

TEXAS DEPARTMENT OF MOTOR VEHICLES

BOARD MEETING

8:00 a.m.
Thursday,
January 5, 2017

Lone Star Room
Building 1
4000 Jackson Avenue
Austin, Texas

BOARD MEMBERS:

Raymond Palacios, Chair
Robert "Barney" Barnwell, III
Luanne Caraway
Brett Graham
Kate Hardy
Blake Ingram
Gary Painter
Guillermo "Memo" Treviño
Johnny Walker

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MVD Docket No. 15-0015.LIC; SOAH Docket No. 608-15-4315.LIC Cecil Atkission Orange, LLC, d/b/a Cecil Atkission Chrysler Jeep Dodge, Complainant v. FCA US, LLC, Respondent

RULES - ADOPTIONS

9. Title 43, Texas Administrative Code, 174
Chapter 215, Motor Vehicle Distribution
- Rule Review, Government Code, §2001.039 (Notice of Intent Published June 19, 2015 - 40 Tex. Reg. 4012)
 - Amendments and Repeals, Subchapters A-J (Proposal Published September 9, 2016 - 41 Tex. Reg. 7011)
 - New, §215.160, Duty to Identify Motor Vehicles Offered for Sale as Rebuilt (Proposal Published September 9, 2016 - 41 Tex. Reg. 7011)
10. Title 43, Texas Administrative Code, 178
Chapter 218, Motor Carriers
Amendments, §§218.2, 218.13, 218.31, 218.32, 218.52, 218.53, 218.56, 218.59, 218.60, and 218.61 (Proposal Published November 25, 2016 - 41 Tex. Reg. 9246)

RULES - PROPOSALS

11. Title 43, Texas Administrative Code 180
- Chapter 206, Management Amendments, §206.131
 - Chapter 221, Salvage Vehicle Dealers, Salvage Pool Operators and Salvage Vehicle Rebuilders Amendments, §§221.16; 221.53; and 221.73
12. Title 43, Texas Administrative Code, 181
Chapter 218, Motor Carriers
Amendments, §§218.13, 218.17, 218.56, 218.57, 218.65, and 218.73 Repeal, §218.74, Settlement Agreements; New §218.75, Cost of Preparing Agency Record

EXECUTIVE SESSION

13. The Board may enter into closed session under 143
one or more of the following provisions of the 183
Texas Open Meetings Act, Government Code,
Chapter 551:
- Section 551.071
 - Section 551.074
 - Section 551.076

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P R O C E E D I N G S

1
2 MR. PALACIOS: Good morning, everybody. My
3 name is Raymond Palacios, and I'm pleased to open the
4 Board meeting of the Texas Department of Motor Vehicles.
5 It is exactly 8:00 a.m., and I'm now calling the board
6 meeting for January 5, 2017 to order. I want to note for
7 the record that public notice of this meeting, containing
8 all items on the agenda, was filed with the Office of the
9 Secretary of State on December 23, 2016

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

15 If you wish to address the board or speak or
16 speak on an agenda item during today's meeting, please
17 complete a speaker's sheet at the registration table.
18 Please identify on the sheet the specific item you are
19 interested in commenting on and indicate if you wish to
20 appear before the board and present your comment or if you
21 wish only to have your written comment read into the
22 record. If your comment does not pertain to a specific
23 agenda item, we will take your comment during the general
24 public comment portion of the meeting.

25 With that, now I will move on and we will have

1 a roll call. Board Member Caraway?

2 MS. CARAWAY: Present.

3 MR. PALACIOS: Board Member Graham?

4 MR. GRAHAM: Present.

5 MR. PALACIOS: Board Member Hardy?

6 MS. HARDY: Present.

7 MR. PALACIOS: Board Member Ingram?

8 MR. INGRAM: Present.

9 MR. PALACIOS: Board Member Painter?

10 MR. PAINTER: Present.

11 MR. PALACIOS: Board Member Treviño?

12 MR. TREVIÑO: Here.

13 MR. PALACIOS: Board Member Walker?

14 MR. WALKER: Present.

15 MR. PALACIOS: And let the record reflect that

16 I am Raymond Palacios, I am here too. We have quorum.

17 Everyone is here with the exception of Board Member

18 Barnwell.

19 So with that, I just want to move on. This is
20 the first board meeting of 2017, so as such, I want to
21 wish all of my fellow board members, all the DMV staff and
22 everyone present all the best in 2017, great health,
23 prosperity, and just wish you all a great 2017.

24 I also want to recognize one of our board
25 members. As you all know, this board is just stacked with

1 aces, great people on this board who receive a plethora of
2 awards, and the latest award was one that really I want to
3 mention. It was given to Board Member Memo Treviño, and
4 it is the JBS Leadership Award. It's in recognition for
5 his outstanding leadership and service to his community.
6 And I know this is just one of many awards, he's probably
7 going to need to get a new trophy case, but let's just
8 congratulate Mr. Treviño, and thank you so much for all
9 that you do.

10 (Applause.)

11 MR. TREVIÑO: Thank you very much, Chairman
12 Palacios.

13 MR. PALACIOS: All right. With that, let's
14 move on, and I want to note we have quite a few items on
15 our agenda today. We do have a contested case that is
16 further down on the agenda, however, I know we have quite
17 a few people here that are involved in that case and we're
18 going to move that case up shortly after the executive
19 director's report, we'll have a couple of reports after
20 that, so we should be able to get to that before 8:30.

21 So with that, I will turn this over to our
22 executive director, Ms. Whitney Brewster.

23 MS. BREWSTER: Thank you, Mr. Chairman. For
24 the record, Whitney Brewster, executive director. Good
25 morning, members of the board.

1 The information I am providing to the board
2 this morning is for briefing purposes only; I will not
3 request any action of you at this time.

4 The first item is in regards to the interagency
5 agreement with the Texas Department of Transportation. At
6 your November meeting, the board heard an update from our
7 general counsel, David Duncan, regarding the status of
8 TxDMV's interagency agreement with TxDOT for FY17. The
9 interagency agreement lays out the roles and
10 responsibilities of the agencies and the responsibilities
11 of both organizations as we pursue continued separation.

12 Since the last time you met, TxDMV staff has
13 met with TxDOT and finalized the remaining items in the
14 agreement. I executed the contract several weeks ago and
15 it was sent to TxDOT for final approval. Once I receive
16 an executed copy back, I will be certain to send that to
17 the board via email.

18 Mr. Chairman, if there aren't any questions, I
19 can move on to the next item.

20 MR. PALACIOS: Are there any questions?

21 (No response.)

22 MR. PALACIOS: Please proceed.

23 MS. BREWSTER: Just a brief legislative update.

24 Again, at the November 3 board meeting, a set of
25 legislative recommendations was adopted by the board.

1 Upon further review with members of the board and
2 receiving additional feedback from stakeholders, a final
3 group of recommendations was approved by Chairman Palacios
4 and has been presented to the office of the governor,
5 lieutenant governor and speaker. Additionally, I had the
6 opportunity to meet with both house and Transportation
7 Committee chairs and have provided that language to them
8 and talked through the different items. They have received
9 the draft language and they have sent that along to
10 Legislative Council for consideration for filing.

11 You will find in your board books a summary of
12 the adopted recommendations in the briefing materials
13 starting on page 9. One change not included in the
14 materials not presented at the November is a
15 recommendation for TxDMV to assume this campus, Camp
16 Hubbard, from TxDOT for headquarters staff. We have
17 continued to work closely with TxDOT and the office of the
18 governor on this effort and we have briefed legislative
19 leadership on this concept as well, and so far it has been
20 very well received.

21 In addition, we removed two items related to
22 fees, fee redirects to the TxDMV Fund, one being salvage
23 dealer licensing, as well as motor carrier credentialing
24 services. Again, that was redirecting from general
25 revenue to the TxDMV Fund. While the department continues

1 to provide these services, obviously at this time the
2 TxDMV Fund is estimated to cover our needs for the next
3 biennium so we are foregoing this at this time but it
4 could potentially be considered for future
5 recommendations.

6 And finally, the draft that the board approved
7 was consolidated down to ten draft bills, and so we have
8 those ten bills that we will be pursuing. We combined
9 like items to have ten overall bills for consideration by
10 the legislature this session.

11 The 85th Legislature begins next Tuesday,
12 January 10, and this kicks off, obviously, the 140-day
13 regular session. We anticipate preliminary committee
14 hearings to start in early February with updates from
15 agencies and then potentially bills to be heard later on
16 that month. So Ms. Love, Caroline Love, our Government
17 and Strategic Communications Division director, will
18 provide a thorough briefing at the board's next meeting.

19 If there aren't any questions, I'm happy to
20 move on to item 3.C.

21 MR. PALACIOS: Do we have any questions for Ms.
22 Brewster?

23 (No response.)

24 MR. PALACIOS: Please move on.

25 MS. BREWSTER: Okay. This part of the agenda

1 is where we recognize our employees, and this is one of
2 the favorite parts of my job. We have several employees
3 who have reached a state service milestone and two
4 retirees that we want to recognize as well. I want to
5 welcome the family and friends of our celebrants who have
6 joined us here this morning, and we appreciate the support
7 you have provided over the years to allow your loved ones
8 to work for this agency and other state agencies.

9 With that, Chairman Palacios and board members,
10 if you would please join me at the front of the dais to
11 congratulate our recipients

12 MR. PALACIOS: Be happy to.

13 MS. BREWSTER: Martha Yancey, from the Human
14 Resources Division, will read the service announcements.

15 MS. YANCEY: Good morning. I'm Martha Yancey,
16 Human Resources Division.

17 State service award recipients, please join Ms.
18 Brewster and our board members as your name is called.

19 This morning we have one employee being
20 recognized for 20 years of state service, our general
21 counsel, David Duncan.

22 (Applause.)

23 MS. YANCEY: David began his legal career at
24 the Texas Air Control Board and worked at the Texas
25 Natural Resource Conservation Commission, supporting the

1 state's air quality regulatory efforts. Prior to joining
2 our agency, David served as deputy general counsel at the
3 Texas Comptroller of Public Accounts. We are fortunate to
4 have David lead our legal team. He greets his work with
5 energy and enthusiasm, and every now and then adds just
6 the right amount of comic relief.

7 Congratulations, David.

8 (Applause.)

9 MS. YANCEY: Now employees reaching a state
10 service milestone of 25 years are Brad Beaty.

11 (Applause.)

12 MS. YANCEY: Brad works in the Finance and
13 Administrative Services Division. He has a very unique
14 job where he works with inmates at the Texas Department of
15 Criminal Justice in Huntsville. He manages the production
16 of millions of license plates, forms and placards that are
17 shipped to the agency and county tax offices. He ensures
18 these orders are filled and shipped within 24 hours of
19 receipt, ultimately benefitting our customers across the
20 state. Through his dedication and consistent efforts,
21 Brad has built excellent customer service relationships
22 and people know they can count on him.

23 Congratulations to Brad for his 25 years of
24 state service.

25 (Applause.)

1 MS. YANCEY: And next Monica Hernandez.

2 (Applause.)

3 MS. YANCEY: Monica works in the Finance and
4 Administrative Services Division as well. She has a very
5 friendly personality and greets everyone with a smile.
6 She provides quality customer service no matter how big or
7 small the request. She brings a sense of humor to her
8 job, as reflected in her clever lost and found emails.
9 Monica has worked in several areas of the agency and has
10 mastered many skills along the way. She is known as an
11 employee who consistent goes the extra mile in whatever
12 she does. She is always willing to take on a new
13 challenge, such as participating in continuous improvement
14 and change management projects. You know Monica as the
15 friendly smile that greets the board members, visitors and
16 staff before each meeting, and today as the friendly smile
17 we are recognizing for her 25 years of state service.

18 Congratulations.

19 (Applause.)

20 MR. PALACIOS: The following employees also
21 reached a state service milestone but were unable to join
22 us this morning. Twenty years: Maria Dassing, Consumer
23 Relations Division; Michelle Lingo, Motor Vehicle
24 Division; Tommy Rodriguez, Enforcement Division. For 30
25 years: Charles Bennett, Enforcement Division. And

1 finally, employees who retired from the agency recently
2 are Nancy Naysmith and Esther Costa.

3 Thank you.

4 (Applause.)

5 MR. PALACIOS: Okay. Let's move forward. We
6 have one individual who has registered to speak. I'd like
7 to call Mr. Hickman.

8 MR. DUNCAN: Ladies and gentlemen of the board,
9 if I may, just a couple of brief announcements. When we
10 take general public comment under the Open Meetings Act,
11 the board can't comment on or deliberate on any public
12 comment that doesn't relate to a specific item on the
13 agenda. That's because the public wouldn't have notice
14 that that would be discussed. If the board desires, we
15 can schedule some aspect of the commented's remarks for a
16 future agenda, with the approval of the chairman.

17 Under Board Rule 34 TAC 206.22, public comment
18 is limited to three minutes per presenter. We have a
19 timer which will give a yellow light when there's one
20 minute remaining and a red light when their time is up.

21 MR. HICKMAN: For the record, my name is Howard
22 Anthony Hickman. I'm a retired enforcement attorney for
23 this agency.

24 As I listened to the executive director at the
25 last board meeting state, "Overall, you will see an

1 improvement in the key performance indicators over this
2 time last year," I thought of the all West Texas axiom
3 about someone pissing on your boots and telling you it's
4 raining. You might ask why that axiom came to mind.
5 Simply put, I know that during the third quarter of 2015,
6 agency performance dropped 15 percent, so an improvement
7 over last year's third quarter is not a proper subject for
8 bragging.

9 The real question is has agency performance
10 reached the level of the second quarter of 2015. The
11 definitive answer is no, so the issue is how much has it
12 improved. To answer that question, I started looked at
13 the quarterly numbers from past board meetings and noticed
14 something rather strange. The numbers for the 2015 second
15 and third quarters in the November 2016 board packet are
16 different from the February 2016 board packet. The
17 numbers for the 2015 third quarter contained in the
18 November 2015 board packet is different from both the
19 November 2016 and February 2016 board packets. The 2015
20 second quarter numbers in the November 2015 board packet
21 is different from the 2015 second quarter numbers in the
22 August 2015 board packet.

23 I'm sure the executive director will probably
24 have an answer for these discrepancies, probably involving
25 more fuzzy math and the universal time conscience or

1 perhaps some new computer program that will somehow cure
2 the problem as it has the agency's performance measures.
3 Whatever the explanation, there are only two things of
4 which I'm certain: agency performance is still down
5 significantly from the second quarter of 2015, and my
6 boots are getting wetter and it still ain't raining.

7 A year and a half of deception and failure is
8 enough. New management is needed. We'll talk again at
9 the next board meeting.

10 And I have a minute. Thank you all.

11 MR. PALACIOS: We are going to move up now, as
12 I mentioned earlier, on the agenda item. We will go
13 straight to a case that we have. Daniel Avitia and
14 Michelle Lingo will now address agenda item 8 which is a
15 contested case, and also, we have attorneys for each party
16 that, by agreement, each will have 20 minutes to present
17 their arguments.

18 Mr. Avitia and Ms. Lingo.

19 MR. AVITIA: Chairman, board members, Ms.
20 Brewster, good morning. For the record, my name is Daniel
21 Avitia, and I have the pleasure of serving as the director
22 of the Motor Vehicle Division.

23 Alongside me this morning is Ms. Michelle
24 Lingo. She is a staff attorney with the Motor Vehicle
25 Division. She's also the legal subject matter expert

1 assigned to review this contested case this morning.

2 Agenda item, which can be found on page 209 of
3 your board books, is a contested case regarding the
4 franchise dealer, Cecil Atkission Chrysler Jeep Dodge and
5 the manufacturer, FCA US, or Chrysler. This matter is
6 being presented for the board's consideration to adopt a
7 final order.

8 In this case, Atkission protested FCA's
9 proposed termination of the franchise for the Chrysler
10 Jeep Dodge dealership located in Orange, Texas. The issue
11 presented in this case is whether FCA established that
12 there is good cause for termination of its franchise with
13 Atkission.

14 This particular case had a five-day hearing
15 conducted by two ALJs at the State Office of
16 Administrative Hearings. The ALJs considered the evidence
17 and legal arguments presented during the hearing on the
18 merits. The ALJs also considered Atkission's exceptions
19 to the PFD, the Texas Automobile Dealer Association's
20 amicus brief, and FCA's replies to Atkission's exceptions
21 to the PFD.

22 After the five-day hearing, the ALJs found that
23 FCA met its burden of proof by a preponderance of the
24 evidence to show that good cause exists for the
25 termination of its franchise with Atkission. The ALJs

1 recommended the board deny Atkission's protest and allow
2 FCA to terminate the franchise.

3 The board may change findings of fact or
4 conclusions of law made by the SOAH ALJs when change is
5 justified under Texas Government Code 2001.058(e). That
6 is to say that change can be made if: (1) the judges did
7 not properly apply or interpret applicable law, agency
8 rules or prior agency decisions; (2) the judge's relied on
9 a prior administrative decision that is incorrect or
10 should be changed; or (3) the judges made a technical
11 error in a finding of fact that should be changed.

12 In determining whether FCA demonstrated good
13 cause for the termination, the statute requires the board
14 to consider all existing circumstances, including specific
15 statutory factors. At this time I'd like to ask Ms. Lingo
16 to speak about the statutory factors the board is required
17 to consider on this matter.

18 Ms. Lingo.

19 MS. LINGO: Good morning. Michelle Lingo.

20 I'm going to briefly go over the statutory
21 factors that you're required by law to consider in this
22 matter, and of course, please feel free to stop me if you
23 have any questions on any of them.

24 The statutory factors require that you consider
25 all existing circumstances including dealer's sales in

1 relation to the sales in the market, dealer's investment
2 and obligations, injury or benefit to the public. Factor
3 four is the adequacy of the dealer's service facilities,
4 equipment, parts and personnel in relation to those of
5 other dealers of new motor vehicles of the same line make,
6 whether warranties are being honored by the dealer.

7 Factor six is actually broken down into nine
8 sub-parts. Those sub-parts are Atkission's sales
9 performance obligation, whether there was performance on
10 warranty obligations, management obligations, personnel
11 obligations, facility, business, advertising and signage
12 obligations, and working capital and net worth
13 obligations, all under the franchise agreement.

14 Factor seven is the enforceability of the
15 franchise from a public policy standpoint, including
16 issues of reasonableness, of the franchise terms,
17 oppression, adhesion and the parties' relative bargaining
18 power.

19 And finally, an element is whether the desire
20 for market penetration is the sole basis for the
21 termination.

22 This concludes my portion. Of course, I'm here
23 to answer any questions you may have, and I believe Daniel
24 has a few closing comments before we go to oral arguments.

25 MR. AVITIA: Ms. Lingo, thank you.

1 Staff's review of the ALJ's proposal for
2 decision under Texas Government Code 2001.058(e) revealed
3 no findings of fact or conclusions of law requiring
4 change. Staff provided a draft order for the board's
5 consideration. The draft order is consistent with the
6 ALJs' findings of fact, conclusions of law and the ALJs'
7 recommendation to the board which is to deny Atkission's
8 protest and allow FCA to terminate the franchise.

9 The board's three options in this contested
10 case are as follows: (1) the board may adopt the ALJs'
11 findings of fact and conclusions of law, as provided in
12 the PFD; (2) the board may amend the PFD by changing the
13 ALJs' findings of fact or conclusions of law which require
14 the board to state specific reason and a legal basis for
15 each change; and (3) the board may remand the PFD back to
16 SOAH with specific direction on further consideration of
17 facts or legal concepts, again, as directed by the board.

18 Members, this concludes our remarks. Ms. Lingo
19 and I are certainly happy to answer any questions you may
20 have. At this time, I'd also like to let the board know
21 that the parties are here and would also like to make oral
22 arguments to the board.

23 MR. PALACIOS: Are there any questions for Mr.
24 Avitia or Ms. Lingo?

25 (No response.)

1 MR. PALACIOS: Thank you very much.

2 MR. DUNCAN: Just a brief note, members. David
3 Duncan, general counsel again.

4 The parties, by agreement, set the time for
5 oral argument for each party at 20 minutes. The party
6 with the burden of proof in this case is the manufacturer
7 so they will go first. They can reserve time for
8 rebuttal. The dealer will then go, and if any time is
9 reserved, the manufacturer will use the remainder of their
10 20 minutes.

11 MR. PALACIOS: Okay. Thank you.

12 MR. WALKER: Mr. Chairman, I have a question.

13 MR. PALACIOS: Yes.

14 MR. WALKER: Can we know who's present for both
15 parties right now. So is Mr. Atkission represented here
16 today?

17 MR. DUNCAN: We could ask the attorneys for the
18 parties to announce their group and we won't use their
19 time for that. How about that?

20 MR. PALACIOS: Did you want to know before?

21 MR. WALKER: I'd like to know who all is here
22 for both sides.

23 MR. DUNCAN: Would it be acceptable to have the
24 attorneys do that?

25 MR. WALKER: That's fine.

1 MR. DUNCAN: Thank you, Member Walker.

2 MR. PALACIOS: Thank you.

3 We will then begin with the attorney that will
4 be speaking on behalf of FCA. I believe that's Mr. Mark
5 Clouarte.

6 MR. CLOUARTE: Mr. Chairman, may I proceed?

7 MR. PALACIOS: Yes, please proceed.

8 MR. CLOUARTE: Good morning. My name is Mark
9 Clouarte and I'm here on behalf of FCA US, LLC, which I'll
10 call FCA or Chrysler. Along with me today from Chrysler
11 is Katherine Trust, who is in-house counsel from Detroit.

12 Also, we have Todd Tunic who is a network development
13 manager from Chrysler Southwest Business Center in Dallas.

14 We appreciate the opportunity to present to the board
15 today.

16 In short, this is a case about decisions by
17 both parties. On the one hand, you have the very
18 difficult decision made by Chrysler in December of 2014 to
19 terminate the dealer agreements of Protestant Cecil
20 Atkission Chrysler Jeep Dodge, which I will refer to as
21 the dealership or Atkission. This decision was not taken
22 lightly. It came after years of counseling of Atkission
23 by Chrysler in person, in writing and electronically in an
24 effort to help the dealership improve its operations to
25 better assist Orange consumers, and it came after giving

1 Atkission a contractual right to cure which Chrysler even
2 let go for an additional six months, for a total of one
3 year, when Atkission's performance actually declined
4 during the cure period. This gave Chrysler little choice
5 but to terminate Atkission's dealer agreements.

6 This case is also about decisions made by the
7 dealership which were largely to ignore the suggestions
8 and offered assistance by Chrysler over a number of years,
9 to ignore its obligations under the dealer agreements, and
10 to ignore, most importantly, the consumers in the Orange
11 area. As the facts show, Atkission's decisions led it to
12 becoming one of the worst performing dealers in Texas, to
13 the detriment of Orange consumers, to itself and to
14 Chrysler.

15 I wanted to start out by discussing the
16 standard of review, if you will, that you all are charged
17 with, but counsel did an apt job of that, as well as a
18 discussion of the good cause factors. One thing I did
19 want to point out about the good cause factors, under
20 applicable case law, Chrysler need not prevail on each of
21 the seven good cause factors to meet its burden. Now, the
22 dealership will try and argue that this case is solely
23 about improving market penetration. If that was the case,
24 we wouldn't be here. This case is about much more than
25 that. It's about a dealer's many failings under the sales

1 and service agreement, it's failure to serve Orange
2 consumers, and its unwillingness to improve, which the
3 ALJs found tipped five of the seven factors in favor of
4 good cause of termination.

5 So let's look at those factors. The first one
6 that Ms. Lingo mentioned was the dealer's sales in
7 relation to the sales in the market. Now, as I will
8 discuss in a moment under another prong, Atkission
9 contractually agreed to meet what is called minimum sales
10 responsibility, or MSR, abbreviated. MSR is the number of
11 new vehicle a dealer must sell to equal the state market
12 share in its local market -- here, the Orange market, it's
13 called the Orange sales locality. Since it became a
14 dealer, Atkission met its MSR for one month; never again
15 did it meet its MSR. The dealers surrounding Atkission
16 did or came very close to meeting their objective. Also,
17 in relation to the sales in its market, the evidence shows
18 that Atkission didn't sell to many customers at all in the
19 Orange area. Instead, the sales made to Orange consumers
20 were made by or pumped in by surrounding dealers outside
21 the Orange market.

22 If you would -- I placed on your desks a packet
23 of admitted exhibits -- if you would flip to the tab that
24 says 57(1). It's a chart that has an orange column down
25 it. This is called a pump-in report and it was an

1 admitted exhibit. And if you'll see on the first line, it
2 talks about the pump-ins into the Orange sales locality or
3 the Orange market. The blue line there, the top line,
4 reflects what the dealership sold. It sold 45 units
5 through July 2014 which was practically the end of the
6 first six months cure period. It sold 45 units, or 13.6
7 percent of the sales in the Orange market. You'll see
8 dealers outside the market sold the remaining nearly 86
9 percent, and you'll see a dealership in Port Arthur sold
10 107 units, doubling that of the Atkission dealership.

11 Now, you may wonder, well, what does that mean,
12 so what. That means that 87 percent of consumers who live
13 in Orange are driving 20 to 40 miles away from Orange,
14 each way, to purchase a vehicle.

15 Now, at the time of the notice of termination
16 at the end of 2014, Atkission was selling only 12.8
17 percent of the vehicles in the Orange market, so in that
18 next six months of the additional cure period it actually
19 went down. In other words, Atkission wasn't taking care
20 of its market or its consumers in that market.

21 Now, during the hearing the dealership argued
22 many defenses and excuses about why it wasn't able to
23 perform, talked about a 2008 hurricane, its location and
24 industry recession, highway construction, but admissions
25 by Mr. Atkission, which are cited to in the PFD, belie

1 these points. Also, uncontradicted data belied those
2 points. For example, with regard to the construction, the
3 dealership's performance was deficient before, during and
4 after the construction. The dealership never asked for
5 any type of relief, whether Chrysler on its MSR figures or
6 TxDOT to assist it with, for example, directional signage
7 during construction. Because the sales in relation to the
8 market were dismal, the ALJs appropriately found this
9 factor tipped in favor of termination.

10 Let's go to number two, the dealership's
11 investments and obligations. The record evidence
12 indicated that the investments in the dealership were
13 minimal. Chrysler CPA expert opined that the dealership's
14 financial statements showed long-term assets, which were
15 accumulated over an eight-year period, of less than
16 100,000, many of which could be recouped at the time of
17 termination.

18 Now, you'll likely hear much of what's called
19 Cecil money, cash deposited into the dealership accounts
20 by Mr. Atkission. These funds were a form a cash
21 management account, or essentially a guaranteed savings
22 account for Mr. Atkission with a guaranteed 4 percent rate
23 of return. Mr. Atkission was paid interest on those funds
24 whether the dealership made money, which it didn't, or
25 whether it lost money.

1 But under this prong the investment to be
2 considered is that of the dealer, and dealer is defined as
3 who holds the distinguishing number issued by the board.
4 Here the dealership holds that distinguishing number, not
5 Mr. Atkission. As the ALJs correctly found, Cecil monies
6 do not bear on this prong.

7 Let's talk about the obligations. The
8 dealership was a month-to-month tenancy, and let's get
9 back to the Cecil monies, if the dealership claims they
10 were obligations, they weren't treated as such. They were
11 called subordinated notes on the financial statements.
12 There was no paperwork to indicate there was ever any
13 indication or intent for it to be considered a loan. In
14 fact, Mr. Atkission testified that there was no indication
15 that he ever intended to be repaid. And even the CFO of
16 the dealership testified that the monies were debt or
17 obligations of the dealership. The testimony and record
18 evidence on this good cause factor were clear and the ALJs
19 found that the evidence tipped in favor of termination.

20 Let's go to number three, injury or benefit to
21 the public. The termination of the dealership's dealer
22 agreements would positively, not negatively, impact the
23 public. As I mentioned before, Atkission was selling a
24 small portion of the consumer market vehicles, so nearly
25 88 percent of the vehicles were driving 30 to 40 miles

1 past the dealership each way. In addition, the dealership
2 ranked 88 out of 90 in terms of sales advocacy, and 85th
3 out of 90 in service advocacy. Neither of these points
4 are good nor convenient for Orange consumers.

5 Chrysler intends to replace this dealership
6 with a dealer who aggressively promotes and sells the
7 product to Orange consumers. Additionally, increased
8 sales will mean more jobs for Orange employees and more
9 tax benefits. This prong, the ALJs found heavily favored
10 termination.

11 Let's talk about the adequacy of the dealer's
12 service facilities. Perhaps the best way to sum this up
13 is testimony from Mr. Atkission himself who said, "It's
14 not conducive to a successful business." And he and the
15 general manager agreed it's not comparable to surrounding
16 dealership facilities. The ALJs found here this factor
17 weighs in favor of termination slightly as well.

18 Let's go to the next point, the party's
19 compliance with the franchise. Perhaps this was the
20 greatest area of testimony during the hearing. The
21 dealership entered into what's called a sales and service
22 agreement, or SSA, with old Chrysler in 2008. The agreed
23 to certain obligations regarding management. For
24 example -- and this is reflected in your binder of
25 materials at R-27, and actually, why don't we flip there

1 for a minute, it's R-27(b). On that first page of this
2 exhibit under paragraph 2, Mr. Atkission agreed to be
3 substantially involved in the management of the
4 dealership, and going on to the second page, he agreed to
5 be physically present during most of the dealership's
6 operating hours.

7 And as we go through here, if were to spend
8 time, you would find obligations regarding sales, for
9 example, to meet its MSR. Under facilities, the
10 dealership agreed to maintain its facilities in a manner
11 equal in attractiveness and appearance to its competitors,
12 and agreed to conduct operations solely at that approved
13 location. With regard to finances, the dealership agreed
14 to meet a certain working capital figure and also maintain
15 adequate net worth, and also submit financial reports in a
16 complete and accurate manner. With regard to personnel,
17 it agreed to maintain and retain personnel sufficient to
18 carry out its obligations. With regard to signage, it
19 agreed to display appropriate signage that was updated
20 with current programming. And with regard to advertising,
21 the dealership agreed to promote products aggressively and
22 sufficiently.

23 Now, the ALJs on pages 37 to 63 of the PFD --
24 you'll see the bulk of the PFD was related to this
25 prong -- they found that the dealership had committed

1 breaches of at least eight portions of the sales and
2 service agreement which, interesting, they said each of
3 those eight were sufficient grounds to tip this factor in
4 favor of good cause to terminate.

5 In terms of management, Mr. Atkission admitted
6 that he only spent 15 to 20 percent of his time at the
7 dealership, despite contractually committing to be there a
8 majority of the time. In terms of sales, the testimony
9 and evidence revealed that Atkission was not an
10 occasionally poor performer, it was the bottom performer
11 in the State of Texas.

12 If you flip to Exhibit 151 and on the bottom
13 right-hand corner of this page I'd like you to go to page
14 140, and there's a yellow highlighted row there, and for
15 years 2012 to August 2015, it showed that the dealership
16 as the bottom ranked performer. In 2013 it was 155th out
17 of 156 dealers. Again, that's on page 140 of Exhibit 151.
18 Now, the dealership may argue no harm, no foul on its poor
19 performance because other dealers were satisfying Orange
20 consumers, but that misses the point of customer
21 inconvenience.

22 Now, it may also argue that is location was the
23 cause of its poor performance, but in the materials at R-
24 3, when he signed up to become a dealer, Mr. Atkission
25 agreed to consider a different location and also make

1 upgrades to its facilities. It didn't make one of the
2 bulleted renovations that it agreed to do way back in
3 2008. It might argue, again, that construction prevented
4 it performing and after construction the sight lines were
5 altered by vehicles driving by. There was disputed
6 testimony on that, and additionally, there was a billboard
7 immediately across the highway that could have been
8 rented. That's at Exhibit 160 in the packet, and right
9 across the highway from the dealership and it says
10 Advertise Here and has a phone number.

11 The dealership could have asked for adjustments
12 to MSR from the manufacturer. It never did. It could
13 have made operational or advertising changes. It never
14 did. In terms of facilities, there's no doubt that the
15 evidence showed that the dealership failed to adhere to
16 the agreements it made. The dealership employees, the
17 principal, the CFO, the office manager, the general
18 manager all testified about the poor condition of the
19 facility and its incomparable condition to other
20 dealerships. Photos of the facility are reflected at
21 Exhibit 150 and it shows the noncompliant nature of the
22 facility, as well as the signage.

23 Ms. Lingo also mentioned the place of business
24 requirement. In the dealer agreement the dealership
25 agreed to conduct dealership operations from that location

1 only. Testimony was that the dealership would bring a
2 customer in, then would ship it to the Toyota facility to
3 do the paperwork and the finance, and then ship it back to
4 the Chrysler dealership for final delivery, all in
5 violation of the dealer agreement and also to the
6 detriment of the convenience of the consumer.

7 In terms of finances, the evidence showed that
8 at no point ever did the dealership have sufficient
9 working capital or meet the guide figure for every year.
10 It also had negative net worth. Now, knowing that they
11 were deficient in net worth and working capital, about
12 nine months after their protest was filed, they hired a
13 CPA expert witness who concocted a scheme to retool the
14 working capital and retool the net worth through sleight
15 of hand, and despite the fact that they had reported the
16 working cap and the net worth completely different for
17 eight years prior to that time. The ALJs rejected that
18 last-minute maneuver, and rightly so. They found that
19 maneuver, I think they called it unreasonable.

20 In terms of personnel, the evidence showed the
21 dealership experienced high turnover. Mr. Atkission
22 testified, "If I was looking for a job, it's probably not
23 one of the spots that I would want to work at." From 2012
24 alone, the dealership had five different general managers,
25 and with each new general manager came a whole new round

1 of employees and disruptions to operations. Additionally,
2 the general manager was shared with the Toyota dealership
3 and the management issue was compounded by the fact that
4 the dealer principal wasn't at the dealership 75 to 80
5 percent of the time, using his own testimony.

6 In terms of signage, the signage was damaged in
7 2008. A bag was placed over the sign. Even though he
8 agreed to adopt some 2010 signage by signing an agreement
9 in 2013, the dealership still hasn't installed that 2010
10 signage at the dealership. In terms of advertising, the
11 dealership spent much less than comparable group dealers,
12 those dealers that were selling into the Orange market.

13 Now, this dealership and its poor performance
14 persisted despite years of efforts to assist the
15 dealership. The Chrysler area sales manager, who called
16 on the dealership for a number of years, testified that he
17 couldn't get the dealership to make changes at all. The
18 record was replete with documents showing the counseling
19 and rejection. For example, Chrysler offered supplemental
20 allocation to the dealership over a six-month period. The
21 dealership decided to order a few more cars on one
22 occasion during those six months.

23 And as I mentioned earlier, this wasn't a
24 surprise to the dealership. They'd been counseled for a
25 number of years, they were given an additional six months

1 on top of the six months to cure from the SSA, and their
2 performance actually declined in terms of sales, in terms
3 of working cap, in terms of net worth.

4 Now, the last prong that Ms. Lingo talked about
5 was enforceability of the franchise from a public policy
6 standpoint. Perhaps the evidence can be best summed up by
7 referring to the dealership's own admissions. Exhibit 129
8 is the dealership's discovery responses, and at page 31 of
9 those responses, in response to a question about if it
10 contended the dealer agreement was in violation of the
11 public policy: "Atkission is not contending its sales and
12 service agreements with FCA are unenforceable from a
13 public policy standpoint." This prong, like the others,
14 weighs in favor of termination.

15 In total, the evidence showed and the ALJs
16 found eight independent breaches of the SSA and it found
17 that five of the seven good cause factors were fulfilled
18 in favor of termination. All of the evidence in sum
19 pointed in one direction: that Atkission made certain
20 decisions that caused its operational deficiencies and
21 that caused its noncompliance with SSA provisions. It's
22 extremely poor performance and its disinterest in doing
23 anything about it left Chrysler with little choice but to
24 make the difficult decision to terminate Atkission.

25 Now the decision is in the board's hands, and

1 that decision is whether it will permit a nonperforming
2 dealership in nearly every conceivable area to continue to
3 operate to the detriment of itself, to Orange consumers,
4 and to Chrysler.

5 Thank you very much.

6 MR. PALACIOS: Thank you Mr. Clouarte.

7 I'll leave that to the board, we can ask
8 questions now or afterwards. You'd rather ask now? Okay.
9 Go ahead.

10 MR. GRAHAM: I've got a few I just need to get
11 clarification on. So you showed us the slide on dealer
12 performance and dealer sales in the marketplace. How many
13 other dealers are actually in that what you call the
14 Orange County market?

15 MR. CLOUARTE: They are the only one.

16 MR. GRAHAM: So they're the only dealer.

17 MR. CLOUARTE: Right. Which typically gives a
18 geographic advantage. If you're the only shop in town,
19 that will give you a geographic advantage to those
20 consumers closest to you.

21 MR. GRAHAM: You spoke to their performance in
22 regards to dealers in their -- how do you classify them?
23 You listed about 90 dealers within that.

24 MR. CLOUARTE: I think there was two
25 references. One was pump-ins into the market, and I

1 showed you the blue and orange chart. Those are all the
2 dealers that sold into the Orange market, irrespective of
3 how close they were to that market. There was expert
4 testimony that looked at group averages and those group
5 averages, I believe, were the nine closest dealers to
6 Atkission which showed, for example, that its advertising
7 expenses were much lower and that its gross profits were
8 higher.

9 MR. GRAHAM: I just know that in one reference
10 you said they were the second from the last performing
11 dealer.

12 MR. CLOUARTE: Right. And that related to
13 overall MSR compliance, so since 2012 they were at the
14 bottom except for that one year when they were the last
15 one next to the bottom of all Chrysler dealers in Texas.

16 MR. GRAHAM: Gotcha. Is Chrysler attempting
17 any efforts on other dealers as well, or just this one?

18 MR. CLOUARTE: I'm not sure. There wasn't any
19 evidence in the record on that, to be honest with you.
20 I'm not sure I'm the one to answer that question either,
21 I'm just their outside guy. But in terms of there wasn't
22 any record evidence on that point.

23 MR. GRAHAM: Okay.

24 MR. CLOUARTE: I'm not trying to avoid your
25 question but that's my understanding of our parameters

1 here.

2 MR. DUNCAN: And I understand Mr. Clouarte's
3 hesitance. I spoke to both counsel before the meeting and
4 I would alert the board, the board is limited to its
5 decision-making to the evidence in the record. You can
6 ask questions and they may have an answer but if they give
7 you that answer, I told them to tell you when it's not in
8 the record, and if it's not in the record, you shouldn't
9 use it in any way, you shouldn't use it to make a decision
10 one way or the other.

11 MR. CLOUARTE: I think you said you'd whack us
12 with your award.

13 (General laughter.)

14 MR. GRAHAM: I have a couple more.

15 MR. PALACIOS: Go ahead, feel free.

16 MR. GRAHAM: So this dealer purchased this in
17 2008. Would that have required Chrysler's approval at
18 that time?

19 MR. CLOUARTE: Yes, sir.

20 MR. GRAHAM: I would assume that you did a
21 financial review of the dealer in 2008.

22 MR. CLOUARTE: Certainly.

23 MR. GRAHAM: And so I'm trying to wrap my head
24 around this discussion about the dealer, according to your
25 testimony, does not meet some of the financial

1 requirements because it sounds like the investment that
2 he's made in this dealership doesn't qualify because he's
3 not technically the distinguishing number owner, it's the
4 actual dealership. And so I'm trying to understand.
5 Obviously that was a significant factor in your decision,
6 and if his investments didn't count, how was he ever going
7 to properly finance it to begin with?

8 MR. CLOUARTE: At the time dealers come into
9 play, they sign what's called a working capital agreement
10 that sets forth that working capital requirement, and at
11 the time there was a representation by the dealership that
12 it indeed had those funds and that it would meet those
13 working capital guidelines. I don't have it in the
14 excerpt that I gave you. What I will show you is if you
15 flip to Exhibit 37(k) in your packet, each month under the
16 dealer agreement -- while you're getting there -- each
17 month the dealer agrees to electronically submit true and
18 accurate financial statements to Chrysler, which is no
19 different than any other motor vehicle manufacturer I
20 know.

21 And if you look at that first page of Exhibit
22 R-37(1), on lines 28 through 30 in the middle of the
23 page, on the right-hand column there's something called
24 working capital, and you'll see there's a guide figure
25 listed there and there's an actual figure listed there.

1 Now, this is December 2014, the time when Chrysler made
2 its decision to terminate and sent out the notice of
3 termination. It was approximately 500 grand less than the
4 requirement.

5 So in due respect, it's not Chrysler's decision
6 about how the dealer represented its working capital. Case
7 in point in this, all the way up to the next exhibit,
8 October 2015, that's Exhibit 38(k), in that same column
9 the dealership reflected this time even more less working
10 capital, 700,000 in deficiency. So this was the last
11 statement, this was three months prior to the hearing in
12 this case, nine months after the protest was filed, the
13 dealership is still reflecting a deficiency of nearly
14 700,000.

15 Now, in November of 2015 is when the change
16 goes into effect and the reorganization of its alleged
17 current assets and current liabilities to swap these
18 numbers. So Chrysler doesn't have -- any manufacturer,
19 for that purpose, doesn't have the financial documents of
20 the dealership, the dealership does and the dealership
21 reports it, and this is how it was reported all the way up
22 to three months prior to the hearing.

23 MR. GRAHAM: Did they ever fail to meet their
24 obligation to Chrysler? Would that have been a component?

25 MR. CLOUARTE: In terms of financial

1 obligations? Again, I don't believe there was any record
2 evidence of that, and that's probably all I can say is
3 there was no record evidence of failure to meet
4 obligations to Chrysler. I just don't know that.

5 MR. GRAHAM: And so I'm just trying to
6 understand if one of the primary issues with the dealer is
7 their financial strength but they meet all their
8 obligations. So I just wanted to ask the question.

9 MR. CLOUARTE: Well, let me answer it this way.
10 You'll see most dealerships don't finance their own
11 inventories, they have a floor plan provider. There was
12 no indication that the floor plan was out of trust or not
13 paid. With respect to other vendors, I don't know. And
14 I'm sure, certainly as the dealer members know, the
15 manufacturer typically won't ship or invoice a vehicle
16 until they're paid, and that's typically, in the normal
17 dealership sense, through a floor plan lender.

18 MR. GRAHAM: I think the only other question I
19 have is did this dealer own other dealerships or lines? I
20 guess I could ask the dealer or the other representative.

21 MR. CLOUARTE: This dealership does own two
22 other Chrysler stores. And I believe -- I'll let Mr.
23 Crocker speak to it -- I don't recall but I think they own
24 other manufacturers -- actually, I know, Toyota, for
25 example in Orange, but may own other dealerships as well.

1 MR. GRAHAM: So this dealer owned three total
2 Chrysler locations.

3 MR. CLOUARTE: That's correct.

4 MR. WALKER: Four, according to the record.

5 MR. GRAHAM: Four Chrysler.

6 So was there a reason that you told him he
7 needed to spend 50 percent of his time at one location
8 when he owned four locations?

9 MR. CLOUARTE: Very good question, because that
10 would be hard to do, wouldn't it? So his other locations,
11 if you look back at that dealer agreement, there's more
12 than one line, Mr. Atkission inserted the name of somebody
13 else, and typically that somebody else was the general
14 manager. At the Orange store, Mr. Atkission represented
15 that he would be there a majority of the time. So for
16 some reason, this dealer agreement is different than the
17 others, and there is record evidence on that.

18 Back to the obligations point, one thing that
19 kept coming up was the fact that he didn't spend money on
20 advertising, on signage, on inventory, so perhaps while he
21 may have been meeting obligations, the record evidence was
22 very clear his obligations were pretty minimal. So
23 working cap is an essential part of a dealership's
24 operations.

25 MR. GRAHAM: That's all. Thank you.

1 MR. PALACIOS: Thank you, Board Member Graham.
2 Mr. Walker.

3 MR. WALKER: So I understand you're just the
4 hired gun. So I think the record reflect that Mr.
5 Atkission owns four Chrysler dealerships. Is that not
6 correct? Three? And so when I went through my records
7 right here last night and the night before and the night
8 before, I don't have a copy of the franchise agreement.
9 Is this a copy of the franchise agreement that I'm holding
10 right here?

11 MR. CLOUARTE: So if you look at tabs 27(b) and
12 then 28(a), those two make up -- and I didn't give you
13 each of the ones, there's one for Chrysler-Dodge-Ram and
14 then there's another one for Jeep, which are virtually the
15 same other than different lines, and that had to deal with
16 purchase of Jeep.

17 MR. WALKER: So point to me where it says in
18 the dealer franchise agreement that he is going to
19 dedicate 50 percent of his time to that dealership.

20 MR. CLOUARTE: If you flip to Exhibit 27(b) and
21 page 2 of that, the top two lines are highlighted. It
22 says: Dealer represents, blah-blah-blah, he'll be
23 physically present during most of it operating hours. Mr.
24 Atkission testified -- and I can give you a record site if
25 you'd like it -- testified that that would mean a majority

1 of the time, he agreed. He then estimated --

2 MR. WALKER: That's not what it says. It says:

3 The dealer represents that at least one of the people
4 will be present in the dealer's facility during operating
5 hours.

6 MR. CLOUARTE: During most of its operating
7 hours.

8 MR. WALKER: It says one, it doesn't say him.

9 MR. CLOUARTE: And then if you go back to the
10 first page, in terms of dealer management, he's the one
11 sole individual listed.

12 MR. WALKER: There's three other people listed
13 on the lines below that.

14 MR. CLOUARTE: In paragraph 3? And those three
15 represent at the time who the percent owners were, not the
16 managers. So that's the difference between paragraph 2
17 and paragraph 3.

18 MR. WALKER: So you have two other franchise
19 agreements with Mr. Atkission also. Is that correct?

20 MR. CLOUARTE: For the other dealerships.

21 MR. WALKER: Do you have a copy of those
22 attached?

23 MR. CLOUARTE: They were not part of the
24 record. There was solely testimony on that. They weren't
25 submitted exhibits so they weren't admitted at the

1 hearing, and the testimony was that the other two
2 dealerships chose to identify someone in addition to Mr.
3 Atkission on paragraph 2 under dealer management.

4 MR. WALKER: So let's talk about MSR, minimum
5 sales requirements for the marketplace, and when I read
6 this, I have a hard time -- I kind of get what it is, we
7 have sales meetings with our sales people and this is what
8 we think the expected market is out there to go sell
9 against, but without going into elaborate details, I never
10 saw in the record any kind of computation of how you come
11 up with what is MSR.

12 MR. CLOUARTE: And I'm going to do my best not
13 to contradict the record. It looks at the state market
14 share for each of the vehicle segments in which Chrysler,
15 Jeep, Dodge and Ram competes.

16 MR. WALKER: Let's take a pickup truck, for
17 example. That's a good one.

18 MR. CLOUARTE: And there's different segments
19 of pickup trucks so let's just say it's a heavy duty
20 pickup truck. Let's say Chrysler has 10 percent of that
21 market in the State of Texas. It then looks at the
22 registrations of heavy duty pickup trucks in the Orange
23 sales locality, so it takes the big pie of the State of
24 Texas and then looks at the little pie to determine how
25 many registrations of the heavy duty pickup trucks were

1 made. It then applies that state market share. So let's
2 say there were 100 heavy duty pickup trucks registered in
3 2015 and the state market share was 10 percent, it would
4 apply 10 percent to the 100 or expected MSR of 10.

5 MR. WALKER: So when we take into consideration
6 this MSR -- and are you from Texas?

7 MR. CLOUARTE: Went to school and lived here
8 for some time, yes, sir.

9 MR. WALKER: So we commonly refer to Orange as
10 being the Golden Triangle, it's Beaumont, Port Arthur,
11 Orange. There's three cities -- well, you could add
12 Nederland to that if you wanted to -- Orange being the
13 smallest of the towns over there. Is that MSR that you're
14 considering, is that encompassing the Beaumont market or
15 just the Orange market? Because Orange is -- I don't
16 know, the population of Orange is probably not more than
17 maybe 10,000. I don't know what it is but it's pretty
18 small.

19 MR. CLOUARTE: It considers the Orange pie.

20 MR. WALKER: Just the Orange pie.

21 MR. CLOUARTE: Correct. And there's different
22 pies for the different adjacent markets, and it just
23 considers the registrations within that Orange pie.

24 MR. WALKER: So when you consider his piece of
25 the pie, you only consider Orange, and he's the only

1 dealer in Orange. Well, I can assure you that two
2 Chrysler dealers or Ford dealers couldn't survive in
3 Orange because there's not that many people live there,
4 and the people are going to tend to gravitate, most
5 likely, to the big city which is Beaumont. Do you have a
6 dealership in Beaumont?

7 MR. CLOUARTE: Yes. And one thing about MSR,
8 it counts -- using my prior example of ten for a heavy
9 duty pickup, it counts not only the dealership sales
10 within the Orange pie, it would consider sales outside
11 that pie to get to that ten. So it could sell one in
12 Topeka, Kansas or in Beaumont. That would be two for the
13 ten it would need to sell.

14 MR. WALKER: So Mr. Atkission bought this
15 dealership in 2008, and I assume it was a Chrysler dealer
16 prior to that time?

17 MR. CLOUARTE: That's correct. There was a
18 buy-sell transition.

19 MR. WALKER: And so was that dealership
20 currently housed in the same facility?

21 MR. CLOUARTE: Correct.

22 MR. WALKER: And what were the -- and I know
23 it's maybe not totally comparable, but what were the sales
24 of that day and time compared to what they are today?

25 MR. CLOUARTE: To be honest with you, I do not

1 know, and I do not believe that was in record evidence.
2 I'm sure my colleague Mr. Crocker will supplement that if
3 that's not accurate.

4 MS. LINGO: My apologies for the distraction,
5 sir. I do not believe that that is evidence in the
6 record.

7 MR. WALKER: It's not in the record?

8 MS. LINGO: I do not believe it is.

9 MR. WALKER: That's why I asked the question
10 because I didn't find it either. And the reason I asked
11 the question is because I could go put a Chrysler
12 dealership in Marfa, Texas or out in West Texas and maybe
13 there's just not a market to sell Chrysler cars or
14 trucking or whatever it might be, and no matter how good a
15 dealer you are or how bad you are, you just may not
16 succeed based on the marketplace. And I read the law
17 2301, it requires that Chrysler has to take and either
18 come back to this board and say that there's not enough
19 market to manage a Chrysler dealership in that location,
20 or Chrysler has the responsibility to the citizens of the
21 State of Texas, according to the law, that they will
22 replace Mr. Atkission's dealership within a reasonable --
23 is what the wording says -- amount of time with another
24 dealer.

25 And so what would be the expectation -- and I

1 know you're the hired gun and maybe we ought to be
2 speaking to Chrysler here instead of you -- but what is
3 Chrysler's expectation going forward on this?

4 MR. CLOUARTE: Two points. I will tell you the
5 record evidence is clear that Chrysler intends to go back
6 into Orange immediately if the termination is permitted.
7 It's an important market. And the second point I want to
8 make to you, referring back to 57(1), is that I think
9 there is a market for the Chrysler product in Orange, as
10 reflected by this exhibit, as reflected by the number of
11 sales. The problem here is they just weren't being made
12 by the local dealer, to the detriment of the consumers.
13 So I hope that answers the question.

14 MR. WALKER: It does somewhat. But I know that
15 we are living in a totally new environment in car sales
16 today because of the internet, and my kids don't buy a car
17 the way you and I bought cars in the past. We don't get
18 in our vehicle and go to the end of the street and walk up
19 and down the lots, my kids go on the internet to buy a car
20 today. And so the world is changing around us, and if my
21 son sees that he can buy a Chrysler-Dodge-Ram in Houston,
22 maybe, for \$500 less than he can buy it in Beaumont, he's
23 probably going to drive over to Houston and go pick up a
24 car.

25 MR. CLOUARTE: And I don't disagree. Times are

1 changing, dealers are adapting to that. This dealership
2 didn't adapt to it. The record was replete with written
3 conferrals with the dealer that said: Internet manager,
4 none; you need to hire an internet manager. At the time
5 of the hearing, the advertising position at the dealership
6 wasn't filled. So I don't disagree with you, but changing
7 times requires changes in operations, which were not being
8 made by the dealership here. And I will tell you Chrysler
9 counseled this dealership in 2008 but concertededly from
10 2012 until the time of the termination notice.

11 MR. WALKER: I have one other question. I'm
12 going to skip the Cecil money, I never have understood
13 what that means or where it came from, but it's not
14 important. One thing that bothered me when I read all
15 these records was the mention constantly of the bag over
16 the sign, and do you have a picture of the bag?

17 MR. CLOUARTE: Yes. If you look at I think
18 it's Exhibit 150.

19 MR. WALKER: I think of a bag as a garbage bag,
20 I think of a bag as something I carry my groceries in.

21 MR. CLOUARTE: If you'll look at Exhibit 150,
22 it's reflected on pages 2 and 3.

23 MR. WALKER: That's what you're calling a bag?

24 MR. CLOUARTE: That's what the record evidence
25 was that it was -- I think the testimony was a plastic

1 bag.

2 MR. WALKER: That looks like a sign to me in
3 that picture. So that's the bag?

4 MR. CLOUARTE: Yes.

5 MR. WALKER: That's kind of the way they make
6 signs today, isn't it, is they take and print them on --
7 they use a tarpaulin today and they print tarpaulin and
8 they go put them on the billboards on the highway and so
9 forth. They take them off and they change them out.
10 Basically they're a tarpaulin bag is what they really are.
11 That's how they make signs today. That is the bag,
12 though?

13 MS. HARDY: But there are franchise standards
14 that these are hard plexi that go on the facility
15 standards that wouldn't allow something like this.

16 MR. PALACIOS: Suffice to say it's not a trash
17 bag.

18 MR. WALKER: That was bothering me that it was
19 a trash bag up there.

20 MS. HARDY: Could I ask a quick question? Can
21 you briefly summarize the process, the timing before the
22 dealer went into letter of cure and then how much time
23 after he received the letter of cure he had to improve
24 performance?

25 MR. CLOUARTE: Sol starting in October 2012,

1 Chrysler started a concerted effort of focusing on
2 performances issue of Atkission. It recognized the
3 importance of the Orange market and wanted to help the
4 dealership improve and help the customers have more
5 convenient access. From that point on until December
6 2013, the counseling continued, and in December 2013, a
7 notice of default was issued under the sales and service
8 agreement, and I have it in your packet, Exhibit 64, in
9 December 2013.

10 MS. HARDY: So when the original counseling
11 started, though, did the dealer understand ultimately what
12 this could result in if performance didn't improve? It's
13 not like they went a year, 12 or 15 months, and then all
14 of a sudden FCA dropped -- it wasn't a surprise to the
15 dealer?

16 MR. CLOUARTE: It definitely wasn't a surprise.
17 The initial conferral letter in October of 2012 is
18 Exhibit 58. Mr. Tunic, there was evidence that he had a
19 meeting with Mr. Atkission about where this all would lead
20 to. That led to the notice of default in December 2013,
21 the notice of termination a year later. That could have
22 happened within six months of that December 2013 date, but
23 Chrysler extended the cure period for an entire year and
24 then issued the December 2014 notice of termination.

25 MS. HARDY: Thank you.

1 MR. PAINTER: How did you determine sales under
2 57(1)? How is that determined?

3 MR. CLOUARTE: There are companies that go
4 collect data from DMVs, such as Texas, that look at the
5 registration data, and they will extract the registration
6 data and then ink out all the customer name and address
7 except for the zips. The manufacturer then buys the --
8 another layer of vendor buy those data, buys that
9 information and then prepares these reports.

10 MR. PAINTER: So it's based on addresses as to
11 the number of pumped-in, what you call pumped-in.

12 MR. CLOUARTE: Right. So it goes in where
13 those vehicles are registered in a census tract within
14 that Orange pie. So it looks at the census tracts within
15 the Orange pie and then slots those registrations in.

16 MR. PAINTER: And is any other dealership,
17 Chrysler dealership of Mr. Atkission, are they making any
18 of those pumped-in sales?

19 MR. CLOUARTE: That's an interesting question
20 and the only way I can answer that is by looking at for
21 this time period on this report. I will tell you there
22 was no specific testimony on that point. Lord knows my
23 eyes are going bad enough.

24 MR. PAINTER: It's small printing.

25 MR. CLOUARTE: It is. I apologize.

1 MR. PAINTER: Thank you.

2 MR. WALKER: There's no testimony on the record
3 that reflects how Mr. Atkission performs at his other
4 dealerships compared to this one?

5 MR. CLOUARTE: No. And I don't believe so, and
6 I'm sure my colleague Mr. Crocker will bring that up. I
7 don't recall that it was even offered.

8 MR. PAINTER: There is information that we
9 received that said there's a total of seven dealerships
10 that Mr. Atkission owns, so I'm assuming it's a mixture of
11 Toyota, Chrysler and something else.

12 MR. CLOUARTE: I believe so.

13 MR. PALACIOS: Go ahead.

14 MR. GRAHAM: I'll keep this going, I guess. I
15 have one short one and one long one. Actually, I just
16 want to ask in regards to this document you just
17 referenced which appears to be the letter -- well, that
18 wouldn't be right. I suspect there was a document sent to
19 the dealer to say if you don't do A, B, C and D, then
20 you're going to get a letter of termination. Here's what
21 you have to do to stop this train. And I thought that was
22 going to be 63. Is that what I'm looking at? But that's
23 dated October 2012, so maybe I'm in the wrong section. So
24 let's go to December -- there it is, 64?

25 MR. CLOUARTE: If you look at page 5 of that

1 exhibit -- in the bottom right-hand corner it says 005 --
2 in bold, all caps, third paragraph from the bottom, I
3 believe is the language that you're asking about.

4 MR. GRAHAM: Okay. So it's the bold caps that
5 state clearly. Okay. Thank you.

6 MR. PALACIOS: Any other questions, Board
7 Member Graham? Feel free.

8 MR. GRAHAM: No, thank you.

9 MR. WALKER: I have one more question. The
10 very first question I asked today was would the parties
11 please identify themselves as to what they do here.
12 You're the hired gun, this is the hired lawyer that works,
13 Katherine is, and we have a man by the name of Todd?

14 Would you tell me what you do for Chrysler,
15 please?

16 MR. TUNIC: (Inaudible - speaking from
17 audience.)

18 MR. PALACIOS: Please come forward.

19 MR. WALKER: Would you please explain to me
20 your job and why you're here today, what you do for
21 Chrysler?

22 MR. TUNIC: I'm responsible for all the dealer
23 network activities in the region, buy-sells, open points,
24 new dealers, working with dealers on sales and service
25 upgrade, so anything to do with the dealer network.

1 MR. WALKER: So if I wanted to open a Chrysler
2 franchise, you're the person I would go to?

3 MR. TUNIC: Yes, sir.

4 MR. WALKER: And you handle how big of an area?

5 MR. TUNIC: Texas, Louisiana, Mississippi,
6 Arkansas, Oklahoma and the Memphis part of Tennessee.

7 MR. WALKER: Okay. Thank you.

8 MR. PAINTER: Could I ask you a question too?

9 MR. TUNIC: Yes, sir.

10 MR. PAINTER: How many interactions did you
11 have with the Atkission dealership?

12 MR. TUNIC: Personally, twice at the
13 dealership.

14 MR. PAINTER: Thank you.

15 MR. TREVIÑO: I was looking at your slide here
16 showing the dealers above and below the MSR line. How
17 many dealers are above the line and how many are below the
18 line? I didn't see it in the record but I guess you could
19 kind of count the dots, if you will, but I was just
20 looking at the dispersion, just wondering. It's 151,
21 slide 20.

22 MR. CLOUARTE: Mr. Treviño, I know I had that
23 in my notes last night.

24 MR. TREVIÑO: That's okay. But it's not a 50-
25 50 split, is it?

1 MR. CLOUARTE: No. It's higher than 50-50.

2 MR. TREVIÑO: Okay. Thanks.

3 MR. CLOUARTE: And Mr. Painter, to your
4 question to Mr. Tunic about how many times did he confer,
5 the record evidence was two. The area sales manager, who
6 is the day-to-day contact, was in constant contact
7 electronically, in person and over the phone, as well as
8 some other. Mr. Tunic can't handle all those areas so he
9 has either placement managers underneath him that call on
10 the dealerships as well.

11 MR. PAINTER: And then he reports to Mr. Tunic?

12 MR. CLOUARTE: Yes.

13 MR. PAINTER: Okay. Thank you.

14 MR. PALACIOS: Mr. Clouarte, I have a few
15 questions for you. I believe Board Member Walker asked
16 about the other two Chrysler dealerships. You're not sure
17 how those dealerships perform?

18 MR. CLOUARTE: In terms of the record evidence,
19 no.

20 MR. PALACIOS: In the sales and service
21 agreements with those two Chrysler dealerships, you
22 mentioned that I guess in terms of the requirement, the
23 time commitment for Mr. Atkission was not 50 percent
24 because he had, I guess, general managers assigned there.
25 And then you said for whatever reason the Orange store he

1 didn't have a general manager listed. So I guess my
2 question is was the expectation that he would actually be
3 at this store at the time of signing, he would always be
4 at this store 50 percent, knowing that he had two other
5 stores?

6 MR. CLOUARTE: Yes.

7 MR. PALACIOS: And why was that? So you were
8 okay with him not being at the other stores?

9 MR. CLOUARTE: Not saying that. I think the
10 manufacturer can only go with what the dealer puts down on
11 the dealer agreement and the dealer had represented that
12 there would be other managers at those other stores. So
13 this one was different for some reason that Mr. Atkission
14 decided to put down.

15 MR. PALACIOS: Okay. But that wasn't
16 necessarily your expectation, that was just for whatever
17 reason Mr. Atkission put down that he would be there 50
18 percent.

19 MR. CLOUARTE: I think Chrysler's expectation
20 is that the dealer commit to whatever it committed to in
21 the dealer agreement.

22 MR. PALACIOS: Okay. Mr. Treviño asked the
23 question regarding the dealers that do not meet the MSR in
24 your network. At any given time, do you know
25 approximately what percentage of your dealers meet or do

1 not meet MSR?

2 MR. CLOUARTE: Mr. Palacios, in consideration
3 of what the record evidence was, I recall it was in the
4 ALJ decision for a particular time period, it was, I'm
5 want to say, 70-something percent.

6 MR. PALACIOS: It was actually 42 percent do
7 not meet MSR, from what I recall. So this is not unusual
8 then for a dealer not to hit MSR.

9 MR. CLOUARTE: I will say that dealers -- I
10 wouldn't agree with that.

11 MR. PALACIOS: Or say 30 percent even.

12 MR. CLOUARTE: That may be, but to the amount
13 that this dealership was under its MSR objective, that is
14 remarkable.

15 MR. PALACIOS: Okay. But you just said with
16 your numbers 30 percent don't meet MSR, so how was this
17 one unusual?

18 MR. CLOUARTE: In the fact that it was
19 repeatedly at the bottom, 150 out of 150, that one exhibit
20 that we looked at, that's the remarkable nature of this
21 particular dealership.

22 MR. PALACIOS: Okay. I want to get into these
23 Cecil dollars because I am very, very confused. Looking
24 at the PFD, the ALJ -- and FCA, I need some clarity
25 here -- there is an assertion now as to who the dealer is

1 and who the dealer isn't. According to the ALJ, the
2 dealer is Atkission Chrysler, the actual dealership, it is
3 not Mr. Atkission. Is that your assertion?

4 MR. CLOUARTE: And that was Mr. Atkission's
5 testimony.

6 MR. PALACIOS: In terms of the dealer, the
7 tangible operator that's there, is it Mr. Atkission? And
8 I know it sounds like a rhetorical question but it is
9 important. Is it Mr. Atkission or is it Atkission
10 Chrysler?

11 MR. CLOUARTE: Yes. I appreciate that
12 question. If you look at Exhibit 27 which is the dealer
13 agreement, that also identifies the dealer as Cecil
14 Atkission Orange, LLC.

15 MR. PALACIOS: Okay. So based on that premise,
16 I guess one of the grounds for termination is that there
17 was no investment into the dealership. I guess everybody
18 acknowledges that there was \$6,250,000 that were put in,
19 but because, I guess, FCA and the ALJs are taking a
20 position that Cecil Atkission Chrysler is the dealer, that
21 there was no investment. I mean, that's what I'm trying
22 to get my head around. Is that what you're telling me,
23 that since the dealer is Cecil Atkission Chrysler and not
24 Mr. Atkission, there was no investment put into the
25 dealership because Cecil Atkission Chrysler is the dealer?

1 Is that your position?

2 MR. CLOUARTE: Yes, based on the plain reading
3 of the statute.

4 MR. PALACIOS: Okay. So therefore, the
5 \$6,250,000, I guess doesn't exist in terms of investment.

6 MR. CLOUARTE: Correct. I referred to a cash
7 management account with an interest bearing account of a 4
8 percent guaranteed return whether the dealership made
9 money or not. That's what that money seemed to be. It
10 wasn't an investment in advertising, it wasn't an
11 investment in inventory, it wasn't an investment in
12 personnel.

13 MR. PALACIOS: How do you know that? I mean,
14 the money was put into the dealership. How do you know
15 what was that money used for?

16 MR. CLOUARTE: That is a good question.

17 MR. PALACIOS: Okay, but you just said it
18 wasn't used for inventory. How do you know that?

19 MR. CLOUARTE: When you look at group average
20 with the surrounding dealerships, they were always
21 different, and that's record evidence. When you look at
22 the testimony of the personnel with respect to the pay
23 plans.

24 MR. PALACIOS: Okay. So you're saying it
25 wasn't maybe up to his peers but it was possibly used. I

1 mean, that \$6 million wasn't sitting in a cash account. I
2 don't have the balance sheet but it was used for
3 something, obviously, I would think.

4 MR. WALKER: So can I ask while we're here?

5 MR. PALACIOS: Go ahead.

6 MR. WALKER: So I have the same question and
7 that's why I didn't want to get into the Cecil because
8 it's so confusing to me. The record is disputed, I think,
9 as to whether or not the money has been actually put into
10 the dealership or not. I think the \$6 million in the
11 record says that he said I put this much money into the
12 record. Is that not correct? There's no here's the
13 receipts.

14 MR. PALACIOS: I don't think there's a dispute.
15 It's on the books of the dealership. I think everybody
16 acknowledges the money was put --

17 MR. WALKER: The record says it's disputed.

18 MR. PALACIOS: It's disputed as to how it's
19 classified, whether it's a payable, and I'll get into that
20 question later as well.

21 MR. WALKER: Because I'm confused about where
22 that money infusion goes and whether it really existed or
23 not.

24 MR. CLOUARTE: And I might, in all due respect,
25 I'm not sure it's reflected as an investment of the

1 dealership, because when I look at the left-hand side of
2 the balance sheet, I'm not seeing that \$6.2-, nor was it
3 ever. And there was never any record evidence or
4 explanation by the dealership of any identifiable use of
5 those monies. The only testimony was as to the repayment
6 in terms of interest at 4 percent. So again, I think
7 we're constrained by the record here.

8 MR. PALACIOS: Well, it's a very, very
9 important point because one of the causes for termination
10 has to do with the fact of lack of investment on behalf of
11 the dealer, which in my world, the dealer is Mr.
12 Atkission. I guess in FCA's world, Atkission Chrysler,
13 this abstract entity, is the dealer, and I guess my
14 question is how is this abstract entity going to pump
15 money into itself but for the person that owns 100 percent
16 of it.

17 MR. CLOUARTE: And I'll tell you it's not
18 Chrysler, it's Chrysler following the state statute that
19 defines dealer in that manner.

20 MR. PALACIOS: Okay. Well, again, that's a
21 totally new definition for me.

22 Okay. So let's get back into this \$6,250,000
23 that there seems to be some dispute as to how it should be
24 accounted for. Reading the ALJs' PFD, on page 27 of the
25 ALJs' PFD, I'll read, again, there's some question about

1 how this money should be classified, and then it says --
2 let me see if I can find this real quick -- according to
3 FCA, the money should be classified as an investment.
4 Again, as I understand it, based on everything I've read,
5 the \$6,250,000 was recorded as a note payable by Atkission
6 Chrysler, payable to Mr. Atkission, which collected 4
7 percent. So according to, I guess, your own people, that
8 money, since the assertion it was never going to be paid
9 back, it should have been classified as an investment. Do
10 you agree with that statement? I don't remember exactly
11 who from your company said that.

12 MR. CLOUARTE: And if you think about the
13 definition of working cap, it's current assets minus
14 current liabilities. If you put it in as let's call it a
15 debt, a long-term debt that's never expected to be repaid,
16 it doesn't even hit that equation.

17 MR. PALACIOS: It doesn't hit working capital,
18 I agree, but it does hit net worth. So again, do you
19 believe it should have been reclassified?

20 MR. CLOUARTE: I think the only way I can
21 answer that is based on the record evidence is that
22 Chrysler can only go based on what the financial
23 statements were. The dealership was on notice since 2012,
24 at least, that its working capital was deficient. It
25 never said it had it, it never tried to change its

1 financial statements.

2 MR. PALACIOS: I understand. Okay. We're
3 talking two different things. There's working capital and
4 there's net worth. Because again, this is important,
5 because one of the factors for termination was that his
6 net worth was low. You said earlier that there was --
7 I'll use your words -- a scheme concocted to reclassify
8 the note to paid-in capital. Are you a CPA?

9 MR. CLOUARTE: I'm not.

10 MR. PALACIOS: Do you believe that that journal
11 entry is improper or fraudulent? Is that, to your
12 knowledge, improper or fraudulent?

13 MR. CLOUARTE: I will tell you that the record
14 evidence was, and that the ALJs found, it was done in
15 response to this protest. And if you look at Exhibit 161
16 which is the last exhibit in your packet, on November 12,
17 2015, which was two to three months before the start of
18 this hearing, at the bottom of page 1 the CFO Chuck
19 Fullman [PHONETIC] is asking expert CPA Carl Woodward:
20 Should the re-class be permanent? And on the following
21 page: Should we be uniform with all of our eight stores?

22 If a CFO is asking a litigation CPA what to do and
23 whether it just applies to this dealership for this
24 specific period of time, that's I think reasonable
25 inferences that it was done for purposes of this

1 litigation.

2 MR. PALACIOS: Okay. But that doesn't mean
3 it's a scheme. I'm just trying to clarify whether or not
4 because your assertion there -- you didn't say it but you
5 said a scheme concocted. That sounds like cooking the
6 books, doing something illegal, something improper. This
7 is not improper, is it?

8 MR. CLOUARTE: Chrysler is not suggesting that
9 there as anything improper, it's just pointing out the
10 fact that it was done three months prior to and never done
11 the prior eight years. And it's also different than what
12 was reported to the IRS as late as December 2014, which is
13 reflected in Exhibit 159. It wasn't low net worth, it was
14 negative net worth reported to the Feds.

15 MR. PALACIOS: All right.

16 MR. INGRAM: Let me ask a quick question.

17 MR. PALACIOS: Go ahead.

18 MR. INGRAM: You had said that they modified --
19 we were talking about how they modified the financials,
20 and I see under 37 and 38 your different financials. Is
21 there one in here that shows it after he modified it?

22 MR. CLOUARTE: That's a good question, Mr.
23 Ingram. I wish I'd included it. Starting in November of
24 2015 is when you saw the modification take place, so
25 November 30. They would have had to submit it by, I

1 think, December 15 of 2015, so a month and a half before
2 the hearing. It's not in this book.

3 MR. INGRAM: It's not in this book.

4 MR. CLOUARTE: It was in evidence, though.

5 MR. PAINTER: And I have a question on the 4
6 percent that's being paid every year of \$250,000, 4
7 percent of what?

8 MR. CLOUARTE: Four percent of whatever Cecil
9 monies were put into the dealership.

10 MR. PAINTER: Do you know how much that he was
11 paid or does it reflect that?

12 MR. CLOUARTE: No. What is reflected is the
13 retained earnings of a minus -- for example, on 37(1),
14 2.9. So that, too, was a fuzzy part of the hearing.

15 MR. PAINTER: Thank you.

16 MR. INGRAM: So just to follow up, I was kind
17 of assuming he had a floor plan but it looks like he did
18 not have a floor plan.

19 MR. CLOUARTE: He did have a floor plan and his
20 goal was to try to pay that off as vehicles came in and
21 out. If you look at, for example, 37(1) on line 26, it
22 says total floor plan liability of 1.2.

23 MR. INGRAM: What page are you on?

24 MR. CLOUARTE: I apologize. It's R-37(1), page
25 1, line 27 which is right above the working cap

1 calculation -- excuse me -- line 26, total floor plan
2 liability, 1.2.

3 MR. INGRAM: I guess what's throwing me off is
4 this very last exhibit in one of the very first emails or
5 letters he's talking about re-classing the floor plan debt
6 due Cecil. So I guess part of it is split? So part of
7 the floor plan is floored and part of it is not. All
8 right, I get it.

9 MR. PALACIOS: Mr. Clouarte, if the dealership
10 is terminated, you stated that you are planning on putting
11 a new dealer in. Do you know if the plan is to put it in
12 the same location or are you going to move?

13 MR. CLOUARTE: There was testimony to the fact
14 that that location -- Mr. Tunic testified that that
15 location would be acceptable. He also testified that
16 there's lots of dealerships -- and he wasn't necessarily
17 agreeing with Mr. Atkission's testimony -- that had
18 highways right in front of it with construction that sell
19 their MSR.

20 MR. PALACIOS: In that same area?

21 MR. CLOUARTE: I apologize, Mr. Palacios, I
22 can't recall the exact location, but within Texas.

23 MR. PALACIOS: I understand Mr. Atkission had
24 requested to move the facility and I guess there's
25 questions about whether the i's were dotted and the t's

1 were crossed and so forth, but is there, I guess,
2 resistance from FCA to move the point?

3 MR. CLOUARTE: I'm trying to answer that within
4 the record. There certain was resistance to the concept
5 proposed by Mr. Atkission, and I say concept, that's
6 using -- it's in here in the dealership's own words, there
7 never was a formal proposal to relocate. And so I don't
8 know that I can -- all I can answer based on the record
9 evidence is that the concepts that were advanced were not
10 approved. I don't know if that satisfies your question.
11 And I guess I'd answer it this way, using Mr. Tunic's
12 testimony, he would be satisfied with that existing
13 location, just with a different operator who was more
14 aggressive and willing to take care of the customer.

15 That concept that I referred to is Exhibit 76
16 in a letter from the dealership. In the third paragraph
17 it says: The outline submitted to you was never intended
18 to be a formal proposal or request for approval of the
19 relocation, but was submitted to show the concept of what
20 could be done. So my recollection of the evidence at the
21 hearing was there wasn't much evidence on the relocation
22 issue because there never was a permissible kind.

23 MR. PALACIOS: Because my understanding was
24 that it was kicked back because it wasn't detailed enough,
25 that it didn't have -- and I guess the question normally

1 when a dealer requests permission to relocate is the
2 requirement that he have the location, all the blueprints
3 in place before he submits? Do they really have to go
4 through all that before they're even --

5 MR. CLOUARTE: And I may have the timing
6 slightly off, but I think in November of 2013, Mr.
7 Atkission presented the idea which was rejected and said
8 send us more information, for example, drawings,
9 renderings, that type of thing. They weren't presented
10 for another seven months, without much more information.

11 MR. WALKER: But the land was purchased for the
12 dealership. Correct? It could be disputed but there was
13 supposedly testimony that there was two to three acres
14 purchased next door to the current dealership, next door
15 to his Toyota dealership to put the Chrysler dealership
16 next door to that, and Chrysler didn't like the fact that
17 they were going to be subordinate to Toyota, with their
18 location being not as visible.

19 MR. CLOUARTE: And the one part that I might
20 disagree with was that last part. I think it was the
21 proposal was that there was an intermingling between the
22 two, there wasn't a separation between the two of the plan
23 that was put forward on that piece of property to which
24 you refer.

25 MR. WALKER: Well, I think the record reflects,

1 if I'm not mistaken, that FCA was concerned about being
2 somewhat subordinate to Toyota with visibility to the
3 location being not as visible as Toyota was going to be by
4 being next door. I don't know, I've never been there, but
5 the road was apparently built up and maybe they didn't
6 have as high visibility because of a bend in the road. I
7 don't know what it was.

8 MR. CLOUARTE: And I recall that. I think the
9 testimony was that the frontage along the frontage road
10 was substantially less, or something to that effect.

11 MR. WALKER: Something to that effect. That is
12 correct.

13 MR. PALACIOS: I have a question again about
14 the facility. From everything I've read, I think one
15 thing that everybody agrees with is the facility is in
16 poor condition, so if you were to install another dealer
17 in that location, I assume then you would start from slab
18 up and build a new facility?

19 MR. CLOUARTE: I'm not sure I can speak to that
20 because it's not in the record evidence. I think we would
21 certainly want something like Mr. Atkission gave us in
22 Exhibit R-3 with commitments to do certain things.

23 MR. PALACIOS: So I guess that commitment at
24 this existing location was never discussed with Mr.
25 Atkission as an option? Was it ever discussed?

1 MR. CLOUARTE: Well, it certainly was promised
2 in 2008 and discussed throughout the entire time period:
3 you've got to do something. And the four bullet points
4 were not even done, much less anything else.

5 MR. PALACIOS: The location he's at right now
6 is leased. I understand Mr. Atkission purchased property
7 not too far from the existing property that he owns. I
8 guess my question is why is there resistance to allowing
9 him to build on property that he owns rather than property
10 that he leases?

11 MR. CLOUARTE: Well, I don't think there's any
12 record evidence to suggest there's resistance to having
13 him build something. The record evidence, I think, was
14 that the plans he submitted were inadequate. In fact,
15 there was testimony they contradicted what the plan said.
16 So there was confusion on the dealership's part about
17 what they want.

18 MR. WALKER: So let me kind of clarify
19 something that he just said right there. Cecil Atkission
20 bought the dealership in 2008, he paid \$500,000, I
21 believe, for the physical assets of the piece of property
22 and the buildings, he paid \$150,000 in good will for the
23 dealership, so he's got \$650,000 invested in the deal. He
24 just said that the facility is leased. My interpretation
25 of lease, and maybe I'm wrong here, is that he's leasing

1 that maybe from his own self. Who owns the physical
2 facility?

3 MR. CLOUARTE: There was a lease in evidence
4 with a third party. I think the \$500,000 you're referring
5 to was purchase of equipment and other assets, so the
6 lifts, perhaps special tools, any existing used inventory,
7 new inventory.

8 MR. WALKER: So it's not the actual physical
9 facility. I thought it was for the facility.

10 MR. CLOUARTE: That's my understanding of the
11 arrangement.

12 MR. WALKER: So if Chrysler -- I keep saying
13 Chrysler, I know you probably like to be called FCA -- if
14 FCA, if this board makes a determination that we need to
15 cancel the franchise, FCA has no binding hold on the
16 facility. Is that correct? You don't know the facility,
17 so another dealer -- if Memo goes in there and puts in a
18 Chrysler dealership, he's going to have to go and find a
19 facility and build a new location. Is that correct?

20 MR. CLOUARTE: Find a location with an existing
21 facility or construct.

22 MR. WALKER: He would either need to go rent
23 something or he would need to go and build a facility that
24 is suitable that meets your needs and requirements.
25 Correct?

1 MR. CLOUARTE: Correct.

2 MR. WALKER: And not necessarily going back to
3 the same location. Correct?

4 MR. CLOUARTE: Not necessarily. It may open up
5 to -- well, I don't think I should go farther, it's not
6 record evidence.

7 MR. PALACIOS: Mr. Clouarte, as an option to
8 termination, was there ever any discussion with Mr.
9 Atkission perhaps to assist him in selling the dealership?

10 MR. CLOUARTE: Absolutely, and I believe it was
11 record evidence that Mr. Tunic had a discussion with the
12 dealership about finding a letter to find a buyer and
13 provide assistance in that regard.

14 MR. GRAHAM: If the dealership is -- who would
15 stand to benefit once another dealer is put in place?
16 Would that be Chrysler? Would Chrysler sell that market
17 area?

18 MR. CLOUARTE: Let me do my best to answer in
19 the record evidence. Manufacturers -- well, I'm going to
20 speak on FCA's behalf, doesn't buy or sell, can't. The
21 record evidence was consumers hopefully would benefit by
22 having an aggressive local dealer, hopefully new jobs,
23 more tax revenue. That was the record evidence about who
24 would benefit.

25 MR. GRAHAM: So what you're saying is there is

1 no record evidence on whether or not someone would write a
2 check to put a dealership in that location. Is that what
3 you're saying?

4 MR. CLOUARTE: Correct.

5 MR. GRAHAM: I want to just address one other
6 thing, and that is in your franchise agreement -- what
7 section was that again? I lost my spot.

8 MR. WALKER: Twenty-seven.

9 MR. CLOUARTE: Twenty-eight.

10 MR. GRAHAM: It lists the dealer as Cecil
11 Atkission Orange. That is the dealer name which is a
12 company on the agreement. Does Chrysler require a company
13 that's a dealer to have a dealer principal?

14 MR. CLOUARTE: Two answers: there wasn't any
15 record evidence of that, and two, I simply do not know. I
16 don't know if there's individuals around the country or
17 there's a prescription of entity, I'm not sure.

18 MR. WALKER: That man over there that does this
19 for Chrysler every day, why don't you ask him that
20 question?

21 MR. GRAHAM: Is there someone here for FCA that
22 can answer that question? Because I feel like that's a
23 very important question to this matter.

24 MR. DUNCAN: You can't add to the record.

25 MR. GRAHAM: Can't add to the record. Okay.

1 MR. DUNCAN: Correct. If you're going to
2 decide on this, you have to decide based on the record.

3 MR. GRAHAM: So what you're telling me is that
4 in the course of the litigation, that was never asked or
5 never came up.

6 MR. CLOUARTE: In the course of the admitted
7 evidence.

8 MR. GRAHAM: Correct. Okay. I mean, I'm
9 talking to myself now, but okay.

10 (General laughter.)

11 MR. WALKER: So we really don't know -- David,
12 so we're getting into some areas here that to me are
13 concerning about how the process works because the board
14 has never seen all of the records. Okay? We don't know
15 all of the testimony. I've read the book here and it
16 doesn't give us a transcript of all the hearings, so we
17 really don't know what was and was not submitted into
18 evidence. And when I talked to you yesterday about some
19 of this, you said if I wanted to see that, it's boxes and
20 boxes of goods. For example, I never saw the franchise
21 agreement, which I called you about yesterday, and it's
22 today being presented to us here and it was a part of the
23 evidence, but if I were to look at my board packet, I
24 never know whether or not it is or is not a part of the
25 testimony.

1 So it's kind of hard in my mind that we're here
2 making a huge decision, and I know we're relying upon
3 people here, attorneys that were there hopefully during
4 most of this testimony and somebody is trying -- I guess
5 Michelle was there maybe during the testimony. No? So
6 somebody has to say that it's not a part of the record or
7 it was, because who studied the records?

8 MR. DUNCAN: We get a copy of the record.

9 MR. WALKER: Did you study the record so you
10 know that it was or was not part?

11 MS. LINGO: I read over 1,200 pages over the
12 Christmas holidays.

13 MR. WALKER: Thank you. And I read a bunch
14 myself.

15 MS. LINGO: I did as much as I possibly could.
16 I will tell you that the parties to the case know the
17 case far better and that the ALJs considered each piece of
18 evidence, whether to admit it into evidence, whether it
19 was relative and probative, and then weighed the veracity
20 of the evidence and the testimony, and then they issued
21 their PFD. We are required by law to use that process.

22 MR. WALKER: I understand the law and I
23 understand all of that. I've been here for seven years
24 now doing this. And one of the things that kind of -- you
25 know, here's something that bothers me also -- and not

1 throwing rocks at anybody in the room -- but here is a
2 200-page document that was put on my desk here today with
3 information that Mr. Clouarte would like us to look at,
4 and I'm trying to sit here, he's talking and he's saying
5 this page and this page. I have never had the opportunity
6 to review his document, so he's asking me to kind of look
7 at what he's presenting to me, comprehending what I'm
8 reading and comprehending what he's saying at the same
9 time. It really is not fair, in my mind.

10 And I've been in the court of law probably as
11 many times as most of you lawyers in the room because I
12 own a trucking company and tend to get sued a lot, but
13 generally, in a court of law all parties are provided with
14 the documentation prior to the case being tried so that
15 you can understand and review the documents so that it's
16 not a bunch of surprises to everybody in the room. Why do
17 we not have the process here where the board is presented
18 this kind of stuff prior to this meeting so that I can be
19 knowledgeable of what he is presenting to us without me
20 having to sit here and try to -- he's given me a
21 voluminous packet of stuff which is nice to have, but how
22 do I review it and listen and comprehend? I'm just not
23 that smart.

24 MR. INGRAM: Just as a counterpoint, it's not
25 really up to us to re-look at every single item of this

1 case. I mean, certainly if it is brought to us by the
2 speakers, we can look at particular items but it's really
3 not up to us just to re-hear the case.

4 MR. WALKER: It's not up to us to try the case.
5 You're right. It's not up to us to try the case in this
6 room. But the reason -- and Blake, you've been here
7 almost as long as I have -- the reason this board was
8 created originally, this agency, not this board but all of
9 us, and that you're a dealer and I'm a trucker and she's a
10 manufacturer, is so that when we get to points like where
11 we're at today with a franchise dispute between a dealer
12 and a manufacturer, that there's representation on our
13 board that instead of it being TxDOT where somebody didn't
14 really have anybody that was a car dealer on their agency
15 and didn't have somebody that was a manufacturer, that was
16 a voice that we could sit down in a room.

17 And I know that some of you remember Ramsay
18 Gillman, and Ramsay was a great guy, he was a dealer on
19 this board and he was one of the guys, and Victor
20 Vandergriff, that created the Department of Motor
21 Vehicles, and they always spoke, they were very vociferous
22 about making sure that everybody had a represented voice
23 to speak before the public as to whether or not we should
24 cancel a franchise or whether we shouldn't cancel a
25 franchise, or the things that affect all of us as parties

1 to what the agency oversees.

2 So we're here today to speak and to listen to
3 what the public -- I'm not saying FCA is right or wrong or
4 Mr. Atkission is right or wrong, but we're here today and
5 it's a huge, it's a financial decision for both of these
6 companies that we're making a decision on. FCA wants to
7 sell cars, Mr. Atkission sure doesn't want to lose his
8 investment, so I mean, we're evaluating here something
9 that's very, very important that needs to be reviewed and
10 studied by all of us and taken very seriously. We
11 shouldn't come to this meeting today or any other day with
12 the assumption that, well, I'll just think about it when I
13 get there and listen, but we're making huge decisions that
14 affect people's lives here.

15 MR. PALACIOS: Point well taken, Board Member
16 Walker. Thank you. Appreciate your input.

17 Are there any other questions for Mr. Clouarte?

18 If not, I have one question, not for Mr. Clouarte but for
19 counsel, and I think before we get to Mr. Atkission's
20 attorney, we'll take a break after that. So any other
21 questions?

22 (No response.)

23 MR. PALACIOS: Thank you very much. We
24 appreciate your time up here.

25 MR. CLOUARTE: Thank you.

1 MR. PALACIOS: Mr. Duncan, I have a question
2 for you. The board members received an amicus brief that
3 was filed by TADA and I will try my best to summarize. It
4 was a lengthy document, or I guess for them it was a short
5 document, but in essence, the gist of the briefing
6 concerns the factors that were considered in the ALJs'
7 decision. My understanding is when a letter of
8 termination is sent out, the manufacturer must state the
9 specific causes and reasons for termination. In the
10 filing sent to the ALJ, there were three specific reasons
11 that were noted in the letter of termination. I guess
12 during the hearing at the SOAH court, those three then
13 turned into seven factors.

14 The concern, I guess the point raised in the
15 amicus brief is that when a letter of termination is sent
16 out, the specific factors to be considered are only those
17 factors that are enumerated in the letter of termination,
18 so I guess this would be akin to let's say somebody is in
19 a trial facing offenses, and they know what the offenses
20 are but during that trial the prosecutor throws out
21 additional offenses, says by the way, you're charged with
22 these three additional offenses. So the concern now is
23 that there were additional reasons, I guess, that were put
24 before the ALJs during the hearing, in which case would
25 have put Mr. Atkission in an unfavorable position.

1 What is your opinion on that?

2 MR. DUNCAN: So my view, having read TADA's
3 brief and the replies, this is not a single thing, it's a
4 process. So yes, the manufacturer puts the dealer on
5 notice and cites specific reasons for their proposed
6 termination, but once the notice of hearing is sent, the
7 notice of hearing is very clear that the board must
8 consider, and therefore, because the ALJ -- the language
9 in the statute is that the ALJ is acting on behalf of the
10 board, the ALJ is basically given power by the board to go
11 and read this. To speak to the concern that Member Walker
12 had, the board is your eyes and ears, listening to the
13 witnesses, their demeanor, reading all of the exhibits
14 that they provide, and coalescing all of that into a
15 recommendation.

16 Once it is sent to hearing, another provision
17 of the statute applies, and it says the board shall
18 consider all existing factors, including. So to limit the
19 board to the notice provided by the manufacturer ignores
20 the statute.

21 MR. PALACIOS: Well, my point has more to do
22 with the actual SOAH hearing, not this board. I
23 understand the board can look at all seven factors but the
24 issue is what about the --

25 MR. DUNCAN: In order to get it in front of the

1 board, the SOAH judge is not going to say, okay, the
2 manufacturer listed three things, we're not going to
3 consider anything else, because the statute demands that
4 the board consider all existing circumstances, including a
5 list, and so they are going to ask questions and they are
6 going to request and probably demand that the parties
7 bring them evidence. Now, for example, if a manufacturer
8 were to put a dealer on notice and say we think your sales
9 performance is poor and that's all it said, and they went
10 into hearing and either there was no evidence, neither
11 party presented evidence or all of the evidence favored
12 the dealer on all of the other factors and everything else
13 that was going on at the dealership, then obviously the
14 ALJs would find for the dealership.

15 But I don't believe that the legislature's
16 intent, when they wrote a section saying what the board
17 must consider when it's considering this action is
18 constrained by another section of the statute that says
19 the manufacturer must put the dealer on notice. One of
20 the basic tenets of statutory construction is that there
21 are two sections and they appear to be in conflict.
22 Number one is they're not. That's the number one rule of
23 statutory construction: find a way to read them so
24 they're not in conflict. And to me, the way to read these
25 two that they're not in conflict is the board must

1 consider everything, and the parties showed up at the
2 hearing prepared to present evidence on everything because
3 that's what the statute says.

4 MR. PALACIOS: Okay.

5 MR. DUNCAN: It's a step-wise process. The
6 manufacturer puts the dealer on notice. If there's a
7 hearing scheduled, if there's a referral to SOAH by the
8 director, the section of statute that the director lists
9 is all existing factors including, and the list of
10 factors. So then it's, okay, you better show up prepared
11 to talk about everything.

12 MR. PAINTER: The stuff that was presented by
13 FCA this morning, has that been entered into the record
14 with the ALJ?

15 MR. DUNCAN: Everything that's in this
16 notebook.

17 MR. PAINTER: So they're just rehashing what
18 they have already done, bringing out their important
19 points or what they consider important points, and then we
20 have a report from the ALJs as to what occurred during the
21 hearing and what was presented, and then they make a
22 judgment based on all of the evidence that they saw and
23 heard and read and what was presented there, so we're just
24 getting kind of a summary of the important points.

25 MR. DUNCAN: Correct.

1 MR. PAINTER: Okay. Thank you.

2 MR. PALACIOS: All right. If there are no
3 other questions, I'd recommend we take about a five-minute
4 recess. We'll come back and then we'll go to Mr.
5 Atkission's counsel.

6 (Whereupon, at 9:59 a.m., a brief recess was
7 taken.)

8 MR. PALACIOS: Okay, folks, let's get moving.
9 Before I recognize Mr. Crocker, I want to turn
10 this over to Mr. Duncan to address a few points.

11 MR. DUNCAN: David Duncan, general counsel,
12 since we're back on the record.

13 Members, when Mr. Walker was discussing the
14 large group of exhibits that was provided, the board
15 presents parties with an opportunity to do oral argument
16 and many times they need demonstrative exhibits to make
17 their points, so that's the reason you all were given
18 this. The way the process is set up by legislation and by
19 board practices, when a complicated matter like this needs
20 to be considered by the board, the statute says you will
21 send it to SOAH, an ALJ looks at it -- that's something I
22 referred to earlier -- and once the ALJ has reviewed the
23 evidence and made a record and written a PFD, the statute
24 then says the board is limited in how it can consider that
25 PFD.

1 Those 2001.058(e) factors that we always read
2 tell the board what you are and are not allowed to do, and
3 when you get a PFD back, you can only change a finding,
4 fact or conclusion of law if you determined that the judge
5 did not properly apply or interpret the applicable law,
6 prior administrative decision on which the administrative
7 law judge relied on is incorrect or should be changed,
8 there's a technical error in a finding of fact, and if you
9 do that, you have to state in writing the specific reason
10 and legal basis for any change made. So it's clear that
11 the legislature and the process the way it's structured is
12 not designed for the board to re-review the record. I
13 mean, that is not really why you're here and what you're
14 supposed to do. The record is built, the judges have made
15 a recommendation based on the record, and to review the
16 entirety of the record is to reconsider the judges'
17 weighing of the evidence, and that .058(e) section says
18 that's not what you're supposed to do.

19 So I just wanted to add that to Mr. Walker's
20 comments and point out that the only reason that these
21 would be here at all is because the board does provide an
22 opportunity for oral argument and it does allow the
23 parties to refer to specific exhibits. We've talked to
24 the parties' counsel and told them to limit themselves to
25 the record, and both parties have either provided only

1 citations to statute or documents from the record, and
2 again, it's just to illustrate their points.

3 Thank you.

4 MR. PALACIOS: Thank you, Mr. Duncan.

5 I'd like at this point to recognize Mr.
6 Crocker, who will be speaking on behalf of Atkission
7 Chrysler and Mr. Atkission.

8 MR. CROCKER: Thank you very much, Mr. Chairman
9 and members of the board. I'm Bill Crocker. I practice
10 law here in Austin.

11 First, I want to thank all of you for your
12 service to the State of Texas and to the Texas motor
13 vehicle industry. I particularly appreciate the sacrifice
14 you make to serve on this board, and thank you also for
15 allowing enough time for a full presentation of this case.

16 That is a huge benefit to you, I hope. It's certainly a
17 benefit to the parties who are before you.

18 Let me turn and introduce my client, Cecil
19 Atkission, this gentleman right over here who has been
20 sitting by me and trying to keep me from being so restless
21 that I exploded. Don't be deceived by his unassuming and
22 easygoing appearance, please. After graduating from
23 Burnet High School, he attended West Texas State
24 University in Canyon. He's been in the car business since
25 1975; he's been a franchise dealer since 1982; he

1 currently owns and operates 19 franchises in seven Texas
2 dealerships. His franchises include the Chrysler, Dodge,
3 Jeep, Ram, Chevrolet, Buick, Cadillac, Ford, Lincoln and
4 Toyota lines. His dealerships are spread from Del Rio to
5 Kerrville to Orange. He personally pilots any of the
6 three airplanes he owns, including one jet, to keep up
7 with those dealerships. He is not a good car dealer, he
8 is an excellent car dealer. I think you will recognize
9 that as we proceed through this presentation.

10 Why are you here hearing this case today? That
11 seems to be an issue that you're dealing with, and I've
12 got to tell you I've never sat through anything that
13 epitomized more the admonition that's given to every young
14 lawyer: there are two sides to every story. I was about
15 to die to give you the other side of the story and explain
16 the answers to some of your questions. You're here
17 because only you can enter a final order in a proceeding
18 like this and because you have real world background and
19 experience to understand the issues that you're hearing.
20 You're the final filter. Sometimes you stand in the gap
21 when nobody else has understood what they were hearing
22 before. Your obligation is to review the proposal for
23 decision prepared by the ALJs who heard this case and I
24 have taken the liberty of supplying you copies of some of
25 the statutes that you're going to be dealing with.

1 The first one is this Government Code, Section
2 2001.058, talking about findings of fact and what you can
3 do and what you can't do. It says that you are required
4 to adopt the proposal for decision prepared by the ALJs
5 unless you find that they did not properly apply or
6 interpret applicable law. It's my obligation to point out
7 to you some glaring errors in the proposal for decision
8 which are the result of the ALJs not properly applying or
9 interpreting applicable law.

10 Cecil and I -- Cecil Atkission is a first-name
11 guy. He advertises his first name on all his dealerships.

12 It's Cecil who is selling you a car. We're actually
13 sorry to be here this morning and sorry to be troubling
14 you about this matter. But for a very erroneous
15 interpretation and application of the law, we probably
16 wouldn't be here. But for that error, Cecil's Chrysler
17 dealership in Orange, which is the subject of this
18 proceeding, would have been fixed or sold long ago, with
19 Chrysler's approval and to Chrysler's satisfaction.

20 That dealership is in the worst location you
21 will have ever seen for a car dealership. He has been
22 working to relocate it since the time he bought the
23 dealership in 2008. Not long before he was notified of
24 Chrysler's intention to terminate the franchise, he
25 finally closed on the purchase of enough land to move the

1 dealership to a site adjacent to his Toyota dealership in
2 Orange. It was understood between him and Chrysler at the
3 time he bought the dealership that they wanted it
4 relocated and wanted it moved two miles down the road, two
5 miles down Interstate 10 in Orange, adjacent to his Toyota
6 dealership. He's been trying to do that ever since. He
7 had a five-year lease. That lease is up and he can move
8 any time.

9 His first relocation proposals were more
10 conceptual -- and you heard some of that -- than detailed
11 plans. Neither the concept nor the plans were
12 satisfactory to Chrysler. Around the time he received
13 Chrysler's termination notice, he developed a new and of
14 course more expensive site plan for the relocation of the
15 dealership. Again, he submitted a concept rather than a
16 detailed plan. But Chrysler refused to even consider the
17 proposal and flatly rejected the idea of relocating the
18 dealership. When we tried to protest that rejection,
19 first your staff and then the ALJs who were hearing the
20 termination case ruled that asking Chrysler for approval
21 to fix the dealership by relocating it was a violation of
22 the statutory stay that is applied by statute, and it's by
23 Section 2301.803 of the Occupations Code, and you have a
24 copy of that before you. I've taken the liberty of
25 printing the pertinent portions of it in red for you.

1 You can see that that statute provides that
2 anyone in a contested case like this one who is notified
3 of a statutory stay -- and everybody was and normally is
4 in a matter that comes before the board or is filed with
5 the board -- may not do anything that would affect a legal
6 right, duty or privilege of another party in the case.
7 Asking Chrysler for approval to relocate the dealership --
8 which is required by the Chrysler franchise agreement, you
9 can't just do that on your own if you're a car dealer --
10 was deemed a violation of the statutory stay by both your
11 staff and the ALJs. And I'm here to tell you that asking
12 Chrysler for approval to sell the dealership would also be
13 deemed a violation of that stay under that construction of
14 the statute.

15 The statutory stay is being interpreted to
16 prohibit a request to fix or sell a troubled dealership
17 after it receives a notice of termination. That is both
18 contrary to good judgment and legally wrong. Good
19 judgment would welcome anything that might fix a problem
20 at any time. And it's legally wrong because it is a
21 simple request for approval to do something that cannot
22 possibly affect a legal right, duty or privilege of
23 anyone. Whatever you do with this case, you must not let
24 that interpretation or application of the law stand. It
25 is not only dead wrong, it will destroy a major purpose of

1 the law you are charged with administering, and that
2 purpose is to facilitate reasonable and workable business
3 solutions. To use the language of the statute as it has
4 been used is a classic improper interpretation and
5 application of the law. It's incorporated in the PFD.
6 You must now allow that to stand.

7 Let's look at another statute, a portion of
8 which you have before you, Occupations Code, Section
9 2301.453. Very simple, short statute, it's the little
10 one. It says for any involuntary termination of a
11 dealership or a dealership franchise, the franchisor must
12 send a written notice of termination that states the
13 specific grounds for termination. You've got a copy of
14 Chrysler's notice of termination. That's the letter that
15 is in your packet that I put up there with some
16 highlighting on it. You have a copy of that notice of
17 termination, it's the letter dated December 14, it's in
18 your folder. It sets out three specific grounds for
19 termination.

20 Look at page 2 with me. You see the underlined
21 title, and I've highlighted it for you, that says: Your
22 dealership's failure to meet its sales performance
23 obligations. That is Chrysler's first specific ground for
24 termination. What that means is Chrysler wants the
25 dealership to sell more new vehicles. Chrysler wants to

1 increase its market penetration or market share.

2 Look now at page 8, if you will --
3 correction -- let's stop on 6 first -- I'm sorry, it is
4 page 6 I wanted to call your attention to. Look at page
5 6. Chrysler lists there what it calls other factors
6 affecting dealer's sales performance. One is titled
7 Dealer signage obligations, the next is titled Dealer's
8 management and sales obligations, the last one is titled
9 on the next page Dealer's advertising and sales
10 promotions. These three bullet points contain reasons for
11 or conditions Chrysler thinks may be causing the
12 dealership's low sales volume. They are not grounds for
13 termination.

14 The highlighted paragraph on page 7, you see
15 right under the last bullet point, make it clear that the
16 alleged material breach of its sales obligations is the
17 first specified ground for termination of the dealership.

18 Please note the highlighted language says: Because the
19 dealers is in material breach of its sales performance
20 obligation and because dealer has failed to cure its
21 material breach of these sales performance obligations,
22 what was then the Chrysler Group has to right to terminate
23 and is hereby terminating each of their four dealer
24 agreements. They had one dealer agreement for each of the
25 four lines in each Chrysler dealership. The so-called

1 three other factors were clearly not specified as grounds
2 for termination.

3 Member Painter, we're going to be talking about
4 this like it's an indictment, and that's pretty close to
5 the fact, and they're in the lesser included offenses.

6 Immediately below the language I just read is
7 the second ground for termination: Your dealership's
8 failure to meet its working capital obligations. On the
9 next page you see the same highlighted language that
10 clearly specifies that allege that alleged failure as a
11 ground for termination. Right below that paragraph is
12 another ground for termination: Your dealership's failure
13 to meet its net worth obligations is grounds for
14 termination. The language may be a little inconsistent
15 but the underlining and the highlighted paragraph below it
16 clearly identify this as the third specific ground for
17 termination, three counts.

18 Why do we care how this document is written and
19 what it says? Remember what we talked about when we
20 looked at 2301.458 -- correction, .453, I believe it is --
21 the dealer must be provided written notice of the specific
22 grounds for the proposed termination. It is critically
23 important to understand that there are only three grounds
24 for termination specified in the notice. These are the
25 allegations the dealership must refute in order to defend

1 its franchise, and they are as follows: the dealership,
2 one, hasn't sold enough new cars and trucks; two, has
3 insufficient working capital; and three, has insufficient
4 net worth.

5 Let's look at the first ground up close: the
6 dealership hasn't sold enough new cars and trucks. Cecil
7 Atkission would be the first person in this room to agree
8 that is true. He knows that better than anybody. The
9 dealership has a lousy location, it had it when he bought
10 it. He bought it with the intention and understanding
11 with Chrysler that it would be relocated down the road
12 where his Toyota dealership is. It has not made a profit
13 since construction began on Interstate 10 in front of it
14 in 2010. After years of construction work, Interstate 10
15 is now elevated so that the view from the front of the
16 dealership is a delightful solid wall supporting the
17 approach to an overpass that's on down the road from the
18 dealership. The roof of the dealership is barely visible
19 from the eastbound lanes of Interstate 10 and none of the
20 dealership is visible at all to westbound drivers.

21 Access is equally poor. People looking for the
22 dealership can't find it and can't get to it once they
23 know where it is. You heard about they want a dealer who
24 will take care of customers. Cecil Atkission has taken
25 care of every customer who had been there. The complaints

1 that Chrysler had in the hearing that they shared in the
2 hearing were from people who couldn't find the dealership,
3 and that's all. Thank goodness it's the only dealership
4 location that Cecil has that he does not own, he can leave
5 it on 30 days notice, he doesn't want to spend a nickel on
6 that current location.

7 Chrysler can't repair or maintain the old sign
8 in front of the dealership but it was still charging a
9 rental or maintenance fee for it at the time of the
10 hearing. That bag is a canvas bag. You'd think somebody
11 in Orange might have a sail-making background, but it is a
12 heavy duty canvas bag with the required advertising --
13 it's not the current required advertising because that's a
14 flavor of the month thing with Chrysler, they change their
15 signs pretty frequently -- but at any rate, it's got all
16 the brands shown on the sign and it is not a plastic
17 garbage bag. And a new sign costs the better part of
18 \$100,000. It's hard to get or keep good people at such a
19 bad location. Increased advertising for that dealership
20 hasn't worked at all. So we agree that the sales by the
21 dealership are way too low.

22 What's the impact of low sales on Chrysler's
23 market share in the market area served by the dealership?

24 One or two of you had a question that touched on that.
25 You might have missed it in the ALJs' proposal for

1 decision because it wasn't there, but if you get into the
2 back of the book -- as we used to call it when it was the
3 math book where the answers were -- at the time of the
4 hearing, Chrysler's market share in that market area was
5 113.82 percent of Chrysler's average market share in
6 Texas, and average market share in Texas is Chrysler's
7 benchmark. Over the previous three years it had average
8 103.47 percent but was never lower than 97.6 percent. The
9 dealership's lack of sales is only hurting Cecil
10 Atkission, it is definitely not hurting Chrysler. That's
11 a poor reason to terminate a dealer who is investing
12 millions in the effort to represent the brand.

13 Second and third specified grounds -- my time
14 is running short and I've got to hurry -- low working
15 capital and low net worth. The record will show that
16 Cecil Atkission has operated franchise dealerships so well
17 through the years that he's been able to buy the Orange
18 Chrysler dealership, capitalize it, and then put an
19 additional \$6.25 million in it to keep it afloat. It is
20 undisputed that amount was put into the dealership by
21 Cecil Atkission, that's the Cecil money, and all of it is
22 still there. He had the money put into the dealership
23 recorded as a loan. The records reflect that the
24 dealership had no other debt other than a small floor plan
25 debt on new vehicle inventory. Cecil's goal is to

1 maintain a \$5,000 floor plan balance on each floor planned
2 new unit. That way he gets a reduced price on his
3 insurance on his inventory.

4 None of his dealerships floor plan used cars.
5 The Orange dealership never failed to pay its employees,
6 pay its bills or maintain a floor plan financing
7 arrangement for new vehicle inventory. It is true that at
8 the time for the hearing the dealership had lost
9 approximately \$4 million, most of it since the interstate
10 construction started. So why does Chrysler think the
11 dealership has inadequate working capital and net worth?
12 Because Cecil accounted for the money he put into the
13 dealership as a loan rather than equity.

14 At the time of the hearing, the dealership had
15 over \$2 million on hand in working capital and net worth,
16 loaned to the dealership by Cecil personally. That has
17 been a longstanding practice to capitalize his dealerships
18 with what he calls and accounts for as loans, and he pays
19 himself the same rate of interest that his floor plan
20 financing sources charge him. His documentation of the
21 loans is bookkeeping entries. The Orange dealership is a
22 single owner limited liability company. For most legal
23 purposes and for most tax purposes -- for all tax purposes
24 it's what's called a disregarded entity, commonly
25 maintained only as a tort liability shield.

1 In Cecil's case, making a loan to the Orange
2 dealership was like moving money from one pocket to
3 another pocket in the same pair of pants. This is why
4 Chrysler wants to terminate him because he put the money
5 that is invested in the dealership on the wrong line. We
6 tried to reconstruct, but still Cecil wants it shown as a
7 loan by owner, and Chrysler doesn't even have a line for
8 that. And that was that effort to recast the loan that he
9 has made to the dealership, it has been made in increments
10 over time.

11 I'm going to run out of time. What are we
12 going to do? Mr. Chairman, might I continue just a little
13 bit. I need to respond to some of the answers.

14 MR. PALACIOS: In full deference to FCA, I'm
15 inclined to limit your time at this point, Mr. Crocker,
16 but perhaps during the questioning perhaps your point
17 might come out.

18 Any questions for Mr. Crocker?

19 MR. WALKER: Of course.

20 MR. PALACIOS: Board Member Walker.

21 MR. CROCKER: Bless you. Thank you.

22 MR. WALKER: Let's start off with the record
23 reflects maybe at the time of the record that Mr.
24 Atkission owns seven franchise car dealerships, I believe
25 is what the record reflects. Nineteen? Seven?

1 MR. CROCKER: Six at that time, seven now.

2 MR. WALKER: Six. But I heard you just say he
3 has 19 franchises.

4 MR. CROCKER: Franchises. Some of those
5 franchises are grouped together in one dealership
6 location. He owns seven dealership locations currently.

7 MR. WALKER: How do you do that? Educate me
8 for a second.

9 MR. CROCKER: A lot of people do it. It's
10 common in the industry.

11 MR. WALKER: I'll let Michelle explain it to me
12 maybe.

13 MS. LINGO: The testimony in record evidence
14 indicates Mr. Atkission testified at the time of his
15 testimony he had six dealerships that are franchise and
16 one that is used.

17 MR. WALKER: Six and one.

18 MS. LINGO: So six locations that are franchise
19 and one.

20 MR. WALKER: He said 19 just a minute ago.

21 MS. LINGO: So at each dealership you can have
22 more than one franchise at a dealership.

23 MR. WALKER: In other words, you can have a
24 Ford and a Chevrolet and a Chrysler and a Toyota all under
25 the same roof?

1 MS. LINGO: Yes, sir. And you could even have
2 Chrysler, Dodge, Ram and Jeep under the same roof.

3 MR. WALKER: So a Dodge, a Chrysler, a Ram and
4 a Jeep are four different franchise agreements?

5 MR. CROCKER: Four different franchise
6 agreements.

7 MS. LINGO: And that is at the time of the
8 testimony.

9 MR. WALKER: So let me ask this question, Mr.
10 Crocker, how many franchise agreements does Mr. Atkission
11 have at this location in Orange, Texas, this one
12 particular location? Don't count Toyota.

13 MR. CROCKER: Four.

14 MR. WALKER: Four?

15 MR. CROCKER: He's got Dodge, Jeep, Chrysler
16 and Ram.

17 MR. WALKER: So now let's go to the next
18 question I have because now we're getting into some things
19 I don't know about. We're trying to take away the
20 Chrysler franchise?

21 MR. CROCKER: All four.

22 MR. WALKER: I never saw where it said we're
23 taking four franchises away, it said that we're -- so
24 they're trying to take all four.

25 MR. CROCKER: It's in here and it's in that

1 highlighted language that I read hurriedly. I can
2 understand why you missed it.

3 MR. WALKER: We had a lot of reading to do in
4 the last four or five days.

5 MR. CROCKER: I understand that. The last
6 sentence on their magic paragraph is: Chrysler has the
7 right to terminate and is hereby terminating each dealer
8 agreement. That means all four of them, they referred to
9 all four dealerships.

10 MR. WALKER: Jeep, Chrysler, Dodge and Ram.
11 All four of those are going to be canceled if FCA gets
12 their request.

13 MR. CROCKER: Yes, sir.

14 MR. INGRAM: I have a question. I'm trying to
15 get over the hurdle of understanding how you're
16 interpreting the statutory stay. You're implying that the
17 way that it was interpreted by the ALJ is that it hindered
18 you from providing a solution to Chrysler.

19 MR. CROCKER: Prohibited.

20 MR. INGRAM: Okay. Prohibited.

21 MR. CROCKER: And our position is it was
22 improperly applied to our circumstance because the request
23 for permission to do something cannot affect a legal
24 right, duty or privilege of any party.

25 MR. INGRAM: Well, so I guess I'm stuck on the

1 fact that a stay is basically freezing it, in my opinion.

2 It's freezing it in place just as it is.

3 MR. CROCKER: That's exactly right.

4 MR. INGRAM: But you're saying that you would
5 like to be able to allow them to also submit this plan
6 that would satisfy the problem.

7 MR. CROCKER: Exactly.

8 MR. INGRAM: But that's not a stay.

9 MR. CROCKER: That is stayed. We were
10 prohibited from doing that. We would be prohibited from
11 asking permission to sell the dealership.

12 MR. INGRAM: Right. But under the Occupations
13 Code there is a stay.

14 MR. CROCKER: There is a stay, but it only
15 applies to some act that's going to affect a legal right,
16 duty or privilege of a party. It doesn't do that. Our
17 request for permission doesn't do that. It doesn't take a
18 right away from anybody. It doesn't inhibit them from
19 doing any duty they have. It doesn't interfere with any
20 privilege they have.

21 MR. INGRAM: So it if didn't inhibit you from
22 you providing the proposal, it wouldn't inhibit them from
23 rejecting it.

24 MR. CROCKER: It should have not inhibited us
25 but it was defined to prohibit us, not just inhibit but

1 prohibit. As this provision was defined or interpreted
2 and applied, it was applied -- and it's in the PFD, just
3 like the mystery money that I hope you'll ask me a
4 question about -- it was interpreted to prohibit us from
5 asking permission to relocate, from asking permission to
6 sell to John Doe. Cecil has got to either fix this
7 dealership or sell it, one of the two.

8 MR. INGRAM: I'm having a hard time. David,
9 can I jump to you? Perhaps you could help me a little bit
10 more with the statutory stay part, because I feel like
11 he's trying to have his cake and eat it too.

12 MR. DUNCAN: Member Ingram, I'm constrained to
13 agree with you. Because a manufacturer with a franchise
14 agreement has the ability to evaluate and potentially
15 contest a relocation or a sale under the Code, a request
16 to relocate or sell triggers legal rights and obligations
17 under their franchise agreement and under the statute. I
18 don't know how that's not affecting a legal right or duty
19 of another person. I just think it's clear that it does,
20 and the ALJs did as well.

21 MR. CROCKER: The distinction there, if I may
22 add to that answer, Mr. Ingram, is that you've got to
23 distinguish between asking permission to do something
24 which doesn't interfere with anybody's rights, duties or
25 privileges, and moving the dealership without permission

1 which would, in fact, interfere with rights, duties or
2 privileges and would interfere with the right of Chrysler
3 to approve the relocation site.

4 MR. INGRAM: Okay. Let me jump away from that
5 then. So Mr. Atkission bought the dealership in 2008. Is
6 there any testimony in the record -- and I want to make
7 sure that my attorneys are also listening.

8 MR. CROCKER: We all do.

9 MR. INGRAM: I'm sorry. In case I jump off the
10 tracks, I want to make sure somebody puts me back on. So
11 I guess I understand that there was a number of attempts
12 to provide a simple request, if you will, to relocate.
13 I'm trying to figure out was there testimony as to why
14 there was not a more wholehearted attempt that provided
15 plans and more structure to the request versus these one-
16 page letters saying would you agree.

17 MR. CROCKER: Here's two parts to that answer.

18 Number one, he hadn't finally secured the land on which
19 it was to be located until shortly before this proceeding.

20 And number two, it's a whole lot smarter to submit a
21 concept, a would you take -- in your business and in the
22 one my clients deal with too -- would you allow us to do
23 this, rather than go get plans from an architect and spend
24 a fortune trying to show what this would be. And that's
25 all that he did or wanted to do was submit a concept.

1 The first concept was we're going to
2 consolidate parts of the two dealerships. Chrysler didn't
3 like that. And so the second concept was we're going to
4 have two separate freestanding facilities, totally
5 complete and totally separated, side by side, with equal
6 visibility, I might add, to the street, to Interstate 10.

7 And Chrysler refused to consider the concept and rejected
8 the idea that they would consider a proposal to relocate.

9 That's when we tried to protest. And we didn't interfere
10 with anybody's rights or duties doing that either. That
11 is a legitimate right that has been interfered with that
12 Cecil Atkission has to come to you and say they're being
13 unreasonable, we want to relocate and they won't even
14 consider the concept. We were told that we were barred by
15 statute from making that proposal.

16 MR. INGRAM: I'm sorry to interrupt you. So
17 the land was finally acquired after the stay was in place?

18 MR. CROCKER: No. It was finally acquired
19 before the notice of termination was given and before this
20 proceeding started so that there was no stay in effect
21 until this proceeding had started.

22 MR. INGRAM: So then that concept letter, if
23 you will, once the property was acquired, that's prior to
24 stay?

25 MR. CROCKER: There are two concept letters.

1 One concept was with the dealerships combined, maybe two
2 of those, I'm not sure -- and all this is in the record --
3 and then the second concept was two separate freestanding
4 facilities.

5 MR. INGRAM: And the second one was prior to
6 the stay or after the stay?

7 MR. CROCKER: After the stay, shortly, very
8 shortly after the stay. We thought we were offering a
9 settlement proposal, and I can't discuss settlement
10 proposals, and I won't do that, that's outside the record.
11 But what we did was totally within the record.

12 MR. INGRAM: And just following along the same
13 line of this thought, you said that there as a five-year
14 lease. When was that lease up? Was that part of the
15 record?

16 MR. CROCKER: Right after '13.

17 MR. INGRAM: So the lease was up in 2013?

18 MR. CROCKER: I believe that's correct. He
19 thought he had to have a five-year lease in order for
20 Chrysler to approve his purchase of a dealership. He
21 already owned -- all of this is in the record -- he owned
22 the Toyota dealership two miles down the road. He bought
23 the Chrysler dealership with the intention of relocating
24 it and Chrysler's encouragement that it be relocated side
25 by side with the Toyota dealership. He couldn't get the

1 land. He was dealing with -- and again, this is in the
2 record -- people who were hard to deal with, and he
3 couldn't get the land that was necessary to put the
4 dealership there until shortly before the notice of
5 termination.

6 MR. PAINTER: The lease that he had when he
7 bought the place was a five-year lease. The lease was not
8 with Chrysler, it's with a private individual?

9 MR. CROCKER: It's with the disappointed
10 dentist who thought he was going to make a million dollars
11 in the car business that he bought the dealership from.
12 He owned the property -- that's in the record also -- he
13 owned the property and he still owns the property, he the
14 dentist. It was leased from him. The five-year lease has
15 expired; he's been there on a month-to-month tenancy since
16 then. The dentist is happy to take the money.

17 MR. PAINTER: After Mr. Atkission purchased the
18 dealership, did he in writing notify Chrysler that he was
19 dissatisfied with it and at the end of the lease would
20 like to move to a different location.

21 MR. CROCKER: He had discussions with Chrysler
22 before and during the time he was buying the dealership.
23 Chrysler was encouraging him at that time and he was
24 responsive to the encouragement to relocate it. He wanted
25 to relocate it, Chrysler wanted it to be relocated. That

1 occurred long ago.

2 MS. HARDY: Is that documented anywhere?

3 MR. CROCKER: It's in the testimony.

4 MS. HARDY: It is in the testimony? Okay.

5 MR. CROCKER: There's sworn testimony to that.

6 MR. PALACIOS: Mr. Crocker, regarding, I guess,
7 the issue about selling the dealership, was that subject
8 every brought up between Mr. Atkission and Chrysler. I
9 know you said there was a stay I guess towards the end,
10 but prior to that FCA gave testimony and said that they
11 had encouraged Mr. Atkission -- I'm not maybe stating
12 verbatim what was said, but there was some discussions
13 regarding a buy-sell.

14 MR. CROCKER: They went to him and wanted a
15 letter from him to them to authorize them to find him a
16 buyer for the Chrysler dealership. The Chrysler
17 dealership doesn't have much value unless you can link it
18 with the Toyota dealership. That wouldn't be part of the
19 deal and so that's why he was not excited about letting
20 Chrysler go find a buyer for the dealership. That's way
21 before the termination. And Chrysler in good faith came
22 to him and said, Let us find you a buyer. But they can't
23 handle the Toyota part of the deal and might not, and so
24 he was reluctant to sign that kind of a letter putting the
25 dealership on the market without the package.

1 MR. INGRAM: I'm sorry. I was reading part of
2 the time that you said that. Could you go over that
3 again? He didn't want to do the deal because he felt like
4 they had to be sold in a duo?

5 MR. CROCKER: Well, the two dealerships
6 together are worth more than either one of them is worth
7 separately, and the Chrysler dealership in its present
8 location is not worth very much at all. And as a result,
9 he didn't want to just sell the Chrysler dealership for
10 nothing. I don't know how much he had in it then, he's go
11 over six and a quarter million dollars in it now and he
12 really didn't want to walk away from all that money if
13 Chrysler was just going to sell the Chrysler dealership or
14 find a buyer for the Chrysler dealership.

15 MR. INGRAM: I guess as a business person I'm
16 trying to make the jump as to I'm trying to move this
17 store, I would like to have this piece of property but I
18 can't get it. I looked at a map of the area, it looks
19 like there's a lot of other property around, it seems like
20 I just would find a different piece.

21 MR. CROCKER: He's a very patient man. The
22 only way these two dealerships really are going to be
23 really profitable to anybody is to have them so close
24 together that they can have some -- they can feed off each
25 other. Like you would put four used car dealerships on

1 the four corners of a location and everybody likes that
2 arrangement because other people draw traffic that you can
3 use. And that's the same dynamic in the new car business,
4 particularly in Orange where there are only four
5 dealerships in the town. All of that, again, is in the
6 record.

7 MR. TREVIÑO: Mr. Crocker, could you elaborate
8 a little bit on the understanding from the very beginning
9 about moving the dealership? Because it wasn't in any of
10 the materials that I saw but apparently was in the record.

11 MR. CROCKER: It was in the record, it was
12 several things in the record that were in the record that
13 were not in the PFD, and you'd have had to go get the
14 testimony. And I will tell you, you don't want to go get
15 the testimony and all the exhibit that go into one of
16 these hearings, nobody should invest that much time. You
17 deserve a summary from the parties, from your counsel, and
18 you don't really want to go into the details like that,
19 but you do need a full summary, a full and complete
20 summary.

21 Now then, let me be sure I understand your
22 question. I got sidetracked, I sidetracked myself.
23 Forgive me.

24 MR. TREVIÑO: Sure. You mentioned that there
25 was an understanding from the very beginning that this

1 dealership should be moved.

2 MR. CROCKER: Yes.

3 MR. TREVIÑO: And in the materials that I saw,
4 I didn't see that come across in any kind of meaningful
5 way, but apparently it is part of the record, and if it's
6 not, I don't want to hear about it.

7 MR. CROCKER: It is part of the record.

8 MR. TREVIÑO: But if it is part of the record,
9 I just wanted you to elaborate on that to get a better
10 understanding of that.

11 MR. CROCKER: Cecil testified at the time of
12 the hearing that when he bought the dealership, Chrysler
13 was there to give him his franchise and they talked about
14 relocating the dealership. It was Chrysler's expressed
15 desire, their representative's expressed desire that the
16 dealership be relocated, and it was his expressed desire
17 to Chrysler that the dealership be relocated. That's at
18 the time of the acquisition of the dealership. It's no
19 more than that but no less than that.

20 MR. TREVIÑO: Does staff have a comment on
21 that?

22 MR. AVITIA: Member Treviño, your question
23 about relocation information being in the record, the ALJs
24 do talk about the relocation issue starting on page 8 of
25 the proposal for decision.

1 MR. TREVIÑO: Right, I did see that. But what
2 I was getting at was a discussion that there was some
3 discussion prior to or during the purchase of the
4 dealership. That's what I was referring to.

5 MS. LINGO: Yes, Member. Mr. Crocker is indeed
6 very accurate and very correct when he says that Mr.
7 Atkission gave testimony that prior to the signing of the
8 contract for purchase agreement that there were some
9 discussions about relocation. That is in testimony. To
10 reemphasize the point that Daniel Avitia is making is that
11 that was considered by the ALJs and that the portions
12 regarding the relocation were considered by the ALJs and
13 the ALJs' findings were that that is not appropriate for
14 this consideration.

15 MR. TREVIÑO: Thank you.

16 MR. WALKER: A quick question I guess for
17 Michelle or David. Can you explain to me, Mr. Crocker
18 made a mention about Chrysler selling the franchise. I
19 don't know how a car dealer franchise works. Does
20 Chrysler or Ford or GM, let's just say that today we
21 cancel Mr. Atkission's dealership, how does Chrysler go
22 about creating a new dealer? Do they say Johnny, what
23 will you offer us for this dealership, or is it hey, if
24 you're financially, we will give you this authority to go
25 do it. Like if I wanted to get an NFL football team -- I

1 think the last one was Bob McNair, he paid \$500 million to
2 the NFL to get the franchise and they split it amongst the
3 teams. So how does a franchise work with a car dealership
4 with respect to is Chrysler going to sell the franchise
5 again or do they just give it to the next guy that shows
6 the ability to do that?

7 MS. LINGO: Member Walker, in this particular
8 case, the testimony is that Chrysler has an intention to
9 establish a franchise dealership in Orange and that they
10 intend to go with a new and different dealership, dealer
11 principal.

12 MR. WALKER: Didn't answer my question.

13 MR. PALACIOS: I think Ms. Hardy could probably
14 answer that question.

15 MS. LINGO: Because I'm trying to answer it
16 within the frame of the evidence in record, and the answer
17 to your question is that there are a number of ways that
18 that can happen that were not discussed in the testimony
19 or at the hearing, but the franchise is not going to
20 transfer. Under the law it establishes that a new entity
21 or a new dealer principal will need to come in and apply
22 for a franchise license.

23 MR. PALACIOS: Board Member Walker, I guess to
24 answer that, Board Member Hardy, can you address Member
25 Walker's question regarding the actual -- regarding a

1 termination and reacquisition.

2 MS. HARDY: Reacquisition, again, sometimes you
3 have to vet out candidates based on the health of the
4 candidate financially, experience in the business and so
5 forth, if they've had franchises before, we'll look at
6 previous performance. So you need to be a qualified
7 candidate, but that can be an open proposal process that's
8 out there. Some dealers may have raised their hands,
9 sometimes they're brought forth, it just depends, but
10 there is a vetting out process that an individual has to
11 go through before they can be approved for a franchise
12 agreement.

13 MR. WALKER: All that I understand, but the one
14 thing that has never been answered to me is do I have to
15 pay for that or do I just get it given to me.

16 MS. HARDY: Yes. There's investment required.

17 MR. PALACIOS: Let me answer, I guess, to
18 follow up on Board Member Hardy, just from my experience,
19 the investment typically in a car dealership involves two
20 primary investments. Typically the biggest dollar amount
21 is regarding blue sky. That is the value of the right to
22 own the franchise, so good will, I guess is the common
23 word in business vernacular. And then the other would be
24 fixed assets and so forth, and then I guess a third would
25 be real estate if there's real estate involved. In the

1 case of a termination, the dealership in essence goes back
2 to the manufacturer in which case if they then reappoint
3 the dealership, there would be no blue sky involved, so
4 whoever would follow up in this particular case would not
5 have to pay blue sky, they would only be responsible for
6 paying for the cost of whatever hard assets are available
7 in the dealership.

8 MR. WALKER: But FCA does not own any hard
9 assets with respect to this franchise.

10 MR. PALACIOS: No.

11 MR. WALKER: Yes, Mr. Crocker?

12 MR. CROCKER: May I respond to your question?

13 MR. WALKER: Yes, sir.

14 MR. CROCKER: The dealership, the factory will
15 never take money for its franchise.

16 MR. WALKER: You've answered that question.

17 MR. CROCKER: It awards the franchise and then
18 the dealer makes the investment he is describing.

19 MR. WALKER: I get that part of it. I just
20 didn't know if there was ever --

21 MR. CROCKER: And when we talk about Chrysler
22 finding a buyer, they're talking about finding somebody
23 else to buy the franchise, not them.

24 MR. WALKER: It could be Mr. Palacios, who owns
25 a car dealership.

1 MR. CROCKER: Absolutely.

2 MR. TREVIÑO: Mr. Crocker, could you briefly
3 talk a little bit about the Cecil money and the
4 investment?

5 MR. CROCKER: I would be delighted. Thank you.

6 MR. TREVIÑO: But briefly, please, if you
7 could, in the interest of time.

8 MR. CROCKER: There was an old judge I heard
9 use the phrase "mercifully brief, please be mercifully
10 brief." I will.

11 The reason you don't understand the Cecil money
12 is because you've never seen anybody disregard assets
13 period that are on a financial statement. That's what the
14 ALJs did. Six and a quarter million dollars went into
15 that dealership from Cecil's other pocket and it went on
16 the books as loans, and they were not documented in the
17 classic way that people document loans, therefore, the
18 ALJs said it's not a loan, and they disregarded Chrysler's
19 suggestion in their brief that said it's a capital
20 contribution with no terms of repayment. The ALJs quoted
21 that on page 27 of their PFD, and they wound up
22 disregarding those assets totally just because they were
23 on the wrong line. That money is on the books in the
24 dealership but it's neither fish nor fowl, as far as the
25 ALJs were concerned, and so they disregarded it.

1 If you've ever filed a financial statement and
2 put something on the wrong line and instead of having it
3 understood that it goes on this line and that's where
4 we'll count it, and instead just disregard it. You put
5 your life insurance net worth of your policies on the
6 wrong line on the financial statement you gave the bank so
7 they're not going to give you credit for it. They'll at
8 least come back and tell you put it on the right line.

9 MR. WALKER: What line was it on?

10 MR. CROCKER: It was on the short-term loans
11 line which is what he was having them use the dealership
12 money for, the money he had invested, a lot of it, because
13 he likes to replace the floor plan on the cars that he has
14 in inventory, and that's a short-term use.

15 MR. WALKER: How much money as on the short-
16 term notice on the statement?

17 MR. CROCKER: I honestly can't remember but the
18 total that was shown on the statement would add up to six
19 and a quarter million dollars. Part of it was four
20 million plus worth of losses. It was split between what
21 wasn't being used at the moment for floor plan and what
22 was being used at the moment for floor plan, and that's
23 why those two had to be added together to find out how
24 much money Cecil had in the dealership cash right then.
25 It was over \$2 million for both net worth and working

1 capital, if you treat those funds correctly.

2 MR. INGRAM: Member Walker, it's tab 37, I
3 believe you'll see it that it's 1.2 million.

4 MR. PALACIOS: For the record, what time period
5 do these financials -- you're reading from this manual
6 that was presented by FCA, what's the time period?

7 MR. INGRAM: This is January to December.

8 MR. PALACIOS: What year?

9 MR. CROCKER: Fifteen.

10 MR. PALACIOS: Who gave us this?

11 MR. INGRAM: FCA.

12 MR. INGRAM: I want to go back to the real
13 estate, but I don't want to jump off Cecil yet until
14 everybody is done with the Cecil money.

15 MR. PALACIOS: I just have a question, Mr.
16 Crocker. I guess looking at the information presented in
17 the ALJs' PFD, the dealership has always been in a
18 negative net worth situation.

19 MR. CROCKER: On paper only.

20 MR. PALACIOS: On paper. Yes. On paper. So
21 my question then, given that, why did the bookkeeper just
22 not simply do a reclassification?

23 MR. CROCKER: That's what we tried to do in
24 November before the hearing and that was what Chrysler was
25 poking fun at, to some degree, because it was a last ditch

1 effort to try to get them to understand where the money
2 was. I believe, if you look at that statement you have
3 before it that is the dealership's operating statement for
4 the year-end of 2014 -- I'm sorry -- Cecil's money at that
5 point in time would include -- I don't want to misstate
6 this -- floor plan liability plus total -- no, I think at
7 that point in time it had all been consolidated in other
8 notes and contracts. It's down on line 42, it's three
9 million, seven, twenty-one Cecil had in the dealership at
10 that point in time. That was the line that Chrysler
11 said -- the Chrysler manual, Chrysler didn't instruct
12 this, but if you have a note from owner, it's supposed to
13 go in other notes and contracts. It's three million,
14 seven, twenty-one is the cash money he had in the
15 dealership available at the time.

16 And the ALJs completely did not understand
17 that, completely decided that they would ignore that asset
18 represented in that fashion. There's almost no other
19 debt, there's nothing but short-term current debt, just
20 operating debt.

21 MR. WALKER: The 3.7 million is long-term debt.

22 MR. CROCKER: That's exactly right, and it was
23 properly reclassified as a long-term debt because Cecil
24 was not making a short-term demand to be repaid, all he
25 wanted was interest on it.

1 MR. WALKER: So what you're saying is that Mr.
2 Atkission infused cash, not as stockholder equity but he
3 said I'm going to lend the dealership let's call it \$3.7
4 million, you owe me this money back. And I've kind of
5 gotten into some of these in our own companies, but you
6 really should have another document that's a promissory
7 note that exists that says: Hey, here's where there's a
8 note that I'm lending this money to you that's been signed
9 by Mr. Atkission as the loaner and as the lende, both of
10 those parties. Did that document exist?

11 MR. CROCKER: No.

12 MR. WALKER: You've got to have a separate
13 transaction here.

14 MR. CROCKER: I understand that, and that is
15 the norm. He's dealing with two pockets in the same pair
16 of pants.

17 MR. WALKER: Well, I do that too. But you
18 still have to have a document that shows that this is how
19 we run our business.

20 MR. CROCKER: In my opening statement, I
21 mentioned that his documentation for those loans has been
22 bookkeeping entries, period. The money is there. And if
23 he wanted to, he could move it down into equity, and as an
24 LLC as a disregarded entity, he could do that with no tax
25 consequences. He doesn't keep books that way, he never

1 has. He started in the eighties and he's still doing it
2 and still wants to do it. It's no harm.

3 MR. PALACIOS: Mr. Crocker, I think I missed
4 this. Can you explain to me again the 2015 year-end
5 financials show a \$3.7 million --

6 MR. CROCKER: I think I'm looking at '14 rather
7 than '15. See right up at the top is it the '14
8 statement? Six of one, half a dozen of the other

9 MR. PALACIOS: Okay. So I'm just trying to
10 account for the \$6.25 million.

11 MR. CROCKER: You have to add to that retained
12 earnings of \$3 million negative.

13 MR. INGRAM: He lost \$3 million.

14 MR. CROCKER: He had lost the money, the money
15 he lost.

16 MR. WALKER: So you're adding owner's equity of
17 a negative \$2 million that he's lost in the deal, plus
18 you're adding the long-term debt, that's where they're
19 coming up with the 6 million investment in the dealership.

20 MR. CROCKER: Exactly. That's how the 6.25-
21 was accounted for, and that's 2.973- negative dividends.

22 MR. DUNCAN: If I may, members, if you will
23 look at the findings of fact on page 70.

24 MR. WALKER: Whose book?

25 MR. DUNCAN: The actual PFD, the proposal for

1 decision, in the findings of fact from 51 to 54, 51 does
2 give a classification that the ALJs find the unsecured
3 subordinated debt lacking the paperwork normally expected.
4 But that is what they call it.

5 MR. WALKER: What page, David?

6 MR. DUNCAN: Sorry. Page 70 of the PFD,
7 findings of fact 51 through 54 specifically talk about the
8 amounts, what the judges found. I just wanted to point
9 you to their conclusion.

10 MS. HARDY: And if I heard you right, most of
11 the 6.2- was to offset floor plan expenses?

12 MR. CROCKER: Yes. He doesn't want to owe
13 anybody anything except GMAC or Ford Motor Credit, or
14 whoever it is, \$5,000 per new unit because that way he
15 gets cheaper insurance. And he did not have 100 percent
16 of that done in the Orange dealership because -- just
17 because, but about half of the floor plan amount for the
18 dealership, as you can tell by looking at the statement,
19 was his money as opposed to the floor plan source's money.

20 MS. HARDY: Okay. I guess I would hope any
21 investment into the store would have seen additional
22 tangible impact maybe on advertising, promotion, signage,
23 more inventory, all those things that would have changed
24 performance.

25 MR. CROCKER: He doesn't want to build a new

1 sign, he can't keep good people there because they don't
2 like to work in that -- it's hard to keep good people
3 there, let's put it that way, and the advertising he has
4 invested in has not worked, people can't find it.

5 MR. GRAHAM: And so at the end of the day --
6 we've talked about this Cecil money now for quite a long
7 time -- at the end of the day, what we're being told is
8 that in the course of a determining factor on the three
9 items listed in the termination agreement, two of which
10 are related to --

11 MR. CROCKER: No cash.

12 MR. GRAHAM: -- no cash, in weighing those two
13 items, the 6.2 million Cecil money that was in the wrong
14 line item was not given any consideration.

15 MR. CROCKER: That is correct. And the
16 dealership had plenty of net worth and plenty of working
17 capital money in hand. It never failed to pay its bills.
18 Any dealership that doesn't have adequate working capital
19 will have that kind of problem. And the rest of that is,
20 therefore, those two of the three specific bases for
21 termination fail, can't be sustained. That leaves you
22 with just one which is statutorily insufficient based on
23 the statement at the bottom of 455: the desire of a
24 manufacturer, distributor or representative for market
25 penetration does not by itself constitute good cause. So

1 this matter should be dismissed because Chrysler can't
2 carry its burden of proof.

3 MS. HARDY: When net working capital is
4 insufficient, there's usually regular notice to a dealer
5 on that point. Is that in the record that that was done?

6 MR. CROCKER: No such notice was ever given.
7 He's done that in every dealership that he owns. That's
8 the way he operates all his dealerships. Two others of
9 them are Chryslers. And some of the factories have -- and
10 I believe this is in the record -- some of the factories
11 have a line item in their financial statement that says
12 notes due owners, and that's considered under most
13 circumstances to be invested equity, invested capital.
14 For tax reasons, people wanted to loan the money to the
15 dealership back when it was just corporations rather than
16 buy stock and have a tax consequence of getting the money
17 back out.

18 MR. CLOUARTE: Just for the purpose of the
19 record, FCA US does object to that statement that nothing
20 was included in the record with regard to notice of
21 working cap deficiencies.

22 MS. HARDY: Thank you.

23 MR. CROCKER: Nothing that I remember, let me
24 put it that way. If he says they did talk -- well, they
25 sent some notice letters, those letters that you've got in

1 your thing, and they mentioned. Cecil disregarded them,
2 for whatever reason, didn't think they surely could mean
3 that problem.

4 Any other questions?

5 MR. WALKER: Just a quick question. I don't
6 think it's going to reflect in the record probably. Let's
7 go back to the 19 franchise dealerships. Can you kind of
8 just, without getting real specific, can you give us an
9 idea where Mr. Atkission's realm of domicile is?

10 MR. CROCKER: I gave you just a thumbnail
11 sketch. They're in Del Rio, Uvalde, Kerrville, Burnet,
12 someplace just southwest of San Antonio -- what's the name
13 of that town down there, Cecil, real close to San Antonio,
14 I thought -- Hondo and Orange.

15 MR. WALKER: So primarily in the southwest,
16 southern part of Texas, close to San Antonio.

17 MR. CROCKER: Everything except Orange is west
18 of Interstate 35.

19 MR. WALKER: So this is the only dealership
20 really -- well, this and Toyota.

21 MR. CROCKER: This and Toyota are both over in
22 Orange.

23 MR. WALKER: And everything else is kind of
24 over on the western half of the state, southwest.

25 MR. CROCKER: Exactly.

1 MR. WALKER: Okay. Thank you.

2 MR. INGRAM: I would like to go back to the
3 real estate just real quickly.

4 MR. CROCKER: Certainly.

5 MR. INGRAM: Mr. Crocker, I'm reading directly
6 from the PFD, so I won't try to read all of it because I
7 don't want to bore you, but it looks like in the PFD --
8 and I'm on page 9 of the PFD -- that towards the end of
9 2013 he acquired the land that was necessary for building
10 the dealership next to Toyota. That's what it looks like.

11 It says: In 2011 through 2013 he purchased the land next
12 to his Toyota dealership. And I don't want to get ahead
13 of you if you want to get to it. It's page 9 of the PFD.

14 And so I'm jumping now then, it looks like in
15 November 2013 it was the first ever request letter, and
16 that makes sense because it seems like he had just
17 acquired the property and now he provided a request
18 letter. That makes sense. Then Chrysler came back and
19 said that they needed a lot more details, and then in
20 December 2013, Daniel Fritz actually called and emailed
21 him explaining that they needed more information. And
22 then going down to page 10, in February of the next year,
23 Mr. Fritz also toured the property with Mr. Atkission and
24 he reminded him about the request for more information.
25 Then in July 2014, eight months after submitting the first

1 one, he provided to FCA a few details about the proposed
2 relocation, specifically a one-page plat which, according
3 to, I guess, the testimony, was unsettling to FCA in that
4 it still lacked the information needed to evaluate the
5 relocation request and it was a different layout than
6 explained to Mr. Fritz previously.

7 So I'm struggling with why during all of this
8 time, there's a significant amount of time that we did not
9 get the information that was needed to Chrysler and we
10 didn't make the plans and we didn't do all of the things.

11 I understand that it's an expense, but you've got to get
12 plans for its approval.

13 MR. CROCKER: I may need to apologize to you.
14 I had recalled that there were three purchases of land --
15 I may be wrong about that -- and that the two smaller
16 purchases were much closer, much later than that one
17 purchase. The first purchase was probably not sufficient
18 for the relocation of the dealership, and the last two
19 purchases I think occurred after 2013 and were
20 incorporated in the concept.

21 Cecil, am I wrong about that?

22 MR. ATKISSON: (Speaking from audience.)
23 That's correct.

24 MR. CROCKER: And again, this will have been
25 the testimony at the hearing. The last two pieces

1 purchased enabled the separate freestanding facilities,
2 and it was that concept that was offered when he finally
3 got those last two pieces of land. He was negotiating
4 with the City of Beaumont for one of them and with people
5 who were very hard to deal with on the other one.

6 MR. INGRAM: So those last two pieces were
7 purchased when? In the record do we know?

8 MR. CROCKER: At the end of the day, it really
9 doesn't make any difference.

10 MR. INGRAM: Okay. Why?

11 MR. CROCKER: I use my acid test question of:
12 So what? The point is that the stay is inappropriately
13 applied to a request to relocate or to sell. That's the
14 whole purpose here. It doesn't make any difference what
15 the fact structure was, and I think I can defend the fact
16 structure I've given you, but it really doesn't -- we
17 shouldn't be sidetracked into the details of the fact
18 structure. Just view it as a simple request to relocate.

19 Forget about whatever land it was, whatever
20 kind of dealership it is, or anything, it's a simple
21 request to relocate or a simple request to sell a
22 dealership, either one after notice of termination, and we
23 are prohibited from requesting the approval to relocate or
24 we are prohibited from requesting approval for a sale
25 because of the stay. That is an improper application of

1 the stay. You do not want to saddle the dealerships of
2 Texas -- the dealers of Texas with that interpretation of
3 the statute.

4 And it doesn't make any difference about the
5 facts, let's don't get caught up. I got caught up in my
6 presentation to you trying to answer some of the questions
7 I was dying to answer sitting over there and used up too
8 much time. There's still big issues we needed to talk
9 about we haven't touched.

10 MR. GRAHAM: I have a question for counsel, if
11 I could right quick. Would you just explain -- I mean, I
12 think it may be obvious but I don't want to assume
13 anything -- section 8 of the items that we are to consider
14 that states that apparently no consideration is to be
15 given on a single basis to sales penetration in the market
16 area.

17 MR. CROCKER: You have it on your desk in front
18 of you if you want to look at it.

19 MR. GRAHAM: Well, I just wanted to get -- I
20 mean, I think it's pretty clear but I just don't want to
21 make any assumptions that that in itself is not an item
22 that a manufacturer can try to terminate a dealer for.
23 Correct?

24 MS. LINGO: You are correct. It is an element
25 of the statute that a manufacturer may not terminate

1 solely for the reason that a manufacturer desires greater
2 market penetration.

3 MR. GRAHAM: Just wanted to make sure my
4 understanding was correct, so thank you very much.

5 MR. CROCKER: Any further questions, Mr.
6 Chairman?

7 MR. PALACIOS: Any further questions?

8 MR. CROCKER: I would be delighted to answer
9 several but I can't offer them.

10 MR. PALACIOS: I understand.

11 Are there any other questions for Mr. Crocker?

12 (No response.)

13 MR. PALACIOS: Okay. Thank you, Mr. Crocker.

14 MR. CROCKER: Thank you.

15 MR. PALACIOS: Okay. Fellow board members, as
16 you know -- well, let me go over a couple of things and
17 then I'll ask Mr. Duncan to go over, I guess, our options.

18 As we all know, we have been presented with a proposal
19 for decision from the administrative law judges and that
20 decision essentially is a decision to terminate Mr. Cecil
21 Atkission's franchise in Orange, Texas. We have seven
22 factors that we must consider, including all relevant
23 circumstances, and I will say that this is a very, very
24 important case. This is something that I know all of you
25 take very, very seriously and we need to make sure that we

1 have thoroughly reviewed the factors and listened to the
2 testimony before we render a decision.

3 But before we go any further, I want to just
4 reach out to Mr. Duncan, and again, if you would just
5 please go over, I guess, the options that we have as a
6 board.

7 MR. DUNCAN: And I would point to the
8 introduction that Mr. Avitia made where in addition to we
9 have gone over several times the 2001.058(e) wording
10 stating you may change a finding of fact or conclusion of
11 law made by an ALJ or vacate or modify an order issued by
12 the ALJ only if the agency determines: (1) that the
13 administrative law judge did not properly apply or
14 interpret applicable law, agency rules, written policies
15 provided under another section, or prior administrative
16 decisions; (2) that a prior administrative decision on
17 which the administrative law judge relied is incorrect or
18 should be changed; or (3) that a technical error in a
19 finding of fact should be changed. The agency shall state
20 in writing the specific reason and legal basis for any
21 change made under this subsection.

22 In addition to that, you could adopt the PFD as
23 it is, or as Mr. Avitia referred to, we have in past
24 cases -- you may recall the wonderful Audi case, we
25 remanded it to the SOAH ALJ for consideration of

1 additional facts. So there's always that possibility as
2 well that if there is some question you feel was
3 unanswered in the ALJs' consideration, you can refer it
4 back to them with a specific direction to elicit from the
5 parties specific factual information.

6 MR. PAINTER: May I ask also that you give a
7 definition in a civil case, preponderance of the evidence
8 and evidence beyond a reasonable doubt, two separate
9 things.

10 MR. DUNCAN: Very different standards. Thanks,
11 Sheriff Painter. The standard in this case is that the
12 manufacturer must prove by a preponderance of the evidence
13 that they have proven that the factors warrant
14 termination.

15 In the executive summary in footnote 1, we've
16 given the definition of preponderance of the evidence.
17 It's on page 3 of 15 of your executive summary or the
18 materials. Black's Law Dictionary defines preponderance
19 of evidence to mean the greater weight of the evidence,
20 superior evidentiary weight, though not sufficient to free
21 the mind wholly from reasonable doubt is still sufficient,
22 to include to a fair and impartial mind to one side or the
23 other. Basically it's 51 percent, 50.1 percent, that's
24 the way lawyers refer to it.

25 Versus in a criminal case, beyond a reasonable

1 doubt is a much higher standard. I think the best analogy
2 I've ever heard is -- and I've seen this actually used in
3 front of a jury -- you put a mouse in a box, you open up
4 the box and there's a hole so you're pretty sure the mouse
5 is gone, you put a mouse and a cat in a box and you open
6 up the box and the mouse is gone and there's a hole, did
7 the cat eat the mouse or did the mouse get out? That's a
8 reasonable doubt. There's just a sliver of doubt in your
9 mind whether the cat ate the mouse or the mouse got out of
10 the hole. So it's a much higher standard, it means if
11 there's just a shade of doubt in your mind, you should
12 probably find for the defendant.

13 In a civil case like this and by statute it's
14 preponderance of the evidence in this case which is just
15 tilting the scale slightly to one side.

16 MR. WALKER: So David, under the amicus brief
17 that's been filed by TADA in this case by Ms. Phillips,
18 she states that: The Texas Department of Motor Vehicles
19 board, not SOAH but the board, is to determine as to
20 whether good cause has been established by the
21 manufacturer, distributor or representative for the
22 proposed termination. This responsibility does not fall
23 on the department as referred to in the proposal for this
24 decision. Under the law under Section 2301.453, after a
25 hearing the board shall determine whether the party

1 seeking the termination or discontinuance, as established
2 by a preponderance of the evidence, that there is good
3 cause for the proposed termination. Although the board
4 may delegate its powers, the power to issue a final order
5 is not delegated in termination of any dealership. The
6 board has ultimate final say in terminations of a
7 dealership.

8 True or false?

9 MR. DUNCAN: Absolutely correct.

10 MR. WALKER: And it says here that even though
11 they can delegate powers, that there has to be the
12 preponderance of all the evidence has to show in favor of
13 the manufacturer. Is that correct?

14 MR. DUNCAN: That's correct. But you are
15 limited in how much you can change a PFD and that you're
16 not supposed to revisit the evidentiary considerations of
17 the ALJs, to re-hear the evidence and reconsider what they
18 did unless they were clearly wrong on a fact or clearly
19 wrong on the law. That's a generalization.

20 MR. PAINTER: And then you have to specify
21 what?

22 MR. DUNCAN: Very clearly. You would have to
23 go through, if we were to draft such an order, it would go
24 through, state the reasons and then state the specific
25 findings of fact and conclusions of law that you found to

1 be wrong. It would go through and pull them out and say
2 they were wrong and replace them presumably with something
3 else.

4 MR. INGRAM: It seems like one of the findings
5 of fact that Mr. Crocker is stressing most often is the
6 statutory stay aspect, and so I'm just trying to work
7 through if that is an incorrect finding of fact in the way
8 that it was handled by the ALJs.

9 MS. LINGO: Member Ingram, Michelle Lingo, for
10 the record.

11 The characterization and the argument, I
12 believe, is very, very creative. However, the law in
13 Occupations Code 2301.803 requires that a person who's
14 affected by a statutory stay imposed by the chapter, by
15 Chapter 2301, may request a hearing to modify, vacate or
16 clarify the extent and the application of the statutory
17 stay. By statute, that hearing in this contested case is
18 at SOAH in front of an ALJ. So if two parties who are a
19 part of a contested case matter, if one presents to the
20 other, well, I'd rather do a buy-sell and I present and
21 everybody is happy and no one complains or no one brings
22 forward a problem but the matter is dismissed, that's
23 fine. When you skip the step of asking and seeking an
24 order -- which is one of the few times that an interim
25 order could come here during a contested case hearing for

1 you to decide is the clarification of the statutory
2 stay -- in absence of that, we have no problem.

3 In this case, Atkission brought forward a
4 complaint that the request to relocate was denied, FCA
5 responded and said, I have a plea to the jurisdiction,
6 there's a statutory stay in place. And our letter, the
7 staff's letter back to Atkission didn't say you can't, it
8 said the proper procedure to do this is to ask the ALJ for
9 permission to ask for a hearing, present your evidence to
10 the ALJs. The ALJs have ruled with a letter, it's an
11 order and said the relocation issue is inappropriate in
12 this hearing, we don't have anything before us. Then our
13 letter came out saying it's not a ripe issue right now but
14 here's how you get to us. And they could have, they
15 didn't go forward with that letter, they didn't attempt
16 that, but that is the proper procedure.

17 MR. INGRAM: Well, I guess I understood it
18 until the very end and you said that they could have but
19 didn't.

20 MS. LINGO: Yes. Member Ingram, they were on
21 the cusp of going into the hearing on the termination
22 matters. The ALJs ordering letter, order letter number 8,
23 indicated the parties had agreed to the procedural
24 schedule for a long, long time, that they weren't going to
25 pull back, and they didn't have that in front of them, so

1 the ALJ declined the relocation issue.

2 With regard to how the staff approached it, we
3 had the complaint and we had the plea to the jurisdiction
4 asserting that that is not appropriate at that time
5 because there is a statutory stay. And our letter said,
6 That's correct, there's a statutory stay in place, here's
7 the best way to get, you could have, you can, you have to
8 follow the procedure. So we didn't actually say no, you
9 can't do this, we pointed them in the right direction of
10 what it is that you have to do, and .803 lays that out for
11 you. You have to go to the ALJs and ask -- a hearing has
12 to be conducted by the ALJs at SOAH. At hearing you ask
13 to modify, vacate or clarify the extent and the
14 application of the statutory stay, and then once you have
15 an order in hand, that order can be appealed. An interim
16 interlocutory order could come back before you, but they
17 were already down the road and ready to go.

18 MR. GRAHAM: And so they never took that step?

19 MS. LINGO: That's correct.

20 MR. WALKER: Who issued the stay?

21 MS. LINGO: It's automatic based on the statute
22 just as soon as the protest is filed, and then when we
23 issue a letter assigning the mediators, we tell them it's
24 in place.

25 MR. WALKER: The mediators or the ALJ?

1 MS. LINGO: The mediators. When the mediators
2 letter goes out saying we've assigned mediators, it
3 notifies them the statutory stay is in place in accordance
4 with the statute, and when Daniel Avitia's letter of
5 notice of hearing goes out, it reminds you that the
6 statutory stay is in place, continues to be in place.

7 MR. WALKER: I thought the stay meant that the
8 manufacturer couldn't take any further actions to disrupt
9 the ongoing business of the dealer.

10 MS. LINGO: Well, that certainly could be
11 considered violation of a statutory stay if that happened.

12 It's basically status quo. The manufacturer continues to
13 provide vehicles, the dealership continues to sell, and
14 the statutory stay imposed by the chapter remains in
15 effect until vacated or until the proceeding is concluded
16 by final order or decision.

17 MR. WALKER: But how does the statutory stay
18 affect the request for movement of the dealership? Why
19 would that affect that?

20 MS. LINGO: Sir, as part of FCA's response and
21 plea to the jurisdiction, they did assert that they would
22 then be forced to defend themselves on two fronts instead
23 of having one, so their rights and obligations are
24 affected. I mean, they make the argument that that
25 statutory stay is in place as protection to them as well

1 and that a consideration of a relocation request makes
2 them stop and have to evaluate it. And the letter that
3 they sent that is part of the evidence in the record, that
4 they sent in response to that request to relo said, once
5 again, I don't have enough information. And they were
6 very prompt, they did it in less than one month, they said
7 I don't have the information. I believe one of the items
8 cited is that you didn't give me, for example, the square
9 footage of the facility you're proposing.

10 MR. WALKER: Well, it was that you didn't give
11 me a drawing of the facility, that's what it was.

12 MS. CARAWAY: But that would have been a
13 separate hearing before the ALJ.

14 MR. WALKER: But it couldn't be presented,
15 apparently, because if there's a stay, you can't take and
16 present anything going forward, and Chrysler basically
17 says we're not going to look at it because there's a stay
18 in place due to the fact that there's a proceeding going
19 on to terminate the dealership.

20 MS. LINGO: It is possible as a matter of
21 judicial efficiency that the stay can be lifted for the
22 limited purpose of allowing that.

23 MR. WALKER: And how would Mr. Crocker or Mr.
24 Atkission have requested that?

25 MS. LINGO: Under the law they would have

1 requested a hearing before the ALJ and gotten an order
2 either lifting the stay to allow for that limited purpose
3 of allowing that to be either a separate proceeding or
4 added to the current proceeding, and the order to whoever
5 it's not favorable could have taken an interim appeal to
6 this board. But it could have been if that was judicially
7 efficient and appropriate.

8 MR. PALACIOS: Thank you, Ms. Lingo.

9 Do we have any other questions before we
10 proceed?

11 (No response.)

12 MR. PALACIOS: Hearing none, I will entertain a
13 motion. Board Member Graham, let me just ask is this a
14 decision in favor of the ALJs' motion?

15 MR. GRAHAM: You know, I think we've got --

16 MR. PALACIOS: If not, I want to take a recess.

17 MR. GRAHAM: Yes. Let's take a recess.

18 MR. PALACIOS: Given the complexity and the
19 severity of this case, I'd like to take a recess.

20 MR. WALKER: Wait, wait, wait. Let's think
21 about what you're doing. Are you taking a recess or are
22 you asking to go into an executive session? A recess
23 means we're going to take a break and go to the bathroom.
24 What are we doing?

25 MR. PALACIOS: This is a recess. We want time

1 to confer with counsel.

2 MR. WALKER: That's an executive session.

3 MR. PALACIOS: We can't do it in executive
4 session.

5 MR. WALKER: I think you can.

6 MR. PALACIOS: Counsel?

7 MR. DUNCAN: If one member wants help drafting
8 a motion, I can help one member draft a motion and not be
9 in executive session.

10 MR. WALKER: But you have the right, I believe,
11 to go into executive session, it's posted on our agenda
12 that we can call an executive session.

13 MR. PALACIOS: I guess my concern is I don't
14 want to make any decisions in executive session.

15 MR. WALKER: We can always go into an executive
16 session to confer for legal advice. We can't take and go
17 in there and draft something, but we can go into an
18 executive session and discuss what the options are that
19 the board has before them as presented from legal counsel.

20 True or false?

21 MR. DUNCAN: Yes, but that's all we could
22 discuss.

23 MR. PALACIOS: I just want to make clear then
24 that if we go into executive session that this case, we
25 don't discuss the merits, we don't discuss any testimony.

1 MR. WALKER: No decision can be made.

2 MR. PALACIOS: There will be no decisions made.

3 MR. WALKER: But we can get legal advice as to
4 what options are available to us as a board. That is
5 correct.

6 MR. DUNCAN: We couldn't draft a motion.

7 MR. WALKER: That is correct.

8 MR. PALACIOS: Again, I'm more concerned with
9 drafting Board Member Graham's motion, but if you'd like
10 some time to confer with counsel, I'm open to that, but
11 again, it will be a very, very, very brief meeting, and
12 then you'll confer with Board Member Graham.

13 MR. INGRAM: If you're saying that you can
14 confer privately --

15 MR. PALACIOS: Well, I think Board Member
16 Walker wants to confer.

17 MR. WALKER: I just would like to know what all
18 of our options are. I mean, I've got some good ideas
19 about what all options are available to the board.
20 There's multiple things we can do, obviously.

21 MR. PALACIOS: Let's go ahead and break. I
22 will call this board into executive session. It is
23 approximately 11:39. I can assure you there will be no
24 decisions rendered regarding this case. We will not
25 discuss the merits of the case either way, we just need

1 some time to -- there's the script.

2 We will go into closed session under Texas
3 Government Code, Sections 551.071, 551.074 and 551.076. I
4 anticipate being in executive session for no more than ten
5 minutes. We'll convene in open session after that. With
6 that, we're recessed.

7 (Whereupon, at 11:39 a.m., the meeting was
8 recessed, to reconvene this same day, Thursday, January 5,
9 2017, following conclusion of the executive session.)

10 MR. PALACIOS: It is 12:01 p.m. on January 5,
11 2017, and the Board of the Texas Department of Motor
12 Vehicles is now in open session. We want to take note that
13 no action was taken in closed session.

14 At this point I believe we have a motion to be
15 presented by Board Member Graham.

16 MR. GRAHAM: Thank you, Chairman.

17 I do have a motion, I'll be glad to make that
18 motion, and of course, if it receives a second, I'll be
19 glad to give my thought process behind where I'm going
20 with this. So I'll begin by making a motion: I move to
21 remand this case back to the State Office of
22 Administrative Hearings to further clarify the legal
23 status of the dealer's financial contributions to the
24 business and how that money does or does not support the
25 manufacturer's proposed termination under their December

1 19, 2014 termination letter, sections beginning on page 7,
2 working capital obligations, and page 8, net worth
3 obligations. That is my motion, sir.

4 MR. PALACIOS: Thank you, Board Member Graham.
5 Do I hear a second?

6 MR. TREVIÑO: I'll second.

7 MR. PALACIOS: All right.

8 MR. GRAHAM: So here's where I'm going with
9 this. On the document from Chrysler Group, dated December
10 19, 2014, they list three primary items to which if those
11 are not resolved, this franchise agreement will be
12 terminated. Those items are sales performance, the second
13 item is meeting the working capital obligations, and the
14 third item is meeting the net worth obligations. How the
15 court weighed and determined the investment -- obviously
16 the dealer has made an investment, it's in the financials
17 but I don't really understand why that wasn't considered
18 for that dealer in the findings. And if it is considered
19 or was considered, then that takes those two items out,
20 leaving only the third item which is sales performance
21 which can't be considered on its own basis.

22 So for me, I don't get it, I don't understand,
23 and I think that there needs to be further clarification
24 on why the financial investment was not considered in this
25 process.

1 MR. PALACIOS: Thank you for your comments, Mr.
2 Graham.

3 Board Member Walker.

4 MR. WALKER: So when we remand -- if we vote to
5 remand this back to SOAH, does it go back to the same two
6 administrative law judges, or is it potluck draw, or what
7 happens?

8 MR. DUNCAN: SOAH utilizes their resources as
9 they see fit. My guess is it will go back to the same two
10 ALJs. They're familiar with the evidentiary record -- I
11 mean, assuming they're still there, I don't know if
12 they're still employed there, they may not be. So when it
13 goes to resources, that is SOAH's call. Again, my guess
14 is honestly, best use of resources, they already know the
15 background, they have the files, they're familiar with the
16 parties and their position. So I'd say the most efficient
17 use, but I'm not SOAH.

18 MR. WALKER: But none of these cases would ever
19 go back to an ALJ that is on our staff that works for us.
20 We only do Lemon Law and warranties. Is that correct?

21 MR. DUNCAN: Yes, sir.

22 MR. WALKER: So this has to go to the state
23 pool of ALJs.

24 MR. DUNCAN: By statute it has to go to SOAH.

25 MR. WALKER: Which means that it's potluck draw

1 that we get somebody that understands car franchises and
2 dealerships, although to be an ALJ you have to be a
3 licensed attorney in the State of Texas.

4 MR. DUNCAN: Correct.

5 MR. WALKER: But I know a lot of lawyers, and
6 David wouldn't know the first thing about drafting a real
7 estate contract, maybe.

8 MR. DUNCAN: I don't know how many district
9 court judges know that much about auto franchise, but it's
10 the job of the parties and their lawyers to go and
11 convince the judge.

12 MR. WALKER: Thanks.

13 MR. PALACIOS: I will say I have very grave
14 concerns to remand this case back to the ALJs. To address
15 your concerns, there is the possibility that it's going
16 back to the very same ALJs who could not answer your
17 question but mine. Quite frankly, I think the ALJs
18 completely misinterpreted basic accounting principles,
19 basic understanding of how legal entities are formed,
20 who's a dealer and who's not, and to remand this back to
21 these same people, I think we're going to be sitting right
22 back where we are again with an explanation that none of
23 us understand. That's my opinion.

24 This is, I will say for the record, one of the
25 most egregious misinterpretations of, again, basic

1 accounting principles. I got my CPA 30 years ago here in
2 Texas and this is basic accounting that the ALJs just
3 completely missed, and I have grave concerns about sending
4 this right back to those same people.

5 MR. WALKER: I couldn't agree with you more on
6 the ALJs just lack of not getting a lot of things, I
7 thought. But I wasn't there at the hearing.

8 So David or Michelle, let's talk about the stay
9 for a second. So does the stay stay in place?

10 MS. LINGO: Yes, sir, until a final decision is
11 made. So it is currently in place as we speak.

12 MR. WALKER: But the parties can request that
13 we consider --

14 MR. PALACIOS: Limit it to the motion.

15 MR. WALKER: Limit to the motion. Okay.

16 MR. GRAHAM: I'm wondering if counsel has any
17 input to the board in regards to the cause and effect of
18 those options.

19 MR. DUNCAN: I think the motion is sufficiently
20 specific to give SOAH direction on what it is the board
21 was confused about. I think that there is something for
22 them to consider.

23 And we could conceivably, Member Walker, ask
24 SOAH to assign different judges, but again, I have no
25 authority to tell them that or to deliver any kind of

1 message from the board that the board things these judges
2 didn't get it right. It's their call who they assign.
3 And other than that, I would say this motion does ask a
4 question that is sufficiently specific that I think the
5 SOAH judges would be able to direct the parties to bring
6 them additional evidence and argument.

7 MR. WALKER: Call for the vote.

8 MR. PALACIOS: Well, we do have a motion and we
9 do have a second so I will go ahead and call for a motion.
10 All those in favor of Board Member Graham's motion to
11 remand this case specifically regarding the issue of the
12 cash contributions back to the SOAH judge, all in favor
13 please signify by raising your right hand.

14 (A show of hands: Board Members Caraway,
15 Graham, Ingram, Painter, Treviño and Walker.)

16 MR. PALACIOS: Okay. We have an affirmative
17 from Board Member Graham, Board Member Ingram, Board
18 Member Walker, Board Member Treviño, and Board Member
19 Painter, and Board Member Caraway.

20 All opposed to remanding it back please signify
21 by raising your right hand.

22 (A show of hands: Board Members Hardy and
23 Palacios.)

24 MR. PALACIOS: Board Member Hardy and myself.
25 So it stands six to two decision to remand the case back

1 to the SOAH judge. Thank you very much.

2 In consideration of time now, I know this case
3 took a little longer than we'd expected, we are going to
4 defer some of the reports. The Projects and Operations
5 report that was to be given by Ms. Judy Sandberg, and
6 Jeremiah Kuntz on the Performance Quality Recognition
7 Program update we'll defer for the next meeting. So with
8 that, we will proceed to item number 5, Finance and Audit
9 reports, and I'd like to ask that Sandra Menjivar-Suddeath
10 please come forward.

11 MS. MENJIVAR-SUDDEATH: Good afternoon. For
12 the record, my name is Sandra Menjivar-Suddeath, and I'm
13 the Internal Audit director. I'm presenting item 5.A, the
14 Internal Audit Division status report. The status report
15 begins on page 16 and is a briefing item only.

16 The first item of the Internal Audit Division
17 status is our current fiscal year 2017 Audit Plan status.

18 Currently we're working on three engagements. The first
19 one is the registration and title refactoring single
20 sticker post-implementation review that is related to data
21 reliability of the COGNOS reports. We are still in field
22 work on that but we will be finishing field work in the
23 next couple of weeks. Once we finish field work, we'll be
24 working with management on any potential findings that we
25 have at that moment.

1 The next one is a new item, it's a management
2 or board request, and in the 2017 plan we left a
3 placeholder for a potential management or board request.
4 Since the last meeting we had a management request from
5 the Information Technology Services to do an
6 organizational review as an advisory service, which
7 differs from an audit. As an advisory service, the nature
8 and the scope of the project is decided before we go and
9 start the work. The advisory service is an organizational
10 review of the application service section of ITS. We'll
11 be looking at research allocation, training, any items to
12 help the division improve its efficiency and
13 effectiveness.

14 The last item is the oversize/overweight
15 permitting audit report. We've finalized our report in
16 November and it is on page 18. The objective of the audit
17 was to determine whether the Texas Department of Motor
18 Vehicles validates, updates and communicates route
19 restriction information on a timely basis to ensure routes
20 are safe for permitted oversize and overweight loads.
21 This is in our new report format which we provide a rating
22 on. The overall rating was a five which is the highest
23 you can get. We had no findings. In fact, we actually
24 found that the Motor Carrier Division has significant
25 controls in place to ensure that permitted routes are

1 entered into the Texas Permitting and Routing Optimization
2 System within five years of receiving the notice from
3 TxDOT, and that carriers are notified of any restriction
4 change within the same day. So overall, the process for
5 providing oversize/overweight permits and interim
6 restrictions is pretty good.

7 MR. WALKER: Can I just real quick ask you a
8 question here?

9 MS. MENJIVAR-SUDDEATH: Yes, sir.

10 MR. WALKER: It's always been a concern of mine
11 and the trucking industry's as to these bridge hits.
12 There's been multiple bridge hits where the trucking
13 industry, so to speak, has torn down bridges. Did you
14 look into what are the root causes of why oversize loads
15 hit the bridges and what can we do to maybe reduce that
16 number?

17 MS. MENJIVAR-SUDDEATH: We did not. Most of
18 those bridge hits, however, are for unpermitted loads, so
19 these are people that either didn't have a permit or did
20 not follow the route restriction. I believe the most
21 recent one in Salado was the fact that they did not follow
22 their route, if I remember.

23 MR. WALKER: And that's what my question is,
24 did we do a study that says what's causing bridge hits is
25 not due to our permitting but is duet unregulated carriers

1 or unpermitted carriers not getting permits that are
2 causing those problems?

3 MS. MENJIVAR-SUDDEATH: No, we did not. We
4 focused only on what we're doing internally to make sure
5 that we're doing everything in our power to make sure that
6 those can be avoided.

7 MS. BREWSTER: Mr. Chairman, if I may?

8 MR. PALACIOS: Yes, please.

9 MS. BREWSTER: For the record, Whitney
10 Brewster, executive director.

11 I myself, Shelley Mellot, Jimmy Archer, we
12 monitor every single one of those and we work with DPS to
13 identify what the root cause was. Since my time at the
14 agency, the two reasons are because, one, either they did
15 not get a permit, or they were off route, and there is a
16 third, they did not provide the proper dimensions of their
17 load. So those three things. And we've looked at it
18 very, very closely. We take them individually and work
19 with local law enforcement who are on the scene.

20 MR. WALKER: And we're still being sued because
21 of a bridge hit that has -- where are you looking?

22 MS. BREWSTER: I'm looking for our general
23 counsel.

24 MR. WALKER: We have the lawsuit, alleged
25 lawsuit down where the bridge fell on top of a car and

1 killed the lady but the guy didn't have a permit.

2 MR. INGRAM: So can we skip the legal?

3 MR. WALKER: Yes. That's okay.

4 MS. MENJIVAR-SUDDEATH: Are there any other
5 questions on the audits?

6 (No response.)

7 MS. MENJIVAR-SUDDEATH: Thanks. The last part
8 is just our coordination with the State Auditor's Office.
9 We sent them the coordination of investigation letters
10 which is for the first quarter of fiscal year 2017 where
11 we talk about any hotline complaints we have. We provide
12 our written response and we provide them information with
13 an internal referrals that we have.

14 The other thing is the State Auditor's Office
15 is still doing their compliant process audit, they're
16 still in planning, they hope to wrap that up in the next
17 couple of weeks and provide us a more solidified scope for
18 their engagement, which once I have that information, I
19 will provide it to you guys.

20 Thank you.

21 MR. PALACIOS: Thank you, Sandra.

22 Let's move on now to the 2016 end of year
23 reports to be presented by Ms. Linda Flores and Sergio
24 Rey.

25 MS. FLORES: For the record, my name is Linda

1 Flores. I'm the chief financial officer for the agency.
2 And with me I have Sergio Rey. He's the director of
3 Accounting.

4 And we have in front of you item 5.B, 2016 end
5 of year report. This is a briefing of the annual
6 financial report and the report of nonfinancial
7 information for year ended August 31, 2016. In the
8 interest of time, we are going to just give you some
9 highlights of the agency's financial position at the end
10 of August 31.

11 MR. REY: Good afternoon, Chairman Palacios,
12 board members, Ms. Brewster. For the record, my name is
13 Sergio Rey, director of Accounting. And as Ms. Flores
14 mentioned, this is the annual financial report for fiscal
15 year ended August 31, 2016.

16 The annual financial report was submitted to
17 our oversight agencies in November and it was completed
18 within the Generally Accepted Accounting Principles
19 guidelines set by the Governmental Accounting Standards
20 Board and the reporting requirements set by the
21 Comptroller's Office. The annual financial report is not
22 an audited document, however, the data is compiled and
23 produced by the Comptroller's Office into the state's
24 Comprehensive Annual Financial Report, which is then
25 audited by the State Auditor's Office.

1 I'd like to first start off with addressing a
2 correction in the Exhibit 1, statement of net assets.
3 This is a correction on the printed document, and if you
4 look at your briefing book on page 37, in the last column
5 the total noncurrent liabilities, there was a data entry
6 error on the formula in the printed document. The
7 information itself or this error did not affect the bottom
8 line in the presentation, in the printed document, nor did
9 it affect the bottom line in the state accounting system.
10 Now, even though the Comptroller's Office does rely on the
11 data in the state accounting system, we still submitted a
12 revised version of the exhibit and updated all of our
13 documentation and we're updating all the information that
14 we have submitted to oversight agencies.

15 Going back to page 36, that's the beginning of
16 the exhibit of the statement of net assets, or commonly
17 known as the balance sheet, to highlight the differences
18 between 2015 and 2016 we've shown the comparisons here,
19 and I'd like to point out that the changes really are
20 based on our method of finance. We have more general
21 revenue Fund 1 appropriations compared to last year,
22 therefore, that's why we see the \$28-1/2 million increase
23 from 2015.

24 On the total assets side, just like on the
25 other side of the equation, our liabilities and fund

1 balance increased the same amount. The increases on that
2 side are due to increases in our accounts payable, and
3 again, our fund balance, the increase is a result of the
4 additional general revenue Fund 1 appropriations for the
5 year.

6 MS. FLORES: And if I can just add, this is all
7 general revenue, this is not the DMV Fund, so this is part
8 of the overall statewide general revenue picture.

9 MR. REY: On the next slide we move on to
10 Exhibit 2 which is the statement of revenue, expenditures
11 and changes in net assets, or as commonly known, the
12 income statement. At the top you'll see the information
13 related to revenues, and again, the fact of additional
14 general revenue Fund 1 money increased our legislative
15 appropriations on this side of the equation, and
16 definitely our biggest chunk of our revenue is our
17 licenses, fees and permits of which we saw a 1.58 percent
18 increase which matches the anticipated natural growth
19 forecasted for that category.

20 As far as expenditures are concerned, we did
21 have an increase of \$11 million. The two major categories
22 here I'd like to highlight are professional fees and
23 services and our other operating expenses. The section of
24 other operating expenses really is the bulk of our license
25 plate production of which we expended more on our

1 purchases of license plates. And we'll talk a little bit
2 more about the professional services in our next schedule
3 which is coming up next.

4 Are there any questions?

5 (No response.)

6 MR. REY: All right. Well, we'll talk about
7 the annual nonfinancial report. The annual nonfinancial
8 is in your briefing documents at page 66 and 67, or 69.

9 As far as the nonfinancial, these are
10 statements that were formally as part of the AFR, but with
11 changes, now our oversight agency, the Governor's Office,
12 requires these on a separate document that was presented
13 to them in December. They are eight schedules that we
14 were required to present, of which on page 66 and 67 there
15 is a briefing document pretty much explaining each of
16 those and the highlights of each of them, but I'd like to
17 focus on the last one, the professional consulting fees
18 and legal services fees.

19 Our next slide presents a pie chart which
20 highlights the expenditure categories that comprise this
21 schedule. The percentages that you see here show how much
22 of the expenditures for each category for each of the
23 specific years which is kind of separate from the fact
24 that we did have an increase of almost \$7 million worth of
25 professional fees in 2016 over 2015. Now, this figure

1 matches exactly our figure in the income statement for
2 this category of the same name, and again, the major
3 categories that saw these increases are the information
4 technology services, data processing services, and the
5 computer services statewide technical center, or the data
6 service center.

7 This concludes the overview and the highlights
8 of both the annual financial report and the nonfinancial
9 report. I'd like to take this opportunity to thank and
10 recognize our financial reporting team who helped prepare
11 this document. With us over here we have Irma Rodriguez,
12 revenue manager, Brenda Stephens, our team lead for the
13 financial reporting team, and the other members of the
14 financial reporting team are Barbara Bonner and Ed
15 Weissbeck.

16 MR. PALACIOS: Mr. Rey, Ms. Flores, thank you
17 so much for your presentation, and we thank the Accounting
18 staff for all of your efforts. As I said before, we can't
19 operate without good information on a timely basis, and
20 everything that you do for us gives us so much leverage
21 and so much ability to do our job better, so we're in
22 great appreciation for all you do.

23 MS. FLORES: That concludes the end of year
24 financial reports, and with that, we can move on to item
25 5.C which is the quarterly financial report, our first

1 quarter 2017. With me is Renita Bankhead. She's the
2 assistant chief financial officer.

3 And this presentation should look very familiar
4 to you. We identify the revenues for the first quarter.
5 We've decided to highlight the DMV Fund because as you
6 know, that went into existence September 1, and for the
7 first quarter through November we have collected slightly
8 more than we anticipated to collect. We projected \$48.7-,
9 we actually collected approximately \$50 million. A lot of
10 that is driven by the one dollar automation fee that we're
11 collecting between September and December. With the
12 implementation of the process and handling fee, that drops
13 down to 50 cents, but for the first four months of the
14 year, we actually did benefit from that significantly.

15 MR. WALKER: So what impact will it have once
16 we go to the 50 cents instead of the dollar?

17 MS. FLORES: We're anticipating to collect
18 approximately \$12 million out of the automation fee,
19 whereas, before we were collecting \$24-, so 50 cents will
20 get us \$12-.

21 MR. WALKER: But how is that going to affect
22 our overall budget?

23 MS. FLORES: We had already anticipated that.
24 Knowing that the process and handling fee would go into
25 effect January 1, we built that into our projections. But

1 even so, we did bring a little bit more than we
2 anticipated, so hopefully that continues. We watch that
3 every month. I know that for the month of December, which
4 is not reflected in any of your information here, we saw
5 another bump from the process and handling fee from early
6 renewals and we collected about \$200,000 from the process
7 and handling.

8 MR. WALKER: So are vehicle registrations where
9 we expect them to be, or a little lower or a little
10 higher?

11 MS. FLORES: Actually, the registration fees
12 are lower than what we had hoped they would be. We don't
13 really have any metrics that I can point to to say this is
14 why. We do see less registered vehicles than we have seen
15 in the past.

16 MR. WALKER: Why is that?

17 MS. FLORES: We're still trying to figure out
18 whether it's single sticker, the syncing up of inspections
19 and registration, or we're just not growing as much as we
20 thought we would grow as far as registered vehicles. We
21 have seen we're just not hitting what we projected to hit

22 MR. INGRAM: Ms. Flores, Raymond and I are
23 trying as hard as we can to get those cars out there.

24 MR. PALACIOS: Please help us.

25 (General laughter.)

1 MR. WALKER: So permitting revenue we know is
2 down. We've talked about that every time and there's no
3 reason that that would be up, although there's going to be
4 a slight uptick in that this year probably. So
5 registrations, we really hadn't anticipated a downturn in
6 that, had we?

7 MS. FLORES: We also have seen some other
8 changes that were implemented. For example, the child
9 support blocks. If parents are 180 days behind on their
10 child support payments, they are being blocked from
11 registrations. But again, I don't have any specific
12 metrics that I can point to to say the agency changed this
13 and this was the impact. It's just a whole lot of
14 different factors.

15 MR. WALKER: I didn't even know about that. So
16 if you're behind on child support, you can't register your
17 car?

18 MS. FLORES: Yes, sir. You're blocked from
19 registering your vehicle at the county.

20 MS. BREWSTER: Mr. Chairman, if I might?

21 MR. PALACIOS: Yes, please.

22 MS. BREWSTER: Just a point of clarification
23 that the registration percentages are still a 1.6 percent
24 increase, however, it is not at the rate that we
25 originally anticipated which was around 2-1/2 percent. So

1 I don't want to give the impression that we are down, it's
2 that our projections are not as high as we thought, and it
3 could potentially be a signal of just a smalling economy.

4 MR. WALKER: But we have to keep in mind that
5 Linda has told this board numerous times over the last six
6 months that we are operating on a very, very thin margin
7 because of the process and handling fees, so any kind of
8 glitches we need to know about because we have to adjust
9 it.

10 MS. FLORES: And that's a good segue into the
11 other revenue, and as we mentioned, our revenue overall is
12 down, less than we anticipated, but that's not to say that
13 we're not collecting. We've collected \$428 million
14 overall, so we are slightly under our projection. We do
15 anticipate that we'll see an uptick probably in March
16 because that's our biggest deposits for registrations, so
17 we'll have one year's whole experience with the syncing up
18 of the registrations and inspections and we'll have a
19 better idea of what's going on in March. But as you
20 mentioned, we know that oversize/overweight, the permits
21 are still down. All our projections took those into
22 account.

23 MR. WALKER: You'll see a little uptick in that
24 this year.

25 MS. FLORES: Any uptick would be welcome.

1 The other thing I wanted to mention was My
2 Plates. The vendor has deposited approximately \$10.8
3 million to general revenue. Their obligation, if I can
4 remind the board, is \$50 million over the five-year
5 contract that we have with them. That contract was put in
6 place in November 2014, so they have until '19 to meet
7 their obligation. We believe they're going to meet their
8 obligation in the fall of this year, so they're doing very
9 well.

10 MR. WALKER: Good job, Steve.

11 MS. FLORES: And with that, I'll turn it over
12 to Ms. Bankhead to kind of give you an overview of the
13 expenditures.

14 MS. BANKHEAD: Good afternoon. For the record,
15 my name is Renita Bankhead. I'm the assistant chief
16 financial officer, and I'm going to talk a little bit
17 about expenditures. This is our first quarter
18 expenditures. This will be found on page 88 of your
19 materials.

20 As of the end of the first quarter, November
21 30, we had \$27.2 million of expenditures and about 50
22 percent of that was related to the agency's core mission,
23 and that is the contract services and freight and
24 reproduction for plates, registration and titling
25 materials, so about 50 percent of our expenditures so far

1 are related to that. And the rest is salaries, that's the
2 other big piece of our budget, and as of the end of the
3 first quarter, we had about a 7 percent vacancy rate, so
4 we're doing better on our vacancies than we have been
5 doing in the past, but it's pretty much where it's kind of
6 been recently.

7 In addition to the expenditures that are shown
8 on this chart, we also have \$69.8 million in encumbered
9 obligations, and most of that is the grants for ABTPA and
10 the professional services related to Deloitte and the rest
11 of our encumbrances for the Data Center.

12 That takes us over to the capital budget. As
13 of the end of the first quarter, we've spent about \$3
14 million. Half of that consists of the payments to the
15 Department of Information Resources for Data Center, and
16 that's pretty much one month worth of expenditures. And
17 the reason why that's so high is we have some upfront
18 costs that we have to pay at the beginning of the fiscal
19 year. We also had some costs at the end of last fiscal
20 year that we kind of had some issues with, so they didn't
21 get paid until September, so that's why that number is so
22 high. But we do have sufficient funds in our budget to
23 pay for the entire Data Center contract, we're not in the
24 situation we were in the past where we were short, we have
25 plenty of funds for that.

1 Other significant expenditures are for
2 automation and the first quarter expenditures are pretty
3 much evenly split between RTS refactoring and our
4 eLICENSING program. The other major category is the
5 county growth and enhancement, and this program started
6 piloting in November. As of the last report that we
7 received from Enterprise Project Management, they have
8 finished about 15 percent of the sites and the project is
9 going pretty well from what we've found. So that's the
10 other big percent there, that 17 percent for county growth
11 and enhancement.

12 So that ends my portion of the presentation.
13 Are there any questions?

14 MR. PALACIOS: Any questions for Ms. Bankhead?

15 (No response.)

16 MR. PALACIOS: Okay. Thank you very much for
17 your presentation.

18 We'll now move on to the relocation of the San
19 Antonio Regional Service Center.

20 MS. FLORES: Again, moving on to item 5.D, this
21 is not a briefing, this is an approval requested of the
22 board. We are requesting approval to relocate the San
23 Antonio Regional Service Center onto approved commercially
24 leased property no later than August 31, 2017. This would
25 be a ten-year lease.

1 The property address is 15150 Nacogdoches Road.
2 It's approximately 16 miles from our current location and
3 our current location, we're actually co-located in the
4 TransGuide in San Antonio off of 410. That particular
5 property, TxDOT had an agreement with the City of San
6 Antonio for space, and so we've been getting kind of
7 squeezed in our location and we believe that the new
8 location will give us the needed space that we need. We
9 are leasing approximately 3,900 square feet. It is in a
10 commercial property site, retail, and the cost over the
11 ten years is approximately \$880,159.

12 MR. WALKER: So is that the building, that
13 Armstrong McCall, whatever it is?

14 MS. PIERCE: Yes. It's the one to the right of
15 that and it kind of goes around the curve.

16 MR. WALKER: You're talking about where the
17 black car is parked?

18 MS. PIERCE: For the record, Ann Pierce,
19 Finance and Administrative Services Division deputy
20 director.

21 The location is actually to the right. The
22 photos that we got they took it kind of head-on at
23 Armstrong McCall, but it's that same strip center and they
24 look very similar.

25 MR. WALKER: So why did we move to a more non-

1 centralized location, Ann, instead of saying -- why did we
2 not try to stay centralized to the general population
3 there?

4 MS. PIERCE: We actually looked at numerous
5 properties and it came down to availability of space and
6 parking as been a big issue, as you well know from the
7 Houston project. And we looked at probably 20 or 30
8 different properties, narrowed it down, and then some
9 landlords were not inclined to follow the requirements
10 that TFC sets forth, and this was the best property that
11 we found and it meets the needs of the agency and it gives
12 us the space that we need to run our business.

13 MR. WALKER: And we did a ten-year lease on
14 this?

15 MS. PIERCE: Yes.

16 MS. FLORES: That's the standard for new leases
17 is to do a ten-year lease. You'll see in the next item
18 where it's not a ten-year lease.

19 MR. WALKER: And I know that we went through
20 this process in Houston and one of the reasons that we
21 didn't select is because we didn't want the general public
22 to be put into an unsafe neighborhood and that was a
23 concern that we really had in Houston. Is this a
24 relatively safe environment, that we're not putting people
25 into the ghettos, so to speak?

1 MS. PIERCE: Yes, sir. That was one of the
2 considerations and why we narrowed out some of those other
3 properties.

4 MS. CARAWAY: Is this an increase in square
5 footage?

6 MS. FLORES: It's an increase of usable square
7 footage. Yes, ma'am.

8 MR. WALKER: What's the difference?

9 MS. PIERCE: Usable.

10 MR. WALKER: I didn't get that, but go ahead.

11 MS. FLORES: That concludes our presentation.

12 MR. WALKER: What is the picture to the right
13 here with the vacant parking lot there?

14 MS. PIERCE: That's the parking area where the
15 trucks can be parked and pulled through.

16 MR. WALKER: That looks like a different
17 shopping center.

18 MS. PIERCE: It's actually adjoining it and the
19 landlord owns both sides and he's going to do some re-
20 striping for us to make that available to us.

21 MR. TREVIÑO: Do you actually get a lot of
22 commercial trucks?

23 MS. PIERCE: At this particular site, yes.

24 MR. WALKER: But in Houston I don't think we
25 ever have any, do we?

1 MS. PIERCE: They do have some but not nearly
2 as much as San Antonio demands.

3 MR. PALACIOS: Okay. Thank you, Ms. Flores.
4 Any other questions?

5 MR. GRAHAM: No. I'd just make a motion, and
6 before I make the motion, I would add that I presume that
7 there's going to be ongoing -- there could be minor
8 changes with this throughout the process, so I would
9 probably recommend doing a motion that gives some latitude
10 to the staff and to the executive director to be able to
11 not be nailed down on every little detail.

12 MS. FLORES: If I could. The lease has
13 actually already been negotiated with the landlord. The
14 Texas Facilities Commission is actually the owners of the
15 lease, and so we're asking that the board approve the
16 lease but TFC actually negotiates the lease on our behalf,
17 so these are the rates that have been approved.

18 MR. WALKER: Just out of curiosity, what if we
19 voted no, what happens to TFC?

20 MS. FLORES: They would cancel the agreement.
21 And they have indicated to the actual landlord that
22 they're waiting on our board to approve this before moving
23 forward, but there is a cancellation clause.

24 MR. GRAHAM: Okay. I move that the board
25 delegate to the executive director, or her designee, the

1 authority to approve all necessary agreements for
2 relocation of the San Antonio Regional Service Center to
3 15150 Nacogdoches Road, San Antonio, Texas, including a
4 lease through the Texas Facilities Commission, no later
5 than August 31, 2017, with an estimated cost of year one
6 of \$179,500 of one-time costs, \$130,877 annual ongoing
7 costs, and a ten-year lease not to exceed \$880,159. In
8 addition, I also move to authorize the agency's executive
9 director, or her designee, to approve any amendments with
10 the approval of the chairman.

11 MR. INGRAM: Second.

12 MR. TREVIÑO: Second.

13 MR. PALACIOS: Okay. We have a motion by Board
14 Member Graham and two seconds, Board Member Ingram, I
15 heard first, and Treviño. Any discussion?

16 (No response.)

17 MR. PALACIOS: All in favor of the motion
18 please signify by raising your right hand.

19 (A show of hands.)

20 MR. PALACIOS: Motion passes unanimously.
21 Thank you very much, Ms. Pierce and Ms. Flores.

22 I will move on now to the renewal of the
23 commercial lease property for the El Paso Regional Service
24 Center.

25 MS. FLORES: Thank you, Chairman.

1 This request is a request of the board to
2 approve renewing the current El Paso Regional Service
3 Center commercial lease for another five-year period. The
4 total projected lease cost should not exceed \$301,653.42
5 over the next five years.

6 We have been at this current location since
7 2002. The address is 1227 Lee Treviño Drive, Suite 100,
8 in El Paso, Texas. We've actually been on that street
9 itself since 1992. So we had a different office, we moved
10 it to this current location in 2002, but we've been in the
11 general area since 1992. This is a five-year lease
12 renewal agreement. Again, the Texas Facilities Commission
13 will handle the lease agreement for us. The lease term
14 doesn't end until October but we would like some time in
15 order to negotiate any kind of renovations or changes that
16 we would like for the landlord to consider, so we'd like a
17 little lead time in order to do that.

18 As I mentioned, the square footage is
19 approximately 3,700 square feet. We have approximately
20 nine staff in El Paso: a regional manager, a coordinator
21 ,and seven customer service representatives. And all of
22 our regional service centers, as Ms. Pierce has reminded
23 me, are undergoing adds of physical security, badges, card
24 readers. This particular area, the equipment has already
25 been installed.

1 And that concludes our presentation.

2 MR. PALACIOS: I'll add, Mr. Walker, this
3 location is a very safe area. Actually, El Paso is a very
4 safe city. In fact, it is the safest city in America,
5 just for the record.

6 MR. WALKER: I'm sure it's better than Chicago,
7 from what I've been hearing on the radio.

8 (General laughter.)

9 MR. PALACIOS: Yes, considerably.
10 Any questions for Ms. Pierce or Ms. Flores?

11 (No response.)

12 MR. PALACIOS: Mr. Painter.

13 MR. PAINTER: Mr. Chairman, I make a motion to
14 authorize the DMV's executive, or her designee, to
15 finalize and approve the renewal purchase for the El Paso
16 Regional Service Center lease for a five-year term,
17 beginning November 1, 2017 through October 31, 2022.
18 Also, authorize the executive director, or her designee,
19 to approve any amendments to the lease with the approval
20 of the chairman.

21 MR. PALACIOS: Motion by Mr. Painter.

22 MR. WALKER: Second.

23 MR. PALACIOS: Second by Board Member Walker.
24 Any discussion?

25 (No response.)

1 MR. PALACIOS: All in favor of Mr. Painter's
2 motion please signify by raising your right hand.

3 (A show of hands.)

4 MR. PALACIOS: Motion passes unanimously.

5 Thank you very much, Ms. Bankhead, Ms. Pierce
6 and Ms. Flores.

7 Let's move on now quickly to item number 7,
8 specialty plate designs. What happened to the plate?

9 MR. DUNCAN: Actually, Mr. Chairman, if you
10 don't mind me jumping back. I was out of the room when I
11 understand Mr. Walker asked a question about bridge hits,
12 whether we had been sued for any bridge hits, and the
13 answer is no. We did get a claim on the Salado hit.

14 MR. WALKER: We never have been sued but we
15 were threatened to be sued.

16 MR. DUNCAN: That's correct.

17 MR. WALKER: Mr. Ingram shut me down, though,
18 on that deal.

19 MR. INGRAM: I just wanted legal counsel here.

20 MR. WALKER: Rightly so.

21 MR. PALACIOS: Okay. Thank you, Mr. Duncan.

22 I'll turn it over now to Mr. Jeremiah Kuntz to
23 discuss the specialty plate designs.

24 MR. KUNTZ: Good afternoon. For the record,
25 Jeremiah Kuntz, director of the Vehicle Titles and

1 Registration Division.

2 Before you are three plates for your
3 consideration. The three plates are listed over here. We
4 have the Colorado School of Mines, a carbon fiber plate,
5 and the University of Iowa. And in the interest of time,
6 I will end my presentation.

7 MR. WALKER: These are My Plates proposals?

8 MR. KUNTZ: All three of these are My Plates
9 proposals.

10 MR. WALKER: He's had pre-sales of 250 plates
11 on all of these?

12 MR. KUNTZ: Yes. Under our current contract
13 with My Plates, it requires that they pre-sell 200 license
14 plates before it goes to production.

15 MR. WALKER: Steve, do you have 200 of these
16 sold, each one of them?

17 MR. KUNTZ: They do the pre-sales after you
18 adopt them.

19 MR. WALKER: Can you tell me what carbon fiber
20 means? Is that some kind of acronym?

21 MR. KUNTZ: Carbon fiber is a design look.

22 MR. WALKER: I didn't know if that's a school
23 or something or what it is.

24 MR. KUNTZ: It's essentially a black plate.
25 When carbon fiber is used in manufacturing, you can

1 generally see the fibers through the epoxy when it's
2 applied, and so that's the look you would get when carbon
3 fiber is used to make a piece, or plastic basically.

4 MR. INGRAM: Mr. Chairman, can I move that we
5 approve all three plates as designed?

6 MR. PALACIOS: There's a motion by Board Member
7 Ingram to accept all three plates.

8 Do I hear a second?

9 MR. PAINTER: Second.

10 MR. PALACIOS: Second by Board Member Painter.

11 All in favor please signify by raising your
12 right hand.

13 (A show of hands: Board Members Caraway,
14 Graham, Hardy, Ingram, Painter, Treviño, and Walker.)

15 MR. PALACIOS: We have approved from Board
16 Members Ingram, Graham, Painter, Hardy, Treviño, Walker
17 and Caraway.

18 All opposed?

19 (A show of hands: Board Member Palacios.)

20 MR. PALACIOS: One opposed, that would be me.
21 Thank you so much, Mr. Kuntz.

22 MR. WALKER: Chief Rodriguez would be proud of
23 you.

24 (General laughter.)

25 MR. PALACIOS: Got to carry on the tradition,

1 you know.

2 Let's move on now to agenda item number 9,
3 rules and adoptions. This now is regarding Title 43,
4 Texas Administrative Code, Chapter 215, that will be
5 presented by Counsel David Duncan, Daniel Avitia, and Bill
6 Harbeson.

7 MR. DUNCAN: Members, David Duncan, general
8 counsel.

9 This is hopefully the end of a very long saga.
10 This rule has been proposed three times. This is the
11 third attempt at adoption. We ran the clock out on two of
12 them, and on this one we proposed it with many of the
13 changes that had been suggested by commenters in the first
14 two rounds. We did receive four comments on the current
15 proposal. Those were submitted by TADA, the Texas Auto
16 Dealers Association, the Texas Independent Auto Dealers
17 Association, Gulf States Toyota, and Buddy Ferguson.

18 We had a meeting with many of those parties
19 about all of the issues that were submitted and comment
20 went through our proposed responses to those comments, and
21 by the end of that meeting had reached agreement when we
22 subsequently sent out a redraft of the language, primarily
23 from the advertising Subchapter H, and reached agreement
24 by all the parties that the language was acceptable. So
25 as I understand it, we have no current outstanding

1 comments in opposition to the adoption of this rule with
2 the language changes we've made.

3 MS. BREWSTER: Mr. Chairman, just a point of
4 clarification. We met with all of the parties.

5 MR. DUNCAN: Correct.

6 MS. BREWSTER: You said many, so I just wanted
7 to clarify that we met with all of them.

8 MR. DUNCAN: Everyone who submitted a comment
9 was at the meeting.

10 MR. PALACIOS: Okay. Thank you.

11 MR. INGRAM: I hate to cut any of the time out
12 in the spotlight but for the interest of time, it's my
13 great honor to actually move that the board approve the
14 notice of re-adoption and the adoption of the amendments
15 new section and repeals to Chapter 215 as recommended by
16 staff.

17 MR. TREVIÑO: I'll second.

18 MR. PALACIOS: Okay. We have a motion by Board
19 Member Ingram to accept the changes, second by Board
20 Member Treviño. All in favor please signify by raising
21 your right hand.

22 (A show of hands.)

23 MR. PALACIOS: Motion passes unanimously.
24 Thank you very much, gentlemen.

25 MR. GRAHAM: Good work.

1 MR. INGRAM: How long was that, two years?

2 MR. DUNCAN: And for the record, Mr. Richards
3 has worked on this since the beginning and he was shaking
4 his head saying they're not going to actually pass it. He
5 went through many, many, many rounds of revisions on this
6 rule.

7 MR. TREVIÑO: Thank you for your hard work.

8 MR. PALACIOS: Appreciate it. Thank you.

9 (Applause.)

10 MR. PALACIOS: Okay. Let's move on now to
11 Title 43, Texas Administrative Code, Chapter 218, Motor
12 Carriers, to be presented by Mr. Bill Harbeson and Jimmy
13 Archer.

14 MR. HARBESON: Mr. Chairman, my name is Bill
15 Harbeson. I'm the director of the Enforcement Division
16 here at the Texas Department of Motor Vehicles.

17 This is again item number 10 found at page 444
18 of your board books. These rules are today before you for
19 adoption. Again, in the interest of brevity, I'll summary
20 exactly what these rules are. This is the work of the
21 Household Goods Advisory Committee which met over the
22 period of the last year and came up with various to the
23 rules that both streamlined the industry for the carriers
24 and also provide consumer protection matters.

25 After publication, we received one comment.

1 That was from John Esparza of the moving association,
2 Southwest Movers Association, and Mr. Esparza's comment
3 was that he was in favor of the rules as published.

4 MR. WALKER: Can he do that? He's on the
5 committee.

6 MR. HARBESON: Mr. Esparza?

7 MR. WALKER: Wasn't he on the committee?

8 MR. HARBESON: No, he was not.

9 MR. WALKER: Oh, Les was, I guess.

10 MR. HARBESON: No, sir. Mr. Esparza was in
11 attendance for all the meetings and Mr. Esparza, of
12 course, was instrumental in asking for the committee to
13 move forward and made the nominations of the carrier
14 members of the committee. In addition to the carriers, of
15 course, there was law enforcement members and public
16 members, in addition to staff.

17 So unless there are any questions, I am asking
18 the board to approve these rules.

19 MR. PALACIOS: Any questions for Mr. Harbeson
20 or Mr. Archer?

21 MR. PAINTER: I make a motion to approve.

22 MR. WALKER: Second.

23 MR. PALACIOS: Okay. We have a motion from
24 Board Member Painter to approve, second by Mr. Walker.
25 All in favor of the motion please signify by raising your

1 right hand.

2 (A show of hands.)

3 MR. PALACIOS: Motion passes unanimously.

4 Thank you very much, Mr. Harbeson, Mr. Archer.

5 We'll move on to agenda item number 11, Title
6 43, Texas Administrative Code.

7 MR. DUNCAN: Again, members, David Duncan,
8 general counsel.

9 These are amendments to implement legislation
10 from the past legislative session, House Bill 2739, which
11 allowed any situation where you are required to provide
12 proof of identity, you're allowed to use a concealed
13 handgun license in lieu of that. You may recall that we
14 had done a different package that implemented this for
15 many of our rules. Some of our rules were open at that
16 time and you can't put one while it's pending, so now
17 we're going back and cleaning up the last of our rules.
18 So this is just a statutory implementation to clean up the
19 last few rules where ID is required.

20 MR. PAINTER: Question.

21 MR. DUNCAN: Yes, sir.

22 MR. PAINTER: It's no longer a concealed
23 handgun license, it's open carry.

24 MR. DUNCAN: We're cleaning up the terminology.
25 License to carry a handgun. Yes, sir. And we're

1 clarifying the terminology in these changes as well.

2 Thank you for pointing that out.

3 MR. TREVIÑO: I move that the board approve the
4 proposed amendments to Chapter 206 and 221 for publication
5 in the *Texas Register* for public comment.

6 MS. HARDY: Second.

7 MR. PALACIOS: Motion by Board Member Treviño
8 to approve the proposed amendments, second by Board Member
9 Hardy. Any discussion?

10 (No response.)

11 MR. PALACIOS: All in favor of the motion
12 please signify by raising your right hand.

13 (A show of hands.)

14 MR. PALACIOS: Motion passes unanimously.
15 Thank you very much, gentlemen.

16 MR. WALKER: We've got one more.

17 MR. PALACIOS: There's another page there.
18 Yes. Okay. We're getting down to the finish line, folks.
19 Hang in there.

20 Agenda item number 12, Title 43, Texas
21 Administrative Code, Chapter 218, Motor Carriers, to be
22 presented by Mr. Archer and Mr. Harbeson.

23 MR. ARCHER: Thank you, Mr. Chairman, members
24 of the board. For the record, my name is Jimmy Archer,
25 director of ht Motor Carrier Division.

1 For the board's consideration, I'm proposing
2 amendments to 43 Texas Administrative Code, Chapter 218,
3 to be published in the *Texas Register* linked to motor
4 carrier registration. Most of the proposed amendments are
5 the result of over 16 meetings of the motor carrier
6 credentialing working group, and the working group
7 included personnel from the Motor Carrier Division,
8 Enforcement Division, General Counsel's Office, and the IT
9 Division.

10 Our mission was to expand the web enabling
11 capabilities of the MCCA, Motor Carrier Credentialing
12 System, and to facilitate certain enhancements to MCCA.
13 The underlying purposes were to improve the credentialing
14 process, protect consumers who use the services of motor
15 carriers, and to automate the credentialing process to
16 ultimately enable all carriers to apply online. This is,
17 like I said, the result of almost a year and a half of
18 meetings to fully web enable this. I can go into detail
19 if you'd like me to, but basically we're asking for more
20 information on the front end when the carriers apply for
21 credentials and also enable them to do it online
22 themselves. So I'll be happy to answer any questions.

23 MR. WALKER: I move that the board approve the
24 proposed amendments, repeal and the new sections of
25 Chapter 218 for publication in the *Texas Register* for

1 public comment.

2 MS. HARDY: Second.

3 MR. PALACIOS: Motion by Board Member Walker,
4 second by Board Member Hardy. All in favor of the motion
5 please signify by raising your right hand.

6 (A show of hands.)

7 MR. PALACIOS: Motion passes unanimously.
8 Thank you very much, Mr. Archer, Mr. Harbeson.

9 We have one item left that we need to go into
10 executive session, so I will say we are now going into
11 closed session. It is 12:58 p.m. on January 5, 2017.
12 We'll go into closed session under Texas Government Code
13 Sections 551.071, 551.074, 551.076. For those of you in
14 the audience, I anticipate being in executive session for
15 approximately ten minutes and we'll reconvene in open
16 session after that.

17 With that, we're recessed from public meeting
18 and going into executive session.

19 (Whereupon, at 12:58 p.m., the meeting was
20 recessed, to reconvene this same day, Thursday, January 5,
21 2017, following conclusion of the executive session.)

22 MR. PALACIOS: It's approximately 1:17 p.m. on
23 January 5, 2017. The Board of the Texas Department of
24 Motor Vehicles is now in open session. We want to note
25 that no action was taken during closed session.

1 Okay, folks, it looks like we have reached the
2 end of our agenda unless there's any further business. Is
3 there any further business?

4 MR. INGRAM: I move we adjourn.

5 MR. PAINTER: Second.

6 MR. PALACIOS: Motion by Board Member Ingram,
7 second by Board Member Painter. All in favor?

8 (A chorus of ayes.)

9 MR. PALACIOS: Let the record reflect the vote
10 is unanimous. It is now 1:18 p.m. We are adjourned.

11 (Whereupon, at 1:18 p.m., the meeting was
12 adjourned.)

C E R T I F I C A T E

MEETING OF: TxDMV Board

LOCATION: Austin, Texas

DATE: January 5, 2017

I do hereby certify that the foregoing pages, numbers 1 through 185, inclusive, are the true, accurate, and complete transcript prepared from the verbal recording made by electronic recording by Nancy H. King before the Texas Department of Motor Vehicles.

/s/ Nancy H. King 1/12/2016
(Transcriber) (Date)

On the Record Reporting
3636 Executive Cntr Dr., G22
Austin, Texas 78731