

1 LAW OFFICES OF MICHAEL J. FLANAGAN
MICHAEL J. FLANAGAN State Bar #93772
2 GAVIN M. HUGHES State Bar #242119
DANIELLE R. VARE State Bar #277844
3 2277 Fair Oaks Boulevard, Suite 450
Sacramento, CA 95825
4 Telephone: (916) 646-9100
Facsimile: (916) 646 9138
5 E-mail: lawmjf@msn.com

6 ATTORNEYS FOR PROTESTANT

7
8 **STATE OF CALIFORNIA**
9 **NEW MOTOR VEHICLE BOARD**
10

11 In the Matter of the Protest of:

12 SANTA CRUZ NISSAN, INC., dba
13 SANTA CRUZ NISSAN,
14 Protestant,
15 v.
16 NISSAN NORTH AMERICA , INC.,
17 Respondent.
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PROTEST NO: PR-2358-13
**PROTESTANT'S POST-HEARING
OPENING BRIEF**

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1 **INTRODUCTION**

2 Protestant, Santa Cruz Nissan, Inc., dba Santa Cruz Nissan (“SCN” or “Protestant”), has been a
3 franchised Nissan dealer since 1972. Protestant is family owned with deep roots in the Santa Cruz
4 community. Protestant is owned by Jim Courtright and Earnest (“Lee”) Courtright. Respondent,
5 Nissan North America, Inc., (“NNA”) provided Protestant a Notice of Termination (“NOT”), dated
6 January 14, 2013, stating its intention to terminate Protestant’s substantial and permanent, 40-year plus
7 investment. Respondent claims that Protestant’s alleged poor sales performance provides good cause
8 to terminate Protestant.

9 During the relevant time period for the facts and circumstances involved in this Protest, NNA
10 measured Protestant’s sales performance using Regional Sales Effectiveness (“RSE”). Respondent’s
11 RSE formula calculates Nissan’s market share throughout the Western Region, then uses this regional
12 average percent market share as a base line to compare the performance of smaller markets, like
13 Protestant’s Primary Market Area (“PMA”). The Region *average* becomes the *minimum* performance
14 measure that each dealer is expected to meet or exceed. Anything less than the Region average is
15 considered underperformance. For SCN, anything less than Region average is interpreted by NNA to
16 be a fatal breach of franchise compliance. The obvious flaw of this type of analysis is that at any given
17 time approximately half of all dealers in the Region will be shown to be underperforming.

18 The other material failing of Respondent’s use of RSE to measure dealer sales performance is
19 its inability to account for the great variety and differences in existing local circumstances among the
20 different PMAs and markets throughout the Region. When these varying local market conditions are
21 taken into account, they explain why some markets perform above or below the Region average. In
22 the present matter, Nissan has made no effort to consider the local market conditions in the Relevant
23 Market Area (“RMA”) and PMA containing Protestant. NNA’s refusal to consider the local market
24 conditions in the Santa Cruz Market renders its measurement of Protestant’s sales performance
25 unreasonable because the result is not truly reflective of Protestant’s efforts to aggressively market and
26 sell new Nissan vehicles.

27 Respondent bears the burden to demonstrate that its use of RSE to measure Protestant’s sales
28 performance is reasonable (Cal. Veh. Code § 11713.13(g).) Based upon the evidence in the record,

1 Respondent has failed to meet its burden. The record reflects the many local market conditions
2 existing in the Santa Cruz Market that Respondent's RSE analysis fails to account for including, but
3 not limited to the following:

- 4 • RSE fails to account for the strong preference in the Santa Cruz Market for "green
5 vehicles" like hybrids and clean diesel vehicles. Nissan does not offer a hybrid or clean
6 diesel to compete with the offerings of other line makes;
- 7 • RSE fails to account for the fact that Protestant is located in an isolated market with a
8 facing Honda and Toyota dealer. The sales from these two dealers drive up Protestant's
9 expected Nissan sales and the isolation of this market exacerbates the problem;
- 10 • RSE fails to account for the strong out-commute pattern in the Santa Cruz Market where
11 more residents travel outside the area for work than those commuting into the area. This
12 routinely exposes potential Nissan customers to higher volume Nissan dealers and the
13 convenience of shopping at auto malls;
- 14 • RSE fails to account for the high level of in-sell in the Santa Cruz Market. RSE sets
15 Protestant's expected sales in its PMA based upon total registrations, regardless of
16 where sold. As a result, if vehicles are being sold outside of the area but registered in
17 Protestant's PMA, Protestant's sales expectations increase with increased competitive
18 registrations, even when the data shows that local dealers are not making the sales;
- 19 • RSE fails to account for the limitations on Protestant's available inventory as compared
20 to higher volume dealers in the San Jose area. Higher volume dealers can offer
21 customers greater selection and lower prices due to their ability to reach NNA's volume
22 sales incentives;
- 23 • RSE fails to account for the presence of Ocean Honda, which dominates the Santa Cruz
24 Market, even surpassing Toyota, the market share leader in California;
- 25 • RSE fails to account for the fact that NNA's own studies show that dealers operating
26 from Nissan Retail Environmental Design Initiative ("NREDI") compliant and exclusive
27 facilities typically show increased sales over non-NREDI, non-exclusive dealerships.
28 Protestant's facility cannot operate as an exclusive, NREDI compliant dealership

1 because it also operates Volkswagen, Ram and Dodge franchises – an arrangement
2 approved by Respondent;

- 3 • Most troubling, is the fact that Respondent relies upon different RSE data in the NOT
4 and the NOD. Respondent’s error results from its incorrect and undisclosed retroactive
5 application of the larger PMA it assigned to Protestant in May, 2012, which was not in
6 place for much of the time period covered in the NOD.

7 While not an exhaustive list, these are some of the local market conditions and existing
8 circumstances that impact Protestant’s ability to achieve the region based RSE average. The evidence
9 in the record shows the impact each of these existing circumstances has upon Protestant’s RSE
10 measurement. Nevertheless, NNA has provided no evidence to rebut any of Protestant’s claims.

11 In addition to bearing the burden of demonstrating the use of RSE to be a reasonable standard
12 to measure Protestant’s sales performance, Respondent must further demonstrate that Protestant’s
13 alleged substandard RSE performance provides good cause to terminate Protestant’s Nissan franchise
14 in consideration of the good cause factors set forth in Vehicle Code § 3061, as well as existing
15 circumstances. In an effort to meet its burden, Respondent presented evidence concerning just one
16 factor: “The amount of business transacted by the franchisee, as compared to the business available to
17 the franchisee.” Veh. Code § 3061(a).

18 However, Respondent’s entire argument rises and falls upon whether its use of RSE provides a
19 reasonable measurement of Protestant’s actual sales performance. As discussed above, NNA’s use of
20 RSE is not a reasonable measurement of Protestant’s sales performance because it fails to account for
21 the unique local conditions existing within the RMA, Protestant’s PMA and the Santa Cruz Market as
22 a whole. Moreover, even if the Board were to determine RSE to be an appropriate measurement of
23 Protestant’s sales performance, it is but *one* good cause factor to be considered by the Board, with the
24 evidence showing the remaining factors to be demonstrably in Protestant’s favor, and in favor of a
25 decision sustaining this Protest based upon the following:

- 26 • Protestant has made a substantial investment in performing its obligations under the
27 franchise;
- 28 • Protestant’s investment is substantial and permanent. Protestant has been a Nissan dealer

1 for more than 40 years and constructed a new facility from the ground up in 1996;

- 2 •The evidence shows that Respondent will be unable to establish a replacement Nissan
- 3 dealer, which will result in substantial injury to the public welfare;
- 4 •Protestant has more than adequate motor vehicle sales and service facilities, equipment,
- 5 vehicle parts, and qualified service personnel to adequately serve the needs of consumers;
- 6 •Protestant fulfills its warranty obligations;
- 7 •Protestant complies with all requirements under the terms of its franchise agreement.

8 While Respondent claims this Protest is about one issue, NNA’s allegation of Protestant’s
9 inadequate sales performance, the evidence shows this not to be the case. Respondent has a strong
10 desire to see its dealers operating from exclusive and NREDI compliant facilities – Protestant is
11 neither. Nissan conducted two separate market studies, commissioned in 2009 and 2012 respectively.
12 Each study identified a shortfall of Nissan registrations in the market and proposed a likely solution.
13 Both studies resulted in proposed solutions that required the relocation of Santa Cruz Nissan to an
14 exclusive and NREDI compliant facility located near the existing Honda and Toyota dealerships.
15 Despite these two separate market studies, Respondent has refused to acknowledge the fact that its own
16 market studies indicate that Protestant’s current facility and location should not be expected to perform
17 at the Western Region average.

18 Understanding NNA’s strong desire to find a dealer willing to provide it an exclusive and
19 NREDI image compliant facility near Honda and Toyota, Protestant agreed to permit Respondent to
20 find a potential buyer candidate to purchase the Nissan franchise. Protestant preferred to remain a
21 Nissan dealer, but, faced with the option of losing its franchise for no value or receiving a return on its
22 substantial and permanent investment, Protestant chose the latter and provided NNA a “buyer’s assist
23 letter,” authorizing NNA to discuss a possible buy-sell transaction with potential purchasers. As
24 further motivation to provide NNA with the buyer’s assist letter, Nissan’s Eric Rodgers advised
25 Protestant that he had a list of buyers he would provide to Protestant, one at a time.

26 However, despite Mr. Rodger’s representation, Respondent referred a *single* candidate to
27 Protestant: Don Groppetti. Mr. Groppetti is an existing Nissan dealer who had expressed an interest in
28 acquiring another dealership in the Monterey Bay Area. NNA representatives actively explored

1 potential locations for the Nissan franchise with Mr. Groppetti, but both NNA and Mr. Groppetti
2 determined that the construction of an exclusive, NREDI facility at Nissan's preferred location was
3 cost prohibitive. Ultimately, Mr. Groppetti informed NNA and Protestant that he would only be
4 interested in the purchase of the entire property which housed all of Protestant's franchises. Protestant
5 was unwilling to surrender the successful family business it had worked so hard to establish.

6 The evidence in the record demonstrates that the Protest against the proposed termination of
7 Protestant's Nissan franchise should be sustained for the following reasons:

- 8 • Respondent has failed to establish that its use of RSE is a reasonable measurement of
9 Protestant's actual sales performance;
- 10 • In consideration of the good cause factors set forth in Veh. Code § 3061, as well as existing
11 circumstances, good cause does not exist to terminate Protestant's franchise;
- 12 • The proposed termination of Protestant's franchise would result in the unjustifiable
13 forfeiture of Protestant's substantial and permanent 40-year plus investment in its Nissan
14 franchise;
- 15 • The public welfare would suffer from the loss of a longtime, local dealer, who has been
16 providing more than adequate sales, service and parts services to local residents for more
17 than forty years. The public welfare in the City of Santa Cruz would also suffer from the
18 loss of jobs and tax revenue;
- 19 • Respondent would suffer the loss of more than 250 sales per year currently made by
20 Protestant because there is no evidence that a replacement dealer could be established. In
21 fact, the evidence demonstrates that Nissan will be unable to establish a replacement dealer,
22 given NNA's requirement that a replacement dealer provide an exclusive and NREDI
23 compliant facility near the Honda and Toyota franchises;
- 24 • If the proposed termination were permitted, Respondent would also suffer extreme harm to
25 its brand image after abandoning Nissan customers in the Santa Cruz Market and forcing
26 local customers to drive more than 20 miles to reach the nearest Nissan dealership.
27 Moreover, prospective Nissan customers would be less likely to purchase a new Nissan
28 vehicle if a local Nissan dealership were not available to service their vehicles.

1 In considering whether or not good cause exists to terminate Protestant's Nissan franchise, the
2 Board is required to balance the interests of NNA in terminating Protestant's franchise, Protestant's
3 interest in maintaining the franchise and the likely impact to the public welfare should the proposed
4 termination be permitted. (*Piano v. State of California*, 103 Cal. App. 3d 412, 417 (1980).) In
5 balancing these interests, it is plain to see that the proposed termination would irreparably harm
6 Protestant's interests by forcing the forfeiture of its 40-plus year investment, and would unjustifiably
7 result in extreme inconvenience to prospective and existing Nissan customers, while also severely
8 impacting the public welfare through the loss of jobs and tax revenue to the City of Santa Cruz.

9 The only potential benefit to NNA would be the *remote* possibility of establishing an exclusive,
10 NREDI compliant dealership in the Santa Cruz Market, should NNA be able to identify a candidate
11 willing to make the tremendous investment necessary. Despite the evidence that this option has proven
12 to be demonstrably *cost prohibitive*, NNA's Eric Rodgers believes it would be easier to establish a new
13 dealer if the new dealer did not have to purchase the franchise for value from Protestant. In essence,
14 Mr. Rodgers believes that if a prospective dealer candidate, like Mr. Groppetti, did not have to
15 compensate Protestant for its 40-year plus investment in its Nissan franchise, a dealer candidate *could*
16 be more willing to construct an exclusive, NREDI facility in the Santa Cruz Market. Such speculation
17 does not justify the forfeiture that would result to Protestant, or the harm that would result to the public
18 welfare.

19 STANDARD

20 The issue before the Board is whether or not there exists good cause to terminate Protestant's
21 Nissan franchise. In determining whether or not good cause exists, the Board shall consider the
22 existing circumstances, including but not limited to the following, as set forth in Vehicle Code Section
23 3061:

- 24 (a) Amount of business transacted by the franchisee, as compared to the business available to
25 the franchisee.
- 26 (b) Investment necessarily made and obligations incurred by the franchisee to perform its part
27 of the franchise.
- 28 (c) Permanency of the investment.
- (d) Whether it is injurious or beneficial to the public welfare for the franchise to be modified or

1 replaced or the business of the franchisee disrupted.

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

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

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

7
8 In addition, to the extent Respondent argues that Protestant's sales performance is substandard,
9 Respondent is required to demonstrate the reasonableness of its use of regional and state based
10 performance standards, RSE and SSER respectively, to measure Protestant's sales performance in the
11 Santa Cruz Market, pursuant to Vehicle Code Section 11713.13(g), which reads as follows:

12 It is unlawful and a violation of this code for any manufacturer, manufacturer branch,
13 distributor, or distributor branch licensed under this code to do, directly or indirectly
14 through an affiliate, any of the following:

15 (g)(1) Establish or maintain a performance standard, sales objective, or program for
16 measuring a dealer's sales, service, or customer service performance that may
17 materially affect the dealer, including, but not limited to, the dealer's right to payment
under any incentive or reimbursement program or establishment of working capital
requirements, unless both of the following requirements are satisfied:

18 (A) The performance standard, sales objective, or program for measuring dealership
19 sales, service, or customer service performance is reasonable in light of all existing
20 circumstances, including, but not limited to, the following:

21 (i) Demographics in the dealer's area of responsibility.

22 (ii) Geographical and market characteristics in the dealer's area of responsibility.

23 (iii) The availability and allocation of vehicles and parts inventory.

24 (iv) Local and statewide economic circumstances.

25 (v) Historical sales, service, and customer service performance of the line-make within
26 the dealer's area of responsibility, including vehicle brand preferences of consumers in
27 the dealer's area of responsibility.

28 (B) Within 30 days after a request by the dealer, the manufacturer, manufacturer branch,
distributor, distributor branch, or affiliate provides a written summary of the
methodology and data used in establishing the performance standard, sales objective, or
program for measuring dealership sales or service performance. The summary shall be
in detail sufficient to permit the dealer to determine how the standard was established
and applied to the dealer.

1 (2) In any proceeding in which the reasonableness of a performance standard, sales
2 objective, or program for measuring dealership sales, service, or customer service
3 performance is an issue, the manufacturer, manufacturer branch, distributor, distributor
4 branch, or affiliate shall have the burden of proof.

5 (3) As used in this subdivision, "area of responsibility" shall have the same meaning as defined
6 in subdivision (z) of Section 11713.3.

7 ARGUMENT

8 **A. Protestant captures a substantial amount of available Nissan business.**

9 Respondent's use of RSE is not a reasonable measurement of Protestant's capture of the Nissan
10 sales business available to it. Jim Courtright provided testimony concerning the many local
11 circumstances existing in the Santa Cruz Market that cause it to be materially different from the vast
12 majority, if not all, of the other markets comprising the Western Region. Protestant's expert, Edward
13 Stockton, presented his analysis demonstrating how the unique local conditions of the Santa Cruz
14 Market cause Protestant's RSE measurement to fall below the regional average that is the baseline for
15 NNA's RSE measurement.

16 The general shortcomings of RSE appear to be apparent even to Respondent. Respondent has
17 recently abandoned the use of the Regional based RSE in favor of the more localized standard, SSER,
18 which is based upon the state average. (RT Vol. VIII, 300:24-301:1.) Mr. Filiault, Area General
19 Manager, testified that not all states in the Region perform at the same level due to a multitude of
20 reasons, dealer performance and competitiveness from other dealers being the two main causes. But
21 when asked if market conditions also play a role, he did not refute the fact that market differences also
22 are a factor. (RT Vol. VII, 303:7-21.) Common sense dictates that not all markets are identical and
23 they should not all be expected to perform the same. The Santa Cruz Market is a poignant example of
24 this reality, where the Honda dealership captures a greater market share than Honda does throughout
25 the State of California.

26 In addition, California as a whole outperforms the Region. Is this because California has better
27 dealers than the Region? Southern California outperforms Northern California. Is it also the case that
28 Southern California dealers are better than Northern California dealers? Mr. Filiault testified that in
his experience Northern California dealers do not outperform the Region. Does that mean that the
Region has better dealers than Northern California? (RT Vol. XII, 308:8-310:25.) This illustrates the

1 fact that, as the comparison area changes, so do the results. Moreover, the “multitude” of differences
2 in markets throughout California and the Region are certain to result in different levels of performance,
3 regardless of the standard of measurement used.

4 Another important fact that cannot be ignored by the Board is Respondent’s incorrect RSE
5 figures in the NOT and the NOD. Respondent’s error is due to its use of the larger PMA assigned to
6 Protestant effective May 16, 2012, and the undisclosed retroactive application of the larger PMA,
7 which was not in place for much of the time period covered in the NOD. (RT Vol. 9 100:14-119:28;
8 Ex. 21, Tabs 2 and 3.)

9 **1. Respondent’s use of RSE to measure Protestant’s sales performance is unreasonable.**

10 Respondent’s RSE analysis is an unreasonable measurement of Protestant’s actual sales
11 performance compared to the sales business available to it and it is not a meaningful reflection of
12 Protestant’s efforts to capture available sales business. This analysis fails to account for existing local
13 conditions that impact Protestant’s ability to meet or exceed the Region based average. In this Protest,
14 RSE fails to account for the high level of out-commute for Santa Cruz area residents, the fact that
15 Protestant does not operate from an exclusive, image compliant facility, the local market preference for
16 vehicles Nissan does not offer and the presence of Ocean Honda, whose market share in the Santa Cruz
17 market far exceeds the California average. Each of these factors, when considered, demonstrate why
18 Protestant should not be expected to achieve 100% of the Region average.

19 Protestant’s expert, Edward Stockton, presented his analysis concerning the inherent flaws of
20 the Respondent’s RSE measurement of dealer sales performance. Mr. Stockton also specifically
21 examined how the local market conditions in the Santa Cruz Market explain why average quality sales
22 performance by Protestant would not result in 100% RSE. These factors, which are outside of dealer
23 control, indicate why it is unreasonable to expect Protestant to achieve 100% RSE as a condition of
24 franchise compliance in regard to sales. In response, Respondent offered the testimony and analysis of
25 its expert, John Frith, of Urban Science. Mr. Frith argued that RSE accounts for local market
26 conditions and provides an accurate measurement of a dealership’s sales performance. However, even
27 Mr. Frith did not attempt to justify why the Region average RSE should be the bar for SCN’s franchise
28 compliance while it is not for other Nissan dealerships. Mr. Stockton’s analysis is entitled to greater

1 weight than Mr. Frith's. Even Mr. Frith concedes that he found nothing in Mr. Stockton's original
2 report to rebut. (RT Vol. 10, 109:17-110:3.)

3 **i. There is a substantial out-commute pattern in the geographically isolated Santa Cruz**
4 **Market as evidenced by the large percentage of in-sell for all line-makes, which results in**
5 **a "sales" bias in the Santa Cruz Market.**

6 A "sales" bias exists when characteristics in the dealership's location or market, that are
7 beyond the dealership's control, affect sales volume relative to the market (even if no "brand bias"
8 exists) differently than dealerships in the markets against which the subject dealership is compared.
9 (RT Vol. 9, 174:9-174:12.) There are several unique existing local conditions in the Santa Cruz
10 market that result in a "sales" bias.

11 The Santa Cruz Market area exhibits a high level of in-sell, meaning more customers are
12 purchasing vehicles outside of their local market area than is seen in most other markets. This is due in
13 large part to the net out-commute pattern, whereby more residents are commuting for work to areas
14 outside of the Santa Cruz market than those workers commuting in. Given this condition it should be
15 expected that Protestant will have greater difficulty in capturing available sales opportunities within its
16 own market than the typical Nissan dealer in the Region. Mr. Bernal, the City of Santa Cruz City
17 Manager, confirmed that Santa Cruz is a net exporter in terms of residents commuting out of Santa
18 Cruz for work compared to those commuting in to Santa Cruz for work. (RT Vol. VI, 32:21-25.)

19 Gary Inman, Nissan's Fixed Operations Manager ("FOM") for Protestant acknowledges this
20 fact as well. While he has observed other markets with a net out-commute pattern, he has not observed
21 a market similar to Santa Cruz where it is geographically isolated between mountains and ocean. (RT
22 Vol. 8, 122:6-123:7.)

23 Mr. Stockton analyzed the pronounced out-commute tendency of the Santa Cruz market
24 working population to determine its impact upon Protestant's ability to achieve RSE. Approximately
25 1.5 workers leave Santa Cruz for work compared to each worker who resides outside of the market but
26 works in Santa Cruz. This means that SCN loses some of its convenience advantage with those
27 workers who leave the market. Protestant does not recapture that opportunity with a corresponding
28 number of in-commuters. (RT Vol. 9, 142:5-143:1 and Ex. 21, Tab 5:3R.) The use of RSE does not

1 account for this local market condition.

2 Mr. Stockton also considered the fact that the Santa Cruz Market area is geographically
3 isolated. Protestant is located very near the ocean, which means that SCN can only sell within 180
4 degrees from the dealership, as opposed to 360 degrees. Geometrically, this means that SCN must
5 reach farther to sell to customers than competing Nissan dealerships. SCN's potential customers are so
6 dispersed that the number of potential customers around SCN does not reach 100% of the RSE
7 requirement until the ring 14-16 miles around the dealership. This is well out of line with most other
8 Nissan dealers, some of which have such densely populated potential customers that they reach the
9 100% RSE level within 4-6 miles of the dealership. (RT Vol. 9, 136:21 – 139:22, Ex. 21, Tab 6:2R-
10 3R.) A more dispersed customer base requires that SCN sell to customers farther away from the
11 dealership than its competitors. Marketing effectiveness declines as distance from the dealership
12 increases (*Id.*)

13 The conditions, described as “sales” biases by Mr. Stockton, affecting Protestant are clearly
14 apparent throughout the Santa Cruz Market. In total, sales anywhere by Santa Cruz dealers are only
15 approximately 71% of the registrations by those brands in the areas closest to those dealerships. If
16 RSE were a valid measure, one would expect this figure to be approximately 100%. (RT Vol. 9 201:24
17 – 203:3, 202:8-202:25, and Ex. 22, Tab 3R.) This does not imply that approximately 30% of all new
18 vehicles registered in this market are sold outside of the market. Instead, it means that Santa Cruz
19 dealers' sales in the market *plus* their sales outside the market equal only approximately 71% of
20 registrations in the market. This net outflow of automotive customers from Santa Cruz is so
21 pronounced that every single brand has a net pump-in condition. Many more local residents leave the
22 market to buy vehicles than the number of customers from outside Santa Cruz who come into the
23 market to buy their vehicles (*Id.*)

24 Despite this demonstrable market condition, Respondent continues to base Protestant's
25 expected sales by the local registrations sold outside of the market. This is a local market condition
26 RSE fails to account for and yet another reason why Respondent's use of RSE is unreasonable.

27 If RSE were a valid measure, there would be no “sales” biases affecting dealer sales.
28 Therefore, there would be approximately a 50% chance that any given brand would be net pump-in or

1 net pump-out. Since all 14 brands in the Santa Cruz Market are net pump-in, this is analogous to
2 flipping a coin and having it come up heads 14 straight times. The chance of this is so remote that the
3 much more reasonable conclusion is that RSE is not an adequate measure because it doesn't take into
4 account the local marketing conditions in Santa Cruz. (*Id.*; RT Vol. 9 201:24-202:7.)

5 In addition, RSE also assumes there are no flow-of-trade issues that affect sales patterns. In
6 other words, it assumes that customers have no reason to favor shopping in certain parts of the market
7 over other parts of the market. Mr. Stockton explained his use of the Gravity Model theory and the
8 reasons why it is a much more realistic in terms of assessing market behavior. It does not assume that
9 maximal proximity is the only factor that conveys a marketing advantage to a dealership. Rather, it
10 acknowledges that proximity is a relative advantage held to some degree by many dealerships. (RT
11 Vol. 9 187:23-188:12.) The Gravity Model also considers the strength of the draw or pull of a certain
12 area. If a customer is half-way between two markets, this does not mean that the customer is equally
13 likely to shop in either market. The attractiveness of the markets affects the tendency of customers to
14 choose one shopping location or another. (RT Vol. 9 188:3-191:16.)

15 The out-commute condition for workers, outgoing flow-of-trade in non-automotive retail and
16 strong outgoing flow of trade in the Santa Cruz automotive market indicate that customers consider
17 Santa Cruz to have a small "mass," meaning that customers will make fewer purchases in Santa Cruz
18 despite the shorter distance to Santa Cruz. This is a much more realistic assessment of market
19 conditions in Santa Cruz than that provided by Respondent RSE analysis. (RT Vol. 9 192:23-197:3.)
20 This helps explain why customers are more likely to shop outside of the Santa Cruz Market than would
21 be observed in other markets.

22 **ii. The Santa Cruz Market also exhibits certain "brand" biases.**

23 A "brand" bias exists when characteristics outside of the control of the dealership lead to
24 different acceptance of the brand or product in the market under consideration compared to the
25 acceptance of the brand in the benchmark area against which the local market is compared. The Santa
26 Cruz Market demonstrates a "brand" bias with respect to Nissan products. This "brand bias" is driven
27 by variation in demographic characteristics in Santa Cruz. A regression analysis that considers the
28 Western Contiguous PMAs demonstrates that the approximate effect of the "brand" bias is 18%. As

1 Mr. Stockton explained at the hearing, his regression analysis is statistically significant to a very high
2 degree. (RT Vol. 9, 159:10 – 168:5 and Protestant’s Ex. 21 Tab 8R, pp. 1-2.) What this means is that
3 the demographic factors analyzed by Mr. Stockton show that the Nissan brand should be expected to
4 perform at 18% below the Regional average.

5 Mr. Stockton’s analysis of income, age, and educational levels of the population in the Santa
6 Cruz Market illustrates the effect of the tendency of customers to migrate between products within
7 Nissan’s competitive segments (*Id.*) The segmentation analysis used in RSE cannot assess these
8 effects because taking a single average across entire product segments is mathematically incapable of
9 accounting for factors that affect market share within the product segment. In other words, not only
10 can RSE not answer questions about brand bias, it is mathematically incapable of even asking the
11 question. (RT Vol. 9, 157:12 – 158:6.)

12 **iii. Respondent admits Protestant’s facility is adequate, but it also acknowledges**
13 **Protestant would capture mores sales from an exclusive and NREDI compliant facility**
14 **located near the Honda or Toyota dealerships.**

15 Protestant has been operating from its dualed facility since it was first constructed in 1996 with
16 Respondent’s approval. Respondent concedes that if Protestant were to operate from an exclusive
17 facility it would be more competitive in its ability to capture available sales. (RT Vol. 8, 279:13-25;
18 RT Vol. 2, 40:5-16.) Moreover, Respondent reviews studies created by USAI (Urban Science) that
19 quantify the average increased RSE performance of NREDI dealers compared to non-NREDI Nissan
20 dealers. (Ex. 11.) Of these reports, each shows NREDI dealers to have higher RSE scores.

21 However, despite this acknowledgment, Respondent’s use of RSE fails to account for the fact
22 that Protestant does not operate from an exclusive facility, while the dominant dealerships, Honda and
23 Toyota, do. This is another example of an existing local condition that the use of RSE fails to account
24 for in measuring Protestant’s actual sales performance. Similarly, Nissan dealers operating from
25 NREDI, image compliant facilities also enjoy a competitive advantage in capturing available sales
26 business. (RT Vol. 8, 280:1-13.) As with exclusivity, this factor is also ignored in Respondent’s RSE
27 calculation.

28 In addition, Respondent further acknowledges that Protestant would be more competitive in

1 capturing available new vehicle sales if it were located near the Honda and Toyota dealerships. (RT
2 Vol. VIII, 281:9-17.) The fact that Protestant is not located near the Honda and Toyota dealerships is
3 another local market condition Respondent's RSE formula does not take into account.

4 **iv. Respondent's RSE analysis measures sales performance against types of vehicles that**
5 **Nissan doesn't offer.**

6 The evidence in the record reflects that the Santa Cruz Market exhibits a strong preference for
7 so called "green" vehicles, which would include hybrids, electrics and clean diesels – Nissan does not
8 offer hybrids and clean diesels. This strong local preference is illustrated by the fact that Protestant's
9 RSE for the Leaf vehicle alone is in excess of 150%, while its combined RSE performance in the
10 subcompact segment is just 41.9%. However, when Respondent calculates expected sales for
11 Protestant across the subcompact segment it includes registrations of Hybrid vehicles and clean diesels,
12 despite the fact that Nissan does not produce a hybrid or clean diesel vehicle. (RT Vol. 9, 73:25-74:3;
13 RT Vol. 11, 10:23-13:10; Ex. 200, P. A10). Respondent's RSE analysis can hardly be considered
14 reasonable when it measures Protestant's expected sales against registrations of the type of vehicles it
15 *does not even offer* – you can't sell apples to customers looking for oranges.

16 While Nissan does offer the electric Leaf, there are a number of reasons why the Leaf cannot
17 effectively compete with the many hybrid vehicles on the market. Most importantly, the Leaf's range
18 is limited to between 70 and 90 miles, while a hybrid vehicle's range is only limited by the number of
19 gas stations between destinations, just like conventional vehicles. (RT Vol. 11, 15:2-15.) Protestant
20 expressed its concerns over its inability to sell vehicles that were competitive with the Toyota Prius.
21 Ms. Novoa backed out Prius registrations and saw that Protestant's RSE performance did in fact
22 increase. Ms. Novoa explained this did not erase the entire deficiency, but this is not surprising given
23 the fact that the Prius is not the only hybrid offering in the market. In a contact dated April, 23, 2012,
24 Ms. Novoa told Protestant that it would need to sell an additional 17 vehicles per month to be
25 competitive with Toyota. This number was reduced by more than 50% to 8 after Ms. Novoa backed
26 out the Prius registrations. Had Ms. Novoa revised Protestant's RSE calculation to exclude all hybrid
27 vehicle registrations, Protestant would have been significantly closer to achieving 100% RSE. (RT
28 Vol. 2, 263:12-265:24; Ex. 209, NNA 28.)

1 The local market demand for hybrid vehicles in the Santa Cruz Market is undeniable. It is also
2 true that Nissan has never offered a hybrid vehicle that could effectively compete with the Toyota
3 Prius and hybrids offered by Honda, Ford and others. (RT Vol. 4, 232:21-233:5; Vol. 7, 144:3-5.) This
4 existing local market condition is not considered in Respondent's RSE measurement of dealer
5 performance.

6 **v. Respondent's retroactive application of Protestant's larger PMA to measure its**
7 **performance during a time period when it was assigned a smaller PMA is misleading.**

8 NNA relies upon incorrect RSE figures in the NOT and the NOD. NNA's error results from its
9 incorrect and undisclosed retroactive application of the larger PMA, which was not in place for much
10 of the time period covered in the NOD. (RT Vol. 9 100:14-119:28; and Ex. 21, Tabs 2 and 3.)

11 Respondent assigned Protestant a larger PMA on May 3, 2012, effective May 16, 2012,
12 increasing the number of census tract assigned to Protestant from 39 to 51. (Ex. J1, NNA 086 and
13 NNA 0600; RT Vol. 2, 215:20-25.) As a result of this increase, Protestant was now held accountable
14 for the competitive registrations in the additional census tracts assigned to it. (RT Vol. 2, 212:25-
15 213:3.) Thus, Protestant's RSE performance showed an instant decline because it was now being
16 measured by a larger number of registrations. When Respondent issued the NOT to Protestant, it
17 retroactively applied the larger PMA for time periods when Protestant was not responsible for the
18 newly included census tracts and the registrations therein. (RT Vol. 9, 100:14-119:28; and Ex. 21, Tabs
19 2 and 3.) The retroactive application of Protestant's revised PMA is not reasonable.

20 **2. Respondent's claims of management or operational deficiencies are unfounded.**

21 Respondent's witnesses argue that Protestant's inability to achieve 100% RSE must be due to
22 the failings of the dealership's Executive Manager ("EM"), James ("Jim") Courtright. While each
23 NNA witness was certain that Protestant's RSE performance was due to the failings of Jim Courtright
24 as a manager, or in the alternative his unwillingness to implement their suggestions, no Nissan witness
25 was able to point to any specific instance or example. Instead, Respondent argues that because RSE is
26 below 100%, Jim Courtright's management must be to blame. There is no testimony in the record that
27 identifies what Protestant should have done differently to achieve 100% RSE performance.

28 Jim Courtright is well qualified to operate a Nissan dealership. Jim Courtright has a Bachelor

1 of Science Degree in Managerial Economics from UC Davis and a Masters of Business Administration
2 from Santa Clara University. (RT Vol. 8, 339:13-21.) He also has worked full time in the automotive
3 industry for more than 20 years. (RT Vol. 8, 339:5-7.) There can be little doubt that Jim Courtright is
4 well qualified to perform his duties as the EM for Protestant.

5 **i. Jim Courtright actively took steps to improve Protestant's Nissan sales performance.**

6 The evidence in the record demonstrates the many efforts Jim Courtright made to improve
7 Protestant's Nissan sales performance. Jim Courtright testified extensively concerning the many
8 changes he has implemented at the dealership in an effort to improve Nissan sales, which include
9 increasing advertising expenditures, investing in the development and expansion of Protestant's
10 internet department, adjusting sales staff pay plans and advertising in Spanish media.

11 **a. Jim Courtright implemented every reasonable suggestion Nissan representatives**
12 **offered.**

13 Respondent has made many suggestions to Protestant over the years concerning ways to
14 improve sales at the dealership. The record reflects that Protestant implemented the vast majority of
15 these recommendations. Even Respondent's witnesses acknowledged the many instances where Jim
16 Courtright implemented the vast majority of their recommendations.

17 For example, Nissan representatives informed Protestant that it should increase its internet
18 marketing and sales department. In response, Protestant devoted a considerable amount of time and
19 resources in expanding its internet department including, but not limited to, hiring more staff to reduce
20 internet lead response times, enrolling in the Cobalt lead management program, reworking and
21 constantly updating its internet site, subscribing to third party lead management providers and also
22 engaging a third party to provide email marketing to the customers in Protestant's customer database.
23 (RT Vol. XI, 31:7-32:24.)

24 Protestant's lead management currently results in a response time to internet leads that is faster
25 than, and well below, the regional average. (RT Vol. 11, 38:2-42:20; Ex. 9, NNA 4445; Ex. 10, NNA
26 4465; Ex. 12, NNA 4613-4614.) Protestant has been successful in reducing its response time as a
27 result of its investment in hiring additional staff to ensure an internet lead manager is available during
28 regular hours of operation. Protestant has also invested in updated Customer Relationship

1 Management software. (RT Vol. 11, 42:21-44:2.)

2 Protestant has increased advertising expenditures as is reflected in the November 22, 2011,
3 contact report between Protestant and Ms. Novoa. One of Ms. Novoa's primary recommendations for
4 improving Protestant's RSE was to increase advertising expenditures, which the dealership did by at
5 least \$10,000 per month, and perhaps more, beyond Ms. Novoa's knowledge. (Ex. J11; RT Vol. 2,
6 308:1-17; Ex. 209, NNA 1023.) In addition, Protestant has recently begun advertising on Spanish
7 radio, TV and internet at a cost of \$2,000 per month. (RT Vol. 11, 47:20-48:17.)

8 While Jim Courtright consistently implemented any reasonable suggestion provided by
9 Respondent, some suggestions were rejected out of sound business judgment. Protestant declined the
10 suggestion that it create a Facebook Page for the dealership and join LinkedIn because their
11 effectiveness is questionable and there are inherent risks involved. Moreover, Protestant's
12 considerable expenditures towards advertising and its internet department exceed any potential benefits
13 that might result from employing social media sites like Facebook and LinkedIn. (RT Vol. XI, 44:3-
14 17.)

15 On other occasions Respondent suggested Protestant increase its advertising expenditures in the
16 San Jose Market area. (RT Vol. 11, 44:18-45:15.) There is little surprise that Protestant determined
17 this not a prudent use of its resources. The Santa Cruz Market is a geographically isolated market and
18 it is extremely unlikely that a San Jose area resident would choose to travel to Santa Cruz to purchase a
19 Nissan vehicle with so many local options available to these customers.

20 Protestant also rejected the suggestion that it provide exclusive salespeople at the dealership.
21 Again, this would not have been a cost effective and sound business decision. But Protestant did take
22 steps to incentivize its sales staff to sell more Nissan vehicle by adjusting the pay plans to provide
23 larger commissions on Nissan sales. (RT Vol. 11, 18-50:12.) Ms. Novoa testified that the development
24 of this strategy to increase Nissan sales was a collaborative effort between Jim Courtright and herself.
25 (RT Vol. 2, 315:8-316:1.)

26 Protestant also rejected Respondent's suggestion that it provide Saturday service hours. This
27 will be discussed in more detail below, but again, Protestant's decision was based upon sound business
28 judgment. Namely, the available Nissan service business did not justify the expense of offering

1 Saturday service. Only the Honda and Toyota dealerships offer Saturday service in the Santa Cruz
2 Market. In addition to Protestant's Volkswagen, Nissan, Ram and Dodge franchises, neither Ford, Kia,
3 Subaru or Mazda provide Saturday service. The Units in Operation ("UIO") counts for Toyota and
4 Honda are significantly higher than these brands, thus, there is significantly more service business
5 available to the Honda and Toyota dealers.

6 Mr. Courtright testified that Protestant had at one time provided Saturday service, but it proved
7 to be unprofitable. However, Protestant is preparing to once again implement Saturday service in the
8 spring of 2014, with the hope that service demand in the market has increased to a point where
9 Saturday service can be profitable. (RT Vol. 12, 148:10-150:17.)

10 **B. Protestant has made a substantial investment to perform its duties and obligations under**
11 **its Nissan franchise agreement.**

12 The evidence in the record shows the substantial investment it has made over the course of
13 more than 40 years. Protestant operates from a facility it constructed from the ground up in 1996. The
14 dealership has adequate sales, service and parts staff and has invested considerable time and expense in
15 insuring that Protestant's employees are well trained to meet the needs of Nissan customers. The
16 termination of Protestant would result in the unjustified forfeiture of Protestant's Nissan franchise and
17 its substantial and permanent investment.

18 Protestant's current facility was constructed in 1996 at considerable expense. Within a couple
19 years of completing construction, Protestant also added a car wash at a cost in excess of \$100,000. (RT
20 Vol. 13, 347:8-348:2.) Every service customer receives a free car wash. When Nissan introduced the
21 Leaf in 2010, Protestant invested an additional \$30,000 plus in charging stations, special tools and
22 other equipment required to sell and service the Nissan Leaf. (RT Vol. 13, 348:3-350:12.)

23 Respondent's argument for why this forfeiture is necessary appears to boil down to this: Nissan
24 wants to establish an exclusive, NREDI image compliant facility nearer to the Honda and Toyota
25 dealerships. This will require a tremendous investment that it has thus far been unable to persuade a
26 dealer candidate to make. Therefore, the forfeiture of Protestant's Nissan franchise is necessary
27 because, in Respondent's view, as Mr. Rodgers testified, it would be easier to establish a Nissan dealer
28 in the Santa Cruz Market if the new dealer did not have to pay Protestant the fair market value for its

1 existing franchise. (RT Vol. 1, 178:5-179:6.) This cannot be considered good cause to terminate
2 Protestant.

3 **1. Respondent has identified Don Groppetti as its preferred candidate to become the**
4 **Santa Cruz Nissan Dealer.**

5 The evidence in the record reflects the substantial efforts Nissan undertook to establish Mr.
6 Groppetti as the Nissan dealer in Santa Cruz Market. These include securing the buyer's assist letter
7 from Protestant, assisting Mr. Groppetti in his search for available property by personally driving the
8 market with Mr. Groppetti (without advising or inviting the Courtrights) and ultimately attempting to
9 leverage Protestant into agreeing to sell its entire dealership operations under threat of termination.
10 (Ex. 212, NNA 05666.)

11 Mr. Rodgers can't say when he first met Mr. Groppetti or when he first learned of Mr.
12 Groppetti's interest in purchasing another Nissan dealership in the Monterey Bay area. However, the
13 record reflects the fact that Mr. Rodgers came into his position in April of 2010 and he met Mr.
14 Groppetti sometime prior to this. The record further reflects that Mr. Rodgers asked Protestant if it had
15 any interest in selling its Nissan franchise in December, 2010. (RT Vol. II, 60:14-62:14.)

16 Mr. Filiault testified that in October, 2012, he drove the Santa Cruz Market with Mr. Groppetti
17 in search of available properties that might be suitable to establish an exclusive Nissan franchise. Mr.
18 Filiault also confirmed that Respondent enlisted the services of its internal real estate vendor, CBRE,
19 in its attempts to identify potential properties. Neither the fact that Mr. Filiault was driving the market
20 with Mr. Groppetti, nor the real estate information received from CBRE, were ever disclosed to
21 Protestant, despite the fact that Protestant was the proposed seller of the Nissan franchise, is a fact that
22 ALJ Hagle appears to have found to be "odd in the extreme." (RT Vol. 13, 204:6-222:20.) While
23 Respondent does not see its extensive interaction with Mr. Groppetti as out of the ordinary, Protestant
24 submitted a buyer's assist letter with assurances that multiple buyer candidates would be provided to it.
25 Instead, Respondent devoted its efforts to assisting a single potential buyer find property without any
26 discussion or involvement by the Protestant. Regardless of how you couch it, the evidence shows that
27 Respondent's primary concern was establishing Mr. Groppetti as the Santa Cruz area Nissan dealer –
28 not facilitating a buy-sell for Protestant.

1 After Respondent exhausted its efforts to locate property for the Nissan franchise, it was
2 determined that available property in the Santa Cruz market for the establishment of an exclusive,
3 stand-alone Nissan dealership was cost prohibitive. (RT Vol. 1, 179:14-180:18.) When Mr. Groppetti
4 informed Respondent that it would be cost prohibitive to purchase property and construct an exclusive,
5 NREDI compliant facility in the Santa Cruz Market, Respondent informed Protestant that it should
6 reach a deal to sell its entire operations and property to Mr. Groppetti before Respondent issued a
7 NOT, which might prevent Protestant from selling its Nissan franchise. (Ex. 212, NNA 05666.)

8 Something the Board should not lose sight of is the fact that it should be assumed Mr. Groppetti
9 was aware Protestant was attempting to sell its franchise under threat of termination. Moreover, the
10 evidence in the record shows that if Protestant is terminated, Respondent would attempt to find a
11 qualified replacement dealer as soon as possible – Respondent has already identified that replacement
12 dealer candidate to be Mr. Groppetti. (RT Vol. 8, 290:5-293:6.) The termination of Protestant would
13 permit Respondent to establish Mr. Groppetti as its Santa Cruz area Nissan dealer, without Mr.
14 Groppetti having to pay the fair market value to Protestant, which Respondent admits would make it
15 easier to replace Protestant. (RT Vol. 1, 178:5-179:6.)

16 At the December 12, 2012, meeting with Protestant, Mr. Rodgers made it very clear that if
17 Protestant did not reach an agreement on a possible sale to Mr. Groppetti before a NOT was issued,
18 Protestant might be prohibited from selling its Nissan franchise. (Ex. 212, NNA 05666.) Mr. Rodgers
19 *could* have recommended that a second extension to the Notice of Default (“NOD”) be issued, but
20 instead, upon learning that Protestant was not willing to sell its facility to *Mr. Groppetti*, Mr. Rodgers
21 recommended that Respondent proceed with the issuance of the NOT to Protestant. (RT Vol.1, 198:23-
22 200:3.) If Respondent was interested in facilitating a buy-sell for Protestant it would have taken more
23 time to find another buyer – it did not. Mr. Groppetti was, and is, the only candidate Nissan ever
24 intended to establish in the Santa Cruz Market.

25 As an inducement to Protestant’s agreement to provide Respondent with a buyer’s assist letter,
26 Mr. Rodgers promised Protestant he had a list of potential buyers that he would send to the Protestant
27 one at a time. The evidence in the record reflects the fact that respondent only sent one – Mr.
28 Groppetti. (RT Vol. 9, 49:11-50:17.)

1 **C. Protestant's investment in its Nissan franchise is permanent.**

2 Protestant has been a Nissan franchisee since 1972 in the Santa Cruz Market. It has cultivated
3 generations of relationships with Nissan customers for sales, service and parts business. The 40-plus
4 years of "good will" Protestant has established in the Santa Cruz Market is substantial and permanent.
5 While Protestant was willing to sell its franchise to avoid the forfeiture of its long-time investment, it
6 would prefer to remain a Nissan dealer – it's the family business. (RT Vol. 9, 45:17-46:4.)

7 Protestant's current facility was constructed from the ground up by Protestant in 1996. The
8 property and building are for the dedicated use as an automotive dealership. Sometime in the late
9 1990's, Protestant also constructed a car wash at a cost in excess of \$100,000. (RT Vol. 8, 347:8-
10 348:2.)

11 In addition to Protestant's substantial and permanent investment in its property and the
12 construction of its facility, Protestant has developed "good will" within the local community during the
13 past forty-plus years. "Good will" is an intangible asset and is not something that can be sold for value
14 if Protestant were terminated.

15 **D. The termination of Protestant's Nissan franchise would have a number of injurious**
16 **consequences to the public welfare with zero offsetting benefits.**

17 The evidence in the record details the many adverse consequences to the public welfare that
18 would occur should Protestant's Nissan franchise be terminated. The adverse impact to the public
19 welfare includes, but is not limited to, substantial inconvenience to the Nissan customers, the loss of
20 sales tax revenue to the City of Santa Cruz, the loss of jobs and a reduction of Protestant's community
21 involvement and charitable activities. (RT Vol. 6, 10:16-23; 24:6-20; Vol. 9, 63:6-22; Vol. 12, 81:12-
22 82:9.)

23 **1. Customers would be greatly inconvenienced by having to travel approximately 20**
24 **miles to reach the nearest authorized Nissan dealership.**

25 The termination of Protestant's Nissan franchise would result in a substantial and material
26 inconvenience for customers located in the RMA and surrounding areas. Currently the average
27 distance between Nissan dealerships is 6.6 air miles or 8.6 drive distance miles and drive time is 12.7
28 minutes. (Ex. 21, Tab 11, P. 2.) The next closest Nissan dealerships are located in West San Jose,

1 Redwood City, Gilroy and Salinas. Each of these dealerships is in excess of 20 air miles from
2 Protestant's current location. (Ex. 21, Tab 4, P. 50.) Should Protestant be terminated, the average air
3 mile distance would increase to 17.4 miles, the average drive distance would increase to 25.4 miles,
4 and drive time to 33.6 minutes. There is little doubt that the resulting decrease in customer
5 convenience would have an adverse impact on the public welfare.

6 Respondent argues that a replacement Nissan dealer would be established and this would avoid
7 the potential impact to Nissan customers. However, the evidence in the record reflects the fact that if
8 Protestant is terminated, there are many significant obstacles to the establishment of a replacement
9 dealer. Respondent has already asked three different dealer candidates if they would be willing to
10 make the investment necessary to establish an exclusive, NREDI compliant Nissan dealership near the
11 Honda and Toyota dealers in the Santa Cruz Market – each has declined.

12 The limited available property in the market that would be suitable to construct an exclusive,
13 NREDI compliant Nissan franchise and its prohibitive cost and expense make it certain that there will
14 be no replacement Nissan franchise any time soon. As Chad Filiault testified in his deposition, and
15 again at the hearing, Nissan has exhausted all opportunities to find available properties suitable to
16 establish a new Nissan dealership. (RT Vol. 8, 270:6-273:23.)

17 **i. A replacement dealer would be required to be exclusive.**

18 Nissan's policy requires that dealers in a market with a planning volume over 400 units per
19 year must operate from an exclusive facility. (RT Vol. 8, 272:24-275:15.) While it is possible that
20 Nissan could ignore its policy and approve a dual Nissan dealership, there is no credible evidence in
21 the record to suggest this is a realistic possibility. Moreover, Nissan's two separate Market Studies,
22 conducted in 2009-2010 and 2012-2013, each concluded that a Nissan dealership in this market should
23 be exclusive. (Exs. J7, J8 and J9; RT Vol. 8, 275:16-279:12.) Similar to Nissan's planning volume
24 policy, there is no credible evidence in the record that demonstrates Nissan might choose to ignore
25 these Market Study recommendations and approve a dual.

26 Respondent's clear desire to establish an exclusive Nissan dealership in the Santa Cruz Market,
27 and the many obstacles to doing so, leave little doubt that, should Protestant be terminated, the
28 residents of this geographically isolated market will be without an authorized Nissan dealership

1 indefinitely.

2 **2. The City of Santa Cruz would lose one of its largest contributors to its tax base.**

3 Mr. Bernal, the Santa Cruz City Manager, testified that Protestant is a major tax revenue source
4 for the city, a good community business and a provider of jobs, all of which the City of Santa Cruz has
5 a strong interest in maintaining. Of particular concern to the City is the potential loss of revenue to the
6 general fund that might adversely impact the city's ability to pay for public safety services and other
7 general fund services. (RT Vol. 6, 23:10-24:20.) Protestant is one of the top ten sales tax revenue
8 producers for the City of Santa Cruz. (RT Vol. 6, 31:1-21.)

9 Protestant is located in the Soquel Avenue corridor, an area the City of Santa Cruz has
10 identified as its area for automotive dealerships, both new and used. (RT Vol. 6, 14:20-15:6.) The City
11 of Santa Cruz used to host all the new car dealerships in Santa Cruz County, but that number has
12 declined to two: the Ford Dealership and Protestant. (RT Vol. 6, 12:17-13:6.) New car dealerships
13 provide a number of benefits to the public welfare in the City of Santa Cruz including providing
14 conveniently located sales and service to customers, generating sales tax revenue, providing jobs and
15 community involvement. (RT Vol. 6, 12:1-16.) Again, the City of Santa Cruz maintains only two new
16 car dealerships and works hard to retain these important businesses. (RT Vol. 6, 12:17-13:6; 15:21-
17 16:15.)

18 Respondent's market studies have each recommended the Nissan dealership should be located
19 adjacent to either Ocean Honda or Santa Cruz Toyota. (Exs. J7; J9.) Mr. Bernal testified that both the
20 Honda and Toyota dealerships are located outside of the City of Santa Cruz and if a new Nissan
21 dealership were established adjacent to either of those locations, the city would not receive sales tax
22 revenue from these locations. (RT Vol. 6, 35:20-36:12.)

23 The City of Santa Cruz, as did most areas of California, experienced an economic recession
24 beginning in late 2007, which resulted in a series of budget reductions, including reductions in public
25 services and a reduction in city employees from approximately 900 to roughly 776. (RT Vol. 6, 16:22-
26 18:20.)

27 According to Mr. Bernal, the City of Santa Cruz is a "built out" city, meaning it does not have a
28 lot of new buildings or vacant property for sale. As a result, property values are high. (RT Vol. 6

1 22:13-23:5.) This is further evidence of why, should Protestant be terminated, it is unlikely that a
2 replacement dealer will be established any time soon.

3 Mr. Bernal testified that residents of Santa Cruz typically have a high level of environmental
4 awareness and that environmental sustainability is a strong community value. (RT Vol. 6, 33:1-33:5.)
5 The various examples of this community value are reflected in the city's use of green technology in the
6 operation of its waste water treatment plants, the use of electric vehicles in its fleet vehicles, and its use
7 of hybrid and natural gas garbage trucks. (RT Vol. 6, 33:6-35:11.) This further confirms other
8 evidence in the record concerning the demand for "green" vehicles in the Santa Cruz Market.

9 Mr. Bernal testified that Protestant is actively involved in the community through youth sports
10 and participation in the Rotary Club. (RT Vol. 6, 37:7-16.) The termination of Protestant would result
11 in a significant reduction in Protestant's ability to give back to the community.

12 In addition to the direct loss of revenue that would result from the loss of the Nissan franchise,
13 the City of Santa Cruz is concerned that the loss of the franchise will further erode the beneficial effect
14 of clustering dealerships along the Soquel Avenue corridor. Specifically, Mr. Bernal is gravely
15 concerned that if the Nissan franchise is lost, the other franchises, Dodge, Ram, Volkswagen and Ford
16 might experience a decline in sales and be more likely to leave as well. (RT Vol. 6, 37:24-38:11.)

17 Tax revenue is important to all cities, however, it is particularly important to the City of Santa
18 Cruz because it bears the burden of increased costs from being the county seat for local government.
19 In addition, Santa Cruz has a large tourist industry, which also places additional strain on the City's
20 resources. (RT Vol. 6, 38:17-39:24.)

21 The termination of Protestant's Nissan franchise would have a lasting, detrimental impact on
22 the City of Santa Cruz and the public welfare it serves. This public welfare consideration represents an
23 important factor to be considered by the Board in making its determination of whether good cause
24 exists to terminate Protestant.

25 **3. Jobs would be lost as a result of Protestant being forced to downsize its operations in**
26 **response to the lost Nissan sales, service and parts business.**

27 The forfeiture of Protestant's Nissan franchise would significantly reduce the amount of new
28 vehicle sales, service and parts business that it currently captures. This would result in Protestant

1 having to reduce its employees to a level that is cost effective. (RT Vol. 9, 46:5-47:14.) The loss of
2 jobs would have an injurious impact upon the public welfare in the City of Santa Cruz.

3 In addition, the loss of the Nissan franchise threatens the continued viability of Protestant's
4 entire dealership. If the loss of Nissan business causes Protestant's dealership to operate unprofitably,
5 it will be unable to remain in business, which would result in the loss of all of the approximately 50-60
6 jobs the dealership currently employs. (RT Vol. 12, 173:6-12.)

7 **4. The termination of Protestant would result in a decrease in Protestant's community**
8 **involvement.**

9 Protestant has been operating in the Santa Cruz community for more than 40 years and has
10 deep ties to the community. Throughout its tenure as a Nissan dealer, Protestant has been active in a
11 number of charitable activities. (Ex. 2; RT Vol. 9, 58:5-62:17.) If Protestant's Nissan franchise were
12 terminated, it would reduce its ability to participate in the various community activities to the same
13 extent it currently does. (RT Vol. 9, 63:6-64:1.)

14 **E. Protestant continues to provide adequate services to its Nissan customers.**

15 Respondent's NOT does not mention any alleged performance issues concerning Protestant's
16 service operations. Nevertheless, NNA's witnesses testified that Protestant should be open for
17 Saturday service business because the Toyota and Honda dealers are open for Saturday service.
18 Respondent is not permitted to assert as grounds for franchise termination any matters not specifically
19 set out in the NOT.¹ Moreover, out of all the dealerships located in the Santa Cruz Market, only
20 Toyota and Honda are open for Saturday service. Both the Honda and Toyota dealerships have the
21 highest UIO counts in the Santa Cruz Market thus, they have more available service business and
22 greater service demand than Nissan. (RT Vol. 7, 316:21-317:22.) Protestant's business decision to
23 provide service hours Monday through Friday was based upon sound business practices. When, and if,
24 the available Nissan service business reaches a level to sustain Protestant being open for Saturday
25 service, Protestant will begin to offer Saturday service. Currently, Protestant's service department
26 does not operate at full capacity. (RT Vol. 9, 15:7-16.)

27
28 ¹ *American Isuzu Motors, Inc. v. New Motor Vehicle Board*, 186 Cal.App.3d 464.

1 Respondent claims Protestant demonstrates a low level of service retention. Mr. Inman, the
2 Fixed Operations Manager (“FOM”) for District 11, believes this is a result of Protestant not providing
3 Saturday service. Respondent further argues that low service retention impacts Protestant’s ability to
4 capture available new vehicle sales. However, Mr. Inman quickly dismisses the idea that many local
5 residents are having their vehicles serviced at dealerships near where they work. It is undisputed that
6 the Santa Cruz market exhibits a strong net out-commute pattern. Respondent’s claim that this has no
7 impact on where customers choose to receive their service is without support.

8 Mr. Inman testified that he is assigned responsibility for three Nissan dealers whose markets
9 also exhibit a high level of out-commute: Boardwalk, Dublin and Selma, but these dealers are open for
10 Saturday service. However, Mr. Inman also testified that these markets exhibit higher UIO counts than
11 Santa Cruz and thus, each has more available Nissan service business.² (RT Vol. 8, 145:3-16.) It is
12 common sense that the larger the volume of service business available to a dealer, the more likely that
13 dealer will make the informed business decision to provide Saturday service. Moreover, despite being
14 open for Saturday service, the Selma and Boardwalk Nissan dealerships also exhibit low levels of
15 service retention. Mr. Inman testified that Boardwalk’s low service retention was due to the way it
16 prices its service – a condition that is not present with Protestant. (RT Vol. 8, 150:2-151:9; Ex 211, P
17 5586.) These examples demonstrate that Saturday service does not necessarily result in greater service
18 retention in markets exhibiting a heavy out-commute.

19 In addition, Protestant’s franchise agreement does not require Protestant to be open for
20 Saturday service business. (RT Vol. 8, 138:8-11.) Protestant had previously been open for Saturday
21 service, but it proved to be unprofitable. Moreover, because Protestant is a dual-dealer, there are
22 a number of obstacles to providing Saturday service hours. (RT Vol. 8, 146:9-147:20.) In order to
23 offer Saturday service to its Nissan customers, Protestant would also need to ensure that it had
24 adequate personnel to provide service for its other line-makers: Volkswagen, Dodge and Ram.

25 Mr. Inman testified that he suggested to Jim Courtright that Protestant provide Saturday service
26 on several occasions and each time Jim Courtright informed him that he did not think it could be done

27 _____
28 ² Mr. Inman did not testify to the UIO count for Selma.

1 profitably, yet Mr. Inman never provided any analysis of what the potential cost might be and what
2 benefits might result. (RT Vol. VIII, 145:17-156:4; 153:5-154:20.)

3 Other than the suggestion that Protestant ought to provide Saturday service, despite the fact that
4 it is not required to do so under the terms of its franchise agreement, Respondent has offered no
5 evidence of any service issue at Protestant.

6 Protestant's service department is open Monday through Friday from 7:30 AM to 6:00 PM.
7 (RT Vol. 11, 23:17-22.) Protestant's service department includes 19 service stalls and 17 lifts. (RT
8 Vol. 9, 12:4-17.) Protestant employs 14 service technicians, six that are devoted exclusively to Nissan,
9 two of which are master technicians. (RT Vol. 9, 12:18-13:8.) Protestant regularly meets or exceeds
10 the regional average for customer service ("CSI"). (RT Vol. 11, 22:15-18.)

11 Respondent does not argue there is any issue with Protestant's facility. Respondent has never
12 claimed that Protestant lacks adequate parts storage. (RT Vol. 9, 7:19-21.) Protestant's showroom is
13 large enough to display six vehicles. (RT Vol. 8, 351:25-352:3.) Protestant offers a covered, two-lane
14 service drive with a direct entrance to the separate service advisor write-up area. (RT Vol. 9, 8:14-
15 10:3.) Protestant also provides a shuttle service and loaner and rental cars to customers. (RT Vol. 9,
16 10:4-13.) Protestant's employs two shuttle service drivers who are available to transport customers
17 during regular service hours. (RT Vol. 9, 13:13-14:1.) Protestant offers customers the option to
18 schedule their service appointment online, at which time they have the option of prearranging their
19 preference for alternate transportation. (RT Vol. 9, 10:14-23.)

20 Protestant also provides a number of other customer amenities including a comfortable waiting
21 area with a flat screen TV, free wi-fi internet, free coffee and tea, a children's play area, available work
22 stations for customers and available private offices for those customers that need a quiet place to work.
23 (RT Vol. 8, 357:24-359:3.)

24 **F. Protestant continues to fulfill the warranty obligations for Nissan vehicles.**

25 Respondent presented no evidence concerning whether Protestant has ever failed to fulfill the
26 warranty obligations for its dealership. Jim Courtright testified that Protestant fulfills all warranty
27 obligations for Nissan vehicles and has never had to refer a service customer to another dealership to
28 receive warranty work. (RT Vol. 11, 22:19-23:3.)

1 **G. Protestant complies with the terms of its franchise agreement.**

2 Protestant meets all of its obligations under the terms of its franchise agreement. Protestant
3 greatly exceeds Nissan's guide for capital and flooring. (RT Vol. 12, 40:9-41:2; Ex. 209, NNA
4 001023; Protestant's Ex. 18.) While Protestant's facility isn't the exclusive, NREDI facility
5 Respondent would prefer, NNA's witnesses admit it is adequate. (RT Vol. 7, 13:18-21; RT Vol. 8,
6 277:17-278:4.)

7 Respondent argues that Protestant is in breach of its franchise agreement because it fails to
8 aggressively promote the sale of Nissan products but, as discussed above, this claim is based upon the
9 use of RSE to measure sales performance, which is inherently flawed, and unreasonable, given the
10 unique local market conditions in the Santa Cruz Market.

11 **H. Nissan's desire to have an exclusive, NREDI image compliant facility is well documented.**

12 Nissan representatives began expressing a desire for Protestant to provide an exclusive, NREDI
13 image compliant facility since at least December, 2010. Jim Courtright testified that the issue had been
14 raised by Nissan prior to this date. (Ex. 227, NNA 908; RT Vol. 9, 23:1-28:5.) The evidence also
15 demonstrates that Respondent's 2009-2010 Market Study recommended that Protestant relocate to an
16 exclusive and NREDI image compliant facility near the Honda and Toyota dealerships. (Ex. J8.)
17 Respondent completed a second Market Study, which was presented to Protestant in March, 2013,
18 confirming the recommendations from the prior study. (Ex. J7.) Jim Courtright testified that
19 Protestant considered the recommendations of the Market Studies, but the Courtrights determined it
20 was too expensive to provide the type of facility Nissan wanted at the preferred location. (RT Vol. 9,
21 28:6-21.)

22 Protestant also considered making its current facility exclusive to Nissan, but this presented the
23 problem of having to find additional property on which to locate the Dodge, Ram and Volkswagen
24 franchises. Moreover, even if a suitable location were obtainable, Protestant would still require the
25 consent and approval of Volkswagen, Ram and Dodge. Similarly, any proposed NREDI remodel
26 would require the approval of Volkswagen, Ram and Dodge, which each have their own facility image
27 programs. (RT Vol. 9, 28:25-30:10.)

28 However in November or December of 2012, Protestant did offer to use its parcel on the other

1 side of Soquel Avenue as a potential site for an exclusive and NREDI compliant Nissan showroom, but
2 this offer was flatly rejected without further discussion. (RT Vol. 11, 7:8-9:4.) Unfortunately, Mr.
3 Rodgers was unavailable to provide testimony on this subject, but obviously this proposal would not
4 have resulted in a Nissan dealership being located in close proximity to the Honda and Toyota
5 dealerships. Moreover, Protestant likely would have required the continued dualing of the Nissan,
6 Volkswagen, Ram and Dodge franchises in the service department, which would not have met
7 Nissan's requirements for complete exclusivity.

8 **CONCLUSION**

9 Based upon the foregoing and the evidence in the record, Respondent has failed meet its burden
10 in establishing good cause to terminate Protestant's Nissan franchise. Respondent's sole justification
11 for the proposed termination of Protestant's Nissan franchise is Protestant's purported inadequate sales
12 performance. Not only does NNA fail to address the other good cause factors set forth in Veh. Code §
13 3061, Respondent's claim of inadequate sales performance is based upon an inherently flawed
14 measurement of sales performance that is designed to show approximately half of its dealers to be
15 underperforming, regardless of actual sales volumes, and fails to account for local market conditions
16 that directly impact individual dealers' market areas. Moreover, Respondent has since abandoned its
17 use of RSE in favor of a state based average.

18 Based upon the evidence in the record, in balancing the interests of the Protestant, the public
19 welfare and of the Respondent, it is plain to see that good cause does not exist to terminate Protestant's
20 Nissan franchise. Therefore, Protestant respectfully requests the Board issue an order sustaining its
21 Protest.

22
23 Dated: May 5, 2014

LAW OFFICES OF
MICHAEL J. FLANAGAN

24
25
26 By: 

Gavin M. Hughes
Attorneys for Protestant

DECLARATION OF SERVICE BY ELECTRONIC MAIL

I, Valerie A. Coffey, declare that I am employed in the County of Sacramento, State of California, that I am over 18 years of age, and that I am not a party to the proceedings identified herein. My business address is 2277 Fair Oaks Boulevard, Suite 450, Sacramento, California, 95825.

I declare that on May 5, 2014, I caused to be served a true and complete copy of:

PROTESTANT'S POST HEARING OPENING BRIEF

Santa Cruz Nissan v Nissan

Protest No. PR-2358-13

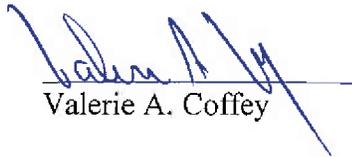
By Electronic Mail:

Maurice Sanchez, Esq.
Kevin M. Colton, Esq.
Lisa Gibson, Esq.
BAKER & HOSTETLER
600 Anton Blvd St 900
Costa Mesa, CA 92626

Also by First Class Mail

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 5 May, 2014, Sacramento, California.


Valerie A. Coffey