

TEXAS DEPARTMENT OF MOTOR VEHICLES

BOARD MEETING

9:00 a.m.

Thursday,
July 14, 2011

Room 1.B1
Building 150
200 East Riverside
Austin, Texas 78704

BOARD MEMBERS:

Victor Vandergriff, Chair
Cheryl E. Johnson, Vice Chair
Cliff Butler
Blake Ingram
Victor Rodriguez
Marvin Rush (absent)
Laura Ryan (absent)
Johnny Walker

STAFF MEMBERS:

Ed Serna, Executive Director
Brett Bray, General Counsel

ON THE RECORD REPORTING
(512) 450-0342

I N D E X

<u>AGENDA ITEM</u>	<u>PAGE</u>
4. RECOGNITION OF RAMSAY GILLMAN	187
6. RESOLUTIONS FOR INDIVIDUAL CONSIDERATION - RULES AND CONTESTED CASES	
D. Consideration of Franchise Proposal for Decision under Occupations Code Chapter 2301 10-0027 LIC - Bayway Auto Sales, Inc. d/b/a Bayway Volvo, Applicant v. Sonic Houston V, LP d/b/a Volvo of Houston and Sonic Momentum JVP, LP d/b/a Momentum Volvo, Protestants ALJ recommends that protest be dismissed	202
E. Consideration of Warranty Performance Proposals for Decision Under Occupations Code Chapter 2301	
1. 10-0253 CAF - Diana & Ernest Martinez v. General Motors LLC ALJ recommends dismissal (deferred)	198
2. 11-0036 CAF - Lisa Jackson v. Ford Motor Company ALJ recommends repairs	198
3. 11-0086 CAF - Charles Brown v. Gulf States Toyota, Inc. ALJ recommends dismissal	199
7. COMMITTEE BRIEFINGS AND ACTION ITEMS	
A. Approval for Specialty Plate Designs	179
8. ADJOURNMENT	242

P R O C E E D I N G S

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2 MR. VANDERGRIFF: We are calling the meeting
3 back to order. We stood in recess yesterday afternoon, we
4 recessed at about 5:15 in the afternoon. And we are on
5 agenda item number 7.A, which is approval of the specialty
6 plate designs. Randy Elliston.

7 MR. ELLISTON: Good morning, Mr. Chairman,
8 members. My name is Randy Elliston. I'm the director of
9 the Vehicle Titles and Registration Division.

10 The state specialty plate vendor is requesting
11 approval of 26 specialty plate designs, each of which are
12 included in your briefing book. These plate designs have
13 been published on the department's website for public
14 comment. Those comments are also included in your book.
15 In addition, the plates have passed the legibility and
16 reflectivity testing. We present those to you for your
17 action this morning.

18 MR. VANDERGRIFF: I have a question for you.
19 When we left yesterday's meeting we were talking about,
20 obviously, the public opinion that came in off of the
21 website. Did you get any further clarification or
22 information with respect to some of the questions that the
23 board members had yesterday?

24 MR. ELLISTON: Yes, sir, I believe so. The
25 E-view process, when someone goes on our website to make

1 comment there's actually phases of that. The first is
2 there's a check box whether they like it or they don't
3 care for it. That's what the statistical information you
4 have in your briefing book where it says I like or I don't
5 like, that's what that's based on, those percentages. The
6 numbers are just who checked the box I like or I don't
7 care for it. There is a section on there if they want to
8 make comment they can, they're not required to to complete
9 it.

10 The second part of that is I think the other
11 question was can they comment multiple times, and the
12 answer to that is yes, they can go on and they can comment
13 as many times as they would like to. But when they do the
14 check box, they have to get back out, they go back and
15 they can do that.

16 We do have the ability to restrict that by URL
17 if we chose to do so. I think the reason that it was not
18 done in the past was you could have multiple people in the
19 same household that use the same computer so you'd be
20 restricting the potential for someone to make comment that
21 way. But today it is not restricted that way.

22 And I believe I've covered the questions that
23 were asked yesterday unless someone has any others.

24 MR. VANDERGRIF: Before I go forward I want to
25 note also for the record we do have the board members that

1 were in attendance yesterday, Board Members Butler,
2 Ingram, Vice Chair Johnson, Board Member Walker, as well
3 as myself, but we've also been joined by Board Member
4 Victor Rodriguez, so we have six members of the board
5 present today.

6 I think some of the concern expressed
7 yesterday, the vice chair first pointed this out, we have
8 26 plates and only six of them actually received in the
9 public opinion polling a greater than 50 percent approval,
10 and so there's just some concern, again, that there was
11 multiple voting that was maybe increasing the voting
12 negatively, perhaps, on some of these plates.

13 MR. ELLISTON: And that potential is there.
14 Someone could vote multiple times. Obviously, if you had
15 a group of folks who said hey, we really want to push this
16 plate, they could go in and run those numbers up as high
17 as they wanted to.

18 MR. VANDERGRIF: And we don't have any way of
19 knowing at this point, the technology doesn't allow us to
20 know if someone from a particular computer is sending in
21 multiple votes.

22 MR. ELLISTON: That's correct.

23 MR. VANDERGRIF: Even though it's possible,
24 we're not able to track or don't track.

25 MR. ELLISTON: We don't track that today, and

1 it is possible for us to further restrict that if we chose
2 to do so, but as I pointed out, you could be restricting
3 it on the negative side too where you would keep some
4 folks from commenting.

5 MS. JOHNSON: And I understand that. We have
6 five computers in my house, we could vote five times, but
7 no, we couldn't because it's coming from the same URL.
8 But it would seem that we'd be getting a truer picture if
9 it was limited, and if people feel passionately about
10 something as a household, then they can go to different
11 places and cast these votes if they so choose. But is
12 there any cost involved in starting to gather that
13 information or to analyze that, or is it just a matter of
14 flipping a switch?

15 MR. ELLISTON: There would be not cost involved
16 to us to limit that, it would just be a matter of staff
17 making a few changes on it.

18 There was another question yesterday about what
19 type of cost or work effort went into us producing this
20 information for you. There is no dollar cost other than
21 the man hours that goes into it, and we estimate there's
22 about six work hours goes into putting together this
23 information for you, collecting it and gathering it,
24 compiling it and getting it ready for the board.

25 MR. VANDERGRIF: Mr. Chairman and board

1 members. Maybe I can suggest that the staff explore
2 tracking and reporting on the number of responses that are
3 coming from the same source. If we can track that and
4 report on it before we make the decision to lock down, so
5 we can see if that's a big enough issue or not. So we'll
6 explore if we can do that and how we can do it. We'll add
7 some columns to this report on the specialty plates that
8 does that and the staff can make a more informed decision
9 about whether to shut down multiple from a similar URL or
10 something like that. So if you'll allow us to try that
11 first.

12 MR. RODRIGUEZ: Mr. Chairman, before we go
13 there, may I?

14 Previous to now these kinds of responses have
15 had no weight-bearing on the decision, so it would be
16 somewhat a correct assumption to not suspect any kind of
17 monkeying around with this right now at this point,
18 because it has had no weight up to now. Would that be a
19 safe assumption?

20 MR. ELLISTON: What the board has done with the
21 information, your consideration is whether you've
22 considered that or not.

23 MR. RODRIGUEZ: What I'm saying to you is that
24 if we took the stance today that in the future anyone not
25 having a 50 percent or greater passage rate in terms of

1 public response that we won't approve it, at that point in
2 time it adds value, and someone could be trying to toy
3 with the system after that. But it isn't something up to
4 now, and what I'm saying to you is that it seems to me
5 there's no reason to suspect that that kind of stuff is
6 going on.

7 But nonetheless, I think if we're going to
8 start doing that I think we have to -- and this is
9 something I mentioned before, Mr. Chairman, I think we
10 have to revise our process about how we get to the process
11 of getting them here. It was suggested that we look at
12 this to try to get a more clear picture so that we can
13 decide, and I would suggest to you that if we're going to
14 start adding that variable into this, then perhaps we
15 ought to revise our process. And I've been a proponent of
16 such for the reasons I've stated before, I just think we
17 need to grab control of this.

18 I was making an observation earlier to a couple
19 of our board members, I was driving around in the western
20 part of the country yesterday and you know a California
21 license plate when you see it, you see a Nevada plate and
22 you know it when you see it, even an Illinois plate you
23 know it when you see it. We're losing that in this
24 process about Texas and its license plates. So just one
25 more reason why I think we ought to put the brakes on this

1 stuff and reevaluate our process of how we get them here,
2 my suggestion.

3 MR. VANDERGRIFF: Well, a couple of comments in
4 response to that. First, I understand, appreciate and
5 agree with your discussion and would very much hope, as I
6 know we've talked about before -- obviously the board as a
7 whole makes decisions after presentations and information
8 from the staff -- but I'd very much hope you'd take the
9 lead in working with the staff to bring all these issues
10 forward to the board and seeing it through.

11 The second is based on the discussion
12 yesterday, and I know you weren't able to join us
13 yesterday, I'm not sure that any of the board members, and
14 I'm not trying to speak for them, were thinking of
15 changing any way we've worked on this in the past in terms
16 of using the public opinion polls, it was more that we
17 wanted to be sure this accurately reflected true public
18 opinion versus somebody potentially gaming the system by
19 just plugging in multiple times. So I'm not suggesting
20 we're going to do anything more or less with this
21 information than we have in the past, but that was really
22 the concern.

23 And if there is an ability potentially to at
24 least monitor that and to see, as the executive director
25 suggested, to look at these numbers, not necessarily these

1 but stuff going forward, then I think that's appropriate
2 to do.

3 MR. ELLISTON: And we'll do that and if we have
4 the capability to collect that information off of this
5 one, we'll do that, I'm not sure if we have that
6 information, but in the next one that we would do we
7 certainly could collect that information at that point.

8 MR. VANDERGRIFF: And one thing that I have
9 some concern about, I share the concerns about the
10 proliferation and the reflectivity, all of the issues that
11 we have, but on these public opinion polls when you have
12 one, and I think I used the example yesterday of the
13 University of Arizona where 86 percent of the respondents
14 say no, you don't know what that means, we don't know the
15 significance, but the number of people, my gosh, if that's
16 just individual people, you have almost 7,600 people that
17 have weighed in. That's more than vote in a lot of city
18 elections. So I don't know what it means and would just
19 feel more comfortable if we had some better understanding
20 of the voter issues there.

21 But anyway, Randy asked for the board's
22 consideration of these plates, and he's pleased to
23 continue to entertain questions or them or listen to the
24 pleasure of the board.

25 MR. BUTLER: Mr. Chairman, I make a motion we

1 approve these plates.

2 MR. VANDERGRIFF: We have a motion to approve.

3 MS. JOHNSON: I'll second.

4 MR. VANDERGRIFF: We have a motion to approve,
5 and a second by the vice chair. Do we have any further
6 discussion on it?

7 (No response.)

8 MR. VANDERGRIFF: Please raise your right hand
9 in support of the motion.

10 (A show of hands.)

11 MR. VANDERGRIFF: Please raise your right hand
12 in opposition.

13 (A show of hands.)

14 MR. VANDERGRIFF: The motion carries five to
15 one.

16 I would also like to note again to ask the
17 staff to bring back at a future board meeting, hopefully
18 sooner than later, some greater clarification on some of
19 the board's opportunities to weigh in on the standards of
20 review here, as the chief just pointed out.

21 MR. SERNA: Yes, sir, we will.

22 MR. VANDERGRIFF: Now I get to come back to a
23 pleasurable part of the agenda for us, and again, I
24 apologize for not having this agenda in front of me, but
25 it is item number 4 on your agenda, and it is a

1 recognition of Ramsay Gillman. Mr. Gillman was a board
2 member here of this commission and probably the most
3 stunning development in our time here was his untimely
4 passing back last month.

5 He was a valuable colleague of ours and a great
6 personal friend, and frankly, he was a great personal
7 friend to everyone, a legend and a giant in the automobile
8 business and motor vehicle industry and in the State of
9 Texas in general.

10 And we are honored today to have members of his
11 family with us as we give special recognition to him.
12 Frankly, there's not, I don't think, anything that we
13 could do to adequately capture his impact on the motor
14 vehicle industry, but we certainly want to acknowledge him
15 here, and very much appreciate them being here.

16 I'd like to, if I could, please, read a
17 resolution from this board that is to you and to the
18 family, and I'm going to read it in total for purposes of
19 both the record and the public.

20 "Whereas, a full, over-the-top and incredible
21 life came to an end with the passing of Ramsay Gillman on
22 June 3, 2011 at the age of 67;

23 "And whereas, the native Houstonian and sixth
24 generation Texan began his automotive career working in
25 the parts department of his father's Pontiac dealership

1 located in downtown Houston, and after attending the
2 General Motors Dealer Management Institute and other
3 specialized schools in 1967, a 23-year-old Ramsay Gillman
4 became and authorized automobile dealer;

5 "And whereas, Ramsay Gillman served as
6 president of the Houston Automobile Dealers Association,
7 appointed in 1984 by then-governor Mark White, Ramsay
8 served three years as vice chairman of the Texas Motor
9 Vehicle Commission, Ramsay was the director of the
10 National Automobile Dealers Association from 1989 through
11 1999 and he chaired various committees of this association
12 from 1993 through 1999, and most recently Ramsay was
13 serving as the chairman of the board of the Gillman
14 Companies, a trustee for the National Automobile Dealers
15 Association Charitable Foundation, and for the National
16 Automobile Dealers Association Political Action Committee,
17 and as an appointed board member by Governor Rick Perry to
18 the Texas Department of Motor Vehicles;

19 "And whereas, Ramsay received the 1996 Sports
20 Illustrated All Star Dealer Award from the American
21 International Automobile Dealers Association for his life
22 commitment to the automobile business and charitable
23 organizations, and again in 1997 an official Texas House
24 of Representatives resolution passed on behalf of his
25 outstanding achievements over his years of philanthropy;

1 "And whereas, Ramsay Gillman supported the Fort
2 Bend County Women's Center, the Ronald McDonald House,
3 Houston Livestock Show & Rodeo Youth Scholarship Program,
4 Sickle Cell Association and Muscular Dystrophy
5 Association;

6 "And whereas, Ramsay was dedicated to his wife,
7 Stevie, and to their children, Stacey, Jason and
8 Christopher. Ramsay had an extraordinary ability to lead
9 and influence change, he instilled honesty, integrity and
10 customer service values in his children and prepared them
11 to lead the Gillman Companies. Ramsay believed and lived
12 the concept of work hard and play hard that included
13 Ramsay's plans of adventure with his grandchildren, Grace,
14 Frankie, Jace and Cavan;

15 "And whereas, Ramsay Gillman was not afraid to
16 step into the foreseeable conflict, he was a mentor, guide
17 and friend who displayed a contagious positive demeanor,
18 he enriched us with his story-telling, displayed mastery
19 on the golf course and hunted and fished with expertise;

20 "And whereas, work and leisure were Ramsay's
21 excuses to meet people. We were grateful had those
22 excuses throughout 67 yeas of a joyful life;

23 "Therefore, be it resolved that the Board of
24 the Texas Department of Motor Vehicles pays tribute to the
25 life of Ramsay Gillman and extends sincerest to the

1 members of his family, friends and the Gillman Company
2 employees, and be it further resolved that the official
3 copy of this resolution be prepared for his family and
4 that when the Texas Department of Motor Vehicles adjourns
5 this day, it do so in memory of Ramsay Gillman."

6 We do have an unsigned copy, we have a few
7 board members to get signed who are not present with us
8 here today, and we also have a special plaque that we'd
9 like to give you on behalf of the department and the
10 board.

11 (Pause for presentation to Gillman family
12 members.)

13 MR. VANDERGRIFF: And I'd like to ask my fellow
14 board members, who I know all have great affection and
15 admiration for Mr. Gillman and the Gillman family, if they
16 want to come and greet you and appreciate you being here,
17 and also if they'd like to back at their place say
18 something about Ramsay. I think they all have their own
19 different stories about him.

20 (Applause, and pause for other board members to
21 greet Gillman family members.)

22 MR. BUTLER: I'd like to say that Ramsay was
23 always a gentleman, and even when the other side he was
24 talking to disagreed with him, he was always a gentleman,
25 he stated his case eloquently and concisely, and I enjoyed

1 serving with him on this board and will miss him.

2 MR. INGRAM: I'll add one thing, that I only
3 got to be with your father one day, and he was one of
4 those people that you instantly liked, that was full of
5 joy, and he talked about every single one of you to me,
6 and he really, really was very, very happy, and I really
7 enjoyed sitting next to him for that one day.

8 MS. JOHNSON: And I'd like to say some people
9 are legends in their own mind, Ramsay Gillman was a legend
10 of our times. And I want to thank you. He loved you
11 dearly, we always knew about the family, and he was a very
12 humble individual and he didn't really have to be. I
13 mean, he definitely did a lot of things, accomplished a
14 lot in his life, and we're going to miss him and I know
15 you are too. God bless you all.

16 MR. WALKER: Well, I was at your dad's wake and
17 funeral and talked to all of you there, but in a very
18 short period of time in the last year I got to know your
19 dad and I never knew your dad before but I got to know him
20 very well. Probably there's only one other person I know
21 as well as I know your dad, and that's Cheryl. And the
22 reason is because we traveled together, we always about
23 half the time either flew in your dad's plane or drove in
24 my pickup truck up here, and so we had lots of free time
25 to talk. And one thing I always admired about your dad,

1 really two things, was that no matter what the story was,
2 he always had a joke that related to it, and the other
3 thing that I really, really liked about your dad was that
4 he never, ever got on that plane or in my truck that he
5 didn't talk about his family and how much he loved you
6 all. And I really admired that in your dad.

7 MR. RODRIGUEZ: On my behalf, I want to tell
8 you publicly what I said to privately, and that is I had
9 the honor and the pleasure of meeting your dad while
10 getting on this board so I've known him for a very short
11 period of time, but getting to know him that short period
12 of time is like knowing him for a lifetime. And I go home
13 to my family and I talk to my family about all the
14 members, and there is one person whom I always talked
15 about and I always did this with a smile, and my kids
16 picked up on this, and that was Ramsay Gillman. We were
17 blessed to have his company up here and we thank you for
18 sharing your dad, not only with us but with the state and
19 this country. So God bless you and we're really sorry
20 about this loss. We will miss him dearly. Thank you for
21 being with us today.

22 MS. GILLMAN WIMBISH: Thank you all very, very
23 much. This is Jason Gillman, Chris Gillman and I'm Stacey
24 Gillman Wimbish.

25 And my dad served on the Motor Vehicle

1 Commission back when I was in college and he would come
2 visit me and stay with me at the University of Texas and
3 loved serving on this board then and he loved serving on
4 this board since its formation again. And he loved what
5 he did, he loved the car business and he felt it was
6 important to give back. And I feel like I know each and
7 every one of you very well because he talked about each
8 one of your characters and your values, and he really made
9 it a point to want to get to know you individually, and he
10 loved serving on this board, he loved serving Texas.

11 So what you're doing here is really important,
12 you're putting America on the road, and on behalf of my
13 family and I, we thank you so much for this recognition.
14 He would have loved every minute of it.

15 Thank you, Brett, for the phone call. You've
16 been a long, long time friend and we appreciate that
17 friendship always. Thank you all.

18 MR. VANDERGRIFF: And I would ask if Brett or
19 the executive director or anybody on the staff that worked
20 closely with Ramsay have anything they'd like to add?

21 MR. SERNA: I will very briefly. I only had
22 the opportunity to know Mr. Gillman since my term on the
23 board, but I will say on behalf of myself and the
24 management team and the staff of the department that it
25 was our absolutely pleasure to work with Mr. Gillman, to

1 gain from him the knowledge that he brought to the board
2 and the advice that he gave us, and we're sorely going to
3 miss his participation on the board. And we're really
4 glad that you joined us and let us honor him and his
5 family a little bit today. So thank you very much for
6 joining us.

7 MR. VANDERGRIFF: I would want to tell you what
8 I think are the sentiments of the other two board members
9 who are not here. I knew and worked with your dad for
10 over 20 years, but Marvin Rush has known him since he was
11 a boy, literally a boy, and of course, Marvin was in
12 business selling Cokes and Coke machines at eight years
13 old, so your dad was only a few years younger and was
14 probably playing in a sandbox at that point in time. But
15 Marvin just had the greatest respect for him and they were
16 two longtime giants in the motor vehicle industry, and he
17 wanted me to convey his regrets for not being able to be
18 here and his respect for him as well, for your father and
19 his family. And he had a personal relationship with your
20 grandfather, Frank Gillman, as well.

21 And then Laura Ryan, Ramsay and Laura had
22 really spearheaded the organizational assessment review of
23 the agency that's ongoing now as we prepare to move
24 forward, take the next step. And he was always, when you
25 got him on the phone or in a meeting, always there, you

1 had his attention, but the conversations went quick, so he
2 cut to the quick of whatever. These are things you know.

3 (General talking and laughter.)

4 MR. VANDERGRIFF: So Laura, her greatest memory
5 is being on the edge of her seat knowing she had to have
6 prepared, like, okay, I've three to five minutes and we've
7 got to get this out because Ramsay gets to the heart of
8 it.

9 And then I know I spoke first and I guess I get
10 to speak last, one of the privileges of being the chair,
11 but Ramsay personified all that's good and the best in the
12 Texas automobile dealers. He really set the bar and the
13 example for dealers in Texas, not only as being a good
14 dealer, a good family man, and as Chief Rodriguez pointed
15 out, always talked about his family. He put you in a
16 position in terms of the way he was always thinking about
17 the future, that you're grieving but your companies move
18 forward and solidly versus so many that don't.

19 But he thought about Texas, he thought about
20 the dealers across the State of Texas, and so many in his
21 position of size and stature in terms of the size of his
22 company, they're involved in too many other things and
23 just don't have time to do that. He always did.

24 And the last thing, and I know Stacey knows
25 this, the audience maybe not or other board members, but

1 when this agency was first formed there were three or four
2 key dealers in the industry that I talked to about the
3 help for doing this, and Ramsay was solidly behind the
4 idea, and so after that became a reality, I called him and
5 I had this bright idea that I just admired his daughter
6 and his family so much that perhaps he might think about
7 asking Stacey to think about applying to be on this board.

8 And Ramsay told me, probably the longest
9 conversation I had with him, he prefaced it by telling how
10 much he admired and loved all of his children and admired
11 and loved Stacey and she was great and all this kind of
12 stuff, but then he got to the point -- and I knew because
13 this was a little longer than normal in a conversation
14 with Ramsay -- he said, But you know, Victor, I kind of
15 think I want to apply for that job myself.

16 So by the end of the conversation I just said,
17 Well, there you have it. And he said, There you have it.

18 And we were done. So the next thing we know, he applied.

19 MS. GILLMAN WIMBISH: I got bumped.

20 (General laughter.)

21 MR. VANDERGRIFF: But again, we will sorely
22 miss his leadership and his guidance. And thank you for
23 honoring us with your presence today to come down.

24 (Applause.)

25 MR. VANDERGRIFF: I'm going to jump a little

1 out of the order again since we've jumped around, I'm
2 going to take up items under 6.E; we have three
3 resolutions for individual consideration under warranty
4 performance proposals. Mark.

5 MR. GLADNEY: Good morning. For the record,
6 Mark Gladney for staff.

7 With regard to the first case, Martinez v. GM,
8 staff wishes to pass this case for board consideration at
9 this time due to recent developments between the parties
10 involving settlement. Therefore, the order at present
11 that's in your briefing books is not appropriate for board
12 consideration given the new development. Staff would like
13 to re-present this item to the board at the next meeting.

14 MR. RODRIGUEZ: So moved, Mr. Chairman.

15 MR. VANDERGRUFF: When did you say, next week?

16 MR. GLADNEY: Next meeting.

17 MR. RODRIGUEZ: So is this proper to table or
18 to pass?

19 MR. VANDERGRUFF: Do we need to have a motion
20 from the board to pass it? I didn't think so.

21 MR. BRAY: It's the chair's prerogative.

22 MR. VANDERGRUFF: We'll pass it till next
23 meeting.

24 MR. GLADNEY: The next case for your
25 consideration is Jackson v. Ford. I would note for the

1 record that neither party is present today; however, Ms.
2 Jackson had sent an email late last night that she wishes
3 to serve as her statement to the board. I believe that
4 all of you have a copy of the same in your briefing books.

5 MR. RODRIGUEZ: Move we deny the requested
6 relief, Mr. Chairman.

7 MR. VANDERGRIFF: We don't have a second yet.
8 Do we have a second?

9 MR. WALKER: I'll second it.

10 MR. VANDERGRIFF: We have a motion to deny and
11 a second. Do we have any discussion?

12 (No response.)

13 MR. VANDERGRIFF: All those in favor please
14 raise your right hand for the motion.

15 (A show of hands.)

16 MR. VANDERGRIFF: All those opposed.

17 (No response.)

18 MR. VANDERGRIFF: Motion carries six to zero.

19 MR. GLADNEY: And the last case for your
20 consideration, once again both parties are not present
21 today, Brown v. Toyota. In this particular case the
22 complainant was seeking repair of a 2011 Avalon,
23 complainant alleged intermittent front end noise. There
24 was a SOAH hearing for 204 relief on February 15 of 2011.
25 During the hearing there was a road test in which no

1 abnormal noise was found. The PFD found insufficient
2 evidence of a continuing unrepaired defect, and the PFD
3 recommended denial of 204 relief.

4 Staff recommends and requests board approval of
5 the order as proposed in your packet denying 204 relief.

6 MR. RODRIGUEZ: Move we deny, Mr. Chairman.

7 MR. VANDERGRIFF: I have a motion to deny. Do
8 we have a second?

9 MR. WALKER: I second.

10 MR. VANDERGRIFF: A motion and a second. Any
11 discussion?

12 MR. WALKER: I have a question. Who calls for
13 these requests for hearings before the board?

14 MR. GLADNEY: The Lemon Law section, after a
15 period of time in which staff tries to mediate and
16 possibly even settle these matters, once we get to the
17 point where it appears that that is not possible, the
18 section drafts a notice of hearing and sends the
19 informational packet which would include the Lemon Law
20 complaint form from the complainant and any other
21 pertinent data that was accompanied with that to SOAH, and
22 from there a hearing date is schedule for the parties.

23 MR. WALKER: So staff is requesting the
24 hearing, it's not the parties?

25 MR. GLADNEY: No, it's not staff requesting the

1 hearing. Staff is not a party in these instances.

2 MR. WALKER: So the complainant has asked us to
3 review all this, and then they don't show up?

4 MR. GLADNEY: Well, at SOAH the complainant did
5 show up.

6 MR. BRAY: May I help out a little bit?

7 MR. VANDERGRIFF: Yes, Brett.

8 MR. BRAY: I believe Member Walker is not
9 talking about the hearing on the merits, he's asking about
10 how does it get on the agenda and to this board today.

11 MR. WALKER: How does it get to here that I
12 spent a lot of time reviewing, reading, studying, and then
13 nobody shows up?

14 MR. BRAY: It gets here today because the board
15 has to take action in an open meeting to finalize this
16 case so that the case becomes -- as Member Johnson was
17 discussing yesterday, becomes final and disposed of.

18 MR. GLADNEY: In 2301.204 matters, you are the
19 final order authority, so for due purposes and procedural
20 purposes it has to come before you. The parties have the
21 option as to whether or not they wish to show.

22 MR. WALKER: Mr. Chairman, I'm finished.

23 MR. BUTLER: I move we vote.

24 MR. VANDERGRIFF: All right. All those in
25 support of the motion, please raise your right hand.

1 (A show of hands.)

2 MR. VANDERGRIFF: All those opposed.

3 (No response.)

4 MR. VANDERGRIFF: The motion carries six-zero.

5 MR. GLADNEY: Thank you very much.

6 MR. VANDERGRIFF: This is the last item on our
7 published agenda, which is under 6.D, and it's the
8 consideration of a franchise proposal for decision. Molly
9 Cost, I believe you're here to introduce the case.

10 MR. RODRIGUEZ: Mr. Chairman, may I ask a
11 question on this?

12 MR. VANDERGRIFF: Yes, please.

13 MR. RODRIGUEZ: I read this packet and I
14 believe I'm ready to make a decision and I don't believe
15 there's a requisite that any testimony be given today. So
16 I'm asking you to ask the question if we have enough
17 information already to make a decision, and if so, to
18 proceed to a decision. A member may say you know what, I
19 want to here this out, and that's okay.

20 MR. VANDERGRIFF: Well, you definitely have
21 enough information to where if you feel comfortable in
22 making a motion, then you can.

23 MR. RODRIGUEZ: Then I so move.

24 MR. VANDERGRIFF: The issue that we come up
25 with is from the standpoint of the parties. I think that

1 both of them do have counsel here that are prepared to
2 address the board, and failing to do so kind of prevents
3 them that opportunity.

4 MR. RODRIGUEZ: I understand. It's not a
5 requirement that they necessarily present information
6 today. Right?

7 MR. VANDERGRIFF: No, it is not.

8 MR. RODRIGUEZ: Then I move that the protest be
9 dismissed, Mr. Chairman.

10 MR. VANDERGRIFF: So are you moving to approve
11 the proposed final decision from SOAH?

12 MR. RODRIGUEZ: Yes, sir.

13 MR. VANDERGRIFF: Do we have a second for that
14 motion?

15 (No response.)

16 MR. VANDERGRIFF: Then the motion would die for
17 lack of a second. So please proceed.

18 MS. COST: For the record, my name is Molly
19 Cost, and I'm the director of the Motor Vehicle Division
20 here at the Department of Motor Vehicles.

21 This case involves an application by Bayway
22 Auto Sales, Inc. d/b/a Bayway Volvo for the establishment
23 of a new dealership at 12333 Gulf Freeway in Houston,
24 Harris County, Texas. Until March 2009, another Volvo
25 dealership had provided sales and service in the area

1 where Bayway proposes to locate its dealership. This
2 prior dealership resigned its franchise and closed its
3 dealership without selling to a new franchisee.

4 Once Bayway's application was declared
5 substantially complete, staff sent notice of eligibility
6 to protest letters to all Volvo dealers in the statutory
7 protest area and two Volvo dealers within Harris county
8 timely protested Bayway's application: Sonic Houston V,
9 LP d/b/a Volvo of Houston, and Sonic Momentum JVP, LP
10 d/b/a Momentum Volvo.

11 The protests were referred to the State Office
12 of Administrative Hearings for a multi-day hearing
13 convened before a SOAH ALJ on September 7, 2010. The
14 evidentiary record closed on December 22, 2010 and the ALJ
15 issued his proposal for decision on February 17, 2011.

16 In the PFD the ALJ concluded that Bayway
17 established good cause for establishing the dealership,
18 finding most compelling the absence of a Volvo dealer in
19 so large an area as the southeast quadrant of Houston, the
20 long distances to the protestants' dealerships from the
21 majority of the proposed dealer area, the apparent absence
22 of significant efforts by the protestants to serve the
23 area in the prior Volvo dealer's absence, the presence of
24 uncaptured opportunity in Houston generally, and the
25 minimal likely impact the proposed dealership would have

1 on the protestants.

2 The issue presented for the board's
3 consideration today is whether Bayway has shown good cause
4 for its application to establish a Volvo dealership in
5 Houston. In determining good cause, the board shall
6 consider: whether the manufacturer or distributor of the
7 same line make of new motor vehicles is being adequately
8 represented as to sales and service, whether the
9 protesting franchise dealer representing the same line
10 make is in substantial compliance with its franchise to
11 the extent that the franchise is not in conflict with
12 Chapter 2301 of the Occupations Code, the desirability of
13 a competitive marketplace, any harm to the protesting
14 franchise dealer, the public interest, any harm to the
15 applicant, and current and reasonably foreseeable
16 projections of economic conditions, financial expectations
17 and the market for new motor vehicles in the relevant
18 market area.

19 As we've discussed at prior meetings, the law
20 only allows an agency to vacate or modify findings of fact
21 or conclusions of law proposed by a SOAH ALJ if that ALJ
22 misapplied or misinterpreted applicable law, agency rules
23 or prior agency decisions, relied on a prior agency
24 decision that is incorrect or should be changed, or made a
25 technical error in a finding of fact. If a change is made

1 the agency must state in writing the specific reason and
2 legal basis for the change.

3 Staff believes that the ALJ provided a very
4 thorough recitation of the evidence and argument presented
5 by the parties and his analysis but has suggested some
6 alterations to the findings of fact and conclusions of law
7 to correct minor technical errors and misapplications of
8 applicable law that do not affect the ultimate outcome
9 recommended by the ALJ which is dismissal of the protests.

10 Staff recommends the board adopt the ALJ's
11 findings of fact and conclusions of law as modified in the
12 attached proposed final order which is located in your
13 board books at Tab 6.D and also in the supplemental book
14 you received at the last board meeting.

15 The parties are represented by counsel who are
16 here to present oral argument. Oral argument is, of
17 course, at the board's discretion, and if you decide to
18 grant it, we recommend 15 minutes for each side. And I'm
19 available for any questions.

20 MR. WALKER: Well, I'm kind of with Victor over
21 here on some of this because I spent a lot of time reading
22 and reviewing and so forth. I didn't vote with him, and
23 the reason I didn't vote with him to second his motion
24 over there was because I want to know is -- these people
25 have gone to some expense to come here, but I don't want

1 to sit over here and rehash everything that's in this book
2 by both sides because we already know what the issues are,
3 but I would like to make sure that we allow them, should
4 what you just said, if there's new facts, new evidence, or
5 something that was not found in this that we listen.

6 MR. BUTLER: You can't listen to that.

7 MR. WALKER: Not new facts, but restate your
8 last, we're not looking at the facts, it's that there's
9 technical problems in there.

10 MR. BRAY: It's the criteria she mentioned for
11 examining a SOAH proposal for decision, and the three are?

12 MS. COST: Misapplication, misinterpretation of
13 applicable law, rules or prior agency decisions, if the
14 ALJ relied on a prior agency decision that's incorrect or
15 should be changed, or made technical errors in finding of
16 fact.

17 MR. WALKER: Without rehashing all the story
18 again.

19 MR. VANDERGRIF: That's right. And basically
20 on the technical error side, the staff has looked at those
21 and has a few recommendations in that regard.

22 MS. COST: Yes. We have looked at those and
23 made ac couple of recommendations.

24 MR. VANDERGRIF: So we're really kind of down
25 to misapplication or misapplied law, as well as the prior

1 agency decision, perhaps, that they relied on.

2 MS. COST: Correct.

3 MR. INGRAM: I just want to concur with Mr.
4 Walker that we definitely want to maintain the testimony
5 down to just those relevant issues.

6 MR. WALKER: Right. I don't want to rehash the
7 whole issue about where everybody is located and all that,
8 we're aware of that.

9 MR. VANDERGRIF: All right. Are we inclined
10 as a board that we did not approve Chief Rodriguez's
11 motion, so I'm asking you, we've got the parties here.

12 MR. WALKER: Yes.

13 MR. VANDERGRIF: All right. I believe that
14 first up would be Bayway to present on this. I think
15 there was some question as to who would go first.

16 MR. BRAY: I think we would recommend the
17 protestant open and close, if they choose.

18 MR. VANDERGRIF: I believe David Coffey is
19 here to represent them as well.

20 MR. COFFEY: Thank you, Mr. Chairman.

21 MR. VANDERGRIF: Thank you, Mr. Coffey. It's
22 good to see you again.

23 MR. COFFEY: Good to see you, sir.

24 This is one of those cases where I feel like
25 the defense counsel in the Casey Anderson trial because

1 Mr. Wischnewsky, the applicant, is one of the nicer people
2 that you're going to meet, and of course, we have lost
3 already at the SOAH and we have obviously not convinced
4 your staff that our position is the one to take, but we
5 are here to represent our client which is Sonic
6 Automotive, Inc. which is a multinational holding company
7 for car dealerships.

8 The two protestants in this case were Sonic
9 Momentum and Volvo of Houston. Momentum was located more
10 closely to the applicant than Houston Volvo was. The
11 distances are larger than you will ordinarily see, but
12 this case is not really so much about proximity as it is
13 some of the other issues that you see on adequate
14 representation.

15 Now, I understand that you guys only want to
16 hear about misinterpretation and misapplication of the law
17 and we think we have that in droves in this case.
18 Particularly, there was a case called the Landmark
19 Chevrolet case that came out in 2004. It was a unanimous
20 MVD, your predecessor, MVD decision and it stands for one
21 simple proposition -- and in fact, I think the lady who
22 was the ALJ on that case is here, Ms. LEEANNE BURNETT, I
23 believe it was -- it stands for one simple proposition and
24 that is if you are going to propose a new point in a
25 market area, you need to do a lost opportunity analysis

1 and you need to demonstrate that there is sufficient
2 uncaptured opportunity in that market to support your
3 dealership so that you don't have to cannibalize off the
4 existing dealers.

5 That was kind of a sea change in this agency's
6 point of view on these types of at-point cases. The TMVC
7 for many years and the MVD for many years, in my opinion,
8 at least, had allowed a lot of applications to go through
9 that perhaps were not warranted because they felt, like
10 most of us do, that anybody should be given a chance to go
11 into business unless there's something wrong with them.
12 And there's certainly nothing wrong with the applicant in
13 this case.

14 What there is wrong is the market, and the
15 market will simply not support a fifth Volvo dealership.
16 That is proven by the fact that one of the best dealers in
17 the business, John Eagle, went out of business with his
18 Volvo franchise, he couldn't make it work in southeast
19 Houston, and now Volvo Cars of North America wants to move
20 that point, a fifth point, 7.8 miles closer to my clients
21 in the middle of the worst recession that this country has
22 seen in 60 years and at a time when the distributor is
23 incapable of providing sufficient product for my clients
24 to make a sufficient return on their investment to be able
25 to provide or to be competitive in the provision of luxury

1 services to the import customer.

2 That's really what it comes down to: my
3 clients want to be able to continue to compete in this
4 very rarified arena where they have to compete against
5 five Mercedes Benz dealers who average approximately 787
6 sales per year and four Lexus dealers who average
7 approximately 1,551 sales per year. That kind of volume
8 allows them to out-compete my clients in the provision of
9 luxury services, and thus, we can't build the market for
10 the Volvo automobile that we would like to be able to
11 build.

12 So when you add to that environment a fifth
13 dealer, even one as good as Mr. Wischnewsky is going to
14 be, it just puts tremendous pressure on my clients, and
15 that's the reason why they are here trying to oppose this
16 application.

17 Getting back to the Landmark Chevrolet case,
18 typically the way a manufacturer demonstrates lost
19 opportunity in a market is they have studied the market
20 for a period of years and they go out and they gather data
21 and they run analyses in the market to try and determine
22 whether or not the market is ready for another dealer.
23 They have typically identified a benchmark that they think
24 is the market share that they are entitled to in any
25 market, and that is a concept that dealers have a lot of

1 problem with, but nevertheless, that's the way it's done.

2 They identify a benchmark market share in a
3 larger geography where they've actually achieved that and
4 they say every geography inside this larger geography
5 should be able to achieve that same market share, and if
6 it doesn't, there's something wrong with it, either the
7 dealers are not trying hard enough or they're not
8 advertising enough or there aren't enough dealers. And
9 quite often, that is the conclusion that the manufacturer
10 comes to: there just aren't enough of our line make
11 dealers in this market so we have to put another one in.

12 And of course, that disturbs everybody in the
13 market who has invested millions of dollars in trying to
14 build the market for that product and are not getting the
15 product that they need from the manufacturer, and then the
16 manufacturer comes and says let's put another dealer in
17 the market.

18 Well, what happened in this case is the
19 distributor, Volvo Cars of North America, did not
20 intervene on behalf of the applicant, it did not produce a
21 market study which is the typical situation, they simply
22 said, Well, the market is being penetrated at our regional
23 average rate -- which we took to be what they consider
24 their benchmark market share, the regional average rate
25 of -- penetration -- they said, The market is achieving

1 that but we don't enough convenience down here in the
2 southeast quadrant of Houston. Well, the big thing in
3 Landmark was what do we look at as the relevant market
4 area, do we look at the metro as a whole or do we look at
5 a small component of that metro and say we have to serve
6 customers down here even though we are adequately
7 representing this product in the market as a whole, by
8 whatever you want to calculate it, whether it's a regional
9 average or a state average or a national average or
10 whatever.

11 So what Landmark said was we are going to look
12 at the metro -- and Landmark, by the way, was a Houston
13 case, they were looking at Houston -- Landmark said we are
14 going to look at the metro as a whole and determine
15 whether or not there's adequate representation in that
16 metro as a whole. If you have a problem in one small
17 segment of the market, that's a dealer placement issue,
18 you need to rearrange your dealers so that they're more
19 evenly distributed and can serve the public better in the
20 entire market. But don't come to this agency without a
21 market study and say we have to have another dealer, a
22 fifth one down here even though our dealers can only
23 average 183 sales per year when they're up against a Lexus
24 dealer averaging 1,551 and a Mercedes Benz dealer
25 averaging 787. Don't come to this agency unless you can

1 prove that there is enough room in the market for your
2 additional dealer. That did not happen in this case

3 And another thing of significance on this is
4 that Landmark specifically repudiated the Texas state
5 average market share as the appropriate benchmark for the
6 Houston metro market because it was too competitive or too
7 stringent a benchmark for a metro to be able to achieve
8 because it had a lot of single point markets in it.

9 At any rate, what happened in this case is that
10 the applicant made no attempt to do a lost opportunity
11 analysis in its direct case, it figured out in its reply
12 briefs that it had to do one because of the Landmark case,
13 and so it cobbled together some data basically from our
14 case, cobbled together some registration data from our
15 case, applied the Texas average to it, and said there's
16 plenty of room in this market for a fifth Volvo dealer
17 because the market as a whole is not achieving the Texas
18 state average.

19 Well, that just sets Landmark on its head, as
20 far as I'm concerned. There was no effort to do a lost
21 opportunity analysis except on the fly with inadequate
22 data at the end of the case, and they used the Texas
23 average benchmark as their comparison benchmark on which
24 to determine that there was inadequate representation in
25 the market.

1 So that's the misapplication and
2 misinterpretation of applicable law.

3 There's one thing that I would like you to take
4 a look at and that is tab 7. I don't know if you got our
5 notebooks or not, but tab 7 we brought before you and I
6 was going to go into some more detail but we only have
7 limited time.

8 MR. INGRAM: Is that your notebooks down there,
9 or what is that?

10 MR. COFFEY: This is the notebook that I'm
11 working from right here. We do have some notebooks.
12 Let's go ahead and hand them out if we have time to look
13 at these documents. These are actual exhibits in the
14 case, board members, and there's one in particular I would
15 like you to see.

16 MR. VANDERGRIFF: Ms. Cost, have you see this?

17 MS. COST: No.

18 MR. COFFEY: We can provide her a copy. Do we
19 have an extra copy for Ms. Cost?

20 MR. BRAY: Just so we're clear, it's not
21 whether Ms. Cost has seen it or not, it's whether or not
22 it was admitted in the hearing.

23 MR. VANDERGRIFF: That was going to be my next
24 question.

25 MR. COFFEY: This is all exhibits that were

1 admitted into the case, they were considered by the SOAH
2 ALJ, and I figured since you guys are over-viewing the
3 SOAH ALJ's decision, you might want to be familiar with
4 some of the actual exhibits that he reviewed.

5 MR. VANDERGRIFF: Has Ms. White seen this? Is
6 she in agreement with that?

7 MS. FREEMAN: It's Ms. Freeman. They are all
8 exhibits except for where they put a bullet point argument
9 behind some tabs. Those were not exhibits, those were
10 just argument. Is that correct, Mr. Coffey?

11 MR. COFFEY: That's correct. Most of those so-
12 called arguments are actual testimony from the record and
13 contain a citation to the record. So there's nothing out
14 of the record in this case except whatever argument we're
15 making right now.

16 MR. VANDERGRIFF: Just one second, Mr. Coffey.

17 MS. FREEMAN: We did not always find in the
18 articles that are talked of, we did not always agree with
19 protestants' citation to the record.

20 MR. VANDERGRIFF: So I'd ask the board at this
21 point, obviously the exhibits themselves can be considered
22 but the other information should not be that's written
23 here since we're not certain that that's actually part of
24 evidentiary record that we saw.

25 MS. FREEMAN: Some of it may be.

1 MR. VANDERGRIFF: I understand, but just making
2 sure the board understands that.

3 Go ahead.

4 MR. COFFEY: Okay. Well, most certainly tab
5 number 7 is certainly part of the record. It was an
6 exhibit actually created by the applicants themselves.
7 And the reason that I bring this to your attention is that
8 the SOAH ALJ reviewed all the evidence and then came to
9 the startling conclusion that there is not an allocation
10 problem in the city of Houston when all five of our
11 witnesses from two dealerships testified there were, when
12 VCNA's, that's Volvo Cars of North America's own witnesses
13 testified that inventory is dire, it's a dire situation,
14 it's scarce, that their region has the lowest day supply
15 of any region in the United States, the SOAH ALJ, after
16 all of this testimony, comes to the conclusion that
17 there's not an allocation problem in Houston.

18 Well, there is an allocation problem in Houston
19 and the evidence is overwhelming to that effect, and this
20 is a really good example of it, the second page of exhibit
21 7 here where you can see that between February of 2009 and
22 August of 2009 my client's day supply fell 95 percent.
23 That's when the allocation problem started. So you have a
24 situation like this on the adequate representation issue.

25 All of the VCNA people admit that this market

1 is achieving all of their benchmarks, it's achieving all
2 of their objectives. You've got all of my clients
3 screaming for more product so that we can increase market
4 share in the Houston market, they can't give it to us, and
5 then they come in and say we're not adequately
6 represented, we need another dealer. Well, how can you
7 not be adequately represented when we are achieving your
8 business model, all the objectives that you say need to be
9 achieved, we're achieving those, we're clamoring for more
10 product and we're not getting it. How can you possibly
11 say that the answer to your perceived representation
12 problem in Houston is lack of another dealer when it's
13 obvious that you can't provide the product to allow us to
14 achieve an even greater market penetration for your
15 product.

16 So that's really what it came down to. I don't
17 want this board to think for a minute that my clients have
18 anything against Mr. Wischnewsky, he's going to make a
19 fine Volvo dealer, that's never been the issue in this
20 case. The issue has been whether or not SOAH is going to
21 follow this agency's prior precedent and whether or not
22 the real problem in Houston is going to be corrected, and
23 that is give us sufficient product, if you think we're not
24 saturating the market sufficiently with your product, give
25 us sufficient product and we'll do it.

1 And I'll be happy to answer any questions.

2 MR. VANDERGRIFF: You've used up, counting
3 stopping for questions, you've used up about ten minutes
4 of your time, a little more. Are you going to reserve?

5 MR. COFFEY: If I could reserve five, Mr.
6 Chairman, I would appreciate that.

7 MR. VANDERGRIFF: Do members of the board have
8 any questions? I'll reserve mine for later. Thank you.

9 Ms. White.

10 MS. WHITE: Thank you, Chairman.

11 Good morning. I am Susan White, and my
12 partner, Janet Freeman, and I have had the distinct
13 privilege and honor of representing Bayway Auto Sales who
14 will be doing business as Bayway Volvo. Darryl
15 Wischnewsky is the 100 percent owner of that corporation,
16 and he's here today and I would like for you to meet him
17 and his wife. If they would stand up, please. This is
18 Darryl Wischnewsky and his wife Linda.

19 I am not going to rehash a bunch of argument
20 that you have seen in our briefing, but I did to just
21 introduce them, they're here, they're concerned, they're
22 interested in the outcome of this case. They've put a lot
23 of effort, a lot of time and a lot of money in it.

24 And I have to tell you I've had the privilege
25 of representing dealers all over the State of Texas. I am

1 Darryl's biggest fan. He is a wonderful man, he will do
2 and give back in the community. He has been in the car
3 business since October of 1975, he has taken two Ford
4 stores that were under-performing and turned them around,
5 they were dealer development stores, but the biggest thing
6 that I would have to say about Darryl is that whenever he
7 has been blessed with having a successful business, he is
8 a good steward of those blessings he has received. He has
9 turned around and put that money back in the community.

10 And one thing I don't know that you have seen
11 and that is the number of things that he contributes to
12 and donates time and money to. He and his wife both are
13 very, very active in the community. They give their
14 time --

15 MR. VANDERGRIFF: Ms. White, I don't think
16 there's going to be any question that he's a great guy,
17 and no question he's a well qualified dealer. I would be
18 interested in your response to Mr. Coffey's arguments with
19 respect to the application of the Landmark Chevrolet case.

20 MS. WHITE: Sure. Ms. Freeman will be the one
21 responding to that. My purpose was to introduce Darryl
22 Wischnewsky and his wife to you and what they do in the
23 community. And obviously you don't have any questions
24 about that, so I will then at this time turn it over to
25 Ms. Freeman.

1 MS. FREEMAN: Good morning again. And this has
2 been sort of interesting to prepare for because we didn't
3 know if we were going to argue, we didn't know if we were
4 going first, we didn't know if we were going last, we
5 didn't know what you were going to hear about.

6 I think it is a shame in protestants' document
7 that they filed entitled Protestants' Exceptions they did
8 not follow Rule 215.53, they have not articulated with any
9 particularity the error of law, what was wrong with any
10 conclusion or finding of fact and how it should be
11 corrected, so I think they've done the process a
12 disservice, and I'm sorry that we are here taking your
13 time this morning, although we appreciate you being here.

14 That having been said, I can address Landmark.
15 I also, if you are interested, can blow through some of
16 the tabs very quickly in the notebook and address those
17 too.

18 Before we go into Landmark, I just want to
19 remind you that in the Grubbs case which was part of our
20 briefing, it was before the court of appeals in Austin,
21 Grubbs Nissan Mid Centuries, Ltd. v. Nissan North America.
22 The Third Court found that Grubbs' reliance on a number
23 of prior agency decisions was misplaced because those
24 decisions were made regarding specific proposals at
25 specific geographic points in specific markets at specific

1 times. The only similarity between Landmark and our case
2 is that they both have to do with Houston.

3 Landmark is almost ten years old so there's no
4 similarities that can be drawn as far as the current and
5 reasonably foreseeable economic conditions or the market
6 for automobile sales in Houston now as it was then.
7 Another distinction is that in Landmark they did not show
8 an inadequacy of representation which we have, and that's
9 one point that I do want to come back to is the adequacy
10 of representation issue because protestant has mixed,
11 mingled and sort of muddled adequacy of representation and
12 lost opportunity. They are not the same thing, they are
13 different, and I want to clear that up.

14 The level of opportunity in the Houston market,
15 our expert, Patrick Jankowski, is an economist local to
16 Houston and there was a wealth of information about
17 Houston being very vibrant. In fact, I'd submit to you
18 that if you look in protestants' packet behind tab 2 they
19 have national statistics. There were a number of tabs in
20 Dr. Manuel, the protestants' expert's report that had
21 national statistics. One of the big fights that we really
22 didn't have was that we all agreed that the relevant
23 market area before the ALJ was the Houston metro market or
24 metropolitan statistical area. You may see MSA as
25 metropolitan statistical area. And all this national data

1 that Dr. Manuel came up with was irrelevant, but it was
2 offered apparently because they didn't have anything bad
3 to say about the Houston economy.

4 In fact, we'd submit that one of the reasons
5 the inventory started to get low in the latter part of
6 2009 was because of the recovery in Houston because it
7 recovered sooner than the rest of the country. It went
8 into the recession later, the testimony was it came out
9 sooner.

10 As far as level of opportunity, Dr. Manuel's
11 own statistics showed that when he chose -- and this was
12 his choice to measure the performance in the Houston Volvo
13 market against the opportunity available for Volvo, that
14 when Houston's performance for Volvo is measured against
15 the Texas benchmark as he drew it, it was still never less
16 than 300 units short. So Bayway could have sold 157 units
17 in Houston in 2009 and still not used up all of the missed
18 opportunity that was available in Houston.

19 The protesting dealer, Landmark, had low
20 profitability. That is not the case here. Both of these
21 dealers are exceeding their expectations or Sonic's
22 expectations of their financial performance. With regard
23 to momentum, Sonic's regional controller, Ms. Tony Strawn,
24 testified that on scale of one to ten as far as financial
25 strength, she would give the dealership a nine. And if

1 she would give this dealership just a nine instead of a
2 ten, I want to own part of that dealership she'd give a
3 ten to. She even said that worst case scenario, if you
4 believed Dr. Manuel's harm analysis, that Momentum would
5 lose \$547,000 which we believe is nowhere -- I mean, it's
6 inflated and tweaked and twisted to get there, had to
7 reach to get there. We believe that figure is totally
8 inflated. But even if that were the case, she testified
9 that that would not affect Momentum's ability to provide
10 services to the luxury car consumer.

11 The distance was different in Landmark. In
12 Landmark they were talking about a dealership ten miles
13 away. Here we're talking about dealerships where the
14 drive time between Momentum and Bayway or the drive
15 distance is almost 28 miles, and the drive distance
16 between Bayway and Volvo of Houston is almost 37 miles, so
17 there's a tremendous difference there.

18 There's a difference in the number of dealer
19 areas in the Landmark case. Houston was divided into 23
20 AGSAS -- I don't recall what that acronym stands for, but
21 essentially 23 different areas of responsibility, of which
22 17 were represented. In this situation we're talking
23 about five, we're talking about an area that's without
24 representation that is greater than the population of the
25 District of Columbia and some states. And I can give you

1 more detail. There's over 1.3 million people, there's
2 over 100,000 age and income qualified people in what would
3 be proposed as the dealer area for Bayway.

4 Another difference is the product. And Dr.
5 Manuel himself said that Chevrolet -- somewhere else in
6 the testimony when they were not talking about Landmark,
7 Dr. Manuel testified that Chevrolet was a mass market
8 brand. I think it was when we were having a conversation
9 about thru-put. Chevrolet is a mass market brand, it's a
10 domestic product, it is not a small volume import product
11 like Volvo is.

12 So those were all of the different criteria and
13 all of the different factual items that they looked at in
14 Landmark, and the only thing these cases have in common is
15 they're both Houston. And so the judge was well within
16 the authority of the Grubbs case to say he was going to
17 look at specific proposals, specific geographic points,
18 specific markets, specific times, and he did not commit an
19 error of law in saying I find this totally factually
20 distinguishable from the present case and I'm not going to
21 follow Landmark.

22 Does that answer everybody's questions about
23 Landmark? Would you like me to go through and address
24 some of the protestants' tabs? Do you have anything that
25 you have questions about?

1 And I do still want to address adequacy of
2 representation, but Vice Chair Johnson, please go ahead.

3 MS. JOHNSON: I'm not sure who to address this
4 to, so I guess I would pose this question to both of you.

5 I'm looking at the map, and as I recall Volvo of Clear
6 Lake, I guess that's at the bottom, they're no longer in
7 existence.

8 MS. FREEMAN: Correct.

9 MS. JOHNSON: So that quadrant of Houston is no
10 longer served with regard to a location of a dealership.
11 Is that not correct? Could you please identify what those
12 dealerships are for me?

13 MS. FREEMAN: Okay. This is the DeMontrond,
14 this is Star Motor Cars, who is actually the closest
15 dealer to the proposed Bayway location but they did not
16 protest.

17 MS. JOHNSON: And is that on 290 or is that on
18 10?

19 MS. FREEMAN: It's on Old Katy Freeway.

20 MS. JOHNSON: Katy Freeway. Okay, got it.

21 MS. FREEMAN: And this is Volvo of Houston
22 which is out here on the industry corridor, this is
23 Momentum Volvo which is on 59 just close to the Fort Bend
24 County line.

25 MS. JOHNSON: Okay.

1 MS. FREEMAN: So if you draw a line down the
2 middle of Houston, your next Volvo dealer at this point is
3 in Lafayette.

4 MS. JOHNSON: As an eagle flies, I guess is the
5 area that is considered which allows everybody to protest
6 this. Right?

7 MS. FREEMAN: The reason they were allowed to
8 protest this is because they're within the same county.
9 It was over the 15-mile mark for both dealerships.

10 MS. JOHNSON: Okay. Thank you.

11 MS. FREEMAN: And as far as adequacy of
12 representation, lost opportunity is typically shown by the
13 number of available registrations based against a
14 benchmark. As I said, it was Dr. Manuel who chose the
15 Texas benchmark. Something he didn't discuss at trial but
16 which is hidden in his data -- and it's not hidden, I
17 don't want to be totally unfair, but it's not something he
18 really wanted to focus on -- was that if Houston had been
19 performing at the Texas benchmark, it would have been
20 selling at least 300 more Volvo units in 2009.

21 Now, adequacy of representation, the
22 protestants did not offer their own expert's opinion, but
23 Dr. Manuel defined adequacy of representation by the
24 dealer network as being measured along several dimensions.
25 Those include having an adequate number of dealership

1 facilities, reasonably sized and conveniently located,
2 offering products in sufficient quantity and variety for
3 consumer selection, offering products and services at
4 competitive prices, promoting the products and services
5 with sufficient advertising, achieving adequate levels of
6 customer satisfaction, achieving a reasonable market share
7 for the brand given local economic demographic and
8 marketing conditions, and achieving an adequate level of
9 dealership profitability to enable continued successful
10 operation and a reasonable return on investment.

11 So you'll forgive me for reading to you but I
12 want to make sure that I stay within the record.
13 "Protestants have asserted that adequacy of representation
14 in this case must be determined as to the Houston market
15 as a whole rather than a discreet subsection of the
16 market, such as the southeast quadrant of Houston. We
17 agree with the broad principle but not the
18 characterization of this southeast quadrant of Houston as
19 the discreet subsection or smaller geography."

20 There are approximately 1.3 million people,
21 roughly 22 percent of the metropolitan statistical area
22 population of 5.9 million people in that area, and the
23 Bayway primary service area, as our expert, Mr. Anderson,
24 proposed it, would be like about a 25-minute drive time,
25 and there were over 17 percent of the income qualified

1 households in Greater Houston within that area.

2 But VCNA's representation challenges in the
3 Houston metro extend beyond the southeast quadrant into
4 other areas of the market. Star Motor Cars over here, the
5 closest dealer -- is not a protestant -- they were only
6 performing in 2009 at 7.42 percent of expected as against
7 the Texas benchmark. Their performance was so bad that
8 when Dr. Manuel said well, let me figure out what Bayway
9 is going to do if their application is granted and they
10 perform like an average dealer, Star Motor Cars
11 performance was so bad he literally wrote them out of the
12 equation when he made that calculation. So there's an
13 inadequacy of representation issue there because Star
14 wasn't penetrating its own dealer area.

15 Momentum Volvo, three of their witnesses, their
16 general manager, Mr. Dugger, their controller, Ms. Stone,
17 and their Volvo sales manager, Mr. Denny, made it quite
18 clear that they didn't care what they sold, what their
19 salespeople sold, as long as they sold something. So with
20 the other three franchises they have, Land Rover, Jaguar
21 and Porsche, they don't have a particular commitment to
22 Volvo.

23 Momentum Volvo is one of only four retailers in
24 the southern region, out of 102 southern region dealers,
25 to be in VCNA's retailer improvement program for their

1 deficiencies in their service, CSI and their net market
2 share. Net market share, as we're using that term now, is
3 the measure of the degree to which the dealership is
4 penetrating its own area of responsibility, and Momentum
5 is missing opportunities within its own area of
6 responsibility, according to Mr. Seidman, who is with
7 VCNA.

8 And I know you're probably going: Well, that's
9 the manufacturer, they're never happy. This is for 2009,
10 only 65 of the Momentum area registrations, there were 116
11 Volvo registrations, not Momentum sales, 116 Volvo
12 registrations in Momentum's dealer area, only 65 of those
13 were sold by Momentum, ranking them as 56 percent
14 effective within their dealer area. They actually
15 registered 287 sales within the Houston MSA so that only
16 22.6 of Momentum Volvo's MSA sales were within their
17 dealer area, but Momentum made a total of 355 new Volvo
18 sales in 2009.

19 MR. VANDERGRIFF: Ms. Freeman, I'm going to
20 make sure and give you a couple of minutes to wrap up.

21 MS. FREEMAN: Basically, as far as adequacy of
22 representation, we see similar issues with Volvo of
23 Houston. Volvo of Houston was also not penetrating its
24 dealer area. Another thing that goes into
25 adequacy of representation is what face does the

1 dealership put on the brand in dealing with the customer,
2 and Momentum Volvo actually pressures customers, they call
3 it a mandatory service charge, but when you buy a new
4 Volvo from Momentum Volvo, unless you vehemently object,
5 they are going to sell you a \$497 coupon book with things
6 like discounted oil changes. So that doesn't really, we
7 feel, reflect well on Volvo.

8 So these are the kinds of things that go into
9 adequacy of representation, and it's throughout the metro.
10 There was no testimony, no substantial testimony
11 particular to DeMontrond, but there are adequacy of
12 representation issues well beyond the southeast quadrant,
13 and there is lost opportunity quantified by Dr. Manuel in
14 the market.

15 MR. WALKER: Can I ask you one question just
16 real quick and we'll finish up. Would you define dealer
17 area to me?

18 MS. FREEMAN: Dealer area, different
19 manufacturers use it in different ways, area of
20 responsibility or primary service area.

21 MR. WALKER: In this particular case.

22 MR. VANDERGRIF: Area of primary
23 responsibility.

24 MR. WALKER: So where is it in this particular
25 case that you're citing it in your rebuttal here?

1 MR. VANDERGRIFF: They have the market as a
2 whole and then a section of the market. Go ahead. Sorry.

3 MS. FREEMAN: Basically, the manufacturer says
4 this is the Houston metro and so what we're going to do if
5 we've got five dealers is we're going to divide it up
6 among the five dealers. And I really am going to get to
7 the answer to your question, I'm just trying to give you a
8 little bit of background. And so if the Houston market is
9 to sell a thousand cars, then we're going to assign a
10 responsibility to each one of those five areas for a
11 certain amount of that thousand cars.

12 MR. WALKER: Where is the 56 cars in the dealer
13 area to Momentum that you mentioned in your comments?

14 MS. FREEMAN: I don't think that's the one.
15 The area of responsibility, each side's expert witness
16 drew a different area of responsibility.

17 MR. WALKER: So it's not a defined border.

18 MS. FREEMAN: Volvo currently has a defined
19 area of responsibility and a map. Let me find that for
20 you, just give me a minute. Each of the experts did a
21 little bit different area of responsibility because they
22 might have done it by drive time or they might have done
23 it by closest dealer.

24 MR. WALKER: It's not something that's defined
25 by the department here.

1 MR. VANDERGRIFF: No. It's defined by the
2 manufacturer. As I'm understanding it, the experts all
3 varied it a bit, but the assigned area of responsibility
4 is by the manufacturer to their franchise dealer, so they
5 give them an assigned area of responsibility.

6 MS. FREEMAN: And Volvo calls it an AOR.

7 MR. WALKER: Do they change that as things
8 change? When Clear Lake Volvo went out of business and
9 you're using this defined area, did that change the area
10 of responsibility for Momentum?

11 MS. FREEMAN: Mr. Simon testified that Volvo
12 has not reconfigured any AORs yet because they were
13 planning on filling Volvo of Clear Lake's area of
14 responsibility.

15 MR. VANDERGRIFF: So they left it as an open.

16 MR. WALKER: So it is an open.

17 MS. FREEMAN: It's an open. I'm sorry. I
18 wasn't following your question.

19 MR. WALKER: That's answers my question.

20 MS. FREEMAN: Are there any other questions?

21 (No response.)

22 MR. VANDERGRIFF: Mr. Coffey, you've got five
23 minutes.

24 MR. COFFEY: Thank you, Mr. Chairman.

25 Lest you guys get the wrong impression that

1 there's something wrong with my clients, I want you to
2 know that the testimony in this record is all of the Volvo
3 witnesses raved about them, said they were good dealers
4 with great attitudes and they were improving by leaps and
5 bounds all the time and they were in substantial
6 compliance with their franchise agreements. So don't be
7 misled that there's anything wrong with my clients,
8 they're a good dealer.

9 MR. VANDERGRIFF: Just like I said about the
10 previous dealer, I don't think that's an issue. Sonic is
11 a national chain of great reputation, and Mr. Smith and
12 all the people underneath him do great work.

13 MR. COFFEY: Thank you, Mr. Chairman.

14 I'd like to bring the statistics home a little
15 bit. It was pointed out to you that we used some national
16 statistics on the declining nature of the car industry
17 over the last four or five years, and yes, that's true,
18 but it's also true in Houston.

19 If you will look at tab 4 of the notebook that
20 we provided you, you will see the import competitive
21 luxury registrations in the Greater Houston area and the
22 Volvo registrations in the Greater Houston area over the
23 last four or five years. The left side of the page are
24 the luxury import registrations. You can see that between
25 2007 and 2010 they declined 26.04 percent. Now, that's

1 the product segment in which my client's dealerships
2 compete, down 26 percent.

3 Over here on the right side of the page, the
4 Volvo registrations which is the actual product that we're
5 talking about, between '07 and 2010 down 43.31 percent in
6 the Greater Houston area. That means 43 percent less
7 people are buying Volvos in 2010 than they did in 2007,
8 and this is the environment that they want to put another
9 Volvo dealer in. It's not time for another Volvo dealer.

10 Let my clients recuperate from the recession, please
11 before you stick hyper competition in their market area.

12 Now, I want to talk about the Landmark case
13 because in my opinion this is probably the most important
14 case, at least for an at point case, that ever came out
15 of this agency. It's the best articulated, it is the most
16 carefully thought out and studied of any that I've ever
17 seen. Usually it's just slam dunk, applicant wins because
18 that's the way it is, but Ms. Burnett actually really
19 studied what was going on.

20 She saw that General Motors was basically
21 trying to sneak one past the agency by coming up with a
22 benchmark market share that wasn't justified and that
23 nobody thought was justified except General Motors, and
24 trying to apply it to the Houston market and trying to
25 take inadequacy of representation in a small segment of

1 the market and translate that into the entire market which
2 is what she said we cannot allow this to happen anymore.
3 And so she put a stop to it in the Landmark case.

4 And all of the points that she made in her PFD
5 are extracted and put on paper in tab 10 of your notebook.

6 And the stuff I've already told you, the Texas market
7 share was rejected for the Houston metro market, the
8 relevant market area was the larger Houston market as
9 opposed to any discreet segment of it, like the southeast
10 quarter. That's really not at issue, it's representation
11 in the whole.

12 And if I could approach that map for just a
13 minute, I want to kind of show you what's going on here.

14 MR. VANDERGRIFF: You've got two minutes.

15 MR. COFFEY: Okay. You can see a very odd
16 dispersal pattern of dealerships in this market. We've
17 got Star Motor Cars and Volvo of Houston sharing the same
18 AOR. And in answer to Mr. Walker's question about AORs,
19 what that is it's an area of responsibility defined either
20 by census tracts or zip codes, and what the manufacturer
21 tries to do is identify those geographies that are closest
22 to you and should be subject to your dealership's reach.

23 At any rate, you've got these two sharing the
24 same AOR, DeMontrond is okay, Momentum is okay down here,
25 and basically what you need is one of these two to move

1 down there to take care of the southeast quadrant. Well,
2 have you ever tried to get a dealership to move? It's
3 probably impossible. But that's their problem, it's a
4 dealer placement issue. It's not an inadequacy of
5 representation in the market as a whole issue.

6 And that's all we've been saying, trying to
7 tell the SOAH ALJ, please understand what the board has
8 been trying to do over the last ten years in making some
9 sense out of how handle these at point cases, and that is
10 you look at the market as a whole, are they achieving
11 their benchmarks, are they achieving their objectives. If
12 they are they don't need another dealer, even though they
13 could provide a little more convenience to that discreet
14 segment of the market. You could look at any part of the
15 market and say hey, let's stick another dealer in there,
16 we'll get a few more registrations, we'll create a little
17 more convenience and maybe boost our CSI in the market a
18 little bit.

19 But that is not good for the market as a whole
20 because it takes business away from those who have
21 invested in the market and how are making their living
22 there and they should be considered as well as the
23 applicant who comes along and wants to interject himself
24 into that market.

25 So all we were telling the SOAH ALJ is do what

1 the board has done in the past, please be respectful of
2 their decisions and apply it to this case, and the ALJ
3 just did not do that. He jumped at any opportunity. He
4 knew he had to find lost opportunity in the market, so he
5 jumped at any opportunity to find it by applying the wrong
6 benchmark to the wrong data and coming up with some
7 idiotic conclusion that there's lost opportunity in the
8 Houston market. Heck, you've got so many dealerships in
9 Houston. That's my point.

10 MR. VANDERGRIFF: Thank you, Mr. Coffey.

11 MR. COFFEY: Thank you, sir.

12 MS. FREEMAN: May I respond?

13 MR. WALKER: No. Let me respond first. You
14 just said when you went up to this map that the problem is
15 not the number of dealerships but the placement of the
16 dealerships and getting one of these dealers to move is
17 impossible.

18 MR. COFFEY: That's true.

19 MR. WALKER: So you're telling me by saying
20 that that the consumer should suffer the consequences of
21 dealers not wanting to move their dealership to service
22 the rest of the people in the city of Houston?

23 MR. COFFEY: I'm telling you that there is
24 adequate representation in the market.

25 MR. WALKER: Well, you represent a dealer. Why

1 don't you move your dealership down here?

2 MR. COFFEY: I represent a lot of dealers.

3 MR. WALKER: Why don't they move one of these
4 dealerships?

5 MR. COFFEY: Maybe they could get one of them
6 to move, it hasn't been tried. They're trying instead to
7 bring another dealer into the market. Why don't they at
8 least try what you're suggesting first, get somebody to
9 move?

10 MR. WALKER: Well, it would have been one of
11 your clients' opportunity to make that request.

12 MR. VANDERGRIFF: The only major issue here is
13 that's not our purview to make those decisions. Our role
14 is pretty clear and fairly limited.

15 MS. JOHNSON: But I have to agree with Mr.
16 Walker, they're making the argument that these guys, it's
17 difficult to move or impossible to move, and I don't
18 understand that. They've had since 2009 to move into that
19 area and they didn't. Did they apply to move? That's my
20 only question.

21 MR. VANDERGRIFF: I appreciate these questions.
22 If we were hearing this case as a new case, then it might
23 be a different question for us, but it's not.

24 MR. INGRAM: Mr. Chairman.

25 MR. VANDERGRIFF: Yes.

1 MR. INGRAM: The protestants' reliance on the
2 misapplication of the Landmark case is one of the primary
3 points. Correct?

4 MR. VANDERGRIFF: Yes. That is the primary
5 point.

6 MR. INGRAM: And I personally have a hard time
7 seeing how those two things, reliance upon that works in
8 this case. So Chief Rodriguez.

9 MR. WALKER: One of you go.

10 MR. RODRIGUEZ: I think we want to. Mr.
11 Chairman, if the opportunity presents itself now, I would
12 renew my motion, and that is to go with the ALJ's
13 recommendation that the protest be dismissed and modified
14 as in the proposed final order, sir.

15 MR. INGRAM: And I'll second that.

16 MR. VANDERGRIFF: We have a motion and a second
17 to approve the ALJ's preliminary final decision with the
18 modifications requested by staff. Do we have any further
19 discussion by the board?

20 (No response.)

21 MR. VANDERGRIFF: I will call for your vote,
22 please. A vote in favor is to approve the PDF from the
23 ALJ as corrected by staff on technical errors. All those
24 in favor please raise your right hand.

25 (A show of hands.)

1 MR. VANDERGRIFF: All those opposed.

2 (No response.)

3 MR. VANDERGRIFF: Thank you very much.

4 MR. BRAY: Excuse me. Can you go ahead and
5 report the vote?

6 MR. VANDERGRIFF: I apologize. The vote
7 carried unanimously, six to zero of all the members
8 present.

9 Appreciate the parties being here.

10 With that, we have come to the end of our
11 agenda. We don't really have any need for an executive
12 session, so is there any board member who wishes to bring
13 any other matter up today?

14 And I'll also ask if there's any member of the
15 public. I didn't ask this earlier, we had this yesterday
16 but it is a new day. I don't see any cards for that.

17 I would be pleased to entertain a motion to
18 adjourn.

19 MR. BUTLER: Mr. Chairman, I make a motion we
20 adjourn this meeting.

21 MS. JOHNSON: Second.

22 MR. VANDERGRIFF: A motion from Director
23 Butler, second from Vice Chair Johnson. Please raise your
24 right hand in support of the motion.

25 (A show of hands.)

1 MR. VANDERGRIFF: The motion carries
2 unanimously. We are adjourned.

3 (Whereupon, at 10:30 a.m., the meeting was
4 concluded.)

C E R T I F I C A T E

MEETING OF: Texas DMV Board

LOCATION: Austin, Texas

DATE: July 14, 2011

I do hereby certify that the foregoing pages, numbers 177 through 243, inclusive, are the true, accurate, and complete transcript prepared from the verbal recording made by electronic recording by Penny Bynum before the Texas Department of Motor Vehicles.

07/22/2011

(Transcriber) (Date)

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