

August 13, 2012

Via Email

California New Motor Vehicle Board
Attn: Robin Parker, Senior Staff Counsel
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**Re: Opposition to Request for Reconsideration of Decision
Denying Yamaha's Request for Amicus Brief; *Powerhouse v.*
Yamaha San Luis Obispo Superior Court No. CV098090;
Court of Appeal No. B236705**

Dear Members of the Board:

This letter is submitted to your honorable Board on behalf of Powerhouse Motorsports Group, Inc. and Jerry Namba, successor in interest to Timothy L. Pilg and Chapter 7 Bankruptcy Trustee for the bankruptcy estate of Timothy Pilg and his wife Frances Pilg (collectively "Powerhouse"). Powerhouse is responding to Yamaha Motor Corporation, U.S.A.'s ("Yamaha") request for reconsideration of your denial of Yamaha's initial request to file an amicus brief in the above-referenced action.

In response to Yamaha's initial request, I appeared before you at your May, 2012 meeting. Yamaha's counsel did not appear. At that time Yamaha had just filed its opening brief in the appellate proceedings. Since then, Powerhouse has filed its responsive brief. Both briefs are lengthy so I will provide a summary of points that I believe are germane to both arguments.

1. Yamaha Seeks to Completely Ignore the Jury's Finding of Wrongful Conduct.

Yamaha's appeal seeks to nullify the entire jury verdict. The jury found that Yamaha had violated Vehicle Code section 11713.3, breached the implied covenant of good faith and fair dealing, committed the tort of interference with contractual relations and acted with malice, oppression or fraud justifying an award of \$200,000 in punitive damages. Yamaha does not

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attack the award on the basis of a lack of substantial evidence. Yamaha's contention on appeal is that Powerhouse should be precluded, *as a matter of law*, from preserving the jury's award. This argument is premised solely on the contention that Powerhouse's failure to file a timely protest precludes Powerhouse's common law and statutory claims.

There is indeed more than substantial evidence supporting the verdict. Powerhouse's brief shows that even though Yamaha represented to Powerhouse that it would consider a dealership sale knowing that the dealership was closed, Yamaha acted to sabotage the sale by misusing the franchise termination process to unlawfully evade its obligation to reasonably consider the proposed purchaser.

2. Neither Powerhouse Nor the Trial Court Contend the NMVB Lacks Jurisdiction to Hear Protests.

Contrary to Yamaha's counsel's letter to this Board of August 2, 2010, Powerhouse's brief does not contend, argue or suggest that this Board lacks jurisdiction to hear protests. Powerhouse's claims are based on Yamaha's violation of section 11713.3 and related common law tort theories. The superior court has the jurisdiction to address these claims.

Yamaha points to language in the trial court's ruling on Yamaha's motion for summary judgment in an attempt to provoke this Board and to construct a protest jurisdiction issue. This is simply not a protest jurisdictional issue. The trial court's unfortunate offhanded comment about this Board not having any "feet" or "legs" had little to do with the court's actual ruling on the summary judgment motion, and it had nothing to do with the issues and rulings during trial. In fact, the trial court upheld this Board's ruling on Powerhouse's protest. The issues facing the trial court during the litigation in the superior court related to its jurisdiction to address Powerhouse's statutory and common law damage claims -- notably claims arising out of section 11713.3. The trial court rejected Yamaha's argument that Powerhouse's claims were precluded as a matter of law. It did not rule that the NMVB lacked jurisdiction to consider protests.

To the extent the trial court's comment about feet and legs raised any actual jurisdictional concern, that concern vanished once the case proceeded through trial. Now, on appeal, Powerhouse's brief confirms that it makes no arguments which might limit this Board's jurisdiction.

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3. The Trial Court Properly Treated the Issues as Factual Questions as Directed by Section 11713.3 and Yamaha was Given Full Opportunity to Admit Evidence of the Termination and the Protest Process.

From Powerhouse's perspective the Board's protest jurisdiction is simply not an issue; and, indeed, Powerhouse was successful in proving its damage claims to the jury even though the jury was fully informed of Powerhouse's untimely protest. Powerhouse's brief explains that the trial court, in its various rulings, concluded that the issue of whether Yamaha violated section 11713.3 and the common law tort claims, involved issues of fact and that the jury should consider *all* facts and circumstances (see section 11713.3(d)(3)). To this end, Yamaha was allowed to introduce evidence of section 3060 and the protest process. Robin Parker testified at Yamaha's request; and she explained the protest process, how the process worked in this case, the 10-day protest limitation, your Board's dismissal of Powerhouse's protest as untimely and the fact that this decision was upheld in court. Apparently this evidence did not compel the jury to rule in Yamaha's favor; most likely, because there was other very substantial evidence showing Yamaha's culpability and misconduct.

4. *Sonoma Subaru* is Misapplied by Yamaha.

Yamaha argues that the trial court concluded that the case of *Sonoma Subaru v. New Motor Vehicle Board* (1987) 189 Cal.App.3d 13 is no longer good law. The trial court never made such a ruling; and, more importantly, Powerhouse does not advocate such a position. The problem with *Sonoma Subaru* is that it does not stand for the proposition that Yamaha uses it for, and it does not apply to the facts of this case. Yamaha attempts to use *Sonoma Subaru* to support its contention that Yamaha's obligation under section 11713.3 terminated once the 10-day protest period lapsed on its termination notice to Powerhouse. *Sonoma Subaru* contains no such holding. It never mentions section 11713.3, and it never discusses obligations to consider a prospective buyer of a dealership.

5. Summary of the Evidence Which Supports the Jury Verdict.

As emphasized in Powerhouse's brief, the case against Yamaha is very much "fact based." Powerhouse believes that the legal issues raised by Yamaha are, in actuality, subsumed in the factual issues which were decided by the jury. Powerhouse believes that the issues on appeal should be decided on the facts supporting the jury verdict, and this is the position it has taken in its brief. Because of the significance of the facts to the outcome of this case, I will

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provide you with a summary. This summary is based on the evidence outlined in Powerhouse's brief (which includes citations to the record), and I refer you to the brief if you would like to review the facts in more detail.

a. Yamaha Represents It Will Consider a Sale and Engages in the Sale Process.

Yamaha represented to Powerhouse that it would consider a proposed sale of Powerhouse's dealership knowing that the dealership was closed. Yamaha became engaged in the sale process and its executives purported to encourage it. There were multiple telephone conversations and a lengthy on-site meeting with Yamaha's district manager and representatives of Powerhouse and the proposed buyer. Yamaha said it would assist in processing the sale to assure that it proceeded smoothly, it encouraged the buyer to order products for the upcoming year and it encouraged the parties to execute and submit to Yamaha a formal buy-sell agreement.

Powerhouse and the buyer acted in reliance on Yamaha's word and executed a buy-sell agreement, opened escrow (with a deposit) and proceeded diligently to consummate the sale and to obtain Yamaha's consent. Not once during this process did Yamaha indicate that there was a problem with the dealership remaining closed. Had this issue been raised at the time, the parties were prepared to expedite reopening the dealership under the terms of an operating agreement. Yamaha's credit manager discouraged Powerhouse from pursuing an operations agreement, and said that Yamaha would expedite processing the sale.

b. Behind the Scenes Yamaha Develops a Plan to Defeat the Sale.

Meanwhile, unbeknownst to Powerhouse, Yamaha executives had developed a plan to terminate Powerhouse's franchise and once terminated to abort processing the sale. After the fact, Powerhouse learned of internal e-mails between Yamaha executives questioning whether they would support the sale and calling for a game plan. These internal e-mails began almost from the very beginning. Also, the same day that Yamaha's district manager attended the lengthy on-site meeting at Powerhouse purporting to support the sale, Yamaha prepared an internal document used to initiate the termination process. The initial termination notice was prepared the next day by Yamaha's legal counsel.

Yamaha's legal counsel testified that at the time he prepared the termination notice he was aware of the pending sale, and he was aware and considered Yamaha's obligations under section 11713.3. He knew that the pending sale would take 30 to 60 days to process, far longer

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than the 10-day protest period for the 15-day notice that he prepared. He believed that once the 10-day protest period lapsed, Yamaha would have no further obligation to even consider the proposed buyer. When asked how he could reconcile Yamaha's obligation to reasonably consider a proposed sale that would take 30 to 60 days to process, with a 10-day protest period that Yamaha planned to use to cease considering the sale, he coined a phrase "Protest Bridge;" meaning Powerhouse would have to file a protest in order for Yamaha to remain obligated to reasonably consider the pending sale.

The initial termination notice prepared by Yamaha's legal counsel was not received by Powerhouse, and Powerhouse had no knowledge of its issuance. In the meantime, Powerhouse delivered to Yamaha a signed copy of the buy-sell agreement and carried on with work on the sale, including hosting a job fair to assist the buyer in hiring employees. Although there were conversations with Yamaha during this time, not once was the defeating termination mentioned to Powerhouse.

A second 15-day notice was issued, and this notice was received by Powerhouse's owner, Tim Pilg, on a Saturday. He was confused by the notice because, until this point in time, Yamaha had never even suggested that there was an issue with the dealership being closed during the pending sale and Yamaha had represented it would assist the smooth processing of the sale. Mr. Pilg discussed the notice with his business consultant and he, his business consultant and the prospective buyer believed the termination must be part of the sale process, terminating the old franchise in preparation for the buyer's new franchise. Nonetheless, to be certain, the following Monday Mr. Pilg called Yamaha's legal counsel.

c. Yamaha Conceals Facts and Fails to Honestly Respond to Questions.

Mr. Pilg informed Yamaha's legal counsel of the pending sale and asked about the termination notice in the context of the sale. Mr. Pilg testified that Yamaha's legal counsel said he did not know about the sale and that he would check with management and get back to him. It was shown to the jury that, in truth, Yamaha's legal counsel was already aware of the pending sale as mentioned above. It appears that Yamaha's legal counsel knowingly gave Mr. Pilg false information and failed to reveal Yamaha's true intentions. The next day Mr. Pilg received a letter from Yamaha's legal counsel stating the notice was not being withdrawn, but did not say anything about the sale.

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Mr. Pilg then sent an e-mail to the district representative that he had been working with on the sale and informed him that he had received a termination notice and inquired whether this was a part of the buy-sell process. The district representative testified that he opened the e-mail a few minutes after it was received and immediately forwarded it to his superiors with a message asking for directions on how to respond due to the sensitive nature of the matter. He refused to testify to any further communications concerning this e-mail claiming the attorney-client privilege. Mr. Pilg also left a telephone message for the district manager's supervisor. Yamaha's district manager and his supervisor admitted at trial to knowing that Mr. Pilg was confused and they knew he did not understand how the termination could impact the pending sale. Nonetheless *no one* responded to Mr. Pilg. This indicates that Yamaha intentionally withheld a response knowing that Mr. Pilg did not understand the trap he was in and knowing the harm that would be caused to Powerhouse.

The next week Mr. Pilg once again attempted to reach his district manager, but there was no response. Later that week, after the 10-day protest period lapsed, Yamaha's legal counsel sent Powerhouse a letter basically stating that Powerhouse's franchise was terminated and there was nothing further to consider regarding the sale. The following Monday Yamaha sent a letter telling the buyer it was "not interested."

d. Yamaha Immediately Aborts Processing Causing Financial Ruin.

Yamaha's district manager testified that he had received the credit application from the proposed buyer, found it to be complete and no negative attributes. He forwarded it on for further review. Once the 10-day protest period lapsed, his supervisor directed return of the materials to the proposed buyer without any further consideration. The only reason given for refusing to consider the proposed buyer was lapse of the 10-day protest period.

Powerhouse and Mr. Pilg were thrown into financial turmoil. Powerhouse was liquidated and, ultimately, Mr. Pilg and his wife filed a bankruptcy and, through foreclosure, lost the building that Powerhouse occupied. Yamaha has never reestablished a dealership in Paso Robles.

e. Summary of Yamaha's Wrongdoing.

The evidence shows that Yamaha adopted a plan to evade its obligations under section 11713.3 *before* the termination notice was even issued. The termination notice was pretextual. It was not legitimately intended to resolve a closure issue, but rather to create an obstacle to the

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pending sale. The concept of a "protest bridge" was fundamentally unreasonable under section 11713.3. Worse yet, Yamaha acted intentionally to keep Powerhouse in the dark, and at times made false statements. It refused to respond to Powerhouse's questions knowing the harm that Powerhouse faced. This evidence fully supports the jury's verdict, including its finding that Yamaha acted with malice, oppression or fraud.

6. The NMVB Should Remain Neutral and Allow the Parties to Address Their Dispute on an Even Playing Field.

The trial court properly treated the issues as factual. In the context of this evidence, Yamaha's argument that Powerhouse's untimely protest precludes recovery as a matter of law is completely unjustifiable.

As Powerhouse has stated before, this is a matter between it and Yamaha. An amicus brief will alter the balance of the playing field, and it is unnecessary because the issues are unique to this case.

Thank you.

Very truly yours,



Dennis D. Law

DDL/ru

cc: Diane Matsinger
Timothy Pilg
Jerry Namba