

**STATE OF FLORIDA
DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES**

**DOAH CASE NO.: 13-3345
MS CASE NO.: 14-931
FINAL ORDER #: HSMV-14-1159 -FOF-MS**

**SOUTH M.M. LLC D/B/A SOUTH
MOTORS MAZDA,**

Petitioners,

vs.

**MAZDA MOTOR OF AMERICA, INC.
AND MIAMI AUTOMOTIVE RETAIL, INC.
D/B/A BRICKELL MAZDA,**

Respondents.

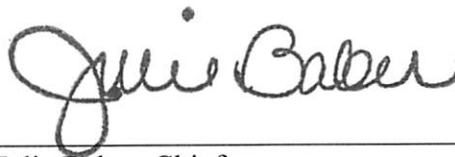
FINAL ORDER

This matter came before the Department for entry of a Final Order upon submission of a Recommended Order by Mary Li Creasy, an Administrative Law Judge of the Division of Administrative Hearings, a copy of which is attached and incorporated by reference in this order¹. The Department hereby adopts the Recommended Order as its Final Order in this matter. Accordingly, it is

ORDERED and ADJUDGED that Respondent, Miami Automotive Retail, Inc. d/b/a Brickell Mazda, be granted a license for sales of Mazda vehicles (MAZD) at 618 Southwest 8th Street, Miami (Dade County), Florida 33130, and for service of Mazda vehicles (MAZD) at 665 Southwest 8th Street, Miami (Dade County), Florida 33130.

¹ Petitioner, South M.M., LLC d/b/a South Motors Mazda filed exceptions to the Recommended Order. These exceptions are ruled on in the Appendix to this Order. Respondent Mazda Motor of America, Inc. and Miami Automotive Retail, Inc. d/b/a Brickell Mazda, filed responses to the exceptions.

DONE AND ORDERED this 14 day of September, 2014, in Tallahassee, Leon
County, Florida.



Julie Baker, Chief
Bureau of Issuance Oversight
Division of Motorist Services
Department of Highway Safety and
Motor Vehicles
Neil Kirkman Building, Room A338
Tallahassee, Florida 32399

Filed with the Clerk of the
Division of Motorist Services
this 14 day of September, 2014.

NOTICE OF APPEAL RIGHTS



Judicial review of this order may be had pursuant to section 120.68, Florida Statutes, in the District Court of Appeal for the First District, State of Florida, or in any other district court of appeal of this state in an appellate district where a party resides. In order to initiate such review, one copy of the notice of appeal must be filed with the Department and the other copy of the notice of appeal, together with the filing fee, must be filed with the court within thirty days of the filing date of this order as set out above, pursuant to Rules of Appellate Procedure.

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STATE OF FLORIDA
DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES

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SOUTH M.M. LLC D/B/A SOUTH
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D/B/A BRICKELL MAZDA,

Respondents.

APPENDIX TO FINAL ORDER
RULINGS ON PETITIONER'S EXCEPTIONS

Having carefully considered Petitioner's Exceptions and Respondent's Responses thereto,
the Department rules as follows on the exceptions:

EXCEPTION 1

Rejected. Finding of Fact 29 is based on competent substantial evidence.

EXCEPTION 2

Rejected. Finding of Fact 38 is based on competent substantial evidence.

EXCEPTION 3

Rejected. Finding of Fact 58 is based on competent substantial evidence.

EXCEPTION 4

Rejected. Finding of Fact 59 is based on competent substantial evidence.

EXCEPTION 5

Rejected. Finding of Fact 81 is based on competent substantial evidence.

EXCEPTION 6

Rejected. Finding of Fact 113 is based on competent substantial evidence.

EXCEPTION 7

Rejected. Finding of Fact 153 is based on competent substantial evidence.

EXCEPTION 8

Rejected. Finding of Fact 154 is based on competent substantial evidence.

EXCEPTION 9

Rejected. Findings of Fact 41-44, 69, 85, 86-91, 158, 164, and 166 are based on competent substantial evidence.

EXCEPTION 10

Rejected. Findings of Fact 86 and 96 are based on competent substantial evidence. Conclusion of Law 198 is legally correct.

EXCEPTION 11

Rejected. Conclusions of Law 182, 184, and 189 are legally correct.

EXCEPTION 12

Rejected. Conclusion of Law 186 is legally correct.

EXCEPTION 13

Rejected. Conclusion of Law 197 is legally correct.

EXCEPTION 14

Rejected. Conclusion of Law 185 is legally correct. To the extent that the Conclusion of Law may also be considered a finding of fact, it is based on competent substantial evidence.

EXCEPTION 15

Rejected. Conclusion of Law 196 is legally correct. To the extent that the Conclusion of Law may also be considered a finding of fact, it is based on competent substantial evidence.

EXCEPTION 16

Rejected. Conclusions of Law 192 and 193 are legally correct.

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SOUTH M. M., LLC, d/b/a SOUTH
MOTORS MAZDA,

Petitioner,

vs.

Case No. 13-3345

MAZDA MOTOR OF AMERICA, INC.,
AND MIAMI AUTOMOTIVE RETAIL,
INC., d/b/a BRICKELL MAZDA,

Respondents.

RECOMMENDED ORDER

Pursuant to notice, a formal administrative hearing was conducted before Administrative Law Judge Mary Li Creasy in Tallahassee, Florida, on April 21 through April 23, and April 28 through May 1, 2014.

APPEARANCES

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STATEMENT OF THE ISSUE

Whether existing Mazda dealers are providing adequate representation of the Mazda line-make in the community or territory in which Mazda Motor of America, Inc., proposes to add a dealer.^{1/}

PRELIMINARY STATEMENT

On August 9, 2013, notice was published in the Florida Administrative Register announcing Mazda Motor of America, Inc.'s ("MMAs"), intent to establish Miami Automotive Retail, Inc., d/b/a Brickell Mazda ("Brickell Mazda"), as a dealer for the sale of Mazda vehicles at 618 Southwest Eighth Street, Miami, and for the service of Mazda vehicles at 665 Southwest Eighth Street, Miami. Protests to the proposed additional

dealer were timely filed with the Department of Highway Safety and Motor Vehicles (Department) by South M.M., LLC, d/b/a South Motors Mazda (SMM), and FRLJ-MAZ, LLC, d/b/a Lehman Mazda. The protests were forwarded to the Division of Administrative Hearings for formal administrative hearing and were consolidated by Order dated September 18, 2013. Subsequently, the protest filed by FRLJ-MAZ, LLC, d/b/a Lehman Mazda, Case No. 13-3367, was dismissed, and an Order was entered closing the file and relinquishing jurisdiction to the Department.

A Pre-hearing Stipulation was filed by the parties on April 11, 2014.

By joint motion filed May 20, 2014, the parties requested an extension until June 23, 2014, to file post-hearing submittals. By Order of May 20, 2014, a deadline of June 23, 2014, was set for filing post-hearing submittals.

At the final hearing, MMA presented the testimony of the following witnesses during its case-in-chief: Sharif Farhat, Vice President of Expert Analytical Services, Urban Science Applications, Inc. (who was accepted as an expert in dealer network analysis); Blase De Leo, General Manager, Southeast Region, MMA; Daniel Devenny, Manager Market Representation, Southeast Region, MMA; and Alexander Ramos, Zone Sales Manager, Southeast Region, MMA. During its rebuttal case, MMA presented

the following witnesses: Blase De Leo; Sharif Farhat; and Mario Murgado, Owner, Brickell Mazda.

Brickell Mazda presented the testimony of Mario Murgado.

SMM presented the testimony of: Ricardo Lujan, Manager, SMM; Jose Prieto, General Manager, SMM; Christopher Crawford, Regional Operations Manager, Southeast Region, MMA; Alexander Sanchez, Media Director, South Motors Automotive Group; Tony Garcia, President, Menda Group (who was accepted as an expert in retail automobile advertising in the South Florida market); and Joseph Roesner, President, The Fontana Group, Inc. (who was accepted as an expert in local retail automobile industry analysis and dealer performance analysis).

Also submitted and received into evidence were transcripts and exhibits of the following depositions: Robert Davis, Senior Vice President of Operations, MMA; Russell Wager, Vice President of Marketing, MMA; Ronald Stettner, Vice President of U.S. Sales Operations, MMA; Barry Brittingham, Manager of Dealer Development, MMA; Jeffrey Dixon, Associate Media Director of Regional Planning, Garage Team Mazda; Mark Brown, Senior Vice President, Managing Director, Garage Team Mazda; Craig Willard, Manager, Dealer Performance Management, MMA; George Wiltz, Controller, South Motors Automotive Group (designated transcript

portions only); and John Hilton, Chief Financial Officer, South Motors Automotive Group (designated transcript portions only).

Petitioner's Exhibits 2 through 6, 8 through 19, 21 through 42, 45, 51, 55 through 57, 59, 60, 65, and 72 through 78 were admitted into evidence. Exhibit 42 was admitted over objection.

Respondents' Exhibits 1 through 4, 5 (with respect to page 19, only the lower portion of the page), 6, 9, 11, 13 through 16, 19, 22, 32, 43, 45, 49, 54, 57, 58, 60 through 65, and 67 through 70 were admitted into evidence. Respondents' Exhibits 5 (page 6) and 32 (pages 27086, 5966, 27081, 27082, and 27106) were admitted over objection.

The complete Transcript of the final hearing, consisting of 12 volumes, was filed on May 23, 2014. The parties timely filed proposed recommended orders that have been given due consideration in the preparation of this Recommended Order. Unless otherwise noted, all statutory references are to the Florida Statutes (2013).

FINDINGS OF FACT

I. The Parties

1. MMA is a "licensee" as defined by section 320.60(8), Florida Statutes.

2. SMM is a "motor vehicle dealer" as defined by section 320.60(11).

II. Notice and Standing

3. On August 9, 2013, notice was published in the Florida Administrative Register announcing MMA's intent to establish Brickell Mazda as a dealer for the sale of Mazda vehicles at 618 Southwest Eighth Street, Miami, and for the service of Mazda vehicles at 665 Southwest Eighth Street, Miami (jointly referred to as the Proposed Point). These two parcels of real property are situated 71 feet apart and directly across from each other on opposite sides of Southwest Eighth Street, a three-lane one-way street that is not a limited access highway. The proposed additional dealer would be located in Miami-Dade County, Florida, which has a population of more than three million persons.

4. SMM is an existing franchised Mazda dealer operating from a facility located at 18010 South Dixie Highway, Miami, Florida. SMM timely protested the proposed additional dealer. During several 12-month periods within the 36 months preceding publication of notice of the proposed additional dealer, SMM made more than 25% of its retail sales of new Mazda vehicles to persons who registered those vehicles within a radius of 12 and one-half miles of the proposed location of the proposed additional dealer.

5. If Brickell Mazda is permitted to open at the Proposed Point, its Mazda sales operations and its Mazda service and parts operations will open on the same day, and it will operate its Mazda sales and service operations at the Proposed Point until

completion of construction of a new Mazda sales and service facility to be located within two miles of the Proposed Point.

III. Community or Territory

6. The first issue to be addressed in this protest is the identification of an appropriate "community or territory" (Comm/Terr), which is the relevant geography within which to judge the performance of the Mazda brand.

7. Section 320.642, Florida Statutes, does not provide any specific criteria for geographically defining the Comm/Terr.

8. In determining the geographic boundaries of the Comm/Terr, consideration is given to the areas assigned to Mazda dealers by MMA. MMA assigns to each of its dealers a geographic area known as a Statistical Observation Area (SOA), which is comprised of United States (U.S.) Census Bureau census tracts close to each dealer.

9. A dealer's SOA is the area in which a dealer has a geographic advantage with respect to consumers, who generally will shop for a new vehicle at the closest dealer, unless they are dissatisfied with that dealer for some reason.

10. In determining the geographic boundaries of the Comm/Terr, consideration is also given to the buyer behavior of new Mazda consumers--what is the geographic area where consumers in that area buy the majority of their new vehicles from dealers in that area, and where the dealers in that area sell the majority of their new vehicles to consumers in that area.

11. The Comm/Terr should also have "connectivity" meaning that the areas within the Comm/Terr are reasonably connected from a buyer behavior point of view.

12. MMA defines the Miami Metro market as an area encompassing all of Miami-Dade County, all of Broward County, a portion of northern Monroe County (consisting of the upper Keys), and a portion of southern Palm Beach County. MMA employs the 2010 version of U.S. Census Bureau census tracts to define the Miami Metro market.

13. Sharif Farhat, MMA's expert witness, testified that the proper Comm/Terr in this case is the geographic area within the four Miami-Dade SOAs--Ocean Mazda (Ocean), Mazda of North Miami (North Miami), SMM, and the open point (formerly Potamkin Mazda's SOA), which shall be referred to hereinafter as the "Miami Comm/Terr." Joseph Roesner, SMM's expert witness, agreed that the Miami Comm/Terr is the proper Comm/Terr.

14. Based on a consideration of all relevant evidence, the proper Comm/Terr in this case is the Miami Comm/Terr.

15. Within the Miami Comm/Terr, Mazda's competitors are represented in the areas near SMM, Ocean, and North Miami, and also in the open point SOA where Brickell Mazda is proposed, but where there is no current Mazda dealer.

IV. Historical Network Changes, Existing Dealer Network

16. For over 16 years, from April 1992 until Potamkin Mazda (Potamkin) closed in March 2009, there were four Mazda

dealerships operating in Miami-Dade County--Ocean Mazda, North Miami/Marlin Mazda, SMM/Kendall Mazda and its predecessors, and Potamkin. If the operations of Williamson Mazda and Spitzer Mazda in Homestead are considered, there were five Mazda dealerships operating in Miami-Dade County for some of those years.

17. It has only been since March 2009, or a little over five years, that there have been only three Mazda dealerships operating in Miami-Dade County. The current Mazda dealers in Miami-Dade County are Ocean (9.3 miles from the Proposed Point), North Miami (13.8 miles from the Proposed Point), and SMM (14.6 miles from the Proposed Point). In 2012, within the SOA of the Proposed Point, North Miami registered the most new Mazda vehicles (204) and SMM registered the least (73), whether measured by number of units or percentage of registrations in the SOA.

18. Brickell Mazda will be the first Mazda dealer added since the 2008/2009 downturn in the automotive industry, and the fourth Mazda dealer in the Miami Comm/Terr, with no plans by MMA to add a fifth dealer.

19. Prior to SMM opening in October 2007, Kendall Mazda (Kendall) operated at 18010 South Dixie Highway, Miami. Kendall lost its floor plan (the bank credit line used to purchase new vehicles from MMA), and it sought bankruptcy court protection.

20. On March 19, 2007, SMM's parent company, South Motors Company of Dade County, purchased the Kendall dealership property from the trustee for the Kendall bankruptcy. When South Motors Company of Dade County purchased the property, SMM did not yet have a Mazda dealership agreement.

21. Prior to its closing, Kendall received negative local publicity, caused in part by that dealership not paying off loans on customers' trade-in vehicles. Kendall's actions could have damaged Mazda in the market place. Before being awarded a Mazda franchise by Mazda and opening the Mazda dealership, SMM knew of the problems caused by the prior dealer, and expected that SMM would struggle to be profitable because of issues with Kendall. SMM even considered not opening the dealership. However, SMM expected that, in time, it could overcome these issues and decided to open the dealership.

22. SMM was awarded its Mazda franchise by Mazda and did not have to purchase the franchise rights from another Mazda dealer. Not only did SMM not pay any money for acquiring the franchise, but MMA provided \$200,000.00 in monetary assistance to SMM specifically to assist in establishing itself in the market. Kendall's actions no longer impair SMM's performance as a Mazda dealer.

23. Potamkin was previously located in the open point SOA where the Proposed Point is located. Potamkin's location was 9.3 miles from Kendall, which is where SMM is located today. The

Proposed Point is 14.6 miles from SMM and will provide better spacing between Mazda dealers.

24. Potamkin's dealership facility was located on four different properties, the leases for which were expiring in February 2009. Potamkin told MMA that it wanted to either close or sell the dealership. The proposed buyer was a prior Mazda dealer, but MMA did not consider him to be a successful dealer and was not interested in him as a buyer for the Potamkin point.

25. Potamkin closed in March 2009, the same year that General Motors and Chrysler filed for bankruptcy and many dealers, not just Mazda dealers, were struggling financially on the heels of the financial crisis and the bottoming out of the automobile market the year before. MMA made the decision to negotiate a voluntary termination of Potamkin and temporarily close the point, in order to provide Ocean and SMM two years to absorb the sales and fixed operations business of Potamkin.

26. In making this decision, MMA conducted a risk/benefit analysis. One potential benefit was that Ocean and SMM might be able to increase sales and profitability. Other benefits were that MMA could "control the point and plan for the future" and "attract a top tier dealer candidate." The risk was that Ocean and SMM would not be able to "absorb sales and fixed operations business."

27. MMA believed closing Potamkin would also help the "crowded" Miami dealer representation, caused by Ocean's relocation to within four miles of Potamkin. MMA approved Ocean's relocation because Ocean's dealership facility was in the direct flight path of jets landing at Miami International Airport, and the noise disrupted sales and service operations. There is no evidence that Potamkin voluntarily terminated because there were four Mazda dealers in Miami-Dade County.

28. MMA kept the SOA formerly assigned to Potamkin as an open point and did not assign any of Potamkin's market area to Ocean or SMM. The Proposed Point is further away from both Ocean and SMM than was the prior Potamkin location.

29. After Potamkin closed in 2009, Ocean and SMM were not able to increase their sales to "absorb" Potamkin's sales business or achieve an acceptable level of sales in the market area previously served by Potamkin. Furthermore, SMM was not able to increase its profitability, and it continued to operate at a loss, which has been the case since the dealership opened in 2007. SMM's losses decreased in 2010, but then increased in 2011 and 2012.

30. Mario Murgado is an experienced and successful new car dealer who expressed interest to MMA in becoming a Mazda dealer. Mr. Murgado was born in Havana, Cuba, is fluent in Spanish and English, and is experienced in marketing and selling new motor

vehicles to Hispanic and non-Hispanic customers in the Miami market. Mr. Murgado owns several successful automobile dealerships on Southwest Eighth Street in Miami, which is within the open point SOA formerly assigned to Potamkin, including Honda, Buick, GMC, and Pontiac. This area is within "Little Havana," one of the most densely Hispanic populated areas in Miami. Mr. Murgado also owns and operates Audi and Infinity dealerships in Stuart, Florida.

31. Mr. Murgado entered into a Letter of Intent with MMA in which he agreed that "the Permanent Dealership Site shall meet Mazda's design and image standards" and which contains specified minimum square footage requirements at the proposed Brickell location. On August 9, 2013, MMA gave notice of its intent to allow the establishment of Brickell Mazda at the Proposed Point.^{2/}

V. Adequacy of Representation in the Community or Territory--
Statutory Criteria

32. After establishing the proper Comm/Terr, section 320.642(2)(b) outlines 11 factors to be balanced when determining whether or not current representation in the Comm/Terr is adequate.

A. Impact of the Proposed Additional Dealer on Consumers,
Public Interest, Existing Dealers, and MMA

i. Impact on Consumers and Public Interest

33. The Miami Comm/Terr is currently served by three Mazda dealers located in the northern (North Miami), western middle

(Ocean), and southern (SMM) portions of the market. The proposed Brickell Mazda location would service the eastern middle portion of the Miami Comm/Terr.

34. Each of the three existing dealers is located in a large cluster of other dealers that offer competing line-make vehicles. These locations provide consumers with convenient access to cross shopping opportunities. The proposed additional dealer would also be located next to a Honda, Buick, and GMC dealership.

35. The travel distance from the proposed location to SMM is 15.4 miles. From the proposed location to Ocean is 10.5 miles. From the proposed location to most of North Miami, the travel distance is 14.5 miles. The proposed location is approximately 2.4 miles east of the former Potamkin, which would place it further away from its nearest competing Mazda dealership, Ocean.

36. The existing road network provides consumers access to one or more Mazda dealers via major arterial roadways: North Miami is accessed from Interstate 95 or the Florida Turnpike, major north/south arteries; Ocean is accessed from the Dolphin Expressway, a major east/west artery, the Palmetto Expressway, a major north/south artery, or the Florida Turnpike; and SMM is located on U.S. 1, a major north/south artery, and is also accessible from the Florida Turnpike. Drive times between the

existing Mazda dealerships vary dramatically based upon traffic congestion, which can be notoriously heavy.

37. Consumers would have convenient access to the proposed Brickell Mazda location from U.S. 1, the Dolphin Expressway, and Interstate 95. The Proposed Point is on Southwest Eighth Street (Tamiami Trail/U.S. 41), which is an east-west three-lane main artery leading into downtown Miami. Brickell Mazda will provide a shuttle service for Mazda customers who work in downtown Miami. Downtown Miami workers and residents would have the greatest enhanced accessibility to Mazda sales and service due to the close proximity of the proposed location to downtown.

38. On average, Mazda consumers in the Miami Comm/Terr have to travel 10.2 miles to a Mazda dealer, which is the highest distance of all brands in the Miami Comm/Terr, placing the Mazda brand at a significant disadvantage to other competitors offering more convenience in terms of travel distance. The establishment of Brickell Mazda would reduce the average distance to the nearest Mazda dealer in the Miami Comm/Terr from 10.2 miles to five miles, which would place Mazda in the middle of its competitors in terms of customer convenience based on travel distance.

39. The proposed additional dealer will benefit consumers by providing an additional choice for Mazda sales and service at a new facility owned and operated by an experienced and

successful automobile dealer and shortening the travel distance for some consumers in the Comm/Terr. More specifically, the addition of a new Mazda dealer at the proposed Brickell location will make sales and service of Mazdas significantly more accessible to the growing residential population of downtown Miami.

ii. Impact On Existing Dealers

40. The analysis of the potential impact on existing dealers begins with an assessment of the opportunity for Mazda sales in the Miami Comm/Terr in addition to the sales occurring historically.

41. These are additional sales available to existing dealers who compete aggressively that will offset any potential impact resulting from Brickell Mazda's establishment. These additional sales come from two sources--sales by competitors (conquest sales) and Mazda sales by Mazda dealers outside the Miami Comm/Terr into the Miami Comm/Terr (in-sell).

42. Based on 2012 registration data, there were 1,729 additional conquest sales available if the Miami Comm/Terr achieves the Broward average.^{3/} A significant number of these conquest sales are located in and around the central part of the Miami Comm/Terr where Brickell Mazda is proposed.

43. Based on 2012 registration data, there are 775 additional in-sell registrations available to Mazda dealers

in the Miami Comm/Terr. The total of these conquest sales and in-sell sales is 2,504 units, which is a significant missed opportunity.

44. Brickell Mazda's potential sales of 647 within 20 miles, and 56 beyond 20 miles, total 703 units, leaving an additional 1,801 units available to the existing dealers.

45. Another way to measure impact is to examine the change in the existing dealers' expected sales based on the changes to their SOAs that would occur if Brickell Mazda is established. The changes in the SOAs reflect changes in each dealer's geographic advantage.

46. All of the existing dealers have significant sales opportunities within their assigned SOAs, and should suffer no negative impact after Brickell Mazda opens. SMM had the opportunity to capture 84 additional sales just as a result of in-sells made by North Miami alone in 2012, which are more sales than SMM made into the open point SOA the same year.

47. SMM argues that the addition of another Mazda dealer in the Comm/Terr will necessarily result in each of the existing dealers receiving a lesser share of total sales. However, this argument was not supported by credible testimony.

48. To the contrary, a review of the data regarding the addition of a new Mazda dealership in other markets demonstrates that there is a likely benefit to existing dealers. For example,

after the addition of a Mazda dealer in Wesley Chapel (Tampa area), registration effectiveness increased 65.5%, indicating that the result was an effective, aggressively-competing dealer network. The sales performance of the existing dealers also improved, indicating no negative impact on sales relative to their historical sales.

49. After the addition of a Mazda dealer in Jacksonville, Mazda's market share increased 29% because of conquest sales, and in-sell sales decreased. After the addition of a Mazda dealer in Royal Palm Beach, following the closing of two Mazda dealers, and at a very difficult time for the automotive industry in 2008 and 2009, Mazda's market penetration was better than in the state of Florida as a whole, and the SOA with a Mazda dealer had improved sales performance.

50. These case studies indicate that the addition of a Mazda dealer, where there is inadequate performance, results in increased Mazda market penetration due to increased customer satisfaction, and that existing dealers are not negatively impacted because of the new dealer.

iii. Financial Impact on South Motors^{4/}

51. SMM is wholly owned by South Motors Company of Dade County, which also owns and operates several other automobile dealerships in South Florida. Since commencing operations in

2007, SMM has continually operated at a loss, averaging approximately \$750,000 in losses each year since 2008.^{5/}

52. SMM executives have made no decision and have not even discussed whether to close the dealership if losses continue.

53. Ricardo Lujan, Vice President of Finance for South Motors Company of Dade County, testified that SMM can "continue to increase our revenues and get to profitability," but he will recommend that SMM close if Brickell Mazda is established because new vehicle sales will be split among four dealers instead of three. This erroneously assumes that the number of new vehicle sales is a "fixed pie," which ignores conquest sales and in-sell sales available in the Miami Comm/Terr to dealers willing to compete for automotive sales and service, as well as future growth in the market.

54. Mr. Roesner acknowledged that a new Mazda dealer in a market can generate new excitement in the Mazda brand and cause people who would not otherwise do so to buy new Mazda vehicles, resulting in increased conquest sales. The mere existence of Brickell Mazda with new Mazda signage may cause people to take note of the brand. The increase in sales has the potential to lead to increased service business for existing Mazda dealers.

55. Mr. Roesner estimates that based on 2012 sales volume, SMM would lose between 67 and 135 new Mazda sales if Brickell Mazda is established. This calculation ignores the fact that SMM

failed to capture 233 units sold to customers in SMM's SOA by other Mazda dealers. In short, Mr. Roesner's financial analysis merely states that SMM will lose more business with the addition of Brickell Mazda without considering the opportunity that currently exists for SMM and all Mazda dealers in the Miami Comm/Terr.

56. Further, if SMM operates according to Mr. Roesner's financial analysis, SMM will never be profitable--even if Brickell Mazda is never established. Mr. Roesner's financial analysis fails to include any calculation of the new car sales volume necessary for SMM to break even.

57. Using Mr. Roesner's calculations and assumptions, Mr. Farhat analyzed SMM's break-even point and determined SMM would have to more than double its annual sales in its new car department, and also double its volume in every other department to break-even, regardless of whether Brickell Mazda is established. In short, if Mr. Roesner's financial/sales analysis is to be believed, SMM will not be able to grow sales and will never be profitable even if Brickell Mazda does not open.

58. SMM's financial problems and inability to make a profit result from poor dealership operations, not the opening of Brickell Mazda, and only SMM can address and rectify its own operational issues. There is no competent, substantial evidence

in the record that Brickell Mazda's opening will cause SMM to go out of business.

iv. Impact on MMA

59. With the addition of Brickell Mazda, MMA will have greater market penetration (as discussed in greater detail below) and a more competitive dealer network in the Miami Comm/Terr, resulting in increased sales of MMA vehicles, and more satisfied Mazda customers, which will enhance the Mazda reputation to the benefit of MMA and its dealers.

B. Investment of Existing Dealers

60. SMM has invested \$6.6 million in its dealership operations, and its parent company, South Motor Company of Dade County, has invested \$6.8 million in the facilities from which SMM operates. The undisputed testimony establishes that the other existing Mazda dealers in the Comm/Terr have made similar facility investments.

61. SMM's investment does not include the dealership property, which is owned by SMM's parent company, South Motors Company of Dade County. SMM's investment in its Mazda dealership is substantially less than what it would be in the ordinary course of business, because it does not own the dealership property and has entered into an interest-only, below-market-rate lease with South Motors Company of Dade County. SMM's investment

is also less because many of its ordinary business expenses are paid by South Motors Company of Dade County.

C. Reasonably Expected Market Penetration

62. Market penetration, or registration performance, is a measure of the share of the retail automobile market which a line-make achieves during a defined period of time in a particular geographic area.

63. In the automobile industry, market penetration is calculated by dividing the number of new vehicles of a line-make that are registered by the number of all new vehicles of competing line-makes that are registered. Thus, for instance, the calculation of the 2013 Mazda market penetration in the Comm/Terr would be: Total Number of New Mazda Registrations in the Comm/Terr during 2013 divided by the Total Number of New Competitive Line-Make Registrations in the Comm/Terr during 2013.

i. Appropriate Benchmark

a. Identifying an Appropriate Comparison Area

64. In determining whether Mazda is currently achieving a reasonably expected level of market penetration in the Comm/Terr, a standard or benchmark for market penetration must first be established against which Mazda's performance is compared. That benchmark must be reasonable, and should be neither too high nor too low.

65. In determining a standard to measure performance in the Miami Comm/Terr, market penetration in another geographic area ("comparison area") is assessed in order to arrive at a level or standard of performance that can reasonably be achieved in the Miami Comm/Terr. The comparison area must be independent of the Miami Comm/Terr, so that the Miami Comm/Terr is not being measured against itself.

66. A smaller comparison area close to the Miami Comm/Terr is superior to a larger comparison area that is farther away because the larger area will include dealers in diverse areas whose performance could be affected by market occurrences such as buy-sells, relocations, and facility changes, and because the larger area will include areas that have no Mazda dealer.

67. For a larger comparison area, such as the U.S. or Florida, it is appropriate to consider only the areas that have a Mazda dealer, known as U.S. Represented SOAs or Florida Represented SOAs.

68. The combined SOAs of the three Mazda dealers in Broward County, Florida--Gunther and the two Lou Bachrodt dealerships--comprise a smaller comparison area adjacent to the Miami Comm/Terr in the same state and climate.

69. The larger comparison areas suggested by SMM, of U.S. Represented and Florida Represented, are not appropriate benchmarks to determine adequate representation in the Miami

Comm/Terr because over the period of 2010 through July 2013, the Broward SOAs consistently achieve higher market penetrations and demonstrate what an adequately represented market can achieve.

70. MMA's use of regional averages or other comparison areas in standardized reports to dealers is not a reason to use Region as the comparison area in this case. Instead, a more thorough analysis of the South Florida market is appropriate in determining adequacy of performance, as required under section 320.642.

71. Using the Broward SOAs as the comparison area (Broward average) results in the dealers in the Miami Comm/Terr being compared to dealers in Broward County, and not to dealers in distant and diverse parts of the U.S. or Florida. The dealers in the Broward SOAs are in the same advertising market as the dealers in the Miami Comm/Terr; were in the same dealer advertising group with the Miami Comm/Terr dealers until March 2012; and, like the Miami Comm/Terr dealers, had no dealer advertising association after March 2012.

72. Another key factor weighing in favor of using the Broward SOAs as the comparison area is the similar Hispanic population to the Miami Comm/Terr. While not as high as the Miami Comm/Terr, the Broward SOAs have high percentages of Hispanic population compared to most other SOAs in Florida.

b. Segmentation Analysis

73. The second step in determining the benchmark is segmentation analysis, the process by which any differences in product popularity caused by consumer purchase preferences between the Miami Comm/Terr and the benchmark area are addressed. This analysis accounts for any differences between the Miami Comm/Terr and the Broward SOAs for consumers purchasing certain types of vehicles, such as trucks or SUVs, and not others.

74. MMA's product lines are broken down into various segments, such as subcompact, mid-size, and SUV, and then Mazda registrations in those segments are compared to industry registrations in those same segments. By dividing the number of Mazda registrations in each segment by the number of industry registrations in each segment, the actual penetration rate in each segment in the Miami Comm/Terr is obtained.

75. The overall actual Mazda penetration rate in 2012 in the Miami Comm/Terr for all segments was 3.43%. This is computed by dividing the total actual Mazda registrations within the Mazda Comm/Terr by the actual industry registrations.

76. These same computations using the actual Mazda and industry registrations in the Broward SOAs yield the actual penetration rate in each segment for 2012 in the Broward SOAs.

77. The number of expected registrations in 2012 in the Miami Comm/Terr in each segment is computed by multiplying each

segment's actual penetration rate in the Broward SOAs by the number of industry registrations in that same segment in the Miami Comm/Terr.

78. The overall expected Mazda penetration rate in 2012 for all segments in the Miami Comm/Terr is 5.29%, computed by dividing the number of expected registrations of 4,320 (Mazda registrations in Miami Comm/Terr if Mazda captured what the Broward SOAs dealers captured) by 81,721 (total competitive registrations in the Comm/Terr).

79. Mazda's expected registrations, or market penetration, for other years can be computed by multiplying the expected penetration rate for that time period by the number of actual industry registrations in the Miami Comm/Terr for that time period. For example, applying the 2012 Broward average expected penetration rate of 5.29%, Mazda's expected registrations in the Miami Comm/Terr were 4,320 registrations, while its actual registrations were only 2,800.

c. Confirmation of the Benchmark as Reasonable

80. The third step in determining the benchmark is to test the reasonableness of the benchmark by determining if it has been achieved.

81. There are many areas in Southeast Florida, including areas in Miami-Dade, Broward, and Palm Beach counties, that achieve or exceed the Broward average of 5.29%. The Broward

average of 5.29% has also been consistently achieved or exceeded in various markets in Florida over a period of time from 2010 to July 2013.

82. Although the Broward average includes Gunther, one of MMA's highest selling dealers, this is not a valid reason to reject it as the benchmark because the Broward average of 5.29% is achieved in numerous areas in Southeast Florida, and over time in various other markets in Florida.

83. Mr. Roesner proposed alternative benchmarks of U.S., comprised of the entire U.S.; the Region, comprised of several states in addition to Florida; and the entire state of Florida. Mr. Roesner's Florida benchmark includes many areas with no Mazda dealer representation.

84. Mr. Roesner's U.S., Region, and Florida benchmarks are not appropriate benchmarks because those areas are too diverse or different from the Miami Comm/Terr to permit a meaningful comparison.

85. Based on a consideration of all relevant evidence, the appropriate comparison area is the Broward SOAs, and the segment-adjusted Broward average of 5.29% is a reasonably expected market penetration level for adequate representation in the Miami Comm/Terr.

d. Performance of Dealer Network in Miami
Comm/Terr Compared to Reasonably Expected
Market Penetration

86. Mazda's performance in the Miami Comm/Terr (actual market penetration) is measured relative to the segment-adjusted Broward average (expected market penetration) to determine if the dealer network in the Miami Comm/Terr is providing adequate representation.

87. For the years 2010 through July 2013, the Miami Comm/Terr performed well below the reasonably expected Broward average performance. Specifically, in 2010, the Miami Comm/Terr performed at 68.7% of the reasonably expected Broward average, with a loss of 1,604 new vehicle registrations; in 2011, at 67.4% of reasonably expected Broward average and 1,535 lost registrations; in 2012, at 64.8% of reasonably expected Broward average and 1,520 lost registrations; and calendar year to date (CYTD) July 2013, at 65.8% of reasonably expected Broward average and 1,659 lost registrations (on an annualized basis).

88. The Miami Comm/Terr's performance in the 60th to 70th percentile range is not a low "C" average; rather it is considered very low achievement because the Broward average is considered to be reasonably expected, and not superlative, performance. In another words, 100% is merely average and to be expected.

89. The Miami Comm/Terr is performing well below a reasonable level of performance, and its performance has been consistently below average--65% of Broward SOAs.

90. Mr. Farhat credibly testified as to the import of this performance--

consumers are saying they're dissatisfied with the Mazda effort, the Mazda Network. Consumers in Broward County are buying at a certain rate. Consumers in this area [the Miami Comm/Terr] are buying at 50 or 60 percent of that rate. So consumers are telling Mazda they're not happy. This is not an adequately represented [market]--there's not enough competition. There's not enough convenience. And it's displayed in ultimately, you know, their purchases. They put their money where their mouth is, and it's not going to Mazda.

91. The fact that the Miami Comm/Terr's performance has been consistently below the Broward average indicates inadequate performance by the Mazda dealer network. This below-average performance is evident throughout the Miami Comm/Terr in all four of the SOAs--Ocean, SMM, North Miami, and the open point.

92. North Miami's performance (although still below the Broward average) is better than the other SOAs' performance and indicates that a stronger performing dealer can do better, so that improved performance is available with a stronger dealer effort.

93. The Miami Comm/Terr's performance is still inadequate when compared to the more conservative benchmark, suggested by

SMM, of the Florida Represented average. The Miami Comm/Terr's performance declined in each year from 2010 through CYTD July 2013 as measured by the Florida Represented average, indicating inadequate performance and consumer dissatisfaction with the level of Mazda dealership competition. Specifically, in 2010, the Miami Comm/Terr performed at 95.2% of Florida Represented average, with a loss of 179 new vehicle registrations; in 2011, at 94.3% of Florida Represented average, with a loss of 191 registrations; in 2012, at 84.3% of Florida Represented average, with a loss of 522 registrations; and CYTD July 2013 (MMA gave notice of establishing Brickell Mazda in August 2013), at 80.8% of Florida Represented average, with a loss of 759 registrations (on an annualized basis).

94. This same below average and declining performance measured against the Florida Represented average is evident in the Ocean, SMM, and open point SOAs. North Miami's performance is better as measured against the Florida Represented average, which indicates the very conservative nature of the Florida Represented as a benchmark. However, even North Miami's performance is declining under the Florida Represented average, dropping over 20% from 2010 to CYTD July 2013.

95. As Mr. Farhat testified, under either the Broward or Florida Represented benchmarks, his conclusions are the same--

So the pattern, I think, is similar. The conclusion is, ultimately, relative to the reasonable benchmark, which is the Broward County SOAs, the Miami Comm/Terr, and in particular, areas south of the Lehman [North Miami] SOA are inadequately represented. There is very poor performance. There is significant incremental opportunity. And even to the more conservative Florida benchmark, you have the same conclusion: Areas below or South of Lehman are not adequately represented by the existing Mazda dealer network.

96. Based on a consideration of all relevant evidence, it is determined that there is an inadequate level of representation of Mazda in the Miami Comm/Terr.

e. Consideration of All Factors Which May Affect Market Penetration

97. The "market penetration" factor requires not only a determination of the appropriate comparison and analysis of how the existing dealers are penetrating their market, but requires "consideration of all factors which may affect said penetration, including, but not limited to, demographic factors such as age, income, education, size class preference, product popularity, retail lease transactions, or other factors affecting sales to consumers of the community or territory." § 320.642(2)(b)3., Fla. Stat.

98. In addition to the segmentation analysis discussed above, which takes into consideration vehicle size and class preference, both MMA and SMM presented extensive evidence

regarding the potential effect of the Miami Comm/Terr Hispanic population, and the lack of Spanish-language advertising by MMA and the Miami Comm/Terr Mazda dealer group.

99. SMM argues that there are unique demographic factors in the Comm/Terr which explain why Mazda's market penetration dropped from 2011 to 2012 and through July 2013. Further, SMM argues that MMA's failure to conduct advertising in Spanish, in the Miami Comm/Terr, resulted in Mazda's declining market penetration. These arguments were not supported by credible evidence.

100. Miami-Dade County makes up the vast majority of the Comm/Terr. The population of Miami-Dade County is 67% Hispanic. By contrast, the population of Broward County is just 27% Hispanic.

101. Within Miami-Dade County more than 50% of the Hispanic population is Spanish dominant, meaning that they speak mostly or only Spanish. Spanish dominance is high across Hispanic nationalities and socio-economic levels.

102. A vast majority of the Hispanic population in Miami-Dade County are Latin Americans who immigrated to this Country. The population of Miami-Dade County is such that Spanish speakers immigrating to the county are not required to assimilate by learning English. Even those Spanish speakers who also speak English are able to live their daily lives without communicating

in English. A large portion of the Miami-Dade County population consumes Spanish media, in the form of El Nuevo Herald (the Spanish language version of The Miami Herald); the numerous Spanish language radio stations; and the four Spanish broadcast television (TV) stations.

103. Spanish broadcast TV stations are the most popular in Miami-Dade County. The two top-rated six o'clock TV newscasts in Miami-Dade County are on Spanish stations. Among broadcast TV viewers, greater than 50% watch Spanish TV stations between the hours of 6:00 p.m. and 11:00 p.m.

104. Because of the high concentration of Hispanics in Miami-Dade County, along with the high percentage of Hispanics that are Spanish dominant and the popularity of Spanish media, Spanish advertising is very common throughout Miami-Dade County.

105. There are three categories or "tiers" of advertising in the automotive industry--Tier 1, Tier 2, and Tier 3.

106. Tier 1 advertising is designed to promote the Mazda brand to a national audience; for example, a Mazda automobile advertisement during a sporting event. MMA pays for all Tier 1 advertising.

107. Tier 2 advertising is designed to advertise the Mazda brand in connection with specific offers available to potential customers in a market area, and usually includes some reference to the local dealers.

108. Dealer groups, known as Dealer Marketing Groups (DMGs), purchase Tier 2 advertising with funds derived from two sources: 1) member dealers contribute on a per-car basis for all cars purchased from MMA (currently 1.5% of base MSRP)^{6/}; and 2) MMA contributes an additional amount (currently \$.50 for each dollar contributed by dealers).

109. DMGs are formed when dealers in the same media market area, known as a Dominant Market Area (DMA), voluntarily join together to pool their advertising dollars to fund advertising in their DMA. South Motors, Ocean, and North Miami are not part of a DMG.

110. If a dealer is not a member of a DMG, the per-car contribution that would otherwise go to the DMG is kept by the dealer and can be used for advertising.

111. DMGs work with MMA to make advertising buys in the local media. MMA's advertising agency will propose advertising content and buys, and the DMGs decide how and on what ads to spend their money.

112. Prior to DMGs, Mazda dealers joined Tier 2 marketing groups known as voluntary or "Vol" groups, which were similar to DMGs, and used dealer contributions and matching funds from MMA to engage in Tier 2 advertising. The Vol groups disbanded in 2012 when the DMG program began.

113. Not all Mazda dealers are in DMGs. A single point market (only one Mazda dealer) does not have a DMG because with no pooling of funds, the dealer can make its own decision about advertising content and buys. In multi-point markets (more than one Mazda dealer), if the dealers voluntarily agree to form a DMG, MMA will support them. If dealers in a market decide not to form a DMG, MMA does not attempt to force them. If MMA were to provide funds for Tier 2 advertising in markets where there is no DMG, it would discourage dealers from participating in DMGs and contributing to the cost.

114. MMA has 18 multi-point markets in the Southeast Region, and ten do not have DMGs. The Mazda dealers in Nashville and Winston-Salem formed DMGs and later disbanded them. MMA currently has six multi-point markets in Florida with DMGs and two multi-point markets without DMGs.

115. There are two DMGs in Florida with some, but not all, dealers participating--West Palm and Orlando. In Palm Beach County, there are two high-volume dealers in the southernmost part of the county who agreed to form a DMG because the dealers to the north do not compete with them.

116. In Orlando, there is one dealer in Ocala who is on the fringe of the DMG and does not strongly compete with the five Orlando dealers in the DMG.

117. MMA prefers not to have DMGs with less than all dealers participating because of the "free rider" problem, where the non-participating dealers may benefit from the advertising paid for by the participating dealers. In both West Palm and Orlando, all of the dealers are aware of and have consented to the formation of the DMGs without the participation of all dealers in these DMAs.

118. Tier 3 advertising is designed to persuade individual local consumers to do business with a particular dealership; for example, advertising of the dealership in local media, the internet, or on billboards.

119. Each individual dealership pays for its Tier 3 advertising. MMA reimburses a portion of each dealership's Tier 3 advertising costs by crediting the dealer's account with amounts known as Co-Op funds. In addition to Co-Op funds, if a dealer is not a member of a DMG, the per-car contribution that would have gone to the DMG is returned to the dealer and can be used for additional Tier 3 advertising.

120. In addition to providing funds for the three advertising tiers, MMA periodically has available regional marketing funds used for additional regional advertising or events, or to assist dealers with grassroots events or additional local advertising.

121. MMA ran Tier 1 advertising in English during all times relevant to this proceeding. Tier 1 advertising provides the same coverage in all markets for all dealers. Beginning in 2013, MMA increased its Tier 1 advertising to be "always on" for all dealers 52 weeks a year.

122. Since October 2010, the majority of Mazda Hispanic advertising has been at the Tier 2 level by the Vol groups or DMGs. MMA's decision to shift Hispanic advertising to the Tier 2 level is consistent with its overall marketing strategy to put greater emphasis on local versus national media.

123. MMA's marketing strategy allows DMGs to focus on Hispanic advertising in markets where there is a large population of Spanish-dominant speaking consumers.

124. DMGs vote and determine whether to engage in Hispanic advertising. DMGs in some markets have elected to engage in Hispanic advertising. Currently, DMGs engage in Hispanic advertising in the following markets--Tampa, Orlando, West Palm, Los Angeles, Sacramento, San Francisco, Houston, Dallas, and the lower Rio Grande Valley.

125. In 2013, MMA investigated the feasibility of a Tier 1 national Hispanic advertising effort, but concluded that Hispanic advertising was best done at the Tier 2 and 3 levels.

126. MMA is not the only manufacturer that does not engage in Hispanic advertising at the Tier 1 level--Kia and Hyundai do

not conduct Tier 1 Hispanic advertising. In addition, at various times from 2010 to 2013, Hyundai, Buick, Mitsubishi, Volvo, GMC, Smart, Subaru, and Mini have not engaged in Tier 1 Hispanic advertising on local Spanish TV stations in the Miami-Dade/Broward market.

127. MMA decided not to do Tier 1 Hispanic advertising because over two-thirds of the national Hispanic audience either speak English fluently or speak both English and Spanish.

128. Miami-Dade and Broward counties comprise one market for advertising purposes (Miami-Dade/Broward Market).

129. MMA's Tier 1 advertising reaches a national audience (which would include the Miami-Dade/Broward Market) through its national TV, digital, and print categories. Through 2012, MMA engaged in Tier 1 English and Hispanic advertising in the Miami-Dade/Broward market, including Tier 1 Hispanic advertising on local Spanish TV stations. In 2013, MMA continued its Tier 1 English advertising in the Miami-Dade/Broward Market and also conducted a small amount (\$5,663.00) of Tier 1 Hispanic advertising on local Spanish TV stations.

130. Garage Team Mazda is MMA's contracted advertising agency and tracks MMA's media planning and spending. Garage Team Mazda prepares summaries of MMA spending on Tier 1 and Tier 2 advertising. MMA and Garage Team Mazda compute the actual advertising dollars spent in the Miami-Dade/Broward Market by

taking the percentage of U.S. households defined by Nielsen to be in the Miami-Dade/Broward Market (1.4%) and applying that percentage to the total national spending.

131. For the fiscal year ending March 2010, MMA spent \$30,407,616.00 on Tier 1 TV advertising, of which 1.4%, or \$425,706.00 was spent in the Miami-Dade/Broward market. For the fiscal year ending March 2011, MMA spent \$35,715,344.00 on Tier 1 TV advertising, of which 1.4%, or \$500,014.00 was spent in the Miami-Dade/Broward Market. For the fiscal year ending March 2012, MMA spent \$80,401,232.00 on Tier 1 TV advertising, of which 1.4%, or \$1,125,617.00 was spent in the Miami-Dade/Broward Market.

133. For the fiscal year ending March 2013, MMA spent \$87,530,735.00 on Tier 1 TV advertising, of which 1.4%, or \$1,225,430.00 was spent in the Miami-Dade/Broward Market. For the fiscal year ending March 2014, MMA spent \$108,065,318.00 on Tier 1 TV advertising, of which 1.4%, or \$1,512,914.00 was spent in the Miami-Dade/Broward Market.

134. These sums represent only Tier 1 advertising on national TV, and do not include other Tier 1 advertising such as national radio, print, spot TV, digital, etc.

135. Tony Garcia, SMM's advertising expert, testified that MMA's spending on general and Hispanic advertising in Miami-Dade and Broward counties has been decreasing, and as a result Mazda

"gets lost in the shuffle." However, Mr. Garcia based his conclusions on advertising spending figures that include only a limited number of local TV stations; and, even for those stations, the figures do not include national broadcast advertising. As a result, Mr. Garcia does not know what additional Tier 1 advertising each manufacturer is doing. The Tier 1 spending in Mr. Garcia's report could reflect as little as 5% or more than 75% of Tier 1 spending in the Miami-Dade/Broward Market; and, thus, Mr. Garcia did not know the true percent of spending for Tier 1 advertising of each brand.

136. With regard to Tier 2 spending, Mr. Garcia did not know whether the data he relied on included all Tier 2 spending by dealer advertising associations or whether the data correctly segregated Tier 1 and Tier 2 spending.

137. Mr. Garcia also testified that MMA's Mazda advertising is not reaching an important segment of the market, specifically Hispanics. However, Mr. Garcia does not know what portion of the Hispanic population that speaks "mostly Spanish" is not reached by English language advertising. Mr. Garcia also does not know how likely Hispanics are to purchase new motor vehicles, but admits that is something a new car dealer would want to know before spending money on Hispanic advertising.

138. Roughly 12.5% of the Miami-Dade population speak only Spanish.

139. Before the DMG program started in 2012, all Mazda dealers in Miami-Dade and Broward counties belonged to the Vol group and engaged in Tier 2 English and Hispanic advertising. The Miami-Dade/Broward Mazda Vol group did not agree on Hispanic advertising and compromised on spending a very small amount on Hispanic advertising.

140. The Miami-Dade/Broward Mazda Vol group disbanded at the start of the DMG program. Hispanic advertising placed by the Vol group continued to run in the Miami-Dade/Broward Market until February or March 2012.

141. After the Vol group disbanded, the dealers in the Miami-Dade/Broward Market did not agree to form a DMG because some dealers were not interested.

142. Mazda dealers are free to engage in Hispanic advertising at the Tier 3 level and, in fact, can use the funds that would otherwise go to the DMG, along with Co-Op funds which are reimbursed by MMA.

143. MMA cannot force its dealers to join a DMG. Less than all of the dealers can form a DMG, but this was not proposed by SMM, Ocean, or North Miami.

144. Mazda dealers can also request reimbursement for advertising, including Hispanic advertising, from the Region's yearly marketing funds. In January 2013, SMM requested regional marketing funds to reimburse expenses of a "grass roots event."

The request was not approved due to a lack of funds left in the regional budget for the fiscal year ending March 31, 2013.

145. The open point SOA is 63.79% Hispanic, the second-highest Hispanic density of all the Mazda SOAs in Florida. In 2012, SMM sold 73 new Mazda vehicles to customers in the open point SOA, while North Miami sold 204. The disparity in the ability of these two dealers to penetrate the open point SOA-- under the same conditions of no DMG and no Hispanic Tier 2 advertising--believes the contention that Mazda's performance in the open point SOA is affected by a lack of Hispanic advertising.

146. If the lack of Tier 1 and/or Tier 2 Spanish language advertising is hampering SMM's ability to sell to customers in the open point SOA, North Miami would not be able to sell almost three times as many vehicles to customers in the same highly Hispanic SOA. The disparity points to differences in individual dealer operations, not a lack of Hispanic advertising.

147. SMM also contends that the cessation of Tier 2 advertising, in any language, in March 2012 is responsible for Mazda's declining market penetration in the Miami Comm/Terr. However, as noted above, the performance of all the SOAs in Broward and Dade counties had already peaked in 2010 and had started to decline in 2011. After the Miami-Dade and Broward dealers' DMG ceased, the per-car contributions by the dealers

were returned by Mazda to the dealers, which funds may be spent on advertising or other purposes.

148. Based on a consideration of all relevant evidence, it is determined that the economic and marketing conditions in the Miami Comm/Terr are not likely causes of the inadequate representation and, in fact, support the need for the establishment of Brickell Mazda.

149. Based on a consideration of all relevant evidence, it is determined that the Hispanic population in the Miami Comm/Terr and the end of Tier 2 Hispanic and/or English advertising in 2012 are not likely causes of the inadequate representation.

D. Action by MMA Denying Existing Dealers Opportunity for Reasonable Growth and Market Expansion

150. There is no evidence establishing that MMA has taken any action to deny existing dealers an opportunity for reasonable growth and market expansion.

E. Attempts by MMA to Coerce Existing Dealers to Consent to the Proposed Additional Dealer

151. There is no evidence establishing that MMA attempted to coerce existing dealers to consent to the proposed additional dealer.

F. Distance, Travel Time, Traffic Patterns, and Accessibility Between Existing Dealers and the Location of the Proposed Additional Dealer

152. As discussed in greater detail above, SMM, Ocean, North Miami, and the proposed Brickell Mazda location are all

accessible by major north/south and east/west thoroughfares. Travel times between existing dealers and the proposed location will vary significantly depending upon traffic conditions.

153. The drive time between the Proposed Point and SMM is approximately 20 to 25 minutes but will take longer if there is congested traffic. The establishment of Brickell Mazda will reduce the average distance to the nearest Mazda dealer in the Miami Comm/Terr in half and eliminate any significant drive time for those who live and work in the immediate downtown Miami area.

G. Benefits to Consumers Not Likely to be Obtained by Geographic, Demographic, or Other Expected Changes

154. As discussed above, it is likely that consumers will benefit from Brickell Mazda's opening, through greater convenience in accessing Mazda sales and service, and increased competition among competitive dealerships and Mazda dealers, resulting in lower prices and improved facilities with better customer care and service.

H. Whether the Protesting Dealer is in Compliance with Its Dealer Agreement

155. SMM is in compliance with its Mazda franchise agreement.

I. Adequacy of Interbrand and Intrabrand Competition and Adequacy of Convenient Consumer Care, including Adequacy of Sales and Service Facilities

156. The presence of interbrand competition (Mazda dealers vs. other brand dealers) and intrabrand competition (Mazda

dealers vs. other Mazda dealers) in the Miami Comm/Terr is also assessed as a factor influencing consumer behavior.

157. With respect to intrabrand competition, existing dealers strenuously compete for new Mazda vehicle sales and service business throughout the Comm/Terr. Each of the three existing Mazda dealers in the Comm/Terr sells into the SOAs in which the other dealers are located, and into the open point SOA in which the proposed additional dealer would be located. However, Ocean and SMM consistently lagged behind North Miami in terms of market performance.

158. With respect to interbrand competition, every line-make that Mazda competes with is represented by at least one dealer in the Comm/Terr (all line-makes except for Smart have more than one dealer). The evidence is that there is inadequate interbrand competition because consumers are not buying Mazda vehicles at the rate projected by the Broward average benchmark, thus indicating their dissatisfaction with the Mazda dealer network in the Miami Comm/Terr.

J. Whether the Proposed Additional Dealer is Justified Based on Economic and Marketing Conditions

159. The Miami Comm/Terr, which is composed of the four SOAs of North Miami, Ocean, SMM, and the open point, constitutes a big market, by any measure, with a 2012 population of roughly 3,080,000. The four SOAs all have significant concentrations of

populations, with the open point SOA having the greatest density of population.

160. Mr. Farhat testified that this indicates a "hole for the Mazda network" where Brickell is proposed, and where there is no current convenient Mazda dealership.

161. The same pattern is true for households in the Miami Comm/Terr, with high household density and past and projected growth both throughout the area and in the open point SOA. A general pattern of population, household, and employment growth, while not a direct predictor of new vehicle sales, does indicate more new vehicle sales over time. Based on the overall population and number of households, the Miami Comm/Terr is a very large, strong, and growing market in terms of new vehicle sales opportunities.

162. Employment in Miami-Dade County has also grown steadily since the bottom of the recent economic recession in 2009, another positive indicator for new vehicle sales. Households with median incomes between \$25,000 and \$85,000 (potential Mazda purchasers based on buyer reports), are found throughout the Miami Comm/Terr, a further indicator of new Mazda vehicle sales opportunities.

163. Mr. Farhat assessed the number of Mazda dealerships relative to competitor dealerships to calculate Mazda's "shelf space," or share of franchise. Mr. Farhat calculated that

Mazda's share of franchises in the Miami Comm/Terr of 3.1% is low compared to 4.9% in the Broward SOAs and 4.7% in the Florida Represented SOAs, which has caused Miami Comm/Terr consumers to buy other brands and not Mazda. Mazda has three dealers in the Miami Comm/Terr. Only four other competitive brands (Fiat, Subaru, Mini, and Smart) have three or fewer dealers. Fourteen other competitive brands have four or more dealers. MMA wants to be located where its competitors have dealers.

164. Using regression analysis, Mr. Farhat testified to the direct correlation between shelf space and higher market share, and concluded that the Miami Comm/Terr needs "4.8 Mazda dealers, or, essentially, more than four, which is five" dealers in order to be able to achieve the Broward average. Using the more conservative Florida Represented standard, Mazda would still need more than four dealers to achieve the same shelf space as its competitors, indicating that the Miami Comm/Terr is too big for just three Mazda dealers.

165. Based on a consideration of all relevant evidence, it is determined that the economic and marketing conditions in the Miami Comm/Terr support the need for the establishment of Brickell Mazda.

K. Volume of Registrations and Service Business Transacted by Existing Dealers

166. As discussed above, the existing dealers are not meeting the Broward average or the Florida Represented benchmark for registrations. Registrations have been declining in the Miami Comm/Terr for the last three years.

167. With only three Mazda dealers, the Miami Comm/Terr currently provides the greatest sales opportunity per dealer among all Florida markets. If Brickell Mazda is added, the Miami Comm/Terr will have four Mazda dealers and will still present substantial opportunities for sales, ranking as the second largest opportunity per dealer just behind Orlando.

168. The same is true with respect to expected service opportunities as measured by units in operation per dealer. With three dealers, the Miami Comm/Terr currently provides the largest service opportunity per dealer among all Florida markets. If Brickell Mazda is added, the Miami Comm/Terr will still be a very large service market, ranking fourth in opportunity per dealer behind Orlando.

CONCLUSIONS OF LAW

169. The Division of Administrative Hearings has jurisdiction over the parties to, and the subject matter of, these proceedings. § 120.569, Fla. Stat.

170. Petitioner has standing to protest the proposed additional dealer pursuant to section 320.642(3)(b)2., Florida Statutes.

171. MMA bears the burden of establishing, by a preponderance of the evidence, that existing franchised Mazda dealers who register retail sales or retail leases of new Mazda vehicles in the Comm/Terr of the proposed additional dealer are not providing adequate representation of Mazda in the Comm/Terr. § 320.642(2)(a)2., Fla. Stat.; BMW of N. Am., LLC, et al. v. Pompano Imports, Inc., et al., Case Nos. 08-1160, 08-1161, 08-1295, 08-1296, and 08-1321 at 64 (Fla. DOAH Apr. 27, 2009; DMSMV June 18, 2009).

172. This matter is governed by chapter 320, including the eleven non-exclusive factors to assess the adequacy of representation set forth in section 320.642(2)(b):

In determining whether the existing franchised motor vehicle dealer or dealers are providing adequate representation in the community or territory for the line-make, the department may consider evidence which may include, but is not limited to:

1. The impact of the establishment of the proposed or relocated dealer on the consumers, public interest, existing dealers, and the licensee; provided, however, that financial impact may only be considered with respect to the protesting dealer or dealers.

2. The size and permanency of investment reasonably made and reasonable obligations incurred by the existing dealer or dealers to

perform their obligations under the dealer agreement.

3. The reasonably expected market penetration of the line-make motor vehicle for the community or territory involved, after consideration of all factors which may affect said penetration, including, but not limited to, demographic factors such as age, income, education, size class preference, product popularity, retail lease transactions, or other factors affecting sales to consumers of the community or territory.

4. Any actions by the licensees in denying its existing dealer or dealers of the same line-make the opportunity for reasonable growth, market expansion, or relocation, including the availability of line-make vehicles in keeping with the reasonable expectations of the licensee in providing an adequate number of dealers in the community or territory.

5. Any attempts by the licensee to coerce the existing dealer or dealers into consenting to additional or relocated franchises of the same line-make in the community or territory.

6. Distance, travel time, traffic patterns, and accessibility between the existing dealer or dealers of the same line-make and the location of the proposed additional or relocated dealer.

7. Whether benefits to consumers will likely occur from the establishment or relocation of the dealership which cannot be obtained by other geographic or demographic changes or expected changes in the community or territory.

8. Whether the protesting dealer or dealers are in substantial compliance with their dealer agreement.

9. Whether there is adequate interbrand and intrabrand competition with respect to said line-make in the community or territory and adequately convenient consumer care for the motor vehicles of the line-make, including the adequacy of sales and service facilities.

10. Whether the establishment or relocation of the proposed dealership appears to be warranted and justified based on economic and marketing conditions pertinent to dealers competing in the community or territory, including anticipated future changes.

11. The volume of registrations and service business transacted by the existing dealer or dealers of the same line-make in the relevant community or territory of the proposed dealership.

173. The purpose of section 320.642 was summarized in Bill Kelley Chevrolet v. Calvin, 322 So. 2d 52 (Fla. 1st DCA 1975), cert. denied 336 So. 2d 1180 (Fla. 1976), as follows:

The purpose of § 320.642, F.S. 1973, is to prevent powerful manufacturers from taking unfair advantage of their dealers by overloading a market area with more dealers than can be justified by the legitimate interests of the manufacturer and its dealers, existing and prospective. Plantation Datsun, Inc. v. Calvin, 275 So. 2d 26 (Fla. 1st DCA 1973). Its purpose is not to foster combinations to prevent the introduction of dealer competition which is reasonably justified in terms of market potential. Antitrust laws have proscribed such combinations in the United States since 1890 and in this State since 1915. Tit. 15 U.S.C. § 1 et seq.; Ch. 6933, Fla. Laws 1915 as amended, Ch. 542, F.S. 1973.

174. This proceeding requires a balancing of any deficiency in Mazda's performance within the Comm/Terr, the degree to which

that deficiency will be addressed by the proposed additional dealer, and the impact the proposed additional dealer will have upon the other existing dealers and consumers. Gen. Motors Corp. v. Roger Whitley Chevrolet, Inc., Case Nos. 03-4083 and 03-4084 at 24-25 (Fla. DOAH Feb. 16, 2005; DHSMV May 9, 2005).

175. That MMA may be better represented in the Comm/Terr if the proposed additional dealer is established is not dispositive of the issue of whether the proposed additional dealer should be approved. BMW of North America, at 68.

176. Neither may MMA satisfy its burden of proof by simply establishing that existing Mazda dealers could do a better job:

In making the determination that a manufacturer is not being adequately represented in a market, it is not enough to simply conclude that the existing dealers could do a better job, or that the proposed dealer network change will improve the manufacturer's performance in the market. Hess Marine, Inc. v. Calvin, 296 So. 2d 114, 115 (Fla. 1st DCA 1974). While, however, one must not forget the famous words of Louise Heath Leber that "[t]here's always room for improvement, you know-it's the biggest room in the house," that sentiment does not equate to inadequate representation. The real focus of proceedings brought under Section 320.642 is whether the existing dealers are doing enough.

Gen. Motors Corp. v. Roger Whitley Chevrolet, Inc., supra.

177. Rather, MMA must establish that existing Mazda representation in the Comm/Terr falls short of the standard of "adequacy." Adequate representation does not equate to

exceptional representation. Adequate representation refers to representation that is just barely satisfactory or sufficient. BMW of North Am., at 69-70; see also United Steelworkers of Am. v. Marshall, 647 F.2d 1189, 1251 (D.C. Cir. 1980) ("'Adequately,' both in normal use and as a contemporary legal cliché, means 'suitably' or 'passably' or 'just barely.'").

178. The Florida statute does not proscribe what weight, if any, should be given to each factor, in contrast to Washington's law that requires that each factor be given equal weight. See § 46.96.160, Wash. Rev. Code Ann.

179. In Lokey Oldsmobile Countryside, Inc. v. Sunshine Chevrolet-Geo-Oldsmobile, Inc., Case No. 92-0021 (Fla. DOAH Sept. 21, 1992; DHSMV Nov. 5, 1992), the Hearing Officer recognized this balancing test and held that:

Application of the criteria set forth in Section 320.642(2)(b)1, Florida Statutes, to the evidence presented at hearing reveals that the negative impacts that could occur from the relocation involve economic and marketing conditions pertinent to [the protesting dealer]. These negative impacts, such as the loss of two census tracts with its financial impact on [the protesting dealer], must be balanced with the overall impact of the proposed relocation on the public and all of the dealers in the territory.

Lokey, ¶ 28. The Hearing Officer further concluded that "the temporary adverse impact of the proposed relocation . . . is

outweighed by the long term advantages," such as increased convenience and competition. Lokey, ¶ 29.

180. Similarly, in American Honda Motor Co. v. Hollywood Imports, Inc., Case No. 95-3673 (Fla. DOAH June 7, 1996; DHSMV Sept. 12, 1996), affirmed by Hollywood Imports, Ltd., Inc. v. American Honda Motor Co., 695 So. 2d 793 (Fla. 1st DCA 1997), the Hearing Officer found that because Hollywood Honda, the protesting dealer, made 34% of its sales in the primary market area where the proposed relocation would occur, it was "reasonable to expect that Hollywood Honda would lose sales . . . if the relocation is approved." Id. ¶ 37. However, the Hearing Officer held that "[i]n weighing the impacts of this proposed relocation, it is concluded that the benefits to the public and to the dealer network outweigh the impact the relocation will have" on the protesting dealer. Id. ¶ 42.

181. These cases demonstrate that any impact on the existing dealer must be weighed against the benefits that could be provided by a proposed relocation or additional dealer.

182. The Miami Comm/Terr has experienced considerable economic and market growth. Population, households, employment, and new car registrations have all expanded substantially and rapidly since as far back as 2000. All of this growth, with Mazda representation below reasonably expected levels for at

least the last three and one-half years, also indicates inadequate representation.

183. The existing Mazda dealers are located far enough away from Brickell Mazda's proposed location that their sales are not likely to be substantially impacted by Brickell Mazda's establishment.

184. The greater convenience offered by interbrand competitors, in and near Brickell Mazda's proposed location, has resulted in inadequate Mazda interbrand competition in the open point SOA. This is reflected in Mazda's low market share as compared to the expected market share in the open point SOA.

185. In the Miami Comm/Terr, currently there are seven Toyota Dealers, seven Honda Dealers, five Nissan Dealers, five Hyundai, and five Kia dealerships covering the same geographical territory as three Mazda dealerships. There is not enough Mazda dealer presence in the Miami-Dade/Broward Market for MMA or its dealers to adequately compete with their major competitors.

186. Credible evidence establishes that the optimal location for a fourth Mazda dealership is at Brickell Mazda's proposed location, which will achieve maximum separation between dealers, as opposed to the previous, more crowded dealer network. Brickell Mazda's location will allow it to serve the burgeoning growth in downtown Miami. With the addition of Brickell Mazda,

there will be optimal customer convenience for sales and service of Mazda vehicles throughout the Miami Comm/Terr.

187. The concept that conquest sales (gross registration losses) plus in-sell sales by other dealers represents lost opportunity has been affirmed in other cases, including General Motors Corporation, Chevrolet Division v. Anthony Abraham Chevrolet Co., et al., Case No. 95-2543 ¶ 40 (Fla. DOAH Sept. 5, 1997; DHSMV Oct. 17, 1997); Terry Ford Co. v. Hollywood Ford, Inc., et al., Case No. 94-0402 ¶ 45 (Fla. DOAH June 13, 1995; DHSMV July 14, 1995) (Rec. Order); and Southeast Toyota Distributors, Inc. v. Triangle Auto Center, Inc., Case No. 97-2002 ¶ 34 (Fla. DOAH June 19, 1998; DHSMV Aug. 1, 1998) (Rec. Order).

188. The concept that there will be no additional sales generated by the new dealer (a "fixed pie") was rejected in General Motors Corporation/Pontiac Motor Division v. Colonial Pontiac, Inc., Case No. 89-6832 ¶ 28 (Fla. DOAH Aug. 21, 1991; DHSMV Jan. 29, 1992) (The protesting dealer's calculation of financial impact was "inherently flawed" because it was "based on the fundamental assumption that there will be no additional sales generated by the new dealer, and in fact, that there would be a net loss of sales. This primary assumption is rejected as not established by persuasive evidence.").

189. The failure of the existing dealers to reach minimum expected market share in the Miami Comm/Terr, and the existence of in-sell from dealers outside the Miami Comm/Terr, demonstrate that existing Mazda dealers are not nearly capturing all reasonably available sales.

190. No credible evidence was presented that a lack of Tier 2 Hispanic advertising caused the existing dealers' poor performance in the Miami Comm/Terr. Moreover, Tier 2 advertising is the responsibility of the local dealers; so, to the extent the existing dealers were not providing adequate Tier 2 Hispanic advertising, which caused poor performance, this confirms that Mazda is not receiving adequate representation. See Gen. Motors Corp. Pontiac Motor Div. & Trevor Duhaney v. Colonial Pontiac, Inc., supra. ("More importantly, local advertising is the responsibility of the local dealers. Thus to the extent that the local dealers are not providing adequate advertising, Petitioner's contention that it is not receiving adequate representation is confirmed.").

191. MMA's experiences in Wesley Chapel, Jacksonville, and Royal Palm Beach confirm that an additional, properly located dealer stimulates increased sales for Mazda dealers across the market.

192. If existing Mazda dealers respond positively and offer competitive value, they will likely capture some of the increased

sales generated by Brickell Mazda's opening. Volkswagen of Am., Inc. v. Pompano Imports, Inc., Case No. 98-2394 ¶¶ 71, 74 (Fla. DOAH Dec. 17, 1999) (reasonable to anticipate that protesting dealer will respond competitively to additional dealer and offset any loss of sales); Gen. Motors Corp. Chevrolet Div. & Beacon Motors, Inc. v. Anthony Abraham Chevrolet Co., et al., supra. ¶ 41 (stimulated competitive response should benefit the surrounding Chevrolet dealers).

193. When the existing dealers become more competitive, they can take advantage of their geographic locations to increase penetration near their own dealerships.

194. SMM did not offer any reliable competent evidence that its sales would be negatively impacted by Brickell Mazda's opening. SMM's expert's evaluation of the sales to be lost in the event of Brickell Mazda's opening was unsupported by credible evidence.

195. MMA's expert's opinion, that SMM's sales would increase after Brickell Mazda opens, is based on competent evidence and empirical data and is accepted as true.

196. With over three million people, Miami-Dade is the most populous county in Florida. Mazda has three dealerships in the Miami Comm/Terr, while its major Asian competitors have no less than five dealerships. Honda and Toyota have seven. Mazda's market share in the Miami Comm/Terr is a fraction of neighboring

Broward County (which is heavily Hispanic and shares the same advertising association as Miami) and is lower than the Florida Represented standard. The Miami Comm/Terr has been declining, and Mazda must re-establish representation in order to create better customer convenience and competitiveness in a market where it is not able to adequately compete.

197. The likely benefits to the public and to the dealer network from the addition of Brickell Mazda outweigh any negative impact it may have on SMM.

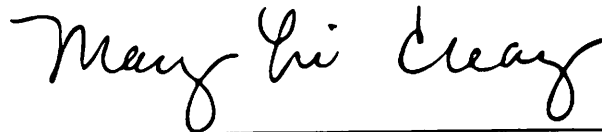
198. Taking all of the relevant factors listed in section 320.642 into consideration, MMA demonstrated by a preponderance of the evidence that the existing Mazda dealers are not adequately representing Mazda in the open point SOA or in the Miami Comm/Terr.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that:

A final order be entered by the Department of Highway Safety and Motor Vehicles granting the application to establish Miami Automotive Retail, Inc., d/b/a Brickell Mazda, as a dealer for the sale and service of Mazda vehicles, with sales to be located at 618 Southwest Eighth Street, Miami, Miami-Dade County, Florida 33130, and service to be located at 665 Southwest Eighth Street, Miami, Miami-Dade County, Florida 33130.

DONE AND ENTERED this 1st day of August, 2014, in
Tallahassee, Leon County, Florida.



MARY LI CREASY
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 1st day of August, 2014.

ENDNOTES

^{1/} "Line-make" refers to a group of vehicles sold under a common name, trademark, service mark, or brand. § 320.60(14), Fla. Stat.

^{2/} MMA previously gave notice of the establishment of Brickell Mazda in 2011, SMM protested and MMA withdrew the notice (DOAH Case Nos. 11-4529 and 11-4538).

^{3/} As discussed in further detail herein, the "Broward average" refers to what the undersigned has concluded is the appropriate benchmark used to determine whether Mazda is currently achieving a reasonably expected level of market penetration in the Miami Comm/Terr.

^{4/} The financial impact may only be considered with respect to the protesting dealer or dealers. § 320.642(2)(b)1., Fla. Stat.

^{5/} Since it opened in 2007, SMM has not had a profitable year. Its total losses to date exceed \$5.5 million, with average yearly losses in the range of \$800,000 per year. One might question why South Motors Automotive Group continues to operate South Motors Mazda given the level of losses it has sustained. Historically, South Motors Automotive Group has been very successful by opening

dealerships representing line-makes with a relatively small U.S. presence and growing those dealerships as the line-makes have grown (e.g., since South Motors Automotive Group opened dealerships representing BMW, Honda, Infiniti, and MINI, BMW registrations nationally have more than tripled; Honda and Infiniti registrations nationally have increased nearly five times; and MINI registrations nationally have nearly tripled). South Motors Automotive Group maintains SMM because it believes the same trend is possible with the Mazda line-make.

^{6/} "MSRP" is manufacturer's suggested retail price.

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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.