

NEW MOTOR VEHICLE BOARD
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STATE OF CALIFORNIA

NEW MOTOR VEHICLE BOARD

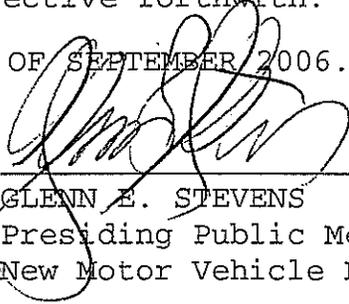
In the Matter of the Protest of)
SERPA AUTOMOTIVE GROUP INC.,) **Protest No. PR-1977-05**
Protestant,)
v.)
VOLKSWAGEN OF AMERICA INC.,)
Respondent.)

DECISION

At its regularly scheduled meeting of September 28, 2006, the Public Members of the Board met and considered the administrative record and Proposed Decision in the above-entitled matter. After such consideration, the Board adopted the Proposed Decision as its final Decision in this matter.

This Decision shall become effective forthwith.

IT IS SO ORDERED THIS 28th DAY OF SEPTEMBER 2006.



GLENN E. STEVENS
Presiding Public Member
New Motor Vehicle Board

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8 STATE OF CALIFORNIA
9 NEW MOTOR VEHICLE BOARD
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11 In the Matter of the Protest of)
12 SERPA AUTOMOTIVE GROUP INC.,) **Protest No. PR-1977-05**
13 Protestant,)
14 v.) **PROPOSED DECISION**
15 VOLKSWAGEN OF AMERICA INC.,)
16 Respondent.)

17
18 PROCEDURAL BACKGROUND

19 1. Protestant Serpa Automotive Group, Inc. (hereinafter "SAG"
20 or "Protestant") is a new motor vehicle dealer and is licensed as such
21 by the California Department of Motor Vehicles ("DMV"). Protestant is
22 a California corporation whose principal place of business as a
23 Volkswagen dealer was 220 South Ben Maddox Way, Visalia, California.

24 2. Frank Serpa is the President and dealer principal of
25 Protestant.

26 3. Volkswagen of America, Inc. (hereinafter "VWoA" or
27 "Respondent") is headquartered in Auburn Hills, Michigan, and is
28 licensed as a distributor of new motor vehicles by the DMV.

1 4. By letter dated October 26, 2005, VWoA notified SAG of
2 VWoA's intent to terminate SAG's Volkswagen Dealer Agreement. The
3 notice stated the grounds for termination as follows:

4 ...Your Volkswagen sales and service operations have now
5 been closed for more than seven business days.
6 **Therefore, in accordance with the provisions of the**
7 **Dealer Agreement and Cal. Veh. Code Ann. § 3060, we**
8 **hereby give you notice that your Volkswagen Dealer**
9 **Agreement is terminated, effective 15 days from your**
10 **receipt of this letter. (Emphasis in original.)**

11 5. SAG filed its protest on November 1, 2005, pursuant to
12 Vehicle Code section 3060¹.

13 6. Pursuant to Section 3066, a four-day hearing was held May 1
14 through May 4, 2006, before Administrative Law Judge Marybelle D.
15 Archibald.

16 7. Philip C. Bourdette, Esq. of Bourdette & Partners, 2924
17 West Main Street, Visalia, California, represented Protestant.

18 8. Allen S. Resnick, Esq. and Neil C. Erickson, Esq. of
19 Jeffer, Mangels, Butler & Marmaro LLP, 1900 Avenue of the Stars,
20 Seventh Floor, Los Angeles, California, represented Respondent.

21 9. Both the Protestant and the Respondent filed pre-hearing
22 briefs which were read and considered by the Administrative Law Judge
23 prior to the receipt of evidence.

24 10. Oral and documentary evidence and evidence by way of
25 stipulation were received.²

26 11. Protestant presented three witnesses at the hearing: Frank
27 Serpa, owner and dealer principal of SAG; Brad Thompson, employee of

28 ¹ All statutory references are to the California Vehicle Code, unless noted
otherwise.

² The Reporter's Transcript (RT) is identified by volume; Exhibits (Exh.) are
identified by number.

1 SAG; and expert witness Edward M. Stockton from The Fontana Group, an
2 automobile industry consulting firm. Protestant also presented the
3 testimony of two witnesses via excerpts of deposition transcripts:
4 Victoria Aida Viskantas, Volkswagen Marketplace facilities project
5 manager for Palladia Architects; and Jim Webber, former Pacific Region
6 Network Development Manager for VWOA.

7 12. VWOA presented the testimony of seven witnesses: Sal
8 Mazzara, Area Manager of VWOA's Area 54; Gary N. Akin, Operations
9 Manager in VWOA's Pacific Region; Kurt Chamberlain, Parts and Service
10 Manager in VWOA's Pacific Region; Hilton Bruce from the network
11 development department in VWOA's Michigan headquarters; adverse
12 witness Frank Serpa; adverse witness Rhonda Loogman, employee of SAG;
13 and expert witness John Frith from Urban Science Applications, Inc.,
14 an automobile industry consulting firm. VWOA also presented the
15 testimony of five witnesses via excerpts of deposition transcripts and
16 electronic video clips: Don Groppetti, dealer principal of Groppetti
17 Automotive Family; Victoria Aida Viskantas; Fred Scott, principal of
18 Scott & Associates; Phillip Vogel, principal of Vogel Strategies; and
19 Jim Webber.

20 13. The parties stipulated to a post-hearing briefing schedule
21 wherein the matter was deemed submitted on August 1, 2006.

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1 ISSUE PRESENTED

2 WHETHER VOLKSWAGEN OF AMERICA, INC. HAS GOOD CAUSE FOR THE
3 TERMINATION OF SERPA AUTOMOTIVE GROUP, INC.'S VOLKSWAGEN FRANCHISE

4 14. Pursuant to Section 3066(b), VWoA has the burden to
5 establish good cause for the termination of SAG's Volkswagen
6 franchise. In determining whether VWoA has established good cause for
7 the termination, Section 3061 requires that the Board consider the
8 "existing circumstances", including but not limited to all of the
9 following:

- 10 (a) Amount of business transacted by the franchisee, as compared
11 to the business available to the franchisee;
- 12 (b) Investment necessarily made and obligations incurred by the
13 franchisee to perform its part of the franchise;
- 14 (c) Permanency of the investment;
- 15 (d) Whether it is injurious or beneficial to the public welfare
16 for the franchise to be modified or replaced or the business
17 of the franchisee disrupted;
- 18 (e) Whether the franchisee has adequate motor vehicle sales and
19 service facilities, equipment, vehicle parts, and qualified
20 service personnel to reasonably provide for the needs of the
21 consumers for the motor vehicles handled by the franchisee
22 and has been and is rendering adequate services to the
23 public;
- 24 (f) Whether the franchisee fails to fulfill the warranty
25 obligations of the franchisor to be performed by the
26 franchisee;
- 27 (g) Extent of the franchisee's failure to comply with the terms
28 of the franchise.

1 EVIDENTIARY RULINGS

2 VOGEL DEPOSITION

3 15. Protestant's objection to the Vogel testimony is sustained
4 as to pages 60:1-61:11 and overruled as to the remainder of the
5 proffered excerpts.³

6 WEBBER DEPOSITION

7 16. Protestant's objection to portions of the Webber testimony
8 is overruled.⁴

9 FINDINGS OF FACT⁵

10 PRELIMINARY FINDINGS

11 MR. SERPA'S EXPERIENCE IN THE INDUSTRY

12 17. Mr. Serpa commenced his employment in the automobile
13 industry in 1978, selling automobiles in Clovis, California.⁶ Between
14 1981 and 1991, Mr. Serpa worked as a team manager, sales manager and
15 general manager for various dealerships in Fresno and Tulare Counties.⁷
16 In 1991, Mr. Serpa opened a used car dealership in Visalia⁸ as well as
17 a new car dealership with Hyundai in Visalia.⁹ In 1996, SAG acquired
18 new car dealerships with Kia and Suzuki.¹⁰ SAG operated a Daewoo
19 dealership for a period of time, and a Serpa affiliated company
20 operates a Saturn dealership.¹¹ In 1998, SAG was authorized to operate
21 a Volkswagen franchise.¹² Evidence was presented that the value of Mr.

22 _____
23 ³ Exh. 7, Phillip Vogel Deposition Excerpts.

24 ⁴ Exh. 10, James Webber Deposition Excerpts.

25 ⁵ The references to testimony, exhibits, or other parts of the record contained
26 herein are examples of the evidence relied upon to reach a finding and are not
27 intended to be all-inclusive.

28 ⁶ RT II, pp. 198:24-199:1.

⁷ RT II, pp. 199:2-200:25.

⁸ RT II, p. 201:8-14.

⁹ RT II, p. 201:15-21.

¹⁰ RT II, pp. 202:25-203:5.

¹¹ RT II, p. 203:6-18.

¹² Exh. 1, Stipulated Fact (SF) 1.

1 Serpa's automobile enterprises and associated real estate holdings is
2 substantial.¹³ In the course of his career, Mr. Serpa has built and
3 remodeled facilities for the sale and service of automobiles.¹⁴

4 THE VMOA-SAG AGREEMENT

5 18. On July 14, 1998, SAG and VWoA entered into a Volkswagen
6 Dealer Agreement ("Dealer Agreement") enabling SAG to operate a
7 Volkswagen dealership at 220 South Ben Maddox Way in Visalia
8 ("Authorized VW Facility").¹⁵ SAG's Dealer Agreement was amended on or
9 about September 10, 1999, and again on or about November 21, 2001;
10 these modifications reflected changes in the beneficial owners and
11 officers of SAG.¹⁶

12 19. The document with the title "Volkswagen Dealer
13 Agreement" is a two-page document, and it incorporates Exhibit
14 A (Statement of Ownership and Management) and Exhibit B (Dealer
15 Premises Addendum).¹⁷ In addition, Paragraph 2 of the Volkswagen
16 Dealer Agreement provides:

17
18 **2. STANDARD PROVISIONS.** The Dealer Agreement
19 Standard Provisions (the "Standard Provisions") (Form
20 No. 97vwstdp), the Dealer Operating Plan (the
21 "Operating Plan") and the Volkswagen Dealer Operating
Standards (the "Operating Standards") are part of this
Agreement. Any term not defined in this Agreement has
the meaning given such term in the Standard
Provisions.¹⁸

22 20. VWoA has a procedure which has been in place for at least
23 twelve years for the preparation and delivery of a Dealer Agreement to
24

25 ¹³ RT III, pp. 154:8-155:10; Exh. 3, Tab E, pp. A0125-A0132; Exh. 7, Vogel, p. 20:12-
19.

26 ¹⁴ RT II, p. 204:2-24; pp. 207:16-208:1; Exh. 7, Scott, p. 18:12-16.

27 ¹⁵ Exh. 1, SF 1; Exh. 3, Tab A.

28 ¹⁶ RT II, pp. 162:23-164:3; pp. 217:3-218:23; pp. 225:13-226:16; Exh. 1, SF 2 and 3;
Exh. 3, Tab A, p. VW0462, and Tab C.

¹⁷ Exh. 3, Tab A, pp. VW0460-VW0464; Exh. 3, Tab C, pp. A0465-A0469.

¹⁸ RT II, p. 21:7-15; Exh. 3, Tab A, p. VW0460; Exh. 3, Tab C, p. A0465.

1 a new dealer.¹⁹ VWOA's network development department in Michigan
2 prepares a Dealer Agreement with the Standard Provisions and Operating
3 Standards which is put in a white three-ringed binder ("white
4 binder").²⁰ The white binder is sent to the appropriate VWOA Region,
5 where a VWOA Area Executive delivers the white binder to the new
6 dealer.²¹ Hilton Bruce ("Mr. Bruce") testified that SAG's Dealer
7 Agreement was prepared by the network development department pursuant
8 to these procedures and sent to the Pacific Region for delivery to Mr.
9 Serpa.²²

10 21. Gary N. Akin ("Mr. Akin"), the VWOA Area Executive in the
11 Pacific Region responsible for Visalia, and Sal Mazzara, the VWOA
12 representative for Visalia, testified that they met with Mr. Serpa in
13 his office in Visalia on July 14, 1998 and presented Mr. Serpa with a
14 white binder containing: (i) an unexecuted version of the Dealer
15 Agreement, (ii) the Standard Provisions, and (iii) the Volkswagen
16 Dealer Operating Standards then in effect ("Operating Standards").²³

17 22. Mr. Akin testified that he reviewed the contents of the
18 white binder with Mr. Serpa, explaining to Mr. Serpa the various
19 paragraph headings and certain other specifics about each of the three
20 documents, including providing an oral overview of each article
21 contained in the Standard Provisions.²⁴ Mr. Mazzara observed this
22 process but does not recall the specifics of the discussion.²⁵

24 ¹⁹ RT II, p. 112:22-24; pp. 113:9-114:18.

25 ²⁰ RT II, pp. 114:1-115:1; Exh. 2 was admitted as a sample, representing the type of
white binder and contents which VWOA contends it provided to Mr. Serpa.

26 ²¹ RT II, pp. 164:20-165:1.

27 ²² RT II, p. 165:2-19.

28 ²³ RT I, pp. 37:17-38:10; p. 40:6-23; pp. 41:21-42:15; pp. 42:16-43:1; RT II, pp.
19:7-21:5; Exh. 2; Exh. 3, Tab A.

²⁴ RT II, pp. 25:10-32:6; pp. 32:18-34:19; p. 35:4-11; pp. 101:20-102:11.

²⁵ RT I, pp. 140:19-141:9.

1 Duplicate originals of the unexecuted Dealer Agreement were removed
2 from the white binder and signed by Mr. Akin and Mr. Serpa.²⁶

3 23. At the meeting, Mr. Mazzara and Mr. Akin also presented Mr.
4 Serpa with a two-page letter agreement from VWoA dated March 11, 1998
5 ("VW Letter") which authorized SAG to use the word "Volkswagen" in the
6 business name "Serpa Volkswagen."²⁷ Mr. Serpa signed the VW Letter.²⁸

7 24. Mr. Akin and Mr. Mazzara testified that copies of the signed
8 Dealer Agreement and signed VW Letter were made and left with Mr.
9 Serpa, along with the white binder containing the Standard Provisions
10 and Operating Standards.²⁹ Following execution of the duplicate
11 original Dealer Agreements by Robert G. Dunn, then Regional Team
12 Leader for VWoA, Mr. Akin sent one of the fully executed originals to
13 VWoA's corporate network development department in Michigan, and he
14 delivered the other fully executed original of the Dealer Agreement to
15 Mr. Serpa during his August 1998 visit to SAG.³⁰

16 25. In July 1998, VWoA procedure did not include having the
17 dealer sign a receipt for the white binder.³¹ Mr. Akin testified that
18 although his practice was to use a checklist when discussing the
19 Dealer Agreement package with a new dealer, he discards the checklist
20 after the Dealer Agreement is delivered to the dealer.³²

21 26. Mr. Serpa testified that he met with Mr. Mazzara and Mr.
22 Akin in his office in Visalia on July 14, 1998, and that he signed the
23

24
25 ²⁶ RT I, p. 40:6-23; p. 122:14-17; RT II, pp. 38:7-39:3; pp. 211:21-212:24.

26 ²⁷ RT II, pp. 40:16-41:4; pp. 72:17-74:9; Exh. 3, Tab A, pp. VW0465-VW0466.

27 ²⁸ RT I, p. 129:14-18; RT II, pp. 40:16-41:4; p. 213:14-23.

28 ²⁹ RT I, pp. 49:7-50:2; p. 133:8-20; RT II, pp. 42:11-43:8.

³⁰ RT II, p. 39:2-23; p. 59:1-10; pp. 66:23-67:15.

³¹ RT I, 135:1 - 24; RT II, p. 118:4-11.

³² RT II, p. 43:9-18; pp. 65:8-66:10.

1 Dealer Agreement in their presence.³³ Mr. Serpa did not read the
2 Dealer Agreement word for word while Mr. Akin was reviewing it with
3 him.³⁴

4 27. Mr. Serpa denied that Mr. Akin reviewed the Standard
5 Provisions document with him.³⁵ English is not Mr. Serpa's native
6 language, and he testified that if he had the opportunity to go
7 through the Standard Provisions, it would have taken him as long as
8 six hours, and he would have remembered reading that document had he
9 done so.³⁶

10 28. Mr. Serpa testified that he does not recall a white binder.³⁷
11 He also denied ever seeing a white binder.³⁸ Mr. Serpa denied that he
12 was shown or given a white binder containing the Standard Provisions
13 and Operating Standards.³⁹ Mr. Serpa also denied that he was given a
14 fully executed duplicate original of the July 14, 1998 Dealer
15 Agreement.⁴⁰

16 29. The SAG files containing the VWoA documents were originally
17 in the custody of Mr. Serpa, who maintained them in a file cabinet in
18 his office with paperwork for his various automobile franchises.⁴¹
19 SAG employee Rhonda Loogman was given the responsibility for
20 maintaining the files after 1998, but she has never seen anything like
21 a white binder.⁴² The VWoA materials in Ms. Loogman's custody are
22 maintained in a manila folder in a locked file cabinet and include

23 ³³ RT II, p. 211:20-23; p. 214:5-16.Exh. 1, SF 1.

24 ³⁴ RT III, pp. 79:8-80:1.

25 ³⁵ RT III, pp. 74:13-75:3; Exh. 2; Exh. 3, Tab B.

26 ³⁶ RT III, p. 77:7-19.

27 ³⁷ RT II, p. 214:22; p. 215:2-3.

28 ³⁸ RT III, p. 75:4-9.

³⁹ RT II, pp. 214:17-216:24; RT III, pp. 74:17-75:9.

⁴⁰ RT III, pp. 75:19-76:9; pp. 157:24-158:4.

⁴¹ RT II, p. 230:1-8; RT III, p. 75:10-18.

⁴² RT III, pp. 77:20-78:4; p. 206:21-207:24; p. 215:10-17:

1 six sheets of paper: the two pages of the amended Dealer Agreement
2 signed by Mr. Serpa on November 21, 2001; the two pages of Exhibit A
3 signed November 21, 2001; Exhibit B signed November 21, 2001; and the
4 second page of the VW Letter signed by Mr. Serpa on July 14, 1998.⁴³
5 Ms. Loogman testified that she did not believe the pages were stapled
6 together.⁴⁴ The file cabinet containing SAG's dealer agreements were
7 moved on at least three occasions.⁴⁵

8 30. The Standard Provisions prohibit a dealer from closing its
9 operations without VWOA's permission, as follows:

10 (1) Except to the extent a greater notice period
11 is required by any applicable statute, VWOA has
12 the right to terminate this Agreement for cause,
13 with immediate effect, by sending notice of
14 termination to Dealer, if any of the following
15 should occur:

16 . . .
17 (f) Failure of Dealer to continue to operate any
18 of Dealer's Premises in the usual manner for a
19 period of five consecutive business days, unless
20 caused by an Act of God, war, riot, strike,
21 lockout, fire, explosion or similar event: . . .⁴⁶

22 31. No modifications have been made to the Standard Provisions
23 since 1998.⁴⁷

24 **BUY-SELL NEGOTIATIONS FOR THE VOLKSWAGEN FRANCHISE**

25 32. Evidence reflects that at various times during 2005, SAG was
26 conducting discussions to sell the Volkswagen dealership to at least
27 three prospective buyers: (1) Don Gropetti ("Mr. Gropetti") of
28 Gropetti Automotive Family ("Gropetti"); (2) Melody Swanson ("Ms.

⁴³ RT II, pp. 224:19-225:12; RT III, p. 158:15-20; pp. 192:12-193:5; p. 212:5-15; p. 213:13-14; Exh. 3, Tabs A and C.

⁴⁴ RT III, p. 209:4-11.

⁴⁵ RT II, p. 230:1-19; RT III, p. 75:10-18; pp. 77:20-79:7.

⁴⁶ Exh. 3, Tab B, p. VW0513, Art. 14(1)(f).

⁴⁷ RT II, p. 46:2-4; p. 115:7-13.

1 Swanson"); and (3) Fawz Sood ("Mr. Sood").⁴⁸

2 33. The Volkswagen franchise and the SAG Hyundai dealership
3 operated as a dual dealership.⁴⁹ In May 2005, Mr. Groppetti and Mr.
4 Serpa began negotiations for a buy-sell of SAG's Volkswagen and
5 Hyundai dealerships, including a lease to Mr. Groppetti of the real
6 property at which the dealerships were located.⁵⁰ At Mr. Serpa's
7 request, the Volkswagen proposal included a provision permitting Mr.
8 Serpa to cancel the Volkswagen sale at his discretion within thirty
9 days of the close of escrow; the purpose of the provision was to
10 enable a sale to a higher bidder.⁵¹ The Hyundai sale and the lease of
11 the real property could be consummated even if Mr. Serpa elected to
12 cancel the Volkswagen portion of the sale.⁵²

13 34. SAG and Groppetti signed two buy-sell agreements on July 15,
14 2005, one for Volkswagen and one for Hyundai.⁵³ The buy-sell
15 agreements each make reference to the Dealer Agreement, and each
16 provides automatic extensions to the extent additional time was
17 necessary to obtain manufacturer approval.⁵⁴

18 35. The Authorized VW Facility and Hyundai premises were located
19 on property owned by Mr. Serpa and his wife, and as part of the buy-
20 sell agreements, the property was to be leased to Groppetti with an
21 option to purchase.⁵⁵ If Mr. Serpa cancelled the sale of the
22 Volkswagen dealership, once the buy-sell agreement for Hyundai had
23 closed escrow, the Authorized VW Facility could no longer be located
24

25 ⁴⁸ RT II, pp. 233:18-234:10; Exh. 1, SF 4; Exh. 3, Tab F3 and Tab J6.

26 ⁴⁹ RT II, p. 202:4-21.

27 ⁵⁰ Exh. 3, Tab O.

28 ⁵¹ RT I, p. 54:18-25; Exh. 1, SF 5; Exh. 3, Tab S, Tab Y, and Tab U2.

⁵² Exh. 3, Tab T2.

⁵³ Exh. 1, SF 4; Exh. 3, Tabs Y and Z; Exh. 6, pp. 51:19-53:11.

⁵⁴ Exh. 3, Tab Y and Tab Z, p. 7, para. 28.

⁵⁵ Exh. 3, Tab A2; Exh. 6, pp. 21:12-22:4; p. 48:7-22.

1 at 220 South Ben Maddox Way, Visalia.⁵⁶

2 36. On or about August 4, 2005, SAG notified Mr. Mazzara of the
3 pending sale of the Volkswagen dealership,⁵⁷ and on August 5, 2005, SAG
4 sent a letter to VWOA confirming the pending sale and requesting
5 "factory approval" to transfer the Volkswagen franchise to Groppetti.⁵⁸

6 37. On August 18, 2005, Mr. Mazzara and Jim Webber ("Mr.
7 Webber") of VWOA met separately with Mr. Serpa and Mr. Groppetti.⁵⁹ At
8 the meetings, Mr. Mazzara provided Mr. Serpa and Mr. Groppetti with
9 copies of VWOA's applicable Operating Standards, and Mr. Mazzara
10 advised Mr. Serpa and Mr. Groppetti that the sale of a Volkswagen
11 franchise triggers certain obligations under the Operating Standards
12 to upgrade the dealership facility to Volkswagen Marketplace facility
13 standards.⁶⁰

14 38. During the August 18, 2005 meeting, Mr. Serpa explained to
15 Mr. Mazzara that the Volkswagen buy-sell agreement with Groppetti gave
16 SAG the right to pull the Volkswagen franchise out of the sale if Mr.
17 Serpa found a prospective buyer to pay more money than offered by
18 Groppetti.⁶¹

19 39. On August 24, 2005, both Mr. Groppetti and Mr. Serpa
20 notified Mr. Mazzara that SAG was exercising its option to cancel the
21 Volkswagen portion of the sale to Groppetti.⁶² SAG and Groppetti
22 proceeded with the sale of the Hyundai franchise and the lease of the
23

24 ⁵⁶ Exh. 3, Tab A2 and Tab D3.

25 ⁵⁷ Exh. 1, SF 6.

26 ⁵⁸ Exh. 1, SF 7; Exh. 3, Tab D2.

27 ⁵⁹ RT I, pp. 51:13-52:12; Exh. 1, SF 10; Exh. 6, pp. 58:1-60:17; Exh. 10, Webber, pp.
25:5-26:21.

28 ⁶⁰ RT I, pp. 52:13-54:17; RT II, pp. 141:13-142:2; Exh. 3, Tab D, p. VW0005; Exh. 10,
Webber, pp. 43:1-44:7; pp. 49:21-50:25.

⁶¹ RT I, p. 54:18-25.

⁶² Exh. 1, SF 11; Exh. 3, Tab P2 and U2; Exh. 6, pp. 73:21-76:20.

1 real property that was the Authorized VW Facility.⁶³

2 40. The primary reason stated in the SAG corporate minutes for
3 withdrawing the Volkswagen franchise from sale was to keep the
4 franchise as a stand-alone business on the Suzuki location at 815
5 South Ben Maddox Way.⁶⁴ Mr. Serpa notified both Mr. Groppetti and Mr.
6 Mazzara that the reason for cancelling the sale of the Volkswagen
7 franchise was that SAG had a prospective buyer who would pay more than
8 Groppetti.⁶⁵ Although Mr. Serpa continued to have discussions with Ms.
9 Swanson and Mr. Sood, no evidence was proffered that either they or
10 any other potential buyer had made a commitment to purchase the
11 Volkswagen franchise at that time.⁶⁶

12 **RELOCATION POSSIBILITIES**

13 41. Mr. Serpa signed the Dealer Agreement on July 14, 1998 and
14 November 21, 2001.⁶⁷ Both documents contain a provision requiring
15 written approval from VWOA prior to relocating:⁶⁸

16 **5. DEALER'S PREMISES.** VWOA has approved the
17 location of Dealer's Premises as specified in the
18 Dealer Premises Addendum, attached as Exhibit B.
19 Dealer agrees that, without VWOA's prior written
20 consent, it will not (a) make any major structural
change in any of Dealer's Premises, (b) change the
location of any of Dealer's Premises or (c)
establish any additional premises for Dealer's
Operations.

21 42. Mr. Serpa testified that he was aware that any proposal to
22 relocate needed to be in writing, that he was required to comply with
23 VW Marketplace facility standards, and that VWOA approval was required
24 for any relocation.⁶⁹

25
26 ⁶³ Exh. 3, Tab Y4.

⁶⁴ Exh. 3, Tab R2.

27 ⁶⁵ Exh. 3, Tab U2 and Tab W2.

⁶⁶ Exh. 3, Tab F3 and Tab J6.

28 ⁶⁷ Exh. 1, SF 1; Exh. 3, Tab A and Tab C.

⁶⁸ Exh. 3, Tab A and Tab C.

1 43. SAG had experience building and remodeling dealerships prior
2 to August 2005.⁷⁰

3 44. As early as July 1, 2005, Mr. Serpa articulated a
4 contingency plan to relocate the Volkswagen franchise should the buy-
5 sell with Groppetti not be consummated.⁷¹ Mr. Serpa operated a Suzuki
6 automobile dealership located at 815 South Ben Maddox Way in Visalia,
7 and the contingency plan was to move the Volkswagen franchise to the
8 Suzuki location.⁷² At the hearing Mr. Serpa testified that during a
9 meeting on August 18, 2005, Mr. Mazzara came up with the idea to
10 relocate the Volkswagen dealership to the Suzuki location.⁷³ Mr.
11 Mazzara denies that this subject was discussed at the August 18, 2005,
12 meeting, and he denies that he suggested the Suzuki location as an
13 acceptable site.⁷⁴

14 45. On August 23, 2005, Mr. Serpa asked Mr. Mazzara if the
15 Suzuki location could be remodeled to house Volkswagen if the buy-sell
16 with Groppetti did not occur.⁷⁵ Mr. Mazzara responded "Anything is
17 possible. If it looks like we are going that direction, I will come
18 back up and we can discuss the requirements in more detail. Just let
19 me know."⁷⁶

20 46. On August 24, 2005, Mr. Serpa asked Mr. Mazzara for ". . .
21 SPECIFIC INFORMATION NEEDED TO IMPROVE ON (sic) OF THE TWO FACILITIES
22 WE TALKED ABOUT"⁷⁷

23
24
25 ⁶⁹ RT III, pp. 25:18-21; p. 28:13-22; p. 32:14-17.

⁷⁰ RT II, p. 204:2-24; pp. 207:16-208:1; Exh. 7, Scott, p. 18:12-16.

⁷¹ Exh. 3, Tab U.

⁷² Exh. 3, Tab U.

⁷³ RT III, pp. 15:22-16:5; p. 180:16-21.

⁷⁴ RT I, p. 56:6-10.

⁷⁵ Exh. 3, Tab O2.

⁷⁶ Exh. 3, Tab O2.

⁷⁷ Exh. 3, Tab U2.

1 47. On August 25, 2005, Mr. Serpa asked Mr. Mazzara about an
2 eighteen month schedule, based upon the assumption that the Volkswagen
3 franchise would be sold and moved to the General Motors ("GM")
4 showroom owned by Mr. Groppetti while a new Volkswagen facility was
5 built on property owned by Mr. Serpa.⁷⁸ Mr. Serpa knew the GM property
6 would not be available for use until December 2005.⁷⁹

7 48. At some point Mr. Serpa offered to move the Volkswagen
8 franchise to his Kia showroom.⁸⁰ No written proposal for this
9 relocation was sent to VWoA.⁸¹

10 49. On August 31, 2005, SAG made a written request to VWoA to
11 relocate the Volkswagen dealership to the Suzuki location.⁸² Although
12 the SAG corporation directors had voted to keep Volkswagen as a stand-
13 alone business at the Suzuki location, Mr. Serpa's original written
14 relocation proposal was to house Volkswagen and Suzuki at the Suzuki
15 location.⁸³ Mr. Serpa testified that he knew this proposal was likely
16 to be rejected.⁸⁴ VWoA immediately rejected the proposal.⁸⁵

17 50. On September 6, 2005, SAG made a written request to VWoA to
18 relocate Volkswagen to the Suzuki location as a stand-alone
19 dealership.⁸⁶

20 51. VWoA has a standard relocation approval process which was
21 explained to Mr. Serpa.⁸⁷ Upon a dealer's written request to relocate,
22 VWoA sends an architect to the proposed facility to determine whether
23

24 ⁷⁸ Exh. 3, Tab A3.

25 ⁷⁹ Exh. 3, Tab U.

26 ⁸⁰ RT III, pp. 32:20-33:21.

27 ⁸¹ RT III, p. 33:1-2.

28 ⁸² Exh. 1, SF 12; Exh. 3, Tab I3.

⁸³ Exh. 3, Tab R2.

⁸⁴ RT III, pp. 25:24-26:8; Exh. 3, Tabs I3 and L3.

⁸⁵ Exh. 3, Tab L3.

⁸⁶ Exh. 1, SF 12; Exh. 3, Tab Q3.

⁸⁷ RT I, pp. 71:10-73:25; Exh. 3, Tab T3.

1 it meets VWOA's Marketplace facility standards; if so, VWOA will
2 develop a letter of intent which sets forth all of the conditions
3 under which VWOA will approve the proposed relocation.⁸⁸

4 52. On September 8, 2005, Mr. Serpa completed a VW Marketplace
5 Design Services Enrollment Form ("Enrollment Form") which described
6 the process as including an initial site visit, approval of
7 preliminary designs, creation of Design Control Documents and a return
8 on-site visit to deliver the design package.⁸⁹ The Enrollment Form
9 also states that the relocating dealer is then responsible for
10 securing construction documents and permits by a properly licensed
11 architect/engineering professional of the dealer's choice.⁹⁰

12 53. The communications by Mr. Mazzara to Mr. Serpa consistently
13 note that the relocation approval process takes time; that VWOA would
14 not authorize SAG to conduct Volkswagen business at the Suzuki
15 location until the process was complete; and that the scheduled escrow
16 closing date for the Groppetti transaction was not realistic.⁹¹ When
17 the transaction with Groppetti closed, SAG would lose the right to
18 occupy and use the real property which was the Authorized VW
19 Facility.⁹² Mr. Mazzara used the phrase "at risk" but did not mention
20 "termination".⁹³

21 54. During September 2005, SAG representatives repeatedly asked
22 VWOA to issue an OL-124 for the Suzuki location.⁹⁴ VWOA advised SAG on
23

24 ⁸⁸ RT II, pp. 119:14-122:22.

25 ⁸⁹ Exh. 3, Tab W3.

26 ⁹⁰ Exh. 3, Tab W3.

27 ⁹¹ Exh. 1, SF 13, SF 18, and SF 24; Exh. 3, Tabs X3, Z3, D4, E4 and F4.

28 ⁹² Exh. 3, Tab A2 and Tab D3.

⁹³ RT I, pp. 90:9-91:18.

⁹⁴ Form OL-124 is signed by the manufacturer or distributor, authorizing the dealer to sell a specific brand of new vehicles at a specific address location. The form is required by DMV before it will issue a license to a dealer. Exh. 1, SF 14, SF 16, SF 19 and SF 20.

1 multiple occasions that an OL-124 would not be issued for the Suzuki
2 location until the relocation proposal had been approved.⁹⁵

3 55. On September 19, 2005, Mr. Serpa asked Mr. Mazzara for
4 advice, claiming that DMV would not be able to issue a license until
5 the end of the month; Mr. Mazzara suggested that Mr. Serpa seek an
6 extension of time on the sale of the Hyundai dealership from Mr.
7 Groppetti.⁹⁶ Mr. Serpa knew on September 19, 2005, that the architect
8 could not survey the Suzuki location until October 6, 2005.⁹⁷ At Mr.
9 Groppetti's suggestion, the date for the close of escrow was moved to
10 October 13, 2005.⁹⁸

11 56. Aida Viskantas (Ms. Viskantas), the VWoA approved architect,
12 inspected the Suzuki location on October 6, 2005 and determined that
13 the existing structure did not meet VWoA's minimum Marketplace
14 requirements and would require substantial new construction, including
15 construction of an expanded showroom and a new service department, and
16 additional parking space.⁹⁹ Ms. Viskantas and Mr. Mazzara advised Mr.
17 Serpa that the Suzuki location, as it existed, was not adequate and
18 required remodeling and expansion.¹⁰⁰

19 57. On October 6, 2005, Mr. Mazzara observed the SAG sales
20 manager moving Volkswagen vehicles to the Suzuki location.¹⁰¹ Mr.
21 Mazzara requested "For Display Only" signs be placed on the vehicles
22 because SAG was not authorized by VWoA nor licensed by DMV to sell
23

24 ⁹⁵ Exh. 1, SF 13, 15, 16, 19, 20, and 24; Exh. 3, Tabs X3, Z3, and D4.

25 ⁹⁶ Exh. 1, SF 17 and SF 18; Exh. 3, Tab E4.

26 ⁹⁷ Exh. 1, SF 19; Exh. 3, Tab D4.

27 ⁹⁸ Exh. 3, Tab J4.

28 ⁹⁹ RT I, p. 96:11-20; Exh. 1, SF 21; Exh. 7, Viskantas, pp. 29:1-32:10; pp. 34:3-37:25; pp. 39:13-44:19; pp. 45:8-46:20.

¹⁰⁰ RT I, pp. 96:21-97:10; p. 98:4-12; Exh. 7, Viskantas, pp. 39:13-44:19; pp. 45:8-46:20.

¹⁰¹ RT I, p. 92:13-21.

1 Volkswagens at the Suzuki location.¹⁰²

2 58. Mr. Mazzara advised Mr. Serpa on October 10, 2005:

3 I have been working very hard to get this done as
4 quickly as possible for you. The DMV is causing the
5 problems for you, not VW. It takes time to review the
6 facility and make sure it will meet the needs for VW,
7 now and in the future. We are moving from a complete
8 facility to one with a showroom that is too small per
9 VW standards, without a service or parts (sic)
10 department. It takes time to draw these plans and
11 review them for accuracy. From the very beginning I
12 made the requirements known to you and expressed my
13 concern over the timing and DMV issues. I will push
14 VW to move as quickly as possible. I urge you to
15 plead your case to with (sic) the DMV and get some
16 flexibility from them as well.¹⁰³

17 59. By the time of SAG's abandonment of the Authorized VW
18 Facility, Ms. Viskantas had conducted the initial site visit and was
19 still in the process of working with VWoA to obtain approval of
20 preliminary design documents.¹⁰⁴

21 **TERMINATION**

22 60. Mr. Serpa asked for advice from Mr. Groppetti on September
23 20, 2005, and Mr. Groppetti warned Mr. Serpa not to close SAG's
24 Volkswagen dealership for more than the maximum number of days before
25 VWoA could terminate SAG's Volkswagen dealership:¹⁰⁵

26 . . .If you do not sell and have to put the cars
27 behind Saturn just be careful not to exceed the
28 maximum number of days you can be closed before VW
could terminate. . . .¹⁰⁶

61. Upon receipt of Mr. Groppetti's advice which warned about
termination, Mr. Serpa did not review the Volkswagen Dealer Agreement

102 RT I, pp. 92:21-93:4.

103 Exh. 1, SF 24; Exh. 3, Tab T4.

104 Exh. 1, SF 25; Exh. 3, Tab H5 and Tab I5; Exh. 7, Viskantas, pp. 54:23-58:20.

105 Exh. 3, Tab H4; Exh. 6, pp. 85:1-87:19.

106 Exh. 3, Tab H4.

1 materials in his file, nor did he inform Ms. Loogman of the Groppetti
2 warning or request that she research the termination issue.¹⁰⁷
3 Upon receipt of Mr. Groppetti's warning concerning termination, Mr.
4 Serpa did not consult with his attorney, although Mr. Serpa did
5 testify that after the exit from the Authorized VW Facility he learned
6 from his attorney that the Standard Provisions prohibited cessation of
7 Volkswagen operations for more than five consecutive days.¹⁰⁸

8 62. On September 21, 2005, Mr. Mazzara came to Visalia to meet
9 with Mr. Serpa; however, Mr. Serpa did not bring up the topic of
10 termination or discuss Mr. Groppetti's warning with Mr. Mazzara.¹⁰⁹

11 63. Between October 12 and October 14, 2005, Mr. Serpa closed
12 the Hyundai deal with Groppetti and ceased doing business at the
13 Authorized VW Facility.¹¹⁰

14 64. Although Mr. Groppetti had previously agreed to extend the
15 closing date to allow more time for completing the relocation approval
16 process, Mr. Serpa agreed to close the transaction on October 13,
17 2005.¹¹¹ Mr. Serpa did not ask Mr. Groppetti to extend the closing
18 beyond October 13, 2005.¹¹²

19 65. Mr. Serpa testified that he was aware of the means to extend
20 the closing of escrow until manufacturer approvals were obtained.¹¹³

21 66. On about October 13, 2005, DMV issued a license to Groppetti
22
23

24 ¹⁰⁷ RT III, pp. 43:7-44:24; pp. 122:23-123:6; pp. 191:23-192:7.

25 ¹⁰⁸ RT III, p. 136:10-18; pp. 167:24-168:9.

26 ¹⁰⁹ RT I, pp. 88:16-91:18; RT III, pp. 43:9-44:19; Exh. 3, Tab H4.

27 ¹¹⁰ RT I, p. 105:5-17; Exh. 1, SF 25.

28 ¹¹¹ Exh. 3, Tab J4.

¹¹² RT III, pp. 61:3-62:4; Exh. 3, Tab Y5; Exh. 6, pp. 90:9-91:8; p. 92:18-22; pp. 95:9-97:1; pp. 118:14-121:16. There is also evidence that Mr. Serpa could have delayed the closing and the DMV licensing of the Hyundai dealership simply by delaying submission of paperwork to DMV (Exh. 3, Tab A5).

¹¹³ RT III, pp. 10:11-11:24; Exh. 3, Tab Y, p. VW0305.

1 for a Hyundai dealership at 220 South Ben Maddox, Visalia.¹¹⁴

2 67. When it abandoned the Authorized VW Facility, SAG took no
3 steps to notify VWOA.¹¹⁵

4 68. Mr. Mazzara telephoned the Authorized VW Facility on October
5 13, 2005, and he was referred to Mr. Serpa's Kia dealership.¹¹⁶ Mr.
6 Bruce made the decision to terminate VWOA's relationship with SAG on
7 October 19, 2005, and no further work was done on the relocation
8 request.¹¹⁷

9 69. As a courtesy to Mr. Serpa, on October 20, 2005 Mr. Mazzara
10 was authorized to call Mr. Serpa and advise him that VWOA would be
11 sending a notice of termination.¹¹⁸ VWOA's Notice of Termination to
12 SAG is dated October 26, 2005.¹¹⁹ The termination cites SAG's failure
13 to conduct its customary Volkswagen sales and service operations
14 during customary business hours for seven consecutive days, in breach
15 of the Dealer Agreement, thus triggering the expedited 15-day notice
16 provided by Section 3060(a)(1)(B)(v) in cases where the dealership has
17 ceased operations for seven consecutive business days.¹²⁰

18 70. SAG filed a protest pursuant to Section 3060 on November 1,
19 2005.¹²¹

20 ///

21 ///

22 ///

23 ///

24 _____
25 ¹¹⁴ Exh. 3, Tab A5.

26 ¹¹⁵ RT I, pp. 105:5-106:10.

27 ¹¹⁶ RT I, pp. 105:5-106:3.

28 ¹¹⁷ RT II, p. 140:1-15; pp. 172:23-173:21.

¹¹⁸ RT I, pp. 207:24-208:10; Exh. 1, SF 26.

¹¹⁹ Exh. 1, SF 27.

¹²⁰ Exh. 1, SF 27; Exh. 3, Tab E6.

¹²¹ Exh. 1, SF 28.

1 FINDINGS RELATING TO THE AMOUNT OF BUSINESS TRANSACTED BY
2 SAG AS COMPARED TO THE BUSINESS AVAILABLE TO IT (SEC. 3061(a))¹²²

3 71. Since October 14, 2005, there has been no authorized or
4 licensed Volkswagen facility in Visalia where new customers can view,
5 test drive and/or buy Volkswagen vehicles.

6 72. Expert testimony and reports were received on behalf of SAG
7 and VWOA. On behalf of SAG, Mr. Edward Stockton ("Mr. Stockton") of
8 the Fontana Group analyzed the comparison of customer convenience
9 before and after the closing of Serpa Volkswagen.¹²³ On behalf of
10 VWOA, Mr. John Frith ("Mr. Frith") of Urban Science Applications
11 analyzed sales performance.¹²⁴

12 73. Mr. Stockton defined the applicable market as the Fresno-
13 Visalia-Bakersfield area¹²⁵ and the consuming public as Serpa's
14 Volkswagen sales customers¹²⁶ or, alternately, VWOA retail car and
15 light truck customers who registered new vehicles in 2005.¹²⁷ Mr.
16 Stockton provided a comparison of air distance and drive times which
17 indicated that the consuming public is affected by the distance
18 between franchisees.¹²⁸ In Mr. Stockton's opinion, the proposed
19 termination of the Serpa franchise will have a measurable negative
20 effect on the consuming public in the Fresno-Visalia-Bakersfield
21

22 ¹²² Protestant argues that the Board should not consider performance issues because
23 VWOA acknowledges they were not a factor in the decision to terminate SAG.
24 Protestant's reliance upon *American Isuzu Motors, Inc. v. New Motor Vehicle Board*
25 (*Fladeboe*) (1986) 186 Cal. App.3d 464 [franchisor attempts to raise additional
26 grounds for termination at hearing] and *British Motor Car Distributors, Ltd. v. New*
27 *Motor Vehicle Board* (1987) 194 Cal. App.3d 81 [no reason for termination stated] do
28 not support this narrow interpretation of the Board's scope of review.

¹²³ RT IV, pp. 110:24-111:4; Exh. 8.

¹²⁴ RT IV, p. 2:18-23; Exh. 5.

¹²⁵ RT 82:8-20; Exh. 8, Tab 4. Mr. Stockton testified that this area, and the primary
area of influence measurement utilized by Mr. Frith, were quite similar.

¹²⁶ RT IV, p. 85:6-18; Exh. 8, Tab 7

¹²⁷ RT IV, p. 86:19-22; Exh. 8, Tab 8.

¹²⁸ RT IV, pp. 91:20-95:9; Exh. 8, Tab 12.

1 market, requiring additional travel to obtain services, and is
2 injurious to the public welfare.¹²⁹ Mr. Stockton did not quantify lost
3 sales due to the closing of Serpa Volkswagen.¹³⁰ Mr. Stockton measured
4 the effect of the closing of the Authorized VW Facility on Volkswagen
5 service customers, not on customers who wish to purchase a new
6 Volkswagen vehicle.¹³¹

7 74. Mr. Frith's analysis considered sales effectiveness, the
8 measure of a dealer's sales anywhere in the United States and compared
9 that number to the number of expected retail registrations in the
10 dealer's primary area of influence; his analysis includes adjustments
11 for local consumer preferences.¹³²

12 75. From 2000 through September 2005, Mr. Frith concluded that
13 SAG sales effectiveness averaged around 55%, which was below the
14 expected performance for a Volkswagen dealer.¹³³

15 76. Mr. Frith's analysis reflects that the dealerships in Fresno
16 and Bakersfield were also performing below California standards during
17 the same time period.¹³⁴ VWOA did not indicate to Mr. Frith that it
18 desired to terminate the SAG franchise based upon poor performance.¹³⁵
19 Mr. Frith's analysis did not include a review of service work,
20 warranty work, or customer satisfaction.¹³⁶

21 77. Mr. Frith testified that management can affect sales
22 effectiveness.¹³⁷ During 2005, SAG employed a general manager for the
23

24 ¹²⁹ RT IV, pp. 79:22-80:3; 80:16-20.

25 ¹³⁰ RT IV, p. 100:9-20.

26 ¹³¹ RT IV, p. 85:8-18; p. 100:2-20.

27 ¹³² RT IV, pp. 15:25-16:21.

28 ¹³³ RT IV, p. 21:19-23; p. 24:18-23.

¹³⁴ RT IV, p. 51:10-13; Exh. 5, PH App. 11 through PH App. 22.

¹³⁵ RT IV, p. 36:19-22.

¹³⁶ RT IV, pp. 40:21-41:1; p. 56:9-11.

¹³⁷ RT IV, p. 59:9-11.

1 Volkswagen franchise to whom VWOA communicated its concerns about
2 performance issues. When it became apparent that the general manager
3 had not shared those concerns with Mr. Serpa, on August 19, 2005, Mr.
4 Mazzara forwarded to Mr. Serpa written communication on the subject.¹³⁸
5 At the time of the termination, the general manager was no longer
6 associated with SAG.

7 78. Even though their analyses address different aspects of the
8 automobile industry, Mr. Stockton and Mr. Frith agree that the public
9 of the Visalia market needs a functioning Volkswagen dealership.¹³⁹

10 79. Sales of the Volkswagen brand in the Fresno-Visalia-
11 Bakersfield market were not good for any dealer, and VWOA's Notice of
12 Termination does not include poor performance as a basis for
13 termination. Mr. Serpa's goal was to sell the Volkswagen franchise -
14 if not to Mr. Groppetti or Ms. Swanson, then to Mr. Sood or some other
15 buyer. Although Mr. Serpa expressed a willingness to work to "bring
16 the numbers back up where they should be", this willingness was solely
17 for the purpose of preparing the franchise for sale.¹⁴⁰ SAG's goal was
18 short-term and appears to be at odds with the goal of VWOA to have an
19 established dealer motivated to increase sales for the long term.

20 **FINDINGS RELATING TO THE INVESTMENT NECESSARILY MADE AND**
21 **OBLIGATIONS INCURRED BY THE FRANCHISEE TO PERFORM**
22 **ITS PART OF THE FRANCHISE (SEC. 3061(b))**

23 80. Since October 14, 2005, there has been no authorized or
24 licensed Volkswagen facility in Visalia.

25 81. Mr. Serpa and his wife own the property which had housed
26 Hyundai and Volkswagen in the Authorized VW Facility. The sale of the

27 ¹³⁸ RT I, p. 154:13-25.

28 ¹³⁹ RT IV, pp. 114:5-118:3.

¹⁴⁰ Exh. 3, Tab F3.

1 Hyundai franchise to Groppetti included the lease to Groppetti of all
2 of the real property, including the Volkswagen facility, requiring a
3 relocation of the Volkswagen franchise to an approved site. Before
4 escrow closed, Mr. Serpa did not request an additional extension of
5 the close of escrow in order to accommodate the Volkswagen relocation
6 approval process.

7 82. Mr. Serpa offered various properties and scenarios for
8 relocation of the Volkswagen franchise. A temporary relocation to Mr.
9 Groppetti's GM facility, followed by building a new facility, appears
10 to be an offer which was impossible to perform: Mr. Serpa knew the GM
11 facility was not available in October and would not be available until
12 December 2005. The proposal to temporarily relocate to Mr. Serpa's
13 Kia facility, followed by building a new facility, appears to have
14 been made while the Suzuki location was being evaluated, and pursuing
15 that proposal would have required a separate relocation approval
16 process.

17 83. After Mr. Serpa exercised his option to pull Volkswagen out
18 of the deal with Groppetti, Mr. Serpa contacted Ms. Swanson on August
19 27, 2005, offering to sell her the Volkswagen franchise and suggesting
20 that she could temporarily move it into the unavailable GM facility
21 until a permanent location was built.¹⁴¹ He requested her response by
22 the end of August, stating that if Ms. Swanson was not interested, Mr.
23 Serpa would keep the franchise, move it in with Suzuki, and sell it
24 later.¹⁴² Apparently Ms. Swanson turned down the deal: on August 31,
25 2005 Mr. Serpa made his written request to relocate the Volkswagen
26 franchise to the Suzuki location and operate the two franchises

27
28 ¹⁴¹ Exh. 3, Tab F3.

¹⁴² Exh. 3, Tab F3.

1 together.

2 84. Mr. Serpa's August 31, 2005 proposal to relocate to the
3 Suzuki location, dualing Suzuki and Volkswagen, delayed the relocation
4 approval process. The SAG directors voted to relocate Volkswagen as a
5 stand-alone business. Mr. Serpa had received a copy of the VWoA
6 Marketplace facility standards on August 18, 2005, and he knew VWoA
7 would reject the proposal for a dual facility.

8 85. The September 6, 2005, written proposal to relocate to the
9 Suzuki location, combined with the September 8, 2005, completion of
10 the Enrollment Form, commenced the VWoA relocation approval process.

11 86. The Suzuki location was never approved as an authorized site
12 for the VWoA franchise. The VWoA relocation approval process had not
13 been completed at the time of the abandonment of the Authorized VW
14 Facility. SAG provided evidence that conceptual plans had been
15 created for the relocation site.¹⁴³ Evidence was also provided that a
16 SAG representative expressed willingness to expend the necessary funds
17 for the relocation remodel.¹⁴⁴

18 87. The investments made by SAG toward the anticipated
19 relocation of the Volkswagen franchise were: (1) providing a potential
20 building for the Volkswagen franchise by moving the Suzuki franchise
21 out of 815 South Ben Maddox; and (2) purchasing signs to post at 815
22 South Ben Maddox to alert the public that Volkswagen business was
23 being conducted at that site.¹⁴⁵

24 88. The Suzuki location did not meet the VWoA Marketplace
25 facility standards and would have required remodeling. Even though
26

27 ¹⁴³ Exh. 7, Scott, p. 29:3-17; Exh. 9.

28 ¹⁴⁴ RT III, p. 198:1-10.

¹⁴⁵ RT III, pp. 145:6-146:6; Exh. 3, Tab Q6 and Tab R6.

1 SAG was willing to expend funds for remodeling, the evidence supports
2 the finding that Mr. Serpa made decisions which caused him to exit the
3 Approved VW Facility without having an approved relocation site. The
4 investment made and obligations incurred are insufficient for SAG to
5 perform its part of the franchise agreement.

6 **FINDINGS RELATING TO THE PERMANENCY**
7 **OF THE INVESTMENT (SEC. 3061(c))**

8 89. Since October 14, 2005, there has been no authorized or
9 licensed Volkswagen facility in Visalia.

10 90. Evidence was received that SAG was not averse to investing
11 the funds necessary for remodeling the Suzuki location.

12 91. Notwithstanding Mr. Serpa's testimony that he wanted to
13 continue selling Volkswagen vehicles, the evidence is conclusive that
14 what Mr. Serpa wanted to accomplish was the sale of the Volkswagen
15 franchise. Notwithstanding the flurry of illusory and impractical
16 proposals such as relocating to the GM or Kia facilities, Mr. Serpa
17 was apparently only willing to invest in a temporary relocation site
18 until a sale of the franchise could be completed.

19 92. Due to Mr. Serpa's decision to request a dual Suzuki-
20 Volkswagen facility, which delayed the relocation approval process,
21 and due to Mr. Serpa's decision not to seek an extension of the date
22 for closing escrow on the sale of the Hyundai franchise and lease of
23 the real property on which the VWoA franchise had operated, SAG's exit
24 from the Authorized VW Facility was required prior to completion of
25 the relocation approval process. Other than the Suzuki facility which
26 was proposed as a relocation site, there is no permanency of the SAG
27 investment and no obligations incurred to relocate the Volkswagen
28 franchise.

1 FINDINGS RELATING TO WHETHER IT IS INJURIOUS OR BENEFICIAL
2 TO THE PUBLIC WELFARE FOR THE FRANCHISE TO BE MODIFIED OR
3 REPLACED OR THE BUSINESS OF THE FRANCHISEE DISRUPTED (SEC. 3061(d))

4 93. Since October 14, 2005, there has been no authorized or
5 licensed Volkswagen facility in Visalia.

6 94. Prior to SAG operating a VWoA franchise in Visalia, there
7 had been other VWoA dealerships in that city.¹⁴⁶ Mr. Stockton and Mr.
8 Frith concur that it is beneficial for the public in the Visalia
9 market area to have a functioning Volkswagen dealership.

10 95. On the one hand, Mr. Serpa expressed concern for his
11 customers. On the other hand, he conceded that he was aware he had
12 the ability to extend the close of escrow in the Hyundai sale, thus
13 delaying the closing of the Authorized VW Facility. He also increased
14 the time necessary for the relocation approval process by requesting
15 to dual the Suzuki dealership with Volkswagen.

16 96. Mr. Serpa was aware that he needed VWoA approval to relocate
17 his Volkswagen dealership. Nevertheless, without approval and without
18 notice to VWoA, the Volkswagen franchise was disbursed among the
19 various SAG holdings: phone calls were referred to the SAG Kia
20 dealership; parts and service went to SAG's Suzuki location; repairs
21 went to SAG's Saturn location; and vehicles were housed at SAG's
22 Suzuki location.¹⁴⁷ No evidence was presented that SAG customers
23 received notice of the changes earlier than did VWoA. SAG caused
24 injury to the public by abandoning the Authorized VW Facility without
25 an approved relocation site.

26 97. Mr. Serpa's goal was to sell the Volkswagen franchise. It
27 would be beneficial to the public to have a dealer who is dedicated to

28 ¹⁴⁶ RT II, p. 88:14-19; p. 89:3-10.

¹⁴⁷ RT III, pp. 195:5-197:7; p. 220:9-18.

1 Volkswagen and its customers, not just a dealer transitioning toward
2 sale.

3 FINDINGS RELATING TO WHETHER THE FRANCHISEE HAS ADEQUATE
4 MOTOR VEHICLE SALES AND SERVICE FACILITIES, EQUIPMENT,
5 VEHICLE PARTS, AND QUALIFIED PERSONNEL TO REASONABLY
6 PROVIDE FOR THE NEEDS OF THE CONSUMERS FOR THE MOTOR
7 VEHICLES HANDLED BY THE FRANCHISEE AND HAS BEEN AND IS
8 RENDERING ADEQUATE SERVICES TO THE PUBLIC (SEC. 3061(e)).

9 98. No evidence was presented that prior to the abandonment of
10 the Authorized VW Facility, SAG failed to provide adequate sales and
11 service facilities, equipment, vehicle parts, and qualified personnel
12 to reasonably provide for the needs of the consumers.

13 99. Since October 14, 2005, there has been no authorized or
14 licensed Volkswagen facility in Visalia.

15 100. One Volkswagen vehicle remained in the service department at
16 220 South Ben Maddox Way because the vehicle was awaiting parts and
17 could not be moved.¹⁴⁸ SAG simply borrowed the now-Hyundai space, just
18 as it borrowed the Suzuki location for service of other Volkswagen
19 vehicles when it left the Authorized VW Facility.

20 101. SAG continues to provide service and warranty work from
21 unauthorized locations.¹⁴⁹

22 102. SAG has displayed Volkswagen service signage at an
23 unauthorized facility without VWoA's permission or authorization.¹⁵⁰

24 103. Pending the outcome of the protest, VWoA has continued to
25 reimburse SAG for warranty work performed at unauthorized locations
26 due to uncertainty as to whether a refusal to reimburse the warranty

27 ¹⁴⁸ RT II, p. 190:7-14; RT III, pp. 54:2-55:17; pp. 221:22-222:8; Exh. 3, Tab V4; Exh.
28 6, pp. 109:9-110:19.

¹⁴⁹ RT I, p. 185:21-25; p. 208:11-25; p. 214:5-20; Exh. 3, Tab A6.

¹⁵⁰ RT III, pp. 145:6-146:6; pp. 176:23-177:19; Exh. 3, Tab Q6.

1 work could be construed as a violation of the Vehicle Code.¹⁵¹

2 104. Brad Thompson, the person most knowledgeable about service
3 and warranty work for SAG, testified that he had been trained and was
4 certified by VWoA; however, he is not certified for 2006.¹⁵² He
5 testified that SAG service personnel had not received training
6 information since October 2005.¹⁵³

7 105. SAG contends that it has the necessary tools to perform the
8 necessary service on VWoA vehicles; no tool inventory has been
9 conducted since January 2005.¹⁵⁴

10 106. SAG contends that it was prepared to and could have modified
11 the Suzuki location to meet the VWoA Marketplace standards. However,
12 SAG knew it could extend the close of escrow on the Hyundai
13 transaction but chose not to do so, and it made an unauthorized move
14 to multiple locations. It has been established that SAG has no
15 Volkswagen sales facility, inadequate service facilities, and
16 technicians who have not received current training.

17 **FINDINGS RELATING TO WHETHER THE FRANCHISEE FAILS TO**
18 **FULFILL WARRANTY OBLIGATIONS OF THE FRANCHISOR TO**
19 **BE PERFORMED BY THE FRANCHISEE (SEC. 3061(f))**

20 107. No evidence was presented that prior to the abandonment of
21 the Authorized VW Facility SAG failed to fulfill the warranty
22 obligations of VWoA to be performed by SAG.

23 108. Since October 14, 2005, there has been no authorized or
24 licensed Volkswagen facility in Visalia.

25 109. Evidence was presented that although SAG does not have an

26 ¹⁵¹ RT I, p. 214:5-20.

27 ¹⁵² RT III, pp. 217:24-218:7; p. 220:2-4; p. 227:20-22.

28 ¹⁵³ RT III, p. 221:19-21; p. 228:10-13.

¹⁵⁴ RT III, p. 228:7-9.

1 authorized Volkswagen facility, pending the outcome of this protest
2 VWOA has authorized and paid for warranty work performed by SAG.¹⁵⁵

3 110. Brad Thompson, SAG's most knowledgeable employee concerning
4 service and warranty work, testified that he was certified to perform
5 work on VWOA vehicles through 2005 and that he and other technicians
6 had not received training since October 2005.

7 111. The evidence is conclusive that warranty work is being
8 performed, albeit by technicians who may not have received the most
9 recent training.

10 **FINDINGS RELATING TO THE EXTENT OF THE FRANCHISEE'S FAILURE**
11 **TO COMPLY WITH THE TERMS OF THE FRANCHISE (SEC. 3061(g))**

12 **MR. SERPA'S KNOWLEDGE OF THE TERMS OF THE CONTRACT WITH VWOA**

13 112. SAG contends that it cannot be bound by the terms of the
14 Dealer Agreement Standard Provisions because the Standard Provisions
15 were not given to Mr. Serpa at the time he signed the Dealer Agreement
16 on July 14, 1998.

17 113. The Dealer Agreement contained in SAG's files and bearing
18 Mr. Serpa's signature from November 2001 expressly states:

19 "[t]he Dealer Agreement Standard Provisions (the
20 'Standard Provisions') (Form No. 97vwstdp) . . .
21 are part of this Agreement. Any term not defined
in this Agreement has the meaning given such term
in the Standard Provisions."

22 That is the same language that is reflected in the July 1998 Dealer
23 Agreement. Mr. Serpa testified that Mr. Akin reviewed the Dealer
24 Agreement with him in July 1998. Mr. Akin testified that he explained
25 the paragraph headings of the Dealer Agreement. Therefore, because the
26 Standard Provisions were called to his attention, because they were

27 _____
28 ¹⁵⁵ RT I, p. 214:5-20.

1 readily available from VWoA, and because Mr. Serpa consented to the
2 incorporation by signing the Dealer Agreement, the incorporation of
3 the Standard Provisions is legally binding.¹⁵⁶

4 114. There is no evidence to support an inference that in
5 contracting with SAG as a new VWoA dealer, VWoA deviated from its
6 standard practice of placing all necessary materials in a white
7 binder, personally delivering those materials to the dealer, reviewing
8 the topic headings in each document with the dealer, signing the
9 necessary documents, and providing the documents incorporated by
10 reference in the Dealer Agreement, with fully executed signed
11 documents, to the dealer. Mr. Bruce testified to the consistency of
12 the process from the headquarters standpoint, and Mr. Akin used a
13 checklist in reviewing the materials with a new dealer. Mr. Akin and
14 Mr. Mazzara testified that they personally observed Mr. Serpa sign the
15 Dealer Agreement on July 14, 1998, and saw him take possession of the
16 white binder containing the Dealer Agreement documents, including the
17 Standard Provisions.

18 115. Both VWoA and SAG exhibited anomalies in document
19 maintenance. Mr. Mazzara, who worked out of a home office,
20 inadvertently commingled VWoA documents with personal items placed in
21 storage. Mr. Serpa was unable to explain why the SAG folder only
22 contains page two of the VW letter which he signed on July 14, 1998.¹⁵⁷
23 The SAG folder for VWoA documents does not contain any July 1998
24 Dealer Agreement pages, nor does the SAG folder contain the Dealer
25 Agreement with changes Mr. Serpa signed in September 1999.

26
27 ¹⁵⁶ See, for example, *Shaw v. Regents of University of California* (1997) 58 Cal. App.
4th 44, 54.

28 ¹⁵⁷ RT III, pp. 157:20-161:6.

1 116. Mr. Serpa is involved in the operation of large and
2 successful multi-brand businesses which in 2005 included Volkswagen,
3 Hyundai, Kia, Saturn and Suzuki dealerships. Mr. Serpa is also
4 involved in the real estate business. Mr. Serpa concedes that he has
5 difficulty with dates, and the evidence reflects inconsistencies in
6 evidence and testimony which raise some doubt as to the accuracy of
7 his recollection. For example, Mr. Serpa testified that in August
8 2005, Mr. Mazzara came up with the idea for the Suzuki relocation -
9 but the idea had been Mr. Serpa's in July. In another example, Mr.
10 Serpa suggested to both VWoA and Ms. Swanson in August that the
11 Volkswagen franchise could be relocated to Mr. Groppetti's GM location
12 - but Mr. Serpa had been advised in July that the GM location would
13 not be available until December. Mr. Serpa also expressed concern to
14 Mr. Groppetti that "Lillian", the DMV representative, had come in
15 October without warning - but Mr. Serpa had received an e-mail from
16 Mr. Groppetti providing him with Lillian's anticipated arrival date.¹⁵⁸

17 117. The evidence establishes that Mr. Serpa has been able to
18 conduct complex transactions and manage successful businesses even
19 though English is not his native language.

20 118. Based upon the evidence presented, it is determined that Mr.
21 Serpa was provided with the Standard Provisions of the Volkswagen
22 Dealer Agreement and that there are no language barriers which would
23 have violated the contract process.

24 ///

25 ///

26 ///

27
28 ¹⁵⁸ Exh. 3, Tab Y5.

1 EVEN IF MR. SERPA DID NOT RECEIVE THE WHITE BINDER, HE DID RECEIVE
2 THE DEALER AGREEMENT, HE IS PRESUMED TO KNOW THE LAW, AND BECAUSE OF
3 THE WARNING FROM MR. GROPPETTI, MR. SERPA HAD REASON TO KNOW ABOUT THE
4 TERMS OF THE DEALER AGREEMENT PERTAINING TO CLOSURE OF THE DEALERSHIP

5 119. As discussed above, the Dealer Agreement incorporates the
6 Standard Provisions by reference. The Dealer Agreement was reviewed
7 by Mr. Akin with Mr. Serpa in July 1998; the Serpa files contain the
8 identical language in the November 2001 Dealer Agreement. The Dealer
9 Agreement, in paragraph 9, provides that the laws of California will
10 govern the agreement.¹⁵⁹

11 120. Parties contracting in California are presumed to know the
12 applicable law.¹⁶⁰ A reasonable interpretation of the agreement would
13 put the parties on notice of the California Vehicle Code, including
14 section 3060(a)(1)(b)(v) referencing termination following closure for
15 seven consecutive business days.

16 121. The concept of franchise termination by VWoA was not unknown
17 to Mr. Serpa: he knew, for example, that VWoA could terminate his
18 franchise if he treated his customers poorly.¹⁶¹

19 122. Mr. Groppetti and Mr. Vogel testified that it was generally
20 known in the automobile industry that if a dealership is closed for a
21 certain length of time, the manufacturer can terminate the
22 franchise.¹⁶²

23 123. Mr. Serpa asked for Mr. Groppetti's advice. He then ignored
24 it. Mr. Groppetti warned him about the maximum number of days a
25 dealer could be closed before VW could terminate. Mr. Serpa testified

26 ¹⁵⁹ Exh. 3, Tab C, p. A0466.

27 ¹⁶⁰ See, for example, *California Association of Highway Patrolmen v. Department of*
Personnel Administration (1986) 185 Cal. App.3d 352, 364.

28 ¹⁶¹ Exh. 3, Tab T4; find cite for Std. Prov. Art. 14, (2)(c)

¹⁶² Exh. 6, pp. 86:24-87:15; Exh. 7, Vogel, pp. 43:14-44:14.

1 that if a VWOA representative had used the word "termination" it would
2 have been a red flag. It is inexplicable that Mr. Serpa would only be
3 concerned if a VWOA representative used "termination", but would
4 ignore the term when used by Mr. Groppetti, from whom he sought
5 advice.

6 124. Even if Mr. Serpa did not receive the Standard Provisions in
7 July 1998, he was on notice that they existed, he was presumed to know
8 the law, and he failed to take action when specific advice was
9 provided by Mr. Groppetti.

10 RELOCATION PROCESS

11 125. The Dealer Agreement clearly states that approval is
12 required before a franchise can be relocated, and Mr. Serpa was aware
13 of that requirement.

14 126. Mr. Serpa requested the clause in the Volkswagen buy-sell
15 agreement which would permit him to withdraw the franchise from sale
16 up to thirty days before close of escrow. Mr. Serpa assumed that his
17 Suzuki location would be an acceptable site for relocating the
18 Volkswagen franchise. But he delayed the relocation approval process
19 by submitting a proposal he knew would be rejected. In spite of notice
20 from VWOA that an OL-124 would not be issued until the relocation
21 approval process had been completed, SAG started moving vehicles and
22 equipment in anticipation of approval.

23 127. The evidence does not support SAG's contention that Mr.
24 Mazzara lulled it into believing approval was imminent. The
25 communications between the parties are clear that Ms. Viskantas'
26 drawings were not complete and required approval by VWOA in Michigan;
27 the next step in the process, the letter of intent, wasn't even
28 discussed. SAG miscalculated the timing for the relocation approval,

1 and, reminiscent of the Baltimore Colts, simply moved without approval
2 or notice to VWoA.

3 128. The evidence supports a finding that SAG failed to comply
4 with the relocation approval procedures in the Volkswagen Dealer
5 Agreement, thus leaving Visalia without an approved Volkswagen
6 facility for more than seven consecutive business days.

7 **FAILURE TO PARTICIPATE IN ALTERNATIVE DISPUTE RESOLUTION**

8 129. Protestant contends that there is no good cause for
9 termination because VWoA failed to engage in pre-termination
10 discussions or alternative dispute resolution.¹⁶³ Article 13 of the
11 Standard Provisions provides for dispute resolution. Termination
12 disputes are covered by the provision in which the parties agree to
13 dispute resolution prior to going to court or an administrative
14 agency. Article 13 also provides that VWoA is to "endeavor" to
15 discuss disputes with franchisees.

16 130. SAG cannot claim it is not covered by the Standard
17 Provisions as to Article 14 (Termination), and then claim that it is
18 covered by the Standard Provisions, Article 13 (Dispute Resolution).
19 As discussed above, the evidence supports a finding that SAG received
20 the Standard Provisions.

21 131. SAG departed the Authorized VW Facility without notice to
22 VWoA. A reasonable inference is that VWoA, while not required to
23 discuss the relocation dispute with SAG, determined that such a
24 discussion would be futile.

25 132. The responsibility for requesting dispute resolution does
26 not rest solely with VWoA - SAG could have requested the process but

27 _____
28 ¹⁶³ Exh. 3, Tab B, pp. 15-16.

1 did not.¹⁶⁴

2 133. There is no evidence that the failure of the parties to
3 utilize dispute resolution was indicative of bad faith on the part of
4 VWoA, so that the termination should be invalidated.

5 DETERMINATION OF ISSUES

6 134. VWoA has established that SAG was not conducting an adequate
7 amount of business as compared to the business available to it;
8 however, this issue was not a factor in the decision to terminate
9 SAG's franchise. [Section 3061(a)]

10 135. VWoA has established that SAG has not made the investment
11 necessary and incurred the obligations necessary to perform its part
12 of the Volkswagen franchise. [Section 3061(b)]

13 136. VWoA has established that SAG's investment was not
14 permanent. [Section 3061(c)]

15 137. VWoA has established that it would not be injurious to the
16 public welfare for the franchise to be replaced. [Section 3061(d)]

17 138. VWoA has established that SAG does not have adequate motor
18 vehicle sales and service facilities, equipment, vehicle parts, and
19 qualified service personnel to reasonably provide for the needs of the
20 consumers for the motor vehicles handled by the franchisee and is not
21 rendering adequate services to the public. [Section 3061(e)]

22 139. VWoA has not established that SAG failed to fulfill the
23 warranty obligations of VWoA to be performed by SAG. [Section
24 3061(f)]

25 140. VWoA has established that SAG failed to comply with the
26 terms of the franchise. [Section 3061(g)]

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28 ¹⁶⁴ RT I, p.205:15-20.

1 PROPOSED DECISION

2 Based on the evidence presented and the findings herein, it is
3 hereby ordered that the Protest is overruled. VWOA has met its burden
4 of proof under Vehicle Code Section 3066(b) to establish that there is
5 good cause to terminate SAG's franchise.
6
7

8 I hereby submit the foregoing which
9 constitutes my proposed decision in
10 the above-entitled matter, as the
11 result of a hearing before me, and
12 I recommend this proposed decision
13 be adopted as the decision of the
14 New Motor Vehicle Board.

15 DATED: August 31, 2006

16 By:


17 MARYBELLE D. ARCHIBALD
18 Administrative Law Judge
19
20
21
22
23
24
25

26 George Valverde, Director, DMV
27 Mary Garcia, Branch Chief,
28 Occupational Licensing, DMV