

NEW MOTOR VEHICLE BOARD
1507 - 21st Street, Suite 330
Sacramento, California 95811
Telephone: (916) 445-1888

STATE OF CALIFORNIA
NEW MOTOR VEHICLE BOARD

In the Matter of the Protest of

CARLSEN SUBARU,

Protestant,

v.

SUBARU OF AMERICA, INC.,

Respondent.

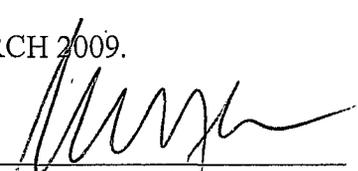
Protest No. PR-2096-07

DECISION

At its regularly scheduled meeting of March 24, 2009, the Public Members of the Board met and considered the administrative record and Proposed Decision after Remand in the above-entitled matter. After such consideration, the Board adopted the Proposed Decision after Remand as its final Decision in this matter.

This Decision shall become effective forthwith.

IT IS SO ORDERED THIS 24th DAY OF MARCH 2009.



ROBERT T. (TOM) FLESH
President
New Motor Vehicle Board

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CERTIFIED MAIL

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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 CARLSEN SUBARU,

13 Protestant,

14 v.

15 SUBARU OF AMERICA, INC.,

16 Respondent.

Protest No. PR-2096-07

**PROPOSED DECISION
AFTER REMAND**

17 1. Protestant, Carlsen Subaru ("CS" or "Protestant"), is located at 480 Veterans Boulevard,
18 Redwood City, California. Protestant is licensed by the California Department of Motor Vehicles
19 ("DMV") as a new motor vehicle dealer.

20 2. Respondent, Subaru of America, Inc. ("SOA" or "Respondent"), is licensed by the DMV
21 as a distributor of new motor vehicles. SOA's national headquarters are located at 2235 Route 70 West,
22 Cherry Hill, New Jersey. SOA's Northwest Region offices are located at 5216 NE 158th Avenue,
23 Portland, Oregon.

24 3. Protestant is a franchisee of SOA and authorized to sell and service Subaru vehicles at the
25 address indicated above.

26 4. Michael M. Sieving, Esq. and Tina Hooper, Esq. of the Law Offices of Michael M.
27 Sieving, 350 University Avenue, Suite 105, Sacramento, California, represented Protestant. Jeffrey A.
28 Baruh, Esq. of Adelson, Hess & Kelley, 577 Salmar Avenue, 2nd Floor, Campbell, California, also

1 represented Protestant but did not appear at the merits hearing.

2 5. Maurice Sanchez, Esq. and Kevin M. Colton, Esq. of Baker & Hostetler LLP, 600 Anton
3 Boulevard, Suite 900, Costa Mesa, California, represented Respondent.

4 **Stipulated Facts¹ and Statement of Case**

5 6. Prior to 1976, the Subaru dealership which is now operated by Protestant was located at
6 4190 El Camino Real, Palo Alto, California, approximately 8.4 air miles to the south of its current
7 location.

8 7. In June 1976, the shares of the corporation which owned the Subaru business now owned
9 by Protestant were purchased by Carlsen Porsche Audi, Inc., a company which ultimately became Carlsen
10 Motor Cars, Inc.

11 8. Carlsen Motor Cars, Inc. is majority-owned by Charles Burton.

12 9. Carlsen Motor Cars, Inc. also owns Porsche and Audi dealerships located in Redwood City
13 and Palo Alto, respectively.

14 10. In 1979, Carlsen Subaru, Inc. the company which currently owns the CS dealership was
15 formed. Carlsen Motor Cars, Inc. currently owns 50% of the shares of Carlsen Subaru, Inc.

16 11. In 1992, Robert Fечи, purchased shares of Carlsen Subaru, Inc. Over time, the ownership
17 of the dealership corporation changed to the point that Carlsen Motor Cars, Inc. and Robert Fечи each
18 owned 50% of the shares of the dealership corporation.

19 12. In 1997, Protestant's Subaru dealership was relocated to the Redwood City site, where it
20 remains today.

21 13. The Fечи family, through a separate entity, then owned and still owns the Redwood City
22 site at which Protestant is located.

23 14. Carlsen Motor Cars, Inc. also owns Carlsen Volvo, which is located at 4180 El Camino
24 Real, Palo Alto, California, next door to the former CS location.

25 15. In 2003, with the financial assistance of Subaru, Protestant's dealership facility was
26 remodeled in accordance with Subaru's brand image program, the "Subaru Signature Facility Program."

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28 ¹ On October 21, 2008, the parties filed [Proposed] Statement of Stipulated Facts and Law.

1 16. In 2004, Robert Fечи passed away.

2 17. Joyce Fечи, Robert Fечи's widow, succeeded to his 50% ownership of both the shares of
3 stock in the dealership corporation, and to the ownership and control of the real estate underlying the
4 dealership.

5 18. Joyce Fечи is not actively involved in Protestant's dealership business.

6 19. John Fечи, the son of Robert and Joyce Fечи, is currently the Used Car Manager at CS.

7 20. In late 2007, Ron Price Subaru ("Price"), the authorized Subaru dealer in South San
8 Francisco, advised Subaru that it intended to sell its dealership. Price also wanted to sell the dealership
9 facility and real estate. In addition, Price wanted to sell its Subaru Service-Only location in downtown
10 San Francisco.

11 21. By letter dated December 13, 2007, SOA served on CS and the Board a Notice of Intent to
12 relocate the South San Francisco dealer from 1 Chestnut Avenue, South San Francisco to 85 California
13 Drive, Burlingame, California. As required by the Vehicle Code, both Protestant and the Board received
14 the notice. CS is located within the relevant market area of the proposed relocating dealer.

15 22. On December 28, 2007, CS filed a timely protest with the New Motor Vehicle Board
16 ("Board") pursuant to the provisions of Vehicle Code section 3062.²

17 23. Under the terms of an Asset Purchase Agreement ("APA") between Price and Putnam
18 Automotive Group ("Putnam") dated January 9, 2008, Putnam and Price agreed to the sale of the Price
19 assets including the Service-Only facility in San Francisco, with the understanding that the Subaru
20 dealership would be relocated from South San Francisco to Burlingame, where Putnam owns and operates
21 several other dealerships. (Exh. 339) SOA approved the proposed buy/sell.

22 24. Prior to the execution of the Price-Putnam APA, the South San Francisco property upon
23 which Price operated was in the process of being acquired by the City of South San Francisco. In early
24 2008, Price sold the real estate to the City of South San Francisco for approximately \$6,000,000.

25 25. Shortly after the real estate was sold, Price closed its South San Francisco location. The
26 Service-Only facility in downtown San Francisco remains open today, under Putnam's ownership.

27
28 ² All statutory references are to the California Vehicle Code unless noted otherwise.

1 26. To avoid any confusion, because Price was no longer operating its Subaru dealership in
2 South San Francisco and had sold its assets to Putnam, SOA, by letter dated April 17, 2008, notified CS
3 that SOA's notice of December 13, 2007, which indicated a relocation of Price to the 85 California Drive
4 was amended to reflect that Putnam would be established as the franchisee at that address.

5 27. The parties to that Amended Notice have stipulated that the existing protest would serve as
6 a protest to the Amended Notice of Establishment.

7 28. A hearing on the merits of the protest was held on October 20-24, 2008, before
8 Administrative Law Judge Jerold A. Prod ("ALJ Prod").

9 29. Post-hearing briefs were filed by the parties in compliance with the schedule established at
10 the conclusion of the hearing and the matter was submitted for decision on December 23, 2008.

11 30. The Proposed Decision was issued January 22, 2009.

12 31. At its General Meeting of February 5, 2009, the Public members of the Board met and
13 considered the administrative record and Proposed Decision dated January 22, 2009. After such
14 consideration, the Board remanded this matter to the Administrative Law Judge ("ALJ") with the
15 following instructions: "The ALJ shall consider evidence, in the record or reopen the record as may be
16 necessary, on comparable Subaru sales in relevant markets with similar demographics, climate and
17 topographical features as exists in the greater San Francisco Peninsula Market. The ALJ shall have
18 discretion to order additional evidence, briefing, and/or arguments, and shall not consider data from
19 markets that are not similar to those serviced by Carlsen Subaru and the proposed Burlingame location."
20 The order was dated February 11, 2009.

21 32. All of the paragraphs in the January 22, 2009 Proposed Decision are hereby incorporated
22 by reference as though fully set forth herein. Particular attention is directed to paragraphs 49, 50, 71, 72,
23 103, 131, 134, 135, 137, 139, 174, 176, 177, 178, 179, 184, 185, 186.

24 33. These are set forth again herein as a group by themselves, with new numbers, immediately
25 following. This is done to focus on the Board's instruction to revisit only the issue of viewing the protest
26 in terms of markets similar in demographics, climate, and topographical features comparable to the
27 greater San Francisco Peninsula Market.

28 // // // // //

1 34. Regarding the standard to be used as a measuring stick for sales expectations and
2 performance, Mr. Frith disagrees with Mr. Stockton's selection of the San Francisco peninsula area minus
3 the relevant market area³ ("RMA"). He believes that amounts to comparing the area to itself. This tends
4 toward a compelled conclusion that everything in the RMA is okay, and no adjustment in the number
5 and/or alignment of dealerships is called for, and no brand penetration increase is to be reasonably
6 expected.

7 35. The SOA Northwest Region outperforms the nation, and most dramatically the San
8 Francisco area, but Mr. Frith believes that the standard is potentially achievable, or at least one toward
9 which a dealer could and should strive. The overall sales performance of the RMA, measured against the
10 SOA Western Region average, is about 60%, with Price included (through 2007). With the closure of
11 Price, the figure drops to about 44%, assuming no other Subaru dealer captures the former Price sales
12 volume. A reasonable assumption is that some previous Price sales volume will or should be captured by
13 other Subaru dealers, and some sales volume is at present being lost to other brands. Mr. Frith concludes
14 that other Subaru dealers have not been picking up what should be expected of the former Price sales
15 volume.

16 36. In considering expected sales, recent past performance, and other factors connected with
17 dealer performance and prospects, Mr. Stockton rejects using SOA's Northwest Region as a benchmark,
18 as SOA's expert has done. He opined that the Northwest Region as a whole contains enough factors of
19 climate and terrain sufficiently different from what dealers face in the Bay Area to render its use as a
20 benchmark inappropriate. He instead uses the geography of the San Francisco Peninsula Metro area minus
21 the RMA, which leaves out snowy/mountainous parts of the west. In this analysis CS does not stand out,
22 being in the middle in terms of market performance. The Subaru brand does better out west in
23 mountainous and snowy locales, and with environmentally conscious customers (e.g., Santa Cruz).

24 37. Mr. Stockton believes that his analysis shows that the market for Subaru vehicles in the
25 RMA is adequately represented in terms of brand performance. Any SOA expectation of significantly
26 increased Subaru sales in the San Francisco area is not warranted, with or without the addition of the

27
28 ³ Section 507 defines relevant market area as "any area within a radius of 10 miles from the site of a potential new dealership."

1 Burlingame point.

2 38. The primary difference between the two dealer network experts' opinions was the standard
3 upon which the market's performance should be measured. Mr. Frith opined that the appropriate standard
4 should be the average of the AORs in the Northwest Region in which SOA has an existing dealer (the
5 "Region Represented Standard"). (RT III, 193: 4 – 10) This is because that standard has consistently
6 been achieved in other AORs in the San Francisco Peninsula Market, but even in CS' AOR, Redwood
7 City, as recently as 2005. (RT III, 200:11 – 201:21, 208:22 – 209:19)

8 39. The expert testimony elicited at the hearing was cogently presented and helpful. Many of
9 the established technical concepts, however, are strongly linked to, and based on, a general automotive
10 market that is at least somewhat stable and/or generally rising. We are now temporarily in a fairly sharp
11 down period in the economy generally, which is disproportionately affecting the car business in an
12 adverse way. Dealerships are closing at an accelerated rate, both voluntarily and otherwise. Expert
13 technical predictive analytical tools, while helpful, must inevitably now be more heavily leavened with
14 business acumen, instinct, and planning for both the short and long terms in which prospects may vary.
15 There must be increased doses of instability, uncertainty, and adjustment factored into the mix for at least
16 the near, and probably medium, terms ahead. In other words more thinking outside the box is called for.

17 40. There is agreement by experts for both parties, and the parties themselves, that there is a
18 need for another Subaru dealership on the peninsula to the north of the present CS store in Redwood City.
19 This controversy revolves primarily around the location thereof. It is also not seriously disputed that, as
20 one starts from the vicinity of the now closed Price store and looks north to San Francisco itself,
21 availability and practicability of a facility decrease rapidly toward a vanishing point, with cost as a major
22 factor.

23 41. The Subaru brand is agreed to have endured less adversity than most line-makes in the
24 recent downturn. SOA actually cites increased sales. Even subtracting sales of the exceptionally well-
25 performing 2009 Forrester as Protestant urges, Subaru sales would be down only 6%, a figure far better
26 than what the industry generally is experiencing. Differences between the parties and their experts on
27 what geographic area should be the measuring stick for prospects and performance are not significant
28 even though it is accepted that the Subaru brand performs remarkably well in snowy and/or mountainous

1 areas. Differing expert perspectives on this point are not a key component for the determination of the
2 issues in this proceeding. The relationships, and the inferences to be drawn there from, do not vary
3 significantly enough to decisively swing the outcome herein one way or another, especially given the
4 consensus that another Subaru dealer in the San Francisco Peninsula Market north of Redwood City is in
5 order.

6 42. CS' expert, Mr. Stockton, agreed that SOA should replace Price with another dealer, but
7 disagreed about the location. (RT II, 161:11 – 14) (See also Protestant's Closing Brief, pp. 2, 8-9) No
8 evidence was presented demonstrating that SOA only needs three dealers in this market.

9 43. CS presented no evidence that SOA needs fewer than four dealers in the San Francisco
10 Peninsula Market. Mr. Stockton, CS' expert, did not form an opinion that SOA should be prevented from
11 appointing a dealer to replace the Price dealership in the San Francisco Peninsula Market. (RT II, 161:11
12 – 14)

13 44. All of the analysis Mr. Stockton performed and conclusions he reached were based on
14 Subaru sales and registration data from the years 2005 through 2007, a period of time during which Price
15 was in business in the market, and SOA had four operating dealerships in the San Francisco Peninsula
16 Market. (RT II, 76: 1 – 3, 152:4 – 6; IV, 70:15 – 71:1)

17 45. While Mr. Stockton opined that the alignment with Price in business in South San
18 Francisco was preferable to the location of Putnam in Burlingame, he did not perform a viability study to
19 determine whether any dealer facilities were actually available in the South San Francisco area, what the
20 cost of those facilities would be, and whether they could actually be used for a Subaru dealership. (RT II,
21 138:1 – 140:14) Mr. Stockton's optimal location analysis was a mathematically derived location, which
22 was not tied to any specific address, and Mr. Stockton did not know if any such location was zoned for
23 automotive dealership use, available, the rent or sales price, and did not have any other information
24 regarding such a location. (Id.)

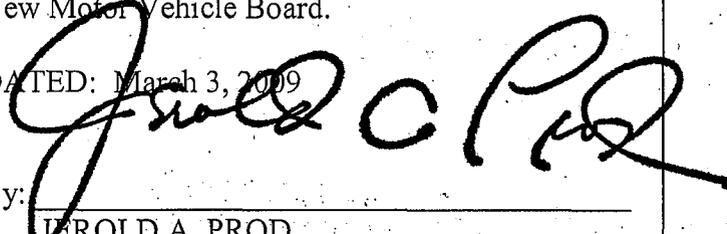
25 46. Mr. Van Wechel of SOA did search for replacement locations for the Price dealership in
26 the South San Francisco/Colma/Daly City area in mid to late 2007. (RT II, 213:12 – 22; 220:22 – 25; III,
27 139:3 – 16) He was unable to find any viable locations for a Subaru dealership, even though he kept
28 looking for property in that area until Price and Putnam agreed to the sale. (Id.; RT II, 216:2 – 6)

1 **PROPOSED DECISION AFTER REMAND**

2 Based on the evidence presented and the findings herein, it is hereby ordered that Protest No. PR-
3 2096-07 is overruled. Protestant has not met its burden of proof under Vehicle Code Section 3066(b) to
4 establish that there is good cause not to enter into a Subaru franchise establishing Putnam Subaru at 85
5 California Avenue in Burlingame. Respondent SOA shall be permitted to proceed with the establishment
6 of Putnam Subaru at the proposed location in Burlingame.

7
8 I hereby submit the foregoing which constitutes my
9 Proposed Decision after Remand in the above-
10 entitled matter, as the result of a hearing before me.
11 I recommend that it be adopted as the decision of the
12 New Motor Vehicle Board.

13 DATED: March 3, 2009

14 By: 

15 JEROLD A. PROD
16 Administrative Law Judge

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

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PROPOSED DECISION

17
18 **PROCEDURAL BACKGROUND**

19 **The Parties and Counsel**

20 1. Protestant, Carlsen Subaru ("CS" or "Protestant"), is located at 480 Veterans Boulevard,
21 Redwood City, California. Protestant is licensed by the California Department of Motor Vehicles
22 ("DMV") as a new motor vehicle dealer.

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24 as a distributor of new motor vehicles. SOA's national headquarters are located at 2235 Route 70 West,
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9 4190 El Camino Real, Palo Alto, California, approximately 8.4 air miles to the south of its current
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28 ¹ On October 21, 2008, the parties filed [Proposed] Statement of Stipulated Facts and Law.

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17 the notice. CS is located within the relevant market area of the proposed relocating dealer.

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20 23. Under the terms of an Asset Purchase Agreement ("APA") between Price and Putnam
21 Automotive Group ("Putnam") dated January 9, 2008, Putnam and Price agreed to the sale of the Price
22 assets including the Service-Only facility in San Francisco, with the understanding that the Subaru
23 dealership would be relocated from South San Francisco to Burlingame, where Putnam owns and operates
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7 was amended to reflect that Putnam would be established as the franchisee at that address.

8 27. The parties to that Amended Notice have stipulated that the existing protest would serve as
9 a protest to the Amended Notice of Establishment.

10 28. A hearing on the merits of the protest was held on October 20-24, 2008, before
11 Administrative Law Judge Jerold A. Prod ("ALJ Prod").

12 29. Post-hearing briefs were filed by the parties in compliance with the schedule established at
13 the conclusion of the hearing and the matter was submitted for decision on December 23, 2008.

14 **Witnesses Presented at Hearing**

15 30. Protestant presented the testimony of five witnesses, including Charles Burton, majority
16 owner of Carlsen Motor Cars, Inc. and 50% owner of Carlsen Subaru, Inc.; John Fечи, Used Car
17 Manager, Carlsen Subaru; George Todd Parkinson, General Manager, Carlsen Subaru; Edward Stockton,
18 Case Manager, Fontana Group; and Jerry Van Wechel, Market Development Manager, Subaru Northwest
19 Region.

20 31. Respondent presented the testimony of five witnesses, including Jerry Van Wechel, Market
21 Development Manager, Subaru Northwest Region; John Frith, Vice President for Emerging Markets,
22 Urban Science Applications, Inc.; Suzanne Heinemann, Vice President, Analysis Group, Inc.; Kent
23 Putnam, proposed Subaru dealer; and Jim Pernas, Regional Vice President, Subaru Northwest Region.

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1 Summary of Witness Testimony Introduced at Hearing³

2 Protestant

3 Charles Burton

4 32. Charles Burton testified as follows: He is an experienced hand in the automobile business,
5 with a history involving many line-makes, and many responsibilities, going back to 1972. He has been a
6 Subaru dealer since 1979. He has other dealerships as well. Mr. Burton has been the recipient of various
7 awards as a dealer.

8 33. Mr. Burton is a 55 percent owner of Carlsen Motor Cars, Inc. (owner of CS and a Volvo
9 store), which in turn holds 50 percent of the Protestant dealership. The other 50 percent was owned by
10 Robert Fечи until his death in 2004. That 50 percent is now owned by his widow Joyce Fечи, who is not
11 actively involved in store operations. Joyce Fечи is the sole owner of the real property on which CS sits.

12 34. CS is compliant with the Subaru Signature Facility Program, which entailed a substantial
13 remodel of the physical plant that was accomplished in 2001-2002. CS and SOA each contributed about
14 \$500,000 to the total remodel cost of \$1,059,000. CS has made certain other investments as well since
15 moving the store to its present location in 1997.

16 35. SOA requires an annual business plan of all dealers. In recent years there has been a
17 disagreement over expected sales; lower sales attributable by Mr. Burton to competition from hybrids and
18 a downturn in the automobile business generally. Mr. Burton alluded to CS doing better than other Subaru
19 dealers in recent years in terms of percentage of sales expectations.

20 36. When CS found out about the proposal to put a new dealer 8.1 miles from it in
21 Burlingame, there was a fear that CS would be put out of business if this proceeding resulted in a decision
22 overruling the protest. Therefore, Mr. Burton would not be entering into long-term obligations (such as an
23 extended lease) concerning the dealership. There was consideration of moving CS to Palo Alto, but that
24 was temporarily abandoned due to car sales being down 40-50 percent in some makes, and the economy

25
26 ³ This is presented in the order that witnesses testified. Since most exhibits were marked for identification by the parties prior
27 to the hearing, they were not offered or introduced in numerical order; also, some pre-marked items may not have been used in
the hearing at all, so there may be numerical gaps in the final Exhibit List, which begins with 1 and ends with 354. Finally,
because of the large number of exhibits, several single exhibit numbers contain many different, but related, documents.

28 This Summary does not refer to exhibits in the record, nor does it include all matters testified to by the witnesses.
Citations, not included here, are set forth in the Findings of Fact sections.

1 in general going down. Mr. Burton did, however, believe that Subaru has not been adversely affected as
2 much as other line-makes.

3 37. According to Mr. Burton, Mrs. Fechi and her son John have expressed an on and off
4 inclination to get out of the car business, but at this point Mr. Burton believes the Fechis intend to remain
5 at their current location, at least pending the outcome of this matter. Mr. Burton has not been informed
6 otherwise. The Joyce Fechi lease to CS remains month-to-month.

7 38. Until Robert Fechi's death in 2004 there existed a proxy, as required by SOA, to vest
8 majority voting control of the franchisee to one person, that being Robert Fechi. Since then SOA has on
9 numerous occasions requested such a proxy be renewed with Mr. Burton authorized to vote the stock of
10 the franchisee. Mr. Burton has been willing to enter this arrangement, but Joyce Fechi remains opposed.
11 Mr. Burton disagrees with SOA's position that it is important in 50/50 ownership situations to have such a
12 proxy in place.

13 39. There was a question in 2004 of sending John Fechi and Todd Parkinson (Joyce Fechi's
14 son-in-law) to attend the NADA Dealer Academy. That was never resolved, although SOA encourages
15 prospective dealer candidates to attend.

16 40. Mr. Burton spends about 4-5- hours per week at CS. The remainder of his time is spent at
17 his other dealerships in Palo Alto. Mr. Burton contends that by putting another dealer in Burlingame SOA
18 is in effect forcing CS to relocate in order to survive.

19 **John Fechi**

20 41. John Fechi, Joyce Fechi's son, testified generally as follows: He is the used car manager of
21 CS, and has been since 1997. Sales of used Subaru vehicles are now down, due to (1) the economy, and
22 (2) according to Mr. Fechi, the product is not as good as it used to be. His mother is not active in the day-
23 to-day operations of CS, but is the owner of the real estate on which the business sits. The property has
24 been for sale, but was not at the time of this hearing. In May of 2007, Mr. Burton told John and Joyce
25 Fechi that he wanted to dissolve the relationship. The Fechis wanted out of the car business, and may still
26 be willing to sell the property if the price sought was obtainable.

27 42. Joyce Fechi remains unwilling to sign the proxy SOA seeks giving Mr. Burton voting
28 control of the shares. There is a concern that Mrs. Fechi could be made a minority stockholder, and that

1 John Fechi could lose his job with the dealership. At one time, there was an executed agreement to sell CS
2 to another party, but that was never closed because the potential buyer backed out when he learned of the
3 proposed relocation of Price in South San Francisco to Burlingame.

4 43. Mr. Burton is John Fechi's boss, but Mr. Fechi's compensation is not set by Mr. Burton.
5 Mr. Fechi does not report to Todd Parkinson (see paragraph 44). Mr. Burton has talked about buying out
6 Joyce Fechi's interest, but this has not happened.

7 **Todd Parkinson**

8 44. Todd Parkinson testified generally as follows: He has been the General Manager of CS
9 since October 2004. Mr. Parkinson worked for Mr. Burton at his Volvo dealership until Robert Fechi's
10 death in 2004, at which time he was asked to take over at CS. He is in overall charge of the dealership,
11 including the used car operation run by John Fechi. Todd Parkinson is the one that meets frequently with
12 SOA representatives in the area of sales, service, and parts. The relationship with John Fechi is
13 problematic as, Mr. Fechi is the son of a person who owns 50 percent of the dealership.

14 45. SOA has been anxious for CS to sell more cars, but the performance of CS has been
15 tracking the market generally, which is in a down phase. Todd Parkinson believes there are several factors
16 hindering improvement in sales of Subaru vehicles, such as, (1) no new Subaru car in especially high
17 demand, as in earlier times; (2) no good answer to hybrid vehicles of competitors; and (3) instability in
18 the locations and openings and closings of Subaru dealerships.

19 46. The CS sales and service staff are among the best in the Bay Area, and SOA concurs in
20 this assessment. There is, however, great pressure to keep sales volume up, increasing the number of deals
21 where cars are being sold at a loss by many or all stores. Todd Parkinson testified that he believes SOA
22 does not need a new dealership as close to CS as Burlingame, and that any new dealership should be far
23 north, maybe in San Francisco itself. CS has, however, captured few, if any, of the sales formerly made by
24 the now closed Price dealership.

25 **Edward Stockton**

26 47. Edward Stockton was Protestant's expert witness. He is a case manger for the Fontana
27 Group, which does management consulting, primarily for the automotive industry. He prepared an
28 extensive report which was the basis for his testimony, which is summarized below (see Exhibit Nos. 18

1 and 19).

2 48. The closure of the Price dealership caused CS to be the closest dealer to many more zip
3 codes in Price's former Area of Responsibility ("AOR").⁴ The proposed opening of a new Burlingame
4 store would considerably decrease the zip codes for which CS is the closest dealer. It would therefore by
5 implication also decrease the number of zip codes in which CS would have a sales advantage over other
6 dealers.

7 49. In considering expected sales, recent past performance, and other factors connected with
8 dealer performance and prospects, Mr. Stockton rejects using SOA's Northwest Region as a benchmark,
9 as SOA's expert has done. He opined that the Northwest Region as a whole contains enough factors of
10 climate and terrain sufficiently different from what dealers face in the Bay Area to render its use as a
11 benchmark inappropriate. He instead uses the geography of the San Francisco Peninsula Metro area minus
12 the relevant market area⁵ ("RMA"), which leaves out snowy/mountainous parts of the west. In this
13 analysis CS does not stand out, being in the middle in terms of market performance. The Subaru brand
14 does better out west in mountainous and snowy locales, and with environmentally conscious customers
15 (e.g., Santa Cruz).

16 50. Mr. Stockton believes that his analysis shows that the market for Subaru vehicles in the
17 RMA is adequately represented in terms of brand performance. Any SOA expectation of significantly
18 increased Subaru sales in the San Francisco area is not warranted, with or without the addition of the
19 Burlingame point.

20 51. CS is well capitalized, and in a good cash position. In this market, however, the financial
21 status of the group of dealers is brittle, and disrupting it could be destabilizing to the whole dealer
22 network. There is no evidence of excessive profit, which would be expected if there were too few dealers
23 in the area. This analysis is made with Price still in place.

24 52. Assuming, nonetheless, a need for a new dealership to achieve adequate (or better) brand
25 market penetration, the Burlingame point does not meet this need. The optimal point should be
26 considerably to the north. It would actually be north of the former Price dealership. If the Burlingame
27

28 ⁴ AOR was defined as an area assigned by Subaru to each dealer for performance measurement purposes.

⁵ Section 507 defines relevant market area as "any area within a radius of 10 miles from the site of a potential new dealership."

1 point is established CS could lose upwards of 20% of its current (or projected) sales.

2 53. Even a great increase in CS efficiency would not restore all of its expected lost sales. It can
3 be very expensive to increase sales marginally, if fixed and semi-variable costs must rise to do so. Lost
4 sales are not as important to a dealership as lost net profit. CS may be forced to spend a lot more to return
5 sales to what they were before. Increased overall brand penetration can mitigate or eliminate adverse
6 effects, but there is no analytical reason to assume this would occur with the addition of the Burlingame
7 point. Subaru dealer alignment on the peninsula with CS and the proposed SOA dealer in Burlingame is
8 less favorable than it was with CS and Price. If SOA establishes a Burlingame point, Mr. Stockton
9 believes some destabilization of the SOA dealer network, possibly substantial, may result. The risk of
10 destabilization in his opinion outweighs any potential benefit to be derived from the Burlingame point.

11 **Jerry Van Wechel**

12 54. Jerry Van Wechel testified first as an adverse witness called by Protestant, as follows:
13 Fremont was a SOA open point from 1993 to 2006. SOA filled it in December of 2006, and it closed in
14 June 2007. Facility renovations pursuant to the Subaru Signature Facility Program were never done. The
15 dealership was not profitable during the short period it was open. The dealer principal stated that he was
16 closing the store for family and medical reasons.

17 55. SOA subsidized the former Price store to the tune of \$30,000 a month for the last couple of
18 months it was open, to buy time for Ron Price to find a buyer. Discussions were opened with Kent
19 Putnam (see below), who knew he would have to relocate the Price dealership. Jerry Van Wechel drove
20 around the Price AOR, checking into the availability of suitable facilities and property. He looked in the
21 Colma/Daly City/South San Francisco area, and came up empty. He stopped looking when Kent Putnam
22 and Ron Price entered into a buy/sell agreement, with Burlingame in mind as the relocation point.

23 56. Prior to the Price/Putnam buy/sell, SOA's first choice was to find a dealer to stay at the
24 South San Francisco location. With the sale to the city of the Price property for \$6 million, that option
25 was no longer available, lease or rental costs being prohibitive.

26 57. Kent Putnam was and is known to be an experienced and very well qualified dealer. He has
27 Toyota, Mazda, and Volvo dealerships in Burlingame, where the new SOA point (within the South San
28 Francisco AOR) would be located. Kent Putnam is well known to the Burlingame community where he

1 supports community and charitable activities. Kent Putnam became aware of this protest and yet remains
2 committed to this plan.

3 **Respondent**

4 **Jerry Van Wechel**

5 58. In addition to Jerry Van Wechel's testimony as an adverse witness called by Protestant, he
6 testified as Respondent's first witness as follows: He is a regional market development manager for SOA,
7 at the SOA Northwest Region in Portland, Oregon. He has been in the car business since 1969 and with
8 Subaru since 1982.

9 59. SOA currently has three AORs in the San Francisco peninsula area north of San Jose. One
10 was served by the Price store (farthest north), the second is the proposed Burlingame (Kent Putnam)
11 facility, and the farthest south is CS in Redwood City. At the time of this hearing, of the three, CS is the
12 only SOA dealer in operation. There are, yet further south, two stores in San Jose, about six miles apart.

13 60. Competitive dealers in the northern peninsula are located in three areas; Daly City,
14 Burlingame, and Redwood City (where CS is). Approximately eight line-makes are located in all three
15 areas. In addition to those eight, Mazda and Hyundai are located in both Burlingame and Redwood City.
16 At the time of the hearing, as noted above, Subaru is represented only in Redwood City.

17 61. All of these 10 or so line-makes have one or more models that compete with Subaru for
18 sales. The three locations are separate and distinct auto rows, all within, or approximately, 10 miles of
19 each other.

20 62. Prior to 2004, Robert Fечи was the driving force behind CS. Messrs. Fечи and Burton
21 executed a signed proxy whereby Mr. Fечи was authorized to vote all of the dealership shares given their
22 50/50 ownership of CS.

23 63. Since Mr. Fечи's death there was no one specific person to answer critical questions
24 regarding the dealer agreement. There is no signed voting proxy, and Charles Burton is for the most part
25 not at the CS store. The normal dealer agreement is three years, but CS had historically been given a five
26 year agreement. This was to be renewed, and also assurances given that execution of a voting proxy
27 would have no effect on Joyce Fечи's ownership stake in the store. Despite these incentives there is still
28 no executive agreement or proxy.

1 64. The store was significantly more successful under Robert Fechi's management than it is
2 now. Sales of new cars were almost twice what they are now. The two owners (Charles Burton and Joyce
3 Fechi) appear not to see eye to eye. The ownership structure seems to be in question. The disjointedness
4 filters down through the dealership. The sales manager told Jerry Van Wechel there is not a lot of
5 harmony at the store and there is a lack of proper direction coming down from a dominant ownership
6 figure. CS sales have declined from 17.5 to 13.2 percent of District 7 (which includes CS) from 2002-
7 2007.

8 65. There was a major realignment of Subaru AORs in 2007. All dealers were notified but
9 Charles Burton was unaware of this. There had been two Burlingame zip codes assigned to CS, but these
10 were removed in 2007, at a time before any SOA knowledge of the closure of Price and the buy/sell
11 between Kent Putnam and Ron Price.

12 66. Kent Putnam and Charles Burton are both good dealers. SOA now needs a dealer in
13 Burlingame whether or not CS moves to Palo Alto; a move which had been discussed and approved
14 between SOA and the Burton/Parkinson element of CS management (conditions were involved and the
15 matter is for the moment off the table.) Kent Putnam has a track record as a strong dealer who can
16 assertively manage a high volume dealership. Between Mr. Burton and Mr. Putnam, Kent Putnam's
17 philosophy is centered more on volume than profit per vehicle; Charles Burton's philosophy is more
18 about profit per vehicle than volume. Robert Fechi's philosophy was more volume oriented, a contrast to
19 Mr. Burton's Volvo, Porsche, and Audi luxury car stores. SOA sees its product as more of a high volume
20 enterprise.

21 67. From SOA's perspective, San Francisco proper would be in the abstract, a better location
22 than Burlingame, other factors such as price, rental, and availability, being equal. As things stand now, if
23 CS moved to Palo Alto (well south of Redwood City where CS now is), Palo Alto would be the farthest
24 north Subaru dealer to serve the San Francisco and peninsula area (there then being no Redwood City,
25 Burlingame, or South San Francisco dealership.)

26 **John Frith**

27 68. John Frith testified as follows: He is the expert witness retained by SOA. He is employed
28 by Urban Science Applications, Inc. ("Urban Science"), a consulting company working mostly in the

1 automobile business. The company was hired by SOA to evaluate the adequacy of the Subaru brand in the
2 San Francisco market; more particularly with regard to the proposed point in Burlingame (see expert
3 report, Exhibit No. 350). Urban Science uses a three-step methodology. First is to define a market;
4 second, to select a standard to measure sales performance in that market; and third, to examine sales
5 performance in the market area relative to the standard.

6 69. The total market, as defined by Urban Science, currently has only three dealerships; those
7 being Stevens Creek Subaru and Capitol Subaru in San Jose, and CS in Redwood City. Within the RMA
8 centered around Burlingame there are three distinct auto row/clusters; one near Daly City, a second in
9 Burlingame, and a third in Redwood City (the CS location).

10 70. Consumers generally like to comparison shop among different brands, and dealers of the
11 same brand, that are reasonably close to each other; and, within a reasonably close distance from where
12 they live and/or work. Another consideration is that there are often de facto barriers, such as freeways,
13 rivers, bridges, etc., across which people do not shop. A portion of the Urban Science methodology
14 reflecting sales and registration data is designed to identify these de facto barriers that do not necessarily
15 self-identify on a map.

16 71. Regarding the standard to be used as a measuring stick for sales expectations and
17 performance, Mr. Frith disagrees with Mr. Stockton's selection of the San Francisco peninsula area minus
18 the RMA. He believes that amounts to comparing the area to itself. This tends toward a compelled
19 conclusion that everything in the RMA is okay, and no adjustment in the number and/or alignment of
20 dealerships is called for, and no brand penetration increase is to be reasonably expected.

21 72. The SOA Northwest Region outperforms the nation, and most dramatically the San
22 Francisco area, but Mr. Frith believes that the standard is potentially achievable, or at least one toward
23 which a dealer could and should strive. The overall sales performance of the RMA, measured against the
24 SOA Western Region average, is about 60%, with Price included (through 2007). With the closure of
25 Price, the figure drops to about 44%, assuming no other Subaru dealer captures the former Price sales
26 volume. A reasonable assumption is that some previous Price sales volume will or should be captured by
27 other Subaru dealers, and some sales volume is at present being lost to other brands. Mr. Frith concludes
28 that other Subaru dealers have not been picking up what should be expected of the former Price sales

1 volume.

2 73. CS had met the higher Western Regional average in earlier years, as late as 2005. The CS
3 contribution to district sales has now dropped. CS is picking up very few sales to the far north since Price
4 closed. Mr. Frith opines that even using the lower standard as described above, without Price there is a
5 performance problem. The overall indication is one of lost opportunity for Subaru with the present dealer
6 configuration.

7 74. There is a large concentration of population north of CS that is much farther from a Subaru
8 dealer than from competitive line-make dealers. Mr. Frith's analysis indicates that, based on planning
9 volume (which is not the same as expected sales), there are too few Subaru dealers on the peninsula.
10 Rough gross Subaru share of market figures (registrations and other factors related to population)
11 compared to those for competing line-makes, indicate a need for six or seven dealers, compared to the
12 three at present (two in San Jose, plus CS). SOA seeks only to go back to four 4, which is reasonable
13 according to Mr. Frith.

14 75. Also, if CS did move south to Palo Alto, as had been seriously considered, the absolute
15 optimal point for the one remaining dealership north of Palo Alto on the peninsula would be precisely in
16 the Burlingame auto row. Given CS staying in Redwood City the optimal location would be more
17 northerly than Burlingame, but in terms of real world options, Burlingame clearly makes sense. Mr. Frith
18 concludes that opening the Burlingame point would increase Subaru sales on the peninsula, and that
19 action, increasing competition and capturing a good deal of lost opportunity, would lead to minimal if any
20 lost business for CS.

21 **Susanne Heinemann**

22 76. Susanne Heinemann testified as an expert witness in financial statements and profit and
23 loss analysis. She looked at the dealer financial statements submitted by CS to SOA, and compared them
24 to those of other dealers in the South Bay (SOA's District 7). CS' gross profit per new unit retailed was
25 8-25% higher than the District 7 average for the years 2006-2008 (\$1,475 to \$1,178). CS seems to be able
26 to sell more cars; not by lowering the price, but, counter-intuitively, while selling at a higher price. CS
27 should be in a good position to meet increased competition. The same general ratios apply to parts and
28 service. She opined that less than the district average per vehicle is spent by CS on advertising.

1 77. Despite earning a larger gross profit per vehicle, CS' realized profit is less than the average
2 dealer in District 7. Ms. Heinemann attributes this to higher than average personnel and bonus costs. Even
3 given Mr. Stockton's scenario of decreased sales she believes CS can remain profitable by better
4 controlling these costs, particularly the supervision portion of personnel costs, which are 3.8 percent of
5 total sales, and by lowering prices.

6 78. Mr. Stockton did indicate that CS' expenditures for advertising did not in fact fall below
7 the district 7 average. He agreed with Ms. Heinemann that a dealer's adjustment to long-term changes in
8 sales would be different from that to short term changes. He disagreed, however, regarding the
9 methodology in the regression analysis that was performed. He therefore does not agree with Ms.
10 Heinemann's projections of actual and/or continuing projections of profitability.

11 **Kent Putnam**

12 79. Kent Putnam testified that he was born and raised on the San Francisco peninsula and has
13 lived there all his life. He has been in the car business since the age of 12 when he washed cars at his
14 dad's Buick dealership. He has been in all aspects of the car business, from being a journeyman mechanic
15 on up through sales, services, parts, etc. He has attended the year-long NADA Dealer Academy, which he
16 found to be an excellent experience.

17 80. Mr. Putnam is the owner of Volvo and Mazda dealerships, and a 40% owner of a Toyota
18 dealership, all in the Burlingame auto row, which is north of the state highway 92 freeway. He recently
19 purchased and owns the former Ron Price service-only Subaru facility in downtown San Francisco. All of
20 his dealerships are profitable. All are open for service on Saturday, which for service is the biggest day of
21 the week. All three stores have won awards as being in the top 10 percent nationally. They contribute
22 about \$1 million a year in tax revenue to the city of Burlingame.

23 81. Mr. Putnam thinks highly of the Subaru brand, and is anxious to have a franchise. He
24 hikes, bikes and kayaks, and is impressed by the esteem in which the brand is held by Consumer Reports.
25 He became aware that Ron Price was selling the Price store, but if \$7 million was the price of the property
26 a Subaru dealership would not be viable at that location due to excessive rent or lease costs. SOA would
27 have preferred to keep the store at that location, but Mr. Putnam executed a buy/sell with Ron Price,
28 which SOA was statutorily bound to consider.

1 82. Moving the store to the well-established Burlingame auto row, with Mr. Putnam's other
2 dealerships and many more, makes a lot of sense, as SOA later concurred. Mr. Putnam is not concerned
3 about CS being eight miles away to the South. It is not only his belief, but his experience, that people in
4 the Burlingame area think north, work north, and shop north. He sees the state highway 92 freeway, an
5 extension of the San Mateo Bridge, as a sort of invisible de facto barrier (as referred to by Mr. Frith in his
6 testimony). Mr. Putnam does not see CS as a problem, as CS efforts and results would remain primarily
7 South of the 92 freeway, and those of his Burlingame dealership primarily north of it.

8 83. Mr. Putnam had discussed his planned relocation to Burlingame with Mr. Burton, a fellow
9 Volvo dealer he knows well, and was initially informed there would be no protest. Mr. Putnam, in running
10 his existing Burlingame dealerships, advertises in the San Francisco Chronicle and not in the San Jose
11 Mercury News. He did for a time 10 or 12 years ago but got nothing out of it, and discontinued the
12 practice.

13 **Jim Pernas**

14 84. Jim Pernas testified as the regional vice president of SOA for the Northwest, headquartered
15 in Portland, Oregon. Subaru has gained nationally in sales from 1996 through 2007, in both volume and
16 market share. The all new 2009 Forrester has been a spectacular success, leading Subaru to be up in a
17 down market, most notably in market share. Sunbelt regions have been the fastest growing in the last two
18 years. Subaru does not at present have a hybrid vehicle, but does have every one of its models
19 recommended by Consumer Reports, and retains a strong loyalty and preference among environmentally
20 conscious buyers. For August 2008 year-to-date, SOA sales are up 6%, despite it being a down year for
21 the car business generally. The product overall remains well accepted.

22 85. Mr. Pernas is aware of the present fractured status of CS ownership. He, along with Jerry
23 Van Wechel, has tried to restore more unity and functionality to CS leadership. In that regard he has,
24 since the death of Robert Fechi, sought to obtain a share voting proxy with the aim of enabling CS
25 leadership to speak with one voice (there is at present no executive manager at CS). He has also
26 encouraged possible future dealer candidates Todd Parkinson and John Fechi to attend the well regarded
27 NADA Dealer Academy. Mr. Parkinson and Mr. Fechi represent different factions of CS ownership/
28 leadership, and sides are not being taken by SOA. Both are encouraged to attend, as Kent Putnam had

1 done earlier.

2 86. For the past few years it has been difficult to deal with CS. Charles Burton and Todd
3 Parkinson (son-in-law to Joyce Fечи) constitute one faction while Joyce Fечи and her son John Fечи
4 constitute another. The dysfunction created by this management situation hampers CS' ability to compete
5 in the business, irrespective of the opening of the Burlingame point. The ownership issue needs to be
6 resolved to move forward and grow the business.

7 87. It appears the factions do not regularly and effectively communicate. Two identical
8 protests were filed in this action, one by each faction, both with attorney assistance. Mr. Burton was
9 unaware of the filing of the other protest. Needless expense was incurred.

10 88. There appeared to have been little or no communication between Charles Burton and Joyce
11 Fечи regarding the real estate underlying the facility (100 percent owned by Joyce Fечи) being put on
12 and taken off the market. The same appears true regarding the on-again off-again proposed move of CS to
13 Palo Alto. There are three options available to CS; moving to Palo Alto, staying in Redwood City, and
14 selling the dealership. To this point ownership appears not to have coalesced around any of these options.

15 89. The dealership agreement with SOA has long since expired. A letter regarding this was
16 sent to both Joyce Fечи and Charles Burton, as SOA did not know who was in charge. The letter outlined
17 several respects in which CS was in default of the agreement. All of this is very disturbing to SOA.

18 **Charles Burton**

19 90. Charles Burton testified further, making him both the first and last witness in the
20 proceeding. He stated that it is neither necessary nor economically viable for CS to open for service on
21 Saturdays. The store can, and has, served customers very satisfactorily Monday through Friday. CS may
22 be paying a premium for personnel, but it is Mr. Burton's opinion that this results in increased sales and
23 enhanced customer loyalty. Also he believes SOA unfairly imposes higher sales targets on CS due to its
24 earlier performance before sales nationally began to decline.

25 91. Mr. Burton disagrees with both Mr. Putnam and Mr. Frith that highway 92 is a de facto
26 barrier creating relatively separate markets north and south of it. He states that north peninsula dealers
27 have strong in-sell figures to both Redwood City and Palo Alto, citing Volvo, Audi, and Porsche.

28 92. Mr. Burton states that although he is loyal to the Subaru brand, the Toyota Prius hybrid

1 outsells Subaru in his market 2-to-1, a large factor being ability to use the commute lane (there was
2 conflicting information regarding the continuing availability of access stickers for the commute lane). He
3 believes the days of 900 annual Subaru sales in his AOR are over, but that CS continues to penetrate its
4 market higher than the district average. It is grossly unfair to assign Kent Putnam a planning volume of
5 448 while CS is assigned 737. Mr. Burton thinks SOA is engaged in a smear campaign against CS by
6 juggling numbers and by characterizing the dealership management as dysfunctional. He is the general
7 manager, and can make needed decisions.

8 93. The duplicate protests were filed to insure that time deadlines were not missed. The deal to
9 sell the store fell through when SOA's intent to relocate Price to Burlingame became known, and backing
10 out was an entirely reasonable response by the prospective buyer. Mr. Burton does not see himself and
11 Joyce Fечи as being in different factions, although Joyce Fечи is not involved in the business. He does
12 not see the lack of a signed proxy enabling him to vote the entire stock of CS as a problem, nor did Tim
13 Parzybok, Jim Pernas' predecessor.

14 94. SOA is establishing too many dealerships. Another dealer may, however, be acceptable to
15 replace Price, but not closer than Price was to CS. Ideally, Price should not be replaced at all in this down
16 market. There are options regarding the future of the dealership as testified to by others. These will be
17 definitively addressed when the outcome of this proceeding is known.

18 **ISSUE PRESENTED**

19 95. The following issue is presented in this Protest: Did Protestant CS sustain its burden of
20 proof of showing "good cause" to preclude Respondent from establishing an additional Subaru dealership
21 at the proposed location.

22 96. Under Section 3062(a)(1), a franchisor is not permitted to establish an additional motor
23 vehicle dealership, where a timely protest has been filed, until there has been a finding of whether or not
24 good cause exists for not permitting the establishment. Under Section 3066(b), the franchisee has the
25 burden of proof to establish that there is good cause not to enter into a franchise establishing an additional
26 motor vehicle dealership.

27 97. In determining whether there is good cause not to establish an additional franchise, Section
28 3063 requires the Board to take into consideration the existing circumstances, including, but not limited

1 to, all of the following:

- 2 (a) Permanency of the investment.
- 3 (b) Effect on the retail motor vehicle business and the consuming public in the relevant
4 market area.
- 5 (c) Whether it is injurious to the public welfare for an additional franchise to be
6 established.
- 7 (d) Whether the franchisees of the same line-make in that relevant market area are providing
8 adequate competition and convenient consumer care for the motor vehicles of the line-
9 make in the market area which shall include the adequacy of motor vehicle sales and
10 service facilities, equipment, supply of vehicle parts, and qualified service personnel.
- 11 (e) Whether the establishment of an additional franchise would increase competition
12 and therefore be in the public interest.

13 **PROTESTANT'S CONTENTIONS**

14 98. Protestant contends that pursuant to the statutory provisions, the protest should be
15 sustained and Respondent should not be allowed to establish a new dealership in Burlingame as proposed.
16 Furthermore, should it be determined that a new dealership in the San Francisco Peninsula area is either
17 permissible or called for, Respondent should start the process of replacing the now closed Price dealership
18 anew, and farther north of CS than the former Price dealership was located.⁶

19 **RESPONDENT'S CONTENTIONS**

20 99. Respondent contends that Protestant has not sustained its burden of establishing that there
21 is good cause to prohibit the establishment or relocation of a new Subaru dealership in Burlingame to
22 replace the now closed Price dealership. The protest should be overruled and Respondent SOA permitted
23 to proceed with establishing the proposed dealership at 85 California Avenue, in Burlingame.

24 ///

25 ///

26 ///

27 _____

28 ⁶ Although this is the relief Protestant has requested, the Board has no power to issue such an order.

1 FINDINGS OF FACT⁷

2 Preliminary Findings

3 100. Protestant is located within the statutory RMA, which is a ten-mile radius around the
4 proposed new location for Putnam. (See Attachments 1 and 2; Vehicle Code section 507; RT I, 85:14- 20;
5 Exh. 350, p. 15) CS is located 8.1 air miles from the proposed location with an approximate 12.5 minute
6 drive time. (Exh. 18, Tab 2, pp. 7-8) Each Subaru dealer is assigned an AOR that consists of the area
7 closest to each dealer (see footnote 4). Because the subject dealers are located in the San Francisco
8 Peninsula Market⁸, they are expected to compete throughout the entire metropolitan area against other
9 Subaru dealers and dealers for other makes. (RT III, 22:25 – 23:12)

10 101. There are 3.1 million people in the San Francisco and San Francisco Peninsula markets,
11 and 527,000 in the RMA. (RT III, 215:4 – 9) At more than 100,000 competitive registrations in 2007,
12 the San Francisco Peninsula Market is a large and important market in the Subaru Northwest Region.
13 (RT V, 155: 2 – 14)

14 102. In 2007, four Subaru dealers operated in the San Francisco Peninsula Market, including:
15 Price (whom SOA is now seeking to replace), CS, and two existing dealers in San Jose. (RT II, 152:4-6;
16 II, 76: 1-3; IV, 70:15 – 71:1) Since Price ceased operations in February 2008, only three Subaru dealers
17 have been in operation in the San Francisco Peninsula Market. (RT III, 6:22 – 7:9; Exh. 301) Kent
18 Putnam's proposed Burlingame dealership would be located within the same AOR formerly occupied by
19 Price, the dealership it is replacing. (RT II, 225:1 – 11)

20 103. CS' expert, Mr. Stockton, agreed that SOA should replace Price with another dealer, but
21 disagreed about the location. (RT II, 161:11 – 14) (See also Protestant's Closing Brief, pp. 2, 8-9) No
22 evidence was presented demonstrating that SOA only needs three dealers in this market.

23 104. There are three auto rows in the Burlingame RMA: (1) Redwood City, where CS is
24 located, (2) Daly City/South San Francisco (where Price was located), and (3) Burlingame (where Putnam
25

26 ⁷ The references to testimony, exhibits, or other parts of the record contained herein are examples of the evidence relied upon
27 to reach a finding, and are not intended to be all-inclusive. Some findings are to be found in more than one section. The
Reporter's Transcript ("RT") is identified by volume. Exhibits are identified by number.

28 ⁸ San Francisco Peninsula Market consists of the San Jose area, and north to the San Francisco City limit.

1 Subaru proposes to be located). (RT III, 187:10 – 188:24; Exhs. 302 and 350, p. 17)

2 105. Eight of Subaru's competitors; Acura, Chrysler, Toyota, Honda, Nissan, Ford, Dodge and
3 Chevrolet, are located in all three auto rows in the Burlingame RMA, and in addition to those line-makes,
4 Mazda and Hyundai are located in both Redwood City and Burlingame. (RT III, 187:10 – 188:24; Exhs.
5 302, 350, p. 17) Therefore, 10 of Subaru's competitors are located in both Burlingame and Redwood
6 City. (Id.)

7 106. In mid to late 2007, Price, the authorized Subaru dealer in South San Francisco, advised
8 SOA that he intended to sell the dealership. Price also wanted to sell the dealership facility and real
9 estate. In addition, Price wanted to sell its Subaru Service-Only location in downtown San Francisco.
10 (Stipulated Fact; RT III, 137:8 – 12, 137:21 – 24)

11 107. At least six potential buyers were contacted by Mr. Van Wechel of SOA, but they were
12 either unable or unwilling to make a deal to purchase the Price dealership, and either to buy Price's real
13 property or to locate alternative property in the area. (RT II, 221:7 – 223:22)

14 108. Ultimately, Price negotiated a sale of the dealership's real estate only, for approximately
15 \$6 to \$7 million, to the City of South San Francisco. (RT II, 221:1 – 7; V, 13:22 – 14:6) At a sales price
16 of \$6 million, the monthly rent factor for the Price property would be \$120,000. (RT II, 144:17-25)

17 109. Mr. Van Wechel testified that he proposed to Subaru National Headquarters that SOA
18 match the City's offer for Price's property, but the company declined, as it was too expensive. (RT II,
19 221:5 – 21)

20 110. Mr. Putnam expressed interest in purchasing the dealership, but matching the price the City
21 had offered Price for the real estate made purchasing it not viable. (RT V, 14:14 – 15:3)

22 111. SOA attempted to persuade Mr. Putnam to operate the Subaru franchise from the former
23 South San Francisco location. SOA and Mr. Putnam had several conversations about that possibility. (RT
24 V, 14:4-23)

25 112. It was agreed that with the \$6 to \$7 million price willing to be paid by the City of South
26 San Francisco, any buyer matching that price would be left with a resulting lease payment that would
27 make any dealership located there unprofitable. (RT V, 13:22 – 14:6) Based upon Mr. Putnam's
28 experience, meeting the City of South San Francisco's offer for the real estate at the Ron Price Subaru

1 location was not a viable option because the dealership could not be a profitable operation at that price.

2 (RT V, 14:4 – 23)

3 113. Mr. Van Wechel also researched potential dealership facilities in the South San
4 Francisco/Colma area to relocate the dealership, but found land to be either unavailable or, as in the case
5 of Price's property, prohibitively expensive. (RT II, 213:8 – 214:3)

6 114. Mr. Putnam then proposed to purchase the dealership (and the service-only point in
7 downtown San Francisco), and to relocate the dealership from South San Francisco to Burlingame, where
8 Putnam owns several dealerships. (RT V, 15:6 – 19) The Putnam family also owns a facility which could
9 be remodeled into a Subaru Signature Facility, meeting all of Subaru's requirements.

10 (RT V, 20:11 – 19)

11 115. The proposed Burlingame dealership would be located within the same AOR as Price,
12 where Subaru wanted to maintain representation. (RT II, 225:1 – 11; III, 87:23 – 88:13) This AOR will
13 likely be re-drawn if Putnam is permitted to move to 85 California Avenue.

14 116. Under the terms of an APA between Price and Putnam, they agreed to the sale of the Price
15 assets, with the understanding that the Subaru dealership would be relocated to Burlingame, where
16 Putnam owns and operates several other dealerships. (Stipulated Fact) Putnam also purchased the assets
17 of a Service-Only operation for warranty repairs of Subaru vehicles, located at 640 O'Farrell Street, San
18 Francisco, CA. (Exh. 339)

19 117. Once the buy/sell agreement between Price and Putnam was signed and submitted to SOA,
20 both Mr. Pernas and Mr. Van Wechel reviewed it and the application package for Mr. Putnam, and gave a
21 strong recommendation that the buy/sell and relocation proposed be approved. (RT II, 227:11 – 228:1)

22 Overall, Mr. Van Wechel graded Mr. Putnam as an "A" dealer candidate. (RT II, 227:8 – 10)

23 **Findings of Facts Relating to Permanency of the Investment.**
24 **(Vehicle Code 3063(a))**

25 **Protestant**

26 118. Mr. Burton is an experienced investor and manager of automobile dealerships. (RT I, 23:4
27 – 6) He has been in the car business for approximately 36 years. (RT I, 23:7 – 25:3) Carlsen Motor
28 Cars, Inc., the company owned by Mr. Burton, and others, owns 50% of CS, which in turn owns Carlsen

1 Volvo in Palo Alto and CS in Redwood City. (RT I, 24:16 – 18; I, 25:23 – 26:1) Mr. Burton, through
2 Carlsen Motor Cars, Inc. also owns Porsche and Audi dealerships in a corporation separate and apart from
3 CS. (RT I, 23:16- 26:1) Mr. Burton cannot be appointed sole Executive Manager of CS, since Joyce
4 Fечи, the other 50% owner, will not execute a proxy agreement required by SOA. (RT I, 99:5 – 20)

5 119. Since opening in June 1976, CS has been a successful and profitable Subaru dealer. CS has
6 a loyal customer base in both sales and service, has developed a good reputation, is strategically
7 positioned to grow, and has the ability to meet its competition. However, the dealership facility where CS
8 is located has recently been for sale, and could be put back on the market at any time. (RT I, 137:15 –
9 138:6; Exh. 331) The owner of the real property and a 50% owner of CS, Joyce Fечи, has indicated a
10 desire to get out of the car business, which desire remains to this day. (RT I, 136:12 – 22) She is not
11 involved in the business of the dealership. (Stipulated Fact)

12 120. Prior to 1976, the Subaru dealership which is now operated by Protestant was located at
13 4190 El Camino Real, Palo Alto, California, approximately 8.4 air miles to the south of its current
14 location. (Stipulated Fact) Approval has been sought from SOA, and obtained, to move the dealership
15 once again, south to Palo Alto. (RT I, 90-95; Exh. 324) This option remains on the table. (RT V, 222-
16 224)

17 121. The property underlying the dealership was, just a few months ago, offered for sale by
18 Mrs. Fечи for general commercial use, not necessarily as a car dealership. (RT I, 136:23 – 137:9; RT III,
19 79:3 – 80:20; Exh. 331) It was taken off the market simply because it was not bringing the price she
20 wanted, not because Mrs. Fечи wanted to remain in the car business. (RT I, 136:23 – 137:9) John Fечи
21 testified that if Mrs. Fечи thought she could obtain her price for the property, it could immediately be for
22 sale again. (RT I, 137:23 – 138:6)

23 122. Nothing ensures that the property will be kept as a car dealership for any definite period of
24 time beyond 30 days, because Mr. Burton refuses to sign a lease for CS to occupy the property, beyond
25 month-to-month. (RT I, 83:21 – 84:22; 139:17 – 140:10)

26 ///

27 ///

28 ///

Respondent

1
2 123. Mr. Putnam has executed a Letter of Intent for the Subaru Burlingame dealership in which
3 he has agreed to provide a dealership facility that meets or exceeds all of SOA's facility standards and
4 requirements. (RT V, 19:13 – 25, 20:1 – 20; Exh. 341)

5 124. Although this protest is not yet resolved and Mr. Putnam's right to open the relocated
6 Subaru dealer in Burlingame is not yet determined, Mr. Putnam has already made an investment towards
7 his goal of opening and operating a Subaru dealership in Burlingame including his purchase of Price in
8 January of 2008 for \$50,000. (RT V, 26:12-14)

9 125. Mr. Putnam has invested approximately \$20,000 in renovating the Subaru service satellite
10 facilities that he also purchased from Mr. Price and approximately \$8,000 in signage for those facilities.
11 (RT V, 21: 2 – 19) Mr. Putnam is currently operating the Subaru service satellite facility, an operation that
12 required assuming an expensive lease in downtown San Francisco, employing approximately 10 full-time
13 employees, and other commitments, such as the acquisition of \$140,000 in parts. (RT V, 21:12 – 15, 22:
14 3 – 8, 26:8)

15 126. Mr. Putnam has invested significant time and expense in renovations to the proposed
16 Subaru dealership facility in Burlingame to comply with SOA's standards, including the completion of
17 renovations to the interior of the showroom to comply with Subaru's Signature Facility Requirements.
18 These renovations, which include the elevation of the showroom floor and installation of a Subaru-
19 specific signature floor, represent an investment of approximately \$200,000 in the Subaru Burlingame
20 dealership facility by Mr. Putnam to date. (RT V, 24:2-19, 25:2-16; Exh. 343)

21 127. Mr. Putnam has also committed to remodel the outside of the Burlingame dealership
22 facility to meet Subaru's Signature Facility Requirements if he is permitted to open the Burlingame
23 dealership. This renovation will require approximately another \$1.25 million in investment in the
24 Burlingame dealership facility (about half of which would come from SOA under its Subaru Signature
25 Facility Program). (RT V, 25:17-24; Exh. 342)

26 128. The proposed Subaru dealership facility in Burlingame is presently empty in order to be
27 ready for the Subaru dealership once this matter is resolved. This vacancy represents \$20,000-\$25,000 a
28 month in lost rental revenue to Mr. Putnam. (RT V, 27:8 – 16)

1 129. The evidence establishes that Mr. Putnam has already invested approximately \$200,000 in
2 the Subaru Burlingame Dealership and has agreed to make at least an additional \$1.2 million in
3 permanent investment if he is granted the right to operate the Subaru Burlingame dealership. (RT V,
4 26:15 – 27:7)

5 130. Mr. Putnam has committed to exceed SOA's requirements with respect to the Burlingame
6 facility. He has begun to fulfill those commitments despite the fact that he is not currently allowed to
7 operate there as a Subaru dealer.

8 **Findings of Facts Regarding Effect On The Retail Motor Vehicle Business**
9 **And The Consuming Public In The Relevant Market Area.**
10 **Vehicle Code Section 3063(b)**

11 131. CS presented no evidence that SOA needs fewer than four dealers in the San Francisco
12 Peninsula Market. Mr. Stockton, CS' expert, did not form an opinion that SOA should be prevented
13 from appointing a dealer to replace the Price dealership in the San Francisco Peninsula Market. (RT II,
14 161:11 – 14)

15 132. Currently, there are only three Subaru dealers in that market; CS in Redwood City, and
16 Stevens Creek Subaru and Capitol Subaru in San Jose. (RT III, 215:21 – 216:1) With the appointment of
17 Putnam Subaru, SOA will be returning to four active dealers in the market. (RT III, 204:25 – 205:7;
18 228:13 – 25)

19 133. Mr. Frith, SOA's expert, testified that in order to meet the competition's dealer count,
20 SOA should have six-to-seven dealers in the market. (RT III, 228:13 – 25) However, SOA at this time is
21 seeking only to open Putnam, which would be the fourth dealer in the market. (RT IV, 70:18 – 71:3)

22 134. All of the analysis Mr. Stockton performed and conclusions he reached were based on
23 Subaru sales and registration data from the years 2005 through 2007, a period of time during which Price
24 was in business in the market, and SOA had four operating dealerships in the San Francisco Peninsula
25 Market. (RT II, 76: 1 – 3, 152:4 – 6; IV, 70:15 – 71:1)

26 135. While Mr. Stockton opined that the alignment with Price in business in South San
27 Francisco was preferable to the location of Putnam in Burlingame, he did not perform a viability study to
28 determine whether any dealer facilities were actually available in the South San Francisco area, what the
cost of those facilities would be, and whether they could actually be used for a Subaru dealership. (RT II,

1 138:1 – 140:14) Mr. Stockton’s optimal location analysis was a mathematically derived location, which
2 was not tied to any specific address, and Mr. Stockton did not know if any such location was zoned for
3 automotive dealership use, available, the rent or sales price, and did not have any other information
4 regarding such a location. (Id.)

5 136. Since the Price facility was sold in early 2008, it was no longer available as a dealership
6 facility. (RT II, 221:1 – 7; V, 13:22 – 14:6) The rent factor of the Price facility would be approximately
7 \$120,000 per month, which effectively ruled it out as a potential facility for a Subaru dealership. (RT II,
8 144:21 – 25, 146:1 – 5) Mr. Putnam concurred that the Price facility was no longer economically viable.
9 (RT V, 13:22 – 14:6)

10 137. Mr. Van Wechel of SOA did search for replacement locations for the Price dealership in
11 the South San Francisco/Colma/Daly City area in mid to late 2007. (RT II, 213:12 – 22; 220:22 – 25; III,
12 139:3 – 16) He was unable to find any viable locations for a Subaru dealership, even though he kept
13 looking for property in that area until Price and Putnam agreed to the sale. (Id.; RT II, 216:2 – 6)

14 138. Mr. Van Wechel spoke to at least six individuals whom he thought might be interested in
15 purchasing and relocating the Subaru dealership, but none could meet SOA’s requirements and either
16 make the Price dealership location viable, or relocate to another facility in the immediate area. (RT III,
17 222:7 – 223:21) SOA subsidized Price’s rent for two months, in order to buy time to find a suitable
18 replacement location and buyer. (RT III, 209:25 – 211:16) At the conclusion of those efforts, no suitable
19 replacement could be found in the South San Francisco/Colma/Daly City area.

20 139. The primary difference between the two dealer network experts’ opinions was the standard
21 upon which the market’s performance should be measured. Mr. Frith opined that the appropriate standard
22 should be the average of the AORs in the Northwest Region in which SOA has an existing dealer (the
23 “Region Represented Standard”). (RT III, 193: 4 – 10) This is because that standard has consistently
24 been achieved in other AORs in the San Francisco Peninsula Market, but even in CS’ AOR, Redwood
25 City, as recently as 2005. (RT III, 200:11 – 201:21, 208:22 – 209:19)

26 140. The achievement of the Region Represented Standard represents only average
27 performance, or a “C” grade, and it is not the maximum that can be achieved. (RT III, 200: 11 – 22) Mr.
28 Frith then determined the performance of the Subaru brand relative to the Regional Represented Standard

1 in various geographies. Applying the Regional Represented Standard to the proposed San Francisco
2 Peninsula Market and the RMA, Mr. Frith determined that the Subaru brand has been underperforming
3 relative to the Regional Represented Standard, suggesting that the market is too big for the existing
4 network. (RT III, 246:19 – 249:7)

5 141. In order to assess the impact of a relocated Subaru dealer in Burlingame on CS, Mr. Frith
6 evaluated lost opportunity in terms of new vehicle sales in the Burlingame RMA. In assessing lost
7 opportunity, Mr. Frith first calculates, within a given geography, the number of Subaru units that would
8 have to be sold in each census tract to bring that census tract up to a “C” grade, i.e., up to the Regional
9 Represented Standard average. (RT III, 246:21 – 25; Exh. 350, p. 72) To that number, Mr. Frith adds the
10 number of Subaru units that are sold into the geography in question by Subaru dealers outside of that
11 geography. Those units are referred to as “insell.” Mr. Frith counts those units as opportunity for the
12 dealers within the geography being studied because they represent consumers who, for whatever reason,
13 are choosing to go to a less convenient location to purchase their Subaru vehicle. (RT III, 247:1 – 6; Exh.
14 350, p. 72)

15 142. Mr. Frith performed various similar calculations, including one which used the
16 “penetration profile” of CS, meaning the rate at which CS penetrates the market at two-mile intervals, and
17 determined that the proposed Putnam dealership would achieve about 136 sales in the San Francisco
18 Peninsula Market, which is only about 10% of the 1,655 units representing the lost opportunity in that
19 market, leaving ample opportunity for other Subaru dealers, including CS, to capture. (RT III, 250:17 –
20 251:12; Exh. 350, p. 74)

21 143. The results of Mr. Frith’s analysis indicate that in the RMA and the San Francisco
22 Peninsula Market if Mr. Putnam opens for business and penetrates at the rate of the average Northwest
23 Region Subaru dealer, Mr. Putnam can do so without taking any sales away from CS. (RT III, 249:2 – 9;
24 III, 253:11 – 21)

25 144. Mr. Stockton’s primary standard was the San Francisco Peninsula Market compared to
26 itself, minus the 10 mile RMA around the proposed Burlingame dealership. (RT II, 60:24 – 61:8) Mr.
27 Frith characterized Mr. Stockton’s analysis as, in essence, a self-comparison. (RT III, 204:8 – 24) Mr.
28 Stockton took the market and compared it by removing the highest performing part of the market, the

1 Burlingame RMA. (Id.) Mr. Frith stated, “as soon as you start comparing yourself to yourself,
2 everything is fine.” (RT 204:22 – 23) Mr. Stockton’s analysis was based on four dealers being in the
3 market, including Price. (RT III, 204:25 – 205:9)

4 145. CS is not open for service business on Saturdays. (RT I, 159:10 – 13) This is a day upon
5 which most consumers are not working and have time to take their vehicle in for service. Mr. Putnam
6 testified that in his dealerships, Saturday is the biggest day of the week for service business, and all of his
7 dealerships are open for service on that day. (RT V, 7:19 – 8:7) CS is not open for service business on
8 Saturdays, and has no intention of changing its hours of operation. (RT 229:13 – 17) That is because,
9 Mr. Burton testified, CS has service stalls available during the week and can service the customers then.
10 (RT V, 230:15 – 21)

11 146. This approach is more consistent with Mr. Burton’s method of operating the Subaru
12 dealership, fewer sales – but more profit per sale, and is perhaps more consistent with the luxury
13 dealerships he owns and operates (Volvo, Porsche and Audi), but not with the Subaru business. (RT III,
14 150:14 – 152:17)

15 147. Mr. Putnam currently owns a Volvo and Mazda dealership, and forty percent of a Toyota
16 dealership. All three dealerships are located on the same block in Burlingame as the proposed Subaru
17 dealer would be located. (RT V, 4:15-17, 6:1-14; Exh. 349) All three of Mr. Putnam’s current dealerships
18 are not only profitable, but each dealership also has above average CSI. (RT V, 7:10-13)

19 148. Mr. Putnam’s current dealerships are open to serve the public for extended hours,
20 including evening sales hours and Saturday service hours at the Toyota and Mazda dealerships. (RT V,
21 7: 14-25) All three of Mr. Putnam’s existing dealerships have won significant and exclusive awards and
22 recognition from their respective franchisors, including the Mazda President’s Award, Volvo Dealer of
23 Excellence Award and Toyota President’s Award of Excellence. (RT V, 9: 1-20) Mr. Putnam intends to
24 bring the same award winning customer service and management philosophy to potential and current
25 Subaru customers in the Burlingame area. (RT V, 10:11-16)

26 149. Mr. Putnam has made special efforts through his dealerships for community related
27 contributions, including serving two terms on the Burlingame Chamber of Commerce, and “adopting” the
28 Saint Francis Center, a charity dedicated to helping low-income families. (RT V, 34:1-13; 36:1-7; Exhs.

1 347 and 354) Mr. Putnam's existing Toyota, Mazda and Volvo dealerships in Burlingame support a large
2 number of community activities including everything from law enforcement, youth, parks, and armed
3 services, to a number of local school districts. Mr. Putnam's support of these school districts includes
4 providing a one year lease of a new car to each of the districts listed to assist in their fund raising. (RT V,
5 34:14-21; Exh. R-347) Mr. Putnam plans to involve the Subaru Burlingame dealership in similar
6 charitable activities in the community if he is permitted to open this dealership. (RT V, 34:22-25, 35:1-7)

7 150. Mr. Putnam anticipates that operating the Subaru Burlingame facility would create an
8 additional 25 jobs if he is permitted to open this dealership. (RT V, 11:5 – 14, 27:20 – 24)

9 151. Mr. Putnam's existing dealerships currently generate approximately \$1 million a year in
10 tax revenues to the City of Burlingame, and, if permitted to open, his Subaru dealership would add to that
11 contribution. (RT V, 12: 4-14)

12 152. Notwithstanding the extensive on-the-job training Mr. Putnam received as he worked his
13 way through his various dealership positions over many years, Mr. Putnam attended the NADA Dealer
14 Academy and found it to be an invaluable experience that educated him in the automotive business. (RT
15 V, 3:16 – 25, 4:1 – 13)

16 153. With its current dealership locations SOA currently is third from the worst in customer
17 convenience in terms of proximity to existing Subaru customer registrations in the RMA, ahead of only
18 the Infiniti and Range Rover brands. (Exh. 350, p. 67) Looking slightly outside of the RMA to the north,
19 SOA has the worst customer convenience, Infiniti has a dealership in Serramonte and Range Rover has a
20 dealership in San Francisco. (RT V, 28:9 – 29:16)

21 **Findings of Fact Relating to whether it is Injurious to the Public Welfare for an**
22 **Additional Franchise to be Established [Section 3063(c)]**

23 154. In 2007, four Subaru dealers operated in the San Francisco Peninsula Market, including:
24 Price, CS, and two existing dealers in San Jose (Stevens Creek Subaru and Capitol Subaru). (RT II, 152:4
25 – 6; II, 76: 1 – 3; IV, 70:15 – 71:1) Since Price ceased operations in February 2008, only three Subaru
26 dealers have been in operation in the San Francisco Peninsula Market. (RT III, 6:22 – 7:9; Exh. 301)
27 Kent Putnam's proposed Burlingame dealership would be located within the same AOR formerly
28 occupied by Price, the dealership it is replacing. (RT II, 225:1 – 11)

1 155. CS' expert, Mr. Stockton, agreed that SOA should replace Price with another dealer, but
2 disagreed about the location. (RT II, 161:11 – 14; II, 123:7-9; see also Protestant's Closing Brief, pp. 2, 8-
3 9) No evidence whatsoever was presented that claims to demonstrate that SOA only needs three dealers in
4 this market.

5 156. There are three auto rows in the Burlingame RMA: (1) Redwood City, where CS is
6 located, (2) Daly City/South San Francisco (where Price was located, and (3) Burlingame (where Putnam
7 Subaru proposes to be located). (RT III, 187:10 – 188:24; Exhs. 302 and 350, p. 17)

8 157. Eight of Subaru's competitors; Acura, Chrysler, Toyota, Honda, Nissan, Ford, Dodge and
9 Chevrolet, are located in all three auto rows in the Burlingame RMA, and in addition to those line-makes,
10 Mazda and Hyundai are located in both Redwood City and Burlingame. (RT III, 187:10 – 188:24; Exhs.
11 302 and 350, p. 17) Therefore, 10 of Subaru's competitors are located in both Burlingame and Redwood
12 City. (Id.)

13 158. In 2007, CS' gross profit (defined as the sales price of the vehicle less the amount the
14 dealer paid for the vehicle), per new Subaru unit retailed ("PNUR") was \$1,475. (RT IV, 96:16 – 21)
15 This gross profit was 25% higher during that same time period than the average Subaru dealer in District
16 7, which had a gross margin per new Subaru unit retailed of \$1,178 per unit. (RT IV, 98:1 – 20; Exh. 1
17 and 1a of Exhibit R-352) CS also charges more in the service, and parts and accessories departments than
18 the average dealer in its area. Gross profit as a percent of sales for these departments collectively is
19 approximately 9 percentage points greater than the average dealer in District 7. (RT IV, 100:19 – 25,
20 101:1 – 11; Exhibit 2 of Exh. 352) CS would be in a good position to meet renewed competition in
21 Burlingame. (RT IV, 99:8 – 13)

22 159. Based on Mr. Stockton's analysis of the alleged impact on CS if Putnam is allowed to be
23 established at the proposed location, CS would still remain profitable. (RT IV, 122:1 – 10; Exhibit 5a of
24 Exh. 352) CS is in a very good position to meet renewed competition in Burlingame by lowering its prices
25 and some personnel costs, if necessary. (RT IV, 102:17 – 25) As a result, CS can compete effectively
26 with a Subaru dealership in Burlingame.

27 160. In a metropolitan area such as San Francisco and the Peninsula most consumers tend to
28 shop at more than one dealership before purchasing a vehicle. (RT III, 188:25 – 189:12)

1 161. Most people tend to travel farther to buy a car, and a shorter distance to service that
2 vehicle, so that a dealer located closer to that customer can capture that service business regardless of
3 whether it made the sale. (RT III, 245:5 – 18)

4 **Findings of Facts Relating to whether the Franchisees of the Same Line-Make**
5 **in that Relevant Market Area are Providing Adequate Competition and**
6 **Convenient Consumer Care for Subaru Vehicles in the Market Area, which shall**
7 **include the Adequacy of Motor Vehicle Sales and Service Facilities, Equipment,**
8 **Supply of Vehicle Parts, and Qualified Service Personnel [Section 3063(d)]**

9 162. CS is the only franchisee of the same line-make in the RMA and is only one of three SOA
10 dealers in the entire San Francisco Peninsular Market which includes the areas of San Jose to San
11 Francisco. (RT III, 180:14 – 181:18) That is not enough dealers to serve the population of that market,
12 about 3.1 million people. (RT III, 215:4 – 9) There is ample opportunity for Putnam to compete in the
13 market, and for CS and the other two Subaru dealers to grow and prosper, as well. (RT V, 153:15 –
14 154:25)

15 163. Mr. Putnam testified that in his dealerships, Saturday is the biggest day of the week for
16 service business, and all of his dealerships are open for service on that day. (RT V, 7:19 – 8:7) CS is not
17 open for service business on Saturdays, and has no intention of changing its hours of operation. (RT
18 229:13 – 17) That is because, Mr. Burton testified, CS has service stalls available during the week and can
19 service the customers then. (RT V, 230:15 – 21)

20 164. CS' service department is closed on weekends, and there are currently no Subaru
21 dealerships with service facilities open on weekends from Marin County in the north to San Jose in the
22 south. (RT III, 180:14 – 181:18) That is a very large territory for a Subaru customer not to be able to
23 have a car serviced on a weekend. Mr. Putnam will alleviate that problem, as he intends the Burlingame
24 Subaru dealership to be open for service on weekends. (RT V, 49:8 – 19)

25 **Findings Relating to Whether the Establishment of an Additional Franchise**
26 **Would Increase Competition and Therefore be in the Public Interest [Section 3063(e)]**

27 165. Vehicle Code section 3063(e) assumes that increased competition is in the public interest,
28 and therefore CS has a heavy burden of proof to establish that the increased competition will be
detrimental to the public.

166. The concept that competition actually raises the level of intra-brand performance in the

1 market was underscored by Mr. Pernas who testified that it is important to customers to have access to
2 Subaru vehicles, to parts and service. (RT V, 157:5 – 18)

3 167. In 2007, CS' gross profit (defined as the sales price of the vehicle less the amount the
4 dealer paid for the vehicle), per new Subaru unit retailed ("PNUR") was \$1,475. (RT IV, 96:16 – 21)
5 This gross profit was 25% higher during that same time period than the average Subaru dealer in District
6 7, which had a gross margin per new Subaru unit retailed of \$1,178 per unit. (RT IV, 98:1 – 20; Exhibit 1
7 and 1a of Exh. 352) CS also charges more in the service, and parts and accessories departments than the
8 average dealer in its area. Gross profit as a percent of sales for these departments collectively is
9 approximately 9 percentage points greater than the average dealer in District 7. (RT IV, 100:19-25,
10 101:1-11; Exhibit 2 of Exh. 352) Based on this finding, CS would be in a good position to meet renewed
11 competition in Burlingame. (RT IV, 99:8 – 13)

12 168. CS is a profitable dealer. Based even on Mr. Stockton's analysis of the alleged impact on
13 CS from the proposed relocation, it would still remain profitable. (RT IV, 122:1 – 10; Exhibit 5a of Exh.
14 352) CS is in a good position to meet renewed competition in Burlingame by lowering its prices and some
15 personnel costs if necessary. (RT IV, 102:17 – 25) As a result, CS can compete effectively with a Subaru
16 dealership in Burlingame.

17 169. CS' gross profit as a percent of sales in the service, and parts and accessories departments
18 is approximately 9 percentage points greater than the gross profit as a percent of sales in these departments
19 for the average dealer in District 7. As an example, in 2006, on a \$100 service bill, the average dealer in
20 District 7 would earn \$46 of profit while CS would earn \$9 dollars more -- \$55 of profit from that same
21 customer. Absent any evidence that the costs of parts or labor differ between CS and the average dealer
22 in the District, this implies that CS' prices are 20% higher than the average dealer in District 7. (RT IV,
23 100:1 – 25, 101:1 – 11; Exhibit 2 of Exh. 352)

24 170. As a result of its higher prices and margins, CS would be in good position to meet renewed
25 competition in Burlingame. If CS found that it was losing sales to renewed competition, it could lower its
26 prices to get some of those sales back, and still have a significant profit margin no less than what other
27 dealers in the district are making. (RT IV, 99:8 – 13, 102:17 – 25, 103:1 – 6)

28 171. In 2007, CS' expenses for salaries for supervision amounted to 3.8% of CS' total sales,

1 compared to the average District 7 dealer's salaries for supervision of 2% of sales. CS' disproportionately
2 higher expenses in this category, which exceed the average District 7 dealer by an additional 1.8% of total
3 sales, results in a considerable increase in expenses and a corresponding decrease in CS' profits. (RT IV,
4 114:3 – 8, 116:2 – 14; Exhibit 4d of Exh. 352)

5 172. By reducing costs to be more in line with those of the average Subaru dealer in its district,
6 CS can improve its own profitability and ability to meet renewed competition. (RT IV, 117:1 – 5; 118:14
7 – 16)

8 173. With its current dealership locations, SOA currently is third from the worst in customer
9 convenience in terms of proximity to existing Subaru customer registrations in the RMA, ahead of only
10 the Infiniti and Range Rover brands. (RT III, 239:14 – 240:9; Exh. 350, p.67) Looking slightly outside
11 of the RMA to the north, SOA has the worst customer convenience, as Infiniti has a dealership in
12 Serramonte and Range Rover has a dealership in San Francisco. (RT V, 28:9 – 29:16)-

13 ANALYSIS

14 General

15 174. The expert testimony elicited at the hearing was cogently presented and helpful. Many of
16 the established technical concepts, however, are strongly linked to, and based on, a general automotive
17 market that is at least somewhat stable and/or generally rising. We are now temporarily in a fairly sharp
18 down period in the economy generally, which is disproportionately affecting the car business in an
19 adverse way. Dealerships are closing at an accelerated rate, both voluntarily and otherwise. Expert
20 technical predictive analytical tools, while helpful, must inevitably now be more heavily leavened with
21 business acumen, instinct, and planning for both the short and long terms in which prospects may vary.
22 There must be increased doses of instability, uncertainty, and adjustment factored into the mix for at least
23 the near, and probably medium, terms ahead. In other words more thinking outside the box is called for.

24 175. For this particular market at this point in time it is hard to say with certainty that there are
25 either too few dealers each selling too many cars, or too many dealers each able to sell too few cars. Both
26 the protesting dealer and the proposed new dealer are sufficiently well regarded by SOA. Both have made
27 in the past, or plan, reasonably significant investments and are at this point in time well capitalized.

28 176. The Subaru brand is agreed to have endured less adversity than most line-makes in the

1 recent downturn. SOA actually cites increased sales. Even subtracting sales of the exceptionally well-
2 performing 2009 Forrester as Protestant urges, Subaru sales would be down only 6%, a figure far better
3 than what the industry generally is experiencing. Differences between the parties and their experts on
4 what geographic area should be the measuring stick for prospects and performance are not significant
5 even though it is accepted that the Subaru brand performs remarkably well in snowy and/or mountainous
6 areas. Differing expert perspectives on this point are not a key component for the determination of the
7 issues in this proceeding. The relationships, and the inferences to be drawn therefrom, do not vary
8 significantly enough to decisively swing the outcome herein one way or another, especially given the
9 consensus that another Subaru dealer in the San Francisco Peninsula Market north of Redwood City is in
10 order.

11 177. There is agreement by experts for both parties, and the parties themselves, that there is a
12 need for another Subaru dealership on the peninsula to the north of the present CS store in Redwood City.
13 This controversy revolves primarily around the location thereof. It is also not seriously disputed that, as
14 one starts from the vicinity of the now closed Price store and looks north to San Francisco itself,
15 availability and practicability of a facility decrease rapidly toward a vanishing point, with cost as a major
16 factor.

17 178. In this fluid situation the prospects facing SOA are varied, as a function of both the
18 prospective intentions of CS ownership and the outcome of this proceeding. CS has in the recent past
19 flirted off and on with the idea of selling the dealership and getting out of the car business altogether,
20 and/or moving the store to Palo Alto.

21 179. If this protest is sustained and CS later moves south there would be no SOA representation
22 in the entire San Francisco peninsula area north of Palo Alto. If this protest is overruled and CS later
23 moves south there would be Subaru brand representation on the peninsula in one locale, that being
24 Burlingame, about mid-way between CS and the former Price store. If this protest is overruled and CS
25 remains in place there would be Subaru brand representation in two places on the peninsula, closer
26 together than were CS and Price, but still separated by 8.1 miles and by California state highway 92, the
27 San Mateo Bridge highway.

28 ///

1 **Permanency of the Investment [Vehicle Code section 3063(a)]**

2 180. The permanency of the CS investment, at its present location, would probably not have
3 been seriously questioned as recently as a year ago. The picture now, however, is clouded. A 50% owner
4 wants out of car the business altogether. There is no solid facility lease commitment beyond 30 days. A
5 move back down to Palo Alto remains an option.

6 181. The commitment of Kent Putnam to the Burlingame point remains strong, and has been
7 consistent even given the filing of this protest. Such costs, while not huge, are especially significant given
8 both the outlook in the automobile business generally and the pendency of this proceeding.

9 **Effect on the Retail Motor Vehicle Business and the Consuming Public**
10 **in the Relevant Market Area [Vehicle Code section 3063(b)]**

11 182. The opening of the Burlingame point will restore to the market a measure of adequate
12 representation of the Subaru brand in the San Francisco peninsula area, addressing a deficiency created by
13 the closure of Price. There is little question that (a) Subaru is a brand that is presently doing relatively
14 well and has potentially favorable prospects, all things considered, and (b) is under-represented in the area
15 without a dealer somewhere north of CS. The public is benefitted if Subaru is better represented vis-à-vis
16 competing line-makes.

17 183. Opening the Burlingame point presents no prospect of Subaru being over-represented
18 compared to virtually all of its competitors. Regardless of whether CS stays where it is in Redwood City
19 or moves to Palo Alto, the public benefits from better Subaru representation in the north peninsula with
20 Price no longer in business.

21 **Whether it is Injurious to the Public Welfare for an**
22 **Additional Franchise to be Established [Vehicle Code section 3063(c)]**

23 184. A good deal of Protestant's case on this point consisted of a prediction of ruinous impact
24 on CS should SOA be allowed to open a Burlingame store. Two points are at play.

25 185. One, even assuming some adverse effect could be visited upon CS (by no means
26 definitively proven), that by itself does not translate into an injury to the public welfare if the opening of
27 the Burlingame store is otherwise a benefit to the consuming public. There is little question that another
28 Subaru dealer is needed on the peninsula north of Redwood City.

1 186. Second, the weight of the evidence strongly supports a conclusion that CS can take
2 measures to not only minimize possible adverse impact, but actually improve its prospects. It is a
3 profitable dealer, and likely to remain so. Even if CS sees itself compelled to relocate to Palo Alto, the
4 effect would not be injurious to the public welfare, but would rather result in an improved configuration
5 of Subaru dealers in the San Francisco Peninsula area.

6 **Whether Carlsen Subaru is providing Adequate Competition and Convenient**
7 **Consumer Care for Subaru Vehicles in the Market Area which Shall Include the**
8 **Adequacy of Motor Vehicle Sales and Service Facilities, Equipment, Supply of**
9 **Vehicle Parts, and Qualified Service Personnel**
10 **[Vehicle Code section 3063(d)]**

11 187. The parties (SOA more enthusiastically than CS) agree that a new Subaru dealer is called
12 for in the north peninsula area to replace the closed Price dealership. The consensus that a new Subaru
13 dealer is needed somewhere north of CS reflects a reality that CS alone cannot, and is not, providing
14 adequate representation for Subaru in any aspect of dealership operations contemplated by Section
15 3063(d) to the northern area earlier covered by Price. Particularly telling is the complete current absence
16 of weekend Subaru service availability from Marin County all the way south to San Jose.

17 **Whether the Establishment of an Additional Franchise would Increase**
18 **Competition and Therefore be in the Public Interest [Vehicle Code section 3063(e)]**

19 188. Consumers when shopping for a car expect to be able to choose among dealers of various
20 brands, and among dealers of the same brand. To achieve this in a metropolitan area, there must be
21 competitive dealerships within a reasonable distance of where consumers live and/or work. The opening
22 of a north peninsula Subaru dealer is needed to restore the market and to establish adequate competition.

23 189. CS, with its relatively high prices and costs, is not adequately representing Subaru
24 compared to competing line-makes. Likewise, Subaru buyers have too far to travel to find reasonably
25 close intra-brand competitors to CS. The opening of a Subaru Burlingame dealership beneficially
26 increases both inter and intra brand competition.

27 **DETERMINATION OF ISSUES**

28 1 Protestant has shown adequate investment in the past, but has not sustained its burden of
proof of establishing and maintaining the permanency of its investment. [Section 3063(a)]

2. Protestant has not proved an adverse effect on the retail motor vehicle business and the

1 consuming public in the relevant market area and therefore has not sustained its burden of proof in this
2 respect. [Section 3063(b)]

3 3. Protestant has not proved that it would be injurious to the public welfare for an additional
4 Subaru dealership to be established. [Section 3063(c)]

5 4. Protestant has not sustained its burden of proof of establishing that it is providing adequate
6 competition and convenient consumer care for Subaru vehicles in the relevant market area, taking into
7 consideration the adequacy of motor vehicle sales and service facilities. [Section 3063(d)]

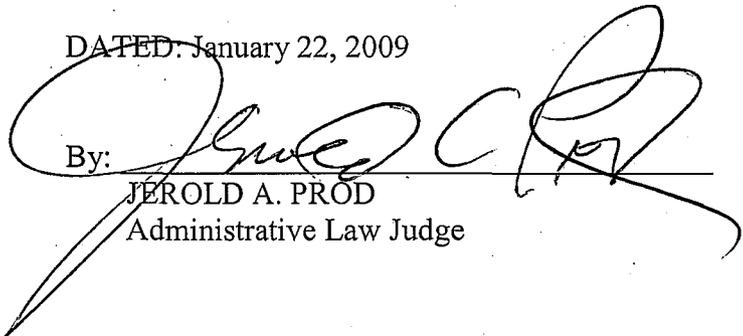
8 5. The establishment of a new Subaru dealership in Burlingame would increase competition
9 and therefore be in the public interest; Protestant has not sustained its burden of proof in this regard.
10 [Section 3063(e)]

11 **PROPOSED DECISION**

12 Based on the evidence presented and the findings herein, it is hereby ordered that Protest No. PR-
13 2096-07 is overruled. Protestant has not met its burden of proof under Vehicle Code Section 3066(b) to
14 establish that there is good cause not to enter into a Subaru franchise establishing Putnam Subaru at 85
15 California Avenue in Burlingame. Respondent SOA shall be permitted to proceed with the establishment
16 of Putnam Subaru at the proposed location in Burlingame.

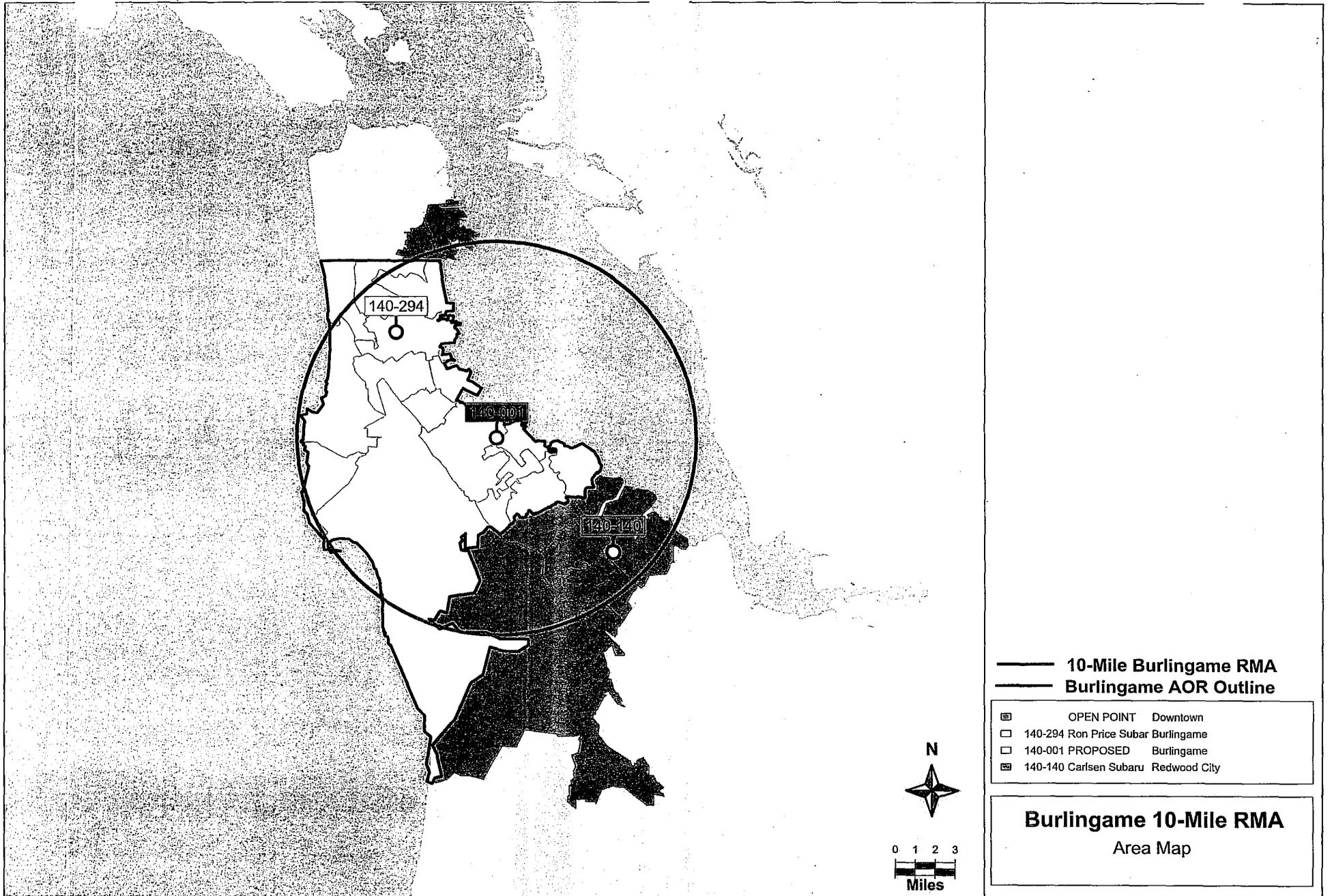
17
18
19 I hereby submit the foregoing which constitutes my
20 Proposed Decision in the above-entitled matter, as
21 the result of a hearing before me and I recommend
22 this Proposed Decision be adopted as the decision of
23 the New Motor Vehicle Board.

24 DATED: January 22, 2009

25 By: 

26 JEROLD A. PROD
27 Administrative Law Judge

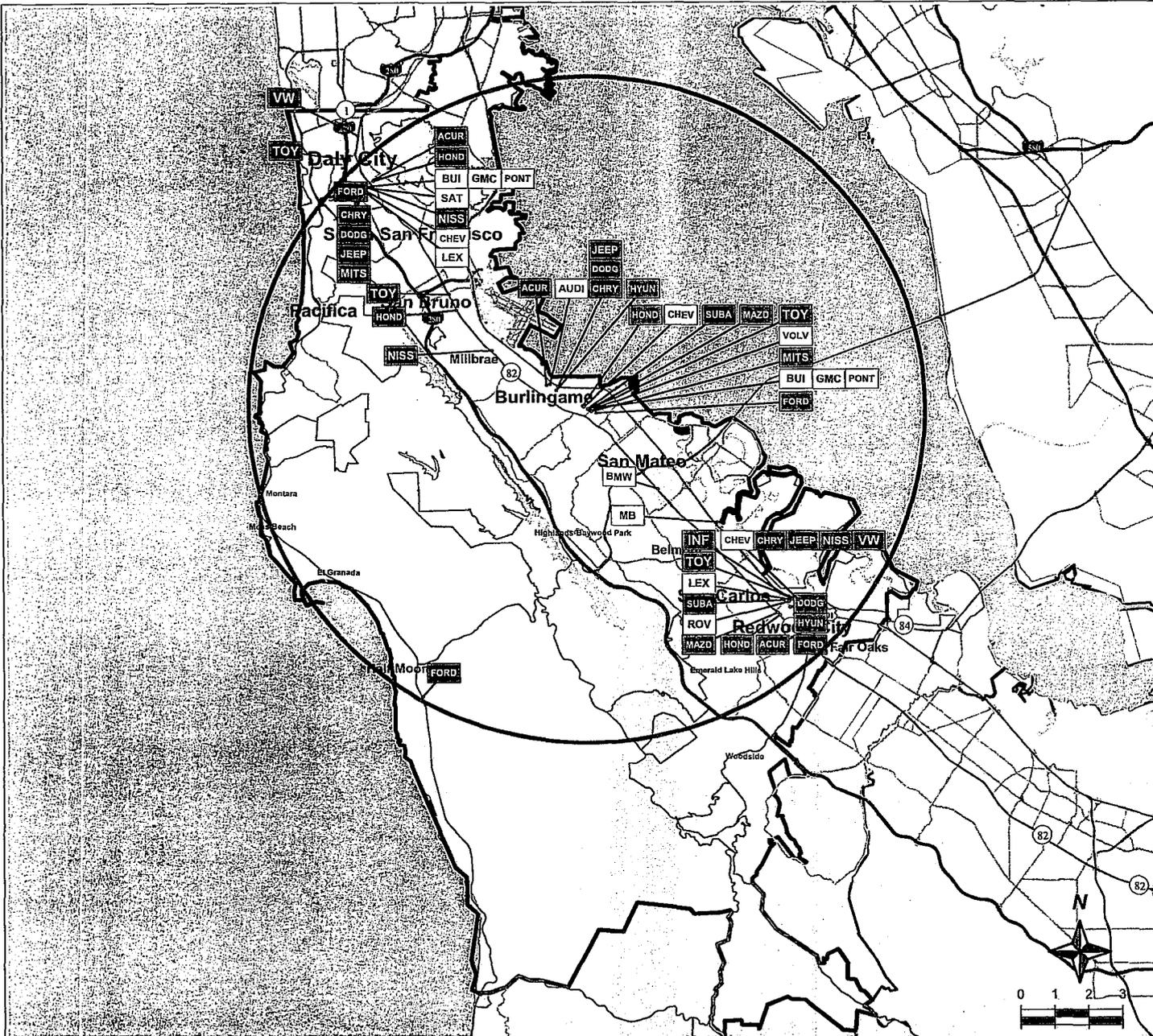
28 George Valverde, Director, DMV
Mary Garcia, Branch Chief,
Occupational Licensing, DMV



SUBARU OF AMERICA

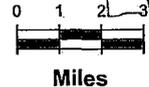


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Geog Ref: H-00-SUBA_BRLNGM_RMA

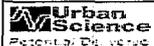


BURLINGAME RMA
Competitive Dealers

Data Ref: USAI DEALERSITES, 04/2008
Geog Ref: H-00-SUBA_BRLNGM_RMA



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Subaru of America

Urban Science Applications, Inc.
Detroit, Michigan