STATE OF CALIFORNIA

DECISION COVER SHEET

[X] ACTION BY: Public Members Only **[ ] ACTION BY**: All Members

To : **BOARD MEMBERS** **Date:** July 3, 2014

From : **ADMINISTRATIVE LAW JUDGE: Diana Woodward Hagle**

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

TYPE: **Vehicle Code section 3060 Termination**

PROCEDURE SUMMARY:

- FILED ON CALENDAR: January 22, 2013
- MOTIONS FILED: None
- HEARING: January 27-February 7, 2014, and March 6-7, 2014
- SITE VISIT: January 24, 2014

- COUNSEL FOR PROTESTANT: Law Offices of Michael J. Flanagan
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EFFECT OF PROPOSED DECISION: The Proposed Decision sustains Protest No. PR-2358-13

SUMMARY OF PROPOSED DECISION:

Background Findings

- Protestant Santa Cruz Nissan ("SCN" or "Protestant"), one of the oldest Nissan dealers in the country, has been underperforming since 2006, when it dropped precipitously in sales rankings compared to other Nissan dealers. This is a "sales performance case" so the "good cause" factor of Vehicle Code section 3061(a) ["amount of business transacted by the franchisee, as compared to the business available to the franchisee"] is the focus of the case.

- SCN is co-owned by father and son. Lee Courtright (the Dealer Principal) not only started SCN in 1972, he has, over the years, owned or had interests in no fewer than ten dealerships throughout Northern California and Nevada selling eight different line-makes as well as two other Nissan stores, in Stockton and Carson City. He is "in town" 120-140 days a year and spends about four hours a day at the dealership when he is Santa Cruz. James Courtright (Executive Manager and General Manager) has a degree from UC Davis and an MBA from Santa Clara, and has worked at SCN since 1993. As Executive Manager, he has full managerial authority and responsibility for the day-to-day operation of the business.

- In 1989, the parties executed a "Dealer Agreement" (the franchise agreement), which has not been substantively changed over the years.

- SCN moved to its present location in 1996. As before the move, the dealership has four franchises under its roof: Nissan, Volkswagen, Dodge and Ram.

- Nissan North America ("Nissan" or "Respondent") distributes 22 models of vehicles, a spectrum ranging from entry-level sedans to trucks and large SUV's to sports cars. In December 2010, it launched the LEAF electric vehicle, a tremendous success for both the company and for SCN.

- Nissan uses "performance metrics" to assess dealer performance; basic to the calculation are "regions" and "Primary Marketing Areas" ("PMA").[1] Briefly, the calculation is this: "Sales penetration calculates a dealer's new vehicle sales (regardless of where they are registered) as a percentage of the registrations of all competitive makes in the dealer's PMA. To gauge sales penetration effectiveness, a dealer's sales penetration is then compared as a ratio to [Nissan's] sales penetration throughout the dealer's assigned region to determine whether the dealer being analyzed is penetrating its PMA below, at or above the average for all Nissan dealers in the region…Expressed as a percentage, the resulting quotient calculates a dealer's "regional sales effectiveness" or "RSE".[2]

- "100% RSE" is the <u>minimum</u> performance level that Nissan states it will accept. The Notice of Default to SCN read that "…Nissan will require Dealer to achieve 100% of the West's regional average sales penetration within …180 days…". (Joint Exhibit 2:0061) At the end of the 180 day period, plus a 60 day extension, Nissan did initiate termination proceedings based solely on poor sales performance (and breach of contract based on the poor sales performance).

- Nissan realigned its regions which, in the words of its own expert witness, made its pre-2009 calculations less reliable than they should have been. In a similar vein, Nissan enlarged SCN's PMA in late Spring of 2012, which had the immediate effect of reducing SCN's RSE.

- A chart with protestant's sales and RSE scores from 2005 to 2013 is found in the Proposed Decision at page 24, paragraph 128, lines 17 through 25.

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[1] In the Dealer Agreement, a PMA is "…the geographic area which is designated from time to time as the area of Dealer's sales and service responsibility for Nissan Products". (JtExh 1:5622-5623)
[2] <u>Sims</u> v. <u>Nissan North America, Inc.</u>, Court of Appeals of Ohio, 10th District, Franklin County, pg.3 (June 25, 2013)

Findings Related to "Good Cause" Factors of Vehicle Code section 3061

- Nissan has not met its burden of proof in the only factor that was seriously contested, section 3061(a) ["amount of business transacted by the franchisee, as compared to the business available to the franchisee"].

- There were many problems with Nissan's analysis of dealer performance. Although Nissan's basic RSE calculation was valid, other aspects of the process were not. The "West Region" was too large to be useful. Reliance on "averages" and "rankings" without further information has the tendency to mislead. Making threats of adverse consequences if a dealer does not "achieve 100% RSE" is misusing the data. Designating a "competitive set" of 197 vehicles (including Tesla and Lotus) leads to unmanageable data.

- With specific regard to protestant, Nissan expanded its PMA into the census tracts of the city of Watsonville for no discernable reason, thereby generating an "alarming" decline in SCN's RSE percentage and, into the future, insuring SCN's failure to "achieve 100% RSE". In deciding to terminate protestant's franchise, Nissan failed to temper its rigid "performance metrics" with the inquiries that its own Dealer Agreement states are appropriate (Section 3.D. – "Additional Factors for Consideration"). Finally, the internal memo recommending the issuance of the Notice of Default contained an error, stating that SCN had committed to increasing its advertising to $10,000 monthly when, in fact, the Courtrights had agreed to increase their advertising by $10,000 per month.

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

- It is true that between 2009 and 2011, there were lost sales opportunities which Santa Cruz Nissan failed to capture. However, Santa Cruz Nissan, even though a below-average sales performer, is otherwise a sound business and its owners are responsible members of the Santa Cruz community. The business employs 45 or so workers, operates with financial security, paying a substantial amount of taxes, and investing in the community.

- SCN's performance deficiencies are due to an insufficient level of resources to accomplish the task, no sense of urgency to change the situation, and no one in charge capable of executing plans for improvement. Hopefully, the changes and upgrades it has made in the past year or so to improve sales will continue.

RELATED MATTERS:

- Related Case Law: There are no published court decisions applicable to this case.
- Applicable Statutes and Regulations: Vehicle Code sections 3060 and 3061.