

# **EXHIBIT A**



22 of 28 DOCUMENTS

**RI-JOYCE, INC., Plaintiff and Respondent, v. NEW MOTOR VEHICLE BOARD,  
Defendant and Appellant; MAZDA MOTORS OF AMERICA, INC., Real Party in  
Interest and Appellant.**

No. C008797

COURT OF APPEAL OF CALIFORNIA, THIRD APPELLATE DISTRICT

*2 Cal. App. 4th 445; 3 Cal. Rptr. 2d 546; 1992 Cal. App. LEXIS 22; 92 Cal. Daily Op.  
Service 321; 92 Daily Journal DAR 342*

January 7, 1992, Decided

**SUBSEQUENT HISTORY:** Review Denied April 16, 1992.

**PRIOR HISTORY:** [\*\*\*1] Superior Court of Sacramento County, No. 363064, Cecily Bond, Judge.

**DISPOSITION:** The judgment is affirmed.

**SUMMARY:****CALIFORNIA OFFICIAL REPORTS SUMMARY**

The New Motor Vehicle Board administratively ruled that an automobile dealership franchisee could not protest, pursuant to *Veh. Code, § 3060 et seq.* (hearings on franchise termination and modification), the proposed establishment of a new dealership by the franchisor in a neighboring community. The trial court granted the franchisee's petition for a peremptory writ of mandate, directing the board to set aside its decision and to consider the protest. (Superior Court of Sacramento County, No. 363064, Cecily Bond, Judge.)

The Court of Appeal affirmed. The court held that although the franchise agreement specifically provided that the franchisor reserved the right to establish a new dealership near an existing dealership, the agreement did not define the word "near," thereby making the

agreement reasonably susceptible of the meaning urged by the franchisee, which was that "near" included the neighboring community where the franchisor wished to start its new dealership. The court held that if the franchisee's interpretation was correct, then the franchisor could start the new franchise only after conferring with the existing franchisee dealership as to mutually agreeable alternatives, pursuant to the franchise agreement. Otherwise, the court held that unilateral establishment of a nearby dealership without conferring with the existing franchisee and without any attempt at justification pursuant to the contract would constitute an attempted modification of the contract, which would be subject to protest under *Veh. Code, § 3060*. The court held that since the agreement was reasonably susceptible of the meaning urged by the franchisee, the franchisee was entitled to an evidentiary hearing at which it could produce evidence in support of that interpretation. (Opinion by Sparks, Acting P. J., with Sims and Marler, JJ., concurring.)

**HEADNOTES**

**CALIFORNIA OFFICIAL REPORTS HEADNOTES**  
Classified to California Digest of Official Reports, 3d and 4th Series

(1a) (1b) Evidence § 61--Documentary Evidence--Parol Evidence Rule--Function. --The parol

evidence rule is a fundamental rule of contract law that operates to bar extrinsic evidence contradicting the terms of a written contract. It is not merely a rule of evidence but is substantive in scope. Under the rule, the act of executing a written contract, whether required by law to be in writing or not, supersedes all the negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument. Extrinsic evidence cannot be admitted to prove what the agreement was, not for any of the usual reasons for exclusion of evidence, but because as a matter of law, the agreement is the writing itself. Consequently, in determining whether substantial evidence supports a judgment, extrinsic evidence inconsistent with any interpretation to which the instrument is reasonably susceptible becomes irrelevant; as a matter of substantive law, such evidence cannot serve to create or alter the obligations under the instrument. Irrelevant evidence cannot support a judgment.

**(2) Evidence § 65--Documentary Evidence--Parol Evidence Rule--Exceptions--Evidence in Aid of Interpretation--Reasonably Susceptible--Extrinsic Evidence.** --There are two aspects to the parol evidence rule. First, while extrinsic evidence may not be introduced to contradict the written terms of a contract, such evidence may be introduced to explain the meaning of a written contract so long as the meaning urged is one to which the written contract terms are reasonably susceptible. Second, where a written contract is not an integration, that is, the final and complete agreement of the parties, then extrinsic evidence may be introduced as to any matter on which the agreement is silent and which is not inconsistent with its written terms.

**(3) Franchise, Distribution, and Dealership Contracts § 3--Construction and Effect of Agreement--Automobile Franchise--Parol Evidence Rule.** --Under the parol evidence rule, the New Motor Vehicle Board had no authority to uphold the protest of an automobile dealership, pursuant to *Veh. Code, § 3060* (termination and modification of franchise), after the franchisor decided to establish another dealership in the same geographical area, where the franchisor's basic agreement specifically provided that a dealership's appointment was nonexclusive and that the franchisor reserved the right to establish new dealerships. Moreover, the written document by which the franchisor informed the dealership of its area of primary responsibility specifically provided that the dealership acknowledged

that the area was subject to modification by the franchisor, and that the dealership's rights with respect to such an area were nonexclusive. Thus, the dealership's claim that its franchise agreement gave it exclusive and unmodifiable rights within an area of primary responsibility was in direct contradiction to the written terms of its agreement, and under the parol evidence rule, the board had no authority to uphold the dealership's protest under § 3060, based upon this argument of the dealership.

[See 2 Witkin, Cal. Evidence (3d ed. 1986) § 960 et seq.]

**(4) Franchise, Distribution, and Dealership Contracts § 3--Construction and Effect of Agreement--Automobile Franchise--Amendment of Written Agreement.** --An automobile dealership's refusal to sign a document from the franchisor reducing the dealership's primary geographical area of responsibility did not effect a unilateral amendment of its franchise to secure for itself an exclusive and unmodifiable trading area defined by its former area of primary responsibility, where the basic written franchise agreement provided that it constituted the entire agreement and understanding between the dealership and the franchisor, and superseded all prior or present agreements and understandings, written or oral, between the parties. The agreement stated that it could be amended, modified, supplemented, or interpreted only by a written instrument signed by the dealership and the appropriate officers of the franchisor. Thus, the dealership's refusal to sign the document could not be held to have secured an exclusive, unmodifiable trading area contrary to the express written terms of its franchise agreement.

**(5) Automobiles and Highway Traffic § 20--Auto Dealers--New Motor Vehicle Board--Jurisdiction.** --The New Motor Vehicle Board is a quasi-judicial administrative agency of limited jurisdiction. It does not have plenary authority to resolve any and all disputes that may arise between a franchisor and a franchisee. The board's jurisdiction under *Veh. Code, § 3060*, encompasses disputes arising over the attempted termination, replacement or modification of a franchise agreement. Claims arising from disputes with other legal bases must be directed to a different forum.

**(6) Automobiles and Highway Traffic § 20--Auto Dealers--Exclusive Trading Areas.** --The New Motor

Vehicle Board Act (*Veh. Code, § 3000 et seq.*) does not preclude a franchisor from granting an exclusive trading area beyond a dealership's relevant market area, nor does it preclude a franchisee from protesting the modification of such an agreement by establishment of a new dealership within such an exclusive trading area. These are matters that are left to the agreement of the parties. If a franchise agreement grants a dealership an exclusive, unmodifiable trading area, then encroachment upon that area may constitute a modification of the franchise that is subject to protest under *Veh. Code, § 3060* (termination or modification of franchise).

**(7a) (7b) (7c) Automobiles and Highway Traffic § 20--Auto Dealers--Interpretation of Franchise Agreement--New Motor Vehicle Board's Jurisdiction--Modification of Franchise.**

--An automobile dealership franchise agreement that reserved the right to establish a new dealership near an existing dealership, but did not define the word "near," was reasonably susceptible of the meaning urged by the existing dealership, which was that "near" included the neighboring community in which the franchisor wished to start its new dealership, thereby entitling the dealership to procedural protections under the agreement and under *Veh. Code, § 3060* (termination and modification of franchise). Where a franchise agreement is reasonably susceptible of the meaning urged by a franchisee, the New Motor Vehicle Board must hear and consider such extrinsic evidence as the franchisee can produce in order to determine what rights were granted under the agreement. Only then can it be determined whether the franchisor's proposed action constitutes a modification of the franchise. If the action does not constitute a modification, then the franchisor is entitled to prevail. If it does, then the board must proceed with further consideration of the protest.

**(8) Contracts § 23--Construction and Interpretation--Discretionary Authority--Good Faith Requirement.** --A contract that confers discretionary decisionmaking authority upon one of the parties may be construed to require an objective standard of reasonableness or may be construed to permit the party to make a decision based upon subjective factors. In either case, it will be implied that the party must exercise its judgment in good faith.

**(9) Automobiles and Highway Traffic § 20--Auto Dealers--Interpretation of Franchise Agreement--**

**Modification.** --Where an automobile dealer franchisee asserts that a franchisor is attempting to modify his or her franchise, the first step is to determine what rights were granted under the franchise agreement. Within the meaning of *Veh. Code, section 3060* (termination and modification of franchise), a franchise is a written agreement of the parties that is subject to the normal rules relating to the interpretation of contracts.

**COUNSEL:** John K. Van de Kamp, Attorney General, N. Eugene Hill, Assistant Attorney General, Vincent J. Scally, Jr., and Daniel J. Turner, Deputy Attorneys General, for Defendant and Appellant.

Pilot, Spar & Siegler and A. Albert Spar for Real Party in Interest and Appellant.

Geary, Shea, O'Donnell & Grattan and Thomas C. Taylor, Jr., for Plaintiff and Respondent.

**JUDGES:** Opinion by Sparks, Acting P. J., with Sims and Marler, JJ., concurring.

**OPINION BY:** SPARKS, Acting P. J.

**OPINION**

[\*449] [\*548] The New Motor Vehicle Board (Board), and Mazda Motors of America, Inc. (Mazda), appeal from a judgment of the Sacramento County Superior Court granting a petition for a peremptory writ of mandate in favor of Ri-Joyce, Inc. (Ri-Joyce). Ri-Joyce, a Mazda dealer in Santa Rosa, had attempted to protest the establishment of a new Mazda dealership [\*450] in Petaluma, more than 10 miles from Ri-Joyce's dealership. The Board found this court's decision in *BMW of North America, Inc. v. New Motor Vehicle Bd.* (1984) 162 Cal.App.3d 980 [209 Cal.Rptr. 50] (hereafter *BMW* or the *BMW* [\*\*\*2] case), to be controlling and dismissed the protest. The trial court concluded that our decision in the *BMW* case was not controlling and issued a writ of mandate directing the Board to set aside its decision and to consider the protest. The court expressly cautioned, however, that "nothing in this judgment or [the] writ shall limit or control in any way the discretion legally vested in [the Board]." We agree with the decision of the trial court and shall affirm the judgment.

The relevant facts are straightforward and we will refer to them as necessary in our discussion.

### Discussion

The Board has jurisdiction to consider dealer-franchisee protests of certain types of intended actions of a franchisor under *Vehicle Code sections 3060 through 3063*, which we have set out in full in an appendix to this opinion. (Unless otherwise specified all further section references are to the Vehicle Code.) Under the first portion of *section 3060*, a franchisor is prohibited from terminating or refusing to continue an existing franchise without complying with certain procedural requirements and, if a protest is filed, unless the Board finds there is good cause. The second portion of *section 3060* precludes a franchisor from modifying or replacing a franchise with a succeeding franchise if the modification or replacement would substantially affect the franchisee's sales or service obligations or investment, unless the franchisor complies with procedural requirements and, if a protest is filed, the Board finds good cause. A franchisor has the burden of establishing good cause for terminating or refusing to continue a franchise and, if it would substantially affect the franchisee's sales or service obligations or investment, for modifying or replacing a franchise with a succeeding franchise. (§ 3060.) The relevant factors to be considered by the Board with respect to a protest under *section 3060* are set forth in *section 3061*.

*Section 3062* limits the ability of a franchisor to establish a new dealership or relocate an existing dealership within an area where the same line/make is already represented. Under that section an existing dealer may file a protest [\*451] of the franchisor's decision to establish or relocate another dealership within the same "relevant market area." A relevant market area is "any area within a radius of 10 miles from the site of a potential [\*4] new dealership." (§ 507.) Upon a protest the Board can preclude the franchisor from establishing or relocating the proposed new dealership if the existing dealer can establish good cause for not permitting the dealership within its relevant market area. (§ 3062.) The relevant factors to be considered are set forth in *section 3063*.

In *BMW, supra*, 162 Cal.App.3d 980, a BMW dealer in Camarillo, in Ventura County, sought to protest the establishment of a new BMW dealership in the Thousand Oaks-Westlake area of that same county. The dealer's franchise agreement reserved to the franchisor the power to appoint additional dealers and the [\*549] new

dealership was to be located at a site beyond the relevant market area of the existing dealer. Nevertheless, the existing dealer claimed that the establishment of the new dealership pursuant to the reserved power was contrary to public policy and void. We disagreed, concluding that *section 3062* "not only restricts the right of a franchisee to object to the appointment of a new dealer to the 10-mile radius, but it also implicitly recognizes the right of a franchisor to appoint new dealers, subject of [\*5] course to the right of an existing dealer to show good cause for precluding such appointment if it is to be within 10 miles of the existing dealer." (*Id. at p. 991.*)

In the *BMW* case the dealer made the alternative argument that the establishment of the new dealership would constitute a modification of his franchise which could be protested under *section 3060*. In making this argument the dealer relied upon the franchisor's use of an "A.O.R." (area of responsibility) system of planning and evaluation. Under this planning system all post office zip codes were assigned to the A.O.R. of the nearest dealership. The franchisor was able to determine the number of its vehicles which were registered to addresses within particular zip codes. This aided the franchisor in anticipating the service and parts requirements for particular areas as well as in evaluating its competitive performance in those areas. For these planning purposes all post office zip codes were assigned to an A.O.R. of an existing dealer, regardless how distant the dealership may have been. Accordingly, the establishment of a new dealership would necessarily change the A.O.R. of the nearest existing dealers since zip [\*6] code areas closer to the new dealership would be considered part of its A.O.R. In the *BMW* case the dealer claimed, and the Board and trial court agreed, that the change [\*452] in his A.O.R. which would occur with the establishment of the new dealership would constitute a modification of his franchise. (162 Cal.App.3d at pp. 991-993.)

We rejected the dealer's claim in that case under the parol evidence rule. (1a) We explained the rule as follows: "The parol evidence rule is a fundamental rule of contract law which operates to bar extrinsic evidence contradicting the terms of a written contract. It is not merely a rule of evidence but is substantive in scope. Under that rule the act of executing a written contract, whether required by law to be in writing or not, supersedes all the negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument. Extrinsic evidence cannot be admitted

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to prove what the agreement was, not for any of the usual reasons for exclusion of evidence, but because as a matter of law the agreement is the writing itself. Consequently, 'in determining whether substantial [\*\*\*7] evidence supports a judgment, extrinsic evidence inconsistent with any interpretation to which the instrument is reasonably susceptible becomes irrelevant; as a matter of substantive law such evidence cannot serve to create or alter the obligations under the instrument. (2) (See fn. 1.) (1b) Irrelevant evidence cannot support a judgment.' " (*BMW, supra*, 162 Cal.App.3d at pp. 990, citations & fn. omitted.)<sup>1</sup>

1 There are two aspects to the parol evidence rule. First, while extrinsic evidence may not be introduced to contradict the written terms of a contract, such evidence may be introduced to explain the meaning of a written contract so long as the meaning urged is one to which the written contract terms are reasonably susceptible. (See *Pacific Gas & E. Co. v. G. W. Thomas Drayage etc. Co.* (1968) 69 Cal.2d 33, 40 [69 Cal.Rptr. 561, 442 P.2d 641, 40 A.L.R.3d 1373].) Second, where a written contract is not an integration, that is, the final and complete agreement of the parties, then extrinsic evidence may be introduced as to any matter on which the agreement is silent and which is not inconsistent with its written terms. (See *Masterson v. Sine* (1968) 68 Cal.2d 222, 226-228 [65 Cal.Rptr. 545, 436 P.2d 561].)

[\*\*\*8] A short and vernacular explanation of the parol evidence rule would be that a party to a written contract cannot be permitted to urge that a contract means something which its written terms simply cannot mean. In the *BMW* case the written terms of the parties' contract expressly provided that the dealer was not given the [\*\*550] exclusive right to deal in BMW products in any particular geographic area and was not limited in the area in which he could trade. BMW expressly reserved the right to appoint other dealers in BMW products. This contractual language was not reasonably susceptible to a construction which would give the dealer an exclusive trading area or which [\*453] would permit him to object to the establishment of a new dealership beyond the limits of his relevant market area. BMW's use of the A.O.R. planning system could not operate to modify the express terms of the dealer's contract. Since the dealer's franchise agreement permitted BMW to establish new dealerships and the new dealership was beyond the

existing dealer's relevant market area, we concluded that the Board exceeded its jurisdiction in upholding the dealer's protest. (162 Cal.App.3d at p. 994.) [\*\*\*9]

(3) The situation in this case bears many similarities to the *BMW* case. In the past Mazda has used a planning mechanism similar to the A.O.R. system which was used by BMW. Under its dealer agreement Mazda is required to perform periodic reviews of a dealer's past performance and of anticipated sales, service, parts and other matters affecting the past, present and future conduct of the dealer's business and its relationship with Mazda. Until at least 1982 Mazda utilized what it referred to as an "APR" (area of primary responsibility) in performing this function. Under the APR scheme postal zip codes were assigned to the APR of a nearby dealer. Here, as in the *BMW* case, the dealer maintains that the alteration of its APR by establishment of another dealership would constitute a modification of its franchise which may be protested under section 3060.<sup>2</sup>

2 It appears that sometime after 1982 Mazda discontinued providing dealers with written notice of their APR's. Since at least 1987 Mazda's dealer agreements make no reference to an APR. Ri-Joyce asserts that its former APR is part of its current franchise agreement because the current agreement incorporates prior written instructions to the dealer. In fact, the current dealer agreement does not incorporate prior written instructions to the specific dealer. Instead, it incorporates current written instructions which are applicable to dealers generally, which would exclude prior instructions specific to a particular dealer. However, we need not consider whether Ri-Joyce's former APR somehow remains a part of its agreement since we find this aspect of its argument meritless in any event.

[\*\*\*10] If only these circumstances were present, the *BMW* decision would appear to be directly controlling. However, Ri-Joyce asserts that its situation is different because in *BMW* the A.O.R. scheme was an "internal planning mechanism" (162 Cal.App.3d at pp. 992-993), while in this case the APR scheme, when it was in use, was set forth in writing as part of Mazda's dealer operating standards, which are considered written instructions and part of the franchise agreement. This distinction lacks legal significance. Mazda's dealer agreement consists of a basic agreement, various

additional agreements, and written instructions. The basic agreement provides: "If there is a conflict between them, provisions set forth in the Basic Agreement shall [\*454] govern over the additional agreements, which shall govern over the written instructions." Throughout the period Mazda used the APR planning system its basic agreement specifically provided that a dealer's appointment was nonexclusive and, in a provision we will discuss more fully in a subsequent portion of this opinion, Mazda reserved the right to establish new dealerships. Moreover, throughout [\*\*\*11] this period the written document by which Mazda informed a dealer of its APR specifically provided: "Dealer acknowledges that the above area is subject to modification by Mazda and that dealer's rights with respect to such area are non-exclusive." Ri-Joyce's claim that its franchise agreement gave it exclusive and unmodifiable rights within an APR is in direct contradiction to the written terms of its agreement and under the parol evidence rule, as applied in the *BMW* case, the Board would have no authority to uphold Ri-Joyce's protest under *section 3060* based upon this argument.

(4) We also reject Ri-Joyce's assertion that in 1982 it effected a unilateral amendment of its franchise to secure for itself an [\*\*551] exclusive and unmodifiable trading area defined by its former APR. It appears that during the time Mazda used the APR scheme it periodically presented a dealer with a written document setting out the zip codes in the dealer's APR which, as we have noted, provided that the APR was modifiable and nonexclusive. On several occasions principals of Ri-Joyce signed these APR documents. In 1982 the zip codes assigned to Ri-Joyce's APR were reduced and Ri-Joyce did not sign the document. [\*\*\*12] It was returned to Ri-Joyce with the notation "Dealer Refused to Sign." The written Mazda dealer agreement provides that it "constitutes the entire agreement and understanding between Dealer and Mazda with respect to the subject matter hereof and supersedes all prior or present agreements and understandings, written or oral, between the parties with respect to the subject matter hereof. The Mazda Dealer Agreement may be amended, modified, supplemented or interpreted only by a written instrument signed by Dealer and the President or any of the Vice Presidents of Mazda." Ri-Joyce's refusal to sign its APR document in 1982 cannot be held to have secured an exclusive, unmodifiable trading area contrary to the express written terms of its franchise agreement.

Ri-Joyce asserts that in connection with the 1982 franchise renewal it was assured that Mazda was satisfied with its performance and intended to continue the relationship indefinitely. At that time Mazda was aware that Ri-Joyce's lease was expiring and that it would need to relocate. In January 1983, Ri-Joyce relocated its dealership to a nearby site and in doing so was [\*455] required to buy out its old lease. In 1987 the [\*\*\*13] owners of Ri-Joyce purchased the land and facilities and expanded the service area at considerable expense. Ri-Joyce asserts that it took these actions in reliance upon representations that Mazda would continue the relationship, which it took to mean that Petaluma would be preserved as part of its territory.

We have noted that the Mazda dealer agreement specifically provides that it may be amended only in writing signed by Mazda's president or one of its vice-presidents. The agreement also provides: "Dealer acknowledges that designated field representatives of Mazda having responsibility for communications with Dealer on behalf of Mazda with respect to day-to-day operational matters do not have authority to represent Mazda or make commitments on behalf of Mazda concerning matters of interpretation of the Mazda Dealer Agreement or matters of policy affecting the relationship of Dealer and Mazda, including without limitation matters involving: ... (iv) the appointment of another Dealer near Dealer's Approved Location; or (v) the termination or renewal of the Mazda Dealer Agreement. Accordingly, Dealer may not rely on any such field representative of Mazda with respect to such [\*\*\*14] matters. If Dealer has any questions concerning matters of interpretation of the Mazda Dealer Agreement or other policy matters, Dealer shall consult with an appropriate officer of Mazda having executive responsibility for the matter in question, including Mazda's general manager." Accordingly, Ri-Joyce cannot rely upon vague oral statements of field representatives in asserting rights under its franchise agreement which are directly contrary to its written terms.<sup>3</sup>

3 We do not imply that this evidence is irrelevant. To the extent the written contract is reasonably susceptible of a meaning urged by Ri-Joyce, evidence of the manner in which the parties acted under the contract is admissible to support that meaning. (*Bohman v. Berg* (1960) 54 Cal.2d 787, 795 [8 Cal.Rptr. 441, 356 P.2d 185]; *Automobile Salesmen's Union v. Eastbay*

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*Motor Car Dealers, Inc. (1970) 10 Cal.App.3d 419, 424 [89 Cal.Rptr. 20].*) And, if it should be determined that Mazda is attempting to modify Ri-Joyce's franchise, then evidence of Ri-Joyce's investment is an important consideration in determining whether such modification should be allowed. (§ 3060, 3061.) We hold only that the scenario relied upon by Ri-Joyce cannot be held to have effected an amendment of its written contract and cannot be introduced to support a meaning to which the contract's written terms are not reasonably susceptible.

[\*\*\*15] To the extent Ri-Joyce may be relying upon an estoppel or perhaps a claim of fraud, the argument is addressed to the wrong forum. (5) The Board is a quasi-judicial [\*\*552] administrative agency of limited jurisdiction. (*BMW, supra, 162 Cal.App.3d at p. 994.*) It does not have plenary authority to resolve any and all disputes which may arise between a franchisor and a franchisee. The Board's jurisdiction under section 3060 encompasses disputes arising over the attempted termination, replacement or modification of a franchise agreement. Claims arising from disputes with other legal bases must be directed to a different forum.

[\*456] Although we have agreed with the Board and Mazda up to this point, we nevertheless perceive a significant difference between the franchise agreement involved here and the one involved in the *BMW* case. This difference renders this case inappropriate for summary disposition by dismissal of Ri-Joyce's protest.

Initially we must clarify an apparent misconception concerning the extent of the holding in the *BMW* case. The Board and Mazda seem to believe that we held in *BMW* that the Board has no jurisdiction [\*\*\*16] to consider a protest based upon the establishment of a new dealership beyond an existing dealer's relevant market area regardless of the terms of the existing dealer's franchise agreement. The *BMW* decision was not so expansive. There the franchisor had expressly reserved the unqualified power to establish new dealerships and we held that nothing in the New Motor Vehicle Board Act precluded a franchisor from reserving such power or entitled a franchisee to object to the exercise of such reserved power beyond his relevant market area. (*162 Cal.App.3d at p. 991.*) (6) We did not hold that the act precluded a franchisor from granting an exclusive trading area beyond a dealer's relevant market area or that a

franchisee would be precluded from protesting the modification of such an agreement by establishment of a new dealer within such an exclusive trading area. (*Ibid.*) That is a matter which is left to the agreement of the parties. If a franchise agreement does grant a dealer an exclusive, unmodifiable trading area then encroachment upon that area may constitute a modification of the franchise which is subject to protest under section 3060. <sup>4</sup> [\*\*\*17]

4 Although some dealers seem to believe that the New Motor Vehicle Board Act was enacted to protect them against competition, quite the contrary is true. The act recognizes that a new motor vehicle dealership may require a significant investment and that there is a disparity of bargaining power and thus the act was intended to protect new motor vehicle dealers against unfair or oppressive trade practices. (*BMW, supra, 162 Cal.App.3d at p. 987.*) But the act recognizes that the needs of consumers are important and that competition is in the public interest. (§ 3061, 3063.) Accordingly, a dealer cannot prevail on a protest simply by asserting a desire to limit competition. Moreover, since the interests of consumers are to be considered (*ibid.*), where a franchisor has granted an exclusive trading area beyond a relevant market area, justification for modifying the franchise will be more easily established the further a new franchise is located from the existing dealer's location.

[\*\*\*18] In the *BMW* case the franchisor had reserved the unqualified power to appoint new dealers whether in the dealer's geographical area or elsewhere. (*BMW, supra, 162 Cal.App.3d at p. 984.*) In contrast, in Mazda's dealer agreement the franchisor reserved a qualified right to appoint new dealers. The agreement provides: "Dealer and Mazda acknowledge that they may not fulfill their respective expectations for the business contemplated by the Mazda Dealer Agreement and agree that in such event the parties may take any one or more of the following actions, consistent with applicable law: (i) [\*457] Dealer of Mazda may elect to terminate or not renew the Mazda Dealer Agreement as provided herein; (ii) Dealer may elect to utilize some of its resources to engage in businesses involving the promotion, sale and service of products other than Mazda Products, including those which may be competitive with Mazda Products; or (iii) if Mazda determines it would be in the best interests

of customers or Mazda to do so, Mazda may elect to appoint another dealer to promote, sell and service Mazda Products near Dealer's Approved Location. Dealer and [\*\*\*19] Mazda shall give each other at least sixty days' written notice prior to taking any of the foregoing actions, for [\*\*553] the purpose of enabling the parties to discuss whether there exist any mutually agreeable alternatives to the proposed action. To the extent any consent is required from a party, such party will not unreasonably withhold its consent to any of the foregoing actions by the other."

(7a) Under this franchise agreement Mazda reserved a qualified right to establish a new dealership "near" Ri-Joyce's approved location. "Near" is not defined in the agreement. Mazda asserts that "near" should be construed consistent with *section 3062* so that it corresponds with Ri-Joyce's relevant market area. That is one, but not the only, possible interpretation of the contractual term. The contract is reasonably susceptible of the meaning urged by Ri-Joyce, that is, that "near" includes a neighboring community which has traditionally been served by Ri-Joyce and which produces a significant portion of its business.

Mazda's franchise agreement provides that the appointment of another dealer near Ri-Joyce's location is an action Mazda may take in the event its business expectations are not [\*\*\*20] fulfilled and if Mazda determines that it would be in the best interests of customers or of Mazda to do so. This reservation of the power to establish another dealership is broad but not unlimited. (8) A contract that confers discretionary decisionmaking authority upon one of the parties may be construed to require an objective standard of reasonableness or may be construed to permit the party to make a decision based upon subjective factors. In either case it will be implied that the party must exercise its judgment in good faith. (*Bleecher v. Conte* (1981) 29 Cal.3d 345, 352-353 [213 Cal.Rptr. 852, 698 P.2d 1154]; *Larwin-Southern California, Inc. v. JGB Investment Co.* (1979) 101 Cal.App.3d 626, 638-639 [162 Cal.Rptr. 52]; *Guntert v. City of Stockton* (1974) 43 Cal.App.3d 203, 209 [117 Cal.Rptr. 601].) (7b) The meaning and scope of Mazda's reservation of the power to appoint another dealer near Ri-Joyce's approved location is a matter which may be illuminated by extrinsic evidence and which Ri-Joyce must be accorded an opportunity to establish.

[\*\*\*21] If Ri-Joyce is correct in its claim that the proposed Petaluma dealership is "near" its approved location within the meaning of the contract, then Mazda [\*458] would not be precluded from establishing the Petaluma dealership but at a minimum it would be required to exercise good faith in deciding to do so. And, Mazda could take such action only after conferring with Ri-Joyce as to any mutually agreeable alternatives. The unilateral establishment of a nearby dealership without conferring with Ri-Joyce and without any attempt at justification pursuant to the contract would constitute an attempted modification of the contract which would be subject to protest under *section 3060*.

Like the trial court, we do not mean to suggest a particular result or otherwise limit the discretion of the Board. (9) Where a franchisee asserts that a franchisor is attempting to modify his franchise the first step is to determine what rights were granted under the franchise. Within the meaning of *section 3060* a franchise is a written agreement of the parties which is subject to the normal rules relating to the interpretation of contracts. (§ 331; *BMW, supra*, 162 Cal.App.3d at p. 990.) [\*\*\*22] (7c) Where a franchise agreement is reasonably susceptible to the meaning urged by a franchisee, the Board must hear and consider such extrinsic evidence as the franchisee can produce in order to determine what rights were granted under the agreement. (See *Pacific Gas & Electric Co. v. Zuckerman* (1987) 189 Cal.App.3d 1113, 1143 [234 Cal.Rptr. 630].) Only then can it be determined whether the franchisor's proposed action constitutes a modification of the franchise. If it does not then the franchisor is entitled to prevail. If it does then the Board must proceed with further consideration of the protest. Since in this case the franchise agreement is reasonably susceptible to the meaning urged by Ri-Joyce, it was entitled to an evidentiary hearing at which it could produce evidence in support of that interpretation. (*Ibid.*)

[\*\*554] Disposition

The judgment is affirmed.

Sims, J., and Marler, J., concurred. The petition of real party in interest for review by the Supreme Court was denied April 16, 1992.

#### APPENDIX

[\*459] At all times relevant to this case *Vehicle Code section 3060* provided: "Notwithstanding *Section*

20999.1 of the Business and Professions [\*\*\*23] Code or the terms of any franchise, no franchisor shall terminate or refuse to continue any existing franchise unless all of the following conditions are met: [P] (a) The franchisee and the board have received written notice from the franchisor as follows: [P] (1) Sixty days before the effective date thereof setting forth the specific grounds for termination or refusal to continue. [P] (2) Fifteen days before the effective date thereof setting forth the specific grounds with respect to any of the following: [P] (A) Transfer of any ownership or interest in the franchise without the consent of the franchisor, which consent shall not be unreasonably withheld. [P] (B) Misrepresentation by the franchisee in applying for the franchise. [P] (C) Insolvency of the franchisee, or filing of any petition by or against the franchisee under any bankruptcy or receivership law. [P] (D) Any unfair business practice after written warning thereof. [P] (E) Failure of the motor vehicle dealer to conduct its customary sales and service operations during its customary hours of business for seven consecutive business days, giving rise to a good faith belief on the part of the franchisor that the motor [\*\*\*24] vehicle dealer is in fact going out of business, except for circumstances beyond the direct control of the motor vehicle dealer or by order of the department. [P] (3) The written notice shall contain, on the first page thereof, a conspicuous statement which reads as follows: 'Notice to Dealer: You may be entitled to file a protest with the New Motor Vehicle Board in Sacramento and have a hearing on your protest under the terms of the California Vehicle Code if you oppose this action. It is important that you act promptly.' [P] (b) The board finds that there is good cause for termination or refusal to continue, following a hearing called pursuant to Section 3066. The franchisee may file a protest with the board within 30 days after receiving a 60-day notice or within 10 days after receiving a 15-day notice. When a protest is filed, the board shall advise the franchisor that a timely protest has been filed, that a hearing is required pursuant to Section 3066, and that the franchisor may not terminate or refuse to continue until the board makes its findings. [P] (c) The franchisor has received the written consent of the franchisee, or the appropriate period for filing a protest [\*\*\*25] has elapsed. [P] The franchisor shall not modify or replace a franchise with a succeeding franchise if the modification or replacement would substantially affect the franchisee's sales or service obligations or investment, unless the franchisor has first given the board and each affected franchisee notice thereof at least 60

days in advance of the modification or replacement. Within 30 days of receipt of the notice, a franchisee may file a protest with the board and the modification or replacement does not become effective until there is a [\*460] finding by the board that there is good cause for the modification or replacement. If, however, a replacement franchise is the successor franchise to an expiring or expired term franchise, the prior franchise shall continue in effect until resolution of the protest by the board. In the event of multiple protests, hearings shall be consolidated to expedite the disposition of the issue." (Stats. 1984, ch. 247, § 2, pp. 754-755.)

*Vehicle Code section 3061* provides: "In determining whether good cause has been established for modifying, replacing, terminating, or refusing to continue a franchise, the board shall take into consideration [\*\*\*26] the existing circumstances, including, but not limited to, all of the following: [P] (a) Amount of business transacted by the franchisee, as compared to the business available to the franchisee. [P] (b) Investment necessarily made and obligations incurred by the franchisee to perform its part of the franchise. [P] (c) Permanency of the investment. [P] (d) Whether it is injurious or beneficial to the public welfare for the [\*555] franchise to be modified or replaced or the business of the franchisee disrupted. [P] (e) Whether the franchisee has adequate motor vehicle sales and service facilities, equipment, vehicle parts, and qualified service personnel to reasonably provide for the needs of the consumers for the motor vehicles handled by the franchisee and has been and is rendering adequate services to the public. [P] (f) Whether the franchisee fails to fulfill the warranty obligations of the franchisor to be performed by the franchisee. [P] (g) Extent of franchisee's failure to comply with the terms of the franchise."

*Vehicle Code section 3062* provides: "(a) Except as otherwise provided in subdivision (b), if a franchisor seeks to enter into a franchise establishing an additional [\*\*\*27] motor vehicle dealership within a relevant market area where the same line-make is then represented, or seeks to relocate an existing motor vehicle dealership, the franchisor shall, in writing, first notify the board and each franchisee in that line-make in the relevant market area of the franchisor's intention to establish an additional dealership or to relocate an existing dealership within or into that market area. Within 20 days of receiving that notice or within 20 days

after the end of any appeal procedure provided by the franchisor, any such franchisee may file with the board a protest to the establishing or relocating of the dealership. If, within this time a franchisee files with the board a request for additional time to file a protest, the board or its secretary, upon a showing of good cause, may grant an additional 10 days to file the protest. When such a protest is filed, the board shall inform the franchisor that a timely protest has been filed, that a hearing is required pursuant to Section 3066, and that the franchisor shall not establish or relocate the proposed dealership until the board has held a hearing as provided in Section 3066, nor thereafter, if the board [\*\*\*28] has determined that there is good cause for not permitting the dealership. In the event [\*461] of multiple protests, hearings may be consolidated to expedite the disposition of the issue. [P] For the purposes of this section, the reopening in a relevant market area of a dealership that has not been in operation for one year or more shall be deemed the establishment of an additional motor vehicle dealership. [P] (b) Subdivision (a) does not apply to either of the following: [P] (1) The relocation of an existing dealership to any location which is both within the same city as, and is within one mile from, the existing dealership location. [P] (2) The establishment at any location which is both within the same city as, and is within one-quarter mile from, the location of a dealership of the same line-make that has been out of operation for less than 90 days. [P] (c) Subdivision (a) does not apply to any display of vehicles at a fair, exposition, or similar exhibit if no actual sales are made at the event and the display does not exceed 30 days. This subdivision shall not be

construed to prohibit a new motor vehicle dealer from establishing a branch office for the purpose of [\*\*\*29] selling vehicles at the fair, exposition, or similar exhibit, even though that the event is sponsored by a financial institution, as defined in *Section 31041 of the Financial Code* or by a financial institution and a licensed dealer. The establishment of these branch offices, however, shall be in accordance with subdivision (a) where applicable. [P] (d) For the purposes of this section, the reopening of a dealership that has not been in operation for one year or more shall be deemed the establishment of an additional motor vehicle dealership."

*Vehicle Code section 3063* provides: "In determining whether good cause has been established for not entering into or relocating an additional franchise for the same line-make, the board shall take into consideration the existing circumstances, including, but not limited to, all of the following: [P] (a) Permanency of the investment. [P] (b) Effect on the retail motor vehicle business and the consuming public in the relevant market area. [P] (c) Whether it is injurious to the public welfare for an additional franchise to be established. [P] (d) Whether the franchisees of the same line-make in that relevant market area are providing adequate [\*\*\*30] competition and convenient consumer care for the motor vehicles of the [\*\*556] line-make in the market area which shall include the adequacy of motor vehicle sales and service facilities, equipment, supply of vehicle parts, and qualified service personnel. [P] (e) Whether the establishment of an additional franchise would increase competition and therefore be in the public interest."

# **EXHIBIT B**



FOCUS - 8 of 10 DOCUMENTS

**BMW OF NORTH AMERICA, INC., Plaintiff and Appellant, v. NEW MOTOR  
VEHICLE BOARD, Defendant and Respondent; HAL WATKINS CHEVROLET,  
INC., Real Party in Interest and Respondent**

Civ. No. 23195

Court of Appeal of California, Third Appellate District

*162 Cal. App. 3d 980; 209 Cal. Rptr. 50; 1984 Cal. App. LEXIS 2843*

December 18, 1984

**SUBSEQUENT HISTORY:** [\*\*\*1] Petitions for a rehearing were denied January 14, 1985, and the petitions of all respondents for a hearing by the Supreme Court were denied March 13, 1985.

**PRIOR HISTORY:** Superior Court of Sacramento County, No. 309794, William A. White, Judge.

**DISPOSITION:** The judgment of the trial court is reversed and the cause is remanded to the trial court with directions to issue a peremptory writ of mandate directing the respondent New Motor Vehicle Board to vacate its decision granting the protest of Hal Watkins Chevrolet, Inc. doing business as Hal Watkins BMW, and to issue a new decision denying said protest.

**SUMMARY:**

**CALIFORNIA OFFICIAL REPORTS SUMMARY**

In a proceeding before the New Motor Vehicles Board by an automobile franchisee to protest the franchisor's appointment of another dealer to a location 15.2 miles from the existing dealership, the board found that the new appointment constituted a modification of the existing franchise agreement and for that reason precluded the new appointment. In an action by the franchisor, the trial court denied a writ of administrative mandate pursuant to *Code Civ. Proc.*, § 1094.5, directing

the board to vacate its decision. (Superior Court of Sacramento County, No. 309794, William A. White, Judge.)

The Court of Appeal reversed the judgment of the trial court and remanded with directions to issue a peremptory writ of mandate directing the board to vacate its decision granting the franchisee's protest and to issue a new decision denying the protest. The court held that the board acted in excess of its jurisdiction in finding that the new appointment constituted a modification of the existing franchise agreement. The agreement expressly reserved the right of the franchisor to appoint other dealers, whether located in the existing franchisee's geographical area or not. This reservation was not contrary to public policy expressed in the New Motor Vehicle Act (*Veh. Code*, § 3000 *et seq.*). Moreover, *Veh. Code*, § 3062, specifically limits the right of an existing franchisee to protest the appointment of a new dealer to cases in which the new dealership would be located within a 10-mile radius of the existing dealership. (Opinion by Sparks, J., with Puglia, P. J., and Carr, J., concurring.)

**HEADNOTES**

**CALIFORNIA OFFICIAL REPORTS HEADNOTES**  
Classified to California Digest of Official Reports, 3d Series

**(1) Automobiles and Highway Traffic § 20--Sales and Transfers--Auto Dealers.** --The relationship between automobile manufacturers and retail dealers is subject to governmental regulation.

**(2) Franchise, Distribution, and Dealership Contracts § 3--Construction and Effect of Agreement--Automobile Franchise--Contract Law.** --Although a franchise is technically a grant of power by a governmental entity to a private person or entity, a "franchise" within the meaning of *Veh. Code, § 331*, is a contract relating to the sale and distribution of automotive products, and as such is subject to the normal rules relating to contracts.

**(3) Evidence § 61--Documentary Evidence--Parol Evidence Rule.** --The parol evidence rule is a fundamental rule of contract law which operates to bar extrinsic evidence contradicting the terms of a written contract. It is not merely a rule of evidence but is substantive in scope. Under the rule, the act of executing a written contract, whether required by law to be in writing or not, supersedes all the negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument (*Civ. Code, § 1625*). Extrinsic evidence cannot be admitted to prove what the agreement was, not for any of the usual reasons for exclusion of evidence, but because as a matter of law the agreement is the writing itself. Consequently, in determining whether substantial evidence supports a judgment, extrinsic evidence inconsistent with any interpretation to which the instrument is reasonably susceptible becomes irrelevant; as a matter of substantive law, such evidence cannot serve to create or alter the obligations under the instrument.

**(4) Evidence § 65--Documentary Evidence--Parol Evidence Rule--Exceptions--Evidence in Aid of Interpretation--Reasonably Susceptible.** --Under the parol evidence rule, where the written contract is not an integration, that is, the complete and final agreement of the parties, then evidence of a separate oral agreement may be introduced as to any matter on which the agreement is silent and which is not inconsistent with its written terms. In addition, extrinsic evidence may be introduced to explain the meaning of a written contract and the test for admissibility is whether the meaning urged is one to which the written contract terms are reasonably susceptible.

**(5a) (5b) Automobiles and Highway Traffic § 20--**

**Sales and Transfers--Auto Dealers--Hearing Before New Motor Vehicle Board--Jurisdiction--Decision Precluding Appointment of New Dealer.** --In a proceeding before the New Motor Vehicle Board by an automobile franchisee to protest the franchisor's appointment of another dealer to a location 15.2 miles from the existing franchisee's dealership, the board acted in excess of its jurisdiction in finding that the new appointment constituted a modification of the existing franchise agreement and for that reason precluding the new appointment. The franchise agreement expressly reserved the right of the franchisor to appoint other dealers, whether located in the existing franchisee's geographical area or not. This reservation was not contrary to public policy expressed in the New Motor Vehicles Act (*Veh. Code, § 3000 et seq.*). Moreover, *Veh. Code, § 3062*, specifically limits the right of an existing franchisee to protest the appointment of a new dealer to cases where the proposed new dealership would be located within a 10-mile radius of the existing dealership. Thus, in an action by the franchisor, the trial court erred in denying a writ of administrative mandate directing the board to vacate its decision.

**(6) Administrative Law § 8--Powers and Functions of Administrative Agencies--Necessity for Compliance With Law.** --An administrative agency has only such power as has been conferred upon it by the Constitution or by statute and an act in excess of the power conferred upon the agency is void.

**COUNSEL:** Lewis, D'Amato, Brisbois & Bisgaard, Roy M. Brisbois, Weil, Gotshal & Manges, Salem M. Katsh, Michael A. Epstein, Bryan R. Dunlap and Sanford F. Remz for Plaintiff and Appellant.

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John K. Van de Kamp, Attorney General, N. Eugene Hill, Assistant Attorney General, Harold W. Teasdale and Gordon Zane, Deputy Attorneys General, for Defendant and Respondent.

Crow, Lytle, [\*\*\*2] Gilwee, Donoghue, Adler & Weninger, Richard E. Crow and James R. McCall as Amici Curiae on behalf of Defendant and Respondent.

Pilot & Spar, A. Albert Spar, Michael J. Flanagan and June Spar for Real Party in Interest and Respondent.

**JUDGES:** Opinion by Sparks, J., with Puglia, P. J., and Carr, J., concurring.

**OPINION BY: SPARKS**

**OPINION**

[\*983] [\*\*51] In this appeal we consider the statutory restrictions on the modification of automobile dealer franchises under the New Motor Vehicle Board Act. (*Veh. Code, § 3000 et seq.*) BMW of North America, Inc. petitioned for a writ of administrative mandate pursuant to *Code of Civil Procedure section 1094.5*, directing the respondent New Motor Vehicle Board of the State of California (Board) to vacate its decision allowing the protest of the establishment of a new dealer filed by real party in interest Hal Watkins Chevrolet, Inc., and to enter a new decision denying the protest. The trial court denied the petition and BMW appeals. BMW contends that the composition of the board is unconstitutional, that the Board lacks jurisdiction over the Watkins protest, and that the Board's interpretation of the relevant statutory provisions is constitutionally [\*\*\*3] impermissible. We need not consider the constitutional questions raised because we conclude that as a matter of law the Board acted in excess of its jurisdiction in allowing the Watkins protest. We therefore reverse the judgment and remand to the trial court with directions to issue a writ of mandate.

Facts

Hal Watkins is the sole shareholder of Hal Sales, Inc. Hal Sales, Inc., in turn owns the majority of the stock in Hal Watkins Chevrolet, Inc. In 1974 Hal Watkins applied to become a franchised dealer for BMW automobiles. At that time Hoffman Motors Corporation was the North American importer of BMW automobiles. Hoffman accepted the application and entered into a franchise agreement with Watkins. Since that time two inconsequential changes have occurred. First, Hoffman Motors Corporation has been succeeded by plaintiff BMW of North America as the BMW importer for North America. Second, although the application was on behalf of Hal Sales, Inc., the actual franchise agreement is held on behalf of Hal Watkins Chevrolet, Inc.

The franchise agreements under which Watkins and

BMW have operated have been limited-term contracts of one year with provision for renewal and [\*984] [\*\*\*4] extension by BMW unless it acts to terminate the agreement in accordance with the contract provisions. Each succeeding agreement has an annual effective date of January 1. Each of the succeeding agreements contained a clause of which the 1982 agreement is typical: "BMWNA hereby appoints Dealer [Watkins] as a retail dealer of BMW Products and grants Dealer the nonexclusive right to buy BMW Products, all in accordance with, and subject to, the provisions of this Agreement. Dealer accepts such appointment and agrees to be bound by all of the terms and conditions of the Agreement. Dealer recognizes and agrees that its appointment as a Dealer in BMW Products does not confer upon it the exclusive right to deal in BMW Products in any specific geographic area. Nothing contained in the Agreement shall limit, or be construed to limit, the geographical area within which, or the persons to whom, Dealer may sell BMW Products. BMWNA reserves the right to grant or confer rights and privileges covering the sale and servicing of BMW Products upon such other Dealers selected and approved by BMWNA, whether located in Dealer's geographic area or elsewhere, as BMWNA, in its sole discretion, shall [\*\*\*5] deem necessary or appropriate." The agreements have further provided: "No representative of BMWNA shall have authority to waive any of the provisions of the Agreement or to make any amendment or modification of or any other change in, addition to, or deletion of any portion of the Agreement . . . or which renews or extends the Agreement; unless such waiver, amendment, modification, change, addition, deletion, or agreement is made in writing and signed by BMWNA and Dealer as set forth in Article H of this Dealer Agreement."

Watkins opened Hal Watkins' BMW in Camarillo, in Ventura County. From time to time BMW had inquiries from other dealers, particularly Paul Rusnak, concerning the possibility of opening a franchise in the Thousand Oaks-Westlake area of Ventura County. Eventually, after a market study of the region, BMW determined to appoint Rusnak as a BMW dealer in the Thousand Oaks-Westlake area. Rusnak was to open his dealership in late 1982 or early 1983. Rusnak's franchise was to be located 15.2 miles from Watkins' Camarillo facility, and 16.2 miles from the next closest dealership in Canoga Park, Los Angeles County. BMW and Rusnak signed a letter of intent and Rusnak began [\*\*\*6] preparations for the opening of his franchise.

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Watkins filed a protest with the New Motor Vehicle Board, alleging that the appointment of Rusnak as a BMW dealer in Ventura County constituted a modification of his franchise agreement. After a lengthy administrative hearing the administrative law judge prepared a proposed decision in which he concluded that the appointment of Rusnak constituted a modification of Watkins' franchise agreement and that there was not good cause for the modification. In particular the administrative law judge found that BMW [\*985] failed to prove: (1) the amount of business transacted by Watkins is inadequate as compared to the business available; (2) the investment made and obligations incurred by Watkins was not substantial; (3) Watkins' investment was not permanent; (4) it would be beneficial to the public welfare for the franchise to be modified; (5) Watkins does not have adequate sales and service facilities or is not rendering adequate services; (6) Watkins failed to fulfill warranty obligations; and (7) Watkins failed to comply with the terms of the franchise. On January 12, 1983, the New Motor Vehicle Board adopted the proposed decision as [\*\*\*7] its decision in the matter. This writ proceeding followed.

#### Discussion

In 1967 the Legislature established the New Car Dealers Policy and Appeals Board to hear appeals of new car dealer licensing decisions of the Department of Motor Vehicles. (See *Veh. Code, § 3000 et seq.*, added by Stats. 1967, ch. 1397, § 2, p. 3261 et seq.) At that time the duties of the Board were similar to those of other occupational licensing boards, and, as is common with such other boards, the Legislature mandated that four of the nine members be new car dealers. (Stats. 1967, ch. 1397, § 2, pp. 3261-3262.) In 1973 the Legislature changed the name of the Board to the New Motor Vehicle Board, and added *sections 3060 to 3069* to the Vehicle Code. (Stats. 1973, ch. 996, § 16, pp. 1967-1971.) Among other things, those sections empower the Board to determine whether there is good cause for the termination, refusal to renew or continue, or the modification of an existing franchise agreement (*Veh. Code, § 3060*), and whether there is good cause not to relocate or establish a motor vehicle dealership in a relevant market area (*Veh. Code, § 3062*). In *American Motors Sales Corp. v. New Motor Vehicle Bd.* [\*\*\*8] *Bd.* (1977) 69 Cal.App.3d 983, at pages 987 to 992 [138 Cal.Rptr. 594], this court held the requirement that four of the nine board members be new car dealers created a

slanted adjudicatory tribunal and thus denied the manufacturer litigants procedural due process of law.

In reaction to the decision in *American Motors*, the Legislature amended *Vehicle Code sections 3050 and 3066* to provide that the new car dealer members of the Board could not participate in, deliberate on, hear or consider, or decide any matter involving a dispute between a manufacturer and a dealer. (Stats. 1977, ch. 278, §§ 2-3, pp. 1171-1173.) In 1979 the Legislature enacted urgency legislation to provide that the new motor vehicle dealer members of the Board "may participate in, hear, and comment or advise other members upon, but may not decide," any dispute between a dealer and a manufacturer. (Stats. 1979, ch. 340, §§ 1-2, pp. 1206-1207.) [\*986] The stated urgency for the legislation was so that the "educated and needed advice of New Motor Vehicle Board members who are themselves new motor vehicle dealers may be utilized in the decision making process of the board . . . ." (Stats. 1979, ch. 340, [\*\*\*9] § 3, p. 1207.)

After the trial court's decision in this case, the Court of Appeal for the First District held in *Chevrolet Motor Division v. New Motor Vehicle Bd.* (1983) 146 Cal.App.3d 533, at page 541 [194 Cal.Rptr. 270], that the mere fact the new motor vehicle dealer members of the board do not technically decide the issues does not cure the constitutional problem of submitting disputes to a biased tribunal, and hence the statutory procedure remains constitutionally defective. In *Nissan Motor Corp. v. New Motor Vehicle Bd.* (1984) 153 Cal.App.3d 109, at page 115 [202 Cal.Rptr. 1], another division of the same court agreed with the holding in *Chevrolet Motor Division*.

The parties renew the dispute whether the procedural provisions for the adjudication of dealer protests before the New Motor Vehicle Board satisfy the requirements of due process and, if not, whether recusal of the new motor vehicle dealer members of the Board from participation in the decision cures any deficiency in the legislation. BMW additionally contends that the Board's construction of the relevant statutory provisions was itself unconstitutional. We are urged by BMW to follow [\*\*\*10] *Chevrolet Motor Division* and declare the composition of the Board to be unconstitutionally biased in violation of due process of law. Watkins argues that both the *Chevrolet Motor Division* case, and our decision in *American Motors* upon which it relies, conflict with

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various federal decisions and with the opinion of the California Supreme Court in *Andrews v. Agricultural Labor Relations Bd.* (1981) 28 Cal.3d 781 [171 Cal.Rptr. 590, 623 P.2d 151].<sup>1</sup> In essence, Watkins contends that the asserted economic interest of dealer board members is too speculative, contingent and uncertain to rise to the level of bias which would deprive manufacturers of a fair and impartial hearing. In resolving this dispute we need not, and therefore do not, reach the constitutional questions raised. We conclude instead that as a matter of law the Board acted in excess of its jurisdiction and erred in allowing the Hal Watkins protest.

1 *Andrews* involved the denial of a motion to disqualify a temporary administrative law officer in an unfair labor practices hearing. The ground for bias was the officer's practice of law with a firm which had previously represented farm workers in a suit against the Secretary of Labor and which had engaged in employment discrimination suits on behalf of Mexican-Americans. Holding that the hearing officer did not err in refusing to disqualify himself, the court noted that the "right to an impartial trier of fact is not synonymous with the claimed right to a trier completely indifferent to the general subject matter of the claim before him." (*Andrews v. Agricultural Labor Relations Bd.* (1981) 28 Cal.3d 781, 790 [171 Cal.Rptr. 590, 623 P.2d 151].)

[\*\*11] [\*987] (1) There can be no question that the relationship between automobile manufacturers and retail dealers is a relationship that is subject to governmental regulation. In *New Motor Vehicle Bd. v. Orrin W. Fox Co.* (1978) 439 U.S. 96 [58 L.Ed.2d 361, 99 S.Ct. 403], the United States Supreme Court considered whether California could, by rule or statute, temporarily delay the establishment or relocation of an automobile dealership pending the adjudication of an existing dealer's protest. The Court concluded that a state may constitutionally require the manufacturer to secure regulatory approval before engaging in specified practices. (439 U.S. at p. 108 [58 L.Ed.2d at p. 374].) The California Legislature, the high court found, "was empowered to subordinate the franchise rights of automobile manufacturers to the conflicting rights of their franchisees where necessary to prevent unfair or oppressive trade practices." (*Id.*, at p. 107 [58 L.Ed.2d at pp. 374, 376].)<sup>2</sup>

2 The decision in *Fox* did not settle all questions of the constitutionality of the regulatory scheme. That decision only addressed the "narrow question . . . whether California may, by rule or statute, temporarily delay the establishment or relocation of automobile dealerships pending the Board's adjudication of the protests of existing dealers." (439 U.S. at p. 106 [58 L.Ed.2d at p. 373].) The Court decided that regulation is permissible, but in doing so expressly noted that California's regulatory scheme was clearly articulated and affirmatively expressed, and that disputes were to be determined by an impartial tribunal. (*Id.*, at pp. 107-108, 109 [58 L.Ed.2d at pp. 374, 376].) Different questions are raised where, as is alleged here, the Legislature has since acted to create a biased rather than impartial tribunal, and the tribunal acts in a manner which is not pursuant to clearly articulated and affirmatively expressed statutory or regulatory provisions.

[\*\*12] The provisions of California's regulatory scheme involved here are contained in *Vehicle Code sections 3060 through 3063*, which are set out in full in the margin.<sup>3</sup> The first portion of *section 3060* precludes a franchisor [\*988] from terminating or refusing to continue an existing franchise without compliance with certain procedural provisions and, if a protest is filed, unless [\*989] the Board finds that there is good cause for the termination or refusal to continue. The second portion of *section 3060* precludes a franchisor from modifying or replacing a franchise with a succeeding franchise if the modification or replacement would substantially affect the franchisee's sales or service obligations or investment, unless the franchisor complies with certain procedural provisions and in the event of a protest the Board finds good cause for the modification or replacement. *Section 3061* provides the factors to be considered by the Board in determining whether good cause has been established for modifying, replacing, terminating, or refusing to continue a franchise.

3 Unless otherwise indicated, all further statutory references are to *Vehicle Code*.

*Section 3060* provides: "Notwithstanding the terms of any franchise, no franchisor shall terminate or refuse to continue any existing franchise unless: [para. ] (a) The franchise and the

board have received written notice from the franchisor as follows: [para. ] (1) Sixty days before the effective date thereof setting forth the specific grounds for termination or refusal to continue. [para. ] (2) Fifteen days before the effective date thereof setting forth the specific grounds with respect to any of the following: [para. ] (A) Transfer of any ownership or interest in the franchise without the consent of the franchisor, which consent shall not be unreasonably withheld. [para. ] (B) Misrepresentation by the franchisee in applying for the franchise. [para. ] (C) Insolvency of the franchisee, or filing of any petition by or against the franchisee under any bankruptcy or receivership law. [para. ] (D) Any unfair business practice after written warning thereof. [para. ] (E) Failure of the motor vehicle dealer to conduct its customary sales and service operations during its customary hours of business for seven consecutive business days, giving rise to a good faith belief on the part of the franchisor that the motor vehicle dealer is in fact going out of business, except for circumstances beyond the direct control of the motor vehicle dealer or by order of the department. [para. ] (3) The written notice shall contain, on the first page thereof, a conspicuous statement which reads as follows: 'NOTICE TO DEALER: You may be entitled to file a protest with the NEW MOTOR VEHICLE BOARD in Sacramento and have a hearing on your protest under the terms of the California Vehicle Code if you oppose this action. It is important that you act promptly.' [para. ] (b) The board finds that there is good cause for termination or refusal to continue, following a hearing called pursuant to *Section 3066*. The franchisee may file a protest with the board within 30 days after receiving a 60-day notice or within 10 days after receiving a 15-day notice. When a protest is filed, the board shall advise the franchisor that a timely protest has been filed, that a hearing is required pursuant to *Section 3066*, and that the franchisor may not terminate or refuse to continue until the board makes its findings. [para. ] (c) The franchisor has received the written consent of the franchisee, or the appropriate period for filing a protest has elapsed. [para. ] The franchisor shall not modify or replace a franchise with a succeeding franchise if the

modification or replacement would substantially affect the franchisee's sales or service obligations or investment, unless the franchisor has first given the board and each affected franchisee notice thereof at least 60 days in advance of the modification or replacement. Within 30 days of receipt of the notice, a franchisee may file a protest with the board and the modification or replacement does not become effective until there is a finding by the board that there is good cause for the modification or replacement. If, however, a replacement franchise is the successor franchise to an expiring or expired term franchise, the prior franchise shall continue in effect until resolution of the protest by the board. In the event of multiple protests, hearings shall be consolidated to expedite the disposition of the issue.

*Section 3061* provides: "In determining whether good cause has been established for modifying, replacing, terminating, or refusing to continue a franchise, the board shall take into consideration the existing circumstances, including, but not limited to, all of the following: [para. ] (a) Amount of business transacted by the franchisee, as compared to the business available to the franchisee. [para. ] (b) Investment necessarily made and obligations incurred by the franchisee to perform its part of the franchise. [para. ] (c) Permanency of the investment. [para. ] (d) Whether it is injurious or beneficial to the public welfare for the franchise to be modified or replaced or the business of the franchisee disrupted. [para. ] (e) Whether the franchisee has adequate motor vehicle sales and service facilities, equipment, vehicle parts, and qualified service personnel to reasonably provide for the needs of the consumers for the motor vehicles handled by the franchisee and has been and is rendering adequate services to the public. [para. ] (f) Whether the franchisee fails to fulfill the warranty obligations of the franchisor to be performed by the franchisee. [para. ] (g) Extent of franchisee's failure to comply with the terms of the franchise."

*Section 3062* provides: "(a) Except as otherwise provided in subdivision (b), in the event that a franchisor seeks to enter into a franchise establishing an additional motor vehicle

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dealership within a relevant market area where the same line-make is then represented, or relocating an existing motor vehicle dealership, the franchisor shall in writing first notify the board and each franchisee in that line-make in the relevant market area of the franchisor's intention to establish an additional dealership or to relocate an existing dealership within or into that market area. Within 20 days of receiving that notice or within 20 days after the end of any appeal procedure provided by the franchisor, any such franchisee may file with the board a protest to the establishing or relocating of the dealership. If within this time a franchisee files with the board a request for additional time to file a protest, the board or its secretary, upon a showing of good cause, may grant an additional 10 days to file the protest. When such a protest is filed, the board shall inform the franchisor that a timely protest has been filed, that a hearing is required pursuant to *Section 3066*, and that the franchisor shall not establish or relocate the proposed dealership until the board has held a hearing as provided in *Section 3066*, nor thereafter, if the board has determined that there is good cause for not permitting the dealership. In the event of multiple protests, hearings may be consolidated to expedite the disposition of the issue. [para. ] For the purposes of this section, the reopening in a relevant market area of a dealership that has not been in operation for one year or more shall be deemed the establishment of an additional motor vehicle dealership. [para. ] (b) With respect to the relocation of an existing dealership, subdivision (a) does not apply to any relocation which is less than one mile from the existing location of the dealership and which is to a location within the same relevant market area within the same city where the existing dealership is located. [para. ] (c) Subdivision (a) does not apply to the establishment of a branch office for selling vehicles at a fair, exposition, or similar exhibit that does not exceed 30 days."

*Section 3063* provides: "In determining whether good cause has been established for not entering into or relocating an additional franchise for the same line-make, the board shall take into consideration the existing circumstances, including, but not limited to, all of the following:

[para. ] (a) Permanency of the investment. [para. ] (b) Effect on the retail motor vehicle business and the consuming public in the relevant market area. [para. ] (c) Whether it is injurious to the public welfare for an additional franchise to be established. [para. ] (d) Whether the franchisees of the same line-make in that relevant market area are providing adequate competition and convenient consumer care for the motor vehicles of the line-make in the market area which shall include the adequacy of motor vehicle sales and service facilities, equipment, supply of vehicle parts, and qualified service personnel. [para. ] (e) Whether the establishment of an additional franchise would increase competition and therefore be in the public interest."

[\*\*\*13] *Section 3062* limits the ability of a franchisor to establish or relocate a dealership within an area where the same line-make is already represented. In doing so the section utilizes the term "relevant market area" which is in turn defined in *section 507* as being "any area within a radius of 10 miles from the site of a potential new dealership." Thus under *section 3062*, any franchisee within 10 miles of the site of a proposed new or relocated dealership of the same line-make may protest such proposed action. At the hearing on the protest the question is whether the existing franchisee establishes good cause for not allowing the establishment or relocation of the additional dealer within the relevant market area, and *section 3063* sets forth the factors which are to be considered by the Board.

Watkins concedes, as he must, that he was not entitled to file a protest of the establishment of the Thousand Oaks-Westlake BMW dealer under *section 3062*. That proposed dealership was more than 15 miles from Watkins' Camarillo dealership and thus Watkins is well outside the relevant market area. At the hearing on the protest Watkins specifically disclaimed any intent to proceed under *section* [\*\*\*14] *3062*. Instead, Watkins claims that the establishment of a new dealership within Ventura County would constitute a modification [\*990] of his franchise. The Board agreed with this contention. In doing so it erred.

(2) Although a franchise is technically a grant of power by a governmental entity to a private person or entity, with respect to the automotive industry a franchise has been defined as "an agreement between two private

162 Cal. App. 3d 980, \*990; 209 Cal. Rptr. 50, \*\*51;  
1984 Cal. App. LEXIS 2843, \*\*\*14

entities arising out of the 'general right to engage in a lawful business, part of the liberty of the citizen.'" ( *National Labor Relations Board v. Bill Daniels, Inc.* (6th Cir. 1953) 202 F.2d 579, 582, citation omitted.) This definition is consistent with the California Vehicle Code, which defines a franchise as a "written agreement between two or more persons" relating to the sale and distribution of automotive products. (§ 331.) A "franchise" within the meaning of the Vehicle Code is thus a contract, and as such is subject to the normal rules relating to contracts.

(3) The parol evidence rule is a fundamental rule of contract law which operates to bar extrinsic evidence contradicting the terms of a written contract. ( *Riley v. Bear Creek* [\*\*\*15] *Planning Committee* (1976) 17 Cal.3d 500, 508-509 [131 Cal.Rptr. 381, 551 P.2d 1213].) It is not merely a rule of evidence but is substantive in scope. ( *Estate of Gaines* (1940) 15 Cal.2d 255, 264-265 [100 P.2d 1055]; see also Witkin, Cal. Evidence (2d ed. 1966) Documentary Evidence, § 715, pp. 661-662; 2 Jefferson, Cal. Evidence Benchbook (2d ed. 1982) Parol Evidence Rule, § 32.1, pp. 1121-1123.) Under that rule the act of executing a written contract, whether required by law to be in writing or not, supersedes all the negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument. (Civ. Code, § 1625.) Extrinsic evidence cannot be admitted to prove what the agreement was, not for any of the usual reasons for exclusion of evidence, but because as a matter of law the agreement is the writing itself. ( *Tahoe National Bank v. Phillips* (1971) 4 Cal.3d 11, 22-23 [92 Cal.Rptr. 704, 480 P.2d 320].) Consequently, "in determining whether substantial evidence supports a judgment, extrinsic evidence inconsistent with any interpretation to which the instrument is reasonably susceptible becomes irrelevant; as a matter of [\*\*\*16] substantive law such evidence cannot serve to create or alter the obligations under the instrument. Irrelevant evidence cannot support a judgment." (4) (See fn. 4.) (*Ibid.*, citations and footnotes omitted.)<sup>4</sup>

4 Two aspects of the parol evidence rule should be noted here. First, where the written contract is not an integration, that is, the complete and final agreement of the parties, then evidence of a separate oral agreement may be introduced as to any matter on which the agreement is silent and which is not inconsistent with its written terms.

(See *Masterson v. Sine* (1968) 68 Cal.2d 222, 226-228 [65 Cal.Rptr. 545, 436 P.2d 561].) Second, extrinsic evidence may be introduced to explain the meaning of a written contract and the test for admissibility is whether the meaning urged is one to which the written contract terms are reasonably susceptible. (See *Pacific Gas & E. Co. v. G.W. Thomas Drayage etc. Co.* (1968) 69 Cal.2d 33, 40 [69 Cal.Rptr. 561, 442 P.2d 641, 40 A.L.R.3d 1373].) As we explain, neither of these aspects of the rule is involved here since the meaning urged by Watkins is directly contrary to the express written terms of his contract.

[\*\*\*17] [\*991] (5a) In determining the rights and liabilities of BMW and Watkins under the franchise agreement the first reference must be to the written terms of the contract. That agreement clearly and unequivocally provides that Watkins was not granted the exclusive right to deal in BMW products in any particular geographic area and was not limited in the area in which he could trade. BMW expressly reserved the right to appoint other dealers in BMW products, whether located in Watkins' geographic area or not. This contract language, of course, cannot be reasonably construed to provide Watkins with the exclusive right to sell BMW products in Ventura County, or in any geographical area, and cannot be construed to give him the right to object to the appointment of a new dealer 15.2 miles from the site of his dealership. Accordingly, in determining to appoint a new dealer in the Thousand Oaks-Westlake area, BMW was acting pursuant to, rather than in derogation of, Watkins' franchise agreement.

Watkins asserted, and the trial court agreed, that the reservation in the franchise agreement of the right to appoint additional dealers is "contrary to the public policy expressed in the Act, and [\*\*\*18] thus void." We disagree. By virtue of *section 3060*, a franchisor may be required to continue existing franchise agreements without modification if a modification would substantially affect the franchisee's sales and service obligations or investment. However, that section in no manner dictates what must be included in a franchise agreement, and it does not state or imply that a franchisor may not reserve the power to appoint new dealers or that a franchise must provide an exclusive trading area to the dealer. The provision of the Act dealing with the appointment of new dealers is found in *section 3062*, and it specifically limits the right of an existing franchisee to

object to the appointment of a new dealer to a 10-mile radius. That section not only restricts the right of a franchisee to object to the appointment of a new dealer to the 10-mile radius, but it also implicitly recognizes the right of a franchisor to appoint new dealers, subject of course to the right of an existing dealer to show good cause for precluding such appointment if it is to be within 10 miles of the existing dealer. Thus, neither the reservation of the right to appoint new dealers, nor the proposed appointment [\*\*\*19] of a dealer over 15 miles from Watkins' dealership, is contrary to the public policy expressed in *sections 3060 and 3062*.

The trial court stated that it would alternatively find that the proposed appointment of a new dealer would constitute a modification of Watkins' [\*992] franchise by changing his A.O.R. A.O.R. stands for area of responsibility, and this concept may be briefly explained. Essentially, for internal planning purposes, BMW utilizes data from R. L. Polk, Inc., which in turn reports annual new car registrations by post office zip code. Among other things, this information enables BMW to determine whether it is achieving sufficient market penetration in any particular area. For example, BMW regards its competition as including Porsche-Audi, Mercedes Benz, and Volvo. During 1981, in the district of which Watkins is a part, BMW maintained a 13.1 percent share of this combined market. In contrast, in the Thousand Oaks-Westlake area BMW obtained only 8.6 percent of that market. This indicated that in the Thousand Oaks-Westlake area BMW was doing very poorly against its competition and this was one of the reasons BMW determined to appoint a dealer in that area.

[\*\*\*20] Another purpose for which the Polk data may be used is the estimation of required service and parts facilities. From this data BMW derives a figure known as the U.I.O., an abbreviation of units in operation. The U.I.O. figure is derived from a study of past registration figures together with projected sales levels. The number of units in operation in proximity to a dealer's location is one of the factors which BMW considers in determining the levels of service and parts facilities a dealer should maintain to provide adequately for the demand for services and parts. It is not, however, the only factor considered.

As we have noted, BMW utilizes the A.O.R. concept for some internal planning purposes. Under this concept every geographic area denominated by a zip code is

assigned to an A.O.R. for an existing dealer. The total group of zip code areas assigned to a particular dealer is that dealer's A.O.R. By design, these areas of responsibility throughout the United States are contiguous. For this reason the size of a particular A.O.R. is dependent upon the distance between BMW dealers. Where the distances between dealers are vast, the A.O.R.'s involved are correspondingly vast; [\*\*\*21] where the distances between dealers are small, the A.O.R.'s are also small. Since all geographic areas in the country are included within some A.O.R., it follows that the appointment of a new dealer will necessarily alter the A.O.R.'s of the nearest dealers. Indeed, BMW concedes that the A.O.R. for the new Thousand Oaks-Westlake dealer will include areas which were previously within the A.O.R.'s of Watkins in Camarillo and Bob Smith in Canoga Park.

The Board and the trial court erred in concluding that a change in Watkins' A.O.R. constituted a modification of his franchise agreement. The A.O.R. concept, as we have explained, is an entirely internal planning [\*993] mechanism utilized by BMW, and is only one of many such mechanisms. BMW is free to use whatever planning mechanisms it desires in determining how to market its products. But these internal considerations are not relevant and are not admissible to establish a meaning of a written contract where the written contract is not reasonably susceptible of the meaning urged. (See *Blumenfeld v. R. H. Macy & Co. (1979) 92 Cal.App.3d 38, 44-45 [154 Cal.Rptr. 652]*.) Watkins' franchise agreement does not refer at all [\*\*\*22] to an A.O.R. or to U.I.O.'s. The agreement does not suggest that Watkins' right to market BMW products is to be in any manner exclusive in any geographical area. In fact it states just the opposite, namely that it is not exclusive and that BMW reserves the right to appoint other dealers whether in Watkins' geographic area or not. The decision of the Board disregarded the terms of Watkins' franchise agreement and imposed contractual obligations upon BMW to which it had never consented and which no interpretation of the contract could support. In short, the fact that BMW utilizes the A.O.R. concept for internal planning purposes does not give Watkins any exclusive right within his A.O.R.

From this discussion it is apparent that in precluding BMW from appointing a dealer in the Thousand Oaks-Westlake area the Board acted in excess of its jurisdiction. The Legislature has acted to regulate the

162 Cal. App. 3d 980, \*993; 209 Cal. Rptr. 50, \*\*51;  
1984 Cal. App. LEXIS 2843, \*\*\*22

relationship between franchisors and franchisees in the automobile industry, but has done so in a limited manner pursuant to clearly articulated and specifically expressed principles. Those principles provide that a franchisor may be required to continue unmodified an existing franchise agreement, [\*\*\*23] or may be precluded from establishing or relocating a dealer within 10 miles of an existing dealer. Beyond those two qualifications (and others not relevant here) the Board has been given no power to regulate the relationship between franchisors and franchisees, and with those exceptions the rule is still unfettered competition and freedom of contract. In precluding BMW from establishing the Thousand Oaks-Westlake dealer the Board disregarded rather than enforced the franchise contract between Watkins and BMW, and gave Watkins something that neither his contract nor the act gave him, namely, an exclusive trading territory far in excess of his relevant market area.

In sum, by the nature of BMW's internal planning formula, the creation of any new dealership would necessarily change the A.O.R. of some existing dealer and hence also the units in operation in his zone. If Watkins' position were sustained, BMW could never create a new dealership without establishing good cause before the Board. The result would be that existing BMW dealers, like Watkins, in contravention of the express terms of their franchises, would be accorded a perpetual territorial monopoly. The short [\*994] [\*\*\*24] answer is that the appointment of a new dealer does not change a single provision of Watkins' franchise and consequently cannot constitute a modification. The power of the Board arises under the statute only when franchisor improperly "[terminates] or [refuses] to continue any existing franchise" or impermissibly

"[modifies] or [replaces] a franchise with a succeeding franchise." (§ 3060.) None of the statutory predicates occurred here. Instead, in violation of the parol evidence rule, Watkins and the Board would rewrite the franchise to read that BMW reserves the right to create other dealers in the present dealer's geographic area, "provided that the new dealership does not change the area of responsibility or units in operation." Having rewritten the agreement, the Board then finds that BMW modified the recast franchise without good cause. Because there was no competent evidentiary basis for that finding and because the Board has no general power over franchises absent statutory enablement, the Board exceeded its jurisdiction. (6) It is fundamental that an administrative agency has only such power as has been conferred upon it by the constitution or by statute and an act [\*\*\*25] in excess of the power conferred upon the agency is void. (See *Ferdig v. State Personnel Bd.* (1969) 71 Cal.2d 96, 103-104 [77 Cal.Rptr. 224, 453 P.2d 728]; *California State Restaurant Assn. v. Whitlow* (1976) 58 Cal.App.3d 340, 346-347 [129 Cal.Rptr. 824].) A writ of administrative mandate will lie to correct acts in excess of jurisdiction. (*Code Civ. Proc.*, § 1094.5, subd. (b).) (5b) Accordingly, the trial court erred in denying the petition of BMW for a writ of mandate.

The judgment of the trial court is reversed and the cause is remanded to the trial court with directions to issue a peremptory writ of mandate directing the respondent New Motor Vehicle Board to vacate its decision granting the protest of Hal Watkins Chevrolet, Inc. doing business as Hal Watkins BMW, and to issue a new decision denying said protest.

# **EXHIBIT C**



**TRUST COMPANY FOR USL, INC., Plaintiff-Counterclaim Defendant-Appellee, v.  
WIEN AIR ALASKA, INC., Defendant-Counterclaimant-Appellant.**

No. 96-15222

**UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

*1997 U.S. App. LEXIS 11958*

**March 12, 1997 \*\***, Submitted, San Francisco, California

\*\* The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a); 9th Cir. R. 34-4.

**May 20, 1997, FILED**

**NOTICE:** [\*1] RULES OF THE NINTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

**PRIOR HISTORY:** Appeal from the United States District Court for the Northern District of California. D.C. No. CV-94-00506-MHP. Marilyn Hall Patel, District Judge, Presiding.

**DISPOSITION:** Decision of the district court **AFFIRMED** in all respects, except **VACATED** the grant of attorneys' fees to USL and **REMANDED** the issue to the district court for determination.

**COUNSEL:** For TRUST COMPANY FOR USL, INC., Plaintiff-counter-claim-defendant - Appellee: Robert J. Stumpf, Esq., Steven H. Winick, BRONSON, BRONSON & McKINNON, San Francisco, CA.

For WIEN AIR ALASKA, INC, Defendant-counter-claimant - Appellant: Thomas A. Trapani, Esq., Michael J. Reiser, Esq., RANKIN, SPROAT & POLLACK, Oakland, CA.

**JUDGES:** Before: CHOY, BRUNETTI, and FERNANDEZ, Circuit Judges.

**OPINION**

**MEMORANDUM \***

\* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by *Ninth Circuit Rule 36-3*.

[\*2] Defendant-counterclaimant-appellant Wien Air Alaska, Inc. ("Wien") appeals the grant of summary judgment in favor of plaintiff-counterclaim defendant-appellee Trust Company for USL, Inc. ("USL"). Wien claims that the district court erred in holding that USL justifiably terminated the contract for the sale of an aircraft to Wien. Wien also contends that the district court erred in holding that USL was entitled to liquidated damages and attorneys' fees. We affirm the decision of the district court in all respects, except we vacate the grant of attorneys' fees to USL and remand that issue to the district court.

**Analysis**

I. USL's demand for assurances

The *California Commercial Code* § 2609(1) provides that, should "reasonable grounds for insecurity arise" regarding the performance of one party to a contract, the other party may "demand adequate assurance of due performance." Until such assurance is received, the party making the demand "may if commercially reasonable suspend any performance." *Id.* The questions of whether grounds for insecurity are "reasonable," and whether or not an assurance of performance is "adequate," are determined under "commercial standards." *Id.* [\*3] at (2). A party's failure to provide adequate assurances within a reasonable time (not to exceed thirty days) after receiving a justified demand is a repudiation of the contract. *Id.* at (4).

The parties debate whether the issue of reasonableness is appropriate for a summary judgment determination. The district court found that "while . . . what constitutes adequate grounds for insecurity is often a factual question, conduct may be sufficiently extreme as to be capable of decision as a matter of law." We agree.<sup>1</sup>

1 Interestingly, one of the cases cited by Wien in support of its claim that reasonableness in this instance must be a question of fact actually supports USL's assertion that such claims may, on occasion, be decided as a matter of law. The court in *BAll Banking Corp.* recognized that "there are circumstances, however, where this issue may be resolved as a matter of law." *BAll Banking Corp. v. UPG, Inc.*, 985 F.2d 685, 702 (2d Cir. 1993).

#### A. Expert testimony

Wien is correct in its argument [\*4] that expert testimony may be sufficient to successfully oppose a motion for summary judgment, provided that the expert is competent and the basis for his or her expertise is stated in the affidavit. *Rebel Oil Co. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1435 (9th Cir. 1995). However, in order to defeat summary judgment, the inferences drawn from the expert's affidavit must fulfill the standard in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-52, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986) of being sufficient to sustain a favorable jury verdict. *Id.*

Given the facts in this case, the testimony of Doust, Wien's expert, is insufficient to create a question of fact for the jury on the reasonableness issue. The comments after *Cal. Com. Code* § 2609 state that "repeated

delinquencies must be viewed as cumulative." Uniform Commercial Code Comment 4, foll. *Cal. Com. Code* § 2609.<sup>2</sup> USL has presented evidence to the effect that Wien received extensions on the closing date not contemplated in the original sale agreement at least three times (to April 1, 1991; May 1, 1991; and September 1, 1991), was late making deposits on at least 2 occasions, and had a deposit check returned [\*5] by the bank due to insufficient funds. Taken cumulatively, these events are enough to create concern on the part of USL about the closing of the sale. For Wien to prevail on the reasonableness issue, its evidence (Doust's testimony) would have to be enough to convince a reasonable jury that USL did not have reasonable grounds for insecurity. In the face of the undisputed facts of this case, we hold that Doust's testimony is not sufficient to sustain a favorable jury verdict, and that therefore Wien has not established that there is a triable issue of fact as to the reasonableness of USL's insecurity.

2 While the comments refer to the Uniform Commercial Code, California has adopted the UCC provisions verbatim, so the comments remain relevant.

#### B. New circumstances arising to justify demand for assurances

Even if Wien is correct in its assertion that a new contract was formed on August 7, the Uniform Commercial Code Comment 3 following *Cal. Com. Code* § 2609 specifically provides that the grounds for insecurity [\*6] "need not arise from or be directly related to the contract in question."<sup>3</sup> Additionally, the Comment states that "repeated delinquencies must be viewed as cumulative." *Id.* at Comment 4. Therefore, even if what Wien claims were true (*i.e.*, that the August 7 modification constituted an entirely new contract), it does not follow that the grounds for USL's insecurity can only be based upon events that occurred after August 7 and that were connected with that new contract.

3 The Comment even refers to a situation similar to scenario Wien presents: "[A] buyer who falls behind in 'his account' with the seller, even though the items involved have to do with separate and legally distinct contracts, impairs the seller's expectation of due performance." *Id.*

Moreover, even if Wien were correct in its claim that a new event must have occurred after August 7 sufficient

to justify USL's insecurity, Wien's actions following the August 7 contract modification were sufficient to give rise to insecurity on the [\*7] part of USL. After August 7, Wien did not notify USL of its intent to close by August 20, as USL had requested. After USL wrote to Wien and asked it to notify USL by August 23 as to the closing date, Wien failed to make such notification. Instead, Wien promised to respond to USL on August 26, because Wien would have needed financial information at that time. Wien did not reply to USL on August 26. These facts could have caused reasonable insecurity on the part of USL.

#### C. USL's right to terminate the contract

Under *Cal. Com. Code § 2609(4)*, if a party to a contract making a justified demand for assurances does not receive those assurances "within a reasonable time not exceeding 30 days," the contract is repudiated. Upon repudiation of the contract, the nonrepudiating party is entitled to cancel the contract. *Cal. Com. Code § 2610, 2703*. Because Wien did not provide USL with assurances of any sort, and because Wien was given more than ample time to provide USL with a closing date for the sale, USL was justified in treating the contract as repudiated. It follows that USL was also justified in terminating the contract.

#### II. Tax opinion of Hawaiian counsel

Section 3.15 of the contract [\*8] provides that:

Buyer's obligations hereunder to purchase the Aircraft and assume the Seller's interest in the Lease Documents shall be subject to fulfillment of the following conditions precedent to the reasonable satisfaction of Buyer:

*3.15 Opinion of Hawaiian Counsel.*  
An opinion of counsel mutually acceptable to both Buyer and Seller that the agreed upon location of the Aircraft at the time of the Closing on the Closing Date will permit the transaction completed by this Agreement not to be subject to taxation by the State of Hawaii.

According to Section 1.4(k) of the contract, this opinion of counsel did not have to be provided until the closing of the sale:

*Seller's and USAI's Actions.* Subject to the terms and conditions hereof, *at the Closing* Seller and USAI shall take the following actions:

(k) *execute and deliver all other instruments, certificates and other documents, and take all other actions, as are required, in the reasonable opinion of Buyer, to be executed and delivered or taken by Seller and USAI on or before the date of the Closing in order to consummate the transactions contemplated hereby.*

(emphasis added). The Hawaiian [\*9] tax opinion is a document required to close; as such under Section 1.4(k) it is due at the closing. Because the sale never closed, USL was never obligated to deliver the opinion. USL's failure to deliver the opinion, then, did not discharge Wien's duty to perform under the contract. Mr. Doust's testimony to the effect that USL should have provided Wien with a copy of the letter as soon as USL received it is not enough to create a triable issue of fact on this point. Therefore, we affirm the district court's grant of summary judgment in favor of USL's declaratory relief claim on this issue.

#### III. Liquidated damages

The burden is on Wien to show that the liquidated damages clauses are invalid. *California Civ. Code § 1671* provides that liquidated damages clauses are valid "unless the party seeking to invalidate the provision establishes that the provision was unreasonable under the circumstances existing at the time the contract was made." The Law Revision Commission Comment following *Section 1671* lists the following factors to be taken into consideration when determining if a liquidated damages provision is unreasonably high or low: the relationship of the damages specified in [\*10] the contract to the harm that could reasonably be anticipated in the case of a breach; the equality of the bargaining

power between the parties; whether the parties were represented by counsel at the time of contracting; whether the parties anticipated that a determination of the actual damages under the contract would be difficult or expensive; the difficulty of establishing foreseeability and causation; and whether the contract that includes the provision is a form contract.

#### A. Differing damages as an indication of a penalty

Wien has not established that the contractual differentiation between the types of damages is unreasonable. In fact, the differentiation would tend to indicate the *reasonableness* of the section, by making the amount of damages contingent on the nature of the breach. *See, e.g., Smith v. Royal Mfg. Co., 185 Cal. App. 2d 315, 8 Cal. Rptr. 417 (Cal. Dist. Ct. App. 1960)* (holding that a liquidated damages clause that provided for the payment of the same amount of damages, regardless of whether the buyer defaulted after the purchase of one or one hundred of seller's products, was a penalty).

Wien relies once again on the testimony of Mr. Doust as support [\*11] for its premise that there is at least a triable issue of fact as to the reasonableness of the sections. Wien's evidence on this point is not the "significant probative evidence" required by *Anderson, 477 U.S. at 249*. Doust's testimony is not enough to raise a triable issue of fact regarding the liquidated damages clause.

#### B. Wien's lack of independent counsel

It is true that two of the factors to be considered when determining the reasonableness of the clauses are whether the parties were represented by counsel, and the relative equality of bargaining power of the parties. Law Revision Committee Comment foll. *Cal. Civ. Code § 1671*. However, Wien does not seem inexperienced in matters of aircraft purchasing. In December of 1990, Wien entered into another contract to purchase an aircraft for millions of dollars. This other contract also contained a liquidated damages clause. It is difficult to accept Wien's apparent claims of unsophistication and unequal bargaining power in this transaction when it appears that Wien has entered into this type of contract in the past.<sup>4</sup>

<sup>4</sup> A letter from USL noted that additional activity buying and selling aircraft on the part of Wien had been mentioned in two recent industry

publications.

[\*12] While the presence of independent counsel is certainly helpful and definitely advisable when entering into a contract of this magnitude, the lack thereof does not render provisions of the contract unreasonable. Wien has not introduced specific facts to show that any of the other Law Revision Commission factors would demonstrate the unreasonableness of the clauses. In fact, the plain language of the contract tends to indicate that the clauses were not unreasonable. The contract expressly states that the liquidated damages clauses have been deemed fair and equitable by counsel for the respective parties. The contract also expressly states that section 25.3 has been deemed the best approximation of the damages that USL might incur, and that what the exact amount of damages would be could not be accurately determined.

For the aforementioned reasons, we hold that Wien has not met its burden of presenting "significant probative evidence" that the liquidated damages provisions are unreasonable.

#### IV. Wien's conspiracy counterclaim

Under California law, to prove a civil conspiracy, Wien must show substantial evidence of three factors: "(1) the formation and operation of the conspiracy, [\*13] (2) wrongful conduct in furtherance of the conspiracy, and (3) damages arising from the wrongful conduct." *Kidron v. Movie Acquisition Corp., 40 Cal. App. 4th 1571, 47 Cal. Rptr. 2d 752, 757 (Cal. Ct. App. 1995)*.

There is no indication that USL was deliberately trying to conspire against Wien by concealing the commission agreement. Though unaware of the exact terms of the commission agreement, Wien knew of the existence of the commission agreement before Wien signed the sale agreement. Moreover, Wien approached USL and asked if they would be willing to consider altering the purchase price of the aircraft if Wien were able to get USL released from the commission agreement. Wien knew at that time that USL was going to pay Turner a \$ 250,000 commission based on the purchase price. Following a meeting wherein an agreement regarding the payment of Turner's commission was reached, Wien's president considered the matter of the commission agreement "resolved", and wrote that Wien "did not blame US Airlease for the situation [Wien] was put in by Jetlease."

There is also no indication that USL would have charged Wien a lower price for the aircraft were it not for USL's commission agreement [\*14] with Turner. In fact, Turner had presented Wien with a preliminary figure of \$ 6.15 million for the aircraft before Turner signed the commission agreement with Wien.

The district court concluded that "Wien cannot have been the unwitting victim of a conspiracy" because "Wien knew about the commission agreement between USL and Turner prior to entering into the Agreement with USL." Because Wien has not presented evidence that USL intentionally entered into a conspiracy for the purpose of injuring Wien that is sufficient to sustain a jury verdict, we affirm the decision of the district court on this issue. *See Kidron, 47 Cal. Rptr. 2d at 758.*

#### V. Attorneys' fees

In the instant case, the sale agreement contains an attorneys' fees provision. The relevant contract section reads as follows:

9.1 Buyer hereby indemnifies and holds Seller and USAI and each of them . . . harmless from and against any and all loss, cost, damage, injury or expense (including, without limitation, court costs and attorneys' fees) whatsoever and however arising (whether directly or indirectly) which Seller or USAI . . . may incur by reason of any liabilities, claims or causes of action which accrue or [\*15] arise under any of the Lease Documents or with respect to the Aircraft after the Closing Date . . . .

This contract provision is ambiguous. While very broad, this provision limits recovery to expenses incurred due to causes of action "which accrue or arise under any of the Lease Documents or with respect to the Aircraft *after the Closing Date*" (emphasis added). This sale was never closed, due to Wien's continuous delays and repeated defaults. It is unclear whether this clause conditions indemnification upon the closing of the sale, by stating that indemnification can only take place *after* the date on which the sale closes.<sup>5</sup>

5 The contract itself defines the Closing Date as "the Initial Closing Date, Initial Cutoff Date, Second Closing Date, Second Cutoff Date, Third Closing Date, Third Cutoff Date, Final Closing Date, Final Cutoff Date, or any earlier date as agreed upon in writing by the parties as the case may be." Section 1.3 of the sale agreement provides that "the closing (the "Closing") shall take place on the Closing Date at a time and place, mutually agreed upon by the parties . . . ."

[\*16] It appears from the record that the meaning of the indemnity provision was never argued before district court. We therefore reverse the district court's grant of attorneys' fees to USL, and remand the issue to the district court for a determination of the meaning of the contract provision.

#### Conclusion

We AFFIRM the decision of the district court in all respects, except we VACATE the grant of attorneys' fees to USL and REMAND the issue to the district court for determination.

Costs on this appeal are awarded to USL.

# **EXHIBIT D**



FOCUS - 44 of 72 DOCUMENTS

**PAUL GOODMAN et al., Plaintiffs and Appellants, v. CITIZENS LIFE AND CASUALTY INSURANCE CO., Defendant and Respondent**

Civ. No. 30080

Court of Appeal of California, Second Appellate District, Division Five

*253 Cal. App. 2d 807; 61 Cal. Rptr. 682; 1967 Cal. App. LEXIS 2408*

August 23, 1967

**SUBSEQUENT HISTORY:** [\*\*\*] A Petition for a Rehearing was Denied September 13, 1967, and Appellants' Petition for a Hearing by the Supreme Court was Denied October 19, 1967.

**PRIOR HISTORY:** APPEAL from a judgment of the Superior Court of Los Angeles County and from an order compelling plaintiffs to pay defendant's expenses. A. A. Scott, Judge.

Action for declaratory relief and for damages for claimed breach of contract resulting from alleged wrongful termination by defendant of an agency contract.

**DISPOSITION:** Judgment affirmed; order reversed. Judgment for defendant affirmed.

**HEADNOTES**

**CALIFORNIA OFFICIAL REPORTS HEADNOTES**

**(1) Appeal--Review--Questions of Law and Fact.** --On appeal the task of the court is not to determine whether the trial court could have reached a conclusion other than that which it did on the basis of evidence submitted to it, but rather to ascertain whether any substantial evidence exists in the record to support the conclusions of the trial court.

**(2) Contracts--Formal Requisites--Incomplete Instruments.** --Written documents themselves were substantial evidence that the documents embodied the material terms of the contract between the parties where the instruments were coherent, apparently integrated documents and did not purport to leave material terms for future negotiation.

**(3) Id.--Formal Requisites--Incomplete Instruments.** --The most certain criterion of the completeness of an individual writing will be found within the writing itself.

**(4) Id.--Actions--Findings.** --A finding by the trial court that the basic agreement between the parties was contained in a written contract with written modifications did not exclude the existence of minor oral modifications of the basic contract, and although there was some evidence that the parties did not follow in every respect the letter of the written agreements, that evidence did not compel the court to conclude that the departures had the effect of abrogating the written portions of the agreement.

**(5) Evidence--Extrinsic Evidence.** --The trial court did not err in excluding proffered evidence relating to an alleged oral agreement on the ground that the evidence was foreclosed by the parol evidence rule where the court found upon ample evidence that a written agreement embodied all the essential terms of the contract; and even if the writings had not fully incorporated all of the terms of the bargain and the contract was partially oral,

evidence of a claimed oral agreement contradicting the termination clause contained in that part of the agreement which was written, was likewise inadmissible.

**(6) Id.--Extrinsic Evidence--Contemporaneous Agreements.** --Where there has been a partial integration of an agreement, parol evidence is admissible to prove that part of the contract not reduced to writing but is not admissible to vary or contradict that part which is.

**(7) Novation--Mode of--Substitution of New Obligation.** --The trial court did not err in excluding evidence of a subsequent oral agreement offered on the theory that it tended to prove a discharge of a prior contract between the parties and a substitution of a new oral agreement, where no evidence was introduced tending to prove that the parties prior to or at the time of the alleged oral agreement intended to extinguish their prior obligation and to substitute a new oral contract in its stead, and there was no evidence that either of the parties intended to abandon the prior contract between them.

**(8) Id.--Requisites Generally.** --Novation is the substitution of a new obligation between the same parties, with intent to extinguish the old obligation (*Civ. Code, § 1531*), and the intention of the parties to extinguish the prior obligation and to substitute a new agreement in its place must clearly appear.

**(9) Id.--Pleading: Burden of Proof.** --Novation must be pleaded either expressly or by unequivocal implication, and the burden of proof is on the party asserting its existence.

**(10) Id.--Intent to Extinguish Old Obligation.** --The question whether a novation has taken place is always one of intention with the controlling factor being the intent of the obligee to effect a release of the original obligor on his obligation under the original agreement.

**(11) Id.--Intent to Extinguish Old Obligation.** --The parties to a written contract could not be said to have abandoned the contract and substituted therefor an oral agreement, where the sole alteration sought by plaintiffs in the prior written contract related to a change in the termination clause, the effect of which would have been to create an agreement consisting of a termination clause without any underlying contract.

**(12) Evidence--Extrinsic Evidence--Subsequent**

**Agreement--Validity.** --No prejudice resulted to plaintiffs from exclusion of evidence attempting to establish the modification of a prior written agreement between plaintiffs and defendant, where the evidence was insufficient to establish modification of the written agreement by an executed oral agreement, and the oral agreement which plaintiffs tried to prove was not supported by any consideration or any substitute therefor and was incapable of unilateral execution.

**(13) Contracts--Modification--Oral Modification of Contract in Writing.** --To come within the provisions of *Civ. Code, § 1698*, permitting modification of a contract in writing by an executed oral agreement, the plaintiffs' evidence must be sufficient to establish all the elements of a contract and a contract which is capable of execution, at least unilaterally.

**(14) Id.--Modification--Oral Modification of Contract in Writing.** --A written contract for continuing services between plaintiffs and defendant under which the reciprocal obligations of the parties were continuing was not in its nature susceptible of complete execution before the contract was terminated, and an asserted oral modification thereof was likewise incapable of execution on either side where it necessarily embodied continuing performance.

**(15) Estoppel--Necessity for Plaintiff to Plead Estoppel: Admissibility of Evidence.** --Plaintiffs were not entitled to introduce evidence on the theory of estoppel where estoppel was not pleaded.

**(16) Contracts--Interpretation--Duration.** --Neither party to a written contract for continuing services could complain about which was responsible for the ultimate termination where the court correctly found that the contract was by its terms terminable at will on the giving of appropriate notice, and the parties agreed that the contract was at an end, and each party had effectively waived failure to give the required notice of termination.

**(17) Depositions--Construction of Statutes.** --The good cause required by *Code Civ. Proc., § 2019, subd. (b)(1)*, relating to orders protecting a defendant from annoyance, embarrassment, or oppression in connection with depositions on oral examination, calls for a factual exposition of a reasonable ground for the order sought.

**(18) Id.--Compliance With Statute.** --Although the trial court obviously had some discretion in determining what

constitutes annoyance, embarrassment, or oppression under *Code Civ. Proc.*, § 2019, *subd. (b)(1)*, relating to depositions upon oral examination, the granting of an order imposing expenses on the plaintiffs in the absence of any facts tending to prove annoyance, embarrassment, or oppression was an abuse of its discretion, where the declaration filed in support of the motion set forth no facts whatsoever in support of the motion, and where the sole statement therein remotely relevant was the expression of the conclusion that it would be "necessary" for defense counsel to travel to the place where the deposition was to be taken.

**COUNSEL:** Hillel Chodos for Plaintiffs and Appellants.

Parker, Stanbury, McGee, Peckham & Garrett and James A. Irwin for Defendant and Respondent.

**JUDGES:** Hufstedler, J. Kaus, P. J., and Stephens, J., concurred.

**OPINION BY:** HUFSTEDLER

#### OPINION

[\*810] [\*\*684] Plaintiffs appeal from a judgment denying them recovery on their complaint for declaratory relief and for damages for claimed breach of contract resulting from alleged wrongful termination by defendant of an agency contract.

The trial court found that a written agreement dated September 6, 1962, and the written addenda thereto "constituted the agreement between the parties in all basic, essential [\*\*\*2] and material respects." The court further found the defendant did not terminate or attempt to terminate the agency contract and that the plaintiffs were not entitled to any damages for claimed breach of contract.

Plaintiffs contend that (1) the evidence was insufficient to [\*811] sustain the court's findings; (2) the court prejudicially erred in excluding evidence of a claimed oral agreement that plaintiffs' agency would not be terminable except for good cause; (3) the court erred in requiring plaintiffs to pay traveling expenses of defendant's counsel in connection with the taking of a deposition in Kansas City.

#### *Summary of the Evidence*

Plaintiffs are both licensed insurance agents and brokers, who have been engaged since 1953 in the business of selling various kinds of insurance and some types of securities. Before 1960 they wrote occasional policies for defendant, but they did not have a contract with defendant. In 1960 plaintiffs executed a general agency contract with defendant, in which plaintiffs agreed to sell defendant's insurance policies to the general public either personally or through their sub-agents. The relationship under the 1960 contract continued until [\*\*\*3] September of 1962. In the summer of 1962 defendant's administrative vice-president, [\*\*685] Crim, proposed to the plaintiffs that plaintiffs should undertake work for defendant as "area supervisors" on a commission basis. Crim proposed that plaintiffs concentrate on soliciting persons to become general agents for the company rather than upon the direct sale of policies to the public, for which plaintiffs would be compensated by overriding commissions in a then unspecified amount on any business produced by general agents appointed by the plaintiffs. Plaintiffs would advance and bear all expenses incurred by them in building up the agency business. Plaintiffs accepted defendant's proposal. Shortly thereafter defendant submitted to plaintiffs a written agreement and an addendum dated September 6, 1962, which was executed not later than the end of September 1962 by both plaintiffs and the defendant. The September agreement appointed plaintiffs as defendant's general agent for the purpose of soliciting insurance applications and recruiting agents to solicit insurance business for the defendant. The agreement, together with the addendum, provided a commission schedule, including [\*\*\*4] specifically a schedule of overriding commissions. The agreement contained a detailed termination clause providing in part, "This Agreement may be terminated with or without cause by either the Company or the General Agent upon thirty days' written notice to the other party." The September 6 agreement was modified from time to time in writing, the latest modification of which was dated April 15, 1964. In [\*812] each addendum there was a provision that the addendum formed a part of the agreement of September 6, 1962, and was subject to all the provisions of that agreement.

Pursuant to the agreement the plaintiffs began building a substantial organization and recruited agents for the defendant. In October or early November of 1962 plaintiff Goodman had a conversation with another

insurance man, who told him that he had built a substantial agency for another insurance company and then had been fired suddenly for no particular reason. Goodman knew that the agreement he had signed was terminable with or without cause on 30 days' written notice. He realized that defendant could terminate the agency contract after the organization had been built up and that if defendant terminated [\*\*\*5] the contract, he and plaintiff Inglott would lose the profits which would otherwise flow to them from the agency.

Plaintiffs succeeded in building a substantial organization to their own profit and to that of the defendant. The relationship was a harmonious one until June of 1964. One of the general agents appointed by plaintiffs was the Delger Corporation, a large securities dealer, with headquarters in Ogden, Utah. Delger for some time produced a substantial quantity of business for both plaintiffs and defendant. However, in May of 1964 Delger ceased placing its business with defendant for the announced reason that Delger disapproved of certain activities on the part of plaintiff Goodman. In early June of 1964 the president of defendant, McClure, found out that Delger refused to do business with defendant as long as Goodman was in any way connected with the Delger account. McClure got in touch with Goodman and asked him to release the Delger account. Goodman told him that before he agreed to release the Delger account, he wanted to talk to the head of Delger to see if he could get the matter straightened out. McClure told him that the arrangement would be satisfactory and [\*\*\*6] that if Goodman could rejuvenate the account, more power to him. By June 15, 1964, Goodman had not contacted Delger and had made no effort to get the account back into production. On the latter date McClure called Goodman and told him that Mr. Goff, the head of Delger, was coming in to see him the following day and he would like to have plaintiffs' decision about relinquishing the Delger account by the time McClure talked to Goff. Plaintiff Goodman did not then give McClure any specific answer to McClure's request, but on June 16, 1964, in a meeting between plaintiffs and [\*813] McClure, plaintiffs told McClure that they [\*\*686] would not aid defendant in redeveloping the business with Delger by releasing that account, unless some appropriate commission arrangement could be made with reference to other business to compensate them for the loss of overriding commissions on Delger's production. Efforts to negotiate their differences deteriorated during the conversation. Plaintiffs told McClure that they were

going to quit and told him that they would take \$ 250,000 in settlement at that time, but that the price would be higher later on. McClure's reception to the proposition [\*\*\*7] was unenthusiastic. McClure told them either that they were terminated or would receive written notice of termination in the next morning's mail, or that he would probably have to send them a cancellation notice of their contract to resolve all the questions.

The morning after the conference, not having received any termination letter, plaintiffs sent McClure a telegram noting that no notice of termination had been received and inquiring about defendant's intentions. During the next two weeks plaintiffs and defendant exchanged correspondence. None of the letters contained a specific notice of termination. The conduct of the parties at the time can be described as an effort on both sides to jockey the other party into giving a termination notice. The efforts were unavailing: No notice of termination was ever sent.

The stalemate was broken by the plaintiffs' filing, on July 7, 1964, their complaint for declaratory relief and breach of contract. Both parties now agree that each has waived any right to insist upon receipt of 30 days' written notice as a condition precedent to contract termination.

#### *Sufficiency of the Evidence*

Plaintiffs' contention that the evidence was insufficient [\*\*\*8] to support the trial court's finding that the September 6 agreement, together with its addenda, constituted the basic agreement between the parties is not sustained by the record. Plaintiffs argue variously that the September 6 agreement and its addenda constituted no more than evidentiary memoranda affirming the existence of an oral agreement which does not purport to embody all the terms of the preexisting oral agreement and that the same documents are a part of a contract which was partly written and partly oral. On the basis of either one or both of these constructions of the documents, plaintiffs urge that the evidence showed without conflict that [\*814] the written agreement did not embody the true contract between the parties.

(1) On appeal, of course, the task of the court is not to determine whether the trial court could have reached a conclusion other than that which it did on the basis on evidence submitted to it, but rather to ascertain whether any substantial evidence exists in the record to support the conclusions of the trial court. (2) The written

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documents themselves are substantial evidence that the documents embody the material terms of the contract between the [\*\*\*9] parties. The instruments are coherent, apparently integrated documents. They do not purport to leave material terms for future negotiation. (3) "Obviously, the most certain criterion of the completeness of an individual writing will be found within the writing itself." (*Merkeley v. Fisk* (1919) 179 Cal. 748, 754 [178 P. 945].) Plaintiffs offer no real explanation of what function these documents served other than to frame the foundation of their contractual relationship with one another. Plaintiffs pleaded that the agreement of September 6 "did not accurately reflect the true terms and provisions of the contract between the parties, or the true nature of their relationship, but was intended to serve merely as a written memorandum of the fact that an agreement had been made between the parties." Plaintiffs neither pleaded nor proved what the "true agreement" was if it were not embodied principally in the written memoranda. Plaintiffs further pleaded that their "agreement was partly written and partly oral, and was subsequently modified from time to time by the parties, both orally and in writing." (4) The court [\*\*687] found that the basic agreement was contained in the written [\*\*\*10] contract with written modifications; the finding did not exclude the existence of minor oral modifications of the basic contract. Although there was some evidence that the parties did not follow in every respect the letter of the written agreements, that evidence did not compel the court to conclude that the departures had the effect of abrogating the written portions of the agreement. <sup>1</sup> At the most the evidence was relevant to construe portions of the agreement which were not in dispute.

1 The writings contained a provision that failure to insist upon compliance with all the terms of the agreement shall not constitute waiver thereof.

#### *Excluded Evidence*

Plaintiffs are fully aware that they cannot prevail unless they can find a supportable way to eliminate the critical [\*815] clause from the September 6 agreement permitting termination with or without cause by either party upon giving 30 days' written notice. To accomplish the excision the plaintiffs offered and attempted to offer evidence of a subsequent [\*\*\*11] oral agreement which on a variety of theories, they urge, effected an alteration of the critical termination clause. The plaintiffs thus

contend that: (1) the September 6 contract was abandoned and discharged and the parties entered into a new contract providing for termination only for good cause; (2) the termination clause was excised by an executed oral agreement substituting termination for cause in the place of termination at will upon giving written notice; and (3) the defendant was estopped to deny the oral modification of the written contract.

The focal point of the plaintiffs' attack upon the judgment is the claimed exclusion of evidence offered by the plaintiffs, characterized by the plaintiffs as follows: Plaintiffs "went to Citizens to complain about the at-will termination provision of their contract; . . . they had discussions with Crim on this matter; . . . they told Crim they could not continue and would not continue to expend their time, effort and money in building an agency organization for Citizens, unless they had some agreement -- confirmed in writing -- that their contract of agency would be non-terminable as long as they performed their obligations, nor except [\*\*\*12] for good cause; . . . Crim agreed with their contentions, and . . . after consultation with McClure, entered into an oral agreement with them that their contract of agency would continue in effect so long as they performed their obligations, and . . . it would not be terminated except for cause; and . . . he [Crim] confirmed that oral agreement by letter dated November 14, 1962."

(5) The trial court excluded part of the proffered evidence relating to the alleged oral agreement on the ground that the evidence was foreclosed by the parol evidence rule. The trial court found upon ample evidence that the written agreement embodied all essential terms of the contract. Even if the writings had not fully incorporated all of the terms of the bargain and the contract was therefore partially oral, the court did not err in excluding the proffered evidence because the claimed oral agreement contradicted the termination clause contained in that part of the agreement which was written. (6) "Where there has been a partial integration, parol evidence is admissible to prove that part of the contract not reduced to writing but is not admissible to vary or contradict [\*816] that part which is. ([\*\*\*13] *Hulse v. Juillard Fancy Foods Co.*, 61 Cal.2d 571 [39 Cal.Rptr. 529, 394 P.2d 65]; *Sivers v. Sivers*, 97 Cal. 518, 521 [32 P. 571]; *Pierce v. Edwards*, 150 Cal. 650, 654 [89 P. 600]; *Keeler v. Murphy*, 117 Cal.App. 386, 390-391 [3 P.2d 950]; Rest., Contracts, § 239, p. 335; Wigmore, § 2430; Witkin, Cal. Evidence, § 361, p. 402;

253 Cal. App. 2d 807, \*816; 61 Cal. Rptr. 682, \*\*687;  
1967 Cal. App. LEXIS 2408, \*\*\*13

18 Cal.Jur.2d, Evidence, § 258, p. 741.) *Wigmore*, in his discussion of this rule, states: "[Obviously] the rule against disputing the terms of the document will be applicable to *so much of the transaction* [\*\*688] *as is so embodied, but not to the remainder.*" ( *Schwartz v. Shapiro*, 229 Cal.App.2d 238, at p. 250 [40 Cal.Rptr. 189].)

(7) Plaintiffs urge that the trial court erred in excluding evidence of the subsequent oral agreement because it tended to prove an oral agreement which discharged the prior contract between the parties and substituted the new oral agreement. This contention appears to be a theory developed for the first time on appeal. Even if we could overlook the delay in asserting the theory, it does not avail plaintiffs because there was no evidence introduced tending to prove that [\*\*\*14] the parties prior to or at the time of the alleged oral agreement intended to extinguish their prior obligation and to substitute a new oral contract in its stead, and there was no evidence that either of the parties intended to abandon the prior contract between them. In order to sustain their contentions, the plaintiffs must show that the oral agreement constituted a novation. (8) Novation in this setting is "the substitution of a new obligation between the same parties, with intent to extinguish the old obligation." ( *Civ. Code*, § 1531.) The intention of the parties to extinguish the prior obligation and to substitute a new agreement in its place must clearly appear. ( *Ayoob v. Ayoob* (1946) 74 Cal.App.2d 236, 250 [168 P.2d 462]; 1 Witkin, Summary of Cal. Law (7th ed. 1960) § 315, p. 340.) (9) "Novation must be pleaded either expressly or 'by unequivocal implication,' and the burden of proof is 'upon the party asserting its existence.' . . . (10) The 'question whether a novation has taken place is always one of intention' ( *Producer Fruit Co. v. Goddard*, 75 Cal.App. 737, 755 [243 P. 686]), with the controlling factor being the intent of the obligee to effect a release of [\*\*\*15] the original obligor on his obligation under the original agreement. ( *Ayoob v. Ayoob*, 74 Cal.App.2d 236, 251 [168 P.2d 462].)" *Alexander v. Angel* (1951) 37 Cal.2d 856, 860 [236 P.2d 561]. (11) According to plaintiffs' testimony the sole alteration which the plaintiffs [\*817] sought in their existing contract related to a change in the termination clause. Had the parties abandoned the prior contract and substituted the claimed oral agreement, the sole agreement would have consisted of a termination clause without any underlying contract.

Plaintiffs' primary argument to sustain the admissibility of the excluded evidence was that the evidence if received would have established an executed oral agreement modifying the termination clause.

(12) Assuming, *arguendo*, that the evidence was admissible to attempt to prove plaintiffs' modification theory, no prejudice resulted to the plaintiffs by the exclusion of the evidence. Even if we assume that the rejected evidence was susceptible of the interpretation which the plaintiffs have put upon it, the evidence was insufficient to establish modification of a written agreement by an executed oral agreement. The oral agreement [\*\*\*16] which the plaintiffs attempted to prove was not supported by any consideration or any substitute for consideration and it was incapable of unilateral execution.

(13) *Section 1698 of the Civil Code* provides: "A contract in writing may be altered by a contract in writing, or by an executed oral agreement, and not otherwise." To come within the provision permitting modification by an executed oral agreement the plaintiffs' evidence must be sufficient to establish all the elements of a contract and a contract which is capable of execution, at least unilaterally. At the time the alleged conversations took place the plaintiffs were under a legal obligation to perform services for the defendant, which obligation would continue until such time as either the plaintiffs or the defendant gave 30 days' notice in writing to terminate the contract. There is in the evidence offered and rejected no proof that the plaintiffs suffered the slightest legal detriment or that the defendant obtained any benefit to which it was not already entitled under the existing contract. Plaintiffs simply indicated their refusal to perform their existing obligations unless their demands [\*\*689] were met. They did [\*\*\*17] not purport to give up their own rights to terminate the contract upon written notice. They offered the defendant nothing to which the defendant was not already entitled. There was therefore no consideration for the agreement. Furthermore there was no substitute for consideration. There was no existing dispute between the parties or any other ground which could be urged to support the bargain. *D. L. Godbey & Sons Constr. Co. v. Deane* (1952) 39 Cal.2d 429 [246 P.2d 946], [\*818] does not help the plaintiffs. In *Godbey* the oral modification was made before performance was started, and there was a substitution of new rights and duties for the old. These factors are completely absent in the case at bench.

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1967 Cal. App. LEXIS 2408, \*\*\*17

(14) Even if the plaintiffs could overcome the consideration hurdle, the contract for continuing services is not in its nature susceptible of complete execution before the contract is terminated. At the time the claimed oral agreement was entered, the performances to be rendered both by the plaintiffs and the defendant were continuing. Because the reciprocal obligations of the parties were continuing, performance on neither side can be considered executed. The [\*\*\*18] oral modification is likewise incapable of execution on either side because it necessarily embodies continuing performance. (*Klein Norton Co. v. Cohen* (1930) 107 Cal.App. 325, 330-331 [290 P. 613].)

(15) The evidence was not admissible on the theory of estoppel. Estoppel was not pleaded. (E.g., see *Judelson v. American Metal Bearing Co.* (1948) 89 Cal.App.2d 256, 266 [200 P.2d 836]; *Fleishbein v. Western Auto Supply Agency* (1937) 19 Cal.App.2d 424, 427 [65 P.2d 928].)

Plaintiffs correctly state that the exclusion of the claimed oral agreement "struck at the very heart of [plaintiffs'] case." Unfortunately for the plaintiffs it was a heart that never beat. Even if the evidence had been received, it was insufficient to support any of the theories plaintiffs propounded to erase the termination clause. (16) The trial court correctly found that the contract was terminable at will upon the giving of appropriate notice. Since we agree with the trial court's finding that the contract was thus terminable, it is unnecessary for us to decide whether the evidence adequately supports the trial court's further finding that defendant did not terminate the contract. Both [\*\*\*19] parties agree that the contract was at an end at the time of trial and that each party had effectively waived the failure to give the required written notice. Since either party could terminate with or without cause, neither can now complain about which one was responsible for the ultimate termination.

#### *Error in Ordering Payment of Expenses*

On August 7, 1964, plaintiffs noticed the deposition of Crim to be held in Kansas City, Missouri, on August 18, 1964. On August 12, 1964, the defendant noticed a motion to compel plaintiffs to pay defense counsel's travel expenses to attend the deposition of Crim. The motion was supported solely by a declaration of a member of the firm representing defendant, [\*819] stating that it would be "necessary for him to travel from Los Angeles, California, to Kansas City, Missouri, to

represent the defendant at the taking of said deposition" and stating on information and belief the anticipated expenses for the trip. The sole authority cited in support of the motion was *section 2019, subdivision (b) (1) of the Code of Civil Procedure*. Over the plaintiffs' opposition the motion was granted by a judge other than the one who tried the case on [\*\*\*20] the merits, and plaintiffs were ordered to pay \$ 200 for such expenses.

*Section 2019, subdivision (b) (1) of the Code of Civil Procedure* provides that upon notice and for good cause shown the court may make certain protective orders with respect to the taking of depositions and that "the court may make any other order which justice requires to protect the party or witness from annoyance, embarrassment, or oppression. In granting or refusing such order the court may impose upon either [\*\*690] party . . . the requirement to pay such costs and expenses, including attorney's fees, as the court may deem reasonable." Under *section 2019, subdivision (a) (1) of the same code*, in the absence of a protective order, a party may depose any person as a matter of right. (*Carlson v. Superior Court* (1961) 56 Cal.2d 431, 437-438 [15 Cal.Rptr. 132, 364 P.2d 308]; *Beverly Hills Nat. Bank & Trust Co. v. Superior Court* (1961) 195 Cal.App.2d 861, 868-869 [16 Cal.Rptr. 236].)

Defendant argues that the trial court properly issued the order requiring payment of expenses within the authority granted to the court by *section 2019, subdivision (b) (1) of the Code of Civil Procedure*. [\*\*\*21] The unspoken premise of the argument is that the defendant's motion for payment of expenses can be properly construed as an order protecting the defendant from "annoyance, embarrassment, or oppression." Although the premise is dubious, we assume *arguendo* that the motion was susceptible of the construction thus placed upon it by the defendant. (17) The further requirement of the section upon which defendant relies, however, is that there shall be "good cause shown" for the issuance of the order. "The concept of good cause . . . calls for a factual exposition of a reasonable ground for the sought order." (*Waters v. Superior Court* (1962) 58 Cal.2d 885, 893 [27 Cal.Rptr. 153, 377 P.2d 265]; *Carlson v. Superior Court, supra*, 56 Cal.2d 431, 440.) (18) The declaration filed in support of the motion sets forth no facts whatsoever in support of the motion. The sole statement in the declaration which is remotely [\*820] relevant is the expression of the conclusion that it would be "necessary" for defense counsel to travel to

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Kansas City. The statements in the declaration relating to anticipated expenses are made on information and belief. Statements in a declaration on [\*\*\*22] information and belief are of no evidentiary value. (*Tracy v. Tracy* (1963) 213 Cal.App.2d 359, 362 [28 Cal.Rptr. 815].)

Although the trial court obviously had some discretion in determining what constitutes annoyance, embarrassment, or oppression, the granting of an order

imposing expenses upon the plaintiffs in the absence of any facts tending to prove annoyance, embarrassment, or oppression was an abuse of its discretion.

The order compelling plaintiffs to pay \$ 200 expenses to the defendant is reversed. In all other respects the judgment is affirmed. Defendant shall recover its costs on appeal.

# **EXHIBIT E**



**HARTFORD FINANCIAL CORPORATION, Plaintiff, Cross-defendant and  
Respondent, v. JEAN S. BURNS, as Executor, etc., et al., Defendants,  
Cross-complainants and Appellants**

Civ. No. 55337

Court of Appeal of California, Second Appellate District, Division Four

*96 Cal. App. 3d 591; 158 Cal. Rptr. 169; 1979 Cal. App. LEXIS 2097; 27 U.C.C. Rep.  
Serv. (Callaghan) 843*

August 31, 1979

**PRIOR HISTORY:** [\*\*\*1] Superior Court of Los Angeles County, No. C 64149, Stephen R. Stothers, Judge.

**DISPOSITION:** The judgment is affirmed.

**SUMMARY:**

**CALIFORNIA OFFICIAL REPORTS SUMMARY**

The trial court gave judgment in favor of the plaintiffs on their complaint for conversion and awarded them damages in the amount of \$ 41,500. The record indicated plaintiffs had a security interest in various equipment owned by a trucking company. The trucking company defaulted in payment of their obligations to plaintiffs who sought to obtain possession of the personal property that was subject to the security agreements. All of the property subject to the security agreements was kept by the trucking company at commercial premises owned by defendants and leased to the trucking company. When plaintiffs attempted to take possession of the trucking equipment, defendants were exercising dominion and control over the property and refused to permit plaintiffs to take the property until rent due defendant from the now bankrupt trucking company had been paid by plaintiff. (Superior Court of Los Angeles County, No. C 64149, Stephen R. Stothers, Judge.)

The Court of Appeal affirmed. The court held that there was sufficient evidence to establish a sufficient interest in the personal property by plaintiff to give it a right of action against defendants for conversion of the property. The court also held there was sufficient evidence to support the trial court's finding that acts of defendants amounted to a conversion of the personal property involved. The court further held that defendants did not constitute an involuntary bailee of personal property entitling them to collect rent from plaintiffs before acceding to plaintiffs' demand for the property. Finally, the court held that a plaintiff, although owning but a limited or qualified interest in the property, may, as against a stranger who has no ownership therein, recover the full value of the property converted, and thus the trial court properly refused to limit plaintiffs' recovery to the unpaid principal balance due on the trucking company's indebtedness to plaintiff. (Opinion by Jefferson (Bernard), J., with Kingsley, Acting P. J., and Alarcon, J., concurring.)

**HEADNOTES**

**CALIFORNIA OFFICIAL REPORTS HEADNOTES**  
Classified to California Digest of Official Reports, 3d Series

(1a) (1b) Conversion §  
4--Actions--Evidence--Sufficiency to Establish

**Plaintiff's Right to Possession of Personal Property.**

--In an action for conversion, there was sufficient evidence to establish that plaintiff had a sufficient right to possession of the personal property to recover in conversion. The evidence established that plaintiff owned a security interest in equipment owned by a trucking company, and that the trucking company defaulted on payments to him. The trucking company kept its equipment on premises owned by defendant and leased to the trucking company. The trucking company failed to pay the rent due defendant who then took control and dominion over the premises and all of the personal property contained on it. On two separate occasions a representative of the plaintiff asked defendant to unlock the building where the personal property was physically located so that plaintiff could take possession, but defendant refused to relinquish possession until the rent due from the trucking company had been paid by plaintiff.

**(2) Conversion § 2--Acts Constituting--Act of Wrongful Dominion Over Personal Property.**

--The tort of conversion is any act of dominion wrongfully exerted over another's personal property in denial of or inconsistent with his rights therein. It is not necessary that there be a manual taking of the property. It is only necessary to show an assumption of control or ownership over the property, or that the alleged converter had applied the property to his own use.

**(3) Conversion § 2--Acts Constituting--Elements.**

--The elements of a conversion cause of action consist of plaintiff's ownership or right to possession of the property at the time of the conversion, defendant's conversion by a wrongful act or disposition of plaintiff's property rights, and damages. Legal title to property is not a requisite to maintain an action for damages in conversion. To mandate a conversion action, it is not essential that plaintiff shall be the absolute owner of the property converted but he must show that he was entitled to immediate possession at the time of conversion.

**(4) Conversion § 4--Actions--Security Interest in Motor Vehicle.** --*Veh. Code, §§ 6301, 6302 and 6303*, dealing with the perfection of a security interest in motor vehicles, do not govern the question of whether a person who has a security interest in a motor vehicle may bring an action for damages for conversion against the one who has no interest, security or otherwise, in such a motor vehicle.

**(5) Secured Transactions § 43--Chattel Mortgages--Conversion--Possessory Right of Plaintiff.**

--Plaintiffs in a conversion action, as secured parties, although not owners, have a special interest with a right of possession only if a default in the security agreement allows them to take possession of the property.

**(6) Secured Transactions § 10--Default and Enforcement of Security Interest--Use of Force or Threats of Force.**

--The right to immediate possession of property by a secured party on default must be effectuated through judicial action rather than self-help if force or threats of force are necessary to secure possession of the collateral without judicial intervention.

**(7) Conversion § 4--Actions--Acts Constituting--Sufficiency of Evidence.**

--In an action for conversion, there was sufficient evidence to support the trial court's finding that acts of defendants amounted to a conversion of the personal property involved. The record indicated plaintiffs had a security interest in equipment owned by a trucking company which eventually defaulted on payments to them. The equipment was located on premises owned by defendant and leased to the trucking company. The trucking company defaulted on its rent to defendant who then took dominion and control over the premises and the trucking equipment. Subsequently, defendant twice refused plaintiffs' demands for surrender of such property by asserting to plaintiff's representatives that surrender would be made only when the back rent owed by the trucking company to defendant was paid by plaintiff.

**(8) Conversion § 2--Acts Constituting--Failure to Deliver Goods on Real Property.**

--The liability of one in possession of real property for the conversion of personal property which he finds upon it, depends, in most cases, upon a determination of whether the conduct of the defendant indicates an assumption of control or ownership over the goods. Under some circumstances, refusal of one in possession of real property to permit, upon demand, the owner of chattels which were left there to remove his goods, constitutes conversion. However, not every failure to deliver goods to the owner constitutes a conversion. To establish a conversion, it is incumbent upon the plaintiff to show an intention or purpose to convert the goods and to exercise ownership over them, or to prevent the owner from taking possession of his property.

**(9a) (9b) Conversion § 3--Defenses--Involuntary**

**Bailee.** --The fact that a trucking company which originally owned secured personal property failed to pay rent to the lessors of the premises on which it stored the property did not place the lessors in the position of an involuntary bailee of the property, and, as such, lessors were not entitled to collect back rent from the secured party before acceding to its demand for the property upon the trucking company's default of payments to the secured party.

**(10) Landlord and Tenant § 179--Unlawful Detainer--Tenant's Personal Property--Payment of Reasonable Storage Charges.** --Where one performs for another, with the other's knowledge, a useful service of a character usually charged for, and the latter expresses no dissent, or avails himself of the service, a promise to pay the reasonable value of the services is implied. This principle has been applied when an owner of the property, entitled to possession of the premises, has advised the tenant or occupant that if he did not remove his property it would be placed in storage at his expense. In such a case where the tenant or occupant chooses to allow it to be stored in a warehouse there is an implied agreement on his part to pay the reasonable storage charges.

**(11) Conversion § 7--Damages--Full Value of Property Converted.** --In an action for damages for conversion, it is the rule that the plaintiff, although owning but a limited or qualified interest in the property may, as against a stranger who has no ownership interest in it, recover the full value of the property converted. The rationale of this rule is that the owner of the limited interest will be liable to the owner of the remaining interest for any amount the former received in the conversion action that exceeds the amount of his action or indebtedness. Thus, in an action for conversion of trucking equipment in which plaintiff had a security interest against the owner and lessor of property on which the trucking company stored the trucking equipment in question, the trial court properly refused to admit evidence as to the unpaid principal balance on the trucking company's indebtedness to plaintiff.

**(12) Conversion § 7--Damages--Mitigation.** --In an action for conversion of trucking equipment, the fact that plaintiff delayed four and one-half months from the date of the conversion of the property until it filed its action for conversion did not constitute a showing of a failure on plaintiff's part to mitigate damages, and thus the trial

court did not err in failing to take this fact into consideration in calculating the amount of damages owed by defendant. Although it is the burden of anyone having a claim against another to do everything reasonably proper to mitigate damages, this principle cannot be successfully invoked to require a plaintiff to file an immediate action to recover possession of property which has been converted by defendant rather than filing a conversion action for damages at a time deemed appropriate by plaintiff.

**COUNSEL:** Smith & Hilbig, Milan D. Smith, Jr., and R. Scott Robinson for Defendants, Cross-complainants and Appellants.

Kranitz, Sarrow & Imerman, Jerome H. Sarrow and James B. Eglin for Plaintiff, Cross-defendant and Respondent.

**JUDGES:** Opinion by Jefferson (Bernard), J., with Kingsley, Acting P. J., and Alarcon, J., concurring.

**OPINION BY: JEFFERSON**

#### OPINION

[\*595] [\*\*170] Defendants appeal from a money judgment rendered against them in an action for conversion of personal property. The defendants originally named in plaintiff's complaint were J. S. Enterprises, Inc., a corporation, and S. H. Burns. The latter defendant died prior to trial and, substituted in his place was Jean S. Burns and [\*596] Ralph L. Bernstein, the executors of the will of S. H. Burns, whose true name was Sol H. Burns. Defendants filed an answer to plaintiff's complaint and also a cross-complaint in which defendants sought damages against plaintiff. Trial was by the court without a jury. The court executed findings of fact and conclusions of law and gave judgment against defendants on their [\*\*\*2] cross-complaint and judgment on the complaint in favor of plaintiffs and against defendants in the amount of \$ 41,500, with interest from March 23, 1973.

#### I

##### *The Factual Background*

Plaintiff was engaged in the commercial finance business and dealt primarily in [\*\*171] loans to businesses, secured by encumbrances primarily on heavy

equipment such as trucks. In the year 1972, plaintiff entered into a security agreement with Marler Trucking, wherein plaintiff was granted a security interest in certain personal property belonging to Marler Trucking as security for loans and advances made by plaintiff to Marler Trucking. Plaintiff entered into a similar written security agreement with Kenneth Dunaway and Kathleen Dunaway.

Also in the year 1972, Socal White Trucks, Inc., a corporation, entered into a written security agreement with Kenneth Dunaway and Roy Weber which granted a security interest in certain personal property owned by Dunaway and Weber as security for loans and advances made by Socal White Trucks. By virtue of assignments, plaintiff succeeded to the security interests of Socal White Trucks. All of the personal property which was subject to these security agreements [\*\*\*3] was kept by Marler Trucking at commercial premises located at 920 Engracia Avenue, in Torrance. Defendants were the owner of these premises and Marler Trucking was a lessee of defendants.

During February of 1973, the debtors under the security agreements defaulted in the payment of their obligations to plaintiff. On March 21, 1973, plaintiff sought to obtain, from the premises occupied by Marler Trucking, possession of the personal property that was subject to the security agreements. These items of personal property consisted of the following vehicles and other personal property: one 1969 Mack, model RL758LT3824, No. Y40024; one 1969 White, Freightliner, No. STP4624; one 1965 White, Freightliner, No. ALI4849; one 1958 White, Tractor, No. 3379; one 1959 Strick 40' Van, I.D. #36217; one 1959 Strick 40' Van, I.D. [\*597] #36213; one 1956 Utility 40' Van, I.D. #27187; one 1967 White, Freightliner, Tractor Engine #NTC335, S/N #CA210ZL0-31135; miscellaneous personal property.

On March 21, 1973, and on March 23, 1973, defendants were exercising dominion and control of these items of personal property and, on the latter date, refused to permit plaintiff to take possession of these [\*\*\*4] items of personal property. As a result, the trial court found that defendants had committed the tort of conversion, entitling plaintiff to a judgment for damages in the amount of the value of this personal property on the conversion date of March 23, 1973.

## II

### *Summary of Defendant's Contentions*

Defendants advance the following contentions as grounds for reversal of the judgment: (1) plaintiff did not have a sufficient right to possession of the personal property to recover in conversion; (2) the evidence is insufficient to support the court's finding that any acts of defendants amounted to a conversion of the personal property involved; (3) the evidence does not support the court's finding as to the amount of damages suffered by plaintiff.

## III

### *The Plaintiff's Right to Possession of the Personal Property*

(1a) It is the position of defendants that plaintiffs did not establish a sufficient interest in the personal property involved on March 23, 1973, to give plaintiff a right of action against defendants for conversion of this personal property.

The evidence establishes that Marler Trucking failed to pay the rent due to defendants on the premises in Torrance for February and [\*\*\*5] March of 1973 and abandoned the premises in early March of that year. On March 12, 1973, the Internal Revenue Service seized the personal property of Marler Trucking and took control of all personal property on the premises. On March 21, 1973, the Internal Revenue Service made a determination that Marler Trucking had no saleable interest in the personal property that had been seized and released the seizure. On the [\*598] same date of March 21, 1973, defendants S. H. Burns and J. S. Enterprises, Inc., took control and dominion over the premises and all of the personal property contained thereon.

[\*\*172] On March 21, 1973, a representative of plaintiff asked defendant S. H. Burns to unlock the building where the personal property involved in this litigation was physically located so that plaintiff could obtain possession of the property. Burns refused to grant the request and advised the plaintiff's representative that the personal property would not be released until the rent due from Marler Trucking had been paid. On March 23, 1973, a different representative of plaintiff went to the premises in Torrance and sought to obtain possession of the property on behalf of [\*\*\*6] plaintiff. Defendant S. H. Burns again refused to allow plaintiff's representative access to the property and advised him that the property

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would not be released to plaintiff until the accrued rent due from Marler Trucking had been paid to defendants.

(2) The tort of "conversion" has been defined as follows: "Conversion is any act of dominion wrongfully exerted over another's personal property in denial of or inconsistent with his rights therein. It is not necessary that there be a manual taking of the property; it is only necessary to show an assumption of control or ownership over the property, or that the alleged converter has applied the property to his own use." (*Igaune v. Howard* (1952) 114 Cal.App.2d 122, 126 [249 P.2d 558].) (3) Similarly, we find this description of the elements of a cause of action for conversion of personal property: "The elements of a conversion cause of action are (1) plaintiffs' ownership or *right to possession of the property* at the time of the conversion; (2) defendants' conversion by a wrongful act or disposition of plaintiffs' property rights; and (3) damages." (*Baldwin v. Marina City Properties, Inc.* (1978) 79 Cal.App.3d 393, 410 [\*\*\*7] [145 Cal.Rptr. 406].) (Italics added.)

It is clear that legal title to property is not a requisite to maintain an action for damages in conversion. To mandate a conversion action "it is not essential that plaintiff shall be the absolute owner of the property converted but she must show that she was *entitled to immediate possession at the time of conversion.*" (*Bastanchury v. Times-Mirror Co.* (1945) 68 Cal.App.2d 217, 236 [156 P.2d 488].) (Italics in original.)

(4) Defendants argue that plaintiffs should have perfected their security interest in the motor vehicles through compliance with *sections* [\*599] 6301, 6302, and 6303 of the *Vehicle Code*.<sup>1</sup> But the provisions of the *Vehicle Code* dealing with perfection of security interest do not govern the question of whether a person who has a security interest in a motor vehicle may bring an action for damages for conversion against one who has no interest, security or otherwise, in such a motor vehicle.

<sup>1</sup> *Vehicle Code section 6301* provides in part as follows: "When the secured party, his successor or assignee, has deposited with the department a properly endorsed certificate of ownership showing the secured party as legal owner or an application in usual form for an original registration, together with an application for registration of the secured party as legal owner, the deposit constitutes perfection of the security interest and the rights of all persons in the vehicle

shall be subject to the provisions of the Uniform Commercial Code, . . ."

*Vehicle Code section 6302* provides: "Upon the deposit of an application for registration of a secured party as legal owner and upon the payment of the fees as provided in this code, the department shall register the secured party, his successor or assignee as legal owner in the manner provided for the registration of motor vehicles under the provisions of this chapter."

*Vehicle Code section 6303* provides: "Except as provided in Sections 5905, 5907 and 5908, the method provided in this chapter for perfecting a security interest on a vehicle registered under this code is exclusive, but the effect of such perfection, and the creation, attachment, priority and validity of such security interest shall be governed by the Uniform Commercial Code."

[\*\*\*8] For their view that plaintiff had an insufficient interest in the personal property involved herein to maintain an action for conversion, defendants also rely upon *section 9503 of the California Uniform Commercial Code*. *Section 9503* provides, in part pertinent to the issue before us, that "[unless] otherwise agreed, a secured party has on default the right to take possession of the collateral. In taking possession a secured party may proceed without judicial process [\*\*173] if this can be done without breach of the peace or may proceed by action."

(5) The decisional law has recognized that plaintiffs "as secured parties, although not owners, have a special interest with a right of possession only if there is a default and the security agreement allows plaintiffs to take possession." (*Baldwin, supra*, 79 Cal.App.3d 393, 410.) This principle was set forth specifically with respect to a motor vehicle in *Crosswhite v. American Insurance Co.* (1964) 61 Cal.2d 300, 302 [38 Cal.Rptr. 412, 392 P.2d 5], in which the court observed: "The truck was subject to a mortgage securing an obligation that was in default. The mortgage expressly granted the mortgagee the right to possession [\*\*\*9] after default, and under its terms the mortgagee could have repossessed the truck without legal process, at least if the repossession could have been accomplished peacefully."

[\*600] In the case at bench, the security agreements gave plaintiff the right to take possession of the trucks

upon default. Defendants argue that since, under *California Uniform Commercial Code section 9503*, a secured party may take possession of the collateral on default only if it can be done without a breach of the peace, plaintiff was not entitled to the immediate possession of the various trucks because they could not have been obtained without a breach of the peace occurring. That self-help by plaintiff would have produced a breach of the peace is apparent, since defendants refused plaintiff's request for possession on both March 21 and March 23, 1973.

To support this position, defendants also rely upon *Henderson v. Security Nat. Bank (1977) 72 Cal.App.3d 764 [140 Cal.Rptr. 388]*. In *Henderson*, the court held that a secured party who, by means of force, took possession of a motor vehicle upon default of the buyer, committed the tort of conversion and thus became responsible in damages [\*\*\*10] to the defaulting owner. This holding of *Henderson*, however, is no authority for defendants' position that a secured party cannot have the right to immediate possession of the collateral upon default if actual possession can be secured only through a breach of the peace.

*Henderson* did not constitute a holding that the secured party was *not* entitled to immediate possession of the hypothecated vehicle if such possession could not have been accomplished without the use of force or threats of force. (6) The only rule of law to be deduced from *Henderson* is simply that the right to immediate possession by a secured party upon default must be effectuated through judicial action rather than self-help if force or threats of force are necessary to secure possession of the collateral without judicial intervention. ""[If] the mortgagee finds that he cannot get possession without committing a breach of the peace, he must stay his hand, and resort to the law, for the preservation of the public peace is of more importance to society than the right of the owner of a chattel to get possession of it."" ( *Henderson, supra*, 72 Cal.App.3d 764, 770.)

(1b) We conclude, therefore, that [\*\*\*11] the evidence establishes that plaintiff had a right to immediate possession of the personal property involved in the case before us, and that such right of possession was sufficient to entitle plaintiff to maintain an action for damages against defendant for the tort of conversion.

[\*601] IV

(7) *Sufficiency of the Evidence to Support the Trial Court's Finding That Acts of Defendants Amounted to a Conversion of the Personal Property Involved*

Defendants advance the argument that the evidence was insufficient to support the court's finding that defendants had converted the personal property at issue. Defendants contend that (1) their actions can be characterized only as a threat to prevent access by plaintiff to the personal property involved and that such a threat does not amount to a conversion of the personal property; and (2) that defendants were entitled to "rent" as an involuntary bailee of the personal property and had a right to refuse to surrender the property to plaintiff until such "rent" had been paid.

[\*\*174] A. *Did Any Acts of Defendants Amount to a Conversion of the Personal Property Involved*

Although defendants assert that they exercised no dominion [\*\*\*12] or control over the personal property involved but merely made a threat to prevent access by plaintiffs to the property, the issue before us is whether the evidence was sufficient to support the trial court's findings that "[on] March 21, 1973, defendants, and each of them, had dominion and control over the aforesaid personal property described in Finding of Fact No. 11 hereinabove" and that "[on] March 23, 1973, defendants and each of them, wrongfully refused plaintiff's request to take possession of the personal property described in Finding of Fact No. 11, pursuant to its right to immediate possession thereof, and defendants, and each of them, thereby converted said personal property, and are therefore liable to plaintiff for damages."

Defendants assert that they never had possession of this property or exercised any dominion and control over it at the two times that plaintiff demanded possession. Defendants take the position that the property was in the possession of defendants' tenant -- Marler Trucking -- on these occasions. But the evidence presented was such that the trial court could reasonably conclude that Marler Trucking had abandoned the premises and the personal [\*\*\*13] property located thereon in early March 1973, which was prior to seizure of this personal property on the premises by the Internal Revenue Service on March 12, 1973. The evidence also establishes that, when the Internal Revenue Service released its dominion [\*602] and control over this personal property on March 21, 1973, it surrendered dominion and control over the property to defendants who, thereafter, exerted dominion

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and control by locking the doors to the area and building where the property was stored, by refusing plaintiff's demand for surrender of such property, and by asserting to plaintiff's representatives that surrender would be made only when the back rent owed by Marler Trucking to defendants was paid.

Defendants cite *Zaslow v. Kroenert* (1946) 29 Cal.2d 541 [176 P.2d 1], as supporting their position that no acts were committed by defendants with reference to this property which would amount to a conversion. But our reading of *Zaslow* does not support defendants' version of the *Zaslow* holding. The tortious act of conversion may be defined as follows: "Stated generally, 'conversion is any act of dominion wrongfully exerted over another's personal [\*\*\*14] property in denial of or inconsistent with his rights therein.' [Citations.]" ( *Zaslow, supra*, 29 Cal.2d 541, 549.) (8) The *Zaslow* court made the following observation, which is pertinent to this issue before us: "The liability of one in possession of real property for the conversion of personal property which he finds upon it, depends, in most cases, upon a determination of whether the conduct of the defendant indicates an assumption of control or ownership over the goods. It is clear that, under some circumstances, refusal of one in possession of real property to permit, upon demand, the owner of chattels which were left there to remove his goods, constitutes conversion." ( *Id.*, at pp. 549-550.)

It must be noted, however, that not every failure to deliver goods to the owner constitutes a conversion. "To establish a conversion, it is incumbent upon the plaintiff to show an intention or purpose to convert the goods and to exercise ownership over them, or to prevent the owner from taking possession of his property." ( *Id.*, at p. 550.) (Italics added.) In the case at bench, however, the evidence justifies the court's conclusion that defendants intended to and did exercise [\*\*\*15] ownership over the personal property herein involved in order to preclude the plaintiff from taking possession of it.

**B. (9a) Marler Trucking's Rent Indebtedness to Defendants as Justification for Defendants' Refusal to Surrender the Personal Property to Plaintiff**

Defendants assert that they constituted an involuntary bailee of the personal [\*\*175] property and, as such, were entitled to collect "rent" from [\*603] plaintiffs before acceding to plaintiff's demand for the property. Defendants rely upon *Gray v. Whitmore* (1971)

17 Cal.App.3d 1 [94 Cal.Rptr. 904], for this position. The *Gray* case dealt with *Code of Civil Procedure section 1174*, which authorizes a landlord to recover his reasonable costs of storage of a lessee's property when such landlord has been successful in obtaining restitution of his premises pursuant to an unlawful detainer action.

(10) "In this state it is an established principle that 'Where one performs for another, with the other's knowledge, a useful service of a character usually charged for, and the latter expresses no dissent, or avails himself of the service, a promise to pay the reasonable value of the services is implied.' [Citations.] [\*\*\*16] This principle has been applied when an owner of property, entitled to possession of the premises, has advised the tenant or occupant that if he did not remove his property it would be placed in storage at his expense. [Citations.] In such a case where the tenant or occupant chooses to allow it to be stored in a warehouse there is an implied agreement on his part to pay the reasonable storage charges." ( *Gray, supra*, 17 Cal.App.3d 1, 24-25.) (Italics in original.)

The *Gray* case offers no assistance to defendants' position. *Gray* points out that the provisions of *Code of Civil Procedure section 1174* do not permit a landlord to hold a tenant's goods as "ransom" for the payment of back rent under the guise of storage costs. It was emphasized "that the judgment for unpaid rent and the storage costs are separately incurred debts and that the liability for each arises under separate and different obligations." ( *Id.*, at p. 24.) (9b) Here we have a case in which defendants' refusal to surrender possession to plaintiff of personal property originally belonging to defendants' tenant, Marler Trucking, was based upon the fact that there was back rent owed to defendants by Marler [\*\*\*17] Trucking and that payment of this rent was a condition precedent to defendants' release of the property. This is not an assertion of any implied agreement for storage costs governed by the *Gray* case.

Defendants have cited no authority other than *Gray* for the proposition that defendants, as landlord of Marler Trucking, were entitled to retain possession of Marler Trucking's personal property, which was subject to a security interest in plaintiff, until the back rent was paid to defendants. The position of defendants is an untenable one and is unavailable for any valid attack upon the judgment below.

[\*604] V

*The Amount of Damages Awarded to Plaintiff*

Defendants attack the award of damages upon several grounds. The trial court determined plaintiff's damages as \$ 41,500 by first considering the value of the personal property on the date of the conversion as being in the sum of \$ 75,500. From this amount there was deducted the sum of \$ 28,000 as depreciation. The court then deducted the further sum of \$ 6,000, which constituted the amount received by plaintiff on the sale of the personal property after plaintiff had obtained possession months later.

In urging [\*\*\*18] that this calculation of damages was erroneous, defendants assert that (1) the trial court erred in refusing to admit evidence regarding the unpaid principal balance of Marler Trucking's indebtedness to plaintiff; and (2) the trial court failed to take into account plaintiff's responsibility to mitigate damages.

*A. The Trial Court's Refusal to Admit Evidence as to the Unpaid Principal Balance on Marler Trucking's Indebtedness to Plaintiff*

Defendants do not dispute the fact that the personal property involved had a reasonable market value of \$ 75,500 as of the date of the alleged conversion. (11) It is defendants' position, however, that plaintiff's right to recover the total value of the personal property converted is limited by the doctrine that, in an action of conversion, [\*\*176] one holding a security interest is limited to recovery of the remaining amount of indebtedness owed by the debtor on the property, in the event the total value of the property exceeds the amount of the indebtedness. On this theory, defendant contends that Marler Trucking's indebtedness to plaintiff at the time of the conversion was less than \$ 41,500. Hence, plaintiff would be entitled to recover [\*\*\*19] only this lesser sum.

No evidence was offered by plaintiff as to the remaining balance owed by Marler Trucking to it and the trial court refused to admit any evidence proffered by defendants to determine the amount of such indebtedness. The trial court sustained plaintiff's objection to defendants' proffered evidence on the ground that such evidence was irrelevant.

In *Bastanchury*, *supra*, 68 Cal.App.2d 217, 236, we find the statement that "[one] who holds property by virtue of a lien upon it may maintain [\*605] an action for conversion if the property was *wrongfully* disposed of

by the owner and without authority, in which case the measure of damages can be no greater than the *amount secured by the lien . . .*" (First italics in original; other italics added.) Similar to *Bastanchury is Service v. Trombetta* (1963) 212 Cal.App.2d 313, 316 [28 Cal.Rptr. 68], in which the court stated: "The measure of damages is the value of the property at the time and place of the conversion [citations], limited, however, in the case of the loss of a lien, to the amount of the lien together with an allowance for lost time and expense. ( *Civ. Code*, § 3338.)" 2 [\*\*\*20] Defendants argue that the principle set forth in *Bastanchury* -- which is also set forth in *Service* -- is authority for their position that the trial court erred in excluding evidence of the balance owed by Marler Trucking to plaintiff.

2 *Civil Code section 3338* provides: "One having a mere lien on personal property cannot recover greater damages for its conversion, from one having a right thereto superior to his, after his lien is discharged, than the amount secured by the lien, and the compensation allowed by *Section 3336* for loss of time and expenses."

*Civil Code section 3336* provides: "The detriment caused by the wrongful conversion of personal property is presumed to be: [para. ] First -- The value of the property at the time of the conversion, with the interest from that time, or, an amount sufficient to indemnify the party injured for the loss which is the natural, reasonable and proximate result of the wrongful act complained of and which a proper degree of prudence on his part would not have averted; and [para. ] Second -- A fair compensation for the time and money properly expended in pursuit of the property."

[\*\*\*21] It is to be noted that the rule as to measure of damages set forth in *Bastanchury* and *Service* relates to an action by a lien holder for conversion against the *owner* who was indebted to the lien holder. In the case at bench, however, we deal with an action by a lien holder against a nondebtor or stranger to the lien holder. In the latter situation, the measure of damages in an action for conversion is different from that set forth in *Bastanchury* and *Service*. In *Camp v. Ortega* (1962) 209 Cal.App.2d 275, 286 [25 Cal.Rptr. 837], the court aptly observed: "In an action for damages for conversion, it is the rule that the plaintiff, although owning but a limited or qualified interest in the property may, as *against a stranger* who

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has no ownership therein, recover the full value of the property converted." (Italics added.)

The rationale of the rule of damages set forth in *Camp*, which permits recovery of the full value of the property by a person having a limited interest in the property, is that the owner of the limited interest will be liable to the owner of the remaining interest for any amount the former received in the conversion action that exceeds [\*\*\*22] the amount of his claim or indebtedness. It was stated in *Goldberg v. List (1938) 11 Cal.2d 389, 393 [79 P.2d 1087, 116 A.L.R. 900]*: "Moreover, an analysis of the authorities [\*606] which support the rule that a recovery of the full value of the property converted may be had by a person having only a limited or qualified interest therein, indicates that the underlying reason and basis for such recovery is the fact that the party having the limited or qualified interest is liable over to the owner of the remaining interest, and in [\*\*177] order to be adequately compensated must receive sufficient compensation not only to compensate himself for his own loss but to satisfy the demands of such owner."

Defendants argue that the rule of law set forth in *Camp* should not be applied in the case at bench rather than the rule of *Bastanchury* because no possibility exists that if plaintiff's judgment for \$ 41,500 exceeds the amount owed by Marler Trucking to plaintiff, plaintiff will be required to pay any excess to Marler Trucking. Defendants point out that Marler Trucking was adjudicated a bankrupt. But the bankruptcy adjudication of the plaintiff's debtor cannot [\*\*\*23] affect the rule as to damages for conversion since the assets and rights of the debtor are transferred to the trustee in bankruptcy. Marler Trucking's right to any sum received by plaintiff from defendant in excess of Marler Trucking's indebtedness to plaintiff, passed to the trustee in bankruptcy who could assert a claim against plaintiff for such sum.

But whether the trustee in bankruptcy would actually seek recovery against plaintiff is an irrelevant consideration. Defendants are in no position to take advantage of the possibility that plaintiff may never be required to answer over to Marler Trucking's trustee in bankruptcy for any excess recovery over the amount of plaintiff's lien. Defendants here must be governed by the principle that "[the] plain answer to the problem posed is that the defendant is the wrongdoer and having brought

about the above situation should bear the resultant risks and disadvantages." (*Camp, supra, 209 Cal.App.2d 275, 289.*)

B. *No Showing of a Failure on Plaintiff's Part to Mitigate Damages*

(12) Defendants assert that plaintiff could have reasonably avoided some portion of the damages which resulted in this case before us. Defendants rely upon [\*\*\*24] that portion of *Civil Code section 3336* which provides that the damages for a wrongful conversion of personal property constitutes "an amount sufficient to indemnify the party injured for the loss which is the natural, reasonable and proximate result of the wrongful act complained of and *which a proper degree of prudence on his part would not have averted.*" (Italics added.) Defendants point out that between the [\*607] alleged date of conversion, March, 23, 1973, and September 1973, plaintiff did nothing other than to file the action against defendants for conversion. The conversion action was filed on August 8, 1973. Apparently, it is the position of defendants that, had plaintiff secured possession of the personal property earlier than September 1973, the property would not have suffered so much depreciation and could have been sold for more than \$ 6,000, the total price received by plaintiff from sales of the property made in September and October of 1973.

Defendants assert that when in March 1973, plaintiff failed to recover possession of the property from defendants by peaceable means, plaintiff had a duty to resort immediately to available legal remedies to prove their [\*\*\*25] right to recover possession of the property instead of simply delaying and instituting the action for damages for conversion. Defendants argue that this is the net effect of the holding in *Henderson*, which declared that a lien holder who resorts to force to secure possession of property which is subject to the lien commits an act of conversion.

But it is a wholly unwarranted and untenable interpretation of *Henderson* to conclude that *Civil Code section 3336* or *California Uniform Commercial Code section 9503* requires a lien holder to institute an immediate action to recover possession of property when a defendant fails to recognize a lien holder's demand for such property or, otherwise, incur the risk that such failure would be deemed a failure to mitigate damages under *Civil Code section 3336*. Defendants allude to no

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decisional law support for such a suggested rule of law with respect to the duty to mitigate damages. Although "it is the burden of anyone having a claim against another to do everything reasonably proper to mitigate damages" (*Service, supra, 212 Cal.App.2d 313, 320*), [\*\*178] this principle cannot be successfully invoked to require a

plaintiff to file [\*\*\*26] an immediate action to recover possession of property which has been converted by defendant rather than filing a conversion action for damages at a time deemed appropriate by plaintiff.

The judgment is affirmed.