

EXHIBIT L

NEW MOTOR VEHICLE BOARD
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STATE OF CALIFORNIA

NEW MOTOR VEHICLE BOARD

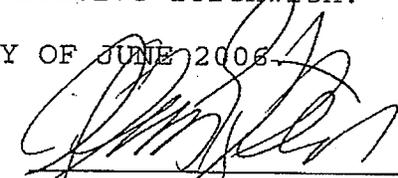
In the Matter of the Protest of)
)
THOMPSON'S AUTO & TRUCK CENTER,) Protest No. PR-1965-05
INC., dba THOMPSON'S CHRYSLER-)
JEEP,)
)
Protestant,)
)
v.)
)
DAIMLERCHRYSLER MOTORS COMPANY,)
LLC,)
)
Respondent.)

DECISION

At its regularly scheduled meeting of June 16, 2006, the Public members of the Board met and considered the administrative record and Proposed Decision in the above-entitled matter. After such consideration, the Board adopted the Proposed Decision as its final Decision in this matter.

This Decision shall become effective forthwith.

IT IS SO ORDERED THIS 16th DAY OF JUNE 2006.



GLENN E. STEVENS
Presiding Public Member
New Motor Vehicle Board

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11 In the Matter of the Protest of)
12 THOMPSON'S AUTO & TRUCK CENTER,)
13 INC., dba THOMPSON'S CHRYSLER-) Protest No. PR-1965-05
JEEP,)
14)
15 Protestant,) PROPOSED DECISION
16 v.)
17 DAIMLERCHRYSLER MOTORS COMPANY,)
LLC,)
18 Respondent.)

19
20 PROCEDURAL BACKGROUND

21 1. Protestant Thompson's Auto & Truck Center, Inc., dba
22 Thompson's Chrysler-Jeep (hereinafter Thompson's or Protestant) is a
23 California corporation with its principal place of business at 55
24 Placerville Drive in Placerville, California.

25 2. The Department of Motor Vehicles (DMV) licenses Protestant
26 as a new motor vehicle dealer. Protestant owns and operates two
27 franchised dealerships: Thompson's Pontiac, Buick and GMC Truck
28 (hereinafter Thompson's GM); and Thompson's Chrysler-Jeep, a

1 DaimlerChrysler franchise. This proceeding involves Protestant's
2 Chrysler-Jeep franchises.

3 3. Ronald Lee Thompson (hereinafter RLT) is the owner and
4 dealer principal of Protestant. RLT also owns a separate corporation,
5 not involved in these proceedings, that owns and operates a Toyota
6 dealership, also located in Placerville.

7 4. Respondent DaimlerChrysler (hereinafter DC or Respondent) is
8 a Delaware corporation headquartered in the Detroit area, with
9 operations throughout the United States and the world, and of
10 relevance hereto in Irvine, California. DC is licensed by the DMV as
11 a distributor.

12 5. By letter dated May 31, 2005, DC gave notice to Thompson's
13 pursuant to Vehicle Code section 3060¹ of its intent to terminate
14 Thompson's Chrysler-Jeep Sales and Service Agreements dated
15 August 23, 2002. It was alleged that:

16 On or about October 1, 2004, Thompson's engaged in an
17 unauthorized relocation from 55 Placerville Drive ("Approved
18 Location") to 659 Main Street in Placerville, California,
19 over the repeated objections of DaimlerChrysler. Since the
20 unauthorized relocation, Thompson's has not conducted
21 Chrysler Jeep dealership operations at the Approved
22 Location. On or about May 5, 2005, Thompson's ceased new
23 Chrysler and Jeep vehicle sales and, to DaimlerChrysler's
24 knowledge, has not conducted customary dealership operations
25 for Chrysler and Jeep at any address since that date.

26 A DaimlerChrysler representative has visited the
27 Thompson's Approved Location from time to time since October
28 2004 through May 16, 2005. At each visit, there were no
Chrysler and Jeep operations being conducted at the Approved
Location. In fact, [Thompson's] Buick, Pontiac and GMC
dealership has occupied the Approved Location exclusively
for many months.

6. Thompson's filed its protest on June 13, 2005.

¹ All statutory references are to the California Vehicle Code, unless noted
otherwise.

1 7. On October 4, 2005, DC issued an amended notice of
2 termination. The amended notice reiterated the allegations of the
3 May 31, 2005, letter and added the following:

4 ...Upon information and belief, after filing its
5 Protest in response to DaimlerChrysler's original notice of
6 termination, Thompson's moved its inventory of Chrysler and
7 Jeep vehicles back to 55 Placerville Drive, where Thompson's
8 Buick, Pontiac and GMC dealership is currently located. In
9 fact, [Thompson's] Buick, Pontiac and GMC dealership had
10 occupied the Approved Location exclusively for many months
11 and despite the recent move back to this location by
12 Thompson's Chrysler Jeep, the Buick, Pontiac and GMC
13 dealership continues to occupy this location along with
14 Thompson's Chrysler Jeep. Upon information and belief,
15 Thompson's continues to conduct its Chrysler and Jeep
16 service operations at 659 Main Street in Placerville,
17 California.

18 8. A hearing on the merits of the protest was held on
19 February 27, 2006 through March 6, 2006, before Administrative Law
20 Judge (ALJ) Jerold A. Prod.

21 9. Michael M. Sieving, Esq., of Law Offices of Michael M.
22 Sieving, 350 University Avenue, Suite 105, Sacramento, California,
23 represented Protestant.

24 10. Mark F. Kennedy, Esq. and Mark T. Clouatre, Esq., of Wheeler
25 Trigg Kennedy LLP, 1801 California Street, Suite 3600, Denver,
26 Colorado, represented Respondent.

27 11. Both parties filed pre-hearing briefs which were read and
28 considered by the ALJ prior to the taking of evidence. Oral
testimony, documentary evidence, stipulated facts, and an officially
noticed document were received.

 12. Protestant presented five witnesses at the hearing.
Testifying on behalf of Thompson's were dealer principal RLT and
controller Tammy St. Germain. As adverse witnesses, Thompson's called
Charles Polce, DC's Dealer Network Development Manager for the West

1 Business Center, and Steve Weeks, a DC Dealer Operations Manager.
2 Thompson's also called Marshall Crossan, a former dealer principal of
3 a Dodge dealership in Shingle Springs, California.

4 13. DC presented the testimony of nine witnesses at the hearing.
5 The following current employees of DC testified at the hearing: Steve
6 Weeks; Santiago Piñon, Public Company Manager and former Dealer
7 Placement Manager for the West Business Center; and Charles Polce.
8 Also testifying on behalf of DC were Denice Ortega, Inspector with
9 DMV; Carrol Anne Stubbs, a private investigator with Pacific Legal
10 Investigations; and Jeff McKay, an Investigator with DMV. DC also
11 called RLT and Tammy St. Germain as adverse witnesses, and presented
12 the deposition testimony of John McClellan, Deputy Director of the
13 Occupational Licensing Division of DMV.

14 14. The hearing was closed on March 6, 2006, at which time a
15 briefing schedule was set. The matter was submitted for decision on
16 May 10, 2006.

17 ISSUE PRESENTED

18 Whether DaimlerChrysler Has Good Cause for the
19 Termination of Thompson's Chrysler and Jeep Franchises

20 15. Pursuant to Section 3066(b), DC has the burden to establish
21 good cause for the termination of Thompson's franchises. In
22 determining whether DC has established good cause for the termination,
23 Section 3061 requires that the Board consider the "existing
24 circumstances", including but not limited to all of the following:

- 25 (a) Amount of business transacted by the franchisee, as compared
26 to the business available to the franchisee;
27 (b) Investment necessarily made and obligations incurred by the
28 franchisee to perform its part of the franchise;

- 1 (c) Permanency of the investment;
- 2 (d) Whether the franchisee has adequate motor vehicle sales and
3 service facilities, equipment, vehicle parts, and qualified
4 service personnel to reasonably provide for the needs of the
5 consumers for the motor vehicles handled by the franchisee
6 and has been and is rendering adequate services to the
7 public;
- 8 (e) Whether the franchisee fails to fulfill the warranty
9 obligations of the franchisor to be performed by the
10 franchisee;
- 11 (f) Extent of the franchisee's failure to comply with the terms
12 of the franchise.

13 GENERAL FINDINGS OF FACT²

14 History Of The Dealerships Owned By RLT Up To October 2004

15 16. RLT has been in the automobile business for about 43 years.
16 He bought Buick, Pontiac, GMC Truck and Jeep dealerships in 1989,
17 which constituted the inception of Thompson's Auto and Truck Center.
18 Since that time, RLT has been its president. The dealerships were at
19 first operated from a facility located on Broadway Street in
20 Placerville, California. (RT Vol. 1, pp. 36-37).

21 17. In February of 2001, RLT bought a Chrysler dealership from
22 another dealer. At that time the Chrysler franchise was to
23 temporarily operate together with the General Motors Corporation
24 (hereinafter GMC) line-makes on Broadway. The plan, also a temporary
25 one, was to subsequently provide a new facility at 140 Forni Road
26

27 ² The references to testimony, exhibits, or other parts of the record contained
28 herein are examples of the evidence relied upon to reach a finding, and are not
intended to be all-inclusive.

1 (hereinafter Forni Road) for all five line-makes: Chrysler; Jeep;
2 Buick; Pontiac; and GMC Truck. (RT Vol. 1, pp. 37-38) RLT was then a
3 favored and well-performing Chrysler and Jeep dealer, and was until
4 recent events (see below) deemed worthy of corporate support by
5 Respondent DC. (Exhibit R29)

6 18. However, the plan changed prior to the relocation to Forni
7 Road. GMC approved the Jeep line being dualled with its Buick,
8 Pontiac, and GMC Truck brands, but would not approve of the dualing of
9 the Chrysler brand. (RT Vol. 1, pp. 38; Vol. V, pp. 60-61) The plan
10 changed to making the Forni Road location an exclusive GMC dealership
11 (Buick, Pontiac, and GMC Truck), and establishing a new stand-alone
12 exclusive Chrysler-Jeep dealership at 55 Placerville Drive
13 (hereinafter Placerville Drive). This plan was implemented, and was
14 at that time (2001-2002) deemed satisfactory to those involved - GMC,
15 DC, and RLT. (Exhibit R20) RLT at that time believed that the move
16 would enhance the overall business opportunities of Thompson's in
17 general, and believed that the exclusive Chrysler-Jeep dealership on
18 Placerville Drive would be successful. (RT Vol. 1, pp. 38-39; Exhibit
19 R17)

20 19. RLT testified that as 2004 drew near, he was losing
21 considerable amounts of money on both his GMC and DC franchises, but
22 making money with his Toyota franchise. (RT Vol. V, p. 81)
23 Irrespective of RLT's financial evaluation of his Placerville Drive
24 Chrysler-Jeep franchise, DC was pleased with the operation from its
25 point of view. (Exhibit R29, p. 2)

26 20. RLT had purchased his Toyota dealership from an existing
27 dealer in 1997 (see Paragraph 3). It was located at 659 Main Street
28 in downtown Placerville (hereinafter Main Street), where it had been

1 since 1963 or 1964. Some time in 1999 or 2000, Toyota Motor Sales,
2 U.S.A., Inc. (hereinafter Toyota), first communicated to RLT that he
3 needed to move the Toyota dealership from Main Street to a better
4 location, or be forced to lose it or sell it. (RT Vol. 1; pp. 75-76)

5 21. Although the Toyota dealership was profitable, it was not
6 performing to its potential at the Main Street location. (RT Vol. I,
7 pp. 76-77) Only one vehicle can be displayed on the showroom floor.
8 Its 2.7-2.8 acres are on four separate pieces of land, a public street
9 crosses the property, and a creek runs underneath the main building.
10 (RT Vol. I, pp. 103-104, 117-119)

11 22. As of March 2004, Thompson's franchises were located thusly:
12 an exclusive GMC franchise (Buick-Pontiac-GMC Truck) at Forni Road; an
13 exclusive Chrysler-Jeep franchise at Placerville Drive; and the
14 exclusive Toyota franchise at Main Street. Faced with the ultimatum
15 from Toyota to move from Main Street and the agreement with GMC to not
16 "dual" Chrysler with its brands, RLT decided in March 2004 to relocate
17 his franchises as follows: Toyota to Forni Road; GM to Placerville
18 Drive; and Chrysler-Jeep to Main Street. This decision was noticed
19 publicly in March 2004, and implemented by RLT in October 2004. (RT
20 Vol. 1, pp. 76-80; Exhibit R37)

21 23. In RLT's mind, Forni Road was the best facility and location
22 of the three. Toyota agreed to and accepted the new location plan, as
23 did GMC. Respondent did not, and has not to this date. (RT Vol. 1,
24 pp. 49-50, 69-70, 77-78, 126-127) The October 2004 moves were
25 denominated and are referred to hereinafter as "Trading Spaces" (see
26 *infra*).

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RLT's Three Facilities³

24. It is not contested that among the Forni Road, Placerville Drive and Main Street locations operated by RLT, the consensus is that "...the 140 Forni Road dealership (is) the best facility and the best location of the three..." (RT Vol. 1, pp. 77, 108) There is a Ford dealership adjacent to RLT's Forni Road Toyota store. Placerville Drive is about ¼ mile from Forni Road. From Main Street to the nearest other car dealership (which is Forni Road) the distance is about 1 ½-2 miles. (RT Vol. 1, pp. 114-116).

25. DC has consistently been of the opinion that the Main Street facility is significantly inferior to Placerville Drive facility in several critical respects, focusing on (1) location, and (2) the physical facility. DC believed, and believes, that Main Street has less freeway visibility, is not as easily accessible, has less traffic passing it, and is located in an older downtown commercial business area featuring small boutique-type establishments, as opposed to a retail area with shopping and other dealerships nearby. (Exhibit R31; RT Vol. IV, pp. 123-127)

26. In reviewing Protestant's proposal for the move of the Chrysler-Jeep franchises from Placerville Drive to Main Street, all factors, including operational considerations and dealer performance, were reviewed by the DC West Business Center in Irvine, California. From DC's dealer placement perspective, however, location was viewed

³ In addition to the citations to the record in this section, labeled ground and aerial photographs of both the Placerville Drive and Main Street facilities, before and after October 2004, can be found as Respondent's Exhibits 4-9 and 16.

1 as a paramount factor given that a franchise is likely to remain in a
2 fixed location for a long period of time. (RT Vol. II, pp. 218-220)

3 27. DC's assessment was, and is, that the Main Street facility
4 is inadequate. The four separate parcels of land comprising the
5 facility required both employees and customers to cross streets to
6 view inventory. Customer parking is limited and inaccessible during
7 higher traffic times, particularly in mornings when customers are
8 bringing cars in for services. Customers are at such times required
9 to park off-site. Employee parking is off-site. The Main Street
10 facility fronts on a two-lane street with no center turn lane, making
11 access difficult. (Exhibit R31, RT Vol. IV, pp. 125-128)

12 28. The Placerville Drive facility fronts on a two-lane street
13 with a center turn lane and has two separate driveways, making for
14 easy ingress and egress. At Placerville Drive many rows of cars can
15 be easily seen, suggesting a large inventory from which to make a
16 selection; probably double what can be displayed at all of the
17 separate Main Street parcels. (RT Vol. II, pp. 244-246)

18 29. The fact that the Main Street dealership consists of several
19 separate parcels of land makes for difficulty in managing and
20 monitoring the facility. (Exhibit R31; RT Vol. IV, pp. 125-128) The
21 Main Street facility does not have the same appearance as the
22 Placerville Drive facility (built in 2002). Main Street, in addition
23 to being smaller and discontinuous, appears to be "...approximately a
24 '70s' type building" (it dates from 1963-64). (RT Vol. II, p. 247)
25 Also, RLT's testimony was that the Main Street location is incapable

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1 of servicing trucks, which can be serviced at Placerville Drive.⁴ (RT
2 Vol. V, pp. 93-94)

3 30. RLT's assessments are not totally dissimilar. He had the
4 Placerville Drive facility constructed in 2002, during the same time
5 the Forni Road facility was being built. It has approximately 300
6 feet of frontage, and consists of four (4) acres on one piece of
7 property. The facility is on a two-lane street with a turning lane in
8 the middle. There is room for a total of six rows of vehicles to be
9 displayed. No public roads or bike paths cross the property. The
10 dealership is about 200 yards from a freeway exit. (RT Vol. I, pp.
11 101-103)

12 31. RLT states that the Main Street facility is 2.7-2.8 acres,
13 and that these are not on one contiguous plot of land. A public
14 street and a bike path both cross the property, and a creek runs
15 underneath the main building. Employee parking is in an off-site lot
16 about 100 yards from the property. Only one vehicle can be displayed
17 in the showroom. Trucks cannot be serviced there. (RT Vol. I, pp.
18 101-104, Vol. V pp. 93-94; see Footnote 4, *supra*)

19 32. The main point of difference between the RLT and DC
20 evaluations is the question of visibility from the Highway 50 freeway.
21 DC at the hearing agreed, contrary to its earlier position in writing,
22 that Placerville Drive is not directly visible from the freeway, and
23 that from the freeway there is an opportunity for a fleeting glance at
24 the Main Street facility when traveling between off-ramps. (RT Vol.
25 111, pp. 63-65)

27 ⁴ Testimony on this point was general, and was uncontested. There was no
28 specificity presented regarding the types of trucks being addressed, and/or whether
sports utility vehicles (SUVs) or similar vehicles were contemplated.

1 33. RLT agreed with DC that the Main Street location is not as
2 easily accessible as Placerville Drive, that a lot fewer new vehicles
3 could be displayed, and that the traffic counts are less at Main
4 Street. They also agreed that the land and buildings at Main Street
5 are less efficient and convenient than Placerville Drive as both
6 customers and employees have to cross streets in conducting sales
7 transactions. At one time, cameras were used to monitor the
8 discontinuous lots at the Main Street location. (RT Vol. I, pp. 117-
9 119)

10 34. Directly across from Placerville Drive are a large retail
11 center and numerous fast food restaurants. The Forni Road Toyota
12 dealership is nearby and the Ford store is on the adjacent land. (RT
13 Vol. II, pp. 232-233) The Main Street facility is located in old
14 downtown Placerville, surrounded by a storage facility, a medical
15 supply building, and some rather old homes that have been converted to
16 small retail boutiques. There are a few older homes nearby on Main
17 Street, and a quilting shop and a small realty office. There is no
18 surrounding major retail business, and no other automobile dealerships
19 are nearby. (RT Vol. II, pp. 238-239)

20 The Franchise Agreement Between Protestant And Respondent

21 35. Thompson's and DC entered into Chrysler and Jeep Sales and
22 Service Agreements on August 23, 2002. The agreements generally
23 require the following:

24 a. Thompson's is to comply with all applicable federal,
25 state and local laws, rules and regulations in the operation of
26 the dealership. (Exhibit R22, p. 5) The dealership is to
27 operate described facilities located at 55 Placerville Drive, a
28 physical facility deemed easily large enough for current

1 operations, and to at some point in the future accommodate the
2 possible addition of the Dodge brand. (Exhibits R18, R20, p. 3)

3 b. The Placerville Drive location was agreed to be an
4 exclusive stand-alone dealership selling and servicing only the
5 Chrysler and Jeep brands and no others. (Exhibit R18) RLT in
6 writing recognized the importance of exclusivity by signing an
7 Exclusivity Acknowledgment letter on August 1, 2002. (Exhibit
8 R19) Protestant agreed to operate the Chrysler-Jeep franchises
9 only from the Placerville Drive location, and to not make any
10 change in the dealership operation or location without the prior
11 written approval of DC. (Exhibit R22, p. 5; RT Vol. 1, pp. 61-
12 64) Additional provisions commit Protestant to provide
13 appropriate support to franchise operations at the Placerville
14 Drive location, including but not limited to personnel, service,
15 advertising, and signage. (Exhibit R22, pp. 3-6)

16 c. The franchise agreements are to terminate without
17 notice to either party upon the failure of the franchisee to
18 conduct dealership operations for seven (7) consecutive business
19 days. (Exhibit R22, pp. 11-12)

20 The "Trading Spaces" Move Of October 2004

21 36. RLT caused a notice to be sent to vendors, suppliers, and
22 other persons that effective October 1, 2004, the franchises were
23 being moved as follows:

- 24 ▪ Buick-Pontiac-GMC Truck from Forni Road to
25 Placerville Drive;
- 26 ▪ Toyota from Main Street to Forni Road; and
- 27 ▪ Chrysler-Jeep from Placerville Drive to Main Street. (RT
28 Vol. 1, pp. 70, 71; Exhibit R37)

1 37. As noted above, RLT had purchased the Toyota franchise in
2 1997. It was located at Main Street, where it had been since 1963 or
3 1964. Around 1999 or 2000, Toyota told him that he must relocate the
4 dealership or sell it. RLT agreed to move the Toyota franchise from
5 its unsatisfactory location (Main Street), and promised Toyota a
6 stand-alone dealership at Forni Road, which RLT believed (and
7 believes) is the best location of the three he operates. Toyota was
8 pleased, and RLT's sales of Toyota vehicles have since increased by
9 about 40 percent. (RT Vol. 1, pp. 75-77, 105)

10 38. RLT's commitment to Toyota put him in a position wherein he
11 needed to do something with the GMC franchises then located at Forni
12 Road. GMC reluctantly agreed to a move of its franchises to
13 Placerville Drive (where Chrysler-Jeep was then located), but only on
14 the condition that it was to be an exclusive GMC dealership. (RT Vol.
15 1, pp. 77-78; Exhibit R6)

16 39. These commitments (to Toyota and GMC) necessitated a need to
17 find a new home for the Chrysler-Jeep dealerships at Placerville
18 Drive. RLT proposed to DC that it move them to Main Street. Neither
19 this move, nor the move of the GMC dealerships from Forni Road to
20 Placerville Drive, where Chrysler-Jeep had been successfully
21 operating, has ever been approved by DC. (RT Vol. 1, pp. 49-50) The
22 entire dealership swap (see Exhibit R37) was advertised and marketed
23 by Thompson's as "Trading Spaces", after a then popular television
24 show. (RT Vol. 1, p. 78)

25 40. All signage at the Placerville Drive location was at RLT's
26 direction changed from Chrysler-Jeep to Buick, Pontiac and GMC Truck,
27 effective October 1, 2004, and continues to the present. No DC
28 vehicles were displayed or stored there from October 2004 until May or

1 June 2005, at which time some were moved back to Placerville Drive.
2 The storage of Chrysler and Jeep vehicles was limited to a small space
3 at the right rear of the Placerville Drive property. None have been
4 openly displayed for sale.

5 41. This small DC presence at the Placerville Drive site
6 beginning May/June 2005 was a result of GMC temporarily "...cutting us
7 some slack, or bearing with it..." for a short period of time to see
8 if difficulties regarding the forced move of the Chrysler-Jeep
9 franchises to Main Street and the trouble with DMV (see *infra*) could
10 be worked out. RLT has since October 2004 done everything he could to
11 make Placerville Drive appear to be an exclusive Buick-Pontiac-GMC
12 Truck dealership. (RT Vol. 1, pp. 50, 78, 85)

13 42. New Chryslers and Jeeps were not displayed at Placerville
14 Drive from October 2004 until May or June of 2005. They were
15 displayed and sold at Main Street from about early October 2004
16 forward. Of importance regarding the May 31, 2005, and October 4,
17 2005 notices of intent to terminated the franchise, RLT acknowledged
18 that there was a period of about six (6) weeks, or from perhaps the
19 end of March through some time in June 2005, when Thompson's was not
20 displaying or selling new Chryslers and Jeeps from any location at
21 all, authorized or unauthorized. (RT Vol. 1, p. 83; see also findings
22 regarding "The Involvement of the Department of Motor Vehicles",
23 *infra*).

24 43. DC never at any time since execution of the franchise
25 agreements of August 23, 2002 consented to either the moving of the
26 GMC franchises from Forni Road to its exclusive Chrysler-Jeep
27 dealership location at Placerville Drive, or the moving of its
28 franchises to Main Street (these moves, along with that of Toyota from

1 Main Street to Forni Road, constituted the October 1, 2004, "Trading
2 Spaces" event). RLT has honored his commitments of exclusivity of
3 franchise to Toyota and GMC in their new locations. He made these
4 commitments "...with (his) eyes wide open..." and an understanding of
5 the possible and probable consequences, i.e., a notice of franchise
6 termination. (RT Vol. 1, pp. 50, 64-67, 126)

7 44. Since early October 2004 until the time of this hearing, all
8 parts, service, and warranty activities of the Chrysler-Jeep
9 franchises have been conducted at Main Street. None of these
10 activities have been conducted at Placerville Drive. (RT Vol. 1, pp.
11 68-69) New Chryslers and Jeeps were displayed only at Main Street
12 until some or all of them were moved to the Placerville Drive back lot
13 in May or June of 2005. (RT Vol. 1, pp. 83-85)

14 45. Since October 2004 until the time of this hearing there has
15 been no Chrysler or Jeep signage at Placerville Drive, nor have any
16 Chrysler or Jeep vehicles been on the showroom floor there. RLT has
17 no present intention to change this. (RT Vol. I, pp. 85-86)

18 46. All advertising, which includes web pages and ads in local
19 and metropolitan newspapers, has since October 2004 until now
20 represented Toyota at Forni Road, GMC at Placerville Drive, and
21 Chrysler-Jeep at Main Street. (RT Vol. I, pp. 90-101, 149, 152)
22 There has been scant advertising of Chrysler-Jeep anywhere as of late,
23 which RLT attributes to events surrounding this dispute. (RT Vol. I,
24 p. 98)

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1 Thompson's/DC Dialogue Regarding The October 2004 Move

2 47. RLT first requested DC approval to move its franchises from
3 Placerville Drive to Main Street as part of the October 2004 3-way
4 dealership swap ("Trading Spaces", described *supra*) in a letter to
5 Steve Weeks, Sacramento area dealer operations manager, dated March
6 17, 2004. RLT knew Mr. Weeks would not be making the final decision
7 to approve or disapprove the relocation request, and asked him to
8 forward the request as appropriate. On April 14, 2004, RLT forwarded
9 traffic count information that had been requested by DC. (Exhibits
10 R25, R28; RT Vol. I, pp. 109-112)

11 48. On May 20, 2004, DC replied to the March 17, 2004 request,
12 denying the same, in a letter to RLT from Charles Polce, DC's Dealer
13 Network Development Manager for the West Business Center located in
14 Irvine. The reasons cited were that the location, appearance, layout,
15 and facility requirements at Main Street were not acceptable. The
16 letter also informed RLT that DC would not issue a Certificate of
17 Proposed Franchise (hereinafter OL-124) for the Main Street location.
18 (Exhibit R30, RT Vol. I, pp. 112-113)

19 49. Internal DC memorandum correspondence subsequent to receipt
20 of the March 14, 2004, request for relocation and prior to the May 20,
21 2004, denial indicates that Mr. Weeks was reluctantly in RLT's corner.
22 Based on RLT's representations to him, Mr. Weeks believed Thompson's
23 was in financial trouble, and that if RLT's claim was believed,
24 Thompson's could not survive and remain in business with DC.
25 (Exhibits R26, 27, 29) Mr. Weeks acknowledges that Main Street was
26 not a prime facility, and that DC would be "moving from a nicer larger
27 facility to the lesser of the three facilities, the smaller one in the
28 older part of town." (Exhibit R26; RT Vol. II, p 95) He subsequently

1 opined that it was maybe "...really not too bad", and that he
2 "...would not be supporting Thompson's case if he was a poor
3 performing dealer." (Exhibits R27 and R29, p. 2)

4 50. Mr. Weeks looked at Thompson's proposal from an operations
5 standpoint rather than from a strategic network dealer alignment
6 standpoint. He was tasked with promoting a continuing flow of sales
7 of cars and parts, and that was his perspective. He did not want to
8 lose car and truck sales in that market (that would result, at least
9 temporarily, if the dealership were to be lost). Thompson's Chrysler-
10 Jeep had been "a 166% MSR performer last year⁵ and has easily exceeded
11 MSR since he has been our CJ dealer." (RT Vol. II, pp. 92-93; Exhibit
12 R29, p. 2)

13 51. Mr. Weeks' memoranda generated discussions and deliberation
14 involving himself, Santiago Piñon and Charles Polce. Mr. Weeks' input
15 from an operations standpoint was received and considered, but was
16 overridden by longer-term dealer network considerations. (RT Vol. II,
17 pp. 221-223, Vol. IV, pp. 83, 85-88, 110-111) These deliberations led
18 to the letter of May 20, 2004, denying the relocation request. (RT
19 Vol. IV, pp. 118-120)

20 52. The next inter-party written communication was a letter from
21 Thompson's counsel to DC dated June 14, 2004, in response to the May
22 20, 2004, denial of the relocation request. That letter reiterated
23 the March 17, 2004, request for approval of the relocation of the
24 Chrysler-Jeep franchises from Placerville Drive to Main Street, and
25 offered to make any reasonable modification to the Main Street

26
27 ⁵ This was at Placerville Drive, not Main Street.

1 facility. (RT Vol. I, p. 113; Exhibit P67) On July 6, 2004, Mr.
2 Polce again denied consent to the transfer; providing more detailed
3 reasons, and once again stated that an OL-124 would not be
4 forthcoming. (Exhibit R31; see also section above, "RLT's Three
5 Facilities")

6 53. This prompted a reply from RLT to Mr. Polce dated September
7 24, 2004. As the October 2004 implementation date for the "Trading
8 Spaces" event drew near, DC was once again implored to assent to the
9 Placerville Drive-Main Street move. Several potential alternative
10 solutions to the looming spectre of litigation were proposed, which
11 included consideration of more favorably located but as yet
12 undeveloped parcels of land, and possible buy-sell and purchase
13 scenarios. The suggested implementation proposed was that DC "...
14 immediately issue to Thompson's Chrysler-Jeep an OL-124 so that we can
15 relocate our dealership to the current Toyota premises on Main Street
16 on or about October 4". There was a promise to commit in writing to a
17 time limit of three years, at which time if new arrangements were not
18 made RLT would agree to a voluntary franchise termination. This was
19 coupled with a pledge to agree to "...any reasonable renovations..."
20 of the Main Street facility. (Exhibit R34)

21 54. The DC reply on September 28, 2004, for the third time
22 rejected the proposal, and once again definitively stated that an OL-
23 124 would not be forthcoming. (Exhibit R35)

24 55. RLT at all relevant times clearly understood that DC's
25 written approval for the October 2004 move was required, and that DC
26 plainly, unambiguously, and consistently declined approval and
27 declined to issue the required OL-124. (RT Vol. I, pp. 112-114, 124-
28 128) Discussions were had between RLT and DC regarding "...as many

1 conceivable options as could be thought of." None of these came to
2 fruition and/or changed RLT's "Trading Spaces" business plan of
3 October 2004. (RT Vol. I, p. 124)

4 56. On January 12, 2005, shortly after the formalization of
5 ongoing and escalating trouble between Protestant and DMV (see *infra*),
6 there was one final written exchange between RLT and DC. DC again, in
7 response to yet another request from RLT for a temporary OL-124 for
8 the Main Street location, replied that it "...will not issue any type
9 of OL-124 for 659 Main Street, Placerville, California" (Exhibit R52).

10 The Involvement Of The Department Of Motor Vehicles

11 57. Some time during September 2004, as the "Trading Spaces"
12 date of October 1, 2004, drew near, Protestant's controller, Tammy St.
13 Germain, contacted DMV to inquire as to what forms needed to be
14 submitted in connection with the relocations. She was told that among
15 other forms, a Certificate of Proposed Franchise (OL-124) was
16 required. (RT Vol. II, pp. 130-133)

17 58. On October 4, 2004, Protestant submitted an application to
18 relocate the Chrysler-Jeep franchises from Placerville Drive to Main
19 Street and to sell new and used vehicles there. The application did
20 not include an OL-124 from DC. On that day DMV Inspector Denice
21 Ortega told Ms. St. Germain that only a temporary permit for used
22 vehicles could be issued, as there was no OL-124. Despite the fact
23 that RLT knew there was never any reason to think an OL-124 would be
24 forthcoming from DC, his controller told DMV that "...they were going
25 to get it in a couple of days, or she might have it the next day."
26 (RT Vol. I, pp. 126-127, Vol. II, pp. 138-139)

27 59. DMV nevertheless, despite the lack of an OL-124, mistakenly
28 issued a temporary permit on October 4, 2004, to sell both new and

1 used vehicles at Main Street. (RT Vol. II, pp. 139-140) Between
2 October 4, 2004, and late October, Protestant's controller (and
3 through her, RLT) were informed that DMV would be issuing a corrected
4 application, to sell used vehicles only at Main Street, due to the
5 lack of an OL-124 from DC. (RT Vol. I, pp. 139-145, Vol. II pp. 146-
6 149) On October 28, 2004, DMV sent a corrected application to
7 Protestant, clearly verifying, consistent with earlier conversations,
8 that the proper license to be applied for was for a temporary permit
9 to sell used vehicles only at Main Street. (RT Vol. I, p. 143, Vol.
10 II, pp. 47-48)

11 60. On October 14 or 15, 2004, DMV received a call from DC's
12 attorney, Carey Taylor, inquiring as to the licensing status of the
13 Main Street location. DMV informed Ms. Taylor, as it had informed Ms.
14 St. Germain, that the proper license was for a used car dealership
15 only. (RT Vol. II, p 147) DMV then left a message for Protestant's
16 controller, Ms. St. Germain, informing her that it was "a violation to
17 sell new Chryslers without the OL-124." She (the controller) said
18 once again "...that she should have an OL-124 at any time." (RT Vol.
19 II, pp. 148-149)

20 61. DMV inspector Denice Ortega went to the Main Street location
21 on November 8 and 16, 2004. She was surprised to note that new
22 Chryslers and Jeeps were being displayed for sale. Protestant had
23 been advised on numerous occasions that this was not permitted by the
24 temporary "used only" license. (RT Vol. II, pp. 154, 159) When the
25 inspector asked personnel there about whether they had an OL-124 she
26 was referred back to the Forni Road headquarters, and then later on to
27 Protestant's attorney. (RT Vol. II, pp. 155, 159-160)

28 62. Between November 16 and December 9, 2004, DMV Inspector

1 Ortega called several times and made several visits to Main Street.
2 Protestant was still displaying new Chryslers and Jeeps despite the
3 ongoing lack of an OL-124. (RT Vol. II, pp. 160-161) On November 22,
4 2004, Protestant's controller, Ms. St. Germain, told the inspector
5 that Thompson's was interested in moving the Main Street location over
6 to a Dodge dealership in Shingle Springs, and also reiterated once
7 again that Thompson's was still working on it (the OL124) and would
8 get it to DMV any time. (RT Vol. II, pp. 162-163) Inspector Ortega
9 then informed Ms. St. Germain that DMV investigations (which deals
10 with non-compliant dealers) was going to be notified. (RT Vol. II,
11 pp. 163-164)

12 63. On December 20, 2004, DMV Inspector Ortega discussed
13 Protestant's situation with her supervising management. She was
14 instructed to make the investigations arm of DMV aware of the
15 situation, and to formally and officially notify Protestant that it
16 had three days to obtain the OL-124 from DC. She called Protestant's
17 controller and so advised her, and also told her that Protestant was
18 to cease and desist from selling new Chrysler and Jeep vehicles. (RT
19 Vol. II, pp. 165-166)

20 64. On January 3, 2005, DMV sent a letter formalizing the
21 foregoing, as follows:

22 The Department of Motor Vehicles Inspector has issued a
23 temporary operating permit effective 10/04/04 for new car
24 sales in error. Thompson's Auto & Truck Center application
25 for a branch location at 659 Main Street Placerville Ca.
26 was approved for used auto only. The temporary permit is
27 hereby voided effective immediately. A corrected Temporary
28 Permit for used autos only has been issued for the business
location.

You must do the following:

Surrender your temporary permit to occupational
Licensing Inspector, Denice Ortega.

1 *Failure to comply with this notice will result in a*
2 *Department of Motor Vehicles Investigator contacting you*
3 *and may also result in criminal prosecution.* (Emphasis and
4 italicization in original)

5 (Exhibit R48, RT Vol. II, pp. 171-175)

6 65. On January 7, 2005, DMV inspectors observed that, despite
7 the unambiguous oral and written directives from DMV, Protestant
8 continued to sell and display new Chrysler and Jeep vehicles at Main
9 Street. The temporary permit mentioned in the January 3, 2005, letter
10 was never returned to DMV Inspector Ortega. (RT Vol. II, pp. 171-175;
11 Exhibit R83, p. 11)

12 66. On January 11, 2005, a DMV investigator, Jeff McKay, also
13 observed the display of new vehicles at Main Street. Prior to the
14 visit he called Santiago Piñon of DC, who when asked informed
15 Investigator McKay that an OL-124 was not forthcoming for the Main
16 Street location. The investigator then went to Forni Road and talked
17 with Protestant's controller and with RLT. He had RLT sign an
18 official formal notice that selling new vehicles at Main Street was a
19 violation of the Vehicle Code. (RT Vol. IV, pp. 4-12; Exhibit R51)

20 67. Months later, on or about May 3, 2005, and/or a few days
21 before, DMV investigator McKay again observed the display of new
22 Chrysler and Jeep vehicles, and sales activity thereof, at Main
23 Street. On May 3, 2005, he and another investigator met with RLT at
24 Forni Road. RLT was informed in no uncertain terms that Protestant
25 was in violation of the January 2005 Cease and Desist Order, and that
26 it needed to stop new Chrysler and Jeep vehicle sales activity and
27 take down Chrysler and Jeep signage that day. (RT Vol. IV, pp. 14-19)

28 68. RLT was aware at all times, from at least as far back as
January 2005 until May 3, 2005 that he was in violation of DMV orders,

1 that he did not have an OL-124 from DC, and had no reason to believe
2 one was forthcoming. (RT Vol. I, pp. 112-114, 124-12, 148-157)

3 69. Official notice is taken that DMV on September 28, 2005,
4 filed an Accusation against Protestant, praying for suspension or
5 revocation of its license. At the time of this hearing, (February 27
6 - March 6, 2006), the proceeding on the DMV Accusation was scheduled
7 to commence on April 12, 2006. As of the time of the preparation of
8 the Proposed Decision on the instant protest proceeding, it was not
9 known by the ALJ whether that Accusation had been heard, or if heard
10 what the decision may have been.

11 COLLATERAL FINDINGS

12 70. Much documentation and testimony was devoted to an attempt
13 at determining how various costs of doing business (particularly
14 lease/rent) were allocated among Protestant's franchises. This proved
15 difficult to sort out. (See e.g. RT Vol. II, pp. 89-91, 223-225, Vol.
16 V, pp. 153-155, 179-180, 183-185)

17 71. DC orally offered free-of-charge consulting assistance to
18 RLT regarding the potential achievement of profitability of the
19 franchises. (RT Vol. II, p 225) This assistance RLT refused, stating
20 that no consultant was going to come in and tell him how to run his
21 business that he had owned for 18 years, and make it profitable. (RT
22 Vol. V, pp. 186-187)

23 72. RLT had offered, through his attorney, to make reasonable
24 modifications to Main Street to make it acceptable to DC. Scraping
25 all the buildings off of the Main Street properties and constructing a
26 new facility or facilities that would meet DC's space and imaging
27 requirements would cost, if not four or five million dollars, "...at
28 least a couple of million..." (RT Vol. V, pp. 169-170) Prior to

1 October 2004 there may have been consideration of putting around
2 \$500,000 into upgrading Main Street, or for a partial purchase of the
3 Dodge dealership in Shingle Springs. None of these alternatives came
4 to fruition due largely to a lack of funds, among other reasons. (RT
5 Vol. V, pp. 170, 174-176)

6 FINDINGS OF FACT RELATING TO THE GOOD CAUSE FACTORS

7 Findings Relating To The Amount Of Business Transacted By
8 Thompson's As Compared To The Business Available To It
9 (Sec. 3061(a))

10 73. Regarding the amount of business transacted by Protestant
11 (Section 3061, subsection (a)), there is no contention that it was
12 inadequate prior to October 2004. Indeed, Thompson's was then a
13 respected and well-performing dealer, functioning at 166% of MSR while
14 at Placerville Drive. Since October 2004, due to what is undoubtedly
15 a combination of factors flowing from the unauthorized move from
16 Placerville Drive to Main Street (primarily poor location and trouble
17 with DMV), business has dropped to a small fraction of what it was.
18 There now is little or no advertising of DC products. Findings on
19 this good cause factor are not contested. See also findings on
20 Section 3061(g).

21 Findings Relating To The Investment Necessarily Made
22 And Obligations Incurred By The Franchisee To
23 Perform Its Part Of The Franchise
24 (Sec. 3061(b))

25 74. There was no contention by Respondent that investment and
26 obligations incurred were inadequate at Placerville Drive prior to
27 October 2004. The "investment" in putative DC franchises at Main
28 Street is, especially when compared to Placerville Drive, inadequate.
This was and is admitted in the form of an oft-repeated acknowledgment
of the need to make renovations. Regarding that, no solid proposal

1 was ever made. What was probably minimally required may well be a
2 scraping of existing buildings from the land and replacement with a
3 new facility. Even this drastic and sweeping measure, at a cost of
4 millions, would still leave DC with a much smaller dealership in a
5 poorer location with inferior access in an old part of town, on four
6 separate parcels of land, bisected by a public street or streets, with
7 a creek running under it. It is accordingly found that there now is
8 virtually no investment in the DC franchises.

9 Findings Relating To The Permanency
10 Of The Investment
11 (Sec. 3061(c))

12 75. RLT has acknowledged that since October of 2004 he has done
13 everything he could to make Placerville Drive appear to be an
14 exclusive Buick-Pontiac-GMC Truck dealership. He has no intention to
15 change this. Placerville Drive is the only authorized locale for the
16 DC franchise. This compels a finding that beyond doubt what
17 investment was made in the DC franchises prior to October 2004 was not
18 permanent.

19 Findings Relating To Whether It Is Injurious Or Beneficial
20 To The Public Welfare For The Franchise To Be Modified Or
21 Replaced Or The Business Of The Franchisee Disrupted
22 (Sec. 3061(d))

23 76. In virtually any termination case, the closure of a
24 franchise will mean that members of the general public owning or
25 having an interest in the line-make of vehicle of the franchisee will
26 have one less place to go for sales or service, and will suffer some
27 inconvenience or loss of flexibility as a consequence thereof. To
28 assign controlling or primary relevance to this fact without extensive
proof would come close to compelling a conclusion that no franchise
should ever be terminated for any performance or business-related

1 reasons.

2 77. Protestant notes that closure of the franchise would dictate
3 that Chrysler and Jeep owners in or near downtown Placerville would
4 have to travel some 10-15 miles to the nearest alternative dealership.
5 However, no actual hardships, egregious or otherwise, have been cited
6 or testified to. Without any such proof it would certainly be
7 incongruous to hold that DC had or has an obligation to accept the
8 unilaterally dictated move to Main Street and remain there primarily
9 on the grounds that the public welfare commands it; this in the face
10 of the fact that its contractual arrangement with Thompson's
11 specifically prohibits such an unapproved move, and to a concededly
12 inferior location at that. Respondent cites the public interest in
13 favoring dealerships of high integrity that are free from running
14 afoul of the regulatory arm of DMV. However, Protestant's own
15 business decisions resulted in all of the following: Total and
16 apparently irreversible cessation of DC operations at the location
17 called for by the franchise and licensed by the DMV; significantly
18 reduced sales and service operations being conducted at an
19 unauthorized and unlicensed location in what appears to be a flagrant
20 disregard not only of the franchise provisions but also of the law;
21 and, a complete cessation of Chrysler and Jeep sales for a period of
22 approximately 45 days from any location. None of these events were
23 attributable to DC and all occurred prior to the issuance of the
24 notice of termination. Therefore, it is difficult to find that DC's
25 decision to formally terminate the franchise relationship will be any
26 more injurious to the public welfare than what has already occurred
27 due to Protestant's unilateral conduct described above.

28 ///

1 Findings Relating To Whether The Franchisee Has Adequate
2 Motor Vehicle Sales And Service Facilities, Equipment,
3 Vehicle Parts, And Qualified Personnel To Reasonably
4 Provide For The Needs Of The Consumers For The Motor
5 Vehicles Handled By The Franchisee And Has Been And Is
6 Rendering Adequate Services To The Public
7 (Sec. 3061(e))

8 78. Since October 2004, and continuing, there has been no sales
9 facility at Placerville Drive, and none authorized elsewhere. No
10 evidence was forthcoming on whether service and parts facilities at
11 Main Street were sufficient to meet the needs of those already owning
12 Chrysler and Jeep vehicles. None were available at Placerville Drive,
13 which was the authorized location agreed upon by the parties. As a
14 consequence of the complete absence of any provision for the needs of
15 customers at Placerville Drive, and at best, partially meeting the
16 needs at Main Street, it is found that customer needs are not being
17 adequately met.

18 Findings Relating To Whether The Franchisee Fails To
19 Fulfill Warranty Obligations Of The Franchisor To
20 Be Performed By The Franchisee
21 (Sec. 3061(f))

22 79. Protestant has not fulfilled its DC warranty obligations at
23 Placerville Drive. No allegation has been made that they are not
24 being fulfilled at Main Street or elsewhere.

25 Findings Relating To the Extent of the Franchisee's Failure
26 To Comply With The Terms Of The Franchise
27 (Sec. 3061(g))

28 80. Of the factors for determining whether good cause exists for
29 termination of a franchise set forth in Section 3061, clearly the most
30 dominant one in this matter is subsection (g), "the extent of the
31 franchisee's failure to comply with the terms of the franchise."

32 Considered by itself this factor alone in the instant proceeding might

33 ///

1 conceivably support termination.⁶

2 81. As concerns Protestant and Respondent herein, the scene-set
3 in March-October of 2004 was as follows. Protestant was making
4 substantial money only with his stand-alone Toyota franchise, which
5 was in the oldest and least desirable location and physical facility
6 of the three dealerships he operated. Even though profitable, it was
7 not performing to its potential. Thompson's GM franchises and its
8 Chrysler-Jeep franchises were both in new and better-located
9 facilities that were built in 2002. Even though the franchisors (GMC
10 and DC) were reasonably satisfied and getting sales, service, and
11 customer satisfaction results above targeted levels, Protestant was
12 losing money on these operations.

13 82. In RLT's mind he may well have had urgent business reasons
14 for unilaterally abandoning Protestant's obligations under the
15 August 23, 2002 franchise agreements with Respondent DC and executing
16 the October 2004 moves. Even granting for purposes of argument
17 Thompson's real or perceived business problems, it is difficult to see
18 how these would translate into an obligation on the part of DC to
19 surrender the basic elements of the arrangement freely and fairly
20 negotiated between the parties on August 23, 2002.⁷

21 83. It is clear from this record that Protestant breached its
22 franchise agreement with DC regarding its most central and basic
23 elements. Despite obligations of exclusivity and maintenance of the
24

25 ⁶ As is shown above, this is not the only factor supporting a determination of good
26 cause to terminate the franchise in this case.

27 ⁷ There is in this record no hint whatsoever of coercion, fraud, or deception in
28 the negotiation of any element of the August 23, 2002 franchise agreements between
Thompson's and DC.

1 Placerville Drive location as an exclusive DC franchise, DC was, over
2 strong and consistent objection, physically removed from the premises
3 and competitor GMC was invited in to exclusively run its franchise at
4 DC's location.

5 84. RLT is a businessman; and has been a successful and
6 respected one at that. He made a business determination in 2004 that
7 he would be in a better financial position by moving his principal
8 franchise (Toyota) from his worst location at Main Street to his best
9 location at Forni Road. He convinced GMC to reluctantly or otherwise
10 agree to move from his best location at Forni Road to his next best
11 location at Placerville Drive; incidentally, a move to which
12 Respondent DC itself had earlier given consent. Both Toyota and GMC
13 had insisted upon and been granted exclusivity in their new franchise
14 agreements. RLT knew this would cause a problem for him in his
15 relations, contractual and otherwise, with DC.

16 85. Protestant responds to the entirely predictable (and
17 predicted) consequences of its unilateral action (DC's notice of
18 intent to terminate the franchises) with a contention that DC's
19 refusal to go along with the "Trading Spaces" move of October 2004 was
20 in some or all respects unreasonable, as contrasted with the approval
21 of GMC, which on the other hand is characterized generally in its
22 pleadings as reasonable.

23 86. GMC was prevailed upon only to move from Forni Road to
24 Placerville Drive, both of which are modern well-located physically
25 suitable facilities within ¼ mile of each other. As noted above, DC
26 had already earlier consented to just such a move. The record
27 indicates GMC was never approached regarding a move from Forni Road to
28 Main Street. One rather suspects that had it been, GMC would have

1 emphatically refused to consent. In any event, the evidence does not
2 support a contention or inference that the moving of a franchise from
3 Forni Road to Placerville Drive is at all comparable to a move from
4 Placerville Drive to Main Street.

5 87. DC, like Toyota, GMC and RLT, made a business decision
6 regarding the October 2004 "Trading Spaces" move. Its decision not to
7 assent to an involuntary move from its established newer and better-
8 located modern facility to a 40 year old downtown location cannot by
9 any strained interpretation of this record be characterized as totally
10 unreasonable. Toyota had insisted on being moved from the Main Street
11 location to a more modern one and predictably experienced a
12 considerable increase in sales, which amounted to 40 percent. (RT Vol.
13 1, pp. 75-77, 105)

14 88. The evidence indicates that Protestant had been a valued DC
15 dealer in the Placerville market while at the Placerville Drive
16 location. There is room for an inference that, could DC have been
17 offered a facility at least somewhat equal in desirability and
18 location to the Placerville Drive facility (as was GMC in moving from
19 Forni Road to Placerville Drive), it may conceivably have consented to
20 being forced out of Placerville Drive in the interest of preserving
21 the dealership and the relationship. However, at some point DC
22 concluded that the price had become too high.

23 89. DC management was within its rights to consider facility
24 location, or relocation, as a long-term proposition. It rationally
25 concluded that being in a new larger facility in a considerably better
26 location was a much better long-term proposition than accepting a
27 poorer facility in an older and concededly less desirable location.
28 This view made sense even if given a well-performing and locally

1 respected dealer principal whom, it must be noted, has already been in
2 the automobile business for 43 years and could not reasonably be
3 expected to remain indefinitely. The trend in the industry is to move
4 toward placing dealerships in auto malls, or auto dealership rows, and
5 away from older downtown locations.

6 90. RLT may well have been, or seen himself to have been,
7 between a rock and a hard place. Each considered alone and in
8 isolation, he may have had sound reasons for making his 2004
9 commitments to GMC and Toyota. Those commitments were not, however,
10 executed in isolation. The execution led directly to a blatant and
11 serious breach of Protestant's August 23, 2002 franchise agreement
12 with DC, which led to the forced relocation from Placerville Drive to
13 Main Street. After October 2004, there was never even the pretense of
14 operating a stand-alone exclusive Chrysler-Jeep franchise at the
15 validly contracted for Placerville Drive location. Protestant
16 contests none of this.

17 91. DC cannot in these circumstances be held obligated to submit
18 to RLT's unilateral action against its clearly expressed opposition,
19 and insulate Thompson's from the consequences of its admitted breach.
20 To so hold would be to stand the law of contracts on its head. It
21 would render meaningless any franchise agreement with a dealer who has
22 multiple franchises, allowing any such dealer to at will move
23 franchises among its locations solely as a function of shifting views
24 on their relative worth and profitability. Unilateral modifications
25 on this basis are without good cause and cannot be sanctioned.

26 92. Protestant in October 2004 knowingly violated the most
27 important provisions of his franchise agreements with DC. He
28 physically moved the Chrysler Jeep franchises to a concededly inferior

1 location in the face of repeated and unambiguous denials of approval
2 therefore, and invited and allowed a rival competitor dealership to
3 exclusively occupy and operate at the Placerville Drive premises.

4 Findings Relating To DC's Notices Of Proposed
5 Termination Dated May 31, 2004, and October 4, 2004

6 93. Dealer principal RLT acknowledged that for about a six week
7 period sometime between the end of March 2005 until sometime in June
8 2005, Protestant did not display for sale, or sell, new Chryslers or
9 Jeeps from any location at all, authorized or unauthorized. (RT Vol.
10 1, p. 83)

11 DETERMINATION OF ISSUES

12 94. Respondent DC has established, pursuant to the provision of
13 Section 3061(a), that commencing in October of 2004 Thompson's
14 Chrysler and Jeep franchises have not been transacting anywhere near
15 the amount of business available to it. This has been a direct result
16 of its unauthorized move from the Placerville Drive location to the
17 Main Street location in October 2004. (See Paragraph 73)

18 95. Respondent DC has established that Protestant now maintains
19 a far less than adequate investment to perform its part of the
20 franchise, as required by the provisions of Section 3061(b). This has
21 been the case since October 2004. (See Paragraph 74)

22 96. Respondent DC has established that the adequate 2002
23 investment Protestant had made in the franchise at Placerville Drive
24 was not permanent, a criterion set forth in Section 3061(c). Since
25 October 2004 the investment at Placerville Drive has been for all
26 practical purposes totally unavailable to the DC franchise, as it has
27 been given over to GMC, a competitor. (See Paragraph 75)

28 97. It has not been established one way or another whether the

1 modification or replacement of the franchise would be injurious or
2 beneficial to the public welfare, a criterion set forth in Section
3 3061(d). However, as stated above in Paragraph 77, it was
4 Protestant's own business decisions that resulted in the cessation of
5 operations of the Chrysler and Jeep franchises at their authorized and
6 legal locations and DC is essentially seeking no more than legal
7 recognition of what had already factually occurred due to Protestant's
8 own conduct. (See Paragraphs 76-77)

9 98. Respondent DC has established that no Chrysler and Jeep
10 sales and service facilities, equipment, and parts, adequate or
11 otherwise, have been available at Placerville Drive since October
12 2004, as set forth in Section 3061(e). No showing was made regarding
13 the adequacy or inadequacy of facilities other than sales available at
14 Main Street since October 2004. (See Paragraph 78)

15 99. No showing has been made that the warranty obligations of DC
16 have not been fulfilled by Protestant, as set forth in Section
17 3061(f). (See Paragraph 79)

18 100. DC has shown that Protestant has since October 2004 failed
19 to comply with the terms of the franchise, as set forth in Section
20 3061(g). The failure was serious, material, intentional, direct, and
21 is ongoing. (See Paragraph 80-92)

22 101. By reason of the foregoing Determination of Issues and the
23 Findings herein, Respondent DC has met the statutory burden of proof
24 required by Section 3066(b) and did establish, under Section 3061,
25 good cause for the termination of Thompson's Chrysler and Jeep
26 franchises.

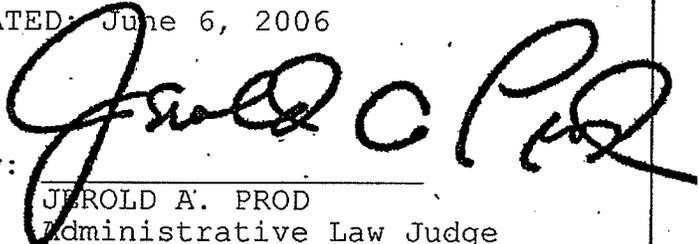
27 ///
28 ///

1 PROPOSED DECISION

2 The protest is overruled. Respondent DaimlerChrysler shall be
3 permitted to terminate Protestant's Chrysler and Jeep franchises
4 effective immediately.

5
6
7 I hereby submit the foregoing which
8 constitutes my proposed decision in
9 the above-entitled matter, as the
10 result of a hearing before me, and
11 I recommend this proposed decision
be adopted as the decision of the
New Motor Vehicle Board.

12
13 DATED: June 6, 2006

14
15 By: 
16 JEROLD A. PROD
Administrative Law Judge

17
18
19
20
21
22
23
24
25
26 George Valverde, Director, DMV
27 Mary Garcia, Branch Chief,
28 Occupational Licensing, DMV

EXHIBIT M

NEW MOTOR VEHICLE BOARD
1507 - 21st Street, Suite 330
Sacramento, California 95814
Telephone: (916) 445-1888

STATE OF CALIFORNIA

NEW MOTOR VEHICLE BOARD

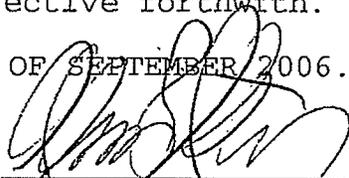
In the Matter of the Protest of)
SERPA AUTOMOTIVE GROUP INC.,) Protest No. PR-1977-05
Protestant,)
v.)
VOLKSWAGEN OF AMERICA INC.,)
Respondent.)

DECISION

At its regularly scheduled meeting of September 28, 2006, the Public Members of the Board met and considered the administrative record and Proposed Decision in the above-entitled matter. After such consideration, the Board adopted the Proposed Decision as its final Decision in this matter.

This Decision shall become effective forthwith.

IT IS SO ORDERED THIS 28th DAY OF SEPTEMBER 2006.



GLENN E. STEVENS
Presiding Public Member
New Motor Vehicle Board

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1507 21ST Street, Suite 330
2 Sacramento, California 95814
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3
4
5
6
7

8 STATE OF CALIFORNIA

9 NEW MOTOR VEHICLE BOARD
10

11 In the Matter of the Protest of)
12 SERPA AUTOMOTIVE GROUP INC.,) **Protest No. PR-1977-05**
13 Protestant,)
14 v.) **PROPOSED DECISION**
15 VOLKSWAGEN OF AMERICA INC.,)
16 Respondent.)

17
18 PROCEDURAL BACKGROUND

19 1. Protestant Serpa Automotive Group, Inc. (hereinafter "SAG"
20 or "Protestant") is a new motor vehicle dealer and is licensed as such
21 by the California Department of Motor Vehicles ("DMV"). Protestant is
22 a California corporation whose principal place of business as a
23 Volkswagen dealer was 220 South Ben Maddox Way, Visalia, California.

24 2. Frank Serpa is the President and dealer principal of
25 Protestant.

26 3. Volkswagen of America, Inc. (hereinafter "VWoA" or
27 "Respondent") is headquartered in Auburn Hills, Michigan, and is
28 licensed as a distributor of new motor vehicles by the DMV.

1 4. By letter dated October 26, 2005, VWoA notified SAG of
2 VWoA's intent to terminate SAG's Volkswagen Dealer Agreement. The
3 notice stated the grounds for termination as follows:

4 ...Your Volkswagen sales and service operations have now
5 been closed for more than seven business days.
6 **Therefore, in accordance with the provisions of the**
7 **Dealer Agreement and Cal. Veh. Code Ann. § 3060, we**
8 **hereby give you notice that your Volkswagen Dealer**
9 **Agreement is terminated, effective 15 days from your**
10 **receipt of this letter. (Emphasis in original.)**

11 5. SAG filed its protest on November 1, 2005, pursuant to
12 Vehicle Code section 3060¹.

13 6. Pursuant to Section 3066, a four-day hearing was held May 1
14 through May 4, 2006, before Administrative Law Judge Marybelle D.
15 Archibald.

16 7. Philip C. Bourdette, Esq. of Bourdette & Partners, 2924
17 West Main Street, Visalia, California, represented Protestant.

18 8. Allen S. Resnick, Esq. and Neil C. Erickson, Esq. of
19 Jeffer, Mangels, Butler & Marmaro LLP, 1900 Avenue of the Stars,
20 Seventh Floor, Los Angeles, California, represented Respondent.

21 9. Both the Protestant and the Respondent filed pre-hearing
22 briefs which were read and considered by the Administrative Law Judge
23 prior to the receipt of evidence.

24 10. Oral and documentary evidence and evidence by way of
25 stipulation were received.²

26 11. Protestant presented three witnesses at the hearing: Frank
27 Serpa, owner and dealer principal of SAG; Brad Thompson, employee of

28 ¹ All statutory references are to the California Vehicle Code, unless noted
otherwise.

² The Reporter's Transcript (RT) is identified by volume; Exhibits (Exh.) are
identified by number.

1 SAG; and expert witness Edward M. Stockton from The Fontana Group, an
2 automobile industry consulting firm. Protestant also presented the
3 testimony of two witnesses via excerpts of deposition transcripts:
4 Victoria Aida Viskantas, Volkswagen Marketplace facilities project
5 manager for Palladia Architects; and Jim Webber, former Pacific Region
6 Network Development Manager for VWoA.

7 12. VWoA presented the testimony of seven witnesses: Sal
8 Mazzara, Area Manager of VWoA's Area 54; Gary N. Akin, Operations
9 Manager in VWoA's Pacific Region; Kurt Chamberlain, Parts and Service
10 Manager in VWoA's Pacific Region; Hilton Bruce from the network
11 development department in VWoA's Michigan headquarters; adverse
12 witness Frank Serpa; adverse witness Rhonda Loogman, employee of SAG;
13 and expert witness John Frith from Urban Science Applications, Inc.,
14 an automobile industry consulting firm. VWoA also presented the
15 testimony of five witnesses via excerpts of deposition transcripts and
16 electronic video clips: Don Groppetti, dealer principal of Groppetti
17 Automotive Family; Victoria Aida Viskantas; Fred Scott, principal of
18 Scott & Associates; Phillip Vogel, principal of Vogel Strategies; and
19 Jim Webber.

20 13. The parties stipulated to a post-hearing briefing schedule
21 wherein the matter was deemed submitted on August 1, 2006.

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1 ISSUE PRESENTED

2 WHETHER VOLKSWAGEN OF AMERICA, INC. HAS GOOD CAUSE FOR THE
3 TERMINATION OF SERPA AUTOMOTIVE GROUP, INC.'S VOLKSWAGEN FRANCHISE

4 14. Pursuant to Section 3066(b), VWoA has the burden to
5 establish good cause for the termination of SAG's Volkswagen
6 franchise. In determining whether VWoA has established good cause for
7 the termination, Section 3061 requires that the Board consider the
8 "existing circumstances", including but not limited to all of the
9 following:

- 10 (a) Amount of business transacted by the franchisee, as compared
11 to the business available to the franchisee;
- 12 (b) Investment necessarily made and obligations incurred by the
13 franchisee to perform its part of the franchise;
- 14 (c) Permanency of the investment;
- 15 (d) Whether it is injurious or beneficial to the public welfare
16 for the franchise to be modified or replaced or the business
17 of the franchisee disrupted;
- 18 (e) Whether the franchisee has adequate motor vehicle sales and
19 service facilities, equipment, vehicle parts, and qualified
20 service personnel to reasonably provide for the needs of the
21 consumers for the motor vehicles handled by the franchisee
22 and has been and is rendering adequate services to the
23 public;
- 24 (f) Whether the franchisee fails to fulfill the warranty
25 obligations of the franchisor to be performed by the
26 franchisee;
- 27 (g) Extent of the franchisee's failure to comply with the terms
28 of the franchise.

1 EVIDENTIARY RULINGS

2 VOGEL DEPOSITION

3 15. Protestant's objection to the Vogel testimony is sustained
4 as to pages 60:1-61:11 and overruled as to the remainder of the
5 proffered excerpts.³

6 WEBBER DEPOSITION

7 16. Protestant's objection to portions of the Webber testimony
8 is overruled.⁴

9 FINDINGS OF FACT⁵

10 PRELIMINARY FINDINGS

11 MR. SERPA'S EXPERIENCE IN THE INDUSTRY

12 17. Mr. Serpa commenced his employment in the automobile
13 industry in 1978, selling automobiles in Clovis, California.⁶ Between
14 1981 and 1991, Mr. Serpa worked as a team manager, sales manager and
15 general manager for various dealerships in Fresno and Tulare Counties.⁷
16 In 1991, Mr. Serpa opened a used car dealership in Visalia⁸ as well as
17 a new car dealership with Hyundai in Visalia.⁹ In 1996, SAG acquired
18 new car dealerships with Kia and Suzuki.¹⁰ SAG operated a Daewoo
19 dealership for a period of time, and a Serpa affiliated company
20 operates a Saturn dealership.¹¹ In 1998, SAG was authorized to operate
21 a Volkswagen franchise.¹² Evidence was presented that the value of Mr.

22 _____
23 ³ Exh. 7, Phillip Vogel Deposition Excerpts.

24 ⁴ Exh. 10, James Webber Deposition Excerpts.

25 ⁵ The references to testimony, exhibits, or other parts of the record contained
26 herein are examples of the evidence relied upon to reach a finding and are not
27 intended to be all-inclusive.

28 ⁶ RT II, pp. 198:24-199:1.

⁷ RT II, pp. 199:2-200:25.

⁸ RT II, p. 201:8-14.

⁹ RT II, p. 201:15-21.

¹⁰ RT II, pp. 202:25-203:5.

¹¹ RT II, p. 203:6-18.

¹² Exh. 1, Stipulated Fact (SF) 1.

1 Serpa's automobile enterprises and associated real estate holdings is
2 substantial.¹³ In the course of his career, Mr. Serpa has built and
3 remodeled facilities for the sale and service of automobiles.¹⁴

4 THE VMOA-SAG AGREEMENT

5 18. On July 14, 1998, SAG and VWoA entered into a Volkswagen
6 Dealer Agreement ("Dealer Agreement") enabling SAG to operate a
7 Volkswagen dealership at 220 South Ben Maddox Way in Visalia
8 ("Authorized VW Facility").¹⁵ SAG's Dealer Agreement was amended on or
9 about September 10, 1999, and again on or about November 21, 2001;
10 these modifications reflected changes in the beneficial owners and
11 officers of SAG.¹⁶

12 19. The document with the title "Volkswagen Dealer
13 Agreement" is a two-page document, and it incorporates Exhibit
14 A (Statement of Ownership and Management) and Exhibit B (Dealer
15 Premises Addendum).¹⁷ In addition, Paragraph 2 of the Volkswagen
16 Dealer Agreement provides:

17 **2. STANDARD PROVISIONS.** The Dealer Agreement
18 Standard Provisions (the "Standard Provisions") (Form
19 No. 97vwstdp), the Dealer Operating Plan (the
20 "Operating Plan") and the Volkswagen Dealer Operating
21 Standards (the "Operating Standards") are part of this
22 Agreement. Any term not defined in this Agreement has
23 the meaning given such term in the Standard
24 Provisions.¹⁸

25 20. VWoA has a procedure which has been in place for at least
26 twelve years for the preparation and delivery of a Dealer Agreement to

27 ¹³ RT III, pp. 154:8-155:10; Exh. 3, Tab E, pp. A0125-A0132; Exh. 7, Vogel, p. 20:12-19.

28 ¹⁴ RT II, p. 204:2-24; pp. 207:16-208:1; Exh. 7, Scott, p. 18:12-16.

¹⁵ Exh. 1, SF 1; Exh. 3, Tab A.

¹⁶ RT II, pp. 162:23-164:3; pp. 217:3-218:23; pp. 225:13-226:16; Exh. 1, SF 2 and 3; Exh. 3, Tab A, p. VW0462, and Tab C.

¹⁷ Exh. 3, Tab A, pp. VW0460-VW0464; Exh. 3, Tab C, pp. A0465-A0469.

¹⁸ RT II, p. 21:7-15; Exh. 3, Tab A, p. VW0460; Exh. 3, Tab C, p. A0465.

1 a new dealer.¹⁹ VWOA's network development department in Michigan
2 prepares a Dealer Agreement with the Standard Provisions and Operating
3 Standards which is put in a white three-ringed binder ("white
4 binder").²⁰ The white binder is sent to the appropriate VWOA Region,
5 where a VWOA Area Executive delivers the white binder to the new
6 dealer.²¹ Hilton Bruce ("Mr. Bruce") testified that SAG's Dealer
7 Agreement was prepared by the network development department pursuant
8 to these procedures and sent to the Pacific Region for delivery to Mr.
9 Serpa.²²

10 21. Gary N. Akin ("Mr. Akin"), the VWOA Area Executive in the
11 Pacific Region responsible for Visalia, and Sal Mazzara, the VWOA
12 representative for Visalia, testified that they met with Mr. Serpa in
13 his office in Visalia on July 14, 1998 and presented Mr. Serpa with a
14 white binder containing: (i) an unexecuted version of the Dealer
15 Agreement, (ii) the Standard Provisions, and (iii) the Volkswagen
16 Dealer Operating Standards then in effect ("Operating Standards").²³

17 22. Mr. Akin testified that he reviewed the contents of the
18 white binder with Mr. Serpa, explaining to Mr. Serpa the various
19 paragraph headings and certain other specifics about each of the three
20 documents, including providing an oral overview of each article
21 contained in the Standard Provisions.²⁴ Mr. Mazzara observed this
22 process but does not recall the specifics of the discussion.²⁵

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24
25 ¹⁹ RT II, p. 112:22-24; pp. 113:9-114:18.

26 ²⁰ RT II, pp. 114:1-115:1; Exh. 2 was admitted as a sample, representing the type of
27 white binder and contents which VWOA contends it provided to Mr. Serpa.

28 ²¹ RT II, pp. 164:20-165:1.

²² RT II, p. 165:2-19.

²³ RT I, pp. 37:17-38:10; p. 40:6-23; pp. 41:21-42:15; pp. 42:16-43:1; RT II, pp.
19:7-21:5; Exh. 2; Exh. 3, Tab A.

²⁴ RT II, pp. 25:10-32:6; pp. 32:18-34:19; p. 35:4-11; pp. 101:20-102:11.

²⁵ RT I, pp. 140:19-141:9.

1 Duplicate originals of the unexecuted Dealer Agreement were removed
2 from the white binder and signed by Mr. Akin and Mr. Serpa.²⁶

3 23. At the meeting, Mr. Mazzara and Mr. Akin also presented Mr.
4 Serpa with a two-page letter agreement from VWOA dated March 11, 1998
5 ("VW Letter") which authorized SAG to use the word "Volkswagen" in the
6 business name "Serpa Volkswagen."²⁷ Mr. Serpa signed the VW Letter.²⁸

7 24. Mr. Akin and Mr. Mazzara testified that copies of the signed
8 Dealer Agreement and signed VW Letter were made and left with Mr.
9 Serpa, along with the white binder containing the Standard Provisions
10 and Operating Standards.²⁹ Following execution of the duplicate
11 original Dealer Agreements by Robert G. Dunn, then Regional Team
12 Leader for VWOA, Mr. Akin sent one of the fully executed originals to
13 VWOA's corporate network development department in Michigan, and he
14 delivered the other fully executed original of the Dealer Agreement to
15 Mr. Serpa during his August 1998 visit to SAG.³⁰

16 25. In July 1998, VWOA procedure did not include having the
17 dealer sign a receipt for the white binder.³¹ Mr. Akin testified that
18 although his practice was to use a checklist when discussing the
19 Dealer Agreement package with a new dealer, he discards the checklist
20 after the Dealer Agreement is delivered to the dealer.³²

21 26. Mr. Serpa testified that he met with Mr. Mazzara and Mr.
22 Akin in his office in Visalia on July 14, 1998, and that he signed the
23
24

25 ²⁶ RT I, p. 40:6-23; p. 122:14-17; RT II, pp. 38:7-39:3; pp. 211:21-212:24.

26 ²⁷ RT II, pp. 40:16-41:4; pp. 72:17-74:9; Exh. 3, Tab A, pp. VWO465-VWO466.

27 ²⁸ RT I, p. 129:14-18; RT II, pp. 40:16-41:4; p. 213:14-23.

28 ²⁹ RT I, pp. 49:7-50:2; p. 133:8-20; RT II, pp. 42:11-43:8.

³⁰ RT II, p. 39:2-23; p. 59:1-10; pp. 66:23-67:15.

³¹ RT I, 135:1 - 24; RT II, p. 118:4-11.

³² RT II, p. 43:9-18; pp. 65:8-66:10.

1 Dealer Agreement in their presence.³³ Mr. Serpa did not read the
2 Dealer Agreement word for word while Mr. Akin was reviewing it with
3 him.³⁴

4 27. Mr. Serpa denied that Mr. Akin reviewed the Standard
5 Provisions document with him.³⁵ English is not Mr. Serpa's native
6 language, and he testified that if he had the opportunity to go
7 through the Standard Provisions, it would have taken him as long as
8 six hours, and he would have remembered reading that document had he
9 done so.³⁶

10 28. Mr. Serpa testified that he does not recall a white binder.³⁷
11 He also denied ever seeing a white binder.³⁸ Mr. Serpa denied that he
12 was shown or given a white binder containing the Standard Provisions
13 and Operating Standards.³⁹ Mr. Serpa also denied that he was given a
14 fully executed duplicate original of the July 14, 1998 Dealer
15 Agreement.⁴⁰

16 29. The SAG files containing the VWOA documents were originally
17 in the custody of Mr. Serpa, who maintained them in a file cabinet in
18 his office with paperwork for his various automobile franchises.⁴¹
19 SAG employee Rhonda Loogman was given the responsibility for
20 maintaining the files after 1998, but she has never seen anything like
21 a white binder.⁴² The VWOA materials in Ms. Loogman's custody are
22 maintained in a manila folder in a locked file cabinet and include

23 ³³ RT II, p. 211:20-23; p. 214:5-16.Exh. 1, SF 1.

24 ³⁴ RT III, pp. 79:8-80:1.

25 ³⁵ RT III, pp. 74:13-75:3; Exh. 2; Exh. 3, Tab B.

26 ³⁶ RT III, p. 77:7-19.

27 ³⁷ RT II, p. 214:22; p. 215:2-3.

28 ³⁸ RT III, p. 75:4-9.

³⁹ RT II, pp. 214:17-216:24; RT III, pp. 74:17-75:9.

⁴⁰ RT III, pp. 75:19-76:9; pp. 157:24-158:4.

⁴¹ RT II, p. 230:1-8; RT III, p. 75:10-18.

⁴² RT III, pp. 77:20-78:4; p. 206:21-207:24; p. 215:10-17:

1 six sheets of paper: the two pages of the amended Dealer Agreement
2 signed by Mr. Serpa on November 21, 2001; the two pages of Exhibit A
3 signed November 21, 2001; Exhibit B signed November 21, 2001; and the
4 second page of the VW Letter signed by Mr. Serpa on July 14, 1998.⁴³
5 Ms. Loogman testified that she did not believe the pages were stapled
6 together.⁴⁴ The file cabinet containing SAG's dealer agreements were
7 moved on at least three occasions.⁴⁵

8 30. The Standard Provisions prohibit a dealer from closing its
9 operations without VWOA's permission, as follows:

10 (1) Except to the extent a greater notice period
11 is required by any applicable statute, VWOA has
12 the right to terminate this Agreement for cause,
13 with immediate effect, by sending notice of
14 termination to Dealer, if any of the following
15 should occur:

16

17 (f) Failure of Dealer to continue to operate any
18 of Dealer's Premises in the usual manner for a
19 period of five consecutive business days, unless
20 caused by an Act of God, war, riot, strike,
21 lockout, fire, explosion or similar event: . . .⁴⁶

22 31. No modifications have been made to the Standard Provisions
23 since 1998.⁴⁷

24 BUY-SELL NEGOTIATIONS FOR THE VOLKSWAGEN FRANCHISE

25 32. Evidence reflects that at various times during 2005, SAG was
26 conducting discussions to sell the Volkswagen dealership to at least
27 three prospective buyers: (1) Don Groppetti ("Mr. Groppetti") of
28 Groppetti Automotive Family ("Groppetti"); (2) Melody Swanson ("Ms.

⁴³ RT II, pp. 224:19-225:12; RT III, p. 158:15-20; pp. 192:12-193:5; p. 212:5-15; p. 213:13-14; Exh. 3, Tabs A and C.

⁴⁴ RT III, p. 209:4-11.

⁴⁵ RT II, p. 230:1-19; RT III, p. 75:10-18; pp. 77:20-79:7.

⁴⁶ Exh. 3, Tab B, p. VW0513, Art. 14(1)(f).

⁴⁷ RT II, p. 46:2-4; p. 115:7-13.

1 Swanson"); and (3) Fawz Sood ("Mr. Sood").⁴⁸

2 33. The Volkswagen franchise and the SAG Hyundai dealership
3 operated as a dual dealership.⁴⁹ In May 2005, Mr. Groppetti and Mr.
4 Serpa began negotiations for a buy-sell of SAG's Volkswagen and
5 Hyundai dealerships, including a lease to Mr. Groppetti of the real
6 property at which the dealerships were located.⁵⁰ At Mr. Serpa's
7 request, the Volkswagen proposal included a provision permitting Mr.
8 Serpa to cancel the Volkswagen sale at his discretion within thirty
9 days of the close of escrow; the purpose of the provision was to
10 enable a sale to a higher bidder.⁵¹ The Hyundai sale and the lease of
11 the real property could be consummated even if Mr. Serpa elected to
12 cancel the Volkswagen portion of the sale.⁵²

13 34. SAG and Groppetti signed two buy-sell agreements on July 15,
14 2005, one for Volkswagen and one for Hyundai.⁵³ The buy-sell
15 agreements each make reference to the Dealer Agreement, and each
16 provides automatic extensions to the extent additional time was
17 necessary to obtain manufacturer approval.⁵⁴

18 35. The Authorized VW Facility and Hyundai premises were located
19 on property owned by Mr. Serpa and his wife, and as part of the buy-
20 sell agreements, the property was to be leased to Groppetti with an
21 option to purchase.⁵⁵ If Mr. Serpa cancelled the sale of the
22 Volkswagen dealership, once the buy-sell agreement for Hyundai had
23 closed escrow, the Authorized VW Facility could no longer be located

24
25 ⁴⁸ RT II, pp. 233:18-234:10; Exh. 1, SF 4; Exh. 3, Tab F3 and Tab J6.

26 ⁴⁹ RT II, p. 202:4-21.

27 ⁵⁰ Exh. 3, Tab O.

28 ⁵¹ RT I, p. 54:18-25; Exh. 1, SF 5; Exh. 3, Tab S, Tab Y, and Tab U2.

⁵² Exh. 3, Tab T2.

⁵³ Exh. 1, SF 4; Exh. 3, Tabs Y and Z; Exh. 6, pp. 51:19-53:11.

⁵⁴ Exh. 3, Tab Y and Tab Z, p. 7, para. 28.

⁵⁵ Exh. 3, Tab A2; Exh. 6, pp. 21:12-22:4; p. 48:7-22.

1 at 220 South Ben Maddox Way, Visalia.⁵⁶

2 36. On or about August 4, 2005, SAG notified Mr. Mazzara of the
3 pending sale of the Volkswagen dealership,⁵⁷ and on August 5, 2005, SAG
4 sent a letter to VWOA confirming the pending sale and requesting
5 "factory approval" to transfer the Volkswagen franchise to Gropetti.⁵⁸

6 37. On August 18, 2005, Mr. Mazzara and Jim Webber ("Mr.
7 Webber") of VWOA met separately with Mr. Serpa and Mr. Gropetti.⁵⁹ At
8 the meetings, Mr. Mazzara provided Mr. Serpa and Mr. Gropetti with
9 copies of VWOA's applicable Operating Standards, and Mr. Mazzara
10 advised Mr. Serpa and Mr. Gropetti that the sale of a Volkswagen
11 franchise triggers certain obligations under the Operating Standards
12 to upgrade the dealership facility to Volkswagen Marketplace facility
13 standards.⁶⁰

14 38. During the August 18, 2005 meeting, Mr. Serpa explained to
15 Mr. Mazzara that the Volkswagen buy-sell agreement with Gropetti gave
16 SAG the right to pull the Volkswagen franchise out of the sale if Mr.
17 Serpa found a prospective buyer to pay more money than offered by
18 Gropetti.⁶¹

19 39. On August 24, 2005, both Mr. Gropetti and Mr. Serpa
20 notified Mr. Mazzara that SAG was exercising its option to cancel the
21 Volkswagen portion of the sale to Gropetti.⁶² SAG and Gropetti
22 proceeded with the sale of the Hyundai franchise and the lease of the
23

24 ⁵⁶ Exh. 3, Tab A2 and Tab D3.

25 ⁵⁷ Exh. 1, SF 6.

26 ⁵⁸ Exh. 1, SF 7; Exh. 3, Tab D2.

27 ⁵⁹ RT I, pp. 51:13-52:12; Exh. 1, SF 10; Exh. 6, pp. 58:1-60:17; Exh. 10, Webber, pp.
25:5-26:21.

28 ⁶⁰ RT I, pp. 52:13-54:17; RT II, pp. 141:13-142:2; Exh. 3, Tab D, p. VW0005; Exh. 10,
Webber, pp. 43:1-44:7; pp. 49:21-50:25.

⁶¹ RT I, p. 54:18-25.

⁶² Exh. 1, SF 11; Exh. 3, Tab P2 and U2; Exh. 6, pp. 73:21-76:20.

1 real property that was the Authorized VW Facility.⁶³

2 40. The primary reason stated in the SAG corporate minutes for
3 withdrawing the Volkswagen franchise from sale was to keep the
4 franchise as a stand-alone business on the Suzuki location at 815
5 South Ben Maddox Way.⁶⁴ Mr. Serpa notified both Mr. Groppetti and Mr.
6 Mazzara that the reason for cancelling the sale of the Volkswagen
7 franchise was that SAG had a prospective buyer who would pay more than
8 Groppetti.⁶⁵ Although Mr. Serpa continued to have discussions with Ms.
9 Swanson and Mr. Sood, no evidence was proffered that either they or
10 any other potential buyer had made a commitment to purchase the
11 Volkswagen franchise at that time.⁶⁶

12 RELOCATION POSSIBILITIES

13 41. Mr. Serpa signed the Dealer Agreement on July 14, 1998 and
14 November 21, 2001.⁶⁷ Both documents contain a provision requiring
15 written approval from VWOA prior to relocating:⁶⁸

16 5. **DEALER'S PREMISES.** VWOA has approved the
17 location of Dealer's Premises as specified in the
18 Dealer Premises Addendum, attached as Exhibit B.
19 Dealer agrees that, without VWOA's prior written
20 consent, it will not (a) make any major structural
change in any of Dealer's Premises, (b) change the
location of any of Dealer's Premises or (c)
establish any additional premises for Dealer's
Operations.

21 42. Mr. Serpa testified that he was aware that any proposal to
22 relocate needed to be in writing, that he was required to comply with
23 VW Marketplace facility standards, and that VWOA approval was required
24 for any relocation.⁶⁹

25
26 ⁶³ Exh. 3, Tab Y4.

⁶⁴ Exh. 3, Tab R2.

27 ⁶⁵ Exh. 3, Tab U2 and Tab W2.

⁶⁶ Exh. 3, Tab F3 and Tab J6.

28 ⁶⁷ Exh. 1, SF 1; Exh. 3, Tab A and Tab C.

⁶⁸ Exh. 3, Tab A and Tab C.

1 43. SAG had experience building and remodeling dealerships prior
2 to August 2005.⁷⁰

3 44. As early as July 1, 2005, Mr. Serpa articulated a
4 contingency plan to relocate the Volkswagen franchise should the buy-
5 sell with Groppetti not be consummated.⁷¹ Mr. Serpa operated a Suzuki
6 automobile dealership located at 815 South Ben Maddox Way in Visalia,
7 and the contingency plan was to move the Volkswagen franchise to the
8 Suzuki location.⁷² At the hearing Mr. Serpa testified that during a
9 meeting on August 18, 2005, Mr. Mazzara came up with the idea to
10 relocate the Volkswagen dealership to the Suzuki location.⁷³ Mr.
11 Mazzara denies that this subject was discussed at the August 18, 2005,
12 meeting, and he denies that he suggested the Suzuki location as an
13 acceptable site.⁷⁴

14 45. On August 23, 2005, Mr. Serpa asked Mr. Mazzara if the
15 Suzuki location could be remodeled to house Volkswagen if the buy-sell
16 with Groppetti did not occur.⁷⁵ Mr. Mazzara responded "Anything is
17 possible. If it looks like we are going that direction, I will come
18 back up and we can discuss the requirements in more detail. Just let
19 me know."⁷⁶

20 46. On August 24, 2005, Mr. Serpa asked Mr. Mazzara for ". . .
21 SPECIFIC INFORMATION NEEDED TO IMPROVE ON (sic) OF THE TWO FACILITIES
22 WE TALKED ABOUT" ⁷⁷

23
24
25 ⁶⁹ RT III, pp. 25:18-21; p. 28:13-22; p. 32:14-17.

⁷⁰ RT II, p. 204:2-24; pp. 207:16-208:1; Exh. 7, Scott, p. 18:12-16.

⁷¹ Exh. 3, Tab U.

⁷² Exh. 3, Tab U.

⁷³ RT III, pp. 15:22-16:5; p. 180:16-21.

⁷⁴ RT I, p. 56:6-10.

⁷⁵ Exh. 3, Tab O2.

⁷⁶ Exh. 3, Tab O2.

⁷⁷ Exh. 3, Tab U2.

1 47. On August 25, 2005, Mr. Serpa asked Mr. Mazzara about an
2 eighteen month schedule, based upon the assumption that the Volkswagen
3 franchise would be sold and moved to the General Motors ("GM")
4 showroom owned by Mr. Groppetti while a new Volkswagen facility was
5 built on property owned by Mr. Serpa.⁷⁸ Mr. Serpa knew the GM property
6 would not be available for use until December 2005.⁷⁹

7 48. At some point Mr. Serpa offered to move the Volkswagen
8 franchise to his Kia showroom.⁸⁰ No written proposal for this
9 relocation was sent to VWoA.⁸¹

10 49. On August 31, 2005, SAG made a written request to VWoA to
11 relocate the Volkswagen dealership to the Suzuki location.⁸² Although
12 the SAG corporation directors had voted to keep Volkswagen as a stand-
13 alone business at the Suzuki location, Mr. Serpa's original written
14 relocation proposal was to house Volkswagen and Suzuki at the Suzuki
15 location.⁸³ Mr. Serpa testified that he knew this proposal was likely
16 to be rejected.⁸⁴ VWoA immediately rejected the proposal.⁸⁵

17 50. On September 6, 2005, SAG made a written request to VWoA to
18 relocate Volkswagen to the Suzuki location as a stand-alone
19 dealership.⁸⁶

20 51. VWoA has a standard relocation approval process which was
21 explained to Mr. Serpa.⁸⁷ Upon a dealer's written request to relocate,
22 VWoA sends an architect to the proposed facility to determine whether
23

24 ⁷⁸ Exh. 3, Tab A3.

⁷⁹ Exh. 3, Tab U.

25 ⁸⁰ RT III, pp. 32:20-33:21.

⁸¹ RT III, p. 33:1-2.

26 ⁸² Exh. 1, SF 12; Exh. 3, Tab I3.

⁸³ Exh. 3, Tab R2.

27 ⁸⁴ RT III, pp. 25:24-26:8; Exh. 3, Tabs I3 and L3.

⁸⁵ Exh. 3, Tab L3.

28 ⁸⁶ Exh. 1, SF 12; Exh. 3, Tab Q3.

⁸⁷ RT I, pp. 71:10-73:25; Exh. 3, Tab T3.

1 it meets VWOA's Marketplace facility standards; if so, VWOA will
2 develop a letter of intent which sets forth all of the conditions
3 under which VWOA will approve the proposed relocation.⁸⁸

4 52. On September 8, 2005, Mr. Serpa completed a VW Marketplace
5 Design Services Enrollment Form ("Enrollment Form") which described
6 the process as including an initial site visit, approval of
7 preliminary designs, creation of Design Control Documents and a return
8 on-site visit to deliver the design package.⁸⁹ The Enrollment Form
9 also states that the relocating dealer is then responsible for
10 securing construction documents and permits by a properly licensed
11 architect/engineering professional of the dealer's choice.⁹⁰

12 53. The communications by Mr. Mazzara to Mr. Serpa consistently
13 note that the relocation approval process takes time; that VWOA would
14 not authorize SAG to conduct Volkswagen business at the Suzuki
15 location until the process was complete; and that the scheduled escrow
16 closing date for the Gropetti transaction was not realistic.⁹¹ When
17 the transaction with Gropetti closed, SAG would lose the right to
18 occupy and use the real property which was the Authorized VW
19 Facility.⁹² Mr. Mazzara used the phrase "at risk" but did not mention
20 "termination".⁹³

21 54. During September 2005, SAG representatives repeatedly asked
22 VWOA to issue an OL-124 for the Suzuki location.⁹⁴ VWOA advised SAG on
23

24 ⁸⁸ RT II, pp. 119:14-122:22.

25 ⁸⁹ Exh. 3, Tab W3.

26 ⁹⁰ Exh. 3, Tab W3.

27 ⁹¹ Exh. 1, SF 13, SF 18, and SF 24; Exh. 3, Tabs X3, Z3, D4, E4 and F4.

28 ⁹² Exh. 3, Tab A2 and Tab D3.

⁹³ RT I, pp. 90:9-91:18.

⁹⁴ Form OL-124 is signed by the manufacturer or distributor, authorizing the dealer to sell a specific brand of new vehicles at a specific address location. The form is required by DMV before it will issue a license to a dealer. Exh. 1, SF 14, SF 16, SF 19 and SF 20.

1 multiple occasions that an OL-124 would not be issued for the Suzuki
2 location until the relocation proposal had been approved.⁹⁵

3 55. On September 19, 2005, Mr. Serpa asked Mr. Mazzara for
4 advice, claiming that DMV would not be able to issue a license until
5 the end of the month; Mr. Mazzara suggested that Mr. Serpa seek an
6 extension of time on the sale of the Hyundai dealership from Mr.
7 Groppetti.⁹⁶ Mr. Serpa knew on September 19, 2005, that the architect
8 could not survey the Suzuki location until October 6, 2005.⁹⁷ At Mr.
9 Groppetti's suggestion, the date for the close of escrow was moved to
10 October 13, 2005.⁹⁸

11 56. Aida Viskantas (Ms. Viskantas), the VWoA approved architect,
12 inspected the Suzuki location on October 6, 2005 and determined that
13 the existing structure did not meet VWoA's minimum Marketplace
14 requirements and would require substantial new construction, including
15 construction of an expanded showroom and a new service department, and
16 additional parking space.⁹⁹ Ms. Viskantas and Mr. Mazzara advised Mr.
17 Serpa that the Suzuki location, as it existed, was not adequate and
18 required remodeling and expansion.¹⁰⁰

19 57. On October 6, 2005, Mr. Mazzara observed the SAG sales
20 manager moving Volkswagen vehicles to the Suzuki location.¹⁰¹ Mr.
21 Mazzara requested "For Display Only" signs be placed on the vehicles
22 because SAG was not authorized by VWoA nor licensed by DMV to sell
23

24 ⁹⁵ Exh. 1, SF 13, 15, 16, 19, 20, and 24; Exh. 3, Tabs X3, Z3, and D4.

25 ⁹⁶ Exh. 1, SF 17 and SF 18; Exh. 3, Tab E4.

26 ⁹⁷ Exh. 1, SF 19; Exh. 3, Tab D4.

27 ⁹⁸ Exh. 3, Tab J4.

28 ⁹⁹ RT I, p. 96:11-20; Exh. 1, SF 21; Exh. 7, Viskantas, pp. 29:1-32:10; pp. 34:3-37:25; pp. 39:13-44:19; pp. 45:8-46:20.

¹⁰⁰ RT I, pp. 96:21-97:10; p. 98:4-12; Exh. 7, Viskantas, pp. 39:13-44:19; pp. 45:8-46:20.

¹⁰¹ RT I, p. 92:13-21.

1 Volkswagens at the Suzuki location.¹⁰²

2 58. Mr. Mazzara advised Mr. Serpa on October 10, 2005:

3 I have been working very hard to get this done as
4 quickly as possible for you. The DMV is causing the
5 problems for you, not VW. It takes time to review the
6 facility and make sure it will meet the needs for VW,
7 now and in the future. We are moving from a complete
8 facility to one with a showroom that is too small per
9 VW standards, without a service or parts (sic)
10 department. It takes time to draw these plans and
11 review them for accuracy. From the very beginning I
12 made the requirements known to you and expressed my
13 concern over the timing and DMV issues. I will push
14 VW to move as quickly as possible. I urge you to
15 plead your case to with (sic) the DMV and get some
16 flexibility from them as well.¹⁰³

17 59. By the time of SAG's abandonment of the Authorized VW
18 Facility, Ms. Viskantas had conducted the initial site visit and was
19 still in the process of working with VWoA to obtain approval of
20 preliminary design documents.¹⁰⁴

21 TERMINATION

22 60. Mr. Serpa asked for advice from Mr. Groppetti on September
23 20, 2005, and Mr. Groppetti warned Mr. Serpa not to close SAG's
24 Volkswagen dealership for more than the maximum number of days before
25 VWoA could terminate SAG's Volkswagen dealership.¹⁰⁵

26 . . . If you do not sell and have to put the cars
27 behind Saturn just be careful not to exceed the
28 maximum number of days you can be closed before VW
could terminate. . . .¹⁰⁶

61. Upon receipt of Mr. Groppetti's advice which warned about
termination, Mr. Serpa did not review the Volkswagen Dealer Agreement

¹⁰² RT I, pp. 92:21-93:4.

¹⁰³ Exh. 1, SF 24; Exh. 3, Tab T4.

¹⁰⁴ Exh. 1, SF 25; Exh. 3, Tab H5 and Tab I5; Exh. 7, Viskantas, pp. 54:23-58:20.

¹⁰⁵ Exh. 3, Tab H4; Exh. 6, pp. 85:1-87:19.

¹⁰⁶ Exh. 3, Tab H4.

1 materials in his file, nor did he inform Ms. Loogman of the Groppetti
2 warning or request that she research the termination issue.¹⁰⁷
3 Upon receipt of Mr. Groppetti's warning concerning termination, Mr.
4 Serpa did not consult with his attorney, although Mr. Serpa did
5 testify that after the exit from the Authorized VW Facility he learned
6 from his attorney that the Standard Provisions prohibited cessation of
7 Volkswagen operations for more than five consecutive days.¹⁰⁸

8 62. On September 21, 2005, Mr. Mazzara came to Visalia to meet
9 with Mr. Serpa; however, Mr. Serpa did not bring up the topic of
10 termination or discuss Mr. Groppetti's warning with Mr. Mazzara.¹⁰⁹

11 63. Between October 12 and October 14, 2005, Mr. Serpa closed
12 the Hyundai deal with Groppetti and ceased doing business at the
13 Authorized VW Facility.¹¹⁰

14 64. Although Mr. Groppetti had previously agreed to extend the
15 closing date to allow more time for completing the relocation approval
16 process, Mr. Serpa agreed to close the transaction on October 13,
17 2005.¹¹¹ Mr. Serpa did not ask Mr. Groppetti to extend the closing
18 beyond October 13, 2005.¹¹²

19 65. Mr. Serpa testified that he was aware of the means to extend
20 the closing of escrow until manufacturer approvals were obtained.¹¹³

21 66. On about October 13, 2005, DMV issued a license to Groppetti
22
23

24 ¹⁰⁷ RT III, pp. 43:7-44:24; pp. 122:23-123:6; pp. 191:23-192:7.

¹⁰⁸ RT III, p. 136:10-18; pp. 167:24-168:9.

25 ¹⁰⁹ RT I, pp. 88:16-91:18; RT III, pp. 43:9-44:19; Exh. 3, Tab H4.

¹¹⁰ RT I, p. 105:5-17; Exh. 1, SF 25.

26 ¹¹¹ Exh. 3, Tab J4.

27 ¹¹² RT III, pp. 61:3-62:4; Exh. 3, Tab Y5; Exh. 6, pp. 90:9-91:8; p. 92:18-22; pp.
28 95:9-97:1; pp. 118:14-121:16. There is also evidence that Mr. Serpa could have
delayed the closing and the DMV licensing of the Hyundai dealership simply by
delaying submission of paperwork to DMV (Exh. 3, Tab A5).

¹¹³ RT III, pp. 10:11-11:24; Exh. 3, Tab Y, p. VW0305.

1 for a Hyundai dealership at 220 South Ben Maddox, Visalia.¹¹⁴

2 67. When it abandoned the Authorized VW Facility, SAG took no
3 steps to notify VWOA.¹¹⁵

4 68. Mr. Mazzara telephoned the Authorized VW Facility on October
5 13, 2005, and he was referred to Mr. Serpa's Kia dealership.¹¹⁶ Mr.
6 Bruce made the decision to terminate VWOA's relationship with SAG on
7 October 19, 2005, and no further work was done on the relocation
8 request.¹¹⁷

9 69. As a courtesy to Mr. Serpa, on October 20, 2005 Mr. Mazzara
10 was authorized to call Mr. Serpa and advise him that VWOA would be
11 sending a notice of termination.¹¹⁸ VWOA's Notice of Termination to
12 SAG is dated October 26, 2005.¹¹⁹ The termination cites SAG's failure
13 to conduct its customary Volkswagen sales and service operations
14 during customary business hours for seven consecutive days, in breach
15 of the Dealer Agreement, thus triggering the expedited 15-day notice
16 provided by Section 3060(a)(1)(B)(v) in cases where the dealership has
17 ceased operations for seven consecutive business days.¹²⁰

18 70. SAG filed a protest pursuant to Section 3060 on November 1,
19 2005.¹²¹

20 ///

21 ///

22 ///

23 ///

24 _____
25 ¹¹⁴ Exh. 3, Tab A5.

26 ¹¹⁵ RT I, pp. 105:5-106:10.

27 ¹¹⁶ RT I, pp. 105:5-106:3.

28 ¹¹⁷ RT II, p. 140:1-15; pp. 172:23-173:21.

¹¹⁸ RT I, pp. 207:24-208:10; Exh. 1, SF 26.

¹¹⁹ Exh. 1, SF 27.

¹²⁰ Exh. 1, SF 27; Exh. 3, Tab E6.

¹²¹ Exh. 1, SF 28.

FINDINGS RELATING TO THE AMOUNT OF BUSINESS TRANSACTED BY
SAG AS COMPARED TO THE BUSINESS AVAILABLE TO IT (SEC. 3061(a))¹²²

71. Since October 14, 2005, there has been no authorized or licensed Volkswagen facility in Visalia where new customers can view, test drive and/or buy Volkswagen vehicles.

72. Expert testimony and reports were received on behalf of SAG and VWoA. On behalf of SAG, Mr. Edward Stockton ("Mr. Stockton") of the Fontana Group analyzed the comparison of customer convenience before and after the closing of Serpa Volkswagen.¹²³ On behalf of VWoA, Mr. John Frith ("Mr. Frith") of Urban Science Applications analyzed sales performance.¹²⁴

73. Mr. Stockton defined the applicable market as the Fresno-Visalia-Bakersfield area¹²⁵ and the consuming public as Serpa's Volkswagen sales customers¹²⁶ or, alternately, VWoA retail car and light truck customers who registered new vehicles in 2005.¹²⁷ Mr. Stockton provided a comparison of air distance and drive times which indicated that the consuming public is affected by the distance between franchisees.¹²⁸ In Mr. Stockton's opinion, the proposed termination of the Serpa franchise will have a measurable negative effect on the consuming public in the Fresno-Visalia-Bakersfield

¹²² Protestant argues that the Board should not consider performance issues because VWoA acknowledges they were not a factor in the decision to terminate SAG. Protestant's reliance upon *American Isuzu Motors, Inc. v. New Motor Vehicle Board (Fladeboe)* (1986) 186 Cal. App.3d 464 [franchisor attempts to raise additional grounds for termination at hearing] and *British Motor Car Distributors, Ltd. v. New Motor Vehicle Board* (1987) 194 Cal. App.3d 81 [no reason for termination stated] do not support this narrow interpretation of the Board's scope of review.

¹²³ RT IV, pp. 110:24-111:4; Exh. 8.

¹²⁴ RT IV, p. 2:18-23; Exh. 5.

¹²⁵ RT 82:8-20; Exh. 8, Tab 4. Mr. Stockton testified that this area, and the primary area of influence measurement utilized by Mr. Frith, were quite similar.

¹²⁶ RT IV, p. 85:6-18; Exh. 8, Tab 7

¹²⁷ RT IV, p. 86:19-22; Exh. 8, Tab 8.

¹²⁸ RT IV, pp. 91:20-95:9; Exh. 8, Tab 12.

1 market, requiring additional travel to obtain services, and is
2 injurious to the public welfare.¹²⁹ Mr. Stockton did not quantify lost
3 sales due to the closing of Serpa Volkswagen.¹³⁰ Mr. Stockton measured
4 the effect of the closing of the Authorized VW Facility on Volkswagen
5 service customers, not on customers who wish to purchase a new
6 Volkswagen vehicle.¹³¹

7 74. Mr. Frith's analysis considered sales effectiveness, the
8 measure of a dealer's sales anywhere in the United States and compared
9 that number to the number of expected retail registrations in the
10 dealer's primary area of influence; his analysis includes adjustments
11 for local consumer preferences.¹³²

12 75. From 2000 through September 2005, Mr. Frith concluded that
13 SAG sales effectiveness averaged around 55%, which was below the
14 expected performance for a Volkswagen dealer.¹³³

15 76. Mr. Frith's analysis reflects that the dealerships in Fresno
16 and Bakersfield were also performing below California standards during
17 the same time period.¹³⁴ VWoA did not indicate to Mr. Frith that it
18 desired to terminate the SAG franchise based upon poor performance.¹³⁵
19 Mr. Frith's analysis did not include a review of service work,
20 warranty work, or customer satisfaction.¹³⁶

21 77. Mr. Frith testified that management can affect sales
22 effectiveness.¹³⁷ During 2005, SAG employed a general manager for the
23

24 ¹²⁹ RT IV, pp. 79:22-80:3; 80:16-20.

25 ¹³⁰ RT IV, p. 100:9-20.

26 ¹³¹ RT IV, p. 85:8-18; p. 100:2-20.

27 ¹³² RT IV, pp. 15:25-16:21.

28 ¹³³ RT IV, p. 21:19-23; p. 24:18-23.

¹³⁴ RT IV, p. 51:10-13; Exh. 5, PH App. 11 through PH App. 22.

¹³⁵ RT IV, p. 36:19-22.

¹³⁶ RT IV, pp. 40:21-41:1; p. 56:9-11.

¹³⁷ RT IV, p. 59:9-11.

1 Volkswagen franchise to whom VWOA communicated its concerns about
2 performance issues. When it became apparent that the general manager
3 had not shared those concerns with Mr. Serpa, on August 19, 2005, Mr.
4 Mazzara forwarded to Mr. Serpa written communication on the subject.¹³⁸
5 At the time of the termination, the general manager was no longer
6 associated with SAG.

7 78. Even though their analyses address different aspects of the
8 automobile industry, Mr. Stockton and Mr. Frith agree that the public
9 of the Visalia market needs a functioning Volkswagen dealership.¹³⁹

10 79. Sales of the Volkswagen brand in the Fresno-Visalia-
11 Bakersfield market were not good for any dealer, and VWOA's Notice of
12 Termination does not include poor performance as a basis for
13 termination. Mr. Serpa's goal was to sell the Volkswagen franchise -
14 if not to Mr. Groppetti or Ms. Swanson, then to Mr. Sood or some other
15 buyer. Although Mr. Serpa expressed a willingness to work to "bring
16 the numbers back up where they should be", this willingness was solely
17 for the purpose of preparing the franchise for sale.¹⁴⁰ SAG's goal was
18 short-term and appears to be at odds with the goal of VWOA to have an
19 established dealer motivated to increase sales for the long term.

20 **FINDINGS RELATING TO THE INVESTMENT NECESSARILY MADE AND**
21 **OBLIGATIONS INCURRED BY THE FRANCHISEE TO PERFORM**
22 **ITS PART OF THE FRANCHISE (SEC. 3061(b))**

23 80. Since October 14, 2005, there has been no authorized or
24 licensed Volkswagen facility in Visalia.

25 81. Mr. Serpa and his wife own the property which had housed
26 Hyundai and Volkswagen in the Authorized VW Facility. The sale of the

27 ¹³⁸ RT I, p. 154:13-25.

28 ¹³⁹ RT IV, pp. 114:5-118:3.

¹⁴⁰ Exh. 3, Tab F3.

1 Hyundai franchise to Groppetti included the lease to Groppetti of all
2 of the real property, including the Volkswagen facility, requiring a
3 relocation of the Volkswagen franchise to an approved site. Before
4 escrow closed, Mr. Serpa did not request an additional extension of
5 the close of escrow in order to accommodate the Volkswagen relocation
6 approval process.

7 82. Mr. Serpa offered various properties and scenarios for
8 relocation of the Volkswagen franchise. A temporary relocation to Mr.
9 Groppetti's GM facility, followed by building a new facility, appears
10 to be an offer which was impossible to perform: Mr. Serpa knew the GM
11 facility was not available in October and would not be available until
12 December 2005. The proposal to temporarily relocate to Mr. Serpa's
13 Kia facility, followed by building a new facility, appears to have
14 been made while the Suzuki location was being evaluated, and pursuing
15 that proposal would have required a separate relocation approval
16 process.

17 83. After Mr. Serpa exercised his option to pull Volkswagen out
18 of the deal with Groppetti, Mr. Serpa contacted Ms. Swanson on August
19 27, 2005, offering to sell her the Volkswagen franchise and suggesting
20 that she could temporarily move it into the unavailable GM facility
21 until a permanent location was built.¹⁴¹ He requested her response by
22 the end of August, stating that if Ms. Swanson was not interested, Mr.
23 Serpa would keep the franchise, move it in with Suzuki, and sell it
24 later.¹⁴² Apparently Ms. Swanson turned down the deal: on August 31,
25 2005 Mr. Serpa made his written request to relocate the Volkswagen
26 franchise to the Suzuki location and operate the two franchises

27
28 ¹⁴¹ Exh. 3, Tab F3.

¹⁴² Exh. 3, Tab F3.

1 together.

2 84. Mr. Serpa's August 31, 2005 proposal to relocate to the
3 Suzuki location, dualing Suzuki and Volkswagen, delayed the relocation
4 approval process. The SAG directors voted to relocate Volkswagen as a
5 stand-alone business. Mr. Serpa had received a copy of the VWOA
6 Marketplace facility standards on August 18, 2005, and he knew VWOA
7 would reject the proposal for a dual facility.

8 85. The September 6, 2005, written proposal to relocate to the
9 Suzuki location, combined with the September 8, 2005, completion of
10 the Enrollment Form, commenced the VWOA relocation approval process.

11 86. The Suzuki location was never approved as an authorized site
12 for the VWOA franchise. The VWOA relocation approval process had not
13 been completed at the time of the abandonment of the Authorized VW
14 Facility. SAG provided evidence that conceptual plans had been
15 created for the relocation site.¹⁴³ Evidence was also provided that a
16 SAG representative expressed willingness to expend the necessary funds
17 for the relocation remodel.¹⁴⁴

18 87. The investments made by SAG toward the anticipated
19 relocation of the Volkswagen franchise were: (1) providing a potential
20 building for the Volkswagen franchise by moving the Suzuki franchise
21 out of 815 South Ben Maddox; and (2) purchasing signs to post at 815
22 South Ben Maddox to alert the public that Volkswagen business was
23 being conducted at that site.¹⁴⁵

24 88. The Suzuki location did not meet the VWOA Marketplace
25 facility standards and would have required remodeling. Even though
26

27 ¹⁴³ Exh. 7, Scott, p. 29:3-17; Exh. 9.

28 ¹⁴⁴ RT III, p. 198:1-10.

¹⁴⁵ RT III, pp. 145:6-146:6; Exh. 3, Tab Q6 and Tab R6.

1 SAG was willing to expend funds for remodeling, the evidence supports
2 the finding that Mr. Serpa made decisions which caused him to exit the
3 Approved VW Facility without having an approved relocation site. The
4 investment made and obligations incurred are insufficient for SAG to
5 perform its part of the franchise agreement.

6 FINDINGS RELATING TO THE PERMANENCY
7 OF THE INVESTMENT (SEC. 3061(c))

8 89. Since October 14, 2005, there has been no authorized or
9 licensed Volkswagen facility in Visalia.

10 90. Evidence was received that SAG was not averse to investing
11 the funds necessary for remodeling the Suzuki location.

12 91. Notwithstanding Mr. Serpa's testimony that he wanted to
13 continue selling Volkswagen vehicles, the evidence is conclusive that
14 what Mr. Serpa wanted to accomplish was the sale of the Volkswagen
15 franchise. Notwithstanding the flurry of illusory and impractical
16 proposals such as relocating to the GM or Kia facilities, Mr. Serpa
17 was apparently only willing to invest in a temporary relocation site
18 until a sale of the franchise could be completed.

19 92. Due to Mr. Serpa's decision to request a dual Suzuki-
20 Volkswagen facility, which delayed the relocation approval process,
21 and due to Mr. Serpa's decision not to seek an extension of the date
22 for closing escrow on the sale of the Hyundai franchise and lease of
23 the real property on which the VWoA franchise had operated, SAG's exit
24 from the Authorized VW Facility was required prior to completion of
25 the relocation approval process. Other than the Suzuki facility which
26 was proposed as a relocation site, there is no permanency of the SAG
27 investment and no obligations incurred to relocate the Volkswagen
28 franchise.

1 FINDINGS RELATING TO WHETHER IT IS INJURIOUS OR BENEFICIAL
2 TO THE PUBLIC WELFARE FOR THE FRANCHISE TO BE MODIFIED OR
3 REPLACED OR THE BUSINESS OF THE FRANCHISEE DISRUPTED (SEC. 3061(d))

4 93. Since October 14, 2005, there has been no authorized or
5 licensed Volkswagen facility in Visalia.

6 94. Prior to SAG operating a VWoA franchise in Visalia, there
7 had been other VWoA dealerships in that city.¹⁴⁶ Mr. Stockton and Mr.
8 Frith concur that it is beneficial for the public in the Visalia
9 market area to have a functioning Volkswagen dealership.

10 95. On the one hand, Mr. Serpa expressed concern for his
11 customers. On the other hand, he conceded that he was aware he had
12 the ability to extend the close of escrow in the Hyundai sale, thus
13 delaying the closing of the Authorized VW Facility. He also increased
14 the time necessary for the relocation approval process by requesting
15 to dual the Suzuki dealership with Volkswagen.

16 96. Mr. Serpa was aware that he needed VWoA approval to relocate
17 his Volkswagen dealership. Nevertheless, without approval and without
18 notice to VWoA, the Volkswagen franchise was disbursed among the
19 various SAG holdings: phone calls were referred to the SAG Kia
20 dealership; parts and service went to SAG's Suzuki location; repairs
21 went to SAG's Saturn location; and vehicles were housed at SAG's
22 Suzuki location.¹⁴⁷ No evidence was presented that SAG customers
23 received notice of the changes earlier than did VWoA. SAG caused
24 injury to the public by abandoning the Authorized VW Facility without
25 an approved relocation site.

26 97. Mr. Serpa's goal was to sell the Volkswagen franchise. It
27 would be beneficial to the public to have a dealer who is dedicated to

28 ¹⁴⁶ RT II, p. 88:14-19; p. 89:3-10.

¹⁴⁷ RT III, pp. 195:5-197:7; p. 220:9-18.

1 Volkswagen and its customers, not just a dealer transitioning toward
2 sale.

3 FINDINGS RELATING TO WHETHER THE FRANCHISEE HAS ADEQUATE
4 MOTOR VEHICLE SALES AND SERVICE FACILITIES, EQUIPMENT,
5 VEHICLE PARTS, AND QUALIFIED PERSONNEL TO REASONABLY
6 PROVIDE FOR THE NEEDS OF THE CONSUMERS FOR THE MOTOR
7 VEHICLES HANDLED BY THE FRANCHISEE AND HAS BEEN AND IS
8 RENDERING ADEQUATE SERVICES TO THE PUBLIC (SEC. 3061(e)).

9 98. No evidence was presented that prior to the abandonment of
10 the Authorized VW Facility, SAG failed to provide adequate sales and
11 service facilities, equipment, vehicle parts, and qualified personnel
12 to reasonably provide for the needs of the consumers.

13 99. Since October 14, 2005, there has been no authorized or
14 licensed Volkswagen facility in Visalia.

15 100. One Volkswagen vehicle remained in the service department at
16 220 South Ben Maddox Way because the vehicle was awaiting parts and
17 could not be moved.¹⁴⁸ SAG simply borrowed the now-Hyundai space, just
18 as it borrowed the Suzuki location for service of other Volkswagen
19 vehicles when it left the Authorized VW Facility.

20 101. SAG continues to provide service and warranty work from
21 unauthorized locations.¹⁴⁹

22 102. SAG has displayed Volkswagen service signage at an
23 unauthorized facility without VWoA's permission or authorization.¹⁵⁰

24 103. Pending the outcome of the protest, VWoA has continued to
25 reimburse SAG for warranty work performed at unauthorized locations
26 due to uncertainty as to whether a refusal to reimburse the warranty

27 ¹⁴⁸ RT II, p. 190:7-14; RT III, pp. 54:2-55:17; pp. 221:22-222:8; Exh. 3, Tab V4; Exh.
28 6, pp. 109:9-110:19.

¹⁴⁹ RT I, p. 185:21-25; p. 208:11-25; p. 214:5-20; Exh. 3, Tab A6.

¹⁵⁰ RT III, pp. 145:6-146:6; pp. 176:23-177:19; Exh. 3, Tab Q6.

1 work could be construed as a violation of the Vehicle Code.¹⁵¹

2 104. Brad Thompson, the person most knowledgeable about service
3 and warranty work for SAG, testified that he had been trained and was
4 certified by VWoA; however, he is not certified for 2006.¹⁵² He
5 testified that SAG service personnel had not received training
6 information since October 2005.¹⁵³

7 105. SAG contends that it has the necessary tools to perform the
8 necessary service on VWoA vehicles; no tool inventory has been
9 conducted since January 2005.¹⁵⁴

10 106. SAG contends that it was prepared to and could have modified
11 the Suzuki location to meet the VWoA Marketplace standards. However,
12 SAG knew it could extend the close of escrow on the Hyundai
13 transaction but chose not to do so, and it made an unauthorized move
14 to multiple locations. It has been established that SAG has no
15 Volkswagen sales facility, inadequate service facilities, and
16 technicians who have not received current training.

17 **FINDINGS RELATING TO WHETHER THE FRANCHISEE FAILS TO**
18 **FULFILL WARRANTY OBLIGATIONS OF THE FRANCHISOR TO**
19 **BE PERFORMED BY THE FRANCHISEE (SEC. 3061(f))**

20 107. No evidence was presented that prior to the abandonment of
21 the Authorized VW Facility SAG failed to fulfill the warranty
22 obligations of VWoA to be performed by SAG.

23 108. Since October 14, 2005, there has been no authorized or
24 licensed Volkswagen facility in Visalia.

25 109. Evidence was presented that although SAG does not have an

26 ¹⁵¹ RT I, p. 214:5-20.

27 ¹⁵² RT III, pp. 217:24-218:7; p. 220:2-4; p. 227:20-22.

28 ¹⁵³ RT III, p. 221:19-21; p. 228:10-13.

¹⁵⁴ RT III, p. 228:7-9.

1 authorized Volkswagen facility, pending the outcome of this protest
2 VWoA has authorized and paid for warranty work performed by SAG.¹⁵⁵

3 110. Brad Thompson, SAG's most knowledgeable employee concerning
4 service and warranty work, testified that he was certified to perform
5 work on VWoA vehicles through 2005 and that he and other technicians
6 had not received training since October 2005.

7 111. The evidence is conclusive that warranty work is being
8 performed, albeit by technicians who may not have received the most
9 recent training.

10 FINDINGS RELATING TO THE EXTENT OF THE FRANCHISEE'S FAILURE
11 TO COMPLY WITH THE TERMS OF THE FRANCHISE (SEC. 3061(g))

12 MR. SERPA'S KNOWLEDGE OF THE TERMS OF THE CONTRACT WITH VWOA

13 112. SAG contends that it cannot be bound by the terms of the
14 Dealer Agreement Standard Provisions because the Standard Provisions
15 were not given to Mr. Serpa at the time he signed the Dealer Agreement
16 on July 14, 1998.

17 113. The Dealer Agreement contained in SAG's files and bearing
18 Mr. Serpa's signature from November 2001 expressly states:

19 "[t]he Dealer Agreement Standard Provisions (the
20 'Standard Provisions') (Form No. 97vwstdp) . . .
21 are part of this Agreement. Any term not defined
in this Agreement has the meaning given such term
in the Standard Provisions."

22 That is the same language that is reflected in the July 1998 Dealer
23 Agreement. Mr. Serpa testified that Mr. Akin reviewed the Dealer
24 Agreement with him in July 1998. Mr. Akin testified that he explained
25 the paragraph headings of the Dealer Agreement. Therefore, because the
26 Standard Provisions were called to his attention, because they were

27 _____
28 ¹⁵⁵ RT I, p. 214:5-20.

1 readily available from VWoA, and because Mr. Serpa consented to the
2 incorporation by signing the Dealer Agreement, the incorporation of
3 the Standard Provisions is legally binding.¹⁵⁶

4 114. There is no evidence to support an inference that in
5 contracting with SAG as a new VWoA dealer, VWoA deviated from its
6 standard practice of placing all necessary materials in a white
7 binder, personally delivering those materials to the dealer, reviewing
8 the topic headings in each document with the dealer, signing the
9 necessary documents, and providing the documents incorporated by
10 reference in the Dealer Agreement, with fully executed signed
11 documents, to the dealer. Mr. Bruce testified to the consistency of
12 the process from the headquarters standpoint, and Mr. Akin used a
13 checklist in reviewing the materials with a new dealer. Mr. Akin and
14 Mr. Mazzara testified that they personally observed Mr. Serpa sign the
15 Dealer Agreement on July 14, 1998, and saw him take possession of the
16 white binder containing the Dealer Agreement documents, including the
17 Standard Provisions.

18 115. Both VWoA and SAG exhibited anomalies in document
19 maintenance. Mr. Mazzara, who worked out of a home office,
20 inadvertently commingled VWoA documents with personal items placed in
21 storage. Mr. Serpa was unable to explain why the SAG folder only
22 contains page two of the VW letter which he signed on July 14, 1998.¹⁵⁷
23 The SAG folder for VWoA documents does not contain any July 1998
24 Dealer Agreement pages, nor does the SAG folder contain the Dealer
25 Agreement with changes Mr. Serpa signed in September 1999.

26
27 ¹⁵⁶ See, for example, *Shaw v. Regents of University of California* (1997) 58 Cal. App.
4th 44, 54.

28 ¹⁵⁷ RT III, pp. 157:20-161:6.

1 116. Mr. Serpa is involved in the operation of large and
2 successful multi-brand businesses which in 2005 included Volkswagen,
3 Hyundai, Kia, Saturn and Suzuki dealerships. Mr. Serpa is also
4 involved in the real estate business. Mr. Serpa concedes that he has
5 difficulty with dates, and the evidence reflects inconsistencies in
6 evidence and testimony which raise some doubt as to the accuracy of
7 his recollection. For example, Mr. Serpa testified that in August
8 2005, Mr. Mazzara came up with the idea for the Suzuki relocation -
9 but the idea had been Mr. Serpa's in July. In another example, Mr.
10 Serpa suggested to both VWoA and Ms. Swanson in August that the
11 Volkswagen franchise could be relocated to Mr. Groppetti's GM location
12 - but Mr. Serpa had been advised in July that the GM location would
13 not be available until December. Mr. Serpa also expressed concern to
14 Mr. Groppetti that "Lillian", the DMV representative, had come in
15 October without warning - but Mr. Serpa had received an e-mail from
16 Mr. Groppetti providing him with Lillian's anticipated arrival date.¹⁵⁸

17 117. The evidence establishes that Mr. Serpa has been able to
18 conduct complex transactions and manage successful businesses even
19 though English is not his native language.

20 118. Based upon the evidence presented, it is determined that Mr.
21 Serpa was provided with the Standard Provisions of the Volkswagen
22 Dealer Agreement and that there are no language barriers which would
23 have violated the contract process.

24 ///

25 ///

26 ///

27 ¹⁵⁸ Exh. 3, Tab Y5.
28

1 EVEN IF MR. SERPA DID NOT RECEIVE THE WHITE BINDER, HE DID RECEIVE
2 THE DEALER AGREEMENT, HE IS PRESUMED TO KNOW THE LAW, AND BECAUSE OF
3 THE WARNING FROM MR. GROPPETTI, MR. SERPA HAD REASON TO KNOW ABOUT THE
4 TERMS OF THE DEALER AGREEMENT PERTAINING TO CLOSURE OF THE DEALERSHIP

5 119. As discussed above, the Dealer Agreement incorporates the
6 Standard Provisions by reference. The Dealer Agreement was reviewed
7 by Mr. Akin with Mr. Serpa in July 1998; the Serpa files contain the
8 identical language in the November 2001 Dealer Agreement. The Dealer
9 Agreement, in paragraph 9, provides that the laws of California will
10 govern the agreement.¹⁵⁹

11 120. Parties contracting in California are presumed to know the
12 applicable law.¹⁶⁰ A reasonable interpretation of the agreement would
13 put the parties on notice of the California Vehicle Code, including
14 section 3060(a)(1)(b)(v) referencing termination following closure for
15 seven consecutive business days.

16 121. The concept of franchise termination by VWoA was not unknown
17 to Mr. Serpa: he knew, for example, that VWoA could terminate his
18 franchise if he treated his customers poorly.¹⁶¹

19 122. Mr. Groppetti and Mr. Vogel testified that it was generally
20 known in the automobile industry that if a dealership is closed for a
21 certain length of time, the manufacturer can terminate the
22 franchise.¹⁶²

23 123. Mr. Serpa asked for Mr. Groppetti's advice. He then ignored
24 it. Mr. Groppetti warned him about the maximum number of days a
25 dealer could be closed before VW could terminate. Mr. Serpa testified

26 ¹⁵⁹ Exh. 3, Tab C, p. A0466.

27 ¹⁶⁰ See, for example, *California Association of Highway Patrolmen v. Department of*
Personnel Administration (1986) 185 Cal. App.3d 352, 364.

28 ¹⁶¹ Exh. 3, Tab T4; find cite for Std. Prov. Art. 14, (2)(c)

¹⁶² Exh. 6, pp. 86:24-87:15; Exh. 7, Vogel, pp. 43:14-44:14.

1 that if a VWOA representative had used the word "termination" it would
2 have been a red flag. It is inexplicable that Mr. Serpa would only be
3 concerned if a VWOA representative used "termination", but would
4 ignore the term when used by Mr. Groppetti, from whom he sought
5 advice.

6 124. Even if Mr. Serpa did not receive the Standard Provisions in
7 July 1998, he was on notice that they existed, he was presumed to know
8 the law, and he failed to take action when specific advice was
9 provided by Mr. Groppetti.

10 RELOCATION PROCESS

11 125. The Dealer Agreement clearly states that approval is
12 required before a franchise can be relocated, and Mr. Serpa was aware
13 of that requirement.

14 126. Mr. Serpa requested the clause in the Volkswagen buy-sell
15 agreement which would permit him to withdraw the franchise from sale
16 up to thirty days before close of escrow. Mr. Serpa assumed that his
17 Suzuki location would be an acceptable site for relocating the
18 Volkswagen franchise. But he delayed the relocation approval process
19 by submitting a proposal he knew would be rejected. In spite of notice
20 from VWOA that an OL-124 would not be issued until the relocation
21 approval process had been completed, SAG started moving vehicles and
22 equipment in anticipation of approval.

23 127. The evidence does not support SAG's contention that Mr.
24 Mazzara lulled it into believing approval was imminent. The
25 communications between the parties are clear that Ms. Viskantas'
26 drawings were not complete and required approval by VWOA in Michigan;
27 the next step in the process, the letter of intent, wasn't even
28 discussed. SAG miscalculated the timing for the relocation approval,

1 and, reminiscent of the Baltimore Colts, simply moved without approval
2 or notice to VWoA.

3 128. The evidence supports a finding that SAG failed to comply
4 with the relocation approval procedures in the Volkswagen Dealer
5 Agreement, thus leaving Visalia without an approved Volkswagen
6 facility for more than seven consecutive business days.

7 **FAILURE TO PARTICIPATE IN ALTERNATIVE DISPUTE RESOLUTION**

8 129. Protestant contends that there is no good cause for
9 termination because VWoA failed to engage in pre-termination
10 discussions or alternative dispute resolution.¹⁶³ Article 13 of the
11 Standard Provisions provides for dispute resolution. Termination
12 disputes are covered by the provision in which the parties agree to
13 dispute resolution prior to going to court or an administrative
14 agency. Article 13 also provides that VWoA is to "endeavor" to
15 discuss disputes with franchisees.

16 130. SAG cannot claim it is not covered by the Standard
17 Provisions as to Article 14 (Termination), and then claim that it is
18 covered by the Standard Provisions, Article 13 (Dispute Resolution).
19 As discussed above, the evidence supports a finding that SAG received
20 the Standard Provisions.

21 131. SAG departed the Authorized VW Facility without notice to
22 VWoA. A reasonable inference is that VWoA, while not required to
23 discuss the relocation dispute with SAG, determined that such a
24 discussion would be futile.

25 132. The responsibility for requesting dispute resolution does
26 not rest solely with VWoA - SAG could have requested the process but
27

28 ¹⁶³ Exh. 3, Tab B, pp. 15-16.

1 did not.¹⁶⁴

2 133. There is no evidence that the failure of the parties to
3 utilize dispute resolution was indicative of bad faith on the part of
4 VWoA, so that the termination should be invalidated.

5 **DETERMINATION OF ISSUES**

6 134. VWoA has established that SAG was not conducting an adequate
7 amount of business as compared to the business available to it;
8 however, this issue was not a factor in the decision to terminate
9 SAG's franchise. [Section 3061(a)]

10 135. VWoA has established that SAG has not made the investment
11 necessary and incurred the obligations necessary to perform its part
12 of the Volkswagen franchise. [Section 3061(b)]

13 136. VWoA has established that SAG's investment was not
14 permanent. [Section 3061(c)]

15 137. VWoA has established that it would not be injurious to the
16 public welfare for the franchise to be replaced. [Section 3061(d)]

17 138. VWoA has established that SAG does not have adequate motor
18 vehicle sales and service facilities, equipment, vehicle parts, and
19 qualified service personnel to reasonably provide for the needs of the
20 consumers for the motor vehicles handled by the franchisee and is not
21 rendering adequate services to the public. [Section 3061(e)]

22 139. VWoA has not established that SAG failed to fulfill the
23 warranty obligations of VWoA to be performed by SAG. [Section
24 3061(f)]

25 140. VWoA has established that SAG failed to comply with the
26 terms of the franchise. [Section 3061(g)]

27
28 ¹⁶⁴ RT I, p.205:15-20.

1 PROPOSED DECISION

2 Based on the evidence presented and the findings herein, it is
3 hereby ordered that the Protest is overruled. VWoA has met its burden
4 of proof under Vehicle Code Section 3066(b) to establish that there is
5 good cause to terminate SAG's franchise.

6
7
8 I hereby submit the foregoing which
9 constitutes my proposed decision in
10 the above-entitled matter, as the
11 result of a hearing before me, and
12 I recommend this proposed decision
13 be adopted as the decision of the
14 New Motor Vehicle Board.

15 DATED: August 31, 2006

16 By:


17 MARYBELLE D. ARCHIBALD
18 Administrative Law Judge
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20
21
22
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25

26 George Valverde, Director, DMV
27 Mary Garcia, Branch Chief,
28 Occupational Licensing, DMV