

NEW MOTOR VEHICLE BOARD
1507 - 21st Street, Suite 330
Sacramento, California 95811
Telephone: (916) 445-1888

STATE OF CALIFORNIA
NEW MOTOR VEHICLE BOARD

In the Matter of the Protest of

BONANDER PONTIAC, INC.,

Protestant,

v.

DAIMLER TRUCKS NORTH AMERICA LLC,

Respondent.

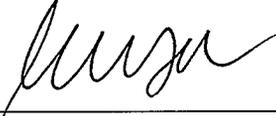
Protest No. PR-2239-10

DECISION

At its regularly scheduled meeting of February 4, 2011, the Public Members of the Board met and considered the administrative record and Administrative Law Judge's "[Proposed] Order Granting Respondent's Motion to Dismiss" in the above-entitled matter. After such consideration, the Board adopted the Proposed Order.

This Decision shall become effective forthwith.

IT IS SO ORDERED THIS 4th DAY OF FEBRUARY 2011.



ROBERT T. (TOM) FLESH
President
New Motor Vehicle Board

1 NEW MOTOR VEHICLE BOARD
1507 - 21ST Street, Suite 330
2 Sacramento, California 95811
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CERTIFIED MAIL

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8 STATE OF CALIFORNIA
9 NEW MOTOR VEHICLE BOARD

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11 In the Matter of the Protest of)
12 BONANDER PONTIAC, INC.,)
13 Protestant,)
14 v.)
15 DAIMLER TRUCKS NORTH AMERICA LLC.)
16 Respondent.)

Protest No. PR-2239-10

**[PROPOSED] ORDER GRANTING
RESPONDENT'S MOTION TO
DISMISS**

17
18 To: Scott J. Ivy, Esq.
Val Saldana, Esq.
19 LANG, RICHERT & PATCH
Attorneys for Protestant
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Fresno, California 93704

21 Gillian Morshedi, Esq.
22 Attorney for Respondent
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23 555 California Street, Suite 1700
San Francisco, California 94104

24 Russell Abrams, Esq.
25 Attorney for Respondent
DAIMLER TRUCKS NORTH AMERICA LLC
26 2477 Deerfield Drive
Fort Mill, South Carolina 29715-6942

27 ///

28 ///

1 Jon P. Christiansen, Esq.
2 Attorney for Respondent
3 FOLEY & LARDNER LLP
4 777 East Wisconsin Avenue
5 Milwaukee, Wisconsin 53202

6 1. This matter came on regularly for telephonic hearing on December 7, 2010, before
7 Anthony M. Skrocki, Administrative Law Judge for the New Motor Vehicle Board ("Board"). Scott J.
8 Ivy, Esq. of Lang, Richert & Patch, represented Protestant. Mr. Donald Bonander and Mr. Ryan
9 Katzenbach were also present on behalf of Protestant. Jon P. Christensen, Esq. and Zach Corey, Esq., of
10 Foley & Lardner LLP represented Respondent.

11 **THE PARTIES PRESENTLY BEFORE THE BOARD**

12 2. Protestant, Bonander Pontiac, Inc. ("Bonander" or "Protestant") has its headquarters at
13 231 South Center Street, Turlock, California. Protestant also does business as Bonander Truck and
14 Trailer with its principal truck and trailer facility located at 4520 Golden State Boulevard, Turlock,
15 California. Bonander has been a dealer selling Western Star brand trucks for nearly 20 years and
16 executed its current franchise with Western Star Trucks Sales, Inc. ("WSTS"),¹ a Washington
17 corporation, in 2007. Bonander is licensed by the Department of Motor Vehicles ("DMV") as a new
18 vehicle dealer, as well as a new trailer dealer, new recreational vehicle dealer, and new motorhome
19 dealer.

20 3. Respondent is Daimler Trucks North America LLC ("DTNA"). DTNA has its corporate
21 headquarters at 2477 Deerfield Drive, Fort Mill, South Carolina.² DTNA claims, although it is the parent

22 ¹ WSTS will be used herein to refer to the corporate entity, Western Star Trucks Sales, Inc., that is the franchisor named in
23 Bonander's 2007 Dealer Agreement. "Western Star" or "Western Star trucks" will be used to refer to the line-make or
24 "brand" of trucks.

25 ² As of the date the notice of termination was issued, the DMV records indicated an "Auto/Commercial Vehicle
26 Manufacturer" license issued to "Daimler Trucks North America LLC" with a "Main Location" of 4435 N. Channel Ave.,
27 Portland, OR 97217, which opened on "09/29/2009". The records indicate the license was first issued on "08/29/2002". The
28 "Owner of Business" was shown as "Schmueckle Rainer Lampert Mark" at a mailing address of "2477 Deerfield Drive, Fort
Mill, SC 29715". DTNA was authorized under this license to distribute the following makes: Freightliner, Sterling, Western
Star, Daimler, and Mercedes. There was no current separate license found for WSTS or for Daimler, Daimler AG,
Freightliner, Freightliner Custom Chassis, or Freightliner Specialty Vehicles. Subsequent to the date of the order denying the
first motion to dismiss, in response to an inquiry from the Board, DTNA agreed that the above licensing information was
accurate except that DTNA is a subsidiary of Daimler North America Corp., which is a subsidiary of Daimler AG, a German
corporation, and that the owner of DTNA is not Rainer Schmueckle or Mark Lampert. DTNA indicated that the addresses are
correct and the brands covered by the license appear to be accurate. Furthermore, DTNA has "...been unable to verify that
WSTS holds an occupational license from the DMV. It is believed that Western Star Trucks are sold by virtue of DTNA's
license."

1 corporation of several brands, including Western Star trucks, that it is not the franchisor of Bonander.

2 4. WSTS, which DTNA claims is the franchisor, has not made an appearance in these
3 proceedings.

4 **FACTUAL AND PROCEDURAL BACKGROUND**

5 5. By letter dated May 19, 2010, received by Bonander and the Board, DTNA gave notice of
6 intent to terminate Bonander's Western Star Trucks franchise.

7 6. Bonander, represented at that time only by its owner Mr. Bonander, filed a very lengthy
8 and very detailed protest in the caption of which DTNA was named as the Respondent but the text of
9 which included WSTS as the franchisor as well.

10 **THE FIRST MOTION TO DISMISS**

11 7. DTNA filed its first motion to dismiss on July 22, 2010. In brief, this motion was based
12 upon DTNA's assertions that even though the notice of termination came from DTNA that DTNA was
13 not the franchisor; that the franchisor was WSTS; that the notice was given in behalf of WSTS; and that
14 WSTS was not named in the protest.

15 8. After a hearing on this first motion, in a comprehensive order dated September 21, 2010,
16 DTNA's first motion to dismiss was denied. A copy of the ALJ's order is attached hereto as Exhibit A
17 and its contents are incorporated into the terms of this order as part of the record before the Board in
18 ruling on this current motion to dismiss.

19 9. In part, the first motion to dismiss was denied on the basis that the actual relationship
20 between DTNA and WSTS and Bonander could not be determined from the documents and declarations
21 submitted by DTNA. No appearance has yet been made by WSTS.

22 **THE MOTION TO DISMISS PRESENTLY BEFORE THE BOARD**
23 **(THE SECOND MOTION TO DISMISS)**

24 10. After denial of its first motion to dismiss, DTNA, on October 1, 2010, gave notice to
25 Bonander and the Board "... that the May 19, 2010 Notice of Termination sent by Monte Mehring of
26 Daimler Trucks North America LLC on behalf of Western Star Trucks Sales, Inc. is hereby withdrawn.
27 Because the Notice of Termination has been withdrawn, Respondent, Daimler Trucks North America
28 LLC requests that this proceeding be dismissed as moot."

1 11. Thereafter, on October 25, 2010, DTNA filed its "Motion to Dismiss".

2 12. Bonander, on November 4, 2010, filed its "Opposition to Respondent Daimler Truck
3 (sic) North America's Second Motion To Dismiss".

4 13. DTNA, on November 29, 2010, filed its "Reply in Support of Motion to Dismiss".

5 14. DTNA's motion to dismiss is based upon the fact that the only notice of termination that
6 had been given was now being withdrawn.

7 15. Bonander's opposition to the motion is based upon the claim that, although the notice of
8 termination has been withdrawn, Bonander believes there remain many areas of dispute between the
9 parties that the Board should resolve. These include assertions contained in the protest as filed, plus a
10 request to amend the protest to assert additional claims by Bonander as to the conduct of DTNA's
11 representatives subsequent to the filing of the protest. These claims relate to such things as warranty
12 obligations, incentive payments, alleged modifications of the franchise, DTNA "Selectruck Remarketing
13 Program" for used trucks. (Opposition, pp. 2-3, et seq.)

14 16. DTNA's reply again asserted that the protest challenging the termination of Bonander's
15 Western Star Trucks franchise is moot. DTNA also asserted that none of the other claims that Bonander
16 desired to have heard by the Board were within the Board's powers under Section 3060, which is
17 applicable to a termination protest. (Reply, p. 3, et seq.)

18 **ANALYSIS**

19 **WHETHER THE PROTEST SHOULD BE HEARD TO DETERMINE IF THERE IS**
20 **GOOD CAUSE TO TERMINATE BONANDER'S FRANCHISE**

21 17. The protest was filed pursuant to Section 3060 which empowers the Board to make a
22 determination of whether there is or is not good cause to terminate the franchise.

23 18. Here the only notice of termination given was by DTNA, allegedly in behalf of WSTS,
24 and the withdrawal of the notice of termination was likewise given by DTNA, allegedly in behalf of
25 WSTS.

26 19. As there is no longer any intention to terminate the Western Star Trucks franchise,
27 Bonander has no need for the legislatively-created protection against termination of its franchise without
28 good cause. Allowing the protest to proceed on the merits of whether there is good cause to terminate

1 Bonander's franchise would require the franchisor (whether it is WSTS or DTNA) to prove good cause to
2 do something that it does not intend to do.

3 **WHETHER THE PROTEST SHOULD BE HEARD TO DETERMINE THE OTHER**
4 **ISSUES ASSERTED BY BONANDER IN ITS PROTEST AS FILED**

5 20. Section 3060 does not empower the Board to conduct a hearing and make determinations
6 as to the other issues that Bonander desires the Board to resolve. These other issues may be subject to
7 protests under other sections of the Vehicle Code, or perhaps they may be litigated by way of a civil
8 action in Superior Court or other forum, but they cannot be resolved by way of a protest filed under
9 Section 3060.

10 **WHETHER BONANDER SHOULD BE GRANTED LEAVE TO AMEND ITS PROTEST**
11 **TO ASSERT OTHER CLAIMS RELATING TO THE CONDUCT OF DTNA'S REPRESENTATIVE**
12 **SUBSEQUENT TO THE FILING OF THE PROTEST**

13 21. Bonander has requested permission to amend its protest to include additional claims, such
14 as those relating to the SelecTruck Remarketing Program for used trucks. None of the additional claims
15 are those that are included in the Board's power to consider in connection with a protest filed under
16 Section 3060. Granting leave to amend the protest to include claims that the Board cannot resolve
17 pursuant to the statutes applicable to this protest would be meaningless.

18 **CONCLUSION**

19 22. Bonander's protest challenging whether there is good cause to terminate its WSTS
20 franchise is moot.

21 23. Bonander's other claims of violation of statutes or contract by DTNA and WSTS as
22 alleged in the protest cannot be resolved by the Board in considering a protest filed pursuant to Section
23 3060.

24 24. Bonander's request for leave to amend the protest to include other claims is denied.

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PROPOSED ORDER

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2 After consideration of the pleadings, exhibits, and oral arguments of counsel, it is hereby ordered
3 that Respondent's Motion to Dismiss Protest is granted. Protest No. PR-2239-10 (*Bonander Pontiac, Inc.*
4 *v. Daimler Trucks North America LLC*) is dismissed without prejudice. This order of itself shall not bar
5 Bonander from filing other claims for relief with the Board as permitted by the Vehicle Code or of itself
6 operate to bar any claims of Bonander that may be brought in any other forum.

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

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16 DATED: January 24, 2011

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27 By: 
28 ANTHONY M. SKROCKI
Administrative Law Judge

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

1 Jon P. Christiansen, Esq.
2 Attorney for Respondent
3 FOLEY & LARDNER LLP
4 777 East Wisconsin Avenue
5 Milwaukee, Wisconsin 53202

6 1. This matter came on regularly for telephonic hearing on August 16, 2010, before Anthony
7 M. Skrocki, Administrative Law Judge for the New Motor Vehicle Board ("Board"). Scott J. Ivy, Esq. of
8 Lang, Richert & Patch, represented Protestant. Mr. Donald Bonander and Mr. Ryan Katzenbach were
9 also present on behalf of Protestant. Jon P. Christensen, Esq. of Foley & Lardner LLP represented
10 Respondent.

11 **THE PARTIES PRESENTLY BEFORE THE BOARD**

12 2. Protestant, Bonander Pontiac, Inc. ("Bonander" or "Protestant") has its headquarters at
13 231 South Center Street, Turlock, California. Protestant also does business as Bonander Truck and
14 Trailer with its principal truck and trailer facility located at 4520 Golden State Boulevard, Turlock,
15 California. Bonander has been a dealer selling Western Star brand trucks for nearly 20 years and
16 executed its current franchise with Western Star Trucks Sales, Inc. ("WSTS"),¹ a Washington
17 corporation, in 2007. Bonander is licensed by the Department of Motor Vehicles ("DMV") as a new
18 vehicle dealer, as well as a new trailer dealer, new recreational vehicle dealer, and new motorhome
19 dealer.

20 3. Respondent is Daimler Trucks North America LLC ("DTNA"). DTNA has its corporate
21 headquarters at 2477 Deerfield Drive, Fort Mill, South Carolina.² DTNA claims, although it is the parent

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25 Bonander's 2007 Dealer Agreement. "Western Star" or "Western Star trucks" will be used to refer to the line-make or
26 "brand" of trucks.

27 ² The DMV records indicate an "Auto/Commercial Vehicle Manufacturer" license issued to "Daimler Trucks North America
28 LLC" with a "Main Location" of 4435 N. Channel Ave., Portland, OR 97217, which opened on "09/29/2009". The records
indicate the license was first issued on "08/29/2002". The "Owner of Business" is shown as "Schmueckle Rainer Lampert
Mark" at a mailing address of "2477 Deerfield Drive, Fort Mill, SC 29715". DTNA is authorized under this license to
distribute the following makes: Freightliner, Sterling, Western Star, Daimler, and Mercedes. There was no current separate
license found for WSTS or for Daimler, Daimler AG, Freightliner, Freightliner Custom Chassis, or Freightliner Specialty
Vehicles. DTNA has been separately requested to confirm to the Board what license or licenses have been issued by DMV to
DTNA and what licenses have been issued by DMV to WSTS.

1 corporation of several brands, including Western Star trucks, that it is not the franchisor of Bonander.

2 **FACTUAL AND PROCEDURAL BACKGROUND**

3 **THE NOTICE OF TERMINATION**

4 4. The only notice of termination given to or received by Bonander or the Board was from
5 DTNA. There was no separate notice from WSTS.

6 5. A letter dated May 19, 2010, from DTNA was directed to Bonander, the Board, and eight
7 other persons. This letter stated in part: "This letter shall serve as Daimler Trucks North America LLC's
8 (DTNA) notice of the termination of your dealership's Western Star Trucks Dealer Sales and Service
9 Agreement..."

10 6. A copy of this letter was received by the Board on May 24, 2010. When it was received
11 by Bonander is unknown. There are no issues as to whether or when the notice was received by
12 Bonander.

13 7. The letterhead on the notice consisted solely of the name "DAIMLER"³ in capital
14 letters, and in what appears to be about 16 point font size. The information printed in much smaller font
15 size on the top right corner of the first page of the six-page notice indicated it came from:

16 Daimler Trucks North America
17 Monte Mehring
18 Director
19 Dealer Operations

20 8. The bottom right corner of the first page contained the following printing also in much
21 smaller font size:

22 ³ Although the hierarchy has not been clearly established in the proceedings as yet, it appears as though "DAIMLER" is
23 Daimler AG, a German corporation which is the parent corporation of DTNA, with DTNA being the parent corporation of
24 WSTS. The brands of Daimler AG as shown on the Daimler AG website include Mercedes-Benz, smart, Mercedes-AMG,
25 Maybach, Freightliner, Mitsubishi Fuso, Western Star, Detroit Diesel, Setra, Orion, and Thomas Built Buses. DTNA, which
26 claims its headquarters to be in South Carolina, calls itself "A Daimler Company" as well as "North America's Leading
27 Manufacturer of Commercial Vehicles". The brands listed on DTNA's website and under the control of DTNA are Western
28 Star, Freightliner, Sterling, Detroit Diesel, Freightliner Custom Chassis, Unimog, and Thomas Built Bus. See also paragraph
54 and Exhibit AA to Bonander's Opposition, for a list which starts off with DTNA also referring to itself as one of the
"brands" of Daimler. DTNA in its Motion asserts that WSTS is a wholly-owned subsidiary of DTNA. To add to the
uncertainty, the "Daimler.com" web page contains the following information: "Western Star Trucks, which is part of
Freightliner LLC and a brand of Daimler Trucks North America, designs, manufactures, and distributes heavy-duty custom
trucks for long haul and vocational applications, primarily for use by owner-operators or small fleets." (Emphasis added.) No
appearance has been made by anyone specifically in behalf of WSTS, which DTNA claims is the only franchisor of Bonander.
The exact relationships and any inaccuracies in the above can be clarified as needed during later proceedings before the Board.

1 Daimler Trucks North America LLC
2 2477 Deerfield Drive
3 Fort Mill, SC 29715
4 Phone: 803.578.3314
5 Fax: 803.578.3710
6 Cellular: 913.522.4790
7 Monte.Mehring@Daimler.com

8 9. The last page of the notice was signed by: Monte Mehring, Director, Dealer Operations.

9 **THE PROTEST**

10 10. In response to the notice from DTNA, Bonander submitted to the Board what is titled
11 "PETITIONER'S PROTEST OF TERMINATION OF FRANCHISE AGREEMENT" ("Protest"). The
12 Protest was received by the Board on June 17, 2010 and was accepted for filing on that date. There is no
13 claim that it was not timely filed.

14 11. The Protest in its caption named as Respondent "DAIMLER TRUCKS NORTH
15 AMERICA LLC". It was prepared and submitted by "Donald E. Bonander, Corporate President, and
16 Dealer-Operator" of Protestant.⁴ It is very detailed and with all of its exhibits is an inch or more thick. It
17 included a Proof of Service indicating that on June 18, 2010,⁵ it had been mailed "CERTIFIED,
18 RETURN RECEIPT REQUESTED" to:

19 Mr. Monte Mehring
20 DAIMLER TRUCKS OF NORTH AMERICA LLC
21 2477 Deerfield Drive
22 Fort Mill, South Carolina 29715

23 **THE MOTION TO DISMISS**

24 12. The Motion was filed in behalf of DTNA and is based upon the contention that the
25 franchisor is WSTS but that the Protest was filed "against" DTNA. It was received by the Board on July
26 19, 2010.

27 13. The Motion alleges in part:

28 "The Protest...is asserted exclusively against the Respondent Daimler Trucks North America,
LLC ('DTNA')." (Motion, page 1, lines 24-26)

⁴ It was not until the Board received a letter dated August 9, 2010, that the Board was informed that the Lang, Richert & Patch law firm had been retained by Bonander. An official appearance by that firm was not made until August 12, 2010, after this motion had been briefed.

⁵ Protestant has informed the Board that the date shown for the proof of service should have been June 17, 2010.

1 "Paragraph 1 of the Protest alleges that Bonander holds a franchise for a new Western Star Trucks
2 franchise (sic)." (Motion, page 1, lines 27-28)

3 14. The Motion refers to Exhibits A and B to the Protest, which are the documents making up
4 the original Sales and Service Agreement between Bonander and WSTS signed in 2007. DTNA then
5 claims that these documents show "that the franchisor was indisputably Western Star Truck (sic)⁶ Sales,
6 Inc. and not Daimler Trucks North America LLC." (Motion, page 2, lines 1-14)

7 15. The Motion then refers to Exhibit C of the Protest, which is a "December 1, 2009, letter
8 from Monte Mehring of Daimler Trucks North America" and is referred to as the "cure letter". (Motion,
9 page 2, lines 14-18)

10 16. The Motion quotes from the letter and in part states as follows:

11 This letter is your dealership's formal notification that Daimler Trucks North America
12 LLC and its Western Star subsidiary (collectively "DTNA") have identified
13 deficiencies in your Western Star dealership's...performance. (Motion, page 2, line
14 19-22)

14 17. The Motion continues claiming that "The December 1, 2009, letter was sent on behalf of
15 Western Star Truck (sic) Sales, Inc. by DTNA. In effect, DTNA was acting as manager of the
16 termination process for Western Star Truck (sic) Sales, Inc." (Motion, page 2, lines 24-27)

17 18. After making other references to what is contained in the Protest, the Motion states in part:

18 While Western Star Trucks Sales, Inc. is a subsidiary of DTNA, they are not the same
19 company. (Motion, page 3, lines 14-15)

20 19. The Motion then concludes stating:

21 Bonander has failed to lodge its protest against the entity that is the manufacturer⁷ and
22 franchisor of the Western Star Trucks. Because of this reason, the Protest must be
23 dismissed. (Motion, page 3, lines 15-18)

24 20. These contentions of DTNA will be addressed after first stating the relevant statutes under
25 which the Board operates.

26 ⁶ As stated earlier, the corporate name is "Western Star Trucks Sales, Inc." with "Trucks" being plural, not singular.

27 ⁷ As stated in footnote 2, the license issued by DMV is to DTNA which is shown to be the "manufacturer" authorized as such
28 to distribute the various brands owned by it, including Western Star Trucks. DTNA's website refers to itself as a
"manufacturer" and, as discussed later, DTNA has provided to Bonander what are called the "manufacturer's" certificate of
origin for the Western Star Trucks.

THE STATUTES APPLICABLE TO THE NOTICE REQUIRED IN ORDER TO
TERMINATE BONANDER'S FRANCHISE

21. Any termination of Bonander's franchise must be done in accordance with Vehicle Code⁸ section 3060, which provides in part as follows:

(a) Notwithstanding...the terms of any franchise, **no franchisor shall terminate** or refuse to continue any existing franchise unless all of the following conditions are met:

(1) The franchisee and the board have received **written notice from the franchisor** as follows:

(A) Sixty days before the effective date thereof setting forth the specific grounds for termination or refusal to continue.

...
(C) The written notice shall contain, on the first page thereof in at 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:

[To be inserted when a 60-day notice of termination is given.]

"NOTICE TO DEALER: You have the right to file a protest with the NEW MOTOR VEHICLE BOARD in Sacramento and 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 30 calendar days after receiving this notice or within 30 days after the end of any appeal procedure provided by the franchisor or your protest right will be waived."

...
(2) Except as provided in Section 3050.7, the board finds that there is good cause for termination or refusal to continue, following a hearing called pursuant to Section 3066. The franchisee may file a protest with the board within 30 days after receiving a 60-day notice, 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. **When a protest is filed, the board shall advise the franchisor that a timely protest has been filed,** that a hearing is required pursuant to Section 3066, and that the franchisor may not terminate or refuse to continue until the board makes its findings. (Emphasis added.)

22. It is noted that there is nothing in this language that imposes any requirement that the franchisee notify, send, or serve a copy of the Protest upon the franchisor. Rather it is "the board [that] shall advise the franchisor that a timely protest is filed..."

23. Section 3060 uses the terms "franchise", "franchisor" and "franchisee" which are defined in the Vehicle Code.

▪ Vehicle Code section 331 defines a "franchise" as follows:

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

⁸ All statutory references are to the California Vehicle Code unless noted otherwise.

- 1 (1) A commercial relationship of definite duration or continuing indefinite duration.
- 2 (2) The franchisee is granted the right to offer for sale or lease, or to sell or lease at
- 3 retail new motor vehicles... manufactured or distributed by the franchisor or the right
- 4 to perform authorized warranty repairs and service, or the right to
- 5 perform any combination of these activities.
- 6 (3) The franchisee constitutes a component of the franchisor's distribution system.
- 7 (4) The operation of the franchisee's business is substantially associated with the
- 8 franchisor's trademark, trade name, advertising, or other commercial symbol
- 9 designating the franchisor.
- 10 (5) The operation of a portion of the franchisee's business is substantially reliant on
- 11 the franchisor for a continued supply of new vehicles, parts, or accessories.
- 12 ...

- 13 ■ Vehicle Code section 331.1 defines a “franchisee” as follows:

14 A “franchisee” is any person who, pursuant to a franchise, receives new motor vehicles
15 subject to registration under this code, new off-highway motorcycles, as defined in
16 Section 436, new all-terrain vehicles, as defined in Section 111, ... from the franchisor
17 and who offers for sale or lease, or sells or leases the vehicles at retail or is granted the
18 right to perform authorized warranty repairs and service, or the right to perform any
19 combination of these activities.

- 20 ■ Vehicle Code section 331.2 defines a “franchisor” as follows:

21 A “franchisor” is any person who manufactures, assembles, or distributes new motor
22 vehicles subject to registration under this code, new off-highway motorcycles, as
23 defined in Section 436, new all-terrain vehicles, as defined in Section 111, or new
24 trailers subject to identification pursuant to Section 5014.1 and who grants a franchise.

25 ANALYSIS OF THE CONTENTIONS OF DTNA IN LIGHT OF THESE STATUTES⁹

26 24. The first contention quoted above from DTNA’s Motion is as follows: “The Protest...is
27 asserted exclusively against the Respondent Daimler Trucks North America, LLC (‘DTNA’).” (Motion,
28 page 1, lines 24-26) This contention is accurate only if one limits the reading of the Protest to its caption.
It is true that the only entity identified in the caption as “Respondent” is “DAIMLER TRUCKS NORTH
AMERICA LLC” without mention of WSTS.

29 25. However the substantive assertions throughout the twenty-six page Protest are replete with
30 references to the WSTS franchise and that Bonander is protesting the termination of that franchise. In
31 addition, a copy of the franchise was attached to the Protest.

32 _____
33 ⁹ The references to testimony, exhibits, or other parts of the record contained herein are examples of the evidence relied upon
34 to reach a finding, and are not intended to be all-inclusive.

1 26. The Protest by Bonander is likely the most completely detailed protest that has ever been
2 submitted to the Board. In addition to specifically challenging each of the alleged grounds for
3 termination as stated in the notice of termination, its details include the alleged relationships between
4 Bonander and WSTS, between Bonander and DTNA, and between WSTS and DTNA. The Protest
5 includes references to personal meetings between Bonander representatives and “Daimler officials” at the
6 Western Star dealer meeting held after the “Daimler/Freightliner/Western Star/Sterling merger.”
7 (Protest, page 9, lines 1-4) It is inconceivable that any representative of DTNA could be misled into
8 believing that Bonander is protesting anything other than the termination of that franchise under which
9 Bonander is authorized to sell Western Star brand trucks and that Bonander is making its assertions
10 against both WSTS and DTNA, “collectively” as was done by DTNA when DTNA sent the cure letter of
11 December 1, 2009, upon which the notice of termination is based.

12 27. DTNA in its Motion to Dismiss now alleges that DTNA’s “Director of Dealer
13 Operations”, in sending the “cure letter” in December 2009, was doing so because DTNA was acting as
14 the “manager of the termination process for Western Star Truck (sic) Sales, Inc.” (Motion, page 2, lines
15 26-27). In fact, some of the language in the communications indicates that it was DTNA alone that had
16 made the decision to terminate the franchise and that it was DTNA alone that was the sender of the notice
17 of termination.

18 28. DTNA’s claim in its Motion that in sending the cure letter it was “acting as manager of the
19 termination process for Western Star Truck (sic) Sales, Inc.” can be interpreted in two ways. It could be
20 interpreted to mean (a) that DTNA is acting as an “agent” of WSTS with the anomalous result, under the
21 law of agency, that DTNA, the parent corporation would be the agent of WSTS, and as such would be
22 subject to the control of its wholly owned subsidiary (the principal). Alternatively, the statement that
23 DTNA is acting as “manager of the termination process” could be interpreted to mean (b) that DTNA is
24 exercising its “parental control” and is in fact “calling the shots” and “controlling the termination
25 process” as it is “in charge” as the “manager” vis-à-vis WSTS. It is also possible, notwithstanding this
26 allegation in the motion, that factually, due to the relationships among the various “DAIMLER” or
27 DTNA sub-entities, that all are under the control of the same individual or group of individuals that are
28 responsible for all of the brands considered by DAIMLER to be within DTNA and in reality there are no

1 separate sub-entities other than in name only. When the curtains are all pulled back, it may be that the
2 only person acting in behalf of and speaking for all of the entities is Mr. Mehring.

3 29. There is nothing before the Board at this time to indicate that anyone other than DTNA
4 representatives were in contact with Bonander regarding the intended termination or that any notice of
5 termination was given by WSTS to either Bonander or the Board.

6 30. If DTNA is correct that only WSTS is the franchisor, then Section 3060 requires that it be
7 WSTS, as the franchisor, that must provide notice to Bonander and the Board. If WSTS is a separate
8 entity and if it has remained the franchisor, the time within which Bonander may file a protest will not
9 commence to run until Bonander receives an appropriate notice from WSTS as required by Section 3060.
10 To date, there is nothing to indicate this has occurred.

11 31. Attached to the Protest as exhibits are a copy of the Western Star Trucks Dealer Sales and
12 Service Agreement, along with its Standard Provisions, Addenda, and Terms of Sales Bulletins, all of
13 which are part of the "Agreement" as defined therein and constituting the "franchise". These
14 attachments, together with the substantive allegations of the Protest, make it clear that the franchise at
15 issue is the franchise authorizing Bonander to sell Western Star brand trucks.

16 32. Bonander admits that the Sales and Service Agreement was entered into between
17 Bonander and WSTS and not DTNA. However, Bonander contends that subsequently WSTS was
18 acquired by DTNA and that over the passage of time there has been a blurring of the lines between
19 DTNA and WSTS with DTNA assuming the role of and becoming the "successor" franchisor.

20 33. The following are some of the terms of the original franchise between WSTS and
21 Bonander as well as some of the subsequent addenda and communications which came from DTNA or
22 Daimler, rather than WSTS.

23 **THE ORIGINAL 2007 DEALER SALES AND SERVICE AGREEMENT AND ITS STANDARD PROVISIONS**

24 34. The Dealer Sales and Service Agreement was signed by Mr. Donald Bonander in behalf
25 of Bonander on October 31, 2007, and by Mr. Joshua Palmer, General Manager Dealer Operations, in
26 behalf of WSTS, on December 13, 2007.

27 35. The Dealer Sales and Service Agreement states in paragraph "VII ADDITIONAL
28 PROVISIONS":

1 The COMPANY'S Standard Provisions for this Western Star Trucks Dealer Sales and
2 Service Agreement, the Western Star Trucks Area of Responsibility Addendum, the
3 Terms of Sale Bulletin, the Western Star Trucks Product Addendum, the Western Star
4 Trucks Annual Operating Requirements Addendum,¹⁰ COMPANY'S Dealer Operations
5 Manual, and any Special Conditions Addenda, are made a part of this Agreement as
6 though they were fully set forth herein, and any other agreements, amendments or addenda
7 are likewise made a part of this Agreement when executed in accordance with the
8 provisions of Paragraph XVIII(C). Standard Provisions include definitions which are
9 applicable to the entire Agreement. DEALER hereby acknowledges receipt of the
10 Standard Provisions and Terms of Sale Bulletin.¹¹

11 36. The WSTS Dealer Sales and Service Agreement Standard Provisions are unsigned and
12 undated (except for the printing on the bottom of each page of "WS/DO-M-102 (2/20/03)").

13 37. The Standard Provisions also state that they are "expressly incorporated in and made part
14 of the Western Star Trucks Dealer Sales and Service Agreement". (Protest, Exhibit A - Standard
15 Provisions, page 6)

16 38. Paragraph XIX of the Standard Provisions contains the definitions of some of the terms
17 used therein and in the Sales and Service Agreement. These include:

18 A. "COMPANY" shall mean Western Star Trucks Sales, Inc. a Washington corporation.
19 ...

20 C. "Agreement" shall mean the Western Star Trucks Dealer Sales and Service Agreement,
21 including the Standard Provisions, and any amendments, addenda, or supplements.
22 ...

23 I. "Dealer Operations Manual" shall mean the COMPANY'S Dealer Operations Manual,
24 as the same may be amended from time to time by COMPANY...

25 J. "Warranty Manual" shall mean the COMPANY'S Warranty Manual, as the same may be
26 amended from time to time by COMPANY... (Protest, Exhibit A - Standard Provisions,
27 page 29)

28 39. In addition, the Standard Provisions contain the following:

XVIII. GENERAL PROVISIONS

...
C. NOTICES TO COMPANY

///

¹⁰ These are referred to as AORAs and are among those supplemental documents that will be discussed below.

¹¹ As can be seen, the document captioned "Dealer Sales and Service Agreement" is not the only document that comprises the franchise between Bonander and WSTS. All of the other documents referred to are expressly made part of the "Dealer Sales and Service Agreement". (See also definition of "Agreement"). For ease of reference distinctions will be attempted when referring to the separate documents even though all are part of the "Agreement", and thus are all part of the "franchise".

1 Except as otherwise provided in Paragraph XV(D)¹² of this Agreement, any notice
2 required to be given by DEALER to COMPANY under this Agreement shall be
3 directed to Freightliner LLC, attention: Director, Dealer Operations, at P.O. Box
3849, Portland, Oregon, 97208, or to such other person or address as the officers of
4 COMPANY may specify to DEALER in writing... (Underline added.)

5 (Protest, Exhibit A – Standard Provisions, page 26)

6 40. As can be seen, this paragraph requires that all notices from “DEALER” be directed to
7 “Freightliner LLC” in Portland, Oregon. Freightliner is another brand of truck and Freightliner LLC
8 (apparently in Portland) is another wholly-owned subsidiary of DTNA. (There are other references to
9 Freightliner and it is possible that WSTS is part of Freightliner LLC.)

10 41. The Standard Provisions also contains the following: Paragraph “D. PAYMENT AND
11 TERMS OF SALE” states that “...all terms of sale for a Western Star Trucks Product shall be those
12 published by the COMPANY and in effect at the time of COMPANY’S acceptance of the order for the
13 Western Star Trucks Products. COMPANY reserves the right to change its terms of sale at any time
14 upon notice to DEALER.” (Protest, Exhibit A – Standard Provisions, pages 6-7).

15 42. The first “Terms of Sale Bulletin” provided to the Board was executed at the same time as
16 was the Sales and Service Agreement and bears the signature of Mr. Donald E. Bonander dated
17 November 29, 2007 and that of Mr. Joshua Palmer for WSTS dated December 12, 2007. (Protest,
18 Exhibit A)

19 43. All of the above permit the “COMPANY” to issue subsequent notices and addenda and
20 terms of sale bulletins, etc., which, by the language of Paragraph VII of the Sales and Service Agreement,
21 are stated to become part of the Sales and Service Agreement. Although the Standard Provisions state

22 ¹² The reference to Paragraph XV(D) is confusing. Paragraph XV(D) reads as follows :

23 NOTICE OF TERMINATION

24 Any notice of termination under this Paragraph XV shall be in writing and shall be return receipt request (sic) or
25 delivered in person to the persons designated to receive such notice as provided in this Agreement. It is understood
that COMPANY is not required to set forth all of the grounds upon which it is relying in its termination notice to
DEALER, and any failure to specifically refer to additional grounds for termination shall not constitute a waiver of
its rights to rely upon such grounds.

26 As can be seen, all notices from DEALER to COMPANY (which is WSTS in Washington, as defined in the Standard
27 Provisions) must be directed to Freightliner LLC in Oregon – “unless otherwise provided in Paragraph XV(D)”. But, as also
28 can be seen, Paragraph XV(D) does not have anything to do with notices “from DEALER to COMPANY” other than perhaps
a notice that Dealer desires to terminate the Agreement, which is certainly not the case here. If this exception did apply, then
Bonander, by these terms, would be required to send “notices” to “Freightliner”, not WSTS and not DTNA. However, the
Protest would not be a “notice required to be given by DEALER to COMPANY under this Agreement.” (Underline added.)

1 that, "COMPANY" shall mean Western Star Trucks Sales, Inc. a Washington corporation", it was DTNA
2 that issued the subsequent notices and other documents that were stated to become binding upon the
3 franchisees as being part of the Dealer Sales and Service Agreement.¹³

4 **THE FOLLOWING ARE SOME OF THE SUBSEQUENT ADDENDA AND COMMUNICATIONS FROM DTNA**

5 44. The second "Terms of Sale Bulletin" provided to the Board is not signed by either party.
6 It apparently was sent to Bonander with a cover letter dated June 16, 2010 from DTNA directed "To All
7 Full Freightliner and/or Western Star Service Dealers".¹⁴ (Protestant's Opposition, Exhibit AA) It is
8 signed by Martin Osborne, General Manager Distribution Network Development. The cover letter states
9 that the Terms of Sale Bulletin does not need to be signed or returned but should be kept "with your
10 dealer agreements."

11 45. Again, although the "Agreement" defines "Company" to mean only WSTS, this Terms of
12 Sale Bulletin came from DTNA. The text of the Terms of Sale Bulletin states that some of the policies
13 addressed are those contained in the "Daimler Trucks North America LLC Dealer Operations Manual"
14 with specific references to the sections applicable. There is also reference to the application of the
15 "...DAIMLER TRUCKS NORTH AMERICA LLC WARRANTY MANUAL IN EFFECT AT THE
16 TIME..." (Caps in the original.) As can be seen, it is DTNA, not WSTS, issuing the Terms of Sale
17 Bulletins and that the policies being announced are those of DTNA, not WSTS.

18 46. In addition, the Board was provided with the cover letters for what are called the "Annual
19 Operating Requirements Addendum (AORA)" (See footnote 10) which are also stated to be part of the
20 terms of the Dealer Sales and Service Agreement when they are sent by the "Company". However, they
21 too all came from DTNA. As DTNA claims in the Motion that DTNA is not WSTS, these AORAs may
22 not be from the "Company". They are dated June 24, 2008, for the 2008 AORA; February 25, 2009, for
23 the 2009 AORA; and December 15, 2009, for the 2010 AORA. (Protestant's Opposition, Exhibit AA)

24 47. Each is on letterhead that has only "DAIMLER".

25
26 ¹³ Whether these subsequent documents would be subject to Section 3060 as modifications that come within the terms of
27 Section 3060 cannot be determined. And, whether "COMPANY" can be interpreted to include DTNA for the purpose of
28 modifying the franchise is likewise not determined. Read literally, "COMPANY" means only WSTS, and if this is the only
interpretation, then none of the subsequent communications from DTNA, including the cure letter and the notice of
termination, would have any legal effect, whether they were modifications subject to Section 3060 or not.

¹⁴ How Bonander fits within these two addressees is unknown.

1 48. The cover letter dated June 24, 2008 for the 2008 AORA reads in part as follows:

2 Enclosed you will find two original copies of the Final Dealer 2008 Annual Operating
3 Requirements Addendum for **your Daimler Trucks North America LLC franchise(s)**
(Bold and underline added) as listed in your Dealer Agreement(s). Please sign both copies,
4 keep one for your records and return the other to our NEW address.

5 Sarah Carrick
6 Daimler Trucks North America
7 Dealer Operations
8 2477 Deerfield Drive
9 FTM-2C
10 Fort Mill, SC 29715

11 (Protestant's Opposition, Exhibit AA)

12 49. The cover letter dated February 25, 2009 for the 2009 AORA and the cover letter dated
13 December 15, 2009 for the 2010 AORA are identical to the above except that these later two do not refer
14 to the address for DTNA as being "NEW". (Protestant's Opposition, Exhibit AA)

15 50. All three refer to "your Daimler Trucks North America LLC franchise(s)". All three
16 require that the AORAs be signed by the dealer and a copy returned to DTNA in South Carolina, not
17 WSTS in Washington or Oregon.¹⁵ (Protestant's Opposition, Exhibit AA)

18 51. The Board was also provided with a copy of a letter dated November 2009 relating to
19 "Revisions to the Dealer Agreements". (Protestant's Opposition, Exhibit AA)

20 52. This letter is also on letterhead that has only DAIMLER" at the top center. On the top
21 right appears the following:

22 Monte Mehring
23 Director Dealer Operations
24 Daimler Trucks North America
25 Dealer Operations
26 2477 Deerfield Drive
27 Fort Mill, SC 29715

28 53. The letter has a signature space for "Monte Mehring, Director, Dealer Operations", but the
copy before the Board is not signed.

54. This letter is addressed to "Dealer Principal" and states in part:

¹⁵ As these are "written", and they appear now to be between DTNA and Bonander, it is possible that these could evidence a
"franchise" as defined in the Vehicle Code, thus making DTNA the "franchisor" as also defined in the Vehicle Code.

1 Dealer Operations has coordinated 2 revisions to the Dealer Sales and Service Agreement
2 and the Service Agreements. These revisions encompass all brands (DTNA, Freightliner,
3 Sterling, Western Star, Detroit Diesel, Freightliner Custom Chassis, Unimog and Thomas
4 Built Bus) in US and Canada. The Dealer Council has been notified of the modifications,
5 as listed below.

6 First, anti-bribery wording has been added to all agreements. Daimler takes seriously its
7 compliance with the laws of all countries governing the export of product from one country
8 to another and the prohibitions on attempts to improperly influence the conduct of both
9 public and private customers. As part of its global effort to establish meaningful standards
10 for the conduct of business, Daimler is requiring all dealer agreements to include
11 standardized language concerning compliance with the laws of the United States and other
12 countries.¹⁶ (Emphasis added.)
13 ...

14 55. The letter concludes by stating:

15 These new agreements will be sent to you as a major change occurs at your location or if
16 your agreement is ready for renewal. Please contact Dealer Operations with any questions.

17 56. It is unknown if a new agreement was sent to Bonander.

18 57. As can be seen, the communications pertaining to the terms of the franchise, although
19 apparently being sent by DTNA are terms that are mandated by Daimler, the parent of DTNA. The only
20 reference to WSTS is its inclusion among those brands the franchises for which are being simultaneously,
21 unilaterally and uniformly modified. The communications or their attachments are intended by DTNA to
22 become part of the terms of the original Dealer Sales and Service Agreements of all of the named brands.
23 It appears that the directives here emanated from "Daimler to DTNA" and then were transmitted from
24 "DTNA to the individual franchisees of all of the brands". This path does not appear to follow what one
25 would expect if WSTS was a separate entity that was still the franchisor of Bonander as alleged by
26 DTNA. If this were so, the path expected would have been, "Daimler to DTNA", then "DTNA to
27 WSTS", then from "WSTS to the WSTS franchisees." Here, it appears that Daimler is directing DTNA
28 and DTNA, rather than communicating with WSTS, it is DTNA that is communicating the changes to the
franchisees of all of the brands listed.

¹⁶ The use of "Daimler" here likely means "Daimler AG", not DTNA. It is noted that the first paragraph of the above quote refers to "all brands" and includes "DTNA" as a brand, along with the others listed including Western Star, etc. The second paragraph indicates that it is "Daimler", not DTNA, that is requiring the changes to "all" the Sales and Service Agreements.

1 58. The original Dealer Sales and Service Agreement of 2007 and the Standard Provisions
2 thereto permit the "COMPANY" to utilize such communications and state that they will become part of
3 the "Agreement" between the franchisor and the franchisee. However, the "COMPANY" is WSTS and if
4 DTNA is correct that WSTS and DTNA are separate entities, some of the questions become:

5 a. Has DTNA substituted itself as the "successor franchisor" even though it was not the
6 "COMPANY" originally?¹⁷

7 b. If DTNA is "merely" acting in behalf of WSTS, how did DTNA become empowered to so
8 act?

9 c. What is the legal significance of these supplemental communications if they are not from
10 WSTS?

11 59. Even if these communications are deemed to be from WSTS, the questions could then
12 become:

13 a. Are they modifications to the "franchise" which would fall within the scope of Section
14 3060?

15 b. What is their legal significance if the requirements of Section 3060 were applicable but
16 not met?

17 60. DTNA is asserting that it was not the entity that should have been named as the
18 "Respondent" in the caption of the Protest. However, DTNA does not state how it or WSTS (which
19 DTNA asserts is one of its wholly owned subsidiaries), could have been prejudiced by Bonander not
20 specifically naming WSTS as the Respondent in the caption of the Protest.

21 61. As stated above, the Protest contents are likely the most detailed of any that have been
22 filed with the Board. They clearly state that the franchise is with WSTS, for Western Star brand trucks,
23 and it is the intended termination of that franchise that is the subject of the Protest. DTNA was both
24 served with a copy of the Protest by Bonander and sent a notice by the Board that the Protest had been
25 filed.

26
27
28

¹⁷ Although there is an "anti-assignment provision" in the franchise that purports to prohibit assignment of the contract by the franchisee, there is no similar language prohibiting an assignment by WSTS, the original franchisor.

1 62. The allegations of DTNA are that it is managing the termination process. Assuming this
2 is being done in behalf of WSTS (which may not be accurate), it is difficult to imagine that DTNA, when
3 it received the Protest from Bonander and the notice from the Board, did not communicate with anyone at
4 WSTS who may have been involved in the intended termination. (This assumes that there was some
5 other natural person at WSTS, who was not the same natural person who was at DTNA, who was not
6 only involved in but also had the authority to decide whether to terminate the Bonander franchise. There
7 is nothing before the Board to indicate the existence of such an individual.) There is nothing before the
8 Board to indicate that there was some other natural person at WSTS to whom the Protest should have
9 been directed rather than Mr. Mehring, whether Mr. Mehring was acting in behalf of WSTS or DTNA (as
10 the cure letter of December 2009 and the notice of termination of May 2010 indicated.)

11 63. It is possible that even if the Protest had named WSTS in the caption and had been sent to
12 WSTS in the state of Washington or Oregon, that it would have wound up on Mr. Mehring's desk in
13 South Carolina as he was the person who had signed the "cure letter" of December 2009, as well as the
14 person who had signed the notice of termination of May 19, 2010. And, if DTNA was "managing" the
15 termination process as it had taken charge as the parent, then DTNA was the entity to which the Protest
16 should have been sent.

17 64. It is difficult to conclude that the Protest should be dismissed merely because it named
18 DTNA in the caption rather than WSTS. The text clearly articulates the salient facts relating to both
19 DTNA and WSTS and the Protest would likely have arrived at Mr. Mehring's desk regardless of which
20 entity was named in the caption. Placing the name of DTNA in the caption title rather than WSTS is an
21 example of "a distinction without a difference."

22 **WHETHER THE FRANCHISE REQUIRED THAT WSTS BE GIVEN NOTICE OR**
23 **BE NAMED IN THE PROTEST CHALLENGING THE TERMINATION**

24 65. There is no requirement in the franchise that any notices from Bonander be sent to WSTS
25 or received by WSTS. The only such provision relates to "Freightliner, LLC".

26 66. As discussed previously in paragraph 39 and footnote 12, the franchise contains the
27 following:

28 XVIII. GENERAL PROVISIONS

1 ...
2 C. NOTICES TO COMPANY¹⁸

3 Except as otherwise provided in Paragraph XV(D) of this Agreement, **any notice**
4 **required to be given by DEALER to COMPANY under this Agreement shall**
5 **be directed to Freightliner LLC,¹⁹ attention: Director, Dealer Operations, at**
6 **P.O. Box 3849, Portland, Oregon, 97208,** or to such other person or address as the
7 officers of COMPANY may specify to DEALER in writing. Notices from
8 DEALER to COMPANY required by this Agreement shall not be deemed to have
9 been given to COMPANY until received by COMPANY at the office to which this
10 notice is required to be directed. (Emphasis added.)

11 67. If this paragraph of the franchise would be applicable to the Protest, it would mean that the
12 Protest would have to be “directed” to Freightliner LLC in Portland, Oregon. Whether this means that
13 any such notice must state that it is “To: Western Star Trucks Sales, LLC” the “COMPANY” and then be
14 mailed or otherwise transmitted (“directed”) “Care of:” Freightliner LLC at the P.O. Box shown or
15 whether it must be “To: Freightliner LLC”, at the P.O. Box stated, is another question the answer to
16 which may not make any difference. Freightliner LLC is another brand of DTNA and it is possible that
17 the “Director, Dealer Operations” for Freightliner LLC is also Mr. Mehring, who is identified as the
18 “Director, Dealer Operations” for DTNA, as shown on the various notices and letters and, as stated in its
19 pleadings, DTNA was acting as manager of the termination process.

20 68. Based on what is before the Board to date, it is not possible to conclude that the franchise
21 provision above should result in a conclusion that a statutory protest, timely filed with the Board, is
22 invalid as it was not “directed” to another subsidiary of DTNA (Freightliner, LLC), rather than directly to
23 DTNA or WSTS. There is no showing that the Protest, if it had named WSTS in the title, would have
24 gone to some person other than Mr. Mehring and would be handled differently by DTNA. DTNA has
25 admitted that it is the “manager” of the termination process, and there is no basis for imposing upon
26 Bonander a forfeiture of its statutory right to a hearing before the Board during which the “franchisor”,

27 _____
28 ¹⁸ “COMPANY” is defined in PARAGRAPH XIX of the franchise as: Western Star Trucks Sales, Inc., a Washington
corporation.”

¹⁹ Although a Protest is not a “notice required to be given by DEALER to COMPANY under this Agreement”, this is
indicative of the interweaving by DTNA of what duties it assumes in behalf of its subsidiaries and what duties it delegates or
allocates among its other subsidiaries. (Underline added.) Bonander’s pleadings contain other instances of the involvement of
Freightliner in the franchise relationship.

1 whoever it may now be, is required to prove there is good cause for the intended termination.²⁰

2 WHETHER THE VEHICLE CODE WOULD REQUIRE THAT BONANDER HAVE NAMED
3 WSTS AS THE RESPONDENT IN THE CAPTION OF THE PROTEST FILED BY THE BOARD

4 69. There is no statute cited that would apply to mandate that Bonander have named WSTS in
5 the caption of the Protest or to require that Bonander notify its franchisor of the protest.

6 70. The only statute that would have application to a notice to a franchisor is Section 3060
7 quoted above, which states in part: “When a protest is filed, the board shall advise the franchisor
8 that a timely protest has been filed, that a hearing is required pursuant to...” (Emphasis added.)

9 71. In this case, the only notice of termination relating to Bonander’s franchise that the Board
10 had received was the notice of termination from DTNA. From its appearance and specific textual
11 content, the notice of termination was from DTNA and was being given by DTNA in the stated capacity
12 of franchisor. The Board, by Section 3060, is assigned the duty that it “... shall advise the franchisor that
13 a timely protest has been filed, that a hearing is required pursuant to Section 3066, and that the franchisor
14 may not terminate or refuse to continue until the board makes its findings.”

15
16 ²⁰ It is true that no appearance has been made as yet by WSTS. However, there is no doubt that DTNA and WSTS have a
17 commonality of interest if not a commonality of identity. Their commonality of interest being their “collective” desire to
18 terminate the Western Star truck franchise of Bonander. It is anticipated that if the Motion to Dismiss would be granted, that
19 any attempt by Bonander at this time to file a protest naming only WSTS in the caption would be met by a motion to dismiss
20 from WSTS asserting that such a protest is untimely. The probable motion from WSTS would likely be based upon the claim
21 that the notice of termination dated May 19, 2010, was a notice from WSTS (despite being on DAIMLER letterhead and
22 expressly stating that it was “Daimler Trucks North America LLC’s notice of termination”). WSTS would likely claim that
23 Bonander had only 30 days from the date Bonander received the notice from DTNA to file its protest naming WSTS. As the
24 findings herein include the determination that, if DTNA and WSTS are truly separate entities and that WSTS has remained the
25 franchisor, then the notice of termination dated May 19, 2010, was not notice from the “franchisor” as required by the Vehicle
26 Code, it is unlikely that such a motion to dismiss filed by WSTS would be granted. However the opposite outcome may occur
27 and therefore, in considering this motion, it is deemed proper to consider the absence of apparent negative impact upon WSTS
28 of Bonander naming DTNA (which is admittedly the “manager” of the termination) in the caption of the Protest. The effect
upon WSTS and DTNA in not naming WSTS in the caption of the Protest is de minimis and perhaps non-existent. If one
compares the effect upon WSTS and DTNA in not naming WSTS in the caption of the Protest with the effect upon Bonander
if the Motion to Dismiss is granted, it is obvious that the “punishment” is grossly disproportionate to any harm that may have
been caused by “the crime”. Granting this Motion means that Bonander would likely be subjected to a separate motion to
dismiss from WSTS, which if granted would impose upon Bonander the possible forfeiture of its right to a hearing before the
Board; whereas, denial of DTNA’s Motion merely allows the matter to proceed to a hearing during which the issue of “Which
entity is now the franchisor?” can be factually decided. By their conduct or lack thereof, it is DTNA and WSTS who have
created the circumstances of a “pickle” for Bonander and will claim that Bonander is “out” no matter which way Bonander
turns. DTNA is claiming that it is not the franchisor, and WSTS will likely claim that it (by way of the letter from DTNA)
provided the notice of termination and that it is now too late for a protest to be filed in which WSTS is named in the caption.
As stated herein, if DTNA is the franchisor, the notice of termination was effective and the Protest was timely filed. If WSTS
is the franchisor, the notice of termination was not effective and the time within which Bonander is statutorily granted the right
to file a protest pursuant to Section 3060 has not begun to run. As the identity of the current franchisor cannot be determined,
DTNA’s motion to dismiss must be denied.

1 72. The notice of termination received by the Board was on “Daimler” letterhead with only
2 DTNA’s address appearing on it. The express language of the notice, in its opening sentence, stated that:
3 **“This letter shall serve as Daimler Trucks North America LLC’s (DTNA) notice of termination** of
4 your dealership’s Western Star Trucks Dealer Sales and Service Agreement...” (Emphasis added.)

5 73. In reading the notice of termination received from DTNA, no one at the Board, in
6 performing the ministerial duty mandated by Section 3060 which is to “advise the franchisor” would do
7 anything other than to “advise” “Daimler Trucks North America LLC” that “a timely protest has been
8 filed”.

9 74. It is true that the notice also referred to the “Western Star Trucks Dealer Sales and Service
10 Agreement” however it is not uncommon for the Board to receive notices similarly worded from “parent
11 corporations” which are the franchisors for a “line-make” or “brand”. In this case, the Board had before
12 it a “notice of termination” dated May 19, 2010, received by the Board on May 24, 2010. The notice
13 bore the letterhead of “DAIMLER”, the return address of DTNA, and expressly stated that it was
14 “Daimler Trucks North America LLC’s notice of termination.” This was followed by a Protest dated
15 June 17, 2010, naming DTNA in the caption. With the information in the Protest from Bonander
16 accurately matching the information contained in the notice of termination from DTNA, the Board, on
17 June 22, 2010, as required by Section 3060, sent to DTNA the notice that a protest had been filed. The
18 notice was sent to the person who signed the notice of termination, Mr. Monte Mehring, Director, Dealer
19 Operations, at the only address provided to the Board as the address of the franchisor, which was:

20 Daimler Trucks North America LLC
21 2477 Deerfield Drive
22 Fort Mill, SC 29715

23 75. The only statutory requirement that a franchisor be given notice of a protest is that
24 imposed upon the Board by Section 3060.²¹ DTNA is seeking that the Protest be dismissed because it is
25 not the franchisor. However, DTNA in its notice received by the Board held itself out as the franchisor,

26 _____
27 ²¹ Section 584 of the Board’s regulations requires that a copy of the protest be served upon the franchisor with proof of service
28 to accompany the protest filed with the Board. Bonander served a copy of the Protest by mail upon DTNA and provided the
Board with proof of such service. The absence of separate service upon WSTS is not significant under these facts. If DTNA
has become the franchisor, service upon DTNA was proper. If WSTS has remained a separate entity and the only franchisor,
the time to file a protest has not begun to run as WSTS has not complied with Section 3060.

1 and the Board, in reliance upon that representation, advised DTNA (in whatever may be its true capacity)
2 that a timely protest had been filed.

3 76. To conclude that the Protest should be dismissed as it is ineffective to operate as a Protest
4 against WSTS could have the effect of barring Bonander from exercising its legislatively-granted right to
5 protest the termination of its WSTS franchise. This is so because it is anticipated that DTNA as the
6 parent corporation of WSTS, or WSTS in its own behalf, will contend that:

7 a. The notice dated May 19, 2010 from DTNA was effective as notice from WSTS;

8 b. Bonander's time to file a protest naming WSTS as Respondent in the caption expired 30
9 days after the notice from DTNA was received by Bonander;

10 c. Any protest filed by Bonander now which named WSTS as Respondent in the caption
11 would be untimely;

12 d. The Board has no jurisdiction to hear a protest unless it is timely filed; and

13 e. Because Bonander did not file a protest naming WSTS as Respondent in the caption the
14 franchise terminated on September 1, 2010.

15 77. This would have the effect of causing Bonander to suffer a forfeiture of its statutory right
16 to file a protest, forfeiture of its right to have a hearing before the Board during which WSTS would have
17 the burden of proving there is good cause to terminate the franchise, and the ultimate forfeiture of its
18 contractual and statutory rights to remain as a WSTS dealer selling and servicing WSTS products. In
19 addition, the public will have summarily lost the benefits of having Bonander as an operating Western
20 Star dealer in Turlock.

21 78. To a large extent, DTNA is seeking this result even though:

22 a. DTNA and its subsidiary, WSTS,²² collectively have been the sole cause of the confusion
23 as to the identity of the "franchisor"; and,

24 b. No showing has been made, and it is difficult to believe, that there is or will be any harm
25 to DTNA or WSTS due to the claimed error of Bonander in naming DTNA as Respondent in the caption
26 of the franchise rather than WSTS. (As stated earlier, the text of the Protest clearly articulated that the

27
28 ²² Even the accuracy of this is uncertain. There are indications that Western Star brand trucks may be part of Freightliner LLC.

1 Protest was challenging both the conduct of DTNA and WSTS based upon not only the notice of
2 termination of May 19, 2010, but also the “cure letter” of December 2009.)

3 79. Either of the above reasons alone would be sufficient cause not to impose upon Bonander
4 a forfeiture of its rights.

5 80. In short, DTNA and its subsidiary WSTS are the sole cause of the claimed error as to the
6 identity of the franchisor, and neither of them suffered any prejudice or harm due to the claimed error.

7 81. In balancing the equities with DTNA and WSTS on one side and Bonander on the other,
8 there is no doubt that they favor Bonander, both as to being the entity least culpable and as being the
9 entity that would suffer the forfeiture with no counter-balancing adverse impact upon either DTNA or
10 WSTS.

11 82. The Protest was clear and explicit as to the relationship between Bonander and WSTS and
12 DTNA. It is only the caption of the Protest that may be technically in error and if an error does exist it is
13 certainly an understandable and excusable error as it was caused by DTNA and WSTS, with one or both
14 of them seeking to take advantage of the confusion they have caused.

15 83. DTNA was made aware in a timely manner, both by the Board and by the service of the
16 Protest by Bonander, that the Protest had been timely filed. Notice to DTNA, in acting as “manager”,
17 whether DTNA is “managing” as a principal in control, or “managing” as an agent under the control of
18 its subsidiary, would also be notice to WSTS, meaning both WSTS and DTNA had timely notice of the
19 timely filing of the Protest.

20 **CONCLUSION AS TO THE EFFECT OF DTNA’S FIRST CONTENTION THAT THE**
21 **PROTEST IS ASSERTED EXCLUSIVELY AGAINST DTNA**

22 84. It is determined that:

- 23 ■ This contention is not accurate when the text of the Protest is considered. This is especially so
24 considering that the Dealer Sales and Service Agreement and the Standard Provisions were
25 attached as an Exhibit to the Protest.
- 26 ■ There was notice of the Protest to both DTNA and WSTS and neither suffered any prejudice
27 under the circumstances here.
- 28 ■ As there was notice to both DTNA and WSTS, regardless of the status of DTNA, the naming of

1 only DTNA in the caption is of no legal significance as the substantive assertions in the Protest
2 should control the caption.

3 ■ The only prejudice that would occur would be to Bonander and such prejudice cannot be
4 permitted to occur for the following reasons:

- 5 ○ The naming of DTNA as Respondent in the caption of the Protest was due in large part to
6 the communications from and conduct of DTNA and its relationship with WSTS; and,
- 7 ○ To dismiss the Protest on this basis could result in an unwarranted forfeiture of the
8 statutory right of Bonander to protest the intended termination of its franchise with the
9 forfeiture in large part attributable to both DTNA and WSTS. This is so because DTNA is
10 claiming that the notice of termination was from WSTS. If this is so, dismissal of the
11 Protest could mean that the time within which to file a protest “against WSTS” (with
12 merely the name of the Respondent in the caption changed to WSTS instead of DTNA)
13 had run. Not only would Bonander suffer a forfeiture but the public would lose the
14 benefits of Bonander’s WSTS dealership without any consideration of the impact upon it.
15 This result should not be permitted under these circumstances.

16 Although it is impossible to sort out the information before the Board at this time, DTNA,
17 which is the parent corporation of its wholly-owned subsidiary WSTS, was acting either in its
18 own behalf in regard to the franchise relationship and the attempted termination or it was
19 acting as agent for WSTS. Which of these is correct is dependent upon more than what is
20 stated in the communications from DTNA or what is stated in the unsupported allegations in
21 the pleadings filed in its behalf. However, regardless of which entity is principal and which
22 is agent,²³ the outcome should be the same. Each entity would be responsible for the conduct
23 of its own agents and shared agents, and whichever entity is a principal would be vicariously

24
25 ²³ Generally, an agent is subject to the control of the principal when acting in behalf of the principal. Here, although unclear,
26 DTNA, the parent corporation, seems to be now claiming that it was acting in behalf of its wholly-owned subsidiary, WSTS.
27 The language of the motion states that it is “acting as manager of the termination process for Western Star Truck (sic) Sales,
28 Inc.” Considering that DTNA is the parent corporation, it is possible that DTNA was not acting subject to the control of
WSTS, but rather had itself taken control over the termination as the parent corporation. However, if DTNA was merely
doing the ministerial tasks needed for the termination and if DTNA agreed to be subject to the control of WSTS that would
make DTNA, the parent corporation, the agent of its subsidiary, WSTS. These facts cannot be determined by what is before
the Board at this time.

1 responsible for the conduct of the other entity's agents, and their subagents. In addition, any
2 notices to DTNA would be notices to it and, if DTNA is acting in behalf of WSTS, would also
3 be imputed notices to its principal, WSTS. This would be so both as to the notice to DTNA
4 from the Board and the service of the Protest upon DTNA by Bonander.²⁴ Again, neither
5 DTNA nor WSTS was prejudiced by the absence of the name of WSTS in the caption of the
6 Protest.

7 **DTNA'S OTHER CONTENTIONS IN THE MOTION TO DISMISS**

8 85. The remaining contentions of DTNA in its Motion appear to be based upon the admission
9 by Bonander that the franchisor is WSTS and not DTNA.

10 86. These contentions have been stated above but are restated here for ease of reference. They
11 are:

- 12 ■ "Paragraph 1 of the Protest alleges that Bonander holds a franchise for a new Western Star Trucks
13 franchise (sic)." (Motion, page 1, lines 27-28)
- 14 ■ The Motion refers to Exhibits A and B to the Protest, which are the documents making up the
15 Sales and Service Agreement between Bonander and WSTS. DTNA then claims that these
16 documents show "that the franchisor was indisputably Western Star Truck (sic) Sales, Inc. and
17 not Daimler Trucks North America LLC." (Motion, page 2, lines 1-14)
- 18 ■ The Motion then refers to Exhibit C of the Protest, which is a "December 1, 2009 letter from
19 Monte Mehring of Daimler Trucks North America" and is referred to as the "cure letter".
20 (Motion, page 2, lines 14-18)
- 21 ■ The Motion quotes from the letter and in part states as follows:
22 This letter is your dealership's formal notification that Daimler Trucks North America
23 LLC and its Western Star subsidiary (collectively "DTNA") have identified
24 deficiencies in your Western Star Dealership's...performance. (Motion, page 2, line
25 19-22)
- 26 ■ The Motion continues claiming that "The December 1, 2009, letter was sent on behalf of Western

27 ²⁴ Although required by the Board's regulations, there is no statutory requirement that the Protest be served upon the
28 franchisor. Regardless, the same analysis would apply as there was service upon DTNA and under the circumstances such
service would operate as service upon both DTNA and WSTS.

1 Star Truck (sic) Sales, Inc. by DTNA. In effect, DTNA was acting as manager of the termination
2 process for Western Star Truck (sic) Sales, Inc.”²⁵ (Motion, page 2, lines 24-27)

- 3 ■ After making other references to what is contained in the Protest, the Motion states in part:

4 While Western Star Trucks Sales, Inc. is a subsidiary of DTNA, they are not the same
5 company. (Motion, page 3, lines 14-15)

- 6 ■ The Motion then concludes stating:

7 Bonander has failed to lodge its protest against the entity that is the manufacturer²⁶
8 and franchisor of the Western Star Trucks. Because of this reason, the Protest must
be dismissed. (Motion, page 3, lines 15-18)

9 87. These allegations may be technically correct insofar as the “franchise” by its terms
10 identifies the franchisor as WSTS and not DTNA. And, it may be technically correct that “While
11 Western Star Trucks Sales, Inc. is a subsidiary of DTNA, they are not the same company”; and it may be
12 “that the franchisor was indisputably Western Star Truck (sic) Sales, Inc. and not Daimler Trucks North
13 America LLC.” (Motion, page 2, lines 1-14)

14 88. If all of these assertions in the Motion are taken at face value, the conclusion could be
15 that the franchisor is only WSTS and DTNA is not the franchisor of Bonander.

16 89. However, if this is so, and if, as alleged by DTNA, it is true that “the franchisor was
17 indisputably Western Star Truck (sic) Sales, Inc. and not Daimler Trucks North America LLC”, the
18 obvious question becomes, “Has WSTS, ‘the entity that is indisputably the franchisor’, complied with
19 the requirements of Section 3060?”

21 ²⁵ This and some of the other contentions of DTNA are merely the characterization of counsel in the Motion as to the
22 interpretation of the language used by DTNA in its communications to Bonander. The first sentence above appears to be
23 limited to the cure letter of December 1, 2009, being sent in behalf of WSTS. Although it may be implicit, there is no similar
express claim in the Motion that the notice of termination of May 19, 2010 was sent in behalf of WSTS. As will be discussed,
24 this may be because this would not be a reasonable interpretation of what is expressly stated in the notice of termination.

25 ²⁶ It is possible that DTNA is the “manufacturer” of Western Star brand trucks. Among the other steps DTNA has taken that
26 makes it appear to be the successor franchisor and acting in the role as “manufacturer” is that it is DTNA that is issuing what
is commonly called the “Manufacturer Statement of Origin” (“MSO”) (here captioned the “Certificate of Origin”) for the
27 Western Star brand trucks that Bonander has received under its franchise. Historically, the MSOs for Western Star trucks
were issued by Western Star Trucks Sales, Inc., showing an address of 4747 North Channel, Portland, Oregon. However
28 starting in 2005, they were issued by Freightliner LLC, with the same address, then in 2008 by WSTS with the same address.
However, also in 2008, through the present, the MSOs for the Western Star trucks were issued by Daimler Trucks North
America LLC, with the address also shown as 4747 North Channel, Portland, Oregon. (Protestant’s Opposition, Exhibit BB)
This last information is consistent with what is shown in DMV records that the occupational license for distribution of
Western Star brand trucks has been issued only to DTNA at that Portland address.

1 90. If WSTS is the franchisor as asserted by DTNA, then it is WSTS that is mandated by
2 Section 3060 to provide the notice of termination to the franchisee and the Board.

3 91. As indicated in paragraph 21, Section 3060 in part states:

4 (a) **Notwithstanding** Section 20999.1 of the Business and Professions Code or **the**
5 **terms of any franchise, no franchisor shall terminate** or refuse to continue any
6 existing franchise **unless** all of the following conditions are met:

7 (1) The franchisee and the board have received written notice from the franchisor
8 **as follows:** (Emphasis added.)

9 92. The time period within which Bonander must file its protest challenging the intended
10 termination by WSTS will not commence to run under Section 3060 until after Bonander and the Board
11 have received the notice from the “franchisor”.

12 93. As DTNA has asserted that it is not the franchisor and that it is only WSTS that is the
13 franchisor, it becomes necessary to determine if there was “notice” given by WSTS as the “franchisor”
14 that was “received” by both Bonander and the Board.

15 94. Bonander would have 30 calendar days from the time such a notice was “received” by it.
16 However, if no such notice was received by Bonander and the Board from WSTS (which is asserted by
17 DTNA to be the only franchisor), the situation would be as follows:

18 a. WSTS may not terminate the franchise of Bonander; and,

19 b. Bonander’s time to file a protest challenging the termination by WSTS will not begin to
20 run until a notice satisfying the requirements of Section 3060 is received from WSTS.²⁷

21 ///

22 ///

23 ///

24 ///

25 ²⁷ There is nothing that precludes a franchisee from filing a protest prior to receipt of a notice of termination that satisfies
26 Section 3060. If such a filing were not permitted, a franchisor that does not provide the required notices (but is willing to run
27 the risks of violating the various statutes), would have the power (not the right) to terminate a franchise and deny a franchisee
28 the right to a hearing before the Board as provided by Section 3060. The franchisor’s failure to provide the legislatively-
mandated notices should not have the effect of shielding the franchisor from the application of the statutes and denying the
franchisee the rights created by them. Therefore, Bonander, if it so chooses, could now file a protest specifically naming
WSTS as Respondent in the caption of the protest. As no notice of termination has been received by Bonander from WSTS
that satisfies Section 3060, such a filing by Bonander would be considered timely as against WSTS. Bonander, in its
Opposition, had requested leave to amend the Protest to include WSTS. However, as there has been no notice received from
WSTS, such relief is not necessary to preserve Bonander’s right to file a protest naming WSTS and have a hearing before the
Board as intended by the legislature.

1 **WHETHER THE NOTICES RECEIVED BY BONANDER AND THE BOARD WERE "...RECEIVED**
2 **FROM THE FRANCHISOR..." AS REQUIRED BY SECTION 3060(a)(1)**

3 **The sender as identified in the notice of termination**

4 95. As indicated in paragraphs 6-8, the May 19, 2010 notice of termination received by
5 Bonander and the Board was on "DAIMLER" letterhead, **with only DTNA's South Carolina address**
6 **and phone number**, and was sent by Monte Mehring, DTNA, Director, Dealer Operations. It is six
7 pages in length. No other page has any identifying information until the 6th page, which is the signature
8 page. The signature is above "Monte Mehring, Director, Dealer Operations", which is the same as that
9 printed on the first page **with an address of DTNA in South Carolina.**

10 **The text of the notice of termination**

11 96. The text of the letter begins: "This letter shall serve **as Daimler Trucks North America**
12 **LLC's (DTNA) notice of the termination** of your dealership's Western Star Trucks Dealer Sales and
13 Service Agreement (Agreement) effective September 1, 2010, for the reasons set forth herein."
14 (Emphasis added.)

15 97. This language expressly and unequivocally states that the letter is DTNA's notice of
16 termination of Bonander's franchise. If DTNA is correct in its contention that it is not the franchisor, the
17 letter cannot satisfy the requirements of Section 3060 as to either WSTS or DTNA because it is not
18 "notice" from the "franchisor".

19 98. The **letter from DTNA continues** by stating: "As required by California law, **we** are
20 providing you with the following notice..." (Emphasis added.)

21 99. The "we" could be ambiguous but the only entity to which it can refer is DTNA as it is the
22 only entity identified so far in the letter. (What follows is the language required by Section 3060 in the
23 proper format.)

24 100. The next paragraph reads in part: "This notice follows your dealership's failure to
25 complete the required actions described on **our** December 1, 2009, cure letter..." (Emphasis added.)
26 The word "our" could also be ambiguous but it refers to the "cure letter" of December 1, 2009, and that
27 letter will be addressed.

28 101. First, it is noted that the cure letter of December 1, 2009, does not satisfy the requirements

1 of Section 3060 as to form or content. Second, as will be discussed, the cure letter too was from DTNA,
2 not WSTS. Therefore, if DTNA's claim that DTNA is not the franchisor is correct, then the termination
3 notice of May 19, 2010, read alone or in conjunction with the cure letter of December 1, 2009, would not
4 satisfy Section 3060 as there was no notice of termination from WSTS, the "franchisor" as alleged by
5 DTNA.

6 **The sender as identified in the cure letter of December 1, 2009**

7 102. The cure letter of December 1, 2009, is six pages in length. The front page has the
8 identical identifying language as the termination notice of May 19, 2010, that is it contains only
9 "DAIMLER" at the top center and "Daimler Trucks North America LLC" address information in South
10 Carolina. It too is signed by Monte Mehring, Director, Dealer Operations, with copies to the same eight
11 "managers".

12 **The text of the cure letter of December 1, 2009**

13 103. The text of this cure letter begins on page 1 as follows:

14 As part of **Daimler Trucks North America LLC's** continuing Dealer Improvement
15 Initiative... This letter is your dealership's formal notification that **Daimler Trucks North**
16 **America LLC and its Western Star subsidiary (collectively "DTNA")** have identified
17 deficiencies in your Western Star Dealership's 2007, 2008 and YTD September 2009
18 performance...Our intent is to have you develop a plan to cure...for the mutual benefit of
19 your dealership, our customers and **Daimler Trucks North America LLC.** (Emphasis
20 added.) (Protest, Exhibit C)

21 104. After specifying claimed deficiencies and required "cures", the cure letter concludes with
22 the following language:

23 Consistent with **DTNA's** desire to use this cure process to improve its underperforming
24 dealers...In the event your dealership is not able to do so...**DTNA** may have no choice but to
25 take additional steps to protect **our** position in the market and to meet the high expectations
26 of **our** customers. This may include, in some instances, the ultimate termination of
27 dealership's (sic) Western Star Dealer Agreement. (Emphasis added.)

28 105. As can be seen from the above, this "cure letter" of December 1, 2009, can be interpreted
as coming only from DTNA, despite the one reference to its "Western Star subsidiary".

29 **The text of the notice of termination dated May 19, 2010**

30 106. The notice of termination which is clearly from only DTNA contains the following
31 language most of which is discussing the cure letter of December 1, 2009.

32 ///

Page No.	Statement in Notice of Termination
1	"...our December 1, 2009 cure letter." ("our" interpreted to mean DTNA)
2	"No plan has been submitted to DTNA."
2	"...to the satisfaction of the Western Star District Manager (DM)"
3	"Evidence of completion has not been submitted to DTNA."
3	"...substantially improve your dealership's market share for the Western Star brand within your AOR."
3	"No plan has been submitted to DTNA."
4	"...through the DTNA Parts Expert training program."
4	"Evidence of completion has not been submitted to DTNA."
4	"No plan has been submitted to the DSM [District Service Manager] or DTNA."
5	"Evidence of completion has not been submitted to DTNA."
5	"Evidence of completion has not been submitted to DTNA."
5	"Evidence of completion has not been submitted to DTNA."
5	"Our records indicate you have not submitted a monthly financial statement to DTNA since December 2007."
5	"We [meaning DTNA] hereby notify you under the terms of Paragraph XV(C)(3) of your Agreement that the Agreement is terminated effective September 1, 2010."
6	"Please provide a list of eligible assets under Paragraph XV(I) of your Agreement, which you wish to be considered for, (sic) repurchase by DTNA."

It is then signed by Monte Mehring, the Director of Dealer Operations for DTNA in Fort Mill, South Carolina.

CONCLUSION AS TO WHETHER THE NOTICE OF TERMINATION DATED MAY 19, 2010 IS FROM THE "FRANCHISOR" AS REQUIRED BY THE VEHICLE CODE

107. The notice of termination dated May 19, 2010 is from DTNA. As DTNA states:

- "...the franchisor was indisputably Western Star Truck (sic) Sales, Inc. and not Daimler Trucks North America, LLC." (Motion, page 2, lines 12-13);
- "While Western Star Trucks Sales, Inc. is a subsidiary of DTNA, they are not the same company." (Motion, page 3, lines 14-15);
- And it is for these reasons that DTNA claims that "Bonander has failed to lodge its protest against the entity that is the manufacturer and franchisor of the (sic) Western Star Trucks." (Motion, page 3, lines 16-17)

108. If DTNA is correct that it is not the "franchisor", then DTNA's notice of termination dated May 19, 2010, was not sent by the "franchisor".

///

1 **The Cure Letter**

2 109. DTNA, in its Motion, asserts that its “cure letter” of “...December 1, 2009, was sent on
3 behalf of Western Star Truck (sic) Sales, Inc. by DTNA” as “In effect, DTNA was acting as manager of
4 the termination process for Western Star Truck (sic) Sales, Inc.” (Motion, page 2, lines 25-26)

5 110. The problems with this contention include:

- 6 ▪ The cure letter of December 1, 2009 is not what is at issue.
- 7 ▪ The cure letter is not the notice of termination mandated by Section 3060.
- 8 ▪ The cure letter does not meet the statutory requirements as to form or content.
- 9 ▪ The cure letter was not from WSTS, which, according to DTNA, is the only franchisor.

10 **The Notice of Termination**

11 111. As stated above, the notice of termination was not sent by WSTS, which is the only
12 franchisor as alleged by DTNA.

13 112. The notice of termination speaks for itself. It states “This letter shall serve as Daimler
14 Trucks North America LLC’s (DTNA) notice of termination...”

15 113. DTNA’s Motion does not contain any similar assertion to that made about the cure letter,
16 which is that the notice of termination of May 19, 2010, was sent by DTNA acting as manager of the
17 termination process for WSTS. Even if this were a contention stated in the Motion regarding the notice
18 of termination, the Motion is only the pleading of DTNA and does not change what is stated or not stated
19 in the notice of termination.

20 114. Further, even if there were such an assertion, and even if it were accurate, this would be
21 nothing more than the result of a decision of DTNA, for whatever reasons of its own, stepping in to give
22 a notice of termination (now claiming not to be the franchisor) that is specifically required to be given by
23 the franchisor. Whatever the arrangements may be between DTNA and WSTS as to how the intended
24 termination of Bonander’s franchise will be handled between them, their agreements or relationship
25 cannot affect the requirements of the statutes that the notice of termination be provided by “the
26 franchisor” and that the notice be received by the franchisee and the Board from “the franchisor”.
27 (Underline added.)

28 115. Although it is true that a corporate entity can act only through its agents, DTNA in the

1 language of the notice of termination states clearly that “This letter shall serve as Daimler Trucks North
2 America LLC’s (DTNA) notice of the termination of your dealership’s Western Star Trucks Dealer Sales
3 and Service Agreement...” There is nothing indicating that the notice was being given in behalf of
4 WSTS with DTNA being “only the messenger”. And, considering the control that DTNA had been
5 exercising over the franchise requirements and the relationships, it is not reasonable to interpret that
6 DTNA was an “agent”, acting as such and subject to the control of WSTS, a “principal”.

7 116. DTNA alleges that Bonander was fully aware that the franchisor was WSTS and not
8 DTNA and therefore Bonander should have named WSTS in the caption of the Protest. However, if any
9 entities were aware of the correct identify of the franchisor, it was DTNA and WSTS. Therefore, it is
10 DTNA and WSTS that should be held to the standard DTNA now seeks to apply to Bonander, that is
11 DTNA and WSTS, should have made certain that the notice of termination came from WSTS as required
12 by Section 3060 and not from DTNA.

13 117. Bonander had valid reasons to believe that DTNA was the entity attempting to terminate
14 the franchise. Contrary to the claims of DTNA (and likely future claim of WSTS), it cannot be decided
15 upon the facts before the Board that Bonander should have known that WSTS was still the franchisor.
16 The true facts were, and even now are, known only to DAIMLER, DTNA, WSTS, and possibly
17 Freightliner. Based upon the thorough and detailed pleadings that have been filed by Bonander, it is
18 believed that Bonander, with 20-20 hindsight and with knowledge of the position being taken by DTNA
19 in its Motion, no doubt would have “named” all four of these entities in the caption of the Protest (and
20 would have served all four of them in some manner) along with any other entity apparently giving notice
21 of intent to terminate the franchise empowering Bonander to sell and service Western Star Trucks.
22 Under the circumstances here, whether it had the right or the power to terminate the franchise, from the
23 perspective of Bonander and the perspective of the Board (in issuing the “notice to dealer”) the only such
24 entity attempting to do so was DTNA.

25 118. Bonander should not be subject to the forfeiture of its protest rights and forfeiture of its
26 franchise due to any internal machinations among the various entities as to which only they were privy.
27 Denying Bonander its right to a hearing before the Board would also have the effect of summarily
28 depriving the public of the benefits of Bonander’s Western Star Trucks dealership for sales, service, and

1 parts, even though there may not be good cause for the termination as is alleged by Bonander.

2 119. DTNA cannot have it both ways. The notice of termination is clearly from DTNA and not
3 WSTS. Therefore, if DTNA is correct that it is not the franchisor, then its letter of May 19, 2010 was not
4 notice from the franchisor.

5 120. If DTNA is correct that WSTS is the franchisor, then there is no notice that has been
6 received by Bonander from its franchisor that would meet the requirements of Section 3060. As the time
7 within which to file a protest commences to run from the time the notice of termination from the
8 franchisor is received by the franchisee and no such notice exists, the time within which Bonander may
9 file a protest against any termination of its franchise has not commenced to run and therefore could not
10 have expired.

11 **ORDER**

12 A. After consideration of the pleadings, exhibits, and oral arguments of counsel, IT IS
13 HEREBY DETERMINED THAT:

14 (1) If DTNA is correct in its claims that it is not the franchisor of Bonander, the notice of
15 termination dated May 19, 2010 from DTNA is of no legal significance.

16 (2) The only notice of termination received by Bonander and the Board was from DTNA and
17 not from WSTS.

18 (3) Regardless of paragraph (1) above, the letter of May 19, 2010 from DTNA does not
19 constitute a notice of termination from WSTS that complies with Section 3060.

20 (4) Any termination or attempt to terminate the Western Star franchise held by Bonander
21 without the franchisor complying with Section 3060 would be in violation of Section 3060 and Section
22 11713.3(1)

23 (5) If DTNA is not the franchisor of Bonander, the Board cannot grant any relief under the
24 Vehicle Code based upon the Protest as submitted.

25 (6) If there is no franchise between DTNA and Bonander, there is no need for Bonander to
26 file a protest naming DTNA as the Protest would be challenging the termination of a franchise
27 relationship that does not exist.

28 (7) However, with the limited evidence before the Board and given the generally known

1 upheaval in the automotive industry, it cannot be determined what the true relationship is between DTNA
2 and WSTS and ultimately with Bonander. And, as there have been several writings exchanged between
3 DTNA and Bonander that have not been presented to the Board in full, it is possible that these writings
4 could constitute the "written agreement" needed for DTNA to have become the franchisor.²⁸

5 (8) If DTNA has become the franchisor of Bonander, then the notice from DTNA was
6 properly given and the Protest filed by Bonander was timely and proper and should not be dismissed.

7 (9) If DTNA has not become the franchisor of Bonander, and WSTS remains the franchisor,
8 then neither Bonander nor the Board have received notice from the franchisor and Bonander's time to file
9 a protest naming WSTS has not begun to run and therefore has not expired.

10 B. In light of the lack of conclusive evidence establishing the true relationship between
11 DTNA and WSTS and between DTNA and Bonander, Respondent's Motion to Dismiss is denied.

12 C. The Protest of *Bonander Pontiac, Inc. v. Daimler Trucks North America LLC*, Protest No.
13 PR-2239-10, is stayed until Bonander and the Board receive from WSTS a proper notice of termination
14 pursuant to Section 3060 and Protestant timely files with the Board a Section 3060 termination protest
15 naming WSTS; or, if WSTS does not issue a notice of termination, until Bonander files a Section 3060
16 termination protest naming WSTS (or the appropriate franchisor), whichever occurs first. If new
17 pleadings are filed, applications for waiver of the Board filing fee could be submitted to the Executive
18 Director.

19 D. Any protests naming DTNA and WSTS could be consolidated by order of the Board,
20 stipulation of counsel, or by law and motion. In the event counsel present additional evidence concerning
21 the relationship between DTNA and WSTS in the form of law and motion, one of the protests could be
22 dismissed by order of the Board.

23 E. If WSTS has remained the franchisor of Bonander – WSTS has not complied with Section
24 3060 and may not terminate the Western Star Trucks franchise of Bonander.

25
26
27 ²⁸ Whether the notices, addenda and other documents issued by DTNA pertaining to Bonander's franchise obligations were
28 invalid attempts to modify the franchise by one not a party to the franchise (as alleged by Bonander), or were otherwise in
violation of Section 3060, are not part of this Motion to Dismiss and cannot be resolved at this time.

1 F. If DTNA has become the franchisor of Bonander – DTNA has given notice of termination
2 in compliance with Section 3060 and the notice has been received by Bonander and the Board.

3 G. Bonander has filed a timely protest in response to the notice of termination from DTNA.

4 H. Therefore, DTNA may not terminate the Western Star Trucks franchise of Bonander until
5 there has been a hearing before the Board nor thereafter unless DTNA establishes good cause for the
6 termination.

7 I. Any attempt to terminate the franchise in violation of Section 3060 could subject the true
8 franchisor to the sanctions and penalties provided by the legislature.

9 SO ORDERED.

10
11 DATED: September 21, 2010

NEW MOTOR VEHICLE BOARD



12
13 By _____
14 ANTHONY M. SKROCKI
15 Administrative Law Judge
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27 George Valverde, Director, DMV
28 Mary Garcia, Branch Chief,
Occupational Licensing, DMV