



## *California New Car Dealers Association*

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July 2, 2009

The Honorable Edmund G. Brown, Jr  
Attorney General  
State of California  
1300 I Street, Ste. 1740  
Sacramento, CA 95814

***Re: General Motors Bankruptcy – Violations of Dealer State Franchise Laws***

Dear Attorney General Brown:

The California New Car Dealers Association (CNCDA) is a statewide trade association that represents the interests of over 1200 franchised new car and truck dealer members. CNCDA members are primarily engaged in the retail sale and lease of new and used motor vehicles, but also engage in automotive service, repair and part sales. We are writing today to thank you for joining with 36 of your fellow state attorney generals in filing limited objections to the Bankruptcy Code Section 363 proposed sale of assets by General Motor (GM) to the New GM.

The limited objections filed by the state attorney generals correctly argues that the Participation and Wind Down Agreements GM forced California's 311 GM dealers to sign violate a host of California Vehicle Code statutes. A summary of those violations is set forth below.

**Coercion**

Immediately following its June 1, 2009 bankruptcy filing, GM sent each of its California dealers one of two letters. Each letter informed the dealer that it had been tentatively chosen to either be a retained dealer (which were offered a Participation Agreement) or a terminated dealer (which were offered a Wind Down Agreement). Each letter informed the dealer that it had until June 12, 2009 to sign the letter without any changes and that the signed letters would amend their existing franchise agreements. The letter also announced that if the dealers signed the letters, GM would move to assume the amended franchise agreements and assign them to the New GM. If they did not, the dealers would be added by GM to a list of dealers whose franchise agreements would be rejected as part of the bankruptcy proceeding.

Both the Participation Agreement and the Wind Down Agreement required the dealers to agree that the signing was purely voluntary and without any coercion – despite the fact that they were presented as non-negotiable, take it or leave it deals that required dealers to waive all violation of state law – including provisions under California law that makes such a waiver unlawful.

**California Vehicle Code Section 11713.2.** *It shall be unlawful and a violation of this code* for any manufacturer, manufacturer branch, distributor, or distributor branch licensed under this code to coerce or attempt to coerce any dealer in this state:

...

(e) *To enter into any agreement with the manufacturer, manufacturer branch, distributor, or distributor branch, or to do any other act prejudicial to the dealer by threatening to cancel a franchise or any contractual agreement existing between the dealer and manufacturer, manufacturer branch, distributor, or distributor branch.* Notice in good faith to any dealer of the dealer's violation of any terms or provisions of such franchise or contractual agreement shall not constitute a violation of this article.

**California Vehicle Code Section 11713.3.** *It is unlawful and a violation of this code* for any manufacturer, manufacturer branch, distributor, or distributor branch licensed under this code to do any of the following:

...

(g) *To require a dealer to prospectively assent to a release, assignment, novation, waiver, or estoppel that would relieve any person from liability to be imposed by this article or to require any controversy between a dealer and a manufacturer, distributor, or representative, to be referred to any person other than the board, if the referral would be binding on the dealer.* This subdivision does not, however, prohibit arbitration before an independent arbitrator

The Participation Agreements contain a provision that requires retained dealers to order sufficient new vehicle inventory to meet new sales quotas. Coercing GM dealers to order unneeded new vehicle inventory and parts is also unlawful under California law:

**California Vehicle Code Section 11713.2.** *It shall be unlawful and a violation of this code* for any manufacturer, manufacturer branch, distributor, or distributor branch licensed under this code to coerce or attempt to coerce any dealer in this state:

(a) *To order or accept delivery of any motor vehicle, part or accessory* thereof, appliance, equipment or any other commodity not required by law *which shall not have been voluntarily ordered by the dealer.*

...

(c) *To order for any person any parts, accessories, equipment, machinery, tools, appliances, or any commodity whatsoever.*

### **Wind Down Agreements Unlawfully Prohibit Dealers from Ordering New Vehicles**

**California Vehicle Code Section 11713.3.** *It is unlawful and a violation of this code* for any manufacturer, manufacturer branch, distributor, or distributor branch licensed under this code to do any of the following:

*(a) To refuse or fail to deliver in reasonable quantities and within a reasonable time after receipt of an order from a dealer having a franchise for the retail sale of any new vehicle sold or distributed by the manufacturer or distributor, any new vehicle or parts or accessories to new vehicles as are covered by the franchise, if the vehicle, parts, or accessories are publicly advertised as being available for delivery or actually being delivered. This subdivision is not violated, however, if the failure is caused by acts or causes beyond the control of the manufacturer, manufacturer branch, distributor, or distributor branch.*

### **Wind Down Agreements Unlawfully Prohibit Dealers from Selling Their Franchises**

**California Vehicle Code Section 11713.3.** *It is unlawful and a violation of this code* for any manufacturer, manufacturer branch, distributor, or distributor branch licensed under this code to do any of the following:

...

(d) (1) Except as provided in subdivision (t), to prevent or require, or *attempt to prevent or require, by contract or otherwise, any dealer, or any officer, partner, or stockholder of any dealership, the sale or transfer of any part of the interest of any of them to any other person.* No dealer, officer, partner, or stockholder shall, however, have the right to sell, transfer, or assign the franchise, or any right thereunder, without the consent of the manufacturer or distributor except that the consent shall not be unreasonably withheld.

(2) (A) For the transferring franchisee to fail, prior to the sale, transfer, or assignment of a franchisee or the sale, assignment, or transfer of all, or substantially all, of the assets of the franchised business or a controlling interest in the franchised business to another person, to notify the manufacturer or distributor of the franchisee's decision to sell, transfer, or assign the franchise. The notice shall be in writing and shall include all of the following:

(i) The proposed transferee's name and address.

(ii) A copy of all of the agreements relating to the sale, assignment, or transfer of the franchised business or its assets.

(iii) The proposed transferee's application for approval to become the successor franchisee. The application shall include forms and related information generally utilized by the manufacturer or distributor in reviewing prospective franchisees, if those forms are readily made available to existing franchisees. As soon as practicable after receipt of the proposed transferee's application, the manufacturer or distributor shall notify the franchisee and the proposed transferee of any information needed to make the application complete.

...

*(e) To prevent, or attempt to prevent, a dealer from receiving fair and reasonable compensation for the value of the franchised business.* There shall be no transfer or assignment

of the dealer's franchise without the consent of the manufacturer or distributor, which consent shall not be unreasonably withheld or conditioned upon the release, assignment, novation, waiver, estoppel, or modification of any claim or defense by the dealer.

### **Participation Agreements will Unlawfully Require Dealers to Maintain Exclusive Showroom Facilities**

**California Vehicle Code Section 11713.13.** *It is unlawful and a violation of this code for any manufacturer, manufacturer branch, distributor, or distributor branch licensed under this code to do, directly or indirectly through an affiliate, any of the following:*

*(a) Prevent, or attempt to prevent, by contract or otherwise, a dealer from acquiring, adding, or maintaining a sales or service operation for another line make of motor vehicles at the same or*

*expanded facility at which the dealer currently operates a dealership if the dealer complies with any reasonable facilities and capital requirements of the manufacturer or distributor.*

*(b) Require a dealer to establish or maintain exclusive facilities, personnel, or display space if the imposition of the requirement would be unreasonable in light of all existing circumstances, including economic conditions. In any proceeding under this subdivision or subdivision (a) in which the reasonableness of a facility or capital requirement is an issue, the manufacturer or distributor shall have the burden of proof.<sup>1</sup>*

### **Wind Down Agreements Require Dealers to Turn Over Customer Service Records Without Assurance of Consumer and Privacy Safeguards**

**California Vehicle Code Section 11713.3.** *It is unlawful and a violation of this code for any manufacturer, manufacturer branch, distributor, or distributor branch licensed under this code to do any of the following:*

*(v) (1) To access, modify, or extract information from a confidential dealer computer record, as defined in Section 11713.25, without obtaining the prior written consent of the dealer and without maintaining administrative, technical, and physical safeguards to protect the security, confidentiality, and integrity of the information.*

*(2) Paragraph (1) does not limit a duty that a dealer may have to safeguard the security and privacy of records maintained by the dealer.*

*(w) (1) To use electronic, contractual, or other means to prevent or interfere with any of the following:*

*(A) The lawful efforts of a dealer to comply with federal and state data security and privacy laws.*

*(B) The ability of a dealer to do either of the following:*

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<sup>1</sup> Vehicle Code Section 11713.13 is contained in SB 424 (Padilla), which was recently passed the California Senate (38 - 0) and Assembly (72 - 0) and enrolled on June 22, 2009. SB 424 contains an urgency clause and as of this date is awaiting signature by Governor Schwarzenegger.

(i) Ensure that specific data accessed from the dealer's computer system is within the scope of consent specified in subdivision (v).

(ii) Monitor specific data accessed from or written to the dealer's computer system.

(2) Paragraph (1) does not limit a duty that a dealer may have to safeguard the security and privacy of records maintained by the dealer.

**Participation Agreements Unlawfully Require Dealers to Waive Their Protest Rights Relative to the Relocation of a Dealership of the Same Line Make That is Further Away than Six Miles (Dealers have a Ten Mile Protest Right)**

**California Vehicle Code Section 11713.3.** *It is unlawful and a violation of this code* for any manufacturer, manufacturer branch, distributor, or distributor branch licensed under this code to do any of the following:

...

*l) To modify, replace, enter into, relocate, terminate or refuse to renew a franchise in violation of Article 4 (commencing with Section 3060) of Chapter 6 of Division 2.*

**California Vehicle Code Section 3062.** (a) (1) Except as otherwise provided in subdivision (b), *if an franchisor seeks to enter into a franchise establishing an additional motor vehicle dealership within a relevant market area where the same line-make is then represented, or seeks to relocate an existing motor vehicle dealership, the franchisor shall, in writing, first notify the board and each franchisee in that line-make in the relevant market area of the franchisor's intention to establish an additional dealership or to relocate an existing dealership within or into that market area. Within 20 days of receiving the notice, satisfying the requirements of this section, or within 20 days after the end of an appeal procedure provided by the franchisor, a franchisee required to be given the notice may file with the board a protest to the establishing or relocating of the dealership.* If, within this time, a franchisee files with the board a request for additional time to file a protest, the board or its executive director, upon a showing of good cause, may grant an additional 10 days to file the protest. *When a protest is filed, the board shall inform the franchisor that a timely protest has been filed, that a hearing is required pursuant to Section 3066, and that the franchisor may not establish or relocate the proposed dealership until the board has held a hearing as provided in Section 3066, nor thereafter, if the board has determined that there is good cause for not permitting the dealership.* In the event of multiple protests, hearings may be consolidated to expedite the disposition of the issue.

(2) If a franchisor seeks to enter into a franchise that authorizes a satellite warranty facility to be established at, or relocated to, a proposed location that is within two miles of a dealership of the same line-make, the franchisor shall first give notice in writing of the franchisor's intention to establish or relocate a satellite warranty facility at the proposed location to the board and each franchisee operating a dealership of the same line-make within two miles of the proposed location. Within 20 days of receiving the notice satisfying the requirements of this section, or within 20 days after the end of an appeal procedure provided by

the franchisor, a franchisee required to be given the notice may file with the board a protest to the establishing or relocating of the satellite warranty facility. If, within this time, a franchisee files with the board a request for additional time to file a protest, the board or its executive director, upon a showing of good cause, may grant an additional 10 days to file the protest. When a protest is filed, the board shall inform the franchisor that a timely protest has been filed, that a hearing is required pursuant to Section 3066, and that the franchisor may not establish or relocate the proposed satellite warranty facility until the board has held a hearing as provided in Section 3066, nor thereafter, if the board has determined that there is good cause for not permitting the satellite warranty facility. In the event of multiple protests, hearings may be consolidated to expedite the disposition of the issue.

(3) The written notice shall contain, on the first page thereof in at least 12-point bold type and circumscribed by a line to segregate it from the rest of the text, the following statement:

"NOTICE TO DEALER: You have the right to file a protest with the NEW MOTOR VEHICLE BOARD in Sacramento and have a hearing on your protest under the terms of the California Vehicle Code if you oppose this action. You must file your protest with the board within 20 days of your receipt of this notice, or within 20 days after the end of any appeal procedure that is provided by us to you. If within this time you file with the board a request for additional time to file a protest, the board or its executive director, upon a showing of good cause, may grant you an additional 10 days to file the protest."

(b) Subdivision (a) does not apply to either of the following:

(1) The relocation of an existing dealership to a location that is both within the same city as, and within one mile from, the existing dealership location.

(2) The establishment at a location that is both within the same city as, and within one-quarter mile from, the location of a dealership of the same line-make that has been out of operation for less than 90 days.

(c) Subdivision (a) does not apply to a display of vehicles at a fair, exposition, or similar exhibit if actual sales are not made at the event and the display does not exceed 30 days. This subdivision may not be construed to prohibit a new vehicle dealer from establishing a branch office for the purpose of selling vehicles at the fair, exposition, or similar exhibit, even though the event is sponsored by a financial institution, as defined in Section 31041 of the Financial Code or by a financial institution and a licensed dealer. The establishment of these branch offices, however, shall be in accordance with subdivision (a) where applicable.

(d) For the purposes of this section, the reopening of a dealership that has not been in operation for one year or more shall be deemed the establishment of an additional motor vehicle dealership.

(e) As used in this section, the following definitions apply:

(1) "Motor vehicle dealership" or "dealership" means an authorized facility at which a franchisee offers for sale or lease, displays for sale or lease, or sells or leases new motor vehicles.

(2) "Satellite warranty facility" means a facility operated by a franchisee where authorized warranty repairs and service are performed and the offer for sale or lease, the display for sale or lease, or the sale or lease of new motor vehicles is not authorized to take place.

**California Vehicle Code Section 507.** The *"relevant market area"* is any area within a radius of 10 miles from the site of a potential new dealership.

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**Both Agreements Purport to Give the Bankruptcy Court *Exclusive* Jurisdiction to Determine any Issues Related to the Agreements and To Resolve Any Disputes (even though the dealers and the New GM will not be in bankruptcy)**

**California Vehicle Code Section 11713.3.** *It is unlawful and a violation of this code* for any manufacturer, manufacturer branch, distributor, or distributor branch licensed under this code to do any of the following:

(g) To require a dealer to prospectively assent to a release, assignment, novation, waiver, or estoppel that would relieve any person from liability to be imposed by this article ***or to require any controversy between a dealer and a manufacturer, distributor, or representative, to be referred to any person other than the board, if the referral would be binding on the dealer.*** This subdivision does not, however, prohibit arbitration before an independent arbitrator.

Thank you again for interceding in this matter. Should you or your staff have any questions or comments, please do not hesitate to give me a call.

Best Regards,



Peter K. Welch  
President

cc: Members of the President's Auto Task Force