



DECISION COVER SHEET

ACTION BY: Public Members Only

ACTION BY: All Members

To : BOARD MEMBERS

Date: September 5, 2014

From : ADMINISTRATIVE LAW JUDGE: Diana Woodward Hagle

CASE: SANTA CRUZ NISSAN, INC. dba SANTA CRUZ NISSAN v. NISSAN NORTH AMERICA, INC.
Protest No. PR-2358-13

TYPE: Vehicle Code section 3060 Termination
Proposed Decision Following Board's Order Sustaining the Protest and
Remanding the Matter

PROCEDURE SUMMARY:

Merits Hearing

- Filed on Calendar: January 22, 2013
- Motions Filed: None
- Merits Hearing: January 27-February 7, 2014, and March 6-7, 2014
- Site Visit: January 24, 2014

Board Remand

- Mandatory Settlement Conference (before ALJ Wong): August 19, 2014
Motion:
 - Protestant's Motion to Strike Portions of Respondent's Proposed Conditions for Mandatory Settlement Conference (granted in part and denied in part but limited to MSC)
- Hearing (regarding proposed conditions) before ALJ Woodward Hagle:
August 26, 2014 (telephonic)
Motions:
 - Protestant's Renewed Motion to Strike Portions of Respondent's Proposed Conditions for Mandatory Settlement Conference (denied)
 - Respondent's Motion to Strike Portions of Protestant's Brief on Remand (denied)
- COUNSEL FOR PROTESTANT: Law Offices of Michael J. Flanagan
Michael J. Flanagan, Esquire
Gavin M. Hughes, Esquire
Danielle R. Vare, Esquire

- COUNSEL FOR RESPONDENT: Baker & Hostetler LLP
Maurice Sanchez, Esquire
Kevin M. Colton, Esquire
Lisa M. Gibson, Esquire

EFFECT OF PROPOSED DECISION: The Proposed Decision Following Board's Order Sustaining the Protest and Remanding the Matter recommends conditions, additional language in footnote 10 (p.14), and additional citations to exhibits and to the record in paragraph 106 (p. 20:12).

SUMMARY OF PROPOSED DECISION:

Background Findings

- Protestant Santa Cruz Nissan ("SCN" or "Protestant"), one of the oldest Nissan dealers in the country, has been underperforming since 2006, when it dropped precipitously in sales rankings compared to other Nissan dealers. This is a "sales performance case" so the "good cause" factor of Vehicle Code section 3061(a) ["amount of business transacted by the franchisee, as compared to the business available to the franchisee"] is the focus of the case.
- SCN is co-owned by father and son. Lee Courtright (the Dealer Principal) not only started SCN in 1972, he has, over the years, owned or had interests in no fewer than ten dealerships throughout Northern California and Nevada selling eight different line-makes, as well as two other Nissan stores, in Stockton and Carson City. He is "in town" 120-140 days a year and spends about four hours a day at the dealership when he is Santa Cruz. James Courtright (Executive Manager and General Manager) has a degree from UC Davis and an MBA from Santa Clara, and has worked at SCN since 1993. As Executive Manager, he has full managerial authority and responsibility for the day-to-day operation of the business.
- In 1989, the parties executed a "Dealer Agreement" (the franchise agreement), which has not been substantively changed over the years.
- SCN moved to its present location in 1996. As before the move, the dealership has four franchises under its roof: Nissan, Volkswagen, Dodge and Ram.
- Nissan North America ("Nissan" or "Respondent") distributes 22 models of vehicles, a spectrum ranging from entry-level sedans to trucks and large SUV's to sports cars. In December 2010, it launched the LEAF electric vehicle, a tremendous success for both the company and for SCN.
- Nissan uses "performance metrics" to assess dealer performance; basic to the calculation are "regions" and "Primary Marketing Areas" ("PMA").¹ Briefly, the calculation is this: "Sales penetration calculates a dealer's new vehicle sales (regardless of where they are registered) as a percentage of the registrations of all competitive makes in the dealer's PMA. To gauge

¹ In the Dealer Agreement, a PMA is "...the geographic area which is designated from time to time as the area of Dealer's sales and service responsibility for Nissan Products". (JtExh 1:5622-5623)

sales penetration effectiveness, a dealer's sales penetration is then compared as a ratio to [Nissan's] sales penetration throughout the dealer's assigned region to determine whether the dealer being analyzed is penetrating its PMA below, at or above the average for all Nissan dealers in the region... Expressed as a percentage, the resulting quotient calculates a dealer's "regional sales effectiveness" or "RSE".²

- "100% RSE" is the minimum performance level that Nissan states it will accept. The Notice of Default to SCN read that "... Nissan will require Dealer to achieve 100% of the West's regional average sales penetration within ... 180 days...". (Joint Exhibit 2:0061) At the end of the 180 day period, plus a 60 day extension, Nissan did initiate termination proceedings based solely on poor sales performance (and breach of contract based on the poor sales performance).
- Nissan realigned its regions which, in the words of its own expert witness, made its pre-2009 calculations less reliable than they should have been. In a similar vein, Nissan enlarged SCN's PMA in late Spring of 2012, which had the immediate effect of reducing SCN's RSE.
- A chart with protestant's sales and RSE scores from 2005 to 2013 is found in the Proposed Decision at page 24, paragraph 128, lines 17 through 25.

Findings Related to "Good Cause" Factors of Vehicle Code section 3061

- Nissan has not met its burden of proof in the only factor that was seriously contested, section 3061(a) ["amount of business transacted by the franchisee, as compared to the business available to the franchisee"].
- There were many problems with Nissan's analysis of dealer performance. Although Nissan's basic RSE calculation was valid, other aspects of the process were not. The "West Region" was too large to be useful. Reliance on "averages" and "rankings" without further information has the tendency to mislead. Making threats of adverse consequences if a dealer does not "achieve 100% RSE" is misusing the data. Designating a "competitive set" of 197 vehicles (including Tesla and Lotus) leads to unmanageable data.
- With specific regard to protestant, Nissan expanded its PMA into the census tracts of the city of Watsonville for no discernable reason, thereby generating an "alarming" decline in SCN's RSE percentage and, into the future, insuring SCN's failure to "achieve 100% RSE". In deciding to terminate protestant's franchise, Nissan failed to temper its rigid "performance metrics" with the inquiries that its own Dealer Agreement states are appropriate (Section 3.D. – "Additional Factors for Consideration"). Finally, the internal memo recommending the issuance of the Notice of Default contained an error, stating that SCN had committed to increasing its advertising to \$10,000 monthly when, in fact, the Courtrights had agreed to increase their advertising by \$10,000 per month.
- However, RSE may be used as a standard, even in termination cases, as long as its limitations are recognized and "rigid performance metrics" are tempered with the kinds of inquiries required by Section 3.D. of the Dealer Agreement.

² Sims v. Nissan North America, Inc., Court of Appeals of Ohio, 10th District, Franklin County, pg.3 (June 25, 2013)

- It is true that between 2009 and 2011, there were lost sales opportunities which Santa Cruz Nissan failed to capture. However, Santa Cruz Nissan, even though a below-average sales performer, is otherwise a sound business and its owners are responsible members of the Santa Cruz community. The business employs 45 or so workers, operates with financial security, paying a substantial amount of taxes, and investing in the community.
- SCN's performance deficiencies are due to an insufficient level of resources to accomplish the task, no sense of urgency to change the situation, and no one in charge capable of executing plans for improvement. Hopefully, the changes and upgrades it has made in the past year or so to improve sales will continue.

The Board's Order Conditionally Sustaining the Protest and Remanding the Matter

- The Board's Order referenced Vehicle Code section 3067, which "... permits the Board to impose conditions upon its decisions so long as the conditions are such as to meet the following language: ... Conditions imposed by the board shall be for the purpose of assuring performance of binding contractual agreements between franchisees and franchisors or otherwise serving the purposes of this article...".
- The Order remanded the matter to ALJ Woodward Hagle with the following instructions: "The ALJ shall recommend conditions for the Board to impose consistent with Section 3067 and establish a time frame for Protestant to comply with those conditions. The ALJ shall have discretion, if deemed necessary, to order additional evidence, briefing, and/or arguments."
- The Board's Order also "strongly encouraged" the parties "to engage in settlement discussions and set a Mandatory Settlement Conference with a Board appointed ALJ".

Summary of Actions Taken Following Remand

- ALJ Woodward Hagle issued an Order setting an MSC for August 19th, before ALJ Wong; the parties were also ordered to submit proposed conditions to ALJ Wong by August 13th. If the matter did not settle at the MSC, the parties' proposed conditions were to be provided to ALJ Woodward Hagle. (The matter did not settle at the MSC; ALJ Wong retained jurisdiction to reconvene the MSC, should the parties so request.)
- ALJ Woodward Hagle also issued an "Order Regarding Matters Pertaining to the Remand", which set August 26th for a telephonic hearing on the conditions, and stated the following: "Additional Evidence: There will be no additional evidence and the record will not be reopened".
- The telephonic hearing on the conditions was held on August 26th. (This was not a hearing in the usual sense, but rather an opportunity for the parties to suggest conditions regarding the Board's Order of Remand.)

Recommended Conditions

- Although respondent has not sustained its burden of proof under Section 3061 to establish good cause to terminate the Nissan franchise of Santa Cruz Nissan, respondent has nonetheless presented evidence sufficient to justify a final decision imposing conditions pursuant to Section 3067(a).
- Section 3067(a) provides that “[c]onditions imposed by the board [on a decision] shall be for the purpose of assuring performance of binding contractual agreements between franchisees and franchisors or otherwise serving the purposes of this article...”.

- The conditions are:

A. Effective no later than 30 days from the effective date of this decision, and continuing until December 31, 2015:

(1) Protestant shall be open for service of Nissan vehicles on Saturdays (excluding holidays) from 8:00 A.M. to 4:30 P.M., and shall have available for Saturday customers on-demand shuttle bus services and loaner cars; and

(2) Protestant shall, at all times its Nissan dealership is open for sales, have at least one salesperson available who is conversant with the Spanish language; and

(3) Protestant shall, in its print, radio and TV advertising, devote no less than 20%³ of its advertising budget for each of those media to Spanish-language advertising.⁴

B. James Courtright (if serving as the Executive Manager or General Manager of protestant) shall successfully complete the Dealer Training Academy program of the National Automobile Dealers Association (“NADA”) within 24 (twenty-four) months from the effective date of this decision. Inability to enroll in the program because of restrictions imposed by NADA shall not constitute a violation of this condition.⁵

C. In regard to the above conditions in paragraphs A. (1) – (3) and B., protestant shall have the burden of proof of verifying compliance. Upon request of Nissan, protestant shall provide verification of compliance with any of the above conditions within 30 days of the request.

D. Effective immediately to December 31, 2015, the Board shall have exclusive jurisdiction to assess the sales performance of protestant and the following calculation shall be the exclusive measurement of protestant’s sales performance to December 31, 2015.

(1) The assessment shall compare protestant’s sales to the sales of the 10 dealers other than protestant in Nissan’s District 8.⁶

³ This percentage was agreed to by the parties during the August 26th telephonic hearing.

⁴ The foregoing conditions relate to Section 3.A. of the Dealer Agreement.

⁵ This condition relates to Section 1.Q of the Dealer Agreement.

⁶ In addition to protestant, District 8 dealers are Nissan of Bakersfield, Selma Nissan, Lithia Nissan of Fresno, Nissan of Visalia, My Nissan (Salinas), Gilroy Nissan, Coast Nissan (San Luis Obispo), Santa Maria Nissan, Nissan of Clovis, and Cardinale Nissan (Seaside).

(2) No less frequently than quarterly, Nissan shall calculate the average percentage increase (or decrease) in number of sales of new Nissan vehicles of the 10 dealers in District 8 other than protestant and transmit the calculation to protestant.

(3) The number of protestant's sales shall meet or exceed the average percentage increase in sales of the 10 dealers.

(4) In any proceeding before the Board regarding protestant's sales performance using the foregoing standard, protestant will not challenge the reasonableness of the standard, nor shall respondent be required to prove the reasonableness of the standard.

E. Respondent may file a written request to the Board for an appropriate order if protestant fails to meet any of the foregoing conditions.

F. In any proceeding where termination of protestant's franchise may be ordered, respondent shall have the burden of proof of showing "good cause" to terminate the franchise.

G. The Board shall retain continuing jurisdiction over this matter.

Discussion

- Both parties participated in the MSC and the Remand Hearing and submitted proposed conditions and arguments in support of their respective positions.
- Very recently, Nissan realigned its California districts so that Santa Cruz Nissan is now in District 8. The other dealers in District 8 are Nissan of Bakersfield, Selma Nissan, Lithia Nissan of Fresno, Nissan of Visalia, My Nissan (Salinas), Gilroy Nissan, Coast Nissan (San Luis Obispo), Santa Maria Nissan, Nissan of Clovis, Cardinale Nissan (Seaside), and Santa Cruz Nissan, a total of eleven dealerships.⁷
- In August, 2013, Nissan abandoned RSE as its measure of sales performance and now uses SSER, a standard which includes all California Nissan dealers, presently numbering approximately 99 dealerships.
- Conditions addressing protestant's sales deficiencies may not impinge on or contradict the parties' existing franchisee-franchisor relationship. Presently, that relationship is governed by the following:
 1. The Dealer Agreement;⁸
 2. The policies and procedures currently in place between the parties (the monthly franchisee reports, visits and communications between the dealer and the DOM and the FOM, as examples);
 3. The terms of the Board's Decision; and
 4. Statutes and regulations governing the franchise relationship (and, since January 1,

⁷ Information provided by Nissan during August 26th telephonic hearing.

⁸ Most notably, Section 3 ("Vehicle Sales Responsibilities of Dealer").

2014, Vehicle Code section 11713.13(g).)

- The proposed conditions are meant to compliment the dealer's campaign to increase sales, already undertaken.
- Although not part of the Board's Order remanding the case, a condition is proposed to measure the success or failure of protestant's operational enhancements to reach a broader market. In this regard, the parties have different ideas: protestant argues that because of "unique local market conditions...there is no "reasonable performance methodology that can be applied...", while respondent urges the use of SSER, the state-wide standard by which it measures the sales performance of all its California dealers (roughly 99 dealers), implemented in August, 2013.
- If no standard of measurement is stated and the conditions only address protestant's "operational deficiencies", then Nissan would be free to apply its SSER standard. However, if the reasonableness of Nissan's SSER standard becomes an issue, it would be unfair to burden this dealer with the expense of litigating a second standard within the context of a single protest.⁹
- Clearly, if the Board orders a method of evaluating sales performance different from Nissan's SSER standard, Nissan would not be required to justify the reasonableness of such a standard (because it would not be Nissan's standard, rather one imposed by the Board on the franchisee-franchisor relationship for a finite term and for a specific reason).
- If respondent requests documentation of performance of these conditions, protestant shall supply such documentation within 30 days of the request.
- Effective immediately to December 31, 2015, the Board shall have exclusive jurisdiction to assess the sales performance of protestant. The assessment shall compare protestant's sales to the sales of the 10 dealers other than protestant in Nissan's District 8.¹⁰ No less frequently than quarterly, Nissan shall calculate the average percentage increase (or decrease) in number of sales of new Nissan vehicles of the 10 dealers in District 8 other than protestant and transmit the calculation to protestant. The number of protestant's sales shall meet or exceed the average percentage increase in sales of the 10 dealers. In any proceeding before the Board regarding protestant's sales performance using the foregoing standard, protestant will not challenge the reasonableness of the standard, nor shall respondent be required to prove the reasonableness of the standard.
- Respondent may file a written request to the Board for an appropriate order if protestant fails to meet a condition. In any proceeding where termination of protestant's franchise may be ordered, respondent shall have the burden of proof of showing "good cause" to terminate the

⁹ The Proposed Decision takes no position on the reasonableness of Nissan's SSER standard, noting only that it became effective in August 2013 (Para. 116, p. 21:27-28), and was the subject of DOM John Gardner's last visit to protestant on June 28, 2013 (Para. 13.A.(3), p.3:25-27).

¹⁰ In addition to protestant, District 8 dealers are Nissan of Bakersfield, Selma Nissan, Lithia Nissan of Fresno, Nissan of Visalia, My Nissan (Salinas), Gilroy Nissan, Coast Nissan (San Luis Obispo), Santa Maria Nissan, Nissan of Clovis, and Cardinale Nissan (Seaside).

franchise.

Proposed Language Added to the Proposed Decision

- The wording of footnote 10 on page 14 of the Proposed Decision is unclear. It gives the reader the impression that Vehicle Code section 11713.13(g) may apply to sales performance calculations Nissan made in 2012 and, by extension, to the facts of this protest. In fact, section 11713.13(g) became effective January 1, 2014, and has no retroactive effect.
- The following replacement of footnote 10 is proposed:

Vehicle Code section 11713.13(g), which became effective January 1, 2014, has no application to this protest, as the statute has no retroactive effect. It deals with a manufacturer's "...performance standard, sales objective, or program for measuring a dealer's sales... performance..." and, among other things, requires the manufacturer to respond to a dealer's request by "...provid[ing] a written summary of the methodology and data used in establishing the performance standard, [etc.]" Here, the lack of clarity in the data would presumably be the sort of information a manufacturer would disclose about its "methodology and data" and "application" of a "performance standard" [Section 11713.13(g)(1)(B)].

- Secondly, the evidence was unequivocal in placing Watsonville in My Nissan's PMA before it was assigned to protestant. The evidence presented at the hearing is as stated paragraph 106 of the Proposed Decision: "Presumably, the new area in SCN's PMA---12 census tracts including Watsonville, the county's second largest city---was not previously "unassigned" territory. The two closest dealers to Watsonville are My Nissan in Salinas and Gilroy Nissan in Gilroy; however, it appears that Watsonville was previously in My Nissan's PMA." (Emphasis added.)
- The added citations are respondent's Exhibits 200:NNA4741 and 200:NNA4742 and a portion of the transcript of the testimony of respondent's expert, John Frith on January 30th at pages 79-80. The exhibits and the two maps show Watsonville in the PMA of My Nissan of Salinas prior to Nissan's reconfiguration of protestant's PMA to include Watsonville. The two maps are attached to this Decision Cover Sheet.
- In regard to this issue, Mr. Frith testified as follows:

QUESTION: [Ms. Gibson]...Could we go back to your exhibit---Respondent's Exhibit 200..."Should we turn now to 4741, please what does this show, Mr. Frith?

ANSWER: [Mr. Frith] 4741 is again, a PMA map. There was a PMA audit that was done in 2012. And there were changes to the Santa Cruz PMA as a result of the PMA audit. And so we have what I've been calling the current PMA that was assigned in 2012. So before that, there was a prior PMA. So this map indicates the PMA that was assigned as of the end of 2011. So I've been calling that the prior PMA.

....
So this map [Exh. 200E, NNA 4741] indicates what that prior PMA looked like.”

....
If we look at the next page, 4742, this is the 2011 PMA assignment...”

[1/30/14 transcript, pp. 79:14-80:14]

- With the additional citations, Paragraph 106 would read as follows:

“106. Presumably, the new area in SCN’s PMA---12 census tracts including Watsonville, the county’s second largest city---was not previously “unassigned” territory. The two closest dealers to Watsonville are My Nissan in Salinas and Gilroy Nissan in Gilroy; however, it appears that Watsonville was previously in My Nissan’s PMA. (Exh 200E:4741, 4742; IV:79:4-80:14) Not only does My Nissan, a successful dealer, have a concentration of sales into the Watsonville area, its 2012 RSE soared (from 113.4% at year-end 2011 to 160.6% at year-end 2012), a mirror image of SCN’s decline (51.6% at year-end 2011 to 32.0% at year-end 2012). (Exhs 200A:4696, 4697; 200B:4714; 200C:4716)”

RELATED MATTERS:

- Related Case Law: There are no published court decisions applicable to this case.
- Applicable Statutes and Regulations: Vehicle Code sections 3060 and 3061.

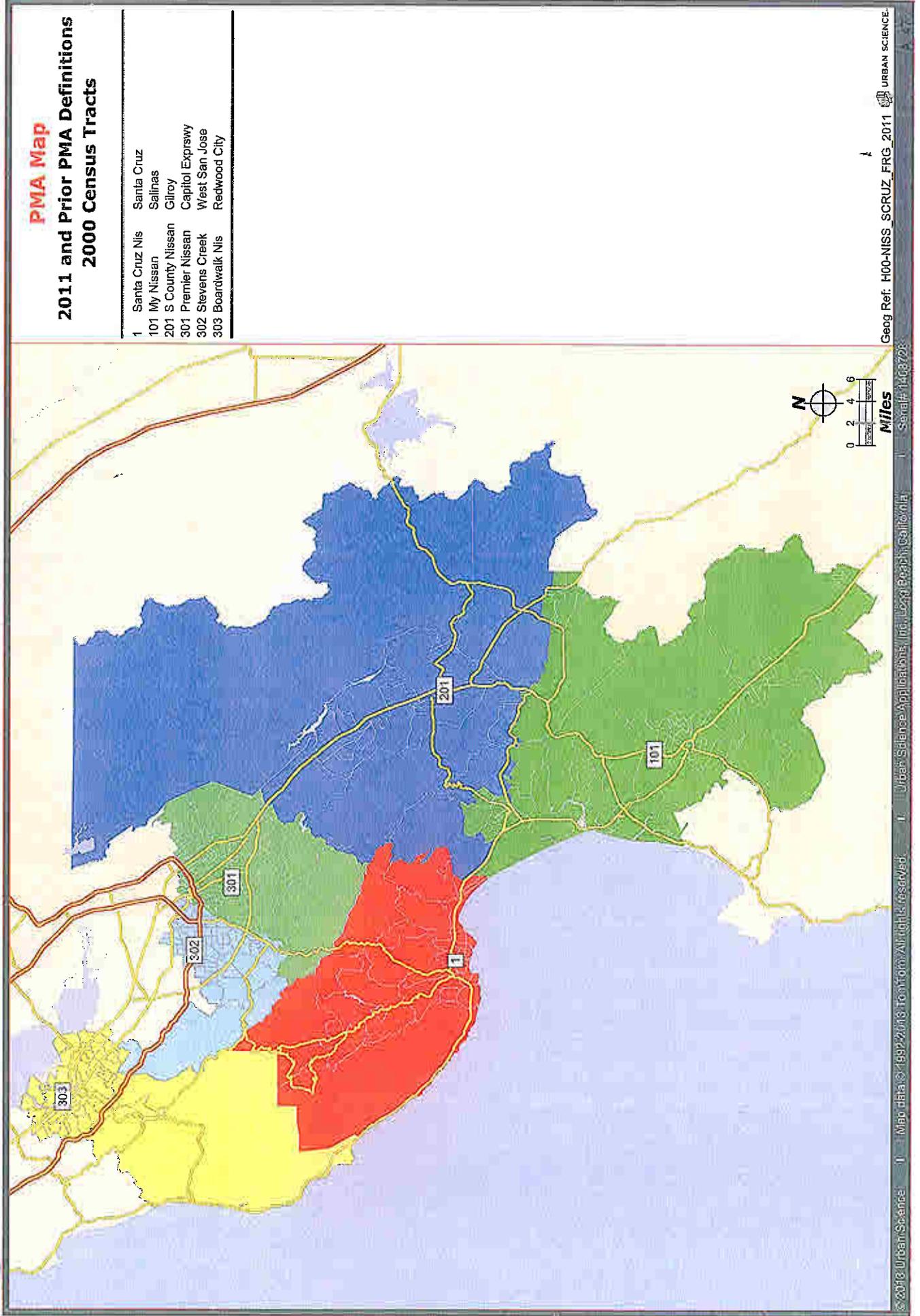
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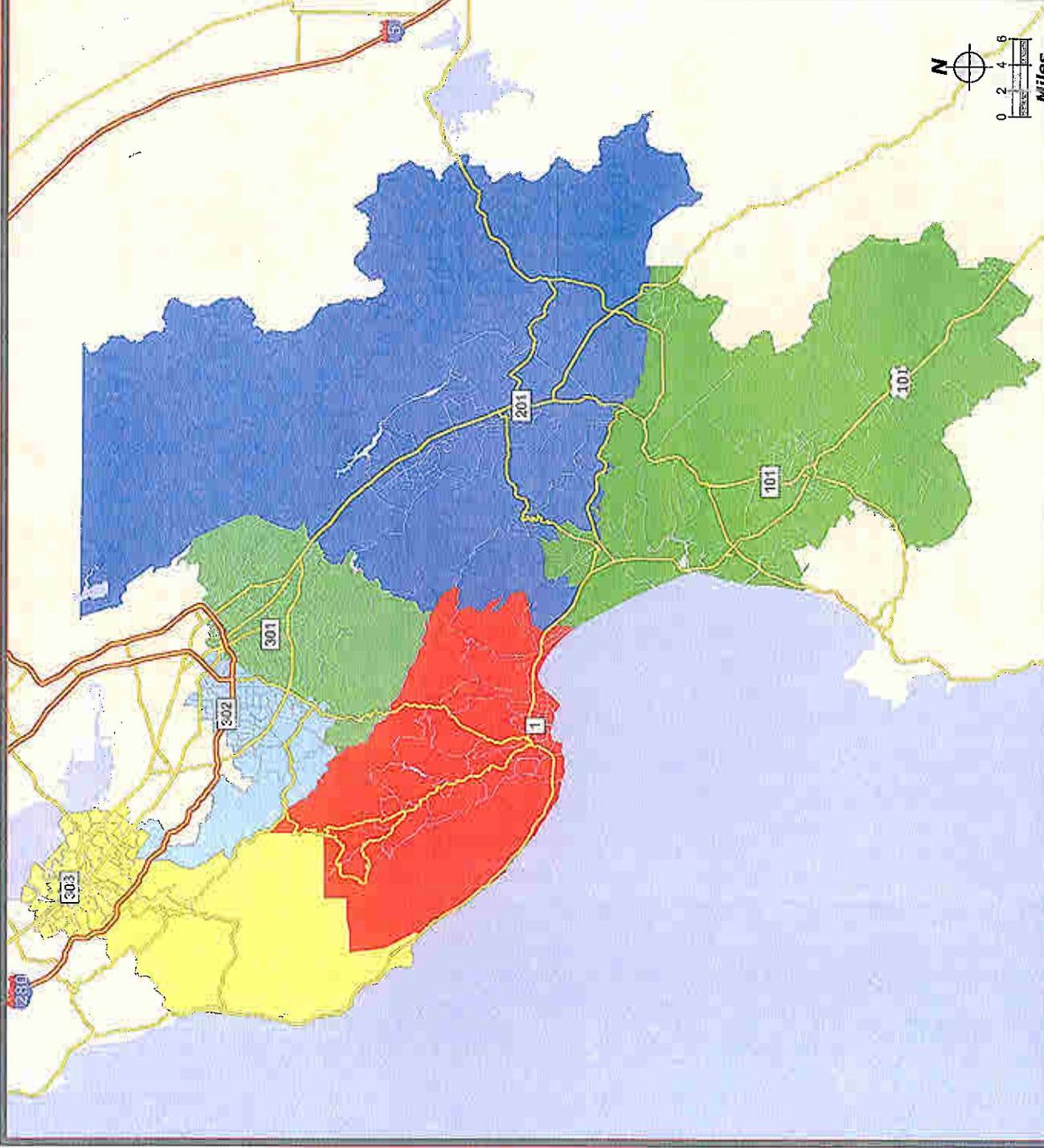
Confidential

NNA04741

Nissan North America

Santa Cruz Market + Fringe





PMA Map

**2011 and Prior PMA Definitions
2010 Census Tracts**

- 1 Santa Cruz Nis Santa Cruz
- 101 My Nissan Salinas
- 201 Gilroy Nissan Gilroy
- 301 Premier Nissan Capitol Expswy
- 302 Stevens Creek West San Jose
- 303 Boardwalk Nis Redwood City