

1 **NELSON MULLINS RILEY & SCARBOROUGH, LLP**

2 PATRICIA R. BRITTON (Cal. Bar No. 100375)

Email: patricia.britton@nelsonmullins.com

3 Atlantic Station, 201 17th St. NW, Suite 1700

Atlanta, GA 30363

4 Telephone: (404) 322-6000

Facsimile: (404) 322-6050

5 STEVEN A. MCKELVEY, JR. (*pro hac vice admission*)

E-Mail: steve.mckelvey@nelsonmullins.com

6 S. KEITH HUTTO (*pro hac vice admission*)

E-Mail: keith.hutto@nelsonmullins.com

7 STEVEN B. MCFARLAND (*pro hac vice admission*)

E-Mail: steven.mcfarland@nelsonmullins.com

8 1320 Main Street / 17th Floor

9 Post Office Box 11070 (29211-1070)

Columbia, SC 29201

10 Telephone: (803) 799-2000

Facsimile: (803) 255-5930

11 Attorneys for Respondent Toyota Motor Sales USA, Inc.

12 **STATE OF CALIFORNIA**

13 **NEW MOTOR VEHICLE BOARD**

14 In the Matter of the Protests of)

15) CONSOLIDATED MATTERS:

16 ALDON, INC., a California corporation,)

PROTEST NO. PR-2339-12

16 dba CARSON TOYOTA, and)

17 ALDON, INC. a California corporation, dba)

PROTEST NO. PR-2340-12

17 CARSON SCION, and)

PROTEST NO. PR-2341-12

18 CABE BROTHERS, a California)

PROTEST NO. PR-2342-12

18 corporation, dba CABE TOYOTA and)

19 CABE SCION, and)

PROTEST NO. PR-2343-12

20 APAULO, INC., dba NORWALK)

20 TOYOTA and NORWALK SCION, and)

21 DWWSB, INC., dba SOUTH BAY)

RESPONDENT TOYOTA MOTOR
SALES, USA, INC.'S REPLY IN
OPPOSITION TO CABE TOYOTA'S
POST-HEARING OPENING BRIEF

22 TOYOTA and SOUTH BAY SCION,)

22 Protestants,)

23 v.)

24 TOYOTA MOTOR SALES, U.S.A., INC.,)

24 a California corporation,)

25 Respondent.)

1 H.T.L. AUTOMOTIVE, INC., dba)
2 HOOMAN TOYOTA OF LONG BEACH)
3 and HOOMAN SCION OF LONG BEACH,)
4 Intervenor.)

5 Pursuant to the Order Establishing Post-Hearing Briefing Schedule and the Notice Regarding
6 Post-Hearing Briefs, Respondent Toyota Motor Sales, USA, Inc. (“TMS”) hereby submits its Reply in
7 Opposition to Cabe Toyota’s Opening Brief in the above-captioned matter.

8 **INTRODUCTION**

9 Although Cabe Toyota and Hooman Toyota have been successfully operating from the same
10 locations for more than 36 years, Cabe Toyota’s Opening Brief alleges that Hooman Toyota’s proposed
11 relocation 0.9 miles and 72 seconds of drive time closer to its facility in one of the largest automotive
12 markets in the country will negatively affect consumers and cause Cabe Toyota to fail. Quite contrary
13 to these allegations, there is simply no evidence that Hooman Toyota’s slight relocation to a new facility
14 within its own PMA and within its own customer base will harm consumers or have some material
15 adverse effect on Cabe Toyota. As set forth in detail below, Cabe Toyota does not conduct a
16 significant portion of its business in any of the areas surrounding the proposed relocation site, and
17 instead admittedly focuses on internet marketing techniques that attract an astounding 63% of its sales
18 from customers located more than ten miles from its facility. Indeed, Cabe Toyota’s own expert
19 witness even admitted that the proposed relocation would not cause Cabe Toyota to go out of business.

20 Cabe Toyota also cites several prior relocation decisions issued by the New Motor Vehicle
21 Board (“Board”), and it claims these decisions are highly persuasive and compel the denial of Hooman
22 Toyota’s proposed relocation. However, these decisions (and other relocation decisions by the Board)
23 actually demonstrate the converse: that there is a lack good cause not to permit Hooman Toyota’s
24 proposed relocation, and that the proposed relocation to a larger, newly renovated, and more modern
25 dealership facility will actually benefit consumers, increase competition, and serve the public interest.

ARGUMENT

I. Caba Toyota Has Failed to Establish Good Cause Not to Permit the Proposed Relocation of Hooman Toyota under the Vehicle Code.

A. Caba Toyota Chose Not to Invest in its Dealership Facility for Many Years.

In its Opening Brief, Caba Toyota first alleges that it has “undoubtedly” made a substantial and permanent investment in its dealership because it has been in business for some time and is currently in the process of renovating its dealership facilities. However, it is undisputed that Caba Toyota made the conscious business decision **not** to invest in its dealership facility for many years. Due to this lack of investment, Caba Toyota’s dealership facilities are woefully deficient and among the least competitive and appealing facilities of any Toyota dealer. (RT Vol. X. 33:13-16). Below is a photograph of Caba Toyota’s current facilities taken immediately before the hearing in this case:



(Ex 286, pp 102).

As this picture makes clear, Caba Toyota’s existing dealership facilities are dilapidated and severely inadequate to serve Toyota consumers. Caba Toyota even admits as much. In its Opening Brief, Caba Toyota admitted that it has “had to contend with the constraints of its limited facility,” (Brief at 10), and at the hearing in this case, Caba Toyota’s Operations Director admitted that its dealership facility is “less than ideal as far as from a location and property.” (RT Vol. IV. 145:2-20).

1 The facility does not have sufficient parking, service area, or total building and land area to adequately
2 serve customers. (RT Vol. II. 12:9-13:14) (Ex. 2058). Cabe Toyota also admitted that its service
3 drive is “very bad,” and that the accessibility for service customers is “very challenging.” (RT Vol. II.
4 89:23-24; RT Vol. IV. 146:15-19). Cabe Toyota’s customers completely agree. They have expressed
5 concerns about Cabe Toyota’s facilities and have rated its sales and service facilities “red standard,”
6 which is poor or substandard. (RT Vol. II. 14:1-9; 17:21-19:11) (Ex. 2003, TMS-Prod_017004).
7 Customers also have raised specific concerns with the cleanliness of Cabe Toyota’s dealership facilities,
8 the lack of convenient parking, and the comfort of the service waiting area. (*Id.*).

9 Despite these deficiencies and customer concerns, Cabe Toyota has repeatedly chosen not to
10 make any substantial investment in its facilities. Twelve years ago in 2001, Cabe Toyota entered into a
11 Dealer Agreement acknowledging that its facilities were deficient and agreeing to renovate its facilities,
12 and it entered into several subsequent contracts agreeing to cure its facility deficiencies. (RT Vol. II.
13 44:11-22; 96:1-14) (Ex. 2014, TMS-Prod_00064). (Ex. 1087, TMS-Prod_00014) (Ex. 2044, TMS-
14 Prod_00024). However, Cabe Toyota did not live up to these promises, but instead made the conscious
15 decision **not** to invest in its dealership for the benefit of its customers:

16 Q. All right. Now, we went through a whole litany of dealer
17 agreements for a period of 11 and 12 years where you had made
18 commitments to renovate and you had not done so. Do you recall that?

19 A. Yes.

20 Q. When it suited you, you did not make the renovations that you
21 had committed to Toyota in those agreements, correct?

22 A. Can you repeat that, please?

23 Q. Yes. Along those time periods of those 11, 12 years, Cabe
24 Toyota, when it suited it, did not make the renovations and expand its
25 facilities as it had agreed to, correct?

A. Correct.

(RT Vol. II. 96:1-14).

1 In an effort to offset its admitted failure to invest, Cabe Toyota’s Opening Brief claims it began
2 construction on its renovation project in 2011, **ten years** after it first agreed to do so. (Brief at 7).
3 However, this claim distorts the evidence in this case. Beginning in 2011, Cabe Toyota completed a
4 few small projects on its existing facility, such as paving a parking lot, installing lights in the parking
5 lot, and installing a small stone wall outside its facility. (RT Vol. II. 179:3-23). Cabe Toyota did not
6 break ground on its facility renovation until April 2013, about two months before this hearing:

7 Q. And, in fact, when I took your deposition on March 19th, just
8 two months ago, you told me that it would be two or three more weeks
9 before you broke ground; is that right, Mr. Cabe?

10 A. I don't recall.

11 Q. And, in fact, did you break ground sometime in April of this
12 year?

13 A. Correct.

14 Q. Okay. And you broke ground just some two months before we
15 commenced trial in this case, correct?

16 A. Correct.

17 (RT Vol. II. 51:13-18).

18 Cabe Toyota also alleges that prior to beginning this renovation, it identified several alternative
19 locations for its dealership but was precluded from relocating “due to the one-mile limitation previously
20 imposed by Toyota Management.” (Brief at 4). Contrary to this claim, however, TMS actually
21 encouraged—not discouraged—Cabe Toyota to pursue alternative locations for its facility. In 2004,
22 Cabe Toyota identified a potential alternative site for its dealership adjacent to the 405 Freeway, and
23 TMS actively encouraged Cabe Toyota to pursue and relocate to that site. (RT Vol. II. 28:11-17).
24 Even though Cabe Toyota was unable to secure that site, TMS further encouraged Cabe Toyota to
25 pursue other land opportunities near the 405 Freeway. (RT Vol. II. 28:11-17).

There also is no evidence that TMS ever placed a one-mile limitation on proposed relocations by
any dealer, including Cabe Toyota. In 2009 and 2010, Cabe Toyota informally raised two other

1 potential sites that were approximately 1.5 miles east of its facility. (RT Vol. II. 42:3-18; RT Vol. V.
2 221:3-6). Although Cabe Toyota claims that TMS rejected these proposed sites because they were
3 more than a mile from its dealership, it is undisputed that both of these sites were actually inside
4 Hooman Toyota's PMA. (RT Vol. II. 41:10-42:2; RT Vol. V. 221:1-8; RT Vol. V. 227:7-16). Cabe
5 Toyota cannot credibly allege that Hooman Toyota's proposed relocation should be denied even though
6 it is staying in its own PMA, then claim that TMS should have approved Cabe Toyota's informal¹
7 inquiries about relocating into Hooman Toyota's PMA.

8 More importantly, and quite revealing, although Cabe Toyota now complains that allowing
9 Hooman Toyota to relocate would make the dealers too close, each of the relocations proposed by Cabe
10 Toyota would have moved the dealership **closer to Hooman Toyota**. As set forth above, both of these
11 proposed sites were approximately 1.5 miles east of Cabe Toyota towards Hooman Toyota. (RT Vol.
12 II. 42:3-18; RT Vol. V. 221:3-6). These proposed sites would have placed Cabe Toyota about two
13 miles away from Hooman Toyota—the same distance that Hooman Toyota's proposed relocation would
14 place it from Cabe Toyota. (RT Vol. II. 42:3-18; RT Vol. V. 221:3-6). Again, Cabe Toyota cannot
15 credibly allege that Hooman Toyota's proposed relocation would make the dealers too close when Cabe
16 Toyota itself previously contemplated relocating the very same distance from Hooman Toyota.

17 **B. Cabe Toyota's PMA Does Not Hinder its Ability to Sell and Service Toyota Vehicles.**

18 Cabe Toyota's Opening Brief next alleges that the proposed relocation should be denied because
19 of the relatively small size of its current PMA and its proximity to other Toyota dealers. In support of
20 this claim, Cabe Toyota alleges that it has the smallest PMA in the Los Angeles Region and is located
21 in close proximity with other Toyota dealers, and that these factors make it struggle to capture sales and
22 service market share in its PMA. (Brief at 4-6). Although TMS agrees that Cabe Toyota is not
23

24 _____
25 ¹ Cabe Toyota admitted that these proposals were informal and that it never secured financing or rights to the property. (RT Vol. V. 224:18-24; RT Vol. V. 227:4-13).

1 adequately representing the market in the areas surrounding its dealership, the size and layout of its
2 PMA is not the cause of its failure to adequately capture the market.

3 As an initial matter, Cabe Toyota's allegation that its PMA "is the smallest in the Region" is
4 simply not true. Cabe Toyota's Opening Brief admits that its PMA currently has approximately 5,700
5 to 6,000 Toyota units in operation ("UIO"). (Brief at 4). However, there are several Toyota dealers in
6 the Los Angeles Region that have PMAs with significantly less UIO than Cabe Toyota, including Perry
7 Motors Toyota (1,165 UIO), Toyota of Lompoc (2,036 UIO), Toyota of Ridgecrest (2,605 UIO),
8 Soutars Toyota (3,289 UIO), and Toyota San Luis Obispo (3,669 UIO). (Ex. 2062, pp. TMS-
9 Prod_016838). There also are several Toyota dealers in the Region that have about the same number of
10 UIO in their PMAs as Cabe Toyota, including Toyota Santa Maria (7,681 UIO) and Ventura Toyota
11 (7,685 UIO). (*Id.*). Accordingly, Cabe Toyota's PMA certainly is not the smallest in the Los Angeles
12 Region, and it is not unusually or abnormally small as Cabe Toyota claims.

13 Moreover, the size and layout of its PMA have not negatively affected Cabe Toyota's business
14 or ability to compete in the market. During the hearing in this case, Cabe Toyota's own Operations
15 Director expressly admitted that Cabe Toyota's PMA is not a hindrance on its ability to sell vehicles:

16 Q. I understand you want to come in and suggest that the PMA is
17 somehow a restriction on you. But doesn't this document, and doesn't the
18 sales pattern of Cabe Toyota demonstrate that that's just not a restriction
19 on Cabe or a hindrance to Cabe's ability to sell vehicles?

20 A. What is your question?

21 Q. **My question is, the size of the PMA is not a hindrance on
22 Cabe's ability to sell vehicles. Isn't that right?**

23 A. **That's correct.**

24 (RT Vol. V. 186:14-25) (emphasis added). In fact, although Cabe Toyota attempts to convince the
25 Board that its current PMA presents some insurmountable obstacle, Cabe Toyota's Operations Director
admitted that 2012 was a **record** year for new vehicle sales at Cabe Toyota. (RT Vol. IV. 179:11-13).

1 Cabe Toyota was able to achieve this record level of sales with its **exact same PMA** and with the **exact**
2 **same Toyota dealers** around its dealership as it has today. (RT Vol. IX. 131:1-13).

3 Although Cabe Toyota was able to achieve record sales in 2012, Cabe Toyota still is not
4 adequately capturing the sales and service business immediately surrounding its dealership. Cabe
5 Toyota's business patterns and inability to capture market share in this area, however, are **not** due to
6 the size or layout of its PMA, as Cabe Toyota attempts to claim in its Opening Brief. During the
7 hearing in this case, Cabe Toyota's Dealer Principal expressly admitted that the reason Cabe Toyota
8 makes the vast majority of its sales to customers located at great distances from the dealership is
9 because it has made the business decision to focus on internet sales and marketing:

10 Q. You stated that most or the great majority of Cabe Toyota's
11 advertising is done on the internet and AutoTrader and Edmunds, and
TrueCar; is that correct?

12 A. Correct.

13 Q. And Cabe also has a business development center where it has
14 hired salesmen that are totally focused on the internet; is that correct?

15 A. Correct.

16 Q. And because of this focus as we have just gone over of all of these
17 things on the internet, that's why the great majority of Cabe Toyota's sales are
made to customers who live further away from the dealership, correct?

18 THE WITNESS: I would imagine, yes.

19 ADMINISTRATIVE LAW JUDGE RYERSON: Let's see if we can get
a stronger answer one way or the other. Are you agreeing that that's the case?

20 THE WITNESS: Yes.

21 (RT Vol. II. 39:12-24). Cabe Toyota's Operations Director similarly attributed the dealership's sales
22 patterns to internet sales and marketing. (RT Vol. V. 192:11-23).

23 Cabe Toyota made the business decision to start focusing on internet sales in 2010, and its
24 Dealer Principal testified that this is when the dealership began selling more vehicles to customers at
25 great distances from its facility. (RT. Vol. II. 37:17-38:20). Prior to 2010, Cabe Toyota made nearly

1 **75%** of its sales within ten miles of its dealership with the same PMA, the same location, and the same
2 competing dealers that it has today. (RT Vol. IX. 136:12-139:10) (Ex. 2088, pp. R-8). In stark
3 contrast, in 2012, Cabe Toyota made only **37%** of its sales to customers **within 10 miles** of its facility,
4 and it made only **7.9%** of its new vehicle sales into its own PMA. (Ex. 2088, pp. R-8) (Ex. 1219, pp.
5 Cabe 01774).² As such, Cabe Toyota’s inability to capture sales around its dealership is not due to its
6 PMA, but instead is the result of its conscious business decision to focus on internet sales.³

7 Cabe Toyota’s PMA similarly has not negatively affected its ability to capture service business
8 in its PMA. In 2012, Cabe Toyota only captured **20%** of the service business available in its PMA.
9 (RT Vol. XIII. 87:9-17) (Ex. 2088, pp. A-29). Although Cabe Toyota claims that this is the result of
10 competition from neighboring Toyota dealers, approximately **50%** of the UIO in Cabe Toyota’s PMA
11 (about 3,000 Toyota customers) are not being serviced by **any** Toyota dealer whatsoever. (*Id.*). These
12 service customers are not being “taken away” from Cabe Toyota by other neighboring Toyota dealers,
13 as Cabe Toyota claims, but instead simply are not being served by Cabe Toyota. Cabe Toyota’s own
14 service manager admitted this represents a significant opportunity for the dealership to increase its
15 service business in the PMA. (Torres Depo. 76:14-17). Accordingly, there is no support for Cabe
16

18 ² Although Cabe Toyota’s Opening Brief alleges that it is “not realistic or logical” to expect Cabe Toyota to improve the
19 number of sales it makes in its PMA, this conclusory allegation is directly contradicted by the fact that (1) Cabe Toyota used
20 to make a significantly larger percentage of its sales near its dealership and (2) its own Operations Director admitted that
Cabe Toyota’s recent failure to capture sales in its PMA represents opportunity to expand its sales business. (RT Vol. V.
190:20-23; RT Vol. VIII. 16-21).

21 ³ Cabe Toyota’s Opening Brief claims that Toyota dealers with the greatest proximity challenges struggle to capture market
22 share in their PMAs. In support of this claim, Cabe Toyota cites Elmore Toyota and Norwalk Toyota as examples of
23 dealers that struggle to capture sales in their PMAs. However, this argument is based on a biased selection of the
24 performance of Toyota dealers in the area. Given the extremely high population density in this area, most Toyota dealers
25 have several other Toyota dealerships located within a relatively close proximity. Nevertheless, many of these dealers are
among the best in the market at capturing sales in their PMAs. For example, Power Cerritos has five Toyota dealers within
6.3 miles of its dealership, and it captures 31.46% of the sales in its PMA. Carson Toyota has four Toyota dealerships
within 6.7 miles of its dealership, and it captures 32.90% of the sales in its PMA. Similarly, Toyota of Huntington Beach
has three other Toyota dealers within 5.6 miles of its dealership, and it captures 34.2% of the sales in its PMA. (Ex. 2088,
pp.A-75); (Ex. 254, pp. Tab 4, Page 1). Accordingly, there is no support for Cabe Toyota’s claim that Toyota dealers with
the greatest proximity to other dealers inherently struggle to capture sales in their PMAs.

1 Toyota's claim that its PMA somehow hinders its ability to conduct business in the market, and this
2 claim is expressly contradicted by its own admissions.

3 **C. The Proposed Relocation Will Not Have a Material Adverse Effect on Cabe Toyota.**

4 Cabe Toyota's Opening Brief next alleges that Hooman Toyota's proposed relocation a mere 0.9
5 miles and 72 seconds closer to its dealership would effectively cripple its operations. In support of this
6 allegation, Cabe Toyota first alleges that the proposed relocation would move Hooman Toyota into
7 Cabe Toyota's PMA, into its main customer base, and closer to the area where 75% of the UIO in its
8 PMA are located. (Brief at 5-6). As an initial matter, Cabe Toyota's claim that Hooman Toyota is
9 moving into its PMA is simply false. Cabe Toyota's Operations Director specifically admitted that the
10 proposed relocation site is within Hooman Toyota's existing PMA, (RT Vol. V. 221:9-11), and Carson
11 Toyota's expert witness testified that the proposed site is located within Hooman Toyota's existing
12 PMA, within the same neighborhood, and within the same general area where Hooman Toyota has
13 operated for years. (RT Vol. IX. 99:19-100:8).

14 In addition to staying within its own PMA and within the same neighborhood, Hooman Toyota
15 also is not proposing to move into Cabe Toyota's main customer base. As set forth in detail above,
16 Cabe Toyota made the decision to focus its business on internet sales, which attracts customers from
17 great distances from the dealership. (RT Vol. II. 39:12-24). Cabe Toyota admits that as a result of this
18 business decision, it makes an astounding 63% of its sales to customers located more than ten miles
19 away from the dealership. (RT Vol. II. 39:12-24) (Ex. 2088, pp. R-8). Cabe Toyota also does not
20 conduct a significant amount of business in the area surrounding the proposed relocation site. In 2012,
21 Cabe Toyota only made 9.7% of its new vehicle sales into Hooman Toyota's entire PMA. (Ex. 1219,
22 pp. Cabe 01774). Moreover, Hooman Toyota already is the dominant dealer for new vehicle sales and
23 service business in the area surrounding the proposed relocation site, and Cabe Toyota is not the
24 dominant dealer for sales or service in that area. (RT Vol. X. 107:4-16; 121:11-122:11) (Ex. 2056,
25

1 pp. 16437) (Ex. 1109, pp. 17535). Accordingly, Cabe Toyota’s allegation that Hooman Toyota is
2 moving into its main customer base is meritless.

3 Cabe Toyota’s claim that 75% of the UIO in its PMA are located at or north of the 405—the
4 direction in which Hooman Toyota is relocating—is similarly flawed. This claim is based on an exhibit
5 prepared by Cabe Toyota’s Operations Director, which allegedly shows that 75% of Cabe Toyota’s
6 UIO are located in the census tracts in the northern portion its dealership. (Ex. 1258).⁴ However, on
7 cross examination, Mr. Duddridge admitted that his exhibit does not actually reflect the location of
8 Toyota’s UIO in Cabe Toyota’s PMA, but instead reflects the number of Toyota units in nearby zip
9 codes, including portions of the zip codes that are outside its PMA. (RT Vol. XIV. 220:9-12). Mr.
10 Duddridge also admitted that he included all of these units—including units located outside its PMA—so
11 that he could show the ALJ a “big number,” (RT Vol. V. 164:13-165:1), and that his calculation also
12 includes units in zip codes that were predominantly to the south of Cabe Toyota if even a “tiny sliver”
13 of the zip code was north of the dealership. (RT Vol. V. 164:13-165:1; 167:25-170:25).⁵

14 TMS’s expert witness, Mr. Farhat, analyzed the number of UIO in Cabe Toyota’s PMA and
15 found that only 47.4% of Cabe Toyota’s UIO are located to the north of the dealership, not 75% of its
16 UIO as Cabe Toyota claims. (RT Vol. 149:7-17) (Ex. 2089). Mr. Duddridge even conceded this
17 analysis is accurate. (RT Vol. XIV. 219:19-22) (“I’m not debating his numbers.”). Mr. Farhat also
18 determined that following the proposed relocation, Cabe Toyota will **gain** proximity advantage to more
19 customers to the south. (RT Vol. XIII. 150:9-151:10) (Ex. 2089). Accordingly, not only is Cabe’s
20

21 _____
22 ⁴ Although Cabe Toyota claims that the north is its area of greatest opportunity, the north actually is the area where Cabe
23 Toyota is the least effective at capturing sales. (RT Vol. V. 150:10-25). Cabe Toyota introduced a lost sales map, which
24 showed that the northern portion of its PMA is the area where Cabe Toyota is losing the most number of sales. (*Id.*).
25 Accordingly, Cabe Toyota is not providing adequate representation in this area, and Hooman Toyota’s slight relocation to
the northwest will not place it into an area that Cabe Toyota is adequately serving.

⁵ During the hearing in this case, the ALJ admonished Mr. Duddridge on the record that his answers sounded evasive, that
he was attempting to dance around questions, and that he did not appear to be candid. (RT Vol. VIII. 59:16-60:5). Mr.
Duddridge’s analyses and testimony therefore are not credible or reliable, and should be disregarded.

1 area of greatest opportunity to the south of the dealership, but Hooman Toyota’s proposed relocation
2 also will make Cabe Toyota the closest dealer to more actual Toyota customers in that direction.

3 Cabe Toyota next cites the testimony of its expert witness, Scott Watkins, in support of its claim
4 that the proposed relocation will materially harm its business. Mr. Watkins testified that Cabe Toyota
5 would lose 9.2% of its new vehicle sales, or seven sales per month, if Hooman Toyota were permitted
6 to relocate. (RT Vol. III. 210:22-211:13). Mr. Watkins also claimed that Cabe Toyota would lose
7 9.2% of its gross profit evenly across all of its other operations, and that it would lose \$455,000 in
8 gross profit based on its 2011 financial statements. (RT Vol. III. 63:18-65:14). However, Mr.
9 Watkins testimony suffers from several egregious and fatal flaws. These flaws are discussed at length
10 in TMS’s Post-Hearing Opening Brief, and TMS will not repeat them all in this memorandum.

11 Briefly, Mr. Watkins’ entire analysis was based on the creation and comparison of 60-degree
12 wedges that he visualized going out east and west from Cabe Toyota’s dealership location. Although
13 Mr. Watkins admitted that any change to these angles would change his results, he did not have **any**
14 analytical basis for choosing 60-degree angles, and he admitted that he chose those angles simply
15 because they are “easy to reference, points of the compass.” (RT Vol. III. 113:8-24). Mr. Watkins
16 further admitted that he did not perform **any** analysis or testing to determine the reasonableness of this
17 angle. (*Id.*). Moreover, when Mr. Watkins measured the angles with a protractor, they actually were
18 50-degree angles, **not** 60-degree angles as represented by Mr. Watkins. (RT Vol. IV. 51:1-52:25).
19 Further diluting the credibility of his opinions, Mr. Watkins also admitted that his conclusion that Cabe
20 Toyota would lose 9.2% of its business across all departments was a “simplifying assumption,” (RT
21 Vol. III. 63:18-64:10), and that he did not perform any analysis of Cabe Toyota’s used vehicle sales,
22 counter parts sales, or wholesale parts sales. (RT Vol. IV. 12:12-19) (RT Vol. IV. 26:11-27:12).

23 Significantly, Mr. Watkins also conceded that even if Cabe Toyota were to lose 9.2% of its
24 business or \$455,000 in gross profits each year, the proposed relocation would not put Cabe Toyota out
25

1 of business. (RT Vol. IV. 38:3-39:9). Mr. Watkins further admitted that the proposed relocation
2 would not put Cabe Toyota's investment at risk other than it might not make as much money as it
3 otherwise would have made. (RT Vol. IV. 40:16-21). Accordingly, Cabe Toyota's claim that the
4 proposed relocation would cripple its operations is not supported by the evidence in this case, and in
5 fact is expressly contradicted by its own expert witness.

6 **D. The Expense of Cabe Toyota's Ongoing Facility Renovation is Not a Financial Effect or**
7 **Consequence of the Proposed Relocation.**

8 Cabe Toyota next alleges that even if the proposed relocation alone will not materially affect the
9 dealership, the proposed relocation will be financially "ruinous" to its business when combined with the
10 estimated cost of its ongoing facility renovation. Although Cabe Toyota attempts to lump these
11 expenses in with the alleged effect of Hooman Toyota's proposed relocation, Cabe Toyota's planned
12 renovation in fact is wholly independent of the relocation. (RT Vol. VII. 200:4-19; RT Vol. VIII.
13 18:16-21). Cabe Toyota entered into a contract agreeing to renovate its facilities seven years **before**
14 Mr. Nissani even acquired Toyota of Long Beach. (RT Vol. II. 44:11-22) (Ex. 2014, TMS-
15 Prod_000064). Similarly, Cabe Toyota made the decision to begin construction and incur these
16 renovation expenses nine months **after** receiving the Notice of Relocation and two months before this
17 hearing. (RT Vol. II. 51:13-18; 97:18-98:6; 198:5-13; RT Vol. V. 132:12-133:25). Accordingly, the
18 expected cost of Cabe Toyota's renovations are not an effect of the proposed relocation, and they are
19 not relevant to whether there is good cause not to permit the proposed relocation.

20 Moreover, even assuming that Cabe Toyota's expenses will increase, this additional rent would
21 not constitute the grave financial burden that Cabe Toyota claims. Even after Cabe Toyota completes
22 the renovation, its rent expense would remain below average when compared to other Toyota dealers in
23 the same Region and other Toyota dealers of the same size. (RT Vol. XII. 111:2-19; 112:10-113:7)
24 (Ex. 2087, pp. Cabe Supp 1-3). The potential increased monthly expenses associated with the proposed
25

1 renovation also would constitute a relatively small percentage of the dealership’s annual expenses,
2 which total more than \$6 million. (RT Vol. XII. 113:11-114:7). Cabe Toyota’s anticipated renovation
3 expenses also fail to account for any increase in business resulting from the renovation or any reduction
4 in expenses as a result of having an improved dealership facility, such as increased efficiency. (RT
5 Vol. VII. 224:20-226:22; RT Vol. VIII. 12:12-14; RT Vol. XII. 114:16-115:23). As such, the
6 potential increase to Cabe Toyota’s rent would not be a critical new expense that will overwhelm the
7 dealership or make it less profitable. (RT Vol. XII. 113:11-114:7).

8 **E. TMS Conducted a Lengthy and Thorough Evaluation of the Proposed Relocation.**

9 Cabe Toyota’s Opening Brief next claims there is good cause to deny the proposed relocation
10 because TMS allegedly approved the proposed relocation in reliance on “incomplete or inaccurate
11 information.” Specifically, Cabe Toyota claims that TMS approved the proposed relocation “quickly,”
12 without appropriate due diligence, and without verification of the information submitted by Hooman
13 Toyota. However, nothing could be further from the truth.

14 Cabe Toyota first alleges that TMS did not conduct appropriate due diligence because it did not
15 conduct a formal market study. (Brief at 20). This allegation, however, confuses the definition and
16 purpose of a market study. TMS performs a market study when evaluating whether there is a need for
17 additional representation in a particular market. (RT Vol. X. 303:15-304:7). That is not the situation
18 presented in this case. In this case, TMS is not seeking to add a dealer to the market, and Hooman
19 Toyota—not TMS—proposed the subject relocation. Accordingly, in order to fully evaluate this
20 proposed relocation, TMS prepared two separate market analyses that evaluated the geography at issue,
21 the PMAs of the Toyota dealers in the RMA, the distance of the proposed move, the household income
22 and population patterns in the RMA, the new vehicle sales and service patterns in the RMA, and the
23 cross-sell between dealers in the RMA. (RT Vol. X. 168:19-170:0) (Exs. 1164; 1165). This
24 evaluation fully complied with TMS’s policies and procedures.
25

1 Cabe Toyota next alleges that TMS did not conduct appropriate due diligence because it
2 allegedly “spent just a few hours reviewing a few sales reports.” (Brief at 20). This allegation,
3 however, grossly mischaracterizes the testimony in this case. TMS’s current Region Manager testified
4 that its region management spent “a few hours” just to review the **first** market analysis prepared by
5 TMS, and that at the end of those few hours, TMS had not yet reached a conclusion about approving
6 the proposed relocation. (RT Vol. X. 202:1-24). Indeed, TMS evaluated the relocation for more than
7 **thirteen months** after it was proposed by Hooman Toyota, and more than **eleven months** after TMS
8 completed its first market analysis. (RT Vol. X. 82:7-83:11; 170:6-9) (Exs. 1100, 1164; 1165).
9 During that thirteen month period, TMS (1) completed two separate market analyses of the proposed
10 relocation, (2) analyzed the service performance of the subject dealers; (3) personally drove the market
11 and visited the dealer locations at issue, including the proposed site; (4) obtained construction estimates
12 for the proposed site; (5) reviewed Hooman Toyota’s lease agreements for the proposed site; and (5)
13 retained a independent third party accountant to perform a review of Hooman Toyota’s financial and
14 operating records. (RT Vol. X. 143:1-149:16; 167:19-168:18) (RT Vol. XIII. 226:21-229:6) (Hearne
15 Depo. 62:21-63:16; 77:1-14; 86:2-87:14) (Exs. 1109, 1164, 2056, 2059). Therefore, the claim that
16 TMS spent just a few hours reviewing the proposed relocation is meritless.

17 Although Cabe Toyota next claims that TMS’s evaluation was insufficient because “no service
18 data was reviewed by the executive management decision team,” (Brief at 20), this allegation also is
19 inaccurate and unsupported by the evidence in this case. In response to questions from Cabe Toyota’s
20 own counsel, the Los Angeles Region’s current General Manager, Doug Eroh, specifically testified
21 about the service data reviewed by TMS when evaluating the proposed relocation:

22 Q. And when you say you looked at service, can you describe
23 specifically what exactly you would have looked at in order to evaluate or
24 determine whether there would be any impact on Cabe Toyota in terms of
25 service business?

1 A. Yes. There were several different service reports and analysis
2 that we looked at.

3 One of those was the Service Winner Map where we evaluate -- I
4 think we talked about it previously today -- but it's a report that shows by
5 census tract within each PMA who the predominant dealer is as it relates
6 to each of those census tracts for service. Based on our analysis of that
7 Cabe was not the predominant dealer in any of the census tracts around
8 the proposed relocation site, so we felt since he was not the predominant
9 dealer it wouldn't have harm to him.

10 We also looked at the service retention figures, service market
11 share figures for all of the dealers, and we had determined from that
12 analysis that there were a significant number of Toyota vehicles within
13 Cabe's PMA that were not servicing their vehicle at any Toyota dealer.
14 And that that, that number of vehicles represented an opportunity for Cabe
15 to grow within its own marketplace. They had a significant upside
16 potential to grow their service business within their market.

17 (RT Vol. X. 143:1-149:16; 29:2-230:2). Steve Hearne, the former General Manager of the Los
18 Angeles Region, also testified about the service data reviewed by TMS when evaluating the proposed
19 relocation, and that he concluded that there was substantial opportunity for Cabe Toyota to increase its
20 service business even after the proposed relocation. (Hearne Depo. 62:21-63:16). As such, there is no
21 support for Cabe Toyota's claim that TMS did not evaluate any service data.

22 Cabe Toyota next claims that TMS's evaluation was insufficient because it had not yet obtained
23 a pro forma from Hooman Toyota, and because it allegedly had not verified Hooman Toyota's proposed
24 rent factor or financial data. Contrary to these claims, however, in cases involving the relocation of a
25 dealer, TMS only requires a dealer to submit a pro forma before commencing construction on its new
facility, not before the resolution of any protests to the proposed relocation. (RT Vol. X. 179:1-15;
253:7-10). Consistent with this practice, TMS's site approval specifically required Hooman Toyota to
provide a pro forma with updated expense and construction costs data before commencing construction
on its new facility. (RT Vol. X. 178:3-6; 179:1-15). In addition to requiring the submission of a pro
forma, TMS also specifically evaluated and verified the financial effects of the proposed relocation
prior to approving the move. TMS received and evaluated Hooman Toyota's lease agreements for the

1 proposed site, performed a comparison of the change in Hooman Toyota’s rent factor due to the
2 proposed relocation, and received an estimate of the proposed construction costs from an architectural
3 firm before approving the proposed relocation. (Ex. 1164, pp. TMS-Prod_012929) (Hearne Depo.
4 86:2-87:14). TMS further retained an independent third party accountant to review Hooman Toyota’s
5 financial and operating records, which verified that it had the financial wherewithal to support the
6 relocation. (RT Vol. XIII. 226:21-229:6) (Ex. 2059). Thus, there is no evidence that TMS did not
7 fully evaluate or verify Hooman Toyota’s proposed rent or expenses associated with the relocation.

8 Cabe Toyota also alleges that the proposed relocation should be denied because TMS previously
9 sent Hooman Toyota several letters “turning down” its proposal. These letters, however, did not turn
10 down Hooman Toyota’s proposed relocation on the merits as Cabe Toyota implies, but instead simply
11 raised various issues that needed to be evaluated and resolved prior to the relocation being approved.
12 Hooman Toyota was a new Toyota dealer in 2008, and it initially experienced some financial and
13 operational issues in the wake of the economic downturn. (RT Vol. XII. 209:22-210:12). Although
14 Hooman Toyota raised this proposed relocation during that time, TMS repeatedly informed Hooman
15 Toyota that it needed to resolve its financial issues **before** TMS would even consider evaluating the
16 merits of the proposal. (RT Vol. X. 87:15-92:23) (Ex. 1102). In those same letters, TMS also
17 informed Hooman Toyota that it would need to fully evaluate the proposed relocation because it was
18 closer to Cabe Toyota and protestable by multiple dealers. (*Id.*). These letters were not outcome
19 determinative, but instead simply outlined the issues—most significantly its financial concerns—that
20 would need to be studied and resolved before TMS could approve the proposed relocation. (*Id.*).

21 Once Hooman Toyota began to make significant progress towards curing its financial
22 deficiencies, TMS began evaluating the proposed relocation. (RT Vol. X. 93:14-94:12) (RT Vol. XII.
23 225:5-226:20) (Ex. 1118). As discussed above, this evaluation revealed that the proposed relocation
24 would be greatly beneficial for consumers and that there is significant sales and service opportunity in
25

1 the market available for these dealers. (RT Vol. X. 129:17-130:16; 143:1-149:16; 168:19-170:0)
2 (Hearne Depo. 62:21-63:16). TMS’s analysis also revealed that Cabe Toyota conducts little business
3 near the proposed site and, therefore, the proposed relocation would have no material effect on Cabe
4 Toyota. (RT Vol. X. 136:2-139:16). Consistent with its correspondence, TMS further retained an
5 independent third party accountant to evaluate Hooman Toyota’s financial status before TMS agreed to
6 approve the proposed relocation, and this evaluation confirmed that Hooman Toyota had cured all of its
7 deficiencies. (RT Vol. XIII. 226:21-229:6) (Ex. 2059).

8 Cabe Toyota further claims that TMS approved the proposed relocation only after receiving a
9 letter from Hooman Toyota’s counsel dated February 23, 2012, allegedly “threatening litigation” if
10 TMS did not approve the proposed relocation. Although Cabe Toyota claims this letter changed TMS’s
11 evaluation process and caused TMS to approve the relocation, TMS had already agreed to begin
12 evaluating Hooman Toyota’s proposed relocation months **before** it even received this letter from
13 Hooman Toyota’s counsel. On December 2, 2011, TMS sent Hooman Toyota a letter expressly stating
14 that Hooman Toyota had made strides towards rectifying these issues and, therefore, “TMS does not
15 wish to delay the evaluation of your proposed relocation” and “will evaluate this proposal in accordance
16 with its site evaluation policies and procedures.” (Ex. 1138). That same letter also informed Hooman
17 Toyota that it would engage an independent consultant to evaluate Hooman Toyota’s financial records.
18 (*Id.*). Importantly, this letter was sent to Hooman Toyota more than **three months before** TMS ever
19 received the letter from Hooman Toyota’s counsel.

20 Similarly, the letter from Hooman Toyota’s counsel did not accelerate or change TMS’s
21 evaluation of the proposed relocation. In its Opening Brief, Cabe Toyota points out that the letter from
22 Hooman Toyota’s counsel requested that TMS issue a statutory notice of relocation by February 28,
23 2012. (Brief at 19). Despite this deadline, however, TMS did not approve the proposed relocation
24 until July 2012, approximately **five months after** receiving this letter. (RT Vol. X. 170:6-9) (Exs.
25

1 1164; 1165). TMS also did not approve the proposed relocation until after it had completed its second
2 market analysis of the proposed relocation, personally toured the market, evaluated the dealer’s service
3 business, and evaluated Hooman Toyota’s proposed rent and construction expenses. (RT Vol. X.
4 143:1-149:16; 167:19-168:18) (RT Vol. XIII. 226:21-229:6) (Hearne Depo. 62:21-63:16; 77:1-14;
5 86:2-87:14) (Exs. 1109, 1164, 2056, 2059). There is simply no evidence that TMS approved Hooman
6 Toyota’s proposed relocation to avoid litigation with one dealer—especially while knowing that the
7 proposed relocation was subject to protest by multiple dealers.⁶ Instead, the evidence conclusively
8 demonstrates that TMS conducted a thorough and diligent evaluation of the proposed relocation and
9 Hooman Toyota’s financial condition before agreeing to approve the relocation.

10 **F. The Proposed Relocation Will Not Harm the Toyota Brand.**

11 Cabe Toyota’s Opening Brief next claims that the proposed relocation is not in the best interest
12 of the Toyota brand. In support of this claim, Cabe Toyota alleges that the proposed relocation will
13 harm Cabe Toyota while helping Hooman Toyota, which has previously experienced some financial
14 issues and has lower customer satisfaction scores. However, as set forth in detail above, there is no
15 credible evidence that the proposed relocation will have any material effect on Cabe Toyota, especially
16 given that Cabe Toyota conducts a negligible percentage of its business in the area surrounding the
17 proposed site. Moreover, Hooman Toyota does not have any significant operational or financial
18 deficiencies that would negatively affect the Toyota brand.

19 Although Cabe Toyota complains about Hooman Toyota’s previous financial issues, Hooman
20 Toyota was not the only Toyota dealer to experience some financial difficulty in the wake of the
21

22 _____
23 ⁶ Cabe Toyota also alleges that after receiving this letter, TMS and Hooman Toyota “struck a deal” under which TMS would
24 approve the relocation if Hooman Toyota agreed to contribute to the cost of defending any protest. (Brief at 19). This
25 allegation, however, also is inaccurate. Hooman Toyota offered to contribute to the cost of defending any protest in October
2011, more than **four months before** its attorney sent TMS the above letter and more than **nine months** before TMS
approved the relocation. (Ex. 1554). It is therefore clear that Hooman Toyota’s contribution to the defense of this protest
was not some settlement given in exchange for a rubber-stamped approval of the proposed relocation, as Cabe Toyota
claims.

1 economic downturn. Indeed, Cabe Toyota itself experienced some financial issues during that same
2 time period. (RT Vol. II. 161:21-165:8). More importantly, however, Hooman Toyota's previous
3 financial issues were resolved **in their entirety** before TMS approved the proposed relocation. (RT
4 Vol. XII. 228:10-19; XIII. 226:21-229:6) (Ex. 2059). Prior to approving the proposed relocation,
5 TMS retained an independent accountant to review Hooman Toyota's financial records, and it
6 confirmed that Hooman Toyota had cured all of its financial issues. (*Id.*). There is no indication that
7 Hooman Toyota has had any financial issues whatsoever since that time and, therefore, no evidence that
8 its past financial issues somehow will negatively affect its potential relocation in the future. (RT Vol.
9 XII. 230:3-6). Cabe Toyota even admits in its Opening Brief that the proposed relocation site will be
10 less expensive for Hooman Toyota, (Brief at 14), and thus the proposed relocation will reduce Hooman
11 Toyota's expenses and put it in a better position to serve consumers and represent the Toyota brand.

12 Although Cabe Toyota also alleges that Hooman Toyota has significantly lower customer
13 satisfaction rankings and more customer complaints, this allegation confuses the evidence in this case.
14 While Hooman Toyota's customer satisfaction scores were lower than normal in 2012, its customer
15 satisfaction scores have consistently placed it among the top half of dealers in the Los Angeles Region.
16 Specifically, Hooman Toyota's sales satisfaction currently is ranked 18 of 76 dealers in the Region for
17 2013, and it ranked 27 of 76 dealers in 2011, 35 of 76 dealers in 2010, and 7 of 76 dealers in 2009.
18 (Ex. 2008, pp. TMS-Prod_010513; 20055). Moreover, although Cabe Toyota alleges that Hooman
19 Toyota has more customer "complaints" than it does, Cabe Toyota is **not** citing to customer complaint
20 numbers. It is simply referencing **inquiries** made by customers who purchased or serviced a vehicle at
21 Hooman Toyota, which include a variety of communications such as congratulatory notes, thank you
22 notes, product concerns, requests for information, or other similar inquiries. (Kong Depo. 9:6-10:12).

23 Moreover, the specific concerns expressed by Hooman Toyota's customers actually demonstrate
24 why Hooman Toyota should in fact be permitted to relocate. During the hearing in this case, Hooman
25

1 Toyota introduced actual customer surveys that raised concerns with its facilities, including (1) the ease
2 and convenience of parking, (2) having to wait in the street for service, (3) the lack of adequate space,
3 (4) the confusing layout of the dealership, (5) the lack of comfortable waiting areas, (6) the lack of
4 customer amenities, and (7) the lack of an express service facility for oil changes and similar services.
5 (RT Vol. XIV. 39:11-55:13). Customers also have rated Hooman Toyota’s current facilities “yellow”
6 standard, which indicates they are substandard and need improvement. (Ex. 2005, pp. TMS-
7 Prod_017052). The proposed relocation will allow Hooman Toyota to completely alleviate these actual
8 customer concerns and, therefore, will allow it to provide a better dealership experience for consumers,
9 improve customer satisfaction, and more adequately represent the Toyota brand.

10 **II. Prior Relocation Decisions Issued by the Board Support the Proposed Relocation.**

11 Cabé Toyota next alleges that prior Board decisions are “highly persuasive” to the determination
12 of this case. Although each relocation case must be decided by applying the statutory good cause
13 factors to the unique facts and circumstances in that particular case, prior relocation decisions reveal a
14 strong propensity by the Board toward permitting existing dealers to relocate to superior facilities.
15 Throughout its entire history, the Board has only found good cause not to permit the proposed
16 relocation of a dealership in one unique situation. This history reflects a recognition by the Legislature
17 and the Board that relocation cases do not involve the establishment of an entirely new competitor that
18 would dramatically change the market, but instead simply allow an existing dealer to relocate to a
19 superior facility, which is good for customers, increases competition, and benefits the public.

20 Cabé Toyota cites two prior relocation decisions and claims those decisions compel the Board to
21 deny the proposed relocation in this case. However, as set forth in detail below, each of these decisions
22 actually supports the conclusion that there is no good cause not to permit Hooman Toyota’s relocation.
23
24
25

1 **A. *Long Beach Honda v. American Honda Motor Co.*, Protest No. PR-1835-02**

2 The first decision cited by Cabe Toyota is *Long Beach Honda v. American Honda Motor Co.*,
3 Protest No. PR-1835-02, which overruled a protest challenging the proposed relocation of Harbor City
4 Honda. In that case, Harbor City Honda proposed to relocate from an outdated and undersized facility
5 to a larger, modern, and state-of-the-art facility on the 405 Freeway in the City of Carson. *Id.* at ¶¶ 1,
6 29. Long Beach Honda filed a protest alleging that because the relocation would move Harbor City
7 Honda approximately 4.3 miles away from its dealership, the proposed relocation would place the
8 dealers in too close of proximity. *Id.* at ¶¶ 29, 33. The protesting dealer also alleged that this
9 relocation would negatively affect competition, cause it to lose a significant portion of its sales and
10 service business, and make Harbor City Honda less convenient for consumers.

11 The Board expressly rejected these claims and held that the protestant failed to establish good
12 cause not to permit Harbor City Honda’s relocation. In rejecting the dealer’s protest, the Board first
13 held that relatively short distances between dealers are “not unusual in a large metropolitan market such
14 as Los Angeles.” *Id.* at ¶ 74. At the time of the relocation, there were twenty-four pairs of Honda
15 dealers in the market located within six miles of each other. *Id.* The Board also held that while the
16 proposed relocation would increase competition between these dealers, “[t]he Legislature obviously
17 considers increased competition to be a good thing.” *Id.* at ¶ 33. In that case, the Board adopted the
18 analysis of Honda’s expert witness from Urban Science and found that while competition would
19 increase in the market, there was sufficient opportunity available for the protesting dealer to maintain or
20 even grow its business following the proposed relocation. *Id.* at ¶¶ 34-46. In addition to the amount of
21 opportunity available in the market, the Board also found it unlikely that the proposed relocation would
22 have any material effect on protestant because it conducted so little business in the area surrounding the
23 proposed relocation site. *Id.* at ¶¶ 57-59. The Board also concluded that even if the protestant’s loss
24

1 estimates were credible, the protestant’s own “expert witness admitted that the sales lost to the relocated
2 dealer will not cause protestant to become unprofitable.” *Id.* at ¶¶ 33, 57-59.

3 In addition to finding that the proposed relocation would not negatively affect competition or the
4 protesting dealer, the Board also held that the proposed relocation would be beneficial for the relocating
5 dealer and the consuming public. The proposed site offered the relocating dealer “many advantages not
6 present at its current location,” and it would provide the public a new dealership facility that complied
7 with all of the manufacturer’s size and facility requirements, was located in a superior location, had
8 freeway access and visibility, and would increase competition in the market. *Id.* at ¶ 55, 60. Despite
9 these benefits, the protesting dealer alleged that this new facility would harm the public because it
10 would place Harbor City Honda farther away from some customers. However, the Board noted that the
11 average Honda customer would have to travel less than one mile further to reach the dealership and
12 held that this was “not a significant distance in view of the benefit received.” *Id.* at ¶ 17.

13 The facts and circumstances in *Long Beach Honda* are virtually identical to those in the present
14 case. Although Cabe Toyota alleges that the proposed relocation would place Hooman Toyota “too
15 close” to its dealership, the Los Angeles market is one of the most densely populated and largest
16 automotive markets in the country. (RT Vol. III. 100:21-101:1; RT. Vol. XIII 39:18-40:2). Given this
17 population density, it is typical—and necessary—to have multiple dealers located in relatively close
18 proximity of one another. *Long Beach Honda* at ¶ 74. In the Los Angeles metropolitan market alone,
19 there are eight pairs of Toyota dealers located less than 4 miles apart and thirteen pairs of Toyota
20 dealers located less than 5 miles apart. (Ex. 2088, pp. A-6). This includes two dealers that are 2.1
21 miles apart—closer than the proposed site is to Cabe Toyota. (*Id.*). Accordingly, the distance between
22 Cabe Toyota and the proposed site is not remarkable or unusual as Cabe Toyota claims.

23 Although Cabe Toyota claims that *Long Beach Honda* is distinguishable because the relocation
24 in that case would not make the protesting dealer unprofitable, the proposed relocation in this case
25

1 similarly will not cause Cabe Toyota to go out of business or become insolvent. Just like the *Long*
2 *Beach Honda* case, Urban Science concluded that there is significant unrealized opportunity in the
3 market for Cabe Toyota to maintain or even increase its business following the proposed relocation.
4 (RT Vol. XIII. 72:15-20; 82:12-21; 130:10-137:17). This additional opportunity, when combined with
5 the fact that Cabe Toyota conducts so little business in the area surrounding the proposed site, makes it
6 highly unlikely that the relocation would have any material effect on Cabe Toyota. (*See infra*, Section
7 II). Although Cabe Toyota’s expert claims it would lose 9.2% of its business or 81 sales per year if the
8 proposed relocation is permitted, (RT Vol. III. 48:21-49:12), he also admitted that this loss would **not**
9 put Cabe Toyota out of business or place its investment at risk “other than they may not make as much
10 money as they otherwise would have.” (RT Vol. IV. 38:3-40:21).⁷ Indeed, TMS’s financial expert
11 testified that in 2012, Cabe Toyota sold 809 new vehicles more than necessary to break even—728 more
12 vehicles than Mr. Watkins concluded Cabe Toyota would lose per year due to the proposed relocation.
13 (RT Vol. XII. 75:1-8). There is thus no evidence that the proposed relocation will render Cabe Toyota
14 insolvent or have some ruinous effect on competition.

15 Cabe Toyota’s Opening Brief also claims that *Long Beach Honda* is distinguishable because
16 Hooman Toyota has proposed to move to a larger facility that will give it a competitive advantage.
17 Contrary to this allegation, the relocating dealer in *Long Beach Honda* was also proposing to move to a
18 new facility on the 405 Freeway that was significantly larger and would provide a better dealership
19 experience for consumers. *Id.* at ¶ 55, 60. Hooman Toyota is proposing the same thing in this case.
20 Moreover, although the average customer will have to travel an additional 0.5 miles or 30 seconds to
21 reach the new facility, all of the expert witnesses—including Cabe Toyota’s expert—agree that this
22 negligible change in drive time is substantially outweighed by the consumer benefits of the proposed
23

24 _____
25 ⁷ In its Post-Hearing Opening Brief, TMS outlines numerous fundamental and fatal flaws in Cabe Toyota’s expert analysis. In the interest of judicial economy, TMS will not restate those flaws here, but incorporates that discussion herein.

1 new dealership. (RT Vol. III. 209:16-210:9; RT Vol. XIII. 122:11-127:11; RT Vol. VI. 86:16-87:19);
2 *see also id.* at ¶ 17 (holding that one mile of additional drive distance was “not a significant distance in
3 view of the benefit received”). Cabe Toyota also is in the process of renovating and expanding its own
4 facilities, and thus the proposed relocation will not give Hooman Toyota a competitive advantage, but
5 will allow both dealers to operate out of improved, newly renovated facilities.

6 Accordingly, the Board’s prior reasoning and decision in the *Long Beach Honda* matter does not
7 support Cabe Toyota’s claims in this case, but actually buttresses the conclusion that Hooman Toyota’s
8 proposed relocation will positively affect competition, will benefit consumers, and should be permitted.

9 **B. *Timmons Volkswagen v. Volkswagen Group of America*, Protest No. PR-2146-09**

10 The second decision cited by Cabe Toyota is *Timmons Volkswagen v. Volkswagen Group of*
11 *America*, Protest No. PR-2146-09, which is the only case in the history of the Board to find good cause
12 not to permit the proposed relocation of an existing dealership. In that case, McKenna Volkswagen
13 proposed to relocate from a small auto mall to a new location in the Cerritos auto mall, which was
14 approximately 3 miles closer to the protesting dealer. *Id.* at ¶ 44, 83. Although Cabe Toyota claims
15 that the facts in *Timmons Volkswagen* are on point with those in the present case, that decision was
16 based on a unique set of facts and circumstances that are highly distinguishable from the present case.

17 Significantly, the *Timmons Volkswagen* case involved the proposed relocation of a dealership
18 during what the Board described as “one of the toughest economic times in the history of the
19 automotive industry.” *Id.* at ¶ 113. During the time period in which McKenna Volkswagen was
20 proposing to relocate, Volkswagen’s nationwide sales “plummeted by 17.5 percent.” *Id.* This
21 dramatic decline hit the protesting dealer particularly hard, and its sales fell by nearly 19 percent. *Id.*
22 at ¶ 104. This economic downturn had such a dramatic effect on the Volkswagen brand that it not only
23 forced Volkswagen to change its sales projections, but also to change its entire methodology for
24 projecting sales. *Id.* at ¶ 113. Given the severity of these economic times, the Board held that
25

1 assessing present and future performance was extremely difficult and unpredictable, and that it was not
2 advisable to permit a dealer to relocate “in such poor economic times.” *Id.* at ¶¶ 95, 113.

3 These unique economic conditions do not exist in the present case. Unlike the protesting dealer
4 in *Timmons Volkswagen*, whose sales declined dramatically during the year of the proposed relocation,
5 Cabe Toyota admits that the last year has been a **record** year for vehicle sales at the dealership. (RT
6 Vol. IV. 179:11-13). During 2012 alone, Cabe Toyota made \$61.5 million in total sales, an increase of
7 nearly \$17 million over the previous year. Cabe Toyota also made \$5.5 million in gross profit during
8 2012, and it has over \$1 million in net working capital, \$1.9 million in net worth, and \$1.2 million in
9 cash on hand. (RT Vol. II. 165:23-11; 171:1-21). Moreover, current industry sales are projected to be
10 15.5 million units in 2013, over 5.1 million units more than in 2009 when McKenna Volkswagen
11 sought to relocate. (RT Vol. XIII. 5-17). This stark contrast in economic conditions alone renders the
12 *Timmons Volkswagen* decision entirely distinguishable from the present case.

13 Despite this significant distinction, Cabe Toyota nevertheless alleges that these two cases are
14 analogous because they both purportedly involve the relocation of a dealer away from its customer base
15 and into a competitive struggle with the protesting dealer for the same customers. However, the
16 circumstances surrounding the proposed relocation in *Timmons Volkswagen* are entirely inapposite to
17 the facts of this case. In that case, McKenna Volkswagen was proposing to relocate out of a “small
18 auto mall” that housed four family-owned competitive dealerships to a new location on the border of its
19 primary market area. *Timmons* at ¶¶ 53, 71. This proposed relocation would have “substantially
20 reduced” the protesting dealer’s primary market area and made McKenna Volkswagen the closest dealer
21 to many of the protesting dealer’s existing customers. *Id.* at ¶ 53-54. In contrast, Hooman Toyota is
22 not proposing to relocate away from a cluster of competitive dealerships, and it is not proposing to
23 relocate to the far edge of its primary market area. In fact, the proposed relocation would **not** result in
24 **any** change to Cabe Toyota’s current PMA, (RT Vol. IV. 128:16-23; RT Vol. X. 113:1-6), and Cabe
25

1 Toyota will remain the closest Toyota dealer to the customers in its primary market area. (RT Vol. IX.
2 128:3-129:7; RT Vol. XIII. 155:2-14). Moreover, as discussed above, Cabe Toyota does not conduct a
3 significant amount of business in the area near the proposed site, (*see* *Infra*, Section II), and thus there
4 is no evidence that the relocation will place the dealers in competition for the same customers.

5 Cabe Toyota also alleges that *Timmons Volkswagen* is instructive because the manufacturer in
6 that case did not conduct a formal market study of the proposed relocation. Contrary to this allegation,
7 however, the Board in *Timmons Volkswagen* did not criticize the manufacturer for not performing a
8 formal market study, but instead found that the manufacturer had failed to conduct **any analysis** of the
9 proposed relocation whatsoever—including any analysis to assess its feasibility and impact on other
10 dealers—until after the protest was filed. *Timmons* at ¶ 42. In this case, TMS evaluated Hooman
11 Toyota’s proposed relocation for more than **thirteen months** before approving the move. (RT Vol. X.
12 82:7-83:11; 170:6-9) (Exs. 1100, 1164; 1165). During that thirteen-month evaluation period, TMS
13 completed two separate market analyses of the proposed relocation, analyzed the service performance of
14 the subject dealers, personally drove the market and visited the dealer locations at issue, and took many
15 other steps to evaluate the proposed relocation. (*See* *Infra*, Section V). The central purpose of this
16 extensive evaluation process was to carefully analyze the proposed relocation’s effect on consumers and
17 other Toyota dealers. (RT Vol. X. 174:9-175:15). Accordingly, the facts and circumstances in
18 *Timmons Volkswagen* are highly distinguishable from the present case and lend no support to Cabe
19 Toyota’s claims.

20 CONCLUSION

21 For the reasons set forth above, Cabe Toyota has failed to demonstrate good cause not to permit
22 Hooman Toyota’s proposed relocation. Accordingly, TMS respectfully requests that the Board enter an
23 Order denying its Protest and permitting Hooman Toyota’s proposed relocation.
24
25

1 DATED: September 19, 2013

NELSON MULLINS RILEY &
SCARBOROUGH, LLP

2
3
4 By: /s/ S. Keith Hutto
S. Keith Hutto

5 Attorney for Respondent Toyota Motor
6 Sales, USA, Inc.
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25