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

10 In the Matter of the Protest of:

11 ALDON, INC. dba CARSON TOYOTA,

12 Protestant,

13 v.

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

15 Respondent.
16

Protest No. PR-2339-12

**INTERVENOR'S REPLY BRIEF
TO PROTESTANT ALDON, INC.
DBA CARSON TOYOTA'S POST
HEARING OPENING BRIEF**

17
18 In the Matter of the Protest of:

19 CABE BROTHERS, dba
CABE TOYOTA, AND CABE SCION

20 Protestant,

21 v.

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

23 Respondent.
24

Protest No. PR-2341-12

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

27 Intervening Party.
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I. INTRODUCTION

Protestant, Carson Toyota submitted a Post Hearing Opening Brief that is replete with inaccuracies, incorrect citations, missing citations and claims that are altogether unsupported by, or contradicted by, the evidence developed in the record before the Board.

Carson Toyota has chosen to cite only its Proposed Findings of Fact to the record. Rather than cite its Post Hearing Brief to evidence in the record, Carson cites its brief to its own Proposed Findings of Fact; the statements do not always correspond between the Findings and the Brief and this required additional time and labor to ensure the citations were proper, which was not always the case. Thus, the arguments made by Protestant in its Post Hearing Opening Brief should be disregarded for its inaccuracy and inability to be cited to the record.

II. ARGUMENT

A. Mischaracterizations and Inaccurate Citations to the Record

Protestant Carson Toyota's brief is filled with inaccuracies in its claims as well as its citations. Some citations are missing entirely. Below are some examples of the rampant mischaracterizations and inaccurate citations to the record found in Carson's Post Hearing Opening Brief:

- Page 4, lines 19-23: Carson misstates several numbers, including miles, minutes and number of vehicles serviced. (Exs. 254, Tab 4; 252.)
- Page 5, lines 15-16: Carson implies that, because Hooman Toyota does not own or lease its outside car washing services, it does not pay anything for those services. That is false; Hooman Toyota pays a fee to the car washing services. (RT Vol. 14, 156:23-157:22.)
- Page 9, line 27: Carson misstates the amount invested in new furniture, fixtures and signs. (Ex. 1514.)
- Page 10, line 14: Carson cites to FF 88, which is cited to an incorrect page.
- Page 10, lines 23-26: Carson cites an entire paragraph to FF 93. The finding itself is not at all cited to any evidence.
- Page 13, lines 13-15: Carson states Toyota's Notice to Cure letter to Hooman Toyota was a "serious letter". This proposition is cited to FF 113. Carson has cited to an incorrect FF and

1 nowhere in the correct FF 114 is the term “serious letter” used. It is inappropriate for Carson to
2 imply that the term is used somewhere in that cite.

- 3 • Page 14, lines 5-8: Carson cites and discusses Mike Durby’s testimony regarding a June 8,
4 2012 extension of Toyota’s Notice to Cure. However, the testimony cited was objected to, and
5 the objection granted, stating that Mr. Durby’s testimony is not to be cited for any of the
6 substantive information in the letter. (RT Vol. 12, 253:25-254:14; Ex. 1560.)
- 7 • Page 17, lines 22-23: Carson writes that Toyota’s market share in the state in 2012 was 21.1%.
8 The evidence cited in FF 142 is incorrect: the exhibit does not support the claim and the
9 testimony by Cabe says that he couldn’t cite any numbers.
- 10 • Page 19, lines 9-10: Carson cites to FF 154, the testimony of Mr. Watkins, to support the
11 proposition that “...the RMA is concentrated with several large and highly competitive Toyota
12 dealers, especially those surrounding Cabe Toyota.” Mr. Watkins’ testimony as cited by
13 Carson is not only nearly incoherent, but it has nothing to do with the claim Carson is making.
- 14 • Page 20, line 26 through page 21, line 3: Carson discusses each dealer’s land and building
15 requirements in part and cites to a chart. This chart is an entirely new document created by
16 Carson and is an improper collection of three different exhibits combined to make one chart.
17 This is further an issue because the standards used to measure Carson were from October 2012,
18 while the standards used to measure Cabe and Hooman were from January 2013. It is unclear
19 what other information has been skewed or misinterpreted because Carson has erroneously
20 created a new chart not in evidence.
- 21 • Page 21, lines 11-15: Carson cites to FF 162. This finding states “[Number Reserved]” and
22 contains no citation to the record therein.
- 23 • Page 23, lines 6-8: This is another example of a citation to FF 170, which contains two alleged
24 pieces of testimony by Dr. Matthews which should support Carson’s contention. Only one of
25 the citations is correct, therefore suggesting that Carson has more support for its contentions
26 than it actually does.

- 1 • Page 24, line 26 through page 25, line 6: This includes an entire paragraph not cited to any
2 testimony or evidence in the record.
- 3 • Page 26, lines 14-19: FF 186 contains yet another example of partially incorrect citations,
4 suggesting that Carson has more authority for its arguments than it actually does.
- 5 • Page 27, line 27 through page 28, line 2: Another example of a completely incorrect citation to
6 the wrong exhibit. (FF 192 has nothing to do with the proposition for which it is cited)
- 7 • Page 31, lines 26-27: Carson states that Toyota's market share within the RMA is double the
8 national average. (FF 217.) In fact, Toyota's national average is 14.8% and the RMA is at
9 24.9%, clearly not double the national average. (Ex. 1227, SW 000055.)
- 10 • Page 32, lines 11-16: Carson cites to FF 219, which itself is cited to a portion of the record
11 which has nothing to do with the assertions made in that finding.
- 12 • Page 33, lines 13-18: Carson cites to another chart which has been altered by Carson and also
13 includes incorrect numbers throughout. (FF 226.) Carson combined three different exhibits, as
14 well as added two additional columns of information, to create the chart cited in FF 226. This
15 chart misstates some actual and "green" standards in sales diagnostics surveys for the Cabe,
16 Carson and Hooman Toyota dealerships. Finally, Carson cited the wrong page number for Ex.
17 2003.
- 18 • Page 34, lines 6-8: Yet another example of Carson's inability to correctly transcribe data from
19 evidence in the record. (FF 232.) In this finding Carson has again combined three different
20 exhibits into one chart tallying all three dealerships' certified and expert technicians. Almost
21 all the data presented for Cabe Toyota, and cited to Ex. 2003, is incorrect. (See TMS-PROD
22 017006.)

23 **B. Carson Toyota's Brief is circular, at times non-sensical and difficult to answer given**
24 **Carson's manipulation of the record**

25 In Carson Toyota's Post Hearing Opening Brief, it argues on page 7 that good cause has been
26 established for not relocating Hooman Toyota to the proposed relocation. Carson, however, takes
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1 liberties with the good cause factors set forth in Cal. Veh. Code § 3063 by asserting that they say what
2 they plainly do not say:

3 “(a) Carson Toyota and Cabe Toyota both made substantial and permanent investments in their
4 respective dealerships in reliance on the permanency of the existing configuration of the local
5 dealer network and the predictability associated with it;

6 (b) The relocation will have an unpredictable degree of negative impact on the retail motor
7 vehicle business but a predictable loss of pro-consumer services and a less convenient dealer
8 network for the consuming public in the RMA;

9 (c) The relocation will be injurious to the public welfare by creating a less convenient dealer
10 network, forcing job terminations, forcing cutbacks in pro-consumer services, and perpetuating
11 illegal, anticompetitive programs such as Hooman Toyota’s VIP Program in an already
12 aggressively competitive RMA;

13 (d) The Toyota dealers in the RMA are providing adequate competition and convenient
14 consumer care for Toyota vehicles in the RMA, including adequate motor vehicle sales and
15 services facilities, equipment, supply of vehicle parts, and qualified personnel;

16 (e) When balancing TMS’s opportunistic actions with the consequential impact on its dealer
17 network and the overwhelming anticompetitive effects on its consumers, the relocation would
18 not increase competition and therefore not be in the public interest.”

19 Carson’s attempt to unilaterally rewrite the good cause factors is not only supported by no legislative
20 history, it is plainly self-serving and must be wholly disregarded.

21 **1. Carson and Cabe Toyota made substantial and permanent investments in their**
22 **respective dealerships as a result of their own independent business decisions.**

23 Carson Toyota argues without authority that there are two forms of permanency of investment:
24 (1) investment by owners through its facilities and (2) a “proven, cemented dealer network” which
25 spurs the first type of investment in that it creates more reliability for dealers to invest in their facilities
26 and levels the playing field. Carson Toyota does not have support for the second alleged form of
27 permanency of investment. In fact, California case law suggests that Carson’s proposition goes against
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1 the purpose of the New Motor Vehicle Board Act, which regulates motor vehicle franchises in
2 California. In the case of *Ri-Joyce, Inc. v. New Motor Vehicle Board*, 2 Cal.App.4th 445 (1992),
3 footnote 4 states the following:

4
5 “Although some dealers seem to believe that the New Motor Vehicle Board Act
6 was enacted to protect them against competition, quite the contrary is true. The
7 act recognizes that a new motor vehicle dealership may require a significant
8 investment and that there is a disparity of bargaining power and thus the act was
9 intended to protect new motor vehicle dealers against *unfair or oppressive trade
practices*. (emphasis added) (see *BMW of North America, Inc. v. New Motor
Vehicle Board*, 162 Cal.App.3d 980, (1984).) But the act recognizes that the
needs of consumers are important and that competition is in the public interest.
(Cal. Veh. Code §§ 3061, 3063.) Accordingly, a dealer cannot prevail on a
protest simply by asserting a desire to limit competition.”

10 Carson claims that a dealer network needs to be constant and predictable in order for dealers to
11 be induced to make permanent investments in their franchises. However, the Vehicle Code, as well as
12 the case law cited above, demonstrates that competition between dealerships is in the public interest
13 and the needs of consumers, including convenient and accessible facilities, and those are important
14 pieces that drive competition and result in dealerships working in support of the public interest.
15 Carson Toyota is suggesting that capitalism and business ownership in America should be regulated in
16 a way that it always provides stability and predictability. This cannot be true: in business there is
17 inevitable and inherent risk for the possibility of large reward. It is seriously misguided for Carson to
18 claim that the New Motor Vehicle Board and Vehicle Code Section 3062 exist to provide Carson with
19 a guaranteed profit in its private business ventures.

20 **a. Despite its claims, Carson is not owed any minimum profit or return on its**
21 **investment.**

22 On page 8, lines 19-23 of its Opening Brief, Carson claims that it has yet to see a return on its
23 investment for its new facility, completed in 2008. Carson states that due to the increase in fixed costs
24 as a result of its renovation, as well as the declining automobile industry and unstable economy, it has
25 not been as profitable in recent years. Carson cites to Mr. Watkins and Mr. Brylski to support this
26 statement. Mr. Watkins’ testimony is unhelpful and states that he doesn’t know the numbers and
27 didn’t research or evaluate them. (RT Vol. 3, 65:22-66:6.) However, when viewing the financial
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1 statements for Carson, it is revealed that has been profitable since 2009. (Exs. 1508; 1510-1514.)
2 Further, it cannot demonstrate that Toyota, the New Motor Vehicle Board nor the state of California
3 owe it any minimum profit, or *any* profit for that matter. Yet again Carson is attempting to persuade
4 this Board that it is owed steady and ample profitability as a result of its own *personal* business
5 decisions.

6 Another example of Carson's sense of entitlement is on page 15, lines 2-8 of its Post Hearing
7 Opening Brief. Carson explains that, as a result of the relocation, Hooman will save approximately
8 60% of its fixed costs. (RT Vol. 6, 207:21-208:5; RT Vol. 7, 176:17-177:12.) But by comparison,
9 Carson's monthly rent allocated to construction and real estate loans allegedly totals \$187,000, almost
10 nine times as much as Hooman. Carson does not cite any exhibit or testimony to support this
11 information. In fact, these numbers have not been stated or claimed anywhere in the record until
12 Carson filed its Post Hearing Opening Brief. Carson claims that Hooman will have a "significant
13 competitive advantage" as a result of the relocation, and Carson's permanent investment will be at
14 risk. But Carson's business choices to take on construction loans and make upgrades to its facility are
15 completely unrelated to Hooman's facility relocation. It is unclear what Carson believes it is owed,
16 and by whom, but certainly the arguments it puts forward do not support good cause not to allow the
17 proposed relocation of Hooman simply because Hooman's business choices, in comparison with
18 Carson's, may provide it a competitive advantage.

19 **b. Mr. Nissani has made a substantial investment in the proposed relocation and**
20 **its facility.**

21 Carson complains on page 15, lines 9-25 of its Opening Brief that there is minimal indication
22 of any permanency of investment or commitment by Mr. Nissani to the proposed relocation. Carson
23 also claims there is no attached "Option Agreement" to Intervenor's lease for the proposed relocation
24 and Mr. Nissani never testified that he executed the option to purchase the proposed relocation.
25 Carson is blatantly ignoring several pieces of evidence in the record which negate all of these claims.
26 Intervenor has provided the Board with a copy of the "Option to Purchase" which is an addendum to
27 the standard lease and initialed by both parties at the bottom of each page. (Ex. 275.) Mr. Nissani
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1 testified that the Option to Purchase *automatically* triggers at the end of his lease. (RT Vol. 14,
2 105:14-18.) Finally, Intervenor has provided the Board with site plans for the new facility, as well as
3 evidence of a minimum investment of \$610,000 in the new facility as of October 2012. (Exs. 253,
4 266.) Toyota Financial services also will likely be providing a construction loan to cover the \$2.95
5 million cost. (RT Vol. 14, 183:18-184:4.) Carson's claims are patently false and contradicted by the
6 record and demonstrate the need for the Board to disregard Carson's claims.

7 Finally, Carson repeatedly complains that Hooman Toyota has not yet submitted a *pro forma*
8 to Toyota. However, Jeff Bracken, previous Vice President of Sales for Toyota, clearly stated in his
9 deposition testimony that Toyota requires a *pro forma* when construction is being undertaken as part
10 of a relocation once dirt has started to move. (emphasis added) (Bracken Depo. P. 85:11-86:3.)
11 Carson's repetitive claims of a lack of *pro forma* are irrelevant since "dirt has not started to move" on
12 Hooman's proposed relocation construction. Any suggestions that Hooman is not complying with
13 Toyota's requirements are simply false.

14 **2. The relocation will have a predictably minute, if any, negative impact on the retail**
15 **motor vehicle business in the RMA.**

16 Carson attempts to bolster its argument regarding territorial protection by misleadingly and
17 incompletely citing testimony from Intervenor's Expert Witness, Ted Stockton. At page 16, line 25
18 through page 17, line 1, Carson writes "...a dealership relies on a manufacturer to establish its degree
19 of territorial protection. As a result, there is a friction between the manufacturer and dealer because of
20 this uneven bargaining power favoring the manufacturer, which creates an incentive for the
21 manufacturer to behave in an opportunistic fashion. This friction exists in the real world and is
22 theoretically supported." (RT Vol. 6, 36:21-25; 44:15-24.) Carson fails to continue to cite the
23 testimony from Mr. Stockton which states, "In this particular case I did not see much, if any, of that in
24 play." (emphasis added) (RT Vol. 6, 44:25-45:1.) Carson has used the testimony of Intervenor's
25 expert witness to support a theory that Mr. Stockton specifically stated was not at issue in this case.

26 In this case, the friction is actually caused by the fact that both parties would be better off if the
27 other party would forgo its market power and sell cheaper. The friction is not caused by the fact that
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1 the manufacturer has uneven bargaining power. Additionally, since this move was dealer-initiated, this
2 is not an exercise in opportunistic behavior by the manufacturer. (RT Vol. 6, 37:5-8.)

3 **a. Carson exaggerates Cabe's alleged issues with its PMA.**

4 Carson also states that Cabe Toyota faces extra challenges with its small PMA and is at a
5 disadvantage given the size and shape of such PMA. However Carson's claims are again
6 disingenuous. Carson writes on page 20, lines 1-2 that Cabe has the smallest number of units in
7 operation out of any dealer in the Los Angeles region. However, Mr. Watkins testified that Cabe has
8 the smallest number of units in operation in the 10 mile RMA, not the entire Los Angeles Region. (RT
9 Vol. 4, 69:11-20.) Carson has attempted to exaggerate the extent to which Cabe may be having
10 difficulty making sales within its PMA.

11 Carson writes at page 20, lines 6-9, that the "...very small size and particularly odd shape
12 significantly diminishes any location advantage and proportionally diminishes its (*sic*) market
13 advantage it may have." However, this goes against all logic in that PMAs are constructed according
14 to proximity advantage. (RT Vol. 8, 181:12-182:21.) Cabe cannot lose market advantage in a
15 situation where the PMA was drawn specifically to reflect its market advantage. Carson then claims
16 that a dealership with a larger PMA would be "buffered" and afforded more protection in a relocation
17 situation. Again, Carson does not have any evidentiary support for this theory and illogically ignores
18 the fact that the basis for the construction of all PMAs is proximity advantage.

19 Carson also alleges that Cabe has a difficult market. The relocation of Hooman Toyota's
20 facility will not change any alleged problems Cabe may see with its market. (RT Vol. 6, 127:15-
21 128:24.) Cabe has already adapted to its PMA and utilizes TrueCar and other internet and marketing
22 techniques to make sales. (RT Vol. 2, 38:1-17; 38:25-39:11.) This does not provide any support for
23 the idea that there is good cause not to permit the relocation of Hooman Toyota; in fact, it is irrelevant
24 to this case.

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3 **b. Carson ignores the real life difficulties with Hooman Toyota's facility and**
4 **location.**

5 Carson Toyota is bold enough to claim at page 20, line 26 through page 21, line 4, that:
6 Hooman Toyota's dealership exhibits no extraordinary facility deficiencies (*sic*) generally found in
7 metro markets; Hooman is only lacking one display sales unit and does not meet its land requirement;
8 This is allegedly typical of a metro market; Toyota supposedly understands these limitations and will
9 usually overlook the land guidelines for metro dealers; and good customer ratings will show that a
10 dealership has overcome any facility deficiency. These claims are patently false and could not be
11 farther from the truth. These are merely hypotheses and speculation set forth by Dan Duddridge and
12 Scott Watkins without any evidence or data to back them up. (RT Vol. 5, 66:9-23; Vol. 4, 80:10-
13 81:15.)

14 In addition to completely ignoring Toyota's land and facility guidelines, Mr. Duddridge's claim
15 does not take into account the logistical aspects of running a dealership. Even if Hooman meets
16 Toyota's minimum guidelines on paper, a tour of the facility and parcels quickly show other changes
17 need to be made. The traffic circle where Hooman is currently located is difficult to navigate,
18 especially for Toyota customers visiting Hooman's current location for the first time, and has a high
19 rate of traffic accidents. (RT Vol. 14, 56:25-57:7; 66:20-69:14; Ex. 276.) Moreover, the service
20 department is located across the street from Hooman's sales showroom, requiring customers to
21 differentiate between the two locations to determine where they must take their cars for service. (RT
22 Vol. 14, 18:16-21:11; Ex. 264.) These facilities offer inadequate parking, with service customers
23 frequently forced to park in the street while they wait for the service drive to clear. (RT Vol. 14, 31:15-
24 24.) Despite positive customer service reviews, there are still many issues with Hooman's facility and
25 the logistical aspects of running the dealership that can't be dealt with by remaining at Hooman's
26 current location. If anything, Hooman Toyota's positive customer ratings, despite facility deficiencies,
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1 demonstrate the extraordinary efforts Mr. Nissani has been willing to make in order to satisfy his
2 customers.

3 **c. Dr. Matthews' analysis of the RMA is less than reliable.**

4 On page 21, line 26 through page 22, line 6, Carson discusses Dr. Matthews' "dot map"
5 analysis. Carson states that "Dr. Matthews expected to find a concentration of 'dots' or registrations
6 associated with a dealer relatively close to the location of the dealer's store..." Carson plainly assumes
7 that "[t]hese 'dots' reflect the market power, or territorial advantage, that is associated with territorial
8 distance between dealers." (RT Vol. 8, 162:3-163:3; 164:13-24; Ex. 1500.) However, this blanket
9 statement is not accurate and was not testified to by any expert witness. Although Carson claims that
10 the "market power" element is definitive, Dr. Matthews actually states that the dot pattern shown
11 "somewhat" reflects market power. Dr. Matthews concluded that "Cabe Toyota less effectively draws
12 customers in the area around its dealership than other dealerships in the market." (Carson FF 194.)
13 Carson also cites to Mr. Stockton in support of this conclusion, however Mr. Stockton's testimony
14 clearly explains that Hooman's relocation closer to Cabe will have less of an impact on Cabe because
15 they are selling fewer cars closer to their dealership. (RT Vol. 7, 84:13-85:11.) In essence, "[y]ou can
16 only lose what you've won. So to the extent Cabe hasn't won relative to their territorial advantage,
17 they have less to lose." (*Id.*)

18 On page 24, lines 16 through 20, Carson criticizes the number of service bays that will be in the
19 PMA (among Carson, Cabe and Hooman's proposed relocated dealership), after Hooman's relocation
20 and renovation of the proposed facility, to be too high by 99 units. Carson argues that Toyota's
21 guidelines only require 66-67 service bays based on the number of units in operation in the three
22 PMAs. (RT Vol. 8, 192:24-194:15; 233:9-234:14; Ex. 1500.) Carson questions whether "society needs
23 this many". Carson's questioning of the amount of service bays is inappropriate in this case. The
24 guidelines against which Carson is measuring are for 2012. (*Id.*) These guidelines were outdated even
25 at the time of this hearing and they do not take into consideration any increase or growth of the Toyota
26 brand in the market which is almost certain to occur in the coming years.

1 Carson also argues, on page 25, line 26 through page 26, line 9 that, five years ago, the RMA
2 dealers supported sales of approximately 37,000 Toyota vehicles, and the current level of sales in the
3 RMA is at 30,000 vehicles. Therefore, the RMA dealers have been proven able to support 37,000
4 vehicles, and can support an additional 7,000 units in its current configuration. (RT Vol. 8, 225:18-
5 227:2; Ex. 1500.) There is no study or data to support this hypothesis by Dr. Matthews. In addition, it
6 is difficult to compare future growth to five years ago when the economy was headed into the biggest
7 downturn of the automobile industry.

8 Finally, Dr. Matthews also failed to file a response affidavit, as Carson's counsel stated he
9 would. Carson's counsel, Mr. Rasmussen, requested that Dr. Matthews be allowed to prepare a
10 responsive declaration to the additional, rebuttal testimony given by Mr. Stockton, criticizing the
11 circularity arguments of Dr. Matthews. (RT Vol. 10, 322:4-18.) Carson also did not propose any
12 findings about Dr. Matthews' circularity argument. This demonstrates that Carson and Dr. Matthews
13 do not believe this argument is meritorious and that they have absolutely no evidence or findings to
14 support it.

15 **d. Mr. Watkins' testimony has been proven false and should be disregarded in its**
16 **entirety.**

17 It is incredible that Carson has continued to cite the testimony of Mr. Watkins in which he
18 opines that the Proposed Relocation will create an analogous market to the east of Cabe as the market
19 currently exists to its west with Carson on the I-405 freeway. (Carson FF 191.) Mr. Watkins' analysis
20 was shown to be so inherently unreliable and misleading, as to be of no use to the Board in making
21 findings related to any potential impact to the existing dealers that might result from the proposed
22 relocation. (Ex. 1227.) As discussed in Intervenor's Post-Hearing Opening Brief, during Mr. Watkins'
23 cross examination, Mr. Watkins' own testimony demonstrated his impact model to be so fatally flawed
24 that it can be of little use as credible evidence of any impact that might result to Protestants as a result
25 of the proposed relocation. Mr. Watkins' impact model was revealed to be a significant departure from
26 industry standards employed by experts in this field, designed to produce a particular result and
27 otherwise of no value. For example, Mr. Watkins suggested that Cabe would experience a lost sales
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1 percentage of nearly 65% in the so-called “eastern wedge”. Much of this area falls in Census tracts
2 where the proximity impact upon Cabe is, at most, 1%. Therefore, at the very least, Mr. Watkins is
3 predicting impact on sales 65 times greater than the actual proximity change that would occur in the
4 market. (RT Vol. 6, 125:15-126:4; Ex. 254, Tab 15, p. 3.) This cannot reasonably be expected to be
5 the case. The problem with this single data point approach is that Mr. Watkins’ “wedge” analysis was
6 a bad guess. First, he either falsely denied or failed to recognize that he had merely subtracted Cabe’s
7 sales penetration in the western wedge from its sales penetration in the eastern wedge, declaring this
8 fact was only a “coincidence.” Second, by attributing all of the difference in the eastern and western
9 wedges’ sales penetration to something (undisclosed) about Carson’s presence, Mr. Watkins ignored
10 the obvious presence of DCH Toyota in the virtual center of the west wedge and the presence of South
11 Bay Toyota. DCH’s concentrated sales pattern demonstrates the fallacy of Mr. Watkins’ assumption.
12 (RT Vol. 6, 190:2-192:20; Ex. 255, Tab S-1, pp. 1-2.)

13 More seriously, Mr. Watkins either erroneously or intentionally presented defective parameters
14 of his analysis to the ALJ, insisting that his wedges were in 60-degree angles. As shown through the
15 protractor exercise, they were not. (RT Vol. 4, 48:12-52:6; Ex. 1227, p. D11.) The significance of the
16 error, intentional or not, is that the analysis as presented excluded South Bay from the western wedge
17 and made it appear that Hooman was moving into the eastern wedge, when its current location was
18 already there. Mr. Watkins testified under oath that the wedges were 60 degrees and even produced
19 back-up showing 60 degree angles. It follows that Mr. Watkins or his staff, therefore, produced
20 alternate versions of the analysis, despite asserting that he did not do so, or produced something other
21 than his actual back-up materials in an exercise of sloppiness or deception. (RT Vol. 4, 52:18-52:25.)

22 Additionally, on page 29, lines 18 through 21 of its brief, Carson states that “Cabe’s expert
23 witness showed the dealership will experience a negative impact of anywhere between 7.3% and
24 12.8%, averaging approximately to the same proportionate negative impact that he found for Cabe’s
25 new vehicle sales”. (Carson FF 206.) This finding appears to be written in error, as it is virtually
26 incoherent. Again, and as stated above, Mr. Watkins clearly admitted that if the angles used to
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1 demonstrate impact were not correct, then any numbers resulting from analysis of such angles must, of
2 necessity, not be correct.

3 **3. The relocation will not be injurious to the public welfare and will create a more**
4 **convenient dealer network.**

5 It is also clearly disingenuous for Carson to claim that “[t]he other expert witnesses agree that
6 the Proposed Relocation will result in some degree of negative impact on both the retail motor vehicle
7 business and consuming public within the RMA.” (Carson’s Post Hearing Opening Brief P. 27, lines
8 12-13, heading G.) Intervenor’s expert witness, Ted Stockton, stated that there will be an increase in
9 travel time for Hooman customers of only approximately 30 seconds. (RT Vol. 6, 86:4-15.) However,
10 Mr. Stockton’s characterizes this miniscule increase in drive time as “small” and he “would expect that
11 increase in travel time to the dealership to be overwhelmed by the operational improvements and the
12 relaxation of operational constraints at Hooman.” (RT Vol. 6, 86:16-25.) In addition, Mr. Stockton
13 testified that in the census tracts touching the RMA, the change in travel time is two to four seconds.
14 (RT Vol. 6, 87:1-15; Ex. 254, Tab 12, P. 2.) Mr. Stockton describes this difference in drive time to be
15 “imperceptible to customers.” (RT Vol. 6, 87:16-19.) Carson continues to blindly and solely rely on *de*
16 *minimus* numbers and unsupported assertions when it is convenient, while ignoring the actual, real
17 problems witnessed by all parties, especially borne out when they visited the dealership sites.

18 Carson reiterates that all expert witnesses “found there to be some injurious effect on the public
19 welfare, and in many different forms.” (Carson Post Hearing Opening Brief P. 29, 25-26.) Again, this
20 is a severe exaggeration of the testimony of Mr. Stockton and Carson has selectively chosen to
21 highlight only part of the evidence on this topic. The proposed relocation will have some customers
22 travel farther (by approximately 30 seconds), but Mr. Stockton clearly stated the operational
23 improvements will overwhelm any minute increase in travel time, thus making it more convenient for
24 customers overall. (RT Vol. 6, 86:4-25; Vol. 7, 128:4-16; Ex. 254, Tab 11, P. 1; Tab 12, P. 2.)

25 In fact, Carson persists in clearly misstating the testimony of Intervenor’s expert witness. In its
26 brief on page 28, lines 13 through 15, Carson writes, “[i]n one analysis that he performed, Mr.
27 Stockton concluded that Cabe Toyota would lose 10.6% of registrations at the California average if
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1 Hooman Toyota moved to the Proposed Relocation.” (RT Vol. 6, 82:24-83:14; 85:1-10; Ex. 254, Tab
2 11, P. 1.) This is a complete misstatement of Mr. Stockton’s testimony. The number of census tracts
3 closest to Cabe on a drive time basis would decline by 10.6%. (*Id.*) This obviously does not mean that
4 Cabe would lose that many registrations, should the relocation occur. (*Id.*)

5 **a. Carson attempts to mislead the Board with false claims of unlawful acts.**

6 Next, Carson makes an argument regarding Hooman’s VIP program that is tortured, at best,
7 and wholly irrelevant to the question of whether there is good cause to prevent the relocation of
8 Hooman Toyota a mere 1.14 miles to the proposed new site. In making this argument, Carson
9 presumes it is entitled to interpret the statute unilaterally, apply it to Hooman’s program and transform
10 the words “cost savings” to the “equivalent” of “cash back”. The rationale for this argument is that it
11 purports to be indicative of “already aggressive competition within the RMA”, with Carson concluding
12 “[t]his signifies that the RMA market does not need any additional stimulation. And any additional
13 competitive stimulation will only lead to a greater degree of unlawful business practices. These
14 business practices are injurious to the public.” (Carson’s Post Hearing Opening Brief, P. 31, lines 10-
15 21.) Three things are evident about this contention: (1) Carson makes no mention of the fact that Cabe
16 Toyota, in direct response to Hooman’s VIP program, instituted a virtually identical program (RT Vol.
17 14, 166:1-14.); Carson itself argues that the existing VIP program is “indicative of already aggressive
18 competition within the RMA” (emphasis added) – that being the case, how could it possibly be
19 relevant to demonstrating good cause not to relocate Hooman Toyota? And (3), though Carson
20 presumes the authority to unilaterally interpret and even transform the language of the statute
21 concerned, the matter is, at best, one for the DMV to determine and as importantly, there’s absolutely
22 no evidence in the record that customers or the public at large have suffered injury as a result of the
23 program. (Further, there is no evidence the DMV is even interested in this matter.) The argument is
24 therefore a transparent attempt to divert attention from the real issues in this case, namely those that
25 pertain to good cause not to relocate Hooman Toyota a mere 1.14 miles from its current location. In
26 addition, the question the statute addresses is whether the relocation will be injurious to the public
27 welfare. Carson’s argument plainly fails to address this question.

1 Finally, Carson argues without benefit of evidence that if Hooman Toyota is allowed to
2 relocate, it will be injurious to the public welfare by forcing job terminations and cutbacks in pro-
3 consumer services. (Carson's Post Hearing Opening Brief P. 4, lines 25-26.) This is absolutely false.
4 Mr. Nissani has indicated his fixed costs will be decreased if he is allowed to relocate. (RT Vol. 6,
5 207:21-208:5; RT Vol. 7, 176:17-177:12.) In addition, Mr. Nissani clearly testified that the number of
6 employees at Hooman Toyota will increase tremendously, they will be able to be more productive,
7 service more cars and facilitate remarkable growth at the dealership. (RT Vol. 14, 117:5-24.) This
8 certainly demonstrates the public and the dealer network in the RMA will not be harmed if Hooman
9 Toyota is allowed to relocate.

10 **4. The relocation will allow Toyota dealers in the RMA to provide more adequate**
11 **competition and convenient consumer care for Toyota customers.**

12 Carson Toyota repeats its claims that Hooman Toyota's dealership exhibits no extraordinary
13 facility deficiencies, Toyota will usually overlook the land guidelines for metro dealers and good
14 customer ratings will show that a dealership has overcome any facility deficiency. As stated above,
15 Carson is completely ignoring Toyota's guidelines and the issues Mr. Nissani is compelled to address
16 concerning the logistics of running his dealership at its current location.

17 Carson also claims, on page 28, lines 20 through 24, that Mr. Stockton states he expects Cabe
18 Toyota, Carson Toyota and South Bay Toyota all to lose sales as a result of the Proposed Relocation.
19 Further, because Toyota dealers face a higher level of intrabrand competition, there is less likelihood
20 of incremental Toyota registrations (the availability of interbrand competition). (RT Vol. 6, 134:1-18;
21 RT Vol. 7, 165:19-166:5; 167:10-169:10; Ex. 254, Tab 17, P. 1.) This is an inaccurate characterization
22 of Mr. Stockton's testimony in regard to high intrabrand competition. Mr. Stockton found that it was
23 extremely unlikely that Toyota would not gain some registrations. Carson is confusing the relative
24 amount of intrabrand versus interbrand capture with the probability that there would be some
25 interbrand capture. (*Id.*)

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1 **5. When balancing the interests of the public, the dealers in the RMA and Toyota, the**
2 **relocation will increase competition and therefore be in the public interest.**

3 First, Carson reiterates its argument regarding friction between a manufacturer and dealer due
4 to uneven bargaining power. Again, as stated above, Carson misquoted Intervenor's expert witness
5 and chose to ignore part of his testimony. Mr. Stockton specifically stated this friction does not exist
6 in this case and this is not an exercise of power by the manufacturer because the relocation was dealer-
7 initiated. (See paragraph B (2) above for further discussion.)

8 Carson, without benefit of the slightest evidence, also writes, at page 34, lines 23-28, that
9 Toyota "incorporates its facility requirements in its dealer agreement in an attempt to force its
10 dealerships to comply with its empty threats of termination if they do not. But in practice TMS
11 [Toyota] has no way of enforcing its requirement. It has never terminated a dealership for not
12 complying with its facility requirement."

13 In truth, most, if not all, manufacturers request that dealers maintain certain facility, land and
14 building requirements in order to best represent the brand and best serve customers. As the Board well
15 knows, many franchise termination notices are based upon alleged failures to comply with facility
16 requirements.¹ It is unclear why Carson would state that Toyota has no way of enforcing its
17 requirement. Whether or not Toyota has ever terminated a dealership solely for not complying with
18 facility requirements, it is simply untrue that it is not able to. Toyota may choose to enforce facility
19 requirements through agreement with the dealer first, rather than jump to the harsh remedy of
20 terminating a dealer's franchise.

21 **a. A market study was not necessary in this established and stable market.**

22 Carson also argues, at page 35, line 22 through page 36, line 2, that Toyota should have
23 conducted a market study before it approved Hooman's relocation request. Carson goes on, without
24 any citation, to describe the dealer network configuration as unchanged for 35 years, not evaluated in
25 over 20 years and claims the prudent course of action on behalf of Toyota would be to conduct a
26 market study. However, Toyota conducted its due diligence before approving this relocation. Toyota
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28 ¹ The Board need only consult its own file of franchise termination notices.

1 reviewed extensive data and drove the market and visited all facilities to determine the relocation will
2 not have a negative effect on the public, customers and dealers in the RMA. (RT Vol. 10, 93:14-95:5;
3 115:21-116:16; 167:19-168:18; Exs. 1109, 2056.) In fact, Toyota clearly states that a market study is
4 used to establish whether there is a need for new representation in the market. (RT Vol. 10, 303:15-
5 304:10.) In this case, a study was not performed because it is a relocation case in an established
6 market and therefore there was no recommendation for a market study. (Ex. 1043.)

7 Carson argues that Toyota informed Mr. Nissani it would not approve the Proposed Relocation
8 for various reasons, including Hooman's financial discrepancies as well as the proximity of the move
9 to other dealers in the PMA. (Carson FF 240-242.) Despite Carson's suggestion, Toyota never
10 disapproved Intervenor's relocation request with finality and in its entirety. In fact, Toyota specifically
11 said its review of the facts of Intervenor's proposal were not outcome determinative and shared its
12 concern with Hooman Toyota gaining stability financially before dealing with any potential protests.
13 (RT Vol. 10, 87:25-89:22; 188:11-189:13; 199:25-200:19; 281:18-25; Ex. 1102.) There is no
14 evidence in the record which supports the statement that Toyota denied Hooman Toyota's relocation
15 request definitely and permanently.

16 **b. Mr. Nissani has provided Toyota with evidence of financial stability and**
17 **support for the proposed relocation.**

18 Carson states that as of June 8, 2012, Hooman Toyota had not yet cured all the financial
19 deficiencies outlined by Toyota and its third party auditor (Carson FF 248) but on July 27, 2012,
20 Toyota approved the Proposed Relocation. (Carson FF 249.) Carson complains that the approval was
21 "hasty" and "within approximately one month" of extending Hooman Toyota's Notice to Cure. These
22 statements are incorrect and not supported by the evidence in the record. Toyota extended Hooman's
23 Notice to Cure through August 31, 2012. (Ex. 1163.) There was at least one and a half months
24 between June 8, 2012 and the date the relocation was approved. During this time, it is unrealistic to
25 expect Hooman Toyota to cure deficiencies that he was already aware of, in the process of fixing and
26 only had until the end of August to complete. Further, the evidence unequivocally demonstrates that
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1 Hooman Toyota has now cured all deficiencies except Toyota's facility concerns, which can and will
2 be addressed if the proposed relocation is allowed. (RT Vol. 10, 73:23-74:2.)

3 It is absolutely false for Carson to claim that "Hooman Toyota provided no evidence to show
4 any commitment to fund the Proposed Relocation renovation..." (Carson FF 245.) Hooman
5 specifically testified that he is receiving a \$1 million tenant improvement allowance from the landlord
6 and Toyota Financial Services will likely be providing a construction loan to cover the remaining
7 \$2.95 million cost. (RT Vol. 14, 183:18-184:4.) Additionally, Toyota approved Hooman Toyota's
8 relocation request with certain contingencies, one of which was for Mr. Nissani to provide \$500,000 to
9 support costs for any potential protests filed by other dealers. (Ex. 1165.) Toyota did not solely
10 condition its approval of the relocation request on receipt of a check from Hooman Toyota; Carson's
11 suggestion that this occurred is a misrepresentation of the facts.

12 Carson then makes the convoluted argument that a statute recently enacted to define when and
13 if a waiver of a right to protest is valid somehow applies to a circumstance under which a protest is
14 filed against a proposed relocation and a hearing is held thereon. In constructing this strange
15 argument, Carson apparently presumes to define the nature of a *pro forma* and to denominate its
16 components. Interestingly, the statute cited by Carson in support of this argument (Veh. Code §
17 11713.3(g)(3)(H)(i)) is not only completely inapplicable to a protest that has already been filed, but as
18 importantly, makes no mention whatsoever of a "*pro forma*" and Carson brazenly misstates California
19 law, declaring, "[a]nd the California Legislature finds these two components material to any relocation
20 protest." (Carson Post Hearing Opening Brief, P. 37, lines 13-14.) No citation is given for this
21 contention, nor is it possible to cite any provision of California law in support of it.

22 **6. The relevance standard upheld at this hearing was not overly restrictive and was**
23 **appropriately imposed throughout the hearing.**

24 Carson's final argument maintains that if the Board does not sustain these protests, the Board
25 should remand them for further hearing of issues precluded from examination due to the over-
26 restrictive relevancy standard. (Carson FF 259-260.) Neither of these findings of fact contains any
27 citation to the record or evidence whatsoever. Carson cites several alleged examples of the ALJ
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1 constraining the relevance threshold for showing good cause in an unarticulated manner. (Carson FF
2 261.) None of those citations demonstrate what Carson is claiming. Carson's citations include the
3 ALJ's examples of several analogies as well as statements of the burden of good cause not to relocate
4 the dealership (which was inadvertently misstated but corrected more than once). (*Id.*) None of
5 Carson's examples demonstrate the ALJ imposed an overly-restrictive relevancy standard, because he
6 did not. It is not necessary to remand the protests for further evidence.

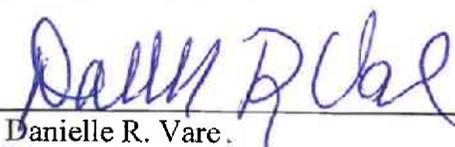
7 III. CONCLUSION

8 Based upon the foregoing, and the totality of the evidence in the record, it is plain to see that
9 Protestant Carson Toyota has failed to demonstrate the existence of good cause to prevent the proposed
10 relocation of Hooman Toyota. The evidence demonstrates that the proposed relocation will result in
11 significant benefits to the public welfare, the City of Long Beach, Hooman Toyota and the Toyota
12 brand, with little, if any, adverse impact to the existing dealers. Moreover, to the extent the relocation
13 results in any impact to Protestant, Toyota and Hooman presented credible expert opinions and
14 evidence conclusively demonstrating that any potential impact to the protesting dealers will be so
15 slight it will certainly not threaten the continued viability of Cabe, Carson or any of the existing Toyota
16 dealers in the RMA.

17 Conversely, if either of the Protests is sustained, the public interest, Hooman Toyota's interest
18 and TMS' interest will suffer unnecessarily, and disproportionately to any perceived benefits to
19 Protestants. The Protests should be denied.

20
21 Dated: September 19, 2013

LAW OFFICES OF
MICHAEL J. FLANAGAN

22
23 By: 

Danielle R. Vare.
Attorneys for Protestant

DECLARATION OF SERVICE BY ELECTRONIC MAIL

I, Valerie A. Coffey, declare that I am employed in the County of Sacramento, State of California, that I am over 18 years of age, and that I am not a party to the proceedings identified herein. My business address is 2277 Fair Oaks Boulevard, Suite 450, Sacramento, California, 95825.

I declare that on September 19, 2013, I caused to be served a true and complete copy of:

***INTERVENOR'S REPLY BRIEF TO
CARSON TOYOTA'S
POST HEARING OPENING BRIEF***

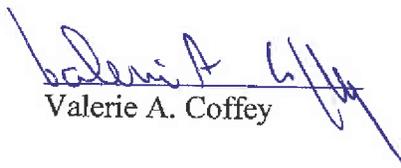
Carson Toyota v Toyota Motor Sales U.S.A., Inc.

Protest No. PR-2339-12 Consolidated

By Electronic Mail:
And by First Class Mail
See Attached Service List

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 19 September, 2013, Sacramento, California.


Valerie A. Coffey

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Service List

*Carson Toyota v Toyota Motor Sales U.S.A., Inc.
Protest No. PR-2339-12 Consolidated*

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