

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

6 ATTORNEYS FOR PROTESTANT

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

11 In the Matter of the Protest of:

12 SANTA CRUZ NISSAN, INC., dba  
13 SANTA CRUZ NISSAN,

14 Protestant,

15 v.

16 NISSAN NORTH AMERICA , INC.,  
17 Respondent.

**PROTEST NO: PR-2358-13**

**PROTESTANT'S PROPOSED  
CONDITIONS ON REMAND**

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22 **INTRODUCTION**

23 At the July 15, 2014, Board meeting the public Board members met to consider the proposed  
24 decision of Administrative Law Judge ("ALJ") Dianna Woodward-Hagle sustaining the Protest in the  
25 above captioned matter. The Board members voted to conditionally sustain the Protest, but remanded  
26 the matter to ALJ Woodward-Hagle with instructions to recommend conditions for the Board to  
27 impose consistent with Section 3067, and establish a time frame for Protestant to comply with those  
28 conditions. No aspect of the Proposed Decision was rejected by the Board Members.

1 **STATEMENT OF FACTS**

2 The proposed decision was conditionally sustained by the Board and the only mandatory  
3 instructions on remand were that the ALJ recommend conditions for the Board to impose to ensure  
4 compliance with the contractual obligations between Protestant, Santa Cruz Nissan, Inc., dba Santa  
5 Cruz Nissan and Respondent, Nissan North America, Inc. The Board's Order does not reject any  
6 finding in the July 3, 2014, Proposed Decision.

7 The Board's Remand Order directs that the proposed conditions are for the purpose of ensuring  
8 compliance with the Sales and Service Agreement between Protestant and Respondent. Specifically,  
9 the Agreement requires:

10 "Dealer shall actively and effectively promote through its own advertising and sales  
11 promotion activities the sale at retail (and if Dealer elects, the leasing and rental) of  
12 Nissan Vehicles to customers located within Dealer's Primary Market Area. Dealer's  
13 Primary Market Area is a geographic area which Seller uses as a tool to evaluate  
14 Dealer's performance of its sales obligations hereunder..."

15 The evidence developed in this matter over the course of 12 hearing days, in addition to a site  
16 visit conducted by ALJ Hagle, resulted in an extensive record and includes evidence concerning the  
17 operational deficiencies Respondent claims to exist at Santa Cruz Nissan. The primary concerns  
18 Respondent raised at the merits hearing included:

- 19
- 20 • Protestant's failure to reach out to the Hispanic community by advertising in Spanish  
21 media until the start of the hearing;
  - 22 • Protestant's lack of Nissan Saturday service;
  - 23 • Protestant's failure to provide its sales staff Nissan specific sales objectives.

24 **A. The Proposed Decision**

25 The Proposed Decision was well reasoned, well supported, and well cited to the record in its  
26 unequivocal rejection of Respondent's use of its Regional Sales Effectiveness ("RSE") standard used  
27 to measure Protestant's sales performance in the Santa Cruz Market. The Board did not raise a single  
28 concern with the Proposed Decision's analysis rejecting the use of the RSE standard, nor did it suggest  
that some version of RSE might be an appropriate measurement of sales performance as applied to the

1 Santa Cruz Market. Instead, the Board conditionally sustained this Protest, accepting the Proposed  
2 Decision, but requiring the recommendation of certain conditions on remand. Any proposed condition  
3 that might require any level of attainment of Respondent's RSE or similar methodology would be  
4 contrary to the Proposed Decision, already conditionally adopted by the Board.

5 **B. The July 15, 2014, Board Meeting**

6 During the July 15<sup>th</sup> Board Meeting, Respondent spent considerable time expressing its concern  
7 that Protestant has purportedly ignored the Hispanic population in the Santa Cruz Market though its  
8 failure to advertise in Spanish media. While Respondent was forced to admit that Protestant began  
9 advertizing in Spanish media just prior to the start of the merits hearing, counsel characterized these  
10 efforts as "too little too late." Obviously, as evidenced by the Remand Order and the Board Members'  
11 comments during the Board Meeting, the Board rejected this argument. Mr. Stevens stated "Well, I  
12 don't know that there really is ever too late when you're taking away a franchise, that is."

13 Respondent also spent considerable time expressing its concern that Protestant was not  
14 providing Saturday Nissan service operations. However, the record reflects that Protestant was in the  
15 process of preparing to implement Saturday service operations during the hearing. Again, counsel  
16 characterized this as "too little too late," and again, the Remand Order demonstrates this not to be the  
17 case.

18 Respondent also argued that Protestant's failure to maintain a FaceBook page was somehow a  
19 failing by Protestant that translated into lost sales opportunities, but this argument was quickly rejected  
20 by the Board Members. Mr. Brooks cautioned that because there was no evidence concerning the  
21 analytics of such a claim, this line of argument was moot. In fact, Chad Filiault testified that social  
22 media web pages, like FaceBook, don't drive sales, but instead, are mere reputation management  
23 tools—the proposed termination of Protestant is not based upon any allegation of poor customer  
24 service relations.

25 Nevertheless, the evidence in the record plainly establishes the fact that Protestant has made  
26 extensive efforts to modernize and maximize its internet sales presence and effectiveness. Protestant  
27 has completely revamped and modernized its internet department, as well as its internet marketing  
28 efforts. Moreover, Protestant continues to work with Respondent's preferred internet consultant

1 company, Cobalt, in its ongoing efforts to continue to look for ways to improve its internet sales  
2 presence.

3 Finally, Respondent complained that Protestant failed to provide its sales staff “Nissan  
4 specific” sales goals, and as a result, Protestant’s sales staff could meet their individual dealership sales  
5 objectives by selling a Nissan, Volkswagen or Dodge-Ram vehicle. Even so, Protestant modified its  
6 sales compensation plans so that its sales staff was incentivized to sell Nissan vehicles over any of the  
7 others offered at retail by Protestant.

### 8 **PROPOSED CONDITIONS**

9 Protestant proposes the following conditions and timelines to be imposed upon it to satisfy the  
10 Board’s order on remand:

- 11 1. Within 30 days of a final decision, Protestant shall advertise in Spanish media at levels  
12 equal to those in place at the start of the merits hearing, for a minimum of six months.  
13 At the conclusion of the six month period, Protestant shall determine the effectiveness  
14 of its Spanish media investment and determine whether sound business judgment  
15 dictates such continued investment to be prudent.
- 16 2. Within 30 days of a final decision, Protestant shall establish and maintain Saturday  
17 service hours and operations for the service of Nissan vehicles, for a period of no less  
18 than 12 months. At any time after the conclusion of the 12 month period, Protestant  
19 shall reevaluate the effectiveness of continuing to provide Saturday Nissan service.
- 20 3. Within 30 days of a final decision, Protestant shall determine and assign monthly  
21 Nissan specific sales goals for its sales staff. This practice shall remain in place for as  
22 long as Protestant remains a Nissan dealer.

23 These conditions are proposed to address the specific operational deficiencies alleged to exist at  
24 Protestant’s dealership. Each of these proposed conditions directly addresses the concerns of the  
25 Board as set forth in the Remand Order as well as those concerns expressed by Board Members at the  
26 July 15, 2014 Board Meeting.

### 27 **CONCLUSION**

28 Protestant welcomes the opportunity to discuss these proposed conditions with Respondent in

1 the hope that a stipulation and agreement can be reached. Protestant will provide good faith  
2 consideration to all reasonable proposals that might satisfy the requirements of the remand order.

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7 Dated: August 13, 2014

LAW OFFICES OF  
MICHAEL J. FLANAGAN

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9 By:   
10 Gavin M. Hughes  
11 Attorneys for Protestant  
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**DECLARATION OF SERVICE BY ELECTRONIC MAIL**

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

I declare that on August 13, 2014, I caused to be served a true and complete copy of:

***PROTESTANT'S PROPOSED  
CONDITIONS ON REMAND***

***Santa Cruz Nissan v Nissan***

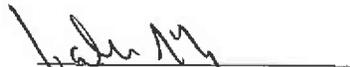
***Protest No. PR-2358-13***

By Electronic Mail:

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

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

Executed this 13 August, 2014, Sacramento, California.

  
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Valerie A. Coffey