

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

GEM MOTORS OF PANAMA CITY, )  
INC., )  
 )  
Petitioner, )  
 )  
vs. ) Case No. 05-2463  
 )  
GLOBAL ELECTRIC MOTORCARS, LLC, )  
 )  
Respondent. )  
\_\_\_\_\_ )

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this matter before the Honorable Judge Diane Cleavinger, Administrative Law Judge, Division of Administrative Hearings, on October 25, 2005, in Panama City, Florida.

APPEARANCES

For Petitioner: Jim Appleman, Esquire  
Appleman, Shepard and Downing, P.A.  
2211 Thomas Drive  
Panama City, Florida 32408

For Respondent: George B. Abney, Esquire  
Dean Bunch, Esquire  
Sutherland, Asbill and Brennan, LLP  
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STATEMENT OF THE ISSUE

Whether the proposed termination of GEM Motors of Panama City, Inc.'s (GEM-PC) Dealer Sales and Service Agreement (SSA) by Respondent Global Electric Motorcars, LLC (GEM) violated the

Florida Motor Vehicle Dealer Act Section 320.641(3), Florida Statutes.

PRELIMINARY STATEMENT

By letter dated April 11, 2005, GEM notified GEM-PC of its intention to terminate the SSA between them based on: (1) deceptive or fraudulent practices by GEM-PC; (2) impairment of the reputation or financial standing of GEM-PC; and (3) GEM-PC's unqualified management.

By letter to the Florida Department of Highway Safety and Motor Vehicles dated July 7, 2005, GEM-PC requested a hearing to determine whether GEM's proposed termination of GEM-PC constituted an unfair or prohibited discontinuance or cancellation of the SSA pursuant to Section 320.641, Florida Statutes. Petitioner's request for hearing was forwarded to the Division of Administrative Hearings.

At hearing, GEM-PC did not present any testimony since relevant depositions were introduced by GEM. GEM-PC offered one exhibit into evidence. GEM presented the testimony of five witnesses, and Respondent offered the testimony of five witnesses. GEM also introduced the transcripts of the depositions of customer Jenny Countryman and GEM-PC owner and President, Jeff Jones. Additionally, GEM's Exhibits 1 through 48 were admitted into evidence. After the hearing, both parties filed Proposed Recommended Order's on November 30, 2005.

## FINDINGS OF FACT

1. Jeff Jones is the sole shareholder, president and dealer-operator of GEM-PC. Mr. Jones is responsible for all of the business decisions at GEM-PC, and is responsible for all of the sales of GEM vehicles by GEM-PC. GEM-PC is located at 647 Clara Avenue, Panama City, Florida. GEM-PC's business bank account, account number 2501056201, is maintained at Coastal Community Bank in Panama City Beach.

2. Mr. Jones is also the President and sole shareholder of Aquatic Adventures of Northwest Florida, Inc. (Aquatic Adventures). Aquatic Adventures is co-located with GEM-PC at 647 Clara Avenue. Aquatic Adventures business bank account, account number 2501128901, is also maintained at Coastal Community Bank in Panama City Beach.

3. Mr. Jones admits that he often transfers funds from other bank accounts into the business bank accounts for GEM-PC and Aquatic Adventures in order to meet his business obligations. Mr. Jones also often transfers funds between GEM-PC and Aquatic Adventures.

4. Between February and June of 2005, the time period relevant to most the customer purchases involved here, Mr. Jones made numerous transfers of funds to and from the GEM-PC and Aquatic Adventures bank accounts, including five transfers

totaling \$12,106.16, from the GEM-PC bank account to the Aquatic Adventures account.

5. Between February and March of 2005, nineteen checks written on the GEM-PC bank account were returned for insufficient funds. Between January and June of 2005, forty-nine checks written on the Aquatic Adventures account were returned for insufficient funds. Such returns and transfers indicate that GEM-PC was short of operating funds and in financial difficulty. Importantly, as will be seen, the lack of funds created problems when customer's cancelled late orders and demanded refund of the money they had paid for their vehicle.

6. On August 22, 2000, GEM and GEM-PC entered into a SSA. Under the SSA, GEM-PC became an authorized dealer of GEM products, including GEM's electric vehicles. Among other things, the SSA provided for termination of the agreement in Section 13. In relevant part, Sections 13.3 (d), (e) and (h) of the Standard Provisions of the SSA provide that GEM may terminate the SSA upon the occurrence of the following:

(d) [T]he presence in the management of Dealer of any person who, in GEM's opinion, does not have or no longer has requisite qualifications for such person's position.

(e) Impairment of the reputation or financial standing of Dealer or of any Dealer Owner subsequent to the execution of this Agreement.

\* \* \* \*

(h) Use by Dealer of any deceptive or fraudulent practice, whether willful, negligent or otherwise, in the sale of any GEM Product.

7. Additionally, the SSA requires GEM-PC to have a "floor-plan" or a line of credit of at least \$100,000, in order to purchase inventory from GEM. Under a floor plan financing arrangement, a car dealer purchases products, such as motor vehicles with money the dealer has borrowed by using the purchased products as collateral for the loan or line of credit. GEM has historically permitted GEM-PC to operate without such financing. GEM has not sought to terminate GEM-PC based on its failure to maintain floor-plan financing. GEM does require payment in full from GEM-PC for any vehicles ordered by GEM-PC before it will manufacture or fill such vehicle orders. Indeed the evidence showed, that once vehicles are ordered and paid for by GEM-PC, GEM ships the ordered vehicles within six weeks to the dealer. There was no credible evidence that any GEM-PC customer's order was delayed beyond six weeks due to delays at the factory.

8. In the summer of 2002, Russell Kiefer, the Director of Sales and Marketing for GEM, traveled to Panama City Beach, Florida, to visit GEM-PC and meet with Mr. Jones. The purpose of Mr. Kiefer's visit was to encourage Mr. Jones to abide by the terms of the SSA and obtain floor-plan financing.

9. After the visit Mr. Kiefer sent a letter to Mr. Jones encouraging him to obtain floor-plan financing in order to stock inventory on its lot and facilitate sales by having such inventory on-hand.

10. Sometime after Mr. Kiefer's visit, GEM-PC obtained a line of credit to purchase vehicles for its lot. However, GEM-PC lost the line of credit.

11. Darrell Russell lives in Rosemary Beach, Florida. Rosemary Beach is a residential development and planned community that maintains a set of property restrictions to ensure a particular atmosphere in the development. Certain types of vehicles are prohibited in the development. However, properly licensed GEM vehicles are allowed in Rosemary Beach and one of Mr. Russell's neighbors owns and operates a GEM electric vehicle in the Rosemary Beach community. Mr. Jones' claim that Rosemary Beach's restrictions did not allow GEM vehicles in the development and that somehow that fact delayed Mr. Russell's purchase, outlined below, is not credible.

12. Around December 12, 2003, Mr. Russell paid \$10,199.00 to GEM-PC for the purchase of a 2004 GEM truck. The payment represented the total purchase price of the truck.

13. Mr. Jones advised Mr. Russell that he would order the truck, that it would take approximately six weeks for it to

arrive, and that it would be delivered in January of 2004.

However, the truck did not arrive in January of 2004.

14. After January, Mr. Russell called and sent faxes to GEM-PC on multiple occasions in order to determine the status of his order.

15. At some time in early 2004, Mr. Jones asked Mr. Russell if he would be willing to substitute a 2005 model GEM truck for the 2004 model he had purchased. Acceptance of the 2005 model would entail additional time to deliver the vehicle.

16. Mr. Russell told Mr. Jones that he did not want a 2005 model, but wanted the 2004 model he had ordered. Mr. Jones replied, "Okay fine."

17. Later, Mr. Jones advised Mr. Russell that his 2004 truck had arrived, but that it had inadvertently been sold to a police department. Mr. Jones advised Mr. Russell that he would order another GEM truck for him, but that he would have to wait longer and would have to accept a 2005 model. Mr. Jones stated that ordering the 2005 model was "the only option at that point," since 2004 models were no longer being manufactured. Mr. Jones did not explain why he could not purchase a 2004 model from another dealer in order to meet the contract he had with Mr. Russell.

18. At some point, Mr. Jones offered to loan Mr. Russell a GEM vehicle, but Mr. Russell declined the offer because he did not want to drive a GEM vehicle with a temporary tag at Rosemary Beach, whose residents, according to Mr. Russell, are notorious sticklers on Rosemary Beach restrictions and might protest such a vehicle.

19. Eventually, Mr. Russell asked Mr. Jones to provide a specific date for delivery of his GEM vehicle. Mr. Jones never provided such a date.

20. Around the beginning of April of 2004, four and one-half months after his initial purchase and well beyond the promised six-weeks' delivery of that purchase, Mr. Russell was exasperated with the multiple delays and unsatisfactory manner in which his order had been handled and demanded a refund of the \$10,199.00 he paid to GEM-PC for his 2004 GEM vehicle.

21. On April 13, 2004, Mr. Russell faxed a letter to Mr. Jones stating that he had not received his refund and that he was considering taking legal action against GEM-PC and Mr. Jones.

22. On April 19, 2004, Mr. Jones sent Mr. Russell a letter that he was having difficulty obtaining a GEM vehicle from the GEM factory, that he could not locate a GEM vehicle with other GEM dealers, and that if Mr. Russell "could be patient a little longer" Mr. Jones would "go ahead and start to process your



refund." At this point, Mr. Jones seems to be desperately trying to talk Mr. Russell into purchasing a 2005 model vehicle. The evidence was not clear whether Mr. Jones had money available to refund Mr. Russell's purchase money to him since the bank records for Mr. Jones' businesses introduced at the hearing post-date this transaction. The delay in refunding Mr. Russell's purchase money was, at best, a very poor business practice by Mr. Jones and GEM-PC and a disservice to GEM-PC's reputation.

23. Mr. Russell responded and faxed Mr. Jones a letter and again demanded a refund. Mr. Russell also stated that he was forwarding the matter to his attorneys.

24. Mr. Russell's attorney left dozens of messages for Mr. Jones, but Mr. Jones never returned her phone calls.

25. In June of 2004, Mr. Russell sued GEM-PC in the County Court for Walton County, Florida, case number 04-CC-000179, for Breach of Contract, Unjust Enrichment, and Misrepresentation. Mr. Jones did not defend the lawsuit.

26. On July 28, 2004, Mr. Russell obtained a Judgment against GEM-PC for \$10,199.00, plus seven percent interest.

27. On or about August 20, 2004, Mr. Russell received a refund from GEM-PC for \$10,199.00, but did not receive the interest that was due on the judgment.

28. Mr. Russell paid fees of between \$2,000 and \$2,5000 to his attorney for her services in this matter.

29. Some delay in processing Mr. Russell's refund might have been expected due to Mr. Jones' duties in taking care of his mother who had cancer and required a great deal of his time. However, Mr. Jones simply had to write a check to Mr. Russell to refund his money. In the time it would have taken to write a check, Mr. Jones had time to write Mr. Russell at least two letters. Therefore, the delay of several months in refunding Mr. Russell's money and forcing a lawsuit to obtain such a refund was unwarranted even with the time constraints caused by the illness of Mr. Jones' mother. On these facts, forcing an undefended lawsuit was detrimental to the reputation of GEM-PC.

30. On June 17, 2004, Brent Skipper, on behalf of the Town of Alys Beach, Florida, ordered three GEM vehicles from GEM-PC. At the time of the order, Mr. Skipper paid the entire purchase price of \$30,270 for the vehicles. Mr. Skipper did not ask that delivery of the vehicles be delayed or staggered. Mr. Jones claim that such a request was made is not credible since the vehicles were fully paid for prior to delivery.

31. At the time of purchase, Mr. Jones advised Mr. Skipper that it would take approximately four to six weeks for the vehicles to be delivered.

32. The vehicles did not arrive in six weeks, and Mr. Jones advised Mr. Skipper that he could obtain the vehicles "in a couple weeks" if he ordered them from another dealer.

33. Approximately three months passed and Mr. Skipper had not received the vehicles.

34. Mr. Jones delivered one vehicle in September of 2004 after obtaining it from another GEM dealer.

35. By late November of 2004, Mr. Jones had not delivered the other two vehicles to Mr. Skipper.

36. Around November 23, 2004, Mr. Skipper complained to GEM and stated that Mr. Jones was, "the most unresponsive, irresponsible, and unprofessional person I have ever dealt with."

37. On November 29, 2004, Mr. Jones finally delivered the last two GEM vehicles to Mr. Skipper. This transaction demonstrates Mr. Jones inability, either through neglect or incompetence, to reasonably comply with the terms of the purchase contracts he had entered into with his customers.

38. Around September 28, 2004, William Cook paid \$8,538.35 to GEM-PC for the purchase of a 2005 GEM truck.

39. Mr. Jones advised Mr. Cook that he would order the truck and that it would arrive in approximately six weeks. Mr. Jones claims that after Mr. Cook ordered and paid for his vehicle he called Orlando Dodge and learned that in January of

2005 they would be receiving a shipment of vehicles of the type ordered by Mr. Cook. However, the delivery time was well beyond the time period Mr. Jones had given to Mr. Cook. Mr. Jones claims he intended to purchase a vehicle from Orlando Dodge to fulfill his contract with Mr. Cook. Mr. Jones' version of the transaction is not credible since no records of the call to Orlando Dodge were introduced and Mr. Jones never told Mr. Cook about his intentions to purchase the vehicle from Orlando Dodge and the delay entailed by such.

40. In November of 2004, at the end of the six-week period, Mr. Cook called Mr. Jones to inquire about the status of his order.

41. Mr. Jones told him that his vehicle had not yet arrived and that the GEM factory would not provide a delivery date on orders until seventy-two hours in advance of shipment because GEM was mad at him. Mr. Jones did not mention the alleged January shipment of vehicles to Orlando Dodge.

42. Around January 20, 2005, after not hearing anything from GEM-PC or Mr. Jones regarding the status of his order, Mr. Cook called GEM-PC and left a message for Mr. Jones stating that he either wanted the GEM vehicle he had ordered, or he wanted his money back.

43. Mr. Jones did not return Mr. Cook's phone call.

44. On January 24, 2004, approximately four months after Mr. Cook originally ordered a GEM vehicle from GEM-PC, Mr. Cook saw a GEM vehicle at Orlando Dodge that was identical to the one he had ordered.

45. Mr. Cook called GEM-PC to advise Mr. Jones that he was going to purchase the GEM vehicle he had seen at Orlando Dodge, and that he wanted a refund of the money he had paid to GEM-PC.

46. Mr. Jones agreed to refund Mr. Cook's money.

47. Even though the vehicle was more expensive, Mr. Cook purchased the GEM vehicle from Orlando Dodge. Mr. Jones explanation of these events was not credible.

48. Around January 28, 2005, Mr. Cook received a refund check in the amount of \$8,538.35 from GEM-PC.

49. When he received the check, Mr. Jones told Mr. Cook not to cash or deposit it immediately because the funds were not available. Mr. Cook complied with Mr. Jones request and waited to cash or deposit the check.

50. On February 1, 2005, Mr. Cook attempted to deposit or cash the check but the bank on which the check was drawn would not accept the check because funds were not available for the transaction. The bank records corroborate the financial difficulty of GEM-PC at this time.

51. Mr. Cook called GEM-PC and could only speak with the receptionist about the insufficient funds. The receptionist

obtained the amount of the check and indicated the check would be made good.

52. Several days later, Mr. Cook again presented the check to the same bank. The bank accepted it and gave Mr. Cook a money order for the amount of the check which he deposited in his account.

53. In a letter dated February 5, 2005, Mr. Cook complained to GEM of his dealings with GEM-PC and Mr. Jones. Again, this transaction demonstrates Mr. Jones inability, either through neglect or incompetence, to reasonably comply with the terms of the purchase contracts he had entered into with his customers.

54. In late June of 2002, Buzz Mitchell purchased a 2002 GEM vehicle, vehicle identification number 5ASAC47412FO18132, from GEM-PC.

55. On November 11, 2004, Mr. Mitchell ordered a new 2005 GEM vehicle from GEM-PC for a total price of \$10,225.00.

56. At the time he ordered the 2005 GEM, Mr. Mitchell traded in his 2002 GEM for \$7,000 toward the purchase price of the 2005 GEM. The 2002 vehicle was listed as a trade-in on the purchase contract/invoice for the 2005 vehicle.

57. At no time did Mr. Jones or anyone else at GEM-PC advise Mr. Mitchell that GEM-PC was accepting his 2002 vehicle on consignment. No one asked Mr. Mitchell for the title to his

2002 vehicle when he delivered it to GEM-PC's lot. However, Mr. Jones' claim that the 2002 vehicle was taken on consignment is not credible and not supported by the documents memorializing this transaction.

58. Mr. Jones advised Mr. Mitchell that his 2005 GEM would arrive in mid-December of 2004, approximately six weeks after Mr. Mitchell ordered it. However, Mr. Jones failed to order the vehicle.

59. Mr. Mitchell did not receive his vehicle by mid-December.

60. A few days before Christmas, Mr. Mitchell called GEM-PC to inquire about the status of his purchase. Mr. Jones did not tell Mr. Mitchell that he had failed to order his vehicle and that such failure was the reason for the delay in delivery. Instead, Mr. Jones advised Mr. Mitchell that the GEM factory had shut-down early for Christmas, and that he should have his vehicle by early January of 2005, falsely leaving the impression that it was the manufacturer's fault that delivery of the vehicle was delayed.

61. Mr. Mitchell did not receive his vehicle in early January.

62. Mr. Mitchell called GEM-PC again, and Mr. Jones advised him that the GEM factory had extended its down time in order to prepare for new models and that he should have his

vehicle in a few weeks again falsely leaving the impression that the delay was the manufacturer's fault. No mention was made regarding the sale or lack of sale of the 2002 vehicle he had traded-in.

63. After January passed and Mr. Mitchell still had not received his vehicle, he was only able to speak with the receptionist at GEM-PC.

64. In late February or early March 2005, after making a number of demanding phone calls to determine when his vehicle would arrive, the receptionist at GEM-PC advised Mr. Mitchell that his vehicle had been inadvertently shipped to another dealer in South Florida.

65. Approximately one week later, Mr. Mitchell called GEM-PC and was advised that they had not gone to south Florida to pick up his vehicle yet. The receptionist stated that it was a long way down to South Florida to pick up one vehicle. Given the earlier obfuscations about the manufacturer and order of the vehicle, the representations that the vehicle had been inadvertently delivered to South Florida is not credible.

66. Mr. Mitchell demanded that he either receive his vehicle, or be given a refund of \$7,000 for the amount of his trade-in.

67. The next day, Mr. Mitchell called GEM-PC. Mr. Jones indicated that his vehicle was being put on the truck as they



spoke. However, Mr. Mitchell no longer wished to do business with GEM-PC and advised that he wanted out of the deal, that he wanted a refund of \$7,000, and that he wanted a check by March 9, 2005. The bank records indicate that GEM-PC did not have the money to pay the manufacturer for the vehicle or to refund the value of Mr. Mitchell's trade-in due to on-going financial problems.

68. Mr. Mitchell did not receive a refund check by March 9, 2005. He contacted GEM to complain about GEM and Mr. Jones.

69. Al McDougal at GEM advised Mr. Mitchell that GEM-PC had never ordered his vehicle from the GEM factory and that he would attempt to assist Mr. Mitchell in getting his money back from GEM-PC. Mr. Jones, in fact admitted that he never ordered Mr. Mitchell's vehicle.

70. On March 11, 2005, approximately four months after he had ordered his vehicle, Mr. Mitchell picked up a check from GEM-PC for \$7,000 and deposited it into his bank account.

71. Around October 18, 2004, Brett Butler ordered a new GEM vehicle from GEM-PC. Mr. Butler paid the entire purchase price of \$12,311 for the GEM vehicle at the time he ordered it.

72. Mr. Jones advised Mr. Butler that it would take approximately six weeks for his vehicle to arrive, and that he should have it before the Christmas holidays.

73. Mr. Jones indicated to Mr. Butler that he would order his vehicle directly from the GEM factory. Again, Mr. Jones failed to order the vehicle even though he had been paid in full for the vehicle and ostensibly had the funds to pay to the manufacturer.

74. At the end of the six weeks' time period, nobody from GEM-PC contacted Mr. Butler.

75. In December of 2004, Mr. Butler called GEM-PC to inquire about the status of his GEM vehicle. He discovered GEM-PC was closed for the holidays. He left a message asking that someone call him regarding his vehicle.

76. No one from GEM-PC returned Mr. Butler's call. He called GEM-PC again in January of 2005 and left another message.

77. Again, no one from GEM-PC returned Mr. Butler's call, Mr. Butler began a "calling campaign" to try to reach someone at GEM-PC, initially calling once per week, and eventually calling once or twice per day.

78. Mr. Jones eventually returned Mr. Butler's calls and falsely told him that his vehicle was taking longer to build because he ordered it before the Christmas holidays, but that it would be forthcoming and would arrive within approximately two weeks.

79. Mr. Butler's vehicle did not arrive within two weeks. In late February or early March, 2005, Mr. Butler called GEM-PC

again. Mr. Jones told Mr. Butler, "I need to apologize to you, I have not ordered your vehicle."

80. In an effort to save the deal, Mr. Jones offered Mr. Butler a discount on the vehicle. Mr. Butler rejected the offer and advised Mr. Jones that he wanted to cancel his order and receive his money back. Mr. Jones' claim that Mr. Butler wanted to cancel the contract because of cost overruns on a house he was building is not credible since Mr. Butler was not building a house. Moreover, the claim does not excuse Mr. Jones' failure to order the vehicle, misrepresentations about the delivery of the vehicle and unreasonable delay in delivery of the vehicle.

81. Mr. Jones agreed to refund Mr. Butler's money, but stated that he needed a little time in order to transfer funds into his account so that he could pay the refund to Mr. Butler.

82. Mr. Butler agreed to allow Mr. Jones time to undertake the necessary transfer.

83. Mr. Butler did not receive his refund. Therefore, he continued to call GEM-PC and was told by Mr. Jones that he had now ordered the GEM vehicle. Clearly, Mr. Jones was trying to avoid coming up with the money to pay Mr. Butler.

84. Mr. Butler advised Mr. Jones that he did not want the vehicle and that he wanted his money back, just as they had agreed in their previous conversation.

85. Mr. Jones admitted that he did not have the money to provide Mr. Butler with a refund.

86. In late March of 2005, Mr. Butler reported his dealings with GEM-PC and Mr. Jones to the Bay County Sheriff's Office, the Panama City Beach Police Department, and GEM.

87. After Mr. Butler contacted law enforcement authorities and GEM, Mr. Jones called him and advised Mr. Butler that he would provide a refund by March 25, 2005, and requested that Mr. Butler, "call off the dogs."

88. Finally on April 1, 2005, approximately five and one-half months after he ordered his GEM vehicle, Mr. Butler received a refund from GEM-PC.

89. In April, 2005, once GEM received numerous customer complaints regarding GEM-PC's failure to timely deliver or deliver ordered and paid for vehicles and complaints about the business practices of GEM-PC and Mr. Jones, GEM sought to terminate the SSA.

90. In all these transactions, the testimony of GEM-PC's customers is supported by documentary evidence to support their version of these transactions. Bank records revealed the poor financial condition of GEM-PC, corroborate the testimony of GEM-PC customers that Mr. Jones failed to order vehicles and provide requested refunds in a timely manner. The fact that Mr. Jones' business had serious cash-flow problems demonstrates why

Mr. Jones did not order vehicles or provide refunds in a timely manner. He did not have sufficient funds in his accounts to do so, and incoming funds paid by customers for the purchase of their vehicles were being used to pay checks that had been returned for insufficient funds or to fund other business interests of Mr. Jones. These repeated problems with multiple customers demonstrate that Mr. Jones either through neglect or incompetence, did not manage GEM-PC appropriately, impaired the financial condition of GEM-PC and was not qualified to continue as a dealer with GEM. To make matters worse, the evidence showed repeated instances where Mr. Jones was not honest with customers in his dealings with them and either through omission or commission, made material misrepresentations to multiple customers. Clearly, GEM-PC and Mr. Jones treatment of customers and business practices constitutes a material and substantial breach of the SSA and are good cause for a terminating the SSA. There was no evidence that the proposed termination was not done in good faith. Since there is good cause for such termination the proposed termination was done in good faith.

#### CONCLUSIONS OF LAW

91. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. §§ 120.57 and 120.60, Fla. Stats. (2004).

92. Section 320.641(3), Florida Statutes, prohibits the "unfair or prohibited" termination of a motor vehicle franchise agreement. Section 320.641(3), Florida Statutes, further provides that a termination of a franchise agreement is unfair if, "it is not clearly permitted by the franchise agreement; is not undertaken in good faith; is not undertaken for good cause; or is based on an alleged breach of the franchise agreement which is not in fact a material and substantial breach.

93. Section 320.64(3), Florida Statutes, states, in part:

A discontinuation, cancellation, of nonrenewal of a franchise agreement is unfair if it is not clearly permitted by the franchise agreement; is not undertaken in good faith; is not undertaken for good cause; or is based on a alleged breach of the franchise agreement which is not in fact a material and substantial breach.

§ 320.641(3), Fla. Stat. (2000).

94. In 2001 Section 320.641, Florida Statutes, was amended to include a fifth factor for determining if a termination was unfair. Specifically, the statute now states that a termination is unfair "if the grounds relied upon for termination, cancellation, or nonrenewal have not been applied in a uniform or consistent manner." See § 320.641(3), Fla. Stat (2005). The statute was also amended in 2001 to place the burden of proving that the termination was fair and not prohibited on the licensee, in this case GEM. Compare International Harvester Co.

v. Calvin, 353 So. 2d 144, 148 (Fla.1st DCA 1977) (holding that dealer has the initial burden of proof to show by a preponderance of the evidence the unfairness of the proposed termination of the franchise agreement). Thus the licensee, GEM, has the burden to establish by a preponderance of the evidence that its proposed termination was fair.

95. In the Notice of Termination, GEM alleged that GEM-PC violated Sections 13.3(h), (e), and (d), of the SSA by: (1) engaging in deceptive and fraudulent practices; (2) having an impaired reputation and financial standing; and (3) having unqualified management, namely President Jones.

96. In this case, GEM established that at least four customers ordered GEM vehicles from GEM-PC and Mr. Jones, that those customers provided funds or a trade-in vehicle to GEM-PC at the time they ordered their vehicles, that GEM-PC failed to deliver those vehicles to those customers in a timely manner, that Mr. Jones made numerous false statements to those customers when they inquired regarding the status of their orders, and that Mr. Jones provided refunds only when those customer sued, contacted law enforcement authorities, or contacted GEM. Clearly, these sorts of business practices violated the SSA. Moreover, a manager of a motor vehicle dealership who repeatedly accepts funds from customers and then does not order or provide their vehicles is not qualified to serve as an employee or

manager of a dealership. Finally, repeatedly accepting funds from customers and then not ordering or providing their vehicles impairs the reputation of a dealer and demonstrates an impaired financial status of GEM-PC. There is no doubt that GEM-PC and Mr. Jones' treatment of customers constitutes a material and substantial breach of the SSA, was undertaken for good cause and in good faith, and was clearly permitted by the SSA. Therefore, the proposed termination of the SSA should be upheld.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is recommended that the termination of the SSA was appropriate and should be upheld.

DONE AND ENTERED this 6th day of January, 2006, in Tallahassee, Leon County, Florida.

*Diane Cleavinger*

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DIANE CLEAVINGER  
Administrative Law Judge  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 6th day of January, 2006.



COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this recommended order. Any exceptions to this recommended order should be filed with the agency that will issue the final order in this case.