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PK 1023-89  
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STATE OF CALIFORNIA  
NEW MOTOR VEHICLE BOARD

|                                  |   |                        |
|----------------------------------|---|------------------------|
| In the Matter of the Protests of | ) |                        |
| LA MESA DODGE, INC.,             | ) | Protest No. PR-1022-89 |
| dba CARL BURGER'S DODGE WORLD;   | ) |                        |
| TRI-CITY LEASING, INC.,          | ) | Protest No. PR-1023-89 |
| dba KEARNY MESA DODGE,           | ) |                        |
| Protestants,                     | ) |                        |
| vs.                              | ) | DECISION               |
| CHRYSLER MOTORS CORPORATION;     | ) |                        |
| CHRYSLER CORPORATION,            | ) |                        |
| Respondents.                     | ) |                        |

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PROCEDURAL BACKGROUND

1. By separate letters dated February 28, 1989, <sup>1/</sup> Chrysler Motors Corporation ("CMC"), 888 South West Street, Anaheim, gave notice pursuant to California Vehicle Code section 3062 <sup>2/</sup> to La Mesa Dodge, Inc., d/b/a Carl Burger's Dodge World ("LMD"), 8355 Hercules Street, La Mesa, and to Tri-City Leasing, Inc., d/b/a Kearny Mesa Dodge ("KMD"), 4910 Kearny Mesa Road, San Diego, of CMC's intention to establish a Dodge dealership on the southeast

<sup>1/</sup> All dates refer to 1989 unless otherwise noted.

<sup>2/</sup> All statutory references are to the California Vehicle Code.

corner of Camino de la Reina and Camino de la Siesta, San Diego, (Mission Valley). The notices stated that this establishment was to be a relocation of the Alan Johnson Dodge dealership then located at "374 Rosecrans" (sic), San Diego ("Johnson"). The notices were received by the New Motor Vehicle Board ("Board") on March 6.

2. By letter dated March 6, CMC sent revised notices to LMD and KMD of the proposed dealership location. These notices corrected the address of the Johnson dealership to read "3740 Rosecrans, San Diego" and were received by the Board on March 7.

3. On March 22, LMD and KMD filed separate protests. On April 4, the protests were consolidated for hearing.

4. Pursuant to stipulation of the parties, the hearing was scheduled for June 5. The parties subsequently stipulated that the commencement date of the hearing be continued until July 24.

5. On July 3, Protestants filed a Motion to Strike and Suspend Proceedings. The motion was based on the contention that the notice from CMC initiating these proceedings was fatally flawed: the notice announced a proposed relocation of an existing dealership, rather than the establishment of an additional dealership. Facts developed during the course of discovery revealed that Robert Townsend ("Townsend") initially intended to purchase and operate Johnson and relocate it to Mission Valley. However, this buy-sell agreement was not concluded, and Johnson ceased operations. Chrysler nevertheless intended to establish Townsend as a Dodge franchisee on the Mission Valley property. Therefore, what had been a proposed relocation had become a proposed establishment. On July 10, Protestants' motion was denied.

6. By mutual agreement of the parties, the hearing date was advanced to July 21 and was conducted on that date and thereafter on July 24 thru July 28 and August 1 before Matthew Goldberg, an Administrative Law Judge of the Board ("ALJ").

7. A proposed decision, dated October 13, 1989, was issued by the ALJ. On November 9, 1989, the public members of the Board acted on this matter by rejecting the proposed decision and putting the matter over for further consideration. On December 13, 1989, the public members of the Board further considered this matter and heard oral arguments from the parties, after which the matter was again put over for further consideration. On March 29, 1990, the public members of the Board again met and considered this matter at which time they remanded it to the ALJ for the purpose of taking additional evidence on specified issues. On June 25, 1990, the ALJ submitted Supplemental Findings of Fact. At its meeting of July 11, 1990, the public members of the Board met and considered the administrative record and reached this decision.

8. CMC was represented by Franklin H. Wilson and Frederick C. Abrolat of Baker, Hostetler, McCutcheon, Black, 600 Wilshire Boulevard, Los Angeles, California.

9. LMD and KMD were represented by George J. Murfey, 4180 La Jolla Village Drive, Suite 240, La Jolla, California.

ISSUES PRESENTED

10. LMD and KMD contend that there is good cause for not allowing the establishment of the proposed dealership in Mission Valley for the following reasons: 3/

a. Their respective investments are permanent {Section 3063(a)};

b. The establishment would result in an adverse effect on the retail motor vehicle business and the consuming public in the relevant market area {Section 3063(b)};

c. It would be injurious to the public welfare should an additional franchise be established {Section 3063(c)};

d. The franchisees of the same line-make in the relevant market area are providing adequate competition and convenient consumer care {Section 3063(d)};

e. The establishment of the additional franchise would not increase competition and therefore would not be in the public interest {Section 3063(e)}; and

f. The establishment of the franchise in the proposed location, as opposed to the revitalization of a recently closed franchise, amounts to an oppressive, abusive, and unfair practice by CMC.

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3/ Section 3066 provides that the Protestants have the burden of proving that there is good cause not to enter a franchise establishing an additional dealership.

FINDINGS OF FACT

Facts Relating to the Permanency of Investment  
{Section 3063(a)}

11. Townsend is the owner of a Lincoln-Mercury dealership located at 588 Camino del Rio, San Diego, which is at the junction of Highway 163 and Interstate 8 in Mission Valley. Townsend has been operating this dealership on its five acre site since 1975. It sells about 1100 new cars and 350-400 used cars annually. Townsend also owns a Lincoln-Mercury dealership in Carlsbad, California.

12. On January 26, 1989, Townsend entered into a buy-sell agreement with Alan Johnson Dodge to purchase the assets of this dealership, located at 3740 Rosecrans Boulevard, San Diego. Townsend initially intended to lease that site and operate a Dodge dealership there until a stand-alone facility could be built on approximately 2.7 of the five acres presently occupied by his Mission Valley Lincoln-Mercury dealership. At such time, Townsend would relocate the Dodge dealership to Mission Valley.

13. The buy-sell agreement was never finalized, and Townsend did not expend any sums toward the purchase of the Johnson dealership. At the time of the hearing, Townsend had no written agreements with CMC regarding the operation of a Dodge dealership in Mission Valley, although he had filed an application to be a Dodge dealer at the Johnson location.

14. On July 25, CMC issued to Townsend what is termed a Letter of Intent. <sup>4/</sup> Under its provisions, CMC agreed to enter into a standard Dodge Sales and Service Agreement with Townsend, provided that the Board permit the establishment of the Mission Valley dealership, and provided that Townsend complies with certain other terms and conditions. Among those conditions were that Townsend submit plans for the facility to CMC within one month from a favorable ruling from the Board, that these plans be approved in writing by CMC, that he complete the requirements for a new motor vehicle dealer's license, to be issued by the Department of Motor Vehicles, that he complete construction of the facility within 18 months after the ruling by the Board, that he provide a net working capital of not less than \$800,573, that he invest a total capital of not less than \$1,000,024, and that he agree in writing that the new dealership facility be a Dodge stand-alone facility for a minimum of 20 years, unless terminated by CMC. As of the hearing, Townsend had not executed the Letter of Intent.

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<sup>4/</sup> Generally, CMC will not enter a term or permanent dealer agreement until there is an operational facility. However, CMC will issue a Letter of Intent which serves as a prospect's protection until the facility is constructed. Because of CMC's obligation to service the existing Dodge units in operation in the San Diego area, and due to the closing of the Johnson dealership, CMC may allow Townsend to operate out of the new facility prior to the completion of its construction.

15. In certain instances, CMC restricts the use of dealer-owned real estate by a contractual arrangement known as "site control." <sup>5/</sup> CMC exercises site control over property occupied by other Dodge dealers in the San Diego area, including that owned by the Protestants. CMC also exercised site control over the defunct Johnson franchise, but chose to relinquish it. However, CMC does not have site control on the Townsend property. Thus, it would be possible, at least in theory, to operate a franchise for a line-make other than Dodge in that same location, to use the property for any purpose, or to sell it to the highest bidder without restrictions.

16. Architectural plans were prepared to comply with CMC facilities guidelines for a dealership having a planning potential of between 1,000 and 1,200 units. There is substantial variation between the space recommendations on the Facilities Guide and the specifics of the design for the proposed facility, particularly in the areas provided for employee and customer parking, <sup>6/</sup> used car display, service facilities, and showroom and office space.

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<sup>5/</sup> In essence, site control ensures that the property will be utilized for a CMC franchise for a designated term. It generally inhibits the sale of dealership real estate to a "highest, best-use" bidder during that term.

<sup>6/</sup> The plans indicate a total of 460 parking spaces will be provided, but only 378 of them will actually be within the new facility. That total is comprised of 85 spaced for service, 36 for employees, 11 for customers, 152 for display and 94 for storage. (RI: 127, 128) When an actual count was taken of the parking spaces drawn on the plans, there was a total of 298. The discrepancy could not be explained by the architect.

These variations exist regardless of whether the planning potential delineating the requirements is 1,000 or 1,200 units.

|                                 | <u>Planned</u> | <u>Per Guide</u>         |            |
|---------------------------------|----------------|--------------------------|------------|
|                                 |                | 1,000 P.P. <sup>7/</sup> | 1,200 P.P. |
| New Car Storage Spaces:         | 112            | 150                      | 180        |
| Showroom & Office (sq. ft.):    | 3,500          | 5,900                    | 6,200      |
| Customer & Free Parking Spaces: | 47             | 131                      | 154        |
| Used Cars (sq. ft.):            | 8,000          | 23,400                   | 28,300     |

17. KMD and LMD, who are each other's main competitor, operate facilities which are substantially equivalent in size. The proposed dealership is roughly half the size of those of the two Protestants.

18. LMD has been at its present location for 23 years and is an exclusive Dodge franchisee. Carl Burger, one of its principals, has been a Dodge dealer for 49 years. James Boaz, the other principal, has a more active role in running the business. The franchise is located on a five acre parcel. Until about two years ago, the property was owned by CMC and leased to the dealership. It was then purchased by LMD, which paid CMC \$2,300,000 for the buildings and land. Currently, the property is worth in excess of \$4,000,000. Excluding the real estate, the depreciated value of the dealership assets were approximately \$7,800,000 as of December 31, 1988.

<sup>7/</sup> P.P. is the abbreviation for planning potential.

19. When CMC sold the property to LMD approximately two years ago, CMC retained site control for a period of 25 years. During the first five years of the contract term, in the event of a violation of the site control agreement, CMC has the right to purchase the property for the original sale price. Following this five-year period, should the agreement be violated, CMC may exercise an option to lease the property at a monthly rental of one percent of the purchase price.

20. Roger Sather has been the 100% owner of KMD since 1984. The total amount at risk in the KMD dealership, exclusive of land, is over \$8,000,000. KMD occupies a land area of 4.25 acres, of which 2.38 are owned by Sather, and the remainder by CMC. Sather's interest in the dealership real estate is worth approximately \$3,000,000, and is subject to site control by CMC for another 22 or 23 years.

21. In August 1989, another Dodge dealer had been established in Poway, California, some 12 or 13 miles from KMD, and that dealership has also sold vehicles in the area where KMD previously marketed its products. 8/

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8/ For the first six months of 1988, KMD sold 916 new units, retail and fleet. In the first six months of 1989, KMD sold 772 units. In terms of percentage, sales have declined about 15%. Chrysler sales nationally are down an equivalent amount.

22. Pursuant to its sales and Service Agreement, KMD is required to maintain a facility which, under the minimum facilities guide, corresponds to a planning potential of more than 2,000 units. Thus, despite the fact that sales in recent years have declined, <sup>9/</sup> KMD is still required to incur the expense of maintaining a dealership for a much larger potential.

23. Despite the fact that the Kearny Mesa trading zone contains a fewer number of households than the Mission Valley zone, KMD has been assigned a higher planning potential than Townsend.<sup>10/</sup> Ordinarily, planning potential should bear a direct relationship to the number of households.<sup>11/</sup> Furthermore, the number of registrations in the Mission Valley area, compared with the registrations in the Kearny Mesa trading zone, should logically result in a higher planning potential for the Mission Valley site.

24. LMD is required by its Sales and Service Agreement to maintain a facility for a planning potential in excess of 2,100.

25. With the opening of the Poway dealership, both sales at LMD and its planning potential have been diminished. The planning potential of LMD has been reduced by about 30% since the initial hearing.

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<sup>9/</sup> KMD had sales of 1,386 units in 1989, and about 1,700 units in 1988.

<sup>10/</sup> Additionally, about 900 new housing units are being constructed across the street from the proposed dealership. There will be no such similar increase in households in the KMD sales locality. Sather denied that there is any development in his area.

<sup>11/</sup> The number of potential sales within an area is not simply a function of the number of households in that area. Household income is also a significant determinant.

Facts Pertaining to the Effect on the Retail Motor  
Vehicle Business and the Consuming Public in the  
Relevant Market Area  
{Section 3063(b)}

26. The straight-line distances from the various sites are as follows:

| <u>FROM</u> | <u>TO PROPOSED SITE (Miles)</u> |
|-------------|---------------------------------|
| LMD         | 9.2                             |
| KMD         | 4.2                             |
| Johnson     | 2.8                             |

If the original Johnson-Townsend buy-sell and relocation had been accomplished, it would have resulted in a franchise relocation of 2.8 miles in an easterly direction toward LMD. The difference in straight-line distance between Johnson and KMD, and the proposed location and KMD, is less than 2 miles. No evidence was produced as to the driving time or driving distances between the various sites.

27. The LMD principals predicted a loss of between 30-35% of their sales if the Mission Valley dealership were established. The predictions were based on their experience and knowledge of the shopping and traffic patterns of their customers, 12/ and on

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12/Boaz and Burger are life-long residents of San Diego.

freeway visibility. <sup>13/</sup> A reduction in sales would naturally produce a substantial reduction in return on investment, and a decline in profits. <sup>14/</sup> It might then become necessary to reduce the size of the LMD work force. Boaz did not believe that the addition of another dealership would increase overall sales, but would merely redistribute the existing ones.

28. Similarly, Sather was of the opinion that the proposed Mission Valley dealership would have an adverse impact on the profitability of KMD. He estimated that the Mission Valley establishment will result in a loss of 20% of his sales volume, especially when considered in conjunction with the impact of the recent placement of a Chrysler-Plymouth franchise in Balboa, which is located "around the corner" from his facility. <sup>15/</sup> The combined effect of these establishments will be economically "terminal,"

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<sup>13/</sup> Like LMD, the proposed Mission Valley site is visible from Interstate 8. Potential customers commuting to work in San Diego from La Mesa, El Cajon and points east would pass by the Mission Valley site as they drove west along this freeway.

<sup>14/</sup> The various components of the LMD franchise (new car sales; used car sales; parts sales; service) are divided into profit centers, as if each was its own distinct enterprise. Boaz stated that given new car advertising, flooring costs, commissions, and a percentage of the dealership's fixed expenses, new car sales, viewed in isolation, has not been a profit center for LMD.

<sup>15/</sup> Many Dodge and Chrysler-Plymouth products are virtually identical, except for the name-plate. Dealers service both line-makes interchangeably. Thus, the lines may be considered to be in direct competition with one another. Sather testified that the Balboa establishment has "devastated" his new passenger car business. For the first two months of 1989, KMD sold at retail about 60 passenger cars per month; in March, when Balboa opened, KMD sold 42 retail passenger car units; in April, 40 units; May, 15 units; June, 16 units; and for the first three weeks of July, 14 units. There has also been a corresponding decline in KMD used car sales, although parts sales and service volume have remained at consistent levels.

according to Sather, since at the present time his operations are unprofitable.

29. Protestants' expert witness, Dr. Richard Emmerson, <sup>16/</sup> performed studies to compare the former Johnson location to the Mission Valley site to determine which site was more convenient for public access. Emmerson also assessed the degree to which the markets might redivide among the existing dealers based on the proposed relocation. In reviewing potential site locations, Emmerson analyzes factors such as existing and projected population growth, demographics, transportation networks, and land availability.

30. Emmerson evaluated potential location information based on the convenience of the dealership as defined by minimum driving time. <sup>17/</sup> Viewing the drive-time factor in terms of access to population and employment, Emmerson concluded that the proposed Mission Valley site is inferior to the Johnson site; i.e., it results in a market area which has a smaller population and employment base. Transportation networks were also taken into account. A similar analysis was performed using projected transportation networks and projected populations. The same conclusion resulted. In sum, if the object of dealership location was to provide the most convenient access to the existing and forecasted populations in San Diego

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<sup>16/</sup> Emmerson possesses a Ph.D. in Economics, and teaches at the University of California. Among other things, he is a business consultant providing advice on a number of business decisions, including location analysis and forecasting.

<sup>17/</sup> Emmerson conceded that "drive-time" would not be the only determinant in projecting potential sales. Those sales would also depend on marketing and other criteria. However, drive-time has been used as a common factor in other business surveys he has conducted, including those for automobile dealerships.

County, the Mission Valley location is not the most desirable site to be next established. In addition, taking into account the freeway system and planned improvements (which will not be forthcoming on that particular stretch on Interstate 8), the Mission Valley site is a highly congested one, especially at peak hours, and will remain so into the future.

31. The chart below details the retail car and truck registrations from 1980 through 1988 for the areas shown:

RETAIL CAR AND TRUCK REGISTRATION TRENDS

LOS ANGELES ZONE vs. SAN DIEGO SALES LOCALITY

| Car-Truck Industry              | 1980    | 1981    | 1982    | 1983    | 1984    | 1985    | 1986    | 1987    | 1988    | '88 v. '80 |
|---------------------------------|---------|---------|---------|---------|---------|---------|---------|---------|---------|------------|
| <b>Los Angeles Zone</b>         |         |         |         |         |         |         |         |         |         |            |
| Industry                        | 610,179 | 572,793 | 568,790 | 652,507 | 762,353 | 920,206 | 924,946 | 934,614 | 965,501 | + 58.2     |
| Dodge                           | 24,247  | 19,350  | 20,669  | 25,794  | 34,643  | 42,523  | 38,270  | 38,436  | 42,969  | + 77.2     |
| Dodge % Industry                | 3.97%   | 3.38%   | 3.63%   | 3.95%   | 4.54%   | 4.62%   | 4.14%   | 4.11%   | 4.45%   | + 12.1     |
| <b>San Diego Sales Locality</b> |         |         |         |         |         |         |         |         |         |            |
| Industry                        | 54,530  | 51,687  | 53,275  | 59,455  | 73,628  | 86,222  | 90,105  | 89,707  | 87,853  | + 61.1     |
| Dodge                           | 2,643   | 2,095   | 2,219   | 2,486   | 3,360   | 4,029   | 3,840   | 3,550   | 3,794   | + 43.5     |
| Dodge % Industry                | 4.85%   | 4.05%   | 4.17%   | 4.18%   | 4.56%   | 4.67%   | 4.26%   | 3.96%   | 4.32%   | (10.9)     |

R. Ex. 7

32. If the Mission Valley franchise is established, CMC will designate new trading zones for each dealership based upon census data tracks. The trading zones will be determined by the driving time and distances to each dealership location. The revised trading

zones will produce the following statistical increases/decreases, as compared with the former trading zone alignment: 18/

|                               | <u>KMD Trading Zone</u> |                | <u>LMD Trading Zone</u> |                |
|-------------------------------|-------------------------|----------------|-------------------------|----------------|
|                               | <u>Units</u>            | <u>Percent</u> | <u>Unit</u>             | <u>Percent</u> |
| 1988 Population:              | - 9,231                 | - 2.85%        | - 28,987                | - 5.68%        |
| 1988 # Households:            | + 2,452                 | - 1.90%        | - 13,271                | - 6.86%        |
| Median Household Income (\$): | + 2,483                 | + 7.58%        | + 802                   | + 2.75%        |
| No. Household >50K Income:    | + 3,612                 | + 9.70%        | - 1,328                 | - 3.22%        |
| 1988 Industry Registrations:  |                         |                |                         |                |
| Total Car and Truck:          | - 877                   | - 3.45%        | - 1,349                 | - 4.76%        |
| Total Retail Car:             | + 82                    | + .63%         | - 830                   | - 5.61%        |
| Total Retail Truck:           | - 84                    | - 1.38%        | - 376                   | - 3.92%        |
| Total Combined Retail:        | - 2                     | - 0.01%        | - 1,206                 | - 4.95%        |

33. For the first six months of 1988, KMD sold 37 cars and trucks, retail and fleet, 19/ which were registered in the "swing area." The "swing area" consists of those census tracts previously assigned to KMD, but which would, under the revised trading zones, be assigned to the Mission Valley dealership.

34. For the first six months of 1988, only six units of the vehicles sold by LMD (fleet and retail, car and truck) were registered in the swing area.

35. CMC establishes minimum facilities criteria for its dealerships. Dealership size, capitalization, service capabilities, and personnel requirements are determined according to the dealer's "planning potential". CMC's market representation department projects each dealer's "planning potential," based on corporate production volumes. Franchisees are contractually bound to maintain

18/ The statistical information was provided to the market research department of CMC by Urban Science Applications, Inc. ("USAI"), which prepared the Alan Johnson Relocation Analysis.

19/ Thirty-one (31) of the units were retail sales.

square footage dictated by CMC's standards. The standards are defined in their "Dealership Facilities and Location Addendum," which is a part of their franchise agreement with CMC. 20/

36. The current architectural plans for the proposed facility were drawn over a land area of 2.33 acres. 21/ It contemplates an enclosed 9,600 square foot area for the showroom, offices and parts storage. This area is below the recommended figure. 22/ Attached to this facility would be a three-story structure, with the service department on the ground floor, and the two levels above for storage and parking. These two levels add an additional .8 acres to the facility's area, bringing the total area to 3.1 acres.

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20/ The Dealer Sales and Service Agreement between CMC and its franchisees provides: "DEALER shall provide facilities for the sale and service of CMC products and related activities ("Dealership Operations") at the location set forth in the... Dealership Facilities and Location Addendum. The entire Dealership Facilities including, but not in limitation of the foregoing, new and used vehicle display area, salesrooms, service area, parts and accessories area, building exterior and grounds will be satisfactory to CMC as to appearance and layout, and will be maintained and used as set forth in the Dealership Facilities and Location Addendum. DEALER shall at all times maintain the Dealership Facilities so that they are of adequate capacity to accommodate DEALER'S total sales volume and are relatively equivalent in their attractiveness, level of maintenance, overall appearance and use to those facilities maintained by DEALER'S principal competitors."

21/ Notwithstanding previous representations of size (varying from 2.39 to 2.7 acres), Sather measured the dimensions of the proposed dealership property utilizing the architect's scale, and found, at least according to the drawing, that the area amounted to 2.33 acres.

22/ However, the Facilities Guide states that "a covered 'outdoor'-- 'open air' showroom may also be used to obtain the required number of display vehicles."

37. Most problematic in the Townsend site plan is the area devoted to service. Various estimations of that area range from 8900 square feet, to 9,600 square feet, to 10,500 square feet. Regardless of these dimensions, the plans call for 20 service stalls. Utilizing either area or number of stalls, the plans do not conform to the service department size recommended for a facility which will have Townsend's planning potential.

38. Undersized service departments may result in diminished consumer satisfaction and convenience. Such a service facility cannot adequately handle the dealership's sales volume and serve the public.

39. Another facet of the plans which does not meet the guidelines is the area devoted to customer and employee parking. The guidelines recommend 46,200 square feet for this purpose. There are, or will be, four parking spaces available to customers on the street in front of the dealership. Coupled with the 11 spaces planned within the property, there will still not be enough customer parking available, given Townsend's planning potential. Convenience for the consumer might be effected. Parking problems will become more acute when the development project across Camino de La Reina, as discussed below, is completed.

40. Townsend employs 60 people at his Lincoln-Mercury dealership. However, the proposed dealership, of approximately the same size, has allocated only 26 spaces for employee parking.

Facts Pertaining to Injury to the Public Welfare  
{Section 3063 (c)}

41. The area around the proposed dealership is being redesigned pursuant to the First San Diego River Project Development. Across Camino de la Reina, to the north of the Townsend property, 400 high density condominiums are being constructed for what is termed the "Mission Valley Project". Several high-rise commercial structures are also being built in the area. Camino de la Reina will be red-lined, which will eliminate parking along it. The area is already congested and employees and customers have problems finding parking. When the condominiums are completed, the congestion and parking problems will increase.

42. The findings of fact contained herein pertaining to the issues of the effect upon the retail motor vehicle business and consuming public, whether there is adequate competition for Dodge vehicles, and whether the additional franchise would increase competition, have specific application to the effect upon the public welfare. This is so because of the recent, dramatic decline in overall sales for Dodge vehicles. The probable involuntary attrition of one or more of the San Diego Dodge dealers in business at the time of the hearing on this matter would adversely impact the public welfare. The establishment of the additional franchise would most likely result in such harm to the public welfare.

Facts Pertaining to Whether Franchisees of the Same Line  
Make in the Relevant Market Area Are Providing Adequate  
Competition and Convenient Consumer Care for Motor  
Vehicles of the Same Line-Make  
{Section 3063 (d)}

43. LMD is a charter member of the Dodge Charger group. To qualify for this group, the dealer must sell at least 1200 units per

year, 23/ achieve a minimum dollar figure for parts sales, have a Customer Satisfaction Index ("CSI") level of 2.5 or better, and be a member of the local Dodge dealer advertising association. LMD is also a charter member of the Ram Chargers, connoting a particular level of truck sales. With parts sales of about \$350,000 per month, LMD has achieved "Mopar Master" status, a designation reserved for high volume parts dealers. Nationally, LMD ranks eighth out of 5400 Chrysler-Plymouth-Dodge- Jeep/Eagle dealers in parts sales. It has the best CSI, 3.12, of any Group E (high volume) dealer in the LA zone. LMD also ranks among the top scorers in the "Prep-It-Right", "Deliver-It-Right" surveys, having received 94 out of a possible 100 points. Since Boaz has assumed the principal role in LMD's operations, its parts business has tripled; service has tripled; used car sales have doubled; while new car sales have remained at about the same levels.

44. New car sales for LMD average 85 units retail and ten units fleet per month. For calendar year 1988, LMD had total sales of 1,344 new vehicles, of which 391 were fleet sales.

45. LMD has 35 service stalls, ten stalls in the body shop, two paint booths, and a parts inventory of about \$1 million. It employs 102 persons.

46. KMD is LMD's main competitor for Dodge sales.

47. KMD is a member of the Charger and Ram Charger groups, a "Mopar Master" parts dealer, and a master lease dealer, being in the top ten per cent of the leasing dealers in the country in retail leases. KMD has been among the top three Dodge Colt dealers in the

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23/ LMD has sold that quantity for the past 22 years.

country since 1971. KMD has met minimum sales requirements in car and truck sales for 15 of the last 19 years.

48. At the time of the original hearing in this matter, KMD's planning potential was 2,000 units. <sup>24/</sup> The facilities guide area requirement for that volume is 5.1 acres. KMD is on a 4.25 acre site, and maintains an off-site storage lot consisting of an additional 79,600 square feet. <sup>25/</sup> KMD has 42 service stalls. 6200 square feet are devoted to parts storage.

49. KMD has excellent CSI levels compared with zone and national averages. Should its CSI continue at the 3.00 level or above for the remainder of the year, KMD will receive a five-star award as a "Group E dealer".

50. The Johnson dealership lost money from its inception. Alan Johnson Dodge-Audi, as it was then called, lost \$876,000 in 1988. In the period from January to May, 1989, Alan Johnson Dodge incurred a loss of \$447,000. (The Audi franchise had by that time been relocated to another facility.)

51. In 1988, KMD reported net earnings of \$1,115,908. The owner's salary totalled \$120,000 that year. In 1987, KMD reported earnings of \$1,280,603, and \$100,000 was paid in owner's salary. In 1985, net earnings for KMD were \$1,110,819, and \$72,000 was paid in salary to the owner. No 1986 figures were made available.

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<sup>24/</sup> At the hearing on remand held on May 7 and May 11, 1990, KMD introduced evidence which indicates that its planning potential had been reduced to 1,363 units.

<sup>25/</sup> Sather also operates a Suzuki franchise on the KMD property. 2200 square feet is devoted to that line-make. This area would be subtracted from the total acreage stated above, to calculate the area to be devoted to Dodge.

52. KMD's financial statements reflect that pre-tax profits for the second quarter of 1988 were \$321,144. For the second quarter of 1989, pre-tax profits were \$28,450.

53. Net earnings for LMD reported in 1985 were \$789,247; \$211,005 was paid to owners and officers (Boaz and Burger) that year. In 1986, net earnings were \$704,319, and officers' salaries were \$224,527. In 1988, net earnings were \$604,350, and salaries \$238,205.

54. While KMD sold fewer than half the vehicles in 1981 than it did in 1988, the dealership still operated at a profit that year. Similarly, LMD was profitable in 1981, even though it sold two-thirds as many vehicles that year as it did in 1988.

55. From the beginning of the year through April 30, 1990, KMD has sold 32 passenger cars and 143 trucks, retail. In comparison with prior years, sales are off 60-70%. This decrease in sales by KMD is attributable, in part, to the general decline in Dodge sales nationally. KMD has incurred year-to-date losses of \$219,000. Since the beginning of this year, Sather has ceased taking a salary from his dealership. The addition of another Dodge dealer in the San Diego area (Poway) in the past year, according to Sather, has affected KMD's sales drastically. <sup>26/</sup> The presence of a Dodge dealership in Mission Valley will have a further negative impact on KMD sales.

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<sup>26/</sup> The Poway dealership is located more than ten miles from KMD.

Facts Pertaining to Whether the Establishment of an  
Additional Franchise Would Increase Competition  
and Therefore Be in The Public Interest  
{Section 3063(e)}.

56. As noted, the plans submitted for the Townsend dealership do not comply in several particulars with CMC minimum facilities guidelines. <sup>27/</sup> LMD and KMD both meet these requirements for their respective planning potentials, and are contractually obligated to do so. Thus, the inference might be raised that in being allowed to construct a substandard facility, Townsend would be able to operate his franchise at lower fixed costs. Consequently, this would allow him to compete on an unequal basis, consistently undersell his competitors, and eventually eliminate them.

57. CMC defines a dual dealership as one where the sales and service facilities of different line-makes are contained within the same building. Dual dealerships sometimes utilize common sales forces and managers for different line-makes. No evidence was presented that Townsend intended to dual. To the contrary, it is clear, that Townsend plans to build and operate separate sales, parts and service facilities for Dodge.

58. As noted earlier, the establishment of the additional franchise would likely result in the involuntary attrition of one or more of the existing Dodge dealers in the San Diego area. As such, establishment of the additional franchise would result in either the

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<sup>27/</sup> In addition to those already detailed, the proposed dealership appears not to be large enough to include the recommended area for storage of new and used car inventory. The planned used car facility will measure 5120 square feet, with space for 40 cars; the guide recommends an area of 28,300 square feet devoted to this purpose.

same number of Dodge dealers in the San Diego area or a reduction in the number of Dodge dealers. Accordingly such an establishment would either reduce or have no effect on competition.

Facts Pertaining to the Establishment of  
the Mission Valley Dealership vs. Reviving the Rosecrans Site

59. CMC possessed site control on the Rosecrans property. When the Johnson dealership closed, CMC could have continued to utilize that property as a Dodge dealership.

60. The dealership was conveniently located, and within easy access of Interstates 5 and 8. It contained a larger service department (23 stalls; 15,200 square feet) than that proposed for the Mission Valley site, and adequately served an existing owner body which was developed over the more than twenty years of operation of the Dodge franchise at that site.

61. According to Protestants' expert, the Rosecrans site had better access to population and employment centers, and given projected freeway improvements, would continue to enjoy that better access in the future. In short, that site would more conveniently serve the public.

62. Nevertheless, Protestants' witnesses conceded that the Mission Valley location was more suitable from the standpoint of sales.

63. CMC decided to release the site control on the Johnson property for a number of reasons. <sup>28/</sup> CMC had long-term plans to locate a Dodge franchise in Mission Valley. The Johnson facility had

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<sup>28/</sup> Johnson did not pay any consideration for its release.

been closed for a period of time. Townsend was not interested in going into that facility because of the delays, and Johnson did not have enough money to keep the facility operating. The rent factor for the site, based on its appraised value, was between \$30,000 and \$35,000 per month. Given the average yearly volume of sales at that location (approximately 450 per year), such a factor was not sustainable. <sup>29/</sup> Furthermore, had CMC elected to exercise its site control option, Johnson, in all likelihood, would have been forced to declare bankruptcy.

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<sup>29/</sup> Under the site control terms, CMC would have been obligated to pay this amount for a five-year period.

### Determination of Issues

The Protestants have proved that there is good cause for not establishing the additional franchise in the Mission Valley area in that:

1. Protestants have proven that their investments are permanent. Protestants have also proven that the proposed franchisee's investment has yet to be placed at risk.

{section 3063(a)};

2. Protestants have proven that the establishment will have an adverse effect on the retail motor vehicle business and the consuming public in the relevant market area {section 3063(b)};

3. Protestants have proven that the establishment will be injurious to the public welfare {section 3063(c)};

4. Protestants have proven that there is adequate competition for Dodge vehicles in the San Diego area {section 3063(d)};

5. Protestants have proven that the establishment would not increase competition, and therefore not be in the public interest {section 3063(e)}; and

6. Protestants have failed to prove that the establishment, rather than the revitalization of a former dealership, is an oppressive or abusive business practice on the part of CMC.

DECISION

The protests are sustained. CMC shall not be permitted to establish the additional dealership at the southeast corner of Camino and De la Reina and Camino De la Siesta, San Diego, California.

Dated: July 20, 1990



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MANNING J. POST  
Vice President  
New Motor Vehicle Board