

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

**CERTIFIED MAIL**

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8 STATE OF CALIFORNIA  
9 NEW MOTOR VEHICLE BOARD

10  
11 In the Matter of the Protest of

12 PLATINUM MOTORS LLC, a California limited  
liability company,

13 Protestant,

14 v.

15 AUTOMOBILI LAMBORGHINI, S.p.A.,

16 Respondent.  
17

**Protest No. PR-2140-08**

**ORDER REJECTING THE  
ADMINISTRATIVE LAW JUDGE'S  
"PROPOSED ORDER GRANTING  
RESPONDENT'S MOTION TO  
DISMISS", DENYING  
RESPONDENT'S MOTION TO  
DISMISS, AND REMANDING THE  
MATTER FOR A FULL HEARING ON  
THE MERITS**

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6 At its regularly scheduled meeting of June 5, 2009, the Public Members of the Board met and  
7 considered the administrative record and Administrative Law Judge's "Proposed Order Granting  
8 Respondent's Motion to Dismiss Protest" in the above-entitled matter. After such consideration, the  
9 Board rejected the Proposed Order, denied Respondent's Motion to Dismiss, and remanded the matter  
10 for a full hearing on the merits.

11 SO ORDERED.

12 DATED: June 9, 2009

NEW MOTOR VEHICLE BOARD

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15 By Glenn E. Stevens  
16 for  
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GLENN E. STEVENS  
Presiding Public Member

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17 Respondent.

**Protest No. PR-2140-08**

**PROPOSED ORDER GRANTING  
RESPONDENT'S MOTION TO  
DISMISS PROTEST**

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7 **PROCEDURAL AND FACTUAL BACKGROUND**

8 **THE PARTIES**

9 1. Protestant, Platinum Motors, LLC, ("Platinum"), a California limited liability company,  
10 located at 2441 S. Pullman Street, Santa Ana, California, 92705 is a new motor vehicle dealer and  
11 franchisee authorized to sell Lamborghini products under a franchise executed in 2006.

12 2. The named Respondent and franchisor is identified as Automobili Lamborghini, S. p. A.,  
13 having its office at Via Modena, 12, 40019 Sant'Agata Bolognese (Bologna), Italy. However, the  
14 appearance made identifies the Respondent and current franchisor as Automobili Lamborghini America,  
15 LLC, ("Lamborghini"), which is stated to be the "assignee and successor in interest", with its offices at  
16 2772 Donald Douglas Loop N., Santa Monica, California, 90405.

17 **THE SENDING OF THE NOTICE OF TERMINATION**

18 3. On November 25, 2008, pursuant to Vehicle Code Section 3060,<sup>1</sup> Lamborghini sent letters  
19 to Platinum, one of its owners (Mr. Vik Keuylian), and its designated agent for service of process (Ms.  
20 Dietrich) stating Lamborghini's intent to terminate the franchise of Platinum.<sup>2</sup> The reasons stated in the  
21 letters were that:

22 1. Dealer has ceased to conduct its customary sales and service operations  
23 during its customary hours of business for seven consecutive business days giving  
24 rise to a good faith belief on the part of the (sic) Lamborghini that Dealer is in fact  
25 going out of business. See California Vehicle Code § 3060, (a)(1)(B)(v);  
26 Agreement, Art 19 (1)(e).

27 <sup>1</sup> Unless otherwise indicated all section references are to the California Vehicle Code.

28 <sup>2</sup> These November 25 letters to Platinum and Mr. Keuylian were the second set of notices. The letters to Ms. Dietrich are referred to as the third set of notices. (The first set of notices discussed below, sent on November 21, did not meet the form requirements of the Vehicle Code.) Some of the notices were sent via U.S. Postal Service Certified Mail and some were sent by United Parcel Service Next Day Air. They were directed to several addressees, but, none of them could be delivered to the franchisee or its owners as all required signatures for the "return receipts" and no signatures could be obtained by the carriers. E-mails were also sent. The multiple communications were sent as the dealership had closed and Platinum had ceased communicating with Lamborghini. In addition to the notices to the dealership and its owners, four notices (the third set) were also sent to Ms. Dietrich, Platinum's designated agent for service of process. It is one of these notices, delivered and signed for at her office that is the basis for this Motion to Dismiss. All the notices will be discussed below.

1 2. Insolvency of the franchisee. On or before November 6, 2008, the Dealer's  
2 floor plan line of credit was shut down by Dealer's finance company.  
3 Furthermore, on November 6, 2008, the Dealer's assets were seized by the same  
4 creditor and Dealer has ceased operations. Both actions taken by the creditor give  
5 rise to a good faith belief by Lamborghini that Dealer is insolvent. See California  
6 Vehicle Code § 3060, (a)(1)(B)(iii); Agreement, Art. 19 (1)(a).<sup>3</sup>

7 4. The November 25 notice sent to Platinum's business address was returned "Unclaimed".  
8 The notice sent to Mr. Keuylian at his residence address was also returned to Lamborghini.

9 5. However, one of the four notices sent to Ms. Dietrich, the person designated as Platinum's  
10 agent for service of process was delivered and signed for by someone at her office on November 26, 2008.  
11 It is this notice that is the focus of this Motion to Dismiss.

12 **THE TIME WITHIN WHICH A PROTEST MUST BE FILED**

13 6. Because the stated reasons in the notice of termination included the cessation of operations  
14 and insolvency of Platinum, Section 3060 permits the franchisor to give what is termed a "15-day notice"  
15 of termination. This would allow the franchisor to terminate the franchise 15 days after the notice is  
16 received by the franchisee unless the franchisee files a protest with the Board "within 10 days after  
17 receiving a 15-day notice."<sup>4</sup> Shortening the time for termination from 60 days to 15 days and, even more  
18 important, limiting the time to file a protest to only 10 days from receipt of the notice (compared to 30  
19 days) is an indication of the significance the legislature placed on the reasons for termination and the  
20 prompt action needed by a franchisee if the reasons were that the franchisee was going out of business or  
21 insolvent as alleged here.

22 7. Despite the significance of these reasons for termination, if a timely protest is filed, the  
23 franchise may not be terminated until after the Board has conducted a hearing and then only if the Board

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24 <sup>3</sup> There is no contention that this notice dated November 25, 2008, did not comply with the requirements of Section 3060 as to  
25 content or form. Lamborghini had sent prior letters, dated November 21, 2008. These earlier letters were identical to the letter  
26 dated November 25 except that the statutorily required language beginning with "Notice to Dealer" in the first set of notices  
27 did not comply with Section 3060(a)(1)(C) which states: "(C) The written notice shall contain, on the first page thereof in at  
28 least 12-point bold type and circumscribed by a line to segregate it from the rest of the text, one of the following statements,  
whichever is applicable: ..." Although the required text was in the first letters, the text was not in bold or circumscribed by a  
line.

<sup>4</sup> Section 3060(a)(2) provides in part: "...The franchisee may file a protest with the board within 30 days after receiving a 60-  
day notice, satisfying the requirements of this section, or within 30 days after the end of any appeal procedure provided by the  
franchisor, or within 10 days after receiving a 15-day notice, satisfying the requirements of this section, or within 10 days after  
the end of any appeal procedure provided by the franchisor."

1 finds that the franchisor has met its burden of proving there is good cause for the termination taking into  
2 consideration the existing circumstances along with other specified factors. However, if a protest is not  
3 filed within 10 days of the time the franchisee received the notice of termination, the franchisee has no  
4 right to a hearing before the Board and the franchise may be terminated upon the passage of 15 days from  
5 the time of receipt by the franchisee of the notice of termination. This means that if no timely protest is  
6 filed the franchise may be terminated five days after the time to file a protest has lapsed.<sup>5</sup>

7 **THE FILING OF THE PROTEST AND THE ALLEGED DATE OF RECEIPT OF THE**  
8 **NOTICE OF TERMINATION AS STATED IN THE PROTEST**

9 8. The Protest, which was deemed filed on December 9, 2008,<sup>6</sup> alleges that:

10 4. **On or about December 1, 2008, Protestant received from Respondent<sup>7</sup>**  
11 **a letter**, a copy of which is attached hereto, advising Protestant of Respondent's  
12 intent to terminate the Lamborghini Dealership Agreement and Franchise. (Protest,  
13 page 2, lines 1-3) (Emphasis added.)

13 **THE MOTION TO DISMISS AND THE ALLEGATIONS THEREIN AS TO THE**  
14 **DATE OF RECEIPT OF THE NOTICE OF TERMINATION**

15 9. Lamborghini filed its Motion To Dismiss Protest on January 5, 2009. In this motion,  
16 Lamborghini alleges that:

17 a. **The notice of termination was received on Wednesday, November 26, 2008 by**  
18 **Platinum's designated agent for service of process;**<sup>8</sup> (Protest, page 3, lines 1-2)

19 ///

20 ///

21 \_\_\_\_\_  
22 <sup>5</sup> If the notices required by Section 3060 have been properly received, Section 3060(a)(3) states that the franchise may be  
23 terminated if "(3) The franchisor has received the written consent of the franchisee, or the appropriate period for filing a protest  
24 has elapsed."

25 <sup>6</sup> Although the Protest was not received by the Board until December 18, because it was sent by Certified Mail it was deemed  
26 received on the date of mailing, which was December 9, and it was filed as of that date. (Section 585(a) of Title 13 of the  
27 California Code of Regulations)

28 <sup>7</sup> Although the protest states "On or about December 1, 2008, Protestant received from Respondent" the notice, counsel for  
Platinum could not state how this occurred as the notices sent to Platinum and to Mr. Keuylian could not be delivered. (March  
9, 2009 Transcript, page 32, lines 3-14) The letter attached to the Protest was the notice dated November 25, 2008, copies of  
which had been sent to Platinum, Mr. Keuylian, and Ms. Dietrich. Of the three, only the notice sent to Ms. Dietrich's office  
had been successfully delivered as of December 1.

<sup>8</sup> As will be discussed, the attempts of Lamborghini to deliver a copy of the notice of termination to Platinum at its business  
address and to Mr. Vik Keuylian, one of Platinum's owners, at his residence address, were unsuccessful.

1 b. As this constituted receipt by Platinum, the 10 days within which Platinum was required to  
2 file its protest in order to be entitled to a hearing before the Board began to run on November 26; (Protest,  
3 page 3, lines 5-8)

4 c. The 10 days for Platinum to file its protest expired on Sunday, December 7, 2008;<sup>9</sup>  
5 (Protest, page 3, lines 7-8) and,

6 d. Because the protest was not filed until Tuesday, December 9, 2008, the Board is without  
7 jurisdiction to hear the protest.<sup>10</sup> (Protest, page 3, lines 12-14)

8 **APPLICABLE LAW GOVERNING WHEN A NOTICE IS DEEMED "RECEIVED"**

9 **THE VEHICLE CODE**

10 10. As stated above, Section 3060 grants a "franchisee" the right to file a protest within 10  
11 days "after receiving a 15-day notice" of termination.<sup>11</sup> The right to file a protest is granted to a  
12 "franchisee" and the time to do so commences to run from the time the notice is "received" by the  
13 franchisee.

14 11. Because some of the argument concerns when the notice was received by Mr. Keuylian,  
15 one of the dealer principals, it is necessary to determine who is the "franchisee".

16 12. The Vehicle Code defines a "franchisee" as follows:

17 331.1. A "franchisee" is any person<sup>12</sup> who, pursuant to a franchise, receives new motor  
18 vehicles subject to registration under this code, ...from the franchisor and who offers for  
sale or lease, or sells or leases the vehicles at retail or is granted the right to perform

19  
20 <sup>9</sup> Because this was a Sunday, the time to file a protest was extended to the next business day, which was Monday, December 8,  
2008. (See Government Code section 6707)

21 <sup>10</sup> Lamborghini also alleges that "Even if the protest had been timely filed (which is not the case), the Board should refuse to  
22 hear the protest for the additional reason that the filing does not comply with..." the Board's regulations as the protest was  
"...not 'responsive' to either of the 'specific grounds' cited by Lamborghini in the Notice..." (Motion, page 3, lines 26-28,  
23 page 4, lines 11-13) This contention, even though it may be accurate, would not by itself be sufficient reason to dismiss the  
protest.

24 <sup>11</sup> Section 3060 mandates that the 10-day notice contain the following language:

25 "NOTICE TO DEALER: You have the right to file a protest with the NEW MOTOR VEHICLE BOARD in Sacramento and  
26 have a hearing in which you may protest the termination of your franchise under provisions of the California Vehicle Code.  
You must file your protest with the board within 10 calendar days after receiving this notice or within 10 days after the end of  
any appeal procedure provided by the franchisor or your protest right will be waived." As can be seen, the time to file a protest  
(as stated here) is "within 10 calendar days after receiving this notice" and the stated effect of failing to file a timely protest is  
that the franchisee's "protest right will be waived."

27 <sup>12</sup> Platinum, a limited liability company, is a "person" as defined in the Vehicle Code. Section 470 states: "'Person' includes a  
28 natural person, firm, copartnership, association, limited liability company, or corporation."

1 authorized warranty repairs and service, or the right to perform any combination of these  
2 activities.

3 13. This definition requires there be a "franchise" which is defined in the Vehicle Code as  
4 follows:

5 331. (a) A "franchise" is a written agreement between two or more persons having all of  
6 the following conditions:

7 (1) A commercial relationship of definite duration or continuing indefinite duration.

8 (2) The franchisee is granted the right to offer for sale or lease, or to sell or lease at  
9 retail new motor vehicles...manufactured or distributed by the franchisor or the right to  
10 perform authorized warranty repairs and service, or the right to perform any combination  
11 of these activities.

12 (3) The franchisee constitutes a component of the franchisor's distribution system.

13 (4) The operation of the franchisee's business is substantially associated with the  
14 franchisor's trademark, trade name, advertising, or other commercial symbol designating  
15 the franchisor.

16 (5) The operation of a portion of the franchisee's business is substantially reliant on the  
17 franchisor for a continued supply of new vehicles, parts, or accessories.

18 (Remainder omitted.)

19 14. In this case the "written agreement" needed for a "franchise" is the document titled  
20 "Lamborghini Dealer Agreement". It identifies the parties to it as "Automobili Lamborghini S.p.A. an  
21 Italian company, having its registered office at Via Modena, 12, 40019 Sant'Agata Bolognese (Bologna),  
22 Italy"<sup>13</sup> and "Platinum Motors, LLC, a California company having its registered office at 2441 S.  
23 Pullman Street, Santa Ana, California 92705, USA."

24 15. The Dealer Agreement before the Board is a copy which has the following signature lines  
25 (none of which are signed in the copy before the Board) as follows:

26 AUTOMOBILI LAMBORGHINI S.P.A.

27 \_\_\_\_\_  
28 By: Enrico Maffeo  
Title: Head of Sales

By: Salvatore Cleri  
Title: Proxy Holder

PLATINUM MOTORS, LLC

\_\_\_\_\_

By: Nora Keuylian  
Title: Managing Director

<sup>13</sup> As stated above, Automobili Lamborghini America, LLC, states that it is the "assignee and successor in interest" to the Italian company and as such would be the "franchisor".

1 16. Just above the signature lines is the language, "IN WITNESS WHEREOF, the parties  
2 hereto have caused this Agreement to be executed by their duly authorized representatives as of the (sic)  
3 July 7, 2006."

4 17. As can be seen, the only parties to the franchise are Lamborghini and Platinum. Assuming  
5 the Agreement was signed in accordance with the signature lines, it was signed by Mr. Maffeo and Mr.  
6 Cleri in their representative capacity as agents for Lamborghini and by Ms. Keuylian signing in her  
7 representative capacity as agent for Platinum. Neither Ms. Keuylian nor Mr. Keuylian are parties to the  
8 franchise either by its terms or as to the manner of their signatures. Ms. Keuylian and Mr. Keuylian are  
9 no more franchisees than are Mr. Maffeo and Mr. Cleri franchisors.

10 18. Therefore there is only one "franchisee" that must receive notice of the termination of the  
11 franchise under Section 3060. This is "Platinum Motors, LLC" ("Platinum" as used herein).

12 19. Accordingly, the time within which a protest must be filed would commence to run when  
13 the notice of termination was received by Platinum, the only franchisee. Any contentions of Platinum  
14 relating to when the notice was personally received by Mr. Keuylian would be irrelevant as to the  
15 running of the 10-day period to file a protest if delivery to the "franchisee" had already occurred on  
16 November 26 as alleged by Lamborghini.

17 THE CALIFORNIA UNIFORM COMMERCIAL CODE<sup>14</sup>

18 20. The second requirement of Section 3060 is that the notice be "received" by the franchisee.  
19 As the Vehicle Code has no provision as to when a notice is deemed "received", which is needed to  
20 determine when the 10-day time to file a protest would commence to run under Section 3060, it is  
21 necessary to look elsewhere for guidance.

22 21. As the franchise is a contract for the sale of goods, it would come within the provisions of  
23 ///

24 \_\_\_\_\_  
25 <sup>14</sup> The first hearing on the Motion to Dismiss was held on January 27, 2009. At that time neither party was prepared to respond  
26 to the ALJ's questions pertaining to the applicability of the California Uniform Commercial Code as neither side had raised it  
27 in their briefs. The parties requested and were granted additional time to file supplemental briefs addressing the application  
28 and effect of the UCC. The UCC is discussed here as it is necessary to do so. The parties' supplemental briefs will be  
addressed again later. Lamborghini asserts that the UCC supports its position but requested that the Board consider the initial  
pleadings of the parties as well. Therefore, this Proposed Order will consider and discuss both the initial pleadings as well as  
the supplemental pleadings relating to the UCC.

1 Division 2 of the California Uniform Commercial Code (“UCC”).<sup>15</sup> If the contract comes within the  
2 scope of Division 2 of the UCC, then the definitions of terms as contained in Division 1 of the UCC  
3 would also be applicable.

4 22. The Vehicle Code in section 3060 unambiguously states that the notice must be received  
5 by the franchisee and the time for filing a protest commences to run from the receipt. The UCC clearly  
6 distinguishes between when a notice is deemed to be “given” as compared to when a notice is deemed to  
7 be “received”.

8 23. The franchise itself (the Dealer Agreement) requires only that the notice of termination be  
9 “given” to the franchisee, and as discussed below, Lamborghini has complied with this requirement.

10 24. UCC section 1202(d) states: “(d) A person ‘notifies’ or ‘gives’ a notice or notification to  
11 another person by taking such steps as may be reasonably required to inform the other person in ordinary  
12 course, whether or not the other person actually comes to know of it.”

13 25. As will be discussed, this had occurred even though the notice was returned to  
14 Lamborghini as “Unclaimed”.

15 26. However, the Vehicle Code in Section 3060 requires that the franchisee “receive” the  
16 notice of termination.

17 27. UCC Section 1202(e) provides as follows:

18 (e) Subject to subdivision (f), a person “receives” a notice or notification when:

19 (1) it comes to that person’s attention; or

20 (2) it is duly delivered in a form reasonable under the circumstances at the place of  
business through which the contract was made or at another location held out by that  
person as the place for receipt of such communications.

21 28. In short, the difference between giving notice (as required by the franchise terms) and  
22 receiving notice (as required by the Vehicle Code) is that notice is deemed given when the notice is sent  
23 whether it is delivered or not, whereas a notice is not deemed received until it is delivered.

24 29. It is UCC section 1202(e) that is applicable to Section 3060.

25 30. As the time within which a termination protest must be filed is very short (in this case only  
26 10 days from the time of “notice”), the legislature has required that the notice must be “received” to

27  
28 <sup>15</sup> Lamborghini agrees that Division 2 and Division 1 of the UCC are applicable. Platinum does not.

1 trigger the running of the time. If the time to file a protest began to run from the time that the notice of  
2 termination was "given" (meaning sent), a notice could be "given" when mailed on Day 1 but not  
3 received by the franchisee until Day 7. This would leave the franchisee with only 3 days to file a protest.  
4 Or, even worse, if notice is required only to be "given" rather than "received", if the notice is lost in the  
5 mail, the time to file a protest could expire even before the notice was delivered to the franchisee. This is  
6 because of the language relating to the giving of notice which states "... whether or not the other person  
7 actually comes to know of it." (UCC section 1202(d))

8 31. By requiring that the notice of termination be received to start the time within which a  
9 protest may be filed, the legislature has clearly allocated the risks of mis-delivery, delay in delivery, non-  
10 delivery, etc. to the franchisor as the time to file a protest will not commence to run until the notice is  
11 "received". However, when a notice is "received" by a franchisee, any delay in opening, reading, or filing  
12 a protest could, within a very short time, result in the loss of the right to a hearing before the Board. The  
13 legislature allows either 10 days or 30 days after a notice has been "received" to file a protest, apparently  
14 expecting that a franchisee, which is likely a business entity such as here, will have established routines  
15 for the notice to be called to the attention of the appropriate person for prompt attention.

16 32. As to what constitutes being "received", UCC section 1202(e) requires that to be  
17 "received" the notice need only be "**duly delivered** in a form reasonable under the circumstances **at the**  
18 **place of business** through which the contract was made **or at another location held out by that person**  
19 **as the place for receipt of such communications.**" (Emphasis added.) As is evident, the focus is upon  
20 being "delivered" to the "place" or "location" not upon receipt by or delivery to an "individual". There is  
21 no need for the notice to be received by a particular individual for the notice to have been received by the  
22 franchisee, which in this case is Platinum.

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1 ANALYSIS

2 THE VARIOUS NOTICES SENT BY LAMBORGHINI<sup>16</sup> – TO WHOM THEY WERE SENT AND HOW,  
3 AND WHETHER THEY WERE RECEIVED, AND IF SO, WHEN

4 33. There were three “sets” of notices sent by Lamborghini. All will be discussed in detail  
5 below.

6 The First Set of Notices - Dated November 21

7 34. These were sent by various modes of transmission to the franchisee, and two of the  
8 franchisee’s owners, and to two different addresses. However, this first set did not comply with the  
9 legislatively-mandated form for the notice.<sup>17</sup>

10 The Second Set of Notices - Dated November 25

11 35. These notices were sent to the franchisee, and one of its owners at the same two addresses  
12 as the first set of notices. Although these notices did comply with the form requirements for such notices,  
13 it was not established that any of these notices were received by the franchisee. These notices to Platinum  
14 and its owner were returned to Lamborghini as undeliverable or unclaimed.

15 36. Complicating the discussion of these two sets of notices is the fact that the manner of  
16 sending the notices as indicated on the notices on each set differs and what is indicated on their face does  
17 not accurately reflect what had actually occurred. This too will be discussed below.

18 ///

19 ///

20 ///

21 <sup>16</sup> Lamborghini’s use of various modes of communicating the notices to various addresses was influenced by the undisputed  
22 fact that Platinum had “shut down the dealership” and that “the dealership facility has been padlocked and all business  
23 operations have ceased.” (Motion, page 2, lines 19-21) Platinum had also stopped communicating with Lamborghini. (Reply,  
24 page 3, lines 4-13) The fact that the business had been “shut down” was confirmed by a “Licensee Out-of-Business Report”  
25 obtained from the Department of Motor Vehicles. This report indicates that a DMV Investigator inspected the premises of the  
26 licensee “Lamborghini Orange County, with an address of 2441 S. Pullman Street, Santa Ana and also “950 West Coast  
27 HWY”. The DMV report stated that the dealership had “Abandoned Location”, that attempts to make telephone contact by  
28 DMV with Nora Keuylian and Sossi Keuyian (sic) at two different phone numbers were unsuccessful. The report also stated,  
“Date Inspected November 6, 2008, Dealership closed. No outside inventory.” The DMV also sent Certified Letters to (a) the  
dealership in Santa Ana, (b) “Asdhig Astrid Keuylian”; (c) Sossi Keuylian; and (d) Nora Arda Keuylian. There is no indication  
in the part of the report before the Board as to whether the certified letters were delivered or returned.

<sup>17</sup> The information as to this notice is provided to show what may have been received by the addressees to put them on notice  
as the possibility that another notice may be coming, the significance of the notice, and also to show the difference in the way  
Lamborghini attempted to communicate the properly formatted Notice of Termination, which was dated November 25, and  
sent to Platinum, one of its owners, and its agent for service of process.

1                    **The Third Set of Notices – Dated November 25 – Sent to the Designated Agent**  
2                    **for Service of Process**

3                    37.        It will be the delivery of one letter in the third set of notices that will be determinative of  
4 the outcome of the Motion to Dismiss. The third set of notices were sent to Platinum's designated agent  
5 for service of process. It is undisputed that one of the four copies of the notice sent to this agent was  
6 delivered to her office on November 26, 2008, and signed for by someone there. It is this delivery that is  
7 urged by Lamborghini as establishing that the notice of termination was "received" by the "franchisee" as  
8 required by Section 3060.

9                    38.        This third set of notices consists of a separate letter addressed to Ms. Debra Dietrich, an  
10 attorney who is the designated agent for service of process for Platinum. This set was sent to the  
11 designated agent at two different addresses using two carriers, UPS Next Day Air and U.S. Postal Service  
12 Certified Mail, for each address (four copies in all). Each letter is dated November 25, and each had a  
13 copy of the "second set" of notices of November 25 enclosed. The first of these four letters to be  
14 delivered was that which was sent via UPS Next Day Air to Ms. Dietrich's current address in Newport  
15 Beach. It was delivered to the current office of the designated agent and was signed for by a person in  
16 that office on November 26. If this receipt on November 26 at the office of the designated agent is the  
17 date the notice of termination was "received" by Platinum, the time to file the protest would have  
18 commenced to run on November 26 and expired on December 8. The filing of the Protest on December 9  
19 would have been untimely. The Board has no power to extend the time limits created by the legislature.

20                    **The First Notice of Termination – Dated November 21, 2008, which did not Meet the Form**  
21                    **Requirements of Section 3060**

22                    39.        Even if this notice had been received by Platinum, this notice would not be effective to  
23 satisfy Section 3060 to start the running of the 10-day period for filing a protest as the statutorily-required  
24 "NOTICE TO DEALER" text is not in bold and is not circumscribed by a line to separate it from the rest  
25 of the text. However, if it was received by one of the agents of Platinum, although it would not trigger the  
26 running of the time to file a protest, it would operate to put them and Platinum on notice that Lamborghini  
27 ~~intended to terminate the franchise. The text of this notice was identical to the subsequent notice of~~  
28 November 25 (that was in the proper form), and although not in bold, the "Notice to Dealer" language

1 stated that a protest must be filed with the board "within 10 calendar days after receiving this notice...or  
2 your protest right will be waived", as required by Section 3060.

3 40. This November 21 notice indicated that it was sent using three methods of communication:  
4 "via Electronic Mail, Overnight Mail and Certified Mail" and that the three addressees were:

5 Ms. Nora Keuylian  
6 Mr. Vik Keuylian  
7 Platinum Motors, LLC  
8 2441 S. Pullman Street  
9 Santa Ana, CA 91205 (This is the dealership address.)

10 **The notices sent "Electronic Mail"**

11 41. The notice was sent on November 21 (as indicated) to one or two e-mail address of Mr.  
12 Vik Keuylian (but, contrary to what was indicated on the notice itself, it was not sent by e-mail to Ms.  
13 Nora Keuylian or to any e-mail address for Platinum, other than Mr. Keuylian's.) The e-mails to Mr. Vik  
14 Keuylian were not returned as undeliverable. There were no responses received from Mr. Vik Keuylian.  
15 (RT page 5, lines 1-14)

16 **The notices sent to the dealership address in Santa Ana - addressed to three persons and  
17 sent via two carriers**

18 **As to the notices sent "Overnight Mail"**

19 42. As to the notices sent "Overnight Mail", the notice was sent in one envelope, addressed as  
20 shown to Ms. Nora Keuylian and Mr. Vik Keuylian, and Platinum Motors, with the address of 2441 S.  
21 Pullman Street, Santa Ana (the dealership address). It was sent "overnight". It was "highly likely" that it  
22 was sent via United Parcel Service ("UPS") with "overnight" meaning "Next Day Air" in UPS  
23 terminology. (RT, page 5, lines 15-28)

24 **As to the notices sent "Certified Mail"**

25 43. The notice was also sent in one envelope via U.S. Postal Service Certified Mail, addressed  
26 as shown to Ms. Nora Keuylian and Mr. Vik Keuylian, and Platinum Motors, with the address of 2441 S.  
27 Pullman Street, Santa Ana (the dealership address). It is unknown if this was delivered or returned to  
28 sender. (RT page 5, lines 27-28, page 6, lines 3-10)

///

///



1 Platinum Motors, LLC  
2 2441 S. Pullman Street  
3 Santa Ana, CA 92705

4 **As to the indication that transmission of this notice occurred**  
5 **“Via Electronic Mail”**

6 50. At the hearing on the Motion to Dismiss, it was candidly stated by Lamborghini that this  
7 notice was not transmitted to Platinum “Via Electronic Mail”. (RT page 12, lines 16-23)

8 **As to the indication that the notice was sent “Overnight Mail”**

9 51. At the hearing on the Motion to Dismiss, it was candidly stated by Lamborghini that this  
10 notice was not sent by “Overnight Mail” via UPS (RT, page 14, lines 1-3) or any other means. (RT page  
11 13, lines 12-17)

12 **As to the indication that the notice was sent “Certified Mail”**

13 52. This is accurate. The notice was sent on November 25 by U.S. Postal Service Certified  
14 Mail, to the dealership address in Santa Ana as follows:

15 Platinum Motors, LLC  
16 2441 S. Pullman Street  
17 Santa Ana, CA 92705

18 (RT, page 12, lines 27-28)

19 53. The U.S. Postal Service attempted but could not make delivery of this notice to Platinum.

20 54. After the U.S. Postal Service carrier left three notices at the dealership address of  
21 “Platinum Motors, 2441 South Pullman Street, Santa Ana, California” for attempted delivery (on  
22 December 3, December 18, and December 21), the notice was returned to Lamborghini with a stamp  
23 stating “UNCLAIMED”. (RT page 13, lines 1-5, and Exhibit D to Lamborghini’s Reply)

24 **The notices purportedly sent to the residence address of Mr. Keuylian**

25 55. The notice of November 25, 2008 also indicated that it was sent “Via Overnight and Mail  
26 Certified Mail (sic)” to two addressees via two carriers. The addressees were:

27 Mr. Vik Keuylian  
28 Platinum Motors  
(street address redacted)  
Laguna Hills, CA 92653 (This is the residence address of Mr. Keuylian.)

(RT page 13, lines 17-19)

1 As to the indication that this notice was sent to Mr. Keuylian's address  
2 "Via Overnight"

3 56. At the hearing on the Motion, it was candidly admitted by Lamborghini that this was  
4 inaccurate. (RT page 13, Lines 17-21)

5 As to the indication that this notice was sent to Mr. Keuylian's address by  
6 "Certified Mail"

7 57. This is accurate. The notice was sent by U.S. Postal Service Certified Mail on November  
8 25, to Mr. Keuylian and Platinum at the home address of Mr. Keuylian in Laguna Hills. (RT page 13,  
9 lines 17-21)

10 58. This notice was returned to Lamborghini on November 29, 2008. (RT page 13, lines 25-27,  
11 page 14, line 1)

12 Summary of Notices Dated November 21, and November 25

13 59. To recap as to the notices dated November 21, sent to Platinum and Nora and Vik  
14 Keuylian, even if any of the notices dated November 21 had been "received" by Platinum or one of its  
15 agents in behalf of Platinum, the receipt would not operate to begin the running of the 10-day time period  
16 within which to file a protest as the notice did not satisfy the requirements of Section 3060 as to the  
17 "Notice to Dealer". The mandated language was not in bold and was not circumscribed by a line.

18 60. To recap as to the notices dated November 25, sent to Platinum's address and Mr.  
19 Keuylian's residence, the notices dated November 25 (as discussed so far) would not operate to start the  
20 running of the 10-day period as there is nothing to evidence that they had been "received" by Platinum or  
21 Mr. Keuylian as one of its agents.

22 61. Lamborghini is making no contention that any of the above notices were effective to start  
23 the 10-day time period for Platinum to file its protest. The information as to the above notices is  
24 presented to show all the attempts Lamborghini had made to communicate the notices to Platinum.

25 62. It is one of the four notices sent to Ms. Dietrich, Platinum's designated agent for service of  
26 process, and delivered to her office on November 26, that is the basis for Lamborghini's Motion to

27 Dismiss.

28 ///

1           **The Letters and Notices Sent to Debra M. Dietrich, Esq. Dated November 25, 2008**

2           63.     Lamborghini, aware of the closure of the dealership, and being unable to communicate  
3 with Platinum and its principals, obtained from the website of the California Secretary of State the  
4 identity of the "Agent for Service of Process" for Platinum. This agent and her address were shown to be:

5           Debra M. Dietrich, Esq.  
6           5 Park Plaza, Ste 1150  
7           Irvine, CA 92614-8591

8           (Motion to Dismiss, Exhibit B)

9           64.     Lamborghini, in an attempt to confirm the above address, did a web search and found that  
10 Ms. Dietrich's current address is:

11           Croudace Dietrich & Parker LLP  
12           4750 Van Karman Ave.  
13           Newport Beach, California 92660

14           (Motion to Dismiss, page 5, Declaration of Stetson, lines 16-18)

15                           **The letters and notices sent to Ms. Dietrich on November 25 - sent to both addresses<sup>19</sup>**

16           65.     The letter and notice were sent via UPS Next Day Air and also by U.S. Postal Service  
17 Certified Mail to both the Irvine address as shown at the Secretary of State's website (Irvine - incorrect  
18 but "official") and also to the correct address (Newport Beach). A total of four sets of letters and notices  
19 were sent to Ms. Dietrich. A copy of the notice was also sent to her by e-mail.

20           66.     These letters stated:

21                     Please find enclosed the notices of termination for Calabasas Euro Auto Group,  
22                     LLC and Platinum Motors, LLC (collectively, "Dealerships") that were sent to the  
23                     Dealerships on November 25, 2008 and are now also being served on the Dealerships  
24                     through you, as their Designated Agent for Service of Process.

25           (Motion to Dismiss, Exhibit A)

26           67.     Copies of the second notice of termination pertaining to Platinum, dated November 25,  
27 2008 (discussed above) were enclosed with each of the four letters to Ms. Dietrich.

28           ///

          ///

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<sup>19</sup> Lamborghini alleges that the incorrect address for Mr. Dietrich was due to the failure of Platinum to file the amendment necessary to change the address for its registered agent. (Reply, page 5, line 13-23)

1                    *The letters of November 25 to Ms. Dietrich sent to the address as shown on the Secretary*  
2                    *of State's website (Irvine)*

3                    68.        The letter to Ms. Dietrich indicated that it was sent to the address as shown at the Secretary  
4 of State's website and that they were sent "Via Overnight Mail and Certified Mail" to:

5                    Debra M. Dietrich, Esq.  
6                    Agent for Service of Process for  
7                    Calabasas Euro Auto Group, LLC  
8                    Platinum Motors, LLC  
9                    5 Park Plaza, Suite 1150  
10                    Irvine, California 92614-8591

11                    *As to the letter sent "Overnight Mail" to the address as shown at the Secretary*  
12                    *of State website (incorrect address in Irvine)*

13                    69.        This letter and the enclosed Notice of Termination were sent ("overnight") by UPS "Next  
14 Day Air".

15                    70.        The UPS tracking information for this indicated the following (in part):

- 16                    ▪ November 26 - Out for Delivery
- 17                    ▪ November 26 - 10:05 A.M. The receiver has moved. Attempting to locate receiver to  
18 complete delivery. No delivery made.
- 19                    ▪ November 26 - 8:30 P.M. The receiver has moved. Attempting to locate receiver to  
20 complete delivery. No delivery made/A postcard has been sent to the recipient requesting  
21 that they contact UPS.
- 22                    ▪ December 8 - Returned to shipper.

23 (Respondent's Reply, Declaration of Stetson, Exhibit C)

24                    *As to the letter sent via U. S. Postal Service Certified Mail to Ms. Dietrich at*  
25                    *the address as shown at the Secretary of State website (incorrect address in*  
26                    *Irvine)*

27                    71.        This letter and the enclosed Notice of Termination were sent by U.S. Postal Service  
28 Certified Mail, were forwarded to her at her correct address in Newport Beach and delivered there on  
December 3, 2008. (RT Page 11, lines 20-22)

*The letters to Ms. Dietrich sent to her correct address (Newport Beach)*

72.        The letter of November 25 to Ms. Dietrich also indicated that it had been sent to her office

1 in Newport Beach (as shown on her law firm's website). The indications are that the letter and notice of  
2 termination were transmitted via three modes of communication - "Via Electronic Mail, Overnight Mail,  
3 and Certified Mail".

4 **As to Electronic Mail**

5 73. This was sent by Lamborghini's counsel on November 25 to the e-mail address obtained  
6 from Ms. Dietrich's law firm website. The e-mail letter and notice were sent to  
7 DebraDietrich@c2d2law.com - Subject: Notice of Termination, Important along with an attachment  
8 which was the Notice of Termination. The sender received nothing back to indicate that this e-mail was  
9 not received by Ms. Dietrich. (Lamborghini is not contending that this e-mail, assuming it had been  
10 received, should operate to satisfy the requirements of the Vehicle Code.)

11 **As to the "Overnight Mail" to Ms. Dietrich at her correct**  
12 **address in Newport Beach**

13 74. The letter and Notice of Termination were sent on November 25, via UPS "Next Day Air"  
14 to:

15 Debra M. Dietrich, Esq.  
16 Agent for Service of Process for  
17 Calabasas Euro Auto Group, LLC  
18 And Platinum Motors, LLC  
19 Croudace Dietrich & Parker LLP  
20 4750 Von Korman Avenue  
21 Newport Beach, California 92660

22 75. This is the notice that Lamborghini is claiming should be deemed received by Platinum on  
23 November 26 and which Lamborghini asserts started the running of the 10-day period to file a protest.

24 76. There is no dispute that this letter was delivered on November 26, 2008 to the Newport  
25 Beach address of Ms. Dietrich and signed for by a person who signed the initials "CAC". (Motion,  
26 Exhibit C, UPS Tracking information showing delivery at 10:08 A.M., November 26.)

27 **As to the "Certified Mail"**

28 77. This letter and Notice of Termination were sent by U.S. Postal Service Certified Mail as  
indicated. It was delivered to Ms. Dietrich's office on December 1, 2008. (RT page 11, line 4-11)

**Summary of what is required for a notice to be "received"**

78. Section 3060 requires that the notice of termination be received by the franchisee. The

1 only "person" that is the franchisee is Platinum Motors, LLC, a limited liability company.

2 79. For a notice to be "received", it must be "duly delivered in a form reasonable under the  
3 circumstances at the place of business through which the contract was made or at another location held  
4 out by that person as the place for receipt of such communications". (UCC section 1202(e))

5 80. As can be seen, the focus is upon delivery at a "place" with the word "place" used twice in  
6 the quoted statute; either the "place of business" or "another location held out as the place". There is no  
7 requirement that the notice be received by or even delivered to any particular individual.

8 81. Here there is no question that the notice was "delivered" to a place, which is the office of  
9 Ms. Dietrich in Newport Beach, and that it was delivered there on November 26. Whether she personally  
10 received it or read it is irrelevant as neither is required by the statute for there to be delivery at that place.

11 82. The significant issue is whether the office of Ms. Dietrich is a proper "place" for such  
12 delivery.

13 **ANALYSIS OF LAMBORGHINI'S ASSERTIONS IN ITS MOTION TO DISMISS AND REPLY**

14 83. Lamborghini asserts that the notice of termination was received by Platinum's designated  
15 agent for service of process on November 26, that Platinum did not file its protest within 10 days of  
16 receipt with the result being that the Board has no jurisdiction to hear the protest. (Motion, page 3, lines  
17 1-14)

18 84. In its Reply brief, Lamborghini states it is aware that it was not making "service of  
19 process" upon Platinum, and was not intending this to be "service of process"<sup>20</sup> (Reply, page 2, line 12-  
20 14) "[h]owever, as is the case with Platinum, when the authorized dealership facility has been closed and  
21 the franchisee is out of business and has not left a forwarding address, it is virtually impossible to deliver  
22 any type of notice to the franchisee, other than through a registered agent for the service of process."  
23 (Reply, page 2, lines 17-20)

24 85. Lamborghini points out that the statutory language for the place of delivery as established  
25 by the UCC is in the disjunctive and permits delivery to be made either at the "place of business" or  
26

27  
28 <sup>20</sup> Delivery by mail to the office of Ms. Dietrich would not constitute service of process as the statute requires personal service upon the designated agent.

1 “another location held out as the place...”, that Lamborghini was aware that the place of business had  
2 been closed, and that there was no longer any contact with the dealer principals.

3 86. Under these circumstances, the “place” that would be the best for communicating to  
4 Platinum any notices would be the office of the person chosen by Platinum and officially declared by  
5 Platinum to be its designated agent for service of process, which would be the office of Ms. Dietrich.

6 87. As Platinum is a limited liability company it is subject to the Corporations Code, which in  
7 part provides:

8 Section 17057. Each limited liability company shall continuously maintain in this state  
9 each of the following:

- 10 (a) An office at which shall be maintained the records required by Section 17058.  
11 (b) An agent in this state for service of process on the limited liability company.

12 Section 17061. (a) In addition to Chapter 4 (commencing with Section 413.10) of Title 5  
13 of Part 2 of the Code of Civil Procedure, process may be served upon limited liability  
14 companies... as provided in this section.

15 (b) Personal service of a copy of any process against the limited liability company ...by  
16 delivery (1) to any individual designated by it as agent, ..., shall constitute valid service on  
17 the limited liability company ... No change in the address of the agent for service of  
18 process or appointment of a new agent for service of process shall be effective until an  
19 amendment to the statement described in Section 17060 is filed. ....

20 (c) (1) If ... the designated agent cannot with reasonable diligence be found at the address  
21 designated for personal delivery of the process, and it is shown by affidavit to the  
22 satisfaction of the court that process against a limited liability company ... cannot be  
23 served with reasonable diligence upon the designated agent by hand in the manner provided  
24 in Section 415.10, subdivision (a) of Section 415.20, or subdivision (a) of Section 415.30  
25 of the Code of Civil Procedure, the court may make an order that the service shall be made  
26 upon a domestic limited liability company ... by delivering by hand to the Secretary of  
27 State, or to any person employed in the Secretary of State's office in the capacity of  
28 assistant or deputy, one copy of the process for each defendant to be served, together with a  
copy of the order authorizing the service.

Service in this manner shall be deemed complete on the 10th day after delivery of the  
process to the Secretary of State....

22 88. As can be seen, this and other similar statutes are aimed at the procedure for service of  
23 process upon an entity (which is a “person” under the law but has no physical presence) and are not  
24 directly applicable to the type of notice required by the Vehicle Code. The notice of termination is not an  
25 initiation of a lawsuit or other legal proceeding for which “service of process” is needed. Although a  
26 notice of termination may be more important than many lawsuits, there is no requirement that there be  
27 personal-service-or-“substituted-service”-or-proof-of-service-upon-a-franchisee.

28 89. It is noted that if this were a situation requiring service of process, the manner of

1 accomplishing such service could also include either personal service upon a designated officer of the  
2 business entity, or (as provided by CCP section 415.20) leaving a copy of the summons and complaint at  
3 the mailing address with the person apparently in charge, followed by a mailing of the summons and  
4 complaint to that address with the service deemed effective on the 10<sup>th</sup> day after the mailing.

5 90. Here, with Platinum closed, it was not possible to make personal delivery to an appropriate  
6 agent at Platinum's place of business or even leaving the notice with a person in charge followed by a  
7 copy sent by U. S. Mail.

8 91. And, as the Vehicle Code requires only that the notice be "received" rather than "served",  
9 all that is required is that the notice be "delivered" at one of the places stated in UCC section 1202(e) as a  
10 place for delivery and the date the notice was "received by the franchisee" would be the date of delivery  
11 to the "place", which in this case was November 26.

12 92. The attempted UPS deliveries and U.S. Postal Service mailings to the franchisee and its  
13 principals were of no avail.

14 93. It is true that Lamborghini could have sent a notice by First Class Mail but there would be  
15 no proof that delivery had occurred or when it had occurred, both of which are necessary for a franchisor  
16 to be sure that it had followed the statutory requirements as to what must be done to effectuate a  
17 termination. The consequences for a franchisor of erroneously assuming there had been delivery of the  
18 notice of termination and proceeding accordingly can be severe. In addition, use of just First Class Mail  
19 would not satisfy Article 27 of the Dealer Agreement which expressly requires that the notice be sent  
20 "return receipt requested".

21 94. Having proof that the notice of termination had been delivered is not only important to the  
22 franchisor, but use of Certified or Registered Mail Return Receipt Requested is also in the best interest of  
23 the franchisee. If the premises had been closed, as here, use of First Class Mail, which could be delivered  
24 to the vacated office, would result in there being even less likelihood that the proper agents of Platinum  
25 would have received actual notice of the intended termination in time to file a protest within 10 days of  
26 the delivery of notice to the vacated premises.

27 ~~95. It is also true that Lamborghini could have sent a representative (employee or third party)~~  
28 to deliver the notice of termination at the franchisee's address by placing the notice in a mail slot or

1 sliding it under the door. Although Lamborghini could establish the date of such delivery to start the  
2 running of the 10-day time period to file a protest, if the premises were vacant this would not provide the  
3 franchisee with a reasonable opportunity to have a protest filed before its right to protest "would be  
4 waived" upon the expiration of 10 days. An agent of the business-entity franchisee may return to the  
5 premises and discover the notice but may not know when the delivery occurred (which is needed to  
6 calculate the 10 day period). And, such delivery would not satisfy Article 27 of the Dealer Agreement.

7 96. When the franchisee has closed its doors and there is no one present, no one answering the  
8 phones, and the principals are not accepting mail at their residence, the franchisor has the dilemma of  
9 trying to comply with the statute and at the same time trying to proceed promptly with a termination (as  
10 stated here in the hope of establishing a needed replacement franchisee to serve the public).

11 97. It is apparent that the legislature recognized that if the conduct of the franchisee falls  
12 within one of Section 3060's specifically stated circumstances, the franchisee must act very expeditiously  
13 in filing its protest. Failure to file a timely protest within 10 days of receipt of the notice means that the  
14 termination may occur five days later. Generally, Section 3060 would prevent a termination from  
15 occurring for 60 days and give a franchisor 30 days from receipt of the notice of termination to file a  
16 protest. However if the reasons for termination are the cessation of business or insolvency (both of which  
17 are alleged here), the franchise may be terminated in only 15 days and the franchisee has an abbreviated  
18 time of only 10 days from receipt of the notice to file a protest. Thus, if a franchisor knows with certainty  
19 that the notice of termination had been "received", which means "delivered", the franchisor will know  
20 within a very short period of time whether the franchisee will contest the termination or whether the  
21 franchisor can begin the process of establishing a replacement dealership.

22 98. Here, it appears as though Platinum is claiming that the notice will not be effective to start  
23 the time to file a protest until it is received by the franchisee or its owner at the business address.  
24 However, as Lamborghini stated in its Motion, "Under Protestant's logic, any motor vehicle dealer in the  
25 State of California could avoid termination indefinitely by simply closing the doors and failing to leave a  
26 forwarding address." (Reply, page 2, lines 21-22)

27 99. Platinum is correct that if the document had been a summons and complaint to be served  
28 on Platinum, the delivery to Ms. Dietrich's office would not constitute service of process as it was not

1 personally served on her. However, Lamborghini is not attempting to establish that there was service of  
2 process under the provisions of the Corporations Code or the Code of Civil Procedure.

3 100. Lamborghini is attempting to establish that the notice of termination had been "received"  
4 by Platinum (when it was delivered to the office of its designated agent), as required by the Vehicle Code.  
5 For the notice to have been received by Platinum, it must only have been delivered to either of two  
6 "places"; either the "place of business through which the contract was made" or "at another location held  
7 out by that person as the place for receipt of such communications".

8 101. Because the language is in the disjunctive and there is no other language establishing a  
9 sequential priority, there is no requirement that delivery to the first of the two "places" (the place of  
10 business) be attempted before the alternative "place" would be deemed proper.

11 102. Unlike the requirement for service of process, there is no need for there to be personal  
12 service upon a designated individual to constitute delivery to a "place".

13 103. Making matters a bit more burdensome for Lamborghini is the fact that the Irvine address  
14 shown on the website of the Secretary of State for Ms. Dietrich, the designated agent of Platinum for  
15 service of process, was no longer accurate.

16 104. However, Lamborghini learned of the correct address through the diligence of its attorneys  
17 and, to be cautious, sent a copy of the notice to Ms. Dietrich at her correct address in Newport Beach, as  
18 well as to Ms. Dietrich's Irvine address as shown in the Secretary of State's website, via both UPS and  
19 U.S. Postal Service Certified Mail (four copies in all).

20 105. The attempted delivery by UPS Next Day Air to the incorrect address (Irvine) was not  
21 successful.

22 106. However, the UPS Next Day Air notice sent to Ms. Dietrich's Newport Beach address was  
23 delivered on November 26 and signed for at the "front desk" by someone using the initials CAC.

24 107. It is this delivery that Lamborghini claims constitutes receipt of the notice of termination  
25 by Platinum.

26 108. The letter sent U.S. Postal Service Certified Mail addressed to the correct address  
27 ~~(Newport Beach) was delivered to Ms. Dietrich's office on December 1.~~

28 109. The letter sent U.S. Postal Service Certified Mail addressed to the incorrect address

1 (Irvine) was forwarded to the correct address (Newport Beach) and was delivered to Ms. Dietrich's office  
2 in Newport Beach on December 3.

3 **ANALYSIS OF PLATINUM'S CONTENTIONS IN ITS OPPOSITION**

4 110. In its first pleading in Opposition to Respondent's Motion to Dismiss, Platinum contends  
5 that:

6 a. First, the Vehicle Code requires that the notice be received by the "franchisee" and that  
7 Lamborghini should not be permitted to utilize the agent for service of process as an agent for delivery of  
8 a notice of termination;

9 b. Second, if service on the designated agent should be sufficient, service was not properly  
10 done here as there was no personal service on Ms. Dietrich;

11 c. Third, the notice of termination is invalid as the Dealer Agreement requires that notice be  
12 "given" to Dealer;

13 d. Fourth, Lamborghini should be estopped from relying on the letter sent to Ms. Dietrich.

14 (Respondent's Opposition, page 2, lines 8-14; page 3, lines 17-25; page 5, lines 3-6, 21-25)

15 **Analysis of Platinum's First Contention – That it is not proper to utilize the designated agent**  
16 **for service of process for a notice of termination and that notice must be given to the**  
17 **franchisee**

18 111. One of the concerns of Platinum is the fear of delay by the designated agent in processing  
19 the notice. However, it is Platinum that has acted in such a way as to deny to Lamborghini the usual  
20 channels of communication for delivery of such a notice.

21 112. First, the statutes require only that the notice be "received" by the franchisee, which means  
22 there must only be "delivery" at either designated "place", not that delivery be only at the place of  
23 business, nor that there be actual knowledge by an individual as to the content of the notice from the  
24 franchisee.

25 113. Second, when the notice has been "duly delivered" at an appropriate place, any risk of  
26 delay in communicating its delivery to an appropriate officer or managing agent of the business  
27 ~~entity/franchisee should be allocated to the person responsible for preventing the use of a more~~  
28 ~~appropriate place or more efficient manner of communicating the notice. Here, it is directly and solely~~  
~~due to the conduct or lack thereof of Platinum (through its managing agents) that there is any delay at all~~

1 in receiving communications and causing Lamborghini to attempt other than the customary channels of  
2 communications between franchisors and franchisees in order to comply with the statutes and the Dealer  
3 Agreement. Although Platinum is concerned about the possibility of delay that MAY operate to its  
4 detriment, there was no concern about the delays that DID occur (all of which were caused by Platinum)  
5 and which did cause prejudice to Lamborghini in its being left in limbo as to the selling and servicing of  
6 its products and whether it could or could not terminate the franchise. There was no apparent concern by  
7 Platinum about the total absence of communication from Platinum to its franchisor. Platinum, the sole  
8 cause of the difficulties in communication, is now complaining about the delays that "may" have occurred  
9 due to the difficulties in communication for which it was solely responsible.

10 114. In addition, the chance of prejudice to Platinum was minimized as Lamborghini had  
11 previously sent notices to Platinum and its owner by e-mail, and attempted phone calls, as well as an e-  
12 mail to Ms. Dietrich, so that all knew of the intended termination before the proper notice was received by  
13 Ms. Dietrich's office on November 26. None should have been taken by surprise by the content of the  
14 notices and that there was a very short time period allowed by statute for the filing of a protest.

15 115. Further, the facts do not indicate any prejudice to Platinum in sending the notices to  
16 Platinum's designated agent. If there was any delay on the part of Ms. Dietrich, it was minimal and not  
17 prejudicial. Platinum states in its protest that "Protestant" (possibly meaning Mr. Keuylian) received the  
18 notice on December 1 "from Respondent" (Counsel could not during the hearing confirm the source or  
19 form of receipt of the notice). As none of the notices could be delivered to Mr. Keuylian or Platinum and  
20 the only deliveries made were to the office of Ms. Dietrich, it is likely that the notice received by  
21 "Protestant" was received from Ms. Dietrich.<sup>21</sup> If the notice was received via Ms. Dietrich, then she did  
22 not unduly delay communicating with Mr. Keuylian or "Protestant". The notice was delivered to Ms.

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23  
24 <sup>21</sup> There is no declaration from Mr. Keuylian as to the source of the notice and why December 1 should be the date of receipt  
25 rather than November 26, the date the notice was received by Platinum's designated agent. Nor is there any declaration from  
26 Ms. Dietrich indicating what she did or did not do in regard to communicating with Platinum's owners or managers. The  
27 inference drawn from the un rebutted facts before the Board is that it was Ms. Dietrich who on December 1 communicated to  
28 Mr. Keuylian that she had received the notice of termination and that she knew that it had been delivered to her office on  
November 26. Even if this inference is not accurate, the un rebutted facts are that the notice of termination was delivered to the  
office of Ms. Dietrich, which has been determined to be a place held out by Platinum as for delivery of such notices. Under the  
circumstances, not only was Ms. Dietrich's office "a place" for delivery of the notice, due to the action or inaction of Platinum  
and its owners, it was the "only place" that delivery of such communications "return receipt requested" could be accomplished.

1 Dietrich's office on Wednesday, November 26, (the day before Thanksgiving). It is likely that Ms.  
2 Dietrich was aware of the significance of the notice due to the e-mail sent to her on November 25. As of  
3 December 1, the date Platinum states "Protestant" received the notice, Platinum still had seven calendar  
4 days to file a timely protest, which, as was done here, merely required sending the Protest (a simple  
5 document) by certified mail to the Board. As stated, and as was done here, if sent by certified mail, the  
6 Protest would be deemed filed as of the date of the mailing.

7 116. The notice of termination, having been delivered to the office of the agent designated for  
8 service of process, was delivered at the place as required by UCC-section 1202(e). This constituted being  
9 "received" by the franchisee, Platinum. At least one dealer principal obtained actual knowledge of the  
10 content of the notice no later than December 1, and for whatever reason, even though seven days  
11 remained to do so, the protest was not filed within the time limit imposed by the statute.

12 **Analysis of Platinum's Second Contention that if service on the designated agent should be**  
13 **sufficient, service was not properly done here as there was no personal service on Ms.**  
14 **Dietrich**

15 117. Platinum is correct that there was no personal service on Ms. Dietrich. However, neither  
16 the Vehicle Code nor UCC section 1202(e) require personal service on anyone for the notice to be  
17 "received" or "delivered".

18 118. Platinum has charged that Lamborghini is attempting to establish that there was service of  
19 process upon Platinum. However, as Lamborghini has stated, the delivery of the notice was not an  
20 attempt to effectuate service of process, but rather was an attempt to comply with the Vehicle Code which  
21 requires under Section 3060 only that the notice be "received" by the franchisee, and that "received"  
22 under UCC section 1202(e) merely requires "delivery" at a "place", not to any person.

23 **Analysis of Platinum's Third Contention that the notice delivered to Ms. Dietrich is invalid**  
24 **as the Dealer Agreement requires that notice be given to Dealer**

25 119. There are two problems with this contention. The first is that protest rights are determined  
26 by the Vehicle Code which means the standards for "notice" are legislatively-created requirements, and  
27 are not established by the terms of the Dealer Agreement which is a contract created by the parties. If  
28 ~~Lamborghini had complied only with the terms of the Dealer Agreement, but not the Vehicle Code,~~  
Platinum would correctly be arguing that compliance with the franchise was irrelevant as it is the Vehicle

1 Code that sets the rules for the filing of protests.

2 120. The second problem with this assertion of Platinum, is that the Dealer Agreement terms,  
3 which are less strict than are the Vehicle Code requirements, were possibly satisfied.

4 121. Platinum quotes from Article 19 of the Dealer Agreement which requires that the  
5 Agreement may be terminated "**upon written notice to Dealer**". (Opposition, page 4, lines 8-9; bold in  
6 Opposition, not in Dealer Agreement)

7 122. Platinum then cites and quotes from Article 27 of the Dealer Agreement, which in part  
8 states that "... all notices... shall be deemed duly given when sent by registered letter, return receipt  
9 requested, to the parties at the addresses set forth above..." (Emphasis added.)

10 123. As can be seen, the terms of the Dealer Agreement require only that the notices be "sent"  
11 and, as they are "duly given when sent", they are effective when sent rather than when they are received  
12 and would be effective even if they were not received.

13 124. This is also the result under the Commercial Code as to when a notice is "given". (See  
14 Paragraph 24)

15 125. Therefore, the sending of the notice to Platinum at its business address "**return receipt**  
16 **requested**" (as Lamborghini did) could satisfy the requirement of the Dealer Agreement<sup>22</sup> that there be  
17 written notice "given" to Dealer and would also satisfy the UCC requirement as to the "giving" of notice.

18 **Analysis of Platinum's Fourth Contention - raising an issue of estoppel**

19 126. This claim is based upon the contention that the notice of termination sent to Platinum  
20 "...makes no mention that it was also being served by overnight mail on Ms. Dietrich. Rather, the  
21 document indicates that Mr. (sic) Dietrich was served by electronic mail and certified mail. The cover  
22 letter that Respondent's law firm sent to Ms. Dietrich was not even carbon copied to Respondent. In sum,  
23  
24

25 <sup>22</sup> The possible impediment to satisfying the Dealer Agreement requirement (but not raised by Platinum) is that the Dealer  
26 Agreement requires that the notice be "sent by registered letter, return receipt requested" and the notices here were sent by UPS  
27 and by U.S. Postal Service "certified mail return receipt requested" rather than "registered". The Dealer Agreement also refers  
28 to the sending of a notice by "certified letter, return receipt requested", but this is only when it is being sent in confirmation of  
an earlier notice that was "dispatched by telefax or by telegram". Sending a notice by "certified" may be substantial  
compliance with the Dealer Agreement requirement as there is little difference between the two, and it is likely that "certified"  
is a bit "faster" than is registered. Some statutes, and also the Board's regulations, state that if "registered" is required,  
"certified" will suffice.

1 by its own conduct, Respondent created significant confusion as to what document and what method  
2 constituted notice to Protestant. Protestant should not be required to guess what letter Respondent  
3 believes triggered the ten-day time to file a protest.”<sup>23</sup> (Opposition, page 5, lines 22-25, page 6, lines 1-3).

4 127. Although the principle of estoppel is alleged, there are no facts alleged that would establish  
5 the existence of the essential element of estoppel, which is that there was any detrimental change of  
6 position by Platinum in reliance upon any statement or conduct of Lamborghini. There is no showing of  
7 what other documents were received by Platinum, when they were received and how Platinum may have  
8 been induced to change position in reliance upon them.<sup>24</sup>

9 **ANALYSIS OF THE SUPPLEMENTAL BRIEFS FILED PRIOR TO THE SECOND HEARING**  
10 **ON THE MOTION TO DISMISS**

11 128. The supplemental briefs were to address the possible application of the UCC to the issue of  
12 when a notice should be deemed received. Part of this has already been discussed as it was necessary to  
13 do so.

14 129. It is found that the arguments in the supplemental brief filed by Lamborghini for the most  
15 part accurately state the effect of the application of the UCC upon the communications described above.  
16 Therefore, the language in “Respondent’s Supplemental Brief in Support of its Motion to Dismiss”, as  
17 quoted below, is hereby incorporated into this Order.

18 130. After correctly asserting (and citing authority) that Division II of the UCC applies to the  
19 franchise and that the definition of “received” as stated in Division 1 of the UCC should apply (as  
20 discussed above), Lamborghini asserts:

21 The definition of “receipt” in Commercial Code § 1202(e)(2) has three  
22 components: (1) the notice received must have been in “a form reasonable under the  
23 circumstances”; (2) the notice must have been “duly delivered”; and (3) the notice must  
24 have been received at the person’s place of business or at “a location held out by that

25 <sup>23</sup> This contention is without merit. There is no need for “guessing” by Platinum as to what notice started the running of the  
26 10-day period to file a protest and it is not the date that Lamborghini “believes triggered the ten-day time to file a protest”. As  
27 to “what document and what method”, it was the notice that was first delivered to Platinum or its authorized agent by any  
28 method that started the 10-day period, with the date of such delivery known by Platinum or its authorized agent (with no need  
to guess). What Lamborghini believes is irrelevant. As to creating confusion and uncertainty, that charge should be made by  
Lamborghini.

<sup>24</sup> Platinum, in its Supplemental Brief relating to the application of the UCC also expanded its contentions as to the application  
of estoppel. Lamborghini calls this additional material “an entirely new estoppel argument”, that is “outside the scope of the  
supplemental briefing that has been ordered, and therefore should be rejected out of hand.”

1 person as the place for receipt of such communications.” Lamborghini’s delivery of the  
2 Notice to Dietrich, Platinum’s agent for service of process, by United Parcel Service  
3 (“UPS”) on November 26, 2008, complied with all three of these requirements. As a  
4 result, this notice was received by Platinum on November 26, 2008, rendering Platinum’s  
5 protest untimely.

6 First, Lamborghini’s notice to Platinum was in a form reasonable under the  
7 circumstances. The Notice was in the form required by the Vehicle Code, and included a  
8 12-point, boldfaced legend advising Platinum of its right to protest the termination of its  
9 dealership as required by Vehicle Code § 3060. The Notice was also delivered via UPS  
10 overnight delivery with a tracking number and a receipt.

11 Second, Lamborghini’s notice to Platinum was “duly delivered” to Dietrich on  
12 November 26, 2008. Platinum acknowledged in its opposition brief that the Notice  
13 physically arrived at Dietrich’s office on November 26, 2008. Def. Opp. to Mot. to  
14 Dismiss 3. Because Lamborghini was unable to deliver the Notice to Platinum or any of  
15 its affiliates except for Dietrich, and because Platinum is actually in possession of the  
16 Notice as evidenced by its protest, it is clear that Dietrich subsequently delivered the  
17 Notice. Moreover, Platinum has not denied that Dietrich actually received the Notice on  
18 November 26, 2008. Under such circumstances, it is appropriate for the Board to  
19 conclude that the Notice was duly delivered to Dietrich on November 26, 2008. [Citations  
20 omitted.] In addition, the Notice, as Platinum admits, was signed for on November 26,  
21 2008 by an individual in Dietrich’s office with the initials “CAC”. Courts that have  
22 interpreted the “duly delivered” language in the UCC’s definition of “receipt” have found  
23 that delivery to a person who is the normal recipient of mail for another is enough to  
24 satisfy the statute’s requirement. [Citations omitted.]

25 Third and finally, Lamborghini’s due delivery of reasonable notice to Dietrich on  
26 November 26, 2008 constituted delivery to a location held out by Platinum as the place for  
27 receipt of such communications. Platinum is a limited liability company (“LLC”)  
28 organized under the laws of the State of California, and is therefore subject to California  
29 Corporations Code § 17000 *et seq.* (the “LLC Statute”). The LLC Statute states that  
30 service of process on an LLC’s agent for service of process constitutes service of process  
31 on the LLC. § 17061(b). Thus, Lamborghini’s delivery of the Notice to Dietrich was  
32 delivery to a location held out by Platinum as the place for receipt of such  
33 communications.

34 In its Opposition to Lamborghini’s Motion to Dismiss, Platinum contends that  
35 Section 17061 only applies to notices related to particular types of litigation, and  
36 attempted to carve out its application to notices related to administrative proceedings.  
37 Platinum cited no authority to support this restrictive interpretation. This is because no  
38 such authority exists. To the contrary, the language of the LLC Statute is broad and states  
39 that service is valid on the LLC if “a copy of any process against the” LLC is delivered to  
40 the designated agent. *Cal. Corp Code § 17061(b)* [emphasis added in original].  
41 Furthermore, the LLC Statute requires that other administrative, non-litigation notices be  
42 given to an LLC’s agent for service of process. *See, e.g. § 1705(e)* (requiring Secretary of  
43 State to give notice to LLC’s agent if LLC’s check for payment of filing fee is not  
44 honored). As a result, Platinum cannot legitimately claim that Dietrich, its agent for  
45 service of process, is not a person “held out by it” to receive communications such as the  
46 Notice. [Citations omitted but referencing a case purportedly holding that “proper UCC  
47 notice may be served upon an entity’s agent for service of process].

48 In addition, that Dietrich moved her office without updating her address  
49 information with the Secretary of State is of no consequence. Lamborghini caused the  
50 Notice to be delivered to Dietrich’s *actual* office. Platinum cannot use the fact that

1 Dietrich did not update her records with the Secretary of State as a basis for defeating the  
2 propriety of Lamborghini's Notice. Although the LLC statute requires an LLC to name an  
3 agent for service of process at the time of its formation and to update that agent's address  
4 in the event that the agent moves [citations omitted], the failure of a registered agent to  
update the information with the Secretary of State does not mean that delivery of a notice  
to a registered agent's *actual* office is not delivery "to a location held out ... as the place  
for ... receipt of ... [such] communications."

5 Lamborghini's delivery of the Notice to Dietrich complied in all respects with the  
6 definition of "receipt" under Commercial Code § 1201....

7 (Lamborghini's Supplemental Brief, pages 5-7)

8 **Platinum's Other Contentions in its Supplemental Brief**

9 131. Platinum contends that UCC section 1202 pertaining to when notices are received is not  
10 applicable. (Protestant's Supplemental Brief, page 3, lines 7-10) Platinum's contention that UCC section  
11 1202 applies only to when notice of a fact is given or received and not when a document is received is not  
12 well taken.

13 132. Likewise Platinum's contention that even if UCC section 1202 applies that UCC section  
14 1202(e) requires that the notice be delivered to Platinum's place of business. (Protestant's Supplemental  
15 Brief, page 3, lines 11-16) In support of this contention, Platinum asserts that the Dealer Agreement  
16 provided that the notices were to be delivered to the address set forth in the Dealer Agreement and that  
17 Ms. Dietrich's address was not listed in the Agreement. This contention is also without merit. The  
18 Dealer Agreement does not require that the notice be delivered to the address shown but states that a  
19 notice such as this would be effective when it was sent to the address listed in the Agreement.

20 Lamborghini in fact may have complied with that requirement. Lamborghini did send the notice to the  
21 address shown in the Dealer Agreement and did send it "return receipt requested" as required by the  
22 Dealer Agreement. However, it is the Vehicle Code that requires the notice be "received", and it is the  
23 UCC that establishes what is needed for "received" - delivery at the place held out by Platinum, which,  
24 under these circumstances in particular, would include the location of Platinum's designated agent as  
25 required by the Corporations Code.

26 133. It is likely that the very situation that has occurred here is a reason that the legislature  
27 ~~through the Corporations Code has required a limited liability company (a non-physical "person" with no~~  
28 physical presence and no residence) to designate a "natural person" as its agent for receipt of service of

1 process with the address listed for the natural person as the place for making such service.

2 134. Such a designation is intended for the benefit of both parties. It enabled Lamborghini to  
3 make delivery when all of the other usual and customary methods of delivering a notice had failed  
4 (through no fault of Lamborghini) due to either the abandonment of the business premises or the refusal  
5 of Platinum's principals to accept delivery or both.

6 135. There was also benefit to Platinum in that, even though its business address was shut down  
7 and apparently abandoned, its designated agent would (as apparently happened here) exercise due  
8 diligence to communicate with Platinum's owners when such delivery had occurred. Had Lamborghini,  
9 knowing that the business address of Platinum had been shut down, by messenger or just first class mail,  
10 left a copy of the notice of termination "under the door" or "in the mail slot", Platinum would likely be  
11 asserting that Lamborghini was required by the Dealer Agreement to send the notices "return receipt  
12 requested" and that Lamborghini knowing of the closure of the business address and that Platinum's  
13 owners were "unavailable" to receive the notices, should have delivered the notice to Platinum's  
14 designated agent.

15 136. And, as stated by Lamborghini, a limited liability company, required to name an agent for  
16 service of process, by operation of law, holds out its designated agent as the person authorized to receive  
17 service of process and the location of that person would be the place for such service. (Respondent's  
18 Supplemental Reply Brief, page 3, lines 17-25)

19 137. Platinum also asserts that if the UCC applies that UCC section 1202(f) would be the  
20 appropriate section. This section states in part:

21 (f) Notice, knowledge, or a notice or notification received by an organization is  
22 effective for a particular transaction from the time it is brought to the attention of the  
23 individual conducting that transaction and, in any event, from the time it would have been  
brought to the individual's attention if the organization had exercised due diligence. ...

24 138. This section is not applicable here. There was no "particular transaction" in progress and  
25 there was no "individual conducting that transaction".

26 139. As to the additional arguments related to estoppel as raised in the Platinum's Supplemental  
27 Brief, this argument is based upon the listing on the letter to Ms. Dietrich that the letter had also been  
28 "sent to Platinum Motors and Vik Keuylian via electronic mail, overnight mail, and certified mail"

1 (Protestant's Supplemental Brief, page 4, line 10-12) but it had not been sent out via overnight mail to  
2 either Platinum or Mr. Keuylian. (Protestant's Supplemental Brief, page 4, line 12-13) The concern  
3 expressed is that Ms. Dietrich, assuming she had been in her office and had read the communication on  
4 November 26, that she may have relied upon the representations that the notice had been sent "via  
5 overnight delivery to Protestant, both at its principal place of business and at the home address of the  
6 dealership's Manager." Ms. Dietrich may thus have been given "the false impression that Ms. Dietrich  
7 did not have to do anything because Respondent was simultaneously providing the required notice."  
8 (Protestant's Supplemental Brief, page 4, lines 17-23, page 5, lines 1-2)

9 140. This is assuming facts that are not before the Board. There is no declaration from Ms.  
10 Dietrich as to any of the above. And, the facts that are before the Board indicate that Protestant (through  
11 Mr. Keuylian) received the notice on December 1, probably from Ms. Dietrich, which if is the case  
12 indicates that she did not rely upon the indicated other addressees and did not unduly delay providing a  
13 copy of the notice to Mr. Keuylian. It is noted that neither is there is a Declaration from Mr. Keuylian as  
14 to any of the above.

15 141. Therefore, there is still no basis for the application of estoppel to operate against  
16 Lamborghini in regard to its motion to dismiss. And, as estoppel is an equitable principle that may be  
17 applied at the discretion of the tribunal to reach a just result, it would be difficult to conclude that  
18 Platinum and its owners who are responsible for the difficulties in communication should be permitted to  
19 invoke the concept under these circumstances. As between Platinum and Lamborghini, it is Platinum that  
20 is the cause of the difficulties in communication that have been recited here.

21 142. No declarations have been submitted in behalf of Platinum indicating any reason why the  
22 notices sent via U.S. Mail and UPS to the correct business address and the residence of Mr. Keuylian  
23 were unclaimed.

24 ///

25 ///

26 ///

27 ///

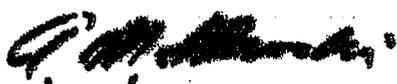
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**PROPOSED ORDER**

After consideration of the pleadings, exhibits, and oral arguments of counsel, it is hereby ordered that "Respondent's Motion to Dismiss Protest" is granted. As the protest was not timely filed, the Board has no jurisdiction over this matter.

I hereby submit the foregoing which constitutes my proposed order in the above-entitled matter, as the result of a hearing before me, and I recommend this proposed order be adopted as the decision of the New Motor Vehicle Board.

DATED: March 18, 2009

By:   
ANTHONY M. SKROCKI  
Administrative Law Judge

George Valverde, Director, DMV  
Mary Garcia, Branch Chief,  
Occupational Licensing, DMV