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NISSAN NORTH AMERICA, INC.

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 RESPONDENT NISSAN NORTH AMERICA, INC.'S SECOND AMENDED PROPOSED FINDING OF FACTS

I. INTRODUCTION

Respondent, Nissan North America, Inc., ("Nissan") files this Proposed Finding of Facts based on the hearing on Santa Cruz Nissan, Inc., dba Santa Cruz Nissan's ("Protestant") protest seeking to prevent the termination of its Nissan Dealer Sales and Service Agreement ("Dealer Agreement").

II. BACKGROUND FACTS

1. After Protestant's relocation to its present site at 1616 Soquel Avenue, Protestant and Respondent entered into a Nissan Dealer Sales and Service Agreement ("Dealer Agreement") dated February 2, 1989. (Exh. Joint 1 bates stamp NNA00063 at Final Article).

2. Within the Dealer Agreement, Nissan is referred to as "Seller" and Protestant is referred to as "Dealer". (Exh. Joint 1, bates stamp NNA00063 Nissan Dealer Sales and Service Agreement at preamble and bates stamp NNA00063 at Final Article).

3. Protestant agreed in Section 3.A of the Standard Provisions of the Dealer Agreement to actively and effectively promote through its own advertising and sales promotion activities the sale at retail of Nissan Vehicles to customer located within Protestant's Primary Market Area as follows:

   Section 3. Vehicle Sales Responsibilities of Dealer

   A. General Obligations of Dealer.

   Dealer shall actively and effectively promote through its own advertising and sales promotion activities the sale at retail (and if Dealer elects, the leasing and rental) of Nissan Vehicles to customers located within Dealer's Primary Market Area. Dealer's Primary Market Area is a geographic area which Seller uses as a tool to evaluate Dealer's performance of its sales obligations hereunder. . . . (Exh. Joint 1, Standard Provisions, NNA005625 at Section 3.A.) (emphasis added).

4. Protestant agreed in Section 3.B of the Standard Provisions of the Dealer Agreement to be evaluated by Nissan on the basis of reasonable criteria as Nissan may develop from time to time Area including examples:

   B. Sales of Nissan Cars and Nissan Trucks.
   Dealer's performance of its sales responsibility for Nissan Cars and Nissan Trucks will be evaluated by Seller on the basis of such

reasonable criteria as Seller may develop from time to time, including for example:... (Exh. Joint 1, Standard Provisions, NNA005625 at Section 3.B.) (emphasis added).

5. Protestant agreed in Section 3.B.2.(ii) of the Standard Provisions to the Dealer Agreement that Nissan may evaluate Protestant's performance of its sales responsibilities using sales penetration for the Competitive Vehicles as follows:

   2. Dealer's sales of Nissan Cars and Nissan Trucks in Dealer's Primary Market Area and/or metropolitan area in which Dealer is located, as applicable, or Dealer's sales as a percentage of:

   (i) registrations of Nissan Cars and Nissan Trucks;
   (ii) registrations of Competitive Vehicles;....
   (Exh. Joint 1, Standard Provisions, NNA005625 at Section 3.B.2) (emphasis added).

6. Protestant agreed in Section 1.G. of the Standard Provisions to the Dealer Agreement that Competitive Vehicles means those vehicles which Respondent considers to be directly competitive with Nissan Vehicles. (Exh. Joint 1, Standard Provisions, NNA005622 at Section 1.G.; RT I, 76: 1-25, 77: 1-3)

7. Protestant agreed in Section 3.B.3 of the Standard Provisions of the Dealer Agreement to be evaluated by Nissan using a comparison of Protestant's sales and/or registrations to the sales and/or registrations of all other Nissan dealers combined in the Nissan Region in which Protestant is located as follows:

   3. A comparison of Dealer's sales and/or registrations to sales and/or registrations of all other Authorized Nissan Dealers combined in Seller's Sales Region and District in which Dealer is located. . ."
   (Exh. Joint 1, Standard Provisions, NNA005625 at Section 3.B.3) (emphasis added).

8. At all times relevant to this Protest, RSE has been the standard used by Nissan to evaluate Protestant's poor sales performance. (RT I, 78: 20-25).

9. RSE is an index. The regional sales divided by the regional registrations is the denominator. The numerator, or the form of the index, is the dealer's sales

penetration, which would be the dealer's total sales (regardless of where they are registered) divided by the competitive registrations in that dealer's Primary Market Area. If you take the penetration of the dealer, divide it by the penetration of the region that would give you what we call Regional Sales Effectiveness. So a dealer who's 100 percent is performing at the same level as the regional average, all the dealers in the region. A dealer performing above it has a higher penetration. A dealer with RSE below 100 would have a penetration performance that's below the regional average. (RT I, 75: 7-19; Resp. Exh. 200.B. at bates stampNNA04698; RT III, 223: 10-25 – 224: 1-21).

10. Section 3.B. of the Standard Provisions comports and is consistent with Regional Sales Effectiveness ("RSE"). (RT I, 92:13-25; 94: 1-19; RT III, 109: 13-25 – 210: 1-6).

11. Segment-Adjusted RSE takes the sales penetration share by segment, rather than the total competitive group level, in calculating the expected level of Nissan's registrations in the PMA. (RT III, 227:7-12; Resp. Exh. 200.B at bates stamp NNA04703).

12. For the period of 1992 until 2008, Protestant sold more in every year and in three of those years sold double the Nissan vehicles than Protestant sold in 2012 (Resp. Exh. 227 at bates stamp NNA00716).

13. By February 14, 2005, Protestant had failed to reach 100% segment-adjusted RSE for a period of six consecutive years. Calendar year 2005 marked the last time Protestant was sales effective (meeting or exceeding 100% RSE) with sales of 366

units and an RSE of 113.7%. (Exh. Joint 2, bates stamp NNA00037; RT I, 110: 2-7; RT XI, 17:23 – 18:2; RT XI, 119:19 – 24.).

14. In 2005 when Protestant achieved above 100% RSE it was from the current location of the dealership with the current owners and managers. (RT II, 157: 20-27 – 158: 1-4).

15. Nissan's counseling and correspondence with Protestant regarding its underperforming sales penetration compared to RSE has continuously occurred since at least April 27, 2007 when Protestant received a letter from Thomas E. Lynch, Regional Vice President, Nissan regarding the dealership's sales deficiencies and stating that it is "imperative that Santa Cruz Nissan remedy these deficiencies to be at 100% RSE by October 31, 2007." (Resp. Exh. 206; RT XII, 203:16 – 204:8).

16. The drop in RSE from 2005 to 2006 was over 45 points, from 113.7% to 68.3% representing the single greatest decrease in RSE percentage points for the period from Calendar year 21005 through at least November, 2011. (Joint Exh. 2, bates stamp NNA00037- bates stamp NNA00038).

17. Despite the 45 point deterioration in RSE from Calendar year 2005 to calendar year 2006, Nissan's practice is to send performance letters and give the dealer an opportunity to improve rather than immediately issue a Notice of Default. (RT I, 110: 21-25; 111: 1-25; 112: 1-7).

18. Respondent through its "field people" such as the Dealer Operations Managers ("DOMs") and Area General Managers ("AGMs") recommend and talk with Nissan Dealers about non-proprietary sales practices that have been successful in

other dealerships and identify opportunities. (RT I, 57: 6-25; 58: 1-6; 113: 21-25; 114: 1-11).

19. Starting with the April 27, 2007 letter and through June, 5 2012, Nissan sent Protestant 8 poor sales performance letters that identified that Dealer's sales performance was less than average as compared to all other Nissan dealers in Protestant's Sales Region. (Resp Exh. 206).

20. A sales performance letter is an important letter sent by certified mail that informs the dealer that they are underperforming, identifies Nissan's concern with the performance and encourages the dealer to take action to correct its performance. (RT I, 88: 6-22)

21. In 2008, there were at least 3 contacts (in person) with Protestant about its poor sales performance and 1 poor sales performance letter sent. All such contacts and correspondence referenced RSE as the standard Nissan used to evaluate Protestant's poor sales performance. (Joint Exh. 2 at bates stamp NNA00038; Resp. Exh. 206 at bates stamp NNA00645).

22. In 2009, there were at least 7 contacts (by telephone and email) with Protestant about its poor sales performance and 1 poor sales performance letter sent. All such contacts and correspondence referenced RSE as the standard Nissan used to evaluate Protestant's poor sales performance. (Joint Exh. 2 at bates stamp NNA00039; Resp. Exh. 206 at bates stamp NNA00788).

23. In 2010, there were at least 10 contacts (in person and by telephone) with Protestant about its poor sales performance and 2 poor sales performance letters sent. All such contacts and correspondence reference RSE as the standard Nissan

used to evaluate Protestant's poor sales performance. (Joint Exh. 2 at bates stamp NNA00040; Resp. Exh. 206 at bates stamps NNA00805-807, NNA00811-NNA00812.)

24. In July 2010, the Regional Vice President visited Protestant and told Messrs. Lee and James Courtright that he would be forced to continue the performance letters if sales performance did not improve and warned the Protestant of potential future action. (RT I, 87: 1-5).

25. Ms. Novoa, during her tenure as Dealer Operations Manager ("DOM") for Nissan's District 11, made at least thirteen different contacts with Protestant and in each instance she discussed the dealership's RSE and notified Protestant that its sales performance was deficient. All such contacts and correspondence referenced RSE as the standard Nissan used to evaluate Protestant's poor sales performance. Her first contact with Protestant while she was DOM for Nissan was on August 8, 2011 and her last contact was on August 30, 2012. In her first contact, Protestant's 12-month rolling RSE was 44.2% and in her last contact Protestant's 12-month rolling RSE was 38.35%. Only three contacts were made by phone, the rest were in the dealership with either Mr. Jim Courtright or both Mr. Jim Courtright and Mr. Lee Courtright in attendance. On at least six different occasions, Jim Courtright acknowledged or agreed that Protestant's sales performance was deficient. Mr. Eric Rodgers was with her on March 20, 2012 to deliver the Notice of Default. Mr. Chad Filiault was with her on July 26, 2012 to also present the dealership's 40-year plaque. (Resp. Exh. 209).

26. Ms. Novoa's held this DOM position from June, 2011 until September, 2012. During Ms. Novoa's tenure as the DOM, Nissan sent 3 poor performance letters to Protestant by certified mail. These letters also reference RSE as the standard Nissan used to evaluate Protestant's poor sales performance. On June 14, 2012, Ms. Novoa called Jim Courtright to let him know that a performance letter was being sent from the West Region. (RT II, 234: 14-16; Resp. Exh. 206, at bates stamps NNA00630- NNA00634 and NNA00638-NNA00639; Resp. Exh. 209 at bates stamp NNA00026).

27. Ms. Novoa had known the Courtrights before she was the DOM for District 11 when she called on the dealership for Volkswagen Credit. (RT II, 236: 8-25 – 237: 1-4).

28. Ms. Novoa's father was a dealer who sold his SAAB, Subaru, Mercedes-Benz and Volkswagen franchises when she was very young. Her husband also works at a dealership. (RT II, 237: 12-20).

29. Ms. Novoa is very familiar with Santa Cruz area and Santa Cruz Nissan because of her experience and has lived in the area most of her life. (RT II, 237: 21-25 – 238: 1-2).

30. On July 26, 2012 Nissan's Area General Manager during a contact with Ms. Novoa, offered to assist Protestant to sell the dealership, but both Courtrights declined Nissan's offer to assist in selling at that time. (RT XII, 60:9 – 21; Resp. Exh. 209 at bates stamp NNA00026).

31. As of June, 2012 Protestant was at 38.35 percent RSE for a rolling 12 month period and 35.6 percent RSE. Protestant was selling 16 new Nissans per month, but to penetrate the market needed to sell 42 new Nissan vehicles per month.

(XII, 61:1 – 18. RT; Resp. Exh. 209 at bates stamp NNA00026)

32. Nissan suggested that Protestant hire a General Sales Manager for the Nissan dealership, but was not successful in recruiting a person for that position. Nissan also recommended that dealership dedicate additional headcount to the internet team which was currently staffed with only one manager and partially a back-up manager (1 and one-half heads). Nissan offered training through Virtual Academy to recertify sales staff because Protestant did not score well on the Customer Behavior Dashboard question involving knowledge and expertise about Nissan Products. Tina Novoa also recommended that Protestant utilize the Dealer Volume Bonus and C&I Programs to increase sales. (RT XII, 63:21 – 65:4; Resp. Exh. 209 at bates stamps NNA00024 - NNA00026).
33. Ms. Novoa cannot remember any exampled of where increasing staff, increasing marketing in order to hit bonuses and sell more cars didn't result in having money to reinvest. (RT II, 309:6-25).
34. After years of underperformance, sending performance letters, contacting and reviewing RSE performance with Protestant (including at least five visits from the RVP of the West Region, Eric Rodgers), Mr. Rodgers concluded that he must recommend that Nissan issue a Notice of Default. (RT I, 101: 3-25; 102: 1-13; 112: 4-23; 114: 9-14; RT II, 206: 22-25 – 207: 1-16).
35. Mr. Rodgers had a support staff in Orange County but he lived in Walnut Creek and traveled extensively in the San Francisco markets. (RT II, 208: 14-23).
36. Mr. Rodgers also relied on the information (market trends and issues) provided to him by all the field people who called on dealerships more frequently than he does. They also all reside in the San Francisco markets. (RT II, 208: 24-25 – 210: 1-7).

37. The process by which Nissan issues a Notice of Default involves the RVP along with others at Nissan to evaluate the performance of Protestant's store over a period of time. (RT I, 103: 24-25; 104: 1-10; 108: 3-8; 116: 19-25; 117: 1).

38. The role of the RVP at the Region is to recommend a Notice of Default. (RT I, 108: 3-8).

39. In a Memo dated February 14, 2012 the West Region requested the issuance of a Notice of Default to Santa Cruz Nissan providing the rationale of prolonged deficient sales performance. A letter of Transmittal was attached. (Exh Joint 2, bates stamp NNA00035; RT I, 111: 11-14).

40. The role of Nissan's National Market Representation ("NMR") management (National Office) is to evaluate whether the dealer has been given the opportunity to improve and ample notice that Nissan is concerned about dealer's performance. There is no one person involved in the process; there are a number of people both at the Region and National. (RT I, 103: 24-25; 104: 1-10; Resp. Exh. 207, bates stamp NNA04155 – bates stamp NNA04157; RT I, 112:19-23).

41. After circulating the Notice of Default package, including the Regions's Transmittal Package Submission ("TPS"), if there's consensus of a group of people, a Notice of Default is issued. (RT I, 104: 7-10; 116: 19-25; 117: 1; Resp. Exh. 207, bates stamp NNA04155 – bates stamp NNA04157; Exh Joint 2, bates stamp NNA00044, bates stamp NNA00033, bates stamp NNA00035- bates stamp NNA00043).

42. Final approval for issuance of a Notice of Default or Notice of Termination must be approved by National Market Representation and the Legal Department. (Resp Exh 207, bates stamp NNA04155).

43. There is no one person who makes the decision to issue a Notice of Termination, there's a group of people. The RVP does not make the final decision. (RT II, 132: 3-8).

44. Based on the years of continued monitoring Protestant's sales performance as compared with all other Nissan dealers in Protestant's Sales Region, using a standard of Regional Sales Effectiveness, Nissan determined that Protestant's sales performance deficiencies were prolonged, severe and chronic. (RT I, 110: 2-7; 113: 5-12; 119: 7-13).

45. On March 19, 2012, Nissan sent Protestant a formal, written Notice of Default based on Protestant's material breaches of its Dealer Agreement. (Joint Exh. 2, bates stamp NNA00056 – bates stamp NNA00061).

46. The Notice of Default specifically related to Protestant's insufficient sales penetration and operational deficiencies, and gave Protestant an opportunity (180-days) to cure its breaches. If the dealer fails to cure, Nissan reserves its right to exercise any and all remedies including but not limited to termination. (Joint Exh. 2, bates stamp NNA00056 – bates stamp NNA00061; RT I, 113: 7-12; RT II, 159: 11-22).

47. Using the standard of segment-adjusted Regional Sales Efficiency (RSE) for the years 2006 through 2011 to calculate Protestant's insufficient sales penetration, Protestant was notified that such calculations demonstrated that it had failed to

adequately represent Nissan in the market or failed to fulfill its responsibilities under Section 3 of the Agreement. (Joint Exh. 2, bates stamp NNA00056 – bates stamp NNA00060).

48. For each full calendar year ("CY") since 2006, Protestant's RSE was as follows:

CY 2006	68.3%
CY 2007	84.4%
CY 2008	81.8%
CY 2009	56.3%
CY 2010	45.9%
CY 2011	51.6%

(Joint Exh. 2, bates stamp NNA00060 at bates stamp NNA00038 for clearer numbers on CY 2006 and CY 2007).

49. According to the data available at the time the Notice of Default was issued, Nissan informed Protestant that its RSE of 51.6% ranked Protestant as 190th of 194 Nissan dealers in the West Region and 95th of 97 Nissan dealers in the State of California. (Exh. Joint 2, bates stamp NNA00056 – bates stamp NNA00060).

50. In his opinion, Mr. Frith's analysis is reasonable in light of all the existing circumstances including demographic, geographic, inventory allocation, and local and statewide economic characteristics. (RT III, 188: 23-25 – 189: 1-3).

51. A standard for measuring a dealer's sales performance is important and fair. In general, you need a yardstick to measure something. Using a speed limit as an example, it's difficult to know if you are speeding if there's no speed limit Likewise, you cannot tell if sales penetration is at expected without a target or an

average. You need a standard in order to tell how you're doing. (RT III, 196: 20-25 – 197: 1-3).

52. The standard should also be applied uniformly. Having a different standard for everyone could result in chaos, like having a different speed limit for every driver on the freeway. (RT III, 197:7-19.)

53. Mr. Stockton believes that there is no one canned standard or formula. A canned standard should be avoided. (RT IX, 237: 2-15, 234:10 – 19.).

54. A standard where roughly half the dealers perform above and roughly half perform below is reasonable. (RT IV, 22: 7-21).

55. Typically, after Nissan has issued a Notice of Default to a dealer, their performance improves. (RT I, 121: 19-25; 122: 1-10).

56. Nissan's practice is to formally rescind a Notice of Default when a dealer improves to 100 percent RSE. (RT III, 78: 21-25 – 79:1).

57. Protestant never achieved 100% of RSE for Nissan sales after issuance of the Notice of Default and it fact it got worse and dropped to 38.3% RSE through June, 2012 or 13 percentage points. (RT I, 120: 25; 121: 1-18; RT XI, 119:19 – 24).

58. Typically dealers in Protestant's situation (of not improving after a NOD is issued) consider selling the store or hiring a third party general manager to help the Executive Manager improve the performance of the store. (RT II, 161: 3-25 – 163: 1-5).

59. Protestant knew that its performance was declining because the Dealer Operations Manager discussed RSE with Protestant every month or every contact report. (RT II, 160: 14-27 – 161: 1-2).

60. At the same time, based Protestant's ranked 98th of 99 dealers in the State of California. (Joint Exh. 3 at bates stamp NNA00022).

61. The decline in Protestant's state ranking between the Notice of Default and the Notice of Termination was a consistent measurement. (RT III, 160: 11-25)

62. The Notice of Default was to expire by its terms on September 22, 2012 and Protestant's performance had declined further. (Joint Exh. 3, handwriting in middle of page at bates stamp NNA00016.)

63. If Protestant's sales performance had shown significant gain, Mr. Rodgers would have been put in a position where he could have perhaps requested more time, but that hadn't occurred. (RT I, 123: 21-25).

64. Mr. Rodgers had a conversation with Mr. Lee Courtright and requested he provide Nissan with a buyers assist letter because at that point he thought it was the best solution. (RT I, 124: 1-2).

65. Typically, when Mr. Rodgers asks a dealer if he is interested in selling the dealership, he asks for the dealer to provide a letter but Nissan has sample letters that can be provided to dealers and put on the dealer's letterhead. (RT I, 125: 8-11).

66. A buyer assist letter is necessary in order to authorize Nissan to talk to dealer or couple of dealers about an opportunity to buy another dealer's store. Without a buyer assist letter, Mr. Rodgers would not and did talk another dealer about buying Protestant's store. (RT I, 125: 12-25; 127: 21-25).

67. Mr. Lee Courtright signed a buyer assist letter dated September 18, 2012 and addressed it to Mr. Eric Rodgers. The one-page letter was faxed to telephone

number (831) 426-1230 on the same date at 13:13 according to the fax line on the bottom of the letter. (Resp. Exh. 208).

68. After receiving the buyer assist letter, Eric Rodgers recommended Nissan extended the cure period provided by the Notice of Default in order to give Protestant an opportunity to sell the Nissan dealership. (Joint Exh. 3 at bates stamp NNA00022, RT I, 120: 12-24; 122: 11-15).

69. It was never an absolute that the National Office would have concurred with Mr. Rodgers' recommendation to extend the Notice of Default. The possible other outcome would have been an NOT. (RT II, 150: 16-25 – 151: 1-2, 151: 20-25).

70. Nissan issued a Notice of Default Extension dated October 5, 2012 providing Protestant with a 60-day period to try to sell the dealership. (Joint Exh. 3 at bates stamps NNA00053 and NNA00054; RT I, 124: 3-13).

71. Mr. Rodgers referred a potential buyer to Protestant by the name of Don Groppetti. Mr. Groppetti owns a Nissan store in Visalia, California. He told Mr. Groppetti that Protestant was potentially interested in selling the store and gave him Mr. Courtright's telephone number in order to put the two of them in contact. (RT I, 126: 17-2; 128: 18-21).

72. Mr. Groppetti was a motivated buyer, and identified property next to the Honda store that he liked the best but found it to be too expensive. (RT I, 129: 15-19).

73. The challenges in the market place were related to either available property or the cost of property. (RT I, 190: 17-25; RT II, 175: 15-20).

74. In the opinion of Mr. Stockton, Protestant's expert, the challenges in the market place would be a temporary one. (RT X, 39: 4-23).

75. Mr. Groppetti asked Mr. Rodgers if Mr. Groppetti would be willing to sell the entire dealership (land and all the franchises) and Mr. Rodgers said he didn't know. (RT I, 130: 3-12).

76. Mr. Courtright told Mr. Rodgers that he was not interested in selling his entire store. (RT I, 130: 3-20).

77. Mr. Rodgers also spoke with another candidate (Mr. Leoni) but assessed his interest level in Protestant's dealership not sufficient to put him in contact with Mr. Courtright. (RT I, 130: 21-25 - 131: 1-20).

78. The reason why Mr. Rodgers wouldn't call on 10 or 15 dealers to flood the market with candidates for Protestant's dealership is because that could lower the value of the store and it may not result in identifying qualified candidates (with financial capital, sufficient interest and approvable by Nissan). (RT II, 14: 1-18).

79. Mr. Rodgers is no longer in the position of RVP and therefore would not know if anyone at Nissan is still attempting to assist Protestant find a buyer. (RT II, 17: 3-12).

80. In order for Protestant to sell the dealership, it did not need to send Mr. Rodgers a buyer assist letter. Protestant could sell the dealership on its own without assistance from Nissan. (RT II, 12: 5-17).

81. Protestant took no action itself to try to find a buyer for the Nissan dealership, and just waited for Nissan to send it potential buyers. (RT XI, 148:10 – 23).

82. After receiving a buyer assist letter, Mr. Rodgers wanted to put a buyer together with a seller, he stays out of the negotiations of what is going to be sold, how it was going to be sold or what the price would be. (RT I, 183: 21-25; 184: 1-5).

83. At the time of the December 7, 2012 contact with Protestant, Mr. Rodgers was not sure whether a Notice of Termination (NOT) would be issued. (RT II, 130: 21-

25; Resp. Exh. 212 at bates stamp NNA05666).

84. At the time of the December 7, 2010 contact with Protestant, the Notice of Default Extension had already expired on December 4th. (Resp. Exh. 212 at bates stamp NNA05666).

85. The time between the date of the Notice of Default Extension and when Nissan actually issued the Notice of Termination was 90 days or 30 days longer than the 60 days provided in the extension. (RT II, 177: 1-10).

86. Although a 60-90 day period is a short period of time for the purposes of consummating a buy-sell, but within this period it is sufficient for securing a candidate and to get some type of Letter of Intent or offer sheet prepared. (RT II, 177: 16-25).

87. Mr. Rodgers from his perspective felt a sense of urgency because of the expiration of the NOD Extension but did not sense the same sense of urgency from Mr. Lee Courtright and felt that he was not motivated to sell the dealership. (RT II, 195: 3-17).

88. At this same contact, Mr. Rodgers urged Mr. Lee Courtright to communicate with Mr. Groppetti in an effort to see what they could do to reach an agreement for a possible sale. After inquiring about whether Mr. Courtright would sell the entire property and Mr. Lee Courtright indicating that he and Jim Courtright would confer in private, Mr. Rodgers encouraged Mr. Lee Courtright to talk to Mr. Groppetti to see if there was something else they could do. Mr. Rodgers believed that the NOT was public information and if they didn't sell the store it makes it sometimes more difficult to sell the store at the desired price. This is what he recalls referring to as opposed to saying that the NOT may prohibit the DP from entering into a sale. (RT II, 142: 3-25 – 144: 1-19, 146: 24-25 147: 1-19; RT II, 179: 22-25 – 180: 1-22; Resp. Exh. 212 at bates stamp NNA05666).

89. Mr. Rodgers was hoping for some sort of agreement between Mr. Lee Courtright

and Mr. Groppetti, he did not care whether Mr. Groppetti bought the entire dealership or not. (RT II, 186: 16-25 – 187: 1-13).

90. A dealer can sell its store at any time on its own initiative. (RT II, 16-23).

91. Sometimes the first indication that Nissan receives about a dealer wishing to sell its store is a copy of the Asset Purchase Agreement ("APA") (RT II, 166: 1-13).

92. Once an APA is received, Nissan would evaluate the proposal to ensure among other things that the buyer has automotive experience and can afford to buy the dealership in order to evaluate the buyer's qualifications. (RT III, 65: 23-25 – 66: 1-11).

93. Interested sellers typically make a number of phone calls to the RVP asking: (1) where we are in the process, (2) how many candidates do we have, (3) when is the candidate going to call me, or (4) when is he going to make an offer. (RT II, 167: 4-11).

94. Also, an interested seller typically doesn't wait for Nissan to find a buyer, oftentimes, the dealer will find a broker, they will list the store for sale, or they will talk to friends of theirs in the market. (RT II, 167: 12-24).

95. It can be easier to sell to a dealer in the market because they typically already have land and do not have to acquire land. It is quite possible that a dealer in the market can provide a facility solution. (RT II, 168: 6-21).

96. Nissan evaluates every proposal on its own merits, including considering a sales proposal of Protestant's dealership that would continue to dual Nissan with another franchise. (RT II, 170: 12-25 – 171: 1-19, 190: 17-25 – 191: 1-14; RTIII, 20-23).

97. The building next to the Toyota dealership is currently being used for Express Service but was occupied by another franchise at one time, being either Chevrolet or Cadillac. (RT II, 171: 23-25- 172: 1-10).

98. The former Chevrolet or Cadillac building next to Toyota is an example of a

facility that would require only a short turnaround time to get a dealer up and running because it is already an automotive facility. (RT II, 172: 17-25 – 173: 1-3).

99. In order for a buy-sell to work, there has to be a motivated seller and buyer. The motivation of the seller in the case of Protestant was not as motivated as the case of the buyer or Mr. Groppetti. (RT II, 175: 3-23).

100. Mr. Rodgers and others in Nissan do not believe that all potential dealers have been exhausted that could go into the Santa Cruz market to replace Protestant should the termination be allowed because of the opportunity in the marketplace. Nissan sees the Santa Cruz PMA as a viable market. (RT I, 131: 21-25; 132: 1-25; 133: 1-25; Protestant Exh. 24, 36: 23-24).

101. In general, Nissan is a desirable brand and people want Nissan franchises. (Protestant Exh. 24, 38: 15-21).

102. More dealers may be interested in an appointment to an open point as opposed to purchasing a dealership because they would not have to pay blue sky to anybody. (RT I, 135: 22-25; 136: 1-25; 137: 1-3).

103. If the termination is allowed, Nissan intends to continue to have a dealer in the Santa Cruz market. (RT I, 137: 4-6).

104. Protestant's sales penetration was 36.9% RSE by the end of September, 2012 and 37.3% as of the end of October, 2012. Dealer's rank remained at 98 out of 99 dealers in California. (Joint Exh. 4 at bates stamp NNA00011 and in the Notice of Termination at bates stamp NNA00049).

105. As of the end of 2012, Protestant's sales penetration sank to 32.0% of expected. Furthermore, Protestant continued to rank as one of the worst underperforming dealers in both the West Region (191th of 196 dealers). (Resp. Exh. 238).

106. The NOT was recommended by Mr. Rodgers and that started the discussion between Ms. Corrao and Mr. Rodgers about Protestant. (Protestant Exh. 24, 12: 1-7).

107. During the discussion, Ms. Corrao asked Mr. Rodgers to verify that Nissan had communicated operational deficiencies, clearly provided counsel to the dealer for areas of improvement as documented in the contact reports. (Protestant Exh. 24, 16: 12-22 – 17: 1-8).

108. In the situation of Protestant, they were discussing an NOT for a chronically poor performer that had not shown any improvement and when Nissan is at that point it has just cause to issue a Notice of Termination. (Protestant Exh. 24, 30: 18-25 -31: 1-6).

109. While discussing the Notice of Termination with Mr. Rodgers, Ms. Corrao knew there was a buyer assist letter but she did not know why Mr. Groppetti did not purchase Protestant's dealership. (Resp. Exh. 241, 38: 22-25 – 39: 1).

110. Concurrence is approval to move forward in Ms. Corrao's vernacular. (Protestant Exh. 24: 7-8).

111. The key stakeholders in the case of Santa Cruz Nissan were represented by Ms. Corrao, Mr. Rodgers and Legal. It required agreement among the key stakeholders to move forward with the Notice of Termination. (Protestant Exh. 24, 26: 7-25; RT II, 152: 25 – 153: 1-7).

112. Mr. Rodgers concurred with the decision in the matter of Santa Cruz Nissan, he does not know what would happen in the hypothetical situation if he had not concurred but there would have to be somebody at that point that, a Vice

President that would make the final decision. (RT II, 9-17, 133: 4-8, 136: 16-27 – 137: 1, 152: 9-17).

113. The outcome can be different than Mr. Rodgers' recommendation. (RT II, 153: 8-14).

114. Even when Mr. Rodgers recommended Nissan issue a Notice of Termination he was always concerned about Protestant getting value from his store. (RT II, 22: 1-11).

115. After Nissan had issued a Notice of Default and provided an extension and because of the consistent underperformance over a period of time, on January 14, 2013, Nissan sent, and Protestant received, a Notice of Termination in compliance with Vehicle Code 3060. In that Notice, Nissan identified unsatisfactory sales penetration performance, related to operational deficiencies, as the reasons for the termination of Protestant's Dealer Agreement. Protestants' poor sales performance is a material breach of Section 3 of the Dealer Agreement. (RT I, 139: 18-25; 140: 1-7; Joint Exh. 4 at bates stamps NNA00047 – NNA00051).

III. GOOD CAUSE FACTORS UNDER VEHICLE CODE SECTION 3061

116. Under Vehicle Code Section 3061, the Board is required to determine whether Nissan has "good cause" to terminate Protestant's Dealer Agreement:

> In determining whether good cause has been established for modifying, replacing, terminating, or refusing to continue a franchise, the board shall 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.

Vehicle Code Section 3061.

Nissan has "good cause" to terminate its Dealer Agreement with Protestant under sub-sections (a), (b), (c), (d) and (g), as well as the existing circumstances. These good cause factors will be addressed separately.

(a) Amount Of Business Transacted By The Franchisee, As Compared To The Business Available To The Franchisee.

117. Based on the sales of the Honda and Toyota dealerships in the Santa Cruz PMA, there's ample opportunity to sell a lot more than the approximate 20 units a month sold by Protestant. (RT I, 134: 1-16).

118. In 2013, a very high percentage or roughly one-third of the Nissan registrations in the Santa Cruz Primary Market Area are sold by a Nissan dealer other than Protestant. (RT I, 138: 20-25; 139: 1-7).

119. Protestant should be concerned about people buying Nissans in the market and they are not buying from it. (RT II, 31: 16-20).

120. Nissan national sales are roughly 1.1 million for the years of 2013 and 2012. (RT I, 40:10-13).

121. Nissan offers a car for the person first entering the buying cycle to when they come out of the buying cycle, there's always a Nissan that meets their needs. (RT I, 47: 13-25; 52: 5-8).

122. Nissan's best-selling vehicle is the Altima sedan. (RT I, 49: 7-8).

123. Respondent seeks to not "over dealer" the marketplace by adding dealers to address an existing dealer's underperformance. Respondent seeks only the number of dealers as is necessary to cover the market and to help ensure dealers' competitiveness, profitability and growth. (RT I, 59: 13-23, 61: 17-25; 62: 1-2).

124. The national policy not to over-dealer is generally the same in California which leads to Nissan having fewer dealers than its competitors. (RT I, 62: 13-22).

125. Nissan's West Region covers geography in California, Washington, Oregon, Idaho, Montana, Wyoming, Nevada, Utah, Arizona, New Mexico and Texas. (Resp. Exh. 200.A at bates stamp NNA04695.)

126. Most manufacturers, including Nissan, measure sales performance using a sales effectiveness standard. (RT III, 197:20-22).

127. Segment adjusted RSE was the primary standard used to measure Protestant's sales penetration performance prior to the issuance of the Notice of Termination. In the Notice of Termination for October, 2012 approximately half of the dealers

in the West Region were Californian dealers or 99 California dealers out of 196 in the West Region. (Joint Exh 4 at bates stamp NNA00049).

128. For periods of Calendar year 2008 through 2012 the Region Retail Sales Penetration (including both the Northwest Region in 2008 and the newly formed West Region from 2009 on) was a lower standard to evaluate Protestant's sales penetration performance as compared with using a standard comprising of the Retail Sales Penetration in California markets alone:

	Santa Cruz Nissan	California Markets	Region
CY 2008	6.28	9.74	7.45
CY 2009	5.30	9.26	8.86
CY 2010	4.75	9.62	9.39
CY 2011	5.41	10.39	10.02
OCT R12 2012	3.40	9.16	8.87
CY 2012	2.88	9.03	8.76

(Resp. Exh. 200.B at bates stamp NNA04701).

129. Other than Protestant's performance across the board was not good, Mr. Rodgers does not know why Protestant's performance eroded from CY 2008 to CY 2009. (RT II, 27: 22-25 -28: 1-3).

130. For the same periods, Protestant's sales performance also never met or exceeded average performance as compared with the retail sales penetration for the following geographic areas: (1) Primary Market Area plus fringe, (2) District, or (3) United States. (Resp. Exh 200.B at bates stamp NNA04701; RT X, 86: 17- 25 –87: 1-15, 90: 7-25).

131. Protestant's expert, Mr. Stockton agreed that his calculations do not conform themselves to being able to determine a standard for evaluating the amount of business conducted by Protestant as compared to the amount of business available. (RT IX 251: 25- 252:1-9, 252:4 – 9, 275: 21-25 – 276: 1-6).

132. The use of a standard such as segment-adjusted RSE is reasonable because (1) it is consistent with Nissan Dealer Agreement, (2) Protestant has achieved it as recently as 2005, (3) other Nissan dealers in the PMA plus fringe such as My Nissan in Salinas and Stevens Creek Nissan in West San Jose have met or exceeded the standard in every year from 2008 to 2012, and, (4) roughly half the dealers in both the Region and the state of California meet or exceed average RSE. (RT I, 92:13-25; 94: 1-19; RT III, 209: 12-25 – 210: 1-7; Exh. Joint 2, bates stamp NNA00037; RT I, 110: 2-7; RT XI, 17:23 – 18:2; RT XI, 119:19 – 24 for Protestant's 2005 RSE; Resp. Exh. 200.B at bates stamps NNA04714 and NNA04715 for My Nissan and Stevens Creek, at bates stamps NNA04719 through NNA04724 for the West Region, NNA04725 through NNA04729 for California).

133. With the exception of CY 2011, for each full calendar year ("CY") since 2008, Protestant's segment-adjusted RSE has sales penetration has been lower than the previous year:

CY 2008	81.8%
CY 2009	56.3%
CY 2010	45.9%
CY 2011	51.6%

CY 2012 32.0%

(Resp. Exh. 200.C at bates stamp NNA04716).

134. This level of sales performance indicates that Protestant is not capturing the vast majority of the sales available to it. If Protestant had only achieved *average* expected sales volume for the West Region, Protestant in calendar year 2012 would have sold 540 Nissan vehicles. (Resp. Exh. 238 under column labeled "Seg.Adj Expected Sales @ Regional Avg.").

135. Instead, Protestant sold only 173 Nissan vehicles for this period, representing a shortfall of 367 vehicles for 2012 alone. (Resp. Exh. 238 under columns labeled "Dealer's Sales" and "Net Gain/Loss").

136. Over the five year period evaluated by Respondent above, Protestant's sales penetration performance represented a loss of 909 Nissan vehicle sales, using only an *average* expected performance in order to calculate this loss. (Resp. Exh. 238 under column labeled "Net Gain/Loss" for CY 2012 and Joint Exh. 4 at bates stamp NNA00049 for CY 2008 through CY 2011).

137. By the end of 2012, Protestant was the last in terms of sales effectiveness among California Nissan dealers which have been open more than 1 year. In fact, there is now only one Nissan dealer with worse sales penetration performance, a recently appointed dealer in San Francisco. (Resp. Exh. 238 at lines 192 and 194 and column labeled "Open Date").

138. In 2012, Nissan revised all its dealers PMAs, including Protestant's PMA, as a result of the 2010 US Census. (RT II, 199: 8-25 – 200: 1-14).

139. 95% or more of the dealers in the West Region had some sort of change to their PMAs as a result of the 2010 Census. All but five or fewer of the roughly 197 Nissan dealers in the West Region raised any concerns about the PMA changes.

140. As a result of the PMA audit conducted for the purposes of the census update, additional geography was added to Protestant's PMA. There were 12 more census tracts in Protestant's PMA after the 2012 change. (RT II, 199: 22-25 – 200: 1-7, 214: 10-25 – 215: 1-25).

141. Mr. Frith, Respondent's expert, eliminated the PMA assignment or its change as a result of the 2010 census as a possible cause of Protestant's Poor sales performance. In his opinion, the current PMA is properly drawn and Protestant's RSE is consistently below 38.2% whether it is under the current configuration, or redrawn using air distance, drive distance or drive time. (Resp. Exh. 200.E at NNA04740; RT IV, 67: 16-21).

142. In the opinion of Mr. Stockton, Protestant's expert, the PMA and its configuration is not a factor. (RT X, 6: 14-25 – 7: 1-2, 179:15 – 180:10.).

143. Mr. Frith also determined that using another standard such as RSE to California average would not result in Protestant being close to sales effective for the years 2008 through 2012:

	Santa Cruz RSE to California Average
CY 2008	63.9%
CY 2009	53.9%
CY 2010	44.9%
CY 2011	50.3%

CY 2012 31.3%

(Resp Exh. 200.F)

144. Sales registration data in the US Automotive Industry is a unique resource that provides the best information on the make, model and brand of vehicle that consumers prefer. As a result, demographic data is a secondary source and should be questioned if the introduction of demographic data yields illogical results. (RT IV, 13: 9-25 – 15: 1-10; RT X 84: 15: 9-25 – 85: 1-14)

145. Mr. Frith's analysis does incorporate demographics. (RT IV, 13: 9-25 –15:1-10).

146. Mr. Frith looked at population, income and employment trends in the Santa Cruz Market plus Fringe and concluded that population, income and employment trends in the Santa Cruz County were stable to moderate growth and adequate and did not represent a possible cause for Protestant's poor sales performance. (Resp. Exh. 200.G at bates stamps NNA04748 – NNA04753; RT IV 101: 21-25 – 102: 1-4).

147. Mr. Frith concluded that the Nissan dealership locations in the Santa Cruz Market plus fringe are on the average 8 miles in terms of drive distance to the other nearest Nissan dealer. This yields a customer convenience that is comparable to Honda, Volkswagen, Kia, Mazda, Subaru and Toyota. (Resp. Exh. 200.G at bates stamp NNA04758).

148. Mr. Frith concluded that the current Nissan count of 1 in the Santa Cruz PMA was appropriate. (Resp. Exh. 200.G at bates stamp NNA04759; RT IV 101: 21-25 – 1-2: 4).

149. After eliminating geographical, standard, economic and market conditions as possible causes of Protestant's poor sales performance, Mr. Frith concludes that the cause is Dealership Operations which are mostly in the control of dealership management. (RT IV, 152:20-25 – 153: 1-17).

150. There could be market factors that could affect Nissan brand performance but the primary driver of performance in the marketplace is the performance by its dealer. (RT I, 177: 15-25)

151. "Digital marketing" is interacting with customers through email or other on-line activities, it includes how a customer is driven to a dealer's website. (RT II, 68: 10-13, 72: 4-27).

152. "Lead management" is how the dealer staffs an Internet department and the processes it uses to respond to customer via email. (RT II, 71: 22-25).

153. "Representation management" refers to customer reviews that Google, other search engines and sites allow customers to write comments. There are varying degrees of control, depending on the site, that a business has over the rating results. A business can leave comments or explain how they've rectified a situation but cannot change any reviews posted on Google, Quest or Yelp. A business has the opportunity to suppress a review on Dealer Rater for a period of time until they have the chance to rectify the situation. (RT II, 78: 2-21, 81: 3-12).

154. It's about 50-50 as far as positive and negative reviews in the automotive industry, positive reviews are there all the time and dealerships can put together processes to encourage satisfied customers to post positive reviews. (RT II, 107: 16-27 – 108: 1).

155. Dealer Rater does not have exactly the same filters as Google to "sniff" out if any there's any loading of reviews that are not true customers. Yelp also knows if it's an actual person and not a fake account. (RT II, 106: 1-27 -107: 1-11, 108: 2-21).

156. If a customer input San Jose area into the Nissan website, the four closest stores would appear. Customers have the option to expand to the next group of four as well and can go as deep as they want but the default would be the closes four based off of zip code. (RT II, 110: 1-17).

157. A "lead" is when a customer through a variety of websites (Nissan USA, choose Nissan, or any third party site) fills out their personal information and requests a specific dealership to contact them on a make or model of vehicle. (RT II, 16-27 – 82: 1-5).

158. "Close rate" is the rate at which leads turn into sales. It is the ratio, for any period of time, between the number of sales from leads and the number of leads received. (RT II, 83 5-7; RT XI, 36:18 – 21).

159. In the year 2012, Protestant did not track the closing ratio separately for Nissan as opposed to for Volkswagen, Dodge and Ram. (RT XI, 75:16 – 20).

160. Protestant did not have enough customer traffic, at the closing ratio being achieved, to meet the sales objectives set by Protestant for the dealership. (RT XI, 124:1 – 5).

161. Protestant's close rate on leads for all makes at the dealership went from 14.04% on November 16, 2012 to 3.59% on December 18, 2012 to 4.03% on July 31, 2013. (Prot. Exhs. P – 9, P – 10, P – 12; RT XI, 102:16 – 104:21).

162. Protestant's Close Rate for the period of Calendar Year 2008 through 2012 has never approached West Region average:

	Santa Cruz Close Rate As a % of West Region
CY 2008	47%
CY 2009	55.1%
CY 2010	37.1%
CY 2011	45.2%
CY 2012	25.6%

(Resp. Exh. 200.H at bates stamp NNA04762).

163. In calculating Protestant's close rate, a lead (regardless of whether it comes from inside the PMA or not) is counted if Protestant converted it into a sale. (RT II, 105: 7-10)

164. Even Protestant's own expert opined at being shocked by the data demonstrating this serious operational deficiency. (Protestant Exh. 22B, Summary of Opinions at paragraph 16).

165. "Lead to Appointment", "Appointment to show" and "Show to close" are important for a dealership to track so that they can better understand where in the sales process they can improve. (RT II, 84: 13-27 – 86: 1-12).

166. Nissan offers digital market training to its dealers to improve its internet practices, Protestant's quality of response to internet leads is inconsistent and ineffective. The amount collected from a dealer represents only 20% of the overall cost of this training. (RT II, 89: 17-23, 92: 6-16).

167. The training measures the dealer against three-month average base-line for the dealership. It tracks any trends as far as dealership improvement over a year-long consulting engagement. (RT II, 91: 1-9).

168. Automotive customers are using the internet predominately in their search to purchase a vehicle. A typical number used is 85% of all consumers have gone online to conduct research prior to purchasing a vehicle. (RT II, 92: 24-25 – 93: 1-7).

169. Because of the internet a customer is not limited just to where they live or work, they can search inventory further out and if they find the right vehicle at the right price, they will travel, depending on the location, 50 to 100 miles is not unheard of. (RT II, 93: 7-16).

170. Reasons that Protestant has not been RSE effective since 2005 – Honda moved to a new facility and Toyota has the Prius and hybrid vehicles. (RT XI, 18:3 – 10).

171. Ms. Novoa backed out the Prius numbers out of the RSE calculations to show Jim Courtright that Protestant was still deficient and Prius was not skewing the numbers. (Resp. Exh. 209 at bates stamp NNA01015.)

172. For the first six-months of 2011, Honda dealers outsold the facing Toyota dealers by 145 units (634 Hondas versus 489 Toyotas) in the Santa Cruz PMA even though the national, regional and district averages were that Toyota outsold Honda. (Resp. Exh. 209 at bates stamp NNA01018).

173. To the best of Ms. Novoa's recollection, Protestant never raised any issues with her about any Honda vehicles that competed with Nissans. (RT II, 268: 3-13).

174. Honda captures more sales in the Santa Cruz market than Toyota, but in the state of California, Toyota has a larger market share than Honda. (RT XI, 21:1 – 7).

175. The reason why Honda performs so well in the Santa Cruz market is because of the dealer spending money, hiring a management team, stocking cars, developing the Internet department and doing all the things needed to be successful in the market. (RT II, 19: 5-25 – 20: 1-7).

176. While there is a high demand for Leafs in the Santa Cruz market, it is not high enough for Protestant to meet its total RSE number. (RT XI, 14:17 – 15:1).

177. Gary Inman recommended that Santa Cruz Nissan open for business on Saturdays for at least 4 ½ years. This recommendation was made at least 7 times by Nissan to Protestant. (Resp. Exh. 210).

178. Protestant sold more vehicles "over the mountains" in 2004 than it did in 2012. (RT XI, 176:8 – 13).

179. Protestant now considering being open for service on Saturdays. (RT XII, 78:23 – 79:8).

(b) Investment Necessarily Made and Obligations Incurred By the Franchisee to Perform Its Part of the Franchise.

180. Nissan dealers, including Protestant, are independent businesses. (Exh. Joint 1, bates stamp NNA05652 at Section 17.C. and RT I, 54: 23-25; 55: 1-3).

181. If a dealer underperforms, it affects dealer's and Respondent's revenues, preventing Respondent from reinvesting more in the Nissan brand and Protestant from spending more in aggressive ways and reducing future sales opportunities. (RT I, 63: 18-25, 64: 1-6).

182. When a dealer underperforms, a customer who might be interested in a Nissan Product may buy another brand because they were not aware of the Nissan brand or the product's availability. RT I, 64: 25; 65: 1-12).

183. Nissan's model line-up has changed and grown since 1996 and Protestant's planning volume for Nissan has increased from 538 in 1996, when it moved into the current facility, to 621 in 2005 at the current facility. However, the facility has not been expanded since that time, other than the addition of a car wash. (Exh. J-2 and Resp. Exh. 208; RT XII, 208:11 – 213:24).

184. Market study recommendations for Protestant were just that, recommendations and not requirements. Protestant understood them as recommendations. (RT I, 148: 11-21; RT XI, 211:15 – 212:13).

185. Letter from Nissan states the recommendations of the Market Study, but no requirement or deadline is stated. (Joint Exh. 6; RT XI, 216:9 – 217:8).

186. Nissan makes a distinction between recommendations and requirements, and states deadlines for requirements to be met as in the Notice of Default and Notice of Termination. (RT XI, 218:8 – 219:9).

187. Protestant had plenty of net working capital at the dealership $2,342,613 compared to the guide requirement of $880,390 so the lack of capital was not the reason the dealership could not spend more money and make more sales. (RT XII, 40:9 – 41:2).

188. Nissan does not always have half of the showroom allocated to it. (RTVII 19:8 – 11).

189. Jim Courtright asked Eric Rodgers if Protestant and Nissan could come to a resolution if Protestant built a showroom on the "across the street" property exclusively for Nissan. This conversation was in approximately November or December of 2012. Mr. Rodgers said "no." (RT XI, 7:16 – 8:25).

190. Jim Courtright of Protestant couldn't remember if the offer to build a showroom for Nissan was made after the Notice of Default had expired or after the extension to the Notice of Default had expired. (RT XI, 76:7 – 24).

191. The same proposal was never made to Volkswagen or Dodge, i.e., to build a showroom for them across the street. (RT XI, 76:25 – 77:7).

192. Protestant has never proposed moving the Volkswagen, Dodge and Ram showroom display of vehicles to buildings across the street from the current showroom. (RTVII, 23:6 - 25:12).

193. Mr. Rodgers believed that the most important thing a dealership can do is fix the operational problems, the fundamental issues but this takes plans and execution of those plans to grow the business. While an NREDI store makes a difference, the most important thing is the operations of the store. The matter was never about NREDI or relocation, it was about the performance of the store. (RT I, 156: 11-22; 153: 23-25; 154: 1).

194. Ms. Corrao has seen case studies that dealers will have greater through-put (more sales, greater capacity and higher customer satisfaction), higher return on sales, higher parts and accessories, gross profit but customer retention may not be specifically called out in these studies. There are many factors that improve customer retention. (Protestant Exh. 24, 32: 3-11; Resp. Exh. 241, 32: 12-20).

195. NREDI is not a panacea to cure all sales problems. Ms. Speranzo when she was the NREDI Manager always reminded dealers that the stadium doesn't win the game. It was important to keep in mind best practices; just because you have a beautiful facility, it's still people processes and place that really matter. (RT III, 93: 3-14).

196. If a dealer was performing at 30-35% RSE and approached Ms. Speranzo about NREDI, she would probably advise the dealer to address sales performance and

have a healthy dealership before talking about investing in NREDI. (RT III, 93: 20-25 – 94: 1-13).

197. The US NREDI ROI Analysis does not tell you anything about a dealer, such as Protestant, that's performing in the 30% RSE range and would not indicate that Protestant could achieve 100% RSE if it were NREDI compliant. (RT II, 156: 18-21; Protestant Exh. 11).

198. Nissan has dealers that are performing at or above 100% RSE that are not (1) exclusive; (2) within close proximity of Toyota or Honda; nor (3) NREDI compliant. A dealer does not have to do these three things in order to perform at or above RSE. (RT II, 157: 1-19).

199. In Nissan's West Region, about 80 percent of the dealers are NREDI compliant or at least under construction and 20 percent are not. (RT III, 8:3-7).

200. There is a specific NREDI scheme that allows dual dealers to be compliant and Nissan has dualed NREDI facilities currently. (Resp. Exh. 241, 32: 21-25 – 33: 1-5; RT II, 194: 5-10).

201. In Mr. Rodgers' opinion, although it may contribute, just having a different location, a larger store, being exclusive, or being NREDI is the answer for selling a lot more cars and trucks. (RT II, 41: 1-10).

202. The Notice of Termination was not based on and had nothing to do with whether Protestant was not (1) NREDI compliant, (2) exclusive, or (3) closer to Toyota or Honda. (RT I, 154: 24-25; 125: 3-10; RT III, 95: 20-25 – 96:1-16).

203. Mr. Rodgers did not rely on the Desktop Market Study in initiating the recommendation for the Notice of Termination. The Desktop Market had nothing to do with this action. (RT II, 53: 2-11).

204. Neither the Notice of Default nor the Notice of Termination were based in any way on the 2013 Market Study or the Desktop Market study. (RT I, 153: 16-20).

205. The only factors in the issuance of the Notice of Default and Notice of

Termination essentially are the factors stated in the notices themselves. (RT III, 17-21).

206. If exclusivity or NREDI had been a consideration for the Notice of Default or Notice of Termination, this would have been included in the notices. Neither of these topics were discussed during any personal conversations Ms. Speranzo had with others at Nissan while going through the process. (RT III, 123: 19-25 – 124: 1, 125: 2-5).

207. When Mr. Rodgers contacted Protestant at the dealership on December 13, 2010 the questions he asked Mr. Lee Courtright would have been independent of any Market Study or Desktop Market study. He had not yet seen "the" or "a" Market Study before this visit and therefore could not have relied on it. (RT II, 56: 2-23 – 59: 1-9, 124: 1-23).

208. At the time of the December 13, 2010 contact, Mr. Rodgers did not have a candidate "lined up" to buy Protestant's store and if he had known Mr. Groppetti was interested in buying Protestant's dealership he would told Protestant. However, Mr. Rodgers did not know of any interest on the part of Mr. Groppetti at this time. (RT II, 61: 17-25 – 62: 1-14).

209. The Dealership was making more profit September,2011 year to date than it made September, 2010 year to date, so that was not a reason it was not selling more vehicles. (RT XII, 41:3 – 20).

210. Despite the underperformance of Protestant in Nissan sales, Jim Courtright would not consider having a dedicated sales team to sell only Nissan vehicles at the dealership. Instead, all salespeople at the dealership can sell all four brands sold there. (RT XII, 4:1 – 23, RT II, 316: 2-9).

211. For two years, 2009 and 2010, Protestant's dealership operated unprofitably. Protestant showed a profit in 2011. (RT XII, 97:5 – 20).

212. Mr. Courtright knew Alison Speranzo's e-mail address to give input to the Market Study. Ms. Novoa did not forbid him from providing input into the Market Study. (RT XII, 121:14 – 122:20).

213. Jim Courtright did not contact Ms. Speranzo about providing information about the Market Study despite the letter asking to contact her with any information. (RT III, 107: 1-25 – 108: 1-7).

214. Jim Courtright stated that there are good years and bad years in business and it is not always an upward trend. However, because Protestant exceeded the net working capital guidelines, it had a cushion against potential losses and never discussed shutting down the dealership. (RT XII, 122:21 – 124:18).

215. Protestant makes all the decision on how much many is spent, and what the focus of marketing or activities are in the store. (RT I, 56: 11-14).

216. The real estate underlying Protestant's dealership facility is owned by a trust, of which Lee Courtright is the trustee. Even during the time the dealership was losing money, the trust continued to charge the dealership rent. (RT XII, 125:17 – 126:1).

217. It is the Protestant's decision to remodel, renovate or expand a dealership facility. *(RT I, 56:4-7).*

218. Jim Courtright believes Santa Cruz Nissan at 1616 Soquel Avenue is well-located to achieve sales and is located close to its competitors, Honda and Toyota dealerships. (RT VII, 13:7 – 17).

219. Jim Courtright didn't know the percentage of either Santa Cruz Nissan, Inc. or Santa Cruz Investors at the time of his dealership. He has since learned he owns 28% of the former and 49% of the latter. RTVII 14:2 - 22.

220. Jim Courtright didn't know the monthly rent amount for the dealership at his deposition on December 5, 2013. He thought it was $15,000 per month and it is $25,000 per month.

221. Jim Courtright didn't know at the time of his deposition how the rent is allocated among the two corporations which have franchises in the dealership and at the time of his testimony at the merits hearing two months later, still didn't know. (RT VII, 7:2 – 11).

222. There are no plans to expand the dealership. (RT VII, 13:25 - 14:1).

223. Jim Courtright had never seen a Market Study before 2013, so he is not aware as to whether any information that he might have provided would have been useful, and he was not prevented from providing that information in any event. (RT XII, 133:19 – 134:22).

224. When Jim Courtright testified that Saturday service was not profitable in the past, he doesn't know what was taken into consideration in making that determination, he was simply told it was not profitable, and he didn't analyze it. (RT XII, 135:2 – 22).

225. Jim Courtright didn't know if his Service Managers surveyed customers to determine whether they wanted Saturday service or not. (RT XII, 136:17 – 137:12).

226. When asked what had changed to make Protestant now consider Saturday service, Jim Courtright admitted that he didn't know if much had changed, but reading Mr. Inman's contact reports and other things in the course of the merits hearing, Protestant now thinks it might be a good idea. (RT XII, 146:20 – 17:7).

227. Protestant's dealership was not unprofitable as a whole in the 1990's and that was not a reason that the dealership stopped doing Saturday service. (RT XII, 158:7 – 15).

228. Protestant never added salespeople in order to increase sales of Nissan vehicles at the dealership during the Notice of Default period in 2012. (RT XI, 121:4 – 16).

229. Protestant had trouble attracting qualified sales people from 2008 through 2012, but Jim Courtright is not sure why. The dealership made no effort to find out why

it had trouble attracting qualified applicants for sales person jobs. (RT XI, 70:20 – 71:16).

(c) Permanency of the Investment.

230. Lee Courtright has owned, in addition to the Nissan franchise in Santa Cruz, an interest in at least 10 other new motor vehicle franchises, including 2 Volkswagen, 2 Nissan, Dodge, Ram, Jeep, Mazda, Toyota and Mercedes, in various places in California and Nevada. For some of these, he still owns the real estate on which the dealerships are located. (RT XII, 168:22 – 172:8).

231. Unless someone overpaid for it, Lee Courtright would not have likely sold the Nissan franchise separately, because in his opinion, that would have rendered the other franchises at the dealership not viable, and the only reason he was considering the sale is that he hadn't thought it through financially. (RT XII, 203:16 – 204:8).

232. Protestant submits consolidated financial statements to Nissan that cover the Nissan, Volkswagen, Dodge and Ram franchises. (Prot. Exh. 14; RT XI, 54:2 – 10).

233. According to Protestant's 2012 financial statements, Protestant has no investment in land, building and improvements. (Exh Protestant 14, lines 59 and 60 at bates stamp SCN05255).

234. The entity which owns the real estate at which Protestant operates the dealership is separate and apart from Protestant and according to Lee Courtright, "I don't think that has anything to do with Santa Cruz Nissan." (RT XII, 207:3 – 9).

235. According to Protestant's 2012 financial statements, Protestant's fixed assets for all franchises (Nissan, Volkswagen, Dodge and Ram) consist of Machinery, Shop Equipment, Parts and Accessory Equipment, Furniture and Fixtures, Leasehold and Signs in the amount of $599, 043. (Protestant Exh 14, lines 61-67 at bates stamp SCN05255).

236. According to Protestant's September, 2013 financial statements, the sum total of Protestant's fixed assets (consisting of Machinery, Shop Equipment, Parts and Accessory Equipment, Furniture and Fixtures, Leasehold and Signs) for all franchises (Nissan, Volkswagen, Dodge and Ram) increased slightly to $618,490. (Resp. Exh. 223, line 67 at bates stamp NNA04211).

237. According to Protestant's September, 2013 financial statements, Protestant still owned no land, building or improvement. (Resp. Exh. 223, lines 59 and 60 at bates stamp NNA04211).

238. Protestant has moved facilities twice in 42 years, in 1979 first from its original location on Front Street in Santa Cruz, to a location on Center Street in Santa Cruz, and again in 1996 from Center Street to its current location on Soquel Avenue, each time to newer and more modern facilities. Lee Courtright would anticipate that the dealership might either have to renovate or remodel or move again at some point from its current facilities. (RT XII, 207:13 – 208:10).

239. Jim and Lee Courtright know that land is expensive in the Santa Cruz market, and don't need Nissan to tell them that. (RT XI, 160:22 – 161:20).

(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.

240. Nationwide, Nissan, Toyota and Honda have approximately 1100, 1200 and 1400 dealers respectively. Ford and General Motors have in the range of 4000 dealers. Chrysler also has more dealers than Nissan nationwide. (RT I, 57: 1-8).

241. In Respondent's West Region, the same trend holds. Nissan has 187 dealers, Honda has 214 dealers and Toyota has 243 dealers. (Resp Exh. 233).

242. The number of competitive franchises in the Santa Cruz Primary Market Area is 16 (RAM is not counted as a stand-alone franchise from Dodge) and includes only 1 Nissan dealer (Protestant), 1 Honda dealer and 1 Toyota dealer. (Resp Exh. 200.A, bates stamp NNA04697 and Resp Exh. 200.G, bates stamp NNA04759).

243. The number of average Nissan Dealers necessary in the Santa Cruz PMA to meet or exceed West Region Average is 0.9, or 1 dealer because it is not possible to have less than 1 dealer. (Rep Exh. 200.G, bates stamp NNA04759; RT IV, 101: 21-25 – 102: 1-4).

244. Respondent expects Protestant to represent its products to all potential customers in the Primary Market Area, regardless of the different languages spoken by the public. (RT I, 60: 10-24).

245. Protestant's PMA was changed in 2012 to add census tracts to the southerly portion of his PMA. (RT VII, 25:13 – 25).

246. The census tracts that were added to the PMA were primarily in the City of Watsonville, which Jim Courtright knew immediately when the new PMA map was shown to him and his immediate reaction was that he objected to the change. (RT VII, 26:1 – 11).

247. Jim Courtright believed the PMA was incorrectly drawn and tried to have Nissan change it back. He believed the census tracts in Watsonville should not have been added. (RT VII, 26:13 - 27:20).

248. The DOM put Jim Courtright in touch with Ms. Speranzo about his concerns over new tracts that were added to the PMA who asked Nissan's Market Study department to confirm that the census tracts belonged to the Santa Cruz Primary Market Area. Nissan's Market Study Department confirmed that because they were closest by drive miles to Protestant than any other Nissan dealer, they belonged to the Santa Cruz Primary Market Area. Ms. Speranzo emailed this information back to Jim Courtright and assumed it was resolved because the dealer did not respond back. (RT III, 99: 22-25 – 100: 1-18).

249. The reason that Jim Courtright believed that the PMA was incorrectly drawn is because the census tracts in Watsonville were in the southern part of Santa Cruz County, which, according to Mr. Courtright, have a population which is "educationally, economically, ethnically and geographically different" from the northern part of the County. (RT VII, 27:21 - 28:2).

250. A person's education level, ethnicity, and economic level are not factors Nissan considers in revising the PMA assignment. (RT III, 106: 1-16).

251. Jim Courtright believed that the population in the south part of Santa Cruz County is educationally different based on what he has read. He did not "explore" whether that was true, but he knows that a person doesn't need a college education to buy a Nissan. (RT VII, 28:3 – 13).

252. Jim Courtright believed that population in the south part of Santa Cruz County is economically different from based on what he has read. He knows that Nissan need to earn $75,000 per year to purchase a Nissan. He also knows that now everyone wants or needs to drive a luxury car. (RT VII, 28:14 - 29:13).

253. Jim Courtright knows that the population in the Watsonville area is about 80% Hispanic, and the City of Santa Cruz is about 20% Hispanic, which makes it ethnically different. He also knows Santa Cruz County has a higher percentage of Hispanic people than the City of Santa Cruz, "Because it includes the City of Watsonville." (RT VII, 30:1 – 7).

254. The ethnic makeup of a purchaser doesn't make any difference to him as a car dealer, yet he brought it up as a factor because the dealership didn't have any Spanish-speaking salespeople working at the dealership to service those consumers from the Watsonville area. He does not speak Spanish. (RT VII, 31:7 - 33:10).

255. A television station contacted Jim Courtright and told him, independently of Nissan, that the Hispanic market is a good market for Nissan, and on that basis, the dealership decided, in January, 2014 to begin advertising in Spanish. Prior to that, the dealership had considered advertising in Spanish, but hadn't done it. (RT VII, 33:11 - 34:12).

256. At the time of his deposition on December 5, the dealership had two Spanish-speaking sales staff, a Sales Manager, Joaquin Rodriguez, who was hired in August, 2013 and Jorge Rocha, a salesperson who was hired in October, 2013. Mr. Rocha no longer works there [and two other Hispanic salespersons have since been hired]. (RT VII, 38:19 - 40:22).

257. From March, 2012 when the Notice of Default was issued to August, 2013 Protestant had no Spanish-speaking sales employees. (RT VII, 41:8 – 11).

258. During her tenure as DOM, Ms. Novoa knew that the Nissan dealers in Salinas, San Jose, West San Jose, Dublin and Freemont all had Spanish speaking sales staff. (RT II, 305: 15-25 – 306:1)

259. Ms. Novoa remembers recommending that Protestant should have at least one fluent speaking Hispanic bilingual sales consultant on the floor and/or in internet to accommodate those customers that did not speak English. During conversations with Protestant, she recalls that the Courtrights mentioned they did not have any Spanish speaking staff members. (RT II, 304: 22-25 – 305: 1-4, 317: 12-25 – 318: 1-11).

260. It was common sense to Ms. Novoa that Protestant should have Hispanic speaking people because most dealerships did. (RT II, 317: 21-25 – 318: 1).

261. Jim Courtright could not recall asking anyone at Nissan if the Watsonville area was a good area for Nissan sales, at the time of the PMA change. (RT VII, 41:21 – 24).

262. Regardless of whether the area added to Santa Cruz Nissan's PMA was in the PMA or outside of it, Santa Cruz Nissan could still sell cars into it. (RT VII, 41:25 - 43:2).

263. Jim Courtright didn't know what level of Nissan sales were being achieved into the Watsonville area prior to challenging the change to Protestant's PMA, nor did he know whether the facing Honda and Toyota dealers sell into the Watsonville area. (RT VII, 43:8 – 20).

264. According to the Quick Facts from the US Census Bureau, the 2010 and 2012 population estimate for Watsonville, Santa Cruz and Santa Cruz County are as follows:

	Watsonville	Santa Cruz	Santa Cruz County
2010	51,199	59,946	262,382
2012	51,881	62,041	266,776

(Joint Exhibit 12A-12C)

265. There is a high Hispanic population in Watsonville. (RT XI, 28:2 – 5).

266. According to Quick Facts from the US Census Bureau, the percent Hispanic or Latino in Watsonville, Santa Cruz, Santa Cruz County (2012 estimate) and California according to the 2010 Census is as follows:

Watsonville	Santa Cruz	Santa Cruz County	California
81.4%	19.4%	32.7%	37.6%

(Joint Exhibit 12A-12C)

267. According to Quick Facts from the US Census Bureau, the percent of people of age 5 or more where a language other than English is spoken at home for the years of 2008-2012 in Watsonville, Santa Cruz, Santa Cruz County and California is as follows:

Watsonville	Santa Cruz	Santa Cruz County	California
74.1%	22.2%	30.6%	43.5%

(Joint Exhibit 12A-12C)

268. Protestant began advertising in Spanish language media in February, 2014. This was 11 months after Protestant received the Notice of Termination in this case. (RT XI, 30:2 – 15).

269. Protestant waited so long to advertise in the Spanish language media because it wanted to have the infrastructure in place to properly service the customers that

would be drawn to the dealership by "Hispanic language advertising." (RT XI, 30:16 – 23).

270. Spending $2,000 per month on Spanish advertising for a 3 month agreement. At the end of the 3 months, if it's effective, Protestant will continue it. (RT XI, 47:25 – 48:17).

271. Protestant has not done any study to determine how many bi-lingual people live in the Watsonville area. (RT XI, 95:19 – 96:4).

272. The Spanish language advertising that was initiated in February, 2014 for a period of three months at $2,000 per month would be discontinued if not effective. (RT XI, 96:15 – 97:10).

273. Since Jim Courtright became the General Manager of the dealership in the late 1990's, it had not done any Spanish-language advertising until February, 2014. (RT XI, 97:16 – 24).

274. Jim Courtright does not recall being told that the centroid of the census tracts added to Santa Cruz Nissan's PMA were closer to it than to any other Nissan dealer. (RT VII, 44:6 – 18).

275. Since the census tracts in Watsonville were added to Protestant's PMA, it now has the right to have Nissan vehicle displays and tent sales in the area, but has not requested Nissan's permission to do so. (RT VII, 44:19 - 45:10).

276. Prior to January, 2014 Protestant's advertising into the Watsonville area has been in English. (RT VII, 46:5 - 47:3).

277. After Protestant's PMA was changed to add Watsonville, Protestant has never had any tent sales or displays of vehicles in that area. (RT XI, 160:10 – 16).

278. Protestant does not track the effectiveness of its college graduate sales program. (RT XI, 211:4 – 12).

279. Protestant's very low level of sales penetration also indicates that Protestant is not operating in the public interest because of the affect on the ability to reinvest in the market by Nissan and Protestant. (RT I, 63: 18-25, 64: 1-6)

280. Protestant is also failing the public interest in that, in effect, it focuses on selling only four models (Leaf, Sentra, Frontier and Versa), a small fraction of Nissan's complete, twenty-two model line-up. (Resp. Exh. 202).

281. Furthermore, Protestant is only sales effective in one of the four models it focuses on selling, that being the Nissan Leaf. (Resp. Exh. 200.Rebuttal at NNA05665).

282. The Nissan brand as primarily represented by Protestant has the second lowest Brand Effectiveness to West Region Average in the Santa Cruz PMA for 2012. (Resp. Exh. 200.Rebuttal at NNA05663).

283. Sales by other Nissan dealers that are registered in the Santa Cruz PMA cannot make up the shortfall in terms of the poor Brand Effectiveness for Nissan. (Resp. Exh. 200.Rebuttal at NNA05664).

284. Protestant's poor service customer retention rate is also related to its poor sales performance. Based on higher sales, Jim Courtright believes that Honda and Toyota have a higher UIO than Nissan. (RT XI, 26:6 – 22).

285. Protestant is not open for service on Saturdays, and has not been open for Saturday service since the mid-1990's, and was discontinued because it wasn't profitable. (RT XI, 21:17 – 22: 4).

286. Jim Courtright didn't start working full-time at any dealership until after he obtained an MBA in 1991. (RT XI, 131:10 – 16).

287. Since Jim Courtright has been the General Manager of the dealership, it has not tried Saturday service. (RT XI, 100:1 – 7).

288. Protestant does not dispute that if a customer comes into a dealership for service 8 to 10 times, the customer is more likely to buy a vehicle from that same dealer. (RT XI, 93:10 – 17).

289. The dealership is not open on Saturdays for service and has not been, since the 1990's. (RT VII, 47:10 – 18).

290. Fewer people commute from Santa Cruz toward San Jose from 7 to 9 in the morning on Saturdays, than during the week. (RT VII, 48:14 – 23).

291. Jim Courtright is not sure if it makes sense for the dealership to be open for service on Saturdays when people are home in Santa Cruz. He has not analyzed it himself, nor is he aware of any survey being done of Protestant's customers on the subject. (RT VII, 49:21 - 51:3).

292. Jim Courtright has seen studies that have concluded that a customer who services a vehicle several times at a dealership is more likely to purchase a vehicle from that same dealership. (RT VII, 52:17 – 20).

293. Mr. Inman has been employed by Nissan North America for 21 years, in various capacities. He is a Fixed Operations Manager and has been for four years. He promotes parts and service business for the dealers in his district and helps them grow their service business and satisfy customers. RTVIII, 45:13 – 46:6.

294. Part of Mr. Inman's responsibilities is service retention. That is defined as two customer visits in 12 months. Service retention leads to customer loyalty, which leads to sales of new vehicles. RTVIII, 47:23 – 48:15.

295. At Santa Cruz Nissan, Mr. Inman calls on the Service Manager and on Jim Courtright, Executive Manager, when he is available, and discussed service issues with them. RTVIII, 51:15 – 22.

296. Nissan keeps data on how service retention leads to more sales. If a customer visits a dealership 8 times or more, they're 80% more likely to buy a car from that same dealer. RTVIII, 52:1 – 53:2.

297. Mr. Inman's contact reports are exhibit 210. He signs each contact report. The date the contact was written might be some time after the actual contact at the dealership, but both dates are on each report. RTVIII, 54:15 – 55:16.

298. On May 14, 2009 Mr. Inman contacted Santa Cruz Nissan's Service Manager Harry Weigant and Jim Courtright and discussed service retention and service defection (customer who buys a car and does not return for service) and Saturday service hours with them, because the dealership was not open for service on Saturdays. Mr. Weigant stated he would not consider it. They also discussed SCN's contention that it is a "pump out" market, selling a lot of vehicles outside their PMA. RTVIII, 59:19 - 61:11.

299. On August 6, 2009 Mr. Inman contacted Santa Cruz Nissan's Service Managers Harry Weigant and Lee Courtright and discussed service retention and service defection (customer who buys a car and does not return for service) claiming low retention is because it's a pump-out dealer. RTVIII, 64:11 - 65:10.

300. On September 15, 2009 Mr. Inman spoke with Lee Courtright and Matt Tanoury, new Service Manager about convenient hours and surveying customers to learn their preferences. That's a partial reference to Saturday service hours. RTVIII, 59:19 - 61:11.

301. On October 20, 2009 Mr. Inman talking to Jim Courtright, who again contended SCN is a "pump-out" dealer and people service vehicles at the Nissan dealers near

where they live. Mr. Inman showed Mr. Courtright that only a small percentage of customers live outside their PMA. Retention at 21.29% for SCN is very low. The Defection Report also does not support the explanation that Protestant pumps out sales beyond their PMA. RTVIII, 67:16 - 71:20.

302. On April 30, 2010 retention improved, but is still low. The pump-out reason given by Jim Courtright for low retention is just not true, but he was just looking for a reason justifying the dealership's retention performance. On this visit Mr. Inman downloaded 5500 customer names and 20,000 total records to help with electric vehicle marketing. RTVIII, 75:9 - 77:24.

303. On April 11, 2011 met with new Service Manager Frank Barsamela and Mr. Inman strongly suggested opening on Saturdays. Mr. Barsamela said he would consider, but needs more time in his position. RTVIII, 84:11 - 85:10.

304. On November 15, 2012 Mr. Inman met with Mr. Barsamela and discussed service retention, which is 27.05, 9.36 points below region average. Also sent to Jim Courtight via e-mail. 76% of customers live within 10 miles of the dealership. Also recommend review opening for service on Saturdays. Busiest day for San Jose dealers. If many customers are commuters, must be open when its convenient for them or risk losing their business. Consider informal survey of "zero visit" customers. RTVIII, 86:16 - 89:21.

305. On March 27, 2013 Mr. Inman met with Jim Courtright and recommended he open for service on Saturdays. Highest customer pay traffic in district. Mr. Courtright said it was very difficult to schedule technicians, but said he would consider it. Still not open on Saturdays. RTVIII, 99:12 - 101:8.

306 Assigned Customer Base, or ACB is 1,454. 5.2% are outside the Santa Cruz area. Impact of pump-outs is minimal. 98% have or could service at Santa Cruz Nissan. 74% service at aftermarket shops. Opportunity for Santa Cruz Nissan. RTVIII, 105:5 - 107:7.

307. Overall, Mr. Inman mentioned the Saturday service issue to Jim Courtright six times and Lee Courtright twice since he's been calling on Santa Cruz Nissan. RTVIII, 114:18 - 116:2.

308. The facing Honda dealer is open on Saturdays for service and the facing Toyota dealer is open on Saturdays and Sundays. RTVIII, 116:10 - 19.

309. Whether another make such as Honda or Toyota has more Units in Operation than Nissan is not a reason to be open or not be open for Saturday service, because a dealer should be open when its customers want it to be open. RTVIII, 119:18 - 120:10.

310. Many markets have an out-commute pattern: Selma, San Rafael, Dublin, Redwood City, Petaluma. A heavy out-commute pattern is not a reason for poor service retention. It's more of an excuse. RTVIII, 122:13 - 123:25.

311. When Boardwalk Nissan in Redwood City was dualled with another line-make is was open for service on Saturday, so it's possible. Most dualled dealers he has called on have been open on Saturdays for service. RTVIII, 147:25 - 148:17.

312. In the case of Santa Cruz Nissan, there are enough customers located close to the dealership for it to be open on Saturday. RTVIII, 151:10 - 152:14.

313. Jim Courtright wants the dealership to give a discount to people in the PMA as opposed to people outside the PMA. (RT VII, 61:5 – 22).

314. A dealer's underperformance in market share affects Nissan's market share because Nissan will sell fewer cars and trucks and its competitors are selling more. (RT I, 65: 13-24).

315. Martin Bernal has been the City Manager of Santa Cruz for 4 years. Prior to that, he was the Assistant City Manager of Santa Cruz for 13 years. RTVI, 7:3 – 16.

316. He works with the Employment Development Department of the City to recruit and retain businesses. RTVI, 8:16 – 9:1.

317. Mr. Bernal has worked with the Santa Cruz Seaside Company, which operates the Boardwalk, to bring the Golden State Warriors minor league team to the City, where they built an arena, leased property owned by the Seaside Company and made a loan to the Warriors to build an arena. RTVI, 9:9 – 10:9.

318. The main reasons for retaining and attracting new business are to retain and expand the tax base and to create and maintain jobs. RTVI, 10:13 – 11:16.

319. Currently, there are two new car dealerships in Santa Cruz, Santa Cruz Nissan, Dodge, Ram and Volkswagen and Northbay Ford Lincoln along the Soquel Avenue corridor, and several used car dealerships, which have increased in the past few years. RTVI, 11:22 – 12:1; RTVI, 14:20 – 15:13.

320. At one time, the City of Santa Cruz had several other dealerships, which moved out, including Chevrolet, Toyota, Mazda, Honda, Subaru, Volvo, Jeep and Chrysler. RTVI, 13:7 – 15; RTVI, 43:25 – 44:10.

321. There was an economic recession in Santa Cruz which started in 2008, with sales tax and other revenue sources declining or levelling off. RTVI, 16:22 – 16.

322. Recently, the City has revenues coming up to where they were, or close to where they were in the early 2000's. RTVI, 18:21 – 19:2.

323. The City's tax revenue was at its peak in 2006 or 2007. RTVI, 19:9 – 19.

324. The City of Santa Cruz generally recovered economically more quickly than the State of California overall [but slower than Silicon Valley]. RTVI, 19:20 – 20:9.

325. Because Santa Cruz is the county seat, and because of the university and businesses, there are a number of people who commute into the city for their jobs. RTVI, 32:1 – 20.

326. The city of Santa Cruz is a net exporter of jobs, meaning more people commute out for jobs than commute in, but Mr. Bernal is not aware of the amount of net difference. RTVI, 32:21 – 25; RTVI, 76:8 – 18.

327. The closest Honda dealer is in an unincorporated area and the Toyota dealer is in the city of Capitola. RTVI, 35:20 – 36:7.

328. The exodus of car dealerships from the City of Santa Cruz started a long time ago. RTVI, 43:25 – 10.

329. The Seaside Company is one of the largest landowners in the City of Santa Cruz, and is also the owner of several dealerships who moved out of the city, including Toyota, Mazda and Subaru, which moved out of the city for economic reasons. RTVI, 44:20 – 45:8.

330. If the termination is allowed to go through and a replacement Nissan dealer wants to locate in the city, the city would attempt to facilitate that. RTVI, 47:8 – 22.

331. The City of Santa Cruz has not done anything to attract new dealerships. RTVI, 50:8 – 14.

332. The people who live in Capitola where several dealerships moved to, need city services, just like the people in Santa Cruz. RTVI, 50:23 – 25.

333. The Honda dealer located in unincorporated area help pay for county services. RTVI, 52:10 – 14.

334. There are approximately 19 used car dealerships in the City of Santa Cruz and the count has increased recently. RTVI, 56:21 – 57:11.

335. Mr. Bernal is not sure if Protestant's Exhibit 15 references the corporation that owns Santa Cruz Nissan. RTVI, 58:9 – 17.

336. The sales tax rate is the same for new vehicle sales and used vehicle sales. RTVI, 60:18 – 20.

337. The cities of Santa Cruz and Watsonville are the two cities in the county with the highest population. RTVI, 32:1 – 20.

338. The entire automobile tax issue boils down to basic arithmetic, if more vehicles are sold in the city, the city gets more tax revenue, if fewer are sold, it gets less. RTVI, 66:5 – 11.

339. If Santa Cruz Nissan had sold more vehicles over the years, the city would have generated more revenue. RTVI, 66:17 – 67:3.

340. Soquel Avenue, from Marnell, where Santa Cruz Nissan is located, to Parkway, where Northbay Ford is located, can get congested. RTVI, 74:2 – 75:11.

341. The percentage of Hispanic population in Santa Cruz is ;20 to 25%, higher in the county and in Watsonville, Hispanic population is the majority. RTVI, 76:24 – 77:21.

342. Protestant's counsel stipulated that some businesses reach out to the Hispanic population in the area. RTVI, 80:14 – 81:1.

343. The amount contributed to Santa Cruz's tax revenues is $149,000 out of $22 million, just over .05%. RTVI, 82:12 – 24.

344. The overall tax revenues are currently trending up. RTVI, 98:25 – 99:4.

(g) Extent Of The Franchisee's Failure To Comply With The Terms Of The Franchise.

345. Section 3.A of the Standard Provisions obligates Protestant to *actively and effectively* promote through its own advertising and sales promotion activities the sale at retail…of Nissan Vehicles. (Exh Joint 1, at bates stamp NNA05625).

346. Respondent spends multiples of billions to develop a full lineup of cars, including $5 Billion alone on a single car like the Leaf. (RT I, 53: 1-3, 53: 6-13).

347. Protestant is not just a Leaf dealer, it is a Nissan dealer charged with selling all vehicle lines that Nissan makes for sale in the U.S. market. (RT XI, 81:17 – 82:1; Exh. Joint 1, Section 3.A. at bates stamp NNA05625).

348. Though according to Mr. Stockton, Honda does not have a viable competitor to the Toyota Prius, Honda is able to outsell Toyota in the Santa Cruz market, despite the fact that Toyota still has the advantage in hybrid sales with the Prius. (RT XI, 80:12 – 81:11).

349. The Honda and Toyota dealers in the Santa Cruz market have the same out-commute problem that Protestant faces. Those dealers would have the same issues as Protestant in selling vehicles to customers that work in the San Jose area. (RT XI, 86:3 – 87:10).

350. According to Quick Facts from the US Census Bureau the mean travel time to work (minutes) for workers age 16 and greater for 2008-2012 in Santa Cruz, Watsonville, Santa Cruz County and the State of California is as follows:

Santa Cruz	Watsonville	Santa Cruz County	California
21.9	22.0	25.7	27.1

(Joint Exh. 12A-12C)

351. Some customers don't want electric vehicles or hybrids, because they are more expensive than gas-powered models of the same vehicle. (RT XI, 82:2 – 83:11).

352. All Nissan dealers sell the same vehicles, so if Nissan does not make a hybrid vehicle in the compact segment, no Nissan dealer has that vehicle to sell, not just Protestant. (RT XI, 83:12 – 84:1).

353. The June 12, 2012 Contact Report of Ms. Novoa shows that on a 12 month RSE report, Protestant's sales were deficient by 24 sales per month, as she indicated to Mr. Courtright. (RT XII, 52:17 – 53:11).

354. Respondent's performance national sales performance through December 2013 versus Honda sales performance was 68 percent and 52 percent against Toyota sales performance but Protestant's performance against its facing Honda and Toyota dealers in Santa Cruz was roughly 16 percent of Honda and 20 percent of Toyota. (RT I, 81: 11-25; 82: 1-10).

355. Chad Filiault recommended that the Protestant's dealership participate in Facebook or LinkedIn, but the dealership didn't do so. (RT XI, 30:2 – 15).

356. Protestant does not have a Facebook page for the dealership, despite Mr. Filiault of Nissan suggesting that the dealership advertise on social media. RTVII 59:13 - 61:4.

357. Section 3.F of the Standard Provisions of the Dealer Agreement requires Protestant to maintain a sales organization that includes a sufficient number of qualified and trained sales managers and sales people to enable Dealer to effectively fulfill its responsibilities under Section 3 of the Dealer Agreement. (Exh. Joint 1 at bates stamp NNA05626.)

358. In the year 2012, Protestant had 4 new vehicle sales people and 2 used vehicle sales people and one sales manager for the entire dealership. (RT XI, 65:10 – 66:17).

359. In the year 2011, Protestant had 4 new vehicle sales people and 2 used vehicle sales people and one sales manager for the entire dealership. (RT XI, 66:18 –

67:8).

360. In the year 2010, Protestant had 4 new vehicle sales people and 1 used vehicle sales person and one sales manager for the entire dealership. (RT XI, 67:9 – 67:18).

361. In the year 2009, Protestant had 4 new vehicle sales people and 1 used vehicle sales person and one sales manager for the entire dealership. (RT XI, 67:19 – 25).

362. In the year 2008, Protestant had 5 new vehicle sales people and 1 used vehicle sales person and two sales managers, one for new car sales and one for used car sales, for the entire dealership. (RT XI, 68:1 – 7).

363. In the year 2008, including the sales people and the sales managers, Protestant a total of 8 persons who could sell vehicles. (RT XI, 68:18 – 22).

364. In the year 2012, including sales people and one sales manager, Protestant had a total of 7 people who could sell vehicles, fewer than it had in 2008. (RT XI, 68:23 – 69:14).

365. Protestant sets sales goals for each salesperson, but does not set a separate goal for Nissan sales for each salesperson, even after the Notice of Default was issued. (RT XI, 116:4 – 117:14).

366. Protestant has yearly goals for the dealership's sales, broken down by salesperson, but not by line-make. (RT XII, 79:15 – 80:12).

367. Salespeople for Protestant can meet their sales objectives by selling other brands at the dealership besides Nissan. (RT XII, 108:22 – 109:10).

368. When Protestant received the Notice of Default from Nissan in March, 2012 it did not increase the sales goals for the dealership because they had already been set for the year. (RT XII, 111:21 – 112:2).

369. If a salesperson at Protestant's dealership did not meet objectives, year after year, and are declining in their percentage of meeting those goals, they would be

replaced and moved to a non-sales position. (RT XII, 113:21 – 114:9).

370. A person could come in to buy a particular type of vehicle and through salesmanship could be persuaded to purchase another vehicle. (RT XII, 118:23 – 119:18).

371. During the five-year period from 2008 through 2012, Protestant employed zero Spanish-speaking sales people. (RT XI, 72:5 – 23).

372. Tina Novoa, Dealer Operations Manager for Respondent, offered lease training for Protestant's sales employees but Protestant declined. (Resp. Exh. 209).

373. Ms. Novoa also offered three times the assistance of Nissan's Loyalty Performance Manager to assist in training amd dealership processes which is provided by Nissan free of charge. (RT II, 262: 4-22, 268: 20-25 – 269: 1-7).

374. Section 6.D of the Standard Provisions to the Dealer Agreement provides:

> D. Hours of Operations.
>
> Dealer recognizes that the service and maintenance needs of the owners of Nissan Products and Dealer's own responsibilities to actively and effectively promote the sale of Nissan Products can be met properly only if Dealer keeps its Dealership Facilities open and conducts all of its Dealership Operations required by the Agreement during hours which are reasonable and convenient for Dealer's customers.....during such days and hours as automobile dealers' sales and service facilities are customarily and lawfully open in Dealer's Primary Market Area....
>
> (Exh. Joint 1. at bates stamp NNA05633).

375. Gary Inman from Nissan suggested Saturday service on at least 5 separate occasions to Protestant's representatives, including Jim Courtright and several Service Managers. (Respondent's Exh. 210; RT XII, 137:13 – 146:7).

376. The Dealer Agreement is a personal services agreement. In entering the Dealer Agreement, Protestant agreed that the retention of qualified management is of critical importance to the successful operation of the dealership and achievement and purposes of the Dealer Agreement. (Exh. Joint 1, bates stamp NNA00063, Nissan Dealer Sales and Service Agreement at Introduction, second paragraph and bates stamp NNA00064 at Article Fourth (a) Executive Manager).

377. The Executive Manager and owners of the dealership make all the decisions to run the store, including hiring and firing management and employees and setting the retail transaction price. (RT I, 55: 17-25, 56: 1-3).

378. Department heads at dealership are not required to notify Jim Courtright, Executive Manager, of hiring and firing of employees. (RT XI, 222:22 – 223:4).

379. Ernest ("Lee") Courtright, dealer principal, spends about 120 to 140 days per year, 4 hours per day, at Protestant's dealership, doing general things that are not running the day-to-day operations, which is Jim Courtright's job. (RT XII, 164: 25 – 165:19).

380. Lee Courtright puts no limitations or control on how Jim Courtright runs the dealership or on his decision-making control of the dealership. (RT XII, 166:11 – 16).

381. Lee and Jim Courtright discuss problems at the dealership, but it's up to Jim Courtright to make the decision on how to resolve any problems, or to deal with projects or proposals. (RT XII, 166:17 – 22).

382. Jim Courtright has a Bachelor's of Science degree from U.C. Davis and a Masters in Business Administration from Santa Clara University. His MBA was obtained in 1991. (RT VII, 7:2 – 11).

383. Jim Courtright is employed by Santa Cruz Nissan, Inc., which is the entity which owns both Santa Cruz Nissan and Santa Cruz Volkswagen. (RT VII, 7:12 – 21).

384. The real estate is held in a trust, and Jim Courtright is not sure if he's a beneficiary, but he assumes so. (RT VII, 8:4 – 10).

385. Jim Courtright is the Executive Manager of Santa Cruz Nissan and has been since the early 2000's. He was the General Manager of the dealership prior to that, since the late 1990's. (RT VII, 8:19 - 9:8).

386. Prior to college, Jim Courtright worked odd jobs at the dealership for a month or two here and there. (RT VII, 9:13 – 25).

387. Lee Courtright was an owner of the Toyota dealership (with the Seaside Group) that Jim Courtright went to work for after he received his MBA. He was a salesman there for about one year and then did part-time finance and insurance for another year. Then he went to work for Santa Cruz Nissan. (RT VII, 10:1 - 11:16).

388. Jim Courtright started working at Santa Cruz Nissan as an F & I Manager in 1993. (RT VII, 11:22 – 25).

389. Shortly after Jim Courtright went to work for Santa Cruz Nissan, Lee Courtright and the Seaside Group dissolved their partnership for the Toyota store and the Seaside Group bought out Lee Courtright's ownership in the Toyota dealership. (RT VII, 12:1 – 17).

390. Seaside Group owns the Toyota, Mazda, Subaru and Kia dealerships in Capitola, California. (RT VII, 12:22 - 13:3).

391. Nissan representatives that called on Protestant's dealership formed the opinion that Jim Courtright lacked the ability to plan and execute a plan. (RT I, 157: 14-27; 158: 1-16, RT II, 307: 6-20).

392. Although all the Nissan Representatives that called on Protestant's dealership never expressed their concerns about Jim Courtright to Mr. Lee Courtright they

knew that Mr. Lee Courtright was aware of Nissan's concerns with the poor sales performance because they met with both Mr. Lee Courtright and Jim Courtright during their contacts at the dealership. (RT I, 167: 1-20).

393. Under the management of Jim Courtright, Protestant's dealership lacked activity and the type of energy flowing through the store that would indicate either he (1) was not trying to improve performance or (2) couldn't improve performance. (RT I, 165: 17-27; 166: 1-17).

394. Most dealers or Executive Managers running a store know and need to know their expenses, particularly the rent expense. (RT I, 160: 16-22).

395. Excluding leases, Protestant's financial statements show gross profit per vehicle sold at: 2012 - $991; 2011 - $1,057; 2010 - $783; 2009 - $1,077; 2008 - $962. (Protestant Exh. 14 at bates stamps SCN05258, SCN05264, SCN05276 SCN05281; RT XI, 30:2 – 15. RT XI, 55:5 – 13; RT XI, 56:10 – 12; RT XI, 60:9 – 16).

396. Including leases, according to Protestant's financial statements show gross profit per total Nissan new vehicles sold at: 2012 - $1059; 2011 - $1,136; 2010 - $783; 2009 - $1,799; 2008 - $1780. (Protestant Exh. 14 at line 72 for bates stamps SCN05258, SCN05264, SCN05276 SCN0528152).

397. Protestant's business model for the dealership was to obtain $2,000 gross profit per vehicle sold. (RT XI, 112:21 – 115:7).

398. Protestant's dealership does not meet its goal of $2,000 gross profit per vehicle. (RT XI, 50:13 – 20).

399. Using the lower gross profits per new retail vehicle sold (excluding gross profits earned on leases), Protestant own expert shows that for calendar years 2011, 2012 and through August, 2013 earned gross profits roughly equivalent to the composite group as follows:

	Protestant	Composite
2011	$1,057	$1,169
2012	$ 991	$1,046
8/2013	$ 998	$ 967

(Protestant Exh. 21B at Tab 11, page 1).

400. In addition to front end gross, looking at F&I and service gross profits are very important. (RT VIII, 201: 5-25 –202: 1-3).

401. At the levels of gross profit that were achieved by Protestant at well below the business model of $2,000 per vehicle, Protestant was still not able to achieve 100% of RSE for Nissan. (XI, 115:8 – 18).

402. Jim Courtright does not dispute Tina Novoa's contact reports wherein she states that Mr. Courtright acknowledges severe underperformance of the dealership in sales from August, 2011 through October 20, 2011 . (. Exh. 209; RT XII, 7:13 – 9:14).

403. Jim Courtright never put together a written plan to improve sales performance at the dealership. (RT XII, 24:25 – 25:6).

404. Jim Courtright never brought up with Tina Novoa the claim that the Ocean Honda facility was the reason Protestant was not performing at the same average as other Nissan dealers. (RT XII, 38:20 – 39:5).

405. As Protestant's sales penetration numbers reflect, Protestant is only selling roughly 30% of the new Nissan vehicles that it is expected to sell, under a conservative measure.

406. Protestant never discussed with Nissan representatives that simply because the overall dealership would not be viable without Nissan that it should be allowed to continue to perform at a level below RSE. (RT XI, 156:8 – 157:3).4

407. Jim and Lee Courtright never discussed what actions should be taken to offset the

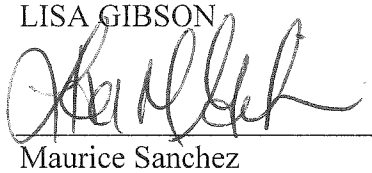
construction of the new Honda facility now occupied by Ocean Honda. (XI, 158:7 – 11).

IV. CONCLUSION

For these reasons, Nissan has good cause under Section 3061 to terminate Protestant's Nissan Dealer Agreement.

Dated: May 12, 2014

BAKER & HOSTETLER LLP
MAURICE SANCHEZ
LISA GIBSON



Maurice Sanchez
Lisa Gibson
Attorneys for Respondent
Nissan North America, Inc.

PROOF OF SERVICE

I, Elly Cordero, declare:

I am employed in Orange County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 600 Anton Boulevard, Suite 900, Costa Mesa, California 92626-7221. On May 12, 2014, I served a copy of the within document(s):

RESPONDENT NISSAN NORTH AMERICA, INC.'S SECOND AMENDED PROPOSED FINDING OF FACTS

☐ by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m. and the transmission was reported as complete and without error.

☒ by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Costa Mesa, California addressed as set forth below.

☐ by placing the document(s) listed above in a sealed _____ envelope and affixing a pre-paid air bill, and causing the envelope to be delivered to a _____ agent for delivery.

☐ following ordinary business practices, the envelope was sealed and placed for collection by Federal Express on this date, and would, in the ordinary course of business, be retrieved by Federal Express for overnight delivery on this date.

☐ by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below.

☒ by transmitting via electronic mail the document(s) listed above to the e-mail address(es) set forth below on this date before 5:00 p.m. and the transmission was reported as complete and without error.

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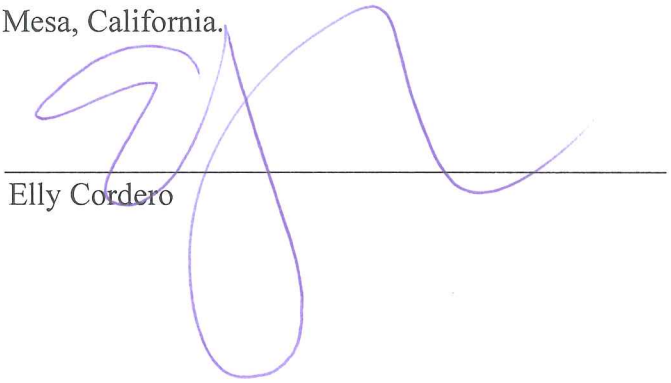
SANTA CRUZ NISSAN

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

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

Executed on May 12, 2014, at Costa Mesa, California.



Elly Cordero