

NEW MOTOR VEHICLE BOARD  
1507 – 21<sup>st</sup> Street, Suite 330  
Sacramento, California 95811  
Telephone: (916) 445-1888

STATE OF CALIFORNIA  
NEW MOTOR VEHICLE BOARD

SANTA CRUZ NISSAN, INC., dba SANTA  
CRUZ NISSAN,

Protestant,

v.

NISSAN NORTH AMERICA, INC.,

Respondent.

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

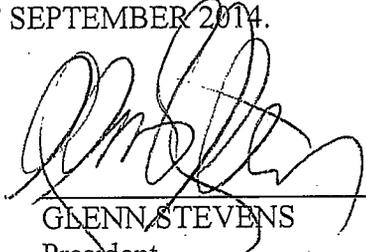
DECISION

At its regularly scheduled meeting of September 17, 2014, the Public Members of the Board met and considered the administrative record and “Proposed Decision Following Board’s Order Sustaining the Protest and Remanding the Matter” in the above-entitled matter. After such consideration, the Board adopted the Proposed Decision as its final Decision in this matter with the following amendment:

1. In paragraph 10, line 13, on page 4, the date “July 14, 2014” is changed to “July 3, 2014”.

This Decision shall become effective forthwith.

IT IS SO ORDERED THIS 17<sup>th</sup> DAY OF SEPTEMBER 2014.

  
\_\_\_\_\_  
GLENN STEVENS  
President  
New Motor Vehicle Board

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7 NEW MOTOR VEHICLE BOARD  
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9 In the Matter of the Protest of

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11 CRUZ NISSAN,

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12 v.

13 NISSAN NORTH AMERICA, INC.,  
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Respondent.  
15  
16

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

**PROPOSED DECISION FOLLOWING  
BOARD'S ORDER SUSTAINING THE  
PROTEST AND REMANDING THE  
MATTER**

17 **BOARD ORDER REMANDING THE MATTER AND SUSTAINING THE PROTEST**

18 1. At the July 15, 2014, Special Meeting, the Public Members of the New Motor Vehicle  
19 Board ("Board") considered the administrative record and Proposed Decision dated July 3, 2014. After  
20 such consideration, the Board by Order dated July 17, 2014, conditionally sustained Protest No.  
21 PR-2358-13 and remanded the matter to Administrative Law Judge Diana Woodward Hagle ("ALJ  
22 Woodward Hagle"). (Order Conditionally Sustaining the Protest and Remanding the Matter, p. 2)

23 2. The Board ordered ALJ Woodward Hagle to "recommend conditions for the Board to  
24 impose consistent with [Vehicle Code<sup>1</sup>] Section 3067 and establish a time frame for Protestant to comply  
25 with those conditions. The ALJ shall have discretion, if deemed necessary, to order additional evidence,  
26 briefing, and/or arguments." (Order Conditionally Sustaining the Protest and Remanding the Matter, p.

27 \_\_\_\_\_  
28 <sup>1</sup> Hereinafter, unless otherwise indicated, all section references are to the Vehicle Code.

1 2)

2 3. The Board's Order also "strongly encouraged" the parties "to engage in settlement  
3 discussions and set a Mandatory Settlement Conference with a Board appointed ALJ". (Order  
4 Conditionally Sustaining the Protest and Remanding the Matter, p. 2)

5 **SUMMARY OF ACTIONS TAKEN FOLLOWING REMAND**

6 4. ALJ Woodward Hagle issued a Notice setting a Mandatory Settlement Conference  
7 ("MSC") for August 19, 2014, before ALJ Wong. The parties were also ordered to submit proposed  
8 conditions to ALJ Wong by August 13, 2014. If the matter did not settle at the MSC, the parties'  
9 proposed conditions were to be provided to ALJ Woodward Hagle. The matter did not settle at the  
10 MSC; however ALJ Wong retained jurisdiction to reconvene the MSC, should the parties so request.

11 5. ALJ Woodward Hagle also issued an "Order Regarding Matters Pertaining to the  
12 Remand", which set August 26, 2014, for a telephonic hearing on the conditions, and stated the  
13 following: "Additional Evidence: There will be no additional evidence and the record will not be  
14 reopened".

15 6. The telephonic hearing on the conditions was held on August 26, 2014. This was not a  
16 hearing in the usual sense, but rather an opportunity for the parties to suggest conditions regarding the  
17 Board's order of remand.

18 **RECOMMENDED CONDITIONS<sup>2</sup>**

19 7. Although respondent has not sustained its burden of proof under Section 3061 to establish  
20 good cause to terminate the Nissan franchise of Santa Cruz Nissan, respondent has nonetheless presented  
21 evidence sufficient to justify a final decision imposing conditions pursuant to Section 3067(a).

22 8. Section 3067(a) provides that "[c]onditions imposed by the board [on a decision] shall be  
23 for the purpose of assuring performance of binding contractual agreements between franchisees and  
24 franchisors or otherwise serving the purposes of this article...".

25 9. The Recommended Conditions are:

26 ///

27  
28 <sup>2</sup> The Proposed Decision dated July 3, 2014, as Attachment 1, is incorporated into this decision as though set forth at length herein.

1 A. Effective no later than 30 days from the effective date of this decision, and continuing  
2 until December 31, 2015:

3 (1) Protestant shall be open for service of Nissan vehicles on Saturdays (excluding  
4 holidays) from 8:00 A.M. to 4:30 P.M., and shall have available for Saturday customers on-  
5 demand shuttle bus services and loaner cars; and

6 (2) Protestant shall, at all times its Nissan dealership is open for sales, have at least  
7 one salesperson available who is conversant with the Spanish language; and

8 (3) Protestant shall, in its print, radio and TV advertising, devote no less than 20%<sup>3</sup> of  
9 its advertising budget for each of those media to Spanish-language advertising.<sup>4</sup>

10 B. James Courtright (if serving as the Executive Manager or General Manager of protestant)  
11 shall successfully complete the Dealer Training Academy program of the National Automobile Dealers  
12 Association (“NADA”) within 24 (twenty-four) months from the effective date of this decision.  
13 Inability to enroll in the program because of restrictions imposed by NADA shall not constitute a  
14 violation of this condition.<sup>5</sup>

15 C. In regard to the above conditions in paragraphs A. (1) – (3) and B., protestant shall  
16 have the burden of proof of verifying compliance. Upon request of Nissan, protestant shall provide  
17 verification of compliance with any of the above conditions within 30 days of the request.

18 D. Effective immediately to December 31, 2015, the Board shall have exclusive jurisdiction  
19 to assess the sales performance of protestant and the following calculation shall be the exclusive  
20 measurement of protestant’s sales performance to December 31, 2015.

21 (1) The assessment shall compare protestant’s sales to the sales of the 10 dealers other  
22 than protestant in Nissan’s District 8.<sup>6</sup>

23 (2) No less frequently than quarterly, Nissan shall calculate the average percentage  
24 increase (or decrease) in number of sales of new Nissan vehicles of the 10 dealers in District 8

25  
26 <sup>3</sup> The percentage was agreed to by the parties during the August 26<sup>th</sup> telephonic hearing.

27 <sup>4</sup> The foregoing conditions relate to Section 3.A. of the Dealer Agreement.

28 <sup>5</sup> This condition relates to Section 1.Q of the Dealer Agreement.

<sup>6</sup> In addition to protestant, District 8 dealers are Nissan of Bakersfield, Selma Nissan, Lithia Nissan of Fresno, Nissan of Visalia, My Nissan (Salinas), Gilroy Nissan, Coast Nissan (San Luis Obispo), Santa Maria Nissan, Nissan of Clovis, and Cardinale Nissan (Seaside).

1 other than protestant and transmit the calculation to protestant.

2 (3) The number of protestant's sales shall meet or exceed the average percentage  
3 increase in sales of the 10 dealers.

4 (4) In any proceeding before the Board regarding protestant's sales performance using  
5 the foregoing standard, protestant will not challenge the reasonableness of the standard, nor shall  
6 respondent be required to prove the reasonableness of the standard.

7 E. Respondent may file a written request to the Board for an appropriate order if protestant  
8 fails to meet any of the foregoing conditions.

9 F. In any proceeding where termination of protestant's franchise may be ordered, respondent  
10 shall have the burden of proof of showing "good cause" to terminate the franchise.

11 G. The Board shall retain continuing jurisdiction over this matter.

12 **AMENDMENTS TO THE PROPOSED DECISION DATED JULY 3, 2014**

13 10. Footnote 10 on page 14 of the Proposed Decision dated July 14, 2014, is amended nunc  
14 pro tunc to read as follows:

15 Vehicle Code section 11713.13(g), which became effective January 1, 2014, has no  
16 application to this protest, as the statute has no retroactive effect. It deals with a  
17 manufacturer's "...performance standard, sales objective, or program for measuring a  
18 dealer's sales...performance..." and, among other things, requires the manufacturer to  
19 respond to a dealer's request by "...provid[ing] a written summary of the methodology  
20 and data used in establishing the performance standard, [etc.]" Here, the lack of clarity in  
21 the data would presumably be the sort of information a manufacturer would disclose  
22 about its "methodology and data" and "application" of a "performance standard" [Section  
23 11713.13(g)(1)(B)].

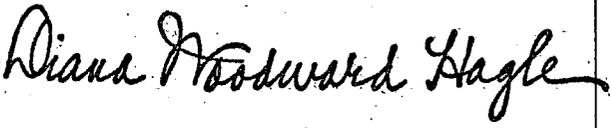
24 11. Two citations clarify that the evidence supports the finding that Watsonville was part of  
25 the PMA of My Nissan prior to its reassignment to protestant. In paragraph 106, line 12, after the  
26 sentence ending "...My Nissan's PMA." The citation (Exh 200E:4741, 4742; IV:79:14-80:14) was  
27 added as indicated below:

28 "106. Presumably, the new area in SCN's PMA---12 census tracts including Watsonville, the  
county's second largest city---was not previously "unassigned" territory. The two closest dealers to  
Watsonville are My Nissan in Salinas and Gilroy Nissan in Gilroy; however, it appears that Watsonville  
was previously in My Nissan's PMA. (Exh 200E:4741, 4742; IV:79:14-80:14) Not only does My  
Nissan, a successful dealer, have a concentration of sales into the Watsonville area, its 2012 RSE soared

1 (from 113.4% at year-end 2011 to 160.6% at year-end 2012), a mirror image of SCN's decline (51.6% at  
2 year-end 2011 to 32.0% at year-end 2012). (Exhs 200A:4696, 4697; 200B:4714; 200C:4716)"

3  
4  
5  
6 I hereby submit the foregoing which constitutes my  
7 Proposed Decision Following Board's Order  
8 Sustaining the Protest and Remanding the Matter in  
9 Protest No. PR-2358-13, as the result of a hearings  
10 before me, and I recommend this Proposed Decision  
11 be adopted as the Decision of the New Motor Vehicle  
12 Board.

13 DATED: September 5, 2014

14   
15 By: \_\_\_\_\_  
16 DIANA WOODWARD HAGLE  
17 Administrative Law Judge  
18  
19  
20  
21  
22  
23  
24  
25

26 Attachment

27 Jean Shiomoto, Director, DMV  
28 Wesley Goo, Deputy Director,  
Licensing Operations Division, DMV

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

**PROPOSED DECISION**

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18 PROCEDURAL BACKGROUND

19 Statement of the Case

20 1. By letter dated January 14, 2013, Nissan North America, Inc. gave notice to Santa Cruz  
21 Nissan, Inc. pursuant to California Vehicle Code section 3060<sup>1</sup> of its intention to terminate the  
22 dealership's Nissan franchise.

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

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

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

28 <sup>1</sup> Hereinafter, unless otherwise indicated all section references are to the Vehicle Code.

PROPOSED DECISION

**ATTACHMENT 1**

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

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

4 **Parties and Counsel**

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

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

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

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

15 **IDENTIFICATION OF WITNESSES**

16 **Protestant's Witnesses**

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

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

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

27 \_\_\_\_\_  
28 <sup>2</sup> References herein to Roman Numerals are to the transcripts of the proceedings.

**Respondent's Witnesses**

1  
2       13.     The following witnesses were employees, or former employees, of Nissan. Their  
3 testimony covered the organization and products of the company; duties of Nissan personnel; assessments  
4 of the sales performance of Santa Cruz Nissan and communications with the dealership; Nissan's method  
5 of evaluating the sales performances of its dealers and its brand popularity; the procedures which Nissan  
6 follows with dealers it considers underperforming; and the decision to issue a Notice of Termination to  
7 SCN.

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

12       (1)    Eric Lewin testified that, as Santa Cruz Nissan's DOM from April of 2009 to June of 2011,  
13 he visited SCN every 30 to 60 days, and was in regular telephone or email contact with the dealership.  
14 SCN's sales performance was an issue during his tenure. In his opinion, SCN's failure to improve sales  
15 performance was due to an insufficient level of resources to accomplish the task, no sense of urgency to  
16 change the situation, and no one in charge capable of executing plans for improvement.

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

22       (3)    John Gardner, the current DOM, assumed his position in October of 2012, shortly after the  
23 180-day Notice of Default under which SCN was operating expired and Nissan had extended the Notice  
24 of Default for 60 days. He testified that he visited SCN four times and had contact with the dealership at  
25 least monthly via phone and email. His last visit to the dealership was on June 28, 2013, when he alerted  
26 James Courtright that Nissan had replaced its "West Region" (RSE) standard with a "State Sales  
27 Effectiveness" (SSER) standard. He testified that he continued email and phone contacts with SCN until  
28 December of 2013.

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

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

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

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

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

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

2 **Expert Witnesses**

3 15. Protestant's expert witness was Edward Stockton, Vice President, The Fontana Group.  
4 (Exhs 21B-23B)<sup>3</sup>

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

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

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

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

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

26  
27 <sup>3</sup> Exhibits are referenced as "Exh" and joint exhibits as "JtExh". In both exhibits and joint exhibits, page number references  
28 will be to the last four digits only. Since most exhibits were marked for identification by the parties prior to the hearing, they  
were not offered or introduced in numerical order; also, some pre-marked items may not have been used in the hearing at all, so  
there may be numerical gaps in the Exhibit List.

1 **Deposition Witness**

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

6 **POST-HEARING REQUESTS TO RE-OPEN RECORD**

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

10 23. The parties' "Joint Glossary of Terms to be Used in Merits Hearing" was received May 22,  
11 2014, and was admitted into evidence.

12 **PRE-HEARING SITE VISIT**

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

17 **BURDEN OF PROOF**

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

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

22 **ISSUE PRESENTED**

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

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

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

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

5 (c) Permanency of the investment.

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

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

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

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

14 **PROTESTANT'S CONTENTIONS**

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

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

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

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

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

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

### 7 RESPONDENT'S CONTENTIONS

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

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

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

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

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

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

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

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

8 **FINDINGS OF FACT**<sup>4</sup>

9 **Preliminary Findings**

10 **History and Description of the Dealership**

11 41. Protestant Santa Cruz Nissan is a California corporation. It is one of the oldest family-  
12 owned Nissan (formerly Datsun) dealer franchises in the U.S., having been appointed on March 20,  
13 1972. (JtExhs 1:0063, 4:0008<sup>5</sup>; IX:45, 55; XII:173)

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

22 43. Lee Courtright was formerly a partner in the Seaside Company, selling his interest in 1993  
23 or soon thereafter. The Seaside Company is a large land owner in the Santa Cruz area and, among other  
24

25 <sup>4</sup> References herein to testimony, exhibits or other parts of the record are examples of evidence relied upon to reach a finding  
26 and are not intended to be all-inclusive.

27 Findings of Fact are organized under topical headings for readability only and are not to be considered relative to only the  
28 particular topic under which they appear, but rather may apply to any of the “existing circumstances” or “good cause” factors  
of section 3061.

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

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

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

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

15 46. As Executive Manager, James Courtright is charged with having full managerial  
16 authority and responsibility for the day-to-day operations of the dealership.<sup>7</sup> His compensation is not  
17 known.

18 47. On September 25, 2005, the Dealer Agreement was amended to reflect James  
19 Courtright’s 28.6% ownership of SCN and Lee Courtright’s 71.4% ownership of the business. (JtExh  
20 1:0076)

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

26  
27 <sup>6</sup> The General Manager (GM) of a dealership is designated by the Dealer only, as opposed to an Executive Manager (EM) who  
is approved by Nissan. (JtExh 14:4)

28 <sup>7</sup> An Executive Manager (EM) must be approved by Nissan, different from a General Manager, who is chosen by the  
dealership. (JtExh 14:4)

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

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

6 50. As before the last move and continuing to the present, protestant is “dualled” with three  
7 line-makes in addition to Nissan: it is a franchisee of Volkswagen, Dodge and Ram vehicles.<sup>8</sup> SCN sells  
8 and services both new and used vehicles. (JtExhs 1:0070; 13:2)

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

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

17 53. SCN’s sales office is open seven days a week, from 9 AM to 8 PM (7 PM during  
18 Daylight Savings Time). The dealership offers service on Monday through Friday, from 7:30 AM to 6  
19 PM, with shuttle service with two drivers available every hour the service department is open. (JtExh  
20 13:2; IX:13-14)

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

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

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

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27  
28 <sup>8</sup> Lee Courtright acquired the Dodge truck franchise in 1978; the separate Ram line-make “...has only been around for the last few years...”. (XII:172)

1 across the street from the dealership or whether it in fact failed to acquire the storage property. (JtExh  
2 1:077)

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

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

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

16 60. In February 2014, SCN entered into a three-month contract to advertise to the Hispanic  
17 market; in preparation for Spanish-speaking customers, James Courtright had previously hired sales staff  
18 conversant in Spanish. In April 2013, the area's dealers who were participating in RMP met and agreed  
19 to allocate 30% of RMP funds to Spanish-language advertising; James Courtright "didn't fight it" but was  
20 concerned because, at that time, SCN had no Spanish-speaking sales staff so would be unable "... to  
21 handle the traffic generated from the spots". (Exh 209:0024; VII:33-34, 46-47; VIII:189-191; XI:29-30,  
22 96-97)

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

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

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

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

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

16 65. Both Nissan’s internal paperwork regarding the extension and the NOD extension itself  
17 noted the “alarming” decline in protestant’s RSE during the 180 days since the issuance of the NOD.  
18 (JtExh 3:all pages; III:61) Compared to SCN’s 2011 year-end RSE of 51.5%, the “...July 2012 rolling 12-  
19 month data...”<sup>9</sup> showed SCN’s RSE to be 39.5%. (JtExh 3:0021) The June 2012 rolling 12-month data  
20 was slightly different, with a 2011 year-end RSE of 51.57% with SCN’s rolling June figure to be 38.35%.  
21 (JtExh 3:0023)

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

26 ///

27 \_\_\_\_\_

28 <sup>9</sup> “12-month rolling” is “data comprised of the most recent twelve month period, regardless of calendar year”. (JtExh 14:6)

1 PMA to the full 12-month periods.<sup>10</sup>

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

10 *Nissan Facts*

11 68. Currently, Nissan manufactures 22 models with the stated aim of capturing a broad  
12 spectrum of the market. With its impressive line-up in many different model “segments”, it hopes to  
13 attract first-time car buyers looking to own entry-level cars; those buyers needing work-horse trucks and  
14 large SUV’s; as well as those interested in sports cars, sedans and the LEAF, Nissan’s EV offering. (Exh  
15 202)

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

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

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

23 72. By the Spring of 2009, the economic situation facing the automobile industry was “very  
24 unfavorable”: the “deep recession” saw dealers reducing inventory and Nissan cutting production in  
25 response. “...Registrations of new cars nationally, locally, were all suffering and on the decline”. By  
26 2010, however, the markets were recovering and, in December of 2010, the LEAF was launched, which

27  
28 <sup>10</sup> This would presumably be the sort of information a manufacturer would disclose about its “methodology and data” and  
“application” of a “performance standard”. [Section 11713.13(g)(1)(B)]

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

2 73. Nissan geographically organizes its dealer network into "Regions", subdividing each  
3 "Region" into "Divisions" and then assigning each Nissan dealer a set of census tracts called "Primary  
4 Market Areas", or "PMA's". In the Dealer Agreement, a PMA is "...the geographic area which is  
5 designated from time to time as the area of Dealer's sales and service responsibility for Nissan Products".  
6 (JtExh 1:5622-5623)

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

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

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

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

27 78. The "Dealer Presentation" dated March 2013 paralleled the executive "market study", with  
28 ///

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

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

#### 11 The Dealer Agreement

12 80. On February 2, 1989, the parties executed a “Nissan Dealer Sales and Service Agreement”.  
13 Its “Standard Provisions” constitute the franchise agreement currently in force, which allows Santa Cruz  
14 Nissan to sell all Nissan models, as well as parts and accessories, and to service the vehicles. (JtExh  
15 1:0089, 0065, 5620-5624)

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

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

#### 20 Santa Cruz Nissan’s Primary Market Areas<sup>12</sup>

21 From March 1<sup>st</sup> of 2004 - May 16<sup>th</sup> or June 1<sup>st</sup> of 2012

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

26 \_\_\_\_\_  
27 <sup>11</sup> On June 8, 2102, SCN was not only under a Notice of Default, but its PMA had been expanded into Watsonville no more  
28 than three weeks earlier.

<sup>12</sup> A map showing both the 2004-2012 PMA and the 2012-present PMA is attached hereto as Exhibit B.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

19 96. There are a total of twelve line-makes sold in SCN’s pre-2012 PMA: SCN’s franchises  
20 (Nissan, Volkswagen, Dodge, Ram), Honda, Toyota, Kia, Subaru, Ford, Scion, Lincoln and Mazda. (Exh  
21 23B:Supplemental Exhs Pg 4)

22 97. Nissan dealers in PMA’s contiguous to protestant’s are My Nissan in Salinas (24.5 miles  
23 from SCN), Gilroy Nissan in Gilroy (22.2 miles), Stevens Creek Nissan in West San Jose (23.6 miles),  
24 Premier Nissan on Capitol Expressway in San Jose (20.8 miles), and Boardwalk Nissan in Redwood City  
25 (38.4 miles). (Exh 21B:0370)

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

28 ///

From May 16<sup>th</sup> or June 1<sup>st</sup> of 2012 to the Present

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

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

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

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

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

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

---

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

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

1 penetration goes down, because more “competitive set” registrations are added to the equation, while the  
2 sales number remains the same. For example, when SCN’s PMA was enlarged into Watsonville,  
3 “competitive set” registrations from 197 vehicle models were immediately folded into the equation. (Exh  
4 200B: 4699, 4700; Exh 200G:4759)

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

9 106. Presumably, the new area in SCN’s PMA---12 census tracts including Watsonville, the  
10 county’s second largest city---was not previously “unassigned” territory. The two closest dealers to  
11 Watsonville are My Nissan in Salinas and Gilroy Nissan in Gilroy; however, it appears that Watsonville  
12 was previously in My Nissan’s PMA. Not only does My Nissan, a successful dealer, have a concentration  
13 of sales into the Watsonville area, its 2012 RSE soared (from 113.4% at year-end 2011, to 160.6% at year-  
14 end 2012), a mirror image of SCN’s decline (51.6% at year-end 2011 to 32.0% at year-end 2012). (Exhs  
15 200A:4696, 4697; 200B:4714; 200C:4716)

16 107. The new census tracts in SCN’s PMA include dealerships selling Ford, GMC, Chevrolet,  
17 Buick, Chrysler, Dodge, Jeep and Ram and possibly Cadillac and Lincoln line-makes. (Exhs 200A:4696,  
18 4697; Exh 23B:Supplemental Exh Pg 4)

19 108. With a total of 16 dealers and 6,031 vehicle sales, Nissan’s 2012 expansion of SCN’s PMA  
20 boundaries has transformed a “mid-sized” market into a larger one. The expansion was not an exercise of  
21 the “reasonable discretion” contemplated by Sections 1.N. and 3.A. of the Dealer Agreement. (Exhs  
22 200A:4697; 200G:4759)

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

#### 25 Nissan’s Calculation of Sales Performance

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

1 is the minimum target---the calculations generate the number of “expected sales” (the opportunity in the  
2 dealer’s PMA) for each dealer and performance rankings of Nissan dealers.

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

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

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

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

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

27 116. As of August of 2013, Nissan abandoned the “West Region” in favor of the “California  
28 Region” (SSER) standard.

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

5 118. To "segment-adjust" its data, Nissan organizes its models into fourteen product groups  
6 ("segments")<sup>15</sup>, then assigns models from the "competitive set" to each group.

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

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

15 A. Nissan compares the sales of all its dealers in the region in each of the segments to the  
16 "competitive set" registrations in the region in each segment, which yields a "region sales penetration"  
17 percentage for each segment. This percentage reflects the popularity of each Nissan model in the region.  
18 These are then multiplied by the number of competitive registrations in each segment in the dealer's  
19 PMA, which yields the number of "expected sales" in each segment. (The "expected sales" figure is  
20 adjusted to reflect the consumer preferences in the dealer's PMA.) Adding each segment's "expected  
21 sales" in the PMA results in a total number of "expected sales" for a dealer to achieve region penetration  
22 in the PMA. The total number of "expected sales" is divided by the total of the competitive registrations  
23 in the dealer's PMA to get the dealer's sales penetration necessary to achieve region average. (Exh  
24 200B:4703)

25 B. Among other things, these calculations measure the size of a particular market by counting  
26 the total combined number of registrations in the PMA in each of the fourteen "segments" in which  
27

28 <sup>15</sup> Since Nissan manufactures 22 models, some "segments" contain two Nissan models.

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

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

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

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

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

21 124. The Notice of Default, dated March 19, 2012, advised Lee Courtright that because of  
22 “unsatisfactory sales penetration performance”, protestant was given 180 days to “cure the default” by  
23 achieving 100% RSE. Year-end 2011 sales figures were used, showing that SCN had sold 204 Nissan  
24 vehicles in 2011, while the “100% RSE” figure was 396, so the “loss” was 192 vehicles, which SCN was  
25

26 <sup>16</sup> The “performance letters” followed a format and, in addition to sales performance, addressed such items as customer service,  
27 training and owner loyalty. (Exh 206)

<sup>17</sup> Note that in other documents, the 2007 RSE figure is 84.4%.

28 <sup>18</sup> The letters were dated November 18, 2009; April 21, 2010; November 10, 2010; July 11, 2011; November 9, 2011, and June  
15, 2012. (Exh 206)

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

2 125. The language in Nissan's Notice of Termination dated January 14, 2013, primarily  
3 concerned itself with the "performance metrics" described above, concluding that "...declining sales  
4 penetration performance for many years...." dictated Nissan's decision to terminate the franchise. (Exh  
5 4:0047-51) No mention was made of the criteria listed in Section 3.D of the Dealer Agreement, nor was  
6 there evidence that these factors were considered.

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

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

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

17 128. Santa Cruz Nissan's sales figures and RSE scores are the following (Exhs 200B:4707;  
18 206:0658; 212:0553; JtExhs 2:0043, 0044; 3:0023; 4:0049; I:110; IX:65):

19

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

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28 <sup>19</sup> Wall Street Journal, June 24, 2014, "Aides Rebelled After CEO Tweaked 'Tar-zhay' Formula" (p. 1)

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

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

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

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

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

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

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

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

26  
27 <sup>20</sup> Respondent's expert testified that "[W]e have four years' worth of data at the west region, I would rely on that. And the  
28 2008 to 2009 changes, we have to acknowledge that there was a region change, and difficult to tell exactly how much change is  
due to the northwest, west region standard change. I think its good information, but I would rely on it a little bit less than the  
more current data using the constant region performance standard." (III:21)

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

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

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

15 136. In sales effectiveness rankings of all Nissan dealers in the “West Region” in 2009, SCN  
16 ranked 178/194; in 2010 it ranked 188/197; and in 2011 it ranked 188/195. The bar graphs<sup>21</sup> in Exhs  
17 200C:4721-23 reflect SCN’s performance in context and, for the years 2009 to 2011, show SCN to be a  
18 poor sales performer.

19 137. Located close to protestant, the Toyota and Honda dealerships face the same geographic  
20 and demographic challenges as protestant in the Santa Cruz marketplace. But both Toyota and Honda---  
21 Nissan’s closest competitors---sell more vehicles in the Santa Cruz market than Nissan. (Exh 21B:0352,  
22 0353)

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

25 139. Moreover, success builds on success: because Toyota and Honda sell more vehicles in the  
26

27 <sup>21</sup> Captioned “West Region Nissan Dealers’ Retail Sales Effectiveness to West Region Average (i.e., Average Sales Penetration  
28 of Nissan Dealers in the West Region Adjusted for Local Segment Popularity”).

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

3 140. Other than the peculiarities of the Santa Cruz geography, no local conditions (i.e., those  
4 things that are outside the control of the dealer) have deterred SCN from selling more vehicles. In fact,  
5 local conditions have been beneficial to business in the Santa Cruz economy: population and households  
6 have increased in number and further increases are projected (Exhs G:448-4752; 21B:0325, 0335); other  
7 than a decline of about 4,600 jobs in the county in 2009-2011, recovery was on the way in 2012 and  
8 2013; employment was at its highest level in ten years, at 140,596 jobs (Exh G:4753); in 2012, there were  
9 a significant number of households with incomes of \$75,000 and \$100,000 in the City of Santa Cruz and  
10 its environs. (Exh G:4754-55). Inclement weather (not uncommon in other parts of the "West Region")  
11 is unknown in Santa Cruz.

12 141. Moreover, Santa Cruz Nissan's location "...is very competitive in terms of convenience to  
13 the customers in this market..." as the average drive distance to its dealership is only 8.0 miles. (Exh  
14 200G:4758; IV:97-8) And since its real estate is owned by a family trust, SCN may not face the same  
15 leasehold worries that other dealers have with their landlords. Protestant's retained capital gives the  
16 Courtrights the financial flexibility to spend in a way to increase sales.

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

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

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

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

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

3 144. SCN's "customer pay service sales per UIO" has been trending upward 2009 to 2011 and,  
4 even though never reaching the 100% composite group average, the figures have been 65.6% in 2009,  
5 78.4% in 2010 and 88.4% in 2011. (Exh 200C:4717)

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

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

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

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

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

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

27  
28 <sup>22</sup> "Digital marketing" is the "...online presence of a dealership" in order to market themselves online; interact with prospects  
online or with email; and develop leads, gained on the Internet, into sales." (II:68, 71)

1 Nissan-supported Cobalt program, which covers four different internet marketing services. (Exhs 9, 10,  
2 12, 209:0024; II:302, 310-313; XII:93-94, 151-155) All SCN sales staff consultants have completed  
3 training via Nissan's Virtual Academy and have become "certified". (XII:100-101)

4 150. After receiving the Notice of Default, the Courtright's "...keyed in on Nissan sales..." and,  
5 among other things, "...increased [Nissan] advertising and "...put up more spiff money...to our sales  
6 [staff]...". "A spiff is extra money...[paid to] salesmen at the time of a sale usually...in cash...". (II:315-  
7 316; XI:49; XII:234-236)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

28 ///

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

11 **ANALYSIS**

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

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

15 185. There were many problems with Nissan's analysis of dealer performance. Although  
16 Nissan's basic calculation was valid (figuring the dealer's sales penetration first, then using the regional  
17 segmented data to establish performance), there were other aspects of the process which were not. The  
18 "West Region" was too large to be useful. Reliance on "averages" and "rankings" without further  
19 information has the tendency to mislead. Making threats of adverse consequences if a dealer does not  
20 "achieve 100% RSE" is misusing the data. Designating a "competitive set" of 197 vehicles (including  
21 Tesla and Lotus) leads to unmanageable data.<sup>24</sup>

22 186. With specific regard to Santa Cruz Nissan, Nissan expanded its PMA into the census tracts  
23 of the city of Watsonville for no discernable reason, thereby generating an "alarming" decline in SCN's  
24 RSE percentage and, into the future, insuring SCN's failure to "achieve 100% RSE". In making the  
25 decision to terminate protestant's franchise, Nissan failed to temper the rigid "performance metrics" with  
26

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

1 the inquiries that its own Dealer Agreement states are appropriate (Section 3.D. – “Additional Factors for  
2 Consideration”). Finally, the internal memo recommending the issuance of the Notice of Default  
3 contained an error, stating that SCN had committed to increasing its advertising to \$10,000 monthly  
4 when, in fact, the Courtright’s had agreed to increase their advertising by \$10,000 per month.

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

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

9 189. However, it is also true that Santa Cruz Nissan is a below-average performer. It clearly  
10 lacks competitive “energy”. For example, most of the new marketing and personnel policies were  
11 suggestions from Nissan representatives such as DOM Tina Novoa and FOM Gary Inman, not generated  
12 by the initiative or creativity of the ownership. And often, good marketing suggestions from Nissan  
13 representatives (opening for service on Saturdays, advertising to the Hispanic market, hiring bi-lingual  
14 sales staff) were either ignored or delayed. It appears that DOM Eric Lewin’s assessment was correct:  
15 that SCN’s performance deficiencies are due to an insufficient level of resources to accomplish the task,  
16 no sense of urgency to change the situation, and no one in charge capable of executing plans for  
17 improvement.

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

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

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

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

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

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

1 solid financially and the premise is clean and functional.

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

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

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

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

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

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

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

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

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

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

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

CONCLUSIONS OF LAW

1  
2       201. Respondent has not proved that Santa Cruz Nissan failed to transact an appropriate amount  
3 of business, as compared to the business available to it. [Section 3061(a)]

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

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

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

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

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

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

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**PROPOSED DECISION**

1  
2 Based on the evidence presented and the findings herein, IT IS HEREBY ORDERED THAT the  
3 Protest in *Santa Cruz Nissan, Inc. dba Santa Cruz Nissan v. Nissan North America, Inc.*, Protest No. PR-  
4 2358-13, is sustained.

5  
6 I hereby submit the foregoing which constitutes my  
7 Proposed Decision in the above-entitled matter, as  
8 the result of a hearing before me, and I recommend  
9 this Proposed Decision be adopted as the Decision of  
10 the New Motor Vehicle Board.

11 DATED: July 3, 2014

12 

13 By: \_\_\_\_\_  
14 DIANA WOODWARD HAGLE  
15 Administrative Law Judge

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22  
23  
24 Attachments

25  
26  
27 Jean Shiomoto, Director, DMV  
28 Mary Garcia, Branch Chief,  
Occupational Licensing, DMV

## THE DEALER AGREEMENT

The "Standard Provisions" of the "Nissan Dealer Sales and Service Agreement" provide, in pertinent part, the following:

### **Section 1. Definitions**

....

G. "Competitive Vehicles" shall mean those new vehicles which are considered by Seller [Nissan] to be directly competitive with Nissan Vehicles.

....

N. "Primary Market Area" shall mean the geographic area which is designated from time to time as the area of Dealer's sales and service responsibility for Nissan Products... Seller reserves the right, in its reasonable discretion, to issue new, superseding "Notices of Primary Market Area" to Dealer from time to time.

....

Q. "Executive Manager" shall mean the person named as Executive Manager in ... this Agreement upon whose personal qualifications, expertise, reputation, integrity, experience, ability and representations that he or she shall devote his or her primary efforts to and have full managerial authority and responsibility for the day-to-day management and performance of Dealer, Seller has relied in entering into this Agreement.

....

### **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 ... 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... Seller may, in its reasonable discretion, change Dealer's Primary Market Area from time to time.

#### **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:

1. Achievement of reasonable sales objectives which may be established from time to time by Seller for Dealer as standards of performance;

## **Exhibit A**

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;....
  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. . .; and
  4. A comparison of sales and/or registrations achieved by Dealer to the sales or registrations of Dealer's competitors.
- ....

D. Additional Factors for Consideration

Where appropriate in evaluating Dealer's sales performance, Seller will take into account such reasonable criteria as Seller may determine from time to time, including, for example, the following: the Dealership Location; the general shopping habits of the public in such market area; the availability of Nissan vehicles to Dealer ...; any special local marketing conditions that would affect Dealer's sales performance differently from the sales performance of other Authorized Nissan Dealers; the recent and long term trends in Dealer's sales performance; the manner in which Dealer has conducted its sales operations (including advertising, sales promotion, and treatment of customers); and the other factors, if any, directly affecting Dealer's sales opportunities and performance.

....

H. Evaluation of Dealer's Sales Performance

Seller will periodically evaluate Dealer's performance of its [sales] responsibilities...Dealer shall have the opportunity to comment, in writing, on such evaluations. Dealer shall promptly take such action as may be required to correct any deficiencies in Dealer's performance of its [sales] responsibilities...".

**Section 6. Other Seller and Dealer Responsibilities**

....

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 only if Dealer keeps its Dealership Facilities open and conducts all of its Dealership Operations ... during hours which are reasonable and convenient for Dealer's

**Exhibit A**

customers. Accordingly, Dealer shall maintain its Dealership Facilities open for business and shall conduct all Dealership Operations required under this Agreement during such days and hours as automobile dealers' sales and service facilities are customarily and lawfully open in Dealer's Primary Market Area...

## **Section 12. Termination**

....

### **B. Termination by Seller for Non-Performance by Dealer.**

1. If, based upon the evaluations thereof made by Seller, Dealer shall fail to substantially fulfill its responsibilities with respect to:

a. Sales of new Nissan Vehicles and the other responsibilities of Dealer set forth in Section 3 of this Agreement;

....

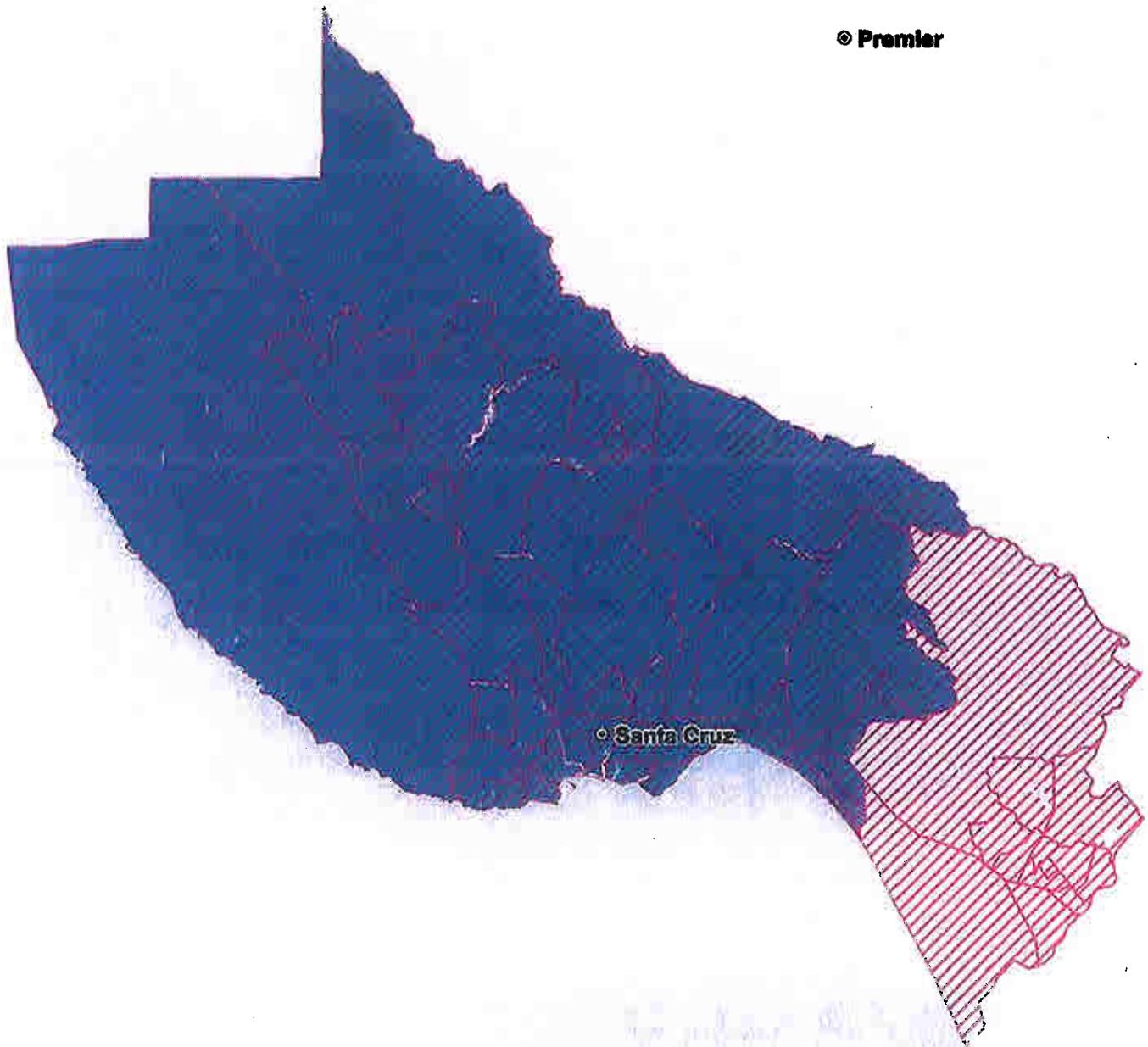
Seller shall notify Dealer of such failure and will review with Dealer the nature and extent of such failure and the reasons which, in Seller's or Dealer's opinion, account for such failure.

Thereafter, Seller will provide Dealer with a reasonable opportunity to correct the failure. If Dealer fails to make substantial progress towards remedying such failure before the expiration of such period, Seller may terminate this Agreement by giving Dealer notice of termination...

**12/2011 Santa Cruz (Santa Cruz) Nissan PMA by 2000 Census Tract vs.  
9/2013 Santa Cruz (Santa Cruz) Nissan PMA by 2010 Census Tract**  
© Nissan Sunnyvale

© Stevens Creek

© Premier



- 12/2011 Santa Cruz (Santa Cruz) PMA
- ▨ 9/2013 Santa Cruz (Santa Cruz) PMA

SOURCE: The Fontana Group, Inc.  
DATA: Manufacturer Dealer Census File (Magnetic Media), 8/2013.  
Manufacturer Structure List Files (Magnetic Media), 12/2011 and 9/2013.



F:SCRU:COMPMA.WOR:00:HHTOHN