

1 LAW OFFICES OF MICHAEL J. FLANAGAN
2 MICHAEL J. FLANAGAN State Bar #93772
3 GAVIN M. HUGHES State Bar #242119
4 2277 Fair Oaks Boulevard, Suite 450
5 Sacramento, CA 95825
6 Telephone: (916) 646-9100
7 Facsimile: (916) 646-9138
8 E-mail: lawmjf@msn.com

9 ATTORNEYS FOR PROTESTANT

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 RESPONSE TO**
22 **RESPONDENT'S OPENING BRIEF ON**
23 **REMAND FROM THE SUPERIOR COURT**

TABLE OF CONTENTS

1

2 I. INTRODUCTION2

3 II. ARGUMENT.....3

4 A. Respondent’s blatant disregard for the Board’s two prior orders rejecting VWoA’s

5 request to reopen the record.....3

6 B. The Appropriate Legal Standard.....4

7 C. Respondent’s Use of the California State Average is an Inappropriate Measurement

8 of Volkswagen Brand Sales Performance in the RMA and RSB Market.....5

9 i. Dire economic circumstances within the RMA and RSB Market are not

10 representative of the average California market6

11 ii. Volkswagen dealers in coastal areas generally meet or achieve the California

12 average while inland markets, with the exception of the Bakersfield PAI, fall short...7

13 D. Respondent’s Mischaracterization of the Evidence and Testimony in the Record

14 Fails to Refute the Substantial Evidence Demonstrating Good Cause to Prevent the

15 Proposed Establishment.....8

16 i. VC § 3063 (a): Protestant’s substantial and permanent investment will be lost if

17 the proposed establishment is permitted..... 15

18 ii. VC § 3063 (b): The proposed establishment would have an adverse impact to

19 the retail motor vehicle business and consuming public in the RMA 16

20 iii. VC § 3063 (c): It would be injurious to the public welfare to permit the

21 proposed establishment..... 18

22 iv. VC § 3063 (d): The existing dealers provide adequate competition and

23 convenient consumer care in the RMA..... 18

24 v. .. VC § 3063 (e): The proposed establishment would result in ruinous competition

25 among the proposed new dealer and the four Volkswagen dealers currently assigned

26 responsibility for portions of the RMA and would therefore not be in the public’s

27 interest..... 19

28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

E. The balancing of the Interests of VWoA, the Public and Protestant in consideration of the good cause factors set forth in VC § 3063 requires a determination that good cause exists to prevent the proposed establishment.....22

 i. VWoA’s Interests22

 ii. The Public Interest.....23

 iii. Ontario VW’s Interests.....24

III. CONCLUSION.....24

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES

UNITED STATE SUPREME COURT CASES

New Motor Vehicle Bd. of California v. Orrin W. Fox Co., 439 U.S. 96 (1978).....4, 5

CALIFORNIA APPELLATE COURT CASES

Piano v. State of California, 103 Cal. App. 3d 412 (1980).....4

STATE STATUTES

Cal. Veh. Code § 30633, 5, 22

Cal. Veh. Code § 3063(a).....15

Cal. Veh. Code § 3063(b)16

Cal. Veh. Code § 3063(c).....18

Cal. Veh. Code § 3063(d).....18

Cal. Veh. Code §3063(e).....19

1 **I. INTRODUCTION**

2 Respondent, Volkswagen of America, Inc. (“VWoA”), in brazen disregard for the Board’s
3 order denying Respondent’s request to reopen the record to submit additional evidence, on two
4 separate occasions no less, attempts to place before the Board evidence outside of the record and
5 then urges the Board to overrule the Protests based upon this same evidence. This the Board must
6 not do.

7 In reviewing the actual record before the Board, it is plain to see the evidence demonstrates
8 unequivocally that good cause exists to prevent the proposed establishment of a Volkswagen dealer
9 in Montclair. Each and every argument set forth by VWoA fails upon a careful consideration of the
10 evidence. Specifically, VWoA’s entire argument for the need of an additional Volkswagen dealer in
11 the RMA, finds its only support in a fatally flawed analysis that is premised upon an inappropriate
12 benchmark, the California average, by which to measure sales performance and/or purported
13 available sales opportunities within the RMA and throughout the RSB Market.

14 In the end, after VWoA’s sales and/or opportunity analysis is properly rejected, neither
15 Respondent’s mischaracterization of the evidence and testimony in the record, nor its
16 mischaracterization of the appropriate legal standard to be employed by the Board, can support a
17 decision overruling this Protest.

18 As the Board properly determined upon its previous comprehensive review of the same
19 record before the Board now, substantial evidence in light of the whole record overwhelmingly
20 demonstrates that good cause exists to prevent the proposed establishment of an additional
21 Volkswagen dealership in Montclair, California, as evidenced by the following:

- 22 • The California average is not an appropriate standard by which to measure
23 performance and or available opportunity in the Relevant Market Area (“RMA”) and
24 the Riverside-San Bernardino Market (“RSB”).
- 25 • The RMA and RSB Market cannot be *expected* to perform at the California average
26 offered by VWoA.
- 27 • Protestant’s impact analysis is more credible than Respondent’s.
- 28 • The legal standard set forth by VWoA is a gross mischaracterization of the Board’s

1 obligation under Vehicle Code Section 3063.

- 2 • Protestant has a substantial and permanent investment that will be at risk if the
- 3 proposed establishment is permitted.
- 4 • The RMA is more than adequately served by the four Volkswagen dealers currently
- 5 assigned responsibility for the RMA.
- 6 • The proposed establishment would have an adverse impact to the public welfare
- 7 because it would result in ruinous competition and harm the existing dealers' ability
- 8 to continue to provide adequate competition and convenient customer care in the
- 9 RMA.
- 10 • The ruinous competition that will result from the establishment of the proposed
- 11 Montclair dealer is almost certain to result in the closure of one of VWoA's best
- 12 dealers in the country.

13
14 **II. ARGUMENT**

15 **A. Respondent's blatant disregard for the Board's two prior orders rejecting VWoA's**

16 **request to reopen the record.**

17 Respondent has on two separate occasions requested the Board to reopen the record for

18 additional evidence. The Board properly rejected each such request. Nevertheless, Respondent, in

19 defiance of the Board's prior two orders, has attempted to place before the Board evidence outside

20 of the record that the Sacramento County Superior Court ordered the Board to consider.

21 Protestant filed its Motion to Strike Portions of Respondent's Opening brief on Remand

22 From the Superior Court on March 4, 2013. At the time of this brief, the Board has yet to rule on

23 Protestant's motion.

24 Not knowing how the Board will rule on Protestant's motion to strike, Protestant must

25 address Respondent's blatant attempts to place before the Board argument and evidence outside of

26 the *record* it has been ordered to review before making its decision. Without addressing the specific

27 instances where Respondent has directed the Board's attention to facts and circumstances outside of

28 the record, which Protestant has not had the an opportunity to rebut or challenge, Protestant must

1 make its position clear that any decision by the Board must not take into consideration respondent's
2 arguments pertaining to evidence outside of the existing record.

3 **B. The Appropriate Legal Standard.**

4 While Protestant and Respondent may disagree with the significance of the Court's holding
5 in *Piano v. State of California*, 103 Cal. App. 3d 412 (1980), substantial evidence supports the
6 Board's prior Decision sustaining the Protest, and the Board's balancing of the interests of VWoA,
7 Protestant and the public welfare was readily apparent.

8 In its Opening Brief Respondent cites to *Piano* as standing for the proposition that: "[It
9 would appear that by the adoption of the above set forth statutory scheme] the legislature intended
10 that the Board balance the dealers' interest in maintaining viable businesses, the manufacturers'
11 interests in promoting sales, and the public's interest in adequate competition and convenient
12 service." (VWoA's OBOR 4:7-10.) Although this language is mere dicta, the Board has done
13 exactly what *Piano* presumes the legislature intended by carefully balancing all of these interest
14 throughout its prior Decision. The relevant holding of *Piano* is that: "the administrative standards
15 [section 3063] as to the meaning of 'good cause' are sufficiently adequate to withstand due process
16 scrutiny." *Id* at 422. Therefore, even if *Piano* does stand for the proposition advanced by VWoA,
17 the Board's prior Decision clearly evidenced the Board's careful and exhaustive analysis of the
18 interests of VWoA, the interests of the existing dealers contractually assigned responsibility for
19 portions of the RMA and the interest of the public in adequate competition and customer
20 convenience. There is no conceivable reason why the Board's reweighing of these interests, based
21 upon the same evidence, should result in a different decision.

22 In its Opening Brief VWoA asserts that the Supreme Court in *New Motor Vehicle Bd. of*
23 *California v. Orrin W. Fox Co.*, 439 U.S. 96 (1978) established Protestant's burden in establishing
24 good cause to prevent the establishment of a proposed dealer is "to prove that the proposed
25 Montclair dealership would be 'offensive,' 'unfair' or 'oppressive,' which is the standard set by the
26 United States Supreme Court and embodied in the Vehicle Code's emphasis on the public good."
27 (VWoA OBOR 6:4-6.) As this Board well knows, this is not the standard to be employed by the
28 Board.

1 The Court’s analysis in *Orrin Fox* was limited to the *validity* of the Automobile Franchise
2 Act (which includes Cal. Veh. Code §3063) and does not affect the clear standard set forth in
3 Vehicle Code Section 3063. The *Orrin Fox* Court held that: (1) the Act’s statutory scheme does not
4 violate due process; (2) the Act’s statutory scheme does not constitute an impermissible delegation
5 of state power to private citizens; and (3) the Act does not conflict with the Sherman Act. *Orrin*
6 *Fox*, 439 U.S. at 108-111. The *Orrin Fox* Court examined the constitutionality of the Act, and the
7 Court did not make *any* attempt to define Protestant’s burden of proof in establishing whether good
8 cause exists to disallow the establishment of a franchise. If the Legislature intended Section 3063 to
9 prohibit only “unfair and oppressive trade practices” that are “offensive to the public welfare,” it
10 would have included this or similar language in place of the good cause factors clearly set forth in
11 the statute. Obviously, this language does not appear in the Vehicle Code. Respondent’s request
12 that the Board adhere to a higher, *nonexistent*, standard in place of the good cause factors set forth
13 in Vehicle Code § 3063 must be ignored.

14 Respondent’s unsupported claim that the addition of a new dealer will always increase
15 competition “which the Vehicle Code declares is *automatically* in the public’s interest,” is entirely
16 without merit and must be rejected by the Board. Moreover, in various sections of its brief VWoA
17 argues against the potential “ruinous competition” that might result from the proposed
18 establishment. It is difficult to reconcile Respondent’s argument that the Board should find the
19 increase in competition does not rise to the level of “ruinous competition” with its argument that all
20 competition is automatically in the public interest.

21 **C. Respondent’s Use of the California State Average is an Inappropriate Measurement of**
22 **Volkswagen Brand Sales Performance in the RMA and RSB Market.**

23 Substantial evidence in the record demonstrates that VWoA’s use of a California average to
24 measure sales performance and/or available sales opportunities located within the RMA and RSB
25 Market fails to account for the fact that these areas are significantly different from the average
26 California market, and therefore the California average is an inappropriate benchmark. Protestant’s
27 expert offered irrefutable evidence detailing why Volkswagen brand’s performance in the RMA and
28 RSB Market should be expected to perform below the California average.

1 Ultimately, VWoA's entire argument rises and falls based upon whether its use of the
2 California average is an appropriate benchmark to measure sales performance and/or available sales
3 opportunities within the RMA and RSB Market. The record is replete with overwhelming evidence
4 demonstrating that Respondent's use of the California average as a measure of lost sales and
5 conversely available sales opportunities must be rejected by the Board.

6 **i. Dire economic circumstances within the RMA and RSB Market are not**
7 **representative of the average California market.**

8 Protestant has repeatedly drawn the Board's attention to the abundant evidence in the record
9 evidencing the dire economic circumstances existing within the RMA and throughout the RSB
10 Market including, but not limited to, high unemployment, low housing prices, high foreclosure
11 rates, low credit scores, low levels of income, and low levels of education. (P Ex. R 17, 21, 23, 1,
12 Tab 16, Pages 1-4, Roesner Decl ¶¶ 44-45; J Ex. 42, Tab 28, Pages 1-2, 4-5; J Ex. 43, Tab 47, Pages
13 7-8; RT 1/12/11, 118:11-20; RT 1/14/11, 182:11-17, 182:18-25.)

14 Protestant's expert introduced compelling evidence concerning the cumulative effect of
15 several demographic factors within the RMA and RSB Market that explain why these markets
16 perform below the California average.

17 In addition, VWoA seems to agree with the data, yet it refuses to concede the obvious
18 conclusion. For example, VWoA cites to the fact that among markets in California counties with a
19 foreclosure rate greater than 2%, Volkswagen's market share is 88% of California average. (VWoA
20 OBOR 39:9-10.) This is clear evidence of the correlation between foreclosure rates and
21 Volkswagen brand performance falling below the California average. Moreover, the evidence
22 shows that the RSB Market had the highest foreclosure rates in the state. (RT 1/12/11, 118:11-20;
23 RT 1/14/11, 182:11-17; J Ex. 42, Tab 28, Pages 4-5; J Ex. 43, Tab 47, Pages 7-8.) As Mr. Roesner
24 testified at the hearing, the cumulative effect of each of the unique characteristics of the RMA and
25 RSB Market, including high unemployment, low education, low income, high Hispanic population,
26 high foreclosure rates and low credit scores leads to the conclusion that the RMA and RSB Market
27 cannot be expected to perform at 100% of the California average. The fact that this
28 underperformance in relation to the California average should be expected, eliminates any

1 possibility underperformance equates to available opportunity or lost sales.

2 **ii. Volkswagen dealers in coastal areas generally meet or achieve the California**
3 **average while inland markets, with the exception of the Bakersfield PAI, fall**
4 **short.**

5 The starting point of VWoA's opportunity analysis is the determination of a segmentation
6 adjusted California average. VWoA determines the percentage of VWoA registrations as compared
7 to the number of registrations for vehicles considered to be in the same competitive segments as
8 VW vehicles. While this may sound like a reasonable means for VWoA to measure its dealers'
9 performance, it fails to account for the unique characteristics of each market throughout the state,
10 especially one as diverse as the State of California. This point is clearly evident on Tab 16, Page 1
11 of Roesner's Remand Expert Report. (P Ex. R 1, Tab 16, Page 1.)

12 This map shows the PAIs of all VW dealers in California. The PAIs in green are those that
13 exceed VWoA's California segment adjusted average. The PAIs that fall short are shown in yellow.
14 The contrast is striking, with the majority of the coastal PAIs exceeding VWA's performance
15 standard and the majority of the inland PAIs falling below. (P Ex. R 1, Tab 16, page 1.) If VWoA's
16 California average were an *appropriate* measurement of Volkswagen dealers' performance and *did*
17 *properly* account for the unique characteristics of individual markets, one would expect to see a
18 more diverse disbursement of PAIs above and below the standard. It cannot be the case that almost
19 every inland dealer is a poor performer.¹

20 Based upon this analysis there can be little doubt that an inland market, like the RSB
21 Market, should be expected to perform *below* the California average. This is a clear indicator of
22 why VWoA's available opportunity analysis *must* be rejected by the Board.

23 The Bakersfield example is a unique situation that produces a unique result. Given the clear
24 disparity between the Inland versus Coastal markets, it is beyond reason to consider any shortfall of
25 the California average to be representative of missed and/or available opportunity within the RMA
26 and RSB Market.

27 _____
28 1 The sole inland PAI exceeding VWA's standard is located in Bakersfield in an isolated market virtually free of
competition from other VW dealers.

1 Furthermore, the fact that the Coastal markets consistently outperform the Inland markets
2 creates a situation where the California average will almost always be unobtainable for Inland
3 dealers. The average is raised by the performance of the Coastal dealers located in areas more
4 reflective of the demographics of Volkswagen customers. Even if the Inland dealers could raise the
5 sales to meet the California average, the result would be a higher average that the Inland dealers
6 could never achieve. Simply said, the Coastal markets, collectively, will always outperform the
7 Inland markets.

8 Finally, Volkswagen points to the performance of “nearby” Volkswagen PAIs of Pasadena,
9 Santa Ana and Irvine as evidence that the RSB Market should exceed the California average.
10 (VWoA 13:4-10.) However, there is no evidence in the record that these markets are similar to the
11 RSB Market in any respect—they are not.

12 **D. Respondent’s Mischaracterization of the Evidence and Testimony in the Record Fails**
13 **to Refute the Substantial Evidence Demonstrating Good Cause to Prevent the**
14 **Proposed Establishment.**

15 Respondent has repeatedly mischaracterized the testimony of Protestant’s expert, Joe
16 Roesner, by providing the Board incomplete citations to the hearing transcript. For example,
17 Respondent claims “Protestant's own expert testified that his so-called ‘damage’ analysis did not
18 necessarily mean that Protestant would sell one less car or make one less dollar as a result of the
19 new dealer in Montclair. Rather, he acknowledged that his analysis meant that Protestant may not
20 get as big a piece of an increased pie.” (VWoA OBOR 3:6-9.) This simply is not true.

21 Mr. Roesner’s calculation of impact was done at a known point in time and based upon
22 actual historic registration data. The percentage of business that would have been lost to the
23 Montclair dealer is based on the available data at that point in time. The calculated percentage is
24 the anticipated loss based on that level of business. The loss as expressed in units or dollars could
25 actually be less or more. If, for whatever reason, Ontario Volkswagen's business without the
26 Montclair point would be greater than it is today, the impact of the additional point would be even
27 greater to Ontario in both units and dollars. Mr Roesner testified, “And actually, the losses could be
28

1 less or they could be more. If indeed there is an increase in overall market, let's say that instead of
2 629, that's -- and I'm just doing this for pure ease of calculations. If it's 1000 units, you would
3 actually have a greater loss. In other words, that 12.5 percent becomes 125. So the losses could
4 actually be greater than what we're talking about here.” (RT 1/13/11, 28:19-25 – 29:1; Roesner
5 Remand Report Tab 24 ¶56.)

6 Later in its brief, Respondent falsely claims, without citation to the record, “Mr. Roesner
7 made the unrealistic assumption that Volkswagen sales would remain *exactly the same as they were*
8 *in 2009-2010* and therefore did not account for the sales growth that he acknowledged in his
9 testimony would likely take place.” (VWoA OBOR 42:20-23.) Once again, Respondent
10 misrepresents the evidence in the record. Mr Roesner testified extensively that his low and high end
11 range of impacts accounts for potential growth. (RT 1/14/11, 184:6-185:4.)

12 Respondent again misstates Mr. Roesner’s testimony and analysis concerning sales that
13 would be lost to the Montclair dealer when it claims Protestant assumes that it would not make any
14 sales into the Montclair PAI, if the proposed establishment were permitted. (VWoA OBOR 24:8-
15 12.) However, this simply is not true. Mr. Roesner testified extensively that Ontario VW would
16 continue to capture some sales in the Montclair PAI, but Montclair would also capture sales within
17 Ontario VW’s PAI. (1/13/11 8:18-10:18.) Looking to 2009 for example, 19.4% of Ontario VW’s
18 sales would be located closer to the Montclair dealer. This proximity advantage would make it
19 more likely than not that these sales would have gone to the Montclair dealer. As Mr. Roesner
20 explained, not all of these sales would be lost to the Montclair dealer, but the Montclair dealer
21 would also capture sales where Ontario VW had a proximity advantage. Ultimately, the percentage
22 of sales Ontario VW would lose to the Montclair dealer could well exceed 19.4%.

23 At page 38 of its brief VWoA misleadingly asserts: “Protestant's counsel implied that
24 Volkswagen's segmentation analysis was insufficient. However, Protestant offered no evidence of
25 local preferences that are not accounted for by the segmentation analysis. Furthermore, Protestant's
26 own expert used *the exact same segmentation analysis* in his report, he agreed that Volkswagen's
27 segmentation analysis does ‘take into account local preferences for the size of the vehicle and the
28 class of the vehicle,’ and he testified that he did not prepare any alternative segmentation analysis

1 which he believed to be more accurate.” The Board must be aware of the several inaccuracies
2 contained in this single paragraph.

3 First, Protestant introduced substantial evidence that the segment adjusted California
4 average does not account for local preferences and market conditions within the RMA and RSB
5 Market. This very issue is at the very heart of this Protest. Second, Protestant’s expert provided
6 extensive testimony and analysis concerning a number of local considerations that Respondent’s
7 segmentation analysis does not account for, as argued in Protestant’s Post-Hearing Opening Brief
8 beginning at page 15, line 20:

9 There are some compelling circumstances that help to explain why
10 Volkswagen’s performance in the Riverside-San Bernardino market is below state
11 average. These have nothing to do with VWoA’s current dealer network. Of the 49
12 metropolitan areas with a population of one million or more, the Riverside-San
13 Bernardino-Ontario area had the highest unemployment rate in October 2010, at
14 14.2%. In fact, the unemployment rate in Riverside and San Bernardino counties has
15 been on the rise since 2006. (RT 1/14/11, 153:24-25, 154:13-20; J. Ex. 43, Tab 39,
16 Pages 1 and 2.)

17 There is a statistically significant negative relationship between the Hispanic
18 population percentage and Volkswagen registration effectiveness, and the Riverside-
19 San Bernardino area has one of the highest Hispanic populations in the state. (RT
20 1/14/11, 182:5-11; J. Ex. 43, Tab 47, Pages 4-6.)

21 There is also a statistically significant negative relationship between the
22 percentage of foreclosed households and Volkswagen registration effectiveness, and
23 the Riverside-San Bernardino-Ontario Metro had the sixth highest foreclosure rate
24 in the country in the third quarter of 2010. (RT 1/12/11, 118:11-20; RT1/14/11,
25 182:11-17; J. Ex. 42, Tab 28, Pages 4-5; J. Ex. 43, Tab 47, Pages 7-8.)

26 In addition, there is a statistically significant positive relationship between
27 the percentage of the population with a Bachelor’s degree or higher and Volkswagen
28 registration effectiveness, and the Riverside-San Bernardino Market had the *third*

1 *lowest education* level of all the California markets. (RT 1/14/11, 182:18-25; J. Ex.
2 43, Tab 47, Pages 9-10.)

3 Each one of these four variables, when combined with the measured values
4 of the Riverside-San Bernardino market, suggest one could expect a lower
5 Volkswagen performance in this market than the CA average. None of these
6 measurements—unemployment, Hispanic population, foreclosures, and education
7 level—will be addressed by establishing another Volkswagen dealership in the
8 Riverside-San Bernardino market. (RT 1/14/11, 183:13-15, 201:14-21.)
9 (Protestant’s Post-Hearing Opening Brief 15:20-16:13.)

10
11 In addition, Mr. Roesner’s actual testimony regarding the appropriateness of VWoA’s
12 segmentation analysis was as follows:

13 Q. Are all variables taken into account in a segmentation analysis, or are there some
14 that are not?

15 A. No, absolutely not. In other words, the size and class is to some extent, but as I
16 said, even that varies across manufacturers. Some think that there's of (*sic*) a robust
17 competition from other brands than there is, but within segments, things such as the
18 demographic differences between the types of buyers, the price level, the vehicles,
19 the income, age, education levels, various things that influence ones decision
20 making within segments, that isn't accounted for at all within the
21 segmentation analysis. (RT 1/13/11, 47:18 - 48:14)

22
23 Obviously, as the record unambiguously reflects, Protestant has consistently and directly
24 challenged Respondent’s segmentation adjusted California average as applied to the RMA and RSB
25 Market. Respondent’s representation to the contrary is patently false und unsupported by the
26 entirety of the record.

27 An even more egregious mischaracterization of Mr. Roesner’s testimony is found at page 21
28 of VWoA’s brief, where Respondent provides the Board an incomplete quote from Mr. Roesner’s

1 testimony purportedly in support of its false claim that Mr. Roesner agrees that adding an additional
2 dealership will increase VW registrations. (VWoA OBOR 21:14-21.) However, Mr. Roesner's
3 complete testimony was:

4 "Well, I think to put additional points in is going to some degree raise Volkswagen
5 registrations. There's --you're always -- not always, but there typically be some -- see
6 some increase in a brand, *and most of that increase in my experience -- and I've*
7 *reviewed hundreds of these cases and testified in a large number. When a dealership*
8 *goes into a market with representation within it, a large number of those sales come*
9 *at the expense of the existing dealers."* (emphasis on Roesner's deleted testimony)
10 (RT 1/12/11, 89:19 – 90:5.)

11
12 In addition, VWoA goes on to falsely claim that Mr. Roesner testified that if the proposed
13 point were established "he would expect to see a 10% increase in Volkswagen sales in at least the
14 Montclair market, and possibly the entire RSB Market." (VWoA OBOR 21:18-21.) However, the
15 actual testimony of Mr. Roesner reveals that he did not expect a 10% increase but was merely
16 saying that it was a *possibility* based upon his analysis of the Puente Hills example:

17 Q. Mr. Roesner in your deposition you testified that looking at the -- at the
18 performance of the Volkswagen brand in the Riverside/San Bernardino market that
19 Volkswagen could expect some sort of an increase in overall volume by adding a
20 dealer. And you while you didn't have a scientific number, you thought that could be
21 around -- somewhere around 10 percent. Do you remember that?

22 A. Yeah. Based on what happened with Puente Hills, I would say 10 percent
23 is a possible expectation.

24 Q. And do you recall saying 10 percent wasn't really scientific, but it was sort of
25 a rough estimate on your part based on what you saw?

26 A. Yes. And as I pointed out earlier today, the increase and decrease of the
27 curve, mainly involved with Puente Hills, seemed to be isolated with that Puente
28 Hills PAI. So I don't know if it would be across the market or just in the Montclair

1 PAI that you'd see that. (RT 1/12/11, 184:11-185:19.)

2
3 Respondent mischaracterizes the testimony of Earl Reed in suggesting that Mr. Reed
4 believes the presence of a Volkswagen dealer on the 10 Freeway will increase overall Volkswagen
5 sales. While Mr. Reed testified that the proposed establishment would increase brand awareness,
6 there is no evidence in the record that this would lead to increased sales, whether in the RMA or
7 anywhere else.

8 In addition, VWoA yet again cites to Paragraph 126 of ALJ Archibald's Proposed Decision,
9 long since rejected by this Board, in support of its claim that Protestant thought a Montclair
10 dealership could co-exist with Ontario VW: "[I]t is imperative to remember the discrepancy
11 between the Mr. Sherman who argues that Montclair will destroy Ontario VW, and the Mr.
12 Sherman who confirmed to Volkswagen that he could make a Montclair dealership as good as
13 Ontario VW." (VWoA OBOR 17:4-11.)

14 However, the ALJ, in each of her proposed decisions, as well as the Board in its prior
15 decision, ultimately concluded:

16 "At this August 26, 2009, meeting, Mr. Sherman told Messrs. Ray and Mears there
17 was **no need** for an additional dealership in Montclair, and that San Bernardino and
18 Redlands **could not support** two dealerships. Mr. Reed confirmed that Mr.
19 Sherman voiced his concern that establishing a Montclair dealership would be a
20 **mistake**. However, VWoA claims it did not become aware of Mr. Sherman's
21 concerns until it received an email dated May 24, 2010, after Mr. Sherman learned
22 he had not been awarded the Montclair point. *The testimony of Mr. Sherman and*
23 *Mr. Reed is more credible.* (emphasis added) (Board's Final Decision ¶50.)

24
25 The record could not be clearer concerning the fact that Mr. Sherman first attempted to
26 dissuade Respondent from establishing a point in Montclair, but it became certain that VWoA
27 intended to establish a dealership in Montclair regardless of the existing circumstances. (RT
28 1/19/11, 70:22-73:6.) Upon realizing VWoA's position could not be changed, Mr. Sherman

1 attempted to secure the point himself to minimize the devastating effects an additional dealership
2 would have on his operations. (RT 1/11/11, 78:14-79:11, 49:21-23.) Volkswagen's repeated claims
3 that Mr. Sherman's application is a sign he believes the market can support an additional point in
4 Montclair is not supported by the evidence in the record. The record reflects that Mr. Sherman
5 unequivocally explained his decision to apply for the Montclair open point as a choice between the
6 lesser of two evils. (RT 1/11/11, 77:13-20.)

7 Respondent misrepresents the evidence in the record when it instructs the Board: "After
8 balancing the interests of *all* parties including the public as the New Motor Vehicle Board ("Board")
9 is required by the law to do -- and not merely looking to whether the new dealership will disrupt
10 Protestant's present monopoly and limited need to compete -- it is evident that existing
11 circumstances do not establish 'good cause' to block the proposed Montclair dealership from
12 opening and putting its employees to work." (VWoA OBOR 2:1-6.) However, the record is clear
13 that no less than *four* existing Volkswagen dealers are assigned contractual responsibility for the
14 RMA with many other dealers also selling into the RMA. (J. Ex. 42 Tab 11.) Not only does
15 Protestant *not* have a "monopoly" over sales into the RMA, no part of the ALJ's proposed
16 decisions, the Board's prior Decision, nor Protestant's arguments have ever contended, that any
17 such "monopoly" exists.

18 In addition, and for reasons unknown, VWoA incorrectly claims: "Following the meeting,
19 on June 1, 2011 the Board issued its Corrected Order Remanding the Proposed Decision (the
20 "Remand Order")", which was limited solely to asking the Judge to provide additional findings of
21 fact on two discrete issues: (1) Additional findings "on the methodology used [by Mr. Roesner] in
22 concluding that Protestant made 19.4% of new Volkswagen sales from the Montclair PAT in 2009";
23 and "a determination that (assuming hypothetically) there is a 19.4% reduction in Protestant's sales
24 due to the establishment of the proposed dealer in Montclair, where, in terms of geography, will
25 Protestant re-capture those lost sales?" (VWoA OBOR 3-9.)

26 However, as the record reflects, the Board's order also instructed that "The focus should not
27 be limited to new retail sales but should also consider used vehicle sales, as well as warranty and
28 any other customer pay services." (Order Remanding Proposed Decision Dated 5/19/11, ¶ 3, Lines

1 13-15.) As will be explained later in this brief, Respondent failed to respond.

2 Despite Volkswagen's attempts to downplay Protestant's winning VW's Generation Best
3 Award for its performance in 2009, it cannot obscure the fact that Protestant was one of only 23
4 dealers in the United States to achieve or surpass all of the Volkswagen established metrics for the
5 Generation Best Award.

6 Volkswagen's 2009 Generation Best Award was awarded only to those dealers who met or
7 exceeded the following metrics: 100% of annual new vehicle sales objective, 100% of annual CPO
8 sales objective, 100% of annual parts purchases objective, achieve a minimum sales CES score of
9 93, achieve a minimum service CES score of 85.5, pass a facility assessment and have 70% of the
10 dealership achieve certification. (P. Ex. 53.) Earl Reed testified that Protestant not only met and
11 exceeded these criteria for the Generation Best Award in 2009, but Ontario VW works to exceed
12 each of these metrics on a regular basis, regardless of whether or not any particular award is tied to
13 their achievement. (RT 1/10/11, 186:3-187:4, 187:23-188:2.)

14 Curiously, Volkswagen's witnesses in this proceeding had a different view of the
15 significance of the Generation Best Award. Steven Smith testified that he believed the criteria for
16 the Generation Best Award only requires dealers to meet "minimum" requirements. (RT 1/20/11,
17 140:15-141:8.) However, Mr. Smith also admitted that, of Volkswagen's 560-570 dealers in the
18 United States, only 23 dealers in 2009 met all of these requirements. (RT 1/20/11, 141:12-24.)
19 Another Volkswagen employee, Kurt Thomas, conceded that being one of 23 dealers out of 600
20 nationally to win an award puts that dealer in an "elite" category. (RT 1/19/11, 236:1-5.) Despite
21 Volkswagen's efforts to minimize Protestant's performance, Protestant's achievements are clear
22 evidence of the superior level of service provided to Volkswagen customers within the RMA and
23 beyond.

24 **i. VC § 3063 (a): Protestant's substantial and permanent investment will be lost**
25 **if the proposed establishment is permitted.**

26 VWoA's argument that Mr. Sherman has had adequate time to recapture his investment is
27 absurd on its face. (VWoA OBOR 42:3-5.) Not surprisingly, VWoA does not cite to any legal
28 support for this theory – there isn't any.

1 The evidence demonstrates, as Respondent concedes, that Protestant has a substantial and
2 permanent investment in its Volkswagen franchise. (VWoA OBOR 42:3.) Upon rejection of
3 VWoA's available sales opportunity analysis, Respondent's argument that Protestant's substantial
4 and permanent investment will not be placed at risk by the establishment of the proposed new dealer
5 is completely without support.

6 Protestant's expert witness, Mr. Roesner, determined that the estimated negative impact on
7 Ontario Volkswagen's New and Used departments ranges from 12.5% to 25%. The estimated
8 negative impact on Ontario Volkswagen's Service and Parts & Accessories departments ranges
9 from 20% to 30%. A loss of sales at the low end of the impact ranges would result in lost net profit
10 of approximately \$450,000 per year, whereas a loss of sales at the high end of the impact ranges
11 would result in lost net profit of approximately \$725,000 per year. (J. Ex. 42, Tab 37, Pages 1 and
12 2.)

13 Faced with these determinations, Mr. Sherman testified that at the low range of impact, with
14 losses of \$448,000, his dealership would go out of business. At the higher range of impact, his
15 dealership would go out of business even sooner. (RT 1/11/11, 27:13-20.)

16 Substantial evidence exists in the record to support a finding that Protestant's substantial and
17 permanent investment will likely be lost should the proposed establishment be permitted.

18 **ii. VC § 3063 (b): The proposed establishment would have an adverse impact to**
19 **the retail motor vehicle business and consuming public in the RMA.**

20 If the proposed dealership is established in Montclair, Bozzani Motors, Puente Hills VW,
21 Alhambra VW and Protestant will become much weaker dealers. It is likely that at least one of
22 these dealers, and maybe more, will be forced to close its doors. (RT 1/10/11, 210:21-211:22;
23 1/11/11, 27:13-20; 120:2-121:9.) VWoA's attempt to increase sales by adding yet another dealer in
24 Montclair will likely have the same results as the addition of the Puente Hills and Alhambra points:
25 a redistribution of sales and a reduction in profitability for the existing dealers currently serving the
26 RMA.

27 The record plainly reflects that the four dealers whose PAI's comprise portions of the RMA
28 are already competing in an extremely competitive market. The record reflects that Mr. Sherman

1 was only recently able to operate profitably after making substantial cost reductions in his
2 operations. Even then, his dealership was still operating below the NADA average for 2009 and
3 2010. (Sherman Decl., Ex. A.) This, despite the fact that, as both the ALJ and the Board found,
4 Protestant is a well-managed dealership. (Proposed Dec. 5/19/11 ¶ 102; Proposed Dec. After
5 Remand ¶ 177.)

6 Greg Bozzani also testified regarding his struggles to operate his Volkswagen dealership
7 profitably in the RSB Market. The current profitability of Bozzani Motors has decreased
8 significantly since the re-opening of the Puente Hills dealership. (RT 1/11/11, 121:1-6.) At the time
9 of the hearing, Mr. Bozzani testified that the current financial state of Bozzani Motors was down to
10 a near break-even level. (RT 1/11/11, 121:1-9.) Mr. Mears' testimony confirmed that Bozzani
11 Motors sold 115 fewer cars in 2010 than in 2009 (down 25%), during the same period when Area
12 53 sales were up 29%. (RT1/19/11, 46:16-22, 47:11-20; R. Ex. 64.) Even in the face of the plain
13 evidence showing the impact the establishment of the Puente Hills Volksagen store had upon
14 Bozzani Motors, VWoA persists in its efforts to add yet another dealership in callous disregard for
15 Bozzani Motors and the other existing dealers in the area.

16 The competitive circumstances in the market are clear evidence of the RMA's inability to
17 support an additional dealer. There is no better example of this fact than the coming and going of
18 the Puente Hills Volkswagen dealership. This real world example provides compelling evidence of
19 the fact that an additional Volkswagen dealership will merely redistribute sales – not increase them.

20 In VWoA's brief, at page 9, lines 15-18, Respondent states that "[t]he proposed new
21 dealership will be located in the *Montclair auto mall*, directly adjacent to and visible from the 10
22 freeway, on the southern side of the 10 freeway across from a large retail mall, the Montclair Plaza."
23 (emphasis added) Respondent cites RT 1-19 at 136:9-20 in support of this statement. However,
24 this citation does not support the statement that the new dealership will be "visible from the 10
25 freeway." In fact, there is no mention of visibility in this citation whatsoever.

26 In addition, during the hearing, the proposed location was never referred to as an "auto
27 mall." In fact, the testimony cited by Respondent describes the area as the "Metro Motorplex." RT
28 1/19, 136:14-20. On page 22, lines 4-6 of VWoA's OBOR, it continues to claim that the proposed

1 Montclair dealership is in an auto mall with direct visibility from the heavily traveled 10 Freeway,
2 which supports the conclusion that the dealership will increase overall vehicle sales within the
3 RMA. Respondent has no citation or evidence to support these statements because no witnesses
4 described this area as an “auto mall.” Since the proposed Montclair dealership is not located in an
5 “auto mall”, it will not receive the alleged benefits of being in an auto mall setting, as VWoA claims
6 it will. Respondent’s argument is misleading and there is no evidence or support for the claim that
7 “the dealership will increase overall vehicle sales within the RMA.”

8 **iii. VC § 3063 (c): It would be injurious to the public welfare to permit the**
9 **proposed establishment.**

10 The ruinous competition that would result from the establishment of the proposed Montclair
11 dealership would, at the very least, force a significant reduction in the amenities and services
12 currently being provided to Volkswagen customers by existing dealers. At worst, the proposed
13 establishment, if permitted, would likely result in the closure of one of these dealers already
14 providing more than adequate services to Volkswagen customers in the RMA, and in areas beyond.

15 **iv. VC § 3063 (d): The existing dealers provide adequate competition and**
16 **convenient consumer care in the RMA.**

17 The existing dealer network is already adequately serving customers within the RMA,
18 which is surrounded by Bozzani and Puente Hills to the west, Ontario to the east, and Cardinale
19 Way and Riverside Volkswagen to the south and southeast. (J. Ex. 42, Tab 4, Page 1.) Each of
20 these dealers is actively competing for sales and service business within the RMA. Moreover, there
21 are a number of Volkswagen dealers that also capture sales and service business within the RMA
22 even though their PAIs do not include census tracts located within the RMA. (J Ex. Tab 11.)

23 As noted above, and by Respondent’s own admission, Ontario VW is an “elite” performing
24 Volkswagen dealership. This is evidenced by the fact that VWoA awarded Protestant the
25 prestigious Generation Best Award in 2009. Protestant was one of only 23 Volkswagen dealers in
26 the entire country to have received this award in 2009.

27 Protestant consistently provides its customers a high level of customer service. Moreover,
28 Ontario VW could handle an additional 50% more service volume should it become available. Mr.

1 Reed testified that Ontario VW has had as many as 15 technicians working in the service
2 department and as many as four service writers. (RT 1/10/11, 103:17-22.) At the time of the
3 hearing, Ontario VW only had 10 service technicians and three service advisors. In addition, fixed
4 operations manager, Mr. Kurt Thomas acknowledged he is familiar with the Ontario VW dealership
5 and believes it could double its service capacity if it had the business. (RT 1/19/11, 214:13-215:5.)
6 Ontario VW is clearly ready and able to hire service staff and ramp up its service volume should the
7 business become available.

8 The drive times for Volkswagen customer within the RMA compare favorably with brands
9 whose sales volumes are comparable to the Volkswagen brand. (J Ex. 44, A-61; P Ex. 12.)) It is
10 unreasonable to argue that Volkswagen should have the same number of dealers in the RMA as
11 Toyota, Honda or Nissan given the great disparity in sales volumes. If every market were required
12 to maintain the same number of Volkswagen dealers as the high volume brands, Toyota, Honda and
13 Nissan, it would be unlikely that any Volkswagen dealer could operate profitably.

14 There is no evidence in the record that the RMA is not being adequately served by the
15 existing dealers. The only evidence of inadequacy offered by Respondent is in the purported sales
16 performance shortfall based upon the application of the inappropriate California average, which
17 once again must be rejected by this Board.

18 v. **VC § 3063 (e): The proposed establishment would result in ruinous competition**
19 **among the proposed new dealer and the four Volkswagen dealers currently**
20 **assigned responsibility for portions of the RMA and would therefore not be in**
21 **the public's interest.**

22 Without any legal authority in support of its claim, Respondent argues that "Vehicle Code §
23 3063(e) requires the Board to consider whether the establishment of the new dealer will increase
24 competition (both intrabrand and interbrand), which the statute finds *necessarily* to be in the
25 public's interest. (VWoA OBOR 41:3-5.) If this were true, there would be no need for the Board to
26 make findings on this good cause factor. Moreover, there would be no need for this factor to even
27 be a part of the statutory scheme, because the addition of a competitor dealer will always increase
28 competition, by definition. VWoA's attempt to yet again warp the legal standard the Board must

1 employ in consideration of this good cause factor must be ignored.

2 In addition, VWoA ignores the potential for ruinous competition. Under VWoA's
3 reasoning, every newly added dealer would increase competition and be in the public's interest.
4 Under these circumstances the public would benefit from the addition of 10 dealers to the RMA.
5 As the Board is undoubtedly aware, this cannot be so. When a market becomes over-dealered the
6 public interest is not benefitted.

7 As discussed above, Protestant's expert provided a range of impact that would ultimately
8 force the closure of Protestant. Also discussed above, is the difficulty Bozzani Motors has
9 experienced in its attempt to maintain profitability. While the continued viability of Protestant and
10 Bozzani Motors would be directly at risk, the other two dealers, Cardinale Way and Puente Hills
11 would also experience a detrimental impact. In 2009, Cardinale Way was dependent upon the
12 Montclair PAI for 9.3% of its sales. Through July, 2010, Puente Hills made 7.9% of its sales in the
13 Montclair PAI. (J Ex 42, Tab 11.)

14 In addition, as Protestant argued previously in its Opening Brief on Remand at pages 9-10:

15 **b. The proposed Montclair dealer will substantially impact Protestant's**
16 **Service business.**

17 The Montclair PAI is a significant source of service business for Ontario
18 VW's service business. Tab 10 Page 1 of Roesner's Remand Expert Report shows
19 that service customers from the Montclair PAI accounted for 22.5% of Ontario
20 VW's service business in 2010. Ontario VW captured more service in the Montclair
21 PAI than all other market dealers combined. (Roesner Remand Expert Report Decl.
22 ¶ 33.) An additional 23% of Protestant's service customers came from the
23 Victorville and Redlands PAIs in 2010 as well. (Roesner Remand Expert Report
24 Decl. ¶ 34.)

25 When limiting the analysis to the Montclair RMA, we see that Ontario
26 completed 41.4% of the service orders in 2009, 42.3% in 2010 and 42.7% through
27 March 2010. (P Ex. R 1, Tab 10, Page 2; Roesner Remand Expert Report Decl.
28 ¶35.) Not only does Montclair dominate the capture of service business within the

1 RMA, Protestant risks the loss of at least 22.5% of its service business should the
2 proposed Montclair dealer be established.

3 As with sales, Protestant's service opportunities are limited by the industrial
4 nature of the areas immediately surrounding Protestant's location. Evidence of this
5 is seen on the final page of Protestant's Service Smarts Report for June 2011 which
6 breaks down Protestant's active customers by increments of 2 mile distances from
7 Protestant. The tremendous increase in customers from the 2 and 4 mile ranges to
8 the 6 and 8 mile ranges is striking. (P Ex. R 6.) The establishment of the proposed
9 Montclair point would have a crippling effect on Protestant's service business.

10 **c. The proposed Montclair dealer will substantially impact Protestant's**
11 **Certified Pre-owned and used sales.**

12 Tab 8 Page 1 of Roesner's Remand Expert Report shows the importance of
13 the Montclair PAI to Protestant's Certified Pre-owned ("CPO") sales. In 2010,
14 14.9% of Protestant's CPO sales came from the Montclair PAI, accounting for
15 26.9% of all CPO sales in the area. The establishment of the proposed Montclair
16 dealer would place approximately 15% of Protestant's future CPO sales at risk.

17 Protestant made an additional 28 CPO sales in the Redlands and Victorville
18 PAIs combined, representing more than 23% of Protestant's CPO sales for 2010. As
19 with sales, approximately 40% of Protestant's future CPO sales will be at risk if the
20 Montclair point is permitted, and the Redlands and Victorville points are
21 established. (P Ex. R 1, Tab 8, Page1.)

22 Turning to the RMA, Ontario VW made 31.5% of its CPO sales within the
23 RMA in 2009, 29.8% in 2010 and 40.5% through March, 2011. There can be little
24 doubt that the RMA is a substantial source of Protestant's CPO sales.

25 The establishment of the proposed Montclair point also poses a significant
26 threat to Protestant's non-CPO used sales. Tab 9 of Roesner's Remand Expert
27 Report includes maps that show the locations of each of Protestant's used
28 Volkswagen sales for 2009 and October 16, 2010 year-to-date. These maps

1 demonstrate that the proposed Montclair point is in close proximity to a large
2 number of Ontario VW's used sales. As expected, a number of Protestant's used
3 sales were made in the Redlands and Victorville PAIs as well.

4 **d. The proposed Montclair point will substantially impact Protestant's**
5 **parts business.**

6 Tab 11 of Mr. Roesner's Remand Expert Report visually demonstrates the
7 importance of the RMA to both Protestant's service and parts business. These maps
8 display the location of each of Protestant's repair orders as blue dots for the years
9 2009 and October 30, 2010 year-to-date. The highest concentration of blue occurs
10 within the RMA, and again, the effect of the industrial areas surrounding Ontario
11 VW is seen in the white blotches on each side where there is a striking absence of
12 blue dots.

13
14 Despite the substantial evidence Respondent believes that Protestant could easily
15 recapture all of its losses in the Montclair PAI if were to "refocus" its efforts. (VWoA
16 OBOR 28:8-10.) While Volkswagen witnesses begrudgingly admit that Protestant is an
17 "elite" performer and a 2009 Generation Best Award winner, it nevertheless claims
18 Protestant lacks focus.

19
20 **E. The balancing of the Interests of VWoA, the Public and Protestant in consideration of**
21 **the good cause factors set forth in VC § 3063 requires a determination that good cause**
22 **exists to prevent the proposed establishment.**

23 **i. VWoA's Interests:**

24 VWoA claims "[t]he Montclair dealership will increase overall brand awareness and total
25 Volkswagen sales within the RMA and will provide greater convenience and service for existing
26 and potential Volkswagen customers." (VWoA OBOR 20:21-23.) However, it is clear from the
27 record that VWoA's sole interest in establishing the proposed Montclair dealership is to establish
28 representation along the 10 Freeway. (RT 1/10/11, 189:17-18.)

1 VWoA's claim that there exists ample opportunity within the RMA and throughout the RSB
2 Market for Protestant and the other dealers to recapture any sales lost to the proposed Montclair
3 dealer is dependent upon the appropriateness of its opportunity analysis, which the substantial
4 evidence in the record overwhelmingly demonstrates, it is not, and it should be rejected by the
5 Board.

6 The evidence in the record shows that the establishment of the proposed Montclair point will
7 not result in an appreciable increase in overall Volkswagen registrations. Instead, the sales will be
8 redistributed among the existing dealers and the proposed dealer, as is seen by the example of what
9 occurred between Bozzani Motors and Puente Hills. (RT 1/12/11, 71:23-73:11.)

10 **ii. The Public Interest:**

11 The proposed establishment would provide a temporary decrease in customer drive distances
12 in the RMA, as is always the case when an additional dealer is added to the RMA, but this benefit to
13 the public would be short lived when Protestant, or any one of the other dealers serving the RMA, is
14 forced to cease its Volkswagen operations. Moreover, there is no legitimate need to decrease
15 customer drive distances because the existing dealer network already provides adequate customer
16 convenience. As explained earlier, Volkswagen's existing dealer network *already* provides
17 comparable customer convenience as compared to all of its competitors *with similar sales volumes*.
18 (J. Ex. 44, A-61; P. Ex. 121.)

19 As discussed earlier, Protestant is one of only 23 Volkswagen dealers in the United States to
20 have been awarded the prestigious Generation Best Award in 2009. (RT 1/10/11, 186:3-187:4,
21 187:23-188:2.) There is no question that the public benefits from the elite level of service provided
22 by Protestant. Conversely, there can be little doubt that the loss of Protestant would have a
23 detrimental impact to the public interest in the RMA and other areas served by Protestant.

24 While it remains to be seen exactly what, if any, manner of facility might be constructed at
25 the proposed location, and assuming a facility were actually built, there would be some job creation
26 and tax revenue generated for the City of Montclair. However, any benefits to Montclair would be
27 offset by losses to Ontario, resulting in no net benefit to the public interest.

28 In addition, any legitimate need for an additional dealer in the RSB market would be best

1 addressed by the addition of a dealer in Redlands, where Respondent's own expert determined
2 would be the optimal location to establish an additional Volkswagen dealership in the RSB Market.
3 (RT 1/14/11, 131:24-132:16.) Moreover, the Redlands location would not be Protestable by any
4 existing dealer. (RT 1/12/11, 89:7-11.)

5 On balance, the potential benefit to the public, if any, would be negligible at best and cannot
6 justify permitting the proposed Montclair dealership to be established.

7 **iii. Ontario VW's Interests:**

8 Protestant is rightfully concerned that the proposed establishment will return Ontario VW's
9 operation to a state of unprofitability. Protestant has made a significant and permanent investment
10 in its Volkswagen franchise that will be placed in jeopardy should the proposed point be
11 established.

12 Protestant purchased property in and relocated its facility, *from Montclair*, to the Ontario
13 Auto Mall and constructed an Image compliant facility to better serve Volkswagen customers and
14 the Volkswagen brand. Protestant bore all the risk in making this substantial and permanent
15 investment and every right to protect it. The severe detrimental impact that is sure to result from the
16 proposed establishment weighs heavily in favor of a determination that good cause exists to prevent
17 the proposed establishment.

18
19 **III. CONCLUSION**

20 Substantial evidence supports each of the Board's previous findings. Moreover, substantial
21 evidence in light of the whole record demonstrates good cause to prevent the establishment of the
22 proposed Montclair Volkswagen dealer. Respondent's entire argument for the purported need to
23 establish the additional point is dependent upon its application of the California segment adjusted
24 average to measure both lost sales and available market opportunity. As the Board properly
25 concluded in its prior decision, the California average is not an appropriate benchmark to measure
26 performance or available opportunity in the RMA and throughout the RSB Market.

27 Upon a determination that the California average is an inappropriate benchmark to be
28 applied in the RMA and RSB Market, Respondent's evidence concerning the purported need for an

1 additional dealership in Montclair is without any evidentiary value. Similarly, its claim that existing
2 available sales opportunities are more than adequate to offset any potential losses incurred by the
3 four existing dealers currently assigned responsibility for the RMA is also without merit.

4 The evidence before the Board plainly shows that Protestant's continued viability will be
5 placed in immediate peril should the proposed point be established. VWoA's desire to establish a
6 dealership along the 10 Freeway cannot justify the likely closure of Protestant, one of only 23
7 dealers in the country to receive Volkswagen's Generation Best Award in 2009, and a dealer
8 Respondent's witness described as "elite."

9 The RMA is already more than adequately served by the four existing dealers whose PAIs
10 include portions of the RMA. The establishment of the Montclair dealer would severely impact
11 these dealers' ability to continue to adequately serve the RMA. Any potential benefit to the public
12 that might result from the proposed establishment would be short lived and ultimately offset by the
13 harm incurred in the RMA and surrounding communities through lost sales tax revenue, lost jobs
14 and the likely closure of one or more of the existing dealers.

15 Based upon all of the forgoing, Protestant urges the Board to sustain its Protest.

16
17
18
19 Dated: March 7, 2013

LAW OFFICES OF
MICHAEL J. FLANAGAN

20
21
22 By 
Michael J. Flanagan
23 Attorneys for Protestant

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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 March 7, 2013 I caused to be served a true and complete copy of:

***PROTESTANT'S RESPONSE TO
RESPONDENT'S
OPENING BRIEF ON REMAND
FROM SUPERIOR COURT***

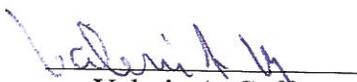
***Ontario Volkswagen v Volkswagen
Protest No. PR-2265-10***

By Electronic Mail:

Allen Resnick
Mathew D. Hinks
Ryan Mauck
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 7 March 2013, at Sacramento, California.


Valerie A. Coffey