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6 Attorneys for Respondents  
7 INFINITI WEST, a Division of  
8 Nissan North America, Inc.

9 STATE OF CALIFORNIA  
10 NEW MOTOR VEHICLE BOARD

12 In The Matter Of The Protest Of:  
13 M&M AUTOMOTIVE GROUP, INC., dba  
14 INFINITI OF OAKLAND,  
15 Protestant,  
16 v.  
17 INFINITI WEST, a Division of Nissan North  
18 America, Inc.,  
19 Respondent.

Protest No. PR-2360-13  
**MOTION TO DISMISS**

20 Respondent, Infiniti Division, Nissan North America, Inc. (erroneously named herein as  
21 “Infiniti West, a Division of Nissan North America, Inc.”) (“INFINITI”) submits the following  
22 Motion to Dismiss Protest in the above-captioned matter and respectfully moves for an order  
23 dismissing the protest initiating this proceeding.

24 **I. INTRODUCTION**

25 On January 29, 2013, Protestant M&M Automotive Group, Inc. dba Infiniti of Oakland  
26 (“Protestant”) filed a protest under Vehicle Code Section 3060 purporting to protest the  
27 termination of its Infiniti Term Sales and Service Agreement (“Dealer Agreement”) on January  
28 31, 2013. The Board, however, should dismiss this protest because Protestant voluntarily

1 terminated the Dealer Agreement. INFINITI did not seek to terminate Protestant's Dealer  
2 Agreement, but rather merely accepted the voluntary termination submitted by Protestant,  
3 pursuant to its terms. For this reason, the Dealer Agreement was voluntarily terminated on  
4 January 31, 2013, and this protest should be dismissed.

5 **II. FACTUAL BACKGROUND**

6 Protestant was made an authorized INFINITI dealer pursuant to an INFINITI Dealer  
7 Agreement dated October 12, 2011. (Exh. A, Declaration of Eric Anderson ("Anderson")). On  
8 November 29, 2012, Protestant sent a letter to INFINITI that set forth Protestant's desire to sell  
9 its dealership assets, and failing that, to voluntarily terminate its INFINITI Dealer Agreement,  
10 effective December 31, 2012. (Exh. B, Declaration of Anderson). INFINITI accepted this  
11 voluntary termination by letter dated December 20, 2012. (Exh. C, Declaration of Anderson). In  
12 an e-mail dated December 31, 2012 Protestant requested an extension of the effective date of the  
13 voluntary termination for 30 additional days, stating that he would "extend the voluntary  
14 termination" if INFINITI would repurchase vehicles, "as if the termination took place on  
15 December 31, 2012." (Exh. D, Declaration of Anderson). INFINITI and Protestant then engaged  
16 in discussions regarding a facility change that Protestant proposed in lieu of termination, and the  
17 parties agreed to extend the effective date of the termination to January 31, 2013. (Declaration of  
18 Anderson at ¶ 6). INFINITI ultimately rejected this facility proposal. After INFINITI indicated  
19 that it would not accept Protestant's facility proposal, Protestant again gave written notice of its  
20 termination of its INFINITI Dealer Agreement, effective January 31, 2013, in a letter dated  
21 January 16, 2013. (Exh. E, Declaration of Anderson). INFINITI again confirmed its acceptance  
22 of the January 31<sup>st</sup> effective date for the termination by letter dated January 18, 2013. (Exh. F,  
23 Declaration of Anderson).

24 On January 25, 2013, INFINITI yet again confirmed, in a letter from Jon Finkel to  
25 Protestant, that the effective date of the voluntary termination would remain January 31, 2013 and  
26 that it would not revoke its acceptance of Protestant's voluntary termination. (Exh. G,  
27 Declaration of Anderson). In an e-mail of that same date, Mr. Murphy of Protestant confirmed  
28 receipt of Mr. Finkel's letter and admitted that he had not yet sent his own letter "asking to

1 rescind my voluntary termination” when Mr. Finkel’s letter arrived in his inbox. (Exh. H,  
2 Declaration of Anderson). Protestant’s letter of January 25, 2013, sent *after* receipt of  
3 INFINITI’s letter of that same date, did indeed request that INFINITI allow it to “rescind” its  
4 voluntary termination of the Dealer Agreement. (Exh. I, Declaration of Anderson). INFINITI  
5 did not agree to revoke its acceptance of Protestant’s voluntary termination. (Declaration of  
6 Anderson at ¶ 12). Protestant then filed its protest on January 29, 2013.

7 **III. LAW AND ARGUMENT**

8 **A. The Board Has the Authority to Decide a Motion to Dismiss a Protest**  
9 **Without Conducting a Wasteful Hearing on the Merits.**

10 Protestant would have this Board hold a full hearing on the merits on the issue of whether  
11 INFINITI has good cause to terminate Protestant’s Dealer Agreement. Given that Protestant  
12 *voluntarily* terminated its Dealer Agreement, however, this claim lacks merit. The alleged  
13 requirement for a full hearing on the merits has been rejected by the California courts with regard  
14 to other meritless termination protests.

15 The Board is within its authority to dismiss the subject protest without a full merits  
16 hearing. *Duarte & Witting v. New Motor Vehicle Board* (2004) 104 Cal. App. 4th 626. The  
17 Court of Appeals in *Duarte & Witting* held that the Board has implied authority to dismiss a  
18 protest upon motion of the Respondent, where there is an overriding issue that renders a merits  
19 hearing on the standard good cause factors moot. The *Duarte & Witting* Court stated that  
20 Respondent DaimlerChrysler’s decision to stop manufacturing the Plymouth line of vehicles  
21 meant that there was no reason to hold a hearing on the applicability of the good cause factors for  
22 termination of protestant’s franchise. After its review of several cases in which the Board granted  
23 motions to dismiss protests for various reasons, the Court stated:

24 Although the foregoing cases involved different kinds of dismissals  
25 that are not at issue in this case, we shall conclude the purpose of  
26 the Board and the goal of administrative efficiency support a  
27 conclusion that the Board has implied authority to dismiss a protest  
28 where the undisputed facts demonstrate good cause for franchise

1 termination as a matter of law and afford no basis for preventing  
2 termination of the franchise. *The procedure in this case was*  
3 *analogous to a summary judgment motion*, where the ... undisputed  
4 facts gave [Protestant] no viable basis to prevent termination of the  
5 franchise. In this circumstance, there would be no point to  
6 conducting an evidentiary hearing on issues of whether the dealer  
7 was performing its obligations under the franchise agreement. Such  
8 an evidentiary hearing would simply entail the wasteful expenditure  
9 of public funds. \* \* \* ¶ Dismissal of a protest in the  
10 circumstances of this case furthers the goal of administrative  
11 efficiency and is consistent with the Board's purpose.

12 104 Cal. App. 4th at 647 - 648. (Footnote and name of Protestant omitted, emphasis added.)

13 As noted by the court in *Duarte & Witting*, the Motion to Dismiss procedure before the  
14 Board is “analogous to a summary judgment motion” where there is no dispute as to the basic  
15 facts, and where a question of law will decide the matter. The *Duarte & Witting* court ultimately  
16 held that the Board could dismiss a protest in response to Respondent’s motion, where to go  
17 through a full merits hearing would constitute a waste of both time and the agency’s resources.  
18 *See also, Nader Automotive Group, LLC v. New Motor Vehicle Board* (2009) 78 Cal. App. 4th  
19 1478, 1485 (citing *Duarte & Witting* for the proposition that the Board’s authority to grant  
20 Motions to Dismiss is “settled law”).

21 **B. Protestant’s Termination of the Dealer Agreement Is Valid.**

22 Pursuant to Section 11E of the Dealer Agreement, a dealer may voluntarily terminate that  
23 agreement at any time:

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

1 Dealer Agreement at Section 11E (explanation added).

2 Here, Protestant has twice given INFINITI (Seller) written notice that it is terminating the  
3 Agreement. On November 29, 2012, Protestant stated, “This letter is my 30 day notice to  
4 terminate Infiniti as of December 31, 2012.” Then again, in its letter of January 16, 2013,  
5 Protestant stated, “If you do not want to do this deal I have no other choice than to terminate  
6 Infiniti effective January 31, 2013.” Nissan’s acceptance of the voluntary termination of the  
7 Protestant’s Dealer Agreement effective January 31, 2013 could not be clearer:

8 This letter will therefore confirm Infiniti’s acceptance of the  
9 voluntary termination of the Infiniti Dealer Term Sales and Service  
10 Agreement between M&M Automotive Group, Inc., dba Infiniti of  
11 Oakland and Infiniti Division of Nissan North America, Inc.,  
12 effective the close of business January 31, 2013.

13 Exh. C at 1. Therefore, the provisions of Section 11E of the Agreement have been satisfied, and  
14 Protestant, not INFINITI, terminated the Dealer Agreement.

15 **C. Termination By The Dealer Is Binding Upon Compliance With The**  
16 **Contract, And Is Not Subject To A Good Cause Requirement.**

17 Under the plain language of Section 3060 of the Vehicle Code, only the *manufacturer’s*  
18 contractual right to terminate has been modified by statute. As Section 3060(a) states,

19 Notwithstanding Section 20999.1 of the Business and Professions  
20 Code or the terms of any franchise, *no franchisor* shall terminate or  
21 refuse to continue any existing franchise . . .

22 (Emphasis added.) Because Section 3060 does not modify the *dealer’s* (franchisee’s) right to  
23 terminate the contract, and does not require the manufacturer to show good cause when the *dealer*  
24 terminates the contract,<sup>1</sup> standard contract law applies to the effectiveness of the dealer’s  
25 voluntary termination.

26 Under black letter California contract law, “[t]ermination occurs when either party

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<sup>1</sup> In fact, reference to the good cause factors in Section 3061 – the criteria applicable to a protest under Section 3060 – make no sense in the context where the manufacturer did not initiate the process to terminate the franchise.

1 pursuant to power created by agreement or law puts an end to the contract otherwise than for  
2 breach.” Witkin, Summary of California Law, Contracts § 925 (internal quotations omitted); *see*  
3 *also Siegel v. Lewis* (1946) 74 Cal. App. 2d 86, 91 (“Once an option to terminate a contract is  
4 exercised, the contract is extinguished and discharged . . .”). If the party that terminated the  
5 contract wishes to have it reinstated, *it must obtain the consent of the other party* to reinstate the  
6 contract. *See generally, California Canning Peachgrowers v. Bardell & Oregoni* (1933) 132  
7 Cal.App. 153 (describing the need for proper assent from both parties to reinstate a contract after  
8 valid notice of termination).

9 Even Protestant understood that once INFINITI accepted its notice of voluntary  
10 termination, any “rescission” of the termination would have to be agreed upon by INFINITI, in  
11 order to be effective. On January 25, 2013, Protestant’s dealer principal wrote:

12 Attached is a letter I wrote to you this morning asking to rescind my  
13 voluntary termination. While the letter was being copied to  
14 letterhead and proof read I received the attached letter from Mr.  
15 Finkel stating that was not an option. . . . I am asking Infiniti to  
16 reconsider your position and rescind my voluntary termination.

17 E-mail from Michael Murphy to Eric Anderson, dated 1/25/13 (Exh. H, Declaration of Anderson).

18 Here, the Dealer Agreement unambiguously gave Protestant the right to terminate it upon  
19 notice to INFINITI. INFINITI unequivocally accepted Protestant’s voluntary termination of the  
20 Agreement. The parties ultimately agreed in writing that January 31, 2013 would be the effective  
21 date of the termination. INFINITI expressly rejected Protestant’s proposal to reinstate the  
22 contract when Protestant later “asked to rescind” its notice of termination. Therefore, Protestant’s  
23 Infiniti Dealer Term Sales and Service Agreement was terminated effective January 31, 2013, and  
24 this protest should be dismissed.

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**IV. CONCLUSION**

For these reasons, Protestant's "protest" should be dismissed, as the Infiniti Dealer Term Sales and Service Agreement was effectively terminated by Protestant in compliance with the contractual provisions in that Dealer Agreement, allowing for voluntary termination by the dealer.

Dated: February 28, 2013

BAKER & HOSTETLER LLP

By:   
Maurice Sanchez  
Kevin M. Colton

Attorneys for Respondent  
INFINITI WEST, a Division of Nissan North  
America, Inc.

**PROOF OF SERVICE**

I, Laraine Cook, 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 February 28, 2013, I served a copy of the within document(s):

***MOTION TO DISMISS***

- 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.

Michael J. Flanagan, Esq.  
Gavin M. Hughes, Esq.  
LAW OFFICES OF MICHAEL J. FLANAGAN  
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*Counsel for Protestant*  
M&M AUTOMOTIVE GROUP, INC.,  
dba INFINITI OF OAKLAND

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same

1 day with postage thereon fully prepaid in the ordinary course of business. I am aware that on  
2 motion of the party served, service is presumed invalid if postal cancellation date or postage  
3 meter date is more than one day after date of deposit for mailing in affidavit.

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

6 Executed on February 28, 2013, at Costa Mesa, California.

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Laraine Cook

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