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10 **STATE OF CALIFORNIA**

11 **NEW MOTOR VEHICLE BOARD**

12 In the Matter of the Protest of:

13 SHAYCO, INC., dba
14 ONTARIO VOLKSWAGEN,

15 Protestant,

16 v.

17 VOLKSWAGEN OF AMERICA, INC.,

18 Respondent.
19 _____/

20 **Protest No: PR-2265-10**

21 **PROTESTANT'S WRITTEN ARGUMENT**
22 **PURSUANT TO GOVERNMENT CODE**
23 **SECTION 11517(C)(2)(E)(ii)**

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1 **I. INTRODUCTION**

2 The record before the Board and the evidence contained therein, demonstrates the many
3 facts and circumstances establishing good cause to prohibit the proposed establishment of a
4 Volkswagen dealership in Montclair, California. Protestant introduced substantial, if not
5 overwhelming, evidence of the dire economic factors facing the four existing Volkswagen dealers
6 *currently* assigned responsibility for portions of the Relevant Market Area (“RMA”). The evidence
7 provides substantial and compelling evidence of the adverse impact the proposed establishment, if
8 permitted, would have upon the existing dealers and the corresponding strong likelihood that one or
9 more of these dealers would be forced to close its doors as a result. Upon the Board’s
10 reconsideration of the record before it, the following findings are clear:

- 11 • The Riverside-San Bernardino (“RSB”) Market and the RMA are already adequately
12 served by the four existing dealers currently assigned responsibility for portions of the
13 RMA.
- 14 • Volkswagen of America, Inc.’s (“VWoA”) opportunity analysis is inherently unreliable
15 and cannot support findings that available opportunity exists within the Ontario Primary
16 Area of Influence (“PAI”) to permit Protestant to re-capture the 19.4% of its new VW
17 sales that would be lost to the proposed Montclair dealer.
- 18 • The evidence exposes the flaws of VWoA’s purported “opportunity” analysis in three key
19 areas:
 - 20 1. First, VWoA’s use of a California average is an unreasonable standard to use to
21 measure performance within the RSB Market and RMA given the unique characteristics of
22 these areas.
 - 23 2. Second, this analysis is designed to show registration loss even in the highest
24 performing markets in California and is therefore inherently unreliable.
 - 25 3. The third major flaw in VWoA’s “opportunity” analysis is the use of “in-sell” as lost
26 opportunity available to Protestant. This analysis is self-contradictory and based upon the
27 impossible assumption that any dealer can capture 100% of all sales within its own PAI.

28

- 1 • Real-world evidence confirms the dire economic conditions facing VW dealers in the RSB
2 Market and explains why the VW brand performs below the California average there.
- 3 • Protestant's current efforts to maximize its sales, service and parts business leave little
4 room for improvement. VWoA's suggestion that Protestant is missing out on large
5 volumes of available VW sales opportunities is not supported by the record.
- 6 • The establishment of the proposed Montclair dealer will adversely affect the retail motor
7 vehicle business and the public welfare in the relevant market area.
- 8 • VWoA's immediate plans to fill the Redlands and Victorville points will effectively
9 eliminate any opportunity Protestant might have to re-capture the 19.4% of its sales to be
10 lost to the proposed Montclair point, because the Montclair, Redlands and Victorville
11 PAIs account for approximately 40% of Protestant's total sales.
- 12 • Protestant has been recognized by VWoA as being in an "elite" category. The loss of one
13 of VWoA's best performing dealers would no doubt reduce the level of service currently
14 being provided to Volkswagen customers located within the RMA and beyond.
- 15 • Protestant has made a substantial and permanent investment in its Volkswagen franchise
16 that will likely be lost should the proposed establishment of an additional Volkswagen
17 dealer in Montclair, California, be permitted.

19 **II. PROCEDURAL HISTORY**

20 **A. Notice of Intent and Protest**

21 VWoA approached Ontario VW in August, 2009, with its proposal to establish additional
22 Volkswagen points in Montclair and Redlands, California. VWoA representatives Tony Ray and
23 Steve Mears met with Ontario VW's Gary Sherman and Earl Reed to gauge their interest in either of
24 the proposed points. Mr. Sherman explained his concerns that the market could not support an
25 additional point in Montclair, but he became convinced that VWoA intended to establish a dealer in
26 Montclair.

27 By letter dated July 30, 2010, VWoA gave notice to Ontario VW of VWoA's intent to
28 establish the proposed Montclair dealer. (J Ex . 35.) On August 13, 2010, Ontario VW filed a

1 timely Protest against the establishment of the proposed Montclair dealership. (J Ex. 36.)

2 **B. The Merits Hearing Before ALJ Archibald**

3 An eight-day hearing on the merits of the Protest was conducted before ALJ Archibald in
4 Sacramento, California, from January 10, 2011, through January 14, 2011, and January 18, 2011,
5 through January 20, 2011. Testimony from 13 live witnesses and more than 100 exhibits were
6 admitted into the record. A considerable portion of the hearing was devoted to the testimony of
7 Ontario VW's expert witness, Joseph Roesner, of the Fontana Group, and VVoA's expert witness,
8 Sharif Farhat, of Urban Science. Each expert also prepared reports that were entered into evidence
9 during the initial hearing, as well additional reports that were submitted on remand.

10 **C. The May 26, 2011, Board Meeting**

11 On May 26, 2011, the Board considered oral argument from counsel for both VVoA and
12 Ontario VW regarding ALJ Archibald's First Proposed Decision. The Board's concern regarding
13 the likely impact to the existing retail motor vehicle business was quickly placed at issue, as
14 evidenced by Board Member Stevens' early question to Ontario VW's counsel: "I did not see it in
15 the Decision, but was there testimony about where you primarily are drawing most of the business?"
16 (RT 5/26/11, 14:25-15:2.)

17 In response to Board Member Stevens' question, counsel directed the Board's attention to
18 several pages from Ontario VW's expert's report, which sets forth uncontroverted evidence of the
19 sales made by the four existing Volkswagen dealers currently assigned responsibility for portions of
20 the RMA. (J Ex. 42, Tab 11, Page 5; RT 5/26/11, 15:16-16:3.) As the record reflects, Ontario VW
21 made approximately 40% of all Volkswagen sales in the Montclair PAI, accounting for almost 20%
22 (19.4%) of its own total sales in 2009.

23 Ultimately, the Board by a three-to-one vote decided to remand the matter to ALJ Archibald
24 to either take additional evidence or briefing on the good-cause factor at § 3063(b) of the Vehicle
25 Code. (RT 5/26/11, 66:21-67:3.)

26 **D. Hearing on Remand**

27 The Board's Corrected Order Remanding the Proposed Decision dated May 19, 2011,
28 ("Remand Order") provided ALJ Archibald the following instructions:

1 “(1) The ALJ shall consider the evidence in the record or reopen the record as may
2 be necessary to make additional findings of fact concerning the effect on the retail
3 motor vehicle business and the consuming public in the relevant market area only.

4 (Veh. Code § 3063(b))

5 (2) The ALJ shall provide additional facts on the methodology used in concluding
6 that Protestant made 19.4% of new Volkswagen sales from the Montclair PAI in
7 2009. (J Ex. 42, Tab 11, Page 5.)

8 (3) The ALJ shall make a determination that (assuming hypothetically) there is a
9 19.4% reduction in Protestant’s sales due to the establishment of the proposed dealer
10 in Montclair, where, in terms of geography, will Protestant re-capture those lost
11 sales? The focus should not be limited to new retail sales but should also consider
12 used vehicle sales, as well as warranty and any other customer pay services.

13 (4) The ALJ shall have discretion to order additional evidence, briefing, and/or
14 arguments.”

15
16 Subsequent to the Board’s Remand Order, Ontario VW submitted additional evidence
17 through declarations by Earl Reed, Gary Sherman, Greg Bozzani and Joseph Roesner. VWoA also
18 submitted additional evidence, yet it failed to address one of the key issues on remand, namely,
19 *where in terms of geography will Ontario VW recapture the 19.4% of its sales presumed to be lost*
20 *to the Montclair dealer*, should it be established? VWoA simply reargued its flawed “available
21 opportunity” analysis and was unable to provide any evidence regarding where these lost sales could
22 be recaptured. After additional briefing, the matter was submitted to ALJ Archibald for further
23 findings pursuant to the Board’s instruction.

24 ALJ Archibald’s Proposed Decision Following Remand once again overruled the Protest.
25 (Prop. Dec. 9/15/11 at Page 42.) It was plain to see that the Proposed Decision Following Remand
26 failed to meaningfully answer¹ the seminal question of the Board’s Remand Order -- *where in terms*

27
28 ¹ The ALJ’s Proposed Decision on Remand failed to specify where in its own PAI or throughout the entire RSB
Market, the lost sales could reasonably be expected to be recaptured by Ontario VW. (Prop. Dec. 9/15/11 at Page

1 of geography will Ontario VW recapture the 19.4% of its sales presumed to be lost to the Montclair
2 dealer, should it be established? The Board considered the ALJ's Proposed Decision Following
3 Remand at the Board's September 27, 2011 meeting.

4 **E. The September 27, 2011, Board Meeting**

5 At the Board's September meeting, counsel for the parties were once again provided an
6 opportunity to present oral argument to the Board members. (RT 9/27/11.) In addition to the
7 presentation of oral argument, counsel also provided the Board members a number of exhibits from
8 the record for consideration. Ultimately, the Board voted unanimously, with Mr. Brooks abstaining,
9 to reject the ALJ's Proposed Decision Following Remand and to draft its own decision for
10 consideration at the Board's December meeting. (Id. at Pages 95-96.)

11 **F. The December 13, 2011, Board Meeting**

12 Having rejected the Proposed Decision following Remand, the Board, with assistance of the
13 Board's staff, drafted its own decision sustaining the Protest. A copy of the Board's Decision was
14 provided to the parties well in advance of the Board's December 13, 2011, meeting in Sacramento,
15 California. (Order Conf. Decision, 11/30/11.) Ordinarily the parties are provided fifteen minutes to
16 make their arguments to the Board. In this instance, the Board, recognizing the unique procedural
17 events leading to the issuance of the Final Decision, permitted additional time to ensure VWoA had
18 "ample opportunity" to make any argument it considered to be important. (RT 12/13/11, 10:13-15.)
19 Neither party was prevented from presenting as lengthy and as comprehensive an argument as it
20 chose.

21 After careful consideration of the parties' arguments, the Board voted three-to-none to
22 adopt the Final Decision. VWoA filed this action on January 24, 2012.

23 **G. The Writ Proceedings Before the Sacramento Superior Court**

24 On or about January 24, 2012, VWoA filed its Verified Petition for Writ of Administrative
25 Mandate, in the Superior Court of Sacramento County, requesting that the Court issue a ruling
26 directing the Board to vacate its decision and instead issue a decision overruling the Protest.

27
28

29.)

1 The matter was briefed for the Court and oral arguments were presented on December 7,
2 2012. The Court issued its Ruling on Submitted Matter: Petition for Writ of Mandamus (“Ruling”),
3 dated January 30, 2013, remanding the matter back to the Board with instructions that:

4 “The writ shall direct the Board to vacate its final decision in this case, dated
5 December 13, 2011, and shall remand the matter to the Board with directions to
6 reconsider the matter in compliance with Government Code section
7 11517(c)(2)(E)(ii) by deciding it upon the record after affording the parties an
8 opportunity to present oral or written argument.”
9

10 In Response to the Court’s Ruling, the Board vacated its Decision at the February 22, 2013,
11 Meeting and scheduled additional written and oral argument to be considered by the Board
12 Members at the March 13, 2013, Meeting.
13

14 **III. ARGUMENT**

15 **A. The Inland Empire Area and the RMA are Currently Over-Dealers and the** 16 **Existing Dealer Network Cannot Sustain the Addition of Another Volkswagen** 17 **Franchise.**

18 California Vehicle Code Section 3063(e) requires the board to consider whether the
19 establishment of an additional dealership would increase competition and therefore be in the public
20 interest. In this case, the RMA is already saturated with Volkswagen dealers and these dealers
21 provide ample competition and opportunity for the public to purchase and service their Volkswagen
22 vehicles. The addition of a Montclair dealership will result in ruinous competition among existing
23 Volkswagen dealers, and therefore would not be in the public interest.

24 Just prior to its decision to establish the proposed dealer in Montclair, Volkswagen had
25 already added two additional dealers to the Inland Empire-San Gabriel Valley area in 2010, in
26 Puente Hills and Alhambra (RT Vol. 1, 124:23-126-11; RT Vol. 2, 43:24-44:16, 115:2-4, 117:2-6,
27 140:11-16; RT Vol. 6, 24:1-4, 28:16-21), with additional open points waiting to be filled in
28 Redlands and Hemet, and Victorville having already been filled. (RT Vol. 1, 149:7-10; RT Vol. 6,

1 29:16-22, 87:14-17, 118:19-119:5, 119:16-24, 121:2-11, 121:16-24; RT Vol. 8, 163:3-5.) This
2 sudden influx of dealers has created a situation where VW dealers in the area are struggling to
3 remain viable. (RT Vol. 2, 43:24-44:5, 117:22-118:12, 120:19-121:9; RT Vol. 3, 60:4-61:17.) The
4 example of Puente Hills VW and its impact upon Bozzani Motors is a clear illustration of this fact.

5 **i. The RMA includes portions of the PAI's of Bozzani Motors, Puente Hills VW,**
6 **CardinaleWay VW and Protestant.**

7 In 2009, Bozzani made 60 sales into the Montclair PAI accounting for 12.8% of its sales,
8 CardinaleWay made 34 sales or 9.3% of its total sales in the Montclair PAI, and Protestant captured
9 116 sales there, representing 19.4% of its total sales. Combined, Bozzani Motors, CardinaleWay
10 and Protestant made more than 70% of all VW sales within the Montclair PAI. (P Ex. R 1, Tab 1,
11 Page 1.)

12 While these three dealers alone more than adequately serviced VW customers within the
13 RMA and throughout the Montclair PAI, an additional VW dealership was established in Puente
14 Hills, in January 2010, which now also serves the RMA and Montclair PAI. (RT Vol. 2, 116:5-15.)
15 Through July 2010, Puente Hills captured 10.1% of all VW sales in the Montclair PAI,
16 CardinaleWay 10.1%, Bozzani Motors 16.7% and Ontario VW was up to 39.9% of all VW sales in
17 the Montclair PAI. These four dealers now accounted for 76.8% of new VW sales in the Montclair
18 PAI. (P Ex. R 1, Tab 1, Page 2.)

19 The RMA is more than adequately served by the four dealers currently serving it. Moreover,
20 Puente Hills VW continues to increase its penetration into the RMA as it becomes more established,
21 and Bozzani Motors is expected to increase its VW penetration as well after it removes the Kia
22 franchise from its overall dealer operation. (Bozzani Decl. ¶ 3; P Ex. R 9; RT Vol. 4, 59:9-23.)

23 **ii. Further Evidence that the RMA is Already Adequately Served by Existing**
24 **Dealers is the Fact That Volkswagen's Optimal Location Analysis Shows the**
25 **Optimal Location for an Additional Point to Be East of Both the Proposed**
26 **Location and Protestant.**

27 Volkswagen's expert performed an "Optimal Location Analysis" which purports to examine
28 the existing Volkswagen dealer network in the Riverside-San Bernardino market and the location of

1 existing Volkswagen customers, and then determine what would be the best location to establish
2 additional representation in order to provide the greatest improvement in proximity-based customer
3 convenience. (RT Vol. 4, 176:10-179:14.)

4 However, Mr. Farhat deliberately manipulated his analysis to come up with the result
5 Volkswagen desired by conducting his analysis to include the addition of two new dealerships as
6 opposed to the single proposed point that is the subject of this Protest. When performing his
7 analysis for the addition of only a *single* Volkswagen dealership, the result was an optimal location
8 of Redlands-San Bernardino. Mr. Farhat admitted that had he been retained to perform an analysis
9 in support of the addition of a point in the Redlands-San Bernardino area, his analysis would have
10 ended there. (RT Vol. 5, 131:24-132:16.) Instead, Mr. Farhat performed the analysis again, but this
11 time as though Volkswagen was considering the addition of *two* new points. This time, Mr. Farhat
12 saw the result he was looking for and went no further.

13 If Volkswagen was genuinely concerned about increasing customer convenience in the
14 Riverside-San Bernardino market, then it should have concentrated its efforts towards filling the
15 Redlands Open Point. As Volkswagen must concede, its optimal location analysis shows that the
16 Redlands Open Point is actually a better location for a new Volkswagen dealership than the
17 Proposed Montclair Point. (RT Vol. 5, 85:19-23, 176:21-177:2; J Ex. 44, A-52, A-53.)

18 In addition, if the optimal location analysis included the fringe areas of the Riverside-San
19 Bernardino market, then the best location for a new Volkswagen dealership—the location that
20 maximizes customer convenience—is to the northeast, in Victorville. Even if VWoA were willing
21 to open two new dealerships in the market plus fringe area, the two best locations are Victorville
22 and Redlands, not the Montclair site. (RT Vol. 5, 177:2-8; J Ex. 43, Tab 45, Pages 3 and 4.)

23 **iii. Bozzani Motors**

24 Bozzani Motors has been operating at its current location in Covina, CA, since 1996. (RT
25 Vol. 2, 111:10-24, 113:15-17.) In 2003, VWoA established an additional dealership, Puente Hills
26 VW, in the City of Industry less than 10 miles from Bozzani Motors. (RT Vol. 2, 116:5-14.) Overall
27 VW registrations in the area did not significantly increase; instead, the available sales were
28 redistributed between the two dealers. (RT Vol. 3, 56:2-57:6, 60:4-61:17, 71:14-72:23, 106:16-

1 107:17; J Ex. 42, Tabs 10-11 and 25-26.) The Puente Hills dealer operator was Fritz Hitchcock, a
2 longtime successful new car dealer. (RT Vol. 1, 125:6-14; RT Vol. 6, 110:15-113:14.) In 2006, Mr.
3 Hitchcock apparently knew that the market could not support both dealerships and decided to
4 voluntarily terminate his Puente Hills VW dealership. (RT Vol. 6, 111:14-20, 112:9-113:14.)
5 Despite this clear demonstration that the market could not support two VW dealers in such close
6 proximity, even during a strong economy, VWoA appointed yet another dealer in Puente Hills in
7 2010, as the economic indicators in the area remained at levels far below where they were in 2006.
8 (RT Vol. 1, 125:16-19; RT Vol. 2, 117:2-6; RT Vol. 6, 24:1-4; J Ex. 42, Tab 28; P Ex. 50.)

9 Making the situation even worse, in 2010 VWoA established another VW dealership in
10 Alhambra approximately 11 to 12 miles from Bozzani Motors. (RT Vol. 6, 28:20-21; RT Vol. 1,
11 125:14-23; J Ex. 44, A-69.) The end result is that, after Bozzani survived the war of attrition with
12 the previous Puente Hills dealer, VWoA reappointed a dealer at the same Puente Hills location, and
13 soon after appointed yet another VW dealer in Alhambra.

14 The proposed Montclair dealership location is just over ten miles from Bozzani Motors in an
15 area that is currently a significant source of sales, service and parts business for Bozzani Motors, as
16 well as Protestant. (RT Vol. 1, 74:14-24; RT Vol. 2, 81:3-82:10, 118:24-119:16; J Ex. 42, Tab 7,
17 Page 3.) Additionally, former Volkswagen Region Director for the Western Region, Steve Mears,
18 testified that Volkswagen *does* expect the Montclair add-point to have an impact on Ontario VW,
19 Bozzani Motors and Puente Hills VW as well. (RT Vol. 7, 41:4-25.)

20 The detrimental impact to Bozzani resulting from the addition of the Puente Hills and
21 Alhambra points is plainly evident in Volkswagen's 2010 Area 53 Vehicle Sales Report. (R Ex. 64.)
22 This report shows Bozzani's new vehicle sales to be down 25% from 2009, while Area 53 total
23 sales were up 29%. During a time when sales in Area 53 were showing a marked increase in new
24 vehicle sales for 2010 over 2009, Bozzani sold 115 fewer new vehicles than it did in 2009. (RT Vol.
25 7, 45:24-46:25.) Moreover, Alhambra did not record its first sale until July of 2010. It is therefore
26 likely that Bozzani's sales would have been even lower had Alhambra been competing in the market
27 throughout all of 2010.

28

1 Mr. Bozzani testified that the current profitability of Bozzani Motors has decreased
2 significantly since the re-opening of the Puente Hills dealership. (RT Vol. 2, 121:1-6.) Mr. Bozzani
3 also testified that the current financial state of Bozzani Motors is down to a near break-even level.
4 (RT Vol. 2, 121:1-9.) As stated in the preceding paragraph, Mr. Mears corroborated Bozzani's
5 description of his sales by confirming that Bozzani Motors sold 115 fewer cars in 2010 than in 2009
6 (down 25%), during the same period when Area 53 sales were up 29%. (RT Vol. 7, 46:16-22,
7 47:11-20; R Ex. 64.) Rather than attempting to assist Bozzani Motors in increasing its sales and
8 profitability, Volkswagen has decided to add yet another dealership in callous disregard for Bozzani
9 Motors and the other existing dealers in the area.

10 Respondent's witness Tony Ray testified that Bozzani Motors' new vehicle sales are
11 deficient. (RT Vol. 6, 27:13-28:3.) Mr. Ray also explained that VWoA employs Jack Feely, a
12 dedicated Business Improvement Manager for the Western Region, which includes Areas 52 and 53,
13 whose focus is on improving a dealer's profitability and helping dealers better run their businesses.
14 (RT Vol. 6, 114:11-25.) Mr. Feely can be called upon to consult with a dealer by various VWoA
15 employees, including the sales operations manager, the fixed operations manager, the region
16 director or even Mr. Ray as the General Manager of Dealer Network Development. (RT Vol. 6,
17 115:1-8.) However, Mr. Ray testified he never called upon Mr. Feely, nor did Mr. Feely ever visit
18 Bozzani Motors, in order to assist with its sales deficiency issues because Bozzani Motors'
19 performance did not dip below a level that warranted his attention. (RT Vol. 6, 115:9-116:4.)
20 Despite the availability of Mr. Feely as a resource, no one from VWoA has ever asked Mr. Feely to
21 counsel Mr. Bozzani.

22 If the proposed dealership is established in Montclair, Bozzani Motors, Puente Hills VW,
23 Alhambra VW and Protestant will become much weaker dealers. It is likely that at least one of these
24 dealers, and maybe more, will be forced to close its doors. (RT Vol. 1, 210:21-211:22; Vol. 2,
25 27:13-20; 120:2-121:9.) VWoA's attempt to increase sales by adding yet another dealer in
26 Montclair will likely have the same results as the addition of the Puente Hills and Alhambra points:
27 a redistribution of sales and a reduction in profitability for the existing dealers currently serving the
28 RMA.

1 **iv. Ontario VW**

2 The record clearly establishes that Protestant captures approximately 20% of its new VW
3 sales from the Montclair PAI. (P Ex. R 1, Tab 1, Pages 1-2.) Each of these sales would be at risk to
4 the proposed Montclair dealer. Moreover, the proposed dealer would also compete for sales within
5 Protestant's PAI and other PAI's in which Protestant currently competes for and captures sales. For
6 these reasons, it is reasonable to expect Protestant to lose more than 20% of its new Volkswagen
7 sales to the proposed Montclair dealer.

8 **1. Ontario VW's Lost service business.**

9 VWoA's analysis regarding the impact to Protestant's service business is equally unavailing
10 and contrary to the evidence in the record. Protestant consistently captures the largest percentage of
11 available service business within its own PAI compared to the other RSB Market dealers and the
12 second most of the ten dealers in Area 52. From the period of July 1, 2009, through June 30, 2011,
13 Protestant captured 39.3% of market share within its own PAI, while the Area 52 service market
14 share was just 29.4%, the Western region was 36.1% and the National Service Market Share was
15 38.1%. (P Ex. R 6 and 7.) It simply is not plausible to argue that Protestant is underperforming in
16 this department.

17 The Montclair PAI is a significant source of service business for Ontario VW, accounting
18 for 22.5% of the dealership's service business in 2010. (P Ex. R 1, Tab 10 Page 1.) Protestant
19 captured more service in the Montclair PAI than all other market dealers combined. (P Ex. R 1,
20 Roesner Decl. ¶ 33.) The imminent establishment of additional dealers in Redlands and Victorville
21 threatens the 23% of Protestant's service business that came from these areas in 2010 as well. (P Ex.
22 R 1, Roesner Decl. ¶ 34.)

23 In the Montclair RMA, Ontario VW completed 41.4% of the service orders in 2009, 42.3%
24 in 2010 and 42.7% through March 2010. (P Ex. R 1, Roesner Decl. ¶35, Tab 10, Page 2.) Not only
25 does Ontario VW dominate the capture of service business within the RMA, the Montclair PAI
26 accounts for approximately 22.5% of Protestant's service business that will be lost should the
27 proposed Montclair dealer be established, an amount that is likely to be even greater as the proposed
28 Montclair dealer would also capture service customers within the Ontario PAI as well.

1 As with sales, Protestant's service opportunities consist of limited numbers of households
2 immediately surrounding Protestant's location. This relationship is clearly shown on the final page
3 of Protestant's Service Smarts Report for June 2011 which breaks down Protestant's active
4 customers by increments of 2 mile distances from Ontario VW. The tremendous increase in
5 customers from the 2 and 4 mile ranges to the 6 and 8 mile ranges is striking. (P Ex. R 6.) The
6 establishment of the proposed Montclair point would have a crippling effect on Protestant's service
7 business, because it will result in a reduction of Protestant's service business by more than 20%. (P
8 Ex. R 1, Tab 10.)

9 **2. Ontario VW's Lost used vehicle sales.**

10 VWoA's purported Used (vehicle) Sales Opportunity analysis offers no support for its claim
11 that ample sales opportunities exist for Protestant to re-capture any sales lost to the proposed
12 Montclair dealer. First, it fails to address the reduction of available certified pre-owned VW
13 vehicles as more dealers enter the market and available Certified Pre-Owned ("CPO") inventories
14 are further diminished. Second, VWoA offers no meaningful analysis of Protestant's CPO sales
15 opportunities, because it lumps together CPO vehicles and all used VW vehicles. Third, it includes
16 used vehicle sales by any new line-make dealers, used car dealers and even individuals. (R Ex. R 1,
17 Pages 4-6.)

18 There was extensive testimony during the hearing regarding the dwindling supply of CPO
19 VW vehicles. There was also testimony regarding VWoA's recent change to its Variable Bonus
20 Program ("VBP"), which now includes a CPO component as part of the performance benchmarks
21 VW dealers must reach in order to maximize their incentive monies, which in turn affects their
22 ability to offer vehicles at a lower price. While Ontario VW has always made a significant number
23 of CPO sales, now all VW dealers are placing more emphasis on their CPO sales, and inventories
24 have become extremely difficult to maintain. (RT Vol. 1, 87:18-89:1.)

25 VWoA's lumping together of CPO sales and all used vehicle sales, regardless of the seller,
26 offers no insight into the effect the proposed Montclair dealer would have upon Ontario VW's used
27 and CPO sales. Only franchised VW dealers are authorized to sell CPO VW vehicles, while any
28 new or used car dealership, as well as individuals, can sell used VWs. As a result, VWoA's

1 analysis of available used vehicle sales opportunities to Protestant cannot be used in support of any
2 finding that Protestant's used vehicle VW sales business will not be adversely impacted by the
3 establishment of the proposed Montclair point.

4 **B. Volkswagen's ambitious sales projections do not justify a dealer network on a par**
5 **with Honda's, Toyota's, and Nissan's.**

6 Volkswagen has proposed the ambitious goal of selling at least 500,000 vehicles annually by
7 2012 (P Ex. 110, ONTVW 0010479) and approximately 800,000 vehicles annually by 2018 (P Ex.
8 118). Part of VWoA's lofty sales goals rely upon the hoped-for success of the company's redesigned
9 Passat, which is intended to compete with other midsize sedans manufactured by Toyota, Honda
10 and other Asian brands. (*Id.*) However, many in the industry have already shown skepticism about
11 VWoA's ability to reach these annual goals, including analyst Jesse Toprak of TrueCar.com, Eric
12 Noble, president of CarLab and Gary Sherman and Earl Reed of Ontario VW, due to Volkswagen's
13 failure to meet sales expectations in years past. (P Ex. 118); additional citations in the following
14 paragraphs.)

15 Mr. Reed hopes the new Passat will boost Volkswagen sales, but he does not believe this
16 will necessarily translate to increased market share for the brand. (RT Vol. 1, 128:16-24.) There
17 have been several Volkswagen models introduced in the past that failed to perform up to VWoA's
18 expectations, including the Routan, Phaeton, Touareg, and Jetta 2005 redesign. (RT Vol. 1, 128:25-
19 129:22.) Moreover, Volkswagen often fails to achieve its sales expectations. Volkswagen's
20 projected sales volume for 2009 was 257,800 units (P Ex. 110, ONTVW 0010488.) In reality,
21 Volkswagen only attained 213,454 unit sales in 2009. (P Ex. 121.) VWoA's ambitious sales
22 expectations in 2009 depended in large part on the success of five new models being introduced;
23 however, Mr. Reed doubts any of those five models actually achieved their target sales goals. (P
24 Ex. 110, ONTVW 0010487; RT Vol. 1, 128:7-15.)

25 Mr. Reed believes Volkswagen's goal to increase growth is a good goal, but he is rightly
26 concerned that increasing the number of dealers in the market without first having vehicles with a
27 proven track record of success is putting the cart before the horse. (RT Vol. 1, 152:16-22.) Mr. Reed
28 lists several reasons for his concerns, including that: (1) Volkswagen does not have a proven track

1 record of offering vehicles that could achieve its high planning volume projections; (2)
2 Volkswagen's captive financing company does not have the capability to handle the number of sales
3 it is projecting; and (3) other internal aspects of Volkswagen's dealer network are not equipped to
4 handle the growth, including a lack of factory representatives and no replacement program to train
5 technicians. (RT Vol. 1, 152:19-154:21.)

6 In comparison, Toyota, Honda and Nissan have sold between three and six times the annual
7 unit sales of Volkswagen in the previous two years. (P Ex. 121.) Volkswagen believes increasing its
8 current dealer network to be on a par with Honda's, Toyota's or Nissan's will increase its annual
9 sales and market share and allow it to better compete with those manufacturers. (RT Vol. 7, 10:5-9.)

10 Despite Volkswagen's best hopes, neither Gary Sherman nor Earl Reed believe the RMA
11 can support dealers in both Ontario and Montclair with VWoA's current annual sales between
12 250,000 and 400,000 units. (RT Vol. 1, 124:19-22; 210:7-20.) The previous closure of the Puente
13 Hills dealership, Bozzani Motors and Ontario VW's difficulty in attaining profitability, and
14 Volkswagen's failure to achieve previous sales goals with new product models illustrate that
15 Volkswagen is putting the cart before the horse by adding another dealer to Montclair. (*Supra.*)

16 In addition, Jonathan Browning, Volkswagen Group of America's CEO, said that while
17 Volkswagen expects to approximately double sales in the next five years, the current dealer network
18 can handle that much extra volume. Thus, although new dealerships may be needed five years from
19 now, more dealerships are not needed right now. (RT Vol. 3, 125:5-20; J Ex. 42, Tab 29, Page 6.)

20 Moreover, Volkswagen's expert testified that the Riverside-San Bernardino area is only one
21 VW dealer below the California average. (RT Vol. 5, 88:5-22; J Ex. 44, A-41.) Mr. Ray testified
22 that the Victorville point has already been filled, but is not yet operational. (RT Vol. 6, 121:12-15.)
23 Once the Victorville point is operational, the addition of the proposed Montclair point would result
24 in the Riverside San Bernardino area having more dealers than the California state average. If
25 VWoA fills the Redlands point as Mr. Ray testified VWoA is actively pursuing, the Riverside San
26 Bernardino area would have two more dealers than the California average. (RT Vol. 6, 121:2-128:4,
27 J Ex. 44, A-41.) As discussed in more detail in section IV, the Riverside-San Bernardino market is
28

1 not the typical California market as evidenced by its extremely high unemployment rate, high home
2 foreclosure rate and poor credit scores.

3 **i. VWoA's recent brand growth is attributable to the market void left by**
4 **Japanese manufacturers affected by the tsunami.**

5 The March 2011 earthquake and tsunami in Japan severely affected the Japanese
6 manufacturing capacity and dealer inventory levels, which has dramatically reduced their vehicle
7 sales. The interruption of production resulted in a dramatic reduction in Japanese automakers'
8 vehicle shipments to the United States with the corresponding impact to Japanese line-make sales
9 readily apparent. (P Ex. R 16.)

10 Beginning in April 2011, the U.S. market share for Honda, Nissan and Toyota vehicles
11 began to decline as dealership inventory levels dwindled. Concurrent with this decline, U.S. market
12 share for Volkswagen vehicles increased. The recent growth in domestic VW market share is
13 directly attributable to the effects of the crisis in Japan. (P Ex. R 16.)

14 Prior to the tsunami, U.S. market share for Volkswagen vehicles in the first three months of
15 2011 had been below the 2010 level. Beginning in April, however, U.S. market share for
16 Volkswagen vehicles jumped 19% over the prior month market share, surpassing the 2010 level for
17 the first time in the year. Publications in both the automotive and the popular press have confirmed
18 that the disruption in shipments from Japan have benefitted non-Japanese competitors, including
19 Volkswagen. (P Ex. R 25.)

20 As the situation in Japan has stabilized, the Japanese manufacturers have decided to increase
21 production schedules to recover the lost production and sales. This is very likely to result in lower
22 market share by Volkswagen. Toyota, Honda and Nissan have always sold significantly higher
23 volumes in the U.S. than Volkswagen and there is no reason to believe these brands will not
24 rebound strongly as Japanese production returns to full capacity. (Roesner Reply Decl. ¶ 3 (e).)

25 **ii. VWoA's persistent poor product quality issues limit VWoA's growth**
26 **potential.**

27 VWoA has continuously had problems with product quality. Mr. Reed testified regarding
28 VW's history of product quality issues, including a number issues involving one of VW's best

1 selling models, the Jetta. (RT Vol. 1, 132:2-133:16; P Ex. 118.) VWoA's growth plans place a
2 good deal of weight on the success of the newly redesigned Passat, which VWoA hopes will capture
3 sales from Honda, Toyota and Hyundai in the midsize sedan segment. However, Honda, Toyota
4 and Hyundai all have higher product quality scores than VWoA.

5 Evidence was introduced during the initial hearing demonstrating the high number of VW
6 vehicle defect customer complaints. In 2010, VWoA registered the third most customer complaints
7 per 100,000 units sold, but it had the most in 2009. (P Ex. 118.) The only reason VW was not at the
8 top of the list in 2010 was the widely reported braking and acceleration issues with Toyota vehicles
9 and the corresponding rush by it and other manufacturers to provide consumers with notice of any
10 potential product issues. The industry average was up from 30 complaints per 100,000 vehicles in
11 2009 to 47 complaints per 100,000 vehicles in 2010. Toyota, Nissan and Honda's complaint ratios
12 were well below VW's in 2009. (P Ex. 118.)

13 VW's consistent product issues persist to this day as evidenced by the most recent J.D.
14 Powers & Associates' 2011 Initial Quality Study ("IQS"). The IQS looked at the number of
15 problems per 100 vehicles and determined VW's IQS ranking to be fourth from the bottom, while
16 Honda and Toyota were ranked in the top 10. (P Ex. R 18.)

17 **iii. Industry growth predictions continue to be adjusted downward.**

18 VWoA makes the unsupported claim in its Opening Brief on Remand ("OBR") that industry
19 experts widely agree that overall automotive sales will grow significantly over the next several
20 years. (VWA OBR 3:8-10.) However this is not the case. The Automotive News reported on
21 August 18, 2011, that analysts recently reduced their estimates for U.S. automobile sales for 2011
22 and 2012, citing weak consumer confidence that has slowed the recovery. (P Ex. R 22.) J.D.
23 Powers & Associates lowered its estimates for U.S. auto sales in 2011 by 300,000 light vehicles and
24 also reduced its estimate for next year by 600,000. Goldman Sachs lowered its 2012 U.S. auto sales
25 estimate by 1 million light vehicles and the article goes on to list others who have come to the same
26 conclusion. (P Ex. R 22.)

27 VWoA's argument alone, without evidence in support, that industry growth will provide
28 Protestant additional opportunity to offset any losses to the proposed Montclair dealer is

1 unsupported by the record.

2 **C. Protestant's application for the Montclair Point was a defensive measure made to**
3 **protect its substantial and permanent investment.**

4 Steve Mears "led Gary Sherman to believe" that Volkswagen intended to establish a point in
5 the Montclair/Claremont area no matter what the circumstances. (RT Vol. 7, 70:22-73:6.) Having
6 realized he could not convince Volkswagen to abandon this plan, Mr. Sherman attempted to secure
7 the point himself to minimize the devastating effects an additional dealership would have on his
8 operations. (RT Vol. 2, 78:14-79:11, 49:21-23.) Volkswagen's assertion that Mr. Sherman's
9 application is a clear sign he believes the market can support an additional point is disingenuous at
10 best. Mr. Sherman clearly explained that his decision to apply for the Montclair open point was a
11 choice between the lesser of two evils. (RT Vol. 2, 77:13-20.)

12 Mr. Sherman believed the only way the point could be viable in the market was to utilize
13 the economies of scale between his Ontario dealership and the Montclair point. (RT Vol. 2, 77:21-
14 78:13.) Mr. Mears also confirmed that Mr. Sherman believed the Montclair point would work for
15 him, and not necessarily for another dealer due to the economies of scale. (RT Vol. 7, 75:18-23.)
16 For example, Mr. Sherman mentioned to Mr. Mears there could be economies of scale on a
17 management level, personnel level, and IT level, as well as with expense cost and structures. (RT
18 Vol. 7, 76:1-5.) In addition, Mr. Mears admitted that Mr. Sherman's ability to utilize economies of
19 scale between his Ontario dealership and the Montclair proposed point "probably factored into Mr.
20 Sherman's decision to go forward with the proposal" because "he wants to make sure that the
21 business is viable." (RT Vol. 7, 65:25-69:1, 76:21-77:6.)

22 Another factor Mr. Sherman considered in determining the viability of his proposal was his
23 tax sharing arrangement with the City of Montclair. (RT Vol. 2, 70:5-72:17; J Ex. 41.) Mr.
24 Sherman approached the City Manager of Montclair and quickly negotiated a deal for a \$1 million
25 contribution from the city to assist in opening a Volkswagen dealership in Montclair (RT Vol. 2,
26 187:17-25.) With this assistance from the City, a Montclair dealership became more viable for Mr.
27 Sherman. With the City's financial assistance, Mr. Sherman was able to consider running a store in
28

1 Montclair while maintaining his Ontario dealership, in order to prevent an additional dealer from
2 being appointed in Montclair and inevitably cannibalizing Ontario VW's sales.

3 Mr. Sherman's reasoning is not at all inconsistent with Mr. Mears's understanding that Mr.
4 Sherman was applying for the Montclair point because it was viable for him, and not necessarily
5 another dealer, due to economies of scale. Mr. Sherman further explained that once he understood
6 VWoA was intent on adding the Montclair point, he chose not to become confrontational with
7 VWoA about the decision, but rather to pursue the Montclair point as the best candidate in order to
8 protect his interests and utilize the economies of scale available to him. (RT Vol. 2, 228:15-229:5.)
9 Mr. Sherman's other alternative—to passively watch the Ontario dealership lose business and
10 profitability as another dealer opened in Montclair—was not an option to him. (RT Vol. 2, 230:5-
11 231:1.)

12 Volkswagen was willing to offer Mr. Sherman an additional point in Redlands if he would
13 sign off on the proposed Montclair point. (P Ex. 84; P Ex. 80; RT Vol. 2, 33:9-21; 34:21-9.) When
14 first approached, Mr. Ray and Mr. Mears asked Mr. Sherman if he had any interest in the Redlands
15 point. Mr. Sherman responded that he was not interested due to the existence of an open point in
16 San Bernardino. Mr. Sherman explained that the market could not support a point in both San
17 Bernardino and Redlands. (RT Vol. 2, 30:4-19.) Later in 2010, Mr. Ray returned to again offer the
18 Redlands point to Mr. Sherman, but this time he explained that after reconsideration the Redlands
19 and San Bernardino points had been combined into a single point. (RT Vol. 5, 128:7-130:8; RT Vol.
20 8, 190:8-191:8) In response, Mr. Sherman requested that VWoA reconsider its decision to add
21 additional representation in Montclair. (RT Vol. 2, 29:22-31:1; RT Vol. 8, 191:12-192:6.) This is
22 yet another example of Protestant voicing its concern that the market could not support an
23 additional VW dealer in Montclair.

24 Volkswagen's own document states that "Gary Sherman was only applying for the point as a
25 defensive measure." (P Ex. 66.) Mr. Ray testified that he drafted this document soon after hearing
26 from Gary Sherman for the first time that he was opposed to the establishment of the Montclair
27 point. (RT Vol. 6, 170:17-20.) Mr. Ray has no explanation for why he did not add the words
28 "recently" or "for the first time" to his statement of Mr. Sherman's concerns in the Network

1 Development Action. In fact, although Mr. Mears claims the Network Development Action
2 summary is the first time he heard of Mr. Sherman's opposition to the Montclair point, there are no
3 documents evidencing his or any VWoA's representatives' alleged surprise, nor did anyone express
4 such surprise to Mr. Sherman in person. (RT Vol. 6, 170:17-173:2; Vol. 7, 79:3-81:14.) Both Mr.
5 Ray's and Mr. Mears' testimony on this point is patently self-serving and not credible.

6 There are other instances in the record where Mr. Ray's hearing testimony is inconsistent
7 with his deposition testimony, as well as contradictory to other witness' testimony. For example,
8 Mr. Sherman testified that either Mr. Ray or Mr. Mears told him that VWoA was interested in
9 having dealerships everywhere Toyota had dealerships. (RT Vol. 2, 170:16-171:7.) However, Mr.
10 Ray claims he never made such a statement and he didn't think Mr. Mears would have made the
11 statement either, because he didn't believe that was Volkswagen's philosophy. (RT Vol. 6, 135:25-
12 136:16.) But at the hearing, Mr. Mears testified he did tell Mr. Sherman or Mr. Reed that VWoA
13 wanted to be where their "key competition was, not specific to Toyota" (RT Vol. 7, 10:5-8) and
14 later clearly stated that Volkswagen's key competitors include Toyota, Honda, Nissan, Hyundai,
15 Subaru and Mazda (RT Vol. 7, 69:3-13). This inconsistency suggests that Mr. Ray is either unclear
16 about VWoA's actual philosophy or there is reason to doubt the candor of his testimony.

17 Another example of Mr. Ray's inconsistency is his testimony regarding John Hawkins' e-
18 mail address. In his deposition, Mr. Ray testified that all his e-mail communications were with
19 Howard Hawkins because John Hawkins did not have an e-mail address. (RT Vol. 6, 151:9-151:18.)
20 However, when presented an email between himself and Mr. John Hawkins that was written during
21 a period of his early contacts with the Hawkins brothers (J Ex. 53), Mr. Ray changed his testimony.
22 (RT Vol. 6, 152:3-152:12.) Mr. Ray stated at the time he gave his deposition testimony that he
23 communicated mostly with Howard Hawkins because John Hawkins did not have an e-mail
24 address; later at the hearing, Mr. Ray testified it is not uncommon to have up to two contact people
25 for an additional point, but he failed to mention this previously because he did not recall this
26 purported common occurrence at his deposition. (*Id.*) Mr. Ray's memory, and therefore his
27 testimony, is clearly questionable.

28

1 Steve Mears's testimony is even less credible than Tony Ray's. At the hearing, Mr. Mears
2 testified that the term "punching cars" refers to when a dealer, field or region representative or
3 manufacturer reports a car as sold. (RT Vol. 7, 126:17-25, 128:1-17.) In addition, Mr. Mears
4 claimed that manufacturers may pay off cars and report them sold on older year models, but he
5 doesn't call this "falsely reporting sales"; nor had he ever been involved in a "punching cars
6 scheme." (RT Vol. 7, 127:6-24.) Mr. Mears's active employment with Volkswagen was terminated
7 on July 23, 2010. (RT Vol. 7, 124:18-20.) Mr. Steven Smith later testified to events that place the
8 credibility of Mr. Mears's testimony in question.

9 In discussing the term "punching cars," Mr. Smith stated that a dealer might report sales that
10 were not actual retail sales in order to look better on month-end reports. (RT Vol. 8, 133:24-
11 134:13.) When asked if he was aware of a manufacturer ever engaging in the false reporting of sales
12 he struggled to recall something about Mitsubishi engaging in the false reporting of sales. (RT Vol.
13 8, 134:14-18.) When asked if VWoA had ever engaged in such practices he suddenly remembered
14 that Volkswagen was, in fact, involved in falsely reporting sales as recently as June 2010. (RT Vol.
15 8, 19-25.) Mr. Smith testified that up to 20 cars in his area alone were falsely reported in June 2010,
16 involving 8 of his 10 area dealers. (RT Vol. 8, 136:3-15.) Mr. Smith claims he does not know the
17 total number of falsely reported sales in June 2010, but did testify that the false reporting was across
18 the *entire Western Region*. (RT Vol. 8, 137:16-23.) At the time of the falsely reported sales in June
19 2010, the Regional Director in charge of reporting sales for the Western Region was Steve Mears.
20 (RT Vol. 8, 138:9-11.)

21 Mr. Mears denies that any single event resulted in the termination of his employment with
22 VWoA, and Mr. Smith does not know who in the Western Region made the decision to falsely
23 report the sales of VW vehicles. Nevertheless, Mr. Mears was the Regional Director for the Western
24 Region and had reason to want Western Region sales to appear higher than they actually were. (RT
25 Vol. 7, 124:21-125:1; RT Vol. 8, 135:3-8, 135:17-19.) These suspicious circumstances call into
26 question Mr. Mears' credibility. Moreover, VWoA went to great lengths to conceal the reasons for
27 Mr. Mears' termination from VWoA by entering into a confidential separation agreement with Mr.
28 Mears that would keep Mr. Mears as "technically" employed and prevent him or any other VWoA

1 representative from discussing the circumstances of his termination. (RT Vol. 6, 7:1-25, 123:15-25.)

2 **D. Volkswagen's Lost Opportunity Analysis Fails to Account for Actual Conditions in the**
3 **RMA and RSB Market.**

4 Respondent's entire argument for why it needs additional representation is based upon an
5 inherently flawed analysis that looks at VWoA's market share against a competitive set on a
6 California level and then applies that average to a much smaller geography, expecting the same
7 result. Any downward deviation from the California market share average when compared to a
8 smaller geographic area is considered "lost opportunity." This measurement is inherently flawed in
9 that it fails to account for the broad variations within individual markets that make up the average of
10 the larger statewide geography. To assume that each of these individual markets, located within
11 different California areas, with different topographies and geographies, different demographics and
12 different local preferences can perform identically is unreasonable and an unreliable measurement
13 of available sales opportunity in any individual market. Each individual market is unique and
14 represents a broad range of characteristics, which, when combined, create a state average. (J Ex. 42,
15 Tab 8, Pages 1-2; Tab 18, Pages 1-3; J Ex. 43, Supp. Tab 39, Pages 1-5.)

16 Mr. Farhat's analysis greatly overestimates what Volkswagen calls "lost opportunity", which
17 he explains are sales that a new dealership at the Montclair Add Point could realize without needing
18 to take a single sale away from Protestant, or any other existing Volkswagen dealership. (RT Vol. 4,
19 184:23-185:8; J Ex. 44, A-56.)

20 One component of Mr. Farhat's "lost opportunity" analysis consists of measuring "in-sell"
21 within the 10-Mile RMA, which he calculates by counting sales within the 10-Mile RMA by all
22 Volkswagen dealers other than Ontario, the only VW dealer currently located within the RMA. (RT
23 Vol. 5, 107:18-25; J Ex. 44, A-55.)

24 However, parts of the RMA overlap the PAIs (Primary Area of Influence) of three other
25 dealerships besides Ontario: Cardinale Way to the south, Bozzani Motors to the west and Puente
26 Hills VW also to the west. Those other dealerships, whose Volkswagen-assigned PAIs are part of
27 the RMA, are *contractually obligated* to sell Volkswagen vehicles in some of the very census tracts
28 Mr. Farhat used to compute in-sell. (RT Vol. 5, 112:10-16, 113:7-12; J Ex. 44, A-2 and A-5.)

1 Even if counted correctly, in-sell is not an accurate measure of “lost opportunity.” In more
2 than 25 years of doing automobile sales analyses, Mr. Farhat has never seen a market or an area that
3 didn’t have some level of in-sell for a major manufacturer. In-sell is a fact of the automobile
4 industry and by no means is it reasonable to rely on in-sell as an indicator of inadequate
5 performance, nor is it reasonable to expect any one Volkswagen dealer to capture 100% of all sales
6 made within its PAI. (RT Vol. 5, 108:6-20, 172:20-173:13.)

7 The primary component of Mr. Farhat’s “lost opportunity” analysis is what both he and
8 Volkswagen refer to as “Gross Registration Loss” within the 10-Mile RMA, which he comes up
9 with by adding together purported Volkswagen registration shortfalls in each of the census tracts in
10 the 10-Mile RMA that are below Volkswagen’s state average versus a competitive set. (RT Vol. 4,
11 180:2-8; J Ex. 44, A-54.)

12 However, for purposes of his calculation, Mr. Farhat ignores census tracts located within the
13 10-Mile RMA that are *above* state average. If you add together Volkswagen surplus in all of the
14 census tracts in the RMA that are *above* state average, you get what Mr. Farhat might call Gross
15 Registration Gain. A more appropriate calculation of “lost opportunity” would offset Loss by Gain,
16 i.e., compute a net figure, something Mr. Farhat neglects to do. (RT Vol. 5, 115:25-116:22.)

17 As it turns out, Volkswagen is actually doing better in the 10-Mile RMA than in the
18 Riverside-San Bernardino Market as a whole. Thus, if one argues that Volkswagen’s performance
19 within the market is inadequate, it is not Volkswagen’s registration performance within the 10-Mile
20 RMA that is the cause; other parts of the market must be doing worse. (RT Vol. 4, 141:13-18; RT
21 Vol. 5, 148:18-23; J Ex. 44, A-17 and A-20.)

22 Despite the fact that the Riverside-San Bernardino market is doing less than 100% of the
23 state average, this does not, on its own, indicate that the market performance is inadequate. It is a
24 mathematical fact that in any group for which you measure an average, some members of the group
25 are necessarily above average and some are necessarily below average. When you look at a bar chart
26 showing the performance of every California Volkswagen market, some markets are above average
27 while others fall below. (RT Vol. 5, 147:16-22; J Ex. 44, A-21.)

28

1 Mr. Farhat describes the Riverside-San Bernardino market performance as “poor,” implying
2 that he thinks the market can, and should, rise to state average. Since it is mathematically
3 impossible for every California market to be at or above state average, it would be interesting to
4 hear Mr. Farhat explain which markets, if any, are permitted to be below state average, and why the
5 Riverside-San Bernardino market isn’t one of those markets. (RT Vol. 4, 141:8-12.)

6 i. **The California average is an inappropriate benchmark to measure any**
7 **dealers’ or line-makers’ performance in the RMA and RSB Market.**

8 VWoA’s use of the California average assumes the RSB Market, and any market for that
9 matter, should perform at or above the California Market as a whole. In the instant case, VWoA
10 argues that the only obstacle to the RSB Market achieving the California VW market share average
11 is the lack of a dealer in Montclair.² However, VWoA’s use of a California average is an
12 unreasonable standard by which to measure the performance of the RSB Market and the RMA
13 because it fails to account for the unique characteristics of each market. All markets in a state as
14 diverse as California are obviously not the same. The great diversity among markets in California
15 will invariably produce a broad range of brand performance for which half the state will always be
16 considered underperforming while the other half of the state will be considered to be performing at
17 or above the California average. (RT Vol. 4, 7.)

18 In fact, given the wide range of diversity throughout California, it would be reasonable to
19 expect performance to vary widely across the state, producing a sort of random or checkerboard
20 pattern, but this is not the case. Instead, a picture of two separate markets emerges with the coastal
21 regions mostly outperforming the California average, while the inland areas fall below. This stark
22 contrast is clearly seen in California map in Mr. Roesner’s Remand Expert Report (“Mr. Roesner’s
23 report”). (P Ex. R 1, Tab 16, Page 1.)

24 There are significant demographic and economic differences between California as a whole,
25 the coastal areas and the RSB Market, including but not limited to, local preferences, average levels
26 of education, average household income, unemployment rates, housing market conditions, different

27 _____
28 ² As discussed earlier, Victorville and Redlands are the real solutions to this purported problem.

1 population densities and ethnic composition. These factors explain the variations in VW
2 performance, but VVoA's segmentation adjusted California average does not and cannot account
3 for them. (P Ex. R 1, Tab 16, Pages 1-4, Roesner Decl. ¶¶44 and 45.)

4 One of the more significant market characteristics of Ontario VW's PAI is the concentration
5 of industrial zones immediately surrounding Protestant's location, the Ontario Airport to the north
6 and the agricultural areas to the south. (Sherman Decl. ¶ 7.) As a result of these conditions, Ontario
7 VW is forced to extend its reach well beyond the typical range where the average dealer would
8 capture the bulk of its sales. Mr. Roesner's report shows significant areas devoid of households. In
9 contrast, the proposed Montclair location shows a high concentration of households surrounding it.
10 Tab 4, page 1 plainly illustrates precisely why Protestant is dependent upon the Montclair market.³
11 VVoA's claim that Protestant should perform better within its own PAI instead of relying on sales
12 opportunities in Montclair, or what VVoA refers to as "low-hanging fruit," mischaracterizes the
13 existing circumstances within the RMA. (VVoA Post Hearing Opening Brief 8:21-9:2.)

14 The evidence introduced during the hearing and on Remand conclusively demonstrates that
15 Ontario VW's PAI offers little opportunity within 4 miles of the dealership. In 2009, Protestant
16 made 3 sales within two miles of its location and 30 within 2-4 miles. (P Ex. R 1, Tab 5, Page 2.)
17 Nevertheless, VVoA does not account for this reality in its "lost opportunity" analysis and instead,
18 characterizes Protestant's success in capturing approximately 20% of its sales from the Montclair
19 PAI as going after "low hanging fruit" while ignoring its own backyard.

20 There are still other compelling circumstances that help to explain why Volkswagen's
21 performance in the Riverside-San Bernardino market is below state average. These have nothing to
22 do with VVoA's current dealer network. For example, of the 49 metropolitan areas with a
23 population of one million or more, the Riverside-San Bernardino-Ontario area had the highest
24 unemployment rate in October 2010, at 14.2%. In fact, the unemployment rate in Riverside and San
25 Bernardino counties has been on the rise since 2006. (RT Vol. 5, 153:24-25, 154:13-20; J Ex. 43,
26 Tab 39, Pages 1 and 2.)

27
28 ³ Originally Page A-34 of J. Ex. 44.

1 There is a statistically significant negative relationship between the Hispanic population
2 percentage and Volkswagen registration effectiveness, and the Riverside-San Bernardino area has
3 one of the highest Hispanic populations in the state. (RT Vol. 5, 182:5-11; J Ex. 43, Tab 47, Pages
4 4-6.)

5 There is also a statistically significant negative relationship between the percentage of
6 foreclosed households and Volkswagen registration effectiveness, and the Riverside-San
7 Bernardino-Ontario Metro had the sixth highest foreclosure rate in the country in the third quarter of
8 2010. (RT Vol. 3, 118:11-20; RT Vol. 5, 182:11-17; J Ex. 42, Tab 28, Pages 4-5; J Ex. 43, Tab 47,
9 Pages 7-8.)

10 In addition, there is a statistically significant positive relationship between the percentage of
11 the population with a Bachelor's degree or higher and Volkswagen registration effectiveness, and
12 the Riverside-San Bernardino Market had the *third lowest education* level of all the California
13 markets. (RT Vol. 5, 182:18-25; J Ex. 43, Tab 47, Pages 9-10.)

14 Each one of these four variables, when combined with the measured values of the Riverside-
15 San Bernardino market, suggest one could expect a lower Volkswagen performance in this market
16 than the CA average. None of these measurements—unemployment, Hispanic population,
17 foreclosures, and education level—will be addressed by establishing another Volkswagen dealership
18 in the Riverside-San Bernardino market. (RT Vol. 5, 183:13-15, 201:14-21.)

19 **E. The Real World Evidence of the Dire Economic Indicators Within the RSB Market**
20 **Demonstrate that the RMA Cannot Support an Additional VW Dealer.**

21 **i. Unemployment in the RSB Market.**

22 The US Bureau of Labor Statistics released the July 2011 unemployment numbers on
23 August 19, 2011. The unemployment for both the state and the RSB Market has not shown any sign
24 of improvement and has in fact become worse. In comparison to the dismal June 2011
25 unemployment numbers, the market has worsened rapidly. The June numbers released on August 3,
26 2011, show that the Riverside/San Bernardino/Ontario Market registered an unemployment rate of
27 14.2% - the highest unemployment rate in the nation for the 49 Metropolitan Areas with a Census
28 2000 population of 1 million or more. (P Ex. R 17.) The unemployment numbers for July increased

1 to 14.7% for the Inland Empire. The unemployment figures in the RSB Market are not improving.
2 (San Bernardino Market increased from 14.0% in June to 14.4% in July, and the Riverside market
3 increased from 14.4% in June to 15.1% in July.)

4 The high unemployment rate in the RSB Market is an example of real-world data evidencing
5 the serious challenges VW dealer's face in that market. The argument that the unemployment rate
6 affects all line-makes equally and is thus accounted for by the use a segment adjusted average is an
7 over simplification and ignores the unique characteristics facing VW dealers within the RMA and
8 RSB Market as a whole.

9 **ii. The RSB Housing Market.**

10 The housing market in the RSB Market remains one of the worst performing markets in the
11 nation and the highest in California. Of the 15 major metro markets in the nation, the RSB Market
12 is the fourth worst performing market. (P Ex. R 21.) A depressed housing market continues to
13 constrain any economic recovery in the RSB Market. Distressed home sales drive down the values
14 of homes, which in turn adversely affects homeowners' ability to make major purchases like new
15 vehicles.

16 The large inventories of existing homes on the market and the depressed values have caused
17 new home construction in the RSB Market to come to a grinding halt. The Associated General
18 Contractors of America ("AGC") reports that construction employment in the RSB Market declined
19 9% (5,300 lost jobs) between May 2010 and May 2011. (P Ex. R 23.)

20 As with unemployment, the RSB housing market is not representative of the California
21 average and therefore it is unreasonable to expect it to perform at the California average.

22 **iii. Consumer credit scores.**

23 Given the high unemployment rates in the RSB market and the dismal state of the housing
24 market there, it is not surprising that consumer credit scores are among the lowest in California. A
25 recent survey found that consumers' credit scores in the Inland Empire are some of the worst in the
26 nation. More than one quarter of consumers (25.2%) in the Riverside-San Bernardino area have a
27 "poor" credit score of between 501 and 600 points. This percentage is third worst among the 50
28 largest U.S. metropolitan areas. (J Ex. 42, Tab 28, Pages 1-2.) Because most customers must

1 finance the purchase of a new vehicle, the large number of residents with a “poor” rating limits RSB
2 Market dealers’ ability to make sales in the area. This is yet one more real-world fact that does not
3 support the addition of the proposed Montclair dealer.

4 **F. The Board’s Prior Decision Was Supported by, and Cited to, Substantial Evidence in**
5 **the Record and There is no Reason a Reexamination of that Same Record Should**
6 **Yield a Different Result.**

7 **i. Vehicle Code § 3063(a); The Proposed Establishment Threatens**
8 **Ontario VW’s Substantial and Permanent Investment in its Volkswagen**
9 **Franchise.**

10 Respondent cannot dispute that Ontario VW has a substantial and permanent investment in
11 its Volkswagen dealership. The evidence shows that Gary Sherman has made and continues to
12 make a substantial and permanent investment in the operations of Ontario VW since it was first
13 acquired 15 years ago.

14 In 1995, Mr. Sherman bought the Wolverton brothers’ VW franchise, located in the Ontario
15 Auto Center, in a bankruptcy proceeding. (RT Vol. 1, 197:18-198:10.) Mr. Sherman then moved his
16 Volvo store from Montclair to the Ontario Auto Center and dualed it with the newly acquired VW
17 franchise until 2003. (RT Vol. 1, 198:6-11.)

18 Mr. Sherman’s investment in his VW franchise exceeds \$11 million. In July 2002, Ontario
19 VW began construction of a stand-alone VW Class A Marketplace facility. (RT Vol. 1, 212:12-25.)

20 Mr. Sherman invested over \$5 million in the construction of the facility consisting of \$800,000 to
21 \$1 million for the land, \$3 to \$3.5 million (*sic*) for construction, and \$500,000 for fixtures and
22 equipment. (*Id.*) Once the new facility was completed in June 2003, Mr. Sherman created Shayco,
23 Inc., dba Ontario Volkswagen—a new corporate entity—to operate the now exclusive VW
24 franchise. Mr. Sherman also invested \$2 million in start-up capital for Shayco, Inc. (RT Vol. 1, 199:
25 3-7, 212:9-17; RT Vol. 2, 7:12-8:8.)

26 The land on which Ontario VW is located is approximately 5 acres, and the facility itself is
27 about 34,000 square feet. (RT Vol. 2, 8:9-13.) Three-and-a-half years ago, the property was valued
28

1 between \$7.5 and 8 million, but Mr. Sherman estimated its current value is closer to \$4.5 million.
2 (Id.)

3 Ontario VW maintains a flooring line for vehicle purchases with VW Credit, Inc. (“VCI”),
4 and Mr. Sherman is a personal guarantor on the flooring agreement. (P Ex. 90, ONTVW 0000206.)
5 The total credit available to Ontario VW on the flooring line is \$5.7 million; of that amount, \$5
6 million is available for new vehicle purchases. (Id.)

7 Mr. Sherman has invested approximately \$11 million in Ontario VW. (RT Vol. 1, 212:18-
8 25.) Because Mr. Sherman has made a substantial and permanent investment in his Volkswagen
9 franchise, which will be put at risk if the proposed new VW dealership is established, this good
10 cause factor weighs against permitting the establishment of the proposed dealership in Montclair.

11 The record is replete with examples of Mr. Sherman’s concern for the continued viability of
12 Ontario VW as a Volkswagen franchise. Ontario VW’s expert witness, Mr. Roesner, determined
13 that the estimated negative impact the establishment of the proposed Montclair dealer would have
14 on Ontario VW’s New and Used Car departments ranges from 12.5% to 25%. The estimated
15 negative impact on Ontario VW’s Service and Parts & Accessories departments ranges from 20% to
16 30%. A loss of sales at the low end of the impact ranges would result in lost net profit of
17 approximately \$450,000 per year. A loss of sales at the high end of the impact ranges would result
18 in lost net profit of approximately \$725,000 per year. (J Ex. 43, Tab 37, Pages 1-2.) Protestant’s
19 profitability is currently below the NADA average. (Sherman Decl. ¶ 4, Ex. A.)

20 Faced with the range of impact set forth above, Mr. Sherman testified that at the low range
21 of impact, with losses of \$448,000, his dealership would go out of business. At the higher range of
22 impact, his dealership would go out of business even sooner. (RT Vol. 2, 27:9-20.)

23 Based upon the evidence in the record, the Board correctly concluded that the investment in
24 Ontario VW is “sizeable and permanent. Whether this investment will be negatively affected by the
25 establishment of the proposed dealership in Montclair will depend upon the extent of lost sales by
26 Ontario VW *within the RMA.*” (emphasis added) (Order Conf. Dec. 12/14/11, ¶ 105.) The likely
27 detrimental impact to Ontario VW is set forth in greater detail in other sections of the Board’s
28 Decision.

1 Nevertheless, VWoA persists in its argument there are “available sales opportunities” to
2 Ontario VW that might off-set any potential loss to Ontario VW, even going so far as to
3 (misleadingly) claim that Ontario VW’s expert admitted that Ontario VW’s sales might actually
4 increase after the establishment of the proposed Montclair Point. (RT Vol. 3, 168:22-169:12.)

5 However, VWoA’s claim is based upon an incomplete and misleading restatement of Mr.
6 Roesner’s testimony and takes Mr. Roesner’s testimony entirely out of context, as was brought to
7 the Board’s attention previously. Mr. Roesner’s testimony referenced by VWoA was in response to
8 a hypothetical that *assumed overall sales growth* in excess of any potential loss. Mr. Roesner
9 testified that, while there may be an initial increase in registrations, “a large number of those sales
10 come at the expense of the existing dealers” when a dealership goes into a market with
11 representation already in it. (RT Vol. 3, 89:19-90:5.) Moreover, when asked what Mr. Roesner
12 would expect would happen with VW registration performance in the market, Mr. Roesner initially
13 said there may be *some* increase in Volkswagen registrations, but he specifically said this is “not
14 always” the case. (RT Vol. 3, 89:19-25.) Mr. Roesner’s research more clearly demonstrates that
15 Volkswagen will have a static number of sales after the addition of a dealer in Montclair, but these
16 sales will be lost to some degree by Ontario VW to the proposed dealership. (RT Vol. 3, 91:1-92:25;
17 J Ex. 42, Tab 16, Page 1.)

18 Ultimately, the record reflects that Mr. Roesner’s high-end and low-end impact analysis
19 accounts for potential growth by the Volkswagen brand, despite VWoA’s mischaracterization of
20 Mr. Roesner’s analysis as a “fixed pie” theory that fails to take into account potential growth in the
21 market. While Mr. Roesner’s analysis is based on historical numbers, he offers a range of potential
22 impact, which takes into account potential growth. (RT Vol. 5, 184:10-185:5.) Certainly Mr.
23 Roesner’s use of historical data must be considered more objective and reliable than VWoA’s
24 projection that it will more than double its sales in the next four years because it is introducing a
25 new Passat, which has never been a high volume model for VWoA. The presumption seems to be
26 that none of VWoA’s competitors will be introducing new models of their own, which of course is
27 absurd.

28

1 and the public's interest in adequate competition is clearly seen by the following excerpt from the
2 Board's decision:

3
4 It is possible that the establishment of an additional dealer will increase sales in the
5 RMA but that the increase could be a short-term spike in sales (at least in the
6 Montclair PAI) followed by what may be 'ruinous completion [competition] (*sic*)'
7 that leaves only two or three dealerships to serve the RMA. The effect of the loss of
8 one or more profitable dealerships over the long term would then be *less*
9 *competition* within the RMA. [22 AR, Tab 368 at 5729 (¶78).]

10 The record evidences the potential harm to the public in several ways. First, if the new
11 Montclair dealership were established, the detrimental impact to Ontario VW's business and
12 financial viability, would require cost-cutting measures that will result in a net decrease in benefits
13 to the general public, as demonstrated below. (RT Vol. 2, 105:20-107:6.)

14 The establishment of the Montclair dealership would result in ruinous competition that
15 would necessitate the implementation of further cost-cutting measures previously made by Ontario
16 VW. Ontario VW was already forced take to some fairly drastic steps to cut costs in the beginning
17 of 2009, in order to remain viable after the economic decline in 2008. (RT Vol. 1, 208:5-19.)
18 Although it was personally difficult for Mr. Sherman to have to implement these drastic measures,
19 he knew it had to be done (RT Vol. 1, 211:5-12) the alternative—operating at a loss and
20 endangering long-term viability—was not an option.

21 The proposed Volkswagen dealership in Montclair would detrimentally impact Ontario
22 VW's business and jeopardize its financial viability. Currently, Ontario VW provides a number of
23 amenities for its service customers: (1) loaner vehicles; (2) customers' pick-up and drop-off shuttle
24 service; (3) free wireless Internet access; (4) a customer waiting lounge and a separate, quiet waiting
25 room; (5) full detail with car wash service; and (6) free parking at and shuttle service to Ontario
26 Airport. (RT Vol. 1, 106:6-107:3.) Ontario VW is also involved in a variety of charitable activities
27 throughout the Inland Empire. (RT Vol. 1, 113:12-114:13.)

28 The cost-cutting measures in 2009 did not target customer amenities or charitable activities.
(RT Vol. 1, 208:7-19.) However, the proposed Montclair dealership represents a far greater threat
to Ontario VW's viability than the economic downturn did. In order to deal with even the lower-

1 range of losses predicted by its expert, Ontario VW would have little choice but to implement
2 additional—harsher than in 2009—measures to keep costs down. (RT Vol. 1, 210:21-211:22.) It is
3 possible that both customer amenities at Ontario VW and its charitable activities would be reduced,
4 or even eliminated, if Petitioner is permitted to establish the proposed dealership in Montclair.

5 Second, it stands to reason that any job and sales tax benefits for the City of Montclair that
6 might result from the establishment of the proposed Montclair dealership will be offset by lost jobs
7 and decreased sales tax revenue in the City of Ontario. (RT Vol. 7, 142:13-144:23; RT Vol. 2,
8 106:13-107:6.) The public welfare in one community within the RMA is no more or less important
9 than in another. Therefore, it was appropriate for the Board to evaluate the benefits for Montclair in
10 conjunction with the potential detriments to the public welfare in other communities within the
11 RMA, namely the City of Ontario.

12 Each opportunity taken away from Ontario VW by the proposed dealership, would decrease
13 sales tax revenues in the City of Ontario. Similarly, while the proposed dealership may create jobs
14 in Montclair, Ontario VW would be forced to lay-off employees in response to reduced sales,
15 service and parts business, in order to remain financially viable. (RT Vol. 2, 221:16-222:14.) And,
16 if Ontario VW, or any of the four existing dealers, is forced out of business because of the
17 detrimental impact of the proposed dealership—which remains a likely scenario given Ontario
18 VW's current financial state and Mr. Roesner's projected losses—no net improvement to the public
19 welfare within the RMA will have occurred. (RT Vol. 2, 77:15-20; P Ex. R 1; Sherman Decl., Pages
20 1-2.)

21 **1. Volkswagen Failed to Establish That Metro Could Provide a Stand-alone VW**
22 **White Frame Facility at the Proposed Location.**

23 The record contains no reliable evidence regarding the actual size and location of the facility
24 that might be constructed at the proposed site. Without more, the Board cannot make findings
25 concerning any increased benefits VW customers might receive upon visiting the proposed location.
26 For example, the Board cannot consider whether adequate parking and storage could be provided or
27 what amenities the proposed location might offer customers, let alone whether and exclusive White
28 Frame facility can even be constructed at the proposed site.

1 John and Howard Hawkins testified that the proposed location poses a number of challenges
2 to the construction of a Volkswagen facility. (RT Vol. 8, 15:14-16:25.) With little more than
3 wishful thinking, John and Howard Hawkins testified that these obstacles would be overcome. (See,
4 e.g., RT Vol. 6, 158:8-14, 161:12-15; RT Vol. 8, 16:18-25, 101:2-10.) However, no evidence was
5 introduced to demonstrate any solutions, and the eventual costs could not be narrowed down to a
6 range more precise than between one and twenty million dollars.

7 During the hearing in this matter, Protestant raised serious doubts about Metro's ability to
8 fulfill its commitment to provide Volkswagen with a stand-alone VW White Frame facility at the
9 proposed location. Yet none of the evidence offered by Respondent adequately responded to these
10 concerns. In fact, both John and Howard Hawkins testified that they do not know what size building
11 they will provide Volkswagen, despite its requests for a 28,000 square foot facility. (RT Vol. 8,
12 80:8-11; 97:22-25.) Further, Howard Hawkins even states he believes 28,000 square feet is too
13 large for initial operations at the store and would like to build something smaller in order to save on
14 rent. (RT Vol. 8, 97:9-21.)

15 In addition, Metro would have to deal with several significant challenges related to the
16 proposed facility, including: (1) the slope in the proposed property, (2) excessive runoff from the
17 freeway, and (3) fire department approval. (RT Vol. 8, 15:25-16:25.) The only evidence Respondent
18 offered to establish that these challenges could be overcome consisted of the unsupported opinions
19 and assurances of the Hawkins brothers and Volkswagen personnel that these problems will be
20 successfully addressed. (See, e.g., RT Vol. 6, 158:8-14, 161:12-15; RT Vol. 8, 16:18-25, 101:2-10.)
21 This testimony is, at best, self-serving; none of these witnesses are trained engineers or architects.
22 The Hawkins brothers could not provide any details about potential solutions, nor give a meaningful
23 estimate as to the anticipated cost of the project, when asked. Additionally, the final design process,
24 which would identify potential solutions, will not begin until after this Protest is resolved.

25 In sum, no competent evidence was presented to establish whether or not—or how—Metro's
26 property-related challenges will be resolved. Yet, many purported benefits of the proposed
27 Montclair dealership depend on the presumption that a stand-alone VW White Frame facility will
28 operate at the proposed location. In their testimony, Volkswagen personnel and the Hawkins

1 brothers dismissed the legitimate concerns regarding Metro's ability to construct the proposed
2 facility, and attributed the uncertainty surrounding the project to the decision to put all architectural
3 and engineering planning on hold, pending the outcome of this proceeding. The Board should reject
4 any arguments that require it to accept, without supporting evidence, that a stand-alone VW White
5 Frame facility will ever operate at the proposed location.

6 **iv. Vehicle Code § 3063(d); The Four Existing Dealers Currently Assigned**
7 **Responsibility for Portions of the RMA Already Provide Adequate**
8 **Competition and Convenient Customer Care in the RMA.**

9 The Board determined that Ontario VW is one of only 23 Volkswagen dealers in the United
10 States to have received the "Generation Best" award in 2009, finding, "Volkswagen representatives
11 conceded that as a Generation Best dealer, Ontario VW was in an elite category." (RT Vol. 8
12 141:12-24; 22 AR 22, Tab 368, at 5695 (¶ 172).) The Board also determined:

- 13 • Ontario VW is a good dealership which is well-managed and does a good job
14 serving its customer base. (RT Vol. 8, 127, 144, 148, 154, 161.)
- 15 • Ontario VW was awarded the Octagon Award in the third quarter of 2009 and tied
16 for top honors in the fourth quarter of 2009. (RT Vol. 1, 109; P Ex. 2.)
- 17 • Ontario VW has a more than adequate sales facility. (RT Vol. 1, 103; RT Vol. 7,
18 215, 243.)
- 19 • Ontario VW has an adequate service facility with 18 service bays and the capacity to
20 perform 50% more service work. (Id.)
- 21 • Ontario VW has invested in adequate specialized equipment to service Volkswagen
22 vehicles. (Id.)

23 As the Board ultimately found: "Although the burden of proof is upon the Protestant, there
24 was no claim by VWoA that the Protestant or that any other franchisees in the RMA are lacking or
25 deficient with regards to sales and service facilities, equipment, supply of parts and qualified service
26 personnel. Therefore the Board draws no conclusions as to this issue." [22 AR 22, Tab 368 at 5751
27 (¶181).]

28

1 VWoA's argument for the purported need for an additional dealership in Montclair is based
2 upon a flawed analysis that must be rejected by the Board in its decision. The evidence reflects that
3 VWoA's use of a California segment adjusted average to measure both performance and so called
4 available sales opportunity, "is not necessarily an appropriate measure for determining whether
5 another dealership is needed or what the effect would be upon the relevant market area if an
6 additional dealership was established." (RT Vol. 3, 162.)

7 As discussed earlier, the record shows that of the 323 total sales made in the Montclair PAI
8 for 2005, Ontario VW sold 119, or 36.8% of those total sales. (J Ex. 42, Tab 11, Page 1.) For the
9 years between 2006 and July 2010 year-to-date, Ontario continued to sell between 35.6% and 40.4%
10 of the total sales made into the Montclair PAI. (J Ex. 42, Tab 11, Pages 2-6.) Overall, Ontario VW
11 has consistently sold more new vehicles in the Montclair PAI than any other Volkswagen dealer. (J
12 Ex. 42, Tab 11, Pages 1-6.)

13 Also discussed earlier, the evidence demonstrates the effect the addition of Puente Hills VW
14 had on Bozzani Motors. Mr. Roesner's analysis found that in 2005, when Puente Hills VW was
15 previously in operation, Bozzani Motors made 97 sales into its own Covina PAI for a total of 37.2%
16 of the sales in the geography. (J Ex. 42, Tab 11, Page 1.) In 2005, Puente Hills VW made 59 sales
17 into the Covina PAI for a total of 22.6% of the sales in the geography. [*Id.*; RT Vol. 3, 72:13-17.)
18 The total sales made by both Puente Hills VW and Bozzani Motors in 2005 in the Covina PAI was
19 59.8%. In 2008, when Puente Hills VW was no longer in operation, Bozzani made 168 sales into
20 the Covina PAI for a total of 61.8% of the sales in the geography. [J Ex. 42, Tab 11, Page 4; RT
21 Vol. 3, 72:13-17.) When comparing these two percentages (59.8% vs. 61.8%), it is clear that
22 instead of an increase of competition and sales resulting from the addition of the Puente Hills dealer
23 in 2005, the number of sales made by Bozzani in 2008 remained very similar to the total sold by
24 both Puente Hills VW and Bozzani Motors in 2005, when the Puente Hills dealership was in
25 operation. The evidence plainly demonstrates a cannibalization of Bozzani Motors' sales, as
26 opposed to an overall increase in total sales. (RT Vol. 3, 72:13-17.) When Puente Hills VW is no
27 longer in operation, Bozzani is the dealer that gains those sales. (*Id.*)

28

1 Mr. Roesner testified that the same cannibalization of Ontario VW's sales is likely to result
2 from the addition of the proposed Montclair point. (RT Vol. 3, 73.) Ontario VW currently captures
3 the greatest percentage of the Volkswagen sales made in the Montclair area. If the proposed
4 Montclair point is established, it will have a proximity advantage to those customers and likely
5 capture those sales that would otherwise be made by Ontario VW, just as Puente Hills VW captured
6 sales in areas previously dominated by Bozzani. (*Id.*) The RMA is already being more than
7 adequately served by the existing Volkswagen dealers. The addition of the proposed Montclair point
8 will simply redistribute sales, rather than cause a significant increase in Volkswagen sales volume.

9 Customer convenience regarding the average distance to the nearest dealer for Volkswagen
10 customers is already on a par with the average distances for its competitors with sales volumes
11 similar to Volkswagen. (J Ex. 44, A-61.) The addition of the proposed Montclair point will not
12 significantly improve customer convenience, which is already adequate.

13 Volkswagen's annual sales volume in 2010 was 256,830 units. (P Ex. 12.) Mazda and
14 Subaru similarly sold 229,566 and 263,820 units respectively. (*Id.*) According to VWoA's Expert
15 Witness Report, of these three line-makes Volkswagen has the closest average distance to the
16 nearest dealer at 8.2 miles; Mazda has an 8.3-mile average distance and Subaru has a 9.1-mile
17 average distance. (J Ex. 44, A-61.) Although other competitors like Honda and Toyota have an
18 average 4.4-mile distance to the nearest dealer, these brands also sell well over 1,000,000 units
19 annually, which is approximately four times the annual sales of Volkswagen. [P Ex. 12; J Ex. 44,
20 A-61.) Volkswagen customers located within the RMA are currently being adequately served by
21 the existing Volkswagen dealers surrounding the RMA.

22 v. **Vehicle Code § 3063(e); any Increase in Competition that Might Result**
23 **from the establishment of the Proposed Montclair Dealer Is Not in the**
24 **Public Interest at this time.**

25 The Board's balancing of the interests of VWoA, the public and Ontario VW has already
26 been demonstrated in Paragraph 182 of the Board's prior Decision:

27 Ontario VW must show that any negative impact upon it, caused by the proposed
28 establishment of a Montclair dealership, outweighs the benefits to the consuming

1 public from the increased competition a new dealership would bring. A concern
2 here may be that *the 'over-dealering' of an area will increase competition beyond*
3 *the point where it is in the public's best interest.* This negative effect could occur if
4 the increased competition causes a dealership to close because there is simply not
5 enough business to allow all dealers in the RMA to be profitable. [RT Vol. 2, 43,
6 42; RT Vol. 7, 68.] Given the *difficult economic times that exist now*, another
7 recessionary dip could cause any number of dealerships to cease operations.
8 [Roesner Decl. Tab 16, Pages 2-4.] It is a time when it may be better to err towards
9 maintaining the status quo as to the number of dealers so that an existing dealership
10 has a better opportunity to survive, preserve its investment, and *continue to*
11 *contribute to the public welfare* than to lean towards allowing a franchisor to
12 establish another franchisee. There is no doubt that the existing franchisee has a
13 greater risk of its capital, and investment than does the franchisor who will more
14 than likely be looking to the prospective new franchisee for all or almost all of the
15 capital necessary to open the new dealership. [RT Vol. 1, 108, 199, 212, 213; Jt.
16 Stip. Fact 3.] The franchisor bears the expense of designing and manufacturing
17 products. This cost is generally in the hundreds of millions of dollar range. It is
18 also true that these expenses can be recovered from the entire dealer body, whereas
19 any one existing franchisee has only that one location from which to protect its
20 investment. (emphasis added) (Order Conf. Dec. 11/30/11, ¶ 182.)
21

22 Paragraph 182, as set forth in its entirety above, clearly evidences the Board's careful
23 balancing of the interests of VWoA, Ontario VW and the public, based upon its consideration of the
24 evidence contained in the record. It is entirely within the Board's discretion to make the
25 determination that, based upon the evidence in the record, the proposed establishment of a
26 Volkswagen dealership in Montclair, under these *existing circumstances* (VC § 3063), poses a
27 threat to the public welfare and the existing dealers that far outweighs any potential benefit.
28

1 **G. There is no Reason Why the Board’s Reexamination of the Same Record Should Yield**
2 **a Different Result.**

3 The Board’s thorough analysis contained in its prior Decision, painstakingly “bridges the
4 analytical” gap between the evidence and the Decision. *Topanga Assn for a Scenic Community v.*
5 *County of Los Angeles*, 11 Cal.3d 506 (1974). Upon its previous review of the record, the Board
6 rejected VWoA’s evidence regarding its measurement of purported underperformance and available
7 opportunity in the market. The Board accepted Ontario VW’s evidence regarding the dire economic
8 conditions existing in the market and the challenges facing the four existing dealers currently
9 assigned responsibility for portions of the RMA. Moreover, the Board determined that these four
10 existing dealers are dependent upon the RMA for a significant percentage of their sales, service and
11 parts business and are adequately servicing Volkswagen customers in the RMA. In the end, the
12 Board determined that the potential harm to the existing dealers and the resulting harm to the public
13 far outweighed any potential benefits that might result from the establishment of the proposed
14 Montclair dealer. The Board’s ultimate conclusions are set forth in the following findings from the
15 Board’s Decision, which, as demonstrated throughout this brief, are more than amply supported by
16 substantial evidence:

- 17 • Protestant Ontario VW has established permanency of its investment [VC § 3063(a)]
18 because it is a dealer with longevity, has constructed a market place facility⁴ in 2003
19 at substantial cost, and has expended the financial outlays required over the years to
20 modernize and maintain the dealership’s building and equipment. Protestant has
21 established that it has a significant and permanent investment. (RT Vol. 1, 108, 199,
22 212, 213; Jt. Stip. Fact 3.)
- 23 • Protestant has established that there will be a significant effect upon the retail motor
24 vehicle business in the RMA [VC § 3063(b)] if the additional dealership is
25 established ***and that there would be no benefit to the public that would out-weigh***
26 ***this negative effect.*** (RT Vol. 1, 210-219; RT Vol. 2, 26, 120-121.)

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4 A Market Place Facility is dealership constructed pursuant to VWoA’s facility image program.

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- Protestant has established that it and the other dealers presently providing sales and services to the public in the RMA would more likely than not suffer a loss of business if the additional dealership were established. *The impact upon them would cause more loss to them and indirectly to the public than would there be benefit gained by the public* [VC § 3063(c)] if an additional Volkswagen dealership were to be established at the proposed location under the current economic conditions. (emphasis added) (RT Vol. 1, 210-219; RT Vol. 2, 26, 120-121.)
 - Ontario VW's sales and service facilities were built in 2003, and they are more than adequate to provide adequate customer care. Ontario VW has invested in the specialized equipment necessary to servicing Volkswagens. The dealership's supply of vehicle parts and storage is currently adequate. Ontario VW has sufficient qualified service technicians. There is no claim that there was a significant deficiency as to these factors as they pertain to Ontario VW or the other Volkswagen franchisees who are responsible for serving the owners of Volkswagen vehicles in the RMA [VC § 3063(d)]. (RT Vol. 1, 103; RT Vol. 7, 205, 215, 233, 241, 243.)
 - The Board believes that there would likely be a spike in Volkswagen sales in the RMA. However, this increase would likely come from the sales opportunities available to Ontario VW and the other three Volkswagen franchisees whose PAI's comprise a part of the RMA. Although there may be an increase in competition in the RMA, it is unlikely that the increase will be of benefit to the public [VC § 3063(e)]. (RT Vol. 1, 210-211; RT Vol. 2, 105-107.)
 - Ontario VW is profitable and considered to have good management. Although Mr. Roesner's dramatic numbers of "loss" are not absolute proof of lost sales or income, the Riverside-San Bernardino market (including the RMA) is still "at risk" economically and demographically, and the Board believes that the survivability of Ontario VW is tenuous under the current economic conditions. Any additional negative factors could cause havoc to the existing Volkswagen dealerships if an additional dealership were established. The establishment of an additional

1 dealership at the location proposed, which is in the heart of the better market when
2 comparing the Montclair PAI to the Ontario PAI, would exacerbate the effect upon
3 Ontario VW if such a negative event or economic downturn occurs. The “risk-
4 benefit” analysis which must be made under these circumstances leads to the
5 conclusion that *Ontario VW has established that the adverse risk to the public is*
6 *greater than the benefit that would flow from the establishment proposed.*
7 (emphasis added.) (RT Vol. 1, 210-219; RT Vol. 2, 102:5-20, 120-121; P Ex. R 1
8

9 **IV. CONCLUSION**

10 As the evidence in the record overwhelmingly demonstrates, and as the Board has previously
11 concluded, the proposed establishment of the Montclair dealership will have a severe impact on the
12 retail motor vehicle business in the RMA, with no benefit to the public welfare or any appreciable
13 increase in Volkswagen sales.

14 The RMA is already fiercely competitive and serviced by *four* existing Volkswagen dealers,
15 Ontario VW, Bozzani VW, Puente Hills VW and CardinaleWay VW. The RMA includes portions
16 of the PAIs of each of these dealers who are contractually assigned responsibility for these areas of
17 the RMA. While the sales, service and parts business of all four of these dealers will be adversely
18 impacted by the establishment of the proposed Montclair point, Ontario VW’s continued viability
19 will be in serious jeopardy and it will likely not survive the significant losses it is certain to
20 experience.

21 In addition, VWoA has failed to offer reliable evidence showing precisely where the
22 proposed VW dealership will be located, what it will consist of or whether it is even feasible on any
23 site at the proposed location.

24 Assuming the loss of 19.4% of Protestant’s total sales to the Montclair dealer, the Board’s
25 Order of Remand requested findings regarding where, in terms of geography, Protestant will
26 recapture these lost sales. The answer is that there will be insufficient opportunity in the
27 surrounding geographies to recoup any of those sales, and any opportunity for Protestant to
28 recapture these lost sales will completely disappear as the Redlands and Victorville points are

1 established. Based upon the record before the Board, there can be no doubt that VWoA will
2 establish points in Redlands and Victorville regardless of whether the proposed Montclair point is
3 established.

4 If Respondent is permitted to establish the proposed Montclair point, Ontario VW will be
5 faced with the very real prospect of seeing its Volkswagen business reduced by 40% to 50%. Under
6 current conditions, Protestant operates at a level of profitability below the NADA average and
7 therefore its viability is extremely vulnerable to the significant impact that will result from the
8 establishment of the proposed Montclair dealer. The RMA cannot support an additional VW dealer
9 at this time, the establishment of which will force the closure of one of VWoA's best dealers, one of
10 only 23 Volkswagen dealers in the U.S. to earn Volkswagen's Generation Best Award in 2009. (RT
11 Vol. 8, 141:12-24.)

12 VWoA's purported "opportunity" analysis is a purely result-driven mechanism used to
13 justify *any* market action a manufacturer seeks to accomplish. VWoA's use of a segment adjusted
14 California average is an inappropriate standard by which to measure Protestant's VW sales
15 performance, because it fails to account for the existing circumstances within Protestant's PAI, the
16 RMA and those throughout the RSB Market. Moreover, VWoA's "gross registration loss" is
17 patently misleading and the use of "in-sell" as available opportunity is equally unavailing. This
18 analysis does not and cannot justify a finding that ample opportunity exists in Protestant's PAI to
19 off-set the significant losses that are certain to result from the establishment of the proposed
20 Montclair point. Instead, any findings relating to the current opportunity available to Protestant
21 should be based upon the real-world data evidencing the dire economic conditions within the RMA
22 and surrounding areas, including, but not limited to, the highest unemployment rate in California
23 and the U.S., among the highest foreclosure rates, a battered housing market and unique
24 demographic characteristics that do not favor VW sales.

25 Each of the good cause factors and all of the existing circumstances have been carefully
26 analyzed, and each establish that good cause exists not to establish to proposed new Montclair
27 Volkswagen franchise.

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Based upon the existing record, and the arguments set forth herein, Protestant respectfully requests that the Board issue a decision sustaining Protestant's Protest against the proposed establishment of an additional Volkswagen dealership in Montclair.

Dated: February 28, 2013

LAW OFFICES OF
MICHAEL J. FLANAGAN

By 
Michael J. Flanagan
Attorneys for Protestant

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DECLARATION OF SERVICE BY ELECTRONIC MAIL

I, Valerie A. Coffey, declare that I am employed in the County of Sacramento, State of California, that I am over 18 years of age, and that I am not a party to the proceedings identified herein. My business address is 2277 Fair Oaks Boulevard., Suite 450, Sacramento, California, 95825.

I declare that on February 28, 2013, I caused to be served a true and complete copy of:

***PROTESTANT'S WRITTEN ARGUMENT
PURSUANT TO
GOVERNMENT CODE SECTION 11517(C)(2)(E)(ii)***

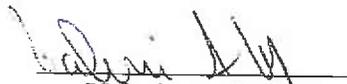
***Ontario Volkswagen v Volkswagen
Protest No. PR-2265-10***

By Electronic Mail:

Allen Resnick
Mathew D. Hinks
JEFFER, MANGLES, BUTLER & MARMARO
1900 Avenue Of The Stars
Seventh Floor
Los Angeles CA 90067-4308

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 28 February 2013, at Sacramento, California.



Valerie A. Coffey