AMERICAN ARBITRATION ASSOCIATION
AUTOMOBILE INDUSTRY SPECIAL BINDING ARBITRATION PROGRAM

In the Matter of the Arbitration between:

TENAFLY CHRYSLER JEEP, INC.,

Claimant, **Case No. 14 532 000222 10**

v.

CHRYSLER GROUP LLC,

Respondent

Written Determination of Arbitrator

I, the undersigned Arbitrator, having been designated pursuant to Section 747 of the Consolidated Appropriations Act of 2010 (Public Law 111-117) (the "Act"), enacted December 16, 2009, and having been duly sworn and having heard the proofs and allegations of the parties, do hereby make my Written Determination pursuant to the Act.

Background

The Act affords a "covered dealership" (as defined in Section 747(a)(2)) the right to challenge by binding arbitration the decision of a "covered manufacturer" (as defined in Section 747(a)(1)(A) and (B)) to terminate, or not to assign, renew or continue, the covered dealership's franchise agreement. This case was filed in accordance with the Act's provisions and I held hearings and heard testimony on May 3 and May 4, 2010. The hearing was closed upon the filing of briefs on May 13, 2010. As provided for in section 747(d) of the Act, set forth below is my "written determination" of the issue to be decided under the Act, namely "whether or not the covered dealership should be added to the dealer network of the covered manufacturer."

I. The Covered Dealership

This proceeding concerns the automobile dealership known as Tenafly Chrysler Jeep, Inc. and located at 95 County Road, Tenafly, NJ 07870 (the "Dealership"), whose Chrysler and Jeep franchise agreements (the "Agreements") were rejected by Order of the United States Bankruptcy Court, Southern District of New York, and not assigned to Chrysler Group LLC, the "Manufacturer".

II. Determination

In accordance with the Act, the covered Dealership described above in Section I shall not be assumed or added to the dealer network of the covered manufacturer.

III. Key Facts Relied Upon by the Arbitrator in Making the Determination

In accordance with Section 747, I considered the following factors:

1. The covered dealership's profitability in 2006, 2007, 2008 and 2009,
2. The covered manufacturer's overall business plan,
3. The covered dealership's current economic viability,
4. The covered dealership's satisfaction of the performance objectives established pursuant to the applicable franchise agreement,
5. The demographic and geographic characteristics of the covered dealership's market territory,
6. The covered dealership's performance in relation to the criteria used by the covered manufacturer to terminate, not renew, not assume or not assign the covered dealership's franchise agreement,
7. The length of experience of the covered dealership,
8. Additional relevant factors raised by both parties.

In making the determination, I relied upon the following key facts:

1. Profitability: The dealership was profitable in 2006, and less profitable progressively in 2007 and 2008. It was not profitable in 2009. Its profits were: $101,498 (2006), $91,321 (2007), $20,936 (2008); and it lost $4,977 in 2009. Mr. Engel, one of the owners of the Dealership, faulted the Manufacturer for failing to consider profits from a separate business that sold Chrysler parts that he claimed at the hearing should be attributed to Tenafly Chrysler Jeep but were reported under a separate franchise which has not appealed its termination. It is hard to fault the Manufacturer for relying on the Dealership's own reporting. But in any case, for the Manufacturer's survival and success, the Dealership's profitability as a car dealership is an appropriate consideration.
2. The Covered Manufacturer's Overall Business Plan: For New Jersey's Bergen/Passaic Sales locality in which Tenafly is located, the Manufacturer was and is of the view that there were far too many dealerships and that their location was not optimal. Indeed, its plan involved the reduction from fifteen dealers with different combinations of Chrysler brands to six dealerships with all three brands. Although the Dealership challenged the basic concept of reducing the number of dealers, it is not clear that the Act permits the arbitrator to discount or ignore the Manufacturer's plan. In any case, the Dealership did not provide any evidence other than the opinions contained in a dealer-group report that its view would more likely prove correct than the Manufacturer's business judgment. What is clear is that the status quo was not viable. Most importantly, the Manufacturer determined that it wanted to focus dealerships in certain specific geographic locations where highways and auto malls converge or where there were major box stores to increase traffic. This was the prime moving factor in the determination relating to this Dealership. The geographical locations that were selected are all in the midst of

population centers where the Manufacturer's demographic expert established there is demonstrated growth. Tenafly is not one of those centers. In the Manufacturer's view, the old model of a dealer on every corner, and particularly in in-town settings did not maximize sales and disadvantaged the Manufacturer vis a vis foreign car manufacturers. It also wanted dealers that had a more floor space inside the dealership and room outside to store a large number of vehicles on its lots, making more choices immediately available to customers. The Manufacturer obviously wants to maximize the number of cars sold and also to consolidate its three franchises if possible. I discounted this last factor as a basis for supporting the Manufacturer because the Dealership had previously requested the opportunity to purchase a Dodge franchise and because the Manufacturer had terminated some dealers with all three franchises and kept others with fewer than three. Moreover, some of the legislative history suggests that the mere fact that the Dealership does not sell all brands is not sufficient to render it ineligible for reinstatement.

3. <u>The Covered Dealership's Current Economic Viability</u>: The evidence provided at the hearing established that the owners were able to survive by becoming a KIA dealer at the Tenafly location. The Manufacturer sees that as a profound impediment to the Dealership resuming its Chrysler and Jeep franchises since it would not be permissible under the Franchise Agreements to have a competing franchise at the same location. Mr. Engel testified that he would move the KIA franchise if he were successful. I do not accept the Manufacturer's position that the KIA franchise acts as a bar because that would be a Catch-22 situation. In order to maintain any viability after his sudden and unexpected termination, Mr. Engel and his brother, who co-owns the Dealership, had to be creative, and they were. But neither does the current situation offer any indication that the Dealership will have more resources to meet its Chrysler and Jeep franchise obligations, to improve the capitalization of the business, and to invest in its physical improvement, while at the same time having sufficient capital to move the KIA dealership. There was no plan for increasing throughput discussed at the hearing by any of the Dealership's witnesses. Indeed, Mr. Engel believed he was using the best methods available and did not believe that the use of media advertising as opposed to Internet or direct mail to former customers would be productive.
4. <u>The Covered Dealership's Satisfaction of the Performance Objectives Established Pursuant to the Franchise Agreement</u>: Although Tenafly Chrysler Jeep took great and justifiable pride in its excellence in customer relations, customer retention, customer satisfaction, and sales satisfaction and its recognition as a 5 Star Chrysler Dealer, it was also well-aware that it was not satisfying other criteria in the Franchise Agreements. Indeed, it contested the application of some of the criteria at the time the evaluations were provided and the Manufacturer attempted to respond to those issues.

In particular, the Dealership had not been meeting the Agreements' minimum sales responsibility ("MSR") for some years. The minimum sales responsibility was a hotly contested issue at the hearing. The MSR is the required number of cars to be sold. It is based on Chrysler's market share in the sales locality and reflects average sales by all of its dealers in that locality. The Dealership argued that there were special conditions that made the application of the MSR to it inappropriate. Interestingly, included in these points was concentration of competition, and customer preferences. To the extent that

these factors were demographic, they support rather than counter the Manufacturer's decision that the location was not optimal and that larger franchises that have more models may have a greater chance of success and of selling more cars.

To the extent that the argument relies on allegations of the manipulation of sales statistics or outright fraud by other dealerships, the evidence on that point was quite dated and inconclusive in explaining why the Dealership fell so far below the Agreement's MSR commitment so consistently. The Dealership did not provide any evidence or calculations that would have established that it actually had a significantly higher MSR. The percentage performance of Tenafly in relation to its assigned MSR was 68.5% (2006), 76.7% (2007), and 80.4% (2008). Looking only at Chrysler dealerships, Tenafly ranked 45 of 54 dealers in the state of New Jersey with respect to MSR. Mr. Engel relied heavily on the fact that Chrysler itself ignored the MSR in awarding the 5-Star status to his Dealership and argued that his excellent service record and customer retention standing were more significant and the correct proxies for determining the success of the Dealership. But if service excellence is a signal goal, it should also translate into sales. That is certainly an appropriate focus for the Manufacturer and will ultimately determine its survival. Although it cannot be viewed as determinative by itself, compliance with the Agreement's performance objectives, which include MSR, is a specific statutory element that must be considered here.

Their MSR calculation is wrong

In addition, apart from the MSR issue, the Dealership had not been meeting its minimal working capital requirement under the Agreements. It had a working capital deficit of from $470,303 to $791,229. In 2007, it had working capital of $785,652 against a guide of $1,350,000 and in 2008, $369,697 against a guide of $840,000. On the scorecard of performance metrics that was accessible via computer to the Dealership, the failure to meet MSR and working capital requirements were clearly indicated. Although Mr. Engel faulted the Manufacturer for not asking him to comply with the requirement, this is not the applicable statutory standard. The statute requires an examination of compliance.

Finally, in a facilities review of the Dealership in 2006 (well before any bankruptcy was threatening) an independent evaluation rated the Dealership as scoring only 27 of 50 points. It scored its "retail presence" as zero. Although Mr. Engel vigorously objected to that evaluation, it did not cause him to make any changes. He saw his facility through his 1994 mind's eye as "new" and not needing any remodeling or additional investment and freely testified that he had made little or none since that time. Although the exact scoring might be debatable, the photographs of the interior space revealed it to be small and crowded and in need of some effort. The lack of significant profits and undercapitalization may have contributed to the Dealership's husbanding of its resources, but the Manufacturer was entitled to consider these issues (even if the facility condition was not specifically noted for the Bankruptcy court, undercapitalization was) and the Act requires that they be considered here.

facility is gorgeous

The Dealership argues that these factors have been used unfairly as after-the-fact justifications given that some of the nearby dealerships selected to continue were not performing as well as Tenafly. However, those dealerships were in locations that the

Manufacturer had determined were optimal and had larger facilities and more acreage. I did not find evidentiary support for Mr. Engel's heartfelt judgment that he had been singled out unfairly due to his failure to participate in an old boy network, or for his inability to obtain the Dodge franchise, even if the Dealership was not initially considered at risk. The situation here changed radically in bankruptcy. The Manufacturer was forced and enabled by the bankruptcy law, the government, and Fiat to make decisions that it had not made before. That prior failure to press for compliance or change may have contributed to its lack of success. I see no basis for determining that objective centrally determined criteria that had different impact on different dealerships were not at work or that favoritism was the basis of the decision with respect to this Dealership.

5. <u>The Demographic Geographic Characteristics of the Covered Dealership's Market Territory</u> : The Manufacturer's expert established that the locations selected for the Bergen/Passaic dealerships that were assumed were carefully considered in connection with demographic growth, and confluence of auto malls or box stores and highway intersections. The Tenafly location was chosen in a different era and based on an entirely different model and it is not in a high growth area within the Bergen/Passaic area. Even after the elimination of nine dealerships in Bergen/Passaic, including Tenafly, the average distance from a customer's residence to the Manufacturer's Chrysler and Jeep dealerships remains convenient. It is 4.3 miles for Jeep and 3.7 miles for Chrysler compared to 3.0 miles and 2.8 miles previously.
6. <u>The Covered Dealership's Performance in Relation to the Criteria used by the Covered Manufacturer to Terminate, not Assume the Covered Dealership's Franchise Agreement</u>: The primary criteria used to terminate was location. But the other factors such as MSR, capitalization, and the conditions and size of the facility lent support to the decision.
7. <u>The Length of Experience of the Covered Dealership</u>: Despite the Manufacturer's argument to the contrary, this factor weighs heavily in the Dealership's favor. The Dealership had been a member of the Manufacturer's dealerships starting in 1986. First it was a Jeep dealership and then acquiring the Chrysler dealership in 1994. Mr. Engel's father had also been a Jeep dealer. The suddenness of the termination and the manner in which it occurred have been both emotionally and financially difficult for the Dealership, which had to carry the facility for months before it could reopen as a KIA dealership. Approximately 25 employees lost their jobs, although KIA now has 9 employees.
8. <u>Additional Considerations</u>: An important additional consideration was the loss of employment for at least 16 people and the substantial reduction of the Engel's income. The Dealership made an important local contribution to employment, taxes and community participation that will be diminished by its termination.

IV. Balance of Economic Interests

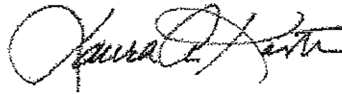
The balance of economic interests of the covered dealership, of the covered manufacturer and of the public supports this determination. The future success of the Manufacturer turns on its ability to increase the number of cars it can sell. It has a business plan that reflects its judgment on how best to proceed. It has a rational basis for its plan and it applied the standards it established in that plan here. If the Dealership is added, there may be more inter-brand competition of the sort that has harmed the Manufacturer in the past. Even more significant to me is the failure of the Dealership to suggest in any way that going forward it could increase its car sales or improve its profitability. The interest of the Dealership is in regaining its franchise, reemploying its people and renewing its role in the community.

But the harm to it is somewhat mitigated by its creative ability to become a KIA dealer and rehire some of its former employees. It may be that the location is better suited to that dealership and that it will prosper and grow. The public interest is not entirely synonymous with the Manufacturer's as it argues. I reject the invitation to simply rubberstamp the Bankruptcy Court decision because that decision did not involve an individualized analysis of this Dealership and therefore it could not comply with the statutory criteria applicable here. But the public does have a very strong interest in the Manufacturer's survival and growth because the public is a major investor and the economy as a whole is impacted by the health of the Manufacturer. There is also a public interest in maintaining employment – but that cuts both ways as creating employment at the Dealership is appropriate only if it will not impede the future health of the Manufacturer and its ability to employ many others. The evidence does not support the view that the Dealership will contribute to the increased health of the Manufacturer. Therefore, the balance of interests as a whole will not be served by adding it to the dealer network of the covered manufacturer.

VI. Costs

In accordance with the statute, the administrative fees and expenses, and the arbitrator's fees and expenses shall be borne equally.

This Written Determination is in full settlement of all claims submitted to this arbitration.



May 17, 2010
Date

Arbitrator