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7  
8 **STATE OF CALIFORNIA**  
9 **NEW MOTOR VEHICLE BOARD**

10 In the Matter of the Protest of:

Protest No. PR-2339-12

11 ALDON, INC. dba CARSON TOYOTA,

12 Protestant,

**INTERVENOR'S REPLY TO  
PROTESTANT CABE TOYOTA'S  
POST HEARING OPENING BRIEF**

13 v.

14  
15 TOYOTA MOTOR SALES U.S.A., INC.,

16 Respondent.

17  
18 In the Matter of the Protest of:

Protest No. PR-2341-12

19 CABE BROTHERS, dba  
CABE TOYOTA, AND CABE SCION

20 Protestant,

21 v.

22  
23 TOYOTA MOTOR SALES U.S.A., INC.,

24 Respondent.

25 H.T.L. AUTOMOTIVE, INC., dba  
HOOMAN TOYOTA OF LONG BEACH

26  
27 Intervening Party.

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1 **I. INTRODUCTION**

2           Cabe Brothers', dba Cabe Toyota and Cabe Scion ("Cabe"), Post-Hearing Opening Brief  
3 illustrates Cabe's utter failure to demonstrate the existence of good cause to prevent the proposed  
4 relocation. As set forth in Respondent's, Toyota Motor Sales, U.S.A., Inc. ("TMS"), and Intervenor's,  
5 H.T.L. Automotive, Inc., dba Hooman Toyota of Long Beach ("Hooman Toyota"), briefs, there is no  
6 evidence in the record supporting even an inference that the proposed relocation will result in *any*  
7 adverse consequence that might provide good cause for the Board to issue an order prohibiting  
8 Hooman Toyota's proposed relocation.

9           Instead, what Cabe's brief plainly demonstrates is the overwhelming evidence that the  
10 proposed relocation will have *no* adverse impact to the public welfare, *no* adverse impact to the  
11 interests of the Toyota brand, and *no* appreciable adverse impact, *if any*, to either Cabe or Carson  
12 Toyota. Upon a careful review and consideration of the evidence in the record, it is clear that the  
13 proposed relocation will result in substantial benefits to the Toyota brand, substantial benefits to the  
14 public welfare, and it is equally apparent that each of the existing Toyota dealers located in the relevant  
15 market area ("RMA") will continue to be successful and profitable after the relocation of Hooman  
16 Toyota, *just over one mile* from its current location.

17           Any determination that good cause exists to prevent the proposed relocation of Hooman Toyota  
18 would be contrary to the evidence contained in the extensive record compiled over the course of three  
19 weeks of hearing. One dealer's desire to limit competition can never be good cause to prevent the  
20 relocation of another dealer where the evidence conclusively demonstrates the resulting benefits the  
21 relocation would provide TMS, the relocating dealer, the public welfare generally, as well as  
22 substantial benefits to existing and prospective Toyota customers specifically.

23 **II. ARGUMENT**

24 **A. Cabe's Brief is largely un-cited to the record and any arguments premised upon allegations**  
25 **of fact and evidence not cited to the record should be ignored.**

26           Cabe's Post-Hearing Opening Brief ("Brief") as originally filed was virtually devoid of  
27 citations to the evidence in the record, referenced evidence outside of the record and cited to prior  
28 Board decisions that the Board is prohibited from relying upon as precedent in its ultimate decision of

1 whether or not there exists good cause to prohibit the proposed relocation. Only after Respondent and  
2 Intervenor filed a Joint Motion to Strike Cabe's brief, did Cabe provide some, but by no means all,  
3 citations to the evidence in the record that purportedly supported its factual assertions. In the many  
4 instances where Cabe failed to cite to the evidence in the record, it should be presumed that no such  
5 evidence exists.

6 Even more troubling than Cabe Toyota's failure to cite to the evidence in the record is the fact  
7 that a number of Cabe's citations to the record are contradictory to the actual evidence cited. For  
8 example, Cabe's repeated claims that the proposed relocation will result in "much greater freeway  
9 visibility" are not supported by the evidence cited. (Cabe's Brief 2:22; 9:9-10.) Cabe cites to the  
10 testimony of its expert, Scott Watkins, in support of this claim, but his actual testimony states that  
11 Hooman Toyota is moving to "a location that *might* give you more visibility" from the 405. (RT Vol.  
12 3, 61:13-15.) (emphasis added.) Moreover, during cross examination Mr. Watkins admitted he did not  
13 know whether the site was visible from the 405. (RT Vol. 3, 96:9-19.) In reality, as ALJ Ryerson  
14 personally observed, and as the evidence in the record reflects, the proposed location is *not* visible  
15 from the 405. (RT Vol. 14, 78:5-79:2.) The only aspect of the proposed location that is visible from  
16 the 405 is the electronic reader board that is *already* in existence and *already* visible from the 405. (RT  
17 Vol. 14, 77:12-78:4; 163:4-164:6; Ex. 286, Proposed Location 00347)

18 Cabe also inexplicably claims the proposed relocation of Hooman Toyota would place it within  
19 Cabe's PMA. (Cabe's Brief 21:22-23.) This statement is demonstrably false. The fact that Hooman  
20 Toyota is relocating within its own PMA was never even a contested issue during the 15 days of  
21 hearing. Cabe relies upon the testimony of Dan Duddridge in support of this false assertion. However,  
22 upon review of the portion of the record Cabe belatedly cites in support, it is revealed that, remarkably,  
23 Mr. Duddridge's actual testimony states that the ELMS system is unable to show Cabe's *actual* PMA  
24 and instead uses an algorithm to "prorate" the surrounding zip codes, and although the geography  
25 depicted on the system is similar, "**it is not our primary market area.**" (RT Vol. 4, 176:13-  
26 20.) (emphasis added.) Further evidence that Cabe's assertion is demonstrably false is evidenced by  
27 Mr. Duddridge's testimony on cross examination where he admits that the ELMS system does not  
28 assign a PMA to dealers and that Mr. Duddridge's use of the term "leads PMA" is a term he invented.

1 (RT Vol. XI, 106:15-107:9.) This is yet another example of Cabe's brazen attempts to misstate the  
2 record to the ALJ and the Board.

3 In addition, despite ALJ Ryerson's May 31, 2013, ruling that evidence concerning potential  
4 alternative locations to the one proposed would not be permitted, and as a result, no such evidence was  
5 introduced, Cabe makes several references to alleged facts outside of the record. For example, Cabe  
6 alleges Hooman will receive financial benefit from occupying the unused Coast Cadillac facility  
7 "rather than construct an improved facility elsewhere." (Cabe's Brief 14:5-8.) However, as stated  
8 above, there is no evidence in the record concerning alternative locations or the costs associated with  
9 any such relocation other than the one proposed.

10 An even more egregious example is seen beginning at page 16 of Cabe's Brief, where Cabe  
11 directly argues the specific evidence excluded by the ALJ's ruling. Here, Cabe argues that Hooman  
12 Nissani had an opportunity to purchase two of the parcels where Hooman Toyota currently operates  
13 and that Mr. Nissani passed on these opportunities. First, these allegations are not based upon a single  
14 piece of evidence in the record. Second, had any such evidence been presented at the hearing  
15 Intervenor and Respondent would have had the opportunity to present evidence to rebut these  
16 allegations, which they surely would have and could have done.

17 Ultimately, any opportunities to purchase certain parcels of Hooman Toyota's current location  
18 or any alternative location to the one proposed, to the extent they existed at all, were commercially  
19 unreasonable, unworkable and did not make good business sense. Moreover, Intervenor's business  
20 judgment is not relevant to the issue of whether good cause exists to prevent its relocation to the  
21 *proposed* location. Any decision of the Board cannot be based upon whether there were available  
22 locations other than the one proposed here. To do so would shift the burden away from protesting  
23 dealers required to prove good cause to *prevent* a proposed relocation, and instead, place the burden on  
24 Respondent and the relocating dealer to demonstrate good cause to relocate – the exact opposite of  
25 what the statutory scheme requires. For these reasons, it was appropriate for ALJ Ryerson to exclude  
26 evidence regarding alternate locations that Hooman Toyota may have considered other than the former  
27 Coast Cadillac location and to strike those references appearing in Cabe's brief.

28

1 **B. Intervenor concedes that Cabe has a permanent investment in its Toyota franchise, however,**  
2 **Cabe is unable to cite any credible evidence that this investment is threatened by the proposed**  
3 **relocation.**

4 It is Cabe's burden to prove *good cause exists to prevent* the proposed relocation of Hooman  
5 Toyota to the former Coast Cadillac facility. Cabe claims the relocation threatens its continued  
6 viability. However, there is no credible evidence in the record that supports this claim. Cabe's only  
7 evidence of any likely adverse impact is found in the analysis and testimony offered by its expert  
8 witness, Mr. Scott Watkins. However, there simply is no basis to conclude Mr. Watkins' analysis  
9 should be entitled to *any weight* by the Board.

10 In addition, Cabe's arguments that the size and shape of its PMA somehow impede its ability to  
11 capture available sales, service and parts opportunities are without merit and should be ignored. The  
12 record is clear: the configuration of a dealer's PMA has no impact upon that dealer's ability to capture  
13 available sales, service and parts opportunities.

14 **1. Cabe's concerns about the alleged challenges it faces in its PMA are not supported by**  
15 **the evidence in the record.**

16 Cabe's arguments that the size of its PMA somehow affects its ability to capture the huge  
17 amount of sales and service opportunities currently available are misplaced and unsupported by the  
18 evidence in the record. The shape and size of Cabe's PMA in no way limits Cabe's ability to capture  
19 Toyota sales, service business and parts business within its PMA and beyond.

20 Because the bulk of the evidence refuting Cabe's assertion was addressed at the hearing  
21 through Respondent's witnesses, Intervenor will be brief in its reply to this portion of Cabe's  
22 argument. However, it is important to note that Cabe Toyota conducts a substantial amount of  
23 wholesale parts sales, disproportionate to its new vehicle sales and service business. (RT Vol. 2, 94:5-  
24 95:10.) Not only does the size and shape of Cabe's PMA have no bearing upon this aspect of Cabe's  
25 business, it is extremely unlikely that the proposed relocation will have any impact upon Cabe's  
26 extensive parts business. Cabe and Hooman Toyota have existed within three miles of one another for  
27 approximately 30 years. It is highly improbable that Hooman Toyota's relocation of 1.14 miles will  
28 have any impact on Cabe's long-established wholesale parts business.

1           **i. Even though Cabe misstates the size of its PMA, the size of a PMA places no limitation**  
2           **on a dealer's ability to capture available sales and service opportunities within its PMA**  
3           **and beyond.**

4           Cabe makes the broad claim that its PMA is the smallest in the Region, yet provides no support  
5 for this claim. (Cabe's Brief 4:26-27.) Cabe does not explain on what basis it makes this claim:  
6 whether it is based upon geography, population, overall sales, or any other metric. The citation for this  
7 claim is Exhibit 1237, which is nothing more than a map of the PMAs in the RMA. This is yet another  
8 false and unsupported claim by Cabe.

9           Even if it were true that Cabe's PMA was the smallest in the Region by some measure, as  
10 discussed above, the size of Cabe's PMA provides no limitation on Cabe's ability to capture the sales  
11 and service opportunities currently available to it. Intervenor will again rely upon Respondent to set  
12 forth the evidence in the record that plainly reflects the fact that Cabe has a tremendous amount of  
13 sales and service opportunities available to it in its own back yard that have gone unrealized. (Torres  
14 Depo. 76:7-17; 78:15-18; Ex. 2053.)

15           Cabe's emphasis on internet sales is the root cause of its inability to capture available  
16 opportunities located within its own PMA and beyond. By focusing its marketing efforts on the use of  
17 the internet and various vehicle lead generators like TrueCar, etc., Cabe is capturing sales well beyond  
18 its own PMA. (RT Vol. 6, 146:21-147:11; RT Vol. 7, 95:2-15) These customers are extremely  
19 unlikely to return to Cabe for service. On the other hand, Cabe's ability to use the internet to extend its  
20 sales reach demonstrates Cabe's ability to capture sales customers well beyond the boundaries of its  
21 PMA.

22           **ii. The number of UIOs in Cabe's PMA does not change the fact that Cabe is capturing a**  
23           **small percentage of the available UIOs in its PMA.**

24           Once again, the size of Cabe's PMA has little impact on Cabe's ability to capture available  
25 service business. The evidence presented at the hearing shows that Cabe is capturing a relatively low  
26 percentage of available UIOs compared to other Toyota dealers. Moreover, Cabe is not limited to  
27 capturing service business in its PMA. There is a significant amount of available service business  
28

1 within and just outside the boundaries of Cabe's PMA. (Torres Depo. 76:7-17; 78:15-18; 103:16-  
2 104:1; Ex. 2053.)

3 The record reflects that for year-end December 2011 there were 6,306 units in operation  
4 ("UIO") in Cabe's PMA. However, Cabe serviced only 21.69% of the service customers in its PMA,  
5 far below the region average of 29.28% of service customers captured in Toyota dealers' PMAs. It is  
6 an undisputed fact that 78% of the UIOs in Cabe's PMA are not being serviced by Cabe. It is foolish  
7 to argue that this significant volume of unrealized service business potential does not present Cabe  
8 opportunity for improved performance. Even Mr. Duddridge admits there is room for Cabe to increase  
9 its capture rate of service business within its PMA. (RT Vol. 5, 209:1-214:3; Ex. 2053.) Cabe's  
10 Service Manager, Julio Torres, acknowledged the same during his deposition: despite having the  
11 capacity to handle more service business, Cabe is missing out on a significant amount of available  
12 service business within its own PMA. (Torres Depo. 76:7-17; 78:15-18.)

13 **iii. Cabe's allegation that it will be unable to sell its franchise upon the relocation is**  
14 **unsupported by the record and must be ignored.**

15 There is no credible evidence in the record that the proposed relocation will threaten Cabe's  
16 continued viability. Moreover, there is no evidence whatsoever concerning Cabe's alleged inability to  
17 sell its Toyota franchise, upon Hooman Toyota's relocation.

18 As will be discussed in greater detail below, Cabe's expert, Mr. Scott Watkins, provided an  
19 impact analysis that was shown to be so inherently unreliable and result driven that it cannot be used to  
20 support any findings of material adverse impact to Cabe that might result from the proposed relocation.

21 **2. Cabe's investment in completing its long overdue Image II facility project is not**  
22 **impacted by the fact that Hooman Toyota is an existing Toyota dealer relocating a mere**  
23 **1.14 miles from its current location.**

24 The evidence introduced at hearing demonstrates that even with the increased costs of  
25 completing the Image II project, the likely impact to Cabe would be so slight that Cabe's continued  
26 viability will not be threatened. While it is undisputed that Cabe is making a substantial investment in  
27 its current facility, the evidence shows that the likely impact to Cabe that might result from the  
28

1 proposed relocation of Hooman Toyota will be between 0 to 3%. (RT Vol. 6, 134:1-4; 13-24; 139:10-  
2 22; Ex. 254, Tab 17, p. 1.)

3 **3. The analysis of Cabe's expert, Scott Watkins, was shown to be inherently flawed and**  
4 **unreliable and cannot be considered credible evidence of likely impact to Cabe.**

5 Mr. Watkins' analysis started from a flawed premise and ended with a deliberate attempt to  
6 manipulate the data to produce his desired result. Mr. Watkins' analysis which, for lack of a better  
7 term has been referred to as his "Wedge Analysis," was premised upon the false hypothesis that an  
8 examination of Cabe's performance to the West of its dealership currently can act as a reliable  
9 prediction of what will occur to Cabe's performance to Cabe's East upon the relocation of Hooman  
10 Toyota. Not only does this analysis begin from a statistically unreliable premise, Mr. Watkins' own  
11 testimony confirms that his analysis is based upon incorrect data that renders his ultimate conclusions  
12 regarding alleged impact to be wrong. (RT Vol. 4, 45:21-24; 51:4-52:25; 54:8-55:13.)

13 Mr. Watkins testified over the course of two days that his "Wedge Analysis" was based on the  
14 use of 60 degree angles. Upon cross examination it was unequivocally demonstrated that Mr.  
15 Watkins' wedges were not 60 degrees. Mr. Watkins conceded that his entire analysis would be  
16 changed if the angles were changed. He further conceded the angles represented in his report were not  
17 60 degrees and he represented that his entire impact analysis would change as a result. (RT Vol. 4,  
18 45:21-24.)

19 Leaving aside the demonstrable unreliability of Mr. Watkins' analysis, Mr. Watkins suggested  
20 that Cabe would experience a lost sales percentage of nearly 65% in the Eastern Wedge upon the  
21 relocation of Hooman Toyota to the proposed location. Much of this area falls in Census tracts where  
22 the proximity impact upon Cabe is, at most, 1%. Therefore, at the very least, Mr. Watkins is predicting  
23 impact on sales 65 times greater than the actual proximity change that would occur in the market. (RT  
24 Vol. 6, 125:15-126:4; Ex. 254, Tab 15, p. 3.) Even Mr. Watkins' misleading analysis cannot support  
25 this assertion.

26 A more reasonable analysis of the actual data is revealed in the scatter-plot map contained in  
27 Exhibit 254, Tab 23, of Mr. Stockton's analysis, which indicates no apparent pattern in customers  
28 choosing between Cabe and Hooman within 5 miles of Cabe. Notably, a five-mile ring covers much of

1 the Cabe PMA. This indicates that customers cross-shopping the two Long Beach dealerships, at least  
2 within this five-mile circle, draw little distinction between the relative proximities of Cabe and  
3 Hooman. This suggests that the supposed lack of territorial advantage for Cabe if the dealerships were  
4 2.2 miles apart is no different than that which exists at the current distance of 3.1 miles. (RT Vol. 6,  
5 173:3-175:14; Ex. 254, Tab 23, p.1.)

6 Mr. Watkins' "Wedge Analysis", used to predict alleged impact to Cabe that might result from  
7 the proposed relocation, focused upon new vehicle sales. (Ex. 1227, D-11.) However, Mr. Watkins  
8 used this estimate for losses across all of Cabe's departments. This simply makes no sense and is not  
9 reflective of the real world existing circumstances demonstrated by the evidence in the record.

10 In addition to the many defects apparent in Mr. Watkins' analysis, it is not even clear what he  
11 was measuring. First, he never disclosed or even seemed to consider exactly what impact he was  
12 considering. It was not clear if he was evaluating the effect of having Carson on the 405 Freeway  
13 versus having no Carson at all in the market, having Carson a mile off of the 405 Freeway or  
14 something else. Second, he was attempting to evaluate a dynamic problem (something about the  
15 presence of Carson) using only a single data point—the percentage of sales that Cabe made in the west  
16 wedge. By using a single data point, Mr. Watkins' analysis did not have the necessary "degrees of  
17 freedom" to pose a question to the data. As a result, his "Wedge Analysis" was, at best, a guess. (RT  
18 Vol. 6 187:2-189:22.)

19 First, although Mr. Watkins claims this to be mere "coincidence", it is plain to see that what  
20 Mr. Watkins did was subtract Cabe's sales penetration in the west wedge from its sales penetration in  
21 the east wedge, completely ignoring other factors that might account for the differences. For example,  
22 Mr. Watkins failed to account for the fact that to Cabe's West there are not one, but *two* Toyota dealers  
23 located on the 405. (RT Vol. 4, 47:4-14.) Mr. Watkins seemed to focus on Carson's presence on the  
24 405 to Cabe's West as being directly analogous to what might happen if Hooman were located on the  
25 405 to Cabe's East. However, Mr. Watkins failed to consider any other factors that might explain  
26 Carson's strong performance, including its level of advertising, customer service, available parking, or  
27 sales staff training. (RT Vol. 4, 42:11-43:9.) Even though Mr. Watkins did not bother to include these  
28

1 factors in his analysis, he admitted these factors could explain why Carson captures the high  
2 percentage of Toyota sales to Cabe's East that it currently does. (RT Vol. 4, 43:4-9.)

3 Second, by attributing all of the difference in the east and west wedges' sales penetration to  
4 something (undisclosed) about Carson's presence, Mr. Watkins ignored the obvious presence of DCH  
5 Toyota in the virtual center of the west wedge and the presence of South Bay Toyota, on the 405.  
6 DCH's concentrated sales pattern demonstrates one of the many fallacies of Mr. Watkins "Wedge  
7 Analysis" that would remain even if he had used the data he claimed to have used. (RT Vol. 6, 190:2-  
8 192:20; Ex. 255, Tab S1, pp. 1-2.)

9 Of all the flaws inherent in Mr. Watkins' analysis, perhaps most serious is his erroneously  
10 presented defective parameters for his analysis. The record is clear that Mr. Watkins' analysis was  
11 based upon the analysis of sales data separated out in 60-degree angles. However, as ALJ Ryerson,  
12 Mr. Watkins and counsel all agreed when measuring the Eastern and Western wedges with their  
13 protractors, the angles were not as Mr. Watkins claimed. The implications of this error, intentional or  
14 not, is that the analysis as presented excluded South Bay Toyota from the Western wedge, which is  
15 located on the 405, and made it appear as though Hooman Toyota is moving *into* the Eastern wedge,  
16 despite the fact that, had the wedges been constructed as Mr. Watkins testified they were, it would  
17 have shown that Hooman Toyota is *already* located in the Eastern Wedge.

18 Mr. Watkins testified under oath that the wedges were 60 degrees and even produced back-up  
19 data showing 60 degree angles. It follows that Mr. Watkins or his staff, therefore, produced alternate  
20 versions of the analysis, despite asserting that he did not do so, or produced something other than his  
21 actual back-up materials in an exercise of sloppiness or deception. (RT Vol. 4, 52:18-52:25.) Either  
22 way, Mr. Watkins' analysis cannot be relied upon in any meaningful way to support any finding of  
23 impact to Cabe Toyota.

24 **i. Cabe's claim that Mr. Watkins' impact analysis is conservative is simply false.**

25 Cabe claims that Mr. Watkins conservatively found that Cabe will experience a loss of 9.2% of  
26 its business upon the relocation of Hooman Toyota. (Cabe Brief 8:14-16.) It is absurd to suggest that  
27 Mr. Watkins' analysis is conservative. As discussed in detail above, it appears Mr. Watkins  
28 manipulated the data in his analysis to exclude South Bay Toyota, located on the 405, from his

1 Western Wedge, while also excluding Hooman Toyota from the Eastern Wedge. It is plainly evident  
2 that there was nothing “conservative” about the impact analysis conducted by Mr. Watkins. Moreover,  
3 looking to the Southeastern Wedge of Mr. Watkins’ analysis, it is shown that Cabe made 9.9% of its  
4 sales in this area, an area Hooman is proposing to move *farther* away from. (Ex. 1227, D-11.)  
5 However, Mr. Watkins made no inquiry to what extent Cabe’s sales might increase in this area after  
6 Hooman Toyota relocates further away from this area. Furthermore, while Mr. Watkins could have  
7 provided a low and high end range of impact, he did not. Instead, he offered only one expected  
8 percentage of impact and then proceeded to apply it equally across all of Cabe’s departments, despite  
9 the fact that his initial analysis *only* considered a limited set of registration data. (RT Vol. 4, 11:3-  
10 12:17; 14:1-7.)

11 In addition, Mr. Watkins actually admits that there may be no impact from the proposed  
12 relocation. (RT Vol. 4, 8:18-9:6.) Given that Mr. Watkins admits there may be no impact, the  
13 characterization of his analysis predicting a 9.2% impact to Cabe as “conservative” is simply not true.

14 **C. Cabe Toyota’s attempts to demonstrate good cause by analogizing the current proposed**  
15 **relocation to prior Board decisions must be ignored.**

16 As ALJ Ryerson has ordered, the two prior decisions Cabe cites as “compelling authority”  
17 cannot be cited as precedent in ruling upon the issue of whether good cause exists to prevent the  
18 proposed relocation of Hooman Toyota. Nevertheless, Cabe spends no less than six pages discussing  
19 two prior Board decisions, and even goes as far as to refer to these decisions as “compelling authority”  
20 for why the Board should find good cause exists to prevent the proposed relocation at issue here under  
21 completely different circumstances.

22 These prior decisions Cabe seems to rely so heavily on involved different line-makes, different  
23 time periods, different economic circumstances, as well as a vast array of existing facts and  
24 circumstances very different from those involved in the current Protest. Moreover, Cabe doesn’t cite  
25 to these prior decisions as standing for a rule of law or legal principle. Instead, Cabe argues that based  
26 upon the Board’s prior rulings, it must sustain Cabe’s Protest now. This is precisely the situation Gov.  
27 Code §11425.60 is intended to prevent.

28 The good cause factors set forth in Vehicle Code §3063 require a factual inquiry of facts and

1 existing circumstances that are unique in each Protest. Cabe's attempt to analogize facts and  
2 circumstances from prior decisions to those presently before the Board is an exercise in futility and of  
3 little usefulness to the Board. Ultimately the Board must base its decision upon the good cause factors  
4 and the existing facts and circumstances unique to the proposed relocation of Hooman Toyota.  
5 Moreover, the Board is prohibited by §11425.60 from relying upon prior Board decisions not  
6 designated as precedent.

7 California law is clear in regard to the Board's obligations in making a determination of good  
8 cause. California courts agree that "It would appear that by the adoption of the above set forth  
9 statutory scheme the legislature intended that the Board balance the dealers' interest in maintaining  
10 viable businesses, the manufacturers' interests in promoting sales, and the public's interest in adequate  
11 competition and convenient service." *Piano v. State of California*, 103 Cal. App. 3d 412, 417 (1980).  
12 Thus, California law requires the Board in its analysis of the good cause factors of §3063 to balance  
13 the interest of the existing dealers, the manufacturer and the public interest. The legal standard from  
14 *Piano* would be undone if the Board were to simply rely upon prior decisions that involved only *some*  
15 degree of factual similarities, as Cabe urges the Board to do in its brief.

16 Whatever persuasive value Cabe hopes to glean from *Long Beach Honda v. American Honda*  
17 *Motor Company*, PR-1835-02, simply does not exist. Not only did the Board determine that good  
18 cause did *not* exist to prevent the proposed relocation in that instance, the *Long beach Honda* protest  
19 involved a different manufacturer, different locations, different facilities, and a number of other factual  
20 circumstances far different to those presently before the Board. Moreover, the *Long Beach Honda*  
21 decision is more than ten years old.

22 Similarly, the persuasive value of the Board's decision in *Walter Timmons Enterprises, Inc. v.*  
23 *Volkswagen Group of America, Inc.*, PR-2146-09 is also nonexistent. The Timmons protest also  
24 involved a different manufacturer, different locations, different facilities, and a number of other factual  
25 circumstances far different to those presently before the Board. But more importantly, it involved a  
26 proposed relocation with demonstrable adverse impacts to an existing dealer during the worst  
27 economic downturn since the Great Depression.

28

1 **D. Hooman’s previous financial difficulties have all been resolved through the due diligence**  
2 **process conducted by TMS.**

3       Cabe’s attempts to highlight Hooman Toyota’s already resolved financial concerns have no  
4 bearing on the determination of whether good cause exists to prevent the proposed relocation of  
5 Hooman Toyota, at this time, and under the current existing circumstances. The record reflects TMS’  
6 exhaustive efforts confirming that Hooman Toyota’s financial ship *is* in order and that the proposed  
7 relocation is economically feasible. (RT Vol. 10, 73:23-74:2.)

8               **1. The proposed relocation of Hooman Toyota will result in a reduction of Hooman**  
9 **Toyota’s fixed expenses.**

10       As discussed above, TMS conducted an extensive examination of Hooman Toyota’s financial  
11 condition and determined that it was in sound condition and that it could indeed support the proposed  
12 relocation. The evidence in the record conclusively demonstrates that Hooman Toyota has moved well  
13 beyond its previous financial issues. Any lingering concern that Hooman Toyota may not be in a  
14 financial position to support the proposed relocation is dashed by the fact that the relocation will result  
15 in a significant rent reduction to Hooman Toyota, which will only enhance its strong financial position.  
16 (RT Vol. 6, 207:21-208:5; RT Vol. 7, 176:17-177:12.)

17 **E. TMS’ prior rejections of Hooman Toyota’s relocation requests are not relevant to whether**  
18 **good cause exists to prevent the proposed relocation now.**

19       There was extensive testimony regarding TMS’ initial concerns regarding the proposed  
20 location. In addition to TMS’ previous financial concerns regarding Hooman Toyota discussed above,  
21 TMS was also rightly concerned that the proposed relocation might result in protest litigation against  
22 as many as seven existing Toyota dealers.

23       However, ultimately upon the completion of its due diligence, TMS made the determination to  
24 approve the proposed relocation. The question for the Board is whether good cause exists to prevent  
25 the proposed relocation—not to second guess TMS’ business judgment. It is well settled law that the  
26 Board’s inquiry must be limited to the good cause factors set forth in § 3063, and in doing so, to  
27 balance the competing interests of the existing dealers, the manufacturer and the impact upon the  
28 public welfare. *Piano v. State of California*, 103 Cal. App. 3d 412 at 417. This does not entail an

1 analysis of the business judgment employed by the manufacturer in making the decision to approve a  
2 particular market action.

3 **1. Cabe's claim that TMS' approval was the result of threatened litigation is**  
4 **demonstrably false in light of the evidence in the record.**

5 Cabe argues that the February 23, 2012, letter from the Law Offices of Michael J. Flanagan  
6 ("LOMJF") to TMS threatened litigation and that this somehow spurred TMS to approve the proposed  
7 relocation and to forgo the due diligence that it should have performed. (Cabe's Brief 19:10-22.) As  
8 the record reflects, Cabe's assertion is false in a number of ways.

9 First, LOMJF never threatened litigation against TMS. Moreover, the idea that TMS would  
10 approve the proposed relocation to exchange potential litigation against seven Protesting Toyota  
11 dealers to avoid potential litigation against a single dealer, Hooman Toyota, is preposterous.

12 Second, the extensive communications between TMS and Hooman Toyota that Cabe argues are  
13 evidence of Toyota's initial refusals to approve the proposed relocation are also clear evidence of  
14 TMS' abundant due diligence in making its determination of whether or not to approve the proposed  
15 relocation. There can be little doubt that TMS performed extensive due diligence in its consideration  
16 of whether or not to approve the proposed relocation during the time period of February 9, 2009, until  
17 its ultimate approval of the proposed relocation on July 30, 2012. (Cabe's Brief 16:4-5; 19:27-28.) As  
18 Cabe argues in its brief, TMS considered the request to relocate for more than three years.

19 In addition, as argued in Respondent's Post-Hearing Opening Brief, TMS conducted a thorough  
20 analysis of the proposed relocation prior to its approval. TMS representatives personally visited all of  
21 the locations at issue in this Protest, including the proposed location. (RT Vol. 10, 167:19-168:18.)  
22 TMS also conducted two separate market analyses to evaluate the proposed relocation's likely effect  
23 on consumers, the public, and the existing Toyota dealers in the RMA. (RT Vol. 10, 93:14-95:5;  
24 115:21-116:16; Exs. 1109 and 2056.)

25 Ultimately, based upon the results of its extensive due diligence, TMS approved the proposed  
26 relocation because it was clear that the proposed relocation will greatly benefit Toyota consumers in  
27 the RMA and have no material adverse impact to the existing Toyota dealers. (RT Vol. X, 168:19-  
28 170:2.) There simply is no support in the record for Cabe's allegation that TMS failed to perform its

1 due diligence in considering whether to approve the proposed relocation. Not surprisingly, Cabe has  
2 failed to cite any evidence in support of its contention.

3 The only citation Cabe provides is to the testimony of a single TMS witness, Doug Eroh, who  
4 testified he spent a few hours reviewing the analysis of the proposed relocation. However, in the same  
5 testimony cited by Cabe, Mr. Eroh states that TMS has a national market representation department  
6 that performed the bulk of the analysis. (RT Vol. 10, 202:14-15.) Cabe's attempt to mischaracterize,  
7 as well as its failure to provide the proper context to, Mr. Eroh's testimony in no way supports its  
8 allegation that TMS failed to perform its proper due diligence in its decision to approve the proposed  
9 relocation.

10 **F. Cabe's argument that the proposed relocation is not in the best interests of the Toyota Brand**  
11 **finds no support in the record.**

12 Cabe's argument that the proposed relocation of Hooman Toyota will harm the Toyota brand is  
13 based upon two flawed claims. First, Cabe argues that the proposed relocation will weaken Cabe or  
14 force it to go out of business. As has been addressed in great detail, there simply is no support for the  
15 claim that the proposed relocation will harm Cabe in any significant way, if at all. Second, Cabe  
16 argues that Hooman Toyota's VIP program is injurious to the public. However, the existence of  
17 Hooman Toyota's VIP program bears no relevance to the issue of whether there exists good cause to  
18 prevent the proposed relocation. Moreover, Cabe offers its own version of the VIP program, which  
19 Cabe advertises as providing customers even more free services and savings than Hooman Toyota's  
20 VIP program. (Ex. 2065.)

21 In addition, it is common sense to see that TMS would not be devoting the significant time and  
22 resources that it has, and continues to expend, in support of the proposed relocation if it believed it  
23 would result in harm to the Toyota brand.

24 **1. The proposed location will provide greater convenience for Toyota customers.**

25 The evidence overwhelmingly demonstrates the many inconveniences Toyota customers  
26 encounter when visiting Hooman Toyota. (RT Vol. 14, 18:16-21:11; Ex. 264; RT Vol. 14, 56:25-57:7;  
27 RT Vol. 14, 66:20-69:14; Ex. 276; RT Vol. 14, 31:15-24; O'Donnell Depo. 34:19-35:12.) The  
28 evidence is equally compelling in regard to the tremendous benefits and additional conveniences the

1 proposed location offers customers. (RT Vol. 14, 62:3-63:16; 64:25-65:11; Ex. 286, Hooman Proposed  
2 00005, 00010; RT Vol. 14, 97:23-98; Exs. 266, 267; Hearne Depo. 77:1-14; Kong Depo. 62:1-9; 80:2-  
3 17.) Upon the relocation of Hooman Toyota, customers will enjoy a significantly improved Toyota  
4 experience that will not only benefit customers but also benefit the esteem of the Toyota brand among  
5 existing and prospective Toyota owners.

6 **2. The proposed location will provide TMS an Image II compliant facility.**

7 Hooman Toyota has committed to providing an Image II compliant facility at the proposed  
8 location. Mr. Nissani testified that Toyota Financial Services is interested in providing Hooman  
9 Toyota a loan to complete the renovations and that the current landlord of the proposed location is  
10 already providing a \$1 million tenant improvement allowance to fund the project. (RT Vol. 14, 183:18-  
11 184:4.)

12 The proposed relocation will result in substantial benefits to the Toyota brand through  
13 increased brand awareness and enhanced branding elements to help maintain its position as the top  
14 performing brand in the Orange County Market Area. (Hearne Depo. 77:15-19; 81:3-5.)

15 **3. Cabe's concerns over the VIP program are misplaced in several ways and ultimately**  
16 **not relevant to the Board's determination whether good cause exists to prevent the**  
17 **proposed relocation.**

18 Cabe's claim that Hooman's VIP program violates Veh. Code § 11713.1(h) simply is not true,  
19 nor is it the subject of this Protest. Moreover, Cabe offers its own version of the VIP program, which  
20 Cabe advertises as being a better value than Hooman's. (Ex. 2065.) But whatever the alleged issues  
21 with both Cabe and Hooman's programs may be, the fact of the matter is that both dealers employed  
22 these programs before the relocation was proposed and it appears these programs will persist,  
23 regardless of whether the proposed relocation goes forward.

24 In the end, this is yet another attempt to divert the Board's attention from Cabe's failure to meet  
25 its burden of establishing good cause to prevent the proposed relocation. Instead of focusing on the  
26 good cause factors set forth in the statute, Cabe's entire argument boils down to a failed attempt to  
27 paint Hooman Nissani as a bad actor who should not be permitted to freely compete against Cabe.  
28

1 **III. CONCLUSION**

2 The evidence in the record demonstrates that Cabe has failed to show good cause to prevent the  
3 proposed relocation of Hooman Toyota from its current fractionalized, crowded, dilapidated and  
4 undersized location, to a spacious, more convenient and far superior location. Cabe's only argument  
5 regarding good cause to prevent the proposed relocation is its unsupportable claim that it will go out of  
6 business when Hooman Toyota relocates a mere 1.14 miles from its current location. This argument  
7 was shown at hearing to be wholly without merit. This fact is undeniable upon a careful review of the  
8 evidence in the record.

9 The proposed relocation of Hooman Toyota will significantly benefit the public in a number of  
10 ways. First, the proposed relocation will ensure that the City of Long Beach retains a large tax  
11 generator for years to come and all of the benefits that flow therefrom. Second, the currently vacant  
12 Coast Cadillac property will be put to productive use and cease being an empty facility in a growing  
13 area. Toyota customers will also benefit from having a safer and more convenient location for Toyota  
14 sales and service. Moreover, the Toyota brand will benefit from being represented at a far superior  
15 location that will raise the esteem of the Toyota brand. Finally, Hooman Toyota will benefit from  
16 being permitted to operate from a superior location offering greater customer convenience, greater on-  
17 site vehicle inventory and parts storage, as well as reduced costs that it can pass on to consumers,  
18 which will ultimately increase competition to the benefit of the public.

19 The burden is on Protestant Cabe to demonstrate good cause to prevent the proposed relocation.  
20 This is a burden Cabe has unquestionably failed to meet. Based upon the entirety of the evidence in  
21 the record and the arguments included in each of Intervenor's and Respondent's briefs, the Protest of  
22 Cabe Toyota must be overruled.

23  
24 Dated: September 19, 2013

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