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9 VOLKSWAGEN OF AMERICA, INC.

10 **STATE OF CALIFORNIA**  
11 **NEW MOTOR VEHICLE BOARD**

12 In the Matter of the Protest of:

13 Protest No. PR-2265-10

14 SHAYCO, INC., dba ONTARIO  
15 VOLKSWAGEN,

16 Protestant,

17 **RESPONDENT VOLKSWAGEN OF  
18 AMERICA, INC.'S OPENING BRIEF ON  
19 REMAND FROM THE SUPERIOR COURT**

20 v.

21 VOLKSWAGEN OF AMERICA, INC.,

22 Respondent.

23 Respondent Volkswagen of America, Inc. ("Volkswagen") respectfully submits this opening  
24 brief.

25 **I. INTRODUCTION**

26 Volkswagen seeks to establish a new dealer in Montclair, in the densely populated  
27 Riverside-San Bernardino market ("RSB Market") where for many years the Volkswagen brand has  
28 been under-represented and performing poorly against its primary competitive group. As a result of  
the under-representation and lack of competitiveness in Montclair and the RSB Market, hundreds of  
potential Volkswagen sales are being lost to competitors.

The evidence in this case established overwhelmingly that the proposed new dealership in  
Montclair is in the best interests of current and future Volkswagen customers, the Volkswagen

1 brand, Volkswagen dealers throughout the RSB Market, and the public at large.<sup>1</sup> After balancing the  
2 interests of *all* parties including the public as the New Motor Vehicle Board (“Board”) is required  
3 by the law to do -- and not merely looking to whether the new dealership will disrupt Protestant’s  
4 present monopoly and limited need to compete -- it is evident that existing circumstances do not  
5 establish “good cause” to block the proposed Montclair dealership from opening and putting its  
6 employees to work.

7 Each of the five “good cause” factors support overruling the Protest:

8 1. The Montclair dealership will have a positive impact on the motor vehicle industry  
9 and consumers in the relevant market area (“RMA”) by increasing Volkswagen’s presence and thus  
10 increasing overall Volkswagen sales for all dealers (including Protestant), providing increased  
11 competition among manufacturers who presently do not need to compete fully with Volkswagen,  
12 and improving convenience for customers in the RMA. Registration data for every year in the  
13 record confirms that there are more than enough sales opportunities available to Protestant in its  
14 own assigned territory to more than offset any future sales it may lose to the new dealership. The  
15 mere fact that Protestant will now be forced to compete for those sales is not “good cause.”

16 2. The evidence is undeniable that the new dealership will not harm the public at large.  
17 In fact, the new dealership will lead to new jobs, new tax revenues and numerous benefits for the  
18 City of Montclair, without any corresponding detriment to the City of Ontario (where Protestant  
19 will continue to exist and thrive).

20 3. Existing dealers are not providing Volkswagen or customers in the RMA with an  
21 adequate level of competition and service. In 2009 for example, Volkswagen dealers were only  
22 capturing about 73% of expected vehicle registrations in the RMA -- meaning that nearly two  
23 hundred vehicle sales to customers in the RMA that should have been captured by Volkswagen  
24 went to *other* brands that year. Protestant offers no credible explanation for this poor performance  
25 by the Volkswagen brand. In fact, the explanation is simple -- Volkswagen does not have as many

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27 <sup>1</sup> On February 22, 2012, Volkswagen submitted a Motion to Augment the Record and/or Request for Official  
28 Notice, for the purpose of providing the Board with updated evidence for the 2011 to 2013 time frame, but that motion  
was denied by the Board.

1 dealerships in the territory as its competitors, and unlike its competitors Volkswagen does not have  
2 any visual exposure along the key Interstate 10 corridor. The new dealer will increase competition  
3 among existing dealers (both Volkswagen and other brands) which the Vehicle Code declares is  
4 *automatically* in the public’s interest.

5 4. Protestant’s investment in its Ontario dealership will not be negatively affected by a  
6 new dealer in Montclair. First, Protestant’s own expert testified that his so-called “damage” analysis  
7 did not necessarily mean that Protestant would sell one less car or make one less dollar as a result of  
8 the new dealer in Montclair. Rather, he acknowledged that his analysis meant that Protestant may  
9 not get as big a piece of an increased pie. Second, even relying on 2009-2010 data, Protestant  
10 cannot seriously dispute that there are more than ample sales opportunities for Protestant to grow its  
11 own business, or that Protestant has and will continue to sell more vehicles in the future than it did  
12 during those recessionary years, even if the Montclair dealership is allowed to finally open.

13 There is simply no risk to Protestant’s investment from a new dealer in Montclair. In fact,  
14 the evidence could not be more clear that the only “risk” to Protestant is the risk of losing its near-  
15 monopoly over the open Montclair territory to the detriment of the consuming public and the  
16 Volkswagen brand, which does not constitute “good cause” under the Vehicle Code, nor a valid  
17 reason to sustain a protest under clear California case law.

18 The evidence in the record does not warrant the extraordinary step of blocking the  
19 establishment of the Montclair dealership, which likely would not even open its doors until 2015 at  
20 the earliest. Under each of the five factors in the Vehicle Code, Protestant has failed to meet its  
21 burden of establishing good cause to block the Montclair dealership. Accordingly, this protest  
22 should be overruled.

23 **II. LEGAL STANDARD: VEHICLE CODE “GOOD CAUSE” FACTORS AND**  
24 **PROTESTANT’S BURDEN OF PROOF**

25 It is important to recognize at the outset the standard that the Board, in electing to decide the  
26 matter for itself after rejecting the ALJ’s two proposed decisions, is obligated to follow under the  
27 New Motor Vehicle Board Act (the “Act”).  
28

1 First, pursuant to Vehicle Code § 3066(b), it is Protestant’s burden to prove there is “good  
2 cause” for the Board to prohibit the establishment of the new Volkswagen dealership in Montclair.

3 Second, the Board cannot (as Protestant urges) simply look to whether the proposed  
4 dealership may impact Protestant or result in increased competition for Protestant. California courts  
5 have been crystal clear that the Act requires the Board to balance the interests of all parties, and  
6 specifically to focus upon the public interest and the importance of *promoting* -- not preventing --  
7 competition. As the court in *Piano v. State of California*, 103 Cal. App. 3d 412, 417 (1980) noted:  
8 “the Legislature intended that the Board balance the dealers’ interest in maintaining viable  
9 businesses, the manufacturers’ interest in promoting sales, and the public’s interest in adequate  
10 competition and convenient service.”

11 Thus, the principles articulated in the Act forbid the Board from denying a proposed new  
12 dealership in order to protect existing dealerships from competition. As explained by the court in  
13 *RiJoyce, Inc. v. New Motor Vehicle Board*, 2 Cal. App. 4th 445, 456, fn. 4 (1992):

14 Although some dealers seem to believe that the New Motor Vehicle Board Act was  
15 enacted to protect them against competition, quite the contrary is true. The act  
16 recognizes that a new motor vehicle dealership may require a significant investment  
17 and that there is a disparity of bargaining power and thus the act was intended to  
18 protect new motor vehicle dealers against unfair or oppressive trade practices. . . .  
19 But the act recognizes that the needs of consumers are important and that  
20 competition is in the public interest. Accordingly, a dealer cannot prevail on a protest  
21 simply by asserting a desire to limit competition.

22 (internal citations omitted).

23 No less than the United States Supreme Court, in reviewing the validity of the Act, noted  
24 that the Act was constitutional only to the extent that protest rights were “necessary to prevent  
25 unfair or oppressive trade practices....” or to regulate competition “offensive to the public welfare.”  
26 *New Motor Vehicle Bd. of California v. Orrin W. Fox Co.*, 439 U.S. 96, 99 S.Ct. 403 (1978).

27 In order to meet this standard, Vehicle Code § 3063 requires that “[i]n determining whether  
28 good cause has been established for not entering into . . . [a] franchise for the same line-make, the  
board shall take into consideration the existing circumstances, including, but not limited to ...” five  
enumerated factors. Consistent with the Legislative intent and the courts’ interpretations of the  
Code, four of the five factors focus on public welfare and the best interests of the consuming public.

1 The five “good cause” factors identified in § 3063 are:

2 (a) Permanency of the investment.

3 (b) Effect on the retail motor vehicle business and the consuming public in the relevant  
4 market area.

5 (c) Whether it is injurious to the public welfare for an additional franchise to be established.

6 (d) Whether the franchisees of the same line-make in that relevant market area are providing  
7 adequate competition and convenient consumer care for the motor vehicles of the line-make in the  
8 market area which shall include the adequacy of motor vehicle sales and service facilities,  
9 equipment, supply of vehicle parts, and qualified service personnel.

10 (e) Whether the establishment of an additional franchise would increase competition and  
11 therefore be in the public interest.

12 In essence, the factors require the Board to consider at least the following questions:

13 1. Has the Protestant made a substantial, permanent investment in its own dealership  
14 ***which Protestant will likely lose*** in whole or in part as a result of the new dealership? Or is the  
15 combination of existing business opportunities and future growth opportunities in the market  
16 sufficient to give the protesting dealer an opportunity to compete and protect his investment? *Piano*,  
17 103 Cal.App.3d at 419 (“If an additional Datsun dealer is established in Simi Valley, Piano will  
18 likely still be profitable and have a substantial return on his investment”); *Id.* at 421 (“the additional  
19 dealership will not jeopardize the permanent investment of Piano. Substantial business opportunities  
20 exist and will increase in the Thousand Oaks and adjacent areas.”)

21 2. Will the additional dealership have a positive impact on the entire motor vehicle  
22 industry (***not*** just Protestant) and consumers in the RMA by growing that market and providing  
23 increased competition and convenience for the customers in the RMA?

24 3. Will the new dealership harm the public at large (separate and apart from the impact  
25 on motor vehicle dealers and customers in the RMA)?

26 4. Are existing dealers providing the manufacturer and customers in the RMA with an  
27 adequate level of competition and service? Or, is the manufacturer under-represented in the RMA?

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1           5. Will the new dealer increase competition among existing dealers (both Volkswagen  
2 dealers and other dealers), which the Vehicle Code declares is *automatically* in the public's  
3 interest?

4           As set forth below, Protestant failed to meet its burden to prove that the proposed Montclair  
5 dealership would be "offensive," "unfair" or "oppressive," which is the standard set by the United  
6 States Supreme Court and embodied in the Vehicle Code's emphasis on the public good. Instead,  
7 Protestant's case focused almost exclusively on the argument that the Protest should be sustained  
8 merely because it would expose Protestant to greater competition from a new dealership -- exactly  
9 the argument that a California court rejected as contrary to the purpose of the Act in *RiJoyce, Inc.*  
10 Moreover, as set forth below and as Administrative Law Judge Archibald concluded, the evidence  
11 is "overwhelming" that Protestant did not meet its burden even on that factor, because Protestant  
12 incorrectly looked only to whether it would face additional competition, and not whether it will  
13 have the opportunity in future years to preserve its investment by making the same or even greater  
14 numbers of sales.

15           **III. FACTUAL BACKGROUND ON THE PARTIES AND THE TERRITORY AT ISSUE**

16           **A. The Parties**

17           **I. Volkswagen of America, Inc.**

18           Respondent Volkswagen of America, Inc. is the exclusive distributor of Volkswagen  
19 vehicles in the United States. Globally, Volkswagen is one of the three highest volume brands in the  
20 world.<sup>2</sup> Although for many years Volkswagen has not been a high volume brand in this country,  
21 shortly before the hearing in this case the company adopted a \$4 billion strategic plan to  
22 dramatically increase its volume in the United States, to be more in line with the brand's high  
23 volume market position internationally.<sup>3</sup> The plan included a \$1 billion investment in a factory in  
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27           <sup>2</sup> Reporter's Transcript ("RT") 1-18 at 20:20-21:6.

28           <sup>3</sup> *Id.*

1 Chattanooga, Tennessee<sup>4</sup> which began producing the highly successful new Passat midsize sedan  
2 that went on sale in September, 2011.<sup>5</sup>

3 **2. Ontario Volkswagen**

4 Protestant operates a Volkswagen dealership at 701 South Kettering Drive, Ontario,  
5 California,<sup>6</sup> in the Ontario Auto Center located on the 15 Freeway. Mr. Sherman describes the  
6 Ontario Auto Center as a “destination point” attracting potential customers from throughout the  
7 RSB Market.<sup>7</sup>

8 **B. The RSB Market**

9 Both Protestant’s Ontario dealership and the proposed dealership in Montclair are situated in  
10 the large RSB Market, comprised of much of Riverside and San Bernardino counties.<sup>8</sup> The RSB  
11 Market is bisected by Interstate 10, the major route for commuters traveling to Los Angeles, and  
12 “one of the busiest freeways in the U.S. freeway system.”<sup>9</sup> Numerous car dealerships are located  
13 along the 10 Freeway, including all of Volkswagen’s major competitors.<sup>10</sup> However, there is not a  
14 single Volkswagen dealership with visibility from the 10 Freeway from the Pacific Ocean to Indio,  
15 halfway to Arizona.<sup>11</sup> Moreover, there are no Volkswagen dealerships located off of the 10 Freeway  
16 -- visible or not -- for a 100-mile stretch between Covina to the west of Montclair and Indio to the  
17 east, a stretch covering the entire length of the RSB Market.<sup>12</sup>

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<sup>4</sup> *Id.*; 21:11-22.

22 <sup>5</sup> *Id.*

23 <sup>6</sup> Stipulated Fact No. 1.

24 <sup>7</sup> RT 1-11 at 43:17-21.

25 <sup>8</sup> Ex. J44 at A-1; RT 1-13 at 94:16-22.

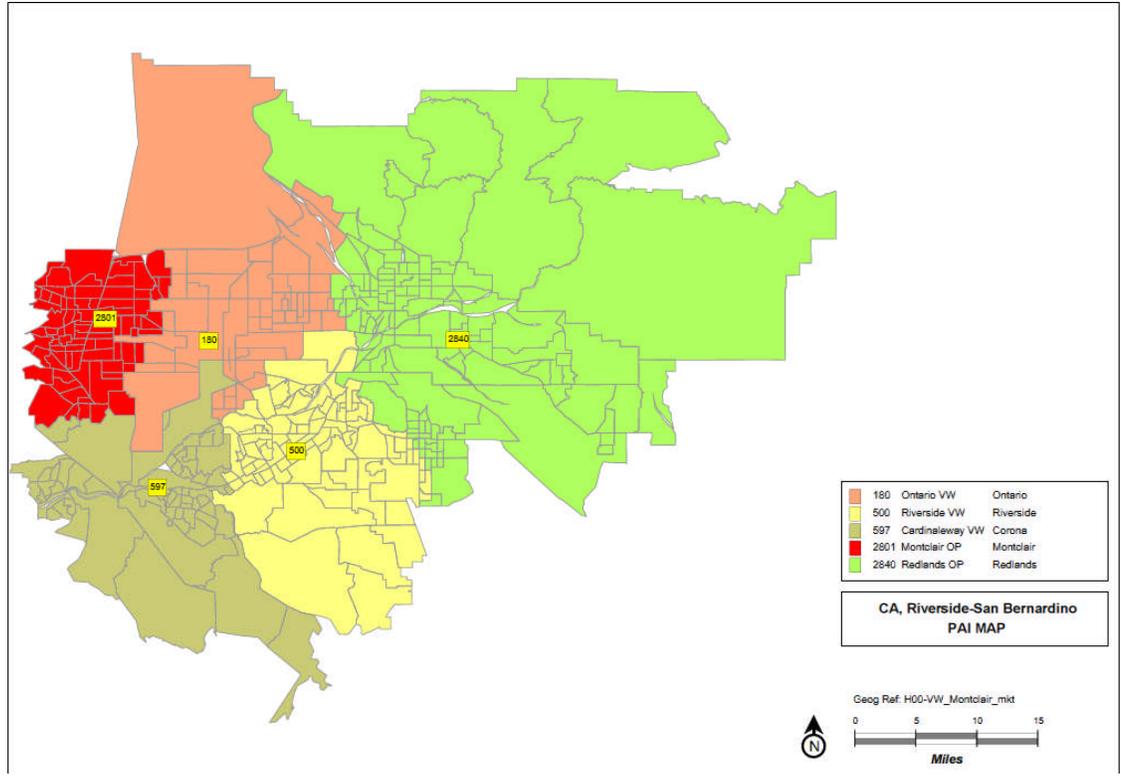
26 <sup>9</sup> RT 1-12 at 165:9-22; 1-19 at 141:20-21.

27 <sup>10</sup> Ex. J44 at A-6; RT 1-18 at 83:5-11.

28 <sup>11</sup> RT 1-18 at 83:5-11.

<sup>12</sup> RT 1-19 at 14:4-9.

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Like virtually every other franchisor, Volkswagen assigns areas of responsibility to its dealers, which Volkswagen calls Primary Areas of Influence or “PAIs.” In 2011, the RSB Market consisted of five PAI’s, including Protestant’s PAI as well as two “open points” unassigned to any existing dealer -- Montclair, which borders Protestant to the west, and Redlands, which borders Protestant to the east.<sup>13</sup>

In the years leading up to the Protest, the RSB Market had seen significant growth, adding over 880,00 additional residents since 1990 (nearly 50% growth in 20 years).<sup>14</sup> Moreover, this growth is expected to continue at a remarkable pace for the foreseeable future. According to Claritas, a third-party demographics agency relied upon by numerous industries, the Montclair RMA alone is projected to grow by nearly 16,000 households by 2015.<sup>15</sup> Much of this growth is anticipated to occur in the eastern portion of the RSB Market where Protestant draws most of its

<sup>13</sup> *Id.*

<sup>14</sup> Ex. J44 at A-30.

<sup>15</sup> *Id.*

1 sales. For example, Protestant’s own PAI is expected to grow by more than 14,000 households by  
2 2015.<sup>16</sup>

3 **C. Montclair and the Relevant Market Area**

4 The City of Montclair is located approximately 35 miles east of Los Angeles, in the western  
5 end of San Bernardino County.<sup>17</sup> The 10 Freeway runs through the northern portion of the City.<sup>18</sup>  
6 Montclair’s population was approximately 38,500 at the time of the hearing and is expected to grow  
7 to 40,000 within a few years, and to 50,000 by 2030.<sup>19</sup> Although the City suffered during the  
8 economic recession in the prior decade, it has since recovered. Sales tax revenues increased over the  
9 last two quarters for which data was available at the time of the hearing.<sup>20</sup> Indeed, Montclair and its  
10 surrounding areas are projected to experience the largest economic growth in the Inland Empire.<sup>21</sup>

11 For a variety of reasons, Montclair attracts customers not only from its own city, but also  
12 from cities to the north and northwest (i.e., Upland, San Dimas, La Verne and Claremont), the west  
13 (Pomona) and the south (Chino).<sup>22</sup> By contrast, Ontario -- located on the 15 Freeway -- draws  
14 customers primarily from the east.<sup>23</sup>

15 **D. The Montclair Auto Mall and the Proposed Dealership**

16 The proposed new dealership will be located in the Montclair auto mall, directly adjacent to  
17 and visible from the 10 Freeway, on the southern side of the 10 Freeway across from a large retail  
18 mall, the Montclair Plaza.<sup>24</sup> The proposed site is between 8.65 and 8.7 air miles from Protestant’s  
19 location in the Ontario Auto Center.<sup>25</sup> According to Protestant’s expert it is approximately 10 miles  
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21 <sup>16</sup> Ex. J44 at A-29.

22 <sup>17</sup> RT 1-19 at 131:19-24.

23 <sup>18</sup> RT 1-19 at 131:25-132:3.

24 <sup>19</sup> RT 1-19 at 132:14-15, 133:13-134:9.

25 <sup>20</sup> RT 1-19 at 134:17-21.

26 <sup>21</sup> RT 1-19 at 135:17-22.

27 <sup>22</sup> RT 1-19 at 137:17-138:4.

28 <sup>23</sup> RT 1-19 at 138:5-18.

<sup>24</sup> RT 1-19 at 136:9-20.

<sup>25</sup> Stipulated Fact No. 4.

1 in drive distance and between 14.8 and 16.4 minutes in drive time from Protestant’s dealership,  
2 which is located off a different thoroughfare, the 15 Freeway.<sup>26</sup> Protestant is the only Volkswagen  
3 dealer in the RMA.<sup>27</sup>

4 Auto malls such as the one in Montclair have largely become the standard within the auto  
5 industry, because among other things they provide customers with an opportunity to travel to one  
6 location to test drive and compare multiple brands, thus increasing the likelihood that customers  
7 will look at multiple brands before selecting a car.<sup>28</sup> In addition, even if the customers aren’t aware  
8 of the specific brands that are located at an auto mall, they associate those locations with purchasing  
9 a car and will “instinctively” go to those locations to make their purchase, again increasing the  
10 potential customer base for brands with a presence in an auto mall.<sup>29</sup>

11 The Montclair open point was established by Volkswagen in 2006.<sup>30</sup> However, due in no  
12 small measure to the limited availability of usable sites in Montclair for a new dealership facility, it  
13 took Volkswagen many years to find an acceptable dealer candidate who could offer a location  
14 suitable for creating a successful dealership.<sup>31</sup> The current candidate, John Hawkins, is a well  
15 capitalized and well respected dealer who owns and operates a competitive dealership in Montclair.

16 The proposed dealership would be built from the ground-up as an exclusive state of the art  
17 new Volkswagen facility with visibility from the 10 Freeway.<sup>32</sup> Because it is a new structure, it will  
18 likely take at least two years before the facility could be built and open to the public -- meaning that  
19 the dealership likely will not make its first sale until sometime in 2015 or later.<sup>33</sup>

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<sup>26</sup> Ex. J42, Tab 7, pp. 1-2.

<sup>27</sup> Stipulated Fact No. 8.

<sup>28</sup> RT 1-13 at 104:5-105:16.

<sup>29</sup> *Id.*

<sup>30</sup> RT 1-18 at 29:9-15.

<sup>31</sup> *Id.*

<sup>32</sup> RT 1-20 at 17:17-21.

<sup>33</sup> RT 1-18 at 161:2-11.

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**E. Volkswagen’s Under-Performance in the RMA and RSB Market**

Volkswagen, like virtually all franchisors, evaluates the performance of its brand in terms of registration effectiveness or market share, i.e., Volkswagen registrations as a percentage of the total registrations of Volkswagen’s primary competitive group. Volkswagen’s performance in any given market, such as the RMA or the Ontario PAI, is measured by comparing the brand’s market share in that specific market to a reasonable standard or “expected” market share in a much larger geography such as the State of California or Volkswagen’s Western Region which includes California and several other states.

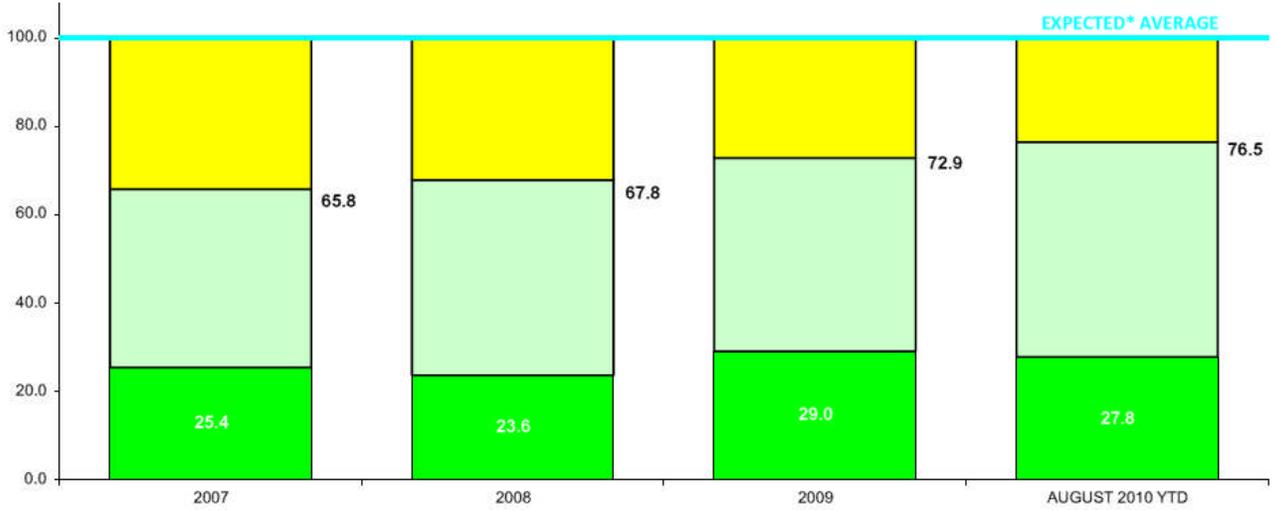
To ensure that the expected market share for any given market accounts for local preferences (e.g., preferences for big cars or SUVs over small cars), a “segmentation” analysis is used to adjust for actual registrations in that local market, on a model segment by model segment basis.<sup>34</sup> This market share and segmentation analysis was used at the hearing by both Protestant’s expert and Volkswagen’s expert.<sup>35</sup>

Based on this standard industry methodology, Volkswagen’s performance or market share in the Montclair RMA, Protestant’s own PAI, and the RSB Market as a whole are all dramatically below Volkswagen’s expected market share based on the California or Western Region average.<sup>36</sup> For example, in the Montclair RMA, Volkswagen’s August 2010 year-to-date market share was just 76.5% of its California average market share.<sup>37</sup> Moreover, this under-performance (represented as the yellow portion of the bar charts below) has existed in the RMA for years.

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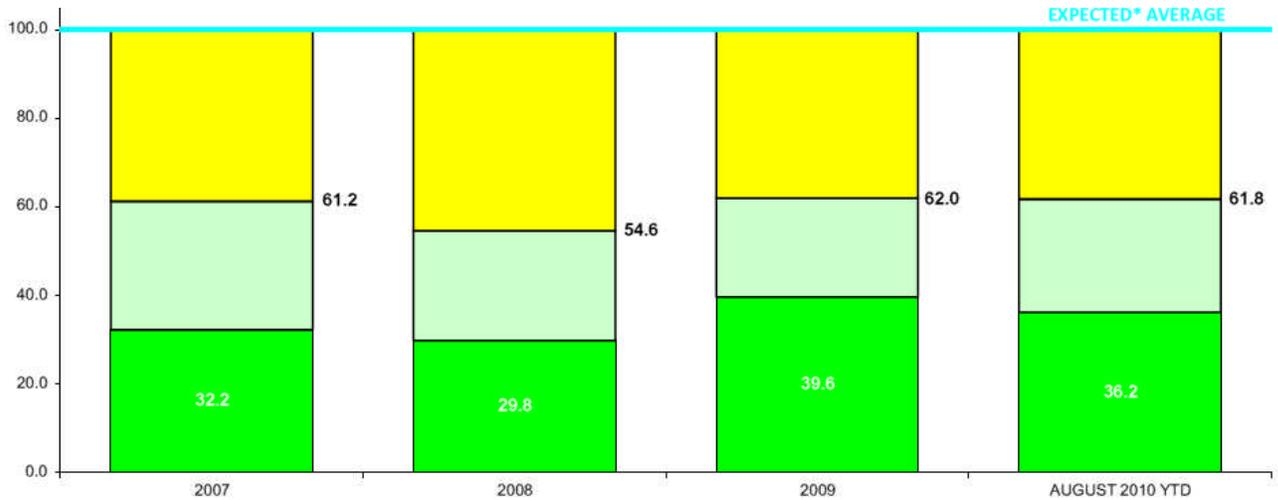
<sup>34</sup> RT 1-12 at 46:16-47:2; 1-13 at 112:17-117:11.  
<sup>35</sup> RT 1-13 at 65:6-21; 112:17-117:11.  
<sup>36</sup> For clarification, all references to average or expected market share in this brief include adjustment using the segmentation analysis discussed above.  
<sup>37</sup> Ex. J44 at A-17.

**VOLKSWAGEN MARKET SHARE IN MONTCLAIR RMA [2010]<sup>38</sup>**



The under-performance is even more pronounced in Protestant's own PAI, where Volkswagen's August 2010 year-to-date market share was only 61.8% of California average, indicating Protestant has been neglecting sales opportunities in its own area in favor of "low hanging fruit" in the neighboring open points where it faces no intrabrand competition:

**VOLKSWAGEN MARKET SHARE IN ONTARIO PAI [2010]<sup>39</sup>**



To place these numbers in context, if the Montclair PAI were considered its own market (as opposed to being part of the RSB Market), Volkswagen's market share in the Montclair PAI would

<sup>38</sup> "Expected Average" is the average market share in California represented markets (i.e., California markets in which there is a current Volkswagen dealer) after segmentation analysis. RT 1-13 at 136:21-23.

1 be the *third worst* among all markets in California.<sup>40</sup> If Protestant’s own PAI were considered its  
 2 own market, Volkswagen’s 61.8% market share would make Ontario the *worst performing market*  
 3 in the entire state of California.<sup>41</sup>

4 This poor performance has not occurred in many of the surrounding local markets where  
 5 Volkswagen’s market share is actually higher than the California average. For example,  
 6 Volkswagen’s August 2010 year-to-date market share in nearby Pasadena was 111.8% of state  
 7 average.<sup>42</sup> Volkswagen’s August 2010 year-to-date market share was also higher than the California  
 8 average in Santa Ana, Irvine and Huntington Beach, all markets located near the RSB Market.<sup>43</sup>  
 9 Accordingly, Volkswagen’s poor brand performance in the RSB Market cannot be attributed to  
 10 location or geography.

11 Instead, the reason for Volkswagen’s poor market share in the Montclair RMA and the RSB  
 12 Market can be found by comparing the number and location of Volkswagen dealers to the number  
 13 and location of its competitors’ dealers. Simply put, Volkswagen’s primary competitors have far  
 14 more dealerships in prime locations throughout the RSB Market. Within the 10-mile RMA alone,  
 15 there are five Chevrolet dealerships, four Ford dealerships, three Toyota dealerships and at least two  
 16 dealerships each for Hyundai, Nissan, Honda, Chrysler and Dodge.<sup>44</sup> Many of these dealerships are  
 17 located at or within a short distance of the Montclair auto mall, including Toyota, Infiniti, Nissan,  
 18 Honda and Acura.<sup>45</sup> By contrast, Volkswagen has only one dealer in the RMA, Protestant, which is  
 19 not located in Montclair at all, but instead is located at the eastern fringe of the RMA off a different  
 20 freeway.

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23 <sup>39</sup> Ex. J44 at A-19.

24 <sup>40</sup> Ex. J44 at A-21.

25 <sup>41</sup> *Id.*

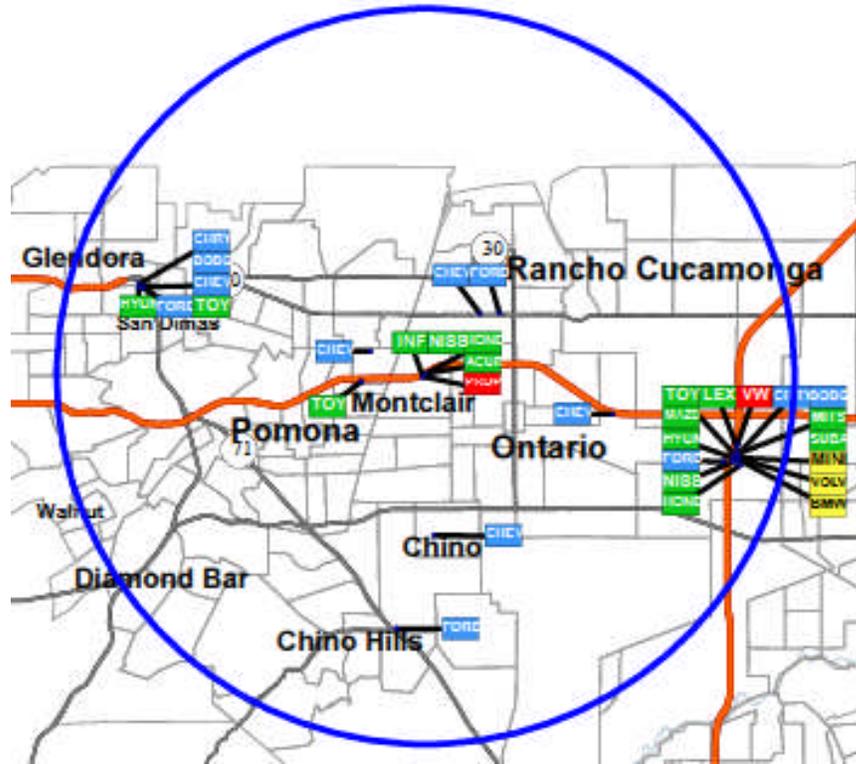
26 <sup>42</sup> Ex. J44 at A-12.

27 <sup>43</sup> Ex. J44 at A-13 through A-15.

28 <sup>44</sup> Ex. J44 at A-6.

<sup>45</sup> *Id.*

**LOCATION OF COMPETITIVE DEALERSHIPS IN MONTCLAIR RMA<sup>46</sup>**



**IV. PROCEDURAL HISTORY**

**A. Notice of Intent and Protest**

In 2009 and 2010, Volkswagen considered two dealer candidates to fill the Montclair open point, including Gary Sherman, the owner of Protestant who actually expressed a strong interest in opening his own Volkswagen dealership in Montclair.<sup>47</sup> Ultimately, Volkswagen selected the other candidate, largely because Mr. Sherman insisted on using a site which has no visibility from the 10 Freeway, and is located in a neighborhood that is not suited for an automobile dealership, and in fact has no other franchised motor vehicle dealerships.<sup>48</sup>

<sup>46</sup> *Id.*  
<sup>47</sup> Ex. J18; RT 1-11 at 173:25-174:5; Ex. J1; RT 1-18 at 53:14-54:8; Ex. R10; RT 1-11 at 192:8-193:22.  
<sup>48</sup> RT 1-19 at 14:6-19; RT 1-19 at 162:12-18; RT 1-19 at 140:18-141:11, 161:3-14.

1           On July 30, 2010, Volkswagen gave notice to Protestant of Volkswagen’s intention to  
 2 establish a new dealership in Montclair.<sup>49</sup> On August 13, 2010, Protestant filed the Protest to oppose  
 3 the proposed new dealer in Montclair.<sup>50</sup>

4           **B. The Protest Hearing**

5           Following discovery, a hearing on the merits was held on January 10, 2011 through January  
 6 14, 2011, and January 18, 2011 through January 20, 2011, before Administrative Law Judge  
 7 Marybelle D. Archibald.

8           **C. The Proposed Decision.**

9           Following a hearing on the merits of this matter and submission of post-hearing briefing, on  
 10 May 19, 2011 Judge Archibald submitted her Proposed Decision (“Proposed Decision”) in which  
 11 she concluded that the protest should be overruled. In the Proposed Decision, Judge Archibald  
 12 found that the evidence established several key facts to be true:

13           **1) Volkswagen is losing existing sales to its competitors in the RMA and RSB Market:**

14 After hearing lengthy testimony from both experts, Judge Archibald concluded that there is a  
 15 shortfall of Volkswagen sales in both the Montclair RMA and the RSB Market: “If Volkswagen is  
 16 not selling new vehicles at least at the expected average, other brands will take sales. The analysis  
 17 of Volkswagen’s performance, not only in the Montclair RMA, but also in the RSB market, as  
 18 compared to California, reveals a significant shortfall.”<sup>51</sup>

19           **2) The reason for this shortfall is not endemic to the area:** “The reasons why Volkswagen is

20 not adequately represented may be explained because existing dealers have failed to capture  
 21 opportunities for sales in the Montclair RMA. Factors which might explain this failure include the  
 22 number of dealers, the location of those dealers, or the effectiveness of the dealer operations. As  
 23 discussed above, Mr. Farhat eliminated income, Hispanic ethnicity, and foreclosure rates as  
 24 explanations for these lost sales opportunities.”<sup>52</sup> “[T]here is no reason to believe that Volkswagen

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25           <sup>49</sup> Stipulated Facts Nos. 2, 5; Ex. J35.

26           <sup>50</sup> Stipulated Fact No. 6.

27           <sup>51</sup> Proposed Decision ¶ 60.

28           <sup>52</sup> *Id.* ¶ 61.

1 sales would be affected by unemployment and foreclosure statistics any differently than the primary  
2 competitive brands.”<sup>53</sup>

3 **3) A Montclair dealership would increase Volkswagen sales, not cannibalize existing**  
4 **sales:** “Brand visibility, by having a Volkswagen dealer on the 1-10 Freeway, would significantly  
5 increase both intrabrand and interbrand competition.”<sup>54</sup> “[T]he establishment of an additional  
6 Volkswagen dealership on the I-10 Freeway in an auto mall with several of Volkswagen’s primary  
7 competitive group brands will increase brand awareness and stimulate sales.”<sup>55</sup>

8 **4) Protestant will remain viable and profitable after Montclair:** “Mr. Farhat concluded that  
9 there is sufficient lost opportunity to permit establishment of the Montclair dealership without  
10 subjecting Ontario VW to ruinous competition. Ontario VW is a viable, well-managed business and  
11 will remain so after the establishment of the Montclair dealership.”<sup>56</sup> “Placing a dealer in an auto  
12 mall or on the freeway would increase sales. There is sufficient lost opportunity in the RMA to  
13 support the new dealership and keep Ontario VW’s sales at average or better levels of  
14 effectiveness.”<sup>57</sup> “There is available opportunity to achieve average performance, and there is no  
15 basis to conclude a negative impact on existing dealers, especially Ontario VW.”<sup>58</sup>

16 **5) Protestant’s expert analysis was incomplete:** Judge Archibald rejected Protestant’s  
17 predictions of economic losses, noting that “Mr. Roesner’s analysis of loss to Ontario VW is based  
18 upon actual data, and he declined to speculate on any sales numbers which might be increased due  
19 to the new Volkswagen campaign, which he labels ‘pie-in-the-sky.’ This analysis does not take into  
20 account any additional profit Ontario VW might make as a result of the new dealership, which, for  
21 example, would stimulate sales by increasing brand awareness on the I-10 Freeway, or by  
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24 <sup>53</sup> *Id.* ¶ 103.  
25 <sup>54</sup> *Id.* ¶ 66.  
26 <sup>55</sup> *Id.* ¶ 86.  
27 <sup>56</sup> *Id.* ¶ 87 (emphasis added).  
28 <sup>57</sup> *Id.* ¶ 118 (emphasis added).  
<sup>58</sup> *Id.* ¶ 125 (emphasis added).

1 increasing advertising expenditures.”<sup>59</sup> “Protestant’s projection of lost profits does not substantiate  
 2 either dramatic lost profits or loss in the value of Ontario VW if the Montclair dealership is  
 3 established.”<sup>60</sup>

4 **6) Protestant itself thought that a Montclair dealership could successfully co-exist with**  
 5 **Ontario VW:** Judge Archibald specifically noted that Mr. Sherman himself had earlier expressed  
 6 confidence that the market could support both dealerships when he was the one lobbying for the  
 7 Montclair point: “Protestant decries the ruinous impact upon it if the Montclair dealership is  
 8 established, and states that it is just a matter of time before it goes out of business. But it is  
 9 imperative to remember the discrepancy between the Mr. Sherman who argues that Montclair will  
 10 destroy Ontario VW, and the Mr. Sherman who confirmed to Volkswagen that he could make a  
 11 Montclair dealership as good as Ontario VW.”<sup>61</sup>

12 Based on these and other findings, Judge Archibald concluded that Protestant had failed to  
 13 meet its burden on every single good cause factor identified in Vehicle Code § 3063 except for  
 14 permanency of investment.<sup>62</sup> The Proposed Decision therefore stated: “Protest No. PR-2265-10 is  
 15 overruled. Protestant Ontario VW has not met its burden of proof under Vehicle Code section  
 16 3066(b) that there is good cause not to establish a Volkswagen dealership in Montclair.”

17 **D. The June 1, 2011 Corrected Order Remanding the Proposed Decision.**

18 On May 26, 2011, the Board heard oral argument regarding the Proposed Decision during its  
 19 General Meeting. During the meeting, Protestant submitted to the Board one page from the report of  
 20 Protestant’s expert identifying 116 new Volkswagen vehicles that were sold by Protestant and  
 21 registered to owners in the Montclair PAI in 2009, accounting for 19.4% of Protestant’s total new  
 22 Volkswagen sales in 2009. At the conclusion of the meeting, the Board announced that it would be  
 23 remanding the matter to Judge Archibald “to either take additional evidence or briefing on the good-  
 24 cause factor at 3063(b), which is the effect on the retail motor vehicle business and the consuming

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25 <sup>59</sup> *Id.* ¶ 77.

26 <sup>60</sup> *Id.* ¶ 92.

27 <sup>61</sup> *Id.* ¶ 126.

28 <sup>62</sup> *Id.* ¶¶ 128-132.

1 public in the relevant market area; specifically, the 19.4% sales that Ontario Volkswagen is making  
 2 in the Montclair RMA.”<sup>63</sup>

3 Following the meeting, on June 1, 2011 the Board issued its Corrected Order Remanding the  
 4 Proposed Decision (the “Remand Order”)<sup>64</sup>, which was limited solely to asking the Judge to provide  
 5 additional findings of fact on two discrete issues: (1) Additional findings “on the methodology used  
 6 [by Mr. Roesner] in concluding that Protestant made 19.4% of new Volkswagen sales from the  
 7 Montclair PAI in 2009”; and “a determination that (assuming hypothetically) there is a 19.4%  
 8 reduction in Protestant’s sales due to the establishment of the proposed dealer in Montclair, where,  
 9 in terms of geography, will Protestant re-capture those lost sales?”

10 **E. Judge Archibald’s Decision on Remand Found “Overwhelming” Evidence in**  
 11 **Favor of Volkswagen and Found That Protestant’s Argument Was**  
 12 **Impermissible Under The Vehicle Code**

13 After reopening the record and taking additional evidence, on September 15, 2011 Judge  
 14 Archibald issued a 48-page Proposed Decision Following Remand, in which she found the evidence  
 15 “overwhelming” that “assuming hypothetically the Montclair dealership is established, Ontario  
 16 [Volkswagen], which in 2009 sold 19.4% of its new vehicles into the Montclair PAI could recapture  
 17 those lost sales” in the Ontario PAI and the RSB market (excluding the Montclair PAI).<sup>65</sup> In  
 18 particular, Judge Archibald found:

- 19 • Based upon 2009 sales and expected registrations, the Ontario PAI had 146 to 155 additional  
 20 sales opportunities and the RSB Market (excluding the Montclair PAI) had 431 to 534  
 21 additional sales opportunities for Ontario VW to offset the hypothetical loss of 116 sales it  
 22 made into the Montclair PAI;
- 23 • Based upon 2010 sales and expected registrations, the Ontario PAI had 186 to 191 additional  
 24 sales opportunities and the RSB Market (excluding the Montclair PAI) had 468 to 562

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26 <sup>63</sup> The 19.4% figure actually refers to sales in the Montclair PAI, not the RMA. *See* Ex. J42, Tab 11, p. 5.

27 <sup>64</sup> The "Corrected" Order merely corrected a typographical error from the original order of the same date.

28 <sup>65</sup> Proposed Decision Following Remand ¶ 132.

1 additional sales opportunities for Ontario VW to offset the hypothetical loss of 126 sales it  
2 made into the Montclair PAI; and

- 3 • Based upon annualized 2011 sales and expected registrations, the Ontario PAI had 164 to  
4 208 additional sales opportunities and the RSB Market (excluding the Montclair PAI) had  
5 496 to 828 additional sales opportunities for Ontario VW to offset the hypothetical loss of  
6 136 sales it made into the Montclair PAI.<sup>66</sup>

7 Judge Archibald not only found that the evidence supported Volkswagen, but held that the  
8 argument presented by Protestant was contrary to the Legislative intent behind the Act: “Using  
9 Protestant’s logic, a franchisor would be precluded from filling an open point simply because a  
10 dealer who has sold into that open point PAI for many years files a protest. This does not meet the  
11 balancing test of *Piano v. State of California, supra.*”<sup>67</sup>

12 Accordingly, once again Judge Archibald concluded that Ontario VW had failed to meet its  
13 burden of showing good cause for not establishing a new dealership in Montclair.

14 **F. The Board’s Final Decision**

15 Oral arguments on the Proposed Decision Following Remand were presented to the Board  
16 on September 27, 2011. During these oral arguments, several Board members indicated that their  
17 primary concern was the timing of the establishment of a new dealership, given the recent recession  
18 and the RSB Market’s still-recovering economy in 2011.<sup>68</sup>

19 After oral presentations of counsel and closed session deliberations, the Board announced  
20 that it had “rejected the Administrative Law Judge’s decision with regards to the good cause factor  
21 in Vehicle Code Section 3063(b),” that it was “sustaining the Protest” and that the Board, in  
22 consultation with the staff, “will draft its own Proposed Decision.”<sup>69</sup>

23 \_\_\_\_\_  
24 <sup>66</sup> *Id.* ¶¶ 132-138.

25 <sup>67</sup> *Id.* ¶ 140.

26 <sup>68</sup> RT 9-27 at 30:25-31:4 (“But the Board can take into consideration the fact that ... the current economic  
27 conditions were not adequately considered”); 35:18-36:1 (“I’m still hanging on this one issue ... dealing with current  
28 economic conditions”); 39:4-19 (“So I don’t know whether the economy is so great and supportive of all these new  
things happening.”)

<sup>69</sup> *Id.* at 95:15-24

1           **G. The Writ Proceedings and Remand to The Board**

2           Following the issuance of the Board’s written decision, Volkswagen filed a petition with the  
3 Superior Court for the County of Sacramento seeking a writ of mandate. On January 30, 2013 the  
4 Superior Court ruled in Volkswagen’s favor, ordering the Board to vacate its Order dated December  
5 13, 2011 and to reconsider this matter by deciding it upon the record after affording the parties an  
6 opportunity to present oral or written argument. On February 22, 2012, at its regularly scheduled  
7 meeting, the Board vacated its December 13, 2011 Order.

8           **V. PROTESTANT DID NOT MEET ITS BURDEN OF ESTABLISHING GOOD CAUSE**  
9           **UNDER EXISTING CIRCUMSTANCES TO BLOCK THE MONTCLAIR**  
10           **DEALERSHIP FROM OPENING**

11           Protestant’s case at heart focused on only one statutory factor, the alleged impact on  
12 Protestant under Section 3063(a), which will be discussed at the end of this section of the brief. The  
13 evidence addressing the other statutory factors under Sections 3063(b) through (e) was virtually  
14 uncontroverted and weighed heavily in favor of allowing the Montclair dealership.

15           **VI. VEHICLE CODE § 3063(B) -- THERE WILL BE A POSITIVE IMPACT ON THE**  
16           **RETAIL MOTOR VEHICLE BUSINESS AND THE CONSUMING PUBLIC IN THE**  
17           **RMA**

18           Vehicle Code 3063(b) requires the Board to consider the impact of the proposed Montclair  
19 dealership on the retail motor vehicle business, customers and potential customers within the 10-  
20 mile statutory RMA. As Judge Archibald concluded after remand, the evidence on this point is  
21 “overwhelming.” The Montclair dealership will increase overall brand awareness and total  
22 Volkswagen sales within the RMA and will provide greater convenience and service for existing  
23 and potential Volkswagen customers. Furthermore, there is no basis to Protestant’s claims that it  
24 will necessarily lose sales in the RMA if the Montclair dealership is permitted to go forward.

25           Accordingly, this factor weighs heavily in favor of overruling the protest, and Protestant  
26 failed to meet its burden in this regard.

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1           **A. The Establishment of the Montclair Dealership Will Increase Overall Sales of**  
 2           **Volkswagen Vehicles in the RMA**

3           Nearly every witness who testified on this topic, including Protestant’s own expert, agreed  
 4 that the addition of a dealership in Montclair will likely increase brand awareness and total  
 5 Volkswagen sales in the RMA, and thus have a positive impact on the retail motor vehicle business.  
 6 Indeed, this outcome is entirely logical. As Mr. Farhat testified, taking sales from one dealership  
 7 and transferring them to another provides Volkswagen with no benefit whatsoever, and yet  
 8 Volkswagen has spent and continues to spend a substantial amount of time and resources to  
 9 establish an additional dealership in Montclair.<sup>70</sup> The reason for this effort is that an additional  
 10 dealership can and will capture sales from *other manufacturers* thereby increasing Volkswagen’s  
 11 sales and market share in this market.

12           Protestant’s own general manager Mr. Reed testified that, in his experience, a new  
 13 dealership brings increased advertising to an area, which in turn leads to increased brand awareness  
 14 among potential customers.<sup>71</sup> Protestant’s expert Mr. Roesner also agreed that, in his experience,  
 15 adding the additional dealership will increase total Volkswagen registrations in the market:

16           “I think to put additional points in is going to some degree raise  
 17           Volkswagen registrations. There’s -- you’re always -- not always, but  
               there typically [sic] be some -- see some increase in a brand ....”<sup>72</sup>

18           Mr. Roesner even provided a number (albeit an admittedly unscientific one), testifying that after the  
 19 new dealership was added he would expect to see a 10% increase in Volkswagen sales in at least the  
 20 Montclair market, and possibly the entire RSB Market (i.e., an additional 252 Volkswagen sales in  
 21 the market based on 2010 data).<sup>73</sup>

22           Mr. Farhat conducted a detailed analysis and, like Mr. Roesner, concluded that the  
 23 establishment of a Montclair dealership would increase total Volkswagen sales within the RMA.  
 24 Indeed, Mr. Farhat, like Judge Archibald, ultimately concluded that a Montclair dealership could

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25           <sup>70</sup> RT 1-13 at 179:16-24.

26           <sup>71</sup> RT 1-10 at 171:22-172:6.

27           <sup>72</sup> RT 1-12 at 89:19-25.

28           <sup>73</sup> RT 1-12 at 144:19-145:11; Ex. J42 at Tab 9, p. 4.

1 raise Volkswagen’s market share within the RMA to the California average, resulting in 241  
2 additional Volkswagen sales based on 2009 sales figures alone, and far more Volkswagen sales  
3 based on the increase in sales volumes in 2010 and later years.<sup>74</sup>

4 The location of the proposed Montclair dealership -- in an auto mall with direct visibility  
5 from the heavily traveled 10 Freeway -- further supports the conclusion that the dealership will  
6 increase overall vehicle sales within the RMA. As the Covina Volkswagen dealer Mr. Bozzani  
7 testified, a dealership located on a freeway such as the 10 Freeway enjoys a “constant viewing ...  
8 by the hundreds of thousands of cars driving on that freeway every single day.”<sup>75</sup> Mr. Bozzani also  
9 confirmed that a dealership located in an auto mall setting attracts customers who may have  
10 originally been going to look at other brands.<sup>76</sup>

11 **B. The Montclair Dealership Will Provide Greater Convenience for Current and**  
12 **Potential Future Customers**

13 Currently, customers in the Montclair PAI must travel an average of 8.2 air miles to reach  
14 the nearest Volkswagen dealership -- almost twice the distance that their neighbors travel to reach  
15 the nearest Toyota, Nissan, Infiniti, Acura or Honda dealership.<sup>77</sup> Further, the establishment of a  
16 new dealership on the highly-traveled 10 Freeway -- the major commuter thoroughfare between the  
17 RMA and Los Angeles -- will provide significant convenience for customers who would like to  
18 shop for a new vehicle or have their Volkswagen serviced on their way to or from Los Angeles.

19 By placing an additional dealership in the Montclair auto mall, Volkswagen will also offer  
20 customers the opportunity to comparison shop at both Montclair and Ontario, whereas currently  
21 they may be ignoring Volkswagen entirely because they cannot comparison shop in Montclair.  
22 Accordingly, the evidence establishes overwhelmingly that the additional dealership in Montclair  
23 will benefit, not harm, the overall vehicle market and customers in the RMA.

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<sup>74</sup> Ex. J44 at A-58.

<sup>75</sup> RT 1-11 at 161:10-14.

<sup>76</sup> RT 1-11 at 164:8-12.

<sup>77</sup> Ex. J44 at A-51.

1           **C.     The Evidence Establishes That Protestant Can Maintain the Same or Even**  
 2                           **Greater Sales Levels in Future Years**

3           Protestant’s principal argument on this factor is that the potential financial impact of the  
 4 proposed new dealership on Protestant alone justifies sustaining the Protestant. The basis for this  
 5 argument is the fact that, in the years leading up to the Protest, Protestant unsurprisingly sold  
 6 Volkswagens to the otherwise unserved customers in Montclair. As Judge Archibald held, this  
 7 argument is contrary to the balancing test mandated by the Vehicle Code. Moreover, the argument  
 8 only presents half the equation. What Protestant ignores and asks the Board to ignore is whether  
 9 Protestant has the opportunity to replace any “lost” future sales in Montclair with sales in its own  
 10 territory or in the RSB Market as a whole. The answer is unquestionably yes.

11           ***1.     Sales opportunities in the geographies at issue.***

12           As Judge Archibald concluded, the Volkswagen brand has been underperforming in the RSB  
 13 Market. This below-average market share results in sales opportunities for Volkswagen dealers --  
 14 actual, not theoretical, sales of vehicles in the market that are currently being lost to competitive  
 15 brands, but which could be captured by a stronger, more visible Volkswagen dealer network and  
 16 refocused efforts by Protestant. The difference between the number of expected registrations and  
 17 the actual registrations that occurred represents the number of additional sales opportunities (i.e.,  
 18 the shortfall) available to Protestant to offset any hypothetical losses in the Montclair PAI.<sup>78</sup>

19           ***2.     In 2009, 2010 and first quarter 2011, available sales opportunities in both the***  
 20                           ***Ontario PAI and the Balance of the RSB Market outnumbered Protestant’s new***  
 21                           ***vehicle sales in the Montclair PAI.***

22           From 2009 through the first quarter of 2011, the additional sales opportunities in  
 23 Protestant’s *own PAI* outnumbered Protestant’s sales into the Montclair PAI. Accordingly, if  
 24 Volkswagen’s market share in the Ontario PAI alone had merely reached California average,

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25                           <sup>78</sup> During the hearing, Protestant and Mr. Roesner challenged Mr. Farhat's use of the "gross loss" rather than  
 26 "net loss" methodology to measure this shortfall. Although Mr. Farhat explained why it is more appropriate to use gross  
 27 loss as a measurement of opportunity, in this case the argument is moot because the amount of shortfall using either  
 28 methodology is substantially greater than Protestant's hypothetical losses in the Montclair PAI. *See* Farhat Remand  
 Decl. ¶9; R.Ex-1.

1 Protestant would have actually *increased* its Volkswagen sales, even if it had not made a single sale  
 2 in the Montclair PAI. In addition, in each of these years, Protestant could have completely replaced  
 3 its sales in the Montclair PAI by capturing only a fraction of the sales opportunities lost to  
 4 competitive brands in the Balance of the RSB Market (i.e., the RSB Market excluding the Montclair  
 5 PAI).

6 Moreover, these calculations are actually conservative in several respects (even ignoring the  
 7 fact that they were based on sales figures from the peak of the recession):

8 First, they assume that Protestant does not make *any* sales in the Montclair PAI. In reality,  
 9 dealers “cross-sell” into neighboring territories, meaning that even after a Montclair dealer opened  
 10 for business in 2015 or later, Protestant would almost certainly continue to sell some vehicles to  
 11 customers in the Montclair PAI, such as customers who have an existing positive relationship with  
 12 Protestant or customers who comparison shop in both Ontario and Montclair.

13 Second, the calculation of expected Volkswagen registrations in each relevant geography  
 14 assumes the market reaches only *average* market share compared to California as a whole. But, the  
 15 California *average* is just that -- an average. It is not a ceiling on performance expectations.  
 16 Volkswagen’s market share in many California PAIs exceeds the California average, including  
 17 PAIs in Southern California near the RSB Market.<sup>79</sup> The opening of a new Volkswagen dealership  
 18 in Montclair with visibility from the high volume I-10 Freeway will likely provide an opportunity  
 19 for Volkswagen registration levels in the RSB Market and the Ontario PAI to *exceed* California  
 20 average, provided Protestant and the other Volkswagen dealers in the area capitalize on this  
 21 increased exposure.

22 Third, the calculations only measure sales opportunities within the RSB Market. As  
 23 Protestant itself pointed out, Protestant sells many vehicles into neighboring territories, some of  
 24 which also performed well below the expected registration rates in the years leading up to the  
 25 hearing.<sup>80</sup> Consequently, Protestant can also capture additional sales opportunities in those areas.

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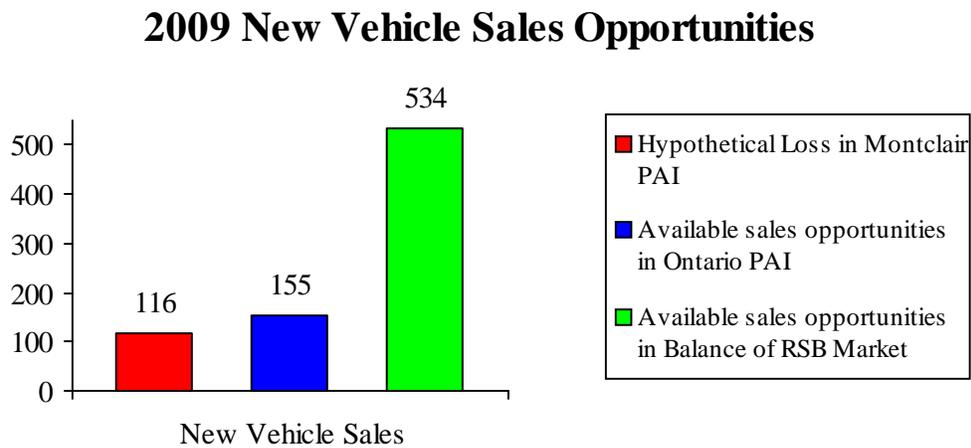
26 <sup>79</sup> See Ex. J44 at A-12 through A-16.

27 <sup>80</sup> See, e.g., Mr. Roesner's report on remand ¶ 7; Ex. J42, Tab 10 p. 3. For example, in 2009 the Victorville PAI  
 28 attained only 43.67% of expected Volkswagen registrations (229 expected registrations, only 100 actual registrations),

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**a. 2009 Sales Opportunities.**

In 2009, Protestant sold 116 new Volkswagens to customers in the Montclair PAI (accounting for 19.4% of its total new vehicle sales that year).<sup>81</sup> However, in the same year, there was a shortfall of 155 Volkswagen registrations in Protestant’s *own PAI*.<sup>82</sup> Moreover, there was a shortfall of 534 Volkswagen registrations in the Balance of the RSB Market.<sup>83</sup> If Protestant had captured just 22% of the 534 lost sales, the additional sales would have completely replaced the loss of 116 sales in the Montclair PAI. Thus, in 2009 even if Protestant had “lost” all 116 new vehicle sales in the Montclair PAI, it could have re-captured all of those sales in its own PAI, or in the Balance of the RSB Market -- even if Volkswagen’s brand performance in both of those geographies were still below California average.



**b. 2010 Sales Opportunities.**

In 2010, as automobile sales began to rebound, the available sales opportunities in Ontario’s own PAI and in the RSB Market again significantly outnumbered Protestant’s sales into Montclair. Indeed, Protestant could have completely replaced the 126 lost sales by capturing just 66% of the

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and therefore, according to Mr. Roesner’s calculations, presented Protestant with 129 additional sales opportunities which are not included in this Opening Brief.

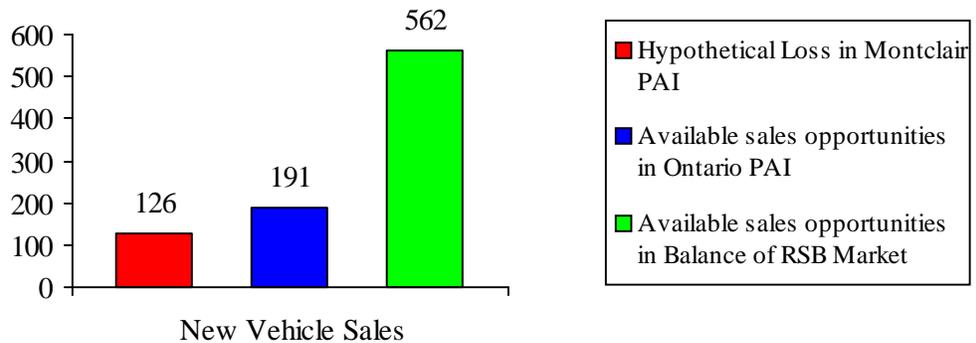
<sup>81</sup> R.Ex - Remand 1 at 1; Farhat Remand Decl. ¶ 11.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

1 expected Volkswagen sales that instead went to competitors in Protestant's *own PAI*. Or, if  
 2 Protestant had captured just 23% of the 562 lost sales in the RSB Market as whole (keeping in mind  
 3 there were only three Volkswagen dealers in the market), the additional sales would have  
 4 completely offset the 126 sales in the Montclair PAI. Thus, once again in 2010, even if Protestant  
 5 had lost all 126 new vehicle sales in the Montclair PAI, it could have re-captured all of those sales  
 6 in its own PAI, or in the Balance of the RSB Market, without either of those geographies attaining  
 7 California average market share.

### 2010 New Vehicle Sales Opportunities



### 3. 2011 Sales Opportunities.

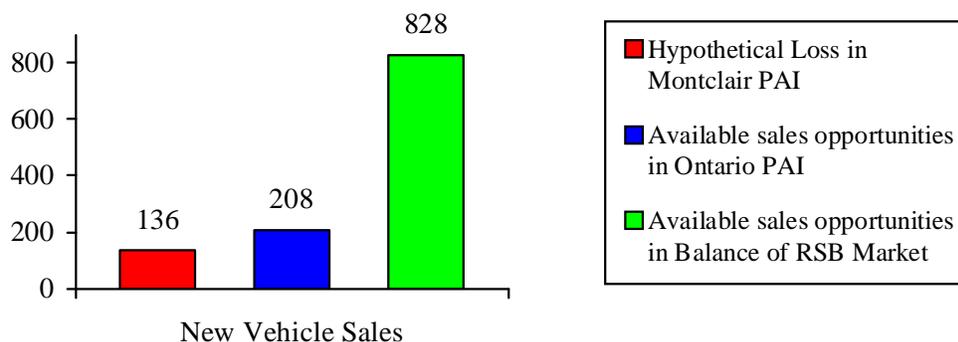
18 Looking to the annualized January-March 2011 registration data in the record, in 2011  
 19 Protestant was on pace to sell 136 new Volkswagens to customers in the Montclair PAI at the time  
 20 of the Remand.<sup>84</sup> Once again, however, Protestant could replace all of these sales (and even increase  
 21 its total sales) by capturing just a portion of the Volkswagen sales opportunities lost to competitive  
 22 brands that year. Specifically, based on first quarter 2011 annualized data, there was a shortfall of  
 23 208 Volkswagen registrations in Protestant's *own PAI*,<sup>85</sup> and a shortfall of 828 Volkswagen  
 24 registrations in the RSB Market -- more than *six times* the number of sales opportunities needed to  
 25 replace all of Protestant's sales in Montclair.<sup>86</sup>

<sup>84</sup> R.Ex - Remand 1 at 3; Farhat Remand Decl. ¶ 13.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

## 2011 New Vehicle Sales Opportunities



Again, these are not “theoretical” vehicle sales -- they were *actual sales* of vehicles to *actual consumers* in Ontario and the RSB Market in 2009-2011. Even in the improbable event that Protestant were to lose every single new vehicle sale in the Montclair PAI after the new dealership opened in 2015 (or later), there are more than ample Volkswagen sales opportunities in the Ontario PAI and the balance of the RSB Market -- i.e., sales being lost to other brands due to inadequate Volkswagen dealer representation -- to completely replace those losses. Indeed, if Volkswagen registration levels for the Ontario PAI and RSB Market increased to just average levels after the brand becomes more competitive with the new dealer in Montclair, Protestant’s sales opportunities will actually *increase* over its 2009-2011 levels.<sup>87</sup> Of course, it will then be up to Protestant to capture those sales.

Moreover, all of this data is based on sales at the peak of the recession and Volkswagen’s old market share. This does not account for increased Volkswagen sales opportunities due to the recovering economy, increased industry sales, or Volkswagen’s growing market share since 2011, all of which will further increase the sales opportunities available to Protestant by the time the Montclair dealership actually opens.

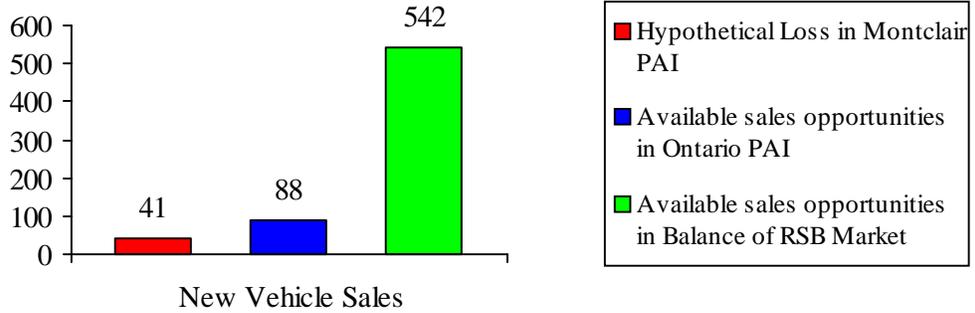
<sup>87</sup> Farhat Decl. ¶ 14.

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**4. Used Volkswagen Sales Opportunities in the Ontario PAI and the Balance of the RSB Market Outnumber Protestant's Hypothetical Losses in the Montclair PAI.**

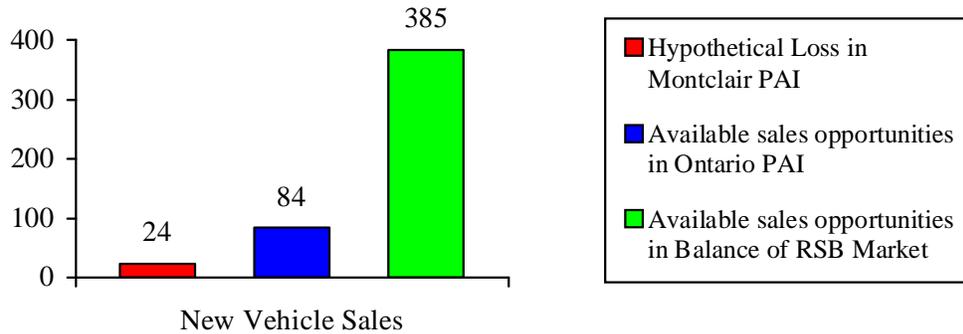
Pursuant to the Remand Order, Volkswagen also submitted evidence which established that there are ample used vehicle sales opportunities -- in both Protestant's own PAI and the Balance of the RSB Market -- for Protestant to re-capture any used vehicle sales it might lose in the Montclair PAI. In 2009-2011, huge numbers of used Volkswagens were purchased from sellers other than Volkswagen dealers, and then registered in Protestant's own PAI and the surrounding area.<sup>88</sup> If Protestant were to refocus its efforts and capture just a fraction of those sales opportunities, it could easily re-capture all of its losses in the Montclair PAI:

**2009 Used Vehicle Sales Opportunities**

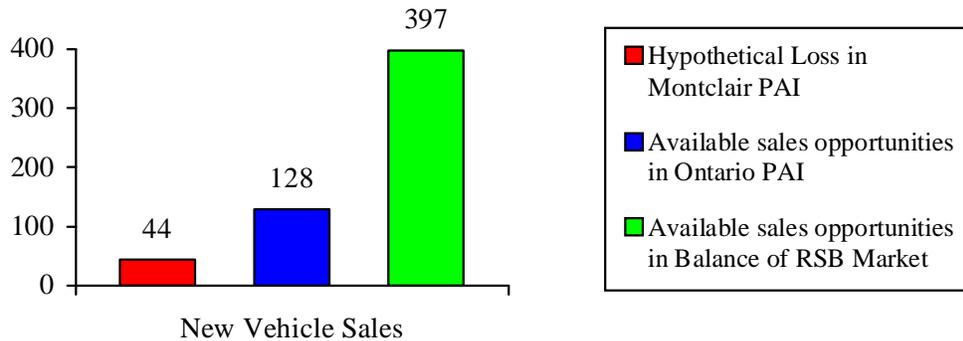


<sup>88</sup> Protestant can also capture additional used vehicle sales from other Volkswagen dealers who are selling used Volkswagens to customers in the Riverside-San Bernardino Market, including customers in Protestant's own PAI. However, Volkswagen conservatively excluded these sales opportunities for purposes of this analysis.

## 2010 Used Vehicle Sales Opportunities



## 2011 Used Vehicle Sales Opportunities



Accordingly, in terms of geography, the data establishes that there are more than ample used vehicle sales opportunities in both the Ontario PAI and the RSB Market (excluding Montclair) to offset Protestant's hypothetical losses in the Montclair PAI.<sup>89</sup>

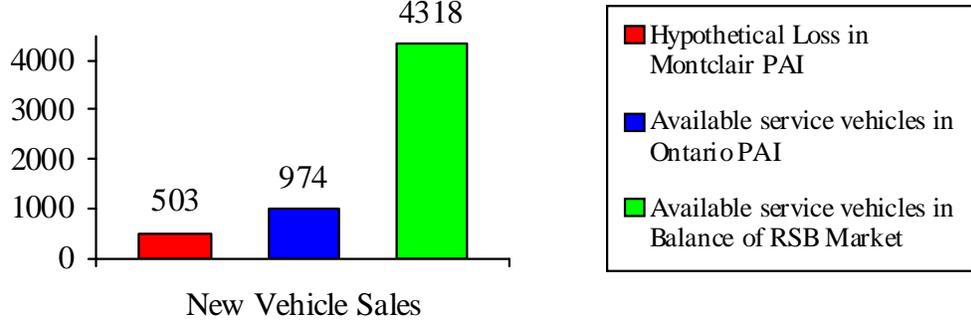
**5. *Warranty and Customer Pay Service Opportunities in the Ontario PAI and the Balance of the RSB Market Outnumber Protestant's Hypothetical Losses in the Montclair PAI.***

The data also establishes that there are numerous opportunities in Protestant's own PAI as well as the balance of the RSB Market for Protestant to re-capture any lost service business from the Montclair PAI. In 2009-2011 there were a substantial number of Volkswagen units in operation

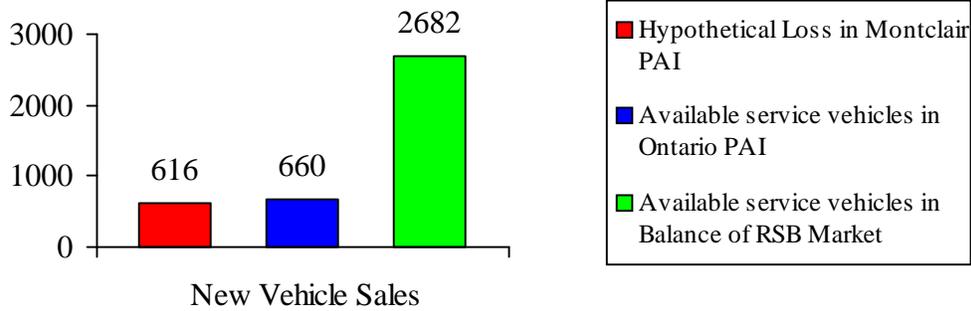
<sup>89</sup> Farhat Remand Decl. ¶ 23.

1 (“UIOs”)<sup>90</sup> in the Ontario PAI and the RSB Market whose owners chose to service their vehicles  
 2 other than at a Volkswagen dealership. Protestant would need to capture just a small percentage of  
 3 these lost service opportunities to completely offset all of the theoretical “lost” service business  
 4 from customers in the Montclair PAI.<sup>91</sup>

**2009 Service Opportunities**  
 (Excluding UIO's serviced at a VW Dealer)



**2010 Service Opportunities**  
 (Excluding UIO's serviced at a VW Dealer)

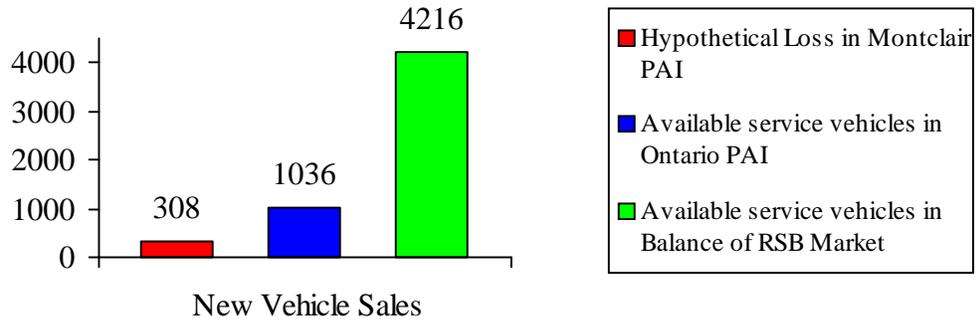


<sup>90</sup> As established during the hearing, Volkswagen defines "units in operation" as Volkswagen vehicles that are currently in operation (i.e., registered) and are either the current model year or one of the prior six model years. For example, the 2009 units in operation consisted of 2003 through 2009 model year registered vehicles. The 2010 units in operation consisted of 2004 through 2010 model year registered vehicles. Thus, each year when one model year gets dropped from the official UIO count, the dropped vehicles that remain in operation represent additional service opportunities for Protestant that are not included in this Opening Brief. *See* Farhat Remand Decl. at 8, fn 4.

<sup>91</sup> Again, it is highly unrealistic that Protestant would lose all of this service business. Customers select a dealership to service their vehicles for a variety of reasons, including proximity to their place of work (as opposed to their homes), hours of operation and their personal relationship with the dealership. Nevertheless, for purposes of this Opening Brief, Volkswagen has addressed the hypothetical assumption that Protestant would lose all of its service business from customers that reside in the Montclair PAI.

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## 2011 1Q Service Opportunities (Excluding UIO's serviced at a VW Dealer)



This service data and the number of Volkswagen UIO's available during each of the relevant time periods confirm that there are ample service opportunities -- i.e., Volkswagen customers whose service business is currently being lost to competitors -- in the Ontario PAI and the RSB Market (excluding Montclair) to more than offset Protestant's hypothetical lost service business from vehicles registered in the Montclair PAI.<sup>92</sup>

6. ***Projected Sales Growth In The Ontario PAI and The RSB Market Will Provide Protestant With Even More Opportunities To Replace Any Hypothetical Losses In The Montclair PAI***

As noted, the above data was based on actual registrations and service work performed in 2009-2011. As the economy recovers and both industry and Volkswagen sales continue to soar following the recession, the additional opportunities in each of these geographies will further enhance Protestant's ability to replace the 2009 Montclair sales on which it based its "ruinous competition" analysis, and maintain its profitability.

Using only the evidence initially submitted on remand in 2011, which was based on industry projections provided by HIS, and assumed that Volkswagen experienced *no growth whatsoever* in its market share (i.e., completely excluding the so-called "pie-in-the-sky" projections derided by Protestant), expected Volkswagen registrations in Protestant's own PAI were projected to increase

<sup>92</sup> Farhat Remand Decl. ¶ 28.

1 from 384 vehicles in 2009 to 721 vehicles by next year -- an increase of 337 Volkswagen sales  
 2 opportunities.<sup>93</sup> Expected Volkswagen registrations in the RSB Market as a whole were projected to  
 3 rise from 1,908 vehicles in 2009 to 3,324 vehicles in 2014.<sup>94</sup> Again, these were the projections  
 4 offered in 2011, and do not account for the actual performance of the industry and the Volkswagen  
 5 brand after the record was closed.

6 In 2009, Protestant sold a total of 397 new Volkswagens to customers in the entire RSB  
 7 Market, 116 of which were sold to customers in the Montclair PAI <sup>95</sup> and 281 of which were sold to  
 8 customers in the Balance of the RSB Market. Even if Protestant were to lose all of its sales in the  
 9 Montclair PAI, by capturing the additional 337 sales opportunities in the *Ontario PAI alone*,  
 10 Protestant's sales in the RSB Market will *increase 56%* from 397 vehicles in 2009 to 618 in 2014.<sup>96</sup>

11 The relevant question is whether Protestant will have more or fewer *total* sales after the  
 12 Montclair dealership opens than Protestant did in 2009-2010 when it was operating at a profit.  
 13 Characterizing any failure to capture future additional sales as a loss that will drive Protestant out of  
 14 business -- even though Protestant's actual number of sales would be higher than they were at the  
 15 time of the hearing -- defies logic.

16 Indeed, such an argument would require the Board to accept the erroneous premise that the  
 17 Vehicle Code guarantees dealers a monopoly in a given geography, and therefore any competition  
 18 that may take sales from a dealer constitutes a "loss" of sales to which the dealer is "entitled." In  
 19 fact, as Judge Archibald noted in the Proposed Decision, the Legislature "intended that the Board  
 20 balance the dealers' interest in maintaining viable businesses, the manufacturers' interest in  
 21 promoting sales, and the public's interest in adequate competition and convenient service."  
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24 <sup>93</sup> R.Ex - Remand 1 at 10; Farhat Remand Decl. ¶¶ 31-33.

25 <sup>94</sup> *Id.*

26 <sup>95</sup> R.Ex - Remand 1 at 1.

27 <sup>96</sup> This amount is calculated as follows: Protestant had 397 sales in the Riverside-San Bernardino Market in  
 28 2009. Deducting Protestant's 116 sales in the Montclair PAI in 2009 (the hypothetical loss) and adding the 337  
 additional sales in the Ontario PAI equals a net total of 618 sales. 618 sales is a 56% increase over the 397 sales  
 Protestant was making in the Riverside-San Bernardino Market as of that point in time.

1 Proposed Decision at 4-5, *citing Piano v. State of California ex rel. New Motor Vehicle Board*  
 2 (1980) 103 Cal.App.3d 412, 417.

3 Based on industry projections at the time the record was made (ignoring actual industry  
 4 performance in the last two years) the sales opportunities available to Protestant in its own PAI and  
 5 in the balance of the RSB Market will be significantly greater by the time the Montclair dealership  
 6 opens in the 2015-2016 time frame than they were in 2011. If Protestant captures even a modest  
 7 percentage of those additional sales opportunities, Protestant’s net sales will increase, not decrease,  
 8 and Protestant most certainly will not be forced out of business by the new dealer in Montclair.

9 **7. Projected Growth in Volkswagen New Vehicle Sales Will Give Protestant**  
 10 **Even More Opportunities to Re-Capture Hypothetical Losses from the**  
 11 **Montclair PAI in Future Years.**

12 Even ignoring updated market share data, the data presented in 2011 confirmed that  
 13 Volkswagen’s market share will also continue to increase in coming years, creating even *more*  
 14 additional sales opportunities for Protestant outside of the Montclair PAI. As of 2011, the expected  
 15 Volkswagen registrations *in the Ontario PAI alone* (assuming only California average market  
 16 share) will increase from 384 vehicles in 2009 to 950 vehicles in 2014-- an increase of 566  
 17 registrations.<sup>97</sup> Thus, even if Protestant were to lose all of its sales in the Montclair PAI, by  
 18 capturing these 566 additional sales opportunities in its own PAI, Protestant would more than  
 19 *double* its net sales (from 397 sales in the RSB Market in 2009 to 847 sales in 2014), even before  
 20 accounting for additional sales that Protestant can capture in the balance of the RSB Market (where  
 21 expected registrations will grow by 1,993 vehicles in the same time period).<sup>98</sup>

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25 <sup>97</sup> R.Ex - Remand 1 at 11; Farhat Remand Decl. ¶ 35.

26 <sup>98</sup> This amount is calculated as follows: Protestant had 397 sales in the Riverside-San Bernardino Market in  
 27 2009. Deducting Protestant's 116 sales in the Montclair PAI in 2009 (the hypothetical loss) and adding the 566  
 28 additional sales in the Ontario PAI equals a net total of 847 sales -- more than double the 397 sales Protestant was  
 making in the RSB Market as of that point in time.

1                   8.       *Projected Growth in New Vehicle Sales Will Also Provide Protestant with*  
2                                   *Additional Service Opportunities to Re-Capture the Hypothetical Loss of*  
3                                   *Service Vehicles from the Montclair PAI.*

4                   Finally, these projected increases in new vehicle sales and registrations (whether due to  
5 industry growth, increases in Volkswagen’s market share, or both) will also increase Protestant’s  
6 available service opportunities. As Volkswagen sales increase in future years, the number of  
7 Volkswagen UIO’s will also increase.<sup>99</sup> Each one of these additional UIO’s will create a new service  
8 opportunity for Protestant.

9                   Accordingly, the evidence on this factor is, as Judge Archibald described, “overwhelming.”  
10 The establishment of the Montclair dealership will have a positive impact on Volkswagen sales in  
11 general; will have a positive impact on consumers by offering greater competition and convenience;  
12 and will not necessarily have any negative impact on Protestant. In fact, it will create an opportunity  
13 for Protestant to increase, not decrease, its sales. Only Protestant can choose whether it will  
14 capitalize on that opportunity.

15       **VII.    VEHICLE CODE § 3063(C) -- THE ESTABLISHMENT OF THE MONTCLAIR**  
16       **DEALERSHIP WILL BENEFIT THE PUBLIC WELFARE**

17                   While Vehicle Code 3063(b) focuses on the impact of the new dealership on only two  
18 specific segments of the population -- existing dealers and customers -- Vehicle Code 3063(c)  
19 requires the Board to also consider how the new dealership will impact the public at large, and more  
20 specifically whether the establishment would be “injurious” to the public. The evidence established  
21 just the opposite -- that the new dealership will create several benefits to the public, including new  
22 jobs, tax revenues and increased economic activity.

23                   **A.    The Montclair Dealership Will Result in Numerous Benefits to the Public**

24                   At the hearing, the Board heard from one of the key representatives of public welfare in the  
25 RMA, Montclair City Manager Edward Starr. As Mr. Starr explained during his testimony, the new  
26 dealership in Montclair will provide substantial benefits to the public welfare:

27                   \_\_\_\_\_  
<sup>99</sup> R.Ex - Remand 1 at 12; Farhat Remand Decl. ¶ 38.

- 1 • It will raise revenue for the City in the form of increased sales, transaction, and use taxes.
- 2 • It will bring customers to the City, who likely will shop at nearby retail stores and
- 3 restaurants, thereby raising their revenues (and taxes on those revenues).
- 4 • It will increase overall sales in the auto mall, not just at the new Volkswagen dealership, as
- 5 it makes the mall more attractive for customers who are considering different brands.
- 6 • It will create prestige for the City, which in turn attracts other businesses to the community.
- 7 • It will create new jobs, not just at the dealership, but also potentially jobs at the numerous
- 8 surrounding business which will be enhanced by the new dealership.<sup>100</sup>

9 Indeed, benefits to the public from a Volkswagen dealership in Montclair are so significant,  
10 the City was willing to provide Mr. Sherman with \$1 million had he opened a new Volkswagen  
11 dealership in the City, a decision requiring about “10 minutes” of thought on the City’s part,  
12 according to Mr. Sherman. Because the proposed site on the 10 Freeway is expected to generate  
13 even greater sales and customer traffic than Mr. Sherman’s proposed location, the benefits to the  
14 City from the proposed new dealership will be even greater than those justifying the City’s  
15 willingness to make a \$1 million contribution to Mr. Sherman.<sup>101</sup>

16 **B. No Evidence that the Montclair Dealership will Cause Harm to the Public**

17 Even Mr. Sherman was forced to agree that the public would receive these significant  
18 benefits from a new Montclair dealership.<sup>102</sup> Thus, Protestant spent significant time at the hearing  
19 focusing on certain complaints raised against the Riverside Volkswagen dealership, apparently to  
20 argue that the public will be harmed by Volkswagen’s selection of Mr. Hawkins (rather than Mr.  
21 Sherman) as the proposed dealer candidate because Mr. Hawkins holds a minority ownership in the  
22 Riverside dealership, and therefore should be held responsible for these complaints. To the extent  
23 Protestant continues to press this argument, the evidence establishes that it is nothing more than a  
24 red herring.

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26 <sup>100</sup> RT 1-19 at 142:13-144:23.

27 <sup>101</sup> RT 1-19 at 144:24-145:14.

28 <sup>102</sup> RT 1-11 at 219:12-16.

1 As numerous witnesses confirmed, including Mr. Hawkins himself, Mr. Hawkins is a  
2 passive investor who has no operational control over the Riverside dealership.<sup>103</sup> The Riverside  
3 dealership is operated by another individual, Richard Michaelson.<sup>104</sup> Indeed, the various  
4 Volkswagen employees who call on the Riverside dealership all testified that they had never dealt  
5 with Mr. Hawkins or even seen him at the Riverside dealership.<sup>105</sup> Protestant offered no evidence  
6 whatsoever to contradict this testimony.

7 Furthermore, Protestant provided no evidence that the complaints referred to during the  
8 hearing were not promptly remedied. Kurt Thomas of Volkswagen testified that he visited the  
9 dealership less than a week before the hearing and was unaware of any problems at that time.<sup>106</sup>  
10 Steve Smith of Volkswagen testified that he attended a review meeting with Paul Feeney -- the  
11 author of the email referenced by Protestant's counsel throughout the hearing -- in January 2010,  
12 only a few months after the email in question was sent, and that there was no discussion of any of  
13 these purported problems at that meeting.<sup>107</sup> Nor is this surprising, as it is common for dealerships to  
14 have issues which they then address. In fact, Protestant itself suffered from significant service  
15 complaints within the past several years -- and appears to have remedied those problems.

16 Accordingly, Protestant failed to meet its burden of establishing that the Montclair  
17 dealership would harm the public welfare. The evidence established just the opposite. It is in the  
18 public's interest to establish the Montclair dealership.

19 **VIII. VEHICLE CODE § 3063(D) -- PROTESTANT IS NOT PROVIDING ADEQUATE**  
20 **COMPETITION AND CONVENIENT CUSTOMER CARE IN THE RMA**

21 Vehicle Code § 3063(d) requires the Board to take into consideration whether existing  
22 dealers within the RMA are capturing an adequate number of sales opportunities and providing  
23 convenient service to consumers. In this case, Protestant failed to meet its burden of proving that --

24 \_\_\_\_\_  
<sup>103</sup> See, e.g., RT 1-20 at 11:2-4.

25 <sup>104</sup> RT 1-20 at 11:18-24.

26 <sup>105</sup> RT 1-19 at 217:12-20; 1-20 at 119:4-16.

27 <sup>106</sup> RT 1-19 at 223:20-224:10.

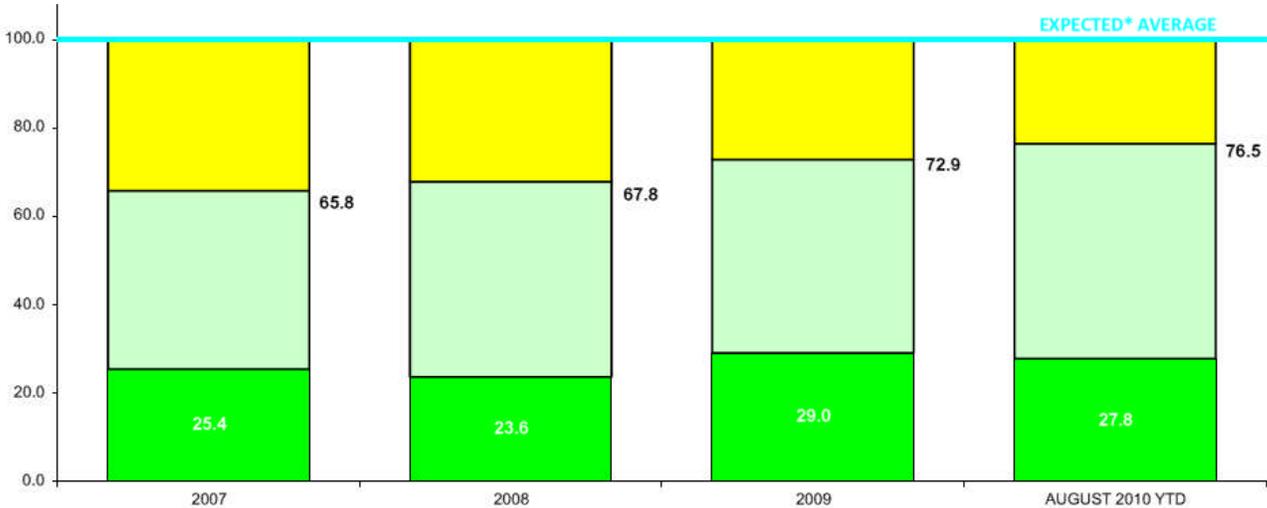
28 <sup>107</sup> RT 1-20 at 156:5-157:12.

1 as the sole Volkswagen dealership located within the RMA -- Protestant is providing “adequate”  
 2 competition and convenience customer care in the RMA.

3 **A. Volkswagen is Not Being Adequately Represented in the RMA**

4 By definition, the “adequacy” of Volkswagen competition in the RMA is measured by the  
 5 brand’s competitive position (i.e., market share) vis-à-vis its competitors in the RMA, as compared  
 6 to a reasonable standard or benchmark of Volkswagen’s market share in a larger geography.  
 7 Regardless of whether the benchmark is Volkswagen’s segment adjusted market share in the State  
 8 of California (as presented by Volkswagen’s expert) or segment adjusted market share in  
 9 Volkswagen’s Western Region (as presented by Protestant’s expert), the evidence leads to the same  
 10 conclusion -- Volkswagen is staggeringly under-represented within the RMA, losing roughly a  
 11 quarter of its “expected” sales to other manufacturers who offer greater competition and better  
 12 convenience to customers in the RMA:

13 **VOLKSWAGEN MARKET SHARE IN MONTCLAIR RMA<sup>108</sup>**



23 **B. There is No Evidence to Support Protestant’s Theories That Volkswagen’s**  
 24 **Under-Representation is the Result of Economic or Demographic Factors**

25 Protestant does not, and cannot, dispute the fact that Volkswagen’s competitive performance  
 26 (market share) in the RMA and the RSB Market as a whole is significantly below its average

27 <sup>108</sup> Ex. J44 at A-17.

1 performance in both the State of California and Volkswagen’s Western Region. During the hearing,  
 2 Protestant’s counsel and expert instead offered a number of speculative *theories* to explain  
 3 Volkswagen’s under-representation, such as high unemployment and foreclosure rates, poor  
 4 consumer credit ratings, and a large Hispanic population in the RSB Market. However, Protestant  
 5 offered no *evidence*, let alone any logical argument, as to why these economic conditions would  
 6 affect Volkswagen’s market share -- i.e., would impact Volkswagen’s actual sales yet would not  
 7 affect other brands within the primary competitive group, such as Toyota, Nissan or Honda.  
 8 Moreover, the evidence thoroughly discredited these unsubstantiated theories. For example:

9 **Local Preferences.** Protestant’s counsel implied that Volkswagen’s segmentation analysis  
 10 was insufficient. However, Protestant offered no evidence of local preferences that are not  
 11 accounted for by the segmentation analysis. Furthermore, Protestant’s own expert used *the exact*  
 12 *same segmentation analysis* in his report,<sup>109</sup> he agreed that Volkswagen’s segmentation analysis  
 13 does “take into account local preferences for the size of the vehicle and the class of the vehicle,”<sup>110</sup>  
 14 and he testified that he did not prepare any alternative segmentation analysis which he believed to  
 15 be more accurate.<sup>111</sup>

16 **Income Levels.** The median household income in the RSB Market was approximately  
 17 \$62,000 (based on the most recent data available at the time of the hearing).<sup>112</sup> Among all markets in  
 18 California with median incomes between \$55,000 and \$65,000, Volkswagen’s market share is  
 19 98.8% of California average.<sup>113</sup> Among markets in California with median incomes between \$60,00  
 20 and \$70,000 (as is the case in both Montclair and Ontario), average Volkswagen market share is  
 21 99.3% of California average.<sup>114</sup>

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<sup>109</sup> RT 1-13 at 65:6-21.  
<sup>110</sup> RT 1-12 at 154:11-16.  
<sup>111</sup> RT 1-13 at 65:6-9.  
<sup>112</sup> RT 1-13 at 127:20-23.  
<sup>113</sup> Ex. R60 at A-34.1.  
<sup>114</sup> Ex. R60 at A-34.2.

1           **Unemployment.** Protestant also noted that the RSB Market suffers from high  
 2 unemployment rates (or at least it did in 2010), yet again offered no evidence that unemployment  
 3 resulted in disproportionate sales of competitive vehicles, as opposed to only Volkswagens.  
 4 Unemployment certainly may explain why someone does not buy a new car at all, but Protestant  
 5 offered zero evidence that it would cause one to buy a new Toyota instead of a new Volkswagen.

6           **Foreclosures.** Again, Protestant offered no explanation, much less evidence, as to why  
 7 foreclosures would cause customers to purchase a Honda, Toyota or Nissan rather than a similarly  
 8 priced and equipped Volkswagen. Indeed, the data dispels any notion of a link between foreclosure  
 9 rates and Volkswagen’s low *market share*. Among markets in California counties with a  
 10 foreclosure rate greater than 2%, Volkswagen’s market share is 88% of California average, well  
 11 above the 74.5% of California average in the RSB Market.<sup>115</sup> Indeed, even if Volkswagen’s market  
 12 share in the RMA increased to just 88% of California average, Protestant’s financial impact  
 13 argument -- which is speculative to begin with -- would completely dissipate.<sup>116</sup>

14           Moreover, high foreclosure rates for San Bernardino and Riverside Counties as a whole  
 15 cannot explain Volkswagen’s low market share in the RMA or Montclair PAI, because the City of  
 16 Montclair did not suffer from the same high foreclosure rates.<sup>117</sup> Finally, looking only to the  
 17 evidence in the record (and ignoring the rise in housing prices since 2011), housing prices in the  
 18 Inland Empire increased 13.8% in the third quarter of 2010, the largest increase in the State of  
 19 California, and the fifth largest increase in the entire country,<sup>118</sup> and updated evidence provided at  
 20 the time of the Remand showed that foreclosure rates in Inland Empire were significantly down in  
 21 2011.<sup>119</sup>

22           **Hispanic Population.** Although the percentage of Hispanic residents in the RMA and RSB  
 23 Market is higher than California average, Protestant offered no evidence to support its contention

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24           <sup>115</sup> Ex. R60 at A-34.5.  
 25           <sup>116</sup> Ex. R60 at A-34.5.  
 26           <sup>117</sup> RT 1-19 at 135:6-16.  
 27           <sup>118</sup> RT 1-19 at 171:20-172:8, 173:19-174:10.  
 28           <sup>119</sup> R.Ex.-Remand 3

1 that racial profiling could explain Volkswagen’s under-representation. In fact, the evidence showed  
 2 that there is no correlation between Volkswagen’s brand performance and a high percentage of  
 3 Hispanics in the market. Among the other four markets in California with a Hispanic population of  
 4 50% or more, Volkswagen’s market share is 96.1% of California average.<sup>120</sup> Likewise,  
 5 Volkswagen’s market share in California PAIs with a greater than 50% Hispanic population is  
 6 97.5% of California average.<sup>121</sup>

7 **Credit Ratings.** Once again, Protestant offered no evidence of any kind to support it’s  
 8 argument that poor credit ratings would affect Volkswagen disproportionately. Indeed, Mr. Farhat  
 9 testified that, in all his years of reviewing brand performance for the automotive industry, he is  
 10 unaware of any information which would suggest that tight credit conditions or poor credit ratings  
 11 would cause buyers to purchase a competitive vehicle, rather than a Volkswagen.<sup>122</sup>

12 **C. There Is No “Shortage” of Certified Volkswagen Technicians**

13 Protestant claimed that there is a shortage of qualified Volkswagen service technicians in the  
 14 area, and therefore the new dealership will “steal” Protestant’s technicians, leading to a decline in  
 15 quality of service at both dealerships. However, the evidence dispelled any notion that there is or  
 16 will be a shortage of qualified Volkswagen service technicians.

17 In addition to the testimony of Volkswagen witnesses that there is no such shortage and in  
 18 fact Volkswagen is taking measures to ensure against a shortage as sales continue to grow, Mr.  
 19 Bozzani testified that he has had *no issue* with the availability of qualified Volkswagen service  
 20 technicians, that he has had no difficulty finding qualified service technicians for his Volkswagen  
 21 dealership, and that neither the Puente Hills nor Alhambra dealerships “stole” any of his technicians  
 22 when they opened.<sup>123</sup> Mr. Bozzani went on to say that he has *no concerns whatsoever* about finding  
 23 additional technicians as his service business increases in the future.<sup>124</sup>

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24 <sup>120</sup> Ex. R60 at A-34.3.

25 <sup>121</sup> Ex. R60 at A-34.4.

26 <sup>122</sup> RT 1-14 at 124:3-10.

27 <sup>123</sup> RT 1-11 at 145:22-146:9.

28 <sup>124</sup> RT 1-11 159:3-8.

1 **IX. VEHICLE CODE § 3063(E) -- THE MONTCLAIR DEALERSHIP WILL INCREASE**  
2 **COMPETITION**

3 Vehicle Code § 3063(e) requires the Board to consider whether the establishment of the new  
4 dealer will increase competition (both intrabrand and interbrand), which the statute finds  
5 *necessarily* to be in the public’s interest. The evidence established, and Protestant’s expert agreed,  
6 that the Montclair dealership will increase *interbrand* competition, i.e., competition against other  
7 brands who are already represented in the Montclair market and along the 10 Freeway. Moreover,  
8 Protestant agrees that the Montclair dealership will increase *intrabrand* competition -- indeed, the  
9 fact of this increased competition is central to Protestant’s entire case.

10 **X. VEHICLE CODE § 3063(A) -- PROTESTANT’S INVESTMENT IN ITS**  
11 **VOLKSWAGEN DEALERSHIP WILL NOT BE JEOPARDIZED BY THE NEW**  
12 **DEALERSHIP IN MONTCLAIR**

13 Finally, Vehicle Code § 3063(a) requires the Board to consider the “permanency” of  
14 Protestant’s investment. Notably, this is the *only one* of the five statutory factors that focuses  
15 exclusively on the likely impact of the new dealership on Protestant, as opposed to the likely impact  
16 on the public and consumers. This focus is in keeping with the purpose of the statute, to empower  
17 the Board to block the establishment of new dealerships only so far as necessary to prevent “unfair  
18 or oppressive trade practices” or to prohibit acts “offensive to the public welfare” -- *not* to shelter  
19 dealers from reasonable competition, or carve out exclusive dealer territories, or guarantee sales and  
20 profits for dealers. *New Motor Vehicle Bd. of California v. Orrin W. Fox Co.*, 439 U.S. 96, 99 S.Ct.  
21 403 (1978).

22 Virtually every franchised motor vehicle dealer has some form of “permanent investment”  
23 in its dealership. To properly assess this good cause factor, the Board must consider not only the  
24 amount of Protestant’s investment, but also whether the market provides Protestant with sufficient  
25 business opportunities to remain profitable after the establishment of the new dealership. *Piano v.*  
26 *State of California ex rel. New Motor Vehicle Bd.*, 103 Cal.App.3d 412, 419 (1980).

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1           **A. Protestant Failed to Establish That the Ontario Dealership Will Lose Money or**  
 2           **Be “Forced Out of Business” as a Result of the Montclair Dealership**

3           Volkswagen agrees that Protestant has a substantial investment in its dealership. However,  
 4 the evidence shows that Protestant has already realized a return on that investment in the form of  
 5 years of profits to both Protestant and its dealer principal, Gary Sherman.

6           Moreover, Protestant did not meet its burden of establishing with any degree of certainty  
 7 that the Montclair dealership would necessarily cause Protestant to lose *any* of that investment,  
 8 much less sufficient revenue to drive it out of business. Even Protestant’s own expert conceded that  
 9 his financial impact analysis did not necessarily mean that Protestant would have lower revenues  
 10 after the Montclair dealership was established. Moreover, Protestant’s claims are squarely at odds  
 11 with pre-protest statements by Mr. Sherman and Mr. Reed that, had *they* been awarded the  
 12 Montclair point, there were ample sales and service opportunities for the Ontario and Montclair  
 13 dealerships to succeed.

14                       ***1. Mr. Roesner’s financial impact analysis does not establish that Protestant’s***  
 15                       ***revenues will decrease below 2009-2010 levels after the Montclair***  
 16                       ***dealership opens***

17           Protestant’s argument that the Montclair dealership will likely force Protestant out of  
 18 business is based upon Mr. Roesner’s financial impact analysis, which concluded that the new  
 19 Montclair dealership will cause Ontario to “lose” between \$448,909 and \$727,100 per year in net  
 20 profits.<sup>125</sup> This analysis is flawed in numerous respects. First, Mr. Roesner made the unrealistic  
 21 assumption that Volkswagen sales would remain *exactly the same as they were in 2009-2010* and  
 22 therefore did not account for the sales growth that he acknowledged in his testimony would likely  
 23 take place.

24           Second, Mr. Roesner only opined that Protestant would “lose” (i.e., not capture) future sales  
 25 and service business that he would otherwise “expect” to go to Protestant based solely on  
 26 geographic proximity, absent the Montclair dealership. In other words, without a dealership in

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27                       <sup>125</sup> Ex. J42, Tab 37 pp. 1-2.

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1 Montclair, Protestant might capture a bigger piece of an expanding pie. As Mr. Roesner conceded at  
2 the hearing, *the number of [projected “losses”] can be completely offset by increased sales*. In his  
3 testimony, Mr. Roesner admitted that the number of new vehicles sold by Protestant *may actually*  
4 *be greater after Montclair opens than it is today*:

5 Q. I’m just saying, this 12.9 percent on this page here, this analysis  
6 that you’ve done here does not tell us whether after Montclair,  
7 Ontario Volkswagen will [sell] more new cars or less new cars. This  
8 doesn’t tell us that, does it?

9 A. In an absolute basis, no, sir. It does not.<sup>126</sup>

10 Mr. Roesner then testified that, because Protestant’s absolute sales (and service and other  
11 business) may be higher after Montclair opens, Protestant’s profits will not necessarily be lower  
12 than they were at the time of the hearing:

13 Q. ...[T]hat’s not an actual loss, saying ‘My sales went down. I’m  
14 going to lay off people, and I’m going to go [out of] business.’ That’s  
15 just saying you would not have captured as much of the new business  
16 as you would have without that competitor, is that right?

17 A. Yes ... it’s just that the pie got bigger. So -- yeah.

18 \*\*\*

19 Q. ... [S]o you would agree with me that if that pie increases, and you  
20 have a [quote-unquote] “loss” because your new slice of that bigger  
21 pie is not as big as it would have been without the competitor, that  
22 loss doesn’t translate into, “I have to lay off people and go out of  
23 business,” it’s just [you] didn’t capture as much of that new business  
24 as you might have?

25 A. Not necessarily. You’re right ....<sup>127</sup>

26 Moreover, in his expert report, Mr. Roesner concluded that “other network actions” which  
27 had already taken place -- chiefly the addition of a Puente Hills dealership in 2010 -- caused a  
28 “loss” of 9.5% of Protestant’s sales.<sup>128</sup> Yet Protestant’s actual sales *increased* between 2009 and  
2010 after Puente Hills opened.<sup>129</sup> Thus, the overall increase in Volkswagen sales more than offset

<sup>126</sup> RT 1-13 at 68:7-13.

<sup>127</sup> RT 1-13 at 70:18-71:13.

<sup>128</sup> Ex. J42, Tab 27 p. 2.

<sup>129</sup> RT 1-13 at 24:9-16; RT 1-13 at 66:14-21; Ex. J42, Tab 10 p. 1.

1 Mr. Roesner’s theoretical “loss” of sales due to the Puente Hills dealership. Even if the Board were  
 2 to ignore the flaws in Mr. Roesner’s analysis and accept his conclusion that Protestant will “lose”  
 3 future sales opportunities to the Montclair dealership, there is no basis to conclude that there will be  
 4 an actual decrease in Protestant’s sales or revenues, or that Protestant’s investment in the Ontario  
 5 dealership will be diminished in any respect.

6 In fact, since the Montclair dealership will finally provide Volkswagen with exposure along  
 7 the 10 Freeway, and a greater presence in the RSB Market to handle the expected increased volume  
 8 for the brand, and more convenient customer service in the western portion of the RSB Market,  
 9 there is no reason to believe that the additional dealership will not *increase* the value of Mr.  
 10 Sherman’s investment in the Ontario Volkswagen dealership. Mr. Sherman’s enthusiastic effort to  
 11 secure the Montclair dealership for himself, and his pre-protest assurances that both dealerships  
 12 would be successful, are consistent with an expected increase in the investment value of the Ontario  
 13 dealership after Montclair is open for business.

14 **2. Mr. Roesner’s analysis included numerous omissions and flaws**

15 The likelihood of Protestant being “forced out of business” is further dispelled by several  
 16 key omissions and flaws in Mr. Roesner’s financial impact analysis. For example, Mr. Roesner  
 17 concluded that approximately 75% of the purported financial impact on Protestant will come from  
 18 “lost” service and parts business.<sup>130</sup> However, Mr. Roesner was unable to say when that impact  
 19 would actually occur.<sup>131</sup> Mr. Ray testified that, if this protest is overruled and the Montclair  
 20 dealership is allowed to proceed, it would likely take two years or more before the facility could be  
 21 built and open to the public.<sup>132</sup> Mr. Sherman testified that, in his experience, after a new dealership  
 22 opens for business it takes another four to five years before the new dealership’s service business  
 23 comes up to speed.<sup>133</sup> Accordingly, it could be 2019-2020 or even later before Montclair provided

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25 <sup>130</sup> RT 1-13 at 26:6-11.  
 26 <sup>131</sup> RT 1-13 at 30:10-14.  
 27 <sup>132</sup> RT 1-18 at 161:2-11.  
 28 <sup>133</sup> RT 1-11 at 220:2-18.

1 significant service and parts competition, rendering Mr. Roesner’s conclusions on financial impact  
 2 highly speculative.

3 Mr. Roesner’s analysis was also flawed in that he applied the *exact same* analysis to both  
 4 warranty and non-warranty service work, despite the fact that Protestant competes for non-warranty  
 5 work with numerous auto repair facilities ranging from other dealerships to Jiffy Lubes, and thus  
 6 the addition of a single additional facility in the RMA will have a far smaller impact on a  
 7 customer’s choices for customer-pay service work.<sup>134</sup>

8 Mr. Roesner also applied the exact same proximity-based analysis to Protestant’s retail and  
 9 wholesale parts business, despite the fact that the wholesale side of the business is based primarily  
 10 on relationships and not on the location of the selling dealership.<sup>135</sup> Similarly, Mr. Roesner used the  
 11 same analysis for new and used cars, even though new cars are available only at authorized  
 12 dealerships, whereas customers can go to a variety of competitors for used Volkswagens, including  
 13 other dealerships in Protestant’s own auto mall.<sup>136</sup>

14 **3. Mr. Roesner’s analysis of the effect of the Puente Hills reestablishment**  
 15 **ignores Bozzani’s declining performance**

16 Mr. Roesner’s analysis is also flawed because he justified his “fixed pie” conclusions in  
 17 large part by pointing to the decline in sales by Bozzani Motors in 2010 after the reopening of a  
 18 Volkswagen dealership in neighboring Puente Hills.<sup>137</sup> Mr. Roesner admitted that he did not account  
 19 for the fact that Bozzani’s sales had *already* decreased by approximately 22% between 2008 and  
 20 2009, the year *before* Puente Hills reopened.<sup>138</sup> Bozzani’s sales effectiveness likewise declined  
 21 precipitously from 2008 to 2009.<sup>139</sup> As Mr. Roesner conceded, Puente Hills could not have  
 22  
 23

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24 <sup>134</sup> RT 1-13 at 31:20-24, 32:18-33:1, 34:18-21.

25 <sup>135</sup> RT 1-13 at 38:11-14; 1-14 at 24:6-18.

26 <sup>136</sup> RT 1-14 at 22:21-23:12.

27 <sup>137</sup> RT 1-12 at 56:23-57:12.

28 <sup>138</sup> Ex. J42, Tab 10, p.1.

<sup>139</sup> Ex. J42, Tab 10, p.2.

1 accounted for this decline,<sup>140</sup> and yet Mr. Roesner assumed that a nearly identical decrease in sales  
 2 from 2009 to 2010 *must* have been caused by Puente Hills.

3 In fact, Mr. Bozzani himself provided a different explanation for his declining performance  
 4 over the prior two years. He testified that during that time frame he spent a considerable amount of  
 5 time and attention on his failing Kia dealership.<sup>141</sup> Mr. Bozzani admitted that the problems with his  
 6 Kia dealership “diminished [his] effectiveness as a Volkswagen dealer,” and “affected [his] ability  
 7 to operate the Volkswagen dealership to the best of his ability.”<sup>142</sup> Mr. Roesner’s analysis did not  
 8 account for these facts.<sup>143</sup> Mr. Mears also testified that Bozzani Motors has been suffering from  
 9 other factors, unrelated to the addition of the Puente Hills dealership.<sup>144</sup> Finally, Mr. Bozzani  
 10 testified that, after the Puente Hills dealership reopened in 2010, he made no effort to adjust his  
 11 business to account for the new dealership.<sup>145</sup> Mr. Roesner’s analysis did not account for these  
 12 performance related matters, but rather simplistically assumed that the proximity of Puente Hills  
 13 was the only factor affecting Bozzani’s performance.

14 Further undermining Mr. Roesner’s flawed conclusion is the fact that, while Bozzani’s sales  
 15 decreased from 2009 to 2010, total sales in Volkswagen’s Area 53 (which includes both Bozzani  
 16 and Puente Hills) *increased* by 29% during that period,<sup>146</sup> reflecting substantial growth in the market  
 17 after the Puente Hills dealership was re-established. During that same time period after Puente Hills  
 18 reopened, Volkswagen’s market share in the PAIs surrounding Puente Hills actually *increased* as a  
 19 percentage of California average: from 57.2% to 69.5% in the Puente Hills PAI,<sup>147</sup> from 60.5% to  
 20  
 21

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22 <sup>140</sup> RT 1-14 at 188:9-189:9; Ex. J42, Tab 10, p. 2.

23 <sup>141</sup> RT 1-11 at 143:5-13.

24 <sup>142</sup> RT 1-11 at 143:14-23.

25 <sup>143</sup> RT 1-12 at 160:3-23.

26 <sup>144</sup> RT 1-19 at 47:1-7, 100:25-101:8, 109-114.

27 <sup>145</sup> RT 1-11 at 142:25-143:4.

28 <sup>146</sup> RT 1-11 at 144:4-13; Ex. R64.

<sup>147</sup> Ex. J44 at A-70.

1 69.6% in Bozzani’s own PAI,<sup>148</sup> from 107.8% to 111.8% in the Pasadena PAI,<sup>149</sup> and from 57.6% to  
 2 77.6% in the Alhambra PAI where a second Volkswagen dealership was established in mid-2010.<sup>150</sup>

3 Moreover, in these four PAIs (i.e., the ones that would have been most affected under Mr.  
 4 Roesner’s “proximity” theory) Bozzani’s total sales decreased by just 22 new cars from 2009 to  
 5 2010 (based on August 2010 annualized data), and, contrary to Mr. Roesner’s “proximity” theory,  
 6 nearly half of that decrease -- 10 sales -- occurred in ***Bozzani’s own PAI***.<sup>151</sup> Accordingly, the  
 7 location of Bozzani’s “lost” sales demonstrates that Puente Hills was not the cause of Bozzani’s  
 8 poor performance. This fact further supports the conclusion echoed by nearly every witness in this  
 9 case that the opening of a dealership in Montclair is likely to “grow” the total market for  
 10 Volkswagens in the RMA, thereby leading to additional sales opportunities for both the new dealer  
 11 ***and*** Protestant.

12 ***4. Existing sales opportunities available to Protestant can more than offset***  
 13 ***any “loss” of future sales to the Montclair dealership***

14 As explained in detail above, the objective data proves there are more than ample sales  
 15 opportunities in both the Montclair RMA and the overall RSB Market to support the addition of the  
 16 Montclair dealership without any negative impact on Protestant. Thus, if increased competition and  
 17 customer convenience, enhanced brand awareness in the market, and refocused efforts by  
 18 Volkswagen dealers in the RSB Market on their own territories results in the capture of just a  
 19 portion of the sales currently being lost to competitors, total sales by Protestant and the other dealers  
 20 ***will not decrease at all.***

21 Mr. Roesner’s analysis does not contradict these results, because Mr. Roesner’s calculations  
 22 failed to account for any sales ***growth*** whatsoever. As Mr. Roesner himself testified, if the  
 23 Montclair and Ontario areas were to experience even a small amount of growth in Volkswagen sales  
 24 between the time data was available for his analysis (i.e., July 2010) and the date the Montclair

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25 <sup>148</sup> Ex. J44 at A-72.

26 <sup>149</sup> Ex. J44 at A-71.

27 <sup>150</sup> Ex. J44 at A-73.

28 <sup>151</sup> Ex. J44 at A-77.

1 dealership opens in 2015 -- whether from increasing industry sales, increasing Volkswagen market  
 2 share, or growth due to the Montclair dealership itself -- that growth can more than offset the  
 3 theoretical “lost” sales assumed by Mr. Roesner.

4 Mr. Roesner’s “fixed pie” theory is also flawed in that it not only fails to account for any  
 5 increase in Volkswagen’s market share as a result of its aggressive growth plans, it also fails to  
 6 account for any potential *decrease* which may occur if the protest is sustained and Volkswagen  
 7 remains unable to maintain a competitive dealer network in the RMA and RSB Market. As Mr.  
 8 Roesner testified, Volkswagen’s competitors are not going to stand still -- they have and will  
 9 continue to grow their own dealer networks to take advantage of the numerous auto malls and  
 10 freeway locations in the market and the tremendous ongoing population growth in the market,  
 11 thereby increasing their brand awareness and convenience for local customers.<sup>152</sup> If Volkswagen is  
 12 prevented from keeping pace with its competitors in the RSB Market, Protestant (and the other  
 13 Volkswagen dealers in the market) will likely lose even more sales to other brands.<sup>153</sup>

14 **5. Before filing the protest, Mr. Sherman and Mr. Reed took the position that**  
 15 **there are ample sales and revenue opportunities for both the Ontario and**  
 16 **Montclair dealerships to be successful**

17 Finally, Protestant’s own actions and words prior to learning that Mr. Sherman would not be  
 18 the Montclair dealer disprove Protestant’s present dire predictions. On March 8, 2010 Mr. Sherman  
 19 wrote to Mr. Ray and *expressly* stated his firm belief that he could operate a successful dealership in  
 20 Montclair while maintaining his “award-winning” dealership in Ontario. In that correspondence,  
 21 Mr. Sherman wrote that his Ontario dealership “meets or exceeds all of the important areas that  
 22 demonstrate good dealer management”<sup>154</sup> -- areas that, according to Mr. Reed, include sales  
 23 effectiveness, customer service and strong sales of parts and service.<sup>155</sup> Mr. Sherman went on to  
 24

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25 <sup>152</sup> RT 1-12 at 123:1-18.

26 <sup>153</sup> RT 1-14 at 20:13-21:8.

27 <sup>154</sup> Ex. R10.

28 <sup>155</sup> RT 1-10 at 158:5-159:8.

1 write that he “wouldn’t consider this opportunity [Montclair] if I wasn’t confident it [the award  
 2 winning performance] could be duplicated at my facility in Montclair.”<sup>156</sup>

3 In that same correspondence, Mr. Sherman also defined what he meant by a “successful”  
 4 dealership in Montclair, stating that his Montclair dealership would “[m]aintain a superior Sales and  
 5 Service Experience for Volkswagen customers,” and would “[p]rovide an above average sales  
 6 penetration in [his] assigned AOR.” Thus, as of March 8, 2010, Mr. Sherman expressed confidence  
 7 that a dealership in Montclair could not only be successful, but could in fact “duplicate” Ontario’s  
 8 success as one of the top performing dealerships in the United States -- a belief Mr. Sherman  
 9 reiterated at the hearing:

10 **Q. And you -- you, as of March 8, 2010, you were confident that**  
 11 **you could duplicate your good dealership management and**  
 12 **success from Ontario -- that you could duplicate that in**  
 13 **Montclair. You were confident, correct?**

14 **A. Relatively, yes.**<sup>157</sup>

15 Mr. Reed also testified that he shared Mr. Sherman’s belief:

16 **Q. So you were confident that if you had been awarded the point**  
 17 **in Montclair that you could have duplicated your success at**  
 18 **Ontario in a Montclair dealership, right?**

19 **Q. I do.**<sup>158</sup>

20 Mr. Reed went on to testify that he could have created a “fantastic Volkswagen experience”  
 21 in Montclair.<sup>159</sup>

22 Most striking, Mr. Sherman *explicitly* confirmed that he believed a Montclair dealership  
 23 would provide “an above average sales penetration” in the Montclair PAI. Thus, in March 2010 Mr.  
 24 Sherman stated clearly that Volkswagen could actually *exceed* expected sales in Montclair if a new  
 25 dealership were to open there -- sales which would be taken from Volkswagen’s competitors, not  
 26 cannibalized from Protestant’s existing Ontario dealership.

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27 <sup>156</sup> Ex. R10.

28 <sup>157</sup> RT 1-11 at 193:18-22.

<sup>158</sup> RT 1-10 at 161:19-23.

<sup>159</sup> RT 1-10 at 162:5-9.

1           The pre-protest statements of Mr. Sherman and Mr. Reed are even more noteworthy given  
 2 that their proposed location in Montclair was not adjacent to the 10 Freeway, nor was it in an auto  
 3 mall, or even close to any other new vehicle dealerships. Several witnesses testified that they would  
 4 expect a dealership located next to a freeway or in an auto mall (such as the proposed Metro Group  
 5 location) to sell *more* cars than a dealership that did not benefit from those advantages.<sup>160</sup> Thus,  
 6 given that Protestant believed prior to this Protest that there are enough sales opportunities to  
 7 support both Protestant and Mr. Sherman’s proposed location in Montclair, Protestant cannot  
 8 legitimately claim that there are not enough sales opportunities to support the proposed Metro  
 9 Group location in a Montclair auto mall with freeway visibility.

10 **XI. THERE IS NO GOOD CAUSE TO SUSTAIN THE PROTEST UNDER EXISTING**  
 11 **CIRCUMSTANCES**

12           Finally, Protestant’s arguments at the time of the hearing were predicated on sales and  
 13 economic data taken from the depths of the recession. Protestant acknowledged that Volkswagen  
 14 was underrepresented in the RSB Market but argued that it was not the right “time” to establish a  
 15 new dealership in the RSB Market.<sup>161</sup> The Board’s initial decision to sustain the Protest in 2011 also  
 16 appears to have been based in large part on the Board’s concerns regarding the recession and the  
 17 state of the economy *at that time*. Certainly, in 2011 the prospects for the economy remained murky  
 18 and the question of whether vehicle sales would recover was an open question. Today, that is no  
 19 longer the case.

20           Mr. Farhat testified, and Mr. Roesner conceded, that if automotive sales in the market grew  
 21 or Volkswagen continued to gain market share in future years, by the time the Montclair dealership  
 22 actually opens and begins serving customers, Protestant will have ample opportunity to replace any  
 23 “lost” sales in Montclair with sales in its own territory and the surrounding RSB Market.

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24  
 25 <sup>160</sup> See e.g., Mr. Bozzani’s testimony, RT 1-11 at 146:24-147:12; Mr. Starr’s testimony, RT 1-19 at 144:24-145:14.

26 <sup>161</sup> Even in the context of those tough economic times, Protestant’s argument is flawed because the objective  
 27 evidence in the record demonstrates overwhelmingly that Volkswagen is woefully underrepresented in the Montclair  
 28 RMA and the RSB Market as a whole, that there is more than ample opportunity for both Protestant and a new dealer in  
 Montclair to thrive, and that Protestant failed to meet its burden of proof.

1 Volkswagen’s February 22, 2013 Motion to Augment the Record and/or Request for Official Notice  
2 included updated evidence for the 2011 to 2013 time frame. Because that Motion was denied by the  
3 Board, Volkswagen has not and will not make any reference to the specific, updated data that was  
4 included with the Motion.

5 However, Protestant cannot ask this Board to close its eyes and pretend that it is still 2011.  
6 The Vehicle Code mandates that “the board *shall* take into consideration the existing  
7 circumstances...” in deciding whether to sustain the Protest. There is no realistic concern, under  
8 *existing circumstances* today, in 2013, that Protestant will suffer “ruinous competition” from the  
9 new Volkswagen dealership in Montclair.

10 Accordingly, while the Board may have been concerned that the timing was not right in  
11 2011 to open a new dealership in Montclair, based on the economy at that point in time, those  
12 concerns must now be set aside. There is no longer any conceivable concern that Protestant will be  
13 negatively affected by the proposed Montclair dealership.

14 **XII. CONCLUSION**

15 The evidence in the record is “overwhelming.” Protestant had the burden to prove that the  
16 proposed new dealership in Montclair rises to the level of “offensive” or “unfair or oppressive trade  
17 practices” which is the standard set by the United States Supreme Court. Protestant failed to meet its  
18 burden of proof. Based on the objective evidence in the record, there is simply no good cause for  
19 the Board to prevent the establishment of a new Volkswagen dealership in the City of Montclair at  
20 this time.

21 Indeed, the evidence is unequivocal that, as long as Volkswagen is prevented from  
22 establishing a dealership in Montclair, consumers, Volkswagen, and the public at large will  
23 continue to suffer harm from inadequate competition and customer convenience.

24 The existing circumstances do not establish “good cause” for this Board to prevent Mr.  
25 Hawkins from building a Volkswagen dealership in Montclair, putting numerous people to work,  
26 opening the doors to consumers, and providing increased competition and improved customer  
27 convenience in this market.

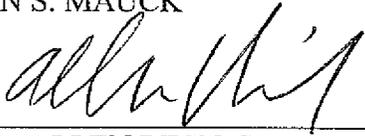
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Accordingly, Volkswagen respectfully submits that this Protest should be overruled.

DATED: February 28, 2013

JEFFER MANGELS BUTLER & MITCHELL LLP  
ALLEN RESNICK  
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**PROOF OF SERVICE**

**STATE OF CALIFORNIA, CITY AND COUNTY OF LOS ANGELES**

I am employed in the City and County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is: 1900 Avenue of the Stars, 7<sup>th</sup> Floor, Los Angeles, California 90067.

On February 28, 2013, I served the document(s) described as **RESPONDENT VOLKSWAGEN OF AMERICA, INC.'S OPENING BRIEF ON REMAND FROM THE SUPERIOR COURT** in this action by placing the true copies thereof enclosed in sealed envelopes addressed as follows:

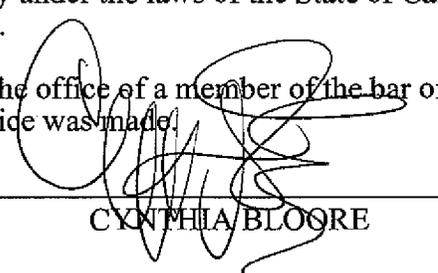
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- (BY MAIL) I am "readily familiar" with the firm's practice for collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.
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- (BY OVERNIGHT DELIVERY) I caused said envelope(s) to be delivered overnight via an overnight delivery service in lieu of delivery by mail to the addressee(s).

Executed on February 28, 2013, at Los Angeles, California.

- (STATE) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.
- (FEDERAL) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

  
\_\_\_\_\_  
CYNTHIA BLOORE