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VIA E-MAIL & FED-EX

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California New Motor Vehicle Board
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Attn: Robin Parker, Senior Staff Counsel

Re: Request for Amicus Brief - Powerhouse Motorsports Group, Inc. v. Yamaha Motor Corporation, U.S.A. - Protest No. PR-2122-08; SLO County Superior Court No. CV098090; and Court of Appeal No. B236705.

Dear Members of the Board:

Yamaha Motor Corporation, U.S.A. ("Yamaha") respectfully renews its request that the New Motor Vehicle Board file a brief in the above-referenced appellate case, as an *amicus curiae*, or "friend of the court." At its May, 2012 meeting, the Board stated that Yamaha would be allowed to present further information regarding its request that the Board file an amicus brief. This letter presents that information.

The amicus brief would educate the Court of Appeal on the issue of the Board's jurisdiction to hear and decide protests, especially termination and establishment protests. The trial court in the Powerhouse case erroneously held, in denying Yamaha's Motion for Summary Judgment, that the Board no longer has jurisdiction to decide protests, essentially ruling that the Board has little reason to exist. The Board should weigh-in on the issue of its continued existence, explaining to the Court of Appeal that it still has jurisdiction to decide protests, which form the vast majority of the contested matters decided by the Board. In essence, the statutory scheme created by the Legislature (Vehicle Code 3060 *et seq.*), detailing the involvement of the Board in hearing and deciding protests, is still valid, and should not be ignored by the courts of this state.

In addition, refusal to file an amicus brief could have catastrophic results for the Board. Failure of the Court of Appeal to reverse the decision of the trial court will very likely adversely impact or eliminate the jurisdiction of this Board. The Board, which was recently successful in avoiding elimination by the Legislature, should be just as concerned that the Court of Appeal could effectively accomplish the same end, by upholding the trial court's ruling that the Board has no jurisdiction to adjudicate protests between dealers and manufacturers.

Yamaha addresses below the issues raised at the Board's May meeting.

I. The Prior Letter Submitted To The California Supreme Court And Ms. Parker's Trial Testimony Do Not Suffice To Educate The Court Of Appeal On The Board's Jurisdiction.

Yamaha requests that the Board submit a brief that is similar to the letter previously submitted by the Board to the California Supreme Court. At the May meeting, questions were asked as to whether this letter was a sufficient statement of the Board's position, and whether an amicus brief was unnecessary. The answer to both questions is a resounding "No," for several reasons.

First, the Board's prior letter was addressed to the Supreme Court, not to the Second District Court of Appeal in Ventura, where the proposed amicus brief would be filed. Also, the letter was filed in connection with a discretionary petition for hearing by the Supreme Court that was made prior to the trial. Currently, this matter is pending at the Court of Appeal, on an appeal as of right after the judgment of the trial court was entered, following a jury verdict. Those are two completely separate and distinct procedural postures and courts.

Second, neither the prior letter of this Board to the Supreme Court nor Ms. Parker's testimony at trial is sufficient to bring the Board's position to the attention of the Court of Appeal. Both the letter and the testimony are buried, as a small part of a very large record. If the Board seeks to protect its jurisdiction, an amicus brief is the best method to draw the Court's attention to the Board's position.

Third, the amicus brief gives the Board a method to explain to the Court why its jurisdiction over these disputes is important – an issue that was not addressed in Ms. Parker's testimony and was only minimally discussed in the Board's prior letter. This presentation of the Board's perspective is important to the Court of Appeal in fulfilling its role of acting in the greater public's interest.

II. The Board's Jurisdiction To Decide Protests Was Not Resolved At Trial.

Despite what the Board was told in May, *the continued jurisdiction of this Board to hear and decide protests is very much still at issue in this case.* Yamaha's primary argument on appeal – as set forth in its appellate brief that was filed on May 17, 2012 and is attached to this letter as Exhibit A – is that the case should not have gone to the jury at all. Yamaha was entitled to have the Superior Court issue a summary judgment in its favor without going to trial, since the underlying facts were never in dispute: Powerhouse closed its doors and Yamaha issued a Notice of Termination. Powerhouse was in the process of proposing a sale, but it failed to file a timely protest. As a result, Powerhouse's franchise was terminated by operation of law. Established case law and statutory law hold that once the applicable protest period has elapsed, "the Legislature's obvious intent is to let the franchisor treat the termination as final and effective." *Sonoma Subaru v. New Motor Vehicle Board* (1987) 189 Cal. App. 3d 13, 22; Vehicle Code section 3060(a)(3).

Moreover, contrary to the representations made to the Board by counsel for Powerhouse during the Board's May meeting, Yamaha does *not* seek to have this Board take the position that dealers cannot bring claims for money damages in court, or that dealers must bring such claims before this Board prior to going to court. Those arguments were not even made by Yamaha at the trial court, and, in any event, the issues have already been decided in other cases. E.g., *Hardin Oldsmobile v. New*

Motor Vehicle Board (1997) 52 Cal. App. 4th 585; *Mazda Motor of America, Inc. v. New Motor Vehicle Board* (2003) 110 Cal. App. 4th 1451. These two cases and others held that *petitions* (including claims which could lead to money damages) which were formerly brought before the Board under Vehicle Code section 3050(c), must go directly to court. The sole issue to be addressed by the proposed amicus brief is the jurisdiction of the Board to hear and decide *protests* (primarily franchise terminations and establishments), under Vehicle Code section 3050(d).

A. Powerhouse Claims A Right To Sell Terminated Franchise.

Powerhouse filed its protest with the Board, ten days late. Yamaha then filed a Motion to Dismiss the late protest. After full discovery, a two-day hearing on the Motion was held, at which ALJ Archibald considered and rejected all of Powerhouse's arguments to excuse the late filing. The Board adopted the ALJ's Proposed Decision as its Decision, granting Yamaha's Motion to Dismiss. The trial court subsequently upheld the Board's decision, denying Powerhouse's Writ Petition.

Despite losing its cause of action challenging the Board's decision granting Yamaha's Motion to Dismiss, Powerhouse sought to proceed with the rest of its court case. Paradoxically, Powerhouse claimed that the termination of the franchise did not excuse Yamaha from its obligation to consider the proposed sale of that franchise. Yamaha argued in its Motion for Summary Judgment before the trial court that after Powerhouse's franchise was terminated (once the protest period passed), the issue raised at the trial court, i.e., whether Yamaha should have later considered and approved a proposed sale of the franchise, was moot, since there was no franchise left to sell.

B. Trial Court Denies Yamaha's Motion For Summary Judgment, Ruling Without Any Briefing That Board Has No Jurisdiction To Decide Protests.

Yamaha's Motion for Summary Judgment was denied, specifically upon the trial court's incorrect ruling that this Board currently lacks jurisdiction to decide termination protests. The trial court erroneously ruled that under the *Hardin* and *Mazda* line of cases, which held that the Board cannot decide *petitions* involving a dealer and a manufacturer, the Board has no jurisdiction to decide *protests*, either.

Despite having upheld the Board's Decision granting Yamaha's Motion to Dismiss the late-filed protest, the court's tentative decision on the Motion for Summary Judgment – issued on the afternoon before oral argument – erroneously concluded that the Board lacked jurisdiction over termination protests. The trial court came to this incorrect conclusion on its own, without the benefit of any briefing on the issue by the parties. The tentative decision is attached as Exhibit B. At the oral argument on the Motion for Summary Judgment, the undersigned, as counsel for Yamaha, *twice* offered to brief the issue of the Board's jurisdiction over protests for the trial court – offers which the court declined. The transcript of the oral argument is attached as Exhibit C. The trial court ultimately made its tentative ruling – including that the Board has no jurisdiction to decide protests – the final ruling on Yamaha's Motion for Summary Judgment. The court's final ruling is attached as Exhibit D. Therefore, the determination that the Board lacks jurisdiction to consider protests was made by the trial court without consideration of any fully-briefed opposition.

This misinterpretation of the Board's jurisdiction led to the trial court's ruling that after the *Hardin* and *Mazda* line of cases, the case of *Sonoma Subaru v. New Motor Vehicle Board*, *supra*, 189 Cal. App. 3d at 22, is no longer good law. *Sonoma Subaru* held that the Board had properly refused to consider a late protest and that the dealer's termination could be treated by the manufacturer as "final and effective" immediately upon the expiration of the protest period. In ruling that the Board has no jurisdiction over termination protests, the trial court stated about *Sonoma Subaru*:

The decision in *Sonoma Subaru* is premised on the assumption that the (New Motor Vehicle) Board has a role to play when a franchisor terminates a franchise. While the premise that the franchisor needs the Board's blessing to terminate a franchise may have had legs in 1987, it barely has feet today.

Tentative Ruling, January 4, 2011. (Parenthetical added.) The trial court's decision on the Board's jurisdiction is clearly incorrect, and will be reviewed by the Court of Appeal.

C. Trial Court Allows Jury To Ignore Board's Findings.

Contrary to the representation made to the Board, the trial court *never* reversed its position that the Board lacked jurisdiction over the protest, despite Yamaha's repeated efforts to have the trial court do so. As a result of its ruling on the Board's jurisdiction, the trial court largely ignored the underlying findings made in the Board's decision on Yamaha's Motion to Dismiss Powerhouse's protest. The Board's findings, reached after an extensive hearing, were entitled to deference by the trial court, because of the Board's exclusive jurisdiction to decide protests, including whether they are timely.

Ultimately, the trial court's ruling allowed many of the same key issues already decided by the Board to be re-decided by the jury. For example, Yamaha's good faith belief that the dealer was going out of business because it was closed, Yamaha's compliance with the requirements of Vehicle Code section 3060 and the impact of that compliance, and the inability of Powerhouse and Mr. Pilg to demonstrate that Yamaha personnel had done anything to mislead Mr. Pilg into failing to file a timely protest, were all issues decided by the Board, which the trial court allowed to be re-argued by Powerhouse to the jury. The Board's decision, though the jury was informed of it, was neither explained in the jury instructions allowed by the trial court, nor was the jury instructed on the impact of the termination of the franchise, by operation of law under Vehicle Code section 3060(a)(3) and *Sonoma Subaru*, *supra*. Essentially, the trial court allowed the jury to simply ignore the Board's decision. Yamaha's post-trial motions on these issues were also denied. These errors by the trial court are all raised by Yamaha on appeal.

III. Filing An Amicus Brief Does Not Mean That This Board Is "Taking Sides" In A Private Dispute, Rather It Allows The Board To Educate The Court Of Appeal On The Board's Jurisdiction To Decide Protests.

While Powerhouse took the position at trial that manufacturers must consider proposed transfers after a termination has occurred, Yamaha is NOT asking this Board to take a position on that issue. ***Yamaha does not seek the Board to take a position with regard to the ultimate outcome of the case or anything that happened during***

the trial. The amicus brief should cite only to case law that the Board relied upon in deciding Yamaha's original Motion to Dismiss Protest.

In short, Yamaha is not asking this Board to show favoritism in a private matter – rather only that it protect its own jurisdiction, and the public policy that supports the Board's continued authority over protests. While the continued existence of the Board's jurisdiction is a necessary element to Yamaha's position on summary judgment – and the reason Yamaha seeks this amicus brief – this Board's protection of its own jurisdiction is in no way "taking sides" in the dispute between Yamaha and Powerhouse. The Board would not be taking sides in an amicus brief any more than it did when it decided Yamaha's Motion to Dismiss Powerhouse's late-filed protest.

IV. Conclusion.

The Board has every reason to be heard on the issue of its own jurisdiction, and no reason not to file an amicus brief. In fact, refusal of the Board to file an amicus brief regarding its own jurisdiction could either be commented upon by Powerhouse and/or misinterpreted by the Court of Appeal itself. Indeed, the Board's silence could be seen as an admission that the Board either has no opinion or even that it agrees with the trial court's erroneous interpretation of the Board's jurisdiction. The Board should not remain silent on this issue, potentially allowing others to misinterpret that silence.

Your consideration of this request is greatly appreciated.

Sincerely,


Maurice Sanchez

MS/ec

cc: Dennis D. Law, Esq.

Exhibit A

No. B236705

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT, DIVISION SIX

POWERHOUSE MOTORSPORTS GROUP, INC., et al.,

Plaintiffs/Respondents/Cross-Appellants,

v.

YAMAHA MOTOR CORP., USA,

Defendant/Appellant/Cross-Respondent.

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The Honorable Martin J. Tangeman
No. CV098090

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Pursuant to rule 8.208 of the California Rules of Court, appellant Yamaha Motor Corp., USA hereby certifies that:

1. The following parties are known to have a 10%, or greater, interest in the ownership of appellant: Yamaha Motor Company, Limited.
2. Appellants are not aware of any other person or entity that has a financial or other interest in the outcome of this proceeding that they believe the justices of this Court should consider in determining whether to disqualify themselves under canon 3E of the Code of Judicial Ethics.

DATED: May 17, 2012



Theodore J. Boutrous, Jr.

*Attorney for Defendant and Appellant
Yamaha Motor Corp., USA*

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INTRODUCTION

Powerhouse Motorsports Group, Inc. (“Powerhouse”) indisputably breached its dealer agreement with Yamaha Motor Corp., USA (“Yamaha”) by closing its dealership without any plans to reopen, which gave Yamaha the right—under the dealer agreement and the California Vehicle Code—to serve Powerhouse with a notice of termination of Powerhouse’s dealer agreement.

Yamaha strictly followed the statutory requirements for the exercise of that right, and the California New Motor Vehicle Board (the “NMVB”)—the state agency with jurisdiction to adjudicate dealer “protests” to notices of termination from franchisors—determined that Powerhouse failed to file a timely protest to Yamaha’s notice of termination. As a result of that failure, the termination of Powerhouse’s dealer agreement became final and effective (see Veh. Code, § 3060(a)(3); *Sonoma Subaru, Inc. v. New Motor Vehicle Bd.* (1987) 189 Cal.App.3d 13, 22 (*Sonoma Subaru*)), and plaintiffs’ claims against Yamaha—all of which were premised on the existence of that agreement—should have been rejected by the trial court as a matter of law.

The foregoing facts—that Powerhouse closed its dealership, that Yamaha served Powerhouse with a notice of termination complying with the statutory requirements for such a notice, and that Powerhouse failed to protest that notice during the statutorily prescribed 10-day time period—were all undisputed and stipulated to on no less than three occasions: (1) at the hearing before the NMVB, (2) in connection with Yamaha’s summary judgment motion, and (3) at trial. The trial court nonetheless denied Yamaha summary judgment, and after a jury trial, plaintiffs were awarded over \$1.3 million in damages, including \$200,000 in punitive damages and over \$500,000 in attorneys’ fees. Yamaha moved for judgment notwithstanding the verdict and for a new trial, but the trial court denied both motions.

The trial court’s decisions denying Yamaha judgment as a matter of law were based on a clear misunderstanding of the significance of the NMVB’s ruling. Although the trial court correctly denied Powerhouse’s petition for a writ of mandate challenging the NMVB’s ruling, and thus upheld the NMVB’s determination that Powerhouse did not file a timely protest to Yamaha’s notice of termination, the court failed to recognize that this conclusion compelled judgment for Yamaha on all of plaintiffs’ claims. Each of these claims was prem-

ised on Yamaha's supposedly improper refusal to allow Powerhouse to sell its franchised business to another dealer, MDK Motorsports ("MDK"), but Yamaha could not have been liable for withholding its approval of that sale because Powerhouse's failure to file a timely protest to Yamaha's notice of termination meant that *Powerhouse had no franchise agreement, and therefore no franchised business to sell*. And once the franchise agreement terminated, Yamaha had no continuing duties to consider the proposed sale to MDK.

The trial court's rulings directly frustrate the regulatory scheme designed by the Legislature when it created the NMVB and authorized franchisors to terminate closed dealerships. The Legislature designed the Vehicle Code's dealership termination procedures so as to quickly provide certainty to franchisors and consumers in the event of a dealership closure. Indeed, a principal purpose of the NMVB and the dealership termination procedures was to ensure "that dealers fulfill their obligations under their franchises and provide adequate and sufficient service to consumers generally." (Stats. 1973, ch. 996, § 1.) And the Legislature authorized expedited termination of closed dealerships specifically to allow a franchisor to react quickly to restore "warranty and other special services" that dealers provide to consum-

ers. (Assem. Com. on Transportation, Analysis of Assem. Bill No. 566 (1983–1984 Reg. Sess.) as introduced Feb. 10, 1983, p. 1; Sen. Com. on Insurance, Claims & Corporations, Analysis of Assem. Bill No. 566 (1983–1984 Reg. Sess.) as amended Apr. 11, 1983, p. 2.) These important goals are undermined by the imposition of liability on Yamaha after it indisputably complied with the Vehicle Code’s termination procedures.

As explained below, the Court should vacate the judgment and enter judgment for Yamaha on all of plaintiffs’ claims. In the alternative, the Court should reduce the amount of compensatory damages awarded to Powerhouse by \$440,250, because this award was based on a clear mistake by the jury that the trial court refused to remedy. In either case, the Court should vacate the awards of punitive damages and attorneys’ fees, which, as discussed below, were both premised on errors of law.

STATEMENT OF THE CASE

I. THE REGULATORY SCHEME

A. The Franchise Agreement

In order to sell or advertise for sale new vehicles of a particular line-make, California law requires the dealer to have a “franchise” for that line-make of vehicles. (Veh. Code, § 11713.1(f) [it is a violation

of the Vehicle Code for a licensed dealer to “[a]dvertise for sale, sell, or purchase for resale a new vehicle of a line-make for which the dealer does not hold a franchise”].¹ The Vehicle Code defines a “franchise” as “a written agreement” having a list of specified conditions, including “the right to offer for sale or lease, or to sell or lease at retail new motor vehicles ... or the right to perform authorized warranty repairs and service.” (§ 331(a).)²

B. Termination of a Franchise Agreement

Section 3050 of the Vehicle Code gives the NMVB narrowly circumscribed jurisdiction to resolve specified disputes between vehicle manufacturers and distributors (also referred to as “franchisors”) and their dealers (also referred to as “franchisees”). Among those disputes is a “protest” filed by a dealer in response to a notice of termination served on it by a manufacturer or distributor. Thus, section 3050 states that the NMVB “shall,” among other things, “[h]ear and decide ... a protest presented by a franchisee pursuant to Section 3060.” (§ 3050(d).)

¹ All further statutory references are to the Vehicle Code unless otherwise indicated.

² The terms “franchise,” “dealer agreement,” and “franchise agreement” are used interchangeably herein.

Section 3060 of the Vehicle Code regulates the circumstances under which a franchisor may terminate a dealer agreement. Franchisors are required to give written notice, containing statutorily prescribed language, to a dealer that the franchisor is seeking to terminate the dealer agreement. (§ 3060(a)(1).) The dealer has a specified time period in which it may file a “protest” with the NMVB challenging the termination. If the dealer timely files a protest, the NMVB conducts a hearing to determine whether there is “good cause” for the franchisor to terminate the agreement. (§ 3060(a)(2).) In that instance, until the “good cause” determination is made, the franchisor must continue to treat the dealer as not terminated. (§ 3060(a).) If, however, the dealer fails to file a timely protest, the franchisor may terminate the dealer agreement immediately. (§ 3060(a)(1), (3).)

For most termination situations, the termination notice sent to the dealer must state (1) that the termination is effective after 60 days, and (2) that the dealer has 30 days to protest the termination. (§ 3060(a)(1)(A), (C).) But in five situations specifically identified in section 3060(a)(1)(B), section 3060’s termination procedure allows a franchisor to initiate an *expedited* termination process in which the dealer is given (1) notice of a termination effective in 15 days, and (2)

10 days in which to file a protest to the notice of termination with the NMVB. (§ 3060(a)(1)(A)–(C).)³ As relevant here, a franchisor is authorized by section 3060 to use the expedited procedure where the franchisor has a “good faith” belief that the dealer is going out of business because the dealer has failed to conduct its operations for seven consecutive business days. (§ 3060(a)(1)(B)(v).)

Where a franchisor gives expedited notice of termination under section 3060(a)(1)(B), the statute requires the franchisor to include in the notice specific warning language that, in at least 12-point bold type and circumscribed by a line that segregates it from the rest of the text of the letter, advises the franchisee of the 10-day deadline in which to file the protest. (§ 3060(a)(1)(C) [requiring warning to franchisee that you “must file your protest with the Board within 10 calendar days after receiving this notice ... or your protest right will be

³ The five situations in which expedited termination are permitted are: (i) transfer of any ownership or interest in the franchise without the consent of the franchisor; (ii) misrepresentation by the franchisee in applying for the franchise; (iii) insolvency of the franchisee; (iv) any unfair business practice after written warning thereof; and (v) “[f]ailure of the motor vehicle dealer to conduct its customary sales and service operations during its customary hours of business for seven consecutive business days, giving rise to a good faith belief on the part of the franchisor that the motor vehicle dealer is in fact going out of business.” (§ 3060(a)(1)(B).)

waived”].) Where the franchisor has complied with the statutory requirements with respect to the termination notice, and “the appropriate period for filing a protest has elapsed,” without the filing of a protest, the franchisor may terminate the franchise. (§ 3060(a)(3); see also *Sonoma Subaru, supra*, 189 Cal.App.3d at p. 22 [“Where no protest of the termination is filed within the allotted time, the Legislature’s obvious intent is to let the franchisor treat the termination as final and effective”].)

C. Sale of a Franchised Business

A franchisee who seeks to sell its franchise is required to give prior written notice to the franchisor of the proposed sale. (§ 11713.3(d)(2)(A).) That notice must contain, among other things, all agreements related to the sale and the proposed transferee’s application to become the successor franchisee, including all forms and related information generally required by the manufacturer in reviewing prospective franchisees. (§ 11713.3(d)(2)(A)(i)–(iii).) The franchisor is then required, no later than 60 days after receipt of all of the required information, to notify the franchisee of its approval or disapproval of the proposed sale of the franchised business. (§ 11713.3(d)(2)(B).) A franchisor is prohibited from preventing a

dealer from receiving “fair and reasonable compensation for the value of the franchised business.” (§ 11713.3(e).) And although a franchisee is prohibited from transferring, selling, or assigning its franchise without the consent of the franchisor, that consent “shall not be unreasonably withheld.” (§ 11713.3(d)(1), (e).)

II. FACTUAL BACKGROUND

A. The Parties

Yamaha is the United States distributor of Yamaha-brand motorcycles, all-terrain vehicles, and side-by-side utility vehicles. (3 Appellant’s Appendix (“AA”) 849.) Timothy Pilg owned and operated Powerhouse, a Yamaha franchised dealer in Paso Robles, until June 2008. (5 Reporter’s Transcript (“RT”) 1223–1232, 1242–1250.)⁴

Pilg has extensive experience in the motorcycle and all-terrain vehicle industry, and, as of the start of trial, had been a motorcycle dealer for over 15 years. (5RT1213–1232; 6RT1567.) Pilg began working as a mechanic at a motorcycle shop when he was 15 years

⁴ During trial, the court ruled that all claims brought individually on behalf of Pilg were actually owned by the trustee of Pilg’s bankruptcy estate, Jerry Namba, and Namba was substituted in place of Pilg. (9RT2403–2408.) For simplicity, Yamaha uses Pilg throughout to refer to the individual claims that are owned and brought by Namba.

old. (5RT1213–1214.) He thereafter owned and operated multiple dealerships in the San Luis Obispo area. (5RT1213–1219.) In 1998, Pilg entered into a dealer agreement with Yamaha in connection with his purchase of a Yamaha franchise in Paso Robles, which he operated under the Powerhouse name. (5RT1222–1224.) In addition to Yamaha products, Powerhouse sold vehicles manufactured by KTM, Suzuki, and Polaris. (5RT1224–1225.)

Prior to 2007, Pilg operated Powerhouse as a sole proprietorship. (5RT1231–1232.) In 2007, Powerhouse became incorporated and entered into a new dealer agreement with Yamaha. (5RT1232–1233; 7AA1732–1738.) Section 6.2 of this dealer agreement provided that “the failure of [Powerhouse] to conduct its operations in the ordinary course of business including closing of [Powerhouse’s] operations in any manner inconsistent with what is customary for the same type of business in the same market area” allowed Yamaha to terminate the agreement “with immediate effect on the giving of written notice” to Powerhouse “[u]nless otherwise provided for or allowed under state law.” (7AA1736.)

B. Powerhouse's Closure and Termination

From 1998 to 2003, Pilg's dealership grew, and in August 2004, Pilg purchased a former Kmart building and relocated his dealership there. (5RT1228–1229.) The new location was about four times the size of the prior location, and, at approximately 60,000 square feet, was one of the largest Yamaha dealerships in the country (even with the other motorsports brands being sold there). (8RT2108, 2111–2113.)

Before moving to the Kmart location, Pilg's dealership had been steadily growing, and in the first year after relocating (2006), sales climbed from \$4 million to almost \$12 million. (5RT1230–1231.) The next year, however, sales fell by about \$2 million, and Powerhouse ended 2007 with a \$200,000 loss. (5RT1235.)

Faced with mounting losses, Pilg, on June 15, 2008, decided to close the dealership. (5RT1242, 1248–1249.) On June 16, 2008, Pilg notified Powerhouse employees that the dealership would be closing, covered the windows of the store with paper, and put a note on the front door explaining to customers that Powerhouse was closed. (5RT1248–1249.) Pilg, on June 17, 2008, sent an email to Luke Dawson, a Yamaha district manager, in which he stated that he had closed

Powerhouse on June 16 because the current economy did not allow a dealership of Powerhouse's size to be profitable. (5RT1249; 7AA1740.) Dawson visited the dealership on July 10, 2008, and confirmed that it was closed and in a state of disarray. (8RT2120, 2123–2124.)

Pilg knew that closing the dealership was a violation of the dealer agreement Powerhouse had entered into with Yamaha. (5RT1270; 6RT1570–1572.) Pilg wrote in an email to a business consultant on June 16, 2008, that, by closing the dealership, he was giving up the right to sell the Yamaha franchise. (7AA1989 [“We will be closing the store tomorrow.... I am giving up the ability to sell my Yamaha, Suzuki, and Polaris franchises which hurts deeply however I do not have the funds to continue on”]; 5RT1251.)

After Dawson confirmed the closure in person, Yamaha in-house counsel Richard Tilley sent a notice of termination to Powerhouse, copying Dawson, Rocky Aiello (a Yamaha regional business manager), and Bob Braun (the Yamaha national sales manager). (7AA1807–1808; 7RT1831, 1838–1840.) Pilg received the letter on

July 26, 2008. (6RT1515; 7AA1808.)⁵ In compliance with section 3060(a)(1)(C), the notice of termination contained in 12-point bold type in a box segregated from the rest of the text the following statement:

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 10 calendar days after receiving this notice or within 10 days after the end of any appeal procedure provided by the franchisor or your protest right will be waived.

(7AA1807, original bold.)

Pursuant to this notice, the deadline for Powerhouse to file a protest was August 5, 2008, 10 days after Pilg received the notice of termination. (§ 3060(a)(1)(C); 1AA210; 7RT1846.) But Powerhouse waited until August 15, 2008—10 days after the deadline—to file a protest. (1AA4, 213; 6RT1621, 1627; 7RT1846–1847.)

⁵ The first mailing of the termination letter, which was addressed to Powerhouse at the dealership, was returned to Yamaha. (7RT1840–1841; 6RT1518.) On July 24, 2008, Tilley re-sent the notice of termination to Pilg's home, and Pilg received the second letter on July 26, 2008. (6RT1515; 7AA1808.)

Yamaha moved to dismiss Powerhouse's protest before the NMVB as untimely. After conducting a two-day evidentiary hearing (focusing in large part on Powerhouse's claim that Yamaha was estopped from asserting the untimeliness of the protest), the NMVB granted Yamaha's motion and dismissed the protest. (1AA4-5, 25.) In granting Yamaha's motion, the NMVB concluded (1) that "Yamaha had a good faith belief that Powerhouse ... was going out of business, and use of the 15-day notice of termination was legally supported," and (2) that "Yamaha [was] not estopped to claim that Powerhouse's protest was untimely" because "Powerhouse [had] failed to establish all necessary elements of estoppel." (1AA25.) Powerhouse challenged the NMVB's decision by petitioning the trial court for a writ of mandate, which the trial court denied. (1AA224-225.)

C. Potential Sale of Powerhouse to MDK

When Pilg initially decided to close Powerhouse, he did not intend to sell the dealership or his Yamaha franchise. (5RT1251-1252, 7AA1989.) Instead, Pilg planned to liquidate the dealership, voluntarily terminate his franchises, and find someone to purchase or lease the Kmart property. (5RT1251-1256; 7AA1955-1960.) A few days after Powerhouse was closed, however, Pilg began negotiating a sale of the

out-of-business dealership, including the Yamaha franchise, and a lease of the Kmart property to another dealer, MDK. (5RT1257–1261.)

On June 21, 2008, Pilg reached a verbal agreement with MDK, that was subsequently memorialized in a written term sheet and an asset purchase agreement, under which MDK would pay \$700,000 for Powerhouse’s tangible and intangible assets, and would lease the Kmart property from Pilg for \$27,090 per month for the first year, an amount insufficient to cover the mortgage, let alone taxes, insurance, and maintenance. (5RT1260–1262; 7AA1749–1751, 1792–1805.) The \$700,000 purchase price included the Yamaha, KTM, Suzuki, and Polaris dealer agreements and \$440,250 worth of parts in inventory. (7AA1793–1794.) Transfer of Powerhouse’s franchise agreements to MDK, including its agreement with Yamaha, was “subject to factory approval which shall be [Powerhouse’s] responsibility to obtain.” (7AA1749.)

D. Yamaha’s Communications with Powerhouse and Pilg Regarding Potential Sale and Termination

Shortly after he began negotiations to sell Powerhouse to MDK, on or about June 19, 2008, Pilg contacted Rod Stout, a Yamaha division manager, and asked if he could sell the Yamaha franchise.

(5RT1259; 12RT3312, 3317–3319.) Stout told Pilg that as long as the dealer agreement was active, he could sell the franchise. (5RT1259; 12RT3317–3319.)

After signing the term sheet with MDK, Pilg, on June 25, 2008, contacted Dawson and informed him of his intention to sell Powerhouse, and that the proposed buyer, MDK, would be leasing the Kmart property. (5RT1262, 1266–1270.) On July 10, 2008, Dawson met with Pilg and MDK executives at the closed dealership, where he agreed to send MDK a dealer application packet and assist in getting the dealer approval process going. (5RT1272–1275; 8RT2120–2123.)

On July 11, 2008, Yamaha sent the Notice of Termination, because Powerhouse had been closed for more than three weeks, and admittedly did not intend to re-open. (7AA1807–1808; 5RT1248–1249; 7RT1831, 1838–1840.) Two days after he received the notice of termination, Pilg called Yamaha in-house counsel Richard Tilley on July 28, 2008. (6RT1515, 1519; 7RT1841–1842.) Tilley testified at trial that he kept the conversation with Pilg “short” and “directed [Pilg] to his attorney” because, as “an attorney for Yamaha,” Tilley had an “ethical duty to only represent Yamaha” and therefore had “to be very careful talking to people that may not be represented or may

be represented by an attorney.” (7RT1842.) That same day, Tilley sent another letter to Powerhouse and Pilg reiterating that “Yamaha [was] not amending, withdrawing, or delaying the effectiveness of the termination notice,” and again advising Pilg to “seek assistance from [his] own legal counsel.” (7AA1810; 6RT1520–1522; 7RT1843.)

Pilg, however, did not immediately contact his attorney regarding the notice of termination, even though Pilg’s long-standing attorney, Dennis Law, had recently advised him in connection with the MDK asset purchase agreement. (6RT1522, 1617, 1626–1627.) Instead, Pilg talked with his business consultant, who was not an attorney. (6RT1646.) He also attempted to contact several Yamaha employees. (6RT1522–1527.) On July 29, 2008, Pilg called and emailed Dawson and asked why Pilg had received a termination letter. (7AA1816; 6RT1522–1523.) Dawson testified at trial that he did not respond to Pilg’s email because he felt that Pilg was seeking legal advice, which Dawson was not qualified to give. (7RT1976–1977.) Pilg also called Yamaha employee Aiello, who did not return Pilg’s call. (6RT1524.)

Pilg testified that he did not take any steps, such as making a calendar entry, to ensure that he would not miss the deadline to file a

protest. (6RT1621–1622.) And it was not until August 7, 2008—two days after the protest deadline had passed—that Pilg first sought legal advice from his attorney regarding the notice of termination. (6RT1529–1530.)

On August 8, 2008, Tilley sent Powerhouse and Pilg a letter explaining that the “submission of the buy/sell agreement [with MDK] did not prevent or stay the effectiveness of the termination notice, nor did any of your other actions,” and that the time to file a protest regarding Yamaha’s termination notice with the NMVB had passed. (7AA1939–1940.) That same day, Tilley told Powerhouse’s counsel that Yamaha considered Powerhouse’s dealer agreement terminated, and that Yamaha was “not interested in entering into a new Dealer Agreement at [Powerhouse’s] former location” with MDK. (3AA851; 7AA1835; see also 7AA1839, 1841.)

E. Internal Yamaha Communications Regarding Potential Sale and Termination

Plaintiffs’ presentation to the jury focused on several emails that Powerhouse claimed were evidence of opposition by Yamaha to Powerhouse’s sale of the franchise to MDK.

In a June 26, 2008 email, Yamaha regional marketing manager Jason Bishop asked whether “we need to get legal involved” because

“[i]f his doors are closed he’s in violation of his dealer agreement.” (7AA1781.) Bishop also stated that he was “not a huge fan of MDK” because “at this point all they’ve done is run a point with a lot of potential in Folsom, CA into complete chaos.” (*Ibid.*) Bishop testified at trial that he was referring to the fact that, in connection with MDK’s purchase of another Yamaha franchise, he had been unable to consistently reach MDK staff, and MDK had failed to correctly complete its dealer application. (8RT2176.) In response to Bishop’s email, Aiello responded that Bishop should contact the legal department in order to “find out what our options might be at this point.” (7AA1781.)

On June 27, 2008, Dawson reported back to Aiello and Bishop regarding a conversation he had with Pilg about the potential sale to MDK. (7AA1781.) Dawson asked whether Bishop had already contacted the legal department, and stated that he “would like to discuss with both [Aiello and Bishop] if supporting this buy/sell [with MDK] is in our best interest and formulate a game plan for moving forward.” (*Ibid.*) At trial, Dawson explained that he was referencing how to deal with the unprecedented situation in which Powerhouse went out of business first and then decided to sell the business afterwards.

(7RT1941.) Dawson also testified that the “game plan” that was eventually formed involved two separate tracks, in which Yamaha would initiate the termination process because Powerhouse was closed, but would also work with Pilg and Powerhouse on the potential sale to MDK as long as Powerhouse had an active dealer agreement. (7RT1941.)

In a subsequent email, Dawson stated that he “want[ed] to be extra careful” and to “proceed cautiously,” and asked Aiello and Bishop to advise him how to respond to Pilg. (7AA1816.) At trial, Dawson explained that he wanted to be careful because the legal department was involved and had sent letters to Pilg, and because he did not want to contradict the legal department or confuse Pilg. (7RT1965–1966.)

F. Post-Termination

After Yamaha notified Pilg that it was treating the franchise as terminated, MDK cancelled the sale and lease agreement it had entered into with Powerhouse and Pilg. (6RT1537–1538; 7AA1837.) Pilg did not attempt to sell the remaining franchises. (6RT1594.) Instead, Pilg liquidated Powerhouse’s inventory in order to pay down debt. (6RT1538–1542.) For seven or eight months, Pilg operated a

small shop on the Kmart property that sold vehicles made by KTM that Powerhouse had in inventory. (6RT1543–1544.)

Pilg then began exploring alternative offers for the Kmart property, including leasing the property to a church and selling part of the property to a hotel developer, but none of these offers resulted in the sale or lease of the property. (6RT1544–1552.) In October 2009, Pilg filed for bankruptcy, and the bank foreclosed on the Kmart property. (6RT1542, 1552.) And in January 2010, MDK went out of business and was liquidated in bankruptcy. (10RT2796–2797.)

III. PROCEDURAL HISTORY

A. Plaintiffs' Claims

In the operative complaint, Powerhouse and Pilg asserted claims against Yamaha for violation of section 11713.3 (unreasonable withholding of consent to transfer of a franchise), intentional interference with contractual relations, and intentional interference with prospective business advantage. (1AA45–49, 50–54.) Powerhouse also asserted a breach of contract claim against Yamaha, and petitioned for a writ of mandate directed to the NMVB. (1AA49–50, 54–59.)

Plaintiffs alleged that Yamaha violated section 11713.3 because it “intentionally ceased processing [MDK’s] application materials without even considering the merits of MDK’s financial and business

capabilities.” (1AA45–46, 50–51.) Plaintiffs further contended that “Yamaha’s purported termination of the Powerhouse franchise did not excuse Yamaha from its obligations under section 11713.3 to have acted reasonably in considering the merits of the transfer to MDK.” (1AA45–46, 50–51.)

Plaintiffs’ intentional interference claims, as well as Powerhouse’s breach of contract claim, were based exclusively on allegations that Yamaha unreasonably withheld consent to the sale of Powerhouse to MDK and therefore violated section 11713.3. (1AA45–53.)

B. Pre-Trial Proceedings

After the NMVB dismissed Powerhouse’s protest to the termination as untimely, Powerhouse petitioned the trial court for a writ of mandate. (1AA25; see also 1AA54–59.) On July 2, 2010, the trial court denied Powerhouse’s writ petition because “substantial evidence support[ed] the Board’s factual findings and ... those findings in turn support[ed] the Board’s determination: (1) that Powerhouse failed to establish a scheme by Yamaha to trick or induce Mr. Pilg to not file a protest; (2) that Powerhouse failed to establish that Yamaha did anything—especially after July 26, 2008, to lull him (or that would lull a

reasonable franchisee in his position) into not filing a protest or to mislead him (or a reasonable franchisee) into not doing so; [and] (3) that Mr. Pilg knew that closure of Powerhouse could lead to termination and that termination could [a]ffect his ability to sell the Yamaha franchise.” (1AA224–225.)

Yamaha then moved for summary judgment on September 24, 2010, arguing that because Powerhouse’s protest was untimely, none of plaintiffs’ claims were viable, as each claim depended upon the existence of a valid dealer agreement. (1AA227–295; see also 2AA296–615; 3AA616–830.) Yamaha argued that because Powerhouse failed to file a timely protest (as the NMVB had determined in a decision that the trial court had upheld), under both section 3060 and *Sonoma Subaru* the termination of Powerhouse’s franchise was final and effective as of August 5, 2008. (1AA236–237.) Yamaha further argued that the termination of Powerhouse’s franchise was fatal to plaintiffs’ claims because they were all premised on the allegation that Yamaha had breached its statutory and contractual obligations to consider the sale of Powerhouse’s franchise to MDK, yet no franchise existed after the dealer agreement terminated, and therefore Yamaha had

no obligation to further consider the sale of Powerhouse's former franchise to MDK. (1AA238–241.)

The trial court denied the motion, concluding that *Sonoma Subaru* did not hold that “if a timely protest is not filed the contractual relationship between the franchisor and franchisee is terminated as a matter of law,” and that if *Sonoma Subaru* had so held, “such a[] holding would be inconsistent with subparagraph (e) of section 3050.” (3AA840–841.)

C. Trial

The trial, which was held between June 2 and June 20, 2011, was bifurcated into two phases: (1) liability, compensatory damages, and entitlement to punitive damages; and (2) amount of punitive damages. During trial, Yamaha moved for a non-suit and a directed verdict. (3AA854–869; 11RT3102–3125; 14RT3905–3911.) The trial court denied both motions, with one exception: It granted Yamaha's motion for non-suit as to Pilg's claim brought directly under section 11713.3. (12RT3309, 3370–3372; 14RT3911–3912.)

The jury found Yamaha liable on all of plaintiffs' claims, awarded Powerhouse \$811,000 in compensatory damages and \$60,000 in punitive damages, and awarded Pilg \$325,080 in compen-

satory damages and \$140,000 punitive damages, for a total award of \$1,336,080. (15RT4202–4233; 16RT4587–4589.) The trial court subsequently awarded pre-judgment interest of \$208,273 to Powerhouse and \$81,406 to Pilg, bringing the damages to \$1,625,759. (6AA1698.)

D. Post-Trial Proceedings

On July 11, 2011, Yamaha moved for a new trial and judgment notwithstanding the verdict. (4AA995–1043.) The motion for a new trial raised, among others issues, the excessive amount of compensatory damages awarded to Powerhouse and the failure of the trial court to give a jury instruction regarding the effect of Powerhouse’s failure to file a timely protest. (4AA1009–1015.) Yamaha argued in the motion for judgment notwithstanding the verdict that there was not sufficient evidence to support the jury’s verdict, including, among other things, its findings that Yamaha had violated section 11713.3 despite complying with the termination procedure of section 3060, and that Yamaha was liable for breach of contract when Powerhouse itself was in material breach. (4AA1027–1030, 1033–1034.) Yamaha also argued that the jury’s award of compensatory damages to Powerhouse was excessive because it did not take into account the value of the in-

ventory Powerhouse retained, and that there was no basis for punitive damages because Powerhouse failed to prove that a Yamaha officer, director, or managing agent was responsible for or ratified the alleged conduct. (4AA1037, 1040–1043.)

On August 5, 2011, the trial court denied both motions, stating that the arguments regarding jury instructions “were made and addressed at trial,” that “[t]he Court stands by its prior rulings” on the section 3060 and section 11713.3 issues, and that the breach of contract claim was viable despite Powerhouse’s material breach because “[e]vidence was introduced that Yamaha agreed that the sale could proceed despite the prior closure of the business.” (6AA1672–1673, 1679; see also 6AA1693–1694 [adopting tentative rulings as final orders].) The trial court also concluded that the compensatory damages award to Powerhouse was supported by substantial evidence, and that “Yamaha failed to convince the jury that [the contract price] was speculative, or that Powerhouse ‘presumably’ recovered a net recovery from subsequent disposition of the[] assets,” which was “not a basis for setting aside the verdict.” (6AA1673.) As to punitive damages, the trial court stated that it could not “say the jury’s conclusion [that Rocky Aiello was a managing agent] was unreasonable and so

lacking in evidentiary support that a reviewing court would be compelled to reverse.” (6AA1677.)

On August 12, 2011, the trial court awarded plaintiffs \$533,350.80 in attorneys’ fees under Vehicle Code section 11726. (6AA1718.)

DISCUSSION

I. POWERHOUSE’S FRANCHISE WAS PROPERLY TERMINATED, WHICH REQUIRED JUDGMENT FOR YAMAHA AS A MATTER OF LAW ON ALL OF PLAINTIFFS’ CLAIMS

All of the claims that Powerhouse and Pilg prevailed on at trial were premised on the allegation that Yamaha violated Vehicle Code section 11713.3(d)(1) and (e) by unreasonably withholding consent to the sale of Powerhouse’s Yamaha franchise to MDK. (1AA45–53.) But Yamaha’s obligations under section 11713.3 to not unreasonably withhold consent to the sale were contingent upon *the continuing existence of Powerhouse’s dealer agreement* with Yamaha, which was terminated after Powerhouse indisputably violated the terms of the agreement. (§ 3060(a)(3); *Sonoma Subaru, Inc. v. New Motor Vehicle Bd.* (1987) 189 Cal.App.3d 13, 22 (*Sonoma Subaru*).) After the franchise agreement terminated, there was no Yamaha franchise, and therefore no Yamaha franchised business, that Powerhouse could have

sold. As a result, Yamaha had no obligation to Powerhouse or Pilg under section 11713.3(d)(1) or (e) to consider a sale of the former Powerhouse franchise, and all of plaintiffs' claims against Yamaha should have been rejected as a matter of law.

A. Powerhouse's Franchise Terminated After It Failed to Timely Protest the Termination Notice

Section 6.2 of Powerhouse's dealer agreement allowed Yamaha to terminate the agreement "with immediate effect on the giving of written notice" for Powerhouse's "failure ... to conduct its operations in the ordinary course of business including closing of [Powerhouse's] operations." (7AA1736.) In turn, Vehicle Code section 3060 allows expedited notice of termination (termination effective in 15 days, with 10 days for the dealer to protest) in the event a dealer fails "to conduct its customary sales and service operations during its customary hours of business for seven consecutive business days, giving rise to a good faith belief on the part of the franchisor that the motor vehicle dealer is in fact going out of business." (§ 3060(a)(1)(B)(v).) And if the dealer does not file a protest before "the appropriate period for filing a protest has elapsed," the franchisor may treat the termination of the dealer agreement as final and effective. (§ 3060(a)(3); *Sonoma Subaru, supra*, 189 Cal.App.3d at p. 22 ["Where no protest of the termi-

nation is filed within the allotted time, the Legislature's obvious intent is to let the franchisor treat the termination as final and effective"].)

The availability of an expedited termination mechanism in situations where a dealer has closed its doors and failed to maintain its customary operations is critical to fulfilling one of the Legislature's principal purposes in creating the NMVB and enacting section 3060: to ensure "that dealers fulfill their obligations under their franchises and provide adequate and sufficient service to consumers generally." (Stats. 1973, ch. 996, § 1.) Indeed, the Legislature authorized expedited termination of closed dealerships under section 3060 specifically to allow a franchisor to react quickly to restore "warranty and other special services" that dealers provide to consumers. (Assem. Com. on Transportation, Analysis of Assem. Bill No. 566 (1983-1984 Reg. Sess.) as introduced Feb. 10, 1983, p. 1; Sen. Com. on Insurance, Claims & Corporations, Analysis of Assem. Bill No. 566 (1983-1984 Reg. Sess.) as amended Apr. 11, 1983, p. 2.)

Thus, as the court of appeal explained in *Sonoma Subaru*, the 10-day protest deadline is warranted in the specified situations because the "Legislature could readily conclude that these disruptions, being particularly serious, justified swifter action by the franchisor."

(*Sonoma Subaru, supra*, 189 Cal.App.3d at p. 21.) “Sanctioning late filings would undercut [the Vehicle Code’s intended] finality and create uncertainty in the minds of franchisors as to whether they may treat their relationship with unsatisfactory franchisees as concluded.” (*Id.* at p. 22.) The procedures outlined in section 3060 ensure that new motor vehicle dealers can be heard and protect themselves against allegedly unfair or unwarranted terminations of a franchise agreement, while also preserving the flexibility that franchisors must have in order to guarantee their customers access to fully functioning dealerships.

Because the “structure of section 3060 ... reveals the Legislature has gone out of its way to *shorten* the time in which a franchisor can react to its franchisee’s insolvency,” the court in *Sonoma Subaru* held that it could not “by judicial fiat, extend what the Legislature has been careful to circumscribe.” (*Sonoma Subaru, supra*, 189 Cal.App.3d at p. 21.) Therefore, the court rejected a franchisee’s request to read a “good cause” exception into section 3060’s 10-day deadline for filing a protest, and held that “[w]here no protest of the termination is filed within the allotted time, the Legislature’s obvious intent is to let the franchisor treat the termination as final and effec-

tive.” (*Id.* at pp. 21–22; see also *British Motor Car Distributors, Ltd. v. New Motor Vehicle Bd.* (1987) 194 Cal.App.3d 81, 93–94 (*British Motor*) [“[T]he Legislature has prescribed a procedure of which franchisors may avail themselves in discontinuing franchise relationships.... Had [the franchisor] complied with the statutorily mandated notice requirements, it would have achieved a swift and expeditious resolution of the propriety of its actions.”].)⁶

There was no dispute in the trial court that Powerhouse failed to conduct customary business for more than seven consecutive days, or that Powerhouse failed to protest Yamaha’s termination within the 10-day protest period. Pilg sent an email to Yamaha employee Luke Dawson on June 17, 2008, in which he announced that he had closed Powerhouse. (7AA1740.) And on July 10, 2008, Dawson confirmed in person that Powerhouse was closed and in disarray. (8RT2120, 2123–2124.) The parties stipulated at trial that “[o]n or about June 17,

⁶ *Sonoma Subaru* also rejected a franchisee’s argument that the notice of termination sent by a franchisor was misleading because it failed to note the deadline to file a protest. (189 Cal.App.3d at pp. 22–24.) Section 3060 was later amended to require that a notice of termination state the deadline for filing a protest, which Yamaha’s notice included. (7AA1807.)

2008, Powerhouse closed its dealership ... [and] never re-opened.”
(3AA849.)

Similarly undisputed is that Yamaha complied with every requirement of the Vehicle Code in sending the notice of termination. The notice contained, in compliant bold, 12-point font, the exact warning language required by section 3060, and advised Powerhouse that it had to file a protest “within 10 calendar days after receiving [the] notice ... or [its] protest right [would] be waived.” (7AA1807.)

Neither was there, nor could there be, any dispute about Powerhouse’s receipt of the termination notice and its failure to file a protest within the 10-day protest window. The statute on its face required Powerhouse to file its protest within *10 days* of receipt, and Powerhouse does not dispute that Pilg received the notice of termination on July 26, 2008 (3AA850; 6RT1515), or that Powerhouse waited until August 15, 2008—*20 days* after Pilg received Yamaha’s notice of termination—to file a protest (1AA4, 213; 6RT1627).

Because Powerhouse’s 10-day period to file a protest elapsed on August 5, 2008 without the filing of such a protest, Yamaha as of that date was entitled under Vehicle Code section 3060 to treat its notice of termination as final and effective. (*Sonoma Subaru, supra*, 189

Cal.App.3d at p. 22 [“Where no protest of the termination is filed within the allotted time, the Legislature’s obvious intent is to let the franchisor treat the termination as final and effective”].)

B. The NMVB Held That Powerhouse Failed to Timely Protest the Termination, and the Trial Court Correctly Affirmed That Decision

The NMVB held a two-day evidentiary hearing at which it heard testimony from most of the same witnesses who testified at trial, and concluded that Powerhouse had indeed failed to file a protest within 10 calendar days after receiving Yamaha’s valid notice of termination. The NMVB noted that “Pilg had closed his business, and had not reopened it as of July 10, 2008 [the date Dawson confirmed the closure of Powerhouse], in violation of the Dealer Agreement.” (1AA19.) The NMVB thus concluded that Yamaha had “a good faith belief that Powerhouse was going out of business” and therefore that the use of the expedited termination process under section 3060(a)(1)(B)(v), with its 10-day deadline for filing a protest, was appropriate. (1AA25.) As a result, Powerhouse’s protest, filed 20 days after its receipt of the notice of termination, was untimely. (*Ibid.*)

Powerhouse had argued to the NMVB “that it was not going out of business because the dealership would be open under MDK follow-

ing approval of the buy/sell.” (1AA20.) The NMVB, however, found that there were “two weak points in that argument: (1) it is the dealer, Powerhouse, the corporate entity which is a person, who is going out of business—not the dealership location; and (2) approval of a buy/sell is not guaranteed.” (*Ibid.*) Therefore, “Powerhouse was going out of business—whether it voluntarily closed the dealership or whether it entered into a successful buy/sell to another corporate entity.” (*Ibid.*)

Powerhouse also argued to the NMVB that “Yamaha [was] estopped to claim that Powerhouse’s protest was untimely filed.” (1AA20.) As the NMVB summarized, “the position of Powerhouse [was] that Yamaha had a duty to explain to Mr. Pilg, an experienced motor vehicle dealer with a business consultant and an attorney, the manner in which the Termination Notice and the processing of the buy/sell were or were not interconnected.” (1AA22.) But the NMVB found that “Powerhouse [had] failed to establish that Yamaha had any duty to advise Mr. Pilg” and noted that “Yamaha made no affirmative statements and did not engage in any conduct that Mr. Pilg could reasonably rely on in failing to file a timely protest.” (*Ibid.*) The NMVB also concluded that the fact that Yamaha’s in-house counsel told Pilg

to “seek legal advice ... negate[d] any inference that Yamaha was trying to lull Powerhouse into abandoning its protest rights.” (*Ibid.*) Moreover, “Mr. Pilg knew the Termination Notice could result in termination ... if Powerhouse did not file a timely protest.” (1AA24.)

The NMVB’s dismissal of Powerhouse’s protest, as well as its rejection of Powerhouse’s excuses for its untimely protest, are entitled to substantial deference. (*Kawasaki Motors Corp. v. Superior Court* (2000) 85 Cal.App.4th 200, 205 [holding that decisions of the NMVB regarding section 3060 protests are reviewed under the substantial evidence test]; *British Motor, supra*, 194 Cal.App.3d at p. 90 [same]; *Am. Isuzu Motors, Inc. v. New Motor Vehicle Bd.* (1986) 186 Cal.App.3d 464, 474 [same].) Section 3050(c) provides the NMVB with jurisdiction over protests under section 3060, and whether a termination protest is timely filed is a matter well within the NMVB’s jurisdiction because it “lies within the power of the administrative agency to determine in the first instance ... whether a given controversy falls within its granted jurisdiction.” (*Cal. Water Impact Network v. Newhall County Water Dist.* (2008) 161 Cal.App.4th 1464, 1491, quoting *Alta Loma School Dist. v. San Bernardino County Comm. on School Dist. Reorganization* (1981) 124 Cal.App.3d 542,

556; see also *Bd. of Police Comrs. v. Superior Court* (1985) 168 Cal.App.3d 420, 431 [an administrative agency has “jurisdiction to determine whether it [has] jurisdiction to act”].) And because the trial court denied Powerhouse’s writ of mandate (which this Court should affirm), Powerhouse should be collaterally estopped from any further challenge to the agency’s decision on the timeliness of Powerhouse’s protest. (See, e.g., *Murray v. Alaska Airlines, Inc.* (2010) 50 Cal. 4th 860, 867 [“It is settled that the doctrine of collateral estoppel or issue preclusion is applicable to final decisions of administrative agencies acting in a judicial or quasi-judicial capacity.”]; *Castillo v. City of Los Angeles* (2001) 92 Cal. App. 4th 477, 481–487; *Gill v. Hughes* (1991) 227 Cal. App. 3d 1299, 1303–1308 [affirming application of collateral estoppel to issues determined in administrative proceeding after trial court’s denial of writ petition was affirmed on appeal].)

Powerhouse has claimed, and the trial court agreed, that the NMVB did not have jurisdiction to rule on whether Yamaha’s termination was based on a good faith belief that Powerhouse was going out of business (1AA123–126, 222–223), but that is patently incorrect. The NMVB, in order to determine whether Powerhouse’s protest was timely and thus whether it had jurisdiction to hear the merits of

the protest, *necessarily had to first decide which protest filing deadline in section 3060—the 10-day or the 30-day deadline—applied.* This is because Powerhouse’s protest would have been timely if the standard 30-day protest deadline under section 3060(a)(1)(A) applied. Therefore, the NMVB had to determine whether Yamaha properly invoked the expedited 10-day protest deadline under section 3060(a)(1)(B), which in turn required the NMVB to determine whether Powerhouse had failed “to conduct its customary sales and service operations during its customary hours of business for seven consecutive business days, *giving rise to a good faith belief* on the part of the franchisor that the motor vehicle dealer is in fact going out of business.” (§ 3060(a)(1)(B)(v), italics added.)

The trial court, by rejecting Powerhouse’s writ petition, confirmed that the NMVB’s dismissal of Powerhouse’s untimely protest was proper and that Yamaha was authorized to use the expedited termination notice. The trial court concluded that “there was substantial evidence to support the [NMVB’s] finding that Yamaha had, at the relevant time, a good faith belief that Powerhouse ‘was going out of business’” because Pilg had told Yamaha that he was going out of business, and Dawson had confirmed in person that Powerhouse was

closed. (1AA224.) The trial court also found critical Powerhouse's admission before the NMVB "that the day Powerhouse closed, it closed with the purpose of going out of business and liquidating." (*Ibid.*) As the trial court explained, "[n]o communications between Yamaha's management and its counsel could change, alter or soften the existence or impact of this judicial admission." (*Ibid.*; see also 1AA225 ["Substantial evidence supports the conclusion that Mr. Pilg was not excused from his failure to file a timely protest"].)

Moreover, there was no basis to apply the doctrine of equitable estoppel to prevent Yamaha from challenging the timeliness of Powerhouse's protest. "Generally speaking, four elements must be present in order to apply the doctrine of equitable estoppel: (1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) he must rely upon the conduct to his injury." (*Honeywell v. Workers' Comp. Appeals Bd.* (2005) 35 Cal.4th 24, 37, quoting *City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 489.) Yamaha never told Pilg that Powerhouse did not need to file a protest with the NMVB to prevent termination of

the dealer agreement or to ensure that the proposed sale of its franchise to MDK would be approved. On the contrary, the written notice of termination clearly informed Pilg that Powerhouse had 10 days to file a protest with the NMVB. And after Pilg asked Yamaha about the notice, Yamaha's in-house counsel Richard Tilley again explicitly confirmed to Pilg both orally and in writing that Yamaha was not withdrawing the notice and advised Pilg to contact an attorney. (7AA1807, 1810; 7RT1831, 1838-1840, 1842-1843.) Additionally, Pilg *knew* that the closure of Powerhouse was a violation of the dealer agreement, and that by closing Powerhouse he was giving up his right to sell his Yamaha franchise. (5RT1251-1252, 1270; 6RT1570-1572; 7AA1989.)

In sum, as both the NMVB and the trial court found, Yamaha properly invoked section 3060's expedited termination procedure, and because Powerhouse failed to file a timely protest with the NMVB, the termination of its dealer agreement with Yamaha was final and effective on August 5, 2008.

C. The Termination of Powerhouse's Dealer Agreement Compelled Judgment as a Matter of Law on All of Plaintiffs' Claims Against Yamaha

The termination of Powerhouse's dealer agreement is fatal to all of plaintiffs' claims, because each claim is based on the *same* allegation: that Yamaha violated section 11713.3(d)(1) and (e) by unreasonably withholding consent to the sale of Powerhouse's Yamaha franchised business to MDK. (1AA45-53.) Because, as the NMVB's decision establishes, Powerhouse had no Yamaha franchise agreement and therefore no Yamaha franchised business to transfer after August 5, 2008, Yamaha did not violate and could not have violated section 11713.3 by ceasing any consideration of the proposed sale. Yamaha was therefore entitled to judgment as a matter of law on all of plaintiffs' claims.

The first cause of action is based on the allegation that "Yamaha intentionally ceased processing the application materials without even considering the merits of MDK's financial and business capabilities" in violation of section 11713.3. (1AA45.) Powerhouse's intentional interference claims, as well as its breach of contract claim, are similarly each premised on the allegation that Yamaha "unreasonably withheld its consent to the sale and purchase of the Powerhouse deal-

ership ... in violation of *California Vehicle Code* section 11713.3(d)(1) ... [and] section 11713.3(e).” (1AA47–48; see also 1AA49–50 [alleging that Yamaha materially breached the dealer agreement by “willfully refus[ing] to consider MDK’s franchise application” and “willfully and unreasonably with[olding] consent to the sale and purchase of the Powerhouse dealership in violation of *California Vehicle Code* section 11713.3(d)(1)”].)⁷

Section 11713.3 prohibits various acts by “a manufacturer, manufacturer branch, distributor, or distributor branch licensed pursuant to [the Vehicle Code].” Section 11713.3(d)(1) makes it unlawful “to prevent or require, or attempt to prevent or require, by contract or otherwise, a dealer, or an officer, partner, or stockholder of a dealership, the sale or transfer of a part of the interest of any of them to an-

⁷ Pilg’s individual claims—for violation of section 11713.3, intentional interference with prospective business advantage, and intentional interference with contract—mirror Powerhouse’s first three causes of action, and are likewise based solely on alleged violations of section 11713.3. (See 1AA50 [“Plaintiffs ... allege that Yamaha’s actions as described above were unlawful and in violation of section 11713.3(d)(1)”], 52–53 [“Yamaha intentionally, willfully and unlawfully refused to consider MDK’s Application Materials, and unreasonably withheld its consent to the sale and purchase of the dealership in violation of *California Vehicle Code* section 11713.3”].)

other person,” and further provides that “[a] dealer, officer, partner, or stockholder shall not ... have the right to *sell, transfer, or assign the franchise*, or a right thereunder, without the consent of the manufacturer or distributor except that the consent shall not be unreasonably withheld.” (§ 11713.3(d)(1), italics added.) In other words, when a dealer seeks to sell a valid dealer agreement, a franchisor cannot unreasonably withhold consent. (See § 11713.3(e) [“consent of the manufacturer or distributor” to “transfer or assignment of the dealer’s franchise ... shall not be unreasonably withheld”].)

But once a franchise is terminated, any duty on the part of the franchisor to consider a proposed sale of that franchise ends. (See *Sonoma Subaru, supra*, 189 Cal.App.3d at p. 22.) After termination of a franchise, a franchisor thus cannot be held liable for withholding consent to the transfer of that franchise. This fundamental principle of motor vehicle franchising law has been recognized by courts across the country. (See, e.g., *South Shore Imported Cars, Inc. v. Volkswagen of Am., Inc.* (1st Cir. 2011) 439 Fed.Appx. 7, 9–10 [Souter, J.] [rejecting dealer claim for failure to approve franchise sale “because at the moment of [the dealer]’s demand the franchise was no longer in full force”]; *Authorized Foreign Car Specialists of Westfield,*

Inc. v. Jaguar Cars, Inc. (3d Cir., Nov. 16, 1998) 1998 WL 34347444, at p. *2 [“the most [the franchisee] had to sell was a franchise subject to [the notices of termination]”].⁸

⁸ (See also, e.g., *H-D Michigan, LLC v. Sovie's Cycle Shop, Inc.* (N.D.N.Y. 2009) 626 F.Supp.2d 274, 279 [“[W]here, as here, [the transfer proposal] was made *after* the franchise was already the subject of a termination notice[, t]he most [the dealer] had to transfer was a franchise subject to the notice of termination”]; *Maple Shade Motor Corp. v. Kia Motors Am., Inc.* (D.N.J. Aug. 8, 2006) 2006 U.S. Dist. LEXIS 58569, at p. *9 [explaining that after notice of termination, franchisee can only sell franchise subject to that notice]; *Chic Miller's Chevrolet, Inc. v. Gen. Motors Group* (D.Conn. 2005) 352 F.Supp.2d 251, 258 fn. 9 [“Even if termination has not yet taken effect, a franchisee is only entitled to transfer his interest in any period remaining”]; *Rainier Nissan, Inc. v. Nissan N. Am., Inc.* (Wash. Dept. of Licensing, Apr. 19, 2002, No. 2002-DOL-0011), at p. 12 [“An attempted transfer of a franchise subject to termination does not ‘cure’ the event giving rise to the termination”], available at 6AA1549–1562; *A&B Motors, Inc. v. Saab-Scania of Am., Inc.* (D.Vt. Feb. 16, 1999, No. 2:98-CV-7), at pp. 7–8 [compelling a transfer after a notice of termination would impermissibly expand the contractual rights of the dealer and the liabilities of the manufacturer], available at 6AA1517–1529; *David Glen, Inc. v. Saab Cars USA, Inc.* (N.D.Ill. 1993) 837 F.Supp. 888, 891–892 [noting that “if [the dealer] loses on the termination claim, it ... will be unable to enforce any transfer rights”]; *Glenn v. Exxon Co.* (D.Del. 1992) 801 F.Supp. 1290, 1297 [“[T]he attempted assignment occurred after the notice of termination. When Exxon refused to give consent ..., there was ‘little left to transfer.’”]; *Portaluppi v. Shell Oil Co.* (4th Cir. 1989) 869 F.2d 245, 248 [manufacturer not liable for “unreasonably disapprov[ing]” franchise transfer, because “there was little left to transfer”]; 6AA1458–1460 [collecting other similar decisions].)

Neither section 11713.3(d)(1) nor (e) creates a generalized duty not to unreasonably withhold consent to a sale or transfer of a business where there is no active franchise agreement in place. Nor would such a generalized duty make any sense, given that absent a franchise agreement between a manufacturer or distributor and the business, no consent by the manufacturer or distributor would be required for the sale of the business.

MDK's dealer credit application was not even put in the mail until August 5, 2008—the day the Powerhouse dealer agreement was terminated—and therefore Yamaha could not possibly have withheld consent to the transfer of Powerhouse's Yamaha franchise before that date. (3AA850; 7AA1819.)⁹ It was only *after* Powerhouse's dealer agreement terminated, when Powerhouse did not have a franchise to transfer, that Yamaha decided to not consider MDK's application. (7AA1839, 1841.)

⁹ Indeed, because Yamaha as of August 5, 2008, did not have the documents that Powerhouse was statutorily required to provide to Yamaha in connection with its proposed sale pursuant to Vehicle Code section 11713.3(d)(2)(A), Yamaha's statutory 60-day period to consider that sale had not even commenced. (See § 11713.3(d)(2)(B).)

Yamaha returned MDK's credit application after the Powerhouse franchise terminated, and sent Pilg a letter stating that Yamaha was no longer considering the proposed sale to MDK. (7AA1839, 1841.) But because the franchise had been terminated, Yamaha could not have been liable under Vehicle Code section 11713.3, because Yamaha could not have "unreasonably withheld" its consent to "transfer or assign[] the dealer's franchise" where that franchise did not exist. With Powerhouse's dealer agreement terminated, Yamaha was entitled to finality—and part of this finality was that its obligations to Powerhouse under section 11713.3 had come to an end.

Powerhouse claimed at trial that by failing to respond to Pilg's questions concerning the notice of termination letter he received, Yamaha somehow became liable under section 11713.3. (See, e.g., 6RT1522–1525; 1AA39–40.) But refusing to give Pilg legal advice concerning the potential termination of Powerhouse's dealer agreement does not constitute the unreasonable withholding of consent to the transfer of Powerhouse's franchise. There is no basis in the text of the statute for holding Yamaha liable for failing to give an independent and potentially adverse party legal advice. Yamaha's response to Pilg's questions—advising him to obtain legal advice from his own

attorney—was eminently reasonable and went above and beyond what was required of Yamaha under the Vehicle Code.

Imposing liability on Yamaha under section 11713.3 in the absence of a franchise agreement and after Yamaha strictly complied with the relevant notice provisions of section 3060—as the jury did in this case—would undercut the Legislature’s “obvious intent” to allow a franchisor to treat its “termination as final and effective” where no protest is filed within the statutorily prescribed time. (*Sonoma Subaru, supra*, 189 Cal.App.3d at p. 22.) By enacting section 3060, the Legislature established a baseline standard of conduct that acts as a “safe harbor” that franchisors may rely on in terminating franchise agreements. (Cf. *Olszewski v. Scripps Health* (2003) 30 Cal.4th 798, 827–828; *Cel-Tech Communications, Inc. v. L.A. Cellular Telephone Co.* (1999) 20 Cal.4th 163, 182–183 [“Acts that the Legislature has determined to be lawful may not form the basis for an action under [a general] law”].) And courts should not frustrate the Legislature’s detailed scheme by imposing civil liability on a franchisor for refusing to consider the transfer of a franchise that the franchisor has lawfully terminated under the section 3060 procedures.

Therefore, because Yamaha's obligation under section 11713.3(d)(1), (d)(2) and (e) ended when Powerhouse failed to file a timely protest on August 5, 2008, plaintiffs' claims, each of which is premised on the existence of an operative franchise, fail as a matter of law.

D. The Trial Court Committed Clear Legal Error in Denying Yamaha's Motion for Summary Judgment and Post-Trial Motions

The termination of Powerhouse's franchise agreement should have warranted summary judgment for Yamaha, but the trial court denied Yamaha's motion (as well as its post-trial motions raising similar arguments), based on clear legal error. The trial court misapprehended why all of plaintiffs' claims fail as a result of the NMVB's decision, and misread a series of court of appeal decisions concerning the jurisdiction of the NMVB. The NMVB's decision—which became the law of the case when the trial court denied Powerhouse's writ petition—was entitled to preclusive effect as to whether Yamaha had properly terminated Powerhouse's dealer agreement. And without a dealer agreement, all of plaintiffs' claims necessarily failed. Yet the trial court, based on a misunderstanding of Yamaha's argument on this point, essentially ignored the preclusive effect that the NMVB's

decision had on plaintiffs' claims. The court's legal error warrants reversal and entry of judgment for Yamaha.

In denying Yamaha's motion for summary judgment, the trial court misstated the premise of Yamaha's motion. According to the court, "Yamaha's position is that ... the franchisee's *failure to exhaust* [its administrative remedies before the NMVB] bars the franchisee from coming into court on any common law or statutory claims." (3AA840, italics added.) But Yamaha did not contend that Powerhouse's claims were barred because it failed to *exhaust* its common law or statutory claims before the NMVB. Rather, as set forth above, the NMVB's determination that Powerhouse's protest was untimely was fatal to plaintiffs' claims because they were all premised on the existence of an operative dealer agreement. (See 1AA238-246; 2AA603-606; 3AA833-834.)

Yamaha does not dispute that a dealer need not first file statutory or common law claims originally cognizable in the courts with the NMVB before bringing them in a superior court, as section 3060 and a line of appellate decisions make clear. (See § 3050(e) [providing that "the courts have jurisdiction over all common law and statutory claims originally cognizable in the courts" and that "[f]or those

claims, a party may initiate an action directly in any court of competent jurisdiction”]; *Mazda Motor of Am., Inc. v. Cal. New Motor Vehicle Bd.* (2003) 110 Cal.App.4th 1451, 1457–1458 (*Mazda Motor*); *South Bay Creditors’ Trust v. GMAC* (1999) 69 Cal.App.4th 1068, 1077 (*South Bay*); *Hardin Oldsmobile v. New Motor Vehicle Bd.* (1997) 52 Cal.App.4th 585, 590 (*Hardin Oldsmobile*); *Miller v. Superior Court* (1996) 50 Cal.App.4th 1665, 1676 (*Miller*.) As explained in *South Bay*, the NMVB “‘is not the exclusive forum for disputes between dealers and manufacturers.’” (69 Cal.App.4th at p. 1077, quoting *Miller*, 52 Cal.App.4th at p. 1676.) In other words, plaintiffs were free to file their statutory and common law claims directly in the superior court, and there was no requirement that they first exhaust those claims before the NMVB.

But the fact that it was unnecessary for plaintiffs to exhaust their claims before the NMVB in no way invalidates or diminishes the significance of the NMVB’s decision concerning the timeliness of Powerhouse’s protest. The NMVB’s findings are entitled to deference (see pp. 35–36, *ante*), and these findings establish that Powerhouse’s dealer agreement was properly terminated as a matter of law under section 3060(a)(3). As a result of this termination, Yamaha no longer

had any obligations to Powerhouse or Pilg under section 11713.3(d)(1) and (e), and the trial court, in deference to the findings of the NMVB (which the court upheld), should have entered judgment for Yamaha on all of plaintiffs' claims. (See *Sonoma Subaru, supra*, 189 Cal.App.3d at p. 22.)

The trial court, however, misinterpreted the nature of the NMVB's jurisdiction, leading it to ignore the NMVB's findings with respect to the timeliness of Powerhouse's protest after concluding that the NMVB lacked jurisdiction over plaintiffs' civil claims. (3AA840–841.) Although the NMVB did not have jurisdiction over plaintiffs' common law and section 11713.3 claims, the NMVB *did* have jurisdiction, under section 3050(d), to determine whether Powerhouse's protest was timely, and it was the NMVB's decision regarding the timeliness of Powerhouse's section 3060 protest which warranted judgment for Yamaha on plaintiffs' claims. (§ 3050(d) [providing that the NMVB “shall ... [h]ear and decide ... a protest presented by a franchisee pursuant to Section 3060”].)

The caselaw discussed above (pp. 48–49, *ante*) reiterates that the NMVB has jurisdiction to hear protests brought under section 3060. In *Miller*, the court recognized that under section 3050(d), “the

enumerated duties of the Board include the consideration of certain claims *brought to the Board*” via the protest procedure. (50 Cal.App.4th at pp. 1674–1675.) Likewise, in *Hardin Oldsmobile*, the court agreed that the NMVB has jurisdiction over “a protest alleging violation of section 3060.” (52 Cal.App.4th at p. 593; see also *Mazda Motor, supra*, 110 Cal.App.4th at p. 1458 [“subdivision (d) to section 3050 ... gave the Board the power to hear and decide these specific dealer protests”].)

Because the NMVB has jurisdiction under section 3050(d) over protests filed by dealers to notices of termination served by franchisors, it had jurisdiction to determine the timeliness of Powerhouse’s protest. The NMVB ruled that Powerhouse’s protest was untimely (1AA25), and that decision was upheld by the trial court, rendering it the law of the case. The NMVB’s determination that Yamaha had properly terminated Powerhouse’s dealer agreement was entitled to preclusive effect, and should have compelled judgment for Yamaha as a matter of law.

E. At the Very Least, Yamaha Is Entitled to a New Trial, Because the Trial Court Failed to Instruct the Jury on the Effect of Powerhouse's Failure to Protest the Termination

Even if Yamaha were not entitled to judgment as a matter of law, reversal for a new trial is still warranted, because the trial court erroneously rejected a key jury instruction related to the effect of Powerhouse's failure to timely protest the termination of the dealer agreement. Yamaha proposed a jury instruction explaining that "Yamaha is allowed to end its relationship with [a] dealer after it receives the Notice of Termination, if the dealer fails to file a timely protest with the Board." (4AA969.) The proposed instruction further stated that "Plaintiffs failed to file a timely protest with the Board for review of Yamaha's decision to end its relationship with them, and Plaintiffs' Yamaha Dealer Agreement was terminated at that time." (*Ibid.*)

Presumably following its prior erroneous decisions on the effect of Powerhouse's untimely protest, the trial court refused to give the instruction. (12RT3305-3306.) Instead, the court instructed the jury only on the section 3060 procedure, without explaining the effect of a franchisee's failure to file a timely protest. (4AA913; 12RT3459-3460.)

The trial court's incomplete jury instruction was prejudicial to Yamaha because the verdict likely was based on the jury's failure to understand the effect of Powerhouse's untimely protest. If the jury had understood that the failure to file a timely protest allowed Yamaha to treat the franchise as terminated, the jury could not have held Yamaha liable for obligations stemming from that agreement. Therefore, at the very least, a new trial should be ordered to correct the prejudicial effect of the trial court's refusal to give a complete jury instruction that adequately explained the substance of the law. (See, e.g., *Piscitelli v. Friedenber*g (2001) 87 Cal.App.4th 953, 974–976 [finding defendant entitled to a new trial where it was probable that jury's verdict was based on an incomplete jury instruction that “prejudicially affect[ed] its verdict”].)

II. YAMAHA WAS ENTITLED TO JUDGMENT FOR ADDITIONAL REASONS BESIDES THE TERMINATION OF POWERHOUSE'S FRANCHISE

Plaintiffs' claims should have been rejected as a matter of law for the additional reasons that Powerhouse's closure was a material breach of the dealer agreement and Yamaha could not have illegally interfered with a contract in which its assent was expressly contemplated. Thus, even if the franchise had not terminated before Yamaha

rejected the sale to MDK, the trial court still erred in denying Yamaha's motions for judgment as a matter of law.

A. Powerhouse's Contract Claim Is Barred Because Powerhouse Materially Breached the Agreement

Powerhouse materially breached its franchise agreement by ceasing operations without intent to reopen, and this material breach bars any contract claim against Yamaha. To recover on a breach of contract claim, a plaintiff must establish (among other things) its performance or excuse for nonperformance. (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 821.) Here, without any legally cognizable excuse for nonperformance, Powerhouse ceased its business operations in violation of Section 6.2 of the dealer agreement. (3AA849; 7AA1736; 6RT1611.)

There is no question that Powerhouse's undisputed failure to maintain operations was a material breach of the franchise agreement. A material breach is one in which "the other party may be discharged from its duty to perform under the contract" (*Brown v. Grimes* (2011) 192 Cal.App.4th 265, 277), and that is precisely what Powerhouse's closure allowed Yamaha to do under the express terms of the dealer agreement (7AA1736). The caselaw is clear that a material breach by a contracting party precludes that party from recovering for any sub-

sequent breach by another party to the contract. (See, e.g., *Brown, supra*, 192 Cal.App.4th at p. 277 [explaining that “in contract law a material breach excuse[s] further performance by [an] innocent party”], quoting *De Burgh v. De Burgh* (1952) 39 Cal.2d 858, 863.)

The contract claim also fails to the extent it is premised on the implied covenant of good faith and fair dealing because “[t]he implied covenant cannot contradict the express terms of a contract.” (*Thrifty Payless, Inc. v. Mariners Mile Gateway, LLC* (2010) 185 Cal.App.4th 1050, 1061.) Section 6.2 expressly provided Yamaha with the right to terminate the agreement if Powerhouse failed to conduct its operations in the ordinary course of business. (7AA1736.) It was thus impossible for Yamaha to have violated the implied covenant by exercising this express termination right that it had under the agreement. (See *Carma Developers, Inc. v. Marathon Development Cal., Inc.* (1992) 2 Cal.4th 342, 374 [“We are aware of no reported case in which a court has held the covenant of good faith may be read to prohibit a party from doing that which is expressly permitted by an agreement”].)

The trial court rejected this argument because “[e]vidence was introduced that Yamaha agreed that the sale could proceed despite the prior closure of the business.” (6AA1673.) But Yamaha employees

told Pilg only that Powerhouse could sell its franchise *while the dealer agreement was still in effect*, and they never said that it was unnecessary for Powerhouse to maintain its franchise in order to sell it. (See, e.g., 7RT1941; 12RT3317–3319.) There is no evidence in the record that Yamaha agreed that it was waiving its right to terminate the franchise agreement because it was working with Powerhouse on the sale to MDK, or that Powerhouse’s franchise could be sold even if its dealer agreement was terminated. On the contrary, Yamaha repeatedly warned Powerhouse and Pilg that Yamaha was indeed exercising its right to terminate the dealer agreement and that Pilg should contact his attorney. (See, e.g., 7AA1808, 1810.)

B. The Intentional Interference Claims Fail Because Yamaha Was Not a Stranger to the Contract

Yamaha cannot be held liable for intentional interference because the contract between Powerhouse and MDK expressly contemplated Yamaha’s approval and would have (if consummated) involved Yamaha’s ongoing participation in the business relationship. (7AA1799 [“Buyer and Seller shall have received written consent from all Franchisors to the transactions contemplated herein”].) Yamaha was not a “stranger” to that contract, and therefore could not as a matter of law have illegally interfered.

In *Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503 (*Applied Equipment*), the Supreme Court held that a cause of action for interference with contractual relations lies only against a “stranger to a contract” and explained that, “consistent with its underlying policy of protecting the expectations of contracting parties against frustration *by outsiders* who have no legitimate social or economic interest in the contractual relationship,” the “tort duty not to interfere with the contract falls only on strangers-interlopers who have no legitimate interest in the scope or course of the contract’s performance.” (*Id.* at pp. 513–514; see also *Kasparian v. County of L.A.* (1995) 38 Cal.App.4th 242, 262–265 [applying *Applied Equipment* to intentional interference with prospective economic advantage claim]; *Fresno Motors, LLC v. Mercedes-Benz USA, LLC* (C.D.Cal. Mar. 27, 2012, No. 11-cv-02000) --- F.Supp.2d ---- [2012 WL 1038004, at pp. *9–18] [holding that *Applied Equipment* barred interference claims against a motor vehicle distributor because it was not a “stranger” to agreement between dealer and potential purchaser to sell franchised business].)

Here, Yamaha’s participation and approval was expressly contemplated by the contract between Powerhouse and MDK. Indeed,

the agreement expressly required the parties to have “received written consent from all Franchisors to the transactions contemplated herein.” (7AA1799.) Moreover, because the agreement contemplated that, if the sale were consummated, there would be a continuing economic (franchise) relationship between Yamaha and MDK, Yamaha was in no way a stranger or interloper to the contract. Instead, Yamaha had a direct “economic interest in the contractual relationship” and therefore a “legitimate interest in the scope or course of the contract’s performance.” (*Applied Equipment, supra*, 7 Cal.4th at pp. 512–513.) Under *Applied Equipment*, Yamaha cannot be held liable on an intentional interference claim based on the agreement between Powerhouse and MDK, and Yamaha was therefore entitled to judgment as a matter of law.

III. THE TRIAL COURT’S DAMAGES AND FEES RULINGS WERE ERRONEOUS AND REQUIRE REVERSAL

The trial court committed multiple legal errors in refusing to reduce the damages awarded and in awarding attorneys’ fees. The award of compensatory damages to Powerhouse failed to take into account the value of the inventory that Powerhouse *retained* after the sale to MDK fell through. And the jury’s award of punitive damages was impermissible under Civil Code section 3294 and violated Yama-

ha's right to due process. The trial court's attorneys' fees award was also erroneous because section 11726 requires a "willful failure" to comply with the Vehicle Code, and the jury nowhere found that Yamaha willfully failed to comply with that provision. Accordingly, even if the Court affirms the trial court's decisions on Yamaha's liability, it should reduce the compensatory damages awarded to Powerhouse by \$440,250, and vacate the awards of punitive damages and attorneys' fees.¹⁰

A. The Amount of Compensatory Damages Awarded Was Premised on a Clear Mistake

Powerhouse's damages award included compensation for its inventory, which Powerhouse retained and which therefore should not have been part of the recovery. The damages awarded to Powerhouse were based on the amount that MDK offered to pay for Powerhouse's assets, which included all four of Powerhouse's franchises (Yamaha, Suzuki, KTM, and Polaris), inventory, and goodwill and intellectual property rights. (7AA1792-1793.) Of the \$700,000 that MDK of-

¹⁰ The award of prejudgment interest (6AA1698) should also be reduced in proportion to any reduction in compensatory damages. (See, e.g., *Eicher v. Business Integrators, Inc.* (2007) 151 Cal.App.4th 1363, 1385 [reducing damages award and directing trial court on remand to recalculate prejudgment interest].)

ferred, at least \$440,250 was for the inventory that Powerhouse had at the time—including “[a]ll new motorcycles and ATV’s acquired from Franchisors,” and “[a]ll current and undamaged parts, accessories, boutique items and merchandise.” (7AA1793.) The value of the Yamaha franchise itself (along with whatever goodwill Powerhouse had built up and its other three franchises) was thus at most \$259,750.

Awarding Powerhouse damages for property Powerhouse retained was impermissible, because Powerhouse clearly had a duty to mitigate its damages through the sale of its property. (See, e.g., *Shaffer v. Debbas* (1993) 17 Cal.App.4th 33, 41 [“A plaintiff who suffers damage as a result of either a breach of contract or a tort has a duty to take reasonable steps to mitigate those damages and will not be able to recover for any losses which could have been thus avoided”].) Powerhouse was not permitted to keep all the assets and then sue for the purchase price, which included within it the value of those same assets. (See, e.g., *Nat. Controls, Inc. v. Commodore Business Machines, Inc.* (1985) 163 Cal.App.3d 688, 696 [damages from breach of sales contract “usually measured by the difference between the resale price of the goods and the contract price”].)

Powerhouse did not offer any excuse for not mitigating its damages or explanation for why it was entitled to recover the full value of the contract, including the value of the inventory that it retained. No evidence at trial was presented establishing that the inventory could not have been sold through reasonable efforts or that it became worthless as a result of Yamaha's alleged conduct. On the contrary, Pilg testified that at least some of Powerhouse's inventory was sold, although he did not specify the amount recovered. (6RT1538-1544.)

After trial, Yamaha moved for judgment notwithstanding the verdict, pointing to the lack of any evidence that Powerhouse had mitigated its damages by selling the retained inventory, and requesting the trial court to reduce the damages by at least \$440,250 (the value of the parts as stated in the asset purchase agreement). (4AA1037.) The trial court rejected this argument, stating that "[s]ubstantial evidence" supported the award of the entire contract price and that the failure "to convince the jury ... that Powerhouse 'presumably' recovered a net recovery from subsequent disposition of these assets, is not a basis for setting aside the verdict." (6AA1673.)

But there is *no* evidence in the record to support the jury's conclusion that the inventory that Powerhouse itself had valued at

\$440,250 somehow became worthless as a result of the failure of the sale to MDK. Without proof that the inventory could not have been sold using reasonable efforts for the amount stated in the asset purchase agreement, there was no basis for the jury to award the full \$700,000 to Powerhouse. Therefore, to avoid compensating Powerhouse for a loss that never occurred, the Court should reduce the award by \$440,250.

B. Yamaha Is Entitled to Judgment on Punitive Damages, Because the Jury's Award Violated California Law and Due Process

The jury awarded not only the purported value of Powerhouse's franchise, but \$200,000 in *punitive damages*, even though, as set forth above, Yamaha's conduct was expressly permitted by the franchise agreement and the Vehicle Code. Awarding punitive damages for effectively breaching an agreement is unjustified under California law, especially where, as here, there was no evidence that any decision at issue was made by a managing agent of the company. And punishing Yamaha for conduct that was expressly permitted by the agreement and the Vehicle Code would violate California law as well as due process.

The statutory authorization for exemplary or punitive damages provides for the recovery of such damages only in “an action for the breach of an obligation *not arising from contract.*” (Civ. Code, § 3294, italics added; see, e.g., *Berkla v. Corel Corp.* (9th Cir. 2002) 302 F.3d 909, 917–918 [collecting cases and explaining that punitive damages are not available even when an action sounds in tort if it arises out of a contract or at least a quasi-contract/unjust enrichment theory].) Punitive damages are therefore not available for claims relating to the termination or transfer of a franchise, which is a contract. (See *JRS Products, Inc. v. Matsushita Electric Corp. of Am.* (2004) 115 Cal.App.4th 168, 182 [reversing award of punitive damages in action based on allegedly wrongful termination of franchise because “motive, regardless of how malevolent, remains irrelevant to a breach of contract claim and does not convert a contract action into a tort claim exposing the breaching party to liability for punitive damages”].) Here, all of Powerhouse’s claims were premised on alleged violations of purported obligations that arose out of Powerhouse’s dealer agreement with Yamaha. Therefore, because Powerhouse’s claims arose from the breach of obligations arising out of a contract,

punitive damages should have been denied as a matter of California law.

Powerhouse also did not establish by clear and convincing evidence that an officer, director, or managing agent of Yamaha was responsible for or ratified the conduct for which punitive damages were imposed. A corporate “employer shall not be liable for [punitive] damages ... [absent] advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud or malice ... on the part of an officer, director, or managing agent of the corporation.” (Civ. Code, § 3294(b).)

At trial, Powerhouse asserted that Rocky Aiello, a Yamaha regional business manager overseeing six district managers in only four states for only the motorsports division of Yamaha, was a managing agent for purposes of punitive damages. (13RT3643; 9RT2413; 10RT2704–05.) But Powerhouse had the burden of proving that Aiello “exercise[d] substantial discretionary authority over *decisions that ultimately determine corporate policy.*” (*White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 577, italics added; see also *id.* at p. 575 [rejecting definition of “managing agent” that would “equate mere supervisory status with managing agent status”].) And there is no evidence in

the record that Aiello had any discretionary authority over decisions that ultimately determined corporate policy for Yamaha. The record contains no evidence regarding the structure of Yamaha's corporate hierarchy or the amount of discretion that managers at various levels have in general, let alone regarding the specific matters at issue in this case. There was simply no evidentiary basis for the jury to conclude that Aiello was a managing agent under the punitive damages statute, and therefore the award of punitive damages was impermissible.

It would also violate both California law and due process to punish Yamaha for engaging in conduct—the termination of Powerhouse's dealer agreement—that was expressly permitted by contract and by statute. The U.S. Supreme Court has made clear that where the law permits or authorizes a defendant's conduct, “it would defy history and current thinking to treat [that] defendant ... as a knowing or reckless violator” subject to punitive damages liability. (*Safeco Insurance Co. of Am. v. Burr* (2007) 551 U.S. 47, 70, fn. 20.) In addition, “[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice” of both “the conduct that will subject him to punishment” and “the severity of the penalty that a State may impose.” (*BMW of North Am., Inc. v. Gore*

(1996) 517 U.S. 559, 574; see also *State Farm Mutual Automobile Insurance Co. v. Campbell* (2003) 538 U.S. 408, 417; *Hale v. Morgan* (1978) 22 Cal.3d 388, 398–399.)

Yamaha did not have “fair notice” that it could be liable for punitive damages here, because its conduct was expressly authorized by agreement and protected by statute, specifically Vehicle Code section 3060. Under section 3060, Yamaha was expressly authorized to initiate the expedited termination of Powerhouse’s franchise in response to its closure. And once Powerhouse failed to file a timely protest after it received the statutorily compliant notice of termination, Yamaha was allowed to “treat the termination as final and effective.” (*Sonoma Subaru, supra*, 189 Cal.App.3d at p. 22.) That is precisely what Yamaha did when it concluded that it no longer had any obligation to consider the sale of Powerhouse to MDK once the dealer agreement had terminated due to Powerhouse’s failure to file a timely protest.

Defendants are guaranteed the right to know, in advance, based on objectively identifiable standards, what conduct can give rise to a punitive award. (See, e.g., *Aetna Life Ins. Co. v. Lavoie* (1986) 475 U.S. 813, 828; *Grayned v. City of Rockford* (1972) 408 U.S. 104, 108.) It would therefore be unconstitutional to punish Yamaha de-

spite Yamaha's perfect compliance with the statute authorizing it to terminate the franchise agreement once Powerhouse closed its dealership operations.

C. Powerhouse Was Not Entitled to Attorneys' Fees

The trial court improperly awarded Powerhouse attorneys' fees, even though there was no basis—in fact or in the jury's findings—for concluding that Yamaha “willful[y] fail[ed]” to comply with the Vehicle Code, as section 11726 requires.

First, any violation of the Vehicle Code by Yamaha could not have been “willful,” because Yamaha acted in reasonable reliance on the express provisions of section 3060 as to the finality and effectiveness of its notice of termination. “[T]he concept of liability for willful behavior is a familiar one that has appeared in a variety of statutory and common law contexts.” (*Calvillo-Silva v. Home Grocery* (1998) 19 Cal.4th 714, 727 (*Calvillo*) [collecting cases], overruled on other grounds in *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 853, fn. 19; see also, e.g., *Manuel v. Pacific Gas & Electric Co.* (2009) 173 Cal.App.4th 927 [relying on *Calvillo*'s discussion of “willful”].) “[I]t is generally recognized that willful ... misconduct is separate and distinct from negligence, involving different principles of

liability and different defenses.” (*Calvillo*, 19 Cal.4th at p. 729.) Yet “[w]hile the word ‘willful’ implies an intent, the intention must relate to the misconduct and not merely to the fact that some act was intentionally done.” (*Ibid.*)

There was no evidence presented at trial that Yamaha had any intention to violate the Vehicle Code. On the contrary, Yamaha carefully followed the termination procedures in section 3060. And while Powerhouse’s dealer agreement was in effect, Yamaha continued to treat Powerhouse like any other dealer, in compliance with Yamaha’s obligations under sections 3060(a) and 11713.3(d)(1) and (e), despite the fact that Powerhouse had closed its doors. It was only after Powerhouse failed to file a timely protest in response to the notice of termination, and the termination of Powerhouse’s dealer agreement became final and effective, that Yamaha declined to consider the sale of Powerhouse to MDK.

While Yamaha’s decision not to consider the sale was intentional, it was not an intentional decision *to violate the Vehicle Code*. In fact, Yamaha justifiably and reasonably believed that the Vehicle Code *authorized* the very conduct that it engaged in, relying both on the text of section 3060 and *Sonoma Subaru*. (See § 3060(a)(3) [fran-

chise may be terminated when “the appropriate period for filing a protest has elapsed”]; 189 Cal.App.3d at p. 22 [“Where no protest of the termination is filed within the allotted time, the Legislature’s obvious intent is to let the franchisor treat the termination as final and effective”].) In light of these circumstances, there was no basis for any finding that Yamaha willfully violated the Vehicle Code.

The attorneys’ fees award was also erroneous because the jury did not, in fact, determine that Yamaha’s alleged failure to comply with section 11713.3 was willful. The trial court, in ruling that “the jury’s verdict in favor of [Powerhouse and Pilg was] sufficient to meet the ‘willful’ requirement” of section 11726, pointed to the jury’s affirmative answer to the question “Did Yamaha Motor Corp., USA intend to disrupt the performance of the contract between Powerhouse Motorsports Group, Inc. and MDK Motorsports?” and the jury’s award of punitive damages. (6AA1705.) But these were not findings that Yamaha *willfully failed to comply with the Vehicle Code*. It was thus improper for the trial judge to award attorneys’ fees under section 11726 without an express jury finding that Yamaha willfully violated the Vehicle Code.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment of the trial court and order judgment for Yamaha. In the alternative, it should reduce the compensatory damages awarded to Powerhouse by \$440,250, and vacate the awards of punitive damages and attorneys' fees.

DATED: May 17, 2012

Respectfully submitted,

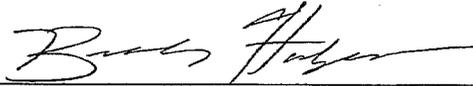
GIBSON, DUNN & CRUTCHER LLP

By: Theodore J. Boutros, Jr. / BTJH
Theodore J. Boutros, Jr.

*Attorney for Defendant and Appellant
Yamaha Motor Corp., USA*

CERTIFICATE OF WORD COUNT

Pursuant to rule 8.204(c), of the California Rules of Court, the undersigned hereby certifies that the foregoing Appellant's Opening Brief is in 14-point Times New Roman font and contains 13,933 words, according to the word count generated by the computer program used to produce the brief.



Bradley J. Hamburger

*Attorney for Defendant and Appellant
Yamaha Motor Corp., USA*

CERTIFICATE OF SERVICE

I, Thelma Dominguez, hereby certify as follows:

I am employed in the County of Los Angeles, State of California; I am over the age of eighteen years and am not a party to this action; my business address is 333 South Grand Avenue, Los Angeles, CA 90071, in said County and State; I am employed in the office of Bradley J. Hamburger, a member of the bar of this Court, and at his direction, on May 17, 2012, I served the following:

1. APPELLANT'S OPENING BRIEF

2. APPELLANT'S APPENDIX (8 VOLUMES)

on the interested parties in this action, by:

Service by Mail: placing true and correct copy (or copies) thereof in an envelope addressed to the attorney(s) of record, addressed as follows:

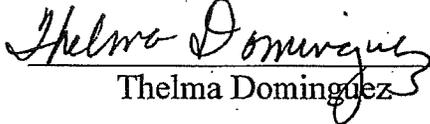
Dennis D. Law
Collete A. Hillier
Andre, Morris & Buttery
1102 Laurel Lane
P.O. Box 730
San Luis Obispo, CA 93406

Diane Matsinger
33 West Mission Street,
Suite 201
Santa Barbara, CA 93101

I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. postal service on that same day with post-

age thereon fully prepaid at Los Angeles, California in the ordinary course of business.

I certify under penalty of perjury that the foregoing is true and correct, that the foregoing document(s), and all copies made from same, were printed on recycled paper, and that this Certificate of Service was executed by me on May 17, 2012 at Los Angeles, California.


Thelma Dominguez

CERTIFICATE OF SERVICE

I, Thelma Dominguez, hereby certify as follows:

I am employed in the County of Los Angeles, State of California; I am over the age of eighteen years and am not a party to this action; my business address is 333 South Grand Avenue, Los Angeles, CA 90071, in said County and State; I am employed in the office of Bradley J. Hamburger, a member of the bar of this Court, and at his direction, on May 17, 2012, I served the following:

1. APPELLANT'S OPENING BRIEF

on the interested parties in this action, by:

Service by Mail: placing true and correct copy (or copies) thereof in an envelope addressed as follows:

Supreme Court of California	San Luis Obispo Superior Court
Office of the Clerk	Office of the Clerk
350 McAllister Street	1035 Palm Street Room 385
San Francisco, CA 94102	San Luis Obispo, CA, 93408

I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. postal service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business.

I certify under penalty of perjury that the foregoing is true and correct, that the foregoing document(s), and all copies made from same, were printed on recycled paper, and that this Certificate of Service was executed by me on May 17, 2012 at Los Angeles, California.

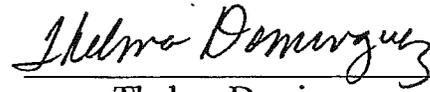

Thelma Dominguez

Exhibit B

Case No. CV 09-8090
Short Title: Powerhouse v. Yamaha
Event: Yamaha's SJ/SA Motion
Date: January 4, 2011

Proposed Tentative Ruling

Introduction

Yamaha moves for summary judgment or in the alternative summary adjudication. In support of its motion Yamaha presents via the required separate statement thirty-seven facts as undisputed. Yamaha relies on these same proposed undisputed facts to move in the alternative for summary adjudication in its favor as to each of the Plaintiff's causes of action.

The Summary Judgment-Summary Adjudication Procedure

Every motion for summary judgment and summary adjudication must be accompanied by a separate statement setting forth plainly and concisely all material facts which the moving party contends are undisputed. Each of the material facts in the statement must be followed by reference to the supporting evidence. (CCP § 437c)

To be "material" for summary judgment purposes, the fact must relate to some claim or defense in issue under the pleadings. Also, it must be in some way essential to the judgment; i.e., if proved, it could change the outcome of the case. See *Zavala v. Arce*, (1997) 58 CA4th 915, 926, *Kelly v. First Astri Corp.* (1999) 72 CA4th 462, 470.

The purpose of a separate statement of undisputed facts is to provide the court with a document that plainly and concisely specifies all material facts that are claimed to be undisputed (CCP §437c(b)(1)) with clear reference to evidence supporting each material fact (Cal Rules of Ct 3.1350) so that the court may quickly determine whether the motion is supported by sufficient undisputed facts. *St. Paul Mercury Ins. Co., v. Frontier Pacific Ins. Co.*, (2003) 111 CA 4th 1234, 1248. The separate statement also affords due process to opposing parties *State ex rel Harris v Pricewaterhouse Coopers LLP* (2005) 125 CA4th 1219, 1262 n28, rev'd on other grounds (2006) 39 C4th 1220; *United Community Church v Garcin* (1991) 231 CA3d 327, 335..

Because of the statutory mandate that all material facts be included in the separate statement and the practical reality that many judges, upon finding one triable issue of material fact, will immediately deny a motion for summary judgment or summary adjudication (Cal. Judges Benchbook: Civil Procedure Before Trial Second Ed. (Cal CJER) 2008) §13.50), several leading practice guides warn against bloated separate statements.

Yamaha Has Failed to Present a Prima Facie Case

Yamaha cites to particular paragraphs of the Decision of the New Motor Vehicle Board dated June 5, 2009, adopting the ALJ's "Proposed Order Granting (Yamaha's) Motion to Dismiss Protest" (hereinafter referred to as "the Board's Decision") as the "evidence" establishing proposed undisputed facts 33, 34 and 35.

The parties argue about whether Yamaha's construction of the Board's Decision is correct. However, because the Board, as a matter of law, could not have and never had jurisdiction over the dispute between the Plaintiff and Yamaha its Decision is irrelevant to the resolution of that dispute and cannot be used as evidence to establish proposed undisputed facts 33, 34 and 35. In addition, even assuming arguendo the Board had jurisdiction, its Decision has no collateral estoppel effect because no final judgment has been entered on the Plaintiff's petition for writ of mandate.

The Board Had No Jurisdiction

As explained in the Court's ruling denying the Plaintiff's petition for writ of administrative mandate, it is the timely filing of a protest that activates the Board's jurisdiction over the parties' dispute. Because the Board determined that Powerhouse's protest was not filed timely and its late filing was not excused the Board never acquired jurisdiction over the parties' dispute.

More fundamentally, even if the Plaintiff had timely filed a protest, the Board, as a matter of law, still would not have had jurisdiction over the dispute. *Mazda Motors of America, Inc. v. California New Motor Vehicle Bd.* (2003) 110 CA 4th 1451. (Board's jurisdiction is limited to disciplining licensees and to disputes between licensees and members of the general public.)

Res Judicata Is Not Available

Yamaha argues that pursuant to the doctrine of collateral estoppel all of the Plaintiff's claims are precluded by the Board's Decision. The doctrine of res judicata consists of two different aspects. The first aspect gives conclusive effect to a former judgment in subsequent litigation involving the same controversy. (*Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1244.) Thus it precludes parties or their privies from re-litigating a cause of action that has been finally determined by a court of competent jurisdiction. This aspect of res judicata has traditionally been referred to as "res judicata" or "claim preclusion." The second aspect gives conclusive effect to any issue necessarily decided in such litigation as to the parties or their privies if it is involved in a subsequent lawsuit as to the parties on a different cause of action. This latter aspect of res judicata is known as "collateral estoppel" or "issue preclusion." (*Rice v. Crow* (2000) 81 Cal.App.4th 725, 734; see also 7 Witkin, *California Procedure* 4th, Judgment, § 282)

Regardless of which aspect of the doctrine of res judicata Yamaha intends to rely on, without a final judgment the doctrine of res judicata does not arise. Plaintiff sought judicial review of the Board's decision by its petition for writ of administrative mandate. Although the Court denied that petition the Court's ruling is not a final judgment.

Finally even assuming arguendo the Board had jurisdiction and its decision was final the Board's findings of fact cannot be treated as indisputably true and used as evidence in this subsequent civil proceeding. Cal. Prac. Guide Civ. Pro. Before Trial. (TRG 2010) §8:876.

Even If the Court Ignores The Board's Decision Yamaha Has Not Made Out a Prima Facie Case.

Citing *Sonoma Subaru, Inc. v. New Motor Vehicle Bd.*, (1987)189 Cal. App. 3d 13, Yamaha argues that once the drop dead date for Powerhouse to file a timely protest expired, the latter's franchise was terminated as a matter of law.

The decision in *Sonoma Subaru* is premised on the assumption that the Board has a role to play when a franchisor terminates a franchise.

While the premise that the franchisor needs the Board's blessing to terminate a franchise may have had legs in 1987, it barely has feet today.

In 1973, due to the disparity in bargaining power between automobile manufacturers and their dealers the California Legislature enacted the Automobile Franchise Act to protect retail car dealers from perceived abusive and oppressive acts by the manufacturers. *New Motor Vehicle Bd. v. Orrin W. Fox Co.* (1978) 439 U.S. 96, 100-101, 99 S.Ct. 403, 58 L.Ed.2d 361. The Act renamed the New Car Dealers Policy and Appeals Board the New Motor Vehicle Board and expanded the Board's authority to the adjudication of disputes between new car dealers and manufacturers. *Chevrolet Motor Div., v. Board* (1983) 146 CA 3rd 533, 537, *University Ford v. New Motor Vehicle Bd.*, (1986) 179 CA 3rd 796, 800, *American Motors Sales Corp. v. New Motor Vehicle Bd.* (1977) 69 Cal.App.3d 983, 986, Stats.1973, c.996, §16. Following passage of the Act, the Board no longer only sat "in judgment upon new car dealers in such matters as eligibility and qualification for a license, regulation of practices, discipline for rule violations, and the like. The additional statutes gave the Board the added power to intrude upon the contractual rights and obligations of dealers and their product suppliers, entities whose respective economic interests are in no way identical or coextensive, frequently not even harmonious." *American Motors Sales Corp.*, supra, 69 CA 3rd at 991.

However, in a series of judicial decisions beginning with *Miller v. Superior Court* (1996) 50 CA 4th 1665 and culminating with *Mazda Motors of America, Inc.*, supra, the California Courts gradually stripped the Board of the expanded jurisdiction created by the Act. Following these decisions the Board no longer has a role to play in the resolution of disputes between a franchisee and a franchisor arising from their private contractual franchise relationship unless the franchisee accuses the franchisor of violating Vehicle Code sections 11713.2 and/or 11713.3 and petitions the Board to investigate and discipline the franchisor if appropriate.

Conclusion & Ruling

Because Yamaha has included facts 33, 34, and 35 in its separate statement, the Court and Powerhouse are entitled to rely on the representation that they are material and treat them as

such. It is not the proper function of the Court to sift through Yamaha's separate statement in search of material facts. See St. Paul Mercury Ins. Co., supra., 111 CA 4th at 1248. For the reasons explained above, Yamaha cannot rely on the Board's Decision to establish its proposed undisputed material facts 33, 34 and 35.

Therefore, it has failed to make out a prima facie case.

For the reasons explained above, it appears that judicial decisions after Sonoma Subaru have for the most part rendered the statutory protest mechanism and the Board irrelevant to a dispute like the one at bar.

Accordingly, Yamaha's motion for summary judgment and in the alternative summary adjudication is denied.

Evidentiary Matters

Yamaha's Request for Judicial Notice

Yamaha's request is denied except, that although probably unnecessary, its request that the Court take judicial notice of its Ruling and Notice of Ruling on Petition for Writ of Mandate filed herein on July 2, 2010, is granted.

Plaintiff's Objections

Plaintiff objects to Yamaha's evidence as follows: the "Stipulation Regarding Undisputed Facts" made by the parties in the administrative proceeding before the Board); Exhibit R-0015 from the administrative proceeding and the Board's Decision. Due to the rationale for the Court's decision denying Yamaha's motion, a ruling on these objections is unnecessary.

Yamaha's Objections to the Declaration of Timothy L. Pilg.

Due to the rationale for the Court's decision denying Yamaha's motion, a ruling on these objections is unnecessary.

Exhibit C

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN LUIS OBISPO, PASO ROBLES BRANCH

* * *

POWERHOUSE MOTORSPORTS GROUP,)	
INC., AND TIMOTHY L. PILG,)	
)	
Plaintiff,)	
)	
vs.)	Case No. CV 09-8090
)	
YAMAHA MOTOR CORPORATION,)	
U.S.A., and DOES 1-25,)	
)	
Defendants.)	
)	
_____)	
And Related Cases.)	
_____)	

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Paso Robles, California

Tuesday, January 4, 2011

11:12 a.m. - 11:48 a.m.

REPORTED BY CINDY D. GRIFFITH
CSR #7281

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1 MR. SANCHEZ: Your Honor, the court spends --
 2 obviously spent a lot of time on the tentative and I
 3 appreciate that.
 4 If I might explain, perhaps we misphrased -- at
 5 first I thought we hadn't referred to res judicata or
 6 collateral estoppel at all, but then I saw that we had
 7 mentioned it in our moving papers, and in looking at it,
 8 perhaps we misphrased it.
 9 What we were trying to do with the bifurcation
 10 of the writ from the rest of the complaint was to have
 11 the writ decided first and assuming the writ was denied,
 12 and to uphold the Board's decision, then what we were
 13 obviously attempting to do was to have that denial serve
 14 as, if you will, the law of the case so that it informed
 15 the remainder of the cause of action.
 16 Because the writ was denied, the Board's
 17 decision was upheld, the dealership was deemed
 18 terminated as of the date that the time to file the
 19 protest had run.
 20 We feel that that basically informs the rest of
 21 the case. Not that the Board was deciding the buy --
 22 the buy/sell or potential sale of the dealership to MDK.
 23 It wasn't. But what the Board was deciding was whether
 24 or not the protest was filed timely, and once that
 25 decision was made, the buy operation -- that was not

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1 Paso Robles, California
 2 Tuesday, January 4, 2011
 3 --o0o--
 4
 5 THE COURT: Powerhouse Motor Sports versus
 6 Yamaha.
 7 Can I have appearances for the record, please?
 8 MR. LAW: Yes, Dennis Law appearing on behalf
 9 of Powerhouse and Tim Pilg, the plaintiffs and the
 10 responding party.
 11 MR. SANCHEZ: Yes, your Honor. Maurice Sanchez
 12 on behalf of Yamaha Motor Corporation U.S.A.
 13 THE COURT: Good morning. I have prepared a
 14 tentative which has been posted. I assume everyone has
 15 had a chance to see that?
 16 MR. SANCHEZ: Yes.
 17 THE COURT: So I'll go to the moving party then
 18 for argument.
 19 MR. SANCHEZ: Thank you, Your Honor. May I use
 20 the podium?
 21 THE COURT: Of course.
 22 MR. SANCHEZ: Your honor, I have read the
 23 tentative, and of course we respectfully disagree with
 24 it. I'm sure you're not surprised to hear that.
 25 THE COURT: That's not the first time.

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1 filed timely, then, by operation of Law, the franchise
 2 was terminated.
 3 I view this bifurcation as very similar to a
 4 bifurcation of liability from damages. If you win on
 5 liability, then you basically don't go to damages. In
 6 other words, if there is no liability, then there's no
 7 point in trying the damages part. So that's how I view
 8 it.
 9 If we won on the writ and the dealership was
 10 deemed terminated, then there was no point in proceeding
 11 because all of the other causes of action has a basis
 12 for their -- as an element of all the other cause of
 13 action, that there's a viable franchise to transfer, and
 14 that's -- or was, and that was a lynchpin, if you will,
 15 of all of those other causes of action.
 16 THE COURT: That's part of the reason that I
 17 spent all of the time on the tentative ruling.
 18 If you look at the evolution in the Board's
 19 jurisdiction from the time of the Sonoma Subaru case and
 20 the time of the Mazda Motors case, you can see, that at
 21 least the Court's conclusion, that it really doesn't
 22 matter what the Board does or did.
 23 MR. SANCHEZ: Yes. I did see that, Your Honor,
 24 and I would like to address that now.
 25 THE COURT: Okay.

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1 MR. SANCHEZ: Your Honor, and I hesitate to say
 2 this, but I'll say it anyway; I know the Mazda case very
 3 well. It was my case. I argued it not only at the
 4 Board, Superior Court, and Court of Appeal. I'm very
 5 familiar with this area of the law.
 6 The Mazda case and its progeny or its preceding
 7 cases that led to that case, if you will, did not affect
 8 the Board's protest jurisdiction under Vehicle Code
 9 3050(d). That's the protest jurisdiction of the Board.
 10 That was left untouched.
 11 What those cases affected was the Board's
 12 petition jurisdiction which is very different, different
 13 subsection of the code, 3050(c). And C basically says
 14 that the Board was to hear and consider any honest
 15 disputes or differences between a licensee and a member
 16 of the public.
 17 The Board had taken that to mean that it had
 18 petition jurisdiction over it various wide number of
 19 types of litigation. In fact, almost any litigation
 20 between a dealer and a manufacturer.
 21 The courts in that line of cases from Miller,
 22 to Tovas, to Kim, to Hardin Oldsmobile, to Mazda, all of
 23 those cases ultimately resulted in the Board's petition
 24 jurisdiction being very narrowly limited. And as the
 25 Court pointed out, it's only those situations where a

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1 dealer would basically say that a manufacturer has
 2 exceeded its licensing authority in some way, and ask
 3 the Board to have the Department of Motor Vehicles look
 4 into that. So that petition jurisdiction was limited.
 5 Specifically, Mazda and Hardin Oldsmobile both
 6 went out of their way to say the Board's protest
 7 jurisdiction over terminations, establishments,
 8 warranties, incentive payments, those are all separate
 9 sections of the code from 3060 to 3065, that protest
 10 jurisdiction is not at all affected. And so I would
 11 submit to the court, that Sonoma Subaru, which was
 12 decided as a protest case under 3060, is still good
 13 law.
 14 In fact, Your Honor, it's been seven years
 15 since the Mazda case, and the Board continues, to this
 16 day, to have termination protest.
 17 I looked on their web site, and just in the
 18 last year, 2010, there were 85 protests filed with the
 19 Board, 26 of which were termination protests. So that
 20 clearly is something the Board still does, and does to
 21 this day.
 22 I got a little out of order here of my
 23 argument, but, basically, those -- that case therefore
 24 Sonoma Subaru, which holds that upon the lack of a
 25 timely filing of the protest, that the dealership was

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1 deemed terminated, and that was final and effective, is
 2 still good law.
 3 Not only that, Section 3060(c) of the vehicle
 4 code echoes that, and basically says the termination is
 5 effective if the protest is not filed timely. So it's
 6 both part of the vehicle code, and as part of Sonoma
 7 Subaru clearly upon the lack of a timely filing that
 8 franchise, if you will, that contract is terminated. So
 9 Yamaha went ahead and followed the code, sent the notice
 10 of termination appropriately.
 11 Once the Board determined that there was no
 12 equitable estoppel issue there, that termination was
 13 deemed final and effective by operation of law. And as
 14 we've stated, it affects all of the other cause of
 15 action in this case.
 16 So once the lack of a timely protest is
 17 established, as we said, the franchise is terminated.
 18 The Board clearly did have jurisdiction to
 19 determine that whether or not the protest itself was
 20 filed timely. I don't think there's any dispute about
 21 that.
 22 If it was not filed timely, the court is right;
 23 the Board cannot then go and consider the merits of the
 24 protest. It has no jurisdiction to do so, to consider
 25 the merits.

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1 But it does have jurisdiction, under the
 2 Automotive Management Group case, which I think is cited
 3 in the decision on the writ, the Court's decision, that
 4 Automotive Management Group case states that the Board
 5 can determine whether a protest is timely filed, and in
 6 that case, as in ours, the Board determined it was --
 7 the ALJ determined it was not timely filed, but failed
 8 to send it to the full Board for hearing.
 9 That mistake, which is pointed out by the Court
 10 of Appeal, was not made in this case. The ALJ did send
 11 her decision to the full Board for hearing, and the
 12 Board adopted it. So the Board clearly has jurisdiction
 13 in order to determine the timely filing of a case.
 14 So, Your Honor, if the franchise is determined
 15 to be terminated, whether due to the failure of the
 16 protest, or to file a protest on time, or in another
 17 case, on the merits, the dealer basically has no
 18 franchise to sell. And that's the nexus, if you will,
 19 between what the Board did.
 20 We're not saying that the Board determined the
 21 buy/sell case. Absolutely not. That comes to court.
 22 That's why we're here.
 23 But what the Board did do was determine the
 24 timely filing, or whether it was a timely filed protest,
 25 and once that decision was made that it was not, then

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1 the franchise basically goes away and there is nothing
 2 to sell on the part of the dealership.
 3 So, again, that's the nexus, Your Honor. The
 4 Board made a finding on that. The court has upheld that
 5 finding. That's why we bifurcated it, and that's why it
 6 was important to the remaining causes of action in this
 7 case, that basically, if you will, it guts the case
 8 because there is nothing left to decide.
 9 Even if that did not happen, Your Honor, the
 10 Board is the only tribunal that has jurisdiction, in the
 11 first instance, to decide that fact, to decide whether
 12 or not a protest is timely filed. That power is
 13 specifically given to it by the legislature. No other
 14 tribunal, including this court, can retry all of those
 15 issues.
 16 You can't retry on the first instance whether a
 17 protest was timely filed and if so whether it should be
 18 decided on the merits or not. Those issues are clearly
 19 within the province of the Board.
 20 What this Court can do is what it did, and that
 21 is to decide the writ petition, and it decided it -- it
 22 denied it, and upheld the decision of the Board
 23 properly.
 24 Further, Your Honor, the tentative did not
 25 address the argument that neither Powerhouse nor

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1 Mr. Pilg were licensees of the Department of Motor
 2 Vehicles at any relevant time.
 3 Under Vehicle Code Section 11726, it says that
 4 a licensee may sue for a violation of the vehicle code
 5 with respect to buy/sells.
 6 That neither Mr. Pilg nor Powerhouse were
 7 licensees, and therefore that's another reason that, at
 8 least that cause of action under Vehicle Code Sections
 9 11713.3(d) and (e) should go away. Under both of those
 10 sections you have to be a licensee to sue.
 11 In any event, Your Honor, it would make no
 12 sense, I submit to the court, to relitigate all of the
 13 issues that were decided by the Board.
 14 The Board ruled there was no timely filing of
 15 the protest and no equitable estoppel to prevent Yamaha
 16 from enforcing that -- that termination. And,
 17 therefore, the termination happened by operation of law
 18 under the Vehicle Code 3060(c) and under Sonoma Subaru.
 19 It's final and effective immediately, and
 20 therefore the time period that the code gives Yamaha to
 21 consider a buy/sell, which is 60 days, either never
 22 started to run before the termination was effective or
 23 it started to run and was one day in. We still have 59
 24 days left to make a decision, and basically it was
 25 mooted because the franchise was terminated and there

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1 was nothing to sell at that point.
 2 Thank you.
 3 THE COURT: Thank you.
 4 Mr. Law.
 5 MR. LAW: Yes. I read the tentative in
 6 relationship to the arguments that we're making in the
 7 case, and I -- I think Yamaha is -- the flaw in Yamaha's
 8 argument is the statement that keeps repeatedly being
 9 made that, as a matter of law, the franchise terminated
 10 once the ten-day protest period lapsed.
 11 First off, we pointed out in our papers that
 12 the effective date of the franchise termination is the
 13 expiration of 15 days, not 10 days. So the 10 days may
 14 be a period of protest, but the franchise, by virtue of
 15 the termination notice itself, the language in it, and
 16 by virtue of the Vehicle Code Section 3060 that
 17 authorizes that termination notice under certain
 18 circumstances, the effective date is 15 days, not 10.
 19 But the real problem that exists here is that
 20 Yamaha is attempting to take a very narrow area of
 21 jurisdiction of the New Motor Vehicle Board and
 22 bootstrap it into determining the final outcome of a
 23 civil action that is expressly authorized under the
 24 vehicle code itself, and they are attempting to do that
 25 through, I think, a misreading of the Sonoma case. And

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1 in particularly a misreading in today's environment
 2 knowing all of the different decisions that have been
 3 decided since then in the Mazda decision.
 4 The reason I say that is that the protest
 5 jurisdiction of the Board under 3060, and relevant to
 6 this case, is very narrow. It's simply to determine
 7 whether or not there has been good cause relative to a
 8 termination of franchise. That's all.
 9 The right to have good cause considered is one
 10 that is given by statute by 3060 and 3061. And the
 11 legislature imposed that obligation on all manufacturers
 12 to mandate consideration of good cause in terminating
 13 the franchise and then gave dealers the opportunity to
 14 invoke that jurisdiction of the Board by filing a
 15 protest, and they gave narrow time frames in order to do
 16 that. And if you failed to file the protest within that
 17 time frame, or didn't file one at all, the net effect of
 18 that was to simply lose an opportunity to go in front of
 19 the New Motor Vehicle Board and prove that the franchise
 20 was terminated without good cause as "good cause" is
 21 defined under Section 3061.
 22 You take that legislative scenario and scheme
 23 and you superimpose it on this Subaru case, and all the
 24 Subaru case was saying is that it's final and
 25 determinative if you don't file that protest within a

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1 time allowed, 10 days for a 15-day notice, 30 days for a
 2 60-day notice, and you've lost your right to challenge
 3 good cause in front of the New Motor Vehicle Board.
 4 And that's all the Sonoma case was saying,
 5 because that's all it could say. That's all the
 6 legislative scheme involves.
 7 And keep in mind that the context of the
 8 decisions Subaru was addressing the question of whether
 9 or not there should be a good cause exception if you
 10 didn't file a protest on time whether the -- you should
 11 be allowed more time under certain circumstances where
 12 good faith was involved and the like.
 13 And they simply said, "No, we're not going
 14 to -- we're not going to put that fuzziness into the
 15 protest period of time, and it will be treated as final
 16 and effective."
 17 Now, the environment -- the Court of Appeal
 18 environment at that time did involve the Board back then
 19 as -- the perception was the Board had a much greater
 20 amount of jurisdiction than, as turned out, it really
 21 does have. And so, in part, what I'm saying is -- to
 22 you is, as the Court of Appeal decisions evolved over
 23 time, we now know that the New Motor Vehicle Board's
 24 jurisdiction is very narrow.
 25 And I don't disagree with a lot of what

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1 Mr. Sanchez said about the Mazda decision, but the Mazda
 2 decision and Kemp decision and the San Diego decision,
 3 and the name escapes me, but they all combined, you look
 4 at it and you can see the Court of Appeal decisions were
 5 narrowing the jurisdiction on the New Motor Vehicle
 6 Board.
 7 And what Yamaha has done is, even though that
 8 Court of Appeal case law has developed as it has, they
 9 are attempting to use the lack of a timely protest, and
 10 that's the only thing that's happened; no determination
 11 on the merits, just the lack of a protest within the
 12 10-day period, as determining whether or not a dealer is
 13 entitled to make out a case under 11713.3 or whether a
 14 dealer is allowed to make out a case for intentional
 15 interference with the contractual relation.
 16 Those claims, by the language in Section 3050,
 17 are expressly said to be tried in court, not before the
 18 New Motor Vehicle Board. And so, in a sense, in a very
 19 true sense, what Yamaha is attempting to do is to use a
 20 decision of the New Motor Vehicle Board on the
 21 timeliness of a protest to determine the outcome of
 22 statutory and common law claims that that Board didn't
 23 even have the jurisdiction to decide in the first
 24 instance.
 25 The reality is the considerations under Section

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1 11713.3 are very broad, and essentially establishes a
 2 reasonableness test.
 3 And, by statute, that test must take into
 4 account all of the relevant facts and circumstances.
 5 And if they are to take into account the relevant facts
 6 and circumstances, I think the trier of fact could take
 7 into account the fact that Yamaha attempted to terminate
 8 the franchise. But they also have to take into account
 9 all of the other facts and circumstances that took
 10 place.
 11 The engagement of Yamaha in the process; the
 12 facilitation of the process by Yamaha; the fact that
 13 they received all of the material that is required under
 14 Section 11713.3 to be given to the manufacturer by a
 15 dealer to consider; the fact that they found that
 16 information to be complete, and it actually started the
 17 review process when they suddenly aborted the process,
 18 these are all facts and circumstances that 11713.3
 19 states have to be taken into account and are to be
 20 considered in court, and, in this instance, by a trier
 21 of fact, being the jury.
 22 The case law that we discuss in our collateral
 23 estoppel section, particularly the public policy cases,
 24 find that, in a circumstance like this where there is a
 25 statutory right to go to court with a set of claims,

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1 even though there may be an administrative process that
 2 is designed and designated by that same statutory
 3 scheme, and where that administrative process serves a
 4 limited purpose, essentially it is not to be considered
 5 in a party's statutory and common law claims that are
 6 submitted in court. And that is the conclusion that
 7 Your Honor came to in the tentative ruling.
 8 Essentially, the New Motor Vehicle Board
 9 proceedings are not pertinent to the issues in this
 10 case. Not to say, again, that Yamaha can't bring up the
 11 fact that it attempted to terminate the franchise. As a
 12 fact, that is considered in the trial by the jury. But
 13 it isn't determinative of the case as they have
 14 advocated.
 15 I also want to address the issue of standing
 16 that has been raised. First off, as to Powerhouse, the
 17 contention that Powerhouse was not a licensee is just
 18 unresponsive. The weight of the evidence is that they
 19 were a licensee.
 20 There was never any action by the Department of
 21 Motor Vehicle Board to withdraw or even attempt to
 22 withdraw the license.
 23 There was no abandonment of sales activities,
 24 and, in fact, sales activities took place up through the
 25 time that the lawsuit was filed.

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1 Originally, of course, the sales activities
 2 involved Yamaha and all of the other brands, and then
 3 when the dealership closed KDM was the only brand that
 4 was actually being sold. But sales activities did take
 5 place, so there's no grounds for abandonment, and there
 6 was never any action on the part of the DMV to find any.
 7 As to Tim Pilg that raises the issue that was
 8 addressed by this court on the demurrer.
 9 Yamaha has not made any attempt whatsoever to
 10 distinguish the circumstances known to exist today from
 11 the circumstances that were known from the pleadings
 12 when the Court ruled on the demurrer in that situation.
 13 There's no new facts that are being raised as a
 14 part of the summary judgment that's different than the
 15 facts that were alleged in the complaint that were the
 16 subject of the demurrer. And the conclusion the Court
 17 in that situation, and moving on to the demurrer and the
 18 conclusion we've advocated here in our papers is that
 19 Pilg, Tim Pilg as an individual is not a licensee. But
 20 under 11713.3, Subsection D, shareholders and officers
 21 are given an express right against the manufacturer.
 22 And Yamaha's position is that, although that may be true
 23 under Section 11726, which states the remedy of damages
 24 and attorneys fees, only licensees are mentioned.
 25 And we have cited, too, in our papers, the

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1 Menke decision, that address that difference in language
 2 of those two sections, the 11713.3 versus 11726.
 3 Somewhat in the opposite way, but its principles lead to
 4 the same conclusion here.
 5 In the Menke decision, there was a transferor
 6 of business -- I'm sorry, a transferee of a business
 7 that attempted to make a claim against the manufacturer.
 8 The manufacturer refused to consent to the
 9 sale, or refused to consent to a new franchise
 10 arrangement, and so not only was a lawsuit brought by
 11 the transferor, the existing dealer, but by the
 12 transferee as well.
 13 And they argued that they had standing to make
 14 that argument because that transferee was an existing
 15 licensee, and under 11726 it refers to licensees, and
 16 they were saying, "We meet that criteria."
 17 And the court said, "No, that may be true under
 18 11726, but it's not true under 11713.3."
 19 Under that section, there's no language that
 20 suggests that a transferee has a claim against the
 21 manufacturer.
 22 And our reading of the legislation is that
 23 those two sections have to be read in harmony together.
 24 And if you read them in together, we looked at 11713.3
 25 to define what parties have the right to bring a claim

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1 against the manufacturer. And that 11726 does not
 2 either expand or restrict that scope, and, of course, in
 3 that other case they were trying to suggest that 11726
 4 was the determining one, and it would actually expand
 5 this -- the scope of litigants that could make a claim
 6 against a manufacturer where that litigant wasn't
 7 defined under 11713.3.
 8 I'll read a short quote from that case, that I
 9 think really makes this point. "The more natural
 10 reading" -- and they are referring to a reading of the
 11 two statutes together -- "The more natural reading is,
 12 as the trial court correctly concluded, that Section
 13 11726 merely specifies the remedy available for
 14 violations of Subdivision E, referring to Subdivision E
 15 of 11713.6, "and does not expand or restrict the scope
 16 of those entitled to sue under it." "It" meaning
 17 11713.3.
 18 So as we established to the Court's
 19 satisfaction on the demurrer, Pilg has proper standing
 20 and proper claim to be made because he is an officer,
 21 and a shareholder of Powerhouse, and so he has a proper
 22 standing under 11713.3.
 23 I think I've addressed all of the important
 24 points that were raised by Yamaha, but I'd be happy to
 25 address any questions Your Honor may have.

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1 THE COURT: Thank you.
 2 Mr. Sanchez, reply?
 3 MR. SANCHEZ: Yes, your Honor. Very quickly.
 4 Plaintiffs have repeatedly stated just now that
 5 Yamaha would be able to raise that it attempted to
 6 terminate the dealership.
 7 It didn't attempt to terminate. It did
 8 terminate the dealership. It was found to be valid. It
 9 was found not to have any equitable defects or equitable
 10 estoppel effect against it. So that dealership is
 11 terminated. It did not attempt to terminate. It is
 12 terminated.
 13 Also, plaintiffs have argued that the
 14 determination of the Board is very narrow, and that it
 15 cannot somehow be transferred over to this case.
 16 I would submit to the court that that's like
 17 saying that a house that's been foreclosed on can still
 18 be sold by the original owner. It can't be. That house
 19 is gone.
 20 This dealership is gone. It cannot be sold to
 21 anyone else. You cannot make that argument that
 22 somehow, even though the dealership has been terminated,
 23 we still have to go through a trial to determine whether
 24 it could have been sold.
 25 By logic and by fact, it couldn't have been

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1 sold because it was gone. It was terminated.
 2 The Board process -- the vehicle code and the
 3 Board process is the only way that's allowed under the
 4 statute to terminate a dealer, even if your dealer
 5 agreement is contrary to what the statute says.
 6 You cannot terminate a dealership unless you
 7 follow the statutory procedure. It's the only way for
 8 that to occur.
 9 Yamaha did that in this case. The Board found
 10 that it properly did so, and further, found that there
 11 was no equitable defect there. So that -- that
 12 decision, that fact has been established. It was upheld
 13 by this court. So there's really no way to reopen, if
 14 you will, or somehow to still argue about whether or not
 15 that dealership was terminated or not terminated.
 16 It was terminated. It was -- the only way that
 17 is available to follow and to achieve that termination
 18 was followed and it was achieved.
 19 Plaintiffs had just argued that there was no
 20 action by the DMV to revoke the license of Powerhouse in
 21 this case. Well, there's no action required. In fact,
 22 Vehicle Code Section 11721(a) states that "When a
 23 dealership is closed and is abandoned, that dealership's
 24 license is automatically terminated."
 25 "Automatic" -- uses that word, "automatically,"

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1 and I believe it says, "cancelled." "Automatically
 2 cancelled" is the language of the statute.
 3 So by its own terms there was no further action
 4 required. It's automatically cancelled.
 5 Now, whether the DMV allowed this dealership to
 6 sell KDM motorcycles, which is a different line make
 7 unrelated to Yamaha, that's irrelevant as to whether
 8 that dealership's Yamaha license was automatically
 9 cancelled. It was, because Yamaha was closed. Never
 10 sold again, never reopened. Nothing ever happened there
 11 businesswise once it was closed in June of 2008. So the
 12 automatic cancellation provision of Vehicle Code 11721
 13 was in effect.
 14 The Menke case that was referred to by
 15 plaintiffs, that's an interesting reading of it, but the
 16 way I read that case, Your Honor, the way Yamaha reads
 17 that case is that you can't say, "I'm merely a licensee
 18 of another line make, so therefore I'm a licensee for
 19 purposes of suing under the statute." That doesn't
 20 work, is what Menke says.
 21 This was a Chrysler case that Menke was
 22 involved in a buy/sell for, and Menke tried to argue,
 23 "Well, I'm a licensee of another line make."
 24 But the court said, "No, you have to be a
 25 licensee of the appropriate line make in order to bring

Page 24

1 this lawsuit." And there's a reason for that, Your
 2 Honor. 11713.3, the buy/sell statute, is a criminal
 3 code. Under Section 40,000.11 of the Vehicle Code, it's
 4 made a misdemeanor. The only section it allows you to
 5 sue under it civilly is 11726, and that section
 6 specifically states that you have to be a licensee to
 7 bring that lawsuit civilly.
 8 Otherwise, the DMV or any other prosecutor can
 9 take criminal action against you under 40,000.11, but
 10 you can't be sued civilly because the legislature has
 11 chosen to limit civil actions to licensees. It's very
 12 clear.
 13 Your Honor, I would -- I know we obviously
 14 threw a lot at the Court today. And I suppose I would
 15 request that if the Court would so desire, if you desire
 16 an additional briefing on the protest jurisdiction of
 17 the Board versus the -- it's escaping me, the other
 18 jurisdiction of the Board, the petition jurisdiction
 19 that was done away with by Miller, Tovas and Hardin
 20 Oldsmobile line of cases, we can certainly provide
 21 additional briefing on that.
 22 I would submit to you again, the Board's
 23 protest jurisdiction was not affected at all by that
 24 line of cases. It was only the petition jurisdiction
 25 which is a separate section of the vehicle code.

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1 THE COURT: All right. At this point in time,
 2 I'm intending to take the matter under submission.
 3 This is not our court reporter. This is a
 4 private court reporter. I don't know if either one of
 5 you can furnish me with the transcript.
 6 MR. SANCHEZ: Yes, Your Honor. I will provide
 7 the court reporter with my card.
 8 THE COURT: All right. I want to review that
 9 transcript again as part of my taking it under
 10 submission.
 11 I tried to take notes, but you raised some
 12 issues and arguments that I want to more carefully
 13 review one more time.
 14 MR. LAW: Your Honor, if I can make one
 15 correction.
 16 THE COURT: You may.
 17 MR. LAW: The idea that there's a license for
 18 each brand, it has no basis under the vehicle code, that
 19 you are a licensed dealer. And you deal in whatever
 20 brands you deal in.
 21 MR. SANCHEZ: And I would submit, Your Honor,
 22 that the Menke decision is completely contrary to that.
 23 It says you have to be a licensee of that brand.
 24 THE COURT: The question is -- the issue is
 25 closed. Now I can read the Menke decision with that

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1 issue in mind. I understand your respective positions.
 2 MR. SANCHEZ: Would the court like further
 3 briefing or not at this point?
 4 THE COURT: I don't think so. I think if I
 5 have this transcript, that provides me with the
 6 direction that I need. I did follow your argument, and
 7 you obviously are familiar enough with the concept to
 8 have cited several of the cases. I'm sure if I follow
 9 that argument through I'll get what you would give me in
 10 a brief.
 11 MR. SANCHEZ: Thank you, Your Honor.
 12 THE COURT: All right. The matter will stand
 13 submitted then.
 14 MR. LAW: Thank you.
 15 MR. SANCHEZ: Thank you.
 16 (Proceedings adjourned at 11:48 a.m.)
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Page 27

1 REPORTER'S CERTIFICATE
 2
 3 I, Cindy D. Griffith, a Certified Shorthand
 4 Reporter in and for the State of California, do hereby
 5 certify:
 6 That said proceeding was taken before me at the
 7 time and place therein set forth and was taken down by
 8 me in shorthand and thereafter reduced to computerized
 9 transcription. I hereby certify that the foregoing
 10 deposition is a full, true and correct transcript of my
 11 shorthand notes so taken.
 12 Dated at San Luis Obispo, California, this 6th
 13 day of January, 2011.
 14
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 18 _____
 19 CINDY D. GRIFFITH
 20 CERTIFIED SHORTHAND REPORTER
 21
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Exhibit D

FILED

JAN 31 2011

SAN LUIS OBISPO SUPERIOR COURT

BY Julia Viera
Julia Viera, Deputy Clerk

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SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN LUIS OBISPO
PASO ROBLES BRANCH

POWERHOUSE MOTORSPORTS GROUP,
INC., and TIMOTHY L. PILG,

Plaintiffs,

v.

YAMAHA MOTOR CORP., USA, and DOES
1-25, inclusive,

Defendants.

Case No.: CV 09-8090

RULING ON MOTION FOR
SUMMARY
JUDGMENT/SUMMARY
ADJUDICATION

Yamaha moved for summary judgment or in the alternative summary adjudication. A hearing was held on January 4, 2011. Shortly before the hearing, the Court posted a Tentative Ruling denying Yamaha's motion.

At the hearing Yamaha's counsel: (1) attempted to clarify why he believes the Board's decision is fatal to the Plaintiffs' claims, (2) argued that the Court's tentative ruling was wrong because it failed to distinguish between the Board's jurisdiction under paragraph (c) of Vehicle Code §3050 and its jurisdiction under paragraph (d) of said section, and (3) argued that neither Powerhouse or Mr. Pilg

1 have standing to maintain claims based on Vehicle Code §11713.3.

2 The standing issue can be summarily disposed of. On July 7, 2009, Plaintiffs
3 filed a First Amended Complaint. The first cause of action alleges Yamaha violated
4 Vehicle Code §11713.3. On August 12, 2009, Yamaha attacked the First Amended
5 Complaint by filing a demurrer and motion to strike. At that time Yamaha made the
6 same "standing" arguments it now makes. The issue was fully briefed. The Court's
7 posted tentative ruling specifically addressed the issue and referred to *Menke v.*
8 *Daimler Chrysler* (2009) 171 CA 4th 1088. The Court overruled Yamaha's
9 demurrer. Yamaha's standing argument is de facto a motion for reconsideration.
10 There are no new facts or law presented in Yamaha's motion. Therefore, there is no
11 basis for reconsideration.

12 Yamaha's position is that when a franchisor issues a notice of termination
13 pursuant to Vehicle Code §3060 (a), and the franchisee fails to file a timely protest,
14 the termination of the contractual relationship between the franchisor and franchisee
15 is "deemed final and effective by operation of law." (T: 8:13) As a result, even
16 though there has been no determination by the Board on the merits, the franchisor
17 wins on liability because "it guts the (franchisee's) case because there is nothing left
18 to decide." (T:7-8) In other words, the franchisee's failure to exhaust bars the
19 franchisee from coming into court on any common law or statutory claims. The
20 corollary is that although judicial decisions have eliminated the Board's jurisdiction
21 to adjudicate disputes between franchisors and franchisees arising under paragraph
22 (c) of section 3050, the Board's jurisdiction over section 3060 protests, which fall
23 under paragraph (d) of section 3050, has been left "untouched." (T:6-10)

24 In support of its contention, Yamaha relies on the language of section 3060
25 (a)(1)(C) and *Sonoma Subaru, Inc., v. Board* (1987) 189 Cal.App.3rd 13. (T 7:22 –
26 8:8).

27 The language of section 3060 (a)(1)(C) does not support Yamaha's position.
28 The section requires the notice of termination inform the franchisee in 12-point bold

1 type that the franchisee "may protest" the termination and that a failure to file a
2 protest results in a waiver of the right to protest. The required statutory warning
3 does not state that a waiver of the right to protest results in a termination "by
4 operation of law" or prevent the franchisee from seeking relief in the courts. The
5 statutory scheme was created to prevent franchisors from overreaching, "not to give
6 manufacturers an extra line of defense from lawsuits by dealers." (*Miller v. Superior*
7 *Court*, (1996) 50 Cal. App.4th 1665, 1676.) Requiring the franchisor to give the
8 franchisee prior notice of the former's intent to declare the parties' contractual
9 relationship over is consistent with the legislative purpose of the Automobile
10 Franchise Act. (*New Motor Vehicle Bd. v. Orrin W. Fox Co.* (1978) 439 U.S. 96,
11 102, fn. 6.)

12 *Sonoma Subaru, Inc. supra.*, does not hold that if a timely protest is not filed
13 the contractual relationship between the franchisor and franchisee is terminated as a
14 matter of law. The only language in the opinion that even arguably suggests this is
15 on page 22; "the Legislature's obvious intent is to let the franchisor treat the
16 termination as final and effective." But that statement was made to support the
17 court's refusal to read a "good cause" exception into the statutory scheme to extend
18 the protest date. Nowhere does the court state that a failure to file a timely protest
19 means that the franchisee cannot sue for damages in court. Finally, even assuming
20 arguendo that Yamaha's interpretation of the holding in *Sonoma Subaru* is correct,
21 such an holding would be inconsistent with subparagraph (e) of section 3050
22 discussed below.

23 *Yamaha Motor Corp. v. Superior Court* (1986) 185 Cal.App.3rd 1232
24 (*Yamaha I*) and *Yamaha Motor Corp. v. Superior Court* (1987) 195 Cal.App.3rd 652
25 (*Yamaha II*) and their progeny held that the Board had plenary authority over
26 statutory and common law claims involving motor vehicle dealerships and
27 franchises, and thus applied the doctrine of exhaustion of administrative remedies to
28 preclude judicial actions involving those disputes. *Miller, supra.*, marked the

1 beginning of the end of the Board's jurisdiction over claims like those pled by the
2 Plaintiffs in the case at bar.

3 In the *Miller* case the Millers filed a cross-complaint against Honda for fraud
4 and unfair business practices. The Millers alleged that their dealership was rendered
5 insolvent because they refused to pay bribes to Honda executives to obtain their fair
6 share of popular Honda cars. On demurrer, the trial court, following *Yamaha I* and
7 *Yamaha II* and their progeny, stayed prosecution of the cross-complaint pending
8 review by the Board. The Millers filed a petition for writ of mandate.

9 The Millers argued that forcing them to present their case first to the Board
10 was a "tax" on their right to a jury trial. After analyzing the statutory scheme, the
11 *Miller* court found insufficient indicia that the Legislature intended the Board to
12 provide the exclusive forum for all disputes between franchisors and franchisees, and
13 that the Miller's claim was not within the scope of the Board's jurisdiction under
14 either paragraph (c) or (d) of section 3050. Therefore, the doctrine of exhaustion of
15 remedies did not apply. (50 Cal.App.4th 1674-1675, 1677 & 1678, fn. 8)

16 Nevertheless, the court held that the Millers' right to a jury trial could be
17 diverted (under the doctrine of primary jurisdiction) by a detour to an administrative
18 proceeding before the Board ("which could, at best, only render an advisory decision
19 on the Millers' common law claims" (50 Cal.App.4th 1665, emphasis added)) if the
20 trial court determined that there was a "paramount need" for the Board's specialized
21 expertise. Therefore, the *Miller* court issued a peremptory writ commanding the trial
22 court to vacate its order staying the Millers' cross-complaint and to exercise its
23 discretion.

24 Two months after *Miller*, another case alleging corruption by executives of
25 Honda reached a court of appeal. In *Hardin Oldsmobile v. New Motor Vehicle Bd.*,
26 (1997) 52 Cal. App.4th 585, 587-588, the franchisee, Hardin, alleged that Honda's
27 executives demanded and received bribes and kickbacks in exchange for favors
28 concerning the allocation of new cars and the location and ownership of new
dealerships. Hardin filed a civil action against Honda and other defendants alleging

1 causes of action for various statutory violations, and five common law contract and
 2 tort claims and seeking compensatory, treble, and punitive damages.

3 Eventually Hardin’s statutory and common law claims wound up before the
 4 Board. Hardin requested the Board to determine it did not have jurisdiction over
 5 these claims. After the Board denied Hardin’s request, Hardin petitioned the superior
 6 court for a writ of review, prohibition, and mandate to prevent the Board from
 7 exercising jurisdiction over any of its claims against Honda. The superior court
 8 denied the petition, and Hardin appealed. The Court of Appcal reversed and directed
 9 the trial court to issue a writ requiring the board to decline jurisdiction over plaintiff’s
 10 state statutory and common law claims.

11 Although the *Hardin* court’s analysis of the statutory scheme was much
 12 different than that of the *Miller* court, it arrived at the same conclusion - that the
 13 Board’s jurisdiction was limited. The *Hardin* court disapproved of and robustly
 14 criticized the holdings and reasoning (or lack thereof) in the *Yamaha* cases and their
 15 progeny. Its criticism of *Yamaha I* is relevant to the matter now at bar, particularly
 16 Defendant’s counsel’s assurances that the Board’s jurisdiction under paragraph (d) of
 17 section 3050 remains “untouched.”

18
 19 We disagree with the holding in *Yamaha I*
 20 ...
 21 When the *Yamaha I* court said that Vehicle Code sections
 22 3060 and 3062 give the Board authority to resolve disputes
 23 between franchisors and franchisees (185 Cal.App.3d at p.
 24 1238), it could only mean the Board could consider a
 25 protest allcging a violation of those sections. The Board’s
 26 jurisdiction over such matters is spccifically limited in
 27 Vehicle Code section 3050, subdivision (d), which states
 28 the Board shall “[h]ear and consider, within the limitations
 and in accordance with the procedure provided, a protest by
 a franchisec pursuant to Section 3060 [or] 3062 ...” (Italics
 added.) Conspicuously missing is any statement or
 implication that the Board can hear and consider any
 common law or statutory claim the foundational facts of
 which could have been, but were not, alleged as a violation
 of section 3060 or 3062. The *Yamaha I* court’s statement

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concerning the Board's jurisdiction over disputes between franchisors and franchisees, while true if applied to a dispute in which a protest alleging violation of section 3060 or 3062 is filed with the Board, is not true if the dispute between the franchisor and the franchisee is based only on other statutory and common law grounds and does not seek the remedy available under those sections. For example, as we have held, the Board does not have jurisdiction under section 3050, subdivision (d) to hear and consider a common law fraud or breach of contract cause of action by the franchisee against the franchisor and award damages if common law liability is found.

...

It cannot be said that the Board has jurisdiction over statutory and common law claims not specified in the enabling legislation merely because some of the facts forming the foundation for such a claim could have been asserted as the foundation of a statutory protest claim within the Board's jurisdiction. That is, in the end, an illogical argument (52 Cal. App. 4th 592-593)

...

Any doubt that *Miller, Hardin and Tovas v. Am. Honda Motor Co.*, (1997) 57 Cal. App. 4th 506, made invocation of the Board's limited authority optional was removed by *Kemp v. Nissan Motor Corp.*, (1997) 57 Cal.App.4th 1527.

Kemp, a former Palm Springs Nissan dealer, sued the Nissan Motor Corporation, U.S.A. ("Nissan) for breach of contract because Nissan would not approve the sale of his dealership to a third party. The trial court granted summary judgment to Nissan accepting its argument that Kemp, by not taking his breach of contract claim to the New Motor Vehicle Board, had failed to exhaust. Kemp appealed. The Court of Appeal reversed the decision of the trial court.

The *Kemp* court held that Kemp's breach of contract action was not subject to an exhaustion of remedies requirement. Even if Kemp's claim came within the purview of the Board's authority, the Legislature never intended the Board to

1 exclusively occupy the field of claims between dealers and manufacturers. The
 2 Legislature did not establish the Board to give manufacturers an extra line of defense
 3 from dealers' claims, but to protect dealers from undue control by manufacturers.
 4 The *Kemp* court also held that this was not a case in which the trial court had the
 5 discretion to stay proceedings pending administrative action under the doctrine of
 6 primary jurisdiction, since the case involved a claim sounding in common law
 7 contracts, rather than one requiring uniformity in the application of complex
 8 administrative regulations issued by the Department of Motor Vehicles.

9
 10 As we showed in *Miller*, because the Legislature never
 11 intended the board to exclusively occupy the field of claims
 12 between dealers and manufacturers - even claims otherwise
 13 within the purview of the board's authority - exhaustion is
 14 not required. (See *Miller v. Superior Court, supra*, 50
 15 Cal.App.4th at pp. 1672-1676.)

16 Independent of the application of *Miller* or *Hardin*
 17 *Oldsmobile* to the present case, Nissan presents a related
 18 series of policy arguments ad horrendum: If exhaustion is
 19 not required, new car dealers will be allowed to "side step
 20 the rigors of expert scrutiny"; there will be the possibility of
 21 "inconsistent results"; dealer claims against manufacturer's
 22 will be rendered truly "Board optional."

23 The answer to all these points is simple: Take it to the
 24 Legislature. The Legislature did not establish the board to
 25 give manufacturers an extra line of defense from dealer
 26 claims, but to protect dealers from "undue control" by
 27 manufacturers. If the Legislature had wanted administrative
 28 proceedings before the board to constitute an extra gauntlet
 which dealers had to run before being allowed to litigate
 otherwise cognizable common law claims against
 manufacturers, it could have said so. It did not. While it may
 (or may not) be desirable in the abstract for the board to first
 pass on dealer claims against manufacturers, that is simply
 not the law the Legislature wrote. (57 Cal.App. 4th 1527,
 1530-1531)

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There was a legislative response, but not the one Nissan (and presumably other franchisors) wanted. The 1997 Legislature added paragraph (e) to Vehicle Code Section 3050. Paragraph (e) provides that, notwithstanding the Board's authority to consider automobile dealership and franchise matters, courts have jurisdiction over all common law and statutory claims originally cognizable by a court, and that a party may "directly" initiate that type of claim in any court of competent jurisdiction.

In *South Bay Creditors Trust v. Gen. Motors Acceptance Corp.*, (1999) 69 Cal.App.4th 1068, the Court of Appeal, after reviewing the legislative history of subdivision (e), concluded that it "reflects the Legislature's disapproval of the *Yamaha* cases and confirms that *Miller* and *Hardin* correctly rejected the proposition that the Board has plenary authority over common law claims by motor vehicle dealers against manufacturers." (*Id.*, at 1079.) The court also clarified that a referral by the trial court to an administrative agency pursuant to the doctrine of primary jurisdiction is only appropriate where that agency possesses some special expertise over a regulatory scheme or subject that is beyond the usual competence of the courts. (*Id.*, 1080-1083.)

Having thus considered the points raised by Yamaha upon oral argument and finding that they are not supported by the applicable authorities, the previously posted Tentative Ruling denying Yamaha's motion for summary judgment and in the alternative summary adjudication is hereby adopted.

DATED: January 31, 2011


MARTIN J. TANGEMAN
Judge of the Superior Court

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SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN LUIS OBISPO
Civil Division

Clerk's Certificate of Service

POWERHOUSE MOTORSPORTS VS. YAMAHA MOTOR CORP.	CV098090
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*
 Attached Pleading:
 RULING ON MOTION FOR SUMMARY JUDGMENT/
 SUMMARY ADJUDICATION

Under penalty of perjury, I hereby certify that I transmitted via
 facsimile; at Paso Robles, California,
 a copy of the foregoing addressed to each of the above.

OR

If counsel has a pickup box in the Courthouse that a copy was placed in said
 pickup box this date.

SUSAN MATHERLY, Court Executive Officer

by Julie E. [Signature], Deputy

Dated: 1.31.11