

NEW MOTOR VEHICLE BOARD
1507 - 21st Street, Suite 330
Sacramento, California 95814
Telephone: (916) 445-2080

STATE OF CALIFORNIA

NEW MOTOR VEHICLE BOARD

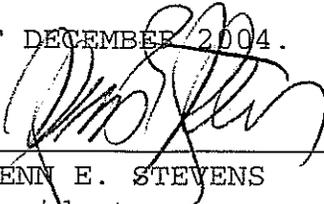
In the Matter of the Protest of)
NADER EGHTESAD, NADER CHRYSLER,) Protest No. PR-1928-04
Protestant,)
v.)
DAIMLERCHRYSLER,)
Respondent.)

DECISION

At its regularly scheduled meeting of December 16, 2004, the Public members of the Board met and considered the administrative record and Proposed Ruling Granting Respondent's Motion to Dismiss or Reject Protest in the above-entitled matter. After such consideration, the Board adopted the Proposed Ruling as its final Decision in this matter.

This Decision shall become effective forthwith.

IT IS SO ORDERED THIS 16th DAY OF DECEMBER 2004.



GLENN E. STEVENS
President
New Motor Vehicle Board

1 NEW MOTOR VEHICLE BOARD
1507 - 21ST Street, Suite 330
2 Sacramento, California 95814
Telephone: (916) 445-2080

CERTIFIED MAIL

3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

STATE OF CALIFORNIA
NEW MOTOR VEHICLE BOARD

In the Matter of the Protest of)
NADER EGHTESAD, NADER CHRYSLER,)
Protestant,)
v.)
DAIMLERCHRYSLER,)
Respondent.)

Protest No. PR-1928-04
PROPOSED RULING GRANTING
RESPONDENT'S MOTION TO
DISMISS OR REJECT PROTEST

To: Richard J. Mendelsohn, Esq.
Attorney for Protestant
MENDELSON & MENDELSON
317 Capitol Street
Salinas, California 93901

Robert E. Davies, Esq.
Attorney for Respondent
CAULFIELD, DAVIS & DONAHUE
80 Iron Point Circle, Suite 105
Folsom, California 95630

Mark F. Kennedy, Esq.
Carey Taylor, Esq.
Attorneys for Respondent
WHEELER TRIGG KENNEDY LLP
1801 California Street, Suite 3600
Denver, Colorado 80202-2617

///
///
///

1 SUMMARY OF ISSUES

2 1. Respondent's motion to dismiss the protest is based upon the
3 contention that the protest was not timely filed. Respondent asserts
4 that: it gave proper notice pursuant to Vehicle Code section 3062¹ on
5 September 1, 2004; the notice was received by Protestant on
6 September 3, 2004; Section 3062 requires that any protest must be
7 filed within 20 days from the time of receipt of the notice; the time
8 to file a protest expired on September 23, 2004; and no protest was
9 filed until September 30, 2004.

10 2. Both parties agree that the notice was sent by certified
11 mail, return receipt requested, and that it was signed for by an
12 employee of Protestant on September 3, 2004.

13 3. However, Protestant asserts that the notice mailed on
14 September 1, 2004 was not effective as it was not properly given
15 because: it was sent to the wrong address; and it was not addressed to
16 the proper person as it was not addressed to the "franchisee" as
17 required by Section 3062.

18 4. Protestant also asserts that, although the notice was signed
19 for on September 3, 2004 by an employee of the dealership: the notice
20 was not received by Protestant until September 13, 2004, when Mr.
21 Nader Eghtesad returned to the dealership and physically received and
22 opened the envelope; the 20-day time period to file the protest did
23 not begin to run until September 13, 2004; and the protest was timely
24 filed on September 30, 2004, which was within 20 days of September 13,
25 2004.

26 ///

27 _____
28 ¹ Statutory references are to the California Vehicle Code unless otherwise indicated.

1 5. Succinctly stated, the issues are:

2 A. Did DaimlerChrysler properly "notify" the "franchisee"?

3 B. When was the notice "received" by the "franchisee"?

4 6. These questions require an analysis of the requirements of,
5 and differences between, "notifying" (or "giving notice") and
6 "receiving notice". For example, it is possible for notice to be
7 "given" and the person "notified" even though the notice was not
8 "received" by that person. And, it is possible for a notice to be
9 "received" even though the person who has "received" it is unaware of
10 its arrival and unaware of its contents.

11 7. Section 3062 encompasses both of these concepts as it
12 requires that the franchisor "notify" the franchisee and the section
13 also gives the franchisee the right to file a protest within 20 days
14 of "receiving the notice."

15 THE IDENTITY OF THE DEALER/FRANCHISEE/PROTESTANT

16 8. The caption of this protest and all of the subsequent
17 pleadings identify an individual ("Nader Eghtesad") and "Nader
18 Chrysler" as "Protestant". Some of the documents quoted from below
19 also refer to Mr. Nader Eghtesad as the "Franchisee" or "Protestant".
20 However both sides now agree that the dealer/franchisee/protestant is:

21 Duarte & Witting, Inc.²

22 D/B/A Nader Chrysler/Plymouth

23 9. Therefore, other than when quoting from other documents,
24 "Protestant" and "franchisee" and "dealer", if used below, shall mean

25
26 ² Section 331.1 states: "A 'franchisee' is any person who, pursuant to a franchise,
27 receives new motor vehicles...." Section 470 states: "'Person' includes...or
28 corporation." As stated, both sides agree that Duarte & Witting, Inc. is the
franchisee entitled to the notice mandated by Section 3062 and granted the right to
file a protest within 20 days from the time the notice is received by the
corporation.

1 "Duarte & Witting, Inc. D/B/A Nader Chrysler/Plymouth" rather than Mr.
2 Nader Eghtesad or "Nader Chrysler".

3 10. Mr. Nader A. Eghtesad is the "CEO, CFO and SEC" of Duarte &
4 Witting, Inc., is the owner of 100% of the voting stock of the
5 corporation, and is the dealer principal.

6 PROCEDURAL AND FACTUAL BACKGROUND³

7 11. On September 1, 2004, DaimlerChrysler Motors Company, LLC
8 (hereafter "DaimlerChrysler") mailed a letter addressed as follows:

9 Mr. Nader A. Eghtesad, CEO
10 Duarte & Witting, Inc.
11 DBA Nader Chrysler/Plymouth
3925 Alhambra
Martinez, CA 94553-1696

12 12. A copy of the letter was also mailed to the New Motor
13 Vehicle Board (hereafter "Board").

14 13. The September 1, 2004, letter stated in part:

15 This letter is to notify you of our intention to
16 approve the relocation of the Chrysler vehicle lines
17 from 2180 Diamond Blvd, Concord, CA and Jeep vehicle
18 lines from 1851 Galindo St., Concord, CA to 4901 Marsh
19 Drive, Concord, CA. This action is taking place with
the concurrent termination of Lehmer's Jeep and
Heitsinger, LTD dba Concord Chrysler and the addition
of the Chrysler and Jeep product lines to the Dodge
dealership, Lithia DC dba Lithia Dodge.

20 ///

21 ///

22 ///

23 ///

24 ///

25 _____

26 ³ As stated in the "Summary of Issues", some of the contentions of Protestant include
27 whether the notice from DaimlerChrysler was properly addressed as to location and
28 whether it was addressed to the proper person/entity. Therefore, the address of the
dealer/franchisee/protestant, its name, and the person creating the documents in
behalf of or purportedly as the franchisee, as contained in the Protestant's
pleadings are specifically identified below.

1 14. DaimlerChrysler's September 1, 2004 letter was sent by
2 U.S. Postal Service, certified mail, return receipt requested.⁴

3 15. The return receipt indicates that the letter was delivered
4 on September 3, 2004. Mr. Mohamad Nafisi, who in his declaration
5 identifies himself as "a book keeper for Nader Chrysler", signed for
6 the letter.

7 16. On September 30, 2004, the Board received and filed a
8 document⁵ captioned "Protest (Vehicle Code Section 3062)" with the
9 parties shown as follows:

10 ///

11 ///

12 ///

13 ///

14 ///

15 _____
16 ⁴ The fact that the notice was sent by certified mail, return receipt requested, is
17 irrelevant as to whether Duarte & Witting, Inc. was properly notified. Utilizing this
18 method of mailing may be prudent for record-keeping and evidentiary purposes but
19 there is nothing in the Vehicle Code or elsewhere that requires such a method be used
20 in giving notice or determining the receipt of notice for purposes of section 3062.
21 Likewise, although it may facilitate proof that the letter was in fact delivered and
22 signed for (again evidentiary purposes), the use of "return receipt requested" is
23 irrelevant as to the issue of when the notification was deemed "received" by the
24 franchisee. All of the analysis herein would be the same even if the notice were
25 sent "regular" mail without "return receipt requested".

26 ⁵ This document and the one that followed were documents submitted to the Board by
27 Mr. Nader Egtesad at the time that he was apparently acting without the assistance
28 of an attorney. Their inclusion is not intended to be critical of his attempts to
comply with legal formalities but rather to show that it was Mr. Egtesad who was in
fact exercising his authority as CEO in acting in behalf of Duarte & Witting, Inc.
(the actual dealer/franchisee/protestant) and by inference that the notice was
properly sent by DaimlerChrysler when it was addressed to:

25 Mr. Nader A. Egtesad, CEO
26 Duarte & Witting, Inc.
3925 Alhambra
Martinez, CA 94553-1696

27 See also, footnote 3.

1 In re: Nader Eghtesad, Nader Chrysler,
2 Franchisee
3 vs.
4 Concord Chrysler, Lehmers Jeep
5 Franchisors.

6 17. The upper left of the document indicated that it had
7 originated from:

8 Nader Eghtesad
9 NADER CHRYSLER
10 3925 Alhambra Ave.
11 Martinez, California 94553
12 Telephone: (925) 957-1515
13 Fax: (925) 228-1709
14 Franchisee

15 18. It was signed as follows:

16 NADER CHRYSLER
17
18 By s/Nader Eghtesad
19 Nader Eghtesad
20 Franchisee

21 19. The document stated in part:

22 I, Nader Eghtesad hereby protest the proposed
23 relocation of the Concord Chrysler and Lehmers Jeep
24 Franchise pursuant to VEH. Section 3062, and base my
25 protest on the following: ...

26 20. Proof of service was shown as having been made by U.S. Mail
27 on Concord Chrysler, 2180 Diamond Blvd., Concord CA 94520 and Lehmers
28 Jeep, 1790 Galindo Blvd., Concord, CA 94520.

29 21. This document did not make any mention of the date that the
30 notice from DaimlerChrysler was received.

31 22. On October 6, 2004, the Board received and filed a document
32 captioned "FIRST AMENDED PROTEST (Vehicle Code Section 3062)" with the
33 parties shown as:

1 In re: Nader Eghtesad, NADER CHRYSLER

2 Protestant,

3 vs.

4 Daimler-Chrysler

5 Respondent.

6 23. This document stated in part:

7 Protestant, Nader Eghtesad in Pro-per, files this
8 protest under the provisions of California Vehicle
Code section 3062 and alleges as follows: ...

9 24. This First Amended Protest, filed on October 6, 2004,
10 contained the same identification in the upper left of the front page
11 for the originator as the original Protest of September 30, 2004
12 which was:

13 Nader Eghtesad
14 NADER CHRYSLER
15 3925 Alhambra Ave.
16 Martinez, California 94553
Telephone: (925) 957-1515
Fax: (925) 228-1709

17 except that it identified the originator as "Protestant in Pro per"
18 rather than "Franchisee".

19 25. The "FIRST AMENDED PROTEST" is signed as follows:

20 NADER CHRYSLER

21 By s/Nader Eghtesad
22 Nader Eghtesad
23 Protestant in Pro-per

24 26. Proof of service is shown to have been made by U.S. Mail on:

25 *Daimler-Chrysler (sic)*
26 *.7700 Irvine Center Dr., Suite 300*
Irvine, Ca. 92618

27 27. This document alleged that Protestant received the notice
28 from DaimlerChrysler on September 13, 2004, which, if it were correct,

1 would make the original protest timely as the original protest was
2 filed on September 30, 2004.

3 28. Although the filings quoted above indicate that Mr. Eghtesad
4 considers himself to be the "franchisee" and the "protestant" along
5 with "Nader Chrysler", neither Mr. Eghtesad nor "Nader Chrysler" is
6 the franchisee, and neither can be the protestant.

7 29. The dealership address utilized by Mr. Eghtesad in both the
8 Protest and the First Amended Protest was "3925 Alhambra Ave." and it
9 was to "3925 Alhambra" that the notice from DaimlerChrysler was
10 addressed.

11 30. On October 15, 2004, DaimlerChrysler filed its "MOTION TO
12 DISMISS OR REJECT UNTIMELY PROTEST."

13 31. On November 2, 2004, Protestant, now represented by counsel,
14 filed its "OPPOSITION TO RESPONDENT'S MOTION TO DISMISS OR REJECT
15 UNTIMELY PROTEST." In this document "Protestant" continued to be
16 identified as Mr. "Nader Eghtesad" and "NADER CHRYSLER". However,
17 this pleading stated Protestant's location to be "825 Ferry Street,
18 Martinez, CA" as compared to the Protest and First Amended Protest
19 which indicated an address of 3925 Alhambra Ave., Martinez, CA.

20 32. On November 5, 2004, DaimlerChrysler filed
21 "DAIMLERCHRYSLER'S MEMORANDUM IN REPLY TO OPPOSITION TO RESPONDENT'S
22 MOTION TO DISMISS OR REJECT UNTIMELY PROTEST."

23 33. A noticed telephonic hearing on the motion commenced on
24 November 9, 2004, before Anthony M. Skrocki, administrative law judge
25 for the Board. Richard J. Mendelsohn, Esq. of Mendelsohn & Mendelsohn
26 represented Protestant. Mark F. Kennedy, Esq. of Wheeler Trigg
27 Kennedy LLP represented Respondent.

28 34. Because Section 3062 requires that a franchisor "notify" the

1 Board and each franchisee of the intended action, and because the
2 section also establishes that the time from which to file a protest is
3 20 days from "receiving" the notice, the administrative law judge
4 believed that it would be necessary to focus more specifically on the
5 distinction between "giving" a notice and "receiving" a notice and
6 what is required for each. As the Vehicle Code does not provide
7 specific guidance for making such determinations for section 3062
8 purposes, the administrative law judge made the following inquiries of
9 counsel:

- 10 1. Whether the Dealer Sales and Service Agreement contained a
11 provision pertaining to the requirements for the giving or
12 receiving of notices between the parties;
- 13 2. Whether the Dealer Sales and Service Agreement contained a
14 choice of law provision specifying whether Michigan law or
15 California law would be applicable to the determination of
16 when notices are deemed effective;
- 17 3. Whether the Dealer Sales and Service Agreement involved a
18 transaction in goods so that the provisions of Divisions 1
19 and 2 of the Uniform Commercial Code (California or
20 Michigan) are applicable; and if so,
- 21 4. What would be the effect of the application of Uniform
22 Commercial Code section 1201(26) and (27) upon the issue of
23 when the September 1, 2004 letter of DaimlerChrysler would
24 be deemed "received" for purposes of Section 3062?

25 35. As counsel were not comfortable in spontaneously addressing
26 these inquiries at the time of the November 9, 2004 hearing, they
27 agreed to submit simultaneous supplemental briefs addressing the
28 inquiries and chose November 16, 2004 as the date for doing so. They
also chose November 17, 2004 as the date for resumption of the hearing
on the motion.

36. The supplemental briefs were filed on November 16, 2004 as
agreed and the hearing on the motion resumed on November 17, 2004.

///

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

I

WHETHER NOTICE WAS PROPERLY GIVEN BY DAIMLERCHRYSLER TO THE
FRANCHISEE (DUARTE & WITTING, INC.)

FINDINGS OF FACT AND ANALYSIS

37. In order to evaluate whether the notice from DaimlerChrysler was properly given and when the notice would be deemed received by Duarte & Witting, Inc., it is necessary to first determine whether the parties have agreed on the procedure and method of giving notice and if not then whether other statutes would be applicable and what their effect would be.

WHETHER THE DEALER AGREEMENT CONTAINS A PROVISION FOR
THE GIVING OF NOTICES BETWEEN THE PARTIES AND IF SO
WHETHER NOTICE WAS PROPERLY GIVEN TO THE FRANCHISEE
IN ACCORDANCE WITH ITS TERMS

The Dealer Agreement

38. The Dealer Agreement in paragraph 43 provides:

NOTICES

Unless otherwise specifically required by the terms of this Agreement, any notice required or permitted under this Agreement must be in writing and will be sufficient if delivered personally, or sent through the United States mail system, postage prepaid, addressed, as appropriate, either to DEALER at the place of business designated in this Agreement, or at such other address as DEALER may designate in writing to CC⁶, or to Chrysler Corporation at Post Office Box 857, Detroit, Michigan 48288 or such other address as CC may designate in writing to DEALER.

Identity of Dealer

39. The "DEALER" as stated in the Dealer Agreement is:

Duarte & Witting, Inc.,
DBA Nader Chrysler/Plymouth.

⁶ Chrysler Corporation is referred to as "CC" throughout the Dealer Sales and Service Agreement.

1 40. The parties do not dispute that this accurately identifies
2 the dealer.

3 Location of Dealer

4 41. At the time the Chrysler Dealer Agreement was granted in
5 November, 1995, the dealership was located at 825 Ferry Street,
6 Martinez, CA. This is the address stated as the location of
7 Protestant in Protestant's pleading which was filed on November 2,
8 2004, after counsel was obtained, and Protestant asserts that the
9 facilities at this address are still in use by the dealership.
10 However, other pleadings submitted in behalf of Protestant when Mr.
11 Eghtesad was preparing the documents, including the Protest and First
12 Amended Protest, show 3925 Alhambra Ave. as the location of the
13 dealership.

14 42. The Dealer Agreement was formally amended in October 2001 to
15 show a relocation of the dealership's sales and service facilities
16 from 825 Ferry Street to 3925 Alhambra, Martinez, CA.

17 Management and Ownership of Dealer

18 43. The Dealer Agreement was amended on September 18, 2001 to
19 show that Mr. Nader A. Eghtesad is the "CEO, CFO, SEC" and that Mr.
20 Eghtesad was the Dealer Principal and continued to be the owner of
21 100% of the voting stock of Duarte & Witting, Inc., dba Nader
22 Chrysler/Plymouth.

23 The Notice That Was Sent

24 44. On September 1, 2004, DaimlerChrysler mailed a notice of its
25 intended action addressed as follows:

26 Mr. Nader A. Eghtesad, CEO
27 Duarte & Witting, Inc.
28 DBA Nader Chrysler/Plymouth
3925 Alhambra
Martinez, CA 94533-1696

1 A copy of the notice was mailed to the Board.

2 45. DaimlerChrysler contends in its Supplemental Hearing
3 Memorandum that Paragraph 43 of the Dealer Agreement is not applicable
4 to the notice at issue as Paragraph 43 is limited by its terms to a
5 "notice required or permitted under this Agreement" and the notice at
6 issue was being given pursuant to Section 3062. Nonetheless, the
7 notice as given was in compliance with Paragraph 43 as it was properly
8 addressed to Mr. Eghtesad in his capacity as the CEO of Duarte &
9 Witting, Inc., and it was sent to 3925 Alhambra, Martinez, CA which
10 was the dealership location as stated in the Dealer Agreement as
11 formally amended.

12 46. The contentions of Protestant as to whether notice was
13 properly given are:

- 14 1. "...any required notifications must be provided to the
15 named Franchisee, in this case, Duarte & Witting, Inc.,
16 dba Nader Chrysler/Plymouth. The notice at issue was
17 addressed to Mr. Eghtesad personally, in violation of
18 the statutory and contractual provisions."; and
- 19 2. "Under the terms of the SSA (Sales and Service
20 Agreement), any required notifications must be mailed
21 to the address named in the SSA, in this case, 825
22 Ferry Street, Martinez, CA. The notice at issue was
23 mailed to 3925 Alhambra, Martinez, CA in violation of
24 the contractual provision."

25 47. Protestant's assertions cannot be accepted for the following
26 reasons:

- 27 1. The notification was not sent to Mr. Eghtesad
28 personally. It was addressed to him as "CEO" of Duarte
& Witting, Inc., which is his capacity shown on the
Dealer Agreement as amended on September 18, 2001; and
2. The address, to which the notice was mailed, 3925
Alhambra, was the address of Duarte & Witting, Inc., as
shown in the Dealer Agreement as amended in October
2001.

///

1 found not to be applicable to this situation involving notice between
2 these parties. Section 29 is not applicable as there is no
3 requirement that the notice be mailed by registered mail. Therefore
4 other statutes must be looked to.

5 WHETHER THE STATUTES OF CALIFORNIA OR MICHIGAN APPLY

6 WHETHER THE DEALER AGREEMENT CONTAINS A CHOICE OF LAW
7 PROVISION THAT WOULD MAKE MICHIGAN LAW APPLICABLE

8 51. Paragraph 42 of the Dealer Agreement provides as follows:

9 In the event of a dispute hereunder, the terms of this
10 Agreement shall be construed in accordance with the
11 laws of the State of Michigan.

12 52. DaimlerChrysler contends that California law is applicable
13 notwithstanding paragraph 42. DaimlerChrysler asserts that the
14 quoted language governs only construction and interpretation of the
15 franchise agreement itself and because there is no dispute as to the
16 terms of the franchise, California law is applicable. Whether the
17 provisions of the Uniform Commercial Code ("UCC") apply will be
18 discussed below.

19 53. Duarte & Witting, Inc., contends that Michigan law governs
20 as a result of paragraph 42. However, Duarte & Witting, Inc. also
21 asserts, "Both states (Michigan and California) have adopted the same
22 provisions of the UCC, so those provisions are applicable whether
23 Michigan or California law applies." The relevant UCC language will
24 be addressed below.

25 ///

26 ///

27 ///

28 ///

1 CONCLUSION AS TO WHETHER MICHIGAN LAW IS APPLICABLE TO
2 THE ISSUES INVOLVING THE GIVING OR RECEIPT OF NOTICE

3 54. As stated, DaimlerChrysler contends that California law
4 applies and Duarte & Witting, Inc. contends that Michigan law applies
5 but that Michigan statutes and California statutes are the same. The
6 effect of these two positions is to moot the issue of which state's
7 statutes should govern.⁸

8 WHETHER THE UNIFORM COMMERCIAL CODE
9 (CALIFORNIA OR MICHIGAN) IS APPLICABLE

10 55. As stated above, California and Michigan have adopted the
11 Uniform Commercial Code so the statutes discussed below are the same
12 in both states.

13 56. Duarte & Witting, Inc., in its Supplemental Brief
14 "...submits that the provisions of the Uniform Commercial Code
15 (hereafter "UCC") are applicable in this case...".

16 57. DaimlerChrysler in its Supplemental Brief asserts that
17 California has not addressed whether a new motor vehicle dealer
18 agreement is subject to the UCC but several other jurisdictions have.
19 These jurisdictions have held that such agreements were predominantly
20 for the sale of goods and thus subject to Article 2 (Division 2 in
21 California). DaimlerChrysler also points out that a majority of
22 jurisdictions, including California, have determined that a
23 distributorship agreement involving the sale of goods would be subject
24 to Division 2 of the UCC.

25
26 ⁸ The choice of law could still be important if the two states had differing judicial
27 interpretations of the statutes, but neither party is making such assertions. Also,
28 although there may be minor difference between the California enactment of those
provisions of the Commercial Code that will be applied here and the "Uniform"
version, the differences are not substantive.

1 58. Division 2 of the UCC is applicable if the Sales and Service
2 Agreement is one involving a transaction in goods. (UCC § 2102)
3 "Goods" are defined as "all things movable (including specially
4 manufactured goods) at the time of identification to the contract for
5 sale other than the money in which the price is to be paid, investment
6 securities (Division 8) and things in action." (UCC § 2105)

7 59. The limited portion of the Dealer Sales and Service
8 Agreement provided includes the following.

9 INTRODUCTION

10 The purpose of the relationship established by this
11 Agreement is to provide for the sale and service of
12 specified Chrysler vehicles and the sale of CC vehicle
13 parts and accessories in a manner that will maximize
14 customer satisfaction and be of benefit to DEALER and CC."

15 This evidences something like a marketing agreement as it is
16 referring to resale to customers, and the language makes later
17 reference to the fact that "...CC anticipates will enable DEALER to
18 perform the personal services contemplated by this Agreement."

19 60. However, the Sales and Service Agreement also states:
20 "PRODUCTS COVERED - DEALER has the right to order and purchase from
21 CC and to sell at retail only those specific models of CC
22 vehicles...." And in Part 4, the Sales and Service Agreement
23 provides: "DEALER shall have the non-exclusive right, ... to
24 purchase from CC those new specified CC vehicles, vehicle parts,
25 accessories and other CC products for resale...."

26 CONCLUSION AS TO WHETHER THE UCC IS
27 APPLICABLE TO THE DEALER AGREEMENT

28 61. Chrysler "vehicles", "parts" and "accessories" would all
come within the UCC definition of "goods". Because the dominant
nature of the transaction is the sale of these goods between

1 DaimlerChrysler and Duarte & Witting, Inc., Division 2 of the UCC
2 would be applicable. Because the relationship is subject to Division
3 2 of the UCC, the general provisions including the definition sections
4 of Division 1 of the UCC would also be applicable.

5 THE EFFECT OF THE APPLICATION OF THE UCC UPON WHETHER
6 DAIMLERCHRYSLER MET ITS OBLIGATION TO "NOTIFY" DUARTE & WITTING,
7 INC. AND THE BOARD AS REQUIRED BY SECTION 3062

8 62. As stated above, Section 3062 requires DaimlerChrysler to
9 "notify" the "board" and the "franchisee" of DaimlerChrysler's
10 intended action. Section 1201(26) of the UCC provides in part as
11 follows:

12 (26) A person "notifies" or "gives" a notice or notification to
13 another by taking those steps that may be reasonably
14 required to inform the other in ordinary course whether or
15 not the other actually comes to know of it....

16 63. Also as stated above, DaimlerChrysler sent its notice to the
17 CEO (in his capacity as such) of Duarte & Witting, Inc. (the
18 "franchisee") at the address of Duarte & Witting, Inc., dba Nader
19 Chrysler Plymouth, 3925 Alhambra, Martinez, CA, as indicated in the
20 amended Dealer Sales and Service Agreement. A copy of this letter was
21 also sent to the Executive Director of the Board.

22 CONCLUSION AS TO WHETHER DAIMLERCHRYSLER NOTIFIED
23 THE FRANCHISEE AND THE BOARD AS REQUIRED BY SECTION 3062

24 64. DaimlerChrysler, in sending its letter of September 1, 2004,
25 satisfied the standard of UCC section 1201(26) for notifying both the
26 "franchisee" and the "board" as required by Section 3062 as
27 DaimlerChrysler "...took those steps that may be reasonably required
28 to inform the other in ordinary course whether or not the other
actually comes to know of it."

65. It is determined that DaimlerChrysler did "notify" Duarte &

1 Witting, Inc., and the Board in compliance with Section 3062(a).

2 II

3 WHEN WAS THE NOTICE "RECEIVED" BY DUARTE & WITTING, INC.?

4 66. In addition to requiring that the franchisor "notify" the
5 franchisee and the Board, Section 3062 also establishes the time
6 within which a franchisee may file a protest. The time within which
7 to do so is dependent upon when the notice has been received by the
8 franchisee.

9 67. Section 3062 provides in part as follows:

10 ...Within 20 days of **receiving** the notice, satisfying the
11 requirements of this section, or within 20 days after the
12 end of any appeal procedure provided by the franchisor, any
13 franchisee required to be given the notice may file with
the board a protest to the establishing or relocating of
the dealership. (Emphasis added.)

14 WHETHER THE DEALER AGREEMENT CONTAINS A PROVISION FOR THE
15 RECEIVING OF NOTICES BETWEEN THE PARTIES

16 68. Other than Paragraph 43 of the Dealer Agreement, discussed
17 above, there is no provision in the Dealer Agreement that establishes
18 when a notice is deemed to have been "received" by the franchisee.
19 Paragraph 43, if it is applicable, makes the notice "...sufficient if
20 delivered personally, or sent through the United States mail
21 system..." The notice was not "delivered personally" but it was
22 "sent through the United States mail system". Although the notice,
23 having been "sent through the United States mail system" may be
24 "sufficient" for compliance with the Dealer Agreement, it does not
25 satisfy the requirement of the Vehicle Code that specifically states
26 that the 20 days to file a protest begins from the date of "receiving"
27 the notice.

28 69. Therefore, even if Paragraph 43 of the Dealer Agreement is

1 applicable (and DaimlerChrysler asserts it is not), compliance with
2 its terms would not constitute compliance with the legislatively
3 created right to file a protest within 20 days from the time of
4 "receiving" the notice.

5 70. The Dealer Agreement provisions do not determine when a
6 notice has been "received" by Duarte & Witting, Inc.

7 WHEN THE NOTICE WAS DEEMED RECEIVED BY THE
8 FRANCHISEE PURSUANT TO APPLICABLE STATUTES

9 71. There are no provisions in the California Vehicle Code that
10 bear upon the issue of when a notice is deemed "received" for section
11 3062 purposes. The prior discussion, about the choice of law and the
12 application of the UCC to the issue of whether Duarte & Witting, Inc.
13 was properly notified, is also relevant to the issue of when the
14 notice was received, and is incorporated by reference.

15 72. It is determined that the UCC also applies to the issue of
16 "receiving" the notice and whether Michigan law or California law
17 applies would make no difference in the analysis or the result:

18 THE EFFECT OF THE APPLICATION OF THE UCC UPON WHEN
19 THE NOTICE FROM DAIMLERCHRYSLER WAS RECEIVED BY
20 DUARTE & WITTING, INC. TO START THE 20-DAY PERIOD
21 ESTABLISHED BY SECTION 3062

22 The Application of UCC Section 1201(26)

23 73. UCC section 1201(26) (part of which was quoted earlier as to
24 when a person "notifies" another) continues as follows:

25 A person "receives" a notice or notification when any of the
26 following occurs:

27 (a) It comes to his or her attention.

28 (b) It is duly delivered at the place of business through
which the contract was made or at any other place held
out by him or her as the place for receipt of these

1 communications.

2 74. Duarte & Witting, Inc. correctly asserts that it and
3 DaimlerChrysler are "persons" as defined in UCC section 1201(30),
4 which defines "person" to include "an individual or an organization"
5 (which includes a corporation⁹). Duarte & Witting, Inc. is also
6 correct that it is the franchisee that must receive the notice
7 required by Section 3062 to start the running of the 20-day period to
8 file the protest.

9 75. Duarte & Witting, Inc. also asserts that because the letter
10 was addressed to Mr. Eghtesad "personally" it was not received by the
11 corporation. However, this overlooks the fact that Mr. Eghestad's
12 name was followed by "CEO" and that it was sent to Duarte & Witting,
13 Inc., at the address shown in the Dealer Agreement for the
14 corporation.¹⁰

15 76. As stated in footnote 4, the fact that the notice was sent
16 by certified mail, return receipt requested, is irrelevant for
17 determining when the notice was "received". Had the notice been sent
18 "regular" mail, without "return receipt requested", and arrived at the
19 dealership on September 3, 2004, it would have been, as of that date,
20 "duly delivered at the...place held out by him or her as the place for
21 receipt of these communications." (UCC § 1201(26)(b)) Without using
22

23 ⁹ This is similar to the definition of "person" in Section 470 of the Vehicle Code,
24 discussed above.

25 ¹⁰ Protestant's argument also is inconsistent with the contention that the 20-day
26 period within which Duarte & Witting, Inc. could have filed a timely protest began to
27 run on September 13, 2004 when Mr. Eghtesad physically received and opened the
28 envelope containing the notice. If Mr. Eghtesad, as CEO, was the proper agent to open
and read the letter on September 13, 2004, to start the 20 days running at that time,
then Mr. Eghtesad, as CEO, was also the proper agent to whom the letter was addressed
on September 1, 2004 when the letter was sent and on September 3, 2004, when the
letter was delivered at the dealership.

1 certified mail, return receipt requested, DaimlerChrysler might have
2 had more difficulty in proving the fact of delivery, but, once proven,
3 the notice would have been deemed "received" by Duarte & Witting, Inc.
4 as of the date of delivery. Whether the notice in fact reached and
5 was read by Mr. Eghtesad, as CEO would be irrelevant as all that is
6 required by the statute is that the notice be "duly delivered...at the
7 place held out by him or her as the place for receipt of these
8 communications."

9 77. The fact that DaimlerChrysler chose to utilize certified
10 mail, return receipt requested, should not cause DaimlerChrysler to
11 lose the benefit of UCC section 1201(26)(b). To do so would be
12 contrary to the common belief that using this method (certified -
13 return receipt requested) is the prudent course to take when it is
14 important to call the addressee's attention to the significance of the
15 communication and to enable the sender to prove the fact of delivery.

16 78. There is no contention that Mr. Eghtesad was the only person
17 who could sign the receipt for the letter. In fact, the U.S. Postal
18 Service form (PS Form 3811) has a block in the "Signature" space for
19 the signer to indicate whether the signer is signing as "Agent" or as
20 "Addressee". Mr. Mohamad Nafisi, the bookkeeper of Duarte & Witting,
21 Inc., who signed for the letter, did not check either of the boxes.
22 Nor, did Mr. Nafisi print his name in the designated space for doing
23 so beneath his signature.

24 79. These omissions are found to be immaterial to the issue of
25 the receipt of the notice as there is no contention made by Duarte &
26 Witting, Inc. that the September 2, 2004 letter was not delivered to
27 the dealership at the 3925 Alhambra address, nor that Mr. Nafisi
28 signed for the letter on September 3, 2004 as an employee of the

1 dealership, nor that Mr. Nafisi, as bookkeeper for Duarte & Witting,
2 Inc., was not authorized to sign for such correspondence.

3 The Application of UCC Section 1201(27)

4 80. Duarte & Witting, Inc. also contends that it is undisputed
5 that the notice from DaimlerChrysler did not come to Mr. Eghestad's
6 attention until September 13, 2004, as he was away from the dealership
7 until that time and that since Duarte & Witting, Inc. is an
8 "organization", UCC section 1201(27) would be applicable.

9 81. UCC section 1201(27) provides:

10 (27) Notice, knowledge, or a notice or notification
11 received by an organization is effective for a particular
12 transaction from the time it is brought to the attention of
13 the individual conducting that transaction and, in any
14 event, from the time it would have been brought to his or
15 her attention if the organization had exercised due
16 diligence. An organization exercises due diligence if it
17 maintains reasonable routines for communicating significant
18 information to the person conducting the transaction and
19 there is reasonable compliance with the routines. Due
20 diligence does not require an individual acting for the
21 organization to communicate information unless the
22 communication is part of his or her regular duties, or
23 unless he or she has reason to know of the transaction and
24 that the transaction would be materially affected by the
25 information.

19 Whether There Was A Particular Transaction
20 Being Conducted By Mr. Eghtesad

21 82. For UCC section 1201(27) to apply, there must be a
22 "particular transaction" being conducted between the parties to which
23 the notice relates. If there is a "particular transaction" being
24 conducted, then the notice may not be effective until "it is brought to
25 the attention of the individual conducting that transaction", which
26 under these facts may have been on September 13, 2004, when Mr.
27 Eghtesad opened the letter containing the notice.

28 83. However, there was little showing by Protestant that there

1 was a "particular transaction" being "conducted" so as to bring into
2 play the more stringent requirement that the communication be brought
3 to the attention of the individual involved before the notice is
4 deemed "received".

5 84. The only showing of a "particular transaction" being
6 "conducted" is a letter from DaimlerChrysler with no visible date but
7 which in its contents states it was written on July 28, 2003. This is
8 more than one year prior to the Section 3062 notice of September 1,
9 2004. The letter states that it is in response to Mr. Eghtesad's
10 "letter dated July 28, 2003 referring to our conversation regarding
11 different scenarios to avoid protest of the expired Buy/Sell between
12 Stead Chrysler and Lithia Dodge of Concord." There was also a
13 reference to a possible "buy out" of the Duarte & Witting, Inc.,
14 dealership by DaimlerChrysler and the other parties involved.

15 Whether There Were "Reasonable Routines" Established
16 By Duarte & Witting, Inc. For The Communication
17 Of Significant Information To Mr. Eghtesad

18 85. UCC section 1201(27) also requires that the organization
19 exercise due diligence, i.e., whether it "maintains reasonable
20 routines for communicating significant information to the person
21 conducting the transaction and there is reasonable compliance with the
22 routines."

23 86. Even if there were a "particular transaction" still being
24 "conducted" as of September 3, 2004 (some 14 months after the letter
25 mentioning the discussions of avoiding a protest), the "due diligence"
26 language of UCC section 1201(27), quoted above, would also have to be
27 met.

28 87. If there was a "particular transaction" still being
"conducted" around the time of the September 3, 2004 letter, it is

1 inconceivable that a CEO already familiar with "different scenarios to
2 avoid protest" would not be aware of the very short time granted to
3 franchisees to exercise their protest rights. If Mr. Eghtesad was
4 still "conducting" the "particular transaction", due diligence would
5 require specific instructions for immediate contact with Mr. Eghtesad
6 in the event of delivery of a certified or registered "return receipt
7 requested" letter from the franchisor. This is especially so in light
8 of the fact that the only letter produced by Protestant described the
9 communications between the writer and Mr. Eghtesad as confidential to
10 just the two of them, which means Mr. Eghtesad could not permit
11 someone else to assume his responsibilities in his absence.

12 88. There was no showing that Mr. Eghtesad gave any instructions
13 on how to be contacted in the event of delivery of "certified mail"
14 from the franchisor.

15 89. The only showing of what transpired upon the delivery of the
16 letter after it was signed for by Mr. Nafisi is that Mr. Nafisi
17 "placed the unopened envelope on Mr. Eghtesad's desk." There is no
18 showing of any attempt to contact Mr. Eghtesad or whether Mr. Eghtesad
19 gave any instructions as to how he could be contacted.

20 **Conclusion As To Whether UCC Section 1201(27) Is Applicable**

21 90. Protestant has not made even a prima facie showing of a
22 "particular transaction" still being "conducted". And, even if there
23 was a "particular transaction" being conducted, Protestant has not
24 established that it exercised due diligence in maintaining reasonable
25 routines for communicating significant information to the person
26 conducting the transaction and that there was reasonable compliance
27 with the routines. (UCC § 1201(27))

28 91. As there was no showing that there was a "particular

1 transaction" being "conducted" between DaimlerChrysler and Mr.
2 Eghtesad, the language of UCC section 1201(27) would have no
3 application.

4 92. The last sentence of UCC section 1201(27) is not applicable
5 to these facts. The bookkeeper did not acquire "information" that he
6 failed to communicate, as he did not open the envelope.

7 93. Therefore, the provisions of UCC section 1201(27) cannot be
8 used to treat the time the notice was "received" as being the time
9 that it came to the attention of Mr. Eghtesad.

10 FURTHER DISCUSSION AS TO WHEN THE NOTICE GIVEN PURSUANT
11 TO SECTION 3062 WAS RECEIVED BY THE FRANCHISEE

12 94. As UCC section 1201(27) is found not to be applicable, only
13 UCC section 1201(26) would govern the question of when the notice to
14 Duarte & Witting, Inc. should be deemed "received".

15 95. UCC section 1201(26)(b) has previously been discussed and is
16 addressed here again in conclusion.

17 96. DaimlerChrysler's contentions and citations are persuasive.
18 DaimlerChrysler in its Supplemental Brief states as follows:

19 California courts have not addressed whether a notice
20 sent via certified mail is deemed to have been received
21 under the UCC if the recipient does not open and read the
22 notice. Other jurisdictions that have addressed this
23 issue, however, have concluded in similar cases that a
24 notice properly addressed and sent via certified mail is
25 deemed received when the return receipt is signed, not when
26 the notice is actually opened. See, e.g., *Bildoc, Inc. v.*
Chicago Hous. Auth., 714 F. Supp. 317, 321-22 (N.D. Ill.
1989) (construing §§ 1-201(26)(27) of the Illinois UCC).
In *Bildoc*, the Chicago Housing Authority ("CHA") sent
written notice of termination of its contract with *Bildoc*,
a contractor, via certified mail. *Bildoc* argued that the
notice of termination was ineffective. The court rejected
the argument summarily:

27 There is no genuine dispute over the material fact
28 that the Termination Letter was received by *Bildoc* on
November 13, 1984 and that notice was effective on

1 that date.... The certified mail return receipt was
2 signed by an individual whom Williams' admits was a
3 part-time employee of Bildoc. Previous correspondence
4 from the CHA addressed to Bildoc at that address was
5 received. Williams' self-serving allegation that he
6 never actually saw the original Termination letter is
7 insufficient for a reasonable jury to conclude
8 otherwise.

9 *Id.* Accordingly, the court held that the termination
10 letter was effective to terminate the CHA's agreement with
11 Bildoc, and granted summary judgment to the CHA.

12 Likewise in *Ertel IV v. Radio Corp. of Am.*, 307 N.E.2d
13 471, 474 (Ind. 1974) an account creditor's assignee sent
14 notice of assignment to the account debtor via certified
15 mail. A receiving clerk signed the return receipt but the
16 notice never made it to the accounting department. *Id.* The
17 court noted that RCA receiving clerks had authority to sign
18 receipts for certified mail. *Id.* According to the court,
19 these facts

20 demonstrate receipt of notification as contemplated by
21 1-201(26). The fact that the accounting department
22 never received the notice is of no consequence in this
23 case. The notice was duly delivered and received at
24 the appropriate place by an authorized agent of RCA.
25 The negligence of RCA employees after the initial
26 receipt at the dock should not be charged to Economy
27 Finance, but rather to RCA. To hold otherwise is to
28 circumvent the obvious policy behind 1-201(26).

97. In this case, the letter from DaimlerChrysler was duly
delivered on September 3, 2004 at the address of Duarte &
Witting, Inc. as shown in the Dealer Agreement as formally
amended in October 2001.

**CONCLUSION AS TO WHEN THE NOTICE WAS RECEIVED BY
DUARTE & WITTING, INC., TO START THE RUNNING OF THE
20-DAY PERIOD TO FILE A PROTEST PURSANT TO SECTION 3062**

98. DaimlerChrysler's notice of September 1, 2004 was "received"
by Duarte & Witting, Inc. on September 3, 2004, when it was duly
delivered at 3925 Alhambra, Martinez, CA which is the address shown in
the Dealer Sales and Service Agreement. The notice was properly
addressed to the authorized agent for the corporation and named him in
his corporate capacity as CEO, as shown in the Dealer Sales and

1 Service Agreement.

2 99. As the notice from DaimlerChrysler was received by Duarte &
3 Witting, Inc. on September 3, 2004, Duarte & Witting, Inc., would have
4 had through September 23, 2004, to file its protest with the Board.
5 No filing in behalf of Duarte & Witting, Inc. was attempted until
6 September 30, 2004.

7 100. It is determined that there is no timely protest before the
8 Board and no hearing is required pursuant to Section 3066.

9 **EFFECT UPON PROTESTANT'S ABILITY TO FILE A TIMELY**
10 **PROTEST AS A RESULT OF DEEMING THE NOTICE TO HAVE**
11 **BEEN RECEIVED ON SEPTEMBER 3, 2004**

12 101. The following is indicative of the fact that Duarte &
13 Witting, Inc. was not deprived of the opportunity to file a timely
14 protest solely due to the application of the statutory rules of when
15 "notice" is deemed "received". Duarte & Witting, Inc. contends that
16 the notice was not read by Mr. Eghtesad until September 13, 2004,
17 which is ten days after it was delivered at the dealership. However,
18 because ten days remained to do so, Duarte & Witting, Inc. could still
19 have timely filed a protest with a minimum of effort as shown below.

20 102. To summarize the dates:

- 21 1. September 3, 2004 - Notice duly delivered to
22 dealership, signed for by employee, and found to have
23 been "received" by Duarte & Witting, Inc. on that date.
- 24 2. September 13, 2004 (Monday) - Mr. Eghtesad, CEO and
25 dealer principal of Duarte & Witting, Inc. returned to
26 dealership and opened the envelope.
- 27 3. September 23, 2004 (Thursday) - The 20-day time period
28 to file a protest expired.

103. Even though the notice was deemed received on September 3,
2004, it was not physically impossible for Mr. Eghtesad, upon his
return to the dealership on September 13, 2004, to be certain, as CEO

1 of Duarte and Witting, Inc., that a timely protest was filed.

2 104. On September 13, 2004, when Protestant's CEO took physical
3 possession of the envelope containing the notice there were still ten
4 days remaining of the 20-day time period in which to file a timely
5 protest with the Board.

6 105. The notice contained the language mandated by Section
7 3062(c), and it was in the proper format that made the specific
8 content conspicuous. The conspicuous language included the following:

9 You must file your protest with the board within 20
10 days of your receipt of this notice, or within 20 days
11 after the end of any appeal procedure that is provided
12 by us to you. If within this time you file with the
13 board a request for additional time to file a protest,
14 the board or its executive director, upon a showing of
15 good cause, may grant you an additional 10 days to
16 file the protest.

17 106. Mr. Eghtesad had been aware of the plans of DaimlerChrysler
18 for at least 14 months prior to the September 1, 2004 letter, as he
19 had been in discussions with DaimlerChrysler representatives about
20 the situation. The confidential discussions included the potential
21 buy out of the dealership for a significant sum of money as one of
22 the scenarios "to avoid protest." As stated in Duarte & Witting,
23 Inc.'s Opposition to Respondent's Motion to Dismiss:

24 Respondent knew that Nader would protest its intended
25 action, and thus has not been prejudiced by its perceived "lack
26 of timeliness" of the instant protest. Evidence of Respondent's
27 knowledge is attached as **Exhibit 1** (emphasis in the original) to
28 this Opposition, which is a letter from Daimler Chrysler's Dealer
Operations Manager referencing negotiations between Nader and
DaimlerChrysler for a buyout of Nader's Franchise "**to avoid
protest**" (emphasis added by Protestant) of Chrysler's long-
planned attempt to place a multi-line (Dodge-Chrysler-Jeep) store
in close proximity to Nader's single-brand (Chrysler) store in
Martinez.

107. This contention cuts both ways. Mr. Eghtesad, as CEO, knew
of the protest rights and knew or should have known that acting

1 promptly was critical. Upon his return to the dealership on September
2 13, 2004, Mr. Eghtesad also had in his possession a copy of the U.S.
3 Postal Service form that had been signed by the dealership's
4 bookkeeper. The form showed a date of delivery of September 3, 2004,
5 yet, for unstated reasons, Mr. Eghtesad waited until September 30,
6 2004 before hand-delivering the original protest to the Board for
7 filing.

8 108. On September 13, 2004, the day Mr. Eghtesad opened the
9 letter from DaimlerChrysler, there were still 10 days left in the
10 statutory period within which to file a protest. Mr. Eghtesad, as
11 CEO, could have (more conveniently compared to the hand-delivery which
12 occurred on September 30, 2004) mailed a protest to the Board by
13 certified or registered mail on or before September 23, 2004. If the
14 protest were sent to the Board by certified or registered mail it
15 would have been deemed filed by the Board on the date the protest was
16 sent rather than when it was received by the Board. The date of the
17 mailing by registered or certified mail is deemed the date of filing
18 pursuant to section 585(a) of the Board's Regulations.

19 109. A single phone call to an attorney could have resulted in a
20 timely protest as there were still 10 days left in the statutory
21 period within which to file a protest.

22 110. Duarte & Witting, Inc. also contends that if Mr. Nafisi had
23 opened the letter and read it that

24 ...the dealership would likely have requested a 10-day
25 extension to file the protest, as permitted by
26 California Vehicle Code §3062(a)(1), since Nader was
27 absent from the office. It is respectfully submitted
28 that such extension likely would have been granted by
this Board, given its authority and sound discretion.

27 ///

28 ///

