

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF HENNEPIN

FOURTH JUDICIAL DISTRICT

Case Type: Other Contracts

Wayzata Nissan, LLC,

Court File No. _____

Plaintiff,

v.

SUMMONS

Nissan North America, Inc.,

Defendant.

THIS SUMMONS IS DIRECTED TO Nissan North America, Inc.

1. **YOU ARE BEING SUED.** The Plaintiff has started a lawsuit against you. The Plaintiff's Complaint against you is attached to this summons. Do not throw these papers away. They are official papers that affect your rights. You must respond to this lawsuit even though it may not yet be filed with the Court and there may be no court file number on this summons.

2. **YOU MUST REPLY WITHIN 20 DAYS TO PROTECT YOUR RIGHTS.** You must give or mail to the person who signed this summons a **written response** called an Answer within 20 days of the date on which you received this Summons. You must send a copy of your Answer to the person who signed this summons.

3. **YOU MUST RESPOND TO EACH CLAIM.** The Answer is your written response to the Plaintiff's Complaint. In your Answer you must state whether you agree or disagree with each paragraph of the Complaint. If you believe the Plaintiff should not be given everything asked for in the Complaint, you must say so in your Answer.

4. **YOU WILL LOSE YOUR CASE IF YOU DO NOT SEND A WRITTEN RESPONSE TO THE COMPLAINT TO THE PERSON WHO SIGNED THIS SUMMONS.** If you do not Answer within 20 days, you will lose this case. You will not get to tell your side of the story, and the Court may decide against you and award the Plaintiff everything asked for in the complaint. If you do not want to contest the claims stated in the complaint, you do not need to respond. A default judgment can then be entered against you for the relief requested in the complaint.

EXHIBIT A

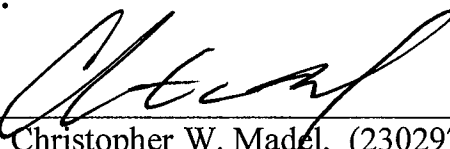
5. LEGAL ASSISTANCE. You may wish to get legal help from a lawyer. If you do not have a lawyer, the Court Administrator may have information about places where you can get legal assistance. **Even if you cannot get legal help, you must still provide a written Answer to protect your rights or you may lose the case.**

6. ALTERNATIVE DISPUTE RESOLUTION. The parties may agree to or be ordered to participate in an alternative dispute resolution process under Rule 114 of the Minnesota General Rules of Practice. You must still send your written response to the Complaint even if you expect to use alternative means of resolving this dispute.

DATED: November 27, 2013

**ROBINS, KAPLAN, MILLER & CIRESI
L.L.P.**

By: _____



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84391871.1

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF HENNEPIN

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Case Type: Other Contracts

Wayzata Nissan, LLC,

Court File No. _____

Plaintiff,

COMPLAINT

v.

JURY TRIAL DEMANDED

Nissan North America, Inc.,

Defendant.

For its Complaint against Defendant Nissan North America, Inc. ("Nissan N.A."), Plaintiff Wayzata Nissan, LLC ("Wayzata Nissan") states and alleges as follows:

INTRODUCTION

1. Wayzata Nissan brings this action for legal and equitable relief from actions, demands, and programs of Nissan N.A. that, on their face and as applied to Wayzata Nissan, violate Minnesota's Motor Vehicle Sale and Distribution statutes as well as Nissan N.A.'s express and implied promises to deal fairly and commercially reasonably with Wayzata Nissan as Wayzata Nissan's franchisor.

2. Nissan N.A. increases its market share by using its sales and performance requirements to force NISSAN dealers, such as Wayzata Nissan, to purchase an ever-increasing volume of new NISSAN vehicles from Nissan N.A. for resale.

3. In early April 2013, Nissan N.A. announced a plan to increase Nissan N.A.'s market share in the United States from 6.9% to 10% (a roughly 45% increase) by 2016.

4. As of March 2013, Nissan N.A.'s market share in Minnesota was only 4.8%.

5. As part of its plan to rapidly increase its market share in the United States, Nissan N.A. imposed on United States NISSAN dealers increasingly aggressive new-vehicle sales performance standards that differed from dealer to dealer and were largely dependent on each dealer's primary market area ("PMA"), the area of "responsibility" assigned to each dealer by Nissan N.A. in Nissan N.A.'s discretion.

6. On April 4, 2013, Nissan N.A. claimed that Wayzata Nissan was not selling enough new NISSAN vehicles relative to the total number of new vehicles registered in Wayzata Nissan's PMA, and Nissan N.A. threatened to terminate Wayzata Nissan's rights under its NISSAN franchise agreement if Wayzata Nissan did not meet Nissan N.A.'s new-vehicle sales requirement over the six-month period beginning on April 1, 2013 and ending on September 30, 2013.

7. Prior to threatening Wayzata Nissan's rights under its NISSAN franchise agreement, Nissan N.A. had assigned Wayzata Nissan an inflated PMA, which Nissan N.A. later further *expanded*, to include, *inter alia*, areas physically separated from the dealership by natural barriers such as Lake Minnetonka, areas too far from Wayzata to make car-shopping at the dealership feasible, and areas that Nissan N.A. knew were dominated by other, competing NISSAN dealers. Indeed, some of the consumers within

Wayzata Nissan's PMA are located 28+ miles and at least a 42-minute drive from Wayzata Nissan, assuming perfect weather and no traffic.

8. Despite threatening Wayzata Nissan's very existence as a dealership if Wayzata Nissan did not satisfy Nissan N.A.'s cure demand, Nissan N.A. refused to tell Wayzata Nissan how many new vehicles Wayzata Nissan would need to sell to cure.

9. At the same time, Nissan N.A., through its dealer "bonus" programs, was providing discriminatory pricing incentives to NISSAN dealers who enjoy reasonably sized PMAs and for that reason have the ability to get Nissan N.A.'s inequitable monthly new-vehicle-sales-based pricing rebates.

10. Nissan N.A. further obstructed Wayzata Nissan from meeting the cure demand, and ensured that Wayzata Nissan could not cure while at the same time earning a profit on new-vehicle sales, by refusing to count Wayzata Nissan's sales of factory program vehicles toward Wayzata Nissan's satisfaction of Nissan N.A.'s objectives, as required by Minnesota statute, and by denying to Wayzata Nissan allocation of vehicles that Wayzata Nissan needed to penetrate substantial segments of its PMA.

11. Notwithstanding Nissan N.A.'s interference with Wayzata Nissan's ability to attain Nissan N.A.'s sales requirement, Wayzata Nissan did what Nissan N.A. had originally stated that Wayzata Nissan had to do to meet Nissan N.A.'s demand (and thus cure any purported breach of contract).

12. But after Wayzata Nissan cured the purported breach, and before Nissan N.A. acknowledged the cure, Nissan N.A. introduced a superseding new-vehicle sales

requirement that again increased the level of monthly new NISSAN vehicle sales that Nissan N.A. demanded of Wayzata Nissan, this time by about 50%.

13. Not only has Nissan N.A. raised the level of new NISSAN vehicle sales demanded of Wayzata Nissan, but Nissan N.A. has simultaneously instituted a more comprehensive new-vehicle sales rebate program that harms Wayzata Nissan by creating an even greater disparity between the price that Wayzata Nissan's competitors, who enjoy reasonably sized PMAs, pay for new NISSAN vehicles relative to what Wayzata Nissan pays for the same new NISSAN vehicles.

14. Nissan N.A.'s recent ratcheting of dealer performance standards, and Nissan N.A.'s recently ramped-up discriminatory pricing programs, assure that dealers, such as Wayzata Nissan, to which Nissan N.A. has improperly assigned oversized and unreasonable PMAs, will be subject to termination at the whim of Nissan N.A. unless they are willing to sell new NISSAN vehicles for net losses.

FACTS APPLICABLE TO ALL CLAIMS

Parties

15. Defendant Nissan N.A. is a California corporation with its principal place of business at One Nissan Way, Franklin, Tennessee 37067. Together with its Japanese parent, Nissan Motor Company ("Nissan"), and affiliated corporations, Nissan N.A. manufactures, *inter alia*, the "NISSAN" line make of motor vehicles.

16. Nissan N.A. markets NISSAN motor vehicles in the United States through a network of authorized dealers. Before Nissan N.A. authorizes a dealer to purchase for resale new NISSAN vehicles, or NISSAN factory vehicles at NISSAN dealer-only

auctions, Nissan N.A. requires the dealer to sign a Dealer Sales & Service Agreement (“DSSA”), or a provisional agreement that precedes the signing of a DSSA, that is drafted by Nissan N.A. Nissan N.A.’s termination of a dealer’s DSSA deprives the dealer of authorization to purchase or sell new and factory NISSAN motor vehicles from Nissan N.A.

17. Wayzata Nissan is a limited liability company with its principal place of business at 15906 Wayzata Boulevard, Wayzata, Minnesota 55391. The members of Wayzata Nissan, and their respective interests, are:

Mark Saliterman, an individual residing at 7128 Mount Curve Road, Bloomington, Minnesota 55438;	66.57%
Marc Allen, Inc. (a Minnesota subchapter S corporation owned by Mark Saliterman);	13.43%
Randy Lammle, an individual residing at 7450 Quail Ridge Trail, Greenfield, Minnesota 55373;	19.5%
Mark Regan, an individual residing at 280 Bartlett Avenue, Sunnyvale, California 94086, in his capacity as trustee of an irrevocable trust domiciled in California.	0.5%

Since its formation in 1993, Wayzata Nissan has conducted business as an authorized NISSAN dealer from its authorized location at 15906 Wayzata Boulevard.

Jurisdiction and Venue

18. This Court possesses subject-matter jurisdiction over this action pursuant to MINN. CONST. ART. VI, § 3 and MINN. STAT. § 484.01.

19. Nissan N.A. conducts business in, and this action arises out of conduct of Nissan N.A. in and directed toward, the state of Minnesota and this judicial district. This

Court's exercise of personal jurisdiction over Nissan N.A, therefore, comports with MINN. STAT. § 543.19, subd. 1, and the Due Process Clause of the United States Constitution.

20. The events underlying the causes of action set forth in this Complaint occurred primarily in Hennepin County, Minnesota. Venue is accordingly proper in this judicial district pursuant to MINN. STAT. § 542.09.

Sales Performance Requirement

21. Each NISSAN dealer's DSSA lists obligations that the dealer must materially satisfy to avoid being subject to termination and having its right to purchase for resale new NISSAN vehicles, or NISSAN factory vehicles at NISSAN dealer-only auctions, revoked by Nissan N.A.

22. Among the obligations contained in each NISSAN dealer's DSSA is a requirement that the dealer "actively and effectively promot[e] the sale at retail (and, if Dealer elects, the leasing and rental) of Nissan Vehicles within Dealer's Primary Market Area" ("Sales Performance Requirement").

23. The DSSA uses the term "Nissan vehicles" in an internally inconsistent manner, i.e., as both including and excluding used NISSAN vehicles.

24. Section 80E.06 of the Minnesota Statutes requires that, regardless of the express terms of any motor vehicle dealer agreement, in evaluating any Minnesota motor vehicle dealer's compliance with motor vehicle sales criteria, a motor vehicle manufacturer must consider the dealer's sales of "factory program vehicles." As used in that statute, "factory program vehicle" means "a vehicle of the current model year offered

for sale and resold by the manufacturer directly or at a factory sponsored or authorized auction and purchased by a dealer holding a current franchise from the manufacturer for that same line make.”

25. In 2012, Wayzata Nissan sold over 100 Model Year (“MY”) 2012 NISSAN factory program vehicles and over 190 MY 2011 NISSAN factory program vehicles.

26. Pursuant to MINN. STAT. § 80E.06, interpreted consistently with industry practice, Nissan N.A. was required to count all such factory program vehicle sales in assessing Wayzata Nissan’s performance under Nissan N.A.’s Sales Performance Requirement for 2012.

27. Nissan N.A.’s Sales Performance Requirement is subject to change at any time because Nissan N.A. has reserved the right to change the requirement’s criteria “from time to time.”

The PMA

28. Under its DSSA with Nissan N.A., a NISSAN dealer’s satisfaction of Nissan N.A.’s Sales Performance Requirement is determined by the dealer’s advertising and sales promotion activities within the dealer’s primary market area (“PMA”).

29. A NISSAN dealer’s PMA is the geographic area, which Nissan N.A. assigns to the dealership, representing the dealer’s “sales and service responsibility” for, *inter alia*, new NISSAN cars and light trucks.

30. Each written notice that Nissan N.A. uses to establish or modify a NISSAN dealer’s PMA is incorporated into the dealer’s DSSA.

31. Nissan N.A. reserves the right to use its “discretion” to change NISSAN dealers’ PMAs.

32. Nissan N.A. reserves the right to assign the same PMA, or overlapping PMAs, to multiple NISSAN dealers.

33. When properly drawn, a PMA is the geographic area in which a dealer enjoys a competitive advantage over all other dealers of the same line make due solely to geographic factors.

34. Studies confirm that the competitive advantage that a dealer enjoys deteriorates as consumer-distance from the dealership location increases.

35. In a metropolitan area, a dealer’s competitive advantage is usually *de minimus* with respect to consumers located more than 8-10 miles from the dealership.

36. A dealer’s competitive advantage similarly diminishes when natural obstacles (such as lakes), traffic patterns, or other factors tend to make shopping for, or servicing of, a motor vehicle less convenient at a particular dealership location relative to a second dealership location, even if the consumer is physically closer to the first dealership location.

37. The PMA that Nissan N.A. assigns to a dealer is fair to the dealer only if the PMA, at a minimum:

(a) has an exterior boundary that is limited to the distance an average consumer will drive to shop for, or obtain warranty service on, a new motor vehicle;

(b) comprises only an area in which the dealer has a competitive advantage over other NISSAN dealers;

(c) is limited to geography that is closer to the dealer's location than to any other NISSAN dealership location; and

(d) is adjusted to remove areas with consumers that would not be expected to prefer traveling to the dealership's location due to natural or man-made barriers, traffic patterns, or shopping patterns of consumers.

Nissan N.A.'s RSE Metric

38. From about 2008 until September 2013, Nissan N.A. evaluated NISSAN dealers using, primarily, a standard called Regional Sales Effectiveness ("RSE").

39. Nissan N.A. used its RSE metric retroactively, to analyze a dealer's sales performance during a particular period after the period had ended.

40. For instance, a dealer's 2012 RSE would not be calculated by Nissan N.A., or known to the dealer, until, at the earliest, February 2013.

41. To determine RSE for any given period, Nissan N.A. multiplies the total number of new-vehicle registrations within the dealer's PMA by Nissan N.A.'s average market penetration within the dealer's region.

42. This produces the total number of new vehicles that Nissan N.A. "expected" the dealer to have sold within the period.

43. The dealer's total new-vehicle sales, whether made inside or outside the dealer's PMA, divided by the number of vehicles that Nissan N.A. "expected" the dealer

to have sold, generates a number, which, when multiplied by 100%, is the dealer's RSE score.

44. For instance, if a dealer sells 35 vehicles in a month, and the number of vehicles that Nissan N.A. "expected" the dealer to have sold during the month, based on the PMA that Nissan N.A. assigned to the dealer, was 53, the dealer would be 66.0% RSE.

45. RSE differs from dealer to dealer, in part, due to differences in PMA size, location, and configuration among dealers.

46. The Minneapolis area is in Nissan N.A.'s Midwest Region, which includes all or portions of 11 Midwest states and over 180 NISSAN dealerships.

Nissan N.A. Shifts to SSER Metric

47. In or about early September 2013, and effective retroactively to June 2013, Nissan N.A. replaced its RSE standard for evaluating dealer performance with a State Sales Effectiveness Represented ("SSER") standard.

48. As it did with RSE, Nissan N.A. uses its SSER metric retroactively, to analyze a dealer's sales performance during a particular period after the period has ended.

49. To determine SSER for any given period, Nissan N.A. multiplies the total number of new-vehicle registrations within the dealer's PMA by Nissan N.A.'s average market penetration within all of the PMAs located in the dealer's state.

50. This produces the total number of new vehicles that Nissan N.A. "expected" the dealer to have sold within the period.

51. The dealer's total new-vehicle sales, whether made inside or outside the dealer's PMA, divided by the number of vehicles that Nissan N.A. "expected" the dealer to have sold, generates a number, which, when multiplied by 100%, is the dealer's SSER score.

52. For instance, if a dealer sells 35 vehicles in a month, and the number of vehicles that Nissan N.A. "expected" the dealer to have sold during the month, based on the PMA that Nissan N.A. assigned to the dealer, was 80, the dealer would be 43.8% SSER.

53. SSER differs from dealer to dealer, in part, due to differences in PMA size, location, and configuration among dealers.

54. In Minnesota, SSER is based on the PMAs of the 14 Minnesota NISSAN dealers.

55. A dealer's ability to achieve the "expected" number of new-vehicle sales set by Nissan N.A., whether measured under Nissan N.A.'s RSE or SSER metric, depends not only on whether the dealer's PMA has been properly and fairly drawn by Nissan N.A., but also on the extent to which circumstances permit the dealer to sell NISSAN vehicles outside the dealer's PMA relative to the ability of other NISSAN dealers to do so.

Nissan N.A.'s Stair-Step Pricing Rebate Program

56. In October 2013, Nissan N.A. phased in a new stair-step pricing rebate program called the "Nissan Sales Growth Program" ("Growth Program").

57. Under the Growth Program, Nissan N.A. requires each dealer to sell a certain number of new NISSAN vehicles in a given month to get a tier-one pricing rebate, to sell a certain number of additional new NISSAN vehicles during the same month to get a higher, tier-two pricing rebate, and to sell a certain number of additional new NISSAN vehicles during the same month to get an even higher, tier-three pricing rebate.

58. Each Growth Program rebate applies retroactively to reduce the total purchase price that a dealer pays for each of a broad set of NISSAN vehicle models that the dealer purchased from Nissan N.A. since the start of the rebate period.

59. If a dealer exceeds the sales necessary to get the highest, tier 3 rebate in a given month, the dealer's excess sales count toward the next month's stair-step sales objectives, giving the dealer a head start over competitors.

60. The Growth Program's new-vehicle sales objectives set by Nissan N.A. differ from dealer to dealer depending on, among other factors, each dealer's SSER, which, in turn, depends on each dealer's PMA.

61. For instance, the Growth Program objectives that Nissan N.A. sets for a dealer with a reasonably drawn PMA will tend to be lower than the objectives that Nissan N.A. sets for a dealer with an unreasonably inflated PMA, because the dealer with the reasonably drawn PMA will have less difficulty attaining a high SSER score.

62. Nissan N.A. also bases a dealer's Growth Program new-vehicle sales objectives, in part, on the dealer's prior months' sales.

63. Until a dealer reaches a certain level of new-vehicle sales for a month, increased sales during the month will result in a higher Growth Program sales objective in following months.

64. When fully phased in on April 1, 2014, Nissan N.A.'s Growth Program will not only involve these three tiers of monthly rebates, but it will also include new 60-day, quarterly, and annual rebates, plus additional regional rebates.

65. Any dealer that is unable to get the rebates under this stair-step program will experience a price disadvantage, relative to those dealers that do get the rebates, of \$700-\$1,500, and possibly more, per new NISSAN vehicle.

66. Since many NISSAN dealers depend on the rebates to make even a small gross margin, i.e., before the cost of sales and advertising, those dealers that do not get the rebates are forced to sell new NISSAN vehicles at substantial losses just to compete against dealers that are selling new NISSAN vehicles at or near losses to meet Nissan N.A.'s Sales Performance Requirement, i.e., RSE or SSER.

Nissan N.A. Pressures Dealers to Increase Share Overnight

67. NISSAN has consistently captured a relatively low brand share in the United States.

68. As of December 2011, NISSAN's brand share was roughly 5% and falling in Nissan N.A.'s Midwest Region.

69. In early April 2013, Nissan N.A. promised shareholders that it would increase the NISSAN United States brand share to 10% or more by 2016, while simultaneously increasing Nissan N.A.'s net operating profit to 8% on sales.

70. At the direction of new Nissan management, including Chairman of North America and Executive Vice President Jose Munoz, Nissan N.A. has put pressure on NISSAN dealers to increase NISSAN's brand share.

71. For instance, leading up to its announcement promising market-share expansion, Nissan N.A. altered dealers' PMAs and revised NISSAN distribution policies and practices, to the detriment of many NISSAN dealers.

72. As Nissan N.A. knows, certain dealers, including Wayzata Nissan, can meet Nissan N.A.'s heightened sales demands, if at all, only at the expense of the profitability that a NISSAN dealer must achieve for long-term viability and a fair return on invested capital.

Wayzata Nissan

73. Since 1993, when Wayzata Nissan obtained provisional approval from Nissan N.A. to operate as a NISSAN dealer, Wayzata Nissan has been an authorized dealer of NISSAN cars and light trucks.

74. Wayzata Nissan entered into a DSSA with Nissan N.A. in June 1996.

75. Since 1993, Wayzata Nissan and its members have devoted substantial assets to Wayzata Nissan's motor vehicle business.

76. The business' assets include: (a) real estate and facilities worth about \$6.8 million that are beneficially owned by Mark Saliterman and that cannot as a practical matter be used productively except as the situs for a motor vehicle dealership; (b) going-concern value of over \$6 million, which would be lost if Nissan N.A. terminated Wayzata Nissan's DSSA; (c) approximately \$400,000 in equipment, furniture, and fixtures, which

would lose nearly all of their value if Nissan N.A. terminated Wayzata Nissan's DSSA; and (d) roughly \$15 million in inventory, including new motor vehicles, factory program vehicles, used motor vehicles, and replacement parts, much of which would need to be liquidated at discounts if Nissan N.A. terminated Wayzata Nissan's DSSA.

77. The livelihood of more than 50 full-time employees depends on Wayzata Nissan's continued operation as an authorized NISSAN dealership.

Nissan N.A. Configures Wayzata Nissan's PMA to be Unreasonably Large in 2004

78. In 2004, Nissan N.A. set Wayzata Nissan's PMA to consist of 58 census tracts.

79. Wayzata Nissan's 2004 PMA encompassed an area roughly 30 miles from east to west and roughly 30 miles from north to south along its western border.

80. Wayzata Nissan's 2004 PMA included territory that was more than 28 miles from Wayzata Nissan's location by road.

81. Numerous consumers in Wayzata Nissan's 2004 PMA resided beyond the geographic area in which Wayzata Nissan had any competitive advantage.

Nissan N.A. Further Expands Wayzata Nissan's Already Unreasonably Large PMA in 2012

82. In or about March 2012, Nissan N.A. notified Wayzata Nissan that, effective July 1, 2012, Nissan N.A. would modify Wayzata Nissan's PMA.

83. In explaining the modification to Mark Saliterman and Randy Lammle, Wayzata Nissan's owners, Nissan N.A. assured them that the change would reduce Wayzata Nissan's PMA.

84. Based on Nissan N.A.'s representations, Saliterman, Lammle, and Wayzata Nissan believed that the PMA modification would reduce the number of new NISSAN vehicles that Wayzata Nissan would need to sell to be 100% RSE.

85. Contrary to Nissan N.A.'s representations, however, Nissan N.A.'s July 2012 PMA modification increased Wayzata Nissan's PMA both by size and new-vehicle registration count.

86. As a result of Nissan N.A.'s PMA modification, Wayzata Nissan was required to sell more vehicles per month to maintain the same RSE score that Wayzata Nissan was able to attain before Nissan N.A. expanded Wayzata Nissan's PMA.

87. Nissan N.A.'s July 2012 modification was a net addition of at least eight census tracts to Wayzata Nissan's PMA.

88. Most or all of the census tracts that Nissan N.A. added to Wayzata Nissan's PMA in July 2012 had until then been assigned to the NISSAN dealer located on the western end of the I-494 strip (a dealer that Nissan N.A. refers to as the "Minneapolis dealer"). These added census tracts, which are heavily populated, are on the side of Lake Minnetonka opposite Wayzata Nissan.

89. These added census tracts were carved out of an area that was and is dominated by the Minneapolis dealer.

90. Shopping patterns in these added census tracts generally take motor vehicle consumers away from, not to, the Wayzata area.

91. Overall, Nissan N.A.'s 2012 changes to Wayzata Nissan's PMA increased the number of census tracts in Wayzata Nissan's PMA from 58 to 66, further expanding

Wayzata Nissan's already oversized PMA, and increased the total number of competitive registrations in Wayzata Nissan's PMA by approximately 8.5%.

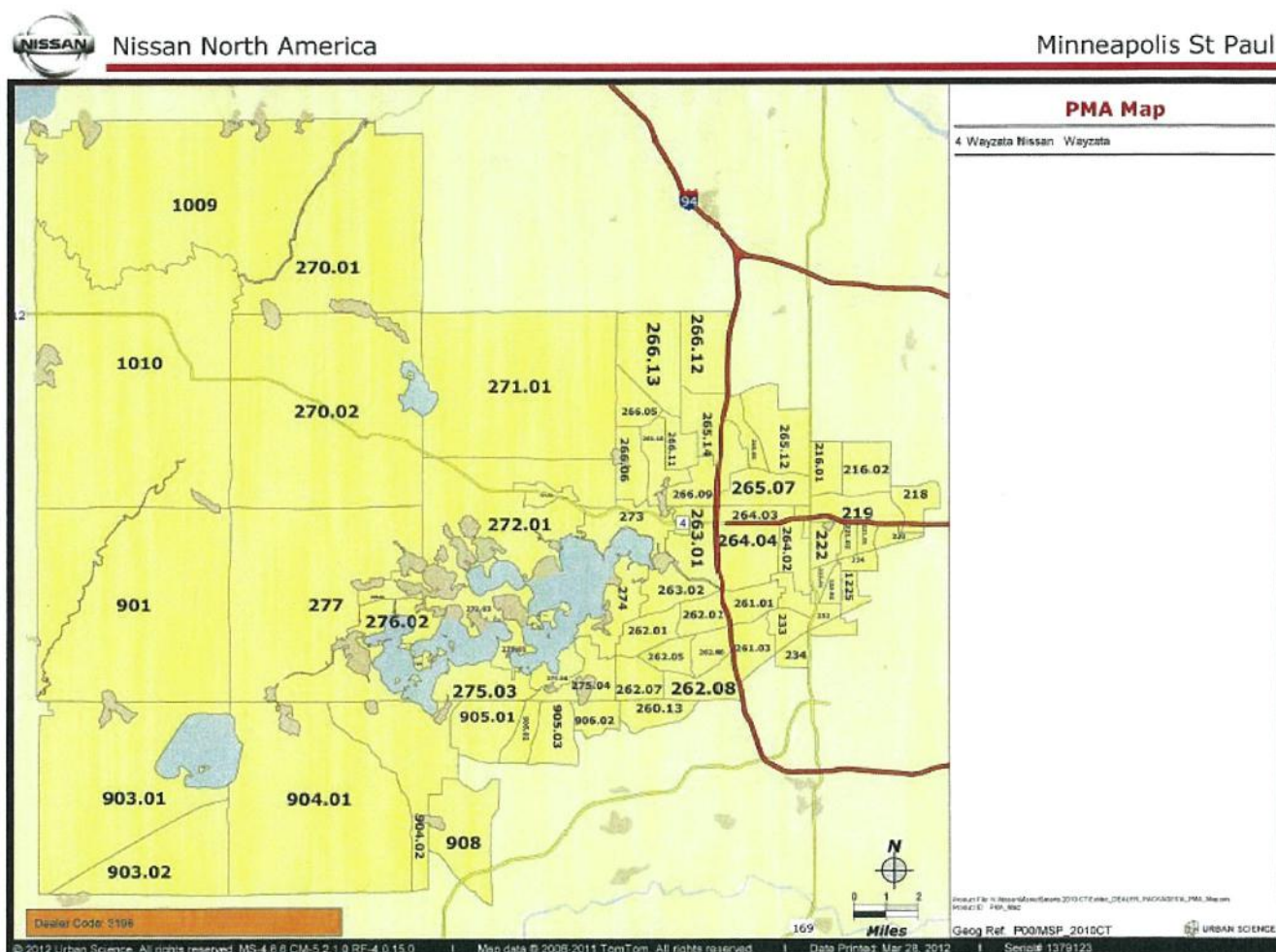
92. The competitive registrations in the recently added census tracts, particularly those in areas in which Wayzata Nissan has no competitive advantage, continue to steadily increase in number.

93. Before Nissan N.A. increased Wayzata Nissan's PMA in 2012, Nissan N.A. knew or should have known that Wayzata Nissan's PMA already included territory in which Wayzata Nissan suffered a competitive disadvantage relative to other nearby NISSAN dealers in the sale of new NISSAN vehicles.

94. When Nissan N.A. changed Wayzata Nissan's PMA in 2012, moreover, Nissan N.A. knew or should have known that the change substantially increased Wayzata Nissan's area of responsibility with additional territory in which Wayzata Nissan suffered a competitive disadvantage relative to other nearby NISSAN dealers in the sale of new NISSAN vehicles.

95. When Nissan N.A. changed Wayzata Nissan's PMA in 2012, Nissan N.A. also knew or should have known that the change substantially increased the number of competitive registrations against which Nissan N.A. would measure Wayzata Nissan in determining whether Wayzata Nissan met the Sales Performance Requirement that Nissan N.A. imposed on Wayzata Nissan.

96. Nissan N.A. has pictorially depicted Wayzata Nissan's current PMA (which includes the 2012 expansion) as follows:¹



97. Nissan N.A.'s 2012 modification of Wayzata Nissan's PMA had at least the following immediate adverse impacts on Wayzata Nissan:

¹ Nissan N.A.'s depiction of Wayzata Nissan's PMA fails to include certain of the natural barriers that further undermine Wayzata Nissan's ability to sell to consumers within its PMA. For example, Lake Minnewashta, which occupies a large portion of tract 905.01 and blocks consumers in the southwestern segment of Wayzata Nissan's PMA from reaching the dealership, is omitted from Nissan N.A.'s map.

(a) Without any changes in Wayzata Nissan's actual performance as a NISSAN dealer, Wayzata Nissan's sales effectiveness, as measured by Nissan N.A., dropped by more than 8%.

(b) Wayzata Nissan's ability to sell new NISSAN vehicles outside its PMA, which was already inferior to that of other NISSAN dealers to sell outside their respective PMAs, was further reduced.

(c) Promotional funds that Nissan N.A. makes available to certain dealers were rendered nearly impossible for Wayzata Nissan to obtain. In particular, because many of the consumers within Wayzata Nissan's expanded PMA are not inclined to travel to Wayzata Nissan for servicing, Wayzata Nissan has been unable to get "Owner First" funds that Nissan N.A. gives to dealers that achieve a specified level of "in warranty service retention," even though Wayzata Nissan had been servicer of choice for NISSAN vehicle owners prior to the PMA increase.

(d) Wayzata Nissan's ability to obtain competitive pricing through Nissan N.A.'s stair-step pricing programs was further undermined.

Wayzata Nissan's Consistent Achievement of Nissan N.A.'s Sales Performance Requirement

98. In Wayzata Nissan's DSSA, Nissan N.A. promises to periodically evaluate Wayzata Nissan's performance of the Sales Performance Requirement that Nissan N.A. imposes on Wayzata Nissan.

99. Nissan N.A. also promises to present the evaluation to Wayzata Nissan.

100. Between 2008 and 2011, despite having an oversized PMA, Wayzata Nissan consistently satisfied the Sales Performance Requirement in its DSSA.

101. Stated differently, between 2008 and 2011, Wayzata Nissan actively and effectively promoted, through its own advertising and sales promotion activities, the sale at retail of NISSAN vehicles to consumers in Wayzata Nissan's PMA, even though its PMA is unreasonably large.

102. Since in or about 2008, Nissan N.A.'s evaluations of Wayzata Nissan have focused on whether or not Wayzata Nissan has been 100% RSE.

103. Between 2003 and 2011, Wayzata Nissan generally achieved 90% RSE or better, as measured by Nissan N.A.

104. From 2004 to 2011, NISSAN's brand share in Wayzata Nissan's PMA regularly exceeded NISSAN's average brand share in the Midwest Region.

105. When all relevant circumstances are considered, including Wayzata Nissan's oversized PMA, Wayzata Nissan's sales of NISSAN factory program vehicles, the general shopping habits of the public in Wayzata Nissan's PMA, and the availability of particular new NISSAN vehicles to Wayzata Nissan and to other competing NISSAN dealers, Wayzata Nissan has exceeded the Sales Performance Requirement in its DSSA.

106. Since 2003, Wayzata Nissan has also regularly outperformed the majority of NISSAN dealers in the Midwest region in—and received accolades and awards from Nissan N.A. for—its sale of NISSAN replacement parts and extended warranties offered by Nissan N.A.'s affiliate.

Nissan N.A. Imposes Unreasonable and Unfair Sales Objectives on Wayzata Nissan

107. Under Nissan N.A.'s stair-step pricing programs that were in place before Nissan N.A. introduced the Growth Program, the new-vehicle sales objectives for dealer-rebates were calculated as a multiple of a dealer's prior months' sales.

108. A NISSAN dealer that met Nissan N.A.'s objectives for one month would have its objectives rise substantially the next month. For instance, Nissan N.A. would set a dealer's highest rebate objective as requiring the dealer to increase new-vehicle sales over the dealer's average prior monthly sales by 25%, in line with Nissan N.A.'s ever-increasing production objectives.

109. When a dealer attained a certain percentage of RSE, such as 150%, however, Nissan N.A. would reduce the dealer's otherwise-applicable rebate objective for the next month instead of increasing the dealer's objective. Nissan N.A. refers to this as the "smoothing effect."

110. Certain NISSAN dealers with which Wayzata Nissan competes have benefited from the smoothing effect.

111. Even before Nissan N.A. enlarged Wayzata Nissan's PMA in 2012, however, Wayzata Nissan was unable to sell enough new NISSAN vehicles to benefit from the smoothing effect while at the same time maintaining a reasonable level of profitability on new NISSAN vehicle sales.

112. Nissan N.A.'s 2012 increase to Wayzata Nissan's PMA made it even more difficult for Wayzata Nissan to benefit from the smoothing effect.

113. Through the combination of Nissan N.A.'s improper configuration and enlargement of Wayzata Nissan's PMA, and Nissan N.A.'s stair-step pricing programs, Nissan N.A. has placed Wayzata Nissan at a price disadvantage relative to competing NISSAN dealers.

114. Nissan N.A.'s unequal pricing has enabled certain of Wayzata Nissan's competitors to sell at a profit despite setting their prices lower than the level at which Wayzata Nissan could set its prices if Wayzata Nissan was to realize any profit on new-vehicle sales.

115. During 2012, Wayzata Nissan's sales of new NISSAN vehicles suffered a significant drop, in large part because Wayzata Nissan was not able to compete with NISSAN dealers that Nissan N.A. favored through its actions and programs if Wayzata Nissan was to maintain any level of profitability.

116. Rather than chasing rebates that it could not attain due to Nissan N.A.'s improper configuration of its PMA, Wayzata Nissan focused in 2012 on making sales of NISSAN vehicles, specifically NISSAN factory program vehicles and quality used NISSAN vehicles, that would result in a fair profit for Wayzata Nissan.

Nissan N.A. Claims that Wayzata Nissan is in Breach of the Sales & Service Agreement

117. By letter dated March 18, 2013, Nissan N.A. provided its evaluation of Wayzata Nissan's sales performance for 2012.

118. NISSAN's brand share in the Midwest Region fell by about 10% from 2011 to 2012.

119. However, Nissan N.A.'s 2012 evaluation of Wayzata Nissan indicated that the number of "expected" new-vehicle sales that Nissan N.A. required Wayzata Nissan to attain retroactively for 2012 was 529, an increase of nearly 20% over the 2011 "expected" new-vehicle sales number of 443.

120. Nissan N.A. neither discussed the March 18, 2013 evaluation with Wayzata Nissan nor gave Wayzata Nissan an opportunity to comment on the evaluation, even though Wayzata Nissan's DSSA required Nissan N.A. to do so.

121. Instead, by letter dated March 29, 2013, and received by Wayzata Nissan on April 4, 2013 ("Notice of Default" or "NOD"), Nissan N.A. declared Wayzata Nissan to be in material breach of Wayzata Nissan's DSSA.

122. Threatening Wayzata Nissan with termination, Nissan N.A. declared in the NOD: "[Wayzata Nissan] has six months from its receipt of this notice to correct its ongoing material breach of its contractual sales performance obligations and comply with Nissan's performance criteria. To correct the breach, [Wayzata Nissan] must meet or exceed 100% regional sales effectiveness or "RSE"."

123. With its business (and associated assets worth over \$10 million) and the jobs of over 50 full-time employees at stake, Wayzata Nissan had no alternative but to satisfy Nissan N.A.'s demand, even though this would require Wayzata Nissan to sacrifice its profitability during the cure period.

124. Wayzata Nissan therefore sold new NISSAN vehicles at whatever prices proved necessary to satisfy Nissan N.A.'s cure demand.

125. Even though Nissan N.A.'s 100% RSE sales requirement assumes that each NISSAN dealer has the same opportunities as all others in the dealer's region, Nissan N.A. withholds from Wayzata Nissan the right to sell all models of NISSAN vehicles.

126. Also, as the cure period commenced, Wayzata Nissan requested that Nissan N.A. allocate to Wayzata Nissan sufficient quantities of certain NISSAN models from Nissan N.A.'s discretionary pool to permit Wayzata Nissan to sell into all key segments of the motor vehicle market.

127. Nissan N.A. refused to do so.

128. Furthermore, before and during the cure period, Nissan N.A. sold leads identifying sales prospects within Wayzata Nissan's PMA to Wayzata Nissan's direct competitors.

129. In a May 1, 2013 letter that Wayzata Nissan's counsel sent to Nissan N.A.'s General Counsel, Wayzata Nissan protested (i) the 2012 changes to Wayzata Nissan's PMA; (ii) Nissan N.A.'s NOD; (iii) the unreasonableness of Nissan N.A.'s RSE standard and its application to Wayzata Nissan; and (iv) Nissan N.A.'s failure to credit Wayzata Nissan for sales of factory program vehicles when evaluating Wayzata Nissan's satisfaction of its DSSA's Sales Performance Requirement.

130. Wayzata Nissan asked that, at a minimum, Nissan N.A. (i) reasonably reduce Wayzata Nissan's PMA; (ii) recognize Wayzata Nissan's sales of NISSAN factory program vehicles when evaluating Wayzata Nissan's satisfaction of its DSSA's Sales Performance Requirement; and (iii) immediately withdraw the NOD.

131. Nissan N.A. denied all of Wayzata Nissan's requests.

132. Nissan N.A. instead asked Wayzata Nissan to submit documentary proof of its NISSAN factory program vehicle sales.

133. On June 10, 2013, Wayzata Nissan presented sample documents and offered to incur the burden and expense of providing Nissan N.A. with like documentation for all factory program vehicle sales if Nissan N.A. would only agree to credit Wayzata Nissan's factory program vehicles toward Wayzata Nissan's satisfaction of Nissan N.A.'s Sales Performance Requirement.

134. In response, Nissan N.A. stated that it agreed to nothing.

135. Wayzata Nissan's owners also communicated directly with Nissan N.A. personnel in an effort to, *inter alia*, obtain information and explanations for Nissan N.A.'s actions, and to underscore that (i) Nissan N.A.'s change in Wayzata Nissan's PMA, (ii) Nissan N.A.'s NOD and the demands therein, and (iii) Nissan N.A.'s stair-step pricing programs were individually and collectively unreasonable and destructive to Wayzata Nissan's business.

136. Wayzata Nissan's owners sought (i) Nissan N.A.'s commitment to count Wayzata Nissan's sales of factory program vehicles toward Wayzata Nissan's satisfaction of Nissan N.A.'s sales requirements in accordance with Minnesota law; (ii) allocation of NISSAN models that Wayzata Nissan lacked in stock; (iii) an indication from Nissan N.A. of the number of monthly sales that Nissan N.A. would require Wayzata Nissan to make to satisfy Nissan N.A.'s cure demand; and (iv) confirmation that in determining whether Wayzata Nissan had satisfied Nissan N.A.'s cure demand, Nissan N.A. would

evaluate Wayzata Nissan's sales effectiveness over the 6-month cure period, i.e., not over a period that extended back to before Nissan N.A. served the NOD on Wayzata Nissan.

137. In response:

(a) Nissan N.A. refused to provide the necessary allocation unless Wayzata Nissan would make sales commitments to Nissan N.A. that exceeded its DSSA's requirements and commit to an action plan, thereby waiving challenges to Nissan N.A.'s unreasonable demands.

(b) Nissan N.A. refused to commit to counting Wayzata Nissan's sales of factory program vehicles toward Wayzata Nissan's satisfaction of Nissan N.A.'s sales requirements, including Nissan N.A.'s cure demand.

(c) Rather than indicating to Wayzata Nissan how many new-vehicle sales Wayzata Nissan needed to make to satisfy Nissan N.A.'s cure demand, Nissan N.A. only stated that it would determine whether Wayzata Nissan had cured the purported breach and "what the next steps would be" after Nissan N.A. received new-vehicle registration data for September, i.e, roughly 45 days after the cure period had concluded.

138. On or about August 16, 2013, Nissan N.A. stated that, in evaluating cure, it would use Wayzata Nissan's RSE as measured over the six-month cure period.

139. However, in September 2013, shortly before the cure period ended, Nissan N.A. stated the opposite, namely, that Nissan N.A. would not acknowledge that Wayzata Nissan had cured unless Wayzata Nissan attained a 100% RSE score over the 12-month period from October 1, 2012 to September 30, 2013, which would require Wayzata

Nissan to increase its monthly sales of new NISSAN vehicles by more than 300% during the six-month cure period.

140. In satisfying Nissan N.A.'s cure demand, Wayzata Nissan has incurred substantial losses not only on new-vehicle sales, but also on its factory program and used vehicle sales.

141. To the date of this Complaint, Wayzata Nissan's satisfaction of the demands made by Nissan N.A., which were backed by the threat termination, has caused Wayzata Nissan to suffer damages in excess of \$50,000.

142. Wayzata Nissan continues to suffer harm as a result of Nissan N.A.'s sales requirements.

Nissan N.A.'s Reliance on Inaccurate Data

143. At a June 27, 2013 meeting between the owners of Wayzata Nissan and Nissan N.A. personnel, Mark Saliterman asked Bryan Dumais, Nissan N.A.'s Regional Vice President for the Midwest Region, to explain why the RSE requirement that Nissan N.A. had set for Wayzata Nissan increased 30% from 2011 to 2012.

144. Dumais explained that 8% of the RSE increase was attributable to Nissan N.A.'s expansion of Wayzata Nissan's PMA.

145. Dumais was unable to explain the additional 22% increase.

146. Wayzata Nissan has yet to receive any meaningful explanation from Nissan N.A. as to what caused the additional 22% increase in the 2012 RSE requirement that Nissan N.A. retroactively set for Wayzata Nissan.

147. Upon information and belief, Nissan N.A. knows or should know that it misuses data in calculating some NISSAN dealers' RSE scores.

148. Upon information and belief, Nissan N.A. uses registration data reported by state agencies (Polk database) to determine the total number of vehicle registrations in a PMA during a particular period of time, a step in calculating a dealer's RSE score.

149. However, when Nissan N.A. calculates a dealer's new-vehicle sales during a particular period of time, the second step in calculating a dealer's RSE score, Nissan N.A. uses data stored on its own sales database.

150. Nissan N.A.'s sales database data is not consistent with Polk's registration database data because Nissan N.A. records sales before vehicles are registered by state agencies.

151. Upon information and belief, Nissan N.A.'s knowing and intentional use of inconsistent data sets, along with delays by Minnesota state agencies in registering new vehicles sold in late-2011, resulted in Nissan N.A. significantly understating Wayzata Nissan's sales effectiveness in 2012.

152. Upon information and belief, Nissan N.A.'s NOD (and Nissan N.A.'s cure demand) was based on an inaccurate calculation of Wayzata Nissan's RSE due to Nissan N.A.'s use of data sets that it knew or should have known were inconsistent.

Nissan N.A. Further Cripples Wayzata Nissan with SSER Metric

153. Announced in or about September 2013, and effective as of June 2013, Nissan N.A. has for all purposes other than evaluating Wayzata Nissan's satisfaction of

Nissan N.A.'s cure demand, required that Wayzata Nissan achieve the "expected" number of new-vehicle sales dictated by Nissan N.A.'s new SSER metric.

154. Without any change in market conditions other than ever-more-aggressive competition, Nissan N.A., by its change from RSE to SSER, is demanding that Wayzata Nissan achieve 50% more monthly new-vehicle sales than Nissan N.A. had demanded when it measured dealer performance with RSE.

155. In sum, between July 1, 2012 and June 30, 2013, Nissan N.A. increased the quantity of new-vehicle sales that Nissan N.A. demands of Wayzata Nissan by 80% or more.

Nissan N.A. Uses Its Stair-Step Pricing Rebate Program to Injure Wayzata Nissan

156. For the month of December 2013, i.e., one of the worst months of the year for new motor vehicle sales in Minnesota, Nissan N.A. has set Wayzata Nissan's top-tier Growth Program sales objective at 94 new NISSAN vehicles, a number that Wayzata Nissan would be forced to suffer a substantial loss to attain.

157. Nissan N.A. set Wayzata Nissan's December 2013 sales objective at 94 new NISSAN vehicles, in part, because Wayzata Nissan sold substantial numbers of new NISSAN vehicles at a loss in the months leading up to December 2013 to satisfy Nissan N.A.'s cure demand.

158. Annualized, Nissan N.A.'s 94-new-vehicle sales requirement (for one of the slowest sales months of the year) would require Wayzata Nissan to sell 1200 new NISSAN vehicles in a single year, that is, nearly 300% of what Wayzata Nissan's "expected" sales were under the RSE metric two years earlier.

159. Nissan N.A. has consistently provided the maximum Growth Program pricing rebates to three or more of the NISSAN dealers in the Minneapolis/St. Paul metropolitan area, including one or more dealers with which Wayzata Nissan must directly compete.

160. Due to, among other factors, Wayzata Nissan's oversized and improperly configured PMA, Wayzata Nissan is unable to sell at volumes necessary to get the favorable pricing on new NISSAN vehicles from Nissan N.A. that other NISSAN dealers are able to get under the Growth Program without setting prices so low that they do not cover costs, much less allow for a reasonable profit.

Nissan N.A.'s Actions Together Promise Almost-Certain Elimination of Wayzata Nissan as a Dealership

161. Nissan N.A.'s (i) configuration of Wayzata Nissan's PMA to include an unreasonably and unfairly high number of registrations, and (ii) adoption of its SSER sales performance standard, places Wayzata Nissan under a continuing threat of termination unless Wayzata Nissan satisfies a SSER sales requirement of roughly 900 new-vehicle sales per year, i.e., roughly double the 430-new-vehicle sales requirement that Nissan N.A. set for Wayzata Nissan less than two years ago.

162. Also, Nissan N.A.'s (i) configuration of Wayzata Nissan's PMA to include an unreasonably and unfairly high number of registrations, and (ii) implementation of a stair-step pricing rebate program that uses this unreasonably and unfairly high number of registrations to set sales objectives that Wayzata Nissan must meet to get the same new-vehicle pricing as its competitors enjoy, places Wayzata Nissan at a \$700+ per-new-

vehicle cost disadvantage (at a minimum) relative to other NISSAN dealers at the same time that it is attempting to satisfy Nissan N.A.'s roughly doubled annual sales requirement.

COUNT I
Violation of MINN. STAT. § 80E.13(o)
(100% RSE Metric)

163. Wayzata Nissan re-alleges Paragraphs 1 through 162 of this Complaint as if set forth fully herein.

164. Nissan N.A. is a “manufacturer” as that word is defined by Minnesota’s Motor Vehicle Sale and Distribution Act, MINN. STAT. CH. 80E (“MVSDA”).

165. Wayzata Nissan is a “dealer” as that word is defined by the MVSDA.

166. Each NISSAN DSSA is a “franchise” as that word is defined by the MVSDA.

167. MINN. STAT. § 80E.13(o) prohibits Nissan N.A. from requiring Wayzata Nissan “to adhere to performance standards that are not applied uniformly to other similarly situated dealers.”

168. Nissan N.A.’s 100% RSE criteria for determining whether a dealer is in compliance with Nissan N.A.’s Sales Performance Requirement is dependent upon the reasonableness and fairness of Nissan N.A.’s assignment of the dealer’s PMA.

169. Nissan N.A. has configured Wayzata Nissan’s PMA to include areas where Wayzata Nissan has no competitive advantage and areas in which Wayzata Nissan is at a competitive disadvantage.

170. By doing so, Nissan N.A. has unreasonably inflated the number of competitive registrations that are used to determine the number of NISSAN new-vehicle sales that Wayzata Nissan must make to be 100% RSE.

171. Nissan N.A.'s improper configuration of Wayzata Nissan's PMA, and other circumstances, also prevent Wayzata Nissan from having the same opportunity to sell outside its PMA as other NISSAN dealers enjoy.

172. Due to Nissan N.A.'s improper configuration of Wayzata Nissan's PMA, and other circumstances, sales expectations for Wayzata Nissan based on the 100% RSE criteria have at all times that Nissan N.A. has used the RSE metric been overstated relative to the sales expectations that Nissan N.A. places on other similarly situated dealers.

173. In demanding, backed by the threat of termination, that Wayzata Nissan satisfy Nissan N.A.'s 100% RSE sales expectation, Nissan N.A. has unlawfully required Wayzata Nissan to adhere to a performance standard that is not applied uniformly to all similarly situated dealers.

174. Pursuant to MINN. STAT. § 80E.13(o), "[a] performance standard, sales objective, or program for measuring dealership performance that may have a material effect on a dealer . . . must be fair, reasonable, equitable, and based on accurate information."

175. The manufacturer "bears the burden of proving that the performance standard, sales objective, or program for measuring dealership performance is fair and reasonable."

176. For the following reasons, Nissan N.A.'s 100% RSE criteria for determining whether a dealer is in compliance with Nissan N.A.'s Sales Performance Requirement is unreasonable, unfair, and inequitable on its face:

(a) Nissan N.A.'s 100% RSE standard does not credit a dealer's sales of factory program vehicles toward satisfaction of Nissan N.A.'s Sales Performance Requirement, as required by the MVSDA.

(b) Contrary to the DSSA, which provides that a dealer only has a Sales Performance Requirement with respect to its assigned PMA, a dealer's performance under Nissan N.A.'s 100% RSE standard depends upon the dealer's ability to sell vehicles outside its PMA.

(c) Due to Nissan N.A.'s unequal configuration of NISSAN dealers' PMAs, NISSAN dealers do not have an equal ability to sell vehicles outside their PMAs, resulting in a discriminatory application of Nissan N.A.'s 100% RSE standard.

(d) Under the DSSA, a dealer's sales performance obligation is limited to "actively and effectively promoting the sale at retail . . . of Nissan Vehicles." Nissan N.A.'s 100% RSE metric fails to credit a dealer for the promotion, development, or support of NISSAN's brand share in the dealer's PMA, even though brand share is an available, objective measure of a dealer's active and effective promotion of NISSAN vehicles within the dealer's PMA.

(e) Nissan N.A.'s 100% RSE standard applies retroactively such that a NISSAN dealer cannot know the number of sales that Nissan N.A. will require the

dealer to attain until it is too late for the dealer to do anything to change the dealer's RSE score.

(f) The 100% RSE standard is based upon an average. Unless all NISSAN dealers in a region sell exactly the same number of new NISSAN vehicles, there will by definition be a number of dealers in the region at all times that are subject to termination regardless of the effort of the dealer network in that region to promote and sell NISSAN vehicles.

(g) Nissan N.A.'s 100% RSE metric holds dealers, such as Wayzata Nissan, that do not have authority to sell all models or who are unable to obtain needed vehicles due to Nissan N.A.'s discriminatory discretionary allocation of vehicles, to a sales standard that is based in substantial part upon sales by dealers authorized to sell all models or who are able to obtain needed vehicles through Nissan N.A.'s discriminatory discretionary allocation of vehicles.

177. For the following reasons, as well as the reasons set forth in the preceding paragraph, Nissan N.A.'s 100% RSE metric is unreasonable, unfair, and inequitable as Nissan N.A. has applied it to Wayzata Nissan beginning in 2012, and extending through the period of cure demanded in Nissan N.A.'s NOD, such that Wayzata Nissan has been unable to achieve Nissan N.A.'s 100% RSE sales goal while earning reasonable profits:

(a) Prior to July 2012, Wayzata Nissan's PMA already included areas in which Wayzata Nissan was either at a competitive disadvantage or had no competitive advantage relative to other NISSAN dealers both due to the oversized nature of Wayzata Nissan's PMA and Nissan N.A.'s decision to include within

Wayzata Nissan's PMA natural barriers, including multiple lakes, that deter consumers from shopping at Wayzata Nissan over Wayzata Nissan's competitors.

(b) Effective July 2012, Nissan N.A. further inflated Wayzata Nissan's PMA, increasing the number of consumers in Wayzata Nissan's PMA as to which Wayzata Nissan either has no competitive advantage or experiences a competitive disadvantage due to the consumers' substantial distance from Wayzata Nissan and obstruction by natural barriers, heightening Nissan N.A.'s already unreasonable 100% RSE sales goal.

(c) Nissan N.A. unreasonably imposed a RSE new-vehicle sales requirement on Wayzata Nissan for 2012 that was 20% higher than Nissan N.A.'s new-vehicle sales requirement for Wayzata Nissan in 2011, even though NISSAN's brand share in Wayzata Nissan's region had dropped by roughly 10% from 2011 to 2012.

(d) A dealer's satisfaction of the 100% RSE metric depends in part on its ability to sell vehicles outside its PMA to the same extent as the other dealers with which it is being compared. Because (i) Nissan N.A. has hamstrung Wayzata Nissan with an oversized PMA that includes large areas in which competitors of Wayzata Nissan are positioned at least as well as Wayzata Nissan to sell vehicles, and (ii) other Midwest dealers have more appropriately configured or smaller PMAs, or locations that are more conducive to selling into neighboring PMAs, Wayzata Nissan does not have an equal ability relative to other NISSAN dealers to sell outside its PMA.

(e) After it became clear that Wayzata Nissan would satisfy Nissan N.A.'s cure demand based on Wayzata Nissan's new-vehicle sales during the six-month period from April 1, 2013 to September 30, 2013, Nissan N.A. stated that it would broaden its assessment to include Wayzata Nissan's RSE score for the six months preceding Nissan N.A.'s NOD in determining whether Wayzata Nissan has satisfied Nissan N.A.'s cure demand.

(f) Even as Nissan N.A. demanded that Wayzata Nissan substantially increase new NISSAN vehicle sales to satisfy Nissan N.A.'s 100% RSE criteria, Nissan N.A. refused to supply Wayzata Nissan with the NISSAN vehicles necessary to sell into one or more substantial segments of the motor vehicle market, forcing Wayzata Nissan to acquire these vehicles elsewhere at higher costs.

(g) Nissan N.A.'s refusal to allocate to Wayzata Nissan the new NISSAN vehicles that Wayzata Nissan needed to penetrate its PMA caused Wayzata Nissan to incur additional losses because, to satisfy Nissan N.A.'s cure demand, Wayzata Nissan was forced to purchase from Nissan N.A. and market to consumers new NISSAN vehicles that were not in demand by consumers.

(h) Nissan N.A.'s demand that Wayzata Nissan meet or exceed the 100% RSE sales target, backed by the threat of termination, forced Wayzata Nissan to underprice and lose money on the new NISSAN vehicles that Nissan N.A. was forcing it to sell because Nissan N.A. was simultaneously providing stair-step pricing advantages to Wayzata Nissan's competitors that were

practically unavailable to Wayzata Nissan due to, *inter alia*, Nissan N.A.'s improper and unreasonable configuration of Wayzata Nissan's PMA.

(i) By forcing Wayzata Nissan to sell an unreasonable number of new NISSAN vehicles to avoid termination at a time when Nissan N.A. was offering discriminatory pricing advantages to Wayzata Nissan's competitors, Nissan N.A. undermined the profitability not only of Wayzata Nissan's new-vehicle sales, but its factory program and used vehicle sales, as well.

178. In addition to being unreasonable, unfair, and inequitable, Nissan N.A.'s 100% RSE metric, which was the basis of the NOD and cure demand that Nissan N.A. imposed on Wayzata Nissan, is based on inaccurate data.

179. Due to Nissan N.A.'s application of an unlawful 100% RSE standard to measure Wayzata Nissan's satisfaction of Nissan N.A.'s Sales Performance Requirement, and Nissan N.A.'s continuing demands since April 4, 2013 that, under threat of termination, Wayzata Nissan achieve and maintain 100% RSE, Wayzata Nissan has suffered and continues to suffer damages in excess of \$50,000.

180. Pursuant to MINN. STAT. § 80E.17, Wayzata Nissan is entitled to an award of all such damages against Nissan N.A., together with costs and disbursements, including reasonable attorneys' fees.

COUNT II
Violation of MINN. STAT. § 80E.13(o)
(100% SSER Metric)

181. Wayzata Nissan re-alleges Paragraphs 1 through 180 of this Complaint as if set forth fully herein.

182. MINN. STAT. § 80E.13(o) prohibits Nissan N.A. from requiring Wayzata Nissan “to adhere to performance standards that are not applied uniformly to other similarly situated dealers.”

183. Nissan N.A.’s 100% SSER criteria for determining whether a dealer is in compliance with Nissan N.A.’s Sales Performance Requirement is dependent upon the reasonableness and fairness of Nissan N.A.’s assignment of the dealer’s PMA.

184. Nissan N.A.’s SSER criteria also depends upon whether circumstances permit the dealer to sell NISSAN vehicles outside its PMA relative to the ability that other NISSAN dealers in the state have to do so.

185. Nissan N.A. has configured Wayzata Nissan’s PMA to include areas where Wayzata Nissan has no competitive advantage and areas in which Wayzata Nissan is at a competitive disadvantage.

186. By doing so, Nissan N.A. has unreasonably inflated the number of competitive registrations that are used to determine the number of NISSAN new-vehicle sales that Wayzata Nissan must make to be 100% SSER.

187. Nissan N.A.’s improper configuration of Wayzata Nissan’s PMA, and other circumstances, also prevent Wayzata Nissan from having the same opportunity to sell outside its PMA as other NISSAN dealers enjoy.

188. Due to Nissan N.A.’s improper configuration of Wayzata Nissan’s PMA, and other circumstances, sales expectations for Wayzata Nissan based on the 100% SSER criteria have at all times that Nissan N.A. has used the SSER metric been overstated

relative to the sales expectations that Nissan N.A. places on other similarly situated dealers.

189. In demanding that Wayzata Nissan satisfy Nissan N.A.'s 100% SSER sales expectation, Nissan N.A. has unlawfully required, and continues to unlawfully require, Wayzata Nissan to adhere to a performance standard that is not applied uniformly to all similarly situated dealers.

190. Pursuant to MINN. STAT. § 80E.13(o), "[a] performance standard, sales objective, or program for measuring dealership performance that may have a material effect on a dealer . . . must be fair, reasonable, equitable, and based on accurate information."

191. The manufacturer "bears the burden of proving that the performance standard, sales objective, or program for measuring dealership performance is fair and reasonable."

192. For the following reasons, Nissan N.A.'s 100% SSER criteria for determining whether a dealer is in compliance with Nissan N.A.'s Sales Performance Requirement is unreasonable, unfair, and inequitable on its face:

(a) Nissan N.A.'s 100% SSER standard does not credit a dealer's sales of factory program vehicles toward satisfaction of Nissan N.A.'s Sales Performance Requirement, as required by the MVSDA.

(b) Contrary to the DSSA, which provides that a dealer only has a Sales Performance Requirement with respect to its assigned PMA, a dealer's

performance under Nissan N.A.'s 100% SSER standard depends upon the dealer's ability to sell vehicles outside its PMA.

(c) Due to Nissan N.A.'s unequal configuration of NISSAN dealers' PMAs, NISSAN dealers do not have an equal ability to sell vehicles outside their PMAs, resulting in a discriminatory application of Nissan N.A.'s 100% SSER standard.

(d) Under the DSSA, a dealer's sales performance obligation is limited to "actively and effectively promoting the sale at retail . . . of Nissan Vehicles." Nissan N.A.'s 100% SSER metric fails to credit a dealer for the promotion, development, or support of NISSAN's brand share in the dealer's PMA, even though brand share is an available, objective measure of a dealer's active and effective promotion of NISSAN vehicles within the dealer's PMA.

(e) Nissan N.A.'s 100% SSER standard applies retroactively such that a NISSAN dealer cannot know the number of sales that Nissan N.A. will require the dealer to attain until it is too late for the dealer to do anything to change the dealer's SSER score.

(f) The 100% SSER standard is based upon an average. Unless all NISSAN dealers in a state sell exactly the same number of new NISSAN vehicles, there will by definition be a number of dealers in the state at all times that are subject to termination regardless of the effort of the dealer network in that state to promote and sell NISSAN vehicles.

(g) In the state of Minnesota, SSER is based on NISSAN's brand share in Minnesota's 14 NISSAN dealers' PMAs, meaning that if any of these Minnesota NISSAN dealers experience a unique sales advantage due to, for example, their market or location, the average against which all Minnesota NISSAN dealers are measured will be unreasonably high.

(h) Nissan N.A.'s 100% SSER metric holds dealers, such as Wayzata Nissan, that do not have authority to sell all models or who are unable to obtain needed vehicles due to Nissan N.A.'s discriminatory discretionary allocation of vehicles, to a sales standard that is based in substantial part upon sales by dealers authorized to sell all models or who are able to obtain needed vehicles through Nissan N.A.'s discriminatory discretionary allocation of vehicles.

193. For the following reasons, as well as the reasons set forth in the preceding paragraph, Nissan N.A.'s 100% SSER metric is unreasonable, unfair, and inequitable as Nissan N.A. has applied it to Wayzata Nissan, such that Wayzata Nissan has been unable to achieve Nissan N.A.'s 100% SSER sales goal while earning reasonable profits:

(a) As of June 2013, the PMA that Nissan N.A. had assigned to Wayzata Nissan included areas in which Wayzata Nissan is either at a competitive disadvantage or has no competitive advantage relative to other NISSAN dealers both due to the oversized nature of Wayzata Nissan's PMA and Nissan N.A.'s decision to include within Wayzata Nissan's PMA natural barriers, including multiple lakes, that deter consumers from shopping at Wayzata Nissan over Wayzata Nissan's competitors.

(b) By imposing its 100% SSER metric, and without any change in market conditions except increased competition, Nissan N.A. has increased Wayzata Nissan's new-vehicle sales requirement by roughly 50% over the already inflated levels required under the previous 100% RSE metric.

(c) Nissan N.A.'s 100% SSER requirement, when coupled with the market effects of Nissan N.A.'s stair-step program and the advantageous pricing that Nissan N.A. provides to dealers other than Wayzata Nissan through the stair-step program, forces Wayzata Nissan to sell new, factory program, and used NISSAN vehicles at negative profit levels, or levels that are too low to provide a reasonable return on investment.

194. Due to Nissan N.A.'s application of its unlawful 100% SSER standard to measure Wayzata Nissan's satisfaction of Nissan N.A.'s Sales Performance Requirement, and Nissan N.A.'s continuing demands that Wayzata Nissan satisfy the standard or face adverse consequences, Wayzata Nissan has incurred and continues to incur damages in excess of \$50,000.

195. Pursuant to MINN. STAT. § 80E.17, Wayzata Nissan is entitled to an award of all such damages against Nissan N.A., together with costs and disbursements, including reasonable attorneys' fees.

196. Nissan N.A.'s application of its unlawful 100% SSER standard to measure Wayzata Nissan's satisfaction of Nissan N.A.'s Sales Performance Requirement places Wayzata Nissan's profitability and going-concern value at risk and is irreparably injuring the business.

197. Pursuant to MINN. STAT. § 555.01, *et seq.*, MINN. STAT. § 80E.17, and Minnesota common law, Wayzata Nissan is entitled to declaratory and injunctive relief enjoining Nissan N.A.'s continued use and imposition of any metric that, like the 100% SSER metric, is discriminatory, unreasonable, unfair, or inequitable to measure Wayzata Nissan's satisfaction of Nissan N.A.'s Sales Performance Requirement.

COUNT III
Violation of MINN. STAT. § 80E.13(o)
(Current Stair-Step Programs)

198. Wayzata Nissan re-alleges Paragraphs 1 through 197 of this Complaint as if set forth fully herein.

199. MINN. STAT. § 80E.13(o) makes it unlawful for a manufacturer to "require a dealer to adhere to performance standards that are not applied uniformly to other similarly situated dealers."

200. MINN. STAT. § 80E.13(o) also requires that "[a] performance standard, sales objective, or program for measuring dealership performance that may have a material effect on a dealer, including the dealer's right to payment under any incentive or reimbursement program, and the application of that standard or program by a manufacturer . . . must be fair, reasonable, equitable, and based on accurate information."

201. Upon information and belief, Nissan N.A.'s Growth Program sets the objectives that a Minnesota dealer must satisfy to earn rebates based, at least in part, upon a dealer's sales effectiveness under Nissan N.A.'s SSER metric, which depends upon the configuration of a dealer's PMA.

202. Because Wayzata Nissan's NISSAN competitors have, *inter alia*, more reasonable and properly configured PMAs, enhanced opportunities to sell inside and outside their PMAs, and the ability to sell NISSAN vehicles that Nissan N.A. withholds from Wayzata Nissan, Nissan N.A. sets Wayzata Nissan's Growth Program sales objectives, which NISSAN dealers must meet to get pricing rebates, discriminatorily high relative to corresponding objectives that Nissan N.A. sets for other similarly situated, and competing, NISSAN dealers in the Minneapolis/St. Paul metropolitan area.

203. Also, because Nissan N.A. bases Growth Program sales objectives in part on prior months' sales, and Nissan N.A. improperly forced Wayzata Nissan to increase its new-vehicle NISSAN sales under threat of termination during the cure period, Nissan N.A. drove Wayzata Nissan's Growth Program sales objectives to be unattainably high during and after the cure period.

204. Through its Growth Program, Nissan N.A. requires Wayzata Nissan to adhere to performance standards that are not applied uniformly to all similarly situated NISSAN dealers in Minnesota to obtain pricing rebates.

205. Therefore, the monthly sales objectives that Nissan N.A. has and continues to set for Wayzata Nissan as requirements for obtaining pricing rebates are unreasonable, unfair, and inequitable as applied to Wayzata Nissan, and have caused and will continue to cause Wayzata Nissan to incur substantial damages each month as well as irreparable injury to its business.

206. Pursuant to MINN. STAT. § 80E.17, Wayzata Nissan is entitled to an award of all such damages against Nissan N.A., together with costs and disbursements, including reasonable attorneys' fees.

207. Pursuant to MINN. STAT. § 555.01, *et seq.*, MINN. STAT. § 80E.17, and Minnesota common law, Wayzata Nissan is entitled to declaratory and injunctive relief enjoining Nissan N.A.'s continued use and imposition of Nissan N.A.'s unlawful standards that Wayzata Nissan must satisfy to obtain the pricing rebates that Nissan N.A. makes available to other NISSAN dealers upon satisfaction of less demanding standards.

COUNT IV
**Breach of Implied Covenant and Express Assurances of
Good Faith and Fair Dealing**

208. Wayzata Nissan re-alleges Paragraphs 1 through 207 of this Complaint as if set forth fully herein.

209. Under Minnesota common law, Wayzata Nissan's DSSA contains an implied covenant of good faith and fair dealing that requires Nissan N.A. to demonstrate honesty in fact and observe reasonable commercial standards of fair dealing in exercising its rights and discretion under Wayzata Nissan's DSSA.

210. Nissan N.A. expressly acknowledged in Wayzata Nissan's DSSA that Wayzata Nissan relied, in entering into its DSSA, upon Nissan N.A.'s "expressed intention to deal fairly with [Wayzata Nissan]" in exercising its rights and discretion under Wayzata Nissan's DSSA.

211. Nissan N.A. is accordingly precluded from making demands or otherwise engaging in conduct the purpose or effect of which is to prevent Wayzata Nissan from

realizing its reasonable expectations under its DSSA, including reasonable profits on the sale of NISSAN products and servicing of NISSAN vehicles.

212. As more particularly described in paragraphs 1-211 of this Complaint, since at least July 1, 2012, Nissan N.A. has made a series of unreasonable demands backed by the threat of termination, refused to credit multiple aspects of Wayzata Nissan's performance in evaluating Wayzata Nissan's success in achieving Nissan N.A.'s various objectives and requirements, employed discriminatory pricing programs that have had an adverse impact on Wayzata Nissan, and otherwise taken actions that Nissan N.A. knows or should know have prevented Wayzata Nissan from earning a fair profit as a NISSAN dealer.

213. By its conduct, Nissan N.A. has knowingly and intentionally frustrated, and continues to knowingly and intentionally frustrate, Wayzata Nissan's realization of Wayzata Nissan's reasonable expectations under its DSSA, in disregard of the commercial standards of fair dealing.

214. Nissan N.A., moreover, has used dishonesty or deception in dealing with Wayzata Nissan, in disregard of the commercial standards of fair dealing.

215. As a direct and proximate result of Nissan N.A.'s breach of its implied and express promises to use good faith and deal fairly with Wayzata Nissan in exercising its rights and discretion under Wayzata Nissan's DSSA, Wayzata Nissan has suffered damages in excess of \$50,000.

216. Wayzata Nissan continues to suffer damages.

217. Under Minnesota common law and MINN. STAT. § 555.01, *et seq.*, Wayzata Nissan is entitled to recover all damages that it has suffered from July 1, 2012 to the date of trial due to Nissan N.A.'s breach of its implied covenant and express assurances of good faith and fair dealing, an amount in excess of \$50,000 to be proven at trial, and appropriate declaratory relief, together with its costs and disbursements.

WHEREFORE, Wayzata Nissan respectfully requests that this Court enter orders and a judgment in its favor and against Nissan N.A. as follows:

A. Awarding Wayzata Nissan, on each and all Counts of this Complaint, a money judgment for damages incurred to the date of trial, estimated to be in excess of \$50,000;

B. On Count II, entering a declaratory judgment that Nissan N.A.'s 100% SSER metric for evaluating Wayzata Nissan's satisfaction of Nissan N.A.'s Sales Performance Requirement under Wayzata Nissan's DSSA violates MINN. STAT. § 80E.13(o); and enjoining Nissan N.A.'s use of such metric, or any substantially similar metric, to evaluate Wayzata Nissan's satisfaction of any of Nissan N.A.'s performance requirements;

C. On Count III, entering a declaratory judgment that, both on their face and as applied to Wayzata Nissan, the standards and objectives of Nissan N.A.'s current stair-step rebate program (referred to as the "Nissan Sales Growth Program") violate MINN. STAT. § 80E.13(o); and enjoining Nissan N.A. from denying to Wayzata Nissan, based on an application of such standard or objective, or any substantially similar standard or objective, any rebate made available to other NISSAN dealers;

D. On Count IV, entering a declaratory judgment that Nissan N.A.'s conduct since July 1, 2012, as alleged in this Complaint, violates Nissan N.A.'s implied covenant and express assurances to demonstrate good faith and fair dealing toward Wayzata Nissan in exercising its rights under Wayzata Nissan's DSSA.

E. Awarding Wayzata Nissan its costs and disbursements, including reasonable attorneys' fees; and

F. Granting Wayzata Nissan such other relief as is appropriate under the circumstances.

DEMAND FOR JURY TRIAL

Wayzata Nissan hereby demands a trial by jury on all counts so triable pursuant to MINN. CONST. ART. I, § 4 and MINN. R. CIV. P. 38.01.

DATED: November 27, 2013

**ROBINS, KAPLAN, MILLER & CIRESI
L.L.P.**

By: 

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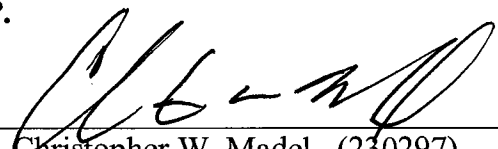
ACKNOWLEDGMENT

The undersigned hereby acknowledges that, pursuant to MINN. STAT. § 549.211, subd. 2, costs, disbursements, and reasonable attorney and witness fees may be awarded to the opposing party or parties in this litigation if the Court should find that the undersigned acted in bad faith, asserted a claim or defense that is frivolous and that is costly to the other party, asserted an unfounded position solely to delay the ordinary course of the proceedings or to harass, or committed a fraud upon the Court.

DATED: November 27, 2013

**ROBINS, KAPLAN, MILLER & CIRESI
L.L.P.**

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