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7
8 **STATE OF CALIFORNIA**
9 **NEW MOTOR VEHICLE BOARD**
10

11 In the Matter of the Protest of:

12 SANTA CRUZ NISSAN, INC., dba
13 SANTA CRUZ NISSAN,

14 Protestant,

15 v.

16 NISSAN NORTH AMERICA , INC.,
17 Respondent.
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PROTEST NO: PR-2358-13

PROTESTANT'S BRIEF ON REMAND

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1 **INTRODUCTION**

2 At the July 15, 2014, Board meeting the public Board members met to consider the proposed
3 decision of Administrative Law Judge (“ALJ”) Dianna Woodward Hagle sustaining the Protest in the
4 above-captioned matter. (Attached as Exhibit 1.) The Board members voted 4 to 1 to conditionally
5 sustain the Protest, but remanded the matter to ALJ Woodward Hagle with instructions to recommend
6 conditions for the Board to impose consistent with Vehicle Code Section 3067, and establish a time
7 frame for Protestant to comply with those conditions. **No aspect of the Proposed Decision was**
8 **rejected by the Board Members.**

9 The Proposed Decision (attached hereto as Exhibit 1.) was conditionally sustained by the
10 Board, and the Board issued in its Order Conditionally Sustaining the Protest and Remanding the
11 Matter (“Remand Order”, attached hereto as Exhibit 2.) The only mandatory instructions on remand
12 were that the ALJ recommend conditions to the Board to be imposed to ensure compliance with the
13 contractual obligations between Protestant, Santa Cruz Nissan, Inc., dba Santa Cruz Nissan and
14 Respondent, Nissan North America, Inc. The Board’s Order does *not* reject any finding in the July 3,
15 2014, Proposed Decision. In response to the Remand Order, ALJ Hagle issued an Order Regarding
16 Matters Pertaining to the Remand. (Attached as Exhibit 3.)

17 The Board’s Remand Order directs that the proposed conditions are for the purpose of ensuring
18 compliance with the Sales and Service Agreement between Protestant and Respondent. Specifically,
19 the Agreement requires:

20 “Dealer shall actively and effectively promote through its own advertising and sales
21 promotion activities the sale at retail (and if Dealer elects, the leasing and rental) of
22 Nissan Vehicles to customers located within Dealer’s Primary Market Area. Dealer’s
23 Primary Market Area is a geographic area which Seller uses as a tool to evaluate
24 Dealer’s performance of its sales obligations hereunder...” (Joint Ex. 1, p. 4, Section
25 3, ¶ A.)

26 Throughout the course of the 12 day merits hearing, Respondent introduced evidence and
27 provided testimony concerning the operational deficiencies it claims exist at Santa Cruz Nissan. It was
28 argued that these operational deficiencies are the cause of Protestant’s alleged inadequate sales

1 performance and demonstrate that Protestant was not actively and effectively promoting new Nissan
2 vehicle sales. The primary operational concerns Respondent raised at the merits hearing included:

- 3 • Protestant's failure to reach out to the Hispanic community by advertising in Spanish
4 media until the start of the hearing;
- 5 • Protestant's lack of available Nissan Saturday service;
- 6 • Protestant's failure to provide its sales staff Nissan specific sales objectives
- 7 • An alleged inadequate number of sales persons;
- 8 • An alleged inadequate number of bilingual sales persons.

9 **A. The Proposed Decision**

10 As Protestant argued to the Board members at the July Board meeting, the Proposed Decision
11 was well reasoned, well supported, and well cited to the record in its unequivocal rejection of
12 Respondent's use of its Regional Sales Effectiveness ("RSE") standard to measure Protestant's sales
13 performance in the Santa Cruz Market. The Board *did not* raise a single concern with the Proposed
14 Decision's analysis *rejecting* the use of the RSE standard, nor did it suggest that some version of RSE,
15 for example Respondent's newly implemented State Sales Effectiveness Ranking ("SSER"), might be
16 an appropriate measurement of sales performance, as applied to the Santa Cruz Market. Instead, the
17 Board conditionally *sustained* this Protest, adopting the Proposed Decision, but requiring the
18 recommendation of certain conditions on remand. Any proposed condition that might require any
19 level of attainment of Respondent's RSE or SSER standard would be contrary to the Proposed
20 Decision, already conditionally adopted by the Board, and not supported by the evidence in the record.

21 **B. The July 15, 2014, Board Meeting**

22 During the July 15th Board Meeting, Respondent spent considerable time expressing its concern
23 that Protestant has purportedly ignored the Hispanic population in the Santa Cruz market. However,
24 the facts are as follows: Protestant has consistently employed Hispanic individuals, has always
25 provided Nissan sales and service to Hispanic customers and has always advertised in the heavily
26 Hispanic Watsonville area. (RT 3/6/14, 27:17-28:1.) Moreover, Respondent was forced to
27 acknowledge the fact that Protestant began advertising in Spanish radio, TV, internet and print media,
28 just prior to the start of the merits hearing, and continues to do so today. (RT 3/6/14, 28:22-30:12.) In

1 its arguments to the Board, counsel characterized these efforts as “too little too late.” Obviously, as
2 evidenced by the Remand Order and the Board Members’ comments during the Board Meeting, the
3 Board rejected this argument. Mr. Stevens stated “Well, I don’t know that there really is ever too late
4 when you’re taking away a franchise, that is.” (RT 7/15/14, 41:21-23.)

5 Respondent also spent considerable time expressing its concern that Protestant was not
6 providing Saturday Nissan service operations. (RT 7/15/14, 21:23-22:22.) However, the record
7 reflects that Protestant was in the process of preparing to implement Saturday service operations at the
8 time of the hearing. (RT 7/15/14, 28:21-29:1.) Again, counsel characterized this as “too little too late,”
9 and again, the Remand Order demonstrates this not to be the case.

10 Respondent also argued that Protestant’s failure to maintain a FaceBook page was somehow a
11 failing by Protestant that translated into lost sales opportunities based upon alleged facts that were
12 outside of the record before the Board. As a result, these arguments were quickly rejected by the
13 Board Members. Mr. Brooks also cautioned Respondent, on at least two occasions, that because there
14 was no evidence concerning the “analytics” of such a claim, this line of argument could not be
15 considered by the Board. (RT 7/15/14, 19:5-20:6.)

16 Despite Respondent’s outside of the record arguments regarding the use of FaceBook, the
17 evidence in the record plainly establishes the fact that Protestant has made extensive efforts to
18 modernize and maximize its internet sales presence and effectiveness. As was argued to the Board
19 members, Protestant has completely revamped and modernized its internet department, as well as its
20 internet marketing efforts, by adding additional internet sales staff, contracting major internet lead
21 providers and enrolling in extensive Nissan recommended internet sales training. (RT 7/15/14, 19:5-
22 20:6.) Moreover, Protestant continues to work with Respondent’s preferred internet consultant
23 company, Cobalt, in its ongoing efforts to continue to look for ways to improve its internet sales
24 presence. (RT 3/6/14, 31:7-32:4.) The Proposed Decision acknowledges Protestant’s many efforts to
25 improve its internet sales: “SCN has recognized this phenomenon and has become more conversant
26 with “digital marketing”. (Proposed Decision ¶ 148.)

27 Finally, Respondent complained that Protestant failed to provide its sales staff “Nissan
28 specific” sales goals, and as a result, Protestant’s sales staff could meet their individual dealership sales

1 objectives by selling a Nissan, Volkswagen or Dodge-Ram vehicle. (RT 7/15/14, 40:8-41:5.) Even so,
2 the record reflects that Protestant modified its sales compensation plans so that its sales staff was
3 incentivized to sell Nissan vehicles over any of the others offered at retail by Protestant. (RT 3/6/14,
4 48:18-50:12.)

5 **C. The August 19, 2014, Settlement Conference**

6 The parties participated in a Mandatory Settlement Conference before ALJ Wong on August
7 19, 2014, in an attempt to come to an agreement concerning proposed conditions and timelines for
8 completion to be imposed on Protestant pursuant to the Remand Order. Unfortunately, the parties
9 were unable to reach an agreement.

10 Without disclosing the settlement discussions between the parties, ALJ Wong seemed to
11 believe that any proposal must include actual sales performance objectives Protestant must reach
12 within certain timelines. It was not clear whether ALJ Wong had reviewed the contents of the
13 proposed decision that was conditionally sustained by the Board or Exhibits 2 and 3 attached hereto.
14 As stated above, the proposed decision unequivocally rejected Respondent's use of RSE to measure
15 sales performance in the Santa Cruz market. Moreover, the Remand Order does not state that any
16 discrete sales performance metrics be imposed. Instead, the Remand Order merely requires that the
17 ALJ propose conditions to ensure compliance with the dealer agreement.

18 **ARGUMENT**

19 **A. The Proposed Decision Was Conditionally Sustained by the Board.**

20 Respondent is expected to argue that any proposed conditions must include a sales objective for
21 Protestant based upon Respondent's use of SSER. However, what Respondent refuses to acknowledge
22 is the fact that the Proposed Decision, which was conditionally sustained by the Board, rejects
23 Respondent's use of RSE, as applied to the Santa Cruz market.

24 SSER is identical to RSE in every respect but one. Namely, SSER calculates expected market
25 share based on Nissan competitive registrations across the state of California, instead of the Region as
26 was the case with RSE. (Ex. 212, NNA 562; RT 2/5/14, 28:22-29:25; RT 2/5/14, 300:24-301:13.)
27 While SSER determines market share from a smaller geography, approximately 100 dealers in
28 California compared to approximately 200 across the Region, the SSER calculation imposes a higher

1 standard of performance than RSE. (RT 2/5/14, 301:3-13.)

2 Although the SSER standard is a more localized standard (California) than RSE, it is still an
3 extremely large area and encompasses a great variety of markets, populations, economies, proximity of
4 competing line-makers in each area and countless other local market differences that exist across a state
5 as large and diverse as California. Moreover, as with RSE, the use of an average to measure Nissan
6 dealers sales performance necessarily results in approximately half of all dealers falling below average
7 at any given time. Any sales performance metric that finds half of all Nissan dealers to be
8 underperforming, and therefore in breach of their dealer agreements, *is per se* unreasonable.

9 **1. The Proposed Decision unequivocally rejects Respondent's measurement of**
10 **Protestant's sales performance in the Santa Cruz market.**

11 The Proposed Decision cites the many reasons why Respondent's measurement is an
12 inappropriate measurement of Protestant's sales performance in the Santa Cruz market as evidenced by
13 the following findings:

14 125. The language in Nissan's Notice of Termination dated January 14, 2013,
15 primarily concerned itself with the "performance metrics" described above, concluding
16 that "...declining sales penetration performance for many years..." dictated Nissan's
17 decision to terminate the franchise. (Exh 4:0047-51) No mention was made of the
18 criteria listed in Section 3.D of the Dealer Agreement, nor was there evidence that these
19 factors were considered.

20 "126. However, RSE may be used as a standard, even in termination cases, as long as
21 its limitations are recognized and "rigid performance metrics" are tempered with the
22 kinds of inquiries required by Section 3.D of the Dealer Agreement.

23 127. The RSE formula does not include a consideration of either topography or
24 commute patterns. SCN's location, 1.8 miles from the ocean, does not have the 360
25 degree "proximity advantage" to customers that other dealers enjoy. And Section 3.D of
26 the Dealer Agreement requires Nissan-, "...where appropriate..." to take into account
27 "reasonable criteria" in evaluating a dealer's sales performance. (IV:237; V:87)

28 135. "Averages" and "rankings" based on those averages, taken by themselves, can be

1 misleading. When looking at an "average" of a group, there will be roughly half over
2 and half under, which is, in fact, a validation of the calculation being used. "Once you
3 set an average, half will be performing over and half under [the average line]...".
4 (IV:252) The bar graphs in Exhibit 200C:4721-23 are reasonable because there is a
5 normal distribution around the average.

6 A. To increase its competitiveness in the marketplace, Nissan seeks to raise those
7 dealers which are below average ("underperformers") by encouraging them to increase
8 sales. If underperforming dealers do become more successful, this will raise the average
9 line, but there will still always be the roughly 50%-50% split of numbers above and
10 below the average line. So even successful dealers could (inappropriately) be
11 characterized as "underperformers" if they fall below the average line.

12 B. When Nissan requires an "underperforming" dealer to "achieve 100% RSE", and
13 the dealer does so, all that happens is that another dealer will fall below the average line
14 (and the rankings will change). By using "averages", there will always be around 50%
15 "underperforming" dealers. Nissan's use of "100% RSE" as a performance goal (together
16 with dire warnings about the consequences of failing to achieve "100% RSE") is not
17 reasonable.

18 C. Nissan's goal, not articulated but implied, is to "...reduce the variation around the
19 average [line]...", so that the dealers below the average line are not far below. It is the
20 "magnitude of the difference", the quantitative deviation from the average line, which is
21 most important, while still having roughly half of the dealers over and half under. So if
22 dealers falling on or close to the average line are "C" students, poor performers are "D"
23 and "F" students as they fall farther below the line. (IV:252)"

24 **2. The Board could have ordered that specific sales performance metrics be proposed**
25 **on remand – it deliberately chose not to do so.**

26 The Remand Order does not require that the ALJ propose specific sales objectives or metrics to
27 be achieved by Protestant. If this was the Board's intention, it would have set forth this requirement in
28 its order. The fact that the Board did not include any such requirement in the Remand Order can only

1 be interpreted as a clear indication that the Board did *not* intend to instruct ALJ Hagle to propose
2 discrete or specific sale objectives. Moreover, when the Board has already voted to conditionally
3 sustain the Proposed Decision, it accepted the Proposed Decision's findings regarding the
4 inappropriateness of Respondent's sales performance metrics, as applied to the Santa Cruz market.

5 **3. The Proposed Decision's rejection of the RSE standard was not based upon the**
6 **application of Vehicle Code § 11713.13(g)(1)(B).**

7 Respondent is expected to argue that the rejection of its RSE, and by extension its SSER
8 standard, is based upon the application of Vehicle Code § 11713.13(g)(1)(B), but this is not the case.
9 The issue of whether this newly adopted provision of the Vehicle Code is applicable to the final
10 determination of this Protest is not relevant in this instance because the Proposed Decision does not
11 base a single finding upon it. Moreover, the Proposed Decision specifically sets forth the burden of
12 proof in paragraph 25:

13 "In termination cases pursuant to section 3060, the franchisor has the burden of proof
14 pursuant to section 3066(b) "...to establish that there is good cause to...terminate...a
15 franchise."

16 The Proposed Decision provides no indication that §11713.13(g)(1)(B) was applied in any way. The
17 only reference to § 11713.13(g)(1)(B) is found in footnote 10 at the bottom of page 14 and is not cited
18 as support for the Proposed Decision's rejection of Respondent's RSE and SSER standards.

19 In addition, pursuant to Vehicle Code § 3061, in determining whether good cause has been
20 established to terminate a franchise, the Board "shall take into account the existing circumstances," in
21 addition to those good cause factors specifically set forth. The existing circumstances include the
22 unique local market conditions that have been thoroughly addressed in the Proposed Decision. This is
23 not the first time the Board has determined a manufacturer's sales performance methodology to be an
24 inappropriate measurement of dealer performance in a particular market.

25 In a final decision drafted directly by the Board, the Board determined that "...as stated above
26 and urged by Protestant, [the manufacturer's] use of averages for measuring performance in a market
27
28

1 and declaring that the market is below average is *not necessarily an appropriate measure...*¹(emphasis
2 added) In that Protest, the manufacturer was attempting to use a California average to demonstrate the
3 underperformance in a market for the purpose of justifying the establishment of an additional same
4 line-make franchise. In the instant Protest, Respondent is using RSE and SSER to show
5 underperformance in the Santa Cruz market in an effort to demonstrate good cause to terminate
6 Protestant. This prior decision demonstrates that the Board has made determinations regarding the
7 reasonableness of a California based sales effectiveness standard without the use of §11713.13(g).

8 **B. Protestant is Willing and Able to Address the Specific Operational Concerns Alleged by**
9 **Respondent.**

10 As noted above, Respondent alleged at hearing that Protestant’s purported inadequate sales
11 performance was due to “operational deficiencies.” Based upon the evidence in the record, those
12 identified operational deficiencies included the following:

- 13 • Protestant’s alleged failure to reach out to the Hispanic community by advertising in Spanish
14 media until the start of the hearing;
- 15 • Protestant’s lack of Nissan Saturday service;
- 16 • Protestant’s failure to provide its sales staff Nissan-specific sales objectives;
- 17 • An alleged inadequate number of sales persons;
- 18 • An alleged inadequate number of bilingual sales persons.

19 Most, if not all, of these alleged operational deficiencies have been, or will be, addressed by
20 Protestant. Nevertheless, Protestant is willing to address each of these alleged operational deficiencies
21 within a time frame to be set by the Board. Because the evidence in the record does not demonstrate a
22 reasonable alternative to RSE or SSER, any proposed conditions must focus on improvement of
23 Protestant’s alleged operational deficiencies and cannot include sales objectives based upon SSER or
24 RSE.

25
26 ¹ *Shayco, Inc., dba Ontario Volkswagen v. Volkswagen of America, Inc.*; PR 2065-10, at Paragraph 75.
27 It should be noted that this decision of the Board did not become final because the Respondent in that
28 Protest filed a writ of mandamus in the Superior Court based in part upon an alleged procedural
irregularity. The Superior Court remanded the matter back to the Board, but Respondent withdrew its
notice prior to a final decision by the Board following remand.

1 **C. The Evidence in the Record Cannot Support any Discrete Sales Objective.**

2 Respondent's sole basis for the termination of Protestant's Nissan franchise was for alleged
3 inadequate sales performance. Respondent's claim of alleged inadequate sales performance was based
4 upon an RSE standard, which has been *rejected* and Respondent offers no alternative standard. Given
5 the fact that the proposed decision, which has been conditionally adopted by the Board, *rejects* the use
6 of the RSE standard to measure Protestant's sales performance in the Santa Cruz market, any condition
7 that is based in any measure upon Respondent's flawed RSE or SSER analysis would be self-
8 contradictory.

9 In addition, the substitution of SSER for RSE does not correct the several problems with RSE
10 identified in the Proposed Decision. Instead, the use of RSE further compounds the problems
11 identified in the application of either standard to the Santa Cruz market because SSER is a higher
12 standard than RSE. Moreover, SSER was *not* the standard in place for the time period relevant to final
13 determination of this Protest. The Notice of Termination ("NOT") does not cite inadequate SSER
14 performance as the basis for the proposed termination of Protestant's Nissan franchise. A franchisor
15 may not assert "good cause" for a franchise termination at the hearing on any ground not asserted in its
16 notice of termination. *American Isuzu Motors, Inc. v. New Motor Vehicle Bd. supra*, 186 Cal.App.3d at
17 p. 477.

18 In essence, per *Isuzu*, any proposed conditions cannot be based upon a standard that was not
19 included in the four corners of the Notice of Termination. Further, any proposed conditions cannot be
20 based upon a methodology that has been unequivocally rejected by the Board, as applied to the Santa
21 Cruz market.

22 **1. Respondent is expected to now urge that Protestant should be held accountable to**
23 **the newly instituted SSER standard.**

24 The NOT states the grounds for the proposed termination of Protestant to be based upon
25 inadequate sales performance as measured by RSE. (Ex. J4.) Respondent has since abandoned its use
26 of RSE and now employs SSER to measure California Nissan dealers' sales performance.
27 Respondent's insistence that Protestant now be required to achieve 100% of SSER is unreasonable for
28 a number of reasons.

1 First, the evidence in the record contains little to no analysis concerning SSER. SSER was not
2 included in the NOT as a basis for termination and as a result, the SSER standard was not addressed in
3 any meaningful way at the hearing. The limited evidence in the record concerning SSER came from
4 lay witnesses, not experts. According to Chad Filiault, the SSER standard is a more stringent standard
5 than RSE – a standard and methodology that was rejected by the Board. Moreover, Mr. Filiault
6 testified that the Southern California Nissan dealers routinely outperform the Northern California
7 dealers.

8 In addition, SSER suffers from the same defects as RSE in its failure to account for the existing
9 local market conditions in the Santa Cruz market. Just as with the RSE, SSER fails to account for the
10 significant amount of insell occurring in this market, across *all* brands, the presence of exclusive
11 Honda and Toyota brands at superior locations, the strong local market demand for green technology
12 options not offered by Nissan, and the presence of a Honda dealership that significantly outperforms
13 Toyota, a brand that is expected to outperform Honda in the State of California.²

14 **D. Any Proposed Condition That Would Require Protestant to Obtain 100% of a SSER**
15 **Based Sales Effectiveness Standard Would Result in the Termination of Protestant and the**
16 **Absence of Nissan Sales and Service Availability in the Santa Cruz Market.**

17 The record plainly reflects the fact that the lack of available and affordable real-estate in the
18 Santa Cruz market makes it extremely unlikely that, should Protestant be terminated, another Nissan
19 dealer will be established anytime in the near future, if ever. (RT Vol. 1, 179:14-180:18.) If Protestant
20 were required to achieve 100% of the newly instituted, and more stringent, SSER standard, it is most
21 likely that Protestant would fall short of this standard and would likely be terminated, should the
22 Board's final decision require automatic termination for Protestant's failure to achieve any of the
23 conditions imposed.

24 The record is replete with substantial and compelling evidence concerning the existing
25 conditions in the Santa Cruz market that make the use of RSE or SSER unreasonable to measure
26

27 ² Paragraph 138 of the Proposed Decision acknowledges that “In 2012, Ocean Honda had an
28 ‘effectiveness percentage’ of 151.3%, Toyota of Santa Cruz’s was 72.0% and Santa Cruz Nissan was
30.9% (Exhs 200H:4760; 200SuppRpt:5663.)”

1 Protestant's sales performance and is set forth in the Proposed Decision. (Proposed Decision ¶¶ 84-87,
2 93-95.) Because the evidence clearly demonstrates that Protestant should *not* be expected to achieve
3 100% of either standard, any requirement that it do so to avoid termination would be unreasonable.

4 In addition, the use of SSER renders half of the approximately 100 California Nissan dealers to
5 be underperforming as measured by this standard. It is unreasonable to make Protestant subject to
6 automatic termination for failing to meet a standard that roughly half of the Nissan dealers in
7 California will not meet at any given time.

8 The Proposed Decision best summarizes Respondent's use of RSE and SSER in this Protest in
9 the following finding:

10 "185. There were many problems with Nissan's analysis of dealer performance.
11 Although Nissan's basic calculation was valid (figuring the dealer's sales penetration first,
12 then using the regional segmented data to establish performance), there were other
13 aspects of the process which were not. The "West Region" was too large to be useful.
14 Reliance on "averages" and "rankings" without further information has the tendency to
15 mislead. Making threats of adverse consequences if a dealer does not "achieve 100%
16 RSE" is misusing the data. Designating a "competitive set" of 197 vehicles (including
17 Tesla and Lotus) leads to unmanageable data."

18 Respondent must not be permitted to rely upon its flawed sales performance analysis to force the
19 termination of a Nissan franchisee that has been successfully operating in the City of Santa Cruz for
20 more than 40 years.

21 **1. Nissan's own market studies demonstrate that it will only accept a replacement**
22 **dealer that will provide an exclusive NREDI image compliant facility located near**
23 **Honda and Toyota.**

24 As the evidence in the record reflects, Nissan's policy requires that dealers in a market with a
25 planning volume over 400 units per year must operate from an exclusive facility. (RT Vol. 8, 272:24-
26 275:15.) While it is possible that Nissan could ignore its policy and approve a dualed Nissan
27 dealership, there is no credible evidence in the record to suggest this is a realistic possibility.
28 Moreover, Nissan's two separate Market Studies, conducted in 2009-2010 and 2012-2013, each

1 concluded that a Nissan dealership in this market should be exclusive. (Exs. J7, J8 and J9; RT Vol. 8,
2 275:16-279:12.) Similar to Nissan's planning volume policy, there is no credible evidence in the
3 record that demonstrates Nissan might choose to ignore these Market Study recommendations and
4 approve a dual.

5 Respondent's clear desire to establish an exclusive Nissan dealership in the Santa Cruz Market
6 located near the facing Honda and Toyota dealerships, and the many obstacles to doing so, leave little
7 doubt that, should Protestant be terminated, the residents of this geographically isolated market will be
8 without an authorized Nissan dealership indefinitely.

9 The imposition of any sales objective based upon Respondent's deeply flawed RSE or SSER
10 standard more likely than not would ensure that Nissan customers in the Santa Cruz market would be
11 without the benefit of authorized Nissan sales and service operations the community has enjoyed for
12 more than 40 years.

13 **PROPOSED CONDITIONS**

14 Protestant proposes the following conditions and timelines to be imposed upon it to satisfy the
15 Board's order on remand:

- 16 1. Within 30 days of a final decision, Protestant shall advertise in Spanish media at levels
17 equal to those in place at the start of the merits hearing, for a minimum of six months.
18 At the conclusion of the six month period, Protestant shall determine the effectiveness
19 of its Spanish media investment and determine whether sound business judgment
20 dictates such continued investment to be prudent.
- 21 2. Within 30 days of a final decision, Protestant shall establish and maintain Saturday
22 service hours and operations for the service of Nissan vehicles, for a period of no less
23 than 12 months. At any time after the conclusion of the 12 month period, Protestant
24 shall reevaluate the effectiveness of continuing to provide Saturday Nissan service.
- 25 3. Within 30 days of a final decision, Protestant shall determine and assign monthly
26 Nissan-specific sales goals for its sales staff. This practice shall remain in place for as
27 long as Protestant remains a Nissan dealer.
- 28 4. Protestant will maintain an adequate number of sales persons to meet the increased sales

1 traffic it hopes will result from its increased efforts to drive sales traffic.

- 2 5. Protestant will endeavor to maintain Spanish-English bilingual sales staff at all times.
3 Should Protestant not maintain bilingual sales staff at any given time, it shall actively
4 advertise and attempt to hire bilingual sales staff, immediately.

5 These conditions are proposed to address the specific operational deficiencies alleged to exist at
6 Protestant's Nissan franchise. Each of these proposed conditions directly addresses the concerns of the
7 Board as set forth in the Remand Order as well as those concerns expressed by Board Members at the
8 July 15, 2014 Board Meeting.

9 **CONCLUSION**

10 The Proposed Decision has already been conditionally sustained by the Board. The Proposed
11 Decision rejects the use of RSE to measure Protestant's sales performance in the Santa Cruz market.
12 As a result, any proposed conditions must not be based in any way upon Respondent's methodology
13 for RSE or SSER. Any such proposed conditions would render the final decision self-contradictory
14 and flawed on its face.

15 Instead, any proposed conditions must be directed towards curing the operational deficiencies
16 alleged by Respondent, which include that Protestant continue to provide Saturday Nissan service, that
17 Protestant continue to advertise in Hispanic media, that Protestant provide Nissan specific sales goals
18 to its sales staff to further encourage its sales staff to aggressively promote the sale of new Nissan
19 vehicles, to hire a bilingual salesperson (English and Spanish) and to also employ an adequate number
20 of sales staff to meet the additional sales traffic that might result from Protestant's efforts to improve
21 its sales volume.

22
23
24 Dated: August 25, 2014

LAW OFFICES OF
MICHAEL J. FLANAGAN

25
26 By: 
27 Gavin M. Hughes
28 Attorneys for Protestant

