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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 POST-HEARING  
BRIEF

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## I. INTRODUCTION

Respondent, Nissan North America, Inc., (“Respondent” or “Nissan”) files this Post-Hearing Brief to in order to demonstrate that good cause was shown during the merits hearing to terminate the franchise, i.e., Nissan Dealer Sales and Service Agreement (“Dealer Agreement”) of Santa Cruz Nissan, Inc., dba Santa Cruz Nissan (“Protestant” or “SCN” ). Nissan demonstrated that: (1) Since at least 2007 Protestant has failed to achieve anything close to transacting an adequate “Amount of business ...compared to the business available to the franchisee” (Vehicle Code § 3061(a)); (2) Protestant itself has made no permanent investment in the facility, as it is owned by a separate trust, and in any event, such investment as was made has been recouped over the years and is still viable (Vehicle Code § 3061(b and c)); (3) because Protestant has chosen to ignore a significant portion of the public in its Primary Market Area (“PMA”) (Hispanic population of City of Watsonville is 81% and of Santa Cruz County is 32.7% - [Exh. J-12-B and C]) for at least the past 5 ¾ years, as demonstrated by Protestant having employed no Spanish-speaking salespersons during that entire time period and never (before February, 2014) used Spanish language advertising, the public welfare would be benefitted by the termination of SCN’s franchise and its replacement by another Nissan dealer (Vehicle Code § 3061(d)) and (4) Protestant has materially breached the terms of its Nissan Dealer Agreement, by failing to “actively and effectively promote the sale of Nissan Vehicles” to the public in its PMA and by failing to exert sufficient effort to give the public a meaningful choice when it comes to car purchases and convenient service in the Santa Cruz County market (Vehicle Code § 3061(g)).

Perhaps most tellingly, Protestant has demonstrated a perplexing passivity in response to an alarming 7 year decline in sales effectiveness and Nissan’s continued exhortations, written and oral, to improve its sales performance. Even when Nissan issued a Notice of Default (“NOD”) to SCN in March, 2012 advising SCN that if its performance didn’t improve within the next six months, Nissan would be forced to issue a Notice of Termination, SCN did virtually nothing in response. For example, Jim Courtright admitted that SCN did not increase its sales

team's sales goals after the NOD was issued. (RT XII, 111:21 – 112:2) Further, Jim Courtright admitted that no separate sales goal was set for Nissan sales at the dealership, just an overall goal that was possible for each salesperson to meet without making a single Nissan sale. (RT XII, 111:21 – 112:2; RT XII, 108:22 – 109:10; RT XI, 116:4 – 117:14) SCN did not take any positive steps to improve sales until well after the six month “cure period” stated in the NOD had expired: SCN did not increase its sales staff and especially did not add any Spanish-speaking salespersons until *19 months* after the NOD was issued (RTVII, 38:19 - 40:22) and did not begin advertising in Spanish until *23 months* after the NOD. (RT XI, 30:2 – 15) Both of these actions were also taken well after the Notice of Termination was issued and after this Protest was pending.

Protestant's counter-arguments to the grounds for termination are unavailing. Even Protestant's expert did not argue that Protestant's sales performance was adequate by any reasonable measure, and indeed failed to present *any* standard by which Protestant's performance could be measured. Protestant attempts to argue that it is impossible for Nissan to replace it after termination, on the basis that one potential buyer of the Nissan dealership assets, after a brief visit, found certain property in the area to be too expensive. (RT I, 129: 15-19) Therefore, Protestant argues, Nissan, this Board and the public must accept and be satisfied with its dismal performance and failure to meet the needs of the public, because “something is better than nothing.” In seeking to equate the inability of a prospective buyer of its franchise to locate property in the area *instantly* with an inability of Nissan to *ever* replace SCN, Protestant simply blurs the facts and argues that it is the *only* alternative, albeit not a very good one at that. This argument is fallacious. Nissan can and will replace Protestant once its franchise has been terminated. (RT I, 137: 4-6) Nissan and the public deserve much better representation than Protestant has provided, and is willing to provide and will have better representation with a replacement dealer.

Protestant essentially admits that it has failed to serve the public. In a county with a 32.7% Hispanic population (Exh. J-12-C), SCN admits it has had “zero” Spanish-speaking salespersons in the nearly 6 years from 2008 through August, 2013 (RT XI, 72:5 – 23; RTVII,

41:8 - 11) Jim Courtright admitted that Protestant, to his knowledge, has *never* during his tenure done any Spanish-language advertising before February, 2014 (RT XI, 97:16 – 24) – despite Nissan’s prior admonitions that it do so. Finally, Protestant admits that it has failed and refused to be open for service on Saturdays since trying it briefly in the mid-1990’s, despite the fact that its closest dealer competitors, Ocean Honda and Santa Cruz Toyota, are open Saturdays for service and in the case of Santa Cruz Toyota, on Sundays as well. (RTXI, 24:15 – 17; RTVIII, 116:14 - 19) All the while, Protestant laments that it cannot sell Nissans to Santa Cruz commuters that drive “over the hill” to the Bay Area every weekday for work, yet it steadfastly refused to open for Saturday service as a way to attempt to attract these potential customers to the dealership when they do stay home – on the weekends. (RTVII, 49:21 - 51:3)

The truth is that SCN simply doesn’t care whether or not it meets the needs of the public. Its post-termination notice efforts to hire Hispanic salespersons, to advertise in Spanish and consideration of opening for Saturday service (RT XII, 78:23 – 79:8) not only constitute admissions of its prior failure to take these necessary actions, but taking these actions now is simply too little, too late. Protestant’s true attitude toward serving all segments of the public was demonstrated by Jim Courtright in his testimony at the merits hearing: Protestant didn’t want the Watsonville area in its Primary Market Area (“PMA”) for Nissan because (with an 81% Hispanic population), it is “economically, educationally, ethnic[ally] and geographically” different from the northern part of Santa Cruz County, where Protestant’s dealership sits. (RTVII, 27:21 - 28:2) Indeed, when Nissan added the Watsonville area to SCN’s PMA in March, 2012 (RTVII, 25:13 - 25) Jim Courtright objected on these grounds and attempted to have the Watsonville area removed from Protestant’s PMA. (RTVII, 26:13 - 27:20) Never did it occur to Jim Courtright to ask whether the Watsonville market is a good market for auto sales and whether it is a good market for Nissan sales in particular. (RTVII, 41:21 - 24) Protestant didn’t want Watsonville in its market because it simply didn’t want to serve the heavily Hispanic population in that market. As Jim Courtright admitted in testimony, SCN could have sold vehicles into the Watsonville market at any time, even before it was added to SCN’s PMA. (RTVII, 41:25 - 43:2) Moreover, in the nearly two years that have passed since Nissan refused to remove the Watsonville area

from Protestant's PMA, SCN has failed to set up any displays of Nissan vehicles in the Watsonville area or to have any tent sales in that area ( RTVII, 44:19 - 45:10), actions which would attract Hispanic customers to its dealership and would tend to increase its sales in the area. Once again, Protestant's actions (or lack thereof) speak louder than its words.

California heavily regulates the automobile industry and protects dealers from proximity of intra-brand competition,<sup>1</sup> and in return, dealers must "fulfill their obligations under their franchises and provide adequate and sufficient service to the consumers generally." 1973 Cal. Stats. ch. 996 § 1; *Orrin W. Fox v. New Motor Vehicle Board* (1978) 439 U.S. 96, fn. 6. Protestant does not take this obligation seriously. It is content merely to turn a profit while not exerting itself, making a minimal number of sales of any of the brands it sells, primarily in the city of Santa Cruz, paying lip service to the Hispanic community and belatedly "considering" whether to be open on Saturdays for service. (RT XII, 146:20 – 17:7). Tellingly, Jim Courtright did not mention that the dealership was considering opening for Saturday service when testifying on February 4, 2014. It was only when the merits hearing resumed on March 6 that Jim Courtright for the first time revealed Protestant's reconsideration of this topic. These are not the actions of a dealership taking seriously its contractual and statutory responsibilities to "actively and effectively" promote and sell Nissan Vehicles and to transact "an adequate amount of business compared to the business available to it" – rather it is just the opposite – a dealer taking up space in a market solely for its own benefit and failing to serve the public – consistently ranking near the bottom of California dealers in Regional Sales Effectiveness ("RSE") rankings. This Board must not allow SCN to continue in business when it has utterly failed to live up to its duty to serve the public, despite its long tenure as a Nissan dealer.

## **II. FACTS**

On March 19, 2012, Nissan sent Protestant a formal, written Notice of Default based on Protestant's material breaches of its Dealer Agreement. (Joint Exh. 2, bates stamp NNA00056 –

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<sup>1</sup> Vehicle Code section 3062 allows an existing dealer to protest the establishment or relocation of a dealer of the same line-make within the relevant market area – 10 air miles. Veh. Code § 507.

bates stamp NNA00061) The Notice specifically related to Protestant's insufficient sales penetration and operational deficiencies, and gave Protestant an opportunity to cure those breaches. (Joint Exh. 2, bates stamp NNA00056 – bates stamp NNA00061; RT I, 113: 7-12) According to the data available at the time the Notice of Default was issued, Nissan informed Protestant that its sales penetration performance was at only 51.6% of the average dealer's sales penetration performance in the West Region, ranking Protestant as 190<sup>th</sup> of 194 Nissan dealers in the West Region and 95<sup>th</sup> of 97 Nissan dealers in the State of California. (Exh. Joint 2, bates stamp NNA00056 – bates stamp NNA00060) These percentages and rankings are not based on raw sales numbers made by the dealership, but rather on Regional Sales Effectiveness ("RSE") comparing industry registration figures for competitive vehicles in Protestant's assigned PMA with the sales made by Protestant anywhere in the U.S. (RT I, 75: 7-19; Resp. Exh. 200.B. at bates stamp NNA04698)

Nissan, however, had been urging Protestant to improve its sales penetration since at least 2007 (2005 being the last time that it met its expected sales penetration requirements) (Resp. Exh. 206; RT XII, 203:16 – 204:8), and providing suggestions on a regular basis regarding how Protestant might improve its sales performance. Protestant's RSE performance dropped from 113% in 2005 to 68.3% in 2006, a drop of 45 points. (Joint Exh. 2, bates stamp NNA00037-bates stamp NNA00038) Protestant's sales performance continued to decline (despite the economic uptrend in 2006 and 2007 in the City of Santa Cruz as testified to by Mr. Bernal - RTVI, 19:9 – 19). Nissan's practice is to send performance letters, work with the dealer and to 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) 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. (Resp Exh. 206). These letters, together with regular monthly or semi-monthly contacts from Nissan's Dealer Operations Managers ("DOMs") and Area General Managers ("AGMs"), who recommended and talked with Protestant, as they do with other Nissan Dealers about non-

proprietary sales practices that have been successful in other dealerships and identify opportunities to improve. (RT I, 57: 6-25; 58: 1-6; 113: 21-25; 114: 1-11).

Despite these actions by Nissan to assist Santa Cruz Nissan, however, Protestant's performance improved to 84.4% RSE in 2007 and then continued to decline over the years, from to 45.9% in 2010. (Joint Exh. 2, bates stamp NNA00060 at bates stamp NNA00038) By June, 2012, the latest data available at the end of the cure period as set forth in the Notice of Default, Protestant's performance instead of improving, had in fact *declined* in terms of both its expected sales penetration performance and ranking (Protestant fell to 38.3% of the average sales penetration performance in the West Region and ranked 98<sup>th</sup> of 99 dealers in the State of California). (RT I, 120: 25; 121: 1-18; RT XI, 119:19 – 24; Joint Exh. 3 at bates stamp NNA00022)

Notwithstanding this worsening performance, Nissan extended the cure period provided by the Notice of Default by letter dated October 5, 2012 in order to give Protestant an opportunity to sell the Nissan dealership. (Joint Exh. 3 at bates stamps NNA00053 and NNA00054; RT I, 124: 3-13) Protestant sent Nissan a "Buyers' Assistance Letter," requesting its help in finding a buyer. (Resp. Exh. 208) Nissan located and referred a potential buyer to Protestant, but the buyer had trouble locating a suitable property to construct a dealership. (RT I, 126: 17-2; 128: 18-21; RT I, 129: 15-19) When the buyer asked Protestant if it would sell all of its current franchises and facility, Protestant flatly declined. (RT I, 130: 3-20) Now Protestant claims that its remaining franchises would not be "viable" if the Nissan franchise were terminated. (RT XI, 156:8 – 157:3) Yet Protestant claims that it seriously considered selling its Nissan franchise and executed a Buyer's Assistance letter, enlisting Nissan's aid in trying to find a buyer. (RT XII, 203:16 – 204:8) Protestant's evidence is self-contradictory, as it insists that it was interested in selling the Nissan franchise, but now also insists its remaining franchises would not be viable without Nissan. (RT XII, 203:16 – 204:8) Protestant presented no analysis or evidence to support its statements that the remaining franchises would not be "viable" without Nissan (despite Lee Courtright's testimony that he had performed such analysis "several times")

RTXII, 194:2 - 13), so the Courtright's unsupported and vague statements to the contrary should be discounted.<sup>2</sup>

Despite the fact that the potential sale of the Nissan dealership went nowhere, Protestant's sales performance continued its downward spiral. Protestant's sales penetration dwindled down to only 36.9% of RSE in September, 2012 and 37.3% of RSE as of the end of October, 2012 (the most current data available to Respondent at the time of the Notice of Termination). (Joint Exh. 4 at bates stamp NNA00011 and in the Notice of Termination at bates stamp NNA00049) As of the end of 2012, two months later, Protestant's sales penetration sank to 32% of RSE. (Resp. Exh. 200.C at bates stamp NNA04716) Furthermore, Protestant continued to rank as one of the worst underperforming dealers in both the West Region (191th of 196 dealers) and the State of California (98<sup>th</sup> of 99). (Ibid.; Resp. Exh. 238)

On January 14, 2013, Nissan sent, and Protestant received, a Notice of Termination in compliance with Vehicle Code 3060. (RT I, 139: 18-25; 140: 1-7; Joint Exh. 4 at bates stamps NNA00047 – NNA00051) In that Notice, Nissan 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. (Id.) Protestant filed a timely protest.

### III. ANALYSIS

Under Vehicle Code Section 3061, the Board is required to determine whether Nissan has "good cause" to terminate Protestant's Dealer Agreement:

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.

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<sup>2</sup> If weaker and less satisfactory evidence is offered when it was within the power of the party to produce stronger and more satisfactory evidence, the evidence offered should be distrusted. Cal. Evidence Code § 412; *Largey v. Intrastate Radiotelephone, Inc.* (1982) 136 Cal. App. 3d 660, 672 (Corporate records concerning date of meeting could have been stronger evidence than witness's memory several years later.)

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

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

Vehicle Code Section 3061.

Nissan has “good cause” to terminate its Dealer Agreement with Protestant under subsections (a), (b), (c), (d) (e) and (g), as well as the existing circumstances. These good cause factors will be addressed separately.

(a) Amount Of Business Transacted By The Franchisee, As Compared To The Business Available To The Franchisee.

Like most manufacturers, Nissan measures sales performance using a sales effectiveness standard, asking its dealers to perform at an average sales penetration level in their PMA compared to Nissan’s percentage of industry vehicle registrations in a larger geography. (Exh. Joint 1, Standard Provisions, NNA005625 at Section 3.B.3) RSE was the primary standard used to measure Protestant’s sales penetration performance prior to the issuance of the Notice of Termination.<sup>3</sup> (RT I, 78: 20-25) The use of a standard such as RSE is reasonable, as Nissan and

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<sup>3</sup> For all of the relevant time period (from before the Notice of Default up through the date of the Notice of Termination) the performance standard remained unchanged from RSE. Nine months after the Notice of Termination was issued, in September, 2013 that standard was changed to the

Protestant agreed to it in the Nissan Dealer Agreement and it is a fair method for the purpose of ranking big and small dealers and dealers in various types of markets. (Ibid.) Under the RSE standard, the *raw sales numbers* dealers are expected to achieve can fluctuate, as the industry and Nissan's percentage of the sales in the industry fluctuate, but the *percentage* of the industry total achieved by Nissan dealers in their PMAs can and should, at a minimum, mirror Nissan's percentage of the industry in the larger geography. (RT I, 75: 7-19; Resp. Exh. 200.B. at bates stampNNA04698) As a result of the percentage of industry registrations being the dominant measurement as opposed to a simple raw sales number, changes in the economy, demographics, geography and other factors are already taken into account in measuring a dealer's performance. (RT I, 177: 15-25) Because all Nissan dealers have the same products to sell against the competition, those competitive factors are also accounted for. Finally, in order to take into consideration market preferences, sales expectancy is adjusted by segment for local product popularity in the dealer's market, to make the measurement as fair as possible to dealers. (RT I, 92:13-25; 94: 1-19)

Protestant, while located at the same dealership facility, achieved 100% of RSE average sales penetration performance as recently as 2005. (RT II, 157: 20-27 – 158: 1-4) Therefore, contrary to Protestant's contentions and excuses (demographics, the mountains,<sup>4</sup> the ocean, etc.), not only *can* 100% of RSE average sales performance be achieved in the Santa Cruz PMA, Protestant *has* achieved RSE average sales in the same location. Jim Courtright admits that Protestant sold more vehicles "over the mountains" in 2004 than it did in 2012. (RT XI, 176:8 – 13) Since at least 2007, however, Protestant's retail sales penetration has been unsatisfactory

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more localized state sales effectiveness in represented markets ("SSER"). Notwithstanding this change, Protestant's sales performance fares even worse under the SSER standard, which generally is a slightly higher average for the State of California than RSE, as the West Region encompasses several states. (Resp. Exh. 200.B at bates stamp NNA04701)

<sup>4</sup> Protestant claims that most residents in its PMA go "over the hill" to work every day and purchase their vehicles closer to their workplaces in the Bay Area, making it more difficult for Protestant to make sales. However, the mean travel time to work in 2008 to 2012 as reported by the U.S. Census Bureau is *less* for the City of Santa Cruz (21.9 minutes) and for Santa Cruz County (25.7 minutes) than it is for the State of California as a whole (27.1 minutes). Exh. J-12-A and C. This means that most Californians travel longer to get to work each day than people who live in Santa Cruz County. Thus the work commute does not explain Protestant's poor sales performance.

and steadily declining. (Joint Exh. 2, bates stamp NNA00060 at bates stamp NNA00038) More importantly, over that time, despite repeated and systematic warnings, suggestions for improvement and counseling by Nissan representatives, Protestant's RSE penetration has continued to fall steadily at an alarming rate. For each full calendar year ("CY") since 2007, Protestant's RSE penetration has been as follows:

CY 2007	84.4%
CY 2008	81.8%
CY 2009	56.3%
CY 2010	45.9%
CY 2011	51.6%
CY 2012	31.3%

(Joint Exh. 2, bates stamp NNA00060, NNA00038 and NNA00049)

This level of sales performance indicates that Protestant is not capturing the vast majority of the sales available to it. If Protestant had only achieved *average* expected sales volume for the West Region, Protestant in calendar year 2012 would have sold 540 Nissan vehicles. Instead, Protestant sold only 173 Nissan vehicles for this period, representing a shortfall of 367 vehicles for 2012 alone. (Resp. Exh. 238 under columns labeled "Dealer's Sales" and "Net Gain/Loss") Over the five year period evaluated by Respondent above, Protestant's sales penetration performance represented a loss of 909 Nissan vehicle sales, using only an *average* expected performance in order to calculate this loss which would have approximately doubled Protestant's sales. (Id.) In fact, Ms. Tina Navoa's contact reports reflect that she told SCN how many sales it would have had to make to reach RSE each month, compared to how many it had made. (E.g., RT XII, 46:15 – 47:6, RT XII, 52:17 – 53:11) Therefore, Protestant had constant feedback as to how many sales it should be making to reach 100% of RSE average sales performance.

Even after receiving the NOD in March, 2012 Protestant failed to hire any additional sales consultants (RT XI, 68:23 – 69:14; RT XI, 121:4 – 16) or to amend its unambitious and underwhelming annual sales goals to include objectives for its sales staff to sell any specific

number of Nissan vehicles (RT XII, 111:21 – 112:2), let alone that number of Nissan's which would have, if achieved, have allowed SCN to sell at average RSE. Instead, despite being under a Notice of Default, Protestant left in place the inadequate and deficient number of sales personnel and sales objectives, which did not require any sales person whatsoever to sell a single Nissan vehicle during the entire year in order to achieve their sales objective (RT XII, 108:22 – 109:10) and virtually ensured that Protestant would not attain adequate performance as measured by RSE.

Moreover, as set forth below, Protestant has failed to make reasonable efforts to improve its Nissan sales. For example, Santa Cruz County has 32.7% Hispanic population, and the City of Watsonville has 81% Hispanic population. (Exh. J-12-B and C) Also, in Watsonville, 74.1% of the households speak Spanish in the home. (Exh. J-12-B) Nissan's consistent suggestions that Protestant reach out to the Hispanic community in its PMA with Spanish-language advertising have until recently been ignored. As Jim Courtright, Executive Manager and part owner of Protestant, testified at the merits hearing, he believes that, "the county is [divided into] two distinct areas ... economically, educationally, ethnic[ally] and geographically." (RTVII, 27:21 - 28:2).

In October, 2013, one and one-half years after the Notice of Termination was issued, Protestant hired its first Spanish-speaking sales person and sales manager since at least 2008. (RTVII, 38:19 - 40:22) Unfortunately, this action was "too little, too late." Moreover, as of the commencement of the merits hearing in January, 2014, Protestant still had not committed to advertising in Spanish-language media, despite being contacted by a local Spanish language television station manager who presented Mr. Courtright with reports showing how popular Nissan is in the Hispanic market. (RTVII, 33:11 - 34:12) Protestant just started Spanish-language advertising in February, 2014 over a month after the merits hearing had started and nearly 2 years after the issuance of the Notice of Default in March, 2012. (RT XI, 30:2 – 15) Protestant's belated actions in this regard constitute an admission that its prior practices were inadequate.

In addition, Protestant continues to be closed for service on Saturdays, despite the fact that Nissan's main competitors both in the nation and in the Santa Cruz market, Ocean Honda and Santa Cruz Toyota are open for service on Saturdays. (RTVII, 47:10 – 18) In fact, Santa Cruz Toyota is even open for service on *Sundays*. (RTVIII, 116:14 - 19) Moreover, Nissan representatives have been recommending that Santa Cruz Nissan open for business on Saturdays for at least 4 ½ years. (Respondent's Exh. 210; RT XII, 137:13 – 146:7) This recommendation was made at least 5 times by Nissan to the owners of Protestant, but has been ignored. (Id.) Again, Protestant now testifies that it is "considering" opening for service on Saturdays despite no changed circumstances (RT XII, 146:20 – 17:7), an admission that its current practices are misguided at best.

Since one of Protestant's main complaints is that its potential customers who live in Santa Cruz go "over the hill" to work in San Jose and environs, it makes sense that Protestant would take advantage of the weekend to expose potential sales customers in the market to its service business. In fact, Nissan representatives informed Mr. Jim Courtright that studies have shown that a regular service customer of a dealership is more likely to purchase a vehicle from that same dealer. (RT XI, 93:10 – 17) Indeed, Jim Courtright is aware of such studies and does not dispute them. (Id.) As James Courtright testified, the decision to remain closed on Saturdays is based on his "belief" that such action would not be profitable, and the argument that Saturday service was tried at some point during the 1990's and it "was not profitable." (RTVII, 47:10 - 18) Protestant has, however, failed to survey customers or to take any proactive measure to determine whether such "belief" is well-founded. (RTVII, 49:21 - 51:3) These failures to be open when Protestant's main competition is open indicate a failure to serve the public.

While Protestant can point to some actions taken in an effort to improve sales, such efforts are either not implemented effectively, or are too little, too late to make a difference. Contrary to its obligations to "*actively and effectively* promote through its own advertising and sales promotion activities the sale at retail ... of Nissan Vehicles to customers located within Dealer's Primary Market Area," (Exh. Joint 1, Standard Provisions, NNA005625 at Section

3.A.- Nissan Dealer Sales and Service Agreement), Protestant's practices in operating the Nissan dealership, as demonstrated by the evidence introduced at the hearing, were *passive and ineffective*: 1) Protestant waited for Nissan representatives to suggest changes to improve operations, 2) it waits for customers to come in the door instead of holding tent sales or displays in Watsonville to bring in customers ( RTVII, 44:19 - 45:10), 3) it waits for a Spanish language media company to tell it that Nissan vehicles are popular in the Hispanic community and that it should be advertising in Spanish (RTVII, 33:11 - 34:12), 4) it even waited for Nissan to suggest purchasers for the dealership and made no effort to find its own buyer. (RT XI, 148:10 – 23)

Further, even when Protestant did implement some changes to improve its business, it waited an inordinate amount of time before doing so. For example, Protestant: 1) prior to February, 2014 had never advertised in Spanish, despite being located in a county in which nearly one-third (32.7%) of the population are Hispanic and nearly the same number (30.6%) speak a language other than English at home (Exh. J-12-C); 2) did not have even one Spanish speaking sales person for almost 6 years – from 2008 through most of 2013 [Prot. Exh. 14; RT XI, 72:5 – 23], 3) waited *20 months* after the addition of census tracts in Watsonville (which is 81.4% Hispanic and in which 74.1% of persons speak a language other than English at home) to its PMA in June, 2012 to begin to advertise in Spanish (Exh. J-12-BA) and 4) waited over 5 years after Mr. Inman of Nissan strongly suggested opening for Saturday service, to seriously “consider” opening for service on Saturdays (20 years after it last did so), despite the facing Honda dealer being open for service on Saturdays and the facing Toyota dealer being open for service *on Saturdays and Sundays*. (RTVIII, 116:14 - 19) Instead, Protestant is content to make excuses for its poor sales performance. It claims that a building housing Ocean Honda, constructed in 2009 about two miles from Protestant's building, causes Protestant's sales deficiencies. (RTXI, 92:16 - 23) When asked to clarify whether it is the *operator* of the Honda dealership or the *building* which makes the Honda dealer #1 in sales in the area, Protestant insists it was the building, not the operator, which made the difference. (Id.)

Further, Protestant cites as excuses the hills to the east of Santa Cruz and the ocean to the west, both of which geographical features which have always been present, even when

Protestant was sales effective in 2005, and which also affect all dealers in the Santa Cruz market, to the same extent as Protestant. (RT XI, 86:3 – 87:10) Protestant also claims an inability to compete with the Toyota Prius, despite the fact that its own expert conceded that Honda has no viable competitor to the Prius, and that all Nissan dealers sell the same vehicles as Protestant, and somehow manage to achieve RSE, on average. None of these excuses explain Protestant's sales performance of 31% of Regional Sales Effectiveness. Even Protestant's expert never argued that Protestant's sales deficiency could be explained by these excuses. This defeatist attitude essentially means that Protestant has given up and refuses to compete with the local Honda dealer (and the Toyota dealer) – it is content to make however many sales it can comfortably make, without exerting itself and excuses its poor performance with worn out claims. This is not “actively and effectively” promoting the sale of Nissan Vehicles, as Protestant agreed to undertake in the Nissan Dealer Agreement.

Even after it received a Notice of Default from Nissan, Protestant failed and refused to change its poor and ineffective sales practices: 1) it hired no additional sales people – even though it knew that given its lead:sales closing ratio, its current sales staff could not make sufficient sales to meet its own sales objectives (RT XI, 124:1 – 5), let alone RSE; 2) it did not set separate Nissan sales objectives, but rather simply has overall sales goals for the dealership (RT XII, 79:15 – 80:12), 3) it did not increase the overall sales goals of the dealership, because the annual sales objective had been written on the dry erase board at the dealership in January, 2012 and the Notice of Default was issued in March, 2012. (RT XII, 111:21 – 112:2) This failure and refusal to adapt and to make the necessary changes to avoid termination represent either a cavalier attitude toward its obligations to actively and effectively promote the sale of Nissan Vehicles or an inability to change and improve sales. Regardless of which of these two reasons explain Protestant's inaction, the result should be the same – Protestant's Nissan franchise should be terminated.

As such, Nissan has “good cause” to terminate Protestant's Dealer Agreement under Section 3061(a).

(b) Investment Necessarily Made And Obligations Incurred By The Franchisee To Perform Its Part Of The Franchise.

(c) Permanency Of The Investment.

A trust of which Lee Courtright is trustee owns the land and building that houses its Nissan, Volkswagen, Dodge and Ram dealership. (RT XII, 125:17 – 126:1) According to Lee Courtright, “I don’t think that has anything to do with Santa Cruz Nissan.” (RT XII, 207:3 – 9) Therefore, Protestant itself cannot truthfully claim that it has any kind of “permanent” investment in the Nissan franchise. Moreover, as Protestant has argued throughout this protest, the amount of land usable for vehicle dealerships in Santa Cruz is severely limited and land and buildings available for dealership operations are very expensive. (RT XI, 160:22 – 161:20) As such, Protestant could readily recoup its investment and more if it ever sold the real estate where its dealership operations are housed. Moreover, the real property is owned by a trust, separate from Protestant’s corporation and, as a result, nothing in terms of approving a termination would prevent such real estate company from continuing to be the landlord for either a replacement Nissan dealer or for Protestant’s Volkswagen, Dodge and Ram line-makes. Therefore, Protestant cannot maintain that any investment in the dealership facility is illiquid and therefore, “permanent.”

Incredibly, Protestant’s facility has not been significantly updated or renovated in the almost 24 years that Protestant has been a Nissan dealer at that location, so again Protestant cannot point to any permanent investment in its Nissan dealership that would weigh against termination. (Exh. J-2 and Resp. Exh. 208; RT XII, 208:11 – 213:24) In the 18 years Protestant has been located at its current facility, it has undoubtedly recovered most, if not all of its original 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 Franchisee Disrupted.

The public welfare to be considered in this protest is, at a minimum, the entire Primary Market Area within which Protestant has agreed to actively and effectively promote and sell

Nissan Vehicles. Exhibit J-1 - Nissan Dealer Agreement Standard Provisions Section 3.A and B. Protestant, however, chooses to take a very narrow view of both the public welfare it must serve and of the Nissan Vehicles it chooses to promote. Jim Courtright of Protestant testified that the residents in the southern portion of its Primary Market Area (an area where the Hispanic population is 81% range – Resp. Exh. J-12-B) are “economically, educationally, ethnic[ally], geographically” distinct from the part of Santa Cruz County Protestant believes should be included within its Primary Market Area. (RTVII, 27:21 - 28:2) Mr. Jim Courtright made this statement to justify his belief that the census tracts in the Watsonville area that Nissan added to Protestant’s PMA should not have been added in June, 2012. (Id.)

Jim Courtright admitted that at the time he objected to the change in Protestant’s PMA, he had not inquired of Nissan whether the Watsonville census tracts were in a good market for Nissan sales or for car sales in general. (RTVII, 41:21 - 24) Further, Jim Courtright admitted that despite the ability to conduct tent sales or Nissan vehicle displays in Watsonville, which is now part of Protestant’s PMA, Protestant had failed to take either action (and had no plans to do so), either to increase its sales or to serve the public in that area. (RTVII, 44:19 - 45:10) Therefore, rather than embracing its newly-expanded PMA as an opportunity to increase its presence in a good area for Nissan sales, Protestant shied away from this market due to the economic, educational and ethnic differences of its inhabitants and has just now begun advertising in Spanish into the Watsonville area, approximately one and one-half years after its PMA was expanded. (RTVII, 46:5 - 47:3)

Further, by its own admission, Protestant’s business model is to achieve a gross profit of \$2000 per car. (RT XI, 50:13 – 20) That Protestant never achieved this goal of high gross profit, nor has it achieved sufficient volume to attain 100% RSE in the 9 years since 2005, is proof that Protestant’s business model is flawed. Protestant’s extremely narrow perspective of the public welfare is similarly demonstrated by nearly every metric Respondent uses to measure sales and service performance; RSE, state ranking. As another example, Protestant has failed to be open for service on Saturdays for about 20 years, since at least the mid-1990’s. Mr. Gary Inman Nissan’s Fixed Operations Manager, suggested that Protestant open for business on

Saturdays for years, and Mr. Inman's contact reports reflect at least 5 occasions on which he raised the issue with Protestant's management: May 14, 2009; August 6, 2009; September 15, 2009; March 31, 2011 and March 27, 2013. (RT XII:137 – 147) Mr. Jim Courtright testified that though on all of these occasions Mr. Inman had raised the issue of Saturday service and no action was taken, including no survey of customers to determine the need for Saturday service, the dealership was, as of the last day of the merits hearing on March 7, 2014 considering opening the service department in May, 2014 because "maybe it would be a good idea." *Id.* This despite Jim Courtright's acknowledgement that a customer who services a vehicle at a dealership a number of times is more like to buy his or her next vehicle there. (RT XI, 93:10 – 17) Despite Protestant's objection that Saturday service had been tried in the mid-1990's before Jim Courtright worked at the dealership, and was not profitable, no study had been made of the profitability of the practice, or of the ancillary benefits (more sales) it could bring to the dealership. (RT XII, 135:2 – 22)

Protestant's very low level of sales penetration also indicates that Protestant is not operating in the public interest. Protestant is failing the public interest in that, in effect, it focuses on selling only four models (Leaf, Sentra, Frontier and Versa), a small fraction of Nissan's complete, twenty-two model line-up, though Jim Courtright admits that salesmanship might change a . (Resp. Exh. 200) Furthermore, Protestant is only sales effective in one of the four models it focuses on selling, that being the Nissan Leaf. (Resp. Exh. 200; Rebuttal at NNA05665) Protestant's unwillingness (or inability) to represent the full line of Nissan products undercuts customer choice and the customer's ability to conduct cross-brand product comparisons, before deciding which brand's vehicle to purchase.

Protestant's poor service customer retention rate is also related to its poor sales performance. (RT XI, 26:6 – 22) By Protestant's own testimony, it is agreed that if Protestant actually sold more Nissan vehicles, it would likely lead to increased service opportunity for its dealership. Moreover, despite Nissan's Fixed Operations Manager's hours-long efforts to extract from Protestant's own database usable lists of Nissan customers residing within 10 miles of the dealership, and due to its own business practices, e.g., being closed on Saturdays for service,

Protestant has been unable to generate enough service business to maintain its service department at capacity during its work week.

Protestant's inadequate sales performance is directly related to Protestant's failure to adequately serve to the public. Protestants' operational deficiencies set forth above, among others, demonstrate that Protestant's continued operation of the Nissan dealership is likewise not in the public interest. For these reasons, Nissan has good cause to terminate Protestant's Dealer Agreement under Section 3061(d) and Nissan should be permitted to appoint a replacement dealer within the Primary Market Area as supported by Nissan's market study data that recommends ongoing representation.

(g) Extent Of The Franchisee's Failure To Comply With The Terms Of The Franchise.

Protestant's gravely deficient sales performance and abandonment of the Hispanic market are also material breaches of Section 3 of the Dealer Agreement and Section 3061(g). Section 3 of the Standard Provisions of the Agreement provides the sales responsibilities of the Dealer, as follows:

**Section 3. Vehicle Sales Responsibilities of Dealer**

A. General Obligations of Dealer.

Dealer shall actively and effectively promote through its own advertising and sales promotion activities the sale at retail (and if Dealer elects, the leasing and rental) of Nissan Vehicles to customers located within Dealer's Primary Market Area. Dealer's Primary Market Area is a geographic area which Seller uses as a tool to evaluate Dealer's performance of its sales obligations hereunder. . . .

B. Sales of Nissan Cars and Nissan Trucks.

Dealer's performance of its sales responsibility for Nissan Cars and Nissan Trucks will be evaluated by Seller on the basis of such reasonable criteria as Seller may develop from time to time, including for example:

1. Achievement of reasonable sales objectives which may be established from time to time by Seller for Dealer as standards for performance;

2. Dealer's sales of Nissan Cars and Nissan Trucks in Dealer's Primary Market Area and/or the metropolitan area in which Dealer is located, as applicable, or Dealer's sales as a percentage of:

- (i) registration of Nissan Cars and Nissan Trucks;
- (ii) registration of Competitive vehicles;
- (iii) registration of Industry Cars;
- (iv) registration of vehicles in the Competitive Truck Segment;

3. A comparison of Dealer's sales and/or registrations to sales and/or registrations of all other Authorized Nissan Dealers combined in Seller's Sales Region and District in which Dealer is located. . ."

(Exh. Joint 1, Standard Provisions, Nissan Sales and Service Agreement NNA005625 *et seq.* at Section 3.A.) (emphasis added).

A dealer's sales penetration is one of the most significant and material aspects of its contractual obligations to its manufacturer. As such, Nissan has good cause under Section 3061(g) to terminate Protestant's Dealer Agreement.

As Protestant's sales penetration numbers reflect, Protestant is only selling roughly 31% of the new Nissan vehicles that it is expected to sell, under a conservative measure. (Joint Exh. 2, bates stamp NNA00060, NNA00038 and NNA00049) If every Nissan dealer in the United States performed at the same level as Protestant, Nissan's national sales would decline 70% from where they are today. Nissan should not be expected to accept that level of performance from any dealer, and must be able to address its issues with its worst performing dealers, such as Protestant, in order to give the public choices in terms of what vehicles to purchase. And, given the dealer protection statutes in California, Nissan is limited in its ability to address this poor performance directly. For example, Nissan is prohibited from opening a "company store" to make direct sales to the public within 10 air miles of an existing independent dealer. Veh. Code Section 11713.3(o)(1). Moreover, adding a second independent dealer to the Santa Cruz market is not a realistic option, and would likely be subject to protest from Santa Cruz Nissan and/or from another Nissan dealer under Vehicle Code section 3062. In any event, adding another

dealer to make up sales for Santa Cruz Nissan would only result in two weak dealers. Therefore, Nissan is functionally unable to remedy the abysmal sales penetration of Protestant, other than through termination and appointment of a new dealer.

Contrary to the expected assertions of Protestant, Nissan fully intends to replace Protestant in its current PMA, once this protest action is concluded. (RT I, 131: 21-25; 132: 1-25; 133: 1-25; Protestant Exh. 24, 36: 23-24; RT I, 137: 4-6) Protestant argues that Protestant cannot be replaced as a Nissan dealer, basing its conclusion on one potential buyer's efforts to locate property and two 5 minute conversations that Mr. Gropetti, the potential buyer Nissan introduced to Protestant, had with Mr. Lee Courtright. Simply because Protestant failed to reach agreement with *one* potential buyer does not, as Protestant claims, mean that Nissan has exhausted any and all options to appoint a new Nissan dealer in the market. (RT I, 129: 15-19) On that basis, Protestant now claims that this Board should allow Protestant to remain a Nissan dealer, because the few sales it makes are "better than nothing." Accepting Protestant's arguments would not only force Nissan to accept a very poorly performing dealer, it would continue to harm the public in the Santa Cruz market.

#### **IV. CONCLUSION**

Protestant has, for many years, failed to conduct an adequate amount of business compared to that which is available to it and to meet its material contractual responsibilities to sell Nissan vehicles. In addition, Protestant is not serving the needs or interests of the consuming public in the Primary Market Area, in violation of its statutory obligations. Yet despite consistent counseling and numerous types of assistance from Nissan for many years, Protestant either stubbornly refuses to make operational changes to attempt to address these issues, ignoring years of declining sales, poor operational practices, and customer neglect or makes such changes in such a belated and ineffectual way that its performance does not improve. Further, rather than embrace competition from its facing Honda and Toyota dealers and taking effective action to meet that competition, Protestant uses those competitors' sales

achievements as excuses for its own poor performance. For these reasons, Nissan has good cause under Section 3061 to terminate Protestant's Nissan Dealer Agreement.

Dated: May 5, 2014

BAKER & HOSTETLER LLP  
MAURICE SANCHEZ  
LISA GIBSON



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Maurice Sanchez  
Attorneys for Respondent  
Nissan North America, Inc.

**PROOF OF SERVICE**

I, Elly Cordero, 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 May 5, 2014, I served a copy of the within document(s):

**RESPONDENT NISSAN NORTH AMERICA, INC.'S POST-HEARING 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.
- 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.
- 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.

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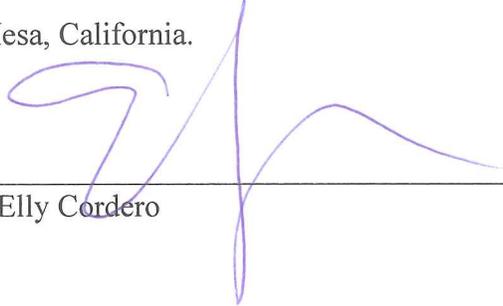
*Counsel for Protestant*  
SANTA CRUZ NISSAN, INC., dba  
SANTA CRUZ NISSAN

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 May 5, 2014, at Costa Mesa, California.



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Elly Cordero

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