

1 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 SHAYCO, INC., dba ONTARIO  
13 VOLKSWAGEN,

14 Protestant,

15 v.

16 VOLKSWAGEN OF AMERICA, INC.,

17 Respondent.

**Protest No. PR-2265-10**

**PROPOSED DECISION**

18  
19 **PROCEDURAL BACKGROUND**

20 **STATEMENT OF THE CASE**

21 1. By letter dated July 30, 2010, Volkswagen of America, Inc. gave notice to Ontario  
22 Volkswagen pursuant to California Vehicle Code section 3062<sup>1</sup> of its intention to establish a new  
23 dealership in Montclair, California.<sup>2</sup> Ontario Volkswagen is the only Volkswagen franchisee located  
24 within the relevant market area (“RMA”) of the proposed new dealer.<sup>3</sup> The location of the proposed  
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26 <sup>1</sup> Unless otherwise indicated, all statutory references are to the California Vehicle Code.

27 <sup>2</sup> On January 10, 2011, the parties submitted a Joint Stipulation of Facts. RT Jan. 10, pp. 57-58; Jt. Stip. Facts 2, 5.

28 <sup>3</sup> Written notice is required whenever a franchisor seeks to establish a new motor vehicle dealership if there is a dealership of the same line-make within a radius of 10 miles from the site of the proposed new location. (Sections 507 and 3062(a)(1)); Jt. Stip. Facts 4, 8.

1 dealership in Montclair is between 8.65 and 8.7 air miles from Protestant's current location.<sup>4</sup>

2 2. On August 13, 2010, Ontario Volkswagen filed a timely protest.<sup>5</sup>

3 3. A hearing on the merits of Protest No. PR- 2265-10 was held January 10 through January  
4 14, 2011, and January 18 through January 20, 2011, before Administrative Law Judge Marybelle D.  
5 Archibald.

6 4. Following the submission of post-hearing briefs by the parties, the matter was submitted  
7 on April 19, 2011.

8 **PARTIES AND COUNSEL**

9 5. Protestant Shayco, Inc. dba Ontario Volkswagen (herein "Ontario VW" or "Protestant") is  
10 an authorized Volkswagen dealership located at 701 S. Kettering Drive, Ontario, California.<sup>6</sup> It is owned  
11 by Gary Sherman and his wife through a family trust, referred to as Shayco, Inc.<sup>7</sup> Protestant is a  
12 "franchisee" within the meaning of Sections 331.1 and 3062(a)(1).

13 6. Protestant is represented by the Law Offices of Michael J. Flanagan, by Michael J.  
14 Flanagan, Esquire, and Gavin M. Hughes, Esquire, 2277 Fair Oaks Boulevard, Suite 450, Sacramento,  
15 California.

16 7. Respondent Volkswagen of America, Inc. (herein "Volkswagen" or "Respondent") is a  
17 "franchisor" within the meaning of Sections 331.2 and 3062(a)(1).

18 8. Respondent is represented by Jeffer Mangels Butler & Mitchell LLP, by Allen Resnick,  
19 Esquire, and Ryan S. Mauck, Esquire, 1900 Avenue of the Stars, Seventh Floor, Los Angeles,  
20 California.

21 **Protestant's Witnesses**

22 9. Protestant called the following witnesses: Gary Sherman, dealer principal, Ontario  
23 Volkswagen; Earl Reed, General Manager, Ontario VW; Greg Bozzani, dealer principal and managing  
24 partner of SAI Auto Group, LLC, the operator of Bozzani Volkswagen in Covina; Howard Hawkins,  
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27 <sup>4</sup> Jt. Stip. Fact 4.

<sup>5</sup> Jt. Stip. Fact 6.

<sup>6</sup> Jt. Stip. Fact 1; Jt. Exh. 36.

28 <sup>7</sup> RT Jan. 10, pp. 211 – 212.

1 Chief Financial Officer of the Metro Autogroup, Montclair, pursuant to Evidence Code section 776.<sup>8</sup>  
2 Protestant's expert witness was Joseph F. Roesner, Vice President, The Fontana Group.

3 **Respondent's Witnesses**

4 10. Respondent called the following witnesses: Tony Ray, General Manager of Dealer  
5 Network Development, Western Region, Volkswagen; Steve Mears, a Volkswagen employee who was  
6 previously Regional Director, Western Region, Volkswagen; Edward Starr, City Manager, City of  
7 Montclair; Marilyn Staats, Director of Redevelopment and Public Works, City of Montclair; Kurt  
8 Thomas, Regional Parts and Accessories Consultant, Western Region, Volkswagen; John Hawkins,  
9 dealer principal, Metro Honda, Montclair; Steven Smith, Sales Operations Manager, Area 52,  
10 Volkswagen. Respondent's expert witness was Sharif G. Farhat, Vice President of Expert Analytical  
11 Services, Urban Science Applications, Inc.

12 **DEPOSITION TESTIMONY**

13 11. Pursuant to a stipulation by the parties, deposition excerpts of the following deponents  
14 were admitted: Debbie Scheline, Business Manager, Shayco, Inc.; Jack Feely, Jr., Business Improvement  
15 Manager, Volkswagen; Ron Stach, General Manager of Sales, Western Region, Volkswagen.

16 **EVIDENTIARY ISSUES**

17 12. The parties offered over 100 exhibits, and all exhibits offered were admitted into evidence.  
18 Hearsay objections were raised to newspaper and journal articles; those objections were overruled.<sup>9</sup>

19 13. During the hearing, Respondent's motion for a protective order in regard to Joint Exhibit  
20 55, an e-mail from Tony Ray to Howard Hawkins and the accompanying Letter of Intent, was granted.  
21 During the hearing, Respondent's motion to expand the protective order to include testimony by Steve  
22 Mears concerning Bozzani Volkswagen, was granted.

23 14. No request was made by Protestant to continue the hearing for the purpose of reopening

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27 <sup>8</sup> Evidence Code section 776 permits a party to call as a witness a person associated with an adverse party and to examine the  
witness as if under cross-examination, i.e., to use leading questions in its direct examination.

28 <sup>9</sup> Exhibits were not offered in numerical order, and some pre-marked exhibits were not used. Several single exhibit numbers  
may contain many different, but related, documents.

1 discovery or submitting additional testimony.<sup>10</sup>

2 **ISSUE PRESENTED**

3 15. The following issue is presented by this protest: Did Ontario VW, the only dealership  
4 within the 10 mile radius of the proposed establishment site, sustain its burden of proof of showing good  
5 cause to preclude Volkswagen from establishing a dealership in Montclair?

6 16. Under Section 3062(a)(1), when a timely protest has been filed, a franchisor is not  
7 permitted to establish the proposed motor vehicle dealership until a hearing has been held before the  
8 Board, nor thereafter if Protestant establishes at the hearing that there is good cause not to permit the  
9 establishment.

10 17. In determining whether there is good cause for not entering into an additional franchise for  
11 the same line-make, Section 3063 requires the New Motor Vehicle Board to take into consideration the  
12 existing circumstances, including, but not limited to, all of the following:

13 (a) Permanency of the investment.

14 (b) Effect on the retail motor vehicle business and the consuming public in the relevant  
15 market area.

16 (c) Whether it is injurious to the public welfare for an additional franchise to be  
17 established.

18 (d) Whether the franchisees of the same line-make in that relevant market area are  
19 providing adequate competition and convenient consumer care for the motor vehicles of the line-make in  
20 the market area which shall include the adequacy of motor vehicle sales and service facilities, equipment,  
21 supply of vehicle parts, and qualified service personnel.

22 (e) Whether the establishment of an additional franchise would increase competition and  
23 therefore be in the public interest.

24 18. This statutory scheme is evidence that the Legislature “intended that the Board balance the  
25 dealers’ interest in maintaining viable businesses, the manufacturers’ interest in promoting sales, and the

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27 <sup>10</sup> Protestant states that on the last day of the hearing it became aware of “falsely reported sales” which may have corrupted the  
28 standard for measuring performance of the RMA, as well as other geographic areas of analysis. Protestant contends that it was  
denied the opportunity to explore this behavior. (Prot. Post-Hearing Reply Brief, p. 2: 21-28)

1 public's interest in adequate competition and convenient service." *Piano v. State of California ex rel.*  
2 *New Motor Vehicle Board* (1980) 103 Cal.App.3d 412, 417.

3 **PROTESTANT'S CONTENTIONS**

4 19. Protestant contends: the Inland Empire<sup>11</sup> is overdealed, cannot sustain an additional  
5 Volkswagen dealership, and the additional dealership would result in ruinous competition; Volkswagen's  
6 "lost opportunity" analysis is flawed, and the accuracy of sales figures is impacted by falsely reported  
7 sales; the Inland Empire economy has suffered a more adverse impact than California or the nation; the  
8 Metro Autogroup and Messrs. John and Howard Hawkins are not the right choice to operate the new  
9 Volkswagen dealership; Ontario VW has a substantial and permanent investment which will be  
10 negatively impacted by the new dealership; the RMA is already adequately served by existing dealers and  
11 the new dealership will not benefit consumers and will harm the public; and Volkswagen's new strategic  
12 plan to increase sales is "pie in the sky".

13 **RESPONDENT'S CONTENTIONS**

14 20. Respondent contends: the new dealership will have a positive impact on the retail motor  
15 vehicle business and the consuming public in the RMA; establishing a dealership in Montclair will  
16 benefit the public welfare; Ontario VW is not providing adequate competition and convenient customer  
17 care in the RMA; competition will increase with an additional dealership; and Ontario VW's investments  
18 in its Volkswagen dealership are not jeopardized by a new dealership in Montclair.

19 **FINDINGS OF FACT<sup>12</sup>**

20 **PRELIMINARY FINDINGS**

21 ***Volkswagen's Plans for Increasing Sales in the United States***

22 21. Sales of Volkswagen vehicles in the United States in 2010 were 260,000 vehicles, but

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25 <sup>11</sup> Witnesses used this term without defining the boundaries of its geographic area; as understood from the context of the  
26 testimony, "Inland Empire" refers to Riverside and San Bernardino counties.

27 <sup>12</sup> References to testimony, exhibits or other parts of the record are examples of evidence relied upon to reach a finding and are  
28 not intended to be all-inclusive. Transcripts of the proceedings are referred to by date. Deposition testimony is referred to by  
the deponent's name. References to "Exh." are to Joint, Protestant's, or Respondent's Exhibits.

Findings of Fact are organized under topical headings for readability only. They are not to be considered relative to only  
the particular topic under which they appear, but rather may apply to any of the good cause factors of Section 3063.

1 Volkswagen expects to sell double that number within two years and increase sales to 800,000 by 2018.<sup>13</sup>  
2 The newly appointed head of this campaign to increase sales in the United States is Mr. Jonathan  
3 Browning, President and CEO of Volkswagen of America. Volkswagen has built a plant in Tennessee to  
4 produce a new Passat in 2011, designed and priced for the American market, which is expected to  
5 compete in the midsize sedan range with vehicles like Toyota's Camry.<sup>14</sup> Volkswagen also plans to  
6 introduce a new Jetta, the next generation new Beetle, and a new Touareg.<sup>15</sup>

7 22. Toyota, one of Volkswagen's primary competitive groups, sold 1.3 million new vehicles  
8 in 2010.<sup>16</sup> Volkswagen's primary competitive groups, in addition to Toyota, include Honda, Nissan,  
9 Mazda, Hyundai, and Subaru.<sup>17</sup>

10 23. A J.D. Powers measure of sales satisfaction for 2010 ranked Volkswagen 26<sup>th</sup>, which  
11 resulted in a motivational memo to dealers from Mr. Browning.<sup>18</sup> Volkswagen has 582 dealers in the  
12 United States.<sup>19</sup>

### 13 Volkswagen in the Western Region, California, and Area 52

14 24. Volkswagen has four geographic regions for administrative purposes, and the Western  
15 Region, which includes California, has approximately 130 dealers.<sup>20</sup> Those dealers are grouped in areas  
16 convenient for Volkswagen field teams to call upon.<sup>21</sup>

17 25. Ontario VW is part of Area 52, along with two other dealers in the Inland Empire:  
18 Riverside Volkswagen and Cardinale Way Volkswagen in Corona.<sup>22</sup> There are 10 Volkswagen dealers in  
19 Area 52, and the proposed Montclair dealership would also be in Area 52.<sup>23</sup>

20 26. The importance of highways and freeways in Area 52 cannot be overemphasized. The I-  
21 10 Freeway, which runs east-west through Area 52 and the northern area of Montclair, continues to the  
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23 <sup>13</sup> RT Jan. 18, pp. 109 - 110; RT Jan. 19, p. 240; Stach Depo. pp. 34, 35, 38.

24 <sup>14</sup> RT Jan. 18, pp. 20-23; 107-108; Resp. Exh. 65.

25 <sup>15</sup> RT Jan. 20, p. 121.

26 <sup>16</sup> RT Jan. 18, pp. 109 -110.

27 <sup>17</sup> RT Jan. 19, pp. 10, 69; Jt. Exh. 44, App.11.

28 <sup>18</sup> Prot. Exh. 106.

<sup>19</sup> RT Jan. 18, pp. 20, 108 - 109. Testimony and exhibits reflecting the current number of dealers varies; however, 582 is the most specific.

<sup>20</sup> RT Jan. 13, p.110; RT Jan. 18, p. 13.

<sup>21</sup> RT Jan. 18, p. 13; RT Jan. 20, p. 116.

<sup>22</sup> RT Jan, 20, p. 126.

<sup>23</sup> RT Jan. 18, p. 43; RT Jan. 20, pp. 116, 126.

1 Pacific Ocean. Volkswagen is extraordinarily concerned that from Indio to Santa Monica, not one  
2 Volkswagen dealership is on the I-10 Freeway or visible from that freeway.<sup>24</sup>

3 27. Ontario VW is on the I-15 Freeway, which runs north-south.<sup>25</sup> The City of Ontario is  
4 crossed by the I-15 and I-10 Freeways and Highways 60 and 210.<sup>26</sup>

5 **The Montclair Open Point**

6 28. The City of Montclair is approximately 35 miles east of Los Angeles on the western edge  
7 of San Bernardino County.<sup>27</sup> The city is primarily south of the I-10 Freeway.<sup>28</sup> Most new car dealerships  
8 are south of the I-10 Freeway, toward the north end of town.<sup>29</sup>

9 29. When Urban Science Applications, Inc., a consulting firm employed by Volkswagen,  
10 determines that a geographical area needs additional Volkswagen representation, that location is placed  
11 on the "Open Point list".<sup>30</sup> Placing a location on the Open Point list does not guarantee that Volkswagen  
12 will actually decide to establish a dealership at that location, and the list changes yearly.<sup>31</sup>

13 30. Montclair was placed on the Open Point list in 2006.<sup>32</sup> Although the National Association  
14 of Minority Automobile Dealers was notified twice about the potential Montclair Open Point, and  
15 although Volkswagen had interest from a number of parties, Volkswagen did not declare the point open  
16 and begin to accept applications until 2010 because the issue of available real estate hampered interest.<sup>33</sup>

17 31. On August 26, 2009, Tony Ray and Steve Mears of Volkswagen met with Gary Sherman  
18 and Earl Reed of Ontario VW to discuss potential open points in Montclair, San Bernardino, and  
19 Redlands.<sup>34</sup> At this meeting Messrs. Ray and Mears displayed graphics which they described as  
20 "scenarios", with San Bernardino and Redlands as separate, but "technically not" open points.<sup>35</sup>

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22  
23 <sup>24</sup> RT Jan. 18, pp. 82 - 83; RT Jan. 19, p. 14.  
<sup>25</sup> Jt. Exh. 42, Tab 4, p. 2, incorporated herein as Attachment 1 ("Volkswagen Dealer Locations, Census Tracts Touching 10-  
24 Mile Ring Around Add Point").  
<sup>26</sup> RT Jan. 19, p. 186.  
<sup>27</sup> RT Jan. 19, p. 131.  
25 <sup>28</sup> RT Jan. 19, p. 132.  
<sup>29</sup> RT Jan. 19, p. 136.  
26 <sup>30</sup> RT Jan. 18, p. 16.  
<sup>31</sup> RT Jan. 18, p. 17.  
<sup>32</sup> RT Jan. 18, p. 29.  
27 <sup>33</sup> RT Jan. 18, p. 63; RT Jan. 19, pp. 110, 158.  
<sup>34</sup> RT Jan. 10, p. 141; RT Jan. 19, p. 9.  
28 <sup>35</sup> RT Jan. 11, p. 31; RT Jan. 18, p. 36; Prot. Exhs. 86, 87.

1           32.     At this meeting, Mr. Sherman told Messrs. Ray and Mears there was no need for an  
2 additional dealership in Montclair, and that San Bernardino and Redlands could not support two  
3 dealerships.<sup>36</sup> Mr. Reed confirmed that Mr. Sherman voiced his concern that establishing a Montclair  
4 dealership would be a mistake.<sup>37</sup> Volkswagen claims it first became aware of Mr. Sherman's concerns in  
5 an e-mail dated May 24, 2010, after Mr. Sherman learned he had not been awarded the Montclair point.<sup>38</sup>  
6 The testimony of Mr. Sherman and Mr. Reed is more credible.<sup>39</sup>

7           33.     The region recommends to Volkswagen's corporate office when it is time to establish a  
8 point, declare it open, and begin accepting applications.<sup>40</sup> On November 17, 2009, Mr. Mears mentioned  
9 to Mr. Sherman that Montclair would quite possibly be declared an open point in early 2010, and that the  
10 application period would be open soon.<sup>41</sup>

11           34.     Although Mr. Sherman testified that he believed an additional Volkswagen dealership in  
12 Montclair was not necessary, Mr. Reed encouraged him to apply for the point as a defensive measure.<sup>42</sup>  
13 Mr. Sherman agreed that it would be better to operate the Montclair dealership, even if he took a loss for  
14 a period, rather than to have some other dealer be selected for the point.

15           35.     Mr. Sherman had previously operated new motor vehicle dealerships in Montclair, and  
16 Shayco, Inc. still owns the property where the former dealerships were located.<sup>43</sup> The property is on  
17 Central Avenue, probably the busiest traffic corridor in Montclair.<sup>44</sup> The property is about one mile from  
18 the I-10 Freeway; it is not visible from the Freeway.<sup>45</sup>

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20 <sup>36</sup> RT Jan. 11, pp. 32, 42; RT Jan. 19, p.68. After that meeting, and hoping he could convince Volkswagen that only one point  
21 was needed between San Bernardino and Redlands, Mr. Sherman began negotiations to purchase a Hyundai dealership in  
22 Loma Linda, which is on the I-10 Freeway. RT Jan. 11, p. 53; RT Jan. 20, pp. 174 – 175. The negotiations for the Loma  
23 Linda site fell through, and Mr. Sherman learned later that Volkswagen had reviewed the "scenarios" and decided that only one  
24 open point, in Redlands, was necessary. RT Jan. 11, pp. 32 – 35.

25 <sup>37</sup> RT Jan. 10, pp. 139-140.

26 <sup>38</sup> Prot. Exh. 83.

27 <sup>39</sup> There would be no reason for Mr. Sherman to voice his opinion about San Bernardino and Redlands, but remain silent about  
28 Montclair. Prior to May 24, 2010, the parties engaged in numerous e-mail communications. Volkswagen argues that none of  
them contains an expression of Mr. Sherman's concern over any negative impact of a Montclair dealership. Jt. Exh. 19; Resp.  
Exhs. 8, 11. Mr. Sherman's explanation is quite plausible: he didn't want to "get in their face" since he was applying for the  
Montclair point as a defensive measure. RT Jan. 11, pp. 228 – 229.

<sup>40</sup> RT Jan. 19, pp. 70-71.

<sup>41</sup> RT Jan. 19, p. 72.

<sup>42</sup> RT Jan. 10, pp. 143-144; RT Jan. 11, p. 46.

<sup>43</sup> RT Jan. 11, p. 57.

<sup>44</sup> RT Jan. 19, p. 141.

<sup>45</sup> RT Jan. 19, p. 145.

1           36.     The City of Montclair’s general plan does not provide for bringing automobile dealerships  
2 back into the Central Avenue area.<sup>46</sup> Nevertheless, because Mr. Sherman had a good working  
3 relationship with the City of Montclair, it agreed to a proposal by which the City of Montclair would give  
4 credit against sales tax in the amount of \$1,000,000 to permit Mr. Sherman to upgrade his vacant  
5 dealership into a new Volkswagen dealership.<sup>47</sup>

6           37.     Mr. Sherman believed he could make the Montclair point work by cutting overhead in the  
7 two dealerships – for example, by sharing staff. When asked by Mr. Ray during a December 8, 2009,  
8 visit to the Central Avenue property, Mr. Sherman confirmed that he was confident that he could sell  
9 1,000 units per year from that location.<sup>48</sup> Mr. Sherman assured Messrs. Ray and Mears that he could  
10 maintain superior sales and service, provide an above average sales penetration in his area of  
11 responsibility, and provide good management.<sup>49</sup> Mr. Sherman submitted an application to become the  
12 dealer at the Montclair Open Point.<sup>50</sup>

13           38.     After Mr. Ray and Mr. Mears conducted their site visits to Mr. Sherman’s Central Avenue  
14 location and compared it to the Metro Autogroup site, which is on the preferred I-10 Freeway, Mr. Mears  
15 instructed Mr. Ray to offer Mr. Sherman additional time to obtain a site which was visible from the I-10  
16 Freeway with relatively close proximity to freeway access.<sup>51</sup> Mr. Sherman declined the offer of  
17 additional time.

18           39.     Three applicants were considered by Volkswagen for the Montclair Open Point: Mr.  
19 Sherman; the Penske Group; and the Metro Autogroup. All three applications were evaluated on criteria

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23 <sup>46</sup> RT Jan. 19, p. 156.

24 <sup>47</sup> Jt. Exh. 41. Mr. Sherman met with City representatives in mid-August 2010 after he filed his Protest in this matter. He  
25 failed to advise them that he had not been selected as the dealer for the Montclair Open Point, and they believed a decision had  
26 not yet been made. RT Jan. 11, pp. 211 - 213; Resp. Exh. 26. Respondent argues that this lack of candor renders Mr.  
27 Sherman’s testimony questionable. However, Mr. Sherman testified truthfully at the hearing; he conceded he had not been  
28 truthful but had an explanation (that although another dealer had been selected, he thought he still could change Volkswagen’s  
mind). This event may have impacted his relationship with the City, but does not completely taint Mr. Sherman’s testimony in  
this hearing.

<sup>48</sup> RT Jan. 18, pp. 53-54.

<sup>49</sup> Resp. Exh. 10.

<sup>50</sup> Jt. Stip. Fact 7; Prot. Exh. 72.

<sup>51</sup> RT Jan. 19, p. 28.

1 including past performance, facility, diversity, and the all-important location.<sup>52</sup> The Western Region  
2 made a recommendation to select the Metro Autogroup.<sup>53</sup>

3 40. Mr. Sherman testified that he knew that his location wasn't what Volkswagen wanted, and  
4 he knew he wasn't selected because Volkswagen wanted to be on the I-10 Freeway.<sup>54</sup> In spite of this  
5 acknowledgement, and in spite of his admission that Mr. John Hawkins is considered a good operator,  
6 Protestant attacked the selection process. This strategy does nothing to support Protestant's burden of  
7 proof that the Montclair Open Point should not be established.

8 41. Protestant criticized Messrs. John and Howard Hawkins because of their financial  
9 investment in Riverside Volkswagen. The Hawkins brothers' involvement in that dealership is purely  
10 financial, and they are not involved in the day-to-day management issues.<sup>55</sup> Protestant cites concerns by  
11 a Volkswagen field member, Mr. Feeney, expressed in 2009.<sup>56</sup> Mr. Feeney mentioned training, tools,  
12 and adherence to Volkswagen policies as ongoing problems. Both Hawkins brothers testified credibly  
13 that they were not made aware of Mr. Feeney's concerns. Moreover, Mr. Thomas, who filled in for Mr.  
14 Feeney from October 2010 to January 2011, testified that the concerns expressed in 2009 were not a  
15 current problem at the Riverside dealership.<sup>57</sup> Protestant unsuccessfully attempts to make the case that  
16 the Hawkins brothers should have fixed these problems in 2009, and since they did not, they will not be  
17 effective dealers in Montclair. Ontario VW, like most dealerships, has also had problems in the past  
18 which have been resolved.<sup>58</sup>

19 42. Protestant complains that Metro Autogroup would pool resources of the Montclair and  
20 Riverside dealerships, thereby giving those dealerships an economic advantage over Ontario VW. Mr.  
21 John Hawkins would not anticipate any combining of the dealerships.<sup>59</sup> This is an especially  
22 disingenuous attack, since Protestant planned to pool resources of the Ontario dealership and the  
23 Montclair dealership, thereby providing them with an economic advantage. In addition Mr. Sherman

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25 <sup>52</sup> RT Jan. 18, pp. 81; Jan. 19, p. 96; Prot. Exh. 66.

<sup>53</sup> RT Jan. 19, p. 12; Prot. Exh. 66.

26 <sup>54</sup> RT Jan. 11, pp. 57; 89-90.

<sup>55</sup> RT Jan. 20, pp. 11, 36, 91.

27 <sup>56</sup> Prot. Exh. 71.

<sup>57</sup> RT Jan. 19, p. 224.

<sup>58</sup> RT Jan. 19, p. 215.

28 <sup>59</sup> RT Jan. 10, pp. 148 - 149; RT Jan. 20, p. 12.

1 took steps to put himself in line for the Redlands point by negotiating for a site in Loma Linda. The  
2 Redlands point is still open; however, had Protestant been awarded the point, it would have been able to  
3 pool their resources with the Ontario dealership, again providing it with an economic advantage. It is  
4 unclear why this approach is acceptable for Protestant, but unacceptable (although denied) by the Metro  
5 Autogroup.

6 43. Finally, Protestant contends that the Metro Autogroup will be unable to build the facility  
7 on the site it owns next to its Honda dealership in the Montclair Auto Mall. The testimony of both  
8 Hawkins brothers demonstrated their extensive experience in the automobile business with their various  
9 dealerships. They were confident they could work with Volkswagen to modify a proposed facility  
10 design, to deal with parking needs, and to deal with such issues as slope and water runoff, needs of the  
11 fire department, and city requirements.<sup>60</sup> To quell concerns that the Montclair dealership could open  
12 earlier than 2013 or 2014, Mr. Ray assured Protestant that Volkswagen would require a standalone  
13 facility to be completed – it would not permit the Metro Autogroup to open the dealership from a  
14 temporary facility or to dual with another line-make in the mall.<sup>61</sup>

15 44. Protestant presented no evidence that the selection process was defective or that the Metro  
16 Autogroup does not have the means and experience to operate the Montclair dealership.

### 17 The Expert Opinions

18 45. Mr. Farhat, the expert for Volkswagen, is Vice President of Expert Services, Urban  
19 Science Applications, Inc. (“Urban Science”).<sup>62</sup> Urban Science is a consulting company which works  
20 with the automotive industry and other industries to offer business solutions.<sup>63</sup>

21 46. Urban Science assists its clients with “dealer network planning”, which determines the  
22 appropriate number of dealerships, and the appropriate location of those dealerships, as well as the  
23 “measurement of the operations” of the dealerships.<sup>64</sup> Mr. Farhat performed an analysis of the Montclair  
24 RMA to determine if Volkswagen had adequate representation, whether the additional dealership was

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26 <sup>60</sup> RT Jan. 20, pp. 28, 43, 101; Prot. Exh. 119.

27 <sup>61</sup> RT Jan. 10, p. 154 -156; RT Jan. 18, p. 96.

28 <sup>62</sup> RT Jan. 13, p. 79; Jt. Exh. 44, Statement of Education and Experience.

<sup>63</sup> RT Jan. 13, p. 73.

<sup>64</sup> RT Jan. 13, p. 74.

1 necessary, and what might be the impact on Ontario VW and the consuming public if the Montclair  
2 dealership is established.<sup>65</sup>

3 47. Protestant's expert, Mr. Roesner, is Vice President of the Fontana Group, a consulting  
4 firm that specializes in the automobile industry.<sup>66</sup>

5 48. Mr. Roesner's analysis examined the location of dealers relative to opportunities for  
6 registrations, the number of dealers in a market, where the dealers are located, and whether there is  
7 sufficient opportunity for a dealer to make a profit.<sup>67</sup>

8 49. Both experts utilized much of the same data from the same sources: 2000 Census  
9 information, Volkswagen statistics, and data purchased from private specialists, such as Polk and  
10 Claritas.<sup>68</sup>

11 50. Volkswagen dealers are assigned Primary Areas of Influence ("PAI") which are  
12 geographical areas containing census tracts nearest each dealer, but not beyond 20 miles.<sup>69</sup> Each census  
13 tract has approximately 4,000 people.<sup>70</sup> Each PAI is unique to its dealer; the Ontario PAI will not change  
14 if the Montclair dealership is established.<sup>71</sup> Five PAIs are in the Riverside-San Bernardino market, an  
15 area defined by Volkswagen.<sup>72</sup>

16 51. The RMA is a statutory construct – a 10 mile radius from the proposed new dealership.  
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19 <sup>65</sup> RT Jan. 13, p. 82.

<sup>66</sup> RT Jan. 12, p. 5; Jt. Exh. 42, Tab 1, Statement of Education and Experience.

<sup>67</sup> RT Jan. 12, pp. 7– 8.

20 <sup>68</sup> RT Jan. 13, pp. 89 – 91. At the time of his testimony, Mr. Mears was a Volkswagen employee who had been removed from  
21 his position as Regional Director, Western Region in July 2010. Protestant attempts to discredit Mr. Mears's testimony by  
22 linking evidence of false reporting of car sales to his termination; although there is a temporal link, that is insufficient to totally  
23 discredit Mr. Mears's testimony.

24 Mr. Mears denied being involved in any scheme to falsely report cars. (RT Jan. 19, p. 127.) His denial is, in part,  
25 contradicted by the more credible testimony of Mr. Smith.

26 Mr. Smith explained that "punching cars" is slang for reporting vehicle sales. (RT Jan. 20, p. 131.) A report can be "false" if  
27 real retail sales have not been made. (RT Jan. 20, pp. 133 – 134.) In June 2010, the Western Region decided to capture  
28 incentive money by reporting a number of vehicles which had not actually been sold. (RT Jan. 20, p. 134.) Area 52 had less  
than 20 vehicles incorrectly or "falsely" reported, and some dealers were charged back for the incentive money when the car  
was actually sold. (RT Jan. 20, p. 135.)

Protestant's argument, that the "false reports" corrupt the analysis of Volkswagen, is not supported. As quickly as it removed  
Mr. Mears from his position, Volkswagen made corrections when vehicles were actually sold, according to Mr. Smith.  
Moreover, any "corruption" would impact Mr. Roesner's calculations also, since he indicated he utilized Volkswagen statistics.

<sup>69</sup> RT Jan. 12, pp. 28, 29.

<sup>70</sup> RT Jan. 12, p. 21.

<sup>71</sup> RT Jan. 13, p. 96.

<sup>72</sup> Jt. Exh. 44, p. A-1, incorporated herein as Attachment 2 ("CA, Riverside-San Bernardino, PAI Map").

1 The RMA may contain portions of several PAIs. The Montclair RMA contains portions of the PAIs of  
2 other dealers, including Ontario VW, Cardinale Way Volkswagen in Corona, and Bozzani Volkswagen  
3 in Covina.<sup>73</sup>

4 52. Both experts considered cross-sells, which tests where dealers make the most sales and  
5 where most customers buy.<sup>74</sup> Ontario VW, for example, makes most of its sales in the Riverside-San  
6 Bernardino market (397 of 597), but Bozzani Volkswagen only makes 20% of its sales in the market,  
7 leading Mr. Farhat to conclude that Bozzani is not part of the Riverside-San Bernardino market.<sup>75</sup> This  
8 analysis is based on actual data, and Mr. Farhat concludes that the Riverside-San Bernardino market as  
9 defined by Volkswagen is a valid market.<sup>76</sup>

10 53. In order to determine if the Volkswagen brand is being adequately represented in the  
11 Montclair RMA, Mr. Farhat compared the market share of Volkswagen in the RMA with the market  
12 share of Volkswagen in California. Mr. Roesner performed a similar analysis but used the Western  
13 Region of Volkswagen, which Mr. Farhat agrees is a more conservative standard.

14 54. Brand representation, or market penetration, is the ratio of Volkswagen sales compared to  
15 sales of the primary competitive group brands.<sup>77</sup> For every 100 sales nationally, Volkswagen sales are  
16 6.61%. For every 100 sales in California, Volkswagen sales are 7.76%. For every 100 sales in the  
17 Western Region, Volkswagen sales are 7.80%.

18 55. Performance standards are adjusted for consumer preferences in the local market.  
19 Segmentation analysis adjusts for these differences by separating all new vehicles sold and registered in  
20 the marketplace into segments of like vehicles. Like vehicles refer to physical and performance  
21 characteristics, as well as consumer perception and are named by size, price and function. For example,  
22 the new Volkswagen Passat and the Toyota Camry are in the midsize sedan segment.<sup>78</sup>

23 56. Mr. Farhat disagrees with the opinion of Mr. Roesner concerning segmentation. Mr.  
24

25 <sup>73</sup> Jt. Exh. 44, p. A-5, incorporated herein as Attachment 3 ("CA, Riverside-San Bernardino, +10 Mile RMA Census Tracts").

26 <sup>74</sup> Jt. Exh. 42, Tab 11; Jt. Exh. 44, pp. A-3, A-4.

27 <sup>75</sup> RT Jan. 13, p. 100.

28 <sup>76</sup> RT Jan. 13, 108.

<sup>77</sup> Jt. Exh. 44, p. A-7. Volkswagen's primary competitive groups include Toyota, Honda, Nissan, Mazda, Hyundai, and Subaru.

<sup>78</sup> Jt. Exh. 44, p. A-9.

1 Roesner is of the opinion that factors beyond statistical segmentation, such as income and ethnicity, may  
2 be depressing Volkswagen's performance in the Montclair RMA.<sup>79</sup>

3 57. Mr. Farhat analyzed income figures, and the median household income in the Riverside-  
4 San Bernardino market is \$62,000. In the Riverside-San Bernardino market, registration effectiveness is  
5 only 74.5% of the expected registrations. Other markets, such as Sacramento and Murrieta, with  
6 comparable median household incomes perform better than Riverside-San Bernardino, so Mr. Farhat  
7 concluded that income was not the cause of inadequate Volkswagen sales.<sup>80</sup>

8 58. Ontario VW's PAI is 60% Hispanic, so Mr. Farhat reviewed Hispanic populations in  
9 California and determined that Hispanic ethnicity does not explain inadequate Volkswagen sales.<sup>81</sup> Other  
10 areas with significant populations of Hispanic ethnicity perform better.

11 59. The foreclosure rate in the Riverside-San Bernardino market is the fifth highest in  
12 California.<sup>82</sup> However, Mr. Farhat's analysis determined this was not the cause of inadequate  
13 Volkswagen sales because the seven other California markets with comparable foreclosure rates  
14 performed better than Riverside-San Bernardino (those seven markets with comparable foreclosure rates  
15 averaged 88% of the expected registrations; the Riverside-San Bernardino market was 74.5% of the  
16 expected registrations).<sup>83</sup>

17 60. If Volkswagen is not selling new vehicles at least at the expected average, other brands  
18 will take sales. The analysis of Volkswagen's performance, not only in the Montclair RMA, but also in  
19 the Riverside-San Bernardino market, as compared to California, reveals a significant shortfall.<sup>84</sup>  
20 Registration effectiveness in the Riverside-San Bernardino market is only 75%, meaning Volkswagen  
21 dealers in the Riverside-San Bernardino market are 25% below the average level of performance of  
22 California Volkswagen dealers. Mr. Farhat's analysis brought him to the conclusion that there is a  
23 shortfall in registrations in the RMA; therefore, Volkswagen is not adequately represented.<sup>85</sup>

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25 <sup>79</sup> RT Jan. 13, pp. 125-126.

26 <sup>80</sup> RT Jan. 13, pp. 129 – 130; Resp. Exh. 60, p. A-34.1; Resp. Exh. 61, App.103.1.

27 <sup>81</sup> RT Jan. 13, pp. 131 – 133; Resp. Exh. 60, pp. A-34.3, A-34.4.

28 <sup>82</sup> Resp. Exh. 61, App. 103.7; Jt. Exh. 43, Supp. Tab. 47, p. 8.

<sup>83</sup> RT Jan. 13, p. 134; Jt. Exh. 44, App.103.7.

<sup>84</sup> Jt. Exh. 44, pp. A-17, A-19, A-20.

<sup>85</sup> RT Jan. 13, p. 141.

1           61.     The reasons why Volkswagen is not adequately represented may be explained because  
2 existing dealers have failed to capture opportunities for sales in the Montclair RMA. Factors which  
3 might explain this failure include the number of dealers, the location of those dealers, or the effectiveness  
4 of the dealer operations. As discussed above, Mr. Farhat eliminated income, Hispanic ethnicity, and  
5 foreclosure rates as explanations for these lost sales opportunities.

6           62.     One reason for lost opportunities may be related to a high population which is exposed to  
7 brands other than Volkswagen. The Montclair auto mall houses several of Volkswagen's primary  
8 competitive groups, including Honda and Nissan, and a Toyota dealer is close by on the I-10 Freeway.  
9 The City of Montclair's population is 38,500 and is projected to increase in the immediate future to  
10 40,000.<sup>86</sup> Between 1990 and 2010, the Riverside-San Bernardino market had a household increase of  
11 208,000 households.<sup>87</sup> The Montclair RMA is projected to grow by 16,000 households in the next five  
12 years.<sup>88</sup> The Ontario PAI is projected to grow by 14,000 households by 2015.<sup>89</sup>

13           63.     Another factor to review is employment.<sup>90</sup> Rather than study unemployment figures, it is  
14 more relevant to look at employment levels, since people who purchase cars are more likely to be  
15 employed. Employment levels are increasing, and the larger the labor force, the larger the sales  
16 opportunity.<sup>91</sup>

17           64.     An additional factor to consider is median income. Median income for a Volkswagen  
18 buyer is \$80,000.<sup>92</sup> A census tract has approximately 4,000 households. Although some census tracts in  
19 the Montclair PAI will have a median income of \$50,000, for example, Mr. Farhat concludes that is not  
20 necessarily a bad indicator, because there will be some households in that census tract with higher

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25 <sup>86</sup> RT Jan. 19, pp. 132, 134.

26 <sup>87</sup> RT Jan. 13, pp. 146-148; Jt. Exh. 44, p. A-25. Households may be a better indicator of potential sales because members of  
households often pool their financial resources to purchase cars.

27 <sup>88</sup> Jt. Exh. 44, p. A-27.

28 <sup>89</sup> Jt. Exh. 44, p. A-29.

<sup>90</sup> Jt. Exh. 44, p. A-31. The data in this exhibit is for the county level.

<sup>91</sup> RT Jan. 13, p. 154.

<sup>92</sup> RT Jan. 13, p. 157.

1 incomes.<sup>93</sup> Mr. Roesner expressed concern because along the I-10 corridor in Montclair and Ontario, the  
2 median income level is less than \$25,000, with a number of census tracts at \$50,000 to \$75,000.<sup>94</sup>

3 65. Mr. Farhat and Mr. Roesner agree that the automobile industry was down as much as  
4 50% between 2008 and 2010, but the Volkswagen brand was able to hold its own in that economy.<sup>95</sup> As  
5 the automobile industry revives, Mr. Roesner suggests that Volkswagen will not gain as much as other  
6 brands, because building a plant in Tennessee to produce a new Passat will not guarantee sales at the rate  
7 Volkswagen is projecting.<sup>96</sup> In addition, Mr. Roesner points out that other brands are actively seeking to  
8 increase market shares. This is in contrast to Mr. Farhat, who is of the opinion that Volkswagen is in a  
9 position to gain as much, or more, by its ability to keep dealers and consumers interested in its products.<sup>97</sup>

10 66. Brand visibility, by having a Volkswagen dealer on the I-10 Freeway, would significantly  
11 increase both intrabrand and interbrand competition.<sup>98</sup> The proposed location for the Montclair  
12 dealership is in an auto mall which has Honda and other brands which are primary competitors of  
13 Volkswagen.

14 67. The next analysis by Mr. Farhat involved determining that there should be 3.9  
15 Volkswagen dealers in the Riverside-San Bernardino market to meet or exceed the California  
16 representation average.<sup>99</sup> Mr. Roesner's analysis indicates 4.2 dealers are necessary.<sup>100</sup> Although both  
17 experts agree that four Volkswagen dealers in the Riverside-San Bernardino market would meet or  
18 exceed the California representative average, Mr. Roesner believes this is not the time to establish a new  
19 dealership in the market. Mr. Farhat emphasized that this is one indicator that there are not enough  
20 dealers in the market – some markets need more dealers than average based on distance and competition  
21 from other brands.<sup>101</sup> Protestant argues that 4 is an absolute maximum number permitted, and that the

22  
23 <sup>93</sup> RT Jan. 13, p. 158; Jt. Exh. 44, pp. A-33 [Mr. Farhat indicated this should be labeled incomes between \$30,000 and  
\$80,000], A-34.

24 <sup>94</sup> RT Jan. 12, p. 43.

25 <sup>95</sup> RT Jan. 13, p. 162.

26 <sup>96</sup> RT Jan. 13, p. 163.

27 <sup>97</sup> RT Jan. 13, p. 163; Jt. Exh. 44, p. A-40.

28 <sup>98</sup> Intrabrand competition is where dealers of the same line-make, i.e., Volkswagen, are competing with each other. (RT Jan.  
12, p. 74) Interbrand competition is where dealers of a different line-make, such as Toyota and Honda are competing with each  
other. (RT Jan. 14, p. 111)

<sup>99</sup> Jt. Exh. 44, p. A-41.

<sup>100</sup> Jt. Exh. 43, Supp. Tab 44, p. 2.

<sup>101</sup> RT Jan. 13, p. 166.

1 Redlands Open Point should be established before Montclair. Protestant contends that Mr. Farhat  
2 manipulated his analysis to conclude that Montclair was the optimal open point. This misstates Mr.  
3 Farhat's testimony, and as he explained, the computer chooses the optimal point based on the point  
4 closest to consumers. The computer does not factor in the impact on proximity to primary competitive  
5 group brands. In Mr. Farhat's opinion, it is more important to capture lost opportunity in the Montclair  
6 RMA from other brands; thus, he recommended Montclair.<sup>102</sup>

7 68. If there are insufficient dealers, this results in inconvenience for customers and insufficient  
8 competition between and among Volkswagen dealers. Mr. Farhat concluded that it is likely that the  
9 Riverside-San Bernardino market needs another dealer. Mr. Roesner provides similar exhibits but  
10 reaches a different conclusion.<sup>103</sup> Mr. Roesner concludes that because there are a lot of Volkswagen sales  
11 in and around Montclair, this will significantly impact Ontario VW.

12 69. A dealer's ability to penetrate a market is influenced by the customer's distance from the  
13 dealer, or proximity. Mr. Roesner concludes that proximity is only one factor in analyzing the  
14 effectiveness of a dealer, but in his analysis it is quite important, for the closer the customer lives to a  
15 dealership, the more likely that customer is to visit.<sup>104</sup> Mr. Farhat's analysis indicates that Ontario VW  
16 obtains most of its sales from 0-4 miles from its dealership.<sup>105</sup> After 8 miles, for whatever reason (roads,  
17 competition from other brands) a dealer cannot be expected to reach a high level of penetration.<sup>106</sup>

18 70. Customer convenience can be determined by measuring the average distance to the nearest  
19 Volkswagen dealer, or alternatively, by measuring the average time it takes to drive that distance.<sup>107</sup>

20 71. In the Montclair PAI, the average distance to the nearest Volkswagen dealer is 8.2  
21 miles.<sup>108</sup>

22 72. By contrast, the average distance to the nearest Honda dealer and the nearest Toyota

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25 <sup>102</sup> RT Jan. 13, p. 177; RT Jan. 14, pp. 85-89; Jt. Exh. 44, p. A-54.

26 <sup>103</sup> Jt. Exh. 43, Supp. Tab 44.

27 <sup>104</sup> RT Jan. 12, p. 32.

28 <sup>105</sup> Jt. Exh. 44, p. A-43.

<sup>106</sup> RT Jan. 13, p. 171.

<sup>107</sup> Jt. Exh. 42, Tab 7, p. 2; Jt. Exh. 44, p. A-51.

<sup>108</sup> Jt. Exh. 44, p. A-51.

1 dealer is 4.4 miles; to the nearest Nissan dealer 4.5 miles.<sup>109</sup>

2 73. Mr. Roesner provides drive time in minutes between the proposed Montclair dealer and  
3 Ontario VW; it takes between 14.8 and 16.4 minutes depending on traffic.<sup>110</sup>

4 74. Mr. Farhat concludes that the market is too big, based on convenience for the customer,  
5 and another dealer is necessary. Mr. Roesner's analysis describes the loss of territory which will  
6 eliminate Ontario VW's proximity advantage, and he concludes that an additional dealership will  
7 negatively impact Ontario VW's performance.<sup>111</sup>

8 75. If there is to be another Volkswagen dealer, it is important to analyze the impact on other  
9 Volkswagen dealers and their viability. The reason another dealership is needed in the Riverside-San  
10 Bernardino market is to capture lost sales; it would be a waste of resources and time for Volkswagen to  
11 suggest the need for another dealer location if that would simply shift sales from one dealer to another.<sup>112</sup>

12 76. Ontario VW has been in business since 1995, and evidence establishes that it is a  
13 profitable and well-managed dealership. During the economic downturn that severely impacted the  
14 automobile industry, Mr. Sherman took steps to protect his dealership by lowering some wages and rent.  
15 In 2009 Mr. Sherman was able to take a salary and a \$120,000 bonus.<sup>113</sup>

16 77. Mr. Roesner provided calculations of lost profits for Ontario VW should the Montclair  
17 dealership be established. The "Low Model" of lost net profit, before tax, would be \$448, 909.<sup>114</sup> The  
18 "High Model" would be a loss of \$727,100.<sup>115</sup> However, Mr. Roesner agrees that a "good" dealer -- one  
19 who manages well -- can have an impact on profitability. As to the "High Model" figure, Mr. Roesner  
20 conceded that this was a worst case scenario, not what he was predicting the impact would be.<sup>116</sup> Mr.  
21 Roesner's analysis of loss to Ontario VW is based upon actual data, and he declined to speculate on any  
22 sales numbers which might be increased due to the new Volkswagen campaign, which he labels "pie-in-  
23 the-sky". This analysis does not take into account any additional profit Ontario VW might make as a

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25 <sup>109</sup> Jt. Exh. 44, p. A-51.

26 <sup>110</sup> Jt. Exh. 42, Tab 7, p. 1.

27 <sup>111</sup> Jt. Exh. 42, Tab 44.

28 <sup>112</sup> RT Jan. 13, p. 179.

<sup>113</sup> Scheline Depo. pp. 51 – 52.

<sup>114</sup> Jt. Exh. 42, Tab 37, p. 2.

<sup>115</sup> Jt. Exh. 42, Tab 37, p. 1.

<sup>116</sup> RT Jan. 12, pp. 140 – 141.

1 result of the new dealership, which, for example, would stimulate sales by increasing brand awareness on  
2 the I-10 Freeway, or by increasing advertising expenditures.

3 78. The experts disagree on their interpretation of the “fixed pie” theory. The “pie” represents  
4 the available automobile business in a market. Each dealer in the market would have a piece of the pie,  
5 and each piece would be a different size, depending upon the dealer’s sales in the market. If another  
6 dealer enters the market, because there are more dealers, each is likely to have a smaller piece of the pie.

7 79. Mr. Farhat does not believe that in the automobile industry the “pie” is fixed. He contends  
8 that the pie increases in size because new business is available (such as a new model, the new Passat), the  
9 brand is stimulated (by having a dealer with visibility on the I-10 Freeway), and households increase,  
10 providing more opportunity.<sup>117</sup> Mr. Farhat and Mr. Roesner agree that if a dealer’s piece of the pie gets  
11 smaller when there is additional competition, that is because the dealer failed to capture as much of the  
12 new business as they would have without the new dealer.<sup>118</sup>

13 80. Mr. Farhat contends that Mr. Roesner’s analysis is faulty because he acknowledges  
14 growth in opportunity will occur, but he does not take that growth into account in his analysis.<sup>119</sup> Mr.  
15 Roesner has said there is a possibility of some increase in available sales in the Riverside-San Bernardino  
16 market, particularly in the Montclair PAI; however, he does not agree with the level of increases  
17 suggested by Mr. Farhat.<sup>120</sup>

18 81. Mr. Roesner places heavy reliance on the situation with Puente Hills Volkswagen in the  
19 City of Industry and Bozzani Volkswagen in Covina to support his contention that the addition of a  
20 Montclair dealership will result in cannibalization of Ontario VW’s sales. This reliance is misplaced.

21 82. In 2006, Puente Hills Volkswagen closed.<sup>121</sup> That closure permitted Bozzani Volkswagen  
22 to capture sales from the Puente Hills PAI. In January of 2010, Puente Hills reopened, which, according  
23 to Mr. Roesner, caused Bozzani’s sales to decrease. Mr. Roesner analogized this set of facts with what  
24 he concludes will happen if a Montclair dealership is established: the Montclair dealership will take sales

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26 <sup>117</sup> RT Jan. 14, p. 17.

27 <sup>118</sup> RT Jan 13, p. 70; RT Jan. 14, p. 7.

28 <sup>119</sup> RT Jan. 14, p. 6.

<sup>120</sup> RT Jan. 14, pp. 184-185.

<sup>121</sup> No competent evidence was provided by either party to explain why the dealer voluntarily terminated the franchise.

1 from Ontario VW in the same manner as Puente Hills took sales from Bozzani. What Mr. Roesner did  
2 not consider is that Bozzani is not in the Montclair RMA, it is not in an auto mall, is not on a freeway,  
3 and it is not visible from the freeway.<sup>122</sup> Its situation is unlike either Ontario VW or the proposed  
4 Montclair point.

5 83. Mr. Roesner pointed out that there are many aspects which impact dealer effectiveness and  
6 competence, and there is a wide variation in how well individual dealers perform.<sup>123</sup> Mr. Bozzani  
7 testified that for the past two years he has not been concentrating on his Volkswagen dealership but rather  
8 on his Kia dealership, and this has affected his ability to be the best Volkswagen dealer.<sup>124</sup> Mr. Roesner  
9 did not take this into account in his report.<sup>125</sup>

10 84. Although several Volkswagen employees mentioned that Mr. Sherman had "lost focus"  
11 recently, Mr. Sherman has evidenced a concern for his dealership, and management at the dealership is  
12 considered good. It is unlikely that he would permit his focus to lapse for several years if the Montclair  
13 point were established.

14 85. The Puente Hills and Bozzani situation is sufficiently distinct from the proposed  
15 dealership in Montclair and Ontario VW; it does not compel a finding that Ontario VW's sales will  
16 actually be cannibalized by the proposed dealer in Montclair.

17 86. Following his analysis of the proposal to establish a Volkswagen dealership in Montclair,  
18 Mr. Roesner concluded that it is premature to add an additional dealer at this time<sup>126</sup> and although  
19 Volkswagen sales and registrations will increase in the next two to three years,<sup>127</sup> Volkswagen's plans to  
20 increase sales in the United States by the numbers it projects is "pie in the sky".<sup>128</sup> Volkswagen's  
21 enthusiastic plans to increase sales may be overly optimistic; however, the establishment of an additional  
22 Volkswagen dealership on the I-10 Freeway in an auto mall with several of Volkswagen's primary  
23 competitive group brands will increase brand awareness and stimulate sales.

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26 <sup>122</sup> RT Jan. 11, p. 146.

27 <sup>123</sup> RT Jan. 12, pp. 154 – 156.

28 <sup>124</sup> RT Jan. 11, p. 143.

<sup>125</sup> RT Jan. 12, p. 160.

<sup>126</sup> RT Jan. 12, pp. 118- 119; 143.

<sup>127</sup> RT Jan. 12, p. 152.

<sup>128</sup> RT Jan. 12, pp. 121; 123.

1 87. Mr. Farhat concluded that there is sufficient lost opportunity to permit establishment of  
2 the Montclair dealership without subjecting Ontario VW to ruinous competition. Ontario VW is a viable,  
3 well-managed business and will remain so after the establishment of the Montclair dealership.

4 **FINDINGS RELATING TO PERMANENCY OF INVESTMENT [SECTION 3063(a)]**

5 88. Mr. Sherman has been a Volkswagen dealer since 1995.<sup>129</sup>

6 89. Ontario VW is located in the Ontario Auto Center, a mall which includes Volkswagen's  
7 primary competitive brands.<sup>130</sup>

8 90. In 2003, Mr. Sherman built a Market Place Facility, Type A.<sup>131</sup> The property is valued at  
9 \$1 million. The value of the property, facility, fixtures, furniture, equipment, flooring, and money loaned  
10 by Mr. Sherman as operating capital is approximately \$11 million.<sup>132</sup>

11 91. Ontario VW had 45 active employees in September 2010; due to a decline in the  
12 economy, this is a decrease from 53.<sup>133</sup> In 2009, in light of the decline in the economy, most employees  
13 were required to take a pay cut, and the amount of rent was dropped.<sup>134</sup> In 2009, the total salary for Mr.  
14 Sherman and Mr. Reed was \$238,194, and Mr. Sherman's bonus was \$120,000.<sup>135</sup> Mr. Sherman testified  
15 that he does not, at this time, take a salary.<sup>136</sup> Ontario VW has been able to adjust for the downturn in the  
16 economy, and now that the Riverside-San Bernardino economy is slowly recovering and the automobile  
17 industry is recovering, the business will remain viable.

18 92. Ontario VW's profit for 2008 was \$193,800; for 2009, \$328,000; estimated profit for 2010  
19 is \$230,000 to \$240,000.<sup>137</sup> Mr. Sherman testified that the value of Ontario VW will drop dramatically  
20 if the Montclair dealership is opened under the management of someone other than Shayco, Inc.<sup>138</sup>  
21 Protestant's projection of lost profits does not substantiate either dramatic lost profits or loss in the value  
22

23 <sup>129</sup> RT Jan. 10, pp. 198, 199.

24 <sup>130</sup> RT Jan. 10, pp. 198, 199; Jt. Exh. 44, p. A-6.

25 <sup>131</sup> RT Jan. 10, p. 199; Jt. Stip. Fact 3.

26 <sup>132</sup> RT Jan. 10, pp. 108, 212, 213.

27 <sup>133</sup> RT Jan. 10, p. 207.

28 <sup>134</sup> RT Jan. 10, p. 209; RT Jan. 11, p. 218. Shayco, Inc. receives \$24,000.00 per month net profit on the lease. RT Jan. 11, p. 218.

<sup>135</sup> Scheline Depo. p. 51, 86.

<sup>136</sup> RT Jan. 11, p. 218.

<sup>137</sup> Jt. Exhs. 12, 14, 16.

<sup>138</sup> RT Jan. 11, p. 70.

1 of Ontario VW if the Montclair dealership is established.

2 **FINDINGS RELATING TO EFFECT ON THE RETAIL MOTOR VEHICLE BUSINESS AND**  
3 **THE CONSUMING PUBLIC IN THE RELEVANT MARKET AREA [SECTION 3063(b)]**

4 93. "Auto shopping areas" are becoming a nationwide industry standard; they allow customers  
5 to comparison shop in one place and provide exposure to vehicle brands.<sup>139</sup>

6 94. The average distance in the RMA to a Volkswagen dealership is 8.2 miles; if the  
7 Montclair dealership is established 8.65 to 8.7 air miles away from Protestant, it will be reduced to 4.5  
8 miles.<sup>140</sup>

9 95. The shortest surface route in miles between Ontario VW and the proposed Montclair  
10 dealership is 10 miles; the shortest surface route in minutes is 14.8 to 16.4 minutes.<sup>141</sup>

11 96. Consumers will have increased convenience with the establishment of an additional  
12 Volkswagen dealership, especially one located in a mall with many of Volkswagen's primary  
13 competitive groups.

14 97. The retail motor vehicle business will have the positive effect of increased intrabrand and  
15 interbrand competition.

16 **FINDINGS RELATING TO WHETHER IT IS INJURIOUS TO THE PUBLIC WELFARE FOR AN**  
17 **ADDITIONAL FRANCHISE TO BE ESTABLISHED [Section 3063(c)]**

18 98. The Ontario Auto Center is a destination point.<sup>142</sup> Ontario is a distinct retail market from  
19 Montclair, distinguished by its outlet mall.<sup>143</sup>

20 99. Montclair's retail shops generally draw primarily from the north, and also from the west,  
21 and a little from the east and south.<sup>144</sup> A Volkswagen dealership in Montclair would minimize travel  
22 time for consumers and increase Volkswagen competition with its primary competitive group brands.

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26 <sup>139</sup> RT Jan. 13, pp. 104-105.

27 <sup>140</sup> Jt. Exh. 44, p. A-51.

28 <sup>141</sup> Jt. Exh. 42, Tab. 7, pp. 1-2.

<sup>142</sup> RT Jan. 11, p. 43.

<sup>143</sup> RT Jan. 19, pp. 175-183.

<sup>144</sup> RT Jan. 19, pp. 138, 194.

1 100. The Inland Empire is still in a depressed economic climate but has seen slight recovery.<sup>145</sup>  
2 A new Volkswagen dealership, anticipated to take two years to get up and running, will provide  
3 construction jobs and initially 35 jobs at the dealership, as well as new revenue for the City of Montclair.

4 101. No evidence leads to the conclusion that the establishment of a Volkswagen dealership in  
5 Montclair will be injurious to the public welfare.

6 **FINDINGS RELATING TO WHETHER FRANCHISEE OF THE SAME LINE-MAKE IN**  
7 **THE RELEVANT MARKET AREA IS PROVIDING ADEQUATE COMPETITION**  
8 **AND CONVENIENT CONSUMER CARE FOR VOLKSWAGEN VEHICLES IN**  
9 **THE MARKET AREA, INCLUDING ADEQUATE SALES AND SERVICE FACILITIES, EQUIPMENT,**  
10 **SUPPLY OF PARTS, AND QUALIFIED SERVICE PERSONNEL [SECTION 3063(d)]**

11 102. Ontario VW is a good dealership which is well-managed and does a good job serving its  
12 customer base.<sup>146</sup> In 2009, Ontario VW increased sales 5% over 2008, when Area 52 was down by  
13 4%.<sup>147</sup> In 2010, Area 52 increased sales almost 24% over 2009; Ontario VW was up only 10%.<sup>148</sup>

14 103. There is no reason to believe that Volkswagen sales would be affected by unemployment  
15 and foreclosure statistics any differently than the primary competitive brands.<sup>149</sup>

16 104. Mr. Reed, the General Manager of Ontario VW, testified that Volkswagen never  
17 counseled the dealership to increase its sales.<sup>150</sup> Mr. Reed testified that sales into the Montclair area are a  
18 significant source of business for Ontario VW.<sup>151</sup> In 2008, Ontario sold 110 units into the proposed  
19 Montclair PAI; in 2009, it sold 116 units.<sup>152</sup> While the Montclair PAI has been open and not assigned to  
20 any dealer, Ontario VW has been able to sell into that area. However, in 2009 its sales were only 61.66%  
21 of expected sales, so Ontario VW has the opportunity to reach 100% or more of expected sales.<sup>153</sup>

22 105. In support of its contention that it has provided adequate sales and service in the RMA,  
23 Ontario VW points to being named as a Generation Best award winner in 2009. The Generation Best

24 <sup>145</sup> RT Jan. 19, pp. 201-202.

25 <sup>146</sup> RT Jan. 20, pp. 127, 144, 148, 154, 161.

26 <sup>147</sup> RT Jan. 20, pp. 120, 188.

27 <sup>148</sup> RT Jan. 20, pp. 128, 129.

28 <sup>149</sup> RT Jan. 20, 128-129.

<sup>150</sup> RT Jan. 10, pp. 68, 71.

<sup>151</sup> RT Jan. 10, p. 74.

<sup>152</sup> Prot. Exh. 95 at 226, 228.

<sup>153</sup> Jt. Exh. 42, Tab 10, p. 4.

1 award was given to 63 of Volkswagen's 582 dealers in the United States.<sup>154</sup> The process was created,  
2 monitored, and administered by a Volkswagen marketing firm.<sup>155</sup> The 63 dealers named were only  
3 required to meet minimum Volkswagen standards.<sup>156</sup> Volkswagen representatives conceded that as a  
4 Generation Best dealer, Ontario VW was in an elite category.<sup>157</sup>

5 106. Ontario VW takes pride in winning the Octagon Award in the third quarter of 2009 and  
6 being tied for top honors in the fourth quarter of 2009.<sup>158</sup> This award is competitive within Area 52 and  
7 tracks eight standards of performance for Volkswagen dealers.

8 107. In spite of winning the Generation Best award and the Octagon Award in 2009,  
9 Ontario VW made only 61.66% of expected sales.<sup>159</sup> Winning awards for minimum or better  
10 performance is laudable, but there is always room for improvement.

11 108. The distance between Volkswagen dealers is not convenient.

12 109. Ontario VW has a more than adequate sales facility. A new Market Place facility was  
13 constructed with all necessary conveniences for customers. Mr. Reed testified that he did not recall that  
14 Volkswagen had ever counseled Ontario VW concerning sales satisfaction.<sup>160</sup> In October 2010, Ontario  
15 VW ranked at 96% of the sales satisfaction index.<sup>161</sup>

16 110. Ontario VW has an adequate service facility with 18 service bays.<sup>162</sup> Service work was  
17 reduced due to the economic downturn, but the dealership has the capacity to perform 50% more service  
18 work. Ontario VW had insufficient parking for customers who would be leaving their vehicles for  
19 service.<sup>163</sup>

20 111. The dealership has invested in adequate specialized equipment necessary for work on  
21 Volkswagen automobiles.

---

22  
23 <sup>154</sup> RT Jan. 19, pp. 241, 249.

24 <sup>155</sup> RT Jan. 10, p. 167; RT Jan. 20, p. 123.

25 <sup>156</sup> RT Jan. 20, pp. 140, 141.

26 <sup>157</sup> RT Jan. 19, pp. 241, 249; Prot. Exh. 53.

27 <sup>158</sup> RT Jan. 10, p. 109; Prot. Exh. 2.

28 <sup>159</sup> Jt. Exh. 42, Tab 10, p. 4. Riverside Volkswagen, which did not win the Generation Best award, sold 80.98% of its expected  
sales. *Ibid.* Mr. Roesner could not explain, from an operational standpoint, why neighboring dealerships had such diverse  
results. RT Jan. 12, p. 161.

<sup>160</sup> RT Jan. 10, pp. 77 - 78.

<sup>161</sup> Prot. Exh. 25.

<sup>162</sup> RT Jan. 10, p. 103.

<sup>163</sup> RT Jan. 19, pp. 215, 243.

1 112. Currently storage for parts is sufficient but Ontario VW would need a larger inventory of  
2 parts with space for storage in the future.<sup>164</sup>

3 113. There is no shortage of technicians qualified to work on Volkswagen vehicles.<sup>165</sup>  
4 Volkswagen requires a minimum of 70% of a dealership's technicians, service, and sales staff to be  
5 certified as Volkswagen trained.<sup>166</sup> Volkswagen offers web-based training as well as training at  
6 Volkswagen learning centers.<sup>167</sup>

7 114. Universal Technical Institute conducted a program for training Volkswagen technicians,  
8 but this program ended in 2010.<sup>168</sup> A new "fast track" training program was scheduled to begin in  
9 2011.<sup>169</sup>

10 115. Due to the decline in service business, Ontario VW had lost technicians, but there is no  
11 evidence that Ontario VW does not have sufficient trained technicians.<sup>170</sup>

12 **FINDINGS RELATING TO WHETHER THE ESTABLISHMENT OF AN**  
13 **ADDITIONAL FRANCHISE WOULD INCREASE COMPETITION AND**  
14 **THEREFORE BE IN THE PUBLIC INTEREST [SECTION 3063(e)]**

15 116. Ontario VW must show that any negative impact upon it, caused by the proposed  
16 establishment of a Montclair dealership, outweighs the benefits to the consuming public from increased  
17 competition.

18 117. Volkswagen underperforms in the Montclair RMA and establishing a Volkswagen  
19 dealership in the Montclair auto mall in a new facility would benefit Volkswagen. The brand would be  
20 visible on the high-traffic I-10 Freeway in a location where several of Volkswagen's primary competitive  
21 groups are also located.<sup>171</sup> This would generate interest in the Volkswagen brand and promote sales.  
22 However, Volkswagen's interests must be balanced against Ontario VW's interests in maintaining a

23 <sup>164</sup> RT Jan. 19, pp. 215, 241.

24 <sup>165</sup> RT Jan. 19, pp. 205, 233. Mr. Sherman expressed concern that a new Montclair dealership would hire quality technicians  
25 away from Ontario VW, thus leaving the dealership with insufficient trained technicians. Mr. John Hawkins explained that his  
26 preference is to staff a new dealership with employees from his organization and train them to Volkswagen standards. RT Jan.  
27 20, pp. 20-21.

26 <sup>166</sup> RT Jan. 19, p. 223.

27 <sup>167</sup> RT Jan. 19, pp. 210, 212.

28 <sup>168</sup> RT Jan. 10, p. 107; RT Jan. 19, p. 205.

<sup>169</sup> RT Jan. 19, p. 208.

<sup>170</sup> RT Jan. 10, p. 62.

<sup>171</sup> RT Jan. 13, p. 107.

1 viable business, as well as public interest in adequate competition and convenient service.

2 118. Projected sales for the Montclair Open Point were set at 571 for 2011; 764 for 2012; 1,057  
3 for 2013.<sup>172</sup> Placing a dealer in an auto mall or on the freeway would increase sales.<sup>173</sup> There is  
4 sufficient lost opportunity in the RMA to support the new dealership and keep Ontario VW's sales at  
5 average or better levels of effectiveness.

6 119. Protestant could avail itself of the expertise of Mr. Feely, Jr., the Volkswagen Business  
7 Improvement Manager, for assistance with any perceived profitability issues.<sup>174</sup>

## 8 ANALYSIS

### 9 PERMANENCY OF THE INVESTMENT [VEHICLE CODE SECTION 3063(a)]

10 120. Protestant Ontario VW has established permanency of its investment because it  
11 is a dealer with longevity, has constructed a Market Place facility in 2003 at substantial cost, and  
12 expended the financial outlays required over the years to modernize and maintain the dealership's  
13 building and equipment. Metro Autogroup has established permanency of its investment because the  
14 Hawkins brothers have over twenty years of experience in the automobile industry, Metro Autogroup  
15 owns property next to its Honda dealership in the Montclair auto mall which is available for a  
16 Volkswagen dealership, and it is anticipated that four to five million dollars will be expended to prepare  
17 the property and to build a facility to Volkswagen standards.<sup>175</sup>

### 18 EFFECT ON THE RETAIL MOTOR VEHICLE BUSINESS AND THE CONSUMING PUBLIC 19 IN THE RELEVANT MARKET AREA [VEHICLE CODE SECTION 3063(b)]

20 121. The Volkswagen brand has inadequate representation in the Montclair RMA. The  
21 addition of a Volkswagen dealer in an auto mall in Montclair housing several of Volkswagen's primary  
22 competitive group brands would stimulate competition. The consumer would benefit by having a shorter  
23 drive time and distance to reach a Volkswagen dealer, and by having the convenience of a dealer on the I-  
24 10 Freeway.

25  
26 <sup>172</sup> Jt. Exh. 24.

27 <sup>173</sup> RT Jan. 11, pp. 146- 147.

28 <sup>174</sup> Feely Depo, pp. 10, 11.

<sup>175</sup> RT Jan. 20, pp. 15-17, 46, 99; Prot. Exh. 119.

1                                    WHETHER IT IS INJURIOUS TO THE PUBLIC WELFARE FOR AN  
2                                    ADDITIONAL FRANCHISE TO BE ESTABLISHED [VEHICLE CODE SECTION 3063(c)]

3                    122. Protestant has failed to establish that it is injurious to the public welfare to establish a new  
4 dealership in Montclair.

5                                    WHETHER THE VOLKSWAGEN FRANCHISEE IS PROVIDING ADEQUATE COMPETITION AND  
6                                    CONVENIENT CONSUMER CARE FOR VOLKSWAGEN VEHICLES IN THE RELEVANT  
7                                    MARKET AREA, WHICH SHALL INCLUDE THE ADEQUACY OF MOTOR VEHICLE  
8                                    SALES AND SERVICE FACILITIES, EQUIPMENT, SUPPLY OF VEHICLE PARTS,  
9                                    AND QUALIFIED SERVICE PERSONNEL [VEHICLE CODE SECTION 3063(d)]

10                    123. There are insufficient dealers in the Riverside-San Bernardino market, and establishing a  
11 new dealership in Montclair will provide additional competition for sales and convenience for customers.

12                    124. Ontario VW's sales and service facilities were built in 2003, and they are more than  
13 adequate to provide adequate consumer care. Ontario VW has invested in the specialized equipment  
14 necessary to servicing Volkswagens. The dealership's supply of vehicle parts and storage is currently  
15 adequate. Ontario VW has sufficient qualified service technicians.

16                                    WHETHER THE ESTABLISHMENT OF AN ADDITIONAL DEALERSHIP WOULD INCREASE  
17                                    COMPETITION AND THEREFORE BE IN THE PUBLIC INTEREST  
18                                    [VEHICLE CODE SECTION 3063(e)]

19                    125. There is available opportunity to achieve average performance, and there is no basis to  
20 conclude a negative impact on existing dealers, especially Ontario VW.

21                    126. Protestant decries the ruinous impact upon it if the Montclair dealership is established, and  
22 states that it is just a matter of time before it goes out of business.<sup>176</sup> But it is imperative to remember the  
23 discrepancy between the Mr. Sherman who argues that Montclair will destroy Ontario VW, and the Mr.  
24 Sherman who confirmed to Volkswagen that he could make a Montclair dealership as good as Ontario  
25 VW.

26                    127. Ontario VW is profitable and considered to have good management. Mr. Roesner's  
27 dramatic numbers of "loss" are not absolute proof of lost sales. A Montclair dealership and Ontario VW  
28 will be able to compete and be profitable.

29 ///

30 \_\_\_\_\_  
<sup>176</sup> Jt. Exh. 42, Tab 37, pp. 1, 2.

**DETERMINATION OF ISSUES**

1  
2           128. Protestant has sustained its burden of proof of establishing the permanency of its  
3 investment. [Section 3063(a)]

4           129. Protestant has not sustained its burden of proof of showing an adverse effect on the retail  
5 motor vehicle business and the consuming public in the relevant market area. [Section 3063(b)]

6           130. Protestant has not proved that it would be injurious to the public welfare for the Montclair  
7 dealership to be established. [Section 3063(c)]

8           131. Protestant has not sustained its burden of proof of establishing that there is adequate  
9 competition and convenient consumer care in terms of sales and distance. Protestant has sustained its  
10 burden of proof of showing its adequacy of sales and service facilities, equipment, supply of vehicle  
11 parts, and qualified service personnel are adequate. [Section 3063(d)]

12           132. Protestant has not sustained its burden of proof of proving that competition would not  
13 increase if the establishment was allowed and the public interest would therefore not be served. [Section  
14 3063(e)]

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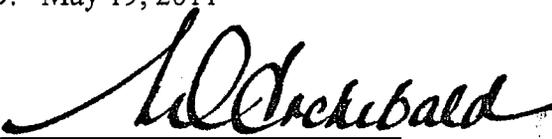
28 ///

1 **PROPOSED DECISION**

2 Protest No. PR-2265-10 is overruled. Protestant Ontario VW has not met its burden of proof  
3 under Vehicle Code section 3066(b) that there is good cause not to establish a Volkswagen dealership in  
4 Montclair. Respondent Volkswagen of America, Inc. shall be permitted to proceed with the  
5 establishment of the new franchise at the proposed location in Montclair.

6  
7 I hereby submit the foregoing which constitutes my  
8 Proposed Decision in the above-entitled matter, as  
9 the result of a hearing before me, and I recommend  
10 this Proposed Decision be adopted as the decision of  
11 the New Motor Vehicle Board.

12 DATED: May 19, 2011

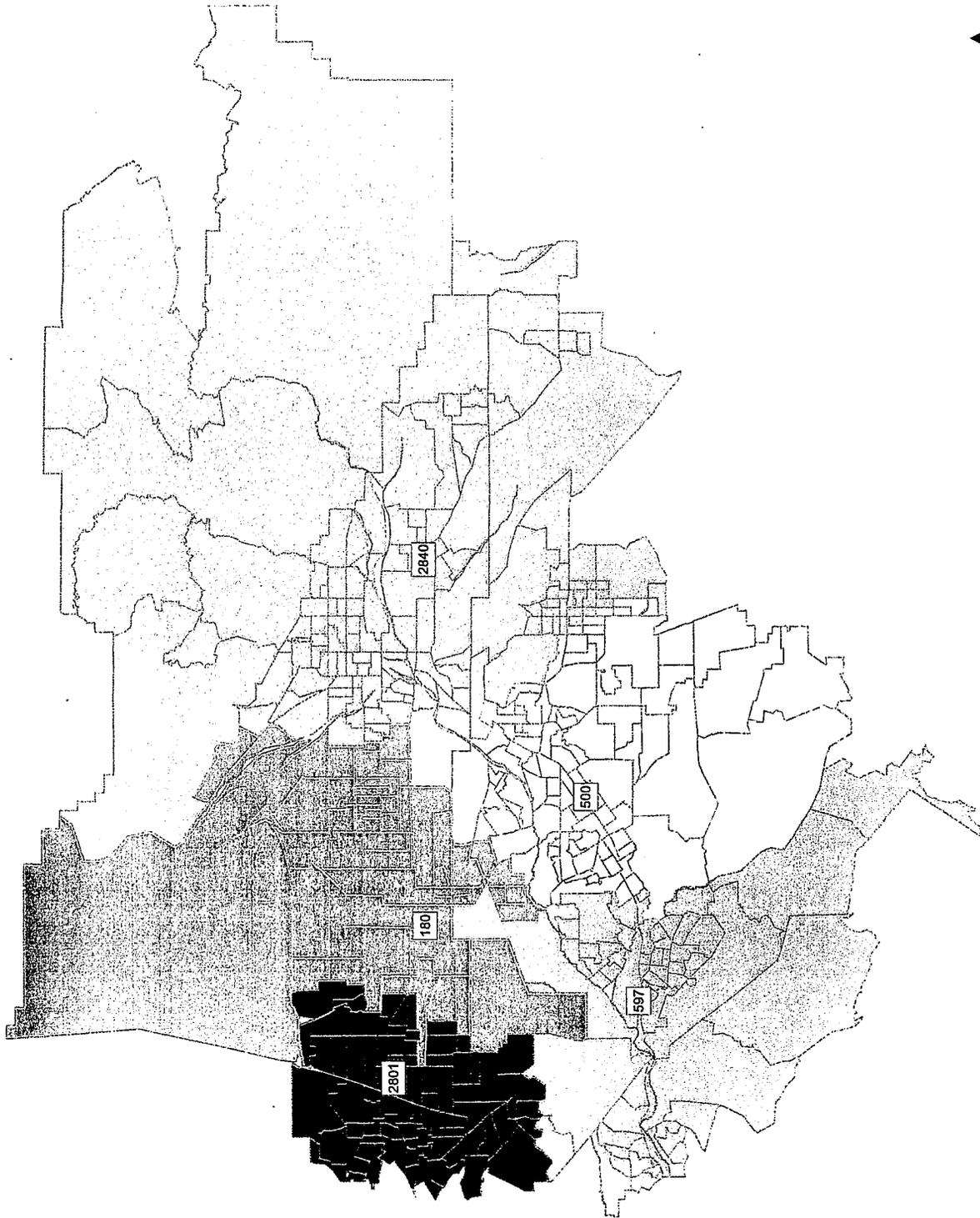
13 By:   
14 MARYBELLE D. ARCHIBALD  
15 Administrative Law Judge  
16  
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25 Attachments

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



# ATTACHMENT 2

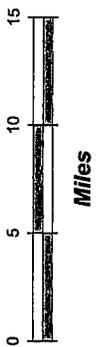


|  |      |                |                |
|--|------|----------------|----------------|
|  | 2801 | Montclair OP   | Montclair      |
|  | 180  | Ontario VW     | Ontario        |
|  | 597  | Cardinalway VW | Cardinalway VW |
|  | 500  | Riverside VW   | Riverside      |
|  | 2840 | Redlands OP    | Redlands       |

## CA, Riverside-San Bernardino PAI MAP



Geog Ref: H00-VW\_Montclair\_mkt

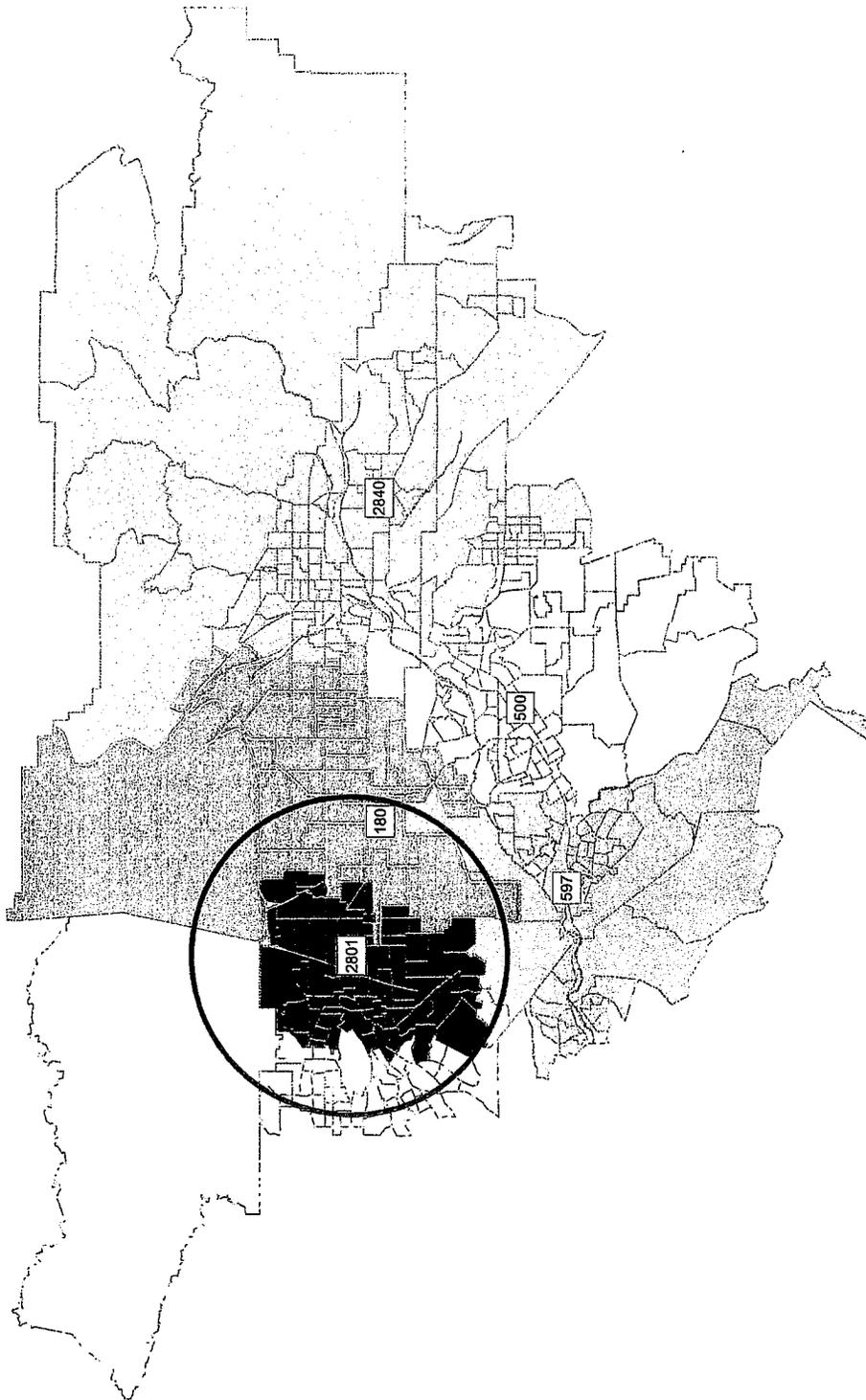


**Volkswagen of America, Inc.**

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# ATTACHMENT 3



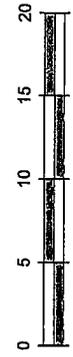
10 Mile RMA

|      |                |            |
|------|----------------|------------|
| 180  | Ontario VW     | Ontario    |
| 500  | Riverside VW   | Riverside  |
| 597  | Cardinalway VW | Corona     |
| 2801 | Montclair OP   | Montclair  |
| 2840 | Redlands OP    | Redlands   |
|      |                | Bal of RMA |

**CA, Riverside-San Bernardino  
+10 Mile RMA Census Tracts**



Geog Ref: H00-VW\_Montclair\_RSB\_RMA



Miles

**Volkswagen of America, Inc.**

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