

1 NEW MOTOR VEHICLE BOARD
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CERTIFIED MAIL

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8 STATE OF CALIFORNIA
9 NEW MOTOR VEHICLE BOARD

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11 In the Matter of the Protest of)
12 DUARTE & WITTING INC., dba)
13 NADER CHRYSLER-PLYMOUTH,)
14 Protestant,)
15 vs.)
16 DAIMLERCHRYSLER MOTORS)
17 CORPORATION,)
18 Respondent.)

Protest No. PR-1750-00

**RULING ON MOTION
TO DISMISS**

19
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PROCEDURAL BACKGROUND

1. Respondent's Motion to Dismiss Protest came on regularly for telephonic hearing on March 23, 2001, before J. Keith McKeag, Administrative Law Judge. Protestant was represented by Richard M. Mendelsohn, and Respondent was represented by Gwen J. Young. All briefs and authorities submitted by the parties having been reviewed prior to the hearing, arguments were made by counsel, and the matter was submitted for hearing.

2. Administrative Law Judge J. Keith McKeag prepared a proposed ruling which would have resulted in a dismissal of the protest with prejudice for lack of jurisdiction.

3. The Public members of the New Motor Vehicle Board ("Board") considered the Proposed Ruling on April 27, 2001. Upon careful consideration of the motion and briefs, the Public members of the Board rejected the Proposed Ruling, dismissed the protest without prejudice, and directed staff to prepare a written document embodying the Board's ruling.

THE PARTIES

4. Respondent is a manufacturer of several line-makes of new

1 motor vehicles, including Chrysler, Plymouth, Dodge, and Jeep.

2 5. Protestant is a new motor vehicle dealer, with franchises from
3 Respondent authorizing it to sell and service Chrysler and Plymouth
4 vehicles.

5 NATURE OF THE DISPUTE

6 6. In the Fall of 1999, Respondent announced that it would
7 discontinue its manufacture and sale of the Plymouth line-make in late
8 2001, with the end of the 2001 model year production. On
9 September 19, 2000, it gave formal written notice to Protestant that it
10 was discontinuing the Plymouth brand and that it was terminating all
11 existing Plymouth Sales and Service Agreements effective
12 September 30, 2001.

13 7. Protestant filed a timely protest pursuant to Vehicle Code
14 Sections¹ 3060 and 3061, requesting: "That the Board sustain this
15 protest and order Respondent not to terminate Protestant's franchise, or
16 to replace it with an equally valuable franchise."

17 8. Respondent filed this Motion to Dismiss Protest, asserting
18 that the Board has no jurisdiction over a franchise termination caused
19 by a manufacturer's discontinuance of an entire line-make of vehicles,
20 or, in the alternative, that such discontinuance would constitute "good
21 cause" for termination as a matter of law.

22 9. Protestant opposes the Motion, asserting that Section 3060
23 applies on its face to the termination of "any existing franchise." It
24 also asserts that when it complained to Respondent about the
25 discontinuance of Plymouth, it was told that it would be given a Jeep
26 franchise. But, it alleges, when two neighboring Jeep dealers filed

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28 ¹ All statutory references are to the California Vehicle Code,
unless noted otherwise.

1 protests to this planned establishment of a new Jeep franchise within
2 their relevant market areas, pursuant to Section 3062, Respondent
3 refused to pursue the matters before the Board, and told Protestant that
4 it would have to make peace with the two protesting Jeep dealers before
5 it would issue a Jeep franchise to Protestant. This action, Protestant
6 asserts, should authorize the Board, in this proceeding, to order
7 Respondent to issue a Jeep franchise to Protestant. Protestant also
8 argues that since some of the existing Plymouth models may be re-labeled
9 as Chryslers, or Dodges, or Jeeps, that the Plymouth line is not really
10 going out of existence and this should result in Protestant being
11 awarded those other lines, or such of them as it desires to have.

12 ANALYSIS

13 10. Section 3060 provides that "no franchisor shall terminate or
14 refuse to continue any existing franchise" unless proper statutory
15 notice is given, the franchisee waives its right to protest, or, if the
16 franchisee files a timely protest, the Board finds there is good cause
17 for termination or refusal to continue.

18 11. In the instant case, Respondent provided the statutorily
19 required notice to Protestant and the Board that it was discontinuing
20 the Plymouth brand. Protestant timely filed a protest with the Board
21 contesting Respondent's intended action, i.e., termination of its
22 Plymouth franchise. The Board clearly has subject matter jurisdiction
23 over this protest.

24 12. Section 3061 sets out the matters which the Board must
25 consider in making its determination of whether "good cause" exists to
26 permit a franchise termination. In most, if not all protests, it is the
27 dealer's failure to adequately perform its obligations to the
28 manufacturer or the public which must be examined in order to determine

1 whether the dealer's franchise should be allowed to remain in effect or
2 be terminated. Ordinarily, the question for the Board is whether the
3 dealer should be allowed to continue doing business in the face of a
4 desire by the manufacturer to terminate the relationship.

5 13. While sections 3060 and 3061 authorize the Board to order a
6 manufacturer to continue doing business with a dealer so long as the
7 manufacturer continues in business, it is impossible under these
8 circumstances for the Board to order a manufacturer to continue
9 manufacturing an entire line-make of automobiles so that they can be
10 available to the Protestant as the only remaining Plymouth dealer in the
11 United States. There is nothing in the statutory framework of the Board
12 which shows an intention to grant the Board the power to order a
13 manufacturer to remain in business or to continue manufacturing a
14 particular line-make, even assuming that a state legislature would have
15 the power to grant such authority to a state administrative agency.

16 14. This same lack of remedy applies to the Protestant's request
17 that the Board order Respondent to issue Protestant another franchise
18 for another line-make, i.e., Jeep. The two adjoining Jeep dealers who
19 filed protests against the establishment of just such a dealership are
20 not parties to this proceeding, and their rights may not be adversely
21 affected by a ruling in this action. Neither is a Section 3060
22 proceeding one in which anything other than approval or disapproval of a
23 termination can be granted. While Section 3067 authorizes the Board to
24 "conditionally sustain" or "conditionally overrule" a protest, it
25 requires that any such conditions "...shall be for the purpose of
26 assuring performance of binding contractual agreements between the
27 franchisees and franchisors or otherwise serving the purposes of this
28 article." It could not serve the purposes of the very statutory article

1 which authorizes neighboring dealers to protest the establishment of a
2 new franchisee, to allow the conditional order in a termination
3 proceeding brought under another statute in the same article to be used
4 to circumvent that right to protest. Thus, this proceeding cannot be
5 used to condition the termination of a franchise for one line-make upon
6 the issuance of a franchise for another line-make. There is a statutory
7 procedure under Section 3062 for the establishment of a new line-make,
8 and that is the procedure which must be followed, not a conditional
9 decision under Section 3060.

10 15. To the extent that Protestant alleges that it suffered severe
11 damage because Respondent allowed it to perform extensive remodeling on
12 the dealership even though it knew it would soon discontinue the
13 Plymouth line, the Board is also without statutory authority to award
14 damages (*Hardin Oldsmobile v. New Motor Vehicle Board* (1997) 52
15 Cal.App.4th 585, 594-595), even assuming a Section 3060 proceeding was a
16 proper proceeding within which to consider those allegations.

17 16. It must be noted that, just because the Board does not have
18 the statutory authority to grant the relief requested by Protestant, it
19 does not mean that Protestant is without a forum which may afford
20 relief. If, as Protestant asserts, it had a contract with Respondent
21 for the settlement of the termination dispute which Respondent has
22 breached, it may not be able to obtain specific performance due to the
23 rights of the neighboring dealers, but it could have a viable claim for
24 damages which could be pursued in Court. Similarly, if it can show
25 Respondent breached a duty to advise it of the impending discontinuance
26 of the Plymouth line and stood by while it spent money improving the
27 Plymouth facility, it has a viable damage claim which can be pursued in
28 Court.

1 17. Protestant's final argument is that since some of the vehicles
2 now manufactured and sold as Plymouth vehicles may be renamed as
3 Chrysler, or Dodge, or Jeep vehicles, this should somehow entitle
4 Protestant to receive franchises for those line-makes. Again, this
5 proceeding cannot be used to circumvent the rights of other Chrysler,
6 Dodge or Jeep dealers who may have statutory rights to protest the
7 establishment of such new franchised dealerships, nor is a Section 3060
8 proceeding the proper statutory vehicle to be used to seek such relief.
9 There is no contention by Protestant that the Plymouth line-make will
10 not cease to exist.

11 18. In sum, even though the Board has subject matter jurisdiction
12 over the protest, it has no authority to grant any remedy requested in
13 the protest which would provide relief to the Protestant, since it has
14 no power to order the manufacturer to remain in business or to continue
15 manufacturing any particular line-make, nor can it order the issuance of
16 a new franchise in violation of the rights of third-parties, nor does it
17 have the power to award damages.

18 RULING

19 Respondent's Motion to Dismiss Protest is granted. The Protest is
20 hereby dismissed without prejudice because it is possible for Protestant
21 to file a protest containing a request for relief within the Board's
22 jurisdiction.

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24 DATED: May 16, 2001

NEW MOTOR VEHICLE BOARD

25 By Tom Flesch *RF*
26 ROBERT T. (TOM) FLESH
Board President

27 Steven Gourley, Director, DMV
28 Terry Thurlow, Acting Chief,
Occupational Licensing Branch, DMV