

January 23, 2014

Robin Parker, Esq.
New Motor Vehicle Board
1507 21st Street, Suite 330
Sacramento, CA 95811

Dear Robin:

As you know, Gibson Dunn, together with BakerHostetler, represents Yamaha Motor Corporation, U.S.A. in its appeal of an adverse 2011 jury verdict in the matter entitled *Powerhouse Motorsports Group, Inc. v. Yamaha Motor Corporation, U.S.A.* On November 26, 2013, the California Court of Appeal, Second Appellate District, issued its decision (certified for publication) affirming the jury's award against Yamaha in all respects. The purpose of this letter is to request that the New Motor Vehicle Board (the "Board") at its February 4, 2014 meeting consider submitting an amicus letter in support of Yamaha's January 6, 2014 Petition for Review to the California Supreme Court. The Court of Appeal's decision and Yamaha's Petition for Review are attached hereto as Exhibits A and B respectively. Also attached, as Exhibit C, is a proposed form of an amicus letter from the Board in support of Yamaha's Petition for Review.

Yamaha is very appreciative of the Board's prior willingness to file an amicus letter in support of Yamaha's 2011 Petition for Review to the California Supreme Court of a pre-trial writ petition in this same matter. Yamaha is hopeful that the Board, as the guardian of the statutory scheme it implements, will once again be willing to step up and inform the California Supreme Court of the confusion and uncertainty that the Court of Appeal's decision creates with respect to the termination protest mechanism set forth at Vehicle Code section 3060.

As set forth in more detail below, we believe the Board has a substantial interest in having the Supreme Court grant review in this case, as the decision upends the Vehicle Code's termination protest mechanism by holding that a franchisor must continue to treat a franchisee who fails to file a timely protest to a Notice of Termination as having an active franchise. Moreover, by effectively holding that the filing of a timely protest to a statutorily compliant Notice of Termination is optional, the decision threatens a significant portion of the Board's jurisdiction—its jurisdiction over franchise terminations.

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1. Factual and Procedural Background

Powerhouse closed its doors on June 15, 2008, never to re-open. Shortly thereafter, Powerhouse's principal, Timothy Pilg, began negotiations to sell to MDK. Upon inquiry from Pilg, Yamaha advised Pilg that he could sell, as long as the dealer agreement was still active. On July 11, 2008, Yamaha's representative went to the dealership facility to confirm that it was closed and engaged in discussions with Pilg and MDK about the potential sale. On July 11, 2008, Yamaha sent Powerhouse a statutorily compliant Notice of Termination ("NOT") under Vehicle Code section 3060 advising Pilg, using the precise statutory language, that if he failed to file a protest within 10 days after receipt of the NOT, his protest right would be waived. The original NOT was returned undelivered to Yamaha, and was re-sent to Pilg's home address. In the interim, Yamaha had received a written buy/sell agreement between Powerhouse and the proposed buyer, MDK. Pilg received the NOT on July 26, 2008, making his deadline to file a protest August 5, 2008. Pilg called Yamaha in-house counsel Richard Tilley on July 28, 2008 (i.e., prior to expiration of the protest period) to ask what the NOT meant. Tilley advised during that call, and confirmed in writing that same day, that Yamaha was not amending, withdrawing or delaying its NOT, and that Pilg should call a lawyer. After Pilg failed to file a protest by August 5, 2008, Yamaha advised Pilg that he was terminated and that Yamaha would no longer consider the sale to MDK.

Pilg filed a late protest on August 15, 2008—10 days after the statutory deadline. In response to Yamaha's motion to dismiss the protest as untimely, the Board allowed discovery and conducted a two-day evidentiary hearing on March 16-17, 2009. The Board ultimately granted Yamaha's motion to dismiss after finding that Powerhouse's protest was untimely. The Board expressly rejected Powerhouse's argument that, having engaged in discussions about a potential sale, Yamaha was estopped to assert the untimeliness of the protest.

Powerhouse thereafter filed a Superior Court action against Yamaha seeking compensatory and punitive damages for Yamaha's alleged unreasonable withholding of consent to the buy/sell, tortious interference with contract and breach of the implied covenant of good faith and fair dealing. All of these claims were based exclusively on the allegation that Yamaha had violated its obligations under Vehicle Code section 11713.3 to reasonably consider the proposed sale of the Powerhouse franchise to MDK. Powerhouse also filed a writ seeking to overturn the Board's decision, which the Superior Court denied. The same judge, however, thereafter denied Yamaha's motion for summary judgment, which argued that Powerhouse's franchise terminated as a matter of law when it failed to file a timely protest and that, as a result, Powerhouse as of August 5, 2008 had no Yamaha franchise to sell, and thus Yamaha was under no obligation under section 11713.3 to consider the sale. The trial judge decided

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to let the jury decide the matter, despite the absence of any significant factual disputes and clear legal grounds for Yamaha's position that the franchise was terminated.

Following a month-long jury trial in June 2011, the jury awarded Powerhouse \$811,000 in compensatory damages and \$60,000 in punitive damages. The jury also awarded Pilg \$325,080 in compensatory damages and \$140,000 in punitive damages. Finally, the trial court awarded Powerhouse over \$500,000 in attorneys' fees under Vehicle Code section 11726.

2. The Court of Appeal's Decision

In a decision dated November 26, 2013, the Court of Appeal affirmed the jury award in full, ruling (1) that the Board's decision regarding the timeliness of Powerhouse's protest did not terminate Powerhouse's franchise as a matter of law, and (2) that Yamaha was obligated under California Vehicle Code section 11713.3 to consider the buy/sell regardless of Powerhouse's failure to comply with Vehicle Code section 3060's procedure for challenging the Notice of Termination, and regardless of the Board's decision that the protest Powerhouse did file was untimely.

3. Issues Raised by the Court of Appeal's Decision

The Court of Appeal's decision raises a number of issues:

(i) The decision is contrary to the plain text of California Vehicle Code section 3060, which provides that a franchisor may treat a franchise as terminated where, as here, the franchisor's Notice of Termination fully complies with the statutory requirements, and "the appropriate period for filing a protest has elapsed." Vehicle Code § 3060, subd. (a)(3).

(ii) The decision cannot be reconciled with *Sonoma Subaru, Inc. v. New Motor Vehicle Board* (1987) 189 Cal.App.3d 13, 22, which held that, "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."

(iii) By ruling that a franchisor's obligations to a franchisee, and a franchisee's rights under its franchise agreement, continue even *after* the franchisee fails to file a timely protest to a Notice of Termination, the decision effectively holds that the failure to file a protest within the statutory deadline has no legal significance, despite the plain text of section 3060, subdivision (a)(3), and *Sonoma Subaru*. In so doing, the decision erodes one of the most fundamental components of the section 3060 termination mechanism—the portion of the statute that specifically requires a dealer to file a timely protest in order to preserve its franchise.

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(iv) By holding that the failure to file a timely protest to a termination does not allow a franchisor to treat a franchise as terminated, the decision has effectively made optional the filing of a timely protest. Since protests constitute nearly all of the matters that have been heard by the Board in the last decade, and since termination protests constitute a significant portion of the Board's total caseload, the Court of Appeal's decision threatens a key portion of the Board's jurisdiction.

(v) The decision engages in a superfluous discussion of the scope of the Board's authority that creates confusion and uncertainty about the Board's jurisdiction to hear and decide protests under Vehicle Code section 3050, subdivision (d). The Board's jurisdiction to hear those protests was not in doubt prior to this decision.

4. Why the Board Should File an Amicus Letter Urging the Supreme Court to Grant Review

(i) Based on its jurisdiction to hear and determine termination protests, the Board plays a critical role in the development of the law that governs those protests, and in the interpretation of Vehicle Code section 3060 in particular. In its role as the guardian of the statutory scheme it implements, the Board has a vested interest in assuring that the statutory scheme is not ignored, and that it is implemented consistent with the Legislature's intent. The Board also has a vested interest in seeing to it that direct conflicts in the caselaw, which create confusion and uncertainty with respect to the rights of franchisees and franchisors, are addressed. By holding that a franchisor cannot treat a franchise as terminated when a dealer fails to file a timely protest to a statutorily compliant Notice of Termination, even after the Board had determined that the protest was untimely, the Second District Court of Appeal has effectively re-written the language of Vehicle Code section 3060, subdivision (a)(3), nullifying the provision that a franchise termination is final when "the appropriate period for the filing of a protest has elapsed." It has also created a direct conflict with the Third Appellate District's decision in *Sonoma Subaru, Inc. v. New Motor Vehicle Board* (1987) 189 Cal.App.3d 13. In so doing, the Court of Appeal has created the very uncertainty (about when a franchisor can treat a franchise as terminated) that the statutory termination mechanism was designed to prevent. The Board is in a unique position to explain to the Supreme Court the impact that the Court of Appeal's decision has on the statutory termination mechanism, and to urge the Supreme Court to ensure that the statutory scheme is not ignored or dismantled.

(ii) The Board should urge that the California Supreme Court grant review in this case because the Court of Appeal's decision threatens a significant aspect of the Board's jurisdiction. In ruling that the failure to file a timely protest does not allow a franchisor to treat a franchise as terminated, the Court of Appeal has effectively made the filing of a

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timely protest to a Notice of Termination optional. Since, under the Court of Appeal's decision, a myriad of rights and duties between franchisors and franchisees continue unimpeded regardless of whether the franchisee files a timely termination protest,¹ why would a dealer go through the expense and effort of filing and litigating a protest with the Board? The protest-optional scenario created by the Court of Appeal decision strips the Board of one of its most historically significant duties and most frequently invoked jurisdictional powers, which is to hear and resolve termination protests.

(iii) Finally, the Board should urge review because the Court of Appeal's decision, by engaging in a superfluous and confusing discussion of the effect of the *Hardin Oldsmobile v. New Motor Vehicle Board* (1997) 52 Cal.App.4th 585 and *Mazda Motor of America, Inc. v. New Motor Vehicle Board* (2003) 110 Cal.App.4th 1451 line of cases, and the meaning of Vehicle Code section 3050, subdivision (d), as compared to section 3050, subdivision (e), ultimately serves only to create uncertainty about a portion of the Board's jurisdiction—i.e., to “hear and decide” dealer protests—that, before the Court of Appeal's decision, was not in doubt.

I would be most grateful if you would include this letter in the materials circulated to the Board Members in advance of the February 4, 2014 meeting, and look forward to addressing the Board on this issue at the meeting.

Very truly yours,

Handwritten signature of Marjorie Ehrich Lewis in black ink, with the initials 'BJH' written to the right of the signature.

Marjorie Ehrich Lewis

cc: Dennis D. Law

¹ For example, must manufacturers continue to allow “terminated” dealers to perform warranty service and purchase vehicles? Must manufacturers continue to give notice of establishments and relocations to “terminated” dealers based on their former business location? When do these obligations end? The Court of Appeal's decision creates, but provides no answers to, these and numerous other questions.

EXHIBIT A

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

POWERHOUSE MOTORSPORTS
GROUP, INC., et al.,

Plaintiffs and Appellants,

v.

YAMAHA MOTOR CORPORATION,
U.S.A.,

Defendant and Appellant.

2d Civil No. B236705
(Super. Ct. No. CV098090)
(San Luis Obispo County)

COURT OF APPEAL – SECOND DIST.

FILED

Nov 26, 2013

JOSEPH A. LANE, Clerk

psilva Deputy Clerk

For over a decade, Powerhouse Motorsports Group, Inc. (Powerhouse) operated a successful retail motorcycle dealership under a dealer/franchise agreement (Franchise Agreement) with Yamaha Motor Corporation (Yamaha). In 2008, Powerhouse suffered a reversal of fortune and its owner Timothy Pilg closed the dealership in June of that year. With the apparent agreement and support of Yamaha, Pilg entered negotiations to sell the dealership and franchise to MDK Motorsports (MDK).

Without informing either Pilg or MDK and contrary to its stated position, Yamaha initiated procedures to terminate the Franchise Agreement pursuant to Vehicle Code section 3060.¹ Before Yamaha served Powerhouse with statutory notice of the termination, Powerhouse notified Yamaha it had reached an agreement to sell the dealership and franchise to MDK and asked Yamaha to approve the sale. Powerhouse

¹ All statutory references are to the Vehicle Code, unless otherwise noted.

filed a protest to the notice of termination (§ 3060, subd. (b)(2)), and the New Motor Vehicle Board (the Board) subsequently granted Yamaha's motion to dismiss the protest as untimely. The Franchise Agreement was accordingly terminated, which led MDK to cancel its purchase of Powerhouse.

Powerhouse and Pilg² then filed this lawsuit alleging that Yamaha unreasonably withheld its consent to the sale of the dealership and franchise in violation of section 11713.3. The complaint also includes common law claims for breach of contract, intentional interference with contractual relations, and breach of the implied covenant of good faith and fair dealing. Powerhouse prevailed in a jury trial and recovered a total of \$1,336,080 in compensatory and punitive damages. Yamaha appeals, contending that the Franchise Agreement was terminated by virtue of the section 3060 procedure and that such termination precludes Powerhouse from recovery on any of its claims. Yamaha also claims the compensatory damages are excessive, the punitive damages are improper, and that attorney fees were erroneously awarded. Powerhouse cross-appeals, contending the court erred in granting nonsuit on Pilg's section 11713.3 claim, and in failing to award the attorney fees it incurred in the administrative proceedings before the Board and Powerhouse's subsequent request for writ relief from the Board's decision.

We conclude that Powerhouse's right to seek and recover damages for Yamaha's unreasonable refusal to approve the sale of Powerhouse's dealership and franchise is not affected by Powerhouse's failure to comply with the section 3060 procedure for challenging Yamaha's termination of the Franchise Agreement (§§ 3050, subd. (e), 11713.3, subd. (d)(1)), nor by the Board's decision regarding the timeliness of Powerhouse's protest to the notice of termination. We further conclude that the jury's verdict is supported by substantial evidence and that the parties' remaining claims lack merit. Accordingly, we affirm the judgment.

FACTS AND PROCEDURAL HISTORY

² For convenience, we will refer to Powerhouse and Pilg collectively as Powerhouse unless otherwise specified.

For several years, Timothy Pilg operated a motorcycle and sport vehicle dealership under the Powerhouse name. In 1998, Pilg became a franchisee of Yamaha. The dealership grew and Powerhouse was incorporated in 2007. After incorporation Powerhouse entered into a new Franchise Agreement with Yamaha. Business, however, declined and Powerhouse closed its dealership on or about June 16, 2008. It never reopened.

After closing the dealership, Powerhouse began negotiations for the sale of the closed dealership, including the Yamaha franchise, to MDK. On June 19, 2008, Pilg contacted Rod Stout, a Yamaha division manager, and asked if Powerhouse could sell the franchise even though it had closed. Stout told Pilg that such a sale was possible.

On June 21, 2008, Powerhouse reached a verbal agreement with MDK for the sale of its assets and, on June 25, Powerhouse and MDK signed a written "term sheet" for the sale.³ MDK was an existing and approved Yamaha franchisee operating at another location. On June 27, 2008, Pilg informed Luke Dawson, a Yamaha district manager, of the terms of the sale. When he informed Regional Sales Manager Rocky Aiello of the sale, Dawson obtained information regarding MDK and Yamaha began the process of approving MDK as a new franchisee. Stout informed Powerhouse that it remained a Yamaha dealer and that Yamaha would consider an application from MDK to transfer the franchise to MDK.

On July 10, 2008, Powerhouse, Yamaha and MDK representatives attended a meeting to discuss and expedite the sale. Dawson was Yamaha's representative. Pilg and the CEO of MDK attended the meeting along with other Powerhouse and MDK personnel. Dawson represented that he would expedite Yamaha's review and approval of the sale and transfer of the franchise. The possibility of entering into an agreement under which Powerhouse would reopen its dealership was discussed but not acted upon.

³ Technically, the Powerhouse franchise would not be "sold" to MDK. Instead, Yamaha would issue a new franchise directly to MDK upon Yamaha's required approval of the transaction. As have the parties in their briefs, we will use the term "sale" in this opinion.

On July 18, 2008, Yamaha manager Stout stated that Yamaha would expedite the paperwork and that an interim reopening of the Powerhouse dealership was not necessary because MDK was an existing Yamaha franchisee in another location. On the same day, Powerhouse and MDK executed a formal agreement for the sale of the dealership to MDK.

At the same time as these negotiations were ongoing, and unbeknownst to Powerhouse or MDK, Yamaha began the section 3060 procedure for terminating the Franchise Agreement. The Franchise Agreement gives Yamaha the right to terminate if Powerhouse closed its operations for a period of seven consecutive days. (See also § 3060, subd. (a)(1)(B)(v).) On July 11, 2008, when Powerhouse had been closed for almost a month, Rocky Aiello signed an internal dealer cancellation request which was followed by a notice of termination of the Franchise Agreement as required by section 3060. The notice was misaddressed and not received by Powerhouse. Another notice of termination was sent on July 24, 2008, after the finalization of the Powerhouse/MDK sale agreement. Powerhouse received this notice on July 26, 2008.

The notice of termination complied with the requirements of section 3060. The notice triggered a statutory obligation on the part of Powerhouse to file a protest with the Board, a state agency created to enforce the Vehicle Code provisions. Section 3060, subdivision (b)(2) provides that, upon a timely protest by a dealer, a franchise may not be terminated without the approval of the Board.

On July 28, 2008, Pilg telephoned Richard Tilly, Yamaha's Senior Legal Counsel, regarding the notice of termination. Tilly was not aware of the pending sale to MDK and declined to discuss the termination notice. Tilly advised Pilg to contact an attorney. Tilly followed up with a letter to Powerhouse stating that Yamaha was not withdrawing or delaying the effectiveness of its notice of termination. Pilg e-mailed Dawson for an explanation but received no reply. Aiello was aware that Pilg did not understand the effect of the notice of termination and was seeking information from Yamaha.

MDK sent its franchise application package to Yamaha on August 5, 2008. The package was forwarded to Aiello and other Yamaha executives for review, but was never fully processed. On August 8, 2008, Yamaha attorney Tilly wrote to Pilg stating that submission of the Powerhouse/MDK agreement did not prevent application of the termination notice, and informed Pilg that the Franchise Agreement would terminate on August 9, 2008, because Powerhouse had failed to file a timely section 3060 protest.

Powerhouse filed a late protest to the notice of termination on August 15. Yamaha moved to dismiss the protest as untimely. The Board conducted a hearing on Yamaha's motion to dismiss and granted the motion, finding that the protest was untimely. The opinion of the administrative law judge recited the facts concerning the closure of the Powerhouse dealership, the sale of the dealership to MDK, and the conduct of Yamaha during the negotiation of the sale. The opinion concluded that Yamaha had the burden of establishing it had a good faith belief that Powerhouse had gone out of business, and that Powerhouse would not reopen the business even if the dealership were sold to MDK. The Board also found that Powerhouse had not established Yamaha should be barred on "estoppel" principles from challenging the timeliness of Powerhouse's protest.

As a consequence of the Board's ruling, MDK cancelled its purchase of Powerhouse and Powerhouse was liquidated. Pilg filed for bankruptcy in October 2009 and the trustee in bankruptcy, Jerry Namba, assumed control over the instant litigation.

Powerhouse filed its lawsuit against Yamaha in March 2009. Its operative complaint alleges four causes of action by Powerhouse against Yamaha: a violation of section 11713.3⁴ (unreasonable withholding of consent to sale of franchise), intentional interference with contractual relations, intentional interference with prospective business advantage, and breach of contract and the covenant of good faith. It also alleges three causes of action by Pilg against Yamaha: violation of section 11713.3, interference with prospective business advantage, and intentional interference with contractual relations.

⁴ See footnote 5, *infra*.

Powerhouse also petitioned for a writ of mandate to overturn the Board's decision on the timeliness of Powerhouse's protest.

The trial court denied the writ of mandate on July 2, 2010. The court found Pilg knew that closure of Powerhouse could lead to termination of his franchise, and that Powerhouse failed to establish that Yamaha had misled Powerhouse with respect to its need to protest Yamaha's notice of termination.

After the denial of Yamaha's motion for summary judgment, the case was tried by a jury in June 2011. During trial, the trial court granted Yamaha's motion for nonsuit on Pilg's section 11713.3 claim.

The jury found Yamaha liable on all remaining claims. The jury awarded Powerhouse \$811,000 in compensatory damages and \$140,000 in punitive damages, and awarded Pilg \$325,080 in compensatory damages and \$60,000 in punitive damages. The court awarded Powerhouse attorney fees with respect to the section 11713.3 claim but denied fees with respect to the administrative proceeding before the Board and Powerhouse's request for writ relief from the Board's decision.

Yamaha filed motions for a new trial and judgment notwithstanding the verdict. After both motions were denied, the parties filed timely notices of appeal and cross-appeal.

DISCUSSION

Standard of Review

Yamaha's principal contention is that the Franchise Agreement was terminated as a matter of law due to the closure of the Powerhouse dealership and Powerhouse's failure to file a timely protest pursuant to section 3060. We exercise our independent judgment in the review of pure questions of law, such as the interpretation of statutes, and application of a statute to undisputed facts. (*Phillips, Spallas & Angstadt, LLP v. Fotouhi* (2011) 197 Cal.App.4th 1132, 1138; *Kavanaugh v. West Sonoma County Union High School Dist.* (2003) 29 Cal.4th 911, 916.)

To the extent Yamaha challenges the jury verdict on evidentiary grounds, we review the judgment under the substantial evidence standard. (*Tesoro Del Valle*

Master Homeowners Assn. v. Griffin (2011) 200 Cal.App.4th 619, 634.) We view the evidence in the light most favorable to the prevailing party, and resolve all conflicts in the evidence in favor of the judgment. (*Ibid.*) The jury has the power to give whatever weight it chooses to the evidence and we will not reweigh the evidence or redetermine credibility. (*Ibid.*; *San Diego Metropolitan Transit Development Bd. v. Cushman* (1997) 53 Cal.App.4th 918, 931.)

The Board's Decision Does Not Preclude Powerhouse's Claims

As stated, Yamaha contends the Franchise Agreement was terminated through the section 3060 protest procedure and that the termination and the Board's ruling preclude all Powerhouse and Pilg claims as a matter of law. Yamaha argues that its termination of the Franchise Agreement left Powerhouse with nothing to sell and Yamaha with nothing to approve. We conclude, as did the trial court, that the Board's decision regarding the timeliness of Powerhouse's section 3060 protest did not terminate the franchise as a matter of law and Yamaha remained bound by the mandate of section 11713.3 subdivision (d)(1) to act reasonably in considering the Powerhouse/MDK sale.

Section 3000 et seq. and section 11700 et seq. establish a statutory scheme regulating the franchise relationship between vehicle manufacturers and distributors, and their dealers. (*Tovas v. American Honda Motor Co.* (1997) 57 Cal.App.4th 506, 512.) The purpose of this scheme is "to avoid undue control of the independent new motor vehicle dealer by the vehicle manufacturer or distributor and to insure that dealers fulfill their obligations under their franchises and provide adequate and sufficient service to consumers generally." (See Historical and Statutory Notes, 65B West's Ann. Veh. Code (2000 ed.) foll. § 3000, p. 371; *Tovas*, at pp. 512-513.) The United States Supreme Court has recognized that the "disparity in bargaining power between automobile manufacturers and their dealers prompted Congress and some 25 States to enact legislation 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, fns. omitted.)

In regulating the relationship between manufacturers and distributors, section 11713.3 sets forth a list of unlawful acts, enables the Board to resolve certain

disputes, and allows licensees to sue for damages. (See *Mazda Motor of America, Inc. v. New Motor Vehicle Bd.* (2003) 110 Cal.App.4th 1451, 1458.) It provides, inter alia, that it is unlawful for a manufacturer or distributor "to prevent or require, or attempt to prevent or require" any dealer from selling or otherwise transferring its interest in a dealership franchise to another person. (§ 11713.3, subd. (d)(1).)⁵ It further provides that a manufacturer or distributor may require its approval of a franchise sale but such approval "shall not be unreasonably withheld." (*Ibid.*) It is also unlawful for a manufacturer or distributor "[t]o prevent, or attempt to prevent, a dealer from receiving fair and reasonable compensation for the value of the franchised business." (*Id.* at subd. (e).)

Section 3050 gives the Board various "duties," and empowers the Board to "[c]onsider any matter concerning the activities or practices" of new motor vehicle manufacturers, distributors and dealers. (At subd. (c).) Under section 3050, subdivision (d), the Board has the power to "[h]ear and decide, within the limitations and in accordance with the procedure provided, a protest presented by a franchisee" pursuant to section 3060. Section 3060 provides that "no franchisor shall terminate or refuse to continue any existing franchise" unless certain conditions are met, and gives a franchisee the right to file a protest with the Board regarding termination. (At subd. (a)(1).) When a timely protest is filed, the franchise may not be terminated until the board makes its findings. (*Id.* at subd. (a)(2); *Tovas v. American Honda Motor Co.*, *supra*, 57 Cal.App.4th at pp. 512-516.)

Although certain portions of sections 3050 and 3060 appear to give the Board broad authority to resolve distributor-dealer disputes, a series of appellate decisions have limited its power. (*Miller v. Superior Court* (1996) 50 Cal.App.4th 1665,

⁵ Section 11713.3, subdivision (d)(1) provides in its entirety that it is unlawful for any manufacturer or distributor: "Except as provided in subdivision (t), to prevent or require, or attempt to prevent or require, by contract or otherwise, any 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 another person. A dealer, officer, partner, or stockholder shall not, however, have the right to sell, transfer, or assign the franchise, or any right thereunder, without the consent of the manufacturer or distributor except that the consent shall not be unreasonably withheld."

1675; *Hardin Oldsmobile v. New Motor Vehicle Bd.* (1997) 52 Cal.App.4th 585, 590 (*Hardin*); *Mazda Motor of America, Inc. v. New Motor Vehicle Bd.*, *supra*, 110 Cal.App.4th at p. 1457.) Specifically, language in section 3050, subdivision (c), giving the Board authority to "[c]onsider *any* matter concerning the activities or practices" (italics added) of a licensee, has been limited to authority to investigate, regulate licensing, and resolve disputes between the public and licensees. (*Hardin*, at p. 590; *Mazda Motor of America*, at p. 1457.) The delegation of greater powers to the Board would violate the judicial powers clause of the California Constitution. (*Hardin*, at p. 598; *Mazda Motor of America*, at p. 1457.)

In addition, section 3050 was amended in 1997 to add subdivision (e), which expressly provides that "[n]otwithstanding subdivisions (c) and (d), the courts have jurisdiction over all common law and statutory claims originally cognizable in the courts" and "a party may initiate an action directly in any court of competent jurisdiction." This amendment preserves the right of dealers and other licensees to file a civil action for all common law and statutory claims. (See *Tovas v. American Honda Motor Co.*, *supra*, 57 Cal.App.4th at p. 519; *DaimlerChrysler Motors Co. v. Lew Williams, Inc.* (2006) 142 Cal.App.4th 344, 352-353.)

Yamaha acknowledges limitations on the Board's jurisdiction and concedes that a dealer such as Powerhouse may file a civil action asserting statutory and common law claims without exhausting administrative remedies, and without filing a protest with the Board. Yamaha further concedes that the Board did not have jurisdiction over Powerhouse's section 11713.3 statutory claim or its common law claims.

Yamaha argues, however, that the Board retains jurisdiction over a section 3060 protest under section 3050, subdivision (d), and that a dealer must file a timely section 3060 protest in order to prevent termination of its franchise and the loss of its right to assert other statutory and common law claims in a civil action. In substance, Yamaha argues that section 3060 trumps all judicial and statutory limitations on the Board's authority and takes precedence over such limitations.

We agree that the Board retains jurisdiction to decide the timeliness of a dealer protest, but such a determination does not preempt or limit a dealers' section 11713.3 and common law rights. The Board appears to agree with us. In this case, the Board determined that the Powerhouse protest was late but did not assert jurisdiction to adjudicate Powerhouse's claims under section 11713.3 and general contract law. While section 3060 provides an expeditious method for terminating a franchise under certain circumstances, it does not preclude a civil action when the facts show unreasonable conduct by the franchisor in violation of other statutes and general contract law. Section 3050, subdivision (e) provides that "[n]otwithstanding subdivisions (c) and (d), the courts have jurisdiction over all common law and statutory claims" (Italics added.)

The *Hardin* case provides a cogent and persuasive analysis of the pertinent issue prior to the enactment of section 3050, subdivision (e). *Hardin* addressed the earlier case of *Yamaha Motor Corp. v. Superior Court* (1986) 185 Cal.App.3d 1232, in which a Yamaha dealer filed a complaint for common law claims similar to those alleged by Powerhouse. In rejecting *Yamaha Motor Corp.*'s holding that the Board had jurisdiction over the dispute, the court in *Hardin* reasoned: "That a litigant must exhaust *administrative remedies* before seeking relief in the courts does not bestow upon the administrative agency the jurisdiction to consider and resolve *all common law and statutory remedies*. Prior resort to the administrative agency does not take away from the litigant the right to allege and prove claims not under the jurisdiction of the agency and does not expand the jurisdiction of the agency to hear and consider those claims." (*Hardin, supra*, 52 Cal.App.4th at p. 593.)

The *Hardin* court concluded that the Board's jurisdiction under section 3050, subdivision (d), allowed the Board to hear and consider protests only "*within the limitations and in accordance with the procedure provided*" in section 3060. (*Hardin, supra*, 52 Cal.App.4th at p. 593.) The court reasoned that this statutory limitation did not give the Board jurisdiction to consider common law or statutory claims merely because some facts forming the foundation for such claims can be asserted as part of a statutory protest claim under section 3060. (*Id.* at pp. 593-594.)

We also find unpersuasive Yamaha's argument that the Board's decision rejecting Powerhouse's claim is entitled to substantial deference. The authority of the Board to consider similar arguments does not expand its constitutional jurisdiction. Also, the degree of "respect" accorded the agency's interpretation depends on the circumstances. An administrative agency's interpretation of a statute is entitled to significant deference only if ". . . the agency has expertise and technical knowledge, especially where the legal text to be interpreted is technical, obscure, complex, open-ended, or entwined with issues of fact, policy, and discretion. . . ." (*Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 7, 12.) Here, the ruling did not require technical knowledge and was not obscure, complex or entwined with other issues.

Yamaha relies on *Sonoma Subaru, Inc. v. New Motor Vehicle Bd.* (1987) 189 Cal.App.3d 13 for the proposition that a notice of termination must be treated as final and effective when a timely protest is not filed by the dealer. In *Sonoma Subaru*, the court refused to incorporate a "good cause" exception to the section 3060 time deadline because it would frustrate the intent of the Legislature. (*Id.* at pp. 20-22.) Nothing in the opinion, however, supports the conclusion that the expedited protest procedure set forth in section 3060 gives the Board authority to resolve common law and statutory claims involving a substantive dispute between a franchisor and franchisee. As *Hardin* clearly states, "The jurisdiction of the New Motor Vehicle Board [] has limits." (*Hardin, supra*, 52 Cal.App.4th at p. 587.) Jurisdiction to resolve such disputes is with "any court of competent jurisdiction." (§ 3050, subd. (e).)

Substantial Evidence Supports the Jury's Factual Findings

Substantial evidence supports the jury's factual findings that Yamaha unreasonably withheld its consent to Powerhouse's sale of the Franchise Agreement to MDK. Substantial evidence shows that Yamaha repeatedly informed Powerhouse that a sale could be approved despite the section 3060 proceedings, but refused to consider approval of the MDK sale despite a prior franchisor-franchisee relationship between Yamaha and MDK and the submission of substantial documentation supporting approval of the sale. In fact, Yamaha does not offer substantial argument to the contrary and,

instead, relies on its position that the Franchise Agreement was terminated in its entirety when Powerhouse failed to file a timely protest under section 3060.

No Instructional Error

Yamaha argues that it is entitled to a new trial because the trial court failed to instruct the jury on the effect of Powerhouse's failure to file a timely protest of Yamaha's notice of termination. We disagree.

Upon request, a trial court must give the jury correct, nonargumentative instructions on every theory of the case supported by substantial evidence. (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 572.) "Instructions should state rules of law in general terms and should not be calculated to amount to an argument to the jury in the guise of a statement of law. [Citations.] Moreover, it is error to give, and proper to refuse, instructions that unduly overemphasize issues, theories or defenses either by repetition or singling them out or making them unduly prominent although the instruction may be a legal proposition. [Citations.]" (*Fibreboard Paper Products Corp. v. East Bay Union of Machinists* (1964) 227 Cal.App.2d 675, 718.)

Yamaha's proposed jury instruction began with a summary of the section 3060 notice of termination and protest procedure but continued by stating: "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. . . . [¶] Plaintiffs failed to file a timely protest with the Board . . . and Plaintiffs' Yamaha Dealer Agreement was terminated at that time." The trial court concluded that this language was not neutral, and gave an instruction regarding the section 3060 procedure without language stating that the Franchise Agreement "was terminated" when Powerhouse failed to file a timely protest. We agree with the trial court that Yamaha's proposed instruction was argumentative and that the instruction actually given fully and adequately instructed the

jury on the relevant law.⁶ (See *Major v. Western Home Ins. Co.* (2009) 169 Cal.App.4th 1197, 1217.)

Contract Claim Not Barred by Material Breach by Powerhouse

Yamaha contends the closure of the Powerhouse dealership constituted a material breach of the Franchise Agreement that barred Powerhouse's claim for breach of contract and the implied covenant of good faith and fair dealing. We disagree.

The law implies in every contract a covenant of good faith and fair dealing providing that no party to the contract will do anything that would deprive another party of the benefits of the contract. (*Wilson v. 21st Century Ins. Co.* (2007) 42 Cal.4th 713, 720.) The covenant cannot impose duties beyond the express terms of the contract, but, when a contract gives one party a discretionary power affecting the rights of the other, that party must exercise its discretion in good faith and in accordance with fair dealing. (*Peak-Las Positas Partners v. Bollag* (2009) 172 Cal.App.4th 101, 106.)

The closure of the Powerhouse dealership is specified in the Franchise Agreement as a ground for termination, but section 11713.3 prohibits Yamaha from taking action to prevent Powerhouse from selling its franchise and imposes a duty on Yamaha to act reasonably in connection with a sale. Here, substantial evidence supports the jury's finding that Yamaha acted in bad faith by encouraging Powerhouse to complete a sale to MDK, representing that it would consider the sale even if consummated after the

⁶ The jury was instructed: "When a distributor wishes to terminate a dealer agreement (aka franchise) it is required by law to give a Termination Notice that conforms to Vehicle Code section 3060.

"The first page of the written notice shall contain 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.'

"A dealer wishing to challenge the franchise termination has the right to have the propriety of the termination reviewed by the New Motor Vehicle Board. In order to obtain review by the New Motor Vehicle Board the dealer must file a protest with the New Motor Vehicle Board within the time period for a protest stated in the Termination Notice. In this case that period was 10 days."

closure of Powerhouse's dealership, and informing Powerhouse that a reopening of its dealership was not required to obtain Yamaha's approval.

Intentional Interference with Contractual Relations

Citing *Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503 (*Applied Equipment*), Yamaha contends that it cannot be sued for interference with the proposed Powerhouse/MDK contract because it was not a "stranger" to that contract. Yamaha argues that the claim is barred because Yamaha had a legitimate interest in the contract based on its right to approve a successor dealer and as the distributor of Yamaha products to a new franchisee. We disagree.

The tort of intentional interference with contractual relations requires (i) a contractual relationship between a plaintiff and a third party, (ii) defendant's knowledge of the contract, (iii) defendant's intent to disrupt performance of the contract, and (iv) conduct by defendant preventing performance of the contract. (CACI No. 2201; *Pacific Gas & Electric Co. v. Bear Stearns & Co.* (1990) 50 Cal.3d 1118, 1126.) In *Applied Equipment*, our Supreme Court held that "the tort cause of action for interference with a contract does not lie against a party to the contract." (*Applied Equipment, supra*, 7 Cal.4th at p. 514.) But, the court also stated that the 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." (*Ibid.*) Yamaha argues that *Applied Equipment* should be extended to include nonparties such as Yamaha who have a "legitimate interest in the scope or course of the contract's performance."

In *Woods v. Fox Broadcasting Sub., Inc.* (2005) 129 Cal.App.4th 344, the court acknowledged this broader language in *Applied Equipment*, but declined to extend the holding of that case which excluded only parties to the contract from asserting an intentional interference claim. *Woods* stated that *Applied Equipment* used the term "stranger to a contract" "interchangeably with the terms 'noncontracting parties' . . . and 'third parties.'" (*Id.* at p. 353.) *Applied Equipment* never "considered the potential liability of noncontracting parties who had some general economic interest or other stake

in the contract." (*Id.* at p. 352.) No published California case has disagreed with *Woods* or expanded the scope of *Applied Equipment*.⁷

We also decline to extend the holding of *Applied Equipment*. The evidence shows that Yamaha was the distributor and that Yamaha would supply new motor vehicles to any successor dealer at prices and terms determined by Yamaha and the dealer. There is no evidence that Yamaha had any right to determine the vehicles sent to the dealer, approve or disapprove any business practice of the dealer, assume any financial obligations to the dealer, or otherwise review any part of the dealer's operations. Nor did Yamaha have any rights to determine the terms or conditions of the Powerhouse/MDK contract apart from approval of the sale and review of MDK's financial stability as a Yamaha dealer.

No Error in Award of Compensatory Damages

Yamaha contends that a portion of the compensatory damage award included a loss Powerhouse did not incur. Yamaha argues that the damages awarded were based on the full amount Powerhouse would have received under its agreement with MDK, but that there was no evidence that Powerhouse made any effort to mitigate its damages by selling its inventory after the MDK sale was aborted.

We agree with Yamaha that a plaintiff cannot be compensated for damages that were not incurred or could have been mitigated by reasonable effort or expenditures. (*Lu v. Grewal* (2005) 130 Cal.App.4th 841, 849-850.) Whether a plaintiff acted reasonably to mitigate damages, however, is a factual matter to be determined by the trier of fact, and is reviewed under the substantial evidence test. (*Green v. Smith* (1968) 261 Cal.App.2d 392, 397.) The burden of proving a plaintiff failed to mitigate damages,

⁷ We acknowledge that a federal district court case dealing with facts similar to the instant case supports Yamaha's position to some extent. In *Fresno Motors, LLC v. Mercedes-Benz USA, LLC* (E.D. Cal. 2012) 852 F.Supp.2d 1280, a new car dealer sued Mercedes Benz for tortious interference with the dealer's contractual relationship with a prospective purchaser of the dealership. We conclude that *Fresno Motors* is inapposite and relies, not on California precedent, but rather a Ninth Circuit case that did not rely on or cite *Applied Equipment* and did not concern the immunity of a noncontractual party from a claim of intentional interference with contract relations. (*Marin Tug & Barge, Inc. v. Westport Petroleum, Inc.* (9th Cir. 2001) 271 F.3d 825, 832-834.)

however, is on the defendant, not the other way around. (*Lu, supra*, at pp. 849-850; *Millikan v. American Spectrum Real Estate Services California, Inc.* (2004) 117 Cal.App.4th 1094, 1105; *Jackson v. Yarbray* (2009) 179 Cal.App.4th 75, 97.)

Yamaha's argument that Powerhouse failed to mitigate damages ignores its burden of proof and the standard for review. The jury was properly instructed on Powerhouse's duty to mitigate its damages. Yamaha fails to demonstrate that in awarding compensatory damages the jury did not take into account the efforts of Powerhouse to mitigate damages.

No Error in Award of Punitive Damages

Yamaha contends that the \$200,000 award of punitive damages to Powerhouse and Pilg was improper because punitive damages cannot be recovered for breach of contract, and because there is insufficient evidence to support the award. We disagree.

Civil Code section 3294, subdivision (a) permits an award of punitive damages "for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice." Civil Code section 3294, subdivision (b), provides that a corporate employer is not liable for punitive damages based upon the acts of its employees unless the acts were committed, authorized, or ratified by a corporate officer, director, or managing agent.

As with compensatory damages, we review an award of punitive damages under the substantial evidence test. (*County of San Bernardino v. Walsh* (2007) 158 Cal.App.4th 533, 545; *Kelly v. Haag* (2006) 145 Cal.App.4th 910, 916.) We consider the evidence in the light most favorable to the prevailing party, giving that party the benefit of every reasonable inference, and resolve evidentiary conflicts in support of the judgment. (*Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.* (2000) 78 Cal.App.4th 847, 891.)

Yamaha argues that the punitive damage award was derived from Yamaha's conduct which was expressly permitted by the Franchise Agreement and section 3060.

We have previously addressed that issue at length and further note that Powerhouse's intentional interference and section 11713.3 claims are based on tort liability.

Yamaha also argues that the punitive damage award fails because there is no substantial evidence permitting the jury to find that Rocky Aiello, Yamaha regional manager, was a "managing agent" of Yamaha. Again, we disagree.

The term "managing agent" includes "only those corporate employees who exercise substantial independent authority and judgment in their corporate decision-making so that their decisions ultimately determine corporate policy." (*White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 566–567.) "[T]o demonstrate that an employee is a true managing agent . . . , a plaintiff seeking punitive damages would have to show that the employee exercised substantial discretionary authority over significant aspects of a corporation's business." (*Id.* at p. 577.) But, the determination of whether certain employees are managing agents ". . . does not necessarily hinge on their "level" in the corporate hierarchy. Rather, the critical inquiry is the degree of discretion the employees possess in making decisions" (*Kelly–Zurian v. Wohl Shoe Co.* (1994) 22 Cal.App.4th 397, 421.)

Here, there was substantial evidence for a reasonable jury to conclude that Rocky Aiello was a "managing agent" of Yamaha for purposes of an award of punitive damages. The evidence established that Aiello was the "Regional Sales Manager for the Western Region" which included California and three other states. His region included between 140 and 240 dealerships. He managed a group of "district managers" and, as he testified, was "ultimately responsible for the total well-being of Yamaha Motor Corporation Dealers." Further, evidence shows that Aiello was directly involved in the Powerhouse/MDK sale and was responsible for the decision to terminate the dealership.

No Error in Award of Attorney Fees

The trial court awarded Powerhouse attorney fees under section 11726 in the total amount of \$533,350. Yamaha contends attorney fees were not recoverable because there is no evidence supporting a jury finding that Yamaha willfully failed to comply with the Vehicle Code as required by section 11726. We disagree.

Section 11726 provides that "[a]ny licensee suffering pecuniary loss because of any willful failure by any other licensee to comply with" various provisions of the Vehicle Code including section 11713.3 "may recover damages and reasonable attorney fees therefor in any court of competent jurisdiction." Yamaha argues that there was no willful violation because it complied with the requirements of section 3060 in seeking to terminate the Franchise Agreement and reasonably believed that its conduct was not wrongful in any manner.

Although there are no published cases regarding an attorney fee award under section 11726, an appeal of an award of attorney fees is generally reviewed under the abuse of discretion standard. (See, e.g., *Moran v. Oso Valley Greenbelt Assn.* (2001) 92 Cal.App.4th 156, 160.) We conclude that an award of attorney fees was authorized by section 11726 and there was no abuse of discretion by the trial court. As the trial court stated, "willful" conduct is defined as "intentional *wrongful* conduct, done either with a knowledge that serious injury to another will probably result, or with a wanton and reckless disregard of the possible results." (*Calvillo-Silva v. Home Grocery* (1998) 19 Cal.4th 714, 735, fn. omitted, overruled on another ground in *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 853, fn. 19.) As the trial court further concluded, willfulness was embodied in the jury's finding that Yamaha "intend[ed] to disrupt" performance of the Powerhouse/MDK agreement, and that Yamaha acted with "malice, oppression, or fraud." The evidence in this case supports the conclusion that Yamaha acted willfully with knowledge of its obligations under section 11713.3 and knowledge of the dire financial consequences of its actions.

POWERHOUSE AND PILG CROSS-APPEAL

No Error in Granting Nonsuit on Pilg's Section 11713.3 Claim

Pilg contends the trial court erred in granting Yamaha's motion for nonsuit on the fifth cause of action brought by Pilg for violation of section 11713.3. We disagree.

A defendant is entitled to a nonsuit when, as a matter of law, the evidence presented by the plaintiff is insufficient to allow a jury to find in plaintiff's favor.

(*Saunders v. Taylor* (1996) 42 Cal.App.4th 1538, 1541; see Code Civ. Proc., § 581c.) The trial court must interpret all of the evidence most favorably to the plaintiff's case and most strongly against the defendant, and must resolve all presumptions, inferences, conflicts and doubts in favor of the plaintiff. (*Saunders*, at p. 1541.) We review the court's ruling de novo, applying the same standard. (*Lund v. Bally's Aerobic Plus, Inc.* (2000) 78 Cal.App.4th 733, 737.)

Section 11713.3, subdivision (d)(1) provides that it is unlawful for a manufacturer or distributor of new motor vehicles to prevent or attempt to prevent "a dealer, or an officer, partner, or stockholder of a dealership" to sell or transfer "a part of the interest of any of them to another person." The statute concerns the sale or transfer of an "interest" in a new motor vehicle dealership and, more specifically, the franchise to sell the vehicles of a particular manufacturer or distributor. Pilg was an officer and shareholder of Powerhouse, but Powerhouse owned the dealership and the Yamaha franchise. Pilg was not transferring any interest in the dealership or franchise, and the claims against Yamaha concerned Yamaha's interference in the sale of the Powerhouse franchise, not Pilg's interest as an officer and shareholder of Powerhouse.

The Powerhouse/MDK sale included the leasehold interest of Powerhouse in the building occupied by the Powerhouse dealership and, as owner of the building, Pilg was Powerhouse's lessor. Contrary to Pilg's assertion, his interest in the building did not constitute an "interest" in the Powerhouse dealership which was being sold to MDK. Pilg may have suffered economic detriment from Yamaha's action but the intent of section 11713.3 is to protect new motor vehicle dealers against overreaching by manufacturers and distributors. It does not encompass every type of economic detriment.

Because we affirm the trial court's granting of nonsuit, we do not address the proper jury instruction regarding the causation element of Pilg's claim.

No Error Regarding Award of Attorney Fees

The trial court awarded attorney fees to Powerhouse under section 11726 for violation of section 11713.3, but denied attorney fees incurred in the protest proceeding before the Board and in bringing a writ of mandate to overturn the Board's

ruling. Powerhouse contends the trial court erred by not awarding fees for the Board proceeding. We disagree.

As previously stated, section 11726 permits recovery of attorney fees because of a "willful failure" by a licensee to comply with provisions of the Vehicle Code or any "decision rendered by the board." Here, the record shows that Yamaha fully complied with the statutory requirements of section 3060 regarding its notice of termination, including giving the required notice of Powerhouse's right to file a protest. Powerhouse did not file a protest within the statutory period. Powerhouse did not suffer a loss due to the willful failure of Yamaha to comply with section 3060 or any decision by the Board. Moreover, a licensee is entitled only to reasonable attorney fees under section 11726. The trial court awarded attorney fees and there is no basis in the record to conclude the amount was not reasonable, or that the court abused its discretion.

The judgment is affirmed in all respects. Powerhouse is awarded costs on appeal.

CERTIFIED FOR PUBLICATION.

PERREN, J.

We concur:

GILBERT, P. J.

YEGAN, J.

Martin J. Tangeman, Judge
Superior Court County of San Luis Obispo

Baker & Hostetler, Maurice Sanchez; Gibson, Dunn & Crutcher, Theodore J. Boutrous, Jr., Marjorie Ehrich Lewis, Blaine H. Evanson, Bradley J. Hamburger for Appellant Yamaha Motor Corporation, U.S.A.

Diane M. Matsinger; Andre, Morris & Buttery, Dennis D. Law, Collette A. Hillier for Appellants Powerhouse Motorsports Group, Inc., and Jerry Namba, as bankruptcy trustee, successor in interest to Timothy L. Pilg.

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

POWERHOUSE MOTORSPORTS
GROUP, INC., et al.,

Plaintiffs and Appellants,

v.

YAMAHA MOTOR CORPORATION,
U.S.A.,

Defendant and Appellant.

2d Civil No. B236705
(Super. Ct. No. CV098090)
(San Luis Obispo County)

ORDER MODIFYING OPINION
AND DENYING REHEARING

[NO CHANGE IN JUDGMENT]

COURT OF APPEAL – SECOND DIST.

FILED

Dec 24, 2013

JOSEPH A. LANE, Clerk

gbents Deputy Clerk

THE COURT:

It is ordered that the opinion filed on November 26, 2013, be modified as follows:

On page 5, in the third full paragraph, the first sentence beginning "As a consequence of the Board's ruling," is deleted and replaced with the following: "As a consequence of Yamaha's actions, MDK cancelled its purchase of Powerhouse and Powerhouse was liquidated."

On page 11, in the third full paragraph, the second sentence beginning "Substantial evidence shows" is deleted and replaced with the following: "Substantial evidence shows that Yamaha informed Powerhouse that a sale could be approved even though the dealership had been closed, and that Yamaha refused to consider approval of the MDK sale despite its prior relationship with MDK and its receipt of information supporting approval of the sale."

[There is no change in the judgment.]
The petitions for rehearing are denied.

EXHIBIT B

No. _____

IN THE SUPREME COURT OF CALIFORNIA

POWERHOUSE MOTORSPORTS GROUP, INC., et al.,
Plaintiffs-Respondents,

v.

YAMAHA MOTOR CORPORATION, U.S.A.,
Defendant-Petitioner.

SUPREME COURT
FILED

JAN - 6 2014

Frank A. McGuire Clerk
Deputy

After a Decision by the Court of Appeal of the State of California,
Second Appellate District, Division Six, Case No. B236705

San Luis Obispo County Superior Court, Case No. CV098090
The Honorable Martin J. Tangeman

PETITION FOR REVIEW

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ISSUES PRESENTED FOR REVIEW

1. Whether a motor vehicle franchisor may treat a franchise as terminated where statutory and contractual grounds for termination exist, the franchisor issues a Notice of Termination that complies with all the requirements of Vehicle Code section 3060, and the franchisee fails to file a protest to the Notice of Termination within the statutory deadline to do so; and

2. Whether California law and due process preclude an award of punitive damages against a motor vehicle franchisor that indisputably complied with the statutorily authorized mechanism for terminating a franchise under the Vehicle Code.

WHY REVIEW SHOULD BE GRANTED

The court of appeal's published opinion disrupts the Legislature's carefully crafted statutory scheme governing the termination of motor vehicle franchises, directly conflicts with *Sonoma Subaru, Inc. v. New Motor Vehicle Board* (1987) 189 Cal.App.3d 13 (*Sonoma Subaru*), injects enormous uncertainty into an industry of significant economic importance, and harms consumers by precluding the termination of franchisees that have closed, become insolvent, or engaged in unfair business practices.

Vehicle Code section 3060 expressly allows a franchisor to treat a franchise as terminated where, as here, (i) a franchisor's Notice of Termination fully complies with the statutory requirements, and (ii) "the appropriate period for filing a protest has elapsed." (§ 3060, subd. (a)(3).)¹ And since 1987, it has been settled law that where a franchisor sends a Notice of Termination under section 3060, and "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." (*Sonoma Subaru, supra*, 189 Cal.App.3d at p. 22.)

There is no question that Yamaha complied perfectly with the Vehicle Code's procedures for terminating the Powerhouse franchise. As Powerhouse's counsel admitted to the jury, "Yamaha followed the law on termination to the T." (13 Reporter's Transcript ("RT") 3691.) If Powerhouse had filed a timely statutory "protest" to Yamaha's statutorily compliant Notice of Termination, the termination would have been stayed until the New Motor Vehicle Board resolved the protest. (§ 3060, subd. (a)(2).) But it is undisputed that Powerhouse's

¹ All statutory references are to the Vehicle Code.

protest was untimely. (Slip opn. at p. 5 [“Powerhouse filed a late protest to the notice of termination”].)

Nevertheless, despite the plain text of Vehicle Code section 3060 allowing a franchisor to treat a franchise as terminated where the franchisee fails to file a timely protest, and the square holding of the Third Appellate District in *Sonoma Subaru* to that effect, the Second Appellate District in this case concluded that Yamaha’s unprotested Notice of Termination “did not terminate the franchise as a matter of law,” and therefore Yamaha “remained bound by the mandate of section 11713.3 subdivision (d)(1) to act reasonably in considering” a proposed sale of the franchise. (Slip opn. at p. 7.) As a result, the court held, Yamaha remained liable for not considering the sale of the Powerhouse franchise even *after* Yamaha precisely followed the section 3060 termination procedure. This ruling directly conflicts with *Sonoma Subaru* and the law of every other state to consider this issue.

The court of appeal’s decision leaves franchisors without a clear mechanism for ending their relationship with franchisees that have violated their statutory and contractual duties to serve consumers. Instead, it imposes on franchisors an indefinite obligation

to treat a defunct franchisee exactly the same as a franchisee with an operating dealership and an active franchise agreement, including, among other things, supplying it with new vehicles, allowing it to perform warranty repairs, and providing it with an opportunity to protest the establishment of a new franchise in the same market area. (§ 11713.3, subs. (a), (l), (p); § 3062, subd. (a)(1) [granting franchisees the right to protest the “establishment or relocation” of “an additional motor vehicle dealership” into a “relevant market area”].)

As *Sonoma Subaru* recognized, allowing a franchisor to “treat the termination as final and effective” where “no protest of the termination is filed within the allotted time” reflects “sound policy” and promotes “finality.” (*Sonoma Subaru, supra*, 189 Cal.App.3d at p. 22.) In departing from the bright-line rule created by the Legislature when it enacted section 3060, the court of appeal has “create[d] uncertainty in the minds of franchisors as to whether they may treat their relationship with unsatisfactory franchisees as concluded.” (*Ibid.*) And this uncertainty frustrates the Legislature’s intent in enacting section 3060, which was specifically designed to bring prompt certainty to the termination process and thus allow a franchisor to restore “warranty and other special services” to

consumers after an existing franchisee had committed a serious breach of its obligations (such as by closing its dealership, as occurred here). (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.)

Even worse, the court of appeal affirmed an award of *punitive damages* premised on Yamaha’s strict adherence to the Vehicle Code’s mechanism for terminating a franchise. (Slip opn. at pp. 16–17.) But the fact that “Yamaha followed the law on termination to the T” (13RT3691), actually *precludes* an award of punitive damages, because a defendant that strictly complies with the law lacks fair notice, based on objectively identifiable standards, that its conduct could give rise to a punitive award. (See, e.g., *FCC v. Fox Television Stations, Inc.* (2012) ___ U.S. ___ [132 S.Ct. 2307, 2317–2318] (*Fox*) [“A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required”]; *BMW of North Am., Inc. v. Gore* (1996) 517 U.S. 559, 574 (*BMW*) [“Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair

notice . . . of the conduct that will subject him to punishment”]; *Bordenkircher v. Hayes* (1978) 434 U.S. 357, 363 (*Bordenkircher*) [“To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort”].)

For all of these reasons, and as discussed in greater detail below, this Court’s review is “necessary to secure uniformity of decision” and “to settle . . . important question[s] of law.” (Cal. Rules of Court, rule 8.500, subd. (b)(1).)

FACTUAL AND PROCEDURAL BACKGROUND

1. Defendant-petitioner Yamaha Motor Corporation, U.S.A. is the United States distributor of Yamaha-brand motorcycles, all-terrain vehicles, and side-by-side utility vehicles. (3 Appellant’s Appendix (“AA”) 849.) Plaintiff-respondent Timothy Pilg owned and operated plaintiff-respondent Powerhouse, a Yamaha-franchised dealer in Paso Robles. (5RT1212, 1223–1232, 1242–1250.)

In August 2004, Pilg purchased a former Kmart building and relocated his dealership there. (5RT1228–1230.) The new location, at over 60,000 square feet, was about four times the size of the prior location. (5RT1226; 8RT2108, 2111–2113.) Before moving to the Kmart location, Pilg’s dealership had been steadily growing, and after

relocating, sales climbed from \$4 million to almost \$12 million in 2006. (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.) The parties stipulated at trial that “[o]n or about June 17, 2008, Powerhouse closed its dealership . . . [and] never re-opened.” (3AA849.)

Pilg knew at that time that closing the dealership was a serious and material breach of Powerhouse’s franchise agreement with Yamaha, and acknowledged that by closing Powerhouse he was “giving up the ability to sell” the Yamaha franchise. (7AA1989.) Section 6.2 of the franchise agreement specifically 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.)

2. Vehicle Code section 3060 regulates the circumstances under, and the method by which, a franchisor may terminate a franchise agreement. Franchisors are required to give franchisees written notice, containing statutorily prescribed language in 12-point bold type, that the franchisor is seeking to terminate the franchise. (§ 3060, subd. (a)(1).) The franchisee has a specified time period (which varies depending on the grounds for termination) to file a “protest” with the New Motor Vehicle Board (the “Board”) challenging the termination. (*Ibid.*)

For most termination situations, the termination notice sent to the franchisee must state (1) that the termination is effective after 60 days, and (2) that the franchisee has 30 days to protest the termination or the protest right will be waived. (§ 3060, subd. (a)(1)(C).) In recognition of certain particularly egregious circumstances, however, the Legislature provided for an expedited termination mechanism in five situations: (i) where the franchisee has transferred any ownership

or interest in the franchise without the consent of the franchisor; (ii) a 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.” (*Id.*, subd. (a)(1)(B).) In these situations, section 3060 provides that the termination notice sent to the franchisee must state (1) that the termination is effective after 15 days, and (2) that the franchisee has 10 days to protest the termination or the protest right will be waived. (*Id.*, subd. (a)(1)(C).)

If the franchisee files a timely protest, the Board conducts a hearing to determine whether there is “good cause” for the franchisor to terminate the agreement. (§ 3060, subd. (a)(2).) Until the “good cause” determination is made, the franchisor must continue to treat the dealer as not terminated. (*Ibid.*) If, however, “the appropriate period for filing a protest has elapsed” and no protest has been filed, the franchisor may terminate the franchise agreement immediately. (*Id.*,

subds. (a)(1), (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”].)

3. Pilg did not intend to sell the Powerhouse dealership or its Yamaha franchise when he initially closed it, but instead planned to liquidate the dealership, voluntarily terminate his franchise, and find someone to purchase or lease the former Kmart property. (5RT1251–1256; 7AA1989.) Pilg, however, later attempted to sell his closed dealership, including its Yamaha franchise, to another dealer, MDK. (5RT1257–1261.) MDK eventually entered into an asset purchase agreement with Powerhouse (5RT1260–1262; 7AA1749–1751, 1792–1805), which was “subject to factory approval which it [was Powerhouse’s] responsibility to obtain” (7AA1749).

When Pilg asked Yamaha employees whether he could sell the franchise despite Powerhouse’s closure, he was told he could do so while the franchise agreement was active. (5RT1259; 8RT2120–2123; 12RT3317–3319.) Prior to Yamaha’s issuance of a Notice of Termination, a Yamaha employee met with Pilg and MDK executives at the closed dealership, and agreed to send MDK a dealer application

packet and assist in getting the dealer approval process started. (5RT1272–1275; 8RT2120–2123.)

4. After verifying that Powerhouse had indeed closed its dealership, Yamaha sent Powerhouse a Notice of Termination under section 3060’s expedited termination procedure. (7AA1807–1808; 7RT1838–1840.) There is no dispute that the notice was sent, received, and that it complied with all the requirements of section 3060. (Slip opn. at p. 4 [“Powerhouse received this notice on July 26, 2008. The notice of termination complied with the requirements of section 3060.”].) Yamaha’s in-house counsel also explicitly advised Powerhouse and Pilg both orally and in writing, in response to Pilg’s inquiry about the significance of the Notice of Termination, that Yamaha was exercising its right to terminate the dealer agreement and was “not amending, withdrawing, or delaying the effectiveness of the termination notice,” and that Pilg should “seek assistance from [his] own legal counsel.” (7AA1811; 7RT1842–1843.)

Powerhouse’s statutory deadline to file a protest was August 5, 2008. (§ 3060, subd. (a)(1)(C); 1AA210; 7RT1846.) On August 8, 2008, Yamaha “informed Pilg that the Franchise Agreement would terminate on August 9, 2008, because Powerhouse had failed to file a

timely section 3060 protest.” (Slip opn. at p. 5.) On August 11, 2008, Yamaha advised Powerhouse that it was not interested in entering into a franchise agreement with MDK at Powerhouse’s former location. (7AA1835.) On August 15, 2008—10 days *after* the statutory deadline—Powerhouse filed an untimely protest with the Board. (Slip opn. at p. 5.)

On August 25, 2008, MDK cancelled its purchase, explaining that, “The Yamaha Motor Corporation[’s] termination of [the] dealer agreement for Powerhouse Motorsports is a violation of a condition of the Asset Purchase Agreement.” (7AA1837.) On August 26, 2008, Yamaha sent a letter to Pilg stating that it was “returning the materials submitted by MDK Motorsports for their proposed buy/sell of Powerhouse,” and was “no longer considering the buy/sell” because “Powerhouse has been terminated.” (7AA1839.)

5. Yamaha moved to dismiss Powerhouse’s protest before the Board as untimely. After written discovery, depositions, and a two-day evidentiary hearing, the Board granted Yamaha’s motion and dismissed the protest. (1AA4–5, 25.) In granting Yamaha’s motion, the Board 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 ha[d] failed to establish all necessary elements of estoppel.” (1AA25.) The trial court denied Powerhouse’s writ petition challenging the Board’s decision after finding that “substantial evidence support[ed] the Board’s factual findings.” (1AA224–225.)

6. In the operative complaint, Powerhouse and Pilg asserted claims against Yamaha under Vehicle Code section 11713.3 for unreasonably withholding consent to transfer the franchise to MDK, as well as common law claims (intentional interference with contractual relations, intentional interference with prospective business advantage, and breach of contract) all expressly premised on Yamaha’s alleged violation of section 11713.3. (1AA45–54.)

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, 50.) 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.” (1AA46, 51.)

7. Yamaha moved for summary judgment on the ground that Powerhouse’s failure to file a timely protest allowed Yamaha to treat the termination of Powerhouse’s franchise as final and effective. Because no franchise existed after the franchise agreement terminated, Yamaha had no obligation to further consider the sale of Powerhouse’s non-existent, terminated franchise to MDK. (1AA238–241.) The trial court denied the motion, concluding that “*Sonoma Subaru* . . . does 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.” (3AA840–841.)

8. After summary judgment was denied, the case went to trial. Yamaha moved for a non-suit and a directed verdict (3AA854–869; 11RT3102–3125; 14RT3905–3911), both of which the trial court denied, with one exception: It granted Yamaha’s motion for non-suit as to Pilg’s claim brought directly under section 11713.3. (12RT3304, 3309, 3370–3372; 14RT3911–3912.)

The jury found Yamaha liable on all of Powerhouse and Pilg’s remaining claims, awarded Powerhouse \$811,000 in compensatory

damages and \$60,000 in punitive damages, and awarded Pilg \$325,080 in compensatory damages and \$140,000 in punitive damages, for a total award of \$1,336,080. (15RT4202–4233; 16RT4587–4589.) Yamaha moved for a new trial and judgment notwithstanding the verdict, and the trial court denied both motions, stating that “[t]he Court stands by its prior rulings” on the section 3060 and section 11713.3 issues. (6AA1672.)

9. Yamaha appealed. In its November 26, 2013 published opinion, the court of appeal affirmed the judgment in full, including the award of punitive damages. The court of appeal “conclude[d] that Powerhouse’s right to seek and recover damages for Yamaha’s unreasonable refusal to approve the sale of Powerhouse’s dealership and franchise [was] not affected by Powerhouse’s failure to comply with the section 3060 procedure for challenging Yamaha’s termination of the Franchise Agreement . . . nor by the Board’s decision regarding the timeliness of Powerhouse’s protest to the notice of termination.” (Slip opn. at p. 2.) According to the court of appeal, “the Board’s decision regarding the timeliness of Powerhouse’s section 3060 protest did not terminate the franchise as a matter of law and Yamaha remained bound by the mandate of section

11713.3 subdivision (d)(1) to act reasonably in considering the Powerhouse/MDK sale.” (*Id.* at p. 7.)

Yamaha filed a petition for rehearing, which the court of appeal denied on December 24, 2013.

DISCUSSION

I. The Court of Appeal’s Ruling Conflicts with Other Decisions and Upends the Statutory Scheme

The court of appeal’s conclusion that Yamaha was obligated to consider a proposed sale of the Powerhouse franchise, even after Yamaha had properly terminated the franchise in strict compliance with the requirements of Vehicle Code section 3060, cannot be reconciled with the text of the statute and squarely conflicts with *Sonoma Subaru*. The court of appeal’s decision injects enormous uncertainty into both the termination mechanism and the motor vehicle industry more broadly. Indeed, it is now entirely unclear how a franchisor could ever bring to an end its relationship with, and obligations towards, a franchisee that has ceased operations and failed to file a timely protest to a statutorily compliant Notice of Termination. This Court should grant review to eliminate this uncertainty and confusion in an important area of law impacting an

industry of vital importance to the State of California and its consumers.

A. The Court of Appeal's Ruling Conflicts with Vehicle Code Section 3060 and *Sonoma Subaru*

The court of appeal's decision cannot be reconciled with either the text of the statute or *Sonoma Subaru*, both of which are clear in allowing a franchisor to treat a franchise as terminated for all purposes when a franchisee fails to timely protest termination.

The text of Vehicle Code section 3060 is unambiguous: A franchisor may treat a franchise as terminated where (i) the "franchisee and the board have received written notice from the franchisor" that contains certain required information (§ 3060, subd. (a)(1)), and (ii) "the appropriate period for filing a protest has elapsed" (*id.*, subd. (a)(3)). Thus, under section 3060, a franchisor can consider a franchise terminated when a franchisee fails to file a timely protest in response to a Notice of Termination, as the court in *Sonoma Subaru* recognized:

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. Thus, subdivision (c) [now (a)(3)] of section 3060 provides a condition of termination of a franchise is satisfied where, "The franchisor has received the written

consent of the franchisee, *or the appropriate period for filing a protest has elapsed.*”

(*Sonoma Subaru, supra*, 189 Cal.App.3d at p. 22, original italics.)

The court of appeal’s decision here directly conflicts with *Sonoma Subaru*. The court recognized that Yamaha’s “notice of termination complied with the requirements of section 3060” and therefore “[t]he notice triggered a statutory obligation on the part of Powerhouse to file a protest with the Board.” (Slip opn. at p. 4.) The court of appeal further acknowledged that “Powerhouse filed a late protest to the notice of termination.” (*Id.* at p. 5.) Under *Sonoma Subaru*, in view of the franchisee’s failure to file a timely protest, Yamaha would have been permitted to treat the franchise as terminated. And that is exactly what Yamaha did, as the court of appeal noted, when it wrote to Pilg and informed him that the franchise agreement “would terminate on August 9, 2008, because Powerhouse had failed to file a timely section 3060 protest.” (*Ibid.*)

But the court of appeal here held that Powerhouse’s franchise “did not terminate” as a result of its failure to file a timely protest, and therefore “Yamaha remained bound by the mandate of section 11713.3 subdivision (d)(1) to act reasonably in considering the Powerhouse/MDK sale.” (Slip opn. at p. 7.) According to the court

of appeal, “Powerhouse’s right to seek and recover damages for Yamaha’s unreasonable refusal to approve the sale of Powerhouse’s dealership and franchise [was] not affected by Powerhouse’s failure to comply with the section 3060 procedure for challenging Yamaha’s termination of the Franchise Agreement.” (*Id.* at p. 2.)

In other words, the court of appeal held that despite the expiration of the statutory protest deadline without the filing of a protest, Yamaha was *not* allowed to “treat the termination” of the Powerhouse franchise “as final and effective.” (*Sonoma Subaru, supra*, 189 Cal.App.3d at p. 22.) In the court of appeal’s view, even where a franchisee fails to timely file a protest to a statutorily compliant Notice of Termination—i.e., where “the appropriate period for filing a protest has elapsed” (§ 3060, subd. (a)(3))—franchisors are not allowed to “treat their relationship with unsatisfactory franchisees as concluded.” (*Sonoma Subaru, supra*, 189 Cal.App.3d at p. 22.) Rather, “Yamaha remained bound by the mandate of section 11713.3 subdivision (d)(1) to act reasonably in considering the Powerhouse/MDK sale.” (Slip opn. at p. 7.) There is simply no way to reconcile the court of appeal’s decision either with the express

language of section 3060, subdivision (a)(3), or with *Sonoma Subaru*'s straightforward reading of that language.

B. The Court of Appeal's Ruling Conflicts with Numerous Decisions of Other States

The court of appeal's decision is contrary to a basic principle of motor vehicle franchising law that has been consistently recognized by courts across the country applying statutory schemes virtually identical in relevant part to California's: that any obligation a franchisor may have to consider the sale of a franchise necessarily ends once the franchise is properly terminated.

For example, in *South Shore Imported Cars, Inc. v. Volkswagen of Am., Inc.* (1st Cir. 2011) 439 Fed.Appx. 7, Justice Souter, sitting by designation and writing for a unanimous First Circuit panel, affirmed summary judgment for a franchisor where a franchisee brought claims under Massachusetts law that were based on the franchisor's refusal to approve the sale of a franchise after "the effective period of the franchise agreement" had ended—claims essentially identical to those upheld in this case. (*Id.* at p. 10.) Likewise, in *Mt. Clemens Auto Center Inc. v. Hyundai Motor Am.* (E.D.Mich. 2012) 897 F.Supp.2d 570, the federal district court rejected similar claims brought under Michigan law, reasoning that "[o]nce the [franchise] agreement ended,

all obligations of the parties ceased,” and therefore “nothing required [the franchisor] to consider the proposed transfer” after termination. (*Id.* at p. 578.) The courts in *South Shore* and *Mt. Clemens* adopted precisely the argument that Yamaha advanced in this case, and that the court of appeal rejected.

Numerous other decisions from courts around the country are similarly in conflict with the court of appeal’s ruling here, including:

- *Chic Miller’s Chevrolet, Inc. v. General Motors Corp.* (D.Conn. 2005) 352 F.Supp.2d 251, 258 [“Miller’s franchise was terminated at the time he applied to transfer the franchise, so Miller had nothing left to transfer and GM could not be found to have breached the dealership contract by failing to approve the sale”];
- *David Glen, Inc. v. Saab Cars USA, Inc.* (N.D.Ill. 1993) 837 F.Supp. 888, 891–892 [reasoning that a franchisee’s “claim that Saab violated [its statutory duties under Illinois law] by refusing to approve, or even process, [a] proposed transfer of the franchise” was dependent on whether a termination was valid, because after termination, the franchisee would “no longer have any rights under” Illinois’s statutory scheme];
- *H-D Michigan, LLC v. Sovie’s Cycle Shop, Inc.* (N.D.N.Y. 2009) 626 F.Supp.2d 274, 279 [“It is not unreasonable to refuse to approve the transfer of a franchise that is in the process of being terminated”]; and
- *Maple Shade Motor Corp. v. Kia Motors Am., Inc.* (D.N.J. Aug. 8, 2006, No. Civ. A. 04-2224 (JEI)) 2006 WL 2320705, at p. *4 [“A franchisor that has already properly provided notice of termination based upon the franchisee’s failure to substantially comply with the franchise agreement should not be compelled

to allow the franchise to continue, whether with the current franchisee or a prospective one”].

The court of appeal’s decision places California in conflict with the law of every other state that has considered the question.

C. The Court of Appeal’s Decision Disrupts the Carefully Crafted Legislative Scheme

As explained in *Sonoma Subaru*, the Legislature enacted the protest and termination procedure in the Vehicle Code in order to promote fairness and finality—for both franchisors and franchisees. The court of appeal’s decision in this case upsets that scheme and creates enormous uncertainty, which will have serious negative consequences in this important area of California’s economy.

In adopting Vehicle Code section 3060, “the Legislature . . . prescribed a procedure of which franchisors may avail themselves in discontinuing franchise relationships” and thus “achieve[] a swift and expeditious resolution of the propriety” of a termination. (*British Motor Car Distributors, Ltd. v. New Motor Vehicle Bd.* (1987) 194 Cal.App.3d 81, 93–94.) The “statutory scheme evinces the Legislature’s intent to provide for an expedited procedure for resolving a protest by a car dealer,” and “the expedited timeframes that apply to protests promote finality, which benefits the public, car

manufacturers, and car dealers, and reduces uncertainty in the minds of all parties.” (*Nader Automotive Group, LLC v. New Motor Vehicle Bd.* (2009) 178 Cal.App.4th 1478, 1485.)

This need for finality is critically important because, as set forth in Vehicle Code section 11713.3, motor vehicle franchisors owe a host of duties to franchisees with active franchise agreements. In addition to requiring a franchisor to reasonably consider a proposed transfer of a franchise, section 11713.3 also prohibits franchisors from refusing to deliver new vehicles to franchisees or to provide warranty reimbursements or sales incentives. (§ 11713.3, subds. (a), (k), (p).) Section 11713.3 also prevents a franchisor from establishing a new franchise in the same relevant market area as an existing franchise without first giving statutory notice of its intent to establish an additional franchise and, in the event an existing franchisee protests, a finding by the Board that there is not good cause to prevent the establishment. (*Id.*, subd. (l); § 3062, subd. (a)(1).) Under the court of appeal’s logic, these obligations on the part of the franchisor would not come to an end, even where grounds for termination exist and all conditions for termination under section 3060 have been satisfied.

As a result, the court of appeal's decision requires franchisors to treat franchisees that have closed, are insolvent, have engaged in unfair business practices, or have made misrepresentations in applying for the franchise, the same as franchisees in good standing—and thus requires franchisors to continue supplying these franchisees with new vehicles for sale, allowing them to conduct warranty repairs and participate in sales incentive programs, and providing them with an opportunity to protest the establishment of a new franchise in the same market area. (See slip opn. at p. 7 [“the Board’s decision regarding the timeliness of Powerhouse’s section 3060 protest did not terminate the franchise as a matter of law and Yamaha remained bound by the mandate of section 11713.3 subdivision (d)(1) to act reasonably in considering the Powerhouse/MDK sale”].)

This absurd result of the court of appeal's decision leaves consumers indefinitely deprived of services and exposed to the risk of unscrupulous business practices. It is also specifically why *Sonoma Subaru* read section 3060 as allowing franchisors to treat franchises as terminated immediately upon the failure of the franchisee to file a timely protest. “Sanctioning late filings” would “create uncertainty in the minds of franchisors as to whether they may treat their

relationship with unsatisfactory franchisees as concluded” and thus frustrate the Legislature’s goals in enacting section 3060. (*Sonoma Subaru, supra*, 189 Cal.App.3d at p. 22; see also *id.* at p. 21 [“The structure of section 3060 thus reveals the Legislature has gone out of its way to *shorten* the time in which a franchisor can react to its franchisee’s insolvency. We cannot, by judicial fiat, extend what the Legislature has been careful to circumscribe.”].)

If not reversed, the court of appeal’s decision will require franchisors either to continue to deal indefinitely with terminated franchisees despite any negative effect on the franchisor’s business or harm to consumers, or else risk a lawsuit and, under the court of appeal’s ruling, inevitable liability. Such a prospect harms consumers, franchisors, and franchisees alike.

By unsettling the scope of the relationship between franchisors and franchisees, the court of appeal has thrown into flux a regulatory scheme governing an important aspect of California’s economy. California has the largest number of motor vehicle dealerships in the country, and revenues at California dealerships were over \$77 billion in 2012, which accounted for nearly 16% of all retail sales in the entire state. (Nat. Automobile Dealers Assn., NADA DATA State-of-

the-Industry Report (2013) at pp. 5–7, at <http://www.nada.org/NR/rdonlyres/1B512AC7-DCFC-472C-A854-6F5527931A2F/0/2013_NADA_Data_102113.pdf> [as of Jan. 6, 2014].) New car dealerships also contribute to California’s economy by employing over 106,000 people at an average salary of over \$50,000 per year. (*Id.* at pp. 14–15.) And consumers, about whom the Legislature was especially concerned when it enacted section 3060, may be deprived of new vehicles and services while franchisors and franchisees are embroiled in disputes over whether or not a franchise has actually been terminated. This extremely important sector of California’s economy requires clear legal standards, and the court of appeal’s decision here delivers the opposite.

D. Yamaha Does Not Seek Review of the Question Whether Plaintiffs Were Required to “Exhaust” Their Claims Before the New Motor Vehicle Board

The court of appeal apparently misconstrued Yamaha’s argument as pressing for a requirement that plaintiffs “exhaust” their common law and statutory claims before the Board before bringing them in superior court, despite Yamaha’s repeated statements in both its court of appeal briefs and its petition for rehearing that it was not advocating for such a requirement. Plaintiffs will undoubtedly argue

against an exhaustion requirement in their answer (as they have done throughout this case), but it is a complete straw man. This was not Yamaha's argument in either the trial court or the court of appeal, and it is not presented in this petition.

The focus of the court of appeal's opinion was a response to a purported argument that "section 3060 trumps all judicial and statutory limitations on the Board's authority" and "gives the Board authority to resolve common law and statutory claims." (Slip opn. at pp. 9, 11.) Yamaha *never* made this argument at any stage of this case. In fact, Yamaha repeatedly acknowledged that the Board "did not have jurisdiction over plaintiffs' common law and section 11713.3 claims" and clarified that it was not arguing that "plaintiffs were required to bring their statutory and common law claims for damages before" the Board. (Appellant's Opening Br. at pp. 48–50; Appellant's Reply Br. at pp. 28–29.)

Contrary to the court of appeal's opinion, Yamaha argued only that the Board's decision confirmed that Powerhouse's protest was not timely—i.e., that "the appropriate period for filing a protest ha[d] elapsed" (§ 3060, subd. (a)(3))—and that Yamaha, as a result of that fact, was entitled under section 3060, subdivision (a)(3), and *Sonoma*

Subaru, to treat the Powerhouse franchise as terminated, and its statutory and contractual obligations toward Powerhouse as having come to an end.

II. The Court of Appeal’s Decision Unconstitutionally Imposes Punishment on a Defendant That Perfectly Complied with a Detailed Regulatory Scheme

The court of appeal upheld a \$200,000 punitive damage award premised on conduct that was *required* and *authorized* by the Vehicle Code. (See slip. opn. at pp. 16–17.) This Court should grant review and hold that such penalties violate due process.

Powerhouse and Pilg argued at trial and on appeal that punitive damages were warranted because Yamaha had engaged in a “duplicitous” “two-track” artifice” that “encouraged Powerhouse and MDK to proceed with the sale while, at the same time . . . sabotaging the sale by terminating the Powerhouse franchise.” (Respondent’s Br. at pp. 1, 25–26.) The theory, put simply, was that it was malicious for Yamaha to both pursue termination of the franchise and at the same time consider the sale of the franchise from Powerhouse to MDK.

But plaintiffs’ loaded contentions obscure a critical point that the court of appeal failed to acknowledge: The “two tracks” were expressly required and permitted by section 3060 of the Vehicle Code,

and as such could not form the basis for an award of punitive damages. Because the statutory scheme *required* Yamaha to consider the sale of the franchise from Powerhouse to MDK until the time the franchise was terminated, Yamaha had no choice but to work with Powerhouse and MDK on the proposed sale even while it was publicly pursuing the statutorily authorized termination.

As discussed above, section 3060 allows a franchisor to initiate the termination of a franchise where grounds for termination exist, including where a dealership has closed. But section 3060 *also* provides that a franchisor “shall [not] terminate or refuse to continue any existing franchise unless all of the following conditions are met” and then proceeds to list prerequisites to termination: the provision and receipt of a statutorily compliant Notice of Termination, and either the expiration of the applicable period for filing a protest, the resolution of a timely filed protest in favor of the franchisor, or the franchisee’s written consent to termination. (§ 3060, subd. (a).) A plain reading of the statute thus indicates that the franchisor *must* continue to treat the franchisee as having an active franchise, subject to all the obligations imposed by section 11713.3, until the specified “conditions are met.”

Therefore, because Yamaha was obligated to treat Powerhouse as an active franchisee—even while it was openly pursuing termination by filing and serving a Notice of Termination in accordance with section 3060—it was required to consider Powerhouse’s proposed sale to MDK until the Powerhouse franchise was terminated.

The court of appeal, however, repeatedly disparaged Yamaha’s efforts to *comply* with the mandate of section 3060 by continuing to treat Powerhouse as having an active franchise until that franchise was lawfully terminated, and concluded that this constituted wrongful and deceptive conduct warranting the imposition of punitive damages. (See, e.g., Slip opn. at p. 1 [“With the apparent agreement and support of Yamaha, Pilg entered negotiations to sell the dealership and franchise to MDK. . . . Without informing either Pilg or MDK and contrary to its stated position, Yamaha initiated procedures to terminate the Franchise Agreement pursuant to Vehicle Code section 3060”]; *id.* at p. 4 [“At the same time as [the sale] negotiations were ongoing, and unbeknownst to Powerhouse or MDK, Yamaha began the section 3060 procedure for terminating the Franchise Agreement”].) The court of appeal further overlooked the fact that

Yamaha had no way of knowing in advance that Powerhouse would fail to file a timely protest, and that if a timely protest had been filed, Yamaha would have been obligated to continue processing the proposed sale until the Board resolved the protest. In fact, Yamaha employees “expected” that Powerhouse would file a timely protest. (8RT2169.)

Because the Vehicle Code expressly permitted Yamaha to serve a Notice of Termination (indeed, an *expedited* Notice of Termination) as Powerhouse had closed its doors and ceased to do business, yet required Yamaha to consider Powerhouse’s proposed sale until the franchise was terminated (either by Powerhouse’s failure to file a timely protest, or, in the event of a protest, the Board’s resolution of the protest in favor of termination), it would violate California law and due process to punish Yamaha for doing just what the statute authorized and required. “Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice . . . of the conduct that will subject him to punishment.” (*BMW, supra*, 517 U.S. at p. 574; see also *Fox, supra*, 132 S.Ct. at pp. 2317–2318 [“A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that

is forbidden or required”].) And 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 Ins. Co. of Am. v. Burr* (2007) 551 U.S. 47, 70, fn. 20; see also *Bordenkircher*, *supra*, 434 U.S. at p. 363 [“To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort”].) This procedural safeguard is especially important in the context of punitive damages, where jury instructions are often vague and lacking in concrete standards. (See, e.g., *Honda Motor Co. v. Oberg* (1994) 512 U.S. 415, 432 [noting that jury instructions for punitive damages “typically leave the jury with wide discretion in choosing amounts”].)

Punishing Yamaha for its compliance with section 3060 thus violates California law and is unconstitutional. It is not malicious for a defendant to utilize a statutorily authorized procedure. And Yamaha lacked fair notice that it might be subject to punitive damages liability if it sought to both terminate the franchise agreement in response to the closure of the Powerhouse dealership, and at the same time fulfill its statutory obligation to treat Powerhouse as having an active franchise until the termination was final and effective. This Court

should grant review to settle this important question and ensure that the guarantees of due process are adequately protected.

CONCLUSION

The Court should grant review.

DATED: January 6, 2014 Respectfully submitted,

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*Attorneys for Defendant-Petitioner
Yamaha Motor Corp., U.S.A.*

CERTIFICATION OF WORD COUNT

Pursuant to California Rules of Court, rule 8.504, subdivision (d)(1), the undersigned certifies that this Petition for Review contains 6,420 words as counted by the word count feature of the Microsoft Word program used to generate this brief, not including the tables of contents and authorities, the court of appeal's opinion, the cover information, the signature block, and this certificate.

DATED: January 6, 2014 Respectfully submitted,

GIBSON, DUNN & CRUTCHER LLP

By: 
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*Attorneys for Defendant-Petitioner
Yamaha Motor Corp., U.S.A.*

EXHIBIT C

February __, 2014

Honorable Tani Cantil-Sakauye, Chief Justice and Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102

Re: Letter of Amicus Curiae in Support of the Petition for Review of Yamaha Motor Corporation, U.S.A. in the matter entitled *Powerhouse Motorsports Group, Inc. v. Yamaha Motor Corporation, U.S.A.*, No. S215677

Dear Chief Justice Cantil-Sakauye and Associate Justices:

Pursuant to rule 8.500, subdivision (g), of the California Rules of Court, amicus curiae the California New Motor Vehicle Board (the “Board”) respectfully submits this letter urging the Court to grant Yamaha Motor Corporation, U.S.A.’s petition for review filed in *Powerhouse Motorsports Group, Inc. v. Yamaha Motor Corporation, U.S.A.*, No. S215677, on January 6, 2014.

Review by this Court is needed in order to preserve the Legislature’s carefully crafted balancing of interests between motor vehicle franchisors and their franchisees as reflected in Vehicle Code section 3060’s franchise termination mechanism, and in particular its notice and protest procedure. Prior to the Court of Appeal’s published decision in this case, section 3060 (1) provided franchisees with the right to clear notice of a franchisor’s intent to terminate, specific deadlines by which a protest was required to be filed and, in effect, an automatic injunction against termination if they filed a timely protest, and (2) provided franchisors certainty with respect to when a franchisor could lawfully treat a franchise as terminated, including when a franchisee failed to file a timely protest. Denial of Yamaha’s petition for review will leave unaddressed the confusion and uncertainty created by the Court of Appeal’s decision with respect to how a franchisor can lawfully terminate a franchise, whether a franchisee served with a notice of termination has to file a timely protest in order to preserve its franchise, and the scope of the Board’s jurisdiction.

I. The Amicus Curiae’s Interest

The Board is a quasi-judicial administrative agency created by the Legislature within the California Department of Motor Vehicles, with oversight provided by the State Transportation Agency. When initially created in 1967 as the New Car Dealers Policy and Appeals Board, its function was limited to hearing appeals from final

decisions of the Director of the Department that were adverse to the occupational license of a new motor vehicle dealer, manufacturer, distributor or representative. In 1973, the Legislature passed the California Automobile Franchise Act (Stats. 1973, ch. 996, sec. 1, p. 2), giving the Board its present name and creating a broad statutory framework and forum for regulating and resolving disputes within the new motor vehicle industry, and between motor vehicle franchisors and franchisees in particular.¹ The constitutionality of this regulatory scheme survived a due process challenge in the United States Supreme Court. (See *New Motor Vehicle Board v. Orrin W. Fox Co.* (1978) 439 U.S. 96.) The Board is fully funded through the imposition of fees on new motor vehicle dealers and other licensees (manufacturers and distributors) within the jurisdiction of the Board. (Veh. Code, § 3016.)

The Board's authority to act is set forth at Vehicle Code section 3050, *et seq.*, which, among other things, empowers the Board to “[h]ear and decide, within the limitations and in accordance with the procedure provided, a protest presented by a franchisee [dealer]” where a franchisor (manufacturer or distributor) gives the dealer and files with the Board a statutorily compliant notice expressing the franchisor's intent to:

- a. terminate the franchise (Veh. Code, §§ 3060, subd. (a), 3070, subd. (a));
- b. modify or replace the terms of the franchise, if the terms would substantially affect the franchisee's sales or service obligations or investment (Veh. Code, §§ 3060, subd. (b), 3070, subd. (b));
- c. establish a new, or relocate an existing, dealer (or allow an off-site sale) of the “same line-make” if the current franchisee is within a 10 air-mile radius of the proposed location (Veh. Code, §§ 3062, 3072); or
- d. take other actions involving warranty reimbursement or payment under a franchisor incentive program (Veh. Code, §§ 3065, 3065.1, 3075, 3076).

Nearly all actions filed with the Board in the past decade have been protests under Vehicle Code sections 3060 and 3070, with the overwhelming majority of those protests being termination protests under Vehicle Code section 3060. As a result, the

¹ In 2003, the Board's jurisdiction was expanded to include disputes between recreational vehicle franchisors and franchisees. (Veh. Code, § 3070.)

Board plays a critical role in the development of the law that governs those protests, and in the interpretation of Vehicle Code section 3060 in particular.

Based on the duties given to it by the Legislature, the Board considers itself a guardian of the statutory scheme that it has the responsibility to implement. For that reason, the Board has a vested interest in assuring that the statutory language of section 3060 is not ignored, and that it is implemented consistent with the Legislature's intent. The Board also has a vested interest in seeing that direct conflicts in the case law interpreting section 3060, which create confusion and uncertainty with respect to the rights of franchisors and franchisees, are addressed. Finally, the Board has a significant interest in protecting its own jurisdiction.

II. The Statutory Scheme

Vehicle Code section 3060 regulates the circumstances under which a franchisor may terminate a franchise.² Franchisors are required to give written notice, containing statutorily prescribed language, to a franchisee that the franchisor is seeking to terminate or refuse to continue the franchise. (Veh. Code, § 3060, subd. (a)(1).) The dealer has a specified time period in which it may file a "protest" with the Board challenging the termination. If the dealer timely files a protest, the termination is stayed and the Board conducts a hearing to determine whether there is "good cause" for the franchisor to terminate the agreement. (Veh. Code, § 3060, subd. (a)(2).) In that instance, until the "good cause" determination is made, the franchisor must continue to treat the dealer in all respects as not terminated. (Veh. Code, § 3060, subd. (a)(1)(C)(2) ["When a protest is filed . . . the franchisor may not terminate or refuse to continue until the board makes its findings."].) If, however, the dealer fails to file a timely protest, the franchisor may terminate the dealer agreement. (Veh. Code, § 3060, subd. (a)(3) [termination allowed where "the appropriate period for filing a protest has elapsed"].)

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 file a protest to the termination with the Board. (Veh. Code, § 3060, subds. (a)(1)(A), (a)(1)(C).) In five situations specifically identified in section 3060, subd. (a)(1)(B), the statutory termination mechanism allows a franchisor to initiate an expedited termination process in which the dealer is given notice (1) that the

² "Franchise," "franchisee" and "franchisor" are defined terms in the Vehicle Code. (See Veh. Code, §§ 331 [defining "franchise"], 331.1 [defining "franchisee"], 331.2 [defining "franchisor"].)

termination is effective after 15 days, and (2) that the dealer has 10 days to file a protest to the termination with the Board. (Veh. Code, § 3060, subs. (a)(1)(B), (a)(1)(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. (Veh. Code, § 3060, subd. (a)(1)(B)(v).)

Where a franchisor sends an expedited notice of termination under section 3060, subdivision (a)(1)(B), the statute requires the franchisor to include in the notice specific warning language, in at least 12-point bold type and circumscribed by a line that segregates it from the rest of the text of the letter, that advises the franchisee of the 10-day deadline in which to file the protest. (Veh. Code, § 3060, subd. (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 waived”].)

III. The Court of Appeal’s Decision

Following a two-day evidentiary hearing in March 2009, the Board ruled that a protest filed by Powerhouse Motorsports Group, Inc. to Yamaha’s statutorily compliant expedited notice of termination, sent in response to the closure of the Powerhouse dealership, was untimely. This case arises out of a subsequent jury award against Yamaha for unreasonably refusing under Vehicle Code section 11713.3 to consider Powerhouse’s proposed sale of its franchise *after* Powerhouse failed to file a timely protest with the Board.⁴ Although the trial court upheld the Board’s decision by denying Powerhouse’s writ petition, and thus agreed that Powerhouse had

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.” (Veh. Code, § 3060, subd. (a)(1)(B).)

⁴ A franchisor is prohibited from preventing a dealer from receiving “fair and reasonable compensation for the value of the franchised business.” (Veh. Code, § 11713.3, subd. (e).) A franchisor is also prohibited from preventing or requiring the sale or transfer of an interest in the franchise. (Veh. Code, § 11713.3, subd. (d)(1).) 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.” (Veh. Code, § 11713.3, subs. (d)(1), (e).)

failed to file a timely protest to Yamaha's statutorily compliant notice of termination, it nonetheless allowed the case to proceed to a jury verdict.

In its decision (certified for publication) dated November 26, 2013, the Court of Appeal affirmed the jury award against Yamaha in all respects, ruling that (1) the Board's decision that the franchisee had failed to file a timely protest within the deadlines set forth in Vehicle Code section 3060 did not terminate the franchise as a matter of law, and (2) Yamaha was obligated under Vehicle Code section 11713.3 to consider the franchisee's proposed sale regardless of the franchisee's failure to file a timely protest with the Board.

IV. Why Review Should Be Granted

The Board is particularly concerned with the following aspects of the Court of Appeal's decision:

(i) The decision appears to disregard the text of Vehicle Code section 3060, which provides that a franchisor may treat a franchise as terminated where the franchisor's notice of termination fully complies with the statutory requirements and "the appropriate period for filing a protest has elapsed." (Veh. Code, § 3060, subd. (a)(3).) In so doing, the decision upends a fundamental component of the section 3060 termination mechanism—the portion of the statute that expressly requires a dealer to file a timely protest in order to preserve its right to challenge the franchisor's asserted grounds for termination. By treating the dealer's failure to file a timely protest as not giving the franchisor the right to treat the franchise as terminated, even after the Board determined that the protest was untimely, the Court of Appeal appears to have written the language of Vehicle Code section 3060, subdivision (a)(3)—which allows a franchisor to treat a franchise termination as final when "the appropriate period for filing a protest has elapsed"—out of the statute. In so doing, the Court of Appeal has created substantial uncertainty about both how a franchisor can lawfully end its relationship with a franchisee and when a franchisor can treat a franchise as terminated—the very uncertainty that the Vehicle Code section 3060 statutory termination mechanism was designed to prevent.

(ii) The Court of Appeal's holding that the franchisee's failure to file a timely protest did not terminate the franchise as a matter of law and did not allow the franchisor to treat the franchise as terminated is in direct conflict with the Court of Appeal's decision in *Sonoma Subaru, Inc. v. New Motor Vehicle Board* (1987) 189 Cal.App.3d 13, 22. The Court of Appeal in that case held that, "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." (*Ibid.*)

(iii) By holding that the failure to file a timely protest to a termination does not allow a franchisor to treat a franchise as terminated, the decision appears to make the filing of a timely protest optional. Since, under the Court of Appeal's decision, a myriad of rights and duties between franchisors and franchisees continue unimpeded regardless of whether the franchisee files a timely termination protest,⁵ it is not clear why a dealer would go through the expense and effort of filing and litigating a protest with the Board. The protest-optional scenario created by the Court of Appeal's decision therefore strips the Board of one of its most historically significant duties and most frequently invoked jurisdictional powers, which is to hear and resolve termination protests under section 3060.

(iv) Finally, by engaging in a superfluous discussion of the effect of the *Hardin Oldsmobile v. New Motor Vehicle Board* (1997) 52 Cal.App.4th 585 and *Mazda Motor of America, Inc. v. New Motor Vehicle Board* (2003) 110 Cal.App.4th 1451 line of cases, and the meaning of Vehicle Code section 3050, subdivision (d), as compared to subdivision (e), the Court of Appeal's decision creates confusion and uncertainty about the scope of the Board's jurisdiction to hear and decide protests under Vehicle Code section 3050, subdivision (d). Prior to the Court of Appeal's decision, the Board's jurisdiction under section 3050, subdivision (d), had been clarified by these cases and was not in doubt.

VI. Conclusion

For the reasons stated above, this Court should grant Yamaha's petition for review.

Very truly yours,

William G. Brennan
Executive Director
California New Motor Vehicle Board

⁵ For example, must manufacturers continue to allow "terminated" dealers to perform warranty service and purchase vehicles? Must manufacturers continue to give notice of their intent to establish new dealer points or to relocate existing dealers to "terminated" dealers based on their former business location? When do these and other statutory franchisor obligations end? The Court of Appeal's decision in effect raises these and other questions but leaves them unanswered.