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

Wednesday, September 15, 2021 at 1:00 p.m.
Via Zoom and Teleconference

On June 11, 2021, Governor Newsom issued Executive Order N-08-21, 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 through September 30, 2021. 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 nmvp@nmvp.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 Robin Parker at Robin.Parker@nmvp.ca.gov or (916) 445-1888.

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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

Wednesday, September 15, 2021 at 1:00 p.m.
Via Zoom and Teleconference

<https://us02web.zoom.us/j/85829298634?pwd=eXVVRUtFWUIlV2ZhTDI1RXg2NENMUT09>

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, he or she may want 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. **1:00 p.m. -- Meeting called to order.**
2. **Roll Call.**
3. **Oral Presentation before the Public Members of the Board.**

PRIETO AUTOMOTIVE, INC., a California Corporation, dba SUBARU OF SONORA v. SUBARU OF AMERICA, INC.
Protest No. PR-2648-19

4. **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.

PRIETO AUTOMOTIVE, INC., a California Corporation, dba SUBARU OF SONORA v. SUBARU OF AMERICA, INC.
Protest No. PR-2648-19

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

5. **Open Session.**
6. **Adjournment.**

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DECISION COVER SHEET

ACTION BY: Public Members Only

ACTION BY: All Members

To : BOARD MEMBERS

Date: August 19, 2021

From : ADMINISTRATIVE LAW JUDGE: Dwight V. Nelsen

CASE: PRIETO AUTOMOTIVE, INC., a California Corporation, dba SUBARU OF SONORA v. SUBARU OF AMERICA, INC.
Protest No. PR-2648-19

TYPE: Vehicle Code section 3060 Termination

PROCEDURAL SUMMARY:

- FILED ON CALENDAR: December 16, 2019
- MOTION FILED: Respondent Subaru of America, Inc.'s Motion to Strike Paragraph 9 of the Protest (withdrawn)
- HEARING: February 22-26, March 1, March 4-5, and April 26-27, 2021
- COUNSEL FOR PROTESTANT: Michael M. Sieving, Esq.
- COUNSEL FOR RESPONDENT: Lisa Gibson, Esq.
Adrienne Toon, Esq.
Nelson Mullins Riley & Scarborough, LLP

EFFECT OF PROPOSED DECISION: The Proposed Decision conditionally sustains the Protest and allows Subaru of Sonora, subject to express conditions, to proceed to fulfill its obligation to construct a dedicated Subaru facility in Sonora.

SUMMARY OF PROPOSED DECISION:

- Protestant objected to Respondent's Notice of Termination dated December 2, 2019. By the terms of a Facility Addendum to Conditional Subaru Dealer Agreement, dated December 26, 2016, Protestant agreed to complete the construction of an exclusive Subaru facility in Sonora by July 31, 2018. Respondent established a 19-month timeline, seven months to obtain a building permit and 12 months for physical construction, for Protestant to complete a dedicated Subaru facility.
- A dedicated Subaru facility is fundamental for representing Subaru. Protestant has not obtained a building permit nor commenced construction of the facility.
- Protestant's temporary facility is a "dual facility" where Protestant performs both Ford and Subaru sales operations. Protestant's temporary facility is deficient in specified areas and

does not meet the needs of Subaru customers. Protestant's service department is in a separate rented, barn-like structure 1.88 air miles away from Protestant's sales operations and is a poor representation of the Subaru brand.

- Protestant's sales performance was not proffered as a ground for termination. From 2017 to 2020, Protestant did an adequate job compared to other dealers.
- Protestant's Subaru facility project is complex. The project site has several natural issues including trees, slopes, drainage, and traffic. One of Protestant's parcels composing the project site has a visible drainage issue which is an obstacle to obtaining a building permit. This parcel must be rezoned for commercial use. County rezoning discussions, which only occur twice a year, placed the project milestones off track. Complex projects may take up to four years to complete.
- The Subaru of Sonora facility is Protestant's first attempt at constructing a facility. Protestant was unaware of the complex obstacles that would be confronting it. There are always local governmental rules and regulations, specific and unique to each project, that must be addressed. In Tuolumne County, Protestant needs a maximum of 29 months to rezone its property and to obtain the building permit. The physical construction process will take an additional 8 to 14 months, depending on weather, for a total maximum of 43 months for completion of the project.
- Respondent required Protestant to use the architectural firm of Feltus Hawkins Design to prepare the intent drawings. Feltus Hawkins' design depicted a massive two-story building situated on the parcel with the drainage issue. The building design was not compliant with the East Sonora Design Guidelines and would not be approved by the County. The Feltus Hawkins drawings contributed to Protestant's inability to comply with the construction schedule.
- On March 21, 2018, Respondent granted Protestant an extension of 17 months to complete the project by October 31, 2019. Protestant still required up to 29 months to obtain a building permit and up to 14 months for physical construction, a total of 43 months, to complete construction of the facility.
- In July of 2018, County personnel advised Protestant that it needed help from someone who understood Protestant's land and how to maneuver through the various steps to develop the property. They recommended that Protestant hire Amy Augustine of Augustine Planning Associates who could assist Protestant in navigating the intricacies of the planning and building permit process. Working with Ms. Augustine, Protestant came to the realization that Respondent's timeline projections were unrealistic.
- In January of 2019, Protestant balked at the cost of doing the surveying, the topography work and the drainage work as being too costly. With the assistance of Ms. Augustine, Protestant sought to try to refine the project scope so that it was not as expensive.

- The County procedure to obtain a building permit is a two-step process. Protestant took the first step to apply for approval, but, for unexplained reasons, did not proceed further. After January 2019, the process just stopped.
- After ALJ Nelsen requested additional testimony on whether a conditional decision would be appropriate in this matter, Protestant renewed its efforts for construction of the facility. Protestant re-engaged Ms. Augustine for planning services. Protestant filed a new application to rezone its parcel for commercial use. Upon resolution of the planning process, the next step is to apply to the County Building Department for the issuance of a building permit which may take 18 months.
- Protestant re-engaged Ronald Marlette who designed a facility to be placed on the parcel adjacent to Protestant's Ford dealership. The estimated cost of the facility is \$6,045,190. The average investment in a facility is about \$7.2 million. On April 16, 2021, Protestant hired a traffic consultant who will take 12 weeks to complete a traffic study at a cost of \$24,250. Protestant is hiring a civil engineer to do a drainage study which is expected to be completed in 12 weeks.
- Protestant and Respondent share responsibility for the failure to timely complete construction of the facility. A conditional decision sustaining the protest is appropriate.
- The proposed decision sustains the protest subject to certain conditions. The decision requires Protestant to increase its letter of credit to assure performance to the amount of \$750,000. The conditional decision requires Protestant to efficiently and without delay perform and complete any action that is within its control, and which is required to be done for the planning and permitting processes and physical construction of the facility. In addition, Protestant shall submit monthly progress reports to Respondent detailing the status of the facility project. Protestant shall obtain the required building permit on or before 29 months after Respondent approves its construction plans and shall complete the physical construction of the facility on or before the following 14 months.
- Failure of Protestant to satisfy any of the conditions of the conditional decision may serve as the basis for Respondent to file a motion with the Board to request that the decision be amended to overrule the protest.

RELATED MATTERS:

- Related Case Law: None
- Applicable Statutes and Regulations: Vehicle Code sections 331, 331.1, 331.2, 3050, 3060, 3061, 3066, 3067, and 11713.13; Evidence Code section 776; Government Code section 11425.60

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CERTIFIED MAIL

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8 STATE OF CALIFORNIA
9 NEW MOTOR VEHICLE BOARD

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11 In the Matter of the Protest of
12 PRIETO AUTOMOTIVE, INC., a California
Corporation, dba SUBARU OF SONORA,
13
14 Protestant,
v.
15 SUBARU OF AMERICA, INC.,
16 Respondent.

Protest No. PR-2648-19

PROPOSED DECISION

17
18 **PROCEDURAL BACKGROUND**

19 **Statement of the Case**

20 1. By letter dated December 2, 2019, Subaru of America, Inc. (“SOA” or “Respondent”),
21 gave notice to Prieto Automotive, Inc., a California Corporation, dba Subaru of Sonora (“Subaru of
22 Sonora” or “Protestant”) pursuant to California Vehicle Code section 3060¹ of its intention to terminate
23 Protestant’s Subaru Dealer Agreement dated March 6, 2017. The New Motor Vehicle Board (“Board”)
24 received the notice from SOA on January 13, 2020.²

25 2. The notice indicates the following reasons for termination:
26 _____

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

28 ² SOA did not send a copy of the Notice of Termination to the Board when it provided it to Subaru of Sonora. At the Board’s request, counsel for Protestant provided the Board with a copy of the notice on December 17, 2019.

1 ...

2 **I. Breach of Section 6.1 of the Standard Provisions to the Subaru Dealer**
3 **Agreement (“Standard Provisions”): Size and Layout and Facility Addendum**

4 **A. Applicable Dealer Agreement Provisions**

5 Section 6.1 of the Standard Provisions provides: “Unless otherwise stated in an Addendum
6 to the Agreement, Dealer represents that the Facilities are, at the time of execution of the
7 Agreement, of sufficient size and of satisfactory layout and design to comply with
8 Dealer’s Minimum Standards Level and will remain in compliance throughout the term of
9 the Agreement. Dealer agrees to continuously maintain the Facilities in a manner
10 satisfactory to Distributor in appearance and condition.”

11 Facility Addendum to Conditional Subaru Dealer Agreement Future Address effective
12 March 6, 2017 provides:

- 13 1. Dealer acknowledges that the facility at 13254 Mono Way, Sonora, CA 95370, is only
14 a temporary location for the Subaru dealership.
- 15 2. Dealer acknowledges that the permanent location of the Subaru dealership will be
16 13232 Mono Way, Sonora, CA 95370.
- 17 3. The temporary location is deficient in the following areas and that said deficiencies
18 would permit Distributor to refuse to approve Dealer’s application to become an
19 authorized Subaru dealer:

20 Facility Minimum Standard Deficiencies:

21 Minimum Standards Deficiency	22 Explanation & Remedy
23 Subaru Signature Facility Exterior Image	Complete Phase II Signature Facility at SOA Approved site.
24 Subaru Signature Facility Interior Image	Complete Phase II Signature Facility at SOA Approved site.
25 Subaru New Vehicle Showroom Area Designation	Exclusive Subaru dealership combining Sales and Service operations within 18 months of buy/sell close.
26 Subaru New Vehicle Showroom Units	Actual = 2; Minimum Required = 3; Deficiency = 1.
27 Subaru Covered/Enclosed Subaru Service Drive	Formal enclosed service drive at approved Subaru site within 18 months of buy/sell close.
28 Subaru New Vehicle Display & Storage (Dedicated Spaces)	Actual = 45; Minimum Required = 70; Deficiency = 25.
Subaru Used Vehicle Storage (Dedicated Spaces)	Actual = 25; Minimum Required = 30; Deficiency = 5.
Subaru Sales Manager Designation	Exclusive Subaru dealership with dedicated Subaru Sales Manager.

- 1 4. Time [sic] table for completion of the Subaru Signature Facility Phase II meeting all
2 Subaru minimum standards as approved by distributor at the permanent location.

Action	Time Frame
Complete Design Intent with SOA approved architectural firm by	Immediately
Obtain permits for facility by	July 30, 2017
Break ground on facility by	August 31, 2017
Facility that meets or exceeds all Subaru Minimum Standards and Operating Guidelines for Facility Size and Image Requirements is completed by	September 30, 2018 ³

- 3 5. The construction of the Subaru Signature Facility Phase II will be secured with a
4 Letter of Credit from Oak Valley Community Bank.
- 5 6. Dealer agrees that its failure to complete one or more of the facility improvements set
6 forth in paragraphs 1-3 of this Addendum within the aforementioned prescribed time
7 periods shall constitute a material breach of the Agreement.
- 8 7. Dealer agrees to voluntarily terminate the Agreement in writing immediately upon
9 Dealer's failure to complete one or more of the facility improvements set forth in
10 paragraphs 1-3 of this Addendum. If Distributor does not find sufficient cause to
11 extend the Agreement for completion of facilities, Dealer will surrender all Subaru
12 assets to Distributor at acquisition cost within a period of no more than thirty (30) days
13 following Distributor's acceptance of Dealer's resignation.
- 14 8. This Addendum is not intended to confer any right, benefit or claim upon any person
15 or entity other than Dealer or Distributor.
- 16 9. Except as modified by this Addendum, all terms, conditions and provisions of the
17 Agreement shall remain in full force and effect.

18
19 **B. Breach**

20 Subaru Of [sic] Sonora breached these provisions because, despite numerous efforts by
21 SOA to work with Subaru Of [sic] Sonora and numerous extensions to the Facility
22 Addendum, you have failed and refused to complete the facility renovations as specified
23 in the Facility Addendum. SOA relied on your material misrepresentations, per the
24 Facility Addendum, and was induced into entering into the Dealer Agreement with you. In
25 fact, because so much time has passed since Subaru Of [sic] Sonora's failure to complete
26 the facility renovations, Subaru Of [sic] Sonora's facility Minimum Standards
27 requirements have increased beyond what was required by the Facility Addendum.

28 **II. Conclusion**

As provided in Section 3060 of the California Vehicle Code and Section 17 of the Dealer Agreement, SOA intends to terminate Subaru Of [sic] Sonora's Dealer Agreement

³ July 31, 2018 is the timeline noted in the "Facility Addendum to Conditional Subaru Dealer Agreement Future Address" dated December 26, 2016. (Ex. J-005.015.)

1 effective at 12:01 AM. on the 61st day following the date of receipt of this letter by Subaru
2 Of [sic] Sonora. Until that time, Subaru Of [sic] Sonora's Dealer Agreement remains in
3 full force and effect. If, at any time until Subaru Of [sic] Sonora's Dealer Agreement is
4 terminated in accordance with its terms and applicable law, Subaru Of [sic] Sonora
5 contends that SOA is not performing any act required by the Dealer Agreement or
6 applicable law, Subaru Of [sic] Sonora is instructed to immediately notify the undersigned
7 [Anthony J. Graziano, Vice President Western Region, Subaru of America, Inc.] in
8 writing, by facsimile or email, of its contention in this regard. (Ex. J-001.)

9 3. On December 16, 2019, Protestant filed a timely protest pursuant to Section 3060.
10 Paragraph 9 of this protest alleged that the grounds for termination set forth in the Notice of Termination
11 "are in violation of the provisions of Vehicle Code Section 11713.13 and constitute a misdemeanor on
12 behalf of Respondent pursuant to Vehicle Code Section 40000.11(a)." Respondent filed a Motion to
13 Strike this paragraph. Ultimately, this matter was resolved by the filing of Protestant's "First Amended
14 Protest" on April 22, 2020, that amended Paragraph 9 to "remove all allegations mentioning any violation
15 of 11713.13 and purported commission by SOA of a misdemeanor." (Respondent Subaru of America,
16 Inc.'s Withdrawal of its Motion to Strike Paragraph 9 of the Protest, p. 1, lines 26-28.)

17 4. In the amended protest, Protestant denies that "good cause" exists for the termination of its
18 Subaru franchise and contends that Respondent's "alleged facility requirements" referenced in the Notice
19 of Termination "as grounds for a breach of the franchise are unreasonable in light of all existing
20 circumstances, including economic conditions." (First Amended Protest, ¶¶ 9, 11.)

21 5. The initial hearing on the merits was held before Administrative Law Judge ("ALJ")
22 Dwight V. Nelsen on February 22-26, March 1, and March 4-5, 2021.

23 6. On April 26-27, 2021, the record was opened to allow additional testimony and/or
24 evidence, in support of or in opposition to, the terms of a possible conditional Proposed Decision.

25 7. The matter was submitted for decision on July 20, 2021.

26 **Parties and Counsel**

27 8. Subaru of Sonora is located at 13254 Mono Way, Sonora, California. Subaru of Sonora is
28 an authorized Subaru "franchisee" within the meaning of Sections 331.1 and 3060(a)(1).

9. Protestant is represented by Michael M. Sieving, Esq., Attorney at Law, 9530 Hageman
Road, Suite B #455, Bakersfield, California 93312.

10. Respondent's Western Region is located at Galleria North Tower, 720 S. Colorado Blvd.,

1 3rd Floor, Suite 300-N, Glendale, Colorado 80246. Respondent is a “franchisor” within the meaning of
2 Sections 331.2 and 3060(a)(1).

3 11. Respondent is represented by Lisa M. Gibson, Esq. and Adrienne L. Toon, Esq, of Nelson
4 Mullins Riley & Scarborough LLP, 19191 South Vermont Avenue, Suite 900, Torrance, California
5 90502.

6 **Witnesses at Hearing**

7 **Respondent’s Witnesses: Initial Merits Hearing⁴**

8 12. Respondent called the following witnesses: Raymond Smit, Retail Market Development
9 Manager, San Francisco Zone, Subaru of America, Inc.; Amy Augustine, President, Amy Augustine
10 Planning Associates; Richard “Larry” Kelso, retired (February 2020) District Parts/Service Manager, San
11 Francisco Zone, Subaru of America, Inc.; Linda L. Francis, Vice President, Dennis Flynn Architects;
12 Paul Romito, Senior Project Manager, Roebbelen Contracting, Inc.; Manuel J. Prieto, Dealer Principal,
13 Subaru of Sonora; Jason Leopold, District Sales Manager, San Francisco Zone, Subaru of America, Inc.;

14 and Scott Farabee, Director, San Francisco Zone, Subaru of America, Inc.
15 13. Respondent’s expert witness was Michael LeRoy, President, Crown Capital Advisers,
16 LLC.

17 **Protestant’s Witnesses: Initial Merits Hearing**

18 14. Protestant called the following witnesses: Manuel J. Prieto, Dealer Principal, Subaru of
19 Sonora; Anthony Graziano, Vice President, Western Region, Subaru of America, Inc. pursuant to
20 Evidence Code section 776;⁵ and Ronald Gene Marlette, Marlette Associates.

21 **Protestant’s Witnesses: Hearing Reopening the Record**

22 15. Protestant called the following witnesses: Manuel J. Prieto, Dealer Principal, Subaru of
23 Sonora; Amy Augustine, President, Amy Augustine Planning Associates; and Ronald Gene Marlette,
24 Marlette Associates.

25 _____
26 ⁴ In a termination protest, the franchisor has the burden of proof. Therefore, SOA put its case on first in the initial
27 hearing. (Section 3066.) At the hearing opening the record, Protestant put its witnesses on first.

28 ⁵ Subdivision (a) of Evidence Code section 776 provides that: “A party to the record of any civil action, or a person
identified with such a party, may be called and examined as if under cross-examination by any adverse party at any
time during the presentation of evidence by the party calling the witness.”

RESPONDENT’S CONTENTIONS⁶

20. According to Respondent, the bases for termination specified in the Notice of Termination include: (i) Protestant’s breach of Section 6.1 of its “Dealer Agreement for failure to maintain dealership facilities ‘in a manner satisfactory to [SOA]’ and of ‘sufficient size and of satisfactory layout and design to comply with Dealer’s Minimum Standards Level;’ and (ii) Protestant’s breach of its Facility Addendum and the amendments thereto due to Protestant’s failure to construct (or even commence construction) of a new Subaru dealership facility as it expressly agreed to do under the terms of the Facility Addendum.” Additionally, under the terms of the Facility Addendum, Protestant agreed to comply with all applicable Subaru Minimum Standards and Operating Guidelines (“MSOG”).⁷ (Respondent Subaru of America, Inc.’s Post-Hearing Reply Brief, p. 4, lines 3-13.)

21. Respondent contends that based on the evidence presented at the hearing, six of the seven good cause factors weigh in favor of terminating Protestant’s franchise because of the following:

a. Protestant’s sales and service facilities are deficient, which resulted in Protestant’s inability to fully capture the sales and service business available to it. “The lack of consumer access to Subaru products and touchpoints, the lack of a Subaru showroom, and the overall lack of a meaningful Subaru presence at Protestant’s dealership is injurious to the Subaru brand, the customer experience, and Prieto Automotive’s ability to market and sell Subaru vehicles and other products.” Other reasons contributing to this are Protestant’s Subaru dealership is dualed with Ford and it operates out of split Subaru sales and service locations. (Respondent Subaru of America, Inc.’s Post-Hearing Brief, p. 1, lines

⁶ Respondent Subaru of America, Inc.’s post-hearing briefs reference the Board’s Decisions in *Saba A. Saba, SPD Partners, Inc. and Honda Kawasaki Sportcenter v. Kawasaki Motors Corp., U.S.A.* (Protest No. PR-1633-98), *Forty-Niner Sierra Resources, Inc. dba Forty-Niner Subaru v. Subaru of America, Inc.* (Protest No. PR-1972-05), *Serpa Automotive Group Inc. v. Volkswagen of America Inc.* (Protest No. PR-1977-05), and *Laidlaw’s Harley-Davidson Sales, Inc. dba Laidlaw’s Harley-Davidson v. Harley-Davidson Motor Company* (Protest No. PR-2299-11). None of these Decisions have 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. Respondent also cites to an unpublished Superior Court decision in *Ford Motor Co., Inc. v. New Motor Vehicle Board*, which will also not be considered in this Proposed Decision.

⁷ Subaru Minimum Standards and Operating Guidelines (“Minimum Standards” or “MSOG”) are “[f]acility, capital and management requirements that fluctuate, based upon a Retailer’s Planning Volume and a Retailer’s Units In Operation count in its AOR.” (See Footnote 19 for definition of Area of Responsibility (“AOR”); Stipulated Glossary of Defined Terms, p. 5.) The purpose of MSOGs is to achieve proper brand dedication and to assure that the business is “right-sized” for the Subaru brand. Respondent has certain requirements based on the levels of service that it wants its customers to have. (RT, Vol. II, p. 76:17-21.)

1 15-18; p. 30, lines 16-19; p. 31, lines 5-8, 18-21; p. 32, lines 4-5, lines 15-18.)

2 Subaru argues that retailers⁸ with MSOG-compliant facilities consistently see higher levels of
3 customer retention than retailers with deficient facilities. These retailers also sell more vehicles than
4 retailers with non-compliant dealerships such as Protestant. (Respondent Subaru of America, Inc.’s Post-
5 Hearing Brief, p. 27, lines 8-10.) Respondent maintains that Protestant is failing to adequately nurture
6 long-term relationships with customers as exhibited by its low scores in SOA’s Owner Loyalty Program
7 (“OLP”) reports.⁹ These reports are generated based on customer reviews and feedback. (Respondent
8 Subaru of America, Inc.’s Post-Hearing Brief, p. 27, lines 18-22; p. 28, lines 22-24.) As of February
9 2021, Respondent asserts that Protestant was ranked 10th out of 10 Subaru retailers in its District in terms
10 of customer retention with respect to both sales and service. (Respondent Subaru of America, Inc.’s Post-
11 Hearing Reply Brief, p. 7, lines 11-13.) “Protestant’s overall OLP Service Satisfaction Scores in 2019
12 placed it in the bottom 20th percentile compared to the scores of all other retailers in the San Francisco
13 Zone.” (Without emphasis; Respondent Subaru of America, Inc.’s Post-Hearing Reply Brief, p. 7, lines
14 19-21.)

15 b. “Protestant has not made a sufficient investment of capital, resources, time, or effort with
16 respect to its Subaru dealership and this lack of investment has resulted in Protestant’s inability and
17 ultimate failure to comply with the terms of its Dealer Agreement.” When Protestant became a Subaru
18 dealer in 2017, “the primary investment it was obligated to make was the establishment of a stand-alone,
19 MSOG-compliant Subaru sales and service facility in Sonora.” Yet, Protestant has not commenced
20 construction of a Subaru facility nor has it obtained the required building permits. (Respondent Subaru of
21 America, Inc.’s Post-Hearing Brief, p. 33, lines 11-13, 15-20.)

22 c. Protestant has made little, if any, permanent investment in its Subaru dealership as it
23

24 ⁸ SOA uses the term “retailer” to designate its dealers although sometimes “dealer” is used. (Stipulated Glossary of
25 Defined Terms, p. 5.)

26 ⁹ SOA’s Owner Loyalty Program (“OLP”) is a “program used to measure a Retailer’s customer satisfaction in both
27 sales and service and to evaluate a Retailer’s compliance with the Retailer’s contractual obligations to provide
28 proper customer handling; including for sales OLP, the Retailer’s sales consultant, purchase process, sales facility,
vehicle delivery and online experience, and for service OLP, the appointment and drop-off process, [service]
representatives, service facility, vehicle pick-up process and service quality....” An OLP Score measures a Subaru
“Retailer’s performance in satisfying customers. Usually broken down into sales (‘sales experience’) and service
(‘service experience’) scores.” (Stipulated Glossary of Defined Terms, p. 4)

1 continues to conduct its Subaru sales operations out of its Ford dealership facility, and the lease for its
2 Subaru service location may be easily terminated. Even though Protestant has made improvements to its
3 Ford dealership facilities, it “has made no meaningful permanent investment relating to its Subaru
4 operations in any facility in which it conducts its Subaru sales or service business.” (Respondent Subaru
5 of America, Inc.’s Post-Hearing Brief, p. 1, lines 21-23; p. 35, lines 19-21; Respondent Subaru of
6 America, Inc.’s Post-Hearing Reply Brief, p. 10, lines 26-28.)

7 d. “The public is not being well served due to the lack of adequate Subaru sales and service
8 options in Sonora, and SOA could expeditiously identify a replacement dealer to provide a brand-
9 compliant dealership facility and a sales and service experience that the Sonora market area needs and
10 deserves.” (Respondent Subaru of America, Inc.’s Post-Hearing Brief, p. 1, lines 24-27.) The public
11 would not be harmed if Protestant’s Subaru dealership were terminated and replaced. The public would
12 be better served if SOA is allowed to appoint a Subaru dealer “in Sonora that would provide Subaru
13 customers with exclusive, MSOG-compliant Subaru sales and service facilities under the same roof.”
14 Protestant indicated that it would need 43-48 months to complete construction of a Subaru facility, which
15 would force consumers to wait an additional four years before they have access to adequate Subaru sales
16 and service facilities, which would not serve the public interest. (Respondent Subaru of America, Inc.’s
17 Post-Hearing Brief, p. 1, lines 24-27; p. 36, lines 21-24; p. 38, lines 3-7; Respondent Subaru of America,
18 Inc.’s Post-Hearing Reply Brief, p. 13, lines 3-6.)

19 e. “Protestant’s sales facilities are inadequate to meet the needs and desires of Subaru
20 customers because Protestant’s Subaru sales operations are located in Protestant’s Ford dealership,
21 Protestant does not have a Subaru showroom, and the lack of Subaru products, touchpoints, and branding
22 at Protestant’s sales location make it a poor and disappointing, if not unrecognizable, representation of
23 the Subaru brand.” (Respondent Subaru of America, Inc.’s Post-Hearing Brief, p. 39, line 27-p. 40, line
24 3.) Protestant’s “service facilities are inadequate to meet the needs of consumers because they are located
25 in a shabby, barn-like building that is a dismal representation of the Subaru brand, and customers have
26 been dissatisfied with the availability of parking, the inconvenient vehicle pick-up and drop-off process,
27 the appearance of the service facilities, and the overall comfort of the customer waiting areas at the
28 service location.” Furthermore, the service facilities are located about three miles driving distance from

1 Protestant’s sales facility. (Respondent Subaru of America, Inc.’s Post-Hearing Brief, p. 42, line 24 - p.
2 43, line 2; Respondent Subaru of America, Inc.’s Post-Hearing Reply Brief, p. 15, lines 6-13.) Under the
3 Dealer Agreement, Protestant is obligated to employ a sufficient number of personnel, Subaru Certified
4 Service Advisors, and fully trained Subaru Technicians.¹⁰ However, Protestant did not have an exclusive
5 Subaru Sales Manager. (Respondent Subaru of America, Inc.’s Post-Hearing Brief, p. 46, lines 6-11.)
6 Respondent argues that the fact that Protestant’s “facilities and operations are non-compliant with SOA’s
7 MSOGs is de facto proof that Protestant’s facilities and personnel staffing are insufficient to meet the
8 needs of consumers in the Sonora market.” (Respondent Subaru of America, Inc.’s Post-Hearing Reply
9 Brief, p. 14, lines 17-19.)

10 f. There is no contention that Protestant has failed to fulfill its Subaru warranty obligations.
11 (Respondent Subaru of America, Inc.’s Post-Hearing Brief, p. 2, lines 3-4; p. 47, lines 2-3.)

12 g. Based on the evidence presented in this matter, it is undisputed that Protestant “breached
13 the terms of its Dealer Agreement by, among other things, failing to complete, obtain permits for, or
14 commence construction of a Subaru dealership facility—a facility that Protestant originally promised to
15 complete by July 31, 2018.... In so doing, Protestant has failed to provide the basis of SOA’s bargain
16 with Protestant given that SOA approved Prieto Automotive as an authorized Subaru dealer based upon
17 Prieto Automotive’s promise to provide a Subaru dealership facility compliant with SOA’s MSOGs.
18 Prieto Automotive’s Dealer Agreement, under any applicable contract law, would be subject to rescission
19 due to Protestant’s failure to comply with a fundamental objective of the contract.” Protestant’s failure to
20 construct a Subaru dealership facility constitutes a material breach of its obligations under the Dealer
21 Agreement, which are to provide and maintain Subaru facilities that comply with SOA’s MSOGs along
22 with other reasonable requirements in terms of facility size, layout, design, appearance and condition.
23

24 ¹⁰ Respondent also argues that Protestant “was short on the requisite number of Subaru Certified Service Advisors
25 and did not employ a sufficient number of fully trained Subaru Technicians.” In addition, Protestant’s “technicians
26 were significantly behind in terms of their required Subaru training credits.” Protestant’s “failure to maintain the
27 requisite number of employees with the requisite level of training at its Subaru dealership has resulted in
28 Protestant’s inability to properly serve customers in terms of vehicle sales and service.” (Respondent Subaru of
America, Inc.’s Post-Hearing Brief, p. 46, lines 6-17; p. 50, line 17 - p. 51, line 3.) These allegations were not
listed as grounds for termination in the notice Subaru issued to Protestant. These allegations may be considered
under “existing circumstances” in Section 3061.

1 SOA is asking that the terms of the Facility Agreement be enforced, and that Protestant’s Dealer
2 Agreement be terminated because of Protestant’s ongoing failure of performance in terms of its facility
3 obligations. (Respondent Subaru of America, Inc.’s Post-Hearing Brief, p. 47, lines 5-15; p. 49, lines 4-8;
4 p. 50, lines 14-16.) In an attempt to downplay the significance of this breach, Protestant argues, “the only
5 issue that SOA has with respect to the issue of failure to comply with the terms of the franchise was the
6 alleged failure to construct a new facility for Subaru operations within [*sic*] based upon the facility
7 addendum.” (Without emphasis; Respondent Subaru of America, Inc.’s Post-Hearing Reply Brief, p. 15,
8 line 26 - p. 16, line 2.) Respondent argues that Protestant’s “failure to provide a Subaru dealership facility
9 is not an ‘alleged’ failure—it is a glaring and significant breach of Protestant’s unambiguous obligations
10 under its Dealer Agreement and Facility Addendum. (Respondent Subaru of America, Inc.’s Post-
11 Hearing Reply Brief, p. 16, lines 3-5.)

12 22. With regards to Protestant’s assertion in its Post-Hearing Opening Brief that the Board
13 “should consider evidence that Protestant’s obligation to provide an MSOG-compliant Subaru
14 dealership” purportedly violates subdivision (c) of Section 11713.13, Respondent maintains “this
15 argument has already been presented and rejected in this proceeding.” The Board lacks the authority to
16 consider “any argument that enforcement of Prieto Automotive’s agreement to construct a Subaru facility
17 would violate” Section 11713.13(b)-(c). Additionally, none of the good cause factors require or relate to
18 whether a manufacturer has violated Section 11713.13. (Respondent Subaru of America, Inc.’s Post-
19 Hearing Reply Brief, p. 5, lines 14-19, 24-26.)

20 23. Lastly, Respondent argues that Protestant’s attempts “to blame Feltus Hawkins¹¹ for its
21 failure to timely construct a Subaru facility is [*sic*] baseless and unsupported by the evidence presented in
22 this case.” (Respondent Subaru of America, Inc.’s Post-Hearing Reply Brief, p. 17, lines 6-8.) According
23 to Respondent, the evidence shows that Protestant’s “failure to make meaningful progress in connection
24 with the planning and construction of its Subaru dealership was caused by none [*sic*] other than
25 Protestant’s own actions.” Delays were caused by Protestant’s: (1) Reluctance to complete Design Intent

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27 ¹¹ Feltus Hawkins is a “[t]hird-party vendor (architectural consultants) utilized by SOA to perform on-site
28 dealership design consultations, the renderings for the Retailer’s Subaru Signature compliant design, and post-
construction compliance evaluations against Subaru Signature requirements.” (Stipulated Glossary of Defined
Terms, p. 3.)

1 Plans in 2017; (2) Election more than once to change the geographic location of the dealership facility;
2 (3) Focus on renovations to its Ford dealership; (4) Focus on acquiring other motor vehicle dealerships;
3 and (5) Failure to follow the planning schedule developed by its planning consultant Amy Augustine,
4 which included proceeding with traffic and drainage studies, landscaping plans, and construction
5 drawings. (Respondent Subaru of America, Inc.'s Post-Hearing Reply Brief, p. 17, lines 8-19.)

6 **RESPONDENT'S PROPOSED TERMS OF ANY CONDITIONAL ORDER**

7 24. Respondent is seeking a Board decision overruling Subaru of Sonora's protest so
8 Respondent can proceed with termination. In the event the Board declines this, "SOA requests that the
9 Board enter a conditional order overruling the Protest and requiring Protestant to timely comply with its
10 obligation to construct a brand-compliant Subaru sales and service facility, or terminate its Subaru Dealer
11 Agreement in the event of any breach of the conditional order. A conditional Proposed Decision that
12 would result in another adjudication on the merits in this matter would not be in the interests of either
13 administrative economy or justice." (Respondent Subaru of America, Inc.'s Post-Hearing Brief, p. 2,
14 lines 7-15.)

15 25. With respect to the terms of any conditional decision entered in this matter, Respondent
16 requests that the terms include the following:

- 17 i. The facility must be completed within 2 years of the Board's issuance of any
18 conditional order.
- 19 ii. Prieto Automotive's complete facility shall comply with all current SOA MSOGs
20 applicable to its dealership, including facility size requirements, signature branding
21 requirements, and dedicated Subaru personnel requirements.
- 22 iii. Prieto Automotive shall make every effort to complete a facility as quickly as
23 possible, including immediate preparation of final building, landscaping and design
24 plans and submission of a building permit application to the County of Tuolumne
25 before the County issues entitlements.
- 26 iv. SOA may reject any design, construction or other building plans that do not meet
27 SOA's MSOGs or other applicable requirements.
- 28 v. SOA's standard capital and financial requirements for construction of new sales
and service facilities by its retailers, including a \$750,000 performance bond or
letter of credit.
- vi. Firm deadlines should be set for: the submission of design and construction plans
to SOA for approval; obtaining necessary permits; commencing construction; and
completing construction. All deadlines shall be timely met and any failure to meet
a deadline will result in termination of Prieto Automotive's Dealer Agreement.

vii. A proposed timeline for the completion of the dealership facility is provided below:

Action Item	Estimated Deadline
Within 15 days of the date of any Conditional Order, Protestant must submit design plans to Feltus Hawkins for review. (assuming Board date of September 17, 2021).	October 2, 2021
Feltus Hawkins must review and provide response to design plans within 30 days.	November 2, 2021
Protestant must submit construction plans for SOA's review within 40 days of Feltus Hawkins' approval of design plans.	December 12, 2021
SOA must review and respond to construction plans within 30 days.	January 12, 2022
Protestant must obtain all necessary zoning, permits and governmental approvals as soon as possible, but no later than 1 year before Protestant's deadline to complete construction of the dealership facility. All necessary studies, including without limitation, traffic and drainage studies must be completed in time for Protestant's compliance with the deadline for obtaining required zoning, permits and governmental approvals.	July 12, 2022
Protestant must promptly commence construction as soon as any necessary zoning, permits and/or governmental approvals are obtained.	No later than August 1, 2022
Protestant must complete construction within 18 months of SOA's approval of Protestant's construction plans.	July 12, 2023
Protestant must obtain certificate of completion of the facility within 30 days of the completion of construction.	August 12, 2023

(Respondent Subaru of America, Inc.'s Post-Hearing Brief, p. 57, line 3 - p. 59, line 19.)

PROTESTANT'S CONTENTIONS

26. Protestant claims that Respondent seeks to terminate Protestant's Subaru franchise based solely upon Protestant's failure to construct a stand-alone Subaru dealership facility in Sonora. (Protestant's Post-Hearing Opening Brief, p. 3, line 14-16; p. 7 line 28.) The requirement to construct the facility was agreed upon between the parties and subject to a facility addendum (as extended) that was incorporated into the franchise. (Protestant's Post-Hearing Opening Brief, p. 3, lines 16-18.) Protestant maintains that it always intended to construct a stand-alone sales and service facility for its Subaru

1 operations, and it continues to work towards this objective. (Protestant’s Post-Hearing Opening Brief, p.
2 6, lines 8-10.) Therefore, “the Board’s analysis should be limited to Section 3061(g) involving the extent
3 of Protestant’s failure to comply with the facility addendum ... concerning the construction of a new
4 Subaru facility, and the reasons for the current situation involving the facility construction. If the Board
5 were to consider all of the factors set forth in Section 3061, the evidence presented would weight [sic] in
6 favor of sustaining the protest of Protestant.” (Protestant’s Post-Hearing Opening Brief, p. 6, line 27 - p.
7 7, line 3; p. 10, line 7 - p. 12, line 15.)

8 27. The Notice of Termination did not contain, as grounds for termination, the good cause
9 factors in Section 3060(a)-(f). Protestant contends the only statutory ground raised by Respondent’s
10 Notice of Termination is “Vehicle Code Section 3061(g), which relates to the alleged failure of the
11 Protestant to comply with the terms of the franchise, purportedly based upon the alleged failure to
12 construct a facility which complies with Respondent’s demands in compliance with the facility
13 addendum to the franchise.” Additionally, “SOA now asserts that it is entitled to rely upon all of the
14 various grounds contained in Section 3061 as good cause factors, even though it did not allege them” in
15 the Notice of Termination. Respondent failed to provide the “specific grounds” for termination as

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1 required by Section 3060.¹² (Protestant’s Post-Hearing Opening Brief, p. 7, line 28 - p. 8, line 16.)

2 28. According to Protestant, the majority of the delays involved in constructing the facility
3 have been attributable to Feltus Hawkins, who makes the initial facility decisions on behalf of SOA.
4 Feltus Hawkins “superimposed” a facility Feltus Hawkins had previously drawn for a different location
5 and did not take into consideration the building requirements and restriction of Tuolumne County.
6 (Protestant’s Post-Hearing Opening Brief, p. 6, lines 13-18.) Arguably, these plans would not be
7 acceptable to or approved by Tuolumne County, which is a requirement necessary to proceed with
8 construction of the facility. (Protestant’s Post-Hearing Opening Brief, p. 6, lines 19-21.) In early
9 December 2020, Protestant submitted revised plans (the “Marlette Plans”) that met all of SOA’s MSOGs
10 which “SOA has failed or refuses to approve, reject or comment upon. Without an approval of these
11 plans, Protestant is unable to proceed with County approval and construction of the facility.”
12 (Protestant’s Post-Hearing Opening Brief, p. 6, lines 22-26.) Protestant argues that “[t]he Board cannot
13 condone the conduct of SOA in refusing to approve, much less consider, the Marlette Plans, which are
14 SOA MSOG complainant [*sic*], and use that refusal to argue that Protestant refuses to construct a
15 facility.” (Protestant’s Post-Hearing Reply Brief, p. 4, lines 24-26.)

16 29. Protestant does not dispute the fact that the construction of a stand-alone Subaru facility in
17

18 ¹² Citing *British Motor Car Distributors, Ltd. v. New Motor Vehicle Board* (1987) 194 Cal.App.3d 81 and
19 *American Isuzu Motors, Inc. v. New Motor Vehicle Board* (1986) 186 Cal.App 3d 464, Protestant argues that the
20 Board’s ability to consider the Section 3061 good cause “factors in termination protests has been restricted by the
21 California Courts to only those issues contained in the [Notice of Termination].” (Protestant’s Opening Brief, p. 5,
22 lines 13-16) Furthermore, “[a] franchisor may not assert ‘good cause’ for a franchise termination at the hearing on
23 any ground not asserted in its notice of termination....” (*British Motor Car Distributors, Ltd.* at p. 91 citing
24 *American Isuzu Motors, Inc.* at p. 477; Protestant’s Opening Brief, p. 8, lines 18-22.) In conclusion, Protestant
25 contends “[t]here is no precedent in the Vehicle Code or California caselaw which would authorize the Board to
26 consider evidence of other ‘good cause’ factors which were not specified” in the Notice of Termination.
27 (Protestant’s Opening Brief, p. 9, lines 1-3.) Protestant is not distinguishing “grounds for termination” that must be
28 in the Notice of Termination per Section 3060 with “good cause to terminate” that must be proven by the
franchisor in order to allow termination of Protestant’s franchise per Section 3061. The effect of the *Isuzu* case is
that a franchisor cannot attempt to prove at the hearing on the merits any other “grounds for termination” not
specifically stated in the Notice of Termination. The *Isuzu* case should not prevent the franchisor from introducing
evidence to establish “good cause for termination,” as long as the evidence sought to be introduced is not being
used to establish additional “grounds for termination” beyond that stated in the Notice of Termination. The
franchisor may introduce such evidence in order to meet its burden of proving good cause to terminate. In this
case, even if Respondent proves Protestant failed to construct a stand-alone Subaru dealership facility in Sonora,
under the “existing circumstances” (including all the Section 3061 good cause factors), Respondent needs to prove
good cause to terminate Protestant’s Subaru franchise.

1 Sonora would increase sales. However, according to Protestant, these arguments miss the point. “The
2 overwhelming (and undisputed evidence) presented at the hearing was that (a) the facility addendum (as
3 amended) requires Protestant to construct a facility) [*sic*], (b) Protestant is anxiously willing and able to
4 do so, (c) SOA has only approved the FH [Feltus Hawkins] plans which provide for a modern two-story
5 glass and steel facility which has no chance of being approved by the County, (d) in response to the
6 SOA-approved FH [Feltus Hawkins] plans, Protestant submitted the MSOG compliant Marlette Plans,
7 and (e) SOA has refused to act on the Marlette Plans.” (Without emphasis; Protestant’s Post-Hearing
8 Reply Brief, p. 4, lines 10-16.) Furthermore, but for SOA’s “refusal to move forward and approve (or
9 modify) the Marlette Plans, or even reject the Marlette Plans and require a re-design,” Protestant’s stand-
10 alone Subaru facility would have been constructed. (Protestant’s Post-Hearing Reply Brief, p. 5, lines 1-
11 4.) Additionally, any problem with Protestant’s sales operations and OLP scores could have been
12 resolved if “SOA considered, modified or approved the Marlette Plans. SOA has apparently decided not
13 to take any of those actions and instead cast the blame upon Protestant in an effort to terminate the
14 franchise.” (Protestant’s Post-Hearing Reply Brief, p. 5, lines 4-7.)

15 30. The resolution Protestant seeks is a conditional decision “sustaining the protest subject to
16 the condition that Protestant construct a facility for Subaru operations within a time limit set by the Board
17 based upon the evidence presented at the hearing.” (See Veh. Code § 3067(a).) Such a decision would
18 require that Respondent act on the Marlette Plans or any subsequent plans submitted to Respondent.
19 Without such a provision, Protestant asserts that “SOA could simply avoid taking any action of [*sic*] the
20 submitted plans, allow the time for construction to expire, and again seek termination based upon a
21 failure of the condition in the Board decision.” (Protestant’s Post-Hearing Opening Brief, p. 7, lines 4-
22 13.)

23 31. Lastly, Protestant argues that the Board should consider the evidence related to the impact
24 of Respondent’s decision to compel it to maintain an exclusive facility for its Subaru operations. (See
25 Veh. Code § 11713.13(b); Protestant’s Post-Hearing Opening Brief, p. 9, lines 4-7.) According to
26 Protestant, both Respondent and Protestant “have agreed that it would be in the best interests of
27 Protestant, SOA and the consuming public for Protestant to construct a dedicated Subaru sales and
28 service facility. Protestant is continuing to pursue this construction process, despite the refusal of SOA to

1 approve or otherwise act on the current proposed plans.” The evidence established that: (a) SOA seeks to
2 terminate the franchise based “solely” on the failure of Protestant to construct an exclusive facility and
3 (b) SOA refuses to approve or otherwise act on the Marlette Plans, which would provide SOA with an
4 exclusive facility. (Protestant’s Post-Hearing Opening Brief, p. 9, lines 12-18.) Protestant contends the
5 reasonableness of the facility in Section 11713.13(b) is an issue that “must be considered by the Board
6 under the ‘existing circumstances’ provisions contained in Section 3061.”¹³ (Protestant’s Post-Hearing
7 Opening Brief, p. 9, lines 20-22.) “The only evidence presented by SOA as to the ‘reasons’ for not
8 approving the Marlette Plans was the testimony of Raymond Smit who stated that the SOA business
9 representatives had not communicated with Protestant regarding any action on the Marlette Plans because
10 this matter was in litigation, all communications were left to and between counsel, and that the only
11 communications between the parties were done through counsel by way of an inadmissible proposed
12 settlement agreement that was never executed.” The facts surrounding the “reasonableness” of the facility
13 demands should be considered in light of the proposed termination proceedings, the submission of the
14 Marlette Plans, and the refusal of Respondent to comment upon those plans except for a proposed
15 settlement agreement. Protestant’s decision to move forward with the facility construction is an issue that
16 the Board should take into consideration in resolving this protest as an “existing circumstance” under
17 Section 3061. (Protestant’s Post-Hearing Opening Brief, p. 9, line 24 - p. 10, line 6.)

18 **PROTESTANT’S PROPOSED TERMS OF ANY CONDITIONAL ORDER**

19 32. Instead of outlining proposed terms for a conditional order, Protestant, without citation,
20 refers to the testimony of Amy Augustine and Exhibit P-110. (Protestant’s Post-Hearing Reply Brief, p.
21 8, lines 8-12.)

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25 ¹³ Respondent filed a Motion in Limine to prohibit Protestant from offering any evidence, testimony or argument
26 during the merits hearing relating to any claim by Protestant that enforcement of its promise to construct a Subaru
27 dealership facility would violate Section 11713.13(b)-(c). (Respondent Subaru of America, Inc.’s Motion in
28 Limine #2 to Exclude Evidence, Testimony, and Argument Regarding any Alleged Violation of Vehicle Code §
11713.13(b)-(c), p. 8, lines 6-9.) Prior to the commencement of the merits hearing, ALJ Nelsen indicated that he
will not make any findings as to the propriety or the existence of any unlawful act regarding Section 11713.13, but
Protestant will be permitted to submit evidence in terms of the existing circumstances including the good cause
factors. (RT Vol. I, p. 32, lines 1-6.)

FRANCHISE

1
2 33. On March 6, 2017, the parties, Prieto Automotive, Inc. dba Subaru of Sonora and Subaru
3 of America, Inc. executed a Subaru Dealer Agreement and Standard Provisions (collectively “Dealer
4 Agreement.”) (Ex. J-005.) The Dealer Agreement meets the definition of a franchise in Section 331.
5 For the most part, the pertinent provision of the Dealer Agreement and “Facility Addendum to
6 Conditional Subaru Dealer Agreement Future Address” (“Facility Addendum) dated December 26, 2016,
7 are noted above in paragraph 2. However, the initial deadline to complete the Subaru facility was July 31,
8 2018, yet the Notice of Termination indicates the deadline was September 30, 2018. (Ex. J-005.014-015,
9 .029; Ex. J-001.001-002.)

10 34. Although the Notice of Termination does not explicitly reference Section 5.3 of the
11 Standard Provisions, it does refer to Protestant’s Facility Minimum Standard Deficiencies.¹⁴ (Ex. J-
12 001.002.) Section 5.3 provides:

13 **Compliance With Minimum Standards.** Dealer acknowledges the importance of the
14 Minimum Standards and agrees that compliance by Dealer with the Minimum Standards is
15 an essential element of Dealer’s performance under the Agreement and is required at all
16 times. Dealer shall be presumed to have acknowledged the reasonableness of all applicable
17 Minimum Standards, unless Dealer promptly notifies Distributor in writing to the contrary
18 at the time when compliance is first required in connection with Dealer's Minimum
19 Standards Level, and produces substantial evidence that compliance with one or more of
20 the applicable Minimum Standards would be unreasonable or unnecessary due to Dealer's
particular circumstances. Upon receipt of such notice, Distributor shall evaluate any
evidence produced by Dealer and notify Dealer in writing whether compliance by Dealer
with any one or more of the applicable Minimum Standards may be delayed or excused, in
whole or in part, due to Dealer’s particular circumstances, provided that Distributor shall
not excuse or permit delay in compliance with the Minimum Standards by a New Dealer
Candidate or upon a Change of Controlling Ownership Interest, unless Distributor is
required to do so by applicable law.

21 (Ex. J-005.029.)

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28 ¹⁴ This allegation may be considered under “existing circumstances” in Section 3061.

1 35. Section 7 of the Standard Provisions,¹⁵ pertains, in part, to operations including personnel
2 and training. In the Notice of Termination, Respondent noted Protestant’s lack of a dedicated Subaru
3 Sales Manager, but the lack of Subaru Certified Service Advisors and fully trained Subaru Technicians
4 were not noted. However, Respondent raised this in its post-hearing opening brief. Respondent is
5 precluded from using this as a ground for termination but, as noted above in footnote 10, this allegation
6 may be considered under existing circumstances in Section 3061. (Exs. J-001, J-005.)

7 36. Section 17 of the Standard Provisions pertains to termination of the franchise and
8 succession. Section 17.1 provides:

9 **Prior Termination by Distributor.** Distributor shall have the right at any time to bring
10 about termination of the Agreement for cause by delivering written notice of termination
11 to Dealer or by sending such notice to Dealer by certified mail, other delivery service,
12 electronic transmission, telegram, or other similar means. Any such termination notice
13 shall take effect immediately or upon the expiration of any waiting period indicated below
14 or as imposed by applicable law, whichever is longer. Any of the following events shall be
15 considered sufficient cause for termination, but they are enumerated by way of illustration
16 and not by way of limitation:

17 ...

18 **17.1.21** Failure of Dealer to make improvements, alterations, or modifications to the
19 Facilities in accordance with Section 6.1¹⁶ hereof; ...

20 (Ex. J-005.038, 040)

21 **APPLICABLE LAW**

22 37. Section 331(a) defines a franchise as “a written agreement between two or more persons
23 having all of the following conditions:”

24 _____
25 ¹⁵ Section 7 of the Standard Provisions provides, in part, as follows:

26 **7.1 Personnel.** Dealer shall employ qualified and trained sales, service, and parts personnel at
27 least in such capacities and in such numbers as are specified in the applicable Minimum
28 Standards and Operating Guidelines.

7.2 Training. Dealer agrees to require such personnel to be trained in such training courses as
may be offered or designated from time to time by Distributor. (Ex. J-005.030.)

¹⁶ Section 6 of the Standard Provisions pertains to facilities. Section 6.1 provides as follows:

Size and Layout. Unless otherwise stated in an addendum to the Agreement, Dealer represents
that the Facilities are, at the time of execution of the Agreement, of sufficient size and of
satisfactory layout and design to comply with Dealer’s Minimum Standards Level and will remain
in compliance throughout the term of the Agreement. Dealer agrees to continuously maintain the
Facilities in a manner satisfactory to Distributor in appearance and condition. (Ex. J-005.029.)

- 1 (1) A commercial relationship of definite duration or continuing indefinite duration.
- 2 (2) The franchisee is granted the right to offer for sale or lease, or to sell or lease at
- 3 retail new motor vehicles ... manufactured or distributed by the franchisor or the right to
- 4 perform authorized warranty repairs and service, or the right to perform any combination
- 5 of these activities.
- 6 (3) The franchisee constitutes a component of the franchisor's distribution system.
- 7 (4) The operation of the franchisee's business is substantially associated with the
- 8 franchisor's trademark, trade name, advertising, or other commercial symbol designating
- 9 the franchisor.
- 10 (5) The operation of a portion of the franchisee's business is substantially reliant on the
- 11 franchisor for a continued supply of new vehicles, parts, or accessories.

12 38. Section 331.1. defines a franchisee as “ ... any person who, pursuant to a franchise,

13 receives new motor vehicles subject to registration under this code ... from the franchisor and who offers

14 for sale or lease, or sells or leases the vehicles at retail or is granted the right to perform authorized

15 warranty repairs and service, or the right to perform any combination of these activities.

16 39. Section 331.2 defines a franchisor as “... any person who manufactures, assembles, or

17 distributes new motor vehicles subject to registration under this code ... and who grants a franchise.”

18 40. Section 3050 provides, in part, as follows:

19 The board shall do all of the following:

- 20 ...
- 21 (c) Hear and decide, within the limitations and in accordance with the procedure

22 41. Section 3060 provides in part as follows:

23 (a) Notwithstanding Section 20999.1 of the Business and Professions Code or the terms

24 of any franchise, no franchisor shall terminate or refuse to continue any existing franchise

25 unless all of the following conditions are met: ...

- 26 (1) The franchisee and the board have received written notice from the franchisor

27 ...

- 28 (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.

30 42. Subdivision (a) of Section 3067 provides the authority for the Board to issue a conditional

31 decision as follows: “The decision shall sustain, conditionally sustain, overrule, or conditionally overrule

32 the protest. Conditions imposed by the board shall be for the purpose of assuring performance of binding

33 contractual agreements between franchisees and franchisors or otherwise serving the purposes of this

1 article.”

2 43. Section 11713.13 provides, in part, that it is unlawful and a violation of the Vehicle Code
3 for a manufacturer or distributor “licensed under this code to do, directly or indirectly through an
4 affiliate, any of the following: ... (b) Require a dealer to establish or maintain exclusive facilities,
5 personnel, or display space if the imposition of the requirement would be unreasonable in light of all
6 existing circumstances, including economic conditions. In any proceeding in which the reasonableness of
7 a facility or capital requirement is an issue, the manufacturer or distributor shall have the burden of
8 proof.”

9 **FINDINGS OF FACT**¹⁷

10 **Stipulated Facts**

11 44. On February 17, 2021, the parties filed a Stipulation of Facts. The pertinent stipulated
12 facts are:

- 13 ■ The owners and officers of Prieto Automotive are J. Manuel Prieto and Ramona R.
14 Llamas. Mr. Prieto is the President and General Manager of Prieto Automotive and Ms.
15 Llamas is the Secretary and Treasurer. (Stipulation of Facts, ¶ 5.)
- 16 ■ Prieto Automotive operates a Subaru dealership in Sonora, California pursuant to a Subaru
17 Dealer Agreement and Standard Provisions, executed on or about March 6, 2017, as
18 amended on March 20, 2018. (Stipulation of Facts, ¶ 6.)
- 19 ■ Prieto Automotive owns and operates a Ford dealership in Sonora, California (“Sonora
20 Ford”) which was acquired pursuant to an Asset Purchase Agreement in 2012. (Stipulation
21 of Facts, ¶ 7.)
- 22 ■ Cypress Square Properties, LLC (“Cypress Square”) owns the land and building for
23 Sonora Ford which was purchased by Prieto Automotive in 2014. (Stipulation of Facts, ¶

24 _____
25 ¹⁷ References to testimony, exhibits or other parts of the record are intended to be examples of evidence relied
26 upon to reach a finding, and not to be exhaustive. Findings of Fact are organized under topical headings for
27 readability only, and not to indicate an exclusive relationship to an issue denoted by the topic heading. The Board
28 may apply a particular finding to any “existing circumstance” or “good cause” factor under Section 3061.

Citations to the record are for 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 finding of the Board based
upon other facts in the record and reasonable inferences therefrom.

1 8.) Mr. Prieto and Ms. Llamas are the owners of Cypress Square. (Stipulation of Facts, ¶
2 9.) Cypress Square charges Prieto Automotive \$43,000 a month in rent for the use of the
3 land and building at 13254 Mono Way, Sonora, California 95320. (Stipulation of Facts, ¶
4 10.)

- 5 ▪ On or about July 29, 2016, Prieto Automotive entered into an Asset Purchase Agreement
6 with Spiryl Dusset, LP (“Spiryl Dusset”) for Prieto Automotive’s purchase of Spiryl
7 Dusset’s Subaru dealership assets. The purchase price for the goodwill for the Subaru
8 dealership was \$1.5 million. (Stipulation of Facts, ¶ 11.)
- 9 ▪ Prieto Automotive’s Subaru dealership is a split facility, its sales operations are dualled
10 with Sonora Ford at 13254 Mono Way and the Subaru dealership’s service location is
11 approximately 1.88 air miles from Sonora Ford at 219 Southgate Drive in Sonora.
12 (Stipulation of Facts, ¶ 13.) The rent for the service facility is \$4,000 a month. (Stipulation
13 of Facts, ¶14.)
- 14 ▪ Under the terms of a Facility Addendum, Prieto Automotive and SOA agreed that Prieto
15 Automotive would temporarily conduct its Subaru dealership sales operations at its
16 existing Ford dealership (the “Temporary Location”) until Prieto Automotive was able to
17 construct a new facility for Subaru operations. (Stipulation of Facts, ¶ 15.)
- 18 ▪ The Temporary Location could not accommodate Subaru service operations so Prieto
19 Automotive and SOA agreed that Prieto Automotive’s Subaru service business would be
20 temporarily conducted at a separate facility located at 219 Southgate Drive in Sonora
21 (“Temporary Service Location”). (Stipulation of Facts, ¶ 16.)
- 22 ▪ In 2018, Prieto Automotive performed improvements on the Sonora Ford building at a
23 cost of \$390,727. (Stipulation of Facts, ¶ 17.)
- 24 ▪ Before Prieto Automotive could proceed with construction of its Subaru dealership, it was
25 required to obtain permits from the County of Tuolumne. (Stipulation of Facts, ¶ 18.)
- 26 ▪ As of the date of the Stipulation of Facts, Prieto Automotive has not yet obtained the
27 required permits from the County of Tuolumne and has not commenced construction of its
28 Subaru dealership facility. (Stipulation of Facts, ¶¶ 19-20.)

- As of the date of the Stipulation of Facts, Prieto Automotive is conducting its Subaru dealership operations at the Temporary Location, and its Subaru service business at the Temporary Service Location. (Stipulation of Facts, ¶ 21.)

SOA’s Sole Ground for Termination of Protestant’s Subaru Franchise¹⁸

45. On March 6, 2017, Respondent and Protestant entered into a Subaru Dealer Agreement authorizing Protestant to operate a Subaru motor vehicle dealership in Sonora, California. Protestant agreed to a timeline to complete a Subaru Signature Facility II meeting all Subaru minimum standards (MSOGs). (See Footnote 7; Ex. J-001.) The timeline for Protestant to complete the facility was extended to October 31, 2019. (RT, Vol. III, p. 52:12-20.) Protestant neither built nor commenced construction of the required Subaru facility by the extended completion date. (RT, Vol. III, p. 52:21-23.) Accordingly, on December 2, 2019, Respondent issued a “Notice of Intent to Terminate” Protestant’s Subaru franchise. (Ex. J-001.003.)

Findings Relating to the Amount of Business Transacted by the Franchisee, as Compared to the Business Available to the Franchisee (§ 3061(a))

46. Protestant operates a Subaru franchise and a Ford franchise at the same location in Sonora. Protestant’s total Subaru sales and combined Subaru and Ford sales from 2017 to 2020 are as follows:

Protestant’s Subaru and Ford Sales

Year	Subaru Sales	Combined Subaru and Ford sales
2017	\$12,600,027	\$33,618,390
2018	\$18,261,106	\$42,273,663
2019	\$20,511,347	\$40,953,933
2020 through November	\$37,591,435	\$41,008,838

(Exs. R-310, R-311.) Protestant’s 2020 annualized net profit (including compensation and rent paid to owner) for its combined Subaru and Ford operations is \$7,681,534. (Ex. R-311.) Protestant’s Subaru dealership was profitable every year from 2017 to 2020. (RT, Vol. VI, p. 116:8-16.) As testified by Respondent’s designated expert, Michael LeRoy, Protestant “was doing just a fine job compared to other dealers.” (RT, Vol. VI, p. 91:11-14.) Protestant’s sales performance was not proffered as a ground for

¹⁸ References herein to Roman numerals are to the transcript volumes of the proceedings.

1 termination. (Ex. J-001.)

2 47. From 2017 to April 2020, the units in operation (UIO)¹⁹ grew from 2,215 to 3,030. (RT,
3 Vol. II, p. 70:18-25; Ex. R-316.004, 029.) Respondent’s Estimated 2024 Dealer Minimum Standards and
4 Operating Guidelines estimates the 7-year UIO to be 3,544, a total increase of 1,329 from 2017. (RT,
5 Vol. II, p. 71:1-9; Ex. R-316.029.)

6 48. Protestant outperformed the previous Subaru franchisee and doubled the number of
7 monthly sales. (RT, Vol. VIII, pp. 117:17-118:2; Ex. P-106.003.) On October 2, 2018, Mr. Prieto wrote
8 to Respondent stating that Protestant’s sales performance and Customer Service Scores are the best that
9 they have ever been in the Tuolumne County area.²⁰ (RT, Vol. VIII, p. 13:21-25; Ex. P-106.003.)

10 49. In terms of a dealer’s performance meeting its minimum sales responsibility, Protestant’s
11 Subaru franchise operation is ranked No. 9 out of 26 dealers in the San Francisco zone.²¹ (RT, Vol. VIII,
12 pp. 128:19-129:1.) Respondent’s 2020 annual review of Protestant set Protestant’s market share at 7%.
13 (RT, Vol. II, p. 87:19-21.) Protestant obtained a 6.79% market share. (RT, Vol. II, pp. 87:24-88:1.)

14 50. The performance of Protestant’s dealership does not stand out as a problem. (RT, Vol II,
15 p. 88:2-7; Vol. III, p. 70:8-10.) Minimum sales responsibility (MSR) is a metric Respondent uses “to
16 assess a Retailer’s sales performance, on an overall and per model basis, based on segment adjusted
17 expectations and may use region, zone or district average as a benchmark.” (Stipulated Glossary of
18 Defined Terms, p. 4.) A score of 100 is the minimum sales responsibility. Protestant has an MSR score of
19 136. (RT, Vol. III, pp. 72:13-73:2.) Protestant’s customer retention numbers at 76.7 are adequate. (RT,
20 Vol. II, p. 88:2-7; Vol. III, p. 70:6-10.)

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22 ///

23 ¹⁹ UIO or Units in Operation is defined as the “number of vehicles of a certain make registered in a Retailer’s
24 AOR, sometimes limited by the age of the vehicles. This number is updated by SOA on an annual basis.”
25 (Stipulated Glossary of Defined Terms, p. 6.) AOR or “Area of Responsibility” is the “non-public geographic area
26 of census tracts assigned to a Retailer by SOA under the Dealer Agreement that delineates the market for which a
27 Retailer will be held responsible, although a Retailer is free to sell to customers outside of the AOR and those sales
28 will be counted for the Retailer. (Stipulated Glossary of Defined Terms, p. 1.)

²⁰ All references to “County” are Tuolumne County.

²¹ The San Francisco Zone is a “geographic subset of the Western Region, in which Prieto Automotive, Inc.’s
Subaru dealership is located, covering Northern California, and Northern Nevada.” (Stipulated Glossary of Defined
Terms, p. 5.)

1 **Findings Relating to the Investment Necessarily Made and Obligations Incurred**
2 **by the Franchisee to Perform its Part of the Franchise (§ 3061(b))**

3 51. Protestant paid \$1.5 million for Blue Sky upon the purchase of the Subaru franchise from
4 the prior franchisee, Spiryl Dusset. (RT, Vol. VIII, p. 144:1-15; Stipulation of Facts, ¶ 11.) Protestant has
5 spent about another \$100,000 in other assets on Protestant’s Subaru operation. (RT, Vol. VIII, p. 144:12-
6 15; Ex. 317.006.) The rent for the service facility is \$4,000 a month. (Stipulation of Facts, ¶14.)

7 52. In making proposals to Respondent, Protestant purchased approximately seven acres of
8 property located behind Protestant’s Ford dealership. (RT, Vol. IV, p. 159:2-16.) Protestant purchased the
9 acreage from Caltrans. (RT, Vol. IV, p. 166:16-22.)

10 53. According to Respondent’s expert, Michael LeRoy, in four years, Protestant’s Sonora
11 dealership generated \$7.4 million for the owners and drove the value of the dealership to \$8-\$9 million
12 plus net asset value. (Ex. R-309.014.)

13 54. Protestant’s Subaru dealership will become more profitable, and the value of the franchise
14 investment will increase, when Protestant makes the obligated investment in a dedicated Subaru facility.
15 A facility combining both Subaru sales and service will enable Protestant to increase sales and improve
16 customer satisfaction. (RT, Vol. VI, p. 135:11-20.)

17 55. Respondent required a letter of credit (performance bond) from Protestant as an assurance
18 of performance.²² (RT, Vol. X, pp. 110:16-25, 124:9-11.) Respondent has not sought to collect on the
19 letter of credit. (RT, Vol. X, pp. 124:11-15, 125:9-15.)

20 **Findings Relating to Permanency of the Investment (§ 3061(c))**

21 56. Protestant’s facility at 13254 Mono Way, Sonora, California, is a temporary location for
22 Protestant’s Subaru sales operations. The Temporary Location is deficient in the following specified
23 areas: Subaru Signature Facility Exterior Image; Subaru Signature Facility Interior Image; Subaru New
24 Vehicle Showroom Area Designation; Subaru New Vehicle Showroom Units; Subaru Covered/Enclosed

25 _____
26 ²² A copy of the Letter of Credit was not offered into evidence although it was provided in Respondent’s exhibit
27 binder. The specific purpose of the Letter of Credit was not explained. It may be that it was intended in part to be a
28 form of liquidated damages in favor of Respondent if the facility was not completed as required. If this is its
purpose, this indicates that Respondent would be compensated for damages and thus the non-performance by
Protestant is not a material breach.

1 Subaru Service Drive; Subaru New Vehicle Display & Storage (Dedicated Spaces); Subaru Used Vehicle
2 Storage (Dedicated Spaces); and Subaru Sales Manager Designation. (Ex. J-001.002-003.) Protestant’s
3 permanent Subaru location is to be constructed at 13232 Mono Way. (Exs. J-001.003, J-005.014.)

4 57. Protestant’s current facility is a “dual facility” where Protestant performs both Ford and
5 Subaru sales operations under the same roof. (RT, Vol. II, pp. 30:17-20, 76:3-6.) Ford Motor Company
6 gave Protestant temporary consent to co-locate Subaru sales at Protestant’s Ford facility. (Ex. R-323A, p.
7 1.) Ford understands that Protestant has been working to resolve the issues relating to the construction of
8 the Subaru facility. (RT, Vol IV, p. 163:2-18.)

9 58. Protestant operates its Subaru service department in a rented building approximately 1.88
10 air miles away from Protestant’s sales operations. (Stipulation of Facts, ¶ 13.) Protestant has a month-to-
11 month lease which has been extended to 2025. (RT, Vol. V, p. 14:15-25.) Protestant may terminate the
12 lease upon giving a 90-day notice. (RT, Vol. V, p. 16:19-22; Vol. VI, p. 141:9-20.)

13 **Findings Relating to Whether it is Injurious or Beneficial to the Public Welfare**
14 **For the Franchise to be Modified or Replaced or the**
15 **Business of the Franchisee Disrupted (§ 3061(d))**

16 59. Manuel Prieto, Protestant’s Dealer Principal, emigrated with his family from Mexico to
17 the United States in 1979. He was nine years old. He grew up in the small town of Fowler, California,
18 with a brother and five sisters. His parents were agricultural workers. (RT, Vol. VII, p. 10:19-25.)

19 60. Mr. Prieto got his start in the auto business after graduating from high school in 1987
20 when a local dealership offered him a job. Years later, in 2012, he was able to acquire the Ford dealership
21 in Sonora. (RT, Vol. VII, pp. 11:11-16, 14:14-15:5, 16:16-24.)

22 61. Respondent promotes a program called “Love Promise.” This constitutes Respondent’s
23 aspirations and behavior to be more than just a car company. It is Respondent’s effort to make the local
24 community and its members better through “love” and giving back. Respondent has invested hundreds of
25 millions of dollars in local communities including thousands of dollars in Sonora to provide help to local
26 community organizations. (RT, Vol. II, p. 10:8-16.) Respondent has given over \$30,000 to Sierra Senior
27 Providers in the Sonora community. (RT, Vol. II, p. 12:1-4.)

28 62. Respondent’s “Love Promise” is a philosophy. Subaru wants its retailers recognized for
the good works that they do in their territory. (RT, Vol. V, pp. 179:21-180:3.) There are five primary

1 areas that Respondent wants to support: (1) animals, (2) environment, (3) community, (4) health, and (5)
2 education. Respondent directs its employees to help retailers to improve their operations and be
3 beneficial within their communities (RT, Vol. V, p. 180:4-16.)

4 63. Respondent expects its retailers to do more than sell and service cars. Respondent wants
5 its retailers to give back to the community and to be pillars of the community. (RT, Vol. II, p. 62:14-22.)

6 64. The “Love Promise” is Respondent’s way to give back and to support the community.
7 Respondent’s phrase is: “Be more than a retailer,” and on the manufacturer side: “Be more than a car
8 company.” (RT, Vol. VI, p. 38:5-9.) Retailers are expected to uphold the “Love Promise” and to support
9 local charities and local need organizations in their own community. (RT, Vol. VI, p. 38:16-21.)

10 65. The “Love Promise” program has been very effective for Respondent. Every year from
11 Thanksgiving to New Year’s Day, Respondent has a program called “Subaru Share the Love.” In this
12 program, Respondent gives \$250 per unit sold to a local community or organization chosen by the
13 retailer. Respondent donates on behalf of the retailer to uplift the community around the retailer and to
14 make the retailer more marketable to potential customers. (RT, Vol. II, p. 11:6-24.)

15 66. Protestant has provided the Tuolumne/Sonora community with Subaru car donations and
16 other donations to continue building the good name of Subaru. (Ex. P-106.003.) While Protestant did not
17 display “Love Promise” awards, posters, charity photos, or partnership materials in Protestant’s facility,
18 Protestant did participate in Respondent’s “Love Promise” program. (RT, Vol. VII, pp. 81:23-82:2; Ex.
19 R-320.016.) Protestant participates in all of Respondent’s “Love Promise” events every year even though
20 Protestant is not eligible for an award because Protestant does not have a dedicated Subaru facility. (RT,
21 Vol. VII, p. 82:2-4.)

22 67. Protestant believes in the community involvements encouraged by Respondent. Protestant
23 makes efforts to get involved in the community and give back to the community. Selling cars is just a
24 small portion of what Protestant does in the community. Protestant’s success comes from its employees
25 and being involved with the community. (RT, Vol. VII, p. 24:17-25.) Protestant has become a staple of
26 the community and is a business that people depend upon when they need services. (RT, Vol. VII, p.
27 25:1-3.) Protestant loves to give back to the community and has done so from day one in its Ford store
28 and has continued to do so with its Subaru dealership. (RT, Vol. VII, p. 25:13-15.)

Findings Relating to Whether the Franchisee has Adequate Motor Vehicle Sales and Service Facilities, Equipment, Vehicle Parts, and Qualified Service Personnel to Reasonably Provide for the Needs of the Consumers for the Motor Vehicles Handled by the Franchisee and has been and is Rendering Adequate Services to the Public (§ 3061(e))

68. Protestant operates a dual sales facility representing both Ford and Subaru. (RT, Vol. V, p. 75:12-21.) Ford is a direct competitor of Subaru. In a dual facility, defection rates are higher. Defection is when a customer tries out a brand and then decides to leave that brand— they defect. A sales consultant is likely to be more interested in completing a sale of a car rather than specifically completing a sale of a Subaru. Usually, it does not make a difference to the sales consultant what kind of car they sell. (RT, Vol. II, pp. 29:24-30:6, 32:24-33:19.)

69. With a new stand-alone sales and service facility, Protestant would have Subaru dedicated sales personnel. There would be no overlap between Ford and Subaru sales personnel. (RT, Vol. VI, p. 36:15-23.) Sales potential is improved with an exclusive facility. There would be a significant jump in market share as exhibited by an increase in customers, which increases dealer profits, enabling the dealer to recoup its investment, resulting in happy customers. (RT, Vol. III, p. 106:14-25.) When a Subaru retailer operates a dual facility and then has an exclusive Subaru facility, Subaru sales, service, and net profit increase. (RT, Vol. II, p. 32:7-21.)

70. The value of Protestant’s investment in the franchise would increase with the intended investment in a dedicated Subaru facility. A facility combining both Subaru sales and service would enable Protestant to increase sales and customer satisfaction. (RT, Vol. VI, p. 135:11-20.)

71. Protestant agreed that its temporary Subaru location is deficient in specified areas and that these deficiencies would permit Respondent to refuse to approve Protestant’s application to become an authorized Subaru dealer. (Ex. J-005.014-015.)

72. Protestant’s current sales facility is not meeting the needs of its customers “because it’s a Ford dealership.” (RT, Vol. VI, p. 37:11-14.) It does not have any of the Subaru branding, elements, or the experience which Subaru’s customers expect. Respondent has done a tremendous job building its brand. Respondent’s customers expect to have a positive experience when they purchase a Subaru or have their Subaru serviced. (RT, Vol. VI, p. 37:21-25; Ex. R-320.)

73. Protestant’s current sales facility poorly represents the Subaru brand. There is very little to

1 reflect it as a Subaru dealership. The Ford brand is being represented in the dual facility. (RT, Vol. VI, p.
2 181:12-14.) The presence of Subaru cars on the lot does not necessarily show that the facility is a Subaru
3 dealer. (RT, Vol. V, p. 76:3-18.) Protestant could sell more vehicles with a better facility. (RT, Vol. VI,
4 p. 51:17-23.) Below is Exhibit R-320.001 depicting Protestant’s temporary Subaru sales facility, which is
5 devoid of any Subaru signage or characteristics that reflect a Subaru dealership:



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18 74. The entrance to Protestant’s Ford store is also the entrance to Subaru of Sonora. None of
19 Subaru’s brand elements are included in front of Protestant’s facility. (RT, Vol. II, p. 47:3-16; Ex. R-
20 320.) Only the Ford logo appears on the facility building. (RT, Vol. II, p. 49:13-21; Ex. R-320.)
21 According to Jason Leopold, Respondent’s District Sales Manager for the San Francisco Zone,
22 Protestant’s temporary sales facility “is in a Ford building...it’s probably one of the worst.” (RT, Vol. V,
23 p. 220:16-20.)

24 75. Protestant agreed with Ford to remove all Subaru related business operations from
25 Protestant’s Ford facility no later than August 1, 2018. (Ex R-323A, p. 1.) However, based on the picture
26 below, it does not appear that Protestant complied. Exhibit R-320.015 depicts a Subaru vehicle in
27 Protestant’s Ford showroom:

28 ///



INTERIOR DESIGN ELEMENTS
Sales/Showroom

1. Is more than one Subaru vehicle in the showroom, and are the vehicles clean and appropriately spaced from other vehicles and fixtures?*

No



2. Is the Subaru primary kit present in the showroom, current, and is it clean and in good working order?*

No

Yes Is the digital showroom touch screen present?



0 How many Performance Pylons are present, and where are they located? (0)



0 How many aluminum frames are present?



0 How many Wheel Feature Stands are present, and where are they located? (0)

76. Protestant’s Subaru facility is a split facility. A split facility is one that does not have physical continuity between a sales facility and a service facility. (RT, Vol. II, pp. 43:5-44:5.) Protestant’s service facility is located 1.88 air miles away from its sales facility. (Stipulation of Facts, ¶ 13.)

77. A split sales and service facility is a detriment. There is no cohesiveness between sales and service in Protestant’s split facility. (RT, Vol. V, pp. 216:20-217:1.) A split facility is inconvenient to customers. It is hard for salespeople to show new Subaru customers where they go for service. When sales and service are included within the same building, there is a potential for additional sales. (RT, Vol. V, pp. 217:2-218:2.)

78. Sales-to-service hand-off occurs when a customer purchases a vehicle and then the customer is turned over to the service advisors because they become the customer’s next contact. When

1 both sales and service operations are at the same facility, this process is easy. (RT, Vol. II, p. 52:16-25.)
2 The customer can be shown around the facility where service will take place, including where to go and
3 where to drive up. This does not happen with Protestant’s current service facility. (RT, Vol. II p. 53:1-5.)

4 79. Customers get a much better impression of the brand when all departments are within the
5 same building. It is easier for all employees to interact in a positive manner to provide the best service to
6 the Subaru customer when all operations are under the same roof. (RT, Vol. V, p. 72:5-11.) A unified
7 presentation of sales, parts and service is positive. It reflects well on sales and service, and the overall
8 business of the franchisee. A unified sales and service facility is preferred by Respondent. (RT, Vol. V, p.
9 195:14-19.)

10 80. Split sales and service facilities impact the retailer’s ability to provide quality customer
11 service. There are no other Subaru retailers in District 3 of the San Francisco Zone operating with split
12 facilities.²³ (RT, Vol. V, p. 73:6-9.) A unified building with appropriate brand imaging improves all
13 facets of a retailer’s business, including parts, service, and sales. (RT, Vol. V, p. 192:16-19.)

14 81. Richard Kelso, Parts and Service Manager for Respondent, now retired, opined that
15 Protestant’s separate service facility has a negative impact on its service performance when compared to
16 other Subaru dealerships in the San Francisco Zone. (RT, Vol. V, pp. 194:17-195:19.) Protestant’s
17 service facility does not display any Subaru brand elements that would normally be visible on a Subaru
18 facility. The service facility is non-compliant with Subaru standards and is not brand dedicated. The
19 facility “looks more like a garage.” (RT, Vol. II, p. 52:8-11; Ex. R-321.002.) Below is Exhibit R-
20 321.002, depicting the exterior of Protestant’s Subaru service facility:

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27
28 ²³ SOA defines a District as a “geographic subsection of a SOA Zone, which contains several Retailers’ AORs. Protestant is located in District 3 of the San Francisco Zone.” (Stipulated Glossary of Defined Terms, p. 3.)



SUB013195

RESPONDENT HEARING EXHIBIT R-321.002

82. Below is Exhibit R-321.004, depicting the entrance to Protestant's Subaru service facility:



SUB013197

RESPONDENT HEARING EXHIBIT R-321.004

83. Protestant's service facility is a poor representation of the Subaru brand. (RT, Vol. VI, p. 182:15-18; Ex. 321.002.) The service building needs additional signage and the customer waiting area needs to be improved. There is one sign that is not easy to see on the outside at the end of the building. The facility is confusing. Customers may find it difficult to figure out where to park. (RT, Vol. V, pp. 79:17-25 and 100:1-6.)

84. Below is Exhibit R-321.003, depicting the inside of Protestant's Subaru service facility:

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SUB013196

RESPONDENT HEARING EXHIBIT R-321.003

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12 85. The construction of a stand-alone new Subaru sales and service facility, which meets all
13 the MSOGs, would resolve the deficiencies of Protestant's remote service facility. (RT, Vol. V, pp.
14 197:23-198:4.)

15 86. Protestant does not have an exclusive Subaru Sales Manager who would be responsible for
16 knowing the Subaru programs. An exclusive Sales Manager would be able to receive feedback from
17 customers and provide them an exceptional customer journey. An exclusive Sales Manager focused
18 purely on Subaru would provide an increase in sales and customer retention. (RT, Vol. III, pp. 116:10-
19 117:4.)

20 87. Protestant has had difficulty maintaining two fully trained Subaru technicians. A lack of
21 trained technicians negatively impacts completion time for servicing a vehicle. (RT, Vol. V, pp. 101:17-
22 102:8.)

23 88. Respondent seeks to provide its sales and service customers an experience that is
24 completely and exclusively Subaru. Respondent works towards the customer being able to walk into a
25 Subaru facility and see, touch, and smell exclusively Subaru elements. There should be no other brands
26 involved in the customer's experience. The Subaru retailer should be exclusively selling and servicing
27 Subaru products and vehicles. The customer waiting lounges, showroom floor, and bathrooms should be
28 exclusively Subaru. (RT, Vol. II, pp. 27:11-21, 27:25-28:4.)

1 89. The absence of Protestant’s dedicated Subaru facility, compliant with Subaru’s MSOGs,
2 impacts potential sales. It impacts the execution of the “Love Promise.” (RT, Vol. III, p. 105:19-24.)
3 Respondent has done research on customers in brand-dedicated facilities versus non-brand-dedicated
4 facilities. Respondent found that a definite deficit occurs in customer retention, especially for service.
5 (RT, Vol. III, p 106:3-9.)

6 90. No evidence was offered to show that Protestant did not have adequate equipment or parts
7 needed to service Subaru vehicles.

8 **Findings Relating to Whether the Franchisee Fails to Fulfill the Warranty Obligations**
9 **of the Franchisor to be Performed by the Franchisee (§ 3061(f))**

10 91. No evidence was offered relating to whether Protestant failed to fulfill the warranty
11 obligations of Subaru of America.

12 **Findings Relating to the Extent of the Franchisee’s Failure to Comply**
13 **with the Terms of the Franchise (§ 3061(g))**

14 92. Having a dedicated Subaru facility is fundamental for representing Subaru. (RT, Vol.
15 VIII, p. 27:14-22.) The issue is more than just a building. It is about representing Respondent in a way
16 that Respondent can be proud. (RT, Vol. VIII, p. 20:7-12.) The dealership facility is the background of
17 the customer experience, which is critical to Respondent. (RT, Vol. II, p. 63:2-6.) Respondent wants its
18 dealership facilities to provide customers with the experience that customers deserve. (RT, Vol. II, pp.
19 62:14-63:6.)

20 93. Pursuant to paragraphs 17.1 and 17.1.21 of the Subaru Dealer Agreement, failure of
21 Protestant to complete the construction of the facility shall be considered sufficient cause for Respondent
22 to terminate the Agreement. (Ex. J-005.015, 038, 040.) Protestant has been the Subaru franchisee in
23 Sonora for four years and Respondent does not have proper representation. Servicing of Subaru vehicles
24 is being done in a separate, barn-like facility almost two air miles away from Protestant’s sales facility.
25 (RT, Vol. IX, p. 162:10-19.)

26 94. Protestant considered four different scenarios for construction of its Subaru facility: (1)
27 originally working with the architectural drawings of Respondent’s approved architect, Feltus Hawkins;
28 (2) locating to a Nissan facility in Stockton; (3) locating to the Chrysler-Jeep location in Sonora; and (4)

1 locating to property across the street from Protestant’s Ford facility. After Respondent issued the Notice
 2 of Termination, Protestant submitted to Respondent the Marlette Plans at the original intended site. None
 3 of Protestant’s efforts resulted in the issuance of the necessary building permit nor the construction of the
 4 Subaru facility. (RT, Vol. III, p. 43:1-8.)

5 95. The Subaru of Sonora facility is Protestant’s first attempt at having a building constructed
 6 from the ground up. (RT, Vol. IV, p. 191:1-15.) Respondent’s Facility Addendum established a timeline
 7 with benchmarks for completion of Protestant’s Subaru facility in Sonora. The original schedule provided
 8 19 months for Protestant to complete the new Subaru facility. Respondent expected Protestant to obtain
 9 building permits within seven months of signing the Facility Addendum and to complete the process of
 10 construction itself in the next 12 months. (RT, Vol. II, p. 97:3-15; Ex. J-005.015)

11 96. Respondent gave two extensions of the initial benchmarks allowing for a total of 34
 12 months for the construction of the facility to be completed. (Exs. J-005.001, J-005.015.) The following
 13 chart illustrates the original timeline and the first and final extensions:

14 **Subaru of Sonora Facility Construction Benchmarks and Extensions**

	Construction benchmarks	Original Timeline: December 26, 2016	First Extension: September 29, 2017	Final Extension: March 21, 2018
15	1. Completed Design Intent with Subaru approved architectural firm	Immediately after signing facility addendum	No change	May 31, 2018
16	2. Submit Construction Drawings for approval	No entry	No entry	September 30, 2018
17	3. Obtain permits for facility project	July 30, 2017	December 31, 2017	December 31, 2018
18	4. Break ground on facility project	August 31, 2017	January 31, 2018	January 31, 2019
19	5. Completed approved Facility	July 31, 2018	December 31, 2018	October 31, 2019

20 (RT, Vol. II, pp. 91:6-10, 97:7-19; Vol. V, p. 12:12-21; Exs. J-005.001, J-005.015.)

21 97. Some projects take longer time than others to be complete. Complex projects may take as
 22 long as four years. (RT, Vol. X, p. 16:2-7.)

23 98. Protestant engaged the services of Linda Francis, an architect with Dennis Flynn
 24 Architects, who has experience with car dealerships, to have a facility designed and built with the Subaru

1 brand. According to Ms. Francis, every project takes two to two and a half years to complete. (RT, Vol.
2 IV, pp. 12:17-13:2; 91:6-13; 109:15-24.) There are always local governmental rules and regulations
3 specific and unique to each project that must be addressed by the architect in preparing the design
4 drawings. (RT, Vol. IV, p. 11:10-14.)

5 99. Raymond Smit, Subaru Retail Market Development Manager for the San Francisco Zone,
6 currently has 16 facility projects in process. The average investment in a facility is about \$7.2 million.
7 (RT, Vol. II, p. 28:8-12.) The time to complete the construction of a facility depends on the property and
8 the aggressiveness of the retailer. Mr. Smit noted that a Subaru facility in Livermore has an estimated
9 nine-month completion period and a facility in Hayward has an estimated 14-month completion period.
10 (RT, Vol. III, pp. 118:12-119:20.)

11 100. Five months prior to Protestant executing the Dealer Agreement, Protestant hired Kevin
12 Strong, an architect, to prepare a rendering for the Subaru facility. Mr. Strong provided his renderings to
13 Protestant on October 10, 2016. Protestant then provided the renderings to Lisa Kline, Market
14 Representative Manager for Respondent. (RT, Vol. VII, pp. 29:5-12, 31:23-32:7.)

15 101. Ms. Kline responded that the Kevin Strong design placed the Subaru facility too close to
16 Protestant's existing Ford facility. (RT, Vol. VI, p. 177:8-18, Vol. VII, p. 32:18-24.) Ms. Kline directed
17 that Protestant's facility be located as far away from the Ford facility as possible. Protestant complied.
18 Mr. Prieto submitted a drawing showing the placement of the facility on Protestant's parcel farthest away
19 from the Ford facility. (RT, Vol. VII, p. 33:4-13; Ex. J-005.019.) Respondent indicated that this
20 placement of the facility was agreeable. (RT, Vol. VII, p. 34:15-18.)

21 102. Protestant had to agree that it would use the architectural firm of Feltus Hawkins to make
22 Protestant's design intent drawings. (RT, Vol. VII, p. 37:5-12.) Respondent required Protestant's
23 architectural plans be reviewed by Feltus Hawkins to assure that the plans are compliant with the
24 MSOGs. (RT, Vol. VIII, pp. 188:23-189:4.)

25 103. To commence the Design Intent process, Feltus Hawkins confirmed a site visit at
26 Protestant's location for March 27, 2017. (RT, Vol. VII, p. 37:13-21; Ex. P-103.001.) Feltus Hawkins
27 provided the design plans for Protestant's review on April 28, 2017. (Ex. P-103.005.)

28 104. Feltus Hawkins produced two sets of drawings. The first set dated April 27, 2017, and the

1 second set dated August 14, 2018. Both “site plans” show Protestant’s Subaru facility being placed on
2 Protestant’s parcel farthest from its Ford facility next to a hillside. The parcel has a drainage issue. (Exs.
3 P-103.005-006, R-545.001.) Respondent approved the Feltus Hawkins plans which depicted the building
4 as being situated on the parcel with the visible drainage issue. (RT, Vol. III, pp. 114:1-18, 115:1-8; Vol.
5 VI, p. 197:2-17; Ex. R-422.003.)

6 105. The Feltus Hawkins design elevations depict a two-story building. Protestant had not
7 intended to construct a two-story building. (RT, Vol. VII, pp. 41:13-42:2.) Protestant presented the Feltus
8 Hawkins drawings to Tuolumne County for review. (RT, Vol. VII, p. 42:16-25.) The County informed
9 Protestant that the proposed building was too massive with too many reflective materials. The building
10 did not blend with anything in the surrounding area. The building was not compliant with the East Sonora
11 Design Guidelines. (RT, Vol. III, p. 157:11-20; Vol. VII, pp. 43:18-44:5.) The County directed
12 Protestant’s attention to the drainage issue. (RT, Vol. VII, pp. 59:14-24.) Protestant informed Respondent
13 and Feltus Hawkins of the County’s concerns. (RT, Vol. VII, pp. 44:6-14, 48:14-22; Vol. VIII, p. 40:7-
14 10.)

15 106. Respondent works with the retailer to design a facility that looks like a Subaru facility.
16 When the local governmental entity requires changes in a facility’s design, Respondent will make the
17 changes necessary to have the facility be compliant with local requirements. (RT, Vol. II, p. 29:11-23.)
18 This is part of Subaru’s “Love Promise.” (RT, Vol. II, p. 145:2-12.)

19 107. On December 12, 2017, Ms. Kline acknowledged receipt of the design intent document
20 and informed Protestant that it would take four weeks for Feltus Hawkins to complete its review of the
21 Design Intent Documents. (Ex. R-330.001.)

22 108. On January 26, 2018, Protestant and Feltus Hawkins discussed building the facility at a
23 different location. (Ex. R-332.001.) On January 31, 2018, Mr. Smit requested information on the new
24 location and indicated that Respondent would review the information and that Protestant would be
25 advised of the next steps. (Ex. R-338.003-004.) The change of location required that the design process
26 start anew and required a new site visit and new Design Intent Documents. (Ex. R-338.001-002.) Feltus
27 Hawkins confirmed a site visit at Protestant’s property for March 13-14, 2018. (Ex. R-340.001-002.)

28 109. On April 9, 2018, Mr. Smit informed Feltus Hawkins that Protestant opted to go with the

1 original design intent adjacent to the Ford building. Mr. Smit requested Feltus Hawkins to start the
2 finalization of the design intent so that Protestant could move forward with the permitting process. (RT,
3 Vol. II, p. 116:3-12; Ex. 343.001-002.)

4 110. On May 13, 2018, Feltus Hawkins informed Protestant that it would be submitting the
5 plans for Protestant's facility on the following day. On May 21, 2018, Protestant requested that Feltus
6 Hawkins wait to complete the final version of the plans. However, Feltus Hawkins had already given the
7 plans to Respondent. (Ex. R-345.001-002.) Mr. Prieto blames his request to delay the Design Intent
8 Documents on his lack of understanding of the entire process. His understanding was that once the plans
9 were submitted that he could not go back and change them. (RT, Vol. IV, p. 190:5-10.)

10 111. Feltus Hawkins sent the proposed floor plan to Mr. Prieto for his review. Six days later, on
11 June 18, 2018, Feltus Hawkins asked if he had received the plans. On June 27, 2018, Mr. Prieto
12 responded that he had been busy finishing his Ford building and getting ready for Subaru. Mr. Prieto was
13 satisfied with the plans and had a meeting on the following day with the Sonora City Manager to go over
14 the plans. (Ex. R-349.001-004.) The design of Protestant's facility was changed from a two-story to a
15 one-story building. The facility was still scheduled to be completed by October 31, 2019. (RT, Vol. II,
16 pp. 119:11-19, 122:4-6.)

17 112. Protestant was not familiar with the process of obtaining a building permit. (RT, Vol. IX,
18 pp. 155:5-25, 157:19-158:3.) In July of 2018, County personnel advised Protestant that it needed further
19 help by someone who understood Protestant's land and how to maneuver through the various steps to
20 develop the property. The County recommended that Protestant hire Amy Augustine of Augustine
21 Planning Associates. She could assist Protestant navigate the intricacies of the planning and building
22 permit process. (Ex. P-106.002) Ms. Augustine is a land use planner who is currently the planning
23 director for the City of Angels Camp. Ms. Augustine has been the planning director for the City of
24 Sonora and a senior planner with Tuolumne County. (RT, Vol. III, p. 123:13-24.) Ms. Augustine has
25 worked on thousands of projects over a period of 30 years. (RT, Vol. IX, p. 84:18-25.)

26 113. The County makes the decision as to what technical studies will be required. (RT, Vol. III,
27 p. 126:13-17.) The County raised traffic, drainage, and landscaping issues. (RT, Vol. III, pp. 128:25-
28 129:7.)

1 114. When Protestant agreed to Respondent’s timeline, Protestant was unaware of the complex
2 obstacles that would be confronted. Working with Ms. Augustine, Protestant came to the realization that
3 Respondent’s timeline projections were unrealistic. (Ex. P-106.003.)

4 115. Protestant approved the Feltus Hawkins drawings dated August 14, 2018. (RT, Vol. II, p.
5 128:3-15; RT, Vol. III, p. 18:7-11; Exs. P-106.002, R-351.001-003, R-545.) The design looked like a
6 prototypical Subaru dealership. (RT, Vol. IV, pp. 98:25-99:6.) Protestant shared the Feltus Hawkins plans
7 with Ms. Augustine who responded that the proposed enormous building would not be approved. (RT,
8 Vol. VII, p. 64:9-15.) Ms. Augustine saw a conflict between the designs and what she anticipated that the
9 County would require. The design changes that had been made did not go far enough to meet what Ms.
10 Augustine anticipated to be County required changes. (RT, Vol. III, p. 139:7-20.)

11 116. Protestant’s project site has several natural issues including trees, slopes, drainage, and
12 traffic. (RT, Vol. IV, p. 91:18-21.) The visible drainage issue on Protestant’s parcel is an obstacle to
13 obtaining a building permit. (RT, Vol. IV, p. 100:16-101:12.) The bulk of Protestant’s project is located
14 within oak woodlands in a semi-rural setting. The East Sonora Design Guidelines call for minimizing
15 negative visual impacts of parking. The Feltus Hawkins drawings require revisions to incorporate
16 landscaping and the preservation of portions of the oak woodlands on site. (Ex. R-391.002.)

17 117. Feltus Hawkins designed a building that was not likely to be approved by the County.
18 Feltus Hawkins placed the building where Protestant was not going to be able to build. (RT, Vol. IX, p.
19 48:10-20.) The Feltus Hawkins drawings contributed to Protestant’s inability to comply with
20 Respondent’s deadlines set forth in Exhibit J-005, the Dealer Agreement and facility addendums. (RT,
21 Vol. IX, pp. 49:7-12 and 161:6-11.)

22 118. The design drawings of Feltus Hawkins placed Protestant’s facility next to a hillside
23 which would necessitate a lot of grading. Cars would be driving from the upper portion of the property
24 onto the roof of Protestant’s building. (RT, Vol. IV, pp. 94:19-95:1.)

25 119. When Ms. Francis looked at the Feltus Hawkins plans, she recognized that the project
26 was not a \$4 million project, but rather closer to a \$12 to \$13 million project. A Subaru dealer would not
27 be able to afford the rent that this design would cost. (RT, Vol. IV, pp. 95:2-11, 105:24-106:5.) The cost
28 of construction was going to exceed what a dealer could afford to maintain the facility. This project was

1 not a feasible design solution. (RT, Vol., IV, p. 98:6-19.)

2 120. Ms. Augustine expected the County to require design elements that were in neither the
3 drawings by Feltus Hawkins nor Ms. Francis, such as the use of stone, having dormers to break up large
4 roofs, and having cross-gable hip roofs. (RT, Vol. III, p. 161:9-16.)

5 121. At Protestant's request, Ms. Francis prepared elevations which were an improvement
6 from the Feltus Hawkins drawings. However, the concerns of the County still applied. (RT, Vol. III, pp.
7 161:9-18, 169:1-8.)

8 122. Ms. Augustine needed the County's Road Department to give her answers to questions
9 about traffic. She needed the County to inform her what further information was required and needed a
10 meeting with Caltrans to resolve the traffic issues. Until that was resolved, Ms. Augustine could not
11 move forward. (RT, Vol. III, p. 136:15-24.) Ms. Augustine also needed Protestant to hire a landscape
12 architect. (RT, Vol. III, pp. 136:25-137:2.) There were difficulties timely finding people who could
13 prepare drainage and provide landscaping assistance. (RT, Vol. III, p. 134:8-10.)

14 123. County rezoning discussions occur twice a year. This placed the project milestones off
15 track. (RT, Vol. III, p. 17:1-17; Ex. R-504.002.) On August 22, 2018, Protestant informed Mr. Smit of
16 potential delays in the project due to required rezoning of its parcel. Protestant's parcel had to be rezoned
17 from agricultural to commercial use. There were potential issues involving a Native American
18 Reservation and land upgrades for water retention systems. (RT, Vol. II, pp. 180:10-181:6; Exs. R-
19 490.001-002, R-355.001)

20 124. On September 14, 2018, Mr. Smit was concerned with Protestant considering alternate
21 locations for the Subaru facility. It appeared that the extended benchmark date of September 30, 2018, for
22 the submission of drawings for Subaru's approval would be missed. (RT, Vol. II, pp. 131:23-132:14; Ex.
23 R-355.)

24 125. On October 18, 2018, Ms. Augustine asked for a meeting as soon as possible with
25 Protestant, a representative from Respondent that could address building design, Protestant's project
26 engineer, and Protestant's landscape architect. Ms. Augustine needed dates from Protestant when the
27 necessary people would be available to meet with the County Community Development Department.
28 This proposed meeting could assist with the necessary County approvals being issued in May 2019.

1 (Exs. R-364, R-366.)

2 126. Protestant forwarded Ms. Augustine’s email to Mr. Smit. Mr. Smit replied that he could
3 come to Sonora but that he was not the expert in building design, so he offered to see if it were possible
4 to have Feltus Hawkins and the County meet by Skype. (Ex. R-366.001-002.)

5 127. On October 29, 2018, Mr. Smit requested that Protestant provide Respondent (1) exterior
6 elevations, (2) site plan, (3) floor plan, and (4) furniture plans by December 31, 2018. Mr. Smit reminded
7 Protestant to send him cost estimates for the facility by November 16, 2018. (Ex. R-368.) Mr. Smit
8 wanted an update on the permitting process with the local government agency. (RT, Vol. II, p. 152:8-18.)
9 Mr. Smit has no recollection of receiving a response from Protestant. (RT, Vol. II, pp. 152:25-153:2.)

10 128. On November 14, 2018, Ms. Augustine informed Respondent that a revised building
11 design consistent with East Sonora Design Guidelines was required before Protestant’s application for
12 approval could proceed. In addition, the County required a drainage study and Caltrans required a
13 transportation study. (Ex. R-391.001-002.)

14 129. The issues with the building design, traffic, drainage, and landscaping had to be
15 addressed. Additional time was needed. (RT, Vol. III, p. 168:4-19; Ex. R-391.)

16 130. Protestant submitted a pre-application to the County with proposed building elevations
17 and site plan as approved by Respondent. There were key design issues that had to be addressed before
18 moving forward with a revised application. The applicant’s response to the County’s comments would
19 provide the County with the information to be able to determine if the project is exempt from the
20 California Environmental Quality Act (CEQA). If the project is not exempt, the County would be
21 required to launch an extensive, minimum six-month, environmental review process to prepare a
22 Mitigated Negative Declaration.²⁴ Failure to sufficiently address these issues would extend the approval
23 date. (Ex. 391.001.)

24 _____
25 ²⁴ Pursuant to California Code of Regulations, title 14, section 15369.5, a “‘Mitigated negative declaration’ means
26 a negative declaration prepared for a project when the initial study has identified potentially significant effects on
27 the environment, but (1) revisions in the project plans or proposals made by, or agreed to by, the applicant before
28 the proposed negative declaration and initial study are released for public review would avoid the effects or
mitigate the effects to a point where clearly no significant effect on the environment would occur, and (2) there is
no substantial evidence in light of the whole of the record before the public agency that the project, as revised,
may have a significant effect on the environment.”

1 131. The size of the building has a bearing on whether the project would be CEQA exempt.
2 (RT, Vol. IX, p. 102:6-12.) The County likely will not find the project to be CEQA exempt. Therefore, it
3 is expected that Protestant will need a Mitigated Negative Declaration. (RT, Vol. IX, p. 82:18-23.)

4 132. On November 14, 2018, Beth Hinkle, Regional Market Development Manager for Subaru,
5 confirmed that the design intent was approved. Protestant now needed to submit construction drawings
6 which were to incorporate the changes as required by the County. (RT, Vol. II, p. 162:6-21; Ex. R-395.)

7 133. On December 11, 2018, Respondent had completed the review of Protestant’s construction
8 drawings. The changes that Respondent required were cosmetic and did not involve any major changes to
9 the submitted plans. (RT, Vol. II, pp. 167:20-168:3, Vol. IV, pp. 65:15-66:6; Ex. R-406.)

10 134. On December 12, 2018, Ms. Francis inquired of Mr. Smit whether Protestant’s team met
11 the requirements for the December 15, 2018, submittal and whether Protestant’s team needed to submit
12 the finished plans and furniture schedule and the few revisions that Feltus Hawkins had mentioned. Mr.
13 Smit requested that the furniture schedule be submitted before December 15. The other revisions could
14 be submitted before December 21, 2018. On December 17, 2018, Ms. Francis provided the revisions.
15 (Ex. R-410.001-002.) Respondent approved the final construction drawings as submitted by Ms. Francis.
16 (RT, Vol. II, p. 177:5-9.)

17 135. In January of 2019, Protestant balked at the cost of doing the surveying, the topography
18 work and the drainage work as being too costly. With the assistance of Ms. Augustine, Protestant sought
19 to refine the project scope so that it was not as expensive. (RT, Vol. III, pp. 178:13-179:23; Ex. R-
20 411.001; Ex. R-411.) On January 10, 2019, Ms. Augustine asked that there be a meeting with the County
21 to reduce the scope of the project. As of January 2019, the project scope had not been revised nor had the
22 drainage study been done. (RT, Vol. III, p. 180:2-10.)

23 136. On February 11, 2019, Ms. Augustine inquired of the County planning personnel if the
24 County would accept a General Plan Amendment and Site Development Permit application without
25 grading plans or landscaping plans. Ms. Augustine informed the County personnel that Protestant was
26 resistant to providing additional documentation at that time. (Ex. R-419.)

27 137. As of February 11, 2019, Ms. Augustine wanted to proceed with the formal application to
28 the County. (RT, Vol. III, p. 181:7-20.) She filled out the application but does not recall if the formal

1 application was submitted. (RT, Vol. III, pp. 182:7-19, 185:8-21.) Protestant’s application for the
2 building permit was not complete. It did not have a completed grading plan, a landscaping plan, or a
3 traffic study. These were needed before the County “could initiate any environmental documentation
4 [sic].” (RT, Vol. V, p. 61:9-24.) The County still needed detailed plans and the drainage issue had not
5 been resolved. Therefore, as of late September 2019, the building permit had not been issued. (RT, Vol.
6 VII, pp. 78:7-79:3.)

7 138. The County procedure to obtain a building permit is a two-step process. Protestant took
8 the first step to apply for approval. (RT, Vol. III, pp. 127:20-128:8.) Protestant completed preparing the
9 application for the second step but, for unexplained reasons, did not submit it to the County. (RT, Vol.
10 VII, p. 187:21-22.) After January 2019, the process just stopped. (RT, Vol. III, p. 162:1-2.)

11 139. On February 25, 2019, Mr. Prieto asked Ms. Francis to forward the plans for Subaru of
12 Sonora to Roebbelen Construction. (Ex. R-421.) On February 27, 2019, Paul Romito for Roebbelen
13 Construction inquired of Ms. Francis as to whether she had full architectural plans along with structural
14 drawings. Ms. Francis replied that the drawings that she had sent to Roebbelen Construction were not
15 construction documents. (Ex. R-424.001.)

16 140. On April 22, 2019, Roebbelen Construction conveyed a budget estimate to Protestant
17 showing a cost of construction for the building at \$7,615,371. Ms. Francis already had an estimate of
18 \$4.2 million from an experienced builder. Protestant sought a competitive cost estimate to get a proper
19 idea of the cost of the project. (RT, Vol. IV, pp. 75:3-17, 199:21-25; Ex. 433.001-004.) The cost estimate
20 was based on just the floor plan of the building itself. It did not consider any modifications to the site.
21 (RT, Vol. IV, pp. 139:19-140:2.) The drainage issue could increase the cost of construction by 20%. (RT,
22 Vol. IV, p. 140:3-11.)

23 141. After June of 2019, Ms. Francis ceased working on Protestant’s project. (RT, Vol. IV, pp.
24 86:21-87:6.)

25 142. Protestant has adequate financial means to fund the construction of a facility in accordance
26 with Respondent’s guidelines. (RT, Vol. VI, p. 85:17-22; Exs. R-308.009-010, R-309.014.) An
27 investment of \$7.6 million for construction of Protestant’s proposed new Subaru facility makes “business
28 sense.” (RT, Vol. VI, p. 138:4-15.)

1 143. On October 28, 2020, Marlette Associates, who had been engaged by Protestant, requested
2 that Dennis Flynn Architects, Ms. Francis' place of employment, to provide them with the drawings that
3 Ms. Francis had prepared. (RT, Vol. VIII, p. 63:18-21; Ex. R-462.001-002.)

4 144. Ronald Marlette has been an architect for 35 years. (RT, Vol. VIII, p. 52:22-25.) His
5 architectural firm handles commercial projects including car dealerships. Protestant hired Mr. Marlette to
6 draw up plans for the facility in Sonora. (RT, Vol. VIII, p. 53:19-23.) Mr. Marlette informed Protestant
7 that it would be difficult to use the upper portion of his property and that such a project simply did not
8 make sense. (RT, Vol. VIII, pp. 54:21-55:7.)

9 145. Mr. Marlette designed a facility to be placed on the parcel adjacent to Protestant's Ford
10 dealership. This is the most reasonable solution. (RT, Vol. VIII, pp. 55:23-56:3.) The estimated cost of
11 the Marlette facility is \$6,045,190. (RT, Vol. IX, p. 30:12-16.) Protestant is willing to commit to that
12 amount. (RT, Vol. IX, pp. 30:20-23, 31:15-20.)

13 146. After ALJ Nelsen requested additional testimony on whether a conditional decision
14 should be issued, Protestant renewed its efforts towards fulfilling its obligation to construct a stand-alone
15 MSOG-compliant facility. Mr. Prieto met with Ms. Augustine and Mr. Marlette to continue to move the
16 project forward. (RT, Vol. IX, pp. 23:19-24:1.)

17 147. Ms. Augustine prepared a spreadsheet illustrating a step-by-step timeline to obtain a
18 building permit and set forth a period of 29 months to obtain a building permit. With this timeline,
19 barring anything unforeseen, there should be no need to ask for an extension. (RT, Vol. IX, pp 28:15-19,
20 69:5-9; Ex. P-110.) This timeline does not include the construction portion of the project. (RT, Vol. IX,
21 pp. 68:24-69:3; Ex. P-110.)

22 148. On April 5, 2021, Protestant submitted a new application to the County to rezone its parcel
23 with the drainage issue to commercial use. Rezoning is needed prior to obtaining a building permit. (RT,
24 Vol. IX, pp. 46:9-23, 76:10-21.) This new application is different than the one that Protestant had
25 prepared earlier. (RT, Vol. IX, pp. 47:17-21, 69:10-18.) The County will examine the application for
26 completeness and gather input from relevant agencies. This process could take up to two and a half
27 months. (RT, Vol. IX, pp. 29:21-30:1.)

28 149. On April 16, 2021, Protestant hired a traffic consultant. (RT, Vol. IX, p. 69:24-25.) The

1 traffic consultant will take 12 weeks to complete the draft traffic study. The traffic study is now
2 underway at a cost of \$24,250. (RT, Vol. IX, pp. 30:2-4, 70:1-5, 94:7-16.) Protestant is in the process of
3 hiring a civil engineer. It is anticipated that the drainage study will take 12 weeks. (RT, Vol. IX, pp. 70:6-
4 9, 95:13-18.)

5 150. Anticipating that the County will proceed with issuing a Mitigated Negative Declaration,
6 Ms. Augustine's timeline includes seven months to go through the CEQA process. (RT, Vol IX, pp.
7 70:22-25, 71:2-9.)

8 151. Any design changes required by the County will be sent to Respondent for approval. After
9 the changes have been made, the matter goes to the planning commission and then to the Board of
10 Supervisors for approval of the rezoning portion of the application. (RT, Vol. IX, p. 71:17-20.)

11 152. Upon resolution of the planning process, the next step is to apply to the County Building
12 Department for the issuance of a building permit. This may take 18 months. (RT, Vol. IX, p. 71:17-23.)
13 Protestant first prepares all final construction drawings and documents, and then submits them to the
14 building department. Once required revisions are completed, the building department will issue the
15 permit. Protestant will then issue a contractor's bid, award the bid within one month, and, weather
16 permitting, will begin construction. (RT, Vol. IX, p. 72:7-20.)

17 153. As indicated above, the anticipated maximum amount of time to get to the point of
18 beginning construction is 29 months. (RT, Vol. IX, pp. 73:7-10, 74:2-6.) The timeline could be shortened
19 by six months if the County abandons its requirement of a Mitigated Negative Declaration. (RT, Vol. IX,
20 p. 73:21-23.) Any significant changes required by Respondent will start the application timeline over
21 again. (RT, Vol. IX, pp. 74:20-22, 75:2-5.)

22 154. Physical construction of the facility will take about a year to finish. (RT, Vol. IX, p. 36:8-
23 10.) An aggressive construction schedule is eight months. The outside timeline is 14 months. (RT, Vol.
24 IX, pp. 142:6-21, 148:20-22.)

25 155. Ms. Augustine's current timeline (Exhibit P-110) is longer than her reactive timeline
26 (Exhibit R-359.004) that she had prepared prior to Respondent's issuance of the Notice of Termination.
27 With the reactive timeline, Ms. Augustine was trying to conform to a timeline prepared by Respondent
28 that was ambitious and not achievable. However, starting without an imposed timeline, Ms. Augustine

1 recommends the 29-month timeline as set forth in Exhibit P-110. (RT, Vol. III, pp. 131:17-20, 132:15-21;
2 Vol. IX, pp. 88:17-89:14.)

3 156. Ms. Augustine researched the Tuolumne area for suitable developed and undeveloped
4 parcels that have the correct zoning. There are no suitable parcels. (RT, Vol. IX, p. 110:3-11.) Once a
5 proposed franchisee and parcel location could be determined, the timeline for the remainder of the
6 process would be the same as Ms. Augustine’s timeline. (RT, Vol. IX, pp. 107:20-108:3; Ex. P-110.)

7 157. Protestant is willing to commit to the timelines as outlined by Ms. Augustine. (RT, Vol.
8 IX, p. 32:3-7; Ex. P-110.) Protestant is willing to do anything that is needed to complete the Subaru
9 facility. Protestant is willing to hire anyone that is needed and is willing do so efficiently and without
10 delay. (RT, Vol. IX, p. 50:9-12.)

11 158. Respondent received the December 3, 2020, Marlette Plans for approval on December 8,
12 2020. (RT, Vol. VI, p. 220:1-6; Vol. IX, pp. 11:13-20,12:24-13:6; Vol. X, p. 22:9-17; Ex. R-466.001-
13 002.) Mr. Marlette prepared his plans to be compliant with the 2018 MSOGs. (RT, Vol. VIII, pp. 60:11-
14 62:1, 117:1-4; Ex. R-466.)

15 159. For current construction of Subaru dealership facilities, Respondent requires compliance
16 with the 2030 MSOGs. (RT, Vol. IX, pp. 168:9-12, 169:5-6.)

17 160. On January 6, 2021, Ms. Hinkle asked Protestant to provide additional square footage
18 information, vehicle parking information, and informed Protestant that Respondent required a three-lane
19 service drive. (RT, Vol. IX, pp. 13:22-14:14.) Protestant provided Ms. Hinkle the requested information.
20 (RT, Vol. IX, pp. 14:15-23, 15:4-7.)

21 161. Mr. Marlette needs three weeks to make modifications to his architectural drawings to
22 accommodate the request to add a third service drive. (RT, Vol. IX, p. 115:9-17.) No additional
23 modifications have been made by Respondent to the Marlette Plans. (RT, Vol. X, p. 85:21-25.)

24 162. As of April 26, 2021, Respondent has not approved the Marlette Plans. (RT, Vol. IX, p.
25 22:18-21.) Once Mr. Marlette has approvals from Respondent, Protestant, and the County, it will take
26 three months to complete the construction documents. (RT, Vol. IX, pp. 116:11-17, 149:10-13.) If
27 Respondent requires changes to the construction drawings, Mr. Marlette may need an additional month to
28 make the changes. (RT, Vol. IX, pp. 116:18-117:11.)

1 163. If the protest is overruled, Respondent will seek to find a candidate that has the necessary
2 capital, customer service experience, and qualifications to be appointed a Subaru dealer. The dealer
3 candidate would also need to have an existing facility or the ability to construct a facility, which would
4 encompass all facets of the construction process with which Protestant is currently involved. (RT, Vol.
5 IX, p. 193:8-25.)

6 164. If Respondent selects a new franchisee, conceivably the timeline would be longer. If a
7 new proposed franchisee is selected who does not currently have property, there would be additional time
8 needed to either buy or lease property zoned for auto commercial use. (RT, Vol. IX, p. 109:8-13.)
9 Additional studies would be required if a parcel were picked that has no history of being built upon. (RT,
10 Vol. IX, 107:9-19, 108:22-109:7.)

11 165. In contrast, Protestant has the property and is at the point of having design plans drafted
12 by Mr. Marlette in addition to having submitted the initial application to the County for rezoning. (RT,
13 Vol. IX, pp. 46:9-23, 76:10-21, 193:8-184:11.)

14 166. Respondent's preference is to have a timeline for groundbreaking and construction of the
15 facility with a grand opening rather than termination of the franchise. (RT, Vol. VIII, pp. 27:14-22, 45:4-
16 6.) But Respondent has lost faith and trust in Protestant's ability to follow through with construction of
17 the facility. (RT, Vol. VIII, p. 41:24-25.)

18 167. The Subaru franchise is one of the fastest growing brands. (RT, Vol. VI, p. 63:5-9.) If
19 Protestant's franchise is terminated, Subaru would put in another retailer that would fulfill the obligation
20 for the facility and represent the brand in the market. (RT, Vol. VI, p. 62:6-9.) Respondent does not have
21 a replacement dealer in Sonora, nor does it know a dealer candidate with a facility that would be willing
22 to add the Subaru franchise in Sonora. (RT, Vol. IX, pp. 190:12-25, 191:7-13.) Respondent gets a call at
23 least once a month from non-Subaru retailers as well as current Subaru retailers looking for Subaru points
24 that may available. If the termination of Protestant's franchise becomes effective, a new franchisee would
25 likely be selected "quickly." (RT, Vol. VI, p. 190:11-25.)

EXISTING CIRCUMSTANCES

26
27 168. The list of good cause factors set forth in Section 3061 for termination of a franchise is not
28 exclusive. The existing circumstances must be considered, including, but not limited to, the seven factors

1 specifically set forth above. Among the existing circumstances is the fact that both parties agree that a
2 dedicated Subaru sales and service facility is needed in Sonora. The only issue is whether Respondent
3 should be permitted to terminate Protestant's franchise for the failure of Protestant to provide such a
4 facility within the timeframe originally agreed upon and subsequently extended. Inherent in this issue is
5 the need to determine whether Protestant has acted reasonably in attempting to construct such a facility,
6 whether Protestant's failure to meet the time requirements should be excused due to the existing
7 circumstances, and whether Respondent should be permitted to terminate Protestant's franchise only if
8 Protestant fails to erect such a dealership facility within time limitations that more realistically take the
9 existing circumstances into consideration.

10 ANALYSIS

11 Amount of Business Transacted by the Franchisee, as Compared 12 to the Business Available to the Franchisee (§ 3061(a))

13 169. Respondent has not sustained its burden of proof in this regard. The preponderance of the
14 evidence in this matter establishes that the amount of business transacted by Protestant as compared to
15 the business available to Protestant is adequate.

16 Investment Necessarily Made and Obligations Incurred by the 17 Franchisee to Perform its Part of the Franchise (§ 3061(b))

18 170. Respondent has sustained its burden of proof in this regard. Although, Protestant invested
19 \$1.5 million for Blue Sky in the Subaru franchise and about \$100,000 in other assets, it has yet to make
20 the major investment associated with constructing the permanent facility.

21 Permanency of the Investment (§ 3061(c))

22 171. Respondent has sustained its burden of proof in this regard. The preponderance of the
23 evidence establishes that Protestant's investment in its franchise operations is not permanent. Protestant's
24 sales and service facilities are split facilities in temporary locations. Protestant may terminate the lease of
25 its service facility with a 90-days' notice.

26 Whether it is Injurious or Beneficial to the Public Welfare 27 For the Franchise to be Modified or Replaced or the 28 Business of the Franchisee Disrupted (§ 3061(d))

172. Respondent has not sustained its burden of proof in this regard. The preponderance of the

1 evidence fails to establish that termination of Protestant’s franchise would be beneficial to the public
2 welfare.

3 173. Protestant is a minority-owned retailer that has become a staple of the Sonora community.
4 Mr. Prieto, on behalf of Protestant, made efforts to get involved in and to give back to the community. He
5 supports the community involvement encouraged and advocated by Respondent. Protestant’s
6 contributions to local community needs would decrease upon the termination of its Subaru franchise.

7 174. Through its “Love Promise” program, Respondent donated thousands of dollars to Sonora
8 community organizations. Respondent expects its franchisees to support local charities and meet the
9 needs in their own community. Respondent’s contributions to a community are connected to the
10 operations of its local Subaru dealer. Without a local franchisee selling Subaru vehicles, there would not
11 be the same level of community support in Sonora, until Respondent replaces Protestant with another
12 Subaru dealer.

13 **Whether the Franchisee has Adequate Motor Vehicle**
14 **Sales and Service Facilities, Equipment, Vehicle Parts, and Qualified Service**
15 **Personnel to Reasonably Provide for the Needs of the Consumers**
16 **for the Motor Vehicles Handled by the Franchisee and has been and**
17 **is Rendering Adequate Services to the Public (§ 3061(e))**

18 175. Respondent has sustained its burden of proof in this regard. The preponderance of the
19 evidence establishes that Protestant does not have adequate sales and service facilities, its temporary sales
20 location is deficient, and it does not have an exclusive Subaru Sales Manager. Having an exclusive
21 Subaru Sales Manager would increase sales and increase customer retention.

22 176. Protestant does not have enough service personnel to adequately meet and satisfy the
23 needs of Subaru of Sonora customers. Protestant commonly does not have a proper number of fully
24 trained technicians. Respondent did not offer evidence to show that Protestant did not have adequate
25 equipment or parts to service Subaru vehicles.

26 177. Protestant’s temporary facilities poorly represent the Subaru brand. With an exclusive
27 Subaru facility, Protestant would have Subaru dedicated sales personnel resulting in increased sales and
28 service activity. A building combining both sales and service would enable Protestant to improve its sales
and customer satisfaction. The absence of the intended MSOG-compliant facility impacts Protestant’s
ability to meet the needs of Subaru consumers in Sonora.

1 **Whether the Franchisee Fails to Fulfill the Warranty Obligations**
2 **of the Franchisor to be Performed by the Franchisee (§ 3061(f))**

3 178. Respondent has not sustained its burden of proof in this regard. No evidence was offered
4 relating to whether Protestant failed to fulfill the warranty obligations of SOA.

5 **Extent of the Franchisee's Failure to Comply with**
6 **the Terms of the Franchise (§ 3061(g))**

7 179. Respondent has not sustained its burden of proof in this regard. The preponderance of the
8 evidence establishes that Respondent did not create reasonable timelines for Protestant to complete its
9 stand-alone, MSOG-compliant Subaru sales and service facility in Sonora, nor did it take into
10 consideration the unique characteristics of Protestant's parcels or the permit requirements of the County.
11 Respondent's timelines were not capable of being met due to factors outside of Protestant's control.
12 Complex facility projects may take four years to complete. Protestant's project is complex.

13 180. A dedicated Subaru facility is fundamental for representing Respondent. The evidence is
14 unrefuted that Protestant failed to construct a dedicated Subaru sales and service facility by the final
15 deadline of October 31, 2019.

16 181. Respondent has experience requiring its franchisees to build dedicated Subaru facilities.
17 Currently, in Subaru's San Francisco Zone, there are 17 ongoing facility projects. In contrast, this was
18 Mr. Prieto's first effort to build a facility from the ground up. He was not aware that the planning and
19 permitting process alone could take up to 29 months.

20 182. Respondent's timeline for the construction of Protestant's Subaru facility does not reflect
21 consideration of the intricacies of land use requirements and planning procedures in Tuolumne County.
22 Respondent's timeline does not allow for the fact that the County Planning Commission only meets twice
23 a year.

24 183. When Respondent established the original timeline for completion of the facility project,
25 Protestant was not aware that Respondent's timeline was unrealistic and not achievable. Even the
26 extensions of time granted by Respondent were not sufficient due to the difficulties encountered and the
27 circumstances that arose.

28 184. Respondent's approved architect, Feltus Hawkins, prepared two sets of drawings,

1 separated by over a year. Both sets of drawings show Protestant's Subaru facility on Protestant's parcel
2 farthest from its Ford facility as had previously been required by Respondent. This parcel has a drainage
3 issue which is an obstacle to obtaining a building permit.

4 185. Feltus Hawkins failed to prepare a design intent that was compliant with the County's
5 guidelines. Instead, it designed a massive two-story structure that would not be approved by the County.

6 186. The actions of Respondent, including Feltus Hawkins, contributed to Protestant's inability
7 to comply with Respondent's deadlines and Protestant's efforts to successfully proceed with the
8 necessary permitting and planning processes.

9 187. Protestant acted in good faith in its efforts to satisfy its contractual obligations to construct
10 the facility. Unsatisfied with the unworkable design intent prepared by Feltus Hawkins, Protestant
11 engaged Ms. Francis to prepare suitable architectural drawings on Protestant's parcel placing the building
12 further away from the source of the drainage. Later, Protestant engaged Mr. Marlette to prepare
13 additional architectural drawings on Protestant's parcel closer to its Ford facility. Protestant met with
14 County personnel for informal review of the proposed project.

15 188. In July of 2018, approximately a year and a half after Respondent established the first
16 timeline for completion of the facility, it was County personnel, and not Respondent, who advised
17 Protestant that Protestant needed help from a planner who understood Protestant's land and how to
18 maneuver through the various steps to develop the property. Protestant hired Ms. Augustine.

19 189. Respondent currently seeks to have the Subaru of Sonora facility fully completed in two
20 years. The evidence does not support that this is possible. Even if a new franchisee could be chosen
21 quickly and a property site located, the best evidence from a knowledgeable professional planner is that
22 29 months may be needed to obtain a building permit once Respondent approves the construction plans
23 and an additional 8 to 14 months for the physical construction to be completed. No benefit would inure to
24 Respondent by replacing Protestant with a new franchisee. On the other hand, Protestant would suffer a
25 forfeiture of its monetary investment and other financial expenditures as well as its time and efforts to
26 date if its franchise is terminated.

27 190. More recently, Protestant has made substantial efforts toward the permitting and planning
28 process by re-engaging Ms. Augustine for planning services and Mr. Marlette for drawing architectural

1 plans, contracting for a traffic study, and preparing to contract for a drainage study. Protestant has also
2 filed a new application to rezone its property. Despite being requested to do so, Respondent would not
3 review the Marlette Plans for approval. Without approved plans, Protestant is unable to move forward
4 with this project.

5 191. Accordingly, a Proposed Decision setting forth specific conditions assuring performance
6 of the franchise agreement between Protestant and Respondent and allowing the existing dealership to
7 continue to serve the public, provide employment and generate benefits to the community until the new
8 facility is erected is appropriate.

9 **DETERMINATION OF ISSUES**

10 192. Respondent has not established that Subaru of Sonora is not conducting an adequate
11 amount of business as compared to the business available to it. (Section 3061(a))

12 193. Respondent has established that Subaru of Sonora has not made the investment necessary
13 and incurred the obligations necessary to perform its part of the Subaru franchise. (Section 3061(b))

14 194. Respondent has established that Subaru of Sonora's investment is not permanent. (Section
15 3061(c))

16 195. Respondent has not established that it would be beneficial to the public welfare for the
17 franchisee to be replaced. (Section 3061(d))

18 196. Respondent has established that Protestant does not have adequate motor vehicle sales and
19 service facilities, and qualified service personnel to reasonably provide for the needs of the consumers for
20 the motor vehicles handled by the franchisee and is not rendering adequate services to the public. No
21 evidence was presented to indicate Protestant was lacking equipment needed for Subaru service or
22 lacking Subaru parts. (Section 3061(e))

23 197. Respondent has not established that Protestant failed to fulfill the warranty obligations of
24 SOA to be performed by Protestant. (Section 3061(f))

25 198. Although Respondent has established that Protestant failed to construct a Subaru facility
26 as required by the franchise, it has been determined that the timelines in the franchise for the construction
27 of the dedicated Subaru facility were not reasonable under the circumstances. Respondent has not
28 established that the "extent" of Protestant's failure to comply with such timelines was an unexcused

1 material breach of the contract sufficient to constitute good cause to terminate the franchise.²⁵ (Section
2 3061(g))

3 **PROPOSED DECISION**

4 Based on the evidence presented and the findings herein IT IS HEREBY ORDERED THAT the
5 protest in *Prieto Automotive, Inc., a California Corporation, dba Subaru of Sonora v. Subaru of America,*
6 *Inc.*, Protest No. PR-2648-19, is conditionally sustained.²⁶ Respondent has not met its burden of proof
7 under Vehicle Code Section 3066(b) to establish under the existing circumstances that there is good
8 cause to terminate Protestant’s Subaru franchise. However, the unexcused failure of Protestant to
9 substantially comply with the conditions listed below shall constitute good cause for Respondent to
10 terminate the franchise.

11 The Protest is sustained upon the following conditions.

12 1. Within 30 days of the issuance of the final Board Decision, Protestant shall apply for and
13 deliver to SOA an irrevocable Letter of Credit in the amount of \$750,000 from the Oak Valley
14 Community Bank (or other bank of good repute and satisfactory to SOA) for assurance of construction.

15 2. Throughout the entire construction process (including planning and permitting) until
16 completion of Protestant’s dedicated Subaru facility, Protestant shall, by the 5th of each month, provide
17 Mr. Smit or another designated SOA representative with a written status report including the following:

- 18 a. The current status of the project;
- 19 b. The benchmark, items or activities Protestant completed towards the planning and
20 permitting process, or construction, in the prior month;
- 21 c. The benchmark, items or activities that are to be completed in the current month;
- 22 d. The next benchmark, item or activity that is to be completed and the anticipated date of

23
24
25 ²⁵ Section 3061(g) requires the Board consider “Extent of franchisee’s failure to comply with the terms of
the franchise.” (Emphasis added.)

26 ²⁶ Subdivision (a) of Section 3067 empowers the Board to issue conditional decisions. This section provides in
27 part: “The decision shall sustain, conditionally sustain, overrule, or conditionally overrule the protest. Conditions
28 imposed by the board shall be for the purpose of assuring performance of binding contractual agreements between
franchisees and franchisors or otherwise serving the purposes of this article.” The conditions are intended to
recognize the obligation of Protestant to meet its contractual agreements and also protect the public interest in
maintaining the dealership as an ongoing enterprise, provided that the new facility is constructed as required.

1 completion;

2 e. Any benchmark, items or activities that are or will be delayed, or have not been completed
3 by the required date of completion, including the cause of the delay;

4 e. Whether a consultant or contractor is required, and, if so, whether the consultant or
5 contractor has been timely engaged;

6 f. Whether Protestant has discharged or refused to timely hire a consultant or contractor that
7 had been recommended by Ms. Augustine or Mr. Marlette;

8 g. Whether Protestant has discharged Ms. Augustine from further planning services, or Mr.
9 Marlette from further architectural services, and the reason for such discharge; and

10 h. Any information as may be reasonably requested by Respondent pertaining to the progress
11 of the facility project.

12 3. These status reports in Paragraph 2 shall also be emailed to counsel for Protestant and
13 counsel for Respondent by the 5th of each month.

14 4. Protestant shall efficiently and without delay perform and complete any action that is
15 within its control and is required to be done for the planning and permitting processes and physical
16 construction of the facility.

17 5. The timeline for the planning and permitting process to construct the facility on
18 Protestant's project site shall not exceed a maximum of 29 months after Respondent approves
19 Protestant's construction plans. The timeline as set forth by Ms. Augustine in Exhibit P-110, is
20 summarized below:

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PLANNING AND PERMITTING TIMELINES

No.	Timeline in Months after Plans are Approved by SOA	Responsible Party	Task
1	Month 1	Subaru of Sonora	Submit application to the County.
2	Months 1-2	County/Caltrans	County determines completeness.
3	Months 1-3	County/Caltrans	County gathers input from agencies.
4	Month 1	Subaru of Sonora	Hire traffic consultant
5	Months 1-4	Subaru of Sonora	Traffic study to be completed.
6	Month 1	Subaru of Sonora	Hire civil engineer (drainage study).
7	Months 2-4	Subaru of Sonora	Drainage study completed.
8	Months 4-5	County/Caltrans	County and Caltrans respond to the studies.
9	Months 6-7	Subaru of Sonora	Revise studies or design in response.
10	No time designated	SOA	Approves design changes, if necessary.
11	Months 8-14	County/Caltrans	County prepares the initial study/mitigated negative declaration (CEQA process)
12	Months 15-16	County/Caltrans	County prepares Rezoning and takes to Board of Supervisors.
13	Month 17	County/Caltrans	County issues Site Development Permit and Use Permit.
14	Months 18-20	Subaru of Sonora	Prepares final building, landscape, design plans.
15	Months 21-23	County/Caltrans	County Building Department review, requests revisions.
16	Months 24-25	Subaru of Sonora	Revises plans.
17	Month 26	County/Caltrans	County Building Department issues permit.
18	Month 26	Subaru of Sonora	Issues for bid.
19	Month 27	Subaru of Sonora	Bid review/award
20	Month 27	Subaru of Sonora	Construction may commence subject to weather
21	Month 28 (?)	Subaru of Sonora	Tenant fixturation
22	Month 29	Subaru of Sonora	Contingency time

Any delay due to action or inaction of the County or Caltrans shall have the effect of extending the timelines for the performance due by Protestant for the time commensurate with the delay attributable to the County or Caltrans.

6. Upon Protestant obtaining a building permit on or before 29 months from Respondent’s approval of Protestant’s construction plans, Protestant thereafter shall complete the construction of the dedicated Subaru sales/service facility compliant with the 2030 MSOGs in a period not to exceed 14

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1 months.²⁷

2 7. In the event it is Protestant that fails to substantially satisfy any of the conditions outlined
3 above within the required times, Respondent shall provide written notice to Protestant and its counsel
4 detailing Protestant’s alleged non-compliance. Protestant shall be provided at least 30 days (from receipt
5 of the notice) to cure or substantially perform the required obligation or rebut the alleged non-
6 compliance. If the parties cannot reach an agreement or resolve Protestant’s alleged non-compliance, all
7 of the above deadlines shall remain in place pending further order of the Board. If counsel cannot agree,
8 then counsel shall notify the Board’s legal staff to schedule a Mandatory Settlement Conference with
9 Administrative Law Judge Marilyn Wong in an attempt to resolve this issue prior to bringing it before the
10 Board. If Judge Wong is unavailable then another Administrative Law Judge will be assigned by the
11 Board.

12 8. If all attempts to reach a resolution of the alleged non-compliance have failed, within 60
13 days after the Mandatory Settlement Conference, Respondent shall file and serve a motion with
14 supporting exhibits and declarations requesting the Board find that the conditions have not substantially
15 occurred or been excused and that the Board should issue a Decision overruling Protest No. PR-2648-19
16 *Prieto Automotive, Inc., a California Corporation, dba Subaru of Sonora v. Subaru of America, Inc.*

17 a. Protestant shall file and serve its opposition to Respondent’s motion with exhibits and
18 supporting declarations, within 30 days after receipt of Respondent’s motion.

19 b. Respondent shall file and serve its Reply within 15 days after receipt of Protestant’s
20 opposition.

21 c. Documents shall be filed and served via email to the Board and the parties by 3:00 p.m.
22 (Pacific Time). The Board’s e-mail address is nm vb@nm vb.ca.gov.

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27 _____
28 ²⁷ This assumes no difficulties with material acquisition or labor caused by the COVID-19 pandemic or other
circumstances beyond the control of Protestant.

1 d. After briefing, this matter shall be agendized for Public Member consideration at the
2 Board's next regularly or specially scheduled meeting.

3
4
5 I hereby submit the foregoing which
6 constitutes my Proposed Decision in the
7 above-entitled matter, as the result of a
8 hearing before me, and I recommend this
9 Proposed Decision be adopted as the decision
10 of the New Motor Vehicle Board.

11 DATED: August 19, 2021

12 By: 
13 _____
14 DWIGHT V. NELSEN
15 Administrative Law Judge
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27 Steve Gordon, Director, DMV
28 Ailene Short, Branch Chief,
Occupational Licensing, DMV

1 **MICHAEL M. SIEVING, Esq.** (SBN 119406)

2 Attorney at Law

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5 Attorney for Protestant PRIETO AUTOMOTIVE, INC.
6 dba SUBARU OF SONORA

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

10
11 In the Matter of the Protest of:

12 PRIETO AUTOMOTIVE, INC., dba
13 SUBARU OF SONORA,

14 Protestant,

15 v.

16 SUBARU OF AMERICA, INC.,

17 Respondent.
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Protest Number: PR-2648-19

**PROTESTANT'S OPENING POST-
HEARING BRIEF**

Hearing Date: February 22, 2021

Hearing Time: 10:00 a.m. *via Zoom*

ALJ: Dwight V. Nelsen

1 Protestant PRIETO AUTOMOTIVE, INC., dba SUBARU OF SONORA (“Protestant” or
2 “Prieto Automotive”) hereby files its Opening Post-Hearing Brief in the above-entitled matter pursuant
3 to the Order Establishing Post-Hearing Briefing Schedule issued by the New Motor Vehicle Board (the
4 “Board”) in this matter dated March 4, 2021.

5 **BACKGROUND**

6 Prieto Automotive is a successful, family-owned business that owns and operates new motor
7 vehicle dealerships in California located in Fresno, California (Mazda and Mitsubishi, at separate
8 locations), Sanger, California (Chevrolet, Buick and GMC), and Sonora, California (Ford and Subaru).
9 Prieto Automotive is owned by Manuel Prieto and his wife Ramona “Mona” Rios Llamas.

10 After months of negotiation, Prieto Automotive was able to purchase the assets of the Subaru
11 franchise in the Sonora area from an existing dealer. This was confirmed on July 29, 2016 when Prieto
12 Automotive entered into an Asset Purchase Agreement (“APA”) with the then-current area Subaru
13 dealership Spiryl Dusset, LP (“Spiryl”). The APA provided for Prieto Automotive to purchase the
14 assets of Spiryl related to its Subaru dealership operations. The APA was conditioned upon the
15 approval of the transaction by Respondent SUBARU OF AMERICA, INC., (“Respondent” or “SOA”).
16 The signed APA was submitted to SOA for approval on or about August 1, 2016, pursuant to the
17 provisions of the Subaru franchise between Spiryl and SOA, as well as various provisions of the
18 Vehicle Code, including Section 11713.3 (d)(1)).

19 A lease or sale of the Spiryl facility was not part of the APA transaction, and it was understood
20 by all parties (including SOA) that Prieto Automotive would have to relocate the dealership and to
21 ultimately find or build a facility for Subaru operations. At the time, the only other new vehicle
22 dealership that Prieto Automotive owned, operated or otherwise controlled in Sonora was its Ford store.
23 SOA approved the franchise transfer and issued a franchise for Prieto Automotive to operate a Subaru
24 as a temporary sales facility at the Ford dealership facility operated by Prieto Automotive, with Subaru
25 vehicle service to be conducted at a remote facility leased on behalf of Prieto Automotive.

26 On December 26, 2016, Prieto Automotive entered into a facility addendum with SOA which
27 provided for Prieto Automotive to a construct a stand-alone Subaru facility. The initial plan was to
28 locate the Subaru dealership on property adjacent to the Ford facility. The addendum contained
specified time deadlines for accomplishing the mutual goal of construction of a stand-alone Subaru

1 facility. The construction deadlines were extended on several occasions, by agreement between the
2 parties, for various reasons. As discussed below, the evidence presented at the hearing established that
3 the design and construction delays were caused by primarily by SOA's building design contractor (as
4 well as its furniture contractor) Feltus Hawkins Design, LLC ("Feltus-Hawkins" or "FH").

5 On or about December 2, 2019, SOA sent Prieto Automotive a notice of intent to terminate the
6 franchise between the parties (the "NOT"), pursuant to Vehicle Code Section 3060.¹ The sole ground
7 listed by SOA in the NOT involved the failure of Prieto Automotive to successfully construct a new
8 Subaru facility in accordance with the facility addendum.

9 On or about December 16, 2019, Prieto Automotive filed the instant protest with the Board,
10 pursuant to Section 3060.

11 A hearing was held on this protest on February 22, 23, 24, 25, 26, March 1, 4 and 5, and
12 (pursuant to an order from the Board re-opening the hearing), on April 26 and 27, 2021.

13 INTRODUCTION

14 This is a relatively simple termination protest. SOA currently seeks to terminate the franchise of
15 Protestant based solely upon Protestant's failure to construct a stand-alone Subaru dealership facility in
16 Sonora, California. The requirement of the construction of the facility was agreed upon between the
17 parties and subject to a facility addendum (as extended) which was incorporated into the franchise (as
18 that term is defined in Section 331) between SOA and Protestant. Both parties agree that the facility
19 should be constructed. Initially, SOA, through its contractor, designed a facility and placed it at a
20 location which would not viable in terms of size, design, and location, and would not have met required
21 County approval. Protestant explored many options, and actually purchased additional property upon
22 which to position the facility, and eventually submitted building plans to SOA for a facility which
23 should have been acceptable to SOA. SOA business personnel took no action on these plans, based
24 upon the pending termination protest. Both SOA and Protestant agree that this matter should be
25 resolved by a conditional order of the Board requiring the construction of a Subaru facility, consistent
26 with and authorized by Section 3067(a).

27
28

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

1 Protestant with represented at the hearing by Michael M. Sieving, Esq. of the Law Offices of
2 Michael M. Sieving, 4930 Hageman Road, Suite B #455, Bakersfield, California 93312, with a
3 telephone number of (661) 410-8556.

4 Respondent was represented at the hearing by Lisa Gibson, Esq. of Nelson Mullins Riley &
5 Scarborough, LLP, 19191 South Vermont Avenue, Suite 900, Torrance, California 90502, with a
6 telephone number of (424) 221-7400 and Adrienne L. Toon, Esq. of Nelson Mullins Riley &
7 Scarborough, LLP, 1400 16th Street, Denver Colorado 80202, with a telephone number of (303) 583-
8 9909.

9 During the course of the hearing on this protest, the following witnesses testified on behalf of
10 the parties:

- 11 1. Raymond Smit, Retailer Market Development Manager, San Francisco Zone, SOA.
- 12 2. Amy Augustine, Consultant hired by Protestant to work with the County of Tuolumne, California regarding County approval of the facility building project.
- 13 3. Richard "Larry" Kelso, Subaru of America, Inc.
- 14 4. Linda Francis, Architect hired by Protestant for building design.
- 15 5. Paul Romito, Roebbelen Contracting. Senior Project Manager, Construction Contractor.
- 16 6. Manuel Prieto, Dealer Principal of Protestant.
- 17 7. Jason Leopold, Subaru of America.
- 18 8. Michael LeRoy, Retained Financial Expert by Subaru of America.
- 19 9. Scott Farabee, Subaru of America.
- 20 10. Anthony Graziano, Regional Vice President, SOA.
- 21 11. Ronald Marlette, Architect retained by Protestant.
- 22 12. Beth Hinkle, Regional Dealer Development Manager, SOA²

23 ISSUES PRESENTED

24 Issue 1. Pursuant to Section 3066(b), SOA has the burden of proof in the present protest
25 to establish "good cause" for the termination of the franchise of Protestant. Section 3061 provides that,
26 in determining "good cause", the Board shall consider the existing circumstances, included but not
27 limited to the following:

- 28 (a) Amount of business transacted by the franchisee, as compared to the business available to the franchisee. (Section 3061(a)).

² It should be noted that a number of these witnesses testified more than once during several stages of the hearing, including Respondent's case in chief, Protestant's case, rebuttal, and the reopening of the hearing phases.

1 (b) Investment necessarily made and obligations incurred by the franchisee to
2 perform its part of the franchise. (Section 3061(b)).

3 (c) Permanency of the investment. (Section 3061(c)).

4 (d) Whether it is injurious or beneficial to the public welfare for the franchise to be
5 modified or replaced or the business of the franchisee disrupted. (Section 3061(d)).

6 (e) Whether the franchisee has adequate motor vehicle sales and service facilities,
7 equipment, vehicle parts, and qualified service personnel to reasonably provide for
8 the needs of the consumers for the motor vehicles handled by the franchisee and
has been and is rendering adequate services to the public. (Section 3061(e)).

9 (f) Whether the franchisee fails to fulfill the warranty obligations of the franchisor
10 to be performed by the franchisee. (Section 3061(f)).

11 (g) Extent of franchisee's failure to comply with the terms of the franchise.
12 (Section 3061(g)).

13 Issue 2. The Board's ability to consider the Section 3061 factors in termination protests
14 has been restricted by the California Courts to only those issues contained in the NOT. (See, for ex.
15 *British Motor Car Distributors, Ltd. v. New Motor Vehicle Board* (1987) 194 Cal.App.3d 81, and
16 *American Motors, Inc. v. New Motor Vehicle Board*, (1986) 186 Cal.App.3d at p. 477). These cases
17 will be discussed *infra*. The scope of the Board's review in determining whether "good cause" exists to
18 permit the franchise termination is an additional issue presented in this protest, and will be discussed
19 *infra*.

20 Issue 3. An additional issue as to the statutory restrictions placed upon franchisors, such
21 as SOA, which make it unlawful for a franchisor to [r]equire a dealer to *establish or maintain exclusive*
22 *facilities*, personnel, or display space if the imposition of the requirement would be unreasonable *in*
23 *light of all existing circumstances*, including economic conditions. *In any proceeding in which the*
24 *reasonableness of a facility or capital requirement is an issue, the manufacturer or distributor shall*
25 *have the burden of proof.* (Section 11713.13(b), emphasis added). This issue will also be discussed
26 *infra*. This is an additional issue presented in this protest.

27 SUMMARY OF PARTIES' POSITIONS

28 1. Respondent's Position. In the NOT (Exhibit J-001), SOA listed a single ground for the
proposed termination of the franchise, specifically the failure of Protestant to construct a stand-alone

1 facility for the sales and service operations of the Subaru brand in Sonora within the time frame as set
2 forth in the current facility addendum to the Sales and Service Agreement. It is Respondent's position
3 that the evidence it presented established that the Board should permit the franchise termination based
4 upon this ground alone. Respondent also asserts that the Board should consider of all of the good cause
5 factors listed in Section 3061 or, in the alternative, order a conditional order of termination subject to
6 the construction of a compliant facility within a period of time established by the Board.

7 2. Protestant's Position. Protestant contends that:

- 8 a. The evidence presented established that it was always intended by Protestant to
9 construct a stand-alone sales and service facility for Subaru operations, and
10 Protestant continues to work toward this objective. Protestant contends that the
11 construction of a separate Subaru sales and service facility would be in the best
12 interests of both SOA and Protestant.
- 13 b. The vast majority of the delays involved in constructing the facility have been
14 attributable to the to the SOA requirement that Feltus-Hawkins make the initial
15 facility decisions on behalf of SOA. The evidence established that Feltus-Hawkins
16 simply "superimposed" a facility it had previously drawn for a different location at
17 dealership location unrelated to this protest, and did not taking into consideration the
18 building requirements and restriction of Tuolumne County.
- 19 c. The evidence was clear that the Feltus-Hawkins plans would in no way be
20 acceptable or approved by the County of Tuolumne, a requirement necessary to
21 proceed with the construction of the planned facility.
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23 Operating Guidelines ("MSOGs") in early December of 2020, (the "Marlette Plans")
24 which SOA has failed or refuses to approve, reject or comment upon. Without an
25 approval of these plans, Protestant is unable to proceed with County approval and
26 construction of the facility.
- 27 e. The sole issue in the Board's analysis should be limited to Section 3061(g) involving
28 the extent of Protestant's failure to comply with the facility addendum to the
 franchise concerning the construction of a new Subaru facility, and the reasons for

1 the current situation involving the facility construction. If the Board were to consider
2 all of the factors set forth in Section 3061, the evidence presented would weight in
3 favor of sustaining the protest of Protestant.

4 f. Protestant's position is that the only reasonable resolution to this protest would be a
5 conditional decision issued by the Board sustaining the protest subject to the
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8 agrees with this outcome. Such a decision would require that SOA act take action on
9 the Marlette Plans (or any subsequent plans submitted to SOA in the event that the
10 Marlette Plans are not approved by SOA). Without such a provision, SOA could
11 simply avoid taking any action of the submitted plans, allow the time for construction
12 to expire, and again seek termination based upon a failure of the condition in the
13 Board decision. The Board's authority to issue such a decision is contained in
14 Section 3067 which provides, in relevant part, that the "[c]onditions imposed by the
15 [b]oard shall be for the purpose of assuring performance of binding contractual
16 agreements between franchisees and franchisors or otherwise serving the purposes of
17 this article."

18 DISCUSSION

19 1. The Board's Analysis of the Protest is Limited by the Notice of Termination.

20 As noted above, California law limits the scope of Section 3060 termination hearings to the
21 grounds as set forth in the NOT. Section 3060 is clear that a franchisor, such as SOA, must specify its
22 grounds for termination of a franchise in an NOT sent to a franchisee. In this regard, Section
23 3060(a)(1)(A) requires that in a notice of termination the franchisor provide the dealer with notice of
24 termination "[s]ixty days before the effective date thereof setting forth the *specific grounds* for
25 termination. (Section 3060(a)(1)(A), emphasis added). The purpose of this requirement is to give the
26 dealer the right and opportunity to present a defense to issues sought by the franchisor for the proposed
27 termination.

28 In this matter, SOA listed, as its sole ground for the proposed termination of the franchise, the
failure of the Protestant to provide a stand-alone Subaru sales and service facility. The NOT did not

1 contain, as grounds for termination, the failure of the Protestant to transact an amount of business
2 available to it, as compared to the business available to is (Vehicle Code Section 3061(a)); the
3 investment necessarily made and obligation incurred by the franchisee to perform its part of the
4 franchise (Vehicle Code Section 3061(b)); the permanency of the investment (Vehicle Code Section
5 3061(c)); whether it was injurious or beneficial to the public welfare for the franchise to be termination
6 (Vehicle Code Section 3061(d)); whether Sonora Subaru has adequate motor vehicle sales and service
7 facilities, equipment, vehicle parts, and qualified service personnel to reasonable provide for the needs
8 of the consumers of Subaru vehicles, and is adequately providing for those needs (Vehicle Code Section
9 3061(e)); and whether Protestant has failed to fulfill the warrant obligations of the franchisor (Vehicle
10 Code Section 3061(f)). Arguably, the only statutory ground raised by SOA's NOT was Vehicle Code
11 Section 3061(g), which relates to the alleged failure of the Protestant to comply with the terms of the
12 franchise, purportedly based upon the alleged failure to construct a facility which complies with SOA's
13 demands in compliance with the facility addendum to the franchise. SOA now asserts that it is entitled
14 to rely upon all of the various grounds contained in Section 3061 as good cause factors, even though it
15 did not allege them in the NOT. The failure of SOA to provide the "specific grounds" for termination as
16 required by Section 3060.

17 The restriction of a franchisor to present evidence on issues not contained in the notice of
18 termination is well established in California law. In *British Motor Car Distributors, Ltd. v. New Motor*
19 *Vehicle Board* (1987) 194 Cal.App.3d 81, the First District Court of Appeal held that "A franchisor may
20 not assert "good cause" for a franchise termination at the hearing on any ground not asserted in its
21 notice of termination" (at p. 91), citing *American Motors, Inc. v. New Motor Vehicle Board*, (1986) 186
22 Cal.App.3d at p. 477). As the *American Motors* Court found:

23 The Vehicle Code unambiguously requires that notice be given of the
24 *specific grounds* for termination of a franchise. When appellant cited to
25 particular provisions of the agreement as those grounds, it limited its
26 position to those stated grounds. To permit a franchisor to later raise
27 additional unspecified grounds at the hearing would be to deny the
28 franchisee the notice prior to hearing guaranteed under the statute; such
denial infringes on the franchisee's right to procedural due process and
cannot be allowed. *The board's determination was properly limited to the*
grounds specified in the notice of termination. (American Motors at p. 477,
emphasis added).

1 There is no precedent in the Vehicle Code or California caselaw which would authorize the
2 Board to consider evidence of other “good cause” factors which were *not* specified in the NOT. As
3 such, the Board’s inquiry should be limited to the facility issue.

4 2. The Board Should Consider the Evidence Related to the Impact of the Decision by SOA to
5 Compel Protestant to Maintain and Exclusive Facility for Subaru Operations.

6 Section 11713.13(b) makes it unlawful and a violation of the Code for a distributor such as
7 SOA to:

8 [r]equire a dealer to *establish or maintain exclusive facilities*, personnel, or display
9 space if the imposition of the requirement would be unreasonable *in light of all*
10 *existing circumstances*, including economic conditions. *In any proceeding in which*
11 *the reasonableness of a facility or capital requirement is an issue, the manufacturer*
12 *or distributor shall have the burden of proof.* (Section 11713.13(b), emphasis
13 added).

14 Both SOA and Protestant have agreed that it would be in the best interests of Protestant, SOA
15 and the consuming public for Protestant to construct a dedicated Subaru sales and service facility.
16 Protestant is continuing to pursue this construction process, despite the refusal of SOA to approve or
17 otherwise act on the current proposed plans. The evidence established the facts that (a) SOA clearly
18 seeks to terminate the franchise based solely upon the failure of Protestant to provide an exclusive
19 facility (Exhibit J-01) and (b) SOA refuses to approve or otherwise act on the current facility proposal
20 (the Marlette Plans), *which would in fact* provide SOA with an exclusive facility. The fact that SOA
21 refuses to act on the Marlette Plans (by approval, denial, or required modifications) makes it impossible
22 for Protestant to comply with the facility demands. The issue of the “reasonableness of a facility”
23 contained in Section 11713.13 has become one which must be considered by the Board under the
24 “existing circumstances” provisions contained in Section 3061. Pursuant to Section 11713.13(b), “[i]n
25 any proceeding in which the reasonableness of a facility or capital requirement is an issue, the
26 manufacturer or distributor shall have the burden of proof.” The only evidence presented by SOA as to
27 the “reasons” for not approving the Marlette Plans was the testimony of Raymond Smit who stated that
28 the SOA business representatives had not communicated with Protestant regarding any action on the
Marlette Plans because this matter was in litigation, all communications were left to and between
counsel, and that the only communications between the parties were done through counsel by way of an

1 inadmissible proposed settlement agreement that was never executed. (RT Vol. 8, 182:18 – 187:21).³
2 The facts surrounding the “reasonableness” of the facility demands should be considered in light of the
3 proposed termination proceedings, the submission of the Marlette Plans, and the refusal of SOA to
4 comment upon those plans except for a proposed settlement agreement. Protestant’s decision to move
5 forward with the facility construction is an issue that the Board should take into consideration in
6 resolving this protest as an “existing circumstance” under Section 3061.

7 3. Evidence Related to the “Good Cause” Factors Set forth in Section 3061.

8 If properly pled as grounds for termination in the NOT, Section 3061 requires that the Board
9 analyze each of the “good cause” factors set forth in Section 3061. In the event that is the Board’s
10 determination that consideration of each of the Section 3061 factors is authorized and necessary,
11 Protestant submits the following:

12 (a) Evidence Related to the Amount of Business Transacted by the Franchisee, as
13 Compared to the Business Available to the Franchisee. (Section 3061(a)).

14 The evidence presented at the hearing clearly established that Protestant is performing, both in
15 sales and service responsibilities, at levels that meet or exceed expected sales and service performance,
16 despite the lack of a stand-alone facility. (RT Vol. 7, 81:16-17). The evidence established that there
17 may be a potential for the sales performance to increase with a stand-alone Subaru facility. (RT Vol 2,
18 32:6 – 32-16). The parties do not dispute that Protestant has the desire, motivation and financial ability
19 to construct a Subaru dedicated facility. (See generally the testimony of Michael LeRoy – (RT Vol.
20 69-167) and Exhibits R-308, R-309).

21 The land upon which the Marlette Plans facility is to be located is on property currently owned
22 by an entity owned and controlled by the principals of Protestant and, given the approval by SOA to
23 construct the facility, will do so. The issue of whether Protestant is transacting the amount of business
24 as compared to the business available to it is not a disputed issue.

25 This was not an issue raised the NOT and should not be considered by the Board as discussed
26 above.
27

28 ³ All references to the Reporter’s Transcript shall be to volume, page and line numbers.

1 Board. The testimony of Amy Augustine (With Exhibit P-110) should be taken into consideration as to
2 the time to be included in the Board decision as to the time frame established for the facility
3 construction. Protestant will address these dates in its reply brief once it has a chance to see the opening
4 brief from SOA to determine what current differences exist.

5
6 DATED: June 4, 2021

By:



MICHAEL M. SIEVING

Attorney at Law

Attorney for Protestant

1 **PROOF OF SERVICE**

2 STATE OF CALIFORNIA)
3 NEW MOTOR VEHICLE BOARD)

4 I am employed in the County of Kern, State of California, I am over the age of 18 years and not a party
5 to the within action; my business mailing address is 9530 Hageman Road, Suite B #455, Bakersfield,
6 CA 93312.

7 On this date, June 4, 2021, I served the foregoing documents described as:

8 **PROTESTANT’S OPENING POST-HEARING BRIEF**

9 I enclosed a true copy of said documents in a sealed envelope or package addressed to the persons noted
10 below.

11 ____ (By United States Mail) I placed the envelope for collection and mailing, following our firm’s
12 ordinary business practices. I am familiar with our firm's practice for collecting and processing
13 correspondence for mailing. On the same day that correspondence is placed for collection and mailing,
14 it is deposited in the ordinary course of business with the United States Postal Service, in a sealed
15 envelope with postage fully prepaid.

16 ____ (By overnight delivery) I enclosed the documents in an envelope or package provided by an
17 overnight delivery carrier and addressed to the persons listed below. I placed the envelope or package
18 for collection and overnight delivery at an office or a regularly utilized drop box of the overnight
19 delivery carrier.

20 ____ (By messenger service) I served the documents by placing them in an envelope or package
21 addressed to the persons at the addresses below and providing them to a professional messenger service
22 for service.

23 ____ (By fax transmission) Based on agreement of the parties to accept service by fax transmission, I
24 faxed the documents to the persons at the fax numbers listed below. No error was reported by the fax
25 machine that I used. A copy of the record of the fax transmission, which I printed out, is attached.

26 ____ (By electronic service) Based on a court order or an agreement of the parties to accept service
27 by electronic transmission, I caused the documents to be sent to the persons at the electronic notification
28 addresses listed below.

____ (By personal service). I served the documents by delivering the envelope, by hand, to the
persons listed below.

XX By E-Mail I caused the above-entitled documents to be served through electronic mail addressed
to all parties listed in the Service List below. The file transmission was reported as completed and a
copy of the E-Mail pages will be maintained with the original documents in our office. I have complied
with California Rules of Court, Rule 2.257(a) and the original, signed Proof of Service is available for
review and copying at the request of the court or any party.

1 I declare under penalty of perjury under the laws of the State of California I am a member of the
2 State Bar of California and that the above is true and correct.

3 

4 MICHAEL M. SIEVING

5
6
7 **SERVICE LIST**

8 Lisa M. Gibson, Esq.
9 NELSON MULLINS RILEY & SCARBOROUGH LLP
10 19191 South Vermont Avenue / Suite 900
11 Torrance, CA 90502
12 E-Mail: lisa.gibson@nelsonmullins.com
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1 **MICHAEL M. SIEVING, Esq.** (SBN 119406)

2 Attorney at Law

3 9530 Hageman Road, Suite B #455

4 Bakersfield, CA 93312

5 Tel: (661) 410-8556

6 E-mail: msieving@sievinglaw.com

7 Attorney for Protestant PRIETO AUTOMOTIVE, INC.

8 dba SUBARU OF SONORA

9 **STATE OF CALIFORNIA**

10 **NEW MOTOR VEHICLE BOARD**

11 In the Matter of the Protest of:

Protest Number: PR-2648-19

12 **PRIETO AUTOMOTIVE, INC., dba**
13 **SUBARU OF SONORA,**

**PROTESTANT'S PROPOSED FINDINGS OF
FACT**

14 Protestant,

15 v.

16 **SUBARU OF AMERICA, INC.,**

Hearing Date: February 22, 2021

Hearing Time: 10:00 a.m. *via Zoom*

ALJ: Dwight V. Nelsen

17 Respondent.

18
19 Protestant PRIETO AUTOMOTIVE, INC., dba SUBARU OF SONORA ("Protestant" or
20 "Prieto Automotive") hereby files its Proposed Findings of Fact in the above-entitled matter pursuant to
21 the Order Establishing Post-Hearing Briefing Schedule issued by the New Motor Vehicle Board (the
22 "Board") in this matter dated March 4, 2021.

23 **BACKGROUND**

24 Prieto Automotive is a successful, family-owned business that owns and operates new motor
25 vehicle dealerships in California located in Fresno, California (Mazda and Mitsubishi, at separate
26 locations), Sanger, California (Chevrolet, Buick and GMC), and Sonora, California (Ford and Subaru).
27 Prieto Automotive is owned by Manuel Prieto and his wife Ramona "Mona" Rios Llamas.

28 After months of negotiation, Prieto Automotive was able to purchase the assets of the Subaru
franchise in the Sonora area from an existing dealer. This was confirmed on July 29, 2016 when Prieto

1 Automotive entered into an Asset Purchase Agreement (“APA”) with the then-current area Subaru
2 dealership Spiryl Dusset, LP (“Spiryl”). The APA provided for Prieto Automotive to purchase the
3 assets of Spiryl related to its Subaru dealership operations. The APA was conditioned upon the
4 approval of the transaction by Respondent SUBARU OF AMERICA, INC., (“Respondent” or “SOA”).
5 The signed APA was submitted to SOA for approval on or about August 1, 2016, pursuant to the
6 provisions of the Subaru franchise between Spiryl and SOA, as well as various provisions of the
7 Vehicle Code, including Section 11713.3 (d)(1)).

8 A lease or sale of the Spiryl facility was not part of the APA transaction, and it was understood
9 by all parties (including SOA) that Prieto Automotive would have to relocate the dealership and to
10 ultimately find or build a facility for Subaru operations. At the time, the only other new vehicle
11 dealership that Prieto Automotive owned, operated or otherwise controlled in Sonora was its Ford store.
12 SOA approved the franchise transfer and issued a franchise for Prieto Automotive to operate a Subaru
13 as a temporary sales facility at the Ford dealership facility operated by Prieto Automotive, with Subaru
14 vehicle service to be conducted at a remote facility leased on behalf of Prieto Automotive.

15 On December 26, 2016, Prieto Automotive entered into a facility addendum with SOA which
16 provided for Prieto Automotive to a construct a stand-alone Subaru facility. The initial plan was to
17 locate the Subaru dealership on property adjacent to the Ford facility. The addendum contained
18 specified time deadlines for accomplishing the mutual goal of construction of a stand-alone Subaru
19 facility. The construction deadlines were extended on several occasions, by agreement between the
20 parties, for various reasons. As discussed below, the evidence presented at the hearing established that
21 the design and construction delays were caused by primarily by SOA’s building design contractor (as
22 well as its furniture contractor) Feltus Hawkins Design, LLC (“Feltus-Hawkins” or “FH”).

23 On or about December 2, 2019, SOA sent Prieto Automotive a notice of intent to terminate the
24 franchise between the parties (the “NOT”), pursuant to Vehicle Code Section 3060.¹ The sole ground
25 listed by SOA in the NOT involved the failure of Prieto Automotive to successfully construct a new
26 Subaru facility in accordance with the facility addendum.

27
28

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

1 On or about December 16, 2019, Prieto Automotive filed the instant protest with the Board,
2 pursuant to Section 3060.

3 A hearing was held on this protest on February 22, 23, 24, 25, 26, March 1, 4 and 5, and
4 (pursuant to an order from the Board re-opening the hearing), on April 26 and 27, 2021.

5 Protestant was represented at the hearing by Michael M. Sieving, Esq. of the Law Offices of
6 Michael M. Sieving, 4930 Hageman Road, Suite B #455, Bakersfield, California 93312, with a
7 telephone number of (661) 410-8556.

8 Respondent was represented at the hearing by Lisa Gibson, Esq. of Nelson Mullins Riley &
9 Scarborough, LLP, 19191 South Vermont Avenue, Suite 900, Torrance, California 90502, with a
10 telephone number of (424) 221-7400 and Adrienne L. Toon, Esq. of Nelson Mullins Riley &
11 Scarborough, LLP, 1400 16th Street, Denver Colorado 80202, with a telephone number of (303) 583-
12 9909.

13 During the course of the hearing on this protest, the following witnesses testified on behalf of
14 the parties:

- 15 1. Raymond Smit, Retailer Market Development Manager, San Francisco Zone,
16 SOA.
- 17 2. Amy Augustine, Consultant hired by Protestant to work with the County of
18 Tuolumne, California regarding County approval of the facility building project.
- 19 3. Richard "Larry" Kelso, Subaru of America, Inc.
- 20 4. Linda Francis, Architect hired by Protestant for building design.
- 21 5. Paul Romito, Roebbelen Contracting. Senior Project Manager, Construction
22 Contractor.
- 23 6. Manuel Prieto, Dealer Principal of Protestant.
- 24 7. Jason Leopold, Subaru of America.
- 25 8. Michael LeRoy, Retained Financial Expert by Subaru of America.
- 26 9. Scott Farabee, Subaru of America.
- 27 10. Anthony Graziano, Regional Vice President, SOA.
- 28 11. Ronald Marlette, Architect retained by Protestant.
12. Beth Hinkle, Regional Dealer Development Manager, SOA²

ISSUES PRESENTED

26 Issue 1. Pursuant to Section 3066(b), SOA has the burden of proof in the present protest
27 to establish "good cause" for the termination of the franchise of Protestant. Section 3061 provides that,

28 ² It should be noted that a number of these witnesses testified more than once during several stages of the hearing, including Respondent's case in chief, Protestant's case, rebuttal, and the reopening of the hearing phases.

1 in determining “good cause”, the Board shall consider the existing circumstances, included but not
2 limited to the following:

3 (a) Amount of business transacted by the franchisee, as compared to the business
4 available to the franchisee. (Section 3061(a)).

5 (b) Investment necessarily made and obligations incurred by the franchisee to
6 perform its part of the franchise. (Section 3061(b)).

7 (c) Permanency of the investment. (Section 3061(c)).

8 (d) Whether it is injurious or beneficial to the public welfare for the franchise to be
9 modified or replaced or the business of the franchisee disrupted. (Section 3061(d)).

10 (e) Whether the franchisee has adequate motor vehicle sales and service facilities,
11 equipment, vehicle parts, and qualified service personnel to reasonably provide for
12 the needs of the consumers for the motor vehicles handled by the franchisee and
has been and is rendering adequate services to the public. (Section 3061(e)).

13 (f) Whether the franchisee fails to fulfill the warranty obligations of the franchisor
14 to be performed by the franchisee. (Section 3061(f)).

15 (g) Extent of franchisee’s failure to comply with the terms of the franchise
16 (Section 3061(g)).

17 Issue 2. The Board’s ability to consider the Section 3061 factors in termination protests
18 has been restricted by the California Courts to only those issues contained in the NOT. (See, for ex.
19 *British Motor Car Distributors, Ltd. v. New Motor Vehicle Board* (1987) 194 Cal.App.3d 81, and
20 *American Motors, Inc. v. New Motor Vehicle Board*, (1986) 186 Cal.App.3d at p. 477). These cases
21 will be discussed *infra*. The scope of the Board’s review in determining whether “good cause” exists to
22 permit the franchise termination is an additional issue presented in this protest, and will be discussed
23 *infra*.

24 Issue 3. An additional issue as to the statutory restrictions placed upon franchisors, such
25 as SOA, which make it unlawful for a franchisor to [r]equire a dealer to *establish or maintain exclusive*
26 *facilities*, personnel, or display space if the imposition of the requirement would be unreasonable *in*
27 *light of all existing circumstances*, including economic conditions. *In any proceeding in which the*
28 *reasonableness of a facility or capital requirement is an issue, the manufacturer or distributor shall*

1 *have the burden of proof.* (Section 11713.13(b), emphasis added). This issue will also be discussed
2 *infra.* This is an additional issue presented in this protest.

3 **SUMMARY OF PARTIES' POSITIONS**

4 1. **Respondent's Position.** In the NOT (Exhibit J-001), SOA listed a single ground for the
5 proposed termination of the franchise, specifically the failure of Protestant to construct a stand-alone
6 facility for the sales and service operations of the Subaru brand in Sonora within the time frame as set
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20 facility decisions on behalf of SOA. The evidence established that Feltus-Hawkins
21 simply "superimposed" a facility it had previously drawn for a different location at
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- 24 c. The evidence was clear that the Feltus-Hawkins plans would in no way be
25 acceptable or approved by the County of Tuolumne, a requirement necessary to
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- 27 d. Protestant submitted a revised plan which met all of SOA's Minimum Standards and
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which SOA has failed or refuses to approve, reject or comment upon. Without an

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2 construction of the facility.

3 e. The sole issue in the Board's analysis should be limited to Section 3061(g) involving
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5 franchise concerning the construction of a new Subaru facility, and the reasons for
6 the current situation involving the facility construction. If the Board were to consider
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9 f. Protestant's position is that the only reasonable resolution to this protest would be a
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17 to expire, and again seek termination based upon a failure of the condition in the
18 Board decision. The Board's authority to issue such a decision is contained in
19 Section 3067 which provides, in relevant part, that the "[c]onditions imposed by the
20 [b]oard shall be for the purpose of assuring performance of binding contractual
21 agreements between franchisees and franchisors or otherwise serving the purposes of
22 this article."

23 **DISCUSSION**

24 I. The Board's Analysis of the Protest is Limited by the Notice of Termination.

25 As noted above, California law limits the scope of Section 3060 termination hearings to the
26 grounds as set forth in the NOT. Section 3060 is clear that a franchisor, such as SOA, must specify its
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1 termination. (Section 3060(a)(1)(A), emphasis added). The purpose of this requirement is to give the
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3 termination.

4 In this matter, SOA listed, as its sole ground for the proposed termination of the franchise, the
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13 of the consumers of Subaru vehicles, and is adequately providing for those needs (Vehicle Code Section
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15 Code Section 3061(f)). Arguably, the only statutory ground raised by SOA's NOT was Vehicle Code
16 Section 3061(g), which relates to the alleged failure of the Protestant to comply with the terms of the
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21 required by Section 3060.

22 The restriction of a franchisor to present evidence on issues not contained in the notice of
23 termination is well established in California law. In *British Motor Car Distributors, Ltd. v. New Motor*
24 *Vehicle Board* (1987) 194 Cal.App.3d 81, the First District Court of Appeal held that "A franchisor may
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28 The Vehicle Code unambiguously requires that notice be given of the
specific grounds for termination of a franchise. When appellant cited to

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3 additional unspecified grounds at the hearing would be to deny the
4 franchisee the notice prior to hearing guaranteed under the statute; such
5 denial infringes on the franchisee's right to procedural due process and
6 cannot be allowed. *The board's determination was properly limited to the
7 grounds specified in the notice of termination. (American Motors at p. 477,
8 emphasis added).*

9 There is no precedent in the Vehicle Code or California caselaw which would authorize the
10 Board to consider evidence of other "good cause" factors which were *not* specified in the NOT. As
11 such, the Board's inquiry should be limited to the facility issue.

12 2. The Board Should Consider the Evidence Related to the Impact of the Decision by SOA to
13 Compel Protestant to Maintain and Exclusive Facility for Subaru Operations.

14 Section 11713.13(b) makes it unlawful and a violation of the Code for a distributor such as
15 SOA to:

16 [r]equire a dealer to *establish or maintain exclusive facilities*, personnel, or display
17 space if the imposition of the requirement would be unreasonable *in light of all*
18 *existing circumstances*, including economic conditions. *In any proceeding in which*
19 *the reasonableness of a facility or capital requirement is an issue, the manufacturer*
20 *or distributor shall have the burden of proof.* (Section 11713.13(b), emphasis
21 added).

22 Both SOA and Protestant have agreed that it would be in the best interests of Protestant, SOA
23 and the consuming public for Protestant to construct a dedicated Subaru sales and service facility.
24 Protestant is continuing to pursue this construction process, despite the refusal of SOA to approve or
25 otherwise act on the current proposed plans. The evidence established the facts that (a) SOA clearly
26 seeks to terminate the franchise based solely upon the failure of Protestant to provide an exclusive
27 facility (Exhibit J-01) and (b) SOA refuses to approve or otherwise act on the current facility proposal
28 (the Marlette Plans), *which would in fact* provide SOA with an exclusive facility. The fact that SOA
refuses to act on the Marlette Plans (by approval, denial, or required modifications) makes it impossible
for Protestant to comply with the facility demands. The issue of the "reasonableness of a facility"
contained in Section 11713.13 has become one which must be considered by the Board under the
"existing circumstances" provisions contained in Section 3061. Pursuant to Section 11713.13(b), "[i]n
any proceeding in which the reasonableness of a facility or capital requirement is an issue, the

1 manufacturer or distributor shall have the burden of proof.” The only evidence presented by SOA as to
2 the “reasons” for not approving the Marlette Plans was the testimony of Raymond Smit who stated that
3 the SOA business representatives had not communicated with Protestant regarding any action on the
4 Marlette Plans because this matter was in litigation, all communications were left to and between
5 counsel, and that the only communications between the parties were done through counsel by way of an
6 inadmissible proposed settlement agreement that was never executed. (RT Vol. 8, 182:18 – 187:21).³
7 The facts surrounding the “reasonableness” of the facility demands should be considered in light of the
8 proposed termination proceedings, the submission of the Marlette Plans, and the refusal of SOA to
9 comment upon those plans except for a proposed settlement agreement. Protestant’s decision to move
10 forward with the facility construction is an issue that the Board should take into consideration in
11 resolving this protest as an “existing circumstance” under Section 3061.

12 3. Evidence Related to the “Good Cause” Factors Set forth in Section 3061.

13 If properly pled as grounds for termination in the NOT, Section 3061 requires that the Board
14 analyze each of the “good cause” factors set forth in Section 3061. In the event that is the Board’s
15 determination that consideration of each of the Section 3061 factors is authorized and necessary,
16 Protestant submits the following:

17 *(a) Evidence Related to the Amount of Business Transacted by the Franchisee, as*
18 *Compared to the Business Available to the Franchisee. (Section 3061(a)).*

19 The evidence presented at the hearing clearly established that Protestant is performing, both in
20 sales and service responsibilities, at levels that meet or exceed expected sales and service performance,
21 despite the lack of a stand-alone facility. (RT Vol. 7, 81:16-17). The evidence established that there
22 may be a potential for the sales performance to increase with a stand-alone Subaru facility. (RT Vol 2,
23 32:6 – 32-16). The parties do not dispute that Protestant has the desire, motivation and financial ability
24 to construct a Subaru dedicated facility. (See generally the testimony of Michael LeRoy – (RT Vol.
25 69-167) and Exhibits R-308, R-309).

26 The land upon which the Marlette Plans facility is to be located is on property currently owned
27 by an entity owned and controlled by the principals of Protestant and, given the approval by SOA to
28

³ All references to the Reporter’s Transcript shall be to volume, page and line numbers.

1 construct the facility, will do so. The issue of whether Protestant is transacting the amount of business
2 as compared to the business available to it is not a disputed issue.

3 This was not an issue raised the NOT and should not be considered by the Board as discussed
4 above.

5 *(b) Evidence Related to the Investment Necessarily Made and Obligations*
6 *Incurred by the Franchisee to Perform its Part of the Franchise.*
7

8 The evidence established that Protestant paid a total of One Million Five Hundred Thousand
9 Dollars (\$1,500,000.00) for the franchise, which was purchased from Spiryl in 2007. (RT Vol. 7, 22:3
10 – 22:13). There was not a dispute between the parties that Protestant made the investments necessary
11 and incurred the obligations incurred to perform its part of the franchise, with the exception of the
12 facility construction discussed above, including the discussion concerning the fact that Protestant is
13 willing to construct an acceptable facility. There was not a dispute as to whether Protestant has
14 inadequate capitalization.

15 This was not an issue raised the NOT and should not be considered by the Board as discussed
16 above.

17 *(c) Permanency of the Investment.*
18

19 Respondent did not raise at the hearing any issues related to the permanency of the investment
20 of Protestant, with the exception of the facility issue addressed above. This was not an issue raised in
21 the NOT and should not be considered by the Board as discussed above.

22 *(d) Whether it is injurious or beneficial to the public welfare for the franchise to*
23 *be modified or replaced or the business of the franchisee disrupted.*
24

25 Respondent did not raise at the hearing any issues related to whether it would be in injurious or
26 beneficial to the public welfare for the franchise to be terminated. This was not an issue raised in the
27 NOT and should not be considered by the Board as discussed above.

28 The undisputed evidence was clear that if Protestant's Subaru franchise was terminated, the
owners of units in the Sonora area would need to drive to Stockton to obtain service or purchase an

1 additional vehicle. Respondent did not submit any additional evidence to support this good cause
2 factor, and did not raise the issue in the NOT. This should not be considered by the Board in reaching
3 its decision in this protest.

4 *(e) Whether the franchisee has adequate motor vehicle sales and service facilities,*
5 *equipment, vehicle parts, and qualified service personnel to reasonably provide for*
6 *the needs of the consumers for the motor vehicles handled by the franchisee and has*
been and is rendering adequate services to the public.

7 With the exception of the facility issue discussed above, Respondent did not raise at the
8 hearing any issues related to whether franchisee has adequate motor vehicle sales and service facilities,
9 equipment, vehicle parts, and qualified service personnel to reasonably provide for the needs of the
10 consumers for the motor vehicles handled by the franchisee and has been and is rendering adequate
11 services to the public. Except to the facility issue, this was not an issue raised the NOT and should not
12 be considered by the Board as discussed above.

13 *(f) Whether the franchisee fails to fulfill the warranty obligations of the franchisor to be*
14 *performed by the franchisee.*

15 Respondent did not raise any issues with respect to the failure of Protestant to fulfill the
16 warranty obligations of the franchisor. Respondent did not submit any evidence to support this good
17 cause factor, and did not raise the issue in the NOT. This should not be considered by the Board in
18 reaching its decision in this protest.

19 *(g) Extent of franchisee's failure to comply with the terms of the franchise.*

20 The evidence presented at the hearing established that the *only* issue that SOA has with respect
21 to the issue of failure to comply with the terms of the franchise was the alleged failure to construct a
22 new facility for Subaru operations within based upon the facility addendum. This issue is addressed
23 above. This is the only issue that should be addressed by the Board as discussed.

24 **CONCLUSION**

25 Pursuant to the statutory mandates which require “specific grounds” to be contained in any
26 notice of termination (Vehicle Code Section 3060), as well as the restrictions imposed by the California
27 Courts on admitting evidence outside the noticed grounds for termination discussed above, the sole
28 scope of this hearing should properly be limited to the facts and existing circumstances surrounding the

1 issue raised in the NOT, specifically the reasons for the fact that Protestant currently does not have a
2 stand-alone facility in Sonora dedicated to the Subaru brand.

3 The parties agree that an acceptable resolution of the protest would be a conditional order
4 sustaining the protest subject to Protestant building a Subaru facility within a time limit set by the
5 Board. The testimony of Amy Augustine (With Exhibit P-110) should be taken into consideration as to
6 the time to be included in the Board decision as to the time frame established for the facility
7 construction. Protestant will address these dates in its reply brief once it has a chance to see the opening
8 brief from SOA to determine what current differences exist.

9
10 DATED: June 4, 2021

By:



MICHAEL M. SIEVING
Attorney at Law
Attorney for Protestant

1 **PROOF OF SERVICE**

2 STATE OF CALIFORNIA)
3 NEW MOTOR VEHICLE BOARD)

4 I am employed in the County of Kern, State of California, I am over the age of 18 years and not a party
5 to the within action; my business mailing address is 9530 Hageman Road, Suite B #455, Bakersfield,
6 CA 93312.

7 On this date, June 8, 2021, I served the foregoing documents described as:

8 **PROTESTANT’S PROPOSED FINDINGS OF FACT**

9 I enclosed a true copy of said documents in a sealed envelope or package addressed to the persons noted
10 below.

11 ____ (By United States Mail) I placed the envelope for collection and mailing, following our firm’s
12 ordinary business practices. I am familiar with our firm's practice for collecting and processing
13 correspondence for mailing. On the same day that correspondence is placed for collection and mailing,
14 it is deposited in the ordinary course of business with the United States Postal Service, in a sealed
15 envelope with postage fully prepaid.

16 ____ (By overnight delivery) I enclosed the documents in an envelope or package provided by an
17 overnight delivery carrier and addressed to the persons listed below. I placed the envelope or package
18 for collection and overnight delivery at an office or a regularly utilized drop box of the overnight
19 delivery carrier.

20 ____ (By messenger service) I served the documents by placing them in an envelope or package
21 addressed to the persons at the addresses below and providing them to a professional messenger service
22 for service.

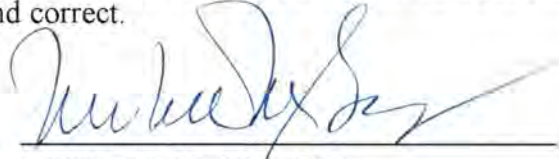
23 ____ (By fax transmission) Based on agreement of the parties to accept service by fax transmission, I
24 faxed the documents to the persons at the fax numbers listed below. No error was reported by the fax
25 machine that I used. A copy of the record of the fax transmission, which I printed out, is attached.

26 ____ (By electronic service) Based on a court order or an agreement of the parties to accept service
27 by electronic transmission, I caused the documents to be sent to the persons at the electronic notification
28 addresses listed below.

____ (By personal service). I served the documents by delivering the envelope, by hand, to the
persons listed below.

XX By E-Mail I caused the above-entitled documents to be served through electronic mail addressed
to all parties listed in the Service List below. The file transmission was reported as completed and a
copy of the E-Mail pages will be maintained with the original documents in our office. I have complied
with California Rules of Court, Rule 2.257(a) and the original, signed Proof of Service is available for
review and copying at the request of the court or any party.

1 I declare under penalty of perjury under the laws of the State of California I am a member of the
2 State Bar of California and that the above is true and correct.

3 

4 MICHAEL M. SIEVING

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7 STATE OF CALIFORNIA
8 NEW MOTOR VEHICLE BOARD

9
10 In the Matter of the Protest of
11 PRIETO AUTOMOTIVE, INC., a California
Corporation, dba SUBARU OF SONORA,
12
Protestant,
13
v.
14 SUBARU OF AMERICA, INC.,
15
Respondent.
16

Protest No.: PR-2648-19

**RESPONDENT SUBARU OF
AMERICA, INC.'S
POST-HEARING BRIEF**

Merits Hearing Dates: February 22-26,
March 1, March 4-5, and April 26-27, 2021
Location: Via Zoom

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I. INTRODUCTION

During the recent merits hearing in this matter, Respondent Subaru of America, Inc. (“SOA”) established that there is good cause pursuant to Cal. Veh. Code § 3061 to terminate the Subaru Dealer Agreement of Protestant Prieto Automotive, Inc., d/b/a Subaru of Sonora (“Protestant” or “Prieto Automotive”). Prieto Automotive has breached various obligations under its Dealer Agreement and has failed to uphold its promise to construct a Subaru dealership facility in Sonora, California.

Despite SOA’s agreement to two extensions of Prieto Automotive’s original planning and construction deadlines, Protestant did not remain focused on proceeding with the new Subaru dealership and instead elected to pursue other ventures, including the acquisition of other automobile franchises, including Mazda, Mitsubishi, Chevy, Buick and GMC. Prieto Automotive disregarded its planning and construction deadlines, ceased work on the project altogether in 2019, and eventually refused to proceed with the project based on its contention that it was “not economically feasible” to build the contemplated dealership in Sonora.

The evidence presented at the merits hearing demonstrates that six of the seven good cause factors under Section 3061 weigh in favor of termination: (a) Protestant has not captured the business available to it, and even Protestant concedes it would have transacted more sales and service business if it had a Subaru brand-dedicated dealership facility; (b) Protestant has not made the investment necessary to perform its part of the franchise because it still has not begun construction of the sales and service facility it originally promised SOA it would complete by July 31, 2018; (c) Protestant has made little, if any, permanent investment in its Subaru dealership as Prieto Automotive continues to conduct its Subaru sales operations out of its Ford dealership facility, and Prieto Automotive’s lease for its Subaru service location may be easily terminated per the testimony of Manuel Prieto; (d) the public is not being well served due to the lack of adequate Subaru sales and service options in Sonora, and SOA could expeditiously identify a replacement dealer to provide a brand-compliant dealership facility and a sales and service experience that the Sonora market area needs and deserves; (e) Protestant’s current Subaru sales and service facilities are far from adequate to properly provide for the needs of consumers—Protestant does not have a

1 Subaru sales facility or showroom and is conducting Subaru sales operations at its Ford dealership,
2 and Protestant’s Subaru service facility is rundown, inconvenient for customers, and located offsite,
3 a few miles from the sales location; (f) there is no contention that Protestant has failed to perform
4 its warranty obligations; and (g) Protestant has not only materially breached its obligations under
5 the Dealer Agreement to construct a Subaru sales and service facility, it has repudiated the
6 Agreement by refusing, or at best, failing to do so.

7 Because termination of Prieto Automotive’s Dealer Agreement is warranted in this case,
8 SOA respectfully requests that the Board overrule Prieto Automotive’s protest, and permit SOA to
9 proceed with termination.

10 In the event that the Board declines SOA’s request to pursue termination, SOA requests that
11 the Board enter a conditional order overruling the Protest and requiring Protestant to timely comply
12 with its obligation to construct a brand-compliant Subaru sales and service facility, or terminate its
13 Subaru Dealer Agreement in the event of any breach of the conditional order. A conditional
14 Proposed Decision that would result in another adjudication on the merits in this matter would not
15 be in the interests of either administrative economy or justice.

16 II. PROCEDURAL HISTORY

17 On December 2, 2019, and in accordance with the provisions of Cal. Veh. Code § 3060,
18 SOA provided Prieto Automotive with notice of SOA’s intent to terminate the Dealer Agreement
19 (the “Notice of Termination”) in light of Prieto Automotive’s various breaches of its Dealer
20 Agreement, its breaches of the Facility Addendum, and its ultimate failure to complete construction
21 of a Subaru dealership facility. *See* Notice of Termination (Exhibit No. J-01); Stipulation of Facts
22 at ¶ 21. In response to the Notice of Termination, on December 16, 2019, Prieto Automotive filed
23 a protest with the Board, Protest No. PR-2648-19, seeking to prevent the termination of its Subaru
24 Dealer Agreement. *See* Stipulation of Facts at ¶ 22.

25 A 10-day merits hearing was held in this case on February 22-26, March 1, March 4-5 and
26 April 26-27, 2021. Administrative Law Judge Dwight V. Nelson presided over the proceedings.
27 During the hearing, the following fact witnesses testified on behalf of SOA: Raymond Smit (Retail
28 Market Development Manager for the San Francisco Zone), Richard Kelso (District Parts/Service

1 Manager for the San Francisco Zone), Jason Leopold (District Sales Manager for the San Francisco
2 Zone), Scott Farabee (Director of the San Francisco Zone), Anthony Graziano (Vice President of
3 the Western Region), and Beth Hinkle (Market Development Manager for the Western Region).

4 In addition, SOA also called Amy Augustine of Augustine Planning Associates Inc., Linda
5 Francis of Dennis Flynn Architects, and Paul Romito of Roebbelen Contracting, Inc. to provide
6 testimony. Michael LeRoy, President of Crown Capital Advisors, LLC, testified as SOA’s expert
7 witness in this matter.

8 Manuel Prieto, Ron Marlette and Amy Augustine testified on behalf of Prieto Automotive.

9 III. FACTUAL BACKGROUND

10 A. The Parties.

11 1. SOA

12 Respondent SOA is a corporation organized and existing under the laws of New Jersey, and
13 is authorized to do business in the State of California. SOA distributes Subaru-brand vehicles in
14 the United States, and holds an occupational license issued by the California Department of Motor
15 Vehicles. *See* Stipulation of Facts at ¶¶ 1-2. SOA sells its vehicles to a network of authorized
16 dealerships or “retailers,” and the retailers, in turn, sell the vehicles to the consuming public and
17 provide vehicle maintenance services. *Id.*; Merits Hearing Transcript (“Tr.”) Volume (“Vol.”) 2 at
18 72:5-76:12 (Smit).

19 The line makes of vehicles manufactured by SOA include the Outback, Forester, Impreza,
20 Crosstrek, Legacy, Ascent, WRX, BRZ, and the STI vehicle lineup. *See* SOA Vehicle Lineup
21 (Exhibit R-626). The vehicle’s in SOA’s lineup have a reputation of being reliable, durable,
22 versatile, and safe. Tr. Vol. 2 at 67:24-68:23 (Smit). Year after year, SOA has received accolades
23 and awards, including awards for safety and for being the most trusted brand by consumers. *Id.*
24 These awards are verified by Kelly Blue Book, the Insurance Institute for Highway Safety, the
25 American Customer Satisfaction Index, and other third-party sources. *Id.*

26 Over the last decade, consumer demand for Subaru-brand vehicles has only continued to
27 escalate. Tr. Vol. 2 at 70:10-25 and 75:16-76:18 (Smit). In fact, SOA is the only manufacturer that
28 has consistently experienced a year-over-year increase in sales over the last ten years. *Id.* The uptick

1 in consumer demand has been so significant that SOA recently increased its production capacity
2 by adding an engine plant at its manufacturing plant in Lafayette, Indiana. *Id.* Due to the positive
3 reputation of the Subaru brand and its vehicles’ ever-increasing popularity with consumers, there
4 is significant demand among automobile retailers for the acquisition of a Subaru franchise. Tr. Vol.
5 3 at 27:9-24 and 111:5-13 (Smit); Tr. Vol. 6 at 63:5-9 (Leopold). In addition, the blue sky value or
6 goodwill associated with Subaru franchises is among the highest associated with an automotive
7 brand. Tr. Vol. 6 at 63:5-9 (Leopold); 103:20-104:22 (LeRoy); and Tr. Vol. 10 at 82:25-83:9
8 (Hinkle).

9 In terms of SOA’s business philosophy, SOA has adopted the Subaru “Love Promise,”
10 which embodies SOA’s aspirations to be more than a car company and its commitment to giving
11 back and investing in local communities. Tr. Vol. 2 at 62:3-63:11 (Smit). Moreover, SOA views its
12 retailers as business partners and strives to provide its retailers with the opportunity to succeed and
13 thrive. Tr. Vol. 2 at 112:22-113:25 (Smit). SOA also encourages its retailers to give back to their
14 communities and to promote a positive culture and experience for their employees and customers.
15 Tr. Vol. 2 at 114:12-115:17 (Smit).

16 **2. Prieto Automotive**

17 Protestant Prieto Automotive is a corporation organized and existing under the laws of
18 California, and is a new motor vehicle dealer licensed by the California Department of Motor
19 Vehicles. *See* Stipulation of Facts at ¶¶ 3-4. Prieto Automotive operates a Subaru dealership
20 pursuant to a Subaru Dealer Agreement and Standard Provisions, executed on or about March 6,
21 2017, as amended on March 20, 2018 (the “Dealer Agreement”). *See* Dealer Agreement (Exhibit
22 J-05); Stipulation of Facts at ¶ 6.

23 The owners and officers of Prieto Automotive are husband and wife, J. Manuel Prieto and
24 Ramona R. Llamas. *See* Stipulation of Facts at ¶ 5. Mr. Prieto is the President and General Manager
25 of Prieto Automotive, and Ms. Llamas is the Secretary and Treasurer. *Id.*

26 Prieto Automotive conducts Subaru sales operations at its Ford dealership, which is located
27 at 13254 Mono Way, Sonora, California 95370. *See* Stipulation of Facts at ¶ 13. Prieto Automotive
28 conducts its Subaru service operations at a separate facility located at 219 Southgate Drive, Sonora,

1 California 95370. *Id.* Prieto Automotive’s Subaru service facility is situated approximately 1.88 air
2 miles from is Subaru sales location. *Id.*

3 Prieto Automotive’s Subaru sales and service facilities are located within District 3 of
4 Subaru’s San Francisco Zone. *See* SOA Western Region Map (Exhibit R-322); Tr. Vol. 2, 91:19-
5 92:10 and 94:1-4 (Smit).

6 **B. Prieto Automotive’s Acquisition of its Ford and Subaru Franchises.**

7 Protestant acquired its first automotive franchise—its Ford dealership—in 2012, and in
8 connection with this acquisition, Prieto Automotive paid 250,000 in goodwill for the franchise. *See*
9 Stipulation of Facts at ¶ 7; Tr. Vol. 4 at 145:25-146:2 and 147:13-19 (Prieto).

10 In 2014, Cypress Square Properties, LLC (“Cypress Square”), an LLC owned by Mr. Prieto
11 and Ms. Llamas, purchased the real property on which Prieto Automotive’s Ford dealership is
12 situated for \$3,000,000. *See* Stipulation of Facts at ¶¶ 8-9; Tr. Vol. 4 at 145:25-147:12 (Prieto).

13 In 2016, Prieto Automotive began negotiating to acquire a Subaru dealership, and in July
14 2016, Protestant entered into an Asset Purchase Agreement with Spiryl Dusset, LP (“Spiryl
15 Dusset”) for its purchase of Spiryl Dusset’s Subaru dealership assets. *See* Stipulation of Facts at ¶
16 11. In connection with Prieto Automotive’s Subaru acquisition, it paid \$1,500,000 in goodwill for
17 the Subaru franchise. Tr. Vol. 6 at 105:5-20 (LeRoy); Tr. Vol. 7 at 22:3-5 (Prieto). The proposed
18 sale of Spiryl Dusset’s Subaru dealership to Prieto Automotive was presented to SOA for
19 consideration, and Prieto Automotive submitted a Subaru Dealer Application to SOA on or about
20 August 1, 2016. *See* Stipulation of Facts at ¶ 12.

21 In order for Prieto Automotive to meet SOA’s requirements to become a Subaru retailer,
22 Prieto Automotive needed to present proposed dealership facilities for its Subaru operations that
23 met SOA’s Minimum Facility Standards and Operating Guidelines, which are applicable to all
24 Subaru retailers. However, at the time Prieto Automotive submitted its Subaru dealer application,
25 it neither owned nor proposed the acquisition of any dealership facilities in Sonora that satisfied
26 SOA’s Minimum Standards and Operating Guidelines (hereinafter, “MSOGs”). Tr. Vol. 7 at 22:14-
27 23:22 (Prieto).

28

1 In light of the facility deficiencies, on December 26, 2016, Prieto Automotive and SOA
2 entered into the Facility Addendum to Conditional Subaru Dealer Agreement (the “Facility
3 Addendum”). *See* Facility Addendum (Exhibit J-05) at p. 14-15; Tr. Vol. 2 at 148:18-149:11 (Smit).

4 Under the terms of the Facility Addendum, Protestant and SOA agreed that Prieto
5 Automotive would temporarily conduct its Subaru dealership operations at its existing Ford
6 dealership located at 13254 Mono Way in Sonora. *See* Facility Addendum (Exhibit J-05) at p. 14-
7 15; Tr. Vol. 3 at 74:21-75:4 (Smit); Tr. Vol. 6 at 44:6-13 (Leopold); Stipulation of Facts at ¶ 14. In
8 addition, because Protestant’s Ford facility could not accommodate Subaru service operations,
9 Protestant and SOA agreed that Prieto Automotive’s Subaru service business would be temporarily
10 conducted at a separate facility located at 219 Southgate Drive in Sonora. *See* Dealer Agreement
11 (Exhibit J-05) at p. 10; Tr. Vol. 3 at 74:21-75:4 (Smit); Stipulation of Facts at ¶ 15.

12 To that end, in connection with Protestant’s negotiations with SOA to become a Subaru
13 retailer, Protestant also provided SOA with a Letter of Consent from Ford stating that Ford
14 approved the dual operation of Ford and Subaru on a temporary basis and that Protestant was
15 required to remove all Subaru operations from the Ford dealership building on or before August 1,
16 2018. *See* Ford Letter of Consent (Exhibit R-323A); Tr. Vol. 4 at 161:7-22 and 168:4-13 (Prieto).
17 Under the provisions of the Letter of Consent, Ford prohibited Prieto Automotive from displaying
18 any Subaru products in the Ford dealership and Mr. Prieto agreed to these terms. *See* Ford Letter
19 of Consent (Exhibit R-323A); Tr. Vol. 7 at 134:13-135:1 (Prieto).

20 In addition, under the Facility Addendum, Prieto Automotive agreed to complete
21 construction of new Subaru sales and service facilities compliant with SOA’s MSOGs by July 31,
22 2018. *See* Facility Addendum (Exhibit J-05) at p. 14-15; Tr. Vol. 5 at 21:11-22:5 (Prieto).

23 Shortly after Protestant’s execution of the Facility Addendum, or about March 4, 2017,
24 SOA approved the proposed sale of Spiryl Dusset’s Subaru dealership assets to Prieto Automotive,
25 and on March 6, 2017, Prieto Automotive and SOA entered into and executed Prieto Automotive’s
26 Subaru Dealer Agreement, which incorporates the terms of the Facility Addendum. *See* Dealer
27 Agreement (Exhibit J-05).

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1 **C. Protestant’s Obligations under the Dealer Agreement and Facility Addendum.**

2 As set forth in the Facility Addendum, Prieto Automotive wanted to “commence operations
3 as an authorized Subaru dealer as soon as possible and even before meeting all applicable
4 MSOGs.” See Facility Addendum (Exhibit J-05) at p. 14 (emphasis added). Accordingly, in
5 reliance upon Protestant’s promise to construct a compliant Subaru sales and service facility, SOA
6 granted Prieto Automotive the privilege of operating as an authorized retailer prior to Prieto
7 Automotive’s compliance with facility requirements. Tr. Vol. 4 at 195:11-16 (Prieto); Tr. Vol. 10
8 at 20:2-14 (Hinkle); and Tr. Vol. 8 at 14:6-15:3 and 17:5-20 (Graziano). Pursuant to the Facility
9 Addendum, Prieto Automotive specifically acknowledged that the temporary Subaru sales location
10 at its Ford dealership and the off-site service location did not comply with SOA’s MSOGs, and that
11 SOA was relying on Prieto Automotive’s commitment to construct a new Subaru dealership facility
12 “as a condition of approving Dealer’s application for a Subaru franchise.” See Facility Addendum
13 (Exhibit J-05) at p. 14.

14 Under the Facility Addendum, the following deadlines regarding Prieto Automotive’s
15 construction of a Subaru facility were established and agreed to:

17 Complete Design Intent with SOA 18 approved architectural firm by	Immediately
19 Obtain permits for facility project by	July 30, 2017
20 Break ground on facility project by	August 31, 2017
21 Facility that meets or exceeds all Subaru 22 Minimum Standards and Operating 23 Guidelines for Facility Size and Image 24 Requirements is completed by	July 31, 2018

25 See Facility Addendum (Exhibit J-05) at p. 15.

1 The Facility Addendum also provided that Prieto Automotive’s failure to meet its deadlines
2 for the planning and construction of its Subaru facility would “constitute a material breach of the
3 Agreement,” and Prieto Automotive agreed to voluntarily terminate its Dealer Agreement if these
4 deadlines were not timely met. *Id.*

5 To that end, Section 6.1 of the Standard Provisions of the Dealer Agreement specifically
6 provides that Prieto Automotive must ensure that its Subaru dealership is of sufficient size and of
7 satisfactory layout and design to comply with SOA’s Minimum Standards for the facility. *See*
8 Dealer Agreement (Exhibit J-05) at p. 29. In addition, pursuant to Section 5.3 of the Standard
9 Provisions, Prieto Automotive acknowledged the importance and reasonableness of SOA’s
10 MSOGs, and agreed that its compliance with MSOGs is an “essential element” of Prieto
11 Automotive’s performance under its Dealer Agreement. *Id.* The purpose of SOA’s MSOGs is to
12 ensure that its retailers have appropriately sized sales and service facilities and a sufficient number
13 of employees to meet the needs of their respective markets and maximize opportunities for success.
14 Tr. Vol. 2 at 76:24-78:17 and 128:16-129:22 (Smit). SOA’s MSOGs are based on the Units in
15 Operation (“UIOs”) in a retailer’s market. *Id.*

16 **D. Protestant’s Failure to Meet Facility Deadlines and Ultimate Failure to Construct**
17 **Subaru Dealership Facilities.**

18 Under SOA’s Signature Facility Program, SOA has established national Subaru dealer
19 image standards. *See* Signature Facility Program Authorization For Design Intent (“SFP
20 Authorization”) (Exhibit R-315). In order to provide an efficient way for dealers to develop design
21 plans that comply with the Program, SOA has partnered with the architecture firm Feltus Hawkins
22 Design (“FH Design”), which works with dealers to complete design plans for new Subaru facility
23 and renovation projects. *Id.*; Tr. Vol. 2 at 180:19-181:6 (Smit). Pursuant to the terms of the SFP
24 Authorization signed by Manuel Prieto, Prieto Automotive agreed to work with FH Design to
25 develop and complete a Design Intent Presentation Binder (hereinafter, “Design Intent”), including
26 blueprint drawings of the new dealership site plan, floor plans, elevations, exterior color rendering,
27 and other project design data. *Id.* In working with FH Design to develop dealership plans, the
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1 retailer is responsible for selecting the real property and site for construction of facilities, and for
 2 ascertaining whether the project is subject to any location restrictions and/or requirements. Tr. Vol.
 3 2 at 166:2-8; 196:16-197:1; and 209:3-210:4 (Smit).

4 Upon completion of the Design Intent, Prieto Automotive was required to submit the Plans
 5 to SOA for approval. *See* Signature Facility Program Authorization For Design Intent (“SFP
 6 Authorization”) (Exhibit R-315); Tr. Vol. 2 at 180:19-181:6 (Smit). After receipt of SOA’s
 7 approval of the Plans, Prieto Automotive was then required to develop construction drawings, and
 8 obtain any necessary building permits. *See* SFP Authorization (Exhibit R-315); Tr. Vol. 2 at
 9 213:11-214:21 (Smit). Like the Design Intent, construction drawings must also be approved by
 10 SOA. Tr. Vol. 2 at 228:17-229:11 (Smit).

11 On April 28, 2017, FH Design sent Manuel Prieto a set of draft Design Intent plans for
 12 Prieto Automotive’s Subaru facilities. *See* April 2017 E-mail Correspondence re: Progress Set
 13 (Exhibit P-103). The April 2017 draft Design Intent contemplated a two-story dealership facility to
 14 be situated adjacent to Protestant’s Ford facility on Mono Way. Tr. Vol. 7 at 40:23-41:12 (Prieto).
 15 On April 30, 2017, Mr. Prieto responded to FH Design regarding the draft plans by stating, “I like
 16 what I see.” *See* April 2017 E-mail Correspondence re: Progress Set (Exhibit P-103) at p.10.

17 The Design Intent for a two-story dealership facility on Mono Way was ultimately approved
 18 by SOA. Tr. Vol. 2 at 171:8-19 (Smit). However, after SOA approved the plans, Manuel Prieto had
 19 concerns regarding the cost of the two-story facility and that it would be too expensive to construct.
 20 Tr. Vol. 2 at 171:8-172:8 (Smit). As such, SOA readily agreed to permit modifications to the Design
 21 Intent to reduce the overall size and cost of the facility. *Id.*

22 By September 2017—nine months after the execution of the Facility Addendum—Prieto
 23 Automotive had not yet completed Design Intent plans that it intended to move forward with. At
 24 Prieto Automotive’s request, per an Amendment to Facility Addendum dated September 29, 2017,
 25 the parties mutually agreed to extend the deadlines in the Facility Addendum as follows:

26 Obtain permits for facility project by	Extended from July 30, 2017 to December 31, 2017
27 Break ground on facility project by	Extended from August 31, 2017 to January 31, 2018

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Facility that meets or exceeds all Subaru Minimum Standards and Operating Guidelines for Facility Size and Image Requirements is completed by	Extended from July 31, 2018 to December 31, 2018
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See September 29, 2017 Amendment to Facility Addendum (Exhibit J-05) at p. 5.

Rather than proceeding with finalizing a modified Design Intent for a smaller version of the two-story facility adjacent to Protestant’s Ford dealership, Manuel Prieto informed SOA in January 2018, that he wanted to construct the Subaru dealership at an entirely new location where he would need to purchase additional property. *See* January 31, 2018 E-mail Correspondence re: Subaru of Sonora (Exhibit R-334); Tr. Vol. 2 at 160:18-162:5 (Smit).

By this time, Prieto Automotive had already missed its deadline to obtain permits for the project, which had been extended to December 31, 2017. *See* September 29, 2017 Amendment to Facility Addendum (Exhibit J-05) at p. 5. In addition, FH Design warned that it was not familiar with the potential new site, and that if the project was moved to a new location, FH Design would “need to start the design process all over again.” *See* February 2018 E-mail Correspondence re: Subaru of Sonora (Exhibit R-338) at p. 1-2. FH Design also communicated its concerns to Mr. Prieto that the proposed new site was too narrow to accommodate Prieto Automotive’s new Subaru facilities. *See* March 8, 2018 E-mail Correspondence re: Site Study (Exhibit R-341); Tr. Vol. 7 at 147:18-148:14 (Prieto). Mr. Prieto was nevertheless undeterred, and on March 13th and 14th, 2018, in an effort to keep the project moving forward, Retailer Development Manager Raymond Smit and FH Design Architect Michael Ventouras met with Mr. Prieto and visited the proposed new site. *See* March 1, 2018 Correspondence re: Site Visit Confirmation Letter (Exhibit R-340); Tr. Vol. 2 at 163:12-166:8 (Smit).

Given the delays caused by Protestant’s consideration of a new location for its Subaru facilities, Protestant once again requested an extension of the deadlines in the Facility Addendum. In March 2018, SOA agreed to further extend the deadlines, including the deadline for Prieto Automotive to finalize its Design Intent, which at the time, was still incomplete. *See* March 21, 2018 Amendment to Facility Addendum (Exhibit J-05) at p. 1; Tr. Vol. 2 at 141:17-144:6 (Smit). SOA accepted Mr. Prieto’s newly-proposed deadlines, and those deadlines were memorialized in

1 the Amendment to Facility Addendum dated March 21, 2018 as follows:

2 Complete Design Intent with SOA approved architectural firm by	3 Extended from Immediately after Execution of the initial Facility Addendum to April 30, 2018
4 Submit Construction Drawings for approval by	5 August 30, 2018
6 Obtain permits for facility project by	7 Extended from December 31, 2017 to December 31, 2018
8 Begin vertical construction by	9 Extended from January 31, 2018 to January 31, 2019
10 Facility that meets or exceeds all Subaru Minimum Standards and Operating Guidelines is completed and operating by	11 Extended from December 31, 2018 to October 31, 2019

12 *Id.*

13 Shortly thereafter, on April 9, 2018, Mr. Prieto informed Mr. Smit that he ultimately decided
14 not to pursue the new location for the Subaru facility and was going to stick with the original
15 proposed location, adjacent to Prieto Automotive’s Ford facility. *See* April 9, 2018 E-mail
16 Correspondence re: Sonora Subaru (Exhibit R-343); Tr. Vol. 2 at 167:10-169:17 (Smit). That same
17 day, Mr. Smit notified FH Design of Mr. Prieto’s decision regarding facility location, and FH
18 Design proceeded with finalizing proposed Design Intent plans. *Id.* This version of the plans
19 contemplated a one-story facility with a false second floor in order to address Mr. Prieto’s concerns
20 regarding the cost of the facility. Tr. Vol. 2 at 170:12-172:2 (Smit). Reducing the facility size from
21 a 2-story building to a one-story building would significantly reduce overall costs. *Id.*

22 FH Design provided Mr. Prieto with a proposed Design Intent for his review on May 13,
23 2018. *See* May 2018 E-mail Correspondence re: Subaru of Sonora (Exhibit R-345); Tr. Vol. 4 at
24 184:19-186:23 (Prieto). In response, Mr. Prieto asked FH Design to hold off on finalizing the
25 Design Intent. *Id.*

26 On June 12, 2018, FH Design again sent a proposed Design Intent to Mr. Prieto for review.
27 *See* June 2018 E-mail Correspondence re: Subaru of Sonora (Exhibit R-349). Mr. Prieto did not
28 respond to FH Design regarding the Design Intent plans until June 27, 2018 because he had been
busy “finishing the Ford building.” *Id.* In 2018, Prieto Automotive made renovations to its Ford

1 facility at a cost of approximately \$300,000. Tr. Vol. 4 at 181:24-183:6 (Prieto). Further in response
 2 to FH Design’s transmission of the Design Intent, Mr. Prieto again asked FH Design to wait to
 3 finalize the proposal and FH Design confirmed that it would wait to hear from Mr. Prieto before
 4 proceeding. *Id.*; Tr. Vol. 2, 170:18-174:14 (Smit).

5 In the summer of 2018, SOA was attempting to work with Mr. Prieto and was encouraging
 6 Prieto Automotive to meet its amended deadlines under the Facility Addendum. In June 2018, even
 7 after two extensions of the deadlines in the Facility Addendum, Prieto Automotive continued to
 8 miss milestones given that the April 30, 2018 deadline to submit Design Intent plans to SOA had
 9 lapsed. Notwithstanding this, SOA’s Ray Smit continued to work with Mr. Prieto on a feasible
 10 timeline in order to “catch up” to the final milestone of completing the facility by October 31, 2019
 11 as set forth below.

12 Complete Design Intent with SOA approved architectural firm by	Missed the April 30, 2018 milestone but meet it by July 30, 2018
14 Submit Construction Drawings for approval by	Missed the August 30, 2018 milestone but meet it by September 30, 2018
16 Begin vertical construction by	Missed the January 31, 2019 milestone but meet it by February 28, 2019

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 19 *See* E-mail Correspondence re: Adjusted Timelines (Exhibit R-350) at p. 3; Tr. Vol. 2 at 175:15-
 20 178:22 (Smit). Mr. Prieto consented to the new deadlines, and responded that the “timelines look
 21 fine.” *See* E-mail Correspondence re: Adjusted Timelines (Exhibit R-350) at p. 2. In the end, these
 22 good faith efforts by SOA were to no avail.

23 Based on Mr. Prieto’s testimony during the Merits Hearing, Prieto Automotive’s continued
 24 lack of progress with its Design Intent in 2018 not only coincided with the time frame in which
 25 improvements were being made to the Ford facility, but also the time period in which Prieto
 26 Automotive was negotiating to acquire its Chevy, Buick and GMC franchises located in Sanger,
 27 California. Tr. Vol. 4 at 152:11-19 (Prieto). Prieto Automotive closed on its acquisition of its
 28 Chevy, Buick, GMC dealership in July 2018, and paid \$225,000 in goodwill for the franchises. Tr.

1 Vol. 4 at 152:11-19 (Prieto); Tr. Vol. 5 at 63:8-64:9 (Prieto). In connection with the acquisition,
2 Prieto Automotive also purchased the existing Chevy, Buick and GMC facilities at a cost of
3 approximately \$1,500,000. Tr. Vol. 4 at 151:13-152:19 (Prieto).

4 The Design Intent for Protestant’s Subaru dealership was finally submitted to SOA and FH
5 Design on July 13, 2018. *See* July 13, 2018 E-mail Correspondence re: Sonora Subaru (Exhibit R-
6 351); Tr. Vol. 2 at 179:24-180:18 (Smit). In August 2018, SOA approved the Design Intent which
7 provided for a one-story Subaru facility situated adjacent to Protestant’s Ford facility. *See* Final
8 Design Intent dated August 14, 2018 (Exhibit R-545); Tr. Vol. 2 at 191:12-195:17 and 197:13-
9 198:14 (Smit).

10 Rather than moving forward with the approved Design Intent in hand, Mr. Prieto instead
11 switched direction again. In September 2018, despite its looming September 30th deadline for the
12 submission of construction drawings, Prieto Automotive notified SOA that it was considering yet
13 another alternative site for the location of its Subaru dealership facilities. Tr. Vol. 2 at 183:10-
14 184:14 (Smit). Specifically, Mr. Prieto wanted to locate is Subaru sales and service facilities at a
15 former Chrysler Dodge facility that was tied up in a bankruptcy proceeding. *See* September 14,
16 2018 Letter re: Facility Addendum (Exhibit R-355); Tr. Vol. 2 at 183:10-184:21 (Smit). Upon
17 learning of Protestant’s latest alternative location, SOA became concerned that Protestant would
18 miss its construction drawing deadline and began to question whether Protestant was truly
19 committed to its obligation to provide a Subaru sales and service facility in Sonora. *Id.* In its
20 response to Mr. Prieto regarding the alternative location, SOA urged Protestant to move forward
21 with its original plans for the Subaru facility adjacent to Protestant’s Ford dealership. *Id.*

22 By October 29, 2018, Prieto Automotive had missed its September 30, 2018 deadline to
23 submit construction drawings to SOA. *See* October 29, 2018 E-mail Correspondence re:
24 Construction Drawings (Exhibit R-368); Tr. Vol. 2 at 203:21-204:24 (Smit). Accordingly, SOA
25 implored Prieto Automotive to provide construction drawings no later than December 31, 2018. *Id.*

26 Later on the same date of October 29, 2018, Mr. Prieto had initial communications with
27 Linda Francis, an architect with Dennis Flynn Architects (“DFA”), regarding retaining DFA to
28 prepare construction drawings for his Subaru sales and service facilities in Sonora. *See* October 29,

1 2018 E-mail Correspondence re: New Facility (Exhibit R-369); Tr. Vol. 4 at 15:24-17:6 (Francis).
2 Mr. Prieto formally retained DFA to work on the project and Linda Francis began preparing
3 construction drawings in November 2018. *See* November 6, 2018 E-mail Correspondence re: DFA
4 Work Authorization (Exhibit R-382); Tr. Vol. 4 at 13:3-16 (Francis).

5 Proposed construction drawings dated December 14, 2018 were submitted by Linda Francis
6 to SOA on December 17, 2018. *See* December 17, 2018 E-mail Correspondence re: Sonora Subaru
7 Submittal Package (Exhibit R-410); Tr. Vol. 4 at 56:18-59:13 and 61:1-64:4 (Francis). On January
8 17, 2019, SOA approved Prieto Automotive's December 14, 2018 construction drawings prepared
9 by DFA. *See* Letter re: Construction Document Review (Exhibit R-413); Tr. Vol. 4 at 65:2-66:7
10 (Francis); Tr. Vol. 2 at 228:3-229:11 (Smit). Regrettably, Mr. Prieto never submitted these
11 construction drawings to the County of Tuolumne for its review and, any progress on the project
12 essentially stopped shortly after the construction drawings were belatedly completed.

13 **1. County of Tuolumne Design and Permitting Requirements.**

14 Pursuant to the March 21, 2018 Amendment to Facility Addendum, Prieto Automotive
15 promised to obtain permits for its Sonora Subaru project by December 31, 2018. *See* March 21,
16 2018 Amendment to Facility Addendum (Exhibit J-05) at p. 1. Specifically, before Prieto
17 Automotive could proceed with construction of its Subaru dealership, it was required to accomplish
18 the following with the County of Tuolumne:

- 19 i. Apply for and obtain a "General Plan Amendment" to change the General Plan
20 designation on certain parcels of land on which the Subaru facilities would be constructed.
21 ii. Apply for and obtain a zone change to change the zoning on the same parcels of land for
22 which the General Plan Amendment was required.
23 iii. Apply for and obtain a site development permit.
24 iv. Apply for and obtain a building permit.

25 *See* Summary Letter (Exhibit R-385) at p. 2-3; September 28, 2018 E-mail Correspondence re:
26 Proposed Alternative Schedules for Subaru (Exhibit R-359); Tr. Vol. 9 at 68:17-69:18 (Augustine).

27 **To date, Prieto Automotive has not accomplished any of the four tasks listed above.** Tr. Vol. 3 at
28 127:20-129:7 and 184:20-23 (Augustine); Tr. Vol. 4 at 229:4-16 (Prieto).

1 To assist with meeting County of Tuolumne requirements and obtaining the necessary
2 permits, Protestant hired planning consultant, Amy Augustine, in late August 2018—just a few
3 months before Protestant’s December 31, 2018 deadline to obtain the required permits. Tr. Vol. 4
4 at 205:17-24 (Prieto). Because Protestant waited over 18 months after it signed the Facility
5 Addendum to retain a planning consultant, Ms. Augustine was not involved in connection with
6 developing the Design Intent drawn up by FH Design, and efforts to obtain required permits did
7 not commence until Ms. Augustine’s retention in late August 2018. Tr. Vol. 4 at 192:10-193:4
8 (Prieto); Tr. Vol. 3 at 45:4-12 (Smit). Mr. Prieto, himself, admitted that he should have hired a
9 planning consultant in the early stages of the project. Tr. Vol. 4 at 192:10-193:4 (Prieto).

10 Per correspondence from Ms. Augustine to Manuel Prieto dated September 28, 2018, Ms.
11 Augustine provided two alternative schedules of tasks to complete and deadlines to meet in order
12 to obtain the necessary permits. *See* September 28, 2018 E-mail Correspondence re: Proposed
13 Alternative Schedules for Subaru (Exhibit R-359); Tr. Vol. 3 at 135:17-137:2 (Augustine). The
14 schedule of tasks titled “Proactive Approach” contemplated that Prieto Automotive would take
15 certain proactive steps to move the project forward. Tr. Vol. 3 at 135:17-138:6 (Augustine). Under
16 the Proactive Approach, even if Protestant’s dealership project was subject to the California
17 Environmental Quality Act (“CEQA”), Ms. Augustine estimated that Protestant could obtain the
18 required permits by late September 2019 or within 12 months from the date of Ms. Augustine’s e-
19 mail regarding the alternative schedules. *See* September 28, 2018 E-mail Correspondence re:
20 Proposed Alternative Schedules for Subaru (Exhibit R-359) at p. 3; Tr. Vol. 3 at 141:19-22
21 (Augustine). Under the schedule titled “Reactive Approach,” Ms. Augustine estimated that, even if
22 the project was subject to CEQA, required permits could be obtained by December 2019 or within
23 18 months. *See* September 28, 2018 E-mail Correspondence re: Proposed Alternative Schedules
24 for Subaru (Exhibit R-359) at p. 4; Tr. Vol. 3 at 141:23-142:14 (Augustine).

25 A number of the necessary tasks associated with obtaining the permits were tasks required
26 to complete the applications for the permits. Specifically, there were three primary issues that Prieto
27 Automotive needed to address in connection with preparing the permit applications for submittal
28 to the County of Tuolumne. *See* November 14, 2018 E-mail re: Sonora Subaru Status (Exhibit R-

1 391); Tr. Vol. 3 at 167:17-168:19 (Augustine).

2 First, Prieto Automotive’s proposed new dealership had to comply with East Sonora design
3 guidelines, which provided for certain aesthetic elements. *Id*; Tr. Vol. 3 at 148:10-149:1
4 (Augustine). Second, Tuolumne County had a set of landscaping requirements that Protestant’s
5 new facility needed to incorporate and landscaping plans needed to be drawn up. *See* November
6 14, 2018 E-mail re: Sonora Subaru Status (Exhibit R-391); Tr. Vol. 3 at 136:12-137:14 (Augustine).
7 Third, the County required that Prieto Automotive procure traffic and drainage studies in order to
8 assess the potential impact that the new facility might have on the existing area. *See* November 14,
9 2018 E-mail re: Sonora Subaru Status (Exhibit R-391); Tr. Vol. 3 at 163:12-25 and 171:4-9
10 (Augustine).

11 To address compliance with East Sonora design guidelines, in early November 2018,
12 Protestant hired DFA to draft construction drawings that incorporated the County’s aesthetic
13 requirements. *See* November 14, 2018 E-mail re: Sonora Subaru Status (Exhibit R-391) a p. 1; Tr.
14 Vol. 4 at 33:8-34:4 and 66:9-14 (Francis). DFA completed a set of construction drawings dated
15 December 14, 2018. *See* December 17, 2018 E-mail Correspondence re: Sonora Subaru Submittal
16 Package (Exhibit R-410). SOA approved the Construction Drawings in January 2019 and Linda
17 Francis—a DFA architect with significant experience in developing architectural plans for car
18 dealerships—was confident that the construction drawings would comply with County design
19 guidelines. *See* Letter re: Construction Document Review (Exhibit R-413); Tr. Vol. 4 at 65:2-66:14
20 (Francis); Tr. Vol. 2 at 228:3-229:11 (Smit). Nevertheless, Prieto Automotive inexplicably chose
21 not to proceed with DFA’s plans and they were never formally submitted to the County of
22 Tuolumne in connection with any permit application. Tr. Vol. 3 at 159:19-160:1 (Augustine); Tr
23 Vol. 7 at 155:23-156:19 (Prieto).

24 DFA was also hired to assist Prieto Automotive in developing landscaping plans compliant
25 with County requirements. *See* November 14, 2018 E-mail re: Sonora Subaru Status (Exhibit R-
26 391); Tr. Vol. 4 at 36:23-37:8 (Francis). However, landscaping plans were never developed and
27 Prieto Automotive never submitted any landscaping plans to the County of Tuolumne. Tr. Vol. 4
28 at 42:11-44:3 (Francis); Tr. Vol. 5 at 61:2-22 (Prieto); Tr. Vol. 7 at 79:4-22 (Prieto).

1 As for the traffic and drainage studies, in November 2018, Ms. Augustine had arranged for
2 KD Anderson & Associates, Inc. to conduct the traffic study, and for Land & Structure Civil
3 Engineers to perform the drainage study. *See* November 16, 2018 E-mail Correspondence re:
4 Sonora Subaru Engineers (Exhibit R-400). Despite the fact that it was necessary to perform both
5 studies in connection with preparing Prieto Automotive’s permit applications, Prieto Automotive
6 declined to move forward with the studies. *See* January 11, 2019 E-mail Correspondence re:
7 Drainage Study (Exhibit R-411); Tr. Vol. 7 at 153:11-20 (Prieto); Tr. Vol. 5 at 61:2-24 (Prieto)
8 (“Q: Okay. And are you aware that—that she still needed, as of February 12th, 2019, a grading plan,
9 landscaping plan, traffic study before she could initiate any environmental documentation? A: Yes.
10 Q: And what of those has since been performed? A: Which one of them you said? Q: Yes, please.
11 A: We haven’t done—we haven’t done a traffic study. There’s been talk about a traffic study. Q:
12 Have you given the County a grading plan? A: No, we have not. Q: Have you given the County a
13 landscaping plan? A: We have not. Q: So is your application complete? A: It is not.”).

14 Prieto Automotive’s progress toward obtaining the required site development and building
15 permits came to particular halt beginning in early 2019. Both Ms. Augustine and Ms. Francis
16 testified that work on the project just stopped in January or February 2019. Tr. Vol. 3 at 185:8-21
17 (Augustine) (“I recall knocking ourselves out trying to get this done, and then it just sort of—the
18 project just sort of disappeared”); Tr. Vol. 4 at 86:21-87:6 (Francis) (“Q: Okay. And really, do you
19 recall doing any work after January of 2019 on the dealership project? A: I—I don’t think we did.
20 Q: Okay. And have you done any additional work on the project since that time? A: No.”).

21 In February 2019, Amy Augustine asked County of Tuolumne representatives Quincy
22 Yaley and David Gonzalves if she could submit a permit application to the County on behalf of
23 Prieto Automotive without completion of a traffic study and without a landscaping or grading plan.
24 *See* February 2019 E-mail Correspondence re: Subaru (Exhibit R-419). In connection with this
25 request, Ms. Augustine remarked that Prieto Automotive was “resistant to providing additional
26 documentation at this point.” *Id.* Ms. Augustine testified that by early 2019, Protestant had declined
27 to move forward with traffic and drainage studies, and landscaping and grading plans due to cost.
28 Tr. Vol. 3 at 178:8-180:5 (Augustine).

1 On April 7, 2019, David Gonzalves explained to Ms. Augustine that in order to move
2 forward with the Subaru dealership, Mr. Prieto needed to complete and turn in his permit
3 applications. *See* April 7, 2019 E-mail Correspondence re: Permit Applications (Exhibit R-431).
4 Mr. Gonzalves stated, “I spoke with Manuel and explained that in order for Quincy and our team
5 to assist him he needed to complete the requested paperwork/information and turn in his
6 application.” *Id.* Even prior to 2019, Mr. Gonzalves expressed frustration with Mr. Prieto’s delay
7 in submitting information to the County regarding the Subaru project. *See e.g.* September 2018 E-
8 mail Correspondence re: Subaru Timeline (Exhibit R-358) (“Manuel has delayed the submittals so
9 long that we may have to tell him something that I do not want to do.”).

10 Coincidentally, this lack of motivation to proceed with the Subaru dealership project, and
11 the attendant lack of progress, coincided with the time period in 2019 when Prieto Automotive was
12 pursuing the acquisition of its Mazda dealership in Fresno, California. Tr. Vol. 4 at 152: 20-153:25
13 (Prieto). Prieto Automotive closed on its acquisition of its Mazda franchise in October 2019 but
14 negotiations regarding the Mazda buy-sell began months prior to closing. Tr. Vol. 5 at 63:8-64:9
15 (Prieto). Prieto Automotive paid \$250,000 in goodwill for the Mazda franchise. Shortly after Prieto
16 Automotive’s Mazda acquisition, it was appointed as a Mitsubishi dealer via an open-point. Tr.
17 Vol. 4 at 157:25-158:6 (Prieto). The lack of forward progress on the project also coincided with
18 Mr. Prieto’s solicitation of another construction firm to provide new cost estimates and the retention
19 of counsel to inform SOA that construction of the Subaru dealership facility was not economically
20 feasible.

21 **2. Construction Cost Estimates and Protestant’s Alleged Inability to Move**
22 **Forward with Construction of Subaru Dealership Facilities.**

23 In connection with DFA’s completion of the Construction Drawings (Exhibit R-410 and R-
24 422), DFA provided Prieto Automotive with a preliminary construction cost estimate for the facility
25 in December 2018. *See* December 12, 2018 E-mail Correspondence re: Cost Estimate (R-408). The
26 construction estimate was drawn up by Pacific West Builders, Inc., and the preliminary estimate
27 approximated that construction costs would range from roughly \$3,900,000 to \$4,200,000. *Id.*
28 However, as stated above, in early 2019, Prieto Automotive ceased work on the Subaru project and

1 chose not to proceed any further with the construction drawings developed by DFA. Tr Vol. 7 at
2 155:23-156:19 (Prieto); Tr. Vol. 4 at 86:21-87:6 (Francis).

3 Then, in April 2019, Prieto Automotive sought another construction cost bid from
4 Roebbelen Contracting, Inc. (“Roebbelen”), based upon the construction drawings developed by
5 DFA. *See* April 2019 Correspondence and Roebbelen Budget Estimate (Exhibit R-433). The
6 estimate provided by Roebbelen approximated that construction costs would run from about
7 \$7,500,000 to \$7,600,000. *Id.* at p.7. DFA architect Linda Francis testified that she believed the
8 Roebbelen estimate was high because she had already obtained an estimate of \$4,200,000 “from a
9 contractor who is very experienced in this type of building.” Tr. Vol. 4 at 75:3-17 (Francis). Paul
10 Romito, a project manager at Roebbelen, conceded that his firm’s \$7,600,000 estimate was a rough,
11 imprecise estimate because the construction drawings developed by DFA did not have a sufficient
12 level of detail to allow Roebbelen to provide a more accurate estimate. Tr. Vol. 4 at 129:13-131:7
13 and 133:8-25 (Romito). Mr. Romito also clearly communicated to Manuel Prieto that Roebbelen’s
14 \$7,600,000 estimate was a rough and “high level price based on the conceptual drawings.” *See*
15 April 2019 Correspondence and Roebbelen Budget Estimate (Exhibit R-433); Tr. Vol. 4 at 133:8-
16 25 (Romito).

17 Despite the imprecise nature of Roebbelen’s construction cost estimate, in communications
18 with SOA regarding the feasibility of complying with its Subaru facility obligations, Prieto
19 Automotive began claiming that it could not afford to construct the dealership facility because
20 construction costs were going to run north of \$7,000,000. *See* May 23, 2019 Letter (Exhibit R-435);
21 Tr. Vol. 4 at 212:1-22 (Prieto). Specifically, in a letter dated May 23, 2019 from Prieto
22 Automotive’s counsel to SOA, Protestant contended that it was not economically feasible for it to
23 construct a Subaru facility in Sonora because construction costs were going to exceed \$7,000,000.
24 *Id.* Based on this, Prieto Automotive stated that it was going to begin considering “alternative
25 facility proposals,” even as it was several months behind schedule for the commencement of
26 construction of the new Subaru facility. *Id.* at p.1. In the May 23, 2019 letter, Prieto Automotive
27 further claimed that the County of Tuolumne was going to withhold approval of the dealership
28 project due to drainage issues that could not be resolved. *Id.* at p.2. In truth, at the time the letter

1 was sent to SOA in May 2019, Prieto Automotive had not yet procured any drainage studies for the
2 property so it had no idea if there were any issues regarding drainage and whether those issues, if
3 any, could be addressed. Tr. Vol. 4 at 209:21-210:13 (Prieto). Although the contentions asserted in
4 the May 23, 2019 letter were largely baseless, it was clear that Prieto Automotive did not intend to
5 proceed with construction of a Subaru facility based on the DFA drawings approved by SOA.

6 Virtually the entire 2019 calendar year had passed and Prieto Automotive made no
7 reasonable attempt whatsoever to honor its obligations to SOA and Subaru customers to provide a
8 compliant dealership facility. By the end of November 2019, Prieto Automotive had not obtained
9 the required site development or building permits from the County of Tuolumne, had not
10 commenced construction of the dealership, and missed its October 31, 2019 deadline to complete
11 construction of the facility. Tr. Vol. 3 at 184:20-23 (Augustine); Tr. Vol. 4 at 229:4-230:7 (Prieto).
12 Moreover, Prieto Automotive had not even provided SOA with design or construction plans
13 compliant with SOA's MSOGs for a facility that Prieto Automotive actually intended to build. Tr.
14 Vol. 3 at 159:19-160:1 (Augustine); Tr Vol. 7 at 155:23-156:19 (Prieto). At that point, and after
15 granting a number of extensions of Protestant's planning and building deadlines, SOA was left with
16 no other option but to pursue available legal remedies. Tr. Vol. 2 at 59:21-60:13 (Smit); Tr. Vol. 3
17 at 49:10-51:14 (Smit); Tr. Vol. 6 at 189:5-15 (Farabee); Tr. Vol. 8 at 26:20-28:3 (Graziano).
18 Accordingly, as stated above, SOA provided Prieto Automotive with its Notice of Termination on
19 December 2, 2019. *See* Notice of Termination (Exhibit No. J-01); Stipulation of Facts at ¶ 21.

20 **3. Prieto Automotive's Current Subaru Sales and Service Facilities and**
21 **Status of Project for Construction of New Subaru Sales and Service**
22 **Facilities.**

23 There is no dispute in this matter that, to date, Protestant has failed to obtain permits and
24 even commence construction of a Subaru sales and service facility. *See* Stipulation of Facts at ¶ 19.
25 Currently, Prieto Automotive is still conducting its Subaru sales operations out its Ford dealership,
26 and its Subaru service operations are still currently conducted at the separate temporary service
27 location on Southgate Drive. *Id.* at ¶ 20.

28 Photographs of Prieto Automotive's Subaru sales and service facilities are provided

1 below. *See also* Subaru Retailer Validation Program Report (Exhibit R-320) and Photos of Service
2 Facility (Exhibit R-321); Tr. Vol. 2 at 98:22-99:2 (Smit).

3 PROTESTANT’S “SUBARU” SALES FACILITY



15
16 PROTESTANT’S “SUBARU” SERVICE FACILITY



1 It is evident from the photographs above (and those contained in Exhibits R-320 and R-321)
2 that Protestant’s Subaru sales and services facilities are nothing like the facilities of SOA’s other
3 Subaru dealerships located throughout California and in other states. Tr. Vol. 2 at 104:1-11 (Smit)
4 (“Q: Again, do you see any Subaru brand elements that you would normally look for on a Subaru
5 facility such as – A: No, ma’am. This is completely non-compliant, completely not brand dedicated.
6 This is not the way I’ve ever seen any Subaru service facility look like. This looks more like a
7 garage.”); Tr. Vol. 5 at 220:16-221:1 (Leopold) (“Q: And how do you think Subaru of Sonora’s
8 sales facilities compare with the other facilities of the Subaru retailers in your district? A: Well, it’s
9 in a Ford building, so I would say it’s probably one of the worst.”); Tr. Vol. 5 at 75:22-76:19 (Kelso)
10 (“Q: Do you have any opinions about the exterior appearance of these sales facilities? A: I would
11 say it is poorly represented because there is nothing that shows me that this is a Subaru organization,
12 that they would sell Subaru product.”). As explained in further detail below, Prieto Automotive’s
13 sales and service facilities lack Subaru brand dedication, and are dated, run down, and woefully
14 inadequate to the meet the needs of consumers.

15 Based on testimony presented by Prieto Automotive in this matter, if its protest is sustained
16 or conditionally overruled and Protestant is given yet another chance to comply with its obligation
17 to construct a Subaru facility, Prieto Automotive estimates that it will not be ready to ***begin***
18 construction for another 29 months from an undetermined date. *See* Timeline (Exhibit P-110); Tr.
19 Vol. 9 at 68:17-73:6 (Augustine). In addition to the 29-month time period, Protestant estimates that
20 construction of the dealership facility could be finished in approximately 8 - 14 months. In all,
21 Protestant does not expect to have a fully constructed and operational Subaru dealership for 37 to
22 43 months, which is nearly a 4-year timeframe. Tr. Vol. 9 at 142:6-143:5 (Marlette).

23 Moreover, Protestant has already been operating its Subaru franchise out of deficient,
24 temporary facilities for over four years, beginning in March 2017. During this entire time, Subaru
25 has been poorly represented in Sonora and consumers in the area have been deprived of access to
26 proper Subaru sales and service options. Tr. Vol. 10 at 35: 14-22 (Hinkle). This markedly
27 inadequate representation of Subaru in the Sonora area cannot continue for yet another three to four
28 years without further significant detriment to consumers and the Subaru brand. *Id.*; Tr. Vol. 9 at

1 165:15-166:7 (Smit) (“Q: And how do you feel that not having even a Subaru showroom in Sonora
2 affects Subaru in terms of customers' trust? A: I mean, there's damage that goes on to the customers.
3 There really is. We've got numerous new models coming out this year... these are going to attract
4 customers that are brand new to the brand. And to walk into a facility where we really don't have
5 representation at all is damaging, because some of those customers will just turn and walk right on
6 out, and they'll go to the competitor that has a showroom, that has an inclusive service center on-
7 site instead of being split. So there's going to be damage that happens, and there has been damage
8 that happened.”).

9 In addition, SOA’s representatives have overseen countless Subaru facility construction
10 projects with its retailers over the years and in their experience, it has never taken a retailer nearly
11 eight years to complete a Subaru facility. Tr. Vol. 10 at 35:14-36:1 (Hinkle). In fact, it typically
12 takes two to two and a half years from the time a retailer agrees to construct a facility to the point
13 when the facility is complete and ready to open for business. Tr. Vol. 10 at 16:8-24 (Hinkle).

14 There is no question that Prieto Automotive’s prolonged and continued failure to complete
15 or even commence construction of a Subaru dealership facility constitutes a material breach of
16 Prieto Automotive’s obligations under its Dealer Agreement and its commitment under the Facility
17 Addendum—a commitment that SOA relied upon as a condition of approving Prieto Automotive’s
18 Subaru Dealer Application. Simply put, Protestant’s actions over the last few years have
19 demonstrated anything but its dedication to the Subaru brand, its customers, or an intent to uphold
20 its commitments to invest in Subaru and complete the dealership facility it promised to construct.
21 To that end, the evidence presented in this matter demonstrates that if given another chance, it is
22 unlikely that Prieto Automotive will come through on its commitment to timely construct a brand-
23 complaint dealership.

24 Since 2017, Protestant has capitalized on the privilege of operating as a Subaru dealer
25 despite its deficient facilities, while, at the same time, failing to honor its obligations under the
26 Dealer Agreement. Indeed, instead of focusing on the planning and construction of its Subaru
27 dealership, Protestant elected to use the profits it has derived from its Subaru business to invest
28 millions in the acquisition of other dealerships. Protestant was spending significant sums to acquire

1 other franchises in 2019 while simultaneously claiming that it would not be economically feasible
2 for Prieto Automotive to comply with its obligations to provide a Subaru facility compliant with
3 SOA’s MSOGs. Protestant’s investment decisions with regard to its automotive dealerships speak
4 for themselves and they provide clear insight into Protestant’s true priorities.

5 In the end, Prieto Automotive has made a series of business decisions that consistently
6 prioritized its other dealerships and business endeavors over investing in its Subaru franchise. SOA
7 is only asking that Protestant be held to the same standards and requirements that all other Subaru
8 dealers are obligated to comply with. Given Protestant’s continued failure to uphold its
9 commitments under its Dealer Agreement, termination of Protestant’s Subaru Dealer Agreement is
10 warranted.

11 IV. LEGAL STANDARD

12 The California New Motor Vehicle Board (the “Board”) has jurisdiction over this matter
13 pursuant to Cal. Veh. Code § 3050(c).

14 Under Cal. Veh. Code § 3061, the Board is required to determine whether Subaru has “good
15 cause” to terminate Prieto Automotive’s Dealer Agreement. Specifically, Section 3061 provides
16 that:

17 In determining whether good cause has been established for modifying, replacing,
18 terminating, or refusing to continue a franchise, the board **shall take into
19 consideration the existing circumstances, including, but not limited to, all of the
20 following:**

- 21 (a) the amount of business transacted by the dealer, as compared to the business
22 available to it.
- 23 (b) investment necessarily made and obligations incurred by the dealer to perform
24 its part of the franchise.
- 25 (c) permanency of the investment.
- 26 (d) whether it is injurious or beneficial to the public welfare for the franchise to be
27 modified or replaced or the business of the dealer disrupted.
- 28 (e) whether the dealer (1) has adequate sales and service facilities, equipment,
parts, and qualified service personnel to reasonably serve the needs of the
consumers for the vehicles handled by the dealer, and (2) has been and is
rendering adequate services to the public.

1 (f) whether the dealer fails to fulfill the franchisor's warranty obligations.

2 (g) extent of the dealer's failure to comply with the terms of the franchise.

3 Cal. Veh. Code § 3061 (emphasis added).

4 However, not every statutory factor must be met in order to establish "good cause" for
5 termination. *See Ray Fladeboe Lincoln-Mercury, Inc. v. New Motor Vehicle Board* (1992) 10 Cal.
6 App. 4th 51. *See also Saba A. Saba v. Kawasaki Motors Corp., U.S.A.*, No. PR-1633-98 (Cal. New
7 Motor Vehicle Bd. August 12, 1999) (adopted as final decision of the Board on June 26, 2001)
8 (good cause for termination existed where Kawasaki established that three of the seven "good
9 cause" factors favored termination.). Here, SOA has "good cause" to terminate Prieto Automotive's
10 Subaru Dealer Agreement under sub-sections (b), (c), (d), (e), and (g) of Cal. Veh. Code § 3061.

11 **V. ARGUMENT AND ANALYSIS OF THE STATUTORY FACTORS**

12 As set forth below, the evidence presented at the hearing relevant to the good-cause factors
13 under Cal. Veh. Code § 3061(a), (b), (c), (d), (e), and (g) supports termination.

14 **A. Amount of Business Transacted by Dealer, as Compared to the Business**
15 **Available.**

16 Deficient sales performance is not a primary basis of SOA's pursuit of termination in this
17 case. Rather, this factor weighs in favor of termination because Protestant's deficient sales and
18 service facilities have resulted in Protestant's inability to fully capture the sales and service
19 business available to it. By Protestant's own admission, building a Subaru facility in a market that
20 currently does not have a Subaru facility will increase sales:

21 Q. And how many more vehicles a month in sales were they doing in
22 Stockton than you do in Sonora?

23 A. Oh, my God. They -- well, I do an average of 37 -- 30 -- 30, 35 cars
24 there a month. More -- double that was being sold in that market when I looked at
the numbers.

25 Q. Okay. And I think on follow-up Mr. Sieving asked you whether or not -
26 - no, let me back up. So do you think that -- if you put a Subaru building in Stockton,
27 do you think you would have been able to increase sales from what they're currently
experiencing right now?

28 A. Oh, there's no doubt. Absolutely no doubt.

1 Tr. Vol. 7 at 184:18-185:5 (Prieto)

2 Since 2017, Prieto Automotive has been conducting and continues to conduct its Subaru
3 sales operations out its Ford dealership, and its Subaru service operations at the separate temporary
4 service location on Southgate Drive. *See* Stipulation of Facts at ¶ 20; Tr. Vol. 4 at 147:20-148:15
5 (Prieto). It is undisputed that Prieto Automotive’s current Subaru sales and service facilities are
6 non-compliant with SOA’s MSOGs in virtually every respect, including without limitation, facility
7 exterior and interior image requirements, Subaru vehicle storage requirements, Prieto
8 Automotive’s lack of a Subaru showroom, and Prieto Automotive’s lack of Subaru customer touch
9 points in its sales and service facilities. *See* 2020 MSOGs for Subaru of Sonora (Exhibit R-316) at
10 p. 23-27; Tr. Vol. 2 at 129:23-134:4 and 149:20-151:20 (Smit).

11 In addition, Prieto Automotive’s Subaru sales facilities do not comply with MSOG
12 requirements because its sales operations are dualled with Prieto Automotive’s Ford facilities, and
13 SOA requires its retailers to have exclusive, Subaru-dedicated dealership facilities that are not
14 combined with other vehicle brands. *See* 2020 MSOGs for Subaru of Sonora (Exhibit R-316) at p.
15 25; Tr. Vol. 2 at 130:4-12 (Smit). Similarly, Prieto Automotive’s Subaru service facilities do not
16 comply with MSOG requirements because the service location is separate from Prieto
17 Automotive’s Subaru sales location and SOA requires each of its retailers to provide Subaru sales
18 and service facilities at one combined sales and service location. *See* 2020 MSOGs for Subaru of
19 Sonora (Exhibit R-316); Tr. Vol. 2 at 104:5-105:5 (Smit); Tr. Vol. 3 at 74:21-75:4 (Smit). Prieto
20 Automotive’s service location is currently situated approximately 1.88 air miles and 3 miles in
21 terms of driving distance from is Subaru sales location. *See* Stipulation of Facts at ¶ 13; Tr. Vol. 2
22 at 95:21-96:2 (Smit). A split facility simply does not allow for the normal “sales-to-service” hand-
23 off. Tr. Vol. 2 at 104:16-105:5 (Smit).

24 As detailed below, the significant deficiencies in Prieto Automotive’s Subaru sales and
25 service facilities have negatively impacted customer experience at the dealership and Prieto
26 Automotive’s ability to capture and retain the available sales and service business in its market.

27 ///

28 ///

1 **1. Prieto Automotive’s Deficient Sales and Service Facilities Negatively**
2 **Impacts its Subaru Sales and Service Business.**

3 A Subaru retailer’s dealership facility is critically important because it is the background
4 of the customer experience. Tr. Vol. 2 at 114:23-115:6 (Smit). SOA’s goal in providing products
5 and services to consumers through its retailers is about building a relationship with each customer,
6 which requires the provision of excellent service in all aspects of the customer experience in order
7 to retain the customer for the next vehicle sale and service appointment. Tr. Vol. 3 at 107:19-110:1
8 (Smit); Tr. Vol. 5 at 84:19-85:11 (Kelso). Subaru retailers with MSOG-compliant facilities
9 consistently see higher levels of customer retention than retailers with deficient facilities. Tr. Vol.
10 3 at 107:19-110:1 (Smit).

11 To that end, during Prieto Automotive’s 2020 annual review with SOA in February 2021,
12 Retail Market Development Manager Raymond Smit specifically asked Prieto Automotive to
13 focus on improving customer retention in terms of sales and service because as of February 2021,
14 Prieto Automotive was ranked dead last at 10 out of 10 Subaru retailers in its District in terms of
15 customer retention with respect to both sales and service. Tr. Vol. 2 at 138:1-19 (Smit); Tr. Vol. 3
16 at 117:5-24 (Smit). Thus, it is undeniable that customers are looking elsewhere for their sales and
17 service needs.

18 It is also evident that Protestant is failing to adequately nurture long-term relationships with
19 customers in light of its low scores in SOA’s Owner Loyalty Program (“OLP”) reports—reports
20 which are generated based on customer reviews and feedback. Tr. Vol. 3 at 201:8-25 (Kelso).
21 Prieto Automotive’s OLP reports demonstrate that customers are deterred by Prieto Automotive’s
22 deficient sales and service facilities.

23 By way of example, customers have been significantly less satisfied with Prieto
24 Automotive’s service facilities than they are with the service facilities of other Subaru retailers in
25 the San Francisco Zone as shown by Prieto Automotive’s low customer satisfaction score for
26 service facilities in 2019 OLP reports. *See* 2019 2nd Quarter OLP Report (Exhibit R-581) at p. 44;
27 Tr. Vol. 5 at 98:18-100:10 (Kelso). Specifically, customers indicated dissatisfaction with the
28 following aspects of Protestant’s service facilities: (i) the availability of convenient parking; (ii)

1 the comfort of the waiting area, (iii) the location of the facility; and (iv) the appearance of the
2 facility. *Id.* Protestant’s overall OLP Service Satisfaction Scores in 2019 placed it in the bottom
3 20th percentile compared to the scores of all other retailers in the San Francisco Zone. *See* 2019
4 2nd Quarter OLP Report (Exhibit R-581) at p. 39; Tr. Vol. 5 at 91:11-92:5 (Kelso). *See also* 3rd
5 Quarter OLP Report (Exhibit R-582) at p. 43 and 49.

6 Likewise, customers were also displeased with Protestant’s sales facilities as demonstrated
7 by Protestant’s low customer satisfaction scores for sales facilities. *See e.g.* 2019 2nd Quarter OLP
8 Report (Exhibit R-581) at p. 21 and 25; 2019 3rd Quarter OLP Report (Exhibit R-582) at p. 28; Tr.
9 Vol. 6 at 12:11-18:5 (Leopold). Specifically, customers were not satisfied with the following
10 aspects of Protestant’s sales facilities; (i) the appearance of the facility; (ii) the availability of
11 convenient parking; (iii) showroom information displays; and (iv) comfort of the area where the
12 vehicle purchase was made. *Id.* In terms of Protestant’s overall OLP Purchase Satisfaction Scores
13 in 2019, for example, Protestant ranked *in the bottom 10th percentile* compared to all other retailers
14 in the San Francisco Zone. *See* 2019 3rd Quarter OLP Report (Exhibit R-582) at p. 23; Tr. Vol. 6
15 at 11:17-12:10 (Leopold). SOA District Sales Manager Jason Leopold testified that Prieto
16 Automotive’s overall OLP Purchase Satisfaction Score of 788 in the third quarter of 2019 was
17 especially low within Protestant’s District because many of the other 9 Subaru retailer’s in
18 Protestant’s District scored much higher than the Zone average score of 833. Tr. Vol. 6 at 17:5-
19 18:15 (Leopold). Mr. Leopold explained that the other retailers in Protestant’s District consistently
20 had significantly higher OLP Purchase Satisfaction Scores because they all have “dedicated
21 exclusive Subaru dealership[s].” *Id.*

22 In addition to the fact that Subaru retailers with MSOG-compliant facilities perform better
23 in terms of customer retention, such retailers also sell more vehicles than retailers with non-
24 compliant dealerships such as Protestant. Tr. Vol. 3 at 106:10-107:18 (Smit). Subaru products are
25 in high demand in Sonora and the surrounding area. *See e.g.* Tr. Vol. 6 at 183:16-184:20 (Farabee)
26 (“...from a market standpoint, Sonora is a wonderful market for us. From a Subaru customer
27 demographic, that area is probably about as Subaru as you can get...That is just a really, really,
28 really good market from a Subaru customer standpoint.”). *See also* Kelly Robinson Deposition

1 Designations (Exhibit R-629) at 23:2-5 (“Q: Okay. Is there anything else that you find to be, I
2 guess, advantageous about the Subaru brand? A: It’s a great brand. Solid resale, quality, and it’s
3 very popular up in our market.”). Thus, given the popularity of the Subaru brand in the Sonora
4 market, Prieto Automotive has the opportunity to achieve stellar sales performance.

5 Although Prieto Automotive has maintained Minimum Sales Responsibility (“MSR”)
6 scores north of 100%, achievement of 100% MSR is “expected” as it is required under the Dealer
7 Agreement, and attainment of 100% MSR is indicative of “average” sales performance or akin to
8 receiving a “C” grade on a report card. Tr. Vol. 3 at 72:13-73:12 (Smit); Tr. Vol. 2 at 118:16-119:9
9 (Smit). Many, if not most, of the Subaru retailers in the San Francisco Zone have maintained MSR
10 scores of 150% - 200%, with some retailers attaining 220% and 240% in terms of MSR. *Id*; Tr.
11 Vol. 6 at 207:24-208:6 (Farabee). With respect to Prieto Automotive, its sales performance has
12 remained in the range of “average to slightly above average.” Tr. Vol. 6 at 206:10-208:6 (Farabee);
13 Tr. Vol. 3 at 72:13-73:12 (Smit); Tr. Vol. 6 at 52:4-53:6 (Leopold). Protestant has not attained a
14 level of exceptional sales performance despite the popularity of and high demand for Subaru
15 products in the Sonora area. *Id*.

16 Simply put, Prieto Automotive’s deficient dealership facilities are hindering its ability to
17 truly excel in terms of sales performance. Tr. Vol. 3 at 106:10-107:18 (Smit). If Prieto Automotive
18 were operating out of MSOG-compliant facilities, it would sell more Subaru vehicles. Tr. Vol. 6
19 at 51:17-23 (Leopold) (“Q: Mr. Leopold, getting back to my question, do you have an opinion as
20 to whether or not the dealer has—dealer being Subaru of Sonora, has suffered any sales loss as a
21 result of the lack of a standalone Subaru facility? A: I think they could sell more vehicles with a
22 better facility.”); Tr. Vol. 6 at 60:9-23 (Leopold) (“in my experience when retailers build an
23 exclusive Subaru facility, additional sales volume comes with that as well as customer
24 satisfaction.”).

25 Even Protestant agrees that it would sell more Subaru vehicles if it were operating out of
26 brand-compliant sales and service facilities. *See* Kelly Robinson Deposition Designations (Exhibit
27 R-629) at 52:10-53:8. (“Q: Well, what about in terms of sales? Can you envision advantages that
28 that new facility might have in terms of your ability to make sales? A: Yeah, I think it will increase,

1 absolutely.”); Tr. Vol. 7 at 184:18-185:5 (Prieto).

2 **2. Prieto Automotive’s Dual Ford-Subaru Facility Negatively Impacts is**
3 **Ability to Capture Available Sales Business.**

4 Since 2017, Prieto Automotive has been conducting is Subaru sales operations out of its
5 Ford dealership in Sonora. *See* Stipulation of Facts at ¶¶ 13 and 20. Even worse, early on in
6 Protestant’s tenure as a Subaru retailer, it actually conducted Subaru sales business from a trailer.
7 *See* Ford Letter of Consent (Exhibit R-323A); Tr. Vol. 4 at 150:9-151:9 (Prieto); Tr. Vol. 7 at
8 134:13-25 (Prieto). Indeed, in connection with Prieto Automotive’s negotiations to obtain a Subaru
9 franchise it executed a Letter of Consent from Ford, outlining the terms and conditions of Ford’s
10 agreement to allow temporary dual Ford and Subaru operations at Protestant’s Ford dealership.
11 *See* Ford Letter of Consent (Exhibit R-323A). Pursuant to the Letter of Consent, Protestant agreed
12 that not only would Subaru sales business be conducted out of trailers on the Ford property, it also
13 agreed that no Subaru vehicles would be displayed in the showroom at the Ford facility, and that
14 all Subaru sales-related business operations would be removed from Protestant’s Ford facility no
15 later than August 1, 2018. *Id.* at p. 1.

16 In light of the Letter of Consent, Subaru vehicles are rarely ever displayed at Protestant’s
17 current Subaru sales location at it Ford dealership. *See* Kelly Robinson Deposition Designations
18 (Exhibit R-629) at 15:13-16:8; Tr. Vol. 5 at 218:9-14 and 219:4-8 (Leopold). Moreover, other than
19 some Subaru brochures and a single digital Subaru kiosk, Prieto Automotive’s Subaru sales
20 location is devoid of Subaru products and touchpoints. Tr. Vol. 5 at 218:9-219:3 (Leopold).
21 Likewise, there is little to no Subaru branding at Protestant’s sales location and overall,
22 Protestant’s current Subaru sales facility is a very poor representation of the Subaru brand. Tr. Vol.
23 5 at 76:1-12 (Kelso) (“Q: And how would you say that Subaru of Sonora’s sales facilities compare
24 to other Subaru retailers in District 3 in the San Francisco zone? A: I would say it is poorly
25 represented because there is nothing that shows me that this is a Subaru organization, that they
26 would sell Subaru product.”); Tr. Vol. 6 at 180:12-181:13 (Farabee) (“Q: And in terms of
27 representing the Subaru brand -- I know everybody else has said it, but I’m going to give you your
28 chance. How do you -- how do you rate this as a representation of the Subaru brand in Sonora? A:

1 It's a poor representation. There's very little Subaru about -- about this facility.”); Tr. Vol. 5 at
2 219:13-221:1 (Leopold) (“Q: And how do you think Subaru of Sonora's sales facilities compare
3 with the other facilities of the Subaru retailers in your district? A: Well, it's in a Ford building, so
4 I would say it's probably one of the worst.”).

5 The lack of consumer access to Subaru products and touchpoints, the lack of a Subaru
6 showroom, and the overall lack of a meaningful Subaru presence at Protestant’s dealership is
7 injurious to the Subaru brand, the customer experience, and Prieto Automotive’s ability to market
8 and sell Subaru vehicles and other products. *Id.* Tr. Vol. 5 at 219:13-221:1 (Leopold); Tr. Vol. 6
9 at 37:7-18 (Leopold); Tr. Vol. 9 at 165:15-166:7 (Smit) (“Q: And how do you feel that not having
10 even a Subaru showroom in Sonora affects Subaru in terms of customers' trust? A: I mean, there's
11 damage that goes on to the customers. There really is. We've got numerous new models coming
12 out this year in particular that's going to attract a lot of new customers that are considering this
13 Subaru brand... these are going to attract customers that are brand new to the brand. And to walk
14 into a facility where we really don't have representation at all is damaging, because some of those
15 customers will just turn and walk right on out, and they'll go to the competitor that has a showroom,
16 that has an inclusive service center on-site instead of being split. So there's going to be damage
17 that happens, and there has been damage that happened.”).

18 Furthermore, when a Subaru retailer is operating out of a facility that is dualed with another
19 motor vehicle brand—like Protestant’s Ford-Subaru dealership—it is difficult, if not impossible,
20 for the retailer to achieve and maintain Subaru brand dedication, which can negatively impact
21 Subaru vehicle sales. Tr. Vol. 2 at 83:1 - 87:16 (Smit). In this scenario, and especially when sales
22 and management staff are simultaneously representing two different vehicle brands—like the staff
23 at Prieto Automotive—sales defection rates rise, meaning that potential Subaru vehicle sales are
24 lost to Ford sales. *Id.* Not surprisingly, when other Subaru retailers that were previously dualed
25 with another brand have transitioned to an exclusive Subaru-only facility, there is an increase in
26 sales performance, customer service satisfaction, and net profits for the retailer, while at the same
27 time, sales defection rates decrease. *Id.*

28 ///

1 available to Protestant, and if Prieto Automotive were operating out of a brand-compliant Subaru
2 dealership, the volume of vehicle sales made and service business conducted by Prieto Automotive
3 would increase. *See e.g.* Tr. Vol. 8, 128:15-129:13 (Prieto) ; Tr. Vol. 3, 107:19-110:1 (Smit); Tr.
4 Vol. 5, 178:6-179:4 (Kelso); Tr. Vol. 5, 192:4-19 (Kelso); Tr. Vol. 5, 217:15-218:2 (Leopold); Tr.
5 Vol. 6, 51:17-23 (Leopold). Prieto Automotive is simply failing to capture available sales and
6 service business, and its outdated and inadequate facilities are detrimental to Protestant’s ability
7 to retain future sales and service business. Accordingly, SOA has “good cause” under Section
8 3061(a) to terminate Protestant’s Dealer Agreement.

9 **B. Investment Necessarily Made and Obligations Incurred by the Dealer to**
10 **Perform its Part of the Franchise.**

11 Protestant has not made a sufficient investment of capital, resources, time, or effort with
12 respect to its Subaru dealership and this lack of investment has resulted in Protestant’s inability and
13 ultimate failure to comply with the terms of its Dealer Agreement. *See e.g.* Tr. Vol. 3, 106:14-
14 107:18 (Smit); Tr. Vol. 6, 135:21-137:20 (LeRoy); Tr. Vol. 5, 171:2-171:25 (Kelso).

15 From the moment that Prieto Automotive became a Subaru retailer in 2017, the primary
16 investment that Prieto Automotive was obligated to make was the establishment of a stand-alone,
17 MSOG-compliant Subaru sales and service facility in Sonora. *See* Facility Addendum (Exhibit J-
18 05) at p. 14-15; Tr. Vol. 2 at 148:18-149:11 (Smit); Tr. Vol. 7 at 22:14-23:22 (Prieto). Yet, as
19 established above, Prieto Automotive has not commenced construction of a Subaru facility or even
20 obtained the required building permits. *See* Stipulation of Facts at ¶ 19; Tr. Vol. 3 at 127:20-129:7
21 and 184:20-23 (Augustine); Tr. Vol. 4 at 229:4-16 (Prieto). And, as outlined in Section (VI) (*infra.*),
22 Prieto Automotive does not plan to have its architect begin drawing up construction plans for its
23 Subaru dealership until the 18th month in its construction timeline, which, at the earliest, will be in
24 October 2022. *See* Timeline (Exhibit P-110); Tr. Vol .9 at 137:9-25 (Marlette). Accordingly, no
25 significant investment has been made by Protestant, such as the commencement of construction or
26 even ordering construction materials, in furtherance of the dealership project.

27 In addition, the evidence presented in this matter clearly demonstrates that while Prieto
28 Automotive was neglecting its promise to SOA under the Facility Addendum to provide a brand-

1 compliant facility, Prieto Automotive was investing in improvements to its Ford dealership, and
2 investing significant capital in connection with its acquisition of other franchises over the last four
3 years. To wit, in 2018, Prieto Automotive made renovations to its Ford facility at a cost of
4 approximately \$300,000. Tr. Vol. 4 at 181:24-183:6 (Prieto). In July, Prieto Automotive closed on
5 its acquisition of its Chevy, Buick, GMC dealership, and paid \$225,000 in goodwill for the
6 franchises. Tr. Vol. 4 at 152:11-19 (Prieto); Tr. Vol. 5 at 63:8-64:9 (Prieto). In connection with this
7 acquisition, Prieto Automotive also purchased the existing Chevy, Buick and GMC facilities at a
8 cost of approximately \$1,500,000. Tr. Vol. 4 at 151:13-152:19 (Prieto). Then, in October 2019,
9 Prieto Automotive closed on its acquisition of its Mazda franchise, paying \$250,000 in goodwill.
10 Tr. Vol. 4 at 152:20-153:25 and 157:25-158:6 (Prieto). Shortly thereafter, Prieto Automotive was
11 appointed as a Mitsubishi dealer via an open-point. Tr. Vol. 4 at 157:25-158:6 (Prieto).

12 Furthermore, since 2017, Prieto Automotive has paid significant sums to its owners, Mr.
13 Prieto and Ms. Llamas, in the form of dividends and distributions. *See* Expert Report of Michael
14 LeRoy (Exhibit R-308) at p. 4. Specifically, in 2017, a distribution of \$293,697 was made to Prieto
15 Automotive’s owners; in 2018, a dividend of \$125,896 and a distribution of \$113,500 was made to
16 its owners; and in 2019, dividends totaling \$1,018,657 were made to its owners. *Id.* Also, in 2020,
17 a distribution in the amount of \$244,000 was made to the owners. Tr. Vol. 6 at 96:5-25 (LeRoy).

18 In addition to dividends and distributions, since 2017, Prieto Automotive has paid
19 approximately \$46,000 per month for its Subaru and Ford dealership’s rental of the real property
20 on which its dual sales operations are conducted, and such rent is paid to Cypress Square—an LLC
21 owned by Mr. Prieto and his wife, Ms. Llamas. Tr. Vol. 4 at 212:14-213:1 (Prieto); Tr. Vol. 5 at
22 46:10-23 (Prieto).

23 Despite Prieto Automotive’s claims in 2019 that it could not afford to construct Subaru
24 facilities in Sonora, Prieto Automotive has remained a profitable enterprise since 2017. SOA’s
25 expert witness, Michael LeRoy concluded that, “the Sonora dealership has maintained a strong
26 balance sheet and financial position from 2017 through 2020, while affording its owners the ability
27 to withdraw approximately \$2 million in the form of dividends and distributions.” *See*
28 Supplemental Expert Report of Michael LeRoy (Exhibit R-309) at p. 7. Mr. LeRoy further noted

1 that, “Sonora’s operations have been quite profitable during the period from 2017 through 2020,”
2 with average annual net profits totaling approximately \$900,000. *Id.* at p. 8.

3 Given Protestant’s financial success, it is not as though Prieto Automotive could not afford
4 to construct Subaru sales and service facilities in Sonora. Rather, over the last four years, Prieto
5 Automotive has simply chosen not to, and has, instead, elected to invest its capital in other
6 franchises and in compensation and rent payments made to its owners and the LCC Cypress Square.
7 As explained in Sections (V)(A) and (V)(E) herein, Prieto Automotive’s lack of investment in its
8 Subaru franchise has left it without the ability to properly represent the Subaru brand and without
9 the ability to adequately serve customers in the Sonora market. For all of these reasons, the evidence
10 presented in this matter pertinent to Protestant’s investment in its Subaru franchise under Cal. Veh.
11 Code § 3061(b) demonstrates that termination of Protestant’s Dealer Agreement is warranted.

12 **C. Permanency of the Investment.**

13 Protestant has made little, if any, permanent investment in its Subaru dealership. *See e.g.*
14 Tr. Vol. 6, 107:25-113:12 (LeRoy). As stated above, Prieto Automotive conducts its Subaru sales
15 business out of its existing Ford facility and Prieto Automotive leases the property on Southgate
16 Drive on which its service facilities are located. *See* Stipulation of Facts at ¶ 20; Tr Vol. 4 at 149:16-
17 150:8 (Prieto) (“Q: Okay. And in terms of the -- the Subaru service facility, you rent that from a
18 third party landlord; is that correct? A: Yes.”).

19 While Prieto Automotive has made improvements to its Ford dealership facilities, Prieto
20 Automotive has made no meaningful permanent investment relating to its Subaru operations in any
21 facility in which it conducts its Subaru sales or service business. *See* Supplemental Expert Report
22 of Michael LeRoy (Exhibit R-309) at p. 5; Tr. Vol. 4 at 181:24-183:6 (Prieto); Tr. Vol. 6 at 107:25-
23 113:12 and 140:17-142:13 (LeRoy). In order to determine the investment made in a particular
24 business entity, the gross fixed asset section of the entity’s balance sheet must be examined. Tr.
25 Vol. 6 at 107:25-108:23 (LeRoy). In terms of Prieto Automotive’s gross fixed assets, they totaled
26 \$581,718 in 2017; \$614,743 in 2018; \$1,016,222 in 2019; and \$1,070,202 in 2020. *See*
27 Supplemental Expert Report of Michael LeRoy (Exhibit R-309) at p. 16; Tr. Vol. 6 at 109:4-110:1
28 (LeRoy). Importantly, Prieto Automotive’s balance sheets combine the fixed assets associated with

1 both its Ford and Subaru dealerships, so the assets reflected are not just for Subaru. *Id.* Additionally,
2 the jump in gross fixed assets from \$614,743 in 2018 to over \$1 million in 2019 resulted from the
3 approximately \$300,000 in improvements that Prieto Automotive made to its **Ford dealership** in
4 2018. Tr. Vol. 6 at 109:4-110:1 (LeRoy). As Mr. LeRoy opined, given that Prieto Automotive
5 reported \$11,863,100 in total assets in 2019, gross fixed assets in the amount of \$1,016,222 is a
6 small figure in terms of investment, relative to the over \$11 million in reported total assets. *Id.*

7 Furthermore, Mr. Prieto testified that even if Protestant’s Subaru Dealer Agreement were
8 terminated and its Subaru franchise no longer existed, Protestant could remain profitable as just a
9 Ford dealer at its current dual Ford-Subaru dealership location. Tr. Vol. 7 at 185:17-186:16 (Prieto)
10 (“Can I become profitable in the event I only have the Ford dealership? The answer would have to
11 be yes, because I was profitable before I bought Subaru. The Ford dealership was profitable. So
12 can I operate the store and be profitable? Yes.”). Likewise, Mr. Prieto also testified that its lease
13 agreement for the service location has an “exit strategy” and that Prieto Automotive can terminate
14 the lease agreement at its discretion upon 90-days’ notice. Tr. Vol. 6 at 140:23-142:1 (LeRoy); Tr.
15 Vol. 5 at 14:15-16:22 (Prieto).

16 For all of these reasons, it is apparent that Protestant has made no significant investment in
17 its Subaru franchise. As such, Cal. Veh. Code § 3061(c) supports termination of Prieto
18 Automotive’s Dealer Agreement.

19 **D. Whether it is Injurious or Beneficial to the Public Welfare for the Franchise**
20 **to be Modified or Replaced or the Business of the Dealer Disrupted.**

21 It would not be injurious to the public welfare if Protestant’s Subaru dealership were
22 terminated and replaced. Tr. Vol. 3 at 110:17-112:4 (Smit). The public would be better served by
23 allowing SOA to appoint a motivated Subaru retailer in Sonora that would provide Subaru
24 customers with exclusive, MSOG-compliant Subaru sales and service facilities under the same roof.

25 As previously addressed above, Subaru dealerships are in high demand among automobile
26 retailers nationwide. Tr. Vol. 3 at 27:9-25 and 110:17-112:4 (Smit) (“Q: And in your direct
27 testimony, Mr. Smit, you indicated how often do you receive contacts from retailers with interest
28 in providing facilities -- or excuse me, in providing an opportunity for them to become a Subaru

1 dealer? A: It is at least a few a month, quite often. We are one of the rate -- highest rated brands in
2 terms of value and predicted future value. So there is a lot of people contacting us.”); Tr. Vol. 3 at
3 27:9-25 (Smit). Tr. Vol. 6 at 63:5-13 (Leopold) (“Q: Mr. Leopold, based on your experience, is the
4 Subaru franchise a popular franchise among retailers? A: We are one of the fastest growing brands,
5 and we have one of the highest blue sky values. Yes, it is very popular.”).

6 In addition, there is significant demand for Subaru products among consumers in the Sonora
7 area due to the popularity of Subaru vehicles in that market. Tr. Vol. 6 at 183:16-185:5; *See also*
8 Kelly Robinson Deposition Designations (Exhibit R-629) at 23:2-5.

9 Given the considerable demand for Subaru franchises among retailers and the popularity of
10 the Subaru brand in Sonora, SOA could quickly identify a replacement dealer to operate a Subaru
11 dealership in the Sonora area if Prieto Automotive’s Dealer Agreement were terminated. Tr. Vol.
12 3, 111:5-112:4 (Smit); Tr. Vol. 6 at 190:11-191:10 (Farabee); Tr. Vol. 6, 63:5-13 (Leopold) (“Q:
13 And do you think that if Subaru of Sonora were terminated that Subaru of America would have
14 difficulty finding a dealer to replace Subaru of Sonora? A: No.”); Tr. Vol. 8 at 47:19-48:22
15 (Graziano) (“Q: Okay...why are you then confident that you would be able to find a replacement
16 for this dealer in Sonora if the board were to overrule Mr. Prieto's protest? A: I think for a couple
17 reasons. One, I think I may have mentioned this before in -- earlier today is that it is a great Subaru
18 market, that Sonora area. The Subaru franchise is a very strong asset. We are one of the strongest
19 assets, one of the strongest brands in the industry right now. And, you know, the fact is we just --
20 you know, we don't have a lot of open points. In fact, we rarely put in an open point. And so the
21 only way for someone to acquire a Subaru franchise is through a -- is through a point that either a
22 buy/sell or, you know, with a retailer that goes out. So yeah, I mean, there is no doubt in my mind
23 that it would be very, very quick to find a retailer that wants to build a facility, do the right thing in
24 Sonora.”).

25 At this point, given Protestant’s prolonged failure to provide a Subaru sales and service
26 facility, termination and replacement of Prieto Automotive is warranted and is the remedy that
27 would best serve consumers in the Sonora market. Tr. Vol. 10 at 78:14-80:4 (Hinkle). Based on
28 Prieto Automotive’s history of non-performance of its facility obligation, SOA justifiably lacks

1 confidence that Prieto Automotive will ever make good on its promise to build an MSOG-compliant
2 Subaru dealership. Tr. Vol., 6, 193:9-15 (Farabee); Tr. Vol. 9 at 194:12-196:6 (Smit); Tr. Vol. 9 at
3 232:14-233:5 (Smit); Tr. Vol. 10 at 120:25-121:10 and 123:10-124:2 (Hinkle). Also, importantly,
4 Prieto Automotive has claimed that it would need an extensive 43-48-month time period in which
5 to complete construction of a Subaru facility (*see* Section (VI) *infra.*) and forcing consumers to
6 wait yet another 4 years before they have access to adequate Subaru sales and service facilities will
7 **certainly not** serve the public interest. Tr. Vol. 9 at 204:7-206:4 (Smit); Tr. Vol. 9 at 207:11-19
8 (Smit) (“Q: And in terms of waiting eight years, would your answer be the same? A: Yes. Yes. It’s
9 way too long for any manufacturer to not have a showroom, to not have proper representation, on
10 a daily basis to have their customers think about going somewhere else because we don’t have a
11 showroom, we don’t have a proper representation for service. It’s -- I don’t think there’s any
12 manufacturer out there that would accept that.”); Tr. Vol. 9 at 208: 25-209:23 (Smit).

13 Furthermore, in less than 43 months, SOA could identify a replacement retailer for the
14 Sonora area, and at a minimum, establish temporary Subaru sales and service facilities that are
15 located under one roof, in an exclusive, Subaru-only building. Tr. Vol. 10 at 78:14-80:4 and 116:16-
16 117:2 (Hinkle) (“Q: And in the event that the board terminates the franchise, do you expect to get
17 a replacement dealer in the Sonora market which would sell vehicles and service units in operation
18 quicker than the time frame set forth in Amy Augustine’s spreadsheet which is Exhibit P-110? A. I
19 do, because we would have that retailer in some kind of temporary facility. At least we would be
20 in our own facility. We wouldn’t be, you know, essentially selling out of a lot and servicing out of
21 something very close to a barn. So we would have a temporary facility while the other facility is
22 under construction.”). In addition, in connection with efforts to identify and establish a replacement
23 retailer, SOA and the new retailer would not be limited to searching for a dealership location within
24 the confines of Sonora proper. The surrounding area is also a viable option for a potential location
25 of a replacement Subaru retailer. Tr. Vol. 10 at 129:1-7 (Hinkle).

26 Based on the foregoing, SOA has demonstrated that it could expeditiously identify and
27 establish a replacement Subaru retailer in the Sonora area if Protestant’s Dealer Agreement were
28 terminated, and the installation of a motivated retailer that will provide MSOG-compliant facilities

1 will better serve the interests of consumers in the long run. Thus, Cal. Veh. Code § 3061(d) supports
2 termination.

3 **E. Whether the Dealer (1) has Adequate Sales and Service Facilities,**
4 **Equipment, Parts, and Qualified Service Personnel to Reasonably Serve the**
5 **Needs of the Consumers for the Vehicles Handled by the Dealer, and (2) has**
6 **been and is Rendering Adequate Services to the Public.**

7 Protestant's existing Subaru dealership operations are woefully inadequate to reasonably
8 provide for the sales and service needs of Subaru consumers in the Sonora area. *See e.g.* Tr. Vol. 3
9 at 110:17-112:4 (Smit) ("Q: Can you imagine anything much worse than a Ford dealership as a
10 sales facility in something that is not really much more than a shack or a barn for a service facility?
11 A: Under my previous direct testimony, I think it's -- I had said it was one of the worst facilities I
12 have seen. I really could not imagine anything else that has the aesthetics -- missing the aesthetics
13 and the customer touchpoints than what we currently have in place."). As explained above, it is
14 undisputed that Prieto Automotive's current Subaru sales and service facilities are non-compliant
15 with SOA's MSOGs in virtually every respect, including without limitation, facility exterior and
16 interior image requirements, Subaru vehicle storage requirements, Prieto Automotive's lack of a
17 Subaru showroom, Prieto Automotive's lack of Subaru customer touch points in its sales and
18 service facilities, and Prieto Automotive's deficient number of Subaru personnel. *See* 2020 MSOGs
19 for Subaru of Sonora (Exhibit R-316) at p. 23-27; Tr. Vol. 2 at 129:23-134:4 and 149:20-151:20
20 (Smit). The purpose of SOA's establishment of MSOGs is to ensure that its retailers have
21 appropriately sized dealership facilities and a sufficient number of employees to meet the needs of
22 their respective markets. Tr. Vol. 2 at 76:24-78:17 and 128:16-129:22 (Smit). Thus, the fact that
23 Prieto Automotive's facilities and operations are non-compliant with SOA's MSOGs reasonably
24 gives rise to a presumption that its facilities and personnel staffing are insufficient to meet the
25 needs of consumers in the Sonora market. As set forth in further detail below, this is undoubtedly
26 the case.

27 **1. Prieto Automotive's Deficient Sales Facilities.**

28 Protestant's sales facilities are inadequate to meet the needs and desires of Subaru customers
because Protestant's Subaru sales operations are located in Protestant's Ford dealership, Protestant

1 does not have a Subaru showroom, and the lack of Subaru products, touchpoints, and branding at
2 Protestant's sales location make it a poor and disappointing, if not unrecognizable, representation
3 of the Subaru brand.

4 Prieto Automotive's Subaru sales location, pictured below, looks nothing like other brand-
5 compliant Subaru dealerships in California or any other state. *See e.g.* Tr. Vol. 3 at 107:19-110:1
6 (Smit) ("And that facility, I don't know how old it is. I don't want to speculate, but it's -- it's older
7 than I probably am, so yeah. And it doesn't provide us proper customer touchpoints. The finish
8 schedule is not there. The signage is incorrect. The facade is -- is not compliant, and it is -- it is
9 just -- honestly, out of the thousands of retailer contacts I have had, it is probably one of the worst
10 I have ever seen, unfortunately.").



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17 **N/A** Does the stone finish or slate tiles have signs of efflorescence?



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22 **∴** Is the dealership's fascia clean and in a well-maintained condition?*

23 **No** Is the fascia damaged?

24
25 As explained above, Subaru vehicles are rarely ever displayed at Protestant's current Subaru
26 sales location at its Ford dealership, and in fact, under the Ford Letter of Consent, Protestant is
27 actually prohibited from displaying Subaru vehicles in its Ford facility. *See* Kelly Robinson
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1 Deposition Designations (Exhibit R-629) at 15:13-16:8; Tr. Vol. 5 at 218:9-14 and 219:4-8
2 (Leopold); Ford Letter of Consent (Exhibit R-323A).

3 In addition, other than some Subaru brochures and a digital Subaru kiosk, Prieto
4 Automotive’s Subaru sales location operates without Subaru products and touchpoints. Tr. Vol. 5
5 at 218:9-219:3 (Leopold). Likewise, there is little to no Subaru branding at Protestant’s sales
6 location and overall, Protestant’s current Subaru sales facility is substandard representation of the
7 Subaru brand and fails to provide consumers with the hands-on access to Subaru products that they
8 are seeking when they walk into a Subaru dealership. Tr. Vol. 5 at 76:1-12 (Kelso) (“Q: And how
9 would you say that Subaru of Sonora’s sales facilities compare to other Subaru retailers in District
10 3 in the San Francisco zone? A: I would say it is poorly represented because there is nothing that
11 shows me that this is a Subaru organization, that they would sell Subaru product.”); Tr. Vol. 6 at
12 37:7-18 (Leopold) (“Q: Okay. Mr. Leopold, based on your knowledge of Subaru of Sonora's sales
13 operations, do you have any opinion about whether Subaru of Sonora and its sales facilities are
14 currently meeting the needs of customers? A: I don't believe it's currently meeting the needs of
15 customers. Q: And why not? A: Because it's a Ford dealership. Q: Okay. A: It doesn't have any of
16 the Subaru branding, Subaru elements, Subaru experience that our customers are asking for.”); Tr.
17 Vol. 5 at 219:13-221:1 (Leopold).

18 The lack of consumer access to Subaru products and touchpoints, the lack of a Subaru
19 showroom, and the overall lack of a meaningful Subaru presence at Protestant’s dealership is
20 injurious to a customer’s ability to experience and learn about the Subaru brand and its vehicles
21 and other products. Customers who are looking to interact with Subaru vehicles and other products
22 have not been well served (and will continue to be poorly served) when they visit Protestant’s
23 Subaru sales location because of the overwhelming lack of a Subaru presence at Protestant’s Ford
24 dealership. *See e.g.* Tr. Vol. 9 at 208:25-209:23 (Smit) (“I mean, from a brand standpoint, you
25 know, you have customers that come into the showroom, and they came in in 2017 and 2018 and
26 2019 and 2020, and there's no representation there. You don't have the touch points. You don't
27 have the -- you don't have the theme that we have our retailers investing in to represent the Love
28 Promise which our whole brand is built on. So we're into 2020. '21, '22, '23, we finally end up

1 getting maybe a showroom. So it's a long time to have to wait. And it's a promise that was made
2 to us when we put Manuel into place, and it just hasn't been -- it hasn't been performed on multiple
3 times. And so there's -- when a customer comes in, we spend a lot of money bringing that customer
4 in, a lot of money for retention. And when they come in and they see a substandard facility,
5 something that doesn't even have representation in it, you'll lose that customer. And it does damage
6 to the brand. It does damage to the surrounding retailers, because that customer might go away
7 and might go to a Honda store, might go to a Toyota store, might go to a Nissan store.”).

8 Along these lines, as of February 2021, Prieto Automotive was ranked dead last at 10 out
9 of 10 Subaru retailers in its District in terms of customer retention with respect to sales. Tr. Vol. 2
10 at 138:1-19 (Smit); Tr. Vol. 3 at 117:5-24 (Smit). Because customers are looking elsewhere for
11 their sales needs, it is undeniable that Prieto Automotive is failing to satisfy the needs and meet
12 the expectations of at least some of its customers.

13 Furthermore, it is evident based on Protestant’s low customer satisfaction scores for sales
14 facilities that customers have been displeased with Protestant’s sales location. *See e.g.* 2019 2nd
15 Quarter OLP Report (Exhibit R-581) at p. 21 and 25; 2019 3rd Quarter OLP Report (Exhibit R-
16 582) at p. 28; Tr. Vol. 6 at 12:11-18:5 (Leopold). Specifically, customers were not satisfied with
17 the following aspects of Protestant’s sales facilities; (i) the appearance of the facility; (ii) the
18 availability of convenient parking; (iii) showroom information displays; and (iv) comfort of the
19 area where the vehicle purchase was made. *Id.* In terms of Protestant’s overall OLP Purchase
20 Satisfaction Scores in 2019, for example, Protestant ranked in the bottom 10th percentile compared
21 to all other retailers in the San Francisco Zone. *See* 2019 3rd Quarter OLP Report (Exhibit R-582)
22 at p. 23; Tr. Vol. 6 at 11:17-12:10 (Leopold).

23 2. Prieto Automotive’s Deficient Service Facilities.

24 Prieto Automotive’s service facilities are inadequate to meet the needs of consumers
25 because they are located in a shabby, barn-like building that is a dismal representation of the Subaru
26 brand, and customers have been dissatisfied with the availability of parking, the inconvenient
27 vehicle pick-up and drop-off process, the appearance of the service facilities, and the overall
28 comfort of the customer waiting areas at the service location. Additionally, Prieto Automotive’s

1 Subaru service department is inconveniently situated approximately 3 miles, driving distance, from
2 Prieto Automotive’s Subaru sales location. Tr. Vol. 2 at 104:16-105:5 (Smit).

3 Like Protestant’s Subaru sales facility, its service location, shown below, is a disappointing
4 and regrettable representation of the Subaru brand. *See e.g.* Tr. Vol. 2 at 104:5-11 (Smit) (“Q:
5 Again, do you see any Subaru brand elements that you would normally look for on a Subaru facility
6 such as -- ? A: No, ma'am. This is completely non-compliant, completely not brand-dedicated. This
7 is not the way I've ever seen any Subaru service facility to look like. This looks more like a
8 garage.”).



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The chief complaints among patrons of Protestants’ service facilities have been the inconvenient, offsite service location, the lack of convenient parking and the inconvenient and confusing vehicle drop-off and pick-up process at Prieto Automotive’s service facilities. Tr. Vol. 5 at 93:7-20 (Kelso); Tr. Vol. 5 at 98:18-100:10 (Kelso) (“Q: Okay. Overall, Mr. Kelso, what does the information contained in page 44 indicate to you about Subaru of Sonora's service facility? A: That it was confusing for customers because they didn't know where to park. They were somewhat comfortable, but there was room for improvement, for their waiting area in particular. And they, for the most part, had to try and figure out, okay, where is this place? And the facility just -- it's not ideal. Let's put it that way. Significantly less than ideal because it's not located under the same roof, i.e., with the sales facility.”).

As discussed above, customers have been significantly less satisfied with Prieto Automotive’s service facilities than they were with the service facilities of other Subaru retailers in the San Francisco Zone as shown by Prieto Automotive’s low customer satisfaction score for

1 service facilities in 2019 OLP reports. *See* 2019 2nd Quarter OLP Report (Exhibit R-581) at p. 44;
2 Tr. Vol. 5 at 98:18-100:10 (Kelso). Specifically, customers indicated dissatisfaction with the
3 following aspects of Protestant’s service facilities: (i) the availability of convenient parking; (ii)
4 the comfort of the waiting area, (iii) the location of the facility; and (iv) the appearance of the
5 facility. *Id.* Protestant’s overall OLP Service Satisfaction Scores in 2019 placed it in the bottom
6 20th percentile compared to the scores of all other retailers in the San Francisco Zone. *See* 2019
7 2nd Quarter OLP Report (Exhibit R-581) at p. 39; Tr. Vol. 5 at 91:11-92:5 (Kelso). *See also* 3rd
8 Quarter OLP Report (Exhibit R-582) at p. 43 and 49; Tr. Vol. 5 at 174:15-177:17 (Kelso); Tr. Vol.
9 5 at 157:1 - 159:7 (Kelso)

10 Even Mr. Prieto and Protestant’s General Manager, Kelly Robinson, have admitted that
11 Prieto Automotive has had challenges in terms of providing customers with a satisfactory Subaru
12 vehicle service experience. Tr. Vol. 7 at 81:17-18 (Prieto) (“I have some challenges in service that
13 we know they are going to get addressed by a new facility.”). *See also* Kelly Robinson Deposition
14 Designations (Exhibit R-629) at 49:13-50:13.

15 To that end, split sales and service facilities—such as the Subaru facilities of Prieto
16 Automotive—are inconvenient for customers and detrimental to the overall Subaru experience for
17 customers. *See e.g.* Tr. Vol. 2 at 104:16-105:5 (Smit) (“Q: How does that affect customer
18 convenience, having a facility miles away from -- a service facility miles away from the sales
19 facility? A. It's -- it's bad at best. It's not good at all. So there's something that I refer to called the
20 sales-to-service hand-off. Usually when you buy a vehicle, you are turned over to the service
21 advisor because they become your next contact through that -- through that customer journey. And
22 usually it's -- when it's connected, it's easy. You can introduce them to the service advisor. You
23 can show them around the facility for service, where to go, where to drive up. But none of that
24 happens in this case. It's -- well, it's three miles away, so it's much more difficult for it to happen.”);
25 Tr. Vol. 5 at 71:23-72:11 (Kelso) (“Q: In your experience, Mr. Kelso, is it common for a Subaru
26 retailer's sales, services, and parts operations to be split up at different facility locations? A: No, it
27 is not. Q: Okay. And -- it's uncommon. Is there a reason that it's not commonly done? A: Well, the
28 primary reason is because the customers get a much better impression of the brand when all

1 departments are run under one roof, if you will. If they are within the same building is ideal. And
2 it makes it easier for all of the employees to interact in a positive manner so that they can provide
3 the best service to the Subaru customer.”); Tr. Vol. 5 at 216:20-218:2 (Leopold); Tr. Vol. 5 at
4 72:12-73:5 (Kelso).

5 **3. Prieto Automotive’s Insufficient Number of Subaru Personnel.**

6 Under the terms of its Dealer Agreement, Prieto Automotive is obligated to maintain the
7 number of Subaru dealership employees specified in SOA’s MSOGs applicable to Protestant. *See*
8 Dealer Agreement (Exhibit J-05) at p. 30, Section 7.1. Pursuant to Protestant’s 2020 MSOGs, Prieto
9 Automotive did not employ a sufficient number of personnel in that it did not have an exclusive
10 Subaru Sales Manager, it was short on the requisite number of Subaru Certified Service Advisors,
11 and it did not employ a sufficient number of fully trained Subaru Technicians. *See* 2020 MSOGs
12 for Subaru of Sonora (Exhibit R-316) at p. 26; Tr. Vol. 2 at 131:9-132:9 (Smit). In addition, Prieto
13 Automotive’s technicians were significantly behind in terms of their required Subaru training
14 credits. *Id.*

15 Prieto Automotive’s failure to maintain the requisite number of employees with the requisite
16 level of training at its Subaru dealership has resulted in Protestant’s inability to properly serve
17 customers in terms of vehicle sales and service. *See e.g.* Tr. Vol. 2 at 129:4-22 (Smit); Tr. Vol. 5 at
18 80:3-17 and 101:12-102:8 (Kelso) (“Q: Were you ever aware of any issues with the functionality
19 of the service facility in terms of ease of use for customers? A: We had -- sometimes where there
20 was a wait for a customer to be able to get their appointment for service... there were issues with
21 being able to get customers in because of tech training, things like that... Did they always have the
22 technicians? No.”).

23 All in all, the evidence presented during the proceedings in this matter has clearly
24 established that Prieto Automotive’s current Subaru dealership facilities and operations are sorely
25 inadequate to meet consumers’ sales and service needs. Accordingly, Cal. Veh. Code § 3061(e)
26 weighs heavily in favor of the termination of Prieto Automotive’s Dealer Agreement.

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1 **F. Whether the Dealer Fails to Fulfill SOA’s Warranty Obligations.**

2 There is no allegation in this case that Prieto Automotive failed to fulfill any warranty
3 obligations.

4 **G. Extent of the Dealer’s Failure to Comply with the Terms of the Franchise.**

5 Based on the evidence presented in this matter, it is undisputed that Prieto Automotive
6 breached the terms of its Dealer Agreement by, among other things, failing to complete, obtain
7 permits for, or commence construction of a Subaru dealership facility—a facility that Protestant
8 originally promised to complete by July 31, 2018. Tr. Vol. 2, 59:21-60:6 and 152:10-25 (Smit); Tr.
9 Vol. 3, 68:7-23 (Smit); Tr. Vol. 10 at 20:2-21:3 (Hinkle). In so doing, Protestant has failed to
10 provide the basis of SOA’s bargain with Protestant given that SOA approved Prieto Automotive as
11 an authorized Subaru dealer based upon Prieto Automotive’s promise to provide a Subaru
12 dealership facility compliant with SOA’s MSOGs. Tr. Vol. 2, 158:15-159:7 (Smit); Tr. Vol. 10 at
13 20:2-21:3 (Hinkle). Prieto Automotive’s Dealer Agreement, under any applicable contract law,
14 would be subject to rescission due to Protestant’s failure to comply with a fundamental objective
15 of the contract.

16 **1. Protestant’s Failure to Comply with Sections 6.1 and 5.3 of the Dealer**
17 **Agreement Constitutes a Material Breach of the Dealer Agreement.**

18 It has been recognized that a dealer’s duty to provide and maintain dealership facilities that
19 comply with the manufacturer’s standards is a material and substantial obligation of a dealer
20 agreement and the breach of such obligation is sufficient to constitute good cause for termination.
21 *See, e.g., Forty-Niner Sierra Resources, Inc. d/b/a Forty-Niner Subaru v. Subaru of America, Inc.*,
22 California New Motor Vehicle Board Protest No. PR-1972-05 (Nov. 15, 2007), at 12–14, 18–19,
23 30 (concluding that distributor had good cause to terminate dealer based in large part on dealer’s
24 failure to comply with distributor’s facility standards in dealer agreement); *Scuncio Motors, Inc.*
25 *v. Subaru of New England, Inc.* (D.R.I. 1982) 555 F. Supp. 1121, 1136–37 (finding that distributor
26 demonstrated that it terminated dealer’s franchise for good cause and acted in good faith when
27 dealer failed to comply with relocation provision of franchising agreement, which was
28 reasonable and of material significance to the franchise relationship); *Autohaus, Inc. v. BMW of N.*

1 *Am., Inc.* (D. Mass. Dec. 23, 1993) 1993 WL 150395, at *5, 8 (granting summary judgment and
2 finding that distributor “unquestionably acted with ‘good cause’ in terminating” dealer which
3 failed to perform agreement to relocate to facility that complied with distributor’s updated facility
4 standards); *Maple Shade Motor Corp. v. Kia Motors of Am., Inc.* (D.N.J. 2005) 384 F. Supp. 2d
5 770, 777–79 (concluding that dealer’s failure to build a separate facility in breach of agreement
6 with distributor was sufficient to establish good cause for distributor to terminate dealer); *Maple*
7 *Shade Motor Corp. d/b/a Maple Shade Kia of Turnersville v. Kia Motors of Am., Inc.* (3d Cir. Jan.
8 11, 2008) 260 Fed. Appx. 517, 518 (“By failing to construct the exclusive Kia showroom required
9 by the Addendum, Maple Shade committed a material breach of the franchise agreement and gave
10 rise to KMA’s good cause termination of the franchise agreement.”); *Wagner and Wagner Auto*
11 *Sales, Inc. v. Land Rover N. Am., Inc.* (D. Mass. 2008) 539 F. Supp. 2d 461, 470–71, *aff’d* (1st Cir.
12 2008) 547 F.3d 38 (granting summary judgment and concluding that dealer’s failure to meet
13 various construction and facility completion deadlines promised at time it received franchise
14 constituted good cause for termination); *Gebardt European Autos v. Porsche* (D. Colo. Dec. 20,
15 2010) 2010 WL 6575913, at *9–10 (denying dealer’s motion for preliminary injunction, finding
16 that dealer failed to demonstrate that distributor did not have “just cause” to terminate dealer for
17 failing to meet facility commitments in dealer agreement to provide an exclusive showroom
18 meeting distributor’s standards); *B.A. Wackerli Co. v. Audi of Am., Inc.*, Idaho Transportation
19 Department (June 8, 2012) at 19, COL ¶ 12 (“[Distributor] has met its burden of establishing good
20 cause . . . for the termination of the dealer franchise agreement with [dealer] based upon [dealer]’s
21 failure to comply with [facility commitment] of the franchise agreement which is both reasonable
22 and of material significance to the franchise agreement relationship.”).

23 With respect to Prieto Automotive’s Subaru Dealer Agreement, Section 6.1 of the Standard
24 Provisions specifically provides that Prieto Automotive must ensure that its Subaru dealership is
25 of sufficient size and of satisfactory layout and design to comply with SOA’s MSOGs for the
26 facility. *See Dealer Agreement (Exhibit J-05)* at p. 29. Section 6.1 further requires Prieto
27 Automotive to “continuously maintain the Facilities in a manner satisfactory to [SOA] in
28 appearance and condition.” *Id.* In addition, pursuant to Section 5.3 of the Standard Provisions,

1 Prieto Automotive acknowledged the importance and reasonableness of SOA’s MSOGs, and
2 agreed that its compliance with MSOGs is an “essential element” of Prieto Automotive’s
3 performance under its Dealer Agreement. *Id.*

4 Given the circumstances of this case, it is both undeniable and undisputed that Prieto
5 Automotive’s failure to construct a Subaru dealership facility constitutes a material breach of its
6 obligations under the Dealer Agreement to provide and maintain a Subaru facilities that comply
7 with SOA’s MSOGs and other reasonable requirements in terms of facility size, layout, design,
8 appearance and condition.

9 **2. Protestant’s Failure to Comply with the Terms of the Facility Addendum
10 and Amendments Thereto Constitutes a Material Breach of the Addendum
11 and the Dealer Agreement.**

12 As set forth above, under the terms of the Facility Addendum, Prieto Automotive agreed to
13 complete construction of new Subaru sales and service facilities compliant with SOA’s MSOGs by
14 July 31, 2018. *See* Facility Addendum (Exhibit J-05) at p. 14-15. In reliance upon Protestant’s
15 promise to construct a compliant Subaru dealership, SOA granted Prieto Automotive the privilege
16 of operating as an authorized Subaru retailer prior to Prieto Automotive’s compliance with facility
17 requirements. *Id.* Pursuant to the Facility Addendum, Prieto Automotive specifically acknowledged
18 that its temporary sales location in its Ford facility and its temporary service location on Southgate
19 Drive did not comply with SOA’s MSOGs, and that SOA was relying on Prieto Automotive’s
20 commitment to construct a new Subaru dealership facility “as a condition of approving Dealer’s
21 application for a Subaru franchise.” *Id.*

22 Despite Protestant’s commitments under the Facility Addendum and SOA’s agreement to
23 extend the facility deadlines on multiple occasions, Prieto Automotive consistently failed to meet
24 the applicable deadlines, including, importantly, its deadlines to obtain required permits, commence
25 construction, and ultimately complete construction of the sales and service facilities. It is indeed
26 undisputed in this case that Protestant has never obtained the required building and development
27 permits, and has never broken ground on construction. *See* Section (III) Factual Background, *supra*.

28 Pursuant to the plain language of the Facility Addendum, Prieto Automotive’s failure to

1 meet its construction deadlines is a clear and material breach of its commitments under the
2 Addendum, which specifically states that Prieto Automotive’s failure to meet its deadlines for the
3 planning and construction of its Subaru facility would “constitute a material breach of the
4 Agreement.” *See* Facility Addendum (Exhibit J-05) at p. 15.

5 Like Protestant’s failure to honor the terms of its Dealer Agreement, Protestant’s breach of
6 the terms of the Facility Addendum cannot be excused. SOA honored its end of the bargain by
7 approving Prieto Automotive as an authorized Subaru retailer. There is simply no justification for
8 Prieto Automotive’s failure and ongoing refusal to uphold its reciprocal agreement to timely
9 construct a sales and service facility compliant with SOA’s MSOGs. Manuel Prieto is a
10 sophisticated businessman who lawfully entered into a contractual agreement—the Facility
11 Addendum—on behalf of Prieto Automotive, which provides that failure to timely complete
12 construction of a Subaru dealership facility shall result in termination of Prieto Automotive’s
13 Dealer Agreement. After receiving multiple extensions of the deadline for completion of the
14 facility, Prieto Automotive has failed to even break ground on construction. SOA is simply asking
15 that the terms of the Facility Agreement be enforced and that Protestant’s Dealer Agreement be
16 terminated due to Protestant’s ongoing failure of performance in terms of its facility obligations.

17 **3. Protestant’s Failure to Comply with Section 7 of the Dealer Agreement**
18 **Constitutes a Material Breach of the Dealer Agreement.**

19 In addition to Prieto Automotive’s failure to honor its agreement to provide a Subaru sales
20 and service facility, Prieto Automotive has also breached its obligation to maintain the requisite
21 number of Subaru dealership employees under Section 7 of its Dealer Agreement.

22 In pertinent part, Section 7 of the Standard Provisions provides that, “Dealer shall employ
23 qualified and trained sales, service, and parts personnel at least in such capacities and in such
24 numbers as are specified in the applicable [MSOGs].” *See* Dealer Agreement (Exhibit J-05) at p.
25 30, Section 7.1. SOA’s MSOGs applicable to Prieto Automotive in 2020 show that Protestant did
26 not employ a sufficient number of personnel in that Protestant did not have an exclusive Subaru
27 Sales Manager, was short on the requisite number of Subaru Certified Service Advisors, and did
28 not employ a sufficient number of fully trained Subaru Technicians. *See* 2020 MSOGs for Subaru

1 of Sonora (Exhibit R-316) at p. 26; Tr. Vol. 2 at 131:9-132:9 (Smit). In addition, Prieto
2 Automotive’s technicians were significantly behind in terms of their required Subaru training
3 credits. *Id.*

4 In light of Protestant’s material breaches of its Dealer Agreement and the Facility
5 Addendum as outlined herein, there is good cause to terminate Protestant’s Dealer Agreement under
6 Cal. Vehicle. Code § 3061(f).

7
8 **VI. POTENTIAL CONDITIONAL DECISION AND**
9 **ORDER OVERRULING THE PROTEST**

10 SOA is requesting termination of Protestant’s Dealer Agreement because termination will
11 be the most efficient and assured way to allow a motivated and capable replacement retailer to
12 establish dedicated Subaru sales and service facilities in the Sonora area. Tr. Vol. 9 at 176:24-
13 177:21 (Smit). In addition, and as explained above, SOA and Protestant expressly agreed that
14 Protestant’s failure to timely construct a Subaru dealership under the terms of the Facility
15 Addendum would result in termination of Protestant’s Dealer Agreement. *See* Facility Addendum
16 (Exhibit J-05) at p. 14-15. Indeed, Protestant failed to adhere to the deadlines under the Facility
17 Addendum on multiple occasions and time and time again, SOA granted deadline extensions and
18 afforded Protestant the benefit of the doubt. *See* Section III, Factual Background (*supra*); Tr. Vol.
19 6 at 190:1-10 (Farabee). Despite having had ample time and opportunity to provide a Subaru
20 facility, Protestant has not yet even procured building and development permits. *Id.* At this point,
21 allowing Protestant even more time to pursue construction of a Subaru dealership is most likely to
22 result only in history repeating itself, and SOA should not be forced to wait years to see if Protestant
23 will finally make good on its obligation. Tr. Vol. 9 at 166:23-167:11 (Smit). In sum, over the course
24 of more than four years, Prieto Automotive has demonstrated that it is unwilling to move forward
25 with timely construction of a Subaru facility, and no convincing evidence has been presented to
26 indicate that this has changed.

27 To that end, even if Prieto Automotive were prepared to proceed with a facility, Protestant’s
28 own witnesses testified that Protestant does not expect to have a completed and fully operational

1 Subaru dealership facility for nearly four years and possibly longer, depending on when the clock
2 begins to run on Protestant’s planning and construction timeline. *See* Timeline (Exhibit P-110); Tr.
3 Vol. 9 at 68:17-73:6 (Augustine); Tr. Vol. 9 at 142:6-143:5 (Marlette). Prieto Automotive’s demand
4 for an additional three and-a-half to four years to complete construction of a Subaru facility is
5 patently unreasonable and unacceptable given that Protestant has already had over four years to
6 complete, or at least make meaningful progress toward, the construction of a sales and service
7 facility. Tr. Vol. 10 at 78:21-79:24 and 35:14-22 (Hinkle). Subaru franchises are in high demand
8 among automobile retailers and SOA could swiftly identify and establish a replacement Subaru
9 retailer in Sonora—a retailer on which SOA could truly rely to provide a brand-compliant Subaru
10 facility as promptly as possible. *Id.*; Tr. Vol. 9 at 163:2-164:23 and 190:18-192:7 (Smit); Tr. Vol.
11 8 at 46:5-16 and 47:19-48:22 (Graziano).

12 If despite the evidence presented in this proceeding, a conditional decision is issued, any
13 such decision must provide for an expeditious and just solution to SOA’s continued lack of a brand-
14 dedicated dealership in Sonora. Forcing SOA to wait an additional 29 months, or longer, to see if
15 Protestant is finally ready to begin construction of Subaru facilities would be neither an expeditious
16 nor just resolution of the predicament at hand.

17 **A. Protestant’s Continued Reluctance to Complete a Subaru Facility.**

18 As demonstrated during the merits hearing and as set forth in this Brief, Prieto Automotive
19 has been unwilling to make the required investment and take the steps necessary to proceed with
20 building a Subaru dealership in Sonora.

21 Prieto Automotive’s planning consultant, Amy Augustine, testified that before Protestant
22 could proceed with construction of a dealership facility, it must obtain a site development permit
23 and a building permit from the County of Tuolumne. *See* Summary Letter (Exhibit R-385) at p. 2-
24 3; September 28, 2018 E-mail Correspondence re: Proposed Alternative Schedules for Subaru
25 (Exhibit R-359); Tr. Vol. 9 at 68:17-69:18 (Augustine); Tr. Vol. 3 at 125:20-126:17 and 127:20-25
26 (Augustine). In order to obtain the required permits, an application for the permits must be
27 submitted to the County. *Id.* In connection with completing the permit application, it was necessary
28 for Prieto Automotive to complete a landscaping plan for the facility, complete a drainage study for

1 the land on which the facility would be built, and complete a traffic study in the area of the proposed
2 facility site. *See* September 28, 2018 E-mail Correspondence re: Proposed Alternative Schedules
3 for Subaru (Exhibit R-359); Tr. Vol. 3 at 168:4-19 (Augustine). In addition, Prieto Automotive was
4 required to complete a set of building plans that complied with the East Sonora Design Guidelines.
5 *See* November 14, 2018 E-mail re: Sonora Subaru Status (Exhibit R-391); Tr. Vol. 3 at 148:10-
6 149:1 (Augustine). In September 2018, Ms. Augustine informed Manuel Prieto that it was necessary
7 to complete these tasks in order to proceed with the permit applications. Tr. Vol. 3 at 134:19-137:14
8 and 171:1-14 (Augustine).

9 As of the time of the merits hearing in this matter two and a half years had passed since Ms.
10 Augustine informed Mr. Prieto about the items that needed to be accomplished in order to complete
11 the permit applications. Yet, as of the latest hearing dates, Prieto Automotive had not procured a
12 landscaping plan for the facility, had not completed a drainage study, and had not completed a
13 traffic study. Tr. Vol. 5 at 61:4-24 (Prieto); Tr. Vol. 8 at 76:20-77:10 (Marlette); Tr. Vol. 9 at 69:19-
14 70:5; 93:25-96:23 (Augustine); Tr. Vol. 9 at 126:19-127:10 (Marlette). As such, Prieto Automotive
15 still has not submitted complete site development or building permit applications to the County of
16 Tuolumne. Tr. Vol. 5, 61:4-24 (Prieto); Tr. Vol. 9 at 69:10-20 and 76:10-77:10 (Augustine).

17 Prieto Automotive also has not obtained County approval of its design plans for the facility.
18 In mid-2020, Protestant elected to start the building design process all over again and hired architect
19 Ronald Marlette to draw up site plans for the Subaru dealership. Tr. Vol. 8 at 63:5-21 and 53:19-
20 56:3 (Marlette). Mr. Marlette submitted a set of plans to SOA in December 2020 that closely
21 resemble the construction drawings that were completed by DFA in December 2019 and approved
22 by SOA in January 2019. *See* Marlette Associates Building Plans (Exhibit R-466); Tr. Vol. 3 at
23 187:8-188:11 (Augustine). To date, Mr. Marlette's building plans have not been approved by the
24 County of Tuolumne as compliant with the East Sonora Design Guidelines or any other applicable
25 County requirement. Tr. Vol. 3 at 187:8-188:11 (Augustine); Tr. Vol. 8 at 75:6-12 (Marlette); Tr.
26 Vol. 9 at 120:4-123:5 (Marlette).

27 One of the primary contributing factors to Prieto Automotive's overall lack of progress in
28 pursuing the dealership project is Prieto Automotive's resistance to incurring necessary costs

1 associated with the project. Ms. Augustine testified that Mr. Prieto chose not to proceed with
2 required drainage, topography and land surveying work because this work was going to be “too
3 costly.” Tr. Vol. 3 at 178:16-179:23 (Augustine). In addition, Mr. Prieto continuously expressed
4 concerns about the costs involved in construction and completing design plans for the facility, and
5 in May 2019, Prieto Automotive ultimately refused to proceed with the facility due to projected
6 construction costs. Tr. Vol. 4 at 190:2-17; 211:3-212:22 and 213:18-214:6 (Prieto). In fact, in 2019,
7 Mr. Prieto concluded that it would not be economically feasible for Prieto Automotive to afford
8 construction costs for the facility if said costs were going to exceed \$7,000,000. Tr. Vol. 4 at
9 211:13-214:6 (Prieto).

10 The most recent construction cost estimate that Prieto Automotive has obtained is based off
11 the building plans drawn up by Mr. Marlette. Tr. Vol. 9 at 30:12-19 (Prieto). Specifically, in January
12 2021, construction firm BJ Perch issued a construction cost estimate of \$6,045,190 for the Sonora
13 Subaru project. *See* BJ Perch Construction Cost Estimate (Exhibit R-469) at p. 13; Tr. Vol. 9 at
14 30:12-19 (Prieto). Mr. Prieto testified that Prieto Automotive is willing to construct a dealership
15 facility based on the BJ Perch estimate if Prieto Automotive receives facility assistance funds from
16 SOA in connection with the project. Tr. Vol. 9 at 30:12-31:20 (Prieto). Mr. Prieto testified that
17 although Prieto Automotive is committed to build a Subaru facility, he believes that Prieto
18 Automotive is entitled to receive facility assistance funds from SOA regardless of Prieto
19 Automotive’s breaches of the Facility Addendum. Tr. Vol. 9 at 60:1-61:15 (Prieto). Notably, the
20 evidence presented in this matter has not established that Prieto Automotive is willing to proceed
21 with the Sonora Subaru project without facility assistance funds from SOA, or that Prieto
22 Automotive is amenable to completing the facility if construction costs exceed the BJ Perch
23 estimate.

24 Given Prieto Automotive’s pervasive reluctance to take meaningful steps toward the
25 completion of a Subaru facility, Prieto Automotive’s continued anxieties about the costs associated
26 with the project, and Prieto Automotive’s lack of firm commitment to pay construction costs
27 without facility assistance funds, SOA has serious and legitimate concerns regarding whether Prieto
28 Automotive will see the project through if it is given yet another chance to do so. Tr. Vol. 9 at

1 163:17-164:7 and 174:16-175:13 (Smit).

2 **B. Prieto Automotive’s Unreasonable Timeframe for Completion of a Facility.**

3 A definitive timeframe for Prieto Automotive’s potential completion of a dealership facility
4 in Sonora was not presented by Protestant during the first eight days of testimony in the merits
5 hearing. *See* Tr. Vol. 1 – 8; Tr. Vol. The only information provided by Protestant relating to
6 permitting and construction timelines during the first eight days was that it did not know when the
7 facility might be built or even when permits might be issued, and Mr. Prieto testified that it could
8 take until 2025 before Prieto Automotive is ready to move out of its temporary service facilities.
9 Tr. Vol. 4 at 229:4-16 (Prieto) (“Q: You don’t know when the building will be built? A: No. Q: Do
10 you know when it will be permitted? A: No.”); Tr. Vol. 5 at 14:15-16:15 (Prieto) (“Q: And why did
11 you extend it until 2025? A: No reason. We wanted to just have plenty of time. We don’t know how
12 long we’ll be in that facility, so we wanted to make sure that we had plenty of time in that facility.
13 That’s why.”).

14 It was not until the hearing was reopened for the submission of additional evidence that
15 Prieto Automotive presented any definitive time estimates relating to permitting and construction.
16 *See* Tr. Vol. 9 – 10. Specifically, on April 26, 2021, Ms. Augustine testified that it will take a
17 period of approximately 29 months for Prieto Automotive to obtain a site development permit and
18 building permit for the Sonora dealership project. *See* Timeline (Exhibit P-110); Tr. Vol. 9 at 68:9-
19 69:5 (Augustine). In Ms. Augustine’s Timeline set forth in Exhibit P-110, it is anticipated that
20 construction plans will be finalized during the 25th month in the Timeline, and Mr. Marlette testified
21 that after the construction plans are completed it will take approximately four and-a-half months
22 before construction begins. *See* Timeline (Exhibit P-110); Tr. Vol. 9 at 151:10-25 (Marlette).
23 Accordingly, construction is expected to commence during the 30th month of the project. *Id.* Mr.
24 Marlette further testified that the fastest possible timeframe in which construction of the facility
25 could be completed is within 8 months of the commencement of construction, and he estimated that
26 construction could take up to 14 months. Tr. Vol. 9 at 142:6-143:5 (Marlette). Likewise, Mr. Prieto
27 testified that representatives of BJ Perch informed him that construction of the facility would take
28 twelve to eighteen months. Tr. Vol. 9 at 36:8-13 (Prieto). Given these time estimates, completion

1 of Protest's Subaru facility could take anywhere from 38 months (with an 8-month construction
2 time period) to 48 months (with an 18-month construction time period). Indeed, Prieto Automotive
3 specifically asked the Board to enter an conditional order, allowing it an additional 43 months to
4 complete construction of a Subaru sales and service facility in Sonora. Tr. Vol. 9 at 158:8-20
5 (Prieto).

6 Given that Protestant has already had since March 2017—over four years—to complete and
7 submit applications for required permits and proceed with construction, Protestant's request for a
8 43-month time period in which to complete construction of a Subaru facility is simply unreasonable
9 and unjustifiable. If the ALJ and Board elect to enter a conditional order in this matter, justice
10 requires that only the promptest reasonably possible permitting and construction deadlines should
11 be included in the order.

12 Ms. Augustine's April 26, 2021 testimony regarding the 29-month time period before site
13 development and building permits could be obtained is inconsistent with her prior testimony during
14 the merits hearing regarding that same issue, and Ms. Augustine admitted that she developed the
15 29-month Timeline for obtaining permits without the benefit of the County's input or review of the
16 Timeline. Tr. Vol. 9 at 103:24-104:6 (Augustine).

17 During the February 2021 hearing dates, Ms. Augustine testified that permits could be
18 obtained from the County of Tuolumne within twelve to eighteen months of commencing work on
19 the permit applications. *See* September 28, 2018 E-mail Correspondence re: Proposed Alternative
20 Schedules for Subaru (Exhibit R-359); Tr. Vol. 3, 140:19-142:9 (Augustine).

21 In addition, evidence presented during the hearing established that it typically takes two to
22 two-and-half years for retailers to fully complete facility construction projects. Linda Francis, an
23 architect with experience in developing plans for dealership facilities, testified that it typically takes
24 two to two and-a-half years to complete construction of a dealership from the time her firm is
25 engaged to draw up plans for a facility. Tr. Vol. 4, 90:12-91:13 (Francis). Like Linda Francis, SOA
26 Market Development Managers Raymond Smit and Beth Hinkle have extensive experience in
27 connection with motor vehicle dealership construction and renovation projects. Tr. Vol. 2 at 76:19-
28 78:17 and 80:5-81:4 (Smit); Tr. Vol. 9 at 166:8-22 and 167:12-24 (Smit); Tr. Vol. 10 at 14:15-16:1

1 (Hinkle). They too, testified that facility construction projects normally take two to two and-a-half
2 years to complete. Tr. Vol. 10 at 16:2-25 (Hinkle); Tr. Vol. 9 at 173:16-174:15 (Smit).

3 With respect to Ms. Augustine’s Timeline, she testified that if the County of Tuolumne
4 determines that Prieto Automotive’s Subaru dealership project is exempt from CEQA, then the time
5 period necessary to obtain permits would be reduced by 6 months. Tr. Vol. 9 at 82:18-83:13
6 (Augustine). As such, the ALJ should require Prieto Automotive to notify the ALJ and SOA in this
7 proceeding of the County’s CEQA determination as soon as such determination is made.

8 Moreover, Ms. Augustine also testified that if Prieto Automotive began preparing final
9 building, landscaping and design plans before the County of Tuolumne approves the project, the
10 29-month timeline would be reduced by three months, and that if Prieto Automotive submitted its
11 building permit application before the County issues “entitlements” that would reduce the 29-month
12 timeline by another three months. Tr. Vol. 9 at 89:22-90:15 (Augustine); Tr. Vol. 9 at 136:17-
13 137:17 and 139:5-17 (Marlette). Tr. Vol. 9 at 90:16-91:6 (Augustine). If, under the terms of any
14 conditional order, Protestant is given yet another opportunity to provide a Subaru facility in Sonora,
15 the conditional order should require Protestant to make every effort to complete a facility as quickly
16 as possible, including immediate preparation of final building, landscaping and design plans and
17 immediate preparation and submission of a building permit application. Tr. Vol. 10 at 80:5-81:14
18 (Hinkle).

19 **C. Proposed Terms of Any Conditional Order.**

20 As a preliminary matter, any conditional order entered by the Board in this proceeding
21 should conditionally overrule Prieto Automotive’s protest of the termination of its Dealer
22 Agreement. SOA and Prieto Automotive presented their respective cases over the course of two
23 weeks during the merits hearing and several witnesses provided testimony during the proceedings.
24 A conditional denial of Prieto Automotive’s protest is in the best interest of the parties as it will
25 provide maximum efficiency in carrying out the intent of the conditional order and will avoid the
26 need for further hearing proceedings and discovery in this case.

27 In addition, the Board lacks jurisdiction to order SOA to approve any design, construction
28 or other building plans that Prieto Automotive might submit to SOA for approval. *See* Cal. Veh.

1 Code § 3050. Accordingly, any conditional order must preserve SOA’s right to reject plans that do
2 not meet SOA’s MSOGs or other applicable requirements.

3 With respect to the terms of any conditional order entered in this matter, SOA requests that
4 that the terms include the following:

- 5 i. The facility must be completed within 2 years of the Board’s issuance of any
6 conditional order.
- 7 ii. Prieto Automotive’s complete facility shall comply with all current SOA MSOGs
8 applicable to its dealership, including facility size requirements, signature branding
9 requirements, and dedicated Subaru personnel requirements.
- 10 iii. Prieto Automotive shall make every effort to complete a facility as quickly as
11 possible, including immediate preparation of final building, landscaping and design
12 plans and submission of a building permit application to the County of Tuolumne
13 before the County issues entitlements.
- 14 iv. SOA may reject any design, construction or other building plans that do not meet
15 SOA’s MSOGs or other applicable requirements.
- 16 v. SOA’s standard capital and financial requirements for construction of new sales and
17 service facilities by its retailers, including a \$750,000 performance bond or letter of
18 credit.
- 19 vi. Firm deadlines should be set for: the submission of design and construction plans to
20 SOA for approval; obtaining necessary permits; commencing construction; and
21 completing construction. All deadlines shall be timely met and any failure to meet a
22 deadline will result in termination of Prieto Automotive’s Dealer Agreement.
- 23 vii. A proposed timeline for the completion of the dealership facility is provided below:

Action Item	Estimated Deadline
Within 15 days of the date of any Conditional Order, Protestant must submit design plans to Feltus Hawkins for review. (assuming Board date of September 17, 2021).	October 2, 2021

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Action Item	Estimated Deadline
Feltus Hawkins must review and provide response to design plans within 30 days.	November 2 , 2021
Protestant must submit construction plans for SOA’s review withing 40 days of Feltus Hawkins’ approval of design plans.	December12, 2021
SOA must review and respond to construction plans within 30 days.	January 12, 2022
Protestant must obtain all necessary zoning, permits and governmental approvals as soon as possible, but no later than 1 year before Protestant’s deadline to complete construction of the dealership facility. All necessary studies, including without limitation, traffic and drainage studies must be completed in time for Protestant’s compliance with the deadline for obtaining required zoning, permits and governmental approvals.	July 12,, 2022
Protestant must promptly commence construction as soon as any necessary zoning, permits and/or governmental approvals are obtained.	No later than August 1, 2022
Protestant must complete construction within 18 months of SOA’s approval of Protestant’s construction plans.	July 12, 2023
Protestant must obtain certificate of completion of the facility within 30 days of the completion of construction.	August 12, 2023

VII. CONCLUSION

For the reasons set forth above and for all additional reasons presented during the hearing and contained in the record, there is good cause pursuant to Cal. Veh. Code § 3061 to terminate Prieto Automotive’s Subaru Dealer Agreement. Accordingly, SOA respectfully requests that Prieto Automotive’s protest be overruled in its entirety, allowing SOA to proceed with termination.

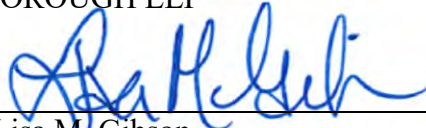
If, and only if, the ALJ and the Board determine that termination is unwarranted at this time, then SOA requests that the proposed decision provide for a conditional order, and that the Board enter a conditional order overruling the Protest, in accordance with the provisions set forth herein, and assuring that Prieto Automotive timely comply with its obligation to construct a Subaru

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dealership facility, or terminate its Subaru Dealer Agreement in the event of Prieto Automotive's breach of any conditions of the conditional order.

Dated: June 4, 2021

Respectfully submitted,
NELSON MULLINS RILEY &
SCARBOROUGH LLP

By: 

Lisa M. Gibson
Crispin L. Collins
Attorneys for Claimant
SUBARU OF AMERICA, INC.

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PROOF OF SERVICE

I am a citizen of the United States. My business address is 19191 South Vermont Avenue, Suite 900, Torrance, California 90502. 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 cause.

On the date set forth below, according to ordinary business practice, I served the foregoing document(s) described as:

RESPONDENT SUBARU OF AMERICA, INC.’S POST-HEARING BRIEF

- (BY FAX)** I transmitted via facsimile, from facsimile number 213.629.7401, the document(s) to the person(s) on the attached service list at the fax number(s) set forth therein, on this date before 5:00 p.m. A statement that this transmission was reported as complete and properly issued by the sending fax machine without error is attached to this Proof of Service.
- (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.
- (BY MAIL)** I am readily familiar with my employer’s business practice for collection and processing of correspondences for mailing with the U.S. Postal Service, and that practice is that correspondences 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 addressed to the person(s) on the attached service list and sealed and placed the envelopes for collection and mailing following ordinary business practices.
- (BY PERSONAL SERVICE)** On this date, I delivered by hand envelope(s) containing the document(s) to the persons(s) on the attached service list.
- (BY OVERNIGHT DELIVERY)** On this date, I placed the documents in envelope(s) addressed to the person(s) on the attached service list, and caused those envelopes to be delivered to an overnight delivery carrier, with delivery fees provided for, for next-business-day delivery to whom it is to be served.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct

Executed on June 4, 2021 at Los Angeles, California.



Sindy Fleeger

SERVICE LIST

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8 NEW MOTOR VEHICLE BOARD

9
10 In the Matter of the Protest of
11 PRIETO AUTOMOTIVE, INC., a California
Corporation, dba SUBARU OF SONORA,
12
Protestant,
13
v.
14 SUBARU OF AMERICA, INC.,
15
Respondent.

Protest No.: PR-2648-19

**RESPONDENT SUBARU OF
AMERICA, INC.'S PROPOSED
FINDINGS OF FACT**

Merits Hearing Dates: February 22-26,
March 1, March 4-5, and April 26-27, 2021
Location: Via Zoom

1 Respondent Subaru of America, Inc. (“SOA”) by and through its attorneys of record in
2 this matter, NELSON MULLINS RILEY & SCARBOROUGH LLP, hereby submits the
3 following proposed Findings of Fact.

4 1. Respondent Subaru of America, Inc. (“SOA”) is a corporation organized and
5 existing under the laws of New Jersey, and is authorized to do business in the State of California.
6 SOA distributes Subaru-brand vehicles in the United States, and holds an occupational license
7 issued by the California Department of Motor Vehicles. *See* Stipulation of Facts at ¶¶ 1-2. SOA
8 sells its vehicles to a network of authorized dealerships or “retailers,” and the retailers, in turn, sell
9 the vehicles to the consuming public and provide vehicle maintenance services. *Id.*; Merits Hearing
10 Transcript (“Tr.”) Volume (“Vol.”) 2 at 72:5-76:12 (Smit).

11 2. The line makes of vehicles manufactured by SOA include the Outback, Forester,
12 Impreza, Crosstrek, Legacy, Ascent, WRX, BRZ, and the STI vehicle lineup. *See* SOA Vehicle
13 Lineup (Exhibit R-626). The vehicle’s in SOA’s lineup have a reputation of being reliable, durable,
14 versatile, and safe. Tr. Vol. 2 at 67:24-68:23 (Smit). Year after year, SOA has received accolades
15 and awards, including awards for safety and for being the most trusted brand by consumers. *Id.*
16 These awards are verified by Kelly Blue Book, the Insurance Institute for Highway Safety, the
17 American Customer Satisfaction Index, and other third-party sources. *Id.*

18 3. Over the last decade, consumer demand for Subaru-brand vehicles has only
19 continued to escalate. Tr. Vol. 2 at 70:10-25 and 75:16-76:18 (Smit). In fact, SOA is the only
20 manufacturer that has consistently experienced a year-over-year increase in sales over the last ten
21 years. *Id.* The uptick in consumer demand has been so significant that SOA recently increased its
22 production capacity by adding an engine plant at its manufacturing plant in Lafayette, Indiana. *Id.*
23 Due to the positive reputation of the Subaru brand and its vehicles’ ever-increasing popularity with
24 consumers, there is significant demand among automobile retailers for the acquisition of a Subaru
25 franchise. Tr. Vol. 3 at 27:9-24 and 111:5-13 (Smit); Tr. Vol. 6 at 63:5-9 (Leopold).

26 4. The blue sky value or goodwill associated with Subaru franchises is among the
27 highest associated with an automotive brand. Tr. Vol. 6 at 63:5-9 (Leopold); 103:20-104:22
28 (LeRoy); and Tr. Vol. 10 at 82:25-83:9 (Hinkle).

1 5. In terms of SOA’s business philosophy, SOA has adopted the Subaru “Love
2 Promise,” which embodies SOA’s aspirations to be more than a car company and its commitment
3 to giving back and investing in local communities. Tr. Vol. 2 at 62:3-63:11 (Smit). SOA views its
4 retailers as business partners and strives to provide its retailers with the opportunity to succeed and
5 thrive. Tr. Vol. 2 at 112:22-113:25 (Smit). SOA also encourages its retailers to give back to their
6 communities and to promote a positive culture and experience for their employees and customers.
7 Tr. Vol. 2 at 114:12-115:17 (Smit).

8 6. Protestant Prieto Automotive, Inc. d/b/a Subaru of Sonora (“Protestant” or “Prieto
9 Automotive”) is a corporation organized under the laws of California, and is a new motor vehicle
10 dealer licensed by the California Department of Motor Vehicles. *See* Stipulation of Facts at ¶¶ 3-4.
11 Prieto Automotive operates a Subaru dealership pursuant to a Subaru Dealer Agreement and
12 Standard Provisions, executed on or about March 6, 2017, as amended on March 20, 2018 (the
13 “Dealer Agreement”). *See* Dealer Agreement (Exhibit J-05); Stipulation of Facts at ¶ 6.

14 7. The owners and officers of Prieto Automotive are husband and wife, J. Manuel
15 Prieto and Ramona R. Llamas. *See* Stipulation of Facts at ¶ 5. Mr. Prieto is the President and
16 General Manager of Prieto Automotive, and Ms. Llamas is the Secretary and Treasurer. *Id.*

17 8. Prieto Automotive conducts Subaru sales operations at its Ford dealership, which is
18 located at 13254 Mono Way, Sonora, California 95370. *See* Stipulation of Facts at ¶ 13. Prieto
19 Automotive conducts its Subaru service operations at a separate facility located at 219 Southgate
20 Drive, Sonora, California 95370. *Id.* Prieto Automotive’s Subaru service facility is situated
21 approximately 1.88 air miles from its Subaru sales location. *Id.*

22 9. Prieto Automotive’s Subaru sales and service facilities are located within District 3
23 of Subaru’s San Francisco Zone. *See* SOA Western Region Map (Exhibit R-322); Tr. Vol. 2, 91:19-
24 92:10 and 94:1-4 (Smit).

25 10. Protestant acquired its first automotive franchise—its Ford dealership—in 2012, and
26 in connection with this acquisition, Prieto Automotive paid 250,000 in goodwill for the franchise.
27 *See* Stipulation of Facts at ¶ 7; Tr. Vol. 4 at 145:25-146:2 and 147:13-19 (Prieto).

28 ///

1 11. In 2014, Cypress Square Properties, LLC (“Cypress Square”), an LLC owned by
2 Mr. Prieto and Ms. Llamas, purchased the real property on which Prieto Automotive’s Ford
3 dealership is situated for \$3,000,000. *See* Stipulation of Facts at ¶¶ 8-9; Tr. Vol. 4 at 145:25-147:12
4 (Prieto).

5 12. In 2016, Prieto Automotive began negotiating to acquire a Subaru dealership, and
6 in July 2016, Protestant entered into an Asset Purchase Agreement with Spiryl Dusset, LP (“Spiryl
7 Dusset”) for its purchase of Spiryl Dusset’s Subaru dealership assets. *See* Stipulation of Facts at ¶
8 11. In connection with Prieto Automotive’s Subaru acquisition, it paid \$1,500,000 in goodwill for
9 the Subaru franchise. Tr. Vol. 6 at 105:5-20 (LeRoy); Tr. Vol. 7 at 22:3-5 (Prieto). The proposed
10 sale of Spiryl Dusset’s Subaru dealership to Prieto Automotive was presented to SOA for
11 consideration, and Prieto Automotive submitted a Subaru Dealer Application to SOA on or about
12 August 1, 2016. *See* Stipulation of Facts at ¶ 12.

13 13. In order for Prieto Automotive to meet SOA’s requirements to become a Subaru
14 retailer, Prieto Automotive needed to present proposed dealership facilities for its Subaru
15 operations that met SOA’s Minimum Facility Standards and Operating Guidelines, which are
16 applicable to all Subaru retailers. However, at the time Prieto Automotive submitted its Subaru
17 dealer application, it neither owned nor proposed the acquisition of any dealership facilities in
18 Sonora that satisfied SOA’s Minimum Standards and Operating Guidelines (hereinafter,
19 “MSOGs”). Tr. Vol. 7 at 22:14-23:22 (Prieto).

20 14. In light of the facility deficiencies, on December 26, 2016, Prieto Automotive and
21 SOA entered into the Facility Addendum to Conditional Subaru Dealer Agreement (the “Facility
22 Addendum”). *See* Facility Addendum (Exhibit J-05) at p. 14-15; Tr. Vol. 2 at 148:18-149:11 (Smit).

23 15. Under the terms of the Facility Addendum, Protestant and SOA agreed that Prieto
24 Automotive would ***temporarily*** conduct its Subaru dealership operations at its existing Ford
25 dealership located at 13254 Mono Way in Sonora. *See* Facility Addendum (Exhibit J-05) at p. 14-
26 15; Tr. Vol. 3 at 74:21-75:4 (Smit); Tr. Vol. 6 at 44:6-13 (Leopold); Stipulation of Facts at ¶ 14. In
27 addition, because Protestant’s Ford facility could not accommodate Subaru service operations,
28 Protestant and SOA agreed that Prieto Automotive’s Subaru service business would be ***temporarily***

1 conducted at a separate facility located at 219 Southgate Drive in Sonora. *See Dealer Agreement*
2 (Exhibit J-05) at p. 10; Tr. Vol. 3 at 74:21-75:4 (Smit); Stipulation of Facts at ¶ 15.

3 16. In connection with Protestant’s negotiations with SOA to become a Subaru retailer,
4 Protestant also provided SOA with a Letter of Consent from Ford stating that Ford approved the
5 dual operation of Ford and Subaru on a temporary basis and that Protestant was required to remove
6 all Subaru operations from the Ford dealership building on or before August 1, 2018. *See Ford*
7 *Letter of Consent (Exhibit R-323A); Tr. Vol. 4 at 161:7-22 and 168:4-13 (Prieto).* Under the
8 provisions of the Letter of Consent, Ford prohibited Prieto Automotive from displaying any Subaru
9 products in the Ford dealership. *See Ford Letter of Consent (Exhibit R-323A); Tr. Vol. 7 at 134:13-*
10 *135:1 (Prieto).*

11 17. Also under the terms of the Ford Letter of Consent, Prieto Automotive Agreed to
12 conduct its Subaru sales operations from trailers located on the property at Protestant’s Ford
13 facility, and early on in Protestant’s tenure as a Subaru retailer, it actually conducted Subaru sales
14 business from a trailer. *See Ford Letter of Consent (Exhibit R-323A); Tr. Vol. 4 at 150:9-151:9*
15 *(Prieto); Tr. Vol. 7 at 134:13-25 (Prieto).*

16 18. Under the Facility Addendum, Prieto Automotive agreed to complete construction
17 of new Subaru sales and service facilities compliant with SOA’s MSOGs by July 31, 2018. *See*
18 *Facility Addendum (Exhibit J-05) at p. 14-15; Tr. Vol. 5 at 21:11-22:5 (Prieto).*

19 19. Shortly after Protestant’s execution of the Facility Addendum, or about March 4,
20 2017, SOA approved the proposed sale of Spiryl Dusset’s Subaru dealership assets to Prieto
21 Automotive, and on March 6, 2017, Prieto Automotive and SOA entered into and executed Prieto
22 Automotive’s Subaru Dealer Agreement, which incorporates the terms of the Facility Addendum.
23 *See Dealer Agreement (Exhibit J-05).*

24 20. As set forth in the Facility Addendum, Prieto Automotive wanted to “commence
25 operations as an authorized Subaru dealer as soon as possible and even before meeting all applicable
26 [MSOGs].” *See Facility Addendum (Exhibit J-05) at p. 14.* Accordingly, in reliance upon
27 Protestant’s promise to construct a compliant Subaru sales and service facility, SOA granted Prieto
28 Automotive the privilege of operating as an authorized retailer prior to Prieto Automotive’s

1 compliance with facility requirements. Tr. Vol. 4 at 195:11-16 (Prieto); Tr. Vol. 10 at 20:2-14
2 (Hinkle); and Tr. Vol. 8 at 14:6-15:3 and 17:5-20 (Graziano).

3 21. Pursuant to the Facility Addendum, Prieto Automotive specifically acknowledged
4 that the temporary Subaru sales location at its Ford dealership and the off-site service location did
5 not comply with SOA’s MSOGs, and that SOA was relying on Prieto Automotive’s commitment
6 to construct a new Subaru dealership facility “as a condition of approving Dealer’s application for
7 a Subaru franchise.” *See* Facility Addendum (Exhibit J-05) at p. 14.

8 22. Under the Facility Addendum, the following deadlines regarding Prieto
9 Automotive’s construction of a Subaru facility were established and agreed to:

11 Complete Design Intent with SOA approved architectural firm by	Immediately
12 Obtain permits for facility project by	July 30, 2017
13 Break ground on facility project by	August 31, 2017
14 Facility that meets or exceeds all Subaru Minimum Standards and Operating Guidelines for Facility Size and Image Requirements is completed by	July 31, 2018

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16
17 *See* Facility Addendum (Exhibit J-05) at p. 15.

18 23. The Facility Addendum also provided that Prieto Automotive’s failure to meet its
19 deadlines for the planning and construction of its Subaru facility would “constitute a material breach
20 of the Agreement,” and Prieto Automotive agreed to voluntarily terminate its Dealer Agreement if
21 these deadlines were not timely met. *Id.*

22 24. Section 6.1 of the Standard Provisions of the Dealer Agreement specifically
23 provides that Prieto Automotive must ensure that its Subaru dealership is of sufficient size and of
24 satisfactory layout and design to comply with SOA’s Minimum Standards for the facility. *See*
25 Dealer Agreement (Exhibit J-05) at p. 29. Pursuant to Section 5.3 of the Standard Provisions, Prieto
26 Automotive acknowledged the importance and reasonableness of SOA’s MSOGs, and agreed that
27 its compliance with MSOGs is an “essential element” of Prieto Automotive’s performance under
28 its Dealer Agreement. *Id.*

1 25. The purpose of SOA’s MSOGs is to ensure that its retailers have appropriately sized
2 sales and service facilities and a sufficient number of employees to meet the needs of their
3 respective markets and maximize opportunities for success. Tr. Vol. 2 at 76:24-78:17 and 128:16-
4 129:22 (Smit). SOA’s MSOGs are based on the Units in Operation (“UIOs”) in a retailer’s market.
5 *Id.*

6 26. Under SOA’s Signature Facility Program, SOA has established national Subaru
7 dealer image standards. *See* Signature Facility Program Authorization For Design Intent (“SFP
8 Authorization”) (Exhibit R-315). SOA has partnered with the architecture firm Feltus Hawkins
9 Design (“FH Design”), which works with dealers to complete design plans for new Subaru facility
10 and renovation projects. *Id.*; Tr. Vol. 2 at 180:19-181:6 (Smit). Pursuant to the terms of the SFP
11 Authorization signed by Manuel Prieto, Prieto Automotive agreed to work with FH Design to
12 develop and complete a Design Intent Presentation Binder (hereinafter, “Design Intent”), including
13 blueline drawings of the new dealership site plan, floor plans, elevations, exterior color rendering,
14 and other project design data. *Id.*

15 27. In working with FH Design to develop dealership plans, the retailer is responsible
16 for selecting the real property and site for construction of facilities, and for ascertaining whether
17 the project is subject to any location restrictions and/or requirements. Tr. Vol. 2 at 166:2-8; 196:16-
18 197:1; and 209:3-210:4 (Smit).

19 28. Upon completion of the Design Intent, Prieto Automotive was required to submit
20 the Plans to SOA for approval. *See* Signature Facility Program Authorization For Design Intent
21 (“SFP Authorization”) (Exhibit R-315); Tr. Vol. 2 at 180:19-181:6 (Smit). A

22 29. After receipt of SOA’s approval of the Plans, Prieto Automotive was then required to
23 develop construction drawings, and obtain any necessary building permits. *See* SFP Authorization
24 (Exhibit R-315); Tr. Vol. 2 at 213:11-214:21 (Smit). Like the Design Intent, construction drawings
25 must also be approved by SOA. Tr. Vol. 2 at 228:17-229:11 (Smit).

26 30. On April 28, 2017, FH Design sent Manuel Prieto a set of draft Design Intent plans
27 for Prieto Automotive’s Subaru facilities. *See* April 2017 E-mail Correspondence re: Progress Set
28 (Exhibit P-103). The April 2017 draft Design Intent contemplated a two-story dealership facility to

1 be situated adjacent to Protestant’s Ford facility on Mono Way. Tr. Vol. 7 at 40:23-41:12 (Prieto).
 2 On April 30, 2017, Mr. Prieto responded to FH Design regarding the draft plans by stating, “I like
 3 what I see.” *See* April 2017 E-mail Correspondence re: Progress Set (Exhibit P-103) at p.10.

4 31. The Design Intent for a two-story dealership facility on Mono Way was ultimately
 5 approved by SOA. Tr. Vol. 2 at 171:8-19 (Smit).

6 32. However, after SOA approved the plans, Manuel Prieto had concerns regarding the
 7 cost of the two-story facility and that it would be too expensive to construct. Tr. Vol. 2 at 171:8-
 8 172:2 (Smit). As such, SOA readily agreed to permit modifications to the Design Intent to reduce
 9 the overall size and cost of the facility. *Id.*

10 33. By September 2017—nine months after the execution of the Facility Addendum—
 11 Prieto Automotive had not yet completed Design Intent plans that it intended to move forward with.
 12 At Prieto Automotive’s request, per an Amendment to Facility Addendum dated September 29,
 13 2017, the parties mutually agreed to extend the deadlines in the Facility Addendum as follows:

14 Obtain permits for facility project by	Extended from July 30, 2017 to December 31, 2017
15 Break ground on facility project by	Extended from August 31, 2017 to January 31, 2018
16 Facility that meets or exceeds all Subaru 17 Minimum Standards and Operating 18 Guidelines for Facility Size and Image 19 Requirements is completed by	Extended from July 31, 2018 to December 31, 2018

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 21 *See* September 29, 2017 Amendment to Facility Addendum (Exhibit J-05) at p. 5.

22 34. Rather than proceeding with finalizing a modified Design Intent for a smaller
 23 version of the two-story facility adjacent to Protestant’s Ford dealership, Manuel Prieto informed
 24 SOA in January 2018, that he wanted to construct the Subaru dealership at an entirely new location
 25 where he would need to purchase additional property. *See* January 31, 2018 E-mail Correspondence
 26 re: Subaru of Sonora (Exhibit R-334); Tr. Vol. 2 at 160:18-162:5 (Smit).

27 35. By this time, Prieto Automotive had missed its deadline to obtain permits for the
 28 project, which had been extended to December 31, 2017. *See* September 29, 2017 Amendment to

1 Facility Addendum (Exhibit J-05) at p. 5.

2 36. In addition, FH Design warned that it was not familiar with the potential new site,
3 and that if the project was moved to a new location, FH Design would “need to start the design
4 process all over again.” *See* February 2018 E-mail Correspondence re: Subaru of Sonora (Exhibit
5 R-338) at p. 1-2.

6 37. FH Design also communicated its concerns to Mr. Prieto that the proposed new site
7 was too narrow to accommodate Prieto Automotive’s new Subaru facilities. *See* March 8, 2018 E-
8 mail Correspondence re: Site Study (Exhibit R-341); Tr. Vol. 7 at 147:18-148:14 (Prieto).

9 38. Mr. Prieto was nevertheless undeterred, and on March 13th and 14th, 2018, in an
10 effort to keep the project moving forward, Retailer Development Manager Raymond Smit and FH
11 Design Architect Michael Ventouras met with Mr. Prieto and visited the proposed new site. *See*
12 March 1, 2018 Correspondence re: Site Visit Confirmation Letter (Exhibit R-340); Tr. Vol. 2 at
13 163:12-166:8 (Smit).

14 39. Given the delays caused by Protestant’s consideration of a new location for its
15 Subaru facilities, Protestant once again requested an extension of the deadlines in the Facility
16 Addendum.

17 40. In March 2018, SOA agreed to further extend the deadlines, including the deadline
18 for Prieto Automotive to finalize its Design Intent, which at the time, was still incomplete. *See*
19 March 21, 2018 Amendment to Facility Addendum (Exhibit J-05) at p. 1; Tr. Vol. 2 at 141:17-
20 144:6 (Smit). SOA accepted Mr. Prieto’s newly-proposed deadlines, and those deadlines were
21 memorialized in the Amendment to Facility Addendum dated March 21, 2018 as follows:

22 Complete Design Intent with SOA 23 approved architectural firm by	Extended from Immediately after Execution of the initial Facility Addendum to April 30, 2018
24 Submit Construction Drawings for 25 approval by	August 30, 2018
26 Obtain permits for facility project by	Extended from December 31, 2017 to December 31, 2018
27 Begin vertical construction by	Extended from January 31, 2018 to 28 January 31, 2019

1 Facility that meets or exceeds all Subaru
2 Minimum Standards and Operating
3 Guidelines is completed and operating by

Extended from December 31, 2018 to
October 31, 2019

3 *Id.*

4 41. Shortly thereafter, on April 9, 2018, Mr. Prieto informed Mr. Smit that he ultimately
5 decided not to pursue the new location for the Subaru facility and was going to stick with the
6 original proposed location, adjacent to Prieto Automotive's Ford facility. *See* April 9, 2018 E-mail
7 Correspondence re: Sonora Subaru (Exhibit R-343); Tr. Vol. 2 at 167:10-169:17 (Smit). That same
8 day, Mr. Smit notified FH Design of Mr. Prieto's decision regarding facility location, and FH
9 Design proceeded with finalizing proposed Design Intent plans. *Id.* This version of the plans
10 contemplated a one-story facility with a false second floor in order to address Mr. Prieto's concerns
11 regarding the cost of the facility. Tr. Vol. 2 at 170:12-172:2 (Smit). Reducing the facility size from
12 a 2-story building to a one-story building would significantly reduce overall costs. *Id.*

13 42. FH Design provided Mr. Prieto with a proposed Design Intent for his review on May
14 13, 2018. *See* May 2018 E-mail Correspondence re: Subaru of Sonora (Exhibit R-345); Tr. Vol. 4
15 at 184:19-186:23 (Prieto). In response, Mr. Prieto asked FH Design to hold off on finalizing the
16 Design Intent. *Id.*

17 43. On June 12, 2018, FH Design again sent a proposed Design Intent to Mr. Prieto for
18 review. *See* June 2018 E-mail Correspondence re: Subaru of Sonora (Exhibit R-349). Mr. Prieto
19 did not respond to FH Design regarding the Design Intent plans until June 27, 2018 because he had
20 been busy "finishing the Ford building." *Id.*

21 44. In 2018, Prieto Automotive made renovations to its Ford facility at a cost of
22 approximately \$300,000. Tr. Vol. 4 at 181:24-183:6 (Prieto).

23 45. In response to FH Design's transmission of the Design Intent, Mr. Prieto again asked
24 FH Design to wait to finalize the proposal and FH Design confirmed that it would wait to hear from
25 Mr. Prieto before proceeding. *Id.*; Tr. Vol. 2, 170:18-174:14 (Smit).

26 46. In the summer of 2018, SOA was attempting to work with Mr. Prieto and was
27 encouraging Prieto Automotive to meet its amended deadlines under the Facility Addendum. In
28 June 2018, even after two extensions of the deadlines in the Facility Addendum, Prieto Automotive

1 continued to miss milestones given that the April 30, 2018 deadline to submit Design Intent plans
2 to SOA had lapsed. Notwithstanding this, SOA’s Ray Smit continued to work with Mr. Prieto on a
3 feasible timeline in order to “catch up” to the final milestone of completing the facility by October
4 31, 2019 as set forth below.

5 Complete Design Intent with SOA approved architectural firm by	Missed the April 30, 2018 milestone but meet it by July 30, 2018
6 Submit Construction Drawings for approval by	Missed the August 30, 2018 milestone but meet it by September 30, 2018
7 Begin vertical construction by	Missed the January 31, 2019 milestone but meet it by February 28, 2019

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11 *See* E-mail Correspondence re: Adjusted Timelines (Exhibit R-350) at p. 3; Tr. Vol. 2 at 175:15-
12 178:22 (Smit).

13 47. Mr. Prieto consented to the new deadlines, and responded that the “timelines look
14 fine.” *See* E-mail Correspondence re: Adjusted Timelines (Exhibit R-350) at p. 2.

15 48. Prieto Automotive’s continued lack of progress with its Design Intent in 2018 not
16 only coincided with the time frame in which improvements were being made to the Ford facility,
17 but also the time period in which Prieto Automotive was negotiating to acquire its Chevy, Buick
18 and GMC franchises located in Sanger, California. Tr. Vol. 4 at 152:11-19 (Prieto).

19 49. Prieto Automotive closed on its acquisition of its Chevy, Buick, GMC dealership in
20 July 2018, and paid \$225,000 in goodwill for the franchises. Tr. Vol. 4 at 152:11-19 (Prieto); Tr.
21 Vol. 5 at 63:8-64:9 (Prieto). In connection with the acquisition, Prieto Automotive also purchased
22 the existing Chevy, Buick and GMC facilities at a cost of approximately \$1,500,000. Tr. Vol. 4 at
23 151:13-152:19 (Prieto).

24 50. The Design Intent for Protestant’s Subaru dealership was finally submitted to SOA
25 and FH Design on July 13, 2018. *See* July 13, 2018 E-mail Correspondence re: Sonora Subaru
26 (Exhibit R-351); Tr. Vol. 2 at 179:24-180:18 (Smit).

27 51. In August 2018, SOA approved the Design Intent which provided for a one-story
28 Subaru facility situated adjacent to Protestant’s Ford facility. *See* Final Design Intent dated August

1 14, 2018 (Exhibit R-545); Tr. Vol. 2 at 191:12-195:17 and 197:13-198:14 (Smit).

2 52. Rather than moving forward with the approved Design Intent in hand, Mr. Prieto
3 instead switched direction again. In September 2018, despite its looming September 30th deadline
4 for the submission of construction drawings, Prieto Automotive notified SOA that it was
5 considering yet another alternative site for the location of its Subaru dealership facilities. Tr. Vol.
6 2 at 183:10-184:14 (Smit).

7 53. Specifically, Mr. Prieto wanted to locate is Subaru sales and service facilities at a
8 former Chrysler Dodge facility that was tied up in a bankruptcy proceeding. *See* September 14,
9 2018 Letter re: Facility Addendum (Exhibit R-355); Tr. Vol. 2 at 183:10-184:21 (Smit). Upon
10 learning of Protestant’s latest alternative location, SOA became concerned that Protestant would
11 miss its construction drawing deadline and began to question whether Protestant was truly
12 committed to its obligation to provide a Subaru sales and service facility in Sonora. *Id.* In its
13 response to Mr. Prieto regarding the alternative location, SOA urged Protestant to move forward
14 with its original plans for the Subaru facility adjacent to Protestant’s Ford dealership. *Id.*

15 54. By October 29, 2018, Prieto Automotive had missed its September 30, 2018
16 deadline to submit construction drawings to SOA. *See* October 29, 2018 E-mail Correspondence
17 re: Construction Drawings (Exhibit R-368); Tr. Vol. 2 at 203:21-204:24 (Smit). Accordingly, SOA
18 implored Prieto Automotive to provide construction drawings no later than December 31, 2018. *Id.*

19 55. On October 29, 2018, Mr. Prieto had initial communications with Linda Francis, an
20 architect with Dennis Flynn Architects (“DFA”), regarding retaining DFA to prepare construction
21 drawings for his Subaru sales and service facilities in Sonora. *See* October 29, 2018 E-mail
22 Correspondence re: New Facility (Exhibit R-369); Tr. Vol. 4 at 15:24-17:6 (Francis).

23 56. Mr. Prieto formally retained DFA to work on the project and Linda Francis began
24 preparing construction drawings in November 2018. *See* November 6, 2018 E-mail
25 Correspondence re: DFA Work Authorization (Exhibit R-382); Tr. Vol. 4 at 13:3-16 (Francis).

26 57. Proposed construction drawings dated December 14, 2018 were submitted by Linda
27 Francis to SOA on December 17, 2018. *See* December 17, 2018 E-mail Correspondence re: Sonora
28 Subaru Submittal Package (Exhibit R-410); Tr. Vol. 4 at 56:18-59:13 and 61:1-64:4 (Francis).

1 58. On January 17, 2019, SOA approved Prieto Automotive’s December 14, 2018
2 construction drawings prepared by DFA. *See* Letter re: Construction Document Review (Exhibit
3 R-413); Tr. Vol. 4 at 65:2-66:7 (Francis); Tr. Vol. 2 at 228:3-229:11 (Smit).

4 59. Pursuant to the March 21, 2018 Amendment to Facility Addendum, Prieto
5 Automotive promised to obtain permits for its Sonora Subaru project by December 31, 2018. *See*
6 March 21, 2018 Amendment to Facility Addendum (Exhibit J-05) at p. 1.

7 60. Before Prieto Automotive could proceed with construction of its Subaru dealership,
8 it was required to accomplish the following with the County of Tuolumne:

- 9 i. Apply for and obtain a “General Plan Amendment” to change the General Plan
10 designation on certain parcels of land on which the Subaru facilities would be constructed.
11 ii. Apply for and obtain a zone change to change the zoning on the same parcels of land for
12 which the General Plan Amendment was required.
13 iii. Apply for and obtain a site development permit.
14 iv. Apply for and obtain a building permit.

15 *See* Summary Letter (Exhibit R-385) at p. 2-3; September 28, 2018 E-mail Correspondence re:
16 Proposed Alternative Schedules for Subaru (Exhibit R-359); Tr. Vol. 9 at 68:17-69:18 (Augustine).

17 61. To date, Prieto Automotive has not accomplished any of the four tasks listed above.
18 Tr. Vol. 3 at 127:20-129:7 and 184:20-23 (Augustine); Tr. Vol. 4 at 229:4-16 (Prieto).

19 62. To date, Prieto Automotive had not procured a landscaping plan for the facility, had
20 not completed a drainage study, and had not completed a traffic study. Tr. Vol. 5 at 61:4-24 (Prieto);
21 Tr. Vol. 8 at 76:20-77:10 (Marlette); Tr. Vol. 9 at 69:19-70:5; 93:25-96:23 (Augustine); Tr. Vol. 9
22 at 126:19-127:10 (Marlette). As such, Prieto Automotive still has not submitted complete site
23 development or building permit applications to the County of Tuolumne. Tr. Vol. 5, 61:4-24
24 (Prieto); Tr. Vol. 9 at 69:10-20 and 76:10-77:10 (Augustine).

25 63. To assist with meeting County of Tuolumne requirements and obtaining the
26 necessary permits, Protestant hired planning consultant, Amy Augustine, in late August 2018—just
27 a few months before Protestant’s December 31, 2018 deadline to obtain the required permits. Tr.
28 Vol. 4 at 205:17-24 (Prieto).

1 64. Because Protestant waited over 18 months after it signed the Facility Addendum to
2 retain a planning consultant, Ms. Augustine was not involved in connection with developing the
3 Design Intent drawn up by FH Design, and efforts to obtain required permits did not commence
4 until Ms. Augustine’s retention in late August 2018. Tr. Vol. 4 at 192:10-193:4 (Prieto); Tr. Vol. 3
5 at 45:4-12 (Smit).

6 65. Mr. Prieto admitted that he should have hired a planning consultant in the early
7 stages of the project. Tr. Vol. 4 at 192:10-193:4 (Prieto).

8 66. Per correspondence from Ms. Augustine to Manuel Prieto dated September 28,
9 2018, Ms. Augustine provided two alternative schedules of tasks to complete and deadlines to meet
10 in order to obtain the necessary permits. *See* September 28, 2018 E-mail Correspondence re:
11 Proposed Alternative Schedules for Subaru (Exhibit R-359); Tr. Vol. 3 at 135:17-137:2
12 (Augustine).

13 67. The schedule of tasks titled “Proactive Approach” contemplated that Prieto
14 Automotive would take certain proactive steps to move the project forward. Tr. Vol. 3 at 135:17-
15 138:6 (Augustine).

16 68. Under the Proactive Approach, even if Protestant’s dealership project was subject
17 to the California Environmental Quality Act (“CEQA”), Ms. Augustine estimated that Protestant
18 could obtain the required permits by late September 2019 or within 12 months from the date of Ms.
19 Augustine’s e-mail regarding the alternative schedules. *See* September 28, 2018 E-mail
20 Correspondence re: Proposed Alternative Schedules for Subaru (Exhibit R-359) at p. 3; Tr. Vol. 3
21 at 141:19-22 (Augustine).

22 69. Under the schedule titled “Reactive Approach,” Ms. Augustine estimated that, even
23 if the project was subject to CEQA, required permits could be obtained by December 2019 or within
24 18 months. *See* September 28, 2018 E-mail Correspondence re: Proposed Alternative Schedules
25 for Subaru (Exhibit R-359) at p. 4; Tr. Vol. 3 at 141:23-142:14 (Augustine).

26 70. A number of the necessary tasks associated with obtaining the permits were tasks
27 required to complete the applications for the permits. Specifically, there were three primary issues
28 that Prieto Automotive needed to address in connection with preparing the permit applications for

1 submittal to the County of Tuolumne. *See* November 14, 2018 E-mail re: Sonora Subaru Status
2 (Exhibit R-391); Tr. Vol. 3 at 167:17-168:19 (Augustine).

3 71. First, Prieto Automotive’s proposed new dealership had to comply with East Sonora
4 design guidelines, which provided for certain aesthetic elements. *See* November 14, 2018 E-mail
5 re: Sonora Subaru Status (Exhibit R-391); Tr. Vol. 3 at 167:17-168:19 (Augustine); Tr. Vol. 3 at
6 148:10-149:1 (Augustine).

7 72. Second, Tuolumne County had a set of landscaping requirements that Protestant’s
8 new facility needed to incorporate and landscaping plans needed to be drawn up. *See* November
9 14, 2018 E-mail re: Sonora Subaru Status (Exhibit R-391); Tr. Vol. 3 at 136:12-137:14 (Augustine).

10 73. Third, the County required that Prieto Automotive procure traffic and drainage
11 studies in order to assess the potential impact that the new facility might have on the existing area.
12 *See* November 14, 2018 E-mail re: Sonora Subaru Status (Exhibit R-391); Tr. Vol. 3 at 163:12-25
13 and 171:4-9 (Augustine).

14 74. To address compliance with East Sonora Design Guidelines, in early November
15 2018, Protestant hired DFA to draft construction drawings that incorporated the County’s aesthetic
16 requirements. *See* November 14, 2018 E-mail re: Sonora Subaru Status (Exhibit R-391) a p. 1; Tr.
17 Vol. 4 at 33:8-34:4 and 66:9-14 (Francis).

18 75. Linda Francis—a DFA architect with significant experience in developing
19 architectural plans for car dealerships—was confident that the construction drawings would comply
20 with County design guidelines. *See* Letter re: Construction Document Review (Exhibit R-413); Tr.
21 Vol. 4 at 65:2-66:14 (Francis); Tr. Vol. 2 at 228:3-229:11 (Smit).

22 76. Prieto Automotive inexplicably chose not to proceed with DFA’s plans and they
23 were never formally submitted to the County of Tuolumne in connection with any permit
24 application. Tr. Vol. 3 at 159:19-160:1 (Augustine); Tr Vol. 7 at 155:23-156:19 (Prieto).

25 77. DFA was also hired to assist Prieto Automotive in developing landscaping plans
26 compliant with County requirements. *See* November 14, 2018 E-mail re: Sonora Subaru Status
27 (Exhibit R-391); Tr. Vol. 4 at 36:23-37:8 (Francis).

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1 78. However, landscaping plans were never developed and Prieto Automotive never
2 submitted any landscaping plans to the County of Tuolumne. Tr. Vol. 4 at 42:11-44:3 (Francis); Tr.
3 Vol. 5 at 61:2-22 (Prieto); Tr. Vol. 7 at 79:4-22 (Prieto).

4 79. As for the traffic and drainage studies, in November 2018, Ms. Augustine had
5 arranged for KD Anderson & Associates, Inc. to conduct the traffic study, and for Land & Structure
6 Civil Engineers to perform the drainage study. *See* November 16, 2018 E-mail Correspondence re:
7 Sonora Subaru Engineers (Exhibit R-400).

8 80. Despite the fact that it was necessary to perform both studies in connection with
9 preparing Prieto Automotive’s permit applications, Prieto Automotive declined to move forward
10 with the studies. *See* January 11, 2019 E-mail Correspondence re: Drainage Study (Exhibit R-411);
11 Tr. Vol. 7 at 153:11-20 (Prieto); Tr. Vol. 5 at 61:2-24 (Prieto).

12 81. Prieto Automotive’s progress toward obtaining the required site development and
13 building permits came to particular halt beginning in early 2019. Both Ms. Augustine and Ms.
14 Francis testified that work on the project just stopped in January or February 2019. Tr. Vol. 3 at
15 185:8-21 (Augustine); Tr. Vol. 4 at 86:21-87:6 (Francis).

16 82. In February 2019, Amy Augustine asked County of Tuolumne representatives
17 Quincy Yaley and David Gonzalves if she could submit a permit application to the County on
18 behalf of Prieto Automotive without completion of a traffic study and without a landscaping or
19 grading plan. *See* February 2019 E-mail Correspondence re: Subaru (Exhibit R-419).

20 83. In connection with this request, Ms. Augustine remarked that Prieto Automotive
21 was “resistant to providing additional documentation at this point.” *Id.* Ms. Augustine testified that
22 by early 2019, Protestant had declined to move forward with traffic and drainage studies, and
23 landscaping and grading plans due to cost. Tr. Vol. 3 at 178:8-180:5 (Augustine).

24 84. On April 7, 2019, David Gonzalves explained to Ms. Augustine that in order to
25 move forward with the Subaru dealership, Mr. Prieto needed to complete and turn in his permit
26 applications. *See* April 7, 2019 E-mail Correspondence re: Permit Applications (Exhibit R-431).
27 Mr. Gonzalves stated, “I spoke with Manuel and explained that in order for Quincy and our team
28 to assist him he needed to complete the requested paperwork/information and turn in his

1 application.” *Id.*

2 85. Even prior to 2019, Mr. Gonzalves expressed frustration with Mr. Prieto’s delay in
3 submitting information to the County regarding the Subaru project. *See e.g.* September 2018 E-
4 mail Correspondence re: Subaru Timeline (Exhibit R-358).

5 86. This lack of motivation to proceed with the Subaru dealership project, and the
6 attendant lack of progress, coincided with the time period in 2019 when Prieto Automotive was
7 pursuing the acquisition of its Mazda dealership in Fresno, California. Tr. Vol. 4 at 152: 20-153:25
8 (Prieto).

9 87. Prieto Automotive closed on its acquisition of its Mazda franchise in October 2019
10 but negotiations regarding the Mazda buy-sell began months prior to closing. Tr. Vol. 5 at 63:8-
11 64:9 (Prieto).

12 88. Prieto Automotive paid \$250,000 in goodwill for the Mazda franchise. Shortly after
13 Prieto Automotive’s Mazda acquisition, it was appointed as a Mitsubishi dealer via an open-point.
14 Tr. Vol. 4 at 157:25-158:6 (Prieto).

15 89. In connection with DFA’s completion of the construction drawings (Exhibit R-410
16 and R-422), DFA provided Prieto Automotive with a preliminary construction cost estimate for the
17 facility in December 2018. *See* December 12, 2018 E-mail Correspondence re: Cost Estimate (R-
18 408). The construction estimate was drawn up by Pacific West Builders, Inc., and the preliminary
19 estimate approximated that construction costs would range from roughly \$3,900,000 to \$4,200,000.
20 *Id.*

21 90. However, in early 2019, Prieto Automotive ceased work on the Subaru project and
22 chose not to proceed any further with the construction drawings developed by DFA. Tr Vol. 7 at
23 155:23-156:19 (Prieto); Tr. Vol. 4 at 86:21-87:6 (Francis).

24 91. In April 2019, Prieto Automotive sought another construction cost bid from
25 Roebbelen Contracting, Inc. (“Roebbelen”), based upon the construction drawings developed by
26 DFA. *See* April 2019 Correspondence and Roebbelen Budget Estimate (Exhibit R-433). The
27 estimate provided by Roebbelen approximated that construction costs would run from about
28 \$7,500,000 to \$7,600,000. *Id.* at p.7.

1 92. DFA architect Linda Francis testified that she believed the Roebbelen estimate was
2 high because she had already obtained an estimate of \$4,200,000 “from a contractor who is very
3 experienced in this type of building.” Tr. Vol. 4 at 75:3-17 (Francis).

4 93. Paul Romito, a project manager at Roebbelen, conceded that his firm’s \$7,600,000
5 estimate was a rough, imprecise estimate because the construction drawings developed by DFA did
6 not have a sufficient level of detail to allow Roebbelen to provide a more accurate estimate. Tr.
7 Vol. 4 at 129:13-131:7 and 133:8-25 (Romito).

8 94. Mr. Romito clearly communicated to Manuel Prieto that Roebbelen’s \$7,600,000
9 estimate was a rough and “high level price based on the conceptual drawings.” *See* April 2019
10 Correspondence and Roebbelen Budget Estimate (Exhibit R-433); Tr. Vol. 4 at 133:8-25 (Romito).

11 95. Despite the imprecise nature of Roebbelen’s construction cost estimate, in
12 communications with SOA regarding the feasibility of complying with its Subaru facility
13 obligations, Prieto Automotive began claiming that it could not afford to construct the dealership
14 facility because construction costs were going to run north of \$7,000,000. *See* May 23, 2019 Letter
15 (Exhibit R-435); Tr. Vol. 4 at 212:1-22 (Prieto).

16 96. In a letter dated May 23, 2019 from Prieto Automotive’s counsel to SOA, Protestant
17 contended that it was not economically feasible for it to construct a Subaru facility in Sonora
18 because construction costs were going to exceed \$7,000,000. *Id.* Based on this, Prieto Automotive
19 stated that it was going to begin considering “alternative facility proposals,” even as it was several
20 months behind schedule for the commencement of construction of the new Subaru facility. *Id.* at
21 p.1. In the May 23, 2019 letter, Prieto Automotive further claimed that the County of Tuolumne
22 was going to withhold approval of the dealership project due to drainage issues that could not be
23 resolved. *Id.* at p.2.

24 97. At the time the letter was sent to SOA in May 2019, Prieto Automotive had not yet
25 procured any drainage studies for the property so it had no idea if there were any issues regarding
26 drainage and whether those issues, if any, could be addressed. Tr. Vol. 4 at 209:21-210:13 (Prieto).

27 98. By the end of November 2019, Prieto Automotive had not obtained the required site
28 development or building permits from the County of Tuolumne, had not commenced construction

1 of the dealership, and missed its October 31, 2019 deadline to complete construction of the facility.
2 Tr. Vol. 3 at 184:20-23 (Augustine); Tr. Vol. 4 at 229:4-230:7 (Prieto).

3 99. Moreover, Prieto Automotive had not even provided SOA with design or
4 construction plans compliant with SOA's MSOGs for a facility that Prieto Automotive actually
5 intended to build. Tr. Vol. 3 at 159:19-160:1 (Augustine); Tr Vol. 7 at 155:23-156:19 (Prieto).

6 100. At that point, and after granting a number of extensions of Protestant's planning and
7 building deadlines, SOA was left with no other option but to pursue available legal remedies. Tr.
8 Vol. 2 at 59:21-60:13 (Smit); Tr. Vol. 3 at 49:10-51:14 (Smit); Tr. Vol. 6 at 189:5-15 (Farabee);
9 Tr. Vol. 8 at 26:20-28:3 (Graziano).

10 101. SOA provided Prieto Automotive with its Notice of Termination on December 2,
11 2019. *See* Notice of Termination (Exhibit No. J-01); Stipulation of Facts at ¶ 21.

12 102. In response to the Notice of Termination, on December 16, 2019, Prieto Automotive
13 filed a protest with the Board, Protest No. PR-2648-19, seeking to prevent the termination of its
14 Subaru Dealer Agreement. *See* Stipulation of Facts at ¶ 22.

15 103. Protestant has failed to obtain permits and even commence construction of a Subaru
16 sales and service facility. *See* Stipulation of Facts at ¶ 19.

17 104. Currently, Prieto Automotive is still conducting its Subaru sales operations out its
18 Ford dealership, and its Subaru service operations are still currently conducted at the separate
19 temporary service location on Southgate Drive. *See* Stipulation of Facts at ¶ 20.

20 105. Photographs of Prieto Automotive's Subaru sales and service facilities are provided
21 below. *See also* Subaru Retailer Validation Program Report (Exhibit R-320) and Photos of Service
22 Facility (Exhibit R-321); Tr. Vol. 2 at 98:22-99:2 (Smit).

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PROTESTANT’S “SUBARU” SALES FACILITY



PROTESTANT’S “SUBARU” SERVICE FACILITY



106. It is evident from the photographs above (and those contained in Exhibits R-320 and R-321) that Protestant’s Subaru sales and services facilities are nothing like the facilities of SOA’s other Subaru dealerships located throughout California and in other states. Tr. Vol. 2 at 104:1-11

1 (Smit); Tr. Vol. Tr. Vol. 5 at 220:16-221:1 (Leopold); Tr. Vol. 5 at 75:22-76:19 (Kelso).

2 107. Prieto Automotive's current Subaru sales and service facilities are non-compliant
3 with SOA's MSOGs in virtually every respect, including without limitation, facility exterior and
4 interior image requirements, Subaru vehicle storage requirements, Prieto Automotive's lack of a
5 Subaru showroom, and Prieto Automotive's lack of Subaru customer touch points in its sales and
6 service facilities. *See* 2020 MSOGs for Subaru of Sonora (Exhibit R-316) at p. 23-27; Tr. Vol. 2 at
7 129:23-134:4 and 149:20-151:20 (Smit).

8 108. Prieto Automotive's Subaru sales facilities also do not comply with MSOG
9 requirements because its sales operations are dualled with Prieto Automotive's Ford facilities, and
10 SOA requires its retailers to have exclusive, Subaru-dedicated dealership facilities that are not
11 combined with other vehicle brands. *See* 2020 MSOGs for Subaru of Sonora (Exhibit R-316) at p.
12 25; Tr. Vol. 2 at 130:4-12 (Smit).

13 109. Prieto Automotive's Subaru service facilities do not comply with MSOG
14 requirements because the service location is separate from Prieto Automotive's Subaru sales
15 location and SOA requires each of its retailers to provide Subaru sales and service facilities at one
16 combined sales and service location. *See* 2020 MSOGs for Subaru of Sonora (Exhibit R-316); Tr.
17 Vol. 2 at 104:5-105:5 (Smit); Tr. Vol. 3 at 74:21-75:4 (Smit).

18 110. The significant deficiencies in Prieto Automotive's Subaru sales and service
19 facilities have negatively impacted customer experience at the dealership and have prevented Prieto
20 Automotive's from capturing and retaining the available sales and service business in its market.

21 111. A Subaru retailer's dealership facility is critically important because it is the
22 background of the customer experience. Tr. Vol. 2 at 114:23-115:6 (Smit).

23 112. Subaru retailers with MSOG-compliant facilities consistently see higher levels of
24 customer retention than retailers with deficient facilities. Tr. Vol. 3 at 107:19-110:1 (Smit).

25 113. As of February 2021, Prieto Automotive was ranked dead last at 10 out of 10 Subaru
26 retailers in its District in terms of customer retention with respect to both sales and service. Tr. Vol.
27 2 at 138:1-19 (Smit); Tr. Vol. 3 at 117:5-24 (Smit).

28 114. Customers have been significantly less satisfied with Prieto Automotive's service

1 facilities than they are with the service facilities of other Subaru retailers in the San Francisco Zone
2 as shown by Prieto Automotive's low customer satisfaction score for service facilities in 2019 OLP
3 reports. *See* 2019 2nd Quarter OLP Report (Exhibit R-581) at p. 44; Tr. Vol. 5 at 98:18-100:10
4 (Kelso). Specifically, customers indicated dissatisfaction with the following aspects of Protestant's
5 service facilities: (i) the availability of convenient parking; (ii) the comfort of the waiting area, (iii)
6 the location of the facility; and (iv) the appearance of the facility. *Id.*

7 115. Protestant's overall OLP Service Satisfaction Scores in 2019 placed it in the bottom
8 20th percentile compared to the scores of all other retailers in the San Francisco Zone. *See* 2019 2nd
9 Quarter OLP Report (Exhibit R-581) at p. 39; Tr. Vol. 5 at 91:11-92:5 (Kelso). *See also* 3rd Quarter
10 OLP Report (Exhibit R-582) at p. 43 and 49.

11 116. Customers were also displeased with Protestant's sales facilities as demonstrated by
12 Protestant's low customer satisfaction scores for sales facilities. *See e.g.* 2019 2nd Quarter OLP
13 Report (Exhibit R-581) at p. 21 and 25; 2019 3rd Quarter OLP Report (Exhibit R-582) at p. 28; Tr.
14 Vol. 6 at 12:11-18:5 (Leopold). Specifically, customers were not satisfied with the following
15 aspects of Protestant's sales facilities; (i) the appearance of the facility; (ii) the availability of
16 convenient parking; (iii) showroom information displays; and (iv) comfort of the area where the
17 vehicle purchase was made. *Id.*

18 117. In terms of Protestant's overall OLP Purchase Satisfaction Scores in 2019, for
19 example, Protestant ranked in the bottom 10th percentile compared to all other retailers in the San
20 Francisco Zone. *See* 2019 3rd Quarter OLP Report (Exhibit R-582) at p. 23; Tr. Vol. 6 at 11:17-
21 12:10 (Leopold).

22 118. In addition to the fact that Subaru retailers with MSOG-compliant facilities perform
23 better in terms of customer retention, such retailers also sell more vehicles than retailers with non-
24 compliant dealerships such as Protestant. Tr. Vol. 3 at 106:10-107:18 (Smit).

25 119. Subaru products are in high demand in Sonora and the surrounding area. *See e.g.* Tr.
26 Vol. 6 at 183:16-184:20 (Farabee); *See also* Kelly Robinson Deposition Designations (Exhibit R-
27 629) at 23:2-5.

28 120. Given the popularity of the Subaru brand in the Sonora market, Prieto Automotive

1 has the opportunity to achieve stellar sales performance.

2 121. Many, if not most, of the Subaru retailers in the San Francisco Zone have maintained
3 MSR scores of 150% - 200%, with some retailers attaining 220% and 240% in terms of MSR. *Id.*;
4 Tr. Vol. 6 at 207:24-208:6 (Farabee).

5 122. With respect to Prieto Automotive, its sales performance has remained in the range
6 of “average to slightly above average.” Tr. Vol. 6 at 206:10-208:6 (Farabee); Tr. Vol. 3 at 72:13-
7 73:12 (Smit); Tr. Vol. 6 at 52:4-53:6 (Leopold). Protestant has not attained a level of exceptional
8 sales performance despite the popularity of and high demand for Subaru products in the Sonora
9 area. *Id.*

10 123. If Prieto Automotive were operating out of MSOG-compliant facilities, it would sell
11 more Subaru vehicles. Tr. Vol. 6 at 51:17-23 (Leopold); Tr. Vol. 6 at 60:9-23 (Leopold).

12 124. Protestant agrees that it would sell more Subaru vehicles if it were operating out of
13 brand-compliant sales and service facilities. *See* Kelly Robinson Deposition Designations (Exhibit
14 R-629) at 52:10-53:8.; Tr. Vol. 7 at 184:18-185:5 (Prieto).

15 125. Subaru vehicles are rarely ever displayed at Protestant’s current Subaru sales
16 location at it Ford dealership. *See* Kelly Robinson Deposition Designations (Exhibit R-629) at
17 15:13-16:8; Tr. Vol. 5 at 218:9-14 and 219:4-8 (Leopold).

18 126. Other than the rare Subaru vehicle display, some Subaru brochures, and a single
19 digital Subaru kiosk, Prieto Automotive’s Subaru sales location is devoid of Subaru products and
20 touchpoints. Tr. Vol. 5 at 218:9-219:3 (Leopold).

21 127. Likewise, there is little to no Subaru branding at Protestant’s sales location and
22 overall, Protestant’s current Subaru sales facility is a very poor representation of the Subaru brand.
23 Tr. Vol. 5 at 76:1-12 (Kelso); Tr. Vol. 6 at 180:12-181:13 (Farabee); Tr. Vol. 5 at 219:13-221:1
24 (Leopold).

25 128. The lack of consumer access to Subaru products and touchpoints, the lack of a
26 Subaru showroom, and the overall lack of a meaningful Subaru presence at Protestant’s dealership
27 is injurious to the Subaru brand, the customer experience, and Prieto Automotive’s ability to market
28 and sell Subaru vehicles and other products. *Id.* Tr. Vol. 5 at 219:13-221:1 (Leopold); Tr. Vol. 6 at

1 37:7-18 (Leopold); Tr. Vol. 9 at 165:15-166:7 (Smit).

2 129. When a Subaru retailer is operating out of a facility that is dualled with another motor
3 vehicle brand—like Protestant’s Ford-Subaru dealership—it is difficult, if not impossible, for the
4 retailer to achieve and maintain Subaru brand dedication, which can negatively impact Subaru
5 vehicle sales. Tr. Vol. 2 at 83:1 - 87:16 (Smit).

6 130. In the context of a dual dealership, and especially when sales and management staff
7 are simultaneously representing two different vehicle brands—like the staff at Prieto Automotive—
8 sales defection rates rise, meaning that potential Subaru vehicle sales are lost to Ford sales. Tr. Vol.
9 2 at 83:1 - 87:16 (Smit).

10 131. When other Subaru retailers that were previously dualled with another brand have
11 transitioned to an exclusive Subaru-only facility, there is an increase in sales performance, customer
12 service satisfaction, and net profits for the retailer, while at the same time, sales defection rates
13 decrease. Tr. Vol. 2 at 83:1 - 87:16 (Smit).

14 132. The fact that Protestant is operating out of split Subaru sales and service locations
15 is detrimental to customer convenience, detrimental to Protestant’s ability to provide proper
16 customer service, and detrimental to customers’ overall Subaru experience and impression of the
17 Subaru brand. Tr. Vol. 2 at 104:12-105:5 (Smit); Tr. Vol. 5 at 71:23-73:5 (Kelso); Tr. Vol.
18 5 at 195:8-19 (Kelso); Tr. Vol. 5 at 216:20-218:2 (Leopold).

19 133. Separate sales and service facilities are not conducive to generating customer
20 vehicle purchases that are spurred on by a consumer’s repeated presence in a dealership’s sales
21 facility because the consumer is having his or her vehicle serviced at a dealer’s combined sales and
22 service location. Tr. Vol. 5 at 72:12-73:5 (Kelso); Tr. Vol. 5 at 216:20-218:2 (Leopold).

23 134. Split sales and service facilities can easily result in lost vehicle sales opportunities
24 for the retailer. *Id.*; Tr. Vol. 6 at 28:2-29:5 (Leopold).

25 135. Protestant agrees that it would improve Prieto Automotive’s Subaru sales
26 performance if it were operating out of new sales and service facilities combined under one roof.
27 *See* Kelly Robinson Deposition Designations (Exhibit R-629) at 52:10-53:8.

28 136. When other Subaru dealers have transitioned from split sales and service locations

1 to a single dealership location with sales and service under one roof, customer service satisfaction
2 as well as the dealership's volume of sales and service business has significantly increased. Tr. Vol.
3 5 at 73:6-74:5 (Kelso).

4 137. A unified Subaru sales and service facility is by far the most advantageous
5 dealership configuration for consumers, the retailer and SOA alike. Tr. Vol. 5 at 195:8-19 (Kelso);
6 *See also* Kelly Robinson Deposition Designations (Exhibit R-629) at 43:23-44:11.

7 138. Protestant has not made a sufficient investment of capital, resources, time, or effort
8 with respect to its Subaru dealership and this lack of investment has resulted in Protestant's inability
9 and ultimate failure to comply with the terms of its Dealer Agreement. *See e.g.* Tr. Vol. 3, 106:14-
10 107:18 (Smit); Tr. Vol. 6, 135:21-137:20 (LeRoy); Tr. Vol. 5, 171:2-171:25 (Kelso).

11 139. Since 2017, Prieto Automotive has paid significant sums to its owners, Mr. Prieto
12 and Ms. Llamas, in the form of dividends and distributions. *See* Expert Report of Michael LeRoy
13 (Exhibit R-308) at p. 4. In 2017, a distribution of \$293,697 was made to Prieto Automotive's
14 owners; in 2018, a dividend of \$125,896 and a distribution of \$113,500 was made to its owners;
15 and in 2019, dividends totaling \$1,018,657 were made to its owners. *Id.* Also, in 2020, a distribution
16 in the amount of \$244,000 was made to the owners. Tr. Vol. 6 at 96:5-25 (LeRoy).

17 140. Since 2017, Prieto Automotive has paid approximately \$46,000 per month for its
18 Subaru and Ford dealership's rental of the real property on which its dual sales operations are
19 conducted, and such rent is paid to Cypress Square—an LLC owned by Mr. Prieto and his wife,
20 Ms. Llamas. Tr. Vol. 4 at 212:14-213:1 (Prieto); Tr. Vol. 5 at 46:10-23 (Prieto).

21 141. Prieto Automotive has remained a profitable enterprise since 2017, and the Sonora
22 dealership has maintained a strong balance sheet and financial position from 2017 through 2020,
23 while affording its owners the ability to withdraw approximately \$2 million in the form of dividends
24 and distributions. *See* Supplemental Expert Report of Michael LeRoy (Exhibit R-309) at p. 7.

25 142. Protestant's operations have been quite profitable during the period from 2017
26 through 2020, with average annual net profits totaling approximately \$900,000. *See* Supplemental
27 Expert Report of Michael LeRoy (Exhibit R-309) at p. 8.

28 143. Given Protestant's financial success, it is not as though Prieto Automotive could not

1 afford to construct Subaru sales and service facilities in Sonora. Rather, over the last four years,
2 Prieto Automotive has chosen not to, and has, instead, elected to invest its capital in other franchises
3 and in compensation and rent payments made to its owners and the LCC, Cypress Square. *See*
4 Supplemental Expert Report of Michael LeRoy (Exhibit R-309) at p. 7-8; Tr. Vol. 4 at 152:11-19
5 (Prieto); Tr. Vol. 5 at 63:8-64:9 (Prieto); Tr. Vol. 4 at 151:13-152:19 (Prieto); Tr. Vol. 4 at 152:
6 20-153:25 (Prieto); Tr. Vol. 5 at 63:8-64:9 (Prieto); Tr. Vol. 4 at 157:25-158:6 (Prieto).

7 144. Protestant has made little, if any, permanent investment in its Subaru dealership. *See*
8 *e.g.* Tr. Vol. 6, 107:25-113:12 (LeRoy).

9 145. While Prieto Automotive has made improvements to its Ford dealership facilities,
10 Prieto Automotive has made no meaningful permanent investment relating to its Subaru operations
11 in any facility in which it conducts its Subaru sales or service business. *See* Supplemental Expert
12 Report of Michael LeRoy (Exhibit R-309) at p. 5; Tr. Vol. 4 at 181:24-183:6 (Prieto); Tr. Vol. 6 at
13 107:25-113:12 and 140:17-142:13 (LeRoy). Given that Prieto Automotive reported \$11,863,100 in
14 total assets in 2019, gross fixed assets in the amount of \$1,016,222 is a small figure in terms of
15 investment, relative to the over \$11 million in reported total assets. *Id.*

16 146. Even if Protestant's Subaru Dealer Agreement were terminated and its Subaru
17 franchise no longer existed, Protestant could remain profitable as just a Ford dealer at its current
18 dual Ford-Subaru dealership location. Tr. Vol. 7 at 185:17-186:16 (Prieto).

19 147. Prieto Automotive's lease agreement for its service location has an "exit strategy"
20 because Prieto Automotive can terminate the lease agreement at its discretion upon 90-days' notice.
21 Tr. Vol. 6 at 140:23-142:1 (LeRoy); Tr. Vol. 5 at 14:15-16:22 (Prieto).

22 148. It would not be injurious to the public welfare if Protestant's Subaru dealership were
23 terminated and replaced. Tr. Vol. 3 at 110:17-112:4 (Smit). The public would be better served by
24 allowing SOA to appoint a motivated Subaru retailer in Sonora that would provide Subaru
25 customers with exclusive, MSOG-compliant Subaru sales and service facilities under the same roof.

26 149. Subaru dealerships are in high demand among automobile retailers nationwide. Tr.
27 Vol. 3 at 27:9-25 and 110:17-112:4 (Smit); Tr. Vol. 3 at 27:9-25 (Smit). Tr. Vol. 6 at 63:5-13
28 (Leopold).

1 150. In addition, there is significant demand for Subaru products among consumers in
2 the Sonora area due to the popularity of Subaru vehicles in that market. Tr. Vol. 6 at 183:16-185:5;
3 *See also* Kelly Robinson Deposition Designations (Exhibit R-629) at 23:2-5.

4 151. Given the considerable demand for Subaru franchises among retailers and the
5 popularity of the Subaru brand in Sonora, SOA could quickly identify a replacement dealer to
6 operate a Subaru dealership in the Sonora area if Prieto Automotive's Dealer Agreement were
7 terminated. Tr. Vol. 3, 111:5-112:4 (Smit); Tr. Vol. 6 at 190:11-191:10 (Farabee); Tr. Vol. 6, 63:5-
8 13 (Leopold); Tr. Vol. 8 at 47:19-48:22 (Graziano).

9 152. Given Protestant's prolonged failure to provide a Subaru sales and service facility,
10 termination and replacement of Prieto Automotive is warranted and is the remedy that would best
11 serve consumers in the Sonora market. Tr. Vol. 10 at 78:14-80:4 (Hinkle).

12 153. Based on Prieto Automotive's history of non-performance of its facility obligation,
13 SOA justifiably lacks confidence that Prieto Automotive will ever make good on its promise to
14 build an MSOG-compliant Subaru dealership. Tr. Vol., 6, 193:9-15 (Farabee); Tr. Vol. 9 at 194:12-
15 196:6 (Smit); Tr. Vol. 9 at 232:14-233:5 (Smit); Tr. Vol. 10 at 120:25-121:10 and 123:10-124:2
16 (Hinkle).

17 154. Prieto Automotive has claimed that it would need an extensive 43-48-month time
18 period in which to complete construction of a Subaru facility. *See* Timeline (Exhibit P-110); Tr.
19 Vol. 9 at 68:17-73:6 (Augustine); Tr. Vol. 9 at 142:6-143:5 (Marlette).

20 155. Forcing consumers to wait yet another 4 years before they have access to adequate
21 Subaru sales and service facilities will certainly not serve the public interest. Tr. Vol. 9 at 204:7-
22 206:4 (Smit); Tr. Vol. 9 at 207:11-19 (Smit).

23 156. In less than 43 months, SOA could identify a replacement retailer for the Sonora
24 area, and at a minimum, establish temporary Subaru sales and service facilities that are located
25 under one roof, in an exclusive, Subaru-only building. Tr. Vol. 10 at 78:14-80:4 and 116:16-117:2
26 (Hinkle).

27 157. In connection with efforts to identify and establish a replacement retailer, SOA and
28 the new retailer would not be limited to searching for a dealership location within the confines of

1 Sonora proper. The surrounding area is also a viable option for a potential location of a replacement
2 Subaru retailer. Tr. Vol. 10 at 129:1-7 (Hinkle).

3 158. Protestant's existing Subaru dealership operations are woefully inadequate to
4 reasonably provide for the sales and service needs of Subaru consumers in the Sonora area. *See e.g.*
5 Tr. Vol. 3 at 110:17-112:4 (Smit).

6 159. Prieto Automotive's current Subaru sales and service facilities are non-compliant
7 with SOA's MSOGs in virtually every respect, including without limitation, facility exterior and
8 interior image requirements, Subaru vehicle storage requirements, Prieto Automotive's lack of a
9 Subaru showroom, Prieto Automotive's lack of Subaru customer touch points in its sales and
10 service facilities, and Prieto Automotive's deficient number of Subaru personnel. *See* 2020 MSOGs
11 for Subaru of Sonora (Exhibit R-316) at p. 23-27; Tr. Vol. 2 at 129:23-134:4 and 149:20-151:20
12 (Smit).

13 160. Overall, Protestant's current Subaru sales facility is substandard representation of
14 the Subaru brand and fails to provide consumers with the hands-on access to Subaru products that
15 they are seeking when they walk into a Subaru dealership. Tr. Vol. 5 at 76:1-12 (Kelso); Tr. Vol. 6
16 at 37:7-18 (Leopold); Tr. Vol. 5 at 219:13-221:1 (Leopold).

17 161. The lack of consumer access to Subaru products and touchpoints, the lack of a
18 Subaru showroom, and the overall lack of a meaningful Subaru presence at Protestant's dealership
19 is injurious to a customer's ability to experience and learn about the Subaru brand and its vehicles
20 and other products, and customers who are looking to interact with Subaru vehicles and other
21 products have not been well served (and will continue to be poorly served) when they visit
22 Protestant's Subaru sales location because of the overwhelming lack of a Subaru presence at
23 Protestant's Ford dealership. *See e.g.* Tr. Vol. 9 at 208:25-209:23 (Smit).

24 162. Prieto Automotive's Subaru service department is inconveniently situated
25 approximately 3 miles, driving distance, from Prieto Automotive's Subaru sales location. Tr. Vol.
26 2 at 104:16-105:5 (Smit).

27 163. Prieto Automotive's service facilities are inadequate to meet the needs of consumers
28 because they are located in a shabby, barn-like building that is a dismal representation of the Subaru

1 brand, and customers have been dissatisfied with the availability of parking, the inconvenient
2 vehicle pick-up and drop-off process, the appearance of the service facilities, and the overall
3 comfort of the customer waiting areas at the service location. Tr. Vol. 5 at 93:7-20 (Kelso); Tr. Vol.
4 5 at 98:18-100:10 (Kelso); Tr. Vol. 3 at 110:17-112:4 (Smit).

5 164. The chief complaints among patrons of Protestants' service facilities have been the
6 inconvenient, offsite service location, the lack of convenient parking and the inconvenient and
7 confusing vehicle drop-off and pick-up process at Prieto Automotive's service facilities. Tr. Vol. 5
8 at 93:7-20 (Kelso); Tr. Vol. 5 at 98:18-100:10 (Kelso).

9 165. Mr. Prieto and Protestant's General Manager, Kelly Robinson, have admitted that
10 Prieto Automotive has had challenges in terms of providing customers with a satisfactory Subaru
11 vehicle service experience. Tr. Vol. 7 at 81:17-18 (Prieto); *See also* Kelly Robinson Deposition
12 Designations (Exhibit R-629) at 49:13-50:13.

13 166. Split sales and service facilities—such as the Subaru facilities of Prieto
14 Automotive—are inconvenient for customers and detrimental to the overall Subaru experience for
15 customers. *See e.g.* Tr. Vol. 2 at 104:16-105:5 (Smit); Tr. Vol. 5 at 71:23-72:11 (Kelso); Tr. Vol. 5
16 at 216:20-218:2 (Leopold); Tr. Vol. 5 at 72:12-73:5 (Kelso).

17 167. Under the terms of its Dealer Agreement, Prieto Automotive is obligated to maintain
18 the number of Subaru dealership employees specified in SOA's MSOGs applicable to Protestant.
19 *See* Dealer Agreement (Exhibit J-05) at p. 30, Section 7.1.

20 168. Pursuant to Protestant's 2020 MSOGs, Prieto Automotive did not employ a
21 sufficient number of personnel in that it did not have an exclusive Subaru Sales Manager, it was
22 short on the requisite number of Subaru Certified Service Advisors, and it did not employ a
23 sufficient number of fully trained Subaru Technicians. *See* 2020 MSOGs for Subaru of Sonora
24 (Exhibit R-316) at p. 26; Tr. Vol. 2 at 131:9-132:9 (Smit). In addition, Prieto Automotive's
25 technicians were significantly behind in terms of their required Subaru training credits. *Id.*

26 169. Prieto Automotive's failure to maintain the requisite number of employees with the
27 requisite level of training at its Subaru dealership has resulted in Protestant's inability to properly
28 serve customers in terms of vehicle sales and service. *See e.g.* Tr. Vol. 2 at 129:4-22 (Smit); Tr.

1 Vol. 5 at 80:3-17 and 101:12-102:8 (Kelso).

2 170. Mr. Marlette submitted a set of plans to SOA in December 2020 that closely
3 resemble the construction drawings that were completed by DFA in December 2019 and approved
4 by SOA in January 2019. *See* Marlette Associates Building Plans (Exhibit R-466); Tr. Vol. 3 at
5 187:8-188:11 (Augustine).

6 171. To date, Mr. Marlette’s building plans have not been approved by the County of
7 Tuolumne as compliant with the East Sonora Design Guidelines or any other applicable County
8 requirement. Tr. Vol. 3 at 187:8-188:11 (Augustine); Tr. Vol. 8 at 75:6-12 (Marlette); Tr. Vol. 9 at
9 120:4-123:5 (Marlette).

10 172. One of the primary contributing factors to Prieto Automotive’s overall lack of
11 progress in pursuing the dealership project is Prieto Automotive’s resistance to incurring necessary
12 costs associated with the project. Ms. Augustine testified that Mr. Prieto chose not to proceed with
13 required drainage, topography and land surveying work because this work was going to be “too
14 costly.” Tr. Vol. 3 at 178:16-179:23 (Augustine).

15 173. In addition, Mr. Prieto continuously expressed concerns about the costs involved in
16 construction and completing design plans for the facility, and in May 2019, Prieto Automotive
17 ultimately refused to proceed with the facility due to projected construction costs. Tr. Vol. 4 at
18 190:2-17; 211:3-212:22 and 213:18-214:6 (Prieto).

19 174. In 2019, Mr. Prieto concluded that it would not be economically feasible for Prieto
20 Automotive to afford construction costs for the facility if said costs were going to exceed
21 \$7,000,000. Tr. Vol. 4 at 211:13-214:6 (Prieto).

22 175. The most recent construction cost estimate that Prieto Automotive has obtained is
23 based off the building plans drawn up by Mr. Marlette. Tr. Vol. 9 at 30:12-19 (Prieto).

24 176. In January 2021, construction firm BJ Perch issued a construction cost estimate of
25 \$6,045,190 for the Sonora Subaru project. *See* BJ Perch Construction Cost Estimate (Exhibit R-
26 469) at p. 13; Tr. Vol. 9 at 30:12-19 (Prieto).

27 177. Prieto Automotive asked the Board to enter an conditional order, allowing it an
28 additional 43 months to complete construction of a Subaru sales and service facility in Sonora. Tr.

1 Vol. 9 at 158:8-20 (Prieto).

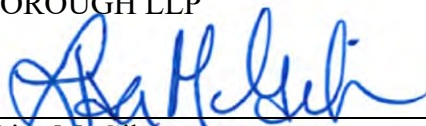
2 178. Given that Protestant has already had since March 2017—over four years—to
3 complete and submit applications for required permits and proceed with construction, Protestant’s
4 request for a 43-month time period in which to complete construction of a Subaru facility is
5 unreasonable and unjustifiable.

6 179. Ms. Augustine’s April 26, 2021 testimony regarding the 29-month time period
7 before site development and building permits could be obtained is inconsistent with her prior
8 testimony during the merits hearing regarding that same issue, and Ms. Augustine admitted that she
9 developed the 29-month Timeline for obtaining permits without the benefit of the County’s input
10 or review of the Timeline. Tr. Vol. 9 at 103:24-104:6 (Augustine).

11 180. It typically takes two to two-and-half years for retailers to fully complete facility
12 construction projects. Tr. Vol. 4, 90:12-91:13 (Francis); Tr. Vol. 2 at 76:19-78:17 and 80:5-81:4
13 (Smit); Tr. Vol. 9 at 166:8-22 and 167:12-24 (Smit); Tr. Vol. 10 at 14:15-16:1 (Hinkle); Tr. Vol.
14 10 at 16:2-25 (Hinkle); Tr. Vol. 9 at 173:16-174:15 (Smit).

15
16 Dated: June 4, 2021

Respectfully submitted,
NELSON MULLINS RILEY &
SCARBOROUGH LLP

17
18 By: 
19 Lisa M. Gibson
20 Crispin L. Collins
21 Attorneys for Claimant
22 SUBARU OF AMERICA, INC.
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PROOF OF SERVICE

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I am a citizen of the United States. My business address is 19191 South Vermont Avenue, Suite 900, Torrance, California 90502. 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 cause.

On the date set forth below, according to ordinary business practice, I served the foregoing document(s) described as:

RESPONDENT SUBARU OF AMERICA, INC.'S PROPOSED FINDINGS OF FACT

- (BY FAX)** I transmitted via facsimile, from facsimile number 213.629.7401, the document(s) to the person(s) on the attached service list at the fax number(s) set forth therein, on this date before 5:00 p.m. A statement that this transmission was reported as complete and properly issued by the sending fax machine without error is attached to this Proof of Service.
- (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.
- (BY MAIL)** I am readily familiar with my employer's business practice for collection and processing of correspondences for mailing with the U.S. Postal Service, and that practice is that correspondences 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 addressed to the person(s) on the attached service list and sealed and placed the envelopes for collection and mailing following ordinary business practices.
- (BY PERSONAL SERVICE)** On this date, I delivered by hand envelope(s) containing the document(s) to the persons(s) on the attached service list.
- (BY OVERNIGHT DELIVERY)** On this date, I placed the documents in envelope(s) addressed to the person(s) on the attached service list, and caused those envelopes to be delivered to an overnight delivery carrier, with delivery fees provided for, for next-business-day delivery to whom it is to be served.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct

Executed on June 4, 2021 at Los Angeles, California.



Sindy Fleeger

SERVICE LIST

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

11 **STATE OF CALIFORNIA**
12 **NEW MOTOR VEHICLE BOARD**

13 In the Matter of the Protest of:

14 **PRIETO AUTOMOTIVE, INC., dba**
15 **SUBARU OF SONORA,**

16 Protestant,

17 v,

18 **SUBARU OF AMERICA, INC.,**

19 Respondent.

20 Protest Number: PR-2648-19

21 **PROTESTANT'S POST-HEARING REPLY**
22 **BRIEF**

23 Hearing Date: February 22, 2021

24 Hearing Time: 10:00 a.m. *via Zoom*

25 ALJ: Dwight V. Nelsen

1 Protestant PRIETO AUTOMOTIVE, INC., dba SUBARU OF SONORA (“Protestant” or
2 “Prieto Automotive”) hereby files its Post-Hearing Reply Brief in the above-entitled matter pursuant to
3 the Order Establishing Post-Hearing Briefing Schedule issued by the New Motor Vehicle Board (the
4 “Board”) in this matter dated March 4, 2021.

5 **BACKGROUND**

6 This protest, filed pursuant to the provisions of Vehicle Code Section 3060¹ involves the
7 proposed termination by Respondent Subaru of America, Inc. (“SOA” or “Respondent”) of Protestant’s
8 Subaru franchise located in Sonora, California. The Opening Post-Hearing Briefs were filed by the
9 parties on or about June 4, 2021, and contain detailed discussions of the background of this dispute as
10 well as the procedural history. As such, the background and procedural history will not be repeated
11 herein.

12 **INTRODUCTION**

13 In SOA’s 60-page Opening Post-Hearing Brief, SOA has again argued that “good cause” exists
14 for the outright termination of Protestant’s franchise, and seeks to do so, despite the fact that it has
15 previously agreed to a conditional decision of termination subject to the imposition of a construction
16 requirements upon on Protestant for an SOA-compliant facility within a specified time. Even in
17 Respondent’s post-hearing brief, it concedes that it is willing to have a conditional decision issued.
18 (SOA Opening Post-Hearing Brief, p. 2, lines 10-13). Once again, as in previous briefs, Protestant
19 submits that a conditional order is the most appropriate manner in which to resolve this dispute and is
20 consistent with the requirements of Sections 3060, 3061, and 3067(a).

21 SOA argues in its Opening Brief that the evidence at the hearing established that good cause
22 exists to find good cause for termination. However, an analysis of the evidence (discussed *infra* and in
23 Protestant’s Opening Post-Hearing Brief), establishes that it far from the case, in evaluating the
24 evidence related to the 3061 “good cause” factors.

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26
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28

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

1 **DISCUSSION**

2 In Protestant’s Opening Post-Hearing Brief, it reiterated and discussed three distinct issues
3 which were raised in the Protest, specifically (1) the good cause factors set forth in Section 3061, (2) the
4 Board’s ability to consider the Section 3061 factors in termination protests as restricted to only those
5 issues contained in the notice of termination. (See, for ex. *British Motor Car Distributors, Ltd. v. New*
6 *Motor Vehicle Board* (1987) 194 Cal.App.3d 81, and *American Motors, Inc. v. New Motor Vehicle*
7 *Board*, (1986) 186 Cal.App.3d at p. 477), and (3) the impact of Section 11713.13(b) on the ability of
8 SOA to impose the facility requirements as it pertains to the facts that existed as of the notice of
9 termination.² Issues 2 and 3 have been discussed in Protestant’s Opening Post-Hearing Brief, and those
10 discussions will not be repeated herein. As such, the primary focus of this reply brief will be in
11 response to Respondent’s discussion related to the good cause factors.

12
13 **ANALYSIS AND ARGUMENT OF THE “GOOD CAUSE” FACTORS ENUMERATED IN**
14 **SECTION 3061.**

15 **A. Amount of business transacted by the franchisee, as compared to the**
16 **business available to the franchisee. (Section 3061(a)).**

17 Respondent admits that sales performance is not a “primary basis of SOA’s pursuant of
18 termination”. (SOA Opening Brief at p 25, lines 16-17). However, in support of its effort to establish
19 this factor to support termination, Respondent references testimony of Manuel Prieto:

20 Q. ... So, do you think that - if you put a Subaru building in Stockton, do you think you
21 would have been able to increase sales from what they’re currently experiencing right
22 now?

23 A. Oh, there’s no doubt. Absolutely no doubt. (SOA Opening Brief at p. 25, lines 25-
24 28).

25
26
27 ² As of the date of the notice of termination, the operative proposal from Feltus Hawkins Design (“FH”) was to have the facility
28 positioned further west from the Ford facility, over a drainage canal, and designed in a manner that would have under no circumstances
been approved by Tuolumne County, consisting of a large 2-story modern building with a steel and glass finish. Subsequent to the notice
of termination, Protestant submitted to SOA additional MSOG-compliant plans (the “Marlette Plans”), which SOA has to date refused to
act upon.

1 This protest in no way involved the issue of whether the establishment of a Subaru facility in
2 Stockton, California (an unrepresented Subaru market) by Mr. Prieto (or anyone else) would increase
3 the sales in the Stockton market. As the Board well know, the establishment of a dealership in an
4 unrepresented market will most certainly increase brand sales in that market. No one disputes that.
5 This testimony has nothing to do with the relevant issues in this termination protest, other than to
6 provide evidence that the *termination* of the *only* Subaru dealership in Sonora will result in a decline in
7 both sales and service availability for current Subaru customers, as discussed *infra*.

8 The remainder of SOA's arguments in its Opening Post-Hearing Brief regarding this good cause
9 factor pertain to whether it would be advantageous to both SOA and Protestant in terms of sales if a new
10 facility would be constructed. No one disputes the fact that the construction of a stand-alone Subaru
11 facility in Sonora would increase sales. These arguments miss the point. The overwhelming (and
12 undisputed evidence) presented at the hearing was that (a) the facility addendum (as amended) requires
13 Protestant to construct a facility), (b) Protestant is anxiously willing and able to do so, (c) SOA has *only*
14 approved the FH plans which provide for a modern two-story glass and steel facility which has no
15 chance of being approved by the County, (d) in response to the SOA-approved FH plans, Protestant
16 submitted the MSOG compliant Marlette Plans, and (e) SOA has refused to act on the Marlette Plans.

17 Respondent presented no evidence to support a determination that Protestant's transacted
18 business is inadequate as compared to the business available to it. As the party with the burden of
19 proof, and uncharacteristically, SOA did not call a marketing expert witness (such as someone from
20 Urban Science Applications) to support its position regarding this factor. Respondent's argument,
21 based upon the evidence adduced at the hearing, appears to be that Protestant will increase sales if it
22 constructs a building. Again, no one disputes that. Assuming SOA approves the Marlette Plans (or any
23 acceptable modification thereof), and the building is constructed, we will all be proven right or wrong
24 as far as sales performance. The Board cannot condone the conduct of SOA in refusing to approve,
25 much less consider, the Marlette Plans, which are SOA MSOG complainant, and use that refusal to
26 argue that Protestant refuses to construct a facility.

27 Respondent has advanced a number of additional arguments as to the detrimental effect on the
28 operations of Protestant's Subaru operations by (a) not having a separate Subaru facility, (b) by having a
remote service facility, (c) OPL scores as a result of the lack of a single sales and service facility.

1 The evidence unequivocally supports a finding that Protestant embraces and seeks to construct a
2 Subaru stand-alone facility. This facility would have been constructed by now, but for SOA refusal to
3 move forward and approve (or modify) the Marlette Plans, or even reject the Marlette Plans and require
4 a re-design. The issue with respect to the sales operations and OLP scores could have easily been
5 resolved had SOA considered, modified or approved the Marlette Plans. SOA has apparently decided
6 not to take any of those actions and instead cast the blame upon Protestant in an effort to terminate the
7 franchise. These tactics should be recognized by the Board for what they are.

8
9 **B. Investment necessarily made and obligations incurred by the**
10 **franchisee to perform its part of the franchise. (Section 3061(b)).**

11 SOA argues that Protestant has not make the necessary investments and incurred the necessary
12 in the obligations to perform its part of the franchise. As noted in Protestant's initial post-hearing brief,
13 Protestant spent \$1,500,000 for the franchise, and was (and is) willing to construct a stand-alone facility
14 for Subaru operations, provided that SOA approves plans that are acceptable to the County. There has
15 never been an issue or evidence submitted with respect to Protestant's advertising, parts inventory, net
16 working capital.

17 The only argument that SOA submits is that Protestant did not invest in the Sonora Subaru
18 facility construction because the owners were spending money to acquire other stores in different
19 markets. This argument not pertinent to these proceedings. There was no evidence admitted which
20 suggested that the acquisition of additional dealerships by Protestant had any impact upon the
21 construction of a facility for Subaru operations in Sonora.

22 There was no evidence presented at the hearing to suggest that because of these dealership
23 acquisitions Protestant was unwilling or financially unable to construct a Subaru facility in Sonora. The
24 evidence was clear that the only reason that the facility in Subaru facility in Sonora hasn't been
25 constructed was due to the conduct of SOA to *only* approve an FH facility which could not be approved
26 and to refuse to consider an approval of an alternate plan.

27 //

1 **C. Permanency of the investment. (Section 3061(c)).**

2 SOA's argument regarding the permanency of the of Protestant in the Subaru operations is
3 equally flawed. As noted in Protestant's Opening Post-Hearing, Protestant invested One Million Five
4 Hundred Thousand Dollars in the franchise, and was and is prepared to construct a stand-alone full sales
5 and service facility approved by both SOA and the County. The FH plan proposed and approved by
6 SOA was *not* approvable by the County. SOA refuses to act on the Marlette Plans, which are in fact
7 approvable by the County. The evidence demonstrates a willingness of Protestant to make further,
8 permanent investments into the dealership, which efforts have only been hampered by SOA's refusal to
9 consider a plans approval by the County.

10
11 **D. Whether it is injurious or beneficial to the public welfare for the franchise**
12 **to be modified or replaced or the business of the franchisee disrupted.**
13 **(Section 3061(d)).**

14 As noted in previous briefs, the termination of the Subaru franchise of Protestant would have a
15 negative effect upon the public welfare in that the evidence presented at the hearing overwhelmingly
16 confirms that the adverse effect of the franchise termination in terms of sales tax revenue to the County,
17 the lack of a Subaru sales facility and, more importantly, the lack of a Subaru service facility for units in
18 operation would be extensive, with the closest dealership to Sonora being located in Modesto
19 approximately 50 miles away. The termination of Protestant's franchise cannot be viewed by the Board
20 as one which does not adversely affect the public welfare.

21 SOA has again argued that, upon termination of Protestant's franchise, SOA would find a replacement
22 dealer to assume the sales and service operations of Protestant. However, during the hearing, SOA did
23 not identify a single acceptable dealer candidate willing to commit to the investment necessary, to
24 purchase or enter into a long-term lease for the required land, or to the construction of a facility in
25 compliance with the current SOA MSOGs. Given the evidence and argument presented by SOA, it is
26 clear that any replacement Subaru dealer in Sonora to satisfy the customer sales and service
27 requirements is unlikely in the near future. SOA presented no evidence as to the time frame expected to
28 find a replacement dealer who is willing to make the investment in the land and facility that SOA would
demand. In the meantime, the consumers in the Sonora market would have no dealership to service it's

1 the Subaru sales and service obligations. The termination of Protestant's franchise would create a
2 substantial void in the Sonora market, and would be against the public welfare.

3
4 **E. Whether the franchisee has adequate motor vehicle sales and service facilities,**
5 **equipment, vehicle parts, and qualified service personnel to reasonably provide for**
6 **the needs of the consumers for the motor vehicles handled by the franchisee and has**
7 **been and is rendering adequate services to the public. (Section 3061(e)).**

8 Protestant does not suggest that the evidence adduced at the hearing supports a finding that the
9 current sales and service facilities are sufficient to meet the needs of the consumers in terms of
10 consumers of Subaru vehicles. This is precisely why Protestant agreed, and has sought to construct a
11 new facility dedicated exclusively to Subaru sales and service operations. No party has asserted that the
12 current facility arrangements are optimal, or even acceptable under the facility addendum to the
13 franchise. However, the evidence supports a determination that it the lack of a facility is due solely to
14 the conduct of SOA in not approving, commenting upon, or otherwise taking action upon the Marlette
15 Plans which has resulted in the failure of Protestant to move forward with its construction of the Subaru
16 facility. As the evidence overwhelming evinces, Protestant is willing to do so, but for the failure or
17 refusal of SOA to act on the current facility plans.

18
19 **F. Whether the franchisee fails to fulfill the warranty obligations of the**
20 **franchisor to be performed by the franchisee. (Section 3061(f)).**

21 Respondent concedes that this is not an issue in this protest.

22 **G. Extent of franchisee's failure to comply with the terms of the franchise.**
23 **(Section 3061(g)).**

24 The evidence presented at the hearing established that the *only* issue that SOA has with respect
25 to the issue of failure to comply with the terms of the franchise was the alleged failure to construct a
26 new facility for Subaru operations within based upon the facility addendum. The reasons for this failure
27 to construct a new facility are clear – the only SOA approved FH plans are not approvable by the
28 County and SOA refused to take any action on the Marlette Plans, which are approvable. This issue has
been addressed above and in previous filings.

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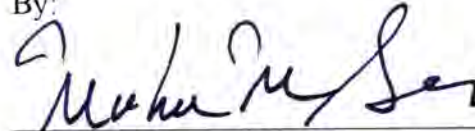
CONCLUSION

Pursuant to the statutory mandates which require “specific grounds” to be contained in any notice of termination (Vehicle Code Section 3060), as well as the restrictions imposed by the California Courts on admitting evidence outside the noticed grounds for termination discussed above, the sole scope of this hearing should properly be limited to the facts and existing circumstances surrounding the issue raised in the notice of termination, specifically the reasons for the fact that Protestant currently does not have a stand-alone facility in Sonora dedicated to the Subaru brand.

The parties agree that an acceptable resolution of the protest would be a conditional order sustaining the protest subject to Protestant building a Subaru facility within a time limit set by the Board. The testimony of Amy Augustine (With Exhibit P-110) should be taken into consideration as to the time to be included in the Board decision as to the time frame established for the facility construction.

DATED: July 20, 2021

By:



MICHAEL M. SIEVING
Attorney at Law

1 **PROOF OF SERVICE**

2 STATE OF CALIFORNIA)
3 NEW MOTOR VEHICLE BOARD)

4 I am employed in the County of Kern, State of California, I am over the age of 18 years and not a party
5 to the within action; my business mailing address is 9530 Hageman Road, Suite B #455, Bakersfield,
6 CA 93312.

7 On this date, July 20, 2021, I served the foregoing documents described as:

8 **PROTESTANT'S OPENING POST-HEARING BRIEF**

9 I enclosed a true copy of said documents in a sealed envelope or package addressed to the persons noted
10 below.

11 ____ (By United States Mail) I placed the envelope for collection and mailing, following our firm's
12 ordinary business practices. I am familiar with our firm's practice for collecting and processing
13 correspondence for mailing. On the same day that correspondence is placed for collection and mailing,
14 it is deposited in the ordinary course of business with the United States Postal Service, in a sealed
15 envelope with postage fully prepaid.

16 ____ (By overnight delivery) I enclosed the documents in an envelope or package provided by an
17 overnight delivery carrier and addressed to the persons listed below. I placed the envelope or package
18 for collection and overnight delivery at an office or a regularly utilized drop box of the overnight
19 delivery carrier.

20 ____ (By messenger service) I served the documents by placing them in an envelope or package
21 addressed to the persons at the addresses below and providing them to a professional messenger service
22 for service.

23 ____ (By fax transmission) Based on agreement of the parties to accept service by fax transmission, I
24 faxed the documents to the persons at the fax numbers listed below. No error was reported by the fax
25 machine that I used. A copy of the record of the fax transmission, which I printed out, is attached.

26 ____ (By electronic service) Based on a court order or an agreement of the parties to accept service
27 by electronic transmission, I caused the documents to be sent to the persons at the electronic notification
28 addresses listed below.

____ (By personal service). I served the documents by delivering the envelope, by hand, to the
persons listed below.

XX By E-Mail I caused the above-entitled documents to be served through electronic mail addressed
to all parties listed in the Service List below. The file transmission was reported as completed and a
copy of the E-Mail pages will be maintained with the original documents in our office. I have complied
with California Rules of Court, Rule 2.257(a) and the original, signed Proof of Service is available for
review and copying at the request of the court or any party.

1 I declare under penalty of perjury under the laws of the State of California I am a member of the
2 State Bar of California and that the above is true and correct.

3 
4 _____
5 MICHAEL M. SIEVING

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9
10 In the Matter of the Protest of
11 PRIETO AUTOMOTIVE, INC., a California
Corporation, dba SUBARU OF SONORA,
12
Protestant,
13
v.
14 SUBARU OF AMERICA, INC.,
15
Respondent.

Protest No.: PR-2648-19

**RESPONDENT SUBARU OF
AMERICA, INC.'S
POST-HEARING REPLY BRIEF**

Merits Hearing Dates: February 22-26,
March 1, March 4-5, and April 26-27, 2021
Location: Via Zoom

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I. INTRODUCTION

Following the conclusion of the merits hearing in this case, on June 4, 2021, Respondent Subaru of America, Inc. (“SOA”) and Protestant Prieto Automotive, Inc., d/b/a Subaru of Sonora (“Protestant” or “Prieto Automotive”) each filed a post-hearing brief summarizing the evidence presented during the hearing and advancing arguments in support of their respective positions.

As discussed throughout this Reply, Protestant’s Brief contains various assertions that mischaracterize the evidence and are unsupported by the record. Despite Protestant’s efforts to muddy the water, what remains clear is that the evidence presented during the hearing supports the conclusion that good cause exists for the termination of Prieto Automotive’s Subaru Dealer Agreement, and Protestant has not succeeded in rebutting this showing.¹ Testimony was also presented by SOA upon Judge Nelsen’s reopening of the record relating to reasonable conditions should he decide to issue a conditional decision. SOA testified that waiting for Protestant’s belated performance over an additional three to four year period was an unreasonable duration given that SOA has already been without brand-compliant facilities for over four years. SOA should not have to further endure the uncertainty of performance or await Protestant to perform at its convenience.

Additionally, in its Post-Hearing Brief, Protestant attempted to resurrect arguments already decided in connection with the parties’ Motions in Limine regarding the scope of information that Judge Nelsen and the Board should consider in determining whether there is sufficient good cause for termination. Specifically, Protestant claims that because the basis for SOA’s termination of Protestant’s Dealer Agreement arises, primarily, out of Protestant’s failure to construct a new Subaru dealership facility, the Board is restricted to considering evidence only as to factor (g) of the good cause analysis, which relates to “the extent of the dealer’s failure to comply with the terms of the franchise.” *See* Protestant’s Post-Hearing Brief at p. 6-8. Protestant further contends that, in

¹ All capitalized terms used but not defined herein have the same meaning as the capitalized terms used and defined in SOA’s Post-Hearing Brief.

1 addition to factor (g) under Cal. Veh. Code § 3061, the Board should also consider evidence that
2 Protestant’s contractual obligation to provide exclusive dealership facilities compliant with SOA’s
3 MSOGs violates Cal. Veh. Code § 11713.13(c). *See* Protestant’s Post-Hearing Brief at p. 8-9. Both
4 of these arguments have previously been analyzed and ruled upon in this proceeding. *See* Merits
5 Hearing Transcript (“Tr.”) Volume (“Vol.”) 1 at 15:7-20:10 and 24:2-9. Accordingly, the
6 averments in Protestant’s Post-Hearing Brief regarding these matters should be disregarded, and
7 the scope of the Board’s good-cause analysis should be dictated by applicable law and Judge
8 Nelsen’s prior decisions on these issues.
9

10 II. FACTUAL BACKGROUND

11 Relevant factual background is set forth in SOA’s Post-Hearing Brief, and is incorporated
12 herein by reference. *See* SOA’s Post-Hearing Brief at p. 3-24.
13

14 III. LEGAL STANDARD

15 Under Cal. Veh. Code § 3061, the Board is required to determine whether SOA has “good
16 cause” to terminate Prieto Automotive’s Dealer Agreement. Specifically, Section 3061 provides
17 that:

18 In determining whether good cause has been established for modifying, replacing,
19 terminating, or refusing to continue a franchise, the board ***shall*** take into
20 consideration the existing circumstances, including, but not limited to, ***all of the***
21 ***following***:

- 22 (a) the amount of business transacted by the dealer, as compared to the business
23 available to it.
- 24 (b) investment necessarily made and obligations incurred by the dealer to perform
25 its part of the franchise.
- 26 (c) permanency of the investment.
- 27 (d) whether it is injurious or beneficial to the public welfare for the franchise to be
28 modified or replaced or the business of the dealer disrupted.
- (e) whether the dealer (1) has adequate sales and service facilities, equipment,
parts, and qualified service personnel to reasonably serve the needs of the

1 consumers for the vehicles handled by the dealer, and (2) has been and is
2 rendering adequate services to the public.

3 (f) whether the dealer fails to fulfill the franchisor's warranty obligations.

4 (g) extent of the dealer's failure to comply with the terms of the franchise.

5 Cal. Veh. Code § 3061.

6 In this case, contrary to the assertions in Protestant's Post-Hearing Brief, the Board's good-
7 cause analysis is not restricted solely to subsection 3061(g). Protestant's request that the Board
8 simply ignore a myriad of relevant evidence in this proceeding runs contrary to applicable law and
9 Judge Nelsen's ruling on this issue during the merits hearing.

10 Indeed, based upon the plain language of Cal. Veh. Code § 3061, the Board is required to
11 consider the existing circumstances, including all seven good-cause factors. The statute specifically
12 provides that "...the board shall take into consideration the existing circumstances, including, but
13 not limited to, all of the following" good-cause factors. Cal. Veh. Code § 3061. In *Ford Motor Co.*
14 *v. New Motor Veh. Bd. Cal.*, No. 96CS0247 (Cal. Super. Ct. Jan. 29, 1997), the Court held that
15 "[i]n determining whether good cause has been established, the Board must consider all of the
16 factors set forth in section 3061 for which evidence has been presented from any party. The Board
17 is then required to weigh the relevant factors and determine whether the weight of those factors
18 favors termination of the franchise or its continuation." *Id.* at 6. The Court specifically concluded
19 that the Board was required to consider all seven factors on which evidence has been presented,
20 and the inquiry is not limited to the grounds for termination specified in the notice of termination.
21 *Id.* at 6-7. See also *Serpa Automotive Group, Inc. v. Volkswagen of America, Inc.*, No. PR-1977-05
22 (Cal. New Motor Vehicle Bd. Aug. 31, 2006) (adopted as final decision of the Board on Sept. 28,
23 2006) ("Section 3061 requires that the Board consider the 'existing circumstances,' including but
24 not limited to all of the [good cause factors]"); in accord, see also *In the Matter of the Protest of*
25 *Laidlaw's Harley-Davidson Sales, Inc. v. Harley-Davidson Motor Co.*, Protest No. PR-2299-11
26
27
28

1 (Cal. New Motor Vehicle Bd. May 24, 2012) (adopted, in relevant part, as final decision of the
2 Board on May 24, 2012).

3 To that end, the grounds for termination provided in SOA's Notice of Termination ("NOT"
4 or "Notice") relate directly to six of the seven good-cause factors. In sum, the bases for termination
5 specified in the NOT include: (i) Protestant's breach of Section 6.1 of its Subaru Dealer Agreement
6 for failure to maintain dealership facilities "in a manner satisfactory to [SOA]" and of "sufficient
7 size and of satisfactory layout and design to comply with Dealer's Minimum Standards Level;" and
8 (ii) Protestant's breach of its Facility Addendum and the amendments thereto due to Protestant's
9 failure to construct (or even commence construction) of a new Subaru dealership facility as it
10 expressly agreed to do under the terms of the Facility Addendum. *See* NOT (Exhibit No. J-01).
11 Under the terms of the Facility Addendum, Protestant also agreed to comply with all applicable
12 MSOGs. *See* Dealer Agreement (J-05) at p. 1, 5 and 14 and 16-17. Protestant's breaches of its
13 Dealer Agreement and Facility Addendum as outlined in the Notice, logically pertain to several of
14 the Section 3061 factors that the Board is required to consider, including:
15

- 16
- 17 (a) the amount of business transacted by the dealer, as compared to the business available
18 to it;
 - 19 (b) the investment necessarily made and obligations incurred by the dealer to
20 perform its part of the franchise;
 - 21 (c) the permanency of the investment;
 - 22 (d) whether it is injurious or beneficial to the public welfare for the franchise to be
23 modified or replaced or the business of the dealer disrupted;
 - 24 (e) whether the dealer (1) has adequate sales and service facilities, equipment,
25 parts, and qualified service personnel to reasonably serve the needs of the
26 consumers for the vehicles handled by the dealer, and (2) has been and is
27 rendering adequate services to the public; and
 - 28 (g) the extent of the dealer's failure to comply with the terms of the franchise.

Protestant's failure to provide compliant Subaru dealership facilities clearly relates to:
Protestant's inability to fully capture available sales and service business due to Protestant's

1 deficient sales and service facilities; Protestant's lack of investment in its Subaru franchise;
2 Protestant's lack of permanent investment; harm caused to consumers resulting from Protestant's
3 inadequate sales and service facilities; Protestant's inability to reasonably serve the needs of
4 consumers due to its deficient facilities; and Protestant's breaches of its Subaru Dealer Agreement
5 and Facility Addendum.

6 Importantly, Judge Nelsen agreed with this position, and ruled that while the Board will not
7 consider additional grounds for termination not contained in the Notice, evidence demonstrating
8 good cause will be considered to the extent that such evidence relates to the grounds for termination
9 listed in the Notice (i.e. Protestant's failure to provide an exclusive, MSOG-compliant Subaru
10 dealership facility). *See* Tr. Vol. 1 at 15:7-16:25; 17:25-18:15; and 19:23-20:10. In accordance
11 with applicable law and Judge Nelsen's determination, the Board should consider all evidence
12 demonstrating good cause for termination that relates to or arises out of Protestant's failure to
13 construct and maintain Subaru dealership facilities in Sonora that comply with SOA's MSOGs.

14 As for Protestant's assertion in its Post-Hearing Brief that the Board should consider
15 evidence that Protestant's obligation to provide an MSOG-compliant Subaru dealership purportedly
16 violates Cal. Veh. Code § 11713.13(c), this argument has already been presented and rejected in
17 this proceeding. From a jurisdictional standpoint, the Board lacks authority to consider any
18 argument that enforcement of Prieto Automotive's agreement to construct a Subaru facility would
19 violate Vehicle Code § 11713.13(b)-(c). *See e.g. Mazda Motor of Am. v. California New Motor*
20 *Vehicle Board* (2003) 110 Cal.App.4th 1451, 1457-1458, 146; *Hardin Oldsmobile v. New Motor*
21 *Vehicle Board* (1997) 52 Cal. App. 4th 585, 597-598; *General Motors LLC v. California New Motor*
22 *Vehicle Board*, No. BS175257, slip. op. (Los Angeles Sup. Ct. July 30, 2020).

23 Moreover, the factors to be considered by the Board in determining whether good cause
24 exists for termination are set forth in Vehicle Code Section 3061. None of these factors require (or
25 even relate to) consideration of whether a manufacturer has violated Vehicle Code Section
26 11713.13. On this issue, Judge Nelsen specifically ruled that:

27 This tribunal will not consider the application of vehicle section 11713.13 ... I will
28 not make any findings as to the propriety or existence of any unlawful act regarding

1 to Vehicle Code Section 11711.13. Mr. Sieving will be permitted to submit
2 evidence in terms of existing circumstances as provided by vehicle section 3061
3 and those certain elements. So if a fact that Mr. Sieving wants to present through
4 evidence is consistent with section 3061, that will be acceptable. If any party is
5 seeking a decision or conclusion with respect to Vehicle Code Section 11713.13,
6 that will not be acceptable.

7 *See* Tr. Vol. 1 at 31:20-32:8. Accordingly, Protestant’s most recent request that the Board consider
8 evidence regarding whether Protestant’s obligation to provide a Subaru facility is “reasonable”
9 under Section 11713.13(b)-(c) must be denied, as it already has been in this matter. Furthermore,
10 any allegation by Protestant on page 9 of its Post-Hearing Brief that the parties’ inability to reach
11 a settlement of this matter renders SOA’s dealership facility requirements “unreasonable” under
12 Cal. Veh. Code § 11713.13(b)-(c) must be flatly rejected. This contention is misplaced and
13 unsubstantiated, and it threatens the confidential nature of settlement negotiations.

14 **IV. ARGUMENT AND ANALYSIS OF THE STATUTORY FACTORS**

15 As set forth below and in SOA’s Post-Hearing Brief, the evidence presented regarding the
16 good-cause factors under Cal. Veh. Code § 3061(a), (b), (c), (d), (e), and (g) supports the ultimate
17 conclusion that there is good cause for the termination of Protestant’s Subaru Dealer Agreement,
18 and Protestant has not succeeded in rebutting this showing.

19 **A. Amount of Business Transacted by Dealer, as Compared to the Business Available.**

20 As stated in SOA’s Post-Hearing Brief, Cal. Veh. Code § 3061(a) weighs in favor of
21 termination because Protestant’s deficient sales and service facilities have resulted in Protestant’s
22 inability to fully capture the sales and service business available to it. By Protestant’s own
23 admission, building a Subaru facility in a market that currently does not have a Subaru facility
24 increases sales. *See* Tr. Vol. at 183:18-184:5 (Prieto); Protestant’s Post-Hearing Brief at p. 9. And,
25 Protestant’s General Manager agrees that it would likely improve Prieto Automotive’s Subaru
26 sales performance if it were operating out of new sales and service facilities combined under one
27 roof. *See* Kelly Robinson Deposition Designations (Exhibit R-629) at 52:10-53:8.

1 Although Protestant contends that it “has the desire, motivation, and financial ability to
2 construct a Subaru dedicated facility,” this allegation is belied by Protestant’s failure to make
3 meaningful progress toward this end over the last four years. Contrary to the averments in
4 Protestant’s Brief, SOA does dispute that Protestant has the desire and motivation to make good
5 on its promise to build an MSOG-compliant Subaru dealership in Sonora. Tr. Vol., 6, 193:9-15
6 (Farabee); Tr. Vol. 9 at 194:12-196:6 (Smit); Tr. Vol. 9 at 232:14-233:5 (Smit); Tr. Vol. 10 at
7 120:25-121:10 and 123:10-124:2 (Hinkle).

8 Moreover, the assertion in Prieto Automotive’s Post-Hearing Brief, that the evidence
9 presented at the hearing “clearly established” it is performing “at levels that meet or exceed
10 expected sales and service performance, despite the lack of a stand-alone facility” is simply untrue.
11 See Protestant’s Post-Hearing Brief at p. 9. In fact, as of February 2021, Prieto Automotive was
12 ranked dead last at 10 out of 10 Subaru retailers in its District in terms of customer retention with
13 respect to both sales and service. Tr. Vol. 2 at 138:1-19 (Smit); Tr. Vol. 3 at 117:5-24 (Smit). There
14 is no denying that customers are looking elsewhere for their sales and service needs.

15 To that end, customers have been significantly less satisfied with Prieto Automotive’s
16 service facilities than they were with the service facilities of other Subaru retailers in the San
17 Francisco Zone as shown by Prieto Automotive’s low customer satisfaction score for service
18 facilities in 2019 OLP reports. See 2019 2nd Quarter OLP Report (Exhibit R-581) at p. 44; Tr. Vol.
19 5 at 98:18-100:10 (Kelso). Protestant’s overall OLP Service Satisfaction Scores in 2019 placed it
20 in the bottom 20th percentile compared to the scores of all other retailers in the San Francisco
21 Zone. See 2019 2nd Quarter OLP Report (Exhibit R-581) at p. 39; Tr. Vol. 5 at 91:11-92:5 (Kelso);
22 3rd Quarter OLP Report (Exhibit R-582) at p. 43 and 49. See also SOA’s Post-Hearing Brief at p.
23 25-33.

24 Likewise, customers have also been displeased with Protestant’s sales facilities as
25 demonstrated by Protestant’s low customer satisfaction scores for sales facilities. See e.g. 2019 2nd
26 Quarter OLP Report (Exhibit R-581) at p. 21 and 25; 2019 3rd Quarter OLP Report (Exhibit R-
27 582) at p. 28; Tr. Vol. 6 at 12:11-18:5 (Leopold). In terms of Protestant’s overall OLP Purchase
28 Satisfaction Scores in 2019, for example, Protestant ranked in the bottom 10th percentile compared

1 to all other retailers in the San Francisco Zone. *See* 2019 3rd Quarter OLP Report (Exhibit R-582)
2 at p. 23; Tr. Vol. 6 at 11:17-12:10 (Leopold). SOA District Sales Manager Jason Leopold testified
3 that the other retailers in Protestant’s District consistently had significantly higher OLP Purchase
4 Satisfaction Scores because they all have “dedicated exclusive Subaru dealership[s].” Tr. Vol. 6 at
5 17:5-18:15 (Leopold).

6 Despite Protestant’s assertion that “[t]he issue of whether Protestant is transacting the
7 amount of business as compared to the business available to it is not a disputed issue,” the record
8 evidence demonstrates that Protestant’s non-compliant and inadequate sales and service facilities
9 are preventing Prieto Automotive from achieving its full potential in terms of the volume of sales
10 and service business available to Protestant, and its outdated and inadequate facilities are
11 detrimental to Protestant’s ability to retain future sales and service business. *See e.g.* Tr. Vol. 8,
12 128:15-129:13 (Prieto) ; Tr. Vol. 3, 107:19-110:1 (Smit); Tr. Vol. 5, 178:6-179:4 (Kelso); Tr. Vol.
13 5, 192:4-19 (Kelso); Tr. Vol. 5, 217:15-218:2 (Leopold); Tr. Vol. 6, 51:17-23 (Leopold). For these
14 reasons, and all additional grounds presented at the hearing and in SOA’s Post-Hearing Brief, there
15 is good cause under Section 3061(a) to terminate Protestant’s Dealer Agreement.

16 **B. Investment Necessarily Made and Obligations Incurred by the Dealer to**
17 **Perform its Part of the Franchise.**

18 In its Post-Hearing Brief, Prieto Automotive contends that it has demonstrated it made
19 adequate investments in its Subaru dealership because it paid \$1,500,000 in goodwill in connection
20 with its acquisition of its Subaru franchise. *See* Protestant’s Post-Hearing Brief at p. 10. If this is
21 Protestant’s true belief, it betrays a fundamental misunderstanding of the investments necessary for
22 the proper operation of a Subaru dealership, including, for example, investments required to
23 establish sales and service facilities, procure equipment, secure vehicle and parts inventory, and
24 train and compensate dealership personnel.

25 To that end, a retailer’s establishment of an MSOG-compliant dealership facility is one of
26 the most important and critical investments a Subaru retailer can make in its Subaru franchise. Tr.
27 Vol. 2 at 114:23-115:6 (Smit); Tr. Vol. 9 at 174:24-175:13 (Smit). Thus, the basis for termination
28 stated in the Notice (i.e. Prieto Automotive’s failure to even commence construction of a Subaru
dealership facility) is tantamount to stating that Prieto Automotive has not sufficiently invested in

1 its Subaru franchise. Protestant’s contention in its Post-Hearing Brief that its lack of necessary
2 investment “was not an issue raised in the NOT” is frankly, disingenuous. *See* Protestant’s Post-
3 Hearing Brief at p. 10. The Board should consider the evidence presented on this issue because the
4 best demonstration that Prieto Automotive failed to make necessary investments is Prieto
5 Automotive’s failure to construct a Subaru sales and service facility.

6 Indeed, Prieto Automotive has not commenced construction of a Subaru facility or even
7 obtained the required building permits. *See* Stipulation of Facts at ¶ 19; Tr. Vol. 3 at 127:20-129:7
8 and 184:20-23 (Augustine); Tr. Vol. 4 at 229:4-16 (Prieto). And, as outlined in Section (VI) of
9 SOA’s Post-Hearing Brief, Prieto Automotive does not plan to have its architect begin drawing up
10 construction plans for its Subaru dealership until the 18th month in its construction timeline, which,
11 at the earliest, will be in October 2022. *See* Timeline (Exhibit P-110); Tr. Vol. 9 at 137:9-25
12 (Marlette). Accordingly, no significant investment has been made by Protestant, such as the
13 commencement of construction, ordering construction materials, or even the completion of
14 construction plans, in furtherance of the dealership project. Prieto Automotive’s failure to invest in
15 and move forward with establishment of Subaru facilities has indisputably resulted in Protestant’s
16 breach of its obligations under its Dealer Agreement. Tr. Vol. 2, 59:21-60:6 and 152:10-25 (Smit);
17 Tr. Vol. 3, 68:7-23 (Smit); Tr. Vol. 10 at 20:2-21:3 (Hinkle).

18 In addition, the evidence presented in this matter clearly demonstrates that while Prieto
19 Automotive was neglecting its promise to SOA under the Facility Addendum to provide a brand-
20 compliant facility, Prieto Automotive was investing in improvements to its Ford dealership, and
21 investing significant capital in connection with its acquisition of other franchises over the last four
22 years. *See* SOA’s Post-Hearing Brief at p. 33-34. Furthermore, since 2017, Prieto Automotive has
23 paid significant sums to its owners, Mr. Prieto and Ms. Llamas, in the form of dividends,
24 distributions and rent payments. *Id.* at p. 34.

25 As further explained in Sections (V)(A) and (V)(E) of SOA’s Post-Hearing Brief, Prieto
26 Automotive’s lack of investment in its Subaru franchise has left it without the ability to properly
27 represent the Subaru brand and without the ability to adequately serve customers in the Sonora
28 market. *See* SOA’s Post-Hearing Brief at p. 25-33 and 39-46. The evidence presented in this matter

1 regarding Protestant’s investment in its Subaru franchise clearly demonstrates that termination of
2 Protestant’s Dealer Agreement is warranted with respect to the considerations under Cal. Veh. Code
3 § 3061(b), and Protestant has not proven otherwise.

4 **C. Permanency of the Investment.**

5 As indicated above, a retailer’s establishment of an MSOG-compliant dealership facility is
6 a type of permanent investment—if not the most important type of permanent investment—a
7 Subaru retailer can make in its Subaru franchise. Tr. Vol. 2 at 114:23-115:6 (Smit); Tr. Vol. 9 at
8 174:24-175:13 (Smit). Accordingly, the basis for termination stated in the Notice (i.e. Prieto
9 Automotive’s failure to provide an MSOG-compliant Subaru dealership facility) is synonymous to
10 stating that Prieto Automotive has not made sufficient permanent investments in its Subaru
11 franchise. Like Protestant’s contention regarding the adequacy of its investments, Protestant’s
12 allegation in its Post-Hearing Brief that its lack of permanent investment “was not an issue raised
13 in the NOT” is underhanded. *See* Protestant’s Post-Hearing Brief at p. 10.

14 Similarly, Protestant contends in its Brief that “Respondent did not raise at the hearing any
15 issues related to the permanency of the investment of Protestant.” *Id.* Not only was this issue
16 addressed at the hearing, it was a focal point of SOA’s case because the primary example of
17 Protestant’s inadequate permanent investment in its Subaru franchise is its failure to construct a
18 Subaru dealership facility.

19 To that end, SOA presented evidence during the hearing demonstrating that Protestant has
20 made little, if any, permanent investment in its Subaru dealership. *See e.g.* Tr. Vol. 6, 107:25-
21 113:12 (LeRoy). Prieto Automotive conducts its Subaru sales business out of its existing Ford
22 facility and Prieto Automotive leases the property on Southgate Drive where its service facilities
23 are located. *See* Stipulation of Facts at ¶ 20; Tr Vol. 4 at 149:16-150:8 (Prieto) (“Q: Okay. And in
24 terms of the -- the Subaru service facility, you rent that from a third party landlord; is that correct?
25 A: Yes.”).

26 While Prieto Automotive has made improvements to its Ford dealership facilities, Prieto
27 Automotive has made no meaningful permanent investment relating to its Subaru operations in any
28 facility in which it conducts its Subaru sales or service business. *See* Supplemental Expert Report

1 of Michael LeRoy (Exhibit R-309) at p. 5; Tr. Vol. 4 at 181:24-183:6 (Prieto); Tr. Vol. 6 at 107:25-
2 113:12 and 140:17-142:13 (LeRoy). Indeed, Mr. Prieto testified that even if Protestant’s Subaru
3 Dealer Agreement were terminated and its Subaru franchise no longer existed, Protestant could
4 remain profitable as simply a Ford dealer at its current dual Ford-Subaru dealership location. Tr.
5 Vol. 7 at 185:17-186:16 (Prieto) (“Can I become profitable in the event I only have the Ford
6 dealership? The answer would have to be yes, because I was profitable before I bought Subaru.
7 The Ford dealership was profitable. So can I operate the store and be profitable? Yes.”). Mr. Prieto
8 also testified that its lease agreement for the service location has an “exit strategy” and that Prieto
9 Automotive can terminate the lease agreement at its discretion upon 90-days’ notice. Tr. Vol. 6 at
10 140:23-142:1 (LeRoy); Tr. Vol. 5 at 14:15-16:22 (Prieto).

11 In light of the substantial evidence presented by SOA regarding the lack of Protestant’s
12 permanent investment in its Subaru dealership, and Protestant’s manifest failure to rebut this
13 evidence, Cal. Veh. Code § 3061(c) supports termination of Prieto Automotive’s Dealer
14 Agreement.

15 **D. Whether it is Injurious or Beneficial to the Public Welfare for the**
16 **Franchise to be Modified or Replaced or the Business of the Dealer**
17 **Disrupted.**

18 As a preliminary matter, SOA’s exclusion of any analysis regarding this good-cause factor
19 in the NOT, should not prevent the Board from considering evidence regarding this issue. To be
20 sure, predictions regarding the potential impact on consumers that might result from a retailer’s
21 termination is not a subject that would typically be addressed in a termination notice, and no
22 applicable law requires its inclusion in such notice.

23 Additionally, and notwithstanding the assertions in Protestant’s Post-Hearing Brief, SOA
24 did, in fact, present evidence as to this good-cause factor—namely, that it would not be injurious
25 to the public welfare if Protestant’s Subaru dealership were terminated and replaced. Tr. Vol. 3 at
26 110:17-112:4 (Smit). The evidence presented demonstrates that the public would be better served
27 by allowing SOA to appoint a motivated Subaru retailer in Sonora that would provide Subaru
28 customers with exclusive, MSOG-compliant Subaru sales and service facilities under the same roof.

1 Subaru dealerships are in high demand among automobile retailers nationwide. Tr. Vol. 3
2 at 27:9-25 and 110:17-112:4 (Smit) (“Q: And in your direct testimony, Mr. Smit, you indicated
3 how often do you receive contacts from retailers with interest in providing facilities -- or excuse
4 me, in providing an opportunity for them to become a Subaru dealer? A: It is at least a few a month,
5 quite often. We are one of the rate -- highest rated brands in terms of value and predicted future
6 value. So there is a lot of people contacting us.”); Tr. Vol. 3 at 27:9-25 (Smit). Tr. Vol. 6 at 63:5-
7 13 (Leopold) (“Q: Mr. Leopold, based on your experience, is the Subaru franchise a popular
8 franchise among retailers? A: We are one of the fastest growing brands, and we have one of the
9 highest blue sky values. Yes, it is very popular.”).

10 In addition, there is significant demand for Subaru products among consumers in the Sonora
11 area due to the popularity of Subaru vehicles in that market. Tr. Vol. 6 at 183:16-185:5; *See also*
12 Kelly Robinson Deposition Designations (Exhibit R-629) at 23:2-5.

13 Given the considerable demand for Subaru franchises among retailers and the popularity of
14 the Subaru brand in Sonora, SOA could quickly identify a replacement dealer to operate a Subaru
15 dealership in the Sonora area if Prieto Automotive’s Dealer Agreement were terminated. Any
16 resulting disruption in consumer access to Subaru sales and service facilities in Sonora would be
17 brief and only temporary. Tr. Vol. 3, 111:5-112:4 (Smit); Tr. Vol. 6 at 190:11-191:10 (Farabee);
18 Tr. Vol. 6, 63:5-13 (Leopold) (“Q: And do you think that if Subaru of Sonora were terminated that
19 Subaru of America would have difficulty finding a dealer to replace Subaru of Sonora? A: No.”);
20 Tr. Vol. 8 at 47:19-48:22 (Graziano) (“Q: Okay...why are you then confident that you would be
21 able to find a replacement for this dealer in Sonora if the board were to overrule Mr. Prieto's protest?
22 A: I think for a couple reasons. One, I think I may have mentioned this before in -- earlier today
23 is that it is a great Subaru market, that Sonora area. The Subaru franchise is a very strong asset.
24 We are one of the strongest assets, one of the strongest brands in the industry right now. And, you
25 know, the fact is we just -- you know, we don't have a lot of open points. In fact, we rarely put in
26 an open point. And so the only way for someone to acquire a Subaru franchise is through a -- is
27 through a point that either a buy/sell or, you know, with a retailer that goes out. So yeah, I mean,
28

1 there is no doubt in my mind that it would be very, very quick to find a retailer that wants to build
2 a facility, do the right thing in Sonora.”).

3 Moreover, Prieto Automotive has claimed that it would need an extensive 43-48-month
4 time period in which to complete construction of a Subaru facility and forcing consumers to wait
5 yet another 4 years before they have access to adequate Subaru sales and service facilities will
6 ***certainly not*** serve the public interest. Tr. Vol. 9 at 204:7-206:4 (Smit); Tr. Vol. 9 at 207:11-19
7 (Smit) (“Q: And in terms of waiting eight years, would your answer be the same? A: Yes. Yes.
8 It's way too long for any manufacturer to not have a showroom, to not have proper representation,
9 on a daily basis to have their customers think about going somewhere else because we don't have a
10 showroom, we don't have a proper representation for service. It's -- I don't think there's any
11 manufacturer out there that would accept that.”); Tr. Vol. 9 at 208: 25-209:23 (Smit).

12 In less than 43 months, SOA could identify a replacement retailer for the Sonora area, and
13 at a minimum, establish temporary Subaru sales and service facilities that are located under one
14 roof, in an exclusive, Subaru-only building. Tr. Vol. 10 at 78:14-80:4 and 116:16-117:2 (Hinkle)
15 In addition, in connection with efforts to identify and establish a replacement retailer, SOA and the
16 new retailer would not be limited to searching for a dealership location within the confines of
17 Sonora proper. The surrounding area is also a viable option for a potential location of a replacement
18 Subaru retailer. Tr. Vol. 10 at 129:1-7 (Hinkle).

19 In sum, SOA has demonstrated that it could expeditiously identify and establish a
20 replacement Subaru retailer in the Sonora area if Protestant’s Dealer Agreement were terminated,
21 and the installation of a motivated retailer that will provide MSOG-compliant facilities will better
22 serve the interests of consumers in the long run. Protestant failed to refute SOA’s evidence
23 regarding this factor; thus, Cal. Veh. Code § 3061(d) supports termination.

24 E. **Whether the Dealer (1) has Adequate Sales and Service Facilities,**
25 **Equipment, Parts, and Qualified Service Personnel to Reasonably Serve**
26 **the Needs of the Consumers for the Vehicles Handled by the Dealer, and**
(2) has been and is Rendering Adequate Services to the Public.

27 Protestant’s averment in its Post-Hearing Brief that the NOT failed to put Protestant on
28 notice of the deficiencies in its current dealership facilities is simply unfounded. *See* Protestant’s

1 Post-Hearing Brief at p. 11. Since Protestant’s appointment as a Subaru retailer in 2017, Protestant
2 has been well aware that its temporary sales and service locations are substantially inadequate, and
3 a new Subaru dealership must be constructed. Tr. Vol. 7 at 23:8-22 (Prieto).

4 The Board should consider all available evidence regarding the adequacy (or lack thereof)
5 of Prieto Automotive’s current Subaru facility because those inadequacies underscore the need for
6 an MSOG-compliant Subaru dealership in Sonora, and highlight the significant shortcomings of
7 Protestant’s current dealership operations.

8 Indeed, it is undisputed that Prieto Automotive’s current Subaru sales and service facilities
9 are non-compliant with SOA’s MSOGs in virtually every respect, including without limitation,
10 facility exterior and interior image requirements, Subaru vehicle storage requirements, Prieto
11 Automotive’s lack of a Subaru showroom, Prieto Automotive’s lack of Subaru customer touch
12 points in its sales and service facilities, and Prieto Automotive’s deficient number of Subaru
13 personnel. *See* 2020 MSOGs for Subaru of Sonora (Exhibit R-316) at p. 23-27; Tr. Vol. 2 at 129:23-
14 134:4 and 149:20-151:20 (Smit). The purpose of SOA’s establishment of MSOGs is to ensure that
15 its retailers have appropriately sized dealership facilities and a sufficient number of employees to
16 meet the needs of their respective markets. Tr. Vol. 2 at 76:24-78:17 and 128:16-129:22 (Smit).
17 Thus, the fact that Prieto Automotive’s facilities and operations are non-compliant with SOA’s
18 MSOGs is de facto proof that Protestant’s facilities and personnel staffing are insufficient to meet
19 the needs of consumers in the Sonora market. *See e.g.* Tr. Vol. 3 at 110:17-112:4 (Smit) (“Q: Can
20 you imagine anything much worse than a Ford dealership as a sales facility in something that is not
21 really much more than a shack or a barn for a service facility? A: Under my previous direct
22 testimony, I think it's -- I had said it was one of the worst facilities I have seen. I really could not
23 imagine anything else that has the aesthetics -- missing the aesthetics and the customer touchpoints
24 than what we currently have in place.”).

25 As explained in further detail in SOA’s Post-Hearing Brief, Protestant’s sales facilities are
26 inadequate to meet the needs and desires of Subaru customers because Protestant’s Subaru sales
27 operations are located in Protestant’s Ford dealership, Protestant does not have a Subaru showroom,
28 and the lack of Subaru products, touchpoints, and branding at Protestant’s sales location make it a

1 poor and disappointing, if not unrecognizable, representation of the Subaru brand. *See* SOA’s Post-
2 Hearing Brief at p. 39-46. It is evident based on Protestant’s low customer satisfaction scores for
3 sales facilities that customers have been displeased with Protestant’s sales location. *See e.g.* 2019
4 2nd Quarter OLP Report (Exhibit R-581) at p. 21 and 25; 2019 3rd Quarter OLP Report (Exhibit R-
5 582) at p. 28; Tr. Vol. 6 at 12:11-18:5 (Leopold).

6 Similarly, Prieto Automotive’s service facilities are insufficient to meet the needs of
7 consumers because they are located in a shabby, barn-like building that is a dismal representation
8 of the Subaru brand, and customers have been dissatisfied with the availability of parking, the
9 inconvenient vehicle pick-up and drop-off process, the appearance of the service facilities, and the
10 overall comfort of the customer waiting areas at the service location. In addition, Prieto
11 Automotive’s Subaru service department is inconveniently situated approximately 3 miles, driving
12 distance, from Prieto Automotive’s Subaru sales location. Tr. Vol. 2 at 104:16-105:5 (Smit). *See*
13 *also* SOA’s Post-Hearing Brief at p. 39-46.

14 All in all, the evidence presented during the proceedings in this matter has clearly
15 established that Prieto Automotive’s current Subaru dealership facilities and operations are sorely
16 inadequate to meet consumers’ sales and service needs. Accordingly, Cal. Veh. Code § 3061(e)
17 weighs heavily in favor of the termination of Prieto Automotive’s Dealer Agreement.

18 **F. Whether the Dealer Fails to Fulfill SOA’s Warranty Obligations.**

19 SOA agrees with statement in Protestant’s Post-Hearing Brief, that there has been
20 no allegation in this case that Prieto Automotive failed to fulfill any warranty obligations.

21 **G. Extent of the Dealer’s Failure to Comply with the Terms of the**
22 **Franchise.**

23 In its Post-Hearing Brief, Prieto Automotive rightfully admitted that it breached the terms
24 of its Subaru Dealer Agreement and the Facility Addendum by failing to provide an exclusive
25 dealership facility for its Subaru sales and service operations. *See* Protestant’s Post-Hearing Brief
26 at p. 11. However, in an apparent attempt to downplay the significance of this breach, Protestant
27 stated, “the *only* issue that SOA has with respect to the issue of failure to comply with the terms of
28

1 the franchise was the alleged failure to construct a new facility for Subaru operations within [sic]
2 based upon the facility addendum.” *Id.*²

3 There can be no mistake, nor is there any dispute, that Prieto Automotive’s failure to provide
4 a Subaru dealership facility is not an “alleged” failure—it is a glaring and significant breach of
5 Protestant’s unambiguous obligations under its Dealer Agreement and Facility Addendum. *See*
6 Dealer Agreement (Exhibit J-05) at p. 29; Facility Addendum (Exhibit J-05) at p. 14-15.

7 Further, not only did Protestant fail to construct a Subaru dealership, it never commenced
8 construction or even obtained required permits. *See* Stipulation of Facts at ¶ 19; Tr. Vol. 3 at
9 184:20-23 (Augustine); Tr. Vol. 4 at 229:4-230:7 (Prieto). Protestant’s failure to meet its
10 obligations under its agreements with SOA has had serious ramifications, including depriving SOA
11 of the basis of its bargain with Protestant given that SOA approved Prieto Automotive as an
12 authorized Subaru retailer in reliance upon Prieto Automotive’s promise to provide a Subaru
13 dealership facility compliant with SOA’s MSOGs. Tr. Vol. 2, 158:15-159:7 (Smit); Tr. Vol. 10 at
14 20:2-21:3 (Hinkle).

15 Now, more than four years after SOA approved Protestant as an authorized retailer, SOA is
16 still without a Subaru facility and adequate brand representation in Sonora. Tr. Vol. 10 at 35: 14-
17 22 (Hinkle). As a result of Protestant’s material breaches of its Dealer Agreement and Facility
18 Addendum, SOA has been poorly represented in Sonora and consumers in the area have been
19 deprived of access to proper Subaru sales and service options for years. Tr. Vol. 10 at 35: 14-22
20 (Hinkle). Unfortunately, this inadequate representation of Subaru in the Sonora area, and the
21 resulting detriment to consumers and the Subaru brand, will continue until a resolution of this
22 matter finally comes to fruition. Tr. Vol. 9 at 165:15-166:7 (Smit) (“Q: And how do you feel that
23 not having even a Subaru showroom in Sonora affects Subaru in terms of customers' trust? A: I
24 mean, there's damage that goes on to the customers. There really is. We've got numerous new

25 _____
26 ² Moreover, and despite Protestant’s contrary assertions in its Brief, Prieto Automotive’s failure to
27 provide a Subaru facility is not the only breach of its obligations under the Dealer Agreement that
28 Prieto Automotive has committed. As set forth in SOA’s Post Hearing Brief, Prieto Automotive
has also breached its obligation to maintain the requisite number of Subaru dealership employees
under Section 7 of its Dealer Agreement. *See* SOA’s Post-Hearing Brief at p. 50-51.

1 models coming out this year... these are going to attract customers that are brand new to the brand.
2 And to walk into a facility where we really don't have representation at all is damaging, because
3 some of those customers will just turn and walk right on out, and they'll go to the competitor that
4 has a showroom, that has an inclusive service center on-site instead of being split. So there's going
5 to be damage that happens, and there has been damage that happened.”).

6 Additionally, Prieto Automotive’s attempts in its Post-Hearing Brief to blame Feltus
7 Hawkins for its failure to timely construct a Subaru facility is baseless and unsupported by the
8 evidence presented in this case. *See* Protestant’s Post-Hearing Brief at p. 2 and 5. The evidence
9 plainly shows that Protestant’s failure to make meaningful progress in connection with the planning
10 and construction of its Subaru dealership was caused by none other than Protestant’s own actions.
11 Delays were caused by Protestant’s reluctance to complete Design Intent Plans in 2017 (*see* SOA’s
12 Post-Hearing Brief at p. 8-9); Protestant’s election on more than one occasion to change the
13 geographic location of the dealership facility (*see* SOA’s Post-Hearing Brief at p. 10-11 and 13);
14 Protestant’s preoccupation with renovations it was making to its Ford dealership (*see* SOA’s Post-
15 Hearing Brief at p. 11-12); Protestant’s focus on acquiring other motor vehicle dealerships,
16 including GM and Mazda franchises (*see* SOA’s Post-Hearing Brief at p. 12 and 18); and
17 Protestant’s failure to follow the planning schedule developed by its planning consultant Amy
18 Augustine, including Protestant’s refusal to proceed with traffic and drainage studies, landscaping
19 plans, and construction drawings. (*see* SOA’s Post-Hearing Brief at p. 14-18).

20 Moreover, by Protestant’s own admission its progress regarding is Subaru dealership
21 project was further hindered by its failure to timely retain a planning consultant to assist in
22 navigating requirements imposed by the County of Tuolumne. Tr. Vol. 4 at 192:10-193:4 (Prieto).
23 Contrary to the assertions in Protestant’s Post-Hearing Brief, Feltus Hawkins was not responsible
24 for ensuring Protestant’s compliance with governmental requirements and this was plainly stated
25 in the Feltus Hawkins contract. *See* Authorization for Design Intent (Exhibit R-315) at p. 1 (stating
26 that Feltus Hawkins’ services do not include review of “construction details, suitability, costs,
27 sustainability, and/or code/zoning issues.”). Protestant’s failure to complete (or even commence)
28

1 construction of a Subaru dealership facility was caused by the actions (or inactions) of Protestant,
2 and Protestant alone.

3 Pursuant to applicable legal precedent, it has been recognized that a dealer’s duty to provide
4 and maintain dealership facilities that comply with the manufacturer’s standards is a material and
5 substantial obligation of a dealer agreement, and the breach of such obligation is sufficient to
6 constitute good cause for termination. *See, e.g., Forty-Niner Sierra Resources, Inc. d/b/a Forty-*
7 *Niner Subaru v. Subaru of America, Inc.*, California New Motor Vehicle Board Protest No. PR-
8 1972-05 (Nov. 15, 2007), at 12–14, 18–19, 30 (concluding that distributor had good cause to
9 terminate dealer based in large part on dealer’s failure to comply with distributor’s facility
10 standards in dealer agreement).

11 In this case, in light of Prieto Automotive’s material and undisputed breaches of its Dealer
12 Agreement and Facility Addendum, there is good cause to terminate Protestant’s Dealer Agreement
13 under Cal. Veh. Code Section 3061(f).

14
15 **V. POTENTIAL CONDITIONAL DECISION AND**
16 **ORDER OVERRULING THE PROTEST**

17 In statements contained in Protestant’s Post-Hearing Brief, Protestant contends that SOA
18 “agrees” with Protestant’s request for the entry of a conditional order in this matter. *See* Protestant’s
19 Post-Hearing Brief at p. 5-6. To be clear, SOA neither agrees with Protestant’s plea for a conditional
20 order, nor is SOA seeking the entry of such an order as its requested relief in this action.

21 As stated in SOA’s Post-Hearing Brief, SOA is requesting termination of Protestant’s
22 Dealer Agreement because termination will be the most efficient and assured way to allow a
23 motivated and capable replacement retailer to establish dedicated Subaru sales and service facilities
24 in the Sonora area. Tr. Vol. 9 at 176:24-177:21 (Smit); SOA’s Post-Hearing Brief at p. 51-60.

25 However, if, and only if, despite the evidence presented in this proceeding, a conditional
26 decision is issued, SOA requests that any such decision provide for an expeditious and just solution
27 to SOA’s continued lack of a brand-dedicated dealership in Sonora. Forcing SOA to wait an
28

1 additional 29 months, or longer, to see if Protestant is finally ready to begin construction of Subaru
2 facilities would be neither an expeditious nor just resolution of the predicament at hand. Indeed,
3 the actual construction of the dealership facility will take another 8 – 14 months before it is
4 complete. Tr. Vol. 9 at 142:6-143:5 (Marlette). Although Protestant frequently expresses his
5 willingness to perform, he has not even obtained the permits necessary to commence construction.
6 SOA is therefore justified in concluding that Protestant’s non-performance is a material breach of
7 the dealer agreement. *See Sackett v. Spindler* (1967) 248 Cal. App. 2d 220, 230-231, relying on
8 *Coughlin v. Blair* (1953) 41 Cal.2d 587 (The Supreme Court determined that, “[a]lthough the
9 defendants had not expressly repudiated the contract, their conduct clearly justified plaintiffs’ belief
10 that performance was either unlikely or would be forthcoming only when it suited defendants’
11 convenience.”). All the while, SOA’s representation in Sonora will remain a Ford dealership and
12 a separate, barn-like service facility:
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14 PROTESTANT’S SUBARU SALES FACILITY



PROTESTANT’S SUBARU SERVICE FACILITY



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In addition, because Protestant failed to propose any definitive timeline in its Post-Hearing Brief for the completion of dealership facilities under a potential conditional order, SOA requests that, if such an order is issued, it contain the planning and construction timeline set forth in SOA’s Post-Hearing Brief at p. 58-59.

SOA further requests that any conditional order conditionally overrule Prieto Automotive’s protest of the termination of its Dealer Agreement. A conditional denial of Prieto Automotive’s protest would provide maximum efficiency in carrying out the intent of the conditional order and will avoid the need for further hearing proceedings and discovery in this case.

In addition, SOA respectfully requests that the provisions of any conditional order include all of the proposed terms set forth on p. 57-59 of Protestant’s Post-Hearing Brief.

VI. CONCLUSION

For the reasons set forth above and for all additional reasons presented during the hearing, and contained in the record, there is good cause pursuant to Cal. Veh. Code § 3061 to terminate Prieto Automotive’s Subaru Dealer Agreement. Accordingly, SOA respectfully requests that Prieto Automotive’s protest be overruled in its entirety, allowing SOA to proceed with termination.

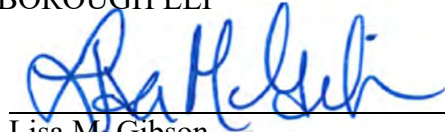
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If, and only if, the ALJ determines that termination is unwarranted at this time, then SOA requests that the proposed decision provide for a conditional order overruling Prieto Automotive's Protest, and that the proposed decision contain the terms set forth in SOA's Post-Hearing Brief. Any such order should assure that Prieto Automotive timely comply with its obligation to construct a Subaru dealership facility, or terminate its Subaru Dealer Agreement in the event of Prieto Automotive's breach of any conditions of the order.

Dated: July 20, 2021

Respectfully submitted,
NELSON MULLINS RILEY &
SCARBOROUGH LLP

By:



Lisa M. Gibson
Attorneys for Claimant
SUBARU OF AMERICA, INC.

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PROOF OF SERVICE

I am a citizen of the United States. My business address is 19191 South Vermont Avenue, Suite 900, Torrance, California 90502. 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 cause.

On the date set forth below, according to ordinary business practice, I served the foregoing document(s) described as:

RESPONDENT SUBARU OF AMERICA, INC.'S POST-HEARING REPLY BRIEF

- (BY FAX)** I transmitted via facsimile, from facsimile number 213.629.7401, the document(s) to the person(s) on the attached service list at the fax number(s) set forth therein, on this date before 5:00 p.m. A statement that this transmission was reported as complete and properly issued by the sending fax machine without error is attached to this Proof of Service.
- (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.
- (BY MAIL)** I am readily familiar with my employer's business practice for collection and processing of correspondences for mailing with the U.S. Postal Service, and that practice is that correspondences 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 addressed to the person(s) on the attached service list and sealed and placed the envelopes for collection and mailing following ordinary business practices.
- (BY PERSONAL SERVICE)** On this date, I delivered by hand envelope(s) containing the document(s) to the persons(s) on the attached service list.
- (BY OVERNIGHT DELIVERY)** On this date, I placed the documents in envelope(s) addressed to the person(s) on the attached service list, and caused those envelopes to be delivered to an overnight delivery carrier, with delivery fees provided for, for next-business-day delivery to whom it is to be served.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct

Executed on July 20, 2021 at Los Angeles, California.



Sindy Fleeger

SERVICE LIST

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MICHAEL M. SIEVING, Esq.
Attorney at Law
9530 Hageman Road, Suite B #455
Bakersfield, California 93312
E-mail: msieving@sievinglaw.com

*Attorney for Protestant
Prieto Automotive, Inc., dba Subaru of
Sonora*

NEW MOTOR VEHICLE BOARD
1507 – 21st Street, Suite 330
Sacramento, CA 95811
Telephone: (916) 445-1888
Email: nmvb@nmvb.ca.gov
robin.parker@nmvb.ca.gov
danielle.phomsopha@nmvb.ca.gov

VIA E-MAIL

RECEIVED
DEC 16 2019
NEW MOTOR VEHICLE BOARD

MICHAEL M. SIEVING, Esq. (SBN 119406)
Attorney at Law
9530 Hageman Road, Suite B #455
Bakersfield, California 93312
Tel: (661) 410-8556
E-mail: msieving@sievinglaw.com

FILED
NEW MOTOR VEHICLE BOARD
DATE 12-16-19
BY NT

Attorney for Protestant
PRIETO AUTOMOTIVE, INC., dba SUBARU OF SONORA

STATE OF CALIFORNIA
NEW MOTOR VEHICLE BOARD

In the Matter of the Protest of
PRIETO AUTOMOTIVE, INC., a California
Corporation, dba SUBARU OF SONORA,
Protestant,
v.
SUBARU OF AMERICA, INC.
Respondent.

Protest No. PR-2648-19

PROTEST
[Vehicle Code §3060]

Protestant PRIETO AUTOMOTIVE, INC., dba SUBARU OF SONORA ("Protestant") hereby files this protest pursuant to the provisions of Vehicle Code §3060 and alleges as follows:

1. Protestant is the holder of an occupational license as a new motor vehicle issued by the California Department of Motor Vehicles. Protestant conducts operations at 13254 Mono Way, Sonora, CA 95370, with a telephone number of (888) 459-2955.

2. Respondent SUBARU OF AMERICA, INC. ("Respondent") is the holder of an occupational license as a distributor of motor vehicles issued by the California Department of Motor Vehicles. Respondent's business address is Subaru of America, Inc., Western Region, Galleria North Tower, 720 S. Colorado Blvd., 3rd Floor, Suite 300-N, Glendale, CO 80246, with a telephone number of (720) 514-4200.

1 3. Protestant is a franchisee of Respondent, as the term "franchisee" is defined by Vehicle
2 Code Section 331.1.

3 4. Respondent is a franchisor of Protestant, as the term "franchisor" is defined by Vehicle
4 Code Section 331.2.

5 5. Protestant sells and services new Subaru brand motor vehicles and associated parts and
6 accessories and provides service on Subaru brand vehicles pursuant to a franchise between the parties.

7 6. By letter dated December 2, 2019 (the "NOT") Respondent purportedly notified
8 Protestant that Respondent intended to terminate the franchise between the parties 60 days after the
9 receipt by Protestant of the NOT.

10 7. At no time has Protestant agreed or otherwise acquiesced to the termination of its
11 franchise with Respondent.

12 8. Protestant denies the factual contentions contained in the NOT.

13 9. Protestant contends that the grounds set forth in the NOT are in violation of the
14 provisions of Vehicle Code Section 11713.13 and constitute a misdemeanor on behalf of Respondent
15 pursuant to Vehicle Code Section 40000.11(a).

16 10. Protestant contends that none of the reasons set forth in the NOT constitute valid
17 grounds for the termination of the franchise between the parties.

18 11. Protestant denies that "good cause" exists for the termination of the franchise between
19 the parties, pursuant to Vehicle Code Section 3061, based upon the following:

20 (a) Protestant has been transacting and is transacting an adequate amount of
21 business compared to the business available to it.

22 (b) Protestant has made a substantial and permanent investment in the dealership,
23 which will be damages if termination of the franchise is permitted.

24 (c) It would be injurious to the public welfare for the franchise to be terminated by
25 Respondent.

26 (d) Protestant has adequate motor vehicle sales and service facilities, equipment,
27 vehicle parts, and qualified service personnel to reasonably provide for the needs of buyers and owners
28 of Respondent's products in the market area and is rendering adequate services to the public.

 (e) The extent of Protestant's noncompliance with the terms of the franchise, if any,

1 is legally excused and lacks materially to warrant termination of the franchise between the parties.

2 12. Protestant desires to appear before the Board and to have a hearing on this protest.
3 Protestant estimates that the time required for such a hearing will be 10 days.

4 13. Protestant requests a pre-hearing conference in this matter.

5 14. Protestant requests that the Board permit discovery into the matters related to this
6 protest.

7 15. Protestant is represented in this matter by the attorney(s) listed above.

8 **PRAYER FOR RELIEF**

9 WHEREFORE, Protestant prays as follows:

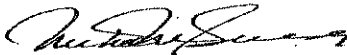
10 1. That the Board immediately advise Respondent that a timely protest has been filed.

11 2. That the Board hold a hearing on this protest and, after that hearing, render a decision
12 that Respondent has not met its burden to establish "good cause" for termination of the franchise
13 between the parties and thus sustain this protest.

14 3. For such other rulings and relief as the Board deems appropriate.

15
16 Dated: December 16, 2019

MICHAEL M. SIEVING, Esq.

17 

18 MICHAEL M. SIEVING
19 Attorney for Protestant
20 PRIETO AUTOMOTIVE, INC.,
21 dba SUBARU OF SONORA
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PROOF OF SERVICE

STATE OF CALIFORNIA)
NEW MOTOR VEHICLE BOARD)

I am employed in the County of Kern, State of California, I am over the age of 18 years and not a party to the within action; my business mailing address is 9530 Hageman Road, Suite B #455, Bakersfield, CA 93312.

On this date, December 16, 2019, I served the foregoing documents described as:

PROTEST [Vehicle Code §3060]

I enclosed a true copy of said documents in a sealed envelope or package addressed to the persons noted below.

X (By United States Mail) I placed the envelope for collection and mailing, following our firm's ordinary business practices. I am familiar with our firm's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

____ (By overnight delivery) I enclosed the documents in an envelope or package provided by an overnight delivery carrier and addressed to the persons listed below. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of the overnight delivery carrier.

____ (By messenger service) I served the documents by placing them in an envelope or package addressed to the persons at the addresses below and providing them to a professional messenger service for service.

____ (By fax transmission) Based on agreement of the parties to accept service by fax transmission, I faxed the documents to the persons at the fax numbers listed below. No error was reported by the fax machine that I used. A copy of the record of the fax transmission, which I printed out, is attached.

____ (By electronic service) Based on a court order or an agreement of the parties to accept service by electronic transmission, I caused the documents to be sent to the persons at the electronic notification addresses listed below.

____ (By personal service) I served the documents by delivering the envelope, by hand, to the persons listed below.

____ By E-Mail I caused the above-entitled documents to be served through electronic mail addressed to all parties listed in the Service List below. The file transmission was reported as completed and a copy of the E-Mail pages will be maintained with the original documents in our office. I have complied with California Rules of Court, Rule 2.257(a) and the original, signed Proof of Service is available for review and copying at the request of the court or any party.

1
2 I declare under penalty of perjury under the laws of the State of California I am a member of
3 the State Bar of California and that the above is true and correct.

4 

5 _____
6 MICHAEL M. SIEVING
7
8
9

10 **SERVICE LIST**

11
12 Anthony J. Graziano
13 Vice President, Western Region
14 Subaru of America, Inc.
15 Galleria North Tower
16 720 S. Colorado Blvd, 3rd Floor, Ste 300-N
17 Glendale, CO 80246
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1 **MICHAEL M. SIEVING**, Esq. (SBN 119406)
2 Attorney at Law
3 9530 Hageman Road, Suite B #455
4 Bakersfield, California 93312
5 Tel: (661) 410-8556
6 E-mail: msieving@sievinglaw.com

7 Attorney for Protestant
8 **PRIETO AUTOMOTIVE, INC.**, dba SUBARU OF SONORA

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

11 In the Matter of the Protest of
12 **PRIETO AUTOMOTIVE, INC.**, a California
13 Corporation, dba SUBARU OF SONORA,
14 Protestant,
15 v.
16 **SUBARU OF AMERICA, INC.**
17 Respondent.

Protest No. PR-2648-19

FIRST AMENDED PROTEST

[Vehicle Code §3060]

18
19 Protestant **PRIETO AUTOMOTIVE, INC.**, dba SUBARU OF SONORA (“Protestant”) hereby
20 files this First Amended Protest pursuant to the provisions of Vehicle Code §3060 and alleges as
21 follows:

22 1. Protestant is the holder of an occupational license as a new motor vehicle issued by the
23 California Department of Motor Vehicles. Protestant conducts operations at 13254 Mono Way,
24 Sonora, CA 95370, with a telephone number of (888) 459-2955.

25 2. Respondent **SUBARU OF AMERICA, INC.** (“Respondent”) is the holder of an
26 occupational license as a distributor of motor vehicles issued by the California Department of Motor
27 Vehicles. Respondent’s business address is Subaru of America, Inc., Western Region, Galleria North
28 Tower, 720 S. Colorado Blvd., 3rd Floor, Suite 300-N, Glendale, CO 80246, with a telephone number

1 of (720) 514-4200.

2 3. Protestant is a franchisee of Respondent, as the term “franchisee” is defined by Vehicle
3 Code Section 331.1.

4 4. Respondent is a franchisor of Protestant, as the term “franchisor” is defined by Vehicle
5 Code Section 331.2.

6 5. Protestant sells and services new Subaru brand motor vehicles and associated parts and
7 accessories and provides service on Subaru brand vehicles pursuant to a franchise between the parties.

8 6. By letter dated December 2, 2019 (the “NOT”) Respondent purportedly notified
9 Protestant that Respondent intended to terminate the franchise between the parties 60 days after the
10 receipt by Protestant of the NOT.

11 7. At no time has Protestant agreed or otherwise acquiesced to the termination of its
12 franchise with Respondent.

13 8. Protestant denies the factual contentions contained in the NOT.

14 9. Protestant contends that Respondent’s alleged facility requirements referenced in
15 paragraph I.B. of the NOT as grounds for a breach of the franchise are unreasonable in light of all
16 existing circumstances, including economic conditions.

17 10. Protestant contends that none of the reasons set forth in the NOT constitute valid
18 grounds for the termination of the franchise between the parties.

19 11. Protestant denies that “good cause” exists for the termination of the franchise between
20 the parties, pursuant to Vehicle Code Section 3061, based upon the following:

21 (a) Protestant has been transacting and is transacting an adequate amount of
22 business compared to the business available to it.

23 (b) Protestant has made a substantial and permanent investment in the dealership,
24 which will be damages if termination of the franchise is permitted.

25 (c) It would be injurious to the public welfare for the franchise to be terminated by
26 Respondent.

27 (d) Protestant has adequate motor vehicle sales and service facilities, equipment,
28 vehicle parts, and qualified service personnel to reasonably provide for the needs of buyers and owners
of Respondent’s products in the market area and is rendering adequate services to the public.

1 (e) The extent of Protestant's noncompliance with the terms of the franchise, if any,
2 is legally excused and lacks materially to warrant termination of the franchise between the parties.

3 12. Protestant desires to appear before the Board and to have a hearing on this protest.
4 Protestant estimates that the time required for such a hearing will be 10 days.

5 13. Protestant requests a pre-hearing conference in this matter.

6 14. Protestant requests that the Board permit discovery into the matters related to this
7 protest.

8 15. Protestant is represented in this matter by the attorney(s) listed above.

9 **PRAYER FOR RELIEF**

10 WHEREFORE, Protestant prays as follows:

11 1. That the Board immediately advise Respondent that a timely protest has been filed.

12 2. That the Board hold a hearing on this protest and, after that hearing, render a decision
13 that Respondent has not met its burden to establish "good cause" for termination of the franchise
14 between the parties and thus sustain this protest.

15 3. For such other rulings and relief as the Board deems appropriate.

16
17 Dated: April 22, 2020

MICHAEL M. SIEVING, Esq.

18 

19 _____
20 MICHAEL M. SIEVING
21 Attorney for Protestant
22 PRIETO AUTOMOTIVE, INC.,
23 dba SUBARU OF SONORA
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3 **PROOF OF SERVICE**

4 STATE OF CALIFORNIA)
5)
6 NEW MOTOR VEHICLE BOARD)

7 I am employed in the County of Kern, State of California, I am over the age of 18 years and not a
8 party to the within action; my business mailing address is 9530 Hageman Road, Suite B #455,
Bakersfield, CA 93312.

9 On this date, April 22, 2020, I served the foregoing documents described as:

10 **FIRST AMENDED PROTEST [Vehicle Code §3060]**

11 I enclosed a true copy of said documents in a sealed envelope or package addressed to the persons
12 noted below.

13 ____ (By United States Mail) I placed the envelope for collection and mailing, following our firm's
14 ordinary business practices. I am familiar with our firm's practice for collecting and processing
15 correspondence for mailing. On the same day that correspondence is placed for collection and
mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a
sealed envelope with postage fully prepaid.

16 ____ (By overnight delivery) I enclosed the documents in an envelope or package provided by an
17 overnight delivery carrier and addressed to the persons listed below. I placed the envelope or package
18 for collection and overnight delivery at an office or a regularly utilized drop box of the overnight
delivery carrier.

19 ____ (By messenger service) I served the documents by placing them in an envelope or package
20 addressed to the persons at the addresses below and providing them to a professional messenger
service for service.

21 ____ (By fax transmission) Based on agreement of the parties to accept service by fax transmission,
22 I faxed the documents to the persons at the fax numbers listed below. No error was reported by the fax
machine that I used. A copy of the record of the fax transmission, which I printed out, is attached.

23 ____ (By electronic service) Based on a court order or an agreement of the parties to accept service
24 by electronic transmission, I caused the documents to be sent to the persons at the electronic
notification addresses listed below.

25 ____ (By personal service) I served the documents by delivering the envelope, by hand, to the
26 persons listed below.

27 X By E-Mail I caused the above-entitled documents to be served through electronic mail
28 addressed to all parties listed in the Service List below. The file transmission was reported as
completed and a copy of the E-Mail pages will be maintained with the original documents in our
office. I have complied with California Rules of Court, Rule 2.257(a) and the original, signed Proof of
Service is available for review and copying at the request of the court or any party.

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I declare under penalty of perjury under the laws of the State of California I am a member of the State Bar of California and that the above is true and correct.



MICHAEL M. SIEVING

SERVICE LIST

Lisa M. Gibson, Esq.
Crispin L. Collins, Esq.
NELSON MULLINS RILEY & SCARBOROUGH LLP
19191 South Vermont Avenue, Suite 900
Torrance, CA 90502
Lisa.Gibson@nelsonmullins.com
Crispin.Collins@nelsonmullins.com

VIA E-MAIL

*** PERSONAL & CONFIDENTIAL ***

December 2, 2019



SUBARU.

Subaru of America, Inc.
Western Region
Galleria North Tower
720 S. Colorado Blvd., 3rd Floor, Ste 300-N
Glendale, CO 80246
720-514-4200
www.subaru.com

Mr. J. Manuel Prieto
President/Executive Manager
Prieto Automotive, Inc.
d/b/a Subaru of Sonora
13254 Mono Way
Sonora, CA 95370

CERTIFIED MAIL
RETURN RECEIPT REQUESTED
7002 0860 0006 6287 0684

**RE: NOTICE OF INTENT TO TERMINATE
SUBARU DEALER AGREEMENT**

Dear Mr. Prieto:

Prieto Automotive, Inc. d/b/a Subaru of Sonora (hereinafter "Subaru of Sonora") and Subaru of America, Inc. (hereinafter "SOA") entered into a Subaru Dealer Agreement dated March 6, 2017 ("the Dealer Agreement"), authorizing Subaru of Sonora to operate a Subaru motor vehicle dealership.

In accordance with the terms of the Dealer Agreement and Section 3060 of the California Vehicle Code, this letter is to notify Subaru Of Sonora of the intent of SOA to terminate the Dealer Agreement on the date specified below, and to inform Subaru Of Sonora of the specific grounds on which this intended termination is based. The specific grounds set forth below constitute good cause for termination in accordance with the Dealer Agreement and California law*.

*** NOTICE TO DEALER: You have the right to file a protest with the NEW MOTOR VEHICLE BOARD in Sacramento and have a hearing in which you may protest the termination of your franchise under provisions of the California Vehicle Code. You must file your protest with the board within 30 calendar days after receiving this notice or within 30 days after the end of any appeal procedure provided by the franchisor or your protest right will be waived.**

- I. **Breach of Section 6.1 of the Standard Provisions to the Subaru Dealer Agreement ("Standard Provisions"): Size and Layout and Facility Addendum**
 - A. **Applicable Dealer Agreement Provisions**

Section 6.1 of the Standard Provisions provides: "Unless otherwise stated in an Addendum to the Agreement, Dealer represents that the Facilities are, at the time of execution of the Agreement, of sufficient size and of satisfactory layout and design to comply with Dealer's Minimum Standards Level and will remain in compliance throughout the term of the Agreement. Dealer agrees to continuously maintain the Facilities in a manner satisfactory to Distributor in appearance and condition."

Facility Addendum to Conditional Subaru Dealer Agreement Future Address effective March 6, 2017 provides:

1. Dealer acknowledges that the facility at 13254 Mono Way, Sonora, CA 95370, is only a temporary location for the Subaru dealership.
2. Dealer acknowledges that the permanent location of the Subaru dealership will be 13232 Mono Way, Sonora, CA 95370.
3. The temporary location is deficient in the following areas and that said deficiencies would permit Distributor to refuse to approve Dealer's application to become an authorized Subaru dealer:

Facility Minimum Standard Deficiencies:

Minimum Standards Deficiency:	Explanation & Remedy:
Subaru Signature Facility Exterior Image	Complete Phase II Signature Facility at SOA approved site.
Subaru Signature Facility Interior Image	Complete Phase II Signature Facility at SOA approved site.
Subaru New Vehicle Showroom Area Designation	Exclusive Subaru dealership combining Sales and Service operations within 18 months of buy/sell close.
Subaru New Vehicle Showroom Units	Actual = 2; Minimum Required = 3; Deficiency = 1.
Subaru Covered/Enclosed Subaru Service Drive	Formal enclosed service drive at approved Subaru site within 18 months of buy/sell close.
Subaru New Vehicle Display & Storage (Dedicated Spaces)	Actual = 45; Minimum Required = 70; Deficiency = 25.
Subaru Used Vehicle Storage (Dedicated Spaces)	Actual = 25; Minimum Required = 30; Deficiency = 5.
Subaru Sales Manager Designation	Exclusive Subaru dealership with dedicated Subaru Sales Manager.

4. Time table for completion of the Subaru Signature Facility Phase II meeting all Subaru minimum standards as approved by distributor at the permanent location.

ACTION	TIME FRAME
Complete Design Intent with SOA approved architectural firm by	immediately
Obtain permits for facility project by	July 30, 2017
Break ground on facility project by	August 31, 2017
Facility that meets or exceeds all Subaru Minimum Standards and Operating Guidelines for Facility Size and Image Requirements is completed by	September 30, 2018

5. The construction of the Subaru Signature Facility Phase II will be secured with a Letter of Credit from Oak Valley Community Bank.
6. Dealer agrees that its failure to complete one or more of the facility improvements set forth in paragraphs 1-3 of this Addendum within the aforementioned prescribed time periods shall constitute a material breach of the Agreement.
7. Dealer agrees to voluntarily terminate the Agreement in writing immediately upon Dealer's failure to complete one or more of the facility improvements set forth in paragraphs 1-3 of this Addendum. If Distributor does not find sufficient cause to extend the Agreement for completion of facilities, Dealer will surrender all Subaru assets to Distributor at acquisition cost within a period of no more than thirty (30) days following Distributor's acceptance of Dealer's resignation.
8. This Addendum is not intended to confer any right, benefit or claim upon any person or entity other than Dealer or Distributor.
9. Except as modified by this Addendum, all terms, conditions and provisions of the Agreement shall remain in full force and effect.

Mr. J. Manuel Prieto
Executive Manager
Subaru Of Sonora
Page 3
October 24, 2019

B. Breach

Subaru Of Sonora breached these provisions because, despite numerous efforts by SOA to work with Subaru Of Sonora and numerous extensions to the Facility Addendum, you have failed and refused to complete the facility renovations as specified in the Facility Addendum. SOA relied on your material misrepresentations, per the Facility Addendum, and was induced into entering into the Dealer Agreement with you. In fact, because so much time has passed since Subaru Of Sonora's failure to complete the facility renovations, Subaru Of Sonora's facility Minimum Standards requirements have increased beyond what was required by the Facility Addendum.

II. Conclusion

As provided in Section 3060 of the California Vehicle Code and Section 17 of the Dealer Agreement, SOA intends to terminate Subaru Of Sonora's Dealer Agreement effective at 12:01 A.M. on the 61st day following the date of receipt of this letter by Subaru Of Sonora. Until that time, Subaru Of Sonora's Dealer Agreement remains in full force and effect. If, at any time until Subaru Of Sonora's Dealer Agreement is terminated in accordance with its terms and applicable law, Subaru Of Sonora contends that SOA is not performing any act required by the Dealer Agreement or applicable law, Subaru Of Sonora is instructed to immediately notify the undersigned in writing, by facsimile or email, of its contention in this regard.

Sincerely,



Anthony J. Graziano
Vice President Western Region

Enclosure (1)

cc: California New Vehicle Board
S. Farabee
B. Hinkle
S. McKessy
R. Smit
A. Salazar

STATE OF CALIFORNIA



MEMO

To: ALL BOARD MEMBERS

**From: TIMOTHY M. CORCORAN
NEW MOTOR VEHICLE BOARD
(916) 445-1888**

Subject: UPCOMING EVENTS

Date: September 2, 2021

The following highlights the upcoming Board events:

- September 8-9, 2021, Industry Roundtable (via Zoom and teleconference)
- September 15, 2021, Special meeting (via Zoom and teleconference)
- November 10-22, 2021, Special meeting (date and location to be determined)
- November 17-18, 2021 AutoMobility LA (Los Angeles Convention Center)
- December 2021, General Meeting (date to be determined; Riverside)
- Winter 2022, Ad Hoc Committee on Equity, Justice and Inclusion Workshops

If you have any questions or concerns about any of the upcoming Board meetings, please do not hesitate to call me at (916) 324-6197.



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. 1-15-25	Governor's Office	Public Member
Inder Dosanjh Term exp. 1-15-21	Governor's Office	Dealer Member
Ryan Fitzpatrick Term exp. 1-15-23	Governor's Office	Dealer Member
Ardashes (Ardy) Kassakhian Term exp. 1-15-22	Senate Rules Committee	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
Jacob Stevens Term exp. 1-15-23	Governor's Office	Public Member