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9 VOLKSWAGEN OF AMERICA, INC.

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

12 In the Matter of the Protest of:
13 SHAYCO, INC., dba ONTARIO
14 VOLKSWAGEN,
15 Protestant,
16 v.
17 VOLKSWAGEN OF AMERICA, INC.,
18 Respondent.

19 Protest No. PR-2265-10

20 **RESPONDENT VOLKSWAGEN OF**
21 **AMERICA, INC.'S REPLY BRIEF ON**
22 **REMAND FROM THE SUPERIOR COURT**

23 Respondent Volkswagen of America, Inc. ("Volkswagen") respectfully submits this post-
24 hearing reply brief.

25 **I. INTRODUCTION**

26 Protestant is asking this Board to shield its Volkswagen dealership from reasonable
27 competition by disregarding the overwhelming, objective evidence in the record, pretending that the
28 last two years did not exist, and making a decision based upon outdated speculation about what the
state of the motor vehicle industry, the Volkswagen brand and the economy *might* look like in 2012
and 2013, contrary to the Board's duty to the people of California, and in violation of the Board's
mandate under the Vehicle Code.

Pursuant to Vehicle Code §§ 3063 and 3066, it is Protestant's burden to prove that "*existing*
circumstances" establish good cause for the Board to take the extraordinary step of prohibiting the

1 proposed new dealership in Montclair. Protestant failed to meet that burden. In fact, Protestant’s
 2 Written Argument Pursuant to Government Code Section 11517(C)(2)(E)(ii) (“Protestant’s Opening
 3 Brief”) is littered with speculation and arguments that do not address “existing circumstances” at
 4 all, but rather point to economic circumstances that were unique to the severe recession in the 2009-
 5 2010 time frame. Over and over again, Protestant’s Opening Brief makes reference to “current”
 6 economic data, dire economic conditions, erroneous sales projections and other evidence that is not
 7 in fact “current,” without even acknowledging, much less explaining, what this outdated, incorrect
 8 speculation should mean to the Board today.

9 The reason for this is obvious -- *existing* circumstances do not warrant sustaining the
 10 Protest. The evidence presented in 2011 established that Volkswagen’s performance in the
 11 Montclair relevant market area ("RMA"), the Riverside-San Bernardino Market (“RSB”), and even
 12 Protestant’s own Primary Area of Influence (“PAI”) was abysmal compared to the sales of its
 13 competitors. The evidence further established that the real reason for this poor performance was not
 14 demographics or racial profiling, as Protestant initially argued, but the fact that Volkswagen’s
 15 competitors had more dealerships in the territory and in locations with better visibility to potential
 16 customers, thereby causing customers to search out their dealers and ignore Volkswagen dealers.
 17 Finally, the evidence showed that, if the Montclair dealership were permitted to open, Volkswagen
 18 sales throughout the region would rise, thereby *increasing* -- not decreasing -- sales opportunities
 19 available to Protestant.

20 Protestant’s primary response to these indisputable facts in 2011 was that, in the fragile
 21 economy of that time, Protestant simply could not risk competing against another Volkswagen
 22 dealer. The Board likewise was concerned in 2011 that “[g]iven the difficult economic times that
 23 exist *now* ... [i]t is a time when it may be better to err towards maintaining the status quo as to the
 24 number of dealers....”

25 Volkswagen strongly disagreed that speculation or concern about the future of the economy
 26 or automotive sales was sufficient to overcome the overwhelming evidence that the Montclair
 27 dealership will be in the public interest. However, in any event, it is now 2013 and beyond dispute
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1 that the Board’s concerns about the economy two years ago do not reflect current reality or statutory
 2 “existing” circumstances today.

3 In accordance with the Superior Court’s decision, the Board must make a fresh decision
 4 today, not merely dust off the decision it made two years ago as if nothing has changed. Moreover,
 5 while the Board must decide this Protest based on the evidence in the record, that evidence must be
 6 weighed and evaluated by the Board in the context of existing circumstances at the time of the
 7 Board’s decision, now, in 2013. The fact that the Board rejected Volkswagen’s request to augment
 8 the record with updated evidence does not mean that the Board must pretend that it is still 2011.

9 The burden of proof still lies with Protestant to convince the Board that *existing*
 10 circumstances in 2013 warrant sustaining the protest. Protestant’s refusal to update its arguments
 11 regarding the evidence in the record, or to explain how 2009-2010 data might support its claims in
 12 2013 -- and, even more egregiously, Protestant’s attempts to mislead the Board by referring to the
 13 2009-2010 as “current” -- only reinforce the obvious, that Protestant cannot meet, and has not met,
 14 its burden of proof under the Vehicle Code.

15 The opening of a new Volkswagen dealership in Montclair, with strong visibility in an
 16 underserved community, will strengthen the dealer network, increase overall Volkswagen sales, and
 17 benefit the community, consumers, the public, and all Volkswagen dealers in the area. Protestant’s
 18 stubborn desire to hold onto its near-monopoly over multiple open territories does not and cannot,
 19 under the law, support the continued blocking of the Montclair dealership.

20 **II. THE RSB MARKET AND RMA ARE NOT “CURRENTLY OVER-DEALERED”**

21 Protestant first argues that the Montclair RMA and the RSB Market are “currently over-
 22 dealered” and that the addition of a dealership in Montclair will result in “ruinous competition.”
 23 This argument flies in the face of the objective facts in the record.

24 **A. Protestant Incorrectly Asserts That The Victorville Open Point Is Filled**

25 Protestant incorrectly states that the Victorville point -- which lies over thirty miles to the
 26 northeast of both Ontario and Montclair -- has already been filled.¹ In fact, the evidence in the

27 _____
 28 ¹ Protestant’s Opening Brief at 15.

1 record confirms that Volkswagen’s letter of intent with the candidate in Victorville was cancelled
2 nearly two years ago, and the Victorville PAI remains an open point.²

3 **B. Protestant Incorrectly Relies On Sales By Dealers Outside The RMA And Even**
4 **The RSB Market**

5 Protestant’s claim that “the RMA is already saturated with Volkswagen dealers”³ is
6 nonsensical. The RMA contains *one* dealer -- Protestant -- who is located at the eastern fringe of the
7 RMA, 10 miles in drive distance and between 14.8 and 16.4 minutes in drive time from the
8 proposed Montclair dealership, and is not even located on the same freeway.⁴ The fact that PAI’s of
9 other Volkswagen dealers may include some census tracts within the RMA does not mean that those
10 dealers are in the RMA. If they were in the RMA, they would have protest rights.

11 Protestant next claims that the RMA is being adequately served, at least in part, by the
12 Puente Hills and Alhambra dealerships -- both well outside of the RMA -- but ignores the fact that
13 neither of those dealerships is in the RSB Market. Sales data in the record confirms that customers
14 in the Eastern Los Angeles area including Alhambra, City of Industry (Puente Hills) and Covina
15 (Bozzani Motors) generally do not travel into the RSB Market for purchases, and customers in the
16 RSB Market likewise do not travel into the East Los Angeles market to buy cars.⁵ Accordingly,
17 dealerships in those cities provide minimal service to customers and potential customers in the RSB
18 Market.

19 It is not surprising that customers in the RSB Market who decide to purchase a Volkswagen,
20 but have no nearby Volkswagen dealership to serve them, travel outside of their home markets to
21 buy a vehicle. This does not mean that Volkswagen dealers “in that relevant market area are
22 providing adequate competition and convenient consumer care for the motor vehicles of the line-
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25 ² Supplemental Declaration of Tony Ray on Remand ¶ 2.

26 ³ Protestant's Opening Brief at 7.

27 ⁴ Stipulated Fact No. 4; Ex. J42, Tab 7, pp. 1-2; Stipulated Fact No. 8.

28 ⁵ Ex. J44 at A-3, A-4.

1 make in the market area.”⁶ In fact, the one dealer in the RMA -- Protestant -- has failed to properly
 2 serve it’s own territory in Ontario⁷, let alone the entire RMA.

3 **C. Protestant’s Reliance On Bozzani Ignores The Evidence Regarding That**
 4 **Dealership**

5 Protestant’s arguments rely heavily on the purported impact of the Puente Hills and
 6 Alhambra dealerships on Bozzani Motors in Covina.⁸ However, Protestant ignores the fact that Mr.
 7 Bozzani admitted that numerous *other* factors were causing his sales to decline -- factors unrelated
 8 to the establishment or re-opening of any other dealership. Indeed, Bozzani’s sales decreased by
 9 approximately 22% the year *before* Puente Hills reopened,⁹ and its sales effectiveness likewise
 10 declined precipitously from 2008 to 2009.¹⁰ Protestant likewise ignores the fact that nearly half of
 11 Bozzani’s sales decrease after Puente Hills opened for business occurred in *Bozzani’s own PAI*,¹¹
 12 and nearly all of Bozzani’s losses in 2010 came from geographies in which the new Puente Hills
 13 and Alhambra dealerships would have had *no effect* according to Mr. Roesner’s theory. Indeed, as
 14 set forth in Volkswagen’s Opening Brief, the only thing that the opening of the Puente Hills
 15 dealership shows is that the establishment of a new Volkswagen dealership in an underperforming
 16 territory increases overall sales of Volkswagens for all dealers.

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 19 ⁶ Vehicle Code § 3063(d).

20 ⁷ See Volkswagen’s Opening Brief at 11-13. Volkswagen’s market share in the Ontario PAI was just 61.8% of
 21 California average in 2010, and was never higher than 62% in the four years leading up to the Hearing. If Protestant’s
 PAI were considered its own market, instead of being part of the overall RSB Market, it would be the worst performing
 market in the State of California.

22 ⁸ Protestant also argues that the proposed dealership in Montclair will negatively impact Bozzani Motors. As
 23 explained in Volkswagen’s Opening Brief, the evidence actually shows that other dealers can achieve a net positive
 24 sales boost from the increased brand performance. In any event, Bozzani Motors is not located in the RMA or even the
 25 RSB Market, and therefore the impact on Bozzani Motors -- positive or negative -- is not relevant for purposes of
 Vehicle Code § 3063(b), which is limited to the "[e]ffect on the retail motor vehicle business ... *in the relevant market
 area.*" Likewise, Bozzani Motors' sales effectiveness is not relevant for purposes of § 3063(d), which considers
 "[w]hether the franchisees of the same line-make *in that relevant market area* are providing adequate competition and
 convenient consumer care...."

26 ⁹ Ex. J42, Tab 10, p.1.

27 ¹⁰ Ex. J42, Tab 10, p.2.

28 ¹¹ Ex. J44 at A-77.

1 **D. Protestant Mischaracterizes Volkswagen’s “Optimal Location Analysis”**

2 Protestant next mischaracterizes the “Optimal Location Analysis” performed by Mr. Farhat,
 3 contending that Mr. Farhat “deliberately manipulated his analysis” in this regard.¹² As Mr. Farhat
 4 explained during his testimony, the computer algorithm cited by Protestant is not itself “analysis”
 5 but rather a tool used by Urban Science. It does nothing more than determine the location that
 6 would minimize the average air distance (not travel time) between customers and the closest
 7 dealership.¹³ Mr. Farhat and other experts use this computer program as *one part* of determining the
 8 most convenient location for a new dealership.¹⁴

9 In this case, the algorithm determined that, out of the entire RSB Market geography, placing
 10 a dealership in the Montclair auto mall (the site of the proposed location) would provide the second-
 11 greatest possible reduction in air distance for Volkswagen customers.¹⁵ When coupled with the fact
 12 that the proposed dealership is right on the 10 Freeway, and potential customers in the RSB Market
 13 are more densely clustered around Montclair than Redlands, this analysis actually *proves* that
 14 placing a dealership in Montclair will *improve* customer convenience for both the RMA and the
 15 entire RSB Market.

16 In any event, Protestant provides no authority for the concept that the Vehicle Code requires
 17 the Board to decide for Volkswagen where it “should” be placing its dealerships, rather than
 18 deciding whether good cause exists to block a real-world proposed dealership.

19 **III. PROTESTANT’S ARGUMENTS REQUIRE THE BOARD TO ASSUME EXISTING**
 20 **CIRCUMSTANCES BASED ON ERRONEOUS SPECULATION FROM TWO**
 21 **YEARS AGO, RATHER THAN ACTUAL EXISTING CIRCUMSTANCES IN THE**
 22 **REAL WORLD**

23 Under the Vehicle Code, it is *Protestant’s* burden to provide evidence of *existing*
 24 *circumstances*. Rather than attempting to do so, Protestant makes numerous arguments about the

25 ¹² Protestant's Opening Brief at 9.
 26 ¹³ RT 1-13 at 177:11-18; RT 1-14 at 125:10-126:7.
 27 ¹⁴ *Id.* at 177:25-179:6; RT 1-14 at 126:8-24.
 28 ¹⁵ Ex. J44 at A-52.

1 state of the economy, the automotive industry, and Volkswagen’s market share, based on the absurd
2 proposition that the Board must: (a) ignore actual, real world, currently existing circumstances; (b)
3 go back in time two years, before the currently existing circumstances were known; (c) and then,
4 guess as to what the currently existing circumstances might be based on the unsupported
5 speculation offered by Protestant two years ago.

6 For example, Protestant challenges the notion that Volkswagen will fulfill its sales goals,
7 based on “the hoped-for success” of the new Passat model. The level of success or failure of the
8 new Passat no longer requires speculation, but is indisputable public knowledge, which Protestant
9 could have addressed but instead studiously avoids. Respondent is not asking the Board to make
10 findings on current facts that are not in the record, but the Board should not and cannot base its
11 decision on Protestant’s outdated speculation about the economy, the motor vehicle industry, and
12 the Volkswagen brand.

13 Protestant’s failure to even address the passage of time in its Opening Brief is also reflected
14 by its acknowledgement that, depending on the level of Volkswagen’s sales growth, “new
15 dealerships may be needed five years from now....” This acknowledgement in turn is based upon
16 public statements by Volkswagen’s own CEO, Mr. Browning. What Protestant fails to note is that
17 Mr. Browning made those statements in November, 2010. If permitted by the Board, the Montclair
18 dealership will not open until 2015, at the earliest -- five years after Mr. Browning’s statement was
19 made, and right when Mr. Browning expected (and Protestant seems to acknowledge) that more
20 dealers *will* be necessary to handle increased Volkswagen sales.

21 Protestant also makes the argument that “existing circumstances” warrant blocking the
22 Montclair dealership because some industry experts *in 2011* predicted that industry sales *in 2011*
23 *and 2012* might be lower.¹⁶ Perhaps the most ridiculous argument of all in Protestant’s Opening
24 Brief is its speculation is that Volkswagen’s market growth in 2011 -- before the record was closed -
25 - was merely a temporary blip caused by the March 2011 tsunami and earthquake in Japan, and that
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¹⁶ Protestant’s Opening Brief at 17-18.

1 “[a]s the situation in Japan has stabilized ... [t]his is very likely to result in lower market share by
 2 Volkswagen.”

3 In other words, Protestant is asking the Board to assume that industry sales and
 4 Volkswagen’s market share might have *decreased* during the last two years based on speculation
 5 presented in 2011. The fact that Protestant presented this argument in 2011 is one thing. The fact
 6 that Protestant continues to make it today, in 2013, merely illustrates why Protestant cannot prevail
 7 in this Protest unless the Board ignores “existing circumstances” and pretends that it is still 2011.

8 Even in addressing the data from 2011, Protestant makes several inaccurate statements about
 9 the impact of Volkswagen’s sales goals (both past and present) on the evidence. As Mr. Farhat
 10 stated repeatedly in his testimony, these sales goals were *not* the basis for Mr. Farhat’s analysis or
 11 conclusions, which instead were based on *actual* Volkswagen registrations in 2009, 2010 and the
 12 first quarter of 2011.¹⁷ To the extent Volkswagen sales have increased, or will increase, *at all* from
 13 those 2009-2010 figures, the increased sales will benefit both Protestant and the proposed dealer in
 14 Montclair.¹⁸

15 **IV. MR. SHERMAN’S MOTIVATIONS IN PURSUING THE MONTCLAIR**
 16 **DEALERSHIP ARE IRRELEVANT -- HIS PRE-PROTEST ASSURANCES THAT**
 17 **THERE WERE ENOUGH SALES TO GO AROUND ARE RELEVANT**

18 As noted in Volkswagen’s Opening Brief, Protestant’s current claims that a Montclair
 19 dealership will result in “ruinous competition” stand in stark contrast to numerous statements by
 20 Mr. Sherman and Mr. Reed regarding a Montclair dealership, including Mr. Sherman’s assurances
 21 that a Montclair dealership could “[p]rovide an above average sales penetration in [his] assigned
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23 ¹⁷ See, e.g., RT 1-13 at 185:12-25 (“This is based on actual data in 2009 ... any additional growth, any
 24 additional opportunity is really a bonus ... *There’s no need to count on 800,000 sales or 400,000 sales.* This location is
 25 needed, and was needed even back in '09 to capture the lost sales in that trough of the market -- that bottom of the
 cycle.”) (emphasis added).

26 ¹⁸ Protestant's "evidence" that Volkswagen will not meet its sales goals is based on the 2011 opinions of
 27 Protestant's owner and general manager and on hearsay editorial articles, also from 2011. None of these industry
 "analysts" were offered as a witness and Volkswagen had no opportunity to examine any of these writers on their
 purported statements in the press. Moreover, this “evidence” is now moot - whether Volkswagen has or has not met its
 sales goals over the past few years is now fact, not requiring speculation.

1 AOR [i.e. in Montclair]”¹⁹ and that he was “confident” that Ontario VW’s performance “could be
2 duplicated at my facility in Montclair.”²⁰

3 Instead of addressing these pre-protest assurances, Protestant levies personal attacks on Mr.
4 Ray, Mr. Mears and Mr. Smith.²¹ Protestant essentially takes the position that, because
5 Volkswagen’s witnesses dispute the testimony of Mr. Sherman and Mr. Reed, Volkswagen’s
6 witnesses are “patently self-serving and not credible”²² -- despite the fact that the pre-protest *written*
7 statements by Mr. Sherman and Mr. Reed corroborate the testimony of Mr. Ray and Mr. Mears, and
8 directly contradicted the hearing testimony of Mr. Sherman and Mr. Reed.

9 Ultimately, however, the Board does not need to address this issue because the *reason* Mr.
10 Sherman pursued the Montclair point is not what is important. What is relevant is the fact that Mr.
11 Sherman stated unambiguously that a Montclair dealership could “[p]rovide an above average sales
12 penetration in [his] assigned AOR” and “a superior Sales and Service Experience for Volkswagen
13 customers.” Mr. Sherman’s statements make clear that, regardless of *why* Mr. Sherman wanted the
14 Montclair dealership, he believed that *both* a Montclair dealership and an Ontario dealership could
15 provide above-average sales and service to Volkswagen customers. These statements cannot be
16 reconciled with Protestant’s current position that the proposed new dealership in Montclair would
17 force Protestant to close its doors.

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¹⁹ *Id.*

²⁰ Ex. R10.

²¹ Protestant's Opening Brief at 20-21.

²² Protestant's Opening Brief at 20.

1 **V. PROTESTANT PROVIDES NO EVIDENCE OF ACTUAL CONDITIONS IN THE**
 2 **RMA AND RSB MARKET TODAY**

3 **A. Protestant Failed To Establish That Volkswagen Cannot Improve Its Market**
 4 **Share In The RMA Or The RSB Market Because Of Ethnic Or Economic**
 5 **Factors**

6 Protestant contends that “[t]he RMA is already being more than adequately served by the
 7 existing Volkswagen dealers.”²³ The evidence does not support this claim. In fact, the evidence is
 8 undisputed that Volkswagen registrations are well *below* expected levels in both the RMA and the
 9 overall RSB Market.²⁴ Further, as set forth in Volkswagen’s Opening Brief, the evidence shows that
 10 this under-performance is the result of Volkswagen having too few dealers in the market and not
 11 being represented in major locations (i.e., not in auto malls or along the heavily traveled 10
 12 Freeway).

13 Protestant counters that there are “compelling circumstances that help to explain why
 14 Volkswagen’s performance in the Riverside-San Bernardino market is below state average,” citing
 15 “statistically significant” relationships between ethnic and economic factors such as unemployment,
 16 Hispanic population, foreclosure rates and education levels, on the one hand, and Volkswagen
 17 performance, on the other.²⁵ According to Protestant, these variables “suggest one could expect a
 18 lower Volkswagen performance in this market....”²⁶

19 However, as noted in Volkswagen’s Opening Brief, actual Volkswagen registrations in other
 20 California markets disprove this “suggestion.” Volkswagen’s market share in other California
 21 markets that have Hispanic populations of 50% or more, or similar foreclosure rates to the RSB
 22 Market, is well above Volkswagen's poor market share in the RMA, RSB Market, and Protestant’s
 23 own PAI.²⁷ In addition, Protestant fails to mention that the City of Montclair itself did not suffer

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 25 ²³ Protestant's Opening Brief at 37.

26 ²⁴ Ex. J44 at A-17, A-20.

27 ²⁵ Protestant's Opening Brief at 25-26.

28 ²⁶ *Id.* at 26 (emphasis added).

²⁷ Ex. R60 at A-34.5.

1 from the same high foreclosure rates as the rest of the market, yet also has well below expected
 2 Volkswagen registration rates;²⁸ or that housing prices in the Inland Empire were rebounding and
 3 foreclosure rates falling even before the record closed in 2011.²⁹

4 Protestant also cites to a number of economic factors that affected the RSB Market during
 5 the recession, such as poor credit scores.³⁰ However, Protestant was unable to offer any *evidence* as
 6 to why these economic factors impacted Volkswagen sales, but not the sales of competitive brands.
 7 To the extent the recession drove down sales of *all* vehicles in the RSB Market, that cannot explain
 8 Volkswagen’s dramatically lower market share. The real reason, as the evidence shows, is customer
 9 dissatisfaction with the number and location of Volkswagen dealerships, leading consumers to
 10 purchase competitive vehicles from more conveniently located dealerships.

11 **B. Protestant’s “Coastal” Argument Fails For The Same Reason The Racial And**
 12 **Economic Arguments Failed -- And In Fact Supports Volkswagen's Case.**

13 On remand and again in its Opening Brief, Protestant offered yet another hypothesis, that the
 14 shortfall of Volkswagen sales in the RMA is explained by proximity to the coast. In support of this
 15 theory, Mr. Roesner’s Declaration on remand presented a map dividing California markets into two
 16 groups -- markets in which Volkswagen registrations are below California average (marked in
 17 yellow), and markets in which Volkswagen registrations are above California average (marked in
 18 green). Based on nothing more than this map, Mr. Roesner concluded that “[o]bviously consumers
 19 located in coastal PAIs are more likely to purchase Volkswagens than those located in the interior
 20 of California.”³¹

21 As with Protestant’s other hypotheses, this theory is not supported by the factual data. The
 22 evidence showed that the real reason that Volkswagen registrations in these territories are above or
 23 below average is not their proximity to the ocean, but rather the adequacy or inadequacy of the
 24 Volkswagen dealer network in those territories (which is precisely why Volkswagen is attempting

25 ²⁸ RT 1-19 at 135:6-16.
 26 ²⁹ RT 1-19 at 171:20-172:8, 173:19-174:10; R.Ex.-Remand 3,
 27 ³⁰ Protestant's Opening Brief, Section IV.
 28 ³¹ Roesner Report on Remand ¶¶ 44-45.

1 to address the inadequacy in the RMA and RSB Market by adding a dealer in the under-served
 2 Montclair area).³²

3 In Mr. Roesner’s “yellow” markets, where Volkswagen has a market share below California
 4 average, Volkswagen dealers constitute an average of 4.1% of the primary competitive group
 5 (“PCG”) dealerships, i.e., for every 100 PCG dealerships in those markets, Volkswagen has
 6 approximately 4 dealers.³³ In Mr. Roesner’s “green” markets, however, where Volkswagen has a
 7 market share above California average, Volkswagen dealers constitute an average of 5.1% of the
 8 PCG dealerships.³⁴

9 Not surprisingly, in territories where there are more Volkswagen dealers to serve customers
 10 and promote the brand, Volkswagen is able to achieve a higher market share and compete more
 11 effectively against its competitors. In the RSB Market, Volkswagen dealerships constituted just
 12 3.8% of the PCG dealerships at the time of the remand.³⁵ Thus, the inadequacy of the Volkswagen
 13 dealer network in the RSB Market is even more dramatic than it is in Mr. Roesner’s “yellow”
 14 underperforming territories.

15 **C. Mr. Reed Confirmed That The Purported “Shortage” Of Certified Pre-Owned**
 16 **Vehicles In 2011 Would Be Resolved As New Vehicle Sales Increase**

17 Protestant contends that used vehicle sales will also suffer from the opening of a new
 18 Volkswagen dealership because of “the dwindling supply of CPO VW vehicles” and because
 19 “inventories [of CPO vehicles] have become extremely difficult to maintain.”³⁶ Once again, this
 20 statement is misleading because the evidence from early 2011 does not show there is *currently* a
 21 “dwindling supply” of CPO vehicles at all. In fact, Mr. Reed testified that the available inventory of
 22 certified pre-owned vehicles is directly tied to the level of new vehicle sales that took place 30 to 42
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24 ³² Supplemental Declaration of Sharif Farhat on Remand ¶¶ 7-10.
 25 ³³ R.Ex.-Remand 2 at 2.
 26 ³⁴ *Id.*
 27 ³⁵ R.Ex.-Remand 2 at 3.
 28 ³⁶ Protestant's Opening Brief at 32.

1 months prior.³⁷ That timeframe is “very, very close” to the timing of the “crash” which resulted in
 2 low vehicle sales in 2007-08³⁸ -- i.e., any shortage in certified pre-owned vehicles in 2011 was
 3 explained by fewer new vehicle sales during the recession. Mr. Reed further testified that, as new
 4 vehicle sales increase, the inventory of pre-owned certified vehicles will also rise; and that he
 5 expected the greater sales volume from 2010 to begin increasing the inventory of certified pre-
 6 owned vehicles within “18 to 24 months”³⁹ -- i.e., by mid-2012 to early 2013. Thus, even by the
 7 limited data in the record, the “shortage” of CPO vehicles will have long passed by the time the
 8 Montclair dealership would open for business in 2015 or later.

9 **D. Protestant’s “Gross” Vs. “Net” Argument Is Irrelevant Because, Even Using**
 10 **Mr. Roesner’s Preferred “Net” Methodology, There Are More Than Adequate**
 11 **Sales Opportunities To Offset All Hypothetical Losses In The Montclair PAI.**

12 Protestant also attacks Mr. Farhat’s use of “gross” registration loss as opposed to “net”
 13 registration loss, which Mr. Roesner prefers. For purposes of this protest the argument is moot,
 14 because there are ample sales opportunities available to Protestant using *either* methodology. Mr.
 15 Farhat’s Declaration on Remand provided the total sales opportunities available to Protestant using
 16 both methodologies and, in each year for which data was then available, the sales opportunities
 17 available to Protestant in its own PAI and in the Balance of the RSB Market (i.e., excluding
 18 Montclair) exceeded Protestant’s hypothetical losses in the Montclair PAI, even using net
 19 registration losses:⁴⁰

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³⁷ RT 1-10 at 180:15-18.

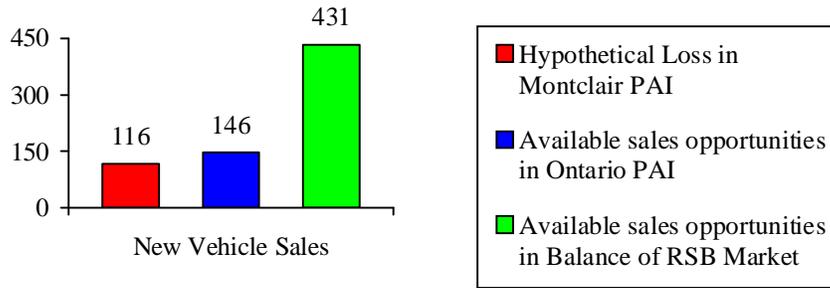
³⁸ *Id.* at 180:22-181:2.

³⁹ *Id.* at 180:12-21.

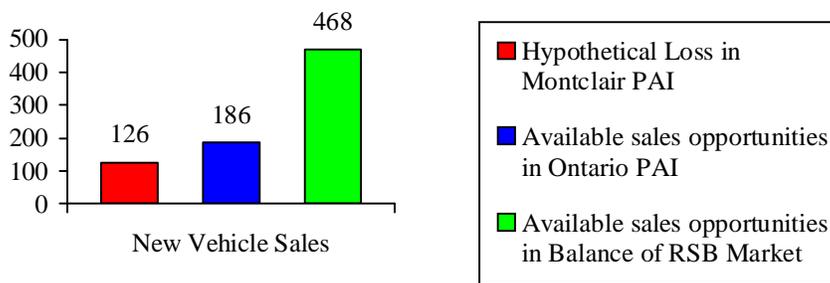
⁴⁰ See Declaration of Sharif Farhat on Remand ¶ 9 (“The amount of shortfall can be measured by using either 'net loss' or 'gross loss' methodologies, but the conclusion is the same. There is more than ample shortfall opportunity available to Ontario VW to offset any hypothetical loss of sales in the Montclair PAI, regardless of which methodology is used. For completeness, I have included calculations using both methodologies on the attached charts.”). See also R.Ex-Remand 1 at 1-3.

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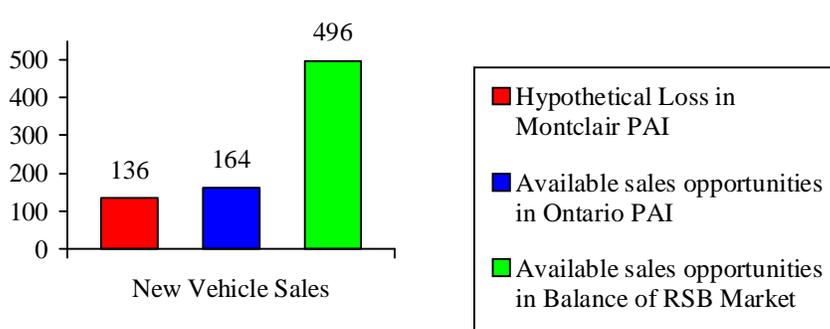
**2009 New Vehicle Sales Opportunities
(Net Losses)**



**2010 New Vehicle Sales Opportunities
(Net Losses)**



**2011 New Vehicle Sales Opportunities
(Net Losses)**



E. Protestant’s “In-Sell” Argument Is Irrelevant Because Mr. Farhat’s Calculations Of Available Opportunities On Remand Excluded Existing In-Sell.

Protestant asserts that Volkswagen’s “use of ‘in-sell’ as lost opportunity available to Protestant ... is self-contradictory and based upon the impossible assumption that any dealer can capture 100% of all sales within its own PAI.”⁴¹ Protestant offers no explanation of why the Board

⁴¹ Protestant's Opening Brief at 2.

1 must assume that a new dealership in Montclair will capture 100% of the Volkswagen sales in *its*
 2 territory (including 100% of the sales currently being made by Protestant in that territory), while
 3 simultaneously assuming that Protestant has no chance whatsoever of capturing the same
 4 percentage of Volkswagen sales in *Protestant's* territory.

5 Regardless, this is a straw-man argument. On remand, Mr. Farhat's calculation of available
 6 opportunities *did not include* any existing in-sell into Protestant's PAI by other Volkswagen
 7 dealers, or for that matter existing in-sell into any other geography within the RSB Market.
 8 Although in-sell actually does represent additional sales opportunities for Protestant, even limiting
 9 the analysis to sales that are lost to competitive brands, and not to other Volkswagen dealers, the net
 10 shortfall in Protestant's PAI is still greater than the total hypothetical loss in the Montclair PAI.

11 **F. Protestant's Argument About The Industrial Nature Of Its Own PAI Ignores**
 12 **The Significant Competitive Group Registrations And Volkswagen's Poor**
 13 **Performance In Protestant's PAI.**

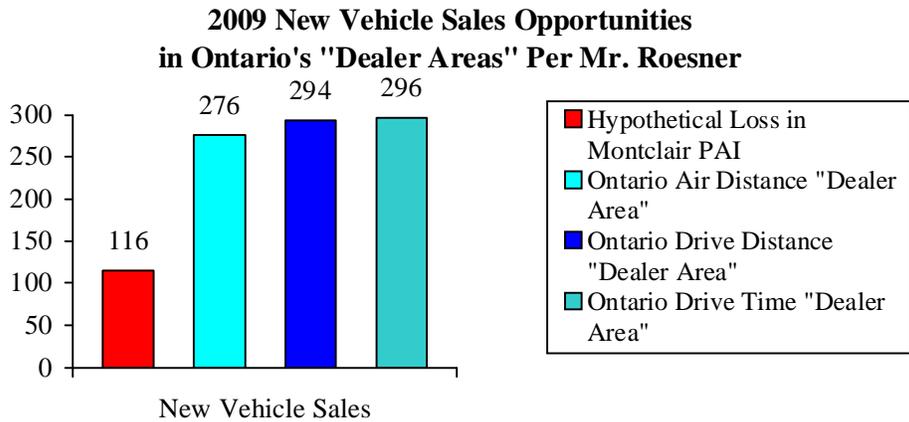
14 Protestant also argues that it relies on the Montclair PAI for survival because its own PAI is
 15 largely industrial and provides little opportunity for sales. This argument fails for a host of reasons.

16 First, Mr. Farhat calculated the sales opportunities available to Protestant as a percentage of
 17 total vehicles *actually being registered to customers living in Protestant's PAI*. Volkswagen is not
 18 claiming that Protestant can sell vehicles to customers who do not exist or even who are not
 19 purchasing a competitive brand. What the evidence clearly establishes, however, is that hundreds of
 20 new vehicles were purchased and registered to *customers who do reside in Protestant's PAI* -- but
 21 who chose to buy vehicles from other primary competitors rather than a Volkswagen dealer.

22 Second, Protestant's arguments that there are very few customers within a 4-mile radius of
 23 its dealership is disingenuous. Protestant's "4-mile radius" is a straight-line calculation of the
 24 distance between Protestant and the proposed Montclair dealer. In fact, in every other direction
 25 other than that one straight line, there is a wide swath of geography in which there is no other
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1 Volkswagen dealer and in which Protestant will retain what Mr. Roesner refers to as a “proximity
 2 advantage” over all other Volkswagen dealers, including the proposed new Montclair dealer.⁴²

3 Indeed, using *Mr. Roesner’s own “dealer areas” and calculations* as to the geography in
 4 which Protestant should retain a proximity advantage after the establishment of the Montclair
 5 dealership, there is ample shortfall to allow Protestant to completely re-capture all of its
 6 hypothetical losses. In his original report and in his remand report, Mr. Roesner defined a
 7 geographic area surrounding Protestant’s dealership, which he called a “dealer area,” in which Mr.
 8 Roesner opined that Protestant would still retain a proximity advantage over all other Volkswagen
 9 dealers, including the new Montclair dealer. In 2009, 2010 and through the first quarter of 2011, the
 10 shortfall in Mr. Roesner’s “dealer areas” for Protestant -- using Mr. Roesner’s preferred “net loss”
 11 methodology -- was substantially greater than the hypothetical losses in the Montclair PAI:

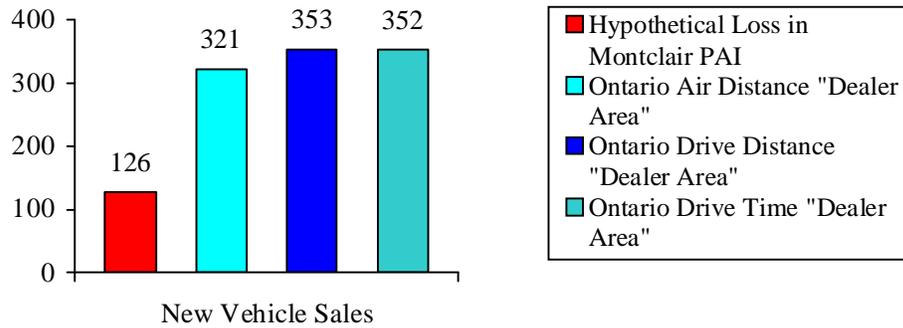


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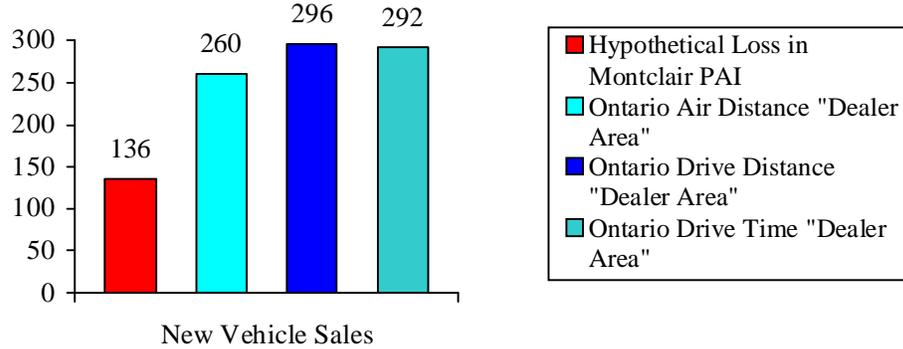
⁴² See, e.g., Roesner Report on Remand at Tab 13, p. 1.

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**2010 New Vehicle Sales Opportunities
in Ontario's "Dealer Areas" Per Mr. Roesner**



**2011 (Annualized) New Vehicle Sales Opportunities
in Ontario's "Dealer Areas" Per Mr. Roesner**

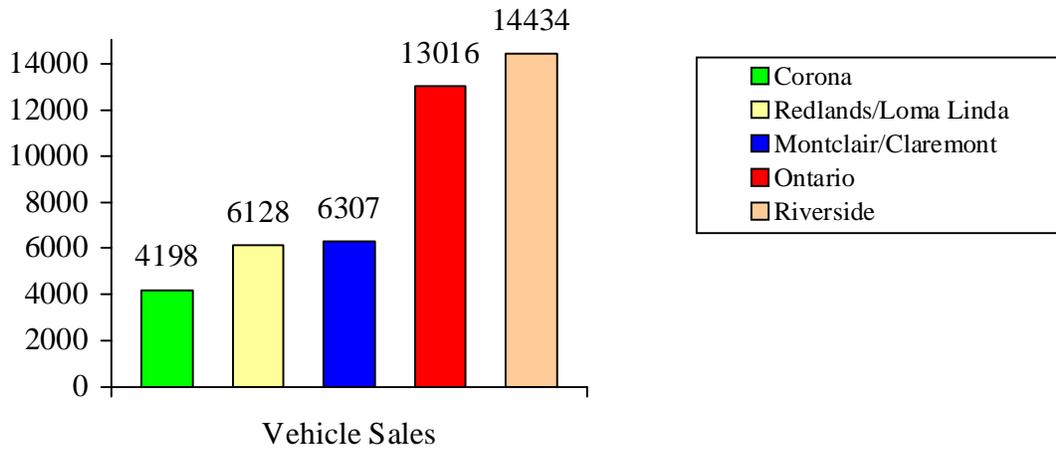


Third, Protestant's argument ignores the fact that Protestant is located in one of the most popular auto malls in the entire region. The PCG dealers in the Ontario Auto Center sold 13,016 new vehicles in 2010 alone, more than the total volume of sales in the Montclair and Redlands auto centers combined, and the second most of any auto mall in the RSB Market.⁴³

⁴³ Supplemental Declaration of Sharif Farhat on Remand ¶ 11, R.Ex.-Remand 2 at 6.

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2010 New Vehicle Sales By Auto Mall



Large numbers of customers travel to Ontario, and will continue to travel to Ontario, to shop for and purchase vehicles, providing Protestant with ample opportunity to maintain a viable business after the Montclair dealer opens for business.

Fourth, Protestant’s argument that it “is already maximizing its efforts” continues to ignore the fact that Volkswagen’s poor performance in the market is not necessarily a function of a single dealership’s efforts, but can instead be a function of the strength of the dealer network and where each dealer focuses its efforts. As Judge Archibald correctly concluded, the addition of a dealership in Montclair will increase Volkswagen sales throughout the RSB Market, including in Protestant’s own PAI. By capturing its share of these increased sales, Protestant can maintain its profitability and viability.

VI. PLAINTIFF’S RELIANCE ON “DIRE ECONOMIC INDICATORS” FROM 2009-2010 IS MISPLACED AND DOES NOT SATISFY ITS BURDEN OF PROOF

Protestant argues that “any findings [by the Board] relating to the *current* opportunity available to Protestant should be based upon the *real-world data* evidencing the dire economic conditions within the RMA and surrounding areas,” and that the “real world evidence of the dire economic indicators within the RSB Market demonstrate that the RMA cannot support an additional

1 VW dealer.”⁴⁴ Yet, Protestant does not present any evidence, or even an argument, addressing
 2 *current* opportunities or “economic conditions” in the RMA today. Instead, Protestant presents
 3 statistics and speculation from several years ago as to what the “real world” in 2013 or later might
 4 look like. To the extent Protestant believes that this Protest should hinge on “real world evidence”
 5 of the status of the economy in the RSB Market, Protestant utterly fails to satisfy its burden of
 6 proof. Unemployment and foreclosure data from 2011 -- even if it was relevant, which it is not -- is
 7 meaningless in establishing the state of the economy in 2013. Even more egregiously, based on this
 8 two-year old data, Protestant makes numerous unsubstantiated and erroneous assertions as to what
 9 the economy looks like *today*:

- 10 • “The unemployment for both the state and the RSB Market has not shown any sign of
 11 improvement and has in fact become worse...”⁴⁵
- 12 • “[T]he market has worsened rapidly.”⁴⁶
- 13 • “The unemployment figures in the RSB Market are not improving.”⁴⁷
- 14 • “A depressed housing market continues to constrain any economic recovery in the RSB
 15 Market.”⁴⁸
- 16 • “The large inventories of existing homes on the market and the depressed values have
 17 caused new home construction in the RSB Market to come to a grinding halt.”⁴⁹

18 Furthermore, Protestant’s “evidence” consists of cherry-picked data that was incomplete or
 19 inaccurate even in 2011. For example, the latest foreclosure data in the record is an August 2011
 20 article in the San Bernardino newspaper *The Sun* citing a RealtyTrac report, which noted that
 21 “[f]oreclosure rates continued to fall in the Inland Empire and the United States as a whole ...” and
 22 that “[l]ocally, San Bernardino County’s foreclosure rate fell 9 percent from June to July. Year-

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 24 ⁴⁴ Protestant’s Opening Brief at 26, 42 (emphasis added).
 25 ⁴⁵ *Id.* at 26.
 26 ⁴⁶ *Id.*
 27 ⁴⁷ *Id.* at 27.
 28 ⁴⁸ *Id.*
⁴⁹ *Id.*

1 over-year, foreclosures fell 27 percent.”⁵⁰ Similarly, the most recent US Bureau of Labor Statistics
 2 report in the record showed that unemployment levels in the RSB Market were essentially flat in
 3 2011 year-over-year, and that employment levels were *increasing* before the record closed.⁵¹

4 In any event, as Volkswagen explained at the hearing and in its Opening Brief, the objective
 5 evidence and calculations of available sales opportunities were all based solely on *actual vehicle*
 6 *registrations that actually occurred* in the RSB Market and Protestant’s PAI during the 2009-2011
 7 timeframe. Protestant submitted no credible evidence that any of these economic arguments could
 8 explain why consumers purchased competitive models, but not Volkswagens.

9 **VII. THE BENEFITS TO THE CITY OF MONTCLAIR WILL NOT BE OFFSET BY**
 10 **ANY HARM TO THE CITY OF ONTARIO OR REDUCTION OF PROTESTANT’S**
 11 **CUSTOMER AMENITIES**

12 Protestant also argues that the proposed dealership will harm the public because “it is
 13 possible that both customer amenities at Protestant’s dealership and Protestant’s charitable activities
 14 will be reduced, or even eliminated” due to the new dealership.⁵² This argument fails because
 15 Protestant presented no credible evidence that its revenues will decrease *at all* as a result of the
 16 Montclair dealership, much less that they will fall below the levels they were at in 2010.

17 Protestant also attempts to downplay the substantial benefits that the new Montclair
 18 dealership will bring to the City of Montclair, by arguing that those benefits will be offset by
 19 “losses” to the City of Ontario if Protestant is forced out of business. Again, however, there is no
 20 evidence that Protestant *will* go out of business, or suffer a single dollar of lost revenue.

21 Protestant similarly argues that Protestant being forced out of business is “a likely scenario
 22 given Ontario VW’s current financial state.”⁵³ This statement is misleading, however, because there
 23 is *no evidence* of Protestant’s “current financial state” in the record, only its financial state several
 24 years ago, during a recession. The Board of course has no way of knowing if Mr. Roesner’s

25 ⁵⁰ R.Ex.-Remand 3.

26 ⁵¹ R.Ex.-Remand 4.

27 ⁵² Protestant's Opening Brief at 33.

28 ⁵³ *Id.*

1 projected “losses” -- even if they occurred -- would cause Protestant to become unprofitable today.
2 The best evidence in the record on this point would be Mr. Sherman’s own written statements
3 confirming unequivocally that his Ontario dealership and a new Montclair dealership could both be
4 operated successfully.

5 **VIII. PROTESTANT’S ARGUMENTS REGARDING THE PROPOSED FACILITY ARE**
6 **UNSUPPORTED AND IMPROPERLY SHIFT PROTESTANT’S BURDEN**

7 Protestant also argues that the Board should “reject” these numerous benefits to Montclair
8 because Volkswagen “failed to establish that Metro could provide a stand-alone VW White Frame
9 Facility.”⁵⁴ This argument fails for a number of reasons.⁵⁵

10 Protestant’s argument inappropriately attempts to shift the burden to Volkswagen, rather
11 than satisfy its own burden of presenting competent evidence that the proposed dealership will harm
12 the public welfare. Protestant provided no evidence whatsoever to support its claim that John
13 Hawkins will be unable to build a Volkswagen facility at the proposed location. Protestant offered
14 no testimony, for example, from any architect, engineer or City official, or anyone else who had
15 reviewed the plans for the facility, or who could testify competently that the facility cannot be built.

16 Instead, all of the testimony in the case was to the contrary. Mr. Ray testified that
17 Volkswagen’s construction project manager and designers have already reviewed the property and
18 performed initial design work which accounts for these purported “challenges.”⁵⁶ John Hawkins
19 testified that, based on his experience building several other dealership facilities (including on the
20 same plot of land at issue), these purported challenges “are normal”⁵⁷ and that he has dealt
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22 ⁵⁴ Protestant's Opening Brief at 33.

23 ⁵⁵ Protestant's Opening Brief also makes a number of inaccurate statements regarding the testimony on the
24 proposed Montclair facility. For example, Protestant states that "the eventual costs could not be narrowed down to a
25 range more precise than between one and twenty million dollars." Protestant's Opening Brief at 34. In fact, John
26 Hawkins testified that, while it is impossible to determine a precise figure today, he fully expects the project to cost "\$4-
5 million," and that even if there are cost overruns above that, "we're well prepared financially for cost overruns." RT 1-
20 at 18:22-19:13. Howard Hawkins likewise testified that he believes the \$4-5 million range is "a very good idea" and
"very close" to what the final costs will be. RT 1-20 at 98:7-99:21.

27 ⁵⁶ RT 1-18 at 159:18-160:23.

28 ⁵⁷ RT 1-20 at 16:18-25, 43:6-8.

1 successfully with each of these potential challenges in the past.⁵⁸ Mr. Starr also testified that he was
 2 unaware of any problems that might prevent John Hawkins from building the proposed facility.⁵⁹
 3 Finally, Mr. Ray *unequivocally* informed the Board that the Montclair dealership will not be
 4 permitted to open until a fully compliant, exclusive Volkswagen facility is completed⁶⁰

5 Protestant offers no explanation of what “guarantees” or evidence Volkswagen could
 6 possibly make on this point beyond Volkswagen’s direct and unequivocal representations to the
 7 Board -- particularly given that Protestant declined to offer *any* direct evidence to question or
 8 contradict those representations. Nor does Protestant explain how any delay in the opening of the
 9 proposed dealership as a result of these challenges *would harm Protestant*. If Mr. Hawkins is
 10 ultimately unable to build the facility, the only downside would be the continued under-
 11 representation of the Volkswagen brand in this market.

12 **IX. THE BOARD’S PRIOR DECISION APPEARS TO HAVE BEEN BASED UPON**
 13 **CONCERNS ABOUT EXISTING CIRCUMSTANCES AT THAT POINT IN TIME,**
 14 **NOT EXISTING CIRCUMSTANCES IN 2013**

15 Finally, Protestant claims that “there is no reason why the Board’s reexamination of the
 16 same record should yield a different result.”⁶¹ In view of Protestant’s single-minded focus on the
 17 unique economic conditions in the RSB Market in 2009-2010, that claim is absurd. Indeed, the
 18 Board’s prior decision *confirms* why the Board’s evaluation of the record *should* yield a different
 19 result today -- because the Board’s initial decision was predicated on concerns about the economic
 20 conditions that existed at that point in time:

- 21 • “The impact on [Protestant and other dealers] would cause more loss to them ... if an
 22 additional Volkswagen dealership were to be established at the proposed location under the
 23 *current economic conditions.*”⁶²

24 ⁵⁸ RT 1-20 at 43:6-8.

25 ⁵⁹ RT 1-19 at 155:14-21.

26 ⁶⁰ RT 1-18 at 96:1-17; RT 1-18 at 150:16-24.

27 ⁶¹ Protestant’s Opening Brief at 39.

28 ⁶² Order at 43 (emphasis added).

- 1 • “Although Mr. Roesner’s dramatic numbers of ‘loss’ are not absolute proof of lost sales or
 2 income, the RSB Market (including the RMA) is still ‘at risk’ economically and
 3 demographically, and the Board believes that the survivability of Ontario VW is tenuous
 4 under the *current economic conditions*.”⁶³
- 5 • “*Given the difficult economic times that exist now*, another recessionary dip could cause
 6 any number of dealerships to cease operations. *It is a time when it may be better to err*
 7 *towards maintaining the status quo as to the number of dealers* so that an existing
 8 dealership has a better opportunity to survive, preserve its investment, and continue to
 9 contribute to the public welfare than to lean towards allowing a franchisor to establish
 10 another franchisee.”⁶⁴

11 The Board's concern over the state of the economy at that point in time was also reflected in
 12 comments by the Board members at the September 27, 2011 meeting, which emphasized that the
 13 timing was not right *in 2011* to establish a new dealership:

- 14 • “But the Board can take into consideration the fact that ... the *current economic conditions*
 15 were not adequately considered.”⁶⁵
- 16 • “I’m still hanging on this one issue ... dealing with *current economic conditions*....”⁶⁶
- 17 • “So I don’t know whether the economy is so great and supportive of all these new things
 18 happening.”⁶⁷

19 As much as Protestant might want to pretend otherwise -- and have the Board join in the
 20 illusion -- it is no longer 2011, and the Board must now consider whether Protestant has proven that
 21 there is good cause under *existing* circumstances today, in 2013, to continue blocking the Montclair
 22 dealership. Protestant has failed to carry that burden of proof.

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⁶³ *Id.* (emphasis added).

⁶⁴ *Id.* at 41 (emphasis added).

⁶⁵ RT 9-27 at 30:25-31:4 (emphasis added).

⁶⁶ *Id.* at 35:18-36:1 (emphasis added).

⁶⁷ *Id.* at 39:4-19.

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X. CONCLUSION

The evidence in the record is overwhelming. Protestant has not met its burden of establishing good cause under existing circumstances for the Board to prohibit the Montclair dealership. Indeed, it is difficult to imagine any scenario in which a franchisor could establish a new dealership if not in this case.

Setting aside Protestant's utter failure and refusal to even address existing -- as opposed to dated, mooted -- circumstances, the evidence in the record establishes that Volkswagen is not being adequately represented in the RMA; the proposed Montclair dealership will provide numerous benefits to consumers, the City of Montclair, and other Volkswagen dealers including Protestant; the proposed dealership will increase competition which is necessarily in the public good; and Protestant will not necessarily lose one dollar of business as a result of the new dealership, much less sufficient business to jeopardize its Ontario investment. Accordingly, Volkswagen respectfully submits that this Protest should be overruled.

DATED: March 7, 2013

JEFFER MANGELS BUTLER & MITCHELL LLP
ALLEN RESNICK
RYAN S. MAUCK

By: 
RYAN S. MAUCK
Attorneys for Respondent
VOLKSWAGEN OF AMERICA, INC.

PROOF OF SERVICE

STATE OF CALIFORNIA, CITY AND COUNTY OF LOS ANGELES

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

On March 7, 2013, I served the document(s) described as **RESPONDENT VOLKSWAGEN OF AMERICA, INC.'S REPLY BRIEF ON REMAND FROM THE SUPERIOR COURT** in this action by placing the true copies thereof enclosed in sealed envelopes addressed as follows:

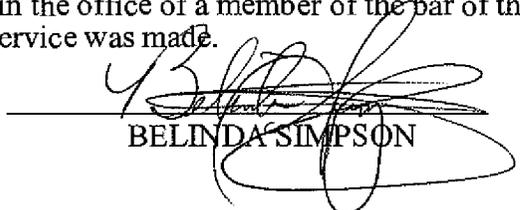
Michael J. Flanagan, Esq.
Gavin M. Hughes, Esq.
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2277 Fair Oaks Blvd., Suite 450
Sacramento, CA 95825

Tel: 916-646-9100
Fax: 916-646-9138
Email: lawmjf@msn.com

- (BY MAIL) I am "readily familiar" with the firm's practice for collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.
- (BY E-MAIL OR ELECTRONIC TRANSMISSION) I transmitted the above-described document by email in PDF format to the persons listed on the service list. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.
- (BY PERSONAL SERVICE) I delivered such envelope by hand to the offices of the addressee.
- (BY OVERNIGHT DELIVERY) I caused said envelope(s) to be delivered overnight via an overnight delivery service in lieu of delivery by mail to the addressee(s).

Executed on March 7, 2013, at Los Angeles, California.

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


BELINDA SIMPSON