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

STATE OF CALIFORNIA

NEW MOTOR VEHICLE BOARD

In the Matter of the Protest of SANTA CRUZ NISSAN, INC., dba SANTA CRUZ NISSAN, Protestant, v. NISSAN NORTH AMERICA, INC., Respondent.	**Protest No. PR-2358-13** **PROPOSED DECISION**

PROCEDURAL BACKGROUND

Statement of the Case

1. By letter dated January 14, 2013, Nissan North America, Inc. gave notice to Santa Cruz Nissan, Inc. pursuant to California Vehicle Code section 3060[1] of its intention to terminate the dealership's Nissan franchise.

2. The New Motor Vehicle Board (hereinafter, sometimes "Board") received the notice on January 16, 2013.

3. On January 22, 2013, Santa Cruz Nissan filed a timely protest.

4. A hearing on the merits of Protest No. PR-2358-13 was held January 27 through 31, 2014;

[1] Hereinafter, unless otherwise indicated, all section references are to the Vehicle Code.

February 3 through 7, 2014; and March 6 and 7, 2014, before Administrative Law Judge Diana Woodward Hagle.

5. The matter was submitted on June 3, 2014.

Parties and Counsel

6. Protestant Santa Cruz Nissan, Inc. dba Santa Cruz Nissan (herein "SCN", "Santa Cruz Nissan" or "Protestant") is a Nissan dealership located at 1616 Soquel Avenue in Santa Cruz, California. Protestant is a "franchisee" within the meaning of sections 331.1 and 3060(a)(1)(A).

7. Protestant is represented by the Law Offices of Michael J. Flanagan, by Michael J. Flanagan, Esquire; Gavin M. Hughes, Esquire; and Danielle R. Vare, Esquire, 2277 Fair Oaks Boulevard, Suite 450, Sacramento, California.

8. Respondent Nissan North America, Inc. (herein "Nissan" or "Respondent") is a "franchisor" within the meaning of sections 331.2 and 3060(a)(1)(A).

9. Respondent is represented by Baker & Hostetler LLP, by Maurice Sanchez, Esquire, and Lisa M. Gibson, Esquire, 600 Anton Boulevard, Suite 900, Costa Mesa, California.

IDENTIFICATION OF WITNESSES

Protestant's Witnesses

10. Ernest L. "Lee" Courtright (Dealer Principal of Santa Cruz Nissan) testified to the dealership's ownership and history, a description of the facilities, and the adverse effect on protestant's business if the Nissan franchise is terminated.[2]

11. James Courtright (Executive Manager of Santa Cruz Nissan) testified about the day-to-day operation of the dealership, the actions taken to improve Nissan vehicle sales, and the dealership's involvement in charitable and community activities.

12. Martin Bernal, City Manager of Santa Cruz, testified about the characteristics of the city and the county of Santa Cruz, the contributions of Santa Cruz Nissan to community activities and to the city's tax revenues. In his opinion, there would be a significant adverse fiscal impact on those revenues if SCN's Nissan franchise is terminated.

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[2] References herein to Roman Numerals are to the transcripts of the proceedings.

Respondent's Witnesses

13. The following witnesses were employees, or former employees, of Nissan. Their testimony covered the organization and products of the company; duties of Nissan personnel; assessments of the sales performance of Santa Cruz Nissan and communications with the dealership; Nissan's method of evaluating the sales performances of its dealers and its brand popularity; the procedures which Nissan follows with dealers it considers underperforming; and the decision to issue a Notice of Termination to SCN.

A. A Nissan "Dealer Operations Manager" (DOM) is the primary contact between a dealer and Nissan. The DOM's responsibility is dealer support and communication to dealers of Nissan policies, programs, and procedures with the goal of boosting sales. After each contact, DOM's prepare "Contact Reports", which are not given to dealers.

(1) Eric Lewin testified that, as Santa Cruz Nissan's DOM from April of 2009 to June of 2011, he visited SCN every 30 to 60 days, and was in regular telephone or email contact with the dealership. SCN's sales performance was an issue during his tenure. In his opinion, SCN's failure to improve sales performance was 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.

(2) Tina Novoa, the DOM for SCN from June of 2011 to September of 2012, testified that she contacted the dealership, either personally or on the phone, at least once a month (and she knew the Courtrights, having called on them when she worked for Volkswagen). She was aware of Nissan's concern about SCN's sales performance. In Ms. Novoa's opinion, James Courtright wanted to be a good manager, but lacked the ability to successfully execute plans for improvement.

(3) John Gardner, the current DOM, assumed his position in October of 2012, shortly after the 180-day Notice of Default under which SCN was operating expired and Nissan had extended the Notice of Default for 60 days. He testified that he visited SCN four times and had contact with the dealership at least monthly via phone and email. His last visit to the dealership was on June 28, 2013, when he alerted James Courtright that Nissan had replaced its "West Region" (RSE) standard with a "State Sales Effectiveness" (SSER) standard. He testified that he continued email and phone contacts with SCN until December of 2013.

B. Gary Inman is a Fixed Operations Manager (FOM) for Nissan, responsible for covering the area which includes the Santa Cruz market. He works with dealers to grow their service business by satisfying and retaining customers, thereby promoting the sale of Nissan's parts and accessories. He testified that in the past four years, he has called on Santa Cruz Nissan "maybe once or twice a quarter", dealing mainly with the Service and Parts Managers, and occasionally with James Courtright. He also has email communications with the dealership. In his opinion, a definite correlation exists between service and sales---retaining service customers leads to loyalty, repeat business and new car sales. He testified that despite his repeated suggestions over the years that SCN's service department stay open on Saturdays, he was unable to convince James Courtright of the value of the idea.

C. As Area General Manager (AGM) since 2011, Chad Filiault is familiar with SCN, having visited the dealership "multiple times". He is in charge of monitoring dealers' performances to meet Nissan objectives in three areas: sales operations, service operations and customer loyalty, and he receives and reviews all "Contact Reports" of the four DOM's, the four FOM's, and the one Loyalty Performance Manager (LPM) assigned to him. After the Notice of Default had been issued to SCN, he had approached two prospective buyers for the Nissan franchise but, in his opinion, the Courtrights were not interested in selling. He testified that Nissan needs representation in Santa Cruz, and that Nissan would replace SCN if the franchise was terminated.

D. In April of 2010, Eric Rodgers became Regional Vice President (RVP) of "West Region North". He testified that, as the senior Nissan executive in the region, he was responsible for insuring that Nissan's "performance metrics" were achieved. He visited SCN's dealership "about five times" and testified, among other things, about the events leading up to his recommendation to Nissan management to issue a Notice of Termination to SCN.

E. Alison Speranzo, a regional Market Representation Specialist for Nissan, described the procedures that Nissan follows before issuing Notices of Default and Notices of Termination. Here, she testified, it was SCN's downward trend in dealer effectiveness beginning in 2006 that prompted the decision to issue a Notice of Default and later, the Notice of Termination.

F. Samuel Wright, Manager of Dealer Digital Marketing, described ways in which dealers develop sales via the Internet and related electronic means.

14. James Courtright was called as an adverse witness pursuant to Evidence Code section 776.

Expert Witnesses

15. Protestant's expert witness was Edward Stockton, Vice President, The Fontana Group. (Exhs 21B-23B)[3]

16. In Mr. Stockton's view, Nissan's statistical analyses of the sales performance of Santa Cruz Nissan were significantly flawed.

17. Among other things, Mr. Stockton was critical of Nissan's use of the "West Region"---a geographical area encompassing, at least in part, most western U.S. states---as a basis for comparing and evaluating SCN's sales performance. Also, he testified that Nissan ignored or minimized factors which depressed sales for SCN which were outside the control of the dealership, especially considering the unique geographic and demographic characteristics of the Santa Cruz market. (Exh 21B: "Introduction")

18. John Frith, Vice President, Urban Science Applications, Inc. (USAI), was respondent's expert witness. USAI is "...a third party vendor company which provides Nissan with analyses of census, sales and registration data, market studies, as well as expert testimony". (Exh 200A-200G, Surrebuttal Report; JtExh 14:7)

19. Mr. Frith testified that all vehicle manufacturers have objective standards to calculate and assess the sales effectiveness not only of their franchised dealers, but also the popularity of their brands in the marketplace, and the performances of their competitors. The surveys, standards and processes by which Nissan made these comparisons and calculations to measure its dealers' sales effectiveness was reasonable.

20. Using several different approaches in evaluating SCN's sales effectiveness, Mr. Frith concluded that Santa Cruz Nissan was "seriously underperforming" in the market, and had been failing to capture sales opportunities in its Primary Market Area for several years. These "lost [sales] opportunities", he concluded, were due to deficiencies in "dealer operations" which were within the control of the dealer. (Exh 200D:4736; IV:7, 59, 144, 153)

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[3] Exhibits are referenced as "Exh" and joint exhibits as "JtExh". In both exhibits and joint exhibits, page number references will be to the last four digits only. Since most exhibits were marked for identification by the parties prior to the hearing, they were not offered or introduced in numerical order; also, some pre-marked items may not have been used in the hearing at all, so there may be numerical gaps in the Exhibit List.

Deposition Witness

21. Pursuant to stipulation, the parties submitted portions of the deposition testimony of Anne Corrao (Nissan's Director of Customer Quality and Dealer Network Development), who testified to the importance of NREDI facilities and her participation in Nissan's decision to issue a Notice of Termination to Santa Cruz Nissan. (Exhs 26, 241, 242)

POST-HEARING REQUESTS TO RE-OPEN RECORD

22. Respondent's request for official notice of certain 2010 census data was granted. This information provided some population, business and race/ethnic data in the Santa Cruz-Watsonville area, with comparisons to California data. Protestant did not object to the admission of the evidence.

23. The parties' "Joint Glossary of Terms to be Used in Merits Hearing" was received May 22, 2014, and was admitted into evidence.

PRE-HEARING SITE VISIT

24. On January 24, 2014, at the request of the parties, ALJ Woodward Hagle conducted a site visit of protestant's dealership (walk-through of buildings and facilities) and a drive-by of other new and used cars dealerships in the city of Santa Cruz and immediately surrounding areas. Both parties and their counsel were present.

BURDEN OF PROOF

25. In termination cases pursuant to section 3060, the franchisor has the burden of proof pursuant to section 3066(b) "...to establish that there is good cause to...terminate...a franchise."

26. The standard is "preponderance of the evidence", which is met if the proposition is more likely to be true than not true---i.e., if there is greater than 50 percent chance that the proposition is true.

ISSUE PRESENTED

27. Did respondent Nissan sustain its burden of proof of establishing "good cause" to terminate protestant's Nissan franchise, thereby creating an "open point" allowing it to appoint another Nissan dealer in the Santa Cruz area?

28. In determining whether there is good cause for terminating a franchise, section 3061 requires the Board "...to take into consideration the existing circumstances, including, but not limited to, all of the following:

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

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

(c) Permanency of the investment.

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

(e) Whether the franchisee has adequate motor vehicle sales and service facilities, equipment, vehicle parts, and qualified service personnel to reasonably provide for the needs of the consumers for the motor vehicles handled by the franchisee and has been and is rendering adequate services to the public.

(f) Whether the franchisee fails to fulfill the warranty obligations of the franchisor to be performed by the franchisee.

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

PROTESTANT'S CONTENTIONS

29. Santa Cruz Nissan has been a successful family-owned Nissan dealer for over 40 years in the City of Santa Cruz. Santa Cruz Nissan is a sound business operation, with excellent capitalization, a contributor to the community and to the city's tax revenues, all of which (including the dealership itself) would be gone if its Nissan franchise were to be terminated.

30. Nissan's analyses and calculations of sales performance are flawed, overstating the sales opportunities for a Nissan dealer in the Santa Cruz market. For example, the representative group of Nissan dealers against which SCN has been compared---the "West Region"---is too large, yielding inaccurate conclusions about SCN's sales performance.

31. When Nissan enlarged SCN's Primary Market Area in the late Spring of 2012, data generated from the larger area had the immediate effect of degrading SCN's sales performance statistics. In Nissan's analyses of SCN's 2012 performance, Nissan appeared to have ignored the dealership's more favorable data from the first months of 2012, thereby generating inaccurate effectiveness scores.

32. Nissan ignored the unique geographic and demographic characteristics of the Santa Cruz market including, as examples, the isolation of Santa Cruz by mountain ranges and ocean; the substantial

net out-flow of workers living in Santa Cruz but commuting to San Jose and the location of SCN's dealership 1.8 miles from the ocean, which reduces the "proximity advantage" for making sales available to other dealerships "ringed" by population centers.

33. The termination action is simply a "proxy" for Nissan to replace protestant's dealership with one with an NREDI-compliant facility, is exclusive to Nissan, and is clustered with at least one other competitive line-make.

RESPONDENT'S CONTENTIONS

34. Nissan's data analysis is reasonable and necessary to monitor dealer sales performance as well as the popularity of the Nissan brand (and models) against the competition.

35. Nissan, like most, if not all, vehicle manufacturers, measures sales penetration of a dealer by comparing its sales against numbers of "competitive set" vehicles sold in the dealer's assigned marketing area. Then, from the data generated, Nissan calculates the dealer's sales performance by comparing it with other Nissan dealers in a geographical region chosen by Nissan.

36. Relying on these "performance metrics", Nissan has determined that Santa Cruz Nissan has been underperforming since 2006, when it precipitously dropped in the sales rankings compared to other Nissan dealers. Since that date, SCN's sales performance has been significantly lower than other dealerships. It has placed near the bottom for several years in rankings of other Nissan dealers, both in the "West Region" and in California.

37. In the Santa Cruz market, there is substantial business available in the new car market for Nissan vehicles---these are "lost opportunities" which should have been captured by Santa Cruz Nissan.

38. Despite marketing suggestions and counseling by Nissan representatives over the last several years, protestant has shown an unwillingness or inability to go after business and to provide a better experience for its customers. There is substantial room for improvement of sales opportunities in the Hispanic community; by opening for service on Saturdays to capture new customers, especially those Santa Cruz residents who commute "over the hill" to jobs in Silicon Valley; and by effectively using the Internet to attract potential customers.

39. Santa Cruz Nissan has breached the parties' Dealer Agreement by its "unsatisfactory sales penetration performance". Since 2006, Santa Cruz Nissan has failed to meet "...100% regional sales

effectiveness [i.e., "100% RSE"]..." which is "...the minimum compliance level per Dealer's Sales and Service Agreement". (Emphasis added.) (JtExh 2)

40. Santa Cruz Nissan is (and has been for several years) a poor sales performer because the owners have complacent competitive attitudes, resulting in the dealership having little "energy". Although Nissan would prefer a Santa Cruz dealership to be "exclusive", built or remodeled to NREDI standards, and in close proximity to other dealers, SCN's lackluster sales performance is not primarily due to its current facility or to its location, but results from the inaction or ineffectiveness of the owners.

FINDINGS OF FACT[4]

Preliminary Findings

History and Description of the Dealership

41. Protestant Santa Cruz Nissan is a California corporation. It is one of the oldest family-owned Nissan (formerly Datsun) dealer franchises in the U.S., having been appointed on March 20, 1972. (JtExhs 1:0063, 4:0008[5]; IX:45, 55; XII:173)

42. Ernest ("Lee") Courtright has been the dealer principal of protestant since its start in 1972. He was the Executive Manager until 1997 and the owner of 100% of the business until 2005. He began in the automobile business in 1962 as a service writer. Santa Cruz Nissan is the first business he owned. Over the years, he has owned or had interests in no fewer than ten dealerships in Northern California and Nevada (Toyota, Jeep, Mazda, Mercedes-Benz, Volkswagen, Dodge, Ram as well as two other Nissan stores, in Stockton and Carson City). Lee Courtright has been on national and regional boards for Nissan and for Volkswagen, including Nissan's National Dealer Council and National Advertising Board. (JtExh 1:0076-0078; II:237; VI:44; XII:164, 167-172, 237)

43. Lee Courtright was formerly a partner in the Seaside Company, selling his interest in 1993 or soon thereafter. The Seaside Company is a large land owner in the Santa Cruz area and, among other

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[4] References herein to testimony, exhibits or other parts of the record are examples of evidence relied upon to reach a finding and are not intended to be all-inclusive.
Findings of Fact are organized under topical headings for readability only and are not to be considered relative to only the particular topic under which they appear, but rather may apply to any of the "existing circumstances" or "good cause" factors of section 3061.

[5] A few exhibits, such as this one, not only have pages out of numerical order but also many missing page numbers.

properties, owns the Toyota, Mazda, Subaru and Kia franchises in Capitola and the Golden State Warriors basketball team. (VII:11-13; VIII:267)

44. Lee Courtright is "in town" 120 to 140 days a year and spends about four hours a day at the dealership when he is in Santa Cruz. His responsibility is to handle "bigger projects", such as health insurance for employees and 401(k) issues. His salary is $6,000 per month; it was not established whether this amount was paid by Nissan, split among the four franchises, or paid from some other account. (XII:165-166, 174)

45. James Courtright (Lee Courtright's son) has been SCN's Executive Manager since October 20, 1997, and also "...act[s] as a General Sales Manager". (JtExh 1:0063, 0078; XII:64) A graduate of the University of California at Davis and the M.B.A. program at the University of Santa Clara, he has worked full-time in the automobile business since 1991. He started as a salesman at the Toyota store in Santa Cruz, then split his job there between sales and Finance & Insurance. In 1993, he moved to Santa Cruz Nissan as Sales Manager and in the late 1990's he became protestant's General Manager.[6] (VII:6-7; VIII:339)

46. As Executive Manager, James Courtright is charged with having full managerial authority and responsibility for the day-to-day operations of the dealership.[7] His compensation is not known.

47. On September 25, 2005, the Dealer Agreement was amended to reflect James Courtright's 28.6% ownership of SCN and Lee Courtright's 71.4% ownership of the business. (JtExh 1:0076)

48. Santa Cruz Nissan, which was first located in downtown Santa Cruz on Front Street, moved to Center Street in 1979. In 1996, it relocated to 1616 Soquel Avenue, in the City of Santa Cruz, to its present site. With each move, the facility was bigger and better. Lee Courtright constructed the dealership building with design assistance and approval from Nissan. The building, at 26,509 square feet, was 112% of Nissan's square footage "guidelines" in 1996 (and 104.9% in 2012), but the land, at 2.61

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[6] The General Manager (GM) of a dealership is designated by the Dealer only, as opposed to an Executive Manager (EM) who is approved by Nissan. (JtExh 14:4)

[7] An Executive Manager (EM) must be approved by Nissan, different from a General Manager, who is chosen by the dealership. (JtExh 14:4)

acres, was only 52% of the "guidelines" which called for 5.01 acres (and 62.3% in 2012, since the "guidelines" had been reduced to 4.19 acres). (JtExhs 1:0070; 3:0020; XI 134-135; XII:207-208)

49. SCN's location on Soquel Avenue is in an area called the "East Commercial Area" by the City of Santa Cruz and is just outside the "Downtown Zone". The dealership is 1.8 miles from Monterey Bay. (Exh 230:1-4)

50. As before the last move and continuing to the present, protestant is "dualed" with three line-makes in addition to Nissan: it is a franchisee of Volkswagen, Dodge and Ram vehicles.[8] SCN sells and services both new and used vehicles. (JtExhs 1:0070; 13:2)

51. A separate entity, a family trust for which Lee Courtright is the trustee, owns the real estate upon which SCN is situated. SCN pays rent of $25,000 a month to the trust; it was not established if this payment is allocated to all four franchises located on the property or is borne by SCN alone. (VII:8, 16)

52. The Nissan Retail Environment Design Initiative (NREDI) is a facility and sign program developed by Nissan to create a consistent brand image for its dealership facilities, including those which are "dualed" with other franchises. NREDI-compliant dealerships enjoy "...[m]ore sales, greater capacity and higher customer satisfaction". SCN is not NREDI compliant. (Exhs 11; 241:31-33, 44-45; JtExh 14:5)

53. SCN's sales office is open seven days a week, from 9 AM to 8 PM (7 PM during Daylight Savings Time). The dealership offers service on Monday through Friday, from 7:30 AM to 6 PM, with shuttle service with two drivers available every hour the service department is open. (JtExh 13:2; IX:13-14)

54. The service department is not open on weekends. (JtExh 13:2)

55. Santa Cruz Nissan is the only Nissan dealer in the Santa Cruz market.

56. In the "Dealership Facilities Addendum" to the Dealer Agreement, which was signed on September 20, 2005, SCN agreed to acquire "off-site storage land [and] facilities" within six months to comply with Nissan's facilities guidelines. Although a later Nissan memo recited that SCN did not fulfill this part of the agreement, it is unclear whether SCN did keep its promise by buying the improved lot

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[8] Lee Courtright acquired the Dodge truck franchise in 1978; the separate Ram line-make "...has only been around for the last few years...". (XII:172)

across the street from the dealership or whether it in fact failed to acquire the storage property. (JtExh 1:077)

57. SCN's capitalization significantly meets or exceeds Nissan's guidelines for dealers. Even though it posted losses in 2009 and 2010, it had a profit of $360,548 in 2011. (JtExh 2:0035, 0377)

58. SCN acquired to right to sell LEAF electric vehicles on December 16, 2010, and it has been a resounding success for the dealer in environmentally-conscious Santa Cruz. The "Cube" was also a big seller for SCN. (JtExh 1:0090; IV:53, 4732)

59. In 2011 and 2012, James Courtright instituted new marketing and personnel policies in order to build up sales (e.g., putting in place Cobalt, increasing the advertising budget by $10,000/month, incentivizing sales staff with higher commissions for Nissan sales, adding ½ staff position to cover the internet). SCN also participates in Nissan's Regional Marketing Program ("RMP"), a voluntary program funded by participating dealers with matching funds from Nissan; the participants meet periodically to decide how to allocate advertising money in their area. (Exh 209:0025; II:248, 312-314; VII:35-36; VIII:185; XI:47-48) Also, for several years, SCN has had an email marketing program, which keeps in contact with customers with offers of coupons and promotions and news of the dealership. (XII:107-108)

60. In February 2014, SCN entered into a three-month contract to advertise to the Hispanic market; in preparation for Spanish-speaking customers, James Courtright had previously hired sales staff conversant in Spanish. In April 2013, the area's dealers who were participating in RMP met and agreed to allocate 30% of RMP funds to Spanish-language advertising; James Courtright "didn't fight it" but was concerned because, at that time, SCN had no Spanish-speaking sales staff so would be unable "... to handle the traffic generated from the spots". (Exh 209:0024; VII:33-34, 46-47; VIII:189-191; XI:29-30, 96-97)

61. Under the Dealer Agreement, the franchisee has the discretion to decide how to allocate its advertising and marketing budget to "effectively promote" sales of Nissan vehicles, although Nissan could look at "...the manner in which Dealer has conducted its sales operations (including advertising...)". (Exh A; JtExh 1:5625-5626)

62. On March 20, 2012, RVP Eric Rodgers served on the Courtrights the Notice of Default ("NOD"), dated March 19th. It cited protestant's "unsatisfactory sales penetration performance" as the

reason, reciting that in 2011, SCN sold 204 Nissan vehicles, but its RSE was 51.6%, which ranked SCN 187th out of 194 Nissan dealers in the "West Region" and 95th out of 97 dealers in California. According to the letter, this unsatisfactory performance "...constitutes a substantial, material breach of the [Dealer] Agreement"; it further advised that "[t]o correct this default, Nissan will require Dealer to achieve 100% of the West's regional average sales penetration...**within One Hundred Eighty Days (180) days** from receipt of this Notice". (Emphasis in original) (Exh 209:0030; JtExh 2:0056-0061; II:285-288)

63. On July 26, 2012, Chad Filiault and Tina Novoa presented Lee Courtright with a plaque commemorating his 40 years as a Nissan dealer. (Exh 209:0025)

64. On September 18, 2012, Lee Courtright submitted to Nissan a "buyer assist letter" asking for help to identify and find a buyer for his Nissan franchise. (Exh 208) Chad Filiault found a couple of prospects, both of whom talked briefly with Lee Courtright, but with little or no further interest by either party. (JtExh 13:2) Lee Courtright made no effort to find a buyer. Lee Courtright was not interested in selling the Nissan franchise. He submitted the "buyer assist letter" in order to secure an extension of the expiring NOD. (XII:187-188) On October 5, 2012, the Notice of Default was extended for 60 days so that a possible sale of the franchise could be accomplished. (JtExh 3:0053-0054)

65. Both Nissan's internal paperwork regarding the extension and the NOD extension itself noted the "alarming" decline in protestant's RSE during the 180 days since the issuance of the NOD. (JtExh 3:all pages; III:61) Compared to SCN's 2011 year-end RSE of 51.5%, the "...July 2012 rolling12-month data..."[9] showed SCN's RSE to be 39.5%. (JtExh 3:0021) The June 2012 rolling 12-month data was slightly different, with a 2011 year-end RSE of 51.57% with SCN's rolling June figure to be 38.35%. (JtExh 3:0023)

66. However, the 2012 rolling percentages encompass one or two months in 2012 (starting either June 1st or May 16th) when SCN's PMA was enlarged into Watsonville, which had the immediate effect of reducing SCN's RSE, independent of any other factors. It is unclear if Nissan prorated the RSE calculations to reflect data from two different PMA's or if Nissan applied data from the current (enlarged)

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[9] "12-month rolling" is "data comprised of the most recent twelve month period, regardless of calendar year". (JtExh 14:6)

PMA to the full 12-month periods.[10]

67. The Notice of Termination ("NOT"), dated January 4, 2013, was directed to Lee Courtright. (JtExh 4:0047-0051) Based on "unsatisfactory sales penetration performance", the NOT recited SCN's October 2012 rolling 12-month RSE of 37.3%. The letter stated that "[s]ince the issuance of the NOD, Dealer has not taken necessary action to cure the substantial and material breaches that led to the NOD, no substantial and sustained progress towards improvement or compliance with Dealer's obligations under the Agreement has been made, and the severity of these defaults continues." However, as with the NOD extension, there is no acknowledgment of the PMA change and its effect on SCN's RSE, nor is there any disclosure of the method of calculating the latest RSE figure. (JtExh 4:0047-0051)

Nissan Facts

68. Currently, Nissan manufactures 22 models with the stated aim of capturing a broad spectrum of the market. With its impressive line-up in many different model "segments", it hopes to attract first-time car buyers looking to own entry-level cars; those buyers needing work-horse trucks and large SUV's; as well as those interested in sports cars, sedans and the LEAF, Nissan's EV offering. (Exh 202)

69. Nissan's primary competitor line-makes are Honda and Toyota, each with one dealership in the Santa Cruz market. Hyundai and Kia are also becoming "increasingly" competitive; Kia established a dealership in the Santa Cruz market in June of 2010. (JtExhs 7:5686, 5690; 8:0322)

70. Nissan's goal is to not "overdealer" the marketplace and, to that end, the current number of U.S. Nissan dealers is around 1,100, while Toyota and Honda have many more dealers nationwide (Toyota has approximately 1,400 and Honda is in the neighborhood of 1,200). (I:61-2)

71. Nissan considers Santa Cruz a "mid-size" market, not a "larger" one. (I:131; VIII:263)

72. By the Spring of 2009, the economic situation facing the automobile industry was "very unfavorable": the "deep recession" saw dealers reducing inventory and Nissan cutting production in response. "...Registrations of new cars nationally, locally, were all suffering and on the decline". By 2010, however, the markets were recovering and, in December of 2010, the LEAF was launched, which

[10] This would presumably be the sort of information a manufacturer would disclose about its "methodology and data" and "application" of a "performance standard". [Section 11713.13(g)(1)(B)]

became a big seller for Nissan and for SCN. (VII:72, 77-8, 157-8)

73. Nissan geographically organizes its dealer network into "Regions", subdividing each "Region" into "Divisions" and then assigning each Nissan dealer a set of census tracts called "Primary Market Areas", or "PMA's". 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)

74. In each PMA, the dealer assigned to it has a geographic, and therefore presumably a competitive, advantage over other Nissan dealers. A dealer may, of course, sell to customers living outside its assigned PMA ("out-sells" or "pump-outs") and, conversely, another Nissan dealership may sell to customers residing inside the dealer's PMA ("in-sells" or "pump-ins"). There are no prohibitions against dealers advertising in another Nissan dealer's PMA. (II:32)

75. In the Dealer Agreement, Nissan has "...reserve[d] the right, in its reasonable discretion, to [change the PMA of a Dealer] from time to time...", (JtExh 1:5623). From March 1, 2004 to the late Spring of 2012, Santa Cruz Nissan's PMA encompassed 39 census tracts---all in Santa Cruz County---designated by reference to "...the 2000 Census Tracts...". (VI:6-14) In the late Spring of 2012 (after the Notice of Default had been served) Nissan enlarged protestant's PMA into southern Santa Cruz County, adding 12 new census tracts, which included the City of Watsonville.

76. During the relevant time, Nissan authorized USAI to prepare two "market studies" of the Santa Cruz market. Both reached similar conclusions: that the Santa Cruz market was underserved, with sales opportunities that were not being captured, especially when compared to the successes of Toyota and Honda. (JtExhs 7, 9)

77. The "Dealer Network Analysis" dated February 2013 was a "market study" prepared for Nissan executives. It recommended that a Nissan dealership in Santa Cruz be an NREDI "stand alone" dealer, "in close proximity to Toyota or Honda" with a facility "meet[ing] or exceed[ing] all established ... guidelines and/or future operational requirements" which would be "competitive with dealerships in the area". (JtExh 7)

78. The "Dealer Presentation" dated March 2013 paralleled the executive "market study", with

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somewhat different wording. By letter dated June 8, 2012,[11] Nissan invited James Courtright to provide information for a market study Nissan was planning for the "Monterey/Salinas/Santa Cruz (including Gilroy/Morgan Hill) market areas", but he did not respond. In March of 2013, at the direction of Alison Speranzo, DOM John Gardner made a presentation of the "Dealer Presentation" to the Courtrights, who listened without comment (not a surprising reaction, since the instant protest had been filed two months earlier). (JtExhs 6, 7, 9:0366; VIII:13-14)

79. Nissan's NREDI program requires franchisees building or upgrading a dealership facility to meet Nissan's corporate design and architectural standards. The facility design is optional for dealers who do not relocate or sell their business, but is mandatory for new or relocating dealers. Nissan will approve a "dual NREDI facility". (Exh 241:43-45)

The Dealer Agreement

80. On February 2, 1989, the parties executed a "Nissan Dealer Sales and Service Agreement". Its "Standard Provisions" constitute the franchise agreement currently in force, which allows Santa Cruz Nissan to sell all Nissan models, as well as parts and accessories, and to service the vehicles. (JtExh 1:0089, 0065, 5620-5624)

81. Over the years, the parties executed Amendments, Product Addenda, at least one Dealership Facilities Addendum, and two Notices of [changes to] Primary Market Area, but none changed the substantive recitals in the 1989 agreement. (JtExhs 1:0063-0085; 3:2)

82. Pertinent provisions of the Dealer Agreement are attached hereto as Exhibit A.

Santa Cruz Nissan's Primary Market Areas[12]

From March 1st of 2004 - May 16th or June 1st of 2012

83. Effective March 1, 2004, Nissan informed SCN that its Primary Market Area (PMA), identified by the "geographical numerical identifiers" [census tracts] of the 2000 U.S. Census, would consist of 39 census tracts, all within the County of Santa Cruz and centered on the City of Santa Cruz. (JtExh 1:0599-0601, 0075)

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[11] On June 8, 2102, SCN was not only under a Notice of Default, but its PMA had been expanded into Watsonville no more than three weeks earlier.

[12] A map showing both the 2004-2012 PMA and the 2012-present PMA is attached hereto as Exhibit B.

84. This PMA has a huge territorial spread. Households are concentrated in the City of Santa Cruz, in small communities south along the Pacific Coast (Capitola, Soquel, Aptos) and on a road leading north from Highway 17 (Boulder Creek, Scotts Valley), but are also scattered throughout the unincorporated areas of the county, with the exception of the wilderness in the northwest part of the PMA. (Exh B)

85. The geography of the PMA is unique and geographically isolated: its southwest border is the Pacific Ocean (Monterey Bay), a vast part of its northwest area is unpopulated and inaccessible by road, and its northwest border is defined by the coast range mountains. Only the PMA's southeast border has no natural barriers. (Exh. 200A:4695)

86. Not only is the Santa Cruz area geographically isolated from its prosperous neighbor to the east---Silicon Valley in San Jose, Santa Clara County---by a coastal range of mountains, the only direct road connecting Santa Cruz to San Jose is the two-lane Highway 17.

87. More workers commute eastward "over the hill" from Santa Cruz to jobs in Santa Clara County than westward into Santa Cruz County. The net commuter "outflow" is approximately 1.5 persons for every 1 person coming into Santa Cruz. (Exh 21B:Tab 7, Pages 1-2)

88. The City of Santa Cruz is the county seat of Santa Cruz County and is home to a campus of the University of California. As of 2012, the city's population was estimated to be 62,041. In 2010, Hispanic or Latino persons constituted 19.4% of the population and 22.2% of persons over the age of five spoke a language other than English at home. (JtExhs 7:5684; 12)

89. Santa Cruz residents are slightly more affluent than the average resident of California. (JtExh 12)

90. The Santa Cruz area's population has grown in the past several years and there are predictions of steady growth in households in the future. (JtExh 9:0375)

91. Commercial real estate in the Santa Cruz area is not only expensive, but availability is limited.

92. In the City of Santa Cruz, only two new vehicle dealerships remain: in addition to the four line-makes sold by the Courtright franchises, Ford is the only other new-vehicle franchise in the city. Dealerships formerly in the city have moved out to other areas---as an example, Toyota of Santa

Cruz, once in downtown Santa Cruz, relocated to Capitola. (I:29)

93. Residents in the PMA are environmentally-conscious and seek to buy "green" or "alternative" automobiles such as the Toyota Prius and, after it was launched in December of 2010, the Nissan LEAF.

94. The "product preference" in the Santa Cruz Market is overwhelmingly for entry level vehicles and compact vehicles. This would include "alternative" vehicles such as the LEAF. However, Toyota's Prius is the most popular "alternative" vehicle. (VII:149)

95. Protestant's primary competitors in the PMA are Honda and Toyota, which are located about one-half mile from one another, with Highway 1 between them:

A. Ocean Honda was built in 2008 or 2009 in an unincorporated area of the County of Santa Cruz, about 2.1 miles from SCN. It is an impressive, exclusive stand-alone facility with an equally impressive sales record---although Toyota generally outsells Honda in most markets, Ocean Honda has turned this around in the Santa Cruz market, outselling its Toyota competitor. Joe Cappo is the dealer principal of Ocean Honda, although he was not the first owner of Ocean Honda. Joe Cappo was formerly a Nissan dealer. (JtExh 7:5697; I:137; II:18-21; IX:76-77)

B. Toyota, Subaru and Kia (all owned by the Seaside Company) are "clustered" in the neighboring town of Capitola, contiguous to the city of Santa Cruz and about 2.5 miles from SCN. The dealerships are reached by an access road. (JtExhs 7:5697; 200A:4697)

96. There are a total of twelve line-makes sold in SCN's pre-2012 PMA: SCN's franchises (Nissan, Volkswagen, Dodge, Ram), Honda, Toyota, Kia, Subaru, Ford, Scion, Lincoln and Mazda. (Exh 23B:Supplemental Exhs Pg 4)

97. Nissan dealers in PMA's contiguous to protestant's are My Nissan in Salinas (24.5 miles from SCN), Gilroy Nissan in Gilroy (22.2 miles), Stevens Creek Nissan in West San Jose (23.6 miles), Premier Nissan on Capitol Expressway in San Jose (20.8 miles), and Boardwalk Nissan in Redwood City (38.4 miles). (Exh 21B:0370)

98. This PMA is an appropriate area for Nissan to use to measure protestant's sales effectiveness.

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From May 16th or June 1st of 2012 to the Present

99. Approximately two months after Nissan had served the Notice of Default on SCN, it advised the dealer that, effective either May 16, 2012, or June 1, 2012,[13] its PMA would be enlarged into the southern part of Santa Cruz County. (JtExh 1:0082-0085)

100. SCN's new PMA now encompasses 51 census tracts and, significantly, includes either all or most of the population of the City of Watsonville, the county's second largest city with an estimated 2012 population of 51,881. The territorial area of the addition appears to be about one-fifth the size of SCN's former PMA. (Exh B) This expanded PMA also includes a greater percentage of Hispanic or Latino residents (81.4%) than the rest of the county of Santa Cruz, and 74.1% of persons over the age of five speak a language other than English at home. (JtExh 12)

101. James Courtright unsuccessfully protested the new PMA assigned to SCN. When he contacted Alison Speranzo protesting the change, she reached out to the Market Studies Department, which confirmed that the census tracts in Watsonville "...did indeed belong to the Santa Cruz Primary Market Area...they were closest by drive miles." (Exhs 204, 207; III:99-100)

102. The assignment of Watsonville to SCN's PMA was not as a result of a dealer going out of business, a new dealer coming into the area, an open point realignment, or recommendations of a market study. It is Nissan's policy to review PMA boundaries after each decennial U.S. Census and to change or revise the geographical boundaries of PMA's after a "PMA Audit.[14] (Exh 204B; II:199-200; III:97-98)

103. Nissan's letter to SCN stated that the PMA change was as a result of 2010 census data, and "...additional criteria such as: air distance, drive distance, natural boundaries, buyer shopping patterns, and other objective factors", although no further details were given. (JtExh 1:0082)

104. The size of a dealer's PMA does have a direct effect on the dealer's sales effectiveness ratings, since its "sales penetration" percentage is calculated by dividing all of its sales by all of the "competitive set" registrations in its PMA. Clearly, when a dealer's PMA is enlarged, its sales

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[13] Two written notices sent by Nissan to SCN state the PMA change will be "effective May 16, 2012" (JtExh 1:0083, 0086), but Alison Speranzo contradicted this by testifying that the effective date of a PMA change is always the first of the month and, in this case, the new PMA was effective June 1, 2012. The difference is 16 days.

[14] Both Eric Rodgers and Alison Speranzo testified to the fact of "PMA Audits", but Ms. Speranzo's explanation of the audit was cursory: "...[W]e...tak[e] a look at the new census tracts and the boundaries and tak[e] a look at each dealer's Primary Market Area. If it needed to be updated, we updated it." (II:199-200, 211; III:97-8)

penetration goes down, because more "competitive set" registrations are added to the equation, while the sales number remains the same. For example, when SCN's PMA was enlarged into Watsonville, "competitive set" registrations from 197 vehicle models were immediately folded into the equation. (Exh 200B: 4699, 4700; Exh 200G:4759)

105. Nissan's enlargement of SCN's PMA to include Watsonville, the second most populous city in the county, negatively affected SCN's "sales performance" score and ranking. It added "competitive set" registrations of 197 models sold by multiple manufacturers, from Chevrolet and Fiat to Lotus and Tesla.

106. Presumably, the new area in SCN's PMA---12 census tracts including Watsonville, the county's second largest city---was not previously "unassigned" territory. The two closest dealers to Watsonville are My Nissan in Salinas and Gilroy Nissan in Gilroy; however, it appears that Watsonville was previously in My Nissan's PMA. Not only does My Nissan, a successful dealer, have a concentration of sales into the Watsonville area, its 2012 RSE soared (from 113.4% at year-end 2011 to 160.6% at year-end 2012), a mirror image of SCN's decline (51.6% at year-end 2011 to 32.0% at year-end 2012). (Exhs 200A:4696, 4697; 200B:4714; 200C:4716)

107. The new census tracts in SCN's PMA include dealerships selling Ford, GMC, Chevrolet, Buick, Chrysler, Dodge, Jeep and Ram and possibly Cadillac and Lincoln line-makes. (Exhs 200A:4696, 4697; Exh 23B:Supplemental Exh Pg 4)

108. With a total of 16 dealers and 6,031 vehicle sales, Nissan's 2012 expansion of SCN's PMA boundaries has transformed a "mid-sized" market into a larger one. The expansion was not an exercise of the "reasonable discretion" contemplated by Sections 1.N. and 3.A. of the Dealer Agreement. (Exhs 200A:4697; 200G:4759)

109. For the foregoing reasons, sales performance data generated by application of the RSE calculations after the 2012 PMA expansion is not reliable.

Nissan's Calculation of Sales Performance

110. Nissan evaluates dealer sales effectiveness using performance metrics, which, after the calculations are completed, assigns each dealer a percentage figure which Nissan calls "Segment-Adjusted Regional Sales Effectiveness" (hereinafter sometimes "RSE"). Nissan states that "100% RSE"

is the minimum target---the calculations generate the number of "expected sales" (the opportunity in the dealer's PMA) for each dealer and performance rankings of Nissan dealers.

111. Section 3.B of the Dealer Agreement describes the calculations Nissan will take to evaluate dealers' sales performances. Using these calculations only leads to sales penetration percentages, and this does not describe Nissan's current---and complex---evaluation calculations. However, the Dealer Agreement is 25 years old; the parties have operated under this agreement for decades while the automotive business predictably changed, and it was reasonably foreseeable that some recitals in the agreement would change and evolve. Nissan's current use of "performance metrics" for evaluations is a reasonably foreseeable extension of the calculations described in the agreement.

112. In calculating RSE, Nissan uses its "regions" to compare dealer performances. Before April 2009, Santa Cruz Nissan was part of the "Northwest Region" (133 dealers in 2009); in that month, Nissan "merged" its Northwest and Southwest Regions and protestant became one of the dealers in the "West Region" (193 dealers in 2009). (Exh 200B:04701; II:18-20; IV:21; VI:143)

113. The "West Region" covered populated areas in California, Hawaii, Alaska, Washington, Oregon, Idaho, Montana, Wyoming, Nevada, Utah, Arizona, New Mexico and two small areas in Texas on the border with New Mexico. There are a few "open points" but much of the geography is "unassigned", i.e., not assigned to any dealer. (Exh. 200A:4695; IV:174-6)

114. The sales performances of Nissan dealers in the "West Region" was the "benchmark" against which SCN's performance was measured after April of 2009. (IV:176) However, neither the "Northwest Region" nor the "West Region" are appropriate "benchmarks" to analyze sales performance of Santa Cruz Nissan. Both suffer from simply being too large a sampling---but the larger "West Region" is more suspect, covering about one-third of the continental U.S., with obvious differences in topography, population centers, economies, and climates.

115. Nissan used the "West Region" standard in its calculations in preparing both the Notice of Default and the Notice of Termination. However, the "West Region", like the "Northwest Region" before it, is too large, leading to results which may be inaccurate or misleading. (IV:177-8)

116. As of August of 2013, Nissan abandoned the "West Region" in favor of the "California Region" (SSER) standard.

117. Nissan calculates a dealer's sales penetration in its PMA as a percentage by dividing a dealer's total sales by the number of "competitive set" vehicle registrations in the dealer's PMA during the same time period. The "competitive set" vehicles are those brands and models of other manufacturers which Nissan has decided compete most closely with its models for customers. (Exh 200B:4698; I:75)

118. To "segment-adjust" its data, Nissan organizes its models into fourteen product groups ("segments")[15], then assigns models from the "competitive set" to each group.

119. The fourteen "segments" are the following, with the number of competitive models Nissan tracks for each "segment" in parenthesis: Entry (12), Compact (28), Mid-Size Lower (18), Mid-Size Upper (15), Sports Performance (13), Small Specialty (14), Compact MAV (4), Compact SUV (28), Mid-Size SUV (13), Full-Size SUV (9), Large SUV (21), Mid-Size Pick Up (9), Full-Size Pick Up (7), and Mid-Size MPV (6). The number of "competitive set" models total 197. (Exh 200B:4704-05)

120. Basically, RSE is the dealer's sales compared to the expected sales in the area, and the expected sales in the area are based on how well the Nissan dealers in the region did compared to the competitive group in the region. (III:212) In greater detail, the calculations are the following:

A. Nissan compares the sales of all its dealers in the region in each of the segments to the "competitive set" registrations in the region in each segment, which yields a "region sales penetration" percentage for each segment. This percentage reflects the popularity of each Nissan model in the region. These are then multiplied by the number of competitive registrations in each segment in the dealer's PMA, which yields the number of "expected sales" in each segment. (The "expected sales" figure is adjusted to reflect the consumer preferences in the dealer's PMA.) Adding each segment's "expected sales" in the PMA results in a total number of "expected sales" for a dealer to achieve region penetration in the PMA. The total number of "expected sales" is divided by the total of the competitive registrations in the dealer's PMA to get the dealer's sales penetration necessary to achieve region average. (Exh 200B:4703)

B. Among other things, these calculations measure the size of a particular market by counting the total combined number of registrations in the PMA in each of the fourteen "segments" in which

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[15] Since Nissan manufactures 22 models, some "segments" contain two Nissan models.

Nissan competes. The result represents the total available opportunity in a given market based on actual registrations.

C. Since "competitive set" sales figures define the size of the available customer base, Nissan uses the "competitive set" data to measure an individual dealer's sales performance, because that comparison evaluates a dealer's actual sales relative to the opportunity available to it. As an example, if Nissan's region sales penetration is 50% of the competitive registrations, a dealer with a "competitive set" of 1,000 vehicles has to sell 500 units to be 100% RSE (i.e., attain the average market share), while a dealer with a "competitive set" of 2,000 vehicles has to sell 1,000 units---twice as many--to be sales effective. Thus, the size of the PMA does affect the dealer's "sales effectiveness" ratings.

121. Dealers operating at 100% RSE are selling at the average of comparative Nissan dealers in the group. They are the "C" students. This is the target number that Nissan's performance metrics have determined is the "opportunity" in the PMA. Those less than 100% RSE are "underperforming".

122. Every quarter or so, Alison Speranzo "...pull[s] the bottom performers in the region, and ...[sends] them performance letters[16] letting them know of where their status [is] versus the region where they're supposed to be, and how that's a breach of their agreement. And that we're looking for sustainable long-term improvement. That we're not happy with the performance." (III:54)

123. On March 7, 2008, a "performance letter" to Lee Courtright commended him on the dealership's "positive improvement" in raising SCN's RSE from 68.3% in 2006 to 86.9%[17] in 2007. However, in later "performance letters"[18], Nissan wrote of its "serious concern" ..."with the poor [sales] performance and operational difficulties at [SCN]...". (Exh 206)

124. The Notice of Default, dated March 19, 2012, advised Lee Courtright that because of "unsatisfactory sales penetration performance", protestant was given 180 days to "cure the default" by achieving 100% RSE. Year-end 2011 sales figures were used, showing that SCN had sold 204 Nissan vehicles in 2011, while the "100% RSE" figure was 396, so the "loss" was 192 vehicles, which SCN was

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[16] The "performance letters" followed a format and, in addition to sales performance, addressed such items as customer service, training and owner loyalty. (Exh 206)

[17] Note that in other documents, the 2007 RSE figure is 84.4%.

[18] The letters were dated November 18, 2009; April 21, 2010; November 10, 2010; July 11, 2011; November 9, 2011, and June 15, 2012. (Exh 206)

presumably required to sell in the 180-day period. (JtExh 2:005661)

125. The language in Nissan's Notice of Termination dated January 14, 2013, primarily concerned itself with the "performance metrics" described above, concluding that "...declining sales penetration performance for many years...." dictated Nissan's decision to terminate the franchise. (Exh 4:0047-51) No mention was made of the criteria listed in Section 3.D of the Dealer Agreement, nor was there evidence that these factors were considered.

126. However, RSE may be used as a standard, even in termination cases, as long as its limitations are recognized and "rigid performance metrics"[19] are tempered with the kinds of inquiries required by Section 3.D. of the Dealer Agreement.

127. The RSE formula does not include a consideration of either topography or commute patterns. SCN's location, 1.8 miles from the ocean, does not have the 360 degree "proximity advantage" to customers that other dealers enjoy. And Section 3.D of the Dealer Agreement requires Nissan "...where appropriate..." to take into account "reasonable criteria" in evaluating a dealer's sales performance. (IV:237; V:87)

Findings Relating to Amount of Business Transacted by the Franchisee, as Compared to the Business Available to the Franchisee [Section 3061(a)]

128. Santa Cruz Nissan's sales figures and RSE scores are the following (Exhs 200B:4707; 206:0658; 212:0553; JtExhs 2:0043, 0044; 3:0023; 4:0049; I:110; IX:65):

Year	Number of Sales	RSE Score
2005	366	113.70%
2006	237	68.30%
2007	304	84.40%
2008	202	81.80%
2009	152	56.30%
2010	150	45.90%
2011	204	51.60%
2012	173	32.00%
2013	246	No data

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[19] Wall Street Journal, June 24, 2014, "Aides Rebelled After CEO Tweaked 'Tar-zhay' Formula" (p. 1)

129. Nissan's RSE performance calculations prior to 2009, relying on a standard other than the "West Region", will be disregarded in this analysis.[20] RSE calculations based upon data from SCN's PMA, enlarged in the Spring of 2012, will also be disregarded.

130. Nissan's RSE calculations from 2009 through 2011, even though based on the overlarge "West Region", provide information which may be considered in regard to protestant's sales performance in its PMA during those years. It appears that there were sales opportunities in the Santa Cruz market which protestant failed to capture: it fell significantly below the average opportunity sales figures: 56.3% in 2009, 45.9% in 2010 and 51.6% in 2011. (Exh 200C:4716; IV:149, 189)

131. Similarly, for the 2009-2011 period, the "retail registration effectiveness" for SCN's PMA, showing how well the Nissan brand is doing in the PMA, reveals that protestant did not capture sales opportunities available to it. In each of those three years, protestant sold fewer Nissan vehicles in its own PMA than other Nissan dealers (there were more "insells" in the PMA), resulting in substantial "shortfalls"---Nissan sales opportunities which were missed. (Exh 200B:4718; IV:41-3)

132. However, SCN's sales of the LEAF were exceptional: in 2012, the dealership sold 154.5% RSE. (Exh 200 Surrebuttal Report:5665)

133. In 2010, 35.4% of Nissan vehicles registered in the PMA were sold by SCN and in 2011, the figure increased to 43.0%. (Exh 200:H:4778)

134. In 2012, it appeared that many of the "insells" were clustered around protestant's dealership in the city of Santa Cruz. (Exh 200H:4776, 4781)

135. "Averages" and "rankings" based on those averages, taken by themselves, can be misleading. When looking at an "average" of a group, there will be roughly half over and half under, which is, in fact, a validation of the calculation being used. "Once you set an average, half will be performing over and half under [the average line]...". (IV:252) The bar graphs in Exhibit 200C:4721-23 are reasonable because there is a normal distribution around the average.

A. To increase its competitiveness in the marketplace, Nissan seeks to raise those dealers

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[20] Respondent's expert testified that "[W]e have four years' worth of data at the west region, I would rely on that. And the 2008 to 2009 changes, we have to acknowledge that there was a region change, and difficult to tell exactly how much change is due to the northwest, west region standard change. I think its good information, but I would rely on it a little bit less than the more current data using the constant region performance standard." (III:21)

which are below average ("underperformers") by encouraging them to increase sales. If underperforming dealers do become more successful, this will raise the average line, but there will still always be the roughly 50%-50% split of numbers above and below the average line. So even successful dealers could (inappropriately) be characterized as "underperformers" if they fall below the average line.

B. When Nissan requires an "underperforming" dealer to "achieve 100% RSE", and the dealer does so, all that happens is that another dealer will fall below the average line (and the rankings will change). By using "averages", there will always be around 50% "underperforming" dealers. Nissan's use of "100% RSE" as a performance goal (together with dire warnings about the consequences of failing to achieve "100% RSE") is not reasonable.

C. Nissan's goal, not articulated but implied, is to "...reduce the variation around the average [line]...", so that the dealers below the average line are not far below. It is the "magnitude of the difference", the quantitative deviation from the average line, which is most important, while still having roughly half of the dealers over and half under. So if dealers falling on or close to the average line are "C" students, poor performers are "D" and "F" students as they fall farther below the line. (IV:252)

136. In sales effectiveness rankings of all Nissan dealers in the "West Region" in 2009, SCN ranked 178/194; in 2010 it ranked 188/197; and in 2011 it ranked 188/195. The bar graphs[21] in Exhs 200C:4721-23 reflect SCN's performance in context and, for the years 2009 to 2011, show SCN to be a poor sales performer.

137. Located close to protestant, the Toyota and Honda dealerships face the same geographic and demographic challenges as protestant in the Santa Cruz marketplace. But both Toyota and Honda---Nissan's closest competitors---sell more vehicles in the Santa Cruz market than Nissan. (Exh 21B:0352, 0353)

138. In 2012, Ocean Honda had an "effectiveness percentage" of 151.3%, Toyota of Santa Cruz's was 72.0% and Santa Cruz Nissan was 30.9% (Exhs 200H:4760; 200SuppRpt:5663)

139. Moreover, success builds on success: because Toyota and Honda sell more vehicles in the

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[21] Captioned "West Region Nissan Dealers' Retail Sales Effectiveness to West Region Average (i.e., Average Sales Penetration of Nissan Dealers in the West Region Adjusted for Local Segment Popularity").

Santa Cruz market than Nissan, they have more Units in Operation (UIO's) in the area than Nissan. This generates more sales: it's easier to attract a "repeat" customer than a "conquest" customer.

140. Other than the peculiarities of the Santa Cruz geography, no local conditions (i.e., those things that are outside the control of the dealer) have deterred SCN from selling more vehicles. In fact, local conditions have been beneficial to business in the Santa Cruz economy: population and households have increased in number and further increases are projected (Exhs G:448-4752; 21B:0325, 0335); other than a decline of about 4,600 jobs in the county in 2009-2011, recovery was on the way in 2012 and 2013; employment was at its highest level in ten years, at 140,596 jobs (Exh G:4753); in 2012, there were a significant number of households with incomes of $75,000 and $100,000 in the City of Santa Cruz and its environs. (Exh G:4754-55). Inclement weather (not uncommon in other parts of the "West Region") is unknown in Santa Cruz.

141. Moreover, Santa Cruz Nissan's location "...is very competitive in terms of convenience to the customers in this market..." as the average drive distance to its dealership is only 8.0 miles. (Exh 200G:4758; IV:97-8) And since its real estate is owned by a family trust, SCN may not face the same leasehold worries that other dealers have with their landlords. Protestant's retained capital gives the Courtrights the financial flexibility to spend in a way to increase sales.

142. However, one of the limitations of Nissan's RSE calculations is its failure to account for intrabrand competition (i.e., competition with other Nissan dealers). Two scenarios negatively impact SCN's sales performance statistics:

A. The net "out commute" to San Jose-Silicon Valley of workers who live in SCN's PMA takes them "over the hill" into the PMA's of five other Nissan dealers. That some of these workers do buy near their work is shown by the cumulative "in-sell" dot map at Exh 200H:4781.

B. At year-end 2012, My Nissan had 439 sales of Nissan vehicles; although most sales were concentrated around its dealership in Salinas, another concentration was in SCN's PMA in Watsonville. (Exh 200H:4765)

143. There is available service business which SCN is not capturing by its failure to be open for service appointments on Saturday. The opportunity for service business is shown by the fact that SCN's two direct competitors in Santa Cruz, Toyota and Honda, are open for service business on Saturdays and

Toyota is also open on Sundays. Other California Nissan dealers have been open for Saturday service business for years. (VIII:116)

144. SCN's "customer pay service sales per UIO" has been trending upward 2009 to 2011 and, even though never reaching the 100% composite group average, the figures have been 65.6% in 2009, 78.4% in 2010 and 88.4% in 2011. (Exh 200C:4717)

145. During DOM visits to the dealership, neither Lee Courtright nor James Courtright challenged the DOM's observations over the years that SCN's sales performance was deficient and, in fact, agreed with the assessment. (II:267)

Findings Related to the Investment Necessarily Made and Obligations Incurred by the Franchisee to Perform Its Part of the Franchise [Section 3061(b)]

146. In 2010, in anticipation of Nissan's launch of the electric vehicle LEAF, protestant reconfigured several service bays for EV's, which also entailed buying special equipment, safety equipment and gear for technicians, as well as training the technicians. (Exhs 25EE, FF and GG)

147. When the LEAF was launched in 2010, protestant installed three EV charging stations, with parking for five or six cars, at a cost of around $30,000, and invested in safety equipment to service the EV. (VIII:348-50)

148. The Internet has changed the way prospective customers approach buying a new vehicle: most have already researched line-makes and models, prices and dealers, and come to a dealership (some traveling 50 or 100 miles) with a lot of information. SCN has recognized this phenomenon and has become more conversant with "digital marketing".[22] Although some, if not all, of the actions taken by the dealership benefit all its line-makes, its impetus and focus is to increase Nissan sales.

149. SCN has improved its internet capabilities by rebuilding its Nissan website and adding a back-up internet employee to more effectively interact online with prospects and existing customers. Since most consumers use the internet before buying a vehicle, lead providers are increasingly important, and SCN has contracts with cars.com, Auto Trader, Edmunds.com, and participates in Nissan's program for third party leads. (II:295, 311-312; XI:31-32; XII:119, 151-155). In 2012, SCN enrolled in the

[22] "Digital marketing" is the "...online presence of a dealership" in order to market themselves online; interact with prospects online or with email; and develop leads, gained on the Internet, into sales." (II:68, 71)

Nissan-supported Cobalt program, which covers four different internet marketing services. (Exhs 9, 10, 12, 209:0024; II:302, 310-313; XII:93-94, 151-155) All SCN sales staff consultants have completed training via Nissan's Virtual Academy and have become "certified". (XII:100-101)

150. After receiving the Notice of Default, the Courtrights "...keyed in on Nissan sales..." and, among other things, "...increased [Nissan] advertising and "...put up more spiff money...to our sales [staff]...". "A spiff is extra money...[paid to] salesmen at the time of a sale usually...in cash...". (II:315-316; XI:49; XII:234-236)

151. Protestant, however, has never explored the possibility of making the dealership into an NREDI-compliant facility, which would require coordination with SCN's other three line-makes.

152. Also, it appears that protestant may not have fulfilled its 2005 promise to Nissan to secure an off-site storage area.

153. Protestant, from the time the dealership facility was built in 1996, has been under Nissan's square footage "guidelines" and has not taken any steps to enlarge the dealership, despite the fact that Nissan, and possibly the three other line-makes, is offering for sale many more models than it did 17 years ago.

Findings Relating to Permanency of Investment [Section 3061(c)]

154. Dealer principal Lee Courtright was appointed a Nissan dealer in 1972, and has operated the store continuously to the present. The current dealership at 1616 Soquel Avenue in Santa Cruz is the third location from which SCN has operated and, with each move, the facility got bigger and better.

155. The amount of the investment in building the dealership in 1996 is unknown.

156. The dealership shares space with three other line-makes: Volkswagen, Dodge and Ram.

157. The dealership real estate includes a 26,509 square foot two-story building with a showroom accommodating up to six vehicles, shared by the four franchises. Land size is 87,200 square feet. The total building and land size is 113,709 square feet. (Exhs 3; 25A, B, L, and N)

158. In addition to the showroom, SCN's building has a customer waiting area with coffee and Wi-Fi available, a children's play area, a parts department with customer counter and storage, a cashier/information window and office, service bays, offices, and displays. With the exception of service bays dedicated to the electric vehicle LEAF, the building is shared by the four franchises. The

premise is clean and functional. (Exhs 25O, P, Q, R, S, T, U, V, W, X, Y, Z, AA, and DD)

159. There are a total of 23 service bays (at 115% above Nissan's guidelines of 20). (JtExhs 1:0070; 3:0020) As noted above, protestant made substantial investments in order to sell and service the electric vehicle LEAF. The Courtrights were very excited about the introduction of the LEAF, anticipating that it would sell very well in the "green" environmentally-conscious Santa Cruz market, which it did. (Exhs 25EE, FF and GG)

160. The building is set back from Soquel Avenue at a distance which allows the display of vehicles for sale on the front lot; the lot extends around the building on three sides. A porte-cochere for service customers is prominently marked, conveniently close to the small offices for four service writers. Four electrical vehicle (EV) charging stations are available 24/7 for use by the general public. There is an enclosed car wash. (Exhs 25C, D, I, J, K, BB and CC)

161. The dealership premise has been upgraded by the addition of the enclosed car wash in the late 1990's, which cost around $100,000, plus the $30,000 for the EV charging stations. (VIII:348-50)

162. The dealership owns an additional parcel of land, with two small buildings, across Soquel Avenue which is used for storage and display of vehicles but is not available to customers. Neither the size of this parcel was established nor was it established whether this parcel was included in the total square footage stated above. (Exhs. 25E, F, G and H)

163. Because of the age of the Dealer Agreement (1989), SCN is exempt from certain facility requirements which Nissan imposes on other dealers arising out of "planning volume" calculations.

164. SCN employs approximately 45 people with a September 2013 payroll of $141,394. (Exh 223:4212). As of the time of the hearing, three of the sales staff were bi-lingual English-Spanish, including a Sales Manager who was hired in August 2013. (VII:38-40)

165. SCN employs between twelve and fifteen service technicians and, of these, seven are specially-trained Nissan mechanics, certified to work on the Nissan LEAF. (Exh 223:4212; XII:173)

166. No remodeling has been done pursuant to the NREDI program. There was no evidence presented that the parties had ever discussed such a remodel program, even though Nissan will approve NREDI construction at a "dualed" Nissan store.

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Findings Relating to Whether it is Injurious or Beneficial to the Public Welfare for the Franchise to be Modified or Replaced or the Business of the Franchisee Disrupted [Section 3061(d)]

167. Santa Cruz Nissan is a valuable contributor to the health, well-being and quality of life of the citizens of Santa Cruz and the environs. The business creates jobs, attracts customers to the area, and ---since the City of Santa Cruz has lost new car dealerships in the past few years---provides a sense of business commitment to the city and to the area. (VI:11-13)

168. In regard to tax revenues, protestant pays approximately $1.6 to $1.7 million in sales tax annually to the City of Santa Cruz, making it one of the top ten sales tax contributors to the City of Santa Cruz. (Exh 15; VI:31; XII:173) These tax revenues help pay for public health and safety services, as well as public works and maintenance of infrastructure. Termination would mean a reduction of tax revenues to the City of Santa Cruz. (VI:10)

169. Santa Cruz Nissan is a family-owned business, with a long history in the community. SCN and the Courtrights are fiscally and socially responsible, the "face" of the Nissan brand in the community.

170. The Courtright family is community-minded, participating in organizations such as Rotary, Little League, and supporting the Seymour Marine Discovery Center. SCN is a "Clean Ocean" business, ensuring that its runoffs do not pollute. (Exh 2; IX: 58-62)

171. Losing the Nissan franchise would diminish SCN's revenue from new vehicle sales, but the dealership would still be able to service Nissans (with possible contractual constraints regarding warranty work) and would still be able to offer the 24/7 EV charging stations to the public.

172. Protestant's used car sales operation would remain in place despite a termination.

173. Although Lee Courtright prophesized that the dealership could not exist without the Nissan franchise, that prediction seems unlikely, given the capitalization of the company.

174. The city's tax revenue from the sales of new Nissan vehicles will be gone if the protest is overruled. However, since the automobile industry has grown and become increasingly complex in recent years[23], it is possible that a four-franchise dealership is simply too challenging an operation to run under

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[23] Respondent made the point that since the 1989 franchise agreement, Nissan had increased the number of its models, as had Dodge, Ram and Volkswagen, and some of the vehicles had increased in size. Developments include the Internet and "alternative" vehicles, not to mention new laws which dealers must know.

one roof, even though it could have been done successfully a decade ago. If Nissan were to be eliminated, the Courtrights' efforts could be focused on selling more Dodge, Ram and Volkswagen vehicles, with commensurate increases in tax revenue to the city.

175. If termination is allowed, it is true that there would be no Nissan dealer in Santa Cruz—at least for a while---with attendant inconvenience to customers and prospective buyers. Termination creates an "open point". However, it appears that Nissan may not be deterred by the lack of vacant or available large parcels in the city, as it states its focus is on the dealer, not the property. (Exh 26:36-38)

Findings Relating to Whether the Franchisee has Adequate Motor Vehicle Sales and Service Facilities, Equipment, Vehicle Parts, and Qualified Service Personnel to Reasonably Provide for the Needs of the Consumers for the Motor Vehicles Handled by the Franchisee and Has Been and Is Rendering Adequate Services to the Public [Section 3061(e)]

176. Protestant's sales and service facilities, equipment, parts department and service personnel are "adequate" to meet the needs of its customers.

177. In the service department, for example, SCN has 19 service stalls and 17 lifts, seven of which are dedicated to Nissan, with one additional lift available to add, if needed. SCN also invested in a special service stall and placed special safety precautions in order for technicians to work on the Nissan LEAF EV's. (IX:14, 17)

178. In regard to the qualifications of service personnel, the dealership employs six service technicians dedicated solely to Nissan, with two of those master technicians. (IX:12-15)

179. However, in one area, protestant is not rendering adequate services to the public. For years, it has failed (and refused suggestions) to be open for service appointments for customers on Saturdays. Moreover, it has not surveyed its customers to discover their preferences in this regard. (VII:50-51, 58; XII:137) The failure to be open for service on Saturdays not only inconveniences (and drives away) existing customers wishing service at a time convenient to their schedules, it also has an adverse effect on potential sales.

Findings Related to Whether the Franchisee Fails to Fulfill the Warranty Obligations of the Franchisor to be Performed by the Franchisee [Section 3061(f)]

180. SCN completes Nissan warranty repairs and there are no warranty repairs that the dealership is not equipped to perform. (XI:22-23)

181. There has never been an instance where the dealership has had to send a customer to another Nissan dealership to receive warranty repairs. (XI:22-23)

Findings Related to the Extent of Franchisee's Failure to Comply With the Terms of the Franchise [Section 3061(g)]

182. Section 6.D of the Dealer Agreement requires dealers to be open "...during hours which are reasonable and convenient for Dealer's customers...and... shall conduct all Dealership Operations ... during such days and hours as automobile dealers' sales and service facilities are customarily and lawfully open in Dealer's Primary Market Area...". (Emphasis added.)

183. As the Toyota and Honda stores in protestant's PMA are "customarily and lawfully" open on Saturdays, it is a violation of the franchise agreement for protestant to fail to be open on Saturdays.

ANALYSIS

The Amount of Business Transacted by the Franchisee, as Compared to the Business Available to the Franchisee [Section 3061(a)]

184. Nissan has not sustained its burden of proof in this regard.

185. There were many problems with Nissan's analysis of dealer performance. Although Nissan's basic calculation was valid (figuring the dealer's sales penetration first, then using the regional segmented data to establish performance), there were other aspects of the process which 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.[24]

186. With specific regard to Santa Cruz Nissan, 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 making the decision to terminate protestant's franchise, Nissan failed to temper the rigid "performance metrics" with

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[24] See the "Competitive Registration Density" map of SCN's PMA in 2012 at JtExh 7:5694 and the "Competitive Segment Dot Map" of SCN's PMA in 2009 at JtExh 8:0327. Both show masses of registration dots, appearing to signify only where people live and not much about what they drive.

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.

187. Between 2009 and 2011, there were lost sales opportunities which Santa Cruz Nissan failed to capture.

188. SCN's 2013 Nissan sales figure of 246 vehicles may be the result of the new marketing and personnel policies put in place at the dealership.

189. However, it is also true that Santa Cruz Nissan is a below-average performer. It clearly lacks competitive "energy". For example, most of the new marketing and personnel policies were suggestions from Nissan representatives such as DOM Tina Novoa and FOM Gary Inman, not generated by the initiative or creativity of the ownership. And often, good marketing suggestions from Nissan representatives (opening for service on Saturdays, advertising to the Hispanic market, hiring bi-lingual sales staff) were either ignored or delayed. It appears that DOM Eric Lewin's assessment was correct: that 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.

The Investment Necessarily Made and Obligations Incurred by the Franchisee to Perform Its Part of the Franchise [Section 3061(b)]

190. Nissan has not sustained its burden of proof in this regard.

191. Protestant has remodeled service bays, installed special equipment, and trained technicians to sell and service the Nissan LEAF. Also, although benefitting all the line-makes which it sells, it has enhanced its digital marketing capabilities.

Permanency of the Investment [Vehicle Code section 3061(c)]

192. Nissan has not sustained its burden of proof in this regard.

193. The permanency of Santa Cruz Nissan's investment is established by the longevity of the family-owned dealership in the City of Santa Cruz since 1972, the loyalty and support it has shown to the City by its investment in the business, and the Courtright family's commitment to the community. It is

solid financially and the premise is clean and functional.

194. However, there has been little upgrading and remodeling of the property over the years and protestant's failure to invest in an NREDI-compliant facility (or to investigate the possibility of doing so) has made it a less effective business.

Whether it is Injurious or Beneficial to the Public Welfare for the Franchise to be Modified or Replaced or the Business of the Franchisee Disrupted [Section 3061(d)]

195. Nissan has not sustained its burden of proof in this regard, as the negative aspects of termination outweigh the beneficial ones. Although it is true that the dealership would survive even if its Nissan franchise were to be terminated, the loss of revenue to the City of Santa Cruz would be considerable.

196. Santa Cruz Nissan has been serving the public from the same location for many years. It is fiscally and socially responsible, characteristics that have great importance in smaller cities.

Findings Relating to Whether the Franchisee has Adequate Motor Vehicle Sales and Service Facilities, Equipment, Vehicle Parts, and Qualified Service Personnel to Reasonably Provide for the Needs of the Consumers for the Motor Vehicles Handled by the Franchisee and Has Been and Is Rendering Adequate Services to the Public [Section 3061(e)]

197. Nissan has not sustained its burden of proof in this regard. Protestant's dealership and its employees, equipment, and parts department are "adequate" to provide for its customers' needs, and its service technicians and their special equipment can provide for the servicing of the Nissan LEAF.

198. However, protestant's failure to be open for service appointments on Saturdays is not providing for the needs of its customers.

Whether the Franchisee Fails to Fulfill the Warranty Obligations of the Franchisor to be Performed by the Franchisee [Section 3061(f)]

199. Nissan has not sustained its burden of proof in this regard. There was no issue raised regarding protestant's fulfillment of its warranty obligations.

The Extent of Franchisee's Failure to Comply With the Terms of the Franchise [Section 3061(g)]

200. Protestant, by failing to be open for service on Saturdays, has not complied with one of the provisions of the Dealer Agreement. However, this is not a great "extent" and respondent has therefore not sustained its burden of proof in this regard.

CONCLUSIONS OF LAW

201. Respondent has not proved that Santa Cruz Nissan failed to transact an appropriate amount of business, as compared to the business available to it. [Section 3061(a)]

202. Respondent has not proved that Santa Cruz Nissan failed to make necessary investments and incurred obligations to perform its part of the franchise. [Section 3061(b)]

203. Respondent has not proved that Santa Cruz Nissan does not have permanency of the investment. [Section 3061(c)]

204. Respondent has not proved that it would be injurious to the public welfare for the franchise to be modified or replaced or the business of the franchisee disrupted. [Section 3061(d)]

205. Respondent has not proved that Santa Cruz Nissan does not have "adequate" facilities, equipment and personnel to provide for the needs of its customers. [Section 3061(e)]

206. Respondent has not proved that Santa Cruz Nissan has failed to fulfill warranty obligations. [Section 3061(f)]

207. Respondent has not proved that Santa Cruz Nissan has failed to comply with the terms of the franchise. [Section 3061(f)]

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PROPOSED DECISION

Based on the evidence presented and the findings herein, IT IS HEREBY ORDERED THAT the Protest in *Santa Cruz Nissan, Inc. dba Santa Cruz Nissan* v. *Nissan North America, Inc.*, Protest No. PR-2358-13, is sustained.

I hereby submit the foregoing which constitutes my Proposed Decision in the above-entitled matter, as the result of a hearing before me, and I recommend this Proposed Decision be adopted as the Decision of the New Motor Vehicle Board.

DATED: July 3, 2014

Diana Woodward Hagle

By: _____
DIANA WOODWARD HAGLE
Administrative Law Judge

Attachments

Jean Shiomoto, Director, DMV
Mary Garcia, Branch Chief,
Occupational Licensing, DMV