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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

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

I. PROCEDURAL BACKGROUND

A. Statement of the Case

1. By letter dated January 14, 2013, Nissan North America, Inc. ("NNA") served Protestant, Santa Cruz Nissan, Inc., dba Santa Cruz Nissan ("SCN") with a Notice of Termination pursuant to Vehicle Code section 3060¹ of its intent to terminate Protestant's Nissan franchise.

2. On January 22, 2013, SCN filed a timely Protest pursuant to Vehicle Code section 3060.

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

1 3. A hearing was held before Administrative Law Judge (“ALJ”) Diana Woodward-Hagle on
2 January 27, 2014 through January 31, 2014; February 3, 2014 through February 7, 2014; and March 6,
3 2014 through March 7, 2014. An ALJ site visit to all relevant locations was held on January 24, 2014.
4 All parties were represented at the site visit.

5 **B. Parties and Counsel**

6 4. Protestant, SCN, is an authorized Nissan “franchisee” within the meaning of Vehicle Code
7 sections 331.1 and 3060(a)(1). Protestant was represented by Michael J. Flanagan, Esq., Gavin M.
8 Hughes, Esq. and Danielle R. Vare, Esq. of the Law Offices of Michael J. Flanagan.

9 5. Respondent, NNA, is a “franchisor” within the meaning of sections 331.2 and 3060(a).
10 Nissan was represented by Maurice Sanchez, Esq. and Lisa Gibson, Esq. of Baker & Hostetler, LLP.

11 **C. Summary of Witness’ Testimony and Exhibits Introduced**

12 6. Respondent, NNA, called the following witnesses: Eric Rodgers, General Manager of
13 Dealer Network Development at NNA; Samuel Wright, Manager of Dealer Digital Marketing at NNA;
14 Tina Novoa, former District Sales Manager at NNA; Alison Speranzo, West Region Market
15 Representation Manager at NNA; Eric Lewin, Loyalty Performance Manager at NNA; James
16 Courtright, Executive Manager at SCN (as an adverse witness under Evidence Code section 776); John
17 Gardner, Dealer Operations Manager at NNA; Gary Inman, Fixed Operations Manager at NNA; and
18 Chad Filiault, Area General Manager at NNA. Respondent’s expert witness was John Frith of Urban
19 Science Applications.

20 7. Protestant, SCN, called the following witnesses: Martin Bernal, City Manager for the City
21 of Santa Cruz; James Courtright, Executive Manager at SCN; and Ernest Courtright, Dealer Principal
22 at SCN. Protestant’s expert witness was Edward Stockton, Vice President and Director of Economic
23 Services of the Fontana Group.

24 8. Pursuant to lodging by Protestant, deposition designations for Anne Corrao, Director of
25 Customer Quality and Dealer Network Development at NNA, were submitted. Respondent lodged
26 counter designations.

1 9. Prior to commencement of the hearing, both parties filed Motions in Limine. Protestant
2 filed a Motion in Limine objecting to the use of Respondent's surrebuttal expert report. Protestant's
3 Motion was granted. Respondent filed a Motion in Limine to exclude certain testimony of Martin
4 Bernal. Respondent's Motion was denied.

5 10. All parties agreed to a Joint Glossary of Non-Controversial Terms.

6 11. The parties offered over 50 exhibits at the hearing and offered deposition designations, as
7 mentioned above.

8 12. Respondent filed a Pocket Brief on the Impeachment of Statements Made by the Owners of
9 Protestant by Use of Prior Inconsistent Statements. Respondent's Pocket Brief was denied.

10 **II. ISSUES PRESENTED**

11 13. Has Respondent demonstrated there is good cause to terminate Protestant's Nissan
12 franchise under Vehicle Code Section 3060 and 3061, taking into account the good cause factors of
13 section 3061 and the existing circumstances?

14 14. Pursuant to Vehicle Code section 3061, in order to determine whether good cause has been
15 established to terminate Protestant's franchise, the Board shall take into consideration the existing
16 circumstances, including, but not limited to:

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

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

21 (c) Permanency of the investment.

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

24 (e) Whether the franchisee has adequate motor vehicle sales and service facilities,
25 equipment, vehicle parts, and qualified service personnel to reasonably provide for the
26 needs of the consumers for the motor vehicles handled by the franchisee and has been
27

1 and is rendering adequate services to the public.

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

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

5 Under this statute, Respondent has the burden to prove there is good cause to terminate Santa
6 Cruz Nissan. (Veh. Code § 3066(b).)

7 15. Respondent also has the burden to demonstrate that the use of its regional and state based
8 performance standards ("RSE" and "SSER") to measure Protestant's sales performance in the market
9 is reasonable according to Vehicle Code Section 11713.13(g), to the extent Respondent is arguing that
10 Protestant's sales performance is substandard. Section 11713.13(g) reads as follows:

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

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

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

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

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

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

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

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

7 **III. PROTESTANT'S CONTENTIONS**

8 16. Protestant contends the following: SCN transacts an adequate amount of business as
9 compared to the business available to it. If the Protest is denied, Protestant's substantial and
10 permanent investment will be forfeited. The termination of Protestant will result in substantial harm to
11 the public welfare and there will be zero offsetting benefits to the public if Protestant is terminated
12 because Respondent cannot establish another Nissan dealer in the market. Protestant has fulfilled all
13 warranty obligations of the franchisor and complies with the terms of its franchise. There is not good
14 cause to terminate Protestant's franchise.

15 **IV. RESPONDENT'S CONTENTIONS**

16 17. Respondent contends the following: Protestant has failed to conduct an adequate amount of
17 business compared to that which is available to it as a result of management or operational
18 deficiencies. Protestant is not serving the needs or interests of the consuming public in its Primary
19 Market Area ("PMA") according to Respondent's sales performance standards and there is good cause
20 to terminate Protestant's franchise.

21 **V. FINDINGS OF FACT**

22 **A. Preliminary Findings**

23 18. Protestant, SCN, has been a Nissan franchisee in Santa Cruz, California since 1972.
24 Protestant operates from a facility it constructed in 1996, with Nissan's approval, at 1616 Soquel
25 Avenue, Santa Cruz, California.

26 19. Respondent assigns its dealers a PMA for which each dealer is responsible. A PMA is the
27 area assigned by Nissan to each dealer for sales performance evaluation purposes. Dealers are not

1 limited to sell in their PMA. (RT Vol. 7, 42:8-12; 42:24-43:2; *see also* Glossary of Terms Used in
2 Merits Hearing.)

3 **B. Joint Stipulations of Fact**

4 20. The parties agreed to the following Stipulated Facts:

5 (1) Protestant Santa Cruz Nissan, Inc. dba Santa Cruz Nissan (“Protestant” or “Santa
6 Cruz”) is a new motor vehicle dealer selling Nissan vehicles and related Products.

7 (2) Respondent, Nissan North American, Inc. (“Respondent” or “Nissan”) is the
8 distributor of Nissan Vehicles and Products in the United States.

9 (3) Santa Cruz (through its owner, Ernest Lee Courtright) has been a Nissan dealer in
10 Santa Cruz for approximately 40 years. James Courtright has been the general manager
11 of the dealership since the mid to late 1990’s, and since 2005 has been the Executive
12 Manager and minority owner of Protestant. The dealership is and has, since
13 approximately 1999 (*sic*), been located at 1616 Soquel Avenue, Santa Cruz, California
14 95062.

15 (4) Santa Cruz is a Nissan dealer pursuant to a Nissan Sales and Service Agreement
16 (“Dealer Agreement”) with Nissan. The basic terms of the Dealer Agreement have not
17 changed during the last 20 years of Santa Cruz’s tenure as a Nissan dealer.

18 (5) The dealership also sells the Volkswagen, Dodge and Ram line-makes of new
19 vehicles and products from the same facility and location.

20 (6) The dealership provides service for all 4 line-makes and sells used vehicles from
21 the same facility and location. The service department is open Monday through Friday.

22 (7) On March 19, 2012, Nissan sent Santa Cruz a written Notice of Default claiming
23 that Protestant had materially breached its Dealer Agreement and giving it an
24 opportunity to cure those alleged deficiencies. Nissan later extended the cure period
25 provided by the Notice of Default by letter dated October 5, 2012. During this latter
26 period, Nissan, pursuant to Protestant’s request, presented a potential buyer to Santa
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1 Cruz. Santa Cruz and the potential buyer were unable to reach agreement on a sale of
2 the dealership.

3 (8) On January 14, 2013, Nissan sent, and Santa Cruz received, a Notice of
4 Termination in compliance with Vehicle Code 3060.

5 (9) Santa Cruz filed a timely protest.

6 (10) The Honda, Toyota and Subaru dealers in the area were all once located in the
7 City of Santa Cruz, but have relocated outside the city limits. The city of Santa Cruz
8 also once had Chevrolet and Volvo dealerships which are no longer there.

9 **C. Findings Related to the Amount of Business Transacted As Compared to the Business**
10 **Available (Vehicle Code Section 3061(a))**

11 21. SCN's Executive Manager, Jim Courtright, is exceedingly qualified to run the daily
12 operations at the dealership. Jim Courtright has a Bachelor of Science in Managerial Economics and a
13 Masters in Business Administration (MBA). (RT Vol. 7, 6:22-7:11; Vol. 8, 339:8-21.) Prior to
14 becoming Executive Manager, Jim Courtright was General Manager of SCN and Finance Manager as
15 well. (RT Vol. 7, 8:25-9:8; 11:7-12.) In addition to these positions, Jim Courtright also worked at
16 other dealerships as a salesman and in the Finance and Insurance department. (RT Vol. 7, 10:11-11:6.)

17 22. In the 1990's, SCN tried opening for service on Saturdays but discontinued the practice
18 because it was not profitable and did not make financial sense. (RT Vol. 7, 47:10-14; 50:1-16; Vol. 11
19 21:20-12:4; Vol. 12, 176:10-177:17.)

20 23. In approximately 2010, Protestant adjusted the pay plans and increased commissions for its
21 sales staff in order to ensure they were focused on selling Nissans and were incentivized to do so. (RT
22 Vol. 2, 314:3-316:1; RT Vol. 11, 48:20-50:12; RT Vol. 12, 94:5-24; Respondent's Ex. 209, Bates
23 1015.)

24 24. In November and December 2012, Protestant's response time to leads was faster than the
25 regional average response time. (RT Vol. 11, 39:24-41:10; Protestant's Exs. 10, 11.) In November,
26 SCN's average response time was 25 minutes and in December, SCN's average response time was 18
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1 minutes. (*Id.*) By July 2013, SCN's response time to leads had been cut down to nine minutes. (RT
2 Vol. 11, 42:4-20; Protestant's Ex. 12.) Protestant was able to achieve this in spite of the fact that
3 Nissan's use of National, Regional and District close rates as applied to individual dealers is
4 misleading. For example, an individual dealer only gets credit for the leads it closes but larger
5 geographies are credited with a close for every resulting sale, regardless of whether the dealer
6 receiving the lead made the actual sale, so long as the lead and the sale occurred in the same geography
7 being measured. (RT Vol. 2, 100:22-104:9.) In addition, dealers can receive customer leads from as
8 far as 100 miles away. (RT Vol. 2, 105:18-23.)

9 25. The dealership utilizes its employees' service time very well, and technicians are operating
10 at approximately 100% efficiency when they are on the job, Monday through Friday. (RT Vol. 7,
11 53:10-24.)

12 26. In 2013, SCN sold 246 Nissan vehicles, which is a 48% increase over 2012. (RT Vol. 9,
13 65:2-17.)

14 27. Nissan does not currently have a hybrid vehicle to compete with other brands' available
15 hybrids (i.e. Toyota Prius). Hybrids are very popular in the Santa Cruz market and Nissan measures
16 Protestant's sales against competing brand dealers with hybrid and clean diesel options that Nissan
17 does not offer. (RT Vol. 9, 71:9-73:14; RT Vol. 11, 10:23-11:25; 12:8-13:10; Respondent's Ex. 200, p.
18 A10.)

19 28. Nissan's electric vehicle option, the Leaf, only has a range of 70-80 miles, after which the
20 battery requires a full charge, taking four-seven hours. (RT Vol. 9, 74:18-75:8.) Protestant also cannot
21 compete with other line-makes' hybrid options because SCN did not receive enough Leaf vehicles in
22 inventory. (RT Vol. 11, 14:17-15:1.)

23 29. A "brand" bias exists when characteristics outside of the control of the dealership lead to
24 different acceptance of the brand or product in the market under consideration compared to the
25 acceptance of the brand in the benchmark area against which the local market is compared.. A "sales"
26 bias exists when characteristics about the dealership's location or market that are beyond the
27

1 dealership's control affect sales volume relative to the market (even if no brand bias exists) differently
2 than dealerships in the markets against which the subject dealership is compared. (RT Vol. 9, 174:9-
3 12.)

4 30. The City of Santa Cruz has a "brand" bias with respect to Nissan products. This "brand"
5 bias is driven by variation in demographic characteristics in Santa Cruz. A regression analysis that
6 considers the Western Contiguous PMAs demonstrates that the approximate effect of the "brand" bias
7 is 18%. Regression analysis is statistically significant to a very high degree. (RT Vol. 9, 159:10-168:5;
8 Protestant's Ex. 21, Tab 8R, pp.1-2.)

9 31. The City of Santa Cruz has several "sales" biases. These factors relate to the geography of
10 the market, and the direction of the flow of trade, which is a net outflow condition. The City of Santa
11 Cruz is a net exporter of jobs, meaning more residents commute out of Santa Cruz for their jobs as
12 opposed to those who commute in. (RT Vol. 6, 32:13-25.) Approximately 1.5 workers leave Santa
13 Cruz for work compared to each worker who resides outside of the market but works in Santa Cruz.
14 Since a number of people drive out of the Santa Cruz area to work, it impacts SCN's ability to sell
15 vehicles to them. People who commute out of Santa Cruz tend to buy their vehicles out of the area,
16 especially in the larger San Jose market. (RT Vol. 9, 3-16; Vol. 11, 15:16-25; 16:14-17:22.) This
17 means that SCN loses some of its convenience advantage with those workers who leave the market but
18 does not recapture that opportunity with a corresponding number of in-commuters. Local market
19 conditions can affect Nissan brand performance, as conceded by Nissan. (RT Vol. 1, 178:1-4.)

20 32. The out-commute condition for workers, outgoing flow of trade in non-automotive retail
21 and strong outgoing flow of trade in the Santa Cruz automotive market indicate that customers
22 consider Santa Cruz to have a small "mass," meaning that customers will make fewer purchases in
23 Santa Cruz given the distance to Santa Cruz. This is a realistic assessment of market conditions in
24 Santa Cruz as compared to the RSE standard of NNA. (RT Vol. 9, 192:23-197:3.)

25 33. The advantages of being a larger, higher volume dealer in a larger market (such as San
26 Jose) include having more inventory and being better able to compete for bonus programs set up by
27

1 Nissan. Under these bonus programs, if you sell more cars and achieve a higher goal, Nissan will pay
2 the dealer more money per vehicle. (RT Vol. 9, 67:22-70:2.)

3 34. Mr. Stockton studied the Santa Cruz market in the context of NNA's allegations of a
4 contractual breach of sales performance obligations by SCN. (RT Vol. 9, 112:13-112:19.)

5 35. Much of Mr. Stockton's study was analysis of whether RSE actually accounts for all
6 factors outside of the control of the dealership. Respondent's expert, Mr. Frith, asserts that a
7 dealership's RSE score is reflective only of the quality of dealership operations. Mr. Stockton's
8 analysis shows that Mr. Frith's interpretation of RSE is not correct. (RT Vol. 5, 112:13-19.)

9 36. A dealership's RSE sales expectation standard is derived based on measures of the dealer's
10 market, but dealers must sell outside of their markets. However, there is no measure of opportunity
11 that is actually based on whether and how much it is feasible for a dealership to make sales outside of
12 its market. In this sense, the RSE formula is simply arbitrary. (RT Vol. 5, 130:22-131:4; 132:3-15.)

13 37. The income, age and educational levels of the population affect the tendency of customers
14 to migrate between products within Nissan's competitive segments. (RT Vol. 9, 159:10-168:5;
15 Protestant's Ex. 21, Tab 8R, pp. 1-2.) The segmentation analysis inherent in RSE cannot assess these
16 effects because taking a single average across entire product segments is mathematically incapable of
17 accounting for factors that affect market share within the product segment. In other words, not only
18 can RSE not answer questions about "brand" bias, it is mathematically incapable of even asking the
19 questions. (RT Vol. 9, 157:12-158:6.)

20 38. Mr. Frith incorrectly claimed that RSE fully accounts for demographic variation. While
21 RSE does account for demographic factors that affect the types of vehicles that customers purchase, it
22 does not even attempt to account for demographic variation that leads customers to migrate between
23 products within the same product segments. The regression analysis tests for demographic effects only
24 after considering the segmentation process from RSE. Inherently, this means that the regression
25 analysis was only analyzing demographic effects not captured by RSE. (RT Vol. 10, 135:4-136:12.)

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1 one shopping location or another. (RT Vol. 9, 188:3-191:16.)

2 45. Nissan expanded Protestant's PMA subsequent to the issuance of the Notice of Default.
3 (RT Vol. 2, 217:12-218:19), therefore all competitive registrations occurring in the additional census
4 tracts were counted against Protestant and increased Protestant's RSE objective. (RT Vol. 2, 212:8-
5 213:3.)

6 46. SCN's gross profits have historically been at or below those of the composite group of
7 Nissan dealerships. (RT Vol. 9, 181:17-182:1; Protestant's Ex. 21, Tab 11.) There was no evidence
8 presented that SCN's customers are any less satisfied than the customers of other Nissan dealers.
9 Customer Satisfaction Index ("CSI") data show that SCN had scores approximately equal to the scores
10 of the average dealership. (RT Vol. 9, 182:2-17; Protestant's Ex. 21, Tab 10.)

11 47. When customers are comparably satisfied and gross profits are at or below comparable
12 levels, this suggests that low sales are more a function of the market than of dealership operations. (RT
13 Vol. 9, 175:13-178:7; Protestant's Ex. 21, Tabs 10-11.)

14 **D. Findings Related to the Investment Necessarily Made and Obligations Incurred (Vehicle**
15 **Code Section 3061(b))**

16 48. The SCN dealership currently pays \$25,000 per month for rent. (RT Vol. 7, 16:19-21.)

17 49. Since the addition of the Watsonville census tracts to SCN's PMA in 2012, Protestant has
18 executed advertising contracts with both cable and network television in the area. (RT Vol. 7, 46:5-
19 47:3.) In order to drive traffic into the dealership, Protestant increased its ad spending in the several
20 months before July, 2012 from \$6,000 per month to \$12,000 per month. (Respondent's Ex. 209, NNA
21 0025.)

22 50. In addition, SCN decided in January, 2014 to advertise with a local Spanish media station
23 (RT Vol. 7, 33:15-34:4; Vol. 11, 29:23-30:23), and as of the hearing date, SCN has three Spanish
24 speaking sales employees. (RT Vol. 7, 38:19-39:7; 39:24-40:25.)

25 51. Moreover, SCN has increased its marketing budget at various times since 2011 (RT Vol.
26 11, 47:2-48:10; Respondent's Ex. 209), and SCN has shuttle service with two drivers available every
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1 hour the service department is open. (RT Vol. 9, 13:19-14:1.)

2 52. Since 2008, Protestant has implemented many changes in order to improve the dealership's
3 internet department. Protestant has rebuilt its Nissan website, hired more internet staff to properly
4 service customers in a shorter time frame, signed up for Cobalt's Reputation Management Internet
5 Program, signed up for Nissan's program for third party leads, attended year-long training with
6 Nissan's Cobalt representative, signed with an additional company for e-mail marketing and also
7 signed up with new lead providers, Cars.com and Auto Trader, to provide more leads and get the SCN
8 name visible. (RT Vol. 2, 295:1-13; 302:2-13; 304:7-18; 310:1-311:9; 311:10-313:25; Vol. 11, 31:10-
9 32:4; Vol. 12, 93:11-94:2; Respondent's Ex. 209, Bates 1015.) All employees at SCN have completed
10 Virtual Academy training to become certified. (RT Vol. 12, 101:1-9.)

11 **E. Findings Related to the Permanency of Investment (Vehicle Code Section 3061(c))**

12 53. SCN is owned by Jim Courtright (28%) and Earnest ("Lee") Courtright (72%) is the
13 majority owner of the rest of the dealership. (RT Vol. 7, 14:2-6; Vol. 9, 45:17-20; RT Vol. 12, 206:24-
14 25.) Protestant has been a Nissan dealer for more than 40 years, since 1972, and constructed a new
15 facility from the ground up in 1996.

16 54. SCN has 19 service stalls and 17 lifts. The dealership employs six service technicians
17 dedicated solely to Nissan, with two of those being master technicians. (RT Vol. 9, 12:13-13:8.) SCN
18 dedicates seven lifts specifically for Nissan, with one additional lift available to add, if needed. (RT
19 Vol. 9, 14:19-15:6.)

20 55. SCN invested in a special service stall and placed special safety precautions in order for
21 technicians to work on the Nissan Leaf electric vehicles. (RT Vol. 9, 17:5-19.)

22 56. The SCN franchise is particularly valuable because it is a successfully established business
23 that has been in the community for a long time. Therefore, people know the name of the dealership in
24 the community and it has been established that it can remain viable. (RT Vol. 9, 55:7-23; Protestant's
25 Ex. 2.)

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1 57. According to Nissan, it would be easier for Nissan to fill an open point in the Santa Cruz
2 market than it would be to find a buyer for the SCN franchise because a potential dealer candidate
3 would not have to pay Protestant's blue sky, or the value of the franchise. (RT Vol. 9, 6-23.)

4 **F. Findings Related to Whether It is Injurious or Beneficial to the Public Welfare for the**
5 **Franchise to be Modified or Replaced or the Business of the Franchisee Disrupted (Vehicle Code**
6 **Section 3061(d))**

7 58. The Courtright's have been involved with the Santa Cruz Rotary and Santa Cruz Rotary
8 endowment for approximately 19 years. (RT Vol. 9, 58:13-59:12; Protestant's Ex. 2.) SCN also has
9 been involved with Santa Cruz Little League for approximately 11 years. (RT Vol. 9, 59:13-60:4;
10 Protestant's Ex. 2.) SCN is also committed to being a Clean Ocean Business, as well as made
11 donations to many other community programs. (RT Vol. 9, 60:7-62:12; Protestant's Ex. 2.)

12 59. If the Nissan franchise were terminated and the rest of the dealership were operating
13 unprofitably, the dealership's ability to participate in various community activities would be severely
14 diminished. (RT Vol. 9, 63:6-22; Vol. 12, 81:12-82:9.)

15 60. The City of Santa Cruz's sales tax revenue is a major source for its general fund which
16 pays for services like public safety, police and fire, parks and recreation, public works, street
17 maintenance, traffic maintenance and other basic city services. (RT Vol. 6, 10:16-23.) The SCN
18 dealership pays approximately \$1.6-1.7 million in sales tax to the City of Santa Cruz annually. (RT
19 Vol. 12, 173:13-18; Protestant's Ex. 15.) SCN is one of the top ten sales tax contributors to the City of
20 Santa Cruz. (RT Vol. 6, 31:16-21.)

21 61. In addition to increased tax revenue, additional benefits of maintaining a business, such as
22 SCN, in the City of Santa Cruz, are job creation, community involvement and the creation of synergy
23 with other dealerships to attract business. (RT Vol. 6, 11:7-13:6.)

24 62. The City of Santa Cruz used to host all the new car dealerships in Santa Cruz County, but
25 that number has diminished to include only Protestant (and its four franchises) and a Ford dealership.
26 (RT Vol. 6, 12:17-13:6.)

1 63. If SCN were required to close, the City of Santa Cruz would lose a major revenue source.
2 Since the city is recovering from an economic downturn, every bit of revenue is critical. The City of
3 Santa Cruz would lose funding for some of its basic services, such as public safety. (RT Vol. 6, 24:6-
4 20.) The City of Santa Cruz would also begin losing other dealerships and sources of revenue because
5 of the clustering, synergy effect. (RT Vol. 6, 37:19-38:11.)

6 64. It would be extremely difficult for Nissan to replace a dealership in the City of Santa Cruz
7 that would be NREDI compliant and exclusive because there are not a lot of vacant or available large
8 parcels in the city. It would take quite a bit of work to assemble parcels and it is even more difficult
9 now since the dissolution of redevelopment agencies. (RT Vol. 6, 85:4-86:23.)

10 65. If the SCN dealership were required to close, the Courtright's family business and other car
11 dealerships would be seriously impacted. There would likely be staff layoffs and the dealership would
12 not remain viable without the Nissan franchise. (RT Vol. 9, 46:5-25; Vol. 12, 172:17-173:12; RT Vol.
13 12, 194:4-17.) In addition, Nissan customers in the Santa Cruz market would have to drive 20-25
14 miles to get service and repairs and would not be able to charge their Leaf vehicles at anytime, 24
15 hours a day, 7 days a week. (RT Vol. 11, 62:1-11.)

16 **G. Findings Related to Whether the Franchisee has Adequate Motor Vehicle Sales and**
17 **Service Facilities, Equipment, Vehicle Parts, and Qualified Service Personnel to Reasonably**
18 **Provide for the Needs of the Consumers for the Motor Vehicles Handled by the Franchisee and**
19 **has been and is Rendering Adequate Services to the Public (Vehicle Code Section 3061(e))**

20 66. SCN has 19 service stalls and 17 lifts. The dealership employs six service technicians
21 dedicated solely to Nissan, with two of those being master technicians. (RT Vol. 9, 12:13-13:8.) SCN
22 dedicates seven lifts specifically for Nissan, with one additional lift available to add, if needed. (RT
23 Vol. 9, 14:19-15:6.)

24 67. SCN invested in a special service stall and placed special safety precautions in order for
25 technicians to work on the Nissan Leaf electric vehicles. (RT Vol. 9, 17:5-19.)

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1 68. Though Respondent has the burden of proof in this matter, Respondent has not presented
2 any evidence that Protestant does not have adequate motor vehicle sales and service facilities,
3 equipment, vehicle parts and qualified service personnel to reasonably provide for the needs of
4 consumers and has not been rendering adequate services to the public.

5 **H. Findings Related to Whether the Franchisee Fails to Fulfill the Warranty Obligations of**
6 **the Franchisor to be Performed by the Franchisee (Vehicle Code Section 3061(f))**

7 69. SCN completes Nissan warranty repairs and there are no type of warranty repairs that the
8 dealership is not equipped to perform. (RT Vol. 11, 22:19-23:3.)

9 70. Again, Respondent has not presented any evidence that Protestant fails to fulfill any
10 warranty obligations.

11 **I. Findings Related to the Extent of Franchisee's Failure to Comply with the Terms of the**
12 **Franchise (Vehicle Code Section 3061(g))**

13 71. No one from Nissan has ever advised SCN that it is not meeting its obligations under the
14 Dealer Agreement in terms of hours of operation at the dealership. (RT Vol. 11, 24:4-8.) Respondent
15 has claimed no violation of the Franchise Agreement. Adequate performance under RSE is not a part
16 of the Franchise Agreement, nor is it defined. (Joint Ex. 1.)

17 72. Nor is it a requirement under Protestant's Franchise Agreement that SCN be open for
18 service on Saturdays. (RT Vol. 11, 23:4-15.)

19 **J. Findings Related to any other Existing Circumstances which Demonstrate that there is**
20 **Good Cause to Terminate Protestant's Nissan Franchise**

21 73. When Jim Courtright spoke with Nissan representative, Tina Novoa, immediately after
22 getting notice of Nissan's intent to conduct a market study, he was dissuaded from providing Nissan
23 with any additional information to consider in its market study because Mr. Courtright was under the
24 impression that it was not an important issue to pursue. (RT Vol. 12, 85:2-86:18; 131:6-132:4.) Tina
25 Novoa's claim that she never discussed with the Courtrights whether they should submit information in
26 regard to the market study is not credible. (RT Vol. 2, 322:4-322:24.)

1 74. Nissan has a policy that, based on a planning volume over 400, a dealership should be
2 exclusive and NREDI compliant. (RT Vol. 12, 83:10-21.) This policy applies to SCN, although there
3 is no evidence for it. (RT Vol. 3, 154:4-155:12.) The importance placed upon whether Protestant was
4 operating from an NREDI, exclusive facility by Nissan is clear and was a consideration of Respondent
5 when it began the Notice of Default process that resulted in the issuance of a Notice of Termination.
6 (RT Vol. 2, 118:19-119:20; Joint Ex. 2, NNA 27). Although N REDI compliance is not mentioned,
7 the NOT and NNA's witnesses testified it was not a factor in issuing the NOT. (RT Vol. 1, 153:16-
8 154:5; Joint Ex. 4.)

9 75. However, outside of litigation, NNA conducted a market study of Santa Cruz. This market
10 study followed very closely to the analytical process used by Mr. Frith's company, Urban Science. (RT
11 Vol. 9, 120:12-20; Protestant's Ex. 21, Tab 4; Joint Ex. 7.) This study concluded that the solution to
12 the alleged sales and market share problem in Santa Cruz was to have SCN relocate to an exclusive,
13 image-compliant facility. (RT Vol. 9, 128:17-132:6; Protestant's Ex. 21, Tab 3, pp. 44-49; Joint Ex. 7.)

14 76. The market study also concluded that the Nissan dealer count could be an issue in Santa
15 Cruz. Outside of litigation, the market study concluded that Nissan needed two dealerships instead of
16 one in Santa Cruz. (RT Vol. 9, 124:9-25; Protestant's Ex. 21, Tab 21, Tab 4; Joint Ex. 7.) The market
17 study also concluded that the effect of having the dealership move into an exclusive, image-compliant
18 facility would be to increase the dealership's ability to capture customers to a level at or above the
19 average Nissan dealership. (RT Vol. 9, 128:17-132:6; Protestant's Ex. 21, Tab 4, pp.44-49; Joint Ex.
20 7.)

21 77. Nissan has told Protestant that it would like the SCN dealership to be exclusively Nissan.
22 (RT Vol. 9, 22:1-10; Joint Ex. 7.) Nissan has also requested the SCN dealership be upgraded to be
23 NREDI image compliant. (RT Vol. 9, 23:13-22; 24:9-14; Joint Ex. 7; Respondent's Ex. 227.) Nissan
24 has expressed a desire for SCN to be located next to a Honda or Toyota dealership. (RT Vol. 9, 28:6-
25 16; 31:25-32:5; RT Vol. 2, Joint Ex. 7.)

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1 78. The above is demonstrated in the transmittal requesting the issuance of the Notice of
2 Default, which contains a section titled "Facility" that reads:

3
4 Despite a Nissan planning volume of 621, Dealer is dualed with Volkswagen and Dodge
5 in a facility constructed/completed in 1997. The facility is not NREDI compliant and is
6 located on Soquel Avenue in Santa Cruz. A 'desktop' market study conducted in January
7 2011 yields a recommendation to relocate the dealership approximately two miles east
8 near Honda and Toyota. As noted in the below table, the facility is also under guide
9 (which was the subject of Amendment No. 2.) (Joint Ex. 2, NNA 37.)

10 Nissan's emphasis on the word not indicates that it placed importance on the fact that Protestant
11 was not an exclusive, NREDI compliant facility, although Nissan claims that these
12 considerations played no part in its decision to issue the Notice of Default and Notice of
13 Termination, which is not credible. (RT Vol. 3, 122:1-125:5.)

14 79. It is not financially viable for Protestant to relocate its Nissan dealership near Honda or
15 Toyota. (RT Vol. 9, 30:12-17; 36:19-37:8; 39:16-21.) There are no lots available in Nissan's preferred
16 location next to Honda or Toyota. (RT Vol. 1, 186:14-190:25; RT Vol. 9, 35:9-12; 40:5-8; Joint Ex. 4.)

17 80. In late 2012, Protestant informed Nissan it would be willing to build it an exclusive
18 showroom to address its concerns, but Nissan declined that offer. (RT Vol. 11, 8:4-22.)

19 81. Protestant would prefer to remain a Nissan dealer but the Courtright's did agree to consider
20 the sale of the Nissan franchise. (RT Vol. 9, 49:11-15.) The Courtright's signed a Buyer's Assist Letter
21 at NNA's urging in order to get an extension of the Notice of Default. (RT Vol. 9, 49:18-23; RT Vol.
22 12, 180:17-182:15; Respondent's Ex. 208.) Ernest Courtright was under the impression that if he did
23 not sign the Buyer's Assist Letter, SCN would be terminated. (RT Vol. 12, 183:8-20.)

24 82. The sole potential buyer provided by Nissan, Mr. Groppetti, stated he wasn't interested
25 after looking into the expense of purchasing the property and constructing an exclusive facility. (RT
26 Vol. 9, 50:25-51:10.) Mr. Groppetti stated the only deal he would be willing to enter into would
27 require the sale of the entire dealership and its property, which was not of interest to the Courtright's.
28 (RT Vol. 9, 52:1-13.)

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1 VI. CONCLUSIONS/ANALYSIS OF GOOD CAUSE FACTORS

2 **A. Amount of Business Transacted As Compared to the Business Available (Vehicle Code**
3 **Section 3061(a))**

4 83. Respondent has not established that Protestant does not conduct an adequate amount of
5 business as compared to the business available.

6 **B. Investment Necessarily Made and Obligations Incurred (Vehicle Code Section 3061(b))**

7 84. Respondent has not established that Protestant has not made or incurred necessary
8 investments or obligations.

9 **C. Permanency of Investment (Vehicle Code Section 3061(c))**

10 85. Respondent has not established a lack of permanency of investment on behalf of
11 Protestant, because Protestant is a dealer with substantial investments in land and property.

12 **D. Whether It is Injurious or Beneficial to the Public Welfare for the Franchise to be**
13 **Modified or Replaced or the Business of the Franchisee Disrupted (Vehicle Code Section**
14 **3061(d))**

15 86. Respondent has not established that the public welfare would benefit from the termination
16 of Protestant's franchise. Further, Respondent has also not proven any injurious effects on the public
17 welfare that might result.

18 **E. Whether the Franchisee has Adequate Motor Vehicle Sales and Service Facilities,**
19 **Equipment, Vehicle Parts, and Qualified Service Personnel to Reasonably Provide for the Needs**
20 **of the Consumers for the Motor Vehicle s Handled by the Franchisee and has been and is**
21 **Rendering Adequate Services to the Public (Vehicle Code Section 3061(e))**

22 87. Respondent has not established that Protestant does not have adequate motor vehicle sales
23 and service facilities, equipment, vehicle parts, and qualified service personnel to reasonably provide
24 for the needs of Nissan customers. In addition, Respondent has not established that Protestant is not
25 rendering adequate services to the public.

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1 **F. Whether the Franchisee Fails to Fulfill the Warranty Obligations of the Franchisor to be**
2 **Performed by the Franchisee (Vehicle Code Section 3061(f))**

3 88. Respondent has not established that Protestant fails to fulfill any warranty obligations of
4 Nissan.

5 **G. Extent of Franchisee's Failure to Comply with the Terms of the Franchise (Vehicle Code**
6 **Section 3061(g))**

7 89. Respondent has not established that Protestant has failed to comply with the terms of its
8 franchise.

9 **VII. DETERMINATION OF ISSUES**

10 90. Respondent has not sustained its burden of proof of establishing Protestant does not
11 transact an adequate amount of business as compared to the business available to it.

12 91. Respondent has not sustained its burden of proof of establishing Protestant has not made
13 investments or incurred obligations related to its franchise.

14 92. Respondent has not sustained its burden of proof of establishing Protestant has not
15 demonstrated permanency of its investment.

16 93. Respondent has not sustained its burden of proof of establishing it would be beneficial to
17 the public welfare for SCN to be replaced or the business disrupted.

18 94. Respondent has not sustained its burden of proof of establishing SCN does not have
19 adequate motor vehicle sales, service facilities, equipment, vehicle parts, and qualified service
20 personnel to reasonably provide for the needs of consumers and has not been rendering adequate
21 services to the public.

22 95. Respondent has not sustained its burden of proof of establishing SCN fails to fulfill the
23 warranty obligations of Nissan to be performed by SCN.

24 96. Respondent has not sustained its burden of proof of establishing SCN has failed to comply
25 with the terms of its franchise.

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DECLARATION OF SERVICE BY ELECTRONIC MAIL

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I, Valerie A. Coffey, declare that I am employed in the County of Sacramento, State of California, that I am over 18 years of age, and that I am not a party to the proceedings identified herein. My business address is 2277 Fair Oaks Boulevard, Suite 450, Sacramento, California, 95825.

I declare that on May 5, 2014, I caused to be served a true and complete copy of:

PROTESTANT'S PROPOSED FINDINGS OF FACT

Santa Cruz Nissan v Nissan

Protest No. PR-2358-13

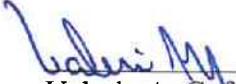
By Electronic Mail:

Maurice Sanchez, Esq.
Kevin M. Colton, Esq.
Lisa Gibson, Esq.
BAKER & HOSTETLER
600 Anton Blvd St 900
Costa Mesa, CA 92626

Also by First Class Mail

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 5 May, 2014, Sacramento, California.



Valerie A. Coffey