

1 JEFFER MANGELS BUTLER & MITCHELL LLP
ALLEN RESNICK (Bar No. 116458)
2 MATTHEW D. HINKS (Bar No. 200750)
RYAN S. MAUCK (Bar No. 223173)
3 1900 Avenue of the Stars, Seventh Floor
Los Angeles, California 90067-4308
4 Telephone: (310) 203-8080
Facsimile: (310) 203-0567

5 Attorneys for Respondent
6 VOLKSWAGEN OF AMERICA, INC.

7
8 **STATE OF CALIFORNIA**
9
10 **NEW MOTOR VEHICLE BOARD**

11 In the Matter of the Protest of:

Protest No. PR-2265-10

12 SHAYCO, INC., dba ONTARIO
VOLKSWAGEN,

**RESPONDENT VOLKSWAGEN OF
AMERICA, INC.'S [PROPOSED] ORDER
OVERRULING PROTEST**

13 Protestant,

14 v.

15 VOLKSWAGEN OF AMERICA, INC.,

16 Respondent.

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18 **I. PROCEDURAL BACKGROUND**

19 **A. STATEMENT OF THE CASE**

20 1. By letter dated July 30, 2010, Volkswagen of America, Inc. (“Volkswagen” or
21 “Respondent”) gave notice to Shayco, Inc., dba Ontario Volkswagen (“Ontario VW” or
22 “Protestant”) pursuant to California Vehicle Code section 3062¹ of Volkswagen’s intention to
23 establish a new Volkswagen dealership in Montclair, California.²

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26 ¹ Unless otherwise indicated, all statutory references are to the California Vehicle Code.

27 ² On January 10, 2011, the parties submitted a Joint Stipulation of Facts. Reporter’s Transcript (“RT”) Jan. 10, pp. 57-
28 58; Jt. Stip. Facts 2, 5.

1 2. Protestant is the only Volkswagen franchisee located within the relevant market area
2 (“RMA”) of the proposed new dealership.³ The location of the proposed dealership in Montclair is
3 between 8.65 and 8.7 air miles from Protestant’s current location.⁴

4 3. On August 13, 2010, Protestant filed a timely protest with the New Motor Vehicle
5 Board (“Board”).⁵

6 **B. HEARING ON THE MERITS AND INITIAL PROPOSED DECISION**

7 4. A hearing on the merits of the protest was held January 10 through January 14, 2011,
8 and January 18 through January 20, 2011, before Board Administrative Law Judge Marybelle D.
9 Archibald (“ALJ”).

10 5. Following the filing of post-hearing briefs by the parties, the matter was submitted to
11 the ALJ on April 19, 2011, who then submitted her Proposed Decision overruling the Protest to the
12 Board on May 19, 2011.

13 6. A General Meeting of the Board was held on May 26, 2011, at which time the
14 Proposed Decision was considered by the Public Members of the Board, who received public
15 comments from counsel for both parties.

16 7. Following consideration of the administrative record, the Proposed Decision, and the
17 comments of counsel, the Board issued a Corrected Order Remanding the Proposed Decision Dated
18 May 19, 2011 (“Remand Order”) with the following instructions to the ALJ:

19 1. The ALJ shall consider the evidence in the record or reopen the
20 record as may be necessary to make additional findings of fact concerning the effect
21 on the retail motor vehicle business and the consuming public in the relevant market
22 area only. (Veh. Code § 3063(b))

23 2. The ALJ shall provide additional facts on the methodology used in
24 concluding that Protestant made 19.4% of new Volkswagen sales from the
25 Montclair PAI in 2009. (See Jt. Exh. 42, Tab 11, p. 5)

26 3. The ALJ shall make a determination that (assuming hypothetically)
27 there is a 19.4% reduction in Protestant’s sales due to the establishment of the

28 ³ 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 the “relevant market area” which is that area 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.)

⁴ Jt. Stip. Fact 4; Jt. Exh. 42, Tab 11, p. 5.

⁵ Jt. Stip. Fact 6.

1 proposed dealer in Montclair, where, in terms of geography, will Protestant re-
2 capture those lost sales? The focus should not be limited to new retail sales but
3 should also consider used vehicle sales, as well as warranty and any other customer
4 pay services.

4. The ALJ shall have discretion to order additional evidence, briefing,
and/or arguments.

5 **C. REMAND TO ALJ AND PROPOSED DECISION FOLLOWING REMAND**

6 8. Pursuant to the Remand Order the parties were given the opportunity to “present
7 declarations, exhibits, and joint exhibits to respond to the questions presented in the remand order
8 and/or to update information presented in the original hearing which is relevant to the questions
9 presented on remand.”⁶

10 9. Following the filing of briefs and evidence by the parties, the matter was again
11 submitted to the ALJ on August 23, 2011. ALJ Archibald prepared a Proposed Decision Following
12 Remand, dated September 15, 2011, again overruling the Protest.

13 **D. BOARD’S REJECTION OF PROPOSED DECISION FOLLOWING REMAND AND**
14 **SUSTAINING OF PROTEST**

15 10. The September 15, 2011 Proposed Decision Following Remand was considered by
16 the Public Members of the Board at the General Meeting of September 27, 2011. Following public
17 comments by counsel for the parties, the Public Members of the Board deliberated in closed
18 Executive Session. Thereafter, as reflected in the Board’s draft minutes of September 27, 2011,
19 “Mr. Flesh moved to reject the Administrative Law Judge’s Proposed Decision with regard to the
20 good cause factor in Vehicle Code section 3063(b), sustain the protest, and the Board in
21 consultation with the staff will draft its own decision which will be considered at the December 7,
22 2011 [this date was subsequently changed to December 13] General Meeting. Mr. Obando seconded
23 the motion. The motion carried by a four-to-zero vote with Mr. Brooks abstaining since he missed
24 some of the presentation.” The Board thereafter announced that it had “rejected the Administrative

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26 ⁶ Order Regarding Pre-Hearing Matters on Remand, para. 9. The opportunity to "update information" was discussed in a
27 June 28, 2011 telephone conference between the ALJ and counsel for the parties and referred to updating statistics, such
28 as those relating to vehicle sales and service, and general economics and demographics. To the extent that Protestant
chose not to comply with the Remand Order and to disregard the Order Regarding Pre-Hearing Matters on Remand by
rearguing issues outside the narrow scope of remand, those matters were not considered by the ALJ.

1 Law Judge’s decision with regards to the good cause factor in Vehicle Code Section 3063(b),” that
2 it was “sustaining the Protest” and that the Board, in consultation with the staff, “will draft its own
3 Proposed Decision.”

4 11. On December 14, 2011, the Board issued its “Order Confirming Decision to Sustain
5 Protest.”

6 **E. WRIT TO SUPERIOR COURT AND POST-WRIT PROCEEDINGS**

7 12. Following the issuance of the Board’s written decision, Volkswagen filed a petition
8 with the Superior Court for the County of Sacramento seeking a writ of mandate. On January 30,
9 2013 the Superior Court ruled in Volkswagen’s favor, ordering the Board to vacate its Order dated
10 December 13, 2011 and to reconsider this matter by deciding it upon the record after affording the
11 parties an opportunity to present oral or written argument. On February 22, 2012, at its regularly
12 scheduled meeting, the Board vacated its December 13, 2011 Order.

13 13. The parties submitted Opening Briefs and Reply Briefs to the Board on February 28,
14 2013 and March 7, 2013, respectively.

15 14. Pursuant to the Board’s March 26, 2013 Order, the parties were each permitted to
16 submit additional evidence in this matter in the form of declarations, which the parties did on April
17 12, 2013.

18 15. Pursuant to the Board’s May 8, 2013 Order, the parties were each permitted to
19 submit proposed findings of fact in the form of a draft proposed decision of the Board with citations
20 to the record.

21 16. Pursuant to Government Code § 11517(c)(2)(E)(ii), on June 26, 2013 the Public
22 Members of the Board met and heard oral arguments from counsel for both parties. After
23 considering all evidence in the record and the oral and written arguments of counsel for both parties,
24 the Public Members of the Board deliberated and tentatively concluded that Protestant had not met
25 its burden of proof, and therefore the Protest should be overruled. On _____, 2013, the Board
26 issued a tentative decision to this effect, which was served upon counsel for both parties. The Board
27 met again on August 26, 2013 to consider the tentative decision and to hear any further oral
28 arguments of counsel for the parties regarding the tentative decision. After hearing oral arguments

1 of counsel, the Board then met in Closed Executive Session and voted to adopt the tentative
2 decision as its final decision, and to overrule the Protest.

3 **II. PARTIES AND COUNSEL**

4 17. Protestant is an authorized Volkswagen dealer located at 701 S. Kettering Drive,
5 Ontario, California,⁷ and a “franchisee” within the meaning of Sections 331.1 and 3062(a)(1).
6 Protestant is owned by Gary Sherman and his wife, through a family trust.⁸

7 18. Protestant is represented by the Law Offices of Michael J. Flanagan, by Michael J.
8 Flanagan, Esquire, and Gavin M. Hughes, Esquire, 2277 Fair Oaks Boulevard, Suite 450,
9 Sacramento, California.

10 19. Respondent is a “franchisor” within the meaning of Sections 331.2 and 3062(a)(1).

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

14 **A. PROTESTANT’S WITNESSES⁹**

15 21. Protestant called the following witnesses: Gary Sherman, dealer principal and owner
16 of Ontario VW; Earl Reed, General Manager of Ontario VW; Greg Bozzani, dealer principal and
17 managing partner of SAI Auto Group, LLC, dba Bozzani Volkswagen in Covina; and Howard
18 Hawkins, Chief Financial Officer of the Metro Autogroup in Montclair.¹⁰ Protestant’s expert witness
19 was Joseph F. Roesner, Vice President of The Fontana Group.

20 22. Following the Remand Order, Protestant submitted declarations from Gary Sherman,
21 Earl Reed, Greg Bozzani, Frederick E. Hitchcock, Jr., and Joseph F. Roesner.

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23 ⁷ Jt. Stip. Fact 1; Jt. Exh. 36.

24 ⁸ RT Jan. 10, pp. 211 – 212.

25 ⁹ Unless otherwise indicated, all testimony and other evidence referred to is evidence received at the merits hearing
26 prior to the remand. There was no additional hearing, and thus no oral testimony, after the remand. However, the
27 parties did submit additional evidence and declarations after the Remand Order and after the remand from the Superior
28 Court, which are part of the record.

¹⁰ Howard Hawkins was called pursuant to Evidence Code section 776, which 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.

1 23. On April 12, 2013 Protestant submitted additional declarations from Earl Reed and
2 Joseph F. Roesner.

3 **B. RESPONDENT’S WITNESSES¹¹**

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

13 25. Following the Remand Order, Respondent submitted declarations from Anthony
14 Ray, Kurt Thomas, and Sharif G. Farhat.

15 26. On April 12, 2013, Respondent submitted additional declarations from Sharif G.
16 Farhat and Charles Kim, General Manager of Dealer Network Development for Volkswagen's
17 Pacific Region.

18 **C. DEPOSITION TESTIMONY AT THE MERITS HEARING¹²**

19 27. Pursuant to a stipulation by the parties, deposition excerpts of the following
20 deponents were admitted: Debbie Scheline, Protestant's Business Manager; Jack Feely, Jr.,
21 Volkswagen's Business Improvement Manager; and Ron Stach, General Manager of Sales for
22 Volkswagen's Western Region.

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¹¹ See footnote 9.

¹² See footnote 9.

1 **D. EVIDENTIARY ISSUES**¹³

2 28. The parties offered over 100 exhibits at the January 2011 hearing, and all offered
3 exhibits were admitted into evidence. Hearsay objections were raised to newspaper and journal
4 articles, but those objections were overruled by the ALJ.

5 29. During the merits hearing, Respondent’s motion for a protective order in regard to
6 Joint Exhibit 55, an e-mail from Tony Ray to Howard Hawkins and the accompanying Letter of
7 Intent, was granted. During the hearing, Respondent’s motion to expand the protective order to
8 include testimony by Steve Mears concerning Bozzani Volkswagen was granted.

9 30. No request was made by Protestant to continue the hearing for the purpose of
10 reopening discovery or submitting additional testimony.¹⁴

11 31. Following the Remand Order, exhibits which constitute hearsay were admitted and
12 given the appropriate weight.

13 32. On July 29, 2011, the Board received documents from Protestant numbered OVWR
14 0000001 through OVWR 0000252, which Protestant characterized as “additional evidence
15 Protestant reserves the right to use as an exhibit to its brief.” Those documents were not admitted.

16 33. On remand, the Declaration of Frederick E. Hitchcock, Jr., offered by Protestant was
17 not admitted. The Declaration is contrary to the Board’s Remand Order and contrary to the ALJ’s
18 Order Regarding Pre-Hearing Matters on Remand. The Declaration is an attempt to fill an
19 evidentiary gap noted in the original Proposed Decision and was not relevant to the issues on
20 remand.

21 34. The Supplemental Declaration of Joseph F. Roesner On Remand dated August 31,
22 2011, and presented by Protestant to correct an alleged misstatement in Respondent’s Reply Brief
23 was not admitted, nor was the correspondence of counsel for Protestant and Respondent concerning
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¹³ Unless otherwise indicated, all evidence referred to is evidence received at the merits hearing prior to the remand.

26 ¹⁴ Protestant stated that on the last day of the hearing it became aware of “falsely reported sales” which may have
27 corrupted the standard for measuring performance of the RMA, as well as other geographic areas of analysis. Protestant
28 contended in its Post-Hearing Reply Brief that it was denied the opportunity to explore this behavior. (Prot. Post-
Hearing Reply Brief, p. 2: 21-28). Protestant has not renewed this objection following remand from the Superior Court.

1 this offer. The concept of “radius” as presented by Mr. Roesner and argued by Respondent does not
2 require correction.

3 35. On remand, the ALJ requested clarification of the Supplemental Declaration of
4 Anthony Ray on Remand due to a real estate advertisement in the August 29, 2011 issue of
5 *Automotive News*. The Third Declaration of Anthony Ray on Remand was submitted and
6 considered solely for its response to the ALJ’s questions. Protestant’s request to exclude the Third
7 Declaration of Anthony Ray on Remand was denied. Protestant’s request to submit additional
8 evidence regarding the status of the Redlands and Victorville open points was denied, and the
9 arguments of Protestant’s counsel in correspondence were not considered.

10 36. On April 19, 2013, Protestant submitted purported “objections” to the April 12,
11 2013 Declarations of Charles Kim and Sharif Farhat. Those objections are overruled. During the
12 March 13, 2013 Meeting of the New Motor Vehicle Board, the Board confirmed that any objections
13 submitted by the parties to the April 12, 2013 declarations were to be limited solely to evidentiary
14 objections “as to why [such declaration] is not admissible evidence,” and not to rebuttal evidence or
15 argument.¹⁵

16 37. Pursuant to Government Code Sec. 11513, a protest hearing before the New Motor
17 Vehicle Board “need not be conducted according to technical rules relating to evidence and
18 witnesses, except as hereinafter provided. Any relevant evidence shall be admitted if it is the sort of
19 evidence on which responsible persons are accustomed to rely in the conduct of serious affairs,
20 regardless of the existence of any common law or statutory rule which might make improper the
21 admission of the evidence over objection in civil actions.” The declarations of Charles Kim and
22 Sharif Farhat are admissible under this standard. Furthermore Protestant’s objections in many cases
23 are not evidentiary objections at all but rather rebuttal arguments to the evidence contained in those
24 declarations, which is inconsistent with the Board’s direction to submit only evidentiary objections,
25 and not rebuttal evidence or argument.

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¹⁵ RT, Mar. 13, 2013, pp. 67:24-69:5.

1 **III. ISSUE PRESENTED**

2 38. The following issue is presented by this protest: Did Protestant, the only Volkswagen
3 dealer within the 10-mile relevant market area of the proposed Montclair dealership site, sustain its
4 burden of proving good cause for the Board to prohibit Volkswagen from establishing the proposed
5 Montclair dealership?

6 39. 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
9 the establishment.

10 40. Pursuant to Section 3066(b), it is Protestant’s burden to prove there is “good cause”
11 for the Board to prohibit the establishment of the new Volkswagen dealership in Montclair.

12 41. The principles articulated in the New Motor Vehicle Board Act (the “Act”), in which
13 Section 3062 is found, do not permit the Board to deny a proposed new dealership in order to
14 protect existing dealerships from competition. As explained by the California Court of Appeal in
15 *RiJoyce, Inc. v. New Motor Vehicle Board*, 2 Cal. App. 4th 445, 456, fn. 4 (1992):

16 “Although some dealers seem to believe that the New Motor Vehicle
17 Board Act was enacted to protect them against competition, quite the
18 contrary is true. The act recognizes that a new motor vehicle
19 dealership may require a significant investment and that there is a
disparity of bargaining power and thus the act was intended to protect
new motor vehicle dealers against unfair or oppressive trade practices.
[Emphasis added.]

20 . . . But the act recognizes that the needs of consumers are important
21 and that competition is in the public interest. Accordingly, a dealer
22 cannot prevail on a protest simply by asserting a desire to limit
competition.” (internal citations omitted).

23 42. The United States Supreme Court, in reviewing the validity of the Act, noted that the
24 Act was constitutional to the extent that protest rights were “necessary to prevent unfair or
25 oppressive trade practices....” or to regulate competition “offensive to the public welfare.” *New*
26 *Motor Vehicle Bd. of California v. Orrin W. Fox Co.*, 439 U.S. 96, 99 S.Ct. 403 (1978). [Emphasis
27 added.]

1 43. In determining whether there is good cause for not entering into an additional
2 franchise for the same line-make, Section 3063 requires the Board to take into consideration the
3 existing circumstances, including, but not limited to, all of the following:

4 (a) Permanency of the investment.

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

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

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

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

15 44. This statutory scheme is evidence that the Legislature “intended that the Board
16 balance the dealers’ interest in maintaining viable businesses, the manufacturers’ interest in
17 promoting sales, and the public’s interest in adequate competition and convenient service.” *Piano v.*
18 *State of California ex rel. New Motor Vehicle Board*, 103 Cal. App. 3d 412, 417 (1980).

19 **IV. FINDINGS OF FACT¹⁶**

20 **A. GENERAL FINDINGS**

21 ***I. Volkswagen and Industry Sales***

22 45. Respondent Volkswagen is the exclusive distributor of Volkswagen vehicles in the
23 United States. Volkswagen’s primary competitive group includes Toyota, Honda, Nissan, Mazda,
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25 ¹⁶ References to testimony, exhibits or other parts of the record are examples of evidence relied upon to reach a finding
26 and are not intended to be all-inclusive. Transcripts of the proceedings are referred to by date. Deposition testimony is
27 referred to by the deponent’s name. References to “Exh.” are to Joint, Protestant’s, or Respondent’s Exhibits. To
28 distinguish them from exhibits from the hearing, exhibits submitted after the hearing are so labeled.

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 Hyundai, and Subaru.¹⁷ Globally, Volkswagen is one of the three highest volume brands in the
2 world.¹⁸ Although for many years Volkswagen has not been a high volume brand in this country,
3 shortly before the hearing in this case the company adopted a \$4 billion strategic plan to increase its
4 volume in the United States, to be more in line with the brand’s high volume market position
5 internationally.¹⁹ The plan included a \$1 billion investment in a factory in Chattanooga, Tennessee²⁰
6 which began producing the successful new Passat midsize sedan that went on sale in September,
7 2011.²¹ Indeed, Passat registrations in California in 2012 increased 871% from 2010.²² Although
8 Protestant argued that this data was skewed in part by “fleet” sales to Hertz Rental Car, none of
9 these retail vehicles were sold to any entity that included the name “Hertz” and thus there is no
10 basis to conclude that this sales data incorrectly includes “fleet” sales.²³

11 46. At the time of the merits hearing, the most recent full-year vehicle sales and
12 registration data available to the parties’ experts was from 2008 and 2009, during the peak of the
13 recession when new vehicle sales were at one of the lowest points in several years. At the time of
14 the Remand, the available market data was current through March 2011. Since that time, both the
15 economy and the industry have rebounded, with new vehicle sales experiencing significant
16 growth.²⁴ Furthermore, since 2011, Volkswagen has experienced substantial growth in market share
17 on top of the growth in vehicle sales experienced by the industry at large. Total sales in the industry
18 increased from 10,431,509 in 2009 to 14,492,398 in 2012.²⁵ Sales of Volkswagen vehicles more
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¹⁷ RT Jan. 19, pp. 10, 69; Jt. Exh. 44, App.11.

22 ¹⁸ RT Jan. 18, pp. 20:20-21:6.

23 ¹⁹ *Id.*

24 ²⁰ *Id.*; 21:11-22.

25 ²¹ *Id.*

26 ²² April 12, 2013 Declaration of Sharif Farhat (“2013 Farhat Decl.”), Exh. A-26.

27 ²³ *Id.* Exh.A-27.

28 ²⁴ *Id.*, ¶ 2.

²⁵ 2013 Farhat Decl. ¶ 66, Exh. B.

1 than doubled, from 213,454 in 2009 to 438,133 in 2012.²⁶ Moreover, Volkswagen’s market share
2 during that time increased by 50%, from 2% to 3%.²⁷

3 47. Consistent with this increase in industry and Volkswagen sales in particular, average
4 dealer profitability for Pacific Region²⁸ dealers increased from \$1.035 million in 2011 to \$1.100
5 million in 2012.²⁹ In 2010, the average profitability for dealers in the Western Region (the
6 predecessor to the current Pacific Region configuration) was \$665,000.³⁰ Thus, profitability for
7 dealers in this area is up considerably from 2010.

8 48. This increase in average dealer profitability is due in large part to the dealers’
9 increased sales and service business over the past few years. While the Pacific Region dealership
10 count has increased since 2010 (104 dealers in January 2011, 106 dealers in January 2012, and 112
11 dealers in January 2013), the average new vehicle sales throughput per dealership increased from
12 610 in 2011, to 742 in 2012, to a projected 870 in 2013.³¹

13 **2. The Riverside-San Bernardino Market and Volkswagen Dealers**

14 49. Both Protestant’s Ontario dealership and the proposed dealership in Montclair are
15 situated in the large Riverside-San Bernardino Market, comprised of much of Riverside and San
16 Bernardino counties. The importance of highways and freeways in the Riverside-San Bernardino
17 Market cannot be overemphasized. The I-10 Freeway runs east-west through Area 52 and the
18 northern area of Montclair and continues westward to the Pacific Ocean. Numerous car dealerships
19 are located along the 10 Freeway, including all of Volkswagen’s major competitors.³² However,
20 there is not a single Volkswagen dealership with visibility from the 10 Freeway from the Pacific
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22 _____
²⁶ *Id.*

23 ²⁷ *Id.*

24 ²⁸ Volkswagen has divided the United States into four geographic regions for administrative purposes. California is in
the Pacific Region (formerly known as the Western Region). RT Jan. 13, p.110; RT Jan. 18, p. 13.

25 ²⁹ April 12, 2013 Declaration of Charles Kim (“Kim Decl.”), ¶16.

26 ³⁰ *Id.*

27 ³¹ *Id.*, ¶17.

28 ³² Jt. Exh. 44 at A-6; RT Jan. 18, pp. 83:5-11.

1 Ocean to Indio, halfway to Arizona.³³ Moreover, there are no Volkswagen dealerships located off of
 2 the 10 Freeway -- visible or not -- for a 100-mile stretch between Covina to the west of Montclair
 3 and Indio to the east, a stretch covering the entire length of the Riverside-San Bernardino Market.³⁴

4 50. Volkswagen assigns areas of responsibility to its dealers, which it calls Primary
 5 Areas of Influence or “PAIs.” At the time of the merits hearing and Remand, the Riverside-San
 6 Bernardino Market consisted of five PAI’s, including Protestant’s PAI as well as two “open points”
 7 unassigned to any existing dealer, both of which bordered Protestant’s PAI: Montclair to the west of
 8 Protestant and Redlands to the east of Protestant.³⁵

9 51. In 2011, Volkswagen entered into a letter of intent with a dealer candidate to open a
 10 Volkswagen dealership in the Moreno Valley Auto Mall, which lies to the east of Riverside in
 11 Riverside County. That dealership opened in September, 2011.³⁶ As a result of the establishment of
 12 the Moreno Valley dealership, Volkswagen reconfigured the Redlands open point PAI in the eastern
 13 portion of the Riverside-San Bernardino Market.³⁷ A portion of that former Redlands PAI became
 14 part of the new Moreno Valley PAI.³⁸ That new Moreno Valley PAI also includes census tracts
 15 previously assigned to a neighboring open point PAI in Hemet, California, outside of the Riverside-
 16 San Bernardino Market.³⁹

17 52. The remaining census tracts within the former Redlands PAI were assigned to a new
 18 open point centered roughly in San Bernardino, California.⁴⁰ In April 2012, Volkswagen entered
 19 into a letter of intent with Mr. David Wilson of Wilson Automotive Group to establish an exclusive
 20 Volkswagen dealership in the San Bernardino Auto Mall to fill this open point.⁴¹ Mr. Wilson

21 ³³ RT Jan. 18, pp. 83:5-11.

22 ³⁴ RT Jan. 19, pp. 14:4-9.

23 ³⁵ Kim Decl. ¶ 3.

24 ³⁶ *Id.*, ¶ 4.

25 ³⁷ *Id.*, ¶ 5.

26 ³⁸ *Id.*

27 ³⁹ *Id.*

28 ⁴⁰ *Id.* ¶ 6.

⁴¹ *Id.*

1 recently began construction on an exclusive “White Frame” Volkswagen facility at this location,
2 which is expected to open in November 2013.⁴²

3 53. Protestant is on the I-15 Freeway, which runs north-south.⁴³ The City of Ontario is
4 crossed by the I-15 and I-10 Freeways and Highways 60 and 210.⁴⁴

5 54. In the years leading up to the Protest, the Riverside-San Bernardino Market had seen
6 significant growth, adding over 880,00 additional residents since 1990 (nearly 50% growth in 20
7 years).⁴⁵ Moreover, this growth is expected to continue at a significant pace for the foreseeable
8 future. According to Claritas, a third-party demographics agency relied upon by numerous
9 industries, the population in the RMA over the next four years will increase by over 30,000. There
10 will also be over 9,000 additional households in the RMA.⁴⁶

11 55. The population in Protestant’s own PAI is projected to increase by nearly 33,000 and
12 households are projected to increase by over 8,000 in the next four years alone.⁴⁷

13 56. At the time of the hearing, the Board was concerned about economic conditions in
14 the Riverside-San Bernardino Market. However, economic conditions have improved significantly
15 since 2011. The number of employed individuals in Riverside and San Bernardino Counties has
16 steadily increased over the past two years.⁴⁸ In addition, foreclosure rates in Riverside and San
17 Bernardino Counties have decreased substantially since 2009, from 3.4% of households in 2009 to
18 1.5% of households in 2012.⁴⁹

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⁴² *Id.*
⁴³ Jt. Exh. 42, Tab 4, p. 2.
⁴⁴ RT Jan. 19, p. 186.
⁴⁵ Jt. Exh. 44 at A-30.
⁴⁶ 2013 Farhat Decl., Exh. A-12 through A-15
⁴⁷ *Id.*
⁴⁸ *Id.*, ¶39, Exh. A-16.
⁴⁹ *Id.*, Exh. A-17.

1 3. *The Montclair Open Point*

2 57. The City of Montclair is approximately 35 miles east of Los Angeles on the western
3 edge of San Bernardino County.⁵⁰ The city is primarily south of the I-10 Freeway.⁵¹ Most new car
4 dealerships are south of the I-10 Freeway, toward the north end of town.⁵² Although the City
5 suffered during the economic recession in the prior decade, it has since recovered. Sales tax
6 revenues increased over the last two quarters for which data was available at the time of the merits
7 hearing.⁵³ Indeed, Montclair and its surrounding areas are projected to experience the largest
8 economic growth in the Inland Empire.⁵⁴ For a variety of reasons, Montclair attracts customers not
9 only from its own city, but also from cities to the north and northwest (i.e., Upland, San Dimas, La
10 Verne and Claremont), the west (Pomona) and the south (Chino).⁵⁵ By contrast, Ontario -- located
11 on the 15 Freeway -- draws customers primarily from the east.⁵⁶

12 58. When Urban Science, a consulting firm employed by Volkswagen, determines that a
13 geographical area needs additional Volkswagen representation, that location is placed on the “Open
14 Point list”.⁵⁷ Placing a location on the Open Point list does not guarantee that Volkswagen will
15 actually decide to establish a dealership at that location, and the list changes yearly.⁵⁸

16 59. Montclair was placed on the Open Point list in 2006.⁵⁹ In the ensuing years,
17 Volkswagen notified the National Association of Minority Automobile Dealers twice about the
18 potential Montclair Open Point, and a number of individuals expressed interest in a potential
19 Volkswagen dealership in Montclair. However, Volkswagen's efforts to find a suitable dealer

21 ⁵⁰ RT Jan. 19, p. 131.
22 ⁵¹ RT Jan. 19, p. 132.
23 ⁵² RT Jan. 19, p. 136.
24 ⁵³ RT Jan. 19, p. 134:17-21.
25 ⁵⁴ RT Jan. 19, p. 135:17-22.
26 ⁵⁵ RT Jan. 19, p. 137:17-138:4.
27 ⁵⁶ RT Jan. 19, p. 138:5-18.
28 ⁵⁷ RT Jan. 18, p. 16.
⁵⁸ RT Jan. 18, p. 17.
⁵⁹ RT Jan. 18, p. 29.

1 candidate and location for the Montclair Open Point were hampered by the limited availability of
2 real estate. Finally, in 2011 Volkswagen formally declared Montclair to be an open point and began
3 accepting applications.⁶⁰

4 60. Mr. Sherman submitted an application to become the Volkswagen dealer at the
5 Montclair Open Point.⁶¹ Mr. Sherman had previously operated new motor vehicle dealerships in
6 Montclair. Protestant Shayco, Inc. still owns the Central Avenue property in Montclair where Mr.
7 Sherman's former dealerships were located.⁶² The property is about one mile from the I-10 Freeway
8 and it is not visible from the Freeway.⁶³

9 61. The City of Montclair's general plan does not provide for bringing automobile
10 dealerships back into the Central Avenue area where Mr. Sherman's property is located.⁶⁴
11 Nevertheless, the City agreed to a proposal by which the City of Montclair would give Mr. Sherman
12 a One Million Dollar credit against future sales taxes, to permit Mr. Sherman to upgrade his vacant
13 dealership property into a new Volkswagen dealership facility.⁶⁵

14 62. When asked by Mr. Ray during a December 8, 2009 visit to the Central Avenue
15 property, Mr. Sherman confirmed that he was confident that he could sell 1,000 units per year from
16 that location if he were permitted to open a new Volkswagen dealership at that location.⁶⁶ Mr.
17 Sherman assured Messrs. Ray and Mears that he could maintain superior sales and service, provide
18 an above average sales penetration in his area of responsibility, and provide good management at
19 the new location.⁶⁷

20 63. After Mr. Ray and Mr. Mears conducted their site visits to Mr. Sherman's Central
21 Avenue location and compared it to the Metro Autogroup site, which is on the preferred I-10

22 _____
⁶⁰ RT Jan. 18, p. 63; RT Jan. 19, pp. 110, 158.

23 ⁶¹ Jt. Stip. Fact 7; Prot. Exh. 72.

24 ⁶² RT Jan. 11, p. 57.

25 ⁶³ RT Jan. 19, p. 145.

26 ⁶⁴ RT Jan. 19, p. 156.

27 ⁶⁵ Jt. Exh. 41.

28 ⁶⁶ RT Jan. 18, pp. 53-54.

⁶⁷ Resp. Exh. 10.

1 Freeway where Volkswagen's competitors are located, Mr. Mears instructed Mr. Ray to offer Mr.
2 Sherman additional time to obtain a site which was visible from the I-10 Freeway with relatively
3 close proximity to freeway access.⁶⁸ Mr. Sherman declined the offer of additional time.

4 64. Three applicants were considered by Volkswagen for the Montclair Open Point: Mr.
5 Sherman; the Penske Group; and the Metro Autogroup. All three applications were evaluated on
6 criteria including past performance, facility, diversity, and location.⁶⁹ The Western Region made a
7 recommendation to select the Metro Autogroup, which is headed by John Hawkins.⁷⁰ Mr. Hawkins,
8 is a well capitalized and well respected dealer who owns and operates a competitive dealership in
9 Montclair.

10 65. Mr. Sherman testified that he knew that his location wasn't what Volkswagen
11 wanted, and he knew he wasn't selected because Volkswagen wanted to be on the I-10 Freeway.⁷¹

12 66. The proposed new dealership will be located in the Montclair auto mall, directly
13 adjacent to and visible from the 10 Freeway, on the southern side of the 10 Freeway across from a
14 large retail mall, the Montclair Plaza.⁷² According to Protestant's expert, Mr. Roesner, it is
15 approximately 10 miles in drive distance and between 14.8 and 16.4 minutes in drive time from
16 Protestant's dealership, which is located off a different thoroughfare, the 15 Freeway.⁷³

17 67. Auto malls such as the one in Montclair have largely become the standard within the
18 auto industry, because among other things they provide customers with an opportunity to travel to
19 one location to test drive and compare multiple brands, thus increasing the likelihood that customers
20 will look at multiple brands before selecting a car.⁷⁴ In addition, even if the customers aren't aware
21 of the specific brands that are located at an auto mall, they associate those locations with purchasing
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23 ⁶⁸ RT Jan. 19, p. 28.

24 ⁶⁹ RT Jan. 18, pp. 81; Jan. 19, p. 96; Prot. Exh. 66.

25 ⁷⁰ RT Jan. 19, p. 12; Prot. Exh. 66.

26 ⁷¹ RT Jan. 11, pp. 57; 89-90.

27 ⁷² RT Jan. 19, p. 136:9-20.

28 ⁷³ Jt. Exh. 42, Tab 7, pp. 1-2.

⁷⁴ RT Jan. 13, pp. 104:5-105:16.

1 a car and will “instinctively” go to those locations to make their purchase, again increasing the
2 potential customer base for brands with a presence in an auto mall.⁷⁵

3 68. The proposed dealership would be built from the ground-up as an exclusive state of
4 the art new Volkswagen facility with visibility from the 10 Freeway.⁷⁶ Because it is a new structure,
5 it will likely take at least two years before the facility could be built and open to the public --
6 meaning that the dealership likely will not make its first sale until sometime in 2015 or later.⁷⁷

7 **4. Volkswagen brand performance in the RMA and the expert opinions**

8 69. Volkswagen's expert, Mr. Farhat, is Vice President of Expert Services at Urban
9 Science.⁷⁸ Urban Science is a consulting company that works with the automotive industry and other
10 industries to offer business solutions.⁷⁹

11 70. Urban Science assists its clients with “dealer network planning,” which determines
12 the appropriate number of dealerships, and the appropriate location of those dealerships, as well as
13 the “measurement of the operations” of the dealerships.⁸⁰ Mr. Farhat performed an analysis of the
14 Montclair RMA to determine if Volkswagen had adequate representation, whether the additional
15 dealership was necessary, and what might be the impact on Protestant and the consuming public if
16 the Montclair dealership is established.⁸¹

17 71. Protestant’s expert, Mr. Roesner, is the President of The Fontana Group, a consulting
18 firm that specializes in the automobile industry.⁸²

19 72. Mr. Roesner’s analysis examined the location of dealers relative to opportunities for
20 registrations, the number of dealers in a market, where the dealers are located, and whether there is
21 sufficient opportunity for a dealer to make a profit.⁸³

22 _____
⁷⁵ *Id.*

23 ⁷⁶ RT Jan. 20, p. 17:17-21.

24 ⁷⁷ RT Jan. 18, p. 161:2-11.

25 ⁷⁸ RT Jan. 13, p. 79; Jt. Exh. 44, Statement of Education and Experience.

26 ⁷⁹ RT Jan. 13, p. 73.

27 ⁸⁰ RT Jan. 13, p. 74.

28 ⁸¹ RT Jan. 13, p. 82.

⁸² RT Jan. 12, p. 5; Jt. Exh. 42, Tab 1, Statement of Education and Experience.

1 73. Both experts utilized much of the same data from the same sources: 2000 and 2010
2 Census information, Volkswagen statistics, and data purchased from private specialists, such as
3 Polk and Claritas.

4 74. As noted above, Volkswagen dealers are assigned PAI's which are geographical
5 areas containing census tracts nearest each dealer, but not beyond 20 miles.⁸⁴ Each census tract has
6 approximately 4,000 people.⁸⁵ Each PAI is unique to its dealer.⁸⁶

7 75. The RMA is a statutory construct -- a 10 mile radius from the proposed new
8 dealership. The RMA may contain portions of several PAIs.

9 76. Volkswagen, like virtually all franchisors, evaluates the performance of its brand in
10 terms of registration effectiveness or market share, i.e., Volkswagen registrations as a percentage of
11 the total registrations of Volkswagen's primary competitive group. Volkswagen's performance in
12 any given market, such as the RMA or the Ontario PAI, is measured by comparing the brand's
13 market share in that specific market to a reasonable standard or "expected" market share in a much
14 larger geography such as the State of California or Volkswagen's Western/Pacific Region which
15 includes California and several other states. For illustration purposes only, if the expected
16 Volkswagen registrations in a local market (based on California average market share) were 100
17 vehicles and the actual Volkswagen registrations were only 50 vehicles, then, Volkswagen's
18 "registration effectiveness" in that local market would be 50% of the "expected" registrations if the
19 brand had performed at an average level. In that same local market, if the expected Volkswagen
20 registrations were 100 and the actual registrations were 120, Volkswagen's registration effectiveness
21 would be 120%.⁸⁷

22 77. To ensure that the expected market share for any given market accounts for local
23 preferences (e.g., preferences for big cars or SUVs over small cars), a "segmentation" analysis is

24 ⁸³ RT Jan. 12, pp. 7– 8.
25 ⁸⁴ RT Jan. 12, pp. 28, 29.
26 ⁸⁵ RT Jan. 12, p. 21.
27 ⁸⁶ RT Jan. 13, p. 96.
28 ⁸⁷ 2013 Farhat Decl., ¶¶ 18-19.

1 used to adjust for actual registrations in that local market, on a model segment by model segment
 2 basis.⁸⁸ This market share and segmentation analysis was used at the hearing by both Mr. Roesner
 3 and Mr. Farhat.⁸⁹

4 78. Based on this standard industry methodology, Volkswagen’s performance or market
 5 share in the Montclair RMA, Protestant’s own PAI, and the Riverside-San Bernardino Market as a
 6 whole are all dramatically below Volkswagen’s expected market share based on the California or
 7 Western Region average.⁹⁰ For example, in the Montclair RMA, Volkswagen’s 2012 market share
 8 was just 69.6% of its California average market share.⁹¹ Moreover, this under-performance has
 9 existed in the RMA for years. The under-performance is even more pronounced in Protestant’s own
 10 PAI, where Volkswagen’s 2012 market share was only 61.7% of California average.⁹²

11 79. Moreover, the registration effectiveness in both Protestant’s PAI and the Montclair
 12 PAI actually decreased from 2011. In the case of the Montclair PAI, this decrease was particularly
 13 dramatic, going from 72.6% in 2011 to 63.9% in 2012.⁹³

14 80. Thus, while the automotive industry as a whole has shown a significant rebound
 15 from the recessionary year of 2009 (and Volkswagen’s share of industry sales significantly
 16 increased over that same time period), Volkswagen’s performance in this particular market and
 17 therefore its share of that market improvement is lagging other areas, which further demonstrates
 18 that Volkswagen is underrepresented and is falling further behind its competitors in this particular
 19 geography.

20 81. To place these numbers in context, in 2012, the Riverside-San Bernardino Market
 21 was the fifth worst performing market in the state in terms of Volkswagen registration effectiveness.
 22 The Montclair and Ontario PAIs, if they were considered their own markets, would rank as the

23 _____
 24 ⁸⁸ RT Jan. 12, pp. 46:16-47:2; Jan. 13, pp. 112:17-117:11.
 25 ⁸⁹ RT Jan. 13, pp. 65:6-21, 112:17-117:11.
 26 ⁹⁰ For clarification, all references to average or expected market share in this Order include adjustment using the
 27 segmentation analysis discussed above.
 28 ⁹¹ April 12, 2013 Farhat Decl., Exh. A-2.
⁹² *Id.*, Exh. A-4.
⁹³ *Id.*, Exh. A-3.

1 lowest performing markets in the entire State other than the Stockton and Victorville markets -- and
2 currently there is no Volkswagen dealership in the Victorville market.⁹⁴ Among California PAI's,
3 Montclair and Ontario rank among the nine worst in terms of Volkswagen registration effectiveness
4 (out of 74), and the Ontario PAI has a lower registration effectiveness than several open point PAI's
5 where Volkswagen is not even represented by a dealer.⁹⁵

6 82. This poor performance has not occurred in many of the surrounding local markets
7 where Volkswagen's market share is actually higher than the California average. For example,
8 Volkswagen's August 2010 year-to-date market share in nearby Pasadena was 111.8% of state
9 average.⁹⁶ Volkswagen's August 2010 year-to-date market share was also higher than the California
10 average in Santa Ana, Irvine and Huntington Beach, all markets located near the Riverside-San
11 Bernardino Market.⁹⁷ Accordingly, Volkswagen's poor brand performance in the Riverside-San
12 Bernardino Market cannot be attributed to location or geography.

13 83. The reason for Volkswagen's poor market share in the Montclair RMA and the
14 Riverside-San Bernardino Market can be found by comparing the number and location of
15 Volkswagen dealers to the number and location of its competitors' dealers. Volkswagen's primary
16 competitors have far more dealerships in prime locations throughout the Riverside-San Bernardino
17 Market. Within the 10-mile RMA alone, there are five Chevrolet dealerships, four Ford dealerships,
18 three Toyota dealerships and at least two dealerships each for Hyundai, Nissan, Honda, Chrysler
19 and Dodge.⁹⁸ Many of these dealerships are located at or within a short distance of the Montclair
20 auto mall, including Toyota, Infiniti, Nissan, Honda and Acura.⁹⁹ By contrast, Volkswagen has only
21 one dealer in the RMA, Protestant, which is not located in Montclair at all, but instead is located at
22 the eastern fringe of the RMA off a different freeway.

23 _____
24 ⁹⁴ *Id.*, Exh. A-5, A-6.

25 ⁹⁵ *Id.*

26 ⁹⁶ Jt. Exh. 44 at A-12.

27 ⁹⁷ Jt. Exh. 44 at A-13 through A-15.

28 ⁹⁸ Jt. Exh. 44 at A-6.

⁹⁹ *Id.*

1 84. Mr. Roesner is of the opinion that factors beyond statistical segmentation, such as
2 income and ethnicity, may be the reason for Volkswagen's poor performance in the Montclair
3 RMA.¹⁰⁰ However, the evidence does not support Mr. Roesner's alternative theories as to why
4 Volkswagen's performance in the Montclair RMA is well below expectations.

5 85. Mr. Farhat analyzed income figures, and the median household income in the
6 Riverside-San Bernardino market is \$62,000. However, the Ontario and Montclair PAIs do not, in
7 fact, have median income levels significantly below the rest of California. Out of 74 California
8 PAIs, Ontario ranks 37th, and Montclair ranks 43rd -- both roughly in the middle of California
9 PAIs. Moreover, the average registration effectiveness for the other California PAIs with a median
10 income level between \$60,000 and \$65,000 (excluding Ontario and the open point PAIs) is 87.0% --
11 much closer to the registration effectiveness for California overall.¹⁰¹ Accordingly, Protestant did
12 not establish that income is the cause of inadequate Volkswagen sales in this market.

13 86. Mr. Roesner also posited that the large Hispanic population in the Riverside-San
14 Bernardino Market is the cause of low Volkswagen sales. The population in Protestant's PAI is
15 60% Hispanic. Volkswagen's average registration effectiveness in the 19 California PAIs with
16 Hispanic populations above 55% is 86.3% -- significantly above the combined 62.8% registration
17 effectiveness of the Ontario and Montclair PAIs.¹⁰² Thus, again, the evidence does not support the
18 theory that the substantial Hispanic population is the cause of Volkswagen's poor performance.

19 87. Mr. Roesner also hypothesized that Volkswagen's poor performance was the result of
20 high foreclosure rates in the Riverside-San Bernardino Market. However, again, Mr. Farhat's
21 analysis demonstrated that high foreclosure rates in the Riverside-San Bernardino Market were not
22 the cause of Volkswagen's poor performance, because the seven other California markets with
23 comparable foreclosure rates performed better than Riverside-San Bernardino. Volkswagen
24 registrations in those seven markets with comparable foreclosure rates averaged 88% of expected
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26 ¹⁰⁰ RT Jan. 13, pp. 125-126.

27 ¹⁰¹ 2013 Farhat Decl., Exh. A-18.

28 ¹⁰² *Id.*, Exh. A-19.

1 registrations, whereas the Riverside-San Bernardino market was only 74.5% of expected
2 registrations.¹⁰³

3 88. Furthermore, Protestant failed to establish why any economic hardships such as high
4 unemployment or foreclosure rates would impact Volkswagen registrations only, and not impact the
5 registrations of Volkswagen's competitors. Registration effectiveness only measures Volkswagen's
6 share or percentage of total actual primary competitive group registrations in any given area. Thus,
7 even if total competitive group registrations in a given area (e.g., RMA, Montclair PAI, Ontario
8 PAI) were depressed by economic factors, which appears to be the case during the 2008-2009
9 recession, absent some other factor such as inadequate dealer representation, Volkswagen's share or
10 percentage of those total competitive group registrations would remain the same.

11 **B. FINDINGS RELATING TO PERMANENCY OF INVESTMENT [SECTION 3063(A)]**

12 89. Section 3063(a) requires the Board to consider the "permanency" of Protestant's
13 investment. Virtually every franchised motor vehicle dealer has some form of "permanent
14 investment" in its dealership. To properly assess this good cause factor, therefore, the Board must
15 consider not only the amount of Protestant's investment, but also whether the market provides
16 Protestant with sufficient business opportunities to remain profitable after the establishment of the
17 new dealership. *Piano v. State of California ex rel. New Motor Vehicle Bd.*, 103 Cal. App. 3d 412,
18 419 (1980).

19 90. Volkswagen does not dispute that Protestant has a substantial investment in its
20 dealership. However, the evidence shows that Protestant has already realized a return on that
21 investment in the form of years of profits to both Protestant and its dealer principal, Gary Sherman.

22 91. Protestant did not meet its burden of establishing with any degree of certainty that
23 the Montclair dealership would necessarily cause Protestant to lose any of that investment, much
24 less sufficient revenue to drive it out of business.

25 92. Protestant's argument that the Montclair dealership will likely force Protestant out of
26 business is based upon Mr. Roesner's financial impact analysis, which concluded that based on

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28 ¹⁰³ RT Jan. 13, p. 134; Jt. Exh. 44, App.103.7.

1 2012 data the new Montclair dealership will cause Ontario to “lose” at least \$545,587 per year in
2 net profits.¹⁰⁴ This analysis is flawed in several respects.

3 93. First, Mr. Roesner assumes that Protestant will necessarily lose Volkswagen sales
4 following the opening of the Montclair dealership, even though he acknowledges that overall
5 Volkswagen sales (and thus sales opportunities available to Protestant) would likely increase.

6 94. Second, Mr. Roesner only opined that Protestant would “lose” (i.e., not capture)
7 future sales and service business that Mr. Roesner would otherwise “expect” to go to Protestant
8 based solely on geographic proximity, absent the Montclair dealership. In other words, without a
9 dealership in Montclair, Protestant might capture a bigger piece of an expanding pie. As Mr.
10 Roesner conceded at the hearing, the number of projected “losses” can be completely offset by
11 increased sales.¹⁰⁵ Mr. Roesner then testified that, because Protestant’s absolute sales (and service
12 and other business) may be higher after Montclair opens, Protestant’s profits will not necessarily be
13 lower than they were at the time of the hearing.¹⁰⁶ Accordingly, Mr. Roesner’s projected “losses” do
14 not necessarily mean that Protestant will be less profitable after the Montclair dealership is open for
15 business.

16 95. Indeed, this fact can be illustrated by Protestant’s actual sales growth following the
17 merits hearing. During the hearing in 2011, Mr. Roesner presented a model reflecting the theoretical
18 “losses” that Protestant would suffer as a result of the proposed Montclair dealership. At the time,
19 Mr. Roesner theorized that Protestant would “lose” between 12.5% and 25% of its sales due to the
20 new Montclair dealership.¹⁰⁷ However, since the time of the hearing, despite the continuing
21 deterioration of Volkswagen's competitive position in the local market, Protestant’s Volkswagen
22 sales have increased dramatically -- more than any predicted losses by Mr. Roesner -- as illustrated
23 by the following data in the record:¹⁰⁸

24 _____
¹⁰⁴ April 12, 2013 Declaration of Joseph Roesner ¶ 32.

25 ¹⁰⁵ RT Jan. 13, p. 68:7-13.

26 ¹⁰⁶ RT Jan. 13, pp. 70:18-71:13.

27 ¹⁰⁷ Jt. Exh. 42, Tab 37.

28 ¹⁰⁸ 2013 Farhat Decl., Exh. A-28.

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	“Low” Model (12.5%)	“High” Model (25%)
Protestant’s Actual 2012 Sales	879	879
Mr. Roesner's Theoretical "Loss" of 2012 Sales	110	220
2012 Sales After Theoretical “Losses”	769	659
Protestant’s 2010 Sales (Time of Hearing)	637	637
Protestant's 2012 Sales (after Theoretical “Losses”) Compared to Protestant's Sales at the Time of the Hearing	132 <u>more</u> sales than at time of hearing	22 <u>more</u> sales than at time of hearing

96. Thus, based on actual data that became available after the protest was remanded to the Board, even assuming that Mr. Roesner's most dramatic scenario had taken place and Protestant had “lost” 25% of its Volkswagen sales after the opening of the Montclair dealership, Protestant's additional Volkswagen sales due to an expanding market would have left Protestant with more sales than it was making at the time of the hearing. Accordingly, there is no basis to suggest that Protestant will be less profitable or “go out of business” as a result of the Montclair dealership, as was suggested at the hearing.

97. Likewise, in his expert report, Mr. Roesner concluded that “other network actions” which had already taken place -- primarily the addition of a Puente Hills dealership in 2010 -- caused a “loss” of 9.5% of Protestant’s sales.¹⁰⁹ Yet Protestant’s actual sales increased between 2009 and 2010 after Puente Hills opened.¹¹⁰ Again, the overall increase in Volkswagen sales more than offset Mr. Roesner’s theoretical “loss” of sales due to the Puente Hills dealership. Thus, there is no basis to conclude that Protestant's sales or revenues will decrease, or that Protestant’s investment in the Ontario dealership will be diminished in any respect, as a result of the new Montclair dealership.

¹⁰⁹ Jt. Exh. 42, Tab 27 p. 2.

¹¹⁰ RT Jan. 13, pp. 24:9-16; 66:14-21; Jt. Exh. 42, Tab 10 p. 1.

1 98. To the contrary, because the Montclair dealership will provide Volkswagen with
2 exposure along the 10 Freeway, and a greater presence in the Riverside-San Bernardino Market to
3 handle the expected increased volume for the brand, and more convenient customer service in the
4 western portion of the Riverside-San Bernardino Market, there is reason to believe that the
5 additional dealership will actually increase the value of Mr. Sherman’s investment in the Ontario
6 Volkswagen dealership. Mr. Sherman’s effort to secure the Montclair dealership for himself, and
7 his pre-protest assurances that both dealerships would be successful, are consistent with an expected
8 increase in the investment value of the Ontario dealership after Montclair is open for business.

9 99. The likelihood of Protestant being “forced out of business” is further dispelled by
10 several omissions and flaws in Mr. Roesner’s financial impact analysis. For example, Mr. Roesner
11 concluded that approximately 75% of the purported financial impact on Protestant will come from
12 “lost” service and parts business.¹¹¹ However, Mr. Roesner was unable to say when that impact
13 would actually occur.¹¹² Mr. Ray testified that, if this protest is overruled and the Montclair
14 dealership is allowed to proceed, it would likely take two years or more before the facility could be
15 built and open to the public.¹¹³ Mr. Sherman testified that, in his experience, after a new dealership
16 opens for business it takes another four to five years before the new dealership’s service business
17 comes up to speed.¹¹⁴ Accordingly, based on the testimony of Mr. Sherman himself, it could be
18 2019-2020 or even later before Montclair provided significant service and parts competition,
19 rendering Mr. Roesner’s conclusions on financial impact highly speculative.

20 100. Mr. Roesner’s analysis was also flawed in that he applied the same analysis to both
21 warranty and non-warranty service work, despite the fact that Protestant competes for non-warranty
22 work with numerous auto repair facilities ranging from other dealerships to Jiffy Lubes, and thus
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25 ¹¹¹ RT Jan. 13, p. 26:6-11.

26 ¹¹² RT Jan. 13, p. 30:10-14.

27 ¹¹³ RT Jan. 18, p. 161:2-11.

28 ¹¹⁴ RT Jan. 11, p. 220:2-18.

1 the addition of a single additional facility in the RMA will have a far smaller impact on a
 2 customer’s choices for customer-pay service work.¹¹⁵

3 101. Mr. Roesner also applied the same proximity-based analysis to Protestant’s retail and
 4 wholesale parts business, despite the fact that the wholesale side of the business is based primarily
 5 on relationships and not on the location of the selling dealership.¹¹⁶ Similarly, Mr. Roesner used the
 6 same analysis for new and used cars, even though new cars are available only at authorized
 7 dealerships, whereas customers can go to a variety of competitors for used Volkswagens, including
 8 other dealerships in Protestant’s own auto mall.¹¹⁷

9 102. Mr. Roesner justified his “fixed pie” conclusions in part by pointing to the decline in
 10 sales by Bozzani Motors in 2010 after the reopening of a Volkswagen dealership in neighboring
 11 Puente Hills.¹¹⁸ However, Mr. Roesner admitted that he did not account for the fact that Bozzani’s
 12 sales had already decreased by approximately 22% between 2008 and 2009, the year before Puente
 13 Hills reopened.¹¹⁹ Bozzani’s sales effectiveness likewise declined precipitously from 2008 to
 14 2009.¹²⁰ As Mr. Roesner conceded, Puente Hills could not have accounted for this decline,¹²¹ and yet
 15 Mr. Roesner assumed that a nearly identical decrease in sales from 2009 to 2010 must have been
 16 caused by Puente Hills.

17 103. In fact, Mr. Bozzani himself provided a different explanation for his declining
 18 performance over the prior two years. He testified that during those years he had spent a
 19 considerable amount of time and attention on his failing Kia dealership.¹²² Mr. Bozzani admitted
 20 that the problems with his Kia dealership “diminished [his] effectiveness as a Volkswagen dealer,”
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22 ¹¹⁵ RT Jan. 13, pp. 31:20-24, 32:18-33:1, 34:18-21.

23 ¹¹⁶ RT Jan. 13, p. 38:11-14; Jan. 14, p. 24:6-18.

24 ¹¹⁷ RT Jan. 14, pp. 22:21-23:12.

25 ¹¹⁸ RT Jan. 12, pp. 56:23-57:12.

26 ¹¹⁹ Jt. Exh. 42, Tab 10, p.1.

27 ¹²⁰ Jt. Exh. 42, Tab 10, p.2.

28 ¹²¹ RT Jan. 14, pp. 188:9-189:9; Jt. Exh. 42, Tab 10, p. 2.

¹²² RT Jan. 11, p. 143:5-13.

1 and “affected [his] ability to operate the Volkswagen dealership to the best of his ability.”¹²³ Mr.
 2 Roesner’s analysis did not account for these facts.¹²⁴ Mr. Mears also testified that Bozzani Motors
 3 has been suffering from other factors, unrelated to the addition of the Puente Hills dealership.¹²⁵
 4 Finally, Mr. Bozzani testified that, after the Puente Hills dealership reopened in 2010, he made no
 5 effort to adjust his business to account for the new dealership.¹²⁶ Mr. Roesner’s analysis did not
 6 account for these performance related matters, but rather assumed that the proximity of Puente Hills
 7 was the only factor affecting Bozzani’s performance.

8 104. Further undermining Mr. Roesner’s conclusion is the fact that, while Bozzani’s sales
 9 decreased from 2009 to 2010, total sales in Volkswagen’s Area 53 (which includes both Bozzani
 10 and Puente Hills) increased by 29% during that period,¹²⁷ reflecting substantial growth in the market
 11 after the Puente Hills dealership was re-established. During that same time period after Puente Hills
 12 reopened, Volkswagen’s market share in the PAIs surrounding Puente Hills increased as a
 13 percentage of California average: from 57.2% to 69.5% in the Puente Hills PAI,¹²⁸ from 60.5% to
 14 69.6% in Bozzani’s own PAI,¹²⁹ from 107.8% to 111.8% in the Pasadena PAI,¹³⁰ and from 57.6% to
 15 77.6% in the Alhambra PAI where a second Volkswagen dealership was established in mid-2010.¹³¹

16 105. Moreover, in these four PAIs (i.e., the ones that would have been most affected
 17 under Mr. Roesner’s “proximity” theory) Bozzani’s total sales decreased by just 22 new cars from
 18 2009 to 2010 (based on August 2010 annualized data), and, contrary to Mr. Roesner’s “proximity”
 19 theory, nearly half of that decrease -- 10 sales -- occurred in Bozzani’s own PAI.¹³² Accordingly, the

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¹²³ RT Jan. 11, p. 143:14-23.
¹²⁴ RT Jan. 12, p. 160:3-23.
¹²⁵ RT Jan. 19, p. 47:1-7, 100:25-101:8, 109-114.
¹²⁶ RT Jan. 11, pp. 142:25-143:4.
¹²⁷ RT Jan. 11, p. 144:4-13; Exh. R64.
¹²⁸ Jt. Exh. 44 at A-70.
¹²⁹ Jt. Exh. 44 at A-72.
¹³⁰ Jt. Exh. 44 at A-71.
¹³¹ Jt. Exh. 44 at A-73.
¹³² Jt. Exh. 44 at A-77.

1 location of Bozzani’s “lost” sales demonstrates that Puente Hills was not the cause of Bozzani’s
 2 poor performance. This fact further supports the conclusion that the opening of a dealership in
 3 Montclair is likely to “grow” the total market for Volkswagens in the RMA, thereby leading to
 4 additional sales opportunities for both the new dealer and Protestant.

5 106. The opening of the Moreno Valley Volkswagen dealership in September 2011
 6 provides additional evidence that the establishment of a new dealership in Montclair would increase
 7 overall Volkswagen sales in the Riverside-San Bernardino Market rather than cannibalize sales
 8 from existing Volkswagen dealers. In 2010 and 2011, Volkswagen’s registration effectiveness in
 9 what is now the Moreno Valley PAI was well below average -- between 51.5% and 53%. In 2012,
 10 the first full year in which the Moreno Valley dealership was open, registration effectiveness
 11 dramatically increased to 73.4%.¹³³ This increase was a result of the new dealership.

12 107. Moreover, the existing Volkswagen dealers within the Riverside-San Bernardino
 13 Market also increased sales. Sales to customers within the Riverside-San Bernardino Market by the
 14 other Volkswagen dealers in that market (i.e., Protestant, Cardinale Way and Riverside VW) went
 15 from 1100 in 2010 to 1653 in 2012, after Moreno Valley opened. Total Volkswagen registrations
 16 increased from 1515 to 2707 during the same time period, a 79% increase.¹³⁴

17 108. Indeed, each of the four dealers in the Riverside-San Bernardino Market significantly
 18 increased its sales to customers in the market between 2010 (before the Moreno Valley dealership
 19 opened) and 2012. Cardinale Way’s sales increased 51%, and Protestant’s sales increased 46%
 20 during this period. Riverside VW -- the dealer closest in proximity to the new Moreno Valley
 21 dealership -- increased its sales the most during this timeframe, 54%.¹³⁵

22 109. Furthermore, the new dealership did not “cannibalize” sales from existing dealers or
 23 cause any existing dealers to “lose” their sales in the Moreno Valley PAI. In fact, in 2012 each of
 24 the existing dealers sold more vehicles into the Moreno Valley PAI than they had in 2010. In
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26 ¹³³ 2013 Farhat Decl., Exh. A-22.

27 ¹³⁴ *Id.*, Exh. A-23.

28 ¹³⁵ *Id.*, Exh. A-24 through A-25.

1 addition, nearly all of Moreno Valley Volkswagen’s sales in 2012 came from just two PAIs -- its
2 own PAI, and the San Bernardino open point PAI. Out of Moreno Valley’s 359 sales in 2012, only
3 16% came from customers in the three existing dealerships' PAIs. This percentage (16%) is almost
4 the same as the percentage of Protestant's 2012 sales to customers in the Riverside VW, Cardinale
5 Way and Moreno Valley PAIs.¹³⁶

6 110. This data supports the conclusion, particularly in the Riverside-San Bernardino
7 Market, that the establishment of a new dealership in Montclair will not cannibalize sales from
8 existing dealers or cause Protestant to “lose” all of its current sales in the Montclair PAI. Rather, the
9 establishment of a new dealership strengthens the dealer network in the market. This leads to
10 increased sales in the local PAI (Moreno Valley, or in this protest Montclair) to correct the poor
11 performance in that area, thereby increasing sales opportunities for the existing same brand dealers.

12 111. The establishment of dealerships in Moreno Valley and San Bernardino, which are
13 located in the eastern and southern portions of the Riverside-San Bernardino Market, will not
14 however adequately address Volkswagen's consistently poor representation in Montclair, which is at
15 the far northern and western end of the market. This is confirmed by the fact that Volkswagen's
16 registration effectiveness in Moreno Valley sharply increased in 2012 after the Moreno Valley
17 dealership opened, whereas the brand's registration effectiveness in the Montclair PAI at the other
18 end of the market actually decreased in 2012.¹³⁷

19 112. As explained in detail in Section C below, the objective data established that there
20 are more than ample sales opportunities in both the Montclair RMA and the overall Riverside-San
21 Bernardino Market to support the addition of the Montclair dealership without necessarily causing
22 any negative impact on Protestant. Thus, if increased competition and customer convenience,
23 enhanced brand awareness in the market, and refocused efforts by Volkswagen dealers in the
24 Riverside-San Bernardino Market on their own territories results in the capture of just a portion of
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27 ¹³⁶ *Id.*

28 ¹³⁷ 2013 Farhat Decl., Exh. A-3, A-22.

1 the sales currently being lost to competitors, total sales by Protestant and the other dealers will not
 2 decrease at all.

3 113. Mr. Roesner’s analysis does not contradict these results, because Mr. Roesner’s
 4 calculations do not account for future sales growth offsetting his projected “losses.” If the Montclair
 5 and Ontario areas experience even a small amount of growth in Volkswagen sales by the date the
 6 Montclair dealership opens in 2015 or later -- whether from increasing industry sales, increasing
 7 Volkswagen market share, or growth due to the Montclair dealership itself -- that growth can more
 8 than offset the theoretical “lost” sales assumed by Mr. Roesner.

9 114. Mr. Roesner’s “fixed pie” theory is also flawed in that it not only fails to account for
 10 any increase in Volkswagen’s market share as a result of its aggressive growth plans, it also fails to
 11 account for any potential decrease which may occur if the protest is sustained and Volkswagen
 12 remains unable to maintain a competitive dealer network in the RMA and Riverside-San Bernardino
 13 Market. As Mr. Roesner testified, Volkswagen’s competitors are not going to stand still -- they have
 14 and will continue to grow their own dealer networks to take advantage of the numerous auto malls
 15 and freeway locations in the market and the tremendous ongoing population growth in the market,
 16 thereby increasing their brand awareness and convenience for local customers.¹³⁸ If Volkswagen is
 17 prevented from keeping pace with its competitors in the Riverside-San Bernardino Market,
 18 Protestant (and the other Volkswagen dealers in the market) will likely lose even more sales to other
 19 brands.¹³⁹

20 115. Protestant’s own actions and words prior to learning that Mr. Sherman would not be
 21 the Montclair dealer disprove Protestant’s present dire predictions. On March 8, 2010 Mr. Sherman
 22 wrote to Mr. Ray and expressly stated his firm belief that he could operate a successful dealership in
 23 Montclair while maintaining his “award-winning” dealership in Ontario. In that correspondence,
 24 Mr. Sherman wrote that his Ontario dealership “meets or exceeds all of the important areas that
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26 ¹³⁸ RT Jan. 12, p. 123:1-18.

27 ¹³⁹ RT Jan. 14, pp. 20:13-21:8.

1 demonstrate good dealer management”¹⁴⁰ -- areas that, according to Mr. Reed, include sales
2 effectiveness, customer service and strong sales of parts and service.¹⁴¹ Mr. Sherman went on to
3 write that he “wouldn’t consider this opportunity [Montclair] if I wasn’t confident it [the award
4 winning performance] could be duplicated at my facility in Montclair.”¹⁴² Mr. Sherman defined
5 what he meant by a “successful” dealership in Montclair, stating that his Montclair dealership
6 would “[m]aintain a superior Sales and Service Experience for Volkswagen customers,” and would
7 “[p]rovide an above average sales penetration in [his] assigned AOR [area of responsibility which,
8 in the case of Volkswagen would be his PAI].”

9 116. Thus, as of March 8, 2010, Mr. Sherman expressed confidence that a dealership in
10 Montclair could not only be successful, but could in fact “duplicate” Ontario VW’s success as one
11 of the top performing dealerships in the United States (at that time), a belief Mr. Sherman reiterated
12 at the hearing.¹⁴³ Mr. Reed also testified that he shared Mr. Sherman’s belief.¹⁴⁴ In fact, Mr. Reed
13 testified that he could have created a “fantastic Volkswagen experience” in Montclair.¹⁴⁵ Of
14 particular import is the fact that Mr. Sherman confirmed that he believed a Montclair dealership
15 would provide “an above average sales penetration” in the Montclair PAI -- i.e., that there were
16 sufficient sales opportunities available in Montclair for a Montclair dealer to exceed expected sales
17 -- without any mention that the sales in Montclair would “cannibalize” his existing Ontario
18 dealership.

19 117. Moreover, Mr. Sherman and Mr. Reed made these statements with the expectation
20 that their Montclair dealership would not be adjacent to the 10 Freeway, would not be in an auto
21 mall, and would not be close to any other new vehicle dealerships. Several witnesses testified that
22 they would expect a dealership located next to a freeway or in an auto mall (such as the proposed
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24 ¹⁴⁰ Exh. R10.

25 ¹⁴¹ RT Jan. 10, pp. 158:5-159:8.

26 ¹⁴² Exh. R10.

27 ¹⁴³ RT Jan. 11, p. 193:18-22.

28 ¹⁴⁴ RT Jan. 10, p. 161:19-23.

¹⁴⁵ RT Jan. 10, p. 162:5-9.

1 Metro Group location) to sell more cars than a dealership that did not benefit from those
2 advantages.¹⁴⁶ Thus, given that Mr. Sherman believed that there were enough sales opportunities for
3 a new Montclair dealership in a bad location to “exceed” expectations, Protestant cannot
4 legitimately now claim that there are insufficient sales opportunities to support the proposed Metro
5 Group location in a Montclair auto mall with freeway visibility.

6 **C. FINDINGS RELATING TO EFFECT ON THE RETAIL MOTOR VEHICLE BUSINESS AND**
7 **THE CONSUMING PUBLIC IN THE RELEVANT MARKET AREA [SECTION 3063(B)]**

8 118. The evidence establishes that the addition of a dealership in Montclair will likely
9 increase brand awareness and total Volkswagen sales in the RMA, and thus have a positive impact
10 on the retail motor vehicle business. Indeed, this outcome is entirely logical. As Mr. Farhat testified,
11 taking sales from one dealership and transferring them to another provides Volkswagen with no
12 benefit whatsoever, and yet Volkswagen has spent and continues to spend a substantial amount of
13 time and resources to establish an additional dealership in Montclair.¹⁴⁷ The reason for this effort is
14 that an additional dealership can capture sales from other manufacturers thereby increasing
15 Volkswagen’s sales and market share in this market.

16 119. Protestant’s general manager Mr. Reed testified that, in his experience, a new
17 dealership brings increased advertising to an area, which in turn leads to increased brand awareness
18 among potential customers.¹⁴⁸ Protestant’s expert Mr. Roesner also agreed that, in his experience,
19 adding the additional dealership will increase total Volkswagen registrations in the market.¹⁴⁹

20 120. Mr. Farhat conducted a detailed analysis and, like Mr. Roesner, concluded that the
21 establishment of a Montclair dealership would increase total Volkswagen sales within the RMA.¹⁵⁰

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¹⁴⁶ See e.g., Mr. Bozzani's testimony, RT Jan. 11, pp. 146:24-147:12; Mr. Starr's testimony, RT Jan. 19, pp. 144:24-145:14.
¹⁴⁷ RT Jan. 13, p. 179:16-24.
¹⁴⁸ RT Jan. 10, pp. 171:22-172:6.
¹⁴⁹ RT Jan. 12, p. 89:19-25.
¹⁵⁰ Jt. Exh. 44 at A-58.

1 future sales in Montclair with sales in its own territory or in the Riverside-San Bernardino Market
 2 as a whole. The answer is yes.

3 125. As set forth above, the Volkswagen brand has been underperforming in the
 4 Riverside-San Bernardino Market. This below-average market share results in sales opportunities
 5 for Volkswagen dealers -- actual, not theoretical, sales of vehicles in the market that are currently
 6 being lost to competitive brands, but which could be captured by a stronger, more visible
 7 Volkswagen dealer network and refocused efforts by Protestant. The difference between the number
 8 of expected registrations and the actual registrations that occurred represents the number of
 9 additional sales opportunities (i.e., the shortfall) available to Protestant to offset any hypothetical
 10 losses in the Montclair PAI.¹⁵⁴

11 126. From 2009 through the first quarter of 2011, the additional sales opportunities in
 12 Protestant's own PAI outnumbered Protestant's sales into the Montclair PAI. For example, in 2010
 13 Protestant sold 126 new Volkswagens to customers in the Montclair PAI. However, these
 14 hypothetical "lost" sales were more than offset by a shortfall of 191 Volkswagen registrations in
 15 Protestant's own PAI. If Volkswagen's market share in the Ontario PAI had merely been equal to
 16 the California average, the hypothetical "loss" of 126 sales in the Montclair PAI would have been
 17 more than offset by the 191 additional sales in the Ontario PAI. That same year, there was also a
 18 shortfall of 562 Volkswagen registrations in the Riverside-San Bernardino Market (excluding
 19 Montclair), which provided Protestant with 436 additional sales opportunities in excess of the 126
 20 sales needed to re-capture the hypothetical loss in the Montclair PAI.¹⁵⁵

21 127. Accordingly, if Volkswagen's market share in the Ontario PAI alone had merely
 22 reached California average during these years, Protestant would have actually increased its
 23 Volkswagen sales, even if it had "lost" each and every sale it made in the Montclair PAI. In

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25 ¹⁵⁴ During the hearing, Protestant and Mr. Roesner challenged Mr. Farhat's use of the "gross loss" rather than "net loss"
 26 methodology to measure this shortfall. Although Mr. Farhat explained why it is more appropriate to use gross loss as a
 27 measurement of opportunity, in this case the argument is moot because the amount of shortfall using either
 methodology is substantially greater than Protestant's hypothetical losses in the Montclair PAI. *See* Farhat Remand
 Decl. ¶9; R.Ex-1; 2013 Farhat Decl., Exh. A-11.

28 ¹⁵⁵ Farhat Remand Decl., Exh. R-2.

1 addition, in each of these years, Protestant could have completely replaced its sales in the Montclair
2 PAI by capturing only a small fraction of the sales opportunities lost to competitive brands in the
3 balance of the Riverside-San Bernardino Market (i.e., the Riverside-San Bernardino Market
4 excluding the Montclair PAI).

5 128. Moreover, these calculations are actually conservative in several respects:

6 (a) First, they assume that Protestant does not make any sales in the Montclair
7 PAI. In reality, dealers “cross-sell” into neighboring territories, meaning that even after a Montclair
8 dealer opened for business in 2015 or later, Protestant would almost certainly continue to sell some
9 vehicles to customers in the Montclair PAI, such as customers who have an existing positive
10 relationship with Protestant or customers who comparison shop in both Ontario and Montclair.

11 (b) Second, the calculation of expected Volkswagen registrations in each
12 relevant geography assumes the market reaches only average market share compared to California
13 as a whole. But, the California average is just that -- an average. It is not a ceiling on performance
14 expectations. Volkswagen’s market share in many California PAIs exceeds the California average,
15 including PAIs in Southern California near the Riverside-San Bernardino Market.¹⁵⁶ The opening of
16 a new Volkswagen dealership in Montclair with visibility from the high volume I-10 Freeway will
17 likely provide an opportunity for Volkswagen registration levels in the Riverside-San Bernardino
18 Market and the Ontario PAI to exceed California average, provided Protestant and the other
19 Volkswagen dealers in the area capitalize on this increased exposure.

20 (c) Third, the calculations only measure sales opportunities within the Riverside-
21 San Bernardino Market. Protestant sells many vehicles into neighboring territories, some of which
22 also performed well below the expected registration rates in the years leading up to the hearing.¹⁵⁷
23 Consequently, Protestant can also capture additional sales opportunities in those areas.

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¹⁵⁶ See Jt. Exh. 44 at A-12 through A-16.

¹⁵⁷ See, e.g., Mr. Roesner's report on remand ¶ 7; Jt. Exh. 42, Tab 10 p. 3. For example, in 2009 the Victorville PAI attained only 43.67% of expected Volkswagen registrations (229 expected registrations, only 100 actual registrations), and therefore, according to Mr. Roesner's calculations, presented Protestant with 129 additional sales opportunities.

1 129. This trend of more than ample opportunity to replace lost sales accelerated in 2011
 2 and 2012. As industry sales increased, Volkswagen’s market share and expected sales also
 3 increased. And yet, due to insufficient Volkswagen brand representation, the Montclair PAI and
 4 Protestant’s own PAI continued to perform poorly, well below the California average.

5 130. In 2011 Protestant sold 170 new Volkswagens to customers in the Montclair PAI.
 6 Yet that same year there were 231 lost sales in Ontario's own PAI, and 732 lost sales in the
 7 Riverside-San Bernardino Market (excluding Montclair). If Protestant had captured just 74% of the
 8 lost sales in its own PAI -- which still would have left the Ontario PAI performing well below the
 9 California average -- Protestant could have recaptured every sale lost to a Montclair customer.¹⁵⁸

10 131. In 2012 Protestant’s sales into the Montclair PAI decreased to 167. However, the
 11 number of lost sales in its own PAI increased to 352, and the number of lost sales in the Riverside-
 12 San Bernardino Market (excluding Montclair) increased to 1,056. If Protestant had captured just
 13 47% of the lost sales in its own PAI, or just 16% of the lost sales in the Riverside-San Bernardino
 14 Market, it could have replaced every sale made into the Montclair PAI.¹⁵⁹

15 132. Using California average and gross loss methodology, lost sales in the Montclair
 16 RMA during this time frame more than doubled, from 241 in 2009 to 514 in 2012.¹⁶⁰ This data
 17 shows that, since the hearing and Remand occurred in 2011, the number of lost sales in this market
 18 has increased dramatically -- measuring in the hundreds in each geographic area in 2012.
 19 Regardless of the methodology (gross vs. net loss) or the geography used for market share
 20 comparisons (California vs. Western/Pacific Region), the evidence could not be more clear. There
 21 are more than ample sales opportunities lost to competitors right in Protestant's own backyard that
 22 are available for Protestant to offset any hypothetical loss of sales in the Montclair PAI.

23 133. Nor is it unreasonable to expect that Protestant can capture these lost sales
 24 opportunities. Although Protestant is selling many more vehicles than it did in 2009, its sales

26 ¹⁵⁸ 2013 Farhat Decl., Exh. A-7.

27 ¹⁵⁹ *Id.*, Exh. A-9.

28 ¹⁶⁰ *Id.*, Exh. A-11.

1 performance in 2009-2012 has lagged significantly behind the tremendous growth in sales
2 opportunities available to it, which supports the conclusion that Protestant has been ineffective over
3 the past few years at capturing sales in its own territory. The total number of Volkswagen sales to
4 customers in the Ontario PAI increased by 126.5% over the past three years.¹⁶¹ This increase was
5 slightly less than the “expected” increase in Volkswagen registrations in the Ontario PAI, which
6 was 127.3% from 2009 to 2012.¹⁶² Volkswagen registrations in California PAIs on average
7 increased by 103.6% over this timeframe, and registrations in Western Region PAIs on average
8 increased by 110.6%.¹⁶³ Thus, by almost any measure -- including demand in its own PAI --
9 Protestant should have more than doubled its sales over these three years.

10 134. Yet Protestant’s sales increased by a mere 47.7% during the past three years, which
11 is roughly one-third the growth of Volkswagen sales in its own territory.¹⁶⁴ If Protestant simply
12 matches the average sales growth of other Volkswagen dealers -- or even meets the growing
13 demand for Volkswagen sales in its own PAI -- Protestant would be making hundreds of additional
14 sales each year. Once again, this data supports the conclusion that if Protestant focuses on its own
15 territory and meets the demands of customers in the Ontario PAI, it will remain profitable and can
16 increase -- not decrease -- its sales after the proposed Montclair dealership opens for business.

17 **D. FINDINGS RELATING TO WHETHER IT IS INJURIOUS TO THE PUBLIC WELFARE**
18 **FOR AN ADDITIONAL FRANCHISE TO BE ESTABLISHED [SECTION 3063(C)]**

19 135. At the hearing, Montclair City Manager Edward Starr testified that the new
20 dealership in Montclair will provide substantial benefits to the public welfare in the RMA, in that it
21 will raise revenue for the City in the form of increased sales, transaction, and use taxes; will bring
22 customers to the City, who likely will shop at nearby retail stores and restaurants, thereby raising
23 their revenues (and taxes on those revenues); will increase overall sales in the auto mall, not just at
24 the new Volkswagen dealership, as it makes the mall more attractive for customers who are

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¹⁶¹ *Id.*, Exh. A-29.

26 ¹⁶² *Id.*

27 ¹⁶³ *Id.*

28 ¹⁶⁴ *Id.*

1 considering different brands; will create prestige for the City, which in turn attracts other businesses
2 to the community; and will create new jobs, not just at the dealership, but also potentially jobs at the
3 numerous surrounding business which will be enhanced by the new dealership.¹⁶⁵

4 136. Indeed, benefits to the public from a Volkswagen dealership in Montclair were
5 considered so significant, the City was willing to provide Mr. Sherman with \$1 Million had he
6 opened a new Volkswagen dealership in the City, a decision requiring about “10 minutes” of
7 thought on the City’s part, according to Mr. Sherman. Because the proposed site on the 10 Freeway
8 is expected to generate even greater sales and customer traffic than Mr. Sherman’s proposed
9 location, the benefits to the City from the proposed new dealership will be even greater than those
10 justifying the City’s willingness to make a \$1 million contribution to Mr. Sherman.¹⁶⁶ Mr. Sherman
11 agreed that the public would receive these significant benefits from a new Montclair dealership.¹⁶⁷

12 137. Protestant argued at the hearing that the public may be harmed by the selection of
13 Mr. Hawkins as the Montclair dealer, citing to certain complaints raised against the Riverside
14 Volkswagen dealership in which Mr. Hawkins holds a minority ownership. However, numerous
15 witnesses confirmed that Mr. Hawkins is a passive investor who has no operational control over the
16 Riverside dealership.¹⁶⁸ The Riverside dealership is operated by another individual, Richard
17 Michaelson.¹⁶⁹ Indeed, the various Volkswagen employees who call on the Riverside dealership all
18 testified that they had never dealt with Mr. Hawkins or even seen him at the Riverside dealership.¹⁷⁰

19 138. Protestant offered no evidence to contradict this testimony. The complaints referred
20 to during the hearing also were promptly remedied. Kurt Thomas of Volkswagen testified that he
21 visited the dealership less than a week before the hearing and was unaware of any problems at that
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¹⁶⁵ RT Jan. 19, pp. 142:13-144:23.

¹⁶⁶ RT Jan. 19, pp. 144:24-145:14.

¹⁶⁷ RT Jan. 11, p. 219:12-16.

¹⁶⁸ *See, e.g.*, RT Jan. 20, p. 11:2-4.

¹⁶⁹ RT Jan. 20, p. 11:18-24.

¹⁷⁰ RT Jan. 19, p. 217:12-20; Jan. 20, p. 119:4-16.

1 time.¹⁷¹ Steve Smith of Volkswagen testified that he attended a review meeting with Paul Feeney --
2 the author of the email referenced by Protestant’s counsel throughout the hearing regarding this
3 issue -- in January 2010, only a few months after the email in question was sent, and that there was
4 no discussion of any of these purported problems at that meeting.¹⁷² Nor is this surprising, as it is
5 common for dealerships to have issues which they then address. In fact, Protestant itself suffered
6 from significant service complaints in the past, but appears to have remedied those problems.

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

12 139. The “adequacy” of Volkswagen competition in the RMA is best measured by the
13 brand’s competitive position (i.e., market share) vis-à-vis its competitors in the RMA, as compared
14 to a reasonable standard or benchmark of Volkswagen’s market share in a larger geography.
15 Regardless of whether the benchmark is Volkswagen’s segment adjusted market share in the State
16 of California (as presented by Volkswagen’s expert) or segment adjusted market share in
17 Volkswagen’s Western Region (as presented by Protestant’s expert), the evidence leads to the same
18 conclusion -- Volkswagen is under-represented within the RMA, losing roughly thirty percent of its
19 “expected” sales to other manufacturers who offer greater competition and better convenience to
20 customers in the RMA.

21 140. As discussed above, Protestant’s theories as to why Volkswagen’s registration
22 effectiveness in the RMA is so significantly below either benchmark are not supported by the
23 evidence. Instead, the evidence shows that Volkswagen's inadequate representation in the market
24 has resulted in a lack of adequate competition, leading customers to select other, more competitive
25 brands.

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27 ¹⁷¹ RT Jan. 19, pp. 223:20-224:10.

28 ¹⁷² RT Jan. 20, pp. 156:5-157:12.

1 141. Protestant argued that there is a shortage of qualified Volkswagen service technicians
2 in the area, and therefore the new dealership may “steal” Protestant’s technicians, leading to a
3 decline in the quality of service at both dealerships. However, the evidence dispelled any notion that
4 there is or will be a shortage of qualified Volkswagen service technicians. In addition to the
5 testimony of Volkswagen witnesses that there is no such shortage and in fact Volkswagen is taking
6 measures to ensure against a shortage as sales continue to grow, Mr. Bozzani testified that he has
7 had no issue with the availability of qualified Volkswagen service technicians, that he has had no
8 difficulty finding qualified service technicians for his Volkswagen dealership, and that neither the
9 Puente Hills nor Alhambra dealerships “stole” any of his technicians when they opened.¹⁷³ Mr.
10 Bozzani went on to say that he has no concerns whatsoever about finding additional technicians as
11 his service business increases in the future.¹⁷⁴

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

15 142. Section 3063(e) requires the Board to consider whether the establishment of the new
16 dealer will increase competition (both intrabrand and interbrand), which the statute finds necessarily
17 to be in the public’s interest.

18 143. The evidence established that the Montclair dealership will increase interbrand
19 competition, i.e., competition against other brands who are already represented in the Montclair
20 market and along the 10 Freeway. Moreover, the Montclair dealership will increase intrabrand
21 competition -- indeed, the fact of this increased competition is central to Protestant’s entire case.

22 **V. CONCLUSIONS**

23 **A. PERMANENCY OF THE INVESTMENT [VEHICLE CODE SECTION 3063(A)]**

24 144. Protestant has established permanency of its investment because it is a dealer with
25 longevity, has constructed a market place facility in 2003 at substantial cost, and has expended the

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27 ¹⁷³ RT Jan. 11, pp. 145:22-146:9.

28 ¹⁷⁴ RT Jan. 11 159:3-8.

1 financial outlays required over the years to modernize and maintain the dealership's building and
2 equipment. However, Protestant has not established that its permanent investment is in jeopardy or
3 that the market will not provide Protestant with sufficient business opportunities to remain
4 profitable after the establishment of the new dealership.

5 **B. EFFECT ON THE RETAIL MOTOR VEHICLE BUSINESS AND THE CONSUMING**
6 **PUBLIC IN THE RELEVANT MARKET AREA [VEHICLE CODE SECTION 3063(B)]**

7 145. Volkswagen does not have adequate representation in the Montclair RMA. The
8 addition of a Volkswagen dealer in an auto mall in Montclair housing several of Volkswagen's
9 primary competitive group would stimulate competition. Consumers will benefit by having a shorter
10 drive time and distance to reach a Volkswagen dealer, and by having the convenience of a dealer on
11 the I-10 Freeway.

12 **C. WHETHER IT IS INJURIOUS TO THE PUBLIC WELFARE FOR AN ADDITIONAL**
13 **FRANCHISE TO BE ESTABLISHED [VEHICLE CODE SECTION 3063(C)]**

14 146. Protestant has failed to establish that it is injurious to the public welfare to establish a
15 new dealership in Montclair.

16 **D. WHETHER THE VOLKSWAGEN FRANCHISEES ARE PROVIDING ADEQUATE**
17 **COMPETITION AND CONVENIENT CONSUMER CARE FOR VOLKSWAGEN VEHICLES**
18 **IN THE RELEVANT MARKET AREA, WHICH SHALL INCLUDE THE ADEQUACY OF**
19 **MOTOR VEHICLE SALES AND SERVICE FACILITIES, EQUIPMENT, SUPPLY OF**
20 **VEHICLE PARTS, AND QUALIFIED SERVICE PERSONNEL [VEHICLE CODE SECTION**
21 **3063(D)]**

22 147. There are insufficient dealers in the Riverside-San Bernardino market, and
23 establishing a new dealership in Montclair will provide additional competition for sales and
24 convenience for customers.

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1 **E. WHETHER THE ESTABLISHMENT OF AN ADDITIONAL DEALERSHIP WOULD**
2 **INCREASE COMPETITION AND THEREFORE BE IN THE PUBLIC INTEREST [VEHICLE**
3 **CODE SECTION 3063(E)]**

4 148. There is available opportunity for Protestant to achieve average performance, and
5 there is no basis to conclude a negative impact on existing dealers, especially Protestant. Protestant
6 is profitable and considered to have good management. Mr. Roesner's dramatic numbers of "loss"
7 are not absolute proof of lost sales. Both the new Montclair dealership and Protestant will be able to
8 compete and be profitable.

9 **VI. DETERMINATION OF ISSUES**

10 149. Protestant has not sustained its burden of proof that the permanency of its investment
11 will be jeopardized by the new dealership in Montclair. [Section 3063(a)]

12 150. Protestant has not sustained its burden of proof that the proposed new dealership in
13 Montclair will have an adverse effect on the retail motor vehicle business and the consuming public
14 in the relevant market area. [Section 3063(b)]

15 151. Protestant has not sustained its burden of proof that the establishment of the
16 Montclair dealership would be injurious to the public welfare. [Section 3063(c)]

17 152. Protestant has not sustained its burden of proof that there is adequate competition
18 and convenient consumer care in terms of sales and distance. Protestant has not sustained its burden
19 of proof that the sales and service facilities, equipment, supply of vehicle parts, and qualified
20 service personnel are adequate to serve the market. [Section 3063(d)]

21 153. Protestant has not sustained its burden of proof that the establishment of the
22 Montclair dealership would not increase competition and therefore would not be in the public
23 interest. [Section 3063(e)]

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PROOF OF SERVICE

STATE OF CALIFORNIA, CITY AND COUNTY OF LOS ANGELES

I am employed in the City and County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is: 1900 Avenue of the Stars, 7th Floor, Los Angeles, California 90067.

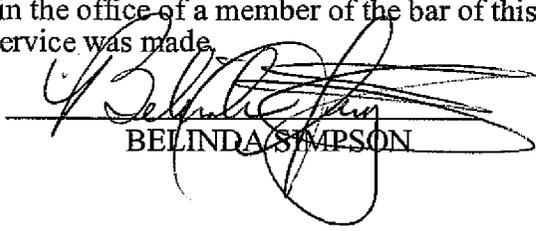
On June 17, 2013, I served the document(s) described as **RESPONDENT VOLKSWAGEN OF AMERICA, INC.'S [PROPOSED] ORDER OVERRULING PROTEST** in this action by placing the true copies thereof enclosed in sealed envelopes addressed as follows:

Michael J. Flanagan, Esq.
Gavin M. Hughes, Esq.
Law Offices of Michael J. Flanagan
2277 Fair Oaks Blvd., Suite 450
Sacramento, CA 95825
Email: lawmjf@msn.com

- (BY MAIL) I am "readily familiar" with the firm's practice for collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.
- (BY E-MAIL OR ELECTRONIC TRANSMISSION) I transmitted the above-described document by email in PDF format to the persons listed on the service list. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.
- (BY PERSONAL SERVICE) I delivered such envelope by hand to the offices of the addressee.
- (BY OVERNIGHT DELIVERY) I caused said envelope(s) to be delivered overnight via an overnight delivery service in lieu of delivery by mail to the addressee(s).

Executed on June 17, 2013, at Los Angeles, California.

- (STATE) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.
- (FEDERAL) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.


BELINDA SIMPSON