, and
22 whether you are representing anyone or speaking for
23 yourself. If your comment does not pertain to a specific
24 agenda item, we'll take your comment during the general
25 public comment portion of the meeting.

1 In accordance with the department's
2 administrative rule, comments will be limited to three
3 minutes. To assist each speaker, a timer has been
4 provided at the podium. The timer light will be green for
5 the first two minutes, yellow when the speaker has one
6 minute left, and then red when the speaker's time is up.

7 Individuals cannot accumulate time from other
8 speakers, and comments should be pertinent to the issues
9 stated on the comment sheet. When addressing the Board,
10 please state your name and affiliation for the record.

11 There are a few things that will assist us in
12 making the meeting run more smoothly and also helping the
13 court reporter get an accurate record: please identify
14 yourself before speaking, speak clearly and slowly, and do
15 not speak over others, and please ask the chairman for
16 permission to speak and be sure to get recognized before
17 speaking.

18 I would like to thank our court reporter who is
19 transcribing this meeting.

20 Before we begin today, I'd like to remind all
21 presenters and those in attendance of the rules of conduct
22 at our Board meetings. The department's administrative
23 rule states that I have the authority to supervise the
24 conduct of the meetings, and this includes the authority
25 to determine when a speaker is being disruptive of th3e

1 meeting or is otherwise violating the timing and the
2 presentation rules that I just discussed.

3 So with those things out of the way, I would
4 like to now have a roll call for the Board members.
5 Please respond verbally when I call your name.

6 Member Alvarado, are you present?

7 MR. ALVARADO: Here.

8 MR. BACARISSE: Member Gillman?

9 MS. GILLMAN: Here.

10 MR. BACARISSE: Member Graham?

11 MR. GRAHAM: Here.

12 MR. BACARISSE: Member McRae?

13 MS. McRAE: Here.

14 MR. BACARISSE: Member Omumu?

15 MS. OMUMU: Present.

16 MR. BACARISSE: Member Prewitt?

17 MR. PREWITT: Here.

18 MR. BACARISSE: Member Scott?

19 MR. SCOTT: Here.

20 MR. BACARISSE: And let the record reflect that
21 I, Charles Bacarisse, am here too, and we have a quorum.

22 Member Manny Ramirez was elected to serve as
23 Tarrant County commissioner for precinct 4 in this last
24 general election. Because his duties as a county
25 commissioner may have potentially presented a conflict

1 with his duties as a Board member, Member Ramirez resigned
2 from this Board effective February 1, 2023. We will
3 recognize Member Ramirez at a future Board meeting to
4 congratulate him for his accomplishments, and we all wish
5 him very well.

6 So now on to the agenda item 2, pledges of
7 allegiance to the U.S. and Texas flags. I would like to
8 ask Member Alvarado to lead us in the U.S. pledge, and
9 then Vice Chair McRae will lead us in the Texas pledge.

10 (The U.S. and Texas Pledges of Allegiance were
11 recited.)

12 MR. BACARISSE: Thank y'all.

13 Thank you Vice Chair McRae and Member Alvarado.

14 I do not have any chair reports today -- that
15 would be agenda item number 3 -- so I would like to just
16 move on to agenda item number 4, which is the executive
17 director's reports.

18 Daniel.

19 MR. AVITIA: Chairman, members, good morning,
20 and welcome everyone. I am Daniel Avitia, executive
21 director for the Texas Department of Motor Vehicles. This
22 morning I am pleased to share information with regard to
23 our Camp Hubbard Renewal project.

24 As you know, staff have been working with
25 architects and engineers for several months now, and I'm

1 happy to share information with you periodically, and more
2 importantly, share visuals with you at some point here
3 shortly.

4 The Texas Department of Motor Vehicles met with
5 the Texas Facilities Commission and our Camp Hubbard
6 renewal project vendor, MarmonMok, to review updated
7 project cost estimates. MarmonMok, TFC and the TxDMV core
8 team have been discussing cost estimates for the
9 department during the legislative session for use during
10 the legislative session in support of our request for
11 funding for Phase 2 of the project, which includes
12 renovation, demolition, and construction activities.

13 The estimated costs, which CFO Glenna Bowman
14 will cover with you later, allow for the demolition of
15 Building 5 and then later Building 1, the building that we
16 are currently sitting in, construction of the new
17 building, furniture and equipment, technology needs and
18 moving expenses as we relocate staff temporarily and
19 permanently between buildings.

20 During this meeting, MarmonMok also reviewed
21 previously requested updates to the floor design of the
22 various three floors in the new building that included
23 relocating the placement of public restrooms.

24 The restrooms were moved closer to the main
25 lobby to make them more accessible for use by the public

1 who are attending meetings and events in public spaces
2 without the need to enter the secured portion of the
3 building. The floor update also included a few design
4 tweaks to make the floor more useful and to give it a
5 better flow.

6 The project team hit the ground running in the
7 new year as well. In the first week of January, MarmonMok
8 shared interior and exterior schematic designs with the
9 Texas Facilities Commission and the TxDMV representatives.
10 This, as you can well imagine, is a very exciting time for
11 Phase 1 of the project, and we continue to progress, and
12 we begin to apply solicited feedback towards the interior
13 and exterior of the buildings as the collaborative work
14 continues on.

15 As part of the process -- if I can go to the
16 first slide -- MarmonMok presented sample interior designs
17 such as this. And by the way, while they were sharing
18 this information, I will let you all know that there was a
19 3D version of it where they were walking us through the
20 building. It made many of us a little ill to our
21 stomachs. I won't do that to anybody in the room this
22 morning, so we figured static pictures would be best for
23 this group.

24 This is what the future interior lobby of our
25 new Camp Hubbard 1 will look like. That is the security

1 desk right there, and you can see the TxDMV symbol right
2 behind the security desk.

3 On the next slide you will see what standing
4 from the security desk looking out might look like, and
5 you know, if I was a security officer, I would want to
6 work right there; looks great.

7 Alongside that, we also saw what the new
8 employee entrance might look like, if I can go to the next
9 slide, please. This is also our employee café gathering,
10 staff gathering area and Board gathering area, right
11 alongside the other side of what would be the future Board
12 room. For perspective, the entrance to this part of the
13 facility would be here to my left.

14 Next slide, please. This is an example of what
15 a typical open office area might look like. This might be
16 a little off in the sense that, please keep in mind there
17 will still be cubicles located throughout the floors as
18 needed for staff to have individual work spaces.

19 And then finally, this is what the exterior
20 front design of the new campus headquarters will look
21 like.

22 MarmonMok also asked that we share exterior
23 building renderings that include the use of -- if I can go
24 back to the previous slide, please -- you can see that
25 there's use of terra cotta, metal panels, curtain wall

1 systems to blend in with the traditional look of the
2 campus.

3 They also shared ideas for use of concrete
4 planters, metal louvers and perforated metal screens for
5 various locations on and around the proposed new building
6 to be renovated in Camp Hubbard 6 in order to smoothly
7 connect the two buildings through the design and color
8 schemes.

9 We also met with MarmonMok again in late
10 January when we reviewed and determined the campus and
11 room identification number that is similar to what we
12 currently have on campus today.

13 If we can move to the next slide, you will see
14 that, on this slide, the new building would be called Camp
15 Hubbard 1, the renovated Building 6 would now be renamed
16 to Camp Hubbard 2, and the former Camp Hubbard 7 utility
17 plan would be renamed Camp Hubbard 3. The historical
18 building, Camp Hubbard 4, would remain as it is currently
19 titled.

20 Next slide, please. Chairman, members, as we
21 look forward, we continue to make great progress in the
22 Phase 1 planning component of this project, and we are on
23 target to finalize information regarding cost estimates
24 and design deliverables that will be available for our use
25 as we discuss funding for the Phase 2 renovations,

1 demolition, and construction components of this project
2 with the legislature.

3 Next steps include our information to the
4 legislature to support the funding request included and
5 needed for our budget exceptional item, and as you recall,
6 we are requesting permission to expend funds out of Fund
7 10, the TxDMV Fund.

8 Next slide, please. And with that, Chairman
9 and members, I conclude this portion of the executive
10 director's update, and I'm happy to answer any questions
11 you may have.

12 MR. BACARISSE: Members, any questions for Mr.
13 Avitia?

14 (No response.)

15 MR. BACARISSE: No? Great.

16 MS. GILLMAN: It all looks good.

17 MR. BACARISSE: Thank you. Thanks for
18 shepherding this project and look forward to seeing the
19 final budget numbers when those are whittled down. Good
20 stuff.

21 MR. AVITIA: Yes, sir, indeed.

22 MR. BACARISSE: Thank you.

23 MR. AVITIA: Thank you, Chairman.

24 MR. BACARISSE: I would now like to move to
25 agenda item number 5, which is our contested case.

1 MR. AVITIA: 4.B.

2 MR. BACARISSE: I'm sorry, what?

3 MR. AVITIA: 4.B.

4 MR. BACARISSE: 4.B. Sorry. I got all
5 excited. Item number 4.B is important for us as well,
6 obviously. We have some recognition and awards and years
7 of service to do, so let me turn it back to you, Daniel.

8 MR. AVITIA: Thank you, Chairman and members.
9 Again for the record, Daniel Avitia, executive director.
10 I will close out the executive director's report with item
11 4.B, which is announcements and recognition of years of
12 service.

13 I'll start with on January 31 through February
14 3, various DMV representatives from all over the county,
15 technical advisors and AAMVA staff met in San Diego,
16 California to serve on the License Plate Standards Work
17 Group. Deputy Executive Director Roland Luna was selected
18 to serve on the work group to represent the Texas
19 Department of Motor Vehicles.

20 For perspective, the purpose of the AAMVA
21 License Plate Standards Work Group is to conduct analysis
22 comparing AAMVA's license plate standards, license plate
23 designs, manufacturing and administration, as well as to
24 provide information on temporary license plates, or temp
25 tags, and their issuance and processes involved, as well

1 as to review best practices for managing specialty plates.

2 The new License Plate Standards Work Group is
3 expected to finalize their work by the end of this summer
4 of 2023. The work group will provide a revised license
5 plate standard for guidance and use throughout the nation.

6 It is my pleasure to recognize Deputy Executive
7 Director Roland Luna, as he has been selected to serve on
8 the core group and to continue to share the system
9 enhancements and operational improvements that this Board
10 and the staff have engaged in over the last year.

11 Please join me in congratulating Mr. Roland
12 Luna.

13 (Applause.)

14 MR. AVITIA: Chairman, if I may proceed?

15 MR. BACARISSE: Please.

16 MR. AVITIA: Thank you.

17 Now at this time I would like to recognize our
18 employees who have reached a state service milestone. We
19 celebrate these employees to show our appreciation for the
20 years of service and their commitment to the citizens of
21 the State of Texas.

22 First, we have Karen Poff, Vehicle Titles and
23 Registration, who has reached 20 years of state service.
24 Second, we have Sara Byers from the Motor Carrier
25 Division, who has reached 30 years of state service.

1 And before we move on to the individual who is
2 present with us in the room, I want to recognize Ms.
3 Angela Masloff, who has recently retired from the
4 Information Technology Services Division with 26 years of
5 state service to the State of Texas.

6 Angela was a good partner in our organization,
7 and she was the project manager that helped us complete
8 the Texas By Texas program, which impacts so many of our
9 citizens throughout the state, and so I am grateful to her
10 for her service.

11 And last but not least, we have Ms. Jennifer
12 Scarier with us this morning. She is with the Consumer
13 Relations Division and has reached a service milestone of
14 30 years of service.

15 Jennifer joined the Consumer Relations Division
16 as a customer service coordinator on November 1 of 2009.
17 She was a transfer from the Texas Department of
18 Transportation to TxDMV and she is an inaugural member of
19 the Consumer Relations Division.

20 Jen has represented CRD as a subject matter
21 expert on several important projects for the agency,
22 including the implementation of eLICENSING, Cisco Finesse,
23 NICE, and Workforce Management.

24 I've worked with Jen as long as I've been in
25 this agency, and it has been an honor and a privilege to

1 work alongside her for the many years that she has been
2 here. So Chairman, members, please join me in
3 congratulating Jen on her years of service.

4 (Applause.)

5 MR. AVITIA: Chairman, members, if you can join
6 me in front of the podium for a quick picture.

7 (Pause for presentation and photos.)

8 MR. BACARISSE: Thank you, and congratulations
9 to those who have served well, and your service is
10 certainly appreciated, we are very thankful for you.

11 I do now wish to move to agenda item number 5,
12 which is our contested case, and before we begin on that,
13 I just have a few remarks at the top end.

14 We'll move through this at the pace at which it
15 deserves. We're not going to be in a hurry; we're going
16 to take our time. This is important work. It's probably
17 some of the most important work we do as a board, and so
18 out of respect for the parties involved and so forth,
19 we'll manage it but we're not going to rush the whole
20 hearing. It may take a while, it's going to take whatever
21 it takes, that's how we're going to manage it.

22 As we start, I do want to ask General Counsel
23 Rob Blech to present the procedural history and summary of
24 the contested case.

25 So Mr. Blech.

1 MR. BLECH: Thank you, Chairman Bacarisse.

2 My name is Rob Blech, associate general
3 counsel, for the record. As Chairman Bacarisse said, I'll
4 be presenting a procedural history and summary of the
5 proposal for decision that is before you today for your
6 consideration.

7 This proposal for decision today involves a
8 contested case between McAllen Jeep, Inc. d/b/a Bert Ogden
9 Subaru, and their protest of the proposed termination of
10 franchise by Subaru of America. The issues presented to
11 the Board is whether Subaru established by a preponderance
12 of evidence good cause for its termination with Bert
13 Ogden, as required in Texas Occupations Code 2301.453(g).

14 This is a contested matter between two
15 licensees, so the department is not a direct participant
16 and will not be making recommendations. That being said,
17 we are providing Monique Johnston, who is the director of
18 the Motor Vehicle Division, as a resource if you have
19 questions, and you can always ask legal questions of
20 counsel to the OGC staff members here today.

21 In this case, on August 20, 2020, Subaru
22 notified Bert Ogden of its intent to terminate the
23 franchise. The parties participated in a department
24 mediation, but that mediation was not resolved
25 successfully.

1 The department's Motor Vehicle Division
2 referred this contested case to SOAH on January 8, 2021,
3 and on January 14, 2021, the department issued a notice of
4 hearing.

5 A panel of two administrative law judges
6 conducted the hearing on the merits on January 18 through
7 21, and January 24 through 28, and on January 31, 2022.
8 The administrative law judge closed the record of the
9 administrative hearings on May 20, 2022, after post-
10 hearing briefs were filed, and issued the proposal for
11 decision on July 19, 2022. The administrative law judge
12 found that Subaru had met its burden to show good cause
13 for the termination and recommended the Board deny Bert
14 Ogden's protest of the termination.

15 Bert Ogden filed exceptions to the PFD, and
16 Subaru filed replies -- excuse me -- filed exceptions --
17 both parties filed exceptions. The ALJs considered the
18 exceptions and the reply briefs and issued their
19 exceptions letter on October 17, 2022. For your purposes,
20 the ALJs' letter did not recommend any changes to the PFD
21 and stated the PFD was ready for your consideration.

22 The Board has jurisdiction to consider this
23 contested case and enter a final order. In determining
24 whether Subaru established good cause for the termination,
25 Texas law requires you as a Board to consider seven

1 statutory factors set out in Occupations Code 2301.455,
2 all existing circumstances, and whether termination is
3 based solely on the desire for market penetration.

4 I'm going to quickly walk through and summarize
5 the ALJs' findings. Going into this, the ALJs made five
6 findings in favor of termination, one factor was deemed to
7 be neutral, and one factor was against termination.

8 For factor one, the dealer's sales in relation
9 to the market, the ALJs found Bert Ogden had consistently
10 been the lowest performing dealer in its zone, achieving
11 an average minimum sales responsibility of 41.3 for the
12 period 2016 through 2020.

13 Subaru of America considers 100 percent MSR to
14 be average. The ALJs additionally found Bert Ogden's
15 lower sales than the rest of the district or zone were not
16 the result of Subaru's inventory allocation.

17 Finally, the ALJs concluded Bert Ogden's sales
18 in relation to the market supported termination. This
19 factor by the ALJs recommended termination of the
20 franchise, so it weighed in favor of termination.

21 The second factor looked at by the ALJs was the
22 dealer's investments and obligations. On this factor the
23 ALJs found Bert Ogden itself, as a dealer, did not invest
24 much in the dealership, so its investments would not be
25 greatly harmed by the proposed termination.

1 However, weighing that against the fact that
2 the ALJs didn't make any findings that the lack of
3 investments were inadequate, the ALJs also acknowledged
4 that significant money was invested in the facilities,
5 just not by the dealer itself. The ALJs weighed this
6 factor as neutral, not favoring either party.

7 The third factor involves injury or benefit to
8 the public. The ALJs found that ranked against other
9 dealers in the Dallas-based zone, or DFW zone, Bert Ogden
10 placed at or near the bottom in purchase satisfaction
11 scores from 2017 through 2021.

12 The ALJs additionally found Bert Ogden ranked
13 below the DFW zone in service satisfaction for most of
14 2019, all of 2020, and most of 2021. The ALJs concluded
15 there is little public benefit to continuing Bert Ogden's
16 dealership agreement, considering the dealership's
17 consistently low purchase and service satisfaction
18 rankings and felt that this factor weighed in favor of
19 termination of the franchise.

20 The fourth factor is the adequacy of the
21 dealer's service facilities, equipment, parts and
22 personnel in relation to those of other dealers of new
23 motor vehicles of the same line -- in other words, other
24 Subaru dealers.

25 The ALJs found there was no evidence that Bert

1 Ogden service facilities are inadequate in relation to
2 other dealers. The ALJs additionally found Bert Ogden had
3 inadequate -- let me go back, this is a little confusing.

4 First, the ALJs found there was no evidence
5 that Bert Ogden's service facilities were inadequate, so
6 on that factor they found they were adequate.

7 However, the ALJs went on to find that Bert
8 Ogden had inadequate service, parts, equipment, and
9 personnel in relation to other dealers of new motor
10 vehicles of the same line make, and based on what the ALJs
11 viewed as the inadequate service parts and equipment and
12 personnel, the ALJs felt this factor weighed in favor of
13 termination.

14 The fifth factor is straightforward: whether
15 warranties are being honored by the dealer. On this
16 factor the ALJs found evidence did not establish that Bert
17 Ogden refuses to perform warranty work, and based on that
18 finding, the ALJs felt this factor weighed against
19 termination of the franchise.

20 The sixth factor was the parties' compliance
21 with franchise, except to the extent the franchise
22 conflicts with Occupations Code 2301. For this factor,
23 the ALJs found Bert Ogden failed to comply with Subaru's
24 staffing requirements, including those requiring exclusive
25 or dedicated sales and service staff, as well as a

1 requirement for a certain number of sales consultants.
2 The ALJs felt Bert Ogden did not comply with the franchise
3 agreement and that this factor weighed in favor of
4 termination.

5 The last factor examined by the ALJs was the
6 enforceability of the franchise from a public policy
7 standpoint, including issues of the reasonableness of the
8 franchise's terms, oppression, adhesion, and the parties'
9 relative bargaining power.

10 Looking at this factor, the ALJs found the
11 dealer agreement contained standard terms and was not an
12 unconscionable contract of adhesion. The ALJs
13 additionally found Bert Ogden's owner is an experienced
14 and sophisticated business owner. Based on those
15 findings, the ALJs felt that that factor weighed for
16 termination.

17 After the seven factors are identified, the
18 Board is also required to examine whether the desire for
19 market penetration was the sole basis for termination, and
20 in this case, the ALJs found Subaru is not seeking
21 termination solely to increase market penetration and
22 based some of that reasoning on the fact that there were m
23 multiple factors that weighed in favor of the termination.

24 Now, you haven't seen one of these cases for a
25 while, but the case before the Board today leaves you with

1 several options. One option is the Board can adopt the
2 PFD as written and ask the Board staff to write an order
3 to that effect.

4 Second, you may amend portions of the PFD and
5 adopt the amended PFD. That's dependent on whether those
6 changes comply with 2001.58(e) of the Texas Government
7 Code. That section of the Government Code allows you to
8 make changes to findings of fact or conclusions of law if
9 an administrative law judge misapplied or misinterpreted
10 applicable law, agency rules, or written policies, or
11 whether they misinterpreted prior administrative
12 decisions, or relied on prior administrative decisions
13 that were incorrect or should be changed, and finally, if
14 the ALJs made a technical error on a finding of fact that
15 needs to be changed.

16 There's an additional option. If the Board
17 feels that portions of the record have not been
18 sufficiently developed or if there are portions of the
19 record that need clarification, factual findings, for
20 instance, the PFD can be remanded back to SOAH with
21 instructions to clarify those factual findings or even to
22 make additional factual findings.

23 Those are the options before the Board today.
24 What we're going to do is turn this over to Bert Ogden
25 Subaru, who is the party affected by the franchise

1 termination. Their attorneys will make a presentation,
2 and then Subaru of America will make a presentation.

3 If during these discussions the Board has any
4 questions that require a legal answer or require advice of
5 counsel, the Board can make a request to go into executive
6 session to get that advice from counsel.

7 Thank you very much for your time this morning.

8 MR. BACARISSE: Thank you, Mr. Blech.

9 A party that timely submitted a request to make
10 an oral presentation will be allowed up to 15 minutes to
11 make that presentation. Time spent by a party responding
12 to any Board questions is not counted against that party's
13 time.

14 The timer light will be green for the first 14
15 minutes, yellow when there's one minute left, and then red
16 when the party's time is up. I, as chairman, have the
17 ability to extend things for a few minutes, let people
18 finish their point.

19 I would also like to remind Board members and
20 the parties that the Board's decision must be based solely
21 on evidence that's contained within the administrative
22 record from SOAH. I think Mr. Blech pointed out our
23 options. If a Board members asks a question about
24 evidence that is not in the SOAH's administrative record
25 for this case, the parties should be respond by saying:

1 The question is about evidence that is not in the SOAH
2 administrative record.

3 The petitioner, McAllen Jeep, Inc. d/b/a Bert
4 Ogden Subaru, is represented by Mr. Dan Worthington and
5 Mr. James Cousar -- I hope I pronounced that correctly --
6 and they will now make Bert Ogden Subaru's oral
7 presentation on agenda item 5, this contested case. So
8 please approach, and you may begin when you're ready.

9 MR. WORTHINGTON: Commissioners, my name is Dan
10 Worthington. I'm one of the attorneys representing Bert
11 Ogden Subaru.

12 Before I begin, I'd like to make a few
13 introductions. To my left, your right, is Bob Vackar, one
14 of the two owners, along with his wife Janet Vackar, of
15 Bert Ogden Subaru. Natasha Del Barrio, the chief
16 executive officer of the Bert Ogden Group. Johnny
17 Rodriguez, our public czar, sitting in the back. My co-
18 counsel, Mr. Cousar, Mr. Bishop and Mrs. Vela.

19 Commissioners, before I begin my remarks, I
20 would like to ask Mr. Vackar to address the commission to
21 introduce himself and the dealership.

22 Bob.

23 MR. BACARISSE: Sure. Mr. Vackar, welcome.

24 MR. VACKAR: Good morning. My name is Robert
25 Vackar. I am the chairman of the board and chief

1 performance officer of the Bert Ogden Auto Group and
2 dealer principal of Bert Ogden Subaru. This has been a
3 family-owned business for over 50 years, and I have never
4 been through one of these before.

5 After Mr. and Mrs. Ogden were killed in a car
6 accident, my wife, Janet, who is president of the Bert
7 Ogden Group, held the dealer group together and expanded
8 it to now own and operate more than 20 dealerships,
9 including domestic imports and high-line luxury stores.
10 Janet and I continue to be involved in the operation of
11 these dealerships on a day-to-day basis.

12 Natasha Del Barrio started with us when she was
13 15 years old and worked her way through college and earned
14 her MBA at University of Texas Rio Grande Valley, and she
15 is now our CEO.

16 Today we sell over 30,000 cars a year and are
17 one of the top ten family-owned dealer groups in the state
18 of Texas, with multiple accolades to our name across our
19 various brands.

20 It is true that I'm proud of our team's
21 success, but I am most proud of how this success has
22 allowed us to give back to the community. The industry
23 has allowed us to make a multi-million dollar donation to
24 the University of Texas Rio Grande Valley and establish
25 the Robert C. Vackar College of Business and

1 Entrepreneurship.

2 The city named the sports park the Janet Ogden
3 Vackar Sports Park. The new 10,000-seat arena just across
4 from the Subaru store is the Bert Ogden Arena. And
5 Covenant Christian Academy was able to establish the only
6 fully accredited dual enrollment Christian high school in
7 our area, the Janet Vackar Distinguished Learning Academy.

8 It's my life commitment to give back to our
9 community and create opportunities for young people, and I
10 will stack up Bert Ogden Subaru against any other Subaru
11 dealer in the nation in Subaru's Share the Love
12 commitment.

13 I have lived my entire life in the Rio Grande
14 Valley, except for my time at Texas A&M University and as
15 a first lieutenant in infantry, Vietnam 1969-70. To this
16 day I live less than four miles from the Subaru
17 dealership.

18 This termination is an injustice and it has
19 been unbelievably expensive, but what I can tell you is I
20 am here today and I am fighting to keep a store that I
21 personally worked hard to see. I do this not just for the
22 Bert Ogden automobile dealerships but all automobile
23 dealers in the state of Texas.

24 Thank you for your time.

25 MR. BACARISSE: Thank you, sir.

1 MR. WORTHINGTON: Thank you, Bob.

2 Commissioners, upon conclusion of my remarks,
3 Mr. Cousar will follow to address how your jurisdictional
4 grant of authority requires this matter to be reversed.

5 With respect, the ALJs got this wrong. The
6 proposal for decision places form over substance, argument
7 over reality, and it is largely an exercise of "gotcha."
8 We are here because Subaru of America decided to terminate
9 Bert Ogden Subaru, the ninth franchised dealer in this
10 market, the only franchised dealer in this market for
11 Subaru of America that has succeeded, and then after
12 deciding to terminate the dealership, began looking for
13 reasons they could argue to justify the termination.

14 I would direct you to page 140 in your briefing
15 book. Page 140 is a snapshot of Bert Ogden Subaru's
16 actual performance. Now, it begins in 2017, which is the
17 date the franchise agreement at issue in this case was
18 executed.

19 You will see on page 140 the Bert Ogden sales,
20 both in terms of revenue and in terms of actual motor
21 vehicles increased every year from 2017 forward. You will
22 see that its OLP scores, Owner Loyalty Program customer
23 satisfaction, were extraordinary for every year from 2017
24 forward, no issues with warranties or recalls. What then
25 is the breakdown between Bert Ogden's actual performance

1 and the store described by the ALJs in the proposal for
2 decision?

3 I'm going to briefly walk through the proposal
4 for decision, but I want to start by saying that of the
5 eight prior Subaru dealers in this market, all failed,
6 three of the last five voluntarily terminated, none lasted
7 more than six years. Bert Ogden is on year 14.

8 Factor one: Dealer sales in relation to the
9 market. This will begin on page 18 of your packet and
10 will track the ALJ executive summary. The ALJs relied
11 exclusively on the minimum sales responsibility
12 percentage.

13 The ALJs ignored the fact that Bert Ogden
14 Subaru was told by SOA, MSR is a long-term goal. SOA
15 testified that it did not expect Bert Ogden to achieve 100
16 percent MSR compliance, and yet that is the only basis
17 utilized to find that factor weighs in favor of
18 termination. It ignores the history of this market, a
19 very difficult market, where all eight prior stores have
20 failed and only Bert Ogden has succeeded.

21 It ignores Bert Ogden's history in this market,
22 that Mr. Vackar so eloquently described, of success. It
23 ignores and misapplies the Bates Nissan case, in which
24 Bates Nissan, a dealer with the lowest MSR equivalent for
25 Nissan was not terminated. The sales relation to the

1 market simply do not weigh in favor of termination.

2 Because we're short on time, I'm going to move
3 to factor 3: Injury or benefit to the public. The ALJs
4 took the extraordinary customer service scores of Bert
5 Ogden and turned them into poor scores.

6 They did this by comparing our extraordinary
7 scores with other dealers in different areas'
8 extraordinary scores. It is not enough that you got an A.

9 This was a grade on a curve comparative scale that does
10 not exist. It doesn't exist under Texas law, it does not
11 exist in the franchise agreement, it doesn't exist in the
12 documents Subaru gave Bert Ogden about the OLP program.
13 It only existed as a mechanism to argue in favor of
14 termination.

15 Going further, and more outrageous, I would ask
16 the commissioners to turn to page 147 in your packet.
17 Subaru of America took the narrative comments -- that is
18 the comments the customers add after they score a
19 dealer -- they edited out all the positive comments, they
20 took Google comments, edited out all the positive comments
21 and offered those into evidence. We objected; the ALJs
22 allowed them in.

23 If you'll turn to page 147, we asked Subaru
24 about this. Here's what Mr. Poston, Subaru employee
25 directly responsible for Bert Ogden for most of its

1 tenure:

2 Mr. Poston: It would be unfair if Subaru
3 edited out all the positive comments and left only the
4 negative comments in the OLP narratives. It is marked
5 exhibits in this case. It would be unfair and
6 misrepresent Bert Ogden Subaru's performance. The answer:
7 True, true.

8 And yet the ALJs allowed them to do it and
9 introduce that into evidence.

10 Factor 4: The adequacy of the dealer's
11 facilities, equipment, parts and personnel. Form over
12 substance. On parts, there is no evidence that the parts
13 supply was inadequate, there's no customers who couldn't
14 get parts.

15 The only thing they did was take the word of an
16 expert who said, from Subaru: Because Bert Ogden for some
17 periods of time had less of an average day's supply of
18 parts, it must be inadequate. That is not what this
19 factor requires. There is no evidence of actual
20 inadequacy.

21 With regard to equipment and personnel, the
22 ALJs took information for equipment off a balance sheet,
23 acknowledging the expert who said our equipment was
24 inadequate never visited the facility, didn't know what
25 equipment we actually had, didn't know whether was

1 adequate or note. They used a balance sheet value solely
2 as evidence. This is in error.

3 Same with regard to personnel. I'd ask you to
4 turn to page 143. The ALJs considered the information off
5 what's called an MSOG. They completely ignored the
6 testimony of the general manager stating these are the
7 employees that comply with the requirements. We actually
8 had the equipment, we actually had the employees, we
9 actually had the parts.

10 Finally, compliance with the franchise. We
11 discussed the employees -- again you can look at 143 --
12 with regard to the sales performance addendum, I direct
13 you to page 141 in your packet. Bert Ogden Subaru sold
14 every single car it was given to sell. If there are
15 questions about the turn rate, I would invite questions
16 about that following our comments.

17 With that, I'll ask Mr. Cousar to come forward.
18 Jim.

19 MR. COUSAR: Board members, my name is James
20 Cousar. I'm with the law firm of Holland & Knight in
21 Austin, Texas, and I'm here on behalf of Bert Ogden
22 Subaru.

23 Your counsel has already cited to you what's on
24 page 20 of your board book, and that's the grounds under
25 which this Board may reject or modify a proposal for

1 decision.

2 We're going to talk about whether the ALJ
3 misapplied or misinterpreted applicable law or prior
4 administrative decisions. There are other grounds, but I
5 think we're just going to focus on those three. Because
6 time is limited, we're just going to talk about the five
7 ways we think that the law was misapplied or
8 misinterpreted.

9 The ALJs, first and foremost, misinterpreted
10 sales in relation to sales in the market. That was far
11 and away the most important factor in this case. And the
12 reason we say they misinterpreted it is TDMV has never
13 terminated a dealership with a record of increasing sales
14 similar to what Bert Ogden had in this case.

15 Mr. Worthington just pointed out to you page
16 140, which shows the dramatic increase in sales over the
17 four- and five-year period leading up to this hearing.
18 That is not the record of a failing dealership. TDMV
19 cases have no record or no example of a dealer with a
20 comparable sales record being terminated.

21 There's a footnote at page 124 of your briefing
22 book that lists every case cited by the parties in this
23 case and cited by the ALJs. You can look at that
24 footnote -- and I'm not expecting you to go read those
25 cases -- but not one of those cases involves a dealership

1 with a record of increasing successful sales comparable to
2 this. So the ALJs basically just disregarded many decades
3 of TDMV precedent.

4 The ALJs also misapplied the sales relative to
5 sales in the market factor by failing to give any weight
6 to the 43-year record of Subaru failure in the Rio Grande
7 Valley before Bert Ogden took over the ninth Subaru
8 dealership. Page 137 of your book lists the eight
9 previous dealers and why they failed.

10 At this time and for the last 19 years, Bert
11 Ogden has been the only -- or 16 years, Bert Ogden has
12 been the only Subaru dealership in this market. The ALJs,
13 however, compared Bert Ogden not to prior dealers in the
14 same market but to dealers in other parts of Texas and
15 other states like New Mexico, with populations and
16 economies and terrain totally different from the Valley.

17 The ALJs simply ignored the failure of the
18 eight prior dealerships, which really confirm that the
19 Valley is a very unique market. By disregarding the
20 previous sales, the ALJs misinterpreted this factor and
21 they made an erroneous finding.

22 The PFD also misapplied the law by failing to
23 consider extensive evidence about the unique demographics
24 and the economic differences of the Valley as a market for
25 Subarus.

1 If you've lived and traveled in Texas for much
2 time, you know that the Valley is unlike any other part of
3 the state; it has demographics, terrain and economic
4 characteristics that are essentially the opposite of
5 markets where Subarus sell well. Subaru buyers tend to be
6 wealthier, more educated and overwhelmingly non-Hispanic
7 white.

8 The chart on page 173 and 174 of your board
9 book shows that the population of Bert Ogden's area is 94
10 percent Hispanic or Latino. It's far less educated than
11 other Subaru markets, and far less wealthy. It's simply
12 defies logic for the ALJs, on page 55, to say that these
13 very real differences don't make it harder to sell Subarus
14 there.

15 Finally, we'd point out to you on page 74 of
16 the board book, the ALJs noted Bert Ogden's objection to
17 the only negative comments. Admitting only negative
18 comments and excluding all favorable comments to Bert
19 Ogden, it was prejudicial and it was harmful.

20 So in conclusion, Mr. Chair, if I could just
21 wrap up.

22 MR. BACARISSE: Go ahead.

23 MR. COUSAR: What we would ask -- those are
24 four of the most glaring legal errors by the ALJs -- we'd
25 also point out to you on page 40 of the board book what is

1 required of a notice of termination. We don't think that
2 the notice was adequate, we don't think that the notice
3 listed all the grounds, and so we respectfully request
4 that the Board either reverse the PFD or send it back to
5 the ALJs for the reconsideration of the following findings
6 of fact 40, 45, 48, 52, 65, 67, 80, 90, and 93, and
7 conclusions of law 10 and 11.

8 Thank you very much.

9 MR. BACARISSE: Thank you. I appreciate it.

10 Thank you, Mr. Worthington and Mr. Cousar. And
11 Mr. Vackar, as well, thank you for your comments and for
12 your service to our country.

13 At this point I'm going to open it to questions
14 from Board members on what we just heard and any other
15 questions pertaining to the facts in the record. So,
16 members? Member Gillman?

17 MS. GILLMAN: I can ask questions to Mr.
18 Worthington and Mr. Cousar. Right?

19 MR. BACARISSE: Yes.³

20 MS. GILLMAN: Thanks. I'm confused, because I
21 don't understand in the discussion about OLP and
22 extraordinary versus them being -- I haven't read this or
23 I don't know where I read it -- being below in OLP scores.
24 Tell me, because I'm confused about that.

25 MR. WORTHINGTON: Yes, ma'am. So Subaru of

1 America developed a customer satisfaction index, a program
2 they called the Owner Loyalty Program, and it had a scale,
3 and indeed up until 14 days before the proceeding it had
4 one way of scoring it, which it abandoned before this
5 hearing began, but it's the scale under which the OLP was
6 judged for the purpose of this proceeding.

7 That scale allowed a customer to score a dealer
8 with a particular score, and Subaru developed -- you had
9 certain scores, you were poor, you were good, you were
10 very good, and you were extraordinary.

11 Bert Ogden Subaru's scores always ranked
12 closest to extraordinary, but what the ALJs did was accept
13 Subaru's argument that if you have an extraordinary score
14 but you're the least extraordinary, that changes your
15 score to poor.

16 That's what they did, and so they compared
17 us -- it's as if you were graded on a curve but by
18 different teachers, so a teacher in Austin where the
19 customer's grade is given an A, teachers in the Valley
20 give a different A, but it's a 90 instead of a 95. Well,
21 now there's this curve that because you ranked 44th out of
22 44, the A becomes an F, extraordinary score becomes a poor
23 score.

24 That scale doesn't exist. You will find no
25 evidence in the record that if you're in the top 90

1 percent you pass, the top 95 percent you pass, et cetera,
2 and so essentially, in Texas, under this argument, every
3 day of every week of every month there are dealers who
4 have extraordinary scores but are subject to termination
5 nevertheless because they are not as extraordinary as
6 other dealers in other parts of the state.

7 And I don't know if I answered your question or
8 not; I hope I did.

9 But for sure, we were extraordinary under the
10 SOA scoring system.

11 MS. GILLMAN: And is there anything in Texas
12 law or statute, code, that says a score, a customer
13 satisfaction score is grounds for termination.

14 MR. WORTHINGTON: There is nothing that I'm
15 aware of certainly that would allow a manufacturer or an
16 administrative law judge to find that where your score
17 ranks in comparison to other dealers is the grounds for
18 termination.

19 Now, if there was evidence otherwise that you
20 were poorly performing, you had poor scores, perhaps, but
21 that is not the case here. And you know, the fact that
22 after two weeks of testimony we have to have edited
23 comments introduced -- I have to shed some light on what's
24 going on with extraordinary scores, we were extraordinary
25 on SOA scale period, there is no ranking scale that exists

1 in Texas law anywhere, or that we found in any Texas
2 opinion anywhere, and it's certainly not in the franchise
3 agreement.

4 MR. BACARISSE: Member Prewitt, you have a
5 question?

6 MR. PREWITT: Yes, sir.

7 On the Bates Nissan precedent, was that brought
8 into arguments before SOAH?

9 MR. WORTHINGTON: Not on that issue. Bates
10 Nissan dealt with at least the MSR score of Bates Nissan,
11 so Bates Nissan had a very low MSR percentage, but had
12 increasing sales. It wasn't terminated.

13 Much like, under that issue, Bert Ogden Subaru,
14 it is true in the Rio Grande Valley, the MSR percentage,
15 based on a formula calculated by Subaru, was not 100
16 percent, but it is also true Bert Ogden Subaru was told
17 this is a long-term goal, we do not expect compliance.
18 And then it is used as a basis for termination,
19 nevertheless.

20 And so like Bates Nissan, which wasn't
21 terminated, our sales are even stronger, both in terms of
22 revenue and in terms of percentage of actual cars sold
23 during that period. This was not a circumstance where we
24 get the notice of termination, we go from losing sales,
25 losing sales, to suddenly making; 2017 to 2021 it

1 increases every single year.

2 MS. OMUMU: Mr. Chairman, I have a question.

3 MR. BACARISSE: Member Omumu, you have a
4 question.

5 MS. OMUMU: During those years of increased
6 sales, you mentioned that every vehicle that was allocated
7 to the dealership they sold. Right?

8 MR. WORTHINGTON: Yes, ma'am.

9 MS. OMUMU: So their turn rates were basically
10 100 percent during that time period.

11 MR. WORTHINGTON: No, ma'am. So the turn rate
12 was below the district average. The issue was even if
13 Bert Ogden had sold at the turn rate, they still wouldn't
14 have met the sales performance agreement. That is the
15 issue here.

16 So while it is true, the sales performance
17 agreement, which was one of the franchise basis for
18 termination, had numbers assigned by SOA that simply
19 couldn't be achieved.

20 MR. BACARISSE: Member Scott.

21 MR. SCOTT: Thank you.

22 I'm looking at the ALJs' analysis summary, and
23 it's number 5. It says Bert Ogden had inadequate service,
24 parts, equipment and personnel in relationship to other
25 dealers.

1 Is there something specific in the franchise
2 agreement that addresses the need to have in relationship
3 to other dealers? That seems pretty vague and nebulous.

4 MR. WORTHINGTON: There is no such requirement.
5 And in fact, in judging adequacy -- and that's one of our
6 complaints here -- the equipment, we had over 20 bays and
7 service slips, over 20. We had a completely equipped
8 service shop.

9 The ALJs found, though, it was the value on a
10 balance sheet that mattered for adequacy, not that we
11 actually had them, which, you know, that's again the form
12 over substance that we talked about.

13 MR. SCOTT: So if you have them, why are they
14 not on the balance sheet?

15 MR. WORTHINGTON: Well, how they were accounted
16 for, Commissioner, to be honest, whether they were
17 depreciated, whether they were on a different balance
18 sheet, I simply don't know, the record isn't clear, but
19 regardless, the store had the equipment, and it was fully
20 active, and that is in the record.

21 Exhibit 303, for example, contains a list of
22 the equipment and the value.

23 MR. SCOTT: Yeah, I just see that in
24 relationship to other dealers.

25 MR. WORTHINGTON: Right. It is no direct

1 evidence comparing our adequacy to other dealers other
2 than their value on a balance sheet versus our value on a
3 balance sheet. That has nothing to do in the real world
4 with the actual adequacy of your equipment.

5 MR. SCOTT: But there is nothing in the dealer
6 agreement --

7 MR. WORTHINGTON: There is not.

8 MR. SCOTT: -- or the operating guidelines
9 that addresses relationship to other dealers.

10 MR. WORTHINGTON: That's true.

11 MR. SCOTT: Thank you.

12 MR. BACARISSE: Member Prewitt.

13 MR. PREWITT: I want to ask a question, but I
14 want to ask our counsel if it's okay if I ask a question
15 about service history of the dealership in terms of the
16 performance on warranty work. Is it okay to ask that?

17 MS. AUCOIN: Aline Aucoin, associate general
18 counsel for Texas Department of Motor Vehicles, for the
19 record.

20 So you're allowed to ask any question that you
21 want; however, if you are asking about something that is
22 outside of SOAH's administrative record, the parties
23 should say that question asks about something that is
24 outside of the SOAH administrative record, and the parties
25 shouldn't answer that question because we don't want to

1 introduce any facts that are outside the record or any
2 evidence that is outside the record.

3 MR. PREWITT: Okay. Well, I'll ask the
4 question.

5 So the question is did you submit to SOAH the
6 average turnaround time on warranty work provided to
7 customers that had Subarus in terms of number of days,
8 hours, what-have-you.

9 MR. WORTHINGTON: So, Commissioner, that isn't
10 in the record. What is in the record is there was nothing
11 that indicated we weren't providing warranty work that
12 should be provided. I don't recall there being something
13 specific about five days, ten days, et cetera.

14 MR. PREWITT: And is there a measure how that
15 compared to other dealerships within SOA's territory that
16 they grouped you into?

17 MR. WORTHINGTON: Likewise, that isn't in the
18 record.

19 MR. PREWITT: Okay. Thank you.

20 MR. BACARISSE: Members, any other questions.
21 Member Graham?

22 MR. GRAHAM: If this isn't in the record, just
23 please tell me. First question, real estate that's owned
24 by the dealership is owned by a family trust.

25 MR. WORTHINGTON: That's correct, yes, sir.

1 MR. GRAHAM: Are the Vackars a part of that
2 family trust?

3 MR. WORTHINGTON: They are, yes, sir.

4 MR. GRAHAM: Okay.

5 MR. WORTHINGTON: Yes, sir. And that includes,
6 for example, there was a massive parking lot expansion --
7 that's in the record with regard to the expense -- done in
8 connection with the store; we'll have a large parking lot.

9 But you know, the way that was accounted for --
10 you know, I'll defer to their accountants, but it is true,
11 I believe that is owned by the family trust, but it's the
12 Vackars, the Vackar family. This is a family-owned
13 business, from the real estate to the franchises.

14 MR. GRAHAM: Okay. I'm going to have some
15 questions later trying to get my head around investments
16 and obligations and that discussion, but at this time I
17 think I'm okay.

18 MR. WORTHINGTON: We'd certainly like those,
19 Commissioner.

20 MR. SCOTT: One further question, if I could.

21 MR. BACARISSE: Member Scott.

22 MR. SCOTT: Addressing what Member Graham just
23 brought up, the ownership of the property is owned by the
24 family trust.

25 MR. WORTHINGTON: That's correct, yes, sir.

1 MR. SCOTT: Has that ownership always been the
2 same?

3 MR. WORTHINGTON: Commissioner Scott, I don't
4 believe the full history of the ownership is in the
5 record. It's currently owned by the family trust.
6 There's no evidence that it wasn't, but I don't know that
7 there's evidence that specifically speaks to the issue.

8 MR. SCOTT: There's no evidence that the
9 ownership changed.

10 MR. WORTHINGTON: That it was never owned by
11 anyone else other than the family members. Whether the
12 percentages moved between Mr. Vackar's sister-in-law and
13 his wife and him or a trust for his daughter, that is
14 possible, but it wouldn't change the overall concept that
15 it's a family owned trust.

16 MR. SCOTT: Thank you.

17 MR. BACARISSE: Members, any other questions of
18 Mr. Worthington? Member Gillman.

19 MS. GILLMAN: Forgive me. I know it's in the
20 record somewhere; you'll have to help me, Rob, maybe.
21 Number 33 in the finding of facts says the MSR in 2017 was
22 860.

23 MR. WORTHINGTON: OLP.

24 MS. GILLMAN: No. Number 33 says, In 2017 the
25 sales performance addendum, Bert Ogden's MSR was 860

1 vehicles, and it sold 359.

2 MR. WORTHINGTON: Commissioner Gillman, I think
3 I understand the confusion. That number is off a sales
4 performance addendum that had certain numbers set out;
5 that is, it was no longer a -- you had to sell a certain
6 number of cars to comply with the sales performance
7 agreement.

8 And the information we provided to the ALJs,
9 you can see, we didn't achieve 864, though we were
10 increasing every year, and though we sold every car we
11 were given to sell, we respectfully suggest that the
12 evidence supports that even if we had sold at the district
13 average turn rate -- that, by the way, was discussed by
14 Mr. Adams in the record, one of the Subaru employees -- we
15 would not have achieved the sales performance addendum
16 numbers. We might have been higher; we still would have
17 been below.

18 MS. GILLMAN: I think my question is the sales
19 performance addendum said that they were supposed to reach
20 50 percent of MSR for that one year. Am I correct in
21 saying that 860 was MSR, but to reach 50 percent I just
22 take 50 percent of that number to reach 430?

23 MR. WORTHINGTON: Commissioner Gillman, I won't
24 pretend to guess and mislead you. There is evidence in
25 the record, and we will get it for you, where we have a

1 chart in our exceptions which show what the specific
2 number in the sales performance addendum required and what
3 we actually sold. And we can get that for you, ma'am,
4 certainly before we wrap up today. But that evidence is
5 in the record, that is you must sell X and you sold Y, we
6 have that, yes, ma'am.

7 MS. GILLMAN: That is what I'm asking to see if
8 it's here, if it's in the record.

9 MR. WORTHINGTON: Yes, ma'am, and it is. The
10 slight difference is the performance agreement addendum is
11 like a June to a July, right, and so you get one number
12 and then there's a January to December number, the way
13 they were tracking end-of-year sales.

14 The performance agreement was sort of a midyear
15 to midyear. So you'll see the numbers slightly different,
16 but it has to do with the calendar dates within which
17 those sales are counted. But that's certainly in the
18 record, and I will provide you with the chart, the page
19 number in our exceptions which identify that.

20 MS. GILLMAN: So why was the bar objective to
21 sell more -- maybe this is not a question to you -- more
22 than cars received?

23 MR. WORTHINGTON: So Subaru of America in 2017
24 approached Bert Ogden and said if you want another
25 franchise agreement, here's this sales performance

1 addendum. This proceeding -- which was, again, certainly
2 new to Mr. Vackar in 50 years of being a car dealer -- was
3 known enough to be something that if we could avoid it, we
4 would avoid it.

5 There was no option, there was no negotiating
6 the sales performance number. It was the number that we
7 were given, you know, the offer you can't refuse. And we
8 sold all the cars we were given, we sold them as quickly
9 as we could, we met staffing requirements.

10 Commissioner Gillman, we have 20 lift bays for
11 a store that size, 20. I suspect we are four or five
12 times the district average for stores this size.

13 MS. GILLMAN: Final question is do you know how
14 many dealers in the DFW zone were below in MSR, below
15 average?

16 MR. WORTHINGTON: That is in the record. I
17 don't know the precise number; it is well more than half.

18 MS. GILLMAN: Half of the dealers --

19 MR. WORTHINGTON: Yes, ma'am.

20 MS. GILLMAN: -- are below MSR.

21 MR. WORTHINGTON: More than half. Yes, ma'am.

22 MS. GILLMAN: So in Texas law, what does the
23 law say with regard to half the dealers are below? Is
24 there any statute or code that addresses?

25 MR. WORTHINGTON: To my knowledge --

1 (Mr. Clouatre spoke from audience; inaudible.)

2 MR. WORTHINGTON: Well, and we'll address that.

3 MR. BACARISSE: In order to get that on the
4 record, we'll do that in a minute, but thank you.

5 MR. WORTHINGTON: And we can address that
6 comment in just a moment.

7 But to answer your question, there's nothing
8 other than the fact that it deals with compliance with the
9 franchise of which I'm aware.

10 Now, in this case, the ALJs didn't specifically
11 find breach of MSR is a breach of the franchise. They
12 relied on the sales performance addendum with regard to
13 car sales. But the Bates Nissan case is the case where
14 there was a dealer -- it wasn't called MSR; Nissan has
15 another name for it -- but they were well below 100, 41
16 percent, I believe, and they were not terminated.

17 MR. GRAHAM: I want to just --

18 MR. BACARISSE: Hold on just a moment. I'm
19 sorry, Mr. Graham. Member Omumu, and then I'll come to
20 you.

21 MR. GRAHAM: Okay, that's fine.

22 MR. BACARISSE: Member Gillman, are you
23 finished for the moment?

24 MS. GILLMAN: Yes.

25 MR. BACARISSE: Okay. I don't want to cut you

1 off. Thank you.

2 Member Omumu.

3 MS. OMUMU: Prior to the notice of termination,
4 did Subaru of America send any other formal written
5 communication to the dealer?

6 MR. WORTHINGTON: No, ma'am. The only argument
7 that Subaru of America has made with regard to an
8 opportunity to cure is the sales performance addendum.
9 It's the chicken and the egg. Right?

10 But the sales performance agreement becomes the
11 basis for breaching the franchise, and so for example,
12 there were no letters sent -- we discussed that in the
13 hearing -- providing an opportunity to cure, save and
14 except for to the extent that the sales performance
15 addendum is such a notice. Again, there's no notice to
16 cure the sales performance addendum, but that's what the
17 record reflects.

18 MS. OMUMU: Thank you.

19 MR. BACARISSE: Member Graham, did you have a
20 question?

21 MR. GRAHAM: So I've been digging around
22 through my notes, which I have about more than I can
23 count, and I am struggling to find something that I'm
24 recalling, so I'd like to ask you about it and shed some
25 light on it.

1 I recall the ALJs -- I can't remember it was
2 somewhere in the PFD; it seems like I recall them implying
3 that because you had missed your goals in year one, it
4 essentially meant you weren't going to reach your goals in
5 two or three.

6 MR. WORTHINGTON: Correct. But there's no
7 actual computation. Right? What the ALJs said was -- I'm
8 going to paraphrase -- it seems to us that if they had --
9 let me back up.

10 The idea is that if you sell more in year one,
11 you're allocated more in year two, and then if you sell
12 more in year two, you're allocated more in year three. So
13 once you miss year one, you're so far behind the eight-
14 ball that you can never catch up to the other years.

15 But there's evidence in the record that even if
16 Bert Ogden had sold at the average turn rate in the
17 district, it would not have achieved the sales performance
18 addendum numbers.

19 But yes, that has to do with you turn more, you
20 earn more, and then as you earn more you continue to turn
21 faster and faster and that number increases. That's true.

22 MR. GRAHAM: Thank you.

23 MR. BACARISSE: Members, any other questions of
24 Mr. Worthington?

25 MS. GILLMAN: I've got a question.

1 MR. BACARISSE: Member Gillman.

2 MS. GILLMAN: I think it was -- I can't
3 remember which -- number 87 in the findings of fact.
4 Number 87 says, Although by the third year of the sales
5 performance addendum Bert Ogden did not have sufficient
6 vehicles to reach these sales requirements. And I think
7 in the third year was also 2020.

8 MR. WORTHINGTON: Yes, ma'am, COVID.

9 MS. GILLMAN: And so I'm asking they didn't
10 have sufficient vehicles to reach the requirement as the
11 finding of fact says, and it was COVID, was there ever --
12 and maybe this is not in the record, uh-oh -- was there
13 ever an attempt to modify, extend, because of these two
14 facts, not enough vehicles and COVID. And I say COVID,
15 because staffing and staying open for business and things
16 like that was a real --

17 MR. WORTHINGTON: Turnover.

18 MS. GILLMAN: -- was a real factor.

19 MR. WORTHINGTON: Yes, ma'am.

20 MS. GILLMAN: Was there ever a request by Bert
21 Ogden Subaru to amend, modify, extend because of those two
22 circumstances in the third year?

23 MR. WORTHINGTON: So, Commissioner, the record
24 is clear there were repeated conversations. However, I
25 don't want to represent, as I sit here, that the contents

1 of the conversations that are in the record are specific
2 enough to address a COVID extension or something to that
3 effect.

4 The record does show that there were continued
5 requests for inventory, but with regard to something
6 particular relating to COVID, I don't recall that being in
7 the record.

8 MS. GILLMAN: Okay.

9 MR. WORTHINGTON: Thank you.

10 MR. BACARISSE: Members, any other questions?

11 (No response.)

12 MR. BACARISSE: Seeing none at this moment, I
13 would -- before we bring the other respondents up, if I
14 may request about a five-minute break, I'd appreciate it.
15 Thank you. We will recess. It is now 10:08, so we'll
16 come back in five minutes at 10:13. Thank you.

17 (Whereupon, a brief recess was taken.)

18 MR. BACARISSE: For the record, it is now 10:16
19 in the morning, and we are reconvening this contested case
20 hearing, and I believe all Board members have returned now
21 so we can proceed.

22 MR. CLOUATRE: Thank you, Chairman Bacarisse.

23 My name is Mark Clouatre, and along with Steve
24 McFarland, we represent Respondent in this case, Subaru of
25 America. We're joined today with Tara de la Corte -- she

1 is assistant general counsel with Subaru -- and also Dave
2 Adams, who is zone manager for Subaru of America.

3 MR. BACARISSE: Mr. Cloutre, will you do the
4 Board a favor -- and thank you for kindly pointing out the
5 item that was in the record. Would you just reference
6 that now for the record? And I'm not going to take away
7 from your time to do that, but we want to get that read
8 into the record properly.

9 MR. CLOUATRE: Yes. It's in Exhibit 188. It
10 shows 72 percent of the dealers in the DFW zone achieved
11 100 percent or more MSR. That equates to 31 of 43.

12 MR. BACARISSE: Okay. Thank you. Please
13 continue.

14 MR. CLOUATRE: I'd like to first go through the
15 good cause factors, and I'll do my best to attempt to
16 address some of the questions that were raised during
17 questioning a few minutes ago.

18 Let's talk about the first factor for Bert
19 Ogden's sales in relation to the market. A couple of
20 things I think were pointed that are important.

21 Bert Ogden has been in this market since 2009.
22 Over that time it's never come close to meeting its sales
23 performance requirements. In fact, Bert Ogden failed to
24 achieve even 50 percent of those since 2016, and it's been
25 the very worst performing retail in the DFW zone since

1 then.

2 The DFW zone consists of about 44 dealers I
3 want to say in four or five states. And a good exhibit to
4 look there in the records is Exhibit 188 at page 43.
5 That's in the SOAH administrative record.

6 To afford Bert Ogden an opportunity to cure its
7 ongoing sales issues, it approached Bert Ogden in 2014 and
8 actually did a sales performance addendum in 2014. Bert
9 Ogden signed it; unfortunately, Bert Ogden didn't meet it.
10 But it wasn't up and out.

11 Again, we're talking a dealer that's been in
12 the market since 2009, and contrary to something that was
13 said earlier, there was tons of correspondence from Subaru
14 to the dealer and the dealer back to Subaru over the years
15 relative to sales performance, so it wasn't simply a
16 "gotcha" moment, as I think it was described.

17 So to afford another opportunity, Subaru
18 approached Bert Ogden in 2017 and did another sales
19 addendum with the dealership, but this time it gave them a
20 reduced sales goal. It wasn't 100 percent of MSR; instead
21 it was 50 percent of MSR in the first year, 60 in the
22 second, and 70 in the third, and Bert Ogden didn't meet
23 those goals.

24 And I know there was a question asked about
25 COVID and its impact on that period. It's true COVID

1 impacted probably the last three to four months of that
2 period. The 2017 sales addendum ended at the end of June
3 2020. And for the record, there was no request by the
4 dealership to extend the period.

5 In reference to MSR, let's talk about the Bates
6 Nissan case that was brought up. Yes, that was a low-
7 performing dealer, yes, that dealership was not terminated
8 by this Board, but salient here is the fact that MSR was
9 still found to be reasonable.

10 The problem in the Bates Nissan case for Nissan
11 was that they used a region standard of 13 different
12 states. In this case we used District 3, which is a
13 subset of the DFW zone which is not even the size of the
14 state of Texas. So in other words, instead of comparing
15 Bert Ogden to dealers in 13 states, we instead used a more
16 localized standard, that being District 3.

17 Let's talk a little bit about factor 3, injury
18 or benefit to the public. There was much made in the
19 proposal for decision about the OLP program, the Owner
20 Loyalty Program. And it's true, Bert Ogden's scores were
21 scored at the extraordinary level.

22 The point that was missing in the prior
23 presentation was that if you look at yourself -- you know,
24 my mom always told me in the morning, You look
25 extraordinary, you look great. But when I went to class I

1 knew I was just another member of the class; I wasn't
2 anything extraordinary. And that's exactly the
3 circumstance if everybody is judged by just looking at the
4 score itself. Instead, when you rank those scores, that's
5 where the information becomes pertinent relevant to
6 operations.

7 Now, if this was a one-off kind of situation
8 when the dealership was only performing at the bottom of
9 the barrel one month out of every year, that might be
10 something different.

11 As the ALJs found here, this was consistently
12 low OLP rankings, month-in, month-out. For example, from
13 2017 to 2021, Bert Ogden ranked either last or in the
14 bottom three of all DFW zone dealers. So I don't think
15 it's fair to look at the scores in isolation just looking
16 in the mirror; instead you need to look at how you appear
17 to the class.

18 There were also comments made in the prior
19 presentation about how it was unfair that only negative
20 comments were admitted. That wasn't the case. Certainly
21 the dealership had the opportunity and in fact did offer
22 positive consumer comments. Those can be found at Exhibit
23 84, and those positive comments were admitted into the
24 record. So the perception that it was an unbalanced
25 presentation is inaccurate on that point.

1 I'd like to turn to factor 4, the adequacy of
2 the equipment, parts, and personnel. I know Director
3 Scott had a question about this. And the way the statute
4 is written is how the evidence was presented in this case.

5 The way it's written is not just looking at their service
6 equipment, parts, and personnel, again in the mirror
7 itself. Instead the statute expressly says in relation to
8 those of other dealers of new motor vehicles of the same
9 line make.

10 So the only evidence that the ALJs had to go on
11 was the evidence of Subaru's expert. There was no
12 contradictory evidence presented about how their parts and
13 service equipment and personnel compared to others in
14 relation to the market, and that's what the statutory good
15 cause factor says.

16 And what the evidence showed was that Bert
17 Ogden's parts inventory was woefully inadequate. In 2019,
18 for example, similarly sized retailers in the zone
19 reported having an average of \$48 in parts per vehicle in
20 operation; Bert Ogden, on the other hand, had \$5. That
21 can be seen in the PFD, the proposal for decision, on page
22 56.

23 Similarly, with respect to Subaru's service
24 equipment, Bert Ogden reported less than one-sixtieth
25 worth of equipment at cost in December 2020, in comparison

1 to other dealers Subaru vehicle equipment, and that's in
2 the PFD at page 56. So while I know there was
3 consternation about the way that perhaps PFD was drafted,
4 it was following the statutory good cause factor in that
5 situation.

6 Let's talk about factor 6, the parties'
7 compliance with the dealer agreement. I think it was
8 admitted earlier today when discussing this factor that
9 the ALJs also found that the sales performance addendum --
10 the 2017 addendum was the addendum that was not adhered
11 to, and that's SOAH administrative Exhibit 12, just for
12 the record.

13 All right. Let's go into some of the specific
14 complaints that were made earlier. First off, let's talk
15 about the fact that MSR was aspirational in nature and
16 that Subaru didn't allocate enough vehicles for the
17 dealership to meet MSR. That's not the case, and that's
18 not what the evidence bore out.

19 First off, Bert Ogden did ask for more
20 inventory. Subaru responded, Subaru responded by giving
21 them nearly 500 units in discretionary allocation over the
22 time period. That's the third most percent of allocation
23 of any dealer in the zone.

24 The problem was they didn't turn those vehicles
25 to earn additional vehicles. Under an allocation system

1 such as Subaru -- and frankly, which is prevalent in most
2 of the automotive industry -- it's a turn-and-earn system.

3 You need to sell the vehicles to get another one.

4 Well, the evidence showed that the turn rate of
5 the dealership was much slower than other dealers in the
6 zone, thus not entitling it to additional product. The
7 evidence showed that their sales to availability -- in
8 other words, how much available product they had to sell
9 was much lower than other dealers in the zone, thus not
10 entitling them to additional product.

11 The ALJs commented in the PFD that Subaru can't
12 be expected to create an idiosyncratic allocation system
13 for one dealer. That would be unfair to the rest of the
14 dealer body, and I imagine we'd get a few comments about
15 that.

16 And there was also evidence presented by the
17 expert witnesses of a dealer in the Houston area that was
18 below MSR that worked to increase its sales, which in turn
19 increased its allocation, such that it went from about a
20 90 percent performer to about 110 percent MSR performer.
21 So to the extent there's arguments about it's unfair that
22 there wasn't enough product, I think in that situation the
23 dealership does need to look in the mirror.

24 Let's talk about the fact of the argument that
25 Subaru has never had a successful dealer in the Valley.

1 It's true prior to 2009 there were multiple dealers who
2 either were terminated or sold or gave up their
3 dealership. Bert Ogden came in in 2009 and has been that
4 dealer for the last 13 or so years. But I think what you
5 need to look at and what the evidence looked at and the
6 ALJs decided was what happened post 2009.

7 Overall economic conditions in the Rio Grande
8 Valley have changed considerably. It's booming in terms
9 of economic opportunity was some of the testimony. In
10 2020 alone there were 19,465 new vehicles registered in
11 this area of responsibility, and anybody that's ever been
12 down there, there's dealerships of every line and make.

13 Apparently even Mr. Vackar agrees with that.
14 He testified that this area is "growing by leaps and
15 bounds." He testified that he believes in the quality of
16 the Subaru vehicles and thinks they are a great product.

17 He even testified that the dealership's poor
18 performance was not the result of economic conditions in
19 the market but was solely a matter of not having the
20 inventory. He even acknowledged he wants to open a second
21 point, not any second point, but a second Subaru point in
22 the Valley, and he's willing to invest millions in that
23 facility. In fact, he said he felt his dealerships
24 collectively could sell more than 120 Subaru vehicles a
25 month.

1 Let's talk about what's happened in the Subaru
2 brand since 2009. Bert Ogden's own expert testified that
3 years ago Subaru was considered more of a niche product
4 but has since become a mass market brand and one of the
5 fastest growing.

6 By way of background, Subaru has increased its
7 sales in the last decade or so. In 2009 there were
8 approximately 7,500 Subarus sold in the DFW zone, but by
9 2019 there were 45,000, some increase of 37,000. And
10 through 2019 the Subaru brand experienced 12 consecutive
11 years of growth.

12 Now, Subaru submits that whatever occurred
13 prior to Bert Ogden coming in doesn't bear as much
14 relevance given the change in not only the local market
15 but the Subaru brand.

16 Certainly Subaru appreciates, and as the ALJs
17 found, Mr. Ogden and his wife's donations to the community
18 laudable, definitely, but as the ALJs found, they couldn't
19 be considered part of the investment in this dealership,
20 and to Mr. Graham's question about how is the property
21 owned, it's owned by a trust, and the trustee is Kristan
22 Vackar McCullough, and Dan may correct me, but I think
23 that's a sister-in-law. Mr. and Mrs. Vackar I don't
24 believe have ownership in the trust, at least that's in
25 evidence.

1 MR. WORTHINGTON: I will correct you, Mr.
2 Clouatre. That's the daughter.

3 MR. CLOUATRE: Thank you.

4 MR. WORTHINGTON: Mr. Vackar is the trustee.

5 MR. CLOUATRE: I stand corrected. And that's
6 Exhibit 309, and also it can be found in Volume 7 of the
7 transcript at page 1942.

8 Let's talk quickly and briefly in closing about
9 the demographics. There was argument about, well, perhaps
10 the market is too poor, too uneducated, too Latino to sell
11 Subaru products.

12 That certainly flies in the face of Mr.
13 Vackar's testimony, and it certainly flies in the face of
14 the regression analysis presented by Bert Ogden's own
15 expert, which showed no causal connection.

16 In fact, Subaru's expert put up chart after
17 chart showing greater achievement MSR in markets with even
18 less education and less income, and certainly there is an
19 interest in this market given the wide number of brands,
20 including Mr. Ogden, he said himself, the super luxury
21 brands, and certainly those are sellable, Subarus should
22 be too.

23 In conclusion, all the evidence showed that
24 Subaru did not take termination proceedings lightly.
25 Given the multiple years of counseling and significantly

1 reduced performance requirements, Bert Ogden's consistent
2 and material performance deficiencies in terms of sales
3 and customer satisfaction left Subaru with no alternative
4 than to pursue the termination of Bert Ogden's dealer
5 agreement.

6 As the ALJs found good cause in their proposed
7 decision, Subaru respectfully requests that you adopt that
8 decision as the Board's own and deny the protest and
9 permit the termination of the dealer agreement.

10 Thank you.

11 MR. BACARISSE: Thank you.

12 Vice Chair McRae, you have a question?

13 MS. McRAE: I do. I want to go back to the
14 notice of termination. It was stated earlier that there
15 was not any notification or communication prior to the
16 notice of termination that was received, and then you just
17 stated that there was multiple communication. Can you go
18 into more detail about that?

19 MR. CLOUATRE: Yes. Well, prior to the
20 issuance in August 2020 of the notice of termination,
21 there had been months, if not years, of correspondence.
22 It goes back to 2014, which was the first sales
23 performance addendum that was executed between the
24 parties.

25 It then continued all the way up to 2017 when

1 that subsequent performance addendum was executed by the
2 parties. And during every month that that 2017 addendum
3 was in effect, Subaru sent a letter to the dealership, all
4 of which are admitted records in the SOAH -- I don't have
5 those exhibits with me but I can -- describing not only
6 the benchmark but also the percent achievement or
7 adherence to that benchmark and offering Subaru's
8 services. So the fact that this is a "gotcha" is frankly
9 surprising; it shouldn't have been a surprise.

10 MS. McRAE: Thank you.

11 MR. BACARISSE: Any other members? Mr.
12 Prewitt.

13 MR. PREWITT: Yes, sir. You mentioned that
14 there were multiple years of counseling, and in this
15 comment you just made you said there was months of
16 correspondence. Do you equate correspondence with
17 counseling?

18 MR. CLOUATRE: I do. And Mr. Prewitt,
19 Chairperson Prewitt, I would add that there was also
20 multiple, multiple, multiple visits by Subaru's personnel.

21 MR. PREWITT: On site?

22 MR. CLOUATRE: Absolutely.

23 MR. PREWITT: And was that a part of the record
24 in the SOAH court?

25 MR. CLOUATRE: Absolutely. There were multiple

1 district managers, both sales, service and parts, that
2 testified.

3 MR. PREWITT: And then also, was it in the
4 record whether Subaru of America invested in Hispanic
5 specific advertising for that market in Pharr?

6 MR. CLOUATRE: So to go into that a little bit,
7 there was a pilot program that was done. The pilot
8 program included San Antonio and included some other
9 markets; the pilot program did not include McAllen.

10 MR. PREWITT: And why not?

11 MR. CLOUATRE: It was simply -- I'm trying to
12 think if this was in the record -- it wasn't intentional
13 or an oversight or anything, they just picked their
14 markets and they went with it.

15 MR. PREWITT: Who picked those markets, SOAH?

16 MR. CLOUATRE: Oh, no, no, no. Subaru did.

17 MR. PREWITT: Subaru of America did that?

18 MR. CLOUATRE: Correct.

19 MR. PREWITT: So to follow up on that, so if I
20 may, you give consistent counseling, made site visits but
21 when you had a program for Hispanic specific advertising,
22 when over 80 percent of their market is Hispanic, somehow
23 they didn't get to take advantage of that. That doesn't
24 seem consistent to me.

25 MR. CLOUATRE: And I would respectfully

1 disagree with the assessment of what the record evidence
2 showed.

3 MR. PREWITT: Okay.

4 MR. CLOUATRE: It was a pilot program that was
5 eventually rolled out to a national program. And to the
6 extent that Bert Ogden truly believed that Hispanic
7 customers were important, they would have placed its own
8 money in that.

9 Subaru has a program called the Subaru
10 Advertising Fund Program, and for each vehicle a retailer
11 sells, retailers are provided an amount that they can use
12 those funds for advertising as they see fit, including for
13 foreign language advertisements.

14 The evidence here shows from 2017 through 2019,
15 Bert Ogden spent none of its SAF money on Spanish language
16 advertising, and that's Exhibit 16 -- or excuse me -- 161.

17 Further, they spent -- and if you look at the whole
18 period from 2014 to 2021, they spent \$61,000 of SAF funds
19 on Spanish advertising. That's in the same Exhibit 161.

20 In fact, at transcript Volume 8 at page 2162,
21 Mr. Vackar testified that Spanish language television ads,
22 he didn't budget any money for them because "it's
23 ineffective" and would "waste the money."

24 So I think, again, you have to look at both
25 sides of the issue.

1 MR. PREWITT: Okay.

2 MR. BACARISSE: If I may interrupt, Mr.
3 Worthington, do you have an item that you wish to correct?

4 MR. WORTHINGTON: I do, Mr. Chairman.

5 MR. BACARISSE: With allowances, I'd like to
6 just get that on the record.

7 MR. WORTHINGTON: Commissioner, with regard to
8 your question about the pilot program --

9 MR. PREWITT: And my correct handle would be
10 Board Member, not Commissioner.

11 MR. WORTHINGTON: I apologize. I don't know if
12 I promoted you or demoted you, but I apologize.

13 Board Member, Mr. Vackar asked to be included
14 in the pilot program and was rejected, so this wasn't just
15 we didn't think to include him, he requested it.

16 And with regard to the testimony regarding
17 Spanish language advertising, it is true that most of the
18 Spanish language advertising, the record will reflect, is
19 done through social media, online, et cetera. That is the
20 changing nature during this period. But we did request to
21 be included in the pilot program, and that's the point I
22 want to make.

23 MR. BACARISSE: Please continue. Member McRae
24 had a follow-up, and then, Member Scott, I'll come to you.

25 MS. McRAE: I want to go back to the notice of

1 termination. I think Member Prewitt said that one of his
2 questions about the counseling, so throughout this time
3 period you counseled with Bert Ogden, was there ever a
4 warning that if you don't meet this, you are going to be
5 terminated? Was that specifically stated at any point in
6 time to them?

7 MR. CLOUATRE: I don't have the 2017 sales
8 performance addendum right here -- it's Exhibit 12. I do
9 believe it certainly said, and the dealership agreed, that
10 not meeting 100 percent was a material breach of the
11 dealer agreement. What I'm not recalling exactly right
12 now is if it said to the extent it isn't met, Subaru will
13 review its remedies.

14 MR. WORTHINGTON: Board Member --

15 MR. BACARISSE: Step up to the mic. Did you
16 have something to correct in the record?

17 MR. WORTHINGTON: I do to supplement the
18 record. The record does not show any letters where there
19 was a termination threatened. What there is in the
20 addendum to the contract that was attached -- that is the
21 basis for the termination, the ALJs said -- if you don't
22 meet these numbers it's a material breach.

23 But there's not a notice letter on any of these
24 issues that say you don't have enough employees, you don't
25 have enough parts and inventory, et cetera, you may be

1 terminated. That doesn't exist, that didn't occur.

2 MR. BACARISSE: Mr. Clouatre.

3 I must thank both counsel for your
4 professionalism this morning. Thank you.

5 MR. CLOUATRE: Thank you.

6 MR. BACARISSE: Member Scott has a question.

7 MR. SCOTT: I want to circle back just a second
8 on the ownership situation.

9 MR. CLOUATRE: Yes, sir.

10 MR. SCOTT: Do you know if that ownership has
11 remained consistent throughout the term?

12 MR. CLOUATRE: I don't believe it was in the
13 record. I'm not trying to hide it. I just don't think it
14 was in the record.

15 MR. SCOTT: So I'm looking here at factor 6:
16 Bert Ogden failed to comply with Subaru's staffing
17 requirements, including those requiring exclusive sales
18 staff and service staff, as well as a requirement for a
19 certain number of sales consultants.

20 I think there's something here about the fact
21 that they didn't have an exclusive sales manager and so
22 forth. So when did that -- when Bert Ogden was granted
23 the franchise, it was a dual facility. It had more than
24 one franchise, and they were sharing service and so forth.
25 When did the requirement for an exclusive service manager

1 come into play?

2 MR. CLOUATRE: I'm not sure that's in the
3 record. Let me tell you what I do know that's in the
4 record. My colleague across the aisle, Dan, referred to
5 something called an MSOG -- which is probably the worst
6 acronym I've ever heard -- it's called minimum standards
7 and operating guidelines, and in that it's a chart
8 essentially.

9 MR. SCOTT: Yeah, I have a copy of it here.

10 MR. CLOUATRE: Okay, great. So for at least
11 for 2017 through 2021, the window we were looking at, they
12 never employed a Subaru exclusive service manager or
13 exclusive service advisor, as required.

14 MR. SCOTT: Okay. So I'm looking at the June
15 '17 MSOG. It says: Service manager designation, Subaru
16 has it marked here as exclusive, and they also have marked
17 exclusive service advisor. But I looked down and there's
18 some notes at the bottom down there, and note number 9
19 says: Seven-year UIO of 2,250 or greater requires
20 exclusive or separate customer touch points.

21 And I go back up to the top and the UIO is
22 1,572, so the UIO is like 1,000 or 750 less than the
23 requirement for exclusive service manager and service
24 advisor. Why is that? Why does this state that you don't
25 have to be exclusive until this UIO count, but yet up here

1 they're dinged for not having it?

2 Question is, obviously when Bert Ogden got the
3 franchise, Subaru was well aware that they shared service
4 and shared service advisors and sales and so forth, but I
5 don't know the requirement that they had to have exclusive
6 ever got into play.

7 MR. CLOUATRE: And unfortunately, I can't
8 answer that question either. I do know that there were
9 multiple, multiple conversations documented throughout the
10 record about this exact issue, about the need to get
11 exclusivity.

12 MR. SCOTT: This is Subaru's own form, and I
13 guess this would be all Subaru dealers. I noticed in the
14 franchise agreement that the franchise agreement refers to
15 this MSOG, which makes this MSOG a part of the franchise
16 agreement. Is that correct?

17 MR. CLOUATRE: That's correct, it's
18 incorporated.

19 MR. SCOTT: So we have a measurement down here
20 that says we have to have exclusive if we have a UIO count
21 greater than this, but the UIO count for Bert Ogden is
22 less than that. How were they ever tasked or how were
23 they ever required to meet a standard that this form says
24 doesn't exist?

25 MR. CLOUATRE: Well, I'm going to go back to --

1 you're looking at factor 6. Correct?

2 MR. SCOTT: Yes.

3 MR. CLOUATRE: That is a good question.

4 Without all the MSOGs in front of me, I will admit that I
5 do not know the answer to that question.

6 MR. SCOTT: Okay. Thank you.

7 MR. BACARISSE: Members, any other questions?
8 Member McRae, and then I'll come to you, Member Graham.

9 MS. McRAE: I just have one question for
10 clarification. There's been a lot of comments about
11 ownership, and number 55 under the findings of fact says:
12 Bert Ogden does not own the property on which the
13 dealership is located, it subleases the property from the
14 Bert Ogden Group Mazda dealership. This lease term
15 extends through 2038.

16 Is Bert Ogden Mazda Group, is that the trust
17 that has been referenced?

18 MR. CLOUATRE: So getting back to Chairperson
19 Scott's comments, it's a dual dealership between Mazda,
20 Volvo, and Subaru. And so in other words, the record
21 supported this -- I'm going to back to the finding of fact
22 that it leases the Subaru part from the Mazda operation,
23 which would indicate to me if you own the property, you
24 wouldn't be leasing it. Right?

25 MS. McRAE: May I ask a question?

1 MR. BACARISSE: You have the floor. Go ahead.

2 MR. WORTHINGTON: Yes, ma'am, if I might. At
3 the inception of Bert Ogden Subaru, they provided a series
4 of locations to Subaru from which Subaru could agree or
5 disagree for this store. This store was placed in a
6 portion of a building; it is separated by a wall from the
7 Mazda store.

8 Mazda had signed an original lease with the
9 trust for the property, and so Bert Ogden Subaru signed a
10 sublease for a portion of the property from Mazda. And so
11 it was simply a case of Mazda having been there first and
12 having signed the original lease, and then Bert Ogden
13 Subaru signed a sublease with Mazda. It's not a co-
14 dealership that you used to see some dealerships. That is
15 not correct.

16 MS. McRAE: But the property itself is owned
17 by --

18 MR. WORTHINGTON: The trust.

19 MS. McRAE: -- the trust.

20 MR. WORTHINGTON: Yes, ma'am.

21 MR. BACARISSE: And they leased it from the
22 trust.

23 MS. McRAE: And Mazda leases it and then Subaru
24 subleases.

25 MR. WORTHINGTON: Yes, ma'am.

1 MS. McRAE: Okay. Thank you.

2 MR. PREWITT: And the Subaru dealership does
3 have total control of their sublease of the property it's
4 own?

5 MR. WORTHINGTON: Total control.

6 MR. PREWITT: Thank you.

7 MR. WORTHINGTON: One thing I would point out,
8 incidentally -- I was going to ask permission to
9 address -- with regard to the issue of the MSOG, if the
10 members will turn to page 143 of your briefing book, there
11 was testimony given by the general manager as to the
12 exclusivity requirement, who was exclusive, who occupied
13 the position.

14 Again, this is one of the form-over-substance
15 issues we raised earlier. We give you the name of the
16 individuals and whether they were exclusive or not. It is
17 true that they're not reflected on the MSOG but that's
18 simply, again, a form issue.

19 To the extent they were required at all --
20 Board Member Scott's question is a good one -- but to the
21 extent they were required, we gave the names, this is who
22 occupied the position, they were exclusive. Why they
23 weren't updated on the form, that isn't in the record.

24 (General discussion.)

25 MR. BACARISSE: Thank you. And I think Member

1 Graham had a question.

2 MR. GRAHAM: Thank you, Chairman.

3 So in regards to the parts inventory, the
4 analysis of the ALJs was pretty much entirely based on a
5 comparison of the parts inventory to other dealers.

6 Now, I saw one of the witnesses testified on
7 behalf of Subaru that they had -- correct me if I'm not
8 right, but I think I saw where there was a witness that
9 testified that Bert Ogden kept a 60- to 90-day supply, or
10 somewhere in that range is the reference. So in regards
11 to my question on adequacy, if that 60- to 90-day supply
12 wasn't adequate, if it's in the record, what was Subaru's
13 expectation of adequacy for parts inventory?

14 MR. CLOUATRE: I don't think it was in the
15 record, but I will refer you back to the language of the
16 good cause prong, and that's why the evidence was
17 presented, as Chairman Scott pointed out, in that way, and
18 there was no contradictory evidence to the contrary.

19 MR. GRAHAM: So I think what I just heard you
20 say was because the analysis was based on comparison,
21 there was really no discussion of adequacy in regards to
22 expectations.

23 MR. CLOUATRE: Except as framed by the Texas
24 Legislature in this good cause factor.

25 MR. GRAHAM: Okay.

1 MR. CLOUATRE: And just to add real quick.
2 Apologize. Perhaps was that 60- to 90-day reference in
3 regard to vehicles rather than parts? Because I know that
4 was the stated desire of his vehicle inventory.

5 MR. GRAHAM: I can get there pretty quick and
6 let's check that. I'm on the page, it is discussing
7 inventory, number 4, and that may be vehicle inventory but
8 let's find out. Page 37 of the PFD, can anybody see if
9 that discussion is on -- that may be on vehicles. MAUI
10 units, that would be vehicles. Right?

11 MR. CLOUATRE: That's right.

12 MR. GRAHAM: Well, that was sort of why that
13 was super confusing to me as to the inventory levels,
14 because that would be a significant amount of parts
15 inventory. But sounds like it was based on comparison.

16 Okay. Thank you. That's all I have.

17 MR. BACARISSE: Members, any other questions
18 for Mr. Cloutre? Yes, Member Omumu.

19 MS. OMUMU: So the dealer received a
20 discretionary allocation. If he was such a poor
21 performer, why did you award him these discretionary
22 units?

23 MR. CLOUATRE: MAUI units can be used, the
24 discretionary units -- one of the main purposes is to
25 assist underperforming dealers, and so in an effort to

1 further their performance, hoping that they would improve
2 performance, turn those vehicles, earn more, they could
3 stair-step their way up to compliance.

4 MS. GILLMAN: I have a question, if you're
5 finished.

6 MR. BACARISSE: Member Gillman.

7 Are you finished, Member Omumu?

8 MS. OMUMU: Yes.

9 MR. BACARISSE: Okay. Member Gillman.

10 MS. GILLMAN: Just to piggyback what Member
11 Omumu said, they received a lot of MAUI units. I don't
12 know exactly how many, but is it in the number allocated
13 on page 141, or is it in addition to?

14 MR. WORTHINGTON: No, ma'am. That number
15 allocated --

16 MR. BACARISSE: Wait just a second.

17 MR. WORTHINGTON: I'm sorry.

18 MR. BACARISSE: That's all right, Mr.

19 Worthington.

20 Mr. Clouatre, if you want to allow Mr.
21 Worthington to step up to the mic, we just need to make
22 sure we get all this on the record. So if you want to
23 answer, and then, Mr. Worthington, you may answer in
24 return.

25 MR. CLOUATRE: Member Gillman, that is a chart

1 not of Subaru, so I'll put that to Dan.

2 MS. GILLMAN: I'm sorry. Then can I ask you?

3 MR. CLOUATRE: You bet.

4 MS. GILLMAN: Is this a correct number or not?

5 MR. CLOUATRE: To be honest with you, this was
6 not in the record evidence; this is a chart that was
7 prepared by counsel. I have not gone back to confirm any
8 of the charts that have been referred to in opposing
9 argument were part of the record.

10 Now, data gleaned from those, from documents in
11 the record, presumably are presented there, but I didn't
12 go back and double-check tit for tat.

13 MS. GILLMAN: So I go back to the MAUI units
14 were discretionary and allocated to help beef up the
15 inventory, and I understand turn-and-earn and that if you
16 turn your vehicles quickly, you're allocated more.

17 Was it possible if they did turn their
18 inventory, like had been hoped, could they have been
19 allocated or earned enough to reach the MSR? There seems
20 a huge gap between what was allocated -- and I confess I'm
21 looking at page 141, and you've already said that that is
22 not confirmed -- but if this allocated includes what you
23 earned and the MAUI units, if they did turn-and-earn,
24 could they have reached the MSR of -- and the only number
25 I have is on page -- just give me a sec -- in the finding

1 of fact where it says in '17 the MSR was 860.

2 MR. BACARISSE: What page are you on?

3 MS. GILLMAN: I'm on page 88, finding of fact
4 number 33.

5 MR. BACARISSE: Thank you.

6 MS. GILLMAN: Where it says MSR was 860 but it
7 only had 359. And I will point out that that 359 is
8 higher than what the chart on 141 says, so it's a little
9 inconsistent there, but it just seems a humongous chasm
10 between 860 and 359 or even on page 141 the 339. If you
11 had turned-and-earned and kept your days supply low, could
12 they have achieved the MSR? Was it possible?

13 MR. CLOUATRE: That is not in the record. I'll
14 tell you what is in the record. If you look at
15 Respondent's Hearing Exhibit 186 on page 20, that is in
16 the SOAH administrative record. That is the expert report
17 showing case studies of a dealership in Houston that
18 raised its MSR percentage from 2016 to 2019 and sold an
19 additional 600-700 units. It raised it from 90 percent to
20 about 110 percent. I think you also have to consider --

21 MS. GILLMAN: That's 20 points from 90 to 110.

22 I just know that the market in Houston where there's -- I
23 don't know -- well, if that's the only thing in the record
24 then --

25 MR. WORTHINGTON: It is not.

1 MR. CLOUATRE: Well, Dan --

2 MR. WORTHINGTON: Go ahead.

3 MR. CLOUATRE: There's many other data points.

4 If you look at there was a period right after the notice
5 of termination was served that Bert Ogden increased its
6 monthly sales rate without an increase in any allocation.

7 There are periods in the record that met the
8 60- to 90-day desired supply of inventory. In the record,
9 if you look at Exhibit 186, that's the expert report of
10 Jay Lyttle and his testimony.

11 In the record, between 2016 and 2020, Bert
12 Ogden routinely had 40 to 120 vehicles available for sale
13 each month. Despite that, they sold only 20 to 40
14 vehicles each month, a fraction of the units they had
15 available.

16 What is in the record is, and as the ALJs
17 found, a lack of inventory was not the cause of their
18 deficient sales performance. They had higher sales
19 availability than any other retailer in the zone, which
20 means that it had more Subaru vehicles in inventory
21 relative to the number of vehicle sales it made each
22 month.

23 Again, Subaru can't be expected to create an
24 idiosyncratic allocation system for one dealer; it has
25 640-something dealers, and it has to be uniform.

1 MR. BACARISSE: Let me let Mr. Worthington just
2 respond to Member Gillman's question.

3 And thank you, gentlemen, again for your
4 professionalism.

5 MR. WORTHINGTON: Board Member Gillman, a
6 couple of points. At Exhibit 321, so there's a contact
7 report, and when counsel mentioned the record was replete
8 with these written documents, contact reports were
9 reports, the record reflects, that were prepared by Subaru
10 of America, never given to Bert Ogden Subaru where they
11 might note one deficiency or another or something good;
12 they simply weren't provided.

13 But when we got them in discovery, well, here's
14 what we found. Exhibit 321 is a contact report completed
15 by Mr. Adams. Mr. Adams wrote: If Bert Ogden Subaru were
16 selling at the district average, it would sell 40 units a
17 month.

18 Forty times 12 doesn't hit any of the sales
19 performance numbers. So there is evidence in the record
20 that if we had sold at the average, we wouldn't have hit
21 the sales performance addendum number. That's in the
22 record, and so I wanted to address that point you raised.

23 Oh, and incidentally, you were asking about the
24 chart of allocation. This comes from Subaru's exhibit,
25 footnote 141, that's a Subaru document. It includes all

1 of the inventory provided from whatever source. Again, a
2 Subaru document, not Bert Ogden's.

3 MR. CLOUATRE: And I would add Mr. Adams's
4 testimony on that exhibit was that, sure, if you look at
5 40 units a month, but what happens is it's a snowball
6 effect on allocation and you increase allocation as you
7 improve your sales rate, and theoretically, your sales
8 should improve.

9 MR. BACARISSE: Member Scott, I think you have
10 a question.

11 MR. SCOTT: Just real quickly. You referred to
12 the amount of inventory that Bert Ogden had available?

13 MR. CLOUATRE: Yes. Between January '16 and
14 September 2020 they had between 40 and 120 vehicles
15 available for sale each month. And that's at Exhibit 186.

16 MR. SCOTT: So could you for me define what
17 available means? Does that mean sitting on the ground?

18 MR. CLOUATRE: Dan will correct me if I'm
19 wrong, but I believe this is in the record that it
20 includes cars in the pipeline. When you have a brand such
21 as Subaru which works on tight supply, then dealers -- and
22 frankly -- well, I can't say that; that's not in the
23 record -- dealers can sell out of a pipeline, meaning it's
24 on order.

25 MR. SCOTT: But is there anything in the record

1 that talks about the availability level for Subaru dealers
2 as a whole across the country?

3 MR. CLOUATRE: Yes, and I would -- well, I'm
4 not sure about across the country, but certainly the DFW
5 zone. I would refer you back to Exhibit 186 at page 73.

6 MR. SCOTT: Okay. What does that say?

7 MR. CLOUATRE: That, again, their sales to
8 availability was much lower than the other dealers. So in
9 other words, they were turning their sales much more
10 slowly than other dealers were. So in other words, these
11 dealers were decreasing availability while Bert Ogden's
12 was remaining stagnant.

13 MR. SCOTT: Thank you.

14 MR. BACARISSE: Mr. Worthington.

15 MR. WORTHINGTON: Yes. I was invited by Mr.
16 Clouatre to address a particular issue.

17 MR. BACARISSE: Yes, you were.

18 MR. WORTHINGTON: And I promise I'm going to
19 say this and sit down.

20 The number mentioned does not reflect cars on
21 the ground. The record was that was maybe cars in the
22 pipeline, et cetera. I don't have committed to memory --
23 you say 40 to 120 over this long period of time.

24 Well, that means 120 could have been one day,
25 one month of one year and you use the high end as opposed

1 to the average. I don't have that information committed
2 to memory except to point out that that doesn't
3 necessarily mean that it was always between 40 and 120.

4 Thank you.

5 MR. BACARISSE: Thank you.

6 Member Graham, do you have a question?

7 MR. GRAHAM: Yeah. Just want to clarify a
8 statement when Member Scott asked -- Member Scott and
9 Member Gillman were asking some questions regarding the
10 numbers and whether or not there was anything in the
11 record regarding whether this dealer could even plausibly
12 hit the expectations of the sales addendum.

13 And then what I heard you say was you didn't
14 believe there was anything in the record to that regards.

15 MR. CLOUATRE: And that's my recollection, Mr.
16 Graham, standing here today.

17 MR. GRAHAM: And so, you know, like step one of
18 the analysis is was this a reasonable sales and service
19 arrangement standard? I mean, I'm just kind of shocked
20 that we got a PFD that does not say, well, step one, it
21 was achievable. If that's truly the case, that's a little
22 surprising.

23 MR. CLOUATRE: Well, and I think the case is
24 that the PFD did exactly that. It analyzed the MSR, and
25 this is half of that MSR standard. And again, 72 percent

1 of dealers in that zone meet MSR, so that is the kind of
2 data that was presented. There was heavy expert testimony
3 on the sales performance standard, and it was heard not by
4 one ALJ but two ALJs, and they both agreed in this PFD.

5 MR. GRAHAM: Okay.

6 MR. BACARISSE: Members, any other questions?

7 (No response.)

8 MR. BACARISSE: Hearing none, at this point the
9 chair would entertain a motion.

10 And I do want to again thank counsel from both
11 sides for your professionalism this morning.

12 I would entertain a motion on agenda item
13 number 5. If the chair does not hear a motion, Counsel --

14 MR. PREWITT: Well --

15 MR. BACARISSE: I'm sorry. Yes, Mr. Prewitt.

16 MR. PREWITT: Well, in light of the lack of a
17 motion, what I would like to propose, Mr. Chairman --

18 MR. BACARISSE: Are you making a motion?

19 MR. PREWITT: Yes, sir, I am.

20 MR. BACARISSE: Okay.

21 MR. PREWITT: I move the Board postpone the
22 motion or postpone action on this matter until the next
23 Board meeting, and I also move the Board authorize each
24 party to do the following for the next Board meeting to
25 the extent the party timely complies with the department's

1 applicable rules, which are, one, submit written materials
2 to the department to provide to the Board, and two, make
3 an oral presentation to the Board.

4 MR. BACARISSE: And that is your motion?

5 MR. PREWITT: Yes, sir.

6 MR. BACARISSE: Is there a second to that
7 motion?

8 MS. OMUMU: I second.

9 MR. BACARISSE: Member Omumu seconds the
10 motion. So Member Prewitt has made a motion, Member Omumu
11 has seconded the motion. I now will call the roll and
12 we'll vote on this motion.

13 I'm sorry. Are there any questions? I'm
14 sorry, my apologies.

15 MR. GRAHAM: So if this motion passes --

16 MR. BACARISSE: The question is on the motion.
17 Right?

18 MR. GRAHAM: If the motion passes, does that
19 mean that we move on in the agenda and the Board doesn't
20 deliberate this at all?

21 MR. BACARISSE: What I understand -- and
22 counsel can correct me -- is that Member Prewitt's motion
23 has essentially asked that, because of the complex nature
24 of this case and the many questions, good questions that
25 have been asked and answered today, there's still more

1 deliberation that members wish to have -- if this motion
2 passes is what it would say -- and that we now give both
3 parties time to submit additional written materials.

4 Am I correct, Counsel?

5 MS. AUCOIN: Aline Aucoin, for the record.

6 So if this motion passes, there will not be any
7 deliberation on the substance of the case. There will be
8 deliberation on whether or not the Board will postpone
9 this action to a future Board meeting, at which the
10 parties will be allowed to provide oral presentation and
11 written materials, to the extent the parties timely comply
12 with our administrative rules.

13 And at that future Board meeting the Board will
14 have an opportunity to make a motion to make a substantive
15 decision on this case.

16 MR. GRAHAM: Okay. That helps me understand
17 that, and clearly this is a very complex case. I'm good.

18 Thank you.

19 MR. BACARISSE: Absolutely.

20 Member Scott, question on the motion?

21 MR. SCOTT: On the motion.

22 MR. BACARISSE: Yes, sir.

23 MR. SCOTT: What you're saying is if the motion
24 passes, then the Board does not have the ability at this
25 point to deliberate this case?

1 MS. AUCOIN: Correct. The Board would not
2 deliberate a substantive decision on this case.

3 MR. SCOTT: Today.

4 MS. AUCOIN: Today. The Board would do that at
5 a future Board meeting. But certainly in deliberating the
6 motion that's on the table, a Board member can say why
7 they agree with that motion, why they disagree with that
8 motion, and say why.

9 MR. SCOTT: Okay. So we can have some
10 deliberation as long as it's tied back to this motion.
11 Correct?

12 MS. AUCOIN: Correct, correct.

13 MR. SCOTT: Thank you.

14 MR. BACARISSE: Any other questions on the
15 motion which has been seconded?

16 MR. SCOTT: Questions or comments?

17 MR. BACARISSE: Questions, comments on this
18 motion

19 MS. GILLMAN: Deliberations on this motion?

20 MR. BACARISSE: Just on this motion, yes,
21 ma'am.

22 MS. GILLMAN: I do have deliberation or a
23 comment.

24 MR. BACARISSE: Yes, Member Gillman.

25 MS. GILLMAN: On this motion.

1 MR. BACARISSE: Okay.

2 MS. GILLMAN: I agree with this motion to allow
3 both parties to submit written materials. I also agree
4 with this motion that it may require more time. And I
5 feel that it's that important that we should take the time
6 to do that.

7 MR. BACARISSE: Thank you.

8 Members, any other comment? Member Scott.

9 MR. SCOTT: Yes. I disagree with this motion,
10 and I disagree with this motion because I feel like the
11 factors, the findings in factor 4, factor 6, I don't think
12 that the ALJ has ruled correctly on those.

13 I think that they applied a standard that
14 doesn't exist or shouldn't exist, and I think there's a
15 mistake by the ALJ in their findings on factor 4 and
16 factor 6.

17 MR. BACARISSE: Okay. Thank you.

18 Members, any other discussion on this motion?

19 (No response.)

20 MR. BACARISSE: Hearing none, we're voting on
21 the motion that Member Prewitt made and was seconded by
22 Member Omumu to postpone further deliberation until, I'm
23 sure, probably the next Board meeting, whereupon we will
24 have additional information provided by counsel, the
25 written materials, and there will be additional

1 presentations made and deliberation on this matter, this
2 case will take place at that meeting.

3 Is that a fair recap?

4 MS. AUCOIN: Aline Aucoin, for the record.

5 That is a correct recap but I would --

6 MR. BACARISSE: It's not the motion, sorry.

7 MS. AUCOIN: -- but I would add that, again,
8 any party's ability to provide an oral presentation and to
9 provide any written materials at the next Board meeting is
10 conditioned on that party timely complying with our
11 administrative rules to do so.

12 MR. BACARISSE: With our administrative rules.
13 Right.

14 So if I may call the vote on this motion.

15 Member Alvarado?

16 MR. ALVARADO: Aye.

17 MR. BACARISSE: Member Gillman?

18 MS. GILLMAN: Aye.

19 MR. BACARISSE: Member Graham?

20 MR. GRAHAM: Aye.

21 MR. BACARISSE: Member McRae?

22 MS. McRAE: Aye.

23 MR. BACARISSE: Member Omumu?

24 MS. OMUMU: Aye.

25 MR. BACARISSE: Member Prewitt?

1 MR. PREWITT: Aye.

2 MR. BACARISSE: Member Scott?

3 MR. SCOTT: Nay.

4 MR. BACARISSE: And I, Chair Bacarisse, vote
5 aye, so the motion passes.

6 We will be back in touch with counsel. I think
7 what this says to me is this Board takes this duty very
8 seriously, and we wish to continue a full examination of
9 the issue prior to rendering a decision.

10 I want to thank the parties today. Mr. Vackar,
11 thank you for being here, your family. We will continue
12 this discussion as per our regulations. So thank you.

13 May I request that we take another five-minute-
14 or-less break? It is now 11:14 and we will temporarily
15 recess the meeting. Thank you.

16 (Whereupon, at 11:14 a.m., a brief recess was
17 taken.)

18 MR. BACARISSE: It's now 11:22 in the morning,
19 and I am calling the meeting of the DMV Board back into
20 session.

21 We are now going to move to agenda item number
22 6, and I will turn it over to Patricia Ueckert for her
23 presentation.

24 Patricia, good morning.

25 MS. UECKERT: Good morning, Chairman Bacarisse,

1 members, Executive Director Avitia. My name is Patricia
2 Ueckert, and I'm the director of the Operations Section of
3 the Vehicle Titles and Registration Division.

4 This is agenda item 6, which can be found on
5 page 260 of your Board book. The action item before you
6 is a request for Board approval or denial of a specialty
7 plate design in accordance with the Board's statutory
8 authority.

9 The following proposed plate design is from My
10 Plates, the state's specialty license plate marketing
11 vendor, and was posted for public comment in December
12 2022. Clemson University is a new plate design and is
13 proposed under Transportation Code Section 504.851. 435
14 people liked this design, and 293 did not.

15 This concludes my presentation on this action
16 item, and I'm available to take any questions.

17 MR. BACARISSE: Were they Auburn fans?

18 (General laughter.)

19 MR. BACARISSE: Members, any questions for Ms.
20 Ueckert on this item?

21 (No response.)

22 MR. BACARISSE: Thank you, Ms. Ueckert, I
23 appreciate it.

24 I will now entertain a motion on agenda item 6,
25 if I may.

1 MS. McRAE: Chairman, I'd like to make a
2 motion.

3 MR. BACARISSE: Member McRae.

4 MS. McRAE: I move that the Board approve the
5 Clemson University specialty plate design as presented by
6 staff.

7 MR. BACARISSE: Is there a second?

8 MR. GRAHAM: I'll second.

9 MR. BACARISSE: Member Graham, thank you.
10 Any questions on this item?

11 (No response.)

12 MR. BACARISSE: Hearing none, I'll just call
13 the roll for approval of agenda item 6.

14 Member Alvarado?

15 MR. ALVARADO: Aye.

16 MR. BACARISSE: Member Gillman?

17 MS. GILLMAN: Aye.

18 MR. BACARISSE: Member Graham?

19 MR. GRAHAM: Aye.

20 MR. BACARISSE: Member McRae?

21 MS. McRAE: Aye.

22 MR. BACARISSE: Member Omumu?

23 MS. OMUMU: Aye.

24 MR. BACARISSE: Member Prewitt?

25 MR. PREWITT: Aye.

1 MR. BACARISSE: Member Scott?

2 MR. SCOTT: Aye.

3 MR. BACARISSE: And I, Bacarisse, vote aye as
4 well, so it is unanimous. Thank you.

5 Agenda item 7 is our Finance and Audit
6 Committee update, and I know that Chair Graham had his
7 meeting yesterday and has some things he'd like to share
8 with us, so let me turn the floor over to Member Graham.

9 MR. GRAHAM: Thank you, Mr. Chairman. And I
10 have an admission to make. All of my work in advance of
11 this Board meeting was 100 percent focused on the
12 contested case, so I have not read what is in front of me;
13 the staff has prepared it. If they're funny, you're just
14 going to get to see it because this will be my first read
15 of the meeting that occurred yesterday. But the good news
16 is I was there.

17 (General laughter.)

18 MR. BACARISSE: You were there.

19 MR. GRAHAM: I was there, so here we go.

20 So thank you, Chairman, Executive Director
21 Avitia and members.

22 Yesterday, Vice Chair McRae, Members Omumu and
23 Prewitt and myself participated in the Finance and Audit
24 Committee meeting and received briefings from the
25 department's staff.

1 So we'll start with agenda item 7.A.
2 Legislative Appropriations Request and the update. This
3 is a briefing item only. So Glenna Bowman, the
4 department's chief financial officer, and her staff
5 briefed the committee on the status of the fiscal year
6 2024-2025 LAR process.

7 The briefing included an overview of the
8 appropriations process, the TxDMV budget based on filed
9 versions of the General Appropriations Act, and the recap
10 of that is that both the House and the Senate versions of
11 the General Appropriations Act were identical, which is
12 always a good sign that we're moving out of the gate in a
13 positive manner.

14 The appropriations in the introduced bill total
15 \$376.4 million for the agency for fiscal year 2024-2025
16 biennium. All requested baseline funding increases were
17 included, except for funding associated with the
18 department's exceptional item for additional authorized
19 FTEs.

20 One exceptional item was approved which was
21 full funding of the MVCPA, and that was a request we made
22 going into the process because the agency felt it would
23 be, all things considered, very positive for the agency if
24 they fully funded MVCPA, so great news is that was there.

25 TxDMV submitted in January of 2023 to the

1 Legislative Budget Board a revised exceptional item list.
2 One exceptional item was added, which was the funding to
3 increase license plate production. And just considering
4 some of the supply chain disruptions that occurred during
5 the pandemic, there was just some thought that that would
6 be a good thing to do to increase the amount of plates in
7 the event that we have further issues.

8 The MVCPA exceptional item is removed due to
9 its inclusion in the introduced bill, and the budget
10 included other notable provisions, which included --
11 everybody ready, I want to hear clapping over there --
12 salary increases for all employees, 5 percent in 2024 and
13 5 percent in 2025. That's exciting; I know y'all were
14 happy to hear that.

15 (Applause.)

16 MR. GRAHAM: Capital budget thresholds
17 increased and transfer provisions for Data Center
18 services. And finally, staff will get to enjoy
19 Valentine's Day with a trip to the Senate Finance
20 Committee for a hearing, and so they're very excited about
21 that.

22 So if you have any questions on agenda item
23 7.A, Ms. Bowman and her staff and Eric are here to answer
24 any questions on this item.

25 MR. BACARISSE: Thank you, Member Graham. Well

1 done.

2 Members, any questions on this item?

3 (No response.)

4 MR. BACARISSE: Hearing none, seeing none,
5 Glenna, good job, good start, and we wish a great
6 Valentine's Day in more ways than one.

7 MS. BOWMAN: (Inaudible; mics not turned on
8 from control room.)

9 MR. BACARISSE: Good. All right. Do we want
10 to move to agenda item 7.B?

11 MR. GRAHAM: Certainly. Agenda item 7.B.

12 MR. BACARISSE: Go ahead, that's you.

13 MR. GRAHAM: Making sure. Like I said, I
14 didn't read it.

15 This is the annual financial report and non-
16 financial report. This is a briefing item only, so no
17 action is needed from the Board.

18 Eric Horn, the department's Accounting
19 Operations director, briefed the committee on the annual
20 financial report and the annual report of non-financial
21 data for fiscal year 2022 which ended August 31, 2022.

22 These two reports were submitted to the
23 required state agencies by November 30 and December 31,
24 respectively, and technically well in advance of those
25 dates -- good job -- in accordance with the requirements

1 set by statute and Governmental Accounting Reporting
2 guidelines.

3 So the annual financial report summarizes the
4 department's activities for fiscal year 2022. Revenues
5 totaled \$1.9 billion, an increase of 2.1 percent over
6 fiscal year 2021. \$186 million of the total revenue
7 collected was deposited to TxDMV Fund 0010 with a 2.1
8 percent increase over fiscal year 2021.

9 The increase is primarily attributable to an
10 uptick in registration related conditions, as well as
11 higher oversize/overweight permit revenue due to increased
12 activity in the oil and gas construction sector. And
13 department expenditures totaled \$177.45 million.

14 This is a slight increase over fiscal year
15 2022, primarily due to other operating expenditures for
16 design services related to the Camp Hubbard renewal
17 project and salary equity adjustments for eligible
18 employees.

19 And so some discussion on that item occurred,
20 and I'm sitting here trying to recall if you take out the
21 costs associated with the Camp Hubbard project, the
22 increase in expenditures was very slight over the previous
23 year, so I think the agency is doing a great job in
24 managing those expenditures.

25 So the annual report of non-financial data

1 presents various schedules required by Government Code
2 Section 2101.115, including appropriation transfers, HUB
3 plan progress, schedule of space occupied, and schedule of
4 vehicles purchased.

5 The report also includes schedules of indirect
6 costs paid by or on behalf of the department, professional
7 consulting and legal service fees, and proprietary
8 purchases.

9 Notable changes in the fiscal year 2022 report
10 are decreases to indirect costs associated with the CAPPS
11 financials and HR payroll modules, purchase of one new
12 vehicle and a decrease in our professional services
13 expenditures attributable to Data Center services,
14 primarily related to the completion of the webDEALER
15 project.

16 So that is my report on item 7.B, and Mr. Horn
17 is here and will be glad to answer any questions you have.

18 MR. BACARISSE: Great. Thank you.

19 Members, any questions for Mr. Horn or Glenna?

20 (No response.)

21 MR. BACARISSE: Good. We're going to let you
22 off easy. Thank y'all, appreciate it very much.

23 MR. GRAHAM: And big shout-out to the team,
24 including Glenna and Eric and everyone. They did a great
25 job with this, ahead of timelines, and have put us in a

1 great position going into session, so thank you.

2 MS. BOWMAN: (inaudible; mics not turned on
3 from control room.)

4 MR. BACARISSE: Very true.

5 Now agenda item 7.C is our Internal Audit
6 Division status update, so Mr. Chuah is here. And good
7 morning, good to see you.

8 Go ahead, Brett.

9 MR. GRAHAM: Okay. Agenda item 7.C is the
10 Internal Audit Division status update that includes
11 internal and external engagements, including the State
12 Auditor's Office audit. This is a briefing item only.

13 So Salem Chuah, the department's Internal Audit
14 director, provided an Internal Audit Division status
15 update regarding internal and external engagements,
16 including the State Auditor's Office audit.

17 For external engagements, the Internal Audit
18 Division is in the initial stages of the planning process
19 for the hiring process audit. The preliminary objective
20 is to determine the effectiveness and efficiency of the
21 hiring process and whether policies and procedures are
22 followed consistently. The audit objective will be
23 narrowed during the planning phase prior to starting our
24 field work.

25 Next is the IAD completed its fiscal year 2023

1 risk assessment and Internal Audit Plan for the second six
2 months, as well as the recommendation implementation
3 followup for the first quarter.

4 Out of the 28 Internal Audit recommendations
5 being tracked, eight are overdue, but the department's
6 divisions, Salem is working with all of the directors and
7 the department's divisions to make sure and track the
8 progress being made on these recommendations and IAD meets
9 with them on a quarterly basis to receive progress and
10 updates on the implementation.

11 Lastly, Mr. Chuah spoke on external engagements
12 such as the dual employment desk audit by the Comptroller
13 of Public Accounts, which remains in progress, and the
14 State Auditor's Office audit regarding the MVCPA and
15 temporary tags.

16 The SAO met with department management in
17 December to present those findings, and the findings were
18 shared with the Board in the December closed session. The
19 SAO provided the department with a draft report this week
20 which Mr. Chuah provided to the Board.

21 IAD will work with management in submitting
22 management responses to audit recommendations and the
23 audit report is scheduled for public release in March.
24 And in closed session we'll be getting a more detailed
25 report on this item, just not publicly due to the type of

1 report it is.

2 Any questions regarding any of that on item
3 7.C?

4 MR. BACARISSE: Members, any questions for Mr.
5 Chuah or Member Graham?

6 (No response.)

7 MR. BACARISSE: All right. Thank you.

8 MR. GRAHAM: So far, so good.

9 MR. BACARISSE: I appreciate it.

10 MR. GRAHAM: Agenda item 7.D.

11 MR. BACARISSE: Yep, 7.D.

12 MR. GRAHAM: So y'all are going to have to
13 really pay attention here, because I'm going to ask for
14 action.

15 Fiscal year 2023 is the Internal Audit Plan for
16 the second six months. Salem Chuah, the department's
17 Internal Audit director, provided an overview of the
18 fiscal year 2023 Internal Audit Plan for the second six
19 months. The plan covers the period of March through
20 August.

21 IAD identified four engagements to conduct
22 during this period. This includes a hiring process audit,
23 a regional service center audit, a fiscal year 2024
24 Internal Audit Plan, and quarterly recommendation
25 implementation status review.

1 IAD also continues to provide additional value-
2 added services to the department, such as facilitating the
3 State Auditor's Office audit, coordinating investigations
4 and complaints, and participating in various work groups
5 in an advisory capacity.

6 The Finance and Audit Committee approved Mr.
7 Chuah's recommendation to recommend to the full Board
8 approval of the second six months Internal Audit Plan, and
9 he is here to answer any questions if you have them.

10 MR. BACARISSE: Members, any questions for Mr.
11 Chuah on this item?

12 (No response.)

13 MR. BACARISSE: If not, thank you, and we do
14 need to take a vote, so the chair would entertain a motion
15 on agenda item 7.D.

16 MR. GRAHAM: Chairman, I'll be glad to make a
17 motion.

18 MR. BACARISSE: Member Graham.

19 MR. GRAHAM: I move that the Board Approve the
20 fiscal year 2023 second six months Internal Audit Plan, as
21 presented by staff.

22 MR. BACARISSE: And is there a second?

23 MS. GILLMAN: I second.

24 MR. BACARISSE: Member Gillman.

25 Okay. We have a motion and a second. Is there

1 any further discussion?

2 (No response.)

3 MR. BACARISSE: Aline, are there any public
4 comments on this item?

5 MS. AUCOIN: Aline Aucoin, for the record.
6 There are no public commenters.

7 MR. BACARISSE: In that case, I will now call
8 for the vote.

9 Member Alvarado?

10 MR. ALVARADO: Aye.

11 MR. BACARISSE: Member Gillman?

12 MS. GILLMAN: Aye.

13 MR. BACARISSE: Member Graham?

14 MR. GRAHAM: Aye.

15 MR. BACARISSE: Member McRae?

16 MS. McRAE: Aye.

17 MR. BACARISSE: Member Omumu?

18 MS. OMUMU: Aye.

19 MR. BACARISSE: Member Prewitt?

20 MR. PREWITT: Aye.

21 MR. BACARISSE: Member Scott?

22 MR. SCOTT: Aye.

23 MR. BACARISSE: And I, Chair Bacarisse, vote
24 aye as well. It's unanimous. Thank you.

25 MR. GRAHAM: Mr. Chair, if I may conclude?

1 MR. BACARISSE: Yes, please.

2 MR. GRAHAM: So the last thing I'll mention is
3 that we are coming up on Salem's one-year anniversary,
4 first of April, and I just wanted to add, as the Finance
5 and Audit chair, that I have been very pleased with his
6 work, his approach and his professionalism.

7 And we all know that our previous auditor was
8 fantastic and we loved her, and it was a little concerning
9 to wonder what the future had ahead for us, but Salem has
10 done a fantastic job, and it's been a real pleasure
11 working with him.

12 And I just wanted to give a little pat on the
13 back there, Salem.

14 MR. BACARISSE: Very true

15 MS. McRAE: Great job, Salem.

16 (Applause.)

17 MR. CHUAH: Thank you, Member Graham and
18 members. You know I have a great team behind me and great
19 leadership. I just wanted to say thank you all for your
20 support, for executive management's support and for my
21 team's support as well. Thank you all.

22 MR. BACARISSE: Again, thank you. Good work.

23 Aline, before we go to executive session, I
24 thought it would be kind if there are any people here that
25 wish to make public comment that we take that out of order

1 and see if there are any people who have signed up
2 generally to make public comment.

3 MS. AUCOIN: Aline Aucoin, for the record. I
4 don't think my microphone is working.

5 MR. BACARISSE: It's funny; we don't hear
6 anybody at the table.

7 MS. AUCOIN: I'll just talk louder.

8 Aline Aucoin, for the record.

9 There are no public commenters for the public
10 comment section, item number 10.

11 MR. BACARISSE: Aline said that there are no
12 public commenters that have signed up for agenda item
13 number 10.

14 So with that, I will now move us towards
15 executive session. We will now take up agenda item number
16 8 and we're going to go into executive session.

17 It is now 11:41 in the morning on February 9,
18 2023. We'll go into executive session, closed session,
19 under Texas Government Code Sections 551.071, 551.074,
20 551.076, and 551.089.

21 So for those of you in attendance, I anticipate
22 being in that closed session for approximately 2-1/2 hours
23 and we'll reconvene in open session after that.

24 With that, we are now recessed from the public
25 meeting and we are going into closed session.

1 (Whereupon, at 11:41 a.m., the meeting was
2 recessed, to reconvene this same day, Thursday, February
3 9, 2023, following conclusion of the executive session.)

4 MR. BACARISSE: It is now 2:27 p.m., and the
5 Board of the Texas DMV is now back in open session.

6 No items will be taken up from the closed
7 session, and we will now move to agenda item 11,
8 adjournment.

9 Do I have a motion to adjourn?

10 MR. PREWITT: So moved.

11 MR. BACARISSE: Is there a second?

12 MS. GILLMAN: Second.

13 MR. BACARISSE: Okay. Is there any question
14 about that?

15 (General laughter.)

16 MR. BACARISSE: And I will note for the record
17 that Vice Chair McRae has left the meeting.

18 So we have a motion from Member Prewitt and a
19 second from Member Gillman, and I'll call the roll on this
20 one.

21 Member Alvarado?

22 MR. ALVARADO: Aye.

23 MR. BACARISSE: Member Gillman?

24 MS. GILLMAN: Aye.

25 MR. BACARISSE: Member Graham?

1 MR. GRAHAM: Aye.

2 MR. BACARISSE: Member Omumu?

3 MS. OMUMU: Aye.

4 MR. BACARISSE: Member Prewitt?

5 MR. PREWITT: Aye.

6 MR. BACARISSE: Member Scott?

7 MR. SCOTT: Aye.

8 MR. BACARISSE: And I, Bacarisse, vote aye too.

9 It's unanimous.

10 Thank you. This meeting is adjourned.

11 (Whereupon, at 2:28 p.m., the meeting was
12 adjourned.)

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C E R T I F I C A T E

MEETING OF: TxDMV Board
LOCATION: Austin, Texas
DATE: February 9, 2023

I do hereby certify that the foregoing pages, numbers 1 through 110, inclusive, are the true, accurate, and complete transcript prepared from the verbal recording made by electronic recording by Nancy H. King before the Texas Department of Motor Vehicles.

DATE: February 21, 2023

/s/ Nancy H. King
(Transcriber)

On the Record Reporting
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