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FILED
Superior Court Of California,
Sacramento
10/31/2014
awoodward
By _____, Deputy
Case Number:
34-2014-80001963

8 SUPERIOR COURT OF STATE OF CALIFORNIA
9 COUNTY OF SACRAMENTO

11 NISSAN NORTH AMERICA, INC., a
12 California corporation,

13 Petitioner,

14 v.

15 CALIFORNIA NEW MOTOR VEHICLE
16 BOARD, a California state agency,

17 Respondent.

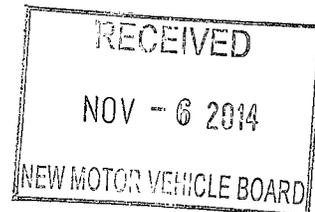
18 SANTA CRUZ NISSAN, INC. dba
19 SANTA CRUZ NISSAN, a California
20 corporation,

21 Real Party in Interest.

Case Number:

PETITION FOR WRIT OF
ADMINISTRATIVE MANDATE

[C.C.P. §1094.5]



22 Petitioner Nissan North America, Inc. ("Petitioner" or "NNA") hereby petitions the above-
23 entitled Court for a Writ of Administrative Mandate, pursuant to Code of Civil Procedure section
24 1094.5 which permits a party to seek judicial review of any final order or decision of an
25 administrative agency, and alleges as follows:

26 I. INTRODUCTION

27 1. Petitioner NNA is a corporation duly organized and existing under the laws of the
28

BY FAX

1 State of California and is the distributor of Nissan brand motor vehicles and Nissan genuine parts
2 and accessories in the United States.

3 2. Respondent California New Motor Vehicle Board (“Respondent” or “the Board”)
4 is an administrative agency of the State of California and is, among other things, authorized to
5 conduct hearings and decide specified protests filed by motor vehicle dealers pursuant to the
6 California Vehicle Code sections 3000 *et seq.*

7 3. Real Party in Interest Santa Cruz Nissan, Inc. dba Santa Cruz Nissan (“Real Party”
8 or “SCN”) is a California corporation licensed and doing business in the State of California and is
9 licensed by the California Department of Motor Vehicles as a new motor vehicle dealer. SCN is
10 a Nissan dealer authorized to sell Nissan products pursuant to a written Nissan Dealer Sales and
11 Service Agreement (“Dealer Agreement”) entered into between NNA and SCN. SCN’s Nissan
12 dealership is located at 1616 Soquel Avenue, Santa Cruz, California 95062.

13 4. The Dealer Agreement is attached as **Exhibit “A”**.

14 **II. BACKGROUND FOR THE INITIAL PROPOSED DECISION**

15 5. By letter dated January 14, 2013, Nissan gave notice to SCN pursuant to California
16 Vehicle Code section 3060 of its intention to terminate SCN’s Dealer Agreement. In that Notice
17 of Termination, Nissan identified unsatisfactory sales penetration performance, related to
18 operational deficiencies, over a period of several years and despite Nissan’s efforts during that
19 time to assist SCN to improve its performance, as the reasons for the termination of SCN’s Dealer
20 Agreement. SCN’s poor sales performance is a material breach of Section 3 of the Standard
21 Provisions of the Dealer Agreement.

22 6. The Notice of Termination is attached as **Exhibit “B”**.

23 7. As October, 2012 (the data available at time of the Notice of Termination), SCN’s
24 sales penetration sank to 37.3% of Regional Sales Effectiveness (“RSE”), which was the sales
25 criteria set by NNA to measure its dealers’ performance under the Dealer Agreement.
26 Furthermore, SCN continued to rank as one of the worst underperforming dealers in both the
27 West Region for NNA (191th of 196 dealers) and the State of California (98th of 99 dealers). The
28 only worse performing Nissan dealer other than SCN in the State of California had been in

1 business for less than one year.

2 8. SCN filed a timely protest with the Board, which was assigned Protest No. PR-
3 2358-13 (the "Protest").

4 9. A hearing on the merits was held before Administrative Law Judge Diana
5 Woodward Hagle ("ALJ Hagle"), who was appointed by the Board, on January 27 through
6 January 31, 2014; February 3 through February 7, 2014; and, March 6 and March 7 2014.

7 10. On July 3, 2014, ALJ Hagle issued her Proposed Decision ("Proposed Decision").
8 The Proposed Decision would have sustained the Protest unconditionally, finding that Nissan did
9 not show good cause to terminate under Vehicle Code section 3061(a) through (g).

10 **III. THE BOARD REMANDS THE PROTEST WITH INSTRUCTIONS THAT ALJ**
11 **HAGLE RECOMMEND CONDITIONS CONSISTENT WITH VEHICLE CODE**
SECTION 3067

12 11. The public members of the Board met on July 15, 2014 to consider whether to
13 approve or reject the Proposed Decision. After a short presentation by each party and private
14 deliberation, the Board conditionally sustained the Protest and remanded the matter to ALJ Hagle
15 setting forth the following instructions in its Order Conditionally Sustaining the Protest and
16 Remanding the Matter dated July 17, 2014 ("Order"):

17 The ALJ shall recommend conditions for the Board to impose consistent with
18 Section 3067 and establish a time frame for SCN to comply with those conditions.
19 The ALJ shall have discretion, if deemed necessary, to order additional evidence,
briefing, and/or arguments.

20 12. The Order also strongly recommended that the parties participate in a further
21 Settlement Conference. The Order is attached as **Exhibit "C"**.

22 13. During its meeting on July 15, 2014, the Board's attorney Ms. Robin Parker
23 announced the Board's decision as being carried by three votes to remand and impose conditions
24 on the dealer; one member Ms. Doi concurred with the majority, but wanted further clarification;
25 and the fifth board member, Mr. Lizarraga, opposed the proposed decision. Notably, not a single
26 board member voted to either (i) unconditionally sustain the Protest, or (ii) adopt the Proposed
27 Decision. (RT Board Hearing 45:3-16).

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1 14. Also during the July 15, 2014 Board meeting, in response to SCN's counsel's
2 request for more detail on the conditions and time frame to be imposed on SCN, board member
3 Mr. Glenn Stevens replied: "You're going to have to hit certain condition marks that the ALJ is
4 going to set." (RT Board Hearing 46: 23-24).

5 15. During the meeting, board member Mr. Brooks stated that SCN's Nissan sales
6 were not growing commensurate with the market and although they had implemented some
7 marketing strategies, it sounded like they had been implemented "under a gun" of a termination.
8 (RT Board Hearing 29:2-7). Mr. Brooks also disclosed to SCN that he "...felt, personally [it is]
9 almost malpractice in how [SCN] run[s] [its] business in terms of Nissan." (RT Board Hearing
10 45:21-23).

11 16. The transcript of the July 15, 2014 Board Hearing pertaining to the Protest and
12 Proposed Decision is attached as **Exhibit "D"**.

13 17. In its Order, the Board did not consider or rule on whether NNA had established
14 "good cause" to terminate under Vehicle Code section 3061 nor did it address any of the separate
15 "good cause" factors which the Board is required to consider in determining whether to sustain or
16 overrule a termination protest under Vehicle Code section 3061. Those factors include, but are
17 not limited to:

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

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

22 (c) Permanency of the investment.

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

26 (e) Whether the franchisee has adequate motor vehicle sales and
27 service facilities, equipment, vehicle parts, and qualified service
28 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.

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

18. Consistent with the Board's Order, the matter was then remanded to ALJ Hagle.

IV. ALJ HAGLE'S SUBSEQUENT RULINGS AND PROPOSED CONDITIONS FAILED TO ASSURE PERFORMANCE OF BINDING CONTRACTUAL COMMITMENTS (THE DEALER AGREEMENT) BETWEEN THE PARTIES AS SET FORTH IN VEHICLE CODE 3067

19. A telephonic conference with ALJ Hagle was conducted on July 24, 2014. As a result of the conference, ALJ Hagle ordered the following: (1) the parties must file and serve proposed conditions for the purposes of a Mandatory Settlement Conference; (2) a Mandatory Settlement Conference was scheduled for August 19, 2014; (3) *no additional evidence would be taken and the record would not be reopened*; (4) the parties must file and serve briefing by August 25, 2014; and (5) a telephonic hearing which was held on August 26, 2014. (Emphasis added.)

20. The matter did not settle at the Mandatory Settlement Conference and the telephonic hearing was held on August 26, 2014.

21. The telephonic hearing was not a hearing in the usual sense, but rather a hearing for the parties to suggest conditions regarding the Board's Order.

22. As a result of ALJ Hagle's decision that there would be no additional evidence taken and the record would not be reopened, NNA was precluded from providing the Board with evidence updating SCN's sales performance data (the existing record was based on year-end 2012 data which would have predated the Notice of Termination in January, 2013). The updated sales performance information would have assisted in proposing prospective conditions to meet the Board's Order. The prior performance data was about 18 months old as of the date of the Order and as a result was inappropriate data for proposing prospective conditions.

23. On September 5, 2014, ALJ Hagle issued the Proposed Decision following the Board's Order ("Proposed Decision after Remand"). The Proposed Decision after Remand is attached as **Exhibit "E"**.

1 24. The Proposed Decision after Remand imposed the following four conditions
2 effective no later than 30 days from its effective date and continuing until December 31, 2015:

3 (1) SCN shall be open for service of Nissan vehicles on Saturdays (excluding
4 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

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

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

8 (4) Jim Courtright (SCN's Executive Manager) shall attend NADA school and
9 complete it within 24 months of the effective date of the decision.

10 25. The Proposed Decision after Remand also ordered that effective immediately,
11 until December 31, 2015, the Board shall have exclusive jurisdiction to assess SCN's sales
12 performance and set an exclusive sales measurement for NNA to calculate and use for the
13 purposes of evaluating SCN's sales performance.

14 26. The sales measurement concocted by ALJ Hagle requires that SCN's *raw sales*
15 meet or exceed the average percentage *increase in raw sales* of the 10 dealers in SCN's currently
16 configured district. Nissan, however, does not measure raw sales as a sales performance measure
17 under the Dealer Agreement, but rather evaluates a dealer's sales performance as a percentage of
18 the sales made by various comparison groups. Measuring raw sales is ineffective in measuring a
19 dealer's sales performance, as it fails to determine the dealer's effectiveness in its market.

20 27. The sales measurement stated in the Proposed Decision After Remand not only is
21 ineffective and contrary to the performance measures set forth in the Dealer Agreement, but it
22 also fails to require that SCN improve its sales performance. SCN can achieve the ALJ-invented
23 "sales standard" and still perform at roughly 30% of the average dealer in the district. The so-
24 called standard, therefore, would allow SCN to remain the worst sales performing dealer in the
25 state of California and still remain a Nissan dealer.

26 28. Further, SCN had achieved sales effectiveness of over 100% in 2005, proving that
27 SCN could achieve sales effectiveness from its current location. Since that time, SCN's sales
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1 performance plummeted from 79% in 2008 of average retail sales penetration by the dealers in its
2 then configured district to 34% by year-end 2012.

3 29. No sales measurement used by NNA nor any sales measurement required by the
4 Dealer Agreement would allow such chronic sales deficiencies by a dealer to persist (i.e., no
5 improvement) without any action by NNA.

6 30. NNA, pursuant to the Dealer Agreement, is entitled to a condition that requires
7 SCN improve its sales performance. The sales measurement imposed by the Proposed Decision
8 Following Remand does not require any improvement by SCN whatsoever. SCN may achieve
9 the results required under the sales measurement condition and remain the worst sales performer
10 in the district and in the state of California, with the exception of a newly appointed dealer.

11 V. **AT THE SPECIAL MEETING FOLLOWING REMAND, THE BOARD**
12 **ANNOUNCES AN UNLAWFUL POLICY TO NOT TERMINATE A DEALER**
13 **FOR POOR SALES PERFORMANCE ALONE**

14 31. On September 17, 2014, the Board considered the Proposed Decision Following
15 Remand during a special meeting. Counsel for NNA and SCN again presented argument, after
16 which the Board announced that it adopted the Proposed Decision Following Remand as its final
17 decision. A true and correct copy of the Board's Decision is attached hereto as **Exhibit "F"**.

18 32. During the special meeting, Mr. Glenn E. Stevens, President of the Board, stated to
19 the parties that the Board has "never" overruled a termination protest solely for poor sales
20 performance and asked for Ms. Robin Parker's confirmation. Ms. Parker confirmed that in the
21 absence of losing a wholesale credit line or fraud, the Board has never terminated a dealer for
22 poor sales performance alone.

23 33. A copy of the transcript of the special meeting is attached as **Exhibit "G"**.

24 34. The Board cannot, as Mr. Stevens asserts, lawfully have a policy not to overrule a
25 termination protest for poor sales performance alone, without following the required rulemaking
26 process. Since making sales is the main function of a dealer, and is the primary reason that a
27 dealer is licensed by the Department of Motor Vehicles and is franchised by its franchisor, a
28 dealer cannot, as Mr. Brooks stated during the special meeting, "not make any sales for 5 years"
and still remain a dealer.

1 35. Ms. Parker responds to Mr. Brooks on page 52, line 7 of Exhibit F:

2 “MS. PARKER: It’s a good cause factor, and that the analysis in 3061. There’s
3 nothing that says you can’t terminate for bad sales. It’s just historically the Board hasn’t.”

4 36. In Exhibit F, Mr. Stevens and Ms. Parker continue to make reference to the
5 “policy”. On page 48, line 23 it states:

6 “MR. SANCHEZ¹: ...but you can’t have an absolute rule and bar that no dealer is ever
7 going to be terminated for lack of sales. You cannot have that absolute bar. If that’s what
8 you are saying, then that’s just wrong.

9 MR. STEVENS: But you know, you’ve been doing this for a long time.

10 MR. SANCHEZ: Sure.

11 MR. STEVENS: The dealers that have been terminated are usually coupled with
12 something else. For example, their doors are closed for seven days in a row. For example,
13 they don’t keep their place in a clean manner; where they don’t stock adequate parts. They’re
14 symptomatic of the same problem.”

15 37. Beginning on page 55, line 5 of Exhibit F, in pertinent part it states [Mr. Brooks
16 already speaking]:

17 “...my policy question to the Board discussed in closed session is should we pull that
18 product line or allow Nissan to do it?

19 MR. STEVENS: We can, but it’s usually, like I said, it’s usually multiple things.
20 That’s why there are multiple good cause factors.

21 MS. PARKER: There’s a lot of times flooring is gone, they broke a lot, fraud.

22 MR. STEVENS: There’s a lot of things...But Mr. Brooks is right, and I think his
23 sentiments reflect sentiments of me and certainly Bismark too. We’re trying to keep him in
24 business and get them what they want at the same time and it may not be possible.”

25

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27 ¹ The Errata Sheet for the transcript of the special meeting is also attached as the last page in
28 Exhibit F which corrects the record from erroneously attributing this statement to Mr. Stevens to
 accurately attributing it to Mr. Sanchez.

1 38. To the extent the Board's policy is not found in any regulation, it may violate the
2 Administrative Procedure Act, with respect to development and implementation of the policy,
3 including but not limited to Government Code section 11340.5.

4 39. Government Code section 11340.5 (a) states:

5 No state agency shall issue, utilize, enforce, or attempt to enforce any guideline,
6 criterion, bulletin, manual, instruction, order, standard of general application, or
7 other rule, which is a regulation as defined in Section 11342.600, unless the
8 guideline, criterion, bulletin, manual, instruction, order, standard of general
9 application, or other rule has been adopted as a regulation and filed with the
10 Secretary of State pursuant to this chapter.

11 40. "Regulation" as defined in Section 11342.600 means every rule, regulation, order,
12 or standard of general application or the amendment, supplement, or revision of any rule,
13 regulation, order, or standard adopted by any state agency to implement, interpret, or make
14 specific the law enforced or administered by it, or to govern its procedure.

15 41. Without first adopting it as a regulation and filing it with the Secretary of State, the
16 Board cannot adopt a "standard of general application" such as non termination dealers for poor
17 sales performance in the absence of also finding another factor (such as loss of floor line or
18 fraud).

19 **VI. THE BOARD ACTED WITHOUT OR IN EXCESS OF ITS JURISDICTIONAL**
20 **AUTHORITY**

21 42. Asserting exclusive jurisdiction to assess SCN's sales performance and ordering
22 NNA to calculate an exclusive sales measurement (that is neither used by NNA for measuring
23 sales performance nor assures performance of the Dealer Agreement) exceeds the authority of the
24 Board and is contrary to Vehicle Code Section 3067.²

25 43. There is also no purpose provided under the article that authorizes the Board either
26 to have exclusive jurisdiction to assess a dealer's sales performance or to impose a sales
27 measurement on a manufacturer that it does not use for any other dealer.

28 44. The Board as a state agency has only jurisdiction granted it by statute.

² Vehicle Code 3067 provides that "...The decision shall sustain, conditionally sustain, overrule,
or conditionally over the protest. Conditions imposed by the board shall be for the purposes of
assuring performance of binding contractual agreements between franchisees and franchisors or
otherwise serving the purpose of this article...."

1 45. There is nothing under Vehicle Code Section 3067 that provides the Board with
2 the jurisdiction to assert exclusive jurisdiction for assessing a dealer's sales performance and/or
3 order NNA to utilize an exclusive sales measurement other than one that would assure
4 performance of the Dealer Agreement.

5 **VII. ALJ HAGLE ACTED WITH PREJUDICIAL ABUSE OF DISCRETION DURING**
6 **THE HEARING ON THE MERITS**

7 46. During the hearing, NNA was not afforded a fair trial (for example, relevant
8 evidence was excluded, such as SCN's sales effectiveness under the local standards of District
9 and PMA plus fringe; NNA was ordered by the ALJ not to object to questions asked by Protestant
10 for a period of the trial because it "interfered with Protestant's direct examination"; evidence of
11 prior inconsistent statements about local market characteristics were excluded as being "too
12 attenuated"; and evidence of vehicle registrations to show SCN's sales effectiveness using
13 mileage rings was allowed for Protestant's expert but excluded for the purposes of NNA's
14 expert).

15 47. In addition, ALJ Hagle abused her discretion (for example by improperly
16 excluding evidence concerning SCN's performance in its Volkswagen or Dodge lines. During its
17 July 15 and September 17 hearings, the public members of the Board asked for such information
18 because it would be helpful in understanding SCN's market and competitive circumstances.

19 **VIII. THE PROPOSED DECISION IS NOT SUPPORTED BY THE FINDINGS AND**
20 **ITS FINDINGS ARE NOT SUPPORTED BY EVIDENCE**

21 48. The Proposed Decision is not supported by its own findings. ALJ Hagle found
22 Santa Cruz Nissan to be a "below-average" sales performer with no one in management capable of
23 executing plans for improvement, yet failed to either conclude that SCN failed to transact
24 sufficient business compared to the business available (under Vehicle Code 3061(a)) or that SCN
25 breached its sales obligation under the Dealer Agreement (under Vehicle Code 3061(g).)

26 49. ALJ Hagle also ignored evidence of SCN's failure to meet average 2012 sales
27 performance in the state of California.

28 50. The Proposed Decision is also not supported by substantial evidence. ALJ Hagle
found that there were lost sales opportunities which SCN failed to capture. She also found that

1 SCN was a poor performer due to SCN's failure to devote a sufficient level of resources to
2 accomplish the task, had no sense of urgency to change the situation, and had no one in charge
3 capable of executing plans for improvement. As a result, ALJ Hagle's finding that NNA failed to
4 meet its burden on every factor cannot be supported.

5 51. Furthermore, ALJ Hagle ignored that SCN failed to also meet State, District,
6 Nation and PMA plus fringe standards; she made numerous errors in defining NNA's RSE
7 calculation, Segment Adjusting, and unit sales necessary to meet RSE for a given period. She also
8 introduced erroneous, unsupported correlations such as: the insell maps are evidence that
9 customers bought vehicles where they worked, and that My Nissan's 2012 RSE performance
10 increase was the correlated and "mirror image" the 2012 RSE decrease for SCN. ALJ Hagle
11 moreover erroneously invented this latter correlation primarily based on the inaccurate finding that
12 My Nissan in Salinas and Gilroy Nissan were the closest dealers to Watsonville when, in fact,
13 SCN was the closest by drive distance and drive time and equidistant with Gilroy Nissan in terms
14 of air distance.

15 **IX. CONCLUSION**

16 52. In adopting the Proposed Decision after Remand, the Board's actions exceed its
17 jurisdictional authority and constitute (1) an abuse of discretion because the Board's Decision is
18 not supported by the evidence, (2) the Decision is not supported by the findings, (3) the Decision
19 erroneously found that NNA had not met its burden; (4) the Board has unlawfully adopted an
20 unwritten a policy or per se rule that it will not overrule a termination protest for poor sales
21 performance alone and (5) the Board did not proceed in the manner required by law under
22 Vehicle Code 3067.

23 53. A true and correct copy of the administrative record will be lodged with the Court
24 before the hearing on the writ of administrative mandate.

25 54. Petitioner NNA does not have a plain, speedy or adequate remedy in the ordinary
26 course of law.

27 WHEREFORE, Petitioner NNA hereby prays for judgment as follows:
28

1 1. For issuance of a peremptory writ of administrative mandate directing Respondent
2 California New Motor Vehicle Board to set aside and vacate its Decision dated September 17,
3 2014, in Protest No. PR-2358-13, and to adopt and issue a new and different decision overruling
4 the Protest; and

5
6 2. For such other and further relief as the Court deems just and proper.

7 Dated: October 31, 2014

BAKER & HOSTETLER LLP

8
9 By: 
10 Maurice Sanchez
Lisa M. Gibson

11 Attorneys for Petitioner
12 Nissan North America, Inc.

BAKER & HOSTETLER LLP
ATTORNEYS AT LAW
COSTA MESA

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VERIFICATION

I am the CMM & Marketing Analytics Manager in the West Region for the Petitioner, Nissan North America, Inc. I have read the Petition for Writ of Administrative Mandate and know its contents. The facts alleged in the Petition are within my own knowledge, except those matters that I learned from Nissan North America, Inc.'s records, which I believe to be true.

I declare under penalty of perjury of the laws of the State of California that the foregoing is true and correct. This verification was executed on this 31st of October 2014 in Irvine, California.



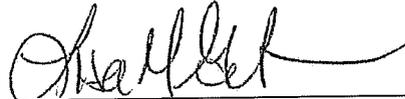
Alison Speranzo

BAKER & HOSTETLER LLP
ATTORNEYS AT LAW
COSTA MESA

VERIFICATION

1
2 I am the attorney for the Petitioner, Nissan North America, Inc. I have read the foregoing
3 Petition for Writ of Administrative Mandate and know its contents. The procedural facts alleged
4 in the Petition are within my own knowledge, and I know these facts to be true. Because of my
5 familiarity with the relevant procedural facts pertaining to the Board proceedings, I also verify
6 this Petition.

7 I declare under penalty of perjury of the laws of the State of California that the foregoing
8 is true and correct. This verification was executed on this 31st of October in Costa Mesa,
9 California.

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12 Lisa M. Gibson
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BAKER & HOSTETLER LLP
ATTORNEYS AT LAW
COSTA MESA

ARTICLE THIRD: Ownership

(a) Owners: This Agreement has been entered into by Seller in reliance upon, and in consideration of, the personal qualifications, expertise, reputation, integrity, experience, ability and representations with respect thereto of the Principal Owner(s) named in the Final Article of this Agreement and in reliance upon Dealer's representations concerning the ownership of Dealer as follows:

(i) Dealer represents and agrees that the person(s) named as Principal Owner(s) in the Final Article of this Agreement, and only those person(s), shall be the Principal Owner(s) of Dealer;

(ii) Dealer represents and agrees that the person(s) named as Other Owner(s) in the Final Article of this Agreement, and only those person(s), shall be the Other Owner(s) of Dealer;

(b) Holding Company. Seller requires that a natural person be named as the Principal Owner(s) of Dealer because Seller relies on the personal qualifications, expertise, reputation, integrity, experience, ability and representations of such individuals. If one or more of the owner(s) of Dealer is a corporation, partnership or other entity and not a natural person (hereinafter called "Holding Company"), Dealer and Seller agree that the natural persons listed in the Holding Company Addendum of this Agreement as owners of the Holding Company shall be deemed to be the Principal Owner(s) and Other Owner(s) of Dealer, as the case may be, and that the terms and conditions of this Agreement, including without limitation the provisions of this Article Third and Sections 12, 14 and 15 of the Standard Provisions, shall apply to the owner(s) of the Holding Company as well as to Dealer. Dealer represents to Seller and agrees that the Holding Company is owned as indicated in the Holding Company Addendum to this Agreement.

(c) Changes in Ownership. In view of the fact that this is a personal services agreement and in view of its objectives and purposes, this Agreement and the rights and privileges conferred on Dealer hereunder are not assignable, transferable or saleable by Dealer, and no property right or interest in or shall be deemed to be sold, conveyed or transferred to Dealer under this Agreement. Dealer agrees that any change in the ownership of Dealer specified herein requires the prior written consent of Seller, excepting only changes in the record or beneficial ownership interests of Other Owner(s) not effecting a change in majority control or interest. Dealer shall give Seller prior notice of any proposed change in said ownership requiring the consent of Seller and immediate notice of the death or incapacity of any Principal Owner. No such change, and no assignment of this Agreement or of any right or interest herein, shall be effective against Seller, unless and until embodied in an appropriate amendment to or assignment of this Agreement, as the case may be, duly executed and delivered by Seller and by Dealer. Seller shall not, however, unreasonably withhold its consent to any such change. Seller shall have no obligation to transact business with any person who is not named either as a Principal Owner or Executive Manager of Dealer hereunder or otherwise to give effect to any proposed sale or transfer of the ownership or management of Dealer prior to having concluded the evaluation of such a proposal as provided in Section 15 of the Standard Provisions.

ARTICLE FOURTH: Management

(a) Executive Manager. Seller and Dealer agree that the retention by Dealer of qualified management is of critical importance to the successful operation of Dealer and to the achievement of the purposes and objectives of this Agreement. This Agreement has been entered into by Seller in reliance upon, and in consideration of, the personal qualifications, expertise, reputation, integrity, experience, ability and representations with respect thereto of the person named as Executive Manager in the Final Article of this Agreement and on Dealer's representation to Seller and agreement that the person identified as Executive Manager shall be Dealer's executive manager, shall have full managerial authority for the Dealership Operations, and shall continually provide his or her personal services in operating the dealership and will be physically present at the Dealership Facilities.

(b) Changes in Management. In view of the fact that this is a personal services Agreement and in view of its objectives and purposes, Dealer agrees that any change in the Executive Manager from that specified in the Final Article of this Agreement requires the prior written consent of Seller. Dealer shall give Seller prior notice of any proposed change in Executive Manager and immediate notice of the death or incapacity of any Executive Manager. No change in Executive Manager shall be effective unless and until embodied in an appropriate amendment to this Agreement duly executed and delivered by Seller and by Dealer. Subject to the foregoing, Dealer shall make its own, independent decisions concerning the hiring and firing of its employees including without limitation, its Executive Manager.

To enable Seller to evaluate and respond to Dealer concerning any proposed change in Executive Manager, Dealer agrees to provide, in the form requested by Seller and in a timely manner, all applications and information customarily requested by Seller to evaluate the proposed change. While Seller shall not unreasonably withhold its consent to any such change, it is agreed that any successor Executive Manager must possess personal qualifications, expertise, reputation, integrity, experience and ability which are, in the opinion of Seller, satisfactory. Seller will determine whether, in its opinion, the proposed change is likely to result in a successful dealership operation with capable management that will satisfactorily perform Dealer's obligations under this Agreement. Seller shall have no obligation to transact business with any person who is not named as an Executive Manager of Dealer hereunder prior to having concluded its evaluation of such person.

(c) Evaluation of Management. Dealer and Seller understand and acknowledge that the personal qualifications, expertise, reputation, ability, integrity, experience and ability of the Executive Manager and his or her ability to effectively manage Dealer's day-to-day Dealership Operations is critical to the success of Dealer. In performing its obligations under this Agreement, Seller may from time to time develop standards and/or procedures for evaluating the performance of the Executive Manager and of Dealer's personnel generally. Seller may, from time to time, evaluate the performance of the Executive Manager and will advise Dealer and the Executive Manager of the results of such evaluations, and Dealer shall promptly take such action as may be required to correct any deficiencies in the Executive Manager's performance to the reasonable satisfaction of Seller.

ARTICLE FIFTH: Additional Provisions

The additional provisions set forth in the attached "Nissan Dealer Sales and Service Agreement Standard Provisions," bearing form number NDA-459-88 are hereby incorporated in and made a part of this Agreement. The Notice of Primary Market Area, Dealership Facilities Addendum, Product Addendum, Dealer Identification Addendum, Holding Company Addendum, if applicable, and all Guides referred to in this Agreement (including references contained in the Standard Provisions referred to above) are hereby incorporated in and made a part of this Agreement. Dealer further agrees to be bound by and comply with: the Warranty Manual; Seller's Manuals or Instructions heretofore or hereafter issued by Seller to Dealer; any amendment, revision or supplement to any of the foregoing; and any other manuals heretofore or hereafter issued by Seller to Dealer.

ARTICLE SIXTH: Termination of Prior Agreements

This Agreement cancels, supersedes and annuls all prior contracts, agreements and understandings except as stated herein, all negotiations, representations and understandings being merged herein. No waiver, modification or change of any of the terms of this Agreement or change or issuance of any printed part of this Agreement or addition to it (except filling of blank spaces and lines) will be valid or binding on Seller unless approved in writing by the President or an authorized Vice-President of Seller.

ARTICLE SEVENTH: Term

This Agreement shall have a term commencing on the effective date hereof and continuing until terminated by either party in accordance with Section 12 of the Standard Provisions.

ARTICLE EIGHTH: License of Dealer

If Dealer is required to secure or maintain a license for the conduct of its business as contemplated by this Agreement in any state or jurisdiction where any of its Dealership Operations are to be conducted or any of its Dealership Facilities are located, this Agreement shall not be valid until and unless Dealer shall have furnished Seller with written notice specifying the date and number, if any, of such license or licenses issued to Dealer; Dealer shall notify Seller immediately in writing if Dealer shall fail to secure or maintain any and all such licenses or renewal thereof or, if such license or licenses are suspended or revoked, specifying the effective date of any such suspension or revocation.

ARTICLE NINTH: Execution of Agreement

This Agreement, and any Addendum or amendment or notice with respect thereto, shall be valid and binding on Seller only when it bears the signature of either the President or an authorized Vice-President of Seller and when such signature is a facsimile, the manual countersignature of an authorized employee of Seller and a duplicate original thereof is delivered personally or by mail to the main Dealership Location. This Agreement shall bind Dealer only when it is signed by: a duly authorized officer or executive of Dealer if a corporation; one of the general partners of Dealer if a partnership; or Dealer if an individual.

ARTICLE TENTH: Special Conditions

**AMENDMENT NO. 1
TO
NISSAN DEALER
SALES AND SERVICE AGREEMENT**

This Agreement of Amendment is entered into February 24, 1998 and effective October 20, 1997 by and between the Nissan Division of NISSAN MOTOR CORPORATION U.S.A., a California corporation (hereinafter "Seller"), and SANTA CRUZ NISSAN, a California corporation (hereinafter "Dealer").

RECITALS

Effective February 2, 1989, Seller and Dealer entered into a Nissan Dealer Sales and Service Agreement (hereinafter "the Agreement"). Seller and Dealer desire to amend the Agreement to reflect an Executive Management Change.

THEREFORE, the parties hereby agree to amend the Agreement as follows:

1. The identification of Owner(s) and Executive Manager in the Final Article is hereby amended to read as follows:

The Principal Owner(s) of Dealer are as follows:

<u>NAME</u>	<u>RESIDENCE</u>	<u>% INTEREST</u>
COURTRIGHT, ERNEST L.	239 MEADOW ROAD SANTA CRUZ, CA 95060	100.0%

The Other Owner(s) of Dealer are as follows:

NONE

The Executive Manager of Dealer is as follows:

<u>NAME</u>	<u>RESIDENCE</u>	<u>% INTEREST</u>
COURTRIGHT, JAMES L.	404 SIDESADDLE CIRCLE SCOTTS VALLEY, CA 95066	0.0%

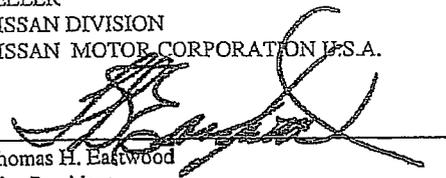
2. The terms and conditions of the Agreement, to the extent not modified herein, shall remain in full force and effect and shall continue to bind the parties hereto.

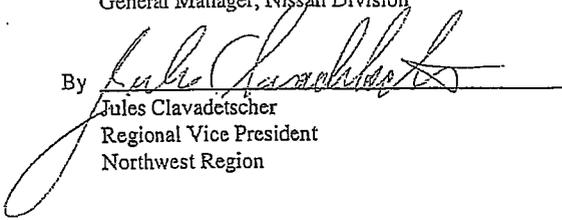
IN WITNESS WHEREOF, the parties have executed this Agreement in duplicate as of the day and year first above written.

DEALER
SANTA CRUZ NISSAN

By 
Ernest L. Courtright
President

SELLER
NISSAN DIVISION
NISSAN MOTOR CORPORATION U.S.A.

By 
Thomas H. Eastwood
Vice President
General Manager, Nissan Division

By 
Jules Clavadetscher
Regional Vice President
Northwest Region

**AMENDMENT NO. 2
TO
NISSAN DEALER
SALES AND SERVICE AGREEMENT**

This Agreement of Amendment is entered into and effective Sept-24, 2005 by and between the Nissan Division of NISSAN NORTH AMERICA, INC., a California corporation (hereinafter "Seller"), and Santa Cruz Nissan, a California Corporation (hereinafter "Dealer"). The terms of this Exhibit will be effective for as long as Dealer or its principals are authorized Nissan dealers, and shall be binding on any successors. As a condition of Seller's consent to any change in ownership, Dealer agrees to require any proposed buyer of Dealer's dealership assets to assume the rights, obligations and provisions in accordance with Seller's Guides and Policies in effect at that time, specifically including those set forth below.

RECITALS

WHEREAS on February 2, 1989 Seller and Dealer entered into a Nissan Dealer Sales and Service Agreement (hereinafter "the Agreement") which was amended on October 20, 1997.

WHEREAS Seller and Dealer desire to amend the agreement to reflect a Minority Ownership change and changes to Article Tenth.

THEREFORE, the parties hereby agree to amend the Agreement as follows:

1. The identification of Owner(s) in the Final Article is hereby amended to read as follows:

The Principal Owner(s) of Dealer are as follows:

<u>Name</u>	<u>Address</u>	<u>Percentage Interest</u>
Ernest L. Courtright	239 Meadow Road Santa Cruz, CA 95060	71.4%

The Other Owner(s) of Dealer are as follows:

<u>Name</u>	<u>Address</u>	<u>Percentage Interest</u>
James L. Courtright	134 Nanna Ct. Santa Cruz, CA 95060	28.6%

The Executive Manager of Dealer is as follows:

<u>Name</u>	<u>Address</u>	<u>Percentage Interest</u>
James L. Courtright	134 Nanna Ct. Santa Cruz, CA 95060	28.6%

2. **Article Tenth**, Special Conditions, is hereby amended to read as follows:

A. NISSAN FACILITIES GUIDES

Dealer acknowledges and agrees that its Nissan Dealership Facilities located at 1616 Soquel Avenue, Santa Cruz, CA 95062 are not in compliance with Seller's Facility Guidelines in the area of **total land**. Dealer's Nissan Dealership Facilities compare to Nissan's Facility Guidelines as follows:

	Actual (Sq. ft)	Guide (Sq. Ft)	% of Guide
Building	26,509	23,760	112%
Land	87,200	126,700	69%
Total Bldg. & Land	113,709	150,460	76%

Dealer agrees to comply with Nissan's Facility Guidelines according to the following timeframe:

- a) Dealer agrees to complete acquisition (purchase or long term lease) of Off-Site storage land on or before March 31, 2006; and
- b) Dealer agrees to execute an amended Facility Addendum to reflect the Off-Site storage facilities on or before March 31, 2006.

DEALER:
Santa Cruz Nissan

By: *Ernest L. Courtright*
Ernest L. Courtright
Principal Owner

Santa Cruz CA
City State

063B
Dealer Code

SELLER:
NISSAN DIVISION
NISSAN NORTH AMERICA, INC.

By: *Mark C. McNabb*
Mark C. McNabb
Vice President, General Manager
Nissan Division

By: *Thomas E. Lynch*
Thomas E. Lynch
Regional Vice President
Northwest Region



**PRODUCT ADDENDUM
TO
NISSAN SALES AND SERVICE AGREEMENT**

Pursuant to Sections I.B, I.C and I.X of the Nissan Dealer Sales & Service Agreement (the "Agreement") in effect between the Authorized Nissan Dealer named below and Nissan North America, Inc. ("Seller"), Seller hereby grants Dealer the non-exclusive right to buy for resale the Nissan Products identified below:

1) Nissan Cars and Trucks

VERSA	MAXIMA	XTERRA	TITAN
SENTRA	350Z	PATHFINDER	ARMADA
ALTIMA	FRONTIER	MURANO	QUEST
ROGUE			

- 2) Genuine Nissan Parts for Nissan Cars and Trucks,
- 3) Genuine Nissan Accessories for such Vehicles (this includes all other products offered by Nissan for dealers and consumers), and.
- 4) All other products and services branded with Nissan and offered by Nissan North America or Nissan Extended Service North America (NESNA) for sale to consumers; promoted through an authorized Nissan dealer.

This Product Addendum shall remain in effect unless and until superseded by a new Product Addendum issued to Dealer by Seller. This Product Addendum cancels and supersedes any previous Product Addendum furnished to Dealer by Seller pursuant to the existing terms of the Agreement (except for the supplemental Altima Hybrid Product Addendum issued to a limited number of Nissan Dealers exclusively in the states of California, Connecticut, Maine, Massachusetts, New Jersey, New York, Rhode Island, and Vermont, which shall remain in full force and effect).

This Product Addendum is effective as of September 1, 2007 or such later date, as may be required by any applicable statute.

DEALER:
SANTA CRUZ NISSAN

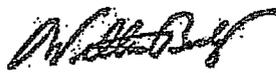
SELLER:
NISSAN DIVISION
NISSAN NORTH AMERICA, INC.

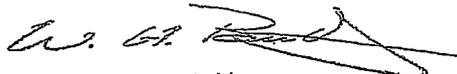
Doing Business As:

City:
SANTA CRUZ

State:
CA

Dealer Code:
063B


By: William O. Bosley
Vice President
General Manager, Nissan Division


By: Walter Burchfield
Regional Vice President
Northwest Region

(File this Addendum with Current Sales & Service Agreement)

NNA00065



**SUPPLEMENTAL PRODUCT ADDENDUM
TO
NISSAN SALES AND SERVICE AGREEMENT**

Pursuant to Sections I.B, I.C and I.X of the Nissan Dealer Sales & Service Agreement (the "Agreement") in effect between the Authorized Nissan Dealer named below and Nissan North America, Inc. ("Seller"), Seller hereby grants Dealer the non-exclusive right to buy for resale the Nissan Products identified below:

(1) Nissan Cars

ALTIMA HYBRID: This vehicle's distribution is limited to certain states (California, Connecticut, Maine, Massachusetts, New Jersey, New York, Rhode Island, and Vermont) and should not be dealer traded out of those states to ensure compliance with Federal emissions law and the requirement that only Nissan qualified Hybrid Specialists perform service on certain components of the vehicle.

This Supplemental Product Addendum shall remain in effect unless and until it is revoked, replaced by a more current version or superseded by a new omnibus Product Addendum that includes the Altima Hybrid issued to Dealer by Seller. This Supplemental Product Addendum is in addition to any previous Product Addendum furnished to Dealer by Seller pursuant to the existing terms of the Agreement.

This Supplemental Product Addendum is effective as of January 30, 2007 or such later date, as may be required by any applicable statute.

DEALER:
SANTA CRUZ NISSAN

Doing Business As:

City:
SANTA CRUZ

State:
CA

Dealer Code:
063B

SELLER:
NISSAN DIVISION
NISSAN NORTH AMERICA, INC.

By: William O. Bosley
Vice President
General Manager, Nissan Division

By: Thomas E. Lynch
Regional Vice President
Northwest Region

(File this Addendum with Current Sales & Service Agreement)



NISSAN NORTH AMERICA, INC.

West Region
20 Pacifica, Suite 1200
Irvine, CA 92618
Telephone: 949.705.4700

June 25, 2013

SANTA CRUZ NISSAN
1616 SOQUÉL AVE
SANTA CRUZ, CA 95062

Attention: Principal Owner

Nationally, all Nissan dealers are receiving new Product Addenda as a result of the addition of the all new Nissan Versa Note to our product line-up.

The issuance of a new superseding Product Addendum is not a change to the Sales & Service Agreement but rather an update to the Product Addenda as provided for within the Agreement. This update is being conducted pursuant to Section 1.X., of the Standard Provisions to your Sales & Service Agreement, which provides that Nissan may issue new, superseding Product Addenda to you from time to time.

Please keep this revised Product Addendum with your Sales & Service Agreement (as well as the supplemental GT-R Product Addendum, the supplemental LEAF Product Addendum, and the supplemental NCV Product Addendum - if you are certified to sell and service the Nissan GT-R, Nissan LEAF, or Nissan Commercial Vehicles); all other previously issued Product Addenda are no longer valid.

If you require any further information, please contact Alison Speranzo, West Region Market Representation Manager.

Sincerely,

A handwritten signature in black ink, appearing to read "Randolph Parker".

Randolph Parker
Regional Vice President
West Region

NNA00088

Exhibit A



**PRODUCT ADDENDUM
TO
NISSAN SALES AND SERVICE AGREEMENT**

Pursuant to Sections I.B, I.C and I.X of the Nissan Dealer Sales & Service Agreement (the "Agreement") in effect between the Authorized Nissan Dealer named below and Nissan North America, Inc. ("Seller"), Seller hereby grants Dealer the non-exclusive right to buy for resale the Nissan Products identified below:

1) Nissan Cars and Trucks

VERSA NOTE	ALTIMA	FRONTIER	MURANO CROSSCAB
VERSA SEDAN	ALTIMA COUPE	XTERRA	ROGUE
SENTRA	MAXIMA	PATHFINDER	TITAN
CUBE	370Z COUPE	JUKE	ARMADA
	370Z ROADSTER	MURANO	QUEST

- 2) Genuine Nissan Parts for Nissan Cars and Trucks,
- 3) Genuine Nissan Accessories for such Vehicles (this includes all other products offered by Nissan for dealers and consumers), and,
- 4) All other products and services branded with Nissan and offered by Nissan North America or Nissan Extended Service-North America (NESNA) for sale to consumers; promoted through an authorized Nissan dealer.

This Product Addendum shall remain in effect unless and until superseded by a new Product Addendum issued to Dealer by Seller. This Product Addendum cancels and supersedes any previous Product Addendum furnished to Dealer by Seller pursuant to the existing terms of the Agreement (except for the supplemental LEAF Product Addendum issued to all certified LEAF Nissan Dealers, the supplemental GT-R Product Addendum issued to a limited number of certified GT-R Nissan Dealers, and the supplemental NCV Product Addendum issued to a limited number of certified Nissan Commercial Vehicle Dealers all of which shall remain in full force and effect).

This Product Addendum is effective as of June 1, 2013 or such later date, as may be required by any applicable statute.

DEALER:
SANTA CRUZ NISSAN

SELLER:
NISSAN DIVISION
NISSAN NORTH AMERICA, INC.

Doing Business As:

City:
SANTA CRUZ

State:
CA

Dealer Code:
063B

By: Fred M. Diaz
Divisional VP, Sales & Marketing,
Parts & Service, Nissan

By: Randolph Parker
Regional Vice President
West Region



**SUPPLEMENTAL PRODUCT ADDENDUM
TO
NISSAN SALES AND SERVICE AGREEMENT**

Pursuant to Sections I.B, I.C and I.X of the Nissan Dealer Sales & Service Agreement (the "Agreement") in effect between the Authorized Nissan Dealer named below and Nissan North America, Inc. ("Seller"), Seller hereby grants Dealer the non-exclusive right to buy for resale the Nissan Products Identified below:

(1) Nissan Cars

LEAF

Note: This vehicle's distribution is only to Certified Nissan LEAF Dealers and it should not be dealer traded to non-certified dealers.

(2) Genuine Nissan parts and accessories for the Nissan LEAF.

(3) All other products marketed by Nissan through certified dealers for the Nissan LEAF.

This Supplemental Product Addendum shall be effective only with respect to the LEAF and shall remain in effect until it is revoked or replaced. This Supplemental Product Addendum is in addition to any other currently effective Product Addendum furnished to Dealer by Seller pursuant to the existing terms of the Agreement.

This Supplemental Product Addendum is effective as of December 16, 2010 or such later date, as may be required by any applicable statute.

DEALER:
SANTA CRUZ NISSAN

SELLER:
NISSAN DIVISION
NISSAN NORTH AMERICA, INC.

Doing Business As:

City:
SANTA CRUZ

State:
CA

Dealer Code:
063B


By: Albert Castignetti
Vice President,
General Manager, Nissan Division

By: Eric Rodgers
Regional Vice President
West Region

(File this Addendum with Current Sales & Service Agreement)

FOR EACH SITE COMPLETE THE FOLLOWING:

SITE A	SITE B	SITE C	SITE D
<p>FACILITIES USE (Check one or more)</p> <input checked="" type="checkbox"/> All Dealership Operations <input type="checkbox"/> New Vehicle Sales <input type="checkbox"/> Used Vehicle Sales <input type="checkbox"/> Parts Storage <input type="checkbox"/> Vehicle Storage <input type="checkbox"/> Office & Administration <input type="checkbox"/> Service Other _____	<p>FACILITIES USE (Check one or more)</p> <input type="checkbox"/> All Dealership Operations <input type="checkbox"/> New Vehicle Sales <input type="checkbox"/> Used Vehicle Sales <input type="checkbox"/> Parts Storage <input type="checkbox"/> Vehicle Storage <input type="checkbox"/> Office & Administration <input type="checkbox"/> Service Other _____	<p>FACILITIES USE (Check one or more)</p> <input type="checkbox"/> All Dealership Operations <input type="checkbox"/> New Vehicle Sales <input type="checkbox"/> Used Vehicle Sales <input type="checkbox"/> Parts Storage <input type="checkbox"/> Vehicle Storage <input type="checkbox"/> Office & Administration <input type="checkbox"/> Service Other _____	<p>FACILITIES USE (Check one or more)</p> <input type="checkbox"/> All Dealership Operations <input type="checkbox"/> New Vehicle Sales <input type="checkbox"/> Used Vehicle Sales <input type="checkbox"/> Parts Storage <input type="checkbox"/> Vehicle Storage <input type="checkbox"/> Office & Administration <input type="checkbox"/> Service Other _____
<p>OWNERSHIP (Check one) Facilities are owned by:</p> <input type="checkbox"/> Dealer <input type="checkbox"/> Affiliate of Dealer <input checked="" type="checkbox"/> Owner of Dealer <input type="checkbox"/> Third Party	<p>OWNERSHIP (Check one) Facilities are owned by:</p> <input type="checkbox"/> Dealer <input type="checkbox"/> Affiliate of Dealer <input type="checkbox"/> Owner of Dealer <input type="checkbox"/> Third Party	<p>OWNERSHIP (Check one) Facilities are owned by:</p> <input type="checkbox"/> Dealer <input type="checkbox"/> Affiliate of Dealer <input type="checkbox"/> Owner of Dealer <input type="checkbox"/> Third Party	<p>OWNERSHIP (Check one) Facilities are owned by:</p> <input type="checkbox"/> Dealer <input type="checkbox"/> Affiliate of Dealer <input type="checkbox"/> Owner of Dealer <input type="checkbox"/> Third Party
<p>LEASE INFORMATION (Complete, if leased)</p> Lease Expiration Date: <u>05/31/01</u> Net Monthly Cost (Taxes, Insurance, etc.): <u>\$20,000</u> Owner Name: <u>Ernest Courtright</u> Explain contingencies or options*: <u>one 3-year extension</u>	<p>LEASE INFORMATION (Complete, if leased)</p> Lease Expiration Date: _____ Net Monthly Cost (Taxes, Insurance, etc.): _____ Owner Name: _____ Explain contingencies or options*: _____	<p>LEASE INFORMATION (Complete, if leased)</p> Lease Expiration Date: _____ Net Monthly Cost (Taxes, Insurance, etc.): _____ Owner Name: _____ Explain contingencies or options*: _____	<p>LEASE INFORMATION (Complete, if leased)</p> Lease Expiration Date: _____ Net Monthly Cost (Taxes, Insurance, etc.): _____ Owner Name: _____ Explain contingencies or options*: _____



NOTICE OF PRIMARY MARKET AREA

The area described by 2000 census tracts in Exhibit A to this Notice, including the underlying levels of geography encompassed in the same area as required for full data collection, shall be deemed to be the Primary Market Area of the Dealer identified below and as defined in Section 1.N of the Nissan Dealer Sales & Service Agreement (the "Agreement") in effect between the Authorized Dealer named below and Nissan North America, Inc. ("Seller"). Exhibit A is incorporated by reference into this Notice.

Such Primary Market Area will be employed by seller, to the extent applicable, in the establishment of vehicle sales responsibilities of Dealer under Section 3 of the Agreement.

To the extent deemed relevant thereto, such Primary Market Area will also be employed in the establishment or amendment of Guides for the Dealership Facilities and other matters relating to Dealer's Dealership Operations.

The Primary Market Area described in Exhibit A hereto will be employed by Seller for the foregoing purposes until superseded by a new Notice of Primary Market Area issued to Dealer by Seller. This Notice of Primary Market Area cancels and supersedes any previous Notice of Primary Market Area furnished to Dealer by Seller.

This Notice of Primary Market Area is effective as of March 1, 2004, or such later date, as may be required by any applicable statute.

DEALER:
SANTA CRUZ NISSAN
Doing Business As:

SELLER:
NISSAN DIVISION
NISSAN NORTH AMERICA, INC.

By: *Mark C. McNabb*

Mark C. McNabb
Vice President
General Manager, Nissan Division

City:
SANTA CRUZ

By: *Thomas E. Lynch*

Thomas E. Lynch
Regional Vice President
Northwest Region

State:
CA

Dealer Code:
063B

(File this Notice of Primary Market Area with current Sales & Service Agreement)

*Exhibit A
To
Notice of Primary Market Area*

Dealer Name and Code: SANTA CRUZ NISSAN
Geog. Ref.: SAN200302

063B

This Exhibit A is incorporated by reference in and is a part of the Notice of Primary Market Area issued to the above named Dealer effective March 1st, 2004

County: 06087 - SANTA CRUZ

CALIFORNIA

1001.00	1002.00	1003.00	1004.00	1005.00	1006.00	1007.00
1008.00	1009.00	1010.00	1011.00	1012.00	1202.00	1203.01
1203.02	1204.00	1205.00	1206.00	1207.00	1208.00	1209.00
1210.00	1211.00	1212.00	1213.00	1214.01	1214.02	1214.03
1215.00	1216.00	1217.00	1218.00	1220.01	1220.02	1220.03
1221.00	1222.01	1222.02	1222.03			

Total Tracts for this PMA: 39

This Exhibit shows the 2000 Census Tracts that compose the Dealer's Primary Market Area. Each full or partial County and the individual 2000 Census Tracts within those full or partial Counties that are included in the Dealer's assigned market are included for reference. Data on the Dealer's market is collected by Nissan based on this geography including the related levels of geography as required for full data collection.

The PMA (Primary Market Area) Map is attached for reference and shows by the area in the yellow tone the Dealer's assigned market as described by 2000 Census Tracts.



NISSAN NORTH AMERICA, INC.

Northwest Region
6880 Koll Center Parkway
Pleasanton, CA 94566-3174
Mailing Address: P.O. Box 9099
Pleasanton, CA 94566-9099
Telephone: 925.426.2900

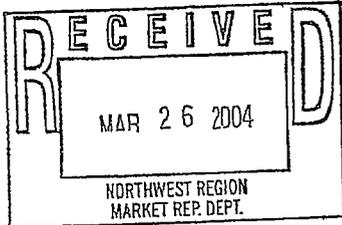
**DEALER NOTICE OF PRIMARY MARKET AREA RECEIPT
NISSAN DIVISION**

This is to certify that Santa Cruz Nissan 063B
Dealer Name Code
Santa Cruz, CA
Location

Has received a signed copy of the following documents as noted:

- Notice of Primary Market Area
- Exhibit A to Notice of Primary Market area
- Revised PMA Map

[Signature] 3-23-04
Dealer Signature Date



Principal Owner
Title

Nissan Representative Date

NISSAN

NISSAN NORTH AMERICA, INC.
Corporate Office
P.O. Box 685001
Franklin, TN 37068-5001
Telephone: 615-725-1000

May 3, 2012

VIA FEDEX

Mr. Ernest L. Courtright
Santa Cruz Nissan 063B
1616 Soquel Ave
Santa Cruz, CA 95062

Re: Changes to Primary Market Area

Dear Mr. Courtright,

This letter is to inform you that Nissan North America, Inc. (Nissan) has revised your Primary Market Area (PMA) as provided in section 1.N of the standard provisions of your Dealer Sales and Service Agreement.

Every 10 years the US government releases new Census figures as called for by the constitution. The recently released 2010 census data reflect population shifts and other demographic trends that have occurred throughout the nation over the previous 10 years of time.

As a result, Nissan has completed a comprehensive review of all Nissan Dealer PMAs on a national basis. In addition to incorporating the revised census data, Nissan also reviewed your PMA based on additional criteria such as: air distance, drive distance, natural boundaries, buyer shopping patterns, and other objective factors. As a result of this review, the attached documents provide information detailing the PMA revisions and your new PMA geography. As you know, your PMA is an evaluation tool and does not affect where you sell vehicles.

Attached you will find the following:

- 1.) Notice of PMA that includes all census tract detail in your new PMA geography
- 2.) PMA Map outlining your new PMA, the census tracts and related geography with major road systems

If you have any questions, please contact your Dealer Operations Manager.

Regards,



Patrick W. Doody
Director, Market Representation
Nissan North America, Inc.

44_063B

NNA00082



NOTICE OF PRIMARY MARKET AREA

Pursuant to Section 1.N of the Standard Provisions of the Nissan Dealer Sales & Service Agreement (the "Agreement"), the area described by 2010 census tracts in Exhibit A to this Notice, shall be deemed to be the Primary Market Area of the Dealer identified below. Exhibit A is incorporated by reference into this Notice.

This Primary Market Area will be used by Nissan North America, Inc. ("Seller"), to the extent applicable, in the establishment and evaluation of vehicle sales responsibilities of Dealer under Section 3 of the Agreement.

To the extent deemed relevant thereto, such Primary Market Area may also be employed in the establishment or amendment of Guides for the Dealership Facilities and other matters relating to Dealer's dealership operations.

The Primary Market Area described in Exhibit A hereto will be employed by Seller for the foregoing purposes until superseded by a new Notice of Primary Market Area issued to Dealer by Seller. This Notice of Primary Market Area cancels and supersedes any previous Notice of Primary Market Area furnished to Dealer by Seller.

This Notice of Primary Market Area is effective as of May 16, 2012, or such later date, as may be required by any applicable statute.

DEALER:
Santa Cruz Nissan

Doing Business As:

City:
Santa Cruz

State:
CA

Dealer Code:
063B

SELLER:
NISSAN DIVISION
NISSAN NORTH AMERICA, INC.


By: Albert Castignetti
Vice President
General Manager, Nissan Division


By: Eric Rodgers
Regional Vice President
West Region North

(File this Addendum with Current Sales & Service Agreement)

44_063B

NNA00083



**Exhibit A
To
Notice of Primary Market Area**

Dealer Name and Code: Santa Cruz Nissan
Geog. Ref.: SAN_2010CT

063B

This Exhibit A is incorporated by reference in and is a part of the Notice of Primary Market Area issued to the above named Dealer effective 5/16/2012

County: 06087 - SANTA CRUZ

CALIFORNIA

1001.00	1002.00	1003.00	1004.00	1005.00	1006.00	1007.00
1008.00	1009.00	1010.00	1011.00	1012.00	1101.00	1102.00
1103.00	1104.00	1105.01	1105.02	1106.00	1107.00	1202.00
1203.01	1203.02	1204.00	1205.00	1206.00	1207.00	1208.00
1209.00	1210.00	1211.00	1212.00	1213.00	1214.01	1214.02
1214.03	1215.00	1216.00	1217.00	1218.00	1220.01	1220.02
1220.03	1221.00	1222.01	1222.02	1222.03	1223.00	1224.00
1225.00	1231.00					

Total Tracts for this PMA: 51

This Exhibit shows the 2010 Census Tracts that compose the Dealer's Primary Market Area. Each full or partial County and the individual 2010 Census Tracts within those full or partial Counties that are included in the Dealer's assigned market are included for reference. Data on the Dealer's market is collected by Nissan based on this geography including the related levels of geography as required for full data collection.

The PMA (Primary Market Area) Map is attached for reference and shows by the area in the yellow tone the Dealer's assigned market as described by 2010 Census Tracts.

Source: Urban Science
Printed 05/03/2012

Page 1 of 1

Ref # 2010CT Project
Dealer # 063B

NNA00086



**NISSAN DEALER
SALES AND SERVICE AGREEMENT**

STANDARD PROVISIONS

**NISSAN DIVISION
NISSAN NORTH AMERICA, INC.**

**NISSAN DEALER SALES AND SERVICE AGREEMENT
STANDARD PROVISIONS
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NISSAN DEALER SALES & SERVICE AGREEMENT

The following Standard Provisions have by reference been incorporated in and made a part of the Nissan Dealer Sales & Service Agreement which they accompany and which has been executed on behalf of Seller and Dealer.

Section 1. Definitions

Seller and Dealer agree that the following terms, as used in this Agreement, shall be defined exclusively as set forth below.

- A. "Authorized Nissan Dealers" shall mean dealers located in the Territory that are authorized by Seller to conduct Dealership Operations in connection with the sale of Nissan Products, pursuant to a duly executed Nissan Dealer Sales and Service Agreement.
- B. "Nissan Cars" shall mean the new passenger cars specified in the current Product Addendum.
- C. "Nissan Trucks" shall mean the new trucks, cab and chassis, utility vehicles, buses or vans specified in the current Product Addendum.
- D. "Nissan Vehicles" shall mean Nissan Cars and Nissan Trucks.
- E. "Genuine Nissan Parts and Accessories" shall mean such parts, accessories and other products for Nissan Vehicles as are from time to time offered for sale by Seller to Authorized Nissan Dealers for resale under this Agreement.
- F. "Nissan Products" shall mean Nissan Vehicles and Genuine Nissan Parts and Accessories.
- G. "Competitive Vehicles" shall mean those new vehicles which are considered by Seller to be directly competitive with Nissan Vehicles.
- H. "Industry Cars" shall mean all new cars of all manufacturers which are sold and distributed within the United States, to the extent data relating to registration thereof are reasonably available.
- I. "Competitive Truck Segment" shall include all compact pickup trucks, compact utility vehicles, and compact buses of all manufacturers which are sold and distributed within the United States, to the extent data relating to registration thereof are reasonably available.
- J. "Dealership Location" shall mean the place or places of business of Dealer established and described in accordance with Section 2 of this Agreement.
- K. "Dealership Facilities" shall mean the land areas at the Dealership Location and the buildings and improvements erected thereon provided by Dealer in accordance with Section 2 of this Agreement.
- L. "Dealership Facilities Addendum" shall mean the addendum executed by Seller and Dealer pursuant to Section 2 of this Agreement.
- M. "Dealership Operations" shall mean all dealer functions contemplated by this Agreement including, without limitation, sale and servicing of Nissan Products; use and display of Nissan Marks and Nissan Products, rental and leasing of Nissan Vehicles, sales of used vehicles, body shop work, financing or insurance services and any other activities undertaken by Dealer in connection with Nissan Products whether conducted directly or indirectly by Dealer.
- N. "Primary Market Area" shall mean the geographic area which is designated from time to time as the area of Dealer's sales and service

responsibility for Nissan Products in a Notice of Primary Market Area issued by Seller to Dealer. Seller reserves the right, in its reasonable discretion, to issue new, superseding "Notices of Primary Market Area" to Dealer from time to time. Such geographic area may at any time be applicable to Dealer and to other Authorized Nissan Dealers.

O. "Principal Owner(s)" shall mean the person(s) named as Principal Owner(s) in the Final Article of this Agreement upon whose personal qualifications, expertise, reputation, integrity, experience, ability and representations concerning the management and operation of Dealer, Seller has relied in entering this Agreement.

P. "Other Owner(s)" shall mean the person(s) named as Other Owner(s) in the Final Article of this Agreement who will not be involved in the operation or management of Dealer.

Q. "Executive Manager" shall mean the person named as Executive Manager in the Final Article of this Agreement upon whose personal qualifications, expertise, reputation, integrity, experience, ability and representations that he or she shall devote his or her primary efforts to and have full managerial authority and responsibility for the day-to-day management and performance of Dealer, Seller has relied in entering into this Agreement.

R. "Successor Addendum" shall mean the Successor Addendum, if any, executed by Seller and Dealer pursuant to Section 14 of this Agreement.

S. "Guides" shall mean such reasonable standards as may be established by Seller for Authorized Nissan Dealers from time to time under its standard procedures with respect to such matters as dealership facilities, tools, equipment, financing, capitalization, inventories, operations and personnel. The execution of this Agreement or of any addenda hereto (including, without limi-

tation, any Dealership Facilities Addendum) shall not, however, be construed as evidence of Dealer's fulfillment of or compliance with said Guides or of Dealer's fulfillment of its responsibilities under this Agreement.

T. "Warranty Manual" shall mean the publication or publications of Seller, as the same may from time to time be amended, revised or supplemented, which set forth Seller's policies and procedures concerning the administration of Seller's warranties and related matters.

U. "Nissan Marks" shall mean those trademarks, service marks, names, logos and designs that Seller may, from time to time, use or authorize for use by Dealer in connection with Nissan Products or Dealership Operations including, without limitation, the name "Nissan".

V. "Seller's Manuals and Instructions" shall mean those bulletins, manuals or instructions issued by Seller to all Authorized Nissan Dealers advising them of Seller's policies or procedures under this Agreement including, without limitation, the Parts and Accessories Policy and Procedures Manual and the Nissan Dealer Accounting System Manual.

W. "Territory" shall mean the geographic area in which Seller has been authorized by Manufacturer to distribute Nissan Products.

X. "Product Addendum" shall mean the Product Addendum issued by Seller to Dealer which specifies those Nissan Vehicles which shall be offered for sale by Seller to Dealer for resale. Seller reserves the right, in its sole discretion, to issue new, superseding Product Addenda to Dealer from time to time.

Y. "Dealer Identification Addendum" shall mean the Dealer Identification Addendum executed by Seller and Dealer pursuant to Section 6.C of this Agreement.

Section 2. Dealership Location and Dealership Facilities

A. Location and Facilities.

Dealer shall provide, at the Dealership Location approved by Seller in accordance with Section 2.B hereof, Dealership Facilities that will enable Dealer to effectively perform its responsibilities under this Agreement and which are reasonably equivalent to those maintained by Dealer's principal competitors in the geographic area in which Dealer's Primary Market Area is located. In addition, the Dealership Facilities shall be satisfactory in space, appearance, layout, equipment, signage and otherwise be substantially in accordance with the Guides therefor established by Seller from time to time. Dealer shall conduct its Dealership Operations only from the Dealership Location specified in the Dealership Facilities Addendum. If the Dealership Location is comprised of more than one place of business, Dealer shall use each such place of business only for the purposes specified therefor in the current Dealership Facilities Addendum.

B. Dealership Facilities Addendum.

Dealer and Seller will execute a Dealership Facilities Addendum which will include a description of the Dealership Location and the Dealership Facilities, the approved use for each such place of business and facility, and the current Guides therefor.

C. Changes and Additions.

Dealer shall not move, relocate, or change the usage of the Dealership Location or any of the Dealership Facilities, or substantially modify any of the Dealership Facilities, nor shall Dealer or any person named in the Final Article of this Agreement directly or indirectly establish or operate any other locations or facilities for the sale or servicing of Nissan Products or for the conduct of any

other of the Dealership Operations contemplated by this Agreement, without the prior written consent of Seller. Any changes in the Dealership Location or the Dealership Facilities that may be agreed to by Seller and Dealer shall be reflected in a new, superseding Dealership Facilities Addendum executed by Seller and Dealer.

D. Assistance Provided by Seller.

To assist Dealer in planning, establishing and maintaining the Dealership Facilities, Seller, at the request of Dealer, will from time to time make its representatives available to Dealer to provide standard building layout plans, facility planning recommendations, and counsel and advice concerning location and facility planning.

E. Evaluation of Dealership Facilities and Location.

Seller will periodically evaluate Dealer's performance of its responsibilities under this Section 2. In making such evaluations, Seller will give consideration to: the actual land and building space provided by Dealer for the performance of its responsibilities under this Agreement; the current Guides established by Seller for the Dealership Facilities; the appearance, condition and layout of the Dealership Facilities; the location of the Dealership Facilities relative to the sales opportunities and service requirements of the Primary Market Area; equivalence with facilities maintained by Dealer's principal competitors; and such other factors, if any, as may directly relate to Dealer's performance of its responsibilities under this Section 2. Evaluations prepared pursuant to this Section 2.E will be discussed with and provided to Dealer, and Dealer shall have an opportunity to comment, in writing, on such evaluations, and Seller will consider Dealer's comments. Dealer shall promptly take such action as may be required to correct any deficiencies in Dealer's performance of its responsibilities under this Section 2.

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. Dealer agrees: that it has no right or property interest in any such geographic area which Seller may designate; that, subject to Section 4 of this Agreement, Seller may add, relocate or replace dealers in Dealer's Primary Market Area; and that Seller may, in its reasonable discretion, change Dealer's Primary Market Area from time to time.

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) registrations of Nissan Cars and Nissan Trucks;
 - (ii) registrations of Competitive Vehicles;
 - (iii) registrations of Industry Cars;
 - (iv) registrations 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 and, where Section 3.C applies, for all other Authorized Nissan Dealers combined in the metropolitan area in which Dealer is located; and

4. A comparison of sales and/or registrations achieved by Dealer to the sales or registrations of Dealer's competitors.

The sales and registration data referred to in this Section 3 shall be those utilized in Seller's records or in reports furnished to Seller by independent sources selected by it and generally available for such purpose in the automotive industry. If such reports of registration and/or sales are not generally available, Seller may rely on such other registration and/or sales data as can be reasonably obtained by Seller.

C. Metropolitan Markets.

If Dealer is located in a metropolitan or other marketing area where there are located one or more Authorized Nissan Dealers other than Dealer, the combined sales performance of all Nissan Dealers in such metropolitan or other marketing area may be evaluated as indicated in Sections 3.B.2 and 3.B.3 above, and Dealer's sales performance may also be evaluated on the basis of the proportion of sales and potential sales of Nissan Vehicles in the metropolitan or other marketing area in which Dealer is located for which Dealer fairly may be held responsible.

D. Additional Factors for Consideration.

Where appropriate in evaluating Dealer's sales performance, Seller will take into account such reasonable criteria as Seller may determine from time to time, including, for example, the following: the Dealership Location; the general shopping habits of the public in such market area; the

availability of Nissan Vehicles to Dealer and to other Authorized Nissan Dealers; any special local marketing conditions that would affect Dealer's sales performance differently from the sales performance of other Authorized Nissan Dealers; the recent and long term trends in Dealer's sales performance; the manner in which Dealer has conducted its sales operations (including advertising, sales promotion, and treatment of customers); and the other factors, if any, directly affecting Dealer's sales opportunities and performance.

E. Used Motor Vehicle Sales.

Dealer shall engage in used motor vehicle operations as and to the extent reasonably required for Dealer to effectively perform its responsibilities for the sale of Nissan Vehicles. Subject to requirements and guidelines established by Seller, Dealer shall be entitled to identify such used motor vehicle operations as a part of its Dealership Operations and to apply the Nissan Marks relating to used motor vehicle operations.

F. Dealer Sales Personnel.

Dealer shall organize and maintain a sales organization that includes a sufficient number of qualified and trained sales managers and sales people to enable Dealer to effectively fulfill its responsibilities under this Section 3. Seller may, from time to time, comment on or advise Dealer concerning the qualifications, performance and ability of Dealer's sales personnel as the same affect Dealer's performance of its obligations under this Section 3.

G. Assistance Provided by Seller.

1. Sales Training Courses.

Seller will offer from time to time sales training courses for Dealer sales personnel. Based on its need therefor, Dealer shall, without expense to Seller, have members of Dealer's sales organization attend such training courses and Dealer shall cooperate in such courses as may from time to time be offered by Seller.

2. Sales Personnel.

To further assist Dealer, Seller will provide to Dealer advice and counsel on matters relating to new vehicle sales, sales personnel training and management, merchandising, and facilities used for Dealer's vehicle sales operations.

H. Evaluation of Dealer's Sales Performance. Seller will periodically evaluate Dealer's performance of its responsibilities under this Section 3. Evaluations prepared pursuant to this Section 3.H will be discussed with and provided to Dealer, and Dealer shall have an opportunity to comment, in writing, on such evaluations. Dealer shall promptly take such action as may be required to correct any deficiencies in Dealer's performance of its responsibilities under this Section 3.

Section 4. Determination of Dealer Representation

A. Development of Market Studies.

Seller may, from time to time and in its sole discretion, conduct studies of various geographic areas to evaluate market conditions. Such market studies may, where appropriate, take into account such factors as geographical characteristics, consumer shopping patterns, existence of other automobile retail outlets, sales opportunities and service requirements of the geographic area in which Dealer's Primary Market Area is located, trends in marketing conditions, current and prospective trends in population, income, occupation, and such other demographic characteristics as may be determined by Seller to be relevant to its study. Such studies will make recommendations concerning the market, the Dealership Facilities, and the Dealership Location. Prior to conducting a study which includes the geographic area in which Dealer's

Primary Market Area is located, Seller will notify Dealer of its intention to conduct such a study. Dealer will be given the opportunity to present to Seller such information pertaining to such study as Dealer believes may be relevant. Seller will consider all relevant information timely provided by Dealer before concluding its study.

B. Appointment of New Authorized Nissan Dealers to Fill Open Points.

1. If any study conducted pursuant to Section 4.A recommends that an open point be established at a location that is within ten (10) miles driving distance, by the shortest publicly traveled route, of Dealer's main Dealership Location, Seller will so notify Dealer. Dealer will have thirty (30) days from Dealer's receipt of notice of the recommendations of the study in which to object to them. Upon Dealer's request, Seller will review the results of the study with Dealer (excluding information considered by Seller to be confidential). Seller will consider all objections to the recommended open point timely made by Dealer. Prior to entering into a Nissan Dealer Sales and Service Agreement with a New Authorized Nissan Dealer filling such an open point, Seller will give Dealer written notice of its intent to fill the open point (hereinafter the "Notice of Appointment"). If Dealer timely files a Notice of Appeal (as defined in Section 16.B hereof) with the Policy Review Board (as defined in Section 16.A hereof) in accordance with the procedures established in Section 16.B therefor, Seller will not enter into a Nissan Dealer Sales and Service Agreement appointing such New Authorized Nissan Dealer until the Policy Review Board has rendered its decision on the matter.

2. Nissan reserves the right to sell Nissan Products to others and to appoint Authorized Nissan Dealers within and outside the ten (10) miles driving distance described above. However, Seller agrees that it will not enter into a Nissan Dealer Sales and Service Agreement appointing a New Authorized Nissan Dealer filling an open point

which is located within the ten (10) miles driving distance described above unless the study made pursuant to Section 4.A demonstrates in Seller's good faith opinion that the declaration of an open point is warranted by market or economic conditions.

3. Nothing in this Agreement shall be construed to require Dealer's consent to the appointment of a New Authorized Nissan Dealer at a location that is within the ten (10) miles driving distance described above. Nothing in this Agreement shall be construed to grant Dealer any rights in connection with the appointment of an Authorized Nissan Dealer at a location that is not within the ten (10) miles driving distance described above. In addition, this Section 4.B does not apply to, nor shall it be construed to grant Dealer any rights in connection with any of the events or transactions excluded from the definition of "New Authorized Nissan Dealer" in Section 4.B.4(a), (b) or (c) below.

4. "New Authorized Nissan Dealer" shall mean an Authorized Nissan Dealer that has not previously executed a Nissan Dealer Sales and Service Agreement or done business as an Authorized Nissan Dealer; provided, however, that "New Authorized Nissan Dealer" shall not include an Authorized Nissan Dealer who: (a) is a Successor Dealer appointed pursuant to Section 14, (b) is a purchaser or transferee of the assets of or ownership interests in an Authorized Nissan Dealer that is appointed as an Authorized Nissan Dealer pursuant to Section 15, or (c) who is approved as a Nissan Dealer following or resulting from:

(i) a change in name or form of an Authorized Nissan Dealer;

(ii) any other sale, exchange or other transfer of any ownership interests in or any assets of any other Authorized Nissan Dealer, by operation of law or otherwise and whether voluntary and involuntary;

(iii) an assignment, sale or other transfer of any interest in a Nissan Dealer Sales and Service Agreement, by operation of law or otherwise and whether voluntary or involuntary;

(iv) the relocation of an existing Authorized Nissan Dealer; or

(v) the replacement of a former Authorized Nissan Dealer where the appointment of such replacement Dealer takes place within two (2) years of the date on which the former Dealer ceased doing business and where such replacement Dealer's main Dealership Location is located within a five (5) mile driving distance by the shortest publicly traveled route of the former Dealer's main Dealership Location; regardless of whether any of the foregoing actions, individually or collectively, result in the appointment of an Authorized Nissan Dealer at a location that is within or without the ten (10) miles driving distance described above.

Section 5. Responsibilities of Dealer with Respect to Service and Parts

A. General Service Obligations of Dealer.

Dealer understands and acknowledges that future sales of Nissan Products depend, in part, upon the satisfaction of Dealer's customers with its servicing of such Products. Dealer further recognizes that Seller has entered into this Agreement in reliance upon Dealer's representations concerning its ability and commitment to fair dealing and professional servicing. Accordingly, Dealer shall develop and maintain a quality service organization and shall render at the Dealership Facilities prompt, efficient and courteous service to owners and users of Nissan Products, regardless of the origin of purchase, including, without limitation, the specific obligations described in Section 5.B. In this regard, Dealer shall take all reasonable steps to insure that: the service needs of its customer's Nissan Vehicles are accurately

diagnosed; Dealer's customers are advised of such needs and that each customer's consent is obtained prior to initiation of any repairs; necessary repairs and maintenance are professionally performed; and Dealer's customers are treated courteously and fairly.

B. Specific Service Obligations of Dealer.

1. Pre-Delivery Inspections and Service.

Dealer shall perform or be responsible for the performance of pre-delivery inspections and service on each Nissan Vehicle prior to sale and delivery thereof by Dealer, in accordance with the standards and procedures relating thereto set forth in the applicable pre-delivery inspection schedules furnished by Seller to Dealer from time to time. The completion of such inspection and service shall be verified by Dealer on forms supplied or approved by Seller for this purpose. Dealer shall retain the original or a legible copy of each such form in its records and shall furnish a copy to the purchaser.

2. Warranty Repairs and Goodwill Adjustments.

Dealer shall promptly, courteously and efficiently perform: (i) warranty repairs on each Nissan Product which qualifies for such repairs under the provisions of any warranty furnished therewith by Seller, Manufacturer or the manufacturer of the Product; and (ii) such other inspections, repairs or corrections on Nissan Products as may be approved or authorized by Seller to be made at Seller's expense (hereinafter referred to as "goodwill adjustments"). Dealer shall perform such repairs and service on each such Nissan Product as and when required and requested by the owner or user (or in the case of goodwill adjustments when requested by Seller), without regard to its origin of purchase and in accordance with the provisions relating thereto set forth in the Warranty Manual or in Seller's Manuals or Instructions issued to Dealer from time to time. In performing such repairs and service on Nissan Products for which Seller has agreed to reimburse Dealer, Dealer shall use Genuine Nissan Parts and Accessories unless

Dealer receives prior authorization from Seller to use non-genuine parts or accessories. Dealer will provide to each owner or user of a Nissan Product upon which any such repairs or service are performed a copy of the repair order reflecting all services performed.

3. Campaign Inspections and Corrections.

Dealer shall promptly, courteously and efficiently perform such campaign inspections and/or corrections for owners and users of Nissan Products, regardless of their origin of purchase, as are: (i) described in owner notifications and recall campaigns conducted by Seller in furtherance of any federal or state law, regulation, rule or order; or (ii) requested by Seller on Nissan Products that qualify for such inspections and/or corrections. Once Dealer has been notified that a recall or service campaign affects a particular class or type of Nissan Product, Dealer shall perform such campaign inspections and/or corrections on all affected Nissan Products then in or which thereafter come into Dealer's inventory or which are delivered to Dealer for repair or service. Dealer shall inquire, through the Nissan Datanet system or otherwise, with respect to each such Nissan Product to determine whether all applicable campaign inspections and/or corrections have been performed on such Nissan Product and, if they have not been performed, Dealer shall perform them.

Dealer shall advise Seller as and when such campaign inspections and/or corrections are performed, in accordance with Seller's Manuals or Instructions relating thereto and in accordance with the provisions relating thereto set forth in the Warranty Manual. To enable Dealer to perform required corrections as promptly as practicable, parts and/or other materials required for each such campaign may be shipped in quantity and billed to Dealer. Dealer shall accept and retain such parts and/or other materials for use in such campaign. Upon completion of the campaign program, Dealer shall have the right to return excess parts shipped by Seller to Dealer for such campaign, but only to the extent that Dealer has not ordered and

received additional parts from Seller. Such a return of parts shall be apart from any other parts return policies or programs which may be instituted by Seller. In performing such campaign corrections for which Seller has agreed to reimburse Dealer for parts and materials used in making such corrections, Dealer shall use Genuine Nissan Parts and Accessories unless Dealer receives prior authorization from Seller to use non-genuine parts and accessories.

4. Maintenance and Repair Service.

Dealer shall promptly, courteously and efficiently maintain and repair Nissan Products as and when required and requested by the owner or user thereof, without regard to their origin of purchase. Dealer shall provide all owners and users for whom Dealer provides maintenance and repair service itemized invoices reflecting all the services performed. In connection with its sale or offering for sale of any maintenance services recommended by Seller for the maintenance of a Nissan Product, Dealer shall advise each customer requesting such recommended maintenance service of (i) a description of the items included in maintenance recommended by Seller and Dealer's price therefor; and (ii) the price and description of such additional maintenance or repair being sold or recommended by Dealer which are in addition to that recommended by Seller in published owner's manuals.

5. Payments by Seller to Dealer.

For pre-delivery inspections and service, warranty repairs, goodwill adjustments, and campaign inspections and corrections performed by Dealer in accordance with this Section 5.B, Seller shall fairly and adequately reimburse Dealer for the parts and/or other materials (or shall provide Dealer with the parts and/or other materials) and the labor required and used in connection therewith in accordance with the provisions relating thereto set forth in the Warranty Manual. Dealer understands and acknowledges that such repairs are provided for the benefit of owners and users of Nissan Products, and Dealer shall not impose any charge on such owners or users for parts, materials, or labor for

which Dealer has received or will receive compensation from Seller hereunder.

Dealer shall comply with the disposition instructions contained in the Warranty Manual with respect to any Genuine Nissan Parts or Accessories acquired by Dealer as a result of its performance of warranty repairs, goodwill adjustments and campaign adjustments and/or corrections.

C. Service Operations of Dealer.

1. Dealer Personnel.

Dealer shall organize and maintain, substantially in accordance with Seller's Guides, a complete service organization that includes a competent, trained service manager and a sufficient number of trained service and customer relations personnel to enable Dealer to fulfill its responsibilities for service and customer relations under this Section 5. Dealer shall designate at least one member of its staff who shall be responsible for resolving consumer complaints on behalf of Dealer. Dealer shall, without expense to Seller, have members of Dealer's service organization attend training courses offered by Seller and Dealer shall cooperate with and participate in such training courses as may from time to time be offered by Seller. Dealer agrees that its personnel will meet such educational, management and technical training standards as Seller may establish or approve. Seller may, from time to time, comment on or advise Dealer concerning the qualifications, performance and ability of Dealer's service personnel as the same affect Dealer's performance of its obligations under this Section 5.

2. Compliance with Laws.

In performing the maintenance and service obligations specified in Section 5.B, Dealer shall comply with all applicable provisions of federal, state and local laws, ordinances, rules, regulations and orders affecting Nissan Products including, but not limited to, laws relating to safety, emissions control, noise control and customer service. Seller shall provide to Dealer, and Dealer shall provide to Seller, such information and assistance as may be reasonably

requested by the other in connection with the performance of obligations of the parties under such laws, ordinances, rules, regulations and orders. If applicable law requires the installation or supply of equipment not installed or supplied as standard equipment by Seller or the manufacturer of a Nissan Vehicle, Dealer shall, prior to its sale of the Nissan Vehicles on or for which such equipment is required, install or supply such equipment at its own expense and in conformance with such standards as may be adopted by Seller. Dealer shall comply with all applicable laws pertaining to the installation or supply of such equipment including, without limitation, the reporting thereof.

3. Tools and Equipment.

Dealer shall provide for use in its service operations such service equipment and special tools, comparable to the type and quality recommended by Seller from time to time, as are necessary to meet Dealer's service responsibilities hereunder and as are substantially in accordance with Seller's Guides. In addition, Dealer shall obtain and maintain for use in its service operations all tools which are essential to the proper service, repair and maintenance of Nissan Vehicles and are identified by Seller as essential tools. Seller shall ship such essential tools to Dealer as required due to new model and component introductions and Dealer shall pay Seller therefor as invoiced. If Dealer is in possession of a tool equivalent to any essential tool shipped by Seller, Dealer may so notify Seller and Seller will exempt Dealer from purchasing such essential tool from Seller upon Seller's determination that Dealer's tool will satisfy the need for the specific repair procedure or procedures for which the essential tool is intended. Dealer shall maintain all such equipment and tools in good repair and proper calibration so as to enable Dealer to meet its service responsibilities under this Section 5.

4. Owner Relations.

In providing service on Nissan Products, Dealer shall make every effort to build and maintain good

relations between Dealer and owners and users of Nissan Products. Dealer shall promptly investigate and handle all matters brought to its attention by Seller, owners or users of Nissan Products, or any public or private agency, relating to the sale or servicing of Nissan Products, so as to develop and maintain owner and user confidence in Dealer, Seller and Nissan Products.

Dealer shall promptly report to Seller the details of each inquiry or complaint received by Dealer relating to any Nissan Product which Dealer cannot handle promptly and satisfactorily. Dealer will take such other steps with respect to such customer complaints as Seller may reasonably require. Dealer will do nothing to affect adversely Seller's rights or obligations under applicable laws, rules and/or regulations. Furthermore, Dealer shall participate in and cooperate with such dispute resolution procedures as Seller may designate from time to time and such other procedures as may be required by law.

Seller will promptly investigate all matters brought to its attention by Dealer, owners or users of Nissan Products, or any public or private agency, relating to the design, manufacture or sale by Seller of Nissan Products, and Seller will take such action as it may deem necessary or appropriate so as to develop and maintain owner confidence in Seller, Dealer and Nissan Products.

D. Parts Operations of Dealer.

1. Parts Sales Responsibility of Dealer.

Dealer shall actively and effectively promote through its own advertising and sales promotion activities the sale of Genuine Nissan Parts and Accessories to service, wholesale, retail and other customers within Dealer's Primary Market Area.

2. Dealer Personnel.

Dealer shall organize and maintain, substantially in accordance with Seller's recommendations with respect thereto, a complete parts organization that includes a competent, trained parts manager and

a sufficient number of trained parts personnel to enable Dealer to fulfill its responsibilities under this Section 5. Based on its need therefor, Dealer shall, without expense to Seller, have members of Dealer's parts organization attend training courses offered by Seller and Dealer shall cooperate in such training courses as may from time to time be offered by Seller. Seller may, from time to time, comment on or advise Dealer concerning the qualifications, performance and ability of Dealer's parts personnel as the same affect Dealer's performance of its obligations under this Section 5.

3. Inventories of Parts and Accessories.

Dealer shall maintain at all times a stock of parts and accessories which is adequate to meet its service and wholesale and retail parts sales responsibilities under this Section 5. Dealer shall also maintain, subject to the ability of Seller to supply the products ordered by Dealer, a stock of Genuine Nissan Parts and Accessories of an assortment and in quantities adequate to meet customer demand and for warranty repairs, goodwill adjustments and campaign corrections made pursuant to this Section 5.

E. Assistance Provided by Seller.

1. Service and Parts Manuals.

Seller will make available to Dealer, for use by Dealer's service and parts personnel, Seller's Manuals or Instructions concerning Dealer's service and parts operations and other sources of information and technical data as Seller deems necessary to permit Dealer to perform its service and parts responsibilities under this Section 5. Dealer shall keep such information and data current and available for consultation by Dealer's service and parts employees.

2. Service and Parts Field Personnel.

To further assist Dealer, Seller will provide to Dealer the advice and counsel of its service and parts field personnel on matters relating to service,

parts and accessories, including technical diagnosis, service and parts management, merchandising, personnel training, owner relations, and facilities used for Dealer's service and parts operations.

F. Evaluation of Dealer's Service and Parts Performance.

Dealer's performance of its service and parts responsibilities will be evaluated by Seller on the basis of such reasonable criteria as Seller may develop from time to time, including for example:

1. Dealer's performance in building and maintaining consumer confidence in Dealer and in Nissan Products as measured by surveys or indices of consumer satisfaction as compared with performance levels achieved by other Authorized Nissan Dealers in Seller's Region or District in which Dealer is located or such other means as may be deemed appropriate by Seller;
2. Reasonable parts purchase or sales performance objectives which may be established from time to time by Seller for Dealer;
3. Dealer's advertising and promotion of its parts and service operations;
4. Dealer's performance of its service responsibilities and Dealer's conduct of its service operations including, without limitation, the financial results of its service operations, labor sales, warranty claims practices, training of service personnel, qualification, performance and ability of service personnel, and inventory of special and essential tools and service equipment, as compared with Seller's Guides therefor where such have been established and/or as compared with performance levels achieved by other Authorized Nissan Dealers in Seller's Region or District in which Dealer is located;
5. Dealer's performance of its parts sales responsibilities and Dealer's conduct of its parts operations including, without limitation, the financial results of its parts operations, training of parts personnel, and inventory of parts, as compared

with Seller's Guides therefor where such have been established and/or as compared with performance levels achieved by other Authorized Nissan Dealers in Seller's Region or District in which Dealer is located; and

6. Evaluation reports resulting from any audit or review of Dealer's service or parts operations by Seller's representatives.

Seller will periodically evaluate Dealer's performance of its responsibilities under this Section 5. Evaluations prepared pursuant to this Section 5 will be discussed with and provided to Dealer, and Dealer shall have an opportunity to comment, in writing, on such evaluations. Dealer shall promptly take such action as may be required to correct any deficiencies in Dealer's performance of its responsibilities under this Section 5.

Section 6. Other Seller and Dealer Responsibilities

A. Advertising and Promotion.

1. Advertising Standards.

Both Seller and Dealer recognize the need for maintaining the highest standards of ethical advertising which is of a quality and dignity consonant with the reputation and standing of Nissan Products. Accordingly, neither Seller nor Dealer shall publish or cause to be published any advertising relating to Nissan Products that is not in compliance with all applicable federal, state and local laws, ordinances, rules, regulations and orders or that is likely to mislead, confuse or deceive the public or impair the goodwill of Manufacturer, Seller or Dealer or the reputation of Nissan Products or the Nissan Marks.

2. Display by Dealer.

Dealer shall prominently state upon its stationery and other printed matter that it is an Authorized Nissan Dealer.

3. Sales Promotion.

Seller will establish and maintain comprehensive advertising programs to promote the sale of Nissan

Vehicles and will from time to time offer advertising, sales promotion and sales campaign materials to Dealer. In addition, to effectively promote the sale of Nissan Products and the availability of service for Nissan Vehicles, Dealer shall establish and maintain its own advertising and sales promotion programs including, but not limited to, effective showroom displays, and Dealer will have available in showroom ready condition at least one vehicle in each model line of Nissan Vehicles for purposes of demonstration to potential customers.

B. Dealer Disclosures and Representations Concerning Nissan Products and Other Products or Services.

Dealer understands and acknowledges that it is of vital importance to Seller that Nissan Products are sold and serviced in a manner which promotes consumer satisfaction and which meet the high quality standards associated with Seller, Manufacturer, the Nissan Marks and Nissan Products in general. Accordingly, Dealer shall fully and accurately disclose to its customers all material information concerning the products and services sold by Dealer and the terms of purchase and sale including, without limitations the items making up the purchase price; the source of products sold; and all warranties affecting products sold. Dealer shall not make any misleading statements or misrepresentations concerning the products sold by Dealer, the terms of sale, the warranties applicable to such products, the source of the products, or the recommendations or approvals of Seller or Manufacturer.

Nothing in this Agreement shall limit or be construed to limit the products or services which Dealer may sell to its customers. Seller acknowledges that Dealer is free to sell whatever products or services Dealer may choose in connection with its sale and servicing of Nissan Products, subject to Dealer obligations under Sections 5 and

6 of this Agreement.

C. Signs.

Dealer shall, at its expense, display at its Dealership Location, in such number and at such locations as Seller may reasonably require, signs which are compatible with the design standards established by Seller and published in Seller's Manuals or Instructions from time to time. Dealer's use and operation of signs displayed by Dealer at the Dealership Location and Dealer's display of any Nissan Mark shall be subject to Seller's approval and shall be in accordance with the terms and conditions of Section 6.K and the Dealership Identification Addendum.

D. Hours of Operations.

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

E. Capital and Financing.

Dealer recognizes that its ability to conduct its Dealership Operations successfully on a day-to-day basis and to effectively perform its other obligations under this Agreement including, without limitation, its obligations with respect to Dealership Facilities, new vehicle sales, and service and parts sales, depends to a great extent upon the adequate capitalization of Dealer, including its maintaining sufficient net working capital and net worth and

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employing the same in its Dealership Operations. Dealer shall at all times maintain and employ such amount and allocation of net working capital and net worth as are substantially in accordance with Seller's Guides therefor and which will enable Dealer to fulfill all of its responsibilities under this Agreement. Dealer shall at all times during the term of this Agreement have flooring arrangements (wholesale financing) satisfactory to Seller, in an amount substantially in accordance with Seller's Guides therefor, with a financial institution acceptable to Seller, and which will enable Dealer to fulfill its obligations under this Agreement.

F. Accounting System.

It is in the mutual interest of Seller and Dealer that all Authorized Nissan Dealers install and maintain uniform accounting systems and practices, so that Seller can develop standards of operating performance which will assist Dealer in obtaining satisfactory results from its Dealership Operations and which will assist Seller in formulating policies in the interests of Seller and all Authorized Nissan Dealers. Accordingly, Dealer shall install and maintain an accounting system, not exclusive of any other system, in accordance with Seller's Nissan Dealer Accounting System Manual, as the same may from time to time be amended, revised or supplemented.

G. Records and Reports.

1. Financial Statements.

Dealer shall furnish to Seller, on or before the tenth (10th) day of each month, in a manner acceptable to Seller, complete and accurate financial and operating statements which fairly present, in accordance with generally accepted accounting principles, Dealer's financial condition as of the end of the preceding month and the results of Dealer's Dealership Operations for the preceding month and

for that portion of Dealer's fiscal year then ended. Dealer shall also furnish for such periods reports of Dealer's sales and inventory of Nissan Products. Dealer shall also promptly furnish to Seller a copy of any adjusted annual financial or operating statement prepared by or for Dealer.

2. Sales Records and Reports.

Dealer shall prepare and retain for a minimum of two (2) years, complete and up-to-date records covering its sales of Nissan Products. To assist Seller in evaluating, among other things, current market trends, to provide information for use in the adjustment of production and distribution schedules, to provide information used by Seller in providing Nissan Vehicles to Dealer, and to provide Seller with accurate records of the ownership of Nissan Vehicles for various purposes including warranty records and ownership notification, Dealer shall accurately submit to Seller such information with respect to Dealer's sales of Nissan Products as Seller may reasonably require as and in the form or manner specified by Seller, at or as soon as possible after the close of each business day on which such Nissan Products are sold by Dealer. If Dealer becomes aware that any information submitted by Dealer to Seller hereunder is or has become inaccurate, Dealer will immediately take all steps necessary to advise Seller of and to correct such inaccuracy. Should Seller determine or discover that any report submitted hereunder by Dealer is or has become inaccurate, Seller may take any steps it deems necessary or appropriate to correct such inaccuracy and to adjust its records, calculations or procedures with respect to Dealer's reported sales to correct the effect of such inaccuracy or to prevent additional inaccurate reports from being made.

3. Service Records.

Dealer shall prepare and retain for a minimum of

two (2) years, in accordance with the procedures specified in the Warranty Manual: records in support of applications for payment for pre-delivery inspection and service, warranty repairs and goodwill adjustments, and campaign inspections and corrections performed by Dealer; claims for parts compensation; and applications for discounts, allowances, refunds or credits.

4. Other Reports.

Dealer shall furnish to Seller such other records or reports concerning its Dealership Operations as Seller may reasonably require from time to time.

H. Nissan Datanet System.

Seller has developed the Nissan Datanet system, which is an electronic data communication and processing system designed to facilitate accurate and prompt reporting of dealership operational and financial data, submission of parts orders and warranty claims and processing of information with respect to the Dealership Operations. Such data is used by Seller, among other things, to develop composite operating statistics which are useful to Dealer and Seller in assessing Dealer's progress in meeting its obligations under this Agreement, to provide a basis for recommendations which Seller may make to Dealer from time to time to assist Dealer in improving Dealership Operations, to assist Seller in developing standards of operating performance which will assist Dealer in obtaining satisfactory results from its Dealership Operations, to assist Seller in formulating policies in the interest of Seller and all Authorized Nissan Dealers, and to provide sales reporting information relied upon by Seller in providing Nissan Vehicles to Dealer. Accordingly, Dealer shall install and maintain electronic data processing facilities which are compatible with the Nissan Datanet system.

I. Right of Inspection.

Seller shall have the right, at all reasonable times during regular business hours, to inspect the

Dealership Facilities and to examine, audit and make and take copies of all records, accounts and supporting data relating to the sale, sales reporting, service and repair of Nissan Products by Dealer. When practicable, Seller shall attempt to provide Dealer with advance notice of an in-dealership audit of Dealer's records or accounts.

J. Confidentiality.

Seller will not furnish to any third party financial statements or other confidential data, excluding sales records or reports, submitted by Dealer to Seller, except as an unidentified part of a composite or coded report, unless disclosure is authorized by Dealer or is required by law, or unless such information is pertinent to judicial or governmental administrative proceedings or to proceedings conducted pursuant to Section 16 of this Agreement.

K. Use of Nissan Marks.

Seller grants Dealer the non-exclusive right to identify itself as an Authorized Nissan Dealer and to display at the Dealership Location and use, in connection with the sale and service of Nissan Products, the Nissan Marks. The Nissan Marks may not be used as part of Dealer's name or trade name without Seller's written consent. No entity owned by or affiliated with Dealer or any of its owners may use any Nissan Mark without Seller's prior written consent. Dealer shall not make any use of any Nissan Mark which is inconsistent with Seller's policies concerning trademark use. Dealer may not, either directly or indirectly, display any Nissan Marks at any location or facility other than those identified in the Dealership Facilities Addendum to this Agreement, without the prior written consent of Seller. Except as authorized herein, Dealer shall not make use of any Nissan Mark, and Dealer shall neither have nor claim any rights in respect of any Nissan Mark. Dealer shall comply with any of Seller's Manuals or Instructions regarding the use of Nissan Marks as may be issued

to Dealer from time to time. Dealer shall promptly change or discontinue its use of any Nissan Marks upon Seller's request. Any authorization granted may be withdrawn by Seller at any time and, in any event, shall cease immediately upon the effective date of termination of this Agreement.

If Seller institutes litigation to effect or enforce compliance with this Section 6.K, the prevailing party in such litigation shall be entitled to reimbursement for its costs and expenses in such litigation, including reasonable attorney's fees.

Section 7. Purchase and Delivery

A. Dealer Purchases.

1. Nissan Vehicles.

From time to time Seller will advise Dealer of the number and model lines of Nissan Vehicles which Seller has available for sale to Dealer and, subject to this Section 7, Dealer shall have the right to purchase such Nissan Vehicles. Seller will distribute Nissan Vehicles to Authorized Nissan Dealers in accordance with Seller's written distribution policies and procedures as the same may be in effect from time to time. Seller will provide to Dealer an explanation of the method used by Seller to distribute Nissan Vehicles to Authorized Nissan Dealers. Dealer recognizes that there are numerous factors which affect the availability of Nissan Vehicles to Seller and to Dealer including, without limitation, production capacity, sales potential in Dealer's and other Primary Market Areas, varying consumer demand, weather and transportation conditions, and state and federal government requirements. Since such factors may affect individual dealers differently, Seller reserves to itself sole discretion to distribute Nissan Vehicles in a fair and consistent manner, and its decisions in such matters shall be final.

2. Genuine Nissan Parts and Accessories.

Dealer shall submit to Seller firm orders for Genuine Nissan Parts and Accessories in such quantity and variety as are reasonably necessary to fulfill Dealer's obligations under this Agreement. All orders shall be submitted by Dealer in the manner specified by Seller and in accordance with Seller's Parts and Accessories Policy and Procedures Manual, may be accepted in whole or in part by Seller, and shall be effective only upon acceptance thereof by Seller at its home office (but without necessity of any notice of acceptance by Seller to Dealer). Such orders shall not be cancellable by Dealer after acceptance and shipment by Seller, except in accordance with Section 8 of this Agreement.

B. Delays in Delivery.

Seller shall not be liable for failure or delay in delivery to Dealer of Nissan Products which Seller has previously agreed to deliver to Dealer where such failure or delay is due to cause or causes beyond the control or without the fault or negligence of Seller.

C. Shipment of Nissan Products.

1. Nissan Vehicles.

Seller will ship Nissan Vehicles to Dealer by whatever mode of transportation, by whatever route, and from whatever point Seller may select. Dealer shall pay to Seller in connection with Nissan Vehicles delivered to Dealer the applicable destination charges that are established for Dealer by Seller and that are in effect at the time of shipment. Dealer shall bear the risk of loss and damage to Nissan Vehicles during transportation from the point of shipment; however, Seller will, if requested by Dealer in such manner and within such time as Seller shall from time to time specify, prosecute claims for loss of or damage to Nissan Vehicles during said transportation against the responsible carrier for and on behalf of Dealer.

2. Genuine Nissan Parts and Accessories. Seller will ship Genuine Nissan Parts and Accessories to Dealer by whatever mode of transportation, by whatever route, and from whatever point Seller may select. Dealer shall bear the risk of loss and damage to Genuine Nissan Parts and Accessories during transportation from the point of shipment.

D. Passage of Title.

Title to each Nissan Product shall pass from Seller to Dealer, or to the financial institution designated by Dealer, upon delivery of said Product to Dealer or to a carrier for transportation to Dealer, whichever occurs first.

E. Security Interest.

1. Grant of Security Interest

As security for the full payment of all sums from time to time owed by Dealer to Seller under this Agreement, whether such sums are now, or hereafter become, due and owing, Dealer hereby grants to Seller a security interest in the following (collectively referred to as "Collateral"):

(i) All non-vehicle inventory of Dealer including, without limitation, all Genuine Nissan Parts and Accessories delivered by Seller to Dealer hereunder on account (all such inventory hereinafter referred to collectively as "Inventory" and individually as "Item of Inventory"); and

(ii) All proceeds from any of the foregoing including, without limitation, insurance payable by reason of the loss, damage or destruction of any Item of Inventory; and all accounts and chattel paper of Dealer arising from sale, lease, or other disposition of Inventory now existing or hereafter arising, and all liens, securities, guarantees, remedies and privileges pertaining thereto, together with all rights and liens of Dealer relating thereto.

2. Default in Payment.

Dealer shall be in default of this Section 7 if: (i)

Dealer shall fail to pay any amounts secured hereby when due or fail to perform any obligations under this Section 7 in a timely manner; (ii) there shall occur any material adverse change in the financial condition of Dealer; (iii) Dealer shall dissolve or become insolvent or bankrupt; or (iv) Seller shall have determined in good faith that the prospect of such payment or performance is impaired; and in any such case Seller may declare all sums secured by this Section 7.E immediately due and payable and Seller shall have all rights and remedies afforded to a secured party after default under the Uniform Commercial Code or other applicable law in effect on the date of this Agreement.

3. Assembly of Collateral, Payment of Costs, Notices.

Dealer shall, if requested by Seller upon the occurrence of any default under the foregoing Section 7.E.2 assemble the Collateral and make it available to Seller at a place or places designated by Seller. Dealer also shall pay all costs of Seller including, without limitation, attorneys' fees incurred with respect to the enforcement of any of Seller's rights under this Section 7.

4. Recording, Further Assurances.

Dealer shall execute and deliver such financing statements and such other instruments or documents and take any other action as Seller may request in order to create or maintain the security interest intended to be created by this Section 7.E or to enable Seller to exercise and enforce its rights hereunder. A carbon, photographic or other reproduction of this Agreement shall be sufficient as a financing statement and may be filed in lieu of a financing statement in any and all jurisdictions which accept such reproductions.

5. Records and Schedules of Inventory.

Dealer shall keep accurate records itemizing and describing the kind, type and quantity of Inventory and shall furnish to Seller within five (5) days

of receipt of Seller's request therefor, with a current schedule of inventory in form and substance satisfactory to Seller ("Schedule of Inventory"), which shall be true and accurate in all respects. A physical inventory shall be conducted no less than annually in connection with preparation of year-end financial statements of Dealer and, at Seller's request, a report of such inventory shall be promptly provided to Seller.

F. Charges for Storage and Diversions.

Dealer shall be responsible for and shall pay all charges for demurrage, storage and other expense accruing after shipment to Dealer or to a carrier for transportation to Dealer. If diversions of shipments are made upon Dealer's request or are made by Seller as a result of Dealer's failure or refusal to accept shipments made pursuant to Dealer's orders, Dealer agrees to pay all additional charges and expenses incident to such diversions.

G. Changes in Nissan Products.

Seller shall have the right in its sole discretion to discontinue the supply, or make changes in the design or component materials, of any Nissan Product at any time. Seller shall be under no liability to Dealer on account of any such changes and shall not be required as a result of any such changes to make any changes to Nissan Products previously purchased by Dealer. No change shall be considered a model year change unless so specified by Seller.

Section 8. Pricing

A. Nissan Vehicles.

At any time prior to shipment (or delivery to a carrier for transportation to Dealer) of any Nissan Vehicle, Seller may, without prior notice and without incurring any liability to Dealer or anyone

else, including any customer of Dealer, change at any time and from time to time the price, discount, allowance or other terms of sale of any Nissan Vehicle offered for sale by Seller. Except with respect to the establishment of initial prices for a new model year vehicle or for any new model or body type, Seller will notify Dealer by mailgram or other acceptable means of any such change in price as soon as reasonably practicable, and Dealer may, by notice to Seller within ten (10) days after such notification, cancel any offer to purchase Nissan Vehicles affected by such change, provided that Seller has not notified Dealer of its acceptance of Dealer's offer on or prior to the date such notification by Dealer is received by Seller.

B. Genuine Nissan Parts and Accessories.

Seller may, without prior notice and without incurring any liability to Dealer or anyone else, including any customer of Dealer, change at any time and from time to time the price, discount, allowance or other terms of sale of any Genuine Nissan Part or Accessory offered for sale by Seller, and any such change in price, discount, allowance or other terms of sale shall apply to all such Genuine Nissan Parts and Accessories whether or not an order has been submitted by Dealer, but not to Genuine Nissan Parts and Accessories for which Seller has accepted and processed Dealer's order prior to the effective date of such change. Seller will notify Dealer of any such change in price as soon as is reasonably practicable. Dealer may, by notice to Seller, cancel any order for Genuine Nissan Parts and Accessories affected by such change which was placed before such notification was given, provided that such Genuine Nissan Parts and Accessories have not been shipped to Dealer or delivered to a carrier for transportation to Dealer on or prior to the date such notification by Dealer is received by Seller.

Section 9. Payment

A. Payment for Vehicles.

Payment by Dealer for Nissan Vehicles must be made in accordance with the applicable prices, charges, discounts, allowances and other terms of sale established by Seller either: (i) in accordance with wholesale financing arrangements that at the time of delivery to Dealer or to a carrier for transportation to Dealer of such Nissan Vehicles, whichever shall first occur, are in effect between Seller, Dealer and a financing institution; or (ii) prior to delivery to Dealer or to a carrier for transportation to Dealer, whichever shall first occur, by cash or such other medium of payment as Seller may agree to accept.

B. Payment for Parts and Accessories.

Parts, equipment, accessories and other products and services will normally be billed by Seller to Dealer on Seller's invoices, which shall be due the tenth (10th) of the month following the month of shipment of such products and services; provided, however, Seller reserves the right to place any and all sales of such items on a C.O.D. or cash in advance basis, without notice; provided further, however, that Seller will endeavor to provide Dealer with prior notice if in Seller's sole judgment such notice would be practicable.

C. Accounts Payable.

1. Right of Set Off.

In addition to any right of set off provided by law, all sums due Dealer shall be considered net of indebtedness of Dealer to Seller, and Seller may deduct any amounts due or to become due from Dealer to Seller or any amounts held by Seller from any sums or accounts due from Seller to Dealer.

2. Liquidated Damages.

(i) Liquidated Damages for Delinquent Payments.

In the event that Dealer fails to pay Seller in full

any amounts owed by Dealer to Seller when due, Dealer shall pay Seller a delinquency charge of one percent (1%) per month of such amount or amounts to compensate Seller for its costs of carrying and collection; provided, however, that Seller agrees that it will not assess any delinquency charge on an overdue account which has a total outstanding balance of less than \$1,000.00, unless such account is more than ninety (90) days overdue. Dealer and Seller agree that such charge is to be assessed not as a penalty, but as liquidated damages under California Civil Code § 1671(b) based on Seller's reasonable estimate of the losses which will be suffered by Seller as a result of such delinquent payment or payments. The imposition of such delinquency charges shall not imply or constitute any agreement to forbear collection of a delinquent account.

(ii) Liquidated Damages for Improper Payments to Dealer.

Seller may, from time to time, conduct audits or reviews of Dealer's books and records pursuant to Section 6.1 of this Agreement. If any such audit or review results in a determination by Seller that Dealer was or is not entitled to received payment from Seller, Seller may debit Dealer's account in such amounts as Seller shall determine were improperly paid to Dealer. Such a determination may be based on Dealer's failure to comply with applicable rules or procedures or on Dealer's submission of false or inaccurate information to Seller. In addition, Seller may assess and, if it does, Dealer will pay a delinquency charge of one percent (1%) per month of such amount or amounts improperly paid by Seller to Dealer to compensate Seller for its costs of auditing, loss of funds and collection. Dealer and Seller agree that such charge is to be assessed not as a penalty, but as liquidated damages under California Civil Code § 1671(b) based on Seller's reasonable estimate of the losses

which will be suffered by Seller as a result of such improper payment or payments. The imposition of such delinquency charges shall not imply or constitute any agreement to forbear collection of a delinquent account.

D. Collection of Taxes by Dealer.

Dealer hereby represents and warrants that all Nissan Products purchased from Seller are purchased for resale in the ordinary course of Dealer's business. Dealer further represents and warrants that Dealer has obtained all licenses and complied with all other requirements to collect sales, use and or other taxes incurred in any such resale transaction, and that Dealer will furnish evidence thereof to Seller, at Seller's request. If Dealer purchases any Nissan Products other than for resale, or puts any Nissan Products to a taxable use, Dealer shall pay directly to the appropriate taxing authority any sales, use or similar taxes incurred as a result of such use or purchase, file any tax returns required in connection therewith and hold Seller harmless from any claims or demands with respect thereto.

Section 10. Warranties

The only warranties that shall be applicable to Nissan Products (or any components thereof) shall be such written warranty or warranties as may be furnished by Seller and as stated in the Warranty Manual or Seller's Parts and Accessories Policy and Procedures Manual, as the same may be revised from time to time. Except for its express limited liability under such written warranties, neither Manufacturer nor Seller assumes, or authorizes any other person or party including, without limitation, Dealer, to assume on their behalf any other obligation or liability in connection with

any Nissan Product (or component thereof). Any obligations or liabilities assumed by Dealer which are in addition to Seller's written warranties shall be solely the responsibility of Dealer. Dealer shall expressly incorporate in full and without modification any warranty furnished by Seller with a Nissan Vehicle as a conspicuous part of each order form or other contract for the sale of such Nissan Vehicle by Dealer to any buyer. Dealer shall make available to the buyer of each Nissan Product prior to the purchase of such Nissan Product, copies of such applicable warranties as may be furnished by Seller. Dealer shall also provide to the buyer of each Nissan Product, in full and without modification, any owner's manual, warranty booklet or other owner information which Seller may provide to Dealer for delivery with such Nissan Product. Dealer agrees to abide by and implement in all other respects Seller's warranty procedures then in effect.

Section 11. Indemnification

A. Indemnification of Dealer.

Subject to Section 11.C, and upon Dealer's written request, Seller shall:

1. Defend Dealer against any and all claims that during the term of this Agreement may arise, commence or be asserted against Dealer in any action concerning or alleging:

(a) Bodily injury or property damage arising out of an occurrence caused solely by a manufacturing defect or alleged manufacturing defect in a Nissan Product supplied by Seller, except for any manufacturing defect in tires, provided that the defect could not have reasonably been discovered by Dealer during the pre-delivery inspection of the product required by Section 5.B.1 of this Agreement;

(b) Bodily injury or property damage arising out of an occurrence caused solely by a defect or alleged defect in the design of a Nissan Product supplied by Seller, except for a defect or alleged defect in the design of tires; and

(c) Any substantial damage occurring to a new Nissan Product and repaired by Seller from the time the product left the manufacturer's assembly plant to the time it was delivered to Dealer's designated location or to a carrier for transportation to Dealer, whichever occurred first, provided Seller failed to notify Dealer of such damage and repair prior to delivery of the product to the first retail customer; and

(d) Breach of Seller's warranty of a Nissan Product which is not, in whole or part, the result of Dealer's sales, service or repair practices or conduct; and

2. Indemnify and hold Dealer harmless from any and all settlements made which are approved by Seller and final judgments rendered with respect to any claims described in Section 11.A.1; provided, however, that Seller shall have no obligation to indemnify or hold Dealer harmless unless Dealer: (i) promptly notifies Seller of the assertion of such claim and the commencement of such action against Dealer; (ii) cooperates fully in the defense of such action in such manner and to such extent as Seller may reasonably require; (iii) consents to the employment of attorneys selected by Seller and agrees to waive any conflict of interest then existent or which may later arise, thereby enabling Seller's selected attorneys to represent Seller and/or the manufacturer of a Nissan Product throughout the defense of the claim; and (iv) withdraws any actions (including cross-claims) filed against Seller or the manufacturer of a Nissan Product arising out of the circumstances for which Dealer seeks indemnity. Dealer shall pay all costs of its own defense incurred prior to Seller's assumption of Dealer's defense and thereafter to

the extent that Dealer employs attorneys in addition to those selected by Seller.

3. Seller may offset any recovery on Dealer's behalf against any indemnification that may be required under this Section 11 including, without limitation, attorneys' fees paid by Seller pursuant to this Section 11.A and the amount of any settlement or judgment paid by Seller.

B. Indemnification of Seller.

Subject to Section 11.C and upon Seller's written request, Dealer shall:

1. Defend Seller against any and all claims that during the term of this Agreement may arise, commence or be asserted against Seller in any action concerning or alleging:

(a) Dealer's failure to comply, in whole or in part, with any obligation of Dealer under this Agreement;

(b) Any negligence, error, omission or act of Dealer in connection with the preparation, repair or service (including warranty service, goodwill adjustments, and campaign inspections and corrections) by Dealer of Nissan Products;

(c) Any modification or alteration made by or on behalf of Dealer to a Nissan Product, except those made pursuant to the express written instruction or with the express written approval of Seller;

(d) Dealer's breach of any agreement between Dealer and Dealer's customer or other third party;

(e) Misleading, libelous or tortious statements, misrepresentations or deceptive or unfair practices by Dealer, directly or indirectly, to Seller, a customer or other third party including, without limitation, Dealer's failure to comply with Section 6.B of this Agreement;

(f) Dealer's breach of any contract or warranty other than a contract with or warranty of Seller or the manufacturer of a Nissan Product; or

(g) Any change in the employment status or in the terms of employment of any officer, employee or agent of Dealer or of any Principal

Owner, Other Owner or Executive Manager including but not limited to, claims for breach of employment contract, wrongful termination or discharge, tortious interference with contract or economic advantage, and similar claims; and

2. Indemnify and hold Seller harmless from any and all settlements made and final judgments rendered with respect to any claims described in Section 11.B.1; provided, however, that Dealer shall have no obligation to indemnify or hold Seller harmless unless Seller: (i) promptly notifies Dealer of the assertion of such claim and the commencement of such action against Seller; (ii) cooperates fully in the defense of such action in such manner and to such extent as Dealer may reasonably require; (iii) consents to the employment of attorneys selected by Dealer and agrees to waive any conflict of interest then existent or which may later arise, thereby enabling Dealer's selected attorneys to represent Dealer throughout the defense of the claim; and (iv) withdraws any actions (including cross-claims) filed against Dealer arising out of the circumstances for which Seller seeks indemnity. Seller shall pay all costs of its own defense incurred prior to Dealer's assumption of Seller's defense and thereafter to the extent that Seller employs attorneys in addition to those selected by Dealer.

C. Conditions and Exceptions to Indemnification.

1. If the allegations asserted in any action or if any facts established during or with respect to any action would require Seller to defend and indemnify Dealer under Section 11.A and Dealer to defend and indemnify Seller under Section 11.B, Seller and Dealer shall each be responsible for its own defense in such an action and there shall be no obligation or responsibility in connection with any defense, judgment, settlement or expenses of such action as between Seller and Dealer.

2. In undertaking its obligations to defend and/or indemnify each other, Dealer and Seller

may make their defense and/or indemnification conditional on the continued existence of the state of facts as then known to such party and may provide for the withdrawal of such defense and/or indemnification at such time as facts arise which, if known at the time of the original request for a defense and/or indemnification, would have caused either Dealer or Seller to refuse such request. In the event that subsequent developments in a case make clear that the allegations which initially justified acceptance of a request for a defense and/or indemnification are no longer at issue therein or that the claims no longer meet the description of those for which indemnification is required hereunder, any party providing a defense and/or indemnification hereunder may terminate such defense and/or indemnification of the other party. The party withdrawing from its defense and/or indemnification to defend and/or indemnify shall give notice of its withdrawal to the indemnifying party. Moreover, the withdrawing party shall be responsible for all costs and expenses of defense up to the date of the other party's receipt of the notice of withdrawal.

Section 12. Termination

A. Termination Due to Certain Acts or Events.

The following represent events which are within the control of or originate from actions taken by Dealer or its management or owners and which are so contrary to the intent and purpose of this Agreement that they warrant its termination:

1. Any actual or attempted sale, transfer, assignment or delegation, whether by operation of law or otherwise, by Dealer of an interest in or right, privilege or obligation under this Agreement, or of the principal assets necessary for the performance of Dealer's responsibilities under this Agreement, without, in either case, the prior

written consent of Seller having been obtained, which consent shall not be unreasonably withheld;

2. Subject to the provisions of Section 14 hereof, a change, by operation of law or otherwise, in the direct or indirect ownership of Dealer, whether voluntary or involuntary, from that set forth in the Final Article of this Agreement, except as expressly permitted herein, without the prior written consent of Seller having been obtained, which consent shall not be unreasonably withheld;

3. Removal, resignation, withdrawal or elimination from Dealer for any reason of the Executive Manager of Dealer; provided, however, Seller shall give Dealer a reasonable period of time within which to replace such person with an Executive Manager satisfactory to Dealer and Seller in accordance with Article Fourth of this Agreement; or the failure of Dealer to retain an Executive Manager who, in accordance with Article Fourth of this Agreement, in Seller's reasonable opinion, is competent, possesses the requisite qualifications for the position, and who will act in a manner consistent with the continued best interests of both Seller and Dealer;

4. The failure of Dealer to maintain the Dealership Facilities open for business or to conduct all the Dealership Operations required by this Agreement during and for not less than the hours customary and lawful in Dealer's Primary Market Area or in the metropolitan area in which Dealer is located for seven (7) consecutive days, unless such failure is caused by fire, flood, earthquake or other act of God;

5. Any undertaking by Dealer to conduct, directly or indirectly, any of the Dealership Operations at a location or facility other than that which is specified in the current Dealership Facilities Addendum for that Dealership Operation;

6. The failure of Dealer to establish or maintain wholesale financing arrangements which are in accordance with Seller's Guides and which are reasonably acceptable to Seller with banks or other financial institutions approved by Seller for use in connection with Dealer's purchase of Nissan Vehicles, unless Seller shall have agreed to accept another medium of payment;

7. Insolvency of Dealer; voluntary institution by Dealer of any proceeding under the federal bankruptcy laws or under any state insolvency law; institution against Dealer of any proceeding under the federal bankruptcy laws or under any state insolvency law which is not vacated within thirty (30) days from the institution thereof; appointment of a receiver, trustee or other officer having similar powers for Dealer or Dealer's business, provided such appointment is not vacated within thirty (30) days of the date of such appointment; execution by Dealer of an assignment for the benefit of creditors; or any levy under attachment, foreclosure, execution or similar process whereby a third party acquires rights to a significant portion of the assets of Dealer necessary for the performance of Dealer's responsibilities under this Agreement or to the operation or ownership of Dealer, which is not within thirty (30) days from the date of such levy vacated or removed by payment or bonding;

8. Any material misrepresentation by Dealer or any person named in the Final Article of this Agreement as to any fact relied on by Seller in entering into, amending or continuing with this Agreement including, without limitation, any representation concerning the ownership, management or capitalization of Dealer;

9. The conviction in a court of original jurisdiction of Dealer or of any Principal Owner or Executive Manager of a crime affecting the Dealership Operations or of any felony; provided,

however, that a convicted Executive Manager's ownership interest in Dealer shall not be an event warranting termination of this Agreement if the individual is no longer employed by Dealer or involved in any way in the management or operation of Dealer and Dealer has made reasonable efforts to obtain the individual's divestiture of his ownership interest in Dealer; or any willful failure of Dealer to comply with the provisions of any laws, ordinances, rules, regulations, or orders relating to the conduct of its Dealership Operations including, without limitation, the sale and servicing of Nissan Products.

10. Knowing submission by Dealer to Seller of: a false or fraudulent report or statement; (ii) a false or fraudulent claim (or statement in support thereof), for payment, reimbursement or for any discount, allowance, refund, rebate, credit or other incentive under any plan that may be offered by Seller, whether or not Dealer offers or makes restitution; (iii) false financial information; (iv) false sales reporting data; or (v) any false report or statement relating to pre-delivery inspection, testing, warranties, service, repair or maintenance required to be performed by Dealer.

Upon the occurrence of any of the foregoing events, Seller may terminate this Agreement by giving Dealer notice thereof, such termination to be effective upon the date specified in such notice, or such later date as may be required by any applicable statute.

B. Termination by Seller for Non-Performance by Dealer.

1. If, based upon the evaluations thereof made by Seller, Dealer shall fail to substantially fulfill its responsibilities with respect to:

a. Sales of new Nissan Vehicles and the other responsibilities of Dealer set forth in Section 3 of this Agreement;

b. Maintenance of the Dealership Facilities

and the Dealership Location set forth in Section 2 of this Agreement;

c. Service of Nissan Vehicles and sale and service of Genuine Nissan Parts and Accessories and the other responsibilities of Dealer set forth in Section 5 of this Agreement;

d. The other responsibilities assumed by Dealer in this Agreement including, without limitation, Dealer's failure to:

(i) Timely submit accurate sales, service and financial information concerning its Dealership Operations, ownership or management and related supporting data, as required under this Agreement or as may be reasonably requested by Seller;

(ii) Permit Seller to make an examination or audit of Dealer's accounts and records concerning its Dealership Operations after receipt of notice from Seller requesting such permission or information;

(iii) Pay Seller for any Nissan Products or any other products or services purchased by Dealer from Seller, in accordance with the terms and conditions of sale; or

(iv) Maintain net worth and working capital substantially in accordance with Seller's Guides therefor; or

2. In the event that any of the following occur:

(i) any dispute, disagreement or controversy between or among Dealer and any third party or between or among the owners or management personnel of Dealer relating to the management or ownership of Dealer develops or exists which, in the reasonable opinion of Seller, tends to adversely affect the conduct of the Dealership Operations or the interests of Dealer or Seller; or

(ii) any other act or activity of Dealer, or any of its owners or management occurs, which substantially impairs the reputation or financial standing of Dealer or of any of its management subsequent to the execution of this Agreement:

Seller will notify Dealer of such failure and will

review with Dealer the nature and extent of such failure and the reasons which, in Seller's or Dealer's opinion, account for such failure.

Thereafter, Seller will provide Dealer with a reasonable opportunity to correct the failure. If Dealer fails to make substantial progress towards remedying such failure before the expiration of such period, Seller may terminate this Agreement by giving Dealer notice of termination, such termination to be effective at least ninety (90) days after such notice is given.

During such period Dealer will commence such actions as may be necessary so that the termination obligations of Seller and Dealer set forth in this Agreement may be fulfilled as promptly as practicable.

C. Termination Because of Death or Physical or Mental Incapacity of Principal Owner.

This Agreement is a personal services agreement and has been entered into by Seller in reliance on Dealer's being owned by the Principal Owner(s). Seller (subject to Section 14 hereof) may terminate this Agreement by giving notice to Dealer upon the death of any of the Principal Owner(s) or if Seller in good faith determines that any Principal Owner is so physically or mentally incapacitated as to be unable to discharge his or her responsibility to the operating management of Dealer. Unless deferred as hereinafter provided, the effective date of such termination shall be not less than ninety (90) days from the date such notice is given to Dealer.

To facilitate the orderly termination of the business relationship between Seller and Dealer and of the Dealership Operations, Seller may, in its sole discretion, defer the effective date of such termination and continue to operate with Dealer under the terms of this Agreement for a period of time, to be determined by Seller, of up to one (1) year from the date such notice of termination is

given if within sixty (60) days from the date of said notice, the executor or representative of the deceased or incapacitated Principal Owner or a surviving Principal Owner shall give to Seller written request for such deferment. This Agreement shall automatically terminate without further notice or action by Seller upon the expiration of any such deferment.

D. Termination for Failure of Seller or Dealer to be Licensed.

If Seller or Dealer shall fail to secure or maintain any license, permit or authorization required by either of them for their performance of any obligation under or in connection with this Agreement, or if such license, permit or authorization is suspended or revoked, irrespective of the cause, and such suspension or revocation continues for a period of seven (7) days, either party may immediately terminate this Agreement by giving notice to the other party.

E. Termination by Dealer.

Dealer has the right to terminate this Agreement at any time by giving notice to Seller, such termination to be effective thirty (30) days after the giving of such notice (unless the thirty (30) day notice period is waived in writing by Seller) or on such other date as may be mutually agreed to in writing by Seller and Dealer.

F. Termination by Seller Because of a Change of Seller's Method of Distribution or Decision by Seller to Cease Distribution of Nissan Vehicles.

If Seller should elect or be required to discontinue its present method of distributing Nissan Vehicles, or if Seller should elect or be required to cease selling or distributing Nissan Vehicles, Seller may terminate this Agreement by giving Dealer notice and such termination will be effective not less than one (1) year after such notice is given.

G. Termination Upon Entering Into a New Sales and Service Agreement.

Seller may terminate this Agreement at any time by giving Dealer at least ninety (90) days prior notice thereof and offering to enter into a new or amended form of Agreement with Dealer in a form being offered generally to Authorized Nissan Dealers.

Unless otherwise agreed in writing, the rights and obligations of Dealer that may otherwise become applicable upon termination or expiration of the term of this Agreement shall not be applicable if Seller and Dealer enter into a new or superseding Dealer Sales and Service Agreement, and the rights and obligations of the parties hereunder shall continue under the terms and provisions of the new agreement.

Dealer's performance under any prior agreement may be considered by Seller in evaluating Dealer's performance under this, or any succeeding, agreement.

Section 13. Rights and Liabilities Upon Termination

A. Termination Procedures.

1. Upon termination of this Agreement by either Seller or Dealer for any reason, Dealer shall cease to be an Authorized Nissan Dealer, and Dealer shall: (i) immediately discontinue the distribution and sale of Nissan Products as an Authorized Nissan Dealer; and (ii) at its own expense (a) erase or obliterate all Nissan Marks and any word or words indicating that Dealer is an Authorized Nissan Dealer from the stationery, forms and other papers used by Dealer or any business associated or affiliated with Dealer; (b) discontinue all advertising of Dealer as an Authorized Nissan Dealer; (c) take all steps necessary to remove any listing in any telephone

directory yellow pages advertisement indicating that Dealer is an Authorized Nissan Dealer; (d) discontinue any use of any Nissan Mark in Dealer's firm or trade name and take all steps necessary or appropriate in the opinion of Seller to change such firm or trade name to eliminate any Nissan Mark therefrom; (e) discontinue or cause to be discontinued all other use of the Nissan Marks; (f) refrain from doing anything, whether or not specified above, that would indicate that Dealer is or was an Authorized Nissan Dealer; and (g) refrain from using, either directly or indirectly, any Nissan Marks or any other confusingly similar marks, names, logos or designs in a manner likely to cause confusion or mistake or to deceive the public. If Dealer fails to comply with any requirements of this Section 13.A.1, Dealer shall reimburse Seller for all costs and expenses, including reasonable attorney's fees, incurred by Seller in effecting or enforcing compliance.

2. Termination of this Agreement will not release Dealer or Seller from the obligation to pay any amounts owing the other.

3. Subject to Section 13.E, Seller shall process all claims and make all payments due for all labor provided and all parts and/or other materials used by Dealer pursuant to Sections 5.B.2 and 5.B.3 prior to the effective date of termination as provided in the Warranty Manual. Dealer shall cease, as of the effective date of termination, to be eligible to receive reimbursement for any work thereafter performed or parts thereafter supplied under any warranty, campaign inspections or corrections and any other adjustment previously authorized by Seller.

4. Dealer shall, upon Seller's request, deliver to Seller or its designee copies of Dealer's records with respect to pre-delivery, warranty, goodwill campaign and other service work of Dealer.

B. Repurchases by Seller Upon Termination. Upon termination other than pursuant to a sale or transfer, Seller shall buy from Dealer and Dealer shall sell to Seller, within ninety (90) days after the effective date of termination:

1. All new, unused, undamaged, unlicensed, then current and immediate previous model year Nissan Vehicles which were purchased by Dealer from Seller and are then the unencumbered property of and in the possession of Dealer or Dealer's flooring and/or financing institution. The price for such vehicles shall be the invoice price previously paid by Dealer therefor, less Seller's destination charges, all allowances paid or applicable allowances offered thereon by Seller, any amount paid by Seller to Dealer for pre-delivery inspection and service with respect to such vehicles pursuant to Section 5.B, any dealer association collection, and any other charge for taxes or special items or service. Seller shall also repurchase Genuine Nissan Accessories which have been installed in such Nissan Vehicles which accessories are listed in the current parts and accessories price list (except those items marked "not eligible") at the prices set forth on Seller's then current parts and accessories price list.

2. Subject to Section 13.C, all new, unused, undamaged and resalable Genuine Nissan Parts and Accessories which are still in the original and undamaged packages, were purchased from Seller, are listed in the current parts and accessories price list (except those items marked "not eligible"), and are then the unencumbered property of and in the possession of Dealer. The prices for such Genuine Nissan Parts and Accessories shall be the prices set forth on Seller's then current parts and accessories price list.

3. Subject to Section 13.C, all special tools and equipment owned by Dealer and which are unencumbered and in the possession of Dealer on the

effective date of termination which were designed especially for servicing Nissan Vehicles, are of the type recommended in writing by Seller and designated as "essential" tools in accordance with Seller's Guides or other notices pertaining thereto from Seller, are in usable and good condition, except for reasonable wear and tear, and were purchased by Dealer from Seller within the three (3) year period preceding the date of termination. Seller's purchase price for such essential tools shall be calculated at Dealer's purchase price reduced by straight-line depreciation on the basis of a useful life of thirty-six (36) months.

Dealer's and Seller's obligations with respect to the signs located at the Dealership Facilities shall be determined in accordance with the Dealership Identification Addendum between Seller and Dealer.

C. Dealer's Responsibilities with Respect to Repurchase.

Seller's obligation to repurchase Genuine Nissan Vehicles, Genuine Nissan Parts and Accessories, and essential tools from Dealer is conditioned on Dealer's fulfilling its responsibilities under this Section 13.C as follows:

1. Immediately following the effective date of termination of this Agreement, Dealer shall furnish to Seller a list of vehicle identification numbers and such other information and documents as Seller may require pertaining to the Nissan Vehicles subject to the repurchase obligations of Section 13.B.1. Dealer shall deliver all such vehicles in accordance with Seller's instructions.

2. Within thirty (30) days after the effective date of termination of this Agreement, Dealer shall deliver or mail to Seller a detailed inventory of all of the items referred to in Sections 13.B.2 and 13.B.3. Within thirty (30) days of its receipt of such inventory, Seller shall provide Dealer with instructions as to the procedures to be followed in returning such items to Seller. Dealer shall, at its

expense, tag, pack and deliver all such items to Seller at Seller's designated parts distribution center in accordance with such instructions.

Should Dealer fail to comply with the responsibilities listed above, Seller shall have no obligation to repurchase any such items from Dealer; provided, however, that Seller shall have the right, but no obligation, to enter into the Dealership Facilities for the purpose of compiling an inventory, tagging, packing and shipping such items to Seller's designated parts distribution center. If Seller undertakes any such responsibilities of Dealer, the repurchase prices of such items shall be fifteen percent (15%) less than the repurchase prices otherwise applicable under Section 13.B.

D. Title to Repurchased Property.

With respect to any items of property repurchased by Seller pursuant to this Section 13, Dealer shall take such action and shall execute and deliver such instruments as may be necessary: (i) to convey good and marketable title to all such items of property; (ii) to comply with the requirements of any applicable law relating to bulk sales and transfers; and (iii) to satisfy and discharge any liens or encumbrances on such items of property prior to delivery thereof to Seller.

E. Payment.

Seller shall make all payments to Dealer pursuant to this Section 13 within ninety (90) days after Seller's receipt of all items to be repurchased by it and provided Dealer has fulfilled all of its obligations under this Section 13; provided, however, that Seller shall be entitled to offset against such payments any and all indebtedness or other obligations of Dealer to Seller. Seller may make any payment for any property repurchased pursuant to this Section 13 directly to anyone having a security or ownership interest therein.

F. Cancellation of Deliveries.

Upon termination of this Agreement Seller shall

have the right to cancel all shipments of Nissan Products scheduled for delivery to Dealer. After the effective date of termination, if Seller shall voluntarily ship any Nissan Products to Dealer, or otherwise transact business with Dealer, all such transactions will be governed by the same terms provided in this Agreement, insofar as those terms would have been applicable had the Agreement not been terminated. Nevertheless, neither the shipping of such Nissan Products nor any other acts by Seller shall be construed as a waiver of the termination or a renewal or extension of this Agreement.

**Section 14. Establishment of
Successor Dealer**

A. Because of Death of Principal Owner.

If Seller shall terminate this Agreement pursuant to Section 12.C because of the death of a Principal Owner, the following provisions shall apply:

1. Subject to the other provisions of this Section 14, Seller shall offer a two (2) year Term Sales and Service Agreement to a successor dealership ("Successor Dealership") comprised of the person nominated by such deceased Principal Owner as his or her successor, together with the other Principal Owner(s) and Other Owner(s), provided that:

(a) The nomination was submitted to Seller on a Successor Addendum, was consented to by the remaining Principal Owner(s) and Other Owner(s), and was approved by Seller prior to the death of such Principal Owner;

(b) Either (i) there has been no change in the Executive Manager of Seller; or (ii) Seller has approved a candidate for Executive Manager having the required qualifications, expertise, integrity, experience and ability to successfully operate the dealership and perform Dealer's obligations under this Agreement; and

(c) The Successor Dealership has capital and facilities substantially in accordance with Seller's Guides therefor at the time the Term Sales and Service Agreement is offered.

2. If the deceased Principal Owner has not nominated a successor in accordance with Section 14.A.1(a) above, but all of the beneficial interest of the deceased Principal Owner has passed by will or the laws of intestate succession directly to the deceased Principal Owner's spouse and/or children or to one (1) or more other Principal Owners who each held not less than a twenty-five percent (25%) beneficial ownership interest in the dealership prior to the death of the deceased Principal Owner (collectively "proposed New Owners"), subject to the other provisions of this Section 14, Seller shall offer a two (2) year Term Sales and Service Agreement to a Successor Dealership composed of the Proposed New Owner(s), together with the other Principal Owner(s) and Other Owner(s), provided that:

(a) Either (i) there has been no change in the Executive Manager of Dealer; or (ii) Seller has approved a candidate for Executive Manager having the required qualifications, expertise, integrity, experience and ability to successfully operate the dealership and perform Dealer's obligations under this Agreement; and

(b) The Successor Dealership has capital and facilities substantially in accordance with Seller's Guides therefor at the time the Term Sales and Service Agreement is offered.

(B) Consideration of Successor Addendum.

To be named in the Successor Addendum, a proposed Principal Owner or Executive Manager must (i) be employed by Dealer or a comparable automotive dealership as his principal place of employment; (ii) be already qualified as a Principal Owner or Executive Manager, as the case may be;

and (iii) otherwise be acceptable to Seller as provided below.

Upon receipt of a request from Dealer that one or more individuals be named in a Successor Addendum, Seller shall request those named to submit an application and to provide all personal and financial information that Seller may reasonably and customarily require in connection with the review of such applications. Seller, upon the submission of all requested information, will determine whether to consent to a Successor Addendum naming such individuals by applying its criteria for considering the qualifications of Principal Owners or Executive Managers, as the case may be.

C. Termination of Successor Addendum.

Dealer may, at any time, withdraw a nomination of a Successor even if Seller previously has qualified the candidate, or cancel an executed Successor Addendum by giving notice to Seller of such withdrawal at any time prior to the death or incapacity of any Principal Owner named in this Agreement. Seller may cancel an executed Successor Addendum only if the proposed Principal Owner or Executive Manager no longer complies with the requirements of this Section 14.

D. Evaluation of Successor Dealership.

During the term of the Term Sales and Service Agreement, Seller will evaluate the performance of the Successor Dealership and periodically review with the new Dealer this evaluation. If the Successor Dealership's performance is deemed to be satisfactory to Seller during the Term Sales and Service Agreement, Seller will give first consideration to such Successor Dealership with respect to a new Sales and Service Agreement.

E. Termination of Market Representation.

Notwithstanding anything stated or implied to the contrary in this Section 14, Seller shall not be obligated to offer a Term Sales and Service Agree-

ment to any Successor Dealership if Seller notified Dealer prior to the event causing the termination of this Agreement that Seller's market representation plans do not provide for continuation of representation in Dealer's Primary Market Area.

F. Termination of Offer.

If the person or persons comprising a proposed Successor Dealership to which any offer of a Term Sales and Service Agreement for Nissan Products shall have been made pursuant to this Section 14 do not accept same within thirty (30) days after notification to them of such offer, such offer shall automatically expire.

Section 15. Sale of Assets or Ownership Interests in Dealer.

A. Sale or Transfer.

Article Third of this Agreement provides that neither this Agreement nor any right or interest herein may be assigned without the prior written consent of Seller. However, during the term of this Agreement, Dealer may negotiate for the sale of the assets of Dealer, or the owners of Dealer may negotiate the sale of their ownership interests in Dealer, upon such terms as may be agreed upon by them and the prospective purchaser. With respect to any sale or transfer which requires Seller's prior written consent under Article Third of this Agreement, Dealer shall notify Seller prior to any closing of the transaction called for by the purchase and sale agreement, and the prospective purchaser shall apply to Seller for a Sales and Service Agreement.

B. Seller's Evaluation.

Seller is responsible for establishing and maintaining an effective body of Authorized Nissan Dealers to promote the sale and servicing of Nissan

Products. Accordingly, Seller has the right and obligation to evaluate each prospective dealer, its owner(s) and executive manager, the dealership location and the dealership facilities to ensure that each of the foregoing is adequate to enable Dealer to meet its responsibilities hereunder. Seller will evaluate each prospective purchaser's qualifications and proposal for the conduct of the Dealership Operations by applying the standards set forth or referred to in this Agreement. In determining whether it shall consent to such a sale or transfer, Seller will take into account factors such as the personal, business and financial qualifications, expertise, reputation, integrity, experience and ability of the proposed Principal Owner(s) and Executive Manager as referred to in Articles Third and Fourth of this Agreement, the capitalization and financial structure of the prospective dealer, the prospective purchaser's proposal for conducting the Dealership Operations, and Seller's interest in promoting and preserving competition.

In evaluating the prospective purchaser's application for a Sales and Service Agreement, Seller may, without liability to Dealer, Dealer's Owners or the prospective purchaser, consult with the prospective purchaser regarding any matter relating to the proposed dealership.

Seller shall notify Dealer of Seller's consent or refusal to consent to Dealer's proposed sale or transfer within sixty (60) days after Seller has received from Dealer (i) Dealer's written request for Seller's approval; and (ii) all applications and information customarily or reasonably requested by Seller to evaluate such a proposal including without limitation, information concerning each proposed owner's and/or the replacement dealer's identity, character, business affiliations, business experience, financial qualifications and proposals for conducting the Dealership Operations. Any material change in such a proposal including,

without limitation, any change in the financial terms or in the proposed ownership or management of any proposed replacement dealer, shall be treated as a new proposal for purposes of this Section 15.B. If Seller does not consent to Dealer's proposed sale or transfer, Seller will specify in its notice to Dealer the reasons for its refusal to consent.

If Seller determines that the proposed dealership would not, at the commencement of its operations, have capital or facilities in accordance with Seller's Guides therefor and otherwise satisfactory to Seller, or if Seller reasonably determines that the proposed dealership might not meet Seller's performance standards in sales or service, Seller may, in its sole discretion and in lieu of refusing to consent to the proposed sale or transfer, agree to enter into a Term Sales and Service Agreement with the prospective purchaser. If Seller has recommended, pursuant to a market study conducted in accordance with Section 4.A, that Dealer relocate its Dealership Facilities, Seller may offer to the proposed dealer a Term Sales & Service Agreement subject to the condition that its Dealership Facilities shall be relocated within a reasonable time to a location and in facilities acceptable to Seller and in accordance with the market study recommendations.

Notwithstanding anything stated or implied to the contrary in this Section 15, Seller shall not be obligated to enter into a Sales and Service Agreement with any purchaser of the assets or ownership interests of Dealer if Seller has notified Dealer prior to its having received notice of the proposed sale or transfer that Seller's market representation plans do not provide for continuation of representation in Dealer's Primary Market Area.

C. Effect of Termination.

This Agreement shall end on the effective date of termination and, except as otherwise set forth in

Exhibit A

Section 13, all rights, obligations, duties and responsibilities of Dealer and Seller under this Agreement shall cease as of the effective date of termination. No assignment, transfer or sale of Dealer's right or interest in this Agreement shall have the effect of granting the assignee, transferee or buyer any right or interest in this Agreement that is greater than or in addition to that then held by Dealer. Any such assignment, transfer or sale shall be subject to the terms of any written notice of deficiency under Section 12.B or any written notice of termination under Sections 12.A, 12.B, 12.C, 12.D, 12.E or 12.F that was previously received by Dealer, including but not limited to Dealer's obligation to correct any failure before the expiration date of any period established in any such notice of deficiency. No such assignment, transfer or sale shall correct any such deficiency or extend the effective date of termination specified in any written notice of termination.

Section 16. Policy Review Board

A. Establishment of Policy Review Board.

In the interest of maintaining harmonious relations between Seller and Dealer and to provide for the resolution of certain protests, controversies and claims with respect to or arising out of Section 4, Section 12 or Section 13 of this Agreement, Seller has established the Nissan North America, Inc. Policy Review Board ("Policy Review Board"). The procedures of the Policy Review Board, as they may be revised by Seller from time to time, are incorporated herein by reference. At the time of execution of this Agreement, Seller will have furnished to Dealer a copy of such procedures, and Seller will furnish to Dealer a copy of each revision or modification that Seller may thereafter make to such procedures. Any decision of the

Policy Review Board shall represent the independent decision of Seller and shall be binding on Seller but not on Dealer.

B. Appeal of Dealer Appointment to Policy Review Board.

Any objections by Dealer to the proposed appointment of an additional Nissan dealer within the ten (10) mile driving distance described in Section 4.B shall be appealed to the Policy Review Board by filing a Notice of Appeal in accordance with the procedures established therefor within thirty (30) days from the date of Dealer's receipt of the Notice of Appointment.

C. Appeal of Termination to Policy Review Board.

Any protests, controversies or claims by Dealer (whether for damages, stay of action, or otherwise) with respect to any termination of this Agreement or the settlement of the accounts of Dealer with Seller after termination of this Agreement has become effective shall be appealed to the Policy Review Board by filing an appeal in accordance with the procedures established therefor within thirty (30) days after Dealer's receipt of notice of termination or, as to settlement of accounts after termination, within one (1) year after the termination has become effective.

D. Effect of Other Proceedings.

Because the purpose of the Policy Review Board is to assist in resolving issues between Seller and Dealer in a non-adversarial setting and to avoid litigation, if Dealer institutes or seeks any relief or remedy through legal, administrative or other proceedings as to any matter that is or could be the subject of an appeal to the Policy Review Board, then the Policy Review Board may, in its sole discretion, elect to refuse to consider any appeal to the Policy Review Board then pending or thereafter filed by Dealer relating to such subject matter.

Dealer further agrees that Dealer's seeking such relief or remedy shall constitute a waiver of any right to an appeal to the Policy Review Board with respect to such subject matter and Seller and the Policy Review Board shall be forever released from any obligation they might otherwise have had to conduct any proceedings, render any decision or take any other action in connection with such subject matter.

Section 17. General

A. Notices.

All notices or notifications required or permitted to be given by this Agreement to either party shall be sufficient only if given in writing and delivered personally or by mail to Dealer at the address set forth on the Dealership Facilities Addendum to this Agreement and to Seller at its national headquarters, or at such other address as the party to be addressed may have previously designated by written notice to the other party. Unless otherwise specified in the notice, such notices shall be effective upon receipt.

B. No Implied Waivers.

The waiver by either party, or the delay or failure by either party to claim a breach, of any provision of this Agreement shall not affect the right to require full performance thereafter, nor shall it constitute a waiver of any subsequent breach, or affect in any way the effectiveness of such provision.

C. No Agency.

Dealer is an independently operated business entity in which Seller has no ownership interest. This Agreement does not constitute Dealer the agent or legal representative of Seller or Manufacturer for any purpose whatsoever. Dealer is not granted any express or implied right or authority to assume or create any obligation on behalf of or in the name of Seller or Manufacturer or to bind

Seller or Manufacturer in any manner or thing whatsoever.

D. Limitations of Seller's Liability.

This Agreement contemplates that all investments by or in Dealer shall be made, and Dealer shall purchase and resell Nissan Products, in conformity with the provisions hereof, but otherwise in the discretion of Dealer. Except as herein specified, nothing herein contained shall impose any liability on Seller in connection with the business of Dealer or otherwise or for any expenditures made or incurred by Dealer in preparation for performance or in performance of Dealer's responsibilities under this Agreement.

E. Entire Agreement.

This agreement contains the entire understanding of the parties hereto with respect to the subject matter contained herein and may be amended only by a written instrument executed by each of the parties or their respective personal representatives, successors and/or assigns. This Agreement supersedes any and all prior agreements with respect to the subject matter hereof, and there are no restrictions, promises, warranties, covenants or undertakings between the parties other than those expressly set forth in this Agreement; provided, however, Seller shall have the right to amend, modify or change this Agreement in case of legislation, government regulations or changes in circumstances beyond the control of Seller that might affect materially the relationship between Seller and Dealer as further provided in Section 17.G.

F. Choice of Law.

This Agreement shall be deemed to have been entered into in the State of California, and all questions concerning the validity, interpretation or performance of any of its terms or provisions, or of any rights or obligations of the parties hereof, shall be governed by and resolved in accordance with the internal laws of the State of California

Exhibit A

including, without limitation, the statute of limitations.

G. Changes Required by Law.

Should Seller determine that any federal or state legislation or regulation or any condition referred to in Section 17.E requires a change or changes in any of the provisions of this Agreement, Seller may offer to Dealer an amendment or an amended Agreement embodying such change or changes. If Dealer shall fail to execute such amendment or amended Agreement and return it to Seller within thirty (30) days after it is offered Dealer, Seller may terminate this Agreement by giving notice to Dealer, such termination to effective upon receipt by Dealer of such notice.

H. Severability.

If any term or provision of this Agreement, or the application thereof to any person or circumstance, shall to any extent be found to be invalid, void or unenforceable, the remaining provisions and any application thereof shall nevertheless continue in full force and effect without being impaired or invalidated in any way.

I. Assignment.

Dealer shall not transfer or assign any right or transfer or delegate any obligation of Dealer under this Agreement without the prior written approval of Seller. Any purported transfer, assignment or delegation made without the prior written approval of Seller shall be null and void.

J. No Franchise Fee.

Dealer represents and warrants that it has paid no fee, nor has it provided any goods or services in lieu of a fee, as consideration for Seller's entering into this Agreement and that the sole consideration for Seller's entering into this Agreement was Dealer's Principal Owners' and Executive Manager's abilities, integrity, assurances of personal services and expressed intention to deal fairly and equitably with Seller and the public and any

other promises recited in this Agreement.

K. Captions.

The captions of the sections of this Agreement are for convenience and reference only and shall in no way be construed to explain, modify, amplify, or aid in the interpretation, construction or meaning of the provisions of this Agreement or to be a part of this Agreement.

L. Benefit.

This Agreement is entered into by and between Seller and Dealer for their sole and mutual benefit. Neither this Agreement nor any specific provision contained in it is intended or shall be construed to be for the benefit of any third party.



NISSAN NORTH AMERICA, INC.

West Region
20 Pacifica
Suite 1200
Irvine, CA 92618

Via Certified Mail --Return Receipt Requested

Personal and Confidential

January 14, 2013

Mr. Ernest L. Courtright
Principal Owner
Santa Cruz Nissan
1616 Soquel Avenue
Santa Cruz, CA 95062

Re: **Notice of Termination Pursuant to the Nissan Dealer Sales and Service Agreement and Pursuant to Section 3060(a)(1)(A) of the California Vehicle Code**

Dear Mr. Courtright:

NOTICE TO DEALER: You have the right to file a protest with the NEW MOTOR VEHICLE BOARD in Sacramento and have a hearing in which you may protest the termination of your franchise under provisions of the California Vehicle Code. You must file your protest with the board within 30 calendar days after receiving this notice or within 30 days after the end of any appeal procedure provided by the franchisor or your protest right will be waived.

Effective February 2, 1989, the Nissan Motor Corporation in U.S.A., now known as Nissan North America, Inc. ("Nissan" or "Seller") and Santa Cruz Nissan ("Dealer"), entered into a Nissan Dealer Sales and Service Agreement (the "Agreement") establishing Dealer as an authorized dealer of Nissan Products. Dealer agreed under the terms and conditions of the Agreement, to assume certain obligations and responsibilities as a Nissan Dealer, in exchange for the rights granted to it under the Agreement. Nissan has determined that Dealer has failed to comply with its obligations under the Agreement.

On March 19, 2012, Nissan sent a letter to provide Dealer with formal written Notice of Default pursuant to section 12.B of the Agreement. The Notice of Default outlined the severity of Dealer's substantial and material breaches of the Agreement and gave the Dealer an opportunity to improve and cure these breaches of the Agreement. To allow Dealer additional time to meet its contractual obligations and cure the material breaches of the Agreement, Nissan extended the time frame to cure the outlined defaults by letter dated October 5, 2012 (this extension and the Notice of Default will be collectively referred to as the "NOD"). Since the issuance of the NOD, Dealer has not taken necessary action to cure the substantial and material breaches that led to the NOD, no substantial and sustained

Mr. Ernest L. Courtright, Principal Owner
Santa Cruz Nissan
January 14, 2013

progress towards improvement or compliance with Dealer's obligations under the Agreement has been made, and the severity of these defaults continues.

Notwithstanding the additional time provided, as of the date of this letter; Dealer has failed to cure the defaults outlined in the NOD as extended. **Accordingly, Nissan hereby gives notice of its intent to terminate Dealer's Agreement pursuant to Section 12.B of the Standard Provisions of the Agreement and Section 3060(a)(1)(A) of the California Vehicle Code, effective sixty (60) days from receipt of this notice.**

As outlined in the NOD, the factors listed below, separately or jointly, constitute good cause for this Notice of Termination.

Unsatisfactory Sales Penetration Performance

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. . . ."*

Mr. Ernest L. Courtright, Principal Owner
 Santa Cruz Nissan
 January 14, 2013

The NOD summarized Dealer's sales penetration performance in both the competitive car and competitive truck segments with a comparison of the average regional sales penetration in the total competitive vehicle segments and demonstrated Dealer's failure to comply with these performance obligations. The following provides an update of Dealer's sales penetration performance since the issuance of the NOD.

Retail Sales Penetration: Santa Cruz Nissan
Competitive Sales Penetration as a Percentage

Santa Cruz Nissan - Santa Cruz, CA	Oct-12 R-12	CY 2011	CY 2010	CY 2009	CY 2008
Dealer Sales Penetration	3.40%	5.41%	4.75%	5.30%	6.28%
Regional Sales Penetration	8.87%	10.02%	9.38%	8.86%	7.45%
Segment Adjusted RSE	37.3%	51.6%	45.9%	56.3%	81.8%
Dealer Vehicle Sales	194	204	150	152	202
Projected Sales at 100% RSE	520	386	327	270	247
Net Unit Gain/(Loss)	(326)	(192)	(177)	(118)	(45)
Regional Ranking	191/196	187/194	181/196	175/194	105/138
State Ranking	98/99	95/97	95/98	93/98	90/102

The above data demonstrates Dealer's prolonged failure to adequately represent Nissan in the Santa Cruz market or to fulfill its responsibilities regarding sales of Nissan vehicles under Section 3 of the Agreement. As described in more detail in the NOD, Nissan has been counseling Dealer regarding declining sales penetration performance for many years. Dealer's sales penetration for at least the past six (6) full calendar years, has not met 100% regional sales effectiveness. Dealer now ranks 191 of 196 in the West Region and 98 of 99 dealers in the State of California. Dealer's sales penetration performance has continued to decline since the issuance of the NOD.

Since the issuance of the NOD, Nissan continued to meet with Dealer to discuss the deficient sales penetration performance. During many of these contacts, the Dealer Operations Manager ("DOM"), Area General Manager ("AGM"), and/or Regional Vice President ("RVP") discussed with Dealer the inadequate sales penetration performance. Additionally, Nissan has also communicated in writing with Dealer regarding Nissan's serious concerns with Dealer's poor sales penetration and operational deficiencies. Notwithstanding the communications regarding the need for improved performance, Dealer's performance has not improved, and as of the date of this notice remains alarmingly below regional average. As an alternative response to the NOD deficiencies, Dealer submitted a Buyer Assist Letter dated September 18, 2012, indicating Dealer's willingness to divest of the Nissan dealership assets. However, to date, Nissan has yet to receive any proposed asset purchase agreement.

For the reasons stated in the NOD, and without waiving any additional breaches of the Agreement which may exist or occur, Nissan asserts that Dealer has breached the Agreement in a manner that warrants termination of your Agreement in accordance with the terms thereof. Accordingly, Nissan hereby gives notice of its intent to terminate Dealer's Agreement pursuant to Section 12.B of the Standard Provisions of the Agreement and Section 3060(a)(1)(A) of the California Vehicle Code, effective sixty (60) days from receipt of this notice.

Mr. Ernest L. Courtright, Principal Owner
Santa Cruz Nissan
January 14, 2013

Termination Requirements:

As of the effective date of termination, you must refrain from the further distribution and sale of new Nissan Products, remove from your place of business and discontinue use of all signs, trademarks or trade names of Nissan used by you in connection with the sale and distribution of Nissan Products, refrain from any further advertising or publicity referring to Nissan Products, Nissan Motor Co., Ltd., or Nissan North America, Inc., return to Nissan all advertising materials provided by Nissan to you free of charge and otherwise comply fully with all of the provisions of the Nissan Dealer Sales and Service Agreement regarding a dealer's duties upon termination.

Termination of the Nissan Dealer Sales and Service Agreement terminates any rights provided to Dealer under the Agreement to use Nissan trademarks and/or trade dress, including, without limitation, Dealer's Nissan signage. Pursuant to Section 15.1 of Dealer's NREDI Sign Program - Lease and Maintenance Agreement ("Sign Lease"), termination of Nissan's Sales and Service Agreement shall constitute a default under the Sign Lease. As such, Nissan Motor Acceptance Corporation ("NMAC") shall be entitled to pursue its rights set forth within Section 15.2 of the Sign Lease, including, without limitation, the right to terminate the Sign Lease (on behalf of NMAC, this document constitutes written notice of termination of the Sign Lease), the right to recover past and future Rents owed by Dealer under the Sign Lease, and the right to recover Rents and other amounts owed directly from Dealer's NNA Non-Vehicle Account. Further, pursuant to Sections 6.1, 15.2 and 15.5 of the Sign Lease, Nissan, NMAC and/or their designated Supplier shall have the right (with or without notice to Dealer) to enter Dealer's premises and disassemble, pack and crate (at Dealer's cost and expense) all signs subject to the Sign Lease and remove said signs from Dealer's possession and/or premises. The Sign Lease shall govern the terms and conditions under which Dealer's Nissan signage shall be removed from Dealer's Dealership Facilities.

Termination of the Nissan Dealer Sales and Service Agreement also terminates any Dealer Equipment Lease and/or Software License between Dealer and Nissan. You will be advised in writing of your obligations under that license and the procedures for returning the software and/or equipment to Nissan.

Within thirty (30) days from the effective date of termination, you should deliver to Nissan's West regional office a detailed inventory listing any items referred to in Sections 12.B.2 and 12.B.3 of the Standard Provisions, and requesting that Nissan fulfill any repurchase obligations that it may have thereunder or under any applicable state law and of which you wish to take advantage.

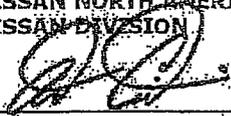
Nissan does not waive any additional breaches of the Agreement that may exist now or in the future, or to its right to issue a Notice of Termination or Notice of Default as to such breach or breaches at a later time.

If any clarification or assistance is required regarding the foregoing, please contact the West Region - North Regional Vice President, Eric Rodgers.

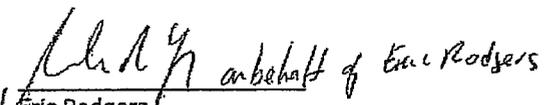
Mr. Ernest L. Courtright, Principal Owner
Sarita Cruz Nissan
January 14, 2013

Sincerely,

NISSAN NORTH AMERICA, INC.
NISSAN DIVISION



Albert Castignetti
Vice President
General Manager, Nissan Division



Eric Rodgers
Regional Vice-President
West Region - North

cc: California New Motor Vehicle Board
1507 21st Street, Suite 330
Sacramento, CA 95814

1 NEW MOTOR VEHICLE BOARD
1507 - 21ST Street, Suite 330
2 Sacramento, California 95811
Telephone: (916) 445-1888

CERTIFIED MAIL

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8 STATE OF CALIFORNIA
9 NEW MOTOR VEHICLE BOARD

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11 In the Matter of the Protest of

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

Protestant,

14 v.

15 NISSAN NORTH AMERICA, INC.,

16 Respondent.

Protest No. PR-2358-13

**ORDER CONDITIONALLY
SUSTAINING THE PROTEST AND
REMANDING THE MATTER**

17
18 To: Michael J. Flanagan, Esq.
Gavin M. Hughes, Esq.
19 Danielle R. Vare, Esq.
Attorneys for Protestant
20 LAW OFFICES OF MICHAEL J. FLANAGAN
2277 Fair Oaks Boulevard, Suite 450
21 Sacramento, California 95825.

22 Maurice Sanchez, Esq.
Lisa M. Gibson, Esq.
23 Attorneys for Respondent
BAKER & HOSTETLER LLP
24 600 Anton Boulevard, Suite 900
25 Costa Mesa, California 92626-7221

26 ///

27 ///

28 ///

1 1. At its July 15, 2014, General Meeting, the Public Members of the Board met and
2 considered the administrative record and Proposed Decision dated July 3, 2014, in the above-entitled
3 protest. After such consideration, the Board conditionally sustained the protest and remanded the matter
4 to the Administrative Law Judge ("ALJ") with the following instructions:

5 a. Vehicle Code section 3067 permits the Board to impose conditions upon its decisions so
6 long as the conditions are such as to meet the following language:

7 ...Conditions imposed by the board shall be for the purpose of assuring performance of
8 binding contractual agreements between franchisees and franchisors or otherwise serving
9 the purposes of this article...

10 b. The ALJ shall recommend conditions for the Board to impose consistent with
11 Section 3067 and establish a time frame for Protestant to comply with those conditions. The ALJ
12 shall have discretion, if deemed necessary, to order additional evidence, briefing, and/or
13 arguments.

14 2. The parties are strongly encouraged to engage in settlement discussions and set a
15 Mandatory Settlement Conference with a Board appointed ALJ.

16 SO ORDERED.

17 DATED: July 17, 2014

NEW MOTOR VEHICLE BOARD

18
19 By William J. Brennan
20 for GLENN E. STEVENS
21 President
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NEW MOTOR VEHICLE BOARD
GENERAL MEETING

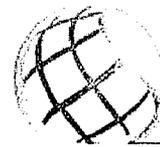
State of California New)
Motor Vehicle Board)
General Meeting)
_____)

REPORTER'S PARTIAL TRANSCRIPT OF BOARD MEETING

DATE: JULY 15, 2014

LOCATION: Milton Marks Conference Center
455 Golden Gate Avenue
San Francisco, California 94102

REPORTED BY: KIMBERLY R. HENDERSHOTT, RPR
CSR NO. 12552



- 1 APPEARANCES:
- 2 ANTHONY A. BATARSE, JR., Dealer Member
- 3 RYAN L. BROOKS, Dealer Member
- 4 KATHRYN ELLEN DOI, Public Member
- 5 RAHIM HASSANALLY, Dealer Member
- 6 DAVID C. LIZARRAGA, Public Member
- 7 BISMARCK OBANDO, Public Member
- 8 VICTORIA RUSNAK, Vice President, Dealer Member
- 9 GLENN E. STEVENS, President, Public Member
- 10 WILLIAM G. BRENNAN, Executive Director
- 11 ROBIN P. PARKER, Senior Staff Counsel

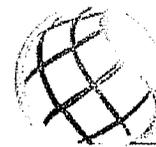
12 For the Protestant Santa Cruz Nissan, Inc.:

13 MICHAEL J. FLANAGAN
 14 GAVIN M. HUGHES
 DANIELLE R. VARE
 15 Law Offices of Michael J. Flanagan
 2277 Fair Oaks Boulevard, Suite 450
 16 Sacramento, California 95825
 (916) 646-9100
 17 Lawmjf@msn.com

18 For the Respondent Nissan North America:

19 MAURICE SANCHEZ
 Baker Hostetler
 20 600 Anton Boulevard, Suite 900
 Costa Mesa, California 92626
 21 (714) 966-809
 Msanchez@bakerlaw.com

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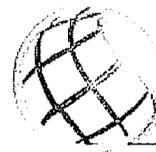
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Also Present for Santa Cruz Nissan, Inc.:

Jim Courtright
Lee Courtright

Also Present for Nissan North America:

Chad Filiault
Cecil L. Davis



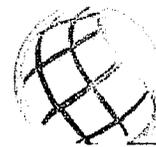
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I N D E X

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Agenda Item 23, Adjournment	47



1 SAN FRANCISCO, CALIFORNIA; TUESDAY, JULY 15, 2014

2 11:43 a.m. - 1:08 p.m.

3 ---o0o---

4 (The following is a partial transcript of the
5 proceedings that were had after the first
6 break at 11:43 a.m.)

7 MR. STEVENS: Back on the record. This is
8 agenda item number 20, Santa Cruz Nissan, Inc., dba
9 Santa Cruz Nissan vs. Santa Cruz North America --
10 Nissan North America, I apologize.

11 Protest PR2358-13.

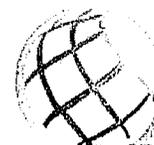
12 You figured 11:30.

13 MR. PARKER: I did. We were right on. We
14 took a break.

15 MR. STEVENS: Okay. Comments by the parties
16 or by their counsel that are made regarding any
17 proposed decision, ruling, or order must be limited to
18 matters contained within the administrative record of
19 proceedings. No other information or argument will be
20 considered by the Board.

21 This is an adjudicative matter as described in
22 Government Code section 11125.7(e) and therefore
23 members of the public may not comment on such matters.

24 This is the case of Santa Cruz Nissan, Inc.,
25 dba Santa Cruz Nissan versus Nissan North America.



1 Nissan sought to terminate Santa Cruz Nissan's
2 franchise because of unsatisfactory sales penetration
3 performance related to operational deficiencies and
4 breach of the Dealer Agreement. Protestant contends
5 that Respondent has failed to meet its burden in
6 establishing good cause to terminate Protestant's
7 Nissan franchise.

8 A 12-day merits hearing was held before
9 Administrative Law Judge Diana Woodward Hagle on
10 January 27th through February 7, 2014, and March 6 and
11 7, 2014.

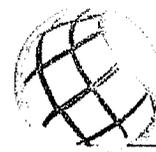
12 The Proposed Decision sustains the protest and
13 does not permit Nissan to terminate Santa Cruz's Nissan
14 franchise.

15 Parties looks like are present. I ask you
16 each to state your appearance. Everyone has a copy of
17 the administrative law judge's decision.

18 MR. SANCHEZ: Yes.

19 MR. STEVENS: Start announcing your
20 appearances, please.

21 MR. SANCHEZ: Yes. Thank you, Mr. Stevens.
22 Maurice Sanchez from Baker Hostetler on behalf of
23 Nissan Nissan North America, respondent. With me is
24 Cecil Davis, who is in-house counsel for Nissan. And
25 sitting in the back row to your right is Chad Filiault,



1 who is the area general manager for this area with me
2 for Nissan North America.

3 MR. HUGHES: Thank you, Mr. Stevens. Gavin
4 Hughes from the law offices of Michael J. Flanagan. I
5 have Mr. James Courtright to my left. Mr. Ernest
6 Courtright behind me. Michael Flanagan and Daniel Vare
7 also from the law offices of Michael J. Flanagan. We
8 are representing protestant Santa Cruz Nissan.

9 MR. STEVENS: Okay. We generally allocate 15
10 minutes of argument to each side, and of course you can
11 reserve five minutes as a rebuttal to what the other
12 side says. We will start with the protestant, and
13 Mr. Hughes you can start.

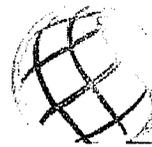
14 Do you want to reserve any time?

15 MR. HUGHES: Yes. Mr. Stevens, I'd like to
16 reserve the bulk of my time to be able to respond to
17 whatever argument respondent might make.

18 MR. STEVENS: Whatever you want to do. I'll
19 kind of do it like in soccer. I'll add time as we ask
20 questions.

21 MR. HUGHES: Okay. I appreciate that.

22 MR. SANCHEZ: Mr. Stevens, I'm sorry, and I
23 don't mean to rudely interrupt. But since we have the
24 burden of proof, my experience we've usually gone first
25 and then been the ones to reply.



1 MR. STEVENS: Respondent -- okay. I thought
2 it was ask the protestant to go first.

3 MR. PARKER: Set up for the respondent goes
4 first. We typically do whoever has the burden.

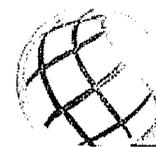
5 MR. STEVENS: Lets start with respondent.
6 That may change your allocation of time based on what
7 he says.

8 MR. SANCHEZ: And I also wish to reserve some
9 time to reply.

10 MR. STEVENS: Go ahead. Yeah.

11 MR. SANCHEZ: Members -- public members of the
12 Board. A dealer license issued by the State of
13 California is a public trust. The dealer must serve
14 the public. And in -- with the state law does is in
15 effect to protect the dealer from some forms of
16 competition, whether it be from the manufacturer
17 directly or from other dealers in exchange for that
18 public trust, to serve the public. But the dealer must
19 in effect perform and represent those products that he
20 is selling -- in this case for Nissan -- to the public,
21 and must basically offer them and represent the company
22 in that way.

23 If that situation is broken as it is in this
24 case, where the dealer is only selling about one-third
25 of the sales that it should be, then that -- obviously

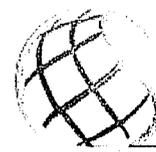


1 the system doesn't work, because the manufacturer
2 cannot either represent itself, close by that dealer,
3 and it cannot appoint another dealer within 10 miles
4 without facing a protest to this very Board.

5 The proposed decision as written sends a
6 message to manufacturers and dealers in the State of
7 California that you don't need to improve your sales.
8 Even though you're the worst dealer in the state
9 barring except for one newer dealer that was recently
10 appointed, and you're the worst dealer in the region
11 sales wise, you don't need to improve, and there's
12 nothing the manufacturer can do about it.

13 Now, Nissan attempted to help this dealer for
14 a period of seven years to improve its performance.
15 Numerous visits, numerous suggestions. Extra
16 allocations of vehicles. You name it, Nissan tried to
17 help this dealer. And the dealer not only didn't
18 improve, it continued to decline. It went from a
19 hundred and 113 percent of expected sales in 2005 to 80
20 to 60 to 40, and then finally to 32 percent.

21 This is why all Nissan was specifically
22 sending letters and asking them to improve when a
23 notice of default was issued to the dealer telling him
24 he was in breach of the dealer agreement, and even when
25 notice of termination was sent to the dealer stating



1 that Nissan intended to try to terminate the
2 relationship.

3 Throughout that entire period the dealer
4 continued to decline to improve performance. We would
5 posit to you that the dealer presumably attempted to
6 improve, and it just couldn't. That's a positive way
7 of looking at it. Another way of looking at it is the
8 dealer didn't try.

9 Whichever way is the truth, this dealer
10 continued to decline, and Nissan by the proposed
11 decision is prevented from fixing it.

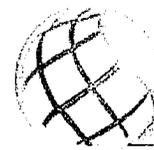
12 MR. BROOKS: I do have a question that you
13 mentioned 2005, '6, '7, '8, '9, and then probably 10 --
14 whatever the last record is from.

15 Are you taking in account the recession that
16 happened in 2008 and the decline?

17 MR. SANCHEZ: Yes.

18 MR. BROOKS: You should probably balance that
19 out with what happened industry wide. Because my
20 assumption is that their performance is equal to the
21 performance of like dealers of that area.

22 MR. SANCHEZ: And you would think that, but
23 it's actually not the case. They did worse than
24 dealers. The recession affected everyone, and so the
25 percentage that we're looking at of sales of the



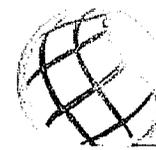
1 dealership, we're looking at it as a percentage, so the
2 economy, all of those factors are taken into account.
3 Everybody's sales went down. This dealer's went down
4 even further.

5 And so Nissan waited. It didn't try to
6 terminate them in '08 or '09. It didn't send the
7 notice of termination until 2012, when almost every
8 other dealer was rebounding, and this dealer kept
9 declining. So that was addressed. And that was -- I
10 may have a Board that can show you that.

11 MS. DOI: So one of the significant factors to
12 me was the expansion of the PMA to include Watsonville,
13 and the proposed decision says there was no discernable
14 reason for the expansion, and I was interested to know
15 whether there is some reason that was provided or
16 offered.

17 And also, I was wondering if any comparison
18 had been made between what the RSE score would look
19 like if Watsonville had not been included versus the
20 decision.

21 MR. SANCHEZ: Very good questions. Yes, both
22 of those issues were addressed. This was a lengthy
23 hearing. The PMA was changed after the 2010 census.
24 Every census, every company re-examines their PMAs, and
25 they do what's called a PMA audit, and they adjust them



12

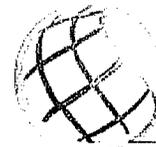
1 based on a census changing demographics, populations,
2 and all that.

3 In this case, and in no discernible reason
4 frankly sticks in Nissan claws very hard. Because not
5 only did the census occur, but the actual drive time
6 and drive distance from Watsonville to Santa Cruz
7 Nissan was closer than to any other dealer. That was
8 an adjustment that Nissan made nationwide for its
9 dealerships. It decided, okay, we're really going to
10 look at drive time and drive distance, not just air
11 distance, and that was the reason that it was changed.
12 That was explained at length in the -- in the hearing.

13 In addition, Nissan's expert John Frith from
14 USA, I did look at the performance under the old PMA
15 and the new PMA. It did go up a few percentage points.
16 It went from like 38 -- I'm sorry, 32 to 38 or so. But
17 the performance was still abysmal under the old PMA,
18 the new PMA.

19 So those issues were looked at, were
20 addressed. There is evidence in the record addressing
21 those, and unfortunately, administrative law judge
22 Hagle chose to ignore them.

23 MS. DOI: And what about the increase in
24 performance between 2012 and 2013? I mean, they went
25 from 173 to 246. That seems pretty significant.



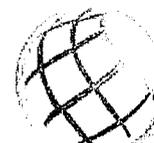
1 MR. SANCHEZ: It did go up, and Mr. Davis is
2 here, and he can address that. It's not in the record,
3 other than protestant just stating it. Nissan -- once
4 Nissan issued the notice of termination, it was our
5 understanding that that was sort of the cutoff.

6 It did go up. It did not even get out of the
7 '30s, though. It was still below 40 percent for the
8 expected sales during that time period even though
9 sales went up. You have to understand, sales of all
10 Nissan vehicles in the region, the state, the district,
11 are all going up. The economy is improving.

12 So, yes, this protestant sales -- raw sales
13 number went up. And his percentage went up slightly,
14 but not nearly enough to make up the difference of the
15 corporate performance.

16 To say that this proposed decision was wrong
17 is a vast understatement. There are too many examples
18 of misstatements, errors in the decision for me to go
19 through them all now in a brief period of time.

20 But for -- just a couple of examples. At one
21 point Nissan North America was from prevented from
22 objecting to questions during the hearing by the judge.
23 The judge told us point-blank do not object anymore.
24 Obviously that hindered our ability to present our
25 case.



1 The other thing, evidence was excluded, and
2 I'll go into some examples of that. Specific examples
3 where the judge excluded some evidence.

4 So I'm just going to focus on some of the more
5 clear examples of this dealer's failure to serve the
6 public.

7 The first is really with the Hispanic
8 community. Where this dealer's sales performance was
9 declining sharply, the dealer ignored the Hispanic
10 community in this area. Santa Cruz county is 30
11 percent Hispanic. Santa Cruz city itself is 20
12 percent. And as you've stated Watsonville to the south
13 in this area is 81 percent Hispanic.

14 MR. BROOKS: I don't know if it's part of the
15 record, because I didn't see it. But do you know what
16 the average income is?

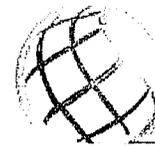
17 MR. SANCHEZ: I can show you that actually.
18 I'm sorry, I have a lot of boards here.

19 MR. STEVENS: One of those boards shows us
20 where the dealership is.

21 MR. SANCHEZ: Yes.

22 MR. STEVENS: Would you put that in the front
23 here, so we can keep focus on that.

24 MR. SANCHEZ: The red here is where the
25 dealership is. This is the primary market area.



1 MR. STEVENS: You mean the little --

2 MR. SANCHEZ: The square. Yeah, the square is
3 where the dealership is.

4 MR. STEVENS: Okay, thanks.

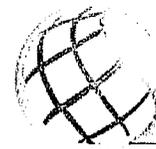
5 MR. SANCHEZ: This is a picture of the
6 dealership. This is a picture of the Honda dealership
7 also next door, about 2.1 miles away here. This is
8 where the dealership is located. That's a straight
9 line. The straight line to the Toyota dealership is
10 about two and a half miles, and this is a bad picture,
11 but that's Toyota Santa Cruz here, and Kia is next door
12 to it.

13 You asked -- I was asked about income. This
14 is the U.S. Census Bureau statistics for Watsonville.
15 It's 51,000 people, almost 52. It's grown since the
16 last census. Hispanic or Latino, 81.4 percent.
17 Language other than English spoken at home, 74.1
18 percent.

19 Let's see. I'm sure there's household income
20 on here. I'm not sure where it is. I apologize. I
21 thought it was on this.

22 This dealer testified at the hearing that --
23 sorry, it's the last one. That the -- I knew that was
24 going to happen.

25 That the -- he could have always sold into the

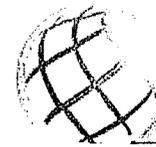


1 Watsonville market. You're not precluded from selling
2 outside of your PMA. And this dealer wasn't precluded.
3 In fact, all of those sales count towards their
4 percentage achievement of RSE, or Regional Sales
5 Effectiveness. Wherever you sell it. If you sell them
6 outside your PMA that's okay. You were given credit
7 for this.

8 Basically, in those seven years when this
9 dealer went from over a hundred percent sales effective
10 down to 32 percent, he had zero Spanish speaking
11 salespeople. Or at least five of those years. That
12 was all we have -- we had data for at the hearing. And
13 he admitted that on the stand. He had zero Spanish
14 speaking advertisements. And that's -- I mean even
15 if -- even if that wasn't part of his PMA in
16 Watsonville, 30 percent of Santa Cruz county is still
17 Hispanic. A large percentage speak language other than
18 English, and yet zero Hispanic ads were put in place by
19 this dealer. That is not serving the market.

20 MS. DOI: Was this true of the other lines he
21 sold to, or was that just specific to Nissan?

22 MR. SANCHEZ: We were precluded by the ALJ
23 from asking too much about the other lines. We were
24 told repeatedly this is a Nissan termination, not a
25 Volkswagen, not a Dodge, not a Ram termination. But I



1 believe it did come out in testimony that that was true
2 for the entire dealership.

3 Mr. Courtright testified that he did not want
4 the PMA changed because it was the area in Watsonville
5 was economically, educationally, ethnically, and
6 geographically different than the city of Santa Cruz,
7 which is where the dealership is located.

8 And I brought this -- this is a transcript
9 from the hearing. And I asked him:

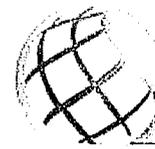
10 "You stated -- you believe that your PMA
11 was drawn incorrectly after the change.

12 "I believe so, the census tract should not
13 have been changed. Whether they drew it in
14 their mind correctly or not is not
15 something I knew.

16 "Sir, when I asked you at your deposition
17 why that was you said that Santa Cruz
18 county is divided in your mind into two
19 areas, and that the area that was added was
20 educationally, economically, ethnically,
21 and geographically different from the
22 northern part, correct?

23 "Answer, yes."

24 So he didn't deny. He said -- those were his
25 words in the deposition. In fact, what he's telling us



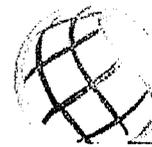
1 is he did not intend to serve that part of the market,
2 both by his words and by his actions. No advertising,
3 no Spanish speaking salespeople.

4 And he said -- I asked him in another part of
5 the hearing, why didn't you have any advertising at
6 least. Well, we didn't have any Spanish speaking sales
7 people, so if they came in, we wouldn't have anybody to
8 sell to.

9 So it becomes sort of a self-fulfilling
10 prophecy. And for five years to have no Spanish
11 speaking salespeople in this market, I would suggest to
12 you is negligent at best. It basically shows you don't
13 care.

14 It's not just Hispanics that were ignored by
15 this dealer. He also ignored the young high-tech
16 social media savvy buyer. He basically said, and
17 testified, this dealership has no Facebook page. Next
18 to the Silicon Valley in a town where there's a UC
19 campus, when every kid probably in that UC campus has a
20 Facebook page, if you don't exist in social media for
21 those young buyers, you don't exist. This dealer has
22 no Facebook page.

23 The judge also precluded us from putting on
24 evidence of the competitive Facebook pages for Honda
25 and for Toyota, who have several pages with oil change



1 offers, free car wash, come in.

2 MR. HUGHES: I'm going to have to object.
3 This was excluded, and he's now presenting this
4 evidence.

5 MR. BROOKS: And also I would be very careful.
6 Unless you can provide analytics behind that a Facebook
7 page will drive business, I think it's irrelevant
8 personally. If you're talking about an overall
9 marketing plan, that's one thing.

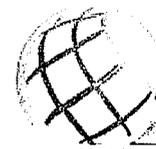
10 MR. SANCHEZ: We did have testimony that other
11 dealers have reached out in social media. It's a form
12 of advertising, but that's as far as I'll take it.
13 This dealer did not do that, and I would submit to you
14 in the area where it's located right next to Silicon
15 Valley, that is something that basically is negligent
16 in my view. It's a poor practice.

17 MS. DOI: Was there testimony as to what
18 percentage of dealers have Facebook pages?

19 MR. SANCHEZ: There was testimony that other
20 competitors in the market have them, but that was as
21 far as we were allowed to go. We were not allowed to
22 present more details.

23 MR. STEVENS: He didn't. The others did.

24 MR. BROOKS: But there's no evidence behind
25 the analytics.



1 MS. DOI: Because the judge would not let that
2 in.

3 MR. BROOKS: That's why I asked counsel to be
4 careful on presenting information with no analytics
5 behind that the judge didn't let in. It's something we
6 can't take account for.

7 MR. STEVENS: I understand. But, Mr. Sanchez,
8 did you want to take five minutes for --

9 MR. SANCHEZ: I do. I still do have a little
10 more to go. Why don't I save two.

11 MR. STEVENS: That's fine.

12 MR. SANCHEZ: In any event.

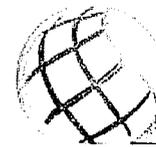
13 MR. STEVENS: I've added time, by the way.

14 MR. SANCHEZ: Thank you.

15 MR. STEVENS: I'm not trying to squeeze you.

16 MR. SANCHEZ: I do appreciate that. This
17 dealer is ignoring large segments of the market, large
18 segments of the community. He is not serving the
19 public when his sales are declining so steeply, and yet
20 there's no effort to reach out to those segments of the
21 public that he could be selling to.

22 The dealer is essentially passive. He wants
23 them to come to me. And that's not the way you market
24 yourself in this day and age. The protestant is very
25 comfortable. He's bought his land. He's almost got it



1 paid off, and this was all in the record, and he caters
2 to customers who come in to him.

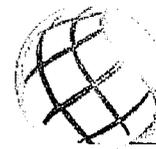
3 MR. STEVENS: Was there anything in the record
4 about historically how Santa Cruz Nissan operated years
5 ago before social media, before --

6 MR. SANCHEZ: Yes. Thank you for that. We
7 did have an article where Mr. Jim Courtright was
8 interviewed in 2004, where he talked about internet
9 advertising and reaching out in other ways at the time.
10 The judge at first let it in and then ended up
11 excluding it. So it was not ultimately left in the
12 record, but we did attempt to put something like that
13 in the record, because that was when, as you surmised,
14 he was over 100 percent as late as '05.

15 So we tried to make that connection. The
16 judge would not let us do that.

17 So this dealer, even though Mr. Lee Courtright
18 basically testified he is semiretired. He is only
19 there 120, 140 days a year, and when he's there, he's
20 there half the day, is now given over to Jim
21 Courtright, the younger Mr. Courtright, but they do
22 things the way they've always been done.

23 For example, Saturday service. This dealer
24 was counseled by Nissan for years on doing Saturday
25 service. Honda does it. Toyota is open Saturdays and



1 Sundays both. And he just refused. He said we tried
2 it in the '90s. It didn't work was his answer.

3 Well, as our person from Nissan, Mr. Hagle --
4 I'm sorry, I can't remember Gary's last name --
5 testified you have to do that. It not only brings up
6 your service business, it adds to your sales, because
7 people are in your dealership then, getting their car
8 serviced. It can help sales. He refused to do it,
9 refused to do it.

10 Finally, at the last day of the hearing he
11 testified:

12 "Well, we're thinking about doing it."

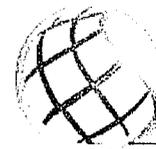
13 And he was asked:

14 "Why are you doing it now after all of
15 this?"

16 "Well, I've heard some things, and I think
17 maybe it's a good idea."

18 No study was done. No survey of customers
19 we've been asking him to do all along. Nothing other
20 than, okay, now maybe we'll do it. I submit to you
21 these things are window dressing to try to avoid
22 termination. He really doesn't want to do it.

23 Santa Cruz is a desirable market. The Honda
24 dealer is a top performer. He not only sells over
25 1,000 vehicles a year, he outperforms Toyota in this



1 market, and he actually -- there was testimony he
2 called Mr. Courtright senior and asked him about
3 selling the dealership to him.

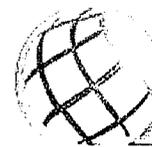
4 So he sees the value of this market. Nissan
5 will appoint a replacement dealer and fully intends to
6 if they're allowed to terminate.

7 And those dealers, Honda, Toyota, all the
8 dealers in the market, sell -- all those dealers in the
9 market. I was going to show you the dealer count, but
10 Mr. Hughes has that. All those dealers have the same
11 issues that this dealer faces: The ocean, the
12 mountains, the two lane road from Santa Cruz to San
13 Jose. All those issues are the same for them. They're
14 only a couple miles apart, and yet Honda is basically
15 killing it in this market. He is outselling Nissan,
16 Toyota, and everybody else.

17 MR. STEVENS: Wrap up.

18 MR. SANCHEZ: Yeah, I will wrap up.

19 In essence, the other big error the judge
20 made, she applied the new statute, 11713.13(g). That
21 statute is inapplicable to this case. It was made
22 effective January 1, 2014, about three weeks before
23 this hearing started. More than a year before -- after
24 the notice of termination was issued, and of course all
25 the warnings and everything were under the old system.



1 But yet Judge Hagle sought to apply it here, and
2 basically attacks Nissan's sales performance standard,
3 which is part of the RSE, regional sales effectiveness,
4 and basically says the region is simply too large.
5 Well, that doesn't work. And I'll tell you why. The
6 region as board member Doi asked, here is national;
7 here is the west region, which is the standard that was
8 applied; here's California. It's even higher than
9 national. Nine percent versus 8.76. Here's district
10 11, which Santa Cruz is in. It's almost as high as
11 California. And here's Santa Cruz Nissan.

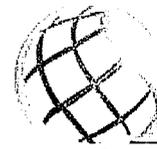
12 Under any measure, this dealer does not
13 perform. There is no standard that we can apply that
14 will show that the dealer performs at an adequate
15 level. And so for the judge to reject west region is
16 simply too large, it doesn't matter. Nissan has now
17 gone to a state standard. It's even higher than the
18 region.

19 MR. STEVENS: Okay. Mr. Sanchez --

20 MR. SANCHEZ: Yes.

21 MR. STEVENS: I think we're --

22 MR. SANCHEZ: Okay. I would only ask that the
23 Board allow Nissan to fix this problem and not to
24 sanction a dealer that's no longer serving the public.
25 Thank you.

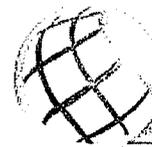


1 MR. STEVENS: Mr. Hughes.

2 MR. HUGHES: Thank you, Mr. Stevens, and I
3 would like to reserve five minutes of my time at the
4 end. The proposed decision is a well-reasoned
5 decision. It's a well-balanced decision. It is
6 evidenced by the finding, that the judge didn't just go
7 completely protestant's way. She criticized protestant
8 at times for different areas, and she weighed and
9 balanced these factors, and her ultimate decision is
10 the right decision, and it's amply cite to the record,
11 there is ample support for this decision. And the
12 thrust of this decision is that Nissan is seeking to
13 terminate protestant's 40-year permanent investment for
14 one issue and one issue alone, and that is poor sales
15 performance.

16 The only problem is the measurement of the
17 sales performance is deeply flawed. The RSE analysis
18 in and of itself has got a number of issues. When you
19 apply it to this market, it's absolutely unreasonable
20 for the different local conditions that the judge has
21 pointed out and supported by the evidence in the
22 record.

23 MR. STEVENS: So, Mr. Hughes, in plain
24 language, what's going on here? Why are the numbers
25 so -- so low compared to other -- other dealerships,



1 line makes and other Nissan franchises?

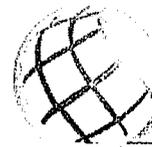
2 MR. HUGHES: Because the Santa Cruz market is
3 a unique market. Let me -- geographically and market
4 preference wise. I mean, it's obvious to see that
5 they're right next to the ocean. They've got a
6 mountain range here separated themselves from a huge
7 amount of population. Mr. Sanchez said maybe if they
8 had a Facebook page, the Silicon Valley folks would
9 drive down the narrow winding mountain road to go
10 buy --

11 MS. DOI: That's not what he was saying.

12 MR. STEVENS: Forget Facebook. Facebook is
13 not the issue. The issue is you've been in business
14 for 40 years and all of a sudden the sales -- the sales
15 are declining. What's going on?

16 MR. HUGHES: It is the RSE that's declining.
17 It's not the sales. As Ms. Doi pointed out, even when
18 sales went up, RSE has gone down. That's a measurement
19 that Nissan uses to measure performance. It's based
20 upon registrations.

21 So if you've got half of the population of
22 Santa Cruz buying their cars in San Jose and
23 registering them in Santa Cruz, all of those
24 registrations create the objective that protestant is
25 supposed to achieve. And there was evidence about the



1 huge amount of insale in this market, and the reason
2 for that is there's a large out commute. People live
3 in Santa Cruz but they drive to work and buy their
4 vehicles outside of the market.

5 There are auto malls, there are high volume
6 dealers. It is a better place to shop than Santa Cruz,
7 and nobody is driving into Santa Cruz to buy.

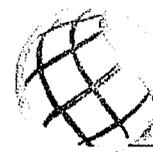
8 MR. STEVENS: What about pure raw sales
9 numbers year to year to year you're declining? What's
10 going on with that?

11 MR. HUGHES: I don't know that that's the
12 case.

13 MR. STEVENS: Is that not the case?

14 MR. HUGHES: I believe the raw sales numbers
15 are turning upwards. And another reason for -- the
16 difference between brand performance in this market is
17 that this is a green market. People like hybrids, they
18 like electrics, they like clean diesels. Nissan
19 doesn't have a hybrid. Toyota Prius is probably the
20 most popular vehicle in the market.

21 Honda has got a lot of fuel efficient
22 vehicles. They also have a number of hybrids. Nissan
23 doesn't have a Hybrid. They have a LEAF. It does
24 incredibly well in this market because of that
25 preference, but that's all they have. And the LEAF has



1 limitations. Ms. Doi, do you have a question?

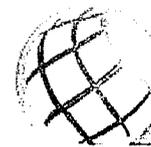
2 MS. DOI: I was going to ask. The in-sale
3 issue, why isn't that the same for Honda?

4 MR. HUGHES: It is. It is.

5 MS. DOI: But Honda -- I guess my question is,
6 does the protestant feel like it has been
7 underperforming, and is it dedicated to improving the
8 performance in the areas that were being discussed, or
9 does it feel like they've done everything, and they
10 don't need to do anything more.

11 MR. HUGHES: No. They realize from being in
12 this hearing that there is room for improvement. And
13 they have been -- the records shows that Mr. Courtright
14 has implemented every suggestion that has come along.
15 And they have now engaged in Spanish media. They had
16 at the time of the hearing. That's in the record.
17 They're waiting to see what kind of dividends that
18 pays. And that is an area of the market that
19 admittedly there should have been more focus on. There
20 is now. And hopefully that will pay dividends.

21 But there are things the dealership is
22 continuing to do and hopes to do. There's also
23 evidence in the record. It wasn't a mere mention.
24 There are actual plans to open the dealership for
25 Saturday service. In fact, it is open for service on



1 Saturdays now.

2 MR. BROOKS: Here's my challenge. It sounds
3 like you guys are on a slope rope and not growing fast
4 based on what the market is. It's good to hear that
5 you're implementing some of your, you know, marketing
6 strategies, but it sounds like you're implementing
7 under a gun, and it's five years too late.

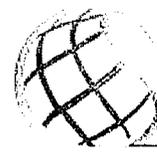
8 I mean, why wasn't -- if the real issue is
9 outreach -- I don't know that to be the issue. If the
10 real issue is outreach, why wasn't it done before,
11 because you have a responsibility to Nissan also.

12 MR. HUGHES: That's right, Mr. Brooks. And
13 you talked about the economic decline, and that's part
14 of it. The dealership wasn't profitable for a number
15 of years, and as soon as they returned to
16 profitability, they started making those investments
17 and revamping the internet department, increasing
18 advertising expenditures.

19 MR. BROOKS: And what year was this?

20 MR. HUGHES: 2000- -- I believe 2010 was the
21 first year they were profitable.

22 MR. BROOKS: No, the question isn't what year
23 profitable. What year did you start changing the
24 market plan to meet the new demands of the 21st
25 century?



1 MR. HUGHES: I believe 2010-2011, once it
2 became profitable. They started gearing up and
3 investing and trying to find out what they could do to
4 get the numbers up.

5 MR. BROOKS: What were those investments?

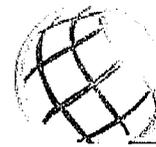
6 MR. HUGHES: There was substantial investment
7 in the Internet department. Additional staff was
8 hired. They enrolled -- completely redid their Nissan
9 website. They signed up for Cobalt. They added the
10 Cobalt reputation management program. Added additional
11 sales rep to make sure all the leads were answered
12 quickly.

13 They have one of the fastest response times in
14 the area in the region by any standard you measure.
15 They are manning the Internet department nonstop and
16 getting back to these customers very quickly. And
17 that's helping to drive some sales, but there are some
18 limitations in the market.

19 They've added E-mailed marketing company where
20 they regularly E-mail the customers. They changed to a
21 new CRM tool that's a customer relations management.

22 MR. COURTRIGHT: Yeah.

23 MR. HUGHES: They've added the Nissan lead
24 purchase program. They've hired -- they're signed up
25 for a number of third party lead dividers. I mean,



1 they're doing -- they're doing a lot, and they continue
2 to do more and more.

3 They regularly work with Cobalt to find ways
4 to maximize their internet efficiency and their
5 marketing and their sales efficiency.

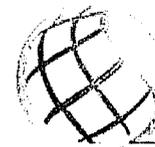
6 They've hired Spanish speaking sales staff.
7 Sales manager. They're advertising in Spanish radio,
8 TV. You know, all of these things will continue to pay
9 dividends, but there are limitations in this market.
10 And the measurement that Nissan is using is
11 unreasonable to actually measure the results of these
12 efforts, and I think that's the thrust of the decision.

13 MR. STEVENS: Okay.

14 MR. HUGHES: I just wanted to respond to a
15 few --

16 MR. STEVENS: When you have a few minutes you
17 can save those comments.

18 MR. HUGHES: Okay. I just wanted to answer a
19 few of Mr. Sanchez's comments if I might. This
20 argument that the dealership is missing out on a third
21 of the sales that it should make, it really rises and
22 falls with whether or not RSE is a reasonable standard,
23 which it's not. This market is unique in a number of
24 ways, which the decision and the record is replete with
25 examples of. So that argument really fails. You know,



1 same with the claim that this dealer is the worst in
2 the state and region. That's when you're applying a
3 fraud measure of performance.

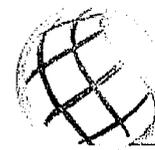
4 You know, the 32 percent number that we've
5 heard repeatedly, that's after they changed the PMA.
6 That's after they expanded. And Nissan claims that
7 this was just, you know, God, that's just the way it
8 works out with the new census data, but they had a
9 certain amount of discretion. They chose not to
10 exercise that discretion.

11 The dealer to the south -- I believe it's
12 Salinas MY Nissan. They have traditionally captured
13 the majority of those sales in that area. That's a
14 pretty good indication that that's where customers are
15 shopping in that area, ought to -- should have remained
16 assigned to that dealership.

17 MR. STEVENS: Do you feel your dealership is
18 being treated fairly by Nissan or being singled out for
19 some reason?

20 MR. HUGHES: I can tell you exactly why
21 they're being single -- yes, we do feel like they're
22 being singled out.

23 This is a page from the market study. There
24 were a number of market studies. There was a desktop
25 market study done in nine or ten, and then there was a



1 formal study that was completed in 2013. Here's a
2 recommendation. You need to relocate close to Toyota
3 and Honda, and you need to provide an exclusive Nissan
4 facility, and you need to build us a brand new N rated
5 compliant facility.

6 Those are the results of two studies Nissan
7 did that said why is there a shortfall in this market,
8 and those are the three recommendations that they came
9 up with to address the shortfall.

10 MR. STEVENS: But they're not asking nor did
11 they -- I didn't see anything in the record that that
12 was a reason why they wanted to terminate the
13 franchise.

14 MR. HUGHES: Well, there is a reason for that,
15 because that would be illegal.

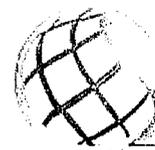
16 MR. STEVENS: True. But it's -- you're
17 saying -- okay. Well I did ask the question.

18 MR. HUGHES: Anyway.

19 MS. DOI: Do you agree with what Mr. Sanchez
20 said that under the old PMA versus a new PMA there's
21 only about a six percent difference in the -- you know.

22 MR. BROOKS: 32 to 38 percent.

23 MR. HUGHES: I don't recall it being that
24 slight. I think it's more significant than that. I
25 would have to go back and look at the records.



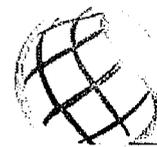
1 MS. DOI: But you object to the RSE. You
2 don't think that standard should be applied at all for
3 some reason?

4 MR. HUGHES: Well, as our expert testified
5 it's a good jumping off place. It's a good place to
6 start, especially if you're talking about terminating
7 the dealer. You've got to look at the local conditions
8 of the market to find out if there's anything else
9 going on there.

10 This is a unique market in a number of ways
11 which the proposed decision points out time and time
12 again in which the record is replete with examples.
13 Our expert did that analysis. If you take this into
14 account and this factor into account, you start
15 whittling away at this RSE measurement, and it shows
16 that the dealer is performing, as, you know, maybe
17 missing some sales but a heck of a lot closer to
18 average.

19 Nissan's expert, when confronted with our
20 expert's analysis, taking into account these global
21 conditions, testified that he found nothing to rebut.
22 He didn't do a rebuttal report. He didn't have any
23 answers, and he didn't try.

24 MR. BROOKS: Here's what I'm having a tough
25 time, and the reason I'm asking the question is for



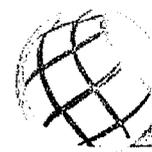
1 clarification. The other two dealerships in the area
2 are growing at a faster pace than Nissan is. Your
3 response to that was, well, Nissan doesn't have the
4 hybrids that, you know, Toyota does. Is that the
5 reason is the product the problem why Nissan is not
6 keeping up with the average with the dealers?

7 MR. HUGHES: Part of it is product. Part of
8 it is just location. These other two dealers are
9 exclusive. They're closer to the freeway. They've got
10 a much better location, and they've got more diverse
11 product lines. I don't know that there was a whole lot
12 of evidence about these year over year growth, but
13 these are higher volume franchises. And as the economy
14 improves and sales go up, they're going to increase,
15 you know.

16 MR. BROOKS: Shouldn't they increase at the
17 same percentage at the same pace?

18 MR. HUGHES: Well, I think that there are
19 factors that work against that. One is location that I
20 just talked about. The other is that they've got
21 hybrids, and they've got more fuel efficient vehicles,
22 and they've got a wider variety of product. So they
23 are more competitive, especially in this market.

24 MR. BROOKS: Not to beat a dead horse, maybe
25 I'm asking the question in the wrong manner. You have



1 a 40-year history. You can track by how companies
2 grow. You know, Toyota might have 20 percent more
3 sales or revenue because of the product, but you'll
4 still grow at the same pace, whatever that is, you
5 know, over 40 years.

6 What I read -- maybe I read it wrong, is from
7 2005 to 2011, you grew significantly a lower pace than
8 your competitors.

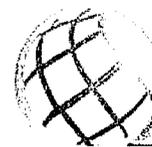
9 MR. HUGHES: And that's based upon the RSE
10 measurement?

11 MR. BROOKS: Based on percentage.

12 MR. HUGHES: Well, if you're looking at raw
13 sales. RSE is not indicative of raw sales. It's a
14 whole different formulation with competitive
15 registration. And every time a hybrid is sold, we're
16 expected to sell a certain number of vehicles in
17 response to the hybrid being sold even though we don't
18 sell one. That's part of it.

19 But the Toyota dealership in this market,
20 they're not 100 percent effective. If you apply the
21 RSE formula to the Toyota dealership, they're at like
22 70 percent. So that tells you that there is something
23 going on in this market.

24 It's an anomaly, the fact that the Honda
25 store, which is the newest facility, and probably the



1 nicest facility in the market, exclusive, it's on the
2 freeway, it greatly exceeds Toyota sales, which is
3 rare.

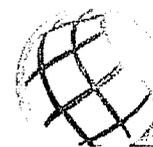
4 Toyota is the top brand in California. And to
5 see a Toyota -- or a Honda dealership, you know, eating
6 Toyota's lunch is a very rare thing to see. It's an
7 indication of uniqueness in the market.

8 MS. DOI: RSE score is that just Nissan versus
9 Nissan or all dealers in the state or region whatever
10 you're talking about? It's Nissan versus Nissan right?

11 MR. HUGHES: That's right to a certain extent.
12 Nissan determines what vehicles compete with its
13 products, and for every one of those that's sold, they
14 assign a certain percentage of those registrations and
15 say this dealer in that area ought to achieve the same
16 percentage of these competitive registrations that it
17 does across the region, which we have a board here, you
18 can see how large it is.

19 And it's also -- not only is the region large,
20 but all of the markets within the region are distinct
21 and different and unique.

22 Some have open points that reduce their
23 responsibility that they're compared to. Some don't
24 have Toyota and Honda dealerships right down the
25 street. Some are on the freeway, some are off the



1 freeway. I mean, there's a whole variety of
2 differences that aren't accounted for by RSE. And
3 that's the west region, and the green areas you can see
4 are the different Nissan markets where registrations and
5 sales are being calculated.

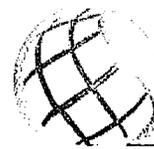
6 We think this termination is really about --
7 we want an exclusive facility, and we understand you
8 own your property, and you're paying it off, and you
9 built the building, and you're probably not going to
10 want to go build us another one, so the solution is
11 let's terminate them and find somebody who will.

12 MR. STEVENS: All right. Respondent.

13 MR. SANCHEZ: Yes. RSE or regional
14 effectiveness, we looked at the old board decisions,
15 and there are at least 12 that we could find that apply
16 either west region or ten western states or a
17 similar -- a similar number, a similar comparison.
18 This decision is a radical departure for the board from
19 a measurement that has been accepted for decades at
20 this board.

21 The only reason that I can see that it was
22 espoused by the AL J was this new and inapplicable
23 statute that went into effect January 1, 2014.

24 Other than that, the board has accepted -- has
25 accepted regional sales effectiveness.



1 MR. HUGHES: I'm sorry. I have to belatedly
2 object. This is not in the record.

3 MR. SANCHEZ: This is argument. You argued
4 that the statute applies.

5 MR. HUGHES: These decisions are not precedent
6 unless they are designated by the Board, and there are
7 no Board decisions that have been designated as
8 accepted.

9 MR. SANCHEZ: I never said they were. I just
10 said the Board has always accepted --

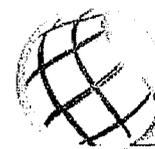
11 MR. STEVENS: I'm taking it as argument. So,
12 you know, it's -- I don't take it as something in the
13 record except the applicability or inapplicability of
14 the statute.

15 MR. SANCHEZ: And that was argued.

16 MR. STEVENS: That may or may not be something
17 we consider. We don't know.

18 MR. SANCHEZ: The statement was made that MY
19 Nissan in Salinas had the Watsonville census tracts
20 before. That is not true. And that is an error in the
21 decision, flat out wrong facts. Gilroy Nissan had the
22 census tracts prior, not Salinas.

23 So as Mr. Courtright testified Santa Cruz
24 Nissan could have always sold in Watsonville and simply
25 chose not to even before this incident.



1 MR. STEVENS: Which fact was that?

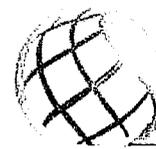
2 MR. SANCHEZ: I'm not sure of the number. It
3 was a fact that states that MY Nissan in Salinas had
4 the census tract that were in Watsonville that was
5 reassigned to Santa Cruz Nissan. That's not true. The
6 evidence in the record is that Gilroy Nissan had those
7 census tracts not Salinas.

8 Several Board members asked what's going on
9 here? What happened? I can tell you there was some
10 very telling testimony. Around the first of the year,
11 this dealership sets goals for its salespeople to make
12 sales for the entire year. In fact, Mr. Courtright
13 testified they're written on a white board just like
14 the one behind you in the sales office of the
15 dealership.

16 I asked him specifically:

17 "So you did that in January 2012 when the
18 notice of termination came out. In March
19 of 2012, did you go back and did you
20 revise? Did you erase that whiteboard and
21 say, 'We've got to sell more Nissans
22 because now they're trying to terminate
23 us.'

24 "Answer, no, it was already on the
25 whiteboard, and I wasn't going to change



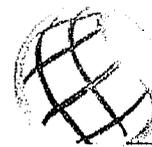
1 it."

2 So no salesperson is tasked with selling
3 Nissans at this dealership. They can make sales
4 objectives by selling Volkswagens, by selling Dodges,
5 by selling Rams. Even when the notice of termination
6 came out, he did not revise that sales goal upwards --
7 I'm sorry, notice of default. Even when that notice of
8 default indicating that there was a breach of the
9 agreement, and if you don't improve we're going to
10 terminate you, he did not revise that.

11 So it's business as usual at this dealership.
12 Mr. Brooks, you asked when did all these changes come
13 about? I'll tell you when they came about. They hired
14 their first Hispanic salesperson in October 2013. They
15 hadn't had one for five years prior to that. They
16 started advertising in Spanish in February 2014 in the
17 middle of this hearing. We had part in January and
18 early February and part of March. Right in between is
19 when they started advertising in Spanish. It's way too
20 little too late.

21 MR. STEVENS: Well, I don't know that there
22 really is ever too late when you're taking away a
23 franchise, that is.

24 MR. SANCHEZ: I'm saying too late for us to
25 measure and say that had any effect. We've been



1 advising this dealer to do these things for years. As
2 their sales declined, we've been saying, "Hey, you've
3 got to do something. How about looking into the
4 Hispanic market. How about hiring additional sales
5 people?"

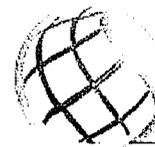
6 Mr. Hughes argues there was additional staff
7 hired. We actually went through the salesperson totals
8 with Mr. Courtright year by year and showed that in
9 2007 there were five salespeople, in 2012 there were
10 five salespeople for the entire dealership. No change.

11 MR. STEVENS: Mr. Sanchez.

12 MR. SANCHEZ: Basically -- all right. Well, I
13 guess that's where I have to leave it, but last
14 statement I'll make, the raw sales, the dealership at
15 one time sold 350 or so Nissans. It's now under 200 --
16 just went back up over 200, but it's not nearly back
17 where it was originally. Thank you.

18 MR. STEVENS: You had a few minutes left.

19 MR. HUGHES: Thank you, Mr. Stevens. As far
20 as not assigning a sales goal to staff to sell Nissans,
21 Mr. Courtright testified that he changed the pay plans,
22 so his sales staff makes higher commission off selling
23 Nissan. They are incentivised to sell a Nissan over
24 any other vehicle that they sell, sales goal or no
25 sales goal.



1 They have always advertised in the Watsonville
2 area. There is a high population of Hispanics there,
3 but guess what, some of them speak English, and some of
4 them are bilingual, and some of them come in and buy
5 vehicles at the dealership.

6 MR. SANCHEZ: I'm going to object there was no
7 evidence of this at all in the record.

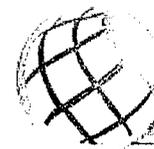
8 MR. HUGHES: I think there was by
9 Mr. Courtright's testimony. It's not a major point,
10 but it is certain that Mr. Courtright testified that
11 they've always advertised in the Watsonville area.

12 MS. DOI: What was your evidence as to why
13 they didn't ever advertise in Spanish or have Spanish
14 speaking salespeople?

15 MR. HUGHES: It's difficult to hire staff, and
16 they had been -- they did not want to advertise in
17 Spanish initially, because they didn't have Spanish
18 sales staff. You can't just go out and find one. It's
19 difficult to find them in this market. You have to be
20 licensed, you have to be bonded, and --

21 MS. DOI: So what's the evidence as to the
22 first time they attempted to find somebody?

23 MR. HUGHES: I don't know that there was
24 evidence of when they first attempted to hire a Spanish
25 speaking salesperson.



1 MR. BROOKS: Here's the challenge here also.
2 I'm not sure anywhere in the record that -- there's
3 nothing indicated in the record that you hired someone
4 who's Spanish speaking sales would go up. I don't know
5 that to be a fact of the case. You know, first look at
6 it, it might be. I think it would be dumb not to
7 personally, but, you know, reviewing the record, there
8 might have been a host of all other factors. You know,
9 you focus this whole hearing on they didn't hire
10 someone that spoke Spanish. I'm not quite sure that
11 was the main factor.

12 MS. DOI: I'm not sure that was the whole
13 focus of the hearing.

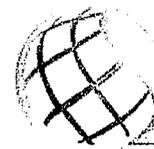
14 MR. HUGHES: It was a major point in Nissan's
15 case. And to the extent there's some merit to it, this
16 dealership has taken corrective action, and we'll see
17 what happens.

18 MR. STEVENS: All right. No other questions
19 from the Board. Then we're going to go into closed
20 executive sessions to deliberate this matter, and we'll
21 let you know when we're -- when we've reached a
22 decision.

23 Okay. We can go off the record.

24 (Closed session from 12:33 p.m. to 1:04 p.m.)

25 MR. STEVENS: Okay. We're all here, and we're



1 back on the record. Robin will announce the decision
2 of the Board.

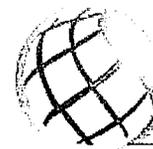
3 MS. PARKER: Yes, I do. In the matter of
4 Santa Cruz Nissan, Inc., dba Santa Cruz Nissan versus
5 Nissan North America, Inc., protest number PR-2358-13.
6 The Board by three votes decided to remand the proposed
7 decision to the ALJ to impose conditions on the dealer
8 with a time frame and encourages the parties to set a
9 settlement conference to see if this matter can be
10 settled.

11 One board member, Ms. Doi concurred with the
12 majority, but wants the ALJ to address whether Vehicle
13 Code Section 11713.13 subdivision (G)1(B) was applied
14 even though the effective date wasn't until January 1st
15 of 2014. And Mr. Lizárraga is opposed to the proposed
16 decision. Any questions?

17 MR. BROOKS: Just make a comment.

18 MR. PARKER: Yes.

19 MR. BROOKS: Santa Cruz Nissan we had
20 deliberation back here. I won't disclose what we said.
21 But it was almost, I felt, personally almost
22 malpractice in how you run your business in terms of
23 Nissan. We're in the 21st century right now. It
24 doesn't seem like you have a marketing plan. It only
25 seemed to me that you guys started to change when there



1 was pressure on you to change. I think this decision
2 is a fair one. I think this decision will give you
3 hopefully the opportunity in time to create your own
4 marketing plan, your own outreach plan for whatever
5 segment you may choose. I don't think it's in my
6 position to do that. But I also encourage you guys to
7 sit down and find some sort of settlement. I think
8 that would be in the best interest of both parties.
9 Those are just my personal feelings. And with that,
10 also thank you for coming today to provide your
11 testimony. You have two or three product lines are
12 great, great facility, and I commend you for that.

13 MR. HUGHES: I'm sorry. May I ask a question.
14 The remand is to place conditions on the dealer with a
15 time frame? Is there going to be more -- is there more
16 detail than that? I mean --

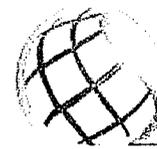
17 MS. PARKER: Not right now. The decision is
18 to -- it's going to be -- I guess I should have said
19 it's going to be conditionally sustained.

20 MR. STEVENS: It's going to be conditionally
21 sustained.

22 MS. PARKER: Conditionally sustained.

23 MR. STEVENS: You're going to have to hit
24 certain condition marks that the ALJ is going to set.

25 MR. HUGHES: Okay.



1 MR. PARKER: And once we get back to the
2 office, we'll work up the Board's remand back to the
3 ALJ, and then that will go to the parties, and then
4 we'll set a conference call with the judge to work out
5 if she wants any briefing or additional evidence. And
6 like we said with regards to the motion, you're
7 encouraged to set a settlement conference with one of
8 the Board's ALJs and perhaps iron out your own
9 conditions in a stipulated decision and order with the
10 Board retaining jurisdiction.

11 MR. FLANAGAN: To conditionally sustained
12 provided the dealership meets whatever the conditions
13 are that ALJ comes up with.

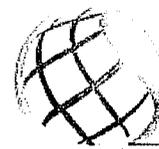
14 MS. PARKER: Well, again, we don't know that
15 yet, because the ALJ may come up on her own or she may
16 want briefing from the parties.

17 MR. SANCHEZ: Does that converse mean whatever
18 conditions are not met then it will be overruled?

19 MR. PARKER: Well, we haven't gotten that far
20 yet. Those are all questions we need to raise with the
21 judge when we have the conference call.

22 MR. STEVENS: Okay. And with that the meeting
23 is adjourned.

24 (Whereupon, the proceeding
25 was adjourned at 1:08 p.m.)



REPORTER'S CERTIFICATE

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I, KIMBERLY R. HENDERSHOTT, do hereby certify:

That said proceedings were taken before me at said time and place, and were taken down in shorthand by me, a Certified Shorthand Reporter of the State of California, and were thereafter transcribed into typewriting, and that the foregoing transcript constitutes a full, true, and correct report of said proceedings which took place;

IN WITNESS WHEREOF, I have hereunder subscribed my hand this 16th day of July, 2014.

Kimberly R. Hendershott



KIMBERLY R. HENDERSHOTT, RPR, CSR No. 12552



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September 5, 2014

VIA E-MAIL AND CERTIFIED MAIL

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

Dear Counsel:

Enclosed is a copy of the Proposed Decision Following Board's Order Sustaining the Protest and Remanding the Matter of the New Motor Vehicle Board relevant to the above-mentioned matter.

If you have any questions or require additional information, please do not hesitate to contact me at (916) 445-1888.

Sincerely,

NEW MOTOR VEHICLE BOARD

A handwritten signature in black ink, appearing to read 'Robin P. Parker'.

Robin P. Parker
Senior Staff Counsel

Enclosure: as stated

Jean Shiimoto, Director, DMV
Wesley Goo, Deputy Director,
Occupational Licensing, DMV

Exhibit E

1 NEW MOTOR VEHICLE BOARD
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2 Sacramento, California 95811
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6 STATE OF CALIFORNIA
7 NEW MOTOR VEHICLE BOARD
8

9 In the Matter of the Protest of

10 SANTA CRUZ NISSAN, INC., dba SANTA
11 CRUZ NISSAN,

Protestant,

12 v.

13 NISSAN NORTH AMERICA, INC.,
14

Respondent.
15
16

Protest No. PR-2358-13

**PROPOSED DECISION FOLLOWING
BOARD'S ORDER SUSTAINING THE
PROTEST AND REMANDING THE
MATTER**

17 **BOARD ORDER REMANDING THE MATTER AND SUSTAINING THE PROTEST**

18 1. At the July 15, 2014, Special Meeting, the Public Members of the New Motor Vehicle
19 Board ("Board") considered the administrative record and Proposed Decision dated July 3, 2014. After
20 such consideration, the Board by Order dated July 17, 2014, conditionally sustained Protest No.
21 PR-2358-13 and remanded the matter to Administrative Law Judge Diana Woodward Hagle ("ALJ
22 Woodward Hagle"). (Order Conditionally Sustaining the Protest and Remanding the Matter, p. 2)

23 2. The Board ordered ALJ Woodward Hagle to "recommend conditions for the Board to
24 impose consistent with [Vehicle Code¹] Section 3067 and establish a time frame for Protestant to comply
25 with those conditions. The ALJ shall have discretion, if deemed necessary, to order additional evidence,
26 briefing, and/or arguments." (Order Conditionally Sustaining the Protest and Remanding the Matter, p.

27 _____
28 ¹ Hereinafter, unless otherwise indicated, all section references are to the Vehicle Code.

PROPOSED DECISION FOLLOWING BOARD'S ORDER SUSTAINING THE PROTEST
AND REMANDING THE MATTER

Exhibit E

1 2)

2 3. The Board's Order also "strongly encouraged" the parties "to engage in settlement
3 discussions and set a Mandatory Settlement Conference with a Board appointed ALJ". (Order
4 Conditionally Sustaining the Protest and Remanding the Matter, p. 2)

5 **SUMMARY OF ACTIONS TAKEN FOLLOWING REMAND**

6 4. ALJ Woodward Hagle issued a Notice setting a Mandatory Settlement Conference
7 ("MSC") for August 19, 2014, before ALJ Wong. The parties were also ordered to submit proposed
8 conditions to ALJ Wong by August 13, 2014. If the matter did not settle at the MSC, the parties'
9 proposed conditions were to be provided to ALJ Woodward Hagle. The matter did not settle at the
10 MSC; however ALJ Wong retained jurisdiction to reconvene the MSC, should the parties so request.

11 5. ALJ Woodward Hagle also issued an "Order Regarding Matters Pertaining to the
12 Remand", which set August 26, 2014, for a telephonic hearing on the conditions, and stated the
13 following: "Additional Evidence: There will be no additional evidence and the record will not be
14 reopened".

15 6. The telephonic hearing on the conditions was held on August 26, 2014. This was not a
16 hearing in the usual sense, but rather an opportunity for the parties to suggest conditions regarding the
17 Board's order of remand.

18 **RECOMMENDED CONDITIONS²**

19 7. Although respondent has not sustained its burden of proof under Section 3061 to establish
20 good cause to terminate the Nissan franchise of Santa Cruz Nissan, respondent has nonetheless presented
21 evidence sufficient to justify a final decision imposing conditions pursuant to Section 3067(a).

22 8. Section 3067(a) provides that "[c]onditions imposed by the board [on a decision] shall be
23 for the purpose of assuring performance of binding contractual agreements between franchisees and
24 franchisors or otherwise serving the purposes of this article...".

25 9. The Recommended Conditions are:

26 ///

27
28 ² The Proposed Decision dated July 3, 2014, as Attachment 1, is incorporated into this decision as though set forth at length herein.

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

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

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

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

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

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

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

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

23 (2) No less frequently than quarterly, Nissan shall calculate the average percentage
24 increase (or decrease) in number of sales of new Nissan vehicles of the 10 dealers in District 8

25
26 ³ The percentage was agreed to by the parties during the August 26th telephonic hearing.

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

28 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).

1 other than protestant and transmit the calculation to protestant.

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

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

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

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

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

12 **AMENDMENTS TO THE PROPOSED DECISION DATED JULY 3, 2014**

13 10. Footnote 10 on page 14 of the Proposed Decision dated July 14, 2014, is amended nunc
14 pro tunc to read as follows:

15 Vehicle Code section 11713.13(g), which became effective January 1, 2014, has no
16 application to this protest, as the statute has no retroactive effect. It deals with a
17 manufacturer's "...performance standard, sales objective, or program for measuring a
18 dealer's sales... performance..." and, among other things, requires the manufacturer to
19 respond to a dealer's request by "...provid[ing] a written summary of the methodology
20 and data used in establishing the performance standard, [etc.]" Here, the lack of clarity in
21 the data would presumably be the sort of information a manufacturer would disclose
22 about its "methodology and data" and "application" of a "performance standard" [Section
23 11713.13(g)(1)(B)].

24 11. Two citations clarify that the evidence supports the finding that Watsonville was part of
25 the PMA of My Nissan prior to its reassignment to protestant. In paragraph 106, line 12, after the
26 sentence ending "...My Nissan's PMA." The citation (Exh 200E:4741, 4742; IV:79:14-80:14) was
27 added as indicated below:

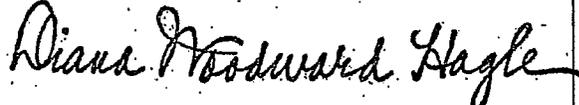
28 "106. Presumably, the new area in SCN's PMA---12 census tracts including Watsonville, the
county's second largest city---was not previously "unassigned" territory. The two closest dealers to
Watsonville are My Nissan in Salinas and Gilroy Nissan in Gilroy; however, it appears that Watsonville
was previously in My Nissan's PMA. (Exh 200E:4741, 4742; IV:79:14-80:14) Not only does My
Nissan, a successful dealer, have a concentration of sales into the Watsonville area, its 2012 RSE soared

1 (from 113.4% at year-end 2011 to 160.6% at year-end 2012), a mirror image of SCN's decline (51.6% at
2 year-end 2011 to 32.0% at year-end 2012). (Exhs 200A:4696, 4697; 200B:4714; 200C:4716)"

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I hereby submit the foregoing which constitutes my Proposed Decision Following Board's Order Sustaining the Protest and Remanding the Matter in Protest No. PR-2358-13, as the result of a hearings before me, and I recommend this Proposed Decision be adopted as the Decision of the New Motor Vehicle Board.

DATED: September 5, 2014



By: _____
DIANA WOODWARD HAGLE
Administrative Law Judge

Attachment
Jean Shiimoto, Director, DMV
Wesley Goo, Deputy Director,
Licensing Operations Division, DMV

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Protest No. PR-2358-13

PROPOSED DECISION

16
17 **PROCEDURAL BACKGROUND**

18 **Statement of the Case**

- 19
- 20 1. By letter dated January 14, 2013, Nissan North America, Inc. gave notice to Santa Cruz
21 Nissan, Inc. pursuant to California Vehicle Code section 3060¹ of its intention to terminate the
22 dealership's Nissan franchise.
- 23 2. The New Motor Vehicle Board (hereinafter, sometimes "Board") received the notice on
24 January 16, 2013.
- 25 3. On January 22, 2013, Santa Cruz Nissan filed a timely protest.
- 26 4. A hearing on the merits of Protest No. PR-2358-13 was held January 27 through 31, 2014;
27

28 ¹ Hereinafter, unless otherwise indicated all section references are to the Vehicle Code.

PROPOSED DECISION

Exhibit E

ATTACHMENT 1

1 February 3 through 7, 2014; and March 6 and 7, 2014, before Administrative Law Judge Diana
2 Woodward Hagle.

3 5. The matter was submitted on June 3, 2014.

4 **Parties and Counsel**

5 6. Protestant Santa Cruz Nissan, Inc. dba Santa Cruz Nissan (herein "SCN", "Santa Cruz
6 Nissan" or "Protestant") is a Nissan dealership located at 1616 Soquel Avenue in Santa Cruz, California.
7 Protestant is a "franchisee" within the meaning of sections 331.1 and 3060(a)(1)(A).

8 7. Protestant is represented by the Law Offices of Michael J. Flanagan, by Michael J.
9 Flanagan, Esquire; Gavin M. Hughes, Esquire; and Danielle R. Vare, Esquire, 2277 Fair Oaks Boulevard,
10 Suite 450, Sacramento, California.

11 8. Respondent Nissan North America, Inc. (herein "Nissan" or "Respondent") is a
12 "franchisor" within the meaning of sections 331.2 and 3060(a)(1)(A).

13 9. Respondent is represented by Baker & Hostetler LLP, by Maurice Sanchez, Esquire, and
14 Lisa M. Gibson, Esquire, 600 Anton Boulevard, Suite 900, Costa Mesa, California.

15 **IDENTIFICATION OF WITNESSES**

16 **Protestant's Witnesses**

17 10. Ernest L. "Lee" Courtright (Dealer Principal of Santa Cruz Nissan) testified to the
18 dealership's ownership and history, a description of the facilities, and the adverse effect on protestant's
19 business if the Nissan franchise is terminated.²

20 11. James Courtright (Executive Manager of Santa Cruz Nissan) testified about the day-to-day
21 operation of the dealership, the actions taken to improve Nissan vehicle sales, and the dealership's
22 involvement in charitable and community activities.

23 12. Martin Bernal, City Manager of Santa Cruz, testified about the characteristics of the city
24 and the county of Santa Cruz, the contributions of Santa Cruz Nissan to community activities and to the
25 city's tax revenues. In his opinion, there would be a significant adverse fiscal impact on those revenues if
26 SCN's Nissan franchise is terminated.

27 _____
28 ² References herein to Roman Numerals are to the transcripts of the proceedings.

Respondent's Witnesses

1
2 13. The following witnesses were employees, or former employees, of Nissan. Their
3 testimony covered the organization and products of the company; duties of Nissan personnel; assessments
4 of the sales performance of Santa Cruz Nissan and communications with the dealership; Nissan's method
5 of evaluating the sales performances of its dealers and its brand popularity; the procedures which Nissan
6 follows with dealers it considers underperforming; and the decision to issue a Notice of Termination to
7 SCN.

8 A. A Nissan "Dealer Operations Manager" (DOM) is the primary contact between a dealer
9 and Nissan. The DOM's responsibility is dealer support and communication to dealers of Nissan policies,
10 programs, and procedures with the goal of boosting sales. After each contact, DOM's prepare "Contact
11 Reports", which are not given to dealers.

12 (1) Eric Lewin testified that, as Santa Cruz Nissan's DOM from April of 2009 to June of 2011,
13 he visited SCN every 30 to 60 days, and was in regular telephone or email contact with the dealership.
14 SCN's sales performance was an issue during his tenure. In his opinion, SCN's failure to improve sales
15 performance was due to an insufficient level of resources to accomplish the task, no sense of urgency to
16 change the situation, and no one in charge capable of executing plans for improvement.

17 (2) Tina Novoa, the DOM for SCN from June of 2011 to September of 2012, testified that she
18 contacted the dealership, either personally or on the phone, at least once a month (and she knew the
19 Courtright's, having called on them when she worked for Volkswagen). She was aware of Nissan's
20 concern about SCN's sales performance. In Ms. Novoa's opinion, James Courtright wanted to be a good
21 manager, but lacked the ability to successfully execute plans for improvement.

22 (3) John Gardner, the current DOM, assumed his position in October of 2012, shortly after the
23 180-day Notice of Default under which SCN was operating expired and Nissan had extended the Notice
24 of Default for 60 days. He testified that he visited SCN four times and had contact with the dealership at
25 least monthly via phone and email. His last visit to the dealership was on June 28, 2013, when he alerted
26 James Courtright that Nissan had replaced its "West Region" (RSE) standard with a "State Sales
27 Effectiveness" (SSER) standard. He testified that he continued email and phone contacts with SCN until
28 December of 2013.

1 B. Gary Inman is a Fixed Operations Manager (FOM) for Nissan, responsible for covering the
2 area which includes the Santa Cruz market. He works with dealers to grow their service business by
3 satisfying and retaining customers, thereby promoting the sale of Nissan's parts and accessories. He
4 testified that in the past four years, he has called on Santa Cruz Nissan "maybe once or twice a quarter",
5 dealing mainly with the Service and Parts Managers, and occasionally with James Courtright. He also has
6 email communications with the dealership. In his opinion, a definite correlation exists between service
7 and sales---retaining service customers leads to loyalty, repeat business and new car sales. He testified
8 that despite his repeated suggestions over the years that SCN's service department stay open on
9 Saturdays, he was unable to convince James Courtright of the value of the idea.

10 C. As Area General Manager (AGM) since 2011, Chad Filiault is familiar with SCN, having
11 visited the dealership "multiple times". He is in charge of monitoring dealers' performances to meet
12 Nissan objectives in three areas: sales operations, service operations and customer loyalty, and he receives
13 and reviews all "Contact Reports" of the four DOM's, the four FOM's, and the one Loyalty Performance
14 Manager (LPM) assigned to him. After the Notice of Default had been issued to SCN, he had approached
15 two prospective buyers for the Nissan franchise but, in his opinion, the Courtright's were not interested in
16 selling. He testified that Nissan needs representation in Santa Cruz, and that Nissan would replace SCN if
17 the franchise was terminated.

18 D. In April of 2010, Eric Rodgers became Regional Vice President (RVP) of "West Region
19 North". He testified that, as the senior Nissan executive in the region, he was responsible for insuring that
20 Nissan's "performance metrics" were achieved. He visited SCN's dealership "about five times" and
21 testified, among other things, about the events leading up to his recommendation to Nissan management
22 to issue a Notice of Termination to SCN.

23 E. Alison Speranzo, a regional Market Representation Specialist for Nissan, described the
24 procedures that Nissan follows before issuing Notices of Default and Notices of Termination. Here, she
25 testified, it was SCN's downward trend in dealer effectiveness beginning in 2006 that prompted the
26 decision to issue a Notice of Default and later, the Notice of Termination.

27 F. Samuel Wright, Manager of Dealer Digital Marketing, described ways in which dealers
28 develop sales via the Internet and related electronic means.

1 14. James Courtright was called as an adverse witness pursuant to Evidence Code section 776.

2 Expert Witnesses

3 15. Protestant's expert witness was Edward Stockton, Vice President, The Fontana Group.
4 (Exhs 21B-23B)³

5 16. In Mr. Stockton's view, Nissan's statistical analyses of the sales performance of Santa
6 Cruz Nissan were significantly flawed.

7 17. Among other things, Mr. Stockton was critical of Nissan's use of the "West Region"---a
8 geographical area encompassing, at least in part, most western U.S. states---as a basis for comparing and
9 evaluating SCN's sales performance. Also, he testified that Nissan ignored or minimized factors which
10 depressed sales for SCN which were outside the control of the dealership, especially considering the
11 unique geographic and demographic characteristics of the Santa Cruz market. (Exh 21B: "Introduction")

12 18. John Frith, Vice President, Urban Science Applications, Inc. (USAI), was respondent's
13 expert witness. USAI is "...a third party vendor company which provides Nissan with analyses of census,
14 sales and registration data, market studies, as well as expert testimony". (Exh 200A-200G, Surrebuttal
15 Report; JtExh 14:7)

16 19. Mr. Frith testified that all vehicle manufacturers have objective standards to calculate and
17 assess the sales effectiveness not only of their franchised dealers, but also the popularity of their brands in
18 the marketplace, and the performances of their competitors. The surveys, standards and processes by
19 which Nissan made these comparisons and calculations to measure its dealers' sales effectiveness was
20 reasonable.

21 20. Using several different approaches in evaluating SCN's sales effectiveness, Mr. Frith
22 concluded that Santa Cruz Nissan was "seriously underperforming" in the market, and had been failing to
23 capture sales opportunities in its Primary Market Area for several years. These "lost [sales]
24 opportunities", he concluded, were due to deficiencies in "dealer operations" which were within the
25 control of the dealer. (Exh 200D:4736; IV:7, 59, 144, 153)

26
27 ³ Exhibits are referenced as "Exh" and joint exhibits as "JtExh". In both exhibits and joint exhibits, page number references
28 will be to the last four digits only. Since most exhibits were marked for identification by the parties prior to the hearing, they
were not offered or introduced in numerical order; also, some pre-marked items may not have been used in the hearing at all, so
there may be numerical gaps in the Exhibit List.

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Deposition Witness

21. Pursuant to stipulation, the parties submitted portions of the deposition testimony of Anne Corrao (Nissan's Director of Customer Quality and Dealer Network Development), who testified to the importance of NREDI facilities and her participation in Nissan's decision to issue a Notice of Termination to Santa Cruz Nissan. (Exhs 26, 241, 242).

POST-HEARING REQUESTS TO RE-OPEN RECORD

22. Respondent's request for official notice of certain 2010 census data was granted. This information provided some population, business and race/ethnic data in the Santa Cruz-Watsonville area, with comparisons to California data. Protestant did not object to the admission of the evidence.

23. The parties' "Joint Glossary of Terms to be Used in Merits Hearing" was received May 22, 2014, and was admitted into evidence.

PRE-HEARING SITE VISIT

24. On January 24, 2014, at the request of the parties, ALJ Woodward Hagle conducted a site visit of protestant's dealership (walk-through of buildings and facilities) and a drive-by of other new and used cars dealerships in the city of Santa Cruz and immediately surrounding areas. Both parties and their counsel were present.

BURDEN OF PROOF

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

26. The standard is "preponderance of the evidence", which is met if the proposition is more likely to be true than not true---i.e., if there is greater than 50 percent chance that the proposition is true.

ISSUE PRESENTED

27. Did respondent Nissan sustain its burden of proof of establishing "good cause" to terminate protestant's Nissan franchise, thereby creating an "open point" allowing it to appoint another Nissan dealer in the Santa Cruz area?

28. In determining whether there is good cause for terminating a franchise, section 3061 requires the Board "...to take into consideration the existing circumstances, including, but not limited to, all of the following:

1 (a) Amount of business transacted by the franchisee, as compared to the business available to the
2 franchisee;

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

5 (c) Permanency of the investment;

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

8 (e) Whether the franchisee has adequate motor vehicle sales and service facilities, equipment,
9 vehicle parts, and qualified service personnel to reasonably provide for the needs of the consumers for the
10 motor vehicles handled by the franchisee and has been and is rendering adequate services to the public.

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

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

14 **PROTESTANT'S CONTENTIONS**

15 29. Santa Cruz Nissan has been a successful family-owned Nissan dealer for over 40 years in
16 the City of Santa Cruz. Santa Cruz Nissan is a sound business operation, with excellent capitalization, a
17 contributor to the community and to the city's tax revenues, all of which (including the dealership itself)
18 would be gone if its Nissan franchise were to be terminated.

19 30. Nissan's analyses and calculations of sales performance are flawed, overstating the sales
20 opportunities for a Nissan dealer in the Santa Cruz market. For example, the representative group of
21 Nissan dealers against which SCN has been compared---the "West Region"---is too large, yielding
22 inaccurate conclusions about SCN's sales performance.

23 31. When Nissan enlarged SCN's Primary Market Area in the late Spring of 2012, data
24 generated from the larger area had the immediate effect of degrading SCN's sales performance statistics.
25 In Nissan's analyses of SCN's 2012 performance, Nissan appeared to have ignored the dealership's more
26 favorable data from the first months of 2012, thereby generating inaccurate effectiveness scores.

27 32. Nissan ignored the unique geographic and demographic characteristics of the Santa Cruz
28 market including, as examples, the isolation of Santa Cruz by mountain ranges and ocean; the substantial

1 net out-flow of workers living in Santa Cruz but commuting to San Jose and the location of SCN's
2 dealership 1.8 miles from the ocean, which reduces the "proximity advantage" for making sales available
3 to other dealerships "ringed" by population centers.

4 33. The termination action is simply a "proxy" for Nissan to replace protestant's dealership.
5 with one with an NREBDI-compliant facility, is exclusive to Nissan, and is clustered with at least one other
6 competitive line-make.

7 **RESPONDENT'S CONTENTIONS**

8 34. Nissan's data analysis is reasonable and necessary to monitor dealer sales performance as
9 well as the popularity of the Nissan brand (and models) against the competition.

10 35. Nissan, like most, if not all, vehicle manufacturers, measures sales penetration of a dealer
11 by comparing its sales against numbers of "competitive set" vehicles sold in the dealer's assigned
12 marketing area. Then, from the data generated, Nissan calculates the dealer's sales performance by
13 comparing it with other Nissan dealers in a geographical region chosen by Nissan.

14 36. Relying on these "performance metrics", Nissan has determined that Santa Cruz Nissan
15 has been underperforming since 2006, when it precipitously dropped in the sales rankings compared to
16 other Nissan dealers. Since that date, SCN's sales performance has been significantly lower than other
17 dealerships. It has placed near the bottom for several years in rankings of other Nissan dealers, both in
18 the "West Region" and in California.

19 37. In the Santa Cruz market, there is substantial business available in the new car market for
20 Nissan vehicles---these are "lost opportunities" which should have been captured by Santa Cruz Nissan.

21 38. Despite marketing suggestions and counseling by Nissan representatives over the last
22 several years, protestant has shown an unwillingness or inability to go after business and to provide a
23 better experience for its customers. There is substantial room for improvement of sales opportunities in
24 the Hispanic community; by opening for service on Saturdays to capture new customers, especially those
25 Santa Cruz residents who commute "over the hill" to jobs in Silicon Valley; and by effectively using the
26 Internet to attract potential customers.

27 39. Santa Cruz Nissan has breached the parties' Dealer Agreement by its "unsatisfactory sales
28 penetration performance". Since 2006, Santa Cruz Nissan has failed to meet "...100% regional sales

1 effectiveness [i.e., "100% RSE"]..." which is "...the minimum compliance level per Dealer's Sales and
2 Service Agreement". (Emphasis added.) (JtExh 2)

3 40. Santa Cruz Nissan is (and has been for several years) a poor sales performer because the
4 owners have complacent competitive attitudes, resulting in the dealership having little "energy".
5 Although Nissan would prefer a Santa Cruz dealership to be "exclusive", built or remodeled to NREDI
6 standards, and in close proximity to other dealers, SCN's lackluster sales performance is not primarily due
7 to its current facility or to its location, but results from the inaction or ineffectiveness of the owners.

8 FINDINGS OF FACT⁴

9 Preliminary Findings

10 History and Description of the Dealership

11 41. Protestant Santa Cruz Nissan is a California corporation. It is one of the oldest family-
12 owned Nissan (formerly Datsun) dealer franchises in the U.S., having been appointed on March 20,
13 1972. (JtExhs 1:0063, 4:0008⁵; IX:45, 55; XII:173)

14 42. Ernest ("Lee") Courtright has been the dealer principal of protestant since its start in 1972.
15 He was the Executive Manager until 1997 and the owner of 100% of the business until 2005. He began
16 in the automobile business in 1962 as a service writer. Santa Cruz Nissan is the first business he owned.
17 Over the years, he has owned or had interests in no fewer than ten dealerships in Northern California and
18 Nevada (Toyota, Jeep, Mazda, Mercedes-Benz, Volkswagen, Dodge, Ram as well as two other Nissan
19 stores, in Stockton and Carson City). Lee Courtright has been on national and regional boards for Nissan
20 and for Volkswagen, including Nissan's National Dealer Council and National Advertising Board.
21 (JtExh 1:0076-0078; II:237; VI:44; XII:164, 167-172, 237)

22 43. Lee Courtright was formerly a partner in the Seaside Company, selling his interest in 1993
23 or soon thereafter. The Seaside Company is a large land owner in the Santa Cruz area and, among other
24

25 ⁴ References herein to testimony, exhibits or other parts of the record are examples of evidence relied upon to reach a finding
26 and are not intended to be all-inclusive.

27 Findings of Fact are organized under topical headings for readability only and are not to be considered relative to only the
28 particular topic under which they appear, but rather may apply to any of the "existing circumstances" or "good cause" factors
of section 3061.

⁵ A few exhibits, such as this one, not only have pages out of numerical order but also many missing page numbers.

1 properties, owns the Toyota, Mazda, Subaru and Kia franchises in Capitola and the Golden State
2 Warriors basketball team. (VII:11-13; VIII:267)

3 44. Lee Courtright is "in town" 120 to 140 days a year and spends about four hours a day at
4 the dealership when he is in Santa Cruz. His responsibility is to handle "bigger projects", such as health
5 insurance for employees and 401(k) issues. His salary is \$6,000 per month; it was not established
6 whether this amount was paid by Nissan, split among the four franchises, or paid from some other
7 account. (XII:165-166, 174)

8 45. James Courtright (Lee Courtright's son) has been SCN's Executive Manager since
9 October 20, 1997, and also "...act[s] as a General Sales Manager". (JtExh 1:0063, 0078; XII:64) A
10 graduate of the University of California at Davis and the M.B.A. program at the University of Santa
11 Clara, he has worked full-time in the automobile business since 1991. He started as a salesman at the
12 Toyota store in Santa Cruz, then split his job there between sales and Finance & Insurance. In 1993, he
13 moved to Santa Cruz Nissan as Sales Manager and in the late 1990's he became protestant's General
14 Manager.⁶ (VII:6-7; VIII:339)

15 46. As Executive Manager, James Courtright is charged with having full managerial
16 authority and responsibility for the day-to-day operations of the dealership.⁷ His compensation is not
17 known.

18 47. On September 25, 2005, the Dealer Agreement was amended to reflect James
19 Courtright's 28.6% ownership of SCN and Lee Courtright's 71.4% ownership of the business. (JtExh
20 1:0076)

21 48. Santa Cruz Nissan, which was first located in downtown Santa Cruz on Front Street,
22 moved to Center Street in 1979. In 1996, it relocated to 1616 Soquel Avenue, in the City of Santa Cruz,
23 to its present site. With each move, the facility was bigger and better. Lee Courtright constructed the
24 dealership building with design assistance and approval from Nissan. The building, at 26,509 square feet,
25 was 112% of Nissan's square footage "guidelines" in 1996 (and 104.9% in 2012), but the land, at 2.61

26
27 ⁶ The General Manager (GM) of a dealership is designated by the Dealer only, as opposed to an Executive Manager (EM) who
is approved by Nissan. (JtExh 14:4)

28 ⁷ An Executive Manager (EM) must be approved by Nissan, different from a General Manager, who is chosen by the
dealership. (JtExh 14:4)

1 acres, was only 52% of the "guidelines" which called for 5.01 acres (and 62.3% in 2012, since the
2 "guidelines" had been reduced to 4.19 acres). (JtExhs 1:0070; 3:0020; XI 134-135; XII:207-208)

3 49. SCN's location on Soquel Avenue is in an area called the "East Commercial Area" by the
4 City of Santa Cruz and is just outside the "Downtown Zone". The dealership is 1.8 miles from
5 Monterey Bay. (Exh 230:1-4)

6 50. As before the last move and continuing to the present, protestant is "dualled" with three
7 line-makes in addition to Nissan: it is a franchisee of Volkswagen, Dodge and Ram vehicles.⁸ SCN sells
8 and services both new and used vehicles. (JtExhs 1:0070; 13:2)

9 51. A separate entity, a family trust for which Lee Courtright is the trustee, owns the real estate
10 upon which SCN is situated. SCN pays rent of \$25,000 a month to the trust; it was not established if this
11 payment is allocated to all four franchises located on the property or is borne by SCN alone. (VII:8, 16)

12 52. The Nissan Retail Environment Design Initiative (NREDI) is a facility and sign program
13 developed by Nissan to create a consistent brand image for its dealership facilities, including those
14 which are "dualled" with other franchises. NREDI-compliant dealerships enjoy "...[m]ore sales, greater
15 capacity and higher customer satisfaction". SCN is not NREDI compliant. (Exhs 11; 241:31-33, 44-45;
16 JtExh 14:5)

17 53. SCN's sales office is open seven days a week, from 9 AM to 8 PM (7 PM during
18 Daylight Savings Time). The dealership offers service on Monday through Friday, from 7:30 AM to 6
19 PM, with shuttle service with two drivers available every hour the service department is open. (JtExh
20 13:2; IX:13-14)

21 54. The service department is not open on weekends. (JtExh 13:2)

22 55. Santa Cruz Nissan is the only Nissan dealer in the Santa Cruz market.

23 56. In the "Dealership Facilities Addendum" to the Dealer Agreement, which was signed on
24 September 20, 2005, SCN agreed to acquire "off-site storage land [and] facilities" within six months to
25 comply with Nissan's facilities guidelines. Although a later Nissan memo recited that SCN did not fulfill
26 this part of the agreement, it is unclear whether SCN did keep its promise by buying the improved lot

27
28 ⁸ Lee Courtright acquired the Dodge truck franchise in 1978; the separate Ram line-make "...has only been around for the last few years...". (XII:172)

1 across the street from the dealership or whether it in fact failed to acquire the storage property. (JtExh
2 1:077)

3 57. SCN's capitalization significantly meets or exceeds Nissan's guidelines for dealers. Even
4 though it posted losses in 2009 and 2010, it had a profit of \$360,548 in 2011. (JtExh 2:0035, 0377)

5 58. SCN acquired to right to sell LEAF electric vehicles on December 16, 2010, and it has
6 been a resounding success for the dealer in environmentally-conscious Santa Cruz. The "Cube" was also
7 a big seller for SCN. (JtExh 1:0090; IV:53, 4732)

8 59. In 2011 and 2012, James Courtright instituted new marketing and personnel policies in
9 order to build up sales (e.g., putting in place Cobalt, increasing the advertising budget by \$10,000/month,
10 incentivizing sales staff with higher commissions for Nissan sales, adding 1/2 staff position, to cover the
11 internet). SCN also participates in Nissan's Regional Marketing Program ("RMP"), a voluntary program
12 funded by participating dealers with matching funds from Nissan; the participants meet periodically to
13 decide how to allocate advertising money in their area. (Exh 209:0025; II:248, 312-344; VII:35-36;
14 VIII:185; XI:47-48) Also, for several years, SCN has had an email marketing program, which keeps in
15 contact with customers with offers of coupons and promotions and news of the dealership. (XII:107-108)

16 60. In February 2014, SCN entered into a three-month contract to advertise to the Hispanic
17 market; in preparation for Spanish-speaking customers, James Courtright had previously hired sales staff
18 conversant in Spanish. In April 2013, the area's dealers who were participating in RMP met and agreed
19 to allocate 30% of RMP funds to Spanish-language advertising; James Courtright "didn't fight it" but was
20 concerned because, at that time, SCN had no Spanish-speaking sales staff so would be unable "... to
21 handle the traffic generated from the spots". (Exh 209:0024; VII:33-34, 46-47; VIII:189-191; XI:29-30,
22 96-97)

23 61. Under the Dealer Agreement, the franchisee has the discretion to decide how to allocate its
24 advertising and marketing budget to "effectively promote" sales of Nissan vehicles, although Nissan
25 could look at "...the manner in which Dealer has conducted its sales operations (including
26 advertising...)". (Exh A; JtExh 1:5625-5626)

27 62. On March 20, 2012, RVP Eric Rodgers served on the Courtrights the Notice of Default
28 ("NOD"), dated March 19th. It cited protestant's "unsatisfactory sales penetration performance" as the

1 reason, reciting that in 2011, SCN sold 204 Nissan vehicles, but its RSE was 51.6%, which ranked SCN
2 187th out of 194 Nissan dealers in the "West Region" and 95th out of 97 dealers in California. According
3 to the letter, this unsatisfactory performance "...constitutes a substantial, material breach of the [Dealer]
4 Agreement"; it further advised that "[t]o correct this default, Nissan will require Dealer to achieve 100%
5 of the West's regional average sales penetration... within One Hundred Eighty Days (180) days from
6 receipt of this Notice". (Emphasis in original) (Exh 209:0030; JtExh 2:0056-0061; II:285-288)

7 63. On July 26, 2012, Chad Filiault and Tina Novoa presented Lee Courtright with a plaque
8 commemorating his 40 years as a Nissan dealer. (Exh 209:0025)

9 64. On September 18, 2012, Lee Courtright submitted to Nissan a "buyer assist letter" asking
10 for help to identify and find a buyer for his Nissan franchise. (Exh 208) Chad Filiault found a couple of
11 prospects; both of whom talked briefly with Lee Courtright, but with little or no further interest by either
12 party. (JtExh 13:2) Lee Courtright made no effort to find a buyer. Lee Courtright was not interested in
13 selling the Nissan franchise. He submitted the "buyer assist letter" in order to secure an extension of the
14 expiring NOD. (XII:187-188) On October 5, 2012, the Notice of Default was extended for 60 days so
15 that a possible sale of the franchise could be accomplished. (JtExh 3:0053-0054)

16 65. Both Nissan's internal paperwork regarding the extension and the NOD extension itself
17 noted the "alarming" decline in protestant's RSE during the 180 days since the issuance of the NOD.
18 (JtExh 3:all pages; III:61) Compared to SCN's 2011 year-end RSE of 51.5%, the "...July 2012 rolling 12-
19 month data..."⁹ showed SCN's RSE to be 39.5%. (JtExh 3:0021) The June 2012 rolling 12-month data
20 was slightly different, with a 2011 year-end RSE of 51.57% with SCN's rolling June figure to be 38.35%.
21 (JtExh 3:0023)

22 66. However, the 2012 rolling percentages encompass one or two months in 2012 (starting
23 either June 1st or May 16th) when SCN's PMA was enlarged into Watsonville, which had the immediate
24 effect of reducing SCN's RSE, independent of any other factors. It is unclear if Nissan prorated the RSE
25 calculations to reflect data from two different PMA's or if Nissan applied data from the current (enlarged)

26 ///

27
28 ⁹ "12-month rolling" is "data comprised of the most recent twelve month period, regardless of calendar year". (JtExh 14:6)

1 PMA to the full 12-month periods.¹⁰

2 67. The Notice of Termination (“NOT”), dated January 4, 2013, was directed to Lee
3 Courtright. (JtExh 4:0047-0051) Based on “unsatisfactory sales penetration performance”, the NOT
4 recited SCN’s October 2012 rolling 12-month RSE of 37.3%. The letter stated that “[s]ince the issuance
5 of the NOD, Dealer has not taken necessary action to cure the substantial and material breaches that led to
6 the NOD, no substantial and sustained progress towards improvement or compliance with Dealer’s
7 obligations under the Agreement has been made, and the severity of these defaults continues.” However,
8 as with the NOD extension, there is no acknowledgment of the PMA change and its effect on SCN’s RSE,
9 nor is there any disclosure of the method of calculating the latest RSE figure. (JtExh 4:0047-0051)

10 Nissan Facts

11 68. Currently, Nissan manufactures 22 models with the stated aim of capturing a broad
12 spectrum of the market. With its impressive line-up in many different model “segments”, it hopes to
13 attract first-time car buyers looking to own entry-level cars; those buyers needing workhorse trucks and
14 large SUV’s; as well as those interested in sports cars, sedans and the LEAF, Nissan’s EV offering. (Exh
15 202)

16 69. Nissan’s primary competitor line-makes are Honda and Toyota, each with one dealership
17 in the Santa Cruz market. Hyundai and Kia are also becoming “increasingly” competitive; Kia
18 established a dealership in the Santa Cruz market in June of 2010. (JtExhs 7:5686, 5690; 8:0322)

19 70. Nissan’s goal is to not “overdealer” the marketplace and, to that end, the current number of
20 U.S. Nissan dealers is around 1,100, while Toyota and Honda have many more dealers nationwide
21 (Toyota has approximately 1,400 and Honda is in the neighborhood of 1,200). (I:61-2)

22 71. Nissan considers Santa Cruz a “mid-size” market, not a “larger” one. (I:131; VIII:263)

23 72. By the Spring of 2009, the economic situation facing the automobile industry was “very
24 unfavorable”: the “deep recession” saw dealers reducing inventory and Nissan cutting production in
25 response. “...Registrations of new cars nationally, locally, were all suffering and on the decline”. By
26 2010, however, the markets were recovering and, in December of 2010, the LEAF was launched, which

27
28 ¹⁰ This 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)]

1 became a big seller for Nissan and for SCN. (VII:72, 77-8, 157-8)

2 73. Nissan geographically organizes its dealer network into "Regions", subdividing each
3 "Region" into "Divisions" and then assigning each Nissan dealer a set of census tracts called "Primary
4 Market Areas", or "PMA's". In the Dealer Agreement, a PMA is "...the geographic area which is
5 designated from time to time as the area of Dealer's sales and service responsibility for Nissan Products".
6 (JtExh 1:5622-5623)

7 74. In each PMA, the dealer assigned to it has a geographic, and therefore presumably a
8 competitive, advantage over other Nissan dealers. A dealer may, of course, sell to customers living
9 outside its assigned PMA ("out-sells" or "pump-outs") and, conversely, another Nissan dealership may
10 sell to customers residing inside the dealer's PMA ("in-sells" or "pump-ins"). There are no prohibitions
11 against dealers advertising in another Nissan dealer's PMA. (II:32)

12 75. In the Dealer Agreement, Nissan has "...reserve[d] the right, in its reasonable discretion, to
13 [change the PMA of a Dealer] from time to time...", (JtExh 1:5623). From March 1, 2004 to the late
14 Spring of 2012, Santa Cruz Nissan's PMA encompassed 39 census tracts---all in Santa Cruz County---
15 designated by reference to "...the 2000 Census Tracts...". (VI:6-14) In the late Spring of 2012 (after the
16 Notice of Default had been served) Nissan enlarged protestant's PMA into southern Santa Cruz County,
17 adding 12 new census tracts, which included the City of Watsonville.

18 76. During the relevant time, Nissan authorized USAI to prepare two "market studies" of the
19 Santa Cruz market. Both reached similar conclusions: that the Santa Cruz market was underserved, with
20 sales opportunities that were not being captured, especially when compared to the successes of Toyota
21 and Honda. (JtExhs 7, 9)

22 77. The "Dealer Network Analysis" dated February 2013 was a "market study" prepared for
23 Nissan executives. It recommended that a Nissan dealership in Santa Cruz be an NREDI "stand alone"
24 dealer, "in close proximity to Toyota or Honda" with a facility "meet[ing] or exceed[ing] all established
25 ... guidelines and/or future operational requirements" which would be "competitive with dealerships in
26 the area". (JtExh 7)

27 78. The "Dealer Presentation" dated March 2013 paralleled the executive "market study", with

28 ///

1 somewhat different wording. By letter dated June 8, 2012,¹¹ Nissan invited James Courtright to provide
2 information for a market study Nissan was planning for the "Monterey/Salinas/Santa Cruz (including
3 Gilroy/Morgan Hill) market areas"; but he did not respond. In March of 2013, at the direction of Alison
4 Speranzo, DOM John Gardner made a presentation of the "Dealer Presentation" to the Courtrights, who
5 listened without comment (not a surprising reaction, since the instant protest had been filed two months
6 earlier). (JtExhs 6, 7, 9:0366; VIII:13-14)

7 79. Nissan's NREDI program requires franchisees building or upgrading a dealership facility
8 to meet Nissan's corporate design and architectural standards. The facility design is optional for dealers
9 who do not relocate or sell their business, but is mandatory for new or relocating dealers. Nissan will
10 approve a "dual NREDI facility". (Exh 241:43-45)

11 The Dealer Agreement

12 80. On February 2, 1989, the parties executed a "Nissan Dealer Sales and Service Agreement".
13 Its "Standard Provisions" constitute the franchise agreement currently in force, which allows Santa Cruz
14 Nissan to sell all Nissan models, as well as parts and accessories, and to service the vehicles. (JtExh
15 1:0089, 0065, 5620-5624)

16 81. Over the years, the parties executed Amendments, Product Addenda, at least one
17 Dealership Facilities Addendum, and two Notices of [changes to] Primary Market Area, but none changed
18 the substantive recitals in the 1989 agreement. (JtExhs 1:0063-0085; 3:2)

19 82. Pertinent provisions of the Dealer Agreement are attached hereto as Exhibit A.

20 Santa Cruz Nissan's Primary Market Areas¹²

21 From March 1st of 2004 - May 16th or June 1st of 2012

22 83. Effective March 1, 2004, Nissan informed SCN that its Primary Market Area (PMA),
23 identified by the "geographical numerical identifiers" [census tracts] of the 2000 U.S. Census, would
24 consist of 39 census tracts, all within the County of Santa Cruz and centered on the City of Santa Cruz.
25 (JtExh 1:0599-0601, 0075)

26
27 ¹¹ On June 8, 2102, SCN was not only under a Notice of Default, but its PMA had been expanded into Watsonville no more
28 than three weeks earlier.

¹² A map showing both the 2004-2012 PMA and the 2012-present PMA is attached hereto as Exhibit B.

1 84. This PMA has a huge territorial spread. Households are concentrated in the City of Santa
2 Cruz, in small communities south along the Pacific Coast (Capitola, Soquel, Aptos) and on a road leading
3 north from Highway 17 (Boulder Creek, Scotts-Valley), but are also scattered throughout the
4 unincorporated areas of the county, with the exception of the wilderness in the northwest part
5 of the PMA. (Exh B)

6 85. The geography of the PMA is unique and geographically isolated: its southwest border is
7 the Pacific Ocean (Monterey Bay), a vast part of its northwest area is unpopulated and inaccessible by
8 road, and its northwest border is defined by the coast range mountains. Only the PMA's southeast border
9 has no natural barriers. (Exh. 200A:4695)

10 86. Not only is the Santa Cruz area geographically isolated from its prosperous neighbor to the
11 east---Silicon Valley in San Jose, Santa Clara County---by a coastal range of mountains, the only direct
12 road connecting Santa Cruz to San Jose is the two-lane Highway 17.

13 87. More workers commute eastward "over the hill" from Santa Cruz to jobs in Santa Clara
14 County than westward into Santa Cruz County. The net commuter "outflow" is approximately 1.5
15 persons for every 1 person coming into Santa Cruz. (Exh 21B:Tab 7, Pages 1-2)

16 88. The City of Santa Cruz is the county seat of Santa Cruz County and is home to a campus
17 of the University of California. As of 2012, the city's population was estimated to be 62,041. In 2010,
18 Hispanic or Latino persons constituted 19.4% of the population and 22.2% of persons over the age of five
19 spoke a language other than English at home. (JtExhs 7:5684; 12)

20 89. Santa Cruz residents are slightly more affluent than the average resident of California.
21 (JtExh 12)

22 90. The Santa Cruz area's population has grown in the past several years and there are
23 predictions of steady growth in households in the future. (JtExh 9:0375)

24 91. Commercial real estate in the Santa Cruz area is not only expensive, but availability is
25 limited.

26 92. In the City of Santa Cruz, only two new vehicle dealerships remain: in addition to the
27 four line-makes sold by the Courtright franchises, Ford is the only other new-vehicle franchise in the
28 city. Dealerships formerly in the city have moved out to other areas---as an example, Toyota of Santa

1 Cruz, once in downtown Santa Cruz, relocated to Capitola. (I:29)

2 93. Residents in the PMA are environmentally-conscious and seek to buy "green" or
3 "alternative" automobiles such as the Toyota Prius and, after it was launched in December of 2010, the
4 Nissan LEAF.

5 94. The "product preference" in the Santa Cruz Market is overwhelmingly for entry level
6 vehicles and compact vehicles. This would include "alternative" vehicles such as the LEAF. However,
7 Toyota's Prius is the most popular "alternative" vehicle. (VII:149)

8 95. Protestant's primary competitors in the PMA are Honda and Toyota, which are located
9 about one-half mile from one another, with Highway 1 between them:

10 A. Ocean Honda was built in 2008 or 2009 in an unincorporated area of the County of Santa
11 Cruz, about 2.1 miles from SCN. It is an impressive, exclusive stand-alone facility with an equally
12 impressive sales record---although Toyota generally outsells Honda in most markets, Ocean Honda has
13 turned this around in the Santa Cruz market, outselling its Toyota competitor. Joe Cappel is the dealer
14 principal of Ocean Honda, although he was not the first owner of Ocean Honda. Joe Cappel was formerly
15 a Nissan dealer. (JtExh 7:5697; I:137; II:18-21; IX:76-77)

16 B. Toyota, Subaru and Kia (all owned by the Seaside Company) are "clustered" in the
17 neighboring town of Capitola, contiguous to the city of Santa Cruz and about 2.5 miles from SCN. The
18 dealerships are reached by an access road. (JtExhs 7:5697; 200A:4697)

19 96. There are a total of twelve line-makes sold in SCN's pre-2012 PMA: SCN's franchises
20 (Nissan, Volkswagen, Dodge, Ram), Honda, Toyota, Kia, Subaru, Ford, Scion, Lincoln and Mazda. (Exh
21 23B:Supplemental Exhs Pg 4)

22 97. Nissan dealers in PMA's contiguous to protestant's are My Nissan in Salinas (24.5 miles
23 from SCN); Gilroy Nissan in Gilroy (22.2 miles), Stevens Creek Nissan in West San Jose (23.6 miles),
24 Premier Nissan on Capitol Expressway in San Jose (20.8 miles), and Boardwalk Nissan in Redwood City
25 (38.4 miles). (Exh 21B:0370)

26 98. This PMA is an appropriate area for Nissan to use to measure protestant's sales
27 effectiveness.

28 ///

From May 16th or June 1st of 2012 to the Present

99. Approximately two months after Nissan had served the Notice of Default on SCN, it advised the dealer that, effective either May 16, 2012, or June 1, 2012,¹³ its PMA would be enlarged into the southern part of Santa Cruz County. (JtExh 1:0082-0085)

100. SCN's new PMA now encompasses 51 census tracts and, significantly, includes either all or most of the population of the City of Watsonville, the county's second largest city with an estimated 2012 population of 51,881. The territorial area of the addition appears to be about one-fifth the size of SCN's former PMA. (Exh B) This expanded PMA also includes a greater percentage of Hispanic or Latino residents (81.4%) than the rest of the county of Santa Cruz, and 74.1% of persons over the age of five speak a language other than English at home. (JtExh 12)

101. James Courtright unsuccessfully protested the new PMA assigned to SCN. When he contacted Alison Speranzo protesting the change, she reached out to the Market Studies Department, which confirmed that the census tracts in Watsonville "...did indeed belong to the Santa Cruz Primary Market Area...they were closest by drive miles." (Exhs 204, 207; III:99-100)

102. The assignment of Watsonville to SCN's PMA was not as a result of a dealer going out of business, a new dealer coming into the area, an open point realignment, or recommendations of a market study. It is Nissan's policy to review PMA boundaries after each decennial U.S. Census and to change or revise the geographical boundaries of PMA's after a "PMA Audit."¹⁴ (Exh 204B; II:199-200; III:97-98)

103. Nissan's letter to SCN stated that the PMA change was as a result of 2010 census data, and "...additional criteria such as: air distance, drive distance; natural boundaries, buyer shopping patterns, and other objective factors", although no further details were given. (JtExh 1:0082)

104. The size of a dealer's PMA does have a direct effect on the dealer's sales effectiveness ratings, since its "sales penetration" percentage is calculated by dividing all of its sales by all of the "competitive set" registrations in its PMA. Clearly, when a dealer's PMA is enlarged, its sales

¹³ Two written notices sent by Nissan to SCN state the PMA change will be "effective May 16, 2012" (JtExh 1:0083, 0086), but Alison Speranzo contradicted this by testifying that the effective date of a PMA change is always the first of the month and, in this case, the new PMA was effective June 1, 2012. The difference is 16 days.

¹⁴ Both Eric Rodgers and Alison Speranzo testified to the fact of "PMA Audits", but Ms. Speranzo's explanation of the audit was cursory: "...[W]e...tak[e] a look at the new census tracts and the boundaries and tak[e] a look at each dealer's Primary Market Area. If it needed to be updated, we updated it." (II:199-200, 211; III:97-8)

1 penetration goes down, because more "competitive set" registrations are added to the equation, while the
2 sales number remains the same. For example, when SCN's PMA was enlarged into Watsonville,
3 "competitive set" registrations from 197 vehicle models were immediately folded into the equation. (Exh
4 200B:4699, 4700; Exh 200G:4759)

5 105. Nissan's enlargement of SCN's PMA to include Watsonville, the second most populous
6 city in the county, negatively affected SCN's "sales performance" score and ranking. It added
7 "competitive set" registrations of 197 models sold by multiple manufacturers, from Chevrolet and Fiat to
8 Lotus and Tesla.

9 106. Presumably, the new area in SCN's PMA---12 census tracts including Watsonville, the
10 county's second largest city---was not previously "unassigned" territory. The two closest dealers to
11 Watsonville are My Nissan in Salinas and Gilroy Nissan in Gilroy; however, it appears that Watsonville
12 was previously in My Nissan's PMA. Not only does My Nissan, a successful dealer, have a concentration
13 of sales into the Watsonville area, its 2012 RSE soared (from 113.4% at year-end 2011 to 160.6% at year-
14 end 2012), a mirror image of SCN's decline (51.6% at year-end 2011 to 32.0% at year-end 2012). (Exhs
15 200A:4696, 4697; 200B:4714; 200C:4716)

16 107. The new census tracts in SCN's PMA include dealerships selling Ford, GMC, Chevrolet,
17 Buick, Chrysler, Dodge, Jeep and Ram and possibly Cadillac and Lincoln line-makes. (Exhs 200A:4696,
18 4697; Exh 23B:Supplemental Exh Pg 4)

19 108. With a total of 16 dealers and 6,031 vehicle sales, Nissan's 2012 expansion of SCN's PMA
20 boundaries has transformed a "mid-sized" market into a larger one. The expansion was not an exercise of
21 the "reasonable discretion" contemplated by Sections 1.N. and 3.A. of the Dealer Agreement. (Exhs
22 200A:4697; 200G:4759)

23 109. For the foregoing reasons, sales performance data generated by application of the RSE
24 calculations after the 2012 PMA expansion is not reliable.

25 Nissan's Calculation of Sales Performance

26 110. Nissan evaluates dealer sales effectiveness using performance metrics, which, after the
27 calculations are completed, assigns each dealer a percentage figure which Nissan calls "Segment-
28 Adjusted Regional Sales Effectiveness" (hereinafter sometimes "RSE"). Nissan states that "100% RSE"

1 is the minimum target---the calculations generate the number of "expected sales" (the opportunity in the
2 dealer's PMA) for each dealer and performance rankings of Nissan dealers.

3 111. Section 3.B of the Dealer Agreement describes the calculations Nissan will take to evaluate
4 dealers' sales performances. Using these calculations only leads to sales penetration percentages, and this
5 does not describe Nissan's current---and complex---evaluation calculations. However, the Dealer
6 Agreement is 25 years old; the parties have operated under this agreement for decades while the
7 automotive business predictably changed, and it was reasonably foreseeable that some recitals in the
8 agreement would change and evolve. Nissan's current use of "performance metrics" for evaluations is a
9 reasonably foreseeable extension of the calculations described in the agreement.

10 112. In calculating RSE, Nissan uses its "regions" to compare dealer performances. Before
11 April 2009, Santa Cruz Nissan was part of the "Northwest Region" (133 dealers in 2009); in that month,
12 Nissan "merged" its Northwest and Southwest Regions and protestant became one of the dealers in the
13 "West Region" (193 dealers in 2009). (Exh 200B:04701; II:18-20; IV:21; VI:143)

14 113. The "West Region" covered populated areas in California, Hawaii, Alaska, Washington,
15 Oregon, Idaho, Montana, Wyoming, Nevada, Utah, Arizona, New Mexico and two small areas in Texas
16 on the border with New Mexico. There are a few "open points" but much of the geography is
17 "unassigned", i.e., not assigned to any dealer. (Exh. 200A:4695; IV:174-6)

18 114. The sales performances of Nissan dealers in the "West Region" was the "benchmark"
19 against which SCN's performance was measured after April of 2009. (IV:176) However, neither the
20 "Northwest Region" nor the "West Region" are appropriate "benchmarks" to analyze sales performance
21 of Santa Cruz Nissan. Both suffer from simply being too large a sampling---but the larger "West
22 Region" is more suspect, covering about one-third of the continental U.S., with obvious differences in
23 topography, population centers, economies, and climates.

24 115. Nissan used the "West Region" standard in its calculations in preparing both the Notice of
25 Default and the Notice of Termination. However, the "West Region", like the "Northwest Region"
26 before it, is too large, leading to results which may be inaccurate or misleading. (IV:177-8)

27 116. As of August of 2013, Nissan abandoned the "West Region" in favor of the "California
28 Region" (SSER) standard.

1 117. Nissan calculates a dealer's sales penetration in its PMA as a percentage by dividing a
2 dealer's total sales by the number of "competitive set" vehicle registrations in the dealer's PMA during
3 the same time period. The "competitive set" vehicles are those brands and models of other manufacturers
4 which Nissan has decided compete most closely with its models for customers. (Exh 200B:4698;I:75)

5 118. To "segment-adjust" its data, Nissan organizes its models into fourteen product groups
6 ("segments")¹⁵; then assigns models from the "competitive set" to each group.

7 119. The fourteen "segments" are the following, with the number of competitive models Nissan
8 tracks for each "segment" in parenthesis: Entry (12), Compact (28), Mid-Size Lower (18), Mid-Size
9 Upper (15), Sports Performance (13), Small Specialty (14), Compact MAV (4), Compact SUV (28), Mid-
10 Size SUV (13), Full-Size SUV (9), Large SUV (21), Mid-Size Pick Up (9), Full-Size Pick Up (7), and
11 Mid-Size MPV (6). The number of "competitive set" models total 197. (Exh 200B:4704;05).

12 120. Basically, RSE is the dealer's sales compared to the expected sales in the area, and the
13 expected sales in the area are based on how well the Nissan dealers in the region did compared to the
14 competitive group in the region. (III:212) In greater detail, the calculations are the following:

15 A. Nissan compares the sales of all its dealers in the region in each of the segments to the
16 "competitive set" registrations in the region in each segment, which yields a "region sales penetration"
17 percentage for each segment. This percentage reflects the popularity of each Nissan model in the region.
18 These are then multiplied by the number of competitive registrations in each segment in the dealer's
19 PMA, which yields the number of "expected sales" in each segment. (The "expected sales" figure is
20 adjusted to reflect the consumer preferences in the dealer's PMA.) Adding each segment's "expected
21 sales" in the PMA results in a total number of "expected sales" for a dealer to achieve region penetration
22 in the PMA. The total number of "expected sales" is divided by the total of the competitive registrations
23 in the dealer's PMA to get the dealer's sales penetration necessary to achieve region average. (Exh
24 200B:4703)

25 B. Among other things, these calculations measure the size of a particular market by counting
26 the total combined number of registrations in the PMA in each of the fourteen "segments" in which

27
28 ¹⁵ Since Nissan manufactures 22 models, some "segments" contain two Nissan models.

1 Nissan competes. The result represents the total available opportunity in a given market based on actual
2 registrations.

3 C. Since "competitive set" sales figures define the size of the available customer base, Nissan
4 uses the "competitive set" data to measure an individual dealer's sales performance, because that
5 comparison evaluates a dealer's actual sales relative to the opportunity available to it. As an example, if
6 Nissan's region sales penetration is 50% of the competitive registrations, a dealer with a "competitive
7 set" of 1,000 vehicles has to sell 500 units to be 100% RSE (i.e., attain the average market share), while a
8 dealer with a "competitive set" of 2,000 vehicles has to sell 1,000 units---twice as many---to be sales
9 effective. Thus, the size of the PMA does affect the dealer's "sales effectiveness" ratings.

10 121. Dealers operating at 100% RSE are selling at the average of comparative Nissan dealers in
11 the group. They are the "C" students. This is the target number that Nissan's performance metrics have
12 determined is the "opportunity" in the PMA. Those less than 100% RSE are "underperforming".

13 122. Every quarter or so, Alison Speranzo "...pull[s] the bottom performers in the region, and
14 ...[sends] them performance letters¹⁶ letting them know of where their status [is] versus the region where
15 they're supposed to be, and how that's a breach of their agreement. And that we're looking for
16 sustainable long-term improvement. That we're not happy with the performance." (III:54)

17 123. On March 7, 2008, a "performance letter" to Lee Courtright commended him on the
18 dealership's "positive improvement" in raising SCN's RSE from 68.3% in 2006 to 86.9%¹⁷ in 2007.
19 However, in later "performance letters"¹⁸, Nissan wrote of its "serious concern" ...with the poor [sales]
20 performance and operational difficulties at [SCN]...". (Exh 206)

21 124. The Notice of Default, dated March 19, 2012, advised Lee Courtright that because of
22 "unsatisfactory sales penetration performance", protestant was given 180 days to "cure the default" by
23 achieving 100% RSE. Year-end 2011 sales figures were used, showing that SCN had sold 204 Nissan
24 vehicles in 2011, while the "100% RSE" figure was 396, so the "loss" was 192 vehicles, which SCN was

25
26 ¹⁶ The "performance letters" followed a format and, in addition to sales performance, addressed such items as customer service,
training and owner loyalty. (Exh 206)

27 ¹⁷ Note that in other documents, the 2007 RSE figure is 84.4%.

28 ¹⁸ The letters were dated November 18, 2009; April 21, 2010; November 10, 2010; July 11, 2011; November 9, 2011, and June
15, 2012. (Exh 206)

1 presumably required to sell in the 180-day period. (JtExh 2:005661)

2 125. The language in Nissan's Notice of Termination dated January 14, 2013, primarily
3 concerned itself with the "performance metrics" described above, concluding that "...declining sales
4 penetration performance for many years...." dictated Nissan's decision to terminate the franchise. (Exh
5 4:0047-51) No mention was made of the criteria listed in Section 3.D of the Dealer Agreement, nor was
6 there evidence that these factors were considered.

7 126. However, RSE may be used as a standard, even in termination cases, as long as its
8 limitations are recognized and "rigid performance metrics"¹⁹ are tempered with the kinds of inquiries
9 required by Section 3.D. of the Dealer Agreement.

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

15 **Findings Relating to Amount of Business Transacted by the Franchisee, as Compared to the**
16 **Business Available to the Franchisee [Section 3061(a)]**

17 128. Santa Cruz Nissan's sales figures and RSE scores are the following (Exhs 200B:4707;
18 206:0658; 212:0553; JtExhs 2:0043, 0044; 3:0023; 4:0049; I:110; IX:65):

19

Year	Number of Sales	RSE Score
2005	366	113.70%
2006	237	68.30%
2007	304	84.40%
2008	202	81.80%
2009	152	56.30%
2010	150	45.90%
2011	204	51.60%
2012	173	32.00%
2013	246	No data

20
21
22
23
24

25 ///

26 ///

27 _____

28 ¹⁹ Wall Street Journal, June 24, 2014, "Aides Rebelled After CEO Tweaked 'Tar-zhay' Formula" (p. 1)

1 129. Nissan's RSE performance calculations prior to 2009, relying on a standard other than the
2 "West Region", will be disregarded in this analysis.²⁰ RSE calculations based upon data from SCN's
3 PMA, enlarged in the Spring of 2012, will also be disregarded.

4 130. Nissan's RSE calculations from 2009 through 2011, even though based on the overlarge
5 "West Region", provide information which may be considered in regard to protestant's sales performance
6 in its PMA during those years. It appears that there were sales opportunities in the Santa Cruz market
7 which protestant failed to capture: it fell significantly below the average opportunity sales figures: 56.3%
8 in 2009, 45.9% in 2010 and 51.6% in 2011. (Exh 200C:4716; IV:149, 189)

9 131. Similarly, for the 2009-2011 period, the "retail registration effectiveness" for SCN's PMA,
10 showing how well the Nissan brand is doing in the PMA, reveals that protestant did not capture sales
11 opportunities available to it. In each of those three years, protestant sold fewer Nissan vehicles in its own
12 PMA than other Nissan dealers (there were more "insells" in the PMA), resulting in substantial
13 "shortfalls"---Nissan sales opportunities which were missed. (Exh 200B:4718; IV:41-2)

14 132. However, SCN's sales of the LEAF were exceptional: in 2012, the dealership sold 154.5%
15 RSE. (Exh 200 Surrebuttal Report:5665)

16 133. In 2010, 35.4% of Nissan vehicles registered in the PMA were sold by SCN and in 2011,
17 the figure increased to 43.0%. (Exh 200:H:4778)

18 134. In 2012, it appeared that many of the "insells" were clustered around protestant's
19 dealership in the city of Santa Cruz. (Exh 200H:4776, 4781)

20 135. "Averages" and "rankings" based on those averages, taken by themselves, can be
21 misleading. When looking at an "average" of a group, there will be roughly half over and half under,
22 which is, in fact, a validation of the calculation being used. "Once you set an average, half will be
23 performing over and half under [the average line]...". (IV:252) The bar graphs in Exhibit 200C:4721-23
24 are reasonable because there is a normal distribution around the average.

25 A. To increase its competitiveness in the marketplace, Nissan seeks to raise those dealers

26
27 ²⁰ Respondent's expert testified that "[W]e have four years' worth of data at the west region, I would rely on that. And the
28 2008 to 2009 changes, we have to acknowledge that there was a region change, and difficult to tell exactly how much change is
due to the northwest, west region standard change. I think its good information, but I would rely on it a little bit less than the
more current data using the constant region performance standard." (III:21)

1 which are below average (“underperformers”) by encouraging them to increase sales. If underperforming
2 dealers do become more successful, this will raise the average line, but there will still always be the
3 roughly 50%-50% split of numbers above and below the average line. So even successful dealers could
4 (inappropriately) be characterized as “underperformers” if they fall below the average line.

5 B. When Nissan requires an “underperforming” dealer to “achieve 100% RSE”, and the
6 dealer does so, all that happens is that another dealer will fall below the average line (and the rankings
7 will change). By using “averages”, there will always be around 50% “underperforming” dealers.
8 Nissan’s use of “100% RSE” as a performance goal (together with dire warnings about the consequences
9 of failing to achieve “100% RSE”) is not reasonable.

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

15 136. In sales effectiveness rankings of all Nissan dealers in the “West Region” in 2009, SCN
16 ranked 178/194; in 2010 it ranked 188/197; and in 2011 it ranked 188/195. The bar graphs²¹ in Exhs
17 200C:4721-23 reflect SCN’s performance in context and, for the years 2009 to 2011, show SCN to be a
18 poor sales performer.

19 137. Located close to protestant, the Toyota and Honda dealerships face the same geographic
20 and demographic challenges as protestant in the Santa Cruz marketplace. But both Toyota and Honda---
21 Nissan’s closest competitors---sell more vehicles in the Santa Cruz market than Nissan. (Exh 21B:0352,
22 0353)

23 138. In 2012, Ocean Honda had an “effectiveness percentage” of 151.3%, Toyota of Santa
24 Cruz’s was 72.0% and Santa Cruz Nissan was 30.9% (Exhs 200H:4760; 200SuppRpt:5663)

25 139. Moreover, success builds on success: because Toyota and Honda sell more vehicles in the
26

27 ²¹ Captioned “West Region Nissan Dealers’ Retail Sales Effectiveness to West Region Average (i.e., Average Sales Penetration
28 of Nissan Dealers in the West Region Adjusted for Local Segment Popularity”).

1 Santa Cruz market than Nissan, they have more Units in Operation (UIO's) in the area than Nissan. This
2 generates more sales: it's easier to attract a "repeat" customer than a "conquest" customer.

3 140. Other than the peculiarities of the Santa Cruz geography, no local conditions (i.e., those
4 things that are outside the control of the dealer) have deterred SCN from selling more vehicles. In fact,
5 local conditions have been beneficial to business in the Santa Cruz economy: population and households
6 have increased in number and further increases are projected (Exhs G:448-4752; 21B:0325, 0335); other
7 than a decline of about 4,600 jobs in the county in 2009-2011, recovery was on the way in 2012 and
8 2013; employment was at its highest level in ten years, at 140,596 jobs (Exh G:4753); in 2012, there were
9 a significant number of households with incomes of \$75,000 and \$100,000 in the City of Santa Cruz and
10 its environs. (Exh G:4754-55). Inclement weather (not uncommon in other parts of the "West Region")
11 is unknown in Santa Cruz.

12 141. Moreover, Santa Cruz Nissan's location "...is very competitive in terms of convenience to
13 the customers in this market..." as the average drive distance to its dealership is only 8.0 miles. (Exh
14 200G:4758; IV:97-8) And since its real estate is owned by a family trust, SCN may not face the same
15 leasehold worries that other dealers have with their landlords. Protestant's retained capital gives the
16 Court rights the financial flexibility to spend in a way to increase sales.

17 142. However, one of the limitations of Nissan's RSE calculations is its failure to account for
18 intrabrand competition (i.e., competition with other Nissan dealers). Two scenarios negatively impact
19 SCN's sales performance statistics:

20 A. The net "out commute" to San Jose-Silicon Valley of workers who live in SCN's PMA
21 takes them "over the hill" into the PMA's of five other Nissan dealers. That some of these workers do
22 buy near their work is shown by the cumulative "in-sell" dot map at Exh 200H:4781.

23 B. At year-end 2012, My Nissan had 439 sales of Nissan vehicles; although most sales were
24 concentrated around its dealership in Salinas, another concentration was in SCN's PMA in Watsonville.
25 (Exh 200H:4765)

26 143. There is available service business which SCN is not capturing by its failure to be open for
27 service appointments on Saturday. The opportunity for service business is shown by the fact that SCN's
28 two direct competitors in Santa Cruz, Toyota and Honda, are open for service business on Saturdays and

1 Toyota is also open on Sundays. Other California Nissan dealers have been open for Saturday service
2 business for years. (VIII:116)

3 144. SCN's "customer pay-service sales per UIO" has been trending upward 2009 to 2011 and,
4 even though never reaching the 100% composite group average, the figures have been 65.6% in 2009,
5 78.4% in 2010 and 88.4% in 2011. (Exh 200C:4717)

6 145. During DOM visits to the dealership, neither Lee Courtright nor James Courtright
7 challenged the DOM's observations over the years that SCN's sales performance was deficient and, in
8 fact, agreed with the assessment. (II:267)

9 **Findings Related to the Investment Necessarily Made and Obligations Incurred by**
10 **the Franchisee to Perform Its Part of the Franchise [Section 3061(b)]**

11 146. In 2010, in anticipation of Nissan's launch of the electric vehicle LEAF, protestant
12 reconfigured several service bays for EV's, which also entailed buying special equipment, safety
13 equipment and gear for technicians, as well as training the technicians. (Exhs 25EE, RE and GG)

14 147. When the LEAF was launched in 2010, protestant installed three EV charging stations,
15 with parking for five or six cars, at a cost of around \$30,000, and invested in safety equipment to service
16 the EV. (VIII:348-50)

17 148. The Internet has changed the way prospective customers approach buying a new vehicle:
18 most have already researched line-makes and models, prices and dealers, and come to a dealership (some
19 traveling 50 or 100 miles) with a lot of information. SCN has recognized this phenomenon and has
20 become more conversant with "digital marketing".²² Although some, if not all, of the actions taken by
21 the dealership benefit all its line-makes, its impetus and focus is to increase Nissan sales.

22 149. SCN has improved its internet capabilities by rebuilding its Nissan website and adding a
23 back-up internet employee to more effectively interact online with prospects and existing customers.
24 Since most consumers use the internet before buying a vehicle, lead providers are increasingly important,
25 and SCN has contracts with cars.com, Auto Trader, Edmunds.com, and participates in Nissan's program
26 for third party leads. (II:295, 311-312; XI:31-32; XII:119, 151-155). In 2012, SCN enrolled in the

27
28 ²² "Digital marketing" is the "...online presence of a dealership" in order to market themselves online; interact with prospects
online or with email; and develop leads, gained on the Internet, into sales." (II:68, 71)

1 Nissan-supported Cobalt program, which covers four different internet marketing services. (Exhs 9, 10,
2 12; 209:0024; II:302, 310-313; XII:93-94, 151-155) All SCN sales staff consultants have completed
3 training via Nissan's Virtual Academy and have become "certified". (XII:100-101)

4 150. After receiving the Notice of Default, the Courtright's "...keyed in on Nissan sales..." and,
5 among other things, "...increased [Nissan] advertising and "...put up more spiff money...to our sales
6 [staff]...". "A spiff is extra money...[paid to] salesmen at the time of a sale usually...in cash...". (II:315-
7 316; XI:49; XII:234-236)

8 151. Protestant, however, has never explored the possibility of making the dealership into an
9 NREDI-compliant facility, which would require coordination with SCN's other three line-makes.

10 152. Also, it appears that protestant may not have fulfilled its 2005 promise to Nissan to secure
11 an off-site storage area.

12 153. Protestant, from the time the dealership facility was built in 1996, has been under Nissan's
13 square footage "guidelines" and has not taken any steps to enlarge the dealership, despite the fact that
14 Nissan, and possibly the three other line-makes, is offering for sale many more models than it did 17
15 years ago.

16 **Findings Relating to Permanency of Investment [Section 3061(c)]**

17 154. Dealer principal Lee Courtright was appointed a Nissan dealer in 1972, and has operated
18 the store continuously to the present. The current dealership at 1616 Soquel Avenue in Santa Cruz is the
19 third location from which SCN has operated and, with each move, the facility got bigger and better,

20 155. The amount of the investment in building the dealership in 1996 is unknown.

21 156. The dealership shares space with three other line-makes: Volkswagen, Dodge and Ram.

22 157. The dealership real estate includes a 26,509 square foot two-story building with a
23 showroom accommodating up to six vehicles, shared by the four franchises. Land size is 87,200 square
24 feet. The total building and land size is 113,709 square feet. (Exhs 3; 25A, B, L, and N)

25 158. In addition to the showroom, SCN's building has a customer waiting area with coffee
26 and Wi-Fi available, a children's play area, a parts department with customer counter and storage, a
27 cashier/information window and office, service bays, offices, and displays. With the exception of
28 service bays dedicated to the electric vehicle LEAF, the building is shared by the four franchises. The

1 premise is clean and functional. (Exhs 25O, P, Q, R, S, T, U, V, W, X, Y, Z, AA, and DD)

2 159. There are a total of 23 service bays (at 115% above Nissan's guidelines of 20). (JtExhs
3 1:0070; 3:0020) As noted above, protestant made substantial investments in order to sell and service the
4 electric vehicle LEAF. The Courtrights were very excited about the introduction of the LEAF,
5 anticipating that it would sell very well in the "green" environmentally-conscious Santa Cruz market,
6 which it did. (Exhs 25EE, FF and GG)

7 160. The building is set back from Soquel Avenue at a distance which allows the display of
8 vehicles for sale on the front lot; the lot extends around the building on three sides. A porte-cochere for
9 service customers is prominently marked, conveniently close to the small offices for four service writers.
10 Four electrical vehicle (EV) charging stations are available 24/7 for use by the general public. There is
11 an enclosed car wash. (Exhs 25C, D, I, J, K, BB and CC)

12 161. The dealership premise has been upgraded by the addition of the enclosed car wash in the
13 late 1990's, which cost around \$100,000, plus the \$30,000 for the EV charging stations. (VIII:348-50)

14 162. The dealership owns an additional parcel of land, with two small buildings, across Soquel
15 Avenue which is used for storage and display of vehicles but is not available to customers. Neither the
16 size of this parcel was established nor was it established whether this parcel was included in the total
17 square footage stated above. (Exhs. 25E, F, G and H)

18 163. Because of the age of the Dealer Agreement (1989), SCN is exempt from certain facility
19 requirements which Nissan imposes on other dealers arising out of "planning volume" calculations.

20 164. SCN employs approximately 45 people with a September 2013 payroll of \$141,394.
21 (Exh 223:4212). As of the time of the hearing, three of the sales staff were bi-lingual English-Spanish,
22 including a Sales Manager who was hired in August 2013. (VII:38-40)

23 165. SCN employs between twelve and fifteen service technicians and, of these, seven are
24 specially-trained Nissan mechanics, certified to work on the Nissan LEAF. (Exh 223:4212; XII:173)

25 166. No remodeling has been done pursuant to the NREDI program. There was no evidence
26 presented that the parties had ever discussed such a remodel program, even though Nissan will approve
27 NREDI construction at a "dual" Nissan store.

28 ///

1 Findings Relating to Whether it is Injurious or Beneficial to the Public Welfare for
2 the Franchise to be Modified or Replaced or the Business of the Franchisee Disrupted
3 [Section 3061(d)]

4 167. Santa Cruz Nissan is a valuable contributor to the health, well-being and quality of life of
5 the citizens of Santa Cruz and the environs. The business creates jobs, attracts customers to the area, and
6 ---since the City of Santa Cruz has lost new car dealerships in the past few years---provides a sense of
7 business commitment to the city and to the area. (VI:11-13)

8 168. In regard to tax revenues, protestant pays approximately \$1.6 to \$1.7 million in sales tax
9 annually to the City of Santa Cruz, making it one of the top ten sales tax contributors to the City of Santa
10 Cruz. (Exh 15; VI:31; XII:173) These tax revenues help pay for public health and safety services, as well
11 as public works and maintenance of infrastructure. Termination would mean a reduction of tax revenues
12 to the City of Santa Cruz. (VI:10)

13 169. Santa Cruz Nissan is a family-owned business, with a long history in the community. SCN
14 and the Courtright are fiscally and socially responsible, the "face" of the Nissan branch in the community.

15 170. The Courtright family is community-minded, participating in organizations such as Rotary,
16 Little League, and supporting the Seymour Marine Discovery Center. SCN is a "Clean Ocean" business,
17 ensuring that its runoffs do not pollute. (Exh 2; IX: 58-62)

18 171. Losing the Nissan franchise would diminish SCN's revenue from new vehicle sales, but
19 the dealership would still be able to service Nissans (with possible contractual constraints regarding
20 warranty work) and would still be able to offer the 24/7 EV charging stations to the public.

21 172. Protestant's used car sales operation would remain in place despite a termination.

22 173. Although Lee Courtright prophesized that the dealership could not exist without the Nissan
23 franchise, that prediction seems unlikely, given the capitalization of the company.

24 174. The city's tax revenue from the sales of new Nissan vehicles will be gone if the protest is
25 overruled. However, since the automobile industry has grown and become increasingly complex in recent
26 years²³, it is possible that a four-franchise dealership is simply too challenging an operation to run under

27 ²³ Respondent made the point that since the 1989 franchise agreement, Nissan had increased the number of its models, as had
28 Dodge, Ram and Volkswagen, and some of the vehicles had increased in size. Developments include the Internet and
"alternative" vehicles, not to mention new laws which dealers must know.

1 one roof, even though it could have been done successfully a decade ago. If Nissan were to be eliminated,
2 the Courtright's efforts could be focused on selling more Dodge, Ram and Volkswagen vehicles, with
3 commensurate increases in tax revenue to the city.

4 175. If termination is allowed, it is true that there would be no Nissan dealer in Santa Cruz—at
5 least for a while—with attendant inconvenience to customers and prospective buyers. Termination
6 creates an "open point". However, it appears that Nissan may not be deterred by the lack of vacant or
7 available large parcels in the city, as it states its focus is on the dealer, not the property. (Exh 26:36-38)

8 **Findings Relating to Whether the Franchisee has Adequate Motor Vehicle Sales and Service**
9 **Facilities, Equipment, Vehicle Parts, and Qualified Service Personnel to Reasonably Provide for the**
10 **Needs of the Consumers for the Motor Vehicles Handled by the Franchisee and Has Been and Is**
11 **Rendering Adequate Services to the Public [Section 3061(e)]**

12 176. Protestant's sales and service facilities, equipment, parts department and service personnel
13 are "adequate" to meet the needs of its customers.

14 177. In the service department, for example, SCN has 19 service stalls and 17 lifts, seven of
15 which are dedicated to Nissan, with one additional lift available to add, if needed. SCN also invested in a
16 special service stall and placed special safety precautions in order for technicians to work on the Nissan
17 LEAF EV's. (IX:14, 17)

18 178. In regard to the qualifications of service personnel, the dealership employs six service
19 technicians dedicated solely to Nissan, with two of those master technicians. (IX:12-15)

20 179. However, in one area, protestant is not rendering adequate services to the public. For
21 years, it has failed (and refused suggestions) to be open for service appointments for customers on
22 Saturdays. Moreover, it has not surveyed its customers to discover their preferences in this regard.
23 (VII:50-51, 58; XII:137) The failure to be open for service on Saturdays not only inconveniences (and
24 drives away) existing customers wishing service at a time convenient to their schedules, it also has an
25 adverse effect on potential sales.

26 **Findings Related to Whether the Franchisee Fails to Fulfill the Warranty Obligations of the**
27 **Franchisor to be Performed by the Franchisee [Section 3061(f)]**

28 180. SCN completes Nissan warranty repairs and there are no warranty repairs that the
dealership is not equipped to perform. (XI:22-23)

1 181. There has never been an instance where the dealership has had to send a customer to
2 another Nissan dealership to receive warranty repairs. (XI:22-23)

3 **Findings Related to the Extent of Franchisee's Failure to Comply With the Terms**
4 **of the Franchise [Section 3061(g)]**

5 182. Section 6.D of the Dealer Agreement requires dealers to be open "...during hours which
6 are reasonable and convenient for Dealer's customers; and... shall conduct all Dealership Operations ...
7 during such days and hours as automobile dealers' sales and service facilities are customarily and lawfully
8 open in Dealer's Primary Market Area...". (Emphasis added.)

9 183. As the Toyota and Honda stores in protestant's PMA are "customarily and lawfully" open
10 on Saturdays, it is a violation of the franchise agreement for protestant to fail to be open on Saturdays.

11 **ANALYSIS**

12 **The Amount of Business Transacted by the Franchisee, as Compared to the Business**
13 **Available to the Franchisee [Section 3061(a)]**

14 184. Nissan has not sustained its burden of proof in this regard.

15 185. There were many problems with Nissan's analysis of dealer performance. Although
16 Nissan's basic calculation was valid (figuring the dealer's sales penetration first, then using the regional
17 segmented data to establish performance), there were other aspects of the process which were not. The
18 "West Region" was too large to be useful. Reliance on "averages" and "rankings" without further
19 information has the tendency to mislead. Making threats of adverse consequences if a dealer does not
20 "achieve 100% RSE" is misusing the data. Designating a "competitive set" of 197 vehicles (including
21 Tesla and Lotus) leads to unmanageable data.²⁴

22 186. With specific regard to Santa Cruz Nissan, Nissan expanded its PMA into the census tracts
23 of the city of Watsonville for no discernable reason, thereby generating an "alarming" decline in SCN's
24 RSE percentage and, into the future, insuring SCN's failure to "achieve 100% RSE". In making the
25 decision to terminate protestant's franchise, Nissan failed to temper the rigid "performance metrics" with

26 _____
27 ²⁴ See the "Competitive Registration Density" map of SCN's PMA in 2012 at JtExh 7:5694 and the "Competitive Segment Dot
28 Map" of SCN's PMA in 2009 at JtExh 8:0327. Both show masses of registration dots, appearing to signify only where people
live and not much about what they drive.

1 the inquiries that its own Dealer Agreement states are appropriate (Section 3.D. – “Additional Factors for
2 Consideration”). Finally, the internal memo recommending the issuance of the Notice of Default
3 contained an error, stating that SCN had committed to increasing its advertising to \$10,000 monthly
4 when, in fact, the Courtright had agreed to increase their advertising by \$10,000 per month.

5 187. Between 2009 and 2011, there were lost sales opportunities which Santa Cruz Nissan
6 failed to capture.

7 188. SCN’s 2013 Nissan sales figure of 246 vehicles may be the result of the new marketing
8 and personnel policies put in place at the dealership.

9 189. However, it is also true that Santa Cruz Nissan is a below-average performer. It clearly
10 lacks competitive “energy”. For example, most of the new marketing and personnel policies were
11 suggestions from Nissan representatives such as DOM Tina Novoa and FOM Gary Inman, not generated
12 by the initiative or creativity of the ownership. And often, good marketing suggestions from Nissan
13 representatives (opening for service on Saturdays, advertising to the Hispanic market, hiring bi-lingual
14 sales staff) were either ignored or delayed. It appears that DOM Eric Lewin’s assessment was correct:
15 that SCN’s performance deficiencies are due to an insufficient level of resources to accomplish the task,
16 no sense of urgency to change the situation, and no one in charge capable of executing plans for
17 improvement.

18 The Investment Necessarily Made and Obligations Incurred by the Franchisee to
19 Perform Its Part of the Franchise [Section 3061(b)]

20 190. Nissan has not sustained its burden of proof in this regard.

21 191. Protestant has remodeled service bays, installed special equipment, and trained technicians
22 to sell and service the Nissan LEAF. Also, although benefitting all the line-makes which it sells, it has
23 enhanced its digital marketing capabilities.

24 Permanency of the Investment [Vehicle Code section 3061(c)]

25 192. Nissan has not sustained its burden of proof in this regard.

26 193. The permanency of Santa Cruz Nissan’s investment is established by the longevity of the
27 family-owned dealership in the City of Santa Cruz since 1972, the loyalty and support it has shown to the
28 City by its investment in the business, and the Courtright family’s commitment to the community. It is

1 solid financially and the premise is clean and functional.

2 194. However, there has been little upgrading and remodeling of the property over the years and
3 protestant's failure to invest in an NREDI-compliant facility (or to investigate the possibility of doing so)
4 has made it a less effective business.

5 Whether it is Injurious or Beneficial to the Public Welfare for the Franchise to be Modified or
6 Replaced or the Business of the Franchisee Disrupted [Section 3061(d)]

7 195. Nissan has not sustained its burden of proof in this regard, as the negative aspects of
8 termination outweigh the beneficial ones. Although it is true that the dealership would survive even if its
9 Nissan franchise were to be terminated, the loss of revenue to the City of Santa Cruz would be
10 considerable.

11 196. Santa Cruz Nissan has been serving the public from the same location for many years. It is
12 fiscally and socially responsible; characteristics that have great importance in smaller cities.

13 Findings Relating to Whether the Franchisee has Adequate Motor Vehicle Sales and Service
14 Facilities, Equipment, Vehicle Parts, and Qualified Service Personnel to Reasonably Provide for the
15 Needs of the Consumers for the Motor Vehicles Handled by the Franchisee and Has Been and Is
16 Rendering Adequate Services to the Public [Section 3061(e)]

17 197. Nissan has not sustained its burden of proof in this regard. Protestant's dealership and its
18 employees, equipment, and parts department are "adequate" to provide for its customers' needs, and its
19 service technicians and their special equipment can provide for the servicing of the Nissan LEAF.

20 198. However, protestant's failure to be open for service appointments on Saturdays is not
21 providing for the needs of its customers.

22 Whether the Franchisee Fails to Fulfill the Warranty Obligations of the Franchisor to be
23 Performed by the Franchisee [Section 3061(f)]

24 199. Nissan has not sustained its burden of proof in this regard. There was no issue raised
25 regarding protestant's fulfillment of its warranty obligations.

26 The Extent of Franchisee's Failure to Comply With the Terms of the Franchise [Section 3061(g)]

27 200. Protestant, by failing to be open for service on Saturdays, has not complied with one of the
28 provisions of the Dealer Agreement. However, this is not a great "extent" and respondent has therefore
not sustained its burden of proof in this regard.

CONCLUSIONS OF LAW

1
2 201. Respondent has not proved that Santa Cruz Nissan failed to transact an appropriate amount
3 of business, as compared to the business available to it. [Section 3061(a)]

4 202. Respondent has not proved that Santa Cruz Nissan failed to make necessary investments
5 and incurred obligations to perform its part of the franchise. [Section 3061(b)]

6 203. Respondent has not proved that Santa Cruz Nissan does not have permanency of the
7 investment. [Section 3061(c)]

8 204. Respondent has not proved that it would be injurious to the public welfare for the franchise
9 to be modified or replaced or the business of the franchisee disrupted. [Section 3061(d)]

10 205. Respondent has not proved that Santa Cruz Nissan does not have "adequate" facilities,
11 equipment and personnel to provide for the needs of its customers. [Section 3061(e)]

12 206. Respondent has not proved that Santa Cruz Nissan has failed to fulfill warranty
13 obligations. [Section 3061(f)]

14 207. Respondent has not proved that Santa Cruz Nissan has failed to comply with the terms of
15 the franchise. [Section 3061(f)]

16 ///

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PROPOSED DECISION

1
2 Based on the evidence presented and the findings herein, IT IS HEREBY ORDERED THAT the
3 Protest in *Santa Cruz Nissan, Inc. dba Santa Cruz Nissan v. Nissan North America, Inc.*, Protest No. PR-
4 2358-13, is sustained.

5
6 I hereby submit the foregoing which constitutes my
7 Proposed Decision in the above-entitled matter, as
8 the result of a hearing before me, and I recommend
9 this Proposed Decision be adopted as the Decision of
10 the New Motor Vehicle Board.

11 DATED: July 3, 2014

12 

13 By: _____
14 DIANA WOODWARD HAGLE
15 Administrative Law Judge

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24 Attachments

25
26
27 Jean Shiomoto, Director, DMV
28 Mary Garcia, Branch Chief,
Occupational Licensing, DMV

THE DEALER AGREEMENT

The "Standard Provisions" of the "Nissan Dealer Sales and Service Agreement" provide, in pertinent part, the following:

Section 1. Definitions

....

G. "Competitive Vehicles" shall mean those new vehicles which are considered by Seller [Nissan] to be directly competitive with Nissan Vehicles.

....

N. "Primary Market Area" shall mean the geographic area which is designated from time to time as the area of Dealer's sales and service responsibility for Nissan Products... Seller reserves the right, in its reasonable discretion, to issue new, superseding "Notices of Primary Market Area" to Dealer from time to time.

....

Q. "Executive Manager" shall mean the person named as Executive Manager in ... this Agreement upon whose personal qualifications, expertise, reputation, integrity, experience, ability and representations that he or she shall devote his or her primary efforts to and have full managerial authority and responsibility for the day-to-day management and performance of Dealer, Seller has relied in entering into this Agreement.

....

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 ... 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... Seller may, in its reasonable discretion, change Dealer's Primary Market Area from time to time.

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 of performance;

Exhibit A

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

(i) registrations of Nissan Cars and Nissan Trucks;

(ii) registrations of Competitive Vehicles;

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. . . ; and

4. A comparison of sales and/or registrations achieved by Dealer to the sales or registrations of Dealer's competitors.

D. Additional Factors for Consideration

Where appropriate in evaluating Dealer's sales performance, Seller will take into account such reasonable criteria as Seller may determine from time to time, including, for example, the following: the Dealership Location; the general shopping habits of the public in such market area; the availability of Nissan vehicles to Dealer . . . ; any special local marketing conditions that would affect Dealer's sales performance differently from the sales performance of other Authorized Nissan Dealers; the recent and long term trends in Dealer's sales performance; the manner in which Dealer has conducted its sales operations (including advertising, sales promotion, and treatment of customers); and the other factors, if any, directly affecting Dealer's sales opportunities and performance.

H. Evaluation of Dealer's Sales Performance

Seller will periodically evaluate Dealer's performance of its [sales] responsibilities. . . Dealer shall have the opportunity to comment, in writing, on such evaluations. Dealer shall promptly take such action as may be required to correct any deficiencies in Dealer's performance of its [sales] responsibilities. . . ."

Section 6. Other Seller and Dealer Responsibilities

D. Hours of Operations.

Dealer recognizes that the service and maintenance needs of the owners of Nissan Products and Dealer's own responsibilities to actively and effectively promote the sale of Nissan Products can be met only if Dealer keeps its Dealership Facilities open and conducts all of its Dealership Operations . . . during hours which are reasonable and convenient for Dealer's

Exhibit A

customers. Accordingly, Dealer shall maintain its Dealership Facilities open for business and shall conduct all Dealership Operations required under this Agreement during such days and hours as automobile dealers' sales and service facilities are customarily and lawfully open in Dealer's Primary Market Area...

Section 12. Termination

B. Termination by Seller for Non-Performance by Dealer.

1. If, based upon the evaluations thereof made by Seller, Dealer shall fail to substantially fulfill its responsibilities with respect to:

a. Sales of new Nissan Vehicles and the other responsibilities of Dealer set forth in Section 3 of this Agreement;

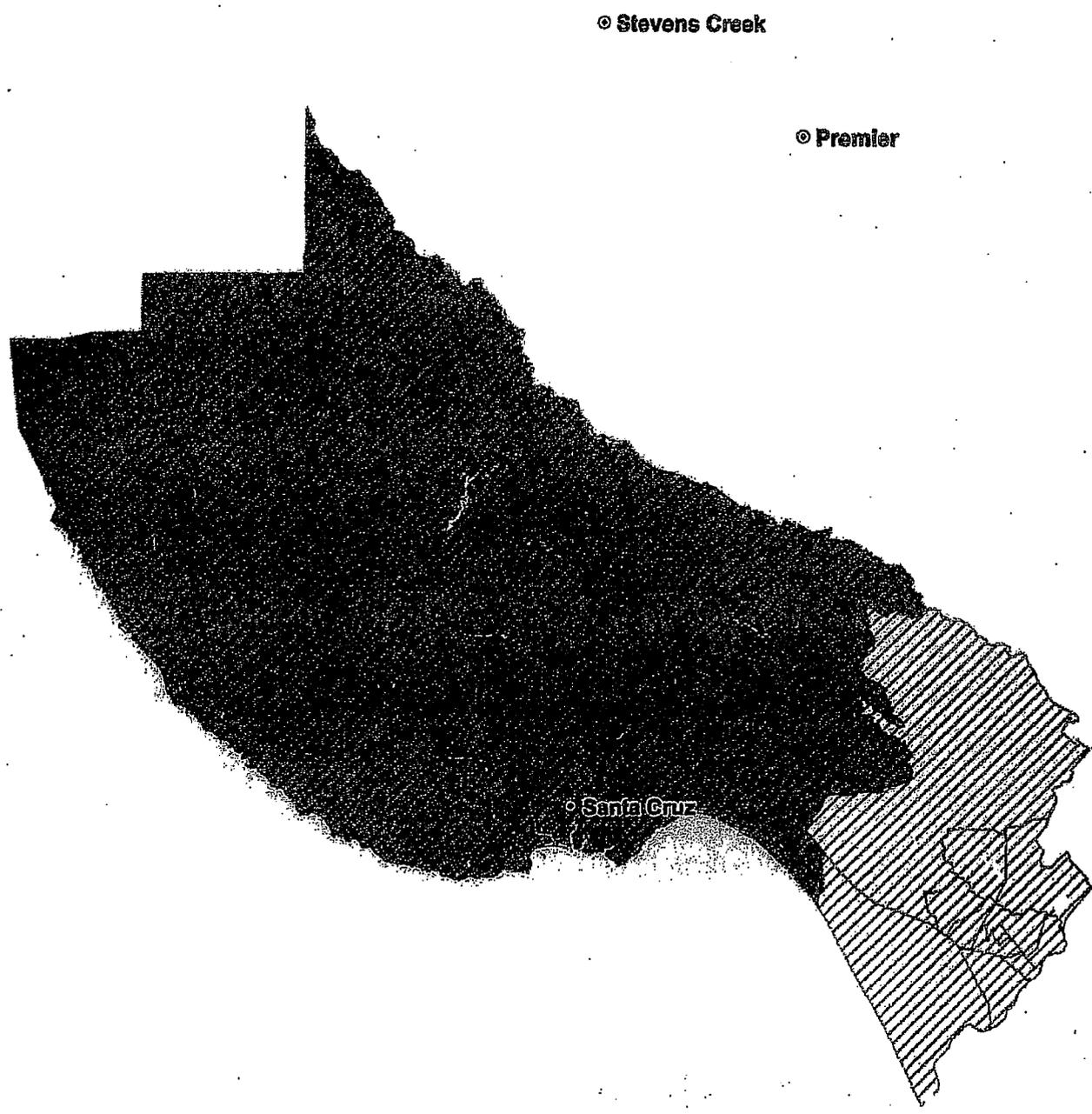
Seller shall notify Dealer of such failure and will review with Dealer the nature and extent of such failure and the reasons which, in Seller's or Dealer's opinion, account for such failure.

Thereafter, Seller will provide Dealer with a reasonable opportunity to correct the failure. If Dealer fails to make substantial progress towards remedying such failure before the expiration of such period, Seller may terminate this Agreement by giving Dealer notice of termination...

Exhibit A

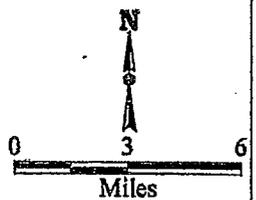
Exhibit E

**12/2011 Santa Cruz (Santa Cruz) Nissan PMA by 2000 Census Tract vs.
9/2013 Santa Cruz (Santa Cruz) Nissan PMA by 2010 Census Tract**
© Nissan Sunnyvale



■ 12/2011 Santa Cruz (Santa Cruz) PMA
▨ 9/2013 Santa Cruz (Santa Cruz) PMA

SOURCE: The Fontana Group, Inc.
DATA: Manufacturer Dealer Census File (Magnetic Media), 8/2013.
Manufacturer Structure List Files (Magnetic Media), 12/2011 and 9/2013.

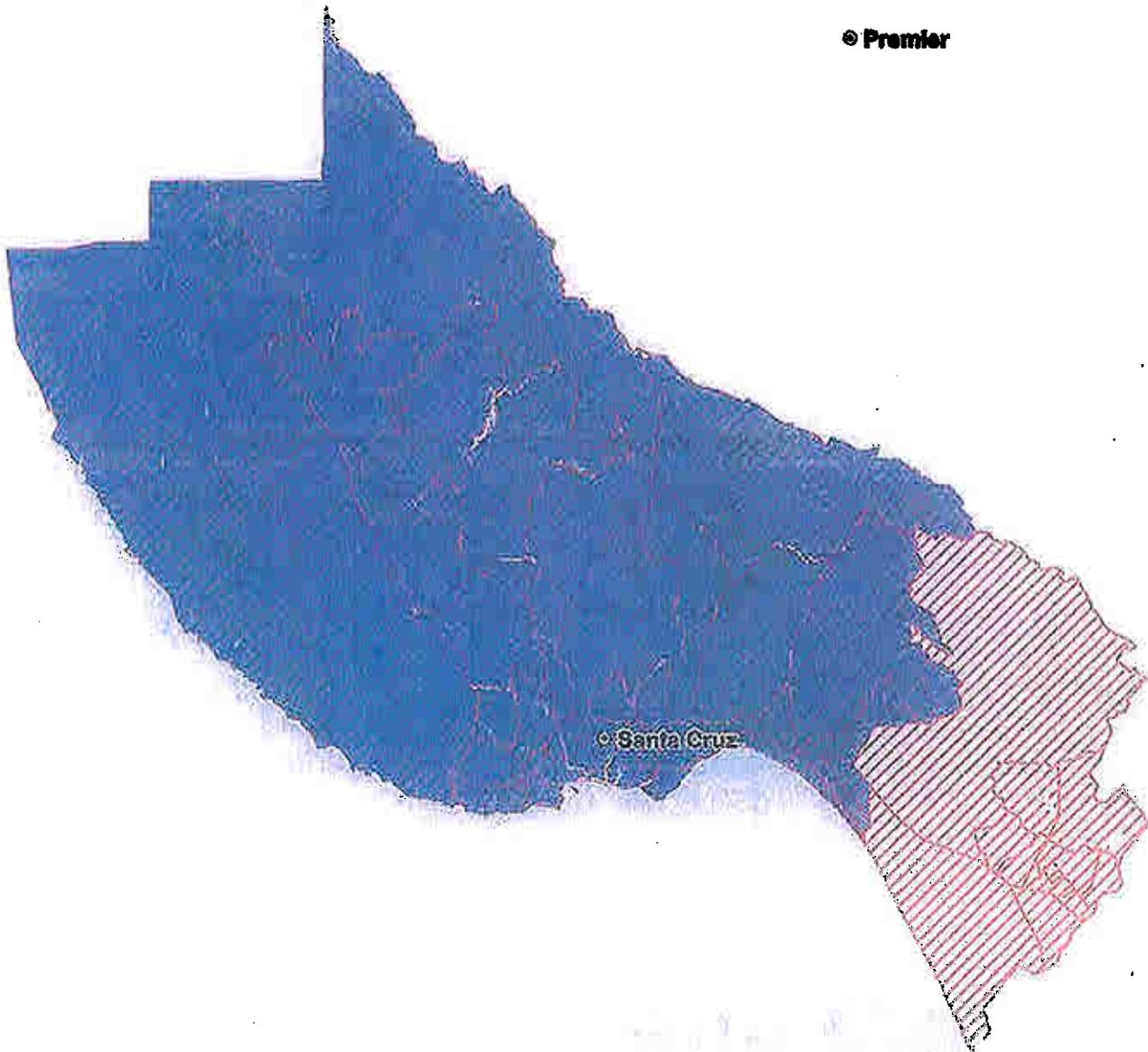


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**12/2011 Santa Cruz (Santa Cruz) Nissan PMA by 2000 Census Tract vs.
 9/2013 Santa Cruz (Santa Cruz) Nissan PMA by 2010 Census Tract
 © Nissan Sunnyvale**

© Stevens Creek

© Premier



	12/2011 Santa Cruz (Santa Cruz) PMA
	9/2013 Santa Cruz (Santa Cruz) PMA

SOURCE: The Pontana Group, Inc.
 DATA: Manufacturer Dealer Census File (Magnetic Media), 9/2013.
 Manufacturer Structure List Files (Magnetic Media), 12/2011 and 9/2013.



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NEW MOTOR VEHICLE BOARD
1507 - 21st Street, Suite 330
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STATE OF CALIFORNIA
NEW MOTOR VEHICLE BOARD

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

Protestant,

Protest No. PR-2358-13

v.

NISSAN NORTH AMERICA, INC.,

Respondent.

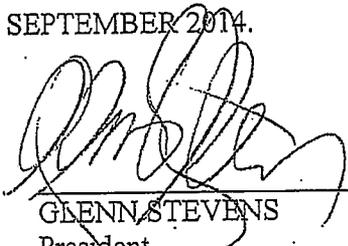
DECISION

At its regularly scheduled meeting of September 17, 2014, the Public Members of the Board met and considered the administrative record and "Proposed Decision Following Board's Order Sustaining the Protest and Remanding the Matter" in the above-entitled matter. After such consideration, the Board adopted the Proposed Decision as its final Decision in this matter with the following amendment:

1. In paragraph 10, line 13, on page 4, the date "July 14, 2014" is changed to "July 3, 2014".

This Decision shall become effective forthwith.

IT IS SO ORDERED THIS 17th DAY OF SEPTEMBER 2014.



GLENN STEVENS
President
New Motor Vehicle Board

1 NEW MOTOR VEHICLE BOARD
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2 Sacramento, California 95811
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3
4

5
6 STATE OF CALIFORNIA
7 NEW MOTOR VEHICLE BOARD
8

9 In the Matter of the Protest of

10 SANTA CRUZ NISSAN, INC., dba SANTA
11 CRUZ NISSAN,

Protestant,

12 v.

13 NISSAN NORTH AMERICA, INC.,
14

Respondent.
15
16

Protest No. PR-2358-13

**PROPOSED DECISION FOLLOWING
BOARD'S ORDER SUSTAINING THE
PROTEST AND REMANDING THE
MATTER**

17 **BOARD ORDER REMANDING THE MATTER AND SUSTAINING THE PROTEST**

18 1. At the July 15, 2014, Special Meeting, the Public Members of the New Motor Vehicle
19 Board ("Board") considered the administrative record and Proposed Decision dated July 3, 2014. After
20 such consideration, the Board by Order dated July 17, 2014, conditionally sustained Protest No.
21 PR-2358-13 and remanded the matter to Administrative Law Judge Diana Woodward Hagle ("ALJ
22 Woodward Hagle"). (Order Conditionally Sustaining the Protest and Remanding the Matter, p. 2)

23 2. The Board ordered ALJ Woodward Hagle to "recommend conditions for the Board to
24 impose consistent with [Vehicle Code¹] Section 3067 and establish a time frame for Protestant to comply
25 with those conditions. The ALJ shall have discretion, if deemed necessary, to order additional evidence,
26 briefing, and/or arguments." (Order Conditionally Sustaining the Protest and Remanding the Matter, p.

27
28 ¹ Hereinafter, unless otherwise indicated, all section references are to the Vehicle Code.

PROPOSED DECISION FOLLOWING BOARD'S ORDER SUSTAINING THE PROTEST
AND REMANDING THE MATTER

Exhibit F

1 2)

2 3. The Board's Order also "strongly encouraged" the parties "to engage in settlement
3 discussions and set a Mandatory Settlement Conference with a Board appointed ALJ". (Order
4 Conditionally Sustaining the Protest and Remanding the Matter, p. 2)

5 **SUMMARY OF ACTIONS TAKEN FOLLOWING REMAND**

6 4. ALJ Woodward Hagle issued a Notice setting a Mandatory Settlement Conference
7 ("MSC") for August 19, 2014, before ALJ Wong. The parties were also ordered to submit proposed
8 conditions to ALJ Wong by August 13, 2014. If the matter did not settle at the MSC, the parties'
9 proposed conditions were to be provided to ALJ Woodward Hagle. The matter did not settle at the
10 MSC; however ALJ Wong retained jurisdiction to reconvene the MSC, should the parties so request.

11 5. ALJ Woodward Hagle also issued an "Order Regarding Matters Pertaining to the
12 Remand", which set August 26, 2014, for a telephonic hearing on the conditions, and stated the
13 following: "Additional Evidence: There will be no additional evidence and the record will not be
14 reopened".

15 6. The telephonic hearing on the conditions was held on August 26, 2014. This was not a
16 hearing in the usual sense, but rather an opportunity for the parties to suggest conditions regarding the
17 Board's order of remand.

18 **RECOMMENDED CONDITIONS²**

19 7. Although respondent has not sustained its burden of proof under Section 3061 to establish
20 good cause to terminate the Nissan franchise of Santa Cruz Nissan, respondent has nonetheless presented
21 evidence sufficient to justify a final decision imposing conditions pursuant to Section 3067(a).

22 8. Section 3067(a) provides that "[c]onditions imposed by the board [on a decision] shall be
23 for the purpose of assuring performance of binding contractual agreements between franchisees and
24 franchisors or otherwise serving the purposes of this article...".

25 9. The Recommended Conditions are:

26 ///

27
28 ² The Proposed Decision dated July 3, 2014, as Attachment 1, is incorporated into this decision as though set forth at length herein.

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

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

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

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

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

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

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

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

23 (2) No less frequently than quarterly, Nissan shall calculate the average percentage
24 increase (or decrease) in number of sales of new Nissan vehicles of the 10 dealers in District 8

25
26 ³ The 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.

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

1 other than protestant and transmit the calculation to protestant.

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

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

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

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

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

12 **AMENDMENTS TO THE PROPOSED DECISION DATED JULY 3, 2014**

13 10. Footnote 10 on page 14 of the Proposed Decision dated July 14, 2014, is amended nunc
14 pro tunc to read as follows:

15 Vehicle Code section 11713.13(g), which became effective January 1, 2014, has no
16 application to this protest, as the statute has no retroactive effect. It deals with a
17 manufacturer's "...performance standard, sales objective, or program for measuring a
18 dealer's sales...performance..." and, among other things, requires the manufacturer to
19 respond to a dealer's request by "...provid[ing] a written summary of the methodology
20 and data used in establishing the performance standard, [etc.]" Here, the lack of clarity in
21 the data would presumably be the sort of information a manufacturer would disclose
22 about its "methodology and data" and "application" of a "performance standard" [Section
23 11713.13(g)(1)(B)].

24 11. Two citations clarify that the evidence supports the finding that Watsonville was part of
25 the PMA of My Nissan prior to its reassignment to protestant. In paragraph 106, line 12, after the
26 sentence ending "...My Nissan's PMA." The citation (Exh 200E:4741, 4742; IV:79:14-80:14) was
27 added as indicated below:

28 "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:79:14-80:14) Not only does My
Nissan, a successful dealer, have a concentration of sales into the Watsonville area, its 2012 RSE soared

1 (from 113.4% at year-end 2011 to 160.6% at year-end 2012), a mirror image of SCN's decline (51.6% at
2 year-end 2011 to 32.0% at year-end 2012). (Exhs 200A:4696, 4697; 200B:4714; 200C:4716)"
3
4
5

6 I hereby submit the foregoing which constitutes my
7 Proposed Decision Following Board's Order
8 Sustaining the Protest and Remanding the Matter in
9 Protest No. PR-2358-13, as the result of a hearings
10 before me, and I recommend this Proposed Decision
11 be adopted as the Decision of the New Motor Vehicle
12 Board.

13 DATED: September 5, 2014

14 *Diana Woodward Hagle*

15 By: _____

16 DIANA WOODWARD HAGLE
17 Administrative Law Judge
18
19
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22
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24
25

26 Attachment

27 Jean Shiimoto, Director, DMV
28 Wesley Goo, Deputy Director,
Licensing Operations Division, DMV

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6 STATE OF CALIFORNIA
7 NEW MOTOR VEHICLE BOARD
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9 In the Matter of the Protest of
10 SANTA CRUZ NISSAN, INC., dba SANTA
11 CRUZ NISSAN,
12 Protestant,
13 v.
14 NISSAN NORTH AMERICA, INC.,
15 Respondent.

Protest No. PR-2358-13

PROPOSED DECISION

16
17
18 PROCEDURAL BACKGROUND

19 Statement of the Case

20 1. By letter dated January 14, 2013, Nissan North America, Inc. gave notice to Santa Cruz
21 Nissan, Inc. pursuant to California Vehicle Code section 3060¹ of its intention to terminate the
22 dealership's Nissan franchise.

23 2. The New Motor Vehicle Board (hereinafter, sometimes "Board") received the notice on
24 January 16, 2013.

25 3. On January 22, 2013, Santa Cruz Nissan filed a timely protest.

26 4. A hearing on the merits of Protest No. PR-2358-13 was held January 27 through 31, 2014;
27

28 ¹ Hereinafter, unless otherwise indicated all section references are to the Vehicle Code.

PROPOSED DECISION

Exhibit F

ATTACHMENT 1

1 February 3 through 7, 2014; and March 6 and 7, 2014, before Administrative Law Judge Diana
2 Woodward Hagle.

3 5. The matter was submitted on June 3, 2014.

4 **Parties and Counsel**

5 6. Protestant Santa Cruz Nissan, Inc. dba Santa Cruz Nissan (herein "SCN", "Santa Cruz
6 Nissan" or "Protestant") is a Nissan dealership located at 1616 Soquel Avenue in Santa Cruz, California.
7 Protestant is a "franchisee" within the meaning of sections 331.1 and 3060(a)(1)(A).

8 7. Protestant is represented by the Law Offices of Michael J. Flanagan, by Michael J.
9 Flanagan, Esquire; Gavin M. Hughes, Esquire; and Danielle R. Vare, Esquire, 2277 Fair Oaks Boulevard,
10 Suite 450, Sacramento, California.

11 8. Respondent Nissan North America, Inc. (herein "Nissan" or "Respondent") is a
12 "franchisor" within the meaning of sections 331.2 and 3060(a)(1)(A).

13 9. Respondent is represented by Baker & Hostetler LLP, by Maurice Sanchez, Esquire, and
14 Lisa M. Gibson, Esquire, 600 Anton Boulevard, Suite 900, Costa Mesa, California.

15 **IDENTIFICATION OF WITNESSES**

16 **Protestant's Witnesses**

17 10. Ernest L. "Lee" Courtright (Dealer Principal of Santa Cruz Nissan) testified to the
18 dealership's ownership and history, a description of the facilities, and the adverse effect on protestant's
19 business if the Nissan franchise is terminated.²

20 11. James Courtright (Executive Manager of Santa Cruz Nissan) testified about the day-to-day
21 operation of the dealership, the actions taken to improve Nissan vehicle sales, and the dealership's
22 involvement in charitable and community activities.

23 12. Martin Bernal, City Manager of Santa Cruz, testified about the characteristics of the city
24 and the county of Santa Cruz, the contributions of Santa Cruz Nissan to community activities and to the
25 city's tax revenues. In his opinion, there would be a significant adverse fiscal impact on those revenues if
26 SCN's Nissan franchise is terminated.

27 _____
28 ² References herein to Roman Numerals are to the transcripts of the proceedings.

Respondent's Witnesses

1
2 13. The following witnesses were employees, or former employees, of Nissan. Their
3 testimony covered the organization and products of the company; duties of Nissan personnel; assessments
4 of the sales performance of Santa Cruz Nissan and communications with the dealership; Nissan's method
5 of evaluating the sales performances of its dealers and its brand popularity; the procedures which Nissan
6 follows with dealers it considers underperforming; and the decision to issue a Notice of Termination to
7 SCN.

8 A. A Nissan "Dealer Operations Manager" (DOM) is the primary contact between a dealer
9 and Nissan. The DOM's responsibility is dealer support and communication to dealers of Nissan policies,
10 programs, and procedures with the goal of boosting sales. After each contact, DOM's prepare "Contact
11 Reports", which are not given to dealers.

12 (1) Eric Lewin testified that, as Santa Cruz Nissan's DOM from April of 2009 to June of 2011,
13 he visited SCN every 30 to 60 days, and was in regular telephone or email contact with the dealership.
14 SCN's sales performance was an issue during his tenure. In his opinion, SCN's failure to improve sales
15 performance was due to an insufficient level of resources to accomplish the task, no sense of urgency to
16 change the situation, and no one in charge capable of executing plans for improvement.

17 (2) Tina Novoa, the DOM for SCN from June of 2011 to September of 2012, testified that she
18 contacted the dealership, either personally or on the phone, at least once a month (and she knew the
19 Courtright's, having called on them when she worked for Volkswagen). She was aware of Nissan's
20 concern about SCN's sales performance. In Ms. Novoa's opinion, James Courtright wanted to be a good
21 manager, but lacked the ability to successfully execute plans for improvement.

22 (3) John Gardner, the current DOM, assumed his position in October of 2012, shortly after the
23 180-day Notice of Default under which SCN was operating expired and Nissan had extended the Notice
24 of Default for 60 days. He testified that he visited SCN four times and had contact with the dealership at
25 least monthly via phone and email. His last visit to the dealership was on June 28, 2013, when he alerted
26 James Courtright that Nissan had replaced its "West Region" (RSE) standard with a "State Sales
27 Effectiveness" (SSER) standard. He testified that he continued email and phone contacts with SCN until
28 December of 2013.

1 B. Gary Inman is a Fixed Operations Manager (FOM) for Nissan, responsible for covering the
2 area which includes the Santa Cruz market. He works with dealers to grow their service business by
3 satisfying and retaining customers, thereby promoting the sale of Nissan's parts and accessories. He
4 testified that in the past four years, he has called on Santa Cruz Nissan "maybe once or twice a quarter",
5 dealing mainly with the Service and Parts Managers, and occasionally with James Courtright. He also has
6 email communications with the dealership. In his opinion, a definite correlation exists between service
7 and sales---retaining service customers leads to loyalty, repeat business and new car sales. He testified
8 that despite his repeated suggestions over the years that SCN's service department stay open on
9 Saturdays, he was unable to convince James Courtright of the value of the idea.

10 C. As Area General Manager (AGM) since 2011, Chad Filiault is familiar with SCN, having
11 visited the dealership "multiple times". He is in charge of monitoring dealers' performances to meet
12 Nissan objectives in three areas: sales operations, service operations and customer loyalty, and he receives
13 and reviews all "Contact Reports" of the four DOM's, the four FOM's, and the one Loyalty Performance
14 Manager (LPM) assigned to him. After the Notice of Default had been issued to SCN, he had approached
15 two prospective buyers for the Nissan franchise but, in his opinion, the Courtright's were not interested in
16 selling. He testified that Nissan needs representation in Santa Cruz, and that Nissan would replace SCN if
17 the franchise was terminated.

18 D. In April of 2010, Eric Rodgers became Regional Vice President (RVP) of "West Region
19 North". He testified that, as the senior Nissan executive in the region, he was responsible for insuring that
20 Nissan's "performance metrics" were achieved. He visited SCN's dealership "about five times" and
21 testified, among other things, about the events leading up to his recommendation to Nissan management
22 to issue a Notice of Termination to SCN.

23 E. Alison Speranzo, a regional Market Representation Specialist for Nissan, described the
24 procedures that Nissan follows before issuing Notices of Default and Notices of Termination. Here, she
25 testified, it was SCN's downward trend in dealer effectiveness beginning in 2006 that prompted the
26 decision to issue a Notice of Default and later, the Notice of Termination.

27 F. Samuel Wright, Manager of Dealer Digital Marketing, described ways in which dealers
28 develop sales via the Internet and related electronic means.

1 14. James Courtright was called as an adverse witness pursuant to Evidence Code section 776.

2 Expert Witnesses

3 15. Protestant's expert witness was Edward Stockton, Vice President, The Fontana Group.
4 (Exhs 21B-23B)³

5 16. In Mr. Stockton's view, Nissan's statistical analyses of the sales performance of Santa
6 Cruz Nissan were significantly flawed.

7 17. Among other things, Mr. Stockton was critical of Nissan's use of the "West Region"---a
8 geographical area encompassing, at least in part, most western U.S. states---as a basis for comparing and
9 evaluating SCN's sales performance. Also, he testified that Nissan ignored or minimized factors which
10 depressed sales for SCN which were outside the control of the dealership, especially considering the
11 unique geographic and demographic characteristics of the Santa Cruz market. (Exh 21B: "Introduction")

12 18. John Frith, Vice President, Urban Science Applications, Inc. (USAI), was respondent's
13 expert witness. USAI is "...a third party vendor company which provides Nissan with analyses of census,
14 sales and registration data, market studies, as well as expert testimony". (Exh 200A-200G, Surrebuttal
15 Report; JtExh 14:7)

16 19. Mr. Frith testified that all vehicle manufacturers have objective standards to calculate and
17 assess the sales effectiveness not only of their franchised dealers, but also the popularity of their brands in
18 the marketplace, and the performances of their competitors. The surveys, standards and processes by
19 which Nissan made these comparisons and calculations to measure its dealers' sales effectiveness was
20 reasonable.

21 20. Using several different approaches in evaluating SCN's sales effectiveness, Mr. Frith
22 concluded that Santa Cruz Nissan was "seriously underperforming" in the market, and had been failing to
23 capture sales opportunities in its Primary Market Area for several years. These "lost [sales]
24 opportunities", he concluded, were due to deficiencies in "dealer operations" which were within the
25 control of the dealer. (Exh 200D:4736; IV:7, 59, 144, 153)

26
27 ³ Exhibits are referenced as "Exh" and joint exhibits as "JtExh". In both exhibits and joint exhibits, page number references
28 will be to the last four digits only. Since most exhibits were marked for identification by the parties prior to the hearing, they
were not offered or introduced in numerical order; also, some pre-marked items may not have been used in the hearing at all, so
there may be numerical gaps in the Exhibit List.

1 Deposition Witness

2 21. Pursuant to stipulation, the parties submitted portions of the deposition testimony of Anne
3 Corrao (Nissan's Director of Customer Quality and Dealer Network Development), who testified to the
4 importance of NREDI facilities and her participation in Nissan's decision to issue a Notice of Termination
5 to Santa Cruz Nissan. (Exhs 26, 241, 242)

6 POST-HEARING REQUESTS TO RE-OPEN RECORD

7 22. Respondent's request for official notice of certain 2010 census data was granted. This
8 information provided some population, business and race/ethnic data in the Santa Cruz-Watsonville area,
9 with comparisons to California data. Protestant did not object to the admission of the evidence.

10 23. The parties' "Joint Glossary of Terms to be Used in Merits Hearing" was received May 22,
11 2014, and was admitted into evidence.

12 PRE-HEARING SITE VISIT

13 24. On January 24, 2014, at the request of the parties, ALJ Woodward Hagle conducted a site
14 visit of protestant's dealership (walk-through of buildings and facilities) and a drive-by of other new and
15 used cars dealerships in the city of Santa Cruz and immediately surrounding areas. Both parties and their
16 counsel were present.

17 BURDEN OF PROOF

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

20 26. The standard is "preponderance of the evidence", which is met if the proposition is more
21 likely to be true than not true---i.e., if there is greater than 50 percent chance that the proposition is true.

22 ISSUE PRESENTED

23 27. Did respondent Nissan sustain its burden of proof of establishing "good cause" to
24 terminate protestant's Nissan franchise, thereby creating an "open point" allowing it to appoint another
25 Nissan dealer in the Santa Cruz area?

26 28. In determining whether there is good cause for terminating a franchise, section 3061
27 requires the Board "...to take into consideration the existing circumstances, including, but not limited to,
28 all of the following:

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

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

5 (c) Permanency of the investment.

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

8 (e) Whether the franchisee has adequate motor vehicle sales and service facilities, equipment,
9 vehicle parts, and qualified service personnel to reasonably provide for the needs of the consumers for the
10 motor vehicles handled by the franchisee and has been and is rendering adequate services to the public.

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

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

14 **PROTESTANT'S CONTENTIONS**

15 29. Santa Cruz Nissan has been a successful family-owned Nissan dealer for over 40 years in
16 the City of Santa Cruz. Santa Cruz Nissan is a sound business operation, with excellent capitalization, a
17 contributor to the community and to the city's tax revenues, all of which (including the dealership itself)
18 would be gone if its Nissan franchise were to be terminated.

19 30. Nissan's analyses and calculations of sales performance are flawed, overstating the sales
20 opportunities for a Nissan dealer in the Santa Cruz market. For example, the representative group of
21 Nissan dealers against which SCN has been compared---the "West Region"---is too large, yielding
22 inaccurate conclusions about SCN's sales performance.

23 31. When Nissan enlarged SCN's Primary Market Area in the late Spring of 2012, data
24 generated from the larger area had the immediate effect of degrading SCN's sales performance statistics.
25 In Nissan's analyses of SCN's 2012 performance, Nissan appeared to have ignored the dealership's more
26 favorable data from the first months of 2012, thereby generating inaccurate effectiveness scores.

27 32. Nissan ignored the unique geographic and demographic characteristics of the Santa Cruz
28 market including, as examples, the isolation of Santa Cruz by mountain ranges and ocean; the substantial

1 net out-flow of workers living in Santa Cruz but commuting to San Jose and the location of SCN's
2 dealership 1.8 miles from the ocean, which reduces the "proximity advantage" for making sales available
3 to other dealerships "ringed" by population centers.

4 33. The termination action is simply a "proxy" for Nissan to replace protestant's dealership
5 with one with an NREDI-compliant facility, is exclusive to Nissan, and is clustered with at least one other
6 competitive line-make.

7 RESPONDENT'S CONTENTIONS

8 34. Nissan's data analysis is reasonable and necessary to monitor dealer sales performance as
9 well as the popularity of the Nissan brand (and models) against the competition.

10 35. Nissan, like most, if not all, vehicle manufacturers, measures sales penetration of a dealer
11 by comparing its sales against numbers of "competitive set" vehicles sold in the dealer's assigned
12 marketing area. Then, from the data generated, Nissan calculates the dealer's sales performance by
13 comparing it with other Nissan dealers in a geographical region chosen by Nissan.

14 36. Relying on these "performance metrics", Nissan has determined that Santa Cruz Nissan
15 has been underperforming since 2006, when it precipitously dropped in the sales rankings compared to
16 other Nissan dealers. Since that date, SCN's sales performance has been significantly lower than other
17 dealerships. It has placed near the bottom for several years in rankings of other Nissan dealers, both in
18 the "West Region" and in California.

19 37. In the Santa Cruz market, there is substantial business available in the new car market for
20 Nissan vehicles---these are "lost opportunities" which should have been captured by Santa Cruz Nissan.

21 38. Despite marketing suggestions and counseling by Nissan representatives over the last
22 several years, protestant has shown an unwillingness or inability to go after business and to provide a
23 better experience for its customers. There is substantial room for improvement of sales opportunities in
24 the Hispanic community; by opening for service on Saturdays to capture new customers, especially those
25 Santa Cruz residents who commute "over the hill" to jobs in Silicon Valley; and by effectively using the
26 Internet to attract potential customers.

27 39. Santa Cruz Nissan has breached the parties' Dealer Agreement by its "unsatisfactory sales
28 penetration performance". Since 2006, Santa Cruz Nissan has failed to meet "...100% regional sales

1 effectiveness [i.e., "100% RSE"]..." which is "...the minimum compliance level per Dealer's Sales and
2 Service Agreement". (Emphasis added.) (JtExh 2)

3 40. Santa Cruz Nissan is (and has been for several years) a poor sales performer because the
4 owners have complacent competitive attitudes, resulting in the dealership having little "energy".
5 Although Nissan would prefer a Santa Cruz dealership to be "exclusive", built or remodeled to NREDI
6 standards, and in close proximity to other dealers, SCN's lackluster sales performance is not primarily due
7 to its current facility or to its location, but results from the inaction or ineffectiveness of the owners.

8 **FINDINGS OF FACT**⁴

9 **Preliminary Findings**

10 **History and Description of the Dealership**

11 41. Protestant Santa Cruz Nissan is a California corporation. It is one of the oldest family-
12 owned Nissan (formerly Datsun) dealer franchises in the U.S., having been appointed on March 20,
13 1972. (JtExhs 1:0063, 4:0008⁵; IX:45, 55; XII:173)

14 42. Ernest ("Lee") Courtright has been the dealer principal of protestant since its start in 1972.
15 He was the Executive Manager until 1997 and the owner of 100% of the business until 2005. He began
16 in the automobile business in 1962 as a service writer. Santa Cruz Nissan is the first business he owned.
17 Over the years, he has owned or had interests in no fewer than ten dealerships in Northern California and
18 Nevada (Toyota, Jeep, Mazda, Mercedes-Benz, Volkswagen, Dodge, Ram as well as two other Nissan
19 stores, in Stockton and Carson City). Lee Courtright has been on national and regional boards for Nissan
20 and for Volkswagen, including Nissan's National Dealer Council and National Advertising Board.
21 (JtExh 1:0076-0078; II:237; VI:44; XII:164, 167-172, 237)

22 43. Lee Courtright was formerly a partner in the Seaside Company, selling his interest in 1993
23 or soon thereafter. The Seaside Company is a large land owner in the Santa Cruz area and, among other
24

25 ⁴ References herein to testimony, exhibits or other parts of the record are examples of evidence relied upon to reach a finding
26 and are not intended to be all-inclusive.

27 Findings of Fact are organized under topical headings for readability only and are not to be considered relative to only the
28 particular topic under which they appear, but rather may apply to any of the "existing circumstances" or "good cause" factors
of section 3061.

⁵ A few exhibits, such as this one, not only have pages out of numerical order but also many missing page numbers.

1 properties, owns the Toyota, Mazda, Subaru and Kia franchises in Capitola and the Golden State
2 Warriors basketball team. (VII:11-13; VIII:267)

3 44. Lee Courtright is "in town" 120 to 140 days a year and spends about four hours a day at
4 the dealership when he is in Santa Cruz. His responsibility is to handle "bigger projects", such as health
5 insurance for employees and 401(k) issues. His salary is \$6,000 per month; it was not established
6 whether this amount was paid by Nissan, split among the four franchises, or paid from some other
7 account. (XII:165-166, 174)

8 45. James Courtright (Lee Courtright's son) has been SCN's Executive Manager since
9 October 20, 1997, and also "...act[s] as a General Sales Manager". (JtExh 1:0063, 0078; XII:64) A
10 graduate of the University of California at Davis and the M.B.A. program at the University of Santa
11 Clara, he has worked full-time in the automobile business since 1991. He started as a salesman at the
12 Toyota store in Santa Cruz, then split his job there between sales and Finance & Insurance. In 1993, he
13 moved to Santa Cruz Nissan as Sales Manager and in the late 1990's he became protestant's General
14 Manager.⁶ (VII:6-7; VIII:339)

15 46. As Executive Manager, James Courtright is charged with having full managerial
16 authority and responsibility for the day-to-day operations of the dealership.⁷ His compensation is not
17 known.

18 47. On September 25, 2005, the Dealer Agreement was amended to reflect James
19 Courtright's 28.6% ownership of SCN and Lee Courtright's 71.4% ownership of the business. (JtExh
20 1:0076)

21 48. Santa Cruz Nissan, which was first located in downtown Santa Cruz on Front Street,
22 moved to Center Street in 1979. In 1996, it relocated to 1616 Soquel Avenue, in the City of Santa Cruz,
23 to its present site. With each move, the facility was bigger and better. Lee Courtright constructed the
24 dealership building with design assistance and approval from Nissan. The building, at 26,509 square feet,
25 was 112% of Nissan's square footage "guidelines" in 1996 (and 104.9% in 2012), but the land, at 2.61

26
27 ⁶ The General Manager (GM) of a dealership is designated by the Dealer only, as opposed to an Executive Manager (EM) who
is approved by Nissan. (JtExh 14:4)

28 ⁷ An Executive Manager (EM) must be approved by Nissan, different from a General Manager, who is chosen by the
dealership. (JtExh 14:4)

1 acres, was only 52% of the "guidelines" which called for 5.01 acres (and 62.3% in 2012, since the
2 "guidelines" had been reduced to 4.19 acres). (JtExhs 1:0070; 3:0020; XI 134-135; XII:207-208)

3 49. SCN's location on Soquel Avenue is in an area called the "East Commercial Area" by the
4 City of Santa Cruz and is just outside the "Downtown Zone". The dealership is 1.8 miles from
5 Monterey Bay. (Exh 230:1-4)

6 50. As before the last move and continuing to the present, protestant is "dualled" with three
7 line-makes in addition to Nissan: it is a franchisee of Volkswagen, Dodge and Ram vehicles.⁸ SCN sells
8 and services both new and used vehicles. (JtExhs 1:0070; 13:2)

9 51. A separate entity, a family trust for which Lee Courtright is the trustee, owns the real estate
10 upon which SCN is situated. SCN pays rent of \$25,000 a month to the trust; it was not established if this
11 payment is allocated to all four franchises located on the property or is borne by SCN alone. (VII:8, 16)

12 52. The Nissan Retail Environment Design Initiative (NREDI) is a facility and sign program
13 developed by Nissan to create a consistent brand image for its dealership facilities, including those
14 which are "dualled" with other franchises. NREDI-compliant dealerships enjoy "...[m]ore sales, greater
15 capacity and higher customer satisfaction". SCN is not NREDI compliant. (Exhs 11; 241:31-33, 44-45;
16 JtExh 14:5)

17 53. SCN's sales office is open seven days a week, from 9 AM to 8 PM (7 PM during
18 Daylight Savings Time). The dealership offers service on Monday through Friday, from 7:30 AM to 6
19 PM, with shuttle service with two drivers available every hour the service department is open. (JtExh
20 13:2; IX:13-14)

21 54. The service department is not open on weekends. (JtExh 13:2)

22 55. Santa Cruz Nissan is the only Nissan dealer in the Santa Cruz market.

23 56. In the "Dealership Facilities Addendum" to the Dealer Agreement, which was signed on
24 September 20, 2005, SCN agreed to acquire "off-site storage land [and] facilities" within six months to
25 comply with Nissan's facilities guidelines. Although a later Nissan memo recited that SCN did not fulfill
26 this part of the agreement, it is unclear whether SCN did keep its promise by buying the improved lot

27
28 ⁸ Lee Courtright acquired the Dodge truck franchise in 1978; the separate Ram line-make "...has only been around for the last few years...". (XII:172)

1 across the street from the dealership or whether it in fact failed to acquire the storage property. (JtExh
2 1:077)

3 57. SCN's capitalization significantly meets or exceeds Nissan's guidelines for dealers. Even
4 though it posted losses in 2009 and 2010, it had a profit of \$360,548 in 2011. (JtExh 2:0035, 0377)

5 58. SCN acquired to right to sell LEAF electric vehicles on December 16, 2010, and it has
6 been a resounding success for the dealer in environmentally-conscious Santa Cruz. The "Cube" was also
7 a big seller for SCN. (JtExh.1:0090; IV:53, 4732)

8 59. In 2011 and 2012, James Courtright instituted new marketing and personnel policies in
9 order to build up sales (e.g., putting in place Cobalt, increasing the advertising budget by \$10,000/month,
10 incentivizing sales staff with higher commissions for Nissan sales, adding ½ staff position to cover the
11 internet). SCN also participates in Nissan's Regional Marketing Program ("RMP"), a voluntary program
12 funded by participating dealers with matching funds from Nissan; the participants meet periodically to
13 decide how to allocate advertising money in their area. (Exh 209:0025; II:248, 312-314; VII:35-36;
14 VIII:185; XI:47-48) Also, for several years, SCN has had an email marketing program, which keeps in
15 contact with customers with offers of coupons and promotions and news of the dealership. (XII:107-108)

16 60. In February 2014, SCN entered into a three-month contract to advertise to the Hispanic
17 market; in preparation for Spanish-speaking customers, James Courtright had previously hired sales staff
18 conversant in Spanish. In April 2013, the area's dealers who were participating in RMP met and agreed
19 to allocate 30% of RMP funds to Spanish-language advertising; James Courtright "didn't fight it" but was
20 concerned because, at that time, SCN had no Spanish-speaking sales staff so would be unable "... to
21 handle the traffic generated from the spots". (Exh 209:0024; VII:33-34, 46-47; VIII:189-191; XI:29-30,
22 96-97)

23 61. Under the Dealer Agreement, the franchisee has the discretion to decide how to allocate its
24 advertising and marketing budget to "effectively promote" sales of Nissan vehicles, although Nissan
25 could look at "...the manner in which Dealer has conducted its sales operations (including
26 advertising...)". (Exh A; JtExh 1:5625-5626)

27 62. On March 20, 2012, RVP Eric Rodgers served on the Courtright's the Notice of Default
28 ("NOD"), dated March 19th. It cited protestant's "unsatisfactory sales penetration performance" as the

1 reason, reciting that in 2011, SCN sold 204 Nissan vehicles, but its RSE was 51.6%, which ranked SCN
2 187th out of 194 Nissan dealers in the "West Region" and 95th out of 97 dealers in California. According
3 to the letter, this unsatisfactory performance "...constitutes a substantial, material breach of the [Dealer]
4 Agreement"; it further advised that "[t]o correct this default, Nissan will require Dealer to achieve 100%
5 of the West's regional average sales penetration... **within One Hundred Eighty Days (180) days** from
6 receipt of this Notice". (Emphasis in original) (Exh 209:0030; JtExh 2:0056-0061; II:285-288)

7 63. On July 26, 2012, Chad Filiault and Tina Novoa presented Lee Courtright with a plaque
8 commemorating his 40 years as a Nissan dealer. (Exh 209:0025)

9 64. On September 18, 2012, Lee Courtright submitted to Nissan a "buyer assist letter" asking
10 for help to identify and find a buyer for his Nissan franchise. (Exh 208) Chad Filiault found a couple of
11 prospects, both of whom talked briefly with Lee Courtright, but with little or no further interest by either
12 party. (JtExh 13:2) Lee Courtright made no effort to find a buyer. Lee Courtright was not interested in
13 selling the Nissan franchise. He submitted the "buyer assist letter" in order to secure an extension of the
14 expiring NOD. (XII:187-188) On October 5, 2012, the Notice of Default was extended for 60 days so
15 that a possible sale of the franchise could be accomplished. (JtExh 3:0053-0054)

16 65. Both Nissan's internal paperwork regarding the extension and the NOD extension itself
17 noted the "alarming" decline in protestant's RSE during the 180 days since the issuance of the NOD.
18 (JtExh 3:all pages; III:61) Compared to SCN's 2011 year-end RSE of 51.5%, the "...July 2012 rolling 12-
19 month data..."⁹ showed SCN's RSE to be 39.5%. (JtExh 3:0021) The June 2012 rolling 12-month data
20 was slightly different, with a 2011 year-end RSE of 51.57% with SCN's rolling June figure to be 38.35%.
21 (JtExh 3:0023)

22 66. However, the 2012 rolling percentages encompass one or two months in 2012 (starting
23 either June 1st or May 16th) when SCN's PMA was enlarged into Watsonville, which had the immediate
24 effect of reducing SCN's RSE, independent of any other factors. It is unclear if Nissan prorated the RSE
25 calculations to reflect data from two different PMA's or if Nissan applied data from the current (enlarged)

26 ///

27 _____
28 ⁹ "12-month rolling" is "data comprised of the most recent twelve month period, regardless of calendar year". (JtExh 14:6)

1 PMA to the full 12-month periods.¹⁰

2 67. The Notice of Termination (“NOT”), dated January 4, 2013, was directed to Lee
3 Courtright. (JtExh 4:0047-0051) Based on “unsatisfactory sales penetration performance”, the NOT
4 recited SCN’s October 2012 rolling 12-month RSE of 37.3%. The letter stated that “[s]ince the issuance
5 of the NOD, Dealer has not taken necessary action to cure the substantial and material breaches that led to
6 the NOD, no substantial and sustained progress towards improvement or compliance with Dealer’s
7 obligations under the Agreement has been made, and the severity of these defaults continues.” However,
8 as with the NOD extension, there is no acknowledgment of the PMA change and its effect on SCN’s RSE,
9 nor is there any disclosure of the method of calculating the latest RSE figure. (JtExh 4:0047-0051)

10 Nissan Facts

11 68. Currently, Nissan manufactures 22 models with the stated aim of capturing a broad
12 spectrum of the market. With its impressive line-up in many different model “segments”, it hopes to
13 attract first-time car buyers looking to own entry-level cars; those buyers needing work-horse trucks and
14 large SUV’s; as well as those interested in sports cars, sedans and the LEAF, Nissan’s EV offering. (Exh
15 202)

16 69. Nissan’s primary competitor line-makes are Honda and Toyota, each with one dealership
17 in the Santa Cruz market. Hyundai and Kia are also becoming “increasingly” competitive; Kia
18 established a dealership in the Santa Cruz market in June of 2010. (JtExhs 7:5686, 5690; 8:0322)

19 70. Nissan’s goal is to not “overdealer” the marketplace and, to that end, the current number of
20 U.S. Nissan dealers is around 1,100, while Toyota and Honda have many more dealers nationwide
21 (Toyota has approximately 1,400 and Honda is in the neighborhood of 1,200). (I:61-2)

22 71. Nissan considers Santa Cruz a “mid-size” market, not a “larger” one. (I:131; VIII:263)

23 72. By the Spring of 2009, the economic situation facing the automobile industry was “very
24 unfavorable”: the “deep recession” saw dealers reducing inventory and Nissan cutting production in
25 response. “...Registrations of new cars nationally, locally, were all suffering and on the decline”. By
26 2010, however, the markets were recovering and, in December of 2010, the LEAF was launched, which

27
28 ¹⁰ This 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)]

1 became a big seller for Nissan and for SCN. (VII:72, 77-8, 157-8)

2 73. Nissan geographically organizes its dealer network into "Regions", subdividing each
3 "Region" into "Divisions" and then assigning each Nissan dealer a set of census tracts called "Primary
4 Market Areas", or "PMA's". In the Dealer Agreement, a PMA is "...the geographic area which is
5 designated from time to time as the area of Dealer's sales and service responsibility for Nissan Products".
6 (JtExh 1:5622-5623)

7 74. In each PMA, the dealer assigned to it has a geographic, and therefore presumably a
8 competitive, advantage over other Nissan dealers. A dealer may, of course, sell to customers living
9 outside its assigned PMA ("out-sells" or "pump-outs") and, conversely, another Nissan dealership may
10 sell to customers residing inside the dealer's PMA ("in-sells" or "pump-ins"). There are no prohibitions
11 against dealers advertising in another Nissan dealer's PMA. (II:32)

12 75. In the Dealer Agreement, Nissan has "...reserve[d] the right, in its reasonable discretion, to
13 [change the PMA of a Dealer] from time to time...", (JtExh 1:5623). From March 1, 2004 to the late
14 Spring of 2012, Santa Cruz Nissan's PMA encompassed 39 census tracts---all in Santa Cruz County---
15 designated by reference to "...the 2000 Census Tracts...". (VI:6-14) In the late Spring of 2012 (after the
16 Notice of Default had been served) Nissan enlarged protestant's PMA into southern Santa Cruz County,
17 adding 12 new census tracts, which included the City of Watsonville.

18 76. During the relevant time, Nissan authorized USAI to prepare two "market studies" of the
19 Santa Cruz market. Both reached similar conclusions: that the Santa Cruz market was underserved, with
20 sales opportunities that were not being captured, especially when compared to the successes of Toyota
21 and Honda. (JtExhs 7, 9)

22 77. The "Dealer Network Analysis" dated February 2013 was a "market study" prepared for
23 Nissan executives. It recommended that a Nissan dealership in Santa Cruz be an NREDI "stand alone"
24 dealer, "in close proximity to Toyota or Honda" with a facility "meet[ing] or exceed[ing] all established
25 ... guidelines and/or future operational requirements" which would be "competitive with dealerships in
26 the area". (JtExh 7)

27 78. The "Dealer Presentation" dated March 2013 paralleled the executive "market study", with

28 ///

1 somewhat different wording. By letter dated June 8, 2012,¹¹ Nissan invited James Courtright to provide
2 information for a market study Nissan was planning for the “Monterey/Salinas/Santa Cruz (including
3 Gilroy/Morgan Hill) market areas”, but he did not respond. In March of 2013, at the direction of Alison
4 Speranzo, DOM John Gardner made a presentation of the “Dealer Presentation” to the Courtrights, who
5 listened without comment (not a surprising reaction, since the instant protest had been filed two months
6 earlier). (JtExhs 6, 7, 9:0366; VIII:13-14)

7 79. Nissan’s NREDI program requires franchisees building or upgrading a dealership facility
8 to meet Nissan’s corporate design and architectural standards. The facility design is optional for dealers
9 who do not relocate or sell their business, but is mandatory for new or relocating dealers. Nissan will
10 approve a “dual NREDI facility”. (Exh 241:43-45)

11 **The Dealer Agreement**

12 80. On February 2, 1989, the parties executed a “Nissan Dealer Sales and Service Agreement”.
13 Its “Standard Provisions” constitute the franchise agreement currently in force, which allows Santa Cruz
14 Nissan to sell all Nissan models, as well as parts and accessories, and to service the vehicles. (JtExh
15 1:0089, 0065, 5620-5624)

16 81. Over the years, the parties executed Amendments, Product Addenda, at least one
17 Dealership Facilities Addendum, and two Notices of [changes to] Primary Market Area, but none changed
18 the substantive recitals in the 1989 agreement. (JtExhs 1:0063-0085; 3:2)

19 82. Pertinent provisions of the Dealer Agreement are attached hereto as Exhibit A.

20 **Santa Cruz Nissan’s Primary Market Areas¹²**

21 *From March 1st of 2004 - May 16th or June 1st of 2012*

22 83. Effective March 1, 2004, Nissan informed SCN that its Primary Market Area (PMA),
23 identified by the “geographical numerical identifiers” [census tracts] of the 2000 U.S. Census, would
24 consist of 39 census tracts, all within the County of Santa Cruz and centered on the City of Santa Cruz.
25 (JtExh 1:0599-0601, 0075)

26 _____
27 ¹¹ On June 8, 2102, SCN was not only under a Notice of Default, but its PMA had been expanded into Watsonville no more
28 than three weeks earlier.

¹² A map showing both the 2004-2012 PMA and the 2012-present PMA is attached hereto as Exhibit B.

1 84. This PMA has a huge territorial spread. Households are concentrated in the City of Santa
2 Cruz, in small communities south along the Pacific Coast (Capitola, Soquel, Aptos) and on a road leading
3 north from Highway 17 (Boulder Creek, Scotts Valley), but are also scattered throughout the
4 unincorporated areas of the county, with the exception of the wilderness in the northwest part
5 of the PMA. (Exh B)

6 85. The geography of the PMA is unique and geographically isolated: its southwest border is
7 the Pacific Ocean (Monterey Bay), a vast part of its northwest area is unpopulated and inaccessible by
8 road, and its northwest border is defined by the coast range mountains. Only the PMA's southeast border
9 has no natural barriers. (Exh. 200A:4695)

10 86. Not only is the Santa Cruz area geographically isolated from its prosperous neighbor to the
11 east--Silicon Valley in San Jose, Santa Clara County---by a coastal range of mountains, the only direct
12 road connecting Santa Cruz to San Jose is the two-lane Highway 17.

13 87. More workers commute eastward "over the hill" from Santa Cruz to jobs in Santa Clara
14 County than westward into Santa Cruz County. The net commuter "outflow" is approximately 1.5
15 persons for every 1 person coming into Santa Cruz. (Exh 21B:Tab 7, Pages 1-2)

16 88. The City of Santa Cruz is the county seat of Santa Cruz County and is home to a campus
17 of the University of California. As of 2012, the city's population was estimated to be 62,041. In 2010,
18 Hispanic or Latino persons constituted 19.4% of the population and 22.2% of persons over the age of five
19 spoke a language other than English at home. (JtExhs 7:5684; 12)

20 89. Santa Cruz residents are slightly more affluent than the average resident of California.
21 (JtExh 12)

22 90. The Santa Cruz area's population has grown in the past several years and there are
23 predictions of steady growth in households in the future. (JtExh 9:0375)

24 91. Commercial real estate in the Santa Cruz area is not only expensive, but availability is
25 limited.

26 92. In the City of Santa Cruz, only two new vehicle dealerships remain: in addition to the
27 four line-makes sold by the Courtright franchises, Ford is the only other new-vehicle franchise in the
28 city. Dealerships formerly in the city have moved out to other areas---as an example, Toyota of Santa

1 Cruz, once in downtown Santa Cruz, relocated to Capitola. (I:29)

2 93. Residents in the PMA are environmentally-conscious and seek to buy "green" or
3 "alternative" automobiles such as the Toyota Prius and, after it was launched in December of 2010, the
4 Nissan LEAF.

5 94. The "product preference" in the Santa Cruz Market is overwhelmingly for entry level
6 vehicles and compact vehicles. This would include "alternative" vehicles such as the LEAF. However,
7 Toyota's Prius is the most popular "alternative" vehicle. (VII:149)

8 95. Protestant's primary competitors in the PMA are Honda and Toyota, which are located
9 about one-half mile from one another, with Highway 1 between them:

10 A. Ocean Honda was built in 2008 or 2009 in an unincorporated area of the County of Santa
11 Cruz, about 2.1 miles from SCN. It is an impressive, exclusive stand-alone facility with an equally
12 impressive sales record---although Toyota generally outsells Honda in most markets, Ocean Honda has
13 turned this around in the Santa Cruz market, outselling its Toyota competitor. Joe Cappel is the dealer
14 principal of Ocean Honda, although he was not the first owner of Ocean Honda. Joe Cappel was formerly
15 a Nissan dealer. (JtExh 7:5697; I:137; II:18-21; IX:76-77)

16 B. Toyota, Subaru and Kia (all owned by the Seaside Company) are "clustered" in the
17 neighboring town of Capitola, contiguous to the city of Santa Cruz and about 2.5 miles from SCN. The
18 dealerships are reached by an access road. (JtExhs 7:5697; 200A:4697)

19 96. There are a total of twelve line-makes sold in SCN's pre-2012 PMA: SCN's franchises
20 (Nissan, Volkswagen, Dodge, Ram), Honda, Toyota, Kia, Subaru, Ford, Scion, Lincoln and Mazda. (Exh
21 23B:Supplemental Exhs Pg 4)

22 97. Nissan dealers in PMA's contiguous to protestant's are My Nissan in Salinas (24.5 miles
23 from SCN), Gilroy Nissan in Gilroy (22.2 miles), Stevens Creek Nissan in West San Jose (23.6 miles),
24 Premier Nissan on Capitol Expressway in San Jose (20.8 miles), and Boardwalk Nissan in Redwood City
25 (38.4 miles). (Exh 21B:0370)

26 98. This PMA is an appropriate area for Nissan to use to measure protestant's sales
27 effectiveness.

28 ///

1 From May 16th or June 1st of 2012 to the Present

2 99. Approximately two months after Nissan had served the Notice of Default on SCN, it
3 advised the dealer that, effective either May 16, 2012, or June 1, 2012,¹³ its PMA would be enlarged into
4 the southern part of Santa Cruz County. (JtExh 1:0082-0085)

5 100. SCN's new PMA now encompasses 51 census tracts and, significantly, includes either all
6 or most of the population of the City of Watsonville, the county's second largest city with an estimated
7 2012 population of 51,881. The territorial area of the addition appears to be about one-fifth the size of
8 SCN's former PMA. (Exh B) This expanded PMA also includes a greater percentage of Hispanic or
9 Latino residents (81.4%) than the rest of the county of Santa Cruz, and 74.1% of persons over the age of
10 five speak a language other than English at home. (JtExh 12)

11 101. James Courtright unsuccessfully protested the new PMA assigned to SCN. When he
12 contacted Alison Speranzo protesting the change, she reached out to the Market Studies Department,
13 which confirmed that the census tracts in Watsonville "...did indeed belong to the Santa Cruz Primary
14 Market Area...they were closest by drive miles." (Exhs 204, 207; III:99-100)

15 102. The assignment of Watsonville to SCN's PMA was not as a result of a dealer going out of
16 business, a new dealer coming into the area, an open point realignment, or recommendations of a market
17 study. It is Nissan's policy to review PMA boundaries after each decennial U.S. Census and to change or
18 revise the geographical boundaries of PMA's after a "PMA Audit."¹⁴ (Exh 204B; II:199-200; III:97-98)

19 103. Nissan's letter to SCN stated that the PMA change was as a result of 2010 census data, and
20 "...additional criteria such as: air distance, drive distance, natural boundaries, buyer shopping patterns,
21 and other objective factors", although no further details were given. (JtExh 1:0082)

22 104. The size of a dealer's PMA does have a direct effect on the dealer's sales effectiveness
23 ratings, since its "sales penetration" percentage is calculated by dividing all of its sales by all of the
24 "competitive set" registrations in its PMA. Clearly, when a dealer's PMA is enlarged, its sales

25
26 ¹³ Two written notices sent by Nissan to SCN state the PMA change will be "effective May 16, 2012" (JtExh 1:0083, 0086),
but Alison Speranzo contradicted this by testifying that the effective date of a PMA change is always the first of the month and,
in this case, the new PMA was effective June 1, 2012. The difference is 16 days.

27 ¹⁴ Both Eric Rodgers and Alison Speranzo testified to the fact of "PMA Audits", but Ms. Speranzo's explanation of the audit
28 was cursory: "...[W]e...tak[e] a look at the new census tracts and the boundaries and tak[e] a look at each dealer's Primary
Market Area. If it needed to be updated, we updated it." (H:199-200, 211; III:97-8)

1 penetration goes down, because more “competitive set” registrations are added to the equation, while the
2 sales number remains the same. For example, when SCN’s PMA was enlarged into Watsonville,
3 “competitive set” registrations from 197 vehicle models were immediately folded into the equation. (Exh
4 200B: 4699, 4700; Exh 200G:4759)

5 105. Nissan’s enlargement of SCN’s PMA to include Watsonville, the second most populous
6 city in the county, negatively affected SCN’s “sales performance” score and ranking. It added
7 “competitive set” registrations of 197 models sold by multiple manufacturers, from Chevrolet and Fiat to
8 Lotus and Tesla.

9 106. Presumably, the new area in SCN’s PMA---12 census tracts including Watsonville, the
10 county’s second largest city---was not previously “unassigned” territory. The two closest dealers to
11 Watsonville are My Nissan in Salinas and Gilroy Nissan in Gilroy; however, it appears that Watsonville
12 was previously in My Nissan’s PMA. Not only does My Nissan, a successful dealer, have a concentration
13 of sales into the Watsonville area, its 2012 RSE soared (from 113.4% at year-end 2011, to 160.6% at year-
14 end 2012), a mirror image of SCN’s decline (51.6% at year-end 2011 to 32.0% at year-end 2012). (Exhs
15 200A:4696, 4697; 200B:4714; 200C:4716)

16 107. The new census tracts in SCN’s PMA include dealerships selling Ford, GMC, Chevrolet,
17 Buick, Chrysler, Dodge, Jeep and Ram and possibly Cadillac and Lincoln line-makes. (Exhs 200A:4696,
18 4697; Exh 23B:Supplemental Exh Pg 4)

19 108. With a total of 16 dealers and 6,031 vehicle sales, Nissan’s 2012 expansion of SCN’s PMA
20 boundaries has transformed a “mid-sized” market into a larger one. The expansion was not an exercise of
21 the “reasonable discretion” contemplated by Sections 1.N. and 3.A. of the Dealer Agreement. (Exhs
22 200A:4697; 200G:4759)

23 109. For the foregoing reasons, sales performance data generated by application of the RSE
24 calculations after the 2012 PMA expansion is not reliable.

25 Nissan’s Calculation of Sales Performance

26 110. Nissan evaluates dealer sales effectiveness using performance metrics, which, after the
27 calculations are completed, assigns each dealer a percentage figure which Nissan calls “Segment-
28 Adjusted Regional Sales Effectiveness” (hereinafter sometimes “RSE”). Nissan states that “100% RSE”

1 is the minimum target---the calculations generate the number of "expected sales" (the opportunity in the
2 dealer's PMA) for each dealer and performance rankings of Nissan dealers.

3 111. Section 3.B of the Dealer Agreement describes the calculations Nissan will take to evaluate
4 dealers' sales performances. Using these calculations only leads to sales penetration percentages, and this
5 does not describe Nissan's current---and complex---evaluation calculations. However, the Dealer
6 Agreement is 25 years old; the parties have operated under this agreement for decades while the
7 automotive business predictably changed, and it was reasonably foreseeable that some recitals in the
8 agreement would change and evolve. Nissan's current use of "performance metrics" for evaluations is a
9 reasonably foreseeable extension of the calculations described in the agreement.

10 112. In calculating RSE, Nissan uses its "regions" to compare dealer performances. Before
11 April 2009, Santa Cruz Nissan was part of the "Northwest Region" (133 dealers in 2009); in that month,
12 Nissan "merged" its Northwest and Southwest Regions and protestant became one of the dealers in the
13 "West Region" (193 dealers in 2009). (Exh 200B:04701; II:18-20; IV:21; VI:143)

14 113. The "West Region" covered populated areas in California, Hawaii, Alaska, Washington,
15 Oregon, Idaho, Montana, Wyoming, Nevada, Utah, Arizona, New Mexico and two small areas in Texas
16 on the border with New Mexico. There are a few "open points" but much of the geography is
17 "unassigned", i.e., not assigned to any dealer. (Exh. 200A:4695; IV:174-6)

18 114. The sales performances of Nissan dealers in the "West Region" was the "benchmark"
19 against which SCN's performance was measured after April of 2009. (IV:176) However, neither the
20 "Northwest Region" nor the "West Region" are appropriate "benchmarks" to analyze sales performance
21 of Santa Cruz Nissan. Both suffer from simply being too large a sampling---but the larger "West
22 Region" is more suspect, covering about one-third of the continental U.S., with obvious differences in
23 topography, population centers, economies, and climates.

24 115. Nissan used the "West Region" standard in its calculations in preparing both the Notice of
25 Default and the Notice of Termination. However, the "West Region", like the "Northwest Region"
26 before it, is too large, leading to results which may be inaccurate or misleading. (IV:177-8)

27 116. As of August of 2013, Nissan abandoned the "West Region" in favor of the "California
28 Region" (SSER) standard.

1 117. Nissan calculates a dealer's sales penetration in its PMA as a percentage by dividing a
2 dealer's total sales by the number of "competitive set" vehicle registrations in the dealer's PMA during
3 the same time period. The "competitive set" vehicles are those brands and models of other manufacturers
4 which Nissan has decided compete most closely with its models for customers. (Exh 200B:4698; I:75)

5 118. To "segment-adjust" its data, Nissan organizes its models into fourteen product groups
6 ("segments")¹⁵; then assigns models from the "competitive set" to each group.

7 119. The fourteen "segments" are the following, with the number of competitive models Nissan
8 tracks for each "segment" in parenthesis: Entry (12), Compact (28), Mid-Size Lower (18), Mid-Size
9 Upper (15), Sports Performance (13), Small Specialty (14), Compact MAV (4), Compact SUV (28), Mid-
10 Size SUV (13), Full-Size SUV (9), Large SUV (21), Mid-Size Pick Up (9), Full-Size Pick Up (7), and
11 Mid-Size MPV (6). The number of "competitive set" models total 197. (Exh 200B:4704:05)

12 120. Basically, RSE is the dealer's sales compared to the expected sales in the area, and the
13 expected sales in the area are based on how well the Nissan dealers in the region did compared to the
14 competitive group in the region. (III:212) In greater detail, the calculations are the following:

15 A. Nissan compares the sales of all its dealers in the region in each of the segments to the
16 "competitive set" registrations in the region in each segment, which yields a "region sales penetration"
17 percentage for each segment. This percentage reflects the popularity of each Nissan model in the region.
18 These are then multiplied by the number of competitive registrations in each segment in the dealer's
19 PMA, which yields the number of "expected sales" in each segment. (The "expected sales" figure is
20 adjusted to reflect the consumer preferences in the dealer's PMA.) Adding each segment's "expected
21 sales" in the PMA results in a total number of "expected sales" for a dealer to achieve region penetration
22 in the PMA. The total number of "expected sales" is divided by the total of the competitive registrations
23 in the dealer's PMA to get the dealer's sales penetration necessary to achieve region average. (Exh
24 200B:4703)

25 B. Among other things, these calculations measure the size of a particular market by counting
26 the total combined number of registrations in the PMA in each of the fourteen "segments" in which
27

28 ¹⁵ Since Nissan manufactures 22 models, some "segments" contain two Nissan models.

1 Nissan competes. The result represents the total available opportunity in a given market based on actual
2 registrations.

3 C. Since "competitive set" sales figures define the size of the available customer base, Nissan
4 uses the "competitive set" data to measure an individual dealer's sales performance, because that
5 comparison evaluates a dealer's actual sales relative to the opportunity available to it. As an example, if
6 Nissan's region sales penetration is 50% of the competitive registrations, a dealer with a "competitive
7 set" of 1,000 vehicles has to sell 500 units to be 100% RSE (i.e., attain the average market share), while a
8 dealer with a "competitive set" of 2,000 vehicles has to sell 1,000 units--twice as many--to be sales
9 effective. Thus, the size of the PMA does affect the dealer's "sales effectiveness" ratings.

10 121. Dealers operating at 100% RSE are selling at the average of comparative Nissan dealers in
11 the group. They are the "C" students. This is the target number that Nissan's performance metrics have
12 determined is the "opportunity" in the PMA. Those less than 100% RSE are "underperforming".

13 122. Every quarter or so, Alison Speranzo "...pull[s] the bottom performers in the region, and
14 ...[sends] them performance letters¹⁶ letting them know of where their status [is] versus the region where
15 they're supposed to be, and how that's a breach of their agreement. And that we're looking for
16 sustainable long-term improvement. That we're not happy with the performance." (III:54)

17 123. On March 7, 2008, a "performance letter" to Lee Courtright commended him on the
18 dealership's "positive improvement" in raising SCN's RSE from 68.3% in 2006 to 86.9%¹⁷ in 2007.
19 However, in later "performance letters"¹⁸, Nissan wrote of its "serious concern" ... "with the poor [sales]
20 performance and operational difficulties at [SCN]..." (Exh 206)

21 124. The Notice of Default, dated March 19, 2012, advised Lee Courtright that because of
22 "unsatisfactory sales penetration performance", protestant was given 180 days to "cure the default" by
23 achieving 100% RSE. Year-end 2011 sales figures were used, showing that SCN had sold 204 Nissan
24 vehicles in 2011, while the "100% RSE" figure was 396, so the "loss" was 192 vehicles, which SCN was

25

26 ¹⁶ The "performance letters" followed a format and, in addition to sales performance, addressed such items as customer service,
27 training and owner loyalty. (Exh 206)

28 ¹⁷ Note that in other documents, the 2007 RSE figure is 84.4%.

¹⁸ The letters were dated November 18, 2009; April 21, 2010; November 10, 2010; July 11, 2011; November 9, 2011, and June
15, 2012. (Exh 206)

1 presumably required to sell in the 180-day period. (JtExh 2:005661)

2 125. The language in Nissan's Notice of Termination dated January 14, 2013, primarily
3 concerned itself with the "performance metrics" described above, concluding that "...declining sales
4 penetration performance for many years...." dictated Nissan's decision to terminate the franchise. (Exh
5 4:0047-51) No mention was made of the criteria listed in Section 3.D of the Dealer Agreement, nor was
6 there evidence that these factors were considered.

7 126. However, RSE may be used as a standard, even in termination cases, as long as its
8 limitations are recognized and "rigid performance metrics"¹⁹ are tempered with the kinds of inquiries
9 required by Section 3.D. of the Dealer Agreement.

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

15 **Findings Relating to Amount of Business Transacted by the Franchisee, as Compared to the**
16 **Business Available to the Franchisee [Section 3061(a)]**

17 128. Santa Cruz Nissan's sales figures and RSE scores are the following (Exhs 200B:4707;
18 206:0658; 212:0553; JtExhs 2:0043, 0044; 3:0023; 4:0049; I:110; IX:65):

19

Year	Number of Sales	RSE Score
2005	366	113.70%
2006	237	68.30%
2007	304	84.40%
2008	202	81.80%
2009	152	56.30%
2010	150	45.90%
2011	204	51.60%
2012	173	32.00%
2013	246	No data

20
21
22
23
24

25 ///

26 ///

27 _____
28 ¹⁹ Wall Street Journal, June 24, 2014, "Aides Rebelled After CEO Tweaked 'Tar-zhay' Formula" (p. 1)

1 129. Nissan's RSE performance calculations prior to 2009, relying on a standard other than the
2 "West Region", will be disregarded in this analysis.²⁰ RSE calculations based upon data from SCN's
3 PMA, enlarged in the Spring of 2012, will also be disregarded.

4 130. Nissan's RSE calculations from 2009 through 2011, even though based on the overlarge
5 "West Region", provide information which may be considered in regard to protestant's sales performance
6 in its PMA during those years. It appears that there were sales opportunities in the Santa Cruz market
7 which protestant failed to capture: it fell significantly below the average opportunity sales figures: 56.3%
8 in 2009, 45.9% in 2010 and 51.6% in 2011. (Exh 200C:4716; IV:149, 189)

9 131. Similarly, for the 2009-2011 period, the "retail registration effectiveness" for SCN's PMA,
10 showing how well the Nissan brand is doing in the PMA, reveals that protestant did not capture sales
11 opportunities available to it. In each of those three years, protestant sold fewer Nissan vehicles in its own
12 PMA than other Nissan dealers (there were more "insells" in the PMA), resulting in substantial
13 "shortfalls"---Nissan sales opportunities which were missed. (Exh 200B:4718; IV:41-3)

14 132. However, SCN's sales of the LEAF were exceptional: in 2012, the dealership sold 154.5%
15 RSE. (Exh 200 Surrebuttal Report:5665)

16 133. In 2010, 35.4% of Nissan vehicles registered in the PMA were sold by SCN and in 2011,
17 the figure increased to 43.0%. (Exh 200:H:4778)

18 134. In 2012, it appeared that many of the "insells" were clustered around protestant's
19 dealership in the city of Santa Cruz. (Exh 200H:4776, 4781)

20 135. "Averages" and "rankings" based on those averages, taken by themselves, can be
21 misleading. When looking at an "average" of a group, there will be roughly half over and half under,
22 which is, in fact, a validation of the calculation being used. "Once you set an average, half will be
23 performing over and half under [the average line]...". (IV:252) The bar graphs in Exhibit 200C:4721-23
24 are reasonable because there is a normal distribution around the average.

25 A. To increase its competitiveness in the marketplace, Nissan seeks to raise those dealers

26
27 ²⁰ Respondent's expert testified that "[W]e have four years' worth of data at the west region, I would rely on that. And the
28 2008 to 2009 changes, we have to acknowledge that there was a region change, and difficult to tell exactly how much change is
due to the northwest, west region standard change. I think its good information, but I would rely on it a little bit less than the
more current data using the constant region performance standard." (III:21)

1 which are below average (“underperformers”) by encouraging them to increase sales. If underperforming
2 dealers do become more successful, this will raise the average line, but there will still always be the
3 roughly 50%-50% split of numbers above and below the average line. So even successful dealers could
4 (inappropriately) be characterized as “underperformers” if they fall below the average line.

5 B. When Nissan requires an “underperforming” dealer to “achieve 100% RSE”, and the
6 dealer does so, all that happens is that another dealer will fall below the average line (and the rankings
7 will change). By using “averages”, there will always be around 50% “underperforming” dealers.
8 Nissan’s use of “100% RSE” as a performance goal (together with dire warnings about the consequences
9 of failing to achieve “100% RSE”) is not reasonable.

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

15 136. In sales effectiveness rankings of all Nissan dealers in the “West Region” in 2009, SCN
16 ranked 178/194; in 2010 it ranked 188/197; and in 2011 it ranked 188/195. The bar graphs²¹ in Exhs
17 200C:4721-23 reflect SCN’s performance in context and, for the years 2009 to 2011, show SCN to be a
18 poor sales performer.

19 137. Located close to protestant, the Toyota and Honda dealerships face the same geographic
20 and demographic challenges as protestant in the Santa Cruz marketplace. But both Toyota and Honda---
21 Nissan’s closest competitors---sell more vehicles in the Santa Cruz market than Nissan. (Exh 21B:0352,
22 0353)

23 138. In 2012, Ocean Honda had an “effectiveness percentage” of 151.3%, Toyota of Santa
24 Cruz’s was 72.0% and Santa Cruz Nissan was 30.9% (Exhs 200H:4760; 200SuppRpt:5663).

25 139. Moreover, success builds on success: because Toyota and Honda sell more vehicles in the
26

27 ²¹ Captioned “West Region Nissan Dealers’ Retail Sales Effectiveness to West Region Average (i.e., Average Sales Penetration
28 of Nissan Dealers in the West Region Adjusted for Local Segment Popularity”).

1 Santa Cruz market than Nissan, they have more Units in Operation (UIO's) in the area than Nissan. This
2 generates more sales: it's easier to attract a "repeat" customer than a "conquest" customer.

3 140. Other than the peculiarities of the Santa Cruz geography, no local conditions (i.e., those
4 things that are outside the control of the dealer) have deterred SCN from selling more vehicles. In fact,
5 local conditions have been beneficial to business in the Santa Cruz economy: population and households
6 have increased in number and further increases are projected (Exhs G:448-4752; 21B:0325, 0335); other
7 than a decline of about 4,600 jobs in the county in 2009-2011, recovery was on the way in 2012 and
8 2013; employment was at its highest level in ten years, at 140,596 jobs (Exh G:4753); in 2012, there were
9 a significant number of households with incomes of \$75,000 and \$100,000 in the City of Santa Cruz and
10 its environs. (Exh G:4754-55). Inclement weather (not uncommon in other parts of the "West Region")
11 is unknown in Santa Cruz.

12 141. Moreover, Santa Cruz Nissan's location "...is very competitive in terms of convenience to
13 the customers in this market..." as the average drive distance to its dealership is only 8.0 miles. (Exh
14 200G:4758; IV:97-8) And since its real estate is owned by a family trust, SCN may not face the same
15 leasehold worries that other dealers have with their landlords. Protestant's retained capital gives the
16 Courtright the financial flexibility to spend in a way to increase sales.

17 142. However, one of the limitations of Nissan's RSE calculations is its failure to account for
18 intrabrand competition (i.e., competition with other Nissan dealers). Two scenarios negatively impact
19 SCN's sales performance statistics:

20 A. The net "out commute" to San Jose-Silicon Valley of workers who live in SCN's PMA
21 takes them "over the hill" into the PMA's of five other Nissan dealers. That some of these workers do
22 buy near their work is shown by the cumulative "in-sell" dot map at Exh 200H:4781.

23 B. At year-end 2012, My Nissan had 439 sales of Nissan vehicles; although most sales were
24 concentrated around its dealership in Salinas, another concentration was in SCN's PMA in Watsonville.
25 (Exh 200H:4765)

26 143. There is available service business which SCN is not capturing by its failure to be open for
27 service appointments on Saturday. The opportunity for service business is shown by the fact that SCN's
28 two direct competitors in Santa Cruz, Toyota and Honda, are open for service business on Saturdays and

1 Toyota is also open on Sundays. Other California Nissan dealers have been open for Saturday service
2 business for years. (VIII:116)

3 144. SCN's "customer pay service sales per UIO" has been trending upward 2009 to 2011 and,
4 even though never reaching the 100% composite group average, the figures have been 65.6% in 2009,
5 78.4% in 2010 and 88.4% in 2011. (Exh 200C:4717)

6 145. During DOM visits to the dealership, neither Lee Courtright nor James Courtright
7 challenged the DOM's observations over the years that SCN's sales performance was deficient and, in
8 fact, agreed with the assessment. (II:267)

9 **Findings Related to the Investment Necessarily Made and Obligations Incurred by**
10 **the Franchisee to Perform Its Part of the Franchise [Section 3061(b)]**

11 146. In 2010, in anticipation of Nissan's launch of the electric vehicle LEAF, protestant
12 reconfigured several service bays for EV's, which also entailed buying special equipment, safety
13 equipment and gear for technicians, as well as training the technicians. (Exhs 25EE, FE and GG)

14 147. When the LEAF was launched in 2010, protestant installed three EV charging stations,
15 with parking for five or six cars, at a cost of around \$30,000, and invested in safety equipment to service
16 the EV. (VIII:348-50)

17 148. The Internet has changed the way prospective customers approach buying a new vehicle:
18 most have already researched line-makes and models, prices and dealers, and come to a dealership (some
19 traveling 50 or 100 miles) with a lot of information. SCN has recognized this phenomenon and has
20 become more conversant with "digital marketing".²² Although some, if not all, of the actions taken by
21 the dealership benefit all its line-makes, its impetus and focus is to increase Nissan sales.

22 149. SCN has improved its internet capabilities by rebuilding its Nissan website and adding a
23 back-up internet employee to more effectively interact online with prospects and existing customers.
24 Since most consumers use the internet before buying a vehicle, lead providers are increasingly important,
25 and SCN has contracts with cars.com, Auto Trader, Edmunds.com, and participates in Nissan's program
26 for third party leads. (II:295, 311-312; XI:31-32; XII:119, 151-155). In 2012, SCN enrolled in the

27
28 ²² "Digital marketing" is the "...online presence of a dealership" in order to market themselves online; interact with prospects
online or with email; and develop leads, gained on the Internet, into sales." (II:68, 71)

1 Nissan-supported Cobalt program, which covers four different internet marketing services. (Exhs 9, 10,
2 12, 209:0024; II:302, 310-313; XII:93-94, 151-155) All SCN sales staff consultants have completed
3 training via Nissan's Virtual Academy and have become "certified". (XII:100-101)

4 150. After receiving the Notice of Default, the Courtright's "...keyed in on Nissan sales..." and,
5 among other things, "...increased [Nissan] advertising and "...put up more spiff money...to our sales
6 [staff]...". "A spiff is extra money...[paid to] salesmen at the time of a sale usually...in cash...". (II:315-
7 316; XI:49; XII:234-236)

8 151. Protestant, however, has never explored the possibility of making the dealership into an
9 NREDI-compliant facility, which would require coordination with SCN's other three line-makes.

10 152. Also, it appears that protestant may not have fulfilled its 2005 promise to Nissan to secure
11 an off-site storage area.

12 153. Protestant, from the time the dealership facility was built in 1996, has been under Nissan's
13 square footage "guidelines" and has not taken any steps to enlarge the dealership, despite the fact that
14 Nissan, and possibly the three other line-makes, is offering for sale many more models than it did 17
15 years ago.

16 **Findings Relating to Permanency of Investment [Section 3061(c)]**

17 154. Dealer principal Lee Courtright was appointed a Nissan dealer in 1972, and has operated
18 the store continuously to the present. The current dealership at 1616 Soquel Avenue in Santa Cruz is the
19 third location from which SCN has operated and, with each move, the facility got bigger and better.

20 155. The amount of the investment in building the dealership in 1996 is unknown.

21 156. The dealership shares space with three other line-makes: Volkswagen, Dodge and Ram.

22 157. The dealership real estate includes a 26,509 square foot two-story building with a
23 showroom accommodating up to six vehicles, shared by the four franchises. Land size is 87,200 square
24 feet. The total building and land size is 113,709 square feet. (Exhs 3; 25A, B, L, and N)

25 158. In addition to the showroom, SCN's building has a customer waiting area with coffee
26 and Wi-Fi available, a children's play area, a parts department with customer counter and storage, a
27 cashier/information window and office, service bays, offices, and displays. With the exception of
28 service bays dedicated to the electric vehicle LEAF, the building is shared by the four franchises. The

1 premise is clean and functional. (Exhs 25O, P, Q, R, S, T, U, V, W, X, Y, Z, AA, and DD)

2 159. There are a total of 23 service bays (at 115% above Nissan's guidelines of 20). (JtExhs
3 1:0070; 3:0020) As noted above, protestant made substantial investments in order to sell and service the
4 electric vehicle LEAF. The Courtright's were very excited about the introduction of the LEAF,
5 anticipating that it would sell very well in the "green" environmentally-conscious Santa Cruz market,
6 which it did. (Exhs 25EE, FF and GG)

7 160. The building is set back from Soquel Avenue at a distance which allows the display of
8 vehicles for sale on the front lot; the lot extends around the building on three sides. A porte-cochere for
9 service customers is prominently marked, conveniently close to the small offices for four service writers.
10 Four electrical vehicle (EV) charging stations are available 24/7 for use by the general public. There is
11 an enclosed car wash. (Exhs 25C, D, I, J, K, BB and CC)

12 161. The dealership premise has been upgraded by the addition of the enclosed car wash in the
13 late 1990's, which cost around \$100,000, plus the \$30,000 for the EV charging stations. (VIII:348-50)

14 162. The dealership owns an additional parcel of land, with two small buildings, across Soquel
15 Avenue which is used for storage and display of vehicles but is not available to customers. Neither the
16 size of this parcel was established nor was it established whether this parcel was included in the total
17 square footage stated above. (Exhs. 25E, F, G and H)

18 163. Because of the age of the Dealer Agreement (1989), SCN is exempt from certain facility
19 requirements which Nissan imposes on other dealers arising out of "planning volume" calculations.

20 164. SCN employs approximately 45 people with a September 2013 payroll of \$141,394.
21 (Exh 223:4212). As of the time of the hearing, three of the sales staff were bi-lingual English-Spanish,
22 including a Sales Manager who was hired in August 2013. (VII:38-40)

23 165. SCN employs between twelve and fifteen service technicians and, of these, seven are
24 specially-trained Nissan mechanics, certified to work on the Nissan LEAF. (Exh 223:4212; XII:173)

25 166. No remodeling has been done pursuant to the NREDI program. There was no evidence
26 presented that the parties had ever discussed such a remodel program, even though Nissan will approve
27 NREDI construction at a "dual" Nissan store.

28 ///

1 **Findings Relating to Whether it is Injurious or Beneficial to the Public Welfare for**
2 **the Franchise to be Modified or Replaced or the Business of the Franchisee Disrupted**
3 **[Section 3061(d)]**

4 167. Santa Cruz Nissan is a valuable contributor to the health, well-being and quality of life of
5 the citizens of Santa Cruz and the environs. The business creates jobs, attracts customers to the area, and
6 ---since the City of Santa Cruz has lost new car dealerships in the past few years---provides a sense of
7 business commitment to the city and to the area. (VI:11-13)

8 168. In regard to tax revenues, protestant pays approximately \$1.6 to \$1.7 million in sales tax
9 annually to the City of Santa Cruz, making it one of the top ten sales tax contributors to the City of Santa
10 Cruz. (Exh 15; VI:31; XII:173) These tax revenues help pay for public health and safety services, as well
11 as public works and maintenance of infrastructure. Termination would mean a reduction of tax revenues
12 to the City of Santa Cruz. (VI:10)

13 169. Santa Cruz Nissan is a family-owned business, with a long history in the community. SCN
14 and the Courtright's are fiscally and socially responsible, the "face" of the Nissan brand in the community.

15 170. The Courtright family is community-minded, participating in organizations such as Rotary,
16 Little League, and supporting the Seymour Marine Discovery Center. SCN is a "Clean Ocean" business,
17 ensuring that its runoffs do not pollute. (Exh 2; IX: 58-62)

18 171. Losing the Nissan franchise would diminish SCN's revenue from new vehicle sales, but
19 the dealership would still be able to service Nissans (with possible contractual constraints regarding
20 warranty work) and would still be able to offer the 24/7 EV charging stations to the public.

21 172. Protestant's used car sales operation would remain in place despite a termination.

22 173. Although Lee Courtright prophesized that the dealership could not exist without the Nissan
23 franchise, that prediction seems unlikely, given the capitalization of the company.

24 174. The city's tax revenue from the sales of new Nissan vehicles will be gone if the protest is
25 overruled. However, since the automobile industry has grown and become increasingly complex in recent
26 years²³, it is possible that a four-franchise dealership is simply too challenging an operation to run under

27 ²³ Respondent made the point that since the 1989 franchise agreement, Nissan had increased the number of its models, as had
28 Dodge, Ram and Volkswagen, and some of the vehicles had increased in size. Developments include the Internet and
 "alternative" vehicles, not to mention new laws which dealers must know.

1 one roof, even though it could have been done successfully a decade ago. If Nissan were to be eliminated,
2 the Courtright's efforts could be focused on selling more Dodge, Ram and Volkswagen vehicles, with
3 commensurate increases in tax revenue to the city.

4 175. If termination is allowed, it is true that there would be no Nissan dealer in Santa Cruz—at
5 least for a while---with attendant inconvenience to customers and prospective buyers. Termination
6 creates an "open point". However, it appears that Nissan may not be deterred by the lack of vacant or
7 available large parcels in the city, as it states its focus is on the dealer, not the property. (Exh 26:36-38)

8 **Findings Relating to Whether the Franchisee has Adequate Motor Vehicle Sales and Service**
9 **Facilities, Equipment, Vehicle Parts, and Qualified Service Personnel to Reasonably Provide for the**
10 **Needs of the Consumers for the Motor Vehicles Handled by the Franchisee and Has Been and Is**
11 **Rendering Adequate Services to the Public [Section 3061(e)]**

12 176. Protestant's sales and service facilities, equipment, parts department and service personnel
13 are "adequate" to meet the needs of its customers.

14 177. In the service department, for example, SCN has 19 service stalls and 17 lifts, seven of
15 which are dedicated to Nissan, with one additional lift available to add, if needed. SCN also invested in a
16 special service stall and placed special safety precautions in order for technicians to work on the Nissan
17 LEAF EV's. (IX:14, 17)

18 178. In regard to the qualifications of service personnel, the dealership employs six service
19 technicians dedicated solely to Nissan, with two of those master technicians. (IX:12-15)

20 179. However, in one area, protestant is not rendering adequate services to the public. For
21 years, it has failed (and refused suggestions) to be open for service appointments for customers on
22 Saturdays. Moreover, it has not surveyed its customers to discover their preferences in this regard.
23 (VII:50-51, 58; XII:137) The failure to be open for service on Saturdays not only inconveniences (and
24 drives away) existing customers wishing service at a time convenient to their schedules, it also has an
25 adverse effect on potential sales.

26 **Findings Related to Whether the Franchisee Fails to Fulfill the Warranty Obligations of the**
27 **Franchisor to be Performed by the Franchisee [Section 3061(f)]**

28 180. SCN completes Nissan warranty repairs and there are no warranty repairs that the
dealership is not equipped to perform. (XI:22-23)

1 181. There has never been an instance where the dealership has had to send a customer to
2 another Nissan dealership to receive warranty repairs. (XI:22-23)

3 **Findings Related to the Extent of Franchisee's Failure to Comply With the Terms**
4 **of the Franchise [Section 3061(g)]**

5 182. Section 6.D of the Dealer Agreement requires dealers to be open "...during hours which
6 are reasonable and convenient for Dealer's customers...and... shall conduct all Dealership Operations ...
7 during such days and hours as automobile dealers' sales and service facilities are customarily and lawfully
8 open in Dealer's Primary Market Area...". (Emphasis added.)

9 183. As the Toyota and Honda stores in protestant's PMA are "customarily and lawfully" open
10 on Saturdays, it is a violation of the franchise agreement for protestant to fail to be open on Saturdays.

11 **ANALYSIS**

12 **The Amount of Business Transacted by the Franchisee, as Compared to the Business**
13 **Available to the Franchisee [Section 3061(a)]**

14 184. Nissan has not sustained its burden of proof in this regard.

15 185. There were many problems with Nissan's analysis of dealer performance. Although
16 Nissan's basic calculation was valid (figuring the dealer's sales penetration first, then using the regional
17 segmented data to establish performance), there were other aspects of the process which were not. The
18 "West Region" was too large to be useful. Reliance on "averages" and "rankings" without further
19 information has the tendency to mislead. Making threats of adverse consequences if a dealer does not
20 "achieve 100% RSE" is misusing the data. Designating a "competitive set" of 197 vehicles (including
21 Tesla and Lotus) leads to unmanageable data.²⁴

22 186. With specific regard to Santa Cruz Nissan, Nissan expanded its PMA into the census tracts
23 of the city of Watsonville for no discernable reason, thereby generating an "alarming" decline in SCN's
24 RSE percentage and, into the future, insuring SCN's failure to "achieve 100% RSE". In making the
25 decision to terminate protestant's franchise, Nissan failed to temper the rigid "performance metrics" with

26 _____
27 ²⁴ See the "Competitive Registration Density" map of SCN's PMA in 2012 at JtExh 7:5694 and the "Competitive Segment Dot
28 Map" of SCN's PMA in 2009 at JtExh 8:0327. Both show masses of registration dots, appearing to signify only where people
live and not much about what they drive.

1 the inquiries that its own Dealer Agreement states are appropriate (Section 3.D. – “Additional Factors for
2 Consideration”). Finally, the internal memo recommending the issuance of the Notice of Default
3 contained an error, stating that SCN had committed to increasing its advertising to \$10,000 monthly
4 when, in fact, the Courtright’s had agreed to increase their advertising by \$10,000 per month.

5 187. Between 2009 and 2011, there were lost sales opportunities which Santa Cruz Nissan
6 failed to capture.

7 188. SCN’s 2013 Nissan sales figure of 246 vehicles may be the result of the new marketing
8 and personnel policies put in place at the dealership.

9 189. However, it is also true that Santa Cruz Nissan is a below-average performer. It clearly
10 lacks competitive “energy”. For example, most of the new marketing and personnel policies were
11 suggestions from Nissan representatives such as DOM Tina Novoa and FOM Gary Inman, not generated
12 by the initiative or creativity of the ownership. And often, good marketing suggestions from Nissan
13 representatives (opening for service on Saturdays, advertising to the Hispanic market, hiring bi-lingual
14 sales staff) were either ignored or delayed. It appears that DOM Eric Lewin’s assessment was correct:
15 that SCN’s performance deficiencies are due to an insufficient level of resources to accomplish the task,
16 no sense of urgency to change the situation, and no one in charge capable of executing plans for
17 improvement.

18 **The Investment Necessarily Made and Obligations Incurred by the Franchisee to**
19 **Perform Its Part of the Franchise [Section 3061(b)]**

20 190. Nissan has not sustained its burden of proof in this regard.

21 191. Protestant has remodeled service bays, installed special equipment, and trained technicians
22 to sell and service the Nissan LEAF. Also, although benefitting all the line-makes which it sells, it has
23 enhanced its digital marketing capabilities.

24 **Permanency of the Investment [Vehicle Code section 3061(c)]**

25 192. Nissan has not sustained its burden of proof in this regard.

26 193. The permanency of Santa Cruz Nissan’s investment is established by the longevity of the
27 family-owned dealership in the City of Santa Cruz since 1972, the loyalty and support it has shown to the
28 City by its investment in the business, and the Courtright family’s commitment to the community. It is

1 solid financially and the premise is clean and functional.

2 194. However, there has been little upgrading and remodeling of the property over the years and
3 protestant's failure to invest in an NREDI-compliant facility (or to investigate the possibility of doing so)
4 has made it a less effective business.

5 **Whether it is Injurious or Beneficial to the Public Welfare for the Franchise to be Modified or**
6 **Replaced or the Business of the Franchisee Disrupted [Section 3061(d)]**

7 195. Nissan has not sustained its burden of proof in this regard, as the negative aspects of
8 termination outweigh the beneficial ones. Although it is true that the dealership would survive even if its
9 Nissan franchise were to be terminated, the loss of revenue to the City of Santa Cruz would be
10 considerable.

11 196. Santa Cruz Nissan has been serving the public from the same location for many years. It is
12 fiscally and socially responsible, characteristics that have great importance in smaller cities.

13 **Findings Relating to Whether the Franchisee has Adequate Motor Vehicle Sales and Service**
14 **Facilities, Equipment, Vehicle Parts, and Qualified Service Personnel to Reasonably Provide for the**
15 **Needs of the Consumers for the Motor Vehicles Handled by the Franchisee and Has Been and Is**
16 **Rendering Adequate Services to the Public [Section 3061(e)]**

17 197. Nissan has not sustained its burden of proof in this regard. Protestant's dealership and its
18 employees, equipment, and parts department are "adequate" to provide for its customers' needs, and its
19 service technicians and their special equipment can provide for the servicing of the Nissan LEAF.

20 198. However, protestant's failure to be open for service appointments on Saturdays is not
21 providing for the needs of its customers.

22 **Whether the Franchisee Fails to Fulfill the Warranty Obligations of the Franchisor to be**
23 **Performed by the Franchisee [Section 3061(f)]**

24 199. Nissan has not sustained its burden of proof in this regard. There was no issue raised
25 regarding protestant's fulfillment of its warranty obligations.

26 **The Extent of Franchisee's Failure to Comply With the Terms of the Franchise [Section 3061(g)]**

27 200. Protestant, by failing to be open for service on Saturdays, has not complied with one of the
28 provisions of the Dealer Agreement. However, this is not a great "extent" and respondent has therefore
not sustained its burden of proof in this regard.

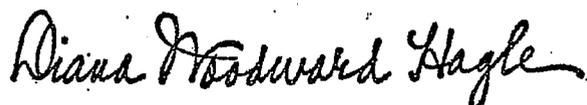
PROPOSED DECISION

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Based on the evidence presented and the findings herein, IT IS HEREBY ORDERED THAT the Protest in *Santa Cruz Nissan, Inc. dba Santa Cruz Nissan v. Nissan North America, Inc.*, Protest No. PR-2358-13, is sustained.

I hereby submit the foregoing which constitutes my Proposed Decision in the above-entitled matter, as the result of a hearing before me, and I recommend this Proposed Decision be adopted as the Decision of the New Motor Vehicle Board.

DATED: July 3, 2014



By: _____
DIANA WOODWARD HAGLE
Administrative Law Judge

Attachments

Jean Shiomoto, Director, DMV
Mary Garcia, Branch Chief,
Occupational Licensing, DMV

THE DEALER AGREEMENT

The "Standard Provisions" of the "Nissan Dealer Sales and Service Agreement" provide, in pertinent part, the following:

Section 1. Definitions

....

G. "Competitive Vehicles" shall mean those new vehicles which are considered by Seller [Nissan] to be directly competitive with Nissan Vehicles.

....

N. "Primary Market Area" shall mean the geographic area which is designated from time to time as the area of Dealer's sales and service responsibility for Nissan Products... Seller reserves the right, in its reasonable discretion, to issue new, superseding "Notices of Primary Market Area" to Dealer from time to time.

....

Q. "Executive Manager" shall mean the person named as Executive Manager in ... this Agreement upon whose personal qualifications, expertise, reputation, integrity, experience, ability and representations that he or she shall devote his or her primary efforts to and have full managerial authority and responsibility for the day-to-day management and performance of Dealer, Seller has relied in entering into this Agreement.

....

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 ... 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... Seller may, in its reasonable discretion, change Dealer's Primary Market Area from time to time.

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 of performance;

Exhibit A

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

(i) registrations of Nissan Cars and Nissan Trucks;

(ii) registrations of Competitive Vehicles;

....

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. . .; and

4. A comparison of sales and/or registrations achieved by Dealer to the sales or registrations of Dealer's competitors.

....

D. Additional Factors for Consideration

Where appropriate in evaluating Dealer's sales performance, Seller will take into account such reasonable criteria as Seller may determine from time to time, including, for example, the following: the Dealership Location; the general shopping habits of the public in such market area; the availability of Nissan vehicles to Dealer . . .; any special local marketing conditions that would affect Dealer's sales performance differently from the sales performance of other Authorized Nissan Dealers; the recent and long term trends in Dealer's sales performance; the manner in which Dealer has conducted its sales operations (including advertising, sales promotion, and treatment of customers); and the other factors, if any, directly affecting Dealer's sales opportunities and performance.

....

H. Evaluation of Dealer's Sales Performance

Seller will periodically evaluate Dealer's performance of its [sales] responsibilities...Dealer shall have the opportunity to comment, in writing, on such evaluations. Dealer shall promptly take such action as may be required to correct any deficiencies in Dealer's performance of its [sales] responsibilities...".

Section 6. Other Seller and Dealer Responsibilities

....

D. Hours of Operations.

Dealer recognizes that the service and maintenance needs of the owners of Nissan Products and Dealer's own responsibilities to actively and effectively promote the sale of Nissan Products can be met only if Dealer keeps its Dealership Facilities open and conducts all of its Dealership Operations ... during hours which are reasonable and convenient for Dealer's

Exhibit A

customers. Accordingly, Dealer shall maintain its Dealership Facilities open for business and shall conduct all Dealership Operations required under this Agreement during such days and hours as automobile dealers' sales and service facilities are customarily and lawfully open in Dealer's Primary Market Area...

Section 12. Termination

....

B. Termination by Seller for Non-Performance by Dealer.

1. If, based upon the evaluations thereof made by Seller, Dealer shall fail to substantially fulfill its responsibilities with respect to:

a. Sales of new Nissan Vehicles and the other responsibilities of Dealer set forth in Section 3 of this Agreement;

....

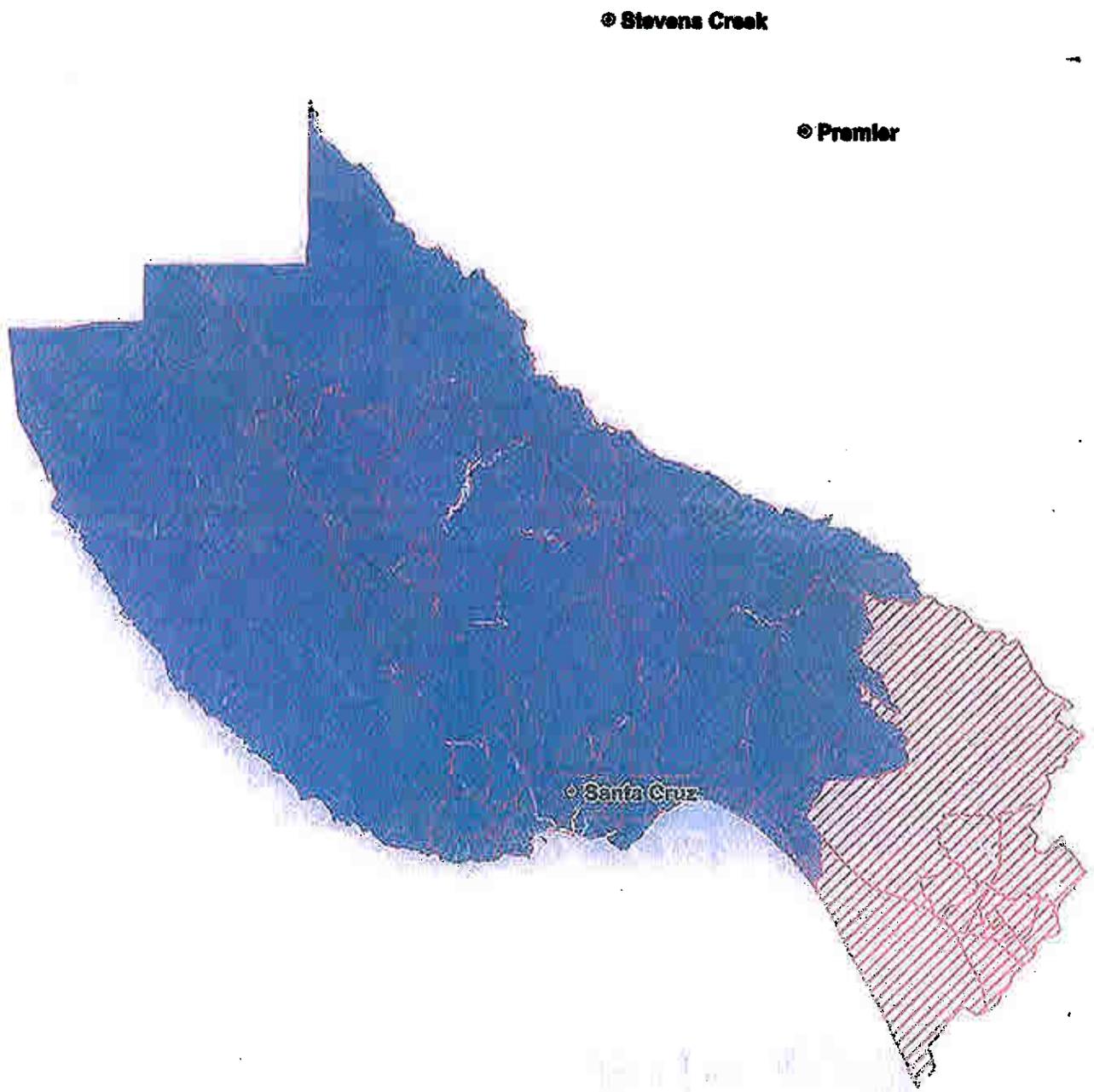
Seller shall notify Dealer of such failure and will review with Dealer the nature and extent of such failure and the reasons which, in Seller's or Dealer's opinion, account for such failure.

Thereafter, Seller will provide Dealer with a reasonable opportunity to correct the failure. If Dealer fails to make substantial progress towards remedying such failure before the expiration of such period, Seller may terminate this Agreement by giving Dealer notice of termination...

Exhibit A

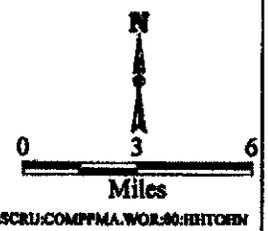
Exhibit F

**12/2011 Santa Cruz (Santa Cruz) Nissan PMA by 2000 Census Tract vs.
 9/2013 Santa Cruz (Santa Cruz) Nissan PMA by 2010 Census Tract
 © Nissan Sunnyvale**



12/2011 Santa Cruz (Santa Cruz) PMA
 9/2013 Santa Cruz (Santa Cruz) PMA

SOURCE: The Fontana Group, Inc.
 DATA: Manufacturer Dealer Census File (Magnetic Media), 9/2013.
 Manufacturer Structure List Files (Magnetic Media), 12/2011 and 9/2013.



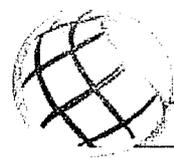
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STATE OF CALIFORNIA
NEW MOTOR VEHICLE BOARD

STATE OF CALIFORNIA NEW)
MOTOR VEHICLE BOARD)
SPECIAL MEETING)
_____)

SPECIAL MEETING

DATE: September 17, 2014
TIME: 2:00 p.m. to 4:30 p.m.
LOCATION: DoubleTree by Hilton San Diego - Hotel Circle
1515 Hotel Circle South
Cortez Room
San Diego, California 92108
REPORTED BY: KERSTEN SONG, CSR NO. 12796



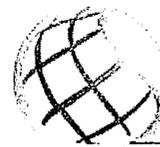
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PRESENT

NEW MOTOR VEHICLE BOARD

RYAN L. BROOKS, Senate Rules Committee, Public Member
ROBIN PARKER, General Counsel
BISMARCK OBANDO, Governor's Office, Public Member
GLENN E. STEVENS, Governor's Office, Public member
KATHRYN ELLEN DOI, Governor's Office, Public member
WILLIAM BRENNAN, Governor's Office, Public Member

FOR PROTESTANT:
LAW OFFICES OF MICHAEL J. FLANAGAN
BY: MICHAEL J. FLANAGAN, ESQ.
BY: GAVIN M. HUGHES, ESQ.
BY: DANIELLE R. VARE, ESQ.
2277 Fair Oaks Boulevard
Suite 450
Sacramento, California 95825
(916) 646-9100



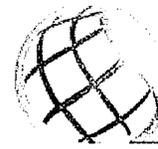
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PRESENT (CONTINUED)

FOR RESPONDENT:
BAKER HOSTETLER
BY: MAURICE SANCHEZ, ESQ.
BY: LISA M. GIBSON, ESQ.
600 Anton Boulevard
Suite 900
Costa Mesa, California 92626
(714) 966-8863

-and-

CECIL L. DAVIS, JR., ESQ.
Senior Counsel, Nissan North America, Inc.
One Nissan Way
Franklin, Tennessee 37067
(615) 725-1672



1 MR. STEVENS: The meeting of New Motor
2 Vehicle Board is now called to order. Please take your
3 cellphones and either put them on silent or vibrate.

4 Bill, would you take the roll, please.

5 MR. BRENNAN: Certainly.

6 Mr. Brooks?

7 MR. BROOKS: Present.

8 MR. BRENNAN: Ms. Doi?

9 MS. DOI: Here.

10 MR. BRENNAN: Mr. Lizarraga?

11 (Not present)

12 MR. BRENNAN: Mr. Obando?

13 MR. OBANDO: Here.

14 MR. BRENNAN: And Mr. Stevens is...

15 MR. STEVENS: Here.

16 MR. BRENNAN: We have a quorum.

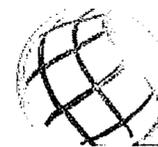
17 MR. STEVENS: Thank you, Bill.

18 And, if any, of the audience would like a
19 transcript of today's meeting, please contact the
20 office staff in Sacramento and we'll arrange for you to
21 get in touch with the court reporter.

22 I think that's the way we do it now?

23 MS. PARKER: Yes, that's correct.

24 MR. STEVENS: So I have my handy dandy
25 American Flag. Everybody will rise. We'll have Robin



1 lead us in the Pledge of Allegiance.

2 (All pledge the United States Pledge of
3 Allegiance.)

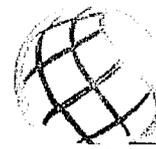
4 MR. STEVENS: This is now going to Agenda
5 Item No. 4.

6 Before we start the proceedings, comments
7 made by the parties and by their counsel made regarding
8 any proposed decision, ruling, or order must be limited
9 to matters contained within the administrative record
10 of the proceedings. No other information or argument
11 will be considered by the board.

12 This is an adjudicative matter as described
13 in Government Code section 11125.7(e) and therefore
14 members of the public may not comment on such matters.

15 This is the case of Santa Cruz Nissan, Inc.
16 dba Santa Cruz Nissan v. Nissan North America, Inc.,
17 Protest No. PR-2358-13. Nissan sought to terminate
18 Santa Cruz Nissan's franchise because of unsatisfactory
19 sales penetration performance related to operational
20 deficiencies and a breach of the dealer agreement.
21 Protestant contends that Respondent has failed to meet
22 its burden in establishing good cause to terminate
23 Protestant's Nissan franchise.

24 A 12-day merits hearing was held before
25 Administrative Law Judge Diana Woodward Hagle on



1 January 27 through February 7, 2014, and March 6 and 7,
2 2014. The proposed decision sustains the protest and
3 does not permit Nissan to terminate Santa Cruz's Nissan
4 franchise.

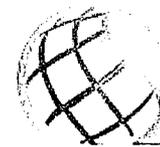
5 At the July 15, 2014, general meeting the
6 public members considered Administrative Law Judge
7 Hagle's proposed decision.

8 After such consideration, the public members
9 conditionally sustained the protest and remanded the
10 matter to the ALJ to recommend conditions for the board
11 to impose consistent with section 3067 and establish a
12 time frame for Protestant to comply with these
13 conditions. The parties were strongly encouraged to
14 engage in settlement discussions and set a mandatory
15 settlement conference with a board appointed ALJ.

16 A mandatory settlement conference was held
17 August 19, 2014, and the matter did not settle.

18 Briefs were filed and oral arguments were
19 presented to ALJ Hagle on August 26, 2014.

20 ALJ Hagle issued a "Proposed Decision
21 Following Board's Order Sustaining the Protestant and
22 Remanding the Matter" on September the 5, 2014. The
23 decision contained the following recommended conditions
24 and incorporated the proposed decision dated July 3,
25 2014.



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

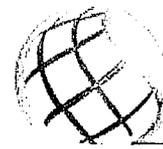
4 (1) Protestant shall be open for service of
5 Nissan vehicles on Saturdays from 8:00 a.m. to 4:30
6 p.m. excluding holidays and shall have available for
7 Saturday customers on-demand shuttle bus services and
8 loaner cars; and (2) Protestant shall, at all times its
9 Nissan dealership is open for sales, have at least one
10 salesperson available who is conversant in the Spanish
11 language; and (3) Protestant shall, in its print, radio
12 and TV advertising, devote no less than 20 percent of
13 its advertising budget for each of those media to
14 Spanish-language advertising.

15 B. James Courtright -- I guess he's still
16 the general manager?

17 MR. HUGHES: Executive manager.

18 MR. STEVENS: Oh, executive manager, shall
19 successfully complete a Dealer Training Academy program
20 of the National Automobile Dealers Association ("NADA")
21 within 24 months from the effective date of the
22 decision. The inability to enroll in the program
23 because of restrictions imposed by NADA shall not
24 constitute a violation of this condition.

25 C. In regard to the above conditions in



1 paragraphs A.(1) - (3) and B., Protestant shall have
2 the burden of proof of verifying compliance. Upon
3 request of Nissan, Protestant shall provide
4 verification of compliance with any of the above
5 conditions within 30 days of request.

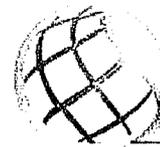
6 D. Effective immediately to December 31,
7 2015, the board shall have exclusive jurisdiction to
8 assess the sales performance of Protestant and the
9 following calculation shall be the exclusive
10 measurement of Protestant's sales performance to
11 December 31, 2015.

12 (1) The assessment shall compare
13 Protestant's sales to the sales of the 10 dealers other
14 than Protestant in Nissan's District 8.

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

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

23 (4) In any proceeding before the Board,
24 regarding Protestant's sales performance using the
25 foregoing standards, Protestant shall not challenge the



1 reasonableness of the standard nor shall respondent be
2 required to prove the reasonableness of the standards.

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

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

10 The Board shall retain continuing
11 jurisdiction over this matter. The parties are present
12 in this matter. And at this time, let's have the
13 counsel make their appearance to the reporter.

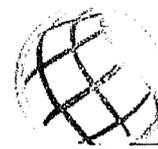
14 MR. HUGHES: This is Gavin Hughes for
15 Protestant Santa Cruz Nissan, Inc. dba Santa Cruz
16 Nissan, from the Law Offices of Michael J. Flanagan.

17 I have with me Mr. Flanagan and Mr. Jim
18 Courtright, Mr. Ernest Courtright, and Ms. Danielle R.
19 Vare, also from the Law Offices of Michael J.
20 Flanagan.

21 MR. SANCHEZ: Maurice Sanchez for Nissan
22 North America.

23 With me is Lisa Gibson. We're both from
24 Baker and Hostetler, counsel for Nissan North America.

25 And in between us is Cecil Davis, in-house



1 counsel for Nissan North America.

2 MR. STEVENS: Okay, each side has received a
3 copy of the administrative law judge's decision
4 following the Board's order sustaining the protest and
5 remanding the matter, is that accurate?

6 MR. HUGHES: Yes, sir.

7 MR. SANCHEZ: Yes, sir.

8 MR. STEVENS: You've had a chance to read
9 it, and the members of the Board have also reviewed the
10 administrative record and proposed decision following
11 the Board's order sustaining the protest and remanding
12 the matter.

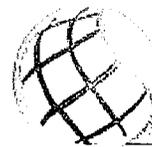
13 At this time, we would like to have each
14 side make a presentation, and we will start with
15 counsel for Nissan.

16 (Oral Argument by Respondent)

17 MR. SANCHEZ: Thank you, Mr. Stevens.

18 As you've stated, this was a sales
19 performance termination. On July 15th, the Board
20 remanded this matter back to ALJ Hagle for the creation
21 of conditions to be met by Protestant.

22 From the comments of the Board, it was clear
23 that the sales performance of the dealer was required
24 to improve. As you'll recall, the dealer's sales
25 performance had declined from 2005 when it was 113.7



1 percent RSE down to 2012 when it was only 32 percent of
2 RSE. Further, Protestant had ignored the Hispanic
3 market, specially Spanish-speakers even after
4 Watsonville had been added to its PMA. As we said
5 before, Watsonville area has 81 percent Hispanic
6 population and 74 percent speak a language other than
7 English.

8 On remand some interesting positions were
9 taken. Protestant argued vehemently that no sales
10 conditions could be imposed on remand at all.

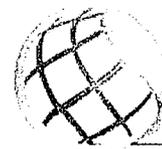
11 ALJ Hagle also refused to reopen the hearing
12 or the evidence to take additional evidence or
13 testimony. So that precluded Nissan from updating
14 Protestant's failure to improve its sales performance
15 and to serve the public.

16 MR. HUGHES: Excuse me? I have to object to
17 that.

18 MR. BROOKS: It's from the record.

19 MR. STEVENS: Whatever is in the record
20 we're not going to consider. So we have, you know,
21 summaries.

22 MR. HUGHES: Thank you, Mr. Stevens. My
23 only concern is if he's making a record in the
24 transcript, the fact that it's been denied to be
25 omitted...



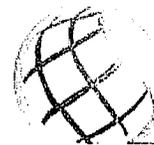
1 MR. STEVENS: Fair enough.

2 MR. SANCHEZ: As well as preventing Nissan
3 from terminating the reasonableness of its -- well,
4 SSER for short, State Sales Effectiveness in
5 Represented Markets, to craft conditions to meet the
6 Board's order.

7 You have seen ALJ Hagle's proposed
8 conditions. The conditions not directly relating to
9 sales performance are not objected to by Nissan. The
10 issue is whether any of these conditions will actually
11 result in improved sales by Protestant. If not, all
12 they are is window dressing.

13 There's the chart with the proposed
14 condition. However, the sales performance objective
15 proposed by ALJ Hagle that's -- this is (D) Sales
16 Performance -- is neither prompt nor acceptable.
17 Nissan strongly feels it misses the point of the
18 reasons the Board ordered the remand.

19 You see Judge Hagle's proposed condition.
20 These are some of the reasons that we feel it's
21 improper. But I'm not going to go through them in that
22 order. 3067 requires that conditions imposed by the
23 Board shall be for the purpose of assuring performance
24 of binding contractual agreements between franchisees
25 and franchisors or otherwise serving the purpose of the



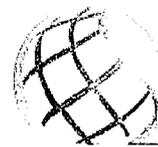
1 article.

2 The Nissan dealer agreement addresses
3 several examples of methods by which Nissan measures a
4 dealer's compliance with the obligation to actively and
5 effectively promote the sale of Nissan vehicles to
6 customers in the PMA. This is section 3 of the dealer
7 agreement and particularly 3(a), general obligations of
8 dealer.

9 Basically the dealer agreement states that
10 Nissan will measure a dealer's sales performance by one
11 or more of the following sales in its primary market
12 area, or PMA, as a percentage of registration of Nissan
13 cars and trucks competitive vehicles registrations of
14 industry cars and registrations of vehicles in the
15 competitive truck selling.

16 It also allows for comparison of sales
17 and/or registrations of the subject dealer and sales
18 and/or registrations of all other Nissan dealers
19 combined in the region and district where dealer is
20 located. That's up in the top of the right column
21 there. So it does mention district.

22 Currently Nissan's chief method of
23 measurement of the dealer's performance, as I've
24 stated, is SSER, Stated Sales Effectiveness in
25 Represented Markets, that was brought out in the



1 original merits hearing because that was the final year
2 prior to the merits hearing that Nissan was using that
3 measure.

4 Because ALJ Hagle believed that the region
5 is simply too large of an area for Protestant to be
6 compared to, and Protestant's counsel believed that
7 even the state of California was too large, Nissan
8 offered to accept the district as a comparison standard
9 as that of the smallest geographic area mentioned in
10 the dealer agreement as a potential comparison area.
11 However, in the agreement the comparison is always
12 expressed as a percentage of sales or registrations
13 compared to the sales or registrations of the
14 comparison group, whether it be region, state, or
15 district.

16 MS. DOI: Do you have that as a handout, by
17 any chance? Because I can't read it from here.

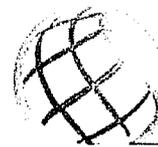
18 MR. SANCHEZ: We do have a copy of it --

19 MS. GIBSON: I do have a copy of the dealer
20 printout.

21 MR. STEVENS: Wasn't that in one of the
22 briefs, guys?

23 MR. SANCHEZ: Yes.

24 MR. HUGHES: Ms. Doi, you've got a handout
25 of the agreement if that would help the members.



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MR. STEVENS: Is it "J"?

(Counsel approaches Board.)

MR. HUGHES: Robin, I have copies of that.

MS. PARKER: Gavin has copies. Can we just let him handle it?

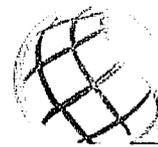
MR. STEVENS: If he wants to.

MR. SANCHEZ: Page 46. The standard provisions of the agreement. So that's not what the proposed conditions had to do with.

The proposed condition would only require that Protestant preserve the current status quo. In other words -- Lisa, if you want to show the green bars -- basically the status quo of the December 2012 was Santa Cruz Nissan was performing a 2.88 penetration rate compared to the district which was at 8.45 California which was at 9.03. And the west region, the west region, was at 8.76.

So basically what this proposed condition would do is merely require Protestant to track its current performance level compared to the district. If the district goes up, the dealer is required to go up proportionately. If the dealer goes down, the dealer can go down.

What it doesn't do, it does not require the dealer in any sense to make any absolute improvement



1 because the dealer in fact can just float, if you will,
2 with the district. And so that would be basically
3 maintaining the status quo.

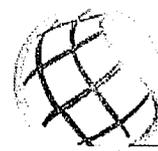
4 MR. STEVENS: Well, if the entire district
5 increases in sales, there's no status quo to it.

6 MR. SANCHEZ: Sure, but what it doesn't do
7 is address the first chart we have which shows the
8 dealer as only at 32 percent.

9 MR. STEVENS: Here's the issue. I think I
10 mentioned this before.

11 At any time you have dealers, multiple
12 dealers, someone's going to be at the bottom, someone's
13 going to be at the top. The mere fact that somebody's
14 at the bottom, the last sale shouldn't in and of itself
15 be enough to say they have poor performance, we're
16 going to terminate, because somebody's always going to
17 be at the end. And eventually, if you use that
18 standard, you'll have nobody left.

19 MR. SANCHEZ: What we don't have,
20 Mr. Stevens, is for a nine-year decline from '05 when
21 this dealer was performing adequately at 19, 100
22 percent decline steadily couple of years, it did go up
23 in '07 and '08. But other than that, a steady, steady
24 decline from 113 percent to 32 percent. That is not
25 just some are above and some are below. If this was a



1 one-year situation or two years and then the dealer as
2 he was trending back up in '07 and '08 -- I'm sorry --
3 '08 and '09. I got it right the first time. '07 and
4 '08, Nissan did not issue a notice of termination in
5 those years. The dealer was actually trending back up
6 at that point. But what happened was that it then
7 reversed course and continued to drop. And, in fact,
8 fell all the way to 32 percent in 2012.

9 MR. BROOKS: When I was looking at that
10 chart --

11 MR. SANCHEZ: I'm sorry?

12 MR. BROOKS: I was looking at the chart and
13 one thing the chart doesn't tell me, they declined as a
14 dealership, but in comparison to the other dealerships,
15 was there a similar decline?

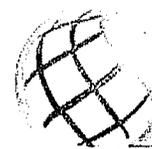
16 MR. SANCHEZ: Well, this is in comparison to
17 the other dealerships.

18 MR. BROOKS: Okay.

19 MR. SANCHEZ: One hundred percent would be
20 average with all the dealerships.

21 MR. BROOKS: That's not just a particular --

22 MR. SANCHEZ: No, RSE per measures
23 performance against the average of all other
24 dealerships. So in '05, Santa Cruz was slightly above
25 average at 113 percent. In 2012 it was basically 68



1 percent below average. It had declined that much.

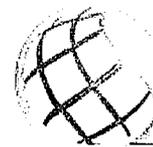
2 While I agree with you there can be ups and
3 downs throughout, to merely peg the performance at 32
4 percent from this point forward for another year does
5 nothing to solve the problem.

6 Mr. Brooks, as I think you stated at the
7 last meeting, they were falling behind, falling behind,
8 falling behind for many -- for nine years, basically,
9 so they reached the level that they were at 32 percent.
10 And now we're saying they just have to basically stay
11 where they are, maintain the status quo. And if the
12 district goes up, then they have to go up
13 proportionately. But what it doesn't do is ever try to
14 get them to make up for this decline. This decline is
15 basically now under this proposed condition accepted as
16 the status quo from this point forward.

17 If the dealer maintains that status quo,
18 then it's deemed to be performing adequately, and I
19 don't think that's what the Board intended when it
20 remanded this case.

21 MS. DOI: Mr. Sanchez, I guess what I'm
22 trying to do is -- my understanding is that whatever
23 the condition is, sales performance condition, that
24 needs to be consistent with the dealer agreement.

25 MR. SANCHEZ: Correct.



1 MS. DOI: So what I understand the judge is
2 saying is you're going to compare the performance to
3 the other 10 dealers in the district and as long as the
4 increase is -- as long as it's the same or better than
5 the increase overall --

6 MR. SANCHEZ: Uh-huh.

7 MS. DOI: -- that's going to be acceptable
8 for the next few years.

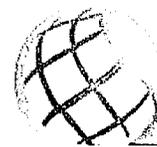
9 MR. SANCHEZ: For the next year.

10 MS. DOI: Next year. And then after that,
11 you can go back to apply your new standard that you
12 want to apply.

13 MR. SANCHEZ: Well, yes, but that condition
14 which I thought the Board basically imposed in order to
15 were a requirement that the dealer actually improve
16 doesn't do that. Not only does not do that, it doesn't
17 match the terms of the agreement.

18 The agreement compares the dealer to, in
19 this case, its district and requires the dealer to
20 perform at least as well as the district, not just I'm
21 going to maintain the status quo at 30 percent or 35
22 percent or what.

23 MR. BROOKS: So you think the baseline is
24 false? Basically, you have 32 percent baseline and the
25 dealer stays the same or even goes up 5 percent the



1 dealer is still way below where they should be?

2 MR. SANCHEZ: Absolutely.

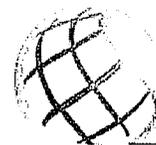
3 MS. DOI: So you think the condition should
4 be they have to be at a hundred percent of --

5 MR. SANCHEZ: Well, we actually have
6 proposed and proposed a condition along those lines,
7 that the dealer basically makes steady progress towards
8 achieving a hundred percent. And we were willing to go
9 two years to give the dealer time to achieve that.

10 What I think everybody wants, I thought, was
11 that the dealer basically make progress to actually
12 getting close to the -- now, this was based on SSER,
13 but it can easily be based on district.

14 And this would show an actual absolute
15 improvement of the dealer and it would recognize that
16 the dealer ask not currently performing adequately
17 today or as of close of the record.

18 I don't think that's any dispute on this
19 chart. The dealer was not performing adequately
20 compared to the other dealers by whatever measure,
21 district, California, region, country. So we need that
22 first green bar to grow, at least gradually towards
23 approaching the other green bars. This isn't just some
24 dealers are below average. This is the worst dealer in
25 the state, except for a new dealer that was only two



1 years old. This is a 42-year dealer that is the worst
2 in the state.

3 MR. STEVENS: What's happened between the
4 last year we have in July and --

5 MS. DOI: We can't answer that.

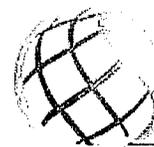
6 MR. SANCHEZ: We can't answer that. Had
7 Judge Hagle let us do that, we could have addressed it.

8 MS. DOI: And the other problem is we have
9 no basis for knowing whether -- what you would like to
10 see imposed is at all realistic in terms of growth
11 over, you know, a couple of months when you institute
12 new requirements.

13 MR. SANCHEZ: Thank you, Ms. Doi.

14 What we know is that this dealer at this
15 location with these other franchises with the same
16 ownership and management at one point was at 113
17 percent. We know that, so it can be done, and it has
18 been done by this dealer in this location. We know
19 it's not impossible. It has happened, so what we're
20 saying is, and what we have shown and what the other
21 conditions I think try to address, is that the dealer
22 needs to do things to get there.

23 The problem with the conditions is that you
24 can meet all those other conditions and never sell a
25 single car. You need to sell cars. They need to work



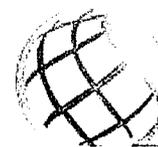
1 or they need to be made effective.

2 So that that's why, and our position is, it
3 needs to show absolutely improvement because that's
4 what Nissan measures in -- by terms of the agreement
5 and 3067 says you have to basically impose conditions
6 that would require a performance or a compliance with
7 the terms of the agreement.

8 What this condition proposed by Judge
9 Hagle...first, it's not in the agreement. Nowhere is
10 it found in the agreement. So it's definitely a
11 violation of 3067.

12 MS. DOI: I mean I think it doesn't have to
13 be in the agreement. I think it needs to be consistent
14 with the agreement and the agreement uses terms like
15 "reasonable," "improvement," and -- I mean, I don't
16 think it's a scientific formula. And I don't know that
17 I would take the position that it is inconsistent. It
18 may just not be optional from your perspective.

19 MR. SANCHEZ: Let's say hypothetically the
20 district stays exactly the same. That's never going to
21 happen, but let's say it stays exactly the same. The
22 dealer's performance can stay exactly the same. That's
23 not improvement. By no measure is that improvement.
24 So again, it does not recognize that the dealer's
25 performance was not adequate.



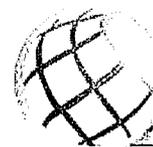
1 And I think under the green bars show the
2 dealer's performance just has not been adequate. If
3 the market agrees and if the area within the district
4 grosses in sales for Nissan, then, yes, of course the
5 dealer -- but the dealership also needs to make
6 absolute gains, not just parallel gains. The dealer
7 needs to make leaps forward to try to get back up to
8 that 100 percent level where it was in '05.

9 MS. DOI: So can I just ask, did Nissan
10 agree to the other conditions, the conditions in (A),
11 about the service being open for service on Saturdays
12 and in the Spanish-language conditions?

13 MR. SANCHEZ: We didn't object to it. ALJ
14 Hagle started proposing them. The one we did have a
15 problem with, the 20 percent Hispanic advertising,
16 there's no dollar amount attached to it, and that's
17 just an issue for us because it could be anything. It
18 could be a hundred dollars and you get twenty bucks. I
19 mean everything that -- we don't think it's just clear
20 enough.

21 MS. DOI: But does Nissan agree that if the
22 Protestant implements these, it should result in an
23 improvement in their performance?

24 MR. SANCHEZ: Again, no, because we don't
25 know how they're going to be implemented.



1 MS. DOI: But aren't these the kinds of
2 things that Nissan wanted them to do --

3 MR. SANCHEZ: Those are the suggestions that
4 Nissan made over the years as good business practice
5 that they should follow, yes, and they did not. Even
6 right before or even during the hearing. Those are
7 things that other dealers do. However, I think there
8 was also a finding that the current management of the
9 dealership did not necessarily implement those changes
10 effectively in order to actually result in better
11 sales. Again, all of those things could actually be
12 done and not add to a single sale. That --

13 MR. STEVENS: Well, I think if they do every
14 one of these conditions on the list, A and B, any one
15 of these in and of themselves is not going to result in
16 greater sales. It can't. There's no conditions that
17 can unless the condition is you've got to hit certain
18 sales figures.

19 MR. SANCHEZ: Right.

20 MR. STEVENS: So the point is you're
21 training and you're doing things for each of your
22 dealers to improve them and let them keep up with
23 whatever what is going on at Nissan and how you want
24 to sell cars. How is this not something that meets the
25 standards that you're setting for other dealers?



1 MR. SANCHEZ: Because it doesn't require
2 them to meet that same standard that other dealers are
3 required to meet. It just requires them to float with
4 the district. You can maintain that gap. You can
5 maintain 80 percent --

6 MR. STEVENS: But you're focused on sales
7 figures. I'm focused on them following the terms of
8 their franchise agreement and also doing what they are
9 supposed to do, be equal to the training received by
10 other dealers. For example, No. 1, open for service
11 8:00 to 4:30. Other dealers do the same thing.

12 MR. SANCHEZ: Sure.

13 MR. STEVENS: Including Saturdays. They
14 have Spanish-speaking salespeople. They have
15 Spanish-speaking advertising. And you want their
16 executive to go to the Dealer Training Academy which
17 other dealers do.

18 MR. SANCHEZ: That was actually Judge
19 Hagle's suggestion. We didn't bring that up.

20 MR. STEVENS: That's not something that you
21 feel would be -- should be required?

22 MR. SANCHEZ: Again, all of these could
23 result in better sales. The bottom line is better
24 sales. They could be doing all or none of these
25 things. Other dealers go all or none of them, yet



1 everybody in the state is ahead of this dealership --

2 MR. STEVENS: Just a comment real quick.

3 It's been 20 minutes. I don't really care because it's
4 the only matter we have, but I want to let everybody
5 know it's 20 minutes.

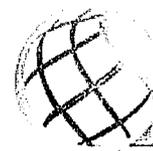
6 MS. DOI: And we are aiming for 30 minutes?

7 MR. STEVENS: I was trying to aim for 15. I
8 think that it's important and we should take as much
9 time as we need to on this, but I'm just letting
10 everybody know.

11 Go ahead. Sorry.

12 MS. DOI: I was just going to say I don't
13 think that you can ever guarantee that somebody is
14 going to guarantee to increase their sales. So I think
15 to a certain point all you can do is try to improve the
16 way that they are running their business in the manner
17 that was not making Nissan unhappy before.

18 And if they meet these conditions and make a
19 good faith effort to do it, there's no guarantee ever
20 that anything you're going to do is going to increase
21 sales. So I appreciate what you're saying and I
22 appreciate -- hopefully they actually want to sell more
23 cars and these conditions will make it more likely that
24 they'll sell more cars. But you know the problem I'm
25 having is saying you have to sell 30 more cars in



1 January and 60 more cars in February, whatever. We
2 don't have -- I'm not sure we have enough data to know
3 that that's a reasonable type of condition to impose.

4 MR. BROOKS: And if I can dovetail.

5 What you're really asking is I don't see
6 from the other chart you had the increase to be
7 achievable. Because if you're asking them to sell --
8 to get to 55 percent by -- 45 percent, where are they
9 right now?

10 MS. GIBSON: We're not allowed to -- --

11 MR. SANCHEZ: The last number was 32.

12 MR. BROOKS: 32 percent.

13 MR. SANCHEZ: But we don't have in the
14 record where they are today.

15 MR. BROOKS: So do we know the number of
16 cars that would take?

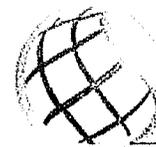
17 MR. SANCHEZ: Again, that's a snapshot,
18 because everything's moving constantly.

19 MR. BROOKS: Correct.

20 MR. SANCHEZ: The number of cars sold total
21 is also growing right now. Nissan's in a growth mode
22 right now.

23 MR. BROOKS: Correct.

24 MR. SANCHEZ: What we do know is that at one
25 time they were at 113.



1 MR. BROOKS: The reason I'm asking the
2 question or trying to articulate the question is I'm
3 trying to figure out if that set them up for failure or
4 is it achievable? And without knowing the total number
5 of cars, I have no baseline. I'm just looking at 45 to
6 55 to 65 percent number. It doesn't tell the full
7 story.

8 MR. SANCHEZ: Right. And this is the
9 problem. Nobody has a crystal ball. Nobody knows what
10 the future is going to hold.

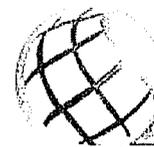
11 What we do know is that this dealer in '05
12 performed at 100 percent --

13 MR. BROOKS: I'm going to go back to my
14 baseline question.

15 Have you put a model together where they
16 have to sell 80 cars where the average is 30 cars? Is
17 that achievable? I don't know what that number is. So
18 that 45, 55, 65 percent number means zero to me because
19 I have no context.

20 MR. SANCHEZ: I can tell you in this market
21 Honda dealer was 1,500 units, two miles way from
22 Santa Cruz Nissan. He sold 1,500 cars in one year. So
23 what we're asking the dealer to do is being done by
24 another dealer in that market.

25 MS. DOI: I don't think you can compare



1 Hondas and Nissans either.

2 MR. SANCHEZ: No, what we're saying is cars
3 are being sold there. It's not like it's a dead
4 market, like nobody's selling cars.

5 What we're saying is Nissan did, and did put
6 on evidence at the hearing that usually Nissan is 60
7 percent of Honda, let's say, and in this market, it's
8 well below that.

9 MR. BROOKS: Even if it's one to one and the
10 percentage wouldn't change?

11 MR. SANCHEZ: Sure, it would.

12 MR. BROOKS: If it's one to one, the
13 percentage is based on the total number of cars sold in
14 the market, correct?

15 MR. SANCHEZ: No, total number of cars sold
16 in the district.

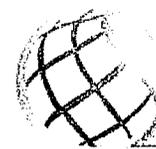
17 MR. BROOKS: So if they were one to one,
18 wouldn't they be all equal to others?

19 MR. SANCHEZ: I don't understand what the
20 one to one --

21 MR. BROOKS: If Nissan sold a hundred cars,
22 Honda sold a hundred cars, would the percentage change?

23 MR. SANCHEZ: It would depend on what's
24 being sold in the district.

25 MR. BROOKS: But it would change equally



1 based on all the other dealerships in the district,
2 correct?

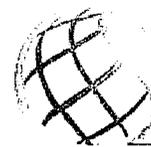
3 MR. SANCHEZ: I guess. I'm not sure I
4 understand the question.

5 MR. BROOKS: I'm trying to figure out what
6 numbers it would take to go from 45 percent to 55
7 percent.

8 MR. SANCHEZ: I'll tell you this. The Board
9 is uncomfortable with these percentages. You can set
10 an absolute number of sales. Nissan doesn't do it that
11 way normally. What I'm going to propose the Board do
12 is take this case from Judge Hagle because these
13 conditions don't achieve what the Board remanded this
14 case for.

15 It doesn't require the dealer to improve at
16 all. The dealer can stay at 32 percent forever. So
17 what I think the Board should do is take this back,
18 have briefing by the party.

19 If you reopen evidence, we can put on
20 evidence of the type that you mentioned. We can submit
21 that evidence and we can -- if you'd rather get to an
22 absolutely number, we can get to an absolute number
23 that they have to meet. And the reason for the scare
24 steps is we don't require them in one month to get to a
25 hundred percent. We're trying to be reasonable. We're



1 not trying to say they have to jump to a hundred
2 percent immediately. What we are saying is they need
3 to show steady improvement over a year or two so that
4 at some point they make up the gap because they were
5 there at one time.

6 MS. DOI: So I have a question.

7 One thing Judge Hagle was proposing to do is
8 not to apply the Nissan standards, the SSER.

9 MR. SANCHEZ: Uh-huh.

10 MS. DOI: Because I thought the reasoning
11 was good, to avoid there being arguments over the
12 reasonable standard and the whole evidentiary hearing.

13 But was there evidence about this District 8
14 and what the different 10 dealers in that --

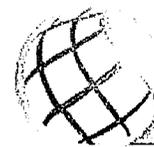
15 MR. SANCHEZ: Well, they were District 11 at
16 the time. That's what the green bars are.

17 MS. DOI: Oh, that's what the green bars
18 are?

19 MR. SANCHEZ: Yes. That shows how they were
20 compared to District 11. District 11 was at 8.45 and
21 they were at 2.8 so they were at 30 percent.

22 MR. HUGHES: That's a different district,
23 though.

24 MR. SANCHEZ: It's changed. It's now
25 District 8. There's a few different dealers. We do



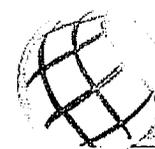
1 have how they compared to the other district --

2 MR. STEVENS: That's the other thing that
3 I'm wrestling with. I don't like standards at all.
4 That makes it impossible for a dealer to retain their
5 franchise agreement if they don't meet certain sales
6 standards. It really bothers me. I do like the fact
7 that Nissan says you have to come back for training
8 every once in a while.

9 You have to have Spanish-speaking
10 salespeople. You have to advertise in Spanish. Those
11 things make perfect sense, because at least you're
12 getting out there and you're walking with your
13 community, you know, in line.

14 They don't always have control as to where
15 somebody buys cars. For instance, they may not
16 distribute cars. That's perfectly their right to say
17 the sticker price is what we're going to sell at and
18 the Nissan dealer down the street says we're going to
19 discount not only that, we're going to give them to you
20 500 over invoice price. That's their business model.
21 They're not going to sell very many cars, but you can't
22 terminate somebody for that, I don't think.

23 MR. SANCHEZ: And this is another chart
24 we're going to show you. Cars -- and this was shown
25 during the hearing. The blue dots are Santa Cruz



1 Nissan and the red dots are other dealers. So other
2 dealers are selling cars into this market and those are
3 other Nissan dealers.

4 MR. STEVENS: You think that might be a
5 function of price?

6 MR. SANCHEZ: It might be a lot of things,
7 but the point is, it's not like nobody's selling cars
8 in this market. They are being sold to this dealer.

9 MS. GIBSON: I'm just showing --

10 MR. STEVENS: You're showing 185 cars sold
11 in their RMA?

12 MR. SANCHEZ: PMA.

13 MS. GIBSON: And this is how much Santa Cruz
14 is selling.

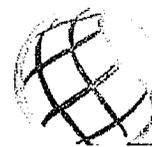
15 MR. STEVENS: Within their own PMA?

16 MS. GIBSON: Almost two to one being
17 outsold.

18 MR. STEVENS: And do we know in the other
19 dealer line, do we know how many other dealers 185 is
20 comprised of?

21 MR. SANCHEZ: These are the fringe dealers,
22 meaning these are the dealers whose PMA touches Santa
23 Cruz Nissan is the red.

24 MR. HUGHES: I object. That's misleading.
25 All that is is PMAs. That's saying nothing about who



1 made the sales you just asked about.

2 MR. SANCHEZ: We're saying just generally it
3 may be other dealers too.

4 MS. DOI: So Mr. Sanchez, if we're going to
5 use District 8 as the measurement, let's assume that,
6 and what you're objecting to is that the ALJ wants to
7 make sure that they are the same or better than the
8 increase in sales that the other -- that the average of
9 the other dealers in their district?

10 MR. SANCHEZ: Uh-huh.

11 MS. DOI: Is there a way to adjust that
12 metric to also include some improved performance over
13 and above, making sure that their increase is the same
14 or better than the average?

15 MR. SANCHEZ: Sure. We tried to do it by
16 percentages. We can certainly come up -- as I said,
17 and this is hard to do within however much time I have,
18 I know I'm probably over.

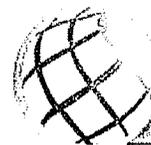
19 MR. STEVENS: But not only that, you used up
20 all his time.

21 MR. BROOKS: Should we go to closed session
22 on this?

23 MR. STEVENS: Yes.

24 (Laughter)

25 MR. SANCHEZ: If we had a chance to brief



1 it, yes, we could probably come up with a standard that
2 would not only maintain this status quo but also
3 require this dealer to improve. Because at 32 percent,
4 I think we can all, at least from Nissan's point of
5 view, this dealer is not complying with the agreement,
6 is not serving the market.

7 MS. DOI: But do we know that it's 32
8 percent of this District 8? We don't know that, right?

9 MR. SANCHEZ: That's the last number we have
10 compared to the region. But we do have 2.88 compared
11 to the District 11.

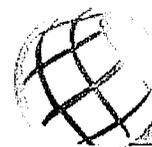
12 MS. DOI: I have an idea.

13 MR. STEVENS: You have an idea?

14 MS. DOI: No, I'll share it in closed
15 session.

16 MR. SANCHEZ: I guess what I'm saying is if
17 the Board chooses to, it can certainly, and with the
18 help of the parties, devise a standard or a program by
19 which this dealer need and can improve over time. This
20 is the best comparison we have; District 19, which the
21 dealer was in at the time, compared to the performance
22 of Santa Cruz Nissan as of December 2012. So if you
23 want to compare it to a district, that's the best
24 comparison that we have.

25 MR. STEVENS: Mr. Hughes, are you going to



1 take your side's argument?

2 MR. HUGHES: Yes, I am. Thank you,
3 Mr. Stevens.

4 (Oral Argument by Protestant)

5 MR. HUGHES: I think what's being lost here,
6 and certainly being completely ignored by Respondent,
7 there has been a decision sustained by this Board
8 conditionally that says the application of RSE to this
9 dealer in this market is inappropriate. All these
10 percentages, we spent so much time talking about the 32
11 percent, getting to 75 percent, 85 percent is based
12 upon a flawed methodology as applied to this market.

13 Our expert came in and did a full analysis
14 of the many local conditions that affect the
15 application of RSE in this market to this dealer. The
16 judge extensively cites why this market is unique and
17 why RSE is inappropriate. Yet here we are talking
18 about the same RSE numbers.

19 It's true Nissan has moved to SSER, but
20 that's a heightened standard. It's a more rigid
21 standard than RSE. It's essentially the same as RSE
22 but it uses the state of California which outperforms
23 the region as a whole making it exceedingly more
24 difficult to achieve a hundred percent effectiveness in
25 this market. I don't know how any decision could be



1 based upon achieving SSER or RSE and at the same time
2 wholeheartedly reject its application. I don't think
3 that makes any sense.

4 MS. DOI: Mr. Hughes, can you address that
5 issue where 185 cars were sold by other dealers in the
6 Protestant's PMA?

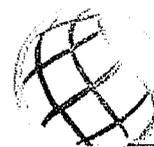
7 MR. HUGHES: I'd like to.

8 MS. DOI: Okay.

9 MR. HUGHES: One of the things that our
10 expert testified extensively about was the strong level
11 of -- high level of out-commute in this market. It's a
12 bedroom community. This has got different percentages
13 of people commuting out as opposed to people commuting
14 in.

15 Here's Santa Cruz at 152 percent, so
16 essentially 1.5 people are driving out of the market
17 every day for work relative to one person coming into
18 the market. They are primarily going up to Silicone
19 Valley where they're exposed to larger dealerships that
20 can sell at volume to try to reach incentives. They
21 can sell vehicles at a loss because they're making so
22 many of them they can make it up on the back end
23 through incentive. Smaller dealer shins in a smaller
24 market don't have the incentive.

25 There's also auto malls up there. They can



1 look at all the vehicles at the same flame. Larger
2 auto malls, lot of them can sell at a higher volume,
3 sell at a lower price. This shows -- if I can say one
4 thing, Ms. Doi. It's not just in-sell for Protestant.
5 There's in-sell for across all the brands, all the
6 dealers. There's high in-sell in this market and part
7 of it is the result of --

8 MR. SANCHEZ: I'm going to object. There's
9 no proof of any other brands. We're not allowed to
10 talk about any other brands --

11 MR. HUGHES: That's not true. Mr. Stockton
12 testified extensively about in-sells for the other
13 brands. It's in the report.

14 MS. DOI: What I was going to ask is does
15 Protestant's dealer sell other brands?

16 MR. HUGHES: Yes.

17 MS. DOI: And was there evidence about the
18 number of -- how the other brands were effected or the
19 amount of, say, Hondas that were sold in their PMA BY
20 other dealers, that kind of thing, or was there --

21 MR. HUGHES: No, Ms. Doi. We objected to
22 that evidence because the termination is about whether
23 or not there's good cause to terminate Nissan and the
24 performance of these other brands have no --

25 MS. DOI: If you're trying to explain the



1 performance by comparison to what's going on in the
2 local market, would it help to confirm whether or not
3 that's a valid basis for the difference if you can
4 compare what happened to other brands?

5 MR. FLANAGAN: But you have to compare that
6 to all the other brands.

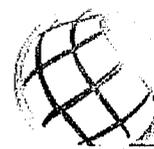
7 MS. DOI: We just don't have that
8 information, okay.

9 MR. HUGHES: This is in the record.
10 Mr. Stockton did a thorough analysis showing that the
11 entire market has a high level of in-sell across
12 automobile brands.

13 There's no one brand that is experiencing a
14 higher level than average-of in-sell in this market.
15 It's because of the market that there's a higher level
16 of in-sell.

17 MR. STEVENS: Mr. Hughes, how does your
18 client feel about the decisions that are in the
19 proposed decision?

20 MR. HUGHES: We don't think there should be
21 any sales objective, but in order to get this thing
22 resolved, the one that has been proposed is something
23 that we think is reasonable, given the circumstances
24 and achievable at the very least. At the very least it
25 keeps Protestant from moving backwards, and like we've



1 touched on already, satisfying the conditions in
2 Condition A and perhaps B, which I'd like to talk about
3 in more detail. Those ought to result in improved
4 sales. Those ought to create change at this dealership
5 and we should see some results.

6 I mean, that's the reason why we're doing
7 them. That's the reason why they're -- because
8 everybody thinks these are going to help improve this
9 dealership's performance. The only part of the
10 decision that we really take issue with is the proposal
11 that Jim Courtright abandon the dealership during a
12 time that he's charged with making these changes and
13 improving performance and go attend a NADA Academy on
14 the East Coast. It's 11 months total. It requires six
15 individual weeks on-site classes back there. And some
16 of these classes -- I've got a handout if anybody would
17 like to see it -- week one is about financial
18 management. Students are introduced to basic
19 accounting principals in how to navigate the balance
20 sheet, income statement.

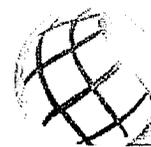
21 Mr. Courtright has an am MBA. I don't think
22 he needs to learn basic accounting. Fixed options part
23 one, it talks about the parts department. Week three,
24 service department. Week four, pre-owned ops. The
25 only one that is even remotely relevant to addressing



1 the concerns here is week five, variable ops for new
2 vehicles. That deals directly with improving sales.
3 Improving the sales department. That sounds
4 reasonable. If he's required to attend these programs,
5 that would be the one that's pertinent to the issues
6 here and really makes some sense.

7 Mr. Courtright has also identified some
8 on-line training that he could attend. We proposed
9 that to the judge but don't know what her thoughts were
10 on that. But one of the classes that is currently
11 available is "Advanced Internet Performance
12 Strategies." The second one is "Digital Retailing
13 Secrets of the Top One Percent." Those are directly on
14 point. These would directly address the need to
15 improve sales or the ability to improve sales if those
16 classes can help, we had a certainly -- Protestant
17 would certainly be willing to give it his best shot and
18 see what he can do.

19 But there are limitations in this market.
20 They are well spelled out in the decision and they are
21 completely ignored by Respondent when Respondent talks
22 about at a hundred percent at one time. I think that
23 was back in 2005. That was a much different time
24 period. There were different vehicles, different
25 markets. Everything was the Internet. Had not gotten



1 to the state where it is right now. The rise and
2 popularity of Hybrids, which all line makes seem to
3 have now. That wasn't the case back then. There have
4 been many changes since then, the market has changed
5 and Protestant has adjusted and is continuing to try to
6 adjust to it.

7 MS. DOI: Was there any testimony whether
8 the level of in-sell has changed between 2005 and 2012?

9 MR. HUGHES: I don't know off the top of my
10 head if it was done on a year-over-year basis.

11 MS. DOI: Uh-huh.

12 MR. HUGHES: I'd have to go back in the
13 record. But I do know part of Mr. Stockton's analysis
14 was to calculate in-sell for all of the dealers in the
15 market. I have a hunch that it was done for at least
16 three or four years, but I'd have to consult the record
17 to see, certainly. But there is evidence clearly
18 demonstrating the in-sell of this market and I don't
19 think you'd find evidence to the contrary that that is
20 not the case.

21 MS. DOI: I guess my thought was if the
22 level of in-sell hadn't changed between 2005 and 2012,
23 then that wouldn't account for, you know, the drop in
24 the relative performance.

25 MR. HUGHES: That's right. If that was the



1 only factor we're looking at under that hypothetical,
2 that would be true.

3 Our other condition -- I'm sorry, not our
4 other condition -- but our other concern about this
5 proposed decision is that we'd like some way to -- we'd
6 like to have the opportunity have the conditions
7 themselves sealed or made confidential in some way in
8 terms of bargaining with sales staff and in terms of
9 competing with other dealers.

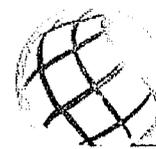
10 If it gets out that this dealer is required
11 to maintain a certain number of Spanish-speaking
12 employees at all times, then the opportunity would --
13 those would be taken from Protestant.

14 MS. PARKER: I have no idea if we can seal
15 those decisions. It's a public record.

16 MR. BROOKS: I don't know how you would do
17 it.

18 MS. PARKER: You'd have to do a proposed
19 stipulation and order which was the purpose of the
20 parties engaging in the settlement conference. It's
21 already public, Gavin. It's already posted on the
22 website. It was public the day it was issued.

23 MR. HUGHES: Yes, I had hoped that we might
24 have an opportunity to make our case subsequent to
25 this, but if it's out, it's out.



1 MR. STEVENS: I get your point.

2 MS. DOI: It's not final yet right now.

3 MR. STEVENS: But you guys could go out and
4 settle while we're deliberating.

5 MR. BROOKS: That was kind of the goal in
6 the first place.

7 MR. HUGHES: And we tried, Mr. Brooks.
8 Respondent insisted that SSER was the standard and any
9 deviation from that was not going to work, was not
10 going to get us there. We did take the position.

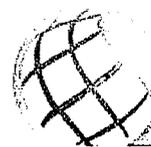
11 MR. BROOKS: Go ahead.

12 MS. DOI: Couldn't you agree to certain
13 conditions, like these -- the A condition and have that
14 sealed and then we would deal with the other? Just a
15 thought.

16 MR. HUGHES: That's a good thought.

17 MR. BROOKS: And along the same lines, the
18 whole purpose, and why we're back for both groups, to
19 sit down and find a common solution.

20 What I'm hearing today, that Nissan's kind
21 of backed away from pulling the franchise but wants to
22 create a better barometer for car sales than what the
23 judge proposed. And what I'm hearing from you, at
24 least today, most of the conditions you're okay with,
25 like car dealership, you don't want to send someone for



1 six weeks and it's not relevant to your goal, Nissan's
2 goal.

3 I'm only seeing one point where you guys are
4 really off. I still think personally there's time to
5 make that deal and encourage it.

6 I mean, after we hear -- you know, if you
7 finish your side and we have time to respond, we'll go
8 into closed session as we normally do, but my hope is
9 you're going to knock on the door and say can we have
10 five more minutes and we're going to come back at
11 closed session and you guys are going to say we have a
12 deal, because I don't hear you guys are too far apart.

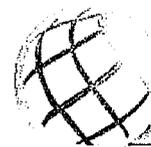
13 MR. HUGHES: Mr. Brooks, I get the sense,
14 and this is me just kind of guessing from the outside
15 looking in, that Nissan corporate cannot strike a deal
16 like that that is anything less than achieving a
17 hundred percent SSER.

18 MR. BROOKS: I wouldn't put the words in
19 Nissan's mouth but general counsel is here.

20 MR. DAVIS: I'm happy to speak on Nissan's
21 behalf.

22 We offered several options and different
23 ways to try and work this out. We can work out
24 something.

25 MR. BROOKS: I don't care about the history.



1 My personal goal is when we go into closed session
2 you'll come back and you guys will have a deal.

3 MS. DOI: Can I also offer my impression
4 from reading the Protestant's papers, you were
5 objecting to any sort of metrics, any sort of, for lack
6 of a better word, accountability, the condition D part.
7 So I do think it sounds like you're kind of close on
8 the A, B, C part. If we just need to deal with the D
9 part, I'll tell you, I'm not inclined to have no
10 accountability at all. I don't think that's
11 appropriate.

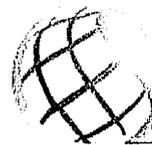
12 MR. HUGHES: I agree, Ms. Doi.

13 MS. DOI: Okay.

14 MR. HUGHES: We're not opposed to being
15 measured in some way, but what we are opposed to is
16 being automatically terminated for not achieving some
17 metric.

18 We can't put our head on the chopping block
19 and say we'll try and meet it, and if we don't, our
20 franchise is gone. We think part of the insistence on
21 using this methodology that's been rejected by this
22 Board already, this is what they want. They want a
23 relocation. They want a new facility.

24 MS. DOI: Why don't you tell us about a
25 metric that would be acceptable?



1 MR. HUGHES: Well, I don't think any dealer
2 should be terminated for performance issues alone, as
3 Mr. Stevens I think tends to agree.

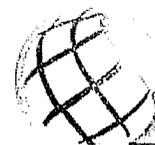
4 MR. STEVENS: It hasn't happened in the
5 years I've been doing this.

6 MR. HUGHES: And I don't think a dealer for
7 that reason alone should ever be terminated. And I
8 don't think any condition should have that threat of
9 automatic termination.

10 I think it's fine for Nissan to continue to
11 have -- measure their performance however they want and
12 continue to say you'd better get it up. But there is
13 not good cause to terminate on that basis alone. And
14 that's what this decision accomplished and we
15 understand the Board's concerns. We appreciate that.

16 There are things that should be done at this
17 dealership and those conditions do address them. And
18 that's why we think the majority of the conditions are
19 all right. But any objective that might potentially
20 result in automatic termination we have an issue with.

21 MR. SANCHEZ: One of the things we proposed
22 at the settlement conference was measurements. And if
23 they were not met, an opportunity to settle. I mean,
24 nobody is trying to take this away with no recourse, no
25 compensation, Ms. Doi, but this is a sales business.



1 Somebody's got to sell cars. If every dealer was at
2 this level, Nissan would promptly go out of business.
3 So we can't just ignore the fact that this is a sales
4 business and that this dealer at one time was able to
5 sell fine. So that -- I think that's the backdrop.

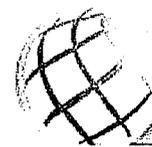
6 Well, as Mr. Davis pointed out, we proposed
7 several different alternatives as to different
8 measurements always with the opportunity if they
9 weren't met to be able to sell the dealership. So
10 there has to be some -- I think everybody at this
11 table, you have to have a goal and you have to have a
12 consequence for not meeting that goal. Otherwise it's
13 not a goal. It's just a wish.

14 MR. STEVENS: To compare their sales this
15 year with what they did nine years ago is just not
16 fair. The world was a different place. The product
17 was a different product.

18 MR. SANCHEZ: But it has been done. The
19 product is the same for every Nissan dealer nationwide.
20 Every dealer has the same cars to sell.

21 MR. HUGHES: And not every market is the
22 same and that's the point.

23 MR. STEVENS: Exactly. And that's fine, but
24 you can't have an absolute rule and bar that no dealer
25 is ever going to be terminated for lack of sales. You



1 cannot have that absolutely bar. If that's what this
2 Board is saying, then that's just wrong.

3 MR. STEVENS: But, you know, you've been
4 doing this for a long time.

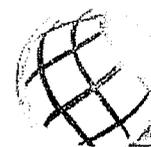
5 MR. SANCHEZ: Sure.

6 MR. STEVENS: The dealers that have been
7 terminated are usually that coupled with something
8 else. For example, their doors are closed for seven
9 days in a row. For example, they don't keep their
10 place in a clean manner; where they don't stock
11 adequate parts. They're symptomatic of the same
12 problem.

13 MR. SANCHEZ: And Mr. Stevens, frankly we
14 had that here. No Spanish-speaking salespeople for
15 five years.

16 MR. STEVENS: And we've kind of agreed with
17 you on that.

18 MR. SANCHEZ: You have, but what I'm saying
19 is if that's the standard, I think we've met it. I
20 keep hearing RSE was rejected. I don't think this
21 Board accepted that proposed decision. It remanded it.
22 So that's kind of still in limbo to me. But I can tell
23 you the argument is being made RSE has been rejected
24 forevermore in the state of California. Can never,
25 ever be used again



1 MR. HUGHES: That's not true.

2 MS. DOI: Can I just ask? So part of the
3 concern I think is, or maybe you can confirm whether
4 this is true, that Nissan is not convinced that the
5 Protestant is wholeheartedly and in good faith going to
6 adopt the conditions and really try to improve its
7 sales to the Latino market?

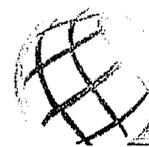
8 MR. SANCHEZ: I'll tell you, and the
9 Courtright's are nice people --

10 MR. BROOKS: I don't think that's it.

11 MR. SANCHEZ: And I'm sorry to say it in the
12 same room, but we're not sure -- I don't know if it's
13 the desire. I don't know if it's the ability.
14 Whatever it is, the steps can be gone through. The
15 actions can be taken. We're not sure they'll be
16 effective.

17 That's really the problem here, because you
18 can -- the same two people can say, okay, spend 20
19 percent on Hispanic advertising, and this guy does it
20 too and guess what? One sells and the other doesn't.
21 I mean it's just -- those are nice things to do and
22 those are things that good business people will do, but
23 will it be effective?

24 MS. DOI: Nobody can ever guarantee anything
25 they try to -- I guess my question to Mr. Hughes...how



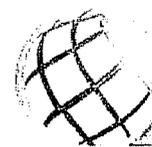
1 committed is the Protestant to implementing these when
2 they've been avoiding and dragging their feet on doing
3 it for years?

4 MR. HUGHES: I don't know that that's a fair
5 characterization. But whatever the circumstances were
6 right now, they are under the gun and required to do it
7 by the requirements of the proposed decision. And also
8 natural in business, to make money and be successful.

9 And they are implementing these. Not just
10 to save the franchise, but also make it more effective
11 to make it more profitable. That's why we're willing
12 to do these things. We're not fighting these
13 conditions. A lot of them sound like good ideas.

14 MR. SANCHEZ: This is frankly the problem,
15 and I think the financial statements show this. This
16 dealership can be profitable selling, call it a number,
17 400 cars a year for all brands. Okay? They don't have
18 to sell Nissans to be profitable. And so this
19 dealership's agenda, and maybe it's fine as far as an
20 individual business, is to make money on all their
21 lines. That's okay. But that doesn't do anything for
22 the public or for Nissan. That's where the district
23 is.

24 MR. BROOKS: I have a question. This might
25 be more of a legal question for the Board and General



1 Counsel Robin.

2 We talk about good faith clauses in the
3 agreement. What would happen hypothetically that the
4 dealership didn't sell any Nissans for five years but
5 had everything else been to par could we take their
6 franchise away or that away? Is that a good faith?

7 MS. PARKER: It's a good cause factor, and
8 that's the analysis in 3061. There's nothing that says
9 you can't terminate for bad sales. It's just
10 historically the Board hasn't.

11 MS. DOI: The manufacturers haven't asked
12 for it. If they're trying.

13 MR. BROOKS: As Glen had said, they're
14 symptomatic of other things going on. I've only been
15 on the Board since April of six, seven years, and I've
16 never seen a case where a product line has been
17 terminated. That doesn't mean that they shouldn't be
18 terminated. I'm just trying to find out is it more of
19 a policy discussion we need to have within the Board on
20 what triggers that?

21 MR. HUGHES: Mr. Brooks, can I address that
22 in this instance?

23 I think Robin is alluding to one. The cause
24 factors that requires the Board and the ALJ to consider
25 is the sales relative to the business available to the

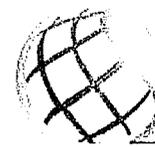


1 dealer. That was done in this proposed decision. The
2 evidence of not achieving adequate sales was the RSE.
3 As it appears, it's very clear from this RSE as applied
4 to this market was rejected by the judge so they failed
5 to meet their burden here. It's not the case that
6 they're not selling any cars. They're selling a lot of
7 cars. The charts we went through, there were a number
8 of years where the actual numbers went up, but the RSE
9 percentage went down.

10 It's the RSE as applied to this market which
11 has been rejected. There are cars being sold and the
12 dealer is out there trying to sell more. Can it sell
13 more? We hope so. And that's why when these
14 conditions are put in place, we hope this occurs.

15 MR. BROOKS: My question is, what happens
16 when hope fails? Hope doesn't work? And that is not
17 necessarily a question I'm posing to you. That's more
18 of a policy question for this board, because I hear
19 both sides. I get it. Nissan saying you guys aren't
20 selling the product and you're declining. We want to
21 get you up.

22 You guys are saying the numbers you're using
23 are false numbers but you still haven't convinced, at
24 least me, that your numbers are still going down and
25 not going up. They're going in the wrong direction.



1 You know, so Nissan's saying what's going to stop that
2 slide?

3 And at what point in time the Board, do we
4 say, Nissan's right, they've got to move product? You
5 guys are underperforming. You're not selling. You're
6 agreeing that your numbers are going down, not going up
7 for that product line.

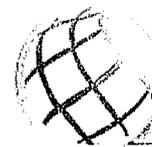
8 MR. HUGHES: Nissan has identified some
9 operational concerns with Protestant and they are
10 addressed to proposed conditions in A and B.

11 If the performance were not to improve even
12 after doing all these things we might find ourselves
13 back here, and Nissan wouldn't have anything to point
14 to because we would have fulfilled all of these
15 conditions and we would still be saying this is a
16 unique market. And if you measure the performance that
17 way, you're going to keep getting that result.

18 MR. BROOKS: This goes to policy before this
19 Board.

20 MR. HUGHES: I'm just trying to make a
21 distinction of evidence of doing things and evidence of
22 strong efforts, and evidence of not so strong efforts.
23 I think that's where the Board's weighing of the
24 evidence will be.

25 MR. BROOKS: I will tell you, you know



1 that's not my weigh-in. The condition is the hope of
2 selling more Nissans. I don't care what you do or how
3 you do it. At the end of the day if you can't sell
4 more Nissans, if you're still at the bottom of the
5 line, my policy question to the Board discussed in
6 closed session is should we pull that product line or
7 allow Nissan to do it?

8 MR. STEVENS: We can, but it's usually, like
9 I said, it's usually multiple things. That's why there
10 are multiple good cause factors.

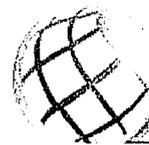
11 MS. PARKER: Right. And a lot of times
12 flooring is gone, they broke a lot, fraud.

13 MR. STEVENS: There's a lot of things.
14 You've been on the receiving end of that stuff before.

15 MR. FLANAGAN: I have.

16 MR. STEVENS: But Mr. Brooks is right, and I
17 think his sentiments reflect sentiments of me and
18 certainly Bismarck too. We're trying to keep him in
19 business and get them what they want at the same time
20 and it may not be possible.

21 MR. FLANAGAN: If I may say, Mr. Stevens,
22 after all of the evidence was presented, part of which
23 consisted in Mr. Stockton's report, Nissan's expert
24 said he had no rebuttal problems with Mr. Stockton's
25 report and Mr. Stockton's report explains why they



1 can't perform to the standard.

2 MR. STEVENS: All right. Guys, I mean --

3 MR. SANCHEZ: if I might just address that.

4 Mr. Stockton never proposed a standard

5 either, and his position was "I don't have to."

6 Well, that's fine. I criticize you. But

7 I'm not going to say what I think the standard should

8 be. And we'll go back to Honda. If somebody's selling

9 1,500 cars in this market, it's not the market.

10 MR. HUGHES: It's 1,500 Hondas.

11 MR. SANCHEZ: Correct. But Nissan should be
12 a certain percentage of that.

13 MR. STEVENS: I know.

14 MR. SANCHEZ: And by the way, the chart that
15 Mr. Hughes showed you with the bars, that was
16 out-commute. This is in-sell.

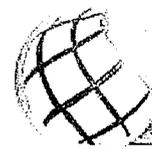
17 MR. STEVENS: Putting Nissan in garages that
18 aren't put in the garages by them.

19 MR. SANCHEZ: Somebody's buying Nissans.

20 MR. STEVENS: We get it. I get it.

21 MR. FLANAGAN: There are three conditions in
22 the left-hand bottom corner at the chart which were
23 arrived at in two separate studies that Nissan did, and
24 not one of them mentions meeting the standard of sales.

25 MR. SANCHEZ: That's a market study that



1 doesn't address sales. That's a market study that
2 doesn't --

3 MR. STEVENS: Guys, we love you dearly.
4 It's time for us to go into effective session.

5 MR. BROOKS: And encourage you guys to talk
6 once you're out there.

7 (Closed session of the Board)

8 (Time noted: 3:11 p.m.)

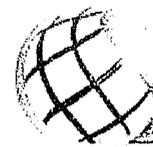
9 MR. STEVENS: We are back on the record.
10 We've come to a decision in the Nissan
11 matter.

12 Robin?

13 MS. PARKER: So the public members of the
14 Board unanimously adopted ALJ Hagle's proposed decision
15 following the Board's decision sustaining the
16 Protestant, and with one amendment, and it's just a
17 typographical amendment in paragraph 10, line 13, on
18 page 4. The date July 14 is changed to July 3rd. And
19 I have copies for everybody.

20 MR. STEVENS: And with that, we are
21 adjourned.

22 (Proceedings adjourned at 4:30 p.m.)
23
24
25



1 STATE OF CALIFORNIA)
 2 :ss
 3 COUNTY OF SAN DIEGO)
 4
 5

6 I, the undersigned, a Certified Shorthand Reporter
 7 of the State of California, do hereby certify:

8 That the foregoing deposition proceedings were
 9 taken before me at the time and place herein set forth; that
 10 any witnesses in the foregoing deposition proceedings, prior to
 11 testifying, were placed under oath; that a verbatim record of
 12 the deposition proceedings was made by me using machine
 13 shorthand which was thereafter transcribed under my direction;
 14 further, that the foregoing is an accurate transcription
 15 thereof.

16 I further certify that I am neither financially
 17 interested in the action nor a relative or employee of any
 18 attorney of any of the parties:

19 IN WITNESS WHEREOF, I have this date subscribed my
 20 name.

21
 22 Dated: September 30 2014
 23 *Kersten Song*
 24 KERSTEN SONG, CSR No. 12796
 25

Errata Sheet – September 17, 2014, Special Board Meeting transcript

Page No.	Correction
1	Cabrillo Room not Cortez Room
2	Delete all references to Governor's Office and Senate Rules Committee
2	Robin Parker, Senior Staff Counsel, New Motor Vehicle Board is the correct title
2	William Brennan, Executive Direction, New Motor Vehicle Board is the correct title
10 Line 16	(Oral Comments by Respondent) not "Oral Arguments..."
22 Line 18	"optimal" instead of "optional"
30 Line 23	"stair" instead of "scare"
35 Line 20	"District 11" instead of "District 19"
36 Line 4	(Oral Comments by Protestant) not "Oral Arguments..."
37 Line 23	"...shins..." - this word is not correct
38 Line 1	"time" instead of "flame"
39 Line 18	"conditions" instead of "decisions"
40 Line 21	Delete "am" before MBA
40 Line 22	"operations" instead of "options"
48 Line 23	"Mr. Sanchez" instead of "Mr. Stevens"
49 Line 1	"absolute" instead "absolutely"
57 Line 4	"executive" instead of "effective"