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STATE OF CALIFORNIA  
NEW MOTOR VEHICLE BOARD

In The Matter Of The Protest Of:

SANTA CRUZ NISSAN, INC., dba  
SANTA CRUZ NISSAN,

Protestant,

v.

NISSAN NORTH AMERICA, INC.,

Respondent.

Protest No. PR-2358-13

**RESPONDENT NISSAN NORTH  
AMERICA, INC.'S REPLY BRIEF  
TO PROTESTANT'S OPENING  
BRIEF**

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## I. INTRODUCTION

Protestant, Santa Cruz Nissan, Inc. dba Santa Cruz Nissan (“Protestant” or “SCN”) has filed a post-hearing brief setting forth a contradictory and often misleading version of the evidence presented both by itself and by Respondent, Nissan North America, Inc. (“Respondent” or “Nissan”) at the merits hearing in this matter. Protestant’s attempt to reformulate the record demonstrates a lack of support for its position, as Protestant attempts to shift any responsibility for its poor sales performance away from itself and onto Nissan. Despite every “justification” Protestant offers for its failure to meet its sales performance obligations, even its own expert was compelled to testify that, according to his analysis (with which Nissan disagrees), SCN makes only about *one-half* the sales it is expected to make from the business available to it. On the other hand, using Nissan’s uniformly-applied RSE standard, of which Protestant was aware for years, Nissan demonstrated that Protestant’s is capturing only about *one-third* of the business available to it. SCN’s chronically poor performance (since 2005) in of itself is sufficient to demonstrate good cause to terminate the Nissan franchise – however the record supports much more in terms of demonstrating good cause. Nissan has also shown that Protestant, through its consistently poor sales practices, lack of direction and failure to conveniently meet customers’ needs in its PMA, has failed to operate the dealership in a manner beneficial to the public welfare. Further, Protestant’s breaches of the Nissan Dealer Sales and Service Agreement (“Dealer Agreement”) are substantial and material. Finally, there is nothing in the record to support that Protestant itself has either made the investment necessary or has a permanent investment in any assets or property of the dealership. Notwithstanding that clear record, Respondent cannot allow Protestant’s brief, which is rife with unsupported argument and distraction, to stand unchallenged.

For example, in its attack on the RSE standard, Protestant erroneously cites an amended and inapplicable statute (Vehicle Code § 11713.13(g)) which became effective long *after* the Notice of Default (“NOD”) and Notice of Termination (“NOT”) in this matter were issued by Nissan, as well as *after* the instant Protest was filed on January 22, 2013 and *after* discovery was completed.<sup>1</sup> In fact, the statute did not become effective until January 1, 2014 – the same month that the merits hearing in this matter began. *Stats. 2013, c. 512 (S.B. 155), § 19*. There is no indication that the Legislature intended the amendment to the statute to be retroactively applied (as Protestant apparently believes), and statutes are presumed to be only prospective in effect, unless specifically stated to be retroactive. Civil Code § 3. Further, there is no indication that the new amendment to the statute even applies to protest proceedings, as it is stated to apply to incentives and other types of manufacturer programs. Moreover, the Protest was filed solely under the provisions of California Vehicle Code § 3060, and it was never amended to cite to the provisions of the amended statute, which was subsequently enacted. Protestant addresses none of these issues, merely citing the new statute and claiming an effect on the proceedings in this matter.

In addition, Protestant’s attacks on the RSE standard and its reliance on its expert’s espousment of a Gravity Model are flawed. For example, Mr. Stockton’s analysis of sales performance was based on a *California* standard that Nissan *never* used to evaluate Protestant’s performance. (RT IX, 263: 21- 264:10; RT I, 78: 20-25). Further, Mr. Stockton admitted that *he never used the Gravity Model* to evaluate Protestant’s performance, and further admitted that the Gravity Model is, to quote him, “apples to oranges” to the concept of a PMA (RT X, 30:10-22), which every manufacturer uses to evaluate the performance of its dealer network. Again,

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<sup>1</sup> The case law also provided in Protestant’s brief is for authority not used for the applicable law in this termination matter. *Piano v. State of California*, 103 Cal. App. 3d 412, 417 (1980) is an establishment matter interpreting Vehicle Code § 3063 and not the applicable law in this matter (Vehicle Code § 3061).

Protestant ignores these limitations and mis-cites the testimony and evidence in this matter.

Further, Protestant claims in its Opening Brief at the bottom of page 16 that its expert performed a regression analysis considering the “Western Contiguous PMAs” (an area that is undefined and which *neither party’s expert nor Nissan* used to evaluate any dealer’s performance) finding that, “The Santa Cruz Market demonstrates a ‘brand bias’ with respect to Nissan products ... [and that ] the approximate effect of the brand bias is 18%.” However, this claim is completely contradicted by Protestant’s expert, Mr. Stockton who, in fact, testified to the exact opposite effect, i.e., that he could not make such a calculation:

“There’s -- unfortunately, a lot of the factors that we looked at, Your Honor, *they’re not conformable* in the sentence where I could say, well, we have 18 percent because of the brand biases, we have 30 percent because of the out commute and the pump-in, we have 13 percent of this, because they are all calculated in different ways (i.e., calculated in different ways by Mr. Stockton himself). *And they have to be, because of the limitations of the data.*

(RT IX 249:16 – 250: 3). [Explanation and emphasis added.] Thus, Protestant’s claim is directly contradicted by the evidence in the record.

Moreover, Protestant attempts to impute several “straw man” arguments to Nissan (that Nissan never made), so that it can knock them down and “prove” that it cannot be held to a reasonable performance standard. Examples include the following, which is not an exhaustive list:

- that Nissan “requires” all of its dealers to conform to its NREDI facility image program and “requires” all dealers over a certain planning volume to be exclusive – when the evidence and testimony were directly to the contrary – there is no such requirement (RT II, 191: 15 – 193:17; RT III, 84:19- 85:23, 93:20 – 94:13; Resp. Exh. 241, 43:25 – 45:2);
- that the Nissan Market Study *recommendations* made after the NOT was issued were

somehow transformed into *requirements* – that Protestant, of course, “cannot” meet, though Jim Courtright testified that he knew the recommendations were not requirements (RT I, 148: 11-21; RT XI, 211:15 – 212:13);

- that Nissan’s PMA revisions after the 2010 Census, which included a change to Protestant’s PMA , was somehow unfair to Protestant – despite Mr. Stockton’s admission that the new PMA configuration was appropriate and did not affect his analysis (RT X, 6: 14-25 – 7: 1-2, 179:15 – 180:10);
- that Nissan’s change to the SSER standard (after the NOT was issued) somehow invalidates the RSE standard used to evaluate Protestant’s performance – despite the fact that Protestant’s performance is severely deficient under either standard (Resp. Exh. 200.C at Bates stamp NNA04716; RT IV, 86: 3-19, Resp Exh. 200.F) and was determined to be deficient by Protestant’s expert, using a California standard (RT IX, 275: 12-20, Resp. Exh. 238 under columns labeled “Dealer’s Sales”);
- that Nissan *cannot ever* replace Protestant, based on *one* potential buyer’s brief efforts for less than one month to locate property in the area – despite unrefuted testimony by Nissan employees that a replacement dealer could and would be found and appointed; (RT I, 131: 21-- 133: 25; Protestant Exh. 24, 36: 23-24; RT I, 135: 22 - 137: 3;Protestant Exh. 24, 38: 15-21; RT I, 137: 4-6);
- That Nissan had a duty to present a “list of buyers” to Protestant, despite Protestant’s failure to seek a buyer on its own, and Protestant’s later questionable claim that its other franchises are not viable without Nissan – leading to the logical conclusion that Protestant didn’t really intend to sell its Nissan assets in the first place (RT XII, 203:16 – 204:8), and
- that the Ocean Honda sales performance in the market is *due to the facility* in which it is housed, and not to the operator, despite the fact that a previous owner built the facility, and sales did not improve to current levels until the current owner had been in business for some time. (RT XI, 91:19- 93:5; RT III, 117:17 – 119:3; RT II, 267:20- 268:5).

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All of these “straw man” arguments are merely intended by Protestant to distract from the true deficiencies of its position, i.e., that its sales performance is so poor that even its own expert could not devise a standard or an analysis that would demonstrate Protestant, for any of the past 5 years, has captured an adequate amount of business compared to the business available to it. Vehicle Code § 3061(a). Most telling is that despite receiving a Notice of Default providing a 6 month period within which Protestant needed to cure its deficiencies, Protestant failed to make any specific changes to its operations or engage in any material effort to improve its Nissan sales performance, in an effort to avoid the termination of its Nissan franchise.

Indeed, when it received the NOD (which was hand-delivered by Nissan representatives to Jim and Lee Courtright (RT II, 285:22 – 286:5; Resp. Exh. 209 at bates stamp NNA00030; Exh. J-2 at bates stamp NNA00056 – NNA00061)), Protestant continued on with business as usual, as though the Courtrights didn’t realize or didn’t care about the gravity of the situation, despite *years* of oral and written warnings from Nissan, that its severe underperformance could not continue. The following actions and inactions after receipt of the NOD demonstrate Jim Courtright’s inability and/or lack of concern about the Protestant’s abysmal sales performance and lack of any urgency to reverse the course of that performance, in order to avoid termination of the Nissan franchise:

1. Failing to amend the dealership’s annual sales objective which had been written on a white board just two months before (RT XII, 111:21 – 112:2); –
2. Failing to set a written sales objective for the dealership (RT XII, 24:25 – 25:6, 80:1-9, 114:10 – 115:2);
3. Failing to set a separate sales objective set for Nissan, despite the gravity of the situation (RT XII, 79:15 – 80:12);
4. Failing to set a separate sales goal set for any individual salesperson to sell Nissan vehicles, such that a salesperson could theoretically meet their sales goals

- by selling any of the other 3 line-makes at the dealership, and not sell a single Nissan vehicle (RT XII, 108:22 – 109:10);
5. Failing to have a method of tracking the “ups” (customer visits - as defined in the Exh. J-14) for Nissan (or for any other brand) at the dealership, in order to determine whether the increased advertising expenditure was effective in generating customer traffic at the dealership (RT XII, 126:23 – 129:2);
  6. Jim Courtright refusing to accept additional allocations of vehicles because of color or trim despite having a deficiency of the model in inventory (RT II, 277:11 – 278:13);
  7. Failing to hire any Hispanic salespersons (and failing to employ any salesperson who speaks Spanish for at least 6 years), (RT XI, 72:5 – 23);
  8. Failing to advertise in Spanish – despite a large Hispanic population in its PMA (which dramatically increased with the addition of Watsonville (81% Hispanic) to the PMA – an area in which a language other than English is spoken in the majority of homes) (RT XI, 30:2 – 15; Exh. J-12A – J-12C);
  9. Failing to change the dynamic (either by changing the advertising or the salespeople) when the dealership was not getting sufficient customer traffic at the sales closing ratio being achieved in order to meet the sales objectives *set by Protestant* for the dealership (RT XI, 116:4 – 117:14); and
  10. Failing to open for service on Saturdays, despite the six recommendations by Gary Inman to Jim Courtright and two to Lee Courtright, and despite the correlation of increased service visits with additional sales. (RT VIII, 114:18 – 116:2).

Not surprisingly, Protestant’s performance continued to decline throughout the NOD cure period, from 51.6% to 38.3% (RT I, 120: 25-- 121: 18; RT XI, 119:19 – 24) and during the NOD extension period, until at year-end 2012 it had dropped to 32% (Resp. Exh. 238). Some

changes were finally made by Protestant, but only well after the NOD and NOD extension had expired, and after the NOT was issued but even well after this Protest was filed – with some of the changes finally being made just before and some after the merits hearing began – mere window dressing for the Board.

Protestant itself has made no permanent investment in the dealership, as the facility is owned by a separate trust, which Lee Courtright adamantly testified is separate and apart from the dealership corporations. (RT XII, 207:3 – 9). In any event, Lee Courtright has owned several dealerships in the past, and has retained the real estate underlying many of them, protecting his investment. (RT XII, 168:22 – 172:8). Similarly, if Protestant’s Nissan franchise were to be terminated, Protestant would not lose any investment. Protestant presented much testimony that real estate in the City of Santa Cruz is scarce and very expensive, so the amount invested by the trust in the dealership facility, which is basically paid for, is safe. (RT XI, 160:22 – 161:20). Further, despite Lee Courtright’s belated and unsupported testimony that the remaining franchises would not be “viable” without Nissan, Protestant’s willingness to consider selling the Nissan dealership assets in December, 2012 belies their current claim. (RT XI, 148:24 – 151:18).

Despite Protestant’s statements to the contrary and in addition to its abysmal sales performance for at least the past 6 years (Resp. Exh. 200. C at Bates stamp NNA04716), Protestant is simply not serving the public in the Santa Cruz PMA. In fact, Protestant acts as though its entire market is only the City of Santa Cruz. In this regard, Protestant called as a witness the City Manager for Santa Cruz, Martin Bernal, who testified as to the tax revenue *the City* would “lose” if Protestant’s Nissan franchise were terminated (and the tax revenue *the City* would “gain” if a replacement Nissan dealer sold an adequate amount of Nissan vehicles). No effort was made by Protestant to address the issues of the other cities or the unincorporated Santa

Cruz County areas in the PMA. Mr. Bernal admitted that residents of those other areas also need public services – which would be funded by the tax revenue generated by a replacement Nissan dealer located there. Of course, Protestant has failed to serve the public by largely ignoring the Hispanic market in its PMA – which comprises 20% of the City of Santa Cruz, 30% of Santa Cruz County, and 81% of the City of Watsonville. The public, therefore, would be better served by a replacement Nissan dealer. (Vehicle Code § 3061(d)).

Finally, contrary to Protestant’s claims in its opening brief that Protestant “meets all of its obligations under the terms of the franchise agreement” (Protestant’s Opening Brief, 32:G), Protestant has also failed to fulfill its obligations under the Nissan Dealer Agreement. For example, Protestant has failed to “actively and effectively promote the sale of Nissan Products to the public”. Section 3.F of the Standard Provisions of the Dealer Agreement further requires Protestant to maintain a sales organization that includes a sufficient number of qualified and trained sales managers and sales persons to enable Dealer to effectively fulfill its responsibilities under Section 3 of the Dealer Agreement. (Exh. J-1 at Bates stamp NNA05626.) As shown in Respondent’s Opening Brief and as shown below, Protestant has materially breached the terms of the Nissan Dealer Agreement.

## II. ANALYSIS

### A. CHARACTERIZATION OF FRANCHISE TERMINATION AS A FORFEITURE IS INCORRECT

#### 1. **The Law of Avoiding “Forfeitures” Does Not Apply To Franchise Terminations, As The Process Of Determining Good Cause Eliminates Any Forfeiture Concerns.**

In its Post-Hearing Brief, Protestant makes references to the termination of its Nissan franchise as constituting a “forfeiture.” This characterization is false. While certain types of forfeitures are sought to be avoided under California law, if a statutory scheme is already in

place to protect against an unfair loss, the outcome under that statutory scheme is not due an extra layer of protection,.

The types of forfeitures which should to be avoided are found *in situations in which the relationship between the parties is not statutorily regulated*, and consist of damages, penalties or losses of rights that are not proportional or appropriate compared to the breach or offense that a party has committed. *Smith v. Allen* (1968) 68 Cal. 2d 93. In situations where the relationship between the parties and the action being taken *are* regulated by statute, however, any *additional* forfeiture concern is not appropriate. *Smith v. Allen, supra* 68 Cal. 2d at 96 (“[a] comprehensive legislative scheme [is] designed to provide adequate protection . . . against forfeitures”). In *Smith*, the court held that because a default on the purchase of real property was under a deed of trust, the statutory scheme regulating the foreclosure process, requiring a notice of default, a cure period, a public foreclosure sale and other protections, provided the vendee/borrower ample opportunity to protect against what might otherwise might be seen as a forfeiture. *Id.*

In this case, the franchise relationship between dealers (franchisees) and manufacturers (franchisors) is heavily regulated by the California Vehicle Code, especially regarding the termination of the franchise agreement between the parties. Manufacturers are required under Vehicle Code § 3060 to give a notice of termination with very specific language, in 12-point bold font. Within a specified number of days after receipt of the notice (not mailing), the franchisee may file a protest, and the parties then participate in full discovery and a merits hearing under Vehicle Code § 3066. At the hearing, the manufacturer must demonstrate “good cause” under Vehicle § 3061 to the Board before it may terminate the subject franchise agreement. This burden imposed on manufacturers works to avoid terminations based on immaterial or insubstantial breaches of dealer agreements, and the code sets forth the factors that this Board must consider before finding good cause. Vehicle Code § 3061 (a) – (g). Any

imposition of an additional or higher standard by the Board, as implied by Protestant and based on some amorphous desire to avoid a “forfeiture,” for which the manufacturer has already demonstrated good cause for termination, exceeds the power of this Board, given the statutory scheme already in place to avoid forfeitures. *Smith, supra*, at 96.

**B. MOREOVER, EVEN IF NO PROTECTIVE SCHEME IS IN PLACE AND A FORFEITURE SUBJECT TO PROTECTION IS FOUND, APPROPRIATE PAYMENT MUST BE MADE BY THE BREACHING PARTY FOR THE FORFEITURE TO BE AVOIDED**

In cases in which a statutory scheme to protect against forfeitures does not exist, the law requires that the breaching party make *full compensation* to the non-breaching party – the forfeiture arises only from a penalty or loss that exceeds the damage that the non-breaching party caused by its breach. Civil Code § 3275. *See, e.g., Atkins v. Anderson* (1956) 139 Cal. App. 2d 918, 920 (citing Civil Code Section 3275). Here, Protestant has not offered to compensate Nissan for the losses of sales and customers that Nissan has endured while Protestant underperformed and breached its contractual obligations. Neither does this Board have the jurisdiction to award damages caused by Protestant’s underperformance – such claims must be brought in court. Vehicle Code § 11726; *Hardin Oldsmobile v. New Motor Vehicle Board* (1997) 52 Cal. App. 4th 585, 595; *Mazda Motor of America, Inc. v. New Motor Vehicle Board* (2003) 110 Cal. App. 4th 1451.

Since the unrefuted evidence demonstrated that Protestant has been below 56.3% of average performance since at least 2009 and is now below 32% of average, the amount owed by Protestant to Nissan would be substantial. Nissan estimates it has lost more than 909 sales since January, 2008 due to Protestant’s failure to perform its sales obligations effectively. (Resp. Exh. 238 under column labeled “Net Gain/Loss” for CY 2012 and Exh. J-4 at Bates stamp NNA00049 for CY 2008 through CY 2011).

In short, Nissan has shown that it has good cause to terminate its Dealer Agreement with Protestant, and any additional “concern” about or imposition of an additional barrier to avoid a “forfeiture” is not warranted.<sup>2</sup>

**III. PROTESTANT DOES NOT CAPTURE AN ADEQUATE AMOUNT OF BUSINESS COMPARED TO THE BUSINESS AVAILABLE TO IT IN THE SANTA CRUZ PMA. (VEHICLE CODE § 3061(A))**

**A. Protestant’s Efforts to Discredit the RSE Standard Fall Short of Establishing That Its Sales Performance Is Adequate under Any Standard.**

At the merits hearing in this matter, only Respondent presented any evidence going to the good cause factor of comparing Protestant’s sales performance compared to the business available in the market. Protestant agreed in Section 3.B of the Standard Provisions of the Dealer Agreement to be evaluated by Nissan on the basis of reasonable criteria as Nissan may develop from time to time. (Exh. J-1, Standard Provisions, NNA005625 at Section 3.B.) The RSE standard, described in Exhibit J-14 as Dealer’s sales performance as compared to expected sales, based on a regional average, for various periods of time. All of a Dealer’s sales are counted, no matter where they are made in the U.S., compared to the Competitive Registrations in the Dealer’s Primary Market Area (PMA). This standard is contained in the Nissan Dealer Agreement, at Section 3.B.3 of the Standard Provisions. (Exh. J-1, Standard Provisions, NNA005625 at Section 3.B.3). The evidence presented by Nissan demonstrated that under the RSE standard, a reasonable measure devised for the purpose of measuring sales performance compared to the business available, Protestant’s performance is, and has been for many years, wholly inadequate.

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<sup>2</sup> The Board may not act outside the authority granted it under the California Vehicle Code. See attached Exhibit “A” Ford Motor Co. v. New Motor Veh. Bd. Cal., No. 96CS0247 (Cal. Super. Ct. Jan. 29, 1997) at page 8. (remanding Board decision sustaining termination protest on ground that, inter alia, Board acted outside authority by adopting per se rule that poor sales performance alone is not good cause for termination) Cal. Vehicle Code §§ 3060, 3061, 3066.

Not only have Nissan representatives written Protestant performance letters for many years on this subject (Resp. Exh. 206; RT XII, 203:16 – 204:8), the contact reports admitted into evidence demonstrate that several Nissan Dealer Operations Managers have visited or contacted the dealership on a monthly basis, reviewed Protestant’s sales performance each time under the RSE standard and made suggested changes to improve Protestant’s sales. (Resp. Exh. 209). The contact reports also demonstrate that Protestant’s owners have admitted to serious underperformance for many years. (RT XII, 7:13 – 9:14). As demonstrated by Nissan, Protestant’s segment-adjusted RSE sales penetration has been well below average from 2006 to the present, and since 2007, each subsequent full calendar year (“CY”) has been lower than the previous year, (with the exception of CY 2011):

CY 2005	113.3%
CY 2006	68.3%
CY 2007	84.4%
CY 2008	81.8%
CY 2009	56.3%
CY 2010	45.9%
CY 2011	51.6%
CY 2012	32.0%

(Resp. Exh. 200.C at Bates stamp NNA04716).

Protestant admits that, in the past, it has been sales effective in this market as recently as 2005, then reaching 113% of RSE. (RT XI, 17:23 – 18:2). Protestant’s last sales performance above 100% RSE was achieved from the current location and facility of the dealership with the current owners. (RT II, 157: 20-27 – 158: 1-4). This fact alone demonstrates that the alleged “causes” of underperformance proffered by Protestant in this case do not explain it: the

demographics, out-commute, mountains, ocean, greenbelt, etc. have been in place both long before and after Protestant was last sales effective. None of these factors explain the downward spiral of this dealership's sales performance. As Mr. Frith testified, the only remaining explanation is the ineffectiveness of dealership operations, which are generally in control of dealership management. (RT IV, 152:20-25 – 153: 1-17).

**B. Protestant's Expert Admitted That He Could Not "Get To A Precise Number With A High Degree of Reliability" To Show The Business Available To SCN In The Santa Cruz Market.**

Despite producing an initial report, a rebuttal report and even a surrebuttal report in this matter, Protestant's expert, Ted Stockton, ultimately admitted he could not calculate a reliable estimate of the business available to SCN in the Santa Cruz PMA. (RT IX, 252: 4-9). Rather than provide the Board with any useful, reasonable guidance on this issue, Mr. Stockton testified that he saw his role as merely developing an analytical process for lawyers and judges to use (not an "institutional" one for a manufacturer's use in working with dealers) that looks at factors selected by him to "run a leg of the relay" *without drawing any conclusions*. (RT IX 234: 15-23). In fact, Mr. Stockton admitted that he had no "canned" standard that he would apply to measure dealer sales performance. (RT IX, 237: 2-15, 234:10 – 19.)

Though Protestant's expert agreed that the RSE standard is his "preferred starting point" (RT IX 241: 11-12), he denied knowing what standard would be appropriate to measure the performance of a dealer's business in comparison with the business available in a franchise termination case. (RT IX, 233:11 – 234: 9). Notwithstanding this admission, however, Protestant's expert chose *not* to use Regional Sales Effectiveness (RSE) (contrary to what Nissan did) as his "yardstick" but used a California average instead (contrary to the statements of Protestant in its Opening Brief at p. 13, 15). (RT IX, 263: 21- 264:10). As a result, Mr. Stockton

describes his analysis as a “relay” race starting with RSE, but one that goes nowhere and fails to provide an analytical “finish line” to the Board, so as to allow it to determine Protestant’s estimate of the business transacted compared to the business available, under the good cause factor set forth in Vehicle Code §3061 (a).

Any attempt to follow Mr. Stockton’s analysis is hopelessly confusing, and ultimately pointless. With certain assumptions made about the average “pump-in” ratio, Mr. Stockton tries to “start us down the path.” (RT IX, 271: 8-17). Then, using the 2012 calendar year sales figures, Mr. Stockton makes a calculation that takes into account *some* demographic factors (which Mr. Frith testified were already taken into account), using his purported “sales” and “brand” bias assumptions, but he still testified that the resulting figure cannot be the full expectation of SCN’s available business. (RT IX, 275:10-20). Eventually, Mr. Stockton conceded that there is no calculation he has made that yields a specific number for the claim that sales were lost due to the alleged effects of “brand bias,” “pump-in” or “out-commute.” (RT IX 249:16 – 250: 3).

Mr. Stockton additionally concurs that Nissan would be equally unable to make his suggested calculation for the purposes of measuring Protestant’s sales performance in its Notice of Termination to SCN. (RT IX, 276: 1-6). Thus, the calculations performed by Mr. Stockton are admitted by him to be neither possible nor useful for a manufacturer like Nissan, which must constantly evaluate the performance of each of more than one thousand of its dealers nationwide.

Mr. Stockton then takes a detour on the “relay” race and goes into a lengthy explanation of his Gravity Model, at the end of which he amazingly conceded that he did not apply the Gravity Model as part of his analysis in this case! (RT X, 29:18-22). Mr. Stockton further admitted, that the Gravity Model is “apples to oranges” to any analysis involving a PMA (RT X, 30:10-22), a concept which all manufacturers utilize. In any event, the Gravity Model is an

attempt to estimate sales data in an industry for which no estimation is needed. As Mr. Frith testified, in the automobile industry, DMV registration data provides the actual information regarding sales and product popularity in a market, information which the Gravity Model and similar analyses must use to estimate expected sales in other industries, such as retail appliance sales. (RT IV 13: 9 – 14:18) Why Mr. Stockton led the parties, counsel and the Administrative Law Judge on this detour, which was not a part of his analysis, is perhaps known only to him.

Even after all of these machinations, *the only figure that Mr. Stockton was willing to calculate is that Protestant achieved 173 new Nissan sales in calendar year 2012 – when he believed it should have sold 313 (using a California average adjusted by Mr. Stockton’s regression analyses) – resulting in Protestant achieving about 55% of Mr. Stockton’s expected sales.* (RT IX, 275: 12-20, Resp. Exh. 238 under columns labeled “Dealer’s Sales”). Note: Nissan’s analysis shows that at 100% of RSE, Protestant should have sold *540 Nissan vehicles* in 2012, and achieved only 32% of expected sales. (Resp. Exh. 238 under column labeled “Seg. Adj Expected Sales @ Regional Avg.”). Thus, even under Mr. Stockton’s flawed and confusing analysis Protestant would *still* demonstrate very poor performance, which in and of itself proves that Protestant is *not* capturing an adequate amount of business compared to the business available to it.

Without a single shred of evidence about the inappropriateness of RSE or the business available to Protestant in its market, Protestant cannot possibly sustain its assertion that SCN captures a “substantial” amount of the available Nissan business.

C. **In Contrast to Protestant's Expert, Mr. Frith, Respondent's Expert, Presented The Only Analysis Of the Business Captured By Protestant, Compared To The Business Available To It, and Therefore Must Be Accepted By This Board.**

In contrast to Mr. Stockton's analysis, Respondent's expert, Mr. John Frith, applies a methodology developed not for lawyers and judges, but for day to day use by manufacturers for dealer network analysis. Mr. Frith's employer, Urban Science Applications, Inc. performs such analysis for virtually every major automobile company in the United States. (RT III, 174: 22 – 175: 19). Basically, his methodology requires defining an area for the analysis, then selecting a standard to use for measuring actual and expected performance in the area. If a shortfall of the expected performance is found, the methodology next looks for reasons that might cause the shortfall. (RT III, 178: 25 – 180: 9, 181: 10-14). The data relied upon in this methodology are commonly used in the U.S. automotive industry and include registration data, sales data, dealer-reported sales data, *demographic data*, and government supplied statistics from the Department of Labor. (RT III, 181:15 – 182: 7, RT III, 240: 1-4). Sales and registration data in the U.S. automotive industry is a unique resource that is accurate and provides the best information on the makes, models and brands of vehicles that consumers prefer and actually purchase in a given area. As a result, demographics constitute a secondary data source and should be questioned if, as here, their introduction yields illogical results. (RT IV, 13: 9-25 – 15: 1-10; RT X 84: 15: 9-25 – 85: 1-14).

Unlike Mr. Stockton, Mr. Frith testified that defining an area and determining an appropriate standard is necessary for calculating the opportunity for a dealer in that given area. (RT III, 211: 11-21). An appropriate standard for measuring a dealer's sales performance is important to the analysis and must be fair. In general, you need a yardstick (i.e., a standard) against which to measure something. Mr. Frith used a speed limit as an example – it's difficult

to know if you are speeding if there's no speed limit. Likewise, you cannot tell if sales penetration is at an appropriate level without a target or an average. That is why a standard is necessary, in order to know how a dealer is performing. (RT III, 196: 20-25 – 197: 1-3). Mr. Frith also testified that the standard should be applied uniformly (unlike Mr. Stockton's analysis). Having a different standard for each dealer would result in chaos, like having a different speed limit for every driver on the freeway. (RT III, 197:7-19). This is what Mr. Stockton advocated – no standard – which makes no sense.

In order to arrive at an expected performance in the market, Mr. Frith's methodology makes segment-adjusted calculations for product popularity in the market. If the segment adjustments were not made, a manufacturer could erroneously come to the conclusion that a dealer was underperforming (or performing above average) when in fact because of the product mix that the consumers prefer in that particular market, the dealer is actually performing at expectations. (RT III, 228:17 – 229:9). So, using the West Region market share or RSE by segment as applied to the Santa Cruz PMA competitive group registrations (adjusted for product popularity), it would be expected that 540 new Nissans would have been registered in the Santa Cruz PMA for calendar year 2012. Based on Santa Cruz Nissan's retail sales (whether sold within or outside the PMA) of 173 for this same period, Protestant is achieving only 32% of the opportunity available to it in the PMA. This shortfall is not made up by other Nissan dealers outside the PMA. (RT III, 248:12- 252:1)

In addressing one of the "straw man" arguments still made by Protestant, Mr. Frith eliminated the PMA census tract assignment (or its change as a result of the 2010 census) as a possible cause of Protestant's poor sales performance. In his opinion, the current PMA is properly drawn, but Protestant's RSE performance is consistently below 38.2%, no matter which reasonable alternative PMA is used, whether it is: (a) the current configuration, (b) the pre-2010

census configuration or (c) redrawn using air distance, drive distance or drive time. (Resp. Exh. 200.E at NNA04740, NNA04743 and NNA04746; RT IV, 67: 16-21). This is one area in which Protestant's expert agreed with Mr. Frith, i.e., that the PMA and its configuration is not a factor affecting Protestant's performance. (RT X, 6: 14-25 – 7: 1-2, 179:15 – 180:10).

In order to confirm that the standard of RSE is reasonable, Mr. Frith also determined that using another standard, such as California Sales Effectiveness average, would result in Protestant being similarly underperforming for the years 2008 through 2012:

Santa Cruz Nissan At California Sales Effectiveness Average

CY 2008	63.9%
CY 2009	53.9%
CY 2010	44.9%
CY 2011	50.3%
CY 2012	31.3%

(RT IV, 86: 3-19; Resp. Exh. 200.F)

Contrary to Protestant's assertions, Mr. Frith's methodology also incorporates demographics. (RT IV, 13: 9-25 –15:1-10). Mr. Frith looked at population, income and employment trends in the Santa Cruz Market plus Fringe and concluded that population, income and employment trends in the Santa Cruz County showed stable to moderate growth and were adequate and did not represent a possible cause for Protestant's poor sales performance. (Resp. Exh. 200.G at Bates stamps NNA04748 – NNA04753; RT IV 101: 21-25 – 102: 1-4). Mr. Frith testified that looking at vehicle segment popularity already accounts for demographic data and consumer modeling of potential sales does not have to be done because people have to register the vehicle, and actual sales data are known, without modeling, unlike other industries such as retail sales of appliances. So rather than guess what types of vehicles are popular in an area

based on demographics, with DMV registration data, product popularity can be determined definitively. (RT IV 13: 9 – 14:18). Further, by starting with segment adjusted RSE (which already accounts for demographics and then grafting additional demographic data onto that, what Protestant is really doing is really double counting, which is redundant as well as unnecessary, and results in inaccuracies. (RT IV 14: 19 – 15:16).

Location or convenience of Santa Cruz Nissan also did not explain the dealership's sales shortfall. Mr. Frith concluded that the Nissan dealership locations in the Santa Cruz Market plus fringe are, on the average, 8 miles apart in terms of drive distance to the next nearest Nissan dealer. This yields a customer convenience that is comparable to Honda, Toyota, Volkswagen, Kia, Mazda, and Subaru. (Resp. Exh. 200.G at Bates stamp NNA04758). Additionally, Mr. Frith concluded that the current Nissan count of 1 dealer in the Santa Cruz PMA was appropriate and not the cause of the poor performance in the market. (Resp. Exh. 200.G at Bates stamp NNA04759; RT IV 101: 21 – 102:4). Therefore, Nissan does not need to appoint another dealer to take up the slack in sales performance demonstrated by Protestant. It simply needs one dealer to perform adequately in the PMA.

Mr. Frith also looked at the performance of the facing Honda dealership (Ocean Honda,) in the Santa Cruz market and concluded that its performance was well above expected. Because Santa Cruz Nissan and the Ocean Honda store are similarly located with similar geography, we can eliminate location (two miles from SCN), geography (mountains and ocean) or convenience (out-commute) as explanations for the difference in sales performance between Santa Cruz Nissan and its facing Honda store. (RT IV, 98: 25- 99: 16). Also, as Mr. Stockton admitted in testimony, Honda does not have a viable competitor to the Toyota Prius. (RT X, 8: 3-18). Therefore, Protestant's theory about the lack of a Nissan hybrid vehicle to compete with the Prius as being the cause of its sales deficiency is simply a poor excuse. All Nissan dealers have

the same vehicles to sell and to compete against Honda and Toyota, and the West Region average for Nissan sales is not determined by this factor. (RT XI, 83:12 – 84:1)

Nevertheless, Ocean Honda is able to outsell not only SCN but also Santa Cruz Toyota in the Santa Cruz market, despite the fact that Toyota still has the advantage in hybrid sales with the Prius. (RT XI, 80:12 – 81:11). As these results indicate, sales performance is really about how the individual dealers operate their dealerships – the owner/operator makes the difference. (RT IV, 99: 16-25). Contrary to Protestant’s claims, it’s not the facility that makes Ocean Honda a strong competitor (since the facility was built and operated briefly by the prior owner) it’s how the current owner operates from that facility that makes it a strong competitor. (RT II, 19: 5-25 – 20: 1-7) As Ms. Speranzo testified, it’s not the stadium that wins games; it’s the people that play there. (RT III, 93: 3-14).

After methodically confirming the appropriateness of both the performance standard (RSE) and the PMA configuration, as well as eliminating the demographic, geographical, economic and market conditions as possible causes of Protestant’s poor sales performance, Mr. Frith concludes that the root cause of the poor performance is the dealership operations at Santa Cruz Nissan, which are in the control of the dealership’s management (RT IV, 152:20-25 – 153: 1-17), i.e., Jim Courtright.

**D. The Steady Decline of Protestant’s Nissan Sales Performance and Operational Deficiencies Under Jim Courtright’s Management, Together With Lee Courtright’s Semi-Retirement, Indicate That Protestant’s Performance Will Not Improve In The Future.**

The Nissan Dealer Agreement is a personal services agreement. (Exh. J-1, bates stamp NNA00063, Nissan Dealer Sales and Service Agreement at Introduction, second paragraph). In entering into the Dealer Agreement, Protestant agreed that the retention of qualified executive management is of critical importance to the successful operation of the dealership and

achievement and purposes of the Dealer Agreement. (Exh. J-1, Bates stamp NNA00064 at Article Fourth (a) Executive Manager). The Executive Manager and owners make all decisions in operating the dealership, including hiring and firing of management and employees and setting retail transaction prices. (RT I, 55: 17 – 56: 3).

As Lee Courtright testified, he started in the automobile business in 1962 (RT XII, 167: 9 – 11) and now only works about 120 days per year when he’s in town, and about 4 hours per day, leaving the day to day operations of the dealership to Jim Courtright. (RT XII, 164: 25 – 165:19). Assuming an 8-hour work day, this translates to about 60 or so working days per year that Lee Courtright is at Protestant’s dealership, or *less than one-sixth of the year*. Even when he is present, Lee Courtright places no limitations or control on how Jim Courtright runs the dealership or on his decision-making control of the dealership. (RT XII, 166:11 – 16). As Lee Courtright testified, “It’s up to [Jim] to make the decision on what he wants to do, as far as whatever the problem is.” (RT XII, 166:20 – 22). With his long history in the business, we can only assume that with the passage of time, Lee Courtright’s involvement in operating the SCN dealership will decrease even more.

Jim Courtright has been the Executive Manager of the Santa Cruz Nissan dealership since the early to mid – 2000’s. (RT VII, 8: 19 – 23). The last full calendar year that Protestant achieved 100% of average RSE performance was in 2005. (RT XI, 17:23 – 18:2). This is not a coincidence. Under Jim Courtright’s tenure as Executive Manager, Santa Cruz Nissan is not operated along the lines set forth in the Dealer Agreement. For example, department heads at Protestant’s dealership are not required to notify Jim Courtright, Executive Manager, in advance of the hiring and firing of employees. (RT XI, 222:22 – 223:4). This is despite Lee Courtright’s testimony that employee problems, health insurance problems and workers compensation problems are “getting to be outrageous” at the dealership. (RT XII, 166:7 – 10).

Further, the operational deficiencies identified at the dealership, all of which were put into evidence, can all be traced to Jim Courtright's tenure as Executive Manager, for example – the failure to set annual, quarterly or monthly sales goals to ensure that the dealership met its Nissan sales objectives (RT XII, 114: 16 – 115:2), the failure to require a single salesperson to sell a single Nissan as part of their annual sales goal (RT XII, 115:3 – 20), the failure to have any Hispanic salespersons for at least a five-year period (RT XI, 72:5 – 23). , the refusal to advertise in Spanish (RT VII, 33:11 - 34:12), ignoring the large Spanish-speaking population in the PMA (RT VII, 38:19-39:10; RT XI, 72:5 – 23) , the refusal to open for service on Saturdays (RT XI, 21:17 – 22: 4; RT VII, 47:10 – 18, 49:21 - 51:3; Resp. Exh. 210), failing to accept (free of charge) training from Nissan to have the Loyalty Performance Manager assist them in improving their customer treatment scores (RT II, 256: 4-19, 262: 1-20; RT XII, 28: 1-14), and the refusal of extra allocations of Nissan vehicles that were deficient in dealership inventory (based on Jim Courtright's own opinion) because of duplication, color, trim, or options not meeting his specifications (RT II, 277:11 – 278:13; RT XII, 36:10- 37:14), despite Jim Courtright's belief that the Leaf is his dealership's most popular model and was in strong demand in the Santa Cruz market (RT XII, 82:11- 17). Protestant's efforts to "fix" some of these deficiencies on the eve of the merits hearing or even afterwards, serve as proof that these issues should have been addressed years earlier.

However, as Eric Rodgers (RT I, 157: 14 -- 158: 16, 165: 17 -- 166: 17) and Tina Novoa (RT II, 307: 6-20) testified, Nissan could make many recommendations to improve dealership operations, and Jim Courtright might even attempt to implement some of them, but if the execution of the recommendation was not done properly, the changes would not be effective. For example, Protestant touts that it increased advertising by \$10,000 per month, on the suggestion of Ms. Novoa. (RT XI, 45:22—46:1). However, Protestant had no method of

tracking the “ups” (customer visits and what drew them to the dealership, as defined in Exh. J-14) for Nissan (or for any other brand) at the dealership, in order to determine whether the increased advertising was effective in generating customer traffic. (RT XII, 126:23 – 129:2).

Further, Jim Courtright admitted in testimony that Protestant did not have sufficient customer traffic, at the closing ratio being achieved, even to meet the sales objectives *set by Protestant* for the dealership (RT XI, 124:1– 5), yet Jim Courtright did nothing to change this dynamic (either by changing the advertising or the salespeople) – he simply accepted failure. This is just one example of how Protestant fumbled the implementation of a recommendation from Nissan (to increase spending on advertising) without thinking through how to execute it properly. It’s not enough to throw money at a problem and hope it goes away. Today’s dealers, in order to be effective, need to be able to think through and implement their operational plans intelligently.

Nissan representatives that called on Protestant’s dealership eventually formed the opinion that Jim Courtright lacked the ability to develop and execute a plan to improve its sales performance. (RT I, 157: 14 – 158: 16, RT II, 307: 6-20). Under the management of Jim Courtright, Nissan representatives testified, Protestant’s dealership lacked activity and the type of energy flowing through the store necessary to be successful and that indicated either he: (1) was not trying to improve performance or (2) didn’t have the ability to improve performance. (RT I, 165: 17 – 166: 17).

Jim Courtright lacks the most fundamental knowledge needed to operate a dealership, and apparently, is not interested in acquiring such knowledge. For example, Executive Managers need to know and do know the expense structure for operating a dealership, particularly the rent expense. (RT I, 160: 16-22). That is because rent is generally the largest fixed expense of the dealership, and makes up the largest part of the “nut” the dealership has to cover each month.

(RT VIII, 203:5 – 204:2) However, after being the Executive Manager at the dealership for several years (and the General Manager since the late 1990's [(RT VII, 8:25 – 9:8)]) and despite having an MBA degree, Jim Courtright didn't know the monthly rent amount for the dealership at his deposition on December 5, 2013. He wasn't even close – he thought it was \$15,000 per month and it is actually \$25,000 per month – he also testified that he didn't know whether the rent had changed since he was the General Manager of the dealership in the mid-1990's. (RT VII, 16:7 – 17:7) Jim Courtright also didn't know at the time of his deposition how the rent is allocated among the two corporations which have franchises in the dealership (one for Nissan and VW and the other for Dodge and Ram) and at the time of his testimony at the merits hearing two months later, he still didn't know. (RT VII, 17:17 – 18 – 17).

The Nissan Representatives that have called on Protestant know that Mr. Lee Courtright was aware of Nissan's concerns with the operations and poor sales performance at the dealership – because they met with both Lee Courtright and Jim Courtright during their regular contacts with the dealership. (RT I, 167: 1-20; RT II, 307: 8-20). Yet Lee Courtright insists that Jim Courtright makes all decisions with respect to the dealership operations. It is apparent that Jim Courtright simply cannot handle the dealership operations in a manner to effectively promote Nissan products and to achieve adequate sales penetration.

**IV. PROTESTANT ITSELF HAS NO PERMANENT INVESTMENT IN THE NISSAN FRANCHISE. (VEHICLE CODE §§ 3061(B) AND (C))**

Mr. Lee Courtright has been buying and selling various dealerships since his acquisition of Santa Cruz Nissan approximately 40 years ago. (Exh. J-13, Stip. Fact 3). Lee Courtright has owned, in addition to the Nissan franchise in Santa Cruz, an interest in at least 10 other new motor vehicle franchises, including 2 Volkswagen, 2 Nissan, Dodge, Ram, Jeep, Mazda, Toyota and Mercedes, in various places in California and Nevada. For some of these, he still owns the

real estate on which his formerly owned dealerships are located. (RT XII, 168:22 – 172:8).

Protestant has moved facilities twice in 42 years, in 1979 first from its original location on Front Street in Santa Cruz, to a location on Center Street in Santa Cruz, and again in 1996 from Center Street to its current location on Soquel Avenue, each time to newer and more modern facilities. Lee Courtright agreed that at some point the dealership might either have to renovate or remodel or move again from its current facilities. Renovating, remodeling or moving to newer more modern facilities is just the way things are in the automobile business. (RT XII, 207: 13- 208:13).

The entity which owns the real estate at which Protestant operates the dealership is separate and apart from Protestant and according to Lee Courtright, “I don’t think that has anything to do with Santa Cruz Nissan.” (RT XII, 207:3 – 9) Mr. Lee Courtright decides what rent will be charged Protestant and the other corporation which operate the four franchises which are housed at the 1616 Soquel Avenue property and the other properties owned by this separate trust. (RT XII, 207:3 – 9). Lee Courtright described that he negotiated a figure with Mr. Cappo (owner of Ocean Honda) on his property in Auburn for the purposes of making it a used car lot. During this same meeting, Lee Courtright told Mr. Cappo that Santa Cruz Nissan was not for sale. (RT XII, 191: 15- 193:3).

Jim and Lee Courtright testified regarding their knowledge that land is expensive and valuable in the Santa Cruz market. (RT XI, 160:22 – 161:20). However, no evidence was presented by Protestant as to the value or extent of the real estate holdings in Santa Cruz (or anywhere else in California and Nevada for that matter), as held in the separate trust. Santa Cruz Nissan has been in its current facilities since 1996. (Exh. J-13, Stip. Fact 3). No evidence was presented as to the viability of the real estate entity should Protestant no longer have the Santa Cruz Nissan franchise. Neither Messrs. Courtright claimed that the investment in land was at risk

should Santa Cruz Nissan be terminated as a result of the termination proceedings.

Without a single shred of evidence or finding of fact to support it, in Protestant's opening brief, it is argued that Protestant has made a permanent investment, including "good will." There is no evidence of any value given to this "good will" and it is erroneously stated as being "substantial and permanent." Contrary to what Protestant has argued it is commonly known in the industry, that "good will" or "blue sky" is an intangible asset, and not a "hard" or permanent investment. Protestant has stipulated to this definition in the Glossary. (Exh. J-14, definition of Blue Sky). Protestant would only realize any "good will" if a third party upon evaluation of the franchise in the context of a buy-sell transaction would be willing to pay an amount in addition to the hard assets of the dealership. There is no evidence of any such value being agreed upon by a third party buyer candidate. Mr. Lee Courtright failed to have more than five minutes of discussion at a time with Mr. Groppetti and less than one half-hour with Mr. Cappo during which there were no negotiations on either price or goodwill for the dealership. (RT XIII, 191: 4 – 192: 14). The "substantial and permanent" investment of goodwill that Protestant argues for in its brief, therefore is, unknown, unrealized and un-quantified.

The dealership also sells the Volkswagen, Dodge and Ram line-makes of new vehicles and products from the same facility and location. The dealership provides service for all 4 line-makes and sells used vehicles from the same facility and location. (Exh. J-13, Stip. Facts 5 and 6). Protestant submits consolidated financial statements to Nissan that cover the Nissan, Volkswagen, Dodge and Ram franchises. (Prot. Exh. 14; RT XI, 54:2 –10). The only argument presented by Protestant regarding its investment and its "permanency" was the total number of employees (50 to 60) for all four line-makes, seven dedicated Nissan mechanics and stalls, and the lifts, car wash and a dynamometer needed to service all line-makes. (RT XII, 173: 6-12, 173: 19- 174: 20, 213:16 - 24). However, human beings are not investments, and are free to obtain

different employment, hardly being “permanent.”

According to Protestant’s 2012 financial statements, Protestant has no investment in land, building and improvements. (Prot. Exh. 14, lines 59 and 60 at Bates stamp SCN05255). Based on the evidence presented of its employees, shared lifts and equipment which can be utilized among any or all of the four brands housed in the same facility, there is insufficient basis to establish any investment, much less the permanency of such investment needed under Vehicle Code 3060 (b) and (c).

A permanent investment is “fixed” i.e., and unlike current assets is subject to depreciation and cannot be converted to cash easily. (Prot. Exh. 14, lines 59 through 67 at Bates stamp SCN05255). On investment which is used by the dealership and is illiquid is shared by the three other line-makes in the building (VW, Dodge and Ram) and/or was made by the real estate trust and not by the Protestant. Therefore, Protestant itself has made no investment, much less a permanent investment, in the Nissan franchise.

V. **IT WOULD BE BENEFICIAL FOR THE PUBLIC WELFARE FOR PROTESTANT’S NISSAN FRANCHISE TO BE TERMINATED. (VEHICLE CODE § 3061(D))**

By the issuance of a new motor vehicle dealer license, the state bestows a public trust on the dealer to whom it is given, i.e., the dealer is required to serve the public. In exchange for fulfilling this trust, the dealer is protected from certain types of intra-brand competition. *See*, Vehicle Code §§ 3062, 3063. This means, at a minimum, that the dealer must serve *all of the public* in the dealer’s Primary Market Area, not just a in a certain city or cities in the market, and not just those members of the public that are “economically, educationally, ethnically and geographically” the same as the owners of the dealership.

However, Jim Courtright rebelled against the revision of Protestant's PMA as a result of the 2010 Census (RT VII, 26:1 – 11), and attempted to have the PMA revision reversed, because of what he perceived were those very same differences (“economically, educationally, ethnically and geographically different” is his phrase (RT VII, 27:21 - 28:2)), in adding the City of Watsonville to the PMA, which is 81% Hispanic. (RT VII, 30:1 – 7). Moreover, Jim Courtright admitted that he never even asked anyone at Nissan whether the area being added was a good area for vehicle sales in general or for Nissan sales in particular (which is true) (RT VII, 41:21 – 24), he just wanted it out his PMA. (RT VII, 26:13 - 27:20). Further, the failure of Santa Cruz Nissan to *ever* advertise in Spanish (RT VII, 46:5 - 47:3), the failure to have any Spanish-speaking salespersons (despite the suggestion of Tina Novoa that it hire such individuals to serve the market (RT II, 304: 22-25 – 305: 1-4, 317: 12-25 – 318: 1-11)) for at least six years, all indicate a conscious decision not to serve that part of the public. (RT VII, 38:19-39:10; RT XI, 72:5 – 23). As Jim Courtright acknowledged, Santa Cruz Nissan could have *always* sold into the Watsonville area, even *before* it was added to Protestant's PMA (RT VII, 41:25 - 43:2), but it simply failed to take any steps to do so, despite Protestant's severe decline in sales performance since 2005. (Exh. J-2, bates stamp NNA00037; RT I, 110: 2-7; RT XI, 17:23 – 18:2; RT XI, 119:19 – 24).

Instead, Protestant acts as though its entire market is the City of Santa Cruz. In this regard, Protestant called as a witness the City Manager for Santa Cruz, Martin Bernal, who testified as to the tax revenue *the City* would “lose” if Protestant's Nissan franchise were terminated (and the tax revenue *the City* would “gain” if a replacement Nissan dealer sold an adequate amount of Nissan vehicles). No effort was made by Protestant to address the issues of the other cities or the unincorporated Santa Cruz County areas in the PMA. In fact, Mr. Bernal admitted on cross-examination that residents of those other areas also need public services –

which would be funded by the tax revenue generated by a replacement Nissan dealer located there. (RT VI, 50:23 – 25, 52:10 – 14). Of course, Protestant has failed to serve the public by largely ignoring the Hispanic market in its PMA – which comprises 20% of the City of Santa Cruz, 30% of Santa Cruz County, and 81% of the City of Watsonville. (Exh. J- 12A- J-12C).

Protestant’s failure and refusal to be open for service on Saturdays is well-documented. Over the years he has called on the dealership, Gary Inman (Fixed Operations Manager) mentioned the Saturday service issue to Jim Courtright six times and to Lee Courtright twice. (RT VIII, 114:18 - 116:2). He also mentioned it on several occasions to the four Service Managers employ by Protestant during that time. (Resp. Exh. 210; RT VIII, 114:23 – 116: 9; RT XII, 137:13 – 146:7). Mr. Inman informed Jim Courtright that Saturday was the busiest day of the week in the service departments of many of the Nissan dealers he calls upon, and that being open for service on Saturdays is a good way to improve service retention, which can lead to increased Nissan vehicle sales. (RT VIII, 86:16 - 89:21). Though Jim Courtright did not dispute those facts, he adamantly refused to open for service on Saturday for years, failing to survey customers to determine their preference on the subject, and claiming that the practice had been tried in the 1990s, and “was not profitable.” (RT VIII, 99:12 - 101:8; RT VII, 47:10 – 18; RT VII, 49:21 - 51:3; RT XI, 21:17 – 22: 4). Mr. Courtright made this statement despite the fact that he had never used his MBA training to study the issue, and had not determined the reason for the alleged lack of profitability. (RT VII, 7:2 – 11; RT XII, 135:2 – 22).

When Jim Courtright of Protestant was asked by ALJ Hagle in March, 2014 what had changed so that Protestant was now “considering” opening for Saturday service, despite the recommendation of Nissan representative Gary Inman for years that it do so, Mr. Courtright responded simply, “by going through some of these Contact Reports and some other things, it’s brought it to our attention, that maybe it would be a good idea.” (RT XII, 146:20 – 17:7).”

This is hardly a logical explanation to support a change in operations which had been suggested and refused for years.

Contrary to Protestant's arguments there is no proof that it will be difficult or take an inordinate amount of time for Nissan to appoint a replacement dealer. Protestant bases this argument on the experience of *one* potential buyer of Protestant's dealership, who looked for property for a very brief period of time. It is axiomatic that it takes a willing seller as well as a willing buyer must agree on a sale. The fact that one particular transaction was not successful does not mean, as Protestant attempts to argue, that Nissan will be shut out of the Santa Cruz PMA forever, and therefore must accept Protestant's substandard performance as "better than nothing." At 32% RSE performance, Nissan is lost in the market as a viable alternative to its competitors in the mind of the public. However, in general, Nissan is a desirable brand and people want Nissan franchises. (Prot. Exh. 24, at 38: 15-21).

Even Mr. Stockton, Protestant's expert, testified that the challenge in replacing a dealer in the market place would be a temporary one. (RT X, 39: 4-23). Further, Mr. Bernal, the Santa Cruz City Manager, testified that if the termination is allowed to go through and a replacement Nissan dealer wants to locate in the City, the City would attempt to facilitate that. RT VI, 47:8 – 22. Protestant's argument that NNA will lose 250 sales also has no basis in fact. At least some of those sales will be made by dealers outside the PMA, whether from "over the hill" as Protestant argues, or to the south in the Salinas, Gilroy or Monterey Nissan dealerships. Finally, Nissan's brand image is not something Protestant needs to concern itself with – NNA can best assess that issue.

As Mr. Rodgers and others from Nissan testified, contrary to the unsupported arguments made by Protestant, all potential replacement dealers for the Santa Cruz market have not been exhausted. Because of the opportunity in the marketplace, Nissan sees the Santa Cruz PMA as a

viable market (RT I, 131: 21-25; 132: 1-25; 133: 1-25; Prot. Exh. 24, 36: 23-24) and dealers will as well (RT XIII 191:24-192.50). More dealers may also be interested in an appointment to an open point as opposed to purchasing a dealership because they would not have to pay blue sky to anybody. (RT I, 135: 22 137: 3). In general, Nissan is a desirable brand and people want Nissan franchises. (Prot. Exh. 24, at 38: 15-21). If the termination is allowed, Nissan definitely intends to continue to have a dealer in the Santa Cruz market, and it will have one. (RT I, 137: 4-6).

**VI. PROTESTANT HAS OUTGROWN ITS SALES AND SERVICE FACILITIES, WHICH ARE NOT ADEQUATE TO HOUSE FOUR LINE-MAKES. (VEHICLE CODE § 3061(E))**

Lee Courtright signed two versions of a New Dealership Facilities Addendum, the first dated October 1, 1996 (Prot. Exh. 3) and the second dated September 21, 2005 (Exh. J-1, Bates 000070). The Facilities Addendum set forth the size requirements for Nissan dealership facilities. RT XII, 210:5 – 211:5) Both documents show that Protestant’s facility is undersized by 1,391 square feet in Used Vehicle Sales Land and 1,603 square feet in Parts Building for 1996 and by 36, 804 square feet in Total Building and Land for 2005. Further, Lee Courtright testified that the Nissan model line-up increased over the years (RT XII, 208:11-13), to the point where it now has 22 models. (Resp. Exh. 202). Further, the other line-makes at the dealership have generally also increased in number of models and in size. (RT XII, 208:11 – 209:7). In addition, since 2005, the truck division of Dodge has become its own line-make, known as Ram. Each of these line-makes at the dealership facility has a planning volume, which has increased over time.

Since the dealership facility was built and first occupied in 1996, the footprint and square footage of the dealership has not changed, except for the addition of a car wash. (RT XII, 213:16 - 24). There are currently no plans to expand the dealership. (RT VII, 13:25 - 14:1). Therefore, since the facility was already deficient in 1996 and 2005, that deficiency has only

increased over time, and the facility is inadequate in sales and service space, to meet the needs of all four line-makes housed there.

**VII. PROTESTANT HAS MATERIALLY BREACHED SEVERAL PROVISIONS OF THE NISSAN DEALER AGREEMENT. (VEHICLE CODE § 3061(G))**

**A. Protestant Has Materially Breached Its Obligation To Actively And Effectively Promote Retail Sales Of Nissan Vehicles.**

Contrary to the arguments in its opening brief Protestant has, in several respects, failed to fulfill its obligations under the Nissan Dealer Agreement. Section 3.A of the Standard Provisions of that Agreement obligates Protestant to “actively and effectively promote through its own advertising and sales promotion activities the sale at retail...of Nissan Vehicles.” (Exh. J-1, at Bates stamp NNA05625).

Ms. Novoa, during her tenure as Dealer Operations Manager (“DOM”) for Nissan’s District 11, made at least thirteen different contacts with Protestant and in each instance she discussed the dealership’s RSE and notified Protestant that its sales performance was deficient. In six of the contact reports documenting those discussions with Protestant, Ms. Novoa notes that one or both of the Messrs. Courtright acknowledged or agreed that the dealership was severely underperforming. (Resp. Exh. 209). Jim Courtright in testimony did not dispute that he had done so with Ms. Novoa during her contacts. (RT XII, 24: 8-19).

All of Ms. Novoa’s contacts and correspondence referenced RSE as the standard Nissan used to evaluate Protestant’s poor sales performance. Her first contact with Protestant while she was a DOM for Nissan was on August 8, 2011 and her last contact was on August 30, 2012. In that first contact, Protestant’s 12-month rolling RSE was 44.2% and in her last contact Protestant’s 12-month rolling RSE was 38.35%. Only three contacts were made by phone, the rest were in the dealership with either Jim Courtright alone or with both Jim and Lee Courtright in attendance. (Resp. Exh. 209).

Protestant's deficiencies revealed significant sales opportunities were being lost. The June 12, 2012 Contact Report of Ms. Novoa shows that on a 12 month RSE report, Protestant's sales were deficient by 24 sales per month, as she indicated to Mr. Courtright. (Resp. Exh. 209 at bates stamp NNA000026; RT XII, 52:17 – 53:11). An additional measure Nissan uses to gauge a dealer's performance is how it compares locally against the Honda and Toyota dealers, to Nissan's national sales performance against those main competitors. (Resp. Exh. 209 at bates stamp NNA001018 and NNA000552). Here too, Protestant's performance was severely deficient. Respondent's national sales performance through December 2013 versus Honda sales performance was 68 percent and 52 percent against Toyota sales performance but Protestant's performance against its facing Honda and Toyota dealers in Santa Cruz was roughly 16 percent of Honda and 20 percent of Toyota. (RT I, 81: 11-25; 82: 1-10).

Protestant agreed in Section 3.B of the Standard Provisions of the Dealer Agreement to be evaluated by Nissan on the basis of reasonable criteria as Nissan may develop from time to time. (Exh. J-1, Standard Provisions, NNA005625 at Section 3.B.). At all times relevant to this Protest, RSE has been the standard used by Nissan to evaluate Protestant's poor sales performance. (RT I, 78: 20-25). Section 3.B. of the Standard Provisions comports and is consistent with Regional Sales Effectiveness ("RSE"). (RT I, 92:13-25; 94: 1-19; RT III, 109: 13-25 – 210: 1-6).

A sales performance letter is an important letter sent by certified mail that informs the dealer that they are underperforming, identifies Nissan's concern with the performance and encourages the dealer to take action to correct its performance. (RT I, 88: 6-25). In July 2010, the Regional Vice President visited Protestant and told Messrs. Lee and James Courtright that he would be forced to continue the performance letters if sales performance did not improve and warned the Protestant of potential future action. (RT I, 87: 1-5). Starting with the April 27, 2007

letter and through June, 5 2012, Nissan sent Protestant 8 poor sales performance letters that identified that Dealer's sales performance was less than average as compared to all other Nissan dealers in Protestant's Sales Region which was measured by RSE. (Resp Exh. 206). At the end of each performance letter, Nissan reserved its right to exercise all its rights and remedies under the Dealer Agreement.

Based on the years of continued monitoring of Protestant's sales performance, as compared with all other Nissan dealers in Protestant's Sales Region, using a standard of Regional Sales Effectiveness, Nissan determined that Protestant's sales performance deficiencies were prolonged, severe and chronic. (RT I, 110: 2-7; 113: 5-12; 119: 7-13). Nissan had also consistently counselled with and suggested changes SCN could make to improve its performance. (RT XII, 63:21 – 65:4; Resp. Exh. 209 at bates stamps NNA01012, NNA01015, NNA01019, NNA01023, NNA0552, NNA00028, NNA00027, NNA00026, NNA00025). Contrary to the assertions of Protestant, Nissan did not immediately take action under the Dealer Agreement when Protestant's performance dropped below 100% of RSE, it worked with SCN for six years to try to help it improve its performance, and only took action when those efforts had failed. (Joint Exh. 2, bates stamp NNA00037- bates stamp NNA00038). In fact, despite the 45 point deterioration in RSE from Calendar Year 2005 to Calendar Year 2006, Nissan's practice is to send performance letters and give the dealer an opportunity to improve rather than immediately issue a Notice of Default. (RT I, 110: 21-25; 111: 1-25; 112: 1-7).

On March 19, 2012, Nissan sent Protestant a formal, written Notice of Default based on Protestant's material breaches of its Dealer Agreement. (Exh. J-2, Bates stamp NNA00056 – Bates stamp NNA00061). Protestant had failed to reach 100% segment-adjusted RSE for a period of six consecutive years. Calendar year 2005 marked the last time Protestant was sales effective (meeting or exceeding 100% RSE) with Nissan sales of 366 units and an RSE of

113.7%. (Exh. J-2, Bates stamp NNA00037; RT I, 110: 2-7; RT XI, 17:23 – 18:2; RT XI, 119:19 – 24.) 47.

Using the standard of segment-adjusted Regional Sales Effectiveness (RSE) for the years 2006 through 2011 to calculate Protestant’s insufficient sales penetration, Protestant was notified that such calculations demonstrated that it had failed to adequately represent Nissan in the market or failed to fulfill its responsibilities under Section 3 of the Agreement. (Exh. J-2, Bates stamp NNA00056 – Bates stamp NNA00060).

According to the data available at the time the Notice of Default was issued, Nissan informed Protestant that its RSE of 51.6% ranked Protestant as 190th of 194 Nissan dealers in the West Region and 95th of 97 Nissan dealers in the State of California. (Exh. J-2, Bates stamp NNA00056 – Bates stamp NNA00060). For each full calendar year (“CY”) since 2006, Protestant’s RSE was as follows:

CY 2006	68.3%
CY 2007	84.4%
CY 2008	81.8%
CY 2009	56.3%
CY 2010	45.9%
CY 2011	51.6%

(Exh. J-2, Bates stamp NNA00060 at Bates stamp NNA00038 for clearer numbers on CY 2006 and CY 2007).

The Notice of Default specifically related to Protestant’s insufficient sales penetration and operational deficiencies, and gave Protestant an opportunity (180 days) to cure its breaches. Nissan reserved its right to exercise any and all remedies including but not limited to termination should Protestant fail to cure. (Exh. J-2, Bates stamp NNA00056 – Bates stamp NNA00061; RT

I, 113: 7-12; RT II, 159: 11-22). Protestant not only never achieved 100% of RSE for Nissan sales after issuance of the Notice of Default, but in fact its performance continued to get worse and dropped to 38.3% RSE through June, 2012 dropping and additional 13 percentage points. (RT I, 120: 25-- 121: 18; RT XI, 119:19 – 24).

Protestant knew that its performance was declining because the Dealer Operations Manager (Tina Novoa) discussed RSE with Protestant every month or every contact report. (RT II, 160: 14-27 – 161: 1-2). Despite the continuing decline in performance, Eric Rodgers recommended and Nissan extended the cure period provided by the Notice of Default in order to give Protestant an opportunity to sell the Nissan dealership. (Exh. J-3 at Bates stamp NNA00022, RT I, 120: 12-24; 122: 11-15). After Protestant indicated a desire to sell the dealership and requested Nissan's help in doing so in a buyer's assist letter (Joint Exh. 3 at bates stamp NNA00022, RT I, 120: 12-24; 122: 11-15), Nissan issued a Notice of Default Extension dated October 5, 2012 providing Protestant with a 60-day period to try to sell the dealership. (Exh. J-3 at Bates stamps NNA00053 and NNA00054; RT I, 124: 3-13). During this latter period, Nissan, pursuant to Protestant's request, presented a potential buyer to Santa Cruz. Santa Cruz and the potential buyer were unable to reach agreement on a sale of the dealership. (Exh. J-13, Stip. Fact 7). Lee Courtright had summarily rejected inquiries by both the potential buyer presented by Nissan, Mr. Gropetti, and by an independent inquiry later made by Mr. Cappo, the facing Honda dealer, to purchase all four of the franchises held by the Courtrights. (Exh. J-13 at Stip. Fact 7; RT XII, 191:19-193:3).

As of the end of 2012, Protestant's sales penetration sank to 32.0% of expected sales, the lowest it had ever been. Furthermore, Protestant continued to rank as one of the worst underperforming dealers in both the West Region (191th of 196 dealers). (Resp. Exh. 238). Because of the consistent underperformance over a long period of time, on January 14, 2013,

Nissan sent, and Protestant received, a Notice of Termination in compliance with Vehicle Code 3060. In that Notice, Nissan again identified unsatisfactory sales penetration performance, related to operational deficiencies, as the reasons for the termination of Protestant's Dealer Agreement. Protestants' poor sales performance is a material breach of Section 3 of the Dealer Agreement. (RT I, 139: 18-25; 140: 1-7; Exh. J-4 at Bates stamps NNA00047 – NNA00051).

In the Dealer Agreement, SCN agreed to promote and sell all models of Nissan Vehicles as contained in the Product Addendum to that Agreement. (Exh. Joint 1, Section 3.A. at bates stamp NNA05625) As of the merits hearing, the Nissan Vehicle line-up consisted of 22 models, as explained by Mr. Rodgers. (Resp. Exh. 202; RT I, 47: 13-52: 8; RT XI, 81:17 – 82:1). Though Protestant believes that Nissan Leaf is a popular vehicle in the City of Santa Cruz, Protestant is not just a Leaf dealer, it is a Nissan dealer charged with selling all vehicle lines that Nissan makes for sale in the U.S. market. (RT XI, 81:17 – 82:1; Exh. J-1, Section 3.A. at Bates stamp NNA05625). Jim Courtright agreed that some customers don't want to buy electric vehicles or hybrids, because they are more expensive than gas-powered models of the same vehicle. (RT XI, 82:2 – 83:11).

Since all Nissan dealers sell the same vehicles, they all have the same opportunity to meet the competition. (RT XI, 83:12 – 84:1). As Protestant's sales performance is compared to that of other Nissan dealers with the same vehicles to sell, Nissan is not expecting that Protestant do anything different that it expects from all of its dealers. As Ocean Honda has demonstrated, a savvy dealer can dominate the Santa Cruz market without a strong competitor to the Toyota Prius hybrid vehicle. (RT XI, 80:12 – 81:11).

**B. Protestant Has Materially Breached Its Obligation To Maintain A Qualified And Trained Sales Organization.**

Section 3.F of the Standard Provisions of the Dealer Agreement requires Protestant to

maintain a sales organization that includes a sufficient number of qualified and trained sales managers and sales people to enable Dealer to effectively fulfill its responsibilities under Section 3 of the Dealer Agreement. (Exh. J-1 at Bates stamp NNA05626.) Contrary to the arguments in Protestant's brief, Protestant failed to maintain a sales organization to effectively fulfill its responsibilities under Section 3.

For example, in the year 2012 (when it received a Notice of Default from Nissan for chronically poor sales performance), Protestant had a total of 7 people who could sell vehicles, *fewer* than it had in 2008. (RT XI, 68:23 – 69:14). Jim Courtright admitted that Protestant never added salespeople in order to increase sales of Nissan vehicles at the dealership during the Notice of Default period. (RT XI, 121:4 – 16). Protestant also had trouble attracting qualified sales people from 2008 through 2012, but Jim Courtright is not sure why. Despite this impediment to meeting its responsibilities under the Dealer Agreement, the dealership made no effort to find out why it had trouble attracting qualified applicants for salesperson jobs. (RT XI, 70:20 – 71:16).

Further, for the six years from 2008 through most of 2013, Protestant did not have one Spanish-speaking salesperson in its employ. (RT VII, 38:19-39:10; RT XI, 72:5 – 23) As Jim Courtright explained, Protestant did no Spanish-language advertising because it was concerned that Spanish speakers would come into the dealership and have no Spanish-speaking salespersons to assist them. (RT XI, 30:16 – 23). Rather than address this issue proactively, to be able to tap into the Hispanic market (which makes up 30% of Santa Cruz County and 81% of the City of Watsonville in the southern part of its PMA), which Jim Courtright later learned is a good market for Nissan sales (RT VII, 43:8 – 20; RT VII, 33:11 - 34:12), Protestant failed to hire any Spanish-speaking salespersons. It appears that Protestant not only accepts its severe underperformance in sales, it welcomes it.

Finally, notwithstanding the severe underperformance of Protestant in Nissan sales, Jim Courtright would not consider having a dedicated sales team to sell only Nissan vehicles at the dealership. Instead, all salespeople at the dealership can sell all four brands sold there. (RT XII, 4:1 – 23, RT II, 316: 2-9), and they don't have to sell a minimum number of any brand (RT XII, 79:15 – 80:12). The goal of each salesperson is simply to sell a certain number of vehicles during the year and it does not matter how they reach their goal. Astoundingly, at the end of the year, every salesperson that works for Protestant could achieve their sales goal without the dealership selling a single Nissan vehicle. (RT XII, 108:22 – 109:10).

**C. Protestant Has Materially Breached Its Obligation To Maintain Hours Of Its Service Department Which Are Reasonable And Convenient For Its Customers.**

Section 6.D of the Standard Provisions to the Dealer Agreement provides:

Hours of Operations.

Dealer recognizes that the service and maintenance needs of the owners of Nissan Products and Dealer's own responsibilities to actively and effectively promote the sale of Nissan Products can be met properly only if Dealer keeps its Dealership Facilities open and conducts all of its Dealership Operations required by the Agreement during hours which are reasonable and convenient for Dealer's customers.....during such days and hours as automobile dealers' sales and service facilities are customarily and lawfully open in Dealer's Primary Market Area....

(Exh. J-1. at Bates stamp NNA05633).

Despite its claim to the contrary, Protestant has materially breached this provision of the Dealer Agreement, as it has not conducted its Dealership Operations during hours that are reasonable and convenient for its service customers. As set forth above, over the four and one-

half years, Gary Inman has recommended time and time again that Protestant open for service on Saturdays. (RT VIII, 114:18 - 116:2; Resp. Exh. 210; RT VIII, 114:23 - 116: 9; RT XII, 137:13 - 146:7). Mr. Inman has counseled Jim Courtright that Saturdays are a good way to improve service retention, which can lead to increased Nissan vehicle sales. (RT VIII, 86:16 - 89:21). Since Jim Courtright has been general manager of the dealership, Protestant has never been open on Saturdays for years, based on unstudied and unsupported rationales of difficulties and lack of success. (RT VIII, 99:12 - 101:8; RT VII, 47:10 - 18; RT VII, 49:21 - 51:3; RT XI, 21:17 - 22: 4, 100:1 - 7; RT VII, 7:2 - 11).

Protestant also has not been operated on such days and hours as are customary in Dealer's PMA. The facing Honda dealer in the market is open on Saturdays for service and the facing Toyota dealer is open on Saturdays and Sundays. (RT VIII, 116:10 - 19). As Mr. Inman testified, whether another make such as Honda or Toyota has more Units in Operation than Nissan is not a reason to be open or not be open for Saturday service, because a dealer should be open when its customers want it to be open. (RTVIII, 119:18 - 120:10). This statement is entirely consistent with the Dealer Agreement requirement that Protestant be open for the hours that customers find to be convenient.

**D. Protestant Has Materially Breached Its Obligation To Maintain Qualified Management Which Operates The Nissan Dealership.**

The Nissan Dealer Agreement is a personal services agreement. (Exh. J-1, bates stamp NNA00063, Nissan Dealer Sales and Service Agreement at Introduction, second paragraph). In entering the Dealer Agreement, Protestant agreed that "the retention of qualified management is of critical importance to the successful operation of the dealership and achievement and purposes of the Dealer Agreement." (Exh. J-1, Bates stamp NNA00063, Nissan Dealer Agreement at Introduction, second paragraph and Bates stamp NNA00064 at Article Fourth (a) Executive

Manager). The Executive Manager and owners of the dealership are required to make all the decisions to run the store, including hiring and firing management and employees and setting the retail transaction price. (RT I, 55: 17-25, 56: 1-3). However, Jim Courtright delegates such responsibilities to others in the dealership. As an example, department heads at dealership are not required to notify Jim Courtright, Executive Manager, of the hiring and firing of employees. (RT XI, 222:22 – 223:4).

Jim Courtright fails to effectively run the day to day dealership operations in the most fundamental sense. Nissan representatives that called on Protestant's dealership formed the opinion that Jim Courtright lacks the ability to create and execute a plan to improve dealership operations. (RT I, 157: 14-27; 158: 1-16, RT II, 307: 6-20). Although all the Nissan representatives that called on Protestant's dealership knew that Lee Courtright was aware of Nissan's concerns with the poor sales performance because they met with both Lee Courtright and Jim Courtright during their contacts at the dealership. (RT I, 167: 1-20).

Under the management of Jim Courtright, Protestant's dealership lacked activity and the type of energy flowing through the store that would indicate either he (1) was not trying to improve performance or (2) couldn't improve performance. (RT I, 165: 17-27; 166: 1-17; RT II, 307: 8-20). Tina Novoa ultimately recommended that Protestant hire a General Manager under Jim Courtright to operate the dealership. Jim Courtright contacted an individual that Ms. Novoa suggested might be interested, but that person wasn't interested, and Jim Courtright never tried to find another General Manager. (RT XII, 63:21- 66:9).

## **VIII. CONCLUSION**

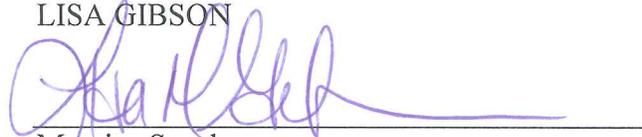
Protestant has not actively and effectively represented Nissan in the Santa Cruz market for almost a decade, its sales performance dwindling down to abysmally low levels. This is not a situation of a dealer briefly dipping below average sales performance. Over the past several

years Santa Cruz Nissan has become one of the worst of the worst dealers the entire West Region and the next to worst performing Nissan dealer in California<sup>3</sup>, performing at just 32% of average. In fact, Protestant has, in essence, ceased representing the Nissan brand and vehicles to the public, through its own actions or lack thereof. It is now simply a car dealer who happens to have a Nissan sign on the front of its building. Nissan, its customers and the public deserve much better. Allowing the Nissan franchise to be terminated is both right and appropriate under the circumstances.

There is no birthright to be able to own and operate a dealership in perpetuity after the founder retires or is deceased. Even the Vehicle Code, at section 11713.3(j) only allows the surviving spouse or heirs of a deceased owner the opportunity to operate the dealership “for a reasonable time after the death of the owner.” Jim Courtright has had a reasonable time to operate the dealership, since becoming Executive Manager in the early to mid-2000s (and the General Manager for about 10 years before that). Unfortunately, Santa Cruz Nissan’s performance has severely declined during his watch with no signs of rebounding and no coherent plan to make that happen. It is now time to make a change. Since Protestant has failed and refused to hire competent management to work under Jim Courtright, there is no alternative but to allow the franchise to be terminated.

Dated: June 2, 2014

BAKER & HOSTETLER LLP  
MAURICE SANCHEZ  
LISA GIBSON



Maurice Sanchez  
Attorneys for Respondent  
Nissan North America, Inc.

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<sup>3</sup> The lowest performing dealer has been in business only less than two years, Protestant over 40 years.

# **Exhibit A**

SACRAMENTO SUPERIOR AND MUNICIPAL COURTS  
IN AND FOR THE COUNTY OF SACRAMENTO

DATE/TIME : JANUARY 29, 1997  
JUDGE : NANCY SWEET  
REPORTER : NONE

DEPT. NO : 1  
CLERK : C. LEWIS  
BAILIFF : D. BUNCH

FORD MOTOR COMPANY, LINCOLN-MERCURY  
DIVISION, a corporation  
Petitioner,

J. KEITH MCKEAG

VS. Case No.: 96CS0247

NEW MOTOR VEHICLE BOARD OF THE STATE OF  
CALIFORNIA ,  
Respondent.

ANDREW LOOMIS

RAY FLADEBOE LINCOLN MERCURY, INC.,  
Real Party in Interest

A. ALBERT SPAR

Nature of Proceedings: STATEMENT OF DECISION ON WRIT OF MANDATE

The Court hereby rules on the above-entitled matter by the attached  
Statement of Decision.

Certificate of Service by Mailing attached.

BOOK : 1  
PAGE :  
DATE : JANUARY 29, 1997  
CASE NO. : 96CS0247  
CASE TITLE : FORD MOTOR V NEW MOTOR  
VEHICLE

SACRAMENTO SUPERIOR COURT

BY: C. LEWIS,

Deputy Clerk

CASE NUMBER: 96CS0247  
CASE TITLE: FORD MOTOR V NEW MOTOR VEHICLE  
PROCEEDINGS: STATEMENT OF DECISION ON WRIT OF MANDATE

DEPARTMENT: 1

CERTIFICATE OF SERVICE BY MAILING  
C.C.P. Sec. 1013a(3))

I, the undersigned deputy clerk of the Sacramento Superior and Municipal Courts of the State of California, in and for the County of Sacramento, do declare under penalty of perjury that I did this date place a copy of the above entitled notice in envelopes addressed to each of the parties, or their counsel of record as stated below, with sufficient postage affixed thereto and deposited the same in the United States Post Office at Sacramento, California.

J. KEITH MCKEAG  
DOWNEY, BRAND, SEYMOUR AND  
ROHWER  
555 CAPITOL MALL, 10TH FL.  
SACRAMENTO CA 95814-4686

ANDREW LOOMIS  
OFFICE OF THE ATTORNEY GENERAL  
1300 I STREET STE 125  
SACRAMENTO CA 94244-2550

A. ALBERT SPAR  
PARKER, MILLIKEN, CLARK,  
O'HARA & SAMUELIAN  
333 SOUTH HOPE ST.,  
LOS ANGELES, CA 90071-1488

Dated: JANUARY 29, 1997

Sacramento Superior Court

By: C. LEWIS, *Chen*  
Deputy Clerk

BOOK : 1  
PAGE : 19  
DATE : JANUARY 29, 1997  
CASE NO. : 96CS0247  
CASE TITLE : FORD MOTOR V NEW MOTOR  
VEHICLE

SACRAMENTO SUPERIOR COURT

BY: C. LEWIS,

Deputy Clerk

The within-entitled matter came on for hearing in the Sacramento County Superior Court on October 25, 1996, before the Honorable Nancy Sweet, Judge presiding. All parties appeared, represented by counsel as follows: J. Keith McKeag, Esq., for Petitioner; Deputy Attorney General Andrew Loomis, Esq., for Respondent; and J. Albert Spar, Esq., for Real Party in Interest. The matter was argued and submitted. The court hereby rules as follows on the issues presented.

Real Party in Interest Ray Fladeboe Lincoln-Mercury, Inc., ("Fladeboe") is a Lincoln-Mercury dealer in Irvine, California. Petitioner Ford Motor Company, Lincoln-Mercury Division, was dissatisfied with Fladeboe's continued poor sales performance and gave it notice of its intent to terminate its dealer franchise. Fladeboe filed a protest with Respondent New Motor Vehicle Board ("Board"). After a fifteen day hearing, the Board determined that Petitioner failed to establish any of the grounds constituting good cause for termination of the franchise under Vehicle Code section 3061, except that Fladeboe is not transacting an adequate amount of business as compared to the business available to it. The Board further found that Petitioner failed to establish that Fladeboe's sales performance was inadequate under the standards set forth in paragraph 2(a) of the Lincoln-Mercury Sales and Service Agreement. Relying on its own prior decision in *Kon Tiki Motorcycle v. Kawasaki Motors Corporation, USA*, Protest No. PR-179-78 (attached as Exhibit B to Petitioner's Memorandum in Support of Petition for Writ of Mandamus), the Board held that low sales alone is insufficient in itself to establish good cause for termination of a franchise and that the franchise in the instant case should not be terminated.

Petitioner then filed the instant petition for a writ of mandate pursuant to Code of Civil Procedure section 1094.5, seeking an order that the Board comply with its duties under Vehicle Code sections 3000 et. seq. and render a decision which conforms to the requirements of law and which is supported by the evidence, and alleging that the Board did not proceed in the manner required by law, that its decision is not supported by the findings, and that its findings are not supported by the evidence. Petitioner articulates its contentions that the Board's decision is erroneous as follows:

1. The Board imposed an improper burden of proof on Petitioner.
2. Poor sales performance alone is a sufficient ground for termination.

3. The Board ignored Petitioner's proof of Fladeboe's material breach of the Sales and Service Agreement.

4. The Board admitted testimony from a witness, on the issue of whether Fladeboe provided adequate service to the public, which witness was not qualified to express an opinion on that issue.

#### Standard of Review

The standard of review for proceedings under Code of Civil Procedure section 1094.5 is stated as follows in subdivision (b) of that section:

"The inquiry in such a case shall extend to the questions whether the respondent has proceeded without, or in excess of jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the respondent has not proceeded in manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence."

In the instant case, Petitioner contends that the Board did not proceed in the manner required by law, i.e., that the Board did not follow the law as stated in relevant sections of the Vehicle Code.

#### Burden of Proof

Vehicle Code section 3066, subdivision (b), provides in pertinent part that "In any hearing on a protest filed pursuant to Section 3060 or 3062, the franchisor shall have the burden of proof to establish that there is good cause to modify, replace, terminate or refuse to continue a franchise". Vehicle Code section 3061 provides:

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

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

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

**Ruling**  
**Page Three**

(c) Permanency of the investment.

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

(e) 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.

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

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

Petitioner argues that the Board improperly imposed on Petitioner the burden to prove all of the above-stated factors, even those which obviously are ones that would favor the dealer's position. Petitioner contends that it only has the burden of proving the factors it relied on for terminating the franchise.

The plain language of the statute (section 3066) provides that the burden is on the franchisor (Petitioner) to prove good cause for termination of a franchise. In determining whether good cause has been established, the Board must consider all of the factors set forth in section 3061 for which evidence has been presented from any party. The Board is then required to weigh the relevant factors and determine whether the weight of those factors favors termination of the franchise or its continuation. The burden on Petitioner was to prove good cause by producing sufficient evidence relating to some or all of the seven factors at issue to tip the balance in its favor, i.e., to show the weight of those factors favored termination of the franchise.

Petitioner's contention that it was required only to establish the factors specified in its Notice of Termination (i.e., those set forth in Section 3061, subdivisions (a) and (g)) is unsupported by any citation to authority and is contrary to the plain language of Section 3061, which requires that the Board consider all of the seven factors on which evidence has been presented, from whatever party. In the instant case, the Notice of Termination (Exhibit 29) provides in pertinent part that "This Notice of Termination is being issued pursuant to the provisions of subparagraph 17(c)(1) of the Lincoln and Mercury Sales and Service Agreements because of Fladeboe's continued failure to fulfill its responsibilities of achieving satisfactory sales and penetration performance under subparagraph 2(a) . . ." Presumably, Petitioner would have wanted to prove

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factors (a) and (g), as well as any other factors listed in section 3061 which would support termination. Petitioner was neither limited to proof of the factors stated in the Notice of Termination nor did the Notice of Limitation limit the Board as to the factors it could consider had evidence been presented on any additional factors by either party.

Petitioner further contends that the Board required it to prove that termination of the franchise would be injurious to the public under section 3061, subdivision (d). Petitioner's argument has support in the record in language in the Board's Determination of Issues. In particular, the finding at page 19, paragraph 94, subdivision (d), states that Petitioner "failed to establish that it would be injurious to the public welfare for the franchise to be" terminated. Obviously, section 3061, subdivision (d), does not require the franchisor to prove (contrary to its own position and interests) that termination would injure the public welfare. The statute plainly contemplates that the franchisor will present evidence to show termination would benefit the public welfare, while the franchisee will attempt to show termination would be injurious. Upon reconsideration as required by this ruling, the Board should reevaluate the evidence and findings on the subdivision (d) factor in light of this discussion.

In summary, the Board should properly weigh all the relevant factors and evidence in support thereof to arrive at its decision.

#### **Sufficiency of Poor Sales Alone as Ground for Termination**

In its Decision on Protest No. PR 1462-95 in the instant case, the Board adopted the Proposed Decision of the Administrative Law Judge. (Exhibit B to Petition for Writ of Mandamus). That decision included the following finding on page 18 (para. 92):

The Board determined in *Kon Tiki Motorcycle v. Kawasaki Motors Corporation, USA*, Protest No. PR 179-78 that "the amount of (retail sales) business transacted by Kon Tiki has been low as compared to the business available to it. This, however, is insufficient in itself to meet the burden of proof imposed upon the franchisor by section 3066 to show good cause as set forth in section 3061 to terminate the franchise."

The Board further determined that Petitioner (Lincoln-Mercury) established that Real Party in Interest dealer (Fladeboe) is not transacting an adequate amount of business as compared to the business available to it.

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The Concurring Opinion of the Board indicated in parag. 3 that that Board Member disagreed with the Majority Opinion to the extent that it might infer, whether intended or not, that a franchise agreement cannot be terminated solely on the basis of poor sales performance.

Petitioner contends that the Board erred in holding that poor sales alone can never be a sufficient ground for termination of a franchise. Petitioner also argues that the *Kon Tiki* case is not binding on the parties in the instant case and that that case was wrongly decided.

Petitioner is correct that the statutes do not expressly provide that poor sales alone is insufficient to establish good cause. Section 3061 requires the Board to consider all the circumstances presented, including all seven which are set forth in the statute. However, nothing in that statute prohibits a finding that, in any given set of facts, one factor may be so egregious that it would outweigh any remaining factors as to which proof was adduced. Each case must be decided on its merits in light of the totality of the evidence presented, not on the basis of an arbitrary rule unauthorized by law which would restrict the Board's weighing process in the determination of good cause for termination.

Under the Board's interpretation, a franchisee could make no sales and no effort to improve sales and yet be protected from termination. (Petition, page 23). The purpose of including sales as a separate statutory criteria was obviously to allow the fact of poor performance to be considered to terminate a franchise, unless shown to be outweighed on the balance of other existing circumstances. The Board acted outside the authority granted to it by establishing a *per se* rule that no matter how poor a dealer's sales performance is, it will never be sufficient to constitute good cause for termination of the franchise. The *Kon Tiki* case is not binding precedent and was similarly wrongly decided in respect to the *per se* rule.

Real Party in Interest dealer asks the court to uphold the Board's *per se* rule on the basis of numerous cases from other jurisdictions (federal and state). None of the rulings in those cases have constitutional law underpinnings. To the extent that they interpret statutes other than the California Vehicle Code, they are not binding on the California courts nor is the legislative intent regarding foreign statutes relevant to the California statutory scheme. Those cases are included in an Appendix to Real Party in Interest's Memorandum of Points and Authorities. In one of the cases applying a different California statute, the Ninth Circuit Court of Appeals did not establish a *per se* rule that poor sales can never justify termination, but

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only that under the facts of that case the dealer's poor sales performance could not justify termination. *Marquis v. Chrysler Corp.* (1978 9th Cir.) 577 F.2d 624, 632-633. The cases cited by Real Party in Interest do not control as to the interpretation of California Vehicle Code section 3061.

The Board erred to the extent it ruled that poor sales alone (factor (a)) can never, under any circumstances, outweigh all the other section 3061 factors and justify termination of a franchise. It is conceivable that, under some factual scenario, factor (a) (poor sales) could be weighed against all other factors and found to outweigh all other factors as to which evidence has been presented. The Board should reconsider its finding in light of the above discussion.

#### Evidence of Dealer's Purported Breach of the Sales and Service Agreements

Real Party in Interest (dealer's) responsibilities with regard to the sale of vehicles, and the criteria by which its sales performance will be measured, are set forth in paragraph 2(a) of the Sales and Service Agreement. Paragraph 2(a) provides in relevant part:

2(a). Sales. The Dealer shall promote vigorously and aggressively the sale at retail (and, if the Dealer elects, the leasing and rental) of VEHICLES to private and fleet customers within the DEALER'S LOCALITY, and shall develop energetically and satisfactorily the potentials for such sales and obtain a reasonable share thereof . . .

The Dealer's performance of his sales responsibility for VEHICLES shall be measured by such reasonable criteria as the Company may develop from time to time, including:

(1) The Dealer's sales of VEHICLES to private and fleet users located in the DEALER'S LOCALITY as a percentage of:

- (i) all private and all fleet registrations of VEHICLES in the DEALER'S LOCALITY,
- (ii) all private and all fleet registrations of COMPETITIVE VEHICLES in the DEALER'S LOCALITY,
- (iii) all private and all fleet registrations of INDUSTRY VEHICLES in the DEALER'S LOCALITY, and
- (iv) the private and fleet sales objectives for VEHICLES established from time to time.

(2) If the Dealer is not the only authorized dealer in VEHICLES in the DEALER'S LOCALITY, the following factors shall be used in computing percentages

pursuant to 2(a)(1) above:

(i) The Dealer's sales of VEHICLES to users located in the DEALER'S LOCALITY shall be deemed to be the total registrations thereof in the DEALER'S LOCALITY multiplied by the Dealer's percent of sales of all VEHICLES made by all authorized Mercury dealers located in the DEALER'S LOCALITY unless the Dealer or the Company shows that the Dealer actually has made a different number of such sales,

(ii) The registrations of VEHICLES and COMPETITIVE and INDUSTRY VEHICLES in the DEALER'S LOCALITY against which the Dealer shall be measured shall be the total thereof multiplied by the DEALER'S PERCENT responsibility, and

(iii) The Dealer's objectives for VEHICLES shall be the total objectives therefor of all authorized Mercury dealers in the DEALER'S LOCALITY multiplied by the DEALER'S PERCENT RESPONSIBILITY.

(3) A comparison of each such percentage with percentages similarly obtained for all other authorized Mercury dealers combined in the Company's sales zone and district in which the Dealer is located, and where subparagraph 2(a)(2) applies, for all other authorized Mercury dealers combined in the DEALER'S LOCALITY.

Petitioner contends that the Board ignored the evidence showing the inadequacy of Real Party Fladeboe's sales performance under the above-stated criteria. Petitioner's argument is somewhat confused, since it is evident from the Board's decision that it did not ignore this evidence, as the Board found that Fladeboe was not transacting an adequate amount of business. (Decision, page 19, paragraph 94(a)). Rather, the Board erroneously concluded that this factor alone could never be good cause for terminating the franchise under the Board's precedents.

What Petitioner really appears to be arguing here is that the Board erred as to the effect of its finding of inadequate sales. Petitioner concedes this in its reply brief at pages 7-8. Petitioner's argument seems to be that, even if inadequate sales alone are not good cause for termination under the Vehicle Code, they are also a breach of contract which justifies termination of the contract. (see Vehicle Code section 3061, subdivision (g)).

There are several difficulties with Petitioner's argument. First, while paragraph 2(a) provides that Fladeboe shall

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obtain a "reasonable share" of sales, and provides criteria for measuring Fladeboe's performance, Petitioner does not cite any provision of the Agreement where Fladeboe promised to sell a certain amount of vehicles, or that termination would result if a certain sales level were not accomplished. It is not clear that poor sales performance is an actual breach of the contract.

Next, one of the problems with review of the Board's decision is that the Decision is not very clear as to its reasoning. The parties both appear to believe that the Board found that Petitioner presented "no evidence as to Fladeboe's performance under subparagraph 2(a) of the Sales and Service Agreements" (Decision, page 20, paragraph 95) because Petitioner's evidence of Fladeboe's poor sales was based on a comparison with other dealers in the "region", rather than Fladeboe's "Dealer's Locality". The Decision itself states that Petitioner's expert used a national average to measure Fladeboe's performance, rather than measuring it based on the "Dealer Locality". (Decision, pages 17-18, paragraphs 87-88). In either event, it appears that while the Board found this evidence sufficient to establish poor sales, it found it inadequate to establish a breach of the Agreements because the measure of performance used was not the one specified by the Agreements.

Consequently, Fladeboe argues that, in order to establish a breach of the franchise agreement, paragraph 2(a) required Petitioner to measure its sales performance by reference to Fladeboe's "Dealer Locality" (which was Orange County, which has six other Lincoln-Mercury dealers). Fladeboe contends that Petitioner presented no evidence of Fladeboe's sales performance within the "Dealer Locality", and therefore it presented no evidence showing a breach of the agreement. Petitioner counters that paragraph 2(a), subdivision (3), authorized it to measure Fladeboe's performance in comparison to the "region" (which is not explained in the briefs, but apparently encompasses the Western United States - see Decision, page 8). Petitioner argues that its evidence of sales performance measured on a regional basis did establish a breach, and that it presented evidence of poor sales measured by reference to the "Dealer Locality" as well. Petitioner asks the court to interpret paragraph 2(a), and subparagraph 3 thereof, as authorizing it to use regional comparisons.

However, an examination of paragraph 2(a) shows it is far from clearly supportive of Petitioner's position. Paragraph 2(a) subparagraph (1), sets forth percentages Petitioner may use to measure dealers' sales performance. Subparagraph (2) then sets forth how these percentages shall be computed if the dealer is not the only dealer in the "Dealer's Locality".

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This language implies that subparagraph (1) applies where the dealer is the only one in the "Locality". In both cases, however, the measurement is made with reference to the "Dealer's Locality". Subparagraph (3) then states that Petitioner may compare these percentages to those for other dealers in the dealers "sales zone and district", and, where subparagraph (2) applies, to those for all other dealers in the "Dealer's Locality".

Petitioner relies on the first part of subparagraph (3) to claim its regional comparison evidence was proper. However, the more logical interpretation in view of paragraph 2(a) as a whole is that the first part of subparagraph (3), arguably authorizing regional comparisons, applies to dealers who are the only dealer in their "Locality"; where subparagraph (2) applies, i.e., where the dealer is not the only dealer in its "Locality", the comparison must instead be made with the other dealers within the "Locality". Under this interpretation, the Board's rejection of the regional (or national) comparison as evidence of a breach of the franchise agreement was proper.

In sum, Petitioner's ground for terminating the franchise was based on one thing: Fladeboe's poor sales performance. The Board did not ignore the evidence of poor sales, and its Decision is replete with reference to evidence showing poor sales. Instead, it appears that the Board did consider the evidence, but determined that it did not establish a breach of the Agreements. Petitioner has not demonstrated that the Board improperly ignored Petitioner's evidence. Such evidence should obviously be considered again upon reconsideration.

#### Admission of Opinion of Unqualified Witness

Petitioner contends that the Board erred in that it admitted the testimony of Fladeboe's expert witness for the limited purpose of establishing section 3061, subdivision (e), and then used that testimony to support its finding on the section 3061, subdivision (d), issue. Petitioner also contends that the expert's opinion was incompetent and should not have been admitted.

Even assuming that the opinion evidence was incompetent and utilized for an improper purpose beyond its limited admission, Petitioner has failed to demonstrate that any error was prejudicial. Petitioner simply argues in conclusory fashion that the error was prejudicial. Since Petitioner has failed to demonstrate or explain how the alleged error was prejudicial, it is not a basis for granting the writ.

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(Code of Civ. Proc., section 1094.5, subd. (b)).

**Conclusion**

The petition for writ of mandamus is granted for the reasons above-stated and the matter is remanded to the Board for reconsideration in light of this court's ruling. Petitioner is directed to prepare a formal order in accordance with the ruling.

DATED: January 29, 1997

*Nancy Sweet*

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Nancy Sweet  
Judge, Superior Court

**PROOF OF SERVICE**

I, Lisa M. Gibson, declare:

I am employed in Orange County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 600 Anton Boulevard, Suite 900, Costa Mesa, California 92626-7221. On June 3, 2014, I served a copy of the within document(s):

**RESPONDENT NISSAN NORTH AMERICA, INC.'S REPLY BRIEF TO PROTESTANT'S OPENING BRIEF**

by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m. and the transmission was reported as complete and without error.

**XXX** by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Costa Mesa, California addressed as set forth below.

by placing the document(s) listed above in a sealed \_\_\_\_\_ envelope and affixing a pre-paid air bill, and causing the envelope to be delivered to a \_\_\_\_\_ agent for delivery.

following ordinary business practices, the envelope was sealed and placed for collection by Federal Express on this date, and would, in the ordinary course of business, be retrieved by Federal Express for overnight delivery on this date.

by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below.

**XXX** by transmitting via electronic mail the document(s) listed above to the e-mail address(es) set forth below on this date before 4:00 p.m. and the transmission was reported as complete and without error.

Michael J. Flanagan, Esq.  
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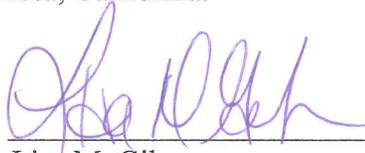
*Counsel for Protestant*  
SANTA CRUZ NISSAN, INC., dba  
SANTA CRUZ NISSAN

I am readily familiar with the firm's practice of collection and processing correspondence for

mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

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

Executed on June 3, 2014, at Costa Mesa, California.



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Lisa M. Gibson

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