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NEW MOTOR VEHICLE BOARD

STATE OF CALIFORNIA

In the Matter of the Protests of	CONSOLIDATED MATTERS:
ALDON, INC., a California corporation, d.b.a. CARSON TOYOTA, and	PROTEST NO. PR-2339-12
ALDON, INC., a California corporation, d.b.a. CARSON SCION, and	PROTEST NO. PR-2340-12
CABE BROTHERS, a California corporation, d.b.a. CABE TOYOTA and CABE SCION	PROTEST NO. PR-2341-12
APAULO, INC. d.b.a. NORWALK TOYOTA and TOYOTA SCION, and	PROTEST NO. PR-2342-12
DWWSB, INC. d.b.a. SOUTH BAY TOYOTA and SOUTH BAY SCION	PROTEST NO. PR-2343-12
Protestants, v. TOYOTA MOTOR SALES U.S.A., INC., a California Corporation, Respondent.	**PROTESTANT ALDON, INC. DBA CARSON TOYOTA AND CARSON SCION'S OPENING BRIEF**
H.T.L AUTOMOTIVE, INC. dba HOOMAN TOYOTA OF LONG BEACH and HOOMAN SCION OF LONG BEACH, Intervening Party.	

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I. Introduction

This is a relocation protest among three Toyota dealerships that have coexisted at their same present locations, separated by mere miles, in a fiercely competitive and successful market for over 35 years. Hooman Toyota now seeks to disrupt that balance by moving to a location off of the I-405 freeway that is only 8 minutes away from Carson Toyota's I-405 location, that is less convenient for its customers within its primary market area and the relevant market area, and into a facility that is almost double in size from its current one. But Toyota Motor Sales's approval of this relocation only benefits its own self-interest to enforce its otherwise unenforced dealer imaging requirements in a tightly packed, mature, and well-served metro market, and Hooman Toyota's desire to hugely profit, all at the expense of heavily-invested dealerships like Carson Toyota and the consuming public.

Carson Toyota meets it burden of establishing that good cause exists to not permit the relocation because the unique circumstances show that the relocation will negatively impact the dealer network, placing Carson Toyota's and Cabe Toyota's permanent investments at risk, promote unfair competitive behavior in a more-than-adequate market, and injure consumers such that it is not in the public interest.

Both Carson Toyota and Cabe Toyota relied on the permanency of the 35 year old dealer network configuration in making their decisions to invest $35 million and $8 million, respectively, in their current location facilities. This investment will be threatened by the expected uncertain degree of negative impact on the retail vehicle business. The relocation will considerably reduce Cabe Toyota's already-minimal market advantage, provide Hooman Toyota with an unfair competitive advantage, bring excessive facility capacity to sufficiently-sized distribution network, shift idle-time costs from that surplusage to the surrounding dealers, and cannibalize their sales.

The consumers are not merely at risk, but will face predictable consequences. The relocation will establish a less convenient dealer network. The surrounding dealers will shift forced idle-time costs to the consumers by slashing their own operating costs through job terminations and eliminating customer services. And the expected price-wars will promote unfair business practices that already exist because of the highly competitive Los Angeles market.

While Hooman Toyota may complain of the shortcomings of its facilities and location by highlighting specific customer complaints, these are merely acute and illusory issues with no material facility or location deficiency. And these issues are overridden by the aggregate consumer survey scores that show otherwise.

But Hooman Toyota is not the only party that will gain from this relocation. TMS acted opportunistically: instead of having just one brand new, image-compliant facility from Carson Toyota, it will stand to gain two more image-compliant facilities from Cabe Toyota and Hooman Toyota simply by approving the relocation. But TMS approved the relocation. It has not conducted a market study in over 20 years despite significant changes to the automobile market and the Toyota brand. It originally denied the relocation because of the serious concerns it had about Hooman Toyota's financial viability, but it then approved it approximately one month after it sent a notice to cure those financial issues, and only after Hooman Toyota contributed one-half million dollars towards TMS's defense costs of any potential protest. And TMS did so without analyzing any pro forma or planning potential though the California Legislature finds both to be materially important and TMS's own policies and procedures require a pro forma before approval.

When balancing TMS's opportunistic actions with the consequential impact on its dealer network and the overwhelming anticompetitive effects on its consumers, the relocation would not increase competition and therefore not be in the public interest. For these reason explained more thoroughly below, Carson Toyota respectfully requests this Board to sustain its protest.

II. Statement of the Case

A. Carson Toyota is a family-owned and operated business that has been located off of the I-405 freeway in Carson, California for over 38 years.

Carson Toyota has served the Toyota brand and its customers since April 1975. [FF 1.] The Skinner and Pennington families, who have owned the dealership at its same location off of the I-405 freeway, undertook a massive real estate acquisition and renovation of their dealership, requiring them to completely demolish their existing facilities to build their new one. [FF 2-5; 15.] After its completion in late-2008, and over $30 million later, it is now revered by TMS as a "fantastic facility" and "one of the finest facilities within its dealer network." [FF 14-16.]

Mr. Albert (Bert) Skinner, Carson Toyota's original purchaser and current dealer principal, is a veteran in the automobile business having worked in it since 1955 and owning several other Toyota stores. [FF 6-9.]. Mr. Martin (Marty) Brylski has run the dealership's day-to-day operations as its President and Chief Operating Officer since 2004. [FF 10; 12.] He first joined the dealership in 1984 for a quick two-year stint, then rejoined the dealership in 1994 as its sales manager, and within a year became its general manager. [FF 11.]

Carson Toyota is characterized as a relatively large and strong-performing dealership. [FF 3.] By late-2012, the dealership generated over $133 million in sales, selling 3,170 new Toyota and Scion vehicles and 1,142 used vehicles, and servicing approximately 24,407 vehicles. [FF 17.] Its strong performance can be attributed to its team of139 employees, including 21 sales associates and 24 qualified technicians. [FF 13]

B. Cabe Toyota is also a family-owned business that has been located in Long Beach, California for over 44 years.

Cabe Toyota has been in business even longer, since 1969, and has been and is owned by the Cabe family. [FF 18; 21.] It is a small dealership by comparison: by late-2012, Cabe Toyota generated over $61 million in sales, selling 1,507 new Toyota and Scion vehicles and 495 used vehicles, and servicing approximately 14,573 vehicles. [FF 32.] But it prides itself on being family-owned and operated primarily by John Cabe, Cabe Toyota's general manager since 1981 and owner since 1988. [FF 19-21.]

Mr. Dan Duddridge – Mr. Cabe's son-in-law – is the dealership's operations manager whose responsibility is to work and coordinate with the dealership's departmental manager on specific, project-oriented issues and report to Mr. Cabe. [FF 24.] Mr. Cabe and Mr. Duddridge are joined by an experienced team of employees, some of who have worked at the dealership for over 40 years, but on average have worked there for 10 years. [FF 23.]

Cabe Toyota is, and has been since its inception, located approximately one-half mile south of the I-405 freeway off of Long Beach Boulevard in Long Beach, California. [FF 25.] It is approximately 3.6 miles away from Carson Toyota, and takes approximately 5.3 minutes to drive between the dealerships. [FF 31.]

In 2003, Cabe Toyota considered relocating to three different locations, including the auto mall located in Signal Hill, California, but TMS rejected all those locations because they were all protestable. [FF 26.] Instead, Cabe Toyota decided to expand its operations by acquiring parcels surrounding its existing dealership in 2006. [FF 27.] In addition to the original parcel, which now hosts the service department, Cabe Toyota acquired and operates from three other, non-contiguous locations. [FF 28-29.] In its effort to harmonize its operations, the dealership successfully partially blocked 29th Street to provide for a pedestrian right-of-way separating the sales and service departments, and it also narrowed Columbia Street though it still remains open to vehicular traffic. [FF 29.] In 2010, Cabe Toyota worked closely with TMS to plan renovations to its existing facilities to comply with TMS's Image USA II facility guidelines. It started construction that same year. [FF 30.]

C. Though Hooman Toyota is a recent newcomer as an investor-owned entity, a Toyota dealership has occupied that Long Beach location for over 35 years.

In January 2008, Hooman Toyota acquired the Toyota dealership located at the Traffic Circle in Long Beach, California with Mr. Hooman Nissani at the helm as majority owner and, what was represented to TMS, two minority owners. [FF 33.] Currently, the dealership is owned only by Mr. Nissani and an original minority owner. [FF 36.] That location was first occupied by Palmers Toyota around 1978 or 1979 and is separated from Cabe Toyota by the geographical feature Signal Hill. [FF 34.] The dealership is located 3.1 miles from Cabe Toyota and 6.7 miles from Carson Toyota, and takes approximately 4.4 minutes and 9.5 minutes on average to drive from Hooman Toyota to each dealership, respectively. [FF 46.] By late 2012, it generated over $72 million in sales, selling 1,781 new Toyota and Scion vehicles and 590 used vehicles, and servicing approximately 23,829 vehicles. [FF 47.]

Mr. Nissani works for the Hooman Automotive Group, which in addition to the Hooman Toyota dealership, also owns the Hooman Nissan dealership. [FF 35.] Prior to purchasing Hooman Toyota, Mr. Nissani acquired the Century City Pontiac Buick GMC dealership in 2003, but only operated that dealership for five years, closing in the beginning of 2009. [FF 37-38.]

Mr. Nissani attributed much of Hooman Toyota's success to his self-praised VIP Program, which he first started at his former Buick, Pontiac, GMC store, and which he implemented upon opening Hooman Toyota. [FF 48.] The VIP Program is included with the purchase of any vehicle from the dealership, and the services provided that are contingent upon a vehicle purchase include oil changes, car washes, and replacement tires for life. [FF 49.] Mr. Nissani intends to continue to offer the VIP Program if Hooman Toyota is permitted to relocate. [FF 50.]

The dealership originally operated from two parcels on the Traffic Circle, one occupied by the sales facility and the other by the service facility. [FF 41.] It performed minor upgrades to these facilities, including adding three service write-up areas to the then-existing four areas, and building an additional area to move some service write up areas to increase waiting room space. [FF 45.] Hooman Toyota also operates from the "Orizaba location," which it uses to deliver its new vehicle inventory, perform pre-delivery inspections, and detail its used vehicles. [FF 42.] Over time, Hooman Toyota entered into several short-term leases for off-site storage facilities, but since it acquired the former Coast Cadillac dealership – the site for the proposed relocation – the dealership now uses that facility as off-site storage. [FF 43.] The dealership utilizes two outside services for car washing, neither of which it owns or leases, but rather are open services to the public. [FF 44.]

But even before it opened its doors for business, Hooman Toyota encountered several financial issues that ultimately required TMS to consult with a third-party auditor to unweave the dealership's evasive financial disclosures. [FF 39.] As of June 8, 2012, over three years after opening the dealership, Hooman Toyota continued to operate without curing all of the financial deficiencies outlined by TMS and its third-party auditor. [FF 40.]

D. Hooman Toyota proposes to relocate its Long Beach location after 35 years.

The Carson Toyota, Cabe Toyota, and Hooman Toyota dealerships have coexisted in the same respective locations and developed their own respective markets over the past 35 years. [FF 51.] But Mr. Nissani sought to disrupt that equilibrium upon acquiring Hooman Toyota, and represented that TMS knew that his "goal from day one has been to relocate this location." [FF 52.] At the latest, on February 12, 2009, Mr. Nissani expressed his desire to relocate Hooman Toyota specifically to the former Boulevard/Coast Cadillac dealership that is now the subject of this protest.

[FF 53.] Around June 24, 2011, Mr. Nissani formally submitted to TMS Hooman Toyota's proposal to relocate to the former Cadillac dealership located at 3399 E. Willow Street, Long Beach, California. [FF 54.] The Proposed Relocation is located 2.2 miles from Cabe Toyota and 5.8 miles from Carson Toyota and, takes takes approximately 2.8 minutes and 8.0 minutes on average to drive from the Proposed Relocation to Cabe Toyota and Carson Toyota, respectively. The relocation would make the Cabe Toyota and Hooman Toyota the closest dealerships as measured by drive time in the RMA and its surrounding area. [FF 55.]

On July 27, 2012, TMS approved Hooman Toyota's request to move to the Proposed Relocation contingent on several requirements, including resolution of all protests against the relocation in Hooman Toyota's favor, complying with TMS's Image USA II facility guidelines, submission and approval of a pro forma, and deposit of $500,000 by Hooman Toyota to TMS to cover the dealership's contribution to TMS's defense of any protest. TMS also approved relocating Hooman Toyota to 2679 Redondo Avenue, Long Beach, California, which is the property adjacent to the former Cadillac dealership. [FF 56.] By letter dated August 2, 2013, TMS gave notice to the dealers within the RMA of its approval to relocate Hooman Toyota to the Proposed Relocation. [FF 57.]

E. Procedural Background

On August 20, 2013, in response to TMS's August 2 letter and notice, Carson Toyota timely filed this protest with the Board challenging TMS's approval to relocate Hooman Toyota to the Proposed Relocation under *Vehicle Code* section 3062. [FF 58.] Cabe Toyota also timely filed a protest. [FF 59.] A hearing was held from June 3 through June 21, 2013 before Victor D. Ryerson, Administrative Law Judge for the Board, in Sacramento, California. [FF 60.] On June 27, 2013, ALJ Ryerson, at the request of the parties, conducted a site visit encompassing the Carson Toyota, Cabe Toyota, Hooman Toyota, and Proposed Relocation properties and the immediate environs. [FF 67.]

III. Legal Standard

When a seasonable protest has been filed in response to a franchisor's notice of its intention to relocate an existing dealership within the RMA under *Vehicle Code* section 3062, as is present here, the Board must hold a hearing to determine if "good cause" has been established for not relocating a franchise for the same line-make. (Veh. Code § 3063.) Carson Toyota has the burden of proof to establish good cause under *Vehicle Code* section 3063. (Veh. Code § 3066(c).)

Under California law, good cause is established for not relocating Hooman Toyota to the Proposed Relocation when:

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

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

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

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

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

(Veh. Code § 3063.)

IV. Carson Toyota and Cabe Toyota both made substantial and permanent investments in their respective dealerships in reliance on the the permanency of the existing dealer network and the predictable business environment associated with it.

Permanency is an important factor, especially in this unique and sensitive industry, because it provides a set of ground rules, establishes a level playing field, and acts as an "equalizer" for the dealerships. In this context, it takes on two forms. This industry depends on significant and permanent investment by its owners, largely through its facilities – this is the first form of permanency. But the second form of permanency - a proven, cemented dealer network – is crucial to spur this type of investment. The more constant a dealer network is, the more predictable it becomes, and in turn, the more likely a dealer-owner will make permanent investments in his or her dealership. By contrast, any disruption in the permanency of a dealer network will also result in a corresponding aversion to investment or risk to existing investment. Therefore, dealerships will work within the limitations presented by a permanent dealer network in exchange for a more reliable investment or level playing field. And in doing so, they necessarily rely on the permanency of the dealer network when they make these investments.

This is the case for Carson Toyota and Cabe Toyota. No one disputes that the family-owned and -operated Carson Toyota and Cabe Toyota dealerships have coexisted with the past and present Hooman Toyota dealership at their same respective locations for over 35 years. [FF 71.] Understandably, both Carson Toyota and Cabe Toyota justifiably relied on permanency of the existing dealer network, and the predictable business atmosphere associated with it, when they substantially invested in their dealerships. [FF 72-73.]

And both did so at a considerably greater cost that corresponds to improving existing facilities. This cost involves both the scarcity of land available around their facilities and the tremendous expense of land within a metro market. And the cost is not limited simply to monetary costs; these dealerships also endured the hardship that comes with renovating existing facilities while also occupying and operating a viable business from them.

Carson Toyota particularly sacrificed for over a year as it completely leveled its old building to build its new one. It also suffered the unfortunate repercussions of completing its new facility, costing over $30 million, immediately before the bottom fell out from underneath the automobile industry. And it has not returned to the same level of profitability as it had before it finished constructing its new facility, and has yet to see the full return on its investment. [FF 188.]

As for Cabe Toyota, it attempted to relocate, but was ultimately denied by TMS. Instead, it worked within the limitations of the existing dealer network, and acquired land around its existing facility like Carson Toyota. And it did so not only in reliance on the permanency of the dealer network, but also in reliance on TMS's denial that Hooman Toyota would move to the Proposed Relocation. [FF 74.]

These same rules apparently do not apply to Hooman Toyota, and it seeks to circumvent the limitations placed on it by the permanency of the existing dealer network both in terms of space constraints and costs associated with a metro market – the same limitations that applied to both Carson Toyota and Cabe Toyota. But the relocation will disrupt the permanency of this well-established dealer network relied upon by both Carson Toyota and Cabe Toyota at the risk of their permanent investments.

But unlike Carson Toyota and Cabe Toyota, which have proven themselves to be stable and successful business for well-over 35 years, the investor-owned Hooman Toyota has demonstrated that it is uncertain, transient, or otherwise lacks permanency to support its relocation. The dealership exhibited financial issues even before it opened for business, and purportedly cured those deficiencies only about one month before TMS approved the relocation. Its lack of investment in its existing facilities casts doubt on the legitimacy of the relocation. And while Mr. Nissani claims that he intends to purchase the Proposed Relocation property, no evidence shows this commitment. Therefore, this factor weighs heavily in favor of Carson Toyota.

A. Carson Toyota invested over $35 million in its facilities at its current location in reliance on the permanency of the existing local dealer network configuration.

Carson Toyota went to great lengths to invest and improve its facilities at its current location. Though originally the real property owner at the time would not sell the dealer-occupied property, Carson Toyota enlisted help from the City of Carson's Redevelopment Agency to purchase the property and in turn sell it to the dealership. [FF 75.] The Skinner and Pennington families, through its dealer-related entity Carson Real Estate Leasing, LLC, purchased that property in May 2004 for approximately $8.5 million, and ultimately acquired about ten acres of land for the dealership's facilities. [FF 76.] It then started construction of its new facilities around March 2007, and demolished its existing facilities to build a completely new one, which was completed around December 2008. [FF 77.] The construction costs of the new facility totaled $20,418,152. [FF 78.]

Upon completion of the new facility, Carson Toyota invested $1,539,500 in all new service equipment, $1,242,362 in new furniture, fixtures, and signs, and $230,688 in parts & accessories equipment. [FF 79; 81-82.] It later invested an additional $148,891 in building and improvements.

[FF 80.] As a result of these significant improvements, Carson Toyota paid monthly rent of $217,347 to the dealer-related entity, Carson Real Estate Leasing, LLC. Roughly $187,000 of the rent was used to cover the monthly payments on the loans for the real estate acquisition and facility and construction costs invested by the Skinner and Pennington families. [FF 83.]

In total, including the foregoing costs and the original investment and the dealership's retained earnings, the Skinner and Pennington families' dealer-related investments, though not inclusive, was $35,822,044. [FF 84-86.]

B. Cabe Toyota invested over $8 million in its facilities at its current location in reliance on the permanency of the existing local dealer network configuration.

Cabe Toyota also went to great lengths to work within the constraints of its existing location in its renovation. First, it unified its non-contiguous parcels at its existing location by successfully partially blocking 29th Street to provide for a pedestrian right-of-way separating the sales and service departments and also successfully narrowing Columbia Street. [FF 87.] In August 2008, the Cabe family purchased a parcel next to its parts building for $1.8 million. [FF 88.] Then in September 2009, they purchased the real estate and corresponding parts building for $1.4 million. [FF 89.] Next in April 2012, the family purchased a property with a house on it, which was eventually torn down to be utilized to store its inventoryfor $400,000. [FF 90.]

In addition to these land acquisitions, the Cabe family intends to invest approximately $4.6 million in costs to renovate existing facilities and build new ones. [FF 91.] As of May 2013, the family has already spent $613,875 in construction costs. [FF 92.] As a result of its remodel, Cabe Toyota expects its monthly fixed costs to increase between $28,000 and $31,000 over the next 20 years. [FF 94.]

Cabe Toyota's investments already made in land acquisition and facility construction costs through May 2013 alone, though not inclusive, total $4,213,875. It estimates that an additional $3,985,125 is required to complete its remodeling based on its proposed loan with Toyota Financial Services, bringing its total estimated investment to approximately $8.2 million. [FF 93.]

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C. Hooman Toyota's material financial issues and lack of investment in its existing facilities demonstrate that the investor-run dealership is uncertain, transient, or otherwise lacks permanency to support its relocation.

1. By conditioning its approval of the relocation on Hooman Toyota's demonstrated ability to meet TMS's capitalization requirements, TMS finds that Hooman Toyota's permanency and investment is material to this relocation.

Hooman Toyota is a relative newcomer to the Toyota family and the RMA, having only acquired the dealership in early 2008. [FF 95.] And the dealership's fiscal condition is a stark contrast from the veteran Carson Toyota and Cabe Toyota. Hooman Toyota's financial troubles started early on, even before it opened its doors for business. [FF 96.] On September 23, 2008, TMS first contacted Mr. Nissani about its concerns regarding the dealership's financial issues. TMS sent follow-up contacts to Mr. Nissani on October 15, 2008, November 21, 2008, January 28, 2009, February 9, 2009, March 4, 2009, and March 11, 2009. And as of the letter dated July 7, 2009 – over a year and a half after the dealership's financial issues started – Mr. Nissani did not provide TMS with an adequate response. This is surprising for someone who TMS characterized as "very involved" in the dealership as an "owner/operator, someone that's there every day and working in the business every day." [FF 97.] As a result of both his failure to respond and the severity of the dealership's financial troubles, TMS conducted a financial review on Hooman Toyota's accounting practices as far back as 2008. It utilized a third-party accounting firm in unique instances, such as this one, where there are multiple, reoccurring financial issues over an extended period of time. [FF 98.]

One measure that TMS monitors closely and finds very important is a dealer's capitalization especially during an economic downturn. Dealers require a lot of capital to pay for large ticket items. And it is a "big concern" for multiple-business owners who take money out of their dealerships to fund their other less successful ventures. [FF 101.] Therefore, TMS oftentimes imposes net worth requirements on a dealer. Its purpose is generally to ensure that the dealership maintains its capital rather than divesting the capital out to some other business. TMS imposed this requirement on Hooman Toyota. [FF 102.]

Upon review, TMS was concerned with Hooman Toyota's misrepresentation and failure to initially capitalize the dealership. Hooman Toyota's investors were required to infuse the dealership with $7 million, but the investors did not have money and fell well short by $2.7 million. This was never disclosed by Mr. Nissani. [FF 99.] But as it turned out, the investors represented to TMS were not the only investors in the dealership. TMS discovered that other individuals gave money to the dealership, but Mr. Nissani concealed those individuals. And now a lawsuit filed by Hooman Toyota's "silent investors" is pending against the dealership, Mr. Nissani, and another investor – Sean Leoni – who has no stated ownership interest in the dealership. [FF 100.]

Having failed to keep his fiscal house in order at the Hooman Toyota store, TMS became even more alarmed when it learned that Mr. Nissani acquired an open point Nissan store. [FF 103.]

His Century City Buick, Pontiac, GMC dealership fared no better; Mr. Nissani took that dealership's used vehicle inventory upon its closing and transferred it to Hooman Toyota. Hooman Toyota then grossly inflated the inventory from its current market value. [FF 104.] In connection with its overinflated used inventory, the dealership also included and reported to TMS several very expensive, used vehicles as assets, including a $350,000 Rolls Royce Phantom, that were actually being used personally by Mr. Nissani and his partners. [FF 105.] As a result of overstating the used vehicle assets and failing to initially capitalize the dealership, Hooman Toyota misrepresented to TMS that it was working above its net working capital requirements and net worth requirements – yet another misrepresentation. [FF 106.]

While TMS may try to blame the economic downturn for these issues, Mr. Durby truthfully characterized them as "bad business decisions," which were then followed by a series of "bad business decisions" that exacerbated the financial problems that Hooman Toyota faced. [FF 107.] And these bad business decisions led to significant consequences. Hooman Toyota's insufficient capitalization led to "extremely out of the ordinary" business practices, such as writing checks in advance with the hope of having sufficient funds to cover them, but then voiding those checks because of insufficient funds. One purpose for these checks was to payoff vehicles. [FF 108.] Hooman Toyota's financial situation became so bad at one point that it was unable to cover the money that it owed to its floor plan lender for its new vehicle inventory, or in other words, the dealership sold its new vehicles "out of trust." As a result, Hooman Toyota's flooring lender suspended its flooring. [FF 109.] As of December 8, 2009, Hooman Toyota's finances were so dire that it entertained seeking a qualified buyer if it was unable to adequately remedy the dealership's ongoing financial and operational concerns. [FF 110.]

As a solution to these capital issues, Mr. Nissani committed to replacing one of Hooman Toyota's initial investors – Geraldine Weber – with a new investor, Jay Zamon, who supposedly intended to add $1.25 million in unencumbered capital to the dealership. Despite Mr. Nissani's commitment, Mr. Zamon was never added as an investor – the third misrepresentation. [FF 111.]

And much like the mystery of the dealership's initial capitalization, TMS found an additional, unsubstantiated $1,333,017 in the dealership's stock account. TMS never identified the source of this capitalization. [FF 112.]

When asked the number of times that TMS consulted Mr. Nissani on these issues, TMS's response was "I honestly can't count. It's dozens. It's not a small number." [FF 113.] Despite these numerous consultations, on June 22, 2011, TMS ultimately sent a Notice to Cure to Mr. Nissani, requiring Hooman Toyota to cure its ongoing financial issues. This notice is a "serious letter" that provides for curing the deficiencies within a specific timeframe and also outlines the implications if the deadline is not met. One of the implications is termination. [FF 113.]

These numerous examples illustrate systematic behavior that is contrary to any sort of permanency, whether it is related to the commitment of dealer network or to the investment of the dealership itself. His countless misrepresentations erode Mr. Nissani's integrity, which questions his representations related to the Proposed Relocation. But his lack commitment to the dealer network is unquestionable. By reeling in many investors to capitalize the dealership, he shifts all the risk of his "bad business decisions" away from him and on to his investors. This explains why he acquired Hooman Toyota while the Century City store was failing, and why he acquired the Hooman Nissan store while the Hooman Toyota store was failing. This risky and uncertain behavior goes towards good cause to not disrupt the permanency and stability of the existing dealer network.

And TMS recognized Mr. Nissani's risky and questionable business decisions. It represented to him that it would not evaluate its proposed relocation until Hooman Toyota cured all of its capitalization deficiencies despite Mr. Nissani's insistent pleas and optimism. TMS stated, "It goes back to that foundation of the business. We want the foundation to be strong before we can build on it." [FF 115.] Because of these significant financial issues, and acknowledging the obvious financial burden related to relocation, TMS questioned whether Hooman Toyota could afford it. In an unprecedented move, TMS required Mr. Nissani to provide a written acknowledgment and commitment for the source of the relocation and facility construction costs – again shifting the risk to someone else. [FF 116.] But as of June 8, 2012 when TMS sent its second extension to its original Notice to Cure letter – over three years after opening the dealership and one only one month before TMS approved the relocation – Hooman Toyota continued to operate without curing all of its financial deficiencies. [FF 117.]

2. In addition to its financial issues, Hooman Toyota's lack of investment and permanency in its existing facilities casts doubt on the legitimacy of the relocation.

This issue relates directly to the second form of permanency regarding the investment in the dealership. But Hooman Toyota remains in substantially the same form as it was back in 2008. The dealership still operates from the two parcels on the Traffic Circle. [FF 118.] It now also operates from the "Orizaba location" and the Proposed Relocation, but there is no evidence that any investments were made to improve those facilities. [FF 119, 121-122.] And only minor upgrades were made to the sales and services facilities. [FF 120.] Here we see no commitment by Mr. Nissani or his investors to make a more permanent investment into the dealership. Instead, Hooman Toyota intends to shift the presumably higher costs of those investments that would have been made at the current location and allocate its risk to Carson Toyota, Cabe Toyota, and surrounding dealers by disturbing the dealer network as a result of the relocation. But Carson Toyota and Cabe Toyota should not assume those costs simply because they chose to make permanent investments in their dealerships.

3. Mr. Nissani entered into a lease with an option to purchase the Proposed Relocation and its facilities with a substantially reduced rent factor and below-market sale price, but no evidence shows his commitment to purchase the property.

Hooman Toyota will realize significant fixed reduction costs amounting to a windfall if it is permitted to relocate. Mr. Nissani entered into an agreement to lease the Proposed Relocation and associated facilities. [FF 123.] The monthly base rent for the Proposed Relocation is $36,000. [FF 124.] Caliber Bodyworks, Inc. – a third-party body shop – subleases the Proposed Relocation from

Hooman Toyota to use for its body shop business. Caliber's monthly base rent under the sublease is $15,000. [FF 125.] Therefore, Hooman Toyota's net monthly rent is $21,000. [FF 126.] This amounts to a fixed costs savings of around 60% if it is permitted to relocate. [FF 127.]

By comparison, Carson Toyota's monthly rent that is allocated to the construction and real estate loans totals $187,000 – almost 9 times as much. And Cabe Toyota's renovation costs alone are estimated between $28,000 and $31,000. Therefore, the Proposed Relocation will place Hooman Toyota at a significant competitive advantage while also placing Carson Toyota's and Cabe Toyota's permanent investments at risk.

And at best, Mr. Nissani's claim that he will purchase the Proposed Relocation is speculative. Mr. Nissani never testified that he executed an option to purchase the Proposed Relocation for $8,250,000, and the evidence shows an incomplete agreement with no indication of the parties executing the agreement and no attached and incorporated "Option Agreement" referenced therein. But Mr. Nissani testified that the seller of the Proposed Relocation represented to him that this was a "good deal because he thinks it's worth between $12 to $13 million, and absed it on if he had to build it all over today." [FF 128.] Even if he does purchase the property, it will be a windfall.

There is minimal indication of any other permanency or commitments in any other aspect of the Proposed Relocation. For instance, though TMS approved Hooman Toyota to relocate to the adjacent 2679 Redondo Avenue, Long Beach, California, there is no evidence that Mr. Nissani or Hooman Toyota committed to that property in any way other than purportedly signing an LOI [Letter of Intent]. [FF 129.] Despite TMS conditionally approving the relocation, Hooman Toyota provided no evidence to show any commitment to fund the Proposed Relocation renovation, which is estimated to cost approximately $2.95 million, other than the $1 million tenant improvement allowance. [FF 130.] Hooman Toyota also failed to show permanency related to expected future sales and financial performance. Hooman Toyota did not submit a Pro Forma. [FF 131.] And TMS never considered any planning potential related to the Proposed Relocation. [FF 132.]

Carson Toyota established its burden that the permanency of investment good cause factor weighs heavily in its favor based on the permanency of the dealer network, permanency of its $35 million investment, and minimal to no permanency by Mr. Nissani, Hooman Toyota, or the Proposed Relocation.

V. The relocation will have an unpredictable degree of negative impact on the retail motor vehicle business but a predictable loss of pro-consumer services and a less convenient dealer network for the consuming public in the relevant market area.

A. A dealership's degree of competitive advantage directly corresponds to its degree of territorial advantage.

Dealerships require a certain degree of market power to support their operations, build nice facilities, be able to answer consumer questions, and have large inventories. Their degree of market power is derived from their degree of territorial protection. [FF 133.] Proximity advantage is important to dealers. They prefer to sell to buyers who are close to their respective stores to obtain those buyers' future service business. [FF 140.] And dealers generally exhibit this behavior provided that they have a territorial advantage.

Hooman Toyota's expert witness, Mr. Stockton, testified that protecting a certain degree of market power enables dealerships to compete more effectively. As an example, he included an article in his expert report, and explained that an entity engaged in anticompetitive practices was able to provide extensive, uncharged consumer services. When the United States Supreme Court found that those practices were illegal, the expectation was that competition would increase. But when that entity lost its market advantage obtained by engaging in those anticompetitive practices, the entity stopped providing those customer services, and the market actually became less competitive. [FF 134.] Thus, Mr. Stockton concluded that not all competition necessarily leads to a net competitive result: "Any increase in competition will put pressure on other forms of competition. So if a price is pushed down, then the dealership's ability to increase service or to provide more unchanged amenities is under pressure." Therefore, simply because prices may decrease if the relocation is allowed does not mean that competition increases. [FF 135.]

But in reality, no dealership has an exclusive territory. Instead, a dealership relies on a manufacturer to establish its degree of territorial protection. Therefore, there is a friction between the manufacturer and dealer because of this uneven bargaining power favoring the manufacturer, which creates an incentive for the manufacturer to behave in an opportunistic fashion. This friction exists in the real world and is theoretically supported. [FF 136.] Despite this incentive, manufacturers generally cannot simply limit dealer market power, such as by crowding geographic areas with dealers, because these practices are prohibited by law in most states. This aspect of the industry distinguishes it from other retail markets. And this is one reason why the New Motor Vehicle Board exists – to protect a dealership's territorial distinction in those instances where the manufacturers act opportunistically. [FF 137.]

With respect to Toyota, it assigns dealerships with a Primary Market Area based on a dealerships geographical proximity to census tracts. TMS does not restrict its dealers to sales within its PMA, and they can pursue business beyond their assigned market. And the interest of TMS is to quantitatively sell as many automobiles as it can. As a result, dealerships experience a lot of cross-sell or cross-shopping where one dealer will capture sales in another dealer's PMA. [FF 138.]

Dealerships enjoy the best market advantage when their assigned territory, or PMAs here, are large and square, rectangular, or round, because it provides them a territory in which they can be active at its center. In contrast to a long and narrow PMA, a typical, optimal-shaped PMA provides a dealership with a market advantage by being in the center and spatially separated from other dealers. [FF 139.]

B. Toyota generally has a high market share, with one of the highest being in the Los Angeles Metro area, and its dealerships face high levels of intrabrand competition.

Toyota is among the highest ranked brands in terms of market share in the country, even besting all other brands in the years 2008 and 2009, but its ranked slipped in the following years. As of 2012, it is ranked third with 12.7% market share in the nation, only 0.1% behind Chevrolet. [FF 141.] Toyota performs much better in California than nationally, and it is ranked first in the state with 21.1% market share in 2012. [FF 142.]

Toyota is even more competitive in Southern California with a 26.25% market share in the Los Angeles Markets (defined as Los Angeles-South Bay, San Fernando, Orange County, Inland Empire, and San Gabriel) without the Hooman Toyota and Cabe Toyota PMAs, and a 28.21% market share in the 10 Mile PMAs (defined as the full PMAs that fall wholly or partially within the RMA) without the Hooman Toyota and Cabe Toyota PMAs. The Los Angeles Metro area is one of the best-performing Toyota markets in the country, and it sets quite a high standard. [FF 143.] TMS characterizes the Los Angeles market as "a very good market," "a critical market," and "a successful market" that "has been doing well for decades." [FF 144.]

Because of this high market share, Toyota dealers face an extraordinarily high level of competition amongst each other, or intrabrand competition, that results in more "cannibalization" of their sales from other Toyota dealers. [FF 145.] And Toyota dealers recognize this level of competition: "Seems like when the people come, they pretty much know they want to buy a Toyota because Toyota is a great car and has a great reputation." These dealers want the public to know that they are a Toyota dealer. [FF 146.] Because of this high intrabrand competition, these dealers try to distinguish themselves from other Toyota dealers by engaging in practices such as offering services like free car washes or the VIP Program. [FF 147.]

C. The RMA is well-represented with eight Toyota dealers that all aggressively and effectively compete against other brands and against each other.

Toyota delineates twelve geographic regions in the United States, but two of those are overseen by private distributors while the remaining ten fall under TMS's management. The Los Angeles region is one of those ten that TMS manages, and it encompasses the southern half of California from roughly Santa Barbara, Bakersfield, and Bishop south to the San Diego-Mexico border. 76 dealers fall within the Los Angeles region. [FF 148.]

The RMA is very concentrated with eight Toyota dealers located within it, and they include Carson Toyota, Cabe Toyota (Long Beach), Hooman Toyota (Long Beach), South Bay Toyota (Gardena), Penske Toyota (Downey), Norwalk Toyota, Power Toyota Cerritos, and Power Toyota Buena Park. Twelve Toyota dealers' PMAs lie within the RMA, and include in addition to the ones already mentioned, DCH Toyota of Torrance, Toyota Place (Garden Grove), Elmore Toyota (Westminster), and Toyota of Huntington Beach, though the actual dealership do not fall within the area. [FF 149.] Toyota has the most dealers within the RMA compared to competitive group franchises, followed by Honda with six. 56 total competitive franchises lie within the RMA. [FF 150.]

The RMA is also densely populated with approximately two million people and approximately 600 thousand households. But the population level in the RMA is expected to rise only modestly at a rate of less than 3% over five years. [FF 151.] The RMA also faces unique geographic constraints, and does not encompass a full ten mile radius. Several census tracts within the RMA have little to no population or registrations because of large commercial, industrial, and government areas such as the Port of Long Beach, Long Beach Naval Complex, the Long Beach Airport, and the Seal Beach National Wildlife Refuge, and of course there is the Pacific Ocean as a geographical barrier to the south. [FF 152.]

In particular, the RMA is concentrated with several large and highly competitive Toyota dealers, especially those surrounding Cabe Toyota. [FF 154.] The RMA's market share of Toyota vehicles is rather high at 24.9% in 2012 – higher than the California average and about double the national average – indicating a highly competitive market. [FF 153.] The RMA dealers' market penetration of Toyota vehicles is among the highest, if not the highest, in the country. Both individual Toyota dealers within the RMA (with the exception of Penske Toyota) and the RMA dealers collectively exhibit more than adequate market sales penetration even when compared to aggressive benchmarks. [FF 155.] These dealers sell a lot, and they do very well representing the Toyota brand, which is in line with Toyota's goal to sell as many cars as possible.

D. Cabe Toyota particularly faces a challenge with the smallest PMA, resulting in virtually no market advantage and is inherently disadvantaged by TMS's unspoken policy not to relocate a dealer within another dealer's PMA.

Cabe Toyota's PMA is a long narrow shape where its areas of responsibility lie at the top and very bottom of the geography. The PMA is exactly one census tract wide at the waist with a distance of about 1.2 miles and a distance of about seven miles from north to south. [FF 156.] As a consequence of this odd shape, it does not have its own exclusive zip code. [FF158.] It is largely dominated by the Port of Long Beach and lower income households to the south. Separating it from Hooman Toyota is the geographical feature known as "Signal Hill." [FF 157.]

It has the least number of Toyota registrations in 2012 out of all 33 PMAs in the Los Angeles-South Bay, Orange County, and San Gabriel markets. It also has the smallest number of expected registrations measured at the Los Angeles-South Bay, Orange County, and San Gabriel markets in 2012 within those markets. With respect to units in operation, Cabe Toyota has the smallest number out of any dealer in the Los Angeles region. [FF 159.]

By contrast, its surrounding dealers are more regularly shaped with the dealer located at the center of the PMA. Cabe Toyota is bordered by Carson Toyota at 3.6 miles to the west, Hooman Toyota at 3.1 miles to the southeast, and Power Toyota Cerritos at 6.3 miles to the north. [FF 156.]

These circumstances present Cabe Toyota with a very difficult situation. First, its very small size and particularly odd shape significantly diminishes any location advantage and proportionally diminishes its market advantage it may have. [FF 156.] This means that it cannot attract customers close to its dealership as well as other, dealers with a larger and more normal-sized PMA. Second, it has difficulty competing within its PMA because of its relative location to its surrounding, competitive dealers and the inherent cross-sell in a metro market, especially because of its minimal location advantage.

Its PMA's small size not only affects its competitive advantage, but it also affects its territorial protection. TMS has an unspoken policy that it will not approve any relocation if the relocating dealer requests to move into another dealer's PMA. TMS's general manager of the Los Angeles region, Mr. Eroh, characterized it as a "non-starter" in the approval process. [FF 160.] Therefore, any dealer with a large PMA enjoys more protection from any encroachment of any potential relocating dealer simply by virtue of being larger. In other words, a large PMA is "buffered" by a relocation and more protected by TMS's relocation approval process.

This is not the case for Cabe Toyota. Its PMA is exactly one census tract wide at its narrowest point, which also happens to be where the dealership is located. Thus, based on TMS's unspoken policy, Cabe Toyota has no territorial protection from a relocation, especially this one where the Proposed Relocation is directly east from its narrowest point.

E. Carson Toyota's, Cabe Toyota's, and Hooman Toyota's facilities generally meet or exceed TMS's guidelines, and their deficiencies reflect the inherent constraints of a metro market.

The Carson Toyota, Cabe Toyota, and Hooman Toyota dealerships exhibit no extraordinary facility deficiencies generally found in metro markets. Generally, all three dealerships, including Carson Toyota and its new facility, show that they are deficient in parking. Hooman Toyota lacks only one sales display unit, and Cabe Toyota and Hooman Toyota both do not meet their land requirements. But all of these supposed shortcomings are inherent and typical in any metro market. [FF 161.] Land is scarce and expensive. TMS understands these limitations, and will generally overlook its land guidelines for those metro dealers. [FF 229.] And any theoretical shortcomings associated with those facility deficiencies can be measured by customer surveys. Good customer ratings will show that a dealership has overcome any facility deficiency. [FF 230.] As explained more thoroughly below, customers from all three dealerships are actually very satisfied based on their generally high survey scores. [FF 226.]

F. Dr. Matthews opined that the Proposed Relocation will have an uncertain degree of negative effect on both the retail motor vehicle market and consuming public within the RMA.

Carson Toyota's expert witness, Dr. John Matthews is a distinguished former professor with an MBA and a Ph.D in quantitative analysis from the Kellogg School of Business, Northwestern University. He is an expert in automotive analysis, including network planning and distribution, and has worked in the field since the 1980s as its expert witness in this matter. He has been qualified as an expert witness in several relocation cases, and has testified before this Board. [FF 162.]

Based on Dr. Matthews's expertise and analysis of this relocation, he opined that: (1) Cabe Toyota's inability to sell within its PMA is a symptom of its virtually nonexistent territorial advantage; (2) Hooman Toyota will encroach on Cabe Toyota's PMA by 24% and further diminish its little territorial advantage if permitted to relocate; (3) the Proposed Relocation's facilities will result in redundant sales and service capacity within the dealer network, and Hooman Toyota's significant fixed costs savings will better enable it to shift those idle-time costs to other dealers; and (4) the Proposed Relocation will create uncertainty within the dealer network and cause the surrounding dealers within the RMA to pass its forced idle-time costs to the consuming public.

1. Dr. Matthews's "dot map" analysis shows that Cabe Toyota's inability to sell within its PMA is a symptom of its virtually nonexistent territorial advantage.

Dr. Matthews performed a "dot map" analysis showing registrations for selected dealerships within the Los Angeles Metro area. He has performed this type of analysis about 100 cities and thousands of dealers. He plotted all the registrations by the dealership for September 2012 year-to-date, indicated the location of the dealer with a red star, and also drew a blue 5-mile ring surrounding the dealer's location. Generally, Dr. Matthews expected to find a concentration of "dots" or registrations associated with a dealer relatively close to the location of the dealer's store and an attenuated concentration of dots the further the distance from the store. These "dots" reflect the market power, or territorial advantage, that is associated with territorial distance between dealers. [FF 163.]

Carson Toyota's dot map analysis shows the highest concentration of registrations right around where Carson Toyota is located and within the 5-mile circle surrounding its location. Carson Toyota also sells in the surrounding areas. [FF 164.] This pattern is typical for the dealers within the Los Angeles Metro area selected by Dr. Matthews. [FF 165.]

Hooman Toyota's dot map analysis generally shows the same pattern as Carson Toyota and the other select dealers with a high concentration of registration closest to the dealership and within the 5-mile circle. [FF 166.]

But Cabe Toyota's dot map analysis shows a much less concentration of registrations around the dealership compared to the other select dealers, because of its lack of territorial advantage from its neighboring dealers. [FF 167.]

Dr. Matthews has two concerns with the relocation as it relates to his dot map analysis: (1) the Proposed Relocation will put more pressure on Cabe Toyota to extract sales from its immediate territory; and (2) Cabe Toyota will have an even less of an already small territorial advantage, because every one of Cabe Toyota's census tracts within its PMA will be no more than 6 miles from both Carson Toyota and Hooman Toyota. [FF 168.] Cabe Toyota's PMA is long and narrow with its area of responsibility only at the top and bottom of the PMA's geography in contrast to the surrounding dealers that have a more normal-shaped PMA with the dealers generally located at the center. He concluded that Cabe Toyota's difficulty in capturing sales within its own PMA is a symptom of its abnormally-shaped PMA, a highly competitive market, and its relative distance to the surrounding dealers which ultimately diminishes its territorial advantage. [FF 169; *see* FF 194.]

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2. Dr. Matthews determined that Hooman Toyota will encroach on Cabe Toyota's PMA by 24% and further diminish its little territorial advantage if permitted to relocate.

Because of Cabe Toyota's lack of territorial advantage, this relocation presents unique circumstances where traditional analysis will not accurately predict its effect. In his entire experience, Dr. Matthews had never encountered a PMA smaller than Cabe Toyota's, especially one that was as narrow as 1.2 miles. As a result, he determined that traditional approaches that assume territorial market power would not accurately reflect the impact from the Proposed Relocation, because Cabe Toyota's is minimal. [FF 170.] Instead, Dr. Matthews chose to employ a novel approach to account for the very close distances among Cabe Toyota, Hooman Toyota, and the Proposed Relocation. In this respect, he performed his "frontier analysis" to determine Hooman Toyota's encroachment on Cabe Toyota's PMA resulting from the Proposed Relocation. [FF 171.]

Dr. Matthews observed the "frontier" that delineates the Cabe Toyota and Hooman Toyota PMAs assigned by TMS. He determined that the Proposed Relocation would be 1.2 miles in a northwesterly direction closer than Hooman Toyota's current location, and he moved the "frontier" 6/10th of a mile (half the distance of the move) in that direction. He then removed the 4.8 square mile census tract containing the Port of Long Beach from Cabe Toyota's PMA, because there are virtually no registrations in that tract. [FF 172.]

Based on this analysis Dr. Matthews observed that by moving the "frontier" by the degree and direction of the relocation, the area of encroachment into Cabe Toyota's PMA from the Proposed Relocation accounts for roughly 3.2 square miles. After removing the Port of Long Beach census tract, Dr. Matthews found that the Cabe Toyota PMA has a total area of approximately 13.2 square miles. He then determined that the encroachment from the Proposed Relocation accounts for roughly 24% of Cabe Toyota's PMA. [FF 173.] Dr. Matthews concluded that this degree of encroachment is problematic because it renders Cabe Toyota's PMA smaller and increases the narrowness of its already odd shape. Cabe Toyota and the Proposed Relocation would be the closest dealers between each other amongst all the dealers within the RMA and surrounding area. [FF 195.] This presents a serious threat to Cabe Toyota's viability, because it is unreasonable to expect Cabe Toyota to rely on capturing even more sales outside of its PMA. [FF 174.]

3. The Proposed Relocation's facilities will result in redundant sales and service capacity within the dealer network, and Hooman Toyota's significant fixed costs savings will better enable it to shift those idle costs to other dealers.

Dr. Matthews opined that the public interest is best served by systems that are correctly sized for the task, efficient, and absent of high idle time costs. The public community is not well-served when it is asked, for instance, to pay for an excess number of hospitals far beyond the needs of the community, too many schools that are underused and excessively costly to support, too many shopping center that stand empty/partially filled. The public interest is not to increase even more capacity when the current capacity is more than adequate. [FF 175.]

Therefore his next analysis was to compare the current Hooman Toyota facilities with the Proposed Relocation facilities to determine whether the Proposed Relocation facilities will serve the needs and provide the appropriate capacity for dealer network and consuming public based on TMS's 2012 facility standards. [FF 176.] He determined that the average ratio or overall change of the facility measures used by TMS from the Hooman Toyota facility to the Proposed Relocation facility would be 1.90. In other words, the Proposed Relocation facility would almost double in size and capacity from the current facilities. [FF 177.]

Dr. Matthews then evaluated the number of service bays among Carson Toyota, Cabe Toyota, and expected at the Proposed Relocation. He calculated a total of155 service bays among the three. But based on TMS's 2012 guidelines only 66 or 67 service bays are required based on the number of units in operation in the three PMAs. This results in an excess capacity of 99 service bays. [FF 178.]

He also determined that the size of the Proposed Relocation facilities would be appropriate for a dealership that sells approximately 4,000 new vehicle units based on TMS's 2012 facility guidelines. But based on an average of new unit sales from 2009 through 2012, Hooman Toyota only sold roughly 1,500 new units per year – a difference of more than double current vehicle sales. [FF 179.]

These circumstances are problematic. A rational dealer is assumed to act in its self-interest in a reasonable, fair, and legal manner as a profit maximizer. [FF 180, 193.] And no dealer would let their capacity go to waste. To maximize profits, a dealer with excess capacity will lower price to increase the number of sales to the point where marginal costs equals marginal revenue. But those additional sales, relative the automotive industry, can come from either dealers of other brands or dealers of the same brand depending on the market and the characteristics of the brand itself. In this particular context, the RMA shows a saturated market with a very high level of competition among Toyota dealers competing for Toyota sales. Thus, any increase in Toyota sales by the Proposed Relocation as a result of a price reduction is most likely to come from other Toyota dealers.

This problem is compounded when factoring in Hooman Toyota's drastic, expected fixed costs reduction from the Proposed Relocation. Hooman Toyota would be expected to cover its fixed costs relatively quickly. Assuming that it recovers its fixed costs half way through the year at the Proposed Relocation (based on a 60% expected reduction in fixed costs), Dr. Matthews concluded that in its self-interest as a profit maximizer, Hooman Toyota will slash his prices to reach the expected number of new unit sales that the Proposed Relocation facility can accommodate. [FF 181.] In fact, Mr. Nissani confirmed exactly that:

"Q. Do you expect a cost savings as a result of the relocation?

A. A tremendous savings, yes.

Q. Do you think you will be a more effective competitor as a result of the cost savings you will realize from the relocation with respect to new vehicle sales against all competitors?

A. Sure. By offering better deals, yes.

Q. What about for service?

A. Absolutely."

[FF 181.]

Dr. Matthews also concluded that the surrounding dealers will not be able to effectively compete against Hooman Toyota at the Proposed Relocation, because they will not be able to match Hooman Toyota's expected price cuts as is evident by both Carson Toyota's and Cabe Toyota's substantially greater fixed costs. [FF 182.]

The next analysis is to determine whether the dealer network has sufficient potential sales to support the expected capacity that the Proposed Relocation will bring online. The historical evidence shows that the additional facility capacity from the Proposed Relocation is unnecessary, because the existing dealer network within the RMA has supported a much larger automobile market than the current one. Dr. Matthews found that five years ago, the RMA dealers supported a level of sales around 37,000 Toyota vehicles. The current level of sales in the same geography is approximately 30,000 Toyota vehicles. Therefore, the RMA dealer network has a proven ability to market and support at least 37,000 Toyota vehicles, and can support an additional 7,000 vehicles in its current configuration. Notably these historical figures reflect sales before Carson Toyota introduced its much larger current facility in the dealer network, which suggests that the RMA dealers may actually be able to service and support 40,000 vehicles. The additional capacity that the Proposed Relocation will bring is, at best, premature for the Los Angeles dealer network. [FF 183.]

And TMS's expert witness, Mr. Farhat, generally agrees with the general theory behind Dr. Matthews's analysis: "a good cause not to allow would be, for example, if the proposed relocation were to create – was to plan for 5,000 additional sales, but there are only 1,000 available. That would be a significant potential impact on the marketplace." [FF 184.]

Dr. Matthews concluded, because there is no significant shortfall of Toyota sales, the additional sales that Hooman Toyota is expected to capture at the Proposed Relocation for its own profit maximization will come from the surrounding Toyota dealers. Therefore, the idle time cost stemming from the Proposed Relocation facility's surplusage will be pushed on to the surrounding dealers, particularly Carson Toyota and Cabe Toyota, because Hooman Toyota will be a more effective competitor. [FF 185.]

4. The Proposed Relocation will create uncertainty within the dealer network and cause the surrounding dealers within the RMA to pass its idle-time costs to the consuming public.

In summary, Dr. Matthews opined that Cabe Toyota's threatened viability, based on the Proposed Relocation's encroachment to Cabe Toyota and redundancy of Cabe Toyota-provided service, creates uncertainty and a disruption within the dealer network. This degree of uncertainty is compounded by the unknown burden of bearing the idle-time costs from the excess capacity that the Proposed Relocation will bring to the dealer network. In turn, the dealers will push these idle-time costs onto the public through lower levels of services, sharper business practices, or personnel cutbacks. [FF 186.]

Dr. Matthews's conclusions are consistent with the market behavior. Based on TMS's Sales Rejecter Study Report for Cabe Toyota, the evidence shows that the number one reason a buyer did not purchase a new vehicle from Cabe Toyota was because of price, which is certainly impacted by the pricing behavior of surrounding, competitive dealerships. [FF 187.] Therefore, it already appears that Cabe Toyota may not be able to support a price war. And compared to Hooman Toyota's drastic fixed cost reduction expected from the Proposed Relocation, Carson Toyota and Cabe Toyota experienced quite the opposite effect with their fixed costs based on their significant permanent investments in their existing facilities. [FF 188.] Consequently, Carson Toyota expects that it would probably terminate about 25 of its employees and potentially cut other consumer provided services to eliminate costs if it were to effectively compete with the Proposed Relocation. [FF 189.]

G. The other expert witnesses agree that the Proposed Relocation will result in some degree of negative impact on both the retail motor vehicle business and consuming public within the RMA.

1. Cabe Toyota's expert witness, Mr. Watkins, opined that the Proposed Relocation will reduce convenience for customers in Long Beach and the RMA and will intercept Toyota customers traveling on the I-405 freeway.

Mr. Watkins concluded that the Proposed Relocation is less convenient than the current Hooman Toyota location. The current location is well-positioned in a population center around income-qualified households, and it serves the Long Beach community well by being visible and accessible specifically to that community. The Proposed Relocation is located off of the I-405 freeway, which is more appropriate for a "regional reach dealership," and away from potential and actual customers in an area that is surrounded by the Long Beach Airport and commercial and industrial areas. [FF 190.]

He also determined that the Proposed Relocation would create an analogous market to the east of Cabe Toyota as the market currently exists to its west with Carson Toyota on the I-405 freeway. Based on this analogous market, Mr. Watkins opines that the Proposed Relocation will "intercept" Toyota customers traveling on the I-405 from the east that would otherwise have been captured by Cabe Toyota but for the Proposed Relocation. [FF 191.] Mr. Watkins opined that based on this "intercept analysis," Cabe Toyota will lose its proximity advantage in the analogous east market resulting in an expected conservative loss of about 9.2% of its sales or $455,000 in profits based on Cabe Toyota's 2011 gross sales. [FF 192.]

2. Hooman Toyota's expert witness, Mr. Stockton, also opined that the Proposed Relocation will reduce convenience for customers in Long Beach and the RMA and negatively impact Carson Toyota's and Cabe Toyota's sales.

Findings of negative impact resulting from the relocation are not limited only to Protestants' experts. Hooman Toyota's expert witness found that the reconfigured dealer network would be less convenient for consumers, and that the Proposed Relocation will have a negative impact on both Carson Toyota and Cabe Toyota.

Mr. Stockton corroborated Mr. Watkins's findings in that the Proposed Relocation is in a *less* convenient location relative to Hooman Toyota's consumers. [FF 197.] The same applies to customers within the RMA; the Proposed Relocation is in a *less* convenient location relative to them. [FF 198.]

In one analysis that he performed, Mr. Stockton concluded that Cabe Toyota would lose 10.6% of registrations at the California average if Hooman Toyota moved to the Proposed Relocation. [FF 196.]

In another analysis, he employed his hybrid Newton's law of universal gravitation/Reilly's law of retail gravitation/extension of Reilly's law, which theory Carson Toyota disputes. Mr. Stockton's model showed that Hooman Toyota would increase its share of Toyota sales amongst dealers in Los Angeles and Orange County and the census tracts touching the RMA based on drive time at the expense of both Carson Toyota and Cabe Toyota. [FF 199.] Even upon further extension of Mr. Stockton's disputed model, he expected Cabe Toyota, Carson Toyota, and South Bay Toyota all to lose sales as a result of the Proposed Relocation. And because Toyota dealers face a higher level of intrabrand competition, there is less likelihood of incremental Toyota registrations, or in other words, the availability of interbrand competition. [FF 200.]

3. TMS's expert witness, Mr. Farhat, found that the Proposed Relocation will be less convenient for customers in the Long Beach PMAs and that the RMA dealers's market penetration exceeds one of the highest Los Angeles Metro area benchmarks.

Mr. Farhat corroborated both Mr. Stockton's and Mr. Watkins's findings; the Proposed Relocation will be less convenient for customers in both Hooman Toyota's PMA and combined

Hooman Toyota and Cabe Toyota PMAs. Though the Toyota brand is currently ranked first in customer convenience in Hooman Toyota's PMA, Toyota will drop down a rank behind Ford as a result of the Proposed Relocation. [FF 201.]

Mr. Farhat's analysis shows that the RMA dealers' market penetration is slightly better than the five Los Angeles Markets without Long Beach PMAs benchmark. This benchmark is relatively aggressive, which Mr. Farhat identified as 26.25% market share– over 1% higher than the California average that TMS uses to measure dealer performance. [FF 202.]

H. The Proposed Relocation will negatively impact service business proportionate to the negative sales impact.

As for service business, proximity in terms of both place of residence and place of employment, is an important factor, even more so than new vehicle sales. [FF 203.] Again, Cabe Toyota's service business is disadvantaged to a higher a degree because of minimal territorial advantage.

And generally the impact on parts and service sales is proportionate to impact on new vehicle sales in the long-run, but in the short-term the impact lags. [FF 204.] Particularly for Cabe Toyota's service business, Hooman Toyota's expert witness opined that the negative impact from the Proposed Relocation would follow fairly closely to the negative impact on its new vehicle sales. [FF 205.] Cabe Toyota's expert witness provided a more detailed analysis. He showed that the dealership will experience a negative impact of anywhere between 7.3% to 12.8%, averaging approximately to the same proportionate negative impact that he found for Cabe Toyota's new vehicle sales. [FF 206.]

VI. The relocation will be injurious to the public welfare by creating a less convenient dealer network, forcing job terminations, forcing cutbacks in pro-consumer services, and perpetuating illegal, anticompetitive programs such as Hooman Toyota's VIP Program in an already aggressive competitive RMA.

All expert witnesses in this protest found there to be some injurious effect on the public welfare, and in many different forms. The undisputable negative impact, reached by a consensus among the expert witnesses including Mr. Stockton and Mr. Farhat, is that the Proposed Relocation will be a less convenient location for customers within Hooman Toyota's PMA, the combined Hooman Toyota and Cabe Toyota PMAs, and the RMA. [FF 207.]

Dr. Matthews also found that the Proposed Relocation will be injurious to the public because of Hooman Toyota shifting its idle-time costs to the surrounding dealers, and in turn, those dealers offsetting those costs by either cutting jobs or pro-consumers services. Hooman Toyota's expert witness generally agrees with the theory behind Dr. Matthews's observation. He testified that diminishing market power and increasing competition may have unintended consequences that would force retailers cut pro-consumer services to effectively compete. In this context, the precompetitive effects of a price reduction would need to be balanced with the anticompetitive effects from that price reduction. And Cabe Toyota shows that it is already competing on price in the existing configuration of the dealer network, and in fact losing because it oftentimes cannot match price. And because of its relatively high fixed costs structure, Carson Toyota is already expecting to cut jobs and services to effectively compete. The surrounding dealer will also likely follow suit. This translates to an injurious effect on the public. [FF 208.]

The expert witnesses generally agree that the relevant market area is highly competitive, and in response, the dealers offer programs like free car washes and the VIP Program to differentiate themselves from other Toyota dealers. [FF 209.] But under California law, it is unlawful for any licensed dealer to "[a]dvertise free merchandise, gifts, or services provided by a dealer contingent on the purchase of a vehicle. 'Free' includes merchandise or services at a price for sale at a price less than the seller's cost of ther merchandise or services." (Veh. Code § 11713.1(h).) [FF 210.] It is also unlawful for any licensed dealer to "[u]se "rebate' or similar words, including, but not limited to, 'cash back,' in advertising the sale of a vehicle unless the rebate is expressed in a specific dollar amount and is in fact a rebate offered by the vehicle manufacturer or distributor directly to the purchaser of the vehicle or the assignee of the retail purchaser. (Veh. Code § 11713.1(j).) [FF 211.]

Here, Mr. Nissani touts his VIP Program and attributes much of Hooman Toyota's success to it. The dealership advertises its VIP Program through fliers in its showroom and service area, banners throughout the store, and in its television advertising. The Program offers services such as oil changes, car washes, and replacement tires contingent on a vehicle purchase from the dealership.

[FF 212.] In the flier, Hooman Toyota advertises to its customers "you save $6747." [FF 214.] And Mr. Nissani intends to continue offering the VIP Program if Hooman Toyota is permitted to relocate. [FF 216.]

But the VIP Program is unlawful. Hooman Toyota advertises the Program not only within its stores, but also through television ads. And the Program offers free services to its customers, like car washes, oil changes, and free merchandise, like oil and tires that correspond to those services. These free services and merchandise are contingent on its customer buying the vehicle, i.e., a customer does not get those services for free if he or she did not buy the car from Hooman Toyota. Therefore, the Program is unlawful under *Vehicle Code* section 11713.1, subdivision (h).

Similarly, the Program is unlawful under *Vehicle Code* section 11713.1, subdivision (j). The "cost savings" that the Program advertises is equivalent to an offer of "cash back" from the dealership. The evidence shows that the Program is offered by Hooman Toyota – not a manufacturer or distributor. Thus, the Program is also unlawful under *Vehicle Code* section 11713.1, subdivision (j).

This is problematic, because the Program is indicative of the already aggressive competition within the RMA. In fact, it is so aggressive that Hooman Toyota resorts to engaging in unlawful and unfair business practices. This signifies that the RMA market does not need any additional stimulation. And any additional competitive stimulation will only lead to a greater degree of unlawful business practices. These business practices are injurious to the public.

Based on these circumstances, Carson Toyota established its burden that the relocation will be injurious to the public welfare.

VII. The Toyota dealers in the RMA are providing adequate competition and convenient consumer care for Toyota vehicles, including adequate motor vehicle sales and services facilities, equipment, supply of vehicle parts, and qualified personnel.

A. The dealers in the RMA are highly competitive and perform well above their benchmark.

Toyota's market share within the RMA is high at 24.9% in 2012 – higher than the California average and about double the national average. [FF 217.] And he RMA dealers' collectively exhibit more than adequate market sales penetration even when compared to the aggressive 5 Los Angeles

Markets without Long Beach PMAs benchmark. The market penetrations at the California average, unless otherwise noted, are as follows:

- Carson Toyota: 254.2% (September 2012 YTD)
- Cabe Toyota: 193.7% (December 2012 YTD)
- Hooman Toyota: 124.9% (December 2012 YTD)
- RMA Dealers: 115.3% (2012)
- RMA Dealers: 114.2% (2007-2012)
- RMA Dealers: 101.2% (at 5 Los Angeles Markets without Long Beach PMAs average, September 2012 YTD).

[FF 218.]

The RMA performs well in that they have a net pump out in terms of cross-selling amond Toyota dealers. Generally, substantial cross-sell is prevalent in metro areas. Dr. Matthews found that the average number of dealers selling into one of the PMAs of the 10-mile dealers (as defined by Mr. Farhat) is around 49 and in one case is around 62. An even more detailed look shows that the average number of dealers that sell within a census tract of the Los Angeles-South Bay, Orange County, and San Gabriel markets is 10.32. [FF 219.]

Viewing insell (pump in) alone, which was Mr. Farhat's analysis, is not indicative of "opportunity" for sales, which is why Dr. Matthews analyzed the RMAs outsell (pump out) to determine whether the RMA dealers are providing adequate competition. And he found that the RMA dealers (as defined by Mr. Farhat) have sold more outside of the RMA (pump out), by a factor of almost 3,000 sales in September 2012 YTD, than other dealers outside of the RMA have sold inside the RMA (pump in) for every year from 2007 through September 2012 YTD. A more in-depth look at the Carson Toyota, Cabe Toyota, and Hooman Toyota dealers shows that these three dealers follow the same pattern as the RMA in that they have a net pump out of 550 sales, about 34% more than its Toyota competitors pump in into their collective PMAs. Dr. Matthews concluded that the RMA dealers, and Carson Toyota, Cabe Toyota, and Hooman Toyota particularly, are competing with other Toyota dealers very effectively. [FF 220.]

B. The Toyota brand is one of the highest ranked among competitive brands in terms of customer convenience in the RMA and combined Hooman Toyota and Cabe Toyota PMAs, and surveys show satisfied customers generally on all measures.

The Toyota brand is the highest ranked in terms of customer convenience measured by average distance to the nearest dealer in both Hooman Toyota's PMA and the combined Hooman Toyota and Cave Toyota PMAs compared to other fifteen competitors. [FF 223.] The PMAs within the RMA rank second on average among competitive brands. A Toyota customer within the RMA only has to drive 3.1 miles on average to reach the nearest Toyota dealer. [FF 224.]

And customer surveys generally indicate satisfied consumers, at least those that patronize Carson Toyota, Cabe Toyota, and Hooman Toyota. TMS provides guidelines to interpret its customer survey scores. Reaching a "green" standard indicates that the dealership is doing well in that area of measure. "Yellow" means caution, and "red" indicates an area of concern that the dealer needs to focus on. [FF 225.]

TMS's sales diagnostics surveys show that the three dealers are performing well and that customers are happy. Carson Toyota is within the "green" standard on all measures. Cabe Toyota is in the "red" standard as to its facilities, which it is in the process of remodeling. Hooman Toyota shows that it is in the "yellow" standard for four measures, but the ones that relate to its facilities, i.e. "facilities" and "product presentation," it is within approximately 1% of reaching the "green" standard. [FF 226.]

The three dealers perform much better in terms of service, though Hooman Toyota's expert opined that his concerns with Hooman Toyota's facilities lie more with its service facility. All three dealers are within the "green" standard on all customer survey measures for service except Carson Toyota, which only has one measure within the "yellow" standard. [FF 227.]

C. Carson Toyota, Cabe Toyota, and Hooman Toyota all have adequate sales and service facilities per TMS's 2012 facility standards.

Again, the dealerships generally meet TMS's facility guidelines within the constraints of a metro market area. [FF 228, 229.] And any theoretical shortcomings of the perceived deficiencies, are at best, acute when considering the positive customer surveys that suggest otherwise. [FF 230.] And as for their capacity, Dr. Matthews concluded that the existing facilities within the RMA are adequate even when considering reasonable sales levels that might occur in the future. [FF 231.] Therefore, the evidence shows that any facility deficiency poses virtually no impact on Toyota's sales when considering the generally satisfied consuming public.

D. Carson Toyota, Cabe Toyota, and Hooman Toyota provide adequate qualified personnel, especially certified and expert technician.

Carson Toyota, Cabe Toyota, and Hooman Toyota all provide adequate, and oftentimes double, the recommended number qualified and expert technicians based on TMS's 2012 guidelines. [FF 232.]

VIII. When balancing TMS's opportunistic actions with the consequential impact on its dealer network and the overwhelming anticompetitive effects on its consumers, the relocation would not increase competition and therefore not be in the public interest.

A. TMS carelessly approved the relocation without performing any market study despite significant events affecting its market and without evaluating information that the California Legislature deems material to any relocation.

Hooman Toyota's expert explained that there is an inherent and real friction between the manufacturer and dealer because of an uneven bargaining power favoring the manufacturer – the dealer is at the mercy of the manufacturer to protect its territorial advantage subject to this Board's intervention. This creates an incentive for the manufacturer to behave in an opportunistic fashion. [FF 233.] And Mr. Skinner unapologetically agreed. [FF 234.]

Here, TMS's interest is for its dealers to build, large, single-purpose, visible, and accessible facilities that conform to its imaging-guidelines. These facilities serve as an advertisement for Toyota to promote the brand, increase market share, and keeping in line with its business objective, sell as many Toyota vehicles as it can. But TMS always wants its dealers to invest more in their facilities than the dealers are willing to invest. Therein lies the friction.

And so TMS incorporates its facility requirements in its dealer agreement in an attempt to force its dealerships to comply with its empty threats of termination if they do not. But in practice, TMS has no way of enforcing its requirement. It has never terminated a dealership for not complying with its facility requirement. And in Hooman Toyota's specific case, the only way it has "enforced" its requirements is by merely including those requirements in its dealer agreement. [FF 235.]

In this case, TMS found an opportunity to update the non-image-compliant Hooman Toyota store and promotes its brand where it otherwise was not able to enforce through its dealer agreement. And that is simply by approving the Proposed Relocation. Normally, there is a significant cost to TMS when making this decision in the form of substantial litigation defense costs associated with potential protests. But here, TMS even shifted those costs to the dealership, and conditioned the Proposed Relocation's approval upon Hooman Toyota contributing one-half million dollars towards its defense costs. With no cost to TMS, the choice was simple: approve the relocation. But it did so irresponsibly and carelessly, and without accounting for the impact that may have on its dealer and the consuming public. And those factors greatly outweigh TMS's opportunistic incentive to approve this relocation.

1. TMS approved the relocation without conducting a market study since 1993 despite significant events that changed the automobile industry generally and the Toyota brand particularly.

Throughout the hearing, many witnesses discussed the recent significant events that affected the automobile industry generally and TMS specifically. For instance, TMS referenced the significance of the recession during the years 2008 through 2011 and how vehicle sales plummeted and TMS's dealership struggled. [FF 236.] In addition to the recession, Toyota experienced other significant issues that generally affected the brand's sales, including the tsunami in 2011 affecting its supply chain, the bad press from the unintended accelerations, and increase competition from the Korean brands. [FF 237.]

In this context, TMS's policies and procedures for reviewing and analyzing a relocation request require a market study recommendation to be provided before TMS approves any request. [FF 238.] But TMS has not conducted a market study of the area in over 20 years. [FF 238.]

Based on these circumstances, TMS acted imprudently by approving the relocation without first conducting a market study. This particular dealer network configuration has generally remained in its same form for over 35 years. And TMS acknowledges that the industry has gone through significant events. The prudent thing to do would be to conduct a market study to fully evaluate the potential disruption to a long-standing dealer network that has been battered by recent events, especially when the market has not been evaluated in over 20 years. But seeing its opportunity, TMS chose not to do this. And the cursory review that it did perform is insufficient to evaluate the full effects of changing a 35 year old dealer network.

2. TMS approved the Proposed Relocation approximately only one month after extending Hooman Toyota's Notice to Cure time period, without verifying Hooman Toyota's ability to undertake the relocation, and only after Mr. Nissani agreed to contribute $500,000 towards TMS's defense costs of any potential protests.

TMS originally informed Mr. Nissani that it would not approve the Proposed Relocation because it was over one mile from its current location, it was closer to Cabe Toyota, and Hooman Toyota still faced its capitalization and financial issues. [FF 240.] TMS represented and made clear to Mr. Nissani that it would not evaluate its proposed relocation until Hooman Toyota cured all of its capitalization deficiencies. [FF 241.] And then TMS verified to Mr. Nissani that it would not support the Proposed Relocation because of the responses it received from multiple dealers and other relevant factors. [FF 242.]

TMS was consistently concerned about Hooman Toyota's financial wherewithal to undertake the Proposed Relocation. [FF 243.] TMS acknowledged there is an obvious financial burden related to a proposed relocation. And in this respect, in an unprecedented move, it required, and made its relocation approval contingent on, Hooman Toyota providing a written acknowledgment and commitment for the source of the relocation and facility construction costs. [FF 244.] But other than the $1 million tenant improvement allowance provided by the Proposed Relocation's landlord, Hooman Toyota provided no evidence to show any commitment to fund the Proposed Relocation renovation, estimated to cost approximately $2.95 million. [FF 245.]

Yet TMS changed its tune when it realized that approving the relocation would result in to consequences to it if it conditioned its approval upon Hooman Toyota agreeing to contribute one-half million dollars towards its defense costs for any potential protest. [FF 247.] And inconsistent with its previous representations, TMS undertook the Proposed Relocation review though it was concurrently reviewing Hooman Toyota's finances. [FF 246.] As late as June 8, 2012. Hooman Toyota had not yet cured all of the financial deficiencies outlined in TMS's notice to cure. [FF 248.] But on July 27, 2012, TMS approved the Proposed Relocation. [FF 249.]

TMS's hasty approval of the relocation within approximately one month of extending Hooman Toyota's notice to cure is not in line with its belief that a dealership should have a good financial foundation before it undertakes a relocation. Nor are TMS's previous representations to Hooman Toyota about not approving the relocation consistent with its subsequent approval of it. Instead, such an approval suggests TMS's own, self-interested motives.

3. TMS approved the relocation without considering any planning potential or pro forma, which the California Legislature considers material relative to any relocation protest.

TMS did not produce or analyze any projected sales, planning potential, or pro forma, nor does Mr. Nissani have any estimates of this information. [FF 252.] But its policies and procedures require a pro forma for any relocation, and the pro forma is required before approval: "Even if the relocation is adjacent to the existing store, a site request is required because *Pro Forma and Facility reviews are necessary to obtain a complete site approval*." [FF 251.]

And the California Legislature finds these two components material to any relocation protest. Under California law, a manufacturer to obtain from a dealer a voluntary waiver agreement to waive its right to a protest under *Vehicle Code* section 3062 provided that the manufacturer discloses to the dealer "[t]he planning potential used to establish the proposed dealership's facility, personnel, and capital requirements," and "[a]n approximation of projected vehicle and parts sales, and number of vehicles to be serviced at the proposed dealership." (Veh. Code § 11713.3(g)(3)(H)(i).) This statute suggests that in order for a dealer to make an informed decision before waiving its rights to challenge a relocation, it should first know what the manufacturer expects the relocated dealer's potential would be based on its facilities and the relocated dealer's expected sales after the relocation.

This same information should have been evaluated by TMS before approving the relocation. Its policies and procedures require it. But this information is unavailable even to this day in breach of its policies and procedures.

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B. The negative impact on the dealer network, the anticompetitive effects on the consumers, and TMS's imprudent, opportunistic actions far outweigh any marginal benefit served by the relocation.

The factors weight heavily in favor of not permitting the relocation.

Carson Toyota meets it burden regarding permanency. Carson Toyota and Cabe Toyota relied on the permanency and stability of the existing dealer network in making substantial investments in their dealerships at their current locations. [FF 253.] And since its inception, Hooman Toyota has demonstrated fiscal irresponsibility, instability, and unreliability, especially when compared to Carson Toyota and Cabe Toyota. [FF 254.]

The evidence supports an uncertain degree of negative impact on the dealer network. The Proposed Relocation's 24% encroachment on Cabe Toyota's PMA threatens Cabe Toyota's viability. [FF 255(a)] Hooman Toyota's drastic fixed cost reduction will allow it compete more effectively and shift the idle time costs from its excessive capacity onto the dealer network that is already competing in a highly competitive market with no perceived shortfall. [FF 255(b)]. And the Proposed Relocation will result in lost sales and service business for both Carson Toyota and Cabe Toyota in a saturated market with high intrabrand competition and marginal opportunity for interbrand competition. [FF 255(c).]

The Proposed Relocation will be injurious to the public by establishing a less convenient dealer network and promoting unfair competition. Mr. Watkins, Mr. Stockton, and Mr. Farhat all agree that the Proposed Relocation will be less convenient for consumers. [FF 256(a).] As a result of the expected excess capacity, the dealer network will push idle time costs onto the public through lower levels of services, sharper business practices, or personnel cutbacks. [FF 256(b).] This highly competitive market has already forced the dealers to engage in unfair competitive practices, such as the VIP Program, and Mr. Nissani intends to continue with the Program if the Proposed Relocation is allowed. [FF 256(c).]

TMS acted opportunistically to enforce its otherwise unenforced imaging standards upon Carson Toyota, Cabe Toyota, and Hooman Toyota, by carelessly approving the relocation without any consequence to itself. TMS did not conduct a market study, and has not conducted a study in over 20 years despite significant changes to the automobile market and Toyota brand. [FF 257(a).]

TMS approved the Proposed Relocation only one month after extending Hooman Toyota's Notice to Cure time period though it first required the dealership to establish fiscal responsibility, and then only agreed to approve the relocation after originally rejecting it upon Mr. Nissani contributing one-half million dollars to its defense costs. [FF 257(b).] TMS did not analyze any pro forma or planning potential before approving the relocation though its own policies and procedures require a pro forma and the California Legislature finds both to be materially important. [FF 257(c).]

And any acute customer complaints or marginal facility deficiencies are illusory, and overcome by the aggregate consumer survey scores that show otherwise. [FF 258.]

For these reasons, Carson Toyota meets it burden of establishing that good cause exists to not permit the relocation. Therefore, Carson Toyota respectfully requests that the Board sustain its protest.

IX. Alternatively, if the Board does not find enough evidence to sustain this protest, the Board should remand the protest for further hearing to obtain additional evidence on issues that were not explored because of the overly-restrictive relevance standard imposed throughout the hearing.

Alternatively, the Board should remand this protest for further hearing on issues that were precluded from examination due to the overly-restrictive relevancy standard employed at the hearing. Throughout the hearing, the relevance threshold imposed by the ALJ was much higher than appropriate standard under the Vehicle Code section 3063 and related statutes. [FF 259.] Also, the record suggests that a more stringent burden of proof and evidentiary threshold was imposed here on the mistaken belief that the standard for a relocation protest differed and was much higher than the standard for an establishment protest under the same statute. [FF 260.]

As an additional ground, Judge Ryerson granted a motion to strike Dr. Matthews's "optimal location" analysis that was intended to illustrate consumer convenience. But ALJ Ryerson inadvertently misinterpreted the "optimal location" analysis as evidence of potential alternative locations though the analysis contained neither potential nor alternative locations. Therefore, he mistakenly granted the motion under his ruling excluding evidence of potential alternative locations. [FF 261.] Additionally, a motion in limine was granted excluding evidence of alternative facilities locations, with the understanding that Hooman's existing location was one of the alternative facilities to be excluded. It is contended by Protestant that this ruling is inconsistent with the proper evidentiary standard for protests under Vehicle Code section 3062 and was prejudicial to Protestant's case. Based on these facts, if the Board does not find sufficient evidence and findings to sustain this protest, Carson Toyota respectfully requests that the Board remand it for further hearing on these issues.

DATE: August 15, 2013

MANNING, LEAVER, BRUDER & BERBERICH

BY____________________________

Franjo M. Dolenac, Esq., Attorneys for Protestant Aldon Inc. dba Carson Toyota and Carson Scion

Proof of Service

I, the undersigned, declare and say as follows:

I am 18 years of age or older, employed at the business noted above my signature which is in the county where any mailing herein stated occurred, and not a party to the within action.

On August 15, 2013, I caused to be served the document(s) listed below my signature under the heading "Document(s) Served" by placing a copy of the document(s) (or the original, if so noted below) in individual envelopes for each of the parties listed below my signature under the heading "Parties Served" (except for fax-only service), addressed to them at their last known addresses in this action exactly as shown (excepting parenthetical references to their capacity), there being U.S. Mail delivery service to those addresses used for service by mail, and by sealing said envelopes, and on the same day, as marked with "X," by --

[X] **placing** each envelope **for collection and processing for mailing** following my firm's ordinary business practice with which I am readily familiar and under which on the same day correspondence is so placed for mailing it is deposited in the ordinary course of business with the U.S. Postal Service at my business address, 1st-class postage fully prepaid.

[ ] **depositing** each envelope **into the U.S. mail** with 1st-class postage fully prepaid at a mail box or collection facility in the city and state of my business address. "Parties Served" lists all parties and counsel served in the within matter, and their respective capacities. [required for federal cases, **including bankruptcy**, among others]

[X] **electronically sending [x] by email or [_] by fax** each page of each document and this proof of service to the parties served at their last known email address or fax numbers as listed below from a email or fax system located at my business address which reported no errors and which, if by fax, produced a transmission confirmation report, a true copy of which is attached hereto. [use only if electronic service authorized or as a supplement.]

[ ] depositing each envelope at a drop box or other facility in the city and state of my business address within the time and pursuant to procedures readily familiar to me necessary for delivery [ ] **by Federal Express** on the morning of the next business day or [_] **by courier** on the same day. [use only if overnight or courier service authorized or as a supplement.]

[_] **personal delivery** by [_] travelling to the address shown on the envelope and delivering it there during normal business hours or [_] handing the documents to the person served.

I declare under penalty of perjury under the laws of the State of California and the United States that the foregoing is true and correct and that this declaration was executed on August 15, 2013 at my business address, 5750 Wilshire Blvd., Suite 655, Los Angeles, California 90036, in the County of Los Angeles.

Ashley Langill

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Parties Served (exact envelope address)

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