



R O S T E R
NEW MOTOR VEHICLE BOARD

P.O. Box 188680
Sacramento, California 95818-8680

<u>NAME</u>	<u>APPOINTING AUTHORITY</u>	<u>STATUS</u>
Ramon Alvarez C. Term exp. 1-15-22	Governor's Office	Dealer Member
Anne Smith Boland Term exp. 1-15-23	Governor's Office	Dealer Member
Kathryn Ellen Doi Term exp. 1-15-21	Governor's Office	Public Member
Inder Dosanjh Term exp. 1-15-21	Governor's Office	Dealer Member
Ardashes (Ardy) Kassakhian Term exp. 1-15-22	Senate Rules Committee	Public Member
Daniel P. Kuhnert Term exp. 1-15-23	Governor's Office	Public Member
Nanxi Liu Term exp. 1-15-23	Speaker of the Assembly	Public Member
Bismarck Obando Term exp. 1-15-22	Governor's Office	Public Member

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STATE OF CALIFORNIA
NEW MOTOR VEHICLE BOARD
NOTICE OF SPECIAL BOARD MEETING

Friday, July 10, 2020 at 9:00 a.m.

Via Zoom and Teleconference

On March 17, 2020, Governor Newsom issued Executive Order N-29-20, which removes the requirement that a meeting location be made available for the public to gather for purposes of observing and commenting at the meeting. The New Motor Vehicle Board Meeting will be conducted via Zoom and teleconference. Board members will participate in the meeting from individual remote locations.

Members of the public can attend the meeting remotely via one of several options listed below. Written comments, if any, can be submitted at nmvb@nmvb.ca.gov or during the meeting.

To request a reasonable modification or accommodation for individuals with disabilities at this or any future Board meeting or to request any modification or accommodation for individuals with disabilities necessary to receive agendas or materials prepared for Board meetings, please contact Eugene Ohta at (916) 445-1888 or Eugene.Ohta@nmvb.ca.gov.

Join Zoom Meeting

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Items of business scheduled for the meeting are listed on the attached agenda. Recesses may be taken at the discretion of the Chairperson and items may be taken out of order.

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STATE OF CALIFORNIA
NEW MOTOR VEHICLE BOARD

A G E N D A
SPECIAL MEETING

Friday, July 10, 2020 at 9:00 a.m.

Via Zoom and Teleconference

<https://us02web.zoom.us/j/86332620382>

Please note that Board action may be taken regarding any of the issues listed below. As such, if any person has an interest in any of these issues, you are encouraged to attend.

The Board provides an opportunity for members of the public to comment on each agenda item before or during the discussion or consideration of the item as circumstances permit. (Gov. Code § 11125.7) However, comments by the parties or by their counsel that are made regarding any proposed decision, order, or ruling must be limited to matters contained within the administrative record of the proceedings. No other information or argument will be considered by the Board. Members of the public may not comment on such matters.

1. **9:00 a.m. Meeting called to order.**
2. **Roll Call.**
3. **9:05 - 11:05 a.m.**
 - a. **Oral Presentation before the Public Members of the Board.**

BARBER GROUP, INC., a California corporation doing business as BARBER HONDA v. AMERICAN HONDA MOTOR CO., INC., a California corporation;
GALPINSFIELD AUTOMOTIVE, LLC, Intervenor
Protest No. PR-2539-17
 - b. **Closed Executive Session deliberations.**

Pursuant to Government Code section 11126(c)(3), Vehicle Code section 3008(a), and Title 13, California Code of Regulations, sections 581 and 588, the Board convenes in closed Executive Session to deliberate the decisions reached upon the evidence introduced in proceedings that were conducted in accordance with Chapter 5 (commencing with section 11500) of Part 1 of

Division 3 of Title 2 of the Government Code.

Pursuant to Government Code section 11517(c)(2), the Board could adopt the proposed decision, make technical or other minor changes, reject the proposed decision and remand the case, or reject the proposed decision and decide the case upon the record.

Consideration of Proposed Decision.

BARBER GROUP, INC., a California corporation doing business as BARBER HONDA v. AMERICAN HONDA MOTOR CO., INC., a California corporation; GALPINSFIELD AUTOMOTIVE, LLC, Intervenor
Protest No. PR-2539-17

Consideration of the Administrative Law Judge's Proposed Decision, by the Public Members of the Board.

c. Open Session.

4. **11:05 a.m. - 11:15 a.m. Break**

5. **11:15 a.m. - 12:00 p.m.**

a. Oral Presentation before the Public Members of the Board.

FAIRFIELD IMPORTS, LLC, a California Limited Liability Company v. TOYOTA MOTOR SALES, USA, INC., a California Corporation
Protest Nos. PR-2579-18 and PR-2580-18

b. Closed Executive Session deliberations.

Pursuant to Government Code section 11126(c)(3), Vehicle Code section 3008(a), and Title 13, California Code of Regulations, sections 581 and 588, the Board convenes in closed Executive Session to deliberate the decisions reached upon the evidence introduced in proceedings that were conducted in accordance with Chapter 5 (commencing with section 11500) of Part 1 of Division 3 of Title 2 of the Government Code.

Pursuant to Government Code section 11517(c)(2), the Board could adopt the proposed decision, make technical or other minor changes, reject the proposed decision and remand the case, or reject the proposed decision and decide the case upon the record.

Consideration of Proposed Order.

FAIRFIELD IMPORTS, LLC, a California Limited Liability Company v. TOYOTA MOTOR SALES, USA, INC., a California Corporation
Protest Nos. PR-2579-18 and PR-2580-18

Consideration of the Administrative Law Judge's Proposed Order Granting "Respondent Toyota Motor Sales, U.S.A., Inc.'s Motion to Dismiss Protests, by the Public Members.

c. **Open Session.**

5. **12:00 p.m. - 12:30 p.m. Lunch Break**

6. **12:30 p.m. - 2:30 p.m.**

Presentation of the Department of Motor Vehicle's Report of Investigation by Investigator Gary Constantino regarding whether the Care by Volvo subscription program violates Vehicle Code sections 11713.3(o)(1), 3060(b), 11713.3(u) and/or 11713.19.

CALIFORNIA NEW CAR DEALERS ASSOCIATION v. VOLVO GROUP NORTH AMERICA LLC aka VOLVO CAR USA, LLC
Petition No. P-460-19

Discussion of the Department of Motor Vehicle's Report of Investigation, by the Public Members of the Board.

7. **Public Comment. (Gov. Code § 11125.7)**

8. **Adjournment.**

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DECISION COVER SHEET

☒ ACTION BY: Public Members Only

☐ ACTION BY: All Members

To : BOARD MEMBERS

Date: June 26, 2020

From : ADMINISTRATIVE LAW JUDGE: Dwight V. Nelsen

CASE: BARBER GROUP, INC., a California corporation doing business as BARBER HONDA v. AMERICAN HONDA MOTOR CO., INC., a California corporation; GALPINSFIELD AUTOMOTIVE, LLC, Intervenor
Protest No. PR-2539-17

TYPE: Vehicle Code section 3062 Establishment

PROCEDURAL SUMMARY:

- FILED ON CALENDAR: October 13, 2017
- MOTIONS FILED: Respondent's Motion to Dismiss (denied)
Protestant's Motion to Compel Testimony at Deposition (denied)
Protestant's Motion to Compel Edik Hartoonian's Testimony at Deposition (granted)
Protestant's Motion to Continue Merits Hearing (granted)
Protestant's Motion to File Reply and Declaration of Jonathan James Ekegren under Seal (granted)
- HEARING: September 9-13, October 21-25, December 3-6, 2019 and January 6-7, 2020; January 9, 2020, site visit; January 21, 2020 telephonic hearing to add deposition designations and complete Protestant's experts' testimony; January 23, 2020 telephonic hearing to admit Joint Exhibit 29; and February 3, 2020 telephonic hearing to clarify and admit exhibits.
- COUNSEL FOR PROTESTANT: Gavin M. Hughes, Esq.
Robert A. Mayville, Jr., Esq.
Law Offices of Gavin M. Hughes

Grover H. Waldon, Esq.
Clifford & Brown
- COUNSEL FOR RESPONDENT: S. Keith Hutto, Esq.
Steven B. McFarland, Esq.
Patrick D. Quinn, Esq.

Patricia R. Britton, Esq.
Nelson Mullins Riley & Scarborough, LLP

- COUNSEL FOR INTERVENOR: Alan J. Skobin, Esq.
John L. Tuell, Esq.
Galpinsfield Automotive, LLC

EFFECT OF PROPOSED DECISION: The Proposed Decision overrules the Protest and allows Honda to establish Galpinsfield in Bakersfield, California.

SUMMARY OF PROPOSED DECISION:

- Protestant objected to the establishment of Intervenor at Respondent's add point in the North Bakersfield Area of Statistical Analysis (ASA).¹ The air distance between Protestant and the intended Intervenor location is 9.1 miles. The drive distance is 9.8 miles and takes about 12 minutes. The drive distance between Protestant and the nearest Honda dealer, AutoNation Valencia, is approximately 74.6 miles and takes one hour and 12 minutes.
- There are 116 pairs of Honda dealerships in California where each of the two dealerships in each pair are within 10 miles or less of each other. There are 96 pairs of Honda dealers closer to each other than the proposed new dealership would be to Protestant.
- Protestant, family-owned and -operated and well capitalized, established the permanency of its investment by its 45 years of operation in Bakersfield, its substantial purchase investment, and its financial outlays over the years to maintain its well-appointed and modern facility. All parties are in agreement that Protestant's investment in its franchise operations in the Bakersfield ASA is a permanent investment.
- Intervenor's investment in the proposed location in the North Bakersfield ASA is limited to the purchase of undeveloped land in an unincorporated area immediately north of the City of Bakersfield. Intervenor's investment in the open point and the proposed dealership does not constitute a permanent investment.
- Respondent and Intervenor seek to establish a Honda dealership approximately a half-mile from the North Bakersfield Toyota store which will allow customers to conveniently cross-shop between the brands. The proposed dealership will increase convenience to customers in the North Bakersfield market and the relevant market area or RMA.² There are additional parts and service business opportunities for Protestant and the proposed dealership not currently being realized by Protestant.

¹ The Area of Statistical Analysis or "ASA" is the geographical area assigned by American Honda to a particular dealer for the purpose of analyzing the representation provided by the dealer, including the dealer's sales and service performance. The ASA is not an exclusive territory, and Honda dealers do not have any exclusive rights or proprietary interest in the ASA. The ASA also does not limit the geographical area in which Honda dealers may sell or service vehicles, or the customers to whom Honda dealers may sell or service vehicles. (Dealer Agreement § 24.2).

² The term "Relevant Market Area" or "RMA" is a statutory term defined by Vehicle Code section 507 as "any area within a radius of 10 miles from the site of a potential new dealership."

- Bakersfield is the 11th largest city in California with a 2006 estimated population of 308,392 people. Household growth has been almost twice the California rate and well over the national average. The open point in North Bakersfield will be convenient to the growth in the northern side of the market. Household growth is projected to continue to increase more on the north side of Bakersfield.
- The Bakersfield market, including the North Bakersfield ASA, has been one of Respondent's worst performers in California. Protestant's sales efforts have not reached or captured the substantial available opportunity that exists in the Bakersfield Metro. Protestant is not capturing the available opportunity which can be captured by adding the open point. There is opportunity to grow Respondent's brand in Bakersfield. There is sufficient opportunity within the market so as not to have any material impact on Protestant. There is adequate opportunity for Protestant to achieve its expected sales and for the proposed dealership to do so as well.
- Respondent does not want to divide the market in half and sell the same number of cars. Respondent wants to grow and sell more cars. Respondent's historical experience is that when Respondent establishes an additional dealership, Respondent's market share increases.
- Protestant has not established its burden of proof under Vehicle Code section 3066(b) that there is good cause not to establish Galpinsfield as a Honda dealership in North Bakersfield.

RELATED MATTERS:

- Related Case Law: None
- Applicable Statutes and Regulations: Vehicle Code sections 331.1, 331.2, 3062, 3063, and 3066; Evidence Code sections 451 and 452; Government Code sections 11425.10(a)(6), 11425.50(c), 11425.60, 11515 and 11517

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CERTIFIED MAIL

STATE OF CALIFORNIA
NEW MOTOR VEHICLE BOARD

In the Matter of the Protest of

BARBER GROUP, INC., a California corporation
doing business as BARBER HONDA,

Protestant,

v.

AMERICAN HONDA MOTOR CO., INC., a
California corporation,

Respondent,

GALPINSFIELD AUTOMOTIVE, LLC,

Intervenor.

Protest No. PR-2539-17

PROPOSED DECISION

Statement of the Case

1. By letter dated October 12, 2017, American Honda Motor Co., Inc. (“American Honda” or “Respondent”) gave notice to Barber Group, Inc., a California corporation doing business as Barber Honda (“Barber Honda” or “Protestant”) pursuant to California Vehicle Code section 3062¹ of its intention to establish a Honda dealership at “7th Standard Road (Merle Haggard Drive) and Industrial Parkway, Assessor Parcel Numbers 482-120-57, 482-120-64, 482-120-70, 482-120-71, 482-120-72, 482-

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

120-73, Bakersfield, CA 93308-6442 in Kern County.” (Jt. Ex. J-26; Joint Statement of Undisputed Facts, ¶ 8.) The New Motor Vehicle Board (“Board”) received the Notice of Establishment on October 16, 2017.

2. Barber Honda is located within the relevant market area (“RMA”) of the proposed new Honda dealership.² The RMA is the area within a radius of 10 miles centered on the proposed site in Bakersfield.

3. On October 13, 2017, Barber Honda filed a timely protest.

4. On December 18, 2017, Galpinsfield Automotive, LLC (“Galpinsfield” or “Intervenor”) filed a Motion to Intervene. Galpinsfield was selected by American Honda as the candidate dealer for the proposed new Honda dealership in September 2015. (Motion to Intervene, p. 1, lines 22-23; Joint Statement of Undisputed Facts, ¶ 10.) By order dated December 27, 2017, Galpinsfield’s Motion to Intervene was granted.³

5. A hearing on the merits of the protest was held on September 9-13, October 21-25, December 3-6, 2019 and January 6-7, 2020, before Administrative Law Judge (“ALJ”) Dwight V. Nelsen.

6. At the beginning of the hearing, Respondent’s Motion in Limine to “exclude untimely produced documents and select opinions of Protestant’s expert” that were allegedly produced by Protestant after discovery was completed was denied.

7. During a telephonic hearing on January 21, 2020, the record was opened to add the deposition designations of: Steven Dale Steele, Service Manager, Barber Honda (June 8, 2018); Troy Devone Stone (November 6, 2018); Herbert Boeckmann, II (December 5, 2018); Ron Mattner, Assistant Zone Manager, Sales, American Honda (December 13, 2018); and Edik Hartoonian, former General Manager, Galpin Honda (January 15, 2019 and March 26, 2019). (Jt. Ex. J-28; Deposition of Steven Dale Steele, p. 15:25-16:7; RT, Vol. 8, p. 1748:22-1749:19, p. 1753:17-18; Deposition of Ron Mattner, p. 9:17-18, p. 10:16-20.) Additionally, Mr. Edward Stockton, Protestant’s expert, finished his testimony.

8. The telephonic hearing on January 21, 2020, resumed on January 23, 2020, to admit Joint Exhibit 29, “Stipulated Facts Regarding January 9, 2020 Market Drive.”

² Such notice is required whenever a franchisor seeks to enter into a franchise establishing an additional motor vehicle dealership if there is a dealership of the same line-make within a radius of 10 miles from the site of the proposed new location. (Sections 3062(a)(1) and 507)

³ Counsel for Protestant and Respondent did not oppose Galpinsfield’s Motion to Intervene.

9. A telephonic hearing was also held on February 3, 2020, to admit Sharif Farhat's expert Rebuttal Report on behalf of Respondent (Exhibit R-378) and Joint Exhibit J-28a (Exhibit 2 of Edik Hartoonian's March 26, 2019, deposition); to clarify all references to Exhibit P-22 are to Joint Exhibit J-22 and citations to transcripts will be to the volume, page and line number; and to add missing highlights to deposition designations that were admitted as Joint Exhibit J-28b (Ron Mattner's December 13, 2018, deposition, page 37, lines 22-25 and Steven Dale Steele's June 8, 2018, deposition page 75, line 16 through page 76, line 15.)

10. This matter was submitted on May 29, 2020.

Parties and Counsel

11. Barber Honda is located at 4500 Wible Road, Bakersfield, California and has been since 1985. (Joint Statement of Undisputed Facts, ¶¶ 6-7.) Barber Honda is an authorized Honda “franchisee” within the meaning of Sections 331.1 and 3062(a)(1). Barber Honda was established in 1973 and is the only Honda dealership in Bakersfield. (Joint Statement of Undisputed Facts, ¶ 3.)

12. Barber Honda is represented by Gavin M. Hughes, Esq. and Robert A. Mayville, Jr., Esq. of the Law Offices of Gavin M. Hughes, 3436 American River Drive, Suite 10, Sacramento, California and Grover H. Waldon, Esq. of Clifford & Brown, a Professional Corporation, 1430 Truxtun Avenue, Suite 900, Bakersfield, California.

13. American Honda is the manufacturer and distributor of Honda brand vehicles, genuine Honda parts and accessories. (Joint Statement of Undisputed Facts, ¶ 1.) American Honda is a “franchisor” within the meaning of Sections 331.2 and 3062(a)(1).

14. American Honda is represented by S. Keith Hutto, Esq., Steven B. McFarland, Esq., and Patrick D. Quinn, Esq. of Nelson Mullins Riley & Scarborough, LLP, 1320 Main Street, 17th Floor, Columbia, South Carolina and Patricia R. Britton, Esq. of Nelson Mullins Riley & Scarborough, LLP Atlantic Station, 201 17th Street NW, Suite 1700, Atlanta, Georgia.

15. Herbert (Beau) Ferdinand Boeckmann, III is the President and COO of the Galpinsfield organization. (RT, Vol. 8, p. 1750:16-17.)

16. Galpinsfield is represented by Alan J. Skobin, Esq. and John L. Tuell, Esq., Galpinsfield Automotive, LLC, 15505 Roscoe Boulevard, North Hills, California.

Witnesses at Hearing

Protestant's Witnesses

17. Protestant called the following witnesses:

Eric Van Olst, Zone Sales Manager, Northern California, American Honda;
Marc Thomas, prior District Sales Manager, American Honda;
Martin Fisher, prior District Sales Manager, American Honda;
Michael Bach, prior Zone Parts and Service Manager, American Honda;
John Ewanicki, District Sales Manager, American Honda;
Todd Meyer, Assistant Zone Manager for Business Improvement, American Honda;
Albin (Frank) Beniche, Assistant Vice President, Public Companies, American Honda;
Peter Gerard Hagan, Assistant Zone Manager for Sales, American Honda;
Jonah Rohde, prior District Parts and Service Manager, American Honda;
Herbert (Beau) Ferdinand Boeckmann, III, President and COO, Galpinsfield;
Stephen Patrick Ekegren, President and Dealer Principal, Barber Honda; and
Jonathan James Ekegren, General Manager/Dealer Manager, Barber Honda.

18. Protestant's expert witness was Edward (Ted) Stockton, Vice President and Director of Economic Services, The Fontana Group.

Respondent's Witnesses

19. Respondent's expert witnesses were Sharif George Farhat, Vice President of Expert Services, Urban Science Applications, and Herbert Walter, expert in dealership financial and operational performance and inventory analysis.

Intervenor's Witnesses

20. Intervenor did not call any witnesses.

Joint Glossary of Terms

21. On August 19, 2019, Protestant, Respondent and Intervenor filed a Joint Glossary of Non-Controversial Terms:

Area of Statistical Analysis ("ASA"): The Area of Statistical Analysis or "ASA" is the geographical area assigned by American Honda to a particular dealer for the purpose of analyzing the representation provided by the dealer, including the dealer's sales and service performance. The ASA is not an exclusive territory, and Honda dealers do not have any exclusive rights or proprietary interest in the ASA. The ASA also does not limit the geographical area in which Honda dealers may sell or service vehicles, or the customers to whom Honda dealers may sell or service vehicles. (Dealer Agreement § 24.2).

Census Tracts: Census tracts are relatively small geographical areas established by the United States Census Bureau based on population. The optimal size of a census tract is 4,000 people, but census tracts generally have between 1,500 and 8,000 people. The spatial size of census tracts therefore varies widely depending on the population density in the area. Census tracts are designed to be relatively permanent, but may change over time due

to a variety of factors. (www.census.gov).

Relevant Market Area (“RMA”): The term “Relevant Market Area” or “RMA” is [a] statutory term defined by the California Vehicle Code as “any area within a radius of 10 miles from the site of a potential new dealership.” Cal. Veh. Code § 507.

Northern California Zone (Zone 12): American Honda has divided its national dealer body into various Zones for internal management, dealer support, and comparison purposes. Zone 12 includes the northern half of the state of California, and it currently consists of 61 Honda dealers. Protestant and the proposed new Honda dealership in this action are both located in Zone 12.

District: American Honda has divided each Zone into various subsets called Districts, which are used for internal management, dealer support, and comparison purposes. The Bakersfield market, including Protestant and the proposed new dealership, are both located in District 12D. There are currently 15 Honda dealers in District 12D.

Dealer Agreement: The Honda Automobile Dealer Sales and Service Agreement entered into between American Honda and one of its authorized Honda dealers, such as the Dealer Agreement entered between American Honda and Barber Honda.

Dealer Principal (“DP”): A contractually defined term for the dealer owner, the person who has ultimate operational control of the dealer and final authority to decide any dealership matters. (Dealer Agreement § 24.9).

Dealership Manager or General Manager: A contractually defined term for the principal manager of the dealer, who is the person authorized by the dealer owner to run the day-to-day dealership operations and enter into ordinary course transactions on behalf of the dealer. (Dealer Agreement § 24.10).

Registrations: The term “registrations” refers to data showing the number of new vehicles that are sold by dealers and are then “registered” by consumers with the state. Registrations and registration data are used to evaluate and analyze the number of new vehicles that are registered by consumers and where those vehicles have been registered.

Competitive Registrations: The term “competitive registrations” refers to registrations of vehicles that are competitive with a particular brand's product offerings and are similar in vehicle type, pricing, wheel base, and other features. For example, the Honda Accord and the Toyota Camry are competitive vehicles, but the Honda Accord is not competitive with a Ford F150 or a Maserati—even if they are registered in the same geographical area.

Expected Registrations: American Honda's calculation of how many Honda vehicles it expects to be registered in a given geographic area, regardless of which dealer sold the vehicle, over a particular time frame in order to achieve state average Market Share or Market Penetration, based on the number of Competitive Registrations in that geography.

Expected Sales: American Honda's calculation of how many new vehicles a dealer is expected to sell over a particular time frame in order to achieve state average sales penetration, based on the number of Competitive Registrations in the dealer's ASA.

In-sell: In-sell refers to the number of new vehicles sold and registered in a particular geographic area made by dealers that are located outside of that geographic area. For example, new Honda vehicles sold by one Honda dealer into the area that makes up another Honda dealer's assigned ASA would constitute “in-sell.”

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1 Market Share/Brand Penetration: Market share or brand penetration is an industry
2 measurement used to evaluate the new vehicle sales performance of a brand. Market share
3 or brand penetration refers to the percentage of competitive new vehicle registrations in a
4 certain geographic area (i.e., in the RMA, in a dealer's ASA, or in some other area) that are
captured by a particular brand. For example, if there are 1,000 competitive new vehicle
registrations in a particular area and 250 of those registrations are Honda vehicles, Honda's
market share or market penetration in that specific area would be 25%.

5 Registration Effectiveness: A process used by American Honda taking the sum of Honda
6 vehicle Registrations in a geographic area (such as a dealer's ASA) no matter which dealer
7 sold the Honda vehicle divided by the number of Expected Registrations in the same
8 geographic area, multiplied by 100 and expressed as a percentage. A registration
effectiveness score of 100% means the brand made American Honda's Expected
Registrations number exactly, while a score of 50% means it made only half the number of
its Expected Registrations.

9 Retail Sales: The term "retail sales" refers to new Honda vehicles that are sold by a Honda
10 dealer to retail consumers and are reported as sold to American Honda.

11 Retail Sales Effectiveness ("RSE"): American Honda's sales performance metric, which
12 takes the number of Retail Sales reported by a dealer anywhere in the U.S. divided by the
13 number of Expected Sales, expressed as a percentage. An RSE of 0% means the dealership
made its American Honda determined Expected Sales number exactly, while a score of
- 50% means it made only half the number of American Honda's Expected Sales.

14 Units in Operation ("UIO"): The number of Honda brand vehicles registered within a
15 particular geographic area. UIO count is considered one measure of the number of Honda
customers in a particular area and the opportunity available for service business in that
area.

16 Days' Supply: Days' supply is an industry measure of a dealership's inventory level, and is
17 the number of days a dealership could continue selling vehicles without receiving new
18 inventory. Days' supply is based on the dealer's inventory and average sales rate (or turn
19 rate) over some period of time. For example, if a dealer has 10 Honda Accords in inventory
and sells 10 new Honda Accords per month, it has a 30-days [sic] supply of Accords.
Depending on the measurement, the calculation of days' supply can include vehicles in the
dealer's on-ground inventory, vehicles in transit to the dealership but not yet on its lot, or
both.

21 MARKET DRIVE

22 22. On January 9, 2020, the parties conducted a market drive to observe Barber Honda's
23 dealership facilities and certain areas in and around the Bakersfield market. Present for the market drive
24 were ALJ Nelsen, counsel for Protestant, Respondent and Intervenor, Stephen and Jonathan Ekegren, and
25 Eric Van Olst. The parties first toured the facilities of the Barber Honda dealership, and then drove to
26 several locations in and around the Bakersfield metropolitan area. A court reporter was not present. The
27 observations were memorialized in Joint Exhibit 29.

28 ///

1 **BURDEN OF PROOF**

2 23. As this is a Section 3062 protest, it is Protestant that has the burden of proving there is
3 good cause to prevent the establishment of the new Honda dealership. Protestant will meet this burden of
4 proof if it establishes by a preponderance of the evidence that there is good cause not to enter into a
5 franchise establishing an additional motor vehicle dealership, i.e., there is greater than a 50 percent
6 probability that this proposition is true. (Veh. Code § 3066(b).)

7 **ISSUE PRESENTED**

8 24. The issue presented in this protest is whether Barber Honda sustained its burden of proof
9 of showing “good cause” to preclude American Honda from establishing an additional Honda dealer in
10 Bakersfield, California?

11 **APPLICABLE LAW**

12 25. Under Section 3062(a)(1), when a timely protest has been filed, a franchisor is not
13 permitted to establish an additional motor vehicle dealership until a hearing has been held before the
14 Board, nor thereafter if Protestant establishes at the hearing that there is good cause not to permit the
15 establishment. (Section 3066)

16 26. In determining whether there is good cause for not establishing an additional dealership
17 of the same line-make, Section 3063 requires the Board to take into consideration the existing
18 circumstances including, but not limited to, all of the following:

- 19 (a) Permanency of the investment.
- 20 (b) Effect on the retail motor vehicle business and the consuming public in the relevant
21 market area.
- 22 (c) Whether it is injurious to the public welfare for an additional franchise to be established.
- 23 (d) Whether the franchisees of the same line-make in the relevant market area are providing
24 adequate competition and convenient consumer care for the motor vehicles of the line-make in the
25 market area, which shall include the adequacy of motor vehicle sales and service facilities, equipment,
26 supply of vehicle parts, and qualified service personnel.
- 27 (e) Whether the establishment of an additional franchise would increase competition and
28 therefore be in the public interest.

PROTESTANT’S CONTENTIONS⁴

27. Relying on *Albert Piano v. The State of California ex rel. New Motor Vehicle Board; Nissan Motor Corporation* (1980) 103 Cal.App.3d 412, 417, Barber Honda contends “[t]he Board must consider and balance the interests of [American Honda] in permitting the proposed point to be established, the interests of Barber Honda in protecting against ruinous competition that poses grave risk to its continued viability, and the public’s interest in additional competition.”⁵ (Protestant’s Post-Hearing Opening Brief, p. 43, lines 16-21.)

28. Barber Honda claims it established its burden to prove the existence of good cause to prevent the proposed establishment of a new Honda dealership in Bakersfield as follows: (Protestant’s Post-Hearing Opening Brief, p. 48, lines 10-12.)

a. Barber Honda’s investment is permanent and substantial having been in business for over 45 years.⁶ (Protestant’s Post-Hearing Opening Brief, p. 43, lines 23-28.) Galpinsfield’s investment is not permanent since undeveloped land cannot be considered permanent since it can be sold or developed into alternative uses. (Protestant’s Post Hearing Reply Brief to Intervenor, p. 7, line 18 through p. 10, line 5.)

b. Galpinsfield and Barber Honda “would be forced to compete for available business in only half the RMA. This circumstance is unique and illustrative of the fact there does not exist robust opportunity in the RMA sufficient to result in a beneficial increase to competition or consumer

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⁴ There is no dispute that circumstances have dramatically changed since the merits hearing concluded. As devastating as the ongoing COVID-19 pandemic is, the ALJ and ultimately the Board are limited to considering what is within the administrative record. (Gov. Code §§ 11425.10(a)(6), 11425.50(c), 11517; Veh. Code § 3066(a).) Therefore, the arguments raised by Barber Honda that are outside the administrative record in its post-hearing opening and reply briefs will not be considered.

⁵ The court in *Piano* indicated that by adopting the statutory scheme for establishment protests, “the Legislature intended that the Board balance the dealers’ interest in maintaining viable businesses, the manufacturers’ interest in promoting sales, and the public’s interest in adequate competition and convenient service.” (*Piano* at p. 417.)

⁶ Protestant’s Post-Hearing Opening Brief references the Board’s Decisions in *Santa Cruz Nissan, Inc., dba Santa Cruz Nissan v. Nissan North America, Inc.* (Protest No. PR-2358-13), *Dependable Dodge, Inc. v. Fiat Chrysler Automobiles, Inc.* (Protest Nos. 2435-15 and PR-2436-15) and *Folsom Chevrolet, Inc., dba Folsom Chevrolet v. General Motors, LLC* (Protest No. PR-2383-16). These Decisions have not been designated by the Board as precedent decisions pursuant to Government Code Section 11425.60, so they will not be relied upon in this Proposed Decision.

1 convenience within the RMA.”⁷ (Protestant’s Post-Hearing Opening Brief, p. 44, lines 24-27; emphasis in
2 original.)

3 c. The establishment of Galpinsfield would “result in the forced closure of Barber Honda”
4 resulting in injury to the public welfare. (Protestant’s Post-Hearing Opening Brief, p. 45, lines 20-21.)
5 “More customers live closer to Barber Honda than the proposed point. If Barber Honda were to fail,
6 customer convenience would be worse now than it is today. Moreover, Barber Honda is located in the
7 only Auto Mall in Bakersfield. The presence of the Bakersfield Auto Mall provides adequate competition
8 in the RMA. The addition of a Honda franchise on the outskirts of town would provide no meaningful
9 benefit.” (Protestant’s Post-Hearing Opening Brief, p. 45, lines 24-28.) The proposed new location does
10 not offer beneficial cross-shopping opportunities with the Toyota dealership in close proximity since it is
11 the only nearby dealership. It is not visible from the proposed location nor does it provide the same
12 number of cross-shopping opportunities available at the Bakersfield Auto Mall, where Protestant is
13 located. (Protestant’s Post-Hearing Reply Brief to Respondent, p. 10, line 2 through p. 11 line 2.)

14 d. Barber Honda contends it is undisputed that its facility is “adequately equipped and staffed
15 with qualified personnel. American Honda makes no claim Barber Honda’s facility is inadequate to serve
16 the needs of existing customers.” (Protestant’s Post-Hearing Opening Brief, p. 46, lines 9-11.)

17 e. The increase in competition if Galpinsfield is established “would not benefit the public
18 welfare because customers are already adequately served by Barber Honda.... Any benefit that might
19 result from increased competition would be short-lived because the competition between the Honda
20 dealers would be unsustainable” and ultimately harm consumers. (Protestant’s Post-Hearing Opening
21 Brief, p. 47, lines 18-22)

22 29. According to Barber Honda, “[t]he primary and most important issue the Board must
23 determine is what impact the proposed establishment would have on Barber Honda. If the [RMA] cannot
24 support two Honda dealerships, any potential benefits would go unrealized.” (Protestant’s Post-Hearing
25 Opening Brief, p. 5, lines 13-15.) Protestant argues that “[a]ny benefit to the public welfare that might

26 ⁷ Barber Honda maintains that with most “proposed add point locations, it is expected to observe significant
27 business available to a proposed new dealer in all directions from the proposed add point location. Here, the
28 business is in one direction and located immediately between” Galpinsfield and Barber Honda. (Protestant’s Post-
Hearing Opening Brief, p. 44, lines 21-23.)

1 result from the proposed establishment would be short-lived while the two Honda dealerships compete for
2 a limited pool of business insufficient to sustain both dealers.” (Protestant’s Post-Hearing Opening Brief,
3 p. 4, lines 23-25.) Barber Honda’s expert “demonstrated the impact from the proposed establishment
4 poses a grave threat to Barber Honda’s continued viability—the proposed establishment is tantamount to
5 a de facto termination.” (Protestant’s Post-Hearing Opening Brief, p. 48, lines 12-14.) Accordingly, one
6 of these two Honda dealers would be forced to close its Honda operations or sell for a reduced return on
7 investment. (Protestant’s Post-Hearing Opening Brief, p. 4, lines 23-26.) Galpinsfield is coming into the
8 Bakersfield market expecting to lose money “for an indefinite period of time” and has the resources to
9 endure “the ruinous competition” if the proposed dealership is established. (Protestant’s Post-Hearing
10 Opening Brief, p. 4, line 27 through p. 5, line 1.)

11 30. Barber Honda contends that American Honda “failed to conduct any genuine rigorous
12 analysis” to determine whether Bakersfield could support both Honda dealerships and what the impact
13 would be on Barber Honda. (Protestant’s Post-Hearing Opening Brief, p. 5, lines 7-9.) American Honda,
14 according to Barber Honda, disregards “the devastating impact certain to result to Barber Honda” as
15 evidenced by projected sales of 1,407 for the proposed dealership when “Barber Honda has never
16 exceeded 2,000 sales in any year—Galpin [*sic*] proposed it would sell 2,500 in its third year of operation.”
17 (Protestant’s Post-Hearing Opening Brief, p. 48, lines 17-21; p. 5, lines 8-12, 23-25.) Barber Honda “is
18 dependent upon the North Bakersfield ASA for 40% of its new vehicle sales and 40-50% of its parts and
19 service business.” (Protestant’s Post-Hearing Opening Brief, p. 48, lines 22-23.) The analyses performed
20 by American Honda only address sales but do not consider the “likely impact to Barber Honda’s parts and
21 service business.” (Protestant’s Post-Hearing Opening Brief, p. 5, lines 20-21.)

22 31. Barber Honda asserts that although increased market share for the Honda brand would
23 occur if a second dealership is added to the RMA, American Honda’s expert’s analysis that the addition
24 will result in an 80 percent increase in Honda market share and that Barber Honda would suffer no losses
25 after a Bakersfield add point, is not supported by the case studies relied upon by American Honda’s
26 expert. (Protestant’s Post-Hearing Reply Brief to Respondent, p. 25, lines 15-16; p. 29, lines 1-9.)

27 32. According to Barber Honda, although the population has increased over the past 45 years
28 in the Bakersfield RMA and metro areas, Barber Honda has made substantial and permanent investments

1 to expand capacity to meet consumer needs. (Protestant’s Post-Hearing Reply Brief to Respondent, p. 7,
2 line 26 through p. 8, line 11.)

3 33. Barber Honda asserts that American Honda’s analysis that its brand share in Bakersfield
4 should be equal to the state-wide average is flawed because Bakersfield has lower income levels than the
5 state average and American Honda does not cater to subprime buyers like the other import brands that are
6 in competition with American Honda do. (Protestant’s Post-Hearing Reply Brief to Respondent, p. 12,
7 line 6 through p. 14, line 7.)

8 34. Barber Honda argues that American Honda’s Retail Sales Effectiveness (RSE) metric and
9 its registration effectiveness (RE) metric used to calculate lost opportunity, are unreasonable because they
10 are based on a state average segment-adjusted market share sales performance, which does not account for
11 existing circumstances such as local market characteristics and conditions. (Protestant’s Post-Hearing
12 Reply Brief to Respondent, p. 14, line 8 through p. 18, line 7; Protestant’s Post-Hearing Reply Brief to
13 Intervenor, p. 5, line 11 through p. 7, line 17.) Barber Honda contends that the rationale applied by
14 termination decisions rejecting state average based metrics applies equally to establishment protests such
15 as Protestant’s. (Protestant’s Post-Hearing Reply Brief to Respondent, p. 18, line 8 through p. 25, line 14.)

16 35. The addition of the proposed Galpinsfield dealership will not significantly improve
17 customer convenience as the decrease in average drive distance will be reduced by a mere 5.1 miles for
18 customers in the Bakersfield market. (Protestant’s Post-Hearing Reply Brief to Intervenor, p. 14, line 15
19 through p. 15, line 12.)

20 **RESPONDENT’S CONTENTIONS**⁸

21 36. American Honda contends that Barber Honda has not met its statutory burden of proving
22 there is good cause not to permit the establishment of the proposed new Honda dealership in Bakersfield.

23
24
25 ⁸ In response to Barber Honda’s references to the COVID-19 pandemic, American Honda contends “these references
26 to events outside the record are wholly improper and completely ignore the evidence actually in the record most
27 relevant to this issue: (1) that establishing a new dealership will significantly benefit the public and the local
28 economy, and (2) that the new dealership still has to be built and will not open until 18-24 months after a final
ruling by the Board.” Consistent with this testimony, American Honda stipulated that it will not authorize
Galpinsfield to open until 24 months from May 29, 2020, the date its Post-Hearing Reply brief was filed.
(Respondent’s Post-Hearing Reply Brief, p. 3, lines 5-18; see Barber Honda’s Request for Judicial Notice in
paragraphs 45-52, *infra*)

1 The proposed dealership would be “established in a large, growing market that is one of the ten most
2 populous cities in California, and a market where there has only been one Honda dealership to serve
3 customers within 67 miles for the last 45 years.” (Respondent’s Post-Hearing Opening Brief, p. 36, lines
4 12-16.) Establishing a second Honda dealership will benefit consumers and the general public in
5 Bakersfield “by improving access to the Honda brand for sales and service, providing customers with
6 much needed competition, and adding valuable economic expansion and employment opportunities in the
7 community.” (Respondent’s Post-Hearing Opening Brief, p. 36, lines 16-19.) Barber Honda failed to
8 prove that establishing a new Honda dealership on the opposite end of Bakersfield and outside the city
9 limits “would have any material adverse effect on their business. Instead, given that Bakersfield is the
10 lowest performing market for Honda in the state and that Honda is the lowest performing brand in
11 Bakersfield, there is more than enough opportunity for Honda sales and service business to support both
12 dealerships, and the establishment of this new dealership will increase—not reduce—the amount of
13 business available in Bakersfield for both dealers.” (Respondent’s Post-Hearing Opening Brief, p. 36,
14 lines 19-25.)

15 37. In addition to the above, American Honda relies on the following “significant facts” to
16 demonstrate the reasons for and benefits of establishing a second Honda dealership in Bakersfield:

- 17 ■ “It currently takes customers more than an hour to drive from Barber Honda to reach any other
18 competing Honda dealership to inquire about buying a new vehicle or to get vehicle service.”
- 19 ■ The proposed site for the new Honda dealership is 9.1 air miles away from Barber Honda; it is
20 on the other side of the town and outside of the city limits.
- 21 ■ “There are 96 pairs of Honda dealers in California closer than the proposed new dealership
22 would be to Barber Honda.”
- 23 ■ “Having a second Honda dealership in Bakersfield would benefit consumers and the public by
24 improving customer convenience, providing another brick-and-mortar location for sales and
25 service, increasing employment, and providing an additional choice for customers.”
- 26 ■ “The proposed site is close to the second Toyota location in Bakersfield, which will improve
27 competition and allow customers to cross-shop between the two brands.”
- 28 ■ Under Barber Honda’s own expert analysis, the Honda brand is only making 63% of the sales

1 expected in the market.

- 2 ■ Bakersfield is the largest market in the United States with only one Honda dealer.
- 3 ■ There is opportunity for additional service work in Bakersfield and additional new vehicle
- 4 sales will result in additional UIO and service opportunity for both dealers.

5 (Respondent’s Post-Hearing Opening Brief, p. 2 lines 5-7, 22-24; p. 3, lines 9-20; without emphasis in
6 original; Respondent’s Post-Hearing Reply Brief, p. 17, lines 10-14; p. 24, line 1 through p. 25, line 19.)

7 38. Contrary to Barber Honda’s argument that American Honda decided to establish a new
8 Honda dealership in reliance on state average only, throughout its evaluation process, American Honda
9 stated that it analyzed Honda’s “performance compared to all of the following more localized markets and
10 standards: (1) Zone 12, which includes Barber Honda and the other 60+ Honda dealers in Northern
11 California; (2) District 12D, which includes Barber Honda and the 14 other Honda dealers located in the
12 Central Valley; (3) Fresno, which is also located in the Central Valley and is the next closest metro
13 market to the north of Bakersfield; (4) Sacramento; (5) San Jose; (6) East Bay; (7) San Francisco; (8)
14 Sonoma; (9) Santa Barbara; and (10) Stockton.” Respondent contends that “[u]nder each one of these
15 evaluations, the Bakersfield market is significantly underperforming, remains the lowest performing
16 market for the Honda brand, and has a substantial amount of untapped opportunity.” (Respondent’s Post-
17 Hearing Opening Brief, p. 23, line 26 through p. 24, line 8; emphasis in original; Respondent’s Post-
18 Hearing Reply Brief, p. 4, lines 20-23; p. 13, line 5 through p. 14, line 28.)

19 39. American Honda maintains that it “repeatedly and specifically evaluated the local market
20 conditions in Bakersfield itself before proposing to establish a new dealership . . . ,” which included
21 analyzing the local market factors in Barber Honda’s ASA and the open point ASA (the Bakersfield
22 Metro) as follows: “(1) the population levels and population growth; (2) the number of households and
23 household growth; (3) household income and income growth; (4) the number and location of competitive
24 dealerships; (5) the distance between the proposed site and Barber Honda; (6) the effect of the new
25 dealership on customer convenience versus other competitive brands; (7) the number and location of
26 competitive registrations; (8) the import brand registrations in the market; (9) the number and location of
27 Barber Honda’s sales; (10) the number and location of new vehicles sold into the metro by other Honda
28 dealers (known as “insell”) more than 65 miles from Barber Honda; and (11) the number and location of

1 the UIO available for potential service.” (Respondent’s Post-Hearing Opening Brief, p. 24, lines 11-22;
2 without emphasis in original.)

3 40. According to American Honda, Barber Honda attempts to shift the burden to American
4 Honda by its reliance on Section 11713.13(g),⁹ asserting that American Honda bears the burden to prove
5 its standards for evaluating the performance of the dealer are reasonable. However, under Section 3062,
6 the burden is on Barber Honda and Section 11713.13(g) is inapplicable here because that section applies
7 only to standards, sales objectives, and programs for measuring the performance of an individual dealer,
8 which is not an issue in this case. (Respondent’s Post-Hearing Reply Brief, p. 9, line 21 through p. 12,
9 line 21.)

10 **INTERVENOR’S CONTENTIONS**

11 41. Galpinsfield contends that Barber Honda has not met its burden of proof to show that
12 there is good cause not to permit the establishment of Galpinsfield as a proposed new Honda dealership
13 in Bakersfield. (Intervenor’s Post-Hearing Opening Brief, p. 18, lines 11-13.) In general, Galpinsfield
14 contends there is “substantial and growing need for competition in Bakersfield as evidenced by the data
15 showing that Honda is the worst performing brand in the market and that more and more consumers are
16 choosing to travel long distances to buy a Honda instead of buying from Barber Honda.” (Intervenor’s
17 Post-Hearing Opening Brief, p. 18, lines 13-16.) By increasing consumer awareness of the Honda brand,
18 and improving consumer convenience and competition, Galpinsfield hopes to reverse that trend.

19 _____
20 ⁹ Subdivision (g) of Section 11713.13 provides, in part, as follows:

21 It is unlawful and a violation of this code for any manufacturer, manufacturer branch, distributor,
22 or distributor branch licensed under this code to do, directly or indirectly through an affiliate, any of
the following:

23 ...
24 (g) (1) Establish or maintain a performance standard, sales objective, or program for measuring a
dealer’s sales, service, or customer service performance that may materially affect the dealer,
including, but not limited to, the dealer’s right to payment under any incentive or reimbursement
25 program or establishment of working capital requirements...

26 ...
27 (2) In any proceeding in which the reasonableness of a performance standard, sales objective, or
program for measuring dealership sales, service, or customer service performance is an issue, the
manufacturer, manufacturer branch, distributor, distributor branch, or affiliate shall have the burden
28 of proof.

...

(Intervenor’s Post-Hearing Opening Brief, p. 18, lines 16-17.) The Galpin organization “has a demonstrated record of doing exactly that, all while [maintaining] high levels of customer satisfaction.” (Intervenor’s Post-Hearing Opening Brief, p. 18, lines 17-18.)

42. According to Galpinsfield, there is no dispute that it has made a substantial and permanent investment in the proposed Honda dealership. It paid \$5 million for the land in 2016, is incurring significant holding costs for the land (property taxes, insurance, and other expenses), and if permitted to go forward with the new Honda dealership, will construct a new facility from the ground-up, and hire and train new employees. (Intervenor’s Post-Hearing Opening Brief, p. 6, line 16 through p. 7, line 3.)

43. Galpinsfield asserts that the proposed new Honda dealership will “greatly benefit the consuming public” because of the Galpin organization’s demonstrated success with the Honda brand, its commitment to charity and the communities it serves, and its “consistently strong customer satisfaction scores at all of its dealerships.” (Intervenor’s Post-Hearing Opening Brief, p. 7, lines 11-26; Intervenor’s Post-Hearing Reply Brief p. 8, line 14 through p. 9, line 14; p. 14, line 15 through p. 15, line 19.) If the establishment is permitted, Galpin intends to have an on-site dealer manager that lives in the community to ensure “Galpin’s customer-centric business model and corporate culture are fully embraced by its employees.” (Intervenor’s Post-Hearing Opening Brief, p. 7, line 27 through p. 8, line 3.) Galpinsfield plans to be a “*good business partner with Barber Honda*, not undercut them” or hurt their business. (Intervenor’s Post-Hearing Opening Brief, p. 10, lines 19-20; p. 11, lines 4-7; p. 17, lines 22-24; emphasis in original.)

44. Galpinsfield maintains that the proposed new Honda dealership “will significantly increase competition and be in the public interest.” Galpinsfield will “greatly improve competition by establishing a second location for Honda sales and service in Bakersfield.” The Honda brand in Bakersfield is underperforming. “Galpinsfield’s objective is to increase market share and grow through competition *with other brands* such as Toyota, which is dominating the market,” and other import brands like Nissan. (Intervenor’s Post-Hearing Opening Brief, p. 17, lines 1-3, 10, 18-20; emphasis in original; Intervenor’s Post-Hearing Reply Brief p. 7, line 1 through p.8, line13.) Galpinsfield contends it will “promote competition by providing an additional option for consumers in Bakersfield” and

therefore positively affect the public interest. (Intervenor’s Post-Hearing Opening Brief, p. 18, lines 8-9.)

BARBER HONDA’S REQUEST FOR JUDICIAL NOTICE

45. On May 29, 2020, in Barber Honda’s post-hearing reply brief in response to Galpinsfield’s opening brief, it requested that the Board take judicial notice of the COVID-19 pandemic and Governor Newsom’s Executive Order N-33-20 issued on March 19, 2020, in response thereto. (Protestant’s Post Hearing Reply Brief to Intervenor Galpinsfield Automotive LLC’s Post-Hearing Opening Brief, footnote 5, p. 17, line 20 through p. 19 line 2.)

46. In addition to the above, Barber Honda in its post-hearing reply brief in response to American Honda’s opening brief requested that the Board take judicial notice of the following existing circumstances that, according to Barber Honda, demonstrate the RMA cannot support the proposed establishment: (1) “The Seasonal Adjusted Annualized Rate . . . for U.S. new vehicle sales is currently at its the (*sic*) lowest in 40 years—lower than the 2008 Great Recession;” (2) “State unemployment is above 15%—surpassing the previous record set in 2010 during the prior recession;” and (3) “The oil industry is crippled.” Barber Honda also requested judicial notice of the broad economic impact of the COVID-19 pandemic. (Protestant’s Post Hearing Reply Brief to Respondent’s Post-Hearing Opening Brief, footnotes 1-3, p. 4, line 19 through p. 5, line 1.)

47. Barber Honda relies on the Evidence Code to support its request for judicial notice. Evidence Code section 451(f) provides that judicial notice shall be taken of “[f]acts and propositions of generalized knowledge that are so universally known that they cannot reasonably be the subject of dispute.”

48. Evidence Code section 452 provides that judicial notice may be taken of:

...
(c) Official acts of the legislative, executive, and judicial departments of the United States and of any state of the United States.

...
(g) Facts and propositions that are of such common knowledge within the territorial jurisdiction of the court that they cannot reasonably be the subject of dispute.

(h) Facts and propositions that are not reasonably subject to dispute and are capable of accuracy.

49. Government Code section 11515 provides for “official notice” not “judicial notice.”

1 In reaching a decision official notice may be taken, either before or after submission of
2 the case for decision, of any generally accepted technical or scientific matter within the
3 agency's special field, and of any fact which may be judicially noticed by the courts of this
4 State. Parties present at the hearing shall be informed of the matters to be noticed, and
5 those matters shall be noted in the record, referred to therein, or appended thereto. Any
6 such party shall be given a reasonable opportunity on request to refute the officially noticed
7 matters by evidence or by written or oral presentation of authority, the matter of such
8 refutation to be determined by the agency.

9 50. Barber Honda's requests for judicial notice were filed after the record closed on February
10 3, 2020, and on the same day this protest was submitted for decision. There are a number of
11 considerations and issues that would need to be addressed including, but not limited to: Whether Barber
12 Honda is permitted to submit evidence of events that occurred after the hearing? If so, what is the
13 authority and procedure? Should American Honda and/or Galpinsfield be permitted to introduce evidence
14 in response? Would the parties' respective experts need to update their reports?

15 51. Section 3066(a) provides that "the board shall make its decision solely on the record so
16 made." Government Code section 11425.10(a)(6) provides that "[t]he decision shall be in writing, be
17 based on the record, and include a statement of the factual and legal basis of the decision as provided in
18 Section 11425.50." Lastly, Government Code section 11425.50(c) provides that "[t]he statement of the
19 factual basis for the decision shall be based exclusively on the evidence of record in the proceeding and
20 on matters officially noticed in the proceeding...."

21 52. For these reasons referenced above, Barber Honda's requests for judicial notice are
22 denied.

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FINDINGS OF FACT¹⁰

Preliminary Findings

Barber Honda's Dealership

53. The Barber Honda dealership is located at 4500 Wible Road, Bakersfield, California. The dealership is situated at the northwest corner of Wible Road and Barber Way. The dealership has been in this location since 1985. This location is within the city limits of the City of Bakersfield. (Jt. Ex. 29 ¶ 1.)

54. The dealership's main building has been expanded over time and currently houses its new vehicle showroom, sales offices, Internet sales department, finance and insurance department, and customer waiting area under one roof. The customer waiting area is down a short hallway from the main showroom and has chairs, a television, snacks, a coffee machine and soda fountain and is located near the dealership's restrooms. The dealership also includes an enclosed children's play area. (Jt. Ex. 29 ¶ 2.)

55. The dealership showroom has several open floor plan office areas where sales staff meet with customers. The showroom has been recently refreshed with new paint and carpets. (Jt. Ex. 29 ¶ 4.) The showroom wraps around the front of the dealership along Wible Road and Barber Way. Outside, the dealership displays a row of new cars along both streets in front of the dealership showroom. Immediately next to the new car display area, on Wible Road, is the dealership's used car lot. (Jt. Ex. 29 ¶ 5.)

56. The dealership has a main service area with 27 service bays and a separate express service area with three lifts used exclusively for express service work such as oil changes and tire rotations. (Jt. Ex. 29 ¶ 6.)

57. Barber Honda has a separate area set aside for washing and detailing vehicles behind the service bay building away from the view of customers. This area includes three bays in the detail shop, the steam rack, the dyno room, as well as the automated car wash. There is also additional outdoor space

¹⁰ References to testimony, exhibits or other parts of the record supporting these findings are intended to be examples of evidence relied upon to reach that finding, and not to be exhaustive. Findings of Fact are organized under topical headings for readability only, and not to indicate an exclusive relationship to the issue denoted by the topic heading. The Board may apply a particular finding to any "existing circumstance" or other "good cause" factor under Section 3063.

Citations to the record are for the convenience of the Board. The absence of a citation generally signifies that the underlying facts are foundational or uncontested, or that the finding is an ultimate fact based upon other facts in the record and reasonable inferences flowing from those facts.

for storing vehicles behind the service bay building. (Jt. Ex. 29 ¶ 7.)

Surrounding Dealerships and the Bakersfield “Auto Mall”

58. There is a commercial area along Wible Road and the adjacent streets, approximately one mile long, which is occupied almost exclusively by automobile dealerships. This stretch of dealerships effectively serves as an auto mall in Bakersfield. (Jt. Ex. 29 ¶ 8.)

59. Barber Honda is located at the northern end of the auto mall. To the west of Barber Honda, directly across Wible Road, is Three Way Chevrolet. To the south of Barber Honda, directly across Barber Way, is Bakersfield Mitsubishi. (Jt. Ex. 29 ¶ 9.)

60. In addition to Chevrolet and Mitsubishi, most major brands are represented in this area including the Honda brand’s primary import competitors Toyota, Nissan, Hyundai, Kia, Mazda, Subaru, and Volkswagen. Additional automotive brands represented with dealerships in this area include: Acura, Cadillac, Chrysler, Jeep, Fiat, Buick, GMC, Lexus, Infiniti, Ford, Lincoln, Dodge, RAM, BMW, Mercedes-Benz, Audi, and Porsche. (Jt. Ex. 29 ¶ 10.)

61. Apart from some commercial and industrial development immediately north along Wible Road, the auto mall is surrounded on the north, south, and west by residential neighborhoods and smaller commercial developments supporting those residential areas with grocery stores, convenience stores, banks and similar business outlets. The auto mall is bounded on the east by Highway 99 with more residential neighborhoods east of the highway. (Jt. Ex. 29 ¶ 11.)

The Proposed Dealership Location

62. American Honda and Galpinsfield entered into a Letter of Intent effective September 15, 2017, conditionally approving Galpinsfield as an authorized Honda dealer. (Joint Statement of Undisputed Facts, ¶ 11.)

63. The proposed dealership site is located at the intersection of 7th Standard Road/Merle Haggard Drive and Industry Parkway Drive. The site is located in Kern County, outside the city limits of the City of Bakersfield. (Jt. Ex. 29 ¶ 14.)

64. The proposed dealership site is located in close proximity to Highway 99. (Jt. Ex. 29 ¶ 15.)

65. The proposed dealership site is currently undeveloped, although it is surrounded by developed lots. (Jt. Ex. 29 ¶ 16.)

66. Further south along Industry Parkway Drive, approximately one half mile from the proposed Honda dealership location, is the North Bakersfield Toyota dealership. (Jt. Ex. 29 ¶ 17.)

67. East of the proposed dealership location on 7th Standard Road/Merle Haggard Drive is the airport and a new, large Amazon distribution facility. (Jt. Ex. 29 ¶ 19.)

68. North of 7th Standard Road/Merle Haggard Drive on Highway 99 development quickly gives way to agricultural fields. (Jt. Ex. 29 ¶ 22.)

The City of Bakersfield

69. The City of Bakersfield and surrounding communities constitute a metropolitan area which the parties have referred to as the Bakersfield Metro. The population of the Bakersfield Metro is concentrated in and around the City of Bakersfield, which is itself a large, spread-out community. (Jt. Ex. 29 ¶ 27.)

70. Bakersfield has many single-story homes in low and middle income neighborhoods and also has higher income residential areas. (Jt. Ex. 29 ¶ 29.)

71. Within Bakersfield there exists significant agriculture and oil industries. There are also present other commercial areas not tied to the agricultural and oil industries such as hospitals, colleges, and city and county government facilities. (Jt. Ex. 29 ¶ 31.)

Drive Times and Distances

72. The air distance between Barber Honda and the intended Galpinsfield location is 9.1 miles. The drive distance is 9.8 miles from Barber Honda to Galpinsfield and takes about 12 minutes. (Ex. P-151, Tab 4, pp. 11-13.)

73. The air distance between Barber Honda and the nearest Honda dealer, Honda Lancaster, is 67.2 miles. (Ex. P-151, Tab 4, p. 11) The drive distance between Barber Honda and the nearest Honda dealer, AutoNation Valencia, is approximately 74.6 miles and takes one hour and 12 minutes. (Ex. P-151, Tab 4, pp. 12-13.)

Findings Relating to Permanency of Investment (Section 3063(a))

Barber Honda

74. The Barber Group, Inc. owns and operates Barber Honda. The Stephen and Maryanne Ekegren Family Trust owns Barber Honda. The beneficiaries of the trust are the Ekegren children:

Jennifer Ingram, Jonathan Ekegren, Jeffrey Ekegren, Joseph Ekegren, and Jessica Ekegren. (RT, Vol. 9, pp. 2023:13-2024:3.) Stephen Ekegren started working with Barber Honda in February of 1986. (RT, Vol. 9, p. 2029:5-7.) He is the current Dealer Principal and Jonathan Ekegren is the current Dealer Manager and is next in line to become the Dealer Principal. (RT, Vol. 9, p. 2024:9-23.)

75. Barber Honda is a family business. (RT, Vol. 9, p. 2046:14-17.) The Catalina Barber Corporation owns the property where Barber Honda is located. The owner of the Catalina Barber Corporation is the Catalina Barber Trust which is composed of the Ekegren family. (RT, Vol. 9, p. 2045:8-23; Vol 9 p. 2046:9-11.)

76. Barber Honda has been at its current location since October 1985. (RT, Vol. 9, p. 2025:6-9.)

77. Barber Honda has gone through major remodels at the Honda store and has put \$8 million of investment into Barber Honda's facilities. (RT, Vol. 9, p. 2108:11-22.) The cost of the original land purchase was about one and a half million dollars. (RT, Vol. 9, p. 2110:7-14.)

78. Barber Honda's expert, Edward Stockton, testified that Barber Honda has a substantial permanent investment in its Honda franchise. Franchised dealers tend to have highly permanent assets. (RT, Vol. 17, p. 4019:1-23.)

79. All parties are in agreement that Barber Honda's investment in its franchise operations in the Bakersfield ASA is a permanent investment. (Respondent's Post Hearing Opening Brief, p. 5; Respondent's Proposed Findings of Fact and Decision, p. 55; and Intervenor's Notice of Joinder and Joinder in Respondent's Proposed Findings of Fact and Decision, p. 1.)

Galpinsfield

80. Galpin Motors has nine franchises: Ford, Honda, Mazda, Volkswagen, Lincoln, Volvo, Jaguar, Aston Martin, and Lotus. Boeckmann Automotive operates its existing Honda Store. Galpin Motors is the umbrella for the entire operation. (RT, Vol 8, p. 1749:3-11.) Beau Boeckmann is the Dealer Principal for all of the Galpin franchises. (RT, Vol. 8, p. 1749:17-18.) He is the President and COO for the organization. (RT, Vol. 1750:16-17.)

81. Galpinsfield paid \$5 million for the purchase of the property at the proposed location in the North Bakersfield ASA. (RT, Vol 8, p. 1968:21-23.)

82. Galpinsfield’s investment in the proposed location is limited to the purchase of raw undeveloped land in an unincorporated area of Kern County immediately north of the City of Bakersfield. Galpinsfield took title to the land in May of 2016. (Ex. I-511.)

83. In September of 2017, American Honda and Galpinsfield signed a “Letter of Intent.” By the terms of the Letter of Intent, American Honda “conditionally approves Candidate’s application to become an authorized Honda Dealer at the” proposed location in North Bakersfield. (Ex. J-23. pp. 1 and 16.) Galpinsfield understood “that it may take an extended period of time to resolve a Protest and may cost AHM in excess of \$750,000.00 in attorney’s fees and costs, expert witness fees and costs, travel expenses and other expenditures. Candidate (Intervenor) may terminate this LOI at any time prior to the Trigger Event” (Ex. J-23, p. 3.)

Findings Relating to Effect on the Retail Motor Vehicle Business and the Consuming Public in the Relevant Market Area (Section 3063(b))

84. Bakersfield is the fastest growing of those cities in the country which have a population of over a quarter million. (RT, Vol. 6, p. 1434:8-14.) Bakersfield is the 11th largest city in California with a 2006 estimated population of 308,392 people. Since 2000, population has grown by 24.83%. Household growth has been almost twice the California rate. (RT, Vol. 6, p. 1434:18-23 and Ex. J-14, p. AHM_00063540.) The Bakersfield Metro is growing in long-term opportunity for the auto business. (RT, Vol. 13, p. 3118:2-7.)

85. The Bakersfield Metro has experienced population and household growth from 2008 to 2018. (RT, Vol. 1, p. 187:16-21; RT, Vol. 3, p. 584:8; and Ex. J-18.) From 2013 to 2018, Bakersfield’s population grew 4.54 percent from 482,063 to 503,933. The North Bakersfield population grew 4.97 percent from 307,497 to 322,778. During the same period of time, California population grew by 4.44 percent and the national population grew by 3.50 percent. (Ex. J-18, p. AHM_0001417.) Bakersfield’s 4.5% increase in households equates to more homes with cars and more opportunity for parts and service business. (RT, Vol. 1, p. 188:6-10.)

86. The population growth in the Bakersfield market area has been well over the national average. Household incomes and the number households have been growing ahead of the national average. This has been a growing market. New customers are coming into the market. (RT, Vol. 6, p.

1337:15-22.)

87. North Bakersfield is growing with new industrial and residential areas. (RT, Vol. 4, pp. 895:23-896:1.) From 2007 to 2012, there has been significant household growth. (RT, Vol. 2, pp. 359:8-360:16.) The open point in North Bakersfield would be convenient to the growth in the northern side of the market. (RT, Vol. 2, pp. 345:24-346:15.) Household growth is projected to continue to increase more on the north side of town. (RT, Vol. 2, pp. 359:21-360:4.) The location of the proposed new dealership is excellent to serve this portion of the Bakersfield community. (RT, Vol. 3, p. 602:6-11.)

88. As more people move into the Bakersfield market establishing more households, there is a greater opportunity to sell more vehicles. The fact that the closest American Honda dealer is 67 miles away from Barber Honda does not help American Honda to sell cars to capture that opportunity. (RT, Vol. 2, pp. 339:22-341:12.)

89. Bakersfield's population is concentrated between Barber Honda's location and the open point location.¹¹ (RT, Vol. 6, pp. 1451:20-1452:3.) Exhibit R-376, p. A-30, illustrates that the 2017 Bakersfield Metro population is mostly situated in the RMA between the open point and Barber Honda's location. The open point is located at the northern edge of the population density. Barber Honda's location is at the southern edge of the RMA and is surrounded by an area of dense population. Exhibit R-376, p. A-32, depicts household increases in the Bakersfield Metro from 2010 to 2017. The vast majority of the area is increasing around Barber Honda's location and the open point. (RT, Vol. 13, p. 3111:4-7.) The majority of household increases have occurred within the RMA between the open point and Barber Honda's location. The open point is located at the northern edge of the area where household increases have occurred. Barber Honda's location, at the southern edge of the RMA, is surrounded by areas of household increases within the RMA and by household increases south of the RMA delineation. (Ex. R-376, p. A-32.) Households are projected to grow more on the north side of Bakersfield. (RT, Vol. 2, pp. 359:21-360:3.) Exhibit R-376, p. A-32, shows a household pattern indicating a strong, growing market. (RT, Vol. 13, p. 3111:12-18.)

¹¹ Exhibit R-376, p. A-30, illustrating the 2017 population in the Bakersfield Metro is attached hereto as Attachment A. Exhibit R-376, p. A-32, illustrating household change in the Bakersfield Metro from 2010-2017 is attached hereto as Attachment B.

1 90. The addition of a new dealership in Bakersfield will benefit consumers. The growth in the
2 Bakersfield market supports the addition of a new American Honda dealership. American Honda would
3 not propose the new point in the market if it thought that it was going to do harm. (RT, Vol. 4, p. 764:3-
4 17.)

5 91. American Honda's purpose in establishing the proposed open point is to compete with
6 major competitors and to grow American Honda's brand versus other brands. (Ex. J-14, p. AHM_63540.)
7 American Honda seeks a second franchise in the Bakersfield area that would be convenient to customers.
8 (RT, Vol. 2, p. 332:18-23.) Establishing an American Honda dealership at the proposed location will
9 allow customers to conveniently cross-shop with Toyota. (RT, Vol. 2, p. 334:8-13.)

10 92. Some people living in the North Bakersfield area drive about a half hour to arrive at Barber
11 Honda's location. (RT, Vol. 3, p. 592:4-11.) Travel time from the North Bakersfield Toyota store, which
12 is near the proposed location, to Barber Honda's location is about ten minutes. (RT, Vol. 3, p. 606:2.)
13 Convenience and travel time are important to a customer seeking to purchase or service a vehicle. (RT,
14 Vol. 4, p. 972:4-9.) The establishment of the North Bakersfield open point will be more convenient to the
15 customers in North Bakersfield. (RT, Vol. 3, p. 724:3-4.)

16 93. An "in-sell" is a vehicle sold by an American Honda dealer into the area that makes up
17 another American Honda dealer's assigned ASA. (Joint Glossary of Non-Controversial Terms.) For
18 example, if a resident from the Bakersfield ASA travels to Los Angeles to purchase a vehicle from an
19 American Honda dealership and the vehicle is then registered in the Bakersfield ASA, that sale constitutes
20 an "in-sell."

21 94. Nearly 40 percent of the customers in Bakersfield that purchased American Honda vehicles
22 bought them from dealers outside the Metro, a minimum of 67 miles away. (RT, Vol. 2, pp. 337:23-
23 338:1.) This is a very high percent of the American Honda registrations for a market like Bakersfield.
24 (RT, Vol. 2, p. 337:6-22.)

25 95. In 2008, American Honda determined that there was opportunity to grow the American
26 Honda brand in Bakersfield. The Bakersfield market has been one of American Honda's worst performers
27 in California. (RT, Vol. 2, p. 334:20-23.) American Honda's January 2008 market study shows 609 units
28 of in-sell, plus gross loss of 973 for a total lost opportunity of 1,582 units. (Ex. J-14, p. AHM_

00063538.) The lost opportunity is compared to projected registrations of 1,374 for the proposed new dealer based on the Zone 12 average. Projected registrations being less than the lost opportunity shows that there is sufficient opportunity within the market so as not to have any material impact on Barber Honda. (RT, Vol. 2, pp. 347:4-14 and 348:11-23.)

96. By American Honda's market study of January 2013, covering a nine-month period, there was a gross loss of 931 plus in-sell of 379, for a total lost opportunity of 1,310 units. (Ex. J-18, p. AHM_00001382.) Total expected registrations for the North Bakersfield ASA was 1,045. (RT, Vol. 6, p. 1367:13-18 and Ex. J-18, p. AHM_00001422.) Actual registrations in the North Bakersfield ASA was 631. (RT, Vol. 6, p. 1368:5-14 and Ex. J-18, p. AHM_00001422.) This lost opportunity is not being captured within the North Bakersfield ASA. (RT, Vol. 6, p. 1369:17-21.) There is substantial opportunity for American Honda vehicle sales to exceed that which is expected from Barber Honda. Based upon American Honda's January 2013 market study, there would be no impact on Barber Honda. (RT, Vol. 6, pp. 1366:14-1367:4.) There is adequate opportunity for Barber Honda to achieve its expected sales and for the proposed dealership to do so as well. (RT, Vol. 3, p. 656:10-19 and RT, Vol. 6, pp. 1366:18-1367:1.)

97. Barber Honda is not capturing the available opportunity which can be captured by adding the open point and by Barber Honda taking a competitive response to effectively cover Barber Honda's ASA. (RT, Vol. 6, p. 1347:1-6.) Furthermore, the amount of in-sell are opportunities to sell American Honda vehicles that Barber Honda did not capture. This indicates a desire for the brand that has not been met by Barber Honda. (RT, Vol. 13, p. 3167:15-20.)

98. American Honda's historical experience is that when an open point is added, American Honda's market share goes up. If the second point is added, sales will increase. (RT, Vol. 6, p. 1347:16-24.)

99. Sharif George Farhat, American Honda's expert, described three examples of adding an American Honda open point where there were prior existing American Honda dealerships in the market. Mr. Farhat described the case studies of Baton Rouge, Louisiana, Sunrise, Arizona, and Marysville, Washington. (RT, Vol. 14, p. 3452:4-16.) In these three areas, after the new dealerships were opened, American Honda's brand performance increased. Five of the six prior existing dealers increased sales.

One prior existing dealer, who was in the process of relocating and investing in a new facility, had decreased sales. In each of the case studies, American Honda's brand increased by about 11 percent. (RT, Vol. 14, p. 3452:4-16.)

100. All three stores in Baton Rouge are performing well. (RT, Vol. 6, p. 1430:18-19.) American Honda's market share in the Baton Rouge area went from 20 percent to over 26 percent. (RT, Vol. 6, p. 1430:21-24.)

101. With two American Honda stores, there is going to be more advertising promoting the American Honda brand in the market area. Potential Toyota customers, when considering a purchase of a car, will have increased brand awareness of American Honda and its products. (RT, Vol. 4, pp. 935:18-936:3.) The new dealer will advertise the American Honda brand which will increase business. More people will be shopping for American Honda vehicles because there will be convenient dealership alternatives. (RT, Vol. 3, p. 657:6-16.) Customers considering an American Honda vehicle would have two options in the Bakersfield market. (RT, Vol. 10, p. 2456:2-6.) A new American Honda store in North Bakersfield will benefit consumers. (RT, Vol. 13, p. 2973:17-21.)

102. There is plenty of opportunity in the Bakersfield Metro. Given the available opportunity, the establishment of a new American Honda dealership at the open point alone will not materially impact Barber Honda. (RT, Vol. 3, p. 669:4-5 and RT, Vol. 4, pp. 935:18-936:3.) Establishing a new American Honda dealer in North Bakersfield will help the customer experience while not having a material impact on Barber Honda. American Honda's market share would improve. Because there are sales to capture against the competition, the establishment of a new American Honda dealer does not necessarily mean that the proposed dealer's sales would decrease Barber Honda's sales. (RT, Vol. 4, p. 897:20-24.)

103. The establishment of a second American Honda dealer in the Bakersfield market will provide another option for customers to have their vehicles serviced. There will be increased competition with independent repair facilities. In addition, the convenience of having a second American Honda dealer available for the servicing of cars may influence customers to buy an American Honda vehicle rather than a Toyota. (RT, Vol. 7, pp. 1705:24-1706:25.) A significant number of service opportunities will be created with better performance of the American Honda brand. (RT, Vol. 13, p. 3133:3-10.)

104. Galpin Motors is the Number 2 Honda dealer in the country. It is volume oriented and

1 will introduce a significant amount of competition in the Bakersfield market. Galpinsfield may capture
2 some of Barber Honda's service business that is currently in the North Bakersfield ASA. (RT, Vol. 10,
3 pp. 2448:2-2449:2.) About 40 percent of Barber Honda's sales are made in the North Bakersfield ASA.
4 Close to 45-50 percent of Barber Honda's parts and service business is from customers in the North
5 Bakersfield ASA. (RT, Vol. 11, p. 2530:18-25.)

6 105. Barber Honda is concerned that Galpinsfield may choose to dramatically reduce the cost of
7 their vehicles to get more customers into the store in order to sell more cars. Jonathan Ekegren testified
8 that it would then come down to which business is willing to experience the most pain in reducing the
9 price of the cars. (RT, Vol. 10, pp. 2484:24-2485:9.) Notwithstanding Barber Honda's general concern of
10 competition from Galpinsfield, the specific evidence is that Galpinsfield will continue the Galpin
11 organization's policy of not advertising deep discounts or doing anything that could be misleading to
12 consumers. Galpinsfield will not be advertising on price alone in a way that would undermine vehicle or
13 brand value. Galpinsfield will not be undercutting the market severely to gain share. (RT, Vol. 8, pp.
14 1959:21-1960:10.)

15 106. A new dealer in the Bakersfield market will increase American Honda's market share.
16 (RT, Vol. 13, p. 2988:13-21.) The proposed new dealer has the potential to take additional sales from
17 competitive brands like Toyota, Nissan or Hyundai. (RT, Vol. 13, pp. 2988:22-2989:4.)

18 107. An additional dealer in the market will provide more brand advertising, including more
19 freeway signs. More vehicles will be sold. (RT, Vol. 5, pp. 1031:24-1032:6.) A new dealer will stimulate
20 the market. The selection of inventory will be better. There will be another convenient place to shop for
21 an American Honda vehicle. (RT, Vol. 3, p. 696:17-24.)

22 108. In Zone 12, which includes Bakersfield, Toyota is the Number 1 brand and is American
23 Honda's primary competitor. The open point is near the North Bakersfield Toyota store. The
24 establishment of a new American Honda dealer in North Bakersfield will have an effect on inter-brand
25 competition between Toyota and American Honda. Inter-brand competition will improve, which will be
26 beneficial for consumers in Bakersfield by providing improved access to the American Honda brand. (RT,
27 Vol. 1, p. 180:20-23; RT, Vol. 4, pp. 894:10-895:15 and pp. 896:12-897:1.)

28 109. American Honda has a lower market share in Bakersfield than it has in all of the other

1 Metros in Zone 12. This indicates that there is significant opportunity for American Honda in the
2 Bakersfield market.¹² (RT, Vol. 2, p 355:10-19.) American Honda's performance is an outlier when
3 compared to its performance in the other metros of Zone 12. In June 2015, the Zone 12 competitive
4 industry share for American Honda was 22.5% whereas the competitive industry share for Barber Honda
5 was 12.3%. American Honda in Fresno had a markedly better market share of 19.5% compared to the
6 Zone 12 share. In contrast, the Zone 12 competitive industry share for Toyota was 19.8% with Toyota in
7 Bakersfield having a share of 18.4%. (Ex. J-21, p. AHM_00065083.)

8 110. American Honda seeks to fill the North Bakersfield open point so as to be more
9 competitive with Toyota. (RT, Vol. 1, p. 181:9-25.) As of 2007, Toyota has had two dealership locations
10 in the Bakersfield market. (RT, Vol. 1, pp. 178:15-179:6.) Barber Honda competes for sales with the two
11 Toyota dealerships as well as other competitors. In the Bakersfield market, American Honda has become
12 inconvenient to the customers. It is important for American Honda to have the second point in order to
13 capture potential customers that it is not now getting. (RT, Vol. 6, p. 1314:1-14.)

14 111. There are a lot of customers in the north and northwest side of Bakersfield. If they want an
15 American Honda product, the only local option is Barber Honda. Their alternative is to go outside the
16 market area to buy an American Honda vehicle or buy a vehicle other than an American Honda vehicle
17 from a competitor that is closer to them. (RT, Vol. 6, p. 1314:15-23.)

18 112. There is more than enough opportunity in this market for two American Honda
19 dealerships. There is room for additional sales which would not necessarily be coming from Barber
20 Honda's sales. (RT, Vol. 14, p. 3305:8-14.) Barber Honda may see opportunities to make more sales than
21 it has seen in its history. (RT, Vol. 14, p. 3306:2-5.)

22 **Findings Relating to Whether it is Injurious to the Public Welfare for an**
23 **Additional Franchise to be Established (Section 3063(c))**

24 113. Barber Honda participates in Bakersfield's new car dealer group which raises money for
25 donations to the Junior College and to California State University Bakersfield. The money that goes to the
26 Junior College is to be used for training mechanics in its Mechanical Training Program. (RT, Vol. 9, pp.

27 _____
28 ¹² Exhibit J-21, p. 65083, titled: "Nor Cal Metro Performance – June 2015 YTD," showing Honda's performance in
nine metro markets of Zone 12, is attached hereto as Attachment C.

2048:23-2049:12.) Barber Honda engages in marketing campaigns directed to the farm workers. (RT, Vol. 9, p. 2062:15-25.) For a number of years, Barber Honda had a program where Barber Honda joined with a radio station and fed lunch to farm workers. Barber Honda has a good relationship with the Hispanic population. (RT, Vol. 9, p. 2063:2-9.) Barber Honda promotes Autism Awareness month in April and also the juvenile diabetes cause. (RT, Vol. 9, p. 2078:9-13.)

114. Barber Honda has long-term relationships with many customers in Bakersfield. Barber Honda contends that it would be injurious to the public welfare if Barber Honda goes out of business. Barber Honda's customers would be damaged if, all of a sudden, Barber Honda was gone. However, Barber Honda's evidence fails to establish that it is a fact that Barber Honda will go out of business if Galpinsfield is allowed to open an American Honda dealership at the open point. (RT, Vol. 10, p. 2449:17-22.)

115. The fact that Galpinsfield's proposed dealership at the open point will be 9.1 miles from Barber Honda's store is consistent with 116 pairs of American Honda dealerships in California where each of the two dealerships in each pair are within 10 miles or less of each other. There are 96 pairs of American Honda dealers closer to each other than the proposed new dealership would be to Barber Honda. There are 17 pairs of American Honda dealers five miles or closer to each other.¹³ (Ex. R-378, pp. R-22-24.) Exhibit R-378, p. 23, lists Galpin Honda, located in Mission Hills, as 6.8 miles from Hamer Honda, located in Reseda, and 7.2 miles from Keyes Honda, located in Van Nuys.

116. Galpinsfield paid \$5 million for the purchase of undeveloped and unimproved property at the proposed location. (RT, Vol 8, p. 1968:21-23.) Galpinsfield's purchase of the property, raw land in unincorporated county territory, increased the tax base for Kern County. If allowed to proceed with the establishment of the proposed dealership, Galpinsfield would be adding construction to the purchased property in a developing commercial area and increasing the county tax base. (Ex. J-29.)

117. The Galpin organization has a reputation for taking care of its customers. (RT, Vol. 7, pp. 1655:24-1656:4.) For the Galpin organization, it is important to be established within the community and be part of the community. Galpinsfield wants the people of the community to feel good about the Galpin

¹³ Exhibit R-378, pp. 22-24, listing 116 pairs of California Honda locations within ten miles of each other is attached hereto and labeled as Attachment D.

organization and the American Honda brand. Galpin Motors has been involved in local school scholarship funds, local schools, the PTA, Little League, the Police Commission, local hospitals, boys' homes, offering community meeting facilities, and Wheels for Humanity. (RT, Vol. 7, p. 1656:11-23 and Ex. 21, p. 65141.)

118. Galpinsfield is expected to continue with the same type of involvement with the Bakersfield community upon establishing its operation at the proposed location. This will benefit the public. (RT, Vol. 7, p. 1657:2-9.)

119. Within the Bakersfield community, Galpinsfield will increase employment opportunities and provide convenience to customers. (RT, Vol. 8, p. 1965:8-21.) The establishment of the proposed American Honda dealership in Bakersfield will bring new employment opportunities to the market. Increasing job opportunities in Bakersfield is good for job seekers and the general public and will benefit the local economy. (RT, Vol. 7, p. 1707:10-20.) The construction and operation of the new dealership will bring money into the community. This will be good for the community in the short term and a benefit in the long term. (RT, Vol 11, p. 2714:7-25 and p. 2715:24-2716:23.)

120. The establishment of the open point will create jobs, improve American Honda's brand awareness and increase the local tax base. An additional American Honda dealer will promote competition and choice for consumers seeking to purchase or service an American Honda vehicle. There will be employment opportunities in constructing the new dealership since Galpin Motors hires locally. There will be additional advertising in the market further promoting competition and brand awareness. All of these activities benefit the public welfare; they are not injurious to the public welfare. (RT, Vol. 15, pp. 3586:21-3587:7.)

Findings Relating to Whether Franchisees of the Same Line-Make in the Relevant Market Area are Providing Adequate Competition and Convenient Consumer Care for Honda Vehicles in the Market Area, Including Adequate Sales and Service Facilities, Equipment, Supply of Vehicle Parts, and Qualified Service Personnel (Section 3063(d))

121. For 45 years, American Honda has had just one franchisee, Barber Honda, serving consumers in the Bakersfield Metro. (RT, Vol. 6, p. 1429:19-21.)

122. Barber Honda's location is in an auto mall area where most of the other franchised dealers are located. (RT, Vol. 17, p. 4018:1-7.) Barber Honda has been aggressive in its marketing with

1 advertising on TV, radio, and the Internet. (RT, Vol. 16, pp. 3893:21-3894:1; and Ex. P-112.) Barber
2 Honda's Parts and Service Department provides free oil changes to veteran groups. Barber Honda
3 provides a 20-year/250,000-mile warranty at no additional cost with every new vehicle that Barber Honda
4 sells. (RT, Vol. 9, p. 2077:14-17 and RT, Vol. 16, pp. 3894:2-3895:5.)

5 123. As American Honda's expert, Mr. Farhat, testified that "the fact of the matter is, there's no
6 [Honda] competition in this market. The nearest competitor is 60-plus miles away." (RT, Vol. 14 p.
7 3308:21-23.)

8 124. Barber Honda demonstrated that it has adequate service facilities, equipment, vehicle parts
9 supply and qualified service personnel. However, Barber Honda's service facilities are underutilized in its
10 current facility. The Bakersfield Metro area has become too big for one dealer to be able to cover the
11 whole Bakersfield Metro area. (RT, Vol. 1, p. 113:9-23.) American Honda's dealership network
12 established to service the Bakersfield market is no longer adequate to continue to serve the growing
13 number of consumers in 2019. (RT, Vol. 4, pp. 763:21-764:2.) There are more potential sales and parts
14 and service business opportunities than one American Honda dealership can handle. (Ex. J-14, p. AHM_
15 00063540.)

16 125. In the five-year period from 2013 to 2017, American Honda's registrations in the
17 Bakersfield Metro increased. But, for the same time period, Barber Honda's sales declined. Barber Honda
18 had a five-year total of 7,988 sales compared to 9,468 Honda registrations in the Bakersfield Metro. A
19 total of 1,480 Bakersfield consumers purchased Honda vehicles from dealers other than Barber Honda. In
20 2017, Barber Honda's sales were 77% of the Honda registrations in the Bakersfield Metro. (RT, Vol. 10,
21 p. 2289:7-24; Ex. R-376, p. A-26; and Ex P-112.) The chart below illustrates American Honda
22 registrations from 2013 to 2017 in the Bakersfield Metro, the Bakersfield ASA, the North Bakersfield
23 ASA, and the RMA and the number of sales by Barber Honda:

24 ///

25 ///

26 ///

27 ///

28 ///

Honda Registrations

Year	Barber Honda sales	Bakersfield Metro	Bakersfield ASA	North Bakersfield ASA	RMA
2013	1,631	1,799	1,032	767	1,226
2014	1,682	1,885	1,089	796	1,264
2015	1,584	1,862	1,080	782	1,248
2016	1,576	1,965	1,135	830	1,273
2017	1,515	1,957	1,171	786	1,232

(Exs. R-376, p. A-26, and P-112.)

126. Barber Honda's sales efforts have not reached or captured the substantial available opportunity that exists in the Bakersfield Metro. (RT, Vol. 16, p. 3905:1-3 and 13-16; RT, Vol 10, p. 2261:7-11.)

127. American Honda does not want to divide the market in half and sell the same number of cars. American Honda wants to grow and sell more cars. (RT, Vol. 2, p. 332:4-14.) American Honda completed a market study dated January 3, 2008, to review the opportunity within the Bakersfield market including the impact upon the existing dealer of adding a point. American Honda reviewed its brand performance in the market. (RT, Vol. 2, pp. 331:12-332:14.) The market study confirmed that there is opportunity to grow the Honda brand in Bakersfield and that the Bakersfield market was one of American Honda's worst performers in the state. (RT, Vol. 2, p. 334:20-23.) The market study revealed a total lost opportunity of 1,582 units and projected registrations of 1,374 units. The market study's finding that projected registrations are less than lost opportunity shows that there is sufficient opportunity in the market that adding a point would have no impact on Barber Honda. (RT, Vol. 2, p. 336:1-12 and Ex. J-14, p. AHM_00063538.)

128. "Registration effectiveness" is defined as actual registrations expressed as a percent of the expected registrations. When actual registrations equal expected registrations, registration effectiveness is 100 percent. This ratio is a direct measure of a brand's adequacy of representation. (Ex. R-376, p. A-17.)

129. In 2013, American Honda's registration effectiveness in the North Bakersfield RMA compared to the California average was 63.1%. By 2017, American Honda's registration effectiveness had declined to 53.6%. The amount of loss increased. (RT, Vol. 13, p. 3100:9-13; p. 3105:17-19; and Ex. R-376, p. A-22.) American Honda's brand is not adequately represented in the Bakersfield Metro. (RT,

Vol. 13, p. 3105:20-23.)

130. For 2017, an additional 1,068 Honda vehicles would have been necessary to bring the RMA up to the California average. (RT, Vol. 13, p. 3100:18-20 and Ex. R-376, p. A-22.)

131. The poor performance of American Honda in Bakersfield is not explained by economic conditions. All indications are that the economic conditions in the Bakersfield market are strong. Long-term, the Bakersfield market is growing. (RT, Vol. 13, pp. 3147:23-3148:2.) American Honda does not offer trucks for sale. A preference for pickup trucks in the Bakersfield area does not explain American Honda's poor performance. (RT, Vol. 13, p. 3148:3-7.)

132. The Bakersfield market is growing. Population and the number of households have increased. (RT, Vol. 14, pp. 3370:22-3371:7.) There are very strong population growth trends in the North Bakersfield ASA and the Bakersfield ASA indicating a strong market and strong potential for vehicle sales. (RT, Vol. 13, p. 3115:2-5.) Economic trends and growth in Bakersfield are much stronger than what are occurring nationally. (RT, Vol. 14, p. 3372:15-23.) The long-term trend in Bakersfield is positive for new vehicle sales. (RT, Vol. 14, pp. 3372:24-3373:2.)

133. In 2000, the RMA had a population of 345,255. In 2017, the RMA population was 444,443. The population is projected to grow to over 460,000 by 2022. (RT, Vol. 13, p. 3114:2-6 and Ex. R-376, p. A-34.) With more people and more households, more vehicles will be sold. Automotive sales have grown over the long term. There will be more vehicles needed within the Bakersfield Metro to serve the community. (RT, Vol. 13, pp. 3113:3-3114:17.)

134. In 2000, Kern County had an employed population of 270,000 people which generally increased until declining during the recession of 2008. After 2008, the county employed population continued to grow until 2014. (RT, Vol. 13, pp. 3118:12-3119:1.) As of 2017, the employed population was about 350,000. This is a good level of employment for this market. (RT, Vol. 13, p. 3119:2-12.)

135. The median household income for an American Honda buyer is at about \$90,000. Half of American Honda buyers have household income between \$30,000 and \$90,000. The other half of American Honda buyers have household incomes over \$90,000. (RT, Vol. 13, p. 3120:12-21.) There is a good mix of households that earn the level of income that American Honda buyers typically earn. All indications are that the Bakersfield market is a good market for American Honda sales. (RT, Vol. 13, p.

3123:2-10.)¹⁴ Exhibit R-376, p. A-41, shows a good distribution of American Honda type households in the RMA between Barber Honda and the open point. (RT, Vol. 13, pp. 3121:23-3122:5.) Exhibit R-376, p. A-41 depicts the density of households with incomes greater than \$90,000 concentrated between Barber Honda and the open point.

136. Consumers are dissatisfied with the current American Honda dealer network. (RT, Vol. 14, pp. 3264:24-3265:1.) In 2017, the RMA performed worse than the Bakersfield Metro. The Bakersfield market was the worst performing American Honda market in the State. The North Bakersfield ASA was the lowest performing ASA in California. (RT, Vol. 13, p. 3094:19-21; p. 3098:9-16; RT, Vol. 14, p. 3265:10-22, and Ex. 376, pp. A-17-A-19.)¹⁵ Out of 41 markets, the Bakersfield Metro and the North Bakersfield RMA rank 40 and 41, respectively. (Ex. 376, p. A-18.) Out of 125 California ASAs, the Bakersfield ASA is ranked 124 and the North Bakersfield ASA is ranked 125. (Ex. 376, p. A-19.) Exhibit 376, pp. A-18 and A-19, illustrate how unique and how poorly performing the Bakersfield Metro is relative to the rest of the state. (RT, Vol. 13, p. 3095:4-14.) The North Bakersfield ASA market is lower in performance than the Bakersfield ASA market because it is less convenient to consumers. (RT, Vol. 13, p. 3096:1-9.)

137. When a dealership sells a vehicle, the vehicle is usually registered in the ASA in which the purchaser resides. This vehicle is deemed a “unit in operation (UIO).” UIO are divided into new, active, lapsed, and inactive categories. “Lapsed” means that the vehicle has not been to an authorized American Honda dealer for 12 months and “inactive” means that the vehicle has not been back to an authorized American Honda dealer in 24 months. (RT, Vol. 5, p 1011:5-24.)

138. As of 2015, there were 1,125 lapsed UIO and 2,729 inactive UIO in the area of the North Bakersfield ASA for a total of 3,854 lapsed and inactive UIO in the North Bakersfield ASA. There were 1,554 lapsed UIO and 3,382 inactive UIO in the Bakersfield ASA for a total of 4,936 lapsed and inactive

¹⁴ Exhibit R-376, p. A-40, illustrating for the Bakersfield Metro the 2017 Median Household Income-Households with income between \$30,000 - \$90,000, is attached hereto as Attachment E. Exhibit R-376, p. A-41, illustrating for the Bakersfield Metro the 2017 Median Household Income-Households with Income Greater than \$90,000, is attached hereto as Attachment F.

¹⁵ Exhibit R-376, p. A-18, illustrating Honda Retail Registration Effectiveness to California Average-California Markets-2017 is attached hereto as Attachment G. Exhibit R-376, p. A-19, illustrating Honda Retail Registration Effectiveness to California-California ASAs is attached hereto as Attachment H.

1 UIO. For the two ASAs combined, there were a total of 8,790 lapsed and inactive UIO. (RT, Vol. 5, pp.
2 1012:8-1013:21 and J-Ex. 21, p. AHM_00065091-AHM_00065092.)

3 139. There is a cluster of lapsed and inactive UIO around the open point. The establishment of
4 a new American Honda dealership at the open point will be convenient to customers living in the North
5 Bakersfield market. (RT, Vol. 5, p. 1017:3-12; p. 1032:11-17.)

6 140. American Honda expects the Bakersfield market to grow and that the number of new
7 vehicle sales and UIO will increase. There will be more business in general for American Honda and its
8 dealers in the market. (RT, Vol. 4, pp. 764:24-765:3.) The more UIO put in the market, the more
9 opportunity there is for an American Honda dealer to provide parts and service. (RT, Vol. 4, p. 825:22-
10 24.)

11 141. UIO are an opportunity in the market. Lapsed and inactive UIO are an opportunity to grow
12 an American Honda dealer's parts and service business. (RT, Vol. 5, p. 1008:9-25; p. 1009:1-3; p.
13 1014:1-6.) The potential growth for the service side of the business in Bakersfield is substantial. There are
14 many UIO that are being missed for service by an American Honda dealer. (RT, Vol. 13, p. 3132:14-21.)

15 142. Barber Honda's existing parts and service operations will not be impacted by a new dealer
16 capturing that lapsed and inactive UIO opportunity. (RT, Vol. 5, p. 1015:14-19.) The opportunity in North
17 Bakersfield is large enough that there should be no negative impact with another dealer pumping in more
18 UIO. It should benefit both Barber Honda and the new dealer. (RT, Vol. 5, p. 1009:1-10; p. 1014:1-16; p.
19 1031:9-20.)

20 143. With an increase in the number of vehicles registered in the Bakersfield Metro, there will
21 be an increase in UIO providing more parts and service opportunities to both dealers. (RT, Vol. 4, p.
22 753:14-19.)

23 144. By the end of 2013, there were 9,540 Honda vehicles 10 years old or newer in operation
24 within the RMA. (Ex. R-376, p. A-51.) By 2017, there were 9,556 UIO in the RMA that were 10 years
25 old or newer. (Ex. R-376, p. A-51.) The Bakersfield Metro had 14,964 UIO. If the Bakersfield Metro had
26 the 6.3 UIO relative to expected registrations, as seen in Fresno, there would be 7,000 additional UIO
27 available to service. Instead of 14,964 UIO, there would have been over 22,000 UIO. (RT, Vol. 13, p.
28 3132:2-12 and Ex. R-376, p. A-51.)

145. The poor performance of American Honda in the Bakersfield Metro has significantly reduced the number of UIO that exist in the Bakersfield Metro. (RT, Vol. 13, p. 3132:2-4.) Improving performance for a brand will increase registrations which will increase the number of UIO and increase the parts and service business opportunity. There are thousands of missed UIO in this market due to the poor performance that has existed for many years. (RT, Vol. 13, p. 3099:6-16; p. 3102:24-25.) The number of lost sales is significant as it translates into a very low number of UIO for American Honda and the loss of significant parts and service opportunity. (RT, Vol. 13, p. 3103:2-4.)

146. There is parts and service business opportunity for the proposed open point in North Bakersfield which is not currently being realized by any American Honda dealer. (RT, Vol. 5, p. 1009:4-10.) While Barber Honda's service retention rate is 95.45 percent, Barber Honda is in a single-point market where there is a lot of captive business, which should be a benefit to Barber Honda. (RT, Vol. 5, p. 1050:15-20; p. 1052:18-23; and Ex. P-121, p. AHM_00001183.) Nonetheless, there is still a large number of lapsed and inactive UIO that are not being serviced within the market by an American Honda dealer. There is a significant potential parts and service business within the Bakersfield market that is not currently being captured Barber Honda. (RT, Vol. 5, p. 1053:12-17.)

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

147. American Honda's purpose in establishing the additional dealership is to compete with other major competitors such as Toyota. Being close to the North Bakersfield Toyota store is important. American Honda customers and Toyota customers are very similar. A new American Honda dealership near the North Bakersfield Toyota store will easily allow customers to cross-shop. (RT, Vol 2, p. 334:4-13.) The establishment of a new American Honda dealer in North Bakersfield will improve inter-brand competition between American Honda and Toyota and will be beneficial for consumers in Bakersfield. (RT, Vol. 4, p. 895:6-15.)

148. Intervenor's purpose is to sell vehicles. (RT, Vol. 10, pp. 2448:24-2449:2.) Competition is beneficial for consumers. Establishing a new American Honda dealer in Bakersfield will provide customers with another choice for getting their vehicles serviced. The new dealership will spur competition and increase healthy competition in the Bakersfield market that will not be ruinous for Barber

Honda. (RT, Vol. 7, pp. 1705:24-1706:20 and RT, Vol 10, p. 2456:2-6.)

149. The typical effect of establishing a new dealership in a market on the brand's performance is to improve and increase the brand's sales. There is more effort put into the market in terms of advertising and inventory. (RT, Vol. 13, p. 3175:13-24.) These factors develop an interest in consumers to shop for the American Honda brand. (RT, Vol. 13, pp. 3175:25-3176:3.)

150. The open point location is in the immediate vicinity of the North Bakersfield Toyota dealership. This is one of the reasons that Galpinsfield liked the property. Toyota is American Honda's primary competitor. (RT, Vol. 8, p. 1972:11-21.) The open point location in the unincorporated area in the North Bakersfield ASA will provide more and better convenience for consumers in the north side of Bakersfield as well as consumers in small towns north of Bakersfield. (RT, Vol. 3, pp. 723:25-724:10; RT, Vol. 4, pp. 935:18-936:9; and RT, Vol. 8, p. 1973:1-2.)

151. As indicated above, American Honda's intention is not to simply divide the market in half and have its dealers sell the same number of vehicles. American Honda wants to grow its market share and sell more vehicles. (RT, Vol. 2, p. 332:7-14.) American Honda seeks to make sure that its dealerships will be convenient to customers. (RT, Vol. 2, p. 332:18-23.) The results of Barber Honda's current operations are inadequate to meet the needs of Bakersfield consumers. (RT, Vol. 14, p. 3308:1-4.)

152. Marc Thomas, the current District Sales Manager for the Sacramento area, in his prior assignments with American Honda, had called upon Barber Honda off and on for 18 years. (RT, Vol. 3, pp. 540:25-541:18.) Mr. Thomas lived in Bakersfield and has owned property in Bakersfield for 25 years. (RT, Vol. 3, p. 542:3-13.) Based upon Mr. Thomas' experience and knowledge of the Bakersfield market, there is a significant amount of opportunity for the American Honda brand in the Bakersfield market. (RT, Vol. 3, pp. 601:23-602:5.) With only one American Honda store currently in the Bakersfield Metro, there remains a lot of opportunity for American Honda in the Bakersfield market. The location of the proposed new dealership would be good for customers in the North Bakersfield ASA. (RT, Vol. 3, p. 602:2-11.) The Bakersfield area is unique in having such a large population and only one American Honda dealer. (RT, Vol. 15, p. 3467:9-11.)

153. The proposed location in North Bakersfield will increase exposure and access to American Honda products and services. Both intra-brand and inter-brand competition will be increased. The

availability of the parts and service business to purchasers of American Honda products within the RMA and the Metro will be increased. (RT, Vol. 13, p. 3207:5-15.)

154. American Honda's expert, Mr. Farhat, sees no basis for ruinous impact on Barber Honda. The Bakersfield market is performing well below available significant opportunity. Mr. Farhat concluded that there is more than sufficient additional opportunity in the Bakersfield market to allow a new dealer to be established. (RT, Vol. 13, pp. 3173:24-3174:13.) Mr. Farhat opined that "there are no indications that Barber Honda would be materially impacted by that additional point." (RT, Vol. 14, pp. 3262:22-3263:1.)

155. The Bakersfield market is too large for one dealer. (RT, Vol. 13, p. 3148:16-24.) There is no reason to think that Barber Honda would stop selling vehicles in North Bakersfield. The fact is, there will be cross-shopping. Barber Honda will still have clients and customers that it has had for many years from that part of town. (RT, Vol. 13, p. 3150:17-23.)

156. The market is ripe for additional competition. It will be beneficial to the Bakersfield market, including Barber Honda. (RT, Vol. 13, p. 3174:14-20.)

157. The number of in-sell in the Bakersfield Metro is an opportunity that Protestant is failing to capture. (RT, Vol. 14, pp. 3353:25-3354:17.) About 34% of American Honda sales registered in Bakersfield are from outside the market. (RT, Vol. 14, p. 3353:12-17.) Without even considering the number of in-sell, there are more than enough inter-brand losses to conclude that there is enough opportunity in the Bakersfield market for a second American Honda dealer. (RT, Vol. 14, pp. 3305:8-14 and 3354:3-6.)

158. The market will be stimulated with Galpinsfield going into the Bakersfield market. More people will be shopping for Honda vehicles. Galpinsfield will advertise American Honda vehicles as will Barber Honda. Consumers will have a convenient choice of Honda dealers. (RT, Vol. 3, p. 657:2-14.)

159. The competition occasioned by the additional dealership will have a positive effect on the consuming public. The consuming public will have an additional choice where they can conveniently comparison shop. (RT, Vol. 14, p. 3453:19-25.) This competition will bring out the best efforts from both dealers. (RT, Vol. 14, p. 3454:3-6.) The establishment of the additional dealership in North Bakersfield is in the public interest on many levels. (RT, Vol. 13, p. 3207:5-15.)

160. American Honda has not been adequately represented in the Bakersfield Metro or the

1 RMA since at least 2013. (RT, Vol. 13, p. 3206:21-25.) The cause of this inadequate representation is a
2 lack of competition by the existing network, primarily Barber Honda. (RT, Vol. 13, pp. 3206:25-3207:4.)

3 161. The Bakersfield market offers sufficient opportunity for a new American Honda dealership
4 to come into the market without significantly impacting Barber Honda. With additional competition and
5 increased representation of the American Honda brand, there will be increased interest in that brand.
6 Barber Honda will have the opportunity to compete and capture more sales than it has historically. (RT,
7 Vol. 14, p. 3407:16-24.) Consumers will become interested in shopping for American Honda products
8 resulting in raising the market share relative to where it has been. (RT, Vol. 13, pp. 3175:25-3176:3.)

9 162. The market does not stay fixed. The market expands and opportunity for more sales exists
10 with better competition. (RT, Vol. 14, p. 3444:9-16.)

11 163. The concept that sales by an existing dealer are always lost with competition is not true.
12 (RT, Vol. 14, p. 3451:9-11.) As demonstrated by Mr. Farhat's case studies, where American Honda added
13 dealerships in the markets of Baton Rouge, Louisiana, Marysville, Washington, and Surprise, Arizona,
14 where American Honda dealerships already existed, sales generally increased. (RT, Vol. 14, p. 3452:7-
15 12.)

16 ANALYSIS

17 Permanency of the Investment (Vehicle Code section 3063(a))

18 Barber Honda

19 164. The preponderance of the evidence in this matter establishes that Protestant's investment in
20 its franchise operations in the Bakersfield ASA is permanent.

21 165. Over a period of 45 years, Protestant has made over \$8 million of financial investments in
22 its Honda franchise operations. Protestant is a family operation that over time was passed down to
23 Stephen Ekegren from his father-in-law and which now appears to be well in the process of being passed
24 down to the next generation. This is all demonstrative of the historical permanency of Protestant's
25 business.

26 166. All parties are in agreement that Protestant's investment in its franchise operations in the
27 Bakersfield ASA is a permanent investment.

28 ///

1 **Galpinsfield**

2 167. Intervenor's investment in the proposed location in the North Bakersfield ASA is limited
3 to the 2016 purchase of raw undeveloped land in an unincorporated area of Kern County immediately
4 north of the City of Bakersfield. Intervenor paid \$5 million for the land.

5 168. Intervenor's investment in the open point and the proposed dealership does not constitute a
6 permanent investment.

7 **Effect on the Retail Motor Vehicle Business and the Consuming Public**
8 **In the Relevant Market Area (Vehicle Code section 3063(b))**

9 169. Protestant has not presented sufficient evidence to establish that a new Honda dealership in
10 the RMA would have a negative impact on the "retail motor business" or the "consuming public" in the
11 RMA.

12 170. American Honda's historical experience is that when American Honda establishes an
13 additional dealership, American Honda's market share increases.

14 171. Intervenor seeks to establish a Honda dealership approximately a half-mile from the North
15 Bakersfield Toyota store which will allow customers to conveniently cross-shop between the brands. A
16 new Honda dealership at the open point will provide a convenient location for customers living in North
17 Bakersfield to shop for a Honda vehicle, have their cars serviced, and to purchase Honda parts. Intervenor
18 will be competing in inter-brand competition with Toyota, Respondent's principal competitor in the
19 Bakersfield market. Inter-brand competition is a positive.

20 172. The proposed dealership will increase convenience to customers in the North Bakersfield
21 market and the RMA. There are additional parts and service business opportunities for Barber Honda and
22 the proposed dealership not currently being realized by Barber Honda. The location of the proposed new
23 dealership is excellent to serve the significant household growth that has occurred in the RMA.

24 173. Competition between separate American Honda dealerships can be beneficial to the
25 consuming public. The consuming public will have convenient American Honda dealership choices. The
26 proposed dealership will provide the benefit of local competition to the Bakersfield population, and more
27 specifically, will provide more convenience to the North Bakersfield population when shopping for a new
28 vehicle and for obtaining parts and service for their vehicles.

1 174. With the establishment of the new dealership, Intervenor will also be competing with
2 Barber Honda. Without more, intra-brand competition is not a negative. Barber Honda has a history of
3 losing sales to other American Honda dealers even though they are 67 or more miles away from Barber
4 Honda. A dealership in North Bakersfield will be much more convenient to these consumers who drive
5 great distances to purchase a Honda vehicle from a dealer other than Barber Honda.

6 175. The evidence establishes that a new dealership in the North Bakersfield ASA will be
7 beneficial to the consuming public and the retail motor vehicle business (including parts and service) in
8 the RMA.

9 **Whether it is Injurious to the Public Welfare for an**
10 **Additional Franchise to be Established (Section 3063(c))**

11 176. The preponderance of the evidence is that the establishment of the new dealership would
12 be beneficial and not injurious to the public welfare.

13 177. Given Barber Honda's positive charitable and community involvement, it would be a loss
14 to the public welfare if Protestant were to go out of business. However, there is no evidence in this matter
15 that the addition of an American Honda dealership in a market with an existing American Honda dealer
16 has caused the existing dealer to go out of business. The preponderance of the evidence is that there is
17 sufficient opportunity for both Barber Honda and Intervenor in the Bakersfield market.

18 **Whether Franchisees of the Same Line-Make in the Relevant Market Area are**
19 **Providing Adequate Competition and Convenient Consumer**
20 **Care for Honda Vehicles in the Market Area, Including Adequate Sales and Service Facilities,**
21 **Equipment, Supply of Vehicle Parts, and Qualified Service Personnel (Section 3063(d))**

22 178. Pursuant to Vehicle Code section 3063, subsection (d), Barber Honda has the burden of
23 proving by a preponderance of the evidence that Barber Honda is providing adequate competition and
24 convenient consumer care for Honda vehicles in the RMA. Barber Honda has not satisfied its burden.
25 The preponderance of the evidence establishes that the Bakersfield market has outgrown Barber Honda's
26 capacity to provide adequate competition for the sale of and convenient consumer care for American
27 Honda vehicles in the market area.

28 179. The growth in population and growth in number of households in the RMA has created
opportunities that Barber Honda has been failing to capture. Even as the opportunities in the market have

1 been growing, Barber Honda's sales have been declining.

2 180. There are a large number of lapsed and inactive UIO in the Bakersfield Metro, including
3 the RMA, that are not being serviced by Barber Honda. Barber Honda has become inconvenient to many
4 customers in the RMA. The number of lapsed and inactive UIO in the RMA indicates significant parts
5 and service business opportunities that are not now being captured by Barber Honda.

6 **Whether the Establishment of an Additional Dealership**
7 **Would Increase Competition and Therefore be in the Public Interest**
8 **(Section 3063(e))**

9 181. The evidence is clear that the establishment of an additional dealership at the open point
10 will increase competition in the Bakersfield market. The new dealership will provide convenience to the
11 consuming public and be in the public interest.

12 182. Galpinsfield will directly compete with North Bakersfield Toyota which is approximately
13 half a mile away from the open point. Consumers will be able to conveniently cross-shop. The
14 establishment of a new American Honda dealer in North Bakersfield will improve inter-brand competition
15 between American Honda and Toyota.

16 183. A new American Honda dealer at the open point will increase exposure to American
17 Honda products. It will increase access to Honda products and services. Intra-brand competition with
18 Barber Honda will occur. The preponderance of the evidence does not establish that Barber Honda will
19 go out of business if Galpinsfield establishes a new America Honda dealership at the open point. There is
20 sufficient opportunity in the Bakersfield market for both Barber Honda and Galpinsfield.

21 **DETERMINATION OF ISSUES**

22 184. Protestant has sustained its burden of proof of establishing the permanency of its
23 investment. (Section 3063(a).)

24 185. Protestant has not sustained its burden of proof of showing an adverse effect on the retail
25 motor vehicle business and the consuming public in the relevant market area. (Section 3063(b).)

26 186. Protestant has not sustained its burden to prove that it would be injurious to the public
27 welfare for Galpinsfield to be established as a Honda franchisee in Bakersfield, California. (Section
28 3063(c).)

187. Protestant has not sustained its burden of proof of establishing that American Honda

franchisees are providing adequate competition and convenient consumer care for Honda vehicles in the relevant market area, taking into consideration the adequacy of motor vehicle sales and service facilities, equipment, supply of vehicle parts, and qualified service personnel. (Section 3063(d).)

188. Protestant has not sustained its burden to prove that competition would not increase if the establishment was allowed and the public interest would therefore not be served. (Section 3063(e).)

PROPOSED DECISION

Based on the evidence presented and the findings herein, IT IS HEREBY ORDERED THAT Protest No. PR-2539-17 is overruled. Protestant has not established its burden of proof under Vehicle Code Section 3066(b) that there is good cause not to establish Galpinsfield as a Honda dealership. Respondent shall be permitted to proceed with the establishment of Galpinsfield at the proposed location at 7th Standard Road (Merle Haggard Drive) and Industrial Parkway.

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

DATED: June 26, 2020

By: 
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Administrative Law Judge

Steven Gordon, Director, DMV
Elizabeth (Lisa) G. Humphreys, Branch Chief
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ATTORNEYS FOR PROTESTANT

STATE OF CALIFORNIA

NEW MOTOR VEHICLE BOARD

In the Matter of the Protest of:

BARBER GROUP, INC., a California corporation,
doing business as BARBER HONDA,

Protestant,

v.

AMERICAN HONDA MOTOR CO., INC., a
California corporation,

Respondent,

GALPINSFIELD AUTOMOTIVE, LLC,

Intervenor.

PROTEST NO. PR-2539-17

**PROTESTANT'S POST HEARING
OPENING BRIEF**

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The world has dramatically changed since the close of the merits hearing. The ongoing COVID-19 pandemic has crippled businesses throughout the United States and appears to be the catalyst that launches the next recession everyone knew was coming, but just not when. Still the full depth and severity of this crisis remains unknown. The focus during the hearing was in regard to what amount of Honda business opportunity might reasonably be expected to exist in the Bakersfield market and what impact would result from the proposed establishment of an additional Honda dealership. The value of these projections now appears moot.

Any reasonable and reliable inferences to be drawn from historical data concerning likely future events are now next to impossible. The uncertainty faced by all parties is something not experienced in our lifetimes. The health, safety, and wellbeing of the public welfare is at issue in ways not previously contemplated by the parties. Protestant and its counsel wish everyone good health and hope for a return to normal as quickly as may be possible under these circumstances.

While it is surreal to be arguing the issues involved in the current Protest at this time, nevertheless, Protestant submits its Post Hearing Brief in support of its belief good cause exists to prevent the proposed establishment of an additional Honda dealership within 10 miles of Barber Honda.

I. INTRODUCTION

This protest was filed to protect Protestant, Barber Group, Inc., dba Barber Honda's ("Barber Honda"), substantial and permanent investment in its Honda franchise—a third generation family owned business serving the Bakersfield community for more than 45 years. The record evidence demonstrates the existence of good cause to prevent the proposed establishment.

Barber Honda's interest in protecting its business from ruinous competition significantly outweighs Respondent, American Honda Motor, Co.'s ("AHM"), interest in the establishment of an additional Honda franchise. Any benefit to the public welfare that might result from the proposed establishment would be short-lived while the two Honda dealerships compete for a limited pool of business insufficient to sustain both dealers. Ultimately, one of these dealers would be forced to close its Honda operations or sell for a return well short of investment.

The proposed dealer is coming into this market expecting to lose money for an indefinite period of time and with the resources to withstand the ruinous competition that is certain to result if the proposed

establishment is permitted. The proposed establishment comes at a time of declining sales and in the midst of an unprecedented economic downturn. The on-going COVID-19 pandemic has sent markets reeling and brought most businesses, including all California dealer sales departments, to a standstill. The existing market conditions in Bakersfield, and throughout the state and nation, plainly demonstrate the proposed establishment could not come at a worse time.

AHM's decision to seek to establish the proposed North Bakersfield Open Point was a knee jerk reaction to the 2007 establishment of a second Toyota franchise in the Bakersfield market. Respondent failed to conduct any genuine rigorous analysis to determine whether this market could support two Honda dealerships nor what impact this would have on Barber Honda. Moreover, the fact Honda approved the proposed new dealer that projected it would sell more than 1,000 units above AHM's expected sales and significantly overbuild relative to AHM's internal calculations, evidences Respondent's disregard for Barber Honda's continued viability.

The primary and most important issue the Board must determine is what impact the proposed establishment would have on Barber Honda. If the Relevant Market Area ("RMA") cannot support two Honda dealerships, any potential benefits would go unrealized. Honda claims the existing available opportunity is greater than the projected sales of the proposed new dealer. However, even if Respondent's analysis were reliable, which AHM is unable to demonstrate, the proposed new dealer projects sales far above any additional opportunity that might reasonably be considered available in this market.

Further, AHM's analyses address only half of the equation—AHM failed to consider the likely impact to Barber Honda's parts and service business. AHM's purported impact analysis is limited to new vehicle sales, even then, it fails to offer any evidence for the number of sales it expects the proposed new dealer to actually capture. Nevertheless, the record reflects Galpin projects it will sell more than 1,000 vehicles above AHM's projected Market Area Potential of 1,407 for the North Bakersfield Open point.

Respondent's initial opportunity analysis was built on a shaky foundation. It is dependent upon the application of a Zone 12 (Northern California) market share average. AHM's subsequent litigation expert analysis relies on a California average. Both these analyses are incapable of accounting for

existing circumstances and local market conditions in Bakersfield and the RMA. Honda brand performance varies widely by market across California. It is unreasonable to expect the Bakersfield market to perform to the same level as the California or Zone 12 average (Zone 12 outperforms California.). The use of any average simply draws an artificial line of demarcation below which Respondent claims opportunity must exist. It is equally likely, if not more so, that genuine additional opportunity exists in markets above the California or Zone 12 average—where demand for the Honda brand is highest. It is a more reasonable assumption that markets where brand performance is above the District, Zone, or State average can support additional brand sales.

The Bakersfield market is unique to all markets in California. It shows strong consumer preferences for trucks, domestic brands, and lower priced vehicles. The average income and employment levels are below state average. The dominant industries are agriculture and oil. The Bakersfield economy is tied to the fate of the oil industry more so than any other area in California. The record reflects oil has been in decline since late 2014. The current per barrel of oil price has dramatically dropped below even recession era prices. The precipitous decline in the price of the oil that followed the merits hearing cannot be discounted nor ignored. It will be several years before the fallout from the current economic crisis is fully known. The only certainty at this time is the Bakersfield market cannot support the addition of the proposed new dealer.

A. Critical Findings the Board Must Consider and Decide

- Is Honda's "opportunity" analysis a reliable basis to conclude additional opportunity exists to support two Honda points in the Relevant Market Area?
- What amount of increased Honda brand market share should be reasonably expected in light of the case study evidence which suggests a market share increase of between 11% to 19%?
- The Toyota example shows when a second point was added to the Bakersfield market, sales were simply split between the two locations with a decline in total sales volumes. In light of this real-world example, how can the addition of the proposed Honda point be expected to have a different result?
- Is it reasonable to conclude Barber Honda will not be materially harmed and its viability jeopardized by the establishment of a dealer in areas where Barber Honda makes 40% of its new

vehicles sales and 40-50% of its parts and service sales?

- Does the minimal improvement to customer convenience justify the threat to Barber Honda's continued viability?
- Is AHM's claim that additional existing "opportunity" exceeds projected sales by the new dealer credible in light of the fact the Proposed new dealer explained to Honda it must make north of 2,000 new vehicle sales to operate profitably and it expects to make 2,500 sales by the third year of operation?
- Is it reasonable to conclude the new dealer will capture greater annual sales than Barber Honda has captured in any single year without severe harm to Barber Honda that threatens its continued viability?
- Is it reasonable to find 2,240 additional available Honda sales opportunities exist in the Bakersfield?
- Is it reasonable to permit the proposed establishment where the new dealer is prepared to experience losses indefinitely and has the resources to do so? If so, does this level of competition benefit the public interest?
- Are AHM's expectations of expected Honda brand market share growth reliable given the demonstrable evidence of declining industry sales preceding the dire economic conditions existing today?

Upon consideration of the evidence in the record, the findings reached in regard to the critical findings set forth above demonstrate good cause exists to prevent the proposed establishment. The direct threat to Barber Honda's permanent investment and continued viability would result in no meaningful lasting benefit to the public welfare.

II. BACKGROUND

A. Protestant – Barber Honda

The Ekegren family has operated franchise car dealerships in Bakersfield for more than 60 years. John Barber established the first franchise, Pontiac, in 1955. (RT Vol. X, 2315:15-23.)¹ Over the years,

¹ Protestant cites to the merits hearing transcripts in the following format: "RT [Record Transcript] Vol. [roman numeral of volume number], [page:line]-[page:line]." Protestant cites the volume number

the family has operated roughly 21 different franchises. (RT Vol. IX, 2029:14-2030:25.) At the time Stephen “Steve” Ekegren became the Dealer Principal, the Barber Group owned and operated four franchises—Cadillac, Isuzu, Saab, and Honda. (RT Vol. IX, 2031:1-10.)

Barber Honda is the last remaining new car franchise owned and operated by the Ekegren family. (RT Vol. IX, 2031:11-13.) Stephen Ekegren does not contemplate selling Barber Honda because it is the core family business. (RT Vol. IX, 2033:15-24.) John Barber established Barber Honda in approximately 1973. (RT Vol. IX, 2024:25-2025:2; RT Vol. X, 2315:24-2316:3; Exh. R-311 (celebrating Barber Honda’s 40-year anniversary as a Honda dealer in 2013).) Barber Honda has been a Honda dealer more than 45-years. (RT Vol. X, 2316:4-10; Exh. R-311.)

Stephen Ekegren is the President and Dealer Principal of Barber Honda. (RT Vol. IX, 2023:9-12.) Stephen Ekegren has been the Dealer Principal since 2002. (RT Vol. IX, 2024:16-18.) Stephen Ekegren started working at Barber Honda in February 1986. (RT Vol. IX, 2029:5-7.) Jonathan Ekegren is the Dealer Manager of Barber Honda and is the next person in line to become the Dealer Principal. (RT Vol. IX, 2024:9-15.) Jonathan Ekegren officially became the Dealer Manager in approximately 2016-2017, however, he has performed the duties of Dealer Manager since approximately 2014. (RT Vol. XI, 2516:5-22.)

Barber Honda relocated to its current Auto Mall location, at 4500 Wible Road, Bakersfield, California, in October 1985. (RT Vol. IX, 2025:3-8.) Barber Honda was the first dealer to relocate to the Auto Mall. (RT Vol. IX, 2025:9-12.)

1. *Barber Honda’s investments*

Protestant’s property is owned by the affiliated family entity Catalina Barber. (RT Vol. IX,

according to the day of the merits hearing despite the inconsistency in the merits hearing transcripts. (See transcripts for Monday, October 21, 2019, page 1 stating “Volume 5” despite it being the sixth day of the merits hearing and Tuesday, October 22, 2019, page 1 stating “Volume 6” despite it being the seventh day of the merits hearing, while the transcript for Wednesday, October 23, 2019, page 1 stating “Volume 8” for the eighth day of the merits hearing.) Therefore the transcripts for September 9-13, 2019, are cited as Volumes I-V; October 21-25, 2019, are cited as Volumes VI-X; December 3-6, 2019, are cited as Volumes XI-XIV; January 6-7, 2020, are cited as Volumes XV-XVI; and January 21 and 23, 2020, are cited as Volumes XVII and XVIII. Protestant cites pages as noted within each individual volume of the transcripts (despite overlap in page range between certain transcripts – see Day 5 and Day 6 transcripts (cited as Volumes V and VI)). Protestant cites Exhibits admitted during the merits hearing in the following format: “Exh. [Exhibit Number, e.g. J-1 or P-101, etc.].”

2045:5-17.) The family ownership of the dealership's property enables the family to curtail any rent increases. (RT Vol. IX, 2046:12-19.) Barber Honda invested \$8 million or more in its facility since 2000. (RT Vol. IX, 2137:9-17; Exh. P-102; RT Vol. IX, 2108:15-22; Exh. P-112.)

Barber Honda purchased the primary dealership property for approximately \$1.5 million. (RT Vol. IX, 2110:7-10.) Barber Honda also purchased six adjacent lots for approximately \$50,000 to \$60,000 each. (RT Vol. IX, 2110:11-2111:13.) Barber Honda bought the land for its used car facility for \$1 million. (RT Vol. IX, 2118:14-2119:14.) Barber Honda devotes approximately 8 acres to its operation including 4.79 acres for the main facility and an off-site storage lot close to 3 acres. (RT Vol. IX, 2034:17-24.) Barber Honda has approximately 30 service bays including three for Express Lube. (RT Vol. IX, 2034:25-2035:7.) Barber Honda employs over 100 employees. (RT Vol. IX, 2078:3; RT Vol. IX, 2159:21-22.) Barber Honda's initial construction of a new Honda facility cost approximately \$1,050,000. (RT Vol. IX, 2112:6-9; Exh. P-112.)

B. Respondent – AHM

In 2007, Toyota established a second point in the Bakersfield market. (Exh. J-14 at AHM_00063538 and AHM_00063540.) In response, AHM immediately determined it needed a second Honda dealership as well. (*See id.*) Respondent's witnesses claim the decision to establish a second point in Bakersfield was not a knee-jerk reaction to Toyota's establishment of a second point, but was instead the result of "rigorous" market analysis. (*See, e.g.*, RT Vol. VI, 1051:21-24; RT Vol. XIV, 3274:1-15.)

However, Honda's analysis failed to provide meaningful consideration to the likely impact that would result to Barber Honda. AHM conducted market analyses in 2008 and 2013. (Exh. J-14 and J-18.) In both instances, AHM's analysis looked only at purported available new vehicle sales "opportunity." AHM failed to provide any consideration to what impact the proposed establishment would have on Barber Honda's parts and service business. (RT Vol. VI, 1097:1-6; Exh. J-14; RT Vol. IV, 974:6-975:10; Exh. J-18.)

In addition, AHM's "opportunity" analysis is unreasonable because it is designed to *always* show market loss. The use of a state average necessarily requires that approximately half of all Honda markets will be shown to underperform at any given time. (RT Vol. XIII, 3011:3-3012:21 (Mr. Stockton

describing a state-average metric will place half the dealers above the average and half the dealers below the average by weight); RT Vol. XIV, 3390:13-24 (Mr. Farhat agreeing with Mr. Stockton’s description); RT Vol. XIV, 3390:25-3391:10 (admitting the alleged short fall in a state average metric will “never” be eliminated).) By design, this underperformance can *never* be eliminated and will *always* provide AHM the *leverage* to argue for whatever market action it desires at that time—presently to award a favored dealer an additional Honda franchise with disregard for the devastating impact certain to result to the existing Honda franchisee, Barber Honda. (*Id.*)

C. Intervenor – The Proposed Dealer

The Galpin organization is a successful dealership group started by Herbert “Bert” Boeckmann, II. (RT Vol. VIII, 1809:19-1810:11; RT Vol. VIII, 1949:5-1951:19.) Mr. Boeckmann is now in his eighties leaving his son Herbert “Beau” Boeckmann, III with primary responsibility for the direction of the organization. (RT Vol. VIII, 1854:13-15 (Bert Boeckmann was 89 years old as of October 2019); RT Vol. VIII, 1750:16-19 (Beau Boeckmann is the President and COO for the Galpin organization); Exh. J-28 at Bert Boeckmann’s December 5, 2018 Deposition, 10:18-22 (Mr. Bert Boeckmann describing Mr. Beau Boeckmann will have the ultimate responsibility for the Honda open point in North Bakersfield).)

In 2006, AHM gave the high-volume Galpin organization the Mission Hills Open Point. (Exh. J-20 at AHM_00065885.) The Galpin organization turned this dealership into one of the highest volume Honda dealers in the country. (*Id.* at AHM_00065880 (showing Galpin Honda as the #2 Volume Honda Dealership in the Nation in 2013).) However, it is readily apparent that Galpin’s success is due to the fact it sells more vehicles into surrounding dealers’ ASAs than it does into its own.² (RT Vol. XII, 2870:7-10; *see also* Exh. P-152 at Tab 15, page 1.) This is not improving Honda’s market share—it is simply redistributing Honda sales that would have otherwise been made by other existing Honda dealers.

Galpin Honda’s Mission Hills location is surrounded by 10 Honda dealers. (Exh. P-152 at Tab

² Galpin Honda made 51.5% of the new Honda sales within its own ASA in 2016 and 2017. (Exh. P-152 at Tab 15, page 1.) It made 15,782 new Honda sales nationwide. (*Id.*) Of its nationwide sales, Galpin Honda sold 6,204 within its own ASA. (*Id.*) Galpin Honda sold 6,554 new Honda vehicles into its neighboring dealers’ ASAs. (*Id.*) Galpin Honda pumped out more sales than it made within its own ASA. (*Id.*) Additionally, Galpin Honda pumped out more sales to neighboring dealers’ ASAs than those dealers pumped in to Galpin Honda’s ASA. (*Id.*)

13, page 1.) This market area stands in stark contrast to isolated Bakersfield. (RT Vol. VI, 1056:12-20 (Mr. Beniche describing Bakersfield as “kind of in an island on its own, 67 miles from its nearest [Honda] location”); RT Vol. IX, 2048:15-22 (Stephen Ekegren agreeing Bakersfield is an island economically and physically); *but see* RT Vol. XIV, 3337:22-3338:22 (Mr. Farhat refusing to agree the Bakersfield market is an isolated market).) The amount of business available to Galpin Honda and the surrounding Honda dealers is significantly greater than business available in the isolated Bakersfield market.

In addition, Galpin is prepared to operate at a loss indefinitely until it develops sufficient business to operate profitably—at the expense of Barber Honda. (RT Vol. VIII, 1859:9-1860:4 (Mr. Beau Boeckmann recognizing the Galpin proforma projects losses in the first two years and, while indicating Galpin is not in the business of trying to lose money, also indicating Galpin is well capitalized and could withstand the economic impact of another recession).) If Galpin were successful in capturing Honda business at the same rate in Bakersfield, the impact to Barber Honda would be even more devastating. (RT Vol. XII, 2870:11-20 (Mr. Stockton expecting losses for Barber Honda beyond the territorial losses of approximately 40 percent if Galpin’s performance pattern in Mission Hills held in North Bakersfield).)

Respondent notified the Galpin organization of the opportunity to be awarded the proposed North Bakersfield Open Point. In fact, Honda representatives identified Galpin as the preferred candidate early in the process based upon its proven success and its substantial capitalization. (RT Vol. VII, 1328:16-1329:23; Exh. J-21 at AHM_00065108.) One of the most important aspects of Galpin’s approval is the fact it is well capitalized and positioned to survive years of expected losses. (Exh. J-21 at AHM_00065146; RT Vol. II, 231:16-233:2 (Mr. Van Olst describing Galpin as able to weather a downturn in the economy and “they could sustain losses”).) Honda was unwilling to provide financial assistance to a minority candidate because it is a financial risk AHM is not willing to take. (*See* RT Vol. VI, 1017:20-1019:11 (Mr. Beniche testifying the Dealer Investment Program still exists but he is “hoping” to secure budget approval for it; moreover, he testified open points are not good opportunities for the minority assistance program because there are expected losses in the first years).)

Upon identifying Galpin as the preferred candidate, AHM approached then General Manager of Galpin Honda, Edik “Ed” Hartoonian, to urge Galpin to pursue the open point. (Exh. J-21 at AHM_00065107 (indicating letters were sent to the key operators on May 1, 2014 and listing Ed

Hartoonian/Boeckmann as the Operator).) Mr. Hartoonian presented the opportunity to the Galpin executive committee and persuaded Galpin to apply for the point. (Exh. J-28 at Edik Hartoonian's January 15, 2019 Deposition, 80:22-81:22; RT Vol. VIII, 1753:9-13 (Mr. Beau Boeckmann testifying the Galpin organization had not been looking at expanding representation to the Bakersfield market before Mr. Hartoonian brought the opportunity to the organization's attention).) Galpin's application for the proposed point provided Mr. Hartoonian would act as General Manager and 20% minority owner. (RT Vol. VIII, 1753:14-22; *see also* Exh. J-23 at AHM_00065571 (listing Mr. Hartoonian as a 20% owner).) Sometime in July 2018, Mr. Hartoonian left the Galpin organization to own and operate a Nissan franchise in Mechanicsville, Virginia. (Exh. J-28 at Edik Hartoonian's January 15, 2019 Deposition, 13:11-19, 28:10-16, and 28:21-22; Edik Hartoonian's March 26, 2019 Deposition, 33:17-25.) Galpin has not identified a replacement GM for the proposed point. (RT Vol. VIII, 1811:14-1812:20.)

Ed Hartoonian visited the Zone office with Beau Boeckmann in 2014 to present Galpin's proposal for the proposed point. (RT Vol. VIII, 1830:25-1831:9; Exh. J-28 at Edik Hartoonian's January 15, 2019 Deposition, 118:7-21 (Mr. Hartoonian testifying he was the lead presenter at the Honda Zone meeting); Exh. J-20.) Galpin's presentation included a projection it would sell 2,496 new Honda vehicles in its third year of operation. (Exh. J-20 at AHM_00065937.) Galpin also projected it would not operate profitably until the third year and expected to sell almost 2,000 new Honda units in its second year (*id.*)—Barber Honda has never sold more than 2,000 units in any year. (RT Vol. XVI, 3901:23-3902:4; RT Vol. XVI, 3921:10-23.) Despite these lofty projections, AHM representatives did not voice any concern for what volume of sales might *reasonably* be expected. (RT Vol. II, 248:13-23; RT Vol. IV, 957:2-18; RT Vol. VII, 1340:4-20.) The only question any AHM witness remembered being asked was in regard to who would run the store. (RT Vol. IV, 953:3-9.) Galpin assured AHM that Mr. Hartoonian would relocate to the Bakersfield market to operate the store (RT Vol. IV, 953:10-19)—this is no longer a possibility and Galpin has no idea who the GM might be if the proposed establishment were permitted. (RT Vol. VIII, 1811:14-20; *see also* RT Vol. IV, 979:13-24 (Mr. Bach indicating an answer to the question “Who’s going to operate the store?” as “We don’t know yet but we’ll find somebody,” would have been insufficient).)

Mr. Hartoonian was the driving force in Galpin's decision to pursue the open point. Mr. Hartoonian's pledged ownership and ongoing operational control was a critical reason for Honda's approval of Galpin. Honda now claims it has no concern for who will operate the proposed point because Galpin has a "deep bench" of GMs to choose from. (RT Vol. IV, 978:18-20; RT Vol. V, 1028:24-1029:2.) It should be noted Honda reps have no knowledge of Galpin's purported stable of GMs. (RT Vol. V, 1042:9-1043:15.) These claims are also contradicted by the record which reflects Galpin lost two of its best GMs since Galpin's candidate selection. (RT Vol. VIII, 1804:10-17.) The Ford store does not even operate with a dedicated GM. (RT Vol. VIII, 1807:9-25 (Mr. Beau Boeckmann testifying Michael Schwartz, who oversees all the Galpin general managers as the Vice President of Business Operations, also became the General Manager of the Ford store after Terry Miller left the Galpin organization).)

Despite Respondent's explicit cautioning against the purchase of property in North Bakersfield for the proposed point, Galpin proceeded to purchase property in May of 2016, prior to the notice of establishment being sent or even before an LOI was executed. (Exh. I-506 (showing the purchase in May of 2016); Exh. J-23 (showing the LOI executed in September of 2017); and RT Vol. VII, 1371:22-1372:6 (Mr. Hagan made it very clear that Galpin's purchase of property was at its own risk because the establishment was subject to protest).) Galpin willfully chose to encounter this risk. The Board should not consider Galpin's premature investment as a justification for why the point should be permitted to go forward. Moreover, Galpin's property investment is not permanent because it is a vacant lot that can be sold at market rate—it is not in an Auto Mall and contains no improvements.

Galpin has ongoing facility commitments to several of its other brands including Ford, Lincoln, Jaguar, Land Rover, Porsche, and Mazda. (RT Vol. VIII, 1916:13-1917:9 and 1920:22-1921:4.) It is difficult to imagine how Galpin will manage the completion of these competing facility projects simultaneously. However, it doesn't matter to Honda whether Galpin can follow through on its facility commitment—Galpin can simply sell the franchise to another buyer with equally deep pockets capable of following through on the facility obligations. Moreover, Galpin will benefit significantly from its property purchase by either executing a long-term lease to the new franchise operator or by selling the property to a new approved owner.

Despite Galpin's delays in timely submitting required documentation, the failure of its commitment to provide an experienced Honda general manager, and its narrow avoidance of litigation with Mr. Hartoonian on the eve of the merits hearing, Honda continues to support Galpin as the approved dealer for the proposed point. Honda chooses to do so because its only interest at this time is to "clear the market." If Respondent prevails in this protest, it will be free to establish and reestablish ownership groups willing to take the financial gamble in this market—this Protest is Barber Honda's only opportunity to guard against this.

D. The Proposed Location

The proposed location is located just outside the city limits of Bakersfield. (Exh. J-29 at ¶ 14.) The areas immediately north of this location consist of mostly farmland for approximately 25 miles—there is no viable North Bakersfield Metro Market. (Exh. J-29 (Stipulated Facts Regarding January 9, 2020 Market Drive) at ¶¶ 22-25 (during the market drive, the parties traveled approximately six miles north from 7th Standard Road/Merle Haggard Drive through agricultural fields and no exits until Lerdo Highway; Delano, described as a rural agricultural community, is approximately 25 miles north of the proposed dealership location); *see also* Exh. R-376 at A-41 and A-42 and RT Vol. XVII, 4063:9-12 (showing the preponderance of Bakersfield households and retail competitive registrations existing in the southern half of the RMA between Barber and the proposed North Bakersfield point).)

The proposed location is immediately adjacent to a Holiday Inn motel, one of several motels in the area. (Exh. J-29 at ¶ 18.) This area is not considered, nor will it even be considered an Auto Mall. The Toyota dealership is located on the other side of Merle Haggard Drive and is not visible from the proposed location. (Exh. R-346 at A-5U (showing the Toyota dealership and proposed location on opposite sides of the street); Exh. J-29 at ¶ 17 (stating the North Bakersfield Toyota dealership is approximately one-half mile away from the proposed Honda dealership location).) Other surrounding businesses include a tractor dealership, a motorcycle dealership, multiple fast-food restaurants, and commercial warehouses. (RT Vol. IX, 2046:23-2047:21; Exh. J-29 at ¶ 16.)

There is little population north of the proposed location. If established, the North Bakersfield dealership would be forced to compete for available Honda business in the bottom half of the RMA. (Exh. R-376 at A-41; RT Vol. XVII, 4063:9-12.)

E. Opportunity in the Market

Respondent's claim that sufficient opportunity exists in the Bakersfield market to support two Honda dealerships without any impact to Barber Honda is not credible. Respondent relies on the use of Honda's average market share in California to support its claim. Respondent's expert prepared case studies he proposed show there would be no impact to Barber Honda, however, Mr. Farhat's analysis deliberately omits consideration of the resulting market share increases from his case studies because they *do not support* his impact analysis. Mr. Farhat's analysis requires Honda brand market share to improve by approximately 80% to avoid any impact to Barber Honda (RT Vol. XIV, 3349:6-3351:16)—none of his case studies show an increase in Honda Market share above 20%. (RT Vol. XIV, 3343:12-3347:8.) The case studies show market share increases in the following percentages:

Case Study	Market Share Increase (and supporting citation)
Surprise Area	11.5% (RT Vol. XIV, 3343:3-6; Exh. R-376 at A-75)
Marysville	11.1% (RT Vol. XIV, 3346:2-8; Exh. R-376 at A-79)
Baton Rouge ³	18.6% (Exh. R-407 at R-20.2)
Bakersfield Toyota	13% (RT Vol. XII, 2850:15-2852:14; Exh. P-154)

Despite the evidence to the contrary, AHM persists in its claim the establishment of the proposed point would have no adverse consequence to Barber Honda.

In contrast to Mr. Farhat, Protestant concedes there would likely to be some increase in Honda market share if the proposed point were permitted to be established. (*See, e.g.*, RT Vol. XII, 2875:15-2876:3 (Mr. Stockton describing some potential increase in Honda brand market share if the North Bakersfield point is established, however the real-world examples do not support an increase of more than 20 percent in market share).) Nevertheless, any increase in Honda market share would not be anywhere near the levels AHM projects. Mr. Farhat's case studies confirm this. (RT Vol. XIV, 3343:12-

³ Mr. Stockton testified to the unique circumstances that led to the less than 20% market share increase in this instance. There was significant flooding in the area and the local Toyota dealership lost hundreds and hundreds of units of Toyota inventory around the time of the add point. Honda pumped a lot of additional allocation to Team Honda to seize the opportunity in the marketplace. (RT Vol. XVII, 3979:3-3980:2.) As a result, Baton Rouge exhibits a higher increase in market share than can be reasonably expected in Bakersfield.

3347:8.) The Bakersfield Toyota experience even more succinctly demonstrates this to be true. (RT Vol. XII, 2850:15-2852:14 (Mr. Stockton testifying Toyota only increased aggregate sales 13 percent higher relative to Toyota's California registrations); Exh. P-154; Exh. R-407 at R20.5 (showing an increase of approximately 8.5% when comparing the 157.5% 2002-2006 average with the 170.9% 2008-2018 average).)

Leaving the expert analyses aside, it is impossible to conclude Barber Honda would not suffer material adverse impact from the establishment of the proposed point due to the plain fact Barber Honda makes approximately 40% of its new vehicle sales to customers residing in areas more proximate to the proposed point. (RT Vol. IX, 2157:19-2159:2; *see also* RT Vol. XI, 2530:15-25; RT Vol. IX, 2161:1-18; Exh. P-172; RT Vol. XII, 2846:3-2847:4; RT Vol. XIV, 3340:24-3341:6.) Similarly, 40-50% of Protestant's parts and service business is located in areas more proximate to the proposed point. (RT Vol. IX, 2158:15-17; RT Vol. XII, 2847:6-15.) AHM's strained arguments that Barber Honda will experience no losses are not credible.

III. THE EXPERT ANALYSIS

Because the central issues in this Protest revolve around the question of whether the RMA provides sufficient opportunity to permit healthy and beneficial competition between Barber Honda and the proposed new dealer, the expert analyses require significant attention.

Protestant offered analysis and testimony from its retained expert, Edward Stockton, of the Fontana Group. Respondent offered testimony and analysis from Mr. Sharif Farhat and Herbert Walter—both in the service of AHM's inhouse consultant Urban Science Industries ("USAI"). All experts were qualified as experts without objection. (RT Vol. XII, 2814:9-24; RT Vol. XIII, 3046:6-2048:3; RT Vol. XV, 3621:20-3622:2.)

The expert testimony in this matter was expansive, and at times, complicated. However, several unifying factors narrow the degree to which the Board must sift through the expert evidence. Namely, the experts drew from common or sufficiently similar data sources. The experts disagreed over the inferences to be drawn from the data, but not as to whether the data were reliable. The expert evidence

included a broad range of market facts. This included hundreds of pages of tabulations and calculations.⁴

A. Framework for Analyzing Expert Evidence within Good Cause Considerations

The expert evidence can be synthesized down to the central question of how the addition of the Galpin dealership in North Bakersfield would affect stakeholders in the retail automotive market in the RMA. In short, how would the market change if the North Bakersfield dealership were to open, and how would those changes affect stakeholders? Both Barber Honda and AHM's experts agreed with this framework.⁵

The focus on the dynamic impacts on stakeholders from the potential Galpin add point offers a critical and economical distillation of evidence. While the administrative process allows parties great leeway in presentation of evidence, the most relevant evidence to the Board's Good Cause consideration is that which is specifically tied to the impact likely to result from the proposed establishment. Residing outside this realm are aspirations, recitations of USAI standard operating procedure, and market comparisons cherrypicked to support a desired outcome.

B. Potential Impact on Stakeholders

It is not disputed the Bakersfield market will change if AHM is permitted to fill the North Bakersfield Open Point. First, the number of Honda dealerships in the RMA would increase from one to two, for as long as both dealerships continue to operate. Second, Barber Honda would lose geographic advantages that it currently has with actual and potential Honda customers in the North Bakersfield ASA—areas where Barber Honda makes approximately 40% of its new vehicle sales and captures approximately 40-50% of its service and parts business—areas critical to Barber Honda's continued viability. (RT Vol. IX, 2157:19-2159:2; *see also* RT Vol. XI, 2530:15-25; RT Vol. IX, 2161:1-18; Exh. P-172; RT Vol. XII, 2846:3-2847:4; RT Vol. XIV, 3340:24-3341:6; RT Vol. XII, 2847:6-15.) Third, as

⁴ The Mr. Stockton and Mr. Farhat primary and supplemental reports total approximately 671 pages. (Exh. P-151, P-152, R-376, and R-378.) In addition, both experts provided other additional and supplemental pages. (Exh. P-153, P-154, R-407.)

⁵ In terms of determining impact, Mr. Stockton testified he looked at what impact changes to the Bakersfield market would have on the stakeholders including, customers, existing dealerships, and Honda. (RT Vol. XII, 2812:4-2813:2; *see also* RT Vol. XII, 2894:1-2896:18.) Mr. Farhat acknowledged Mr. Stockton "gave a good summary of [impact]" and testified there are three stakeholders including the consumer/public interest, the dealer or dealers in the market, and the manufacturer or OEM. (RT Vol. XIII, 3042:23-3043:12.)

long as two Honda dealerships operate within the RMA, average travel time and average travel distance would be reduced for some Honda customers, adding a measure of convenience. (*See, e.g.*, Exh. R-376 at A-65.)

It is reasonable to expect Honda market share would rise in Bakersfield if the Galpin point is permitted to open in North Bakersfield. It is also reasonable to expect Barber Honda's lost geographic advantage may be somewhat offset by these expected Honda market share gains. However, if Honda's market share gains are insufficient to offset Barber's geographic losses, Barber will lose sales as a result of the additional point.

C. Framework for Assessment

Testimony from Mr. Stockton and Mr. Farhat's Exhibit R-378, page R-21 provide the concepts that underlie this question. Mr. Stockton testified that if a dealership loses one-third of its territorial advantage, and brand opportunity in the market expands by 20%, then the dealership's remaining share of the market would be two-thirds of 120%, or 80%--a 20% loss. (RT Vol. XVII, 3960:9-3961:9.) Mr. Farhat's exhibit applies the same concept, but with different inputs. He assesses the geographic change based on the territory that would be closest to the North Bakersfield point, and assesses potential market share increase in the territory that would remain closest to Barber. (Exh. R-378 at R-21.) Under either Mr. Stockton's or Mr. Farhat's set of inputs the relevant consideration remains conceptually the same.

D. AHM's Attempt to Distort the Issue

Recognizing the holes Mr. Farhat's case studies poked in his impact analysis, Respondent attempts to distract the board from reasoned analysis. AHM takes the straw man approach and attempts to frame the Board's analysis as a choice between either the acceptance of Mr. Farhat's analysis or what Mr. Farhat and Respondent disingenuously characterize as Mr. Stockton's "fixed pie" model.

1. *The "Fixed Pie" Canard*

AHM brazenly argues Mr. Stockton's analysis consists of a "fixed pie" view of the market that assumes no growth in Honda market share—this claim is demonstrably false. In AHM's incarnation it attributes to Mr. Stockton, Barber Honda's loss of territorial advantage is the sole driver of the impact the proposed North Bakersfield dealership would have on Barber Honda's business. It is intellectually dishonest to characterize Mr. Stockton's analysis as a "fixed pie" analysis. (RT Vol. XVII, 3958:15-

3961:15.)

AHM's attempt to characterize Mr. Stockton's analysis as a "fixed pie" analysis is critical to AHM's efforts to convince the Board there will be no impact to Barber Honda from the proposed establishment—despite the fact Barber Honda is dependent on the North Bakersfield ASA for 40% to 50% of its business. AHM is compelled to argue Mr. Stockton's estimates of impact on Barber Honda are rigidly tethered to an assumption that Honda sales in the market would not grow if a second dealership were established because this assumption would be inconsistent with the extensive record showing some market share increase should be expected, which includes Mr. Stockton's own testimony that some increase in market share is expected.

AHM disingenuously argues the only difference between Mr. Stockton's and Mr. Farhat's analysis is that Mr. Stockton assumes *no* brand growth while Mr. Farhat does. However, the record clearly reflects the fact that Mr. Stockton presumes some Honda brand market share growth would occur as well as some increase in raw sales from the proposed establishment. (RT Vol. XII, 2875:15-2876:3; RT Vol. XVII, 3958:15-3961:9.)

Despite AHM witnesses specifically testifying to Mr. Stockton's opinion that Honda market share would increase somewhat if an additional Honda dealership were established in North Bakersfield, Mr. Farhat adopts AHM's "Fixed Pie" refrain, not passively, but actively. (RT Vol. XIII, 3187:20-3188:22.) Exhibit R-378 refers to Stockton's purported "Fixed Pie" approach, and exhibit R-378 pages R-19 and R-20 purport to test Stockton's "Fixed Pie" model by comparing Honda dealers' sales after add points to what they had been before the add point, while not accounting for the growing economy or any other change in the market. (Exh. R-378 at R-16, R-19, and R-20; *see also* RT Vol. XVII, 3975:10-3977:19 (Mr. Stockton testifying Mr. Farhat accounted for the shrinking state-wide Toyota sales in the Toyota case study but failed to account for the growing economy in his case studies).) Mr. Farhat's willingness to engage in this misleading advocacy bears heavily on the credibility of his findings.

E. The Actual Question of Impact on Barber Honda

Mr. Farhat's exhibit R-378, page R-21 reveals the reason Mr. Farhat obfuscates the issue of expected Honda market share expansion and engages in the "fixed pie" charade. In the first section of

the page, Mr. Farhat opines Honda brand expansion of approximately 80% would offset Barber's loss of territory in the Bakersfield market. (Exh. R-378 at R-21.) However, when the Honda brand increase drops by a mere 10% from the 80%, Barber Honda's lost sales are approximately 7% under Mr. Farhat's calculations. (*Id.*) In other words, the number Mr. Farhat selects for his expectation of brand expansion is the number AHM must argue to support its claim Barber will not be harmed by the proposed establishment. If Mr. Farhat's aspirational number does not hold, all evidence points to severe harm to Barber Honda. A central question in this Protest is to what extent increased Honda market share can be reasonably expected to offset Barber Honda's extreme loss of proximity advantage to customers in the North Bakersfield ASA.

1. *Undisputed Data on Market Expansion after Add Points*

Case data evidence includes four examples of brand expansion after add points. These include markets in and around the following markets: 1.) Everett, Washington area; 2.) Buckeye/Peoria/Surprise area of Phoenix's West Valley; 3.) Baton Rouge, Louisiana area; and 4.) Bakersfield, California.

Overall brand expansion in these cases was between approximately 9% and 19%. (RT Vol. XIV, 3343:12-3347:8; RT Vol. XIV, 3452:2-17; Exh. R-407, page R-20.5; RT Vol. XVII, 4015:17-4016:18 (interpreting a less than 10 percent sales increase based on Mr. Farhat's Exhibit R-407, page R-20.5); *see also* RT Vol. XVII, 3979:3-3980:2 (Mr. Stockton testifying concerning the unique circumstances leading to an 18.6% brand expansion in the Baton Rouge case study).) Nothing in the record supports an expectation of anything close to the brand expansion necessary to maintain Barber Honda's sales. All evidence in the record is consistent with structurally devastating losses for Barber Honda.

2. *AHM's Alternative Explanation of Market Expansion*

AHM offers a two-pronged approach to the question of market share expansion. The first is to fabricate the "Fixed Pie" Dichotomy. The second is the aspirational approach. Neither is credible.

The aspirational tier of AHM's strategy is the same tried-and-false approach that has been soundly rejected by this Board and courts across the country. This model starts with an average benchmark—a relatively benign starting point—and stretches it beyond the limits of any reasonable inference. First, by starting with an average benchmark the approach itself mandates that approximately half of all markets judged under this standard, by weight, will be below the average. Second, despite

using a standard that mandates equal amounts of below-average and above-average market share, it assumes that any deviation below average represents a departure from reasonably expected market share. Third, it assumes the result of any market action, such as an add point, would add exactly enough market share necessary to reach the market share average that Mr. Farhat selected. (RT Vol. XIII, 3011:3-3012:11.)

Mr. Stockton's unrebutted testimony shows this approach does not have the mathematical properties required to support Mr. Farhat's conclusions. In other words, the static observed difference between some observed market share locally and the average market share applied, cannot be used to draw dynamic inferences about what should reasonably be expected to result from a change to market circumstances. In other words, there is no analytically valid basis to assume state average market share is the level the Honda brand would achieve in Bakersfield if the proposed point is permitted to be established—it provides no meaningful analysis for evaluating the likely impact to Barber Honda. Mr. Stockton's testimony on this topic was within his expertise in econometrics, which AHM did not challenge, Mr. Farhat did not attempt to rebut, and AHM did not attempt to cross-examine.

3. *AHM's spontaneous effort to revive its market share expectation*

Cross-examination of Mr. Farhat revealed his case studies squarely contradict his assumptions about market share expansion and confirmed market share expansion would need to be some *seven times* larger in Bakersfield than in his own "Comparable Experience" examples used to support his opinion that Barber Honda would not lose sales to a North Bakersfield Honda dealership. (RT Vol. XIV, 3343:12-3347:8.) Prior to cross-examination, Mr. Farhat sought to conceal the fact his case studies were entirely unsupportive of his aspirational benchmark approach because they did not even approximate the market share increases needed in Bakersfield to avoid acknowledgment of lost sales certain to occur.

When confronted with the evidence showing his case studies did not support the aspirational market share expansion, he speculates would occur in the Bakersfield market, Mr. Farhat spontaneously offered the Board an entirely new theory. Mr. Farhat theorized Honda market share expansion in Bakersfield would dwarf that observed in his carefully selected case study examples (Not subject to the higher California market share average.) because Honda market share in Bakersfield was lower than that

in his case studies.⁶ (RT Vol. XIV, 3452:18-3453:4.) Mr. Farhat cited no basis for this new theory nor did he show any analysis to support the novel and newly formed opinion. (See RT Vol. XVII, 3969:4-3970:21 (Mr. Stockton testifying to the lack of support for Mr. Farhat's theory).) There is no reasonable justification for the Board to provide any weight to this testimony.

First, when evaluating market share in the Honda case studies, Mr. Farhat used Honda's U.S. average. Honda's market share in California is some 37% higher than it is in the U.S. The effect of the benchmark swap is to show the case study markets had much higher registration effectiveness than Bakersfield. (RT Vol. XVII, 3971:20-3972:25.) The data do not support this finding.

Second, even if Honda market share in the Bakersfield market was somewhat lower than in the case study markets, it was only modestly so. The Washington and Arizona examples did not even reach the much-lower U.S. Honda average market share after the add points were established. (Exh. R-376 at pages A-75 and A-79.) Even assuming that market share in the Bakersfield market is lower than Mr. Farhat's case study markets, there is no support for Mr. Farhat's spontaneously created theory that some reliable principle (which Mr. Farhat did not identify) would cause market share increases from the Bakersfield add point to surpass the increases observed in the case study markets. Mr. Farhat's opinion in this regard is little more than back-filling advocacy.

4. *Most Reliable Interpretation of Market Share Expansion Evidence*

A market share expansion of 20% in the Bakersfield market from the addition of the Bakersfield dealership exceeds anything observed in Mr. Farhat's case studies.⁷ There is no reasoned basis to expect market share expansion beyond this level. This level of market share expansion alone, given Mr. Stockton's most conservative estimate of lost territorial advantage for Barber Honda, would leave Barber Honda with lost sales of at least 20%. (RT Vol. XVII, 3959:17-3961:9.) There is no credible basis to expect Barber Honda's lost sales would be less than this.

⁶ It cannot be ignored that Mr. Farhat applied the lower National standard in his case studies while applying the materially higher California average to the Bakersfield market. The designed effect showed less underperformance in his case studies and significantly greater underperformance in the Bakersfield market. (RT Vol. XVII, 3971:20-3972:25.)

⁷ It would also exceed the 18.6% increase seen in Baton Rouge case study. The Baton Rouge case study showed the best-case scenario for market share increase, but still short of 20% and nothing close to the 80% increase Mr. Farhat expects for Bakersfield.

5. *Likely Lost Sales: Bakersfield Experience and Galpin Effects*

There is compelling evidence in the record to support the reasonable expectation that Barber Honda's lost sales would exceed those estimated through the lost proximity advantage and market share expansion models expressed above. The actual market experience from the addition of the North Bakersfield Toyota dealership resulted in little market share expansion and demonstrable evidence of redistributed sales—Toyota brand sales were essentially split between the two locations with no appreciable increase in sales or market share. Further, the market experience with other Galpin dealerships demonstrates the Galpin organizations brings an outsized marketing presence that draws primarily from its intra-brand neighbors.

a. Bakersfield Toyota

Exhibit P-154 outlines the detailed long-term experience following the addition of the North Bakersfield Toyota dealership. (Exh. P-154.) The alignment of the dealerships is almost identical to the proposed Honda establishment in this protest. (*See, e.g.*, Exh. P-151 at Tab 1, page 1 and Tab 6, page 1.) The reason the two Toyota points were able to survive was because the two Toyota dealerships are under the same ownership. (RT Vol. XII, 2731:16-2732:4.) Another important difference is that Toyota offers a more expansive line of products, which results in more sales opportunities for Toyota dealers that are available to Honda dealers. (RT Vol. XII, 2796:2-2797:22.)

The market share expansion following the addition of the second Toyota dealership is modest, at best. (Exh. P-154.) In the years following the establishment of the North Bakersfield Toyota dealership, the aggregate sales of the two Toyota dealerships increased little, generally less than 13%, compared to Toyota registrations in California. (*Id.*) Given the modest market share expansion, the existing Toyota dealership experiences large volumes of lost sales in every single year following the addition of the North Bakersfield Toyota dealership. These losses reach nearly 40% in some years, and generally are in the 30% range. (*Id.*; *see also* RT Vol. XII, 2850:15-2852:14.) Notably, the existing Toyota dealership never achieves the sales volumes it made prior to the establishment of the North Bakersfield Toyota dealership in any subsequent year (*id.*)—there is no reason to expect this would be different for Honda.

This example is directly relevant to the Board's consideration in this protest. What does exist of AHM's documentation prior to proceeding with this proposed market action, shows its only concern was

Toyota's market share and the presence of a second Toyota point in the market. (Exh. J-14 at AHM_00063538 and AHM_00063540; Exh. J-18 at AHM_00001385.) The alignment of the Toyota dealerships is very close to what Honda proposes in this protest. (*See, e.g.*, R-376 at A-5U.) Following Toyota's example should be expected to produce similar results.

The Toyota Bakersfield experience is much more relevant than Mr. Farhat's select case studies. The Washington case study involves the addition of a Honda dealership more than 20 miles away from an existing dealership where the connecting road is a mountainous coastal area. (RT Vol. XVII, 3978:17-24; Exh. R-376 at A-75 and A-76.) In the Baton Rouge example, severe flooding wiped out the inventory of a neighboring Toyota dealership, providing AHM the opportunity to capture inter-brand sales while a the competing Toyota dealer was without inventory. (RT Vol. XVII, 3979:3-3980:6.) Finally, the Surprise (West Valley of Phoenix) Area example is within extended developments of tract housing, which is quite unlike Bakersfield's isolated area without meaningful abutting areas in which to sell or offset impact from a new competitor. (RT Vol. XVII, 3978:9-16.)

b. Galpin Effects

AHM has not merely chosen to add a dealership in North Bakersfield; it has elected to add a Galpin dealership with a demonstrable record of achieving high-volume sales at the expense of surrounding same-brand dealers. (RT Vol. XII, 2869:16-2870:6.) This raises specific concerns that are relevant to the good cause consideration in this protest. To study this issue, Mr. Stockton considered the sales patterns around two Galpin dealerships, Galpin Honda and Galpin Ford. (RT Vol. XII, 2870:7-10; RT Vol. XII, 2873:8-2874:17; Exh. P-152 at Rebuttal Tab 15, pages 1-6.) While Mr. Farhat suggests the use of Galpin Ford may, because of the size of the dealership, involve some level of outlier behavior, the same cannot be suggested in regard to Galpin Honda. According to Mr. Farhat's figures, Galpin Honda's sales effectiveness is not above the average of Galpin dealerships that Mr. Farhat considered. (Exh. R-407 at A-71.1.)

In intra-brand competition, Galpin generally outsells other dealerships proportionally by two-to-one, three-to-one, or more. (RT Vol. XII, 2866:2869:15; Exh. P-152 at Tab 15, pages 1-6.) By way of example, Galpin sold 14.3% of the vehicles registered in First's Simi Valley area, whereas First sold just 1.3% into Galpin's San Fernando area, a 10-1 relative cross-sell favoring Galpin. (Exh. P-152 at Tab

15, page 1.) The corresponding ratio for the Van Nuys dealership was approximately 3-1 favoring Galpin. (*Id.*) The fact that cross-sell so favors Galpin means Galpin's outsized presence draws primarily from an intra-brand pool, as its large sales volumes tend to come at the expense of intra-brand competitors' sales. (RT Vol. XII, 2870:11-20.) The following shows the cross-sell ratios between Galpin and the competing Honda dealership for all the ASAs in Exhibit P-152, Tab 15, page 1:

Competitive Dealer/Dealer Area	Galpin % Area Sum of sales in Competing Dealer's ASA	Competing Dealer's % Area Sum of sales in Galpin's ASA	Ration of Galpin Cross-Sell to Competing Dealer's Cross-Sell
AutoNation Valencia / Valencia	23.2%	4.6%	5.0:1
Diamond of Glendale/New Century / Glendale	9.3%	2.3%	4.0:1
First / Simi Valley	14.3%	1.3%	11.0:1
Honda of Pasadena / Pasadena	3.9%	1.0%	3.9:1
Kolbe/Hamer / Reseda	26.0%	4.4%	5.9:1
Miller/Keyes / Van Nuys	21.5%	7.2%	3.0:1
Robertson / Hollywood	22.6%	6.0%	3.8:1
Robertson's Palmdale / Palmdale	14.5%	0.4%	36.3:1
Sierra / Monrovia	0.8%	0.5%	1.6:1
Woodland Hills / Woodland Hills	12.8%	4.7%	2.7:1

It is reasonable to expect Galpin would have a similar effect in Bakersfield, meaning that impact on Barber would be larger than the loss of territorial advantage would suggest. (RT Vol. XII, 2870:11-20; Exh. P-152 at Tab 15, page 1.)

Another reason this is of particular concern is the alignment of the Bakersfield market. Unlike Los Angeles county in which Galpin has ten adjacent Honda dealerships (Exh. P-152 at Tab 13, page 1), Bakersfield does not offer other areas from which to offset sales. (RT Vol. XII, 2870:25-2871:5 (Mr. Stockton testifying there may be an adjoining ASA to the north of the North Bakersfield ASA but no

others).) Barber Honda would have much less opportunity to offset lost sales than do the Honda dealerships in the Los Angeles market. The Bakersfield Toyota experience and the Galpin Honda experience should be given significant weight in assessing expected impact upon Barber Honda because they provide the best evidence of what should be expected when a second same line-make brand is added to the Bakersfield market and operated under the Galpin business model.

6. *Bakersfield-Specific Consideration*

AHM ignored relevant data specific to the Bakersfield market. First, whether AHM chooses to assign territory in Delano and Shafter to the “Bakersfield Metro,” the City of Bakersfield itself is the area where the majority of the population resides. Outlying communities are distant and separated by expansive and sparsely populated areas with agriculture and oil activity. (Exh. R-376 at A-41 and A-42; Exh. J-28 (Stipulated Facts Regarding January 9, 2020 Market Drive) at ¶¶ 27, 28, 30, and 31.) AHM stretches the Bakersfield Metro to its most expansive in order to support its arguments for the establishment of the proposed dealer.

a. *Bakersfield Market Conditions*

Within the RMA and throughout the Bakersfield market, no other manufacturer has established two dealerships to compete head to head under different ownership groups—Honda is the only brand to propose this scenario. Toyota and Ford have two locations each, but a single owner operates each pair of locations. (RT Vol. XII, 2731:16-2732:4; RT Vol. XII, 2796:2-2797:22; RT Vol. XVI, 3895:18-3897:9.) Notably, despite operating two separate free-standing locations, neither brand performs to state average market share. (Exh. P-151 at Tab 16, page 1 (showing Toyota with a registration effectiveness of 93.86% and Ford with a registration effectiveness of 81.07%).) AHM’s proposal to establish second point under different ownership is out-of-step with the rest of the market.

Honda’s projections of the benefits to Barber Honda and the Honda brand that would result from the proposed establishment are unsound and unsupported. As noted, the first Bakersfield Toyota dealership *never recovered to the sales volumes it achieved before the second dealership was added*. (Exh. P-154.) While the market declined in the 2008 time period, 13 years have passed since then. Furthermore, the Bakersfield market has been in decline since 2015. (Exh. P-153.) There is simply no basis to claim Bakersfield’s economy is not in a state of devastation currently. The Oak Street Auto

Row is a real-world test to AHM's story of great untapped business opportunity in the Bakersfield market. (RT Vol. XVII, 4022:12-4023:2 and 4025:3-11.) This area sits as an eyesore, undeveloped and filled with empty former dealerships that the market chose not to redevelop or even occupy. (*Id.*)

Bakersfield is a heavily sub-prime auto lending market. (*See* RT Vol. XI, 2559:21-2561:4 and Exh. P-151 at Tab 16, page 1 (showing the Mitsubishi store actively pursues subprime customers and has significantly above average market share in Bakersfield); *see also* RT Vol. XII, 2823:25-2825:9.) As a consequence, customers are much less likely to qualify for favorable financing terms, meaning they must accept less favorable terms and pay additional fees to acquire financing. (RT Vol XI, 2561:20-2562:21.) Notably, Honda Finance chooses not to finance sub-prime customers. (RT Vol. XI, 2557:3-11.) There are fewer customers in Bakersfield eligible for Honda sales promotions than there are in markets comprising the California and Zone 12 averages.

b. Oil Industry in Bakersfield and Kern County

There are two primary industries in Bakersfield—oil and agriculture. Kern county is the second largest oil-producing county in the country. The local economy suffers when the oil industry is adversely affected. (RT Vol. IX, 2057:16-2061:18.)

When the price of oil declined in 2015, approximately 1,200 oil industry jobs were lost. The drop in oil also affected property tax revenue. (Exh. P-122; RT Vol. IX, 2203:12-2205:20.) Oil prices fell to under \$30 per barrel from over \$130 per barrel by January 25, 2016. (Exh. R-322.) The price of oil has not recovered and is currently below prices not seen since the Great Recession.⁸

Unemployment in Kern county reached 10.2 percent for the fourth quarter of 2015 compared to California's unemployment figure of 5.8 percent. (Exh. R-324.) More employees were laid off in the oil industry as of February 2016. (*Id.*) Oil prices fell to under \$23 per barrel by June 2016. (Exh. P-131.) Oil is currently priced lower than in the depths of the Great Recession.

Oil is the “lifeblood” of Bakersfield. Thousands of oil pumps dot the landscape near Bakersfield. The oil crash created unemployment in Kern county at more than double California's unemployment rate. (Exh. P-133.) When the price of oil falls below lifting cost, the oil companies stop pumping oil from the ground and lay off employees. This has a direct impact on the economic conditions in

⁸ As of today's date March 30, 2020, the WTI price of oil was \$19.98.

Bakersfield. (RT Vol. X, 2467:19-2469:4.)

Bakersfield is oil and gas dependent and the oil and gas industries have been contracting in Bakersfield. (RT Vol. XII, 2890:15-24.) Mr. Farhat claimed, “the change in oil prices did not affect the performance of the [Honda] brand in a dramatic way.” (RT Vol. XIV, 3430:9-13.) However, Mr. Farhat admitted, “[O]il’s a big part of this country. It’s a big part of the economy. Decisions are made and investments are made and purchases are made based on oil prices.” (RT Vol. XIV, 3429:18-21.) He also admitted the drop in oil impacted the Bakersfield economy through a change in employment. His understanding was that oil is a big part of the economy in Bakersfield. (RT Vol. XIV, 3430:19-3431:1.)

The number of wells being drilled in Bakersfield has steadily declined since 2007. Stephen Ekegren has seen a lot of people moving out of Bakersfield as a result of oil industry declines in recent years. (RT Vol. XVI, 3919:13-3921:6.) Since the close of the merits hearing, the price of oil has plummeted to as low as \$22 per barrel. The primary economic engine in the Bakersfield market will not be driving growth in the area any time soon.

c. Mitsubishi Dealership experience

Rather than relying upon aspirational benchmarks, Mr. Stockton investigated existing local circumstances in the Bakersfield market. As a part of his investigation, he interviewed Mr. Hosseini, who manages the Bakersfield Mitsubishi store, to learn what was driving its outlier performance. (RT Vol. XII, 2826:19-2827:14.) Mitsubishi achieves a market share level *over eight times the state average* in Bakersfield. (RT Vol. XII, 2817:10-13; Exh. P-151 at Tab 16, page 1.)

Mr. Hosseini explained to Mr. Stockton that the Mitsubishi dealership has a sub-prime department of four full-time employees dedicated to the credit-challenged section of the market. (RT Vol. XII, 2817:10-13.) He stated this was necessary, because modest participation in the sub-prime credit market can lead to extremely high fees for consumers (\$2,000-\$2,500), poor customer and employee morale, and problems with employee retention. (*Id.*) However, the high volume of sub-prime financing at the Mitsubishi dealer brings down costs to credit-challenged consumers. (*Id.*) However, this required a full commitment to do so. (*Id.*) The Mitsubishi brand is better positioned for subprime customers than is Honda.

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d. Barber Honda and Sub-Prime:

Barber Honda is willing to find sub-prime financing for consumers who seek it (RT Vol. XI, 2558:2-2559:4), but the dealership does not believe promoting sub-prime sales is good for the brand or consumers. (RT Vol. XI, 2559:5-20.) Sub-prime financing involves high fees, high payments, and can leave consumers with negative equity in their vehicles, which hurts loyalty and is bad for the consumer. (RT Vol XI, 2561:20-2562:21.) Barber Honda acknowledges the dealership could sell more vehicles, for some period of time, if it actively engaged in sub-prime financing, but it believes this approach is ultimately harmful to the public welfare. (*Id.*) Having dealerships like the Mitsubishi dealership specialize in sub-prime finance serves customers in the market and brings down costs for those customers. Moreover, the Mitsubishi brand is a better fit for this type of business model because of lower vehicle prices. (RT Vol. IX, 2095:17-2096:9.)

If Honda Finance were to offer more favorable subprime financing terms than those provided by sub-prime lenders, the Honda brand would capture more of this market. However, AHM argued even relatively small differences in gross profit levels are bad for consumers and bad for the brand. If Barber Honda sought out these sub-prime deals more aggressively, it would have to account for the extra costs of financing, raising prices for consumers. AHM has already argued this would be bad for consumers and the dealership's reputation.

F. State Average Market Share

AHM's marketing case comes down to exactly what Mr. Stockton described. Mr. Farhat chooses an aspirational market share level, state average market share, and colors his market analysis based upon the observed difference in market share between Bakersfield and the state average litigation standard he picked. (RT Vol. XII, 2896:19-2897:22; RT Vol. XVII, 3963:7-13 and 4021:2-16.) This approach is invalid, and simply can't be done as a matter of mathematical operation. (*Id.*)

Mr. Farhat's analysis is dependent on the impossible premise that all markets should be at or above the benchmark that he selects in litigation. Since the average inherently must balance above-average markets with below-average markets, this requires some markets must be below average. (RT Vol. XIV, 3390:25-3391:10 ("Mr. Farhat agreed you could "never eliminate" alleged under performance and shortfalls when using a California average metric—"That's the whole point because you never

eliminate it.”))

However, Mr. Farhat’s analysis assumes any deviation below average represents underperformance, which he unreasonably concludes must represent available “opportunity.” (*See, e.g.*, Exh. R-376 at A-22 to A-25 (showing any deviation from average Honda registration effectiveness in Bakersfield to allegedly constitute shortfall or net loss); *see also* RT Vol. VII, 1261:24-1262:3 (Mr. Beniche agreeing “anything short of what Honda determines to be expected registrations is considered shortfall or available opportunity”).) Mr. Farhat conducts no analysis to determine which markets should reasonably be expected to fall below average, nor by how much. He conducts no analysis that Bakersfield is similar enough to the average of California to expect identical-or-better market share. Instead, his conclusions follow directly from his selection of the state average market share. This is aspirational and assumptive. (RT Vol. XII, 2896:19-2897:22; RT Vol. XVII, 3963:7-13 and 4021:2-16.) As determined by the Board in *Dependable*, an average standard cannot be used to assess materiality. (*Dependable Dodge, Inc. v. Fiat Chrysler Automobiles, Inc.* (Cal. NMVB, Mar. 15, 2017) Protest Nos. PR-2435-15 and PR-2436-15 at Proposed Decision ¶ 114 (“*Dependable*”).)⁹

The Bakersfield market is demonstrably different from the average of California in a number of meaningful ways. Bakersfield exhibits income levels lower than the state average. (RT Vol. III, 519:12-18; RT Vol. XII, 2818:14-2820:25; Exh. J-18 at AHM_00001417 (showing a 2013 average household income of \$57,220 for the Bakersfield ASA, \$69,700 for the North Bakersfield ASA, \$61,997 for the market total, and \$81,689 for the State of California); *see also* Exh. R-376 at A-38 (showing Bakersfield Metro 2017 median income to be \$55,042).)

Bakersfield’s economy is highly dependent on the condition of the oil industry, which is experiencing dire consequences from the economic shutdown. (RT Vol. IX, 2057:16-2061:18; Exh. P-133; RT Vol. X, 2467:19-2469:4; RT Vol. XII, 2890:15-24.)

The Bakersfield market is significantly reliant on a heavy mix of sub-prime products. (RT Vol. XI, 2559:21-2561:4 and Exh. P-151 at Tab 16, page 1 (showing the Mitsubishi store actively pursues subprime customers and has significantly above average market share in Bakersfield); *see also* RT Vol. XII, 2823:25-2825:9.)

⁹ A copy of the Board’s *Dependable* decision is attached hereto as Exhibit 1.

The isolated nature of the Bakersfield market does not offer meaningful opportunity to capture sales in surrounding markets. (RT Vol. VI, 1056:12-20 (Mr. Beniche describing Bakersfield as “kind of in an island on its own, 67 miles from its nearest [Honda] location”); RT Vol. IX, 2048:15-22 (Stephen Ekegren agreeing Bakersfield is an island economically and physically).) The existing dealer network is comprised of single owner operators for all brands represented there. (RT Vol. XII, 2731:16-2732:4; RT Vol. XVI, 3895:18-3897:9 (showing the only two brands with two locations in Bakersfield are under common ownership).)

Mr. Farhat’s use of a state average prevents his analysis from providing any meaningful consideration of existing market conditions unique to the Bakersfield market. (RT Vol. XII, 2829:17-2830:10.) Instead, Mr. Farhat simply assumes segmentation analysis is sufficient to control for all variation across markets. (RT Vol. XIV, 3383:20-24.) This is inherently a non-rigorous process designed to reach conclusions that cannot be reasonably be made from the work Mr. Farhat performed—overstating opportunity and minimizing the appearance of likely impact.

G. Financial Impact

Mr. Stockton determined there is not a reasoned case in which the financial impact on Barber Honda from the addition of Galpin would be less than Barber’s profitability—this is not a close call. (RT Vol. XII, 2875:15-2876:14; RT Vol. XVII, 3959:17-3961:9.) Mr. Farhat attempted to obfuscate this analysis with misleading claims that Mr. Stockton assumed lock-step movement of departmental profits and no increase in UIOs would occur. These statements are simply incorrect, unsupported, and deserve no weight. (RT Vol. XVII, 3980:11-3983:4.)

Mr. Walter presented analyses purporting to show Barber Honda should be more profitable than its financial statements show because the dealership can be operated like the composite dealership derived by Mr. Walter. Unlike the other dealerships which are heavily weighted toward multi-dealership groups, Barber is a family-owned dealership and is the only dealership owned by the Ekegren family. (RT Vol. XVI, 3827:12-24 (Mr. Walter admitting his composites could contain dealers who are part of groups that own multiple franchise and could spread data processing expenses across multiple franchises); RT Vol. IX, 2031:11-13.) Barber Honda does not dispute that a multi-dealer group or a public company operating the Honda dealership in Bakersfield might have different financial outcomes

or overhead operating efficiencies. However, this is of little benefit to the Board’s analysis because the Board’s consideration must necessarily focus on the likely financial impact to Barber Honda. However, Mr. Walter’s analyses stop well short of addressing the likely financial impact to Barber Honda. There is no credible showing that impact on Barber Honda would be less than its profitability.

In addition, Mr. Walter’s analyses and testimony were shown to lack credibility. Mr. Walters offered several deliberately misleading pieces of evidence and testimony. First, Mr. Walters manufactured the acronym “PAC” knowing full well the term is known as “PACK” throughout the industry.¹⁰ (RT Vol. VIII, 1883:17-1884:21 (Mr. Beau Boeckmann testifying a pack or management cost is a “very common thing in our industry”); RT Vol. XVI, 3889:4-11 (Barber Honda’s DMS, a commonly used DMS, lists the management fee as “P-A-C-K” and not “P-A-C”); RT Vol. XVII, 3993:3-8; RT Vol. XVII, 3994:6-25 (during a continuing educational seminar, Mr. Stockton posed the question if anyone had heard of “PAC” as “protection against commission” to a group of 17-20 CPAs who represent auto dealers—“nobody said that they had”).) Second, he compared Barber Honda’s profits per new vehicle retailed “PNVR” to a composite PNVR known to include “PACK”—an unequal comparison.¹¹ The following year, after Barber Honda began using PACK, Mr. Walters compared Barber Honda to the composite and added Barber Honda’s PACK money back to preserve his unequal comparison to the composite. (Exh. R-379 at page 11 ¶ 43 and Attachment 45 and 46.) Mr. Walter’s analysis is pure advocacy designed to mislead the Board to believe Barber Honda’s PNVR is substantially higher than it actually is in comparison to the composites.

¹⁰ Mr. Stockton testified PACK is “a change to the internal cost of the vehicle and, generally, it reflects recovery of some cost that the dealership incurs or some benefit that management provides to the dealership.” (RT Vol. XVII, 3995:1-18.)

¹¹ Mr. Walter first testified he looked at the Miscellaneous Income, where Barber moved their PACK moneys in 2017, for the composites but did not see significant miscellaneous incomes for the composites. “They’re non-zero but they’re not significant.” (RT Vol. XVI, 3797:18-3798:6.) Upon review of his geographic composite for 2015, it showed a miscellaneous income of \$327,000 compared to Barber Honda showing a miscellaneous income of \$11,349. (RT Vol. XVI, 3832:23-3833:13.) The size composite for 2015 shows miscellaneous income of \$451,061. (RT Vol. XVI, 3834:2-10.) Mr. Walter then denied he had said significant discrepancy—instead pointing to a consistency between years for the composites. (RT Vol. XVI, 3833:14-3834.) Barber Honda’s miscellaneous income in 2017 was \$656,662. (RT Vol. XVI, 3875:3-4.) The size-based composite has miscellaneous income of \$543,585 for 2017. (RT Vol. XVI, 3876:5-14.) Mr. Walter denied he would need to adjust for “PAC” in his composite comparison dealership groups for year prior to 2017. (RT Vol. XVI, 3868:10-22.) Mr. Walter made no adjustment for PACK in any of his composites. (RT Vol. XVI, 3869:22-24.)

IV. RETAIL SALES EFFECTIVENESS VS. BRAND SALES EFFECTIVENESS

Respondent makes every effort to distinguish RSE from Brand Registration Effectiveness (“RE”) because AHM and its USAI experts are well aware the Board and other jurisdictions have rejected the use of state average based performance metrics as misleading and unreasonable. While RSE and RE are slightly different in certain ways, they suffer from the same inherent flaws that make their use unreasonable.

First, the use of an average will always show some dealers/markets to be below the average used—AHM mandates this be unavoidable by design. (RT Vol. XIII, 3011:3-3012:1; RT Vol. XIV, 3390:13-3391:10.) Second, the use of a state average makes it impossible to capture existing local market conditions and existing circumstances. (RT Vol. XIII, 3012:2-5.) The use of segments simply does not control for local conditions. The segments do nothing more than account for the size of the vehicles registered and, to a lesser extent, the price range of these vehicles. (RT Vol. XII, 2818:23-2820:25; RT Vol. XIV, 3374:17-3375 (Mr. Farhat testifying the segments are determined based on price, size, and functionality).) Segments are incapable of considering consumer brand preference, consumer price point preference, consumer credit worthiness, or historic brand sales in any given market (*see* RT Vol. XII, 2818:23-2822:14; Exh. P-151 at Tab 18, pages 1-3)—the use of segment adjusted state averages is unreasonable and will continue to be rejected in California and throughout the nation.

Both RSE and RE rely on Honda brand market share based on a set of competitive registrations in a larger geographic area. (RT Vol. II, 450:18-451:13; RT Vol. VII, 1249:13-1252:1.) RSE relies on the Honda market share across California and RE relies on Honda market share in Northern California (Zone 12).¹² (RT Vol. II, 448:9-19; RT Vol. II, 451:14-18; RT Vol. VI, 1087:16-1088:1.) The standards are virtually identical in this regard except for the fact that Zone 12 Honda market share is higher than California, which is higher than the nation. (RT Vol. II, 449:2-13; RT Vol. VI, 1088:5-10.)

AHM suggests it will only rely on RSE when arguing good cause for termination. Nevertheless, the record in this matter is replete with evidence concerning Barber Honda’s purportedly inadequate

¹² AHM can use any benchmark for brand market share. Each will reveal a different result, but consistently show approximately half of all markets to underperform the selected benchmark to conclude additional opportunity exists.

sales performance as measured using RSE. (See, e.g., Exh. R-346.) RSE and RE are variants of the same animal. The Board has rejected average based performance standards like RSE. (*Santa Cruz Nissan, Inc., dba Santa Cruz Nissan v. Nissan North America, Inc.* (Cal. NMVB, Sept. 17, 2014) Protest No. PR-2358-13 (“*Santa Cruz Nissan*”) at Proposed Decision ¶ 185; *Dependable, supra*, at Proposed Decision ¶ 106; *Folsom Chevrolet, Inc., dba Folsom Chevrolet v. General Motors, LLC* (Cal. NMVB, Aug. 13, 2018) Protest No. PR-2483-16 (“*Folsom*”) at Proposed Decision ¶ 218.)¹³

There is no reason the Board would accept the same inertly flawed and unreasonable analysis AHM and its experts offer now. “Reliance on “average” and “rankings” without further information has the tendency to mislead. Making threats of adverse consequences if a dealer does not “achieve 100% RSE” is misusing the data.” (*Santa Cruz Nissan, supra*, at Proposed Decision ¶ 185.) Among other failings, MSR measured Dependable’s sales performance “by comparison to a statewide class of dealers, then adjusts the standard with respect to one metric: local consumer purchasing preferences for certain vehicle types. That fails to take into account that the segments used by FCA in its MSR calculation are over broad.” (*Dependable, supra*, at Proposed Decision ¶ 106.) Average-based measures like MSR and Honda’s measures are incapable of accounting for materiality, which is a critical element to establishing the need for an additional dealership. (*Dependable, supra*, at Proposed Decision ¶ 114.) As the Board determined in *Folsom* “[t]he use of RSI generally by General Motors, and as applied in this case, violates Section 11713.13(g)(1)(A). RSI fails to account for the impact of circumstances unique to Folsom Chevrolet’s market (other than segment popularity), including but not limited to demographics, geography and brand preferences.” (*Folsom, supra*, at ¶ 218.)

V. AHM’S INITIAL MARKET ANALYSES

Honda’s market study analyses from 2008 and 2013 applied the Zone 12 average market share to measure Honda brand performance in Bakersfield. (RT Vol. II, 448:15-17; Exh. J-14 and J-18.) The Zone 12 market share average is the highest among California and the nation, which had the predictable result of showing the highest level of “gross loss” or “available opportunity” possible. (RT Vol. II, 449:2-13; RT Vol. VI, 1088:5-10.) This stands in stark contrast to Mr. Farhat’s analysis in his case

¹³ A copy of the Board’s *Santa Cruz Nissan* and *Folsom* decisions are attached hereto as Exhibits 2 and 3, respectively.

studies where he applied a National Honda market share—the lowest standard available. (Exh. R-376 at A-75 and A-79.) In each instance, AHM’s initial market analyses are revealed to be result driven. (Exh. J-14 and J-18.) Each is designed to show the highest level of purported “gross loss” or “available opportunity.”

As far back as 2008, AHM was preparing to make the arguments offered in this protest litigation that the proposed “available opportunity” would be greater than the projected sales of the new dealer—a concern AHM identified early in its quest to match Toyota rooftop for rooftop. (Exh. J-14 at AHM_00063538 and AHM_00063540; *see also* RT Vol. I, 106:11-107:6; RT Vol. II, 335:13-336:12; RT Vol. III, 697:3-13 (testimony indicating if lost opportunity exceeded projected registrations, there would allegedly be no impact on Barber Honda).) In its rush to develop a record to support its position, AHM neglected to provide any meaningful consideration to parts and service business. (RT Vol. VI, 1097:1-6; Exh. J-14; RT Vol. XIV, 3283:12-3284:7; Exh. J-18.; Exh. J-28 at Ron Mattner Deposition, 41:23-42:8 (describing no service component in the 2008 market study beyond the synergy between a sales customer becoming a service customer).)

A. The 2008 Market Study

In response to the establishment of the North Bakersfield Toyota dealership, Respondent conducted its first market analysis to support Honda’s desire to add a North Bakersfield point to match Toyota. (Exh. J-14 at AHM_00063538 and AHM_00063540.)

AHM’s executive summary is dated January 3, 2008, and summarizes Honda’s preliminary findings based upon analysis conducted in mid to late 2007—immediately prior to the Great Recession. (Exh. J-14 at AHM_00063538.) Mr. Frank Beniche reviewed and adopted these findings in his capacity as Senior Market Representation Manager. (RT Vol. VI, 1062:24-1063:1.) There are several critical statements and data points in the executive summary the Board must take into consideration.

First, AHM believes the North Bakersfield location was being developed as an Auto Mall—this was not true in 2008 and is not even a remote possibility in 2020. (Exh. J-14 at AHM_00063538 under the Market Findings heading.) The Chevrolet dealership operating in North Bakersfield failed—only Toyota remains in operation. (RT Vol. VI, 1054:15-1055:6.) The North Bakersfield location is surrounded by warehouses, motels, and fast food. (Exh. J-29 (Stipulated Facts Regarding January 9,

2020 Market Drive) at ¶ 16.) The proposed location is not in an area zoned to be an Auto Mall. (RT Vol. X, 2250:8-2251:10.) It is immediately adjacent a motel. (Exh. J-29 (Stipulated Facts Regarding January 9, 2020 Market Drive) at ¶ 16.)

Second, the 2008 executive summary concludes “We also recognize that the ‘lost opportunity’ in this market is equal to or may be exceeded by the potential sales to the newly established dealership. While this will present a challenge should there be a protest of this establishment, we believe that other factors weigh more heavily towards establishment.” (Exh. J-14 at AHM_00063538 under the Recommendations heading.) To deal with this *challenge*, AHM retained USAI experts Mr. Farhat and Mr. Walter to zealously advocate AHM’s position and confirm the initial analysis performed using USAI market analysis tools and the services of USAI employees imbedded within AHM’s Market Planning Department.

AHM calculated gross loss to be 973 units.¹⁴ (Exh. J-14 at AHM_00063538.) AHM calculated the expected registrations of a North Bakersfield dealer to be between 1,374 to 982—each of these projections exceeds the gross loss figure of 973. (Exh. J-14 at AHM_00063538 under the “Total Lost Opportunity” and “Impact Analysis (Projected Regs)” headings.) Moreover, the inherent flaws of AHM’s gross loss cannot be ignored. AHM’s gross loss is based upon the unreasonable expectation the Bakersfield market should be expected to capture the same competitive segment market share as Honda does throughout California. (RT Vol. VII, 1261:24-1262:3 (AHM considers anything short of its expected registrations to be shortfall or available opportunity).) The Board has previously rejected the application of state market share averages to measure performance as unreasonable. (*Santa Cruz Nissan, supra*, at Proposed Decision ¶ 185; *Dependable* at Proposed Decision ¶ 106; *Folsom, supra*, at Proposed Decision ¶ 218.) AHM’s argument that state averages are only unreasonable when used for the purpose of proposed franchise termination is unavailing and ignores the inherent flaws of any analysis based upon a comparison to state average.

The 2008 Market Study finds 609 units of Insell into the Bakersfield market. AHM argues Insell should be considered opportunity available to support the establishment an additional point. It is unreasonable to consider Insell to be available opportunity. These are not sales lost to Honda. By

¹⁴ The document indicates it is based on data through August 2007. (Exh. J-14 at AHM_00063538.)

definition, these are Honda brand sales. (RT Vol. VI, 1056:9-1057:14.) No market in California is devoid of Insell registrations. (RT Vol. III, 544:24-545:1; RT Vol. III, 650:8-19; RT Vol. IV, 815:3-8; RT Vol. XIV, 3352:10-13 (Mr. Farhat testified he could not recall ever seeing a Honda market with zero Insell—“Even Hawaii has in-sell, believe it or not”).) AHM makes no effort to quantify what reasonable level of Insell should be or what amount of Insell reduction might reasonably be expected if the proposed point were established. (*See, e.g.*, RT Vol. III, 493:22-494:11.)

Despite the difficulties AHM identified in regard to its gross loss relative to expected sales, AHM cites other factors that weigh more heavily in favor of the establishment of an additional Honda point. The first factor AHM identifies is the false claim Toyota outsells Honda 2 to 1. (Exh. J-14 at AHM_00063538.) This data is misleading because it includes all Toyota registrations, which includes big trucks and other products where AHM does not offer a competing product.

The next factor cited is AHM’s claim the market has a population of 750,000. (Exh. J-14 at AHM_00063538.) This claim is misleading because it includes remote and isolated communities that should not be considered part of the Bakersfield market. (Exh. J-29 (Stipulated Facts Regarding January 9, 2020 Market Drive) at ¶¶ 22-25; *see also* Exh. R-376 at A-41 and A-42.) AHM also claims “many” of its competitors have two locations in the market—a fact contrary to information on the same document, which plainly indicates of Honda’s main competitors, only Toyota has a second location. (Exh. J-14 at AHM_00063538.) Moreover, the Board is required to make findings in regard to the RMA—evidence concerning the overbroad “Bakersfield Metro” adds little to this analysis.

Next, AHM finds the optimals support the proposed establishment in North Bakersfield. However, AHM’s optimals also support an establishment north of the proposed location—more than 10 miles from Barber Honda. (Exh. J-14 at AHM_00063594 and AHM_00063595; *see also* Exh. R-376 at A-63.) AHM witnesses said they would not consider establishing a Honda dealership in Delano because it is too remote to the Bakersfield market. (RT Vol. II, 328:13-329:3.) Nevertheless, AHM includes Delano in its definition of the Bakersfield market and uses the presence of those dealerships as justification for the need for the proposed North Bakersfield location. (RT Vol. I, 179:14-17; Exh. J-14 at AHM_00063543; Exh. R-376 at A-5.)

Finally, AHM finds its dealer count analysis indicates the need for 2.1 Honda dealerships. (Exh.

J-14 at AHM_00063538.) AHM's initial calculation was flawed because it includes dealers in Delano and Shafter—areas AHM considers too remote to even be considered for additional Honda representation, where small domestic brand dealers are located. (RT Vol. II, 328:13-329:3; Exh. J-14 at AHM_00063543; Exh. R-376 at A-5.) Moreover, the record reflects AHM's dealer count has declined to 1.7, meaning AHM's own analysis concludes it *does not need 2 dealers* to equal the average Honda dealer count in the Bakersfield market. (Exh. J-22 at AHM_00063623.) The dealer count figure further declines if the Delano and Shafter dealers are excluded. (RT Vol. XIV, 3419:9-3420:20 (indicating a dealer count of 1.9 declines to 1.65 if the Delano and Shafter dealers are excluded).) The proposed establishment would give Honda a higher dealer count than most markets.

The third important piece of data from AHM's 2008 analysis is AHM's determination of Market Area Potential¹⁵ ("MAP") for the proposed North Bakersfield Open Point. While Honda determined the North Bakersfield Open Point was projected to have 1,482 annual sales, the MAP figure has since declined to 1,407. (Exh. J-14 at AHM_00063538; RT Vol. I, 102:4-9 (testifying to a MAP figure of 1,482 in the 2008 market study); RT Vol. I, 102:18-23.) AHM claims this reduction is due to its decision to reduce the sizes of the Bakersfield ASAs. However, this does not square up with AHM's claims of significant growth and the fact that the reduced territory represented sparsely populated areas. AHM offered no evidence to support this claim other than a map showing an outline of the old ASA compared to the current ASA. (Exh. R-404.) The significance of this evidence is that it demonstrates AHM's internal analysis of actual Market Area Potential is significantly less than what its Expert presented for consideration during the merits hearing.

Overall, the importance of AHM's 2008 findings is that relative to today, AHM's own MAP figure is lower than what it was in 2008, dealer count is lower than it was in 2008, the North Bakersfield Chevy dealer failed and closed, and there is no possibility of a second Bakersfield Auto Mall at the proposed location. Each of these factors provide good cause why the proposed point should not be established.

¹⁵ AHM calculates a new dealer's anticipated annual sales over a projected five-year period. (RT Vol. VI, 1084:8-23.)

B. The 2013 Market Study

While Respondent designated the North Bakersfield Open Point in 2008, it suspended efforts to fill the point in response to the Great Recession. (RT Vol. II, 363:10-21.) On November 26, 2013, Mr. Van Olst sought AHM's permission to fill the North Bakersfield Open Point. (Exh. J-18, AHM_00001386.) AHM did some additional market review designed to support its decision to fill the North Bakersfield Open Point. These findings are included in the executive summary. (Exh. J-18, AHM_00001384.)

This time around, AHM determined the market size test to be 1.9—meaning Honda needs less than two dealers, a number that drops to 1.7 by 2015. (Exh. J-18 at AHM_00001384; Exh. J-22 at AHM_00063623.) At the top of the 2013 executive summary AHM concludes “In order to stay competitive with Toyota, it is important to move forward on the second point for the Bakersfield market.” (Exh. J-18 at AHM_00001384.) At the bottom of the page under “Market Findings,” AHM states “Toyota has been represented within the proposed open point geography since late 2007. All other brands are represented with one location. Toyota is the competitive and registration leader.” (Exh. J-18 at AHM_00001384.) This once again confirms AHM's motivation to match Toyota rooftop for rooftop. AHM cites no other reason for its decision to fill the open point other than to keep pace with Toyota.

It is important to take notice of what is missing from the 2013 analysis compared to what was included in 2008. There is no reference to AHM's previous concern that a new dealer's sales may exceed purported “lost opportunity” in the market. There is no reference to a “an Auto Mall being developed.” There is no reference to the presence of a Chevy dealer being located in North Bakersfield, nor its closure. Moreover, nowhere in AHM's 2013 analysis is there any consideration of what impact the proposed establishment would have on Barber Honda's new vehicle sales or service and parts business. (*See, generally*, Exh. J-18.) Similarly, the only consideration of the public interest is a chart showing an immaterial reduction in customer drive distance from 13.9 miles to 11.8. (Exh. J-18 at AHM_00001444.)

At no point in these proceedings did AHM witnesses show any concern for the fact Barber Honda is dependent upon the North Bakersfield ASA for approximately 40% of its new vehicle sales. (*See, e.g.*, RT Vol. I, 112:16-113:15.) AHM's 2013 market analysis shows AHM was well of aware of this because the data it considered through September 2013 shows 39% of Barber Honda's sales were made

to residents within the North Bakersfield ASA. (Exh. J-18 at AHM_00001423.) While Honda chooses to ignore this fact, the Board cannot. (*See*, RT Vol. I, 113:4-15 (Mr. Van Olst testifying Honda did not have a concern Barber made 40 percent of its sales in the North Bakersfield ASA and instead focusing on “the overall opportunity of the market”).) There is no credible evidence to support AHM’s claim the proposed establishment nearest customers where Barber makes 40% of its new vehicle sales would not result in material harm to Barber Honda.

Similarly, both AHM’s 2008 and 2013 market analyses are devoid of any consideration of the likely impact to Barber Honda’s parts and service business. (RT Vol. VI, 1097:1-6; Exh. J-14; RT Vol. XIV, 3283:12-3284:7; Exh. J-18.; Exh. J-28 at Ron Mattner Deposition, 41:23-42:8 (describing no service component in the 2008 market study beyond the synergy between a sales customer becoming a service customer).) The evidence shows Barber Honda depends on the North Bakersfield ASA for approximately 40% to 50% of its parts and service business. (Exh. J-21 at AHM_00065091 to AHM_00065093.) A healthy parts and service department is the financial backbone of any viable dealership operation. (RT Vol. VII, 1479:18-20.) Nevertheless, AHM failed to provide any consideration to the impact the proposed establishment would have to Barber Honda’s parts and service business. (RT Vol. VI, 1097:1-6; Exh. J-14; RT Vol. XIV, 3283:12-3284:7; Exh. J-18.; Exh. J-28 at Ron Mattner Deposition, 41:23-42:8 (describing no service component in the 2008 market study beyond the synergy between a sales customer becoming a service customer).)

C. Service Business

Barber Honda captures available service customer business at a rate of approximately 95% higher than the Honda brand’s state average.¹⁶ (Exh. P-121.) While some inactive customers remain, this is to be expected as no market captures all Honda UIOs. (RT Vol. V, 1046: 7-16.) It is disingenuous for Honda to argue the lapsed and inactive UIOs in Bakersfield represents opportunity that will be captured by the proposed dealer—the market penetration is already almost 100% higher than the average Honda dealer. (RT Vol. V, 1046:12-1049:1, 1050:15-20, and 1052:14-23; Exh. P-121.)

Barber Honda relies on households more proximate to the proposed Open Point dealership

¹⁶ The service retention percentage is the percent above or below the dealership is from the expected service retention—zero percent is at the average dealer service retention. (RT Vol. VII, 1440:10-23.)

location for approximately 40% to 50% of its service and parts business. (Exh. J-21 at AHM_00065091 to AHM_00065093.) It defies logic to claim Barber Honda would not suffer material adverse impact from the addition of a second Honda point located closer to these customers. (RT Vol. VII, 1430:5-9 and 1432:17-21 (service customers typically receive service from the nearest Honda dealership; convenience is important to service customers).)

AHM attempts to discount this plain to see fact by advancing the misleading argument that lapsed and inactive UIOs represent opportunity that will avoid any loss of service and parts business by Barber Honda. However, AHM acknowledges no market exhibits 100% service customer retention and AHM is unable to provide any guidance for what number of the lapsed and an inactive UIOs should reasonably be expected to be captured by the addition of a second Honda dealer. (RT Vol. V, 1046:7-16 (Mr. Bach testifying he is not aware of any Honda market with no lapsed or inactive UIOs and Honda does not have an “acceptable level” or expected level of lapsed or inactive UIOs in a market); RT Vol. XV, 3596:9-16 (Mr. Van Olst testifying he does not have any basis to say what percentage of the lapsed and inactive UIO count should be expected to be captured if the open point is permitted to go forward).) AHM’s logic is contrary to its sales opportunity analysis which equates low market share with higher opportunity. In contrast, AHM argues high service customer capture rates indicates greater service opportunity. These contrary paradigms are emblematic of AHM’s result driven analyses.

VI. HONDA IDENTIFIED SEVEN KEY OPERATORS

Immediately prior to the candidate selection process, Honda identified seven “key operators.” (Exh. J-21 at AHM_00065108; RT Vol. VII, 1329:3-23.) These candidates were selected by AHM representatives based upon their success with other dealerships and significant capitalization. Only *two* of these key operators were interested in pursuing the opportunity AHM’s expert characterizes as “one of the most ripe” he’s ever seen. (Exh. J-21 at AHM_00065108; RT Vol. VII, 1329:24-1331:22; RT Vol. XIII, 3200:12-14.) Galpin and John L. Sullivan were the *only* key operators interested in the proposed North Bakersfield opportunity. (Exh. J-21 at AHM_00065108.) Presumably the other Five AHM identified key operators would not agree with Mr. Farhat’s assessment. There is no evidence in the record Galpin conducted any independent analysis of the market. It appears Galpin instead chose to blindly adopt AHM’s USAI figures. (See RT Vol. VIII, 1829:14-25 (Mr. Beau Boeckmann testifying

the Galpin organization did not do any third-party analysis and “relied on Honda’s expertise and their research”).)

Ultimately, AHM unanimously selected Galpin for the proposed North Bakersfield point. Galpin was identified early in the process because of its tremendous capitalization and its RSE (sales volume) performance. (Exh. J-21 at AHM_00065146; RT Vol. II, 231:16-233:2; RT Vol. VII, 1333:21-1334:1.) The evidence shows Galpin’s RSE performance is directly attributable to its ability to capture sales in neighboring Honda dealers ASAs. (RT Vol. XII, 2869:16-2870:6; RT Vol. XII, 2870:7-10; Exh. P-152 at Tab 15, pages 1-6.) AHM offered no evidence to suggest Galpin Honda’s performance increased Honda *brand* market share commensurate with its RSE.

VII. DEALERS BEAR ALL FINANCIAL RISK

Dealers make the financial investment in their franchise operations. In this instance, whether Barber Honda or the proposed new dealer can operate profitably is of no consequence to Respondent. (RT Vol. III, 478:16-479:24.)

AHM would benefit from forcing the Bakersfield dealers to aggressively compete for a limited pool of business in the isolated Bakersfield market. (*See* RT Vol. XIII, 3014:5-3016:9 (Mr. Stockton describing AHM’s profit motive of adding another dealer to the Bakersfield market); *see also* Exh. P-151 at Tab 24, pages 1-8.) Both dealers would be required to aggressively price vehicles below wholesale price with the hope of capturing some profit through F&I and future service business. This is the business model most advantageous for all franchisors. Creating a level of competition in markets that prevents dealers from earning a profit from new vehicle sales ensures AHM’s vehicles will be offered for sale at the lowest possible price. This can be sustainable for longer periods in times of growth, but when the cyclical automotive industry encounters recession there is predictable culling of dealers, as was observed in 2008.

AHM disingenuously argues Barber Honda enjoys a monopoly in Bakersfield—it does not—Insell by other Honda dealers into the market proves this to be true as does competition from other brands offering competing products. In contrast, AHM has the benefit of dictating its profit margin on the vehicles it sells to its dealers—AHM sets its own price and profit margin. Unlike Barber Honda, AHM is free to determine whatever level of profit it needs from each vehicle transaction—Barber Honda

cannot purchase Honda vehicles from a competing supplier.

This plain to see disparity in bargaining power is the precise reason why the legislature created Barber Honda's right to protest the proposed establishment. (*New Motor Vehicle Bd. of California v. Orrin W. Fox Co.* (1978) 439 U.S. 96, 100-102.) "The disparity in bargaining power between automobile manufacturers and their dealers prompted Congress and some 25 States to enact legislation to protect retail car dealers from perceived abusive and oppressive acts by the manufacturers. California's version is its Automobile Franchise Act. Among its other safeguards, the Act protects the equities of existing dealers by prohibiting automobile manufacturers from adding dealerships to the market areas of its existing franchisees where the effect of such intrabrand competition would be injurious to the existing franchisees and to the public interest." (*Id.*)

VIII. THE GOOD CAUSE FACTORS AND STANDARD OF REVIEW

In making its determination whether good cause has been established for not entering into and additional same line-make franchise the Board is required take into consideration and make findings concerning the existing circumstances and "good cause" factors set forth in Section 3063. (Cal. Veh. Code § 3063.)

The *Piano* case provides guidance for the Board's consideration of the ultimate good cause determination to be made in this protest. (*Piano v. State of California ex rel. New Motor Vehicle Bd.* (1980) 103 Cal.App.3d 412, 417.) The Board must consider and balance the interests of AHM in permitting the proposed point to be established, the interests of Barber Honda in protecting against ruinous competition that poses grave risk to its continued viability, and the public's interest in additional competition. (*Id.*)

A. Permanency of Investment

There can be little doubt Protestant's investment is permanent and substantial. Barber Honda has been operating in Bakersfield for more than 45 years. (RT Vol. X, 2316:4-10.) Although this investment and the resulting goodwill developed over this period of time does not show on a balance sheet, its permanency is without challenge. (RT Vol. XVI, 3756:19-3758:15.) As the Board recognized in the *Dependable* decision, a dealers over 45 years operation of a new motor vehicle dealership "certainly speaks to the permanency of their investment. During this time, the business has built up

considerable good will in their community which does not show up on the dealership financial reports to [the manufacturer].” (*Dependable, supra*, at ¶ 129.)

B. Effect on Retail Motor Vehicle Business and Consuming Public in the RMA

This good cause factor requires the Board consider the effects the proposed establishment would have on existing retail business and the consuming public in the RMA. (Cal. Veh. Code § 3063, subd. (b).) The RMA is the statutorily created ten-mile radius extending from the proposed open point. (Cal. Veh. Code § 507.) Respondent would have the Board focus its consideration on the over-broad “Bakersfield Metro,” which includes areas so remote as to have little to no interaction with the RMA.

The RMA consists of single franchise points for all manufacturers, with the exception of Toyota. The Ford dealer operates a primary dealership location as well as a satellite location. (RT Vol. IX, 2025:13-24.) The Toyota franchises are owned and operated by the same owner. (RT Vol. XII, 2731:16-2732:4.) As a result, all brands, with the exception of Toyota and Ford, provide customer convenience equal to Honda’s. (Exh. J-18 at AHM_00001444; *see also* Exh. R-376 at A-65.) It should be noted only Toyota is considered a primary competitor to Honda. (Exh. J-18 at AHM_00001444.)

A striking characteristic of the RMA is the fact that the overwhelming majority of the population exists in the bottom half of the RMA, south of the proposed point. (Exh. R-376 at A-41; RT Vol. XVII, 4063:3-20.) The consequence of this is that any increase in competition will occur in the bottom half of the RMA—an area already adequately served by Barber Honda. This is an unusual characteristic of Honda’s proposed market action. Most proposed add point locations are surrounded by population radiating out in multiple directions.

With most proposed add point locations, it is expected to observe significant business available to a proposed new dealer in all directions from the proposed add point location. Here, the business is in one direction and located immediately between the existing dealer and the proposed dealer. (Exh. R-376 at A-41; RT Vol. XVII, 4063:3-20.) The proposed new dealer and Barber Honda would be forced to compete for available business in only *half* the RMA. (*Id.*) This circumstance is unique and illustrative of the fact there does not exist robust opportunity in the RMA sufficient to result in a beneficial increase to competition or consumer convenience within the RMA.

///

C. Whether it is Injurious to the Public Welfare for an Additional Point to be Established

Protestant's expert provided analysis and testimony demonstrating the material impact the proposed establishment would have to Barber Honda's sales, service, and parts business. Mr. Stockton's conservative range of impacts leave no room to find Barber Honda would not be severely impacted by the proposed establishment. (RT Vol. XVII, 3960:9-3961:9; Exh. P-152 at Tab 22, pages 4 (showing an impact on Barber Honda's profitability of over three times the overall profitability for a 20% impact).) Moreover, the proposed dealer's demonstrable business practice of cannibalizing sales from surrounding dealers provides compelling reason to expect the impact to be significantly higher. (RT Vol. XII, 2870:11-20.)

Galpin is prepared to experience financial losses indefinitely. Galpin's own projections indicate it will not begin to operate profitably until it captures in excess of 2,000 annual sales. (Exh. J-20 at AHM_00065937.) If Galpin is successful in achieving profitability after an indeterminate number of years of losses, it will be the result of its siphoning off Honda sales, service, and parts business from Barber Honda. Barber Honda cannot survive competition on this scale against a competitor willing to lose money as long as it takes. (RT Vol. VIII, 1859:9-1860:4 (Mr. Beau Boeckmann recognizing the Galpin proforma projects losses in the first two years and, while indicating Galpin is not in the business of trying to lose money, also indicating Galpin is well capitalized and could withstand the economic impact of another recession).)

The establishment of the proposed point would result in the forced closure of Barber Honda. The loss of this long-time community institution would result in injury to the public welfare. Moreover, the ruinous competition that would precede Barber Honda's demise would also be characterized by sharp business tactics harmful to consumers and the Honda brand.

More customers live closer to Barber Honda than the proposed point. (*See, e.g.*, Exh. R-376 at A-41 and A-42.) If Barber Honda were to fail, customer convenience would be worse now than it is today. Moreover, Barber Honda is located in the only Auto Mall in Bakersfield. (RT Vol. X, 2250:8-2251:10.) The presence of the Bakersfield Auto Mall provides adequate competition in the RMA. The addition of a Honda franchise on the outskirts of town would provide no meaningful benefit.

If Barber Honda were to fail, the loss of a major brand like Honda would significantly injure the draw of the Auto Mall. Consumers benefit from the ability to shop multiple brands at a centralized location. The elimination of Honda from the Auto Mall would materially reduce the synergistic effect of having all major brands at a single location. Additionally, the proposed open point is located outside the city limits of the City of Bakersfield. (Exh. J-29 (Stipulated Facts Regarding January 9, 2020 Market Drive) at ¶ 14.) The elimination of Barber Honda would leave the City of Bakersfield without a Honda dealership within the city limits.

D. Adequacy of Competition and Convenient Consumer Care in the RMA

It is not disputed Barber Honda's facility is adequately equipped and staffed with qualified personnel. Honda makes no claim Barber Honda's facility is inadequate to serve the needs of existing customers.

Barber Honda's facility reflects several years of expansion and improvements. Barber Honda has a separate service drive for Express Lube customers with signage designating the different service drives. (RT Vol. IX, 2035:8-21; RT Vol. IX, 2540:10-18.) Barber Honda added an Express Lube building in approximately the last 10 years for approximately \$180,000 to \$200,000. (RT Vol. IX, 2116:23-2118:13.) By 2006, Barber Honda remodeled its showroom in two phases for \$256,089 and then \$314,434 to add the Honda Oil Can Image feature, add new image furniture, expand the showroom, move the service drive, create a big display area for the Parts/Service area, create a new waiting area, remove all old sales offices, and create new F & I offices. (RT Vol. IX, 2113:12-2114:20; Exh. P-112.)

Barber Honda also expanded the facility to install a \$17,005 dyno machine and allow for car washing and detailing. (RT Vol. IX, 2115:14-2116:22; Exh. P-112.) The facility addition for the detail shop, smog dyno stall, and automatic carwash cost \$179,862 for the facility addition and \$174,927 for the car wash and detail addition. (*Id.*) Barber Honda built its used car facility in 2007 for \$3,380,631. The facility eventually became the Acura store. (RT Vol. IX, 2119:20-2120:13.) Barber Honda has made other investments in its facilities including doubling of the number of skylights in the service department (RT Vol. IX, 2131:13-2132; Exh. P-112); resurfaced its service and Express Lube asphalt ((RT Vol. IX, 2132:2-13; Exh. P-112); installing "Big Ass Fans" in its service department (RT Vol. IX, 2132:14-23), and others. Barber Honda investment more than \$8 million in its Honda franchise since

2000. (RT Vol. IX, 2137:9-14.)

The service department contains 30 service stalls and lifts, including three Express Lube bays. (RT Vol. IX, 2034:25-2035:7.) The service department is nowhere near capacity. (RT Vol. IX, 2036:16-21.) Protestant estimates its service department currently operates at about 50 to 60 percent of capacity and could easily handle an increase of 50-100 percent in its service business. (RT Vol. IX, 2036:16-21.) In fact, on the day of the site visit, a modest amount of service customer traffic was observed. Service customers have complimentary TV, internet, snacks, coffee, other beverages, and ample seating was available. (Exh. J-29 (Stipulated Facts Regarding January 9, 2020 Market Drive) at ¶ 2.)

Barber Honda's service retention is also among the highest in the state—almost 100% above the California average. (Exh. P-121.) Honda failed to offer any evidence that Honda customers are not adequately served by Barber Honda.

E. Whether the Proposed Establishment Would Increase Competition and Therefore Benefit the Public Interest

Adding an additional dealer to the RMA will almost always increase competition to some degree. However, the Board must determine whether the increase in competition will benefit the public. Not all increases in competition are beneficial. If this were not the case, the legislature would not have required the Board to make the determination whether the increase in competition is in the public interest.

Here, the increase in competition would not benefit the public welfare because customers are already adequately served by Barber Honda. (*See, supra*, Part VIII.D.) Any benefit that might result from increased competition would be short-lived because the competition between the Honda dealers would be unsustainable. (*See, supra*, Part VIII.C.) The resulting competition between Honda dealers would also force aggressive sale tactics that ultimately harm consumers. Moreover, the Honda dealers would be forced to compete over qualified staff for each location—Barber Honda is the only source for trained Honda service, sales, and parts employees in Bakersfield.

AHM chooses to frame the consumer competition issue as being limited to Honda dealer versus Honda dealer. AHM ignores the fact that every one of AHM's competitors is located in the Bakersfield Auto Mall. (Exh. R-376 at A-5U.) These dealers are all competing for consumer business. The primary benefit to consumers shopping the Auto Mall is the ability for consumers to cross shop between 17

different brand locations. (*Id.*) The proposed establishment does not enhance this competition and will likely have the opposite effect by drawing some customers away from the Auto Mall.

The proposed location is surrounded by motels, fast food, warehouses—it is not an Auto Mall. (Exh. J-29 (Stipulated Facts Regarding January 9, 2020 Market Drive) at ¶ 16.) The only option for customers to cross shop is the Toyota store across Merle Haggard Boulevard, not even visible from the proposed location. (*Id.* at ¶ 17.) To be fair, there is a motor cycle dealership, a heavy equipment dealer, and an RV dealer in the vicinity, but the cross-shopping opportunities from these businesses present a range from slim to none. (*Id.* at ¶ 16; *see also* RT Vol. IX, 2046:23-2047:21.)

IX. CONCLUSION

The evidence and testimony presented during the course of the merits hearing demonstrates Barber Honda established its burden to prove the existence of good cause to prevent the proposed establishment. Through its expert, Barber Honda demonstrated the impact from the proposed establishment poses a grave threat to Barber Honda's continued viability—the proposed establishment is tantamount to a de facto termination. Honda seeks to establish a high-volume dealer in the Bakersfield market to match Toyota's rooftop count and possibly replace Barber Honda for a high-volume Galpin store.

AHM demonstrates disregard for the devastating impact certain to result to Barber Honda. This is evidenced by the fact Honda projected 1,407 sales for the proposed point and saw no reason for concern when the dealer candidate proposed to overbuild a facility with the expectation of capturing at least 1,000 sales more than AHM's MAP figure of 1,407—Barber Honda has never exceeded 2,000 sales in any year—Galpin proposed it would sell 2,500 in its third year of operation.

Barber Honda is dependent upon the North Bakersfield ASA for 40% of its new vehicle sales and 40-50% of its parts and service business. It is disingenuous for Honda and its experts to argue Barber Honda will experience no impact from the proposed establishment. AHM's arguments for dramatic increases in Honda market share are unavailing.

Respondent's expert's case studies purporting to demonstrate the increase in Honda market share would result in no impact to Barber Honda are flatly contradicted by the very data used—none of these case studies come close to approximating the market share increase that would be required to offset the

likely impact to Barber Honda. Moreover, the Toyota example provides a more reliable guide to expected market share increase. The Toyota example shows sales were split between the two Bakersfield dealership locations. The Toyota market share increase in the Bakersfield market was due to Toyota's declining market share in the state. Toyota raw sales actually declined, despite the addition of the second point in North Bakersfield.

The record evidence sufficiently demonstrates good cause to prevent the proposed establishment. However, the current state of affairs renders the value from the consideration of this evidence to be dubious at best. Barber Honda's sale operations are currently shuttered by state order, service and parts business is down to a trickle, and there is no indication when this situation will reverse. Further, when the U.S. economy reopens for business, there is no telling how bad market conditions will be. However, it is likely the Bakersfield population will be reduced, unemployment will be at record levels, incomes will be down, and vehicle sales will be at historic lows. It is plain to see good cause exists to prevent the proposed establishment.

Dated: June 24, 2020

LAW OFFICES OF
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ATTORNEYS FOR PROTESTANT

STATE OF CALIFORNIA

NEW MOTOR VEHICLE BOARD

In the Matter of the Protest of:

BARBER GROUP, INC., a California corporation,
doing business as BARBER HONDA,

Protestant,

v.

AMERICAN HONDA MOTOR CO., INC., a
California corporation,

Respondent,

GALPINSFIELD AUTOMOTIVE, LLC,

Intervenor.

PROTEST NO. PR-2539-17

**PROTESTANT'S PROPOSED
FINDINGS OF FACT AND
PROPOSED DECISION**

Pursuant to the Board's January 6, 2020, Order Establishing Post-Hearing Briefing Schedule, Protestant files its Proposed Findings of Fact and Proposed Decision.

PROCEDURAL BACKGROUND

I. STATEMENT OF THE CASE

1. By letter dated September 26, 2017, American Honda Motor Co., Inc. ("AHM" or "American Honda"), served Protestant, Barber Group, Inc., dba Barber Honda ("Barber" or "Barber Honda") with a Notice of Establishment for a new Honda franchise dealership to be added at Assessor Parcel Numbers ("APN") 480-120-57, 480-120-64, 480-120-70, 480-120-71, 480-120-72, and 480-120-73, Merle Haggard Drive, Bakersfield, CA 93308-6442 in Kern County pursuant to Vehicle Code section 3062.¹

2. By letter dated October 4, 2017, Barber Honda objected to the September 26, 2017, notice as defective because it identified APNs in Ridgecrest, California and also the street address for Merle Haggard Drive in Bakersfield, California.

3. On or about October 12, 2017, AHM issued a "Corrected and Superseding" Notice of Establishment for the New Honda franchise dealership to be added. The APNs were corrected to 482-120-57, 482-120-64, 482-120-70, 482-120-71, 482-120-72, and 482-120-73 located at 7th Standard Road (Merle Haggard Drive) and Industrial Parkway.

4. On October 13, 2017, Barber Honda filed a timely Protest pursuant to Vehicle Code section 3062.

5. On December 18, 2017, Intervenor, Galpinsfield Automotive, LLC ("Galpinsfield"), filed a Motion to Intervene in this Protest.

6. On December 27, 2017, the Board granted Galpinsfield's Motion in its Order Granting Motion to Intervene. The order established specific conditions for Galpinsfield's participation in this Protest.

7. On July 6, 2018, AHM filed a Motion to Dismiss based on Barber Honda allegedly not filing a Protest in response to the "Corrected and Superseding" Notice of Establishment.

8. On August 2, 2018, after briefing and a telephonic hearing on Thursday, August 2, 2018,

¹ All statutory references are to the Vehicle Code unless otherwise indicated.

the Board, through Administrative Law Judge (“ALJ”) Anthony M. Skrocki, denied AHM’s Motion to Dismiss.

9. On July 31, 2018, Barber Honda filed a Motion to Continue Merits Hearing or in the Alternative Vacate the PHC Order setting a tentative merits hearing date of September 24, 2018. Thereafter, at the instruction of the Board, Barber Honda amended its Motion to a Motion to Amend Pre-Hearing Conference Orders. The parties briefed the issues and appeared at a telephonic conference with ALJ Skrocki. During the call, the parties agreed to continue the merits hearing and requested the Board issue the August 23, 2018, Second Amended Pre-Hearing Conference Order setting the tentative date for the merits hearing on Monday, February 4, 2019.

10. On December 19, 2018, the Board issued a Notice of Telephonic Pre-Hearing Conference with Administrative Law Judge assigning ALJ Kymberly M. Pipkin to preside over the merits hearing.

11. On December 21, 2018, Barber Honda filed a Motion to Compel Testimony at Deposition challenging AHM’s and Galpinsfield’s assertion of a “joint defense privilege” during the depositions of Herbert (“Beau”) Boeckmann III, Herbert (“Bert”) Boeckmann II, and Jeffrey Skobin on December 5-6, 2018.

12. On January 3, 2019, AHM filed a preemptory challenge of ALJ Pipkin. On January 4, 2019, AHM refiled its preemptory challenge of ALJ Pipkin to comply with California Code of Regulations title 13, section 551.12.

13. On January 4, 2019, the Board issued a Notice Changing Assigned Administrative Law Judge in response to AHM’s preemptory challenge. The January 4, 2019, notice assigned ALJ Evelyn M. Matteucci to preside over the merits hearing.

14. On January 16, 2019, after briefing and a telephonic hearing on Wednesday, January 16, 2019, the Board denied Protestant’s December 21, 2018, Motion to Compel Testimony at Deposition in ALJ Skrocki’s Order Denying Protestant’s Motion to Compel Testimony at Deposition.

15. On January 21, 2019, Galpinsfield filed a preemptory challenge of ALJ Matteucci.

16. The Board initially rejected Galpinsfield’s preemptory challenge in its January 22, 2019, Notice Rejecting “Intervenor’s Preemptory Challenge of ALJ Evelyn Matteucci” as Untimely. After email exchanges regarding Section 551.12 of Title 13 of the California Code of Regulations, the Board

ultimately accepted Intervenor's peremptory challenge of ALJ Metteucci.

17. Because the Board had one remaining ALJ, ALJ Dwight V. Nelsen, to hear the Barber Honda merits hearing who was also scheduled to hear another unrelated merits hearing during the same time as the Barber Honda merits hearing, the Board issued its January 25, 2019, Order Vacating Order Regarding Pre-Hearing Matters and Order Vacating Order of Time and Place of Hearing.

18. A telephonic Pre-Hearing Conference was then scheduled and conducted with ALJ Nelsen on Thursday, February 7, 2019. ALJ Nelsen then issued a February 7, 2019, Order Regarding Pre-Hearing Matters tentatively setting the merits hearing to begin on Monday, April 22, 2019.

19. On February 14, 2019, Barber Honda filed its Motion to Compel Edik Hartoonian's Testimony at Deposition. Barber Honda challenged the repeated objections from three different counsel as well as inappropriate instructions not to answer questions during Mr. Hartoonian's January 15, 2019, deposition.

20. After briefing and telephonic hearings regarding Protestant's February 14, 2019, Motion to Compel on Wednesday, February 27, 2019, and Monday, March 4, 2019, ALJ Skrocki issued a March 4, 2019 Order Granting Protestant's Motion to Compel Edik Hartoonian's Testimony at Deposition.

21. Protestant took the second deposition of Edik Hartoonian on March 26, 2019, pursuant to the Board's March 4, 2019 Order. During the deposition, ALJ Skrocki telephonically considered and ruled on objections concerning certain questions (Deposition pages 95-115).

22. On or about March 27, 2019, the day after Mr. Hartoonian's second deposition, AHM sent an email requesting a conference call with ALJ Nelsen. The Board issued a March 27, 2019, Notice of Telephonic Conference with Administrative Law Judge setting a conference call for the following day, March 28, 2019.

23. During the March 28, 2019, conference call, AHM's counsel, Mr. S. Keith Hutto, communicated he had hurt his back while removing luggage from an overhead bin on an airplane. Mr. Hutto required an anterior lumbar interbody fusion, or, as Mr. Hutto referred to it, "the Tiger Woods surgery." As a result, Mr. Hutto communicated he would be unable to attend the April 22, 2019, date for the merits hearing. AHM requested the Board continue the April 22, 2019, merits hearing date.

24. During the March 28, 2019, conference call, Barber Honda objected to an August 19,

2019, hearing date because of concerns its Dealer Manager's (Jonathan Ekegren) wife was expecting a child on September 3, 2019.

25. The Board granted AHM's request to continue the April 22, 2019, merits hearing. The Board issued the March 28, 2019 Order Vacating Order of Time and Place of Hearing and Order Vacating Order Regarding Pre-Hearing Matters.

26. The Board then issued a Notice of Hearing Readiness Conference setting a Hearing Readiness Conference for July 3, 2019 and the tentative hearing date for the merits hearing as August 19, 2019.

27. During the July 3, 2019, Hearing Readiness Conference, Barber Honda again objected to the August 19, 2019, tentative merits hearing date. The Board indicated the hearing would go forward on August 19, 2019. The Board and ALJ Nelsen issued a July 5, 2019, Order Regarding Pre-Hearing Matters setting the merits hearing for Monday, August 19, 2019.

28. Barber Honda filed a July 3, 2019, Motion to Continue Merits Hearing arguing a need to continue the merits hearing for good cause—specifically the expected due date for Mr. Jonathan Ekegren's wife on September 3, 2019, close in time to the August 19, 2019, hearing date.

29. After briefing and a telephonic hearing, the Board issued a July 23, 2019, Order Continuing Hearing in response to Barber Honda's July 3, 2019, Motion. The Board set the hearing to commence on September 9, 2019.

30. A hearing was held before ALJ Nelsen in the William G. Brennen Hearing Room on September 9, 2019 through September 13, 2019; October 21, 2019 through October 25, 2019; December 3, 2019 through December 6, 2019; January 6, 2020 through January 7, 2020; and telephonically on January 21, 2019 and January 23, 2019. An ALJ site visit to relevant locations was conducted on January 9, 2020.

II. PARTIES AND COUNSEL

31. Protestant is an authorized Honda "franchisee" within the meaning of Vehicle Code sections 331.1 and 3062. During the hearing, Protestant was represented by Gavin M. Hughes, Esq. and Robert A. Mayville, Jr., Esq. of the Law Offices of Gavin M. Hughes.

32. Respondent is a "franchisor" within the meaning of sections 331.2 and 3062. During the

hearing, Respondent was represented by S. Keith Hutto, Esq., Steven B. McFarland, Esq., and Patrick D. Quinn, Esq. of Nelson Mullins Riley & Scarborough, LLP.

33. Intervenor is the proposed owner and operator of the proposed additional motor vehicle dealership at the location noticed by AHM in North Bakersfield. During the hearing, Intervenor was represented by Alan J. Skobin, Esq., the general counsel of Galpinsfield Automotive, LLC as well as Galpin Motors Incorporated (“Galpin”).

III. SUMMARY OF WITNESS TESTIMONY AND EXHIBITS INTRODUCED

34. Protestant called the following adverse witnesses: Eric Van Olst, AHM’s Zone 12 Sales Manager; Marc Thomas, currently AHM’s District 12C Sales Manager and previously AHM’s District 12D Sales Manager; David Adair, AHM’s Senior Manager for Market Representation; Martin Fisher, currently AHM’s District Sales Manager for the Inland Empire and previously AHM’s District 12D Sales Manager; Michael Bach, AHM’s Manager of Counterfeit Parts Control and previously AHM’s Zone Parts and Service Manager; John Ewanicki, AHM’s District Sales Manager of District 12D; Todd Meyer, AHM’s Assistant Zone Manager for Business Improvement; Albin “Frank” Beniche, AHM’s Assistant Vice President of Public Companies; Peter Gerard Hagan, AHM’s Assistant Zone Manager for Sales; Jonah Rohde, AHM’s District Parts and Service Manager for district 1D and previously for districts 1B and 1A; and Herbert (“Beau”) Ferdinand Boeckmann III, President and COO of Galpin Motors, Incorporated. Additionally, Protestant called Stephen “Steve” Patrick Ekegren, President and Dealer Principal for Barber Honda, and Jonathan James Ekegren, Dealer Manager for Barber Honda. Protestant’s expert witness was Edward “Ted” Stockton, Vice President and Director of Economic Services for the Fontana Group. Protestant also recalled Stephen Ekegren, Jonathan Ekegren, and Edward Stockton as rebuttal witnesses.

35. Respondent called the following witness: Eric Van Olst, AHM’s Zone 12 Sales Manager. Respondent’s expert witnesses were Herbert “Herb” Walter, independent contractor, and Sharif George Farhat, Vice-President of Expert Services for Urban Science Applications (“USAI”).

36. Protestant and Respondent lodged deposition designations for the following depositions for consideration by the Board: January 15, 2019 Deposition of Edik Hartoonian, previously the proposed General Manager for Galpinsfield; March 26, 2019 Deposition of Edik Hartoonian; December

5, 2018 Deposition of Herbert “Bert” Ferdinand Boeckmann II, previously the President of Galpin Motors, Incorporated; December 13, 2018 Deposition of Ron Mattner, an AHM Assistant Zone Sales Manager; June 8, 2018 Deposition of Steven Dale Steele, Barber Honda’s Service Manager; and November 6, 2018 Deposition of Troy Devone Stone, an AHM Assistant Zone Sales Manager. Protestant and Respondent also lodged counter designations. The parties agreed to admit deposition designations and counter designations as Exhibit J-28. The parties also admitted Exhibits J-28A and J-28B as supplemental to the original combined designations in Exhibit J-28 for the Board’s consideration. The designated portions of the depositions are highlighted in Exhibits J-28 and J-28B.

37. Prior to the commencement of the hearing, Respondent filed an August 19, 2019, Motion *in Limine* to Exclude Untimely Produced Documents and Select Opinions of Protestant’s Expert. AHM challenged Barber Honda’s use of Toyota registration data for the two Toyota dealerships in and around Bakersfield as well as hearsay statements from Bakersfield’s Mitsubishi dealer. ALJ Nelsen denied AHM’s Motion to Exclude on the first day of the merits hearing, September 9, 2019.

38. The Parties agreed to a Joint Glossary of Non-Controversial Terms, a Joint Statement of Undisputed Facts, and joint Stipulated Facts Regarding January 9, 2020 Market Drive.

39. The parties offered over a hundred exhibits at the hearing and offered deposition designations, as referenced above. During the hearing, upon Motion from Barber Honda, ALJ Nelsen ordered Exhibits J-2, J-5, J-8, J-11, R-372, and R-373 sealed and protected from public disclosure.

ISSUES PRESENTED

40. Has Protestant demonstrated there is good cause for not entering into a franchise of the same line-make in North Bakersfield under Vehicle Code sections 3062 and 3063, taking into account the good cause factors of Section 3063 and the existing circumstances?

41. Pursuant to Vehicle Code section 3063, in order to determine whether good cause has been established for not entering into a franchise of the same line-make, the Board shall take into consideration the existing circumstances, including, but not limited to, all of the following:

- (a) Permanency of the investment.
- (b) Effect on the retail motor vehicle business and the consuming public in the relevant market area.

- (c) Whether it is injurious to the public welfare for an additional franchise to be established or an existing dealership to be relocated.
- (d) Whether the franchisees of the same line-make in the relevant market area are providing adequate competition and convenient consumer care for the motor vehicles of the line-make in the market area, which shall include the adequacy of motor vehicle sales and service facilities, equipment, supply of vehicle parts, and qualified service personnel.
- (e) Whether the establishment of an additional franchise would increase competition and therefore be in the public interest.

Protestant has the burden of proving there is good cause not to enter into a franchise establishing an additional motor vehicle dealership. (Cal. Veh. Code § 3066, subd. (b).)

42. Respondent bears the burden to demonstrate its use of state average based standards, Retail Sales Effectiveness (“RSE”) and Registration Effectiveness (“RE”) to measure Protestant’s sales performance in the market and the sales opportunity reasonably available in the Bakersfield market is reasonable according to Vehicle Code section 11713.13(g). Section 11713.13(g) reads as follows:

It is unlawful and a violation of this code for any manufacturer, manufacturer branch, distributor, or distributor branch licensed under this code to do, directly or indirectly through an affiliate, any of the following:

(g)(1) Establish or maintain a performance standard, sales objective, or program for measuring a dealer’s sales, service, or customer service performance that may materially affect the dealer, including, but not limited to, the dealer’s right to payment under any incentive or reimbursement program or establishment of working capital requirements, unless both of the following requirements are satisfied:

(A) The performance standard, sales objective, or program for measuring dealership sales, service, or customer service performance is reasonable in light of all existing circumstances, including, but not limited to, the following:

- (i) Demographics in the dealer’s area of responsibility.
- (ii) Geographical and market characteristics in the dealer’s area of responsibility.
- (iii) The availability and allocation of vehicles and parts inventory.
- (iv) Local and statewide economic circumstances.

(v) Historical sales, service, and customer service performance of the line-make within the dealer’s area of responsibility, including vehicle brand preferences of consumers in

the dealer's area of responsibility.

(B) Within 30 days after a request by the dealer, the manufacturer, manufacturer branch, distributor, distributor branch, or affiliate provides a written summary of the methodology and data used in establishing the performance standard, sales objective, or program for measuring dealership sales or service performance. The summary shall be in detail sufficient to permit the dealer to determine how the standard was established and applied to the dealer.

(2) In any proceeding in which the reasonableness of a performance standard, sales objective, or program for measuring dealership sales, service, or customer service performance is an issue, the manufacturer, manufacturer branch, distributor, distributor branch, or affiliate shall have the burden of proof.

(3) As used in this subdivision, "area of responsibility" shall have the same meaning as defined in subdivision (z) of Section 11713.3.

PROTESTANT'S CONTENTIONS

43. Protestant contends the following: the proposed establishment of the North Bakersfield Honda Dealership will deprive Barber Honda of a geographic advantage to approximately 40% of its sales customers and 40-50% of its service customers. While some expansion of Honda's market share is expected as a result of the proposed establishment, nothing supports that the expanded Honda market share will exceed a 20% increase in Honda brand registrations in the Bakersfield market. The resulting negative financial impact of the establishment to Barber Honda will be at least 300% of its profitability. The proposed establishment has the potential to far exceed the 300% impact to Barber Honda's profitability due to the market contractions in Bakersfield's oil industry, the current COVID-19 pandemic, the recent sharp drop in oil prices, and the identity of the proposed North Bakersfield Open Point Dealer as the Galpin organization whose business model competes for intrabrand sales and creates large cross-sells into neighboring dealer's ASA with smaller cross-sells back into Galpin's ASA.

44. The isolated nature of Bakersfield means Barber Honda will have no alternative market to makeup lost sales and service business in the North Bakersfield ASA. The Honda registrations and households in the Relevant Market Area ("RMA") are located overwhelmingly in the southern half of the RMA between the proposed North Bakersfield dealership location and Barber Honda.

45. AHM's Retail Sales Effectiveness ("RSE") and Registration Effectiveness ("RE") fail to comply with Vehicle Code section 11713.13(g). RSE and RE do not account for the demographics,

geographical and market characteristics, the availability and allocation of vehicles, local and statewide economic circumstances, or historical sales, service, and customer service performance of the Honda brand in the Bakersfield market. AHM's reliance on RSE and RE to determine available sales "opportunity" in the Bakersfield market is unreasonable. There is not significantly more sales or service opportunity in the Bakersfield market for the proposed additional Honda dealer.

46. The proposed establishment would be unique relative to every other brand in Bakersfield. Honda is the only brand to propose a second dealership location in the RMA under different ownership. Both Ford and Toyota have two dealerships in the RMA under common ownership. Commonly owned dealerships will not force one another out of business. The separate ownership will create ruinous competition between Barber Honda and the proposed new dealer.

47. The proposed establishment will have little, short term benefit to the public interest because it will create ruinous competition and ultimately force the closure of Barber Honda. AHM has unreasonably disregarded the impact the proposed establishment will have on Barber Honda. AHM's efforts to establish the North Bakersfield dealership will result in the de facto termination of Barber Honda, an over 45-year family business operating in Bakersfield's only Auto Mall.

48. Protestant met its burden to establish there is good cause to prevent the proposed establishment of the North Bakersfield Galpinsfield Honda dealership.

RESPONDENT'S CONTENTIONS

49. Respondent contends the following: the proposed establishment could not have any impact on Barber Honda. The Bakersfield market is the lowest performing metro market in the State of California. The Bakersfield ASAs rank last in terms of RE. There exists significant service and sales opportunity in Barber Honda's own ASA to offset any lost sales or service business due to the proposed establishment. The proposed establishment will benefit consumers, the Honda brand, and Barber Honda itself by creating more Honda advertising within the market, improving customer convenience, and introducing "friendly" competition to the Bakersfield market.

50. Protestant failed to meet its burden to establish there is good cause not to permit the proposed establishment of the North Bakersfield Galpinsfield Honda dealership.

INTERVENOR'S CONTENTIONS

51. Intervenor contends the following: the proposed establishment could not have any negative impact on Barber Honda. Intervenor intends to be in “friendly” competition with Barber Honda in Bakersfield. “[I]t would mean that something pretty traumatic and tragic happened in society,” if Galpinsfield is not permitted to establish the North Bakersfield Open Point. (RT Vol. VIII, 1995:22-1996:8.)² Galpin intends to “grow the pie” for Honda in Bakersfield.

52. Protestant failed to meet its burden to establish there is good cause to prevent the proposed establishment of the North Bakersfield Galpinsfield Honda dealership.

FINDINGS OF FACT

I. PRELIMINARY FINDINGS

53. The Ekegren family has been in the franchise dealer business since 1955. The first franchise, Pontiac, was established by John Barber in 1955. (RT Vol. X, 2315:15-23.)

54. Over the years John Barber and the Ekegren family had about 21 franchises at one point. (RT Vol. IX, 2029:14-2030:25.) At the time Steve Ekegren became the Dealer Principal, the Barber Group owned and operated four franchises—Cadillac, Isuzu, Saab, and Honda. (RT Vol. IX, 2031:1-10.)

55. The Ekegren family currently operates only the Honda franchise. (RT Vol. IX, 2031:11-13.) Stephen “Steve” Ekegren has not contemplated selling or getting rid of the Barber Honda franchise because it is a family business. (RT Vol. IX, 2033:15-24.)

56. John Barber established the Barber Honda franchise in 1973. (RT Vol. IX, 2024:25-

² Protestant cites to the merits hearing transcripts in the following format: “RT [Record Transcript] Vol. [roman numeral of volume number], [page:line]-[page:line].” Protestant cites the volume number according to the day of the merits hearing despite the inconsistency in the merits hearing transcripts. (See transcripts for Monday, October 21, 2019, page 1 stating “Volume 5” despite it being the sixth day of the merits hearing and Tuesday, October 22, 2019, page 1 stating “Volume 6” despite it being the seventh day of the merits hearing, while the transcript for Wednesday, October 23, 2019, page 1 stating “Volume 8” for the eighth day of the merits hearing.) Therefore the transcripts for September 9-13, 2019, are cited as Volumes I-V; October 21-25, 2019, are cited as Volumes VI-X; December 3-6, 2019, are cited as Volumes XI-XIV; January 6-7, 2020, are cited as Volumes XV-XVI; and January 21 and 23, 2020, are cited as Volumes XVII and XVIII. Protestant cites pages as noted within each individual volume of the transcripts (despite overlap in page range between certain transcripts – see Day 5 and Day 6 transcripts (cited as Volumes V and VI)). Protestant cites Exhibits admitted during the merits hearing in the following format: “Exh. [Exhibit Number, e.g. J-1 or P-101, etc.].”

2025:2; RT Vol. X, 2315:24-2316:3; RT Vol. X, 2316:4-10; Exh. R-311 (showing Barber Honda celebrated its 40-year anniversary as a Honda dealer in 2013).) Barber Honda has had an over 45-year history with Honda. (*Id.*)

57. Barber Honda relocated to its current auto mall at 4500 Wible Road, Bakersfield, California in October 1985. (RT Vol. IX, 2025:3-8.) Barber Honda was the first dealer to relocate to the auto mall. (RT Vol. IX, 2025:9-12.)

58. Barber Honda completed construction of improvements to its facility in 2006. (RT Vol. IX, 2113:12-2114:20.)

59. Stephen Ekegren is the President and Dealer Principal of Barber Honda. (RT Vol. IX, 2023:9-12.) Stephen Ekegren has been the Dealer Principal since 2002. (RT Vol. IX, 2024:16-18.) Stephen Ekegren started working at Barber Honda in February 1986. (RT Vol. IX, 2029:5-7.)

60. Jonathan Ekegren is the Dealer Manager of Barber Honda and is the next person in line to be Barber Honda's Dealer Principal. (RT Vol. IX, 2024:9-15.) Jonathan Ekegren officially became the Dealer Manager in approximately 2016-2017. He performed duties equivalent to what he currently performs since approximately 2014. (RT Vol. XI, 2516:5-22.)

II. JOINT STIPULATIONS OF FACT

61. The parties agreed to the following undisputed facts:

- (1) American Honda is an automobile manufacturer and distributor with its headquarters in Torrance, California. American Honda sells its Honda brand vehicles, genuine parts, and accessories to a network of licensed Honda dealers, which then sell those vehicles, genuine parts, and accessories and provide authorized vehicle service to consumers.
- (2) Protestant is a licensed Honda dealer in Bakersfield, California, and is authorized to sell and service Honda vehicles, parts and accessories pursuant to a Honda Automobile Dealer Sales and Service Agreement governing the rights and obligations of the parties.
- (3) Barber Honda was established in 1973 and is the only Honda dealership in Bakersfield.
- (4) At all relevant times, Stephen Ekegren has been Barber Honda's Dealer Principal.
- (5) Since March 27, 2017, Jonathan Ekegren has been Barber Honda's authorized Dealership Manager.

- (6) Barber Honda operates from its authorized location at 4500 Wible Road, Bakersfield, California 93313.
- (7) Barber Honda's primary sales and service facilities have been located at 4500 Wible Road since 1985.
- (8) Galpinsfield's proposed new Honda dealership will be located at 7th Standard Road (Merle Haggard Drive) and Industrial Parkway, in Bakersfield, California.
- (9) There have been two Toyota dealerships in Bakersfield since 2007.
- (10) American Honda selected Intervenor Galpinsfield as the candidate dealer for the proposed new Honda dealership in September 2015.
- (11) American Honda and Galpinsfield entered into a Letter of Intent effective September 15, 2017, conditionally approving Galpinsfield as an authorized Honda dealer.
- (12) On September 26, 2017, American Honda sent Barber Honda notice of intent [to] establish a new Honda dealership in north Bakersfield.
- (13) On October 12, 2017, American Honda sent Barber Honda a superseding notice of its intent to establish a new Honda dealership in north Bakersfield.
- (14) On October 13, 2017, Barber Honda filed its Protest with the Board.

III. STIPULATED FACTS REGARDING JANUARY 9, 2020 MARKET DRIVE

62. The parties agreed to the following facts in connection with the market drive:
 - (1) The Barber Honda dealership is located at 4500 Wible Road, Bakersfield, California 93313. The dealership is situated at the northwest corner of Wible Road and Barber Way. The dealership has been in this location since 1985. This location is within the city limits of the City of Bakersfield.
 - (2) The dealership's main building has been expanded over time and currently houses its new vehicle showroom, sales offices, internet sales department, finance and insurance department, and customer waiting area under one roof. The customer waiting area is down a short hallway from the main showroom and has chairs, a television, snacks, a coffee machine and soda fountain and is located near the dealership's restrooms. The dealership also includes an enclosed children's play area.

- (3) The parties visited the finance department and briefly spoke with finance manager, Matt Martinez. Mr. Martinez briefly demonstrated the Reynolds and Reynolds DocuPad to ALJ Nelsen.
- (4) Inside the showroom the dealership displayed seven new Honda vehicles. An eighth vehicle is displayed in the retail parts and accessories department. The dealership showroom has several open floor plan office areas where sales staff meet with customers. The showroom has been recently refreshed with new paint and carpets.
- (5) The showroom wraps around the front of the dealership along Wible Road and Barber Way. Outside, the dealership displays a row of new cars along both streets in front of the dealership showroom. Immediately next to the new car display area, on Wible Road, is the dealership's used car lot.
- (6) The dealership has a main service area with 27 service bays and a separate express service area with three lifts used exclusively for express service work such as oil changes and tire rotations. There were no customer lines at the service department or express service.
- (7) Barber Honda has a separate area set aside for washing and detailing vehicles behind the service bay building away from the view of customers. This area includes three bays in the detail shop, the steam rack, the dyno room, as well as the automated car wash. There is also additional outdoor space for storing vehicles behind the service bay building.
- (8) There is a commercial area along Wible Road and the adjacent streets, approximately one mile long, which is occupied almost exclusively by automobile dealerships. This stretch of dealerships effectively serves as an auto mall in Bakersfield.
- (9) Barber Honda is located at the northern end of the auto mall. To the west of Barber Honda, directly across Wible Road, is Three Way Chevrolet. To the south of Barber Honda, directly across Barber Way, is Bakersfield Mitsubishi.
- (10) In addition to Chevrolet and Mitsubishi, most major brands are represented in this area including the Honda brand's primary import competitors Toyota, Nissan, Hyundai, Kia, Mazda, Subaru, and Volkswagen. Additional automotive brands represented with dealerships in this area include: Acura, Cadillac, Chrysler, Jeep, Fiat, Buick, GMC,

- Lexus, Infiniti, Ford, Lincoln, Dodge, RAM, BMW, Mercedes-Benz, Audi, and Porsche.
- (11) Apart from some commercial and industrial development immediately north along Wible Road, the auto mall is surrounded on the north, south, and west by residential neighborhoods and smaller commercial developments supporting those residential areas with grocery stores, convenience stores, banks and similar business outlets. The auto mall is bound to the east by Highway 99 with more residential neighborhoods east of the highway.
 - (12) The parties next travelled west from the auto row via Panama Lane and north via Old River Road and Calloway Drive towards Galpinsfield's proposed dealership location on 7th Standard Road/Merle Haggard Drive. This area is a more affluent section of Bakersfield, and the parties observed many residential developments, including both new and established neighborhoods.
 - (13) At the intersection of Rosedale Highway and Calloway Drive the parties observed the Dewar's Candy Shop location which is surrounded by large commercial establishments.
 - (14) The proposed dealership site is located at the intersection of 7th Standard Road/Merle Haggard Drive and Industry Parkway Drive. The site is located in Kern County, outside the city limits of the City of Bakersfield.
 - (15) The proposed dealership site is located in close proximity to Highway 99. As customers exit the highway from the south, they will almost immediately see the Honda dealership in front of them.
 - (16) The proposed dealership site is currently undeveloped, although it is surrounded by developed lots. Immediately to the west of the site is one of several hotels in the immediate area. North of the site across McMurtrey Avenue is a large Car Quest Auto Parts distribution center. East of the site across Industry Parkway Drive is Booth Machinery, a heavy machinery dealer. South of the site across 7th Standard Road/Merle Haggard Drive is a Harley-Davidson dealership, some fast food restaurants and a bank.
 - (17) Further south along Industry Parkway Drive, approximately one half mile from the proposed Honda dealership location, is the North Bakersfield Toyota dealership.

- (18) The parties observed a new hotel being constructed on Spectrum Parkway Drive, near the North Bakersfield Toyota dealership, one of several hotels in the immediate area.
- (19) East of the proposed dealership location on 7th Standard Road/Merle Haggard Drive is the airport and a new, large Amazon distribution facility. Further east are more residential neighborhoods which eventually give way to the Kern River Basin oilfields. The neighborhoods in this area appeared to be mostly single-story lower to middle income working class and blue collar residences.
- (20) The parties traveled east on Panorama Drive along the bluffs overlooking the Kern River and the oilfields. Although some oil derricks were not operating, the parties observed other derricks moving and apparently in operation. Further east and south were more long-established residential areas as well as Bakersfield College, one of two colleges in Bakersfield along with CSU-Bakersfield.
- (21) The parties turned south off Panorama Drive onto Mt. Vernon past lower and middle income housing. The parties continued west on the Highway 178, turned north on Buck Owens Drive, past the Buck Owens Crystal Palace, before entering Highway 99 at the intersection of Buck Owens Blvd. and Sillect Ave.
- (22) The parties then traveled north on Highway 99 towards the communities of Shafter and Delano. North of 7th Standard Road/Merle Haggard Drive on Highway 99 development quickly gives way to agricultural fields and there are no exits until Lerdo Highway, approximately six miles north.
- (23) The parties traveled via Highway 99 and Lerdo Highway to Shafter, approximately twelve driving miles northwest of the proposed dealership location. Shafter appeared to be a small, rural community serving the surrounding agricultural industries. There is one small Chevrolet dealership in Shafter, Richland Chevrolet.
- (24) The parties then returned to Highway 99 and traveled further north to the town of Delano, another rural agricultural community approximately 25 miles north of the proposed dealership location. There is one Chevrolet Buick GMC store in Delano.
- (25) Returning from Delano, it took approximately 30 minutes to reach 7th Standard

Road/Merle Haggard Drive on the northern edge of Bakersfield.

- (26) The parties then returned to Barber Honda's dealership, where the market drive concluded.
- (27) The City of Bakersfield and the surrounding cities of Shafter, McFarland, Delano, and other smaller surrounding communities constitute a metropolitan area which the parties have referred to as the Bakersfield Metro. The population of the Bakersfield Metro is concentrated in and around the City of Bakersfield, which is itself a large, spread-out community.
- (28) The City of Bakersfield is set apart from smaller residential populations in Delano, Shafter, and surrounding communities by large areas of farmland and open space.
- (29) Bakersfield has many single-story homes in low and middle income neighborhoods. The parties also observed that Bakersfield also has higher income residential areas.
- (30) The oil extraction industry appears to be concentrated to the northeast of Bakersfield and the agricultural industries are located to the north and south of the city.
- (31) Within Bakersfield there exists significant agriculture and oil industries. There are also other commercial areas not tied to the agricultural and oil industries such as hospitals, colleges, and city and county government facilities.

IV. FINDINGS RELATED TO THE PERMANENCY OF INVESTMENT (VEHICLE CODE SECTION 3063(A))

63. Barber Honda's 45 plus years serving the Bakersfield community demonstrates its permanent investment. The value of this investment does not show on a balance sheet. Mr. Walter admitted the Blue Sky value derived in part from Barber Honda's 45 year operation of the business does not show up on the income statement for the dealership. (RT Vol. XVI, 3756:19-3758:15.)

64. Protestant's property is owned by the affiliated family entity Catalina Barber. (RT Vol. IX, 2045:5-17.) The family ownership of the dealership's property enables the family to curtail any rent increases. (RT Vol. IX, 2046:12-19.) There are many tax and legal reasons why a dealer chooses to maintain separate ownership of the franchise and the property it operates. This separate ownership does not serve to eliminate Protestant's investment in the property. (*Dependable Dodge, Inc. v. Fiat Chrysler*

Automobiles, Inc. (Cal. NMVB, Mar. 15, 2017) Protest Nos. PR-2435-15 and PR-2436-15 at Proposed Decision ¶ 128 (“*Dependable*”).) Mr. Walter admitted it is common for the dealership owning entity to be separate from the property-owning entity among motor vehicle dealerships. “[I]t’s very rare that a dealership would have the land and building on the dealership Balance Sheet itself.” (RT Vol. XVI, 3763:2-13.)

65. Barber Honda’s \$8 million plus investment in its facility since 2000 is permanent. (RT Vol. IX, 2137:12-17.)

66. Protestant’s location in the auto mall causes the property to be most valuable when used for the specific purpose of operating as a franchised new car dealer.

67. The auto mall contains dealership operations for all major manufacturers. (RT Vol. IX, 2025:13-24.) Protestant could not add a comparable franchise to replace its Honda franchise.

68. Stephen Ekegren considers the Barber Honda operations to be a permanent operation. (RT Vol. X, 2443:17-2444:1.)

Barber Honda’s Facility and Franchise Investments

69. Barber Honda’s initial purchase of land for the dealership was for approximately \$1.5 million. (RT Vol. IX, 2110:7-10.)

70. Barber Honda also purchased six adjacent residential parcels for approximately \$50,000 to \$60,000 each. (RT Vol. IX, 2110:11-2111:13.)

71. Barber Honda bought the land for its used car facility for \$1 million. (RT Vol. IX, 2118:14-2119:14.)

72. Barber Honda devotes approximately 8 acres to its operation including 4.79 acres for the main facility and an off-site storage lot close to 3 acres. (RT Vol. IX, 2034:17-24.)

73. Barber Honda has approximately 30 service bays including three for Express Lube. (RT Vol. IX, 2034:25-2035:7.)

74. Barber Honda has a separate service drive for Express Lube customers with signage designating the different service drives. (RT Vol. IX, 2035:8-21; RT Vol. XI, 2540:10-18.) Barber Honda added the Express Lube building in approximately the last 10 years for approximately \$180,000 to \$200,000. (RT Vol. IX, 2116:23-2118:13.)

75. Barber Honda invested approximately \$8 million or more in the remodels of the Honda store and the purchase and building of a new 24,000 square foot used car facility. (RT Vol. IX, 2137:9-14; RT Vol. IX, 2108:15-22; Exh. P-102; Exh. P-112.)

76. Barber Honda graded out the lots for the six homes it purchased and put in asphalt for \$54,026. (RT Vol. IX, 2111:18-24.)

77. Barber Honda's initial construction of a new Honda facility cost approximately \$1,050,000. (RT Vol. IX, 2112:6-9; Exh. P-112.)

78. By 2006, Barber Honda remodeled its showroom in two phases for \$256,089 and then \$314,434 to add the Honda Oil Can Image feature, add new image furniture, expand the showroom, move the service drive, create a big display area for the Parts/Service area, create a new waiting area, remove all old sales offices, and create new F & I offices. (RT Vol. IX, 2113:12-2114:20; Exh. P-112.)

79. Barber Honda also expanded a facility to install a \$17,005 dyno machine and allow for car washing and detailing. (RT Vol. IX, 2115:14-2116:22; Exh. P-112.) The facility addition for the detail shop, smog dyno stall, and automatic carwash cost \$179,862 for the facility addition and \$174,927 for the car wash and detail addition. (*Id.*)

80. Barber Honda built its used car facility in 2007 for \$3,380,631. The facility eventually became the Acura store. (RT Vol. IX, 2119:20-2120:13.)

81. Barber Honda took on Price Acura's debt of approximately \$1,850,000 after the dealer, Clarence Price, entered default. (RT Vol. IX, 2125:24-2126:25.)

82. Barber Honda coated the roof of its service depart for \$20,078. (RT Vol. IX, 2130:17-2131:12.)

83. Barber Honda doubled the number of skylights for its service department for \$8,761. (RT Vol. IX, 2131:13-2132; Exh. P-112.)

84. Barber Honda resurfaced its service and Express Lube asphalt for \$52,161. (RT Vol. IX, 2132:2-13; Exh. P-112.)

85. Barber Honda installed "Big Ass Fans" in its service department to help with airflow. (RT Vol. IX, 2132:14-23.)

86. Barber Honda graded and added a dry well to its storage lot. (RT Vol. IX, 2132:24-

2133:9.) Barber Honda invested approximately \$20,000 in the grading and dry well. (RT Vol. XI, 2539:8-2540:9.)

87. Barber Honda installs new AC and heating units every few years. (RT Vol. IX, 2133:13-25.)

88. Barber Honda redid the roof in the showroom and offices in the last year for approximately \$25,000. (RT Vol. IX, 2134:1-8.)

89. Barber Honda installed new image compliant Honda signs for approximately \$30,000 visible from the freeway, and at the front of the store. Barber Honda also pays a rental fee for the signs. (RT Vol. IX, 2134:11-2135:23.)

90. Barber Honda repaired and replaced its interior gutter system in approximately February 2018. (P-112.)

91. Barber Honda employs over 100 employees. (RT Vol. IX, 2078:3; RT Vol. IX, 2159:21-22.)

92. Barber Honda's annual advertising was \$1,157,219 for 2013; \$934,325 for 2014; \$1,266,183 for 2015; \$1,402,896 for 2016; and \$1,124,024 for 2017. (RT Vol. IX, 2139:11-2140:11; Exh. P-112.)

93. Barber Honda participates in Baker Street advertising (1% invoice cost per vehicle sold and later 2%) and at one point specifically requested Baker Street increase its Spanish media advertising. (RT Vol. IX, 2140:12-2148:18.)

94. Barber Honda also specifically advertises for its parts and service business in addition to its new car advertising. Barber Honda advertises in digital, TV, radio, and print. (RT Vol. IX, 2149:8-2150:9.)

95. Barber Honda's substantial and permanent investment in its franchise weighs in favor of not establishing the proposed Honda dealership in North Bakersfield. Barber Honda's permanent investment and continued viability is jeopardized by the proposed establishment. If the proposed point were permitted, Protestant would become unprofitable and be forced to close.

V. FINDINGS RELATED TO THE EFFECT ON THE RETAIL MOTOR VEHICLE BUSINESS AND THE CONSUMING PUBLIC IN THE RELEVANT MARKET AREA (VEHICLE CODE SECTION 3063(B))

96. The addition of the proposed point would increase competition in the RMA. However, the increased competition is not likely to materially benefit the public.

97. The proposed additional dealership would cause a severe harm to Barber Honda and would ultimately force the dealership's closure.

Impact on Barber Honda

98. Van Olst testified if lost opportunity exceeded projected registrations, he would not see a challenge to the establishment. (RT Vol. I, 106:11-107:6.) Mr. Van Olst believes there would be no impact to the existing dealer because the projected registrations are less than the lost opportunity in the market. (RT Vol. II, 335:13-336:12.) Respondent argues there would be no harm to Barber Honda because "there's more opportunity than the new dealer's going to consume based on our projected for expected sales, based on expected registrations." (RT Vol. III, 697:3-13.) Michael Bach testified Barber Honda's service and parts business will not be impacted by the establishment of the proposed Honda dealership in North Bakersfield because sales will increase and therefore UIOs will increase throughout the market. (RT Vol. V, 1065:17-21.)

99. If the opportunity had gone down by 2014 and was less than the projected registrations, Honda "would have stopped the whole open point process at that point and not gone any further." (RT Vol. II, 383:21-384:9.) Current market conditions point to a bleak future for Protestant and all dealers throughout California.

100. The June 2019 Market Master report for Barber Honda shows Barber made 40.1 percent of its sales year to date into the North Bakersfield ASA. (RT Vol. I, 112:16-23; Exh. P-172.)

101. Marty Fisher estimated Barber receives approximately 30 to 40 percent of its sales business from the North Bakersfield ASA. (RT Vol. IV, 900:6-23.)

102. In 2008, Honda stopped trying to fill the North Bakersfield Open Point because of the economic crash. (RT Vol. II, 363:10-21.) After the crash, Honda sales in Van Olst's Zone dropped about 45 percent. (RT Vol. II, 364:8-11.)

103. David Adair admitted there is “no doubt” there will be cross shopping occurring between the two ASAs if the North Bakersfield Open Point is established. (RT Vol. III, 669:10-22.)

104. Honda began using service as a component of market studies in 2011-2012. Honda did not include a service business analysis in its 2013 market study. (RT Vol. IV, 974:6-975:10; Exh. J-18.)

105. Honda does not take any proactive steps in preventing a new Honda dealer from “pillaging” staff from existing Honda dealers. (RT Vol. IV, 985:13-986:7.) The proposed establishment would likely result in a shortage of trained technicians and both Honda locations.

106. An “active” service client is someone who serviced their vehicle at a Honda dealership at least once in the last year. A “lapsed” service client is someone who serviced their vehicle at a Honda dealership in the last 12 to 24 months. An “inactive” service client is someone who has not serviced their vehicle at a Honda dealership in the last 24 months. (RT Vol. V, 1055:16-1056:10.)

107. There are a “multitude of factors” for why Honda service customers go from being active to inactive or lapsed customers. (RT Vol. V, 1047:22-1048:12.) There is a common perception that customers are going to get a better deal from an independent repair shop compared to a dealer. (RT Vol. V, 1048:13-17.) No Honda market exhibits zero lapsed and inactive UIOs. (RT Vol. V, 1046:7-16.)

108. Chevrolet previously had an additional franchise near Toyota in North Bakersfield. However, the Chevrolet franchise is no longer in operation. The commonly owned Toyota dealership is the only new motor vehicle car dealership operating in North Bakersfield. (RT Vol. VI, 1054:15-1055:6.)

109. Frank Beniche admitted “there could be a chance that a dealer loses sales” as a result of an additional Honda point. (RT Vol. VI, 1095:5-14.)

110. Exhibit J-14, Honda’s 2008 market study, does not include an analysis of service business in the Bakersfield market. (RT Vol. VI, 1097:1-6; Exh. J-14.)

111. At the time of Exhibit J-18, Honda’s January 15, 2014, market study, Barber Honda made approximately 39% of its sales into the North Bakersfield ASA. (RT Vol. VI, 1117:9-21; Exh. J-18 at AHM_0001423.)

112. Service customers typically receive service from the nearest Honda dealership. Convenience is important to service customers. (RT Vol. VII, 1430:5-9 and 1432:17-21.) A customer

may also go to the dealership who sold him or her a vehicle—“generally, Service follows Sales.” (RT Vol. VII, 1429:22-1430:3 and 1431:6-12.)

113. Jonah Rohde would not be surprised if 50 percent of Barber Honda’s service business comes from the North Bakersfield ASA. (RT Vol. VII, 1479:21-1480:6.) A healthy Honda dealership obtains approximately 70 percent service absorption—meaning 70 percent of the dealership’s overhead is covered by the Parts and Service Department. (RT Vol. VII, 1478:22-1479:14.) Service business is critical to the economic success of any Honda dealership. (RT Vol. VII, 1479:18-20.)

114. Barber Honda’s service retention has been in the range of approximately 93% to 124% from February 2014 to September 2017. (Exh. P-121.) The service retention percentage is the percent above or below the dealership is from the expected service retention—zero percent is at the average Honda dealer service retention. (RT Vol. VII, 1440:10-23.)

115. Barber Honda outperforms the average Honda dealer’s service retention by over 90%. (RT Vol. XI, 2534:1-2535:3.)

116. Beau Boeckmann agreed another recession is inevitable at some point. (RT Vol. VIII, 1860:19-22.)

117. Beau Boeckmann agrees there would be competition between the North Bakersfield Galpin store and Barber Honda if the Open Point is permitted to move forward, but he believes the competition would be “healthy.” (RT Vol. VIII, 2001:12-17.)

118. After the establishment of the second Toyota dealership in Bakersfield, it took Mr. Downs approximately 10 years to get back to selling approximately the same volume of vehicles as the one Toyota store sold in 2007; the two Toyota stores sell a lower volume of vehicles than the single Toyota store sold in 2006. (RT Vol. IX, 2052:3-11; Exh. P-148.) The combined sales for the two Toyota dealership make 1.26% of Toyota’s California-wide Toyota registrations compared to 1.20% before the second Toyota dealership was added. (Exh. P-154.)

119. When the 2008 recession hit, Barber Honda was forced to cut costs to survive. The dealership was forced to lay off approximately 25 employees in October and another 25 employees in December. (RT Vol. IX, 2155:20-2157:8; *see also* RT Vol. XI, 2546:15-24.)

120. Barber Honda also borrowed money against the equity in the Ekegren’s personal home

to give the dealership additional working capital during the Great Recession. (RT Vol. IX, 2157:9-18; *see also* RT Vol. XI, 2546:15-24.)

121. The establishment of the North Bakersfield point would harm Barber Honda's financial viability. Barber Honda makes 40 percent of its new car sales into the North Bakersfield ASA and receives approximately 50 percent of its parts and service business from the North Bakersfield ASA. (RT Vol. IX, 2157:19-2159:2; *see also* RT Vol. XI, 2530:15-25.) Barber Honda made over 40 percent of its sales for the first half of 2019 into the North Bakersfield ASA. (RT Vol. IX, 2161:1-18; Exh. P-172.)

122. Barber Honda could not take the same actions it took in the Great Recession to withstand the establishment of a new dealer in North Bakersfield because a recession is temporary, but a new dealership is there to stay. (RT Vol. IX, 2159:14-2160:13.)

123. Returning a lapsed or inactive UIO customer into an active customer is speculative and Barber Honda already makes an effort to market to lapsed and inactive customers. (RT Vol. IX, 2175:15-2176:6.)

124. The area near the North Bakersfield Toyota dealership has only one new motor vehicle dealership and is not classified as an Auto Mall. The area near Barber Honda functions as an Auto Mall. (RT Vol. X, 2250:8-2251:10.)

125. The proposed establishment of Galpin in North Bakersfield will have an impact on Barber Honda's parts and service business. Barber Honda's profit margins depend heavily on its parts and service business. (RT Vol. X, 2448:7-2449:5.) The establishment of the proposed North Bakersfield Honda dealership would threaten Barber Honda's ability to operate profitably. (RT Vol. XI, 2531:1-10.) The market is not big enough to support two Honda dealerships. (RT Vol. XI, 2531:1-10.) The Bakersfield market cannot sustain two independently owned Honda dealerships. (RT Vol. XI, 2576:12-15.)

126. Barber Honda's high customer retention score relative to other Honda dealers supports the conclusion there is not significant additional service opportunity for a Honda dealer in and around Bakersfield. (*See* RT Vol. XI, 2535:22-2537:21.)

127. All of Barber Honda's operations contribute to the profitability of the dealership. Barber

Honda's new car sales are an important aspect of its operation and contribute to the dealership's overall profitability. (RT Vol. XI, 2542:20-2544:4.)

128. The Bakersfield market's decline in competitive registrations by approximately 9 percent from 2015 to 2019 does not evidence a growing market that could support two Honda dealerships. (RT Vol. XII, 2803:1-14.)

129. The two Toyota stores do not sell exclusively within their own territory and instead both sell throughout the Bakersfield market. (RT Vol. XII, 2836:14-2837:1.)

130. If the North Bakersfield Open Point is established, Barber will lose a proximity advantage to the registrations in the Bakersfield market of 39-40 percent based on air distance, 45-46 percent based on drive distance, or 43-45 percent based on drive time. (RT Vol. XII, 2846:3-2847:4.) Mr. Farhat admitted Barber Honda will lose a proximity advantage to the North Bakersfield ASA where it makes approximately 40 percent of its sales. (RT Vol. XIV, 3340:24-3341:6.)

131. If the North Bakersfield Open Point is established, Barber will lose a proximity advantage to UIOs in the Bakersfield market of 36, 40, or 42 percent of customers. (RT Vol. XII, 2847:6-15.)

132. Based on a gravity model, if the North Bakersfield Open Point were established, Barber would suffer territorial losses with respect to registrations in the Bakersfield market of 34-35 percent based on air distance, 35-36.5 percent based on drive distance, and 34.5-36 percent based on drive time. Based on a gravity model, if the North Bakersfield Open Point were established, Barber would suffer territorial losses with respect to UIOs in the Bakersfield market of about 33 or 34 percent. (RT Vol. XII, 2847:16-2848:4.)

133. When Toyota added a second point to the Bakersfield market, it only increased aggregate sales 13 percent higher relative to Toyota's California registrations. (RT Vol. XII, 2850:15-2852:14.) There was a "relatively minimal increase in brand sales by Toyota and significant impact on the existing dealer." (*Id.*) The existing Toyota dealership showed approximately 30 percent fewer sales compared to before the add point. (RT Vol. XII, 2854:4-9.) The vast majority of sales made by the North Bakersfield Toyota dealership were cannibalized from the existing Toyota dealership and not incremental. (RT Vol. XII, 2854:17-21.)

134. There will likely be some increase in Honda brand market share if the North Bakersfield

Point is established, however, the evidence from the Toyota example and Mr. Farhat's case studies indicate any Honda brand increase is most likely to be less than 20 percent—about 13 percent for the Toyota example. (RT Vol. XII, 2875:15-2876:3.)

135. Barber Honda makes roughly 40% of its sales to customers in the North Bakersfield ASA. It is reasonable to expect a significant portion of these sales would be lost to the North Bakersfield Point. (RT Vol. XII, 2878:4-2879:2.) There will also likely be some impact to Toyota sales, but with a far greater impact on Barber Honda's sales. (RT Vol. XII, 2879:3-18.)

136. If the Barber Honda losses 30 percent of its profit contribution as a result of the North Bakersfield Open Point being established, the impact to Barber Honda's profitability will be approximately 500 percent of the profit Barber Honda made in 2017. (RT Vol. XII, 2885:6-22; Exh. P-152 at Tab 22, page 4.) However, if Barber Honda experiences a higher loss of 45 percent of its profit contribution as a result of the North Bakersfield Open Point being established, the impact to Barber Honda's profitability will be over 700 percent of Barber Honda's profit in 2017. (Exh. P-152 at Tab 22, page 4.) Even if Barber Honda experiences only a 20 percent loss to its profit contribution as a result of the North Bakersfield Open Point being established, the impact will be over 300 percent of the profit Barber Honda made in 2017. (*Id.*)

137. If a 30 percent profit contribution impact is combined with an approximately 10 percent reduction in Bakersfield's market size, the impact to Barber Honda's profitability is over 600 percent. (RT Vol. XII, 2885:23-2886:8; Exh. 152 at Tab 22, page 5.) If the impact is 45 percent with a 10 percent reduction in Bakersfield's market size, the impact to Barber Honda's profitability is over 800 percent. (*Id.*) If the impact is 20 percent with a 10 percent reduction in Bakersfield's market size, the impact to Barber Honda's profitability is over 450 percent. (*Id.*)

138. Considering a range of impact on Barber Honda from 20 percent of the profit contribution to 45 percent, the impact on Barber Honda's profitability ranges from three times Barber Honda's profitability to over 700 percent of Barber Honda's profitability. (RT Vol. XII, 2886:16-2887:1; Exh. P-151 at Tab 22, page 4.) Moreover, if the Bakersfield market also declines, the impact as a percentage of profitability will be higher. (RT Vol. XII, 2887:2-6; Exh. P-151 at Tab 22 page 5.)

139. Mr. Stockton testified there is not a credible case where impact to Barber Honda due to

the addition of the proposed North Bakersfield Honda dealership would not be greater than the profitability of Barber Honda. (RT Vol. XII, 2887:9-18; RT Vol. XIII, 3017:6-13.)

140. Competitive registrations in the Bakersfield market have declined incrementally every year since 2015. (RT Vol. XII, 2888:3-11; Exh. P-153.) There is no foreseeable localized or overall automotive industry growth that would offset the impact from an additional point in the Bakersfield Market. (RT Vol. XII, 2889:12-19.)

141. The economic benchmark for assessing the viability of a business is a reasonable return on the invest over and above the break-even point. (RT Vol. XIII, 3017:22-3018:20.)

142. Mr. Farhat's case studies showed the following for increased registration effectiveness after add points: (1) in the Surprise case study, in the year prior to the add point actual registrations in the ASAs was 4639 and expected registration was 6225 (a registration effectiveness of 74.5%) while in the year after the add point the actual registrations was 5692 and the expected registrations was 6658 (a registration effectiveness of 85.49%) – the overall increase in registration effectiveness for the Surprise case study was 11 percentage points or an 11.5 percent increase; and (2) in the Seattle case study, in the year prior to the add point actual registrations in the ASAs was 2307 and expected registrations was 2692 (a registration effectiveness of 85.7%) while in the year after the add point the actual registrations was 2762 and the expected registrations was 2900 (a registration effectiveness of 95.2%) – the overall increase in registration effectiveness for the Seattle case study was 9.5 percentage points or an 11.1 percent increase. (RT Vol. XIV, 3343:12-3347:8.)

143. The overall brand expansion in Washington, Surprise, Baton Rouge, and Bakersfield case studies support brand expansions of approximately 9% to 18%. (RT Vol. XIV, 3343:12-3347:8; RT Vol. XIV, 3452:2-17; Exh. R-407, page R-20.5; RT Vol. XVII, 4015:17-4016:18 (interpreting a less than 10 percent sales increase based on Mr. Farhat's Exhibit R-407, page R-20.5).)

144. The percentage change in registration effectiveness necessary to go from Bakersfield's current registration effectiveness to 100 percent registration effectiveness would be an increase of approximately 46 percentage points or approximately an 81-82 percent increase in registration effectiveness. (RT Vol. XIV, 3349:6-3351:16.) This level of increase is not supported by the case study evidence.

145. An overwhelming number of households and retail competitive registrations are in the southern half of the RMA between Barber and the proposed north Bakersfield point. (Exh. R-376 at A-41 and A-42 and RT Vol. XVII, 4063:9-12.)

146. There is little population north of the proposed location. If established, the North Bakersfield dealership would be forced to compete for available Honda business in the bottom half of the RMA. (Exh. R-376 at A-41; RT Vol. XVII, 4063:9-12.)

147. If Barber Honda loses one-third of its territorial advantage, and brand opportunity in the market expands by 20%, then the dealership's remaining share of the market will be two-thirds of 120%, or 80%--a 20% loss. (RT Vol. XVII, 3960:9-3961:9.)

148. Mr. Stockton determined there is not a reasoned case in which the financial impact on Barber Honda from the addition of Galpin would be less than Barber's profitability—this is not a close call. (RT Vol. XII, 2875:15-2876:14; RT Vol. XVII, 3959:17-3961:9.)

The Oil and Agricultural Industries in Bakersfield

149. There are two primary industries in Bakersfield—oil and agriculture. Kern county is the second largest oil-producing county in the country. The local economy is adversely affected when the oil industry is adversely affected. (RT Vol. IX, 2057:16-2061:18.)

150. The Bakersfield High School team name is the “Drillers” in reference to oil drilling. (RT Vol. IX, 2066:15-2067:3.)

151. Bakersfield has a significant Hispanic market of about 50 percent compared to the North Hills area of about 34 percent and California's Hispanic market of about 36 percent. (RT Vol. IX, 2061:21-2062:12.) Barber Honda directs significant advertising to its Hispanic market including television advertising, radio, and a program to go feed the farm workers lunch. (RT Vol. IX, 2062:18-2063:9; Exh. P-117 and RT Vol. IX, 2152:11-2153:5.) Barber Honda advertises to the Hispanic market independent of the Baker Street advertising including radio, digital, TV spots, and billboards. (RT Vol. IX, 2151:14-23.) Barber Honda employs a large number of Spanish speaking staff across all departments. (RT Vol. IX, 2063:10-12 and 2150:19-2151:13.)

152. Several witnesses refer to Bakersfield as an “island.” Bakersfield's isolated nature presents challenges for Barber Honda because it limits its ability to sell outside its ASA. (RT Vol. IX,

2082:4-2083:15.) Additionally, the historic traffic pattern shows consumers traveling from Bakersfield to L.A. for major purchases. (*Id.*)

153. The population in the City of Bakersfield is approximately 376,000. (RT Vol. IX, 2099:21-23.)

154. There was an impact of approximately 1,200 lost jobs due to the drop in oil in 2015. The drop in oil also affected property tax revenue. (Exh. P-122; RT Vol. IX, 2203:12-2205:20.)

155. Oil prices fell to under \$30 per barrel from over \$130 per barrel by January 25, 2016. (Exh. P-128 and R-322.)

156. Unemployment in Kern county reached 10.2 percent for the fourth quarter of 2015 compared to California's unemployment figure of 5.8 percent. (Exh. R-324.) More employees were laid off in the oil industry as of February 2016. (*Id.*)

157. Oil prices fell to under \$23 per barrel by June 2016. (Exh. P-131.)

158. Oil is the "lifeblood" of Bakersfield. Thousands of oil pumps dot the landscape near Bakersfield. The oil crash created unemployment in Kern county at more than double California's unemployment rate. (Exh. P-133.)

159. When the price of oil falls below lifting cost, the oil companies stop pumping oil from the ground and lay off employees. This has a direct impact on the economic conditions in Bakersfield. (RT Vol. X, 2467:19-2469:4.)

160. The Bakersfield economy is oil and gas dependent and these industries have been contracting in Bakersfield. (RT Vol. XII, 2890:15-24.)

161. The parties observed some derricks apparently operating and some not operating during the market drive. (Exh. J-29 (Stipulated Facts Regarding January 9, 2020 Market Drive) at ¶ 20.)

162. Mr. Farhat claimed, "the change in oil prices did not affect the performance of the [Honda] brand in a dramatic way." (RT Vol. XIV, 3430:9-13.) However, Mr. Farhat admitted, "[O]il's a big part of this country. It's a big part of the economy. Decisions are made and investments are made and purchases are made based on oil prices." (RT Vol. XIV, 3429:18-21.) He also admitted the drop in oil impacted the Bakersfield economy through a change in employment. His understanding was that oil is a big part of the economy in Bakersfield. (RT Vol. XIV, 3430:19-3431:1.)

163. The number of wells being drilled in Bakersfield has decreased due to environmental concerns regarding drilling oil wells. This has caused additional layoffs as of January 2020. (RT Vol. XVI, 3918:8-3919:12.)

164. Declines in the oil and gas industry adversely impact the Bakersfield economy more so than any other area in California. Kern County is one of the largest oil producers in the country. Stephen Ekegren has seen a lot of people moving out of Bakersfield in response to the declining oil industry. (RT Vol. XVI, 3919:13-3921:6.)

165. During the market drive, the parties traveled approximately six miles north from 7th Standard Road/Merle Haggard Drive through agricultural fields and no exits until Lerdo Highway; Delano, described as a rural agricultural community, is approximately 25 miles north of the proposed dealership location. (Exh. J-29 (Stipulated Facts Regarding January 9, 2020 Market Drive) at ¶¶ 22-25.)

166. Honda's use of registration effectiveness to approximate "available opportunity" in the Bakersfield market is not reasonable and fails to accurately reflect the Honda sales, parts, and service opportunities in the Bakersfield market. There are not sufficient sales, parts, and service opportunities in the Bakersfield market to mitigate the severe impact the proposed establishment would have on Barber Honda. Honda's RSE and RE metrics fail to comply with Vehicle Code section 11713.13(g).

Honda's Standard and Calculation of Available Opportunity

167. Van Olst admitted using the zone average is the most stringent average you could use between California and the Zone. (RT Vol. II, 449:14-20.) Zone 12 outperforms the California market share for Honda. (RT Vol. III, 470:18-21.)

168. Van Olst agreed the average income in the East Bay is probably considerably higher than Bakersfield and home prices in the East Bay market are considerably higher on average than they are in Bakersfield (RT Vol. III, 472:2-9.)

169. In 2013, Bakersfield had an average household income a little less than \$20,000 below California's average household income. (RT Vol. III, 519:12-18.)

170. Marc Thomas described Bakersfield as "its own little isolated market." (RT Vol. III, 542:14-24.)

171. Marc Thomas agreed "a lot of trucks" are sold in the Bakersfield. He was not aware of a

market selling a similar number of trucks compared to Bakersfield. (RT Vol. III, 547:10-16.)

172. The MAP (Market Area Potential) figure for the North Bakersfield Open Point was 1,482 at the time of Exhibit J-14. (RT Vol. III, 625:13-17; Exh. J-14.) At some point thereafter, the MAP figure for the North Bakersfield Open Point was reduced. (RT Vol. III, 626:2-5.) In comparison, after the change to ASAs, it is most likely that most MAPs went up. (RT Vol. III, 631:11-632:15.) One of the “building blocks” of the MAP calculation is the expected sales in a particular geography. (RT Vol. IV, 770:23-771:25.)

173. There is not a large commuter market in Bakersfield and there is a lower demand for hybrids in the Central Valley than there is in the Zone. (RT Vol. IV, 846:23-847:17.)

174. Mr. Ewanicki admitted, “[I]t’s no secret that there are nuances between all markets within a state, and sometimes, you know, within a county even or something like that.” (RT Vol. V, 1073:15-22.)

175. There are areas of California with higher truck sale penetration than car sale penetration. (RT Vol. V, 1078:7-13.)

176. A market like Fresno or Bakersfield is going to see more full-sized truck registrations than Santa Cruz or Modesto. Honda may also sell more CR-Vs in the valley and more Fits on the coast (RT Vol. V, 1084:1-24.)

177. District D performs the lowest in Honda market share of the four districts in Zone 12. (RT Vol. V, 1087:8-16.)

178. Barber Honda has been receptive of suggestions and recommendations from Honda representatives including Todd Meyer. There’s never been an occasion where Barber Honda refused to do something Mr. Meyer suggested or requested. (RT Vol. V, 1145:4-1146:13.)

179. From year end 2015 to year end 2016, competitive industry registrations in the Bakersfield ASA declined while Honda’s expected sales using RSE increased. (RT Vol. V, 1229:7-17; Exh. 346 at p. 021 (there were 8126 competitive retail registrations in Barber Honda’s ASA in 2015; AHM expected Barber Honda to sell 1850 new vehicles under the RSE calculation) and p. 009 (there were 8076 competitive retail registrations in Barber Honda’s ASA in 2016; AHM expected Barber Honda to sell 1978 new vehicles under the RSE calculation).)

180. California markets have different levels of average income, levels of employment or unemployment, education, and geographies. (RT Vol. VI, 1037:11-23.)

181. Frank Beniche admitted to seeing a market that exhibited a preference for domestic vehicles more so than the state average. (RT Vol. VI, 1037:24-1038:2.)

182. RSE presumes every Honda dealer has the same opportunity to achieve zero RSE. (RT Vol. VI, 1038:17-20.)

183. There can be more availability of sales to some dealers outside their ASA than there are to other dealers. (RT Vol. VI, 1039:6-13.)

184. There are factors beyond dealer performance that determine Honda's market share in a given market including household incomes. For example, in a market with a higher household income, Honda may do better in terms of market share. (RT Vol. VI, 1043:13-19.)

185. RSE applies Honda's California average market share in a segment by segment manner to competitive registrations in census tracts to determine expected registrations. (RT Vol. VI, 1046:20-1047:20.)

186. When evaluating dealers using an average market share, approximately half the dealers will be above and half the dealers will be below the average market share. It may be approximately 53-54% above and 46% below by the raw number of dealers. (RT Vol. VI, 1047:21-1048:10.)

187. Frank Beniche could offer no explanation for why Barber Honda is currently unable to capture the purported additional sales opportunity in its market. (RT Vol. VI, 1092:8-11.)

188. Competitive registrations in Bakersfield declined from 2015 to 2017. (RT Vol. VI, 1238:3-12; Exh. R-376 at A-43 to A-46.) Retail Honda Expected Registrations increased in Bakersfield from 2015 to 2017 under AHM's RSE calculation. (Exh. R-376 at A47 to A-50.)

189. In calculating RSE and Registration Effectiveness, Honda takes another geography's market share (for example, California market share for RSE or Zone market share for registration effectiveness) and looks to the competitive segment registrations in an ASA. By segment, RSE and Registration Effectiveness determine an expected number of sales or registrations from the competitive segment registrations modified by Honda's market share for the other geography. AHM considers any "deviation from the expected to the actual is lost opportunity." (RT Vol. VII, 1249:13-1252:1.)

190. From 2015 through 2017, competitive registrations declined for Bakersfield and nationally. (RT Vol. VII, 1254:1-1256:21.)

191. From 2015 through 2017, AHM's expected registrations within the North Bakersfield RMA increased because AHM's market share in areas outside Bakersfield was increasing. (RT Vol. VII, 1256:25-1257:12.)

192. If AHM's market share remains unchanged and AHM's competitive registrations decline, AHM's expected sales or registrations also decline. (RT Vol. VII, 1259:8-13 and 1260:3-6.)

193. Frank Beniche testified that Bakersfield's expected sales increased during a time when competitive registrations were in decline and consumers were buying fewer cars because AHM's market share had grown based on the California represented average. (RT Vol. VII, 1260:16-1261:13.) He agreed, "Honda dealers across all of California, which includes the L.A. Metro, the San Francisco Metro, Honda's increasing market share in those areas. And because of that, you would expect increased sales in Bakersfield." (RT Vol. VII, 1261:13-19.)

194. For registration effectiveness, anything short of Honda's expected registrations is considered shortfall or available opportunity. (RT Vol. VII, 1261:24-1262:3.)

195. If actual Honda registrations in the North Bakersfield ASA remained the same in 2016 as they were in 2015, Honda would have determined an increased available opportunity based on its expected registration analysis. (RT Vol. VII, 1263:23-1264:3.)

196. Honda's District A is north of San Francisco and the Metro East Bay; District B is the San Francisco Metro through San Jose Metro; District C is Sacramento and some outlying areas (Yreka and Eureka); and District D is the Central Valley. (RT Vol. VII, 1317:10-1319:2.)

197. District B is the largest volume district for Honda sales in the Northern California Zone followed by District A as the second highest volume, District C as the third highest, and District D (the Central Valley) as the lowest volume. (RT Vol. VII, 1319:3-17.)

198. Peter Hagan agreed there are some markets where domestics are stronger than others in terms of sales. (RT Vol. VII, 1323:9-12.)

199. A dealer may meet a sales objective but may still be below Honda's calculation of RSE. (RT Vol. VII, 1327:8-22.)

200. There is a preference for trucks in the Bakersfield economy including models with which Honda does not compete. (RT Vol. IX, 2086:18-2087:19.) As shown during Barber Honda's off-site showroom, many customers shop for vehicles at the dealer where they bought their work truck. (RT Vol. IX, 2087:20-2089:12.) A lack of a large truck impacts Barber Honda's ability to sell other vehicles in the Bakersfield market. (RT Vol. IX, 2092:13-2093:3.)

201. The Mitsubishi and Kia brands sell vehicles at a lower price point than Honda. Honda's competitive sets include Mitsubishi and Kia vehicles; however, Honda's segmentation is incapable of accounting for differences in price or available financing options within each segment. (RT Vol. IX, 2095:17-2096:9; Exh. R-376 at A-9.)

202. Barber Honda consistently strives to sell additional vehicles, but Steve Ekegren and Jonathan Ekegren do not believe there are 50 percent more Honda sales to be made in the Bakersfield market. (RT Vol. IX, 2165:2-2166:9; RT Vol. XVI, 3900:25-3901:22.) There is no reason why Barber Honda would not be motivated to sell as many new Hondas as possible. (RT Vol. IX, 2167:8-19.)

203. Barber Honda's RSE scores went from negative 13.65 in 2012 to negative 7.73 in 2013 and then positive RSE by the end of 2014. (RT Vol. IX, 2186:7-2189:9; Exh. R-346.) Barber Honda understood it needed to improve its RSE to prevent the second point from being established and was receiving additional supplemental inventory from Honda during these years. (RT Vol. IX, 2184:15-2185:21; Exh. P-175; RT Vol. IX, 2188:4-2189:9.) Barber Honda's RSE decreased after 2014 due to the significant drop in oil prices. (RT Vol. IX, 2189:13-2190:20.)

204. The Bakersfield ASA's retail registrations have declined approximately 10 percent since 2014 while Honda's expected opportunity has increase by about 12 percent. (RT Vol. XI, 2542:5-19.)

205. Barber Honda's MAP is 1,784. (RT Vol. XI, 2564:22-2565:8.)

206. The Bakersfield market is different from the Fresno market based on the education levels being higher in the Fresno market, the unemployment level is higher in the Bakersfield market, Bakersfield's agricultural market is larger than Fresno's, Bakersfield is in the largest oil producing county in the state while Fresno is not known for producing oil, and Fresno is a larger city than Bakersfield. (RT Vol. XI, 2566:17-2567:17.)

207. There may be some additional new Honda sales opportunity in the Bakersfield market on

the order of a couple hundred. However, there are not 1,920 or more additional new Honda sales available to be made in the Bakersfield market. (RT Vol. XI, 2579:14-2580:3.)

208. When Barber Honda was RSE positive, it made 1,689 sales in the Bakersfield market. (RT Vol. XI, 2580:10-2581:5; Exh. R-346 at p. 346.033.)

209. Barber Honda's sales are up five percent in 2019 compared to the Zone being down two and a half percent. (RT Vol. XI, 2648:14-17.)

210. The Toyota dealerships in Bakersfield are under common ownership. The ownership group does not lose a sale when a vehicle is sold in one of the locations as opposed to the other location. (RT Vol. XII, 2731:16-2732:4.) Similarly, the Ford "locations" in Bakersfield are both Jim Burke Ford buildings at different addresses along the same road. (RT Vol. XVI, 3895:18-3897:9.)

211. Competitive registrations for Barber Honda's ASA went from 8,076 for year-end 2016 to 7,584 annualized sales for 2019 based on Exhibit R-405. (RT Vol. XII, 2743:25-2745:16.)

212. Registration effectiveness at California average provides a "first cut" for evaluating performance in any given market but does not allow an independent assessment of cause or materiality and does not account for differences (beyond segmentation) in the market. (RT Vol. XII, 2817:24-2818:13.)

213. After controlling for demographic factors including median age, median household income, education level, population density, and registrations at California average as a percent of industry registrations (fit of the product), there is an approximate negative 10 percent effect on the Honda brand in the Bakersfield market. (RT Vol. XII, 2818:14-2820:25.)

214. The State average market share in California cannot be relied on alone to determine a brand's performance in a market. (RT Vol. XII, 2821:1-2822:14.)

215. RSE does not meaningfully explain Honda dealer sales in California. (RT Vol. XII, 2837:21-2840:4; Exh. P-152 at Tab 4, Page 1.)

216. The effect of Honda's dealer network explains at most 11.5 percent of how much Honda registrations vary from census tract to census tract. (RT Vol. XII, 2842:15-2843:6.)

217. No other brands in Bakersfield have two dealerships under separate ownership. Toyota and Ford have two dealerships under the same ownership. (RT Vol. XII, 2843:7-2844:8.)

218. RSE is a “weathervane” as a first-cut metric, but it does not do the math to determine dealer performance or real shortfall in sales. (RT Vol. XII, 2880:7-2881:6.)

219. The three primary failings of the use of a state-based average to determine potential opportunity are (1) it constrains half of the dealer body or markets to be above the average and half of the dealer body or markets to be below the average by weight; (2) an average does not adequately control for local conditions; and (3) it provides no means of assessing materiality and provides no meaningful way to reach conclusions based on the difference from the average that one could observe. (RT Vol. XIII, 3011:3-3012:11.)

220. Mr. Farhat agreed that an average will always evaluate approximately a half of all markets operating above the California average and half the markets operating below the average by weight. (RT Vol. XIV, 3390:13-24.) He also agreed the under performance and shortfalls based on the California average could not be eliminated. It might be “minimized” but “you never eliminate it.” (RT Vol. XIV, 3390:25-3391:10.)

221. The Honda market study in Exhibit J-18 does not contain an explicit parts or service analysis. (RT Vol. XIV, 3283:12-3284:7.)

222. Mr. Farhat’s dealer count calculation was based on 22 franchises includes the two dealerships in Delano. (RT Vol. XIV, 3417:22-25.) Mr. Farhat never actually visited Delano during his market drive because “it was a lot longer -- lot further away” from Bakersfield than he initially realized. (RT Vol. XIV, 3418:1-13.) If the three franchises in Delano are removed from Mr. Farhat’s dealer count calculation, the dealer count is 1.65 instead of 1.9. (RT Vol. XIV, 3419:9-3420:20; Exh. R-376 at A-55U.)

223. Van Olst testified the registrations and competitive segment registrations did not forecast “bad or dire economic conditions in Bakersfield and negative projections for the automobile industry overall in Bakersfield.” (RT Vol. XV, 3471:12-3472:1.)

224. AHM was predicting a 1 percent increase in Honda sales in 2020 compared to 2019 as of January 6, 2020. (RT Vol. XV, 3485:13-21.)

225. Mr. Van Olst agreed according to Exhibit P-153, competitive registrations have declined in the Bakersfield market since 2015. (RT Vol. XV, 3604:5-19.)

226. Jonathan Ekegren testified he did not believe there are 2,000 additional Honda sales to be made in Bakersfield. (RT Vol. XVI, 3900:25-3901:22.) Barber Honda's highest annual new vehicle sales in a year was roughly 1,850 since Jonathan Ekegren's involvement with the dealership, and Barber Honda has never exceeded 2,000 sales in a year. (RT Vol. XVI, 3901:23-3902:4; RT Vol. XVI, 3921:10-23.)

In-Sell

227. Van Olst was unable to give an amount of in-sell that might be expected in any given market or Bakersfield. Van Olst claimed all in-sell is opportunity for the dealer. (RT Vol. III, 493:22-494:11.)

228. Marc Thomas expects there to be in-sell in every market. (RT Vol. III, 544:24-545:1.)

229. David Adair has never seen a market in California with 0 in-sell. He was also unaware of any acceptable standard of in-sell. (RT Vol. III, 650:8-19; *see also* RT Vol. IV, 815:3-8.)

230. David Adair testified Honda is "not going to eliminate in-sell." "There's always going to be situations where people -- family reasons or whatever -- will buy a car from out of market." (RT Vol. IV, 817:8-24.)

231. In-sell is not a "sound cushion" for impact and generally reflects dynamic movement between markets. (RT Vol. XII, 2871:6-18.) In two of Mr. Farhat's case studies, in-sell did not go down significantly after the add point. In-sell did not function as a "cushion" against impact in those case studies. (RT Vol. XII, 2875:1-10.)

232. The distance at which a pump-in occurs in Bakersfield is not necessarily more than 60 miles—it depends on the distance of the customer to the competing dealership. (RT Vol. XIII, 2968:12-16.)

233. Mr. Farhat testified he did not recall seeing a Honda market with zero in-sell – "Even Hawaii has in-sell, believe it or not." (RT Vol. XIV, 3352:10-13.)

Flex Cash

234. From time to time Honda will provide dealers "flex cash" based on the dealer's sales history. (RT Vol. VII, 1376:4-1377:13.) Smaller dealers receive less flex cash than larger dealers. (RT Vol. VII, 1379:8-17.) Sometimes dealer cash is only available for vehicles financed through American

Honda Finance. (RT Vol. VII, 1379:25-1380:2.)

235. From time to time, Barber Honda is allocated a certain amount of flex cash to apply to customer transactions. Honda's process to determine the amount of flex cash assigned to Barber Honda was never explained to Jonathan Ekegren, Barber Honda's Dealer Manager. (RT Vol. XI, 2528:11-2530:12.)

236. Bakersfield's higher unemployment rate and lower education level makes price a more compelling factor for the sale of a vehicle than other parts of California. (RT Vol. XI, 2569:25-2570:10.)

Subprime

237. Subprime lending generally applies to customers with credit scores under a 650 or 620 FICO score. (RT Vol. XI, 2556:18-2557:2.)

238. American Honda Finance does not have much of a program for subprime deals. (RT Vol. IX, 2097:16-2098:21.)

239. Honda Finance does not cater to subprime customers. Subprime customers do not qualify for Honda Finance programs. (RT Vol. XI, 2557:3-11.)

240. Barber Honda never turns a customer away because of finance scores but needs to find another bank if Honda Finance does not approve a loan to a customer. (RT Vol. XI, 2558:2-2559:4.)

241. Barber Honda does not actively target subprime customers for vehicle sales. (RT Vol. XI, 2559:5-20.) Barber Honda does not view subprime as beneficial to the customer because it places the customer in a high interest rate loan and creates a negative equity position for the customer when the customer returns to buy another vehicle from the dealership. (RT Vol XI, 2561:20-2562:21.)

242. The Mitsubishi store in Bakersfield actively pursues the subprime market. (RT Vol. XI, 2559:21-2561:4 (Mr. Jonathan Ekegren testifying "the sole reason [the Mitsubishi dealer] exist[s] is selling to subprime borrowers").)

243. Some of the market share difference between Bakersfield and the California average is explained by the amount of subprime business available in Bakersfield and Barber Honda's choice to not pursue subprime customers aggressively or actively. (RT Vol. XII, 2823:25-2825:9.)

244. In comparison, the Mitsubishi dealer in Bakersfield is extremely active in subprime. (RT Vol. XII, 2826:10-2827:17.)

The Galpin Organization

245. During the Galpin organization's presentation to the Zone concerning the North Bakersfield Open Point, Michael Bach asked "Who was going to manage the facility, the operation, if they were given that open point?" (RT Vol. IV, 953:3-9.) Ed Hartoonian responded he would be the on-site General Manager and operator of the store and he would relocate to Bakersfield. (RT Vol. IV, 953:10-19.) Ed Hartoonian would then hire the Department Managers locally and they would hire the remaining staff. (RT Vol. IV, 953:20-25.)

246. Frank Beniche understood Ed Hartoonian was going to relocate and manage the North Bakersfield Galpin store. (RT Vol. VII, 1270:24-1271:2.)

247. The Subaru franchise appears to be a strong growth franchise in California. (RT Vol. V, 1044:24-1045:1.) However, Galpin voluntarily terminated its Subaru franchise to open up a Porsche franchise. (RT Vol. V, 1045:2-9.)

248. Honda required the North Bakersfield Open Point dealer to use 3.59 acres for the facility. Galpin secured 11 acres of property in North Bakersfield. (RT Vol. VI, 1123:15-25.)

249. Galpin purchased its property in North Bakersfield more than a year before the LOI was executed. (RT Vol. VI, 1231:22-24.)

250. The Galpin Honda store in the San Fernando Valley has more opportunity to sell outside its ASA compared to a Honda store location in the North Bakersfield ASA. (RT Vol. VII, 1272:22-25.)

251. Peter Hagan was sure Bert Boeckmann might have ownership involvement in the North Bakersfield Opening Point, but he was not going to be actively involved because of his age. (RT Vol. VII, 1338:12-19.)

252. The Galpin organization has nine franchises: Ford, Honda, Mazda, Volkswagen, Lincoln, Volvo, Jaguar, Aston Martin, and Lotus. (RT Vol. VIII, 1748:24-1749:5.) Beau Boeckmann is the Dealer Principal for all the Galpin franchises. (RT Vol. VIII, 1749:17-20.) He is also the President and COO of the Galpin organization. (RT Vol. VIII, 1750:16-22.)

253. Approximately five years ago, Brad Boeckmann, Beau Boeckmann's brother, retired from the Galpin organization. (RT Vol. VIII, 1749:21-25.) When Brad Boeckmann was part of the Galpin organization, Beau Boeckmann and Brad Boeckmann were co-Vice-Presidents of the

organization. (RT Vol. VIII, 1750:23-25.)

254. Ed Hartoonian previously reported directly to Brad Boeckmann. (RT Vol. VIII, 1750:13-15.)

255. After Brad Boeckmann retired, Ed Hartoonian began reporting to the Vice-President of Sales as a direct report (previously Andy Graff and today Michael Schwartz) and Beau Boeckmann. (RT Vol. VIII, 1751:1-13.)

256. Beau Boeckmann testified Ed Hartoonian did not have any criticisms of the new structure. (RT Vol. VIII, 1752:3-6.) However, Ed Hartoonian testified one of the reasons he left the Galpin organization was because “there were some changes made in the organizational structure that in my opinion had negatively impacted my ability to run the Honda store substantially. And the other one was I thought there was too many layers of bureaucracy, I’m going to call it, for approvals that was implemented recently. I mean, there were a number of things. But, again, it’s -- somebody doesn’t get up and leave after 28 years if everything is hunky-dory, right?” (Exh. J-28 at Edik Hartoonian’s March 26, 2019 Deposition at 44:9-45:21.)

257. Ed Hartoonian was approved to have day-to-day responsibilities for the North Bakersfield Open Point. (RT Vol. VIII, 1753:23-1754:4.)

258. Beau Boeckmann denied the plan was for Ed Hartoonian to relocate to Bakersfield to be the General Manager for the North Bakersfield Open Point. He believed Ed Hartoonian might have had a temporary place to stay in Bakersfield but was not planning on moving his family. (RT Vol. VIII, 1755:1-16.)

259. Beau Boeckmann testified that Ed Hartoonian left the Galpin organization because he was not happy with California’s cost of living and taxes and because he had a desire to be his own dealer. (RT Vol. VIII, 1759:7-1761:6.) However, Ed Hartoonian testified the reasons he left the Galpin organization included the inability to come to a mutual understanding regarding Mr. Hartoonian’s ownership interest in Galpin Honda, changes to the organizational structure of the Galpin organization, and additional layers of bureaucracy within the Galpin organization. (Exh. J-28 at Edik Hartoonian’s March 26, 2019 Deposition at 44:9-45:21; *see also* Exh. J-28 at Edik Hartoonian’s March 26, 2019 Deposition at 48:13-49:11.)

260. Beau Boeckmann denied Ed Hartoonian left the Galpin organization based on a dissatisfaction with the organization. (RT Vol. VIII, 1765:21-25.) He also denied he told Ed Hartoonian to worry about managing the store and leave management to him when Ed Hartoonian complained about additional layers of approval needed in the organization after Brad Boeckmann retired. (RT Vol. VIII, 1767:4-19.) Ed Hartoonian testified, “I had that discussion with Bo [sic] and about vision and direction of the company. And Bo [sic] was very explicit with me that that’s his area and I should focus on the operations of the Honda store. And I just focused on the operation of the Honda store and I left the rest of it to them, again.” (Exh. J-28 at Edik Hartoonian’s March 26, 2019 Deposition at 55:7-22.)

261. Beau Boeckmann denied ever failing to follow through on any commitments to Ed Hartoonian (RT Vol. VIII, 1767:20-22.) However, Mr. Hartoonian testified Beau has told him things he did not follow through on. (Exh. J-28 at Edik Hartoonian’s March 26, 2019 Deposition at 116:18-20.) Additionally, Beau Boeckmann denied telling Ed Hartoonian he would be able to get an advance on having his Galpin Honda stock bought out. (RT Vol. VIII, 1768:15-18.) Beau Boeckmann denied telling Ed Hartoonian he would receive the advance if Ed Hartoonian remained to announce a new General Manager for the Honda store. (RT Vol. VIII, 1769:2-6.) Mr. Hartoonian testified he had requested an advance toward his buyout and been told it would not be a problem. Beau Boeckmann requested Ed Hartoonian address the Honda group to introduce the new general manager in exchange for the advance. After introducing the new general manager for the Honda store, the advance became a loan and not in the amount Mr. Hartoonian requested. (Exh. J-28 at Edik Hartoonian’s March 26, 2019 Deposition at 122:13-123:18.)

262. David Gillam is the current GM for the Galpin Honda store. (RT Vol. VIII, 1776:14-16.) He previously ran the Galpin Mazda stores (most recently the Galpin Mazda store in the San Fernando Valley). (RT Vol. VIII, 1778:7-20.)

263. Galpin no longer operates the Santa Clarita Mazda store and Santa Clarita Subaru store. Galpin replaced the franchises with a Porsche franchise in Santa Clarita. Galpin looked at building a new facility on leased property for the Mazda and Subaru franchise but ultimately voluntarily terminated the franchises. (RT Vol. VIII, 1778:21-1781:8.) Beau Boeckmann denied having made facility commitments to Mazda and Subaru before voluntarily terminating the franchises. (RT Vol. VIII,

1787:12-1790:3.)

264. Galpin previously acquired a Kia franchise. The Kia franchise was relocated to a temporary structure while a facility was built. (RT Vol. VIII, 1790:19-1791:25.) Galpin planned to build a Kia facility and had plans put together, however, the Galpin Mazda franchise's lease expired and Galpin decided to relocate the Mazda franchise to the location originally intended for the Kia franchise. Galpin then voluntarily terminated its Kia franchise. (RT Vol. VIII, 1792:19-1794:11.)

265. When David Gillam became the general manger of Galpin's Honda store, Jan from the Volkswagen store became the general manager of the Mazda store and the top manager at the Mazda store became the general manager at the Volkswagen store. (RT Vol. VIII, 1803:13-18.)

266. Two general managers have left the Galpin organization since 2015—Ed Hartoonian and Terry Miller. Terry Miller was previously the general manager of the Galpin Ford store. (RT Vol. VIII, 1804:10-17.)

267. Terry Miller left the Galpin organization approximately a few months before October. (RT Vol. VIII, 1804:18-21.) Terry Miller had previously been the general manager of the Galpin Ford store for a little over 10 years. (RT Vol. VIII, 1804:22-1805:1.) Terry Miller ultimately ended up moving to Kansas to run a small Ford store there. (RT Vol. VIII, 1805:3-25.)

268. Michael Schwartz, who oversees all the Galpin general managers as the Vice President of Business Operations, also became the General Manager of the Ford store after Terry Miller left the Galpin organization. (RT Vol. VIII, 1807:9-25.)

269. Al Joseph, who was the Galpin Kia general manager, came from the Galpin Ford store as its Sales Manager. He is now Galpin's used-car manager. (RT Vol. VIII, 1811:6-13.)

270. Galpin currently does not have a person identified to be the general manager for the proposed Galpin store in North Bakersfield. (RT Vol. VIII, 1811:14-20.)

271. Galpin has not identified which employees might be candidates to relocate to Bakersfield. (RT Vol. VIII, 1816:24-1817:2.)

272. Beau Boeckmann will be the Dealer Principal for the North Bakersfield Open Point if the point is permitted to go forward. (RT Vol. VIII, 1818:7-10.) He is also on Ford's Product Committee, a Ford committee regarding future automobile transportation, a local FDAF advertising committee, and

the Dealer Advisory Board for Aston Martin. (RT Vol. VIII, 1819:25-1820:20.)

273. Beau Boeckmann is also currently involved in current television production projects. (RT Vol. VIII, 1821:19-1822:5.)

274. Galpin relied on Honda's opportunity analysis to determine what sales opportunities exist in Bakersfield. Galpin did not do any independent research. (RT Vol. VIII, 1829:14-25.)

275. Bert Boeckmann was 89 years old as of October 2019. (RT Vol. VIII, 1854:13-15.)

276. The Galpin organization is a "very healthy company" and could sustain losses if there was another recession. Beau Boeckmann testified, "Even as difficult as the last recession that we were in, we came out quite nicely through it, even though it was a difficult time, obviously, for all of us." (RT Vol. VIII, 1859:9-24.) The Galpin organization is well capitalized and could withstand another recession if it were to hit. (RT Vol. VIII. 1860:1-4.)

277. Galpin uses a pack in the sense of a cost associated with the management cost of a vehicle. (RT Vol. VIII, 1883:17-1884:21.) Beau Boeckmann described it as "a very common thing in our industry." (*Id.*)

278. Galpin's current facility commitments include Porsche, Land Rover, a three-dealership campus for Volvo, VW, and Mazda, a facility remodel for Lincoln, and a facility remodel for Lotus. (RT Vol. VIII, 1916:13-1917:9 and 1920:22-1921:4.)

279. If the North Bakersfield point is permitted to go forward, Galpin would also have a facility commitment to Honda in North Bakersfield. (RT Vol. VIII, 1921:9-13.)

280. Galpin Honda's rank for CSE stores was 33 in 2010, 48 in 2011, 59 in 2012, 62 in 2013, 32 in 2014, roughly the same in 2015 as the prior year, and 14 in 2016 with 2,466 surveys. (RT Vol. VIII, 1984:3-1990:22.)

281. Galpin purchased approximately 11 acres for the North Bakersfield Open Point. (RT Vol. VIII, 1996:23-25.) Honda only requires a little less than 4 acres for the Open Point. (RT Vol. VIII, 1997:1-18.) Beau Boeckmann testified the large property gives Galpin "room to grow" and "prevents another dealer coming in right next door." (*Id.*)

282. Beau Boeckmann agreed that Galpin Honda tends to sell more vehicles outside its market than other dealers sell into Galpin Honda's market. (RT Vol. VIII, 2004:16-23.)

283. Galpin has more resources to draw from than Barber Honda and could outlast Barber Honda in the event there is ruinous competition between the two points in Bakersfield. (RT Vol. X, 2485:7-20.)

284. Galpin achieves its higher sales volumes at its current stores through mostly intrabrand instead of interbrand competition. (RT Vol. XII, 2869:16-2870:6.) Galpin Honda overwhelmingly sells more vehicles into surrounding dealers' ASAs than those dealers sell into Galpin's ASA. (RT Vol. XII, 2870:7-10.) If Galpin's sales history holds true in Bakersfield, Barber Honda will experience sales and service losses greater than the territorial losses would predict. (RT Vol. XII, 2870:11-20.) Galpin's Ford store exhibits a similar pattern showing a 7-to-1 relative cross-sell with Woodland Hills and over a 32-to-1 relative cross-sell with Simi Valley. (RT Vol. XII, 2873:8-2874:17.)

Galpin Proforma

285. Galpinsfield's proforma for the North Bakersfield Honda Dealership is included in Exhibit J-20. (Exh. J-20 at AHM_00065937.) Galpinsfield projected to sell 1,600 new vehicles in its first year of operation, 1,920 new vehicles in its second year of operation, and 2,496 new vehicles in its third year of operation. (*Id.*) Galpinsfield projected it would lose money the first two years of operation and only earn a profit the third year of operation. (*Id.*) Moreover, Galpin's proforma shows expenses increases year-over-year for the first three years (and not decreasing as proposed by certain witnesses). (*Id.*)

286. Galpin's projection of 2500 new vehicle sales was "aggressive" to Peter Hagan because the MAP for the area "is a lot less than that." (RT Vol. VII, 1340:4-20.)

287. Based on Galpin's proforma, the Galpin dealership would need to be making between 1,920 and 2,496 new car sales to operate profitably. (RT Vol. VII, 1344:4-12.)

288. Beau Boeckmann denied Galpin would need to sell more than 1,920 new vehicles to operate profitably. (RT Vol. VIII, 1837:21-1838:12.)

289. Galpin's proforma was prepared by Ed Hartoonian and Galpin's Business Manager. (RT Vol. VIII, 1830:4-10.)

290. Beau Boeckmann testified the proforma shows the North Bakersfield dealership operating at a loss for the first two years due to up-front costs. (RT Vol. VIII, 1834:6-23.) However,

from the first year to the second year, the proforma shows all costs increasing except fixed expenses decrease roughly \$60,000. (RT Vol. VIII, 1837:13-20.) Moreover, fixed expenses then increase in Galpin's proforma from \$1,609,866 in the second year to \$1,793,927 in the third year. (Exh. J-20 at AHM_00065937.)

291. Galpin's proforma was developed in a time of projected growth in and around Bakersfield. However, because competitive industry sales are declining, Galpin is more likely to take business from Barber to reach the level of sales projected in its proforma. (RT Vol. XI, 2553:5-2554:2.)

292. Galpin's projection of 1,920 sales in the second year of operation would place its sales operations close to the 1,950 sales operations of the Galpin Honda store in San Fernando. Galpin's projection of 2,500 sales in the third year is in the ballpark of Galpin Ford's operations of approximately 2,700 sales per year. (RT Vol. XIII, 3022:17-3023:9.)

293. If Galpin were able to achieve the units sold of 2,496 in Bakersfield, it would have an extremely outsized intrabrand impact and overwhelming negative impact on Barber Honda. (RT Vol. XIII, 3024:5-3025:1.)

294. The combined MAP for the North Bakersfield ASA and Barber Honda's ASA is 3,191 units. Galpin selling 2,496 units would be 78 percent of the MAP for the combined area and would be "aggressive." (RT Vol. XIII, 3029:6-3030:21.)

VI. FINDINGS RELATED TO WHETHER IT IS INJURIOUS TO THE PUBLIC WELFARE FOR AN ADDITIONAL FRANCHISE TO BE ESTABLISHED OR AN EXISTING DEALERSHIP TO BE RELOCATED (VEHICLE CODE SECTION 3063(C))

295. The addition of the proposed point would only benefit the public welfare so long as both Honda dealerships are able to continue in operation.

296. The benefit to customers that would be gained from having a second point would be lost if one of the dealerships was forced to close. (RT Vol. VII, 1478:16-21.)

297. As noted above, the proposed establishment will have a devastating impact on Barber Honda's profitability. The impact will most likely force the closure of Barber Honda after ruinous competition.

298. If Barber Honda is forced to lay off employees as a result of the open point, it would not

benefit the Bakersfield community. (RT Vol. IX, 2159:3-13.)

299. If Barber Honda is forced out of business by the proposed establishment of the North Bakersfield Honda dealership, there will not be a net benefit to the community of Bakersfield. (RT Vol. XI, 2531:1-10.)

300. The purported benefits of the proposed North Bakersfield Honda dealership including increased convenience, a second brick-and-mortar location, and more competition all depend on the continued existence of Barber Honda in the Bakersfield market. (RT Vol. XIII, 3016:13-3017:5.)

301. Customer convenience would show an immaterial increase over levels exhibited for every brand with the exception of Toyota, which is the only brand with more than one location in Bakersfield. (Exh. J18 at AHM_00001384.)

302. The proposed additional Honda dealership will be added outside the city limits of Bakersfield. (Exh. J-29 (Stipulated Facts Regarding January 9, 2020 Market Drive) at ¶ 14.)

303. The two Bakersfield Toyota franchise are owned by Steve Downs. (RT Vol. IX, 2047:22-2048:10.)

304. The Ford store in the auto mall in Bakersfield is a satellite of the other Ford store. (RT Vol. IX, 2025:13-24.)

305. If Barber Honda is forced to close its doors, the proposed North Bakersfield dealer would be the only dealership available to Honda customers. This location is located farther from the majority of the population than Barber is currently. (*See* Exh. R-376 at A-41 and A-42.)

306. The Bakersfield market is more conducive to a second Toyota dealership under common ownership with the first dealership compared to a Honda dealership. The Bakersfield market did not effectively support the two Toyota dealerships after the second dealership was added. (Exh. P-154.) Toyota's market share increased only nominally in Bakersfield relative to Toyota's market share throughout California and the sales were split between the two locations. (*Id.*)

Facts Concerning the Comparison of the Honda and Toyota brands developed during the hearing

307. Toyota from time to time offers 0 percent financing. (RT Vol. II, 282:24-283:2.) Honda finance does not offer 0 percent financing and does not go lower than 0.9 percent on a special finance deal. (RT Vol. II, 283:3-8.) In order to offer 0% financing, a Honda dealer must buy down the interest

rate. (RT Vol. III, 597:10-21.)

308. Honda's incentive budget for 2019 is the same as it was in 2018. (RT Vol. II, 283:21-24.)

309. Zone 12 and the four Districts therein (Districts A, B, C, and D) do not outsell Toyota in raw sales. The Zone and Districts sell approximately 80 to 85 percent of the total Toyota sales. (RT Vol. III, 493:3-15.)

310. Mark Thomas testified the Toyota dealerships in Bakersfield are good, well-run dealership operations. The people working for the Toyota dealerships "are top-notch people as far as car sales. They know their business." (RT Vol. III, 549:6-19.)

311. Mark Thomas stated Toyota can "turn the spigot on and off" for incentive money on its vehicles while Honda is very conservative when providing incentive money on its vehicles. (RT Vol. III, 569:22-570:22.)

312. Household income of \$50,000 or more is a "sweet spot" for Honda because these individuals can afford the Honda product. (RT Vol. III, 689:2-10.)

313. Honda views the Honda Ridgeline as a competitive vehicle with the Toyota Tacoma. (RT Vol. IV, 845:9-846:1.)

314. "Toyota's been very aggressive in the marketplace with their incentive support." (RT Vol. V, 1091:20-1092:2.)

315. Toyota was very aggressive in the marketplace in 2018 and were buying the market with incentives. (RT Vol. V, 1097:20-1098:12.)

316. Honda tends to reserve its special low financing rates of 0.9 percent for customers with better credit. (RT Vol. VIII, 1995:10-21.)

317. Toyota sells more vehicles than Honda in the State of California. (RT Vol. XI, 2555:22-2556:1.)

318. Toyota has a full-size truck that sells well in the Bakersfield market, has more inventory than Barber Honda does, and has financing that is very aggressive compared to Honda finance which is a more conservative lender. (RT Vol. XI, 2555:20-2556:17.)

319. A new Toyota dealership has a greater number of products available for sale than a Honda

dealership. This gives the Toyota dealership an advantage when selling and marketing to customers. (RT Vol. XII, 2730:6-2731:15.)

320. The two Toyota dealerships have the ability to operate in Bakersfield because Toyota has a more robust lineup, more financing options available, and the two Toyota stores are under common ownership. The two Toyota stores will not put each other out of business but the two proposed Honda dealerships under different ownership will create ruinous competition. (RT Vol. XII, 2796:2-2797:22.)

VII. FINDINGS RELATED TO WHETHER THE FRANCHISEES OF THE SAME LINE-MAKE IN THE RELEVANT MARKET AREA ARE PROVIDING ADEQUATE COMPETITION AND CONVENIENT CONSUMER CARE FOR THE MOTOR VEHICLES OF THE LINE-MAKE IN THE MARKET AREA, WHICH SHALL INCLUDE THE ADEQUACY OF MOTOR VEHICLE SALES AND SERVICE FACILITIES, EQUIPMENT, SUPPLY OF VEHICLE PARTS, AND QUALIFIED SERVICE PERSONNEL (VEHICLE CODE SECTION 3063(D))

321. All line-makes with the exception of Honda offer a single dealer location to serve the RMA, with the exception of Toyota. To find the RMA is not adequately served by a single existing Honda point would suggest all non-Toyota brand customers are inadequately served.

322. Barber Honda's facility is well equipped and of adequate size to meet the needs of the RMA. There is no evidence to support a finding that Barber Honda does not adequately serve the RMA.

323. Barber Honda has adequate capacity for its service customers. (RT Vol. VII, 1435:22-1436:8.)

324. Customers are shopping online more and more and are pricing vehicles online. (RT Vol. VIII, 2004:25-2005:7.)

325. Barber Honda is currently in constant price competition with other dealers by way of prices accessible through the internet. (RT Vol. X, 2445:23-2446:16.)

326. Honda has never advised Barber Honda that the dealership is undersized in any way. (RT Vol. IX, 2035:22-24.)

327. Barber Honda's service department is well equipped to handle more service business and currently operates at about 50 to 60 percent of capacity. (RT Vol. IX, 2036:16-21.)

328. In 2018, Barber Honda received the Express Service Elite designation for its Express Lube operation. (RT Vol. IX, 2036:25-2038:8.) Among other requirements, Barber Honda serviced vehicles in under 45 minutes. (RT Vol XI, 2540:19-2541:8.)

329. Barber Honda could also expand its hours to increase its service capacity. (RT Vol. IX, 2038:9-2039:5.)

330. Barber Honda's service department opens at 7:00 AM and operates until 5:00 PM. Barber Honda's sales department opens at 8:00 AM and is open until 9:00 PM on weekdays. (RT Vol. IX, 2040:4-20.) The sales department is open from 8:00 AM until 7:00 PM on Saturdays and 10:00 to 5:00 PM on Sundays. (RT Vol. IX, 2040:22-24.)

331. Barber Honda would also be willing to expand its service operations to Sunday if service business were to increase. (RT Vol. IX, 2041:25-2042:3; RT Vol. XI, 2538:7-11.) Barber Honda tried keeping its service operations open on Sundays from approximately 2015 or 2016 to 2017 or 2018, but it did not work well for the dealership because the volume did not support it. (RT Vol. IX, 2040:25-2041:24.)

332. Barber Honda has more service capacity than it uses—Barber Honda's MAP would require approximately 17 service stalls and Barber Honda has 30 stalls. (RT Vol. XI, 2537:22-2538:6.)

333. Barber Honda stopped ordering accessory packages for its vehicles because it needed to reduce the price point of its vehicles to remain competitive on price. (RT Vol. XI, 2568:17-2569:24.)

334. Barber Honda operates normally relative to Mr. Walter's composite dealerships including as to advertising and compensation to employees. (RT Vol. XII, 2893:4-15.)

335. The majority of the RMA business is located in the southern half of the RMA. There is little relative opportunity in the northern half of the RMA. (Exh. R-376 at A-41 and A-42.)

VIII. FINDINGS RELATED TO WHETHER THE ESTABLISHMENT OF AN ADDITIONAL FRANCHISE WOULD INCREASE COMPETITION AND THEREFORE BE IN THE PUBLIC INTEREST (VEHICLE CODE SECTION 3063(E))

336. While it is true an additional competitor in the market would increase competition, the increase would no translate into a meaningful benefit to the public interest.

337. The evidence supports Protestant's claim the proposed establishment presents a severe

threat to its continued viability. The fact the proposed dealer projects losses for at least the first two years of operation and is prepared to suffer losses beyond that, supports Protestant's claim that ruinous competition would result from the proposed establishment.

IX. CONCLUSIONS/ANALYSIS OF GOOD CAUSE FACTORS

A. **Permanency of the investment (Vehicle Code section 3063(a))**

338. Protestant established it has a substantial and permanent investment in Bakersfield in the form of its approximately 45-year-old Honda franchise. This good cause factor weighs against the proposed establishment.

B. **Effect on the retail motor vehicle business and the consuming public in the relevant market area (Vehicle Code section 3063(b))**

339. Protestant established the proposed establishment will have a negative impact to its profitability of over 300 percent with more than likely impacts in the range of 500 to 700 percent of Barber Honda's profitability. These impacts will all but ensure the de facto termination of Barber Honda if the proposed establishment is permitted. Moreover, the consuming public will not be benefited by the proposed establishment because it will ultimately result in the closure of Barber Honda with the only remaining Honda dealership outside the Bakersfield Auto Mall and outside the city limits of Bakersfield. This good cause factor weighs heavily against the proposed establishment.

C. **Whether it is injurious to the public welfare for an additional franchise to be established or an existing dealership to be relocated (Vehicle Code section 3063(c))**

340. Protestant established the proposed establishment will be injurious to the public welfare by creating ruinous competition between two Honda dealerships in the Bakersfield market. While there may be some short term benefits to the public, the proposed establishment will ultimately lead to the end of a family business located at Bakersfield Auto Mall with its replacement dealership located outside on the northern edge of the City of Bakersfield. This good cause factor weighs against the proposed establishment.

D. Whether the franchisees of the same line-make in the relevant market area are providing adequate competition and convenient consumer care for the motor vehicles of the line-make in the market area, which shall include the adequacy of motor vehicle sales and service facilities, equipment, supply of vehicle parts, and qualified service personnel (Vehicle Code section 3063(d))

341. Protestant established Barber Honda provides adequate competition and convenient consumer care for the Honda brand within the RMA. Barber Honda provides adequate motor vehicle sales and service facilities, equipment, supply of vehicle parts, and qualified service personnel. This good cause factor weighs against the proposed establishment.

E. Whether the establishment of an additional franchise would increase competition and therefore be in the public interest (Vehicle Code section 3063(e))

342. Protestant established the proposed establishment would result in ruinous competition and economic destruction of the Barber Honda franchise. This good cause factor weighs against the proposed establishment.

X. DETERMINATION OF ISSUES

343. Protestant met its burden to establish a permanency of its investment.

344. Protestant met its burden to establish the effect on the retail motor vehicle business and the consuming public in the RMA is best served by preventing the proposed establishment.

345. Protestant met its burden to establish it would be injurious to the public welfare for an additional Honda franchise to be established within the RMA.

346. Protestant met its burden to establish Barber Honda provides adequate competition and convenient customer care for Honda customers within the RMA.

347. Protestant met its burden to show the proposed establishment would not ultimately increase competition and there not be in the long-term public interest.

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XI. PROPOSED DECISION

Protest No. PR-2539-17 is hereby sustained. Protestant has met its burden of proof under Vehicle Code section 3066(b) that there is good cause to not permit the establishment of the proposed dealership. Respondent shall not establish the proposed dealership.

Dated: June 24, 2020

NEW MOTOR VEHICLE BOARD

By: _____
DWIGHT V. NELSEN
Administrative Law Judge

Dated: June 24, 2020

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**STATE OF CALIFORNIA
NEW MOTOR VEHICLE BOARD**

In the Matter of the Protest of:

BARBER GROUP, INC., d/b/a BARBER
HONDA,

Protestant,

v.

AMERICAN HONDA MOTOR CO., INC.,

Respondent,

GALPINSFIELD AUTOMOTIVE, LLC,

Intervenor.

PROTEST NO.: PR-2539-17

**RESPONDENT AMERICAN HONDA
MOTOR CO., INC.'S POST-HEARING
OPENING BRIEF**

Pursuant to the Order Establishing Post-Hearing Briefing Schedule, Respondent American Honda Motor Co., Inc. ("American Honda") hereby files its Post-Hearing Opening Brief.

INTRODUCTION

This action involves the proposed establishment of a new Honda dealership in Bakersfield, a large and growing community that currently has only one Honda dealership to serve customers in and around one of the largest markets in California. Indeed, Sharif Farhat from Urban Science

described this market as one of the “most ripe” areas he has ever seen for a new dealership during his 33 years of experience evaluating dealer networks throughout the country, and that he saw no reason the proposed new dealership would have any effect but to benefit consumers, benefit the public in the Bakersfield market, and result in more customers for the Honda brand. (Hrg. Tr. Vol. 13 Pages 3174:6-20; 3200:6-23). The bases of this opinion are clear. Indeed, below is a list of significant facts that are wholly uncontested and that conclusively demonstrate the reasons for and the benefits of the addition of this proposed new dealership in North Bakersfield:

- Barber Honda was established in Bakersfield in 1973, and it has been **the only Honda dealer** in the Bakersfield market to serve customers **for the last 45 years**. (Hrg. Tr. Vol. 10 Pages 2315:15-2316:1; Vol. 11 Pages 2592:18-2693:5) (testimony of Stephen Ekegren and Jonathan Ekegren);
- Bakersfield is one of the **ten largest cities** in the state of California, and the Bakersfield Metro is the **ninth largest metro** in the state of California. (Hrg. Tr. Vol. 11 Pages 2590:4-2592:17) (testimony of Jonathan Ekegren) (Exhibit J-21 at AHM_00065077);
- As of 2017, there were **722,714 people** living in the Bakersfield metro and **900,000 people** living in Kern County, which is about **three times the population** of Kern County when Barber Honda opened its doors back in the 1970s. (Exhibit R-376 at A-38) (Hrg. Tr. Vol. 13 Pages 3115:24-3116:19). In fact, there are **approximately 17-18 high schools** to serve this population in Bakersfield alone. (Hrg. Tr. Vol. 3 Page 590:3-13);
- From 2010 to 2017 alone, the Bakersfield metro experienced **a 7.18% growth in population**, well above the growth in the state and the nation as a whole. (Exhibit R-376 at A-38) (Hrg. Tr. Vol. 17 Pages 4029:12-4030:9) (testimony of Edward Stockton);
- Despite this significant population, there is not another Honda dealership to serve customers for **more than a 67-mile radius** in any direction from Barber Honda. (Hrg. Tr. Vol. 11 Pages 2592:25-2593:5; 2594:18-25) (testimony of Jonathan Ekegren) (Exhibit P-151 at Tab 4 Page 11) (Stockton Initial Report).
- It currently takes customers **more than an hour to drive** from Barber Honda to reach any other competing Honda dealership to inquire about buying a new vehicle or to get vehicle service. (Hrg. Tr. Vol. 11 Page 2595:8-19) (testimony of Jonathan Ekegren) (Exhibit 151 at Tab 4 Page 12) (Stockton Initial Report).
- Bakersfield is the **largest market in the United States** (by population and number of competitive registrations) with only one Honda dealer to serve customers. (Hrg. Tr. Vol. 4 Pages 742:23-743:3) (Hrg. Tr. Vol. 5 Pages 1173:18-1174:11);
- Bakersfield is the **lowest performing market** in the Northern California Zone and in the entire state for new vehicle sales for the Honda brand by a wide margin. (Hrg. Tr. Vol. 11 Pages 2621:19-25) (testimony of Jonathan Ekegren) (Hrg. Tr. Vol. 13 Pages 3093:20-

3094:21; 3095:15-3096:9) (Exhibit R-376 at A-18 and A-19);

- Honda is the **lowest performing brand** in Bakersfield in registration effectiveness, and it performs well below other import brands like Mazda, Hyundai, Nissan, Fiat, Toyota, Subaru, Kia, and Volkswagen—including brands not known for large trucks. (Exhibit P-151 at Tab 16 Page 1) (Stockton Initial Report) (Hrg. Tr. Vol. 12 Pages 2939:1-2941:3) (testimony of Edward Stockton);
- There is **opportunity for additional Honda sales** in Bakersfield, and if the proposed new dealership is added, there will be an **increase in Honda's market share** in the market. (Hrg. Tr. Vol. 12 Pages 2875:11-13; 2952:17-2953:9) (testimony of Edward Stockton); (Hrg. Tr. Vol. 11 Pages 2579:14-22; 2614:1-9) (testimony of Jonathan Ekegren);
- The proposed site for the new dealership is located **9.1 air miles away from Barber Honda**, on the other side of the town, and **outside of the city limits**. (Exhibit P-151 at Tab 4 Page 11) (Stockton Initial Report) (Stipulated Facts Regarding Market Drive ¶ 14);
- There are **96 pairs of Honda dealers in California closer** than the proposed new dealership would be to Barber Honda. (Exhibit 378 at R-23 and R-24) (Hrg. Tr. Vol. 14 Page 3256:16-19);
- Having a second Honda dealership in Bakersfield would **benefit consumers and the public** by improving customer convenience, providing another brick-and-mortar location for sales and service, increasing employment, and providing an additional choice for customers. (Hrg. Tr. Vol. 13 Pages 2973:17-2974:4) (testimony of Edward Stockton) (Hrg. Tr. Vol. 10 Pages 2311:25-2313:23) (testimony of Stephen Ekegren) (Hrg. Tr. Vol. 11 Pages 2713:7-2714:25) (testimony of Jonathan Ekegren);
- The proposed site is **close to the second Toyota location in Bakersfield**, which will improve competition and allow customers to cross-shop between the two brands. (Hrg. Tr. Vol. 8 Page 1972:17-21) (Stipulated Facts Regarding Market Drive ¶ 17).
- In three recent situations in which American Honda added a new dealership, the **Honda brand's performance in each market improved**, and the 5 of the 6 neighboring dealers actually **increased their new vehicle sales**. (Hrg. Tr. Vol. 14 Pages 3451:22-3452:12).

These undisputed facts make clear that the addition of the proposed new Honda dealership in North Bakersfield is warranted and will have a positive impact on consumers, the public generally, and the Honda brand. Moreover, given its distance from Barber Honda and the amount of untapped opportunity in the market, the new dealership will stimulate the market for Honda sales and service business for *all* Honda dealers without any material impact to Barber Honda.

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LEGAL STANDARD

When it enacted the Vehicle Code, the California Legislature expressly recognized that automotive distributors like American Honda may need to establish new dealerships in order to address changes in market conditions and consumer needs over time. Accordingly, the Legislature established a statutory framework to specifically address the proposed addition of a new dealership. While this framework gives existing dealers the right to protest under certain circumstances, it also expressly recognizes the significant benefits that the establishment of a new dealership can provide for consumers and the public generally. In order to balance these competing interests, the Vehicle Code provides that an existing dealer may protest a proposed new dealership only when it is located within a 10-mile radius of the proposed site. Moreover, even when an existing dealer is within that radius, the manufacturer does not have to prove there is good cause for establishing the new dealership. Instead, it is the protesting dealer that bears the heavy burden of proving that there is “good cause **not** to enter into a franchise” establishing the additional dealership. Cal. Veh. Code § 3066(b) (emphasis added).

In determining whether the Protestant has met its burden of proving good cause not to permit the proposed new Honda dealer in Bakersfield, the Vehicle Code provides that the Board shall consider the existing circumstances, including the following statutory factors:

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

Id. § 3063. As set forth in detail below, based on these factors and the other existing circumstances in this case, Protestant has failed to meet its burden of proving that there is some good cause not to

permit the establishment of this new Honda dealership.

ANALYSIS

I. Protestant previously made a Permanent Investment in its Dealership, and Galpinsfield currently is making a Permanent Investment in Bakersfield.

American Honda does not dispute that Protestant has made a permanent investment in its dealership over the course of its history, although the vast majority of that investment was made many years ago. As discussed above, Barber Honda first opened for business more than 45 years ago in 1973, and it moved to its present location some 35 years ago in 1985. (Hrg. Tr. Vol. 9 Page 2025:3-8; Vol. 10 Pages 2315:15-2316:1; Vol. 11 Pages 2592:18-2693:5). At its current location, Barber Honda previously acquired additional land and renovated its dealership facility, although that renovation took place in phases from 1999 to 2006—more than 14 years ago today. (Exhibit P-112 at BH_069058) (Hrg. Tr. Vol. 10 Pages 2308:15-2309:14; 2310:13-23). Aside from recently refreshing the carpet and paint, along with a few other investments (adding a dry well and replacing the interior gutter system), most of Barber Honda’s permanent investment in its business occurred years in the past. (Stipulated Facts Regarding Market Drive ¶ 4) (Exhibit P-112 at BH_069058). Barber Honda thus has had many years to recoup its investment as the only Honda dealership within a 67-mile radius; indeed, American Honda did not provide statutory notice of its intent to establish this new dealership until 11 years after Barber Honda completed its last major renovation in 2006. (Exhibits J-26; P-112 at BH_069058).

Moreover, there is no dispute that the candidate, Galpinsfield, has recently made a substantial and permanent investment in the proposed dealership. Shortly after being selected as the operator for this open point, the Galpin organization invested a significant amount of money to acquire the proposed site in North Bakersfield. (Hrg. Tr. Vol. 8 Page 1968:12-23). In May 2016, Galpinsfield paid over \$5 million to acquire five adjacent parcels of land for the future construction of a new Honda dealership at the intersection of several major thoroughfares in order to best serve customers. (Exhibits J-22; I-506) (Hrg. Tr. Vol. 8 Pages 1968:12-23; 1971:18-1973:2). During the past several years during this protest process, Galpinsfield also has continued to pay significant holding costs for this property without any profit, including property taxes, insurance, and other

expenses. (Hrg. Tr. Vol. 8 Pages 1968:24-1969:2). Accordingly, even though it is waiting until resolution of this protest to build a new dealership facility, Galpinsfield already has made a substantial and permanent investment in this proposed dealership.

II. The Proposed New Dealership will Benefit the Consuming Public and will have no Material Negative Effect on the Retail Motor Vehicle Business in the RMA.

A. The Proposed New Dealership will Significantly Benefit Consumers.

There is little dispute that the establishment of this new dealership in North Bakersfield will provide significant benefits for consumers. As set forth above, the Bakersfield metro is the ninth largest metro area in the state of California with a population of approximately 722,000. (Exhibit J-21 at AHM_00065077) (Exhibit R-376 at A-38). The Bakersfield metro also is a growing market, and the population in this area has increased by 7.18% from 2010 to 2017—well above the growth experienced in the state and the nation as a whole. (Exhibit R-376 at A-38). Despite this significant population and growth, some 45 years after it was first established, Barber Honda remains the only Honda dealership in Bakersfield to serve consumers. (Hrg. Tr. Vol. 10 Pages 2315:15-2316:1; Vol. 11 Pages 2592:18-2693:5). Indeed, there is not another Honda dealership for more than 67 miles in any direction from Barber Honda, and it takes customers more than an hour to drive from Barber Honda to reach another Honda dealer. (Hrg. Tr. Vol. 11 at Pages 2592:25-2593:5; 2594:18-2595:19) (Exhibit P-151 at Tab 4 Page 11-12).

Given this situation, the establishment of a second Honda dealership in Bakersfield would provide customers with much needed competition and improved access to the Honda brand. The proposed new dealership would give customers a second choice for Honda sales, service, and parts—a choice they currently do not have without driving more than an hour in any direction. The new dealership also would greatly improve customer convenience. The average consumer in the North Bakersfield ASA currently must drive 16.3 miles before they reach any Honda dealership (*i.e.*, Barber Honda), which is much further than other competing brands with more dealership points in the Bakersfield metro, including Chevrolet, GMC, Toyota, and Ford. (Exhibit R-376 at A-65). The addition of this new dealership would cut that travel distance by a third to 11.2 miles and put the Honda brand more in line with the competitors above. (*Id.*).

The proposed site and dealership facility also will be very convenient for customers. Galpinsfield plans to build a brand-new dealership facility at the intersection of Highway 99 and Merle Haggard Drive, which are both major thoroughfares for customers in the market. (Hrg. Tr. Vol. 8 Pages 1910:10-19; 1972:11-16). This proposed location very is accessible and highly visible for customers as they exit Highway 99, and is at a location that is very convenient for customers in North Bakersfield. (Hrg. Tr. Vol. 8 Pages 1972:11-1973:2) (Stipulated Facts Regarding Market Drive ¶ 15). The proposed site also is in close proximity to the second Toyota location in Bakersfield, which will allow customers easy access to cross-shop between the two brands. (Hrg. Tr. Vol. 8 Page 1972:17-21) (Stipulated Facts Regarding Market Drive ¶ 17).

Moreover, the proposed operator of this new dealership—Galpinsfield—is a perfect fit for Bakersfield. (Hrg. Tr. Vol. 2 Page 394:6-23). Although 33 candidates expressed interest in the open point, Galpinsfield was selected because of its strong record of success and dedication to customer service. (Hrg. Tr. Vol. 6 Page 1388:1-7). Galpinsfield is a well-known and highly respected dealer organization that has experience not only operating a Honda dealership in California (its existing Honda dealership in Mission Hills), but also with opening a new Honda dealership from the ground up. (Hrg. Tr. Vol. 5 Page 1038:7-15). It also has been serving the Honda brand in a similar market with a strong Hispanic presence just like Bakersfield. (Hrg. Tr. Vol. 2 Page 394:6-23) (Hrg. Tr. Vol. 8 Pages 1961:1-1962:13). Galpinsfield further promotes a strong work ethic and culture that is built around a “servant’s attitude” of treating people with honesty and respect, and ensuring that its employees, its customers, and the communities it serves are properly taken care of. (Hrg. Tr. Vol. 8 Pages 1818:7-1819:3; 1954:24-1956:2). The Galpin organization consistently has achieved strong customer satisfaction scores at its other dealerships and has demonstrated that it knows how to take care of customers. (Hrg. Tr. Vol. 5 Pages 1401:4-1402:4). It also is deeply involved in the communities where it operates, including with local schools, PTAs, little leagues, the police commission, local hospitals, children’s homes, wheels for humanity, and other programs. (Hrg. Tr. Vol. 5 Pages 1402:5-1403:9).

Accordingly, when all of these factors are combined—increased choice for customers, improved customer convenience, a new dealership facility, and an experienced operator who is

dedicated to customer service and the community—it is clear that Galpinsfield’s presence as a new Honda dealer at the proposed site will greatly benefit the consuming public in Bakersfield.

B. The Honda Brand is Materially Underperforming in Bakersfield, and there is Substantial Opportunity for Additional Business Available in the RMA.

In addition to the significant consumer benefits of the proposed new dealership, it is clear that the Honda brand is underperforming in Bakersfield and that there is substantial opportunity for additional sales and service business available in the market.

i. American Honda Conducted Multiple Studies and Analyses to Assess the Brand’s Performance and the Amount of Opportunity in Bakersfield.

Prior to issuing statutory notice in this case, American Honda performed three separate market studies evaluating the brand’s performance in Bakersfield under multiple different approaches and in multiple different ways. American Honda evaluated its brand performance versus other competitors—including the traditional import brands—and determined that it was not keeping pace in Bakersfield. (Hrg. Tr. Vol. 4 746:12-748:9). Specifically, American Honda looked at the competitive registration patterns for the foreign-based brands, (Exhibit J-14 at AHM_063582), and found that Toyota is dominating the market in competitive vehicles in this market.¹ (Exhibit J-18 at AHM_0001427). American Honda also evaluated its performance compared to its two main Japanese competitors: Toyota and Nissan. Looking at straight competitive market share only (without using any standard), American Honda found that while Toyota and Nissan are performing close to or even above their Zone averages in Bakersfield, the Honda brand is performing at only about half the level of its Zone in the very same market. (J-21 at AHM_065082-83) (Hrg. Tr. Vol. 4 Pages 746:12-748:9). In fact, while Honda outperforms Toyota in competitive market share in every other metro area in Northern California, the Honda brand is only performing at about 66% of the level of Toyota in Bakersfield. (*Id.*)

American Honda also evaluated the brand’s performance in Bakersfield compared to

¹ As discussed at length during the hearing, competitive vehicles refers to vehicles of the same type that the Honda brand has available for sale in Bakersfield, and expressly excludes large trucks, large SUVs, luxury vehicles, and other segments in which AHM does not compete. Accordingly, all of these data points consider sedans, SUVs, sport trucks, and other vehicle segments in which Honda competes, and do not include any consideration of large trucks like the Ford F-150 or Toyota Tundra, large SUVs like a Chevrolet Tahoe or the Toyota Sequoia, and other similar non-competitive vehicles. (Hrg. Tr. Vol. 3 Pages 718:3-9; 719:10-720:21)

several other markets in and around the Bakersfield area. This evaluation revealed that the Honda brand performs significantly worse in Bakersfield than it does in the rest of District 12D—the Central Valley District that includes Barber Honda and the 14 other Honda dealers in the Central Valley. (Exhibit J-14 at AHM_063541) (Hrg. Tr. Vol. 3 Pages 690:9-691:4). American Honda also evaluated its brand performance in Bakersfield compared to the Zone 12—the Northern California Zone that includes Barber Honda and the other 60+ Honda dealers in the northern half of the state. Under this analysis, American Honda determined that the brand is performing at about half the level of the Zone. (Exhibits J-22 at AHM_63623; J-21 at AHM_065083)

American Honda further analyzed its competitive market share in Bakersfield compared to every single metropolitan market in Northern California, and found that Bakersfield is the lowest performing market for the Honda brand in this entire half of the state. (Exhibits J-22 at AHM_63623; J-21 at AHM_065083) (Hrg. Tr. Vol. 4 Page 744:12-17). Below is one of the charts American Honda prepared showing the brand’s competitive market share in Bakersfield compared to the other eight metro markets in the Northern California Zone:

			
Metro Market	Honda	Toyota	Nissan
Bakersfield	12.3%	18.4%	10.2%
Fresno	19.5%	18.2%	9.9%
Sacramento	21.8%	20.3%	9.3%
San Jose	23.3%	21.3%	6.4%
East Bay SF	24.0%	21.5%	8.3%
San Francisco	24.3%	22.8%	6.0%
Sonoma	25.3%	14.7%	8.8%
Santa Barbara	26.2%	16.6%	10.8%
Stockton	30.2%	19.3%	7.5%
Zone	22.5%	19.8%	8.5%

This chart tells the story: that Bakersfield not only is the lowest performing market in Northern California, but also is falling far behind every other market. Indeed, Bakersfield is performing at about 63% of the next lowest market—the Fresno metro—which is also located in the Central Valley. (Exhibit J-21 at AHM_065083) (Hrg. Tr. Vol. 4 Pages 744:23-745:3).

Given this substantial underperformance, American Honda also found that there is a significant amount of untapped opportunity for new vehicle sales business in the Bakersfield

market. When American Honda first studied this market in 2008, it found a total of 1,583 units of lost opportunity for new vehicle sales to the Honda dealers in the Bakersfield market. (Exhibit J-14 at AHM_063538). This amount of lost opportunity, however, grew each time American Honda evaluated the market: from **1,583 units** in 2008, to **1,746 units** of lost opportunity in 2013; to **1,880 units** of lost opportunity in 2015. (Exhibits J-18 at AHM_01385; J-22 at AHM_063623) (Hrg. Tr. Vol. 4 Pages 756:16-757:10).² This analysis clearly demonstrates there is an increasing amount of opportunity—not decreasing opportunity—for Barber Honda and the proposed new dealership to operate in the Bakersfield market.

As with new vehicle sales, American Honda also found that there is a substantial amount of opportunity for additional service business in Bakersfield. While Barber Honda performs well in service retention, that is no surprise when it is the only dealer in the market and customers have no other options to have their vehicle serviced at an authorized Honda dealership within a 67-mile radius. (Hrg. Tr. Vol. 4 Pages 988:12-989:5; Vol. 5 Page 1115:3-19). In addition, the true measure of service opportunity in a market is the number of units in operation (“UIO”) for the brand that are not being serviced. (Hrg. Tr. Vol. 4 Page 749:21-23). Here, American Honda found that there are **8,800 units of Honda UIO** in the Bakersfield market that are either lapsed (have not serviced with a Honda dealer in 12 months but have in 24 months) or inactive (have not serviced at a Honda dealer in 24 months), which is a significant amount of opportunity for more service business. (Exhibit J-21 at AHM_065093) (Hrg. Tr. Vol. 4 Page 750:10-23). In fact, there is a great concentration of lapsed and inactive UIO in North Bakersfield around the proposed site. (Hrg. Tr. Vol. 4 Page 751:18-24). Further, this number of UIO also is depressed given the brand’s continuous underperformance in Bakersfield, and as Honda sales increase with the addition of a new dealer, the number of UIO will increase and result in even more service opportunity for both dealers. (Hrg. Tr. Vol. 2 Page 382:14-25; Vol. 4 Page 753:5-21).

² American Honda calculates lost opportunity by looking at the amount of gross loss in the market based on the brand’s underperformance plus insell made into the market by other Honda dealers. There is no dispute that other Honda dealers—despite their significant distance from Bakersfield—are selling hundreds of units into the Bakersfield market, including about 600 units per year or 34% of the new Honda vehicles sold in Barber Honda’s own ASA. (Exhibit R-342; R-403). Although Protestant initially challenged counting insell as opportunity for a dealer like Barber Honda, Jonathan Ekegren expressly admitted that these hundreds of units of insell are “opportunity for Barber Honda” to increase its sales. (Hrg. Tr. Vol. 11 Pages 2645:7-2646:2; 2648:7-11).

While these figures alone show substantial opportunity for sales and service business, they do not include any upward adjustment for the growth in Bakersfield. (Hrg. Tr. Vol. 4 Pages 790:19-791:8). Thus, to further evaluate the opportunity in the market, American Honda also analyzed the population, household income, and other demographic factors specific to Bakersfield. This analysis revealed that the population in Bakersfield has grown to the ninth largest metro market in California and is projected to grow by another 4.6%—faster than the rest of the state and the nation. (Exhibit J-21 at AHM_065077-78). The same with households and household income. American Honda found that the number of households is expected to grow significantly going forward, and that household income is expected to grow by an astounding 10.3%—much greater than the state or the nation. (J-18 at AHM_01417). This is significant given that the median household income in Bakersfield already exceeds \$65,000—well over the “sweet spot” for Honda customers. (Exhibit J-21 at AHM_065077) (Hrg. Tr. Vol. 3 Page 689:2-10). Indeed, given that the metro has over 700,000 people and about 15,000 competitive registrations each year, Bakersfield is the **largest market in the country** with only one Honda dealer. (Hrg. Tr. Vol. 4 Pages 742:23-743:3; Vol. 5 Pages 1173:18-1174:11). As such, there is substantial long-term opportunity for both Protestant and the proposed dealership.

ii. American Honda’s Expert Analysis Found Significant Existing and Long-Term Opportunity for the Honda Brand in Bakersfield.

In addition to its own analyses, American Honda also presented the expert testimony of Sharif Farhat from Urban Science, a leading expert in motor vehicle network analysis. Mr. Farhat has worked with Urban Science for more than 33 years, and is currently the Vice President of Expert Services for the company. During his time with Urban Science, Mr. Farhat has analyzed dealer networks thousands of times and has testified on market representation issues on over 100 occasions in approximately 24 states. (Hrg. Tr. Vol. 13 Pages 3038:8-3040:6). Mr. Farhat also has testified in open point matters like this one approximately 25 times and has used a consistent methodology that was not developed for litigation purposes, but rather is used for real world network planning purposes by almost every major automotive company in the world. (*Id.* 3044:1-17).

Mr. Farhat analyzed the amount of opportunity in the Bakersfield market by evaluating Honda's market share, which is a fundamental concept used by Burger King, Target, and all manner of businesses in all manner of industries. (*Id.* 3070:25-3071:7). Mr. Farhat performed this analysis by comparing the Honda brand's performance in Bakersfield to two different standards: (1) the California average and (2) the brand's performance in Fresno—a local market in the Central Valley right up the road from Bakersfield. (*Id.* 3070:10-13). Mr. Farhat also applied a "segmentation analysis" to Bakersfield, which is a fundamental concept that is accepted throughout the industry. (*Id.* 3073:6-8). This analysis adjusts Honda's expected market share to account for the varying popularity of different types of vehicles that are actually being purchased by customers in the Bakersfield market itself, and only considers the types of vehicles the Honda brand offers for sale. (*Id.* 3077:2-3081:15).

This analysis revealed that the Honda brand has been significantly underperforming in Bakersfield for many years. Specifically, the Bakersfield RMA has been performing at only **53.6% of expected** compared to California average, and only **53.8% of expected** compared to the neighboring market of Fresno. (Exhibit R-376 at A-26 and A-27). The brand's performance in the Bakersfield RMA also has been consistently declining and has fallen from 65.9% in 2013 to 53.8% in 2017. (*Id.*). Significantly, the **Bakersfield RMA is the lowest performing market** for Honda in the entire state, and the two ASAs that comprise this market (Barber Honda's ASA and the open point ASA) are the **two lowest performing ASAs** in the state by a significant margin. (*Id.* at A-18 and A-19) (Hrg. Tr. Vol. 13 Pages 3093:20-3094:21). Accordingly—using the more local Fresno standard—there are approximately **1,570 units of lost opportunity** for new Honda sales in the Bakersfield metro, more than enough to support the addition of a new dealership. (Exhibit R-376 at A-27) (Hrg. Tr. Vol. 13 Page 3106:5-16).

Mr. Farhat also found that the Honda brand's poor sales performance has resulted in a significant amount of lost service opportunity. (Hrg. Tr. Vol. 13 Page 3093:6-19). As discussed above, service opportunity is measured by the number of UIO in the market. (*Id.* 3097:13-15). In most markets, for every new vehicle sale expected to be made, there are typically 10 UIO in the market that serve as opportunity for service business. The Bakersfield market, however, is

performing at a significantly lower level and currently has only 4.5 UIO for every expected sale. (*Id.* 3097:13-3098:16). This ranks the Bakersfield RMA and the Bakersfield ASAs **next to last in the entire state** in service performance. (*Id.*) (Exhibit 376 at A-20; A-21; A-51). Indeed, had the metro performed at the same level as Fresno, there would be an additional 7,000 UIO available to service by Barber Honda and the proposed new dealer. (Exhibit 376 at A-51) (Hrg. Tr. Vol. 13 Page 3132:2-21). This is a substantial amount of service opportunity, and is one of the largest amounts of lost opportunity Mr. Farhat has seen in his 33-year career. (*Id.*).

Mr. Farhat also found that this already-significant amount of sales and service opportunity in Bakersfield has grown and likely will continue to grow in the future. As discussed above, the population in the Bakersfield RMA grew from 345,255 in 2010 to 444,443 in 2017, and it is expected to continue growing through 2022. (Exhibit R-376 at A-34). The same is true for the Bakersfield metro as a whole. From 2010 to 2017, the population in the Bakersfield metro increased significantly from 517,258 to 722,714, and the number of households in this area increased from 157,278 to 208,497. (*Id.* at A-37). Indeed, the Bakersfield metro has **grown by 7.18%** since 2010, well above the growth rate for the state and the nation. (*Id.* at A-38). There also are a significant number of households with income over \$30,000 and over \$90,000, and employment levels in Kern County have grown from 269,613 to 349,502—an increase of approximately 23% since 2010. (*Id.* at A-39 to A-41). These undisputed facts demonstrate that Bakersfield is a large, growing market with a significant amount of opportunity for the Honda brand, both currently and in the long term. (Hrg. Tr. Vol. 13 Pages 3112:21-3113:14).

iii. Protestant Admits the Honda Brand is Underperforming and that there is Opportunity for Additional Business in Bakersfield.

Protestant and its own expert also concede that the Honda brand is underperforming in Bakersfield and that there is opportunity for additional business in this market.

In his own report, Protestant's retained expert—Edward Stockton—examined the registration effectiveness achieved by the competitive brands in Bakersfield and found that **Honda is the lowest performing brand in Bakersfield** and performs at only **56.63% of expected**, well below other import brands like Mazda, Hyundai, Nissan, Fiat, Toyota, Subaru, Kia, and

Volkswagen. (Exhibit P-151 at Tab 16 Page 1) (Hrg. Tr. Vol. 12 Pages 2939:1-2941:3). Mr. Stockton also performed a second analysis that attempted to calculate the number of Honda sales that should be expected in Bakersfield by adjusting for several local market factors he believes explain the brand's performance: (1) product popularity; (2) median age; (3) median household income; (4) education levels; and (5) population density. (Exhibit P-151 at Tab 18 Page 1). Even after making adjustments in Protestant's favor for all these factors, Protestant's own expert found that Honda has been performing only at **63% of expected** in Bakersfield, and has been **underperforming by 2,331 new vehicle registrations** over two years (or 1,165 units per year) (*Id.*) (Hrg. Tr. Vol. 13 Pages 2950:1-2952:22; Vol. 17 Pages 4044:16-4045:7). This is a substantial amount of untapped opportunity for Protestant and the proposed dealership.

Protestant itself also admits there is opportunity for additional Honda sales in the Bakersfield market. During his testimony, Stephen Ekegren—the Dealer Principal—expressly agreed that “there’s a substantial amount of opportunity that exists in the Bakersfield market for Barber Honda.” (Hrg. Tr. Vol. 10 Page 2257:3-11). Jonathan Ekegren—the General Manager—testified that he has seen the Bakersfield area grow over the past several decades, and he admitted that Bakersfield is the lowest performing metro market in Northern California for Honda. (Hrg. Tr. Vol. 11 Pages 2589:21-2590:3; 2621:10-25). He further acknowledged that last place is not where he’d like to see the Honda brand be in Bakersfield, and agreed there is room for Honda’s market share to improve. (*Id.* 2579:16-22; 2614:1-9; 2621-25).

Even more tellingly, Protestant made clear it believes there is additional sales and service business in Bakersfield by seeking to expand their own operations on several occasions. Stephen Ekegren admitted that when he first learned American Honda intended to establish an open point in North Bakersfield, he asked if Protestant could be considered for the point. (Hrg. Tr. Vol. 10 Pages 2257:19-2258:13). Although he claimed at trial *for the first time* that this was a “self-preservation” move, Mr. Ekegren admitted that he never told American Honda this request was in the interest of self-preservation and that he did not raise self-preservation during his deposition. (*Id.*). He also admitted that establishing a new dealer would have required him to invest millions of dollars, (*id.* 2258:14-17), an unlikely investment for pure self-preservation. But Protestant did

not stop there. Barber Honda also considered establishing an off-site service location about five miles to the north of its facility—in the direction of the proposed dealership—and even identified a potential site in an attempt to capture additional service business from the northwest, particularly from independent repair facilities. (*Id.* 2263:21–2265:9; 2270:3-22). These admissions and proposals belie any claim there is some fixed amount of business in Bakersfield, and confirm Protestant’s own belief that there is room for additional business in the market.

C. The Proposed New Dealership in North Bakersfield will not have any Material Adverse Effect on Protestant.

Given the underperformance of the existing Honda dealer network and the amount of opportunity for sales and service business in this market, it is clear that the addition of a new dealership in Bakersfield is needed and would not have any notable impact on Barber Honda.

i. There is More than Enough Opportunity in Bakersfield to Support a Second Dealership without Negatively Affecting Barber Honda.

As part of its three studies evaluating the potential addition of this new dealership, American Honda expressly evaluated the potential impact that new dealership would have on Barber Honda. (Hrg. Tr. Vol. 3 Page 645:11-23). Specifically, American Honda evaluated the sales and service business performed by Barber Honda, the location of that business, the direction of that business from its dealership, and its insell into the open point ASA. (Exhibits J-14 at AHM_063584; J-18 at AHM_01423; J-21 at AHM_065093). American Honda also considered many local market factors to evaluate the opportunity for sales and service business in Bakersfield, including local demographics, population and household growth, household income, the distance between the two locations, the location of competitive dealerships, and the vehicle types most popular in the market. (Exhibits J-14; J-18; J-22) (Hrg. Tr. Vol. 3 Pages 645:8-647:5).

American Honda further evaluated the potential impact to Protestant by expressly comparing the amount of opportunity in the market to the number of projected sales for the proposed dealership. In its 2008 study, American Honda determined there were 1583 units of opportunity in this market and found that it exceeded even the highest sales projections for the proposed new dealership. (Exhibit J-14 at AHM_63560) (Hrg. Tr. Vol. 3 Pages 694:22-695:6). As noted above, this amount of opportunity grew each time American Honda re-evaluated the market:

from **1,583 units** in 2008, to **1,746 units** in 2013; to **1,880 units** in 2015. (Exhibits J-18 at AHM_01385; J-22 at AHM_063623) (Hrg. Tr. Vol. 4 Pages 756:16-757:10). Accordingly, there is more than enough existing opportunity and growth potential to support a new dealership without harming Barber Honda—particularly given that Bakersfield is the largest market in the country by population and competitive registrations with only one Honda dealer. (Hrg. Tr. Vol. 4 Pages 742:23-743:3; Vol. 5 Pages 1173:18-1174:11).

In addition to American Honda’s own internal studies, American Honda also presented the testimony of its market expert—Sharif Farhat—who also concluded that the new dealership would not have any material impact on Barber Honda. Without restating his analysis above, Mr. Farhat considered many factors in evaluating impact, including local demographics, population and household growth, local vehicle preferences, and the amount of opportunity in the market. (Exhibit R-376). In addition to those analyses, Mr. Farhat prepared his own projection of the sales expected to be made by the new dealership versus the amount of opportunity in the market. This analysis found that the new dealer would be expected to make 1,290 sales into the Bakersfield metro if it achieved the same sales distribution as Barber Honda, or 1,351 new vehicle sales if it achieved the same distribution as the Honda dealers in Fresno. (Exhibit R-376 at A-70). Even using his highest projection, under either a California or Fresno standard, the proposed new dealership’s sales would account for only **60% of the opportunity available** in this market, and would still be less than the amount of gross loss available in the market without including a single unit of insell. (*Id.*) (Hrg. Tr. Vol. 13 Pages 3169:17-3170:10; 3171:2-3174:20). Mr. Farhat thus found no basis for concluding there would be any impact to Protestant. (*Id.*).

ii. Protestant’s Theories of Impact Fail for Several Reasons.

Despite the amount of opportunity and the underperformance of the Honda brand’s existing dealer network in Bakersfield, one of Protestant’s key arguments is that the addition of a new dealership will materially harm its business. Protestant and its expert both base their claims on a “change in proximity” theory, *i.e.*, that the new dealership will be closer to some existing customers. Specifically, the Ekegrens testified that Barber Honda makes about 40% of its sales and service business in the area surrounding the new dealership. Mr. Stockton similarly used two separate

models to analyze the change in proximity that would occur if the new dealership is established, and estimated that the new dealership would cause Protestant to lose between 20-45% of its sales and service business. (Hrg. Tr. Vol. 13 Page 2985:5-9). These proximity-based theories, however, are fundamentally flawed and unreliable in several respects.

iii. Protestant's Impact Claims are based on the Improper Assumption that there is a "Fixed Pie" of Sales and Service Business in Bakersfield.

Most importantly, Protestant's theories of harm are based on the improper assumption that there is a "fixed pie" of business available in Bakersfield. Although Mr. Stockton on the one hand admits there is opportunity in the market and that the addition of a new dealership will result in more business for the brand, Mr. Stockton then fails to allow for that opportunity and new business. Rather, Mr. Stockton admits that his proximity models (1) are based **solely on the historical registrations and UIO** in the Bakersfield market in prior years and (2) **do not make any adjustment** for the opportunity in the market or for any increase in business from the new dealership. (Hrg. Tr. Vol. 12 Page 2875:11-13; Vol. 13 Pages 2975:1-13; 2952:17-2953:9; 2990:9-2992:4; Vol. 17 Page 4040:1-12). Simply put, Mr. Stockton's impact models simply "divvy up" the existing business in Bakersfield between Protestant and the proposed dealership, and wholly fail to account for the amount of opportunity actually available in the market.

This type of fixed pie analysis is improper and has been rejected in other open point decisions. See *LCA Acquisition Corp. dba South Motors Infiniti v. Nissan North America, Inc., et al.*, Case No. 14-2069; 14-2070 (Fla. DOAH Nov. 2, 2015), affirmed Case No. 1D15-5159 (Fla. 1st DCA Nov. 17, 2016). In the *South Motors Infiniti* case, an open point case like this one, Mr. Stockton's business partner performed the same proximity-based analysis to claim that "if the new dealership is approved, it will lose its proximity advantage for a substantial portion of its customers, and that as a result, it stands to lose between 20 percent and 40 percent of its business." (*Id.* ¶ 97). The court, however, expressly criticized and rejected this approach:

[T]his position *erroneously assumes that the number of new vehicle sales is a "fixed pie" and fails to take into account the amount of business opportunity available in the market* that currently is not being captured. Mr. Roesner acknowledged that South Motors currently is capturing only 50 percent of the sales available in the Coral Gables area. If capture rate is increased, new vehicle sales would increase, indicating that the "pie" of new vehicle sales business is not fixed.

(*Id.* ¶ 98) (emphasis added).³ The court also found that the addition of a new dealership increases brand awareness and stimulates additional business for the brand, which again “evidences that new vehicle sales are not a ‘fixed pie’” in terms of amount available in the market. (*Id.* ¶ 103).⁴

In an effort to circumvent this fatal flaw, Mr. Stockton testified that while his “actual” calculations contain no true adjustment for the opportunity in the market, he instead just “estimated” the business in this market may increase somewhere between 0-20%. (Hrg. Tr. Vol. 17 Pages 4040:20-4041:18). Mr. Stockton also admitted he performed no quantitative analysis to determine what this increase in new business would be, and that while he “never assumed it would be zero,” he simply based his estimates on a reading of Mr. Farhat’s study of other Honda open points. (*Id.*). These types of assumptions and estimates, made without any quantitative analysis, are wholly unreliable—especially given Mr. Stockton’s own admissions that (1) there is opportunity for additional business in the market; (2) the addition of a new dealership will result in more business for the Honda brand; and (3) Honda has the lowest registration effectiveness of any competitive brand in Bakersfield. (Hrg. Tr. Vol. 12 Pages 2875:11-13; 2952:17-2953:9) (Exhibit P-151 at Tab 16 Page 1; Tab 18 Page 1).

iv. Protestant’s Proximity-Based Models Do Not Reflect Real World Results.

Mr. Stockton’s proximity-based models also are fundamentally flawed because they do not accurately reflect what happens in the real world when a new Honda dealership is added to a market. Unlike Mr. Stockton, Sharif Farhat actually studied three prior situations where the Honda brand had recently established a new dealer: (1) Surprise, Arizona; (2) Marysville, Washington; and (3)

³ At the hearing, counsel for Protestant objected to referencing this case and other cases from different states on the grounds that they are unpublished decisions from other jurisdictions. Contrary to this objection, Rule 8.1115(a) only applies to unpublished decisions issued by “a California Court of Appeal or superior court appellate division.” Cal. Rules of Court 8.1115(a). Numerous decisions have recognized that California courts are free to cite both published and unpublished decisions from other jurisdictions and rely on them as persuasive authority. *See, e.g., Univ. of S. California v. Superior Court*, 30 Cal. App. 5th 429, 446, 241 Cal. Rptr. 3d 616, 628 (Ct. App. 2018); *Lebrilla v. Farmers Grp., Inc.*, 119 Cal. App. 4th 1070, 1077, 16 Cal. Rptr. 3d 25, 31–32 (2004) (holding that “opinions from other jurisdiction can be cited without regard to their publication status” and noting that many states “have different publication criteria than California”).

⁴ The Fontana Group’s analysis has not been successful in many other open point cases, particularly when facing the same analysis performed by Urban Science in this case. Indeed, the Fontana Group’s analysis has not been accepted or has been unsuccessful in at least six open point cases since 2012, including in Nevada, multiple cases in Florida, New York, and Connecticut. (Hrg. Tr. Vol. 12 Pages 3223:21-3227:10).

Baton Rouge, Louisiana—a market very similar to Bakersfield in that it has a large oil industry and nearly the same number of competitive registrations, but where American Honda was adding a third dealer to the market. (Hrg. Tr. Vol. 6 Pages 1174:12-1175:17).

There is no dispute that the new dealerships above dramatically improved Honda's brand performance in all three markets. In Surprise, the addition of the new dealership improved Honda's sales by 43% in the open point ASA, and by 19% and 17% in the two adjacent dealers' ASAs. (Exhibit 376 at A-75). In Marysville, the addition of the new dealership improved Honda's sales by 54% in the open point ASA, and by 10% and 17% in the two adjacent dealers' ASAs. (*Id.* at A-79). Similarly, in Baton Rouge, the addition of the new dealership improved Honda's sales by 61% in the open point ASA, and by 4% and 9% in the two adjacent dealers' ASAs. (Exhibit 407 at R-20.2). These studies demonstrate the real-world benefits and increase in business that occurs from the addition of a new dealership.

Even more telling is the impact—or lack thereof—that the addition of these new points had on the existing Honda dealers in the market. Contrary to Protestant's claims, in almost all of these situations, the existing dealers **actually made more sales after the addition of the new dealership** than they did beforehand. In Surprise, the two adjacent dealers made 92 and 250 *more sales* after the open point—an increase of 5% and 10% respectively. (Exhibit 376 at A-75). In Marysville, the two adjacent dealers made 160 and 98 *more sales* after the new dealership was established, increases of 12% and 13% respectively. (*Id.* at A-79). Moreover, in Baton Rouge, the dealer closest to the open point—Team Honda—increased its sales by 281 units (10%) after the new point was established. While that dealer had filed a protest claiming the new dealership would harm its business, after the new point was established, the dealer actually told American Honda “You were right. You told me it wouldn't impact me.” (Hrg. Tr. Vol. 6 Pages 1093:13-1094:20). In fact, out of the six neighboring dealers in this study, the only existing dealer whose sales went down at all was Richards Honda. (Exhibit 407 at R-20.2). This anomaly is easily explained, however. That dealer's sales went down a relatively small amount (10%) and only because it was in the middle of relocating from an outdated facility in an outdated auto row. (Hrg. Tr. Vol. 6 Pages 1093:13-

1094:22; Vol. 13 Pages 3191:20-25: 3196:5-3197:1).⁵

In addition to showing the lack of impact that a new Honda dealership has on existing dealers, Mr. Farhat's analyses of these prior open points also shows that Mr. Stockton's proximity-based models do not accurately reflect what actually happens when a new dealership is established. As part of his analysis, Mr. Farhat expressly applied Mr. Stockton's models to the open points in all three of these prior cases to evaluate what impact he would have predicted to existing dealers. (Exhibit 378 at R-19 and R-20; Exhibit 407 at R-20.4). The results of Mr. Stockton's model are staggeringly different than what actually occurred in real life. Instead of the increase in sales these dealers actually experienced, Mr. Stockton's model predicted that the two neighboring dealers in Surprise should have lost 30% and 7% of their existing Honda sales respectively, and that both of the neighboring dealers in Marysville should have lost 20-25% of their existing sales. (*Id.*). Similarly, Mr. Stockton's model predicted that Richards Honda would be unaffected by the new dealership in Baton Rouge, and that Team Honda—instead of increasing its sales by 281 units—should have lost 20-25% of its sales. (*Id.*). Mr. Stockton's models thus are not only inaccurate for predicting the *amount of impact*, but are also unreliable even for predicting the *direction of impact* from a new dealership. (Hrg. Tr. Vol. 13 Page 3189:15-16).⁶

v. Barber Honda is in a Strong Position to Compete with a New Dealership.

Barber Honda also is well positioned to compete with a new dealership in North Bakersfield. There is no dispute that Protestant has had the unique opportunity to sell and service

⁵ Richards Honda actually was further away from the open point than Team Honda, and on the complete other side of Team Honda from the open point. (Exhibit 407 at R-20.1). In addition, Richards Honda actually experienced an increase of 9% in Honda registrations within its own ASA after the open point was established. (*Id.*) (Exhibit 407 at R-20.2). These undisputed facts make clear that some other factors were at play in the decline of its sales.

⁶ Mr. Stockton's proximity-based approaches are fatally flawed in several other respects. By splitting the market in half and measuring the change in relative proximity to existing business, Mr. Stockton's model predetermines there will be impact on existing dealers. Indeed, if there was one Honda dealer in California and a new Honda dealer were added in New York, his model would simply divide the country in half and assume proximity loss to the dealer on the west coast, which does not reflect reality. (Hrg. Tr. Vol. 13 Page 3188:7-22). Moreover, although Mr. Stockton admits that 400-600 Honda vehicles are being sold into Barber Honda's ASA each year by other Honda dealers, his model still includes those units in his calculation of proximity loss to Barber Honda, even though it did not even make those sales. (*Id.* 2967:15-2970:17). Mr. Stockton similarly included the total amount of UIO in Bakersfield in his calculation of proximity loss to Barber Honda regardless of whether those units were being serviced at another Honda dealership or an independent repair facility. (*Id.* 2971:4-23). He even admitted that he was not able to determine how many of those UIO were actually being serviced by Barber Honda. (*Id.*).

Honda vehicles for 45 years without any other Honda dealership within 67 miles of its location, and Stephen Ekegren even had to “admit that we have been blessed to have a single-point in an isolated market.” (Hrg. Tr. Vol. 9 Page 2082:8-10; Vol. 11 Pages 2596:16-2597:3). Indeed, Barber Honda acknowledged it has a “home field advantage” from having served the Bakersfield community for 45 years, and that given this opportunity to build relationships and loyalty with customers, it has a strong opportunity to retain its customers if a new dealership comes to town. (Hrg. Tr. Vol. 10 Pages 2314:3-6; 2316:25-2317:14; Vol. 11 Pages 2612:19-2613:9). Indeed, if this open point is permitted, the new dealership likely will not open for another 18 months or more, giving Protestant even more time to build these customer relationships.

It also is uncontested that the proposed site for the new dealership is located on the complete other side of Bakersfield. While Protestant is located on the far south side of Bakersfield, the proposed site for the new dealership is located 9.1 air miles away from Barber Honda, on the other side of the town, and outside of the city limits. (Exhibit P-151 at Tab 4 Page 11) (Stipulated Facts Regarding Market Drive ¶ 14). In addition, as discussed above, there are 96 pairs of Honda dealers in California closer than the proposed new dealership would be to Barber Honda. (Exhibit 378 at R-23 and R-24) (Hrg. Tr. Vol. 14 Page 3256:16-19). This puts Barber Honda in a strong position to remain successful—particularly given that it operates in the largest market in the United States with only one Honda dealer to serve customers. (Hrg. Tr. Vol. 4 Pages 742:23-743:3; Vol. 5 Pages 1173:18-1174:11).

Barber Honda also has the financial wherewithal to be successful and compete with a new dealership in this market. In each year since at least 2014, Barber Honda’s net working capital and net worth have exceeded American Honda’s guidelines. In most years, its net working capital has been nearly double and its net worth has nearly been nearly triple American Honda’s guidelines. (Exhibits J-02; 05; 08; and 11). Moreover, although Barber Honda’s financial statements reflect that the dealership is profitable on their face, American Honda’s accounting expert witness Mr. Herb Walter found some anomalies in its financial statements, including significantly higher than normal expenses for personnel (including payments to the owners), floor plan financing, data processing, and “other interest.” (Hrg. Tr. Vol. 15 Pages 3633:5–3635:1) (Exhibit R-379). Mr.

Walter found that if adjustments were made to account for these anomalies, Protestant's financial statements would reflect millions of dollars in additional profit from 2014 to 2017 (the only years where full information was available). (Hrg. Tr. Vol. 15 Pages 3669:25-3672:12) (Exhibit R-410). As such, Barber Honda not only has the financial ability, but also the financial flexibility, to respond competitively to a new dealership (*Id.*).

D. Protestant's Arguments do not Change the Fact that the Honda Brand is Materially Underperforming in Bakersfield.

Despite the clear consumer benefits of adding a new dealership in Bakersfield, the underperformance of the Honda brand, and the substantial amount of opportunity available in the market, Protestant makes several arguments in an attempt to meet its burden of proving there is some good cause not to allow this proposed new dealership. As discussed in detail below, however, these arguments all fail for several compelling reasons.

i. American Honda did not Decide to Establish the New Dealership based on State Average or without Considering Local Market Factors.

Notwithstanding the hundreds of pages of analysis performed by American Honda over a nine-year period before issuing the statutory notice here, Protestant claims that American Honda did not conduct a rigorous review of the market before deciding to move forward with the proposed dealership. Specifically, Protestant repeatedly has referred to prior decisions issued in New York and by the Board finding that franchisors did not meet their burden of proving good cause to terminate an existing dealership based on state average retail sales effectiveness ("RSE") and without considering local market factors particular to the specific market at issue.⁷ Protestant's reliance on these decisions, however, misses the mark both legally and factually.

Unlike the decisions referenced by Protestant, this Protest Action is **not** a termination or "corporate death penalty" case in which American Honda is seeking to terminate the franchise of an existing Honda dealer—it is a situation where American Honda has proposed adding a new dealership to a materially underperforming market where there is only one Honda dealer within a

⁷ The termination cases cited by Protestant include *Beck Chevrolet Co. v. General Motors*, 27 N.Y.3d 379 (2016); *Santa Cruz Nissan v. Nissan North America*, Protest No. PR-2358-13 (Cal. NMVB Sept. 17, 2014); *Dependable Dodge v. Fiat Chrysler Automobiles*, Protest Nos. PR-2435-15 and PR-2436-15 (Cal. NMVB Mar. 15, 2017); and *Folsom Chevrolet v. General Motors*, Protest No. PR-2483-16 (Cal. NMVB Aug. 13, 2018).

67 mile radius to serve a metro area with a population of more than 700,000 people. Moreover, this is not a termination case where American Honda has the burden of proving it has good cause for ending a franchise relationship. To the contrary, Protestant instead has the burden of proving there is some reason to stop the addition of the proposed new dealership, *i.e.*, some good cause **not** to move forward. Cal. Veh. Code § 3066(b).

Just as importantly, American Honda did not base its decision to establish the proposed dealership on state average RSE, and it did not make its decision lightly without considering the demographics and other local market factors specific to Bakersfield. In its policies and the monthly reports sent to dealers, American Honda expressly distinguishes between its process for determining whether one dealer's sales performance complies with its contractual obligations (as in termination cases) and whether the Honda brand as a whole is adequately represented in a particular market (as in open point cases). That distinction makes clear that while state average is the standard used to evaluate a dealer's performance of its contractual obligations, when evaluating the adequacy of its dealer network in a particular market, American Honda goes much further and evaluates local market conditions and other appropriate standards, including but not limited to "local, state, zone, and national" standards. (Exhibits R-346 fn 1; R-356 fn 1).

In accordance with this policy, American Honda analyzed the Bakersfield market several different times in many different ways before ultimately deciding to move forward with this proposed dealership. It conducted three separate market studies of the Bakersfield market over a nine year period: (1) a 60+ page market study declaring the open point in 2008; (2) an 85+ page market study in 2013-2014 to reassess the need for additional representation in Bakersfield following the recession; and (3) a 100+ page study in September 2015 with dozens of pages of refreshed data and analyses before choosing Galpinsfield as the final candidate. (Exhibits J-14; J-18; J-21). At the hearing, American Honda also presented a fourth study of this particular market – the expert reports of Sharif Farhat from Urban Science. (Exhibits R-376 and R-378).

Contrary to Protestant's misguided argument that American Honda decided to establish a new dealership in reliance on state average only, throughout its evaluation process, American Honda analyzed the brand's performance compared to all of the following more localized markets

and standards: (1) Zone 12, which includes Barber Honda and the other 60+ Honda dealers in Northern California; (2) District 12D, which includes Barber Honda and the 14 other Honda dealers located in the Central Valley; (3) Fresno, which is also located in the Central Valley and is the next closest metro market to the north of Bakersfield; (4) Sacramento; (5) San Jose; (6) East Bay; (7) San Francisco; (8) Sonoma; (9) Santa Barbara; and (10) Stockton. (Exhibits J-14; J-18; J-21; R-376; R-378). Under each one of these evaluations, the Bakersfield market is significantly underperforming, remains the lowest performing market for the Honda brand, and has a substantial amount of untapped opportunity. (*See id.*) (Hrg. Tr. Volume 4 Page 762:2-20). Indeed, the Bakersfield market performs at just 63% of the level of the next lowest market in Northern California. (Exhibit J-21 at AHM_65083) (Hrg. Tr. Volume 4 Pages 744:23-745:3).

Also directly contrary to Protestant's arguments, American Honda repeatedly and specifically evaluated the local market conditions in Bakersfield itself before proposing to establish a new dealership in this market. This evaluation included analysis of the following local market factors in the Bakersfield metro and in the two ASAs that make up the metro: (1) the population levels and population growth; (2) the number of households and household growth; (3) household income and income growth; (4) the number and location of competitive dealerships; (5) the distance between the proposed site and Barber Honda; (6) the effect of the new dealership on customer convenience versus other competitive brands; (7) the number and location of competitive registrations; (8) the import brand registrations in the market; (9) the number and location of Barber Honda's sales; (10) the number and location of new vehicles sold into the metro by other Honda dealers (known as "insell") more than 65 miles from Barber Honda; and (11) the number and location of the UIO available for potential service.

Although Protestant claims that American Honda did not evaluate local market conditions, many of these factors are the exact same local demographic and market conditions that Protestant's own expert relied on in his own analysis. (Exhibit P-151 at Tab 18 Page 1) (Hrg. Tr. Vol. 12 Pages 2929:12-2930:21) (confirming that Mr. Stockton, like American Honda, also evaluated population, household income, the orientation of the dealerships in the market, and the distances between Honda dealerships in his analysis). Indeed, in his analysis calculating Honda's expected

performance in Bakersfield based on local market factors he believes are relevant—including product popularity, median age, household income, education, and population density—Mr. Stockton found that the Honda brand was underperforming by 2,331 registrations over two years (or 1,165 units per year) and was performing at only 63% of the level expected. (Exhibit P-151 at Tab 18 Page 1) (Hrg. Tr. Vol. 13 Pages 2950:1-2952:22; Vol. 17 Pages 4044:16-4045:7). As such, there is no dispute that Honda is materially underperforming in Bakersfield—even under the analysis of local market factors prepared by Protestant’s own expert.

Moreover, there are no decisions anywhere in the country applying the termination cases cited by Protestant to an add-point case such as this one and, in fact, the case law actually has held the opposite. In *Beck* itself, the Court of Appeals was careful to limit its decision to dealership “performance standards” under a single statute, and specifically stated that other decisions about how to best improve the quality of its dealer network and sales “involve business judgments rightly left to franchisors.” 27 N.Y.3d at 394 (this decision “should not be understood as an invitation for a court to substitute its opinion for a franchisor’s determination of how to best achieve its business goals”). Applying this reasoning, New York courts have expressly held that the decision in *Beck* does not apply to the establishment of a new dealership in an underperforming area. *JJM Sunrise Automotive, LLC v. Volkswagen Group of America, Inc.*, Index Nos. 601658-14 and 602591-14 (N.Y. Sup. Ct., Jan. 26, 2017) (holding that a “franchisor’s decision to permit establishment of a new dealership in an allegedly underperforming region [is] distinct from the issue of whether a franchisor’s performance standards are lawful”) (attached as Exhibit A).

New York is not the only jurisdiction to make this important distinction. The United States District Court for the Southern District of Alabama also recently refused to extend the decisions in termination cases like *Beck* and *Folsom* to the establishment of a new dealership. *GPI-AL, Inc. v. Nissan North America*, No. 17-0511-WS-MU (Oct. 17, 2019) (attached as Exhibit B). In that case, the court found that *Beck* and *Folsom* were distinguishable for several reasons:

- (ii) *Beck* and *Folsom* were both cases in which a vehicle manufacturer was terminating a dealer’s franchise rights for noncompliance with a franchise agreement, whereas the case at bar relates to the significantly different question of assessing brand performance in a specific market area;

(iii) the issue in *Beck* and *Folsom* was the proper market comparison for evaluating a dealer's performance, whereas the issue here is whether Nissan should reasonably add another dealer to the Mobile Market to bolster its brand penetration in that market;

(iv) *Beck* and *Folsom* involved the use of a specific sales metric to evaluate a dealer's performance, as opposed to the important question in this case of the Nissan brand's effectiveness in the West Mobile PMA;

These same distinctions apply equally here. As discussed above, this is not a termination case assessing a dealer's compliance with the franchise agreement, but instead is a case involving the addition of a new dealership based on the brand performance in the market. This determination was not made based on a state average sales performance metric, but was made after thorough consideration of multiple metrics and multiple local market conditions specific to Bakersfield. Accordingly, Protestant's claim that these prior termination cases somehow help meet its burden of proving there is good cause not to proceed with the proposed new dealership is misplaced.

ii. The Honda Brand's Poor Performance in Bakersfield is not due to a Local Preference for Domestic Brands or Large Trucks.

Protestant next claims that the Honda brand is not underperforming because it needs more representation for the growing number of consumers in Bakersfield, but instead because there is a local preference for domestic vehicles—and more specifically large trucks and SUVs—that make Honda a less desirable brand in this market. The majority of the evidence Protestant presented at the hearing on this issue was anecdotal, including their alleged personal observations and hearsay discussions with others in the market. Indeed, the only analytical evidence Protestant introduced at the hearing on this issue were a handful of charts prepared by its expert purporting to establish that Honda products are not as good of a “fit” for the Bakersfield market. These analyses, however, do not actually support this conclusion. (Exhibit P-151 at Tabs 16-18).

Mr. Stockton's first analysis—a ranking of the registration effectiveness of each competitive brand in Bakersfield—does not support Protestant's claim that domestic brands and brands with large trucks are more favored in the market. (*Id.* at Tab 16 Page 1). Curiously, under Mr. Stockton's own analysis, Ford, a domestic brand with some of the most popular large trucks and SUVs in the nation, is one of the three worst performing brands in the market. (*Id.*). More importantly, Mr. Stockton also admitted that while Honda is the lowest performing brand in the

entire market at only 56.63% of expected, there are at least **six import brands without prominent truck offerings that perform much better than Honda in Bakersfield**, including Mazda, Hyundai, Nissan, Fiat, Kia, and Volkswagen. (*Id.*) (Hrg. Tr. Vol. 12 Pages 2939:1-2941:3). Several of these brands even perform well above expected in this market, including Mazda (137.73%), Hyundai (117.38%), and Nissan (105.07%). (*Id.*). Given the performance of these other import brands, there is no credible claim that Honda's performance in Bakersfield is caused by some inherent bias against import brands or brands without large truck offerings.

Mr. Stockton also attempted to evaluate the "fit of the product" for each brand by comparing the percentage of industry registrations each brand captures in Bakersfield compared to the state average. (Exhibit P-151 at Tab 17 Page 1). This analysis, however, is not an accurate measure of "fit of the product" as Mr. Stockton claims. It is undisputed that four of the five top performing brands under Mr. Stockton's analysis do not have just one dealership point like Honda, but have **two or even three dealership points each** in the Bakersfield metro—which easily explains their higher performance in this market. (Hrg. Tr. Vol. 12 Pages 2947:18-2948:21).⁸ Mr. Stockton also could not show any correlation between his product favorability factor and brand performance. Several of the brands with allegedly favorable products (including Dodge/RAM and Ford) are actually performing lower than expected in Bakersfield, while several brands with allegedly unfavorable products (like Nissan, Buick, Hyundai, Fiat, Infiniti, Lexus, Lincoln, Cadillac, and Acura) are all performing better than expected in this market. (Exhibit R-378 at R-3). In fact, Sharif Farhat tested this model and found that the explanatory value of Mr. Stockton's product favorability metric for predicting brand performance was just 0.33%--or essentially zero. (Hrg. Tr. 3242:7-3243:7). Moreover, when Mr. Stockton plugged his own "fit of the product" factor into his analysis of the opportunity for the Honda brand, he found that the Honda brand was still performing at only 63% of expected in the market. (Exhibit P-151 at Tab 18 Page 1). Accordingly, and ironically, Mr. Stockton's own analysis proves that his "fit of the product" metric does not explain Honda's poor performance in Bakersfield.

Similarly, Mr. Farhat performed his own analysis and found that any alleged preference for

⁸ These four brands are GMC, Chevrolet, Ford, and Toyota. (*Id.*).

trucks does not explain the Honda brand's poor performance in Bakersfield. Under his analysis, Mr. Farhat ranked the markets in California by the percent of vehicles purchased by customers in each market that are pickup trucks. (Exhibit R-376 at A-52). This analysis showed that there are 11 other markets in California with a greater consumer preference for trucks, and that the Honda brand performs significantly better in all 11 of these markets than it does in Bakersfield. (*Id.*). The four markets in California with the highest preference for trucks all perform well above 100% of expected—including one market at 140.7% of expected. (*Id.*). Once again, this analysis further demonstrates there is no correlation between consumer preferences for trucks and the Honda brand's performance as measured by segment adjusted⁹ registration effectiveness. (*Id.*) (Hrg. Tr. Vol. 13 Pages 3135:25-3136:16).

iii. The Honda Brand's Underperformance in Bakersfield is not due to Local Economic Issues in the Market.

Protestant's next claim is that the Honda brand has been underperforming in Bakersfield since 2014-2015 because Bakersfield is a lower income community and because the economy was negatively affected by a drought and decrease in oil prices beginning at that time that devastated the motor vehicle retail business. The evidence, however, simply does not support this claim.

As an initial matter, American Honda declared this open point in 2008—years before this alleged downturn—and studied the market for a second time at the end of 2013. (Hrg. Tr. Vol. 11 Page 2643:13-20). Both of these analyses were performed before the alleged drought and decline in oil, and both revealed the need for a second Honda dealership in this market. Accordingly, there has been evidence that Bakersfield has been underperforming and underrepresented for the Honda brand for more than 12 years—for the long term.

Jonathan Ekegren also admitted that a downturn in these industries would not just affect Honda, but would affect all different types of business and other automotive brands. (*Id.* 2637:20-2639:6). Despite this fact, the demographic data in Bakersfield does not evidence some dramatic

⁹ These conclusions make sense given that when it calculates brand performance, American Honda only takes into account competitive registrations, *i.e.*, registrations of the same types of vehicles that the Honda brand has available for sale. These metrics expressly exclude the very large trucks and large SUVs addressed in Protestant's claim. (Hrg. Tr. Vol. 3 Pages 718:3-9; 719:10-720:21; Vol. 13 Pages 3077:2-3081:15).

decline in the local economy. As discussed above, the objective facts paint a different picture:

- Population Growth - From 2010 to 2017, the population in the Bakersfield RMA grew from 345,255 to 444,443, and the population in the Bakersfield metro grew from 517,258 to 722,714. (Exhibit R-376 at A-34). This is a 7.18% growth in population, well above the growth experienced in the state and the nation as a whole. (*Id.* at A-38).
- Household Growth - From 2010 to 2017, the number of households in the Bakersfield metro grew from 196,608 to 208,497, which is a 6.05% growth and about the same level as the rest of the state and the nation as a whole. (*Id.* at A-37 and A-38).
- Employment Growth – From 2010 to 2017, employment levels in Kern County grew from 269,613 to 349,502. In fact, the average annual employment in Kern County was higher in 2017 than it was in 2013—the year before this alleged economic decline. (*Id.* at A-39).
- Decline in Unemployment – While Mr. Stockton presented evidence that the unemployment rate in Bakersfield generally has been higher than the rest of the United States, it has been that way since at least 2008, and his own chart shows unemployment in Bakersfield *noticeably declining since 2013*. (Exhibit P-152 Tab 7 Page 1).
- Increase in Competitive Registrations – From 2013 to 2017, the number of competitive retail registrations in the Bakersfield metro increased from 13,336 to 14,912 registrations. (Exhibit R-376 at A-46). Indeed, competitive registrations in the RMA grew by 6.7% during this time period, and competitive registrations in the metro grew by 10.8% during this same time period—faster than the national average. (Exhibit P-152 Tab 9 Page 1).

These undisputed facts show a growing market—not a devastated local economy.

In an effort to combat these local statistics, Protestant’s expert prepared a chart alleging that competitive registrations in Bakersfield have been declining since 2015. This chart, however, is a clear example of cherry picking. There is no dispute that the motor vehicle industry set all-time record highs in 2015 and 2016 with over 17 million registrations, after years of pent up demand following the great recession. (Exhibit P-152 Tab 5 Page 1) (Hrg. Tr. Vol. 13 Pages 3126:10-3127:23). Since those record years, the industry has experienced a slight “leveling off” in registrations, but even in 2019, the industry was outperforming expectations and still achieved near all-time highs with over 17 million registrations. (*Id.*). Moreover, while competitive registrations in Bakersfield leveled off slightly between 2015 and April 2019, according to Mr. Stockton’s own chart, the competitive registrations in the Bakersfield RMA and the Bakersfield metro actually declined **less than the rest of the state of California**. (Exhibit P-153). These facts do not evidence

some local economic devastation, much less provide good cause not to permit the establishment of a new dealership to serve customers in Bakersfield for years to come.

iv. American Honda's Allocation of New Vehicles to Barber Honda has been Reasonable, Fair, and Appropriate.

Although Protestant claims that the economy in Bakersfield has been poor and that Honda products are a poor fit for that market, Protestant next claims that it actually needed more Honda products to effectively serve this market. In support of its claim, Protestant relies almost entirely on several emails that were drafted by Protestant itself (almost all of which were from 2013 and 2014) asking American Honda for additional inventory. Indeed, Protestant's own expert witness did not provide any testimony regarding allocations during his initial examination, and on rebuttal, relied on these emails to claim that American Honda could have "prioritized" Barber Honda more in allocations. Mr. Stockton, however, admitted that he did not perform any substantive analysis of Barber Honda's allocations, that he was not aware of how many supplemental allocations the dealer had received, and that he did no analysis of those supplemental allocations. (Hrg. Tr. Vol. 17 Pages 4026:16-4027:7). Tellingly, Mr. Stockton also admitted that Protestant is not challenging Honda's administration of its allocation system in this case. (*Id.* 4003:19-21).

There is a clear and simple explanation for why neither Protestant nor its retained expert were able to provide any objective or quantitative evidence showing that Barber Honda did not receive sufficient allocations: the evidence in this case shows the exact opposite. Contrary to Protestant's claims, the evidence in this case overwhelmingly demonstrated that Barber Honda consistently had a **higher level of inventory than other Honda dealers** and consistently sold that inventory at a much slower pace.¹⁰ From 2011 through January 2018, Barber Honda's available days' supply (which includes all vehicles on the dealer's lot and in transit) exceeded the Zone 12 average in **61 of 85 months** or an astounding 71.8% of the time, including in 17 of the 24 months in 2013 and 2014 when Barber Honda was requesting more inventory. (Exhibit R-351). In

¹⁰ Under American Honda's allocation system, Honda dealers earn inventory based on how many vehicles they have in stock (*i.e.*, their days' supply) and how quickly they are selling those vehicles (*i.e.*, their turn rate).¹⁰ (Hrg. Tr. Vol. 15 Pages 3691:15-3695:18). Accordingly, a dealership can improve its own inventory and earn more vehicles by selling the vehicles it already has in inventory at a quicker pace. (Hrg. Tr. Vol. 11 Page 2655:13-20; Vol. 15 Page 3700:14-25).

addition, from 2013 to 2017, American Honda provided Protestant **more than 982 units of supplemental allocation**, including 318 units in 2013, 227 units in 2014, and 233 units in 2016. (Exhibit R-345) (Hrg. Tr. Vol. 2 Page 439:3-17). These supplemental allocations were the highest of any dealers in the District, among the highest in the Zone, and extremely high for a dealer of this size. (Hrg. Tr. Vol. 2 Pages 436:2-437:10; 439:18-440:8).

In addition to this evidence, American Honda also presented the testimony of Herb Walter, who is one of the most renowned allocation and financial experts in the automotive industry. Mr. Walter is an independent consultant with over 42 years of experience in the automotive industry, including 32 years of experience with PriceWaterhouse Coopers. (Hrg. Tr. Vol. 3608:20-3609:22). He has a bachelor's degree in business administration and accounting in quantitative analysis, and a master's in business administration with concentrations in finance and quantitative analysis, and held licenses as a CPA and a certified fraud examiner for many years. (*Id.* 3610:2-3611:14). Specifically as it relates to inventory, Mr. Walter has studied the allocation systems of almost every automotive company during his career, and has testified in automotive matters approximately 40-50 times in about 20 different jurisdictions. (*Id.* 3613:9-3614:25).

Unlike Protestant's expert witness, Mr. Walter expressly and substantively studied Barber Honda's inventory and turn rate of Honda vehicles, and found that Barber Honda consistently had a higher relative level of inventory than the other dealers in the Zone and was turning its inventory at a significantly slower pace. Mr. Walter first evaluated Barber Honda's "sales to availability," which compares the number of sales the dealership makes each month to the amount of inventory it has available that month. (Exhibit 377 ¶ 24) (Hrg. Tr. Vol. 15 Pages 3697:24-3698:25). Using this metric, Mr. Walter found that from 2014 to 2017, Barber Honda consistently **sold between 30-40% of its available inventory each month**. (Exhibit 377 Attachments 10-12). This means that Barber Honda had about **65% of its inventory remaining and available each month to make additional sales** to customers. (Hrg. Tr. Vol. 15 Page 6702:10-24). This analysis also revealed that Barber Honda regularly sells its inventory more slowly than other Honda dealers in the Zone. Indeed, out of the top five models sold by Protestant (which make up 85% of its total sales), Protestant consistently sells four of those five models more slowly than other Honda dealers. (*Id.*

3704:22-3705:13) (Exhibit 377 Appx 11-20).

Mr. Walter also analyzed Barber Honda's days' supply compared to the relative inventory levels of the other Honda dealers in the Zone. While American Honda's own records showed that Barber Honda's *available days' supply* (which includes all vehicles on the dealer's lot and in transit to the store) exceeded the Zone average 71.8% of the time, Mr. Walter instead analyzed Barber Honda's *inventory days' supply*—which looks only at the vehicles actually on the dealer's lot. (Hrg. Tr. Vol. 15 Page 3717:2-15). This analysis painted the same picture – that **Barber Honda's inventory days' supply was higher** than the relative inventory levels of the other Honda dealers in the Zone **about 69% of the time**. (*Id.* 3722:4-24) (Exhibit 377 Attachments 13-14). This analysis again shows that, contrary to Protestant's claims, Barber Honda actually had higher inventory levels and was selling vehicles at a slower rate than other Honda dealers. (*Id.*).

There also is no dispute that Barber Honda often had access to inventory on its lot that it was unable to sell in a timely manner. American Honda regularly issues reports showing the amount of “aged inventory” each dealer has on its lot, which reflect the vehicles that have been on the dealer's lot over 90 days. Several times, American Honda sent Barber Honda reports showing that the dealership had over 75 or more units of aged inventory on its lot. (Exhibits R-388 and R-395). For example, in October 2017, American Honda informed Protestant that 118 of the 298 vehicles on its lot (about 40% of its total inventory) were over 90 days old. (Exhibits R-395 and R-396).¹¹ Although some of these vehicles could have come to the dealership on trade, Jonathan Ekegren admitted the vast majority of this inventory had come directly from American Honda, had been on the lot over 90 days, and were additional vehicles it could have used to make more sales. (Hrg. Tr. Vol. 11 Pages 2679:2-2680:3). Mr. Ekegren also admitted that it is “not ideal” for the dealer to have vehicles on its lot for a long time because it increases the dealership's carrying costs, including its floor-plan financing expense. (*Id.* 2680:11-21). Consistent with Protestant's testimony, Mr. Walter's expert report found that Barber Honda's new vehicle floor-plan financing expense significantly exceeds that of other similarly-situated Honda dealers—again demonstrating

¹¹ Jonathan Ekegren also acknowledged that this aged inventory included almost every single model that American Honda makes, including Civics, Accords, Crosstours, CR-Zs, Fits, Odysseys, Pilots, and HR-Vs. (Hrg. Tr. Vol. 11 Pages 2682:11-2683:15; 2685:3-2686:21).

that Barber Honda had excess inventory and was turning its inventory much too slowly. (Exhibit 379 Attachments 26-27) (Hrg. Tr. Vol. 16 Page 3741:2-11).

In summary, it is entirely uncontroverted that Barber Honda consistently (1) had a higher available days' supply of vehicles, (2) had a higher inventory days' supply of vehicles, (3) sold its inventory at a slower pace, (4) had about 65% of its inventory available each month to make additional sales, (5) had substantial aged inventory on its lot, and (6) had higher new vehicle floor-plan financing expense than other Honda dealers. Given these undisputed facts, there is no support for Protestant's claim that it did not receive enough Honda vehicles for sale.

III. The Existing Honda Dealer Network in the RMA is not Providing Adequate Competition and Convenient Consumer Care.

It is also clear that the Honda dealership network established back in the early 1970s is no longer sufficient to provide adequate competition and convenient care for consumers in Bakersfield some 45 years later. As discussed above, Barber Honda is the only Honda dealer available to sell new vehicles and provide service for customers within a 67-mile radius of its location—an area exceeding more than 14,000 square miles—and there are over 900,000 people currently living in Kern County alone. (Exhibit P-151 at Tab 4 Page 11) (Hrg. Tr. Vol. 13 Pages 3115:24-3116:19). This is simply too large of an area with too large of a population for Barber Honda to effectively cover by itself.

The evidence at the hearing makes this clear. Although Barber Honda has enjoyed the benefits of being “a single-point in an isolated market,” having one location in Bakersfield some 45 years later is no longer beneficial for Honda customers. As discussed above, the average consumer in North Bakersfield currently must drive 16.3 miles before they reach any Honda dealership (*i.e.*, Barber Honda), which is much further than other competing brands with more dealership points like Chevrolet, GMC, Toyota, and Ford. (Exhibit R-376 at A-65). It is undisputed that convenience is a very important factor for consumers, particularly as it relates to service work. Moreover, while American Honda is not establishing the new dealership as an affront to Barber Honda, the dealership's customer satisfaction scores in service have consistently been poor. Since at least 2013, Barber Honda's service satisfaction scores repeatedly have ranked in the bottom 20%

of all Honda dealers in Northern California, and at one point even ranked 1039 out of 1048 Honda dealers in the nation. (Exhibits R-387; R-399; R-400). There is no dispute that poor service satisfaction can affect a dealer's sales operations and the reputation of the Honda brand. (Hrg. Tr. Vol. 7 Pages 1471:16–1473:6; Vol. 11 Page 2707:10-17).

Moreover, despite Barber Honda's clear competitive advantage in the Bakersfield market, hundreds and hundreds of Honda customers are driving incredible distances to visit another dealership and purchase a Honda vehicle. As of October 2017, 31.4% of all customers who purchased a Honda vehicle in Barber Honda's own ASA bought their vehicle from another Honda dealership more than 67 miles away. (Exhibit R-342). By June 2019, this number had grown to over 34%. (Exhibit R-403). In fact, while Barber Honda's own sales numbers declined from 1,623 units in 2013 to 1,507 units in 2017, the number of Honda vehicles registered in the Bakersfield metro during this same time period actually increased from 1,799 to 1,957 vehicles. (Exhibit R-376 at A-27; A-App-11; A-App-23). These facts demonstrate that customers in Bakersfield want to purchase and are purchasing Honda products, but are in need of additional representation and competition in this specific market.

These inadequacies in convenience and customer care have manifested themselves in significant underperformance for the Honda brand in Bakersfield, as discussed at length above. Indeed, if the new dealership were not established and Barber Honda were to be made responsible for the entire Bakersfield metro by itself, rather than just the southern half of the market, Protestant's sales performance would rank dead last out of all Honda dealers in the state regardless of the standard used. (Exhibit R-376 at A-57) (Hrg. Tr. Vol. 13 Pages 3145:25-3147:11). This makes sense given that Bakersfield is the largest market in the country (by population and number of competitive registrations) with only one Honda dealer. (Hrg. Tr. Vol. 4 Pages 742:23-743:3; Vol. 5 Pages 1173:18-1174:11). Accordingly, establishing a new dealership in North Bakersfield not only would help provide adequate customer care and convenient service for customers, it would "right size" the market for both Honda dealerships. (Hrg. Tr. Vol. 13 Page 3146:15-17).

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IV. The Proposed New Dealership will not be Injurious to the Public Welfare, and instead will Increase Competition and be in the Public Interest.

In addition to improving Honda's representation in Bakersfield, the proposed dealership also will have a positive effect on competition and the public welfare. As discussed above, currently there are no other Honda dealerships to serve customers for a large distance from Barber Honda, and it takes customers more than an hour to drive from Barber Honda to reach another Honda dealership. (Hrg. Tr. Vol. 11 at Pages 2592:25-2593:5; 2594:18-2595:19) (Exhibit P-151 at Tab 4 Page 11-12). Despite this distance, other Honda dealers are making 400-600 sales each year into the market, which shows that customers are in need of competition and other options. (Exhibit R-342; R-403). Establishing a second point in North Bakersfield to serve customers within this area will provide that much needed competition and benefit the public interest. Indeed, as Mr. Boeckmann testified, competition is good for consumers because it "makes us better dealers" and "keeps us on our game." (Hrg. Tr. Vol. 8 Page 1977:1-10).

The proposed dealership also will benefit the local public in other ways. As previously stated, Galpinsfield is a well-respected and experienced dealer who has a history of treating customers well and becoming involved in the local community. (Hrg. Tr. Vol. 5 Page 1038:7-15; Vol. 6 Pages 1401:4-1402:4; 1402:5-1403:9). Indeed, Jonathan Ekegren admitted that Protestant has no concerns about the Galpinsfield team individually, how they operate a dealership, or how they treat customers. (Hrg. Tr. Vol. 11 Pages 2711:23-2712:10). Galpinsfield also plans to build a brand-new dealership facility that will benefit the public welfare.

The proposed site is located on land that is currently undeveloped, (Stipulated Facts Regarding Market Drive ¶ 16), and thus developing that site will benefit the local economy and promote economic development. In fact, Galpinsfield plans to look for local construction companies to build the new facility, which would increase employment and benefit the local economy. (Hrg. Tr. Vol. 8 Page 1922:5-21). This proposed dealership also will greatly improve customer convenience and access to the Honda brand, and is situated on the complete other side of town from Barber Honda, is highly visible and accessible from several major thoroughfares, and is close to the second Toyota location in Bakersfield so that customers can easily cross-shop between

these two brands. (Exhibit R-376 at A-65) (Hrg. Tr. Vol. 8 Pages 1910:10-19; 1972:11-1973:2) (Stipulated Facts Regarding Market Drive ¶¶ 15 and 17).

Indeed, the Ekegrens and Mr. Stockton conceded that as long as Barber Honda continues operating—which is a certainty given the facts of this case—this new dealership would provide another touch point for customers, improve customer choice and convenience in the market, improve customer access to the brand, increase service capacity, increase employment, and increase the local tax base—all of which are good for customers and the public interest. (Hrg. Tr. Vol. 10 Pages 2311:25-2313:23) (Stephen Ekegren) (Vol. 11 Pages 2713:7-2714:25) (Jonathan Ekegren) (Vol. 13 Pages 2973:17-2974:4) (Edward Stockton). As such, the proposed new dealership will have a positive effect on competition, consumers, and the public interest.

CONCLUSION

Protestant has not met its statutory burden of proving there is good cause **not** to permit the establishment of the proposed new Honda dealership in Bakersfield. This proposed new dealership is being established in a large, growing market that is one of the ten most populous cities in California, and a market where there has only been one Honda dealership to serve customers within 67 miles for the last 45 years. Adding a second Honda dealership therefore will benefit consumers and the general public in this market by improving access to the Honda brand for sales and service, providing customers with much needed competition, and adding valuable economic expansion and employment opportunities in the community. Moreover, Protestant has not proven that this new dealership—on the opposite end of Bakersfield and outside the city limits—would have any material adverse effect on their business. Instead, given that Bakersfield is the lowest performing market for Honda in the state and that Honda is the lowest performing brand in Bakersfield, there is more than enough opportunity for Honda sales and service business to support both dealerships, and the establishment of this new dealership will increase—not reduce—the amount of business available in Bakersfield for both dealers. Accordingly, American Honda respectfully requests that the ALJ enter an Order denying the Protest and permitting the establishment of Galpinsfield as a new Honda dealer in Bakersfield.

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DATED: March 30, 2020

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**STATE OF CALIFORNIA
NEW MOTOR VEHICLE BOARD**

In the Matter of the Protest of:

BARBER GROUP, INC., d/b/a BARBER
HONDA,

Protestant,

v.

AMERICAN HONDA MOTOR CO., INC.,

Respondent,

GALPINSFIELD AUTOMOTIVE, LLC,

Intervenor.

PROTEST NO.: PR-2539-17

**RESPONDENT AMERICAN HONDA
MOTOR CO., INC.'S PROPOSED
FINDINGS OF FACT AND DECISION**

Pursuant to the Order Establishing Post-Hearing Briefing Schedule, Respondent American Honda Motor Co., Inc. hereby submits its Proposed Findings of Fact and Decision in the above-captioned matter.

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PROCEDURAL BACKGROUND

Statement of the Case

1. On September 26, 2017, American Honda Motor Co., Inc. (“American Honda” or “Respondent”) notified Protestant Barber Group, Inc. dba Barber Honda (“Barber Honda” or “Protestant”) of its intent to establish a new Honda dealer at a location on Merle Haggard Drive, Bakersfield, California 93308-6442, more specifically identified by the property’s Assessor Parcel Numbers.

2. Protestant objected to what it called American Honda’s “fatally defective” notice of establishment in a letter dated October 4, 2017. Subsequently, on October 13, 2017, Protestant filed a protest with the California New Motor Vehicle Board (“Board”) challenging both the adequacy of American Honda’s September 26, 2017 notice and the proposed establishment of a new Honda dealer in the north Bakersfield area.

3. Based upon the objections contained in Protestant’s October 4 letter, on October 12, 2017, American Honda issued a Corrected and Superseding Notice of its intent to establish a new Honda dealership in Bakersfield. This Corrected and Superseding Notice updated the Assessor Parcel Numbers of the proposed Honda dealership to which Protestant initially objected and made clear that it superseded the prior notice sent to Barber Honda.

4. The candidate for the proposed Honda dealership, Galpinsfield Automotive, LLC (“Galpinsfield” or “Intervenor”), was joined in this lawsuit as an Intervenor pursuant to an order of the Board dated December 27, 2017.

5. A 19-day hearing on the merits of the Protest was held before Administrative Law Judge Dwight V. Nelsen on September 9-13, 2019; October 21-25, 2019; December 3-6, 2019; January 6-7, 2020; January 9, 2020¹; January 21, 2020; and January 23, 2020.

Parties and Counsel

6. As provided in the Honda Dealer Sales and Service Agreement (“Dealer Agreement”) entered into between Protestant and Respondent, Protestant Barber Honda is an

¹ No testimony was heard on January 9, 2020; instead, the parties and ALJ Nelsen participated in a “market drive” in which they toured Barber Honda’s dealership facility and the Bakersfield market. The parties’ stipulated findings related to this market drive were filed with the Board on January 23, 2020 and form part of the record of this matter.

authorized Honda new motor vehicle dealership located at 4500 Wible Road, Bakersfield, CA 93313. (Ex. J-16 at AHM_00001149). Protestant is owned by the Ekegren Family Trust. (Ex. J-16 at AHM_00001144).

7. Barber Honda is a “franchisee” within the meaning of Vehicle Code Sections 331.1 and 3062(a), and it is represented by Gavin M. Hughes and Robert A. Mayville, Jr. of the Law Offices of Gavin M. Hughes.

8. Respondent American Honda Motor Co., Inc. is a licensed distributor of Honda brand vehicles and products. It is a “franchisor” within the meaning of Vehicle Code Sections 331.2 and 3062(a), and it is represented by S. Keith Hutto, Steven B. McFarland, and Patrick D. Quinn of Nelson Mullins Riley & Scarborough, LLP.

9. Intervenor Galpinsfield Automotive, LLC is a limited liability company formed to act as the dealer candidate and proposed authorized Honda dealer which American Honda seeks to establish in north Bakersfield. (Ex. J-23.005). It is represented in this protest by Alan J. Skobin, its general counsel.

Witnesses at the Hearing

Protestant’s Witnesses

10. Protestant Barber Honda called the following fact witnesses from American Honda: (1) Eric Van Olst, American Honda Zone 12 Sales Manager; (2) Marc Thomas, American Honda District Sales Manager; (3) David Adair, American Honda Senior Manager, Market Representation; (4) Marty Fisher, American Honda District Sales Manager; (5) Michael Bach, American Honda Zone 1 Parts and Service Manager; (6) John Ewanicki, American Honda District Sales Manager; (7) Todd Meyer, American Honda Zone 12 Assistant Manager; (8) Frank Beniche, American Honda Assistant Vice President, Public Companies; (9) Peter Hagan, American Honda Zone 12 Assistant Manager; (10) Jonah Rohde, American Honda District Parts and Service Manager; and (11) Beau Boeckmann, Galpinsfield Automotive, LLC.

11. Protestant also called the following fact witnesses from Barber Honda in support of its own case: (12) Stephen Ekegren, Dealer Principal for Barber Honda; and (13) Jonathan Ekegren, Dealer Manager for Barber Honda.

12. Protestant's expert witness was Edward "Ted" Stockton, Vice President and Director of Economic Services, The Fontana Group. Mr. Stockton was qualified as an expert with respect to the opinions he offered during the hearing.

Respondent's Witnesses

13. Respondent American Honda called Eric Van Olst², American Honda Zone 12 Sales Manager, back to the stand as a fact witness in its case-in-chief. In addition, American Honda also conducted direct examinations and elicited testimony from most of the American Honda witnesses called by Protestant as part of its case-in-chief.

14. Respondent's expert witnesses were: (1) Sharif Farhat, Vice President of Expert Services, Urban Science Applications, Inc., who was qualified as an expert regarding dealer network analysis; and (2) Herbert Walter, who was qualified as an expert regarding dealership financial and operational performance and inventory analysis.

Intervenor's Witnesses

15. Intervenor Galpinsfield conducted a direct examination of Beau Boeckmann, one of the owners of Galpinsfield, who was called as a witnesses as part of Protestant's case-in-chief. Because Mr. Boeckmann was first called to the stand and cross-examined by Protestant's counsel during Protestant's case, Intervenor did not call any other witnesses in its presentation of the evidence.

Deposition Excerpts

16. In addition to the witnesses presented at the hearing, the parties also submitted select excerpts from the deposition testimony of the following witnesses: (1) Steve Dale Steele, Service Manager at Barber Honda; (2) Edik Hartoonian³; (3) Herbert Boeckmann II, Galpinsfield Automotive, LLC; (4) Ron Mattner, American Honda; and (5) Troy Stone, American Honda.

17. The depositions designations from these witnesses were accepted into evidence as

² Respondent offered direct testimony from Mr. Van Olst during Protestant's case and subsequently recalled Mr. Van Olst as a rebuttal witness during its presentation of the evidence.

³ Mr. Hartoonian was deposed twice in this matter, January 15, 2019 and March 26, 2019. The parties submitted deposition designations from both depositions given by Mr. Hartoonian.

Exhibits J-28, J-28A⁴, and J-28B⁵.

Market Drive

18. The parties and the hearing officer also conducted a site visit and market drive during which they toured Barber Honda's dealership facility and drove throughout the Bakersfield market to observe the location and appearance of competitive dealerships, the proposed dealership location, and residential and commercial development in the market. Subsequent to the site visit, the parties jointly submitted their agreed upon Stipulated Facts Regarding the January 9, 2020 Market Drive which was admitted into evidence and forms part of the record in this matter. (*See* Ex. J-29).

BURDEN OF PROOF

19. In protests regarding the proposed establishment of a new motor vehicle dealer under Vehicle Code Section 3062, the dealer protesting the proposed establishment has the burden of proof to establish that there is good cause not to enter into a franchise establishing an additional motor vehicle dealership. (Veh. Code § 3066(b)).

ISSUE PRESENTED

20. The ultimate issue presented in this case is whether Protestant has met its burden of establishing there is good cause not to permit the proposed establishment of Galpinsfield as a new Honda dealer in the north Bakersfield area.

21. Pursuant to Vehicle Code Section 3062(a), a franchisor that seeks to enter into a franchise establishing an additional motor vehicle dealership within the Relevant Market Area ("RMA") of an existing motor vehicle dealership of the same line-make must first provide written notice to the Board and to each franchisee of the same line-make within the RMA, which is defined as the area within a 10-mile radius from the proposed site of the dealership. (Veh. Code § 507).

22. Pursuant to Vehicle Code Section 3062, existing dealers of the same line-make

⁴ Exhibit J-28A is an exhibit to the March 26, 2019 deposition of Mr. Hartoonian which Protestant sought to have admitted in order to provide context to his deposition testimony. Respondent and Intervenor did not object to this exhibit.

⁵ Exhibit J-28B are excerpts from the depositions of Mr. Steele and Mr. Mattner which Protestant and Respondent designated but which were erroneously excluded from Exhibit J-28.

within the RMA have the right to protest the proposed establishment of a new motor vehicle dealership.

23. In determining whether there is good cause not to permit the proposed establishment of a new motor vehicle dealership, Vehicle Code Section 3063 provides that the Board shall take into consideration the existing circumstances, including, but not limited to, all of the following:

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

24. By limiting the protest right to same line-make dealers within the RMA, the Vehicle Code seeks to balance the interests of existing dealers with the needs of franchisors to grow their dealer network as market conditions invariably change over time. Similarly, by placing the burden on the protesting dealer to show that there is good cause not to permit the proposed establishment, the Vehicle Code establishes a “default” position that favors the establishment of new motor vehicle dealers.

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

PROTESTANT'S CONTENTIONS

26. Protestant contends there is good cause not to permit the proposed establishment of Galpinsfield as a new Honda dealer in the north Bakersfield area. Specifically, Protestant makes the following arguments:

- a. Protestant alleges it is already providing adequate competition and Honda representation in the RMA.
- b. Protestant criticizes American Honda's market studies and opportunity analysis, alleging that it fails to account for certain local market conditions and consumer preferences that make Honda products less desirable for consumers in Bakersfield than in other California markets.
- c. Protestant claims that there is insufficient opportunity in the RMA and in the Bakersfield market as a whole to support the addition of a second Honda dealership. Given this lack of opportunity, Protestant claims that adding a second Honda dealer will detrimentally impact the investment made in the Barber Honda dealership.
- d. Protestant claims that any shortcomings in its performance or in the Honda brand's performance in the Bakersfield market is due to American Honda's failure to provide Barber Honda with adequate allocations of new motor vehicles.

RESPONDENT'S CONTENTIONS

27. Respondent contends that Protestant cannot meet its burden of proving that there is good cause not to permit the establishment of a new Honda dealership in the RMA. Respondent alleges that a new Honda dealership located in north Bakersfield, 9.1 miles from Protestant's dealership, would improve competition, customer convenience, and employment, and, therefore, would benefit consumers and the public interest. This is particularly true, according to Respondent, given that the closest existing Honda dealer to Barber Honda is over 67 miles away, meaning that consumers in the Bakersfield market have no other convenient options apart from Barber Honda if they wish to purchase a new Honda vehicle or need their vehicle serviced by an authorized Honda dealer.

28. Respondent further contends that the Honda brand's registration effectiveness and

market share in the RMA, and in the Bakersfield market as a whole, is the worst among Honda-represented markets throughout California. Within the Bakersfield market, Honda is the worst performing brand. As such, Respondent contends that there is sufficient sales and service opportunity for Protestant and a new Honda dealer to both operate successfully in the market.

29. Respondent also asserts that in addition to the available sales and service opportunity presently available in the Bakersfield market, demographic trends forecasting continued growth in Bakersfield mean that there is currently, and will be in the future, sufficient opportunity to support a second Honda dealer without harming Barber Honda. In addition, case studies from other recent Honda add points demonstrate that in all instances but one—which is itself distinguishable due to factors unrelated to the establishment of a new Honda dealer—performance of the Honda brand improved as did the performance of the existing Honda dealers with the addition of a new dealership.

INTERVENOR'S CONTENTIONS

30. Intervenor's contentions are similar to and consistent with those set forth by Respondent. Intervenor contends it sought to become the candidate dealer for this open point based on its positive prior experience establishing a new Honda dealership and because it also believes there is sufficient opportunity in the Bakersfield market to support a second Honda dealership.

31. Intervenor further contends that its plan to gain market share through inter-brand competition and its belief in the benefit of healthy competition as a means to stimulate brand performance means that there will be little or no impact on Protestant. At the same time, a second Honda dealership will greatly improve customer convenience and access to the Honda brand. Accordingly, Intervenor contends that Protestant cannot meet its burden of proving that there is good cause not to permit its proposed relocation.

FINDINGS OF FACT

Preliminary Findings

I. Barber Honda and the Bakersfield Market

32. Barber Honda first began operating in Bakersfield as an authorized Honda dealership in 1973. (Hrg. Tr. Vol. 10, 2315:15-2316:1). Barber Honda moved to its current

location at 4500 Wible Road, Bakerfield, California in 1985. (Hrg. Tr. Vol. 9, 2025:3-8). At the time, Barber Honda was the first dealership to be established along Wible Road, in what grew over time into an “auto row” where most competitive brands are currently represented. (Hrg. Tr. Vol. 9, 2025:9-20) (Ex. J-28).

33. Barber Honda was originally established by its namesake, John Barber. Stephen Ekegren, John Barber’s son-in-law, began working for the Barber Group when he moved to Bakersfield in 1986 and became the Dealer Principal and Dealer Manager for Barber Honda in 2003 upon John Barber’s death. (Hrg. Tr. Vol. 2, 321:10-23) (Ex. J-16 at AHM_00001147). Mr. Ekegren is still the Dealer Principal for Barber Honda, but in March 2017, his son Jonathan Ekegren became the Dealer Manager for the dealership. (Hrg. Tr. Vol. 2, 322:16-25) (Ex. J-16 at AHM_00001148).

34. At one time in the past, Protestant owned and operated 21 different automotive franchises in Bakersfield. (Hrg. Tr. Vol. 9, 2030:15-25). Protestant sold off those franchises over time, and currently Barber Honda is the only automotive franchise owned and operated by Protestant. (Hrg. Tr. Vol. 9, 2031:11-13).

35. Since Barber Honda was established in 1973, the Bakersfield market has experienced significant growth. Between just 2000 and 2017, the population within the RMA increased from 346,255 to 460,201, while the population in the Bakersfield metro as a whole increased by more than 235,000 people, from 517,258 to 753,345. (Ex. R-376 at A-34, A-37). Similarly, over that same time period the number of households increased by over 40,000 within the RMA, from 115,528 to 147,573, and increased by more than 55,000 in Bakersfield as a whole, from 157,278 to 216,634. (Ex. R-376 at A-34, A-37).

36. Despite this large growth, Barber Honda remains the only Honda dealer in Bakersfield. (Hrg. Tr. Vol. 11, 2592:18-2693:5). It is undisputed that Barber Honda has been the only Honda dealer in Bakersfield over the past 47 years since it was established in 1973. (Hrg. Tr. Vol. 10, 2315:15-2316:10). Protestant and Respondent both referred to Barber Honda’s position as the only Honda dealer in Bakersfield as being “on an island.” In air-miles, the closest Honda dealer to Barber Honda is Honda Lancaster, 67.2 miles away. (Ex. 151 at Tab 4, Page 11). When

measured by the more practical measures of drive distance and drive time, AutoNation Valencia is the closest Honda dealer at 74.4 miles or a 1 hour, 12 minute drive away. (Ex. 151 at Tab 4, Pages 12 and 13).

37. While Barber Honda is the only Honda dealership in Bakersfield, a number of other brands have more than one dealership in the market. Ford and GMC also have two dealerships in the Bakersfield metro, while Chevrolet has three dealerships. (Hrg. Tr. Vol. 2, 326:7-17) (Ex. R-376 at A-5U). In addition, Toyota, which is Honda's biggest competitor in Northern California, has two dealerships in Bakersfield, having added a second dealership in 2007. (Hrg. Tr. Vol. 1, 109:20-23) (Hrg. Tr. Vol. 9, 2048:11-14) (Ex. R-376 at A-5U). American Honda asserts that the Honda brand's poor performance in the Bakersfield market is in part due to a competitive disadvantage resulting from having only one dealership in the market, while Toyota, its largest competitor, has two dealerships. In 2017, Toyota had 3,100 competitive registrations⁶ in Bakersfield, compared to only 1,956 competitive registrations for the Honda brand. (Ex. 151 at Tab 16, Page 3).

38. American Honda now seeks to establish Galpinsfield as a new Honda dealer at the intersection of 7th Standard Road/Merle Haggard Drive and Industrial Parkway Drive (the "Proposed Location") (Ex. J-29 at ¶ 14). The Proposed Location is 9.1 miles air miles and 10.2 driving miles from Barber Honda's dealership. (Ex. 151 at Tab 4, Pages 11 and 13).

II. Honda Zone 12 and Barber Honda's Area of Statistical Analysis

39. Administratively, American Honda divides the United States into geographic "Zones." Barber Honda and the Bakersfield market are located in Zone 12 for sales, which encompasses Northern California.⁷ (Hrg. Tr. Vol. 2, 301:13-21). Zone 12 was established by American Honda in January 2007 when Northern California was separated from Southern California. (Hrg. Tr. Vol. 2, 301:25-302:6). The Zones are responsible for overseeing the

⁶ In evaluating brand performance, American Honda only considers competitive registrations, *i.e.*, registrations of the same types of vehicles that the Honda brand has available for sale. These metrics expressly exclude the large trucks and large SUVs addressed in Protestant's claim. (Hrg. Tr. Vol. 3, 718:3-9 and 719:10-720:21; Vol. 13, 3077:2-3081:15).

⁷ While Barber Honda was assigned to Zone 12, Northern California for sales, it was assigned to Zone 1, Southern California, for parts and service. (Hrg. Tr. Vol. 7, 1467:10-17).

performance of dealers located within the zone, the performance of the Honda brand, marketing efforts, and the distribution of Honda vehicles to dealers. (Hrg. Tr. Vol. 2, 303:5-19).

40. Each Zone is further divided into “Districts.” Each District has a district manager assigned by American Honda who interacts directly with dealers and typically visits each dealer in the district once per month. (Hrg. Tr. Vol. 2, 303:23-304:7). Barber Honda and the Bakersfield market are located in District 12D, which includes 15 dealers in the Central Valley and Central Coast areas. (Hrg. Tr. Vol. 2, 304:12-17).

41. Every Honda dealer is assigned a geographic area of responsibility which American Honda refers to as the dealer’s Area of Statistical Analysis (“ASA”). (Hrg. Tr. Vol. 2, 324:20-325:1) (Ex. J-16 at Section 24.2). A dealer’s ASA is used by American Honda as a tool to measure the advertising, sales, and service performance of its dealers. (Hrg. Tr. Vol. 2, 324:20-325:1) (Ex. J-16 at Section 24.2). Each ASA is comprised of individual census tracts as determined by the U.S. Census Bureau. (Hrg. Tr. Vol. 3, 626:9-16; Vol. 13, 3059:24-3060:6). American Honda assigns census tracts to the nearest Honda dealer’s ASA as determined by drive distance to the dealer. (Hrg. Tr. Vol. 3, 627:9-11). In addition, census tracts farther than 30 miles drive distance from a Honda dealer are not included in any Honda dealer’s ASA and are considered “unassigned.”⁸ (Hrg. Tr. Vol. 2, 453:15-454:3).

42. By assigning census tracts to dealers based on drive distance, a dealer’s ASA is the geographic area where the dealer generally is closer to customers compared to other Honda dealers or, stated differently, the area where it has a geographic advantage over other Honda dealers. (Hrg. Tr. Vol. 13, 3060:4-6). Importantly, however, dealers do not have exclusive rights to their ASA, and customers are unaware of the ASA boundaries for each dealer. (Hrg. Tr. Vol. 12, 2836:6-8) (Ex. J-16 at Section 24.2). As such, Honda dealers are not limited to selling vehicles within their own ASA, and they may sell vehicles to customers located anywhere in the United States. (Hrg. Tr. Vol. 6, 1169:8-10).

III. American Honda’s Assessment of Need for Additional Honda Representation

⁸ This 30-mile drive-distance ASA limit has been in place since American Honda performed a nationwide analysis and recalibration of dealers’ ASAs in 2014. (Hrg. Tr. Vol. 6, 1063:18-1064:5). Prior to 2014, a dealer’s ASA was based on air-distance and extended up to 50 miles from the dealership. (*Id.*)

43. Shortly after Zone 12 was established in 2007, the Zone Sales Manager, Eric Van Olst, undertook a review of all of the markets in the Zone to assess Honda's performance in those markets. (Hrg. Tr. Vol. 1, 97:8-17). He discovered that the Honda brand's market share in Bakersfield was underperforming relative to Honda's performance in the rest of Zone 12. (Hrg. Tr. Vol. 1, 97:18-98:8).

44. In a prior role with American Honda⁹, Mr. Van Olst was a district sales manager and made monthly visits to Bakersfield to call on Barber Honda from 1993 to 1995. (Hrg. Tr. Vol. 2, 310:3-25; 316:9-18). In that role, Mr. Van Olst familiarized himself with the Bakersfield market by doing background research on other dealerships in the market and the commercial areas within the market to better assist the dealer in effectively selling vehicles and taking care of Honda customers. (Hrg. Tr. Vol. 2, 311:1-16). When Mr. Van Olst returned to the Bakersfield market some years later in his role as Zone Manager, he was shocked at how much it had grown, having roughly doubled in population. (Hrg. Tr. Vol. 2, 330:9-21).

45. Based on his preliminary review of Honda's performance and his own observations about the growth of the Bakersfield market, Mr. Van Olst felt that there was untapped opportunity for American Honda to add a second Honda dealership in Bakersfield. (Hrg. Tr. Vol. 1, 97:18-98:4). Accordingly, Mr. Van Olst worked with Matt Vidmar, his Assistant Zone Manager for Market Representation at the time, to draft a memorandum to American Honda's Market Planning Department requesting an in-depth study of the Bakersfield market to determine if the addition of a second Honda dealership was warranted. (Hrg. Tr. Vol. 2, 338:7-20) (Ex. J-14 at AHM_00063540-41).

46. The memorandum outlined a number of demographic reasons why Mr. Van Olst felt a second dealership is needed in Bakersfield, including: (i) Bakersfield at the time was the 11th largest city in California and the fastest growing city in the US with a population over 250,000; (ii) projected household growth for the Bakersfield market (11.66%) was almost double that of

⁹ In total, Mr. Van Olst has worked for American Honda for 35 years. He has held a number of different positions with the company, primarily sales roles in different regions throughout the United States. (Hrg. Tr. Vol. 2, 309:9-313:8).

California (6.58%); and (iii) 23.54% growth in households making over \$50,000 outpaced California as a whole at 14.04%. (Hrg. Tr. Vol. 2, 338:7-341:2) (Ex. J-14 at AHM_00063540).

47. The memorandum also mentioned concerns related to the performance of Honda's dealer network, including: (i) the fact that the closest Honda dealer was more than 60 miles away; (ii) the Toyota dealers in Bakersfield were greatly outselling Barber Honda; (iii) Honda's market share and its share of competitive registrations in Bakersfield were below both District 12D and Zone 12; and (iv) Bakersfield had 471 fewer sales than expected through the first six months of the year. (Hrg. Tr. Vol. 2, 341:7-342:7) (Ex. J-14 at AHM_00063540-51).

48. In response to Mr. Van Olst's request, American Honda's National Market Planning Department conducted an analysis of the opportunity in the Bakersfield market and prepared what is known as a "bench market study" or a "desk market study." (Hrg. Tr. Vol. 1, 100:4-101:8). This market study ultimately concluded that a second Honda dealership was needed in Bakersfield. (Ex. J-14 at AHM_00063538). In coming to that conclusion, the market study analyzed a variety of relevant factors such as the location of new housing developments in the market, the location and appearance of competitive dealerships, which brand(s) were selling the most vehicles in the market, the location and amount of Honda registrations and registrations by competitors, the amount of in-sell¹⁰ by Honda dealers outside the market, projected household and population growth, and household income. (Hrg. Tr. Vol. 2, 345:8-361:23) (Ex. J-14 at AHM_00063542-AHM_00063598).

49. The market study also analyzed the amount of opportunity for the Honda brand in the Bakersfield market, finding that the opportunity¹¹ for additional Honda sales of 1,583 units exceeded the expected registrations for a second Honda dealer of 1,374 units. (Hrg. Tr. Vol. 2, 347:2-14) (Ex. J-14 at AHM_00063560). Given the level of opportunity in the market, American Honda found that there would be no harm to Barber Honda, as a second Honda dealer could make all of the sales that American Honda expects of it by capturing that opportunity without taking sales

¹⁰ In-sell refers to Honda vehicles registered in Bakersfield that were sold by dealers outside the Bakersfield market. (Hrg. Tr. Vol. 1, 105:18-25).

¹¹ American Honda calculates lost opportunity by looking at the amount of gross loss in the market based on the brand's underperformance plus in-sell of Honda vehicles into the market by other Honda dealers. (Hrg. Tr. Vol. 2, 335:18-336:3).

from Barber Honda. (Hrg. Tr. Vol. 2, 334:14-335:1; 347:4-14).

50. Based on the strength of the market data indicating the need for a second Honda dealer in Bakersfield, and its findings that a second Honda dealer would not have a material impact on Barber Honda, American Honda approved the proposal to move forward with establishing a second Honda dealership in Bakersfield in March 2008. (Hrg. Tr. Vol. 2, 362:17-363:1) (Ex. J-14 at AHM_00063537). As a first step of that process, American Honda “carved” an ASA for the open point (the “North Bakersfield Open Point”) by reducing Barber Honda’s ASA, reducing the geographic territory for which it had sales and service responsibility, and notifying Barber Honda of that change. (Ex. J-15 at AHM_00064706-10) (Hrg. Vol. 9, 2102:19-2104:2).

51. Several years after establishing the North Bakersfield Open Point, Mr. Van Olst again requested that the Market Planning department perform an updated analysis of the Bakersfield market before beginning the process of selecting a candidate for the proposed Honda dealership. (Ex. J-18 at AHM_00001386). As with the 2008 market study, American Honda once again conducted an in-depth analysis of relevant market conditions related to the volume of competitive registrations in Bakersfield and demographic trends in the market. American Honda found that the lost opportunity for the Honda brand in Bakersfield had grown from 1,582 units in 2008 to 1,746 units in 2013. (Hrg. Tr. Vol. 2, 372:24-373:21). This indicated that there was even greater opportunity for a second Honda dealer in Bakersfield in 2013 than there was in 2008, and even less potential for negative impact on Barber Honda. (Hrg. Tr. Vol. 2, 373:25-374:5).

52. The market data in late 2013 also indicated that Toyota, which has two dealerships in Bakersfield, continued to dominate¹² the market. (Hrg. Tr. Vol. 2, 377:25-378:8) (Ex. J-18 at AHM_00001427). In Bakersfield, Toyota’s performance, as well as the performance of brands like Kia, Volkswagen, Mazda, and Subaru, is much better than most markets in Zone 12 where Honda is generally much more dominant. (Hrg. Tr. Vol. 2, 378:11-15; 379:14-20). In addition, American Honda found that demographic forecasts indicated that population and households in Bakersfield were growing faster than the state of California and the U.S. as a whole, indicating even greater

¹² The Dominant Select map at AHM_00001427 in Exhibit J-18 depicts which brand registers the most vehicles in competitive segments each census tract. (Hrg. Tr. Vol. 2, 378:3-4).

future opportunity in the market. (Hrg. Tr. Vol. 2, 375:18-376:3) (Ex. J-18 at AHM_00001417).

53. Based on the market analysis showing even greater opportunity in the Bakersfield market in 2014 than in 2008, American Honda decided to move forward with establishing a new Honda dealer in the North Bakersfield area. (Hrg. Tr. Vol. 2, 383:21-384:4) (Ex. J-14 at AHM_00001383). After a lengthy candidate selection process, Zone 12 management made a presentation to American Honda's corporate management at American Honda's headquarters in Torrance, California in September 2015. (Ex. J-21 at AHM_00065074) (Hrg. Tr. Vol. 2, 217:5-14; 387:6-11). That presentation included yet another analysis of the Bakersfield market—the third third such analysis since 2008—to verify that the opportunity for an additional Honda dealer in the market existed and to demonstrate that opportunity to the executive committee. (Hrg. Tr. Vol. 2, 387:12-388:1).

54. This third market analysis confirmed that the same market trends continued to prevail in Bakersfield. In terms of demographics, Bakersfield had grown to the ninth largest metro¹³ area in the state of California, with a population of 704,442. (Ex. J-21 at AHM_00065077). Growth in households with income above \$75,000—a “sweet spot” and target income for potential Honda buyers—was expected to grow at a faster pace than California or the U.S. (Ex. J-21 at AHM_00065078) (Hrg. Tr. Vol. 2, 400:9-20).

55. The 2015 market analysis also closely studied Honda's performance in comparison to its largest Japanese competitors, Toyota and Nissan. Toyota's second dealership in North Bakersfield alone was selling almost as many new vehicles as Barber Honda, while Bill Wright Toyota was selling significantly more. (Ex. J-21 at AHM_00065080). In addition, Nissan of Bakersfield was selling slightly fewer new vehicles than Barber Honda, quite an anomaly as there are very few markets in Zone 12 where the facing Nissan dealer is anywhere close to Honda's performance. (Hrg. Tr. Vol. 2, 404:12-18) (Ex. J-21 at AHM_00065080). American Honda also found that while Toyota and Nissan's market share in Bakersfield was close to or exceeding average market share in the Zone, Honda's market share was significantly worse than its Zone average. (J-

¹³ American Honda considers the Bakersfield metro to include the territory of both Barber Honda's ASA and the North Bakersfield Open Point ASA. (Hrg. Tr. Vol. 1, 114:11-15).

21 at AHM_065082-83) (Hrg. Tr. Vol. 4, 746:12-748:9). In fact, Honda's market share in Bakersfield was lower than every other market in Northern California, by a significant margin. (J-21 at AHM_065083) (Hrg. Tr. Vol. 2, 407:2-24).

56. Based on the level of opportunity and the underperformance of the Honda brand in Bakersfield, American Honda confirmed that a second Honda dealer was needed in Bakersfield and unanimously agreed that Galpinsfield was the best candidate for that dealership. (Hrg. Tr. Vol. 2, 398:9-22).

57. Several months later, in November 2015, American Honda approved Galpinsfield's proposed dealership location in North Bakersfield at the intersection of 7th Standard Road / Merle Haggard Boulevard and Industry Parkway. (Ex. J-22 at AHM_63622). As part of the site approval process, American Honda once again prepared an analysis of lost opportunity in the market for the Honda brand and updated demographic data. (Ex. J-22 at AHM_063623). American Honda found that the lost opportunity in the Bakersfield market had grown to 1,880 units, indicating that the opportunity in Bakersfield continued to grow. (Ex. J-22 at AHM_063623) (Hrg. Tr. Vol. 4, 756:14-757:10). This analysis also indicated that population, households, and average household income within the North Bakersfield Open Point ASA were all projected to grow at a faster rate than the Bakersfield market as a whole and faster than the U.S. overall. (Ex. J-22 at AHM_063623).

58. On September 26, 2017, American Honda notified Protestant of its intent to establish a new Honda dealer at the proposed location, and Protestant subsequently filed its protest on October 13, 2017.

Findings Related to Permanency of Investment
(Veh. Code § 3063(a))

I. Findings Related to Barber Honda

59. Barber Honda has been an authorized Honda dealer since 1973, and has been operating from its current dealership location since 1985. (Hrg. Tr. Vol. 9, 2025:3-8; Vol. 10, 2315:15-2316:1; Vol. 11, 2592:18-2693:5). Protestant, through its contractor, identified approximately \$1.1 million in costs for the original construction of the dealership facility in 1985

as well as expansion of the dealership's north display lot.¹⁴ (Ex. P-112 at BH_069058).

60. Beginning approximately 15 years after the dealership was built, Barber Honda acquired additional property and renovated the dealership facilities in two phases, first in 1999 and then in 2006. (Hrg. Tr. Vol. 10, 2308:15-2309:14; 2310:13-23) (Ex. P-112 at BH_069058). The first phase of this renovation in 1999 included expansion of the dealership showroom, addition of a Honda "oil can" Image feature¹⁵, and new Image furniture. (Hrg. Tr. Vol. 9, 2113:6-2114:3) (Ex. P-112 at BH_069058). That phase of the dealership remodel cost \$256,089. (Ex. R-112).

61. The second phase of the dealership renovation in 2006 included moving the service drive, adding a new waiting area, creating a parts and service display area, adding a detail shop, a smog dyno stall, reconfiguring offices and adding new furniture. (Hrg. Tr. Vol. 9, 2114:4-10) (Ex. P-112 at BH_069058). The second phase of the remodel cost \$514,434.

62. Barber Honda's Dealer Principal, Stephen Ekegren, also recalled that the dealership paid approximately \$180,000-\$200,000 to construct the dealership's ExpressLube Service Building, but could not recall when that was built. (Hrg. Tr. Vol. 9, 2116:23-2118:13).

63. Mr. Ekegren identified more recent investments in the dealership for coating the roof of the service department (\$20,078), doubling the number of skylights (\$8,761), adding large fans in the service area (unspecified), resurfacing service and ExpressLube asphalt (\$52,161), coating the roof of the showroom and offices (approximately \$25,000), adding a new style freeway sign (approximately \$30,000), grading and adding drywell to storage lot (unspecified), and repairing and replacing the gutters (unspecified)¹⁶. (Hrg. Tr. Vol. 9, 2130:17-2134:25) (Ex. P-112). Barber Honda has also incurred other unspecified costs for routine items like replacing air

¹⁴ Although he did not work at the dealership at the time, and although no documentation of cost was entered into evidence, Stephen Ekegren also testified that he thought Barber Honda spent "about a million and a half" dollars to acquire the dealership property. (Hrg. Tr. Vol. 9, 2110:7-10). Mr. Ekegren also testified that Barber Honda paid \$50,000-\$60,000 to purchase six houses to allow for the expansion of the north display lot, although again no documentation of that cost, or when it was incurred, was entered into evidence. (Hrg. Tr. Vol. 9, 2110:7-2111:13). The dealership property and facility is owned by a separate entity, Catalina Barber Corporation. (Hrg. Tr. Vol. 9, 2045:5-7).

¹⁵ The reference to the oil can is an architectural feature to standardize the exterior appearance of Honda dealerships. (Hrg. Tr. Vol. 9, 2114:21-2115:10).

¹⁶ Exhibit P-112 also identifies approximately \$3.3 million invested in a used car facility, and Stephen Ekegren testified that he paid approximately \$1 million for the property that facility sits on. (Hrg. Tr. Vol. 9, 2136:23-25). However, that property and facility became the Bakersfield Acura dealership, which is owned by a separate dealer and is not used for Barber Honda's operations in any way. (Hrg. Tr. Vol. 9, 2118:14-2120:13; 2129:25-2130:16).

conditioning and heating units. (Hrg. Tr. Vol. 9, 2133:13-25).

64. Based on analysis of Barber Honda's financial statements, American Honda's expert Herbert Walter found that Barber Honda reported fixed assets totaling approximately \$3 million at cost, which have been depreciated to approximately \$750,000. (Hrg. Tr. Vol. 15, 3681:24-3682:23) (Ex. R-377 at Attachments 5 and 6). Protestant's expert Ted Stockton did not perform any analysis or calculation of the dealership's fixed asserts or permanent investment. (Hrg. Tr. Vol. 17, 4045:14-19).

65. Since 1999, Barber Honda has identified investments in the dealership totaling \$1,106,523, more than half of which were incurred between 1999 and 2006.¹⁷ Barber Honda invested this money to improve and add efficiencies to the operations of its dealership, and to benefit its customers, the community, and the Honda brand. (Hrg. Tr. Vol. 10, 2309:15-2310:9; 2311:3-9).

II. Findings Related to Galpinsfield

66. Galpinsfield has also made a significant and permanent investment in the proposed new dealership, having invested a significant amount of money to acquire the property where the proposed new Honda dealership would be located. (Hrg. Tr. Vol. 8, 1968:12-23). In May 2016, Galpinsfield paid over \$5 million to purchase five adjacent parcels of land for the future construction of a new Honda dealership at the intersection of several major thoroughfares in order to best serve customers. (Hrg. Tr. Vol. 8, 1968:12-23; 1971:18-1973:2) (Exhibits J-22; I-506).

67. In addition, over the past several years during this protest process, Galpinsfield has incurred significant holding costs for the dealership property, including property taxes, insurance, and other expenses, but unlike Barber Honda has not yet realized any profits for its investment. (Hrg. Tr. Vol. 8, 1968:24-1969:2).

¹⁷ Stephen Ekegren testified that Barber Honda has made investments in the dealership in excess of \$8 million, but offered no explanation of that figure was arrived at. (2137:12-14).

**Findings Related to the Effect on the Retail Motor Vehicle Business
and the Consuming Public in the Relevant Market Area**
(Veh. Code § 3063(b))

I. Effect on the Consuming Public

68. It is clear from the record that the establishment of this new dealership in North Bakersfield will provide significant benefits for the consuming public. As set forth above, the Bakersfield metro is the ninth largest metropolitan area in the state of California with a population of approximately 722,000 people. (Exhibit J-21 at AHM_00065077) (Exhibit R-376 at A-38). The Bakersfield metro is also a growing market. The population in this area has increased by 7.18% from 2010 to 2017—well above the growth experienced in the state and the nation as a whole. (Exhibit R-376 at A-38). The size and continued growth of present-day Bakersfield is consistent with the growth forecast by American Honda in its earlier market studies in 2008, 2014, and 2015.

69. Despite this significant demographic growth in the Bakersfield market, Barber Honda remains the only Honda dealer within 67 miles to serve customers. (Hrg. Tr. Vol. 10, 2315:15-2316:1; Vol. 11, 2592:18-2693:5). As a result, customers must drive more than an hour from Barber Honda to reach another Honda dealership. (Hrg. Tr. Vol. 11, 2592:25-2593:5; 2594:18-2595:19) (Exhibit P-151 at Tab 4, Page 11-12). Barber Honda, in essence, is on an island unto itself, surrounded by a captive population of nearly three quarters of a million people with no other reasonably convenient option for authorized new Honda sales and service.

70. Having a market of this size with only one Honda dealer is a unique phenomenon for American Honda in both California and throughout the United States. Bakersfield is the largest market in the country, based on the number of competitive registrations, with only one Honda dealer to serve customers. (Hrg. Tr. Vol. 4, 742:23-743:3) (Hrg. Tr. Vol. 7, 1173:18-1174:11).

71. Significantly, much of the growth experienced within the Bakersfield market appears to have occurred towards the north, in the area of the North Bakersfield Open Point. Protestant called Marc Thomas, a former district sales manager for Barber Honda and District 12D as a witness. Mr. Thomas lived in Bakersfield for over 20 years from the early 1990s to 2011. (Hrg. Tr. Vol. 3, 582:15-21). He recounted “tremendous growth” in the Bakersfield market during the time he lived there, particularly the northwest part of Bakersfield which “exploded” as the result

of acres and acres of farmland being bought up and converted into houses and neighborhoods. (Hrg. Tr. Vol. 3, 584:11-585:16). This pattern of new home development was also documented in American Honda's market studies, which showed significant residential density and projected growth in North Bakersfield. (*See, e.g.*, Ex. J-14 at AHM_00063546, 587-88; Ex. J-18 at AHM_00001417, 419; Ex. J-21 at AHM_00065077-78).

72. Given this situation, the proposed new dealership will provide customers with a second choice for Honda sales, service, and parts that they cannot get without having to travel more than an hour in any direction. And, even within the Bakersfield market, the new dealership will also greatly improve customer convenience. Consumers residing in the North Bakersfield Open Point ASA currently must drive an average of 16.3 miles in order to reach Barber Honda. (Ex. R-376 at A-65). That distance compares very unfavorably to competing brands with more dealerships in the Bakersfield metro including Chevrolet (8.4 miles) which has three dealerships, and GMC (10.8 miles), Ford (12.3 miles), and mostly importantly for the Honda brand's purposes Toyota (11.4 miles). (*Id.*). However, adding a second Honda dealership at the Proposed Location will significantly improve that travel distance by one-third, to 11.2 miles, bringing the Honda brand much more in line with these competitor brands. (*Id.*).

73. Apart from drive distance, the Proposed Location and dealership facility will be highly visible and easily accessible for customers. Given that the Proposed Location is currently undeveloped, Galpinsfield plans to build a brand-new brick and mortar dealership facility on Merle Haggard Drive just off Highway 99. (Hrg. Tr. Vol. 8, 1910:10-19). These are both major thoroughfares for customers in the market, and as a result, the Proposed Location will be easily accessible and highly visible for customers as they exit Highway 99. (Hrg. Tr. Vol. 8, 1972:11-1973:2) (Stipulated Facts Regarding Market Drive ¶ 15).

74. The addition of a second Honda dealership in North Bakersfield will also promote competition, further benefiting the consuming public. The Proposed Location is approximately one half mile from the North Bakersfield Toyota dealership. (Stipulated Facts Regarding Market Drive ¶ 17). This location will allow customers to easily cross-shop between the two brands. (Hrg. Tr. Vol. 8, 1972:17-21).

75. Protestant does not dispute that the addition of a second Honda dealer in North Bakersfield will yield improvements to customer convenience and competition within the Bakersfield Market. Stephen Ekegren testified that Merle Haggard Drive is a major artery for traffic, as it services the Bakersfield airport. (Hrg. Tr. Vol. 10, 2266:14-2267:5). He also stated that Galpinsfield will improve competition in the Bakersfield market and that adding a second Honda dealer will result in an advantage for the consuming public. (Hrg. Tr. Vol. 10, 2444:17-19; 2445:3-10). Jonathan Ekegren similarly acknowledged that the addition of a second Honda dealership in North Bakersfield would provide greater consumer access to the Honda brand and increase sales and service capacity for current and potential Honda owners. (Hrg. Tr. Vol. 11, 2713:7-2714:6).

76. In addition to the benefits to customer convenience and improved competition from adding a new dealership, American Honda's selection of Galpinsfield as the dealer will also benefit consumers. Galpinsfield was selected after a lengthy candidate selection process that began in March 2014 and culminated with the presentation to American Honda executives in September 2015. (Ex. J-21 at AHM_00065094-176) (Hrg. Tr. Vol. 2, 388:5-390:8).

77. Out of 33 candidates that expressed interest in the North Bakersfield Open Point, Galpinsfield was ultimately selected as the candidate because of its familiarity with the Honda brand, its record of success, and its emphasis on customer satisfaction. Galpinsfield is part of the Galpin organization, a well-known, respected, and successful dealer organization that has experience building, opening, and successfully operating a new Honda dealership from the ground up. (Hrg. Tr. Vol. 5, 1038:7-15). Galpin Honda was established in Mission Hills, California in 2006, (Hrg. Tr. Vol. 8, 19521:24-1953:18) (Ex. J-20 at AHM_00065879-887), and in eight years it grew to become the #2 volume Honda dealer in the United States. (Ex. J-20 at AHM_00065879).

78. Mission Hills, like Bakersfield, is a heavily Hispanic area, and as a result Galpin has a great deal of experience marketing and selling to the Hispanic community. (Ex. J-20 at AHM_00065879) (Hrg. Tr. Vol. 8, 1960:22-1962:13). Beau Boeckmann, the Dealer Principal of

Galpin Honda¹⁸ and planned Dealer Principal of Galpinsfield¹⁹, testified regarding the Galpin organization's business culture, which emphasizes the importance of having a "servant's attitude," of treating people with honesty and respect, and of ensuring that its employees, its customers, and the communities it serves are properly taken care of. (Hrg. Tr. Vol. 8, 1818:7-1819:3; 1954:24-1956:2). In that regard, Mr. Boeckmann emphasized the importance of having proper staff to communicate with customers in the language they feel most comfortable. (Hrg. Tr. Vol. 8, 1961:17-1962:1). In Bakersfield, as in Mission Hills, that ensuring that dealership personnel can communicate with the Hispanic community in Spanish rather than English. (Hrg. Tr. Vol. 8, 1962:1-4).

79. In addition to the Galpin organization's familiarity with the Honda brand, its strong performance as a Honda dealer, and its extensive experience marketing and selling to the Hispanic community, American Honda also analyzed the Galpin organization's customer satisfaction performance at its other dealerships. Overall, Galpin demonstrated strong sales and service customer satisfaction scores across nine different dealerships. (Ex. J-21 at AHM_00065140). This strong customer service performance lends additional credence to Mr. Boeckmann's testimony about Galpin's business philosophy and its genuine belief that success comes from treating customers well. (Hrg. Tr. Vol. 8, 1955:5-1956:2).

80. Protestant did not present any evidence that Galpinsfield's business practices or its customer satisfaction efforts would harm consumers in the market. To the contrary, Stephen Ekegren testified that, based on his limited interactions with the Boeckmanns, he thought positively of them, and in fact Barber Honda has done dealer trades with Galpin Honda in the past. (Hrg. Tr. Vol. 10, 2406:4-2407:5). Indeed, Barber Honda's protest in this case was not based on Galpinsfield's selection as the candidate and it would have filed a protest no matter who the candidate was. (Hrg. Tr. Vol. 10, 2407:13-19). Jonathan Ekegren similarly testified that he had no reason to believe that Galpinsfield opening a new Honda dealer in North Bakersfield would

¹⁸ (See Hrg. Tr. Vol. 8, 1749:17-20).

¹⁹ (See Hrg. Tr. Vol. 8, 1818:7-10).

negatively affect customers, provided Barber Honda remains open as well. (Hrg. Tr. Vol. 11, 2718:19-2719:25).

81. Taken as a whole, the evidence confirms that the addition of a second Honda dealer in North Bakersfield will result in increased consumer choice, improved customer convenience, a new dealership facility providing an addition Honda touch point in the market, and an experienced and successful Honda dealer that is dedicated to customer service and the community. Thus, it is clear that establishing Galpinsfield as a new Honda dealer at the proposed location will greatly benefit the consuming public in Bakersfield.

II. Effect on the Retail Motor Vehicle Business

82. American Honda's market studies and supporting analyses, as well as the market analysis performed by its expert Sharif Farhat, show that the Honda brand is underperforming in the Bakersfield market and that there is significant opportunity for the Honda brand to increase registrations and expand its service business without harming Barber Honda's existing dealership operations or driving the dealership out of business.

Respondent's Evidence of Opportunity

83. As detailed above, American Honda studied the opportunity for a new Honda dealer in the Bakersfield market three separate times between 2008 and 2015. As part of these studies, American Honda evaluated the amount of sales and service business performed by Barber Honda, the location of Barber Honda's business, the direction of that business from its dealership, and Barber Honda's in-sell into the North Bakersfield Open Point ASA. (Ex. J-14 at AHM_063584; J-18 at AHM_01423; J-21 at AHM_065093). American Honda also considered many local market factors, including local demographic factors, population and household growth, household income, the distance between the two locations, the location of competitive dealerships, and which vehicle types are most popular in Bakersfield, to evaluate whether future opportunity for sales and service business in the Bakersfield market would be expected to increase. (*See generally* Ex. J-14; J-18; J-22) (Hrg. Tr. Vol. 3, 645:8-647:5).

84. American Honda further evaluated potential impact of the addition of a second Honda dealer on Protestant by comparing the amount of opportunity in the market to the number

of projected sales for the proposed new dealership. When American Honda first studied this market in 2008, it calculated 1,583 units of lost opportunity for new Honda registrations in the Bakersfield market. (Ex. J-14 at AHM_063538). The amount of lost opportunity grew each time American Honda evaluated the Bakersfield market, going from 1,583 units in 2008 to 1,746 units in 2013 to 1,880 units of lost opportunity in 2015. (Ex. J-18 at AHM_01385; J-22 at AHM_063623) (Hrg. Tr. Vol. 4, 756:16-757:10).

85. In addition to this analysis of sales opportunity, American Honda found a substantial amount of opportunity for additional service business in Bakersfield. Throughout and inherent in all of the market studies, American Honda's analysis of registration patterns, customer convenience, and demographic trends like growth in population, households, and household income all bear directly on present and future expected service opportunities. (Hrg. Tr. Vol. 4, 753:10-755:8).

86. American Honda's September 2015 candidate recommendation presentation included additional data on service opportunities through its analysis of Honda units in operation ("UIO") in the Bakersfield market. (Ex. J-21 at AHM_00065090-093). American Honda's primary assessment of service opportunity is the amount of UIO in the market not being serviced by a Honda dealer.²⁰ (Hrg. Tr. Vol. 4, 749:21-23). In Bakersfield, American Honda found that there are 8,800 UIO in the Bakersfield market that are either lapsed²¹ or inactive,²² and further found that much of the lapsed and inactive UIO is concentrated in North Bakersfield around the Proposed Location. (Ex. J-21 at AHM_00065093) (Hrg. Tr. Vol. 4, 751:18-24).

87. Moreover, this amount of UIO in Bakersfield is actually depressed given the Honda brand's significant, long-term sales underperformance. As Honda sales increase with the addition of a new dealer the number of UIO will also increase, resulting in even more service opportunities for both Honda dealers in the future. (Hrg. Tr. Vol. 2, 382:14-25; Vol. 4, 753:5-21).

²⁰ Barber Honda's service manager, Steve Steele, testified that he also believes lapsed and inactive UIO represent service opportunity for the dealer. (Ex. J-28, Steele Dep., 82:11-20).

²¹ Lapsed UIO is a customer who has not been to a Honda dealer for service in the last 12 months, but has been in the last 24-27 months. (Hrg. Tr. Vol. 4, 750:10-15).

²² Inactive UIO is a customer who has not been to a dealership for service for over 24 months. (Hrg. Tr. Vol. 4, 750:21-23).

88. In addition to its own sales and service analyses, American Honda retained Sharif Farhat from Urban Science Applications, Inc. to provide expert testimony on motor vehicle retail market and network issues. Urban Science is an industry leading consultant that largely focuses on analyzing motor vehicle dealer networks, optimal dealership locations, and similar performance issues for the automobile industry. (Hrg. Tr. Vol. 13, 3035:1-24). Its applications are used to analyze registration data, sales data, geographic information, and spatial distribution of motor vehicle markets for all major motor vehicle manufacturers as well as the majority of dealers and dealer operations within the U.S. and throughout the world. (Hrg. Tr. Vol. 13, 3035:21-3036:3).

89. Mr. Farhat has worked at Urban Science for 33 years since 1986 and currently serves as the Vice President of Expert Services. (Hrg. Tr. Vol. 13, 3038:6-9). In his 33 years with Urban Science, Mr. Farhat has analyzed dealer networks thousands of times and has given testimony regarding market representation issues on over 100 occasions in approximately 24 states. (Hrg. Tr. Vol. 13, 3038:8-3040:6). Mr. Farhat has testified in open point hearings and trials like this one approximately 25 times, and has used a consistent methodology that was not developed for litigation, but is used for real world network planning purposes on a daily basis by almost every major automotive company in the world. (Hrg. Tr. Vol. 13, 3044:1-17). He has never been disqualified or precluded from testifying as an expert on these subjects. (Hrg. Tr. Vol. 13, 3047:20-23).

90. In this matter, Mr. Farhat analyzed the amount of opportunity for additional Honda sales in the Bakersfield market, and specifically the RMA, by evaluating Honda's market share, which is a fundamental marketing concept used by companies across all industries such as Burger King and Target. (Hrg. Tr. Vol. 13, 3070:25-3071:7).

91. In order to determine the level of opportunity available within the RMA for additional Honda registrations, Mr. Farhat first selected a benchmark against which to compare the brand's existing level of performance. Mr. Farhat performed his analysis by comparing the Honda brand's performance in Bakersfield to two different standards, California average and Fresno average. (Hrg. Tr. Vol. 13, 3070:10-13). Fresno was chosen to provide a more local standard, in

addition to the California standard, because Fresno is another local market in the Central Valley just north of Bakersfield but still distinct from Bakersfield. (Hrg. Tr. Vol. 13, 3068:13-23).

92. Mr. Farhat also performed a “segmentation analysis” of registrations occurring in the Bakersfield market, a fundamental concept that is accepted throughout the automotive industry. (Hrg. Tr. Vol. 13, 3073:6-8). The segmentation analysis adjusts Honda’s expected market share within Bakersfield to account for the relative popularity or unpopularity of various types of vehicles purchased by customers in the Bakersfield market and it only considers registrations in the “competitive set”—vehicles that are directly competitive or close to being directly competitive with vehicles that Honda sells. (Ex. R-376 at A-8) (Hrg. Tr. Vol. 13, 3077:2-3081:15).

93. Mr. Farhat’s analysis confirms that the Honda brand is currently and has been significantly underperforming in the Bakersfield market for many years. The North Bakersfield RMA has been performing at only 53.6% of expected compared to the California average, and only 53.8% of expected compared to the neighboring market of Fresno. (Ex. R-376 at A-26 and A-27). This analysis also shows that the Honda brand’s performance has been consistently declining over time, having fallen from 63.1% in 2013 to 53.6% in 2017 based on California average, and from 65.9% in 2013 to 53.8% in 2017 based on the Fresno standard. (Ex. R-376 at A-26 and A-27).

94. The North Bakersfield RMA is the lowest performing market for Honda in the entire state of California. The Bakersfield Metro, which again consists of Barber Honda’s ASA and the North Bakersfield Open Point ASA, performs only marginally better than the North Bakersfield RMA and significantly worse than the next worst market in the state. (Ex. R-376 at A-18). Out of every Honda dealer’s ASA in the entire state of California, Barber Honda’s ASA and the North Bakersfield Open Point ASA are the two lowest performing ASAs in the state by a significant margin. (Ex. R-376 at A-19) (Hrg. Tr. Vol. 13, 3093:20-3094:21).

95. As the result of this significant underperformance in the entire Bakersfield Metro, there are 1,570 units of lost opportunity in the Bakersfield metro based on the more local, conservative Fresno standard, which shows there is ample opportunity to support a second Honda dealership in Bakersfield. (Exhibit R-376 at A-27) (Hrg. Tr. Vol. 13, 3106:5-16).

96. In addition to lost sales opportunity, Mr. Farhat found that this poor performance has resulted in a significant amount of lost service opportunity in the market. (Hrg. Tr. Vol. 13, 3093:6-19). As discussed above, service opportunity typically is measured by the number of units in operation (“UIO”) available in the market. (Hrg. Tr. Vol. 13, 3097:13-15). In California markets as a whole, on average, there are 6.5 UIO for every new vehicle sale expected to be made and in the more local Fresno market there are 6.3 UIO for every new vehicle sale expected. (Ex. R-376 at A-51). Some California markets have UIO counts well in excess of 6.5. (Ex. R-376 at A-20).

97. In Bakersfield, however, there are only 4.2 UIO per expected across the entire Bakersfield Metro. (Ex. R-376 at A-51) (Hrg. Tr. Vol. 13, 3097:13-3098:16). The Bakersfield Metro and the North Bakersfield RMA rank 39 and 40, respectively, out of 41 California markets in terms of UIO per expected. (Ex. R-376 at A-20). Similarly, the Barber Honda ASA and the North Bakersfield Open Point ASA rank 123 and 124, respectively, out of 125 ASAs in the state of California in this same metric. (Ex. R-376 at A-21). This represents a significant amount of lost service opportunity in Bakersfield, and is one of the largest amounts of lost opportunity Mr. Farhat has ever seen. (Hrg. Tr. Vol. 13, 3132:14-21). If the Bakersfield Metro performed at the same level as the neighboring Fresno market, there would be an additional 7,000 UIO available to grow and support the service business of Barber Honda as well as a new Honda dealer. (Ex. R-376 at A-51) (Hrg. Tr. Vol. 13, 3132:2-12).

98. Mr. Farhat’s analysis also confirmed American Honda’s earlier findings that the existing amount of sales and service opportunity in Bakersfield is growing and will likely continue to grow in the future as populations, households, and household incomes in Bakersfield continue to rise over time. From 2010 to 2017, the population in the North Bakersfield RMA grew from 345,255 to 444,443, and it is expected to continue growing through 2022. (Ex. R-376 at A-34). Similarly, households in the North Bakersfield RMA increased from 115,528 in 2010 to 142,869 in 2017. (*Id.*).

99. This growth in the North Bakersfield RMA mirrors the growth seen throughout the Bakersfield Metro. Across the metro as a whole, population increased from 517,258 to 722,714 between 2010 and 2017. (Ex. R-376 at A-37). The number of households in the metro increased

from 157,278 to 208,497. (*Id.*). As with the RMA, both population and households are expected to continue growing through at least 2020. Indeed, population in the Bakersfield Metro has grown by 7.18% since 2010, well above the growth rate for the state of California and the U.S. as a whole. (Ex. R-376 at A-38).

100. Importantly, there are a significant number of households with incomes between \$30,000 and \$90,000 and households with income over \$90,000 in the RMA and in close proximity to the proposed dealership location. (Ex. R-376 at A-40 and A-41). This is key because \$90,000 is the median household income level for Honda buyers, meaning that the \$30,000 - \$90,000 range represents approximately half of Honda buyers and \$90,000 and above represents the other half of Honda buyers. (Hrg. Tr. Vol. 13, 3120:18-21). Mr. Farhat's analysis shows a significant number of these households throughout the Bakersfield market, with many in close proximity to the Proposed Location for the new Honda dealership in North Bakersfield. (Ex. R-376 at A-40 and A-41).

101. Taken as a whole, these figures demonstrate that Bakersfield is a large and growing market with a significant amount of opportunity for the Honda brand, both currently and in the long term.

Protestant's Evidence Regarding Opportunity

102. Protestant, however, disputes American Honda's findings and asserts that the addition of a second Honda dealership in Bakersfield will negatively impact Barber Honda's sales and service business by up to 40%, possibly resulting in ruinous competition that could cause the dealership to close entirely. The primary thrust of Barber Honda's criticism is that American Honda's use of the registration effectiveness metric to calculate gross loss for the Honda brand—and thus opportunity for a second Honda dealer in the market—fails to account for consumer preferences and economic conditions particular to the Bakersfield market.

103. Importantly, however, Protestant does not dispute the existence of additional sales and service opportunity in the Bakersfield market. In fact, Protestant concedes that there is additional unrealized opportunity for Barber Honda and the Honda brand within the Bakersfield

market. Stephen Ekegren acknowledged “there’s a substantial amount of opportunity that exists in the Bakersfield market for Barber Honda.” (Hrg. Tr. Vol. 10, 2257:3-11).

104. Jonathan Ekegren testified that he has seen the Bakersfield area grow over the past several decades, reflecting the demographic growth charted by American Honda and Mr. Farhat, and admitted that Bakersfield is the lowest performing metro market in Northern California for Honda. (Hrg. Tr. Vol. 11, 2589:21-2590:3; 2621:10-25). Jonathan Ekegren further testified there are a “couple hundred” units of additional Honda sales available in the Bakersfield market. (Hrg. Tr. Vol. 11, 2579:16-22).

105. In addition, Barber Honda itself previously sought to expand its own sales and service operations in Bakersfield to realize this unmet opportunity, confirming its view as to the significant amount of available opportunity. When he first learned that American Honda intended to establish a new Honda dealer in North Bakersfield in 2008, Stephen Ekegren asked Eric Van Olst if he Protestant could be considered for the new point. (Hrg. Tr. Vol. 10, 2257:19-2258:13). Moreover, Barber Honda also considered establishing an off-site service location in the direction of and closer to the Proposed Location, in what is now a Dewar’s ice cream shop in a busy commercial center five miles north of Barber Honda’s dealership. Barber Honda’s Dealer Principal, Stephen Ekegren, acknowledged that this was an effort to capture additional service opportunity in the North Bakersfield Open Point ASA. (Hrg. Tr. Vol. 10, 2263:21-2265:9; 2270:3-22).

106. In addition to these concessions by Barber Honda’s Dealer Principal and Dealer Manager, Protestant’s expert witness Ted Stockton also found significant additional opportunity for additional Honda sales in Bakersfield, even after adjusting for certain statistically significant demographic variables which he argues American Honda failed to account for in its calculation of lost opportunity.

107. Mr. Stockton first analyzed the comparative registration effectiveness achieved by Honda and other competitive brands in the Bakersfield market. This analysis showed that the Honda brand’s registration effectiveness of 56.63% is the lowest among competitive brands in Bakersfield by a significant margin, placing Honda well behind other import brands with similar sedan and

SUV offerings like Mazda (137.73% registration effectiveness), Hyundai (117.38% registration effectiveness), Nissan (105.07% registration effectiveness), Fiat (90.30% registration effectiveness), Toyota (93.86% registration effectiveness), Subaru (89.92% registration effectiveness), Kia (87.42% registration effectiveness), and Volkswagen (71.06% registration effectiveness). (Ex. P-151 at Tab 16, Page 1) (Hrg. Tr. Vol. 12, 2939:1-2941:3).

108. Mr. Stockton also performed an adjusted registration effectiveness analysis to compensate for local market demographic factors he believes explain Honda's poor performance in the market. Mr. Stockton performed a "regression analysis" which accounted for the impact of the following factors on Honda's performance in Bakersfield: (1) product popularity; (2) median age; (3) median household income; (4) education levels; and (5) population density. (Ex. P-151 at Tab 18, Page 1).

109. Even after making adjustments to account for all of these factors, however, Mr. Stockton himself found that the Honda brand was significantly underperforming at only at 63% of expected in the Bakersfield market—slightly better than the 56.63% calculated under American Honda's analysis but still well below the second worst performing brand in Bakersfield, Volkswagen, which had a 71.06% registration effectiveness. Based on Mr. Stockton's calculation that the Honda brand is performing at only 63% of expected in Bakersfield, he found that the Honda brand should have been expected to register 2,331 additional new vehicle registrations between 2016 and 2017, or roughly 1,165 additional registrations per year. (Ex. P-151 at Tab 18, Page 1) (Hrg. Tr. Vol. 13, 2950:1-2952:22; Vol. 17, 4044:16-4045:7).

110. In addition to Mr. Stockton's adjustments to registrations effectiveness for the local market factors which he considered to be significant, Protestant alleges that American Honda failed to account for other unique conditions in the Bakersfield market including consumer preference for large trucks and domestic brands and local economic conditions resulting from Bakersfield's large oil and agricultural industries.

111. Protestant claims that the Honda brand's underperformance, even as calculated by Mr. Stockton, is not due to a need for additional Honda representation in the market to account for the significant growth since Barber Honda was established in 1973, but is instead explained

by a local preference for domestic vehicles amongst consumers in Bakersfield, particularly large trucks and SUVs which the Honda brand does not offer. Protestant argues that Honda's lack of competitive offerings in these segments makes Honda less desirable in this market.

112. Protestant's evidence in support of this claim was largely anecdotal evidence supplied through the testimony of Stephen Ekegren and Jonathan Ekegren during the hearing of this matter. This anecdotal evidence included their personal observations regarding the number of trucks in grocery store parking lots, (Hrg. Tr. Vol. 9, 2089:14-19), and hearsay discussions with others in the market. (Hrg. Tr. Vol. 9, 2087:1-2089:1). In addition to this testimonial evidence, Protestant introduced at the hearing several charts prepared by Mr. Stockton which attempt to establish that Honda products are not as good of a "fit" for the Bakersfield market due to these consumer preferences for large trucks and SUVs. (Ex. P-151 at Tabs 16-18).

113. Mr. Stockton's first analysis discussed above—a ranking of the registration effectiveness of each competitive brand in Bakersfield—does not support Protestant's claim that domestic brands and brands with large trucks are more favored in the market, however. (P-151 at Tab 16, Page 1). In this analysis, Ford, a domestic brand with some of the most popular large trucks in the U.S. market, is one of the three worst performing brands in the market. (*Id.*).

114. In addition, Mr. Stockton's analysis shows that while Honda is the lowest performing brand in the entire market with a registration effectiveness of only 56.63% of expected, there are six import brands without prominent truck offerings that perform much better than Honda in Bakersfield, including Mazda, Hyundai, Nissan, Fiat, Kia, and Volkswagen, which he acknowledged in his testimony during the hearing. (P-151 at Tab 16, Page 1) (Hrg. Tr. Vol. 12, 2939:1-2941:3). Several of these non-truck, non-domestic brands perform above expected in this market, including Mazda (137.73%), Hyundai (117.38%), and Nissan (105.07%). (P-151 at Tab 16, Page 1). Given the below average performance of Ford and the above average performance of these other import brands, there is no credible evidence to support Protestant's claim that that Honda's performance in Bakersfield is explained by consumer bias against import brands or brands without large truck offerings.

115. Mr. Stockton also attempted to evaluate the “fit of the product” for each brand by comparing the percentage of industry registrations each brand captures in Bakersfield compared to the state average. (Exhibit P-151 at Tab 17 Page 1). This analysis, however, does not accurately measure “fit of the product” as Mr. Stockton claims. It is undisputed that three of the five top performing brands under Mr. Stockton’s “fit of the product” analysis—GMC, Ford, and Toyota—have two dealerships in the market while a fourth brand, Chevrolet, has three dealerships. (Hrg. Tr. Vol. 12, 2947:18-2948:21).

116. Mr. Stockton’s “fit of the product” analysis does not lead to any identifiable correlation between product favorability and brand performance. Several of the brands with allegedly “favorable” products, including Dodge/RAM and Ford, are actually performing lower than expected, while several brands with what Mr. Stockton characterizes as “unfavorable” products, like Nissan, Buick, Hyundai, Fiat, Infiniti, Lexus, Lincoln, Cadillac, and Acura, are all performing well in this market. (Ex. R-378 at R-3). Moreover, as set forth above, Mr. Stockton’s adjusted registration effectiveness attempted to control for this “fit of the product” in his calculation of opportunity for the Honda brand in Bakersfield, yet he still found that the Honda brand was performing at just 63% of expected. (Exhibit P-151 at Tab 18 Page 1). Accordingly, through his own analysis, Stockton proves that his “fit of the product” analysis does not explain Honda’s poor performance in Bakersfield.

117. Additionally, Mr. Farhat performed his own analysis to test Protestant’s claim about consumer preferences for trucks. (Exhibit R-376 at A-52). Mr. Farhat ranked all of the markets in California where Honda is represented by the percentage of pickup truck ownership in that market, and compared those percentages to Honda’s registration effectiveness in those markets. (*Id.*). This analysis showed that there are 11 markets in California with a greater consumer preference for—or at least greater level of ownership of—trucks, and that the Honda brand performs significantly better in all 11 of these markets than it does in Bakersfield. (*Id.*). Indeed, the four markets in California with the highest preference for trucks all perform well above 100% of expected—including one market at 140.7% of expected. (*Id.*). Mr. Farhat’s analysis further demonstrates a

lack of any reliable correlation between consumer preferences for trucks and the Honda brand's performance in Bakersfield. (*Id.*) (Hrg. Tr. Vol. 13, 3135:25-3136:16).

118. Protestant's next claim is that the Honda brand's underperformance in Bakersfield is the result of poor economic conditions in Bakersfield. Specifically, Protestant asserts that the Honda brand has not been more successful because Bakersfield is a lower income community that was negatively affected by a drought and decrease in oil prices beginning in 2014-2015 that devastated the motor vehicle retail business.

119. American Honda's analysis shows that the poor performance of the Honda brand existed well-before any economic downturn in the 2014-2015 time frame, however. American Honda first studied the Bakersfield market in 2008, then again at the end of 2013. (Hrg. Tr. Vol. 11, 2643:13-20). Both of these analyses were performed before the alleged drought and decline in oil, and both revealed significant lost opportunity for the Honda brand supporting the need for a second Honda dealership in this market.

120. Jonathan Ekegren testified that a downturn in these industries would not just affect Honda, but would be expected to affect all competitive automotive brands. (Hrg. Tr. Vol. 11, 2637:20-2639:6). Yet, from 2013 to 2017, the number of competitive retail registrations in the Bakersfield metro increased from 13,336 to 14,912 registrations. (Ex. R-376 at A-46). Indeed, competitive registrations in the RMA grew by 6.7% during this time period, and competitive registrations in the Bakersfield Metro as a whole grew by 10.8% during this same time period—faster than the national average. (Ex. P-152 at Tab 9, Page 1).

121. Similarly, although Barber Honda's annual registrations declined from 1,682 in 2014 to 1,515 in 2017, Honda registrations in the Bakersfield Metro overall increased from 1,885 in 2014 to 1,957 in 2017. (Ex. R-408). As such, there was actually greater demand for new Honda vehicles in 2017—two to three years after the alleged economic downturn—than there was in 2014. (*Id.*). Customer were simply buying from other Honda dealers.

122. Moreover, the demographic data in Bakersfield does not evidence some dramatic decline in the local economy:

- a. As discussed above, from 2010 to 2017, the population in the Bakersfield RMA

grew from 345,255 to 444,443, and the population in the Bakersfield Metro grew from 517,258 to 722,714, a 7.18% increase during that period above the rates of California and the U.S. as a whole. (Ex. R-376 at A-34).

- b. From 2010 to 2017, the number of households in the Bakersfield Metro grew from 196,608 to 208,497, which is a 6.05% growth and about the same level as the rest of the state and the nation as a whole. (Ex. R-376 at A-37 and A-38).
- c. Similarly, from 2010 to 2017 employment levels in Kern County grew from 269,613 to 349,502. (Ex. R-376 at A-39). In fact, the average annual employment in Kern County was higher in 2017 than it was in 2013—the year before this alleged economic decline. (*Id.*).
- d. Finally, Mr. Stockton presented evidence that the unemployment rate in Bakersfield generally has been higher than the rest of the United States at all points in time since 2008, but his own data shows that unemployment in Bakersfield noticeably declined since 2013. (Ex. P-152 at Tab 7, Page 1).

123. These undisputed facts show a large, growing market—not a devastated local economy.

124. In an effort to combat these local economic statistics, Mr. Stockton prepared a chart attempting to demonstrate that competitive registrations in the Bakersfield market have been declining since 2015 as evidence of this decrease in local demand. There is no dispute between the parties that the motor vehicle industry set all-time record highs in 2015 and 2016 with over 17 million industry registrations after years of pent up demand following the Great Recession. (Ex. P-152 at Tab 5, Page 1) (Hrg. Tr. Vol. 13, 3126:10-3127:23).

125. Similarly, the parties agree that since reaching those all-time highs the industry has experienced a slight “leveling off” in industry registrations, but even in 2019, the industry was outperforming expectations and still achieved near all-time highs with over 17 million registrations. (Ex. P-152 at Tab 5, Page 1) (Hrg. Tr. Vol. 13, 3126:10-3127:23). Importantly, however, while competitive registrations in Bakersfield did level off slightly between 2015 and 2019, the

competitive registrations in the Bakersfield RMA and the Bakersfield metro actually declined less than the rest of the state of California according to Mr. Stockton's own analysis. (Ex. P-153).

126. Again, these facts do not evidence a local economic recession of any measurable significance sufficient to show good cause not to permit the establishment of a new Honda dealership to serve customers in Bakersfield for years to come, long after any presumed negative economic conditions have resolved. It will take several years for Galpinsfield to build a dealership once approved, (Hrg. Tr. Vol. 8, 1866:11-1867:13), and manufacturers and new dealers view these types of opportunities with a long-term view—Barber Honda has been operating since 1973 and the Galpin organization was born when Herbert F. “Bert” Boeckmann, II started working as a salesman in 1953. (Hrg. Tr. Vol. 8, 1809:22-1810:4; Vol. 10, 2315:15-23). Moreover, Honda dealers are well situated to weather even economic downturns given the reputation of Honda products and the strength of the Honda brand as a whole. (Hrg. Tr. Vol. 6, 1190:16-1191:4).

127. Notwithstanding Stephen Ekegren and Jonathan Ekegren's concessions about opportunity in the Bakersfield market, and notwithstanding Mr. Stockton's own findings that the Honda brand is significantly underperforming in the market, Protestant further criticizes American Honda's registration effectiveness analysis because, Protestant argues, it improperly attempts to measure performance in Bakersfield against the performance of other California markets through the use of state average.

128. Specifically, Protestant claims that American Honda did not conduct a rigorous review of the market before deciding to move forward with the proposed new dealership. During the hearing, Protestant attempted to draw a connection between prior decisions issued in New York courts and by the Board in termination cases where the courts found that franchisors did not meet their burden of proving good cause to terminate an existing dealership based on state average retail sales effectiveness (“RSE”) and without considering local market factors particular to the specific market at issue. The termination cases specifically cited by Protestant include *Beck Chevrolet Co. v. General Motors*, 27 N.Y.3d 379 (2016); *Santa Cruz Nissan v. Nissan North America*, Protest No. PR-2358-13 (Cal. NMVB Sept. 17, 2014); *Dependable Dodge v. Fiat Chrysler Automobiles*,

Protest Nos. PR-2435-15 and PR-2436-15 (Cal. NMVB Mar. 15, 2017); and *Folsom Chevrolet v. General Motors*, Protest No. PR-2483-16 (Cal. NMVB Aug. 13, 2018).

129. These decisions are inapposite and unavailing to Protestant's position in this case. This Protest is not one in which American Honda is seeking to terminate the franchise of an existing Honda dealer. Rather, it is a situation where American Honda has proposed adding a new dealership to an underperforming market in which there is only one Honda dealer within a 67 mile radius to serve a metro area with a population of more than 700,000 people.

130. In addition, this Protest is not a termination case in which American Honda has the burden of proving it has good cause for ending a franchise relationship. American Honda does not have the burden of proving that it has good cause for establishing the proposed new dealership here. Rather, Protestant instead has the burden of proving good cause to prevent the addition of the proposed new dealership. Cal. Veh. Code § 3066(b).

131. Moreover, American Honda did not base its decision to establish the proposed new dealership on state average RSE, and there is no evidence that it made its decision without considering the demographics and other local market factors specific to Bakersfield. In its policies and in the monthly reports sent to its dealers, American Honda expressly distinguishes between its process for determining whether one dealer's sales performance complies with its contractual obligations (as in termination cases) and its evaluation of whether the Honda brand as a whole is adequately represented in a particular market. (Ex. R-346 fn 1; R-356 fn 1). That distinction makes clear that while "state average" is the standard used to evaluate a dealer's performance of its contractual obligations, when evaluating the adequacy of its dealer network in a particular market, American Honda goes much further and evaluates local market conditions and other appropriate standards, including but not limited to "local, state, zone, and national" standards. (*Id.*). That was done in this case through American Honda's several studies and investigations of the Bakersfield market.

132. American Honda analyzed the Bakersfield market several different times in many different ways before ultimately deciding to move forward with a new dealership in North Bakersfield. As explained in detail above, American Honda conducted three separate market

studies of the Bakersfield market over a nine year period before issuing statutory notice of its intent to establish the proposed dealership: (1) a 60+ page market study declaring the open point in 2008; (2) an 85+ page market study in 2013-2014 to reassess the need for additional representation in Bakersfield following the recession; and (3) a 100+ page study in September 2015 with dozens of pages of refreshed data and analyses before choosing Galpinsfield as the final candidate to operate the new dealership. (*See generally* Ex. J-14; J-18; J-21). By way of this litigation, American Honda also presented a fourth study of this particular market – the expert reports of Sharif Farhat from Urban Science. (Ex. R-376 and R-378).

133. Contrary to Protestant’s insistence that American Honda decided to establish a new dealership in reliance on state average sales performance, throughout its evaluation of this proposal, American Honda analyzed the brand’s performance in Bakersfield as compared to all of the following more localized markets and standards: (1) Zone 12, which includes Barber Honda and the other 60+ Honda dealers in northern California; (2) District 12D, which includes Barber Honda and the 14 other Honda dealers located in the Central Valley; (3) Fresno, which is also located in the Central Valley and is the next closest metro market to the north of Bakersfield; (4) Sacramento; (5) San Jose; (6) East Bay; (7) San Francisco; (8) Sonoma; (9) Santa Barbara; and (10) Stockton. (Ex. J-14; J-18; J-21; R-376; R-378). Under each one of the markets and standards listed above, the Bakersfield market is significantly underperforming, remains the lowest performing market for the Honda brand, and demonstrates substantial opportunity for additional Honda business. (*See id.*) (Hrg. Tr. Vol. 4, 762:2-20). Indeed, the Bakersfield market performs at just 63% of the level of the next lowest market in Northern California. (Ex. J-21 at AHM_65083) (Hrg. Tr. Vol. 4, 744:23-745:3).

134. Also contrary to Protestant’s arguments, American Honda repeatedly and specifically evaluated the local market conditions in Bakersfield itself before proposing to establish a new dealership in this market. This evaluation included analysis of the following local market factors in the Bakersfield metro and in the two ASAs that make up the metro: (1) the population levels and population growth; (2) the number of households and household growth; (3) household income and income growth; (4) the number and location of competitive dealerships; (5) the effect

of the new dealership on customer convenience compared to other competitive brands; (6) the number and location of competitive registrations; (7) the registrations of only the foreign-based automotive brands; (8) the number and location of Barber Honda's sales; (9) the number and location of new vehicles sold into the metro by other Honda dealers (known as "insell") more than 65 miles from Barber Honda; and (10) the number and location of the units in operation ("UIO") available for potential service.

135. Nevertheless, Protestant claims that American Honda did not sufficiently evaluate local market conditions in Bakersfield. However, many of these factors are the exact same local demographic and market conditions that Protestant's own expert, Mr. Stockton, relied upon in his analysis. (*See* Ex. P-151 at Tab 18, Page 1) (Hrg. Tr. Vol. 12, 2929:12-2930:21).

136. Indeed, in his analysis calculating Honda's expected performance in Bakersfield based on local market factors he believes are relevant—including product popularity, median age, household income, education, and population density—Mr. Stockton found that the Honda brand was underperforming by 2,331 registrations over two years, 1,165 units per year, and was performing at only 63% of the level expected. (Ex. P-151 at Tab 18, Page 1) (Hrg. Tr. Vol. 13, 2950:1-2952:22; Vol. 17, 4044:16-4045:7). Accordingly, it is undisputed that Honda is materially underperforming in Bakersfield—even under the analysis of local market factors prepared by Protestant's own expert.

137. There are no decisions in the United States apply the reasoning in the termination cases cited by Protestant to an add-point case as is before the Board in this Protest. To the contrary, the case law actually has held the opposite. In *Beck* itself, cited by the Protestant, the Court of Appeals was careful to limit its decision to dealership "performance standards" under a single statute, and specifically stated that other decisions about how to best improve the quality of its dealer network and sales "involve business judgments rightly left to franchisors." 27 N.Y.3d at 394 (this decision "should not be understood as an invitation for a court to substitute its opinion for a franchisor's determination of how to best achieve its business goals"). New York courts also have expressly held that the decision in *Beck* does not apply to the decision to establish a new dealership in an underperforming area. *JJM Sunrise Automotive, LLC v. Volkswagen Group of*

America, Inc., Index Nos. 601658-14 and 602591-14 (N.Y. Sup. Ct., Jan. 26, 2017) (holding that a “franchisor’s decision to permit establishment of a new dealership in an allegedly underperforming region [is] distinct from the issue of whether a franchisor’s performance standards are lawful”).²³

138. New York is not the only jurisdiction to make this essential distinction. The United States District Court for the Southern District of Alabama also recently refused to extend the decisions in termination cases like *Beck* and *Folsom* to the establishment of a new dealership. *GPI-AL, Inc. v. Nissan North America*, No. 17-0511-WS-MU (Oct. 17, 2019). In that case, the Court found that *Beck* and *Folsom* were distinguishable for several reasons:

(ii) *Beck* and *Folsom* were both cases in which a vehicle manufacturer was terminating a dealer’s franchise rights for noncompliance with a franchise agreement, whereas the case at bar relates to the significantly different question of assessing brand performance in a specific market area;

(iii) the issue in *Beck* and *Folsom* was the proper market comparison for evaluating a dealer’s performance, whereas the issue here is whether Nissan should reasonably add another dealer to the Mobile Market to bolster its brand penetration in that market;

(iv) *Beck* and *Folsom* involved the use of a specific sales metric to evaluate a dealer’s performance, as opposed to the important question in this case of the Nissan brand’s effectiveness in the West Mobile PMA;

139. These same distinctions apply here. This is not a termination case assessing a dealer’s compliance with the franchise agreement, but instead is a case involving the addition of a new dealership based on the brand performance in the market.

140. American Honda’s determination was not made based on a state average sales performance metric, but was made after thorough consideration of multiple metrics and multiple local market conditions specific to Bakersfield.²⁴

²³ At the hearing, counsel for Protestant objected to referencing these authorities on the grounds that they are unpublished decisions from other jurisdictions. Contrary to this objection, Rule 8.1115(a) only applies to unpublished decisions issued by “a California Court of Appeal or superior court appellate division.” Cal. Rules of Court 8.1115(a). Numerous decisions have recognized that California courts are free to cite both published and unpublished decisions from other jurisdictions and rely on them as persuasive authority. See, e.g., *Univ. of S. California v. Superior Court*, 30 Cal. App. 5th 429, 446, 241 Cal. Rptr. 3d 616, 628 (Ct. App. 2018); *Lebrilla v. Farmers Grp., Inc.*, 119 Cal. App. 4th 1070, 1077, 16 Cal. Rptr. 3d 25, 31–32 (2004) (holding that “opinions from other jurisdiction can be cited without regard to their publication status” and noting that many states “have different publication criteria than California”).

²⁴ At the same time it is criticizing American Honda’s use of any of several standards to assess opportunity for additional Honda sales, Protestant touts Barber Honda’s high service retention scores as evidence that it is more than adequately serving the Bakersfield market’s service needs. (Hrg. Tr Vol. 11, 2532:16-2535:3). Ironically, however,

141. Accordingly, Protestant's claim that these prior termination cases somehow help meet its burden of proving there is good cause not to proceed with the proposed new dealership is misplaced.

142. Finally, as further evidence of potential negative impact upon the retail motor vehicle business in Bakersfield, Protestant argued that its business would be decimated and that it would lose a significant portion of its existing business to the new dealer. Despite the admitted underperformance of the existing Honda dealer network and the opportunity for sales and service business, Protestant alleges that the addition of a new dealership will materially harm its business.

143. Protestant and its expert both base their claims on a "change in proximity" theory, *i.e.*, that the new dealership will be closer to some existing customers. Specifically, the Ekegrens testified that Barber Honda makes about 40% of its sales and service business in the area surrounding the new dealership. (Hrg. Tr Vol. 11, 2530:15-25). Mr. Stockton similarly used two separate models to analyze the change in proximity that would occur if the new dealership is established, and estimated that the new dealership would cause Protestant to lose between 20-45% of its sales and service business. (Hrg. Tr. Vol. 13, 2985:5-9).

144. These theories of harm are based on the erroneous assumption—contradicted by both Protestant and indeed Mr. Stockton himself—that there is a "fixed pie" of business in Bakersfield and that Honda cannot expand that fixed amount of business, it can only divide it amongst Honda dealers. Mr. Stockton acknowledged that his proximity models are based solely on the historical registrations and UIO in the Bakersfield market in prior years. (Hrg. Tr. Vol. 13, 2975:1-13; 2990:9-2992:4). Although Mr. Stockton admits there is opportunity in the market and that the addition of a new dealership will result in more business for the brand, (Hrg. Tr. Vol. 12, 2875:11-13; 2952:17-2953:9), his proximity models nevertheless failed to account for the existing

Barber Honda acknowledges but then seems to overlook the fact that American Honda's service retention metric is also based on California average, the very metric it decries in its attack on American Honda's sales performance. (Hrg. Tr Vol. 11, 2534:1-5). In addition, Protestant fails to note that Barber Honda's expected service retention is calculated only on its ASA, but it receives credit for all service opportunities even those originating from the North Bakersfield Open Point ASA. (Hrg. Tr Vol. 11, 2610:1-25). Because Barber Honda is the only option for 67+ miles for customers to receive service from an authorized Honda dealer it is not surprising that its service retention scores are so high.

opportunity in the market or for any increase in business from the new dealership. (Hrg. Tr. Vol. 13, 2975:1-13; 2990:9-2992:4; Vol. 17, 4040:1-12).

145. Rather than adjusting for expected increased opportunity in the market—which Mr. Stockton acknowledges—his impact models only apportion the existing business in Bakersfield between Protestant and the proposed new Honda dealership. In addition, they wholly fail to account for the amount of opportunity actually available, but as of yet untapped, to the Honda brand in the market.

146. In response to these models, American Honda submitted evidence that this type of fixed pie analysis is improper and has been rejected in other open point decisions. *See LCA Acquisition Corp. dba South Motors Infiniti v. Nissan North America, Inc., et al.*, Case No. 14-2069; 14-2070 (Fla. DOAH Nov. 2, 2015), *affirmed* Case No. 1D15-5159 (Fla. 1st DCA Nov. 17, 2016). In the *South Motors Infiniti* case, Mr. Stockton’s business partner performed the same proximity-based analysis to analyze the potential impact on the protesting dealer. In that case, just like in this one, the Fontana Group claimed that “if the new dealership is approved, it will lose its proximity advantage for a substantial portion of its customers, and that as a result, it stands to lose between 20 percent and 40 percent of its business.” (*Id.* ¶ 97). The court, however, expressly criticized and rejected this approach:

[T]his position *erroneously assumes that the number of new vehicle sales is a "fixed pie" and fails to take into account the amount of business opportunity available in the market* that currently is not being captured. Mr. Roesner acknowledged that South Motors currently is capturing only 50 percent of the sales available in the Coral Gables area. If capture rate is increased, new vehicle sales would increase, indicating that the "pie" of new vehicle sales business is not fixed.

(*Id.* ¶ 98) (emphasis added).

147. The *South Motors* court also found that the addition of a new dealership increases brand awareness and stimulates additional business for the brand, which again “evidences that new vehicle sales are not a ‘fixed pie’ in terms of amount available in the market. (*Id.* ¶ 103).

148. In an effort to circumvent this fatal criticism of his analyses, Mr. Stockton testified that while his actual calculations contain no adjustment for the opportunity in the market, he simply

estimated the increase in business in the market would be somewhere between 0-20%. (Hrg. Tr. Vol. 17, 4040:20-4041:18). Mr. Stockton also conceded he performed no quantitative analysis to determine what this increase in new business would be, and that while he “never assumed it would be zero,” he simply based his estimates on a reading of Mr. Farhat’s study of other Honda open points. (*Id.*).

149. These types of assumptions and estimates, made without any quantitative analysis, are wholly unreliable—especially given Mr. Stockton’s own admissions that (1) there is opportunity for additional business in the market; (2) the addition of a new dealership will result in more business for the Honda brand; and (3) Honda has the lowest registration effectiveness of any competitive brand in Bakersfield. (Hrg. Tr. Vol. 12, 2875:11-13; 2952:17-2953:9) (Ex. P-151 at Tab 16, Page 1; Tab 18, Page 1).

150. Moreover, Mr. Stockton’s proximity-based impact models do not accurately reflect what happens in the real world when a new Honda dealership is added to a market. Unlike Mr. Stockton, Sharif Farhat from Urban Science offered evidence of three prior situations where American Honda had recently established a new Honda dealership in a market: (1) Surprise, Arizona; (2) Marysville, Washington; and (3) Baton Rouge, Louisiana. Notably, the Baton Rouge market is particularly instructive as it is a market that is extremely similar to Bakersfield in that it has a large oil industry and almost the exact same number of competitive registrations, yet Honda American Honda was adding a third dealer to that market. (Hrg. Tr. Vol. 6, 1174:12-1175:17).

151. The evidence indicates that the addition of a new Honda dealership improved Honda’s brand performance in all three of the markets studied:

- a. In Surprise, Arizona, the addition of the new dealership improved Honda’s sales by 43% in the open point ASA, and by 19% and 17% in the two adjacent dealers’ ASAs. (Ex. 376 at A-75).
- b. In Marysville, Washington, the addition of the new dealership improved Honda’s sales by 54% in the open point ASA, and by 10% and 17% in the two adjacent dealers’ ASAs. (*Id.* at A-79).

- c. Similarly, in Baton Rouge, the addition of the new dealership improved Honda's sales by 61% in the open point ASA, and by 4% and 9% in the two adjacent dealers' ASAs. (Exhibit 407 at R-20.2). These studies demonstrate the real-world benefits and brand stimulation that occurs from the addition of a new dealership in a market.

152. Even more telling is the impact—or lack thereof—that the addition of these new dealerships had on the existing Honda dealers in the market. Contrary to Protestant's claims of impact, in almost all of these situations, the existing dealers actually made more sales after the addition of the new dealership than they did beforehand. In Surprise, the two adjacent dealers made 92 and 250 more sales after the open point—an increase of 5% and 10% respectively. (Exhibit 376 at A-75). In Marysville, the two adjacent dealers made 160 and 98 more sales after the new dealership was established, increases of 12% and 13% respectively. (*Id.* at A-79).

153. Moreover, in Baton Rouge, the dealer closest to the open point—Team Honda—increased its sales by 281 units (10%) after the new point was established. While that dealer had filed a protest claiming the new dealership would impact its business, after the new point was established, that dealer actually called American Honda and said “you were right. You told me it wouldn't impact me.” (Hrg. Tr. Vol. 6, 1093:13-1094:20).

154. Out of the six neighboring dealers in this study, the only existing dealer whose sales went down at all was Richards Honda—for reasons completely unrelated to the add-point. (Exhibit 407 at R-20.2). Moreover, that dealer's sales went down a relatively small amount and there was no evidence that this decline was due to the addition of a new Honda dealer in the market. Rather, it appears that the decline in sales by Richards Honda was due to the fact that it was in process of relocating from an outdated facility in an outdated auto row to a new facility. (Hrg. Tr. Vol. 6, 1093:13-1094:22; Vol. 13, 3191:20-25: 3196:5-3197:1).²⁵

155. Mr. Farhat's analysis not only confirms the lack of any appreciable negative impact from the addition of a new Honda dealership in a market, but it also shows that Mr. Stockton's

²⁵ Richards Honda actually was further away from the open point than Team Honda, and on the complete other side of Team Honda from the open point. (Exhibit 407 at R-20.1). In addition, Richards Honda actually experienced an increase of 9% in Honda registrations within its own ASA after the open point was established. (Exhibit 407 at R-20.1-20.2).

proximity-based models do not reflect the reality of what happens when a new dealership is established. As part of his analysis, Mr. Farhat expressly applied Mr. Stockton's models to the open points in all three of these prior cases to evaluate what impact he would have predicted to existing dealers. (Exhibit 378 at R-19 and R-20; Exhibit 407 at R-20.4).

156. The results of Mr. Stockton's model are much different than what actually occurred in real life. Instead of the increase in sales these dealers actually experienced, Mr. Stockton's model predicted that the two neighboring dealers in Surprise should have lost 30% and 7% of their existing Honda sales respectively, and that both of the neighboring dealers in Marysville should have lost 20-25% of their existing sales. (*Id.*). Similarly, Mr. Stockton's model predicted that Richards Honda would be unaffected by the addition of the new dealership in Baton Rouge, and that Team Honda—instead of increasing its sales by 281 units—should have lost 20-25% of its sales. (*Id.*). Mr. Stockton's models thus are not only inaccurate and unreliable in predicting the amount of impact, but are also inaccurate and unreliable for predicting the direction of impact a new dealership has on existing dealers. (Hrg. Tr. Vol. 13, 3189:15-16).

157. By splitting the market in half and measuring the change in relative proximity to existing business, Mr. Stockton's model predetermines there will be impact on existing dealers. Indeed, if there was one Honda dealer in California and a new Honda dealer were added in New York, Mr. Stockton's model would simply divide the country in half and assume proximity loss to the dealer on the west coast, which does not reflect reality. (Hrg. Tr. Vol. 13, 3188:7-22).

158. Moreover, although Mr. Stockton admits that 400-600 Honda vehicles are being sold into Barber Honda's ASA each year by other Honda dealers, his model still includes those units in his calculation of proximity loss to Barber Honda, even though it did not even make those sales. (Hrg. Tr. Vol. 13, 2967:15-2970:17). Mr. Stockton similarly included the total amount of UIO in Bakersfield in his calculation of proximity loss to Barber Honda regardless of whether those units were being serviced at another Honda dealership or an independent repair facility, despite the fact that he was not able to determine how many of those UIO were actually being serviced by Barber Honda. (Hrg. Tr. Vol. 13, 2971:4-23).

159. In addition to the opportunity available in this market, Barber Honda is well positioned to compete with a new dealership in North Bakersfield. There is no dispute that Protestant has had the unique opportunity to sell and service Honda vehicles for 45 years without any other Honda dealership within 67 miles of its location, and Stephen Ekegren even had to “admit that we have been blessed to have a single-point in an isolated market.” (Hrg. Tr. Vol. 9, 2082:8-10; Vol. 11, 2596:16-2597:3).

160. Indeed, Barber Honda acknowledged it has a “home field advantage” from having served the Bakersfield community for 45 years, and that given this long duration of building relationships and loyalty with customers, it now has a strong opportunity to retain its customers if a new dealership comes to town. (Hrg. Tr. Vol. 10, 2314:3-6; 2316:25-2317:14; Vol. 11, 2612:19-2613:9).

161. There also is no dispute that the proposed site for the new dealership is located on the complete other side of Bakersfield. While Protestant is located on the far south side of Bakersfield, within the city limits, the proposed site for the new dealership is located 9.1 air miles away from Barber Honda, on the other side of the town, and outside of the city limits. (Ex. P-151 at Tab 4, Page 11) (Stipulated Facts Regarding Market Drive ¶ 14).

162. In addition, as discussed above, there are 96 pairs of Honda dealers in California closer than the proposed new dealership would be to Barber Honda. (Ex. 378 at R-23 and R-24) (Hrg. Tr. Vol. 14, 3256:16-19). This puts Barber Honda in a strong position to remain successful—particularly given that it operates in the largest market in the United States with only one Honda dealer to serve customers. (Hrg. Tr. Vol. 4, 742:23-743:3; Vol. 5, 1173:18-1174:11).

163. The evidence indicates that Barber Honda also has the financial wherewithal to be successful and compete with a new dealership in this market. In each year since 2014, Barber Honda’s net working capital and net worth have exceeded American Honda’s guidelines. Indeed, in most years, its net working capital has been nearly double and its net worth has nearly been nearly triple the amount required by American Honda’s guidelines. (Ex. J-02; 05; 08; and 11).

164. Moreover, although Barber Honda’s financial statements reflect that the dealership is profitable on their face, American Honda’s accounting expert witness Mr. Herbert Walter found

some key anomalies in its financial statements, including high personnel expense (including payments to the owners), floor plan financing expense, data processing expense, and other interest expense. (Hrg. Tr. Vol. 15, 3633:5 – 3635:1) (Ex. R-379). Mr. Walter found that if adjustments were made to account for these anomalies, Protestant’s financial statements would in actuality reflect millions of dollars in additional profit from 2014 to 2017 (the only years where full information was available). (Hrg. Tr. Vol. 15, 3669:25-3672:12) (Ex. R-410). As such, Barber Honda not only has the financial ability, but also the financial flexibility, to respond competitively to a new dealership (*Id.*).

165. Given all of the foregoing, it is clear that the addition of a second Honda dealership in Bakersfield will not result in any harm to Barber Honda. In addition, a second Honda dealer will actually improve the existing retail motor vehicle business by improving competition, convenience and Honda brand awareness.

Findings Related to Whether it is Injurious to the Public Welfare for the Additional Franchise to be Established

(Veh. Code § 3063(c))

166. In addition to improving Honda’s representation in Bakersfield, the proposed dealership also will have a positive effect on the public welfare. As discussed above, currently there are no other Honda dealership to serve customers for more than 67 miles in any direction from Barber Honda, and it takes customers more than an hour to drive from Barber Honda to reach another Honda dealership. (Hrg. Tr. Vol. 11, 2592:25-2593:5; 2594:18-2595:19) (Ex. P-151 at Tab 4, Page 11-12). Despite this distance, other Honda dealers are making 400-600 sales each year into the market, which shows that customers are in need of competition and other options. (Ex. R-342; R-403).

167. Establishing a second point in North Bakersfield to serve customers within this 67-mile radius will provide customers with that much needed competition and benefit the public interest. Indeed, as Mr. Boeckmann testified, competition is good for consumers because it “makes us better dealers” and “keeps us on our game” when Galpin has to compete with other dealers. (Hrg. Tr. Vol. 8, 1977:1-10).

168. The proposed dealership also will benefit the local public in other ways. As previously stated, Galpinsfield is a well-respected and experienced dealer who has a history of treating customers well and becoming involved in the local community. (Hrg. Tr. Vol. 5, 1038:7-15; Vol. 6, 1401:4-1402:4; 1402:5-1403:9). Indeed, Jonathan Ekegren testified that Protestant has no concerns about the Galpinsfield team individually, how they operate a dealership, or how they treat customers. (Hrg. Tr. Vol. 11, 2711:23-2712:10).

169. American Honda and Galpinsfield presented evidence of the Galpin organization's strong commitment to the communities where its dealers are located, including charitable contributions to local school sports, scholarship funds, PTAs, little leagues, the police commission, local hospitals, children's homes, and other programs. (Hrg. Tr. Vol. 7, 1402:5-1403:9) (Ex. J-21 at AHM_00065141). In establishing this new dealership, Mr. Boeckmann testified that he would work to instill the Galpin culture by ensuring that the dealership's general manager both lives and works in the community and that the dealership becomes a part of that community. (Hrg. Tr. Vol. 8, 1812:24-1813:15).

170. Further, Galpinsfield also plans to build a brand-new dealership facility that will benefit the public welfare. The proposed site is located on land that is currently undeveloped, (Stipulated Facts Regarding Market Drive ¶ 16), and thus developing that site will benefit the local economy and promote economic development. In fact, Galpinsfield plans to look for local construction companies to build the new facility, which would increase employment and benefit the local economy. (Hrg. Tr. Vol. 8, 1922:5-21).

171. Additionally, as detailed above, the proposed dealership also will greatly improve customer convenience and access to the Honda brand, and is situated on the complete other side of town from Barber Honda, outside the city limits, is highly visible and accessible from several major thoroughfares, and is close to the second Toyota location in Bakersfield so that customers can easily cross-shop between these two brands. (Ex. R-376 at A-65) (Hrg. Tr. Vol. 8, 1910:10-19; 1972:11-1973:2) (Stipulated Facts Regarding Market Drive ¶¶ 15 and 17).

172. Indeed, the Ekegrens and Mr. Stockton conceded that with Barber Honda's continued operations, this new dealership would provide another touch point for customers,

improve customer choice and convenience in the market, improve customer access to the brand, increase service capacity, increase employment, and increase the local tax base—all of which are good for customers and the public interest. (Hrg. Tr. Vol. 10, 2311:25-2313:23) (Stephen Ekegren) (Hrg. Tr. Vol. 11, 2713:7-2714:25) (Jonathan Ekegren) (Hrg. Tr. Vol. 13, 2973:17-2974:4) (Ted Stockton).

173. As such, the proposed new dealership will have a positive effect on competition, consumers, and the public interest.

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Findings Related to Whether the Honda Franchisees in the Relevant Market Area are Providing Adequate Competition and Convenient Consumer Care for the Motor Vehicles in the Relevant Market Area, Including the Adequacy of Motor Vehicle Sales and Service Facilities, Equipment, Supply of Vehicle Parts, and Qualified Service Personnel

(Veh. Code § 3063(d))

174. As discussed above, Barber Honda is the only Honda dealer available to sell new vehicles and provide service for customers within a 67-mile radius of its location—an area exceeding more than 14,000 square miles—and there are over 900,000 people currently living in Kern County alone. (Ex. P-151 at Tab 4, Page 11) (Hrg. Tr. Vol. 13, 3115:24-3116:19).

175. Although Barber Honda has enjoyed the benefits of being “a single-point in an isolated market,” the evidence presented at the hearing confirms that having only one Honda dealership location in Bakersfield is no longer beneficial for Honda customers. The average consumer in North Bakersfield currently must drive 16.3 miles before they reach any Honda dealership, which is much further than other competing brands with more dealership points like Chevrolet, GMC, Toyota, and Ford. (Ex. R-376 at A-65). It is undisputed that convenience is a very important factor for consumers, for both their sales and service needs.

176. In addition, Barber Honda's customer satisfaction scores in service have consistently been poor. Since at least 2013, Barber Honda's service satisfaction scores have consistently ranked in the bottom 20% of all Honda dealers in northern California, and at one point even ranked 1039 out of 1048 Honda dealers in the nation. (Ex. R-387; R-399; R-400). There is no dispute that poor service satisfaction can affect a dealer's sales operations and the reputation of the Honda brand. (Hrg. Tr. Vol. 7, 1471:16 – 1473:6; Vol. 11, 2707:10-17).

177. Moreover, despite Barber Honda's clear competitive advantage and near monopoly in the Bakersfield market, hundreds and hundreds of Honda customers are driving incredible distances to visit another dealership and purchase a Honda vehicle. As of October 2017, 31.4% of all customers who purchased a Honda vehicle in Barber Honda's own ASA bought their vehicle from another Honda dealership more than 67 miles away. (Ex. R-342). By June 2019, this number had grown to over 34%. (Ex. R-403).

178. In fact, while Barber Honda's own sales numbers declined from 1,623 units in 2013 to 1,507 units in 2017, the number of Honda vehicles registered in the Bakersfield metro during this time period actually increased from 1,799 to 1,957 vehicles. (Ex. R-376 at A-27, A-App-11, A-App-23; Ex. R-408). These facts demonstrate that customers in Bakersfield want to purchase and are purchasing Honda products, but are in need of additional representation and competition in the Bakersfield market in order to make it reasonably convenient and increase customer satisfaction when purchasing Honda products.

179. Protestant argued and introduced evidence at the hearing to show that its poor performance, and its lack of competitiveness both within Bakersfield and with Honda dealers outside the Bakersfield market, was due to an inadequate supply of vehicles from American Honda. Although Protestant argued that the economy in Bakersfield has been poor and that Honda products are a poor fit for that market, Protestant alternatively claims, in turn, that it somehow needed more Honda products to effectively serve the market.

180. In support of its claim that Barber Honda did not receive enough Honda vehicles, Protestant relies almost entirely on a handful of emails, almost all of which were from 2013 and 2014, sent by Protestant to American Honda requesting additional inventory. Tellingly, however,

Protestant's own expert witness did not offer any opinions or provide any testimony regarding allocations during his initial examination, testifying that, to his knowledge, no one was challenging American Honda's vehicle allocation system in this protest. (Hrg. Tr. Vol. 12, 2823:22-24). On rebuttal, Mr. Stockton relied on the emails cited by Protestant to claim that American Honda could have "prioritized" Barber Honda more in allocations. Mr. Stockton, however, admitted that he did not perform any substantive analysis of Barber Honda's allocations, that he was not aware of how many supplemental allocations the dealer had received during the relevant time period, and that he did no analysis of those supplemental allocations. (Hrg. Tr. Vol. 17, 4026:16-4027:7). Mr. Stockton also admitted on rebuttal, for the second time, that Protestant is not challenging Honda's administration of its allocation system in this case. (Hrg. Tr. Vol. 17, 4003:19-21) ("[t]his protest does not have an element, I believe, that is challenging Honda's administration of its allocation system").

181. Although Protestant offered *prima facie* evidence to argue that it did not receive sufficient inventory to support its operations, neither Protestant nor its retained expert were able to provide any quantitative evidence showing that the dealership did not receive enough Honda vehicles, and detailed analysis from Respondent indicated that the opposite was true.

182. Under American Honda's allocation system, Honda dealers earn inventory based on how many vehicles they have in stock (*i.e.*, their days' supply) and how quickly they are selling those vehicles, their "turn rate."²⁶ (Hrg. Tr. Vol. 15, 3691:15-3695:18). A dealership can improve its own inventory and earn more vehicles by selling the vehicles it already has in inventory at a quicker pace. (Hrg. Tr. Vol. 11, 2655:13-20; Vol. 15, 3700:14-25).

183. Although Barber Honda claims it did not have enough inventory, Barber Honda's available days' supply, which includes all vehicles on the dealer's lot and in transit, exceeded the Zone 12 average in 61 of 85 months from 2011 to January 2018, 71.8% of the time. (Ex. R-351).

²⁶ A balanced days' supply system is the industry standard, and is used by many other automotive companies to distribute vehicles to their dealers. American Honda's system is one of the newest and most sophisticated systems in the industry, and is the result of multiple years and millions of dollars in development. (Hrg. Tr. Vol. 15, 3693:3-13; 3696:2-24).

Barber Honda's available days' supply during 2013 and 2014, the years in which the majority of their inventory complaints were made, exceeded the Zone 12 average 17 of the 24 months. (*Id.*).

184. In addition, from 2013 to 2017, American Honda provided Protestant more than 982 units of supplemental allocation, including 318 supplemental units in 2013, 227 supplemental units in 2014, and 233 supplemental units in 2016. (Ex. R-345) (Hrg. Tr. Vol. 2, 439:3-17). The undisputed evidence is that Barber Honda received supplemental allocations that were among the highest of any dealers in the district and among the highest in Zone 12, and that Barber Honda's level of supplemental allocations was extremely high for a dealer this size. (Hrg. Tr. Vol. 2, 436:2-437:10; 439:18-440:8). Accordingly, there is no evidence that American Honda was not responsive to Barber Honda's requests or that it was not working with Barber Honda to improve its performance via these supplemental allocations.

185. In addition to this evidence, American Honda presented the testimony of its expert Herbert Walter regarding allocation and financial analysis in the automotive industry. Mr. Walter is an independent consultant with over 42 years of experience in the automotive industry, including 32 years of experience with PriceWaterhouse Coopers. (Hrg. Tr. Vol. 15, 3608:20-3609:22). He has a bachelor's degree in business administration and accounting in quantitative analysis, and a master's in business administration with concentrations in finance and quantitative analysis, and held licenses as a CPA and a certified fraud examiner for many years. (Hrg. Tr. Vol. 15, 3610:2-3611:14). Specifically as it relates to inventory, Mr. Walter has studied the allocation systems of almost every automotive company during his career, and has testified in automotive matters approximately 40-50 times in about 20 different jurisdictions. (Hrg. Tr. Vol. 15, 3613:9-3614:25).

186. Unlike Protestant's expert witness, Mr. Walter specifically and substantively studied Barber Honda's inventory and turn rate of Honda vehicles and found that Barber Honda consistently had a higher relative level of inventory than the other dealers in the Zone and was turning its inventory at a significantly slower pace. Mr. Walter first evaluated Barber Honda's "sales to availability," which compares the number of sales the dealership makes each month to the amount of inventory it has available that month. (Exhibit 377 at ¶ 24) (Hrg. Tr. Vol. 15, 3697:24-3698:25).

187. Using this metric, Mr. Walter found that from 2014 to 2017, Barber Honda consistently sold between 30-40% of its available inventory each month. (Ex. 377 at Attachments 10-12). This means that, contrary to Protestant's claims, Barber Honda on average had about 65% of its inventory remaining and available each month to make additional sales to customers. (Hrg. Tr. Vol. 15, 6702:10-24). This analysis also revealed that Barber Honda regularly sells its inventory more slowly than other Honda dealers in the Zone. Indeed, out of the top five models sold by Protestant—which make up approximately 85% of its total sales—Barber Honda consistently sells four of those five models more slowly than other Honda dealers in the Zone. (Hrg. Tr. Vol. 15, 3704:22-3705:13) (Ex. 377 at Appendix 11-20).

188. Mr. Walter also analyzed Barber Honda's days' supply of Honda vehicles compared to the relative inventory levels of the other Honda dealers in the Zone. While American Honda's own records showed that Barber Honda's available days' supply (which includes all vehicles on the dealer's lot and in transit to the store) exceeded the Zone average 71.8% of the time, Mr. Walter instead analyzed Barber Honda's inventory days' supply—which looks only at the vehicles actually on the dealer's lot. (Hrg. Tr. Vol. 15, 3717:2-15).

189. Regardless of whether available days' supply or inventory days' supply is used, the outcome is the same. Barber Honda's inventory days' supply was higher than the relative inventory levels of the other Honda dealers in the Zone about 69% of the time. (Hrg. Tr. Vol. 15, 3722:4-24) (Ex. 377 at Attachments 13-14). This analysis again shows that, contrary to Protestant's claims, Barber Honda actually had higher relative inventory levels than other dealers in the Zone, and was selling its inventory at a slower rate than those other Honda dealers. (*Id.*).

190. There is no dispute that Barber Honda often had access to inventory on its lot that it was unable to sell quickly. American Honda regularly issues reports showing the amount of "aged inventory" each dealer has on its lot, which reflect the inventory that has been on the dealer's lot over 90 days. On several occasions, American Honda sent Barber Honda reports showing that the dealership had 75 or more units of aged inventory on its lot. (Ex. R-388 and R-395). For example, in October 2017, American Honda informed Protestant that 118 of the 298 vehicles on its lot,

approximately 40% of its total inventory at that time, were over 90 days old. (Ex. R-395 and R-396).

191. Barber Honda's Dealer Manager Jonathan Ekegren acknowledged that the vast majority of this aged inventory had come directly from American Honda, had been on Barber Honda's lot for over 90 days, and conceded that this inventory were vehicles the dealership could have used to make additional sales. (Hrg. Tr. Vol. 11, 2679:2-2680:3).

192. Mr. Ekegren also admitted that it is "not ideal" for the dealer to have vehicles on its lot for a long time, and that doing so increases its floor-plan financing expense for those vehicles. (Hrg. Tr. Vol. 11, 2680:11-21). Consistent with Mr. Ekegren's testimony, Mr. Walter found that Barber Honda's new vehicle floor-plan financing expense significantly exceeded that of other similarly-situated Honda dealers—again demonstrating that Barber Honda had excess inventory and was turning its inventory much too slowly. (Ex. 379 at Attachments 26-27) (Hrg. Tr. Vol. 16, 3741:2-11).

193. As stated above, Mr. Stockton did not perform any allocation analysis similar to that prepared by Mr. Walter and he offered no substantive opinions or testimony to contradict any of the analysis performed by Mr. Walter. (Hrg. Tr. Vol. 17, 4026:21-22).

194. With respect to Barber Honda's allocation of new vehicles from American Honda, the undisputed evidence presented in this case establishes that Barber Honda consistently: (1) had a higher available days' supply of vehicles than the rest of Zone 12; (2) had a higher inventory days' supply of vehicles than the rest of Zone 12; (3) sold its inventory at a slower pace than Zone 12 Honda dealers; (4) had about 65% of its inventory available each month to make additional sales; (5) had substantial aged inventory on its lot; and (6) had higher new vehicle floor-plan financing expense than similarly sized and similarly located Honda dealers.

195. Given these facts, there is no support for Protestant's claim that it did not receive enough Honda vehicles to support its sales. As a result, there is no evidence to support Protestant's claim that its efforts to provide adequate competition in the market were hampered by American Honda's failure to provide the dealership with sufficient vehicle allocations.

196. The evidence supports the conclusion that Barber Honda is not providing adequate competition and convenient customer care in the Bakersfield market.

**Findings Related to the Establishment Would Increase Competition
and Therefore be in the Public Interest**

(Veh. Code § 3063(c))

197. As discussed above, Barber Honda is the only Honda dealer available to sell new vehicles and provide service for customers within a 67-mile radius of its location, yet in-sell from other Honda dealers more than 67 miles away has continued to increase. As of October 2017, 31.4% of all customers who purchased a Honda vehicle in Barber Honda's own ASA bought their vehicle from another Honda dealership more than 67 miles away. (Ex. R-342). By June 2019, this number had grown to over 34%. (Ex. R-403).

198. The evidence suggests that the inadequacies in customer convenience and customer care brought on by having only one Honda dealer in the Bakersfield market have resulted in long-term underperformance for the Honda brand in Bakersfield, as discussed at length above.

199. Finally, as stated above, the Ekegrens and Mr. Stockton conceded that as long as Barber Honda continues operating, this new dealership would provide another touch point for customers, improve customer choice and convenience in the market, improve customer access to the brand, increase service capacity, increase employment, and increase the local tax base—all of which are good for customers and the public interest. (Hrg. Tr. Vol. 10, 2311:25-2313:23) (Stephen Ekegren) (Hrg. Tr. Vol. 11, 2713:7-2714:25) (Jonathan Ekegren) (Hrg. Tr. Vol. 13, 2973:17-2974:4) (Ted Stockton). As such, the proposed new dealership will have a positive effect on competition, consumers, and the public interest.

DETERMINATION OF ISSUES

200. Protestant has sustained its burden of proof to establish that it has a permanent investment in its dealerships, although the vast majority of that investment was made 15 or more

years ago. However, Intervenor has also established that Galpinsfield already has made a substantial permanent investment in its proposed dealership but has not yet had the benefit of operating a dealership to recoup that investment, and if permitted to be established as a Honda dealer, would continue to make additional permanent investments in the dealership and in the Bakersfield market, overall.

201. Protestant has not sustained its burden of proof to show that the proposed relocation would have an adverse effect on the retail motor vehicle business or the consuming public in the RMA.

202. Protestant has not sustained its burden of proof to show that the proposed relocation would be injurious to the public welfare.

203. Protestant has not sustained its burden of proof to show that the existing Honda dealer in the RMA, Barber Honda, is providing adequate competition and convenient consumer care in the RMA, including the adequacy of motor vehicle sales and service facilities, equipment, supply of vehicle parts, and qualified service personnel.

204. The proposed relocation will increase competition and therefore be in the public interest.

205. Protestant has not established any existing circumstances that provide good cause for not permitting the proposed establishment of a new Honda dealer at the Proposed Location in Bakersfield.

PROPOSED DECISION

Based on the evidence presented at the hearing and the findings herein, Protestant has not met its burden of proof under Vehicle Code section 3066(b) to establish there is good cause not to permit the establishment of a new Honda dealership at the Proposed Location at the intersection of 7th Standard Road / Merle Haggard Boulevard and Industry Parkway in North Bakersfield, California.

Accordingly, IT IS HEREBY ORDERED that the Protest in the above-captioned matter is overruled. Respondent is permitted to establish Intervenor Galpinsfield as a new Honda dealer at the Proposed Location.

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

DATED: _____, 2020

By: _____
DWIGHT V. NELSEN
Administrative Law Judge

DATED: March 30, 2020

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**STATE OF CALIFORNIA
NEW MOTOR VEHICLE BOARD**

In the Matter of the Protest of:

BARBER GROUP, INC., d/b/a BARBER
HONDA,

Protestant,

v.

AMERICAN HONDA MOTOR CO., INC.,

Respondent,

GALPINSFIELD AUTOMOTIVE, LLC,

Intervenor.

PROTEST NO.: PR-2539-17

**INTERVENOR GALPINSFIELD
AUTOMOTIVE, LLC'S
POST-HEARING OPENING BRIEF**

Pursuant to the Order Establishing Post-Hearing Briefing Schedule, Intervenor Galpinsfield Automotive, LLC ("Intervenor" or "Galpinsfield") hereby files its Post-Hearing Opening Brief.

INTRODUCTION AND BACKGROUND

In September 2015, Galpinsfield was selected by Respondent American Honda Motor Co., Inc. ("American Honda") as the candidate for a proposed new Honda dealership in Bakersfield, California. Since that time, and even during the application process leading up to it, Galpinsfield has been eager to capture the significant opportunity that is available for additional Honda sales in the Bakersfield market. Galpinsfield's commitment to this open point, and the opportunity it presents, is evidenced by Galpinsfield's substantial investment of time, effort, and money over the past five years. The evidence presented during the hearing clearly demonstrates that there is significant opportunity for both Galpinsfield, as the newcomer to Bakersfield, and Protestant, which has been established in the Bakersfield community for over 45 years, to increase sales, improve

competition, expand their respective dealership operations, and improve representation for Honda customers.

A. The Galpin Organization

Galpinsfield is part of the Galpin organization, a dealer group that currently operates nine dealerships in and around the San Fernando Valley. The cornerstones of the Galpin organization are Herbert F. (“Bert”) Boeckmann, II and Herbert F. (“Beau”) Boeckmann, III. Bert Boeckmann and Beau Boeckmann will be the majority owners of Galpinsfield, along with Jeffrey E. Skobin, who will be a minority owner. (Exhibit R-366).

Bert Boeckmann brings 67 years of experience in the automotive industry to Galpinsfield. He began working for Galpin Motors, a Ford dealership in North Hills, California, as a salesman in 1953, and later became the sole owner of Galpin Motors in 1968. (Hrg. Tr. Vol. 8 Pages 1809:22-1810:11) (Exhibit J-20 at AHM_00065904-23). Since getting his start in 1953, Bert Boeckmann has grown Galpin Ford into one of the largest volume Ford dealerships in the world. (Hrg. Tr. Vol. 8 Page 1888:5-9). In addition, he has strongly supported the retail automotive industry and his community through his past service as Director of the California New Motor Vehicle Board and numerous positions with the California Motor Car Dealers Association, among other civic, philanthropic, and charitable endeavors. (Exhibit J-20 at AHM_00065907-14).

His son, Beau Boeckmann, also grew up in the automotive industry and worked full time in nearly every area of dealership operations. (Hrg. Tr. Vol. 8 Pages 1948:2-1949:4). He currently serves as the President and COO of the Galpin organization, and in that role oversees the operations of all Galpin dealerships. (Hrg. Tr. Vol. 8 Pages 1749:17-1750:19; 1818:11-1819:3). Among other positions in the automotive industry, Beau serves on Ford Motor Company’s Product Committee and Aston Martin’s Dealer Advisory Board. (Hrg. Tr. Vol. 8 Page 1820:2-19). Jeff Skobin, the third owner of Galpinsfield, is Vice President of Non-Dealership Operations for Galpin, and is also in charge of the Galpin’s advertising and marketing department. (Hrg. Tr. Vol. 8 Page 1826:7-15).

Over time, Bert Boeckmann expanded the Galpin organization beyond just Ford to the point where Galpin now operates franchises for nine different automotive brands: Ford, Lincoln, Volvo,

Jaguar, Aston Martin, Lotus, Volkswagen, Mazda, and Honda.¹ (Hrg. Tr. Vol. 8 Pages 1748:24-1749:5). Galpin has been fortunate to experience great success with these brands as well. Galpin Honda, which was established as an open point in 2006, grew from a fledgling store to the #2 volume Honda dealer in the United States. (Hrg. Tr. Vol. 8 Pages 1953:5-10; 1980:10-12). Despite its success, however, Galpin remains, at its core, a family owned and operated dealer group. Bert Boeckmann remains involved in the day-to-day operations of the Galpin organization and is the primary decision maker for the organization. (Hrg. Tr. Vol. 8 Pages 1854:16-1855:3). He grew the Galpin organization to what it is today organically over a long period of time by having a “servant’s mentality,” recognizing that Galpin is in business to serve its customers. (Hrg. Tr. Vol. 8 Pages 1950:12-25).

The Galpin organization takes pride in its culture and has found success by building value in its brand and its customers rather than trying to undersell competing dealers. (Hrg. Tr. Vol. 8 Pages 1959:21-1960:10). Galpinsfield will leverage the considerable experience of its owners and the proven strength of its corporate culture to establish a Honda dealership in Bakersfield that will greatly improve competition with other brands, significantly increase consumer convenience and access to the Honda brand, and benefit the public welfare in Bakersfield.

B. Galpinsfield’s Candidacy and Assessment of Opportunity in Bakersfield

Galpin first learned of the Bakersfield open point through the former General Manager of Galpin Honda, Ed Hartoonian. (Hartoonian Depo I Pages 79:15-80:21). Mr. Hartoonian looked at performance data on the Bakersfield market to see if there was merit to this opportunity and determined it was a viable and exciting option for Galpin to pursue. (Hartoonian Depo I Page 81:2-9). Specifically, he looked at sales data, the size of the Bakersfield market, Honda’s market share, Toyota’s market share and other competitive data. (Hartoonian Depo I Page 84:1-17). Mr. Hartoonian then presented that information to Galpin’s executive committee, (Hartoonian Depo I Pages 81:13-82:15), which ultimately decided to apply for and pursue the open point opportunity. (Hrg. Tr. Vol. 8 Page 1753:4-8). The Galpin organization prepared a detailed application package

¹ In addition to these nine existing franchises, Mr. Boeckmann testified that Galpin was in the process of constructing dealership facilities for new Porsche and Land Rover franchises. (Hrg. Tr. Vol. 8 Page 1916:17-22).

demonstrating the history and success of its operations, Galpin's proven business model, and its plans and projections for the North Bakersfield open point. (*See generally* Exhibit J-20). Galpinsfield went through the time and effort to prepare and submit this application package because it believes in the Honda brand, and because Bakersfield represents a tremendous opportunity to grow sales and service in an underrepresented market. (Hrg. Tr. Vol. 8 Page 1832:2-5).

This opportunity was not recognized solely by American Honda and Galpinsfield. In total, thirty-three dealer candidates expressed interest in the open point, and of those thirty-three interested parties, nineteen submitted candidate packages, including Galpinsfield. (Hrg. Tr. Vol. 7 Page 1388:1-7) (Ex. J-21 at AHM_00065116). Of those nineteen candidates, Galpinsfield was one of ten invited to give an in-person presentation to American Honda at its Zone office in Walnut Creek, California. (Hrg. Tr. Vol. 7 Page 1391:10-14) (Exhibit J-21 at AHM_00065116). In December 2014, Galpinsfield gave a candidate presentation to several American Honda representatives, during which Beau Boeckmann along with Ed Hartoonian presented Galpinsfield's vision and business plan for the new dealership. (Hrg. Tr. Vol. 7 Page 1391:18-19; Hrg. Tr. Vol. 8 Page 1755:17-23) (Exhibit J-21 at AHM_00065118). American Honda's witnesses testified that Galpinsfield's presentation stood out for the depth of information as well as the open, candid manner in which Mr. Boeckmann and Mr. Hartoonian approached the opportunity. (Hrg. Tr. Vol. 7 Pages 1392:6-1393:8). In September 2015, American Honda unanimously chose Galpin as the candidate for the Bakersfield open point. (Hrg. Tr. Vol. 2 Page 398:9-22).

C. Galpin's Investment and Commitment to the Open Point

After being selected for the open point, Galpinsfield moved quickly to secure property for the new dealership, further demonstrating its enthusiasm and belief in the opportunity present in the Bakersfield market. In May 2016, Galpinsfield paid over \$5 million to acquire five adjacent parcels of land for the future construction of a new Honda dealership at the intersection of several major thoroughfares in the North Bakersfield area. (Exhibits J-22 and I-506) (Hrg. Tr. Vol. 8 Pages 1968:12-23; 1971:18-1973:2). The property, which is 9.1 miles air miles and 10.2 driving miles from Barber Honda's dealership, (Ex. 151 at Tab 4, Pages 11 and 13), is located just off of Highway

99 along 7th Standard Road (also known as Merle Haggard Drive). (Hrg. Tr. Vol. 8 Page 1972:9-16). It is also located in close proximity to the facing Toyota dealer, which was one of the reasons Galpinsfield selected that property. (Hrg. Tr. Vol. 8 Page 1972:17-21). That proximity to Highway 99, as well as its primary competitor Toyota, makes the site extremely convenient for consumers. (Hrg. Tr. Vol. 8 Pages 1972:22-1973:2). Not only is the proposed location extremely convenient and well situated to promote competition, but it is also the only reasonable site for a second dealership, something which even Protestant's expert acknowledged. (Hrg. Tr. Vol. 13 Pages 2999:17-3001:6).

Since acquiring the property in 2016, Galpinsfield has incurred significant holding costs for property taxes, insurance and the like. (Hrg. Tr. Vol. 8 Pages 1968:24-1969:2). Going forward, Galpinsfield will continue to incur substantial costs and will make significant additional investments in the dealership before it is able to sell its first vehicle. Beau Boeckmann, who is intimately familiar with the process of being awarded an open point, building a facility, and operating a new franchise, testified that Galpinsfield is "years away" from opening, given the time needed to prepare plans, get approvals, and actually build the physical dealership facility. (Hrg. Tr. Vol. 8, Page 1816:10-14). Notwithstanding these expenses and the years it will take for the new dealership to open, Galpinsfield continues to believe that there is substantial opportunity for a second Honda dealer in Bakersfield, and that this opportunity will only grow in the future. (Hrg. Tr. Vol. 8, 1977:13-24). Galpinsfield would not have incurred these substantial costs and invested the time and energy it has into this Protest if it did not believe that it had the opportunity to be successful and profitable in Bakersfield. (Hrg. Tr. Vol. 8 Page 1969:14-24).

LEGAL STANDARD

Pursuant to the Vehicle Code, the burden of proof in this case is on Protestant, not American Honda or Galpinsfield. Specifically, the issue before the Board is whether *Protestant* has established there is good cause *not* to allow American Honda to enter into a franchise with Galpinsfield to establish the proposed new Honda dealer in North Bakersfield. Cal. Veh. Code §§ 3062(a)(1); 3066(b). The good cause factors for making this determination are set forth below:

In determining whether good cause has been established for not entering into a

franchise . . . of the same line-make, the board shall take into consideration the existing circumstances, including but not limited to, all of the following:

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

Cal. Veh. Code § 3063. For the reasons set forth below, Protestant has not met this burden.

ANALYSIS

I. Galpinsfield Has Made a Substantial Investment in the Proposed New Dealership and Will Continue to Invest in the Dealership and the Bakersfield Community.

There is no dispute that Galpinsfield has made a substantial and permanent investment in the proposed dealership. Shortly after being selected as the proposed operator for this open point, the Galpin organization invested a significant amount of money to acquire the proposed site in North Bakersfield. (Hrg. Tr. Vol. 8 Page 1968:12-23). Specifically, in May 2016, Galpinsfield paid over \$5 million to acquire five adjacent parcels of land for the future construction of a new Honda dealership at the intersection of several major thoroughfares in order to best serve customers. (Exhibits J-22; I-506) (Hrg. Tr. Vol. 8 Pages 1968:12-23; 1971:18-1973:2). In the past several years during the pendency of this protest, Galpinsfield also has continued to pay significant holding costs for this property without any profit, including property taxes, insurance, and other expenses. (Hrg. Tr. Vol. 8 Pages 1968:24-1969:2). Beau Boeckmann testified that it will take years for the new dealership to be built and open for business, meaning its already substantial holding costs will continue to grow. (Hrg. Tr. Vol. 8, Page 1816:10-14).

Galpinsfield's investment will only increase upon approval for the establishment of a

second Honda dealer in Bakersfield. Galpinsfield will construct a brand-new dealership facility from the ground up, as the proposed dealership location is currently undeveloped. (Hrg. Tr. Vol. 8 Page 1911:8-17). It will also invest considerable resources in hiring and training staff, providing good paying jobs to area residents. (Hrg. Tr. Vol. 8, Pages 1814:8-1815:20). As Stephen Ekegren acknowledged, a second Honda dealership in Bakersfield will grow the tax base, keeping money in Bakersfield to support emergency services, first responders, and public services generally. (Hrg. Tr. Vol. 11 Page 2084:10-21). Accordingly, even though it will not be able to invest additional amounts in the proposed new dealership until resolution of this protest, Galpinsfield already has made a substantial and permanent investment in this proposed dealership and its investment is expected to grow once it is allowed to further invest in the Bakersfield market.

II. The Proposed New Dealership Will Greatly Benefit the Consuming Public.

The Galpin organization also has a strong record of success with the Honda brand that will greatly benefit customers in the Bakersfield market. As mentioned above, in 2007, Galpin opened Galpin Honda in Mission Hills, California, and grew that dealership to become the #2 volume Honda dealer in the country. (Hrg. Tr. Vol. 8 Page 1953:5-10). Galpin's demonstrated success, along with its commitment to charity and the communities it serves, formed the basis of American Honda's decision to select Galpinsfield as the candidate for the proposed new Honda dealership in North Bakersfield. (Hrg. Vol. 2 Page 227:12-25). Galpin's business philosophy is embodied by its founder, Bert Boeckmann, who sincerely cares about every customer, every employee, and the communities where Galpin does business. (Hrg. Tr. Vol. 8 Pages 1809:24-1810:11). Beau Boeckmann has taken up that mantle and works every day to ensure that the Galpin culture is embraced and that customers, employees, and communities are being genuinely cared for. (Hrg. Tr. Vol. 8, Pages 1818:11-1819:3).

Indeed, the Galpin organization has established a proven record of caring for its customers. The proof of Galpin's genuine commitment to its customers is borne out in its consistently strong customer satisfaction scores at all of its dealerships, further demonstrating that Galpin knows how to take care of customers. (Hrg. Tr. Vol. 5 Pages 1401:4-1402:4). To ensure this commitment follows Galpin into Bakersfield, Beau Boeckmann testified that Galpinsfield will ensure that it has

an on-site general manager for the dealership who lives in the community and will ensure that Galpin's customer-centric business model and corporate culture are fully embraced by its employees. (Hrg. Tr. Vol. 8 Pages 1812:21-1813:15). Similarly, the Galpin organization works very hard to ensure it enjoys a positive reputation amongst its own employees and staff. It has a demonstrated record of employee longevity, with many employees working for the organization for ten, fifteen, even as long as forty-five years. (Hrg. Tr. Vol. 8 Page 1964:12-25). Galpin will apply the same winning formula to the proposed Honda dealership in Bakersfield to ensure that employees are hired, properly trained, and retained. (Exhibit J-20 at AHM_00066022-24). Galpin is also very involved in the communities where it operates, including with local schools, PTAs, little leagues, the police commission, local hospitals, children's homes, wheels for humanity, and other programs. (Hrg. Tr. Vol. 5 Pages 1402:5-1403:9).

During the hearing, Protestant made much of the demographics in Bakersfield, particularly the fact that Bakersfield has a large Hispanic community. Mission Hills, where Galpin Honda operates, also has a large Hispanic population, and Galpin is very experienced in serving Hispanic customers. (Hrg. Tr. Vol. 8 Page 1962:5-18). Galpin honors its Hispanic customers in the way it honors all of its customers, by ensuring that everyone who comes to a Galpin dealership is treated equally and with respect. (Hrg. Tr. Vol. 8 Page 1961:17-22). That includes hiring personnel who are able to communicate with Hispanic customers in Spanish rather than English if they prefer. (Hrg. Tr. Vol. 8 Pages 1961:23-1962:4). In addition, Galpin has a great deal of experience marketing to Hispanic customers. Jeff Skobin, one of Galpinsfield's owners and the Galpin organization's Vice President in charge of marketing and advertising, is himself Hispanic and Spanish speaking, and he is intimately involved in Galpin's marketing efforts towards the Hispanic community. (Hrg. Tr. Vol. 8 Pages 1960:22-1961:10). Galpin has particular experience marketing Honda products and has found that the Honda brand has been quite well-received in the Hispanic community. (Hrg. Tr. Vol. 8 Page 1961:11-16).

In all of its marketing efforts, Galpin does not advertise deep discounts or do anything that could be misleading to consumers, and it does not advertise on price alone in a way that would undermine vehicle or brand value. (Hrg. Tr. Vol. 8 Pages 1959:21-1960:10). Galpin has become

successful through building relationships with customers and through word of mouth referrals from those satisfied customers. (Hrg. Tr. Vol. 8 Pages 1949:8-1951:19). It will apply the same strategy in Bakersfield to create a positive customer experience, further benefitting consumers in the market.

The establishment of Galpinsfield as a new Honda dealer in North Bakersfield will also benefit consumers by increasing consumer choice and access to the Honda brand. As set forth above, Galpinsfield will build a new Honda facility at the intersection of Highway 99 and Merle Haggard Drive, two major thoroughfares in Bakersfield. (Hrg. Tr. Vol. 8 Pages 1910:10-19; 1972:11-16). The proposed dealership location will be easily accessible and to customers traveling along Merle Haggard Drive or as they exit Highway 99. (Hrg. Tr. Vol. 8 Pages 1972:11-1973:2) (Stipulated Facts Regarding Market Drive ¶ 15). The proposed site also is in close proximity to North Bakersfield Toyota, which will allow customers to easily shop the Honda and Toyota brands. (Hrg. Tr. Vol. 8 Page 1972:17-21) (Stipulated Facts Regarding Market Drive ¶ 17). In addition, adding a new Honda dealership in this area will greatly improve customer convenience, bringing it in line with Toyota and other Honda competitors. (Exhibit R-376 at A-65). Taken as a whole, the establishment of Galpinsfield as a new Honda dealer in North Bakersfield will greatly benefit consumers by bringing Galpin's demonstrated record of high customer satisfaction and investment in its community to the market while greatly improving consumer access to the Honda brand.

III. The Proposed New Dealership will have no Material Negative Effect on the Retail Motor Vehicle Business in the RMA or on Protestant.

Despite the clear benefits of having a new Honda dealership in North Bakersfield, in its filings and throughout the hearing, Protestant repeatedly claimed that the Board should find good cause not to allow this new dealership because it would be operated by Galpin. On the one hand, Protestant claims that the Galpin organization is simply too strong and too good of a dealership group to be permitted to compete in this market. In the next breath, however, Protestant claims that Galpin is a "rudderless ship" that lacks sufficient management and will never be able to establish a competitive facility in Bakersfield. These two theories are wholly inconsistent and irreconcilable, and they both lack merit for several reasons.

A. Galpinsfield Intends to Compete with the Other Brands in Bakersfield—in Partnership with Protestant—not to the Detriment of Protestant.

Protestant first claims that Galpinsfield being the candidate provides good cause not to allow this new point because it is too strong, too competitive, and would harm Protestant's business. In particular, Protestant alleges that Galpin is a "big LA" dealer group that makes lots of sales that could come into the market, build a huge facility, steal its employees, establish low prices, and plan to sustain long-term losses in an effort to undercut Protestant and its business. These theories, however, simply are not supported by the evidence.

These allegations are based almost entirely on pure speculation about what Galpinsfield's business practices possibly could be in Bakersfield. Although Protestant made several allegations about Galpinsfield's alleged plans and intentions, Stephen and Jonathan Ekegren both testified that they had virtually no knowledge of the Galpin organization or the Boeckmanns other than through this protest process. (Hrg. Tr. Vol. 10 Pages 2405:23-2406:18; Vol. 11 Pages 2711:4-22). In fact, the Ekegrens admitted they are not familiar with Galpin's dealership operations, have never seen their financial statements, and are not familiar with their pricing strategies. (Hrg. Tr. Vol. 11 Page 2712:11-19). The Ekegrens also testified that they have nothing bad to say about Galpin, how it operates a dealership, how it treats customers, or its reputation as a dealer. (Hrg. Tr. Vol. 10 Pages 2406:19-2407:5; Vol. 11 Pages 2711:23-2712:10).

The actual evidence presented on these issues shows that Galpinsfield plans to be a **good business partner with Barber Honda**, not undercut them. Contrary to Protestant's claims on pricing, Galpin's internal policy is not to advertise deep discounts or below market prices, and Mr. Boeckmann made clear that he is not in the business of losing money to gain market share. (Exhibit J-20 at AHM_065946) (Hrg. Tr. Vol. 8 Pages 1859:9-24; 1959:13-1960:14). In fact, while Protestant implied that Galpinsfield's pro forma projects it may lose money in the first two years because of some strategy to undercut the market, this is entirely untrue.² Instead, Galpinsfield's

² Although Protestant also claims that Galpinsfield's pro forma shows the new dealership would have to make over 2,000 new vehicle sales to be profitable, this also is not true. As Mr. Boeckmann testified, new vehicle sales are not a large profit center for a car dealership any more. (Hrg. Tr. Vol. 8 Pages 1837:21-1839:22). There are many factors that have a much larger effect on profitability, including service work, parts, used vehicle sales, and operating expenses. (*Id.*) (Hrg. Tr. Vol. 7 Page 1395:3-1396:3). Moreover, Galpinsfield's pro forma shows a profit in year three—not because of the number of sales it hopes to make—but because the significant start-up costs associated with a new dealership likely would be substantially abated after two years. (*Id.*).

projected loss in its first few years simply reflects its multi-million-dollar investment in the proposed site, a new facility, and other start-up costs it would incur in those years. (*Id.* 1834:6-23).³ Similarly with regard to Protestant's claim about its employees, Galpin has an express policy against poaching or soliciting other dealership's employees. (*Id.* 1966:2-1967:8). Mr. Boeckmann also made clear that his intention is to compete with the other brands in Bakersfield, and that he wants to have "a wonderful relationship with the Ekegrens" and "go into this market together," not hurt their business. (*Id.* 1966:25-1968:2). Indeed, Stephen Ekegren even admitted the Galpin organization is already engaging in dealer trades with Barber Honda from its current location in Mission Hills. (Hrg. Tr. Vol. 10 Page 2407:2-11).

Similarly, while Protestant hypothesized that Galpinsfield purchased more land than required under American Honda's minimum guides so it could build an oversized facility, this claim is inaccurate and based on speculation. Despite making this claim, the Ekegrens admitted they are not familiar with Galpinsfield's plans for its new facility. (Hrg. Tr. Vol. 11 Page 2712:20-24). Mr. Boeckmann also made clear that Galpinsfield is not planning to build a huge facility that uses this entire property, but instead is planning to build a "normal Honda facility" that meets American Honda's standards. (Hrg. Tr. Vol. 8 Pages 1908:15-25; 1997:1-18). Mr. Boeckmann instead testified that Galpinsfield made the decision to purchase this land for several practical business reasons: (1) the property included five different parcels that were being sold together as one unit; (2) having additional property gives the dealership room to grow, including potentially with used vehicle sales; and (3) the additional property prevents another brand dealer from building a competing store directly next door. (*Id.* 1997:1-18).

The only evidence Protestant actually presented about the Galpin organization was a few analyses by their retained expert, Edward Stockton, looking at specific sales-related information from Galpin's other existing dealerships in other markets. Mr. Stockton looked at the level of cross-sell made by other Galpin dealerships into other dealer markets, and prepared an analysis that if

³ Several American Honda representatives confirmed it is not unusual for a new dealership to project or experience some losses in its first few years given the amount of start-up costs associated with a new point. (Hrg. Tr. Vol. 5 Page 1157:10-1158:4; Vol. 7 Page 1341:17-24).

Galpinsfield were able to perform at the same level as the existing Galpin Honda and Ford dealers, it would outperform the Toyota brand and the opportunity available in Bakersfield. These two analyses, however, are fatally flawed in several respects.

First, Mr. Stockton's conclusions are unreliable and untrustworthy because he chose to limit his analysis to only two existing Galpin dealers—and specifically two of its highest performing dealers—in an effort to artificially inflate his findings. On the other hand, Mr. Farhat from Urban Science recreated this same analysis in an objective way by using *all of Galpin's competitive dealerships*. (Exhibit 407 at A-71.1 and A-71.2) (Hrg. Tr. Vol. 13 Pages 3091:19-3092:4). This analysis revealed that if Galpinsfield performed at the same level as these other Galpin dealerships on average, the new dealership would make approximate 1,725 sales per year in the Bakersfield metro and would raise the brand's performance to 104.1%, just over average. (Exhibit 407 at A-71.1). In fact, if Galpinsfield were to perform at the same level of Galpin Subaru, Galpin Mazda in Santa Clarita, or Galpin Mazda in Van Nuys, the Honda brand's performance would remain slightly below or just at 100%. (*Id.*). This level of performance is more than achievable in Bakersfield, and would still be less than the brand's performance just up the road in Fresno—all without Barber Honda's sales declining even a single unit. (Exhibit 407 at A-71.1 and A-71.2) (Hrg. Tr. Vol. 13 Pages 3054:24-3055:5; 3057:3-23).

Moreover, although Mr. Stockton purportedly looked at the sales made by these Galpin dealers to compare them to the opportunity in the market, he completely failed to evaluate how the Honda and Ford brands were actually performing in those particular markets. Specifically, while Mr. Stockton compared his inflated projection of Galpinsfield's sales to Toyota's brand performance in Bakersfield (which is about 90% of expected), in Mission Hills where Galpin Honda operates, the Honda brand is performing significantly higher at over 113%. (Exhibit R-376 at A-App-99). This is important for multiple reasons. First, Mr. Stockton admitted that Honda currently is the lowest performing brand in the Bakersfield market at only 56.63% of expected, (Hrg. Tr. Vol. 12 Pages 2939:1-2941:3), meaning there is substantial room for additional sales here. Second, Mr. Stockton admitted that a new dealership in Bakersfield would improve Honda's brand performance, and that the brand's performance could increase at a higher rate because it will be

Galpin opening in this market. (Hrg. Tr. Vol. 12 Pages 2875:11-14; 2876:1-7; 2877:20-23). Given these admissions, Mr. Stockton's use of these dealers' sales performance—without any analysis of how the brands are actually performing in those dealers' markets—is biased and unreliable.

There also is no reason to believe that American Honda's selection of a strong operator like the Galpin organization, which prides itself on serving its customers and communities well, should be good cause not to allow this new dealership. Mr. Stockton agreed it is reasonable for a manufacturer to consider strong candidates for open points, and that he does not believe American Honda should seek out a weak operator to open a new dealership. (Hrg. Tr. Vol. 13 Pages 3002:16–3003:2). Similarly, Stephen Ekegren expressly admitted that *Barber Honda would be protesting this new point regardless of whether Galpinsfield were selected* as the operator or whether American Honda had selected some other entirely different candidate. (Hrg. Tr. Vol. 10 Page 2407:13-19). Mr. Ekegren further acknowledged that Barber Honda has been “blessed” to operate as the only Honda dealership in Bakersfield for more than 45 years, which gives him a “home-field advantage,” strong relationships and loyalty with customers, and a strong opportunity to retain its customers even with a new dealership coming to town. (Hrg. Tr. Vol. 10 Pages 2314:3-6; 2316:25-2317:14; Vol. 11 Pages 2612:19-2613:9). Accordingly, there is no support for Protestant's claim that it is unable to compete with Galpinsfield or that Galpinsfield's operation of this new dealership in North Bakersfield will harm its business.

B. Galpinsfield is Ready, Willing, and Able to Meet its Commitments and Serve Customers in North Bakersfield.

Despite claiming that Galpinsfield would be too strong of a competitor in the market, in the very next breath, Protestant claims that the Galpin organization is “a rudderless ship” that will never be able to operate in Bakersfield. Specifically, although Protestant alleges Galpinsfield would build too large of a facility for this market, Protestant also claims that Galpinsfield would never complete a permanent building and instead would struggle to establish some sort of temporary structure. Protestant also claims that Galpinsfield cannot establish firm ownership, management, and staffing for the new dealership. Nothing could be further from the truth.

First, there is no evidence that Galpinsfield is unable to build a quality permanent Honda

facility in North Bakersfield or lacks the intention to do so. After being selected as the candidate, Galpinsfield paid more than \$5 million to purchase five adjacent parcels in North Bakersfield where it plans to build a new Honda dealership that complies with American Honda's guidelines. (Exhibits J-22; I-506) (Hrg. Tr. Vol. 8 Pages 1908:15-25; 1968:14-23; 1997:1-18). Mr. Boeckmann expressly testified that he would not have purchased this property if he did not intend to move forward and build the dealership. (*Id.* 1971:7-11). In addition, when asked by if there is a chance Galpinsfield could establish a temporary structure here, Mr. Boeckmann made clear that a temporary structure is not even possible because he could not put "service bays on dirt." (*Id.* 1911:8-17).⁴ He also made clear that American Honda would never permit the dealership to operate from a temporary structure anyway:

No, absolutely not. We're not allowed to do that. So we have to have the facility completely finished. And once Honda approves of our facility, then we get our license to – their approval to sell and service Honda automobiles.

(*Id.* 1910:10-1911:1). Consistent with this testimony, Section I.F. of the Letter of Intent expressly states that Galpinsfield must build a full facility that meets all Honda requirements before American Honda will execute a Dealer Agreement for the new store. (Exhibit J-23).

Protestant next claims that Galpinsfield was not committed to operating in Bakersfield because it took some time to submit its complete package materials to American Honda, but this claim also is not true. Contrary to Protestant's allegation, in May 2016—just a few months after being selected as the candidate—Galpinsfield invested millions of dollars to acquire the proposed site for this new dealership. (Exhibit I-506) (Hrg. Tr. Vol. 8 Pages 1968:12-23). This investment was entirely at Galpinsfield's own risk. (Hrg. Tr. Vol. 7 Pages 1371:22-1372:6). In fact, in the past several years during the pendency of this protest, Galpinsfield has continued to pay substantial holding costs on this land, including taxes, insurance, and other similar costs. (Hrg. Tr. Vol. 8 Pages 1968:24-1969:2). Furthermore, although American Honda acknowledged that the package process

⁴ Although Protestant attempted to imply that Galpinsfield would establish a temporary facility because the Galpin organization had previously done that for a separate Kia franchise, that was a very different situation. In that case, the Galpin organization purchased an existing Kia franchise and had to move it to a new location quickly. Kia thus actually approached Galpin, recommended a temporary structure, and even recommended the company to build it. (Hrg. Tr. Vol. 8 Page 1791:11-25). The Kia dealership also did not have a temporary service structure, and instead already had an existing service department with multiple service bays. (*Id.* 1911:18-25).

(identifying ownership, identifying property, preparing an attorney's letter, forming a legal entity, etc.) takes a long time even in the fastest of situations, there were extenuating circumstances here. (Hrg. Tr. Vol. 7 Page 1409:12-1410:7). In this case, Galpinsfield was not only working on the structure of the organization, but their chief counsel was in the midst of a number of serious health issues. (*Id.* 1361:19-1362:7) (Vol. 6 Pages 1133:18-1134:7). Indeed, there is no dispute that Galpin specifically told American Honda of these health issues, told American Honda that it was excited about getting the deal done, and simply asked that it be understanding given these circumstances. (*Id.*).

Protestant also claims that Galpinsfield's ability to operate in North Bakersfield is questionable because Ed Hartoonian—the initial proposed GM and 20% owner of the new point—has moved on from the Galpin organization. While Protestant first alleges that Mr. Hartoonian must have made this decision because he did not believe in the viability of the Bakersfield point, there is no evidence to support this claim. Contrary to this position, Mr. Hartoonian himself—who is now a disinterested third party—made clear that he believes there is substantial opportunity for the Honda brand in Bakersfield. During his depositions, Mr. Hartoonian testified that when he first learned about this open point, he analyzed the opportunity in Bakersfield by looking at data on the sales in the market, the size of the market, Honda and Toyota's market share, and other competitive data. (Hartoonian Depo I 83:5-9; 84:1-17). Based on this analysis, Mr. Hartoonian concluded that the Honda brand is underrepresented in Bakersfield and that there is substantial opportunity for additional sales. (*Id.* 98:1-99:19). He also testified that Bakersfield would be a "perfect fit" for Galpin because it was similar to Galpin Honda's market in Mission Hills, had a large blue collar and Hispanic population, and was another underperforming area where Galpin could improve Honda's brand performance. (*Id.* 87:15-88:15). Importantly, Mr. Hartoonian also confirmed that between first learning of the open point and his decision to leave Galpin in July 2018, his ***assessment of the amount of opportunity in Bakersfield never changed***, and he never had any concern that Galpinsfield would be able to meet its commitments and commence operations in Bakersfield. (Hartoonian Depo II 71:16-23; 75:20-76:1).

Mr. Hartoonian also made abundantly clear that he decided to leave the Galpin organization

because he wanted to pursue his dream of owning and operating his own dealership—not because of anything related to the Bakersfield open point. Mr. Hartoonian confirmed that he started looking for opportunities to acquire a Nissan dealer, and that when he learned of an opportunity in Virginia, he decided to leave so that he could pursue that opportunity and own his own store. (Hartoonian Depo II 34:10-15; 39:18-40:4; 57:11-21). In fact, as of this day, Mr. Hartoonian is the owner, general manager, and dealer principal of a Nissan dealership in Mechanicsville, Virginia. (Hartoonian Depo I 28:10-22; 33:6-8). To remove any doubt, Mr. Hartoonian also specifically testified that the Bakersfield open point “had nothing to do with me leaving.” (Hartoonian Depo II 42:10-18). Accordingly, there is zero evidence that Mr. Hartoonian decided that he needed to leave the Galpin organization entirely, change jobs, and move across the entire country just because he was no longer interested in the new dealership.

Moreover, Protestant’s claim that the new dealership is somehow in jeopardy because Mr. Hartoonian is no longer part of the deal also lacks merit. Multiple witnesses from American Honda confirmed they had no concerns about Mr. Hartoonian leaving the organization, and that they did not choose Galpin because of one person but because of the organization’s overall culture and record of accomplishment of success. (Hrg. Tr. Vol. 4 Page 978:2-25; Vol. 7 Pages 1399:4-1402:4). Since Mr. Hartoonian left Galpin Honda in Mission Hills, the dealership has appointed a new General Manager from within the Galpin organization’s deep bench of experienced and well-qualified managers, and the dealership has maintained its strong sales performance. (Hrg. Tr. Vol. 4 Page 978:2-25; Vol. 5 Pages 1030:6-1031:1; Vol. 8 Pages 1776:14-1778:10; 1803:13-18). The Galpin organization also has a proven track record of solid sales performance and high customer satisfaction scores across all of its other dealers—none of which were operated by Mr. Hartoonian. (Hrg. Tr. Vol. 7 Pages 1399:4-1402:4). In fact, American Honda actually provided Galpinsfield with an Amended Letter of Intent acknowledging that Mr. Hartoonian has left the deal, moving forward with the proposed dealership, and simply providing for Galpinsfield to nominate a qualified General Manager for the new dealership once it is ready to begin operations. (Exhibit R-366). Accordingly, there is no support for Protestant’s claim that Galpinsfield is a rudderless ship, not committed to opening the new point, or unable to meet its commitments here.

IV. The Proposed New Dealership Will Significantly Increase Competition and Be In the Public Interest.

Finally, there is no dispute that Galpinsfield will greatly improve competition by establishing a second location for Honda sales and service in Bakersfield. The data shows that there is a significant amount of in-sell in Bakersfield by Honda dealers 60-plus miles away from Bakersfield. Between 30-35 percent of all Hondas sold in Bakersfield come from dealers outside the market. (Exhibits R-342 and R-403). Between 2013 and 2017, Barber Honda's sales decreased from 1,623 units to 1,507 units, even as the number of Hondas sold in Bakersfield increased from 1,799 to 1,957. (Exhibit R-376 at A-27; A-App-11; A-App-23). This is strongly indicative of consumers' dissatisfaction with the level of competition existing in the Bakersfield market.

As a result of this dissatisfaction, the Honda brand is greatly underperforming—Protestant's own expert presented evidence that Honda is the lowest performing brand in Bakersfield, well below other import brands like Mazda, Hyundai, Nissan, Toyota, Subaru, Kia, and Volkswagen. (Exhibit P-151 at Tab 16 Page 1) (Hrg. Tr. Vol. 12 Pages 2939:1-2941:3). This underperformance is all the more surprising considering that in Mr. Boeckmann's experience the Honda brand is uniquely suited to consumers in Bakersfield and throughout the State of California and is poised to continue growing in popularity and market share. (Hrg. Tr. Vol. 8 Pages 1864:22-1866:9).

Protestant has raised concerns that any success of Galpinsfield will come at the expense of Barber Honda. Contrary to these concerns, however, Galpinsfield's objective is to increase market share and grow through competition *with other brands* such as Toyota, which is dominating the market, as well as other import brands like Nissan which have outsized market share in Bakersfield due largely to the underperformance of the Honda brand. (Hrg. Tr. Vol. 8 Pages 1831:19-1832:5; 1866:11-1867:3; 1967:9-11). Indeed, Beau Boeckmann testified that Galpin has no interest in hurting Barber Honda and instead hopes to grow in such a way to allow both Honda dealers to be successful. (Hrg. Tr. Vol. 8 Page 1967:4-18). Mr. Boeckmann also testified that he considers healthy competition to be beneficial for both dealers and consumers:

I think competition is a good thing. I think it keeps us on our game and makes us better, you know, just like, when you're in a race, people run by themselves, but when they're in a race with somebody else, they run faster.

I do believe that. And I do believe, by having that competition, that consumers will benefit from it from the added convenience, but I also believe that competition makes us better as dealers, and that's a good thing.

(Hrg. Tr. Vol. 8 Pages 1976:23-1977:10). Mr. Boeckmann's experience and view of the benefits of healthy competition is consistent with the analysis of American Honda's expert Sharif Farhat, who studied three other markets where Honda added new dealership and found that in all three, Honda brand performance increased and in almost all cases the existing Honda dealers in the neighboring markets experienced an increase, not a decrease, in their sales. (Exhibit R-376 at A-75 and A-79; Exhibit R-407 at R-20.2). Galpinsfield will promote competition by providing an additional option for consumers in Bakersfield and will thus positively affect the public interest.

CONCLUSION

Based on the foregoing, it is clear that Protestant has not met its burden of proof to show that there is good cause not to permit the establishment of Galpinsfield as a proposed new Honda dealership in Bakersfield. There is substantial and growing need for competition in Bakersfield as evidenced by the data showing that Honda is the worst performing brand in the market and that more and more consumers are choosing to travel long distances to buy a Honda instead of buying from Barber Honda. Galpinsfield hopes to reverse that trend by increasing consumer awareness of the Honda brand by improving consumer convenience and competition. Galpin has a demonstrated record of doing exactly that, all while maintain high levels of customer satisfaction. For all of these reasons, Galpinsfield requests that the ALJ issue an order overruling this Protest and permitting the establishment of Galpinsfield as a new Honda dealer in North Bakersfield.

[Signature Page Below]

DATED: March 30, 2020

GALPINSFIELD AUTOMOTIVE, LLC

By: _____

Alan J. Skobin

General Counsel for Intervenor

Galpinsfield Automotive, LLC

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**STATE OF CALIFORNIA
NEW MOTOR VEHICLE BOARD**

In the Matter of the Protest of:

BARBER GROUP, INC., d/b/a BARBER
HONDA,

Protestant,

v.

AMERICAN HONDA MOTOR CO., INC.,

Respondent,

GALPINSFIELD AUTOMOTIVE, LLC,

Intervenor.

PROTEST NO.: PR-2539-17

**INTERVENOR GALPINSFIELD
AUTOMOTIVE, LLC'S
NOTICE OF JOINDER AND JOINDER
IN RESPONDENT'S PROPOSED
FINDINGS OF FACT AND DECISION**

TO THE NEW MOTOR VEHICLE BOARD, ALL PARTIES AND THEIR COUNSEL:

PLEASE TAKE NOTICE that Intervenor Galpinsfield Automotive, LLC ("Galpinsfield") hereby fully joins in and adopts Respondent American Honda Motor Co., Inc.'s Proposed Findings of Fact and Decision.

For the reasons set forth in Respondent's Proposed Findings of Fact and Decision, as well as those set forth in Galpinsfield's Post-Hearing Opening Brief, filed contemporaneously herewith, Galpinsfield asserts that Protestant has not met its burden of proof to show that there is good cause not to enter into a franchise establishing the proposed Honda dealership that is at issue in this matter. The Protest should therefore be overruled, and the establishment should be allowed.

DATED: March 30, 2020

Respectfully submitted,

GALPINSFIELD AUTOMOTIVE, LLC

By: _____

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STATE OF CALIFORNIA

NEW MOTOR VEHICLE BOARD

In the Matter of the Protest of:

BARBER GROUP, INC., a California corporation,
doing business as BARBER HONDA,

Protestant,

v.

AMERICAN HONDA MOTOR CO., INC., a
California corporation,

Respondent,

GALPINSFIELD AUTOMOTIVE, LLC,

Intervenor.

PROTEST NO. PR-2539-17

**PROTESTANT'S POST-HEARING
REPLY BRIEF TO
RESPONDENT'S POST-HEARING
OPENING BRIEF**

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INTRODUCTION

Remarkably, Respondent, American Honda Motor Co., Inc. (“AHM”), chooses to ignore the current state of the world. The COVID-19 pandemic continues to ravage economies, unemployment numbers continue to soar, and businesses continue to fail. Realizing these existing circumstances are fatal to its arguments and analysis offered at hearing, Respondent simply ignores them.

Instead, Respondent argues a combination of now irrelevant historic data and now meaningless speculative opinions about the future of the Bakersfield market support the proposed establishment of an additional Honda dealership in North Bakersfield—despite the fact current existing circumstances provide demonstrable evidence of good cause to prevent the proposed establishment. Respondent’s arguments are based upon an overstating of the record evidence and speculative predictions of market growth based on now irrelevant data, while turning a blind eye to the real-world realities confronting Bakersfield, California, and the Nation. California is in the grips of an economic and public health disaster not previously experienced in our lifetimes. The Board cannot ignore these existing circumstances. If Barber Honda survives the current recession, it would have no ability to withstand the ruinous competition certain to result from the proposed establishment.

Each of Respondent’s arguments for why the proposed North Bakersfield point should be permitted are premised upon an unreliable aspirational analysis of future growth and opportunity. These aspirational models were of negligible value at the time of the hearing—they are of no predictive value now. The Seasonal Adjusted Annualized Rate (“SAAR”) for U.S. new vehicle sales is currently at its the lowest in 40 years—lower than the 2008 Great Recession. State unemployment is above 15%—surpassing the previous record set in 2010 during the prior recession.¹ The oil industry is crippled.² The Board must take judicial notice of these existing circumstances, which unambiguously demonstrate the

¹ Employment Development Department, May 22, 2020, NR No. 20-20, “California unemployment rate rose to record 15.5 percent in April,” Contacts: Loree Levy/Aubrey Henry, <https://www.edd.ca.gov/newsroom/unemployment-may-2020.htm> (accessed May 28, 2020).

² The Sacramento Bee, April 21, 2020 05:00 AM, updated 03:30 PM, “COVID-19 shutdown is crushing oil prices. Why this part of California isn’t celebrating” by Dale Kasler, <https://www.sacbee.com/news/business/article242153486.html> (accessed May 28, 2020).

RMA cannot support the proposed establishment of the North Bakersfield Galpin Honda dealership.³

In 2008, Respondent determined it was not the appropriate time to attempt to fill the proposed North Bakersfield open point. The current economic crisis is more severe than conditions experienced in 2008. The uncertainty surrounding an expected recovery is unprecedented. It remains to be seen whether Honda will attempt to justify the proposed establishment despite current existing circumstances, or whether it will continue to hope the Board simply ignores them.

Good cause exists to prevent the proposed establishment in consideration of the following key issues AHM fails to adequately address:

- There is no dispute the COVID-19 pandemic has caused devastation to the economies of the U.S., California, and especially Bakersfield. The immediate question is whether Barber Honda will survive current economic conditions—the proposed establishment should not even be on the table at this time;
- Ignoring the current state of the world, AHM continues to cling to its argument the use of a segment adjusted average is a reliable means to judge market performance and available opportunity—it is not;
- AHM continues to offer its unreasonable opportunity analysis as a basis to conclude there exists sufficient opportunity to support two dealers—this analysis must be rejected because

³ The California Evidence Code allows the Board to take judicial notice of the COVID-19 pandemic and its broad economic impact. Judicial notice shall be taken of “[f]acts and propositions of generalized knowledge that are so universally known that they cannot reasonably be the subject of dispute.” (Cal. Evid. Code § 451, subd. (f).) Moreover, judicial notice may be taken of “[o]fficial acts of the legislative, executive, and judicial departments of the United States and of any state of the United States”; “[f]acts and propositions that are of such common knowledge within the territorial jurisdiction of the court that they cannot reasonably be the subject of dispute”; and “[f]acts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy.” (Cal. Evid. Code § 452, subd. (c), (g) and (h).) In response to the COVID-19 pandemic, California Governor Gavin Newsom issued Executive Order N-33-20 requiring non-essential businesses (including new motor vehicle sales departments) to cease operation. Moreover, the millions of American’s out of work as a result of shutdown orders in response to the COVID-19 pandemic is beyond question. There is no reasonable dispute the COVID-19 pandemic is a public health and economic disaster. Similarly, the global drops in oil prices cannot be disputed and are capable of immediate and accurate determination through numerous reliable sources. The Board should take judicial notice of these important, current, and far-reaching existing circumstances that arose after the close of the merits hearing.

- it is designed to always find “opportunity.” Approximately half of all markets in the state will always be shown to exhibit “lost sales” or “opportunity”;
- AHM persists in its refusal to consider local market conditions in Bakersfield and the RMA and their predictable effect on Honda brand market share—Bakersfield exhibits lower incomes, lower credit scores, and higher unemployment than the rest of California—it is unreasonable to expect this market to perform to state average;
 - The oil industry is one of the largest contributors to the Bakersfield economy. This industry has been in decline since at least 2015. Oil is now trading at prices ranging between zero to \$35 per barrel;
 - AHM offers an interpretation of Mr. Farhat’s case study data that is flatly contradicted by the same data—Mr. Farhat’s cherry picked case studies indicate the Bakersfield Honda market share can at best be expected to increase 11-19%.⁴ Even a market share increase of 20% would still result in severe economic injury to Barber Honda;
 - AHM argues market share doesn’t matter when considering likely impact because Mr. Farhat’s case studies show increased raw sales, but these increases occurred *in growing markets*—no plausible argument can be made to support a claim new vehicle sales should be expected to increase during the next 3-4 years; and
 - If this matter were remanded for further evidence, AHM and its experts would be unable to offer the same opinions in regard to expected growth and existing opportunity—these opinions are now demonstrably unreliable.

DISCUSSION

I. BARBER HONDA’S INVESTMENT IS PERMANENT—GALPIN’S IS NOT.

AHM argues it is important to consider the fact Barber Honda has been the only Honda dealer in

⁴ Moreover, in the Baton Rouge case study, the only case study with a market share expansion greater than 15%, there was significant flooding in the area and the local Toyota dealership lost hundreds and hundreds of units of Toyota inventory around the time of the add point. Honda pumped a lot of additional allocation to Team Honda to seize the opportunity in the marketplace. (RT Vol. XVII, 3979:3-3980:2.) As a result, Baton Rouge exhibits a higher increase in market share than can be reasonably expected in Bakersfield.

Bakersfield for more than 45 years. However, AHM ignores that, during this time period, Barber Honda continuously made the necessary investment to expand its capacity to meet the needs of consumers in the Bakersfield market. AHM does not dispute the fact Barber Honda's investment is substantial and permanent. (Respondent American Honda Motor Co., Inc.'s Post-Hearing Opening Brief ("AHM's Brief") at 5:4-7.) The proposed establishment would result in grave harm to Barber Honda and is an imminent threat to its continued viability. Barber Honda's interest in protecting its permanent investment provides good cause to prevent the proposed establishment. This interest far outweighs AHM's interest in adding a second point to match Toyota, outweighs the immaterial benefits to the public interest, and outweighs Galpin's interest in receiving a second Honda franchise at no cost.

AHM incorrectly asserts Intervenor's investment in the property at the proposed location is also a permanent investment—it is not. Galpin made the ill-advised property purchase before it had even executed a Letter of Intent for the proposed North Bakersfield point, with full knowledge a successful Protest challenge might prevent the proposed establishment. (Exh. I-506 (showing the property purchase in approximately May 2016); Exh. J-23 (showing Galpinsfield and AHM entered into the letter of intent on or about September 15, 2017).) Respondent explicitly advised Galpin of this risk, which Galpin freely assumed. (Exh. J-23 at AHM_00065576; *see also* RT Vol. VII, 1371:22-1372:6 (Mr. Hagan indicating he made it clear that Galpin's purchase of property would be at its own risk).)⁵ Moreover, Galpin's land purchase does not represent a permanent investment. The proposed location is a vacant lot with *no improvements*. (Exh. J-29 at ¶ 16.) Galpin purchased the land for fair market value and is free to resell the property for fair market value.

II. THE PROPOSED ESTABLISHMENT WOULD HAVE NO MATERIAL BENEFIT TO THE PUBLIC WELFARE AND WOULD RESULT IN SEVERE ADVERSE IMPACT TO THE RETAIL MOTOR VEHICLE BUSINESS IN THE RMA.

A. **Any possible benefit to consumers would be immaterial and short-lived.**

1. *Bakersfield's historical population growth does not equate to the need for additional Honda representation.*

AHM places strong emphasis on Bakersfield's population growth over the course of the past 45

⁵ Barber Honda uses the same citation format herein as used in its Post-Hearing Opening Brief.

years. However, the record reflects that during this same time period Barber Honda made substantial and permanent investment in expanding its capacity to meet consumers' needs. (*See, e.g.*, RT Vol. IX, 2137:9-17; Exh. P-102; RT Vol. IX, 2108:15-22; Exh. P-112; *see also* Protestant's Post-Hearing Opening Brief at 8:20-9:12 (detailing Barber Honda's investments in its franchise).) Barber Honda was the first dealership to relocate to the current Bakersfield Auto Mall where it constructed a new ground-up facility. (RT Vol. IX, 2025:9-12.) Subsequent to this, Barber Honda purchased surrounding lots to further expand its capacity. (RT Vol. IX, 2110:11-2111:13; RT Vol. IX, 2118:14-2119:14.) Barber Honda also constructed a Quick Lube service department with a separate service drive. (RT Vol. IX, 2035:8-21; RT Vol. IX, 2540:10-18; RT Vol. IX, 2116:23-2118:13.) There is no evidence supporting a conclusion the Bakersfield population growth has overtaken Barber Honda's capacity to adequately serve this population.

In addition, AHM brazenly misstates population growth claiming "the population in the Bakersfield RMA grew from 345,255 in 2010 to 444,443 in 2017." (AHM's Post Hearing Opening Brief at 13:9-11; AHM's Post Hearing Opening Brief at 29:2-9; *see also* AHM's Proposed Findings of Fact at ¶ 98.) However, based on the Exhibit cited by AHM, the population in the Bakersfield RMA was 421,206 in 2010—instead of AHM's suggested growth of approximately 100,000 in seven years, the population of Bakersfield actually grew by approximately 20,000 during this time. (Exh. R-376 at A-34.)

AHM also offers misleading statements concerning population growth in the RMA by falsely claiming "[f]rom 2010 to 2017, the population in the Bakersfield metro increased significantly from 517,258 to 722,714, and the number of households in this area increased from 157,278 to 208,497." (AHM's Post Hearing Opening Brief at 13:12-14; AHM's Post Hearing Opening Brief at 29:2-9; AHM's Proposed Findings of Fact at ¶ 99.) However, from 2010 to 2017 the population trend for the Bakersfield Metro went from 674,283 to 722,714 and the household trend went from 196,608 to 208,497—substantially less than what AHM claims in its brief. (Exh. R-376 at A-37.) AHM's misrepresentation of the evidence described above is a reoccurring theme throughout its brief.

2. *AHM's use of consumer drive distances is misleading.*

AHM argues the average consumer in the North Bakersfield ASA must drive 16.3 miles to reach

any Honda dealership, arguing this is further than other competing brands including Chevrolet, GMC, Toyota, and Ford. (AHM's Brief at 6:22-25.) This argument is misleading in that Chevrolet, GMC, and Ford are *not* primary competitors to Honda. (Exh. J-29 at ¶ 10.) Moreover, the Ford store is actually a single dealer with a satellite location. (RT Vol. IX, 2025:13-24.) The next nearest Chevrolet store is located in Shafter—a small isolated rural town where Honda would not consider adding a dealership. The other GMC and Chevrolet dealerships are located in Delano—also an isolated town where Honda would not consider adding a dealership. (Exh. 376 A-5U; Exh. J-29 at ¶ 23.) These domestic brand dealers cater to the rural communities they serve. There is no evidence to suggest the presence of these outlier dealerships impacts Honda's market share in Bakersfield. Further, these remote dealership locations in no way affect customer convenience within the RMA nor the City of Bakersfield.

Toyota is the only primary competitor to Honda with a second point in Bakersfield—no other manufacturer has determined a second point is needed in this market. There are 26 different brands represented at the Bakersfield Auto Mall. (Exh. J-29 at ¶ 10.) It defies logic to find the remaining 22 brands do not provide adequate consumer convenience to customers.

Finally, the proposed establishment would reduce average drive distance by an immaterial amount. (Exh. J-14 at AHM_00063538 (showing a reduction of 4.1 miles); Exh. J-18 at AHM_00001384 (showing a reduction of 2.1 miles); Exh R-376 at A-65 (showing a reduction of 5.1 miles) AHM's evidence of customer convenience varies widely. In 2014, when AHM made the decision to move forward with the candidate selection for the proposed North Bakersfield point, it did so in reliance on its determination the proposed establishment would reduce average customer drive distance from 13.9 miles to 11.8. (Exh. J-18 at AHM_00001384.) Mr. Farhat's subsequent determination, prepared for litigation purposes, jumps to a 16.3 average drive distance currently with a reduction to 11.2 from the proposed establishment. (Exh. R-376 at A-65.) The more reliable figure is the one AHM relied upon in making its determination to fill the open point—not the latter figure developed by Mr. Farhat for litigation.

The vast majority of Bakersfield vehicle registrations occur in the bottom half of the RMA. (Exh. P-151 at Tab 5.) Any improvement in customer convenience would be immaterial given the proposed location is on the fringe of the population concentration. The inclusion of Delano and Shafter in Mr. Farhat's convenience calculation provides no meaningful information about potential decreased drive

distances *in the RMA*.

3. *The proposed location does not offer beneficial cross shopping opportunities.*

AHM argues the proposed location is in close proximity to the North Bakersfield Toyota dealership and would allow customers easy access to cross-shop between the two brands. (AHM's Brief at 7:7-9.) The Toyota dealership is not visible from the proposed location. Customers would be required to cross Merle Haggard Boulevard to visit the Toyota dealership. (Exh. J-29 at ¶ 17.) Even then, the lone Toyota dealership does not provide the same number of cross-shopping opportunities available to consumers visiting the Bakersfield Auto Mall. (See Exh. J-29 at ¶ 10 (listing 26 franchises in addition to Honda in the Bakersfield Auto Mall).)

Consumers wishing to test drive competing vehicles or "kick the tires" will continue to visit the Bakersfield Auto Mall. However, consumers will price shop digitally for the lowest price. Galpin's entry to the market would necessitate ruinous competition because Galpin is coming into the market with the expectation of losing money. (Exh. J-20 at AHM_00065937.) Moreover, the proposed location would not have the benefits of the Auto Mall location, requiring Galpin severely undercut Barber Honda on price to achieve the *2,000 sales in would require to operate profitably*. (Exh. J 20 at AHM_0006537.) While this competition may provide some short-term benefit to Honda customers, the RMA cannot sustain the level of competition that would follow. The current economic recession further assures ruinous competition would result. The proposed new dealer's robust resources assure Galpin would outlast Barber Honda. (RT Vol. VIII, 1860:1-4 (Beau Boeckmann testifying the Galpin organization is well capitalized and could withstand another recession if it were to hit).)

Respondent's goal from 2007 through the present has always been to match Toyota rooftop for rooftop. (Exh. J-14 at AHM_00063538 and AHM_00063540.) In 2007, AHM also believed the North Bakersfield location would be developed as a second Auto Mall—this is no longer a possibility. (Exh. J-14 at AHM_00063538.) Motels and warehouses are the dominant features surrounding the proposed location. (Exh. J-29 at ¶ 16.) Nevertheless, AHM persists in its effort to establish a second point near Toyota, even in the face of evidence showing the second Toyota point provided *no* appreciable increase in Toyota sales or market share. (Exh. P-154; RT Vol. XII, 2850:15-2852:14; *see also* Protestant's Post-Hearing Opening Brief at 23:10-24:13.) The dual Toyota points survive because they are under common

ownership (RT Vol. XII, 2731:16-2732:4)—this would not be the case with the proposed Honda experiment.

B. Respondent’s claim it merely seeks to “right size” the market is without support.

Respondent argues the proposed establishment would “right size” the market for both Honda dealerships. (AHM’s Brief at 34:24-26.) AHM claims “Bakersfield is the largest market in the country with only one Honda dealer.” (AHM’s Brief at 11:14-15, 16:4-6, and 34:22-23.) In support, AHM cites the testimony of David Adair stating, “Yeah. I don’t know of another market in the country really where – of this size that we only have one dealer.” (RT Vol. IV, 743:1-3.) Mr. Adair’s testimony cannot be relied upon to support AHM’s claim. Mr. Adair merely stated he was not aware of a market of this size with a single dealer. He did not affirmatively claim to have knowledge of this. The second citation in support of AHM’s claim is not relevant and does not support AHM’s assertion. (RT Vol. V, 1173:18-1174:11 (Mr. Todd Meyer testifying about the contents of an email sent to Eric Van Olst regarding additional inventory).) AHM’s claim Bakersfield is the largest market with only one Honda dealer is unsupported by reliable evidence.

In addition, Respondent’s Market Size Tests show the need for less than two Honda dealers to achieve state average. AHM’s size test showed a need for 1.9 Honda dealers in 2008, a figure that dropped to 1.7 in 2015. (Protestant’s Post-Hearing Opening Brief at pp. 8-10 (citing Exh. J-18 at AHM_00001384; Exh. J-22 at AHM_00063623).) When the outlier domestic brand dealerships in Shafter and Delano are removed from the calculation, the size test results in the need for 1.65 Honda dealers. (RT Vol. XIV, 3419:9-3420:20 (indicating a dealer count of 1.9 declines to 1.65 if the Delano and Shafter dealers are excluded).) Instead of “right sizing” the Bakersfield market, the proposed establishment would give Honda a *higher* dealer count than *most* markets.

C. The Honda brand market share in Bakersfield is less than most California markets—this should be expected.

An aspirational average market share tells you very little—it does not diagnose why market share is different from the average nor does it address materiality. It does little more than confirm that alleged below-average market share in some areas must exist in order to offset the corresponding level of above-average market share territory elsewhere. AHM would have the Board believe Honda market share in

California should function as a teeter-totter that can only be level, or point up, despite the elementary mathematical fact that above-average and below-average markets must balance. According to AHM, any market under review should have average market share or better, and that any change to the market will bring market share up to average, irrespective of the starting point. However, it is undisputed AHM's market share analysis requires approximately half of all markets fall below state average.

1. *AHM continues to ignore existing circumstances and local market conditions in the Bakersfield market.*

The Bakersfield market is primarily driven by the agriculture and oil industries. When these industries suffer, the effects ripple through the market. (RT Vol. IX, 2057:16-2061:18.) Droughts result in fewer crops and reduced employment. Declines in the price of oil results in reduced oil industry employment. The price of oil is experiencing historic lows. Oil cannot be profitably pumped from the ground at this time. In fact, it was widely reported the price of oil had actually gone negative in April. Oil companies were paying buyers to take the supply they could not store.⁶

The price of oil has hovered between zero and below \$20 per barrel for the past two months.⁷ While a recent surge in oil has brought barrel prices up to the mid \$30 range⁸, this figure is well below prices in the past 10 years. (Exh. R-378 at APP 18 (showing the barrel Cushing, OK WTI Spot Price FOB to be \$99.67 in 2008, \$48.66 in 2015, and \$50.80 in 2017).) It is within the Board's discretion to take judicial notice of these widely reported events. (Cal. Evid. Code § 451, subd. (f); Cal. Evid. Code § 452, subd. (c), (g) and (h); *see also, supra*, FN 3.) The oil industry job losses will continue to affect Bakersfield more severely than any other area of the state.

Before the COVID-19 pandemic shutdown the California economy, unemployment in Bakersfield was on the rise and greater than the state average. (Exh. P-152 at Rebuttal Tab 7, Page 1;

⁶ The Sacramento Bee, April 21, 2020 05:00 AM, updated 03:30 PM, "COVID-19 shutdown is crushing oil prices. Why this part of California isn't celebrating" by Dale Kasler, <https://www.sacbee.com/news/business/article242153486.html> (accessed May 28, 2020).

⁷ Forbes, April 29, 2020 12:27 PM EDT, "Oil Prices May Recover Before 2021" by Ariel Cohen, <https://www.forbes.com/sites/arielcohen/2020/04/29/oil-prices-may-recover-before-2021/#3f91df51dd62> (accessed May 28, 2020).

⁸ Forbes, May 28, 2020 4:33 AM EDT, "Here's What's Moving Oil Prices" by Naeem Aslam, <https://www.forbes.com/sites/naeemaslam/2020/05/28/heres-whats-moving-oil-prices/#2948a1923953> (accessed May 28, 2020).

see also Exh. R-324.) The collapse of the oil industry assures Bakersfield's unemployment will continue to outpace the state. It is unreasonable to expect an area with a greater percentage of unemployed residents to purchase Honda vehicles at the same rate as areas with lower unemployment rates. It is impossible to expect increasing sales opportunity in the Bakersfield market under the current economic circumstances.

Similarly, the Bakersfield market exhibits lower income levels than the state average. It is unreasonable to expect Bakersfield's Honda brand market share to be equal to state average when the state average income is roughly \$10,000 higher. (RT Vol. III, 519:12-18; RT Vol. XII, 2818:14-2820:25; Exh. J-18 at AHM_00001417 (showing a 2013 average household income of \$57,220 for the Bakersfield ASA, \$69,700 for the North Bakersfield ASA, \$61,997 for the market total, and \$81,689 for the State of California); *see also* Exh. R-376 at A-38 (showing Bakersfield Metro 2017 median income to be \$55,042); RT Vol. XIV, 3397:8-10 (Mr. Farhat testifies Bakersfield Median income is \$55,000 compared to the state at \$65,000).)

Brand market share in Bakersfield for cars—not trucks—is dependent on capturing significant numbers of subprime buyers. (RT Vol. XI, 2559:21-2561:4 and Exh. P-151 at Tab 16, page 1 (showing the Mitsubishi store actively pursues subprime customers and has significantly above average market share in Bakersfield); *see also* RT Vol. XII, 2823:25-2825:9.) The Honda brand is not well suited in this regard. Honda does not cater to subprime buyers. American Honda Finance is less aggressive with incentives and has transitioned to a focus on lease programs, which require high credit ratings—a subprime buyer cannot qualify for a Honda lease program. (RT Vol. IX, 2097:16-2098:21; RT Vol. XI, 2557:3-11.) Moreover, Honda's transaction prices are higher than other brands. (RT Vol. IX, 2095:17-2096:9 (Steve Ekegren testifying Honda tends to cost a bit more than competing Kia, Mitsubishi, or Hyundai products).) Honda makes a high-quality product and it is priced to reflect this. Lower income—credit challenged consumers are more likely to purchase Kia, Mitsubishi, Hyundai, or another cheaper alternative to Honda.

If Honda were to take a deeper dive and actually consider local market conditions in Bakersfield, it would be forced to acknowledge the fact that Bakersfield should be expected to underperform the state average. Bakersfield's below state average market share is not a shortfall, it is a predictable outcome—

it does not represent additional opportunity—it is a reflection of the lack of opportunity relative to the rest of the state. Half of all Honda markets will fall below state average. (RT Vol. XIV, 3390:13-24 (Mr. Farhat agreeing with Mr. Stockton that approximately a half of all markets operating above the California average and half the markets operating below the average by weight); RT Vol. XIV, 3390:25-3391:10 (Mr. Farhat testifying the underperformance and shortfalls based on the California average could not be eliminated).) Bakersfield will predictably fall below the state average regardless of how many Honda dealers are established within its boundaries.

D. The differences between AHM’s calculation of total lost opportunity using its Registration Effectiveness and RSE metrics do not overcome the flaws identified by the Board and other Courts concerning the reasonableness of applying a state-wide average based metric.

AHM takes great effort to distinguish its Retail Sales Effectiveness (“RSE”) metric from its registration effectiveness (“RE”) metric. (*See, e.g.*, AHM’s Brief at 22:17-23:16; RT Vol. I, 53:12-15 (Mr. Hutto mistakenly arguing RSE and the state standard cases only apply in termination cases).) AHM also argues the cases considering metrics similar to RSE are inapplicable because RSE is the metric AHM applies in termination cases while it applies RE to establishment cases. (*See* AHM’s Brief at 25:8-26:12.) AHM never disputes that boards, including this one, have routinely rejected state average based metrics like RSE.

Thus, the question is whether the differences between RSE and RE would change the conclusion reached by this Board and other courts concerning the reasonableness of the application of a state-wide average based sales performance metric. Comparing and critically analyzing the pieces of these two metrics shows they would not. In fact, the denominators of both metrics are the same. Both denominators are expected vehicle sales (under RSE) or registrations (under RE) under a state average segment-adjusted market share—in this case, based on Honda’s State Represented Market Share by

Competitive Industry Retail Registrations⁹ applied to local registrations in Bakersfield.¹⁰ (See Joint Glossary of Non-Controversial Terms, 3:15-18 (describing RSE as dividing by Expected Sales) and Joint Glossary of Non-Controversial Terms, 3:9-12 (describing RE as dividing by Expected Registrations).) Accordingly, any difference lies in the numerators of the two metrics.

The numerator of RSE is the sum of Barber Honda's Sales in the Bakersfield ASAs and Barber Honda's sales outside of the ASAs. The numerator of RE is equal to Barber Honda's sales in the Bakersfield ASAs plus Insell by other Honda dealers into the ASAs. (Joint Glossary of Non-Controversial Terms, 3:15-18 (describing RSE's numerator as being based on a dealer's number of Retail Sales reported by a dealer anywhere in the U.S.) and Joint Glossary of Non-Controversial Terms, 3:9-12 (describing RE's numerator as being the sum of Honda vehicle Registrations in a geographic area—in the case of Bakersfield, including the registrations by Barber Honda as well as any other Honda dealers).)

Thus, the differences between the numerators of RSE and RE amount to replacing Barber's Sales outside the ASAs with Honda Insell into the ASAs. However, it is important to consider the manner in which AHM calculates lost opportunity. Specifically, it includes Honda Insell as Lost Opportunity. (See, e.g., R-376 at A-64 (Mr. Farhat's report including Insell in his calculation of lost opportunity of 2,240 in the Bakersfield Metro); RT Vol. II, 335:18-336:12 (Mr. Van Olst testifying AHM adds Insell to the calculated gross loss to determine "lost opportunity").) This means that AHM adding Insell to the

⁹ AHM's market studies used a Zone 12 standard while Mr. Farhat used a California Represented Markets standard. (RT Vol. II, 448:15-449:20 (Mr. Van Olst testifying all three of AHM's studies used the Zone 12 standard); Exh. R-376 at A-22 to A-25 (Mr. Farhat's report footnoting Expected Average as calculated using a California Represented Market Average applied on a segment by segment basis).) AHM's use of a Zone 12 standard is higher and even more unreasonable than applying the California standard. (RT Vol. II, 448:15-449:20 (Mr. Van Olst testifying the Zone 12 standard is the more stringent average between Zone 12 and California).)

¹⁰ This is further supported by examples in this case. For example, comparing AHM's Expected Sales for Barber Honda in its ASA for year end 2016 from a Dealer Sales Performance Summary (1,978 Expected Sales) with the Expected Registrations for Barber Honda's ASA based on year end 2016 data in Mr. Farhat's report (1,973 Expected Registrations) shows the numbers are nearly identical. (Compare Exh. R-346 at AHM_00001235 with Exh. R-376 at A APP-65.) Rounding errors account for the difference. Similarly, comparing 2015 data showing 1850 Expected Sales and 1838 Expected Registration, taking into account rounding errors, the numbers are also nearly identical. (Compare Exh. R-346 at AHM_00001247 with Exh. R-376 at A APP-64.)

RSE calculation is illusory, since AHM proposes to reverse this addition in its Lost Opportunity calculation.

AHM ignores Barber's sales outside of the ASAs when determining the opportunity available using its RE metric. This difference simply cannot cure the defects of RSE. In particular, these differences do not meaningfully distinguish the metrics when evaluating whether they are reasonable in light of the local market conditions. The following illustrates AHM's proposed application of these metrics in practice.

AHM's use of Insell when calculating RE is such that it expects all markets to achieve zero Insell. AHM considers any Insell in a market to be lost opportunity.^{11 12} (*See, e.g.*, R-376 at A-64 (Mr. Farhat's report including Insell in his calculation of lost opportunity of 2,240 in the Bakersfield Metro); RT Vol. II, 335:18-336:12 (Mr. Van Olst testifying AHM adds Insell to the calculated gross loss to determine "lost opportunity").) When determining gross loss in its RE calculation for the Bakersfield Metro, AHM subtracts both Barber Honda's sales that are registered in the market and sales by other dealers in the market from the expected registrations in the market.¹³ (*See* Exh. R-376 at A-64 (describing Gross loss as the difference between the expected registrations and the actual registrations; said another way, the number of registrations necessary to raise the number of registrations in the market to AHM's expected

¹¹ As Barber Honda has argued throughout the merits hearing, Barber Honda disputes Insell should fairly be considered "opportunity" available to Barber Honda and the Bakersfield Market. No market in California is devoid of Insell registrations. (RT Vol. III, 544:24-545:1; RT Vol. III, 650:8-19; RT Vol. IV, 815:3-8; RT Vol. XIV, 3352:10-13 (Mr. Farhat testified he could not recall ever seeing a Honda market with zero Insell—"Even Hawaii has in-sell, believe it or not").) Moreover, as David Adair testified, Honda is "not going to eliminate in-sell." "There's always going to be situations where people -- family reasons or whatever -- will buy a car from out of market." (RT Vol. IV, 817:8-24.) However, AHM's calculation of RE and total lost opportunity in Bakersfield includes calculations based on Insell (without regard for the reasonableness of including Insell in the calculations).

¹² Remarkably, two purportedly independent entities, AHM and Urban Science, independently reached the astounding position that one should expect no sales from out-of-market dealerships, despite both acknowledging these sales occur in every market.

¹³ $(\text{Gross Loss}) = (\text{Expected Honda Registrations in Bakersfield Metro}) - (\text{Actual Honda Registrations in Bakersfield Metro})$; the Actual Honda Registrations in Bakersfield Metro consists of Honda Registrations in Bakersfield resulting from sales made by Barber Honda as well as Honda Registrations in Bakersfield resulting from sales made by other Honda dealers; i.e. $(\text{Actual Honda Registrations in Bakersfield Metro}) = (\text{Honda Registrations in Bakersfield resulting from sales made by Barber Honda}) + (\text{Honda Registrations in Bakersfield resulting from sales made by other Honda dealers})$

number of registrations based on state-average); *see also* RT Vol. VI, 1085:15-1088:1 (Frank Beniche describing AHM's calculation of gross loss.) AHM then adds to its calculation of gross loss the Insell to determine total lost opportunity.¹⁴ (Exh. R-376 at A-64 (adding gross loss of 1,577 in the Bakersfield Metro to 663 Insell in the Bakersfield Metro to arrive at an alleged total lost opportunity in the Bakersfield Metro of 2,240).)

Insell is, by AHM's definition, the number of new vehicles sold and registered in a particular geographic area made by dealers that are located outside of that geographic area—i.e. Honda vehicles sold by any Honda dealer besides Barber Honda and then registered in Bakersfield.¹⁵ (Joint Glossary of Non-Controversial Terms, 3:1-3.) As a result, the only local registrations truly relevant in AHM's calculation of total lost opportunity in Bakersfield are Honda Registrations in Bakersfield resulting from sales made by Barber Honda.¹⁶ Because AHM assumes Insell should be zero in Bakersfield, the presence of Insell in the RE calculation does not distinguish the metric from RSE.

The only remaining distinction between RSE and RE is that RSE considers sales made by Barber Honda anywhere in the US, while RE is limited to the sales made by Barber Honda but then registered

¹⁴ $(Total\ Lost\ Opportunity) = (Gross\ Loss) + (Insell)$

¹⁵ $(Insell) =$

$(Honda\ Registrations\ in\ Bakersfield\ resulting\ from\ sales\ made\ by\ other\ Honda\ dealers)$

¹⁶ Starting with the Total Lost Opportunity equation and substitute in the equation for Gross Loss:

$(Total\ Lost\ Opportunity) = (Expected\ Honda\ Registrations\ in\ Bakersfield\ Metro) - (Actual\ Honda\ Registrations\ in\ Bakersfield\ Metro) + (Insell);$

we substitute the component parts of the Actual Honda Registrations in Bakersfield Metro as described above:

$(Total\ Lost\ Opportunity) = (Expected\ Honda\ Registrations\ in\ Bakersfield\ Metro) - (Honda\ Registrations\ in\ Bakersfield\ resulting\ from\ sales\ made\ by\ Barber\ Honda) - (Honda\ Registrations\ in\ Bakersfield\ resulting\ from\ sales\ made\ by\ other\ Honda\ dealers) + (Insell);$

however, as noted above Honda Registrations in Bakersfield resulting from sales made by other Honda dealers is equal to AHM's calculation of Insell:

$(Total\ Lost\ Opportunity) = (Expected\ Honda\ Registrations\ in\ Bakersfield\ Metro) - (Honda\ Registrations\ in\ Bakersfield\ resulting\ from\ sales\ made\ by\ Barber\ Honda) - (Insell) + (Insell);$

because AHM is effectively adding and subtracting Insell in its calculation of Total Lost Opportunity, they cancel out of the equation and it simplifies to:

$(Total\ Lost\ Opportunity) = (Expected\ Honda\ Registrations\ in\ Bakersfield\ Metro) - (Honda\ Registrations\ in\ Bakersfield\ resulting\ from\ sales\ made\ by\ Barber\ Honda).$

in the local geography (i.e. the Bakersfield Metro, the RMA, or one of the two ASAs). This distinction only makes AHM’s use of RE more troubling because even when this Board and other Courts have considered metrics similar to RSE, which credit dealers with sales made outside the local market area, state average based metrics have still been rejected as unreasonable for their inability to account for observable effects from local market characteristics. (*See, infra*, Part II.D.) AHM’s RE metric, which omits Barber Honda’s sales outside the local market from the calculation, is *even more* unreasonable than its RSE metric.

E. The rationale from prior termination protest decisions rejecting the use of state average based metrics applies to RSE and RE as used by AHM in this establishment protest.

Protestant argues cases, including *Beck Chevrolet Co. v. General Motors* (2016) 27 N.Y.3d 379 (“*Beck*”); *Santa Cruz Nissan v. Nissan North America* (Cal. NMVB Sept. 17, 2014) Protest No. PR-2358-13 (“*Santa Cruz Nissan*”); *Dependable Dodge v. Fiat Chrysler Automobiles* (Cal. NMVB Mar. 15, 2017) Protest Nos. PR-2435-15 and PR-2436-15 (“*Dependable*”); and *Folsom Chevrolet v. General Motors* (Cal. NMVB Aug. 13, 2018) Protest No. PR-2483-16 (“*Folsom*”), support Barber Honda’s position that RSE and RE¹⁷ are unreasonable and unreliable metrics for purposes of determining opportunity actually available in the RMA. AHM argues these cases are inapplicable because they are termination cases. (AHM’s Brief at 25:8-26:12.)

1. *Respondent relies on RSE and RE for the purpose of determining the opportunity available in Bakersfield to allegedly cushion or prevent any negative impact on Barber Honda.*

Respondent, Intervenor, and AHM’s expert use the “lost opportunity” calculated from RSE and RE to argue the proposed establishment will not negatively impact Barber Honda. (*See* J-14 at AHM_00063538 (AHM’s 2008 market study calculating Gross Loss, Insell, and Total Lost Opportunity to compare with Projected Registrations); J-18 at AHM_00001384 (AHM’s 2013-2014 market study again calculating Market Insell, Gross Loss, and Total Lost Opportunity—and notably omitting expected registrations); Exh. R-376 at A-64 (Mr. Farhat’s report showing 2,240 lost opportunity in the Bakersfield

¹⁷ As discussed above, AHM’s calculation of “lost opportunity” is substantially the same for RSE and RE—RE provides an even more unreasonable measure of purported lost opportunity. (*See, supra*, Part II.C.)

metro based on gross registration loss (1577) plus Insell (663)); Intervenor's Post-Hearing Opening Brief at 1:22-24 (describing the "significant opportunity" for additional Honda sales in the Bakersfield market); RT Vol. VIII, 1829:14-25 (Mr. Beau Boeckmann testifying Galpin relied on Honda's opportunity analysis to determine what sales opportunities exist in Bakersfield).) As Mr. Van Olst suggested, "[T]here's no impact on the existing dealer because the projected registrations are less than - than our opportunity within the market, our lost opportunity within the market." (RT Vol. II, 336:8-12.)

2. *AHM's use of RSE and RE to determine "lost opportunity" in Bakersfield fails to comply with Vehicle Code section 11713.13(g) and is unreasonable in light of the local market conditions in Bakersfield.*

There are not an additional 2,000 Honda sales opportunities available in Bakersfield. (See RT Vol. XVI, 3900:25-3901:22 (Mr. Jonathan Ekegren testifying in his experience there are not 2,000 additional Honda sales to be made in Bakersfield); RT Vol. XVI, 3901:23-3902:4 and RT Vol. XVI, 3921:10-23 (Barber Honda's highest annual new vehicle sales in a year was roughly 1,850 since Jonathan Ekegren's involvement with the dealership, and Barber Honda has never exceeded 2,000 sales in a year).) The way AHM and its expert reach the number of 2,240 lost sales in the Bakersfield market is by applying a California Honda Represented Market Share average (or the even higher Zone 12 average) to competitive registrations by segment in Bakersfield. (See, e.g., RT Vol. II, 448:15-449:20 (Mr. Van Olst testifying all three of AHM's studies used the Zone 12 standard and the Zone 12 standard is the more stringent average between Zone 12 and California); RT Vol. VI, 1087:16-1088:10 (Mr. Beniche agreeing the Zone 12 market share is higher than the California market share); Exh. R-376 at A-64.) The shortfall is then declared available opportunity. For good measure, AHM also adds all sales made by dealers outside Bakersfield (Insell) to calculate purported "opportunity."

The application of a Zone 12 market share or California market share to the Bakersfield market is unreasonable and unlawful pursuant to Vehicle Code section 11713.13(g) because AHM's RSE and RE metrics fail to account for all the existing circumstances including, (1) demographics in the dealer's area of responsibility, (2) geographical and market characteristics in the dealer's area of responsibility, (3) the availability and allocation of vehicles and parts inventory, (4) local and statewide economic circumstances, and (5) historical sales, service, and customer service performance of the line-make

within the dealer's area of responsibility, including vehicle brand preferences of consumers in the dealer's area of responsibility. (Cal. Veh. Code § 11713.13(g).) As the court in *Beck* and this Board have held, a state average based performance metric fails to reasonably consider local market characteristics when calculating a dealer or market's expected sales.

“Reliance on “average” and “rankings” without further information has the tendency to mislead. Making threats of adverse consequences if a dealer does not “achieve 100% RSE” is misusing the data.” (*Santa Cruz Nissan, supra*, at Proposed Decision ¶ 185.) Among other failings, MSR measured Dependable's sales performance “by comparison to a statewide class of dealers, then adjusts the standard with respect to one metric: local consumer purchasing preferences for certain vehicle types. That fails to take into account that the segments used by FCA in its MSR calculation are over broad.” (*Dependable, supra*, at Proposed Decision ¶ 106.) Average-based measures like MSR and Honda's measures are incapable of accounting for materiality, which is a critical element to establishing the need for an additional dealership. (*Dependable, supra*, at Proposed Decision ¶ 114.) As the Board determined in *Folsom*, “[t]he use of RSI generally by General Motors, and as applied in this case, violates Section 11713.13(g)(1)(A). RSI fails to account for the impact of circumstances unique to Folsom Chevrolet's market (other than segment popularity), including but not limited to demographics, geography and brand preferences.” (*Folsom, supra*, at ¶ 218.)

3. *California Vehicle Code section 11713.13(g) applies in any proceeding where a manufacturer's “performance standard, sales objective, or program for measuring dealership sales, service, or customer service performance is an issue” including this establishment protest.*

While each of the above cases was a termination case, California Vehicle Code section 11713.13(g) is not limited to termination cases. It applies to “a performance standard, sales objective, or *program for measuring a dealer's sales, service, or customer service performance* that may materially affect the dealer.” (Cal. Veh. Code § 11713.13, subd. (g)(1) (emphasis added.)) RSE and RE both purport to measure Barber Honda's sales performance within the Bakersfield market and determine “lost opportunity” that will materially affect Barber Honda through the proposed establishment of an

additional Honda dealership within 10 miles of Barber Honda.¹⁸ The use of a state average to determine performance, whether it's the use of RE for Honda brand performance or RSE for Barber Honda's individual sales performance, is unreliable in each instance due to these metrics' inherent inability to consider local market conditions.

AHM tries to distract the Board from the central issue of whether or not the use of RSE and RE is a reasonable standard to measure performance and opportunity in Bakersfield by proposing the court in *Beck* "was careful to limit its decision." (AHM's Brief at 25:10-15.) AHM cites the statement in *Beck* the decision "should not be understood as an invitation for a court to substitute its opinion for a franchisor's determination of how best to achieve its bottom-line business goals." (*Id.* at 25:13-15; *Beck, supra*, 27 N.Y.3d at p. 394.) However, AHM omits what the court wrote thereafter. The court in *Beck* then said, "Nevertheless, the legislature, by its enactment of the Dealer Act, has determined it is in the interest of the state to subject a franchisor's performance standards to statutory limits in order to prevent unfair business practices, and has seen fit to place review of franchisor standards squarely within the authority of the courts." (*Beck, supra*, 27 N.Y.3d at p. 394.) Here, the Board must determine whether Honda's analysis provides reliable evidence to counter Protestant's evidence of substantial impact to Protestant.

California has placed franchisor metrics for measuring a dealer's sales performance squarely within the Board's authority to review. (Cal. Veh. Code § 11713.13, subd. (g); *see also* Cal. Veh. Code § 3065.3 (giving the Board jurisdiction over protests raising Vehicle Code § 11713.13, subd. (g)).) The court in *Beck* did not, as AHM suggest, limit its decision to only termination protests—the court instead was more generally considering a performance standard based on statewide average sales data and whether the standard was "unreasonable, arbitrary or unfair" because it failed to account for local market conditions. (*Beck, supra*, 27 N.Y.3d at p. 389.) There is no support for AHM's argument the Board should avoid making a determination concerning the reasonableness of AHM's performance metrics.

Furthermore, when comparing the equivalent New York statute with California Vehicle Code section 11713.13(g), the California legislature placed review of a franchisor's performance standard

¹⁸ *See, supra*, Part II.C (showing AHM's application of a state-wide average based standard through its RE metric is even more unreasonable than applying a state-wide average based standard with RSE).

more strongly before the Board and California courts than New York's legislature. New York's statute at issue in *Beck* states it shall be unlawful for a manufacturer:

To use an unreasonable, arbitrary or unfair sales or other performance standard in determining a franchised motor vehicle dealer's compliance with a franchise agreement. Before applying any sales, service or other performance standard to a franchised motor vehicle dealer, a franchisor shall communicate the performance standard in writing in a clear and concise manner. (NY Vehicle & Traffic Law § 463, subd. (2)(gg).)

The statute at issue in *Beck* was limited to one directed at a dealer's compliance with a franchise agreement. It also did not more specifically define what it means to be "unreasonable, arbitrary or unfair." However, California's equivalent statute is broader and more specifically defines a violation when a manufacturer does the following:

Establish or maintain a performance standard, sales objective, or program for measuring a dealer's sales, service, or customer service performance that may materially affect the dealer, including, but not limited to, the dealer's right to payment under any incentive or reimbursement program or establishment of working capital requirements, unless both of the following requirements are satisfied:

(A) The performance standard, sales objective, or program for measuring dealership sales, service, or customer service performance is reasonable in light of all existing circumstances, including, but not limited to, the following:

- (i) Demographics in the dealer's area of responsibility.
- (ii) Geographical and market characteristics in the dealer's area of responsibility.
- (iii) The availability and allocation of vehicles and parts inventory.
- (iv) Local and statewide economic circumstances.
- (v) Historical sales, service, and customer service performance of the line-make within the dealer's area of responsibility, including vehicle brand preferences of consumers in the dealer's area of responsibility.

(B) Within 30 days after a request by the dealer, the manufacturer, manufacturer branch, distributor, distributor branch, or affiliate provides a written summary of the methodology and data used in establishing the performance standard, sales objective, or program for measuring dealership sales or service performance. The summary shall be in detail sufficient to permit the dealer to determine how the standard was established and applied to the dealer.

(2) In any proceeding in which the reasonableness of a performance standard, sales

objective, or program for measuring dealership sales, service, or customer service performance is an issue, the manufacturer, manufacturer branch, distributor, distributor branch, or affiliate shall have the burden of proof.

(3) As used in this subdivision, “area of responsibility” shall have the same meaning as defined in subdivision (z) of Section 11713.3. (Cal. Veh. Code § 11713.13, subd. (g).)

California’s statute is not limited to compliance with a franchise agreement and is broader in referring to a program for measuring a dealer’s sales performance that may materially affect the dealer. Moreover, where New York prohibited “unreasonable, arbitrary or unfair” standards, California required a manufacturer prove the standard is *reasonable* in light of all existing circumstances and thereafter specifying a non-exclusive list of circumstances. Among the circumstances specified are the vehicle brand preferences of consumers in the dealer’s area of responsibility specifically at issue in *Beck*.

Even if the court in *Beck* was not empowered to apply Vehicle and Traffic Law section 463(2)(gg) to a non-termination proceeding, California’s Vehicle Code section 11713.13(g) empowers the Board and California courts to consider whether RSE and RE are reasonable “in *any proceeding* in which the reasonableness of a performance standard, sales objective, or program for measuring dealership sales, service, or customer service performance is an issue.” (Cal. Veh. Code § 11713.13, subd. (g) (emphasis added).) Here, RSE and RE are at issue, and the Board must make findings concerning the reasonableness of AHM’s use of RE and RSE to the Bakersfield market and Barber Honda, respectively.

AHM also cites *JJM Sunrise Automotive, LLC v. Volkswagen Group of America, Inc.*, Index Nos. 601658-14 and 602591-14 (N.Y. Sup. Ct., Jan. 26, 2017) (“*JJM Sunrise*”) as support for the proposition New York courts have held the decision in *Beck* does not apply to establishment cases. (Respondent’s Post-Hearing Opening Brief, 25:15-20.) However, as an initial matter, AHM cites a ruling on a motion *in limine* by a New York Supreme Court¹⁹ in Nassau County. The motion *in limine* is not a final ruling on which this Board should place any weight.

¹⁹ In contrast to other jurisdictions, New York’s Supreme Courts are trial level courts. Above the Supreme Courts are the Appellate Divisions of the Supreme Court. Finally, the New York Court of Appeals is the highest-level court in New York state. (See NYCOURTS.GOV at <http://www.courts.state.ny.us/courts/appellatedivisions.shtml>; see also *Beck, supra*, 27 N.Y.3d at p. 379 (showing a ruling by New York’s highest court as one by the New York Court of Appeals.)

The motion *in limine* was from the plaintiff in an establishment case contesting the ability of the manufacturer's expert (presumably a testifying expert from Urban Science) from offering expert opinions based on the holding in *Beck*. The motion is ultimately denied, and the manufacturer's expert is at least allowed to offer his opinions. Because it is not a final decision, we have no way of knowing what weight if any the court applied to the manufacturer's expert.

Moreover, as noted above, New York's applicable statute under Vehicle and Traffic Law section 463(2)(gg) is specific to "a franchised motor vehicle dealer's compliance with a franchise agreement." While a New York court might arguably be limited to applying the rationale in *Beck* to a termination proceeding, California's Vehicle Code section 11713.13(g) does not have such a limitation. California Vehicle Code section 11713.13(g) applies in situations where the standard "may materially affect the dealer"—not just in circumstances of compliance with a dealer agreement. (Cal. Veh. Code § 11713.13(g).) AHM's citation to *JJM Sunrise* is wholly inapplicable to the issues before the Board.²⁰

AHM also cites *GPI-AL, Inc. v. Nissan North America*, No. 17-0511-WS-MU (Oct. 17, 2019) ("*GPI-AL*") for the idea the United States District Court for the Southern District of Alabama refused to extend the decisions in *Beck* and *Folsom* beyond the termination context. Again, AHM cites a ruling on a motion *in limine* (plaintiff's Motion to Exclude Expert Testimony of Sharif Farhat) as if it was a final ruling. The *GPI-AL* order AHM cites expressly decides whether Mr. Farhat could testify to his expert opinion and does not weigh the credibility of that testimony. The court expressly points the plaintiff toward cross-examination of Mr. Farhat on the topics raised in the motion on pages 7, 9, 11, and 14-15.

Similar to New York, Alabama's applicable sales performance statute defines unfair and deceptive trade practices to include for a manufacturer "to coerce or attempt to coerce any motor vehicle dealer to do any of the following:"

To adhere to performance standards that are not fair, reasonable, and equitable or that are not applied uniformly to other similarly situated dealers. A performance standard, sales objective, or program for measuring dealership performance that may have a material effect on a dealer, including the dealer's right to payment under any incentive or reimbursement program shall be fair, reasonable, equitable, and based on accurate information. (Alabama Commercial Law and Consumer Protection § 8-20-4, subd. (1)(h).)

²⁰ While the Board can rely on unpublished authorities outside California as persuasive authority, *JJM Sunrise* fails to contain any discussion that would aid the Board in reaching a decision in this Protest.

Alabama's statute is limited to situations where a manufacturer "coerces or attempts to coerce" the motor vehicle dealer. Alabama's statute arguably applies only in situations of attempted termination of a dealer.²¹ However, as noted above, California's statute applies in situations where the standard "may materially affect the dealer." (Cal. Veh. Code § 11713.13(g).) Here, AHM offers its RE analysis as justification for both the need for the proposed establishment as well as the purported available opportunity that would avoid any losses to Barber Honda. AHM offers evidence of Barber Honda's RSE as evidence to suggest Barber Honda is an inadequate performer and thus the RMA is "underserved."

Leaving aside the issue of whether AHM must establish its burden of reasonableness in offering its evidence concerning RSE and RE, the Board must make findings concerning the reliability of this evidence in making a determination of whether good cause exists to prevent the proposed establishment. RSE and RE are unreasonable and unreliable metrics for the same reasons articulated in *Beck*, *Santa Cruz Nissan*, *Dependable*, and *Folsom*.²²

F. AHM's expert's predictions for growth and prosperity are now meaningless.

Mr. Farhat's aspirational analyses are based upon carefully selected case studies where a

²¹ The court in *GPI-AL* does consider application of Alabama Commercial Law and Consumer Protection section 8-20-4(1)(h) in the court's footnote 7 on page 14. However, the court rejects application of the statute for two primary reasons: (1) Mr. Farhat is not a "manufacturer" as defined by the statute and (2) Mr. Farhat's report does not demonstrate "coercion"—he did not offer an opinion the dealer's performance has been inadequate or the dealer in any way violated its dealer agreement. The *GPI-AL*'s reasons for rejecting application of section 8-20-4(1)(h) do not apply here. First, Barber Honda is challenging AHM's determination of available opportunity through RSE and RE as then adopted and allegedly supported by Mr. Farhat. AHM is clearly a manufacturer. Additionally, Barber Honda is not challenging the admissibility of Mr. Farhat's report—it is already admitted—however, the use of RSE and RE to determine available "opportunity" is at issue and the metrics are not reasonable in light of the existing circumstances specified in California Vehicle Code section 11713.13(g). Moreover, to the second rationale from the *GPI-AL* court, "coercion" is not a requirement of California Vehicle Code section 11713.13(g). California Vehicle Code section 11713.13(g) is not limited to instances of proposed terminations of dealers. California's statute applies in situations where the standard "may materially affect the dealer," which would include a proposed additional dealer within 10 miles of Barber Honda. (Cal. Veh. Code § 11713.13(g).)

²² Administrative Law Judges Hagle, Pipkin, and Matteucci were prevented from hearing this Protest through a combination of efforts by Respondent and Intervenor—each of these ALJs previously rejected state average based performance metrics.

dealership was added to a *growing* market. These case studies are an unreliable comparison to predict expected impact in the Bakersfield market because the Arizona, Washington, and Louisiana markets selected are substantially different from the Bakersfield market. Most significantly, these dealer establishments occurred during a time of industry growth—they provide no value in making any assessment about the future of the Bakersfield market under the current circumstances.

1. *Mr. Farhat's case studies do not support his conclusions.*

The parties agree Honda brand market share tends to rise after new dealerships are added to the market. The objective evidence consistently shows market share increases after add points to be quite modest—about 10%. (See Protestant's Post-Hearing Opening Brief at 15:1-18 (showing and supporting market share increases of 11.5%, 11.1%, and 18.6% from Mr. Farhat's case studies and 13% from the Toyota experience).) The parties agree increases in Honda market share of 70-80% would be necessary for Barber Honda to have an *opportunity* to maintain its current sales volumes, if the overall market remained unchanged. (RT Vol. XIV, 3349:6-3351:16.) They also agree Barber Honda would lose sales if market share did not increase to that level. (*Id.*) Despite universal showings of modest market share increases from the addition of Honda dealers and an even more compelling example in the Bakersfield Toyota example, AHM claims Barber Honda would not suffer any losses from the addition of the Galpin dealership.

Mr. Farhat's case studies showed negligible increase in Honda brand market share ranging from between 11.1 to 18.6%. (RT Vol. XIV, 3343:3-6; Exh. R-376 at A-75; RT Vol. XIV, 3346:2-8; Exh. R-376 at A-79; Exh. R-407 at R-20.2.) If it were reasonable to expect the proposed establishment would provide similar market share increases, the increased sales would result in a mere 217 to 364 additional units. (Exh. R-376 at A APP-71 (showing Honda registrations of 1957 in the Bakersfield Metro in 2017 multiplied by 11.1% and 18.6%).) This stands in stark contrast to the proposed dealer's stated goal to capture 2,500 sales in its third year of operation. (Exh. J-20 at AHM_00065937.) It is significantly less than AHM's MAP figure of 1,407. (RT Vol. I, 102:18-23.) It is well below AHM's claim of 2,240 in available opportunity. (Exh. R-376 at A-64 (Mr. Farhat's combined calculation of "lost opportunity" and Insell for the Bakersfield Metro).)

2. *AHM's Retreat from Market Evidence to the Aspirational.*

When the contradictory results from Mr. Farhat's case study data were exposed, AHM's arguments turned back to its aspirational, average-based modeling. After establishing Mr. Farhat's case studies showed the expected market share increases would be well short of what would be required to avoid ruinous impact to Barber Honda (RT Vol. XIV, 3349:6-3351:16; RT Vol. XVII, 3967:18-3968:12), AHM and its expert simply abandoned their own evidence.

Confronted with the modest market share increases demonstrated through the Honda add point case studies, and the massive sales losses of the incumbent Bakersfield Toyota dealership, AHM and its expert spontaneously improvised a new theory. Mr. Farhat's hand-selected case studies, which AHM argued showed no expected impact to Barber Honda, now did not apply. Instead, Mr. Farhat theorized that because the market shares in his case study examples were higher than the market share in Bakersfield, therefore even more sales opportunities must exist in Bakersfield than did in his case studies. (RT Vol. XIV, 3452:18-3453:4.)

Not only is Mr. Farhat's newly formed opinion without support, the market share discrepancy is misleading due to his deliberate use of the lower national market share standard in his case studies and his use of the higher market share standard, California, applied to the Bakersfield market. (RT Vol. XVII, 3971:20-3972:25.) Mr. Farhat's use of the California state average market share is the only one that permits Mr. Farhat to offer his opinion that no losses would occur to Barber Honda—because it is designed to show the greatest shortfall. (Exh. R-378 at R-21.) To be clear, the use of the higher California market share standard shows a greater shortfall and thus greater purported “opportunity” than could be shown using the lower National market share standard. Conversely, the use of the lower National standard in the case studies showed a reduced shortfall.

Aside from Mr. Farhat's misleading mixed comparison of markets applying different market share standards, AHM's use of an aspirational average as a dynamic predictive tool has three serious problems. First, this approach, as a matter of fundamental mathematics, does not and cannot provide valid inferences about the market response to some dynamic change. Second, even if AHM does not agree with this mathematical principle, there is nothing in the record where AHM disputes this point or even attempts to mute it through cross examination. Third, even if AHM had done so, the evidence from

Mr. Farhat's case study examples disprove any inference drawn from aspirational average-based modeling. Instead, AHM and its expert simply grasp at the notion the Bakersfield Market would somehow divine the market share AHM and its expert have designed for it and increase to that level. AHM asks the Board to tether Barber Honda's fate to AHM's aspirations and ignore demonstrable evidence.

It is not more complicated than this. The case studies in which additional Honda dealerships entered the market, or in which Toyota undertook essentially the action that Honda proposes here, incorporate all of the qualitative changes that AHM could reasonably assert to apply to add point situations. Increases in brand awareness, increased inventory, purportedly increased convenience, increased advertising, etc. These all would have been inherent factors associated with the case study add points. While adding some brand share, the case study examples simply do not demonstrate the increased market share AHM claims would occur in Bakersfield. Accepting the undisputed evidence the Bakersfield add point would add foreseeably little market share, compared to the market share necessary to support two competing Honda dealers, does not disregard the purportedly positive elements of adding dealerships to the market. Rather, it recognizes that consumers in the real-world value these changes much less than AHM suggests they would here.

AHM incorrectly states Mr. Stockton determined the Honda brand underperformed by 2,331 registrations in the Bakersfield market.²³ (AHM's Brief at 25:3-6.) It is a blatant misrepresentation when AHM claims there is no dispute Honda is materially underperforming in Bakersfield. Protestant and its expert have *at all times disputed Respondent's measurements of performance and opportunity*. (See, e.g., Protestant's Post-Hearing Opening Brief at 29:18-31:13 and 33:1-34:20.) The use of a state average will predictably show purported underperformance against the state average. (RT Vol. XIII, 3011:3-3012:11; RT Vol. XIV, 3390:13-24 (Mr. Farhat agreeing with Mr. Stockton that approximately a half of all markets operate above the California average and half the markets operate below the average by

²³ Mr. Stockton clarified, AHM is "falling into the same trap, which is to observe sales as some aspirational or average base[d] standard and compare that to -- to what -- to a level in the market. The fact that that's the difference between sales and standards and actual sales does not mean those are sales available. The sales available are those that would be in play with -- with respect to a potential add point and it's not anywhere near that." (RT Vol. XVII, 4021:2-12.)

weight); RT Vol. XIV, 3390:25-3391:10 (Mr. Farhat testifying the underperformance and shortfalls based on the California average could not be eliminated).) The Bakersfield market should be expected to be in the bottom half when compared to the California average—this predictable shortfall does not represent addiotnal “opportunity.”

AHM’s impact analysis is counterintuitive and contrary to its own expert’s analysis. AHM would have this Board believe Bakersfield’s lower than state average market share would be raised to state average simply by adding the proposed point. This logic ignores the fact that consideration of local market conditions shows it is unreasonable to expect the Bakersfield market to perform to the same level as the California average.

3. *Existing circumstances.*

At the time of the hearing, the evidence focused on the local market characteristics that make it unreasonable to expect the Bakersfield market and RMA to perform to the same level as the California state average. These included lower incomes, higher unemployment, consumer preference, and lower consumer credit scores. (*See* Protestant’s Post-Hearing Opening Brief at 27:12-28:13 and 29:18-31:13.) These local market conditions are now amplified and exacerbated by the current recession. Respondent’s efforts to minimize these conditions are unavailing.

AHM claims the record evidence shows: “These undisputed facts show a growing market—not a devastated local economy.” (AHM’s Brief at 29:16.) If this matter were remanded for further evidence, AHM could not provide any support for this claim. Nevertheless, remand is unnecessary because the record evidence concerning local market conditions conclusively demonstrates AHM’s opportunity analysis and impact analysis are unreliable for their failure to account for local market conditions in Bakersfield and the RMA.

Consumer preference for Honda products is lower in Bakersfield. The Bakersfield market shows demonstrable preference for large trucks, cheap cars, and exhibits a well-established domestic brand preference. Mr. Stockton considered a number of local market conditions to test the popularity of Honda products in the market, including the “Fit of the Product.”

AHM criticized Mr. Stockton’s evaluation of the Fit of the Product in Bakersfield stating Mr. Stockton could not show any correlation between his product favorability factor and brand performance.

(AHM's Brief at 27:15-16.) AHM also relies on Mr. Farhat's alleged effort to "test" Mr. Stockton's Fit of the Product variable. (AHM's Brief at 27:20-22.)

AHM's criticisms of Mr. Stockton's Fit of the Product analysis are misleading and incorrect. Mr. Stockton specifically demonstrated a correlation between his product favorability factor and brand performance. Tab 18 of Mr. Stockton's Expert Report indicates that the "Registrations at CA Average as a percent of Industry Registrations" or "Fit of the Product" variable is statistically significant to a high degree, and that it does correlate positively with Honda market share. (Exh. P-151 at Tab 18, page 1 (summarizing that "Registrations at CA Average as a Percent of Industry Registrations are positively correlated with the Sq. Root of actual Honda registrations").)

Additionally, the "test" Mr. Farhat performed on the Fit of the Product does not evaluate Mr. Stockton's analysis. Mr. Farhat instead tested the irrelevant hypothesis that Fit of the Product is the only factor that influences the registration effectiveness of various brands in Bakersfield. Mr. Farhat ignored the other four variables Mr. Stockton determined to impact brand performance on Tab 18 (including Median Age, Median Household Income, Percent of the Population with at least a 4-Year Degree, and Population Density) and instead evaluated whether Fit of the Product alone could explain brand performance. (RT Vol. XVII, 3983:19-3987:20 (Mr. Stockton describing the flaws in Mr. Farhat's effort to "test" his Fit of the Product variable and concluding the analysis "doesn't do what it purports to do and it doesn't test what I did").) Mr. Stockton did not offer the narrow proposition that Fit of Product is the only factor that influences the registration effectiveness of various brands. Mr. Farhat's regression analysis showed nothing and refuted nothing material.

Moreover, AHM does not criticize nor contest the results of Mr. Stockton's regression analysis. Mr. Stockton's regression analysis shows an R^2 value of 0.8854. (Exh. P-151 at Tab 18, page 1.) As Mr. Stockton testified, this means the five variables he measured, Fit of the Product, Median Age, Median Household Income, Percent of the Population with at least a 4-Year Degree, and Population Density, account for 88.54% of the variation in Honda brand performance. The remaining 11.46%, including dealer inputs, the Honda dealer network, and random chance account the remaining variation in Honda brand performance. (RT Vol. XII, 2821:10-2822:14.) This shows the facts are in stark contrast to AHM's position that approximately 100% of the variation in brand performance is attributable to

dealer inputs and the Honda dealer network. AHM's flawed reasoning requires all markets be considered identical—they are not. This is precisely why the legislature was compelled to require franchisors to consider local market conditions and existing circumstances when measuring performance.

G. The proposed establishment would be fatal to Barber Honda.

1. *AHM's self-contradicting arguments regarding Mr. Stockton's impact analysis.*

Respondent claims Mr. Stockton's impact model does not allow for potential growth in the market. (AHM's Brief at 17:7-17.) This claim is demonstrably false. Mr. Stockton explained how his analysis explicitly considered the possibility of market share expansion. (RT Vol. XII, 2875:15-287:3; RT Vol. XVII, 3958:15-3961:9; Exh. P-152 at Tab 22, p. 4.) Mr. Stockton first calculated a spacial change, and loss of proximity advantage to existing customers, to show a loss of a third of Barber Honda's territorial advantage. However, Mr. Stockton did not end his analysis here, as Honda disingenuously represents. Instead, Mr. Stockton offset this loss by including a potential 20% increase in market share, which is higher than the market share increases seen in Mr. Farhat's case studies. (RT Vol. XVII, 3960:9-3961:9.)

Respondent moves on to later acknowledge Mr. Stockton did in fact account for a potential 20% Honda brand market share increase. (AHM's Brief at 18:4-7.) Respondent's acknowledgment proves its characterization of Mr. Stockton's analysis as a "fixed pie" model to be brazenly false. Nevertheless, Respondent persists in its false representation that Mr. Stockton's analysis fails to consider potential growth—even after it acknowledges the fact that it does.

After Respondent disingenuously claims Mr. Stockton's analysis does not account for growth, then later admitting it does in fact account for a 20% increase in Honda brand market share, Respondent next attempts to argue the 20% growth figure is an assumption and estimate "made without any qualitative analysis" and "wholly unreliable." (AHM's Brief at 18:10-15.) It should be noted the data relied upon is from Respondent's own expert, Mr. Farhat. It is troubling Respondent would now claim its own expert's analysis to be unreliable simply because it results in conclusions adverse to its position. It is important to note Respondent is unable to offer any substantive challenge to the high-end 20% market share figure derived from Mr. Farhat's analysis.

Respondent's criticism is limited to its claim Mr. Stockton "simply based his estimates on a

reading of Mr. Farhat’s study of other Honda open points.” (AHM’s Brief at 18:7-10.) This statement is misleading in several ways. First, Mr. Stockton did in fact conduct the analysis as is clearly reflected in Exhibit 152. (Exh. P-152 at Tab 22, p 4.) Second, Mr. Farhat confirmed the market share increase calculations during his examination. (See RT Vol. XIV, 3343:3-6; RT Vol. XIV, 3346:2-8.)

Respondent’s self-contradicting and misleading argument that Mr. Stockton relies on a “fixed pie” model is easily rejected. Respondent’s alternative argument that even when Mr. Stockton considers growth, the data used is unreliable because it comes from Mr. Farhat’s analysis, is similarly without merit.

AHM’s reference to *LCA Acquisition Corp. dba South Motors Infiniti v. Nissan North America, Inc. et al.* (Fla. DOAH Nov. 2, 2015) Case. No. 14-2069; 14-2070, affirmed Case No. 1D15-5159 (Fla. 1st DCA Nov. 17 2016) (“*South Motors Infiniti*”) to support its “fixed pie” argument is inapplicable here.²⁴ As an initial matter, the *South Motors Infiniti* case is a decision from the State of Florida Department of Highway Safety and Motor Vehicles. AHM cites the case without reference to the applicable law; instead, AHM cites the case for a factual determination by the hearing officer. The facts of this case stand entirely independent of the facts as presented to the hearing officer in the *South Motors Infiniti* case.

The *South Motors Infiniti* decision cited by AHM is critical of Mr. Rosner’s proximity-based analysis because it “fails to take into account the amount of business opportunity available in the market.” (*South Motors Infiniti, supra*, at ¶ 98.) However, as discussed above, Mr. Stockton recognized at the hearing that proximity analysis alone does not directly translate to impact, and he accounted for the largest possible market share expansion proposed by AHM’s expert. (RT Vol. XVII, 3958:15-3961:9.) Mr. Stockton’s analysis is not a “fixed pie” analysis.²⁵ (*Id.*)

In addition, the *South Motors Infiniti* decision is markedly different from the facts in this Protest.

²⁴ While the Board can rely on unpublished authorities outside California as persuasive authority, *South Motors Infiniti* fails to contain any discussion that would aid the Board in reaching a decision in this Protest.

²⁵ In contrast, Mr. Farhat’s analysis proposing an 80 percent market share increase for Honda in Bakersfield after the add point is almost a “double-pie” analysis. Mr. Farhat’s analysis proposes the additional dealer in Bakersfield will result in 4/5ths more “pie” somehow materializing in the Bakersfield market.

In *South Motors Infiniti*, the area between the two existing dealers was urban, heavily populated, and contained a list of communities without an existing dealer. (*South Motors Infiniti, supra*, at ¶ 10.) Here, Barber Honda and the proposed open point only have the city of Bakersfield between them (in which Barber Honda is already located). Moreover, there is no urban population to the north, east, or west of the proposed open point. The two Bakersfield dealers would be forced to compete for a limited pool of business located predominately in the bottom half of the RMA. (Exh. R-376 at A-30 and A-31.)

Further, the protesting dealer in *South Motors Infiniti* was part of a large, successful dealership group, and the dealership group generated nearly \$1 billion in gross revenue per year with a profit of approximately \$800,000 to \$1.5 million per year. (*South Motors Infiniti, supra*, at ¶ 107.) “South Motors’ Executive Vice President, Jonathan Chariff, testified that South Motors is in a very sound and financially stable position.” (*Id.*) In comparison, Barber Honda is a family owned single-point dealership and generates approximately \$400,000 in net profit plus owner compensation. (Exh. P-152 at Tab 22, pages 4-5.) The *South Motors Infiniti* case is factually distinct from the Barber Honda Protest.

2. *Two critical points AHM fails to answer.*

AHM was quick to point to Mr. Farhat’s case studies in which absolute sales volumes by existing Honda dealerships changed little after dealerships entered the market. This ignores the uncontested fact that, after controlling for changes in the overall market, as Mr. Farhat insists is necessary in the Bakersfield Toyota case, existing dealerships sold less in their markets after the addition of new Honda dealerships. It also disregards the critically omitted fact in regard to the Baton Rouge example wherein the inventory of Team Honda’s facing Toyota dealership had been wiped out by flooding, allowing Honda an opportunity to exploit the idling of a critical competitor during Mr. Farhat’s evaluation period. (RT Vol. XVII, 3979:3-3980:6.) However, these questions are secondary to a larger question.

What would have happened if these add points had occurred under conditions like those that exist today? It is not clear how anyone could say California’s oil industry is in a positive condition.²⁶ It is well established Bakersfield’s economy is centrally and uniquely dependent upon the oil industry. (RT

²⁶ The Sacramento Bee, April 21, 2020 05:00 AM, updated 03:30 PM, “COVID-19 shutdown is crushing oil prices. Why this part of California isn’t celebrating” by Dale Kasler, <https://www.sacbee.com/news/business/article242153486.html> (accessed May 28, 2020).

Vol. IX, 2057:16-2061:18.) These conditions existed prior to the unanticipated economic assault from the COVID-19 outbreak. In short, the add points from Mr. Farhat's case studies, which occurred in growing markets, would have crippled those dealerships under declining market conditions seen today. In a market that was already in decline, like Bakersfield (*see* Exh. P-153), the impact from the proposed establishment would be foreseeably devastating.

Second, AHM disregards the question of subprime financing. Bakersfield is a subprime market. (*See* RT Vol. XII, 2823:25-2825:9.) Much of AHM's evidence attempted to paint Barber as a dealership that does not discount as steeply as dealerships do state-wide. However, expanding subprime operations, like the Mitsubishi dealership, adds costs to the transaction, which must be passed on to the customer. (RT Vol XI, 2561:20-2562:21 (Jonathan Ekegren describing the negative aspects of subprime sales).) Honda does not make deep subprime financing available to customers (RT Vol. XI, 2557:3-11), suggesting that this business does not fit its overall model. How, then, can AHM argue Barber should adopt these practices, when doing so increases prices for consumer, which AHM asserts is a negative for Bakersfield customers? AHM did not answer this question, because it could not in a way that fits its narrative. As Protestant argued throughout the hearing, Bakersfield is a unique market distinct from the typical California market. Honda's state-average "one size fits all" approach does not change this fact.

3. *AHM claims Barber Honda is in a strong position to compete with the proposed dealer.*

Respondent argues Barber Honda's 45 years of service to the Bakersfield community provides it a competitive advantage over the proposed Galpin dealership. Respondent also argues the proposed dealership is not expected to open for another 18 months, or more, providing Protestant even more time to build customer relationships. (AHM's Brief at 21:3-9.)

While it is true Barber Honda enjoys strong ties to the community it has served for more than 45 years, across three generations, this argument ignores the fact the proposed dealer is expecting to operate at a loss. Moreover, the multi-franchise Galpin organization is positioned to withstand a severe recession and can easily outlast Barber Honda—a single-point family owned dealership. (RT Vol. VIII, 1860:1-4.) An additional 18 months to prepare for ruinous competition with a multi-point dealer headquartered out of one of the largest automotive markets in the world would be of little consequence.

Respondent's argument borders on the absurd given current existing market conditions. All dealers are struggling across the State and the Nation. The outlook for dealers in Bakersfield is even more bleak. Bakersfield already had higher unemployment than the state average. (RT Vol. XI, 2569:25-2570:10 (testimony Bakersfield's higher unemployment rate and lower education level makes price a more compelling factor for the sale of a vehicle than other parts of California); *see also* Exh. P-152 at Rebuttal Tab 7, Page 1; Exh. R-324.) Competitive vehicle registrations have been in decline since 2015. (Exh. P-153.) The devastation to the oil industry continues to ripple through the Bakersfield economy. Protestant's opportunities to build customer relationships over the next 18 months can be expected to focus on keeping existing vehicles in service and working with customers unable to make their payments.

4. *Mr. Walter's analysis is misleading and unreliable.*

Respondent relies on its expert, Herb Walter, to support its claim Barber Honda is more profitable than its financial records reflect and there exists room for substantial cost reductions. Mr. Walter's analysis is based upon an unreliable comparison to composite data for dealers grouped by geography²⁷ and size. The use of a composite is an unreliable basis for comparison because it is only as reliable as the data reported and incapable of accounting for the sharing of costs in the comparison group or any other factor unique to any member of the composite. (RT Vol. XVI, 3827:12-24 (Mr. Walter admitting the composites could contain dealers who are part of a group that own multiple franchises able to spread data processing expenses across multiple franchises).)

Respondent refers to "anomalies" Mr. Walter identified when comparing Barber Honda to his composites including perceived higher personnel expenses, higher floor plan expenses, data processing, and "other interest." (AHM's Brief at 21:24-28.) However, comparing Barber Honda to the composites is an unreliable comparison.

Mr. Walter testified he looked at the Miscellaneous Income, where Barber moved their "PAC" moneys in 2017, for the composites but did not see significant miscellaneous incomes for the composites. "They're non-zero but they're not significant." (RT Vol. XVI, 3797:18-3798:6.) However, the

²⁷ For reasons Mr. Walter was unable to explain, Visalia Honda was omitted from Mr. Walter's geographic composite—a suspect exclusion considering its proximity to Bakersfield. (Exh. P-151 at Tab 4, page 11 shows 70.8 air distance miles, 77.8 drive distance miles (Tab 4, page 13).)

geographic composite for 2015 showed miscellaneous income of \$327,000 despite Barber showing a miscellaneous income of \$11,349. (RT Vol. XVI, 3832:23-3833:13.) He then denied he had said significant discrepancy—instead pointing to a consistency between years for the composites. (RT Vol. XVI, 3833:14-3834.) Similarly, the size composite for 2015 shows miscellaneous income of \$451,061. (RT Vol. XVI, 3834:2-10.) Mr. Walter denied he would need to adjust for “PAC” in his composite comparison dealership groups for year prior to 2017. (RT Vol. XVI, 3868:10-22.) Mr. Walter made no adjustment for “PAC” in any of his composites. (RT Vol. XVI, 3869:22-24.) For comparison, Barber Honda’s miscellaneous income in 2017 was \$656,662. (RT Vol. XVI, 3875:3-4.) The size-based composite has miscellaneous income of \$543,585 for 2017. (RT Vol. XVI, 3876:5-14.)

In addition, even the premise of the comparison is flawed. Bakersfield is a highly sub-prime credit market, meaning that many consumers must incur additional fees for non-conventional financing arrangements. The gross profit comparisons do not compare Barber’s gross profits to those in the market—those of the other Bakersfield dealerships. Notably, Barber’s back-end gross profits, from finance income, are lower than those of the group, despite operating in Bakersfield, with higher portions of credit-challenged consumers. In short, if there is any meaningful evidence about Barber’s gross profits, it is that in 2017, when both Barber and the composite dealerships recorded PACKs, they were comparable. There is no reliable showing that Barber’s gross profits were high for the market.

Mr. Walter’s treatment of PACK or “PAC”²⁸ is suspect at best. His testimony is not credible and cannot be relied upon for the conclusions advanced in support of AHM’s litigation goals.

5. *AHM’s allocation system causes Barber Honda to be dependent on supplemental allocation in times of growth.*

Barber Honda could have captured more vehicles sales in times when sales were robust. While it is correct AHM did at times provide Barber Honda with supplemental allocation, it is also evident Barber Honda’s ability to achieve RSE in 2014 (Exh. R-346 at AHM_0001259 (1.81% above expected)) was the result of these supplemental allocations. (Exh. R-347 at AHM_0002722 (showing 227 units of

²⁸ “PAC” is a term created by Mr. Walters for this Protest—it does not exist elsewhere. The common industry term is PACK. The DMS system used by Barber Honda and thousands of other dealers provides a predefined entry for PACK—not “PAC.” (RT Vol. XVI, 3888:1-3889:11.)

supplemental allocation provided).) As Jonathan Ekegren testified, there is something wrong with a system that makes a dealer dependent on supplemental allocations to achieve expected sales performance. (RT Vol. XII, 2738:25-2740:25.)

Nevertheless, Honda allocation has not been an issue for dealers for several years. AHM has an abundance of available inventory. Prior to the COVID-19 outbreak, dealers were increasingly refusing earned allocations. The market was in decline before COVID-19, it remains to be seen how severe the effects of the ongoing economic downturn will be and when the recovery will begin.

III. BARBER HONDA ADEQUATELY SERVES THE RMA.

There is no support for a claim the RMA is not already adequately served by Barber Honda. Barber Honda is well equipped and staffed to serve the needs of Honda customers. The facility is well appointed and modern. There is no evidence to suggest Barber Honda faces any current or even future capacity shortfall. (*See* Protestant's Post-Hearing Opening Brief at Part VIII.D.)

AHM claims Barber Honda's service scores are somehow a cause of purported inadequate sales performance, citing a handful of service contact reports. (AHM's Brief at 33:26-34:4.) However, a review of the actual scores relative to other Honda dealers provides much needed context to AHM's claims. For year-end 2017, Barber Honda is ranked 58 of 75 with a score of 86.3. The 20th ranked dealer shows a score of 90.1—a mere 3.8 points higher. The 10th ranked dealer shows a score of 90.9—4.5 points higher than Barber Honda. (Exh. R-400 at pp.006-007.) This differential can hardly be considered material and does not support a claim the RMA is inadequately served nor can it support AHM's shaky claim this somehow impacts Barber Honda's sales volumes.

It is surprising AHM would advance the argument CSE, service satisfaction scores, could impact a dealer's sales performance and reputation more so than HSE, the sales satisfaction score. HSE purports to measure customer satisfaction with the sales process received from the dealer. (RT Vol. IV, 869:24-871:19.) The HSE metric would intuitively seem more relevant to a dealership's reputation in regard to vehicle sales. However, AHM's Mr. Fisher testified he would not expect to see any correlation between HSE scores and a dealer's RSE performance. (RT Vol. IV, 991:10-21.)

It is a bit of a stretch for AHM to argue Barber Honda's CSE ranking, may adversely affect its sales reputation. It is even more of a stretch to claim Barber Honda's few percentage points difference

in CSE scores from dealers in the top 10 represents a material deficiency.

IV. THE PROPOSED ESTABLISHMENT WOULD HARM THE PUBLIC WELFARE AND WOULD NOT RESULT IN COMPETITION BENEFICIAL TO THE PUBLIC INTEREST.

As discussed above, any potential benefit to consumers is dependent upon the continued existence of both Barber Honda and the proposed new dealer. The ruinous competition certain to result from the proposed establishment would be unsustainable for Barber Honda. While consumers may experience a short-term benefit from the increase in competition, it would be temporary. Moreover, the level of intra-brand competition between the two Honda dealers would force both dealers to sell vehicles below cost and result in sharp sales tactics.

Robust and healthy competition already exists in the RMA. Barber Honda competes against all brands for sales. If a customer can purchase a competing brand product at a better price, that customer is likely to do so. Barber Honda is located in the Bakersfield Auto Mall amidst all its local competitors. (Exh. J-29 at ¶ 10.) There is no support for a claim Barber Honda fails to provide adequate competition. Moreover, the importance of brick and mortar locations is diminishing. COVID-19 has forced the industry to accelerate the use of online sales and delivery.

As discussed previously, Mr. Walter's misleading PNVR analysis is demonstrably misleading and unreliable. Mr. Walter's analysis cannot be relied upon to support a finding Barber Honda is not providing competitive pricing. (See Protestant's Post-Hearing Opening Brief at 32:5-19.)

Respondent's arguments that the number of customers purchasing vehicles outside of the Bakersfield market indicates a lack of competition is unavailing. All markets exhibit Insell. (RT Vol. III, 544:24-545:1; RT Vol. III, 650:8-19; RT Vol. IV, 815:3-8; RT Vol. XIV, 3352:10-13 (Mr. Farhat testified he could not recall ever seeing a Honda market with zero Insell—"Even Hawaii has in-sell, believe it or not").) Barber Honda's Insell is lower than most markets. Some of this is due to its isolated nature, but the percentage of Insell in Bakersfield does not show an anomaly that suggests a lack of adequate competition in the RMA.

In fact, when the locations where some of these vehicles were purchased are considered, the notion a purported lack of convenience is driving customers to purchase outside the market is without support. Bakersfield residents purchased Honda vehicles from dealers in states outside California

including Utah, Texas, Nevada, Virginia, Iowa, and Arizona. (Exh. R-376 at APP 12-25.) Out-of-market sales in California ranged from as far south as San Diego to the north of San Francisco. The idea these customers found it more convenient to purchase vehicles hundreds, and in some instances thousands, of miles outside Bakersfield is easily dismissed. Obviously, there are unknown reasons why these purchases occurred. The proposed add point cannot reasonably be expected to result in the elimination of these out of market sales. Even Galpin Honda shows Insell into its ASA, despite the fact it captures more sales outside its ASA than any dealer captures in Galpin Honda's ASA. (See Protestant's Post-Hearing Opening Brief at p. 35; Exh. P-152 at Tab 15, page 1.) Insell cannot reasonably be considered genuine opportunity available to the Bakersfield market nor can it serve as an indication of a need for additional competition.

V. AHM MISREPRESENTS, MISSTATES, AND EXAGGERATES THE FACTS IN ITS OPENING BRIEF AND PROPOSED FINDINGS OF FACT.

In addition to the other inconsistencies and misstatements discussed above, AHM's citations of the facts in its Opening Brief and Proposed Findings of Fact are inconsistent with the record. AHM misrepresents, misstates, and exaggerates the facts throughout its Opening Brief and Proposed Findings of Fact. The following examples show the Board cannot rely on the facts as stated in AHM's Opening Brief and Proposed Findings of Fact:

- AHM asserts it is uncontested a second Honda dealership in Bakersfield would improve customer convenience, provide another brick-and-mortar location for sales and service, increasing employment, and providing an additional choice for customers (AHM's Brief at 3:14-17), however, the witnesses AHM cites testify any such benefits to consumers and the public are contingent on Barber Honda's continued operation after the establishment—AHM omits this testimony (RT Vol. X, 2313:19-20; RT Vol. XI, 2713:7-2714:13);
- AHM argues Galpinsfield "has been serving the Honda brand in a similar market with a strong Hispanic presence just like Bakersfield" (AHM's Brief at 7:16-17), however, AHM's citations only compare Bakersfield and Mission Hills in terms of the Hispanic customers in the markets—AHM ignores the unique aspects of Bakersfield as an isolated market with significant oil and agriculture industries (RT Vol. II, 394:6-23; RT Vol. VIII, 1961:1-

- 1962:13; *see also* Exh. J-29 (Stipulated Facts Regarding January 9, 2020 Market Drive) at ¶¶ 28 and 30 (describing the isolated nature of Bakersfield and the locations of the nearby oil and agriculture industries));
- AHM suggests the Galpin organization “consistently” achieved strong customer satisfaction scores at its dealerships (AHM’s Brief at 7:21-23), however, AHM ignores the period of time Galpin Honda’s customer satisfaction scores ranked 48 out of 69 dealers in 2011, 59 out of 69 dealers in 2012, and 62 out of 70 dealers in 2013 (Exh. R-399 at pages 4, 7, and 9; *see also* RT Vol. VIII, 1983:9-11 (Mr. Beau Boeckmann agreeing Galpin Honda’s dealer code is 208424)); remarkably, Galpin Honda’s service scores—as measured by Respondent—steadily improve after AHM identifies Galpin as the dealer for the proposed North Bakersfield point;
 - AHM implies Protestant abandoned its argument that Insell should not be properly considered opportunity available to Barber Honda under AHM’s gross loss analysis when Jonathan Ekegren testified in-sell represented “opportunity” to Barber Honda (AHM’s Brief at 10:FN 2), however, Insell should not be part of AHM’s gross loss calculation because there is Insell in every market, AHM cannot identify an acceptable standard of Insell, and AHM is never going to eliminate Insell (RT Vol. III, 493:22-494:11; RT Vol. III, 544:24-545:1; RT Vol. III, 650:8-19; RT Vol. IV, 815:3-8; RT Vol. IV, 817:8-24 (David Adair testifying Honda is “not going to eliminate in-sell.” There’s always going to be situations where people -- family reasons or whatever -- will buy a car from out of market); *see also* RT Vol. XII, 2871:6-18; RT Vol. XII, 2875:1-10; RT Vol. XIV, 3352:10-13 (Mr. Farhat testifying he did not recall seeing a Honda market with zero Insell – “Even Hawaii has in-sell, believe it or not”)); Protestant maintains Insell should not properly be considered “lost opportunity” in the Bakersfield market—the Honda brand already captures all “Insell” sales and the Honda dealers making “Insell” sales will continue to make these sales after the proposed establishment;
 - AHM argues Barber Honda only performs well in service retention because it is the only authorized Honda dealership within a 67-mile radius (AHM’s Brief at 10:10-13), however,

AHM ignores that Barber Honda customers also have the choice to go to independent service shops, yet still choose to receive service from Barber Honda (*see e.g.* RT Vol. V, 1048:13-17 (Michael Bach testifying there is a common perception that customers are going to get a better deal from an independent repair shop compared to a dealer));

- AHM proposes the “true measure” of service opportunity is the UIO not being serviced for a brand (AHM’s Brief at 10:13-15), however, AHM’s citation does not support the number of active or lapsed UIO being the “true measure” of service opportunity any more than service retention scores (RT Vol. IV, 749:21-23)—moreover, AHM normally measures UIO based on comparison to a standard and not based on raw lapsed or inactive UIO in a market (RT Vol. IV, 803:13-804:7 (Mr. Adair testifying AHM measures service performance based on comparing the rate of servicing UIO to the same rate AHM expects as the standard)); AHM does not ordinarily look at the raw number of lapsed or inactive UIO because there are no markets with no lapsed or inactive UIO (RT Vol. V, 1046:7-16 (Mr. Bach testifying he is unaware of any Honda market with no lapsed or inactive UIO and he does not have an expected number for lapsed or inactive UIO in a market)); the only reason AHM chose to look at the raw number of lapsed and inactive UIO in Bakersfield in this Protest is because Barber Honda’s service retention scores do not support AHM’s argument;
- AHM claims “there is a great concentration of lapsed and inactive UIO in North Bakersfield around the proposed site” (AHM’s Brief at 10:19-21; *see also* AHM’s Proposed Findings of Fact at ¶ 86), however, AHM’s citation only states there is the greatest concentration of UIO in the North Bakersfield ASA in the southern part of the ASA within the city of Bakersfield (RT Vol. IV, 751:18-24); the maps actually show the UIO are effectively between the proposed location for Galpinsfield and Barber Honda and does not compare the lapsed and inactive UIO concentrations to the lapsed and inactive UIO concentrations in Barber Honda’s ASA;
- AHM suggests Fresno is “a local market in the Central Valley right up the road from Bakersfield” (AHM’s Brief at 12:5-6; AHM’s Proposed Findings of Fact at ¶ 91), however, Fresno and Bakersfield are approximately 100 miles apart and, unlike Bakersfield, Fresno is

not known for its oil industry (RT Vol. XI, 2566:17-2567:17);

- AHM claims “employment levels in Kern County have grown from 269,613 to 349,502—an increase of approximately 23% since 2010” (AHM’s Brief at 13:17-18; AHM’s Brief at 29:2-9), however, based on the Exhibit cited by AHM, employment levels were 313,361 in the year 2010; employment levels increased approximately 11.5%—half the rate of increase proposed by AHM; moreover, employment levels declined from 2014 to 2016 (Exh. R-376 at A-39);
- AHM suggests Stephen Ekegren agreed there is opportunity for additional Honda sales in the Bakersfield market based on a quote that “there’s a substantial amount of opportunity that exists in the Bakersfield market for Barber Honda” (AHM’s Brief at 14:11-14; AHM’s Proposed Findings of Fact at ¶ 103), however, Barber Honda sells a substantial number of new Hondas in Bakersfield—there is sufficient opportunity for Barber Honda in Bakersfield, but not to sustain an additional Honda dealership;
- AHM argues “Barber Honda is the only Honda dealer available to sell new vehicles and provide service for customers within a 67 mile radius of its location—an area exceeding more than 14,000 square miles” (AHM’s Post Hearing Opening Brief at 33:13-16), however, the 14,000 square mile area AHM calculates is based solely on pi times 67 miles squared ($A = \pi r^2$ – the formula for the area of a circle); AHM exaggerates the area available to Barber Honda because there are other Honda dealers at approximately 67 miles away from Barber Honda and the effective radius should effectively be halved (this results in an approximately 3,500 square mile area—over 10,000 less than the 14,000 proposed by AHM); additionally, much of this area is sparsely populated; AHM’s calculation of a 14,000 square area solely available to Barber Honda is a transparent exaggeration;
- AHM proposes “Galpinsfield plans to look for local construction companies to build the new facility” (AHM’s Brief at 35:23-25), however, during the merits hearing, Beau Boeckmann had *not even thought about* using a local Bakersfield company to build the new facility (RT Vol. VIII, 1922:5-9);
- AHM asserts “Between just 2000 and 2017, the population within the RMA increased from

346,255 to 460,201, while the population in the Bakersfield metro as a whole increased by more than 235,000 people, from 517,258 to 753,345. Similarly, over that same time period the number of households increase by over 40,000 within the RMA, from 115,528 to 147,573, and increased by more than 55,000 in Bakersfield as a whole, from 157,278 to 216,634.”²⁹ (AHM’s Proposed Findings of Fact at ¶ 35.) However, based on the Exhibit cited by AHM, from 2000 to 2017, the population of in the RMA increase from 345,255 to 444,443—with the majority of the population increase from 2000 to 2010 (Exh. R-376 at A-34); the population of the Bakersfield Metro increase from 517,258 to 722,714—approximately an increase of 200,000 people with over 150,000 of the increase between 2000 and 2010 (Exh. R-376 at A-37); the number of households in the RMA increased from 115,528 to 142,869—an increase of less than 40,000 with most of the increase between 2000 and 2010 (Exh. R-376 at A-34); and the number of households in the Bakersfield metro increased from 157,278 to 208,497—an increase of less than 55,000 with most of the increase between 2000 and 2010 (Exh. R-376 at A-37);

- AHM describes Barber Honda paid \$50,000-\$60,000 to purchase six houses to expand its display lot (AHM’s Proposed Findings of Fact at 17:FN 14), however, the testimony reflects Barber Honda paid \$50,000-\$60,000 *per house* for a total of approximately \$300,000 to \$360,000 (RT Vol. IX, 2111:12-13);
- AHM suggests while Stephen Ekegren testified Barber Honda has made investments in the dealership in excess of \$8 million, he “offered no explanation of that [sic] figure was arrived at” (AHM’s Proposed Findings of Fact at 18:FN17), however, AHM never asked Stephen Ekegren how he arrived at the \$8 million figure, and AHM’s citation does not support its conclusion (RT Vol. IX, 2137:12-14); if AHM had some concern about the amount of investment in Barber Honda, it was obligated to raise the concern during its cross-

²⁹ The numbers referenced by AHM actually refer to the projected growth from 2000 to 2022. (Exh. R-376 at A-34 and A-37.) Mr. Farhat’s projections for population growth by 2022 are substantially uncertain given the COVID-19 Pandemic. Moreover, AHM’s proposed finding of fact proposes to improperly apply a higher amount of growth to a shorter amount of time than supported by the Exhibit.

examinations; AHM chose not to raise any such concern during the entire merits hearing; moreover, the \$8 million plus figure is also documented in an email sent by Stephen Ekegren to AHM (Exh. P-102);

- AHM suggests the amount of UIO in the market is AHM's "primary assessment of service opportunity" in a market (AHM's Proposed Findings of Fact at ¶ 86), however, AHM's citation does not support the raw number of lapsed and inactive UIO is AHM's primary assessment of service opportunity (RT Vol. IV, 749:21-23 (stating only that UIO is used to look at service opportunity in a market)); instead, AHM normally uses a standard of comparison to look at relative service retention between Honda dealers because AHM does not expect any market to have no lapsed or inactive UIO (RT Vol. IV, 803:13-804:7 (Mr. Adair testifying AHM measures service performance based on comparing the rate of servicing UIO to the same rate AHM expects as the standard)); AHM is not doing so in this case, however, because Barber Honda's service retention scores are approximately twice as good as the average Honda dealer (Exh. P-121);
- AHM states service opportunity is "typically" measured by the number of UIO available in the market (AHM's Proposed Findings of Fact at ¶ 96), however, AHM's citation states only that UIO is *an* indicator of opportunity of service (RT Vol. XIII, 3097:13-15), raw lapsed and inactive UIO counts are not the typical indicator for service opportunity (*see* RT Vol. IV, 803:13-804:7 (Mr. Adair testifying AHM measures service performance based on comparing the rate of servicing UIO to the same rate AHM expects as the standard)); AHM proposes the UIO count in Bakersfield relative to expected new vehicle sales is lower than other markets (AHM's Proposed Findings of Fact at ¶ 96), however, this is only further evidence that AHM's new vehicle sales expectations for Bakersfield are inconsistent with the reality of the local market;
- AHM attributes Jonathan Ekegren with the testimony that "there are a 'couple hundred' units of additional Honda sales available in the Bakersfield market" (AHM's Proposed Findings of Fact at ¶ 104), however, Jonathan Ekegren actually testified, "So, I don't think that there is 1,920 additional sales in the Bakersfield market. Do I believe there's a couple hundred

some, 200, 300? Maybe if all things were aligned right” (RT Vol. XI, 2579:19-22);

- AHM argues Barber Honda’s request to be considered for the North Bakersfield open point in 2008 is “confirmation” of the significant opportunity allegedly available in the Bakersfield market (AHM’s Proposed Findings of Fact at ¶ 105), however, as Stephen Ekegren testified, the conversation he had with Mr. Van Olst was short and in passing; he “did not have time to make an assessment on how wise that investment would have been, exactly what the result of that investment would be, or whether or not it was really appropriate for us. Simply what we -- would I be considered for that location” (RT Vol. X, 2263:3-17); Stephen Ekegren’s motivation for asking about the point was “a self-preservation move as opposed to having somebody else come in and cannibalize my sales” much like the common ownership of the Toyota dealership in Bakersfield (RT Vol. IX, 2106:22-2107:3); and
- AHM proposes it is “ironic” Barber Honda raises its high service retention scores and challenges AHM’s sales performance metrics, both based on state-average calculations (AHM’s Proposed Findings of Fact at ¶ 140: FN24), however, AHM’s complaint only highlights its own inconsistency; instead of applying both raw sales or state-average adjusted metrics, AHM chooses to apply the metric that most benefits its legal position (raw lapsed and inactive UIO numbers for service and state-average for sales); Barber Honda consistently challenges AHM’s state-average based metrics as unreasonable, however, even under an unreasonable service retention metric, Barber Honda performs substantially above the state-average. Moreover, these comparisons significantly differ in that service retention only considers actual existing Honda customers while AHM’s sales metrics are dependent on registrations from other brands and is aspirational for what Honda expects if Bakersfield were to perform to the state average.

CONCLUSION

The record evidence demonstrates the existence of good cause to prevent the proposed establishment. Any uncertainty has since been eliminated by the current state of the world, the U.S., and the Bakersfield economies. Unemployment levels are at record highs and growing. The oil industry, one of Bakersfield’s largest economic drivers, is economically decimated. New vehicle sales are at their

lowest levels in 40 years. California may experience a culling of its dealer network larger than what occurred during the Great Recession. If Barber Honda survives, it will emerge with depleted resources and no ability to compete with the proposed North Bakersfield point for a severely reduced pool of business, clustered in the southern half of the RMA. Moreover, AHM failed to offer reliable evidence to counter the plain to see fact that Barber Honda would be severely impacted by the establishment of a dealer in an area where Barber Honda captures 40% of its new vehicle sales and roughly 50% of its parts and service business.

Prior to the COVID-19 pandemic, the RMA did not provide sufficient sales and service opportunities to support two Honda dealerships. Any additional opportunity that may have existed at the time of hearing has vanished. The Bakersfield market was already showing decreasing year-over-year registrations from 2015 through the close of hearing. Honda dealers were increasingly rejecting earned allocations. AHM determined economic circumstances in 2008 militated against the addition of the proposed North Bakersfield point. The same conclusion is inescapable today.

Dated: June 24, 2020

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STATE OF CALIFORNIA

NEW MOTOR VEHICLE BOARD

In the Matter of the Protest of:

BARBER GROUP, INC., a California corporation,
doing business as BARBER HONDA,

Protestant,

v.

AMERICAN HONDA MOTOR CO., INC., a
California corporation,

Respondent,

GALPINSFIELD AUTOMOTIVE, LLC,

Intervenor.

PROTEST NO. PR-2539-17

**PROTESTANT'S POST-HEARING
REPLY BRIEF TO INTERVENOR
GALPINSFIELD AUTOMOTIVE,
LLC'S POST-HEARING OPENING
BRIEF**

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Pursuant to the Board’s January 6, 2020, Order Establishing Post-Hearing Briefing Schedule, Protestant files its Post-Hearing Reply Brief to Intervenor Galpinsfield Automotive, LLC’s Post-Hearing Opening Brief.

INTRODUCTION

Intervenor Galpinsfield Automotive, LLC’s Post-Hearing Opening Brief (“Galpinsfield’s Post-Hearing Opening Brief”) begins by repeatedly referencing the open point and “the significant opportunity” available to capture in Bakersfield, the “opportunity it presents,” and the “significant opportunity” in Bakersfield. (Galpinsfield’s Post-Hearing Opening Brief at 1:22-28.) The “opportunity” Galpinsfield allegedly observes in the market is aspirational and based on AHM’s unreliable market analysis—now meaningless given the economic devastation resulting from the COVID-19 pandemic. Galpinsfield did not perform any third-party analysis and “relied on Honda’s expertise and their research.” (RT Vol. VIII, 1829:14-25.)¹ AHM and its expert’s analysis of what “opportunity” is available in the Bakersfield market is based on the flawed premise that every market throughout California is equally capable of meeting AHM’s brand performance—this is a mathematical impossibility.

The “opportunity” available in the Bakersfield market is illusory. An 80 percent Honda market share increase in Bakersfield is unsupported by Mr. Farhat’s hand-picked case studies. (RT Vol. XIV, 3343:3-6 and Exh. R-376 at A-75 (showing an 11.5% market share increase for the Surprise Area case study; RT Vol. XIV, 3346:2-8 and Exh. R-376 at A-79 (showing an 11.1% market share increase for the Marysville case study); Exh. R-407 at R-20.2 (showing an 18.6% market share increase for the Baton Rouge case study; RT Vol. XII, 2850:15-2852:14 and Exh. P-154 (showing a 13% average market share increase for the Bakersfield Toyota experience); *see also* RT Vol. XII, 2872:2-14 (Mr. Stockton testifying the introduction of the new dealership would have significant intrabrand effects because “Honda is the most competitive product with a Honda”); RT Vol. XIII, 3022:17-3025:1 (Mr. Stockton describing overwhelming negative impact on Barber Honda if Galpinsfield were able to make 2,496 sales in the Bakersfield market).)

¹ Barber Honda uses the same citation format herein as used in its Post-Hearing Opening Brief.

Galpinsfield's Post-Hearing Opening Brief also focuses on its "permanent" investment in the purchase of 11 acres of land north of Bakersfield along 7th Standard Road (Merle Haggard Drive) for over \$5 million. (*See* Galpinsfield's Post-Hearing Opening Brief at 4:22-5:21 and 6:15-7:10.) This investment is not permanent. The property is a vacant unimproved lot and represents no permanency of investment. In contrast, Galpinsfield's Brief entirely ignores Barber Honda's substantial investments in its facility of over \$8 million. (RT Vol. IX, 2137:9-17; RT Vol. IX, 2108:15-22; Exh. P-102; Exh. P-112.)

Galpinsfield's 11-acre land purchase can be resold or developed into different businesses. Moreover, Galpinsfield indicates it does not intend to devote the entire 11 acres of land to the Honda franchise and instead build only a "normal Honda facility." (Galpinsfield's Post-Hearing Opening Brief at 11:15-16.) As a result, Galpinsfield's argument the entire \$5 million cost of the land should be considered as an investment in its proposed Honda franchise is inherently inconsistent. Galpinsfield was aware the proposed location in the North Bakersfield Open Point was subject to protest. Nevertheless, Galpinsfield willfully chose to encounter this avoidable risk.

Galpinsfield's Post-Hearing Opening Brief also ignores the following important facts:

- Bert Boeckmann's involvement in the proposed Galpinsfield Honda dealership will be minimal, and Beau Boeckmann will ultimately be responsible for the dealership;
- The Galpin Organization is involved in multiple facility commitments for multiple manufacturers, and Beau Boeckmann is personally involved in multiple commitments that limit his time to manage the proposed Galpinsfield Honda dealership;
- The Galpin Organization's "deep bench" of general managers is taxed by the departure of Edik ("Ed") Hartoonian and Terry Miller;
- Barber Honda already aggressively markets to the Bakersfield Hispanic community;
- Adding another Honda dealer to the Bakersfield market outside the city limits of Bakersfield will not make the Honda brand significantly more convenient for Honda customers; no brands have new motor vehicle dealerships in Bakersfield owned by more than a single owner;
- Galpinsfield's pro forma shows losses in the first two years of operations with

approximately consistent costs each year; and

- The current health and economic circumstances make the establishment of an additional Honda dealer in Bakersfield untenable.

DISCUSSION

Galpinsfield's reliance on AHM's "opportunity" analysis fails for the same reasons discussed in Barber Honda's Post-Hearing Opening Brief and Reply Brief to AHM's Post-Hearing Opening Brief. (*See, infra*, Part I.) When considering the permanency of investment, Barber Honda's investment far outweighs Galpinsfield's impermanent investment through the purchase of 11 acres of undeveloped land. (*See, infra*, Part II.) Galpinsfield's Post-Hearing Opening Brief ignores important facts relevant to the Board's good cause determination. (*See, infra*, Part III.)

I. THE THOUSANDS OF NEW HONDA SALES "OPPORTUNITIES" REQUIRED TO SUPPORT THE PROPOSED ESTABLISHMENT DO NOT EXIST.

Galpinsfield did not conduct any third-party analysis and instead "relied on Honda's expertise and their research." (RT Vol. VIII, 1829:14-25.) Galpinsfield's repeated assertions there is "significant opportunity," the open point has an "opportunity it presents," and similar statements in its Opening Brief are premised on AHM's inherently flawed and unreliable opportunity analysis.

As Barber Honda showed throughout this Protest, AHM's opportunity analysis based on the application of a statewide market share to local competitive registrations in Bakersfield is unreliable and unlawful pursuant to Vehicle Code section 11713.13(g). AHM and its expert assume all markets should achieve the state average Honda market share, and any deviation below the average is allegedly a shortfall. However, AHM's use of an average *always* results in approximately half the Honda markets above the average and half the Honda markets below the average by weight. (RT Vol. XIII, 3011:3-3012:11; RT Vol. XIV, 3390:13-3391:10.) AHM's attribution of the deviation from average market share as "opportunity" in the Bakersfield market is unsupported.

The Board cannot rely on AHM's RSE and RE metrics to show the "opportunity" in Bakersfield because AHM failed to meet its burden under Vehicle Code section 11713.13(g) requiring it to show these metrics are reasonable in light of all existing circumstances. (Cal. Veh. Code § 11713.13, subd. (g)(1)(A).) These metrics are unreasonable for the same reasons the Board has rejected other

manufacturer state average-based metrics.

“Reliance on “average” and “rankings” without further information has the tendency to mislead. Making threats of adverse consequences if a dealer does not “achieve 100% RSE” is misusing the data.” (*Santa Cruz Nissan, Inc., dba Santa Cruz Nissan v. Nissan North America, Inc.* (Cal. NMVB, Sept. 17, 2014) Protest No. PR-2358-13 (“*Santa Cruz Nissan*”) at Proposed Decision ¶ 185.) Among other failings, MSR measured Dependable’s sales performance “by comparison to a statewide class of dealers, then adjusts the standard with respect to one metric: local consumer purchasing preferences for certain vehicle types. That fails to take into account that the segments used by FCA in its MSR calculation are over broad.” (*Dependable Dodge, Inc. v. Fiat Chrysler Automobiles, Inc.* (Cal. NMVB, Mar. 15, 2017) Protest Nos. PR-2435-15 and PR-2436-15 at Proposed Decision ¶ 106 (“*Dependable*”).) Average-based measures like MSR and Honda’s measures are incapable of accounting for materiality, which is a critical element to establishing the need for an additional dealership. (*Dependable, supra*, at Proposed Decision ¶ 114.) As the Board determined in Folsom, “[t]he use of RSI generally by General Motors, and as applied in this case, violates Section 11713.13(g)(1)(A). RSI fails to account for the impact of circumstances unique to Folsom Chevrolet’s market (other than segment popularity), including but not limited to demographics, geography and brand preferences.” (*Folsom Chevrolet, Inc., dba Folsom Chevrolet v. General Motors, LLC* (Cal. NMVB, Aug. 13, 2018) Protest No. PR-2483-16 (“*Folsom*”) at Proposed Decision ¶ 218.)

Mr. Farhat’s suggestion the addition of the Galpinsfield dealership in North Bakersfield will result in an 80 percent increase in Honda market share in Bakersfield is unreliable and unsupported. Mr. Farhat’s hand-picked case studies and the Toyota experience in Bakersfield support potential market share increases of less than 20 percent—in growing markets. (RT Vol. XIV, 3343:3-6; Exh. R-376 at A-75 (showing an 11.5% market share increase in the Surprise Area case study); RT Vol. XIV, 3346:2-8; Exh. R-376 at A-79 (showing an 11.1% market share increase in the Marysville case study); Exh. R-407 at R-20.2 (showing an 18.6% market share increase in the Baton Rouge case study); RT Vol. XII, 2850:15-2852:14 and Exh. P-154 (showing a 13% market share increase in the Bakersfield Toyota analysis).)

There is no reliable support for the claim over 2,000 additional Honda sales are going unrealized

in Bakersfield. 2,000 sales are more sales than Barber Honda has ever made in any single year. (See RT Vol. XVI, 3900:25-3901:22 (Mr. Jonathan Ekegren testifying in his experience there are not 2,000 additional Honda sales to be made in Bakersfield); RT Vol. XVI, 3901:23-3902:4 and RT Vol. XVI, 3921:10-23 (Barber Honda's highest annual new vehicle sales in a year was roughly 1,850 since Jonathan Ekegren's involvement with the dealership, and Barber Honda has never exceeded 2,000 sales in a year).)

There is no reason why Barber Honda would not be motivated to sell as many new Hondas as possible. (RT Vol. IX, 2167:8-19.) AHM and Galpinsfield did not even attempt to explain why Barber Honda is not capturing more of the purported thousands of additional Honda sales "available." The "opportunity" AHM's metrics suggest is present in the Bakersfield market does not exist.

While there may be some Honda market share expansion after the proposed establishment, the expansion will not double the available Honda sales in the market. As a result, Barber Honda will at least suffer a 20% impact. (RT Vol. XVII, 3960:9-3961:9 (Mr. Stockton testifying to at least a 20% impact to Barber Honda based on up to a 20% increase in Honda's market share in Bakersfield).) A 20% reduction in Honda business would result in at least a 300% negative impact to Barber Honda's profitability. (RT Vol. XII, 2885:6-22; Exh. P-152 at Tab 22, page 4.) If the proposed establishment is permitted to move forward, the coexistence of the two dealerships in Bakersfield would be temporary, and at least one of the dealerships will eventually be forced to close.

II. GALPINSFIELD'S PURCHASE OF 11 ACRES OF UNDEVELOPED LAND CANNOT BE CONSIDERED PERMANENT; IT IS UNDISPUTED BARBER HONDA'S INVESTMENT IS PERMANENT.

California Vehicle Code section 3063(a) requires the Board shall take into consideration the "Permanency of the investment" when considering whether there is good cause for not entering into a franchise to establish a same line-make dealership within the RMA. (Cal. Veh. Code § 3063, subd. (a).) Galpinsfield argues it "has made a substantial and permanent investment in the proposed dealership." (Galpinsfield's Post-Hearing Opening Brief at 6:16-17.) Galpinsfield's argument it has made a "permanent" investment is entirely based on its purchase of 11 acres of land for approximately \$5 million

and the associated holding costs.² (*Id.* at 6:19-25.)

However, as Galpinsfield freely admits, the 11 acres of land is undeveloped. (Galpinsfield's Post-Hearing Opening Brief at 7:2; *see also* Exh. J-29 at ¶ 16.) The land can be sold or developed into alternative uses other than a new Honda dealership. In contrast, Barber Honda's land and facility are already devoted to new motor vehicle sales and service for the Honda brand. Moreover, Barber Honda is located in the Bakersfield's Auto Mall. (Exh. J-29 at ¶ 8.) All the major franchises are represented in the auto mall and Barber Honda could not replace the Honda franchise with another franchise. (RT Vol. IX, 2025:13-24.) Galpinsfield's purchase of undeveloped land north of Bakersfield is not a permanent investment. Barber Honda's 45 plus year investment clearly is.

Additionally, Galpinsfield alleges it has devoted, but will not use, the whole 11 acres of land for its Honda franchise.³ (Galpinsfield's Post-Hearing Opening Brief at 11:14-16; *see also* RT Vol. VIII, 1908:15-25.) If Galpinsfield's claim is true, Galpinsfield's purchase of 11 acres cannot wholly be considered an investment in the proposed Honda franchise. Beau Boeckmann testified Galpinsfield would build a "normal Honda facility." (RT Vol. VIII, 1908:15-25.) AHM's guide for the proposed new Honda dealership is for 3.59 acres. (Exh. 23 at AHM_00065573.) This would result in the use of 3.59 of the 11.3 acres if Galpinsfield built a "normal" facility consistent with AHM's guide. As a result, none of the remaining 7.7 acres should be considered an investment by Galpinsfield in the proposed

² Galpinsfield also asserts it will increase its investment upon approval of the establishment including constructing a brand-new facility and hire and train local staff. (Galpinsfield's Post-Hearing Opening Brief at 6:28-7:10.) However, these additional investments are prospective and have not been made. These assertions should not be considered as part of the Board's determination of the permanency of investment pursuant to the good cause factors. Moreover, there is no certainty how many local employees Galpinsfield will hire or if Galpinsfield will use a local contractor to construct the brand-new facility. (*See* RT Vol. VIII, 1922:5-21 (as of the merits hearing, Beau Boeckmann had not looked into having a local company build the North Bakersfield facility).) Additionally, Beau Boeckmann testified the first place the Galpin organization would look to fill the employment positions at the North Bakersfield Open Point would be within the Galpin organization and not from local Bakersfield residents. (RT Vol. VIII, 1814:11-13.)

³ Barber Honda disputes Galpinsfield's claim. Galpinsfield's purchase of 11 acres is more likely designed to allow the dealership to operate a large volume dealership consistent with the Galpin organization's other dealerships. This will cause a substantial, negative impact on Barber Honda. (*See, e.g.*, RT Vol. XIII, 3021:25-3025:1.) However, if Galpinsfield's claim were to be taken seriously, the entire 11 acres and the related \$5 million payment cannot be considered a permanent investment in the proposed Galpinsfield Honda franchise.

Honda franchise—of the entire \$5 million purchase, the portion associated with the 3.59 acres would be approximately \$1.6 million. Galpinsfield cannot legitimately claim the other \$3.4 million is part of its permanent investment in the proposed establishment of a “normal” Honda facility.

Moreover, the holding costs Galpinsfield incurred are not a permanent investment. The year to year costs for the 11 acres, including taxes, are reoccurring costs. Vehicle Code section 3061 (the good cause factors for 3060 protests) lists both “Investment necessarily made and obligations incurred by the franchisee to perform its part of the franchise” and “Permanency of the investment.” (Cal. Veh. Code § 3061, subd. (b) and (c).) However, Section 3063 includes only the “Permanency of the investment.” (Cal. Veh. Code § 3063, subd (a).) This indicates the obligations to pay taxes, insurance costs, and other holding costs are not properly part of the permanency of the investment contemplated by Vehicle Code section 3063—otherwise, similar language to subdivision (b) in Vehicle Code section 3061 would be included in Section 3063. The holding costs are also not permanent—these are yearly costs and are not further investment. The only benefit to paying the holding costs is not forfeiting the original property purchase.

Further, Galpinsfield knowingly accepted the risk of purchasing the property, despite AHM explicitly cautioning against the purchase. Galpinsfield purchased the property in approximately May 2016. (Exh. I-506.) Galpinsfield purchased the property over a *year* before it had any written commitment from AHM that Galpinsfield would be the candidate for the North Bakersfield Open Point. Galpinsfield and AHM only entered into the letter of intent on or about September 15, 2017. (Exh. J-23.) Moreover, the letter of intent warned Galpinsfield the proposed location was subject to protest, and its purchase of property would be at its own risk. (Exh. J-23 at AHM_00065576.) Moreover, Mr. Hagan made it very clear that Galpin’s purchase of property was at its own risk because the establishment was subject to protest. (RT Vol. VII, 1371:22-1372:6.) Because Galpinsfield purchased the property accepting all risk, Galpinsfield’s purchase should not be considered when determining the permanency of investment. AHM did not require Galpinsfield purchase the property while also advising against the property purchase.

For these reasons, Barber Honda’s undisputed permanent investment overwhelmingly outweighs any Galpinsfield investment. Barber Honda’s investments, including its over 45 years of operation, are

directly associated with the Honda brand. In contrast, Galpinsfield's property can be sold or used for purposes other than a new Honda dealership; Galpinsfield is not proposing to use the entire property for Honda operations; and Galpinsfield assumed all the risk associated with the property purchase. Barber Honda's substantial and permanent investment deserves protection and provides good cause to prevent the proposed establishment.

III. GALPINSFIELD'S POST-HEARING OPENING BRIEF IGNORES OTHER IMPORTANT EXISTING CIRCUMSTANCES.

While Galpinsfield relies on the experience and success of Bert Boeckmann, Galpinsfield ignores the fact Bert Boeckmann is approximately 89 years old and would not directly participate in the operation of the proposed point. (*See, infra*, Part A.) Galpinsfield ignores the Galpin organization's many existing facility commitments to multiple manufacturers and Beau Boeckmann's personal time commitments. (*See, infra*, Part B.) The Galpin organization does not discuss its depleted "bench" of general managers. (*See, infra*, Part C.) Galpinsfield's Opening Brief stated Barber Honda "made much of the demographics in Bakersfield, particularly the fact that Bakersfield has a large Hispanic community," however, Galpinsfield ignores Barber Honda already aggressively markets to the Hispanic community in Bakersfield. (*See, infra*, Part D.) Galpinsfield's claim a new Honda dealership in the Bakersfield market will "greatly improve customer convenience" ignores the increase in customer convenience will be by an average of several miles and is inconsistent with the customer convenience of most other brands in Bakersfield. (*See, infra*, Part E.) Galpinsfield ignores its pro forma is inconsistent with higher startup costs justifying losses in the first two years of operation. (*See, infra*, Part F.) Finally, Galpinsfield makes absolutely no mention of the current circumstances as a result of the Coronavirus. (*See, infra*, Part G.)

A. **Bert Boeckmann will not be directly involved in the operation of the proposed Galpinsfield dealership.**

Galpinsfield's Post-Hearing Opening Brief lists the accomplishments of Bert Boeckmann. (Galpinsfield's Post-Hearing Opening Brief at 2:9-17.) However, Bert Boeckmann is approximately 89 years old. (RT Vol. VIII, 1854:13-15.) Bert Boeckmann testified Beau Boeckmann will have the ultimate responsibility for the open point if it is established. (Exh. J-28 at Herbert Boeckmann II's 12/5/2018 Deposition at 10:18-22.) Moreover, Mr. Hagan was sure Bert Boeckmann might have

ownership involvement in the North Bakersfield Opening Point, but he was not going to be actively involved because of his age. (RT Vol. VII, 1338:12-19.)

While Bert Boeckmann is well known and respected in the automotive industry, Galpinsfield cannot rely on his active involvement. Bert Boeckmann is 89 and admits Beau Boeckmann will be the individual responsible for the open point. AHM initially raised Bert Boeckmann's involvement as an area of concern. (Exh. J-21 at AHM_00065146.) This concern was alleviated by the involvement of Ed Hartoonian. Mr. Hartoonian will not be involved in the proposed open point because, like the Galpin Ford GM, he chose to leave the Galpin organization.

B. The Galpin organization and Beau Boeckmann have a substantial number of commitments that compete with the proposed establishment of the Galpinsfield dealership.

Galpinsfield mentions some of the Galpin organization's facility commitments including the ones to Porsche and Land Rover. (Galpinsfield's Post-Hearing Opening Brief at 3:FN1.) However, Galpin's current facility commitments include Porsche, Land Rover, a three-dealership campus for Volvo, VW, and Mazda, a facility remodel for Lincoln, and a facility remodel for Lotus. (RT Vol. VIII, 1916:13-1917:9 and 1920:22-1921:4.) If it is awarded the North Bakersfield Open Point, Galpin will also be obligated to build a new Honda facility.

Beau Boeckmann's personal commitments include being the Dealer principal for all nine Galpin franchise, as well as President and COO of the Galpin organization. (RT Vol. VIII, 1749:17-20; RT Vol. VIII, 1750:16-22.) He participates in Ford's Product Committee, a Ford committee regarding future automobile transportation, a local FDAF advertising committee, and the Dealer Advisory Board for Aston Martin. (RT Vol. VIII, 1819:25-1820:20.) He is also currently involved in television production projects. (RT Vol. VIII, 1821:19-1822:5.)

The commitments facing the Galpin Organization and Beau Boeckmann show they have many potentially conflicting interests with the North Bakersfield Open Point. This is troubling in light of how the Galpin organization has recently resolved conflicts between its franchises. The Galpin organization voluntarily terminated its Santa Clarita Mazda and Santa Clarita Subaru stores because it sought to add a Porsche franchise in Santa Clarita and decided not to build a new facility on leased property. (RT Vol. VIII, 1778:21-1781:8.) Similarly, when the Galpin Mazda lease expired, Galpin decided to voluntarily

terminate its Kia franchise in favor of relocating the Galpin Mazda franchise to the facility intended for the Kia franchise. (RT Vol. VIII, 1792:19-1794:11.)

The voluntary terminations of the Galpin Subaru, Mazda, and Kia franchises were not in the best interest of the consuming public or associated manufacturer. If the establishment of the Galpinsfield dealership conflicts with other interests of the Galpin organization, the Galpinsfield dealership would likely be sold to the highest bidder. Galpinsfield's Post-Hearing Opening Brief ignores the current, substantial franchise obligations of the Galpin organization and Beau Boeckmann's personal obligations.

The question then posed is why should Barber Honda challenge the establishment of a dealer it suspects may not follow through in its commitment to establish a new dealership? The answer is this, if AHM is successful in this protest, it would be free to establish and reestablish representation in North Bakersfield. The proposed establishment is a speculative investment. There will always be another investor willing to take a chance on an additional Honda franchise. Barber Honda faces the prospect of being indefinitely locked in ruinous competition against a carousel of larger ownership groups.

It is not important to AHM whether Galpinsfield ultimately establishes and operates the proposed point—only that it prevails in this protest to “clear the market” of protest rights. The Galpin organization can sell the franchise rights and property for an immediate return on its investment without ever establishing a profitable Honda dealership. The value of Galpin's investment would be entirely subsidized by Barber Honda.

C. The Galpin organization has a reduced pool of general managers to fill the proposed North Bakersfield Open Point.

Galpinsfield's Post-Hearing Opening Brief argues the Galpin organization will simply provide a qualified General Manager from its “deep bench of experienced and well qualified managers” if it is allowed to fill the North Bakersfield Open Point. (Galpinsfield's Post-Hearing Opening Brief at 16:12-28.) However, two of its general managers recently left the organization—Ed Hartoonian and Terry Miller. (RT Vol. VIII, 1804:10-17.)

Ed Hartoonian left the Galpin organization in mid-July 2018. (Exh. J-28 at Edik Hartoonian's January 15, 2019 Deposition at 13:11-19.) Terry Miller left the Galpin organization approximately a few months before October 2019. (RT Vol. VIII, 1804:18-21.) As a result of the departures, David

Gillam became the general manger of Galpin's Honda store, Jan from the Volkswagen store became the general manager of the Mazda store, and the top manager at the Mazda store became the general manager at the Volkswagen store. (RT Vol. VIII, 1803:13-18.) Moreover, the Ford store no longer has a dedicated general manager. Instead Michael Schwartz, who oversees all the Galpin general managers as the Vice President of Business Operations, also became the General Manager of the Ford store. (RT Vol. VIII, 1807:9-25.)

The replacement of two general managers in the last two years reduces the "deep bench" of qualified managers the Galpin organization could appoint to run the North Bakersfield Open Point. The Galpin organization has not currently named *anyone* to be the general manager for the proposed Galpinsfield dealership. (Exh. R-366; RT Vol. VIII, 1811:14-20.) The departure of two general managers from the Galpin organization signals limitations in its selection of general managers to effectively run its stores. It also signals broader problems in the overall management of the Galpin organization. (*See, e.g.*, Exh. J-28 at Edik Hartoonian's 3/26/2019 Deposition at 45:19-21 ("[S]omebody doesn't get up and leave after 28 years if everything is hunky-dory").)

D. Barber Honda already aggressively markets to Hispanics in the Bakersfield market.

Galpinsfield claims, "Protestant made much of the demographics in Bakersfield, particularly the fact that Bakersfield has a large Hispanic community." (Galpinsfield's Post-Hearing Opening Brief at 8:12-14.) However, Barber Honda raised concerns about the demographics in Bakersfield fundamentally linked to its isolated market and oil and agriculture industries. (*See, e.g.*, RT Vol. IX, 2057:16-2061:18; RT Vol. IX, 2082:4-2083:15.) Moreover, Hispanic populations are not the same. A broad diversity of other demographic factors exists within these populations. Barber Honda's Hispanic market is unlike the market in the North Hills—exhibiting lower incomes, lower credit scores, and higher unemployment in line with the overall demographics of Bakersfield. In addition to the unique oil and agriculture dependent economy in Bakersfield, Bakersfield has a significant Hispanic market of about 50 percent compared to the North Hills area of about 34 percent and California's Hispanic market of about 36 percent. (RT Vol. IX, 2061:21-2062:12.) Bakersfield has a significant farming employment base. These low paying jobs do not fit the profile of the typical Honda purchaser. (RT Vol. IX, 2061:6-2061:18; *see also* RT Vol. III, 519:12-18; RT Vol. XII, 2818:14-2820:25; Exh. J-18 at AHM_00001417

(showing a 2013 average household income of \$57,220 for the Bakersfield ASA, \$69,700 for the North Bakersfield ASA, \$61,997 for the market total, and \$81,689 for the State of California); Exh. R-376 at A-38 (showing Bakersfield Metro 2017 median income to be \$55,042).)

Barber Honda devotes significant resources toward marketing Honda products to Hispanic customers in Bakersfield. Barber Honda directs significant advertising to its Hispanic market including television advertising, radio, and a program to provide lunch to the farm workers. (RT Vol. IX, 2062:18-2063:9; Exh. P-117 and RT Vol. IX, 2152:11-2153:5.) Barber Honda participates in Baker Street advertising (1% invoice cost per vehicle sold and later 2%) and at one point specifically requested Baker Street increase its Spanish media advertising. (RT Vol. IX, 2140:12-2148:18.) Barber Honda also advertises to the Hispanic market independent of the Baker Street advertising including radio, digital, TV spots, and billboards. (RT Vol. IX, 2151:14-23.) Barber Honda employs a large number of Spanish speaking staff across all departments. (RT Vol. IX, 2063:10-12 and 2150:19-2151:13.)

Barber Honda already serves its Hispanic customers. Galpinsfield's suggestion to the contrary is without support.

E. The addition of the proposed Galpinsfield dealership will not significantly improve customer convenience.

Galpinsfield argues "adding a new Honda dealership in this [Bakersfield] area will greatly improve customer convenience, bringing it in line with Toyota and other Honda competitors." (Galpinsfield's Post-Hearing Opening Brief at 9:12-14.) However, the proposed addition of the Galpinsfield dealership will decrease average drive distance to the nearest Honda location from, at most, 16.3 miles to 11.2 miles for customers in the Bakersfield market—a decrease of 5.1 miles. (Exh. R-376 at A-65.) Or if you accept AHM's initial analysis when it decided to fill the Open Point, a move from 13.9 miles to 11.8 miles—a decrease of 2.1 miles. (Exh. J-18 AHM_00001384.)

There are currently 17 competitive franchises represented in Bakersfield. (Exh. R-376 at A-5U.) Of those franchises, 7 have average drive distances less than Honda and 9 have average drive distances greater than Honda. (Exh. R-376 at A-5U and A-65 (according to the note, only those franchises with better customer convenience are displayed on the chart—these include Chevrolet, GMC Truck, Toyota, Ford, Chrysler, Jeep, and Dodge—and so the remaining franchises in Bakersfield have worse customer

convenience compared to Honda).) Honda is currently more convenient to access in Bakersfield than the majority of other competitive franchises.

Additionally, the only franchises with two locations in the RMA, Ford and Toyota, are under common ownership. (RT Vol. XII, 2731:16-2732:4; RT Vol. XVI, 3895:18-3897:9.) Honda would be the first and *only* brand with two dealerships in the RMA under different ownership, if the proposed establishment is permitted. Adding the Galpinsfield dealership would be out of line with the practices of every brand in Bakersfield.

For these reasons, adding the proposed Galpinsfield dealership would not result in “greatly improved” customer convenience nor bring the customer convenience in line with other competitors. It would reduce travel distance by approximately 2-5 miles for the average Honda customer. This nominal improvement in consumer convenience does not outweigh the ruinous impact the proposed establishment would have on Barber Honda.

F. Galpinsfield’s Post-Hearing Opening Brief ignores its pro forma does not show losses in the first two years of operation attributable to start-up costs.

Galpinsfield argues its pro forma does not require it sell over 2,000 new vehicles each year in order to be profitable in Bakersfield. Galpinsfield claims the “projected loss in its first few years simply reflects its multi-million-dollar investment in the proposed site, a new facility, and other start-up costs it would incur in those years.” (Galpinsfield’s Post-Hearing Opening Brief at 10:22-11:2.)

A review of Galpinsfield’s pro forma shows the difference in profitability between the first and third year are dependent on selling more than 1920 new Hondas per year. The pro forma shows a loss of \$600,744 in the first year of operation, a loss of \$210,457 in the second year of operation, and a profit of \$861,466 in the third year of operation. (Exh. J-20 at AHM_00065937.) It is important to consider the pro forma was created during the near peak of the market—circumstances considerably different than exist today.

Contrary to Galpinsfield’s explanation, the fixed expenses are projected to be *higher* in Galpinsfield’s third year of operation compared to its first year of operation. (Exh. J-20 at AHM_00065937 (lines for Fixed Expenses).) Similarly, the projected costs of hiring, training, and compensating personnel *increases* from the first year to the third year of Galpinsfield’s projected

operations. (*Id.* (lines for Personnel Expenses).) As a matter of fact, *all* of Galpinsfield's projected expenses increase when comparing the first year of operation to the third year of operation. (*Id.* (lines for Variable Expenses, Personnel Expenses, Semi-Fixed Expenses, Fixed Expenses, and Total Expenses).) As a result, Galpinsfield's projected profitability in its third year cannot be a result of a decrease in Galpinsfield's expenses.

Instead, the pro forma shows Galpinsfield reaches profitability in its third year of operation because its total gross profits are projected to increase faster than its total expenses. (Exh. J-20 at AHM_00065937 (lines for Total Gross Profit and Total Expenses showing an increase in Gross Profit of \$1,879,671 and an increase of \$1,477,461 in Total Expenses from the first year of operation to the second year of operation resulting in the approximately \$400,000 lower net loss in the second year; similarly, there is an increase in Gross Profit of \$3,327,622 and an increase of \$2,234,239 in Total Expenses from the second year of operation to the third year of operation resulting in the approximately \$1 million difference in profitability from the second to third year).)

Part of Galpinsfield's Total Gross Profit is projected to come directly from new car sales: \$1,600,000 from 1,600 new car sales in the first year, \$2,112,000 from 1,920 new car sales in the second year, and \$2,995,200 from 2,496 new car sales in the third year. (Exh. J-20 at AHM_00065937 (from Units: New and Gross Profit: New lines).) Galpinsfield projects making on average \$1,000 gross profit per new vehicle sold in the first year, \$1,100 gross profit per new vehicle sold in the second year, and \$1,200 gross profit per new vehicle sold in the third year. (*Id.*) Galpinsfield projects other sources of gross profit, however, without the gross profit from the new vehicle sales, Galpinsfield would be showing a net loss of millions of dollars each year. (*Id.* (without the \$1,600,000 the first year, the \$2,112,000 the second year, and the \$2,995,200 the third year, Galpinsfield's pro forma would show a net loss of over \$2 million each year).)

Moreover, the projected increases in new vehicle sales is necessary for Galpinsfield to reach projected profitability in its third year of operation. Without the increase of gross new vehicle sales profits from the second to third year of operation, Galpinsfield's pro forma would continue to show a loss in the third year of operation. (Exh. J-20 at AHM_00065937 (Gross: New line showing a difference of \$883,200 between the second and third year; this exceeds the projected net income of \$861,466 in the

third year of operation).)

Galpinsfield's explanation for why its pro forma projects only being profitable in the third year of operation is inconsistent with the pro forma. Decreases in projected expenses does not result in the net income in the projected third year of operation; total expenses increase year over year in Galpinsfield's pro forma. Instead, Galpinsfield's projected profitability relies on increasing gross profits. Among these, Galpinsfield must increase its gross profits from new vehicle sales to reach profitability. Galpinsfield projects increasing sales over 2,000 new units sold per year to result in the projected gross profit. Based on Galpinsfield's own pro forma, Galpinsfield cannot operate profitability without reaching over 2,000 new Honda sales per year—no reliable evidence supports finding an additional 2,000 available Honda sales opportunities exist in the RMA or throughout the Bakersfield market.

Why would Galpinsfield pursue the proposed establishment if the numbers reflect it is unlikely to operate profitably? Again, this is a long-term investment subsidized by the value of Barber Honda's permanent investment. Galpin would receive the franchise for free⁴—this can be resold for a substantial profit. Galpin's land purchase could also be resold for a significant profit if attached to a Honda franchise. Galpin would also have the option to sell the franchise and lease back the land. Galpin is well positioned to absorb years of losses for the eventual windfall it would receive at significant cost to Barber Honda. In the alternative, the multi-franchise Galpin organization may also simply outlast Barber Honda. Under any scenario, Galpin stands to benefit significantly from the proposed establishment.

G. Galpinsfield's Post-Hearing Opening Brief completely ignores the current COVID-19 pandemic.

On March 19, 2020, California Governor Gavin Newsom issued Executive Order N-33-20 in response to the global COVID-19 pandemic.⁵ The order required, among other things, non-essential

⁴ While Galpinsfield may be required to make the investments AHM requires of a Honda franchise if permitted to establish the North Bakersfield dealership, Galpinsfield will not need to make a payment for the "blue sky" value of a Honda franchise in Bakersfield. It will receive blue sky value of a Honda franchise for free if permitted to establish the dealership.

⁵ The California Evidence Code supports the Board taking judicial notice of the COVID-19 pandemic and the Governor's March 19, 2020 order. Judicial notice shall be taken of "[f]acts and propositions of generalized knowledge that are so universally known that they cannot reasonably be the subject of

businesses to cease operation. Non-essential businesses include new motor vehicle sales departments. No California motor vehicle sales departments are permitted to operate as they did before the current COVID-19 pandemic. Predictably, the car business and new motor vehicle sales have slowed.

There is currently no date certain for the end of the stay at home order underlying Executive Order N-33-20. Even as California businesses begin to resume operations, health experts recommend the process not be immediate. At this time, it is uncertain what lasting financial impact the current health crisis will have. The United States government continues to spend unprecedented amounts of money—trillions of dollars—in Corona virus aid in an effort to limit the depths of the current recession.

At the same time, oil prices have dropped to historic lows. The recent financial harm to the oil industry will have lasting effects on the Bakersfield economy. (RT Vol. IX, 2057:16-2061:18 (Kern county is the second largest oil-producing county in the country; the local economy is adversely affected when the oil industry is adversely affected).)

However, despite these critically important global events, Galpinsfield's Post-Hearing Opening Brief fails to even acknowledge the COVID-19 pandemic and the resulting financial, despite being filed // days after the Governor's March 19, 2020 order. COVID-19 impacted almost every aspect of daily life. However, because these existing circumstances are fatal to Galpinsfield's and AHM's arguments, they choose to ignore them.

The Board must consider these current circumstances. Good cause exists to prevent the proposed establishment of a second Honda dealership in the Bakersfield RMA. The local Bakersfield economy is

dispute.” (Cal. Evid. Code § 451, subd. (f).) There can be no reasonable dispute California and the world at large are currently in the middle of a global pandemic. Moreover, judicial notice may be taken of “[o]fficial acts of the legislative, executive, and judicial departments of the United States and of any state of the United States”; “[f]acts and propositions that are of such common knowledge within the territorial jurisdiction of the court that they cannot reasonably be the subject of dispute”; and “[f]acts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy.” (Cal. Evid. Code § 452, subd. (c), (g) and (h).) The Governor's March 19, 2020 order is an official act of the executive branch of the state of California. The presence of the global pandemic in California may be ascertained by reference to the California Department of Public Health, the World Health Organization, the U.S. Department of Health, the California Governor's daily briefings, and the President of the United States' briefings. The ongoing global pandemic is not subject to reasonable dispute in California or the world at large. The Board should take judicial notice of the COVID-19 pandemic and include COVID-19's effects in the Vehicle Code section 3063 analysis.

devastated, unemployment levels are at historic highs, and new vehicle sales are experiencing severe declines.

CONCLUSION

Galpinsfield relies on AHM's opportunity analysis to support the idea there is "significant opportunity" in the Bakersfield market that will allow the proposed dealership to be established without negatively impacting Barber Honda. AHM's opportunity analysis violates Vehicle Code section 11713.13 and is not reasonable in light of the existing circumstances. The purported "significant opportunity" for Honda sales in the Bakersfield market does not exist. The proposed establishment would force the closure of Barber Honda if permitted to move forward.

Galpinsfield's land purchase is not a permanent investment. Barber Honda's interest in preserving its substantial and permanent investment over the past 45 plus deserves considerably more weight than Galpinsfield's interest in seeking returns on its speculative investment through the purchase of unimproved property.

As supported by Barber Honda's Post-Hearing Opening Brief, Barber Honda's Post-Hearing Reply Brief to AHM's Post-Hearing Opening Brief, and above, Protestant respectfully requests the Board determine there is good cause for not entering into the proposed Honda franchise. Any potential benefits from the proposed establishment would be short-lived. Sustaining this Protest will prevent ruinous competition between the two Honda franchises which will ultimately force one or both of the franchises out of business. The interest of protecting Barber Honda's permanent investment substantially outweighs AHM's interest in establishing a second point as well as Galpin's interests in receiving another free Honda franchise.

Dated: June 24, 2020

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**STATE OF CALIFORNIA
NEW MOTOR VEHICLE BOARD**

In the Matter of the Protest of:

BARBER GROUP, INC., d/b/a BARBER
HONDA,

Protestant,

v.

AMERICAN HONDA MOTOR CO., INC.,

Respondent,

GALPINSFIELD AUTOMOTIVE, LLC,

Intervenor.

PROTEST NO.: PR-2539-17

**RESPONDENT AMERICAN HONDA
MOTOR CO., INC.'S REPLY BRIEF**

Pursuant to the Order Establishing Post-Hearing Briefing Schedule, Respondent American Honda Motor Co., Inc. ("American Honda") hereby files its Reply Brief.

INTRODUCTION

Protestant's Opening Brief does not contain any evidence or arguments contradicting any of the undisputed facts outlined by American Honda in its filings. Protestant does not dispute the

significant population and population growth in the Bakersfield metropolitan area, the fact that there is no Honda competition within 67 miles in any direction from Barber Honda (an area exceeding 14,000 square miles), or that Bakersfield is the largest market in the entire country by population and competitive registrations with only one Honda dealer to serve customers. Protestant also does not contest that Honda is the lowest performing of all the brands in Bakersfield, that the proposed site is 9.1 miles away from its dealership, or that there are 96 pairs of Honda dealers successfully operating in California closer together than the new dealership would be to its facility. In fact, Protestant even concedes, as it must, that the addition of a new Honda dealership in North Bakersfield will improve the brand's performance in the market. (Protestant's Opening Brief at 18).

Protestant's Opening Brief also fails to support—and in some cases completely abandons—many of the arguments it raised at the hearing in an attempt to demonstrate good cause not to permit this new dealership. Although Protestant spent considerable time attempting to convince the Board that it had not received enough inventory as an explanation for its poor performance and the poor performance of the Honda brand in Bakersfield, Protestant's Opening Brief does not mention allocation even one single time. Similarly, while Protestant argued that the Bakersfield market is different because it demonstrates an alleged preference for domestic brands, Protestant's Opening Brief only mentions this alleged domestic preference once, in the introduction, with no citations to any facts or evidence in the record to support it. (Protestant's Opening Brief at 6). The same is true for Protestant's claim that there is a local preference for trucks – one conclusory mention in the same sentence of the introduction. (*Id.*). Moreover, while Protestant's brief does include some discussion of the oil industry in Bakersfield, it is wholly devoid of any evidence correlating the performance of the oil market or the price of oil to the historical performance of the retail automotive sales and service business in Bakersfield.

Instead of attempting to develop these themes—thus acknowledging their lack of support—in its Opening Brief, Protestant relies heavily on several claims and arguments outside the record and the pleadings in a last-ditch effort to stop the addition of a new business that will greatly benefit the public. First, while the COVID-19 pandemic and the accompanying “stay-at-home” orders have dominated the headlines in recent weeks, Protestant shamelessly seeks to use this once-in-a-generational health issue—an unforeseeable event that arose after the hearing in this case was completed—for its own benefit and as an opportunity to attack the addition of a new dealership that will serve the ever-growing number of customers in Bakersfield for decades to come. As discussed below, these references to events outside the record are wholly improper and completely ignore the evidence actually in the record most relevant to this issue: (1) that establishing a new dealership will significantly benefit the public and the local economy, and (2) that the new dealership still has to be built and will not open until 18-24 months after a final ruling by the Board. ***Consistent with this testimony, American Honda hereby stipulates that it will not authorize the opening of this new dealership until 24 months following the filing of this brief.***

In addition, Protestant’s Opening Brief improperly continues to litigate this case like a termination matter and tries to meet its burden of proof almost entirely by attacking American Honda’s internal process for evaluating brand representation in the market. Instead of embracing its burden and attempting to meet it by relying on its own evidence and expert, Protestant has now decided its best path forward is to improperly shift that burden of proof over to American Honda. In its Proposed Recommended Order, Protestant cites California Vehicle Code Section 11713.13(g) for the claim that American Honda bears the burden to prove its internal standards for evaluating brand representation in this case are reasonable. Contrary to this misguided argument, however, Protestant has never asserted any claim against American Honda under this provision as part of this open point protest—nor could it. Not only does the Board lack statutory authority to adjudicate

allegations under this provision in protest actions like this one, that provision is wholly irrelevant here. The plain language of Section 11713.13(g) makes clear it applies only to standards used to evaluate an individual dealer's performance, not to a manufacturer or distributor's internal processes for evaluating the representation of the brand in a market as a whole. Rather, California Vehicle Code Section 3066(b) makes it clear that the burden of proof rests with Protestant—despite its best efforts to avoid it.

Protestant's actual attacks on American Honda's internal evaluation process also lack merit, and instead are based entirely on half-truths and misleading interpretations of the evidence in a clear attempt to place a square peg in a round hole. While Protestant continues to claim that American Honda's decision to open this new dealership was a "knee-jerk reaction" to the opening of the second Toyota dealership in Bakersfield, Protestant ignores the fact that American Honda *waited ten years* after that dealership opened to issue the statutory notice here and *conducted three separate studies* of this market during that ten-year time period. Hardly a knee-jerk reaction. While Protestant repeatedly claims that American Honda's decision was based solely on Zone average registration effectiveness without evaluation of other factors, that assertion is provably false and has been thoroughly debunked. At the hearing, American Honda and its experts affirmatively presented evidence of (1) the brand's performance under multiple different standards and methodologies and (2) the dozens of local demographic, economic, and market conditions that it evaluated without regard to any performance standard at all. Instead of addressing these actual facts, however, Protestant simply chooses to ignore them because they do not fit its narrative. By failing to rebut this convincing evidence head on, Protestant has tacitly acknowledged its truth and undermined its own argument on this point.

Protestant also incorrectly claims that American Honda did not even analyze the potential impact of this new dealership on Barber Honda, and claims that the issue of impact can be resolved

solely by looking at the amount of business it currently conducts in North Bakersfield. This assertion, however, is more than ironic. While Protestant goes to great lengths to convince the Board (inaccurately) that American Honda's decision was based on one single methodology, it is Protestant who is asking the Board to make a decision on impact by looking at one factor in a vacuum without considering all the relevant facts and circumstances. The fact that Barber Honda conducts business in North Bakersfield is no surprise given that it has a virtual monopoly on this market, *i.e.*, there are more than 722,000 potential customers in the Bakersfield metro but (1) there are no other Honda dealers to serve this growing number customers for 67 miles in any direction from Barber Honda and (2) it takes customers over an hour drive to visit any other Honda dealership. Tellingly, Protestant ignores these facts entirely. It also ignores the fact that Protestant's own expert analysis found that the Honda brand is severely underperforming with only one dealer in this market, and by Mr. Stockton's own admission, establishing a new Honda dealer to serve this market will improve the brand's performance and result in additional Honda sales and service business that can be captured by Barber Honda as well as the new dealership.

Protestant's focus on the Bakersfield market as it currently exists, without consideration of the growth and opportunity in this market, highlights the fatal flaw in its position. Although Protestant argues that referring to its flawed analysis as a "fixed pie" analysis is a canard, exactly what Protestant has indeed calculated here. During the hearing, Protestant's own expert admitted that his impact analysis made "no adjustment for any increase in sales and no adjustment for an increase in Units in Operation that would occur with the addition of a new dealership." (Hrg. Tr. Vol. 17 Page 4040:1-12) (emphasis added). Indeed, had Mr. Stockton simply used his own analysis of the additional Honda sales available in Bakersfield when evaluating impact, he would have found that *these available sales exceed the amount of lost sales he predicted for Barber Honda and would have resulted in zero impact to Protestant.* Instead he disingenuously chose to ignore his

own growth projections in order to overstate the expected impact of a second Honda dealership.

Given these glaring failures, it is clear that Protestant has failed to meet its burden of proving there is good cause not to permit the addition of this new dealership. Instead, the actual facts of this case make convincingly clear that a new Honda dealership in North Bakersfield will greatly benefit consumers and the public and stimulate the market for Honda business—all without any material impact to Barber Honda.

ANALYSIS

I. Protestant's Reliance on COVID-19 is Improper and Ignores the Actual Evidence at the Hearing about the Opening of the New Dealership.

American Honda is highly sensitive to the effects of the recent COVID-19 health pandemic on the health and well-being of its customers, its employees, its authorized dealers, and the public at large. This once-in-a-generational development is at the forefront of everyone's mind, including American Honda, and was unforeseen at the time of this hearing.

While fully recognizing the seriousness of COVID-19, American Honda nevertheless was surprised to see that Protestant, from the very first sentence of its Opening Brief (and continuing throughout its papers), is seeking to capitalize on these unique events by asserting they provide good cause not to permit the addition of this proposed new Honda dealership. Specifically, Protestant repeatedly references the COVID-19 outbreak, the various “stay-at-home” orders issued for the safety of the public, and their economic effects (and speculates about the length of these events even while the country is in the process of reopening) to ask this Board to enjoin the opening of a new dealership that will serve customers in one of the largest metro markets in the state for decades to come. These references to later events, all of which were unforeseen and arose *after* the close of evidence in this case, are wholly improper.

Although California authorities recognize that attorneys have significant leeway to argue their interpretation of evidence that is in the record, courts have made clear that parties have “no

right” to cite facts that are not in evidence, cite facts unsupported by the evidence, or speculate “as to unsupported inferences.”¹ These authorities apply with equal force to administrative proceedings like this one. The Government Code expressly provides that the factual basis of any decision “shall be based exclusively on the evidence of record in the proceeding.” Cal. Gov. Code § 11425.50(c). Consistent with this authority, the Order Establishing Post-Hearing Briefing Schedule issued by Administrative Law Judge Nelsen expressly required all briefings to be supported with “citations to the administrative record.” Protestant’s references to these events, which are nothing more than mere speculation about potential future effects of the COVID-19 pandemic, are not supported by the record and must be stricken.

Moreover, to the extent the Board deems it necessary to consider these current events, the evidence actually in the record makes clear that American Honda was never seeking to establish a new dealership in North Bakersfield simply to take advantage of a short-term level of opportunity in this market, but instead is looking to improve representation for the growing number of customers in Bakersfield for many years to come. As the evidence at the hearing showed, American Honda studied this market three different times over a nine-year period beginning in 2007 and determined that the *population has been growing*, that the *Honda brand has been underperforming*, and that there *has been a significant amount of opportunity* in this market *for more than a decade now*. (Exhibits J-18 at AHM_01385; J-22 at AHM_063623) (Hrg. Tr. Vol. 4 Pages 756:16-757:10). This includes its analyses performed both *before* the 2008-2012 recession and in the years *after* that recession ended. (*Id.*).

¹ See, e.g., *Las Palmas Associates v. Las Palmas Center Associates*, 1 Cal.Rptr.2d 301, 315 (1991) (stating that the parties have “no right to cite facts unsupported by the evidence”); *People v. Collins*, 49 Cal. 4th 175, 209, 232 P.3d 32, 62 (2010) (“While counsel is accorded great latitude at argument to urge whatever conclusions counsel believes can properly be drawn from the evidence, counsel may not assume or state facts not in evidence”); *Cassim v. Allstate Ins. Co.*, 33 Cal.4th 780, 796, 94 P.3d 513, 521 (2004) (holding that parties are not permitted to “assume facts not in evidence” or invite speculation “as to unsupported inferences”); 7 *Witkin, Cal. Proc. 5th Trial* § 222 (2020) (“It is misconduct to refer to matters that, even if admissible, were not offered or admitted in evidence.”).

These facts and the other evidence at the hearing also demonstrate the incredible resilience of the automotive industry. Although vehicle registrations declined during the 2008-2012 recession, Protestant's own expert report acknowledged that registrations rebounded at an incredible rate to set all-time record highs at well over 17 million registrations within just a few years after that recession ended. (Exhibit P-152 Tab 5 Page 1) (Hrg. Tr. Vol. 13 Pages 3126:10-3127:23). In fact, industry registrations remained over 17 million for more than five years through the end of 2019. (*Id.*). The same is true for Bakersfield specifically. From 2010 to 2017 alone, the population in the Bakersfield metro increased significantly from 517,258 to 722,714, and the number of households in this area increased from 157,278 to 208,497. (Exhibit R-376 at A-37 and A-38). During this same time period, employment levels in Kern County grew from 269,613 to 349,502, (Exhibit R-376 at A-39), and Protestant's own expert materials made clear that in 2018, the Bakersfield metro experienced its lowest level of unemployment since 2008. (Exhibit P-152 Tab 7 Page 1). These facts demonstrate that there is and has been significant opportunity and need for a new Honda dealership to serve customers in Bakersfield—not just at one specific point in time, but over the long-term.

In fact, while Protestant argues that now is not the time to open a new dealership, there is no suggestion that American Honda or the Intervenor are planning to open the proposed dealership at any point in 2020 (and likely not even in 2021). Galpinsfield did not purchase a “move-in ready” dealership facility that can be opened at the drop of the hat. To the contrary, Galpinsfield invested significant money to acquire several parcels of raw land that are currently undeveloped. (Stipulated Facts Regarding Market Drive ¶ 16). Once this protest is resolved, Galpinsfield will have to start its facility process from the ground up: it still needs to prepare facility plans, obtain quotes, get approvals from the city, and complete the entire construction process. (Hrg. Tr. Vol. 8 Pages 1816:6-18; 1908:15-20; 1921:14-1922:21). As such, the new dealership almost certainly would

not open for at least 18-24 months after a final ruling here. (Hrg. Tr. Vol. 8 Pages 1816:6-18 (“[W]e’re years away from it.”). *Accordingly, while these facts are already in the record, in order to allay any concerns about the opening of this new dealership, American Honda further stipulates that it will not authorize the operation of this new dealership for at least 24 months following the submission of this brief.*

Moreover, once this new dealership does open, it will significantly benefit the public and the local economy. Because the proposed site currently is undeveloped, constructing a new business on this site will help the local economy and promote economic development. Galpinsfield also plans to look for local construction companies to build the new facility, which would increase local employment and benefit the public. (Hrg. Tr. Vol. 8 Page 1922:5-21). Once operational, the new dealership further will increase employment and the local tax base, both of which are good for the public interest. Accordingly, the actual evidence makes clear that the opening of this new dealership years into the future will be a good thing for the local market, and will help serve the growing customer base in Bakersfield for years to come.

II. Protestant’s Attempt to Circumvent its own Burden of Proof must be Rejected.

After first improperly attempting to raise facts outside of the record, Protestant’s next detour inappropriately attempts to apply an entirely different legal standard and burden of proof to this open point case. While Protestant continues its efforts to litigate this case like a termination dispute by focusing almost entirely on American Honda’s internal evaluation process, its latest filings take these efforts one step further. Instead of acknowledging it bears the burden of proof and actually attempting to meet this burden by relying on its own evidence and expert (who actually admitted Honda is the worst performing brand in Bakersfield, there is substantial opportunity for additional sales, and a new dealer will improve Honda’s performance in the market), Protestant throws another “desperation heave” by seeking to shift the burden of proof onto American Honda. Specifically, in

its Proposed Recommended Order, Protestant relies on Section 11713.13(g) to claim that American Honda actually bears the burden to prove that its standards for evaluating the performance of an individual dealer are reasonable. Protestant’s attempt to avoid—rather than embrace—its statutory burden, however, is as improper as it is illuminating.

Contrary to Protestant’s efforts to shift the burden, Section 11713.13(g)—which is located in a completely different Division, Chapter, and Article of the Vehicle Code than the statutes governing this open point protest—is not even at issue in this case. The very pleading that Protestant drafted and filed in this case makes clear this is an open point protest under Section 3062 and nothing more. Protestant never asserted a claim under Section 11713.13(g) in its pleadings, or at the hearing, and thus has no cause of action under that provision. Nor could it bring such a claim in this forum. The Vehicle Code and California courts both have made clear that the Board lacks jurisdiction to adjudicate protests under Section 11700 *et seq.*, and that the Board is only authorized to adjudicate petitions under those sections that involve some potential investigatory or disciplinary action.² That, of course, is not the case here. Instead, this is an action challenging an open point under Section 3062—a statute that expressly gives Protestant alone the burden of proving there is good cause not to establish the proposed dealership. Protestant cannot hide from this burden no matter how hard it tries.

Moreover, even if Protestant had asserted or could have asserted a claim under Section 11713.13(g) in this case, that provision is wholly inapplicable here. The plain language of the statute expressly states that it applies only to standards, sales objectives, and programs for measuring the performance of an *individual dealer*—not the performance of a brand in a metro

² See, e.g., Veh. Code § 3050(c) (granting the Board authority to hear petitions under Section 11700 *et seq.* for disciplinary or investigatory purposes only); *Mazda Motor of America, Inc. v. California New Motor Vehicle Board*, 110 Cal.App.4th 1451 (2003) (holding that the Board lacked jurisdiction to entertain a transfer protest under Section 11700 *et seq.* because the Vehicle Code limits the Board’s authority to adjudicate disputes under those provisions to petitions that call for an investigation or disciplinary action of the distributor and because the Protestant “had no interest in the suspension or revocation of its supplier’s license, and did not seek that relief”).

market. *See id.* (addressing programs “for measuring ***a dealer’s*** sales, service, or customer service performance . . .”). To make this even more clear, the statute goes further to state that it applies to programs for measuring a single dealer’s performance that may affect that individual dealer’s right to payment under an incentive program or establishment of working capital requirements. *Id.*

Individual dealer performance is not what is at issue in this protest. This case does not revolve around the performance of one dealer, but instead is based on the adequacy of representation for the Honda brand as a whole in the Bakersfield market and the need for additional representation to adequately serve customers in the market. The record in this case makes that abundantly clear. Despite Protestant’s desire to turn this market representation dispute into a case about Barber Honda’s sales effectiveness, American Honda’s witnesses expressly testified that their decision to open a new point in Bakersfield has nothing to do with Barber Honda’s sales performance or any individual dealer’s performance:

It’s not [a] dealer sales performance standard that we’re looking at in this study. It’s our – our brand or the line-make, as it says here in this sentence, that we evaluated in the market.

(Hrg. Tr. Vol. 3 Pages 685:23-686:3). American Honda’s witnesses also testified that ***none of the three market studies it performed contained any consideration of Barber Honda’s sales effectiveness whatsoever.*** (*Id.* at 531:17-22) (“No. In all three market studies, there’s no mention of RSE.”) (Hrg. Tr. Vol. 6 Pages 1168:24-1169:7) (confirming the market studies contain no analysis of the individual performance of Barber Honda or RSE because “what we’re looking for is – in a market situation, we’re looking for how the brand is doing in the market”).

Protestant’s belated attempt to make an end-run around its burden is clear: it cannot meet its burden based on the evidence it presented. At the hearing, the very expert Protestant retained to testify on its behalf admitted that (1) Honda is the lowest performing brand in Bakersfield and performs well below many other import brands like Mazda, Hyundai, Toyota, Fiat, Kia, and

Volkswagen; (2) there is opportunity for additional sales in Bakersfield; and (3) the proposed new dealership will increase Honda's market share. (Exhibit P-151 at Tab 4 Pages 11-12; Tab 16 Page 1) (Hrg. Tr. Vol. 12 Pages 2875:11-13; 2952:17-2953:9). Similarly, while Protestant spent days at the hearing discussing its inventory of Honda vehicles, Protestant's own expert admitted within minutes of being on the stand that there is no valid challenge to the allocation system here. (Hrg. Tr. Vol. 17 Pages 4003:19-21; 4026:16-4027:7).³ Moreover, when Protestant's expert evaluated Honda's expected performance based on the same local factors American Honda reviewed in its market studies, its own expert found that the brand was performing at only 63% of the level expected and that there are thousands of units of opportunity for additional Honda sales in the market. (Exhibit P-151 at Tab 18 Page 1). Accordingly, Protestant's last ditch effort to circumvent its burden of proof not only fails as a matter of law, but also shines a spotlight on the fatal flaws in its case.

III. Protestant's Attacks on American Honda's Market Studies are Based on Half-Truths and Mischaracterizations of the Evidence.

Despite multiple days of testimony at the hearing addressing American Honda's multiple analyses of the Bakersfield market, Protestant's post-hearing brief continue to claim that American Honda failed to conduct any "rigorous review" of the market. This attack, however, is based on several theories that are simply untrue and that are unsupported by the evidence.

A. American Honda did not base its Decision on Segment Adjusted Zone Average Registration Effectiveness Without Substantial Analysis of other Standards, Measurements, and Local Market Conditions Specific to Bakersfield.

Protestant first claims that American Honda based its decision to establish the new dealership on a "shaky foundation" of Zone average registration effectiveness alone and without

³ If allocation had been a legitimate issue in this protest, Mr. Stockton, as the expert for the party with the burden of proof, presumably would have at least attempted to perform some analysis to address that issue, and Protestant certainly would have addressed this issue in their Opening Brief rather than wasting time during the hearing on this "red herring" issue only to immediately abandon it in its post-hearing papers.

any other considerations. This allegation is provably false. At the hearing, American Honda and its expert presented calculations of the brand's performance, the potential impact of a new dealership on Barber Honda, and the amount of opportunity in the market under three different standards: (1) California average; (2) Zone average (which is more local and consists of the Honda dealers in the northern half of the state);⁴ and (3) the Fresno metro average (which consists of three dealers in a neighboring market in the Central Valley). (Exhibits J-14; J-18; R-376; R-378). Before moving forward with this open point, American Honda also reviewed the brand's performance compared to (4) the Central Valley District (which includes Protestant and 14 other dealers in the Central Valley) and to seven other markets in northern California, including (5) Sacramento; (6) San Jose; (7) East Bay; (8) San Francisco; (9) Sonoma; (10) Santa Barbara; and (11) Stockton. (Exhibits J-14; J-21). Instead of addressing these eleven different standards, Protestant's filings wholly ignore them for one reason: because the Bakersfield market is significantly underperforming and is the lowest performing market for Honda under all of them. (*See id.*) (Hrg. Tr. Volume 4 Page 762:2-20). That fact is undisputed.

Protestant's next fallacy is that American Honda evaluated its brand performance adjusted by segment only (the size, price, and type of vehicles) and without any consideration of local conditions in Bakersfield. This claim also is demonstrably untrue. If this claim were accurate, American Honda's evaluation would have consisted of just one page that summarized the brand's performance by segment. The opposite is true, however, as the evidence shows that American Honda's calculation of brand effectiveness was simply one factor out of hundreds of pages of

⁴ Protestant repeatedly complains about American Honda's use of Zone average on the grounds that the Honda brand performs better in the Zone than it does in the rest of the state. Although this argument suggests that the Zone significantly outperforms the state average, that is not the case. To the contrary, the Northern California Zone only performs "fractionally higher" than the rest of California, and there would be almost no difference between the two standards. (Hrg. Tr. Vol. 3072:1-13). Moreover, there is no dispute that the Zone is a more local standard than the state. Protestant is simply upset that "more local" does not mean "lower" in this case—especially given that Bakersfield is the lowest performing market in the entire state for the Honda brand.

materials addressing a plethora of local market conditions that involve no comparison or standard at all, including population levels and growth; the number of households and household growth; population and household density; household income and income growth; the number and location of competitive dealerships; the proposed site's distance from Barber Honda; the effect on customer convenience; the number and location of competitive registrations; import-only registration patterns; the number and location of Barber Honda's sales; the number and location of insell by other Honda dealers; and the number and location of UIO available for service. Protestant again makes no effort to address or rebut these findings, and instead simply chooses to ignore them. (Exhibits J-14; J-18; J-21). This is because Protestant's own expert admitted he had no reason to doubt American Honda's demographic figures, and when he prepared revised calculations of Honda's brand performance based on many of these same factors, Mr. Stockton himself found that the Honda brand was woefully underperforming in this market. (Exhibit P-151 at Tab 18 Page 1).⁵

B. Protestant's Claim that American Honda Performed No Analysis and Showed No Concern for the Alleged Impact to Barber Honda is Simply Untrue.

Protestant's Opening Brief next claims that American Honda gave "no meaningful analysis" of any alleged impact to Barber Honda, and even goes so far as to allege that American Honda's witnesses showed no concern for the issue of impact at the hearing. (Protestant's Opening Brief at 21; 39). This allegation again is untrue and again is not supported by the evidence.

Contrary to Protestant's position, the potential impact of establishing a new dealership in Bakersfield was one of the primary considerations and issues analyzed by American Honda in this case. During the hearing, multiple witnesses from American Honda testified that they thoughtfully

⁵ Protestant also claimed at the hearing that even though American Honda analyzed these factors, its evaluation was flawed because it did not make an express mathematical adjustment to its registration effectiveness calculation in Barber Honda's favor based on these factors. Contrary to this argument, American Honda's witnesses confirmed that these demographic factors (population, households, household income, etc.) were all trending upward—not downward—and that the mathematical component of its evaluation process therefore is "actually fairly conservative because we haven't forecasted out in the calculation based on population growth or any of the other demographic growths: targeted households, household income." (Hrg. Tr. Vol. 3 Page 791:1-13).

and specifically considered the issue of impact. For example, Eric Van Olst confirmed that American Honda has no interest in opening another dealership if it would simply “split up” Barber Honda’s existing sales, and instead would only add a dealership if it believed the new point would benefit consumers, improve the brand’s market share, and grow the business for all dealers. (Hrg. Tr. Vol. 2 Page 332:4-14). Similarly, David Adair testified that American Honda has no intention to harm Barber Honda, and specifically testified that it would not propose a new dealership in Bakersfield if it thought there would be a material impact on Protestant, stating, “[a]bsolutely not. *We wouldn’t propose the new point in the market if we thought it was going to harm them.*” (Hrg. Tr. Vol. 4 Page 764:12-17) (emphasis added). The claim that American Honda showed “no concern” or consideration for Barber Honda is simply untrue.

Moreover, American Honda’s consideration of impact was not just “lip service,” but was shown through its repeated evaluation of all market factors potentially bearing on that issue. American Honda’s 2008 study included an express “Potential Impact” analysis that calculated the projected sales for the new dealer compared to the amount of opportunity in the market, and found that its expected sales would capture only 74.42% of this opportunity—leaving a significant cushion. (Exhibit J-14 at AHM_0063560). American Honda also re-evaluated this same issue in each of its subsequent studies and found that the amount of lost opportunity in the market actually **grew** each time: from **1,583 units** in 2008; to **1,746 units** in 2013; to **1,880 units** in 2015—providing an even greater cushion and further minimizing the chance of any impact on Barber Honda. (Exhibits J-18 at AHM_01385; J-22 at AHM_063623).

While Protestant alleges that American Honda relied solely on these calculations in its evaluation of impact, that is not the case. American Honda’s witnesses made clear that in addition to lost opportunity, when looking at the issue of potential impact, it analyzed all the relevant local market factors discussed above, including population growth, household growth, demographics,

insell, and the like. (Hrg. Tr. Vol. 3 Pages 655:15-657:16; Vol. 4 Pages 762:21-763:10) (“[W]e absolutely look at all those factors. We know - - We’re going to know if our market’s growing, opportunity growing, and so forth.”). American Honda also considered the stimulation or increase in business that occurs when a new dealership opens in a market, (*id.*), which Protestant even admits will occur. Given these factors, American Honda concluded there is no reason that the new dealership should have any material adverse impact on Barber Honda. (Hrg. Tr. Vol. 2 Pages 334:14-335:1). Accordingly, there is no support for Protestant’s claim that American Honda did not consider this issue—Protestant just doesn’t like the answer.

Moreover, Protestant’s claim that the issue of impact can be resolved by looking solely at one factor—the amount of business it currently conducts in North Bakersfield—is more than ironic. Although Protestant repeatedly makes the inaccurate claim that American Honda based its decision on one factor (registration effectiveness) without looking at local market conditions, ***Protestant actually is the one asking the Board to make its decision based on Protestant’s claim of impact which is itself based on one single, isolated, narrow fact without considering the whole picture.*** Protestant wants the Board to consider the amount of business Barber Honda has historically conducted in North Bakersfield, but ignore the fact that this is because there are no other Honda dealers for 67 miles to its north or in any other direction from Barber Honda. (Hrg. Tr. Vol. 11 Pages 2592:25-2593:5; 2594:18-25) (Exhibit P-151 at Tab 4 Page 11). Protestant wants the Board to look at its existing business, but ignore the fact that there are more than 444,000 people in the 10-mile RMA and more than 722,000 people in the metro—and that those numbers are growing year-over-year. (Exhibit R-376 at A-34; A-37). Protestant wants the Board to look at Barber Honda’s existing sales patterns, but ignore that with those patterns, Honda is the lowest performing brand in Bakersfield, and that under its own expert analysis the brand is only making about 63% of

the sales expected in the market. (Exhibit P-151 at Tab 16 Page 1; Tab 18 Page 1).⁶ Protestant also ignores that Bakersfield is the largest market in the United States with only one Honda dealer, and there are 96 pairs of Honda dealers in California closer than these two dealers would be. (Exhibit 378 at R-23 and R-24) (Hrg. Tr. Vol. 4 Pages 742:23-743:3) (Hrg. Tr. Vol. 5 Pages 1173:18-1174:11). These undisputed facts should not be ignored – they make it clear that American Honda thoroughly considered impact as part of its analysis and determined that providing additional representation in this large and growing market should not materially impact Barber Honda.

C. Protestant’s Other Attacks on American Honda’s Process are Unsupported.

In addition to the arguments above, many of the other challenges Protestant raises to this proposed new dealership and American Honda’s process for evaluating this proposal also are based on half-truths and misleading characterizations of the evidence.

Establishing the Open Point was not a “Knee Jerk” Reaction

In its Open Brief, Protestant claims that “the proposed North Bakersfield Open Point was a ‘knee-jerk’ reaction to the 2007 establishment of a second Toyota franchise in the Bakersfield market.” (Protestant’s Opening Brief at 5). Contrary to this allegation, however, there is no dispute that American Honda waited *10-12 years after Toyota opened its second location* in Bakersfield before moving forward with this new dealership. (Hrg. Tr. Vol. 11 Pages 2598:5-2599:1) (testimony of Jonathan Ekegren). While the new Toyota dealership opened for business in December 2007, American Honda did not issue its statutory notice of this open point until nearly 10 years later in October 2017. (*Id.*) (Exhibit J-26). Moreover, there is no dispute that American

⁶ Protestant’s allegation that American Honda never considered Barber Honda’s existing business in North Bakersfield is untrue. American Honda’s market studies included multiple analyses of that issue, including charts showing (1) the amount of Barber Honda’s cross-sell into North Bakersfield, (2) a rose bar chart showing the direction of Barber Honda’s sales from its dealership, and (3) maps plotting its historical sales across the entire Bakersfield metro. (Exhibits J-14 at AHM_063584; J-18 at AHM_01423). Again, American Honda instead decided to look at the entire picture—including the amount of opportunity in the market, the population growth, and many other factors—when concluding a new dealership would benefit the growing number of customers in this market without materially affecting Barber Honda.

Honda conducted three separate studies of this market before it sent this statutory notice, including a market study in 2008, a market study in 2014, and a third analysis in September 2015. (Exhibits J-14; J-18; J-21). This is hardly a “knee-jerk” reaction as claimed by Protestant.

Galpinsfield was not Identified as “the Preferred Candidate” for the Open Point from the Beginning of the Selection Process

Protestant also claims that American Honda identified Galpinsfield as “the preferred candidate” for the open point early in the process. (Protestant’s Opening Brief at 11). This is simply untrue. In reality, American Honda followed a three-step process for identifying potential operators for this dealership that began with notifying the National Association of Minority Automobile Dealers (“NAMAD”), identifying key operator candidates, and publicly announcing the open point for other interested applicants. (Exhibit J-21). The Galpin organization was one of seven key operators identified by Honda, one of 33 applicants initially interested in the point, one of 19 applicants to submit a completed package, and one of 10 applicants chosen to submit a presentation to the Zone staff. (*Id.*).⁷ There is no evidence that this lengthy candidate process was a charade. In fact, contrary to the implications made by Protestant in its briefing after the hearing, Stephen Ekegren expressly testified during the hearing that he knows American Honda “goes by the book on selection of candidates and all that kind of stuff.” (Hrg. Tr. Vol. 9 Page 2129:12-20). As such, there is no evidence to support Protestant’s conjured suggestion of favoritism.

⁷ Protestant also alleges that because only two key operators applied for the open point, “presumably” the other key operators did not agree this is a good opportunity. Protestant again makes this argument without any citation to the record, and yet again it is expressly contradicted by the record. At the hearing, Peter Hagan—the American Honda representative who expressly handled the application process—testified that the other key operators said they were “crazy for not going for a Honda dealership” here, but chose not to apply for various reasons, including because they were downsizing, were looking into retirement, were pursuing other open points, or wanted to remain more local to their other dealerships. (Hrg. Tr. Vol. 7 Pages 1330:3-10; 1331:2-1332:7). He also testified that the interest in this point was significant and that having so many candidates submit “extensive” proposals shows the point is “very desirable.” (*Id.* 1390:20-1391:9).

American Honda did not Base its Decision to Establish the New Dealership on Honda's Brand Sales Compared to the Toyota Brand's Sales in Non-Competitive Vehicles

Protestant next claims that American Honda's market studies rely on the fact that Toyota outsells the Honda brand 2 to 1 in Bakersfield, and alleges that this data "is misleading because it includes all Toyota registrations" like large trucks and other products where American Honda does not have a competing product. (Protestant's Opening Brief at 37). This allegation, however, fails to tell the whole story once again—and once again because the whole story is bad for Protestant's case.

While Protestant is right that Honda only makes about **50% of the total sales** made by Toyota ***in Bakersfield***, American Honda's Zone Manager expressly testified *on examination from Protestant's counsel* that Honda typically makes about **80-85% of Toyota's total sales** (including pickup trucks and large SUVs with which the Honda brand does not compete) throughout the ***rest of northern California***. (Hrg. Tr. Vol. 3 Page 493:3-15). This is a significant difference of 30-35%--a difference that Protestant ignores in its brief.

Protestant also fails to mention the many other data points American Honda analyzed when comparing its performance to Toyota, including (1) the "winner" map in the 2008 study showing that the Toyota brand dominates almost the entire Bakersfield metro in **competitive sales** (Exhibit J-14 at AHM_063577); (2) the chart in the 2014 market study of the sales made by the Honda and Toyota dealers in Bakersfield, which showed that in 2012 the Toyota dealers made **3,156 competitive sales** compared to only **1,481 competitive sales** by Barber Honda (Exhibit J-18 at AHM_01449); and (3) the chart in the 2015 study showing that while the Toyota brand performs at nearly the same level in Bakersfield as the rest of the Zone, the Honda brand performs at only 54.6% of the Zone in the very same type of **competitive vehicles**. (Exhibit J-21 at AHM_06583). These are the actual facts related to American Honda's review of its brand performance compared to the Toyota brand's performance in Bakersfield, and they highlight the very reason additional

Honda representation is needed in this market.

Toyota and Ford are not the only Brands with Multiple Points in Bakersfield, and the Brands with Multiple Points Predictably Perform at Higher Levels

Protestant's brief next discusses the other brands that have multiple dealership points in the Bakersfield market. When doing so, however, Protestant only mentions Toyota and Ford as the brands with two dealerships in the market, and then states that having two dealerships must not be helpful because neither one of these brands performs to state average. (Protestant's Opening Brief at 26; 44).

As an initial matter, these carefully worded sentences fail to mention that several brands besides Toyota and Ford also have multiple locations in the Bakersfield metro, including GMC (2 dealers) and Chevrolet (3 dealers). (Exhibit 376 at A-5). Protestant's argument also only tells half the story about the performance of these brands. The brands Protestant failed to mention—GMC and Chevrolet—both perform at levels *higher than 191% of state average*, and while Toyota and Ford are not quite at state average, they perform close to average at 92.93% and 88.0% respectively. (Exhibit P-151 Tab 16 Page 1). Whether well above or slightly below state average, all four of these multi-dealership brands are performing substantially better than the Honda's brand performance at 55.68%. (*Id.*). Indeed, in Mr. Stockton's own analysis attempting to show the "fit of the product" for each brand in Bakersfield, he found that four of the top five performing brands in the market are GMC, Chevrolet, Ford, and Toyota—the four brands with multiple dealership locations in the market. (*Id.* at Tab 17 Page 1). Accordingly, Protestant's suggestion that establishing a second Honda dealership in Bakersfield would not improve brand performance or would be "out-of-step" with other brands is unsupported.

The Small Rural Town of Delano falls within the Bakersfield Metropolitan Area but is not a Viable Location for the Proposed New Dealership

Protestant's Opening Brief next criticizes American Honda both because it included Delano

in the definition of the Bakersfield metro, and because American Honda “would not consider establishing a Honda dealership in Delano.” (Protestant’s Opening Brief at 37). Neither of these arguments are viable criticisms under the actual facts of this case.

First, while Protestant now tries to take issue with Delano being included in the metro *after the hearing*, its own expert expressly admitted *during the hearing* that he does not have any disagreement with the definition of the metro used by American Honda in this case. (Hrg. Tr. Vol. 12 Pages 2935:6-2936:3). There also is no real claim that Delano is a viable location for the proposed dealership. As Protestant acknowledges in its brief and in the Stipulated Facts Regarding Market Drive, Delano is a small, rural, agricultural community that is about 25 miles to the north of the proposed location and surrounded by farmland and open spaces. (Protestant’s Opening Brief at 14) (Stipulated Facts Regarding Market Drive ¶¶ 24-25; 28). This is no place for a Honda dealership. In fact, Protestant’s expert admitted he did not see any site outside of the 10-mile protest ring whatsoever that “looked appealing” or was practical for the new dealership, and even described the area north of the proposed site towards Delano as “pretty remote” and as “the Netherlands.” (Hrg. Tr. Vol. 13 Pages 2999:17-3000:12). As such, Protestant’s claims that Delano should not be considered part of the metro but should be considered as an alternative location for this dealership are expressly contradicted by the evidence and its own expert.

Subprime Lending does not Explain Honda’s Severe Underperformance in Bakersfield

Protestant next claims that the Honda brand’s underperformance in Bakersfield is due to the fact that this area is a “heavily sub-prime auto lending market.” (Protestant’s Opening Brief at 27). Contrary to this sweeping proposition, the only evidence Protestant introduced at the hearing (and the only evidence cited in its brief) relates to the Mitsubishi brand—a hearsay statement from the owner of the Mitsubishi dealer given after the close of discovery stating that he pursues subprime consumers. (*Id.* at 28). Protestant did not introduce any evidence whatsoever that any other brand

in Bakersfield is pursuing subprime lending or relying on it for business. This is significant because while there is *no evidence* that other brands are engaged in subprime lending, there is *undisputed evidence* that every other brand is substantially outperforming Honda in Bakersfield. According to Protestant's own expert, there are 14 competitive brands other than Mitsubishi that are performing better than Honda in this market, including eight other import brands like Mazda, Hyundai, Nissan, Toyota, Fiat, Subaru, Kia, and Volkswagen. (Exhibit P-152 Tab 16 Page 1). Subprime lending thus does not provide any explanation for why these other brands perform so much better than Honda, and Protestant has provided no other explanation for this fact.

Insell made by other Honda Dealers into Bakersfield represents Opportunity for Barber Honda and the Proposed New Dealership

Protestant's Opening Brief does not dispute the fact that other Honda dealers, despite being more than 65 miles away from Barber Honda, are selling hundreds of Honda vehicles to customers in the Bakersfield market each and every year. (Exhibit R-342; R-403). Protestant instead claims it is "unreasonable to consider insell to be available opportunity" in the market because "these are not sales lost to Honda." (Protestant's Opening Brief at 36). This argument, however, misunderstands the importance of insell. While not additional sales for the Honda brand per se, insell absolutely does represent opportunity for additional sales that are available for Barber Honda and for the proposed dealership, and thus is essential when evaluating the issue of impact.

There is no dispute that insell represents opportunity to the existing and proposed dealership in Bakersfield. During his testimony, Jonathan Ekegren expressly admitted that insell represents opportunity for Barber Honda to increase its sales. (Hrg. Tr. Vol. 11 Pages 2645:7-2646:2; 2648:7-11). Protestant's expert witness similarly acknowledged that insell represents opportunity to the dealer, and even included insell in his calculation of the alleged "lost opportunity" to Barber Honda as a result of the new dealership. (Hrg. Tr. Vol. 13 Pages 2969:1-2970:3). Indeed, Protestant's own counsel even agreed on the record that insell is opportunity available to the dealers in

Bakersfield. (Hrg. Tr. Vol. 3 Page 650:20-22) (“So, Honda considers all in-sell to be opportunity available to the dealer, which I agree with.”).⁸ Accordingly, Protestant’s claim that it was “unreasonable” for American Honda to consider insell as opportunity is unsupported and contradicted by its own witnesses, expert, and counsel.

There is a Significant Amount of Opportunity for Additional Service Work in Bakersfield

Protestant also repeatedly claims that American Honda “neglected” to perform any meaningful analysis related to service opportunity in the market, then criticizes American Honda’s analysis of service business in the market by alleging it is “disingenuous” to claim that lapsed and inactive UIO in the market represent opportunity for additional service business because Barber Honda has higher than average service retention. (Protestant’s Opening Brief at 35; 40). These allegations, however, again are half-true at best.

As an initial matter, there is no dispute that lapsed and inactive UIO represent additional service opportunity for the Honda dealers in Bakersfield. Protestant’s own service manager (who Protestant did not call to testify at trial) admitted that he considers UIO “an important tool” for evaluating service opportunity, and expressly agreed under oath that lapsed and inactive UIO represent opportunity to grow Barber Honda’s service business:

Q. Do you agree that lapse[d] and inactive UIO represents an opportunity to grow Barber’s service business?

A. *Yes, I do.*

(Steele Depo. 82:11-20; 86:18-21) (emphasis added). American Honda’s market studies in this case found that there are **8,800 units of lapsed and inactive UIO** in the Bakersfield market—opportunity for additional service business that has never been refuted. (Exhibit J-21 at

⁸ Protestant also ignores Sharif Farhat’s testimony that even using the highest projection of sales for the proposed new dealership, its sales would only account for 60% of the opportunity available in this market, and would still be **less than the amount of gross loss available in the market without including a single unit of insell**. (Exhibit R-376 at A-70) (Hrg. Tr. Vol. 13 Pages 3169:17-3170:10; 3171:2-3174:20).

AHM_065093).⁹ Moreover, although Protestant does not mention this fact, the other local market and demographic factors American Honda analyzed in its market studies bear heavily on the amount of service business available in the market going forward. (Hrg. Tr. Vol. 4 Pages 753:5-755:8). This includes factors like customer convenience to a Honda dealership, population and household growth in the market, household income levels, and other factors. (*Id.*).

Protestant's filing also completely ignores the relationship between new vehicle sales and service opportunity in the market, and the significant amount of evidence on that key point. It is beyond dispute that additional new vehicle sales in a market necessarily will result in additional UIO and service opportunity for the dealers in that market. (*Id.* 753:5-21). In addition to American Honda's thorough review of its sales performance in Bakersfield, American Honda presented substantial evidence that the number of UIO in this market is depressed given the brand's continued underperformance here. (Hrg. Tr. Vol. 2 Page 382:14-25). While most markets generally have about 10 units of UIO for every new vehicle sale expected to be made, given the brand's poor sales performance, the Bakersfield market currently has only about 4.5 units of UIO for every expected sale there. (Hrg. Tr. Vol. 13 Pages 3097:13-3098:16). Indeed, the Bakersfield RMA and the Bakersfield ASAs rank *next to last in the entire state* in service performance, and if they performed as the same level of Fresno, there would be an additional 7,000 UIO available to service by Barber Honda and the proposed new dealer. (*Id.* 3097:13-3098:16; 3132:2-21) (Exhibit 376 at A-20; A-21; A-51). This is a substantial amount of service opportunity, and a substantial amount of evidence proving it.

Honda Customers are not being Adequately Served by Barber Honda

Protestant next claims that American Honda "failed to offer any evidence that Honda

⁹ As mentioned in American Honda's Opening Brief, while Barber Honda performs well in service retention, that is no surprise when it is the only dealer in the market and customers have no other options to have their vehicle serviced at an authorized Honda dealer within a 67-mile radius. (Hrg. Tr. Vol. 4 Pages 988:12-989:5; Vol. 5 Page 1115:3-19). It also does not change the amount of lapsed and inactive UIO available for additional service in the market.

customers are not adequately served by Barber Honda.” (Protestant’s Opening Brief at 47). Contrary to this assertion, this entire case is about the fact that customers in Bakersfield are not being adequately served with just Barber Honda in the market. With Barber Honda as the only Honda dealer to serve customers within a 67-mile radius of the ninth largest metro in the state with a population of over 722,000 people, Protestant’s own expert found that Honda is the lowest performing brand in the market and is performing at only 63% of the level expected based on his own evaluation of brand preference and demographics. (Exhibit P-151 at Tab 16 Page 1; Tab 18 Page 1). There is nothing adequate about this level of performance.

With regard to Barber Honda specifically, the dealership’s service satisfaction scores have repeatedly ranked in the bottom 20% of all Honda dealers in Northern California, and at one point even ranked 1039 out of 1048 Honda dealers in the nation. (Exhibits R-387; R-399; R-400).¹⁰ Barber Honda also charges its customers, on average, a higher margin on new vehicles than other Honda dealers in the same district.¹¹ (Exhibit R-379 Attachment 46) (Hrg. Tr. Vol. 15 Pages 3673:2-3674:19). Based on these factors, between 400 and 600 customers who live in Bakersfield drive to other dealers more than 67 miles away from Protestant to purchase Honda vehicles every year. (Exhibit R-342; R-403) (Hrg. Tr. Vol. 13 Page 2967:15-2970:17). Establishing a second

¹⁰ While Protestant alleges that this document refers to its customer satisfaction scores in express service and not in overall service performance, this distinction not only is inaccurate, but it also does not help Protestant’s case. Ranking almost dead last in the entire country for oil changes and express service is not a good thing for customers.

¹¹ During the hearing, Protestant’s counsel repeatedly fought about whether an industry term should be spelled “PAC” or “PACK”, and in its Opening Brief, even goes so far as to accuse Mr. Walter—a renowned and respected industry expert and accountant—as “deliberately misleading” and manufacturing the spelling PAC for use at the hearing. This allegation, in addition to being unnecessary and unprofessional, completely misses the point. The spelling of this term does not matter at all, *i.e.*, “a rose by any other name would smell as sweet.” Whether spelled P-A-C or P-A-C-K, there is no dispute as to what it means. Protestant’s own expert testified that the term refers to a tool used by a dealership to change to the internal cost of the vehicle and, generally, it reflects recovery of some cost that the dealership incurs or some benefit that management provides to the dealership.” (Hrg. Tr. Vol. 17 Page 3995:1-18.). Jonathan Ekegren also testified that regardless of how it is spelled, the term refers to “money that is retained for the earnings of the dealership so that those earnings do not count toward the commission of salespeople.” (Hrg. Tr. Vol. 19 3903:23-3904:18). Protestant’s blustery obfuscation on the spelling of PAC rather than its substance is an effort to distract from a substantial error in its expert’s analysis. While Mr. Stockton’s report claimed that Barber Honda dropped its new vehicle prices in 2017, that was not accurate—Barber Honda simply instituted a PAC on its vehicles that changed the appearance of its margins on its books, but did not affect the prices it actually charged customers.

dealership in Bakersfield will address these issues, improve competition, and improve the representation of the Honda brand in this market.

Honda's Underperformance in Bakersfield is not Due to a Local Preference for Domestic Vehicles and Trucks, or the Oil Industry

Protestant's opening brief also alleges that American Honda's process for evaluating this open point was inappropriate because the Bakersfield market allegedly is unique in several respects, including because it allegedly "shows a strong consumer preference for trucks [and] domestic vehicles." (Protestant's Opening Brief at 6). While Protestant spent a considerable amount of time at the hearing attempting to convince the ALJ that there is some domestic or truck preference in the market, and while its brief claims this is a "strong preference," Protestant's Opening Brief was able to cite exactly zero evidence in support of this claim. Protestant's alleged "strong showing" consists of just one conclusory sentence, in the introduction of its brief, with no citations to the record. This is because there is no support for Protestant's claim.

As discussed in American Honda's Opening Brief, Sharif Farhat specifically analyzed this issue by ranking the markets in California by the percent of vehicles purchased by customers in each market that are pickup trucks. (Exhibit R-376 at A-52). Not only are there 11 other markets in California with a greater preference for trucks than Bakersfield, the Honda brand performs significantly better in all 11 of those markets than it does here, and it performs well above 100% of expected in the four markets with the highest preference for trucks. (*Id.*). Moreover, Mr. Stockton did not present any analysis showing that customers in Bakersfield prefer domestic vehicles, and no credible analysis that there is a preference for trucks. To the contrary, his own materials acknowledge that Honda is the lowest performing brand in the market—below ***many other import brands without prominent truck offerings*** like Mazda, Hyundai, Nissan, Fiat, Kia, and Volkswagen. (Exhibit P-151 at Tab 16). In fact, when Mr. Stockton plugged his own "fit of the product" factor into his analysis of the opportunity for the Honda brand in Bakersfield, he found

that Honda is still performing at only 63% of expected in the market. (Exhibit P-151 at Tab 18 Page 1). As such, there is no evidence of any correlation between an alleged consumer preference for trucks and the Honda brand's performance.

The same is true for Protestant's claims about the oil industry. Protestant's Opening Brief is filled with anecdotal claims about how oil is the "lifeblood of Bakersfield" and stories about its effect on the economy generally, but is entirely devoid of any evidence tying these anecdotes to the retail automotive industry's performance in the Bakersfield market. That is because this evidence does not exist. Given Protestant's claims that oil is so important to this market, one would expect that following the decline in oil prices in 2014-2015, there would be a major drop-off in population, employment, and car sales in Bakersfield, but that simply is not the case. Indeed, the undisputed evidence shows just the opposite. Despite this alleged decline, from 2010 to 2017, the Bakersfield market actually experienced an *increase in population*, an *increase in households*, an *increase in employment*, and an *increase in competitive vehicle registrations* in Bakersfield. (Exhibit R-376 at A37-39; 46) (Exhibit P-152 at Tab 7 Page 1; Tab 9 Page 1). Moreover, while Barber Honda's own new vehicle sales declined from 1,623 units in 2013 to 1,507 units in 2017, the total number of Honda sales in the Bakersfield metro *actually increased from 1,799 to 1,957 vehicles* during this same time period. (Exhibit R-376 at A-27; A-App-11; A-App-23). This proves that customers in Bakersfield are craving more Honda competition, that they are still purchasing Honda products, and that they are actually purchasing Honda vehicles at a greater pace than before any downturn in the oil industry.

IV. The Expert Reports Issued by American Honda and Protestant both Make Clear That the Proposed Dealership Will Have No Material Adverse Effect on Protestant.

Aside from its repeated detours outside the record and continued attacks on American Honda's internal process, the only substantive argument Protestant makes in an attempt to meet its burden is that the new dealership will harm Barber Honda. Specifically, Protestant claims—like

every protesting dealer in every open point case—that the establishment of a new dealership will harm its business and ultimately cause it to fail. Given the undisputed facts about the size of this market, the large and growing population in Bakersfield to support two dealers, the distance between the two points, the opportunity in this market, and American Honda’s history of opening new points without impact to existing dealers, there is no reason to believe the opening of a second dealership outside of the city limits nearly 10 miles away would have any material impact on Barber Honda. Indeed, the expert reports produced by both parties, including Protestant’s own expert, confirm this lack of impact.

A. Mr. Stockton’s Proximity Based Models are the Canard – They Have Been Proven to be False and Unreliable in Evaluating Impact.

Protestant’s claim of impact relies entirely on the amount of business it currently conducts to the north and its expert’s analysis of the “change in proximity” that would occur following the establishment of a second Honda dealership in North Bakersfield. This type of proximity-based model, however, is wholly improper and is nothing more than an unreliable fixed pie analysis.

Although Mr. Stockton concedes that establishing a new dealership in North Bakersfield will improve the brand’s performance and market share, he admits that his impact models are based solely on historical performance and do not account for any potential increase in sales or service based on the new dealership.

Q. And here, again, *this model doesn't account for any potential increase in registrations or UIOs based on the addition of a proposed new dealership; correct?*

A. *That's correct.* These are based on 2016 and 2017, or 2017. So it's what has actually occurred in the market, so you're correct.

Q. Right. But *there's no adjustment for any increase in sales and no adjustment for an increase in Units In Operation that would occur with the addition of a new dealership; correct?*

A. *Right.*

(Hrg. Tr. Vol. 17 Page 4040:1-12). While Protestant claims that characterizing this model an

improper “fixed pie” approach is a canard, it is instead the absolute and admitted truth.

In a last-minute effort to avoid his testimony being discarded as an improper fixed pie like so many Fontana Group analyses in prior open point matters, Mr. Stockton testified during rebuttal that he made a guess. He admitted that he did no quantitative analysis of his own, but instead, based on his readings of Mr. Farhat’s case studies, he simply “estimated” and “assumed” the business in this market would increase somewhere between 0-20%. (Hrg. Tr. Vol. 17 Pages 4040:20-4041:18). The problem with this approach, however, is that there was no reason for Mr. Stockton to guess, estimate, or assume because *he had already performed an evaluation of what Honda’s expected sales should be in Bakersfield* based on the factors he believes explain the brand’s performance—including product popularity, median age, household income, education, and population density. (Exhibit P-151 at Tab 18 Page 1). Although Mr. Stockton could have easily plugged this analysis into his proximity model, he chose not to do that for one reason—*doing so would have resulted in a finding of zero impact to Barber Honda*.

As discussed above, Mr. Stockton’s own analysis of the sales that should be expected for the Honda brand in Bakersfield found that the brand is underperforming by 2,331 registrations over a two-year period. (*Id.*). When this number is compared to his impact model for Barber Honda, however, *it exceeds the amount of lost sales Mr. Stockton predicted for Barber Honda*. While he found that the Honda brand could expect an additional 2,331 sales over two years, his proximity analysis found that Barber Honda would lose proximity to, at most, 1,772 Honda sales over two years—more than 550 sales less than his own calculation of expected sales. (Exhibit P-151 at Tab 19 Page 1). Mr. Stockton’s gravity model similarly found that Barber Honda would lose proximity to, at most, 1,220 Honda sales over two years and 2,191 expected registrations at California average—both below his own calculation of the sales expected for the Honda brand in this market. (*Id.* Tab 21 Page 1). *Accordingly, had Mr. Stockton used his own analyses of the sales expected*

in Bakersfield rather than making unsupported “assumptions” (also known as guesses) about the brand’s expected growth, his very own impact models would have shown zero harm to Barber Honda.

This analysis shows exactly why Mr. Stockton’s impact model is correctly characterized as a “fixed pie,” and why it has been *proven to be false and unreliable for evaluating potential impact*. As discussed in American Honda’s brief, Mr. Farhat expressly applied Mr. Stockton’s impact models to the neighboring dealers in all three prior situations where American Honda established a new dealership. The difference between Mr. Stockton’s predicted harm and what happened in real life when a new Honda dealership was added to a market is staggering:

	Stockton Prediction	Reality	Difference
Arrowhead Honda	-29.4% to -33.9%	+5.0%	34.3% to 38.9%
Earnhardt Honda	-6.5% to -6.8%	+9.8%	16.3% to 16.6%
Klein Honda	-18.5% to -25.0%	+12.3%	30.8% to 37.3%
Sims Honda	-20.5% to -23.4%	+12.7%	33.2% to 36.1%
Richards Honda	0%	-10.2%	-10.2%
Team Honda	-27.0% to -35.3%	+10.3%	37.3% to 45.6%

While Mr. Stockton’s models predicted significant losses for almost every single one of these neighboring dealers, the sales by these dealers *actually increased* when a new dealer was added to the market—the only exception being a dealer who was in the middle of relocating out of an outdated facility in an outdated auto row. (Hrg. Tr. Vol. 6 Pages 1093:13-1094:22; Vol. 13 Pages 3191:20-25: 3196:5-3197:1). This undisputed evidence proves that Mr. Stockton’s impact models do not reflect reality, are unreliable, and cannot be used to predict *the amount* or even the *direction of impact* from a new dealership. (Hrg. Tr. Vol. 13 Page 3189:15-16).

B. The Actual Results of Honda Dealers Added in Other Markets Further Proves the Lack of Impact to Barber Honda.

As discussed above, in addition to evaluating the local market conditions in Bakersfield, American Honda further introduced evidence of three prior situations where the Honda brand

recently established a new dealership: (1) Surprise, Arizona; (2) Marysville, Washington; and (3) Baton Rouge, Louisiana—a market very similar to Bakersfield in that it has a large oil industry and nearly the same number of competitive registrations, but where American Honda was adding a third dealer to the market. (Hrg. Tr. Vol. 6 Pages 1174:12-1175:17). There is no dispute that these new dealerships **dramatically improved the Honda brand’s sales performance** in all three markets, including by 43% in the Surprise ASA, 54% in the Marysville ASA, and 61% in the new Baton Rouge ASA. (Exhibit R-376 at A-75; A-79; R-407 at R-20.2). Moreover, as discussed above, the existing Honda dealers **actually made more sales after the addition of the new dealership** than they did beforehand in five of six cases. (*Id.*). This is powerful evidence of two key principles: stimulation of the market and lack of impact.

Protestant has not and cannot put forward any evidence disputing these results—they are fact. Instead, in an effort to combat these comparable experiences, Protestant’s briefings claim that these case studies do not support a finding of lack of impact because (1) Mr. Farhat allegedly admitted the Honda brand would have “to improve by approximately 80% to avoid any impact to Barber Honda” and (2) none of these case studies show such an increase. (Protestant’s Opening Brief at 15). These two assertions, however, are inaccurate and misleading.

First, **Mr. Farhat never testified that the Honda brand would have to improve by 80% to avoid impact to Barber Honda**, and for Protestant to submit otherwise is simply untrue. To the contrary, he testified that given the Honda brand’s significant underperformance in Bakersfield (55% of expected registrations), the Honda brand would have to improve by 80% **to achieve state average registration effectiveness** – a very different thing. (Hrg. Tr. Vol. 14 Pages 3349:6-3351:16). This is an important distinction because Mr. Farhat expressly testified that even using his highest projection of sales for the new dealership, the new dealership would account for only **60% of the opportunity available** in this market under either a state or Fresno standard, *i.e.*,

hundreds of sales less than needed to achieve state average. (Exhibit R-376 at A-70) (Hrg. Tr. Vol. 13 Pages 3169:17-3170:10; 3171:2-3174:20). This analysis confirms there is more than enough opportunity to support a new dealership even if the brand does not achieve state average.

Moreover, while none of the comparable markets showed an increase as high as 80%, none of those other markets were performing as poorly as the Honda brand is in Bakersfield, as Protestant concedes in its own brief.¹² (Protestant's Opening Brief at 22). It is undisputed that Bakersfield is the *lowest performing market* in the entire state for the Honda brand, and that Honda is by far the *lowest performing brand* in Bakersfield in registration effectiveness. (Exhibit R-376 at A-18 and A-19; P-151 at Tab 16 Page 1). The brand only performs at 63% of expected even under Protestant's own expert analysis. (*Id.* Tab 18 Page 1). Protestant's own expert further acknowledged that significantly higher performance is possible via his own chart showing the many other brands that perform near or above state average in Bakersfield, including other import brands like Mazda (137.73%), Hyundai (117.38%), Nissan (105.07%), and Toyota (93.86%). (*Id.* Tab 16 Page 1). Protestant's criticisms of these case studies therefore are unsupported. They also do not change the fact that in each prior case where American Honda added a new dealership, the brand performance improved dramatically and there was no negative impact to surrounding dealers.

C. Toyota Decided to Add a Second Dealership in Bakersfield Under Very Different Circumstances Than American Honda.

Protestant's Opening Brief also claims that Toyota's decision to establish a new dealership in Bakersfield did not result in much improvement for the brand, and suggests the same will occur when American Honda establishes this proposed dealer in North Bakersfield. Toyota's

¹² Just like its personal attacks on Mr. Walter, Protestant inexplicably accuses Mr. Farhat of being "intellectually dishonest" and attempting to "conceal" the level of the brand's performance in each of his case studies. These accusations are completely unnecessary, ill-advised, and untrue. It is difficult to claim that Mr. Farhat concealed information that expressly appears on the face of his reports. The fact that Bakersfield has far more room to improve than these other markets also was not some "spontaneous" or "new theory" offered to the Board at the hearing. It is simply the truth. It also is true that Protestant's counsel did not ask Mr. Farhat a single question about these comparisons at his deposition whatsoever, which explains why this information was "new" to Protestant at the hearing.

establishment of its second point in Bakersfield, however, was very different from Honda's proposal in several key respects.

First, even prior to the establishment of this second point, the Toyota brand was already performing at a much higher level than the Honda brand ever has accomplished in Bakersfield. While the Honda brand has consistently achieved only 55% of state average in the metro and Barber Honda has made only about 70% of the sales of the average dealer in California, the year before Toyota established its new point, the existing Toyota dealer in Bakersfield was already making 161% of the sales of the average Toyota dealer in California. (Exhibit R-407 at R-20.5) (Hrg. Tr. Vol. Pages 3205:5-25). Accordingly, there is no question that the Honda brand has significantly more room for growth in Bakersfield than Toyota ever had. (*Id.*). Even though the Toyota brand had much less opportunity for growth, Protestant expressly admits that Toyota's market share still improved by 13% following the addition of this second dealership. (Protestant's Opening Brief at 15). These facts show just how much the addition of a second Honda point in Bakersfield can and will improve the brand's market share.

Moreover, while Protestant trumpets the fact that both Toyota dealership locations are owned by the same person, common ownership actually has several key disadvantages from a financial and a market performance perspective. Instead of being responsible only for the cost of establishing and operating one Toyota dealership in Bakersfield, the Bill Wright organization had to bear the additional costs of securing land, building a facility, upfitting, and staffing a whole separate dealership location in Bakersfield. Jonathan Ekegren acknowledged that this investment likely cost the Toyota dealer "several millions" of dollars. (Hrg. Tr. Vol. 11 Pages 2604:23-2605:6). Having one owner who is single-handedly bearing the cost of not one, but two, dealerships in the same market gives that dealer little incentive to "compete" with itself in terms of price and other operational areas. (Hrg. Tr. Vol. 2 Page 293:3-21). This is the very reason American Honda

has a policy that prevents the same person from owning two stores in the same market, and having a monopoly on that market. (Hrg. Tr. Vol. 2 Page 293:3-21).

V. Protestant's Attacks on Galpin Are Unsupported and Do Not Provide Good Cause to Prevent the Establishment of the Proposed New Dealership.

Protestant next continues to march forward with its attacks on the candidate for the proposed dealership . . . and continues to be unable to make up its mind about which of its inconsistent theories best support its case. Specifically, Protestant first levies several allegations about why the Galpin organization will never be able to establish a functioning and successful dealership in the Bakersfield market, but then claims that the Galpin organization is too financially and operationally strong of a dealership group who can sustain losses indefinitely and will harm Protestant's business. Neither of these theories, however, is accurate or provides good cause not to permit the establishment of this proposed new dealership.

Protestant's brief begins by claiming that Galpin is a floundering organization that simply will not be able to meet its commitments in Bakersfield: that it will not be able to build a facility in the market; that it will not be able to operate effectively because Mr. Hartoonian was the "driving force" for the dealership; and that Galpinsfield is simply a strawman that hopes to sell the franchise to another operator. (Protestant's Opening Brief at 13). These allegations, however, are entirely unsupported. While Protestant claims that the new dealership cannot survive without Mr. Hartoonian, multiple witnesses from American Honda testified that they did not choose Galpin because of Mr. Hartoonian but because the organization has demonstrated an overall culture and track record of success. (Hrg. Tr. Vol. 4 Page 978:2-25; Vol. 7 Pages 1399:4-1402:4). Indeed, Galpin has developed a strong record of solid sales performance and high customer satisfaction across all of its other dealers—none of which were operated by Mr. Hartoonian. (Hrg. Tr. Vol. 7 Pages 1399:4-1402:4). While Protestant claims that Galpinsfield will be unable to construct a new dealership facility, there is no dispute that it has already paid more than \$5 million to purchase the

proposed site. (Exhibits J-22; I-506) (Hrg. Tr. Vol. 8 Pages 1908:15-25; 1968:14-23; 1997:1-18). There also is no evidence that Galpinsfield plans to transfer the franchise to another operator, and Protestant has cited no evidence in support of this unfounded accusation.

Realizing the failings of the above arguments, Protestant's brief then switches gears completely and claims that the Galpin organization is not floundering, but instead is too big and strong to be permitted to establish a new dealership in Bakersfield. Relying almost entirely on a pro forma that Galpinsfield prepared back in 2014 as part of the candidate selection process, Protestant claims that Galpinsfield will make around 2,400 new vehicle sales each year¹³ and needs that level of sales to be profitable, but also is ready, willing, and able to sustain financial losses indefinitely. None of these claims are true. In addition to agreeing that the pro forma was aggressive and based on the best-case scenario for the brand in the market, there was not a single witness at trial who testified that Galpinsfield needed to hit those projections in order to remain profitable. Galpinsfield's projected loss in its first few years instead simply reflects the significant start-up costs it would experience, including its multi-million-dollar investment in the proposed site. (Hrg. Tr. Vol. 8 Page 1834:6-23). Stephen Ekegren—who specifically asked to be considered for the new dealership here—even admitted that establishing a new location would have required him to invest millions of dollars. (Hrg. Tr. Vol. 10 Page 2258:14-17). Mr. Boeckmann also testified that the new dealership will not need to make a certain number of new vehicle sales to be profitable, and that Galpinsfield is not interested in sustaining losses indefinitely or losing money to gain market share. (Hrg. Tr. Vol. 8 Pages 1837:24-1838:12; 1859:9-18). Accordingly, there is no support for the claim that Galpin is planning to make some huge number of sales in the market,

¹³ The pro forma simply had an entry for total sales without any distinction for the location of those sales (nationwide and internet sales v. actual sales in the Bakersfield metro) and any fleet arrangements the Galpin organization may have. Contrary to Protestant's suggestion, American Honda projected the new dealership would make at most 1,374 retail sales in the actual Bakersfield metro, (Exhibit J-14 at AHM_63560), and Mr. Farhat projected it would make at most 1,351 retail sales in the metro—far below the amount of opportunity available here. (Exhibit R-376 at A-70).

needs those sales to be successful, or is planning to sustain losses indefinitely.

Protestant's brief also includes a chart of the Galpin organization's outsell into other markets by its other dealerships, and claims that if Galpin is able to perform in Bakersfield like it does at other stores, there will not be enough opportunity to support the new dealership. These claims are an "apples to oranges" comparison at best, if not entirely misleading. While Protestant suggests that Galpinsfield will have similar outsell patterns in Bakersfield as it does at its other dealerships, this argument ignores the difference in the locations of these stores. There is no dispute that Galpin's other dealerships are located in and around the Los Angeles metropolitan area, which has many more dealership locations. Protestant's own brief even admits that "Galpin Honda's Mission Hills location is surrounded by 10 Honda dealers." (Protestant's Opening Brief at 10). Accordingly, it is simply non-sensical to compare the cross-sell by Galpin's other dealerships in the Los Angeles metro to what may or may not occur in Bakersfield where there is not another Honda dealership for a 67-mile radius in any direction from Barber Honda.

Mr. Stockton's analysis of the sales patterns at only two existing Galpin dealerships—its Ford and Honda stores—is similarly uninspiring. Although Mr. Stockton had sales information for all of Galpin's dealerships, he instead made the decision to limit his analysis to these two dealerships—two of the highest performers—in an effort to artificially inflate his findings. Protestant even acknowledges this flaw in Mr. Stockton's analysis, and admits that Galpin Ford's sales performance is an "outlier." (Protestant's Opening Brief at 24). To the contrary, Mr. Farhat performed this same analysis using all of Galpin's competitive dealerships and found that if the new dealership performed at the same level, it would make 1,725 sales in the Bakersfield metro. (Exhibit 407 at A-71.1 and A-71.2) (Hrg. Tr. Vol. 13 Pages 3091:19-3092:4). This would raise the brand to right at average performance in the market, which is more than achievable and is achieved by many other import brands in the market. (*Id.*) (Exhibit P-151 at Tab 16 Page 1).

Accordingly, there is no support for Protestant's claim that Galpinsfield will be unable to establish or operate a Honda dealership in Bakersfield or, to the contrary, that it will be too strong of an operator in this market and harm Protestant's business.

VI. Protestant Provides No Credible Claim That Providing Additional Representation to Serve Customers in Bakersfield Will Harm Consumers or the Public Interest.

It is difficult to credibly claim the addition of a second Honda dealership will somehow harm the public given all of its significant benefits, including the increase in convenience, competition, and consumer choice; the positive effects it will have on development and employment; and the benefits of having a well-respected and experienced dealer group to serve and become involved in the community. In an effort to address these required statutory factors, however, Protestant makes a handful of brief arguments in an attempt to combat these proven benefits.

First, although Protestant's brief admits a second dealership would reduce travel times for Honda customers and improve customer convenience, Protestant alleges this improvement would be "minimal" and even "immaterial." (Protestant's Opening Brief at 7; 18; 39). This argument, however, relies on a chart showing the average improvement to drive time for the entire Bakersfield metro as a whole, a huge area that spans from several miles south of Barber Honda to more than 25 miles north, past the proposed site into Delano and beyond. (Exhibit J-18 at AHM_01444) (Hrg. Tr. Vol. 3 Page 723:3-22). Contrary to Protestant's claim, there is no dispute that the new dealership would have a great impact on convenience for customers in the crucial northern portion of the Bakersfield metro, (Hrg. Tr. Vol. 3 Pages 723:23-724:5), and Protestant's own expert admits the new dealership is more than 10 drive miles and 12 drive minutes away from Barber Honda. (Exhibit P-151 at Tab 4 Pages 12-13). An improvement of 20 miles and 24 minutes round trip is hardly "immaterial" for customers in North Bakersfield—particularly for service.

Protestant next claims the fact that other Honda dealers are able to make sales to customers

in Bakersfield shows there is already competition in this area, but the amount of insell into Bakersfield actually shows the exact opposite. As previously stated, there are no other Honda dealers for 67 miles in any direction from Barber Honda—an area amassing more than 14,000 square miles—giving Protestant a virtual monopoly for the Honda brand. The fact that 400-600 customers who live in Bakersfield choose to drive past Protestant and purchase Honda vehicles from other dealers outside this area demonstrates they are unhappy with this monopoly and are craving competition. (Exhibit R-342; R-403). Protestant also admits that “[c]onsumers benefit from having the ability to shop multiple brands at a centralized location.” (Protestant’s Opening Brief at 46). Establishing a new Honda dealer at the proposed site in North Bakersfield therefore will not only provide customers more competition for the Honda brand, but will also place Honda in close proximity to the second Toyota point and allow customers easy access to cross-shop between the two brands. (Hrg. Tr. Vol. 8 Page 1972:17-21) (Stipulated Facts Regarding Market Drive ¶ 17).

Moreover, while Protestant asserts several theories for how the proposed new dealership could potentially have a negative effect on the public, all of these theories are based on the assumption that the opening of this new dealership some two years in the future might cause Barber Honda to close its doors. Given the facts of this case, however, this assumption is unwarranted. As previously mentioned, there are **96 pairs of Honda dealers in California alone** that successfully operate closer than the proposed new dealership would be to Barber Honda, (Exhibit 378 at R-23 and R-24), and Bakersfield is the **largest market in the entire country** by population and by competitive registrations with only one Honda dealer. (Hrg. Tr. Vol. 4 Pages 742:23-743:3) (Hrg. Tr. Vol. 5 Pages 1173:18-1174:11). There is no reason to believe Barber Honda cannot be successful when all of these other dealers can. This is particularly true given that Barber Honda’s net working capital generally has been nearly double, and its net worth has nearly been nearly triple, American

Honda's guidelines. (Exhibits J-02; 05; 08; and 11).

The evidence makes clear that after this new dealership is established on the other side of town Barber Honda will continue operating for many years to come. When it does, the Ekegrens and Mr. Stockton admit this new dealership will provide another touch point for customers, improve customer choice and convenience, improve customer access to the brand, increase service capacity, increase employment, and increase the local tax base. (Hrg. Tr. Vol. 10 Pages 2311:25-2313:23) (Stephen Ekegren) (Vol. 11 Pages 2713:7-2714:25) (Jonathan Ekegren) (Vol. 13 Pages 2973:17-2974:4) (Edward Stockton). These undisputed effects of adding a new dealership in Bakersfield will all significantly benefit consumers and the public interest.

CONCLUSION

For the reasons set forth above, Protestant again has failed to meet its statutory burden of proving there is good cause not to permit the establishment of the proposed new Honda dealer. Accordingly, American Honda respectfully requests that the ALJ enter an Order denying the Protest and permitting the establishment of Galpinsfield as a new Honda dealer in Bakersfield.

DATED: May 29, 2020

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**STATE OF CALIFORNIA
NEW MOTOR VEHICLE BOARD**

In the Matter of the Protest of:

BARBER GROUP, INC., d/b/a BARBER
HONDA,

Protestant,

v.

AMERICAN HONDA MOTOR CO., INC.,

Respondent,

GALPINSFIELD AUTOMOTIVE, LLC,

Intervenor.

PROTEST NO.: PR-2539-17

**INTERVENOR GALPINSFIELD
AUTOMOTIVE, LLC'S
POST-HEARING REPLY BRIEF**

Pursuant to the Order Establishing Post-Hearing Briefing Schedule, Intervenor Galpinsfield Automotive, LLC ("Intervenor" or "Galpinsfield") hereby files this Reply Brief.

INTRODUCTION

From the first pages of its Opening Brief, Protestant engages in a campaign of misrepresentation. As but one example, Protestant veers between two completely inconsistent arguments that Galpinsfield is either too successful and too powerful to be allowed to operate the proposed new Honda dealership, or that it is overextended and will be unable to open the new dealership if permitted by the Board to do so. First, Protestant claims that Galpinsfield has resources to operate at a loss indefinitely, that it plans to sell more than 2,000 new vehicles per year, and that it intends to significantly overbuild its dealership facility beyond what American

Honda requires. Each of these allegations are not only unsupported by the record, but they are demonstrably false and entirely contradicted by the evidence presented during the hearing. In the same brief, and sometimes within the same page, Protestant then contradicts its own claims about the strength of Galpinsfield by arguing that it is lacking the personnel and resources needed to successfully establish and operate the new dealership. Here again, these wholly unfounded allegations misconstrue the record.

On each of these claims, the record is clear. True, the Galpin organization as a whole is a successful dealership group with a demonstrated record of opening a new Honda dealership and effectively promoting the Honda brand. It is well-capitalized and is able to sustain the significant expenses associated with securing real estate and building a new dealership from the ground up. At its core, however, it is a family run company still led by its founder Bert Boeckmann, who began in the industry more than 60 years ago with a servant's mentality and a desire to treat his customers as well as he possibly could. Although the Galpin organization has grown over time, its core values of putting customers first remains its guiding principal. Galpin's success is a result of its rigorous adherence over time to the business philosophy Bert Boeckmann worked so hard to implement throughout the Galpin organization over the past six decades.

Galpin also believes in competition and has seen how competition can benefit both consumers and the retail automotive business as a whole. However, in keeping with its core business philosophies, Galpin does not prioritize competition over its customers. Galpin does not engage in predatory advertising or pricing practices and does not operate its dealerships in a way that could be construed as misleading or harmful to consumers. This commitment to its customers above all else is demonstrated through Galpin's consistently strong customer satisfaction scores at all of its dealerships. (Hrg. Tr. Vol. 5 Pages 1401:4-1402:4).

In this case, the evidence shows that consumers in Bakersfield crave convenience, choice, and competition from a second Honda dealership—all of which has been conspicuously absent from the market. The establishment of a new Honda dealership in Bakersfield will also benefit the community as a whole by growing the tax base, injecting substantial money into the community, and increasing employment.

As set forth in more detail herein, Protestant has failed to meet its burden of proving there is good cause not to permit the addition of this new dealership. Protestant's misleading, and at times outright false, representations about Galpinsfield are unsupported by the record and should be given no credence. These arguments are perhaps not surprising coming from this Protestant, which at one point had twenty-one different franchises yet claims the one it chose to keep is a poor fit for the very market it serves. (Hrg. Tr. Vol. 9 Page 2030:22-25). However, the actual facts of this case make clear that a new Honda dealership in North Bakersfield will greatly benefit consumers and the public, and will stimulate the market for Honda business—all without any material negative impact to Barber Honda.

ARGUMENT

I. Protestant's Misrepresentations About Galpinsfield and Its Plans for the Bakersfield Market Must Be Rejected.

Protestant's Opening Brief attempts to carry its burden of proof by attacking Galpinsfield's sales projections, facility plans, proposed dealership location and the Galpin organization's strong record of success. Protestant's arguments on these points are misleading and unsupported by the record, and should therefore be rejected.

A. Protestant Misconstrues the Facts Surrounding Galpinsfield's Pro Forma and Facility Plans.

Throughout its opening brief, Protest mischaracterizes Galpinsfield's pro forma, which was submitted with its candidate package six years ago in 2014, as evidence of a necessary level of new

vehicle sales that Galpinsfield must achieve each year to be profitable. Protestant similarly claims, without evidence, that Galpinsfield intends to “overbuild” its dealership facility, and that the Galpin organization’s business practices in other dealerships is evidence that Galpinsfield will put Barber Honda out of business if allowed to open. These arguments are, at best, unsupported inferences and, at worst, entirely contradicted by the record.

As part of a comprehensive candidate package prepared by the Galpin organization, Galpinsfield provided a pro forma illustrating what the first three years of sales and profitability might look like. (Exhibit J-20 at AHM_00065937). This was prepared and submitted to American Honda some six years ago, before its candidate presentation in December 2014. Protestant relies on this single document to repeatedly claim throughout its brief that Galpinsfield must achieve more than 2,000 new vehicle sales per year to reach profitability. (Protestant’s Opening Brief at 5, 7, 12, 45, 48). Then, without any basis and contrary to the evidence, Protestant also astonishingly claims that Galpinsfield is willing to sustain losses “indefinitely” in order to grow its business at the expense of Barber Honda. (Protestant’s Opening Brief at 4, 7, 11, 45). As with so many of Protestant’s other arguments in this case, neither of these claims are true.

Protestant’s briefing claims that Galpinsfield’s pro forma projects it may lose money in the first two years until it reaches a certain level of new vehicle sales, or as part of some strategy to undercut the market and drive Barber Honda out of business. These assertions are entirely untrue. As the witnesses with actual knowledge of the pro forma testified at trial, Galpinsfield’s projected loss in its first few years reflect its multi-million-dollar investment in the proposed site, a new facility, and other start-up costs it would incur in those years. (*See* Hrg. Tr. Vol. 8 Page 1834:6-23 (Beau Boeckmann)); (*see also* Hrg. Tr. Vol. 7 Pages 1395:3-1396:1 (Peter Hagan); Hrg. Tr. Vol. 5 Page 1157:10-22 (Todd Meyer)). Galpinsfield’s pro forma shows a profit in its third year of operation—not because of the number of new vehicle sales it hopes to make—but because the

significant start-up costs associated with a new dealership likely would be substantially abated after two years. (Hrg. Tr. Vol. 8 Page 1834:6-23). Indeed, as Beau Boeckmann testified, new vehicle sales are not a large profit center for a car dealership any more, meaning that Galpinsfield is “not dependent on selling X number of cars in order to be profitable.” (Hrg. Tr. Vol. 8 Pages 1837:21-1839:22). There are many factors that have a much larger effect on profitability, including service work, parts, used vehicle sales, and operating expenses. (*Id.*); (*see also* Hrg. Tr. Vol. 7 Pages 1395:3-1396:3 (Peter Hagan explaining various factors affecting dealership profitability)).

Similarly, Protestant’s claim that Galpinsfield is prepared to sustain losses indefinitely also is simply untrue. During the hearing, Mr. Boeckmann testified that

[Galpin] is not in the business of . . . trying to lose money to gain share or anything like that, if that’s what you’re implying. We can’t just, you know, lose money forever. But we’re a very healthy company, so that we could sustain it if we had -- hit a recession, for example.

(Hrg. Tr. Vol. 8, p. 1859:15-20). The clear meaning of this testimony was that Galpinsfield can withstand an economic downturn without going out of business, which is ultimately good for consumers. Protestant, however, twists Mr. Boeckmann’s testimony and the pro forma in an effort to say the exact opposite, arguing that Galpinsfield will use its resources to operate at a loss, undercut Barber Honda, and ultimately drive them out of business. Here again, there is no evidence to support Protestant’s baseless suppositions, as the actual testimony is that Galpin’s success comes by building value in its brand and its customers rather than trying to undersell competing dealers. (Hrg. Tr. Vol. 8 Pages 1959:21-1960:10).

Protestant’s Opening Brief also claims, without citation to any evidence, that Galpinsfield intends to “overbuild” its dealership facility. This claim, presumably based on Galpinsfield’s purchase of an 11 acre tract where the dealership facility will be located, is similarly inaccurate, contrary to the evidence, and based entirely on speculation. The Ekegrens admitted during the hearing that they are not familiar with Galpinsfield’s plans for its new facility. (Hrg. Tr. Vol. 11

Page 2712:20-24). The only credible evidence on this point comes from the testimony of Beau Boeckmann who, contrary to Protestant's claims, made clear that Galpinsfield is not planning to build a huge facility that uses this entire property. Instead Galpinsfield plans to build a "normal Honda facility" that meets American Honda's standards, which require slightly less than 4 acres for the dealership facility. (Hrg. Tr. Vol. 8 Pages 1908:15-25; 1997:1-18). Mr. Boeckmann explained in his testimony that Galpinsfield made the decision to purchase this land for several practical business reasons: (1) the property included five different parcels that were being sold together as one unit; (2) having additional property gives the dealership room to grow, including potentially with used vehicle sales; and (3) the additional property prevents another brand dealer from building a competing store directly next door. (Hrg. Tr. Vol. 8 Pages 1997:1-18). Moreover, it is both ironic and disingenuous for Protestant to claim that Galpinsfield will be significantly overbuilding its facility given that Barber Honda's dealership facilities are 8.96 acres, consisting of 5.96 acres plus an additional 3 acres dedicated to storage, which is well above American Honda's requirement of only 4.53 acres for Barber Honda. (Exhibit J-16 at AHM_00001150) (Barber Honda facility requirements); (Hrg. Tr. Vol. 9 Page 2034:17-24) (Stephen Ekegren testimony regarding dealership acreage). Accordingly, contrary to Protestant's claims, the evidence shows that Galpinsfield has developed a scalable business plan that is not dependent on a particular level of vehicle sales to ensure profitability. Consistent with this approach, Galpinsfield has developed a prudent, reasonable plan for its dealership facility that will help it become profitable.

B. The Proposed Dealership Site Is Well Positioned to Improve Competition and Benefit Customers in the Bakersfield Market.

Just as the evidence unequivocally shows that Galpinsfield has no intention of needlessly overbuilding its dealership facility or incurring unnecessary expenses to do so, it is also apparent from the record that the property Galpinsfield acquired for the proposed dealership offers a number of advantages which will ultimately benefit consumers and the Honda brand as a whole in the North

Bakersfield RMA and surrounding retail automotive market. The proposed location will improve convenience for customers in the North Bakersfield area, while the proposed site's close proximity to North Bakersfield Toyota will promote cross-shopping and improve competition with Toyota, which has historically dominated the market. Protestant, seeking to draw attention away from these irrefutable facts, ignores and minimizes these undeniable benefits and instead attacks Galpinsfield's proposed dealership location as poorly situated because it is north of the majority of competitive registrations in Bakersfield (Protestant's Opening Brief at 12, 24), and because the proposed location is not in an established auto mall (*id.* at 13, 14, 35-36, 38, 45-46).

Protestant's arguments in this regard ignore the demographic trends in the Bakersfield market, which show a long-term trend of residential and commercial growth towards the north of the market and away from the established neighborhoods around Barber Honda's dealership on the south-side of Bakersfield. The population in the Bakersfield RMA grew from 345,255 in 2010 to 444,443 in 2017, while the Bakersfield metro as a whole grew in population from 517,258 to 722,714, and the number of households in the area increased from 157,278 to 208,497. (Exhibit R-376 at A-34, A-37, and A-38).

During the hearing, several witnesses testified that much of this residential development has occurred in the northern part of the Bakersfield metro. Marc Thomas, a former District Sales Manager for Zone 12, District D, lived in Bakersfield for over twenty years from the early 1990s through 2011. (Hrg. Tr. Vol. 3, Page 582:15-18). Mr. Thomas testified that during the time he lived in Bakersfield, the northern part of the metro "exploded" with "acres and acres and acres of farmland that just disappeared [where] houses were being built." (Hrg. Tr. Vol. 3, Page 585:5-16). Marty Fisher, another American Honda District Sales Manager who called on Barber Honda and visited Bakersfield approximately 35 times over three years between 2014 and 2017 (Hrg. Tr. Vol. 4 Page 890:15-18), observed that the north side of Bakersfield was growing with new residential

and commercial development. (Hrg. Tr. Vol 4, Pages 895:16-896:11). As such, the proposed dealership location is “future-proofed” and will provide the Honda brand an excellent point from which to compete as development in the North Bakersfield area continues in the future.¹

C. The Galpin Organization’s Demonstrated Record of Success Will Improve Competition and Benefit Consumers.

The Galpin organization was previously awarded a Honda open point in Missions Hills and in 2007 opened Galpin Honda. (Hrg. Tr. Vol. 8 Page 1953:5-10). Since that time, Galpin Honda has grown into one of the most respected Honda dealers in the United States, and Galpin’s demonstrated record of success is part of the reason Galpinsfield was selected as the candidate for this new point. (*Id.*) Yet, in an effort to use Galpin’s success as a cudgel against its candidacy for the North Bakersfield Open Point, Protestant and its expert attempt to show that Galpin’s other dealerships are *too* successful and would pose an existential threat to Barber Honda. (Protestant’s Opening Brief at 24-26) (Exhibit P-152 at Tab 15). However, this facile analysis stands in contradiction to Protestant’s own arguments throughout this case, in which it has sought to discredit Galpinsfield and American Honda’s assessment of opportunity in Bakersfield by arguing that Bakersfield is unique and not comparable with other California markets.

As American Honda’s market studies analyzed and determined, there are several factors that make Bakersfield uniquely positioned to support the addition of another Honda dealership. The evidence at the hearing expressly proved that Bakersfield is a large, growing, metropolitan market with over 722,000 people and a large demand for vehicles. Despite the size of the Bakersfield market, however, Barber Honda is the only Honda dealer within 67 miles and, not coincidentally, the Honda brand performs significantly worse in Bakersfield than it does elsewhere in the state. (*See* Exhibit R-376 at A-18 and A-19). Within the Bakersfield market itself, the Honda

¹ As set forth in more detail in Galpinsfield’s Opening Brief, there are numerous other advantages to the proposed location including accessibility for consumers, improved convenience to the Honda brand and authorized Honda service, and competition with the North Bakersfield Toyota dealership. (Galpinsfield’s Opening Brief at 9).

brand performs significantly worse than other competitive import brands (Exhibit P-151 at Tab 16), further indicating there is substantial opportunity for growth of the Honda brand without impact on Barber Honda.

Protestant, however, disregards these facts in its attempt to show that Galpinsfield will be ruinous to Barber Honda's business. Mr. Stockton, as part of his rebuttal analysis, simplistically grafts the sales patterns and performance of two of the Galpin organization's other dealers in very different circumstances and areas—specifically the San Fernando area—onto an expectation for performance in the Bakersfield market. (Exhibit P-152 at Tab 15). This superficial analysis disregards the very differences in the Bakersfield market which Protestant highlights elsewhere in its arguments and, ultimately, provides no support for its claim that Galpinsfield is the Goliath to Barber Honda's David. Galpin's other dealerships are located in the San Fernando Valley, part of the large, sprawling, and densely populated Los Angeles metro. Not surprisingly, this large market is highly competitive. Galpin Honda, for example, is surrounded by 10 other Honda dealers. (Exhibit P-152 at Tab 15, Page 1). Galpin Ford is surrounded by eight other Ford dealers. (*Id.* at Page 4). This is in stark contrast to Bakersfield, where Barber Honda currently is the only choice for customers within a 67 mile radius of its location. Accordingly, in addition to the natural expectation for inter-brand competition between brands, it is no surprise that cross-sell among dealers of the same brand is more endemic in the San Fernando Valley and Los Angeles.

Importantly, Mr. Stockton's cross-sell analysis, which Protestant relies on to suggest that Galpinsfield will necessarily cannibalize sales from Barber Honda leading to so-called "ruinous competition," is limited to only those dealers immediately surrounding Galpin Honda and Galpin Ford. (Exhibit P-152 at Tab 15). Each of the dealers analyzed, however, including the Galpin dealerships, also experience substantial in-sell from other same-brand dealers not shown on these charts. For example, Galpin Honda makes a mere 0.8% of the sales in Sierra Honda's ASA, while

Sierra Honda makes 26.4% of the sales and *other* Honda dealers beyond the 10 included on Mr. Stockton's chart make up 64.1% of the sales in Sierra Honda's market. (Exhibit P-152 at Tab 15, Page 1). This is further evidence of the type of cross-sell expected in a market like Los Angeles not just from Galpin but from the many other Honda dealers in that market.

It is disingenuous and a misstatement of the facts for Protestant to suggest that Galpin's dealerships represent the only competition for surrounding dealers of the same line-make, or that this data indicates that Galpin succeeds only through intra-brand cannibalization of those surrounding dealers. Most glaringly, Mr. Stockton makes no analysis of the performance of competitive brands surrounding Galpin's dealerships, focusing only on intra-brand cross-sell rather than inter-brand competition.² Yet, the evidence shows that there is greater opportunity for *inter-brand* competition in Bakersfield than for *intra-brand* competition. Other competitive import brands perform substantially better than expected in Bakersfield, while the Honda brand is the worst performing brand in the market. Recognizing this, Beau Boeckmann testified, logically, that Galpinsfield intends to compete primarily with other brands in Bakersfield, because that is where the opportunity exists in the market. (Hrg. Tr. Vol. 8, 2001:4-11). Protestant's efforts to conjure up fear of outsized impact to Barber Honda based on cross-sell in a dissimilar market, where the Honda brand is much better represented, provides no meaningful basis to determine that Galpinsfield will lead to ruinous competition for Barber Honda and should be rejected.

II. Galpinsfield will Benefit, not Harm, Consumers and the Public.

Protestant's Opening Brief next makes a number of arguments that the addition of Galpinsfield as a new Honda dealer in Bakersfield would actually harm consumers and the public rather than benefitting them. Specifically, after attacking Galpinsfield and the larger Galpin

² It is also telling that neither Protestant nor Mr. Stockton offered any evidence that the level of cross-sell made by Galpin Honda into other Honda dealers' ASAs resulted in "ruinous competition" or the shuttering of any surrounding Honda dealers. Despite the cross-sell amongst Honda dealers in and around the San Fernando Valley, none have come to the fate that Barber Honda is certain will occur in Bakersfield.

organization as too strong of a competitor with too deep of pockets, Protestant suggests that Galpinsfield will not be able to even open a competitive dealership in Bakersfield because it is financially unable to construct a dealership facility and/or unable to adequately staff the dealership. Not only are these claims directly inconsistent with each other, but they are pure supposition, and are not based on anything in the record. Protestant's other arguments regarding opportunity in the Bakersfield market are similarly unavailing.

A. Galpinsfield has Clearly Demonstrated Its Financial Wherewithal and Long-Term Commitment to the North Bakersfield Open Point.

Protestant first argues, without evidence, that Galpin may be unable to complete a new brick-and-mortar facility for the Honda brand in Bakersfield given its other facility obligations. (Protestant's Opening Brief at 13). There is no evidence, however, that Galpinsfield is unable to build a quality permanent Honda facility in North Bakersfield or lacks the intention to do so. Galpinsfield has already made a substantial investment in this new dealership, having paid more than \$5 million to purchase the property for the new Honda dealership. (Exhibits J-22; I-506) (Hrg. Tr. Vol. 8 Pages 1908:15-25; 1968:14-23; 1997:1-18). Since acquiring the property in 2016, Galpinsfield has incurred significant holding costs for property taxes, insurance and other expenses. (Hrg. Tr. Vol. 8 Pages 1968:24-1969:2). Further, the proposed site is located on land that is currently undeveloped, (Stipulated Facts Regarding Market Drive ¶ 16), and thus developing that site will benefit the local economy and promote economic development. In fact, Galpinsfield plans to look for local construction companies to build the new facility, which would further increase local employment and benefit the local economy. (Hrg. Tr. Vol. 8 Page 1922:5-21).

After claiming that Galpinsfield will not be able to build a new facility, Protestant's next unfounded suggestion is that Galpinsfield may be a "strawman" candidate for another owner of the Honda dealership in Bakersfield. Protestant, however, offers no evidence whatsoever in support of this preposterous theory. To the contrary, Mr. Boeckmann expressly testified that he would not

have purchased this property and incurred all of these costs if he did not intend to move forward and build the dealership. (Hrg. Tr. Vol. 8 Page 1971:7-11). Indeed, Protestant's allegation that Galpinsfield has no intention to move forward with this new dealership is entirely non-sensical given that Galpinsfield has invested so much time, money, and effort into this open point—and spent years in this very protest process pursuing the opening of this very store.

B. Galpinsfield Will Select a Qualified and Capable Management Team for the Open Point and Will Benefit the General Public With Valuable Employment Opportunities.

Protestant's Opening Brief suggests that Galpinsfield's prudent decision not to name a proposed general manager of the new Honda store after the departure of Ed Hartoonian is somehow indicative of the Galpin organization's lack of qualified personnel to operate the dealership. (Protestant's Opening Brief at 12-13). To the contrary, the Galpin organization has a deep bench of experienced, well-qualified general managers as well as other qualified employees seeking to further rise within the organization that Galpinsfield can call on to fill this role. As an example, when Mr. Hartoonian announced that he was leaving Galpin Honda to fulfill his life dream of becoming a dealer and acquiring his own dealership on the East Coast, Galpin Honda was able to immediately appoint a new General Manager from within the Galpin organization, and the dealership has maintained its strong performance. (*See* Vol. 8 Pages 1776:14-1778:10 (Beau Boeckmann discussing Ed Hartoonian's replacement at Galpin Honda) and 1803:13-1804:8 (Beau Boeckmann discussing deep bench of managers across the Galpin organization)). The Galpin organization also has a proven track record of solid sales performance and high customer satisfaction scores across all of its other dealers—none of which were operated by Mr. Hartoonian.³

³ As for Mr. Hartoonian, he now owns and operates a Nissan dealership in Virginia and has no interest in the North Bakersfield Open Point. (Hartoonian Depo I Pages 28:10-22; 33:6-8). He has no ongoing ties to Galpin or the Honda brand, and thus no incentive to advocate for this open point, yet when deposed in this case he nevertheless testified to his belief that the Honda brand is underrepresented in Bakersfield, that there is substantial opportunity for additional sales in the Bakersfield market, and that Bakersfield would be a "perfect fit" for Galpin based on its similarities to Galpin Honda's market in Mission Hills. (*Id.* at 83:5-9; 84:1-17; 87:15-88:15; 98:1-99:19).

(Hrg. Tr. Vol. 7 Pages 1399:4-1402:4). American Honda's witnesses similarly testified that Mr. Hartoonian's departure did not give any cause for concern as that they did not choose Galpin because of one person but because of the organization's overall culture and track record of success. (Hrg. Tr. Vol. 4 Page 978:2-25; Vol. 7 Pages 1399:4-1402:4). Galpin's business philosophy, its servant's mentality, and its track record of success will be the basis of Galpin's choice of candidate for the new dealership, if awarded, and these positive characteristics will benefit the Honda brand as well as consumers in the Bakersfield market.

Protestant also warns that the addition of Galpinsfield in the Bakersfield market will result in competition for employees as a reason Galpinsfield should not be allowed to open in the market. (Protestant's Opening Brief at 47). It is difficult to see how a more competitive employment environment would be bad for employees, however. Nevertheless, the evidence on this issue is clear—Galpin has an express policy against poaching or soliciting other dealership's employees. (Hrg. Tr. Vol. 8 Page 1966:2-1967:8). That will be the same policy in Bakersfield, and Galpinsfield will not actively seek to poach employees from Barber Honda.

Moreover, Protestant's argument on this issue ignores the Galpin organization's exemplary record for employee retention and longevity. (*See* Hrg. Tr. Vol. 8 Page 1964:12-25 (Beau Boeckmann discussing employee longevity and Galpin's employee appreciation efforts). The potential for new employment opportunities with an organization like Galpin is all the more reason to permit the establishment of Galpinsfield, not to deny it. Respectfully, Galpinsfield submits that Protestant's argument against expanding employment opportunities in Bakersfield should not a basis for finding good in this matter.

C. Galpinsfield Will Positively Benefit Competition and Provide Much Needed Choice for Consumers in Bakersfield.

Contrary to the evidence, Protestant argues that it is providing sufficient competition in the Bakersfield market and that adding Galpinsfield as a second Honda dealer will lead to the

implementation of aggressive sales tactics that will harm consumers. (Protestant's Opening Brief at 47). With respect to Galpinsfield's sales strategy, the undisputed evidence in this case is that even in its stores in the LA metro, surrounded by 10 or more same line-make dealers in a market with heavy cross-sell and intra-brand competition, Galpin does not advertise deep discounts or do anything that could be misleading to consumers, and it does not advertise on price alone in a way that would undermine vehicle or brand value. (Hrg. Tr. Vol. 8 Pages 1959:21-1960:10). Rather, the Galpin organization has become successful through building relationships with customers and through word of mouth referrals from those satisfied customers. (Hrg. Tr. Vol. 8 Pages 1949:8-1951:19). Galpinsfield will apply the same strategy in Bakersfield to create a positive customer experience, further benefitting consumers in the market.

Despite the monopoly it enjoys as the only Honda dealer for 67 miles, customers in Bakersfield are increasingly choosing to purchase vehicles from dealers outside the market, evidencing the lack of competition that exists in Bakersfield with Barber Honda as the only choice for new Honda sales and service. Other Honda dealers—despite their distance from Bakersfield—are selling hundreds of units into the Bakersfield market, including about 600 units per year, or 34% of the new Honda vehicles sold in Barber Honda's own ASA. (Exhibit R-342; R-403). Logic dictates that 34% of Honda customers in Bakersfield would not willingly choose to drive 67 or more miles if they were receiving competitive prices and a good customer experience from Barber Honda. Moreover, this in-sell represents *existing* opportunity for Galpinsfield to offer a *local* alternative and provide choice to consumers in the Bakersfield market, to grow its sales, to compete with other brands, and to improve consumer access to authorized Honda sales and service—all without taking a single sale from Barber Honda or otherwise impacting its operations. Given the substantial amount of in-sell from these distant Honda dealers, it is apparent that additional Honda representation will be beneficial to consumers in the Bakersfield market.

Protestant also suggests in its briefing that there is a lack of opportunity for additional Honda sales in Bakersfield because consumers in the market are too credit challenged to qualify for Honda financing and that Bakersfield is a “heavily sub-prime auto lending market.” (Protestant’s Opening Brief at 27-29). On these points there is no credible evidence. With respect to Protestant’s claims that Bakersfield is a “sub-prime” market, the only evidence comes from one hearsay statement regarding the business practices of the local Mitsubishi dealer. In 2016 and 2017 combined, Mitsubishi had a grand total of 1,394 competitive registrations in the Bakersfield market, which represent just 4.9% percent of the 27,882 competitive registrations in the market during those two years. (Exhibit P-151 at Tab 16, Page 1). Not only is this a small fraction of the total competitive registrations in the market, but there is no evidence that any other brand in Bakersfield engages in a meaningful level of sub-prime lending. Indeed, the Mitsubishi dealer also owns the local Nissan dealership in Bakersfield, meaning that even within the same ownership group there is no evidence of a pervasive sub-prime lending strategy throughout the Bakersfield market. (*See* Hrg. Tr. Vol. 9, Pages 2098:22 – 2099:11 (Stephen Ekegren discussing ownership of Kia and Nissan dealerships by same ownership group)). This argument about affordability and access to financing also completely ignores the fact that American Honda Finance Corporation is just one lender available to dealers, and that dealers are free to work other banks or credit unions as they see fit. (Hrg. Tr. Vol. 15 Page 3503:8-18). Moreover, dealers can buy down rates from Honda Finance or other lenders to make vehicles more affordable for consumers, something that the Galpin organization has done successfully at times.

Taken as a whole, the evidence shows that Galpinsfield will be a net benefit to the Bakersfield market by building a new, vibrant dealership facility on undeveloped land, growing the tax base, providing additional job opportunities, and offering consumers another option and a new sales and financing strategy for the Honda brand.

III. Protestant's Speculation about Current Economic Conditions Are Both Inappropriate and Insufficient to Support Its Burden of Proof.

Protestant also argues that the Board should sustain the Protest because of the recent COVID-19 pandemic, claiming that the economic impact of this healthcare issue has devastated portions of the Bakersfield market, particularly its oil industry, due to a downturn in oil prices. (Protestant's Opening Brief at 4-6, 27-28, 30). Galpinsfield is extremely sensitive to the effects of this pandemic and its impacts on the health and well-being of its customers, its community, and the retail automotive industry in which the Galpin organization operates. However, Protestant inappropriately seeks to use this crisis to its benefit, claiming that this unforeseen, "black swan" event, and the substantial, but temporary, economic impact that has resulted are sufficient to prevent the establishment of a second Honda dealership in Bakersfield.

Although there is no evidence in the record about the effects of current economic conditions on registrations in the Bakersfield market, there is evidence of how the market has responded to prior economic downturns. Although vehicle registrations declined during the previous recession in 2008-2012, Protestant's own expert report revealed that registrations rebounded at an incredible rate to set all-time record highs at well over 17 million registrations for more than five years through the end of 2019. (Exhibit P-152 Tab 5 Page 1) (Hrg. Tr. Vol. 13 Pages 3126:10-3127:23). All parties acknowledge and agree that the automotive industry is cyclical, and that temporary downturns are both expected and unavoidable. Whatever short- to medium-term effects may result from the current health and economic shock, however, the evidence and history both show that the economy and the retail automotive industry will rebound and likely emerge even stronger than before.

Despite these facts, Protestant argues, however, that Bakersfield's local economy and retail automotive industry are uniquely affected by this crisis and the effects on oil prices. On this point, there is even more recent evidence to consider. During the hearing, Protestant sought to show that

the retail automotive industry in Bakersfield was devastated due to a downturn in oil prices beginning in 2015, as an explanation for Honda's poor performance in the market and why there is no need for a second Honda dealer there. It is true that Barber Honda's new vehicle sales decreased from 1,623 units in 2013 to 1,507 units in 2017. But it is also true, and more telling, that the total number of Honda sales in the Bakersfield metro actually increased from 1,799 to 1,957 vehicles during this same time period. (Exhibit R-376 at A-27; A-App-11; A-App-23). There is no reason to believe the same will not hold true in the current economic climate, and Protestant's speculation about the current economic situation should not be taken as evidence to deny the establishment of this open point.

Even if the establishment is permitted, Galpinsfield will not be able to begin operations in the coming weeks, months, or even in the next year. The land purchased for the proposed new dealership is a completely undeveloped lot, and despite Protestant's speculation, Galpinsfield will not be able to immediately begin operating from a "tent" at that location, nor would it wish to do so. (See Hrg. Tr. Vol. 8 Pages 1910:10-1911:25 (Beau Boeckmann discussing need for a brick-and-mortar dealership facility before operations can begin in North Bakersfield)). As required by the Letter of Intent, Galpinsfield will build a brick-and-mortar facility in line with American Honda's facility size requirements. (Exhibit J-23). Like Rome, such a facility cannot be built in a day—Galpinsfield still needs to prepare facility plans, obtain quotes, obtain construction permits and approvals, and complete the entire construction process. (Hrg. Tr. Vol. 8 Pages 1816:6-18; 1908:15-20; 1921:14-1922:21). Based on his experience, Beau Boeckmann testified that it will take "years" for the new dealership to open after a final ruling from the Board. (Hrg. Tr. Vol. 8 Page 1816:6-18) ("[W]e're years away from it."). The months and years needed for the construction process to be completed will inure to Protestant's benefit, further extending its longtime monopoly over new Honda sales in the Bakersfield market and giving it unfettered

opportunity to grow its sales as the economy recovers from the current economic and healthcare shock it has sustained. To that end, in light of the economic effects created by the COVID-19 crisis, ***Galpinsfield hereby stipulates that it will not seek to begin operations in Bakersfield until 24 months following the filing of this brief, May 2022, at the earliest.***

CONCLUSION

For the reasons set forth above, Protestant has failed to meet its statutory burden of proving there is good cause not to permit the establishment of the proposed new Honda dealer. Galpinsfield's proven track record of customer satisfaction, as well as civic engagement, offer insight and clarity into its plans for the Bakersfield market and show that it is a good fit for this open point. Accordingly, Galpinsfield respectfully requests that the ALJ enter an Order overruling the Protest and permitting the establishment of Galpinsfield as a new Honda dealer in Bakersfield.

DATED: May 29, 2020

GALPINSFIELD AUTOMOTIVE, LLC

By: _____

Alan J. Skobin
*General Counsel for Intervenor
Galpinsfield Automotive, LLC*

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Attorneys for Protestant

STATE OF CALIFORNIA
NEW MOTOR VEHICLE BOARD

In the Matter of the Protest of:

BARBER GROUP, INC., a California corporation
doing business as **BARBER HONDA**,

Protestant,

vs.

AMERICAN HONDA MOTOR CO., INC., a
California corporation,

Respondent.

Protest No.

**PROTEST RE: ESTABLISHMENT OF
ADDITIONAL DEALERSHIP, AND REQUEST
FOR PRE-HEARING CONFERENCE AND
HEARING**

[Vehicle Code Section 3062]

Protestant, **BARBER GROUP, INC.**, a California corporation doing business as **BARBER HONDA**, files
this protest under the provisions of California Vehicle Code Section 3062 and alleges as follows:

1. Protestant is a duly licensed new motor vehicle dealer selling Honda makes of vehicle products.
Protestant is located at 4500 Wible Road in Bakersfield, California 93313. Protestant's telephone number is
661.396.4200.

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2. Respondent, **AMERICAN HONDA MOTOR CO., INC.**, a California corporation, manufactures and distributes Honda makes of vehicle products and is the franchisor of Protestant. Respondent is located at 1919 Torrance Boulevard in Torrance, California 90501-2746. Respondent's telephone number is 310.783.2000.

3. Protestant sells and services new Honda motor vehicles, parts, and service pursuant to an agreement and franchise entered into by and between Respondent, as the franchisor, and Protestant, as the franchisee.

4. Protestant is represented in this matter by **CLIFFORD & BROWN, A PROFESSIONAL CORPORATION**, a California professional corporation (collectively "Protestant's Counsel"), and specifically Grover H. Waldon, Esq. (State Bar No. 111206), and Charles D. Melton, Esq. (State Bar No. 130027). Protestant's Counsel's address is 1430 Truxtun Avenue, Suite 900, in Bakersfield, California 93301-5230. Protestant's Counsel's telephone no. is 661.322.6023.

5. On or about September 29, 2017, Protestant received a written notice from Respondent pursuant to Vehicle Code Section 3062 dated September 26, 2017 (the "Notice"). The Notice stated that Respondent intends to establish a new Honda franchise dealership in Kern County, California at Merle Haggard Drive in Bakersfield, California 93308 (the "Proposed Dealership"). In the Notice, Respondent alleges that the Proposed Dealership "is consistent with its marketing plan, and will enhance Honda's presence in the Bakersfield Market." A true and correct copy of the Notice is attached hereto as Exhibit "A" and incorporated herein by reference as if fully set forth at length.

6. Protestant objected to the Notice based on the conflicting description of the location of the Proposed Dealership therein. Specifically, the Notice referred to both Merle Haggard Drive in Bakersfield, California 93308 and also Kern County Assessor's Parcel Nos. beginning with 480-120, which would place it in Ridgecrest, California. Protestant preserves and reserves this objection notwithstanding the filing of this Protest. As a result, Protestant objected to the Notice by a letter to Respondent on October 4, 2017. A true and correct copy of the Objection Letter to Notice is attached hereto as Exhibit "B" and incorporated herein by reference as if fully set forth at length.

7. Protestant is located within the relevant market area of the Proposed Dealership. More specifically, Vehicle Code Section 507 defines a "relevant market area" as "any area within a radius of 10 miles from the site of

a potential new dealership.” The distance is determined by a straight-line measurement between the nearest points of the new motor vehicle dealership of Protestant and the location of the Proposed Dealership. The new motor vehicle dealership of Protestant is located within ten miles (10 mi.) of the location of the Proposed Dealership. A map indicating said distance between the new motor vehicle dealership of Protestant and the location of the Proposed Dealership is attached hereto as Exhibit “C” and incorporated herein by reference as if fully set forth at length.

8. Protestant has good cause to request that the Board prevent the establishment of the Proposed Dealership by reason of the following facts and circumstances:

- a. Since May 16, 1973, Protestant and its predecessors-in-interest operated for as a franchised Honda new motor vehicle dealer under a written franchise agreement with Respondent and its predecessors-in-interest;
- b. Protestant has made a substantial and permanent investment in its dealership, having operated it since the commencement of said franchise relationship since May 16, 1973, in a manner beneficial to the public and Respondent, as the franchisor, which investment will be harmed or destroyed by the establishment of the Proposed Dealership;
- c. Protestant has conducted and continues to conduct a substantial and adequate amount of Honda business compared to the business available in the relevant market area;
- d. Protestant has complied with all obligations to be performed by it under the franchise agreement, save only such deviations, if any, as are immaterial or otherwise excused;
- e. There will be an adverse effect upon the retail motor vehicle business and the consuming public in the relevant market area;
- f. It would be injurious to the public welfare for the additional franchise to be established;
- g. Protestant is providing adequate competition and convenient consumer care for Honda makes of vehicle products, including, without limitation, adequate motor vehicle sales and service facilities, equipment, supply of vehicle parts, and qualified service personnel;
- h. The establishment of the Proposed Dealership would not be in the public interest; and/or,

- i. Other circumstances that would support the claim that there is good cause not to allow the proposed establishment.

9. In a letter from Protestant to Respondent dated June 3, 2016, and as an example, Protestant set forth many of the facts and circumstances, and also reasons why the establishment of the Proposed Dealership should be prevented. A true and correct copy of said letter is attached hereto as Exhibit "D" and incorporated herein by reference as if fully set forth at length.

10. Protestant and Protestant's Counsel desire to appear before the Board and to have a hearing on this protest, and also estimates that the time required for the hearing will take approximately three (3) days to complete.

11. Protestant and Protestant's Counsel request a Pre-Hearing Conference.

12. Protestant and Protestant's Counsel also request that a schedule for discovery be approved and ordered, and that a hearing date be assigned during the Pre-Hearing Conference.

13. Protestant desires that all correspondence and notices be served upon Protestant's Counsel its attorneys at the following address:

Grover H. Waldon, Esq.
Charles D. Melton, Esq.
CLIFFORD & BROWN,
A PROFESSIONAL CORPORATION
1430 Truxtun Avenue, Suite 900
Bakersfield, California 93301-5230
Telephone No. 661.322.6023

WHEREFORE, Protestant prays as follows:

1. That the Board (or its authorized representative) immediately advise Respondent that this Protest has been filed;
2. That a hearing on this Protest is required pursuant to Vehicle Code Section 3066;
3. That pending the hearing on this Protest, the Board require Respondent to observe the applicable provisions of law prohibiting the establishment of the Proposed Dealership, including sales of Honda motor vehicles, parts and products, or the provision of Honda services from the location of the Proposed Dealership;

4. That the Board sustain this Protest and order Respondent not to establish the Proposed Dealership pursuant to Vehicle Code Sections 3062 and 3063 if the Board determines that there is good cause for not permitting the establishment of the Proposed Dealership; and,
5. That Protestant be awarded such other and further relief as the Board deems just and proper.

DATED: October 13, 2017

By: _____
CHARLES D. MELTON

Attorneys for Protestant

EXHIBIT “A”

The Notice

[ATTACHED]

EXHIBIT “B”

The Objection Letter to the Notice

[ATTACHED]

EXHIBIT “C”

**Map Showing the Distance Between the New Motor
Vehicle Dealership and the Location of the Proposed Dealership**

[ATTACHED]

EXHIBIT “D”

The June 3, 2016, Letter

[ATTACHED]



DECISION COVER SHEET

☒ **ACTION BY:** Public Members Only

☐ **ACTION BY:** All Members

To : BOARD MEMBERS

Date: June 26, 2020

From : ADMINISTRATIVE LAW JUDGE: Anthony M. Skrocki

CASE: FAIRFIELD IMPORTS, LLC, a California Limited Liability Company v. TOYOTA MOTOR SALES, USA., INC., a California Corporation
Protest Nos. PR-2579-18 and PR-2580-18

TYPE: Vehicle Code section 3060 Termination

PROCEDURAL SUMMARY:

- FILED ON CALENDAR: December 11, 2018
- MOTIONS FILED: "Respondent Toyota Motor Sales, U.S.A., Inc.'s Motion to Dismiss Protests"
- COUNSEL FOR PROTESTANTS: Christian J. Scali, Esq.
Halbert B. Rasmussen, Esq.
Jade F. Jurdi, Esq.
Scali Rasmussen
- COUNSEL FOR RESPONDENT: Richard H. Otera, Esq.
Steven A. McKelvey, Jr., Esq.
M. Ronald McMahon, Jr., Esq.
Nelson Mullins Riley & Scarborough LLP
- **EFFECT OF PROPOSED ORDER:** The Proposed Order grants Respondent Toyota Motor Sales, U.S.A., Inc.'s Motion to Dismiss Protests. The Proposed Order would dismiss the protests with prejudice.

Background Findings

- Fairfield Imports, LLC, a California Limited Liability Company ("Momentum Toyota" or "Protestant") does not contest that it: (1) Closed its Toyota dealership in November 2018; (2) Ceased selling and servicing Toyota vehicles in November 2018; (3) Currently is not selling or servicing Toyota vehicles or otherwise serving the public in Fairfield, California; and (4) Does not have viable plans to re-open or resume operations of the Toyota dealership at its authorized location.¹

¹ "Protestant's Non-Opposition to Respondent's Motion to Dismiss Protests" was filed on May 12, 2020.

- On March 6, 2020, the Receiver appointed by the Superior Court sold the assets of Protestant's Toyota dealership to a new franchisee so it is now impossible for Protestant to re-open or resume operations at its authorized location. Therefore, there is no longer an effective written agreement between the parties that satisfies the statutory definition of a "franchise," Protestant is no longer a "franchisee" of Respondent, Respondent is no longer the "franchisor" of Protestant, and the Board had no jurisdiction to hear the protests.
- Protestant did not file an opposition to the Motion to Dismiss. Protestant's counsel stated that the facts as alleged in the Motion were accurate. Thus, if the jurisdiction of the Board did continue to exist, the ALJ found that the undisputed facts were sufficient, as a matter of law, to establish good cause to terminate the franchise.
- The ALJ also found that the uncontested facts evidenced that the protests were moot, as alleged by Respondent.

RELATED MATTERS:

- Related Board Protests: There were a total of 21 protests filed pertaining to the Momentum terminations. All of the other protests have been settled or dismissed by Board order.
- Related Case Law: *Duarte & Witting, Inc. v. New Motor Vehicle Bd.* (2002) 104 Cal.App.4th 626, 637
- Applicable Statutes and Regulations: Vehicle Code sections 331, 331.1, 331.2, 470, 3050, and 3060
Evidence Code section 452
Government Code Section 11425.60, 11515

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

CERTIFIED MAIL

STATE OF CALIFORNIA
NEW MOTOR VEHICLE BOARD

In the Matter of the Protest of

FAIRFIELD IMPORTS, LLC, a California
Limited Liability Company,

Protestant,

v.

TOYOTA MOTOR SALES, USA, INC., a
California Corporation,

Respondent.

Protest Nos. PR-2579-18 and PR-2580-18

**PROPOSED ORDER GRANTING
“RESPONDENT TOYOTA MOTOR
SALES, U.S.A., INC.’S MOTION TO
DISMISS PROTESTS”**

To: Christian J. Scali, Esq.
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Jade F. Jurdi, Esq.
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M. Ronald McMahan, Jr., Esq.
Attorneys for Respondent
NELSON MULLINS RILEY & SCARBOROUGH, LLP
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Post Office Box 11070 (29211-1070)
Columbia, South Carolina 29201

1 This matter came on regularly for telephonic hearing on Friday, May 15, 2020, before Anthony M.
2 Skrocki, Administrative Law Judge (“ALJ”) for the New Motor Vehicle Board (“Board”). Halbert B.
3 Rasmussen, Esq. and Jade F. Jurdi, Esq. of Scali Rasmussen represented Protestant. M. Ronald
4 McMahan, Jr., Esq. of Nelson Mullins Riley & Scarborough LLP represented Respondent.

5 **FACTUAL AND PROCEDURAL BACKGROUND**

6 1. Fairfield Imports, LLC, a California Limited Liability Company (“Momentum Toyota” or
7 “Protestant”) was a “franchisee” within the definition of Vehicle Code section 331.1.¹ Toyota Motor
8 Sales, U.S.A., Inc., a California Corporation (“TMS” or “Respondent”) was Protestant’s “franchisor”
9 within the definition of Section 331.2. (Protest Nos. PR-2579-18 and PR-2580-18, p. 2, lines 9-10)
10 Momentum Toyota and TMS were parties to a “franchise” as defined in Section 331.² (Declaration of M.
11 Ronald McMahan, Jr., Exs. C and D)

12 2. Momentum Toyota sold and serviced Toyota vehicles at its dealership, which was located
13 at 2575 Auto Mall Parkway, Fairfield, California. (Protest Nos. PR-2579-18 and PR-2580-18, p. 1, lines
14 24-25)

15 **Notices of Termination**

16 3. By letter dated November 27, 2018, TMS issued Momentum Toyota a 15-day Notice of
17 Termination³ alleging: (a) Momentum Toyota’s insolvency and its inability to pay debts as they become
18 due, the suspension of its floorplan financing, and TMS’ understanding that Protestant’s employees,
19 vendors, and creditors have not been timely paid; (b) The filing of petitions(s) for receivership against
20 _____

21 ¹ All statutory references are to the California Vehicle Code unless otherwise indicated.

22 ² The franchise, called the Toyota Dealer Agreement, was not provided by Respondent in its Motion to Dismiss.

23 ³ A 15-day notice of termination may be issued only if one or more of the specified grounds outlined below exist, otherwise
24 the franchisor may issue only a 60-day notice of termination:

25 (i) Transfer of any ownership or interest in the franchise without the consent of the franchisor, which
26 consent shall not be unreasonably withheld;

27 (ii) Misrepresentation by the franchisee in applying for the franchise;

28 (iii) Insolvency of the franchisee, or filing of any petition by or against the franchisee under any bankruptcy
or receivership law;

(iv) Any unfair business practice after written warning thereof;

(v) Failure of the motor vehicle dealer to conduct its customary sales and service operations during its
customary hours of business for seven consecutive business days, giving rise to a good faith belief on the part
of the franchisor that the motor vehicle dealer is in fact going out of business, except for circumstances
beyond the direct control of the motor vehicle dealer or by order of the Department of Motor Vehicles.
(Section 3060(a)(1)(B)(i)-(v))

1 Momentum Toyota and/or its affiliates by at least one and possibly several banks; and (c) Momentum
2 Toyota's failure to conduct customary dealership operations on or after November 15, 2018. (Declaration
3 of M. Ronald McMahon, Jr., Ex. C)

4 4. By letter dated November 27, 2018, TMS issued Momentum Toyota a 60-day Notice of
5 Termination alleging Momentum Toyota breached its franchise obligations by failing to: (a) Obtain an
6 alternate source of floorplan financing or reinstate its wholesale financing commitment with Toyota
7 Motor Credit Corporation when it was suspended on November 13, 2018; and (b) Provide and maintain
8 dealership facilities that meet the minimum standards established by TMS and correct facility deficiencies
9 within the agreed upon timelines. (Declaration of M. Ronald McMahon, Jr., Ex. D)

10 5. The Board and Protestant received the Notices of Termination on November 28, 2018.
11 (Protest Nos. PR-2579-18 and PR-2580-18, p. 2, lines 16-17)

12 **The Protests**

13 6. On December 7, 2018, Momentum Toyota filed Protest No. PR-2579-18, in response to the
14 60-day Notice of Termination, and Protest No. PR-2580-18, in response to the 15-day Notice of
15 Termination. By Board Order dated December 27, 2018, the Protests were consolidated for purposes of
16 hearing.

17 7. In its Protests, Momentum Toyota denies the existence of the reasons contained in the
18 written Notices of Termination, asserts that the reasons for termination are misleading, and denies that
19 any of the reasons for termination "constitute valid grounds for termination" under the franchise. (Protest
20 Nos. PR-2579-18 and PR-2580-18, p. 2, lines 22-28)

21 **The Asset Purchase Agreement**

22 8. Toyota Motor Credit Corporation, the secured lender that formerly provided Protestant's
23 line of wholesale flooring, filed a lawsuit against Protestant and various affiliates of Protestant in the
24 Solano County Superior Court alleging various causes of action including breach of contract. A Receiver,
25 J. Michael Issa, was appointed by the court on or about January 31, 2019. (Declaration of M. Ronald
26 McMahon, Jr., p. 1, lines 9-20, Ex. A)

27 9. On or about October 2019, Mr. Issa, in his capacity as Receiver, entered into an Asset
28 Purchase Agreement with Hanlees Fairfield, Inc. regarding the sale of Momentum Toyota's dealership

assets.⁴ (Declaration of M. Ronald McMahon, Jr., p. 2, lines 20-22)

10. TMS conditionally approved the proposed sale of Momentum Toyota's dealership assets in early March 2020 and the sale closed on March 6, 2020. (Declaration of M. Ronald McMahon, Jr., p. 2, lines 23-25) As a result, Protestant no longer owns the Toyota dealership that is the subject of the protests; a new owner now operates Protestant's former Toyota dealership. (Motion, p. 1, lines 7-9)

MOTION TO DISMISS PROTESTS

11. On May 8, 2020, TMS filed "Respondent Toyota Motor Sales, U.S.A., Inc.'s Motion to Dismiss Protests." Relying on *Duarte & Witting, Inc. v. New Motor Vehicle Bd.* (2002) 104 Cal.App.4th 626, Respondent contends that "there is no dispute that the Board has the implied authority to summarily dismiss a protest based upon the 'existing circumstances.'"⁵ (Motion, p. 3, lines 21-22; p. 4, lines 1-2)

12. Respondent argues that "Protestant does not contest that it (i) closed its Toyota dealership in November 2018, (ii) ceased selling and servicing Toyota vehicles in November 2018, and (iii) currently is not selling or servicing Toyota vehicles or otherwise serving the public in Fairfield, California, and (iv) does not have viable plans to re-open or resume operations of the Toyota dealership at its authorized location." The assets of Protestant's Toyota dealership have been sold to a new operator so it is now impossible for Protestant to re-open or resume operations at its authorized location. Respondent contends that as a result of the Asset Purchase Agreement, summary dismissal of the Protests is appropriate because no order of the Board could result in Protestant resuming operations as a Toyota dealership. (Motion, p. 4, lines 9-16)

13. Additionally, Respondent maintains that "[t]he Toyota dealership that is the subject of these Protests no longer exists, and the indisputable facts demonstrate that there is no relief available for Protestant before the Board." Proceeding with a merits hearing to determine whether there is good cause to terminate Protestant's Toyota franchise would be an exercise in futility. There is no legitimate reason

⁴ The Asset Purchase Agreement was not provided by Respondent.

⁵ TMS' motion references the Board's Decisions in: (1) *Porter Auto Group, L.P. v. FCA US LLC* (Protest No. PR-2534-17, et al.); (2) *Vallejo CJD, LLC v. FCA US LLC* (Protest No. PR-2589-18, et al.) and *Fairfield CJD, LP v. FCA US LLC* (Protest Nos. PR-2593-18, et al.); (3) *Maverick Auto Group 2, LLC v. Volkswagen Group of America, Inc.* (Protest No. PR-2581-18) and (4) *Fairfield Imports Three, LLC v. Mitsubishi Motors North America, Inc.* (Protest No. PR-2586-18). These Decisions have not been designated by the Board as precedent decisions pursuant to Government Code Section 11425.60, so they will not be relied upon in this Proposed Order.

why the protests should not be “summarily dismissed.” (Motion, p. 4, lines 20-24)

14. Lastly, Respondent contends that “the statutory scheme and legislative intent behind Section 3060 cannot be effectuated by continuing these Protests. It is clear from the statutory language that by enacting Section 3060, the legislature was concerned about the loss of the rights under a franchise and the possible adverse effects that the subsequent loss of a ‘dealership’ could have on the consuming public, the automotive business, and the franchisee. None of these concerns are present here because Protestant’s dealership closed nearly a year and a half ago, and its assets have been sold to an entirely different operator. The legislative intent of maintaining the status quo and possibly preventing the loss of the investment of the Protestant and the loss to the public of the goods and services provided by the Protestant’s dealership cannot now be effectuated.” Consequently, Respondent requests the Board issue a decision dismissing the protests as moot. (Motion, p. 4, lines 26-28; p. 5, lines 1-7)

15. Momentum Toyota filed its “Non-Opposition to Respondent’s Motion to Dismiss Protests” on May 12, 2020, indicating it will not file an opposition to TMS’ motion.

APPLICABLE LAW

16. Section 331 provides in part as follows:

(a) A “franchise” is a written agreement between two or more persons having all of the following conditions:

(1) A commercial relationship of definite duration or continuing indefinite duration.

(2) The franchisee is granted the right to offer for sale or lease, or to sell or lease at retail new motor vehicles ... manufactured or distributed by the franchisor or the right to perform authorized warranty repairs and service, or the right to perform any combination of these activities.

(3) The franchisee constitutes a component of the franchisor’s distribution system.

(4) The operation of the franchisee’s business is substantially associated with the franchisor’s trademark, trade name, advertising, or other commercial symbol designating the franchisor.

(5) The operation of a portion of the franchisee’s business is substantially reliant on the franchisor for a continued supply of new vehicles, parts, or accessories.”

...

17. Section 331.1 defines a franchisee as follows:

A “franchisee” is any person⁶ who, pursuant to a franchise, receives new motor vehicles subject to registration under this code, new off-highway motorcycles, as defined in Section 436, new all-terrain vehicles, as defined in Section 111, ... from the franchisor and who

⁶ Section 470 defines “person” to include “a natural person, firm, copartnership, association, limited liability company, or corporation.” The “person” within the definition of a “franchisee” here is Momentum Toyota.

offers for sale or lease, or sells or leases the vehicles at retail or is granted the right to perform authorized warranty repairs and service, or the right to perform any combination of these activities.

18. Section 331.2 defines a franchisor as follows:

A “franchisor” is any person who manufactures, assembles, or distributes new motor vehicles subject to registration under this code, new off-highway motorcycles, as defined in Section 436, new all-terrain vehicles, as defined in Section 111, ... and who grants a franchise.

19. Section 3050 provides, in part, as follows:

The board shall do all of the following:

...
(c) Hear and decide, within the limitations and in accordance with the procedure provided, a protest presented by a franchisee pursuant to Section 3060...

20. Section 3060 provides in part as follows:

(a) Notwithstanding Section 20999.1 of the Business and Professions Code or the terms of any franchise, no franchisor shall terminate or refuse to continue any existing franchise unless all of the following conditions are met:

(1) The franchisee and the board have received written notice from the franchisor as

(A) Sixty days before the effective date thereof setting forth the specific grounds for termination or refusal to continue.

(B) Fifteen days before the effective date thereof setting forth the specific grounds with respect to any of the following:

(i) Transfer of any ownership or interest in the franchise without the consent of the franchisor, which consent shall not be unreasonably withheld.

(ii) Misrepresentation by the franchisee in applying for the franchise.

(iii) Insolvency of the franchisee, or filing of any petition by or against the franchisee under any bankruptcy or receivership law.

(iv) Any unfair business practice after written warning thereof.

(v) Failure of the motor vehicle dealer to conduct its customary sales and service operations during its customary hours of business for seven consecutive business days, giving rise to a good faith belief on the part of the franchisor that the motor vehicle dealer is in fact going out of business, except for circumstances beyond the direct control of the motor vehicle dealer or by order of the department.

...

(2) Except as provided in Section 3050.7, the board finds that there is good cause for

(3) The franchisor has received the written consent of the franchisee, or the appropriate period for filing a protest has elapsed.

...

RESPONDENT’S REQUEST FOR OFFICIAL NOTICE

21. Relying on Government Code section 11515 and Evidence Code section 452(d), TMS requests that the Board take official notice of the “lawsuit and related documents” filed by Toyota Motor

Credit Corporation against Protestant and other defendants in Solano County Superior Court, Case No. FCS051912.

22. Section 11515 provides for official notice:

In reaching a decision official notice may be taken, either before or after submission of the case for decision, of any generally accepted technical or scientific matter within the agency's special field, and of any fact which may be judicially noticed by the courts of this State...."

23. Evidence Code section 452 provides that judicial notice may be taken of:

...
(d) Records of (1) any court of this state or (2) any court of record of the United States or
...

24. Protestant did not object to Respondent's request for official notice during the telephonic hearing when asked by ALJ Skrocki. As the request pertains to records of the Superior Court of the State of California, County of Solano, and meets the standard set forth in the Government Code, official notice will be taken.

ANALYSIS AND DETERMINATIONS

25. As stated above, Protestant, on May 12, 2020, three days prior to the hearing on the motion, filed what it captioned "Non-Opposition to Respondent's Motion to Dismiss Protests." The entirety of the pleading stated: "Protestant will not file an opposition to Respondent Toyota Motor Sales, USA, Inc.'s motion to dismiss the protest." In addition to this statement, counsel for Protestant apparently did not intend to participate in the telephonic hearing on the motion as they did not join the telephonic hearing until after the Board's staff contacted their office and informed them that the ALJ requested that counsel join the hearing.

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1 26. When asked by the ALJ at the hearing, counsel for Protestant stated that there is no dispute
2 as to the facts alleged by Respondent in the motion.⁷ Protestant's counsel's concurrence in the accuracy of
3 the facts in the motion and the absence of any written or oral opposition to the motion are deemed to be
4 implicit indicators that Protestant has no objections to the granting of Respondent's Motion to Dismiss
5 Protests.

6 27. These uncontested facts are, as a matter of law, sufficient to evidence there is good cause
7 to terminate the franchise of Protestant. (See Veh. Code § 3061)

8 28. Respondent's claim that the protests should be dismissed due to mootness is found to be
9 correct.

10 29. The Board is without jurisdiction to act on the protests as Protestant is no longer a
11 franchisee. Although Protestant had been a franchisee at the time of filing the protests, Protestant's status
12 as a franchisee ceased to exist, at the latest, as of March 6, 2020, upon the closing of the sale of
13 Protestant's assets by the court-appointed Receiver and the granting of a franchise to the new dealer in
14 Fairfield.

15 30. As of March 6, 2020, at the latest, there was no longer an effective written agreement
16 between the parties that satisfies the statutory definition of a "franchisee."

17 31. As of March 6, 2020, at the latest:

- 18 a. Protestant was no longer a "franchisee" of Respondent;
19 b. Respondent was no longer the "franchisor" of Protestant; and,
20 c. The Board had no jurisdiction to hear the protests.

21 **REASONS FOR DISMISSAL OF THE PROTESTS**

22 32. The Protests are dismissed for the following reasons:

23 a. As of March 6, 2020, at the latest, the Board no longer had jurisdiction to hear the protests
24 as there was no longer a franchise between the parties and Protestant was no longer a franchisee.

25 ⁷ The ALJ asked counsel for Protestant why Protestant had not filed a request for dismissal of the protests as
26 customarily would be expected under circumstances such as here. Withdrawal of protests avoids the time and
27 expense of filing a formal motion, a hearing before an ALJ (with a court reporter), the drafting of a Proposed Order
28 and Board consideration of the record and Proposed Order. Counsel replied that Mr. Rahim Hassanally, the Dealer
Principal of Protestant, refused to allow such a filing in behalf of Protestant. Counsel then asserted the attorney-
client privilege and declined to give reasons for Mr. Hassanally's refusal to withdraw the protests.

b. If the jurisdiction of the Board has continued, the uncontested facts demonstrate that Respondent has good cause to terminate the franchise.

c. If the jurisdiction of the Board has continued, the protests should be dismissed on the grounds of mootness.

PROPOSED ORDER

After consideration of the pleadings, exhibits and statements of counsel, it is hereby ordered that “Respondent Toyota Motor Sales, U.S.A., Inc.’s Motion to Dismiss Protests” is granted. *Fairfield Imports, LLC, a California Limited Liability Company v. Toyota Motor Sales, USA, Inc., California Corporation*, Protest Nos. PR-2579-18 and PR-2580-18 are dismissed with prejudice.

I hereby submit the foregoing which constitutes my proposed order in the above-entitled matters, as the result of a hearing before me, and I recommend this proposed order be adopted as the decision of the New Motor Vehicle Board.

DATED: May 18, 2020

By ANTHONY M. SKROCKI
Administrative Law Judge

Steven Gordon, Director, DMV
Elizabeth (Lisa) G. Humphreys, Branch Chief
Occupational Licensing, DMV

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STATE OF CALIFORNIA

NEW MOTOR VEHICLE BOARD

In the Matter of the Protests of

FAIRFIELD IMPORTS, LLC, a California
Limited Liability Company,

Protestant,

v.

Toyota Motor Sales, U.S.A., INC., a
California Corporation,

Respondent.

Protest Nos.: PR-2579-18 and PR-2580-18

**RESPONDENT TOYOTA
MOTOR SALES, U.S.A., INC.'S
MOTION TO DISMISS
PROTESTS**

I. INTRODUCTION

In November 2018, Protestant Fairfield Imports, LLC d/b/a Momentum Toyota of Fairfield (“Protestant”) shut down its Toyota dealership, declared it had “closed its doors,” and ceased to conduct its customary sales and service operations or otherwise serve the public in Fairfield, California. Nearly one year later, in October 2019, the court-appointed Receiver for Protestant entered into an Asset Purchase Agreement to sell Protestant’s Toyota dealership assets to a new operator. The asset sale closed on March 6, 2020. As a result, Protestant no longer owns the Toyota dealership that is the subject of these Protests, and a new owner now operates Protestant’s former Toyota dealership in Fairfield, California.

TMS moves to dismiss the Protests¹ filed by Protestant on the grounds that Protestant’s sale of the dealership assets to an entirely new and different operator renders the Protests moot, as the Board can no longer provide any meaningful relief to Protestant since it no longer owns the dealerships that are subject to the Protests. Counsel for Protestant has informed counsel for TMS and counsel for the Board that Protestant does not intend to oppose TMS’s Motion to Dismiss. Consequently, it would be futile and a waste of public funds for the Board to hold a merits hearing on the Protests, and, for the reasons set forth below, TMS respectfully requests that the Board dismiss the Protests with prejudice.

II. FACTUAL BACKGROUND

A. Dealership Closure and Notices of Termination

On November 13, 2018, Toyota Motor Credit Corporation (“TMCC”) determined that Protestant sold about 33 cars valued at approximately \$1.1 million “out of trust,” having received the proceeds of those sales, but failing to pay TMCC for the debt associated with the vehicles. (Declaration of M. Ronald McMahan, Jr. (“McMahan Decl.”), ¶¶ 3-4, Ex. A at p.2.) That same day, Toyota Financial Services (“TFS”)² notified both Protestant and TMS that Protestant’s wholesale financing commitment had been suspended and that it would not finance any additional

¹ Protest Nos. PR-2579-18 and PR-2580-18 have been consolidated by the Board.

² TFS is a service mark used by TMCC.

units under its wholesale floorplan. (*Id.*, ¶ 4, Ex. B) On November 16, 2018, Protestant closed its business and ceased selling and servicing vehicles or otherwise operating as a Toyota dealership in Fairfield, California. (*Id.*, ¶ 5 and Ex. A at p.2.) Protestant has never reopened the Toyota dealership since the November 16, 2018 closure.

On November 27, 2018 – more than seven (7) consecutive business days after Protestant closed its doors, during which time it never re-opened for business – TMS issued a 15-Day Notice of Termination of Dealer Agreement (“15-Day Notice of Termination”) to Protestant. The 15-Day Notice of Termination set forth the specific grounds for termination, including (i) Protestant’s failure to maintain solvency, (ii) the filing of receivership petition against Momentum Auto Group and/or its affiliates, and (iii) Protestant’s failure to conduct customary dealership operations for seven consecutive business days. (*Id.*, ¶ 6, Ex. C.) Concurrently with the 15-Day Notice of Termination, TMS issued a 60-Day Notice of Termination of Dealer Agreement (“60-Day Notice of Termination,” collectively with the 15-Day Notice of Termination, the “Notices of Termination”) to Protestant. The 60-Day Notice of Termination set forth additional grounds for termination, including Protestant’s (i) failure to maintain floorplan financing and (ii) failure to correct facility deficiencies. (*Id.*, ¶ 7, Ex. D.)

The Notices of Termination were addressed to Mr. Rahim Hassanally, owner of Protestant, at 2575 Auto Mall Parkway, Fairfield, California 94533, and were delivered by hand to the dealership and by email to Mr. Hassanally, with a copy of each provided to the Board. (*Id.*, Exs. C and D.) Protestant filed the instant Protests with the Board on or about December 7, 2018. The Pre-Hearing Conference on the Protests was originally scheduled for December 21, 2018. By consent of the parties, the Conference was continued many times over the next sixteen months while a sale of Protestant’s Toyota dealership assets was pursued. (*Id.*, ¶ 8).

B. Appointment of Receiver and Sale of Protestant’s Toyota dealership assets

Multiple creditors of Protestant and entities affiliated with Protestant pursued various recovery efforts and associated litigation related to the closure of Protestant’s Toyota dealership. (McMahan Decl., ¶ 3.) In particular, TMCC, the secured lender who formerly provided

Protestant's line of wholesale financing, filed a complaint against Protestant, Rahim Hassanally, and various affiliates of Protestant on November 21, 2018, in the Superior Court for the State of California, County of Solano, alleging causes of action for judicial foreclosure, claim and delivery, conversion, appointment of receiver, temporary restraining order, and preliminary and permanent injunctions. (*Id.*, ¶¶ 3, 5, Ex. A.)³

On January 31, 2019, the Superior Court of the State of California, County of Solano, Case No. FCS051912, appointed Mr. J. Michael Issa ("Receiver") as receiver for Protestant, empowering him to take control of the assets of Protestant and to dispose of such assets to satisfy the debts of Protestant. (*Id.*, ¶ 3, Ex. A.) On or about October 18, 2019, nearly one year after Protestant unilaterally closed its Toyota dealership, the court-appointed Receiver entered into an Asset Purchase Agreement ("APA") with Hanlees Fairfield, Inc., agreeing to the sale of substantially all Protestant's Toyota dealership assets. (*Id.*, ¶ 9). In early March 2020, TMS conditionally approved the proposed sale pursuant to the APA, and the sale to Hanlees Fairfield, Inc. closed on March 6, 2020. (*Id.*, ¶ 10). The new owner, Hanlees Fairfield, Inc., now operates the Toyota dealership in Fairfield, California (known as Hanlees Fairfield Toyota), and Protestant no longer owns or operates the Toyota dealership that is the subject of these Protests.

III. SUMMARY DISMISSAL OF THE PROTESTS IS WARRANTED BECAUSE THE RECEIVER SOLD THE TOYOTA DEALERSHIP TO AN ENTIRELY NEW AND DIFFERENT OPERATOR, RENDERING THE PROTESTS MOOT

The Board is a quasi-judicial administrative agency of limited jurisdiction. *BMW of N. Am., Inc. v. New Motor Vehicle Bd.*, (1984) 162 Cal.App.3d 980, 994. In general, the Board's jurisdiction to preside over disputes is limited to those specifically committed to its jurisdiction by

³ Pursuant to section 11515 of the California Government Code and section 452(d) of the California Evidence Code, TMS also requests that the Board take official notice of the lawsuit and related documents filed by TMCC against Protestant and other defendants in Solano County Superior Court, Case No. FCS051912. A true and correct copy of the Order appointing Mr. Issa as Receiver is attached as Exhibit A to the McMahan Declaration. Section 452(d) of the California Evidence Code provides that judicial notice may be taken of "[r]ecords of (1) any court of this state or (2) any court of record of the United States or of any state of the United States." Cal. Evid. Code § 452(d). Because the Order appointing Mr. Issa as Receiver is a record of a superior court of the state of California, and it meets the standard set forth in section 11515 of the Government Code, it is proper for the Board to take official notice of this document.

statute. *Mazda Motor of Am. Inc. v. California New Motor Vehicle Bd.* (2003) 110 Cal. App. 4th 1451, 1457. Although the Board's jurisdiction is limited, there is no dispute that the Board has the implied authority to summarily dismiss a protest based upon the "existing circumstances," as recognized in *Duarte v. New Motor Vehicle Board* and many of the Board's recent Decisions. *Duarte & Witting, Inc. v. New Motor Vehicle Bd.* (2002) 104 Cal.App.4th 626, 635-4; *Porter Auto Group, L.P. v. FCA US LLC*, Protest Nos. PR-2534-17, PR-2535-17, PR-2536-17, PR-2537-17, PR-2555-18, PR-2556-18, PR-2557-18, PR-2558-18, at ¶¶ 40, 63; *Vallejo CJD, LLC v. FCA US LLC*, Protest Nos. PR-2589-18, PR-2590-18, PR-2591-18, and PR-2592-18; *Fairfield CJD, LP v. FCA US LLC*, PR-2593-18, PR-2594-18, PR-2595-18, and PR-2596-18; *Maverick Auto Group 2, LLC v. Volkswagen Group of America, Inc.*, PR-2581-18, at ¶ 62; and *Fairfield Imports Three, LLC v. Mitsubishi Motors North America, Inc.*, PR-2586-18, at ¶ 63.

Here, Protestant does not contest that it (i) closed its Toyota dealership in November 2018, (ii) ceased selling and servicing Toyota vehicles in November 2018, and (iii) currently is not selling or servicing Toyota vehicles or otherwise serving the public in Fairfield, California, and (iv) does not have viable plans to re-open or resume operations of the Toyota dealership at its authorized location. In fact, it is now impossible for Protestant to re-open or resume operations at its authorized location because Protestant's Toyota dealership assets have been sold to a new operator. As a result, summary dismissal of the Protest is appropriate because no order of the Board could result in Protestant resuming operations as a Toyota dealership.

The court-appointed Receiver, pursuant to authority granted to him by the Court, sold Protestant's Toyota dealership assets to an entirely new and different owner, who has been operating the Toyota dealership (now known as Hanlees Fairfield Toyota) in the Fairfield area since March 2020. The Toyota dealership that is the subject of these Protests no longer exists, and the indisputable facts demonstrate that there is no relief available for Protestant before the Board. Consequently, going to a merits hearing to determine whether there is good cause to terminate the franchise would be an exercise in futility, and Protestant will be unable to cite to any legitimate

reason why the Protests should not be summarily dismissed. Indeed, counsel for Protestant has indicated that it does not intend to oppose TMS's motion to dismiss.

Moreover, the statutory scheme and legislative intent behind Section 3060 cannot be effectuated by continuing these Protests. It is clear from the statutory language that by enacting Section 3060, the legislature was concerned about the loss of the rights under a franchise and the possible adverse effects that the subsequent loss of a "dealership" could have on the consuming public, the automotive business, and the franchisee. None of these concerns are present here because Protestant's dealership closed nearly a year and a half ago, and its assets have been sold to an entirely different operator. The legislative intent of maintaining the status quo and possibly preventing the loss of the investment of the Protestant and the loss to the public of the goods and services provided by the Protestant's dealership cannot now be effectuated. Accordingly, a decision of the Board dismissing the Protests as moot is appropriate.

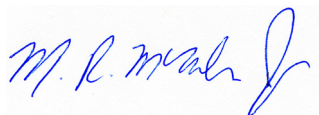
IV. CONCLUSION

For the foregoing reasons, the Protests are moot, and it would be futile and a waste of public funds and Board resources to have a merits hearing on the Protests. Furthermore, counsel for Protestant has represented to counsel for TMS and counsel for the Board that Protestant does not intend to oppose TMS's Motion to Dismiss. Consequently, TMS respectfully requests that the Board dismiss the Protests with prejudice.

Dated: May 8, 2020

NELSON MULLINS RILEY & SCARBOROUGH LLP

By:



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STATE OF CALIFORNIA

NEW MOTOR VEHICLE BOARD

In the Matter of the Protests of

FAIRFIELD IMPORTS, LLC, a California
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v.

Toyota Motor Sales, U.S.A., INC., a
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Respondent.

Protest Nos.: PR-2579-18 and PR-2580-18

**DECLARATION OF M. RONALD
MCMAHAN, JR. IN SUPPORT OF
RESPONDENT TOYOTA
MOTOR SALES U.S.A., INC.'S
MOTION TO DISMISS
PROTESTS**

DECLARATION OF M. RONALD MCMAHAN, JR.

I, M. Ronald McMahan, Jr., declare:

1. I am a partner at the law firm of Nelson Mullins Riley & Scarborough, LLP (“Nelson Mullins”), counsel of record for Respondent Toyota Motor Sales, U.S.A., Inc. (“TMS”). I have personal knowledge of the facts set forth in this Declaration, and, if called as a witness, could and would testify competently to the matters stated in this Declaration.

2. I submit this Declaration in support of TMS’s Motion to Dismiss Protests (“Motion to Dismiss”).

3. Multiple creditors of Protestant have pursued various recovery efforts and associated litigation against Protestant and Protestant’s other affiliate dealerships. In particular, the secured lender who formerly provided Protestant’s line of wholesale financing, Toyota Motor Credit Corporation (“TMCC”), filed a lawsuit against Protestant and various affiliates of Protestant, in the Superior Court for the State of California, County of Solano, alleging causes of action for claim and delivery, writ of possession, and breach of contract (“TMCC Lawsuit”). In the TMCC lawsuit, the Court appointed J. Michael Issa (“Issa” or “Receiver”) as the Receiver for the assets of Protestant. A true and correct copy of the Stipulation for Order Appointing Receiver and for Preliminary Injunction and Order Appointing Receiver entered on or about January 31, 2019, in the matter *Toyota Motor Credit Corporation. v. Fairfield Imports, LLC, et al.*, in Solano County Superior Court, Case No. FCS051912 is attached hereto as **Exhibit A** (“TMCC Order”).

4. As stipulated in the TMCC Order, on November 13, 2018, TMCC conducted a “car audit” and determined that Protestant was “out of trust,” having sold about 33 cars with a value of approximately \$1.1 million and had received the proceeds of those sales but failed to pay TMCC for the debt associated with the vehicles. On November 13, 2018, TMCC also notified both Protestant and TMS that Protestant’s wholesale financing commitment had been suspended and that it would not agree to finance any additional units under its wholesale floorplan. A true and correct copy of the Finance Hold Letter dated November 13, 2018, is attached hereto as **Exhibit B**.

5. As also stated in the TMCC Order, Protestant closed its business and ceased selling and servicing vehicles at its Toyota dealership on November 16, 2018, and, on November 21, 2018, TMCC filed suit against Protestant and other defendants to recover for their failure to pay TMCC the amounts due under various loan agreements.

6. On November 27, 2018, TMS issued a 15-Day Notice of Termination of Dealer Agreement (“15-Day Notice of Termination”), setting forth the specific grounds for termination, including: (1) Protestant’s failure to maintain solvency, (2) the filing of receivership petition against Momentum Auto Group and/or its affiliates, and (3) Protestant’s failure to conduct customary dealership operations for seven consecutive business days. A true and correct copy of the 15-Day Notice of Termination is attached hereto as **Exhibit C**.

7. Concurrently with the 15-Day Notice of Termination, TMS issued a 60-Day Notice of Termination of Dealer Agreement (“60-Day Notice of Termination”), setting forth additional grounds for termination, including Protestant’s (1) failure to maintain floorplan financing and (2) failure to correct facility deficiencies. A true and correct copy of the 60-Day Notice of Termination is attached hereto as **Exhibit D**.

8. The Pre-Hearing Conference on the Protests in this matter was originally scheduled for December 21, 2018. By consent of the parties, the Conference was continued many times over the next sixteen months while the Receiver negotiated for the sale of Protestant’s dealership assets.

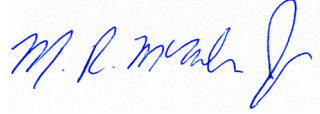
9. On or about October 18, 2019, the court-appointed Receiver for Protestant entered into an Asset Purchase Agreement (“APA”) with Hanlees Fairfield, Inc. regarding the sale of Protestant’s Toyota dealership assets.

10. In early March 2020, TMS conditionally approved the proposed sale of Protestant’s Toyota dealership assets pursuant to the APA, and the sale of Protestant’s Toyota dealership assets to Hanlees Fairfield, Inc. closed on March 6, 2020.

11. On May 5, 2020, counsel for Protestant informed counsel for the Board and me that Protestant will not oppose a motion to dismiss filed by TMS in this action.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on this 8th day of May 2020, in Columbia, South Carolina



M. Ronald McMahan, Jr.

SCALI RASMUSSEN, PC
Christian J. Scali, Esq. (SBN 193785)
cscali@scalilaw.com
Halbert B. Rasmussen, Esq. (SBN 108566)
hrasmussen@scalilaw.com
Jade F. Jurdi, Esq. (SBN 273401)
jjurdi@scalilaw.com
800 Wilshire Boulevard, Suite 400
Los Angeles, CA 90017
Telephone: 213.239.5622
Facsimile: 213.239.5623

Attorneys for Protestant
FAIRFIELD IMPORTS, LLC,
a California Limited Liability Company

STATE OF CALIFORNIA

NEW MOTOR VEHICLE BOARD

FAIRFIELD IMPORTS, LLC,
a California Limited Liability Company,

Protestant,

vs.

TOYOTA MOTOR SALES, USA, INC., a
California Corporation,

Respondent.

Protest Nos. PR-2579-18 and PR-2580-18

**PROTESTANT'S NON-OPPOSITION TO
RESPONDENT'S MOTION TO DISMISS
PROTESTS**

Protestant will not file an opposition to Respondent Toyota Motor Sales, USA, Inc.'s motion
to dismiss the protest.

Dated: May 12, 2020

SCALI RASMUSSEN, PC

By: _____
Christian J. Scali, Esq.
Halbert B. Rasmussen, Esq.
Jade F. Jurdi, Esq.
Attorneys for Protestant
FAIRFIELD IMPORTS, LLC,
a California Limited Liability Company

PROOF OF SERVICE

I am employed in the 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 800 Wilshire Boulevard, Suite 400, Los Angeles, CA 90017.

On May 12, 2020, I served the within document(s) described as:

PROTESTANT'S NON-OPPOSITION TO RESPONDENT'S MOTION TO DISMISS PROTESTS

on the interested parties in this action as stated below:

New Motor Vehicle Board
1507 – 21st Street, Suite 330
Sacramento, CA 905814
Email: nmvb@nmvb.ca.gov

Richard H. Otera, Esq.
Attorney for Respondent
NELSON MULLINS RILEY &
SCARBOUROUGH, LLP
19191 South Vermont Avenue, Suite 900
Torrance, California 90502
Email: rich.oter@nelsonmullins.com

Steven A. McIcelvey, Jr., Esq.
M. Ronald McMahan, Jr., Esq.
Attorneys for Respondent
NELSON MULLINS RILEY &
SCARBOUROUGH, LLP
1320 Main Street / 17th floor
Post Office Box 11070 (29211-1070)
Columbia, South Carolina 29201
Email: steve.mckelvey@nelsonmullins.com
ronnie.mcmahan@nelsonmullins.com
Attorneys for Respondent

☒ (BY E-MAIL) On this date, I personally transmitted the foregoing document(s) via electronic mail to the e-mail address(es) of the person(s) listed above before 5:00 p.m., Pacific Standard Time.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on May 12, 2020, at Los Angeles, California.

Ashley Langill

(Type or print name)

(Signature)

Christian J. Scali, Esq. (SBN 193785)
Halbert B. Rasmussen, Esq. (SBN 108566)
SCALI RASMUSSEN
800 Wilshire Boulevard, Suite 400
Los Angeles, California 90017
Tel. No.: (213) 239-5622
Fax No.: (213) 239-5623
cscali@scalilaw.com
hrasmussen@scalilaw.com

Attorneys for Protestant
FAIRFIELD IMPORTS, LLC,
a California Limited Liability Company

STATE OF CALIFORNIA
NEW MOTOR VEHICLE BOARD

FAIRFIELD IMPORTS, LLC, a California
Limited Liability Company,

Protestant,

vs.

TOYOTA MOTOR SALES, USA, INC., a
California Corporation,

Respondent

Protest No.:

PROTEST

[Vehicle Code §3060]

**(PREHEARING CONFERENCE
AND HEARING REQUESTED)**

**[Consolidation with Protestant's concurrently
filed Protest against Respondent requested]**

PROTEST PURSUANT TO VEHICLE CODE SECTION 3060

Protestant FAIRFIELD IMPORTS, LLC, dba Momentum Toyota of Fairfield, a
California Limited Liability Company ("Momentum Toyota," "Dealer," or "Protestant"), through
its attorneys, hereby files this Protest pursuant to Vehicle Code section 3060 and alleges as
follows:

1. Momentum Toyota is a duly licensed California new motor vehicle dealer doing
business at 2575 Auto Mall Parkway, Fairfield, CA, 94533, and its telephone number is (707) 402-
3100

2. Momentum Toyota is represented in this matter by Halbert B. Rasmussen of Scali

1 Rasmussen whose address is 800 Wilshire Boulevard, Suite 400, Los Angeles, CA, 90017 and
2 telephone number is (213) 239-5622.

3 3. Respondent TOYOTA MOTOR SALES, USA, INC., a California Corporation
4 (“TMS”) is a licensed vehicle manufacturer / distributor whose principal office is located in the
5 State of Texas. TMS’s California mailing address is 2451 Bishop Drive, San Ramon, CA, 94583-
6 2347 and its telephone number is (925) 830-8300. The notice to which this protest relates was
7 signed by Shawn Domeracki, General Manager, at the address set forth above.

8 4. Momentum Toyota is a “franchisee” as defined under Vehicle Code section 331.1
9 and TMS is a “franchisor” as defined under Vehicle Code section 331.2.

10 5. Momentum Toyota sells new motor vehicles and associated parts, accessories, and
11 service pursuant to a written agreement and “franchise,” as defined in Vehicle Code section 331,
12 entered into by and between Momentum Toyota and TMS, all of which being subject to the
13 jurisdiction of the New Motor Vehicle Board (hereinafter the “Board”).

14 6. On or about November 28, 2018, Momentum Toyota received a letter from TMS
15 dated November 27, 2018, (the “Notice”) purporting to give Momentum Toyota 60-day notice of
16 termination of Momentum Toyota’s franchise as a TMS dealer. The Notice failed to comply with
17 the requirements of law and the franchise for giving notices of termination.

18 7. As alleged by Protestant in its concurrently filed protest, on or about November 28,
19 2018, Momentum Toyota also received a separate letter from TMS dated November 27, 2018
20 purporting to give Momentum Toyota 15-day notice of termination of Momentum Toyota’s
21 franchise as a TMS dealer. The Notice failed to comply with the requirements of law and the
22 franchise for giving notices of termination. Protestant requests the Board to consolidate the instant
23 Protest with said earlier Protest.

24 8. At no time has Momentum Toyota agreed to, or acquiesced in, or otherwise
25 indicated any approval whatsoever for the purported termination of the franchise.

1 9. Momentum Toyota denies that the reasons for termination set forth in the Notice
2 are true and generally denies each and every allegation contained in the Notice. Momentum Toyota
3 avers that the reasons for termination set forth in the Notice are misleading.

4 10. Momentum Toyota denies that any of the reasons for termination set forth in the
5 Notice (whether true or not) constitute valid contractual grounds for termination under the
6 franchise agreement.

7 11. Momentum Toyota furthermore denies that good cause exists under the existing
8 circumstances for terminating Momentum Toyota's franchise. By way of example, and among
9 other legal and factual contentions, the following reflect the lack of such good cause:
10

11 (a) Momentum Toyota has transacted and is transacting an adequate amount of
12 business compared to the business available to it;

13 (b) Momentum Toyota has made a substantial and permanent investment in the
14 dealership, which will be damaged if TMS's purported termination of Momentum
15 Toyota's franchise is allowed;

16 (c) It would be injurious to the public welfare for Momentum Toyota's
17 franchise to be terminated by TMS;

18 (d) Momentum Toyota has adequate motor vehicle sales and service facilities,
19 equipment, vehicle parts, and qualified service personnel to reasonably provide for
20 the needs of buyers and owners of TMS's same-make products in the market area
21 and is rendering adequate service to the public;

22 (e) The extent of Momentum Toyota's noncompliance, if any, with the terms
23 of the franchise agreement is legally privileged by virtue of provisions of the
24 Vehicle Code and other applicable law and/or excused and, in any event, lacks
25 sufficient materiality to warrant termination.
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1 (f) Momentum Toyota is informed and believes and thereon alleges that the
2 purported termination runs contrary to numerous and substantial legal, equitable,
3 and contractual obligations of TMS and rights of Momentum Toyota including but
4 not limited to those set forth in Vehicle Code, sections 3060, 11713.2, 11713.3, and
5 11713.13, including, but not limited to the following: TMS's breach of the
6 exclusivity provisions of the franchise and applicable law by directly and unfairly
7 competing with Momentum Toyota; TMS's failure and refusal to recognize and
8 treat Momentum Toyota as a dealer generally and as a dealer able to represent
9 certain models within the line-make and its notification to Momentum Toyota's
10 customers for TMS that Momentum Toyota is no longer a dealer; and by TMS
11 conducting its vehicle sales and other competitive activities in California in
12 contravention of applicable law, including required dealer licensure under the
13 Vehicle Code.
14

15 12. Any contention of TMS that Momentum Toyota failed to cure purported breaches
16 on its part or had agreed to termination under certain circumstances is incomplete, inaccurate,
17 insufficient to constitute good cause to terminate, contrary to applicable law, and subject to
18 Momentum Toyota's averments set forth above.
19

20 13. Momentum Toyota and its attorneys desire to appear before the Board and to have
21 a hearing on this Protest, it being estimated that the time required for hearing will be approximately
22 ten days.
23

24 14. Momentum Toyota requests a prehearing conference.

25 **PRAYER**

26 WHEREFORE, Momentum Toyota prays for relief as follows:

27 1. That the Board order TMS to refrain from terminating the franchise of Momentum
28

1 Toyota, and from taking any acts that treat Momentum Toyota as terminated or otherwise not a
2 TMS dealer, including an order prohibiting TMS from competing with Momentum Toyota as a
3 dealer and from making public statements in derogation of Momentum Toyota's status as a TMS
4 dealer, unless and until the Board overrules this Protest.

5 2. That the Board hold a hearing and based on the evidence and proof produced therein
6 determine that good cause does not exist for the termination of Momentum Toyota's franchise and
7 thereby sustain this Protest; or if the Board does not enter such an order, that the Board
8 conditionally sustain this Protest on such terms as comport with the Board's authority under
9 Vehicle Code section 3067; or, if the Board does not enter the orders aforesaid, that any order
10 overruling this Protest be conditioned in such a manner as shall preserve Momentum Toyota's
11 rights under applicable law, including but not limited to Vehicle Code sections 11713.2, 11713.3
12 and 11713.13.
13

14 3. For such other rulings and relief as the Board deems just and equitable.
15
16

17 DATED: December 6, 2018

SCALI RASMUSSEN

19 By: _____

20 CHRISTIAN SCALI, ESQ.
21 HALBERT RASMUSSEN, ESQ.
22 Attorneys for Protestant,
23 **FAIRFIELD IMPORTS, LLC**
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PROOF OF SERVICE

I am a citizen of the United States. My business address is The Scali Law Firm, 800 Wilshire Boulevard, Suite 400, Los Angeles, California 90017. I am employed in the County of Los Angeles where this service occurs. I am over the age of 18 years, and not a party to the within action.

On the date below, according to ordinary business practice, I served the foregoing documents described as:

PROTEST

on the interested parties to this action in the manner described below and addressed as follows:

*****PLEASE SEE ATTACHED SERVICE LIST*****

☒ (BY E-MAIL) On this date, I personally transmitted the foregoing document(s) via electronic mail to the e-mail address(es) of the person(s) on the attached service list before 5:00 p.m., Pacific Standard Time.

☒ (BY MAIL) I am readily familiar with my employer's business practice for collection and processing of correspondence for mailing with the U.S. Postal Service, and that practice is that correspondence is deposited with the U.S. Postal Service the same day as the day of collection in the ordinary course of business. On this date, I placed the document(s) in envelopes for collection and mailing following ordinary business practices.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on **December 6, 2018**, at Los Angeles, California.

Ashley Langill

Declarant

Signature

SERVICE LIST

**In the Matter of the Protest of FAIRFIELD IMPORTS, LLC v. TOYOTA MOTOR
SALES, USA, INC.**

Protest No.:

New Motor Vehicle Board 1507 – 21st Street, Suite 330 Sacramento, CA 905814 Email: nmvb@nmvb.ca.gov	Via Electronic Mail Only
TOYOTA MOTOR SALES, USA, INC. c/o CT Corporation System 818 West Seventh Street, Suite 930 Los Angeles, CA 90017	Via Postal Mail Only
TOYOTA MOTOR NORTH AMERICA Attn: Shawn Domeracki General Manager 2451 Bishop Drive San Ramon, CA 94583-2347	Via Postal Mail Only

Christian J. Scali, Esq. (SBN 193785)
Halbert B. Rasmussen, Esq. (SBN 108566)
SCALI RASMUSSEN
800 Wilshire Boulevard, Suite 400
Los Angeles, California 90017
Tel. No.: (213) 239-5622
Fax No.: (213) 239-5623
cscali@scalilaw.com
hrasmussen@scalilaw.com

Attorneys for Protestant
FAIRFIELD IMPORTS, LLC,
a California Limited Liability Company

STATE OF CALIFORNIA

NEW MOTOR VEHICLE BOARD

FAIRFIELD IMPORTS, LLC, a California
Limited Liability Company,

Protestant,

vs.

TOYOTA MOTOR SALES, USA, INC., a
California Corporation,

Respondent

Protest No.:

PROTEST

[Vehicle Code §3060]

**(PREHEARING CONFERENCE
AND HEARING REQUESTED)**

PROTEST PURSUANT TO VEHICLE CODE SECTION 3060

Protestant FAIRFIELD IMPORTS, LLC, dba Momentum Toyota of Fairfield, a
California Limited Liability Company (“Momentum Toyota,” “Dealer,” or “Protestant”), through
its attorneys, hereby files this Protest pursuant to Vehicle Code section 3060 and alleges as
follows:

1. Momentum Toyota is a duly licensed California new motor vehicle dealer doing
business at 2575 Auto Mall Parkway, Fairfield, CA, 94533, and its telephone number is (707) 402-
3100

2. Momentum Toyota is represented in this matter by Halbert B. Rasmussen of Scali

1 Rasmussen whose address is 800 Wilshire Boulevard, Suite 400, Los Angeles, CA, 90017 and
2 telephone number is (213) 239-5622.

3 3. Respondent TOYOTA MOTOR SALES, USA, INC., a California Corporation
4 (“TMS”) is a licensed vehicle manufacturer / distributor whose principal office is located in the
5 State of Texas. TMS’s California mailing address is 2451 Bishop Drive, San Ramon, CA, 94583-
6 2347 and its telephone number is (925) 830-8300. The notice to which this protest relates was
7 signed by Shawn Domeracki, General Manager, at the address set forth above.

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9 and TMS is a “franchisor” as defined under Vehicle Code section 331.2.

10 5. Momentum Toyota sells new motor vehicles and associated parts, accessories, and
11 service pursuant to a written agreement and “franchise,” as defined in Vehicle Code section 331,
12 entered into by and between Momentum Toyota and TMS, all of which being subject to the
13 jurisdiction of the New Motor Vehicle Board (hereinafter the “Board”).

14 6. On or about November 28, 2018, Momentum Toyota received a letter from TMS
15 dated November 27, 2018, (the “Notice”) purporting to give Momentum Toyota 15-day notice of
16 termination of Momentum Toyota’s franchise as a TMS dealer. The Notice failed to comply with
17 the requirements of law and the franchise for giving notices of termination.

18 7. At no time has Momentum Toyota agreed to, or acquiesced in, or otherwise
19 indicated any approval whatsoever for the purported termination of the franchise.

20 8. Momentum Toyota denies that the reasons for termination set forth in the Notice
21 are true and generally denies each and every allegation contained in the Notice. Momentum
22 Toyota avers that the reasons for termination set forth in the Notice are misleading.

23 9. Momentum Toyota denies that any of the reasons for termination set forth in the
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25 franchise agreement.

1 10. Momentum Toyota furthermore denies that good cause exists under the existing
2 circumstances for terminating Momentum Toyota's franchise. By way of example, and among
3 other legal and factual contentions, the following reflect the lack of such good cause:

4 (a) Momentum Toyota has transacted and is transacting an adequate amount of
5 business compared to the business available to it;

6 (b) Momentum Toyota has made a substantial and permanent investment in the
7 dealership, which will be damaged if TMS's purported termination of Momentum
8 Toyota's franchise is allowed;

9 (c) It would be injurious to the public welfare for Momentum Toyota's
10 franchise to be terminated by TMS;

11 (d) Momentum Toyota has adequate motor vehicle sales and service facilities,
12 equipment, vehicle parts, and qualified service personnel to reasonably provide for
13 the needs of buyers and owners of TMS's same-make products in the market area
14 and is rendering adequate service to the public;

15 (e) The extent of Momentum Toyota's noncompliance, if any, with the terms
16 of the franchise agreement is legally privileged by virtue of provisions of the
17 Vehicle Code and other applicable law and/or excused and, in any event, lacks
18 sufficient materiality to warrant termination.

19 (f) Momentum Toyota is informed and believes and thereon alleges that the
20 purported termination runs contrary to numerous and substantial legal, equitable,
21 and contractual obligations of TMS and rights of Momentum Toyota including but
22 not limited to those set forth in Vehicle Code, sections 3060, 11713.2, 11713.3, and
23 11713.13, including, but not limited to the following: TMS's breach of the
24 exclusivity provisions of the franchise and applicable law by directly and unfairly
25 competing with Momentum Toyota; TMS's failure and refusal to recognize and
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1 treat Momentum Toyota as a dealer generally and as a dealer able to represent
2 certain models within the line-make and its notification to Momentum Toyota's
3 customers for TMS that Momentum Toyota is no longer a dealer; and by TMS
4 conducting its vehicle sales and other competitive activities in California in
5 contravention of applicable law, including required dealer licensure under the
6 Vehicle Code.

7 11. Any contention of TMS that Momentum Toyota failed to cure purported breaches
8 on its part or had agreed to termination under certain circumstances is incomplete, inaccurate,
9 insufficient to constitute good cause to terminate, contrary to applicable law, and subject to
10 Momentum Toyota's averments set forth above.

12 12. Momentum Toyota and its attorneys desire to appear before the Board and to have
13 a hearing on this Protest, it being estimated that the time required for hearing will be approximately
14 ten days.

15 13. Momentum Toyota requests a prehearing conference.

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17 **PRAYER**

18 WHEREFORE, Momentum Toyota prays for relief as follows:

19 1. That the Board order TMS to refrain from terminating the franchise of Momentum
20 Toyota, and from taking any acts that treat Momentum Toyota as terminated or otherwise not a
21 TMS dealer, including an order prohibiting TMS from competing with Momentum Toyota as a
22 dealer and from making public statements in derogation of Momentum Toyota's status as a TMS
23 dealer, unless and until the Board overrules this Protest.

25 2. That the Board hold a hearing and based on the evidence and proof produced therein
26 determine that good cause does not exist for the termination of Momentum Toyota's franchise and
27 thereby sustain this Protest; or if the Board does not enter such an order, that the Board
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1 conditionally sustain this Protest on such terms as comport with the Board's authority under
2 Vehicle Code section 3067; or, if the Board does not enter the orders aforesaid, that any order
3 overruling this Protest be conditioned in such a manner as shall preserve Momentum Toyota's
4 rights under applicable law, including but not limited to Vehicle Code sections 11713.2, 11713.3
5 and 11713.13.

6 3. For such other rulings and relief as the Board deems just and equitable.
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9 DATED: December 6, 2018

SCALI RASMUSSEN

11 By: _____
12 CHRISTIAN SCALI, ESQ.
13 HALBERT RASMUSSEN, ESQ.
14 Attorneys for Protestant,
15 **FAIRFIELD IMPORTS, LLC**
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On the date below, according to ordinary business practice, I served the foregoing documents described as:

on the interested parties to this action in the manner described below and addressed as follows:

☒ (BY E-MAIL) On this date, I personally transmitted the foregoing document(s) via electronic mail to the e-mail address(es) of the person(s) on the attached service list before 5:00 p.m., Pacific Standard Time.

☒ (BY MAIL) I am readily familiar with my employer's business practice for collection and processing of correspondence for mailing with the U.S. Postal Service, and that practice is that correspondence is deposited with the U.S. Postal Service the same day as the day of collection in the ordinary course of business. On this date, I placed the document(s) in envelopes for collection and mailing following ordinary business practices.

Executed on **December 6, 2018**, at Los Angeles, California.

Signature

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SERVICE LIST

In the Matter of the Protest of FAIRFIELD IMPORTS, LLC v. TOYOTA MOTOR SALES, USA, INC.

Protest No.:

New Motor Vehicle Board 1507 – 21st Street, Suite 330 Sacramento, CA 905814 Email: nmvb@nmvb.ca.gov	Via Electronic Mail Only
TOYOTA MOTOR SALES, USA, INC. c/o CT Corporation System 818 West Seventh Street, Suite 930 Los Angeles, CA 90017	Via Postal Mail Only
TOYOTA MOTOR NORTH AMERICA Attn: Shawn Domeracki General Manager 2451 Bishop Drive San Ramon, CA 94583-2347	Via Postal Mail Only

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

CERTIFIED MAIL

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8 STATE OF CALIFORNIA
9 NEW MOTOR VEHICLE BOARD
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11 In the Matter of the Petition of

12 CALIFORNIA NEW CAR DEALERS
ASSOCIATION,

13 Petitioner,

14 v.

15 VOLVO GROUP NORTH AMERICA LLC aka
VOLVO CAR USA, LLC,

16 Respondent.
17

Petition No. P-460-19

**ORDER GRANTING PETITIONER'S
REQUEST FOR RELIEF PURSUANT
TO VEHICLE CODE SECTION
3050(c)(1)**

18 To: Michael Cypers, Esq.
Julie R. F. Gerchik, Esq.
19 Cynthia E. Organ, Esq.
Attorneys for Petitioner
20 GLASER WEIL FINK HOWARD AVCHEN & SHAPIRO LLP
10250 Constellation Boulevard, 19th Floor
21 Los Angeles, California 90067

22 Colm A. Moran, Esq.
Attorney for Respondent
23 HOGAN LOVELLS US LLP
1999 Avenue of the Stars, Suite 1400
24 Los Angeles, California 90067

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At its regularly scheduled meeting of August 15, 2019, the Public Members of the New Motor Vehicle Board met and considered the above-entitled Petition. After consideration, the Board unanimously granted the relief requested in the petition as follows: The Board directs the Department of Motor Vehicles to conduct an investigation pursuant to subdivision (c)(1) of Vehicle Code section 3050 concerning whether the Care by Volvo subscription program violates Vehicle Code sections 11713.3(o)(1), 3060(b), 11713.3(u) and/or 11713.19. The Board requests that the Department of Motor Vehicles provide the Board with a written report on the results of its investigation within 180 days of the date of this order.

SO ORDERED.

DATED: August 15, 2019

NEW MOTOR VEHICLE BOARD

By _____
KATHRYN E. DOI
President

Steven Gordon, Director, DMV
Elizabeth (Lisa) G. Humphreys, Branch Chief
Occupational Licensing, DMV

**DEPARTMENT OF MOTOR VEHICLES**

INVESTIGATIONS DIVISION

8259 Demetre Ave
Sacramento, CA 95828
(916) 229-0167**REPORT OF INVESTIGATION
CONFIDENTIAL****DATE:** 02/11/2020
CASE #: 19C4L30570**SUBJECT:**Volvo Group North America, LLC, Volvo Car USA
Care by Volvo**CONFIDENTIAL****REPORT PREPARED BY:** Gary Costantino, Investigator #501

Synopsis – Executive Summary

Procedural Setting: On August 15, 2019, the New Motor Vehicle Board (NMVB) heard a California New Car Dealers Association (CNCDA) petition, and answer by Volvo, regarding Volvo's implementation of a "subscription" service called Care by Volvo (CbV). The NMVB then granted the relief CNCDA requested and directed the Department of Motor Vehicles (DMV) to investigate and determine whether implementation of CbV violated laws. This investigation included a review of the record before the NMVB, interviews with Volvo dealers, review of Volvo's website, review of CbV contracts and an interview with Volvo representatives.

Volvo Entities and Franchisees: There are a variety of relevant Volvo entities involved that are wholly owned subsidiaries of Volvo Car Corporation: Volvo Cars North America (VCNA), Volvo Cars USA (VCUSA), Volvo Car Financial Services Auto Leasing Company (VCFSALC), and Volvo Car Financial Services (VCFS). The acts of these entities derive from and are imputed to Volvo (they are collectively referred to as "Volvo"). Volvo also has a "franchise agreement" with each of 26 independently owned and DMV licensed retail dealers (Dealers) in California.

What is Care by Volvo? On November 29, 2017, Volvo Car USA launched CbV in the United States. CbV is marketed as a "subscription" but is substantially a 2 year lease for a monthly fee that includes use of the vehicle for 15,000 miles per year, auto insurance, maintenance, excess wear protection, road hazard, tire and wheel protection, and an option to upgrade to a newer model after 12 months, but excludes tax, title and registration fees. From the CbV website, customers select a participating Volvo model and trim level under the "subscription" program. As part of the process Volvo confirms the customer's credit and insurance eligibility. Afterwards, a Volvo Concierge member will coordinate the date and time for vehicle delivery at the customer's preferred Volvo dealership. The dealer will assist the customer in completing all paperwork and execute delivery of the vehicle to the customer.

CbV Implementation: Volvo began to offer the CbV "subscription" directly to consumers via Volvo's website. Volvo released a "hot" new model XC40 allocated to Dealers through a routine formula but also through port stock reserved for priority allocation to CbV subscribers. Prior to CbV and continuing through and after CbV's launch, the Dealers also leased Volvo cars to consumers typically through traditional 3 year leases. To implement CbV participating Dealers were required to sign a dealer lease agreement addendum (Addendum) that made Dealers limited agents of Volvo. Without signing the Addendum Dealers would not get allocated port stock XC40's. The Addendum allowed

Volvo to control how the Dealers offered CbV and to use dealer employees to consummate CbV transactions.

According to the January 16, 2019, complaint filed with the New Motor Vehicle Board (NMVB), the CNCDA contends CbV's subscription program and the implementation of the program, violates California law. CNCDA's petition requested the NMVB direct the Department of Motor Vehicles (DMV) to conduct an investigation into Volvo's "Subscription" program, CbV. In the petition the CNCDA alleged:

1. CbV creates competition between the manufacturer and the dealers, in violation of Vehicle Code section 11713.3.
2. Volvo failed to give written notice to franchisees and the NMVB prior to the implementation of CbV, in violation of Vehicle Code section 3060(b).
3. CbV gives preferential treatment in allocating vehicles and referring sales to dealerships controlled in part by Volvo, in violation of Vehicle Code section 11713.3(u).
4. CbV undermines the purpose of Vehicle Code section 11713.19, which prohibits payment packing.

Violation #1 – Manufacturer Competition With Dealers: When Volvo offered the same line-make XC40 directly to consumers for "subscription" lease, then Volvo began competing with the Dealers. When Volvo offered the XC40 subscription through its website, which is accessible and exchanges information with consumers everywhere in California, then Volvo was competing in the same line-make of vehicle in each dealer's relevant market area (RMA). When Volvo used dealer employees Volvo controlled to consummate CbV transactions, this constituted Volvo competing with the Dealers from inside each dealership, which is within the RMA. Volvo's competition in the same line-make within a 10 mile RMA of each dealer violated Vehicle Code § 11713.3(o)(1).

Violation #2 – Franchise Modification Without Notice/Protest: When Volvo had the Dealers sign the Addendum, making the Dealers agents of Volvo, rather than independent of Volvo as in the franchise agreement, then Volvo modified the Dealers franchise agreement. A franchise agreement modification required notice to the NMVB and each dealer to give them an opportunity to protest. Volvo did not give notice to the NMVB or the Dealers. This violated Vehicle Code § 3060(b)(1) and Title 13, California Code of Regulations § 593.1.

Volvo Cars USA

Allocation of XC40's and Factory Controlled Dealers: Dealers were required to sign the Addendum to participate in CbV. When a dealer signed, they became an agent of Volvo. This made signatories factory controlled Dealers; not because Volvo owned them but because Volvo, in part, controlled them. Not all Dealers signed the Addendum and participated in CbV. Without participating in CbV Dealers would and did not receive the port stock XC40's reserved for CbV. "Millennials" are understood to demand "subscriptions" in higher proportion than other consumers and tend to be located in certain specific geographic areas. Dealers with an area of responsibility that includes a higher number of millennials would, and did, receive a higher allocation of port stock XC40s.

Violation #3 - Allocation of XC40's Discriminated in Favor of Factory Controlled, In Part Dealers: When Volvo allocated XC40's from port stock to Dealers offering CbV then Volvo discriminated in favor of factory, in part, controlled dealerships and discriminated against any dealership that did not participate in CbV. When Volvo allocated from port stock XC40's to Dealers in geographic areas with higher numbers of millennials then Volvo did not make XC40's available pursuant to a reasonable allocation formula that is applied uniformly to all Dealers. This violated Vehicle Code § 11713.3(u)(1).

Violation #4 - Illegal Price Packing Did Not Occur: All of the goods and services included in a CbV are identified upon initial contact with inquiring consumers. The price or payment for the subscription is not inflated, or the maturity of a sale or lease extended, to disguise actual charges for goods or services added by the dealer to the contract. Therefore, CbV did not violate Vehicle Code § 11713.19.

Other Violations or Concerns Discovered as a Result of the Investigation:

Required Vehicle Lease Contract Disclosures Not Present: The CbV leases examined identify the lease cost and other required disclosures as well as the cost of auto insurance. The costs for maintenance, excess wear protection, road hazard, tire and wheel protection, are also required to be, but are not, separately itemized. This violated Civil Code § 2985.8(c)(2)(D) and (G).

Prohibition Against Waiver of Notice/Protest Obligations/Rights: As previously stated, a franchise agreement modification requires notice to the NMVB and

Dealers, and an opportunity to protest. A dealer lease agreement addendum does not require such notice and opportunity to protest. A manufacturer, distributor, or affiliate thereof, is prohibited from obtaining an agreement or waiver that modifies or disclaims a manufacturer or distributor's obligations, or the

right or privilege of a dealer, to notice or opportunity to protest, set forth in Vehicle Code § 3060 et seq., including Vehicle Code § 3060(b)(1).

Waiver of Obligation to Give Notice and Opportunity to Protest: When VCFS had Dealers sign the Addendum, which changed the relationship of parties as set forth in a franchise agreement from being independent dealers to being agents of Volvo, then Volvo used the Addendum to accomplish a franchise modification. This made the Addendum substantially a waiver of Volvo's obligation to give notice of the franchise modification to the NMVB and Dealers, and the opportunity to protest, and constituted an affiliate of Volvo obtaining a waiver of that obligation which is specifically prohibited under the Vehicle Code. This violated Vehicle Code § 11713.3(g)(1)(A).

Concerns "Subscription" May Be "Misleading": Vehicle Code § 11713(a) prohibits use of any untrue or misleading word or statement in an advertisement. Volvo advertises a "subscription" but the contract consumers sign is labeled "California Motor Vehicle Lease Agreement, Care by Volvo." "Subscription" may mislead a consumer to believe they can opt out and cancel the subscription at any time whereas a "lease" is understood to be binding for an extended period of time, which is the duration of the lease. Volvo baiting consumers with the word "subscription" and then switching consumers to a "lease" when executing the contract may be deemed "misleading." This issue was identified even though the DMV was not directed to investigate it. Consequently, DMV does not reach a conclusion on this issue in this report.

Potential Legal Consequences: A violation of Vehicle Code § 11700 et seq., or a rule or regulation adopted pursuant thereto, (violations 1, 2, 3, and 5 above) constitutes cause for license discipline pursuant to Vehicle Code § 11705(a)(10). There are 26 counts of violations 1, 2, 3 and 5.

INVESTIGATION:

Upon receipt of the referral from NMVB, DMV Investigations confirmed the following occupational licenses issued to Volvo affiliates:

The DMV Occupational Licensing database showed OL#: 49551 was issued to Therence Pickett, Ken Trolle and Dennis Slagle, DBA: Volvo Group North America, LLC (A DMV licensed Auto-Commercial Manufacturer), at 7900 National Service Road, Greensboro, NC 27409.

The DMV Occupational Licensing database showed OL#: 95508 was issued to Michael Gregory Thomas, DBA: Volvo Car USA, LLC (A DMV licensed Distributor), at 8835 Research Drive, Irvine, CA 92618.

VCFSALC and VCFS are not licensed by the DMV Occupational Licensing Branch as these groups do not meet the definition of a dealer or a manufacturer under the Vehicle Code.

The investigation of the complaint began with a review of Volvo's internet site, CbV transactions, contracts, dealer files, Volvo Car Financial Services (VCFS) addendum to lease agreement, Volvo Retail Agreement, and Volvo memos provided to the department by the parties to the complaint. Interviews with Volvo franchise dealers and Volvo representatives were done. As a result, DMV responds to the NMVB directive as set forth below.

Violation #1: Does CbV create competition between the Manufacturer and the dealers, in violation of VC 11713.3?

APPLICABLE LAW

Vehicle Code § 11713.3(o)(1) - *It is unlawful and a violation of this code for a manufacturer, manufacturer branch, distributor, or distributor branch licensed pursuant to this code to do, directly or indirectly through an affiliate, any of the following:*

To compete with a dealer in the same line-make operating under an agreement or franchise from a manufacturer or distributor in the relevant market area.

The CNCDA alleged, "CbV creates unlawful competition between manufacturer and dealers: it diverts customers away from dealers to Volvo with the apparent ultimate goal of bypassing the franchise model entirely."

A review of Volvo's website, Volvo Car USA Memo, dated November 22, 2017, and CbV dealer transactions and file reviews, showed that CbV transactions originate with the consumer going online to the CbV website, selecting a participating Volvo model and placing an order. Volvo confirms the consumer is credit and insurance eligible. Volvo confirms the order and a Volvo Concierge coordinates a time and date between the consumer and dealer for delivery. The dealer is recommended to the consumer based on the consumer's zip code, however, the consumer may select a Volvo dealer of their choice.

After a date and time is confirmed for delivery the vehicle is wholesaled and delivered to the dealer. The vehicle is invoiced to the dealer and placed in dealer inventory. The consumer goes to the dealership reviews and signs the "California

Volvo Cars USA

Motor Vehicle Lease Agreement, Care by Volvo" lease contract and takes delivery of the vehicle. The dealer retails the CbV vehicle to VCFS, which is documented on a Bill of Sale. The vehicle is registered showing VCFS Auto Leasing Company as the Lessor and the consumer as the Lessee.

Per the November 22, 2017 Volvo Car USA memo announcing CbV to Volvo representatives and retail dealers, "The margin qualification for CbV is the same for any wholesaled vehicle. As a result, 8% behind the line margin is paid to the dealer in the same way as any car subject to the same qualifications." In other words, CbV alleges dealers are adequately compensated for the subscription transaction. This is also stated in Volvo's response to the CNCDA's petition.

Six different Volvo franchise dealers were interviewed throughout Northern and Southern California. Participating Dealers stated they earned approximately 8% from a CbV transaction. All Dealers stated they would earn more on a traditional lease or sale, approximately \$2,000 to \$4,000 more, than a CbV transaction. Some Dealers interviewed also stated they could not offer a standard lease package equivalent to a CbV lease, for the same price.

This investigation found that VCFS and Volvo Car USA are wholly owned subsidiaries and affiliates of Volvo Car Corporation. These subsidiaries are "Volvo" and each of their acts derive from and are imputed to Volvo. Volvo is both a manufacturer and distributor and VCFS is an affiliate of these entities.

A relevant market area (RMA) is defined as an area within a 10 mile radius of a dealership. Prior to CbV dealers offered leases either financed through VCFS or other financial institutions. CbV is a product offered by Volvo, the manufacturer, and VCFS, an affiliate, directly to consumers. CbV was primarily marketed as available for XC40's the manufacturer would allocate from port stock. Dealers are also allocated XC40's for lease or sale.

The manufacturer and dealers are both competing in leasing the same line-make financed with competing financial products. Volvo offers CbV via the manufacturer's website. Volvo's website exchanges information with consumers statewide, including inside each dealer's RMA. The Addendum makes dealers agents of Volvo and controls how the dealers offer CbV. The dealers, as limited agents of Volvo, are in part controlled by Volvo, the manufacturer. Volvo offers, and controls the offer, of CbV through the dealers.

The manufacturer subscription lease competes against the traditional leases dealers sold because it is less expensive and precludes dealers from add-ons to the transactions. Volvo is competing with each dealer in the RMA through the

dealership property using a dealer employee as its own agent. Volvo is competing in each dealer's RMA via its website marketing CbV. Therefore, Volvo is competing with its franchised dealers in the same line-make in their RMA in violation of Vehicle Code § 11713.3(o)(1). This constitutes cause for license discipline as that section interacts with Vehicle Code § 11705(a)(10).

Violation #2: Did Volvo fail to give written notice to Franchisees and the NMVB about CbV, in violation of VC 3060(b)?

APPLICABLE LAW

Vehicle Code § 3060(b)(1) – Notwithstanding Section 20999.1 of the Business and Professions Code or the terms of any franchise, no franchisor shall modify or replace a franchise with a succeeding franchise if the modification or replacement would substantially affect the franchisee's sales or service obligations or investment, unless the franchisor has first given the board and each affected franchisee written notice thereof at least 60 days in advance of the modification or replacement.

Title 13, California Code of Regulations § 593.1 - All written notices pursuant to Vehicle Code section 3060, 3062, 3070, or 3072 shall be:
(a) Separately issued to each franchisee;

Vehicle Code § 11713.3 - It is unlawful and a violation of this code for a manufacturer, manufacturer branch, distributor, or distributor branch licensed pursuant to this code to do, directly or indirectly through an affiliate, any of the following:

(g) (1) Except as provided in paragraph (3), to obtain from a dealer or enforce against a dealer an agreement, provision, release, assignment, novation, waiver, or estoppel that does any of the following:

(A) Modifies or disclaims a duty or obligation of a manufacturer, manufacturer branch, distributor, distributor branch, or representative, or a right or privilege of a dealer, pursuant to Chapter 4 (commencing with Section 11700) of Division 5 or Chapter 6 (commencing with Section 3000) of Division 2.

As previously stated, VCFS and Volvo Car USA are wholly owned subsidiaries of Volvo Car Corporation. DMV has issued manufacturer and distributor licenses to Volvo Group North America, LLC and Volvo Car USA. These licensed subsidiaries are "Volvo" and each of their acts derive from and are imputed to Volvo.

Volvo Cars USA

Volvo Car USA has a "franchise agreement" labeled a "Retailer Agreement" with each of its 26 independently owned and operated retail dealerships in California. The franchise agreement defines the dealers as independent of Volvo. To implement CbV the dealers were required to execute an "Addendum to Dealer Lease Agreement." The Addendum made each dealer a limited "Agent" of VCFS, and therefore of Volvo. The Addendum defines and controls how the dealers are to offer consumers CbV. The Addendum defining and controlling CbV caused the dealers to be controlled in part by VCFS and Volvo.

This investigation found the Addendum changed the dealers from being independent of Volvo to being agents of Volvo. The dealers cannot be independent of Volvo and agents of Volvo at the same time. Using the Addendum to convert dealers to agents modified the franchise agreement, which had defined them as independent. A franchise agreement modification requires notice to the NMVB and an opportunity to protest. Volvo gave no notice to the NMVB and dealers of the franchise modification and opportunity to protest and this violated Vehicle Code § 3060(b)(1) and Title 13, California Code of Regulations § 593.1. This constitutes cause for license discipline pursuant to vehicle Code § 11705(a)(10).

Violation #3: Does CbV give preferential treatment in allocating vehicles and referring sales to dealerships controlled in part by Volvo, in violation of VC 11713.3(u)?

APPLICABLE LAW

Vehicle Code § 11713.3(u)(1) - *It is unlawful and a violation of this code for a manufacturer, manufacturer branch, distributor, or distributor branch licensed pursuant to this code to do, directly or indirectly through an affiliate, any of the following:*

To unfairly discriminate in favor of a dealership owned or controlled, in whole or in part, by a manufacturer or distributor or an entity that controls or is controlled by the manufacturer or distributor. Unfair discrimination includes, but is not limited to, the following:

(A) The furnishing to a franchisee or dealer that is owned or controlled, in whole or in part, by a manufacturer, branch, or distributor of any of the following:

Volvo Cars USA

- (i) *A vehicle that is not made available to each franchisee pursuant to a reasonable allocation formula that is applied uniformly, and a part or accessory that is not made available to all franchisees on an equal basis when there is no reasonable allocation formula that is applied uniformly.*

The CNCDA alleged, "CbV violates VC 11713.3(u) by, among other things, furnishing to CbV dealer vehicles that are not made available to non-CbV dealers pursuant to a reasonable allocation of Formula and effectively directing inventory away from non CbV dealers."

As previously stated, VCFS and VCUSA are wholly owned subsidiaries and affiliates of Volvo Car Corporation. These subsidiaries are "Volvo" and each of their acts derive from and are imputed to Volvo. Volvo is both a licensed manufacturer and distributor and VCFS is an affiliate.

This investigation found that when CbV was implemented, the XC40 was the "hottest" most marketable new vehicle. CbV subscriptions were marketed as primarily available for the XC40. Dealers were compelled to sign the Addendum to offer CbV to receive XC40s reserved for subscribers from port stock. Dealers that signed the Addendum would receive priority allocation of XC40's from port stock. Dealers who declined to sign the Addendum, or not participate in CbV, would not receive XC40s from port stock.

Dealers that signed the Addendum agreed to be agents of Volvo and became in part controlled by Volvo. Dealers with higher numbers of younger affluent customers, considered "millennials" would have greater demand for CbV subscriptions. Allocation of XC40's from port stock based on demand of "millennials" in a dealer's area of responsibility is not a formula applied uniformly to all dealers. Dealers did not complain that XC40's were allocated unfairly but that they were difficult to obtain. One dealer that did not participate in CbV received no port stock XC40's. If half the dealers did not offer CbV than half of the dealers would have been denied port stock XC40's.

The structure of CbV resulted in Volvo unfairly discriminating in favor of dealerships controlled in part by Volvo, which offered CbV, in allocating XC40's from port stock, and to dealers with high demand from "millennials" for subscriptions and those are not an allocation formula uniformly applied to all dealers. The structure of CbV distributed XC40's according to an allocation formula not applied uniformly and that violated Vehicle Code § 11713.3(u)(1). This constitutes cause for license discipline as that section interacts with Vehicle Code § 11705(a)(10).

Violation #4: Does CbV undermine the purpose of VC 11713.19, which prohibits payment packing?

APPLICABLE LAW

Vehicle Code § 11713.19 - (a) It is unlawful and a violation of this code for the holder of any dealer's license issued under this article to do any of the following:

(1) Negotiate the terms of a vehicle sale or lease contract and then add charges to the contract for any goods or services without previously disclosing to the consumer the goods and services to be added and obtaining the consumer's consent.

(2) (A) Inflate the amount of an installment payment or down payment or extend the maturity of a sale or lease contract for the purpose of disguising the actual charges for goods or services to be added by the dealer to the contract.

(B) For purposes of subparagraph (A), "goods or services" means any type of good or service, including, but not limited to, insurance and service contracts.

Civil Code § 2985.8 - (a) A lease contract shall be in writing, and the print portion of the contract shall be printed in at least 8-point type and shall contain in a single document all of the agreements of the lessor and lessee with respect to the obligations of each party.

(c) A lease contract shall disclose all of the following:

(2)(C) The premium for each policy of insurance.

(2)(D) The amount charged for each service contract.

(2)(G) An itemization by type and agreed-upon value of each good or service included in the gross capitalized cost other than those items included in the disclosures required in subparagraphs (A) to (F), inclusive.

The CNCDA alleged "The Care by Volvo program undermines the purpose of VC Section 11713.19, which prohibits payment packing." They went on to state that "CbV's flat monthly rate conceals the actual cost of the CbV vehicle and of bundled services (e.g., insurance maintenance) and fails to disclose cost will vary

between CbV subscribers. When CbV customers go to the dealership to pick up their car, they learn, for the first time, the breakdown of costs upon receipt of the CbV contract."

Through this investigation, a review of CbV website showed everything included in a CbV subscription/lease. The website showed features included in CbV lease are: monthly payment, insurance coverage, factory-scheduled maintenance, excess wear protection, tire and wheel protection, replacement wiper blades, replacement brakes, and 15,000 miles annually.

The consumer selects a vehicle from the CbV website, and before submitting personal information to start the subscription process, they are given a monthly price for that vehicle excluding taxes, title and registration.

A review of approximately 23 CbV lease contracts showed:

- Cost of insurance itemized (section 25).
- The Lessor would pay for regularly scheduled maintenance, repairs, roadside assistance, replacement of wiper blades, brake pads and repair or replacement of tires damaged by road hazards (Section 30).
- The Lessor will waive up to \$1000 in excessive wear and use (Section 31).

Vehicle Code 11713.19(a)(1) states it is unlawful for a dealer to negotiate the terms of a vehicle sale or lease contract and then add charges to the contract for any goods or services without previously disclosing to the consumer the goods and services to be added and obtaining the consumer's consent. No goods or services were added to the contract, after the terms were negotiated and the goods and services advertised by CbV were listed in the CbV Lease Contract.

Also, CbV vehicles are transferred to dealer inventory before the dealer completes a subscription lease between Volvo and the consumer, therefore the statute applies to the dealers.

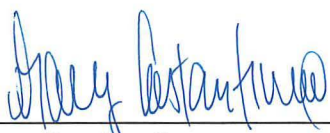
However, aside from the usual required disclosures for a lease, the lease agreement only discloses the price of the insurance premium to the consumer, but not the cost of maintenance, roadside assistance, and Volvo Concierge, etc.

Civil Code §2985.8(c)(2)(D) requires disclosure of "the amount charged for each service contract" (maintenance is included in the "subscription") and (c)(2)(G) requires disclosure roadside assistance and Volvo Concierge if those costs are included in the gross capitalized cost.

This violation is not cause for license discipline under VC 11705(a)(12), which establishes violations of the Automobile Sales Finance Act as causes for license discipline, but not violations of the Vehicle Leasing Act.

RECOMMENDATIONS:

A copy of this report has been submitted to the California New Motor Vehicle Board for evaluation.

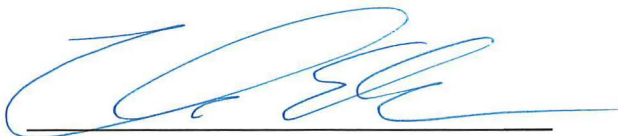


Gary Costantino
Investigator

Badge #501

2-28-2020

Date



Tom Edwards
Deputy Chief

Badge #93

3/2/2020

Date

ATTACHMENTS:

1. Petition filed by the California New Car Dealers, dated 01/16/2019, requesting the California New Motor Vehicle Board (NMVB) direct the DMV to conduct an investigation into Care by Volvo (CbV).
2. DMV Occupational License printout for Volvo Group North America, LLC (OL#: 49951).
3. DMV Occupational License printout for Volvo Car USA (OL#: 95508).
4. Memo from the NMVB, dated 08/19/2019, requesting DMV conduct an investigation into Care by Volvo.
5. Volvo Car USA memo, date 11/22/2017, announcing the launch of CbV.
6. Volvo Car US Invoice for CbV purchased by Volvo franchise dealer.
7. California Motor Vehicle Lease Agreement, CbV lease contract.
8. Volvo Car Financial Services (VCFS) Bill of Sale for CbV vehicle.
9. Volvo's response to CNCDA's petition to the NMVB.
10. Volvo Retailer Agreement.
11. VCFS, Addendum to dealer lease agreement.
12. Organizational chart for Volvo provided by Volvo.

**DEPARTMENT OF MOTOR VEHICLES**

INVESTIGATIONS DIVISION

8259 Demetre Ave
Sacramento, CA 95828
(916) 229-0167**SUPPLEMENTAL - REPORT OF INVESTIGATION
CONFIDENTIAL****DATE:** 04/28/2020
CASE #: 19C4L30570**SUBJECT:**Volvo Group North America, LLC, Volvo Car USA
Care by Volvo**CONFIDENTIAL****REPORT PREPARED BY:** Gary Costantino, Investigator #501

INVESTIGATION:

On April 23, 2020, I, DMV Investigator G. Costantino (Badge#: 501), spoke with Peter Wexler, head of Care by Volvo (CbV), via phone regarding the Department of Motor Vehicles' (DMV) Investigation into Volvo's CbV program.

I explained to Wexler the DMV's investigation has been completed and found the following violations:

Violation #1 – CVC 11713.3(o)(1), Manufacturer Competing With Franchise Dealers.

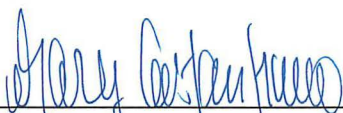
Violation #2 – CVC 3060(b)(1), and Title 13, California Code of Regulations 593.1, Franchise Modification Without Notice/Protest.

Violation #3 – CVC 11713.3(u)(1), Discrimination in Allocation of Vehicles in Favor of Factory Controlled Stores.

Violation #4 – Civil Code 2985.8(c)(2)(d), Required Lease Contract Disclosure Not Present.

I summarized DMV's finding regarding each of the above violations and told him a detailed report of the investigation would be available soon. I also told Wexler I would follow-up with a warning letter and at this time, no further action would be taken.

On April 28, 2020, a warning letter was mailed to Volvo Group North America LLC and Volvo Car USA LLC.



Gary Costantino Badge #501
Investigator

4.29.2020

Date



Tom Edwards Badge #93
Deputy Chief

4/29/2020

Date

Department of Motor Vehicles, Investigation Division
Case Number: 19C4L30570
Volvo Cars USA

ATTACHMENTS:

S-1. Warning letter dated 04/28/2020.

**Volvo Group North America, LLC / Volvo
Car USA, Care by Volvo**

Case#: 19C4L30570

Attachment: S-1



DEPARTMENT OF MOTOR VEHICLES
INVESTIGATIONS DIVISION
2120 Broadway
Sacramento, CA 95818



April 28, 2020

VIA FIRST CLASS U.S MAIL & CERTIFIED MAIL

Volvo Group North America LLC
7900 National Service Road
Greensboro, NC 27409
Attention: Therence Pickett, Ken Trolle,
and Martin Weissburg

Volvo Car USA LLC
8835 Research Drive
Irvine, CA 92618
Attention: Michael Gregory Thomas

DMV Case No.: 19C4L30570

To Whom It May Concern:

On August 15, 2019, the New Motor Vehicle Board (NMVB) directed the Department of Motor Vehicles (DMV) to investigate and determine whether implementation of Care by Volvo violated state laws. The DMV's investigation has been completed and found the following violations:

Violation #1 – CVC 11713.3(o)(1), Manufacturer Competing With Franchised Dealers.

Violation #2 – CVC 3060(b)(1), and Title 13, California Code of Regulations 593.1,
Franchise Modification Without Notice and Opportunity to Protest.

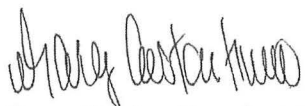
Violation #3 – CVC 11713.3(u)(1), Discrimination in Allocation of Vehicles in Favor of
Factory, In Part, Controlled Stores.

Violation #4 – Civil Code 2985.8(c)(2)(D), Required Lease Contract Disclosure Not Present.

This correspondence serves as a formal warning from the DMV that future violations of law, as described above, may result in enforcement action.

Enforcement actions in the future could include administrative, criminal, and/or civil action. However, considering the circumstances of this matter we are taking no further action at this time.

Sincerely,



Gary Costantino, Investigator
Investigations Division
Department of Motor Vehicles

Cc: Volvo Car USA LLC
1 Volvo Drive
Rockleigh, NJ 07647
Attention: Peter Wexler

Shook, Hardy & Bacon LLP
2049 Century Park East, Suite 3000
Los Angeles, CA 90067
Attention: Colm A. Moran, Esq.