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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.)
24 **PROTESTANT CABE TOYOTA'S
REPLY TO POST-HEARING
OPENING BRIEF SUBMITTED BY
RESPONDENT TOYOTA MOTOR
SALES**
**Hearing Conducted: 6/3/2013 - 6/21/2013
Before Victor Ryerson, Administrative
Law Judge**

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

29 Protestant CABE BROTHERS, a California corporation dba CABE TOYOTA and CABE
30 SCION (hereinafter referred to as "CABE" or "CABE TOYOTA") hereby submits its Reply to the Post-
31 Hearing Opening Brief submitted by Respondent Toyota Motor Sales, USA, Inc., in the above-
32 captioned matter.

1 **1. TMS CONTENDS THAT THE CONSTRAINTS OF HOOMAN TOYOTA'S CURRENT**
2 **FACILITIES JUSTIFY THE PROPOSED RELOCATION**

3 Intervenor and Respondents repeated assertion that Hooman Toyota currently operates from six
4 locations is inaccurate. (See TMS's Post Hearing Brief at Page 4, Lines 13-14.) The evidence presented
5 at the hearing shows that Hooman Toyota actually uses and is only authorized to operate from three
6 approved locations as specified in Hooman Toyota's Dealer Agreement. The Toyota Dealer Agreement
7 for Hooman Toyota, dated January 9, 2008 (EX. 1009), specifically states the two approved locations
8 from which Hooman Toyota may operate are 4401 E. Pacific Coast Highway, Long Beach, CA 90804
9 (the Sales Department Facility) and 1775 Ximeno Ave., Long Beach, CA 90804 (the Service
10 Department Facility) (See EX. 10098 at Page 4 Section VII Approved Dealer Locations). The only
11 other facility location that has been approved by Toyota Motor Sales is one offsite vehicle storage
12 location on Orizaba Ave. in Long Beach. Hooman Toyota has also exaggerated its facility constraints
13 by including other outside vendors who provide car washes as additional "locations." These sites are
14 not part of Hooman Toyota's dealership operation. It is not uncommon for Toyota dealers to have
15 additional offsite storage locations and Hooman Toyota can certainly consolidate his storage lots as he
16 has done recently. In addition, third party car wash services are not considered property or part of a
17 dealer's rent. Hooman Toyota has erroneously included these services to inflate the dealership's rent
18 and property concerns. Most dealerships utilize offsite storage as part of their operations as well as
19 utilize various third party vendors to provide services. Such common practice in the automobile
20 dealership business is not evidence that Hooman Toyota's facility is so constrained that the proposed
21 relocation is somehow necessary.

22 One concern cited by TMS is the fact that Hooman Toyota's current location is separated by a
23 four lane street. (TMS Post Hearing Brief Page 4, Lines 13-20.) The Outer circle side street that
24 separates the Hooman Toyota sales facility from the service facility is an extremely low traffic road that
25 is rarely used and is only a single lane in each direction at the corner where customers cross. Cabe
26 Toyota submits that it, like other dealerships, have had to invest the money necessary to overcome or
27 mitigate this same type of facility issue. Cabe Toyota's new renovated facility will have its sales and
28 service departments on two separate parcels. Cabe Toyota has made the investment in its current

1 location and has worked with the City of Long Beach to redesign the streets (Columbia Street and 29th
2 Street) to accommodate the needs of Cabe Toyota. TMS has approved these designs, which include
3 multiple parcels of land separated by public streets, as part of Cabe Toyota's Image II renovation. In
4 addition, multiple dealers in the local metro area who are much larger and sell a significant amount
5 more vehicles than Hooman Toyota have less property than Hooman Toyota's current property sales
6 and service. As an example, Huntington Beach Toyota and Toyota of Orange both operate on two
7 acres. Hooman Toyota currently has three acres where the sales and service departments are located.
8 Huntington Beach Toyota just completed a multi-story remodel and Toyota of Orange (ranked #2 in
9 the Region in sales) utilizes off-site storage for its large inventory.

10 **2. TMS DID NOT CONDUCT A "THOROUGH ANALYSIS" OF THE PROPOSED**
11 **RELOCATION AS SUGGESTED IN RESPONDENT'S POST-HEARING OPENING**
12 **BRIEF (at Page 5, lines 23-24)**

13 Primary decision maker and Region Manager Steve Hearne never visited Cabe Toyota, and
14 Assistant Manager Doug Eroh had not visited Cabe Toyota in over five years.

15 The only analysis that TMS conducted of the proposed relocation site was a very limited review
16 of the PMA maps, Service and Sales Winner Maps, and Cross-Sell Reports. (EXs. 1109 and 2056.)
17 No service study was performed. The reports reviewed are readily available online at any Toyota
18 dealership and Toyota executive management spent less than 2 hours reviewing these reports to reach
19 their conclusion. [Doug Eroh, RT Vol. 10, 202:12-19.] These reports show some historical sales data
20 but do not provide any information that can be used to predict a future outcome or impact from a
21 relocation.

22 In addition to the lack of any market study, the relocation approval was given without adequate
23 or proper due diligence or verification of the information provided by Hooman Nissani. Hooman
24 Toyota has consistently misrepresented information to Toyota regarding the amount of his financial
25 statements, facility rent, his rights to the freeway reader board sign located at the proposed relocation
26 site, the challenges regarding his current facility, and his dealership's service volume. No Pro Forma
27 was prepared as required by Toyota's site evaluation procedures. (EX 1043.) The information provided
28 by Hooman Toyota relied upon in the site evaluation process were not verified by TMS as accurate.

1 This summary review did not adequately analyze the adverse economic impact the proposed
2 relocation would actually have on Cabe Toyota. The experts who testified at the hearing of this matter
3 on behalf of TMS (Sharif Farhat and Herbert Walters), had not been engaged by TMS to analyze the
4 proposed relocation until after the decision had been made to TMS to approve and support the proposed
5 relocation.

6 After conducting the so called “analysis” of the proposed relocation, TMS did not decide to
7 approve the proposed relocation. The claimed internal “analysis” of the proposed relocation was
8 conducted and discussed with TMS on several occasions. First on or about February 11, 2009, Mr. Jeff
9 Bracken and Mr. Dennis Thornhill discussed the proposed relocation. (EX. 1017.) Among the key
10 points listed is the fact that “The Coast Cadillac site is subject to protest and based upon the new
11 proximity to Cabe of only 2.18 miles the likelihood of success seems challenging.” (EX. 1017.) This
12 informal internal “analysis” did not comport with the complete requirements of TMS’s recognized Site
13 Request methods. (EX. 1043.) TMS’ analysis and discussion between Jeff Bracken and Dennis
14 Thornhill did not result in recommendation to approve the relocation. Instead, TMS subsequently
15 notified Hooman Toyota that TMS does not have enough information to fully evaluate the relocation
16 request. (EX. 1102 Page 2.)

17 Another “analysis” of the proposed relocation was conducted by TMS on or about August 23,
18 2001. (EX. 1109.) This limited analysis by TMS did not result in any finding or recommendation that
19 the relocation should be approved or report documenting a finding that the impact on Cabe Toyota
20 would be minimal. Instead TMS subsequently notified Hooman Toyota that “TMS is making no
21 commitment to approve the relocation.” (EX. 1111 at Page 2) In it’s September 7, 2011
22 correspondence to Mr. Hooman Nissani, TMS stated that (as previously stated in the August 3, 2011
23 letter - EX. 1005), TMS does not have enough information to fully evaluate your relocation proposal
24 or concluded that such a proposal is viable. (EX 1111 at Page 2)

25 On December 2, 2011, TMS advised Mr. Hooman Nissani in writing that TMS will evaluate the
26 relocation proposal in accordance with its’ site evaluation policies and procedures. (EX. 1138.)
27 Subsequently, on February 9, 2012, TMS notified Hooman Nissan that TMS will not support or
28 authorize relocation by Hooman Toyota to the former Boulevard Cadillac location at 3399 East Willow

1 St., Long Beach, CA. (EX. 1147.) This determination was based upon the responses received from
2 multiple dealers and other relevant factors.

3 Clearly based on TMS's own documentation, TMS had not concluded over the preceding three
4 years that the proposed relocation would benefit Toyota customers and would not have any material
5 adverse effects on other Toyota dealers as asserted in TMS's Post Hearing Brief (Page 6, Lines 3-5).

6 On February 23, 2013, counsel for Intervenor sent a letter to TMS stating that unless the Hooman
7 Toyota relocation proposal is approved without further delay, Hooman Toyota will incur losses in
8 excess of \$12 million. In response to this threat of litigation, TMS quickly changed course and approved
9 the proposed relocation which it had previously denied.

10 On July 26, 2012, the approval of the relocation request was "expedited" (see EX 1164, page 1)
11 and was subsequently approved on July 27, 2012, subject to various contingencies.

12 **3. TMS INCORRECTLY ASSERTS THAT BECAUSE HOOMAN AND CABE TOYOTA**
13 **HAVE OPERATED IN CLOSE PROXIMITY FOR MORE THAN 36 YEARS, THE**
14 **PROPOSED RELOCATION CLOSER TO CABE TOYOTA SHOULD NOT HAVE ANY**
15 **MEANINGFUL EFFECT ON CABE TOYOTA**

16 This argument misses the point and ignores the truth that the proposed move closer to Cabe
17 Toyota will change the playing field dramatically. This change in location which is closer to Cabe
18 Toyota and into a much larger freeway visible/accessible facility will greatly impact Cabe Toyota.

19 To support its position, TMS relies on the assertion that Cabe Toyota makes relatively few sales
20 in its own surrounding PMA. This suggests that this is the result of a focus on internet sales. (TMS Post
21 Hearing Brief at Page 14, Lines 3-20.) In the hearing, TMS' own expert witness Sharif Farhat testified
22 to his analysis and produced exhibits depicting the sales patterns of the various Toyota dealers in the
23 statutory 10 mile. In his testimony, Mr. Farhat describes Cabe Toyota's sales pattern as "different from
24 the typical pattern we see." (RT Vol. XIII, Page 115:15-116:10.) Mr. Farhat attributes Cabe Toyota's
25 "different" sales pattern to a focus other than local sales. Therefore, Mr. Farhat concludes that the
26 proposed relocation of Hooman Toyota would, in his opinion, not affect Cabe Toyota's operation.
27 TMS's experts primarily presented reports that either showed the calendar year 2012 or September 2012
28 year to date data. These short terms results should not be considered an accurate representation of long

1 term sales results, nor a reliable statistic to predict future results. Considering only 9 months of data
2 out of 45 years of history is unreliable, and basing a relocation decision on this information could be
3 fatal for Cabe Toyota. 2012 was a sales anomaly since Cabe Toyota benefitted greatly from early
4 adoption of multiple internet lead sources, such as TrueCar and Edmunds. Over 350 additional sales
5 for Cabe were attributed to these sources during that period. Today these internet lead companies have
6 added a significant amount of new Toyota dealers to their programs, dramatically reducing Cabe
7 Toyota's territory and the number of leads it receives. (Dan Duddridge, RT Vol. 11, 63:15 - 64:21.)

8 Toyota's contention that Cabe Toyota's focus is outside the local market area is incorrect. Cabe
9 Toyota's proximity challenges make it more difficult for Cabe Toyota to achieve average market
10 penetration in sale and service. In comparison with other dealers who have similar but less severe
11 proximity challenges, Cabe Toyota actually out-performs those dealers in service, and has similar result
12 for new vehicle sales.

13 Toyota has no basis to make this assumption. Toyota's case focused on percentage of sales Cabe
14 Toyota made in and outside of its PMA. The facts show Cabe Toyota has sold more new vehicles
15 inside its PMA each year since 2007, and 2012 was record sales in its PMA. Executive management
16 Steve Hearne had never visited Cabe Toyota prior to the visit to inform Cabe Toyota that Toyota was
17 supporting the Hooman Toyota relocation. Doug Eroh had not visited Cabe Toyota in over 5 years.
18 None of the Toyota management or field personnel had any discussions with Mr. Duddridge or
19 responsible Cabe Toyota employees with regard to Cabe Toyota's business strategy or marketing
20 efforts. Mr. Eroh testified that he had not discussed Cabe Toyota's business model and Toyota did not
21 have an issue or any concerns with that aspect of Cabe Toyota's operations. (Doug Eroh, RT Vol. 10,
22 204:13 - 205:6; 195:25 - 196:4.) Furthermore, Toyota management completely ignored the service
23 department business factors when considering the relocation. Service department business is a critical
24 area of the dealership performance and profits results. In addition, a successful service department is
25 a major contributor to new and used vehicle sales.

26 The testimony of Dan Duddridge and Exhibit 1196 demonstrate Cabe Toyota is committed to a
27 balanced marketing effort of direct mail, service customer marketing, local events, signage, and internet
28 marketing. (Dan Duddridge, RT Vol. 4, 193:17-24.) In addition, Cabe Toyota created a business

1 development center that utilizes its customer database and markets to the local customers and prospects
2 using a combination of methods, including outbound phone calls, letters, and email.

3 TMS contends that Cabe Toyota has increased its internet presence over the past 5 years and
4 added multiple internet marketing resources, such as TrueCar, Edmund, and Toyota third party leads,
5 and has therefore forgotten about its local market. This was not a deliberate and long term strategy to
6 abandon Cabe Toyota's local market, but rather an attempt to augment Cabe Toyota's traditional
7 advertising. Since Cabe Toyota did not have any meaningful internet presence prior to 2008, the result
8 of Cabe Toyota's internet marketing has been an increase in total new Toyota vehicle sales for the
9 dealership, both within Cabe Toyota's local PMA and outside the area. Considering the changing
10 marketplace and ongoing business challenges Cabe Toyota continues to modify its marketing plan in
11 an effort to improve its local sales results.

12 **4. THE TESTIMONY OF MR. DAN DUDDRIDGE PROVES THAT CABE TOYOTA**
13 **IS INDEED FOCUSED ON IMPROVING ITS SALES & SERVICE LOCALLY**

14 Cabe Toyota recognizes the sales opportunities closest to its dealership as being very important
15 to its business. Cabe Toyota struggles to capture this local business. The testimony of Mr. Scott
16 Watkins establishes that the level of competition among Toyota dealers in the RMA is high. (Scott
17 Watkins, RT Vol. 3, 66:13 and 37:16.)

18 The testimony of Mr. John Cabe and Mr. Dan Duddridge also supports the conclusion that the
19 level of competition for sales and service business between Cabe Toyota and Hooman Toyota is high.
20 Cabe Toyota has shown that it will need to improve its sales and service business in order to cover the
21 increased costs associated with its recent multi-million dollar facility expansion and Image II renovation
22 project. Cabe Toyota's continued viability is dependent upon being able to improve is sales and service
23 business. Most importantly, Cabe Toyota must improve its local sales and service business. The
24 proposed relocation of Hooman Toyota will further frustrate this effort and jeopardize Cabe Toyota's
25 business.

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1 **5. TMS' ASSERTION THAT CABE TOYOTA HAS ONLY RECENTLY BEGUN IT'S**
2 **IMAGE II FACILITY UPGRADE IS MISPLACED. CABE TOYOTA'S IMAGE II**
3 **RENOVATION HAS BEEN IN PROCESS FOR YEARS**

4 Cabe Toyota enrolled in the Toyota Image II program in September, 2010. (EX 1070.) The
5 evidence demonstrates that Cabe Toyota has been planning the project for years. Cabe Toyota began
6 acquiring the additional land needed in 2006. (EX 1209) Since then, Cabe Toyota has invested
7 considerable time and money to acquire the additional land necessary to expand its facility before it can
8 begin the construction phase. (EX. 1162, 1209, 1238.) Prior to making this commitment to build the
9 new Image II facility, Cabe Toyota inquired as to the possibility of Hooman Toyota relocating. Cabe
10 Toyota was told that there were no plans to relocate Hooman Toyota. As it turned out, this was untrue.
11 In August 2012, Cabe Toyota was shocked to learn that Hooman Toyota was being permitted to
12 relocate even closer to Cabe Toyota. (EX. 1166.) (John Cabe, RT Vol. 1, 145:7-19; RT Vol. 2, 56:11-
13 24.)

14 **6. THE CHALLENGES THAT CABE TOYOTA FACES IN ITS LOCAL PMA ARE MANY**

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

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

23 Much of the area included in Cabe Toyota's defined PMA is comprised of low income or
24 industrial areas associate with the port of Long Beach. Given these many local challenges, it is not
25 surprising that Cabe Toyota struggles to make sales locally in such a difficult and competitive market.
26 TMS unfairly attempts to show Cabe Toyota is not focused on their PMA as justification for the
27 proposed relocation. In comparison with other Toyota dealers how have similar but less severe PMA
28 challenges, Cabe Toyota actually outperforms those dealers in service market share and has similar

1 results for new vehicle sales. (EX. 1202.)

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

4 Toyota asserts that Cabe Toyota was very profitable as compared to other Toyota dealers who,
5 on average, each \$1,500,000.00 per year. However, Cabe Toyota only showed a net profit after taxes
6 of \$378,122 in 2012. (RT Vol. 2, 11:167:14 to 168:1; EX 1243.) TMS asserts that Cabe Toyota has
7 a significant amount of financial flexibility and is more than capable of competing with Hooman Toyota
8 following the relocation. This assertion is incorrect.

9 Herbert Walter's analysis was based on incorrect assumptions and information as exposed during
10 the testimony of Dan Duddridge. Mr. Walter applied, incorrectly, "other income" to the used car
11 department and also did not include all the correct fixed costs. Corrected breakeven units using
12 Walter's figures and increased rent is 1,462. Cabe Toyota has averaged 1,066 units the past 3 years,
13 with their all time record sales in 2012 being 1,507 units. Prior to 2012, Cabe Toyota's prior record
14 for new units was 1,286 in 2007, or 176 units short of the new sales unit breakeven number. Despite
15 Cabe Toyota's best efforts, Cabe Toyota sold 77 fewer units, or 12% less, for 2013 year to date through
16 May (EX 1250).

17 TMS incorrectly asserts that Cabe Toyota's current service market share is about 20%. However,
18 EX 2088, page A-29 shows 21.7% served by Cabe Toyota, 33.1% served by another Toyota dealer, and
19 45.2% not being serviced by a Toyota dealer. Cabe Toyota's PMA has a lower percentage of vehicles
20 being serviced by a non-Toyota dealer than average, 1.4% less than Carson Toyota and only 1.5%
21 greater than Hooman Toyota. The record shows the highest percent service market share of any Toyota
22 dealer in a metro area is 35%; thus, it is misleading to make statements Cabe Toyota could easily double
23 its service market share. EX 1247, page 2, shows the best case service market share scenario and
24 revenue opportunity if Cabe Toyota could achieve a top 10% service marketing share ranking in the
25 region, which would be nearly impossible based on Cabe Toyota's proximity challenges.

26 TMS contends that Toyota dealers are not providing adequate new vehicle sales representation
27 in the RMA or the Long Beach area. However, EX 2056, p. 12, shows Toyota sales representation in
28 Cabe Toyota's PMA is higher than both the District and Region average; thus, Toyota dealers are

1 providing more than adequate representation of the Toyota brand.

2 EX 1247, representing best case scenario opportunity for Cabe Toyota, shows that if Cabe Toyota
3 was able to achieve the same market penetration as the best Toyota dealers in the metro area, resulting
4 in 35% units sold in its PMA, the total unit increase for 2012 would only have been 138 units (11
5 additional units per month). Not only would it be nearly impossible for Cabe Toyota to achieve this
6 market penetration due to its proximity challenges, but an additional 11 units per month would only
7 cover a small fraction of Cabe Toyota's new construction expense. (Dan Duddridge, RT Vol. 5, 88:4;
8 88:14-20; 89:13; 91:1-11; 97:6-10; 102:20 - 103:24; 104:1-15.)

9 The evidence shows that the highest percentage of service market share of any Toyota dealer in
10 a metro area is 35%; thus, it is misleading to make statements or imply Cabe Toyota could easily
11 increase service market share when the top performing Toyota dealers in service market share are only
12 10% higher than Cabe Toyota. EX. 1202 shows the best case service market share scenario and revenue
13 opportunity if Cabe Toyota could achieve a top 10% service market share ranking in the region, which
14 would be nearly impossible based on Cabe Toyota's proximity and PMA challenges.

15 **8. CONCLUSION**

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

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

23 In the case of *Piano v. State of California*, 103 Cal. App. 3d 412 (1980), the Court of Appeal
24 noted that the Board must balance the dealer's interest in maintaining a viable business, the
25 manufacturers interest in promoting sales, and the public's interest in adequate competition and
26 convenient service. Under the assessment presented by Respondent and Intervenor in this matter, the
27 interests of Cabe Toyota as the affected dealer should be trampled. This result is unjust.

28 Based on the foregoing, the evidence will demonstrate that giving consideration to all the relevant

1 facts and circumstances, there is good cause not to permit the proposed relocation.

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

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Respectfully submitted,

DATED: September 19, 2013

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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

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