

NEW MOTOR VEHICLE BOARD  
1507 - 21st Street, Suite 330  
Sacramento, California 95814  
Telephone: (916) 445-1888

STATE OF CALIFORNIA

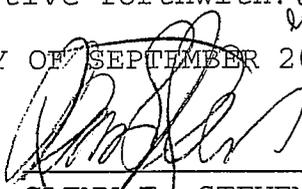
NEW MOTOR VEHICLE BOARD

In the Matter of the Protest of )  
FRONTIER INFINITI, ) **Protest No. PR-1969-05**  
Protestant, )  
v. )  
NISSAN NORTH AMERICA, INC., )  
INFINITI DIVISION, )  
Respondent. )

ORDER

At its regularly scheduled meeting of September 28, 2006, the Public Members of the Board met and considered the administrative record and Administrative Law Judge's "Recommendation Re: Payment of Attorney's Fees" in the above-entitled matter. After such consideration, the Board adopted the Recommendation in this matter. Protestant is ordered to pay Respondent's attorney's fees in the sum of \$11,694.37. *Subject to the award being consistent with the Attorney's billing rates.*  
This Order shall become effective forthwith.

IT IS SO ORDERED THIS 28<sup>th</sup> DAY OF SEPTEMBER 2006.

  
\_\_\_\_\_  
GLENN E STEVENS  
Presiding Public Member  
New Motor Vehicle Board

1 NEW MOTOR VEHICLE BOARD  
1507 - 21<sup>ST</sup> Street, Suite 330  
2 Sacramento, California 95814  
Telephone: (916) 445-1888

HAND DELIVER

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8 STATE OF CALIFORNIA

9 NEW MOTOR VEHICLE BOARD

10  
11 In the Matter of the Protest of )

12 FRONTIER INFINITI, )

13 Protestant, )

14 v. )

15 NISSAN NORTH AMERICA, INC., )  
16 INFINITI DIVISION, )

Respondent. )

Protest No. PR-1969-05

1. ORDER DENYING RESPONDENT'S MOTION TO DISMISS;
2. ORDER GRANTING IN PART RESPONDENT'S MOTION TO COMPEL DISCOVERY; AND,
3. RECOMMENDATION RE: PAYMENT OF ATTORNEY'S FEES

17  
18 To: Michael M. Sieving, Esq.  
Kevin L. Bryant, Esq.  
19 Attorneys for Protestant  
LAW OFFICES OF MICHAEL M. SIEVING  
20 350 University Avenue, Suite 105  
Sacramento, California 95825

21  
22 Marjorie Ehrich Lewis, Esq.  
Susan K. Leader, Esq.  
23 Attorneys for Respondent  
GIBSON, DUNN & CRUTCHER LLP  
24 333 South Grand Avenue  
Los Angeles, California 90071-3197

25  
26 Kevin M. Colton, Esq.  
Attorney for Respondent  
27 NISSAN NORTH AMERICA, INC.  
18701 S. Figueroa Street  
28 Gardena, California 90248

ACTION SOUGHT BY MOTION

1  
2 1. This is a motion brought by Respondent seeking sanctions  
3 against Protestant. The motion alleges that Mr. James Landes  
4 ("Landes"), the dealer principal of Protestant, wrongfully refused to  
5 proceed with a deposition that had been properly noticed to be  
6 recorded both stenographically and by videotape. Landes' refusal was  
7 due to his concerns about the effect of having the deposition  
8 videotaped.

9 2. Respondent seeks the following:

10 a. Dismissal of the protest with prejudice; or,

11 Alternatively, Respondent seeks;

12 b. An order directing the deposition of Landes proceed and be  
13 videotaped; and

14 c. Attorney's fees and costs.

15 Of the above, only the issue of the request for attorney's fees is  
16 submitted to the Executive Director with the recommendation to seek  
17 direction from the Board as a body.<sup>1</sup> No action by the Board itself is  
18 needed as to either: the administrative law judge's denial of the  
19 motion to dismiss; or the order pertaining to the re-scheduling and  
20 taking of the deposition of Landes.

21 ///

22 ///

23 \_\_\_\_\_  
24 <sup>1</sup> Vehicle Code section 3050.2(b) in part provides: "...the executive director  
25 may, at the direction of the board, upon a failure to comply with authorized  
26 discovery without substantial justification for that failure, require payment  
27 of costs incurred by the board, as well as attorney's fees and costs of the  
28 party who successfully makes or opposes a motion to compel enforcement of  
discovery..."



1 pursuant to Section 3062 asserting a lack of good cause to establish  
2 the additional dealership.

3 **THE PRE-HEARING CONFERENCE ORDER RE: DEPOSITIONS**

4 6. Counsel for the parties stipulated to a discovery schedule  
5 and a date for commencement of a hearing on the merits of the  
6 protest.<sup>6</sup>

7 7. As a result of the stipulations, the Board issued a "THIRD  
8 AMENDED PRE-HEARING CONFERENCE ORDER" dated April 12, 2006. This  
9 order, among other things, stated:

10 ...

11 "9. All depositions shall be taken no later than Friday,  
12 June 23, 2006, with a minimum of 72 hours notice."

13 ...

14 (Page 2, lines 13-14)

15 **THE NOTICE OF DEPOSITION OF LANDES**

16 8. Landes is a co-owner of Frontier, is the named Dealer  
17 Principal in the franchise, and is the person to whom the notice of  
18 establishment, required by Section 3062, was addressed.

19 9. Pursuant to the above Pre-hearing Conference Order,  
20 Infiniti, on May 15, 2006, noticed the deposition of Landes, to be  
21 recorded "...stenographically and by sound and visual means  
22 (videotape)". (Parenthesis in original.) (Exhibit B to Respondent's  
23 Motion to Dismiss, Notice of Deposition, page 2, lines 7-8)

24 10. The "NOTICE OF DEPOSITON", dated May 15, 2006 with a proof  
25 of service on Protestant's counsel on the same date, initially set the

26  
27 stated to be 9.2 miles from the proposed new dealership. (Infiniti motion,  
28 page 3, lines 21-24)

<sup>6</sup> The hearing on the merits of the protest began on July 10, 2006.

1 deposition for May 31, 2006 at 9:30 a.m., at Gibson, Dunn & Crutcher,  
2 LLP, One Montgomery Street, Suite 3100, San Francisco. (This is the  
3 San Francisco office of counsel for Infiniti.) The date initially set  
4 was more than two weeks from the date of the Notice, well beyond the  
5 "minimum of 72 hours notice" as required by the Pre-hearing Conference  
6 Order.

7 11. Counsel for each side had been willing to accommodate their  
8 respective requests for rescheduling depositions, and, upon request of  
9 counsel for Frontier, the deposition date was changed from May 31,  
10 2006 to June 7, 2006, and the place was changed from counsel for  
11 Respondent's law offices in San Francisco to a location in Palo Alto.  
12 The new date of June 7 meant that there was more than three weeks  
13 between the date of the notice (May 15) and the date of the deposition  
14 (June 7).

15 **THE REFUSAL OF LANDES TO HAVE THE DEPOSITION VIDEOTAPED**

16 12. Landes and his counsel<sup>7</sup> appeared at the agreed upon place at  
17 the designated time on June 7, 2006, but, just as the deposition was  
18 to begin, Landes refused to proceed with the deposition. Landes'  
19 refusal was due to the fact that the deposition was going to be  
20 videotaped. Despite there having been more than three weeks from the  
21 time of the notice of the deposition (which expressly stated that the  
22 deposition was to be recorded stenographically and by videotape) and  
23 the date for its commencement, during which time counsel for Frontier  
24 had contacted counsel for Infiniti to request a change of date and  
25 place of the Landes deposition, neither Landes nor counsel for  
26 Frontier had given any prior notice to Infiniti or the Board that

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27 <sup>7</sup> Counsel for Landes is also counsel for Frontier.  
28

Landes had any concerns about the videotaping of his deposition. Landes' stated concerns about being videotaped will be addressed below.

13. Counsel for the parties attempted to resolve the problem but after being unable to agree went "on the record" with statements as to their respective positions. Their statements and suggestions for resolution of the problem will be addressed below. No agreement was reached between counsel as to the taking of the deposition on that date (June 7, 2006) or thereafter.

**THE PLEADINGS OF THE PARTIES PERTAINING TO THIS MOTION OF INFINITI**

14. On June 13, 2006, Infiniti filed "RESPONDENT NISSAN NORTH AMERICA, INC., INFINITI DIVISION'S MOTION TO DISMISS FOR FAILURE TO COMPLY WITH DISCOVERY OBLIGATIONS OR, IN THE ALTERNATIVE, TO COMPEL DISCOVERY AND FOR ATTORNEY'S FEES AND COSTS".

15. On June 16, 2006, Frontier filed "PROTESTANT FRONTIER INFINITI'S OPPOSITION TO RESPONDENT NISSAN NORTH AMERICA, INC. INFINITI DIVISION'S MOTION TO COMPLY WITH DISCOVERY OBLIGATIONS OR, IN THE ALTERNATIVE, TO COMPEL DISCOVERY AND FOR ATTORNEY'S FEES AND COSTS".

16. On June 26, 2006, Infiniti filed its "REPLY IN SUPPORT OF RESPONDENT NISSAN NORTH AMERICA, INC., INFINITI DIVISION'S MOTION TO DISMISS FOR FAILURE TO COMPLY WITH DISCOVERY OBLIGATIONS OR, IN THE ALTERNATIVE, TO COMPEL DISCOVERY AND FOR ATTORNEY'S FEES AND COSTS".

17. On June 26, 2006, a scheduled telephonic hearing was held before Anthony M. Skrocki, an administrative law judge for the New Motor Vehicle Board, to rule on "RESPONDENT NISSAN NORTH AMERICA, INC., INFINITI DIVISION'S MOTION TO DISMISS FOR FAILURE TO COMPLY WITH DISCOVERY OBLIGATIONS OR, IN THE ALTERNATIVE, TO COMPEL DISCOVERY AND

1 FOR ATTORNEY'S FEES AND COSTS".

2 18. Michael M. Sieving, Esq., of the LAW OFFICES OF MICHAEL M.  
3 SIEVING, represented Protestant, and Marjorie Ehrich Lewis, Esq., of  
4 GIBSON, DUNN & CRUTCHER, LLP, represented Respondent.

5 GENERAL ISSUES PRESENTED BY THE MOTION

6 19. The issues presented by Respondent's motion are as follows:

7 a. Whether the refusal of Landes, a co-owner of Frontier and  
8 the Dealer-Principal, to submit to a deposition to be  
9 videotaped should result in the imposition of a sanction or  
10 sanctions; and,

11 b. If so, what sanction or sanctions should be imposed?<sup>8</sup>

12 APPLICABLE STATUTES AND DISCUSSION AS TO THE EXTENT OF  
13 COMPLIANCE WITH OR VIOLATION OF THE STATUTES

14 THE STATUTES AUTHORIZING THE TAKING OF THE DEPOSITION

15 20. Section 3050.1(b) allows discovery in protest proceedings  
16 and specifically references "the civil action discovery procedures" as  
17 contained in the Code of Civil Procedure ("CCP"), Title 4, Part 4,  
18 commencing with CCP Section 2016.010 (with the exception of Chapter 13  
19 of the CCP commencing with CCP section 2030.10 which deals with  
20 interrogatories).

21 21. There is no contention that the taking of the deposition of  
22 Landes was not within the discovery authorized.

23 THE PROVISIONS OF THE VEHICLE CODE APPLICABLE TO SANCTIONS FOR  
24 FAILURE TO COMPLY WITH AUTHORIZED DISCOVERY

25 22. Section 3050.2 provides in part:  
26

27 \_\_\_\_\_  
28 <sup>8</sup> As stated above, of the issues presented, it is only whether attorney's fees  
should be recovered by Infiniti that must be submitted to the Board as a body.

1 (b) Compliance with discovery procedures authorized  
2 pursuant to subdivision (b) of Section 3050.1 may be  
3 enforced by application to the executive director of the  
4 board. The executive director may, at the direction of the  
5 board, upon a showing of failure to comply with authorized  
6 discovery without substantial justification for that  
7 failure, dismiss the protest or petition or suspend the  
8 proceedings pending compliance. The executive director may,  
9 at the direction of the board, upon a failure to comply with  
10 authorized discovery without substantial justification for  
11 that failure, require payment of costs incurred by the  
12 board,<sup>9</sup> as well as attorney's fees and costs of the party  
13 who successfully makes or opposes a motion to compel  
14 enforcement of discovery. ... (Emphasis added.)

9 The two sanctions sought by Infiniti as provided here are:  
10 dismissal of the protest; and payment of attorney's fees.

11 23. Neither party is contending that the Board does not  
12 have authority to impose sanctions.

13 **THE PROVISIONS OF THE CCP REGARDING THE PROCEDURE FOR GIVING**  
14 **NOTICE OF THE TAKING OF THE DEPOSITION BY VIDEO TECHNOLOGY**

15 24. One of the provisions of the CCP applicable to the taking of  
16 the deposition of Landes states in part:

17 2025.220. (a) A party desiring to take the oral  
18 deposition of any person shall give notice in writing. The  
19 deposition notice shall state all of the following:

20 (5) Any intention by the party noticing the deposition  
21 to record the testimony by audio or video technology, in  
22 addition to recording the testimony by the stenographic  
23 method as required by Section 2025.330 and any intention to  
24 record the testimony by stenographic method through the  
25 instant visual display of the testimony. (Emphasis added.)

26 25. The notice given by Infiniti complied with the above  
27 requirement as it stated that the deposition "...will be recorded  
28 stenographically and by sound and visual means (videotape)...".  
(Parenthesis in original.) (Exhibit B to Respondent's Motion to

<sup>9</sup> The Board is not seeking recovery of any of its costs in connection with this dispute.

1 Dismiss, Notice of Deposition, page 2, lines 7-8) There is no  
2 contention that the notice of taking the Landes deposition,  
3 including the intent to record it by videotape, was not properly or  
4 timely given. The notice was given on May 15, 2006 with the date of  
5 May 31, 2006 originally designated as the date for the deposition. As  
6 stated earlier, counsel for Frontier requested (and Infiniti  
7 acquiesced) to change the date and place for the Landes deposition  
8 (from May 31 in San Francisco to June 7 in Palo Alto). However, no  
9 objection or request was made by Frontier or Landes relating to the  
10 notice by Infiniti of the intended recording of the deposition by  
11 videotape.

12 **THE PROVISIONS OF THE CCP APPLICABLE TO THE RIGHT OF A PARTY OR**  
13 **DEPONENT TO OBJECT TO THE MANNER OF RECORDING THE DEPOSITION.**

14 26. CCP section 2025.420 states in part as follows:

15 2025.420. (a) **Before, during, or after a deposition,**  
16 **any party, any deponent, or any other affected natural**  
17 **person or organization may promptly move for a protective**  
18 **order.** The motion shall be accompanied by a meet and confer  
19 declaration under Section 2016.040. (Emphasis added.)

18 (b) The court, for good cause shown, may make any order  
19 that justice requires to protect any party, deponent, or  
20 other natural person or organization from unwarranted  
21 annoyance, embarrassment, or oppression, or undue burden and  
22 expense. **This protective order may include,** but is not  
23 limited to, one or more of the following directions:

21 (8) **That the testimony be recorded in a manner**  
22 **different from that specified in the deposition notice.**  
23 (Emphasis added.)

23 (c) If the motion for a protective order is denied in  
24 whole or in part, the court may order that the deponent  
25 provide or permit the discovery against which protection was  
26 sought on those terms and conditions that are just.

25 (d) The court shall impose a monetary sanction under  
26 Chapter 7 (commencing with Section 2023.010) against any  
27 party, person, or attorney who unsuccessfully makes or  
28 opposes a motion for a protective order, unless it finds  
that the one subject to the sanction acted with substantial  
justification or that other circumstances make the  
imposition of the sanction unjust.

1 27. Despite the fact that there was more than a three-week  
2 period from the date of notice of the deposition (May 15) to the date  
3 of the commencement of the deposition (June 7), (during which there  
4 was the request by counsel for Frontier to change the date and place  
5 of the deposition of Landes), there was neither an informal request  
6 made to Infiniti nor formal motion made in behalf of Landes or  
7 Frontier in any forum, as permitted by CCP section 2025.420, "before"  
8 the deposition to have the "testimony...recorded in a manner different  
9 from that specified in the deposition notice". (CCP section  
10 2025.420(b)(8))

11 28. Subject to the statutory requirement that the motion for a  
12 protective order be "timely", the CCP states that it may be made not  
13 only "before" the deposition, but also "during or after" the  
14 deposition. Allowing the broadest time spectrum possible ("before,  
15 during or after") was likely intended to recognize that the basis for  
16 the objection may be based upon facts or something that occurs after  
17 the deposition has commenced<sup>10</sup> and to allow the parties to proceed with  
18 the deposition as a matter of expedience and efficiency and yet still  
19 provide an opportunity to a party or a deponent to seek protection  
20 under whatever portions of CCP section 2025.420 may be applicable.

21 29. Allowing for a protective order after the deposition has  
22 already been taken is also likely due to the interrelationship between  
23 CCP section 2025.420 and CCP section 2025.570, which provides in part:

24 2025.570. (a) Notwithstanding subdivision (b) of  
25 Section 2025.320, **unless the court issues an order to the**

26  
27 <sup>10</sup> The claimed justification of Landes here however is based upon an experience  
28 of Landes that had allegedly occurred at some unstated time prior to the taking  
of the deposition. Therefore, any motion for a protective order, to be "timely"  
as required by the CCP, would likely have been required to have been made prior  
to the date set for the deposition.

1 contrary, a copy of the transcript of the deposition  
2 testimony made by, or at the direction of, any party, or an  
3 audio or video recording of the deposition testimony, if  
4 still in the possession of the deposition officer, shall be  
5 made available by the deposition officer to any person  
6 requesting a copy, on payment of a reasonable charge set by  
7 the deposition officer.

8 (b) If a copy is requested from the deposition officer,  
9 the deposition officer shall mail a notice to all parties  
10 attending the deposition and to the deponent at the  
11 deponent's last known address advising them of all of the  
12 following:

13 (1) The copy is being sought.

14 (2) The name of the person requesting the copy.

15 (3) The right to seek a protective order under Section  
16 2025.420.

17 (c) If a protective order is not served on the  
18 deposition officer within 30 days of the mailing of the  
19 notice, the deposition officer shall make the copy available  
20 to the person requesting the copy.

21 (d) This section shall apply only to recorded testimony  
22 taken at depositions occurring on or after January 1, 1998.  
23 (Emphasis added.)

24 30. However, despite a deponent or party having the broadest  
25 time spectrum conceivable ("before, during or after"), and with  
26 more than three weeks from the time of the notice and the date for  
27 the deposition, as finally set upon request by counsel for  
28 Frontier, neither Landes, the deponent, nor Frontier, the party,  
chose to "promptly move for a protective order" as provided in CCP  
section 2025.420(a).

**THE PROVISIONS OF THE CCP APPLICABLE TO THE FAILURE TO  
SUBMIT TO "AN AUTHORIZED METHOD OF DISCOVERY"**

31. CCP section 2023.010 provides in part:

2023.010. Misuses of the discovery process include, but  
are not limited to, the following:

(d) Failing to respond or to submit to an authorized  
method of discovery. (Emphasis added.)

(e) Making, without substantial justification, an  
unmeritorious objection to discovery.

(h) Making or opposing, unsuccessfully and without  
substantial justification, a motion to compel or to limit  
discovery.

1 (i) Failing to confer in person, by telephone, or by  
2 letter with an opposing party or attorney in a reasonable and  
3 good faith attempt to resolve informally any dispute  
4 concerning discovery, if the section governing a particular  
5 discovery motion requires the filing of a declaration  
6 stating facts showing that an attempt at informal resolution  
7 has been made.

8 32. There is no contention that the taking of the deposition of  
9 Landes by way of a videotape was not "an authorized method of  
10 discovery" or that Landes refused to submit to the videotaping of his  
11 deposition.<sup>11</sup> Frontier asserts only that "...Landes Had Reasonable<sup>12</sup>  
12 Justification To Not Submit for Videotaped Deposition..." (Protestant's  
13 Opposition, page 2, lines 23-24)

14 **THE PROVISIONS OF THE VEHICLE CODE APPLICABLE TO A "...FAILURE  
15 TO COMPLY WITH AUTHORIZED DISCOVERY WITHOUT SUBSTANTIAL  
16 JUSTIFICATION FOR THAT FAILURE..."**

17 33. As stated earlier, Section 3050.2 in part provides:  
18 3050.2.

19 (b) Compliance with discovery procedures authorized  
20 pursuant to subdivision (b) of Section 3050.1 may be enforced  
21 by application to the executive director of the board. **The  
22 executive director may, at the direction of the board, upon a  
23 showing of failure to comply with authorized discovery  
24 without substantial justification for that failure, dismiss  
25 the protest or petition or suspend the proceedings pending  
26 compliance. The executive director may, at the direction of  
27 the board, upon a failure to comply with authorized discovery  
28 without substantial justification for that failure, require  
payment of costs incurred by the board, as well as attorney's  
fees and costs of the party who successfully makes or opposes  
a motion to compel enforcement of discovery. Nothing in this  
section precludes the executive director from making  
application to the superior court to enforce obedience to  
subpoenas or compliance with other discovery procedures**

---

25 <sup>11</sup> Landes and his counsel did agree to allow the deposition to be videotaped but  
26 only on the condition that the videotape would not become part of the public  
27 record if used at the hearing on the protest. For reasons stated below,  
28 Infiniti declined to assent to this condition.

<sup>12</sup> Frontier here used the language "reasonable justification", however the  
statutory language is whether there was "substantial justification" for the  
refusal of Landes to submit to the videotaping of his deposition and this will  
be the standard applied. (Emphasis added.)

1 authorized pursuant to subdivision (b) of Section 3050.1.  
2 (Emphasis added.)

3 34. It is clear from Section 3050.1(b)<sup>13</sup> that the provisions of  
4 the CCP and the Vehicle Code are intended to operate jointly in  
5 allowing and policing the discovery by the parties in a protest  
6 proceeding before the Board.

7 35. One of the CCP sections applicable provides:

8 CCP section 2025.450.

9 (a) If, after service of a deposition notice, a party to  
10 the action or an officer, director, managing agent, or  
11 employee of a party, ...fails...to proceed with it...the party  
giving the notice may move for an order compelling the  
deponent's attendance and testimony,...

12 (b) ...

13 (c) (1) If a motion under subdivision (a) is granted,  
14 the court shall impose a monetary sanction under Chapter 7  
15 (commencing with Section 2023.010) in favor of the party who  
16 noticed the deposition and against the deponent or the party  
with whom the deponent is affiliated, unless the court finds  
that the one subject to the sanction acted with substantial  
justification or that other circumstances make the imposition  
of the sanction unjust... (Emphasis added.)

17 36. Under these facts, Infiniti has proceeded in accordance with  
18 the Vehicle Code and the CCP in seeking to take the deposition of  
19 Landes and have it recorded by videotape. Notice of the intent to do  
20 so was properly and timely given. Likewise, Frontier and Landes, had  
21 they so chosen, were permitted to seek a protective order, pursuant to  
22 the provisions of CCP 2025.420(a) and (b)(8), to have the deposition

23 ///

24 ///

25 \_\_\_\_\_  
26 <sup>13</sup> 3050.1. "... (b) For purposes of discovery, the board or its executive director  
27 may, if deemed appropriate and proper under the circumstances, authorize the  
parties to engage in the civil action discovery procedures in Title 4  
28 (commencing with Section 2016.010) of Part 4 of the Code of Civil Procedure,  
excepting the provisions of Chapter 13 (commencing with Section 2030.010) of  
that title."

1 recorded in a different manner than that stated in the notice.<sup>14</sup>

2 Neither Frontier nor Landes chose to do so. Instead, at the time the  
3 deposition was to commence, Landes announced his refusal to allow the  
4 deposition to be videotaped unless Infiniti agreed to limitations upon  
5 the possible use of the videotape.

6 37. Instead of Landes or Frontier seeking a protective order  
7 "before, during or after" the taking of the deposition as permitted by  
8 the CCP, it is now Infiniti that is attempting to enforce its claimed  
9 rights to discovery by filing this motion pursuant to the Vehicle Code  
10 and the CCP.

11 38. There is no dispute as to the following:

- 12 a. Proper and timely notice was given by Infiniti of the intent  
13 to record the deposition by videotape;
- 14 b. There was no prior notice to Infiniti that Landes did not  
15 want to have his deposition videotaped;
- 16 c. Infiniti learned of the objection and refusal of Landes at  
17 the time the deposition was to begin;
- 18 d. No motion for a protective order was filed in behalf of

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19  
20 <sup>14</sup> Infiniti also states that Landes and Frontier could have and should have  
21 availed themselves of the provisions of CCP section 2025.410 which in part  
22 provides that "Any party served with a deposition notice that does not comply  
23 with Article 2...waives any error or irregularity unless that party promptly  
24 serves a written objection specifying that error or irregularity at least three  
25 calendar days prior to the date for which the deposition is scheduled...". It is  
26 undisputed that no such written objection was served upon Infiniti. However,  
27 as stated earlier, Landes and Frontier are not contending there was any error  
28 or irregularity in the notice of deposition and there are no obvious facts  
indicating Infiniti did not comply with the requirement of the CCP in giving  
the notice of deposition. Further, Infiniti does not specifically indicate  
what "error or irregularity" there may have been in its notice that would give  
rise to grounds for objection by Landes under CCP section 2025.410. Stating  
that the deposition was to be recorded both stenographically and by videotape  
would not constitute an "error or irregularity". Failure to object under CCP  
section 2025.410 waives only "an error or irregularity" in the deposition  
notice. There is no showing that this statutory provision would apply as there  
is no apparent "error or irregularity" in the notice of deposition."

Landes or Frontier "before, during or after" the scheduled deposition of Landes.

39. It is determined that Landes "fail(ed) to proceed" with the deposition (CCP section 2025.450(a)) which also constituted a "failure to comply with authorized discovery" (Vehicle Code section 3050.2(b)).

40. However, sanctions may not be imposed under the CCP if it is found "...that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust." (CCP § 2025.450(c)(1))

41. Similarly, the Vehicle Code allows the imposition of sanctions "...upon a failure to comply with authorized discovery without substantial justification for that failure." (Veh. Code § 3050.2)

42. The issue then becomes whether there was substantial justification for the refusal of Landes to proceed with the videotaping of his deposition. This requires a review of the reasons given by Landes and by his and Frontier's counsel, what evidence was presented in support thereof, and the alternatives that were available to them.

WHETHER THERE WAS SUBSTANTIAL JUSTIFICATION FOR THE REFUSAL OF LANDES TO PROCEED WITH THE VIDEOTAPING OF HIS DEPOSITON

43. The following is from the "STATEMENT ON THE RECORD" created at the time Landes refused to proceed with the deposition.

MS. LEWIS (Counsel for Infiniti): This is a record with respect to the witness's refusal to be videographed, videotaped for his deposition, despite the fact that this deposition was noticed for a court reporter and a

1 videographer. I have told the witness - I have represented to  
2 him that the videotape would be used only for purposes of  
3 litigation, so through the trial and any appeals, and that  
4 thereafter I would return the videotapes to his lawyer.

5 He has stated that this is unacceptable to him, and he is  
6 refusing to testify under those conditions. So I have also  
7 told him and his lawyer that I will be moving to dismiss the  
8 entire protest based on his failure of -- refusal to testify  
9 as California law allows me to depose him, and that,  
10 alternatively, we will ask for an order that he is barred from  
11 testifying at the hearing, and I will also seek sanctions for  
12 the cost of this entire setup, based on his refusal to  
13 testify.

14 MR. SIEVING (Counsel for Frontier and Landes): And, for  
15 the record, Ms. Lewis didn't mention it, this is the  
16 deposition noticed for Jim Landes in the Frontier Infiniti  
17 matter, prior to going on the record, Mr. Landes articulated  
18 concerns that he had about being videotaped. Some of those  
19 concerns dealt with - a number of those concerns dealt with  
20 previous business dealings in which Mr. Landes was involved,  
21 and some of which were issues that he raised concerning his  
22 personal safety and physical threats that had been made to him  
23 before.

24 So it is my client's decision not to proceed with the  
25 deposition if it is in fact going to be videotaped, and we  
26 will respond accordingly. (Statement on the Record, June 7,  
27 2006, page 4, line 4 through page 5, line 10)

28 44. This was followed by a discussion involving the deponent

1 (Landes), counsel for Infiniti (Lewis) and counsel for Frontier and  
2 Landes (Sieving), as recorded:

3 MS. LEWIS: And can I ask him this question on the  
4 record, and that is, I think what he is (sic) articulated as  
5 his primary concern -- well, among his many concerns at this  
6 point, is that if the videotape is used at the hearing, that  
7 then becomes a matter of public record. And is that, in  
8 fact, a concern that you have?

9 MR. LANDES: That's one of my concerns, that's correct.

10 MS. LEWIS: Do you have -- so are you saying that you  
11 will not allow yourself to be videotaped because you will not  
12 allow the videotaped (sic) to be used at the hearing?

13 MR. LANDES: I don't have a problem using it at the  
14 hearing. I would be -- you say it's a public record.  
15 Anybody can view the videotape, is that what you're saying?

16 MS. LEWIS: If --

17 MR. LANDES: I have no objection to letting them use it  
18 at the trial as long as it goes no further than that. Then  
19 and I have no objection. I just don't want it getting out to  
20 media, to Infiniti employees.

21 MS. LEWIS: Well, Mike, you would know this better than  
22 I would. If a video is used to impeach at the hearing, does  
23 the board then get the videotape and maintain it as part of  
24 its record?

25 MR. SIEVING: Only if the videotape itself is offered  
26 into evidence and either admitted over objection or admitted  
27 without objection.

28 MS. LEWIS: So if I offer the videotape at the hearing

1 and it's admitted, then the videotape is part of the record?

2 MR. SIEVING: That is absolutely correct, and anyone can  
3 request a copy through the guidelines to access to public  
4 records and obtain a copy of the videotape.

5 MS. LEWIS: That's the problem I have. That means that  
6 if I use the video at trial, and it's to impeach this  
7 witness, and it's admitted into evidence, for purposes of  
8 impeachment --

9 MR. SIEVING: You could show the videotape to the  
10 administrative law judge at the hearing in this case but not  
11 offer the actual tape as an exhibit into evidence, and that  
12 way the only person who would see it would be the assigned  
13 administrative law judge and the witnesses and counsel  
14 present at the hearing. It would not become part of the  
15 evidence, the administrative record, that someone could  
16 request a copy of.

17 MS. LEWIS: Well, then I would suggest that we do this  
18 instead. I would suggest that we proceed by way of  
19 videotape, and if it turns out that the board -- I'm  
20 concerned about the trial judge saying since you have now  
21 used this to impeach, it's part of the record and has to be  
22 admitted into evidence.

23 MR. SIEVEING: That is a distinct possibility that that  
24 would occur.

25 MS. LEWIS: Right.

26 MR. SIEVING: Even if know (sic) no one -- I certainly  
27 would not move it. And whether you move it or not, there is  
28 a distinct possibility that the judge would want it to be

1 part of the record because you played it.

2 MS. LEWIS: Right.

3 MR. SIEVING: So, in other words --

4 MS. LEWIS: So for that reason, if I agree that it's  
5 not going to be admitted -- I actually can't agree it's not  
6 going to be admitted into evidence because the trial judge  
7 may say since you have used it to impeach the witness, it has  
8 to be moved into evidence.

9 MR. SIEVING: I understand that. And I wasn't offering  
10 that by way of a stipulation. I was explaining to you the  
11 answer to the question you asked as to whether it would be  
12 part of the record.

13 MS. LEWIS: Which means I can't agree to what he wants.

14 MR. SIEVING: Correct.

15 MS. LEWIS: So that means we can't go forward and I will  
16 make our motion immediately. It will get resolved one way or  
17 the other, and then depending on how it's resolved, we may be  
18 back here doing this again, because I will also seek an order  
19 requiring the witness to submit to a videotape deposition and  
20 I will ask for sanctions for having had to go through this  
21 little exercise --

22 MR. SIEVING: Well --

23 MS. LEWIS: --in order to get that order.

24 MR. SIEVING: I understand that. But I don't know what  
25 the incremental cost of staying here for another half an hour  
26 was because we already had a videotape deposition.

27 MS. LEWIS: I understand that, but I think it would be  
28 fair for me to argue that half of the cost of the whole

1 operation, including my expenses to get here are attributable  
2 to this witness.

3 MR. SIEVING: I would say much less than half. I would  
4 say probably about 4 percent.

5 MS. LEWIS: It wouldn't be a question of time. I had to  
6 do this because I was doing both.

7 So anyway, that's all I need for the record. I don't  
8 know if you want to say anything else for the record.

9 MR. SIEVING: No. We're fine.

10 MS. LEWIS: Okay. Thank you.

11 END OF TRANSCRIPT <sup>15</sup>

12 (Statement of the Record, June 7, 2006, page 5, line 11 through page  
13 9, line 12)

14 45. Other reasons (as contained in the documents submitted and  
15 arguments of counsel at the hearing) for Landes refusing to submit to  
16 the videotaped deposition include the following:

17 ///

18  
19 <sup>15</sup> The thrust of the concern in this exchange is focused upon whether the  
20 videotape could become part of the public record if the deposition testimony,  
21 as recorded by "video technology", was used at the hearing on the protest. It  
22 is unclear as to what effect CCP section 2025.510(g) would have on this  
23 possibility. This subsection states:

24 2025.510 ...

25 (g) If the testimony at the deposition is recorded both  
26 stenographically, and by audio or video technology, the stenographic  
27 transcript is the official record of that testimony for the purpose  
28 of the trial and any subsequent hearing or appeal.

As the deposition of Landes was to be recorded both stenographically and by  
video technology, it is possible that, as a result of this subsection, only the  
stenographic transcript would be the "official record of that testimony for the  
purpose of the trial and any subsequent hearing or appeal" even if the  
videotape had been used in the trial for whatever purpose. There was no  
discussion of this provision in the "Statement On The Record" quoted above, nor  
in any of the pleadings of the parties filed in connection with this motion.

1           Summary from Frontier's Opposition to the Motion

- 2           a.   Landes was concerned about his personal safety as physical  
3           threats had been made to him during some previous business  
4           dealings concerning union negotiations. (Page 2, lines 3-5,  
5           page 3, lines 14-15)
- 6           b.   Landes was afraid that the videotape may be leaked to media  
7           persons or Infiniti employees that would endanger him. (Page  
8           2, lines 5-6)
- 9           c.   Landes owns only one-third of Frontier and he could provide  
10          no new information that was not already obtained by Infiniti  
11          from the depositions of the other two owners who own two-  
12          thirds of Frontier. (Page 2, lines 7-13, and 26-28)
- 13          d.   "...due to genuine concerns regarding his personal safety, Mr.  
14          Landes had no choice but to object to the videotaped  
15          deposition." (Page 3, lines 17-18)

16 No more specific facts are evidenced anywhere in the record.

17         46. Starting with subparagraph d. above, - that "...Mr. Landes had  
18 no choice but to object to the videotaped deposition." - the statement  
19 is a conclusion as to the claimed merits of the reasons why Landes  
20 refused to proceed with the videotaping. The initial problem however  
21 is not with the merits of the objection of Landes. The initial  
22 problem is when and how Landes could have and should have raised the  
23 objection. Contrary to the contention in subparagraph d. above,  
24 Landes did have choices. He had a choice to proceed with the  
25 videotaping of the deposition or not. If Landes' choice was to not  
26 proceed with the deposition, then he had a choice to make a timely  
27 objection prior to the commencement of the deposition. Landes also  
28 had the choice of submitting to the videotaped deposition and then

1 moving for a protective order "after" the deposition as is also  
2 permitted by the CCP. If Landes had determined that he had "no  
3 choice" but to object to the videotaping, he could have and should  
4 have objected at a much earlier time and in an appropriate manner  
5 during the three week interval from the date of the notice and the  
6 date of the deposition and certainly not at the time the deposition  
7 was to begin. If any person had "no choice", it was Infiniti. As  
8 stated in Infiniti's Reply, "By flagrantly disregarding the options  
9 available to it under the Code, Frontier left Infiniti with no choice  
10 but to incur the time and expense of pursuing this Motion."

11 (Infiniti's Reply, page 3, lines 15-17)

12 47. As to the reason in subparagraph c. above, - that no new  
13 information could be obtained from Landes - this on its face appears  
14 to be completely outside of any plausible reason to object to the  
15 manner of recording (videotaping) the deposition. If anything, it is  
16 an objection to the deposition itself, not the manner of its  
17 recordation, and, as such, it too could have been raised by filing a  
18 motion for a protective order at a much earlier time. At this time,  
19 the claim that Landes could not provide any new information appears to  
20 be an afterthought asserted as a belated excuse for not allowing the  
21 deposition to proceed as noticed.

22 48. As to the merits of the other two reasons above (see  
23 subparagraphs a. and b.), - Landes' fears for his personal safety -  
24 they could have been evaluated at the proper time in a proper motion  
25 for a protective order that could have been made by Landes or Frontier  
26 long before the date and time of the deposition. Had such a motion  
27 for a protective order been timely made, Landes would have likely been  
28 required to provide significantly more facts, either by way of

1 declaration or sworn testimony, to enable the official presiding over  
2 the hearing on the motion for a protective order to pass on the  
3 credibility, validity, and seriousness of the asserted threats  
4 previously made against Landes and the likelihood that this protest  
5 dispute would engender the same or similar hostile reaction. This  
6 would necessitate an evaluation of the facts to determine: whether the  
7 persons who made the prior threats, which allegedly arose out of union  
8 negotiations at some unstated time in the past, are likely to have any  
9 connection with this litigation; what their connection may be; why  
10 their interests in this litigation would engender the same type of  
11 hostile reaction as occurred in the past; why Landes, who claims to  
12 have only a minority ownership interest and not involved in the day-  
13 to-day operation of Frontier, would be the target of such threats  
14 arising from this proceeding; and if the fear is of threats from  
15 persons not involved in the prior union negotiations, what other facts  
16 exist which would support the claimed need for precluding the  
17 videographic recording of the deposition in this dispute.

18 49. Landes, in not seeking a protective order, did not take the  
19 affirmative in establishing the facts that would be needed to evaluate  
20 the merits of such a motion. Now that Infiniti has taken the  
21 initiative in this Motion and established that Landes has refused to  
22 comply with the properly noticed deposition, it would become incumbent  
23 upon Landes to establish these same facts as "substantial  
24 justification"<sup>16</sup> for refusing to proceed with the deposition as  
25 noticed. However, Landes, in opposing this motion, did not submit any  
26

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27 <sup>16</sup> As stated above, the CCP would excuse the failure of Landes to comply with  
28 authorized discovery if it is found that Landes "acted with substantial  
justification or that other circumstances make the imposition of the sanction

1 declaration or sworn testimony that would establish the facts needed  
2 to show substantial justification for refusing to proceed. All that  
3 has been submitted to show justification for the refusal of Landes to  
4 proceed are the statements of counsel for Frontier and the unsworn  
5 statement of Landes, all "on the record", along with the pleadings of  
6 counsel filed in connection with this motion including a declaration  
7 of counsel for Landes and Frontier.<sup>17</sup>

8 SUMMARY FROM INFINITI'S MOTION AND REPLY AS TO LANDES'  
9 REASONS FOR REFUSING TO PROCEED WITH THE VIDEOTAPING OF  
10 HIS DEPOSITION AND INFINITI'S RESPONSES TO HIS CONCERNS

11 50. The motion of Infiniti asserts that Landes gave the  
12 following reasons for refusing to proceed with the videotaping of the  
13 deposition and states the responses of Infiniti to his concerns:

14 unjust." The provisions of the Vehicle Code also recognize that sanctions  
15 should not be imposed if there was "substantial justification" for not  
16 complying with the authorized discovery.

17 <sup>17</sup> During the hearing on this motion on June 26, 2006, counsel for Landes made  
18 an untimely offer to submit substantiation for the claimed fears of Landes.  
19 Landes had two opportunities to establish the facts giving rise to his fears  
20 about his personal safety. He could have timely moved for a protective order  
21 and "The court, for good cause shown, (could) make any order that justice  
22 requires to protect..." him. (Emphasis added.) (CCP section 2025.420(b)) As the  
23 statute states, Landes would have had to establish "good cause" for the  
24 protective order. Now, however, Landes is confronted with a motion for  
25 sanctions for his refusal to comply with the properly noticed and authorized  
26 discovery. To be excused or relieved from the consequences of his refusal to  
27 comply, Landes would have to show there was "substantial justification" for his  
28 refusal. Whether there would have been "good cause" for a protective order, or  
whether there was "substantial justification" for his refusal to submit to a  
videotaped deposition in order to avoid the imposition of sanctions, the same  
factual showing would have had to have been made. An offer (to establish the  
facts evidencing substantial justification for refusing to allow the videotape)  
made during the course of the hearing on this motion for sanctions is as tardy  
as was Landes' objection to the videotaping which was not made until the time  
the deposition was to commence on June 7, 2006. There is nothing to indicate  
why the evidentiary facts (to support the claim that Landes was justified in  
refusing to submit to authorized discovery) were not presented prior to the  
actual hearing on this motion on June 26, 2006. Although, during oral argument  
on this motion, counsel for Infiniti, in response to the belated offer by  
counsel for Landes, indicated that Infiniti was most concerned with the failure  
of Landes to take earlier steps to object to the videotaping and that Infiniti  
was not concerned with the merits of the claimed fears of Landes, the statutory  
language requiring a showing by Landes of substantial justification for his  
refusal should not be ignored.

1 a. Landes was concerned about Infiniti using the videotape for  
2 an improper purpose. In response to this, counsel for  
3 Infiniti assured Landes that the videotape would be used  
4 only in connection with the litigation and that it would be  
5 returned to his counsel upon conclusion of the litigation.

6 b. Unsatisfied with Infiniti's response, Landes required  
7 written assurances that the videotape would never be made  
8 public. Infiniti determined that if Infiniti utilized the  
9 deposition at the hearing it would be up to the Board or  
10 Hearing Officer to determine if it would become part of the  
11 record and also to determine how the videotape would be  
12 treated following the conclusion of the litigation.

13 (Declaration of Lewis, page 10, lines 20-28)

14 CONCLUSION AS TO WHETHER LANDES HAD SUBSTANTIAL JUSTIFICATION  
15 FOR REFUSING TO PROCEED WITH THE VIDEOTAPED DEPOSITION

16 51. It is determined that Landes has not provided anything in  
17 the way of factual evidence that would support his claimed fears that  
18 the possible use of his videotaped deposition would jeopardize his  
19 personal safety. Landes has not established any other facts that  
20 would constitute substantial justification for refusing to proceed  
21 with the videotaped deposition.

22 WHETHER, UNDER THE CIRCUMSTANCES, LANDES' REASONS, EVEN IF  
23 THEY WOULD HAVE CONSTITUTED SUBSTANTIAL JUSTIFICATION FOR  
24 REFUSING TO PROCEED WITH THE VIDEOTAPED DEPOSITION, CAN NOW  
25 BE ASSERTED WHEN THERE WAS NO PRIOR NOTICE AND NO ACTION  
26 TAKEN BY LANDES OR FRONTIER TO LIMIT THE RIGHT OF  
27 INFINITI TO VIDEOTAPE THE DEPOSITION

28 52. As is evident in the above record, there is no discussion as  
to why there was no earlier objection communicated to Infiniti or the  
Board or any attempt to obtain a protective order during the three

1 plus weeks time period from when the deposition was noticed on  
2 May 15, 2006 until the attorneys and Landes appeared on June 7, 2006.

3 53. The provisions of the CCP give the deponent or a party the  
4 right to seek a protective order and leave it up to those persons to  
5 affirmatively seek to limit, in this case, the right of Infiniti to  
6 take the deposition by videotape as noticed. Neither Landes nor  
7 Frontier sought to do so.

8 54. It is quite possible that if Landes or his counsel had  
9 notified Infiniti or the Board in a timely manner, the concerns of  
10 Landes could have been resolved prior to the deposition date.  
11 Alternatively, if Landes had filed a motion for a protective order  
12 with sufficient factual evidence in support, it could have been found  
13 that Landes had good cause to be fearful and a protective order  
14 changing the manner of recording the deposition (pursuant to CCP  
15 section 2025.420(b)(8)) could have been issued.

16 55. Informal early contact with Infiniti would certainly have  
17 avoided the last-minute surprise that occurred here, and Infiniti,  
18 rather than being confronted with what it may have thought to be an  
19 "ambush", may have been more amenable to making a concession. And, if  
20 Infiniti did not agree prior to the date of the deposition, Landes,  
21 after the required "meet and confer", could then have filed a properly  
22 noticed motion for protective order with the sole issue being whether  
23 there was good cause for the protective order under CCP section  
24 2025.420 to prevent the videotaping of the deposition. Or, counsel  
25 for Landes and Frontier could have sought informal assistance of the  
26 Board in addressing the concerns of Landes.

27 56. At the hearing on this motion of Infiniti, when counsel for  
28 Frontier and Landes was asked why there was no earlier attempt on his

1 part to communicate Landes' objections to Infiniti or the Board,  
2 counsel stated that he did not know about Landes' concerns until the  
3 day of the deposition. (RT page 14, lines 3-12) The question was then  
4 posed as to why Landes did not communicate his concerns to his counsel  
5 earlier. This was not adequately explained. The reasons given  
6 included references to Landes being an "investor only", who had  
7 nothing to do "with the operational control of this dealership" (even  
8 though Landes is the dealer-principal), the "deposition notices (were  
9 sent) to Mr. Ricks who is in fact the operator of the store", counsel  
10 for Landes "does not know that (Landes) ever saw, he personally ever  
11 saw the deposition notice because it wasn't sent to him." (RT page 16,  
12 lines 5-9 and lines 15-17; page 17, lines 4-8) None of these reasons  
13 are deemed sufficient to conclude that notice was not properly given  
14 to Landes or to explain, let alone excuse, the failure of Landes to be  
15 informed by the Notice, or to communicate with his attorney. Infiniti  
16 was and is entitled to assume that their properly served notice was  
17 effective to give notice to Frontier, Landes, and their attorney of  
18 the intended videotaping of Landes' deposition.

19 57. Whether there may, or may not, have been "substantial  
20 justification" for Landes' objections to having the deposition  
21 videotaped, there is no justification at all, let alone substantial,  
22 for the failure of Landes to make his concerns known in a timely<sup>18</sup>  
23 manner. Then, if the "meet and confer" (required in connection with  
24 a motion for a protective order) did not resolve the problem, the  
25

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26 <sup>18</sup> "Timely" under these circumstances should be interpreted to be a reasonable  
27 time after the notice of deposition was given. This is because the reasons  
28 stated for Landes' refusal to allow videotaping arose out of previous business  
dealings at some unspecified time in the past and not on the day of the  
deposition.

1 motion for a protective order could have been filed. Although Landes  
2 may not have been statutorily required to make a motion for a  
3 protective order, the failure to do so could, as here, give rise to a  
4 motion for sanctions and the consequences that could flow therefrom.  
5 It was the failure of Landes to act reasonably and in accordance with  
6 the procedures available to him and Frontier that caused the  
7 disruption of the discovery process to which Infiniti was entitled and  
8 which also created the necessity for this motion by Infiniti.

9 58. As well stated by Infiniti, "Had concerns been raised prior  
10 to the deposition, they could possibly have been addressed either  
11 between the parties or with the Board's intervention and a procedure  
12 acceptable to all parties might well have been achieved. Because  
13 Frontier failed even to raise the objection prior to the deposition,  
14 Frontier foreclosed the possibility of agreement prior to the  
15 deposition. Moreover, because Mr. Landes waited until June 7, 2006 to  
16 announce that he wanted assurances that only the Board or the Hearing  
17 Officer could provide, Mr. Landes made it impossible for Infiniti to  
18 reach any agreement at the deposition without Infiniti risking giving  
19 up its right to use the videotaped deposition at the hearing."

20 (Infiniti Motion, page 7, lines 2-9)

21 59. Infiniti cannot be faulted as to any of its procedures. As  
22 stated, even the bringing of this motion by Infiniti was because  
23 Landes and Frontier did nothing to notify Infiniti in a timely manner  
24 or seek a protective order "before, during or after", the deposition.  
25 In the absence of a protective order which could certainly have been

26 ///

27 ///

28 ///

1 timely sought<sup>19</sup>, Infiniti, with no prior notice of any concern by  
2 Landes, had the right to assume the videotaping would proceed as  
3 permitted by the discovery statutes. To the surprise of Infiniti's  
4 counsel, Landes refused to proceed. There had been no attempt to  
5 obtain an order that Landes' testimony be recorded only by  
6 stenographic means. And, without any prior notice to Infiniti, the  
7 attorneys could not meet and confer prior to the date scheduled for  
8 his deposition.

9 60. Alternatively, as there was no motion for a protective order  
10 filed prior to the deposition and no prior notice to Infiniti, Landes  
11 had another choice. He could have proceeded with the deposition being  
12 videotaped and expressly reserved the right to seek a protective order  
13 in a timely manner after the deposition had been concluded. CCP  
14 section 2025.420(a) allows such a motion to be made "before, during or  
15 after" the deposition. From May 15, 2006, when the notice of  
16 deposition was given to the date of the hearing on this motion (June  
17 24, 2006) Landes and Frontier had not seen fit to take any affirmative  
18 action or provide any specific evidentiary facts to be relieved either  
19 from the rightful notice of taking the deposition of Landes by  
20 videotape or to produce any evidentiary facts to show substantial  
21 justification to avoid the imposition of the sanctions provided by the  
22 statutes.

23 61. As stated above, Landes had the right and the opportunity to  
24 seek relief from the noticed videotaping of the deposition but failed

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25  
26 <sup>19</sup> Whether Landes would have succeeded in obtaining a protective order, if  
27 timely sought, is unknown. However, if nothing more was presented in support of  
28 a Motion for a Protective Order than was submitted here in opposition to the  
motion of Infiniti, the chances of the Protective Order being issued would be  
slim. However, it is possible that Infiniti, with timely notice of the concerns  
of Landes, would have been willing to make some concessions.

1 to do so. Landes has not presented any facts to explain or excuse why  
2 there was no attempt to utilize the statutorily provided means for  
3 limiting the deposition to stenographic mode only, and Landes has not  
4 presented any facts to explain or excuse why there was no attempt to  
5 notify Infiniti of his concerns and seek an informal solution.  
6 Although likely irrelevant as the notice to Landes was proper, there  
7 was no statement by Landes as to when he first saw the notice of the  
8 deposition and acquired actual knowledge of the intent that it be  
9 videotaped.

10 WHETHER INFINITI, IN MAKING THIS MOTION, HAS COMPLIED  
11 WITH THE REQUIREMENTS OF CCP SECTION 2025.450

12 62. CCP section 2025.450(b)(2) requires that "[t]he motion  
13 [Infiniti's motion for sanctions] shall be accompanied by a meet and  
14 confer declaration under Section 2016.040... ."20

15 63. CCP section 2016.040 reads as follows:

16 2016.040. A meet and confer declaration in support of a  
17 motion shall state facts showing a reasonable and good faith  
18 attempt at an informal resolution of each issue presented by  
19 the motion.

20 64. Infiniti did provide, as part of its Motion, a Declaration  
21 from its counsel (Ms. Lewis) setting forth the facts as to what  
22 occurred and the attempts between both attorneys and Landes to resolve  
23 the problem. In addition, a copy of the STATEMENT ON THE RECORD was  
24 provided with the motion.

25 65. It is found that the above satisfy the requirements for a  
26 "meet and confer declaration" stating "facts showing a reasonable and

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27 20 Counsel for Frontier and Landes have not in the pleadings asserted any  
28 procedural defect in the motion filed by Infiniti. However, this requirement  
is being addressed because of the use of the word "shall" in the statute.

1 good faith attempt at an informal resolution".

2 66. It has been found that:

- 3     ▪ Landes had ample opportunity to give notice to Infiniti and to
- 4     meet and confer in order to resolve his concerns prior to the
- 5     deposition date;
- 6     ▪ Landes provided no facts that would explain why there was no
- 7     earlier notice to Infiniti as to Landes' objections to being
- 8     videotaped;
- 9     ▪ Landes had ample opportunity to seek a protective order;
- 10    ▪ Landes provided no facts that would explain why neither he nor
- 11    Frontier sought a protective order prior to the deposition date;
- 12    ▪ Landes failed to comply with the noticed deposition;
- 13    ▪ Infiniti has complied with the requirements for a motion to
- 14    compel the deposition of Landes and Infiniti has complied as well
- 15    with the requirements for a motion for sanctions; and that,
- 16    ▪ Landes has not established substantial justification to avoid the
- 17    imposition of sanctions for failing to comply with the authorized
- 18    discovery.

19 67. It now becomes necessary to determine:

- 20    a. What sanctions would be appropriate due to the failure of
- 21    Landes to proceed with the noticed deposition;
- 22    b. What sanctions would be appropriate in regard to the filing
- 23    of this motion by Infiniti; and
- 24    c. What Landes should be ordered to do as to the taking of his
- 25    deposition?

26           WHAT SANCTIONS ARE AVAILABLE UNDER THE VEHICLE CODE FOR  
27           THE FAILURE OF LANDES TO COMPLY WITH AUTHORIZED DISCOVERY

28 68. The sanctions permitted by Section 3050.2 (b) include:

- 1 a. Dismissal of the protest; and
- 2 b. The payment of attorney's fees and costs of the party who
- 3 successfully makes or opposes a motion to compel enforcement
- 4 of discovery.

5 **WHETHER THE PROTEST SHOULD BE DISMISSED (SECTION 3050.2(b))**

6 69. Infiniti, in its motion (partly captioned "MOTION TO DISMISS  
7 FOR FAILURE TO COMPLY WITH DISCOVERY OBLIGATIONS") seeks that the  
8 protest be dismissed.

9 70. Dismissal of the protest under these circumstances is not  
10 appropriate. Landes did not totally refuse to be deposed. He refused  
11 to allow his deposition to be videotaped and failed to proceed timely  
12 or properly to be relieved of the obligation to do so. Counsel for  
13 the parties, at the hearing of this motion, stated that it would still  
14 be possible to complete the deposition of Landes without changing the  
15 date for hearing the protest (July 10, 2006). Therefore, issuing an  
16 order dismissing the protest would constitute a forfeiture of the  
17 statutory right of Frontier to a hearing on the merits of the protest  
18 as a result of misconduct of an owner of Frontier that did not cause  
19 irreparable or even significant harm to Infiniti.

20 71. Dismissal of the protest is not warranted.

21 **WHETHER INFINITI SHOULD BE ENTITLED, PURSUANT TO SECTION**  
22 **3050.2(b), TO RECOVER ITS ATTORNEY'S FEES AND COSTS**

23 72. Infiniti's motion is partly captioned a motion "FOR  
24 ATTORNEY'S FEES AND COSTS" and in it, Infiniti sought recovery of its  
25 attorney's fees and costs "in connection with Frontier's refusal to  
26 proceed with the Landes deposition, including travel expenses from Los  
27 Angeles to Palo Alto, and attorney's fees associated with the  
28 preparation of this Motion" and "...additional fees and costs if Mr.

1 Landes' deposition proceeds pursuant to Board Order." (Infiniti  
2 Motion, page 8, lines 22-24, page 9, line 1) Therefore, attorney's  
3 fees and costs were being sought by Infiniti for:

- 4 a. The aborted deposition of Landes on June 7, 2006;
- 5 b. The fees and costs of bringing this motion;
- 6 c. The fees and costs involved in taking the deposition of  
7 Landes when his deposition is taken.

8 73. At the hearing on this motion, Infiniti agreed to forego any  
9 claim of Infiniti to attorney's fees and costs associated with the  
10 aborted first attempt at deposing Landes on June 7 [(a) above]. In  
11 addition, Infiniti also agreed to forego any claim for attorney's fees  
12 and costs associated with the yet to be taken deposition of Landes if  
13 the Landes deposition can be taken on the same day and at the same  
14 location as other yet-to-be-taken depositions in this matter [(c)  
15 above].

16 74. Therefore, the only claim now being made by Infiniti is for  
17 attorney's fees and costs associated with this motion [(b) above].

18 75. As stated above, it has been determined that Landes had  
19 several courses of conduct available prior to the date of the  
20 deposition that could have resolved the problem without the necessity  
21 of this motion being filed by Infiniti. The failure of Landes to  
22 utilize them, announcing his objection to being videotaped at the very  
23 time the deposition was to commence, and producing no evidentiary  
24 facts to support Landes' contentions, "...constitutes a failure to  
25 comply with authorized discovery without substantial justification for  
26 that failure." (Section 3050.2(b))

27 76. Therefore, it is appropriate that Infiniti be permitted to  
28 recover its attorney's fees and costs pursuant to Section 3050.2(b) as

1 the "...party who successfully makes...a motion to compel enforcement of  
2 discovery..." but limited only to those fees and costs incurred in  
3 bringing this motion.

4 WHAT SANCTIONS ARE AVAILABLE UNDER THE CCP FOR THE  
5 FAILURE OF LANDES TO COMPLY WITH AUTHORIZED DISCOVERY

6 77. CCP section 2023.030 allows for sanctions "against anyone  
7 engaging in conduct that is a misuse of the discovery process".  
8 "Misuse of the discovery process" <sup>21</sup> includes failure to submit to an  
9 authorized method of discovery.

10 78. CCP section 2023.030(a) allows "a monetary sanction ordering  
11 that one engaging in the misuse of a discovery process, ...pay the  
12 reasonable expenses, including attorney's fees, incurred by anyone as  
13 a result of that conduct..."<sup>22</sup>

14 79. CCP section 2025.450 provides in part:

15 (a) If, after service of a deposition notice, a party to  
16 the action or an officer, director, managing agent, or  
17 employee of a party, ...without having served a valid objection  
18 under Section 2025.410, fails to...proceed with it..., the party  
19 giving the notice may move for an order compelling the  
20 deponent's attendance and testimony...

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21 <sup>21</sup> CCP section 2023.010 in part states: Misuses of the discovery process  
22 include, but are not limited to, the following:

23 ...  
24 (d) Failing to respond or to submit to an authorized method  
25 of discovery.

26 (e) Making, without substantial justification, an  
27 unmeritorious objection to discovery.

28 <sup>22</sup> CCP section 2023.030 also allows many other sanctions including the following

...  
(d) The court may impose a terminating sanction by one of the  
following orders:

...  
(3) An order dismissing the action, or any part of the  
action, of that party...

For the reasons addressed above in regard to dismissal of the protest under the  
Vehicle Code, dismissal of the protest under this CCP provision is not deemed  
appropriate.

1 (c) (1) If a motion under subdivision (a) is granted,  
2 the court shall<sup>23</sup> impose a monetary sanction under Chapter 7  
3 (commencing with Section 2023.010) in favor of the party who  
4 noticed the deposition and against the deponent or the party  
5 with whom the deponent is affiliated, unless the court finds  
6 that the one subject to the sanction acted with substantial  
7 justification or that other circumstances make the imposition  
8 of the sanction unjust. (Emphasis added.)  
9 . . . .

6 80. It has been determined that:

- 7 a. There was a properly served deposition notice that entitled  
8 Infiniti to both stenographically and by videotape record  
9 the deposition of Landes;  
10 b. Landes is the Dealer Principal of Frontier and is a one-  
11 third owner of the dealership;  
12 c. No valid objection was made by or in behalf of Landes under  
13 CCP section 2025.410; meaning Landes, in the absence of  
14 obtaining or seeking a protective order pursuant to CCP  
15 section 2025.420, was required to attend and submit to the  
16 videotaped deposition;  
17 d. Landes has not factually established that in refusing to  
18 submit to the videotaped deposition he "acted with  
19 substantial justification or that other circumstances make  
20 the imposition of the sanction unjust." CCP section  
21 2025.450(c)(1)

22 81. Therefore, as Infiniti is the party who noticed the  
23 deposition, Infiniti would be entitled to monetary sanctions against  
24 Frontier due to the "failure to proceed" of Landes, Frontier's dealer

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26 <sup>23</sup> The use of "shall" would appear to make the imposition of monetary sanctions  
27 mandatory under the CCP, whereas the Vehicle Code, in section 3050.2(b) states  
28 that the Executive Director "may", at the direction of the Board, require  
payment of costs and attorney's fees. Whether mandatory under the CCP or  
permissive under the Vehicle Code, the monetary sanctions as recommended herein  
are deemed appropriate under these facts.

1 principal who would certainly be "an officer, director, managing  
2 agent, or employee of a party".<sup>24</sup>

3 82. For the reasons stated above, and as stated in regard to  
4 sanctions available under the Vehicle Code, it is determined that  
5 Infiniti is entitled to monetary sanctions under the CCP..

6 ANALYSIS OF WHETHER LANDES SHOULD BE REQUIRED TO  
7 SUBMIT TO A VIDEOTAPED DEPOSITION

8 83. As stated above, Landes stated only general reasons for  
9 refusing to submit to videotaping of his deposition. Landes provided  
10 no declaration or sworn testimony of any kind, and not even unsworn  
11 specific information, relating to the "who, what, when, where, how, or  
12 why" facts to explain why he was fearful of the videotape being used  
13 for some nefarious purpose.

14 84. Despite the complete absence of facts to support the claim  
15 of Landes that he should be relieved of the obligation to comply with  
16 the notice of taking the deposition by videotape, the administrative  
17 law judge at the hearing, in an abundance of caution (and quite  
18 possibly an overabundance), ordered that the deposition of Landes be  
19 taken but that it be taken by stenographic record only.

20 85. The rationale for limiting the deposition to being recorded  
21 stenographically was not based upon a showing by Landes of a  
22 substantial justification for the failure to comply with the notice of  
23 deposition. To the contrary, it was specifically found that Landes  
24 had not established a factual justification for the failure to comply  
25 with the authorized discovery. In addition, Landes failed not only to  
26 utilize the formal procedures provided by statute to obtain a

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27  
28 <sup>24</sup> CCP section 2025.450. Further discussion of why Infiniti is subject to the  
sanction due to the refusal of Landes follows.

1 protective order, but also failed to act reasonably in not advising  
2 Infiniti of his claimed fears prior to the time the deposition was to  
3 begin or attempt to resolve the issue informally.

4 86. Again, there is no finding that Landes had substantial  
5 justification for refusing to proceed with the videotaping of his  
6 deposition. Landes' failure to proceed timely and reasonably, his  
7 failure to state specific facts in support of his claimed fears, and  
8 his intransigence in the face of the last minute attempts to resolve a  
9 problem of his own making, have been determined to be reason enough to  
10 allow Infiniti the recovery of its costs in bringing this motion.  
11 These could also have been sufficient reasons to order that Landes  
12 also be required to submit to a videotaped deposition. However, the  
13 administrative law judge, in a modified "cost-benefit" analysis took  
14 into consideration what could be the possible "cost" to Landes, which  
15 although it might be remote, is the possibility of psychological and  
16 bodily harm to Landes, as compared to the "benefit" to Infiniti of  
17 having the deposition videotaped as well as stenographically recorded.

18 87. The factors which resulted in limiting the order to allow  
19 Infiniti to take the deposition of Landes but by stenographic record  
20 only include:

- 21 ■ A concern that Landes may indeed have subjective concerns for his  
22 personal safety - well founded or not;
- 23 ■ Even if the concerns of Landes are not well founded, there could  
24 be an emotional effect upon him and his family if the deposition  
25 was videotaped;
- 26 ■ The possibility (no matter how remote) that an order of the Board  
27 may in fact result in not only emotional distress but also bodily  
28 harm to a person appearing before it, were weighed against the

1 likely impact upon Infiniti in denying it a right to videotape  
2 the deposition;

3 ■ The impact upon Infiniti of the absence of a videotaped format  
4 may be nil as there is the possibility that the deposition record  
5 (whether stenographic or by videotape) may not even be used in  
6 the hearing or if it is the videotape would not make any more of  
7 an impact upon the outcome of the proceeding than would the  
8 stenographic record of the deposition; and,

9 ■ There will not be a jury involved in the hearing and all of the  
10 Board's administrative law judges are seasoned veterans of  
11 litigation.

12 88. Weighing all of the above resulted in the scale tipping  
13 towards giving Landes the benefit of the doubt. However, giving him  
14 the benefit of the doubt does not mean that he "acted with substantial  
15 justification" in refusing to proceed with the videotaping of his  
16 deposition, or that "other circumstances make the imposition of the  
17 sanction (of payment of Infiniti's attorney's fees) unjust.

18 AMOUNT OF ATTORNEY'S FEES CLAIMED BY INFINITI IN  
19 CONNECTION WITH THIS MOTION

20 89. Infiniti's attorneys have submitted a declaration claiming  
21 that Infiniti was billed a total of \$11,694.37 in connection with this  
22 motion. This amount was stated to be based upon the time sheets of  
23 Ms. Lewis and Ms. Leader in "preparing the Motion, reviewing  
24 Frontier's Opposition to the Motion, preparing Infiniti's Reply,  
25 preparing for the telephonic hearing on the Motion and participating  
26 in that hearing." (Page 2, lines 13-14) The time shown for Ms. Lewis  
27 was 5.25 hours and for Ms. Leader the time shown was 21 hours. No  
28 hourly rate for either person was stated. However, based upon the

1 total time shown of 26.25 hours, the average dollar amount per hour  
2 equals \$445.50.

3 90. On the date of the hearing on this motion, June 26, 2006,  
4 Counsel for Frontier requested an opportunity to submit a response to  
5 the amount claimed as attorney's fees. As of this date, no response  
6 or opposition to the amount claimed has been received by the Board.

7 91. Absent a challenge from Frontier as to the amount claimed by  
8 Infiniti, it is assumed that the number of hours spent and the amount  
9 charged per hour are not unreasonable.

10 WHETHER FRONTIER IS SUBJECT TO SANCTIONS

11 92. The motion of Infiniti sought sanctions against Frontier  
12 only, and not Landes. CCP section 2025.450(c) provides for the  
13 imposition of sanctions against either the "deponent or the party with  
14 whom the deponent is affiliated".<sup>25</sup> This subsection provides in part  
15 as follows:

16 (c) (1) If a motion under subdivision (a) is granted,  
17 **the court shall impose a monetary sanction under Chapter 7**  
18 **(commencing with Section 2023.010) in favor of the party who**  
19 **noticed the deposition and against the deponent or the party**  
20 **with whom the deponent is affiliated, unless the court finds**  
that the one subject to the sanction acted with substantial  
justification or that other circumstances make the imposition  
of the sanction unjust. (Emphasis added.)

21 93. As Frontier is the "party with whom the deponent (Landes)  
22 is affiliated", Frontier is subject to sanctions.

23 94. Section 3050.2(b) of the Vehicle Code also allows Infiniti,  
24 as a party, the right to recover attorney's fees and costs in regard  
25 to this motion but is not as specific as the CCP as to the persons  
26 subject to the sanctions. It states in part:

27 \_\_\_\_\_  
28 <sup>25</sup> As stated earlier, Landes is a one-third owner and Dealer-Principal of  
Frontier. Thus Frontier is the "party with whom the deponent is affiliated."

1           ...The executive director may, at the direction of the  
2 board, upon a failure to comply with authorized discovery  
3 without substantial justification for that failure, require  
4 payment of costs incurred by the board, as well as attorney's  
5 fees and costs of the party who successfully makes or opposes  
6 a motion to compel enforcement of discovery. ...

7           95. This section, as it relates to discovery between or among  
8 parties, would, under the circumstances that exist here, implicitly  
9 allow for sanctions to be imposed against the other party, in this  
10 case, Frontier.

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