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Infiniti Division, Nissan North America, Inc.

8 STATE OF CALIFORNIA
9 NEW MOTOR VEHICLE BOARD

11 In the Matter of the Protest of

12 SANTA MONICA AUTO GROUP, dba
SANTA MONICA INFINITI,

13 Protestant,

14 v.

15 INFINITI WEST, a Division of NISSAN
16 NORTH AMERICA, INC.,

17 Respondent.

Protest No. PR-2330-12

**REPLY IN SUPPORT OF
RESPONDENT INFINITI DIVISION,
NISSAN NORTH AMERICA, INC.'S
MOTION TO DISMISS PROTEST**

Telephonic Hearing

Date: June 6, 2012
Time: 10:00 a.m.
Call-In No.: 877-402-9753
Participant Code: 437282

18
19 Respondent Infiniti Division, Nissan North America, Inc. (erroneously named herein as
20 Infiniti West, a Division of Nissan North America, Inc.)) (“INFINITI”) submits the following
21 Reply in Support of its Motion to Dismiss Protest in the above-captioned matter.

22 **I. INTRODUCTION**

23 In its Opposition, Protestant mischaracterizes the nature of the Waiver Agreement which it
24 entered into knowingly and voluntarily in this matter. Indeed, Protestant does not deny that it
25 agreed not to protest the appointment of an Infiniti dealer in the Beverly Hills Open Point.
26 Instead, in the Opposition, Protestant attempts and fails to refute California law, which clearly
27 supports the dismissal of the Protest in this case.
28

1 Protestant's Opposition rests solely on unsupported statements and references to statutory
2 authority, which have no application to this case, to argue that INFINITI is somehow precluded
3 from relying on the binding Waiver Agreement in this case.

4 However, based on the express language of the Dealer Agreement, as well as controlling
5 case and statutory law on the subject, it is clear that the Waiver Agreement is binding and
6 enforceable in this case. Because there is no dispute as to the relevant facts and law governing
7 this case, there is no need to hold a merits hearing on the good cause factors set forth in Vehicle
8 Code section 3063. That is precisely what the parties bargained for: Protestant voluntarily
9 relinquished its protest rights in the Waiver Agreement, in order to obtain the economic benefits
10 which it now holds as an Infiniti dealer. Therefore, the Protest should be dismissed.¹

11 **II. PROTESTANT CANNOT REFUTE THE VALIDITY OF THE WAIVER**
12 **AGREEMENT UNDER CALIFORNIA LAW.**

13 As set forth in the Motion, Protestant may not rely on the amendment (effective January 1,
14 2012) to the provisions of Vehicle Code Section 11713.3(g) to overcome the validity of the
15 Waiver Agreement which was entered into between the parties in September, 2010. Indeed,
16 those provisions have no application to this matter, as the amendment expressly provides that the
17 statute does not "[a]ffect the enforceability of any contract entered into on or before December
18 31, 2011." Veh. Code §11713.3(g)(3)(D). Notably, Protestant does not address this statutory
19 language at all in its Opposition.

20 Instead, Protestant urges the Board to simply ignore the express language of Section
21 11713.3(g)(3)(D) regarding the date after which its application is effective and to adopt the
22 statute's subsequent policy, without citation to any authority supporting its position.

23 The Board should reject Protestant's meritless position, as it would contradict the express
24 language of the statute itself. Moreover, misapplication of the statute to the Waiver Agreement
25 would, in effect, impose sanctions on INFINITI for actions that were taken and completed over
26

27 ¹ Protestant argues that the dismissal of its protest will not promote efficiency because another dealer has also
28 protested the appointment of an Infiniti dealer in Beverly Hills. That argument fails because the protests are not at
present consolidated, and therefore each must stand on its own. Further, the other dealer and INFINITI could settle
their dispute at any time, and if this Protest were already dismissed, the appointment could proceed immediately.

1 one year prior to the effective date of the amendments to Section 11713.3(g). Further, that
2 section makes certain specified conduct “unlawful,” and a violation of its provisions is a crime.
3 See, Veh. Code §40000.11(a), making violations of Division 5 of the Vehicle Code, including
4 Section 11713.3, a misdemeanor. Unless specified by the Legislature, a statute cannot apply
5 retroactively, much less a criminal statute, for conduct that was not unlawful at the time it
6 occurred.

7 Indeed, it is well-settled that a new statute is presumed to operate prospectively, absent an
8 express declaration of retroactivity or some other clear indication that the Legislature intended
9 otherwise. *Tapia v. Superior Court of Tulare County* (1991) 53 Cal.3d 282, 287; *See also, Aetna*
10 *Cas. & Surety Co. v. Ind. Acc. Comm.* (1947) 30 Cal.2d 388, 393 (“statutes are not to be given a
11 retrospective operation unless it is clearly made to appear that such was the legislative intent.”;
12 Penal Code §3 (no part of code is retroactive unless expressly so declared); Veh. Code §4 (“[n]o
13 action or proceeding commenced before this code takes effect, and no right accrued, is affected
14 by the provisions of this code, but all procedure thereafter taken therein shall conform to the
15 provisions of this code so far as possible.”

16 Given the express statement by the Legislature that the amendments to Section 11713.3(g)
17 do not apply to agreements entered into up to and including December 31, 2011, as well as the
18 general rule that statutes are not retroactive, the law is clear. Accordingly, the January 1, 2012
19 amendments to Section 11713.3(g) have no application in this matter.

20 **III. PROTESTANT CANNOT AVOID CONTROLLING CASE LAW WHICH**
21 **SUPPORTS THE DISMISSAL OF THE PROTEST IN THIS CASE.**

22 In an effort to overcome the express language of the Waiver Agreement, Protestant
23 distorts the ruling in *DaimlerChrysler Motors Company et. al. v. Lew Williams, Inc. et al.* (2006)
24 142 Cal.App.4th 344. In that case, the Court ruled that a waiver by a dealer almost identical to
25 the one at issue here was valid and enforceable. In an attempt to overcome this precedent,
26 Protestant mischaracterizes the *Lew Williams* Court’s decision and argues that the case is
27 distinguishable because there was separate consideration for the waiver agreement in that case
28 and that none exists here. This is simply not true. As set forth in the Motion, there was ample

1 consideration for the Waiver Agreement and as set forth in the Motion, it is undisputed that
2 Protestant received valuable consideration from INFINITI for entering into the Waiver
3 Agreement, including being appointed as an authorized Infiniti dealer. The dealers in *Lew*
4 *Williams* had already been existing dealers when their waiver agreement was entered into, and
5 thus separate consideration was required. Here, Protestant was appointed as an Infiniti dealer,
6 because of and concurrently with, its consent to enter into the Waiver Agreement. Thus the
7 appointment of Protestant as an Infiniti dealer constitutes adequate consideration, as set forth
8 below.

9 In cases where two instruments are executed simultaneously and are meant to be a part of
10 the same transaction, such as a promissory note and a guaranty, the same consideration supports
11 both agreements. *Mortgage Guarantee Co. v. Chotnier* (1936) 8 Cal.2d 110, 112; *Home Federal*
12 *Sav. & Loan Assn. v. Ramos* (1991) 229 Cal. App.3d 1609, fn.1; *Shafer v. Wholesale Frozen*
13 *Foods* (1957) 151 Cal.App.2d 96, 100. Here, it is undisputed that both the Dealer Agreement
14 and the Waiver Agreement were executed by Protestant on the same date, as part of the same
15 transaction, i.e., the appointment of Protestant as an Infiniti dealer.

16 Alternatively, Protestant's promise not to protest the appointment of an Infiniti dealer in
17 the Beverly Hills Open Point may be enforced through the doctrine of promissory estoppel. The
18 estoppel is a substitute for consideration in a contract. 1 Witkin Summary of California Law,
19 *Contracts*, § 244 et seq., and cases cited therein, e.g., *Toscano v. Greene Music* (2004) 124
20 Cal.App.4th 685. The elements are: (1) a promise made by the promisor and (2) relied upon by
21 the promisee and/or a third party (3) to their detriment. Rest. 2d, *Contracts*, § 90(1). The remedy
22 is enforcement of the promise. *Id.* In this case, INFINITI relied on Protestant's written promise
23 not to protest the appointment of a dealer in the Beverly Hills Open Point by expending
24 significant time and resources in locating dealer candidates, screening them and seeking to
25 appoint one of them as its dealer. The candidate also found property in Beverly Hills for the
26 dealership (as set forth in the Notice given to Protestant), and is expending substantial sums of
27 money to retain the option to open a dealership there.

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1 Thus, even if no consideration were present to support the Waiver Agreement, the
2 elements are present to establish promissory estoppel, which substitutes for the necessary
3 consideration. The remedy is enforcement of Protestant's promise not to protest the appointment
4 of a dealer in Beverly Hills, and to dismiss this Protest.

5 Therefore, Protestant's attempt to overcome the facts and law governing this matter lacks
6 merit. Regardless of how Protestant attempts to distort the case law and statutory language to
7 salvage its Protest, Protestant cannot overcome the direct language of the Dealer Agreement and
8 the Waiver Agreement, which were knowingly and voluntarily entered into between the parties
9 and are binding and enforceable in this matter.

10 **IV. THE PAROL EVIDENCE RULE HAS NO APPLICATION TO THE WAIVER**
11 **AGREEMENT IN THIS MATTER.**

12 In another weak attempt to overcome the dismissal of its Protest, in the Opposition,
13 Protestant contends that the parol evidence rule and the integration clause in Dealer Agreement
14 somehow nullify the separate Waiver Agreement in this matter. Essentially, though Protestant
15 does not dispute that it knowingly and voluntarily entered into the Waiver Agreement, Protestant
16 now asks the Board to simply ignore the terms of that Waiver Agreement in its entirety.

17 In its Opposition, Protestant simply argues that, pursuant to Civil Code section 1625, the
18 Dealer Agreement supersedes the Waiver Agreement. However, Section 1625 provides:

19 The execution of a contract in writing, whether the law
20 requires it to be written or not, supersedes all the
21 negotiations or stipulations concerning its matter which
preceded or accompanied the execution of the instrument.

22 Cal. Civ. Code §1625 (emphasis added.)

23 Here, although the Dealer Agreement contains an integration clause, that clause expressly
24 permits the parties to amend the Dealer Agreement, in a writing signed by both parties.
25 Specifically, Section 15.E of the Standard Provisions to the Dealer Agreement, Standard
26 Provisions, provides:

27 E. Entire Agreement

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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,

Dealer Agreement, Standard Provisions, Section 15.E., p. 19 (Exhibit “A” to Protestant’s Opposition.) (emphasis added.)

In this case, in seeking to enforce the Waiver Agreement, INFINITI does not seek to alter or modify the standard terms of the Dealer Agreement, as that form agreement does not contain any terms relating to the content of the Waiver Agreement. Rather, it is clear from both documents that the Waiver Agreement was entered into to memorialize the agreement between the parties on a subject that was not otherwise covered by the terms of the form Dealer Agreement – the standard terms of the Dealer Agreement do not mention a waiver of protest rights. As illustrated by the simultaneous signing of both agreements, INFINITI agreed to appoint Protestant as a dealer based, in part, on Protestant’s agreement to waive its protest rights as set forth in the Waiver Agreement. The Waiver Agreement is in writing and is signed by each of the parties or their representatives. Therefore, the Waiver Agreement constitutes an amendment to the Dealer Agreement, an amendment which is expressly allowed pursuant to Section 15.E of the Dealer Agreement.

Further, by its terms, the integration clause in the Dealer Agreement nullifies only prior or contemporaneous understandings as to the “subject matter” of the Dealer Agreement. Dealer Agreement, Standard Provisions, §15.E. That clause does not address or restrict the ability of the parties to enter into an additional agreement pertaining to a subject not otherwise covered by the Dealer Agreement, i.e., a waiver of protest rights involving the Beverly Hills Open Point.

Moreover, Protestant’s interpretation of the parol evidence rule makes no sense based on the present facts. Under Protestant’s theory, in order for the waiver to be binding, the parties

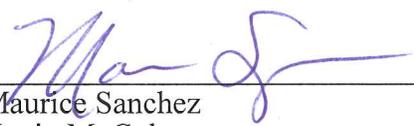
1 were required to memorialize the waiver within the Dealer Agreement itself, though an
2 amendment is specifically contemplated and allowed under the terms of the Dealer Agreement.
3 Under Protestant's interpretation of the parol evidence rule, no contract could ever be amended.
4 The parties' documentation of their agreement regarding the waiver by a separate writing, entered
5 into contemporaneously with the Dealer Agreement and signed by both parties, was expressly
6 permissible under the terms of the Dealer Agreement.

7 **V. CONCLUSION**

8 Protestant knowingly gave up the right to protest the appointment of the new dealer when
9 it voluntarily executed the Waiver Agreement. Now it seeks to retain the economic benefits of
10 being an Infiniti dealer, while not keeping the promise it made when it was appointed, i.e.,
11 waiving its right to protest the establishment of a dealer in Beverly Hills. Protestant should not be
12 allowed by this Board to accomplish its plan to renege on its agreement to forebear from
13 protesting the appointment in Beverly Hills, without consequence. INFINITI was candid about
14 its intention to establish a dealer in Beverly Hills, and made full disclosure of that fact to
15 Protestant at the time it was appointed. Protestant knew all of the facts before going in as an
16 Infiniti dealer, and now seeks simply to void its Waiver Agreement, for no lawful reason.
17 Accordingly, for the reasons stated above and in INFINITI's Motion to Dismiss, INFINITI
18 respectfully requests that the Board grant its Motion and enter an order dismissing Protest No.
19 PR-2330-12

20 Dated: May 25, 2012

BAKER & HOSTETTLER LLP

21
22 By: 
23 Maurice Sanchez
Kevin M. Colton

24 Attorneys for Respondent
25 Infiniti Division, Nissan North America, Inc.
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PROOF OF SERVICE

I, Elly Corona, declare:

I am employed in Orange County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 600 Anton Boulevard, Suite 900, Costa Mesa, California 92626-7221. On May 25, 2012, I served a copy of the within document(s):

**REPLY IN SUPPORT OF RESPONDENT INFINITI
DIVISION, NISSAN NORTH AMERICA, INC.'S MOTION
TO DISMISS PROTEST**

- by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m. and the transmission was reported as complete and without error.
- by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Costa Mesa, California addressed as set forth below.
- by placing the document(s) listed above in a sealed _____ envelope and affixing a pre-paid air bill, and causing the envelope to be delivered to a _____ agent for delivery.
- following ordinary business practices, the envelope was sealed and placed for collection by Overnite Express on this date, and would, in the ordinary course of business, be retrieved by Overnite Express for overnight delivery on this date.
- by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below.
- by transmitting via electronic mail the document(s) listed above to the e-mail address(es) set forth below on this date before 5:00 p.m. and the transmission was reported as complete and without error.

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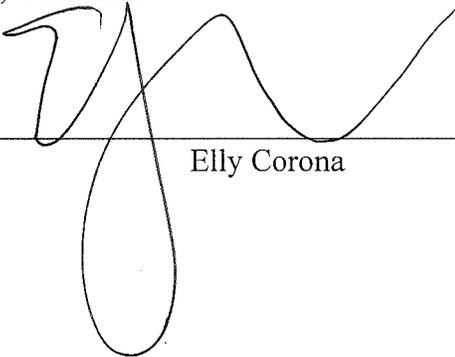
Counsel for Protestant
SANTA MONICA AUTO GROUP, dba
SANTA MONICA INFINITI

I am readily familiar with the firm's practice of collection and processing correspondence

1 for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same
2 day with postage thereon fully prepaid in the ordinary course of business. I am aware that on
3 motion of the party served, service is presumed invalid if postal cancellation date or postage
4 meter date is more than one day after date of deposit for mailing in affidavit.

5 I declare under penalty of perjury under the laws of the State of California that the above
6 is true and correct.

7 Executed on May 25, 2012, at Costa Mesa, California.

8 
9 _____
10 Elly Corona

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12 601317816

BAKER & HOSTETTLER LLP
ATTORNEYS AT LAW
COSTA MESA

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