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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

**PROTESTANT'S POST-HEARING
REPLY BRIEF**

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INTRODUCTION

Respondent, Nissan North America, Inc., has failed to address the key question it was required to answer in meeting its burden in this protest – whether its use of RSE to measure Protestant’s sales performance is reasonable. Instead, Respondent argues that Protestant’s RSE performance has been in decline for a protracted period of time and this alone presents good cause to terminate Protestant’s 40-year plus franchise.

Respondent’s only reason for its attempt to terminate Protestant’s Nissan franchise is based upon *its own* measure of sales performance. Since this is Respondent’s only argument for the claim that good cause exists to terminate Protestant, it was expected that Respondent would spend considerable time in its Post-Hearing Opening Brief addressing the reasons its use of RSE is a reasonable standard by which to measure Protestant’s sales performance. Not only was this expected, given the reasons for termination included in the Notice of Termination (“NOT”), it is also required by Veh. Code §11713.13(g) that Respondent address the reasonableness of its RSE standard, with the burden of proof being on Respondent. Instead, Respondent has offered no persuasive evidence that its RSE standard, as applied to Protestant, is reasonable. Protestant’s expert, Edward Stockton, testified extensively in regard to Respondent’s use of RSE being an unreasonable measure of sales performance within the Santa Cruz Market. In addition, Respondent’s expert, John Frith, found *nothing* in Mr. Stockton’s report to rebut.

Similarly, Respondent appears to have determined the evidence in the record, as presented in Protestant’s Post-Hearing Opening Brief, did not require rebuttal either, because it has offered *no* credible evidence in opposition to the following:

- Respondent has no answer for the fact that the Santa Cruz Market shows a demonstrable preference for hybrid and other “green” technology vehicles – Nissan does not offer competitive hybrid or clean diesel vehicles;
- Respondent has failed to address the fact that the Santa Cruz Market exhibits a high level of in-sell as compared to other markets in the Region;
- Respondent has failed to address the fact that its own studies concluded that Protestant is at a

competitive disadvantage operating from its current facility and location and therefore Protestant should not be expected to meet or exceed RSE;

- Respondent has failed to answer for the fact that Protestant is located in an isolated market with exclusive, facing Toyota and Honda dealerships, with the Honda dealership being located in an exclusive, image compliant facility;
- Respondent failed to account for the fact that Respondent increased the size of Protestant's PMA, thus increasing Protestant's sales objectives and causing a further reduction in Protestant's RSE measurement;
- Respondent's claims that Protestant is "content to merely turn a profit," and that it demonstrates "perplexing passivity," are contrary to the evidence in the record, which details the extensive efforts Protestant has made to improve its Nissan sales performance.

In addition, not only has Respondent failed to establish that its use of RSE is a reasonable measurement of Protestant's sales performance, it has failed to demonstrate the existence of good cause to terminate Protestant, as evidenced by the following:

- Respondent has been unable to demonstrate that Protestant fails to capture the business available to it; the evidence shows the use of RSE to be unreasonable to measure Protestant's sales performance;
- Respondent has been unable to demonstrate that Protestant has failed to meet the obligations necessary to perform its part of the franchise;
- Respondent has failed to demonstrate that Protestant's investment is not permanent;
- Respondent has failed to rebut the fact that it would be injurious to the public welfare to terminate Protestant's franchise – the evidence demonstrates that Respondent will be unable to establish a replacement dealer;
- Respondent has not alleged that Protestant lacks adequate motor vehicle sales and service facilities, parts and qualified personnel to provide for the needs of the public; there is also no allegation that Protestant's quality of service is inadequate;

- Respondent has offered no evidence that Protestant fails to fulfill its warranty obligations;
- Respondent's only claim concerning Protestant's alleged failure to comply with the terms of the franchise is in regard to the allegation that Protestant failed to achieve RSE – a term not set forth in the franchise agreement and unreasonable as applied to the Santa Cruz Market.

Ultimately the Board is required to balance the impact the proposed termination would have upon the public welfare, Protestant and Respondent. Respondent's brief fails to provide any credible evidence that the public welfare will not be harmed. The evidence in the record overwhelmingly demonstrates that if Protestant is terminated, there will be no replacement dealer any time soon, if ever. Respondent attempted to locate property suitable to house an exclusive Nissan dealership and ultimately concluded that it was "cost prohibitive." Protestant's termination would leave the public without a convenient, local Nissan dealer and customers would be forced to travel more than 20 miles to reach the next closest Nissan dealership. Moreover, because Respondent would be unable to establish a replacement dealer, the jobs, tax revenue and other benefits resulting from Protestant's continued operation would be lost indefinitely, if not permanently.

Protestant's interests would be unreasonably and irreparably harmed because it would lose its 40-year plus investment in its successful Nissan franchise. Respondent's argument that it has recouped its investment and therefore the investment is neither permanent, nor deserving of protection, is disingenuous at best. Certainly it is reasonable to expect that Protestant should be able to continue to enjoy some profit from its continuing investment and hard work.

Respondent's interest in terminating Protestant appears to rest entirely on the hope that if Protestant is terminated, it might be easier to find a dealer willing to make the tremendous investment necessary to establish an exclusive, NREDI image compliant facility in the Santa Cruz Market. The only support for this claim is Respondent's belief that a new dealer would not have to compensate Protestant for the value of its Nissan franchise and, as a result, *might* be willing to make the investment that has thus far proven to be "cost prohibitive." This "belief" finds no support in the record.

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STANDARD

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

- (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 franchisee's failure to comply with the terms of the franchise.

As mentioned above, and repeated in Protestant's Post-Hearing Opening Brief, to the extent Respondent argues that Protestant's sales performance is substandard, Respondent is required to demonstrate the reasonableness of its use of regional and state based performance standards, RSE and SSER respectively, to measure Protestant's sales performance in the Santa Cruz Market, pursuant to Vehicle Code Section 11713.13(g), which reads as follows:

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

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

(A) The performance standard, sales objective, or program for measuring dealership sales, service, or customer service performance is reasonable in light of all existing

circumstances, including, but not limited to, the following:

- (i) Demographics in the dealer's area of responsibility.
- (ii) Geographical and market characteristics in the dealer's area of responsibility.
- (iii) The availability and allocation of vehicles and parts inventory.
- (iv) Local and statewide economic circumstances.
- (v) Historical sales, service, and customer service performance of the line-make within the dealer's area of responsibility, including vehicle brand preferences of consumers in the dealer's area of responsibility.

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

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

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

ARGUMENT

A. Respondent failed to rebut any of the evidence offered concerning the local market conditions that impact Protestant's ability to achieve RSE.

Protestant offered extensive evidence concerning the many existing local market conditions that make the use of RSE as a standard against which to measure Protestant's sales performance unreasonable. However, Respondent has failed to offer any credible evidence to rebut these issues. Moreover, it is Respondent's burden under Cal. Veh. Code §11713.13(g) to demonstrate that the RSE standard is reasonable. Protestant's expert, Edward Stockton, provided testimony concerning the extensive analysis he performed in his examination of the local market conditions impacting Nissan sales in the Santa Cruz Market. Nevertheless, when confronted with this evidence, Respondent's expert, John Frith, found "nothing to rebut."

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In addition, Mr. Frith also testified that he had concluded that operational difficulties are the likely cause of underperformance of SCN. (RT Vol. 5, 64:16-21.) However, Mr. Frith could not specify what those operational deficiencies were because he failed to do that analysis. (RT Vol. 5, 64:22-65:1.) Mr. Stockton explained that Nissan's market study findings that the Santa Cruz Market needs two dealers and that SCN relocate its facility closer to the Toyota dealership suggest that a substantial portion of the alleged performance deficiencies by SCN are unrelated to near term operational issues. (Prot. Ex. 22B, para. 6.) Mr. Frith's heavy reliance on sales effectiveness as a proxy for dealer performance is misleading because the measure merely observes outcomes and provides no information on causes for the outcomes. (*Id.* at para. 7.) Mr. Stockton's gravity model evaluates retail pull based on proximity and the relative attractiveness or "mass" of the location. (*Id.*) This is why Mr. Frith's analysis should be disregarded.

Respondent also argues that Protestant was once able to achieve 100% RSE at the same facility in 2005. (Respondent's Post-Hearing Brief, p. 11.) However, this statement is irrelevant because many factors have since changed since then, including the fact that the local Honda store became exclusive in 2008, the location and circumstances of dealers in the market changed, the state of the economy has changed and the Toyota Prius and other hybrids, such as the Honda Civic and Accord, Ford Fusion and Volkswagen Jetta have gained significant popularity since 2005. Respondent has not taken into account the many other factors involved in achieving RSE.

Finally, the use of state, regional or national averages to measure the sales performance of a dealership has been deemed unreasonable in other states. (*Sims v. Nissan North Am., Inc.*, 2013 Ohio App. LEXIS 2642, 2013 WL 3270914 (Ct. of App. Of Ohio June 25, 2013).¹ (attached hereto as Attachment A) Although these cases are not controlling authority over the California New Motor Vehicle Board, they are persuasive authority meant to provide guidance for this Board.

In the case of *Sims v. Nissan North America, Inc.*, the Court of Appeals of Ohio affirmed the Ohio Motor Vehicle Dealer Board's decision that use of a regional segment-adjusted market share was

¹ See also *General Motors Corp. v. State of Illinois Motor Vehicle Review Board*, 224 Ill.2d 1 (2007); *Austin Chevrolet, Inc. v. Motor Vehicle Board*, 212 S.W.3d 425 (Tex.App. 2006); *Halleen Chevrolet v. GMC*, Case No. 03-050MVDB-277-SS (Ohio Mot. Veh. Dealers Bd., July 21, 2006); *General Motors Corp. v. Kinlaw*, 338 S.E.2d 114 (N.C.App. 1985); *Ford Motor Co. v. Claremont Acquisition Corp.*, 186 B.R. 977, 989 (C.D.Cal. 1995). (attached hereto as Attachment B)

unreasonable. The court stated, "...[T]he use of RSE without taking into consideration the local market conditions rendered the normal measure of performance unreasonable..." (2013 Ohio App. LEXIS 2642, 2013 WL 3270914 (Ct. of App. Of Ohio June 25, 2013).)

1. Nissan has a lack of competitive vehicles to compete in the hybrid and clean diesel segments Protestant's performance is measured against.

According to evidence in the record, it is clear the Santa Cruz Market is inclined to be more environmentally conscious, or "green" when making its consumer decisions. (RT Vol. 6, 33:1-35:19.) Given this inclination, the evidence shows that alternative fuel vehicles (i.e. hybrids, electrics or clean diesels) are more popular in this Market. This is demonstrated in Protestant's RSE performance in excess of 150% for the Leaf vehicle, Nissan's only alternative fuel vehicle. Nissan does not produce any hybrid or clean diesel vehicle models. (RT Vol. 4, 232:21-233:5; Vol. 7, 144:3-5.) However, Nissan's direct competitors, Toyota and Honda, both offer hybrid vehicles in their subcompact segment (Prius and Civic, respectively). Protestant's RSE performance in the subcompact segment, in which it does not have any hybrid or clean diesel vehicle models to compete, is 41.9%. (Ex. 200, P. A10.) The market bias for "green", environmentally friendly models is clear, and Nissan and its dealers cannot keep up with the competition in the subcompact segment. (RT Vol. 4, 232:21-233:5; Vol. 7, 144:3-5.)

2. There is a high level of in-sell into the Santa Cruz Market due to the heavy out-commute of customers in the Santa Cruz Market.

There are more customers that reside in the Santa Cruz Market that are purchasing vehicles outside the Santa Cruz Market area than are usually seen in most other markets, which results in a high level of in-sell. The net out-commute pattern is due to the influx of residents commuting to work to areas outside of Santa Cruz as opposed to the amount of workers commuting in. With far more commuters leaving the Santa Cruz Market than there are coming in, it is clear this presents an additional degree of difficulty in achieving sales goals, like the ones set by Nissan, when the goals are measured against other dealers within the state that do not have the same hurdles to overcome. (RT Vol. 6, 32:21-25; RT Vol. 9, 174:9-174:12.) Nissan does not dispute that there is a high level of in-sell

and a heavy out-commute of customers in the Santa Cruz Market. (RT Vol. 8, 122:6-123:7.) Further, according to the research and analysis done by Protestant's expert, Mr. Stockton, Santa Cruz Nissan loses convenience advantage with the large amount of potential customers commuting out of the Santa Cruz market and the lack of in-commuters to make up for that loss. (RT Vol. 9, 142:5-143:1 and Ex. 21, Tab 5:3R.)

3. The Santa Cruz Market is geographically isolated due to the surrounding mountains and ocean.

Protestant is faced with the additional challenges of the local geography. Unfortunately, Protestant does not have the advantage of having a complete 360 degree range of territory around the dealership in which to sell. As explained by Protestant's expert, Ted Stockton, "[w]hen there is an ocean right next to the dealership, there are going to be fewer customers to reach, and the dealership will have to move in one direction farther away from the dealership to reach its sales." (RT Vol. 5, 191:24-192:3.) It is unreasonable to measure vehicle registrations knowing that many sales are made outside the market area and expect the same performance as a dealership in a non-isolated market.

In addition, Protestant's reach in the opposite direction of the ocean is toward another geographic barrier, the Santa Cruz Mountains. As Mr. Stockton explained, "...the inland perimeter of Santa Cruz is mountainous which creates natural boundaries around the market. Although Santa Cruz is proximate to larger metro areas, there is a distinct lack of contiguous retail activity from other PMAs to the Santa Cruz PMA. This condition limits retail draw from outside of the PMA. Collectively these factors cause a reduced opportunity for SCN to make sales to customers outside of the PMA. RSE does not account for these factors, which are clearly outside of the dealer's control." (RT Vol. 9, 141:4-15; Ex. 21, Tab 6.)

4. The presence of Ocean Honda in the Santa Cruz Market is unaccounted for in NNA's RSE calculations.

The Honda dealership located in the Santa Cruz Market captures a larger market share than the Honda brand captures throughout California. This is an anomaly, due in large part to the stand-alone, image compliant facility from which Ocean Honda operates. The rest of the state's vehicle sales are

dominated by Toyota. However, in the Santa Cruz Market, sales are dominated by Honda. RSE fails to account for this unique market condition in the isolated Santa Cruz Market. (RT Vol. 9, 76:7-19.)

B. Respondent's claims of Protestant's passivity and operational deficiencies are not supported by the evidence in the record.

There are several instances in Respondent's Post-Hearing Opening Brief in which it misleadingly describes Protestant as passive and operationally deficient. In addition, Respondent wrote, "[t]he truth is that SCN simply doesn't care whether or not it meets the needs of the public." (Respondent's Post-Hearing Brief, p. 5.) These claims are unfounded and completely unsupported by the record and Respondent is unable to give any evidentiary support for these claims. Moreover, Respondent takes issue with the fact that Jim Courtright objected to the addition of Watsonville area census tracts into Protestant's PMA. Respondent claims, "Never did it occur to Jim Courtright to ask whether the Watsonville market is a good market for auto sales and whether it is a good market for Nissan sales in particular. (RT VII, 41:21-24)." Respondent's citation is improper because the quote misstates Jim Courtright's testimony. Jim Courtright testified that he did not recall whether he asked this question, not that it didn't occur to him. Also, Respondent's attempt to vilify Protestant for questioning the addition of census tracts that it does not believe it should be responsible for is unwarranted. Protestant was rightfully unhappy with the change to its PMA.

In violation of the ALJ's rulings on Motions *in Limine*, Respondent also makes claims regarding the number of sales Protestant makes of its other brands, Volkswagen, Dodge and Ram. (Respondent's Post-Hearing Brief, p. 6.) These claims are improper and unsubstantiated. In fact, Respondent was barred from referring to the sales of Protestant's other brands and there is specifically no evidence in the record regarding these other brands after several Motions *in Limine*. Any argument made regarding Protestant's other brands should be disregarded.

C. Respondent's claims that Protestant ignored the Hispanic population in the Santa Cruz Market are unfounded and misleading.

Respondent has placed unnecessary emphasis on Protestant's lack of advertisement in Hispanic population of the Santa Cruz Market. It cannot be the case that Protestant's lack of Spanish

advertisements in recent years has resulted in Protestant's inability to achieve Respondent's unreasonable RSE standard. In fact, Respondent is inaccurate in its Opening Brief when discussing the amount of Spanish speakers in Watsonville, CA. On page 13 of its Opening Brief, Respondent writes, "Also, in Watsonville, 74.1% of the households speak Spanish in the home. (Exh. J-12-B)." (emphasis added). This is an entirely incorrect statement of the data in this exhibit and should not be relied upon as fact. The data actually states that 74.1% of the households in Watsonville speak a language other than English, not specifically Spanish. (*Id.*) Respondent's overemphasis on Hispanic advertising cannot mask the fact that its RSE standard is not a reasonable or appropriate standard by which to measure Protestant's sales.

Respondent also argues that the large demand for Nissan vehicles from the local Hispanic population is evidenced in the fact that a Spanish language media company approached Protestant, advising it of this information and encouraging it to advertise in Spanish. Although this may have occurred, it cannot be used as proof of the demand in the Santa Cruz Market because the Spanish language media company has incentive to encourage and facilitate more business for itself. Respondent has not shown any studies regarding the demand for Nissans in the Santa Cruz Market and its alleged correlation with the Hispanic community.

In addition, Respondent's claims that SCN has never attempted to market to the Hispanic population in the Santa Cruz market are completely false. Protestant has advertised for years throughout the county, including Watsonville, where there is a high Hispanic population, via TV, Cable, network TV and in print. (RT Vol. 11, 27:17-28:1.)

D. Respondent's arguments regarding Saturday service are not related to the reasons for termination set forth in the Notice of Termination.

The proposed termination of Protestant is not based upon any service issues. There is no allegation in the Notice of Termination ("NOT") that Protestant fails to provide adequate service to Nissan customers. Respondent's argument that Protestant's RSE performance is the result of the dealership not providing Saturday service is attenuated and speculative. In fact, Protestant is not

required under the franchise agreement to provide Saturday service. (RT Vol. 11, 23:4-8.) Further, “RSE” itself is not mentioned or defined in the franchise agreement. (Joint Ex. 1.)

In addition, as the record reflects, Protestant is in the process of implementing Saturday service with the hope that existing customer demand might support Saturday service operation at this time. Respondent claims that there have been no changes since Protestant unsuccessfully implemented Saturday service in the 1990’s. (Respondent’s Post-Hearing Brief, p. 14, para. 1.) However, this is untrue. Protestant is currently profitable, unlike when it attempted to implement Saturday service in the 1990s. In addition, the economy is currently on an upswing. (RT Vol. 12, 148:10-149:16.) These are the reasons Protestant is willing to try and implement Saturday service again.

E. Respondent’s argument that Protestant’s investment is not permanent is without merit.

Respondent’s argument that Protestant’s investment in its Nissan franchise is not permanent because the land and buildings are owned in a trust in which Lee Courtright is the trustee should be dismissed. The purpose of owning property through a trust is done for a variety of reasons, the primary reason being to preserve the ownership and value of the property.

Similarly, Respondent’s argument that “[i]n the 18 years Protestant has been located at its current facility, it has undoubtedly recovered most, if not all (*sic*) of its original investment,” is also inaccurate. To argue that Protestant’s investment in a franchise it has successfully owned and operated for more than 40 years, located on property it purchased and in a facility it constructed from the ground up, is not permanent is simply unreasonable.

Nissan also makes the curious argument that “Protestant cannot maintain that any investment in the dealership facility is illiquid and therefore, ‘permanent’.” (Respondent’s Post-Hearing Brief, p.17.) Respondent has now created rules or guidelines by which to measure Protestant. Protestant has built up its dealership facility and it is already image compliant. The evidence demonstrates there can be little doubt Protestant’s investment is substantial and permanent.

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F. Respondent failed to address the actual impact that affected Protestant after Nissan increased the size of Protestant's PMA.

Respondent has still failed to explain the increase in PMA had upon Protestant in calculating the RSE. (Respondent's Post-Hearing Brief, p. 12.) In fact, Respondent applied the PMA size increase retroactively, thereby increasing the RSE expectation for the period before the PMA actually changed. (RT Vol. 5, 135:9-19; Joint Ex. 3.) This resulted in an incorrect increase in expectation of approximately 40%, if they were not applied retroactively. (RT Vol. 5, 136:17-137:4.) Respondent has chosen to ignore this fact and continues to unfairly evaluate Protestant against a standard that should not have been retroactively applied. It is curious that Respondent has chosen such a severe penalty of terminating Protestant's franchise, yet it hasn't even carefully considered or properly calculated the RSE measurement which is the basis for Protestant's termination.

G. Respondent has offered no credible evidence that a replacement dealer can be established in the Santa Cruz Market.

Respondent has chosen to pay little attention to the needs of the Santa Cruz Market should Protestant's franchise actually be terminated. In fact, Respondent did not present any evidence addressing the relevant good cause factor: "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." (Cal. Veh. Code § 3061(d). Respondent has not shown evidence of any plan for a replacement dealer in the market, nor offered any evidence that any dealer is interested in making the tremendous investment in order to establish a new dealership in Santa Cruz.

In fact, Respondent acknowledged "there are challenges finding a new location for the dealership in the market." (Joint Ex. 4; RT Vol. 1, 190:18-21.) The "challenges" are a lack of available property and the high cost of property in the Santa Cruz Market. (RT Vol. 1, 190:24-191:25.) After interest from only one potential candidate, Mr. Groppetti, fell through due to these "challenges", and after promising to provide buyers "one by one", Nissan was not aware of any other prospective buyers for the Santa Cruz Nissan franchise and Nissan felt it had exhausted all efforts to find available property in the Santa Cruz Market. (RT Vol. 2, 182:21-183:6; Vol. 8, 270:7-23; Vol. 12, 188:22-

189:9.) It is clear that it will be extremely difficult, or perhaps impossible, for Nissan to replace SCN should its franchise be terminated. The Santa Cruz Market would be left without a Nissan dealer as a result.

CONCLUSION

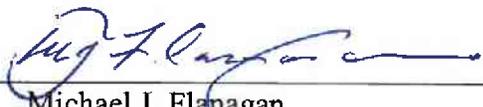
Based upon the parties' post-hearing briefs and the evidence in the record, it is plain to see that Respondent has failed to meet its burden in establishing good cause to terminate Protestant's Nissan franchise. Respondent's sole justification for the proposed termination is Protestant's purported inadequate sales performance. Not only does NNA fail to provide credible evidence concerning the remaining good cause factors set forth in Veh. Code § 3061, Respondent's claim of inadequate sales performance is based upon an inherently flawed measurement of sales performance that is designed to show approximately half of its dealers to be underperforming at any given time, regardless of actual sales volumes. In addition, the measure fails to account for local market conditions that directly impact individual dealers' market areas. Moreover, Respondent has since abandoned its use of RSE in favor of a state based average ("SSER").

Based upon the evidence in the record, in balancing the interests of the Protestant, the public welfare and the Respondent, it is obvious that good cause does not exist to terminate Protestant's Nissan franchise.

Therefore, Protestant respectfully requests the Board issue an order sustaining its Protest.

Dated: June 3, 2014

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