

2000

John Watson Chevrolet v. Buck Motors division, General Motors Corporation : Brief of Appellant

Utah Court of Appeals

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JOHN WATSON CHEVROLET,	:	ADDENDA TO
	:	BRIEF OF APPELLANT
Plaintiff/Appellant,	:	
	:	
vs.	:	
	:	
BUICK MOTORS DIVISION,	:	Appellate Court No. 20000351-CA
GENERAL MOTORS CORPORATION,	:	
	:	Priority No. 15
Defendant/Appellee.	:	

APPEAL FROM THE SECOND DISTRICT
WEBER COUNTY
JUDGE STANTON M. TAYLOR

Attorneys for Defendant/ Appellee

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Attorneys for Plaintiff/Appellant

IN THE UTAH COURT OF APPEALS

JOHN WATSON CHEVROLET,

Plaintiff/Appellant,

vs.

BUICK MOTORS DIVISION,
GENERAL MOTORS CORPORATION,

Defendant/Appellee.

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**ADDENDA TO
BRIEF OF APPELLANT**

Appellate Court No. 20000351-CA

Priority No. 15

BRIEF OF APPELLANT

APPEAL FROM THE SECOND DISTRICT
WEBER COUNTY
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Standard Provisions

Dealer Sales and Service Agreement



GENERAL MOTORS CORPORATION

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Standard Provisions

Dealer Sales and Service Agreement



GENERAL MOTORS CORPORATION

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Standard Provisions

The following Standard Provisions are part of Division's Dealer Sales and Service Agreement (Form GMMS 1012).

PURPOSE OF AGREEMENT

The purpose of this Agreement is to promote a relationship between Division and its Dealers which encourages and facilitates cooperation and mutual effort to satisfy customers, and permits Division and its dealers to fully realize their opportunities for business success. Division has established a network of authorized dealers operating at approved locations to effectively sell and service its Products and to build and maintain consumer confidence and satisfaction in Dealer and Division. Consequently, Division relies upon each Dealer to provide appropriate skill, capital, equipment, staff and facilities to properly sell, service, protect the reputation, and satisfy the customers of Division's Products in a manner that demonstrates a caring attitude toward those customers. At the same time, Dealer relies upon Division to provide sales and service support and to continually strive to enhance the quality and competitiveness of its Products

This mutual dependence requires a spirit of cooperation, trust and confidence between Division and its dealers. To facilitate attainment of cooperation, trust and confidence, and to provide Division with the benefit of dealer advice regarding many decisions which affect dealer business operations, Division has established mechanisms to obtain dealer input in the decision-making process. These mechanisms are described in Division's Dealer Sales and Service Agreement.

This Agreement (i) authorizes Dealer to sell and service Division's Products and represent itself as a Division Dealer; (ii) states the terms under which Dealer and Division agree to do business together, (iii) states the responsibilities of Dealer and Division to each other and to customers, and (iv) reflects the mutual dependence of the parties in achieving their business objectives.

ARTICLE 1. APPOINTMENT AS AUTHORIZED DEALER

Division appoints Dealer as a non-exclusive dealer of Division Products. Dealer has the right to buy Products

and the obligation to market and service those Products in accordance with this Agreement and related documents.

ARTICLE 2. DEALER OPERATOR

This is a Personal Services Agreement, entered into in reliance on the qualifications of Dealer Operator identified in Paragraph Third, and on Dealer's assurance that Dealer Operator will provide personal services by

exercising full managerial authority over Dealership Operations. Dealer Operator will have an unencumbered ownership interest in Dealer of at least 15 percent at all times. A Dealer Operator must be a competent business

person, an effective manager, must have demonstrated a caring attitude toward customers, and should have a successful record as a merchandiser of automotive products and services or otherwise have demonstrated

the ability to manage a dealership. The experience necessary may vary with the potential represented by each dealer location.

ARTICLE 3. DEALER OWNER

Division enters into this Agreement in reliance on the qualifications of dealer owner(s) identified in the Dealer Statement of Ownership. Division and Dealer agree each dealer owner will continue to own, both of record

and beneficially, the percentage stated in the Dealer Statement of Ownership, unless a change is made in accordance with Article 12.

ARTICLE 4. AUTHORIZED LOCATIONS

4.1 Dealer Network Planning

Because Division distributes its Products through a network of authorized dealers operating from approved locations; those dealers must be appropriate in number, located properly, and have proper facilities to represent and service Division's Products competitively and to permit each dealer the opportunity to achieve a reasonable return on investment if it fulfills its obligations under its Dealer Agreement. Through such a dealer network, the Division can maximize the convenience of customers in purchasing Products and having them serviced. As a result, customers, dealers, and the Division all benefit.

To maximize the effectiveness of its dealer network, Division agrees to monitor marketing conditions and strive, to the extent practicable, to have dealers appropriate in number, size and location to achieve the objectives stated above. Such marketing conditions include Division's sales and registration performance, present and future demographic and economic considerations, competitive dealer networks, the ability of Division's existing dealers to achieve the objectives stated above, the opportunities available to existing dealers, and other appropriate circumstances.

4.2 Area of Primary Responsibility

Dealer is responsible for effectively selling, servicing and otherwise representing Division's Products in the Area designated in a Notice of Area of Primary Responsibility. Division retains the right to revise Dealer's Area of Primary Responsibility at Division's sole discretion consistent with dealer network planning objectives. If Division determines that marketing conditions warrant a change in Dealer's Area of Primary Responsibility, it will advise Dealer in writing of the proposed change, the reasons for it, and will consider any information the Dealer submits. Dealer must submit such information in writing within 30 days of receipt of notice of the proposed change. If Division thereafter decides the change is warranted, it will issue a revised Notice of Area of Primary Responsibility.

4.3 Establishment of Additional Dealers

Division reserves the right to appoint additional dealers but Division will not exercise this right without first analyzing dealer network planning considerations

Prior to establishing an additional dealer within Dealer's Area of Primary Responsibility, Division will

advise Division in writing and give Dealer thirty days to present relevant information before Division makes a final decision. Division will advise Dealer of the final decision, which will be made solely by Division pursuant to its business judgment. ~~Nothing in this Agreement is intended to require Dealer's consent to the establishment of an additional dealer.~~

Neither the appointment of a dealer at or within three miles of a former dealership location as a replacement for the former dealer nor the relocation of an existing dealer will be considered the establishment of an additional Dealer for purposes of this Article 4.3. Such events are within the sole discretion of Division, pursuant to its business judgment.

4.4 Facilities

4.4.1 Location

Dealer agrees to conduct Dealership Operations only from the approved location(s) within its Area of Primary Responsibility. The Location and Premises Addendum identifies Dealer's approved location(s) and facilities ("Premises"). If more than one location is approved, Dealer agrees to conduct from each location only those Dealership Operations authorized in the Addendum for such location.

4.4.2 Change in Location or Use of Premises

If Dealer wants to make any change in location(s) or Premises, or in the uses previously approved for those Premises, Dealer will give Division written notice of the proposed change together with the reasons for the proposal, for Division's evaluation and final decision in light of dealer network planning considerations. No change in location or in the use of Premises, including addition of any other vehicle lines, will be made without Division's prior written authorization.

Before Division requires any changes in Premises, it will consult with Dealer, indicate the rationale for the

change, and solicit Dealer's views on the proposal. If, after such review with Dealer, Division determines a change in Premises or location is appropriate, the Dealer will be allowed a reasonable time to implement the change. Any such changes will be reflected in a new Location and Premises Addendum or other written agreement executed by Dealer and Division.

~~Nothing herein is intended to require the consent or approval of any dealer to a proposed relocation of any other dealer.~~

4.4.3 Size

Dealer agrees to provide Premises at its approved location(s) that will promote the effective performance and conduct of Dealership Operations, and the Division's image and goodwill. Consistent with Division's dealer network planning objectives and Division's interest in maintaining the stability and viability of its dealers, Dealer agrees that its facilities will be sized in accordance with Division's requirements for that location.

Division agrees to establish and maintain a clearly stated policy for determining reasonable dealer facility space requirements and to periodically re-evaluate those requirements to ensure that they continue to be reasonable.

4.4.4 Dealership Image and Design

The appearance of Dealer's Premises is important to the image of Dealer and Division, and can affect the way customers perceive Division's Products and its dealers generally. Dealer therefore agrees that its Premises will be properly equipped and maintained, and that the interior and exterior retail environment and signs will comply with any reasonable requirements Division may establish to promote and preserve the image of Division and its dealers.

Division will monitor developments in automotive and

other retailing to ensure that Division's image and facility requirements are responsive to changes in the marketing environment.

Division will take into account existing economic and marketing conditions, and consult with dealers as described in Division's Dealer Sales and Service Agreement, in establishing such requirements

4.4.5 Dealership Equipment

Effective performance of Dealer's responsibilities

under this Agreement requires that the dealership be reasonably equipped to communicate with customers and the Division and to properly diagnose and service Products. Accordingly, Dealer agrees to provide for use in the Dealership Operations any equipment reasonably designated by Division as necessary to Dealer's effective performance under this Agreement. Division will make such designations only after having consulted with dealers as described in Division's Dealer Sales and Service Agreement

ARTICLE 5. DEALER'S RESPONSIBILITY TO PROMOTE, SELL, AND SERVICE PRODUCTS

5.1 Responsibility to Promote and Sell

5.1.1 Dealer agrees to effectively, ethically and lawfully sell and promote the purchase, lease and use of Products by consumers located in its Area of Primary Responsibility. To achieve this objective, Dealer agrees to:

- (a) maintain an adequate force of trained sales personnel;
- (b) explain to Product purchasers the items which make up the purchase price and provide purchasers with itemized invoices;
- (c) not charge customers for services for which Dealer is reimbursed by General Motors;
- (d) include in customer orders only equipment or accessories requested by customer or required by law; and
- (e) ensure that the customer's purchase and delivery experience are satisfactory.

If Dealer modifies or sells a modified new Motor Vehicle, or installs any equipment, accessory or part not supplied by General Motors, or sells any non-General Motors service contract for a Motor Vehicle, Dealer will disclose this fact on the purchase order and bill of sale, indicating that the modification, equipment, accessory

or part is not warranted by General Motors or, in the case of a service contract, the coverage is not provided by General Motors or an affiliate.

5.1.2 Dealer is authorized to sell new Motor Vehicles only to customers located in the United States. Dealer agrees that it will not sell new Motor Vehicles for resale or principal use outside the United States. Dealer also agrees not to sell any new Motor Vehicles which were not originally manufactured for sale and distribution in the United States.

5.1.3 Division will conduct general advertising programs to promote the sale of Products for the mutual benefit of Division and Dealers. Division will make available to Dealer advertising and sales promotion materials from time to time and advise Dealer of any applicable charges.

5.2 Responsibility to Service

5.2.1 Dealer agrees to maximize customer satisfaction by providing courteous, convenient, prompt efficient and quality service to owners of Motor Vehicles, regardless of from whom the Vehicles were

purchased. service will be performed and administered in a professional manner and in accordance with all applicable laws and regulations, and this Agreement, including the Service Policies and Procedures Manual, as amended from time to time.

5.2.2 Dealer agrees to maintain an adequate service and parts organization as recommended by Division, including a competent, trained service and parts manager(s), trained service and parts personnel and, where service volume or other conditions make it advisable, a consumer relations manager.

5.2.3 Dealer and Division will each provide the other with such information and assistance as may reasonably be requested by the other to facilitate compliance with applicable laws, regulations, investigations and orders relating to Products.

5.2.4 To build and maintain consumer confidence in, and satisfaction with, Dealer and Division, Dealer will comply with Divisional procedures for the investigation and resolution of Product-related complaints.

5.2.5 Division will make available Dealer current service and parts manuals, bulletins, and technical data publications relating to Motor Vehicles.

5.3 Customer Satisfaction

Dealer and Division recognize that appropriate care for the customer will promote customer satisfaction with Division's Products and its dealers, which is critically important to our current and future business success. Dealer therefore agrees to conduct its operations in a manner which will promote customer satisfaction with the purchase and ownership experience. Division agrees to provide Dealer with reasonable support to assist Dealer's attainment of customer satisfaction. At its discretion, Division will monitor the satisfaction of Dealer's customers, and report the results to Dealer. Any written response from Dealer concerning a customer satisfaction report issued to Dealer will become a part of the report.

5.4 Business Planning

To enable Dealer to most effectively meet its obligations under this Agreement, and to enable Division to effectively support Dealer's efforts, Dealer agrees to develop and implement a Business Plan if such is required by Division.

ARTICLE 6. SALE OF PRODUCTS TO DEALERS

6.1 Sale of Motor Vehicles to Dealer

Division will periodically furnish Dealer one or more Motor Vehicle Addenda specifying the current model types or series of new Motor Vehicles which Dealer may order under this Agreement. Division may change a Motor Vehicle Addendum by furnishing a superseding one, or may cancel an Addendum at any time.

Division will endeavor to distribute new Motor Vehicles among its dealers in a fair and equitable manner. Many factors affect the availability and distribution of Motor Vehicles to dealers, including com-

ponent availability and production capacity, sales potential in Dealer's Area of Primary Responsibility, varying consumer demand, weather and transportation conditions, governmental regulations, and other conditions beyond the control of General Motors. Division reserves to itself discretion in accepting orders and distributing Motor Vehicles, and its judgments and decisions are final. Upon written request, Division will advise Dealer of the total number of new Motor Vehicles, by series, sold to Dealers in Dealer's Zone or Branch during the preceding month.

6.2 Sale of Parts and Accessories to Dealer

New, reconditioned or remanufactured automotive parts and accessories marketed by General Motors and listed in current Dealer Parts and Accessories Price Schedules or supplements furnished to Dealer are called Parts and Accessories.

Orders for Parts and Accessories will be submitted and processed according to written procedures established by General Motors or other designated suppliers.

6.3 Prices and Other Terms of Sale

6.3.1 Motor Vehicles

Prices, destination charges, and other terms of sale applicable to purchases of new Motor Vehicles will be those established according to Vehicle Terms of Sale Bulletins furnished periodically to Dealer.

Prices, destination charges, and other terms of sale applicable to any Motor Vehicle may be changed at any time. Except as otherwise provided in writing, changes apply to Motor Vehicles not shipped to Dealer at the time the changes are made effective.

Dealer will receive written notice of any price increase before any Motor Vehicle to which such increase applies is shipped, except for initial prices for a new model year or for any new model or body type. Dealer has the right to cancel or modify the affected orders by delivering written notice to Division within 10 days after its receipt of the price increase notice.

6.3.2 Parts and Accessories

Prices and other terms of sale applicable to Parts and Accessories are established by General Motors according to the Parts and Accessories Terms of Sale Bulletin furnished to Dealer.

Prices and other terms of sale applicable to Parts and Accessories may be changed by General Motors at any time. Such changes apply to Parts and Accessories not shipped to Dealer at the time changes become effective.

6.4 Inventory

6.4.1 Motor Vehicle Inventory

Dealer recognizes that customers expect Dealer to have a reasonable quantity and variety of current model Motor Vehicles in inventory. Accordingly, Dealer agrees to order and stock and Division agrees to make available, subject to Article 6.1, a mix of models and series of Motor Vehicles identified in the Motor Vehicle Addendum in quantities adequate to enable Dealer to fulfill its obligations in its Area of Primary Responsibility.

6.4.2 Parts and Accessories

Dealer agrees to stock sufficient Parts and Accessories made available by General Motors to perform warranty repairs and policy adjustments and meet customer demand.

6.5 Warranties on Products

General Motors warrants new Motor Vehicles and Parts and Accessories (Products) as explained in documents provided with the Products or in the Service Policies and Procedures Manual.

EXCEPT AS OTHERWISE PROVIDED BY LAW, THE WRITTEN GENERAL MOTORS WARRANTIES ARE THE ONLY WARRANTIES APPLICABLE TO PRODUCTS. WITH RESPECT TO DEALERS, SUCH WARRANTIES ARE IN LIEU OF ALL OTHER WARRANTIES OR LIABILITIES, EXPRESS OR IMPLIED, INCLUDING ANY IMPLIED WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE OR ANY LIABILITY FOR COMMERCIAL LOSSES BASED UPON NEGLIGENCE OR MANUFACTURER'S STRICT LIABILITY. EXCEPT AS MAY BE PROVIDED UNDER AN ESTABLISHED GENERAL MOTORS PROGRAM OR PROCEDURE, GENERAL MOTORS NEITHER ASSUMES NOR AUTHORIZES ANYONE TO ASSUME FOR IT ANY OTHER OBLIGATION OR LIABILITY IN CONNECTION WITH PRODUCTS, AND GENERAL MOTORS MAXIMUM LIABILITY IS TO REPAIR OR REPLACE THE PRODUCT.

ARTICLE 7. SERVICE OF PRODUCTS

7.1 Service for Which Division Pays

7.1.1 New Motor Vehicle Pre-Delivery Inspections and Adjustments

Because new vehicle delivery condition is critical to customer satisfaction, Dealer agrees to perform specified pre-delivery inspections and adjustments on each new Motor Vehicle and verify completion according to procedures identified in the Service Policies and Procedures Manual.

7.1.2 Warranty and Special Policy Repairs

Dealer agrees to perform (i) required warranty repairs on each qualified Motor Vehicle at the time of pre-delivery service and when requested by owner, and (ii) special policy repairs approved by Division. When the vehicle is returned to the owner, Dealer will provide owner a copy and explanation of the repair document reflecting all services performed.

7.1.3 Campaign Inspections and Corrections

Division will notify Dealer of suspected unsatisfactory conditions on Products and issue campaign instructions. Dealer agrees to inspect and correct suspected unsatisfactory conditions on Products in accordance with the instructions. * Dealer will also determine that campaign inspections and corrections have been made on new and used Motor Vehicles in its inventory prior to sale, and follow up on Products on which campaigns are outstanding.

Division may ship, and Dealer agrees to accept, unordered parts and materials required for campaigns. Upon campaign completion, Dealer will receive credit for excess parts and materials so shipped if they are returned or disposed of according to Division's instructions.

7.1.4 Payment for Pre-Delivery Adjustments, Warranty, Campaign and Transportation Damage Work

For Dealer's performance of services, pre-delivery inspections and adjustments, warranty repairs, special policy repairs, campaign inspections and corrections, and transportation damage repairs, Division will provide or pay Dealer for the Parts and other materials required and will pay Dealer a reasonable amount for labor. Payment will be made according to policies in the Service Policies and Procedures Manual. Dealer will not impose any charge for such service on owners or users except where a deductible or pro-rata charge applies.

7.2 Parts, Accessories, and Body Repairs

7.2.1 Warranty and Policy Repairs

Dealer agrees to use only genuine GM or General Motors approved Parts and Accessories in performing warranty repairs, special policy repairs, and any other repairs paid for by Division, in accordance with the applicable provisions of the Service Policies and Procedures Manual.

7.2.2 Representations and Disclosures as to Parts and Accessories

In servicing vehicles marketed by General Motors, Dealer agrees to disclose the use of non-General Motors parts and accessories as set forth in Article 5.1.1.

7.2.3 Body Repairs

Dealer agrees to provide quality body repair service for Motor Vehicles. Dealer can provide this service through its own body shop, or by arrangement with an alternate repair establishment.

7.2.4 Tools and Equipment

Dealer agrees to provide essential service tools as required by Division and other tools and equipment as

necessary to fulfill its responsibilities to properly diagnose and service Products.

ARTICLE 8. TRAINING

Properly trained personnel are essential to the success of Dealer and Division, and to providing customers with a satisfactory sales and service experience. Division agrees to make available or recommend to Dealer product, sales, service and parts, accounting and business management training courses for Dealer personnel. Division will make such training available as conveniently in time and location as practical circumstances permit. Division will assist Dealer in determining training requirements and periodically will require that Dealer have personnel attend specific courses. Dealer agrees to comply with any such reasonable training

requirements and pay any specified training charges. Division will consult with dealers as described in Division's Dealer Sales and Service Agreement prior to determining the training courses or programs from which an individual Dealer's requirements under this Article may be established. Specific minimum service training requirements will be described in Division's Service Policies and Procedures Manual.

Division will make available personnel to advise and counsel Dealer personnel on sales, service, parts and accessories, and related subjects.

ARTICLE 9. REVIEW OF DEALER'S SALES AND SERVICE PERFORMANCE

* Dealer's performance of its obligations is essential to the effective representation of Division's Products, and to the reputation and goodwill of Dealer, Division, and other Division dealers. Periodically, Division will review various aspects of Dealer's sales and service

performance. Division and Dealer will use the review process to identify areas in which improvements or changes are necessary so that Dealer can take prompt action to achieve acceptable performance.

ARTICLE 10. CAPITALIZATION

The Capital Standard Addendum reflects the minimum net working capital necessary for Dealer to conduct Dealership Operations. Dealer agrees to maintain at least this level of net working capital. Division will issue a new Addendum if changes in operating conditions or Divisional guidelines indicate capital needs have changed materially.

To avoid damage to goodwill which could result if Dealer is financially unable to fulfill its commitments, Dealer agrees to have and maintain a separate line of credit from a financial institution available to finance its purchase of new vehicles. The amount of the line of credit will be sufficient for Dealer to meet its obligations under Article 6.4.

ARTICLE 11. ACCOUNTS AND RECORDS

11.1 *Uniform Accounting System*

A uniform accounting system facilitates an evaluation of Dealer business management practices and the impact of Division's policies and practices. Division therefore agrees to maintain, and Dealer agrees to use and maintain records in accordance with, a uniform accounting system set forth in an accounting manual furnished to Dealer.

* Dealer also agrees to timely submit true and accurate applications or claims for payments, discounts or allowances; true and correct orders for Products and reports of sale and delivery; and any other reports or statements required by Division, in the manner specified by Division, and to retain such records for at least two years.

11.2 *Examination of Accounts and Records*

Dealer agrees to permit any designated representative of Division to examine, audit, and take copies of any of the accounts and records Dealer is to maintain under the accounting manual and this Agreement. Dealer agrees to make such accounts and records readily available at its facilities during regular business hours. Division agrees to furnish Dealer with a list of any reproduced records.

11.3 *Confidentiality of Dealer Data*

Division agrees not to furnish any personal or financial data submitted to it by Dealer to any non-affiliated entity unless authorized by Dealer, required by law, or pertinent to judicial or administrative proceedings, or to proceedings under the Dispute Resolution Process.

ARTICLE 12. CHANGES IN MANAGEMENT AND OWNERSHIP

The parties recognize that customers and authorized dealers, as well as shareholders and employees of General Motors, have a vital interest in the continued success and efficient operation of Division's dealer network. Accordingly, Division has the responsibility of continuing to administer the network to ensure that dealers are owned and operated by qualified persons able to meet the requirements of this Agreement.

12.1 *Succession Rights Upon Death or Incapacity*

12.1.1 *Successor Addendum*

* Dealer can apply for a Successor Addendum designating a proposed dealer operator and/or owners of a

successor dealer to be established if this Agreement expires or is terminated because of death or incapacity. Division will execute the Addendum provided Dealer is meeting its obligations under this Agreement and under any Dealer Agreement which Dealer may have with other Divisions of General Motors for the conduct of Dealership Operations at the approved location; and the proposed dealer operator is, and will continue to be, employed full-time by Dealer or a comparable automotive dealership, and is already qualified or is being trained to qualify as a dealer operator; and provided all other proposed owners are acceptable.

Division may refuse to enter into a Successor Addendum with Dealer if Division has previously notified

Dealer if does not plan to continue Dealership Operations at the approved location, except for renewal of an existing Successor Addendum where the same proposed dealer operator continues to be qualified.

Upon expiration of this Agreement, Division will, upon Dealer's request, execute a new successor addendum provided a new and superseding dealer agreement is executed with Dealer, and Dealer, the proposed dealer operator and dealer owners are then qualified as described above.

12.1.2 Absence of Successor Addendum

If this Agreement expires or is terminated because of death or incapacity and Dealer and Division have not executed a Successor Addendum, the Dealer Operator or, if there is not a remaining Dealer Operator, the remaining dealer owners may propose a successor dealer to continue the operations identified in this Agreement The proposal must be made to Division in writing at least 30 days prior to the expiration or termination of this Agreement, including any deferrals.

12.1.3 Successor Dealer Requirements

Division will accept a proposal to establish a successor dealer submitted by a proposed dealer operator under this Article 12.1 provided:

(a) the proposed successor dealer and the proposed dealer operator are ready, willing and able to meet the requirements of a new dealer agreement at the approved location(s);

(b) Division approves the proposed dealer operator and all proposed owners not previously approved for the existing Dealership Operations;

(c) all outstanding monetary obligations of Dealer to General Motors have been satisfied; and

(d) Dealer has not been previously notified that Division may discontinue Dealership Operations at that location.

12.1.4 Term of New Dealer Agreement

The dealer agreement offered a successor dealer will be for a three-year term Division will notify the successor dealer in writing at least 90 days prior to the expiration date whether the successor dealer has performed satisfactorily and, if so, that Division will offer a new dealer agreement.

12.1.5 Limitation on Offers

Dealer will be notified in writing of the decision on a proposal to establish a successor dealer submitted under Article 12.1 within 60 days after Division has received from Dealer all applications and information reasonably requested by Division. Division may condition its offer of a dealer agreement on the relocation of dealership operations to an approved location by successor dealer within a reasonable time. Division's offer of a new dealer agreement under this Article 12.1 will automatically expire if not accepted in writing by the proposed successor dealer within 60 days after it receives the offer.

12.1.6 Cancellation of Addendum

Dealer may cancel an executed Successor Addendum at any time prior to the death of a Dealer Operator or Dealer Owner, or the incapacity of Dealer Operator. Division may cancel an executed Successor Addendum only if the proposed dealer operator is no longer qualified under Article 12.1.1.

12.2 Changes in Management or Ownership

If Dealer proposes a change in Dealer Operator, a change in ownership, or a transfer of the dealership business or its principal assets to any person conditioned upon Division's entering into a dealer agreement with that person, Division will consider Dealer's proposal and not arbitrarily refuse to approve it, subject to the following:

12.2.1 Dealer agrees to give Division prior written notice of any proposed change or transfer described above. Dealer understands that if any such change is made prior to Division's approval of the proposal, termination of this Agreement will be warranted and Division will have no further obligation to consider Dealer's proposal.

12.2.2 Division agrees to consider Dealer's proposal, taking into account factors such as (a) the personal, business, and financial qualifications of the proposed dealer operator and owners, and (b) whether the proposed change is likely to result in a successful dealership operation with acceptable management, capitalization, and ownership which will provide satisfactory sales, service, and facilities at an approved location, while promoting and preserving competition and customer satisfaction.

12.2.3 Division will notify Dealer in writing of Division's decision on Dealer's proposal within 60 days after Division has received from Dealer all applications and information reasonably requested by Division. If Division disagrees with the proposal, it will specify its reasons.

12.2.4 Any material change in Dealer's proposal, including change in price, facilities, capitalization, proposed owners, or dealer operator, will be

considered a new proposal, and the response period for Division to respond shall recommence.

12.2.5 Division's prior written approval is not required where the transfer of equity ownership or beneficial interest to an individual is (a) less than ten percent in a calendar year; and (b) between existing dealer owners previously approved by Division where there is no change in majority ownership or voting control. Dealer agrees to notify Division within 30 days of the date of the change and to execute a new Dealer Statement of Ownership.

12.2.6 Division is not obligated to approve any proposed changes in management or ownership under this Article unless Dealer makes arrangements acceptable to Division to satisfy any indebtedness of Dealer to General Motors.

12.3 Right of First Refusal to Purchase

12.3.1 Creation and Coverage

If Dealer submits a proposal for a change of ownership ~~under Article 12.2, Division will have a~~ right of first refusal ~~to purchase the dealership assets~~ regardless of whether the proposed buyer is qualified to be a dealer. If ~~Division chooses to exercise this right, it will do so in its written response to Dealer's proposal.~~ Division will have a reasonable opportunity to inspect the assets, including real estate, before making its decision.

12.3.2 Purchase Price and Other Terms of Sale

(a) Bona Fide Agreement

If Dealer has entered into a bona fide written buy/sell agreement, the purchase price and other terms of sale will be those set forth in such agreement and any related documents, unless Dealer and Division agree to other terms.

Upon Division's request, Dealer agrees to provide all documents relating to the proposed transfer. If Dealer refuses to provide such documentation or state in writing that such documents do not exist, it will be presumed that the agreement is not bona fide.

(b) *Absence of Bona Fide Agreement*

In the absence of a bona fide written buy/sell agreement, the purchase price of the dealership assets will be determined by good faith negotiations by Dealer and Division. If agreement cannot be reached within a reasonable time, the price and other terms of sale will be established by arbitration according to the rules of the American Arbitration Association.

12.3.3 *Consummation*

Dealer agrees to transfer the property by Warranty Deed, where possible, conveying marketable title free and clear of liens and encumbrances. The Warranty Deed will be in proper form for recording and Dealer will deliver complete possession of the property when the Deed is delivered. Dealer will also furnish copies of any easements, licenses or other documents affecting the property and assign any permits or licenses necessary for the conduct of Dealership Operations.

12.3.4 *Assignment*

Division's rights under this section may be assigned to any third party ("Assignee"). If there is an assignment, Division will guarantee full payment of the purchase price by the Assignee. Division shall have the opportunity to discuss the terms of the buy/sell agreement with a potential Assignee.

Division's rights under this Article are binding on and enforceable against any Assignee or successor in interest of Dealer or purchaser of Dealer's assets.

12.3.5 *Transfer Involving Family Members and Dealer Management*

When the proposed change of ownership involves a transfer by a dealer owner solely to a member or members of his or her immediate family, or to a qualifying member of Dealer's Management, the Division's right of first refusal will not apply. An "immediate family member" shall be the spouse, child, grandchild, spouse of a child or grandchild, brother, sister or parent of the dealer owner. A "qualifying member of Dealer's Management" shall be an individual who has been employed by Dealer for at least two years and otherwise qualifies as a dealer operator.

ARTICLE 13. BREACHES AND OPPORTUNITY TO REMEDY

13.1 *Certain Acts or Events*

The following acts or events, which are within the control of Dealer or originate from action taken by Dealer or its management or owners, are material breaches of this Agreement. If Division learns that any of the acts or events has occurred, it may notify the Dealer in writing. If notified, Dealer will be given the opportunity to respond in writing within 30 days of receipt of

the notice, explaining or correcting the situation to Division's satisfaction.

13.1.1 The removal, resignation, withdrawal, or elimination from Dealer for any reason of any Dealer Operator or dealer owner without Division's prior written approval.

13.1.2 Any attempted or actual sale, transfer,

or assign by Dealer of this Agreement or any of the rights granted Dealer hereunder, or any attempted or actual transfer, assignment or delegation by Dealer of any of the responsibilities assumed by it under this Agreement contrary to the terms of this Agreement.

13.1.3 Any change, whether voluntary or involuntary, in the record or beneficial ownership of Dealer as set forth in the Dealer Statement of Ownership furnished by Dealer, unless permitted by Article 12.2.5 or pursuant to Division's written approval.

13.1.4 Any undertaking by Dealer or any of its owners to conduct, either directly or indirectly, any of the Dealership Operations at any unapproved location.

13.1.5 Any sale, transfer, relinquishment, or discontinuance of use by Dealer of any of the Dealership Premises or other principal assets required in the conduct of the Dealership Operations, without Division's prior written approval.

13.1.6 Any dispute among the owners or management personnel of Dealer which, in Division's opinion, may adversely affect the Dealership Operations or the interests of Dealer or Division.

13.1.7 Refusal by Dealer to timely furnish sales, service or financial information and related supporting data, or to permit Division's examination or audit of Dealer's accounts and records.

13.1.8 A finding by a government agency or court of original jurisdiction or a settlement arising from charges that Dealer, or a predecessor of Dealer owned or controlled by the same person, had committed a misdemeanor or unfair or deceptive business practice which, in Division's opinion, may adversely affect the reputation or interests of Dealer or Division.

13.1.9 Willful failure of Dealer to comply with the provisions of any laws or regulations relating to the sale or service of Products.

13.1.10 Submission by Dealer of false applications or reports, including false orders for Products, or reports of delivery or transfer of Products.

13.1.11 Failure of Dealer to maintain the line of credit required by Article 10.

13.1.12 Failure of Dealer to timely pay its obligations to General Motors.

13.1.13 Any other material breach of Dealer's obligations under this Agreement not otherwise identified in this Article 13 or in Article 14.

If Dealer's response demonstrates that the breach has been corrected, or otherwise explains the circumstances to Division's satisfaction, then Division shall confirm this fact in writing to Dealer.

If, however, Dealer's response does not demonstrate that the breach has been corrected, or explain the circumstances to Division's satisfaction, termination is warranted and Division may terminate this Agreement upon written notice to Dealer. Termination will be effective 60 days following Dealer's receipt of the notice.

13.2 Failure of Performance by Dealer

If Division determines that Dealer's Premises are not acceptable, or that Dealer has failed to adequately perform its sales or service responsibilities, including those responsibilities relating to customer satisfaction and training, Division will review such failure with Dealer.

As soon as practicable thereafter, Division will notify Dealer in writing of the nature of Dealer's failure and of the period of time (which shall not be less than six months) during which Dealer will have the opportunity to correct the failure.

If Dealer does correct the failure by the expiration of the period, Division will so advise the Dealer in writing.

If, however, Dealer does not correct the failure by the

expiration of the period, Division may terminate this Agreement by giving Dealer 90 days advance written notice.

ARTICLE 14. TERMINATION OF AGREEMENT

14.1 By Dealer

Dealer has the right to terminate this Agreement without cause at any time upon written notice to Division. Termination will be effective 30 days after Division's receipt of the notice, unless otherwise mutually agreed in writing.

14.2 By Agreement

This Agreement may be terminated at any time by written agreement between Division and Dealer.

Termination assistance will apply only as specified in the written termination agreement.

14.3 Failure to be Licensed

If Division or Dealer fails to secure or maintain any license required for the performance of obligations under this Agreement or such license is suspended or revoked, either party may immediately terminate this Agreement by giving the other party written notice.

14.4 Incapacity of Dealer Operator

Because this is a Personal Services Agreement, Division may terminate this Agreement by written notice to Dealer if Dealer Operator is so physically or mentally incapacitated that the Dealer Operator is unable to actively exercise full managerial authority. The effective date of termination will be stated in such written notice and will be not less than three months after receipt of such notice.

14.5 Acts or Events

If Division learns that any of the following has occurred, it may terminate this Agreement by giving

Dealer written notice of termination. Termination will be effective on the date specified in the notice.

14.5.1 Conviction in a court of original jurisdiction of Dealer, or a predecessor of Dealer owned or controlled by the same person, or any Dealer Operator or dealer owner of any felony.

14.5.2 Insolvency of Dealer, or filing by or against Dealer of a petition in bankruptcy; or filing of a proceeding for the appointment of a receiver or trustee for Dealer, provided such filing or appointment is not dismissed or vacated within thirty days; or execution by Dealer of an assignment for the benefit of creditors or any foreclosure or other due process of law whereby a third party acquires rights to the operation, ownership or assets of Dealer.

14.5.3 Failure of Dealer to conduct customary sales and service operations during customary business hours for seven consecutive business days.

14.5.4 Any misrepresentation to General Motors by Dealer or by any Dealer Operator or owner in applying for this Agreement, or in identifying the Dealer Operator, or record or beneficial ownership of Dealer.

14.5.5 Submission by Dealer of false applications or claims for any payment, credit, discount, or allowance, including false applications in connection with incentive activities, where the false information was submitted to generate a payment to Dealer for a claim

which would not otherwise have been qualified for payment.

Termination for failure to correct other breaches will be according to the procedures outlined in Article 13.

14.6 Reliance on Any Applicable Termination Provision

The terminating party may select the provision under which it elects to terminate without reference in its notice to any other provision that may also be applicable. The terminating party subsequently also may assert other grounds for termination.

14.7 Transactions After Termination

14.7.1 Effect on Orders

If Dealer and Division do not enter into a new Dealer Agreement when this Agreement expires or is terminated, all of Dealer's outstanding orders for Products will be automatically cancelled except as provided in this Article 14.7.

Termination of this Agreement will not release Dealer or Division from the obligation to pay any amounts

owing the other, nor release Dealer from the obligation to pay for Special Vehicles if Division has begun processing such orders prior to the effective date of termination.

14.7.2 Termination Deliveries

If this Agreement is voluntarily terminated by Dealer or expires or is terminated because of the death or incapacity of a Dealer Operator or death of a Dealer Owner, without a termination or expiration deferral, Division will use its best efforts consistent with its distribution procedures to furnish Dealer with Motor Vehicles to fill Dealer's bona fide retail orders on hand on the effective date of termination or expiration, not to exceed, however, the total number of Motor Vehicles invoiced to Dealer for retail sale during the three months immediately preceding the effective date of termination.

14.7.3 Effect of Transactions After Termination

Neither the sale of Products to Dealer nor any other act by Division or Dealer after termination of this Agreement will be construed as a waiver of the termination.

ARTICLE 15. TERMINATION ASSISTANCE

15.1 Deferral of Effective Date

If this Agreement is scheduled to expire or terminate because of the death or incapacity of a Dealer Operator or the death of a Dealer Owner and Dealer requests an extension of the effective date of expiration or termination thirty days prior to such date, Division will defer the effective date for up to a total of eighteen months after such death or incapacity occurs to assist Dealer in winding up its Dealership Operations.

15.2 Purchase of Personal Property

15.2.1 Division's Obligations

If this Agreement expires or is terminated and

Division does not offer Dealer or a replacement dealer that has substantially the same ownership (more than 50 percent including total family ownership) a new Dealer Agreement, Division will offer to purchase the following items of personal property (herein called Eligible Items) from Dealer at the prices indicated:

(a) New and unused Motor Vehicles of the current model year purchased by Dealer from Division at a price equal to the net prices and charges that were paid to General Motors;

(b) Any signs owned by Dealer of a type recommended in writing by Division and bearing any Marks at a price agreed upon by Division and

Dealer. If Division and Dealer cannot agree on a price, they will select a third party who will set the price;

(c) Any essential tools recommended by Division and designed specifically for service of Motor Vehicles that Division offered for sale during the three years preceding termination at prices established in accordance with the applicable pricing formula in the Service Policies and Procedures Manual; and

(d) Unused and undamaged Parts and Accessories that (i) are still in the original, resalable merchandising packages and in unbroken lots (in the case of sheet metal, a comparable substitute for the original package may be used); (ii) are listed for sale in the then current Dealer Parts and Accessories Price Schedules (except "discontinued" or "replaced" Parts and Accessories); and (iii) were purchased by Dealer either directly from General Motors or from an outgoing dealer as a part of Dealer's initial Parts and Accessories inventory. Prices will be those dealer prices in effect at the time General Motors receives the Parts and Accessories, less any applicable allowances whether or not any such allowances were made to Dealer when Dealer purchased the Parts and Accessories. In addition, an allowance of five percent of dealer price for packing costs and reimbursement for transportation charges to the destination specified by General Motors will be credited to Dealer's account.

15.2.2 Dealer's Responsibilities

Division's obligation to purchase Eligible Items is subject to Dealer fulfilling its responsibility under this section.

Within fifteen days following the effective date of termination or expiration of this Agreement, Dealer will furnish Division with a list of vehicle identification numbers and such other information as Division may

request pertaining to eligible Motor Vehicles. Dealer will deliver the eligible Motor Vehicles to a destination determined by Division that will be in a reasonable proximity to Dealer's Premises.

Within two months following the effective date of termination or expiration of this Agreement, Dealer will mail or deliver to General Motors a complete and separate list of each of the Eligible Items other than Motor Vehicles. Dealer will retain the Eligible Items until receipt of written shipping instructions from General Motors. Within thirty days after receipt of instructions, Dealer will ship the Eligible Items, transportation charges prepaid, to the destinations specified in the instructions.

Dealer will take action and execute and deliver such instruments as necessary to (a) convey to Division and General Motors good and marketable title to all Eligible Items to be purchased, (b) comply with the requirements of any applicable state law relating to bulk sales or transfer, and (c) satisfy and discharge any liens or encumbrances on Eligible Items prior to their delivery to Division and General Motors.

15.2.3 Payment

Subject to Article 17.10, Division will pay for the Eligible Items as soon as practicable following their delivery to the specified destinations. Payment may be made directly to anyone having a security or ownership interest in the Eligible Items.

If Division has not paid Dealer for the Eligible Items within two months after delivery, and if Dealer has fulfilled its termination obligations under this Agreement, Division will, at Dealer's written request, estimate the purchase price of the unpaid Eligible Items and all other amounts owed Dealer by General Motors. After deducting the amounts estimated to be owing General Motors and its subsidiaries by Dealer, Division will advance Dealer 75 percent of the net amount owed Dealer and will pay the balance, if any, as soon as practicable thereafter.

Assignment of its

If Division has decided to appoint a replacement dealer at Dealer's location, Dealer may sell its Eligible Items and, if approved in writing by Division, assign its rights under this Article 15.2 to a designated replacement dealer provided the replacement dealer assumes Dealer's obligations under this Article.

15.3 Assistance on Premises

15.3.1 Division's Obligation

Subject to Article 17.10, Division agrees to give Dealer assistance in disposing of the Premises if (i) this Agreement expires for any reason or is terminated by Division under Articles 13.2 or 14.4 and (ii) Dealer is not offered a new Dealer Agreement. Such assistance shall be given only on Premises that are described in the Location and Premises Addendum and only if:

- (a) they are used solely for Dealership Operations (or similar dealership operations under agreements with other Divisions of General Motors which will be terminated simultaneously with this Agreement); and
- (b) they are not substantially in excess of space requirements at the time of termination or, if they are substantially in excess, they became excessive because of a reduction in the requirements applicable to Dealer's facilities.

Any Dealer request for such assistance must be in writing and received by Division within thirty days of the expiration or termination of this Agreement.

Premises that consist of more than one parcel of property or more than one building, each of which is separately usable, distinct and apart from the whole or any other part with appropriate ingress or egress, shall be considered separately under this Article 15.3.

15.3.2 Owned Premises

Division will provide assistance on owned Premises by either (a) locating a purchaser who will offer to purchase the Premises at a reasonable price, or (b)

locating a lessee who will offer to lease the Premises. If Division does not locate a purchaser or lessee within a reasonable time, Division will itself either purchase or, at its option, lease the Premises for a reasonable term at a reasonable rent. If the cause of termination or expiration is a death or the incapacity of the Dealer Operator, Division may instead pay Dealer a sum equal to a reasonable rent for a period of twelve months immediately following the effective date of termination or expiration of this Agreement.

15.3.3 Leased Premises

Division will provide assistance on leased Premises by either:

- (a) locating a tenant(s), satisfactory to lessor, who will sublet for the balance of the lease or assume it; or
- (b) arranging with the lessor for the cancellation of the lease without penalty to Dealer; or
- (c) reimbursing Dealer for the lesser of the rent specified in the lease or settlement agreement or a reasonable rent for a period equal to the lesser of twelve months from the effective date of termination or expiration of the balance of the lease term.

Upon request, Dealer will use its best efforts to effect a settlement of the lease with the lessor subject to Division's prior approval of the terms. Division is not obligated to reimburse Dealer for rent for any month during which the Premises are occupied by Dealer or anyone else after the first month following the effective date of termination or expiration.

15.3.4 Rent and Price

Division and Dealer will fix the amount of a reasonable rent and a reasonable price for the Premises by agreement at the time Dealer requests assistance. The factors to be considered in fixing those amounts are:

- (a) the adequacy and desirability of the Premises for a dealership operation; and

(b) the fair market value of the Premises. If Division and Dealer cannot agree, the fair market value will be determined by the median appraisal of three qualified real estate appraisers, of whom Dealer and Division will each select one and the two selected will select the third. The cost of appraisals will be shared equally by Dealer and Division.

15.3.5 Limitations on Obligation to Provide Assistance

Division will not be obligated to provide assistance on Premises if Dealer

- (a) fails to accept a bona fide offer from a prospective purchaser, sublessee or assignee;
- (b) refuses to execute a settlement agreement with the lessor if the agreement would be

without cost to Dealer;

(c) refuses to use its best efforts to effect a settlement when requested by Division, or

(d) refuses to permit Division to examine Dealer's books and records if necessary to verify claims of Dealer under this Article

Any amount payable by Division as rental reimbursement or reasonable rent shall be proportionately reduced if the Premises are leased or sold to another party during the period for which such amount is payable. Payment of rental reimbursement or reasonable rent is waived by Dealer if it does not file its claim therefor within two months after the expiration of the period covered by the payment. Upon request, Dealer will support its claim with satisfactory evidence of its accuracy and reasonableness.

ARTICLE 16. DISPUTE RESOLUTION PROCESS

Division and Dealer agree that mutual respect, trust and confidence are vital to the relationship between Division and Dealer. So that such respect, trust and confidence can be maintained, and differences that may

develop between Dealer and Division may be resolved amicably, Division and Dealer agree to resolve disputes in accordance with the Dispute Resolution Process, a copy of which has been provided to Dealer

ARTICLE 17. GENERAL PROVISIONS

17.1 No Agent or Legal Representative Status

This Agreement does not make either party the agent or legal representative of the other for any purpose, nor does it grant either party authority to assume or create any obligation on behalf of or in the name of the others. No fiduciary obligations are created by this Agreement.

17.2 Responsibility for Operations

Except as provided in this Agreement, Dealer is solely

responsible for all expenditures, liabilities and obligations incurred or assumed by Dealer for the establishment and conduct of its operations.

17.3 Taxes

Dealer is responsible for all local, state, federal, or other applicable taxes and tax returns related to its dealership business and will hold General Motors harmless from any related claims or demands made by any taxing authority.

17.4 Indemnification by General Motors

General Motors will assume the defense of Dealer and indemnify Dealer against any judgment for monetary damages or rescission of contract, less any offset recovered by Dealer, in any lawsuit naming Dealer as a defendant relating to any Product that has not been altered when the lawsuit concerns:

17.4.1 Breach of the General Motors warranty related to the Product, bodily injury or property damage claimed to have been caused solely by a defect in the design, manufacture, or assembly of a Product by General Motors (other than a defect which should have been detected by Dealer in a reasonable inspection of the Product);

17.4.2 Failure of the Product to conform to the description set forth in advertisements or product brochures distributed by General Motors because of changes in standard equipment or material component parts unless Dealer received notice of the changes prior to retail delivery of the affected Product by Dealer; or

17.4.3 Any substantial damage to a Product purchased by Dealer from General Motors which has been repaired by General Motors unless Dealer has been notified of the repair prior to retail delivery of the affected Product.

If General Motors reasonably concludes that allegations other than those set forth in 17.4.1, 17.4.2, or 17.4.3 above are being pursued in the lawsuit, General Motors shall have the right to decline to accept the defense or indemnify dealer or, after accepting the defense, to transfer the defense back to Dealer and withdraw its agreement to indemnify Dealer.

Procedures for requesting indemnification, administrative details, and limitations are contained in the Service Policies and Procedures Manual under "Indem-

nification." The obligations assumed by General Motors are limited to those specifically described in this Article and in the Service Policies and Procedures Manual and are conditioned upon compliance by Dealer with the procedures described in the Manual. This Article shall not affect any right either party may have to seek indemnification or contribution under any other contract or by law and such rights are hereby expressly preserved.

17.5 Trademarks and Service Marks

General Motors or affiliated companies are the exclusive owners or licensees of the various trademarks, service marks, names and designs (Marks) used in connection with Products and services.

Dealer is granted the non-exclusive right to display Marks in the form and manner approved by Division in the conduct of its dealership business. Dealer agrees to permit any designated representative of Division upon the Premises during regular business hours to inspect Products or services in connection with Marks.

Dealer will not apply to register any Marks either alone or as part of another mark, and will not take any action which may adversely affect the validity of the Marks or the goodwill associated with them.

Dealer agrees to purchase and sell goods bearing Marks only from parties authorized or licensed by Division or General Motors.

Marks may be used as part of the Dealer's name with Division's written approval.

Dealer agrees to change or discontinue the use of any Marks upon Division's request.

Dealer agrees that no company owned by or affiliated with Dealer or any of its owners may use any Mark to identify a business without Division's written permission.

Upon termination of this Agreement, Dealer agrees to immediately discontinue, at its expense, all use of Marks. Thereafter, Dealer will not use, either directly or indirectly, any Marks or any other confusingly similar

marks in a manner that Division determines is likely to cause confusion or mistake or deceive the public.

Dealer will reimburse Division for all legal fees and other expenses incurred in connection with action to require Dealer to comply with this Article 17.5.

17.6 Notices

Any notice required to be given by either party to the other in connection with this Agreement will be in writing and delivered personally or by first class or express mail or by facsimile. Notices to Dealer will be directed to Dealer or its representatives at Dealer's principal place of business and, except for indemnification requests made pursuant to Article 17.4, notices by Dealer will be directed to the appropriate Zone or Branch Manager of the Division(s) of General Motors.

17.7 No Implied Waivers

The delay or failure of either party to require performance by the other party or the waiver by either party of a breach of any provision of this Agreement will not affect the right to subsequently require such performance.

17.8 Assignment of Rights or Delegation of Duties

Dealer has not paid any fee for this Agreement. Neither this Agreement nor any right granted by this Agreement is a property right.

Except as provided in Article 12, neither this Agreement nor the rights or obligations of Dealer may be sold, assigned, delegated or otherwise transferred.

Division may assign this Agreement and any rights, or delegate any obligations, under this Agreement to any affiliated or successor company, and will provide Dealer written notice of such assignment or delegation. Such assignment or delegation shall not relieve Division of liability for the performance of its obligations under this Agreement.

17.9 No Third Party Benefit Intended

This Agreement is not enforceable by any third parties and is not intended to convey any rights or benefits to anyone who is not a party to this Agreement.

17.10 Accounts Payable

All monies or accounts due Dealer are net of Dealer's indebtedness to Division, General Motors and its subsidiaries. In addition, Division may deduct any amounts due or to become due from Dealer to Division or General Motors, or any amounts held by Division, from any sums or accounts due or to become due from Division, General Motors or its subsidiaries.

17.11 Sole Agreement of Parties

Except as provided in this Agreement, Division has made no promises to Dealer, Dealer Operator, or dealer owner and there are no other agreements or understandings, either oral or written, between the parties affecting this Agreement or relating to any of the subject matters covered by this Agreement.

Except as otherwise provided herein, this Agreement cancels and supersedes all previous agreements between the parties that relate to any matters covered herein, except as to any monies which may be owing between the parties.

No agreement between Division and Dealer which relates to matters covered herein, and no change in, addition to (except the filling in of blank lines) or erasure of any printed portion of this Agreement, will be binding unless permitted under the terms of this Agreement or related documents, or approved in a written agreement executed as set forth in Division's Dealer Sales and Service Agreement.

17.12 Applicable Law

This agreement is governed by the laws of the State of Michigan. However, if performance under this Agree-

ment is illegal under a valid law of jurisdiction where such performance is to take place, performance will be modified to the minimum extent necessary to comply with such law if it was effective as of the effective date of this Agreement.

17.13 Superseding Dealer Agreements

If Division offers a superseding form of dealer agreement to Division's dealers generally at any time prior to expiration of this Agreement, Division may terminate this Agreement by prior written notice to Dealer, provided Division offers Dealer a dealer agree-

ment in the superseding form for a term of not less than the unexpired term of this Agreement.

Unless otherwise agreed in writing, the rights and obligations of Dealer that may otherwise become applicable upon termination or expiration of the term of this Agreement shall not be applicable if Division and Dealer execute a superseding dealer agreement, and the matured rights and obligations of the parties hereunder shall continue under the new agreement.

Dealer's performance under any prior agreement may be considered in an evaluation of Dealer's performance under this or any succeeding agreement.

GLOSSARY

1. **Area of Primary Responsibility** – The geographic area designated by Division from time to time in a Notice of Area of Primary Responsibility.
2. **Dealer** – The corporation, partnership or proprietorship that signs the Dealer Agreement with Division.
3. **Dealer Agreement** – The Dealer Sales and Service Agreement, including the Agreement proper that is executed, the Standard Provisions, all of the related Addenda, the Accounting and Service Policies and Procedures Manuals, and the Terms of Sale Bulletins.
4. **Dealership Operations** – All operations contemplated by the Dealer Agreement. These operations include the sale and service of Products and any other activities undertaken by Dealer related to Products, including rental and leasing operations, used vehicle sales and body shop operations and finance and insurance operations whether conducted directly or indirectly by Dealer.
5. **Division** – The unit of General Motors Corporation that has entered into a Dealer Agreement with Dealer authorizing it to market and service Division's Motor Vehicles.
6. **General Motors** – General Motors Corporation.
7. **Motor Vehicles** – All current model types or series of new motor vehicles specified in any Motor Vehicle Addendum and all past General Motors motor vehicles marketed through Motor Vehicle Dealers.
8. **Products** – Motor Vehicles, Parts and Accessories.
9. **Service Policies and Procedures Manual** – The Manual issued periodically which details certain administrative and performance requirements for Dealer service under the Dealer Agreement.
10. **Special Vehicles** – Motor Vehicles that have limited marketability because they differ from standard specifications or incorporate special equipment.

Tab 2

1 Q ACCORDING TO YOUR COMPLAINT, I THINK YOU
2 INDICATE THAT IN APPROXIMATELY MAY OF 1992 SIERRA BUICK
3 FAILED TO OPEN ITS DOORS FOR BUSINESS AND UNDER THE TERMS
4 OF ARTICLE 14 OF THE DEALER SALES AND SERVICE AGREEMENT
5 BUICK ADVISED HELSCO BY LETTER THAT THE SALES AND SERVICE
6 AGREEMENT COULD BE TERMINATED. DOES THAT REFRESH YOUR
7 RECOLLECTION?

8 A YES, 1992.

9 Q HAD YOU HAD ANY DISCUSSIONS WITH ANYONE ABOUT
10 THE POSSIBLE ACQUISITION PRIOR TO THAT TIME OF APPLYING
11 -- NOT ACQUIRING BUT APPLYING FOR THE BUICK POINT IF IT
12 BECAME AVAILABLE?

13 A SOMETIME IN 1992 I HAD CONVERSATIONS.

14 Q WHO WITH?

15 A I CALLED THE BUICK ZONE OFFICE AND ASKED THEM
16 IF THERE WAS A POSSIBILITY OF PURCHASING THAT POINT.

17 Q APPLYING FOR THAT POINT?

18 A YES.

19 Q WHEN YOU SAY PURCHASE, YOU DON'T PURCHASE
20 SALES AND SERVICE AGREEMENTS, YOU APPLY FOR THEM AND THEY
21 ARE EITHER ACCEPTED OR DECLINED, ISN'T THAT CORRECT?

22 A WELL, THERE IS TWO PARTS TO THAT. YOU APPLY
23 FOR THEM BUT YOU DO HAVE TO STRIKE SOME PURCHASE
24 AGREEMENT.

25 Q WITH THE OLD OWNER?

1 A THAT'S CORRECT.

2 Q BUT YOU DON'T PAY ANYTHING TO GENERAL MOTORS
3 CORPORATION FOR THE DEALER SALES AND SERVICE AGREEMENTS
4 PER SE?

5 A NO, SIR.

6 Q WHO DID YOU TALK WITH AT THE ZONE OFFICE ABOUT
7 THAT?

8 A I BELIEVE IT WAS THE ZONE MANAGER, TOM GAROVE.

9 Q THAT WOULD HAVE BEEN BEFORE THE MAY 1992 TIME
10 PERIOD WHEN SIERRA BUICK FAILED TO OPEN ITS DOORS FOR
11 BUSINESS?

12 A COULD HAVE BEEN, YES.

13 Q LET ME SHOW YOU WHAT WILL BE MARKED AS
14 DEPOSITION EXHIBIT NUMBER 3 AND ASK IF YOU CAN IDENTIFY
15 IT FOR ME, PLEASE.

16 (DEPOSITION EXHIBIT NO. 3 WAS MARKED
17 FOR IDENTIFICATION.)

18 A I DO RECOGNIZE THIS.

19 Q DO YOU RECALL SPEAKING TO MR. GAROVE BEFORE
20 YOU WROTE THIS LETTER ABOUT THE BUICK POINT IN OGDEN,
21 UTAH --

22 A YES, SIR.

23 Q -- CURRENTLY HELD BY SIERRA BUICK AT THIS
24 TIME?

25 A YES.

1 Q HOW MANY CONVERSATIONS DID YOU HAVE WITH MR.
2 GAROVE PRIOR TO THIS LETTER BEING SENT?

3 A I BELIEVE JUST ONE.

4 Q CAN YOU RECALL WHAT WAS SAID AND BY WHOM
5 DURING THAT -- I GUESS IT WAS A TELEPHONIC CONVERSATION.

6 A YES. HE WAS VERY POLITE TO ME, LET ME KNOW
7 THAT PRESENTLY THEY HAD A SALES AND SERVICE AGREEMENT
8 WITH A DEALER IN OGDEN, UTAH AND INVITED ME TO UPDATE HIS
9 FILE OR SEND SOMETHING TO HIM AND THAT WAS THE PURPOSE
10 FOR THIS LETTER.

11 Q HE ALSO PROBABLY TOLD YOU, DIDN'T HE, THAT HE
12 COULDN'T REALLY TALK TOO MUCH ABOUT THAT DEALERSHIP OR
13 ITS FUTURE BECAUSE THEY HAD A CURRENT DEALER? DIDN'T HE
14 ADVISE YOU OF THAT AS WELL?

15 A YES, HE DID.

16 Q IN FACT, IT'S THE POLICY OF GENERAL MOTORS
17 CORPORATION, WHEN THEY HAVE AN EXISTING DEALER, NOT TO
18 TALK ABOUT THAT EXISTING DEALER WITH OTHER DEALERS, ISN'T
19 THAT CORRECT?

20 A THAT IS THE POLICY.

21 Q THAT'S USUALLY FOLLOWED, AT LEAST BASED ON
22 YOUR EXPERIENCE?

23 A YES, I DO THINK SO.

24 Q THIS LETTER, EXHIBIT 3, WAS PRECIPITATED BY
25 YOUR TELEPHONE CALL WITH MR. GAROVE, IS THAT CORRECT?

1 A YES.

2 Q IN FACT, THAT TELEPHONE CONVERSATION

3 APPARENTLY OCCURRED THE WEEK BEFORE MARCH 30 OF 1992,

4 ACCORDING TO EXHIBIT 3, IS THAT CORRECT?

5 A YES.

6 Q HAD YOU TALKED WITH ANYONE ELSE ABOUT APPLYING

7 FOR THAT BUICK POINT, IF IT BECAME AVAILABLE, WITH ANYONE

8 ELSE AT BUICK BESIDES MR. GAROVE PRIOR TO MARCH 30 OF

9 1992?

10 A NO, SIR.

11 Q HAD YOU TALKED WITH ANYBODY ABOUT ACQUIRING

12 THAT BUICK POINT PRIOR TO MARCH 30 OF 1992?

13 A I THINK I TALKED TO MY PARTNER, MERRILL BEAN,

14 OF OUR -- OF THE POTENTIAL INTEREST IN HAVING ANOTHER

15 FRANCHISE IN THIS BUILDING.

16 Q THE REASON FOR THAT WAS YOU HAD THE SPACE?

17 A YES.

18 Q BECAUSE YOU HAD ALREADY SOLD THE OTHER THREE

19 LINES THAT WE TALKED ABOUT PREVIOUSLY.

20 A YES, SIR.

21 Q YOU THOUGHT BUICK WOULD COMPLEMENT THE

22 CHEVROLET LINE THAT YOU KEPT?

23 A YES.

24 Q ANY OTHER CONVERSATIONS WITH ANYBODY ELSE

25 BESIDES YOUR BUSINESS PARTNER, MR. GAROVE, ABOUT THE

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about whether or not they could make application for this franchise, to your recollection?

A Prior to this proposal?

Q Either prior to that proposal or concurrent with that proposal, in that same time period.

MR. STEPHENS: Prior to Exhibit 2 or concurrent with Exhibit 2.

A You know, it's hard to recall conversations, but I would guess that somewhere in the course of considering this proposal there were other inquiries, yes.

Q And what did you do with those other inquiries?

A Well, if they were verbal, I simply advised the inquirer that we currently had a dealer in place and in business in Ogden, Utah and that I was not at liberty to discuss any opportunities with them.

Q Is that the general policy of General Motors where you have an application that's been made?

A Yes, sir.

Q At what point do you feel that you are then free to accept other applications from other parties?

MR. STEPHENS: If the application originally is rejected or accepted? I don't understand your

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question.

MR. BEAN: Whichever way they go.

Q If the application is accepted, then I assume no other applicants are considered; is that a fair statement?

A Certainly.

Q And if the application is rejected, then you are then in a position to accept other applications; is that correct?

A Certainly, yes.

Q At what point in that rejection process do you feel that you are free to accept other applications?

A Well, that would be after our existing dealer is formally notified in writing that he is -- his proposal has been rejected.

Q So, you would not make contact then or allow some other dealer to make contact with you about whether or not a franchise was available until you formally notified the applicant that his application had been rejected; is that correct?

A That's correct.

Q Are there written guidelines that are used by zone managers to determine the qualifications of an applicant for a Buick franchise?

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1 discuss or entertain that application or any other
2 application for that dealership until the application
3 pending has been disposed of?

4 MR. STEPHENS: Object; the question is compound.

5 MR. BEAN: Q. Do you understand my question?

6 A. I don't understand the "industry" part of
7 it. I don't understand it.

8 MR. STEPHENS: He's asking for discussions about
9 that.

10 MR. BEAN: Q. I'm saying, are you privy to any
11 discussions or understanding among the employees of
12 Buick Motor Division that when an application for a
13 sales and service agreement is pending, has been
14 received, that Buick Motor Division will not discuss
15 that application, nor will they receive applications
16 from any other parties until the pending application
17 is disposed of?

18 MR. STEPHENS: Object to the question as
19 definitely compound.

20 THE WITNESS: It's my understanding that we woul
21 not consider two applications at the same time.

22 MR. BEAN: Q. And where somebody wants to make
23 application while another application is pending, how
24 is that handled?

25 A. Normally it would not be -- we would not be
26 handling two applications at the same time.

*Would Not Consider
Two Applications at the Same Time*

1 Q. What do you say to the other party wanting
2 to make application?

3 A. Normally that conversation would happen with
4 the selling party.

5 Q. Between you and the selling party?

6 A. Yes, between --

7 Q. And what do you mean by that? Would you
8 tell a selling party that you can't look at anyone
9 else until the application that's there and the
10 buy-and-sell agreement that's in your possession has
11 been handled one way or another?

12 A. Normally we would inform the seller that the
13 practice would be not to evaluate two applications at
14 one time.

15 Q. Do any of the reports of CSI or retail sales
16 and registration summaries come through you; that is,
17 do you review those reports or read them with respect
18 to Buick dealers in the San Francisco zone?

19 A. Yes, I do read those reports.

20 Q. Are you familiar with the reports of CSI and
21 retail sales and registration summary for Petersen
22 Motors with regard to Buick --

23 A. No, I'm not.

24 Q. -- sales? Who would have those reports now?

25 A. Any reports now would be at the zone office,
26 which would be in Denver.

Tab 3

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Q I'm talking about the agreement for sale of assets that was made between John Watson Chevrolet and Helsco, Inc. d/b/a Sierra Buick.

A Yes, I'm aware of it, the agreement you are referring to.

Q And were you aware?

A But I'm not -- the date is unclear to me. I believe it was sometime in late August, September.

MR. STEPHENS: The buy-sell agreement?

THE WITNESS: The buy-sell agreement.

Q Prior to that buy-sell agreement, did your investigation show whether or not Sierra Buick was still doing business, and if not, what did you do about that? That's what I'm trying to ascertain.

A All our investigations showed that they were doing business.

Q Was a letter of termination ever sent to Sierra Buick indicating that their franchise was going to be terminated?

A No.

Q You are not aware of it?

A Not as a result of those investigations.

MR. STEPHENS: You used the term "franchise," David, and I'm not going to object to

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many reasons in the normal course of business after they have been submitted to us for consideration.

Q I guess that's my question. That goes to the heart of my question. In those kinds of situations you've just described, normally you have a dealer in place that's continuing to function; is that correct?

A Correct.

Q And in this case, is it possible that Sierra Buick was not continuing to function, that they were not selling new cars?

MR. STEPHENS: Objection. His testimony was that it was his belief they were continuing to do business and selling cars.

MR. BEAN: Yes, I'm just reconfirming that and saying is it possible that you are mistaken that they were not selling cars at this time.

MR. STEPHENS: Do you have any knowledge that they were not doing business?

THE WITNESS: I don't have any knowledge of that, no.

Q Do you, as the zone manager, get reports of the number of cars, new automobiles, registered in a particular area from a particular point in the state in which that point exists? Do you follow my question?



BUICK

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

August 19, 1992

Helsco, Inc. dba Sierra Buick-Jeep Eagle
520 Wall Avenue
Ogden, Utah 84403

ATTENTION: Mr. David Koch, VP/General Manager

Gentlemen:

Effective November 1, 1990, Buick Motor Division, General Motors Corporation, and Helsco, Inc. dba Sierra Buick-Jeep Eagle entered into a General Motors Corporation Dealer Sales and Service Agreement (Dealers Agreement) which authorized you to conduct dealership operations at premises located at 3520 Wall Avenue, Ogden, Utah.

Our observation and investigation indicates that you have failed to maintain customary sales and service operations for at least seven (7) consecutive business days. This constitutes grounds for immediate termination pursuant to the Dealer Agreement and is grounds for termination pursuant to state law.

Article 14.5.3 of your Dealer Agreement provides in pertinent part:

If Division learns that any of the following has occurred, it may terminate this Agreement by giving Dealer written notice of termination. Termination will be effective on the date specified in the notice.

Failure of Dealer to conduct customary sales and service operations during customary business hours for seven consecutive business days.

For the reasons stated herein, Buick is hereby terminating the Dealer Agreement between it and Helsco, Inc. dba Sierra Buick-Jeep Eagle. This termination is in effect sixty (60) days following your receipt of this letter and your status as an authorized Buick dealer will cease at that time.

Sincerely,

BUICK MOTOR DIVISION
General Motors Corporation

J. E. Garove

J. E. Garove
Assistant Zone Manager

EG/db
cc: Henry Nixon

cc: *CE. Peterson*
D. Kaye
MS Hadden
D. Brinkman

PREMIUM AMERICAN
MOTORCARS

EXHIBIT <i>PH 217</i>	
Def.	For Identification
Consisting of	<i>2</i> Page(s)
Witness	<i>Brinkman</i>
Date	<i>11/31/96</i>
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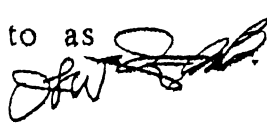
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EXHIBIT 21
EXHIBIT 22
EXHIBIT 23
EXHIBIT 24
EXHIBIT 25
EXHIBIT 26
EXHIBIT 27
EXHIBIT 28
EXHIBIT 29
EXHIBIT 30
EXHIBIT 18
EXHIBIT 19
EXHIBIT 20

Tab 4

AGREEMENT FOR SALE AND PURCHASE OF ASSETS

THIS AGREEMENT is made and entered into this 31ST day of AUGUST, 1992 by and between HELSCO, INC. , an Alabama corporation, dba Sierra Buick Jeep/Eagle (hereinafter referred to as "Seller") and John Watson Chevrolet, ~~Geo~~ (Watson), a Delaware corporation (hereinafter referred to as "Purchaser"). 

WITNESSETH:

WHEREAS, Seller is engaged in business as a Buick automobile dealer pursuant to a General Motors Sales and Service Agreement-Buick Division and as a Jeep/Eagle dealer pursuant to a Sales and Service Agreement with Chrysler Corporation. The said business (located in Ogden, Utah) may at times hereinafter be referred to as the "Dealership". The aforementioned sales and service agreement may at times hereinafter be referred to as the "Franchise Agreements"; and

WHEREAS, Seller is desirous of selling certain specified assets used in the Dealership business and Purchaser is desirous of purchasing certain specified assets used in the operation of the Dealership related to Buick, pursuant to the terms and conditions set forth herein; and

WHEREAS, the Seller has represented and does hereby represent that this "Agreement for Sale and Purchase of Assets" is entered into pursuant to a resolution of the Board of Directors of HELSCO, Inc. and approved by unanimous consent of the shareholders of the corporation, a copy of said resolution and consent to be provided to Purchaser prior to the Closing Date of the transaction; and

WHEREAS, the parties, by this Agreement set forth the purchase price, terms, and conditions upon which the parties desire to proceed; and

NOW, THEREFORE, in consideration of the purchase price hereinafter set forth and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, it is mutually agreed by and between the Seller and Purchaser as follows:

1. ASSETS PURCHASED AND PURCHASE PRICE. The Seller agrees to sell and the purchaser agrees to purchase the following assets (the "purchased assets") at the price as established in this paragraph:

a. Parts Inventory. All Buick factory parts listed in the Buick Factory Price Catalog as being current parts on or about the date of closing shall be purchased by Purchaser. A physical inventory will be conducted three days prior to the date of closing under this agreement by representatives of both Buyer and Seller and mutually agreed to by both Buyer and Seller. Purchaser agrees to purchase said inventory at current factory catalog prices , to the extent the parts and accessories are current items in the Buick catalog. It is specifically agreed that items in parts inventory which are partial cases, etc. which are not returnable to the factory will be purchased at mutually-agreed prices, so long as the items are in usable condition. The purchase price of all inventory items not returnable to Buick shall be negotiated by and between the parties. If the parties are unable to reach agreement regarding the value of non-current parts, then an appraiser mutually agreeable to the parties shall be selected to establish the value. The cost of such an appraisal shall be shared equally by the parties. The purchase price of the parts inventory shall be adjusted to the date of closing. An exhibit to this agreement shall be prepared prior to closing which identifies the parts and accessories to be purchased and the respective purchase price individually and in the aggregate.

b. Fixed assets and personal property. The Seller will create an inventory of fixed assets and personal property of the Dealership, if any, remaining subsequent to the auction conducted by Zion's Bank and will provide same to Purchaser. Purchaser agrees to purchase Buick special tools at Seller's cost and to purchase Buick advertising materials/showroom display materials at Seller's cost as shown on

Exhibit A to this agreement to be prepared and agreed to prior to closing, to the extent the advertising materials and displays are current and usable for 1993 models. Buick special tools and their related storage containers will be purchased at Seller's cost only to the extent they are no more than three years old and to the extent they are usable, full sets. Usable full sets of special tools that are more than three years old will be purchased by Buyer at mutually-agreed amounts, provided that if amounts cannot be mutually agreed upon, the purchase price will be determined by independent appraisal. Cost of such appraisal to be shared equally by Purchaser and Seller. Other fixed assets and personal property shall be purchased at mutually-agreed upon amounts. A listing of assets to be purchased and amounts to be paid therefor shall be prepared by the Seller and signed by Purchaser and Seller prior to closing. If Purchaser and Seller cannot agree on a price, an appraiser mutually acceptable to the parties shall be selected to establish the value, and the cost of the appraisal shall be shared equally by the parties. The purchase price of property which is subject to a security interest of Zion's Bank or GMAC will be paid to respective lender as provided herein.

The sum of the items above shall be defined as the "purchase price".

2. PAYMENT OF PURCHASE PRICE. The purchase price, as set forth above, shall be paid in immediately available funds by Purchaser to Seller on the closing date. Said payment will be made to the Escrow Agent hereinafter designated and disbursed by the Escrow Agent to secured/priority creditors of Seller, including the Internal Revenue Service and the Utah State Tax Commission, as directed by Seller.

3. CLOSING DATE. The closing date will occur within three business days of receipt by Purchaser of a General Motors Sales and Service Agreement-Buick Division. Provided, however, If closing does not occur before October 31, 1992, the parties shall be relieved from performing the terms and conditions of this Agreement and further relieved from any claims arising hereunder. Provided, however, that

such closing date may be extended by written mutual agreement of the parties to this Agreement.

4. WARRANTIES AND REPRESENTATIONS OF SELLER. Seller hereby represents and warrants as follows:

a. Title. Seller will transfer to Purchaser good and marketable title to all of the assets purchased hereunder, free and clear of all liens and encumbrances.

b. Bulk Sales. Seller shall cooperate in all respects in fulfilling and complying with the terms of the Utah Bulk Sales Law.

c. Authorization. Seller is a corporation duly organized, validly existing and in good standing under the laws of the state of Alabama and has all necessary corporate power and authority to consummate the transactions contemplated herein. This agreement has been duly authorized and executed pursuant to all necessary corporate action and constitutes a valid obligation of the Seller. The Seller will cause to be executed the appropriate corporate resolution and shareholder consent to allow closing of the transaction.

d. Transfer of the franchise agreement. Following the execution of this agreement and upon payment of the agreed upon sums into escrow, Seller will use its best efforts to assist purchaser in obtaining the consent and approval of Buick Motor Division necessary to allow the granting of the General Motors Sales and Service Agreement-Buick Division to Purchaser.

e. Compliance with law. To the best knowledge of Seller, the operations of Seller have not violated any federal, state, or local laws, regulations or orders to the extent that any such violation would materially and adversely affect Seller or Seller's ability to perform its obligations set forth in this agreement.

f. Litigation.

(1) Seller has not received notice and has no knowledge of any claim or demand, either pending or threatened, asserted against, affecting or involving Seller or its business, assets, properties, rights or operations which would materially affect the ability of Seller to carry out the transactions contemplated by this agreement, except for pending litigation between Seller and James Whetton , et. al., which litigation will be settled and dismissed, by offset of claims and mutual releases of all parties, within two business days of the execution of this Agreement.

(2) There is to the best knowledge of Seller's executive officers no litigation, action, proceeding or investigation pending or threatened (or any basis therefor known to such persons) before any court, administrative agency or other governmental body or arbitrator by, against, affecting or involving Seller or any of its business, assets, properties, rights or operations or which would materially affect the abilities of Seller to carry out the transactions contemplated by this agreement.

g. Broker's or Finder's Fees. Seller has not incurred nor will it incur any liability for broker's fees or finders fees. Purchaser acknowledges it has not incurred any broker's or finder's fees in connection with this transaction.

5. Transfer of assets. All of the purchased assets shall be transferred to Purchaser by Seller on the closing date by appropriate legal documents..

6. Warranties and representations of Purchaser.

a. Authorization. Purchaser is a corporation duly organized , validly existing and in good standing under the laws of the state of Delaware and has all necessary corporate power and authority to consummate the transactions contemplated herein. This agreement has been duly authorized by all necessary corporate

action, has been executed, and constitutes a valid obligation of Purchaser. Documentation of such corporate authorization will be provided at closing.

b. Franchise application. Purchaser warrants that Purchaser is an experienced automobile dealer and is aware of the requirements which must be met in order to obtain the Buick franchise. Purchaser agrees to promptly perform all acts necessary to obtain prompt approval of such applications. It is acknowledged that time is of the essence in the performance of the terms and conditions of this agreement. John Watson, as a stockholder of Purchaser, warrants and guarantees that he personally and the Purchaser will perform all acts necessary to fulfill this agreement and to effect the transfers of assets contemplated by this agreement. By execution of this agreement, John Watson acknowledges receipt of good and valuable consideration for the guarantee set forth in this paragraph and, hence, his execution of this agreement. This personal guarantee includes payment of the \$120,000 referred to herein but is limited to said sum in dollar amount.

c. Ownership. Purchaser is a corporation owned by John Watson, Beanstalk Limited Partnership, and J. Merrill Bean. There are no ownership interests (partnership, joint venture, or otherwise) by any other individuals, corporations, or partnerships with respect to John Watson Chevrolet or with respect to any entity which will operate the Buick dealership or its successor companies, if any. Purchaser represents that James J. Whetton, individually or through a corporation or partnership, does not have an ownership interest in Beanstalk Limited Partnership. As of the date of this Agreement, it is not contemplated there will be any change of ownership in John Watson Chevrolet Geo, or its subsidiaries or affiliated companies which are in the business of selling or leasing automobiles and trucks.

7. Access to records and properties. From and after the execution hereof until the closing date, Seller agrees to permit purchaser to make investigation of seller's business records relevant

to this transaction. Seller shall give to Purchaser access to relevant records at reasonable hours and shall furnish such documents as are requested and are relevant to this transaction. All such information revealed to Purchaser shall be held by it, its agents and employees, as confidential.

8. Conditions to closing.

a. Accuracy of representations and warranties. All of the representations and warranties made by Seller and Purchaser in this Agreement shall be correct and complete in all material respects at and as of the closing date, except to the extent such representations and warranties may have been affected by changes specifically permitted by this Agreement.

b. No action or proceeding. No claim, action, suit, investigation or other proceeding shall be pending or threatened before any court or governmental body which presents a substantial risk of the restraint or prohibition of the transaction contemplated by this Agreement. It is agreed by the parties hereto that, simultaneously with the execution of this Agreement, the litigation between the Seller and James Whetton, et. al., will be settled and dismissed, as described herein.

c. Purchaser shall submit all required Buick Motor Division documents to be appointed the Buick Dealer in Ogden, Utah.

d. Compliance with terms. On the closing date, all of the terms, conditions and covenants of this Agreement to be complied with, performed or observed by Purchaser and Seller at or before the closing date shall have been complied with, performed or observed, in all material respects.

e. Approval of documentation. The form and substance of all certificates, instruments, opinions and other documents delivered under this Agreement shall be satisfactory to the attorneys for the Purchaser and the Seller.

f. Time being of the essence, Purchaser shall receive at least verbal approval as a Buick dealer in Ogden, Utah and verbal approval of this Agreement within twenty-one (21) days of the date of execution of this Agreement. In the event such approval is not received within that period, Seller, solely within its discretion, may at any time exercise its right to terminate this Agreement upon forty-eight (48) hours prior written notice. If Seller terminates this Agreement as provided in this subparagraph 8 (f), the escrowed funds and the interest, if any, earned thereon while in the account, will be returned to Purchaser.

9. Termination.

a. Anything in this Agreement to the contrary notwithstanding, this Agreement may be terminated and abandoned at any time prior to closing:

(1) by mutual written consent of all parties hereto;

(2) notwithstanding anything to the contrary herein, if the closing has not occurred by October 31, 1992, and if prior to that date neither Seller or Purchaser have terminated the Agreement, then this Agreement shall automatically terminate unless extended in writing signed by all parties hereto.

10. Notices. All notices and other documents to be given by any party or parties to this agreement to any other party or parties hereto shall be in writing, and shall be given in person or by depositing in the United States mail, postage prepaid, addressed as follows:

To Seller:
Mr. Noel Hyde, Esq.
Nielsen & Senior
Eagle Gate Tower
Salt Lake City, UT

To Purchaser:
Mr. John L. Watson ^{IN}
John Watson Chevrolet, ^{Se}
3535 Wall Avenue
Ogden, UT 84401 4

or to such other address as such party may provide by notice given in the manner herein prescribed. Any such notice shall be deemed effective upon such personal delivery or upon the third day following its deposit in the mail as specified above.

11. General provisions. The following additional general provisions shall apply to this agreement:

a. This agreement has been executed in and shall be governed by the laws of the state of Utah.

b. This Agreement sets forth the entire understanding between the parties hereto and may not be altered, amended or revoked except by the written agreement of all of the parties or as provided for herein.

c. This agreement shall inure to the benefit of and be binding upon the parties hereto, their heirs, and personal representatives.

d. This agreement may not be assigned without written consent of Seller.

e. The parties agree that, should a dispute arise in the consummation of the transaction contemplated herein, said dispute will be resolved by submission of the matter for arbitration. Said arbitration will be by an individual or organization which has professional certification by a national organization as an arbitrator. The decision of the arbitrator shall be binding on all parties.

f. The paragraph headings used herein are for convenience only and shall not be deemed to modify or construe the provisions of this agreement.

g. Each of the parties shall pay all of their own costs and expenses (including attorney's fees and accountant fees) incurred or to be incurred by it or them in negotiating and preparing this

agreement and in closing and carrying out the transactions contemplated by this agreement. This provision shall be in effect whether or not the contemplated closing shall occur.

h. All representations, warranties, covenants and agreements of the parties contained in this agreement or in any exhibit, instrument, certificate, opinion or other writing provided for in it, shall survive the closing date.

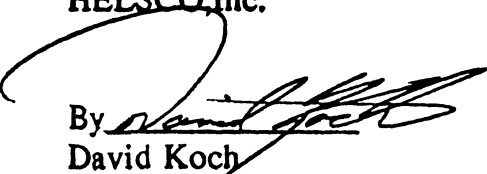
12. Escrow payment. Contemporaneously with the execution of this agreement, Purchaser will deliver to Nielsen & Senior, as escrow agent, (Escrow Agent), the sum of \$120,000. Funds representing the purchase price as defined herein will also be deposited with the escrow agent at closing. The total of the funds deposited and interest earned thereon (the Escrowed Funds) will be held by the Escrow Agent until closing. Escrow Agent agrees to hold the Escrowed Funds in an interest-bearing account. At the closing date, the Escrowed Funds will be disbursed by the Escrow Agent upon written approval of Purchaser and Seller to the Internal Revenue Service and the State of Utah Tax Commission in full settlement of amounts owed. The remainder of the Escrowed Funds, if any, will be disbursed to James & Co., Certified Public Accountants, who will then disburse such funds to the secured and preference creditors, and to unsecured creditors, to the extent of remaining funds after payment of secured and preference creditors. Lien releases will be obtained by Seller's agent concurrent with payments to the Internal Revenue Service, the State of Utah Tax Commission, and secured and preference creditors.

a. If Purchaser fails to close after appointment as a Buick dealer in Ogden, Utah, the Escrowed Funds will be paid to Seller as liquidated damages.

b. It is acknowledged that, from the Escrowed Funds representing the purchase price, \$81,531.78 will be paid at closing to the Internal Revenue Service and that [approximately \$38,000-exact amount to be inserted] will be paid at closing to the Utah State Tax Commission.

IN WITNESS WHEREOF, this agreement has been executed as of the day and year first above written.


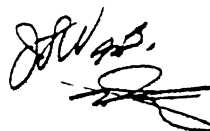
SELLER:
HELSCO, Inc.

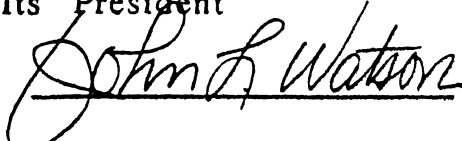
By 
David Koch
Its President

ESCROW AGENT:
Nielsen & Senior

BY 

BUYER:
John Watson Chevrolet, Geo

By 
John Watson 
Its President


John Watson, Guarantor
with respect to the items in
paragraph 6 above

COVENANT NOT TO COMPETE AND
CONSULTING AGREEMENT

THIS AGREEMENT, is made effective as of this 31ST day of August, 1992 by and between John Watson Chevrolet ~~Gco~~, Inc., a Utah corporation, hereinafter referred to as "Purchaser" and David Koch (hereinafter referred to as "Koch").

WHEREAS, Koch is the owner of approximately 15% of the issued and outstanding stock of HELSCO, Inc. , an Alabama corporation dba Sierra Buick Jeep/Eagle which operates a Buick and Jeep/Eagle automobile and truck dealership located in Ogden, Utah; and

WHEREAS, Purchaser has agreed to purchase certain specified assets from HELSCO in accordance with the terms and conditions of that certain "Agreement for Sale and Purchase of Assets", dated the 31ST day of August, 1992 (the Purchase Agreement); and

WHEREAS, Purchaser desires to obtain a Covenant Not to Compete and Consulting Agreement from Koch, and whereas Koch is willing to execute such a Covenant Not to Compete and Consulting Agreement on the terms and conditions set forth herein; and

WHEREAS, Koch has agreed with Purchaser to assist the Purchaser in its marketing efforts and business pursuits in accordance with the terms and conditions of this agreement.

NOW, THEREFORE, in consideration of the mutual covenants and agreements contained herein and other good and valuable consideration and intending to be legally bound hereby, the parties covenant and agree as follows:

1. TERM. The term of this agreement shall be three years effective on the date first written and continuing thereafter for three consecutive years;

2. RESTRICTIVE COVENANT. It is acknowledged by the parties that Koch has been substantially involved in the operation of the automobile dealership described in this agreement as a stockholder, an officer, director, and as general manager of the dealership during the period HELSCO has operated the automobile dealership described in this agreement for a substantial period of time. Koch has developed not only expertise in the operation of the business, but also expertise in marketing strategies which have lead to a substantial customer base in the dealership's relevant market area. Koch has knowledge of the books and records of the dealership together with the knowledge of the propensities of the franchisors to establish or relocate the dealership within Davis, Weber, or Box Elder counties. Koch agrees that he will not , for a period of three years from the effective date of this agreement, directly or indirectly as a sole proprietorship, as an equity member of a partnership, as an officer of a joint venture, association or corporation, or as a stockholder owning more than ten percent of the outstanding stock of a corporation in competition with Purchaser compete with Purchaser as a Buick new car or truck dealer in Davis, Weber, or Box Elder counties, State of Utah.

In the event the length of time, type of activity, geographic area, or other restrictions set forth in this paragraph are deemed unreasonable in any court proceeding, the parties agree that the court may reduce such restrictions in such a manner as it deems reasonable to protect the substantial investment Purchaser has made in the dealership.

3. CONSULTING SERVICES. Purchaser hereby engages Koch to consult with Purchaser on an as-needed basis and upon reasonable notice with respect to the operation of the Buick dealership located in Ogden, Utah. Koch agrees to furnish such consulting services as and when call upon by the Purchaser and at such times as Koch is available. Koch agrees to use his best efforts to promote the continuation and growth and profitability of the Buick dealership.

4. COMPENSATION. Purchaser agrees to pay Koch the sum of \$50,000 in consideration for the covenants set forth in this agreement. This amount is included in the \$120,000 paid into escrow by Purchaser under the terms of the Purchase Agreement. Payment shall be made in full on the closing date of the "Purchase Agreement" referred to herein. All compensation paid to Koch under this Agreement will be invested in HELSCO, to pay obligations of

HELSCO to the Internal Revenue Service for the trust portion of payroll taxes withheld and to the Utah State Tax Commission for sales taxes collected.

5. INDEPENDENT CONTRACTOR STATUS. Koch shall be deemed an independent contractor in fulfilling the terms of this agreement, and Purchaser shall not be responsible for tax withholding.

6. REMEDIES.

a. In addition to other rights of the parties as provided by law, Purchaser shall be entitled to enforce this agreement by injunction or restraining order, in addition to any other damages which may be proven, including actual attorney's fees, costs and expert witness fees which may be required to enforce the agreement.

b. In the event of breach or default in the performance of this noncompetition and consulting agreement by either party, the parties agree to enter into binding arbitration, using an individual or organization which has professional certification as an arbitrator.

7. ENTIRE AGREEMENT. This agreement constitutes the entire agreement between the parties pertaining to the subject matters contained herein and supersedes any prior agreements. No supplement, modification, or amendment to this agreement shall be deemed, or shall constitute a waiver of any other provision, whether or not similar, nor shall any waiver constitute a continuing waiver. No such amendment, modification, or waiver shall be binding unless executed in writing by the parties.

IN WITNESS WHEREOF, the undersigned have executed this agreement the date and year first above written.

John Watson Chevrolet, Geo

David Koch

By

~~John Watson~~

Its President

~~L. M. Bean~~

COVENANT NOT TO COMPETE AND
CONSULTING AGREEMENT

THIS AGREEMENT, is made effective as of this 31ST day of August, 1992 by and between John Watson Chevrolet Geo, Inc., a Utah corporation, hereinafter referred to as "Purchaser" and Henry P. Mixon (hereinafter referred to as "Mixon").

WHEREAS, Mixon is the owner of approximately 85% of the issued and outstanding stock of HELSCO, Inc. , an Alabama corporation dba Sierra Buick Jeep/Eagle which operates a Buick and Jeep/Eagle automobile and truck dealership located in Ogden, Utah; and

WHEREAS, Purchaser has agreed to purchase certain specified assets from HELSCO in accordance with the terms and conditions of that certain "Agreement for Sale and Purchase of Assets", dated the 31ST day of August, 1992 (the Purchase Agreement); and

WHEREAS, Purchaser desires to obtain a Covenant Not to Compete and Consulting Agreement from Mixon, and whereas Mixon is willing to execute such a Covenant Not to Compete and Consulting Agreement on the terms and conditions set forth herein; and

WHEREAS, Mixon has agreed with Purchaser to assist the Purchaser in its marketing efforts and business pursuits in accordance with the terms and conditions of this agreement.

NOW, THEREFORE, in consideration of the mutual covenants and agreements contained herein and other good and valuable consideration and intending to be legally bound hereby, the parties covenant and agree as follows:

1. TERM. The term of this agreement shall be two years effective on the date first written and continuing thereafter for two consecutive years;

2. RESTRICTIVE COVENANT. It is acknowledged by the parties that Mixon has been involved as a stockholder in HELSCO, Inc. during the period HELSCO has operated the automobile dealership described in this agreement for a substantial period of time. As a stockholder and investor, Mixon has developed not only expertise in the automobile business, but also expertise in marketing strategies, valuable relationships with Buick Motor Division and its representatives, and other relationships acknowledged by the parties hereto to be valuable to the ongoing success of the Buick franchise. Further, Mixon has numerous important business contacts in the state of Utah who represent potential buyers of products and services of the successor dealership. Mixon agrees that he will not , for a period of three years from the effective date of this agreement, directly or indirectly as a sole proprietorship, as an equity member of a partnership, as an officer of a joint venture, association or corporation, or as a stockholder owning more than ten percent of the outstanding stock of a corporation in competition with Purchaser compete with Purchaser as a Buick new car or truck dealer in Davis, Weber, or Box Elder counties, State of Utah.

In the event the length of time, type of activity, geographic area, or other restrictions set forth in this paragraph are deemed unreasonable in any court proceeding, the parties agree that the court may reduce such restrictions in such a manner as it deems reasonable to protect the substantial investment Purchaser has made in the dealership.

3. CONSULTING SERVICES. Purchaser hereby engages Mixon to consult with Purchaser on an as-needed basis and upon reasonable notice with respect to the operation of the Buick dealership located in Ogden, Utah. Consulting services under this agreement will be related to knowledge acquired as a stockholder of HELSCO during the period HELSCO operated the dealership. It is understood by the parties that Mixon has other business and professional relationships which may restrict the services he can provide. Accordingly, it is acknowledged by the parties that Mixon will not be required to perform any consulting services which are inconsistent with those business and professional relationships. Mixon represents, however, that he has no business relationships which are in the automobile industry which would prevent his performance under this agreement. Mixon agrees to furnish such consulting services as and when call upon by the Purchaser and at such times as Mixon is

available. Mixon agrees to use his best efforts to promote the continuation and growth and profitability of the Buick dealership.

4. **COMPENSATION.** Purchaser agrees to pay Mixon the sum of \$70,000 in consideration for the covenants set forth in this agreement. This amount is included in the \$120,000 paid into escrow by Purchaser under the terms of the Purchase Agreement. Payment shall be made in full on the closing date of the "Purchase Agreement" referred to herein. This consideration has been negotiated by the parties based upon the understanding and assumption that there shall remain no obligations owing to the Internal Revenue Service (IRS) for payroll tax trust funds or to the Utah State Tax Commission (Tax Commission) for sales taxes, after application of the proceeds of sale under the Agreement for Sale and Purchase of Assets and after application of money to which Purchaser is entitled to offset or withhold from David Koch . The value of such consulting and non-compete arrangements shall be lower if such obligations do exist. If, therefore, there remain any IRS or Tax Commission obligations, the consideration to Mixon shall be reduced by the amount of the remaining IRS and Tax Commission obligations. Mixon shall have no direct or indirect interest in those moneys, and Purchaser shall pay such amounts directly to the IRS and to the Tax Commission

5. **INDEPENDENT CONTRACTOR STATUS.** Mixon shall be deemed an independent contractor in fulfilling the terms of this agreement, and Purchaser shall not be responsible for tax withholding.

6. **REMEDIES.**

a. In addition to other rights of the parties as provided by law, Purchaser shall be entitled to enforce this agreement by injunction or restraining order, in addition to any other damages which may be proven, including actual attorney's fees, costs and expert witness fees which may be required to enforce the agreement.

b. In the event of breach or default in the performance of this noncompetition and consulting agreement by either party, the parties agree to enter into binding arbitration , using an individual or organization which has professional certification as an arbitrator.

7. ENTIRE AGREEMENT. This agreement constitutes the entire agreement between the parties pertaining to the subject matter contained herein and supersedes any prior agreements. No supplement, modification, or amendment to this agreement shall be deemed, or shall constitute a waiver of any other provision, whether or not similar, nor shall any waiver constitute a continuing waiver. No such amendment, modification, or waiver shall be binding unless executed in writing by the parties.

IN WITNESS WHEREOF, the undersigned have executed this agreement the date and year first above written.

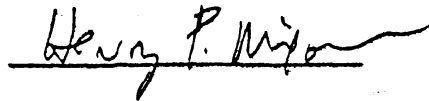
John Watson Chevrolet, Geo.

Henry P. Mixon

By 

~~John Watson~~

Its President


Henry P. Mixon

Tab 5

1 MR. STEPHENS: Objection, assumes facts,
2 vague.

3 THE WITNESS: Well, in the negotiations on
4 this, we were assured that John Watson could get James
5 Whetton to lift the restraining order.

6 Q. (BY MR. BEAN) Okay. Is that how you
7 expected that to be done, is through John Watson?

8 A. Exactly.

9 Q. And was that an understanding that was
10 expressed at the time that you negotiated this Exhibit
11 4 contract?

12 A. That's as it was expressed to me, yes.

13 Q. At the time that that occurred, did you have
14 any conversations with anybody representing Buick
15 Motor Division that that was how that restraining
16 order was going to get handled?

17 A. One telephone conversation.

18 Q. Do you recall who that was with?

19 A. I cannot recall. It was either Chris Wolf or
20 his successor. I can't recall his name right off the
21 top of my head.

22 Q. If I gave you a name, would you recognize it?

23 A. I'm sure I would.

24 Q. Mr. Garove, Tom Garove?

25 A. That's him, yeah.

1 Q. When you say you had one conversation, do you
2 recall about when that occurred?

3 A. I can't give you a date on that right off the
4 top of my head, no.

5 Q. Would it have been after the execution of
6 this agreement or before, if you can recall?

7 MR. STEPHENS: Again, Exhibit 4?

8 Q. (BY MR. BEAN) Exhibit 4.

9 A. My guess would be before, and without
10 actually having my diaries or anything to
11 double-check, I would just have to -- I'm almost
12 certain it was before, but I'm not positive.

13 Q. Do you recall what was said in that
14 conversation or -- I don't mean the exact words, but
15 the nature, the substance of the conversation, what
16 was being discussed?

17 A. Only that there was some concern by Buick
18 Motor Division that James Whetton was employed by the
19 purchasing -- the company we were planning to let
20 purchase the franchise and the concern was that James
21 Whetton would somehow be involved in the new
22 franchise. Without recalling exact verbiage or any of
23 that, there was strong opposition to that.

24 Q. To your knowledge, was that concern ever
25 realized? That is, to your knowledge, was Mr. Whetton

1 WHETTON BECAUSE NO ONE ELSE WAS ABLE TO DO THAT.

2 Q THAT'S CONTAINED IN THE AGREEMENT FOR SALE,
3 EXHIBIT 9, IS IT NOT?

4 A IT IS NOT -- IT'S IDENTIFIED IN THE AGREEMENT
5 OF SALE BUT POTENTIALLY MAYBE NOT INTERPRETED IN THE
6 AGREEMENT OF SALE AS I JUST STATED.

7 Q IN FACT, LOOKING AT PAGE 5, PARAGRAPH F(1) ON
8 EXHIBIT 9, IT REFERS TO A "PENDING LITIGATION BETWEEN
9 SELLER AND JAMES WHETTON, ET AL., WHICH LITIGATION WILL
10 BE SETTLED AND DISMISSED BY OFFSET OF CLAIMS AND MUTUAL
11 RELEASES OF ALL PARTIES WITHIN TWO BUSINESS DAYS OF THE
12 EXECUTION OF THIS AGREEMENT."

13 A YES, SIR, AND THAT WAS INTENDED THAT JOHN
14 WATSON WOULD BE THE ONE TO SETTLE THAT CLAIM OR GET MR.
15 WHETTON TO RELEASE THE RESTRAINING ORDER OR PETITION THE
16 COURT TO RELEASE THE RESTRAINING ORDER.

17 Q DURING THE MONTH OF AUGUST HAD YOU HAD ANY
18 DISCUSSIONS WITH MR. WHETTON OR AT ANY TIME PRIOR TO
19 AUGUST 31 OF 1992 WITH MR. WHETTON ABOUT SETTLING HIS
20 CLAIMS AGAINST HELSCO, DBA SIERRA BUICK?

21 A YES.

22 Q HOW MANY SUCH CONVERSATIONS DID YOU HAVE?

23 A I COULDN'T TELL YOU THE NUMBER OF
24 CONVERSATIONS, BUT I HAD GONE TO MR. WHETTON AND PLEADED
25 WITH HIM THAT IF IN FACT I BECAME THE BUICK DEALER IN

1 A I don't recall what caused it to be lifted
2 specifically. I didn't lift it. Are you saying
3 did we get a bond posted or as a result of not
4 posting the bond was it lifted?

5 QUESTIONS BY MR. BEAN:

6 Q Yes.

7 A My recollection was it was not lifted at the
8 time of this, and my recollection is that the
9 judge did not require the posting of the bond,
10 as is normally required by law.

11 Q I show you Exhibit 8, and ask you to read
12 through that exhibit.

13 A Okay.

14 Q Was a pretrial conference referred to in that
15 document actually held, to your knowledge?

16 MR. STEPHENS: Objection, no
17 foundation.

18 A I don't know if this particular one was held or
19 not.

20 QUESTIONS BY MR. BEAN:

21 Q Do you recall attending a pretrial conference
22 in connection with the lifting of the
23 restraining order?

24 A There were so many meetings and discussions. I
25 don't -- I mean, this one appears to have been

1 Utah?

2 A Did I communicate that to Buick?

3 Q Yes.

4 A I can't remember a particular conversation, but
5 I do recall that was my belief at the time, and
6 based upon that belief, it might have been
7 communicated, but I can't say, yes, I told them
8 that.

9 Q Is there some reason why you did not tell them
10 that there was an agreement between Helsco and
11 John Watson Chevrolet, that John Watson
12 Chevrolet would get the Whetton restraining
13 order lifted as part of the Buy and Sell
14 Agreement between Helsco and John Watson
15 Chevrolet?

16 MR. STEPHENS: That's vague,
17 ambiguous, objection, also misstates testimony.

18 THE WITNESS: Can you read that
19 back or repeat it?

20 COURT REPORTER: (Reading back)

21 "QUESTION: Is there some reason why you
22 did not tell them that there was an agreement
23 between Helsco and John Watson Chevrolet, that
24 John Watson Chevrolet would get the Whetton
25 restraining order lifted as part of the Buy and

Mixon's understanding
of the dismissal procedure
Koch was President
and dealer operator

Koch was the dealer
and took part in sale

1 Sell Agreement between Helsco and John Watson
2 Chevrolet?"

3 A I can't recall any particular reason for my
4 failure to communicate information to Buick
5 Motor Division. As to whether there was an
6 agreement, I don't know that I would
7 characterize it as an agreement until it
8 actually happened. I mean, there was a
9 discussion, if this, then that. I don't rec
10 that ever being reduced to an agreement. Th
11 discussion was, this will happen if this
12 happens, and if you make it happen, fine. I
13 don't know that that's an agreement.

14 QUESTIONS BY MR. BEAN:

15 Q Was the execution of the Buy and Sell Agreement
16 between John Watson Chevrolet and Helsco
17 contingent upon the dismissal of the Buy and
18 Sell Agreement -- excuse me, the restraining
19 order in the Whetton lawsuit?

20 MR. STEPHENS: Objection, leading.

21 The agreement speaks for itself.

22 THE WITNESS: Okay. Would you
23 read back the question again now that I have
24 looked at the agreement?

25 COURT REPORTER: (Reading back)

Mixon's understanding
of the dismissal procedure
Koch was President
and denio

Koch was the dealer
and took part in the

Deposition
Word Index

1 Q And you indicate that that was a verbal
2 agreement.

3 A Yes, that's what it says.

4 Q Did you also tell Buick Motor Company at some
5 time along the way, representatives of Buick
6 Motor Company --

7 MR. STEPHENS: Division.

8 QUESTIONS BY MR. BEAN:

9 Q -- that the restraining order could be lifted by
10 John Watson and Merrill Bean if they were
11 appointed the dealer operator at Ogden, Utah?

12 MR. STEPHENS: Objection, leading.

13 A I don't recall specifically saying it, but it
14 may have happened. It may have happened.

15 QUESTIONS BY MR. BEAN:

16 Q Did you tell anyone at Buick Motor Division that
17 there was an agreement by them, that is Merrill
18 Bean and John Watson and Jim Whetton, to dismiss
19 the restraining order and the lawsuit, the
20 lawsuit that John Whetton filed against Sierra
21 Buick Jeep-Eagle --

22 MR. STEPHENS: Objection, leading,
23 compound.

24 QUESTIONS BY MR. BEAN:

25 Q -- if they were appointed the dealer at Ogden,

Mixon's understanding
of the dismissal procedure
Koch was President
and dealer-operator

Koch was the dealer
and took part in sale

Deposition
Word Index

Tab 6

CK

October 7, 1992

To: Eric E. Peterson, Director
Dealer Network Development

Subject: Financial Intervention
Ogden, Utah

Attention: Dale Brinkman, Dealer Operations Manager-
West

The attached business case on the above subject city is being forwarded to for your review and assistance in obtaining the necessary approval to facilitate financial intervention in Ogden, Utah.

Please call Vorn Woodley or me if you have questions concerning the attached business case.

T. E. Garove

T. E. Garove
Zone Manager

Attachments

CONFIDENTIAL
FOR ATTORNEY'S EYES ONLY

EXHIBIT	3
Def.	For Identification
Consisting of	3
Witness	<i>Brinkman</i>
Date	1/31/96
A. L. ANDREINI, C.S.R. NO. 4804	

000139

PREMIUM AMERICAN
MOTORCARS

GG000007

EXHIBIT 21
EXHIBIT 11
EXHIBIT 12
EXHIBIT 13
EXHIBIT 4
EXHIBIT 5
EXHIBIT 6
EXHIBIT 7
EXHIBIT 8
EXHIBIT 9
EXHIBIT 10

BUSINESS CASE

FOR ATTORNEY'S EYES ONLY

Buick Franchise Purchase
Helsco, Inc. dba Sierra Buick-Jeep Eagle
Ogden, Utah

ZONE: San Francisco DATE: 10/6/92

PRESENT FIRM NAME: Helsco, Inc. dba Sierra Buick-Jeep Eagle
Ogden, Utah

TYPE OF PROPOSAL: Financial Intervention

Purchase of our franchise for "goodwill" dollars to facilitate the implementation of the Year 2000 Plan in Ogden, Utah and prevent the Buick franchise from going into Bankruptcy Court.

BACKGROUND:

Helsco, Inc. dba Sierra Buick-Jeep Eagle became a Buick Dealer on December 12, 1989. Sometime after becoming the Buick Dealer, the owners of Helsco, Inc. dba Sierra Buick-Jeep Eagle found themselves in a legal dispute with the seller, Jim Whetton. On April 2, 1992, after finding itself in a great deal of financial trouble with the Internal Revenue Service, the Utah State Tax Board and other creditors, Helsco, Inc. dba Sierra Buick Jeep-Eagle entered into an "Agreement for Sale and Purchase of Assets" with Rick Warner Enterprises, Inc. Rick Warner was proposed as the dealer/operator. During the review of the proposal package submitted to Buick by Rick Warner Enterprises, Inc., the Zone determined that Rick Warner did not have the necessary 15% required investment to be named dealer/operator. While the review process was going on, Jim Whetton, seller of the Buick franchise to Helsco, Inc. filed for and received a temporary restraining order which prevented Helsco, Inc. dba Sierra Buick-Jeep Eagle from transferring the assets of the Corporation to Rick Warner Enterprises. After months of legal maneuvers and unsuccessful attempts by Helsco, Inc. to have the restraining order lifted, Helsco, Inc. and Rick Warner Enterprises, Inc. terminated their Agreement. Shortly, thereafter, Helsco, Inc. entered into an "Agreement for Sale and Purchase of Assets" with John Watson Chevrolet, Inc. This buy-sell was facilitated by the lifting of the temporary restraining order which had existed preventing such.

The Zone has reviewed the stipulations of the "Agreement" as well as the performance of the Dealer applicant. The Zone has also reviewed the Year 2000 Plan for Ogden, Utah with the other GM Divisions that have representation in Ogden, Utah and concluded that it would be in the best interest of General Motors that all efforts be made to conform to the plans set forth. Those plans are for a Buick-Pontiac-GMC Truck dual, an Oldsmobile-Cadillac dual and a Chevrolet stand alone. In an effort to adhere to the Year 2000 Dealer Network Plan for Ogden, Utah, the Zone is proposing that Buick exercise the Right of First Refusal by

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purchasing our franchise for "goodwill" dollars as set forth in the "Agreement For Sale and Purchase of Assets" entered into between Helsco, Inc. dba Sierra Buick Jeep/Eagle and John Watson Chevrolet Inc. The dollar amount set forth in the Agreement is \$120,000.

RETURN OF INVESTMENT: The Zone has discussed the option with the Pontiac zone management responsible for Ogden, Utah. In discussing the Year 2000 Plan with Kent Petersen, dealer/owner, Petersen Motor Company, Inc. the Pontiac/GMC Truck dealer in Ogden, Pontiac's zone management was advised by Mr. Petersen that he would be very interested in acquiring the Buick franchise and dualling it with Pontiac and GMC Truck. The Zone will discuss conditions and agreements with Mr. Petersen for the possibility of being awarded a Buick Motor Division - General Motors Sales and Service Agreement. The conditions and agreements will include the payment of \$120,000 paid by Petersen Motor Company, Inc. to Buick as repayment for the amount Buick would pay to purchase the Buick franchise for "goodwill" dollars from Helsco, Inc. dba Sierra Buick Jeep-Eagle.

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FINAL CONSIDERATION: Should Buick decide not to exercise the Right of First Refusal, then it is likely that Helsco, Inc. will file for bankruptcy and Buick may be forced to accept an unsatisfactory Dealer as holder of the Buick franchise. Another consideration is that of foregoing the implementation of the Year 2000 Dealer Network Plan for Ogden, Utah by awarding John Watson Chevrolet the Buick Agreement.

The San Francisco Zone feels that given all of the particulars of the destiny of the Buick franchise in Ogden, Utah that exercising the Right of First Refusal and reassigning the \$120,000 expense to Petersen Motor Company, Inc. is our best course of action and is in the best interest of General Motors long-term.

Attachments are being provided to show the improving performance level of Petersen Motor Company, Inc.

CONFIDENTIAL
FOR ATTORNEY'S EYES ONLY

Tab 7

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about was in a conversation between you and Mr. Woodley
and Mr. Nixon; do I understand you correctly?

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A That's my recollection, yes.

5

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Q Well, could it have been any other person
with General Motors Corporation that would have been
involved in that conversation?

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A No, we were the front line decision makers.

9

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Q So would it have been you and Mr. Woodley
and Mr. Nixon --

11

A Right.

12

Q -- to your best recollection?

13

A Correct.

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Q Do you have any recollection, at this time,
that it could have been anyone else involved in that
conversation?

16

17

A Would have been no reason.

18

Q So, it wouldn't have been anyone else?

19

A No.

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Q And as far as you know, there was no written
authorization given by Mr. Nixon for that type of
contact?

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A No. I may add, as I recall, the chronology
of the events was upon receiving Mr. Nixon's verbal
permission to contact other candidates. In this case,

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Mr. Petersen's contact was made either by myself and/or Mr. Woodley, I can't recall. And that was followed up by further communication with Mr. Mixon, which would have -- which precipitated his understanding as documented in Exhibit 14.

Q In Exhibit 14 though, he doesn't say anything about your contacting another dealer, does he, another existing dealer?

MR. STEPHENS: Objection. The document speaks for itself.

A It does not state that, no. Let me read it again. No, it does not state that.

Q Your recommendation with regard to the options that were set forth in considering John Watson's application, it was clearly your recommendation and your representation to John Watson that there could be no dualing with Chevrolet; isn't that true?

A That's correct.

MR. STEPHENS: Can I talk to the witness again, please?

(Whereupon, at this time, Mr. Stephens and the witness left the deposition room.)

(Whereupon, at this time, the reporter marked the above-mentioned two-page document dated

1 A I indicated to Mr. Vansic if there was an
2 opportunity, I would be happy to have the franchise.
3 Either that afternoon or the next day, Mr. Tom Garove
4 who was the San Francisco Zone Manager for Buick
5 called me, said that he had been in touch with Jim
6 Vansic, and that we had been highly recommended and
7 would we be interested in taking that same agreement
8 if they exercised their first right of refusal, would
9 we step in and take the Buick franchise.

10 Q When you say the same agreement, what are
11 you referring to?

12 A The agreement that was on the table on the
13 buy and sale between John Watson and Sierra.

14 Q Did Mr. Garove indicate to you whether or
15 not at that time a decision had been made not to
16 accept the John Watson application?

17 A What he said was that it did not meet their
18 criteria for Project 2000, and that inasmuch as the
19 buy and sale was imminent, that they would like to
20 align it so it would be properly aligned.

21 Q Was any other reason given by Mr. Garove for
22 the rejection of the Watson application, to your
23 recollection?

24 A He did not indicate anything to me.

25 Q That was the only reason given?

Tab 8

1 Q. Was he acting under your direction in any of
2 the representations that are made in this note?

3 A. Not under my direction, no.

4 Q. Do you know if he was acting under direction
5 of the board of directors generally, that is whether
6 there had been a resolution passed or anything like
7 that that authorized Mr. Nixon to represent the
8 corporation in this capacity?

9 MR. STEPHENS: Objection, vague as to what
10 capacity. Go ahead.

11 THE WITNESS: I can't answer that question
12 directly. I have no general knowledge of that. You
13 have to remember that Henry Nixon, the board of this
14 corporation, was myself, Henry Nixon's wife and one of
15 his friends. They had a quorum to hold a board
16 meeting or whatever in my total absence. So all I can
17 go on concerning the board meetings is what I was
18 told. If any meetings took place directing Henry to
19 do any of this, I had no knowledge of it.

20 Q. (BY MR. BEAN) Let's talk about that for a
21 minute. Were board meetings held regularly,
22 corporation board of directors meeting held regularly
23 by this corporation?

24 MR. STEPHENS: Objection, lacks foundation.

25 THE WITNESS: Again, I have no direct

1 assets?

2 A I never recall such conversations. I don't know
3 that I had to authorize them. That was their
4 right. It wasn't up to me to authorize it, as I
5 recall.

6 Q Now, going back to one of my previous questions,
7 did you have any conversations with Peterson
8 Motor or any representatives of Peterson Motor
9 Company at Ogden, Utah regarding their
10 appointment as the dealer operator for Buick
11 Motor Division at Ogden, Utah, any conversation
12 with them as to their appointment?

13 A As I recall, we had discussions about the
14 logistical arrangements once they were appointed
15 or once it had been announced that they had been
16 appointed, I mean, matters like getting the
17 parts and doing this and doing that. I mean,
18 that was just part of the winding down.

19 Q Did you have any discussions with Peterson,
20 anyone, any representative of Peterson Motor
21 Company regarding their application for a Buick
22 Dealer Sales and Service Agreement?

23 A I don't recall any, no.

24 Q Did you receive any kind of payment from
25 Peterson Motor Company for any of the assets of

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A Prior to October 15th or after?

Q Either before or after October 15th.

A After October 15th, we discussed the details of executing Mr. Nixon's demonstrator, which was part of the terms of the buy-sell agreement which --

Q I guess I don't understand what you mean by buy-sell agreement.

A Who was going to provide him with a car and how would he take delivery, through what dealership.

Q Anything else that you can recall?

A None specifically at this time.

Q Do you recall conversations with anyone else representing Sierra Buick that relates to the purchase -- to the exercise of your right of first refusal or the purchase of the assets of Helsco d/b/a Sierra Buick that you have not told us about?

A Mr. Nixon was our sole contact.

Q He was your sole contact?

A Yes. Mr. Koch was per -- Mr. Nixon had been relocated out of the area and was, at some point in time, unavailable.

Q Regardless of where he was. So, you don't recall having any conversations with him?

A No, there were none, I can assure you of

2 of any such contact?

3 MR. STEPHENS: By Pontiac.

4 A By Pontiac, no.

5 Q By Pontiac.

6 A No.

7 Q Who in your zone would have made any such
8 contact if the contact was made?

9 MR. STEPHENS: He's Buick, not Pontiac.

10 MR. BEAN: Yes, I understand that.

11 A Now, you are referring to Buick?

12 Q Yes, who in your zone.

13 A In the Buick zone who would have made a
14 contact?

15 Q Yes, in your zone for Buick, who would have
16 made a contact with Pontiac regarding such I contact with
17 Kent Petersen?

18 MR. STEPHENS: At this juncture, it assumes
19 facts.

20 A Yes, it would have been myself or
21 Mr. Woodley.

22 Q If Mr. Woodley had done that, would he have
23 discussed that with you?

24 A Yes.

25 Q Then my question is, if that kind of contact

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was made, would that have been contrary to the basic policy of General Motors that we discussed previously, about making contacts or accepting contacts from other persons while an application is being considered?

A While an application is pending and being considered?

Q Yes.

A No, it wouldn't, if it's with the permission of the existing dealer.

Q With the permission of, for example, Helsco?

A Correct.

Q Do you have any knowledge that Helsco gave such permission in this case?

A Yes.

Q Tell us what your information is in that regard.

A Once again, I can't recall the conversations, but it would have been a discussion with Mr. Nixon and myself and Mr. Woodley.

Q And that would have been something that you would have done prior to notification to John Watson that he was being restricted as an applicant for that?

A That's correct.

Q Do you have any knowledge, at this time,

1
2 that such a conversation did exist between you and
3 Mr. Woodley and Helsco or Mr. Nixon?

4 A I believe there was one yes,

5 Q Well, when you said you believe there was
6 one --

7 A I would say, yes.

8 Q -- do you have a recollection of that
9 conversation?

0 A Once again, David, we are talking a few
1 years back. To the best of my recollection, one took
2 place, yes.

3 Q In the documents that have been furnished to
4 me, Mr. Garove, I see some notations of telephone calls
5 that you had with Mr. Whetton and with other persons
6 relative to this transaction where you felt the necessity
7 to make a memo of the call.

8 A Correct.

9 Q If you had had such a conversation with
0 Mr. Nixon, would you have made a memo of that?

11 MR. STEPHENS: Objection. Argumentative.

12 A Not in this particular case, no.

13 Q Why not?

14 A The reason I was taking memos on my
15 conversations from Mr. Whetton was, my concern about

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2 litigation that he may bring forward whatever the outcome
3 of all of the circumstances that were going on in Ogden,
4 Utah. At no time did I even consider that any litigation
5 would be brought forward based on our exercise of right
6 of first refusal. Therefore, I did not document any of
7 the conversations.

8 Q But you are saying that a conversation did
9 take place?

10 A That's correct.

11 Q So, you are telling us that the exception to
12 the policy is that if the dealer, existing dealer,
13 permits you to do that, then you can go ahead and do
14 that, make contact with other dealers, other prospective
15 dealers; is that correct?

16 A It's not an exception to a policy. It's
17 just a normal business courtesy that we would discuss it
18 with our existing dealer prior to making a contact.

19 Q Doesn't that allow you then to make
20 comparisons between perspective dealers if you will
21 follow that policy?

22 A Yes.

23 Q Is that something that is acceptable as a
24 matter to General Motors, to your knowledge, to make
25 those kinds of comparisons?

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A Yes.

Q So then, what you are telling me, if I understand you correctly, is you can consider the application or the possibility of the strengths and weaknesses of many different dealers for a particular franchise all at the same time if you get permission from the existing dealer to do so; is that correct?

A If that's the desires. And sales and service agreements, correction on the terminology.

Q When you say if it's his desire, you mean if it's the existing dealer's desire?

A Correct or he grants us permission based on our request.

Q That's what I'm saying. So, if you are able to make comparisons of various applicants for sales and service agreement, you ask the existing dealer if he'll grant you the right to do that and then you can make comparisons with four or five prospective --

A Candidates.

Q -- candidates for that dealer sales and service agreement; is that what you are telling me?

A That's correct.

Q And then when you do that, when you make those comparisons, do you look at all of the factors that

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you've discussed with us previously for each of those dealers to determine which is the strongest candidates for that sales and service agreement?

A Yes, all of those items we've discussed.

Q So, the fact that there may be a dealer who has an application with the Buick Division of General Motors and is first to have that application pending, it doesn't necessarily mean that his application will receive consideration solely on the merits of that application, that it may be compared with other prospective dealers if you desire to do so?

MR. STEPHENS: If the dealer desires.

MR. BEAN: His point was he could ask the dealer and if the dealer gave his permission, at their request, they can do that.

Q Isn't that so, sir?

A That's correct.

Q So, if you want to do that, you can do that by simply getting the dealer's permission to do that and you never get the permission in writing. Let me rephrase that. The permission from that existing dealer does not have to be in writing, it can be verbal; is that correct?

A As in this case it was, correct.

Q And the permission that you are talking

1 questions about Mr. Nixon with regard to this
2 exhibit. Was there any type of action or any
3 direction of you as president of the corporation to
4 Mr. Nixon to make contact with Mr. Whetton or his
5 attorneys or to make contact with Buick Motor Division
6 with respect to that lawsuit? Do you understand the
7 nature of my question?

8 A. No, sir, I don't.

9 Q. I'm trying to understand in what capacity
10 Mr. Nixon was making representations as contained in
11 this note to Buick Motor Division and making
12 representations to Mr. Whetton, in what capacity he
13 was representing HELSCO.

14 MR. STEPHENS: Objection, it lacks
15 foundation. It calls for representations in the
16 letter, Exhibit 8, for the note to file letter 8,
17 Exhibit 8. I think it's vague. I don't understand
18 the question. Go ahead.

19 THE WITNESS: I can't answer the question
20 because I don't know what capacity he was trying to
21 serve when he was doing this.

22 Q. (BY MR. BEAN) That's the very thing I'm
23 trying to get at. Did you direct him to do this as
24 president of the corporation?

25 A. No, I did not.

Tab 9

1 Q. When you say you had one conversation, do you
2 recall about when that occurred?

3 A. I can't give you a date on that right off the
4 top of my head, no.

5 Q. Would it have been after the execution of
6 this agreement or before, if you can recall?

7 MR. STEPHENS: Again, Exhibit 4?

8 Q. (BY MR. BEAN) Exhibit 4.

9 A. My guess would be before, and without
10 actually having my diaries or anything to
11 double-check, I would just have to -- I'm almost
12 certain it was before, but I'm not positive.

13 Q. Do you recall what was said in that
14 conversation or -- I don't mean the exact words, but
15 the nature, the substance of the conversation, what
16 was being discussed?

17 A. Only that there was some concern by Buick
18 Motor Division that James Whetton was employed by the
19 purchasing -- the company we were planning to let
20 purchase the franchise and the concern was that James
21 Whetton would somehow be involved in the new
22 franchise. Without recalling exact verbiage or any of
23 that, there was strong opposition to that.

24 Q. To your knowledge, was that concern ever
25 realized? That is, to your knowledge, was Mr. Whetton

1 ever employed by John Watson Chevrolet?

2 A. I believe so, as a salesman, but that was way
3 prior to us even discussing the matter of the
4 franchise purchase.

5 Q. Did you indicate to anyone representing Buick
6 Motor Company that John Watson may be able to get the
7 restraining order dismissed?

8 A. Yes, sir, that was in that phone
9 conversation.

10 Q. That was in that phone conversation?

11 A. Yes.

12 (Whereupon, Exhibit No. 7
13 was marked
14 for identification.)

15 Q. I show you, Mr. Koch, what's been marked
16 Exhibit 7 to the deposition and ask if you have --
17 aside from the first page which is a fax page, if you
18 have seen the other two pages of that exhibit before.

19 A. I don't believe so.

20 (Whereupon, Exhibit No. 8
21 was marked
22 for identification.)

23 Q. I show you what's been marked as Exhibit 8,
24 Mr. Koch. I don't represent that you have seen this
25 before. I, however, would like to ask you a couple of

Tab 10

1 dealership, did you make any comments to anyone about
2 whether or not this was contrary to the provisions of
3 the Project 2000 realignment?

4 A Again, to be honest with you, I don't recall
5 that comment.

6 Q So to your recollection, you didn't have any
7 conversations with Mr. Vansic, Zone Manager of
8 Pontiac, or with anybody at GMC Truck as to whether or
9 not you should be the one or entitled to receive the
10 Buick franchise rather than Rick Warner or anyone
11 else?

12 A The same answer. If I did, I don't recall
13 it. You talk to these people once a month, and a lot
14 of things are on the record. A lot of things are
15 off. But I have no recollection of specifically
16 saying, "Well, I ought to be the man to have Buick."

17 Q When you heard that the Rick Warner
18 application had been rejected, did you make any
19 attempt at that time to file an application for the
20 Buick Sales and Service Agreement?

21 A No.

22 Q Can you tell us why you didn't do it at that
23 time?

24 A I had heard that John was going to receive
25 it and it had been between Merrill and Jim Whetton. They

1 had had the inside track to receive it. I thought it
2 was a done deal. In fact, at one time I congratulated
3 John on his acquisition of Buick about the time that
4 we received the Mitsubishi franchise. And I had
5 entered into negotiation with Warner on the
6 Mitsubishi. So I thought it had been accomplished.
7 And so I did not try to go into competition with him
8 over it.

9 Q Did you ever have any conversations with
10 either David Cook or Henry Mixon about trying to
11 buy or enter into a buy and sell agreement with Sierra
12 Buick/Jeep/Eagle in connection with the Buick Sales
13 and Service Agreement?

14 A No.

15 Q Is it fair to state, Mr. Petersen, that at
16 that time and prior to the time you were contacted
17 by Mr. Vansic, that you were not actively seeking the
18 Buick Sales and Service Agreement for the Ogden area?

19 A Probably.

20 Q After you had the conversation with the
21 Pontiac Zone Manager, did you then have conversations
22 with anybody representing the Buick Zone?

23 A Yes.

24 Q Can you tell us who you had conversations
25 with?

Tab 11

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

NICHOLAS CRIVELLI; NICK)	
CRIVELLI CHEVROLET, INC.;)	
NICHOLAS CRIVELLI and ORLANDO)	
G. CRIVELLI, t/d/b/a CRIVELLI)	
ENTERPRISES,)	
)	
Plaintiffs,)	
)	
v.)	Civil Action No. 94-1453
)	
GENERAL MOTORS CORPORATION,)	
)	
Defendant.)	

OPINION

ZIEGLER, Chief Judge.

Pending before the court is the motion of defendant, General Motors Corporation, for summary judgment pursuant to Fed.R.Civ.P. 56(c). Defendant has moved for summary judgment with regard to two claims of plaintiffs, to wit, violation of the Pennsylvania Board of Vehicles Act and tortious interference with contracts. General Motors also has moved to dismiss the claims of Nicholas Crivelli, Orlando Crivelli and Crivelli Enterprises.

This case arises out of the attempted purchase of an automobile dealership in Beaver Falls, Pennsylvania. In early 1991, the owner of Scheidmantel Oldsmobile-Cadillac, Inc. decided to sell his business, and entered into negotiations with Floyd McElwain, another auto dealer. Scheidmantel's franchise agreement with GM contained two clauses relevant to this action. One mandated that any sale or transfer of the franchise must first have GM's approval, and the other granted GM a right of first refusal prior to the final transfer of the franchise. In October 1991, Scheidmantel and McElwain signed an asset purchase

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agreement which would have transferred ownership to McElwain. GM approved the transfer, but McElwain rescinded the agreement on October 28, 1991.

On November 20, 1991, Scheidmantel signed a second asset purchase agreement, this time with plaintiffs. In this agreement, plaintiffs sought to relocate the Oldsmobile-Cadillac dealership from Beaver Falls to the site of Nick Crivelli Chevrolet, Inc., in Vanport Pennsylvania, about five miles away. GM did not approve the Crivelli/Scheidmantel agreement, and in subsequent months plaintiffs modified the agreement in order to gain GM's approval. In doing so, they removed the condition that required the move. At the same time, however, GM began separate negotiations with McElwain, ultimately agreeing that if GM exercised its right of first refusal in the Scheidmantel franchise contract, McElwain would assume GM's rights and replace plaintiffs as the buyer. The GM/McElwain contract would have pre-empted any final sale from Scheidmantel to plaintiffs and would have given McElwain the dealership at the price and terms of the Crivelli/Scheidmantel agreement.

By letter dated January 31, 1992, plaintiffs notified GM of their modified agreement with Scheidmantel. On February sixth, GM exercised its right of first refusal, and scheduled a closing for the Scheidmantel/McElwain transfer. In March 1992, however, before the final transfer of the dealership to any party, creditors forced the Scheidmantel dealership into Chapter 7 bankruptcy proceedings. On April 23 the United States

Bankruptcy Court held an auction to dispose of the dealership and awarded the dealership to McElwain, as the highest bidder.

Plaintiffs claim that the actions of General Motors violated the Pennsylvania statute prohibiting manufacturers from unreasonably withholding approval of franchise transfers among auto dealers. Further, plaintiffs argue that the actions also give rise to a tortious claim involving intentional interference with performance of contract by a third person. Defendant argues that this case is ripe for summary judgment in its favor, as there are no issues of material fact and that defendant is entitled to judgment as a matter of law. We disagree.

Summary judgment may be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits, show that there is no issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Celotex v. Catrett, 477 U.S. 317, 322 (1986). In considering a motion for summary judgment, we must examine the evidence in the light most favorable to the non-moving party and draw all reasonable inferences in favor of that party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). Further, the Court of Appeals for the Third Circuit has held that

[a]lthough a 'scintilla of evidence' supporting the non-movant's case is not sufficient to defeat a motion for summary judgment, it is clear that a district court should not weigh the evidence and determine the truth of the matter itself, but instead, should determine whether there is a genuine issue for trial.

Country Floors v. Partnership of Gepner and Ford, 930 F.2d at

1062 (3d Cir. 1991), citing Anderson, 477 U.S. at 252.

Pennsylvania Statute

Plaintiffs contend that defendant violated § 818.9(b)(3) of the Pennsylvania Board of Vehicles Act, which states that it is unlawful "for any manufacturer . . . licensed under this act to [u]nreasonably withhold consent to the sale, transfer or exchange of the franchise to a qualified buyer capable of being licensed as a new vehicle dealer in this Commonwealth." Under the act, "any person who is or may be injured by a violation" may bring an action for damages. 63 P.S.A. §818.20(a).

Defendant argues that plaintiffs lack standing under this act because the statute "protects [only] the existing dealer's ability to obtain by 'sale' the value represented by 'the franchise.'" Defendant's brief at 25. However, in Big Apple BMW, Inc. v. BMW of North America, Inc., 974 F.2d 1358, 1383 (3d Cir. 1992), cert. denied, 113 S.Ct. 1262 (1993), the Court of Appeals interpreted the statute to grant standing to a prospective purchaser of an automobile dealership. Therefore, we hold that plaintiffs have standing to bring suit under the statute.

Defendant also argues that there is no genuine issue of material fact as to whether GM reasonably denied the transfer of the franchise to plaintiffs, and that GM is entitled to judgment as a matter of law. We disagree.

Plaintiffs first submitted the Scheidmantel/Crivelli transfer application to defendant's local "zone office" on December 10, 1991. At that time, the application included a plan to relocate the franchise to the site of Crivelli's current GM dealership. Subsequently, plaintiffs removed the condition, and notified defendant of the change on January 31, 1992. During the interim period, General Motors initiated negotiations with McElwain concerning the contractual right of first refusal. On February 6th, defendant exercised its right of refusal and notified plaintiffs of its action. GM contends that this amounted to nothing more than an exercise of its "considered business judgment," in selecting franchisees for its dealerships, and therefore was not unreasonable. Defendant's brief at 22. Plaintiffs rejoin that their modified agreement with Scheidmantel overcame all of defendant's stated objections, and that defendant's denial of permission to transfer the franchise violated the statute.

We have considered In Re Headquarters Dodge, Inc., 13 F.3d 674 (3d Cir. 1993), where the Court of Appeals found that an issue of material fact arose in a similar situation. In that case, under a similarly-interpreted New Jersey statute, a plaintiff contended that a manufacturer had modified conditions for approval of transfer. The Court found that a finder of fact would have to determine whether the denial of approval was unreasonable. Applying that teaching, we find that plaintiffs have adduced sufficient evidence to present a genuine issue of

material fact. Plaintiffs' claim will survive summary judgment.

Tortious Interference with Contractual Relationship

GM further claims that its pre-existing right of first refusal precludes plaintiffs' claim for tortious interference with the performance of a contract. In its brief, defendant argues that because the right of first refusal existed in Scheidmantel's franchise contract before plaintiffs and Scheidmantel began negotiations for transfer of the franchise, General Motors acted within its rights. Defendant's brief at 10.

Plaintiffs argue that the ultimate determination of whether a tort occurred should be based on whether GM violated the Pennsylvania Board of Vehicles Act. In support, plaintiffs again cite Big Apple BMW, Inc. v. BMW of North America, 974 F.2d at 1380-1382, as well as §767 of the Restatement (Second) of Torts. According to §767(a), the nature of the actor's conduct should be a part of the determination of whether the conduct was improper. Further, the Comment on Clause (a) states that evidence of whether the conduct alleged was improper can include "[c]onduct specifically in violation of statutory provisions." In Big Apple BMW, the Court of Appeals found that because the "factual underpinnings of [the] tort claims are intertwined" with the plaintiffs' statutory claims, a finder of fact would need to determine whether the actions constituted improper interference. Big Apple BMW, Inc., 974 F.2d at 1382.

In considering these factors, we hold that a fact-finder

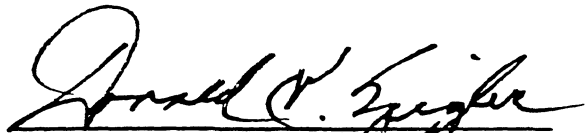
/ must make the determination as to defendant's liability on the tort claim. Because a genuine issue of material fact exists for the statutory claim, summary judgment is inappropriate on the tort claim.

Dismissal of Plaintiffs

Finally, GM also has moved to dismiss Nicholas Crivelli, individually, and Nicholas and Orlando Crivelli, doing business as Crivelli Enterprises. Defendant argues that Crivelli Enterprises can claim no injury from the events that occurred in this case. Plaintiffs agree. Therefore, we will dismiss those claims. Defendant also claims that Nicholas Crivelli personally should be dismissed from the case. We disagree, because Crivelli was a party to the second Scheidmantel/Crivelli agreement, and therefore Nicholas Crivelli may remain as a party to the action.

An appropriate order will follow.

Dated: December 27, 1995


Donald E. Ziegler
Chief Judge

cc: Counsel of Record

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

NICHOLAS CRIVELLI; NICK)
CRIVELLI CHEVROLET, INC.;)
NICHOLAS CRIVELLI and ORLANDO)
G. CRIVELLI, t/d/b/a CRIVELLI)
ENTERPRISES,)

Plaintiffs,)

v.)

GENERAL MOTORS CORPORATION,)

Defendant.)

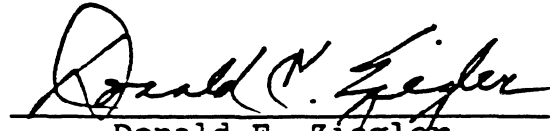
Civil Action No. 94-1453

ORDER

AND NOW, this 27th day of December, 1995, after
consideration of the motion (document no. 5) of defendant,
General Motors Corporation for summary judgment pursuant to
Fed.R.Civ.P. 56(c),

IT IS ORDERED that the motion be and hereby is granted
with respect to the claims of Orlando Crivelli and Crivelli
Enterprises and that judgment be and hereby is entered in favor
of defendant on these claims.

IT IS FURTHER ORDERED that the motion be and hereby is
denied in all other respects.


Donald E. Ziegler
Chief Judge

cc: Counsel of Record

Tab 12

OPTIONS I

I. Approve deal with Cavates

1. Separate Corp. based on year 2000 goals
2. Separate Showrooms, Sales Force, Service
Common Parts OK
3. Merrill Bean Dealer until John Watson is
sales effective with both Chevrolet & Buick
4. and CSI at or above state average for both
Chevrolet & Buick
4. Dealer to acquire Part. GMC Truck franchise
by year 2000 or Buick has right to
terminate agreement on recontacting date
of year 2000. GM corporate assistance to
execute Part-GMC Truck purchase optional
to Buick & General Motors Corporation. Provide
or not providing assistance has no bearing
on dealer obligation to execute year 2000 plan
5. Upon acquiring Part & GMC Truck franchise
adequate facilities to house all that will
be provided/added at current Duggles & Elms
Station site meeting General Motors Space
Guidelines and approval requirements
6. Existent temporary showroom to be reconfigured
to Buick L.E.O. trans. specifications
- 7- No consideration of any other temporary facility
to house Buick until new facility is constructed
and other franchises acquired. GG000020

CONFIDENTIAL
FOR ATTORNEY'S EYES ONLY

EXHIBIT	219	For Identification
Consisting of	2	Page(s)
Witness	Woodward	
Date	1/31/88	
A. L. ANDREIM, C.S.R. NO. 4304		

OPTION II

- check or/issue
1. Turn down based on sales effectiveness and lack of performance:
 2. Option: declare bankruptcy
 3. We extract agreement from bankruptcy court

Option III

1. Exercise right of first refusal
2. Pass on expense to winning dealer

CONFIDENTIAL
FOR ATTORNEY'S EYES ONLY

000199

GG000021

Tab 13

1. INSTALL R.E.D. TEAM FEATURE CAR DISPLAY ILLUMINATED RING & PAD
2. INSTALL PLANTER SEPARATION OF SHOWROOM & AND ICON
3. PROVIDE FRONTAGE DISPLAY SPACE FOR MINIMUM OF 20 NEW BUICKS ALONG RIVERDALE RD.
4. RELOCATE EXISTING GM SIGN FROM WALL ST. FACILITY TO RIVERDALE ROAD. INSTALL AT FRONT ST DRIVEWAY ENTRANCE
5. RE SIGN FRONT OF BUILDING TO READ
RICK WARNER BUICK - JEEP EAGLE WITH
GM SIGNAGE
6. PROVIDE MINIMUM OF 5 SERVICE STALLS OF EXISTING 10 TO BE USED AS BUICK SERVICE
7. HIRE 2-3 GM TRAINED TECHNICIANS FROM CURRENT BUICK - JEEP EAGLE DEALERSHIP FOR PRODUCT WARRANTY & CUSTOMER PAY WORK. ADD TO EXISTING 2 TECHNICIANS MITSUBISHI
8. HIRE SERVICE MGR FROM SIERRA BUICK - JEEP EAGLE
9. PROVIDE SEPARATE BUICK SALESMANAGER AND BUICK SALESPERSON FOR MAXIMUM MARKET PENETRATION

OTHER PLANS:

- BUY-SELL OF MITSUBISHI AT INSISTENCE OF RAY NORDA
- WILKING OF SATURN FRANCHISE AND 10 ADDITIONAL SERVICE STALLS WHEN SATURN AVAILABILITY INCREASES
- EXPENSE STRUCTURE OF DEALERSHIP TO BE COVERED BY ONE-WHOLE WHEN LEASES EXPIRE
- POSSIBLE BUY OUT OF RICK WARNER BY RAY NORDA
- SET-UP OF ALL DEALERSHIP PROFITS TO BENEFIT EDUCATION IN VTAN (FOUNDATION) WITH ALL ENTERPRISE IT TO GO TO CHARITY

PLAINTIFF'S	
EXHIBIT NO.	6
FOR IDENTIFICATION	
8-4-95	
DATE:	RPTR:

000598

GG000152

ONE MANAGER'S COMMENTS - OGDEN, UT.

The San Francisco Zone proposes Mr. Richard L. Warner to be dealer/owner of this new Dealer Company with a 15% investment. The Noorda Family Trust, headed by Mr. Raymond J. Noorda will own 85% of the new Dealer Company, which will be Rick Warner Ogden Motor Sales, Inc. DBA Rick Warner Buick Jeep/Eagle.

The proposal is a result of an "Agreement for Sale and Purchase of Assets" between Helsco, Inc. dba Sierra Buick Jeep-Eagle and Rick Warner Enterprises, Inc. The Agreement was received in this office on April 7, 1992. This subject point is outside the relevant market area, 100 miles (10 mile radius) of the other like GM franchises, therefore, it will not be necessary to notify any dealers to satisfy the Utah State Franchise Law. Ogden is also an Single Dealer Area (SDA).

CAPITALIZATION: The proposed new dealership corporation will be owned by Richard L. Warner, 15% and the Noorda Family Trust, 85%. The total proposed capital investment is \$681,500. The Minimum Net Working Capital Standard is \$500,000. The Actual Working Capital Amount is \$537,500. There will be no deficiency. The proposed net value of fixed and other assets is \$72,000.

Mr. Richard L. Warner will invest \$103,000 in capital stock to account for his minimum required investment of 15% to be named dealer. Mr. Warner's funds will come from his financial investment in Rick Warner Enterprises and will not be encumbered.

INDEBTEDNESS: There is no proposed Long-Term Debt.

Mr. Warner is currently dealer/owner of several other automotive dealerships, including: Saturn of Salt Lake City, Rick Warner Pontiac-Mazda, Salt Lake City, Utah, Rick Warner Chrysler-Plymouth, Salt Lake City, Rick Warner Hyundai, Ogden, Utah, Rick Warner Lincoln-Mercury, Provo, Utah, Rick Warner Suzuki, Salt Lake City and Warner Imports, Inc., Salt Lake City, Utah.

Mr. Rick McDonald who is currently the general manager of Rick Warner Mitsubishi, Riverdale, Utah is proposed as Executive Manager of the new Dealer Company. Mr McDonald's application indicates that he has been in the automobile selling business since January, 1975. There is no financial investment proposed for Mr. McDonald.

Mr. Raymond J. Noorda, head of the Noorda Family Trust, is Chairman-President, CEO of Novell, Inc. a Provo, Ut. based computer software company. Mr. Noorda indicates on his Source of Funds statement the current value of Novell, Inc. common stock at \$27,000,000.

VERIFICATION OF FUNDS: An attached deposit slip from Mr. Richard L. Warner was used to verify that funds are available to him to make the minimum required investment of 15% in the proposed Dealer Company.

GG000040

000269

ZONE MANAGER'S COMMENTS - OGDEN, UT. (CONT'D)

FACILITIES: Buick and Jeep/Eagle will be relocated from their present location at 3520 Wall Avenue - Ogden, Utah to 770 West Riverdale Road Riverdale, Utah. The new location will be 2 miles from the current location. As mentioned earlier, Ogden is an SDA and there are no other Buick dealers within a 10 mile radius. Therefore, no notification is required to any Buick dealers.

Buick and Jeep/Eagle will be joining Mitsubishi which is already in the proposed facility. However, there will be adequate space for the addition of Buick and Jeep/Eagle.

Buick will be separated from the other product lines and will be distinguished through the use of elements purchased by the dealer through the Buick Retail Environment Design Image Element catalog. Those elements are: Car Talker, Buick Ceiling Ring with Dome and Illumination, New Vehicle Carpet Display Pad and the Buick Icon. Order form to be submitted after signing proposed Dealer. (Signed order form on file at zone office).

The proposed Rent and Rent Equivalent is \$240,000 or \$444 per new unit sold retail. The average Rent and Rent Equivalent for the San Francisco Zone per new unit sold retail is \$584. The current lease on the proposed facility expires in 1999 with a 10 year renewable option.

The San Francisco Zone recommends approval of this proposal.

CONFIDENTIAL
FOR ATTORNEY'S EYES ONLY

CONFIDENTIAL

4/9/92

On 4/9/92 Mr. Nick Warner contacted the writer to request Binch's consideration towards dualing Buick in his existing Mitsubishi facility with Chrysler-Plymouth Jeep Eagle on one-half of the showroom and Buick on the other half of the showroom. Mr. Warner indicated that the Chrysler-Plymouth dealer across the street from his Mitsubishi store was also the Jeep-Eagle dealer in a near-by town (within 10 miles) and it was his intention to protect the Jeep-Eagle relocation to the Mitsubishi site in Ogden.

Mr. Warner believed that he may be able to keep the Chrysler-Plymouth dealer across the street from protecting the Jeep-Eagle relocation by offering a trade of Mitsubishi for Chrysler-Plymouth thereby creating a Buick / Chrysler-Plymouth Jeep Eagle dual situation in the existing Mitsubishi location.

The writer agreed in principle with the trade if a protest could be avoided and the showroom differentiation of walls were still built as previously agreed.

T. L. Lamer
Assistant Zone Mgr.

000523

GC000544

EXHIBIT 11

EXHIBIT 12

EXHIBIT 3

EXHIBIT 4

EXHIBIT 5

EXHIBIT 6

EXHIBIT 7

EXHIBIT 8

EXHIBIT 9

EXHIBIT 10

EXHIBIT 21

EXHIBIT 22

EXHIBIT 23

EXHIBIT 24

EXHIBIT 25

EXHIBIT 26

EXHIBIT 27

EXHIBIT 28

EXHIBIT 29

EXHIBIT 30

Tab 14

(c) Please identify all documents referring to or relating in any way to your response to subparts (a) and (b) of this Interrogatory.

ANSWER: Not applicable.

REQUEST FOR ADMISSION NO. 22: Admit that the reasons for not appointing John Watson Chevrolet, Inc., as the authorized Buick dealer for the Ogden, Utah area had nothing to do with the performance of John Watson as an authorized Buick dealer either in Rocks Springs, Wyoming or Evanston, Wyoming.

RESPONSE: Admit.

INTERROGATORY NO. 22: If your response to Request for Admission No. 22 above was anything other than an unqualified admission:

(a) Please state all facts upon which you base your qualification or denial.

(b) Please identify all persons having knowledge of facts supporting or otherwise relating to your response to subpart (a) of this Interrogatory and state the basis for such knowledge.

(c) Please identify all documents referring to or relating in any way to your response to subparts (a) and (b) of this Interrogatory.

ANSWER: Not applicable.

1 Q NOT AS OFTEN, THOUGH.

2 A NOT AS OFTEN. I HAVE GOT THOSE IN MY RECORDS.

3 TO JUST GIVE YOU THE NAMES OFF THE CUFF, I MAY MAKE A

4 MISTAKE.

5 Q WAS THAT DEALERSHIP IN EVANSTON SUCCESSFUL?

6 A FAIRLY SUCCESSFUL.

7 Q WHAT DO YOU MEAN, FAIRLY?

8 A EVANSTON WAS GOING THROUGH SOME -- A LITTLE

9 DECLINE RECESSION-WISE. IT WAS PROFITABLE BUT IT WAS NOT

10 AS PROFITABLE AS I HAD HOPED AND IT WAS AWAY FROM MY HOME

11 HERE IN OGDEN, UTAH AND THAT WAS THE REASON THAT I SOLD

12 IT.

13 Q WOULD IT BE FAIR TO SAY THAT YOUR EVANSTON

14 VENTURE WAS LESS PROFITABLE THAN PREVIOUS VENTURES THAT

15 YOU HAD HAD?

16 A I WOULDN'T CATEGORIZE IT THAT WAY.

17 Q IT JUST WASN'T WHAT YOU HAD HOPED?

18 A EXACTLY.

19 Q HOW WERE YOUR PERFORMANCE RATINGS IN THE

20 EVANSTON OPERATION?

21 A IN THE SHORT TIME THAT I HAD IT, I DON'T THINK

22 THAT WE EXCEEDED STANDARDS THAT WERE SET EVER.

23 Q IN FACT, YOU DID NOT EXCEED; IN FACT, YOU FELL

24 SHORT OF THE STANDARDS THAT WERE SET?

25 A POSSIBLY.

1 Q IN FACT, FOR JUST AN EXAMPLE, I'LL SHOW YOU A
2 DOCUMENT WHICH WILL BE MARKED AS EXHIBIT 1 AND ASK IF
3 THIS IS A TYPICAL PERFORMANCE EVALUATION FOR THAT
4 EVANSTON OPERATION DURING THE TIME THAT YOU WERE THE
5 DEALER OWNER-OPERATOR OF IT.

6 (DEPOSITION EXHIBIT NO. 1 WAS MARKED
7 FOR IDENTIFICATION.)

8 IT INDICATES, DOES IT NOT, EXHIBIT 1, THAT
9 YOUR PERFORMANCE BASED ON SALES IS NOT EFFECTIVE?

10 A YES.

11 Q WOULD THAT BE A TYPICAL PERFORMANCE EVALUATION
12 BY BUICK DURING THE TIME THAT YOU HELD THE DEALERSHIP
13 FROM BUICK AS WELL AS FROM CHEVROLET AND OLDSMOBILE?

14 A I COULDN'T ANSWER THAT.

15 Q BUT AT LEAST AS OF THE FULL YEAR 1987 IT
16 APPEARS OVERALL PERFORMANCE WAS DEEMED NOT EFFECTIVE BY
17 YOUR ZONE/BRANCH MANAGER WHO APPEARS TO BE JERRY HOLLAND.
18 DOES THAT REFRESH YOUR RECOLLECTION?

19 A AS YOU PROBABLY KNOW, THERE'S TWO OR THREE
20 WAYS OF MEASURING SALES EFFECTIVENESS. OUR SALES
21 EFFECTIVENESS WAS NOT AS WE HAD HOPED. THERE WERE OTHER
22 PARTS OF THE DEALERSHIP THAT WERE DOING REASONABLY WELL.

23 Q LIKE BASED ON REGISTRATIONS?

24 A AS YOU CAN SEE ON THIS. THAT MEANS THAT WE
25 WERE PROBABLY MORE EFFECTIVE THAN OTHER DEALERSHIPS IN

DNPTSR10 RETAIL SALES AND REGISTRATION SUMMARY
LOC PT: 0006714 DIVN CODE: P GM LINE: P DIV P G
PETERSEN MOTOR COMPANY, INC. OGDEN, UT

10/05/92 16:07:4

APPT DATE 06/27/80

INDUSTRY REG IN APR -SDA	1989	1990	12/1990
REG TO = NAT IN APR -SDA	2973	3000	2267
ACTUAL REG IN APR -SDA	199	179	112
REG VARIANCE TO NATL IN APR	228	173	120
	0	6	

UNIT SALES	233	130	107
SALES VARIANCE TO NATIONAL	0	49	10
REGISTRATION INDEX IN APR	114.57	96.65	107.14

SALES INDEX	117.09	72.63	91.07
SALES INDEX RANK IN GROUP	010/022	013/019	017/022

PF01 DLR FIN SUMM PF02 SALES BY SGMT PF03 DLR CSI INQ PF04 FAC INQ-PREM
PF05 REG BY SGMT PF06 FT REG BY SGMT PF07 SALES/REG HIST PF08 SALES/REG
PF09 BROWSE MENU PF10 INQUIRY MENU PF11 MAIN MENU ENTR NEXT PAGE
MORE DATA - PRESS ENTER TO CONTINUE P/W:

CONFIDENTIAL
FOR ATTORNEY'S EYES ONLY



000850

10/05/92 16:08:

1989	1990	12/1990
2158	2122	188
174	170	14
179	190	11
0	0	2

127	62	4.
47	108	10.
102.87	111.76	81.6

72.99	36.47	28.11
142/242	196/227	195/220

CONFIDENTIAL
FOR ATTORNEY'S EYES ONLY

000851

ГРРРРРРР

DNPTSI01 PONTIAC CSI INQUIRY 10/05/92 16:07:1
 LOC POINT: 0006714 PLAN NO 0117824 DIVN CODE: P STATUS ACTIVE LOAD
 PETERSEN MOTOR COMPANY, INC. NON GM
 OGDEN, UT 84405 WEBER
 APPT DATE 06/27/80

DIVISION P G
 --- CSI OVERALL DEALERSHIP ---

YR	STA	SURVEY PERIOD	---12 MTH---	LAST 3 MTHS	---DEALER RANK---	CUSTOMER RESPONSE				
		DLR	ZONE	DIVN	DLR	ZONE	ZONE	DIVN	NUM	PCT
92		AUGUST	81	87	88	86	88	101/123	2420/2789	34 44%
92		JUNE	82	86	87	84	87	98/121	2355/2787	31 43%
92		MARCH	83	86	87	73	85	96/120	2242/2799	38 45%
91		DECEMBER	81	86	87	81	86	104/126	2410/2832	41 45%
91		SEPTEMBER	80	86	87	95	87	109/129	2467/2840	46 45%
91		JUNE	78	86	87	86	86	117/132	2590/2848	52 46%
91		MARCH	76	85	86	72	85	116/133	2655/2860	47 41%
90		DECEMBER	77	86	86	78	85	115/132	2619/2869	58 40%
90		SEPTEMBER	76	86	86	77	87	119/133	2665/2867	67 38%

* = DEALER PARTICIPATING IN PROGRAM LESS THAN 12 MONTHS

\$ = OWNERSHIP CHANGED HANDS LAST 12 MONTHS; PREV OWNER DATA INCL IN REPORT

@ = NO CUSTOMER RESPONSE DURING LAST 3 MONTH PERIOD

PF01 PF02 PF03 DIV DLR INQ PF04 SALES/REG SUMM
 PF05 DLR FIN SUMM PF06 FAC INQ-PREM PF07 PF08
 PF09 BROWSE MENU PF10 INQUIRY MENU PF11 MAIN MENU ENTR NEXT DIVISION
 P/W:

CONFIDENTIAL
 FOR ATTORNEY'S EYES ONLY

**DEPOSITION
 EXHIBIT**
 5

DNPTFA05 DEALER FACILITY INQUIRY - DETAIL
LOC PT: 0006714 PLAN NO 0117824 STATUS ACTIVE LOAD
PETERSEN MOTOR COMPANY, INC.

10/05/92 16:09:52
BMD PONT

GMMS 1016 DATE 11/01/90

DIVN P G

PGUID 200 200

	GUIDE	--BUILDING--	----	LOT----	GM	% GM	FACTS
	STALLS	GM	OTHER	GM	OTHER	TOTAL	TOTAL NONGM
-----DEPARTMENTS-----						400	760
NEW VEHICLE DISPLAY	3	5	10	30	60	35	1167
USED VEHICLE DISPLAY	33			40	47	40	121
PROD. SERVICE: MECH	9	12	18			12	133
PROD. SERVICE: BODY	5	8	10			8	160
SERVICE RECEPTION	2	8	12	4	8	12	600
PARKING - CUSTOMER	28			40	46	40	143
NEW VEHICLE STORAGE	50			70	155	70	140
EMPL/DEMO PARK MISC	14			35	50	35	250
		SQ. FT					
GENERAL OFFICE	1800	2340	1560			2340	130
PARTS	2800	3600	4060			3600	129

PF01 FAC STUDY-SUMM	PF02 NON-GM INQ	PF03 DIV DLR INQ	PF04 SALES/REG SUM
PF05 DLR FIN SUMM	PF06 FAC INQ-PREM	PF07 CSI INQUIRY	PF08 INV INQ
PF09 BROWSE MENU	PF10 INQUIRY MENU	PF11 MAIN MENU	ENTR NEXT LOC PT

P/W:

CONFIDENTIAL
FOR ATTORNEY'S EYES ONLY



000852

Tab 15

September 17, 1992

Mr. Tom Garove
Buick Motor Division
39465 Paseo Padre Parkway
Fremont CA 94538

RECEIVED
SEP 17 1992
BUICK MOTOR DIV.
S.F. ZONE

Dear Mr. Garove:

I forwarded the documents concerning John Watson's application as Buick dealer in Ogden to Mr. Watson today via Mr. Merrill Bean by a copy of this letter.

Your letter of September 15, 1992 transmitting said documents requested a copy of the Buy/Sell Agreement between HELSCO and John Watson. It is my understanding Dave Koch, President of HELSCO forwarded said document to you the day after it was executed. It is my understanding from John Watson today that said document has already been forwarded to Flint for corporate review. Accordingly, I did not send another copy to you. If you need an "official" transmittal in a certain form from an officer of the corporation, please contact Dave Koch. I am not an officer.

Sincerely,

HPM

Henry Mixon

Vrm.

*Paul Bostic and I
will be going to Ogden
on 9/28 and 9/29 to
meet with John Watson.*

*Let's discuss this
before I go. TAY.
9/21/92*

EXHIBIT	(PIL) 29
Doc. For Identification	
Consisting of	Page(s)
Witness	<i>Brinkner</i>
Date	<i>9/31/92</i>
A. L. ANDREINI, C.S.R. NO. 4804	

000197

Tab 16

RECEIVED
BUICK MOTOR DIV.

OCT 13 1992

Mr. Vean Woodley
Buick Motor Division
P. O. Box 23500
Oakland, CA 94623

SAN FRANCISCO ZONE

October 13, 1992

CONFIDENTIAL

Dear Vorn:

You indicated that, in the event John Watson is not approved as the Buick Dealer in Ogden, Utah, Buick Motor Division will exercise its rights under the dealer sales and service agreement to complete the purchase under the same terms as are contained in the Agreement for Sale and Purchase of Assets (the Agreement) dated August 31, 1992, which you have been provided. Further, you indicated that should delay in resolving the issuance of the new dealer sales and service agreement extend beyond the expiration of the statutory 60 day period, Buick Motor Division will not cause the franchise to be terminated. In reliance upon that representation, HELSCO will not file for Chapter 11 protection under the bankruptcy laws. Such action would be needed at this time only to preserve the franchise rights for ultimate sale.

My understanding of the terms of the Agreement is as follows. The Buick parts and accessories will be inventoried and purchased at current catalog prices (or at amounts mutually agreed to, if not in a current catalog). The special tools and their storage cases will be purchased as provided in the Agreement. Fixed assets (such as parts storage bins, etc.) would be purchased at mutually agreed upon amounts (not a required asset to be purchased). The consulting fees/covenant not to compete of \$120,000 will be paid. The sum of the above amounts will be paid to the law firm of Nielsen & Senior (trust account).

Sincerely,


Henry Nixon

000136

GG000239

Tab 17

Henry T. Reath, Lewis R. Olshin, Duane, Morris & Heckscher, Philadelphia, Pa., James W. Quinn (argued), Mindy J. Spector, Weil, Gotshal & Manges, New York City, for appellee cross appellant.

Before: MANSMANN, COWEN and ROTH, Circuit Judges.

OPINION OF THE COURT¹

MANSMANN, Circuit Judge.

In these cross appeals, we are once again called upon to delineate that quantum of evidence necessary for an antitrust plaintiff to prove in order to withstand a motion for summary judgment. Here the unsuccessful applicants for several BMW franchises brought suit against the United States distributor for BMW automobiles, BMW of North America (BMW NA). The applicants (the Potamkins) assert that BMW NA and its dealers violated the Sherman Act by engaging in concerted action to exclude them from becoming dealers. BMW NA contends that it acted independently of its dealers and tenders business reasons for its refusal to deal with the Potamkins. In response, the Potamkins have countered each business reason with circumstantial evidence of concerted action. Thus faced with equal and competing inferences, we must apply to the standard for summary judgment, in which all inferences must be drawn in favor of the non-moving party, *Country Floors, Inc. v. A Partnership Composed of Gepner and Ford*, 930 F.2d 1056, 1061 (3d Cir.1991), the holding in *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 768, 104 S.Ct. 1464, 1473, 79 L.Ed.2d 775 (1984), that in an antitrust action "there must be evidence that tends to exclude the possibility of independent action by the manufacturer and distributor."

The plaintiffs are brothers Robert and Alan Potamkin, and their corporate entities, Big Apple BMW, Inc. and Potamkin BMW and VW, Inc., who, in 1985, sought BMW franchises in Manhattan, New York

and Philadelphia, Pennsylvania. The Potamkin family, which for our purposes includes Robert, Alan, and their father Victor, owns approximately 45 automobile franchises located in Manhattan, Philadelphia, Atlanta, and Miami. According to Victor, these franchises collectively amassed a sales volume of between \$800 and \$900 million in 1987 alone. A657.

The Potamkins asserted in their complaint that BMW NA and certain of its dealers engaged in a "group boycott to exclude plaintiffs and pursuant to a contract, combination or conspiracy with certain BMW dealers to fix, raise, maintain and stabilize prices of BMW automobiles in the United States." Compl. at ¶34. Briefly, BMW NA contends that it unilaterally rejected the Potamkins because their high volume price-discounter image is incompatible with the image of BMW NA and because the Potamkins did not meet other required standards.

We conclude that, for purposes of summary judgment, the Potamkins have set forth sufficient evidence of concerted action between BMW NA and its dealership body to exclude the Potamkins and further produced evidence that tends to show that BMW NA's alleged reasons for rejecting the Potamkins were pretextual. Thus, we will vacate the judgment with respect to the antitrust claims and the closely related pendent state law antitrust and tortious interference claims and remand them for further proceedings. These counts will then be joined with the Pennsylvania Board of Vehicles Act claim, the sole claim that the district court had excepted from summary judgment, for further proceedings.

I.

The factual underpinnings for the Potamkins' claims arose from three distinct, but allegedly related, incidents in which the Potamkins negotiated with BMW NA and BMW dealers for franchises in the Philadelphia and New York City metropolitan areas. The first incident involved Victor

1. References to portions of the record filed under seal have been deleted from the published version of this opinion. Deletions in this pub-

lished opinion of the court are indicated by three asterisks, and the length of the matter deleted is given in brackets.

6. Monopolies ⇨28(7.3)

Antitrust plaintiff must be prepared to demonstrate causal relationship between alleged dealer complaints and distributor's action in order to show that concerted action in violation of Sherman Act is distinguishable from "perfectly legitimate" independent conduct; in that regard, proof of causation requires more than sequence of dealer complaints to distributor followed by distributor's conduct alleged to violate antitrust laws. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

7. Federal Civil Procedure ⇨2484

On automobile distributor's motion for summary judgment on antitrust claims of concerted action, district court inappropriately compartmentalized unsuccessful automobile franchise applicants' evidence and drew inferences in distributor's favor; in defending against summary judgment, applicants did not have to eliminate all possible independent justifications by distributor so that only evidence of concerted action would be left in the record, but rather had to produce evidence tending to exclude possibility of independent action. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

8. Corporations ⇨1.5(3)

Statement of subsidiary may be attributed to its corporate parent, consistent with agency theory, where parent dominates activities of subsidiary.

9. Monopolies ⇨28(7.3)

Statement evidencing occurrence of concerted action is not inadmissible in antitrust action because it follows that activity Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

10. Evidence ⇨253(1)

Proponent for admission of statement as coconspirator admission must establish existence of conspiracy by a fair preponderance of independent evidence; mere association does not suffice, but on the other hand, timing circumstances, one or a series of meetings may. Fed. Rules Evid. Rule 801(d)(2)(E) 28 U.S.C.A.

11. Federal Civil Procedure ⇨2484

Unsuccessful applicants for automobile franchises set forth sufficient evidence of concerted action between distributor and its dealership body to exclude them, for purposes of determining admissibility of statements as coconspirators admissions and defeating distributor's motion for summary judgment on antitrust claims. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1; Fed. Rules Evid. Rule 801(d)(2)(E), 28 U.S.C.A.

12. Federal Civil Procedure ⇨2484

Unsuccessful applicants for automobile franchises produced evidence tending to show that distributor's alleged independent reasons for rejecting their applications were pretextual and thus defeated distributor's motion for summary judgment on antitrust claims; alleged reasons included allegations that applicants' image as high volume price-discounters was incompatible with desired product image, that applicants' customer service record was inadequate, that one proposed location was inadequate for a number of reasons, that applicants were uncooperative, and that one applicant objected to annual allocation of cars. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

13. Federal Civil Procedure ⇨2515

Genuine issues of material fact precluded summary judgment for automobile distributors on unsuccessful franchise applicants' pendant state law claims for tortious interference with contract, the underpinnings of which were intertwined with antitrust claims.

14. Trade Regulation ⇨871.3

Unsuccessful applicants for automobile franchises had standing to allege violation of Pennsylvania Board of Vehicles Act by automobile distributor. 63 P.S. §§ 818.1 et seq., 818.9(b)(3, 4) 818.20(a)

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Potamkin's negotiations for a Great Neck, New York franchise in 1981. It admittedly falls outside the statute of limitations but is included for the purpose of demonstrating a pattern of conduct. The latter two incidents comprise the Potamkins' basis for liability. We provide only a cursory sketch of these incidents here because the evidence will be later reviewed in detail.

First, during 1981, Victor Potamkin met with BMW NA representatives on several occasions to discuss Victor's acquisition of a Great Neck, New York BMW franchise. The Potamkins allege that Victor and BMW NA's Eastern Regional Manager Terry Cronin reached an oral agreement for a BMW franchise; BMW NA insists that their discussions terminated prior to any agreement because Victor allegedly attempted to bribe Cronin. Both parties agree that these discussions ended without a written agreement. By letter dated November 4, 1981, BMW NA conveyed to Victor its desire not to appoint a dealer in Great Neck. A1203.

The second incident occurred in 1985. Gladys Caufield, owner of the Trans-Atlantic BMW dealership in Manhattan, in anticipation of losing her lease, began to negotiate with the Potamkins. A1613-14. In early September, they reached an oral agreement of sale for a price of \$800,000 plus an undetermined amount for parts. In the ensuing months, however, BMW NA informed Caufield that it would not award a franchise to the Potamkins, and only days before the expiration of her lease, BMW NA offered her the significantly lower amount of \$550,000, plus a repurchase of parts as required by the franchise agreement. A1640. She accepted this offer and BMW NA closed Trans-Atlantic, leaving only one dealer remaining in Manhattan. A1648-49.

The third incident occurred in Philadelphia, contemporaneously with the second, when Robert Potamkin entered into a written agreement to purchase the assets of Irvin Green's BMW dealership in October

of 1985. A1720-47. This "buy-sell" agreement was contingent upon Robert's acquisition of a BMW franchise, and included an expiration date of December 23, 1985. A1729-30. Robert sought immediately to obtain a franchise application from BMW NA, and although they vigorously contest the reasons, both parties agree that Robert's application was not taken until October 29, 1985. Thus, as BMW NA recognized, it had 60 days from October 29th in which to act on the application under state law. After the buy-sell agreement expired on December 23rd, BMW NA informed Green that Potamkin was not a suitable candidate for a BMW franchise. A869-70.

The Potamkins filed suit in April of 1987, alleging that BMW NA violated section 1 of the Sherman Act, 15 U.S.C. § 1, sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15, 26 (Count I), and the Pennsylvania Board of Vehicles Act, 63 Pa.Stat. Ann. § 818.1, *et seq.* (Purdon's Supp.1991) (Count II). In addition, the Potamkins alleged that BMW NA tortiously interfered with their contractual and prospective business advantage (Count III), committed state law civil conspiracy (Count IV), and utilized unfair methods of competition under Pennsylvania law and New York's Donnelly Act (Count V).

After lengthy and acrimonious discovery, in May of 1989, BMW NA moved for summary judgment. Much of the evidence provided in support of its motion involved information that the district court had ruled inadmissible in its April 18, 1989 order limiting discovery. A59-60. In answer to the Potamkins' responsive motion, as well as to amplify its previous order, the district court issued an order on June 2, 1989, which excluded, for purposes of summary judgment, "information concerning plaintiffs' specific customer satisfaction rankings except to the extent that such information was known to and allegedly relied upon by the defendant in 1985, and has been disclosed to plaintiffs in discovery." A1448-49.

2. In its appellate briefs, BMW NA has continued to cite to that evidence ruled inadmissible by the district court but has failed to challenge

those rulings. We will, therefore, review the evidence as confined by those orders.

In due course, the district court ruled in favor of BMW NA on each count, except for Count II, the Pennsylvania Board of Vehicles Act claim, which it reserved for trial. The Potamkins sought and received a Rule 54(b) certification from the district court as to those counts on which summary judgment was entered. On the state law claim of Count II, the district court certified a controlling question of law concerning standing to sue under the Board of Vehicles Act, and we subsequently granted BMW NA permission to appeal the denial of summary judgment on that claim pursuant to 28 U.S.C. § 1292(b). This appeal and cross-appeal followed.

The district court exercised federal subject matter jurisdiction over the Sherman Act claim and pendent jurisdiction over the state law claims. Our standard of review is plenary. *Goodman v. Mead Johnson & Co.*, 534 F.2d 566, 573 (3d Cir.1976), *cert. denied*, 429 U.S. 1038, 97 S.Ct. 732, 50 L.Ed.2d 748 (1977). We review the dismissal of the pendent state claims utilizing an abuse of discretion standard. *Cooley v. Pennsylvania Housing Finance Agency*, 830 F.2d 469 (3d Cir.1987).

II.

A.

As the district court accurately stated in its unpublished Memorandum Opinion, 1990 WL 182340 "[t]he narrow issue upon which decision turns is whether plaintiffs have enough evidence to get to a jury on the issue of concerted action." *Id.* at 5. The district court first concluded that the Potamkins had failed to produce direct evidence that BMW dealers opposed the Potamkins as dealers, complained to BMW NA about the Potamkins, or that BMW NA's decisions were responsive to dealer complaints. *Id.* at 6. The district court then evaluated "19 bits of evidence which, [the Potamkins] argue, support . . . an inference [of the requisite concerted action]." ³ *Id.* After considering each of the "19 bits" individually, the district court concluded that it was "left with the reason-

ably firm conviction that, while the evidence does not rule out the possibility that the defendant's rejections of plaintiffs' applications were the product of concerted action between defendant and one or more of its dealers, there is simply no proof of concerted action sufficient to withstand a motion for summary judgment." *Id.* at 15.

B.

[1] Summary judgment should be granted where no genuine issue of material fact exists for resolution at trial and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). It is no longer a disfavored procedural shortcut, and may present the district court with the first opportunity to dispose of meritless cases under the federal practice of notice pleading. *Celotex Corp. v. Catrett*, 477 U.S. 317, 327, 106 S.Ct. 2548, 2354, 91 L.Ed.2d 265 (1986). This is true even in antitrust cases, "where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot," *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473, 82 S.Ct. 486, 491, 7 L.Ed.2d 458 (1962); *see Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 533 (1986); *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 104 S.Ct. 1464, 79 L.Ed.2d 775 (1984); *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 637 F.2d 105 (3d Cir.1980), *cert. denied*, 451 U.S. 911, 101 S.Ct. 1981, 68 L.Ed.2d 300 (1981); *Fragale & Sons Beverage Co. v. Dill*, 760 F.2d 469 (3d Cir.1985).

The summary judgment standard has been likened to the "reasonable jury" directed verdict standard. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251, 106 S.Ct. 2505, 2512, 91 L.Ed.2d 202 (1986). The moving party need not produce evidence to disprove the opponent's claim. *Celotex*, 477 U.S. at 323, 106 S.Ct. at 2552, but does carry the burden to demonstrate the absence of any genuine issues of material fact. If the movant has produced evidence in support of summary judgment, then the

3. These "19 bits" of evidence are listed *infra* at

footnote 11.

opponent may not rest on the allegations set forth in its pleadings but must counter with evidence that demonstrates a genuine issue of fact. Fed.R.Civ.P. 56(e). This, in turn, requires the opponent to "set forth specific facts showing that there is a genuine issue for trial." *Id.*

[2, 3] When deciding a motion for summary judgment, nonetheless, a court's role remains circumscribed in that it is inappropriate for a court to resolve factual disputes and to make credibility determinations. *Country Floors*, 930 F.2d at 1061. Thus an opponent may not prevail merely by discrediting the credibility of the movant's evidence; it must produce some affirmative evidence. *Anderson*, 477 U.S. at 256-57, 106 S.Ct. at 2514-15. Inferences should be drawn in the light most favorable to the non-moving party, and where the non-moving party's evidence contradicts the movant's, then the non-movant's must be taken as true. *Country Floors*, 930 F.2d at 1061 (citing *Goodman v. Mead Johnson & Co.*, 534 F.2d at 573).

This trial "on paper" differs from a trial before a jury in one significant detail: "at the summary judgment stage the judge's function is not . . . to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson*, 477 U.S. at 249, 106 S.Ct. at 2511. This does not require a court to turn a blind eye to the weight of the evidence; the "opponent must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita*, 475 U.S. at 586, 106 S.Ct. at 1356. To raise a genuine issue of material fact, however, the opponent need not match, item for item, each piece of evidence proffered by the movant. In practical terms, if the opponent has exceeded the "mere scintilla" threshold and has offered a genuine issue of material fact, then the court cannot credit the movant's version of events against the opponent, even if the quantity of the movant's evidence far outweighs that of its opponent. It thus remains the province of the factfinder to ascertain the believability and weight of the evidence.

A non-movant's burden in defending against summary judgment in an antitrust case is no different than in any other case. As was recently clarified by the Supreme Court:

The Court's requirement in *Matsushita* that the plaintiffs' claims make economic sense did not introduce a special burden on plaintiffs facing summary judgment in antitrust cases. The Court did not hold if the moving party enunciates *any* economic theory supporting its behavior, regardless of its accuracy in reflecting the actual market, it is entitled to summary judgment. *Matsushita* demands only that the nonmoving party's inferences be reasonable in order to reach the jury, a requirement that was not invented, but merely articulated, in that decision. If the plaintiffs theory is economically senseless, no reasonable jury could find in its favor, and summary judgment should be granted.

Eastman Kodak Co. v. Image Technical Services, — U.S. —, —, 112 S.Ct. 2072, 2083, 119 L Ed 2d 265 (1992) (footnote omitted).

Therefore, in the summary judgment context, "inferences to be drawn from the underlying facts must be viewed in the light most favorable to the opposing party." *Matsushita*, 475 U.S. at 587, 106 S.Ct. at 587. These inferences, however, when drawn from ambiguous evidence, are circumscribed in antitrust cases because a fine line demarcates concerted action that violates antitrust law from legitimate business practices. See *Monsanto*, 465 U.S. at 762-64, 104 S.Ct. at 1470-71. Care must be taken to ensure that inferences of unlawful activity drawn from ambiguous evidence do not infringe upon the defendant's freedom, so long as it acts independently, to refuse to deal, *United States v. Colgate & Co.*, 250 U.S. 300, 39 S.Ct. 465, 63 L.Ed. 992 (1919), or to impose vertical non-price restraints, *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 97 S.Ct. 2549, 53 L.Ed.2d 568 (1977). Nevertheless, the summary judgment movant must show that an inference of concerted action to exclude competition from evidence of BMW

NA's inconsistent behavior and dealer complaints is unreasonable. See *Eastman Kodak*, — U.S. at —, 112 S.Ct. at 2083.

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[4-6] Of course, in ruling upon a motion for summary judgment a court must evaluate the material facts against the substantive proof required of the plaintiff. For a section 1 claim under the Sherman Act, a plaintiff must prove "concerted action," a collective reference to the "'contract . . . combination or conspiracy.'" *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 445-45 (3d Cir.1977), cert. denied, 434 U.S. 1086, 98 S.Ct. 1280, 55 L.Ed.2d 791 (1978), see *Edward J. Sweeney*, 637 F.2d at 111. If, as BMW NA asserts, it acted independently in denying the Potamkins a franchise, no antitrust liability would attach. *Colgate*, 250 U.S. at 307, 39 S.Ct. 468. Moreover, the inferences of concerted action that may be drawn from circumstantial evidence in antitrust cases is circumscribed. Thus an antitrust plaintiff must be prepared to demonstrate a causal relationship between alleged dealer complaints and a distributor's action in order to show that the concerted action in violation of the Sherman Act is distinguishable from "perfectly legitimate" independent conduct. See *Monsanto*, 465 U.S. at 763-64, 104 S.Ct. at 1470-71.

In that regard, proof of causation requires more than a sequence of dealer complaints to a distributor that are followed by the distributor's conduct alleged to violate antitrust laws. *Edward J. Sweeney*, 637 F.2d at 111-15. A jury may not be permitted to speculate as to cause from a chain of events, *id.* at 111; the plaintiff must demonstrate adequately "'a unity of purpose or a common design and understanding, or a meeting of the minds.'" *Id.* (quoting *American Tobacco Co. v. United States*, 328 U.S. 781, 810, 66 S.Ct. 1125, 1139, 90 L.Ed. 1575 (1946)).

As the Supreme Court admonished in *Monsanto*, we ought not to permit an inference of an agreement in violation of the Sherman Act to arise merely from "the fact that termination came about 'in re-

sponse to complaints.'" 465 U.S. at 763, 104 S.Ct. at 1470. Permitting such an inference could "deter or penalize perfectly legitimate conduct". non price restrictions may simply reflect normal business conditions which do not raise the specter of concerted action. Moreover, dealers are often important sources of information for distributors or manufacturers and these sources should not be restricted by impractical antitrust prohibitions. See *id.* at 763-64, 104 S.Ct. at 1470-71.

In *Monsanto*, the Court ruled that more than mere complaints of concerted action were necessary to defeat the motion for summary judgment. Accordingly, "[t]here must be evidence that tends to exclude the possibility that the manufacturer and non-terminated distributors were acting independently." 465 U.S. at 764, 104 S.Ct. at 1471. "[T]he antitrust plaintiff should present direct or circumstantial evidence that reasonably tends to prove that the manufacturer and others 'had a conscious commitment to a common scheme designed to achieve an unlawful objective.'" *Id.* (citing *Edward J. Sweeney*, 637 F.2d at 111).

Monsanto does not require that a plaintiff provide direct evidence of a causal relationship; concerted action may be inferred from circumstantial evidence. See *id.*, 465 U.S. at 764, 768, 104 S.Ct. at 1470, 1472. That evidence should be analyzed as a whole, rather than compartmentalized, to determine whether it supports an inference of concerted action. *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 82 S.Ct. 1404, 8 L.Ed.2d 777 (1962). In *Continental Ore*, the Court admonished federal courts not to "approach [antitrust] claims as if they were . . . completely separate and unrelated lawsuits." *Id.* at 698, 82 S.Ct. at 1410.

In cases such as this, plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each. [T]he duty of the jury was to look at the

whole picture and not merely at the individual figures in it.

370 U.S. at 699, 82 S.Ct. at 1410.

We utilized this approach in *Arnold Pontiac-GMC, Inc. v. General Motors Corp.*, 786 F.2d 564 (3d Cir.1986), in which the plaintiff asserted that GM and its dealers conspired to deny the plaintiff a franchise in violation of section 1 of the Sherman Act. There we found sufficient to withstand summary judgment the evidence that GM had favorably viewed Arnold Pontiac's franchise application until after the GM dealers' collectively expressed disapproval and threatened non-cooperation. *Id.* at 573-74. Arnold Pontiac had met the *Monsanto* standard, specifically that the conduct of the dealers constituted sufficient evidence that "tends to exclude the possibility that [GMC acted] independently." *Id.* at 574 (quoting *Monsanto*). We concluded that a reasonable inference of concerted action could be drawn from the whole of the evidence and remanded the case for trial. *Id.*

[7] Here, the Potamkins assert, and we agree, that the district court inappropriately compartmentalized their evidence and drew inferences in favor of BMW NA rather than in their favor. They argue that the district court's holding, in effect, would require that to successfully defend against summary judgment, they must produce evidence sufficient to prevail upon their own motion for summary judgment. In essence, the Potamkins urge, and we agree, that in defending against summary judgment, they need not "eliminate all possible 'independent' justifications by the manufacturer, [so that] only evidence of concerted action would be left in the record." They need, rather, to produce "evidence that tends to exclude the possibility of independent action." *Monsanto*, 465 U.S. at 768, 104 S.Ct. at 1473.

According to the Potamkins, *Monsanto* cannot be read to require an opponent of summary judgment to produce the same quantum and kind of evidence it would need to affirmatively make its own motion for summary judgment. Thus the Potamkins urge that a reading of *Monsanto* that

requires them to affirmatively disprove any legitimate reasons for BMW NA's actions would be inconsistent with the burden of proof required for a non-movant to defeat a summary judgment motion. In this case, that consideration is especially germane because the quantity of the Potamkins' evidence is outweighed by the quantity of BMW NA's evidence. BMW NA primarily contends that summary judgment is appropriate because "there [is] no evidence to establish that BMW dealers were opposed to appellants' efforts to obtain franchises, or that any BMW dealers complained to BMW NA about [the Potamkins], or that BMW NA's refusal to appoint [the Potamkins] as dealers was in response to dealer complaints." With the foregoing orientation, we now turn to review the evidence presented in this case.

III.

The Potamkins have produced evidence of concerted action spanning several years and three locations. For the sake of clarity, we will order the evidence according to the location in which the Potamkins sought a particular franchise. There is consistent evidence that BMW NA encouraged the Potamkins to acquire BMW dealerships, that the New York and Philadelphia dealers subsequently complained to BMW NA about the Potamkins, and that BMW NA later denied the Potamkins franchises giving allegedly pretextual reasons.

A.

1981 Great Neck

In 1980, Victor Potamkin initiated negotiations with BMW NA for a franchise by writing to BMW's German manufacturer A1463. In response, Terry Cronin, BMW NA's Eastern Regional Manager, sent the following correspondence to Victor in November of 1980:

Obviously, because I reside and work in the New York Metro area I am personally well aware of your status as a proven and successful automobile executive. Dealerization for the northeast portion of the United States comes under the re-

sponsibility of the Eastern region. I would be very happy to meet with you at your convenience to discuss whatever mutual opportunities may exist between yourself and BMWNA.

A1464.

Accordingly, Victor and Cronin met on approximately four or five occasions. Cronin testified in his deposition that following initial meetings, also attended by Andrew Pokorny, BMW NA's Vice President of Sales, A1487-88, 1507-09, he "was favorably impressed with Victor" as an individual, although Cronin shied away from opining as to Victor's suitability for a dealership at that time. A1491-92. These meetings focused upon available "open points."⁴ As one basis for its termination of negotiations, BMW NA contends that Victor's interests lay not in the Great Neck open point that BMW NA sought to fill, but in Atlanta and Miami, A1489-90, or North Plainfield, New Jersey. A1501. Cronin testified, but Victor denies, that Victor was primarily interested in a North Plainfield, New Jersey, franchise rather than one in Great Neck, New York. A261; A645.

However, despite inquiries about other locations, BMW NA does not dispute, and Cronin testified, that Victor located a facility in Great Neck. A1495-96. Cronin, who visited that facility, A1496-97, testified that "It probably needed a great deal of renovation. But I believe it could have been suitable for BMW." A1498. Cronin also testified that the Potamkins envisioned this as an exclusively BMW franchise and may have anticipated selling as many as 500 cars annually. A1500.

Negotiations proceeded apace as Cronin subsequently met with Robert and Alan Potamkin at BMW NA's eastern regional office, to review a "pro forma facility investment analysis" during the summer of 1981. A1499, 1508. At the conclusion of this meeting, Cronin was still interested in the Potamkins' pursuit of the Great Neck point, A1503, and Robert and Alan were expected to report back to Victor and con-

tact BMW NA if they were still interested. It remains Victor's belief that during these negotiations he and BMW NA reached an oral agreement on the Great Neck BMW franchise. A615.

Later, during that fall, Cronin again met with Victor at the "21 Club" in Manhattan, where, Cronin testified, they discussed the viability of BMW in Great Neck over lunch and Victor again allegedly inquired about North Plainfield. A1509. Afterward, in Victor's limousine, BMW NA alleges that Victor attempted to bribe Cronin for a North Plainfield location. Cronin testified: "... [H]e said to me that North Plainfield was very important to him; that it would be worth a lot of money to him, \$25,000, if he were awarded the North Plainfield point." A1510. Cronin immediately returned to his office and telephoned Gordon Bingham, then-Vice President of Operations and Jack Cook, then-President of BMW NA, to report the alleged bribe. A1513-14; A1522-23. Pursuant to Cook's instructions, Cronin did not tell anyone else of this incident, nor did he document it. A1523-1526. It is not disputed that others at BMW NA became aware of the alleged bribe.

By letter dated November 4, 1981, from Cronin, Victor learned:

After much deliberation, we have decided that the appointment of a BMW dealer in Great Neck, at this time, would not be the proper long range solution to our long standing problem. In lieu of an appointment, we have opted to work with our existing dealer body to improve the overall representation of BMW on the Northshore of Long Island.

A1203.

In support of their allegation of concerted action, the Potamkins have produced the affidavit of Harry Gray. In 1981, Gray served as a Long Island BMW dealer and a member of the area Dealer Advertising Group ("DAG"). Dealer Advertising Groups are composed of regional dealers who meet regularly with BMW NA representatives to coordinate advertising strate-

4. An "open point" is a location for which a new franchise is slated in contrast with a "buy-sell"

situation in which a new dealer replaces a retiring one.

gy. A1854-55; * * * [one sentence deleted]. In his affidavit, Gray reported dealer opposition to a Potamkin franchise featured at a DAG meeting:

2. Great Neck, Long Island, was a BMW "open point" during the early 1980's. I knew that BMW had expressed interest in having Victor Potamkin as a franchised dealer at that location.

3. At that time, I recall attending a BMW Dealer Advertising Group ("DAG") meeting with other BMW dealers from the New York area and with BMW employees. I recall specifically that the dealer principals for BMW dealerships in Brooklyn, New York, Jamaica, New York, Smithtown, New York and Inwood, New York were present. There were other BMW dealers present as well.

4. There was a discussion among the BMW dealers about the possibility of Victor Potamkin obtaining the Great Neck, BMW open point.

5. The dealers opposed BMW granting Victor Potamkin a BMW franchise. The dealers feared that Mr. Potamkin would take away significant business from them, and would "alter the competitive landscape", as I believe one dealer expressed it.

6. The dealers understood and expressed that Mr. Potamkin's Great Neck dealership had already been approved at the level of BMW's central office, in Montvale, New Jersey. However, *the central office had decided to leave the final decision to the regional office for the BMW Eastern region*, which region included all of the New York area dealerships.

7. *BMW dealers at the meeting said they had already spoken to Terry Cronin, the BMW Regional Manager for the Eastern region, opposing Mr. Potamkin's BMW franchise appointment, and that they would continue to speak to him on this subject, since the dealers understood that Mr. Cronin had significant input on this matter.*

8. I subsequently came to understand that Terry Cronin had opposed this ap

pointment, which I concluded was in response to the New York-area BMW dealers' objections.

A1541-43 (emphasis added).

Assuming that Gray's trial testimony would be consistent with his affidavit, the district court ruled it inadmissible, reasoning that Gray's testimony would not establish a conspiracy between BMW NA and the New York area dealers. Specifically, the district court found that Gray's affidavit did not establish that dealer opposition had been communicated to BMW NA nor that BMW had acted in response to dealer complaints. Memorandum Opinion at 8. Therefore, the district court ruled that Gray's conclusion of causation constituted "[t]hat kind of unfounded speculation [that] would not be admissible at trial, and does not prove anything." *Id.*

The Potamkins argue that the affidavit itself evidences communication of dealer opposition to BMW NA because Gray states first, that Cronin possessed authority to approve Victor for the Great Neck point; second, that some of the DAG members had communicated their opposition to Cronin; and third, at the meeting they expressed an intent to continue to communicate to Cronin their opposition.

The record also supports this first proposition; prior to Michael Jackling's installation as BMW NA's Vice President, Director of Operations in October of 1985, BMW dealership appointments were largely relegated to the regional offices. A2378. While there is little in the record to flesh out the details of the pre Jackling era dealer appointment procedure, a jury could reasonably infer, from the evidence that Jackling confined post-1985 decisions to BMW NA's Montvale headquarters, that regional representatives wielded a significant amount of power over appointments prior to 1985.

* * * [one sentence deleted]⁵ Thus the third proposition, according to the Potamkins, would be supported by Gray's testimony of concerted action on behalf of the New York area dealership body with BMW

NA to reject Victor's appointment as a price competitor. BMW NA accurately notes that, as factual matters, the Gray affidavit does not even identify Cronin as one of the unnamed BMW NA employees present at that DAG meeting. Nor does it contain evidence that BMW NA considered the alleged dealers' demands. This factual argument, however, properly belongs in front of a jury. That Gray's affidavit is not a proverbial smoking gun does not make it inadmissible.

As a legal matter, BMW NA suggests that the Gray affidavit is inadmissible because it allegedly contains only Gray's surmise of causation and lacks the requisite personal knowledge required by Fed. R.Civ.P. 56(e). In this respect, BMW NA cites *Edward J. Sweeney, Inc.*, in which we held, in part, that the plaintiff had failed to meet its burden to prove concerted action, when defending against summary judgment. 637 F.2d at 116-17. Significantly, in that case we did not rule that evidence of concerted action inadmissible, but simply insufficient to sustain the plaintiff's burden of proof. This case, as distinguished from *Edward J. Sweeney*, presents more evidence than a witness's "general feeling," 637 F.2d at 114, and another witness's "'belief' ... without factual basis," 637 F.2d at 112. See also *Mid-South Grizzlies v. National Football League*, 550 F.Supp. 558 (E.D.Pa.1982) (finding a statement that some people opined that the applicant's past WFL affiliation would hurt its chances of obtaining an NFL affiliation was insufficient to prove retaliation, in part because the witness admitted these views were personal to the speakers and did not represent the NFL's position), *aff'd*, 720 F.2d 772 (3d Cir.1983), *cert. denied*, 467 U.S. 1215, 104 S.Ct. 2657, 81 L.Ed.2d 364 (1984).

In addition, we noted in *Edward J. Sweeney* that "absent some evidence supporting appellant's theory, we will not assume [that the defense witness] lied about his [legitimate] reasons." 637 F.2d at 113. By contrast, Gray's affidavit, combined with the

segment of a 1978 BMW "Policy and Procedure Manual for Dealer Development," indicates that Cronin was given decision-making authority and that area dealers had voiced to Cronin, and intended to continue to voice, their opposition to a Potamkin franchise. The fact that Cronin has categorically refuted any dealership pressure or discussions with dealers concerning Victor's interest in a BMW franchise does not serve to render Gray's affidavit inadmissible, but simply creates a material fact for the jury to resolve. See A265.

The Potamkins do not request that we simply discredit the testimony of BMW NA's witnesses in order to deny summary judgment. Rather, they have proffered significant, albeit circumstantial, evidence to counter this evidence. For example, Robert alleges that one New Jersey BMW dealer, Gene Hoffman, revealed to him in late 1985 that "BMWNA's decision in 1981-82 not to give the Potamkins a BMW franchise in Great Neck, Long Island was due to the fact that other Long Island BMW dealers feared the price competition that a Potamkin BMW franchise would bring to the Long Island market." A1712. Hoffman has testified inconsistently that 1) he cannot recall the substantive content of his conversations with Robert and 2) he denies Robert's allegations. A417-18. Reasonable inferences of concerted action may be drawn from the Gray affidavit combined with Hoffman's comments, BMW NA's alleged abrupt reversal of opinion, and as will be seen below, Cronin's solicitation of Robert even after the alleged bribe attempt.

Unlike the plaintiff in *Edward J. Sweeney*, who failed to disprove the defendant's legitimate reasons, the Potamkins have produced evidence that tends to negate BMW NA's allegation of the attempted bribe. BMW NA has not explained why, if the bribe incident occurred, later in 1982 Cronin suggested to Robert Potamkin that he purchase Irv Green's franchise as Robert alleges. A1704.⁶ The absence of any

6. BMW NA's response at appellate oral argument to the apparent inconsistency between Cronin's outrage in 1981 at the alleged bribe

and his solicitation of Robert's application in 1982 is two-fold: (1) Robert's recollection of the 1982 date is inaccurate, or (2) Cronin had no

BMW NA documentation of the bribe and Cronin's November 1981 letter to Victor evidencing different concerns further serves to buttress an inference that this alleged bribe may have been conjured up later. The Potamkins point out that Victor and Gunter Kramer, BMW NA's President, had a cordial lunch together in 1983, A1460; 2171, although Kramer responds that, new to his position at that time, he had not yet been informed of the bribe. A484-86.

Given this sequence of events, a reasonable jury could infer that BMW NA would have welcomed a "high volume" dealer such as Victor, and after succumbing to pressure from its New York area dealers, entertained the prospect of installing a Potamkin dealership in an alternative location, Philadelphia.

B.

1985: Manhattan

In early September of 1985, the Potamkins⁷ began negotiating with Gladys Caufield and her lawyer, Marvin Buchner, in order to purchase Caufield's Manhattan BMW dealership, Trans-Atlantic. Caufield explained that she had sought to sell her business to the Potamkins because "... it just made more sense ... you know, they had the wherewithal to really do a beautiful job and I thought that's what BMW was looking for." A1662-63. Because her lease was expiring, she was compelled to sell the business by the end of December of 1985. A1612-1614. At a September 9th meeting, the Potamkins offered to buy Trans-Atlantic for \$800,000 plus an undetermined amount for parts. A1620. On September 30th, Cronin spoke to Buchner, and urged that Caufield stall the Potamkin deal so that BMW NA could make an offer by October 10th. A1673.

responsibility for the Philadelphia territory. The first explanation clearly raises an issue of credibility for the jury. The second explanation is not borne out by the record. Prior to 1985 when the Mid Atlantic Region was first formed Cronin served the Eastern Region which encompassed Philadelphia. See A1553. Moreover, Green's testimony shows that Cronin supervised his dealership. See A1769.

Having heard nothing from BMW NA, Buchner unsuccessfully attempted to reach Cronin on October 16th. A1674. Subsequently, the Potamkins and Caufield reached an "agreement in principle" on October 29, 1985, subject to successfully negotiating a written sales agreement. A1632, A1674. BMW NA again stepped into the picture the next day, on October 30th, when Cronin and Andy Pokorny of BMW NA met with Buchner, Caufield and her partner at Trans-Atlantic. A1633. Buchner testified that Cronin advised them "that BMW would not accept Potamkin as a dealer" and "BMW wanted Manhattan to be a one-dealer territory" and they should "delay signing an agreement with Potamkin until BMW could make its offer to Trans-Atlantic." A1633. Buchner believed that BMW's opposition to the Potamkins was related to discounting and reputation for service. A1634.

Informing them of the agreement in principle, A1634-35, Buchner countered that if a signed agreement was submitted to BMW for approval and was rejected, it would precipitate litigation by Trans-Atlantic and probably Potamkin against BMW. A1633. The following day, October 31st, BMW NA's counsel, Michael Epstein from Weil, Gotshal & Manges, contacted Buchner and asked to see the agreement with the Potamkins; Buchner refused and the two agreed to a November 5th deadline for a BMW NA offer. A1635-36. On November 7th, Caufield, her partner, and Buchner met with BMW NA's Vice President Michael Jackling and Michael Epstein and Arthur Jacobs of Weil, Gotshal & Manges. A1639.

After reviewing the Potamkin negotiations, BMW NA offered Caufield \$500,000 plus repurchasing assets as required under the franchise agreement. A1640. No

7. Gladys Caufield testified that she believed that she and her lawyer, Marvin Buchner, negotiated with all three of the Potamkins, A1663, because she met with all three at one time. Moreover, Buchner initially contacted one of Victor's salesmen to inquire into the Potamkins' interest in Trans-Atlantic. A1621.

agreement was reached but Jackling did indicate that BMW NA would not award a franchise to the Potamkins because as Buchner recalled, it was "the tenor of his comment that they were price discounters." A1641. In response to a counteroffer based on the price the Potamkins were willing to pay, BMW NA's counsel "indicated to [Buchner] that the position of BMW was that these premises were closing down and that we really had nothing to sell, they had nothing to buy." A1642.

Buchner then called the Potamkins' lawyer and explained that Caufield would not sign that agreement until the Potamkins could provide a possession date. A1643. Nothing happened until December 17th, when Jacobs offered Buchner BMW NA's top offer of \$550,000,⁸ and Caufield, pressed by an expiring lease, accepted. A1644. Buchner explained that "BMW, through Mr. Cronin, had made it crystal clear that they would not approve the Potamkin people; therefore, our choices of purchasers was limited to one and my instructions were to strike the best deal I could with BMW and close it." A1645. Caufield stated, "I think they indicated clearly that if we went ahead with the sale to Potamkin that we would be in litigation for a long period of time." "... [A]nd if we were in some kind of litigation I had parts and cars and whatever that would be tied up and it was sort of forcing the hand, so to speak." A1665.

BMW NA counters that it had long planned to eliminate one of its two Manhattan dealerships because New York is widely considered to be a one-dealer market, according to Cronin, and BMW NA already had an additional New York City dealership, Martin BMW. A296-97. Caufield testified that in 1984, BMW NA had once mentioned the possibility of buying Trans-Atlantic and turning it into a factory store or mausoleum, although no terms or prices were reached. A1655-56; 303-07. This was consistent with BMW NA's earlier plan for its Manhattan dealers, dubbed the "Manhattan Project," which envisioned eliminating the two Manhattan BMW deal-

erships by buying them out and then opening a factory store or mausoleum. A873-75, 298. For this reason, BMW NA suggests that Caufield's negotiations with the Potamkins were merely an attempt to obtain a valuation of her business. A305; A1335-38.

Following BMW NA's purchase of Trans-Atlantic's assets, however, it deviated from the "Manhattan Project", granting to Martin BMW an exclusive Manhattan franchise. BMW NA alleges it chose this course because it came to see the wisdom of not engaging in competition with its dealers.

Nevertheless, Robert asserts that one BMW dealer, Hoffman, later informed him that a BMW NA representative had "visited him and asked his opinion" about the proposed sale of Trans-Atlantic to the Potamkins. A1712. During BMW NA's negotiations with the principal of Martin BMW—prior to the Caufield/Potamkin negotiations—a Cronin memorandum anticipated the need to discuss with the area dealers the operation of a factory store. A2227; A873-75. The Potamkins theorize that the dealer opposition of 1981 was reactivated in 1985 to defeat their agreement in principle with Caufield for Trans-Atlantic, and to award Martin BMW an exclusive Manhattan dealership.

C.

1985: Philadelphia

Also during the fall of 1985, Robert and Alan Potamkin reached a written buy-sell agreement with Philadelphia BMW dealer Irvin Green, but once again fell short of acquiring a BMW franchise. Because this third attempt constitutes the heart of the Potamkins' lawsuit and BMW NA presents a multitude of reasons for its decision to reject Robert's franchise application, an especially detailed review is required.

Robert alleges that Cronin approached him in 1982 about acquiring the Philadelphia franchise owned by Irvin Green. Green conceded that BMW NA, particularly Cronin, had long been dissatisfied with

8. BMW NA ultimately paid \$693,569 for Trans-

Atlantic, inclusive of parts. A1649.

his meager sales performance . . . [phrase deleted]. Therefore, on October 8, 1985, Green and Robert entered into a buy-sell agreement for Green's BMW and Volkswagen franchises. A929-47. Robert, as half owner, would manage the dealership; Alan and another investor were each to contribute 25% of the capital. The Potamkins planned to move these franchises to a different location in Northeast Philadelphia, at the corner of Grant Avenue and Academy Road, which also housed Robert's Chevrolet, Dodge, Isuzu, and AMC Jeep Renault franchises. A595; A2065.

The buy-sell agreement was expressly contingent upon the award of BMW and Volkswagen franchises, and contained an expiration date of December 23, 1985. A1729-30. This expiration date, combined

with BMW NA's alleged delay in delivering a franchise application to Robert, forms a significant part of the Potamkins' grievance with BMW NA. Although Green and Robert each sought to obtain a BMW franchise application immediately after signing their agreement, the Potamkins assert that BMW NA delayed sending the necessary application form until October 29, 1985. BMW NA was required to act on Robert's application under the Pennsylvania Board of Vehicles Act, 63 Pa.Stat.Ann. § 818-9(b)(4), within 60 days. By delaying until October 29th, BMW NA ensured that this deadline would exceed the December 23rd expiration of the buy-sell agreement.⁹ By letter to Irv Green dated November 25, 1985, Michael Jackling, at that time BMW NA's Senior Vice President of Operations, explicitly acknowledged this deadline.¹⁰ A1746.

9. There is significant dispute concerning whether BMW NA made a good faith attempt to consider Robert's application. According to Robert's affidavit, by October 10th Green hand-delivered the buy-sell agreement to Philip Capossela, then the BMW Regional Manager for the mid-Atlantic Region, and requested a dealership application form which Capossela refused to provide. A1706. Capossela testified that he was thus aware of the expiration date, A103, and that at that time he told Green that Robert was not a "suitable" candidate for a franchise, in the words of BMW NA in-house counsel. A105-106. Robert telephoned Capossela and offered personally to travel to his Virginia office to obtain an application, but was told that the district manager would provide Robert with a copy and that he, Capossela, would contact Robert by October 16th. A1706-07. Robert was unable to reach Capossela again, but sent a letter, dated October 18th, A1716, and contacted Robert Casella, BMW Director of Dealer Development for the mid-Atlantic Region, on October 22, 1985, who again discouraged Robert from traveling to Virginia to obtain an application form. A1707. Casella agreed to meet with Robert on October 29th and to supply a form at that time. Robert then wrote a follow-up letter, A1717. Casella refutes Robert's recollection that Casella gave him assurances that there would be sufficient time to process the application before the expiration of the buy-sell agreement. A147. *see also* A1205-06 (Casella's "Inter-branch Memo" of the incident).

BMW NA provides a host of reasons for failing to decide on the application until after the agreement expired. It hints that . . . [clause deleted] and that field personnel could not have taken the application before October 29th and 30th. BMW NA also suggests that Irv Green did not properly tender notice of the alleged buy-

sell agreement. Thus, Capossela testified that Green needed to enclose a cover letter to introduce the buy-sell agreement, and his personal delivery of the buy-sell agreement to BMW NA was insufficient notice. A1756.

Indeed Jackling asserted that Robert's application was incomplete, and the buy-sell agreement expired of its own accord. A2415-16. The record does not indicate why, if the application package was incomplete, Jackling directed counsel at Weil, Gotshal to hire a private investigator to investigate Robert pursuant to the application, nor why other processing steps were taken. . . . [one sentence deleted]. And Casella explained that an application is pending from the "time the [acquisition agreement] hits my desk." A1814.

Although District Parts Manager Graynor indicated that Robert and his proposed parts manager had refused to sign the Prospective Dealer Parts Department form, A2017, Robert contends they were never shown that form. A1974. Another BMW dealer, Martin Sussman, had refused to sign a BMW Dealer Operating Requirement Agreement because he disagreed with one of its conditions, but had not been threatened with termination of his franchise. A2141-44.

10. In relevant part, Jackling wrote:

I am informed that Pennsylvania law allows BMWNA to respond to a request for consent to the sale of a franchise "within 60 days of receipt of a written request on the forms, if any generally utilized by the manufacturer or distributor for such purposes and containing the information required."

At your October 10, 1985 meeting with Mr. Capossela, BMWNA was not provided with a written request or with the information we require in order to evaluate your potential

As a result of this posturing, Andrew Pokorny, BMW NA's Vice President of Regional Operations and Sales, A289, sent to Irv Green a letter dated December 26, 1985, informing him that it would not award Robert Potamkin a franchise. By this time, the executory contract had already expired. Ultimately, Green sold his BMW franchise to an existing area BMW dealer, Robert Sloane, and his partner, Martin Lustgarten, who relocated the franchise to an affluent Philadelphia suburb.

The Potamkins allege that they were denied the Green franchise because Philadelphia area BMW dealers feared price competition and coalesced to pressure BMW NA into rejecting their application. As proof, they tender the testimony of Bruce Braverman, Robert's Lease Manager. This evidence consists of statements allegedly made by a BMW leasing representative, Don Mitchell, to Braverman. Braverman testified in his deposition that:

Don Mitchell told me that the BMW dealers in the area would not let Potamkin get the franchise because they were afraid that Potamkin's reputation of selling cars cheaper than everybody else was not something that they wanted to get involved with. They didn't want to be involved in price competition. They wanted to keep their price levels where they were and that [sic] they were going to do what they could to make sure that Potamkin did not get the franchise.

A2195-96. In answer to the question "Did Mitchell indicate that he had spoken to anyone from BMW of North America?," Braverman also stated:

No. He indicated to me that he had spoken to dealers. The dealers, it was the dealers who did not want Potamkin to get the franchise, it wasn't BMW who had rejected them.

To me it seemed like it was a conspiracy of the dealers in the tri-state area that

purchaser. Mr. Potamkin submitted his application package on October 29. The following day, October 30, we received your written request for consent.

By statute, BMWNA's 60 days to evaluate the proposed sale of a franchise cannot expire on

didn't want Potamkin to get that franchise. I don't think BMW cared.

A2312. However, Braverman also answered negatively when asked, "Did Mr. Mitchell indicate that the dealers had specifically spoken to a particular individual at BMW?" A2312. Braverman memorialized this alleged conversation in a memorandum dated January 15, 1986. A2197. While this testimony also falls short of direct "smoking gun" evidence of causation, if admissible, it does supply additional circumstantial evidence of concerted action.

In excluding this evidence, the district court reasoned that Mitchell's statement would constitute hearsay unless he possessed authority to bind BMW NA, which he indisputably lacked. This conclusion misperceives the nature of a vicarious admission, which the Federal Rules of Evidence designate as outside the realm of hearsay by definition. Further, the vicarious admission rule of Federal Rule of Evidence 801(d)(2)(D) does not require that a declarant have authority to bind its employer. As the Advisory Committee noted when amending this rule, to limit its scope in this manner would preclude much probative evidence because an employer will rarely authorize its employee to make incriminating statements. Advisory Committee Note to Fed.R.Evid. 801(d)(2)(D). The rule simply requires that an agent make the statement "within the scope of" his or her employment.

To analyze the relevant scope of Mitchell's employment, we must first identify his employer. Braverman testified that Mitchell was BMW Credit's representative to Robert's prospective dealership. A2194-95. Yet according to BMW NA, Don Mitchell was employed by General Electric Capital Auto Lease (GECAL) as an area sales manager. A2426. Mitchell testified that he received his salary from GECAL without commissions from BMW Credit. A506.

a Saturday or Sunday. Consequently, whether we count from October 29 or from October 30, BMWNA's deadline is Monday, December 30, 1985.

The relationship between Mitchell's employer, GECAL and BMW NA is complex.
 * * * [three sentences deleted].

* * * [paragraph deleted].

[8] As far as the record discloses, Mitchell was the only representative of BMW Credit and BMW Leasing assigned to serve the territory in which Robert's proposed dealership was located. Mitchell described his job function as "solicit[ing] leasing business from automobile dealerships and independent leasing companies within [his territory]." Pursuant to the GECC and BMW NA joint ventures, his job included some retail installment financing. A2427; * * * [citation to record deleted]. He also "provide[d] the BMW dealers with help on their leases and promotions," A2434, and provided BMW dealers with training and the necessary supplies to complete the leasing and financing paperwork. A2846. As the leasing agent for GECAL to BMW dealerships, he admitted, "I represent BMW Credit Corporation." A2872.

We conclude that Mitchell's statement, made as a representative of BMW Credit and BMW Leasing, may be attributed to BMW NA. The statement of a subsidiary may be attributed to its corporate parent, consistent with agency theory, where the parent dominates the activities of the subsidiary. See *Zenith Radio Corp. v. Matsushita Elec. Indus. Co. Ltd.*, 505 F.Supp. 1190, 1247-48 (E.D. Pa.1980). This evidence of the relationship between BMW NA and BMW Credit and BMW Leasing, while close, does suffice to confer agency status on Mitchell. BMW NA's ownership interests, control through corporate officers, advertising, and the subsidiaries' use of the BMW logo on their documentation, together indicate a sufficiently dominating interest in its subsidiaries.

As a further matter, the identity of the dealers referred to is sufficiently clear from the record. BMW NA's District Manager Martin Focht identified the members of the Philadelphia area dealer advertising group (DAG) as consisting of the following dealerships: Rosen, Otto's, Devon Hill, Sloane, DeSimone, Martin, Union Park, Thompson, Hans, and West German

A1854. Mitchell specified servicing the following BMW dealerships from September 1985 through January 1986: Rosen, Otto's, Devon Hill, Thompson, Hans and West German. A2201-02. Braverman's account of Mitchell's statement conveys that Rosen referred to the area dealers, which would fairly comprise the area DAG. The evidence sufficiently identifies the source of the dealers' statements. *Contra Carden v. Westinghouse Elec. Corp.*, 850 F.2d 996, 1002 (3d Cir.1988) (an unidentified "they," who said something to the declarant, was insufficient).

[9] The district court noted, as its second reason, that Mitchell was alleged to have made the statement "some two weeks after" BMW NA rejected Robert's application. We reject the theory that a statement evidencing the occurrence of concerted action may be inadmissible because it follows that activity. Although Mitchell's alleged statement to Braverman occurred on January 16, 1986, and after the decision to reject Robert's application was made, there is no evidence to support the conclusion that the dealers' statements to Mitchell followed the rejection of Robert's application. In addition, that a vicarious admission is disclosed after the fact does not defeat its admissibility. See *Mahlandt v. Wild Canid Survival & Research Center, Inc.*, 588 F.2d 626 (8th Cir.1978).

[10] The Potamkins also assert that the dealers' statements to Mitchell are admissible under Fed.R.Evid. 801(d)(2)(E), the co-conspirator admission provision. In *United States v. Ammar*, 714 F.2d 238 (3d Cir.1983), *cert. denied*, *Stillman v. United States*, 464 U.S. 936, 104 S.Ct. 344, 78 L.Ed.2d 311 (1983), we comprehensively identified the requirements for such an admission: 1) independent evidence establishes the existence of a conspiracy and connects the declarant and defendant to it; 2) the statement was made in furtherance of the conspiracy; and 3) the statement was made during the course of the conspiracy. *Id.* at 245. The proponent must establish the first requirement by a "fair preponderance of independent evidence." *Id.* at 250. Mere association does not suffice but, on

the other hand, timing, circumstances, or one or a series of meetings, may. *Id.*

More recently, while not deciding the question of whether the challenged hearsay statement alone might adequately demonstrate conspiracy, the Supreme Court ruled that the conspiracy need not be exclusively proven by evidence *aliunde*. *Bourjaily v. United States*, 483 U.S. 171, 181, 107 S.Ct. 2775, 2781, 97 L.Ed.2d 144 (1987). *See United States v. Levy*, 865 F.2d 551, 553 (3d Cir.1989). Thus, for the first element, we may look to independent evidence plus the statement itself for evidence of a conspiracy. On appellate review, the witness' statements "must be accepted as true for the purposes of determining the sufficiency of the evidence." *Ammar*, 714 F.2d at 251. As well, the co-conspirator admission of Rule 801(d)(2) does not require personal knowledge. As noted by the Advisory Committee, Rule 801(d)(2) is designated as an admission against interest; its admissibility is premised upon our adversarial system rather than in reliance upon indicia of reliability or trustworthiness. *Id.* at 254; *see United States v. Castro*, 776 F.2d 1118 (3d Cir.1985), *cert. denied*, 475 U.S. 1029, 106 S.Ct. 1233, 89 L.Ed.2d 342 (1986).

[11] Because the Potamkins have proffered evidence to show concerted action in violation of the Sherman Act, they have demonstrated the requisite conspiracy for admissibility under Rule 801(d)(2)(E). This judgment is entirely separate from the fact that both Mitchell and Rosen, in their deposition testimony, categorically deny the

statements attributed to them in Braverman's testimony. At trial, the factfinder must decide which of the diametrically opposed witnesses is truthful.

Last, the district court reasoned that Braverman's testimony did not support an inference that dealer sentiment caused BMW NA's inaction on Robert's application. Memorandum Opinion at 10, 1990 WL 182340. We agree that as with the Gray affidavit, the Braverman testimony alone does present sufficient evidence from which a reasonable jury could find concerted action in violation of section one of the Sherman Act.

IV.

[12] BMW NA provides a variety of reasons for allegedly independently rejecting the Potamkins as BMW dealers. The district court found these reasons compelling, on balance, when contrasted to the "19 bits" of evidence it attributed to the Potamkins.¹¹ To the contrary, although a jury may credit BMW NA's reasons, we cannot conclude that a reasonable jury would disbelieve the Potamkins' substantial rebuttal evidence. In light of BMW NA's many inconsistent reasons for denying the Potamkins a franchise, and assuming all credibility determinations in favor of the Potamkins at this juncture, we are satisfied that they have met their burden of proof.

Viewing the evidence in a light most favorable to the Potamkins while bearing in mind that an antitrust plaintiff must assert an economically sensible claim, we

11. These "19 bits" were identified as follows:

1. the letter rejecting Victor Potamkin's Great Neck application;
2. the affidavit of Harry Gray;
3. BMW NA's failure to differentiate among the various members of the Potamkin family;
4. and 5. Michael Jackling's and Terry Cronin's assertions that they did not want the Potamkins as dealers because they were "price discounters,";
6. Bruce Braverman's testimony about statements made by Don Mitchell;
7. BMW NA's alleged opposition to price advertising by its dealers;
8. dealers' cooperative efforts to enforce advertising standards;
9. evidence that BMW dealers had a strong motive to exclude [the] Potamkin[s];

10. the testimony of Michael Vadasz;
11. discussions of sales figures at dealer advertising group meetings;
12. groups of BMW dealers are organized into "Twenty Group" clubs;
13. BMW NA monitors the average profit margin for all dealers in each region;
14. allocation of vehicles;
15. the 1978 dealers' manual; consulting existing dealers about new applicants;
16. the testimony of Frank Ursomarso;
17. evidence that BMW NA conferred with other New York metropolitan dealers "concerning plans for the New York market";
18. evidence that BMW NA punished discounters by decreasing their allocations; and last,
19. BMW NA's aversion to the Potamkins.

turn to consider BMW NA's alleged independent reasons and the Potamkins' evidence that these reasons were pretextual. In sum, BMW NA alleges that the Potamkin image as high volume price-discounters was incompatible with the desired BMW image; the Potamkins' customer service record was inadequate; the proposed Philadelphia location was inadequate for a number of reasons; the Potamkins were uncooperative; and Robert objected to an annual allocation of 94 cars.¹² Indeed, when contrasted to BMW NA's earlier actions expressive of an interest in the Potamkins, the plethora of complaints pressed by BMW NA is both internally inconsistent and inconsistent with its concomitant treatment of BMW dealers. We turn to address BMW NA's alleged reasons for refusing to grant a franchise to the Potamkins.

A.

As its primary reason for refusing to grant a franchise to the Potamkins, BMW NA asserts that the Potamkins threatened harm as potential "free rider" dealers. BMW NA mistakenly reads *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 108 S.Ct. 1515, 99 L.Ed.2d 808 (1988), to support its proposition that no liability could attach to its decision not to appoint the Potamkins as dealers. It contends that under *Sharp*, the Potamkins

must prove an agreement to fix prices or price level, and BMW NA maintains that it has not set price levels for its cars, although the record is replete with evidence that BMW NA representatives and dealers share and discuss retail price statistics. A1845; see also A2053; A2063-64. * * * [two sentences deleted].

Therefore, there is evidence of a concrete motive for dealer animus toward other dealers who would undercut a flexibly set price over invoice by advertising sales at, for example, \$99 over invoice. Nevertheless, there is no direct evidence, only evidence from which a factfinder could infer, that BMW NA and its dealers have tacitly fixed prices for BMWs.

BMW NA further asserts that it does not prohibit its dealers from price advertising. See, e.g., A135-37 (testimony of BMW NA's Mid-Atlantic Region Business Development Manager Robert Casella); A327-31 (testimony of BMW NA's Mid-Atlantic Region District Manager Martin Focht). In fact, numerous BMW dealers concurred that they are free to price advertise. See, e.g., A420 (testimony of BMW dealer Gene Hoffman); A399 (testimony of BMW dealer Irv Green); A406 (testimony of BMW dealer Andrew Hill); A502 (testimony of BMW dealer Martin Lustgarten); A225 (testimony of BMW dealer Mario Cesarini). BMW

12. A November, 1985 memorandum from Robert Casella, Business Development Manager for the Mid-Atlantic Region, to Edward Robinson, BMW NA's Eastern Region Sales Manager, best articulates BMW NA's position:

1. Mr. Potamkin has not indicated a willingness to provide the necessary minimum operating requirements standards for Service and Parts.

2. It is not clear that proposed Potamkin BMW would be a distinct and separate operation allowing for the complete autonomy needed for a proficient and distinct BMW operation.

3. Mr. Potamkin has expressed an unwillingness to provide the necessary exclusive personnel required for the BMW operation.

4. As a dealer in Philadelphia, Pennsylvania and through his association and vested interest in the Potamkin New York organization Robert M. Potamkin brings a somewhat cloudy commitment to customer satisfaction and customer service in addition to publicly announced pending legal action for customer

tampering, advertising misrepresentation, and questionable leasing tactics. The above as evidenced by enclosed newspaper articles.

5. Mr. Potamkin has emphatically stressed that the guide of 94 units would not be acceptable. It is felt that at some time in the future our status at the proposed facility would be compromised and the BMW operation would be shuffled into secondary or less than adequate accommodations.

A1901.

In addition, many of those same reasons were provided to Green by Andrew Pokorny:

Moreover, to date, Mr. Potamkin has been unwilling to agree to meet BMWNA's minimum standard operating requirements, and to accept an SPG of 94 units—the identical SPG you have. We are unwilling to accept any buyer not prepared to meet our minimum operating standards. In addition, Potamkin's action reflects a spirit of non-cooperation which is contrary to that required to build a good working relationship.

A294-70

NA and its dealers do admittedly discourage other BMW dealers from engaging in price advertising because they view that practice as counterproductive given the preferences and demographics of a typical BMW customer. As one dealer explained, "The quality of the product is a factor, but you have to understand as a dealer who your customers are, what the demographics of the customers are and figure out how to handle that customer." A2470. Accordingly, customers spending more than \$30,000 for an automobile "don't want it thought of as a price item.... [I]t is an image thing, an association, an affinity with a fine product." A330. BMW NA's Senior Vice President of Operations, Michael Jackling, stated that BMW NA speaks with its dealers about advertising and about setting the appropriate tone.

Because BMW is marketing a luxury product, BMW is very sensitive as to how that product is perceived in the marketplace, so ... that the product value itself is maximized through its image as well as its specification, performance and ownership qualities.

A450. * * * [one sentence deleted].

Thus BMW NA claims that the Potamkins' advertising style—prominently featuring prices and terms like "blow out sale" or "sellathon" A314-17; A915-28—is incompatible with the BMW image and heavily influenced BMW NA's decision to reject the Potamkins.

BMW NA misapprehends the legal parameters. In *Sharp*, the Court held that "a vertical restraint is not illegal *per se* unless it includes some agreement on price or price levels." Ruling after a trial in which the jury was instructed only on a *per se* theory of liability, the Court remanded the case for a new trial holding that *per se* illegality would not attach to a vertical non-price restraint and that "an agreement between a manufacturer and a dealer to terminate a 'price cutter,' without a further agreement on the price or price levels to be

charged by the remaining dealer," must be judged under a rule of reason test. 485 U.S. at 726, 736, 108 S.Ct. at 1520, 1526. Thus, even if this case is on all fours with *Sharp*, the Potamkins may still proceed to a jury trial under the rule of reason test.¹³

Moreover, this case has an additional horizontal component that *Sharp* lacked. In *Sharp*, a single dealer, Hartwell, pressured Sharp to terminate Business Electronics. Here the Potamkins pled in their complaint, and the evidence suggests, that a number of BMW dealers combined to form a group boycott to pressure BMW NA to reject Potamkin competition. The Potamkins assert that all of BMW NA's alleged reasons for rejecting them are pretextual and that until BMW dealers voiced their strenuous opposition to Potamkin competition, BMW NA had acknowledged the value of installing Potamkins as dealers. Thus the Potamkins present a horizontal boycott case, rather than the non-price vertical restraint suggested by BMW NA. As we fully evaluate *infra*, the evidence of record, when viewed in the light most favorable to the Potamkins, supports their proposition.

Sharp suggests that the proper distinction between a horizontal and a vertical restraint lies in determining which kind of an arrangement produces the restraint rather than analyzing its anticompetitive effects. *Sharp*, 485 U.S. at 730 n. 4, 108 S.Ct. at 1523 n. 4. Under either analysis, however, when viewed in the light most favorable to the Potamkins, the evidence suggests that BMW NA rejected the Potamkins as a result of dealer opposition to price competition.

Last, *Sharp* also reflected the concern that fear of antitrust liability should not serve to inhibit a manufacturer's ability to expel "free riders" from its dealership body. BMW NA insists that it feared a "free rider" effect. As explained in *GTE Sylvania*, 433 U.S. at 55, 97 S.Ct. at 2560, this effect occurs when the "free riding"

13. Proof of anticompetitive effect is the hallmark of a rule of reason test, see *Tunis Bros. Co., Inc. v. Ford Motor Co.*, 952 F.2d 715 (3d Cir.1991) cert. denied, — U.S. —, 112 S.Ct. 3034, 120 L.Ed.2d 903 (1992), and it is well

settled that protecting interbrand, rather than intrabrand, competition should be the goal of antitrust law. *GTE Sylvania*, 433 U.S. at 52, 97 S.Ct. at 2558.

retailer reduces or eliminates service to create price competition and a customer researches a purchase at a full service retailer but ultimately buys the product from the discounting retailer. BMW NA maintains that it feared just such an effect, emphasizing that quality service is crucial to its reputation and ultimate success. In support of its claim, BMW NA asserts that the Potamkin reputation evokes a high volume, price-discounting image. When viewed in the light most favorable to the Potamkins, however, the record suggests that this image incompatibility, as well, is simply pretextual.¹⁴

14. In a letter to BMW dealer Irv Green, Andrew Porkorny, BMW NA's Vice President of Regional Operations and Sales, also provided as a reason for the decision that "Mr. Potamkin is not qualified," the following:

In general, it is clear to us that there is a fundamental incompatibility between the "BMWNA" corporate image and the "Potamkin" image, that the proposed buyer will not maintain the high commitment to customer service required by BMWNA, and that Mr. Potamkin will not properly represent BMWNA in the market place. As a result, the public and BMWNA will be harmed should your proposed transaction go forward.

A869. In an effort to prove that incompatibility, BMW NA has also produced the report of a private investigator, Earle Gay, which was prepared at the request of BMW NA's counsel during the pendency of Robert's application for the Green franchise. The Potamkins have provided sufficient evidence to render as a material factual dispute the genuineness of this "image" reason, however, especially as it relates to Gay's report.

First, combined with the other evidence to indicate that BMW NA never intended to consider Robert's application, there is no dispute that Robert's application was the first for which BMW NA hired a private investigator's services. A2288. Gay submitted his report directly to the Weil, Gotshal & Manges law firm and BMW NA decision-makers never received a copy of it. A2164. Further, from the information provided to Gay at the outset of his investigation a jury could infer that BMW NA was culling pretextual excuses to deny a Potamkin franchise. Gay testified that he was ordered to investigate consumer complaints, but not provided with favorable references furnished by Robert. A2292-98. Despite BMW NA's contention that applicant references are always favorable and therefore were considered less valuable for purposes of its investigation, Gay testified that in each subsequent investigation of a potential dealer, BMW NA furnished him with a copy of the application

Indeed, there is evidence to suggest that the Potamkins would not have posed the "free rider" problem. Robert Potamkin asserts that he had been willing to conform to any service and facilities requirements that BMW NA demanded. Robert insists that he was willing to meet any BMW requirement, "if I could get somebody in authority to talk to me." A1974; 1977. Despite BMW NA's claims that Robert evidenced an uncooperative attitude, an internal BMW NA document acknowledged that Robert had promised to meet all required BMW standards. See A1998-99.¹⁵

and he checked positive as well as negative sources.

Moreover, BMW NA's thorough investigation into the Potamkins' business practices appears pretextual given its lack of interest in similarly investigating other prospective and existing dealers. For example, although Gay was asked to investigate all consumer complaints against the Potamkins, a 1981 lawsuit brought by the Pennsylvania Attorney General against several Toyota dealerships, who also owned BMW franchises, attracted no attention from BMW NA. One BMW dealer who entered into an "assurance of voluntary compliance" with the state Attorney General's Office testified that he did not receive an inquiry from BMW NA. A2040-41.

15. Another reason given by BMW NA pertained to alleged deficiencies in Robert's Philadelphia location. We note that these are no more extensive than those attributed to other prospective and existing dealers, and a reasonable jury may find that rationale for BMW NA's decision to have been pretextual. For example, one BMW dealer, John Thompson, whose franchise acquisition was conditioned upon relocation, received numerous extensions over several years. A2034-40. By contrast, BMW NA contends that the location of Robert's proposed facility was undesirable, as had been Green's location, and that BMW NA had planned to move that dealership point north into the more affluent suburban area where Sloane BMW was eventually opened. Yet, in contrast to the negotiations with and repeated extensions given to Thompson, BMW NA never informed Robert of this alleged deficiency. Robert also opined that his proposed facility, located at a busy crossroads frequented by residents of the northern suburbs, would have been an appropriate one.

Another dealer, Frank Ursomarso, conceded that he failed to meet a requirement of separate franchise facilities but has reached a compromise with BMW NA. A2465. For example, in response to one deficiency of which Robert was informed, lack of a customer service counter, he promised to build one to suit BMW NA. In

Additionally, only innuendo supports BMW NA's assumption that the Potamkins would have engaged in price advertising BMWs. In fact, one BMW NA "Inter-Branch Memo" reported that "[Robert] stated . . . [he] has no intention of utilizing [price advertising] in [the Potamkin organization's] potential activity with the BMW franchise." A1989. Alan Potamkin also testified that each Potamkin franchise belonged to its corresponding Dealer Advertising Group, A2444; one could presume that Robert and Alan would have adhered to that practice and joined the Philadelphia area BMW NA DAG and its collective advertising efforts.

The record is equally clear that a number of BMW dealers did engage in price advertising on occasion. See, e.g. the testimony of BMW dealers: Green, A399; Hoffman, A409-10; Lustgarten, A500; Hill, A327-31. Although these dealers were "counseled" by District Manager Martin Focht and other BMW NA representatives, A327-31; A2210-12, sometimes at the behest of competing area dealers, price advertising remained an occasional practice. A327-31. Significantly, BMW NA ultimately granted a franchise to one dealer who displayed the same price advertising practices associated with the Potamkins.¹⁶

We do not mean to suggest that BMW NA had a responsibility even to consider the applications of the Potamkins. Clearly, as long as it acted independently, BMW NA could escape antitrust liability for its conduct. But the Potamkins have provided sufficient evidence of concerted action, and have raised genuine issues of material fact, which call into question BMW NA's statement of reasons for rejecting the Potamkins. There is no evidence that the Potamkins' service and facilities would not have equalled those of other qualified dealers

contrast, BMW NA's District Parts Manager John Graynor indicated to Robert and his parts manager that BMW required an exclusive BMW parts manager and counted their disagreement as a deficiency; yet Robert was never informed that many BMW dealerships satisfied that requirement by assigning one assistant parts manager exclusively to the BMW franchise. A1916-18.

and applicants, *see supra*, notes 14-15; however, and there is sufficient indication that the alleged concerted action between BMW NA and its dealers may have diminished retail competition without a corresponding benefit to consumers. Moreover, like the manufacturer's reversal of opinion in *Arnold Pontiac*, BMW NA's conduct is inconsistent with all of the evidence that BMW NA's Eastern Regional Manager Cronin negotiated with Victor Potamkin in good faith, and even after Victor allegedly tried to bribe Cronin, Cronin allegedly encouraged Robert to buy Green's Philadelphia franchise. If proven at trial, the fact that the Philadelphia area dealers, like the New York area dealers, were familiar with the Potamkins' success as high volume price discounters and feared that kind of competition, would make sense of BMW NA's reversal of opinion with respect to the Potamkins.

B.

Another of BMW NA's reasons for rejecting Robert Potamkin's application for the Philadelphia franchise was his alleged challenge to the number of cars he would be allotted annually. When BMW NA field personnel took his application in late October of 1985, Robert qualified his signature on the "New Dealer Information and Requirements" form, with the typed notation: "I do not accept Irvin Green's SPG (planning guide). It is unreasonable." A1207. This notation became one of the primary reasons cited for BMW NA's rejection of Robert's application.

While the precise definition of the SPG remains in dispute, the parties agree that a dealer's SPG serves as a guide to the number of BMW automobiles allotted to it annually. A dealer's SPG is derived from

16. Although BMW NA rejected BMW dealer Robert Ciasulli's initial application for a franchise in a 1981 proposed buy-sell agreement, citing a "perceived lack of commitment to customer satisfaction," A2214, and again in 1986, citing concerns nearly identical to those invoked when rejecting Robert's application, A2229-30, the record indicates that Ciasulli subsequently received the Mack BMW franchise in Toms River, New Jersey. A2377; 2307-08.

both the number of cars available from the German manufacturer and BMW NA's assessment of the sales requirements and service capacities of each dealership. BMW NA has been imprecise in defining the SPG throughout this litigation, * * * [one clause and one sentence deleted].

In October of 1985, before Robert Potamkin made the notation, Robert Casella, BMW NA's Regional Business Development Manager, informed Robert that Green's dealership carried with it an SPG of 94. A171-72; A1999. Despite Casella's view that the SPG serves merely as a guide or a forecast, (in his words, "I'm not aware that it has [limited allocations] but it could," A1803-04), he did not convey that to Robert. A171-72; A1999. The BMW NA representatives who subsequently evaluated Robert's proposed facility were unqualified to negotiate the SPG and also declined to explain it. A632. Robert explained that he refused to sign without reservation, and thereby to obligate himself to, a form that indicated an annual cap of 94 BMWs, before he could speak to someone in authority at BMW NA. He testified that he signed the form with the notation so as to comply as fully as possible with BMW NA requirements, but he did not want to be bound by a figure that he felt had been neither adequately explained nor justified. A910-12. His notation was received as evidencing an uncooperative attitude, yet it is undisputed that no one from BMW NA inquired of Robert concerning his notation. A869-70.

BMW NA has explained, however, that the SPG of 94 conformed with corporate policy. According to Phil Caposella, Mid-Atlantic Regional Manager in 1985, when a dealer acquires a dealership through a buy-sell agreement, he inherits the same SPG as the seller. A111, *see* A171-74, A495. The SPG is thus neutral and serves neither to inflate or deflate the price of the dealership during the transaction. A new dealer may, however, anticipate an increased SPG after, for example, demonstrating an ability to accommodate a higher "rate of travel" (actual sales), A98-99, A490-91, or expanding or enhancing its facility. A337-38.

Nonetheless, there is substantial evidence which shows that the SPG did not limit actual allocations of cars. Green's eventual successor, Sloane BMW, while nominally bound by an SPG of 94, A1898, actually obtained approximately 400 BMWs a year. A1830. An internal BMW NA memorandum suggests that the decision to hold Sloane BMW to a nominal SPG of 94 was motivated by this litigation. A1898. In fact, District Manager Focht praised Sloane for selling more than 101 BMWs during its first three months of operation. A2305. BMW dealer Sloane's experience is consistent with that of another BMW dealership manager, Michael Vadasz, that his SPG never limited the number of cars he would be able to sell, A793; *see, e.g.*, A1887-88 (Focht), and of dealer Andrew Hill of Devon Hill Motors. A2118-20. In fact, Hill believed that the SPG equals approximately one-half of a dealer's actual allotment. A2124. And BMW NA's President, Gunter Kramer indicated, the "actual allocation is also determined by rate of travel," unless that rate indicates price discounting. A491. None of this was explained to Robert; he was simply told that his SPG would be 94 and no more.

Moreover, Robert indicated that he had been willing to meet any BMW NA criteria, including renovations to his proposed facility, to meet standards required for a higher SPG, and had so informed Casella. A1708-09; A1719; A1999. As evidence, Robert produced the cover letter submitted with his application to Casella, BMW NA's Mid-Atlantic Region Business Development Manager. In relevant part, Robert wrote:

On Tuesday I gave you a copy of plans for a facility in which we could put our BMW dealership. As we discussed, facility size and car numbers go hand in hand. That facility could be used exclusively for BMW in both sales and service if we get enough cars to support it. If we get a smaller number of cars, we could use the showroom for both BMW and VW and the service department for BMW exclusively. We will consider both smaller facilities and larger facilities as the number of cars dictates

A1719. In contrast to BMW NA's theory of noncooperation, Casella's own internal BMW NA memorandum reflects Robert's willingness to meet any requirements A1998-99.

C.

Integral to BMW NA's theory of the case is its assertion that during the early 1980s, BMW NA was initiating a dealer "upgrade" program. This involved targeting items for improvement, gradually improving deficient aspects of existing dealerships, and requiring improved standards of prospective franchise applicants. BMW NA also faults Robert for planning to place his BMW dealership in an "automall" adjacent to Robert's other dealerships * * * [one sentence deleted].

The Potamkins proffer significant evidence suggesting that this reason, as well, is pretextual. First, and most importantly, the Potamkins produced a letter addressed to Business Development Manager Casella, that Robert had expressed an interest in making his BMW facility exclusive if he received the number of cars necessary to make it profitable. A1719. Despite this invitation, Robert stated that he was not asked to make the dealership exclusive. See A1710-11. Second, many other BMW dealers operated multi-franchise dealerships and, contrary to BMW NA's implication, BMW NA appeared unconcerned, and in some cases even unaware, of the additional franchises * * * [one sentence deleted].

Finally, Casella opined that with an SPG of 94, Robert would be likely to "shuffle" his BMW franchise to less accommodating facilities, A194-95, tacitly acknowledging that with an SPG of 94 a BMW dealership would have been only marginally profitable. In addition to BMW NA's intent to hold Robert to a 94 SPG, as contrasted with the treatment accorded other dealers, this decision makes little economic sense for BMW NA. Accordingly, BMW NA's President, Gunter Kramer, acknowledged BMW NA's emphasis on dealership profitability. Cf. A480-81.

Finally, BMW NA's alleged concern that Robert's dealership was not to be an exclusive one is weakened by the testimony of BMW NA representatives that in 1985, the definition of an "exclusive" dealership had not yet been clarified. Prior to the arrival of Vice President and Director of Operations, Jackling, an "exclusive" dealership could consist of a different building from, even if physically attached to, other franchises. Over time, this concept evolved to require that the BMW franchise would stand alone entirely. In 1985, however, Robert's proposed BMW showroom and service area would have met the first definition of "exclusive."

D.

In summary, although BMW NA offers a wide variety of reasons for having rejected the Potamkins as BMW franchisees, it has failed to meet the standard of proof necessary for summary judgment. The Potamkins have countered each alleged reason with evidence that both discredits BMW NA's witnesses and provides independent support for the Potamkins' claim that BMW NA and its dealers acted in concert to repel any Potamkin competition in BMW sales.

Because the Potamkins have adduced sufficient evidence to support their federal antitrust claim, we will vacate the order granting summary judgment on Count I and remand the case for further pretrial proceedings. As well, the judgment with respect to Counts IV and V, dismissed pursuant to the disposition of Count I, will be vacated and remanded.

V.

[13] In Count III, the Potamkins also claim that BMW NA tortiously interfered with their contract and prospective contractual advantage to purchase the Green and Trans-Atlantic dealerships, respectively. The district court granted BMW NA summary judgment on this claim as well, concluding that the Potamkins lacked an enforceable contract in either case absent BMW NA's approval and that BMW NA was privileged not to offer its approval.

A.

The parties apparently agree that sections 766 and 766B of the Restatement (Second) of Torts, adopted by both New York and Pennsylvania, govern.¹⁷ *Guard-Life Corp. v. S. Parker Hardware Mfg Corp.*, 50 N.Y.2d 183, 428 N.Y.S.2d 628, 631, 406 N.E.2d 445, 448 (1980); *Adler, Barish, Daniels, Levin and Creskoff v. Epstein*, 482 Pa. 416, 393 A.2d 1175, 1183-1184 (1978); see *Thompson Coal Co. v. Pike Coal Co.*, 488 Pa. 198, 412 A.2d 466, 471 (1979).

With respect to the Green agreement, we look to section 766, entitled, Intentional Interference with Performance of Contract by Third Person, which provides:

One who intentionally and improperly interferes with the performance of a contract . . . between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract.

Restatement (Second) of Torts, § 766 (1979). Factors delineating the contours of "improper" conduct are set forth in section 767,¹⁸ and include the nature of the actor's conduct and intent.

As articulated by the Pennsylvania Supreme Court, proper conduct may be described as "socially acceptable conduct" that comports with the "'rules of the game' which society has adopted." *Adler, Barish*, 482 Pa. at 433, 393 A.2d at 1184

17. The parties have not addressed the question of choice of law. It remains true that if New York law governs the Trans-Atlantic incident (prospective contractual advantage) and Pennsylvania law governs the Green agreement (contractual relationship) then the Restatement (Second) of Torts as adopted by each jurisdiction would apply. We will proceed on that assumption.

We note, however, that if Pennsylvania law were to control the prospective contractual advantage claim proper recourse should be made to section 766 of the Restatement (First) of Torts. *Silver v. Mendel*, 894 F.2d 945, 601 U.S. 23 (1991), cert. denied, 496 U.S. 926, 110 S.Ct. 2620, 110 L.Ed.2d 641 (1990).

18. They include:

Because only an agreement in principle had been reached during the Trans-Atlantic negotiations, section 766B, Intentional Interference with Prospective Contractual Relation, governs that claim:

One who intentionally and improperly interferes with another's prospective contractual relation (except a contract to marry) is subject to liability to the other for the pecuniary harm resulting from loss of the benefits of the relation, whether the interference consists of

(a) inducing or otherwise causing a third person not to enter into or continue the prospective relation or

(b) preventing the other from acquiring or continuing the prospective relation

Restatement (Second) of Torts § 766B (1979). Having set forth the applicable legal principles, we turn to the parties' contentions.

B.

With respect to the Green agreement, BMW NA urges that absent a valid, enforceable contract, the Potamkins would not have a claim for tortious interference. Likewise, BMW NA claims that a higher standard is required for a prospective contractual advantage, and that, concerning Trans-Atlantic, it has also not been met. To the contrary, the Potamkins contend that if we reverse the antitrust claim in their favor, they have, *a fortiori*, presented material factual issues on the question of

In determining whether an actor's conduct in intentionally interfering with a contract or a prospective contractual relation of another is improper or not, consideration is given to the following factors:

- (a) the nature of the actor's conduct,
- (b) the actor's motive,
- (c) the interest of the other with which the actor's conduct interferes,
- (d) the interest sought to be advanced by the actor,
- (e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other,
- (f) the proximity or remoteness of the actor's conduct to the interference and the relations between the parties.

Restatement (Second) of Torts, § 767 (1979)

whether BMW NA's interference amounted to actionable "improper conduct."

Although variously couched as a "privilege to interfere, or interference not improper," the Restatement provides that "[t]he issue in each case is whether the interference is improper or not under the circumstances . . ." § 767, comment b. Further, "[a] determination of propriety requires inquiry into the 'mental and moral character of the defendant's conduct.'" *Brownsville Golden Age Nursing Home Inc. v. Wells*, 839 F.2d 155, 159 (3d Cir. 1988).

Some stated examples of improper conduct are particularly germane. In one, "conduct that is in violation of antitrust provisions or is in restraint of trade" may constitute improper interference. Restatement (Second) of Torts, § 767 comment on clause (a). Economic pressure, such as that allegedly applied to Caulfield when BMW NA bought Trans-Atlantic at a significantly lower price than the Potamkins had offered while suggesting that she had nothing to sell without its approval, may constitute unprivileged, improper interference. BMW NA's allegedly disingenuous delay in taking Robert's application for the Green franchise, if found by the jury to have violated the Pennsylvania Board of Vehicle Act and to have been sufficiently intentional, could also constitute improper interference. Because the factual underpinnings of these tort claims are intertwined with the antitrust claims, we will vacate the district court's judgment with respect to them and remand them as well.

VI.

[14] In its cross-appeal, BMW NA challenges the district court's denial of summary judgment on Count II, alleging a violation of the Pennsylvania Board of Vehicles Act, 63 Pa.Stat. Ann. § 818.1, *et seq.* Although BMW NA presented a multifaceted attack on this claim in its motion before the district court, on appeal it has confined its challenge to the single question certified by the district court: "Does a prospective purchaser of an automobile dealership have standing to pursue a claim under the Penn-

sylvania Board of Vehicles Act . . . against a franchisor who withholds its consent to the transfer of a franchise?" (citations omitted). The Act provides for liability where a franchisor has acted so as to:

(1) Unreasonably withhold consent to the sale, transfer or exchange of the franchise to a qualified buyer capable of being licensed as a new vehicle dealer in this Commonwealth [. . . or]

(1) Fail to respond in writing to a request for consent as specified in paragraph (3) within 60 days of receipt of a written request . . . Such failure shall be deemed to be refusal to consent to the request.

63 Pa Stat Ann § 818.9(b)(3) and (4). Section 20 provides for civil actions:

Notwithstanding the terms . . . of any agreement . . . (i) any person who is or may be injured by a violation of a provision of this act or (ii) any party to a franchise who is so injured in his business or property by a violation of a provision of this act relating to that franchise or (iii) any person so injured because he refused to accede to a proposal for an arrangement which, if consummated, would be in violation of this act, may bring an action for damages and equitable relief, including injunctive relief, in any court of competent jurisdiction.

63 Pa Stat. Ann. § 818.20(a) (bracketed numbers added for purpose of explanation).

Since this count raises an issue of Pennsylvania law, our duty is to predict how the Pennsylvania Supreme Court would decide this issue. *Robertson v. Allied Signal, Inc.*, 914 F.2d 360, 378 (3d Cir. 1990); *see Commissioner v. Estate of Bosch*, 387 U.S. 456, 464-65, 87 S.Ct. 1776, 1782-83, 18 L.Ed.2d 886 (1967). We must make this prediction without the benefit of substantive legislative history or Pennsylvania caselaw concerning this standing provision of the Board of Vehicles Act. Lacking direct guidance on the interpretation of this Act, we turn to the general instructions of Pennsylvania's Statutory Construction Act of 1972, 1 Pa.C.S.A. § 1501 *et seq.* (Purdon's Supp 1991). The Statutory Construction Act provides that we should construe

the Act "to give effect to all its provisions," and further provides that "when the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit." 1 Pa.C.S.A. § 1921(a), (b) (Purdon's Supp.1991).

Given this guidance from the Pennsylvania legislature, we conclude that the clause providing that "any person who is or may be injured by a violation of a provision of this Act . . . may bring an action . . ." plainly confers standing upon the Potamkins.

BMW NA contends that the Act protects only franchisees' economic interests by leveling the playing field between franchisees and manufacturers, and therefore does not impose on manufacturers any duty to *prospective* franchisees. While this contention has some appeal, we reject it because it is inconsistent with the plain language of section 818.20. Second, BMW NA contends that the standing conveyed to "any person who is or may be injured . . ." by section 818.20(a), must be read narrowly so as to avert rendering unnecessary the standing conveyed in the following clauses. In other words, if "any person who is or may be injured" were broadly construed to encompass the Potamkins, the following clauses would not enlarge the class of litigants. BMW appears to suggest that "any person who is or may be injured" refers to violations of the statute *other than* those relating to regulation of franchises.

The Act does not support BMW NA's position, however, and BMW NA has not cited any binding or even persuasive cases. In none of the cases BMW NA cites did the courts construe a statute similarly broad in granting standing to "any person." At least with respect to the standing provision in clauses one and three BMW NA's concern that the first makes the remaining clauses superfluous is misplaced. The concern of the first clause is injury caused by violation. The concern of the third providing standing to "any person so injured because he refused to accede to a proposal for an arrangement which if consummated, would be a violation of this act . . ." is injury caused by refusal to participate in a

violation; no actual violation need occur. Even if the first clause covered every conceivable violation, some additional persons could sue under the third clause.

BMW NA also asserts a policy argument, predicting that if the court opens the door to prospective franchisees, manufacturers will be afraid to deny applications, even reasonably, for fear of litigation. Where manufacturers have acted reasonably, however, they have not only the defense of reasonableness, but in litigation brought in the federal courts, the protection of Rule 11 as well. Moreover, the fear of litigation is not alien to car manufacturers nor limited exclusively to them; they are subject to all kinds of liabilities—product, negligence, and, even under this statute, liability to franchisees. These are subsumed in the cost of doing business and from society's viewpoint have favorable aspects which outweigh the negative ones.

In sum, we will not diverge from the plain language of the Pennsylvania Board of Vehicles Act's standing provision, especially where we cannot find support in legislative history or caselaw for doing so.

VII.

We will therefore vacate the grant of summary judgment on Count I, vacate the dismissal of Counts III, IV and V, and affirm the district court's order with respect to Count II, remanding all counts for further proceedings.

ROTH, Circuit Judge, concurring and dissenting.

I join part VI of the majority's opinion and judgment which affirms the denial of summary judgment on the Potamkins' claim under the Pennsylvania Board of Vehicles Act. However, I respectfully dissent from the majority's disposition of the Potamkins' antitrust and tortious interference with contract claims. In regard to the antitrust claim I conclude that the plaintiffs have not met their burden of producing evidence which tends to show that the distributor BMW NA, had entered into a conspiracy with its dealers to boycott the Potamkins. More significantly, I find that

plaintiffs have not met their burden of producing evidence that tends to exclude the possibility that BMW NA was acting independently of its dealers when it rejected the Potamkin dealerships. *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 768, 104 S.Ct. 1464, 1473, 79 L.Ed.2d 775 (1984). There is no evidence of a "conscious commitment to a common scheme designed to achieve an unlawful objective." *Id.*; *Edward J. Sweeney & Sons, Inc. v. Texaco*, 637 F.2d 105, 111 (3d Cir.1980), *cert. denied*, 451 U.S. 911, 101 S.Ct. 1981, 68 L.Ed.2d 300 (1981). I would, therefore, affirm the summary judgment entered against the Potamkins on their Sherman Act § 1 claim. Because the basis for the tortious interference with contract claim is so closely interwoven with the antitrust claim, I further conclude that it must fall with the failure of the antitrust claim. I would, therefore, affirm the grant of summary judgment on that claim as well.

Turning first to the antitrust claim, I believe the majority has misread our standard for summary judgment when it allows the 'Potamkins' antitrust claim to go forward. As the majority acknowledges, an antitrust plaintiff must be prepared to demonstrate a causal relationship between alleged dealer complaints and a distributor's action in order to distinguish concerted action in violation of the Sherman Act from "perfectly legitimate" independent conduct. *Monsanto*, 465 U.S. at 763-64, 104 S.Ct. at 1470-71. However, the present case differs from situations such as that in *Arnold Pontiac-GMC, Inc. v. General Motors Corp.*, 786 F.2d 564 (3d Cir.1986), where we were able to find such a linkage. In *Arnold Pontiac*, there was direct evidence of concerted action which was coupled with circumstantial evidence that GMC had planned to grant Arnold Pontiac-GMC a Buick franchise but changed its mind after a meeting between its representative and the local dealers. We found that the combination of direct and circumstantial evidence raised a genuine issue as to whether the Buick dealers had conspired to thwart

competition at the dealership level. For this reason, we reversed the grant of summary judgment and remanded the case for trial.

Our careful review of the record here shows no direct evidence of a conspiracy that allegedly caused the Potamkins their injury. We are left to infer from only circumstantial evidence whether there was concerted action. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986). As I relate below, I find that BMW NA's conduct is as consistent with permissible unilateral conduct as it is with illegal conspiracy, and therefore, following *Matsushita*, I find that the evidence is not adequate to support the alleged antitrust conspiracy.

The evidence here suggests at most that, at different times New York area and Philadelphia area dealers may have complained to BMW NA about awarding dealerships to the Potamkins. Yet, in *Monsanto*, 465 U.S. at 763, 104 S.Ct. at 1470, the Supreme Court rejected the notion that a jury could infer the existence of a price-fixing agreement from the complaints of other distributors or "from the fact that termination came about 'in response to' complaints" from other distributors. The Court required something more of section 1 plaintiffs: Evidence that "tends to exclude the possibility that the manufacturer and non-terminated distributors were acting independently." *Monsanto*, 465 U.S. at 764, 104 S.Ct. at 1471; *Fragale & Sons Beverage Co. v. Dill*, 760 F.2d 469, 473 (3d Cir. 1985).

The Court explained that a plaintiff does not establish an illegal price-fixing agreement solely by proof of complaints by competitors of the prospective dealer. Complaints about discounters¹ "are natural— and from the manufacturer's perspective, unavoidable—reactions by distributors to the activities of their rivals." *Monsanto*, 465 U.S. at 763, 104 S.Ct. at 1470. A distributor's decision not to deal may re-

1. The Potamkins had been long recognized for selling high volumes of automobiles at discount

prices.

flect a restraint which is primarily horizontal in nature, in that dealers are trying to suppress competition by utilizing the power of a common supplier. Nevertheless, so long as the distributor made an independent business decision not to do business with a dealer, the fact that the distributor was aware of the dealers' complaints is of no moment. *Id.* at 763-764, 104 S.Ct. at 1470-71.

In looking at all of the evidence which the Potamkins present, I understand we cannot compartmentalize the various factual components. However, neither can we read between the lines to infer linkage where there is none. When drawing inferences, we may draw only reasonable inferences from sufficient evidence. For the reasons which follow, I conclude that the Potamkins have not presented the quantum of evidence necessary to permit their case to go to the jury. In reaching this conclusion, I heed the *Monsanto* Court's warning that allowing finders of fact to infer conspiracies from extremely equivocal evidence may deter pro competitive conduct.

If an inference of such an agreement may be drawn from highly ambiguous evidence, there is a considerable danger that the doctrines enunciated in *Sylvania* and *Colgate* will be seriously eroded. *Id.* at 763, 106 S.Ct. at 1470.

Evaluating the evidence in the present case in the light most favorable to the Potamkins, I conclude that a jury could not find a violation of section 1 of the Sherman Act without relying on speculation or conjecture, a result we have cautioned against. *Edward J. Sweeney*, 637 F.2d at 116.

When examined closely the Potamkins' evidence is slender. With regard to the alleged 1981 conspiracy, the Potamkins present the Gray affidavit along with the statement of Robert Potamkin to support an inference of concerted action. As the majority notes, the Gray affidavit contains no evidence that BMW NA considered the dealers' alleged demands or acted in response to those demands. Nevertheless

the majority reads the affidavit to support an inference that BMW NA knuckled under to dealer pressure. Taking the affidavit together with the other evidence the Potamkins present, I cannot draw such an inference. Gray's testimony relates only Gray's own belief that BMW NA's decision to deny the Potamkins the Great Neck open point came as a result of the New York area BMW dealers' objections. The affidavit neither mentions whether a BMW NA employee participated in the meeting at which dealers discussed complaining to BMW NA nor supports an inference that the dealers had formed an agreement to pressure BMW NA or its Eastern Regional Manager, Terry Cronin.² The affidavit relates only that dealers at the meeting opposed BMW NA's granting the Potamkins a franchise, a sentiment which is not surprising from dealers who would face new competition if the franchise were granted.

Even if a representative of BMW NA were present at the dealer advertising group meeting, such contact between a distributor and its dealers, while evidence of an opportunity to conspire, does not amount to a conspiracy. Our case law suggests such meetings have important business purposes, they provide the distributor or manufacturer with important information which can be used to change product mix or advertising direction. Distributors and dealers must speak "to assure that their product will reach the consumer persuasively and efficiently." *Monsanto, supra*, 465 U.S. at 763-64, 104 S.Ct. at 1470.

As further evidence of concerted action by New York area dealers, Robert Potamkin offers his own statement that in late 1985, Gene Hoffman, a BMW dealer in Bloomfield, New Jersey, told him that BMW NA's decision to deny the Potamkins the Great Neck franchise "was due to the fact that other Long Island BMW dealers feared the price competition that a Potamkin BMW franchise would bring to the Long Island market." I do not find that

2. The affidavit suggests that some dealers had complained to Cronin prior to the meeting and that others complained following the meeting.

There is nothing to suggest a meeting of the minds followed by concerted action.

this evidence enhances the Potamkins' conspiracy claim. Again, all businesses fear competition, particularly from a new competitor who will compete on price. Moreover, I do not read Robert Potamkin's affidavit to suggest that Hoffman told him that BMW NA consented to an agreement with its Long Island dealers to exclude the Potamkins.³ Robert Potamkin's affidavit, even when considered with the Gray affidavit, does not present evidence which tends to exclude the possibility that BMW NA acted unilaterally to keep the Potamkins out of Long Island.

* * * [one sentence deleted]⁴ However, even if BMW NA did contact existing dealers, a conclusion refuted by the testimony of Cronin and Hoffman among others, such evidence, when taken together with the Gray and Robert Potamkin affidavits, still does not raise an inference of concerted action between BMW NA and its New York area dealers to deny the Potamkins a franchise. At a minimum, "the circumstances [must be] such as to warrant a jury in finding that the conspirators had a unity of purpose or a common design or understanding, or a meeting of the minds in an unlawful arrangement." *American Tobacco Co. v. United States*, 328 U.S. 781, 810, 66 S.Ct. 1125, 1139, 90 L.Ed. 1575 (1946). BMW NA's own decision to contact its dealers would not meet the Potamkins' burden of having to show that BMW and the dealers had acted with a common design.

Finally, it must be remembered that the 1981 allegations are not part of the antitrust injury complained of here; the Potamkins use those allegations to suggest a pattern of dealing that supports their claim of concerted action arising out of the events of 1985.

With regard to those 1985 events surrounding the Potamkins' inability to obtain a BMW franchise in Manhattan, the evi-

dence which the Potamkins present is very thin. To suggest concerted action, the Potamkins offer only Robert Potamkin's statement that Gene Hoffman had informed him on May 30, 1986, that a BMW NA representative had visited Hoffman in the fall of 1985 and had asked Hoffman's opinion about the proposed sale of Trans-Atlantic to the Potamkins. Based on this evidence, the Potamkins argue that dealer opposition from 1981 was reactivated in 1985 to defeat their agreement in principle with Caufield for the Trans-Atlantic dealership in Manhattan. Even if Hoffman had complained to a BMW NA representative—Hoffman denies that any representative of BMW ever visited him regarding the possible sale of a dealership in Manhattan to the Potamkins—and even if a BMW NA representative heard similar complaints from other dealers—there is no evidence supporting this point in the record—complaints by competitors, standing alone, are not sufficient to show a conspiracy.⁵

As for other evidence of a 1985 New York conspiracy, the majority notes that BMW NA backed away from its strategy of creating a factory store and instead gave Martin BMW the exclusive Manhattan dealership. However, the factory store concept was not invented to cover up the conspiracy. The uncontroverted documentary and deposition testimony suggests that BMW came up with the idea at least one year prior to the proposed sale of Trans-Atlantic. In short, I find the evidence insufficient to deduce a conspiracy between BMW NA and its New York dealers to deprive the Potamkins of a BMW dealership in Manhattan.

Finally, the evidence that BMW NA conspired with its Philadelphia dealers to prevent the Potamkins from purchasing the Green dealership is equally scant. It stems from one source: the statement of Bruce Braverman, a Potamkin employee, recount-

3. Because I am looking at this evidence in the light most favorable to the Potamkins, I will not consider the credibility of this affidavit or of Hoffman's responding affidavit, which denies Robert Potamkin's allegations.

4. * * * [one sentence deleted]

5. I do not suggest that evidence of complaints has no probative value at all, but only that the burden remains on the antitrust plaintiff to introduce additional evidence sufficient to support a finding of unlawful contract, combination, or conspiracy. *Monsanto*, 465 U.S. at 764 n. 8, 104 S.Ct. at 1471 n. 8.

ing what Donald Mitchell allegedly had told him. I do not agree with the majority's conclusion that the Braverman statement is admissible evidence. Nor can I conclude that the district court abused its discretion in excluding the Braverman statement. *See, e.g., United States v. Gambino*, 926 F.2d 1355, 1364 (3d Cir.1991). However, even if his statement were admissible, I find that it offers little evidence of the alleged conspiracy.

The majority goes to great lengths to find Braverman's testimony admissible. Yet, I cannot agree with its reasoning for several reasons. First, I find that Braverman's statement of what Mitchell told him should not be admitted as an exception to the hearsay rule because Mitchell does not qualify as an agent of BMW NA acting within the scope of his agency and employment. Second, I find that Braverman's statement also falls short of the exception for the admission of hearsay statements by co-conspirators. Furthermore, even if the Braverman relation of the Mitchell statement is admissible evidence of a conspiracy, it relates only to a conspiracy between BMW dealers, which is not the conspiracy charged in the complaint. The statement does not refer to BMW NA's role in any such scheme.

The record suggests that Mitchell worked for BMW Credit Corporation . . . [remainder of sentence deleted]. In his work for BMW Credit, Mitchell had no contact with BMW NA and nothing to do with its decisions on dealer appointments. Therefore, I do not believe that Mitchell's statement to Braverman concerned a matter within the scope of his agency, such that Braverman's retelling should be admissible under Rule 801(d)(2)(D).

In any event I do not find that BMW NA so dominates the activities of BMW Credit that Mitchell could act as BMW NA's agent. The majority finds this a close question. I think the answer is clear . . . [four sentences deleted]

Moreover, even if Mitchell could have spoken as BMW NA's agent, the admissibility of Braverman's statement is cast into doubt by the multiple layers of hearsay

contained within Mitchell's statement as Braverman relates it. As the majority indicates, our case law allows secondary and tertiary levels of hearsay to come in if there is a basis for admitting the hearsay statement. *See Fed.R.Evid.* 805. Braverman testified in his deposition that he remembers Mitchell telling him that Don Rosen was the source of Mitchell's news that other Philadelphia area BMW dealers were going to do what they could to make certain the Potamkins did not get a franchise. However, I do not find that the out of court statements purportedly made by other dealers to Rosen, who then repeated them to Mitchell, should be admissible in light of our concern for restricting declarations of unidentified persons. Even where we might infer who such persons may be, such supposition does not satisfy the heavy burden on the proponent of the evidence to demonstrate its trustworthiness. *See Carden v. Westinghouse Elec. Corp.*, 850 F.2d 996, 1003 (3d Cir.1988). We do not know the identity of the other dealers who presumably spoke to Don Rosen, nor do we know whether it was Don Rosen himself or someone else at his dealership who spoke to Mitchell. I note that Mitchell indicated that he did not usually talk to dealership owners when he visited his accounts. Moreover, the nonhearsay evidence contradicts Braverman's testimony. Mitchell denies having made the statements attributed to him by Braverman, and Don Rosen denies having told Mitchell that Philadelphia area BMW dealers had complained to BMW NA about the possibility that the Potamkins would become a dealer.

I also conclude that the Mitchell "statement" is not admissible under the co-conspirator exception, Rule 801(d)(2)(E). I do not find, either within the statement or independent of the statement, any evidence of a conspiracy involving BMW NA and the Philadelphia area BMW dealers. Nor do I find that Mitchell held a position relative to BMW NA that could implicate BMW NA in such a conspiracy through Mitchell's actions.

For each of the above reasons, I believe the district court did not err in excluding

Braverman's statement. However, even if the trial court did abuse its discretion by ruling that the Braverman testimony was inadmissible, our consideration of the statement in connection with the motion still would not preclude summary judgment for the defendants on the antitrust claim. In the statement, Braverman asserts that Mitchell told him that the Philadelphia area dealers did not want the Potamkins to have a franchise because they feared price competition. Yet, at his deposition, Braverman responded in the negative to questions regarding whether he knew if Mitchell had spoken to anyone at BMW NA and whether Mitchell knew if the Philadelphia dealers had spoken to anyone at BMW NA about the proposed sale. These negative answers suggest that Mitchell was relating nothing more than the grumbling he heard in his conversations at BMW dealerships. Braverman's testimony provides no hint that BMW NA acted other than unilaterally when it chose not to approve the sale of the Green dealership to the Potamkins. Nothing in what Braverman says Mitchell told him suggests that the dealers communicated demands to BMW NA or that BMW NA acquiesced in those demands or entered an agreement with the Philadelphia area dealers to keep out the Potamkins.⁶

I recognize, of course, that it is rare to find overt evidence of a conspiracy. I note as well that BMW NA may have been both slow and disingenuous in its handling of the Potamkins' application for the Philadelphia franchise. However, BMW NA's failure to consider the Potamkin's application in a prompt and scrupulous fashion does not constitute evidence of a conspiracy.

Beyond the evidentiary problems relating to concerted action, I believe the majority understates the four-year gap between the events surrounding BMW NA's failure to award the Potamkins the Great Neck open point in 1981 and the failed attempts by the

Potamkins to purchase dealerships in Manhattan and Philadelphia in the fall of 1985. I find the causal nexus between the 1981 actions and the events of 1985 too attenuated to support the existence of the alleged conspiracy. There is no evidentiary link showing that the alleged 1981 agreement between New York area dealers and BMW was reactivated to keep the Potamkins out of Manhattan in 1985. Even more apparent is the lack of any evidence which supports even an inference that the purported conspiracy from 1981 to deny the Potamkins the Great Neck open point could have been reactivated in 1985 to deny them the Green dealership in Philadelphia. Previously, we have required of plaintiffs "proof of a causal relationship between competitor complaints" and the decision not to deal. *Edward J. Sweeney & Sons*, 637 F.2d at 111. Plaintiffs have failed to meet this same burden of proof here.

Moreover, the relevant literature suggests that the defendant had credible business reasons for rejecting the Potamkins' dealership applications. BMW NA had an interest in protecting its reputation and the image it has attempted to develop as a high quality car distributor. In order to compete with other brands in the market for luxury automobiles, BMW NA had ample reason to want to insure that its products were offered with certain point-of-sale services. BMW NA could have feared that the introduction of a dealer who "sells at the factory gate" would lead its other dealers to lower the level of service they offered in order to compete better with the price-cutter and prevent the price-cutter from free riding on the services they provided.⁷ Finally, BMW NA may have acted in a desire to protect the investments its dealers had made in their own franchises. Had BMW NA's rejection of the Potamkins' applications lacked a sensible economic justification, plaintiffs' allegations of concerted action would be more compelling.

6. In addition, I note that, while the majority opinion focuses on the dealer interactions with BMW NA, it overlooks the paucity of evidence showing that the dealers had conspired together to form an anticompetitive scheme.

7. A review of the depositions and exhibits makes clear that both BMW and its dealers had reason to fear a price cutting Potamkin franchise. The Potamkins had built a huge retail business by selling cars in high volume at small markup over the prices paid to various manufacturers.

Tab 18

May 6, 1992

~~CONFIDENTIAL~~

Subject: Ogden, Utah

Note to the File:

On today's date, Tim Martin called from Ogden, Utah to say that he was in the Buick dealership and that Dave Koch the dealer had advised him that he would be closing the dealership today and not re-opening until Monday.

Shelia Powell and I discussed the situation with Dave Koch. Dave advised that he would re-open the dealership on Monday with a skeleton crew. He also advised us that the service manager had gone to work for Rick Warner at the Mitsubishi dealership.

Tim Martin advised us that a representative from GMAC would be taking the keys for all the new cars with him and would keep us informed as to the situation and occurrences at the dealership.

I called Rick Warner after talking with Dave Koch to see if he was aware of what was going on. Rick was not aware that Dave Koch was closing the dealership but did say that he had received a phone call from Dave Koch but was away from the dealership and had not returned the call. However, he would call Dave Koch as soon as he and I finished talking. Rick Warner said that he would get back with me to let us know what we could expect from the Buick dealership. When asked about the remaining paperwork needed to complete his proposal package, Rick said that Dave Gibbs had everything. I have left two messages for Dave Gibbs this afternoon but he has not returned my calls. I will complete this note to file after hearing back from Dave Gibbs and Rick Warner.

At 3:25PM on today, I received a call from Rick Warner and Dave Gibbs to verify that we would have the necessary paperwork to complete the proposal package on tomorrow by fax. Dave Gibbs asked how long the approval would take. I advised him that once everything was completed here and forwarded to Flint, that perhaps a week to a week and a half. Dave Gibbs said they should be able to work out something to keep the Buick dealership open for that amount of time.

End of note to the file.

EXHIBIT	Doc. 25
Consisting of	1 For Identification Page(s)
Witness	Wood
Date	1/31/92
A. L. ANDREINI, C.S.R. NO. 4804	

000613

0000502

NOTE TO FILE:

June 30, 1992

I called Sierra Buick-Jeep Eagle, Ogden, Utah today at 4pm and got a recorded message indicating that services had been temporarily disconnected. The number that I dialed was 801-394-1651.

I called Henry Nixon's office at approximately 4:10pm and left a message for him to call me.

*7/1/92 Called Sierra Buick-Jeep Eagle, Ogden, Utah at 9:42am today.
Vorn Woodley
got same message as yesterday, # temporarily disconnected.*

~~CONFIDENTIAL~~

EXHIBIT	23
Consisting of	1
Witness	<i>W. Woodley</i>
Date	<i>7/31/92</i>
A. L. ANDREINI, C.S.R. NO. 4804	

000532

Tab 19

1 PREMISES?

2 A YES, SIR.

3 Q WHAT WAS SAID AND BY WHOM AT THAT MEETING?

4 A WELL, IT WAS A LONG DISCUSSION. THEY WANTED

5 TO MEET US, VISIT OUR FACILITY, LOOK THE FACILITY OVER.

6 THERE WAS DISCUSSION THAT THEY HAD LOOKED THE TOWN OVER

7 AND IN FACT KNEW WHERE THE POCKETS OF AUTO DEALERS WERE.

8 THEY WERE VERY --

9 Q WHICH IS WALL AVENUE AND RIVERDALE ROAD, IS

10 THAT CORRECT?

11 A YES, IT IS.

12 AND THEY WERE FAIRLY KNOWLEDGEABLE ON THOSE

13 TWO HIGH VISIBILITY AREAS AND THEY, IN FACT, SAT IN THIS

14 OFFICE AND, ONCE AGAIN, WERE QUITE IMPRESSED WITH THIS

15 FACILITY, IMPRESSED, AS THEY MENTIONED, WITH OUR ABILITY

16 TO POTENTIALLY BECOME THE BUICK DEALER AND THE WORDS THAT

17 CAME OUT OF MR. GAROVE'S MOUTH WERE THAT -- LET ME

18 PREFACE THOSE REMARKS BY WE DID DISCUSS A LITTLE BIT OF

19 PROJECT 2000 WHILE THEY WERE IN THIS OFFICE. BUT WITH

20 THAT DISCUSSION MR. GAROVE SAID, AND I QUOTE, "I DON'T

21 WANT BUICK IN THAT MAZE OF FRANCHISES OUT ON RIVERDALE

22 ROAD." THAT GAVE US A GOOD FEELING THAT THEY WERE

23 INTERESTED IN US AND CERTAINLY GAVE US THE REASON TO

24 CONTINUE TO DO THE WORK THAT WE WERE REQUIRED TO DO ON

25 THE BUY-SELL OF DISMISSING THE -- TRYING TO GET THE

1 complete review of with respect to Project 2000.

2 But there is a recommendation as to one of those
3 documents which I will provide to you that does
4 indicate preferred locations Riverdale Road for
5 that Pontiac, Buick, GMC dealer.
6

7 Q Do you recall making any statement in your
8 visit to Mr. Watson and Mr. Bean that you did not want to
9 go out into that maze on Riverdale Road or words to that
10 effect with the Buick franchise?

11 A I may have made a statement similar to that.

12 Q What was the basis for that statement?

13 A Well, if the place would have been based on
14 the -- I assume I'd be referring to the Petersen
15 operation which housed, at that time, Nissan, Honda,
16 Pontiac and GMC Truck, I believe, give or take a few
17 franchises.

18 Q And you think that's what you had made
19 reference to when you made that statement?

20 A Correct. Once again, I don't recall it, but
21 chances are it's a statement I may have made.

22 MR. BEAN: Mark that for me, please.

23 (Whereupon, at this time, the reporter
24 marked the-above mentioned two-page handwritten
25 document titled "Options I" as Plaintiff's Exhibit

Tab 20

1 A. It's one of the exhibits here (indicating).
2 That was a telephone call to one of the exhibits here
3 that I recalled.

4 Q. Other than that, have you talked to
5 Mr. Koch, to your knowledge?

6 A. Not that I -- not that I can recall, other
7 than what's noted in the exhibits.

8 Q. Do you maintain in your office, Mr. Woodley,
9 a separate file on each of the Buick dealers in the
10 zone?

11 MR. STEPHENS: Does he personally?

12 THE WITNESS: The zone office maintains it; I
13 don't personally.

14 MR. BEAN: Q. The zone office maintains it?

15 A. Yes.

16 Q. Do you have access to those files?

17 A. Yes, I do.

18 Q. Are you aware, Mr. Woodley, of any other
19 applications for a Buick sales and service agreement
20 that had been rejected to implement Project 2000?

21 A. And the time frame? I guess I'm -- would
22 you please characterize the time frame; excuse me.

23 Q. Yes. Well, first of all, during the time
24 that you served in the capacity as zone organization
25 manager for the San Francisco zone.

26 A. No, I'm not. I'm not aware of any.

1 Q. Are you aware of any since that time where
2 Buick has rejected the application for a sales and
3 service agreement and exercised its right of first
4 refusal for the purpose of implementing Project 2000?

5 A. I'm aware of --

6 MR. STEPHENS: Go ahead, I'm sorry.

7 THE WITNESS: I'm aware of one that's in process.

8 MR. BEAN: Q. That's in process now?

9 A. Yes, sir.

10 Q. Is that within the San Francisco zone?

11 A. Yes, it is.

12 Q. And where is that dealership located?

13 MR. STEPHENS: I'm not so sure that -- let me
14 talk to the witness on this. This could be
15 confidential information.

16 (Brief recess.)

17 MR. STEPHENS: Back on the record. After talking
18 with the witness, the process is not complete and the
19 information is highly confidential and proprietary and
20 I'll have to instruct the witness not to answer or
21 identify the dealership.

22 MR. BEAN: Q. Are you aware, Mr. Woodley, of any
23 applications for sales and service agreement with
24 Buick Motor Division that have been rejected and right
25 of first refusal exercised to implement Project 2000
26 anywhere else in any other zones in the United States?

1 A. No, I'm not aware of --

2 Q. Have you had any conversations with Henry
3 Mixon other than as set forth in the memorandums that
4 are part of the exhibits to this deposition --

5 A. None that --

6 Q. -- that you can recall?

7 A. None that I can recall.

8 Q. Have you had any conversations with anyone
9 representing Henry Mixon, an attorney or anyone else
10 representing Henry Mixon, with regard to the sale of
11 the assets of Helsco dba Sierra Buick or the
12 application of any other party for that Buick point in
13 Ogden?

14 A. None that I can recall.

15 Q. Do you know a person named Sally Pearsol?

16 A. No, I do not.

17 MR. STEPHENS: Who is she? Why do we care?
18 Sally, Sally.

19 MR. WATSON: We met her last night. No, I'm
20 being facetious.

21 MR. STEPHENS: What's David's obsession about
22 Sally?

23 MR. BEAN: Talk to John a minute.

24 (Brief recess.)

25 MR. BEAN: I'm through. That's all I have.

26 MR. STEPHENS: Thank you.