

1 **FERRUZZO & FERRUZZO, LLP**  
2 A Limited Liability Partnership,  
3 including Professional Corporations  
4 3737 Birch Street, Suite 400  
5 Newport Beach, California 92660  
6 Telephone (949) 608-6900  
7 E-Mail: gferruzzo@ferruzzo.com

8 GREGORY J. FERRUZZO, SBN 165782

9 Attorneys for Protestant, CABE BROTHERS, dba CABE TOYOTA and CABE SCION

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

12 In the Matter of the Protests of )  
13 ALDON, INC., a California corporation, dba )  
14 CARSON TOYOTA, and )  
15 ALDON, INC., a California corporation, dba )  
16 CARSON SCION, and )  
17 CABE BROTHERS, a California corporation, )  
18 dba CABE TOYOTA and CABE SCION, and )  
19 Protestants, )  
20 v. )  
21 TOYOTA MOTOR SALES, U.S.A., INC., a )  
22 California corporation, )  
23 Respondent. )

CONSOLIDATED MATTERS:  
PROTEST NO. PR-2339-12  
PROTEST NO. PR-2340-12  
PROTEST NO. PR-2341-12

**PROTESTANT CABE TOYOTA'S  
REPLY TO POST-HEARING  
OPENING BRIEF SUBMITTED BY  
INTERVENOR HOOMAN TOYOTA**

**Hearing Conducted: 6/3/2013 - 6/21/2013  
Before Victor Ryerson, Administrative  
Law Judge**

24 H.T.L. AUTOMOTIVE, INC., dba HOOMAN )  
25 TOYOTA OF LONG BEACH and HOOMAN )  
26 SCION OF LONG BEACH, )  
27 Intervenor. )

28 Protestant CABE BROTHERS, a California corporation dba CABE TOYOTA and CABE SCION (hereinafter referred to as "CABE" or "CABE TOYOTA") hereby submits its Reply to the Post-Hearing Opening Brief submitted by Intervenor H.T.L. Automotive, Inc., dba Hooman Toyota of Long Beach and Hooman Scion of Long Beach, in the above-captioned matter.

1 **1. THE EVIDENCE PRESENTED AT THE HEARING SHOWS THAT CABE TOYOTA**  
2 **WILL SUFFER A SIGNIFICANT ADVERSE IMPACT BY THE PROPOSED**  
3 **RELOCATION OF HOOMAN TOYOTA**

4 The expert testimony offered by Intervenor Hooman Toyota's expert, Ted Stockton, concedes  
5 that the proposed relocation of Hooman Toyota will have an impact on Cabe Toyota. The proposed  
6 relocation site would place Hooman Toyota only 2.2 miles by air distance and 2.6 miles by road  
7 distance from Cabe Toyota. (See EX. 254, Tab 4.) Common sense, and even a basic understanding  
8 of the automobile business, will tell you that moving any two dealers so close together will have some  
9 impact on sales and service business.

10 However, Mr. Stockton's testimony blatantly understates the degree of adverse impact the  
11 proposed relocation would actually have on Cabe Toyota. In order to minimize the degree of impact,  
12 Intervenor and TMS have purposefully excluded from their consideration a major factor, that is the  
13 impact on Cabe Toyota's service department business.

14 All parties and experts have consistently testified as to the great importance that a robust service  
15 department business plays in the success of an automobile dealer. The testimony offered by Mr.  
16 Stockton admittedly did not take into account any study or analysis of the impact the proposed  
17 relocation would have upon Cabe Toyota's service department business. (RT Vol. 7, 74:22). Mr.  
18 Stockton testified that he would normally consider the impact on service department business in  
19 conducting such an impact analysis. Mr. Stockton testified that he did, in fact, ask to receive the service  
20 department information in order to conduct his analysis of this case. Mr. Stockton, however, was not  
21 provided with this very important data for his work in this case.

22 Mr. Stockton testified that TMS refused to provide him with the service department data. The  
23 offered explanation for this was that TMS had "successfully objected to the production of that data."  
24 (RT Vol. 7, 81:8). It is obvious that Respondent and Intervenor are knowingly understating the true  
25 impact the proposed relocation would have on Cabe Toyota.

26 Mr. Stockton testified that having seen and considered Cabe Toyota's service department  
27 information may have assisted him in his analysis. (RT Vol. 7, 98:5.)

28 Mr. Stockton testified that the proposed relocation will result (based on his own analysis) in a

1 10% change in census tracts that are closest to Cabe Toyota. (See EX. 254, Tab 10, Page 4.) Mr.  
2 Stockton admitted that proximity to customers home or work are two of the most important factors in  
3 determining where customers take their cars for service. (RT Vol. 7 91:7-94:12.) The true impact on  
4 Cabe Toyota's business will be substantially greater than Mr. Stockton has testified.

5 **2. CABE TOYOTA PRESENTLY STRUGGLES TO CAPTURE SALES AND SERVICE**  
6 **BUSINESS IN ITS OWN PMA**

7 One of the many challenges Toyota faces is a relatively small primary market area. (EX. 1109,  
8 page 2 and EX. 1237.) There are numerous other larger Toyota Dealers in close proximity, particularly  
9 Carson Toyota and Hooman Toyota. Cabe Toyota has fewer Units in Operation compared to other  
10 Toyota Dealers in the RMA. (Dan Duddridge RT Vol. 4. 137:17-20.) As a result, Toyota receives less  
11 co-op marketing support from Toyota.

12 Cabe Toyota does not "own" any of the zip codes that lie within its defined PMA. (EX. 1156.)  
13 As a result, Cabe Toyota receives significantly fewer leads from Toyota's ELMS system than other  
14 Toyota dealers in the district. (EX. 1188, 1218, Dan Duddridge RT Vol. 4 171:5-16.)

15 Much of the area included in Cabe Toyota's defined PMA is comprised of low income or  
16 industrial areas associate with the port of Long Beach. (EX. 1237.) Given these many local challenges,  
17 it is not surprising that Cabe Toyota struggles to make sales locally in such a difficult, competitive  
18 market. TMS unfairly attempts to explain this unique and challenging situation as support for their  
19 claim that Cabe Toyota is not focused on sales within their PMA. This is not a bona fide justification  
20 for the proposed relocation. In comparison with other Toyota dealers who have similar but less severe  
21 PMA challenges, Cabe Toyota actually outperforms those dealers in service market share and has  
22 similar results for new vehicle sales. (See EX. 1202.) The area to which Hooman Toyota is proposing  
23 to relocate is an area that offers Cabe Toyota the most important area of local sales and service  
24 opportunity. (Dan Duddridge, RT Vol. 4, 129:16 - 130:12; EX. 1237.)

25 If Hooman Toyota is permitted to relocate even closer to Cabe Toyota then Protestant Cabe  
26 Toyota will likely never be able to improve its local sales and service business.

27 ///

28 ///

1 **3. THE PROPOSED RELOCATION OF HOOMAN TOYOTA EVEN CLOSER TO CABE**  
2 **TOYOTA WILL FURTHER IMPEDE CABE TOYOTA'S ABILITY TO CAPTURE**  
3 **LOCAL SALES AND SERVICE OPPORTUNITIES IN ITS OWN PMA**

4 Approximately 20% of Cabe Toyota's sales in 2012 were from TrueCar. Since mid- and late-  
5 2012, all the top dealer groups have added TrueCar as a lead partner for their dealership. The  
6 surrounding dealers, Carson, South Coast, Torrance, Cerritos, Penske, Huntington Beach, and Elmore,  
7 are all using TrueCar. Cabe Toyota's current True Car sales are less than 50% of its 2012 levels due  
8 to the addition of these dealers. (Dan Duddridge, RT Vol. 11, 63:15 - 64:21.) This situation creates  
9 an even stronger need to find replacement sales to support the financial impact from Cabe Toyota's  
10 increased building facility costs.

11 If Hooman Toyota is allowed to relocate, it would be easier for Cabe Toyota customers and other  
12 Toyota dealer customers to visit Hooman Toyota instead. The majority of existing Hooman Toyota  
13 clients and prospective customers in the Hooman Toyota PMA would have to travel a greater distance  
14 and drive through traffic. The majority of Hooman's UIO are on the opposite side of the dealership  
15 to the proposed location. (Scott Watkins, RT Vol. 3, 61:16-23 and 35:7 - 36:17; EX. 1227, Map D-9.)  
16 The proposed relocation moves Hooman Toyota away from customers in its own PMA. (Scott  
17 Watkins, RT Vol. 3, 35:7 - 36:17, EX 1227, Map D-9.)

18 The proposed relocation of Hooman Toyota will also adversely impact the manner in which  
19 Toyota's sales leads are allocated among Toyota dealers in the area. In Intervenor's Post Hearing Brief  
20 (at Page 19, Lines 23-26) and in Intervenor's Proposed Findings of Fact 33 and 37, Hooman Toyota  
21 asserts that the proposed relocation will not disadvantage Cabe Toyota in terms of sales leads provided  
22 by the ELMS system. The evidence presented at the hearing shows otherwise and demonstrates why  
23 there is good cause not to permit the proposed relocation to a facility that is so close to Cabe Toyota  
24 and is in fact in the same zip code as Cabe Toyota.

25 TMS provides sales leads to its' dealers through an ELMS system. The ELMS system provides  
26 leads based on zip codes. The proposed relocation will move Hooman Toyota into the same zip code  
27 as Cabe Toyota (zip code 90806). (See EX 1166.)

28 Currently Cabe Toyota is located in zip code 90806 and Hooman Toyota is located in 90804. The

1 evidence shows that Cabe Toyota already receives only about one half of the leads from the Toyota  
2 ELMS system as other Toyota Dealers. Cabe Toyota has previously expressed concerns to Toyota's  
3 management regarding the ELMS system and the low number (48% of the district average) of leads that  
4 Cabe Toyota receives. (EX. 1188.) The testimony of Dan Duddridge establishes that the proposed  
5 relocation of Hooman Toyota into the same zip code will further disadvantage Cabe Toyota in terms  
6 of its' allocation of sales leads from the ELMS system. (Dan Duddridge, RT Vol. 4, 171:5-16 and  
7 176:4 - 177:12.)

8 The argument offered by Respondent and Intervenor is that these dealers (Cabe, Carson, and  
9 Hooman) are already close, so what is the harm of moving them closer? It does not make any sense  
10 logically to assume that the proximity challenges Cabe Toyota already has, causing below average sales  
11 and service results, would not become worse if Hooman Toyota was allowed to relocate even closer  
12 to Cabe Toyota. The opinion that "it will not get much worse" should not be permitted as the basis to  
13 allow this relocation when, clearly, Cabe Toyota's financial situation is precarious at best.

14 **4. HOOMAN TOYOTA HAS OVERSTATED THE DIFFICULTIES WITHIN ITS**  
15 **CURRENT FACILITY**

16 Intervenor and Respondents repeated assertion that Hooman Toyota currently operates from six  
17 locations is inaccurate. (See Intervenor's Post Hearing Brief at Page 7, Lines 24-25.) The evidence  
18 presented at the hearing shows that Hooman Toyota is only authorized to operate from two approved  
19 locations as specified in Hooman Toyota's Dealer Agreement.

20 The Toyota Dealer Agreement for Hooman Toyota, dated January 9, 2008 (EX. 1009),  
21 specifically states that the only two approved locations from which Hooman Toyota may operate are  
22 4401 E. Pacific Coast Highway, Long Beach, CA 90804 (the Sales Department Facility) and 1775  
23 Ximeno Ave., Long Beach, CA 90804 (the Service Department Facility) (See EX. 10098 at Page 4  
24 Section VII Approved Dealer Locations). The only other facility location that has been approved by  
25 Toyota Motor Sales is one offsite vehicle storage location on Orizaba Ave. in Long Beach. Hooman  
26 Toyota has also exaggerated its facility constraints by including other outside vendors who provide car  
27 washes as additional "locations." These sites are not part of Hooman Toyota's dealership operation.  
28 It is not uncommon for Toyota dealers to have additional offsite storage locations and Hooman Toyota

1 can certainly consolidate his storage lots as he has done recently. In addition, third party car wash  
2 services are not considered property or part of a dealer's rent. Hooman Toyota has erroneously included  
3 these services to inflate the dealership's rent and property concerns. Most dealerships utilize offsite  
4 storage as part of their operations as well as utilize various third party vendors to provide services. Such  
5 common practice in the automobile dealership business is not evidence that Hooman Toyota's facility  
6 is so constrained that the proposed relocation is somehow necessary.

7 Intervenor Hooman Toyota misstates the facts concerning his rights to the Freeway Reader Board  
8 sign (depicted in photograph EX . 1226). Hooman Nissani mistakenly informed TMS that the proposed  
9 move would permit Hooman Toyota to utilize a larger portion of the freeway sign. (EX 1164.004.)  
10 This characterization is incorrect. As set forth in the Declaration of Mr. Jim Speck (EX. 1264), the  
11 move to the proposed location will not increase Hooman Toyota's use of the sign.

12 **5. THE BOARD MAY PRESUME THAT HOOMAN TOYOTA CAN RELOCATE**  
13 **ELSEWHERE IF THIS PROTEST IS GRANTED**

14 Intervenor Hooman Toyota improperly argues that the proposed relocation of Hooman Toyota  
15 should be permitted because "The loss of Hooman Toyota would be a devastating blow to the City of  
16 Long Beach and the community" (Intervenor's post hearing brief at Page 3 Line 9-10). This argument  
17 is asserted based upon the impermissible opinion testimony of Long Beach City Counsel Member  
18 Patrick O'Donnell. Mr. O'Donnell represents Hooman Toyota's City District and understandably wants  
19 to help Hooman Toyota in any way he can. Mr. O'Donnell is not well informed of all the facts  
20 regarding the relocation, and certainly is not aware of Cabe Toyota's situation. Mr. O'Donnell's  
21 testimony claiming there would be no impact on Cabe Toyota is an inadmissible expert opinion that  
22 is without any foundation. His statements are nothing more than his effort to support one of his  
23 constituents. Mr. O'Donnell's opinion is based on an improper assumption for which there is no proper  
24 evidentiary foundation (that Hooman Toyota will be forced out of business if the proposed relocation  
25 is not permitted). Counsel for Intervenor and Respondent sought to exclude evidence of other  
26 alternative site locations by a Motion in Limine. This motion was granted by the ALJ prior to the  
27 commencement of the hearing of this matter. As such, no evidence of other relocation sites, or the lack  
28 there of, was offered or received into evidence.

1 In a telephonic hearing conducted on May 30, 2012, Administrative Law Judge Victor Ryerson  
2 ruled that Protestants will not be permitted to offer evidence of other available sites unless the  
3 Respondents open the door by offering testimony to that effect. (See Transcript of Hearing conducted  
4 May 30, 2012, at Page 83 Line 9 through Page 84 Line 5 and Page 85:5-24.)

5 In making this determination, Judge Ryerson stated that “But I think the Board may and in  
6 common sense they should, presume that there are alternative sites available for any dealership, whether  
7 its’ in a relocation situation like this or on an establishment case.” (See Transcript of Hearing conducted  
8 on May 30, 2012, at Page 83 Lines 16-20.)

9 Intervenor’s assertion, post hearing, that the proposed relocation is somehow justified because  
10 Hooman Toyota would otherwise be out of business and therefore a loss to the City of Long Beach and  
11 the community is impermissible in light of the Court’s evidentiary ruling and is without any proper  
12 evidentiary basis.

13 **7. CONCLUSION**

14 In an obvious reference to prior board decisions, Intervenor suggests in their brief that “As the  
15 Board is aware, protests against the proposed relocation of an existing franchise typically show a low  
16 probability of success . . .” (Intervenor’s Post Hearing Brief Page 5 Line 18 and See Page 5 Line 22.)  
17 It is true that each case is unique and must be determined based on it’s own unique facts. This protest  
18 presents a unique set of facts that compel a determination in favor of Protestants.

19 Because Cabe Toyota already faces so many unique challenges in the Long Beach market, and  
20 has just recently undertaken a major permanent investment in building an Image II compliant facility,  
21 the proposed relocation of Hooman Toyota to a position so close to, and of great geographic advantage  
22 over, Cabe Toyota is impermissible if the interests of Cabe Toyota are to be given any weight at all.

23 Based on the facts presented in this matter, there is substantial evidence to support the  
24 determination that good cause exists not to permit the proposed relocation of Hooman Toyota to a  
25 freeway adjacent site only 2.2 miles away from Cabe Toyota.

26 In the case of *Piano v. State of California*, 103 Cal. App. 3d 412 (1980), the Court of Appeal  
27 noted that the Board must balance the dealer’s interest in maintaining a viable business, the  
28 manufacturers interest in promoting sales, and the public’s interest in adequate competition and

1 convenient service. Under the assessment presented by Respondent and Intervenor in this matter, the  
2 interests of Cabe Toyota as the affected dealer should be trampled. This result is unjust.

3 Based on the foregoing, the evidence will demonstrate that giving consideration to all the relevant  
4 facts and circumstances, there is good cause not to permit the proposed relocation.

5 Respectfully submitted,

6 DATED: September 19, 2013

**FERRUZZO & FERRUZZO, LLP**

7  
8 By: \_\_\_\_\_

GREGORY S. FERRUZZO  
Attorneys for Protestant CABE BROTHERS dba  
CABE TOYOTA and CABE SCION

FERRUZZO & FERRUZZO, LLP  
3737 Birch Street, Suite 400  
Newport Beach, California 92660  
Telephone: (949) 608-6900

9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
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

**Service List**

For the Consolidated Cases of:

NMVB Protest Nos. PR 2339-12, PR 2340-12, PR 2341-12, PR 2342-12 and PR 2343-12

<p>Patricia R. Britton, Esq.          Nelson Mullins Riley &amp; Scarborough LLP          Atlantic Station, 201 17th Street N.W., Suite 1700          Atlanta, Georgia 30363          Ph: 404-322-6000          Fax: 404-322-6050          E-mail: patricia.britton@nelsonmullins.com</p>	<p>Attorneys for Respondent,          Toyota Motor Sales, U.S.A., Inc.</p>
<p>Steven A. McKelvey, Jr., Esq.          S. Keith Hutto, Esq.          Steven B. McFarland, Esq.          Nelson Mullins Riley &amp; Scarborough LLP          1320 Main Street, 17th Floor          Post Office Box 11070 (29211-1070)          Columbia, South Carolina 29201          Ph: 803-799-2000          Fax: 803-255-9043          E-mail: steve.mckelvey@nelsonmullins.com          keith.hutto@nelsonmullins.com          steven.mcfarland@nelsonmullins.com</p>	<p>Attorneys for Respondent,          Toyota Motor Sales, U.S.A., Inc.</p>
<p>Halbert B. Rasmussen, Esq.          Timothy D. Robinett, Esq.          Manning Leaver Bruder &amp; Berberich          5750 Wilshire Boulevard, Suite 655          Los Angeles, California 90036-3637          Ph: 323-937-4730          Fax: 323-937-6727          E-mail: hrasmussen@manningleaver.com</p>	<p>Attorneys for Protestants          Aldon, Inc. dba Carson Toyota and          Carson Scion</p>
<p>Michael J. Flanagan, Esq.          Gavin M. Hughes, Esq.          Law offices of Michael J. Flanagan          2277 Fair Oaks Boulevard, Suite 450          Sacramento, California 95825          Ph: 916-646-9100          Fax: 916-646-9138          E-mail: lawmjf@msn.com</p>	<p>Attorneys for Intervenor          H.T.L. Automotive, Inc. dba Hooman          Toyota of Long Beach and Hooman Scion          of Long Beach</p>
<p>California New Motor Vehicle Board          1507 21st Street, Suite 330          Sacramento, California 95811</p>	<p>Ph: 916-445-1888          Fax: 916-323-1632          E-mail: nmvb@nmvb.ca.gov</p>