

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

STATE OF CALIFORNIA
NEW MOTOR VEHICLE BOARD

In the Matter of the Protest of

POWERHOUSE MOTORSPORTS GROUP,
INC.,

Protestant,

v.

YAMAHA MOTOR CORPORATION, U.S.A.,

Respondent.

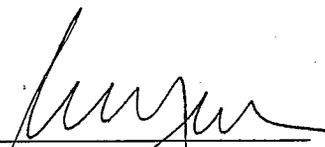
Protest No. PR-2122-08

DECISION

At its regularly scheduled meeting of June 5, 2009, the Public Members of the Board met and considered the administrative record and Administrative Law Judge's "Proposed Order Granting Motion to Dismiss Protest" in the above-entitled matter. After such consideration, the Board adopted the Proposed Order.

This Decision shall become effective forthwith.

IT IS SO ORDERED THIS 5th DAY OF JUNE 2009.


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

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

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8 STATE OF CALIFORNIA
9 NEW MOTOR VEHICLE BOARD
10

11 In the Matter of the Protest of
12 POWERHOUSE MOTORSPORTS GROUP,
13 INC.,
14 Protestant,
15 v.
16 YAMAHA MOTOR CORPORATION, U.S.A.,
17 Respondent.

Protest No. PR-2122-08

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

18
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Attorney for Protestant
20 ANDRÉ, MORRIS & BUTTERY
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22 Michael J. Flanagan, Esq.
23 Attorney for Protestant
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25 Maurice Sanchez, Esq.
26 Kevin M. Colton, Esq.
Attorneys for Respondent
27 BAKER & HOSTETLER LLP
600 Anton Boulevard, Suite 900
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PROCEDURAL BACKGROUND

1
2 1. Protestant is Powerhouse Motorsports Group, Inc. doing business as Powerhouse (hereafter
3 “Powerhouse”) which was located at 2800 Riverside Avenue, Paso Robles, California.

4 2. Protestant was licensed by the California Department of Motor Vehicles (“DMV”) as a
5 new motor vehicle dealer.

6 3. Respondent Yamaha Motor Corporation, U.S.A. (“Yamaha”) is licensed by the DMV as a
7 manufacturer of new motor vehicles. Yamaha’s California headquarters are located in Cypress,
8 California.

9 4. Powerhouse is a franchisee of Yamaha and authorized to sell and service Yamaha vehicles.
10 Timothy L. Pilg is the dealer principal.

11 5. By letter dated July 11, 2008, pursuant to Vehicle Code section 3060(a)(1)(B)(v), Yamaha
12 notified Powerhouse of Yamaha’s intent to terminate the Dealer Agreement. The notice stated the
13 grounds for termination as follows:

14 Our review of your business activities indicates that you are closed and out of
15 business, are not open normal business hours and do not have a wholesale line of credit
that is adequate to meet your obligations under our Dealer Agreement.

16 These actions violate the terms of our Dealer Agreement for all product lines with
17 you. As a result we are terminating your Dealer Agreement effective fifteen (15) days
from the date of your receipt of this letter.

18 6. Mr. Pilg did not receive this letter.

19 7. On or about July 24, 2008, the letter was resent to an alternative address for Mr. Pilg. Mr.
20 Pilg received the letter on July 26, 2008.

21 8. Powerhouse filed a protest on August 15, 2008.

22 9. Yamaha filed a Motion to Dismiss on September 2, 2008, on the basis that the protest was
23 not timely filed. A hearing was held September 25, 2008 before Administrative Law Judge (“ALJ”)
24 Anthony M. Skrocki, who issued an order dated October 24, 2008 deferring a ruling and referring the
25 matter for an evidentiary hearing.¹

26 10. An evidentiary hearing on the merits of the Motion to Dismiss was held March 16 and 17,
27

28 ¹ See, *Automotive Management Group, Inc. v. NMVB* (1993, 6th Dist.) 20 Cal.App.4th 1002.

1 2009, before ALJ Marybelle D. Archibald.

2 11. Dennis D. Law of Andre, Morris & Buttery, PLC, 1102 Laurel Lane, P.O. Box 730, San
3 Luis Obispo, California and Michael J. Flanagan, Law Offices of Michael J. Flanagan, 2277 Fair Oaks
4 Boulevard, Suite 450, Sacramento, California represented Powerhouse.

5 12. Maurice Sanchez of Baker & Hostetler LLP, 600 Anton Boulevard, Suite 900, Costa Mesa,
6 California represented Yamaha.

7 13. Both Powerhouse and Yamaha filed pre-hearing briefs which were read and considered by
8 the ALJ prior to the receipt of evidence.

9 14. Oral and documentary evidence was received.²

10 15. The parties agreed to call some witnesses jointly and to waive certain evidentiary
11 objections in order to accommodate witnesses and to streamline the hearing. Timothy L. Pilg, dealer
12 principal of Powerhouse, was called as an adverse witness pursuant to Evidence Code section 776 by
13 Yamaha. Michael Coffin, owner of CBASE2, a consulting firm hired by Mr. Pilg, was called as an
14 adverse witness pursuant to Evidence Code section 776 by Yamaha. Other witnesses included Bob
15 Braun, National Sales Manager for Yamaha; Lucas Dawson, District Sales Manager for Yamaha's district
16 including Powerhouse; Jason Bishop, Regional Marketing Manager for West and Northwest Regions,
17 Yamaha; Rocky Aiello, Regional Business Manager, West Region, Yamaha; Rodney Stout, Wholesale
18 Credit Manager for Yamaha; and Richard J. Tilley, Senior Legal Counsel, Yamaha Motor Corporation,
19 U.S.A.

20 16. Post-hearing briefs were submitted in compliance with the schedule established at the
21 conclusion of the hearing, the parties submitted Undisputed Facts, and the matter was deemed submitted
22 on April 24, 2009.

23 **EVIDENTIARY MATTERS**

24 17. Pursuant to agreement by the parties, undisputed facts were submitted and are set forth
25 below as "Stipulated Facts".

26 18. Powerhouse has requested that judicial notice be taken of a complaint filed March 6, 2009,

27
28 ² Undisputed facts to which the parties stipulated are identified by number as SF ("SF"). The Reporter's Transcript ("RT") is identified by volume. Exhibits ("Exh.") are identified by party and number.

1 by Powerhouse against Yamaha (San Luis Obispo Superior Court No. CV 09-8090). Yamaha has
2 opposed the request for judicial notice. During the course of the proceedings, not only before ALJ
3 Skrocki, but also before ALJ Archibald, the parties and the judges were particularly careful in their
4 discussions and rulings to delineate the powers of the Board as compared to the distinct authority of the
5 Superior Court in matters which might arise from this dispute. Filing an action in Superior Court to seek
6 remedies not available from the Board is not relevant to this proceeding, and the request for judicial notice
7 is denied.

8 19. Powerhouse objects to the citation by Yamaha of the Board's decision in *Serpa Automotive*
9 *Group v. Volkswagen of America, Inc.* PR-1977-05, September 28, 2006. Although the Board has
10 authority to designate a final decision as precedential pursuant to Government Code section 11425.60, to
11 date it has declined to do so. Thus, no Board decision, or part of a decision, may be cited or relied on as
12 precedent in Board proceedings. The Board's *Serpa* decision, cited by Yamaha, will not be relied upon.

13 20. Powerhouse objects to the citation by Yamaha of the Hearing Decision in *Milloy Subaru,*
14 *Inc. v. Subaru of America, Inc.*, June 30, 1999, by the Commonwealth of Virginia Department of Motor
15 Vehicles. Referencing another state's agency decision and asserting it is comparable to the instant case,
16 without comparative analysis of California and Virginia law, provides no precedential value. The *Milloy*
17 decision, cited by Yamaha, will not be relied upon.

18 **STIPULATED FACTS**

19 21. SF 1. Protestant Powerhouse Motorsports Group, Inc. ("Protestant" or "Powerhouse") was
20 a new motor vehicle dealer selling Yamaha motorcycles, all terrain vehicles, side-by-side utility vehicles,
21 Riva motor scooters and related products.

22 22. SF 2. Respondent, Yamaha Motor Corporation, U.S.A. ("Respondent or "Yamaha") is a
23 distributor of Yamaha motorcycles, all terrain vehicles, and side-by-side utility vehicles in the United
24 States.

25 23. SF 3. Powerhouse (and Timothy L. Pilg, ("Tim Pilg") its predecessor before it was
26 incorporated) has been the Yamaha dealer in Paso Robles since 1998. Tim Pilg acquired the Yamaha
27 franchise in 1998. Powerhouse was a multi-franchise dealership consisting of Suzuki, Polaris (including
28 the Victory line of cruiser motorcycles), KTM and Yamaha.

1 24. SF 4. On or about March 19, 2007, Powerhouse entered into a new Sales and Service
2 Agreement (“Dealer Agreement”) with Yamaha.

3 25. SF 5. From April, 2008 to early June, 2008 Tim Pilg and Powerhouse’s business
4 consultant, Michael Coffin, had several discussions and correspondence with representatives of MDK
5 Motorsports (“MDK”), with respect to a potential sale of Powerhouse to MDK.

6 26. SF 6. On June 17, 2008, Powerhouse closed its doors. It did so because of declining sales
7 and the inability to maintain a positive cash flow. On that day, Tim Pilg contacted Yamaha, as well as its
8 other franchisors, and informed them of the closure of the store. The dealership never re-opened.

9 27. SF 7. On or about June 19 or June 20, 2008 Tim Pilg called Rod Stout. Mr. Pilg told Mr.
10 Stout that he had a potential buyer of the dealership. He asked Mr. Stout whether it was possible to sell
11 the dealership even though the doors were closed. Mr. Stout said he could sell it, so long as Powerhouse
12 had an “active” Dealer Agreement.

13 28. SF 8. On June 21, 2008, Tim Pilg met with representatives of MDK, discussed its
14 purchase of the Powerhouse dealership, and reached a verbal agreement with MDK for the purchase of
15 Powerhouse’s assets.

16 29. SF 9. On June 25, 2008 Powerhouse and MDK signed a “Term Sheet” stating the essential
17 terms of the transaction.

18 30. SF 10. On or about June 25th, Tim Pilg notified Luke Dawson, the Yamaha District
19 Manager responsible for dealer relations with Powerhouse, that Powerhouse had reached an agreement to
20 sell the dealership.

21 31. SF 11. On or about June 26 or June 27, 2008 Tim Pilg and Mr. Dawson spoke about the
22 pending sale, and Tim Pilg told Mr. Dawson that MDK was the proposed buyer.

23 32. SF 12. On July 10, 2008, Yamaha’s district representative, Luke Dawson, met with
24 representatives from Powerhouse and MDK at the Powerhouse store. The dealership was closed to the
25 public the day Mr. Dawson attended this meeting, and it had been closed since June 17th. The meeting
26 ended with an understanding that Mr. Dawson would provide MDK with credit application forms and
27 other written materials for MDK to seek Yamaha’s consent to the transfer (“Credit Application
28 Materials”).

1 33. SF 13. On July 15, 2008, Yamaha sent MDK the Credit Application Materials.

2 34. SF 14. On July 18, 2008, Powerhouse and MDK signed a written Asset Purchase
3 Agreement. A copy of the Asset Purchase Agreement was e-mailed to Mr. Dawson the next day.

4 35. SF 15. On Saturday, July 26, 2008, Tim Pilg received, at his home address, a 15-Day
5 Notice of Termination dated July 11, 2008 ("the Termination Notice") and a letter from Richard Tilley,
6 Yamaha's senior legal counsel, dated July 24, 2008. The July 24th letter stated that the Termination
7 Notice had been previously sent on July 11th to Powerhouse's business address but that it had been
8 returned to Yamaha by the Post Office, without being delivered.

9 36. SF 16. The following Monday, July 28, 2008, Tim Pilg called Richard Tilley to find out
10 what the Termination Notice was about. Mr. Tilley said that he had attempted to mail the Termination
11 Notice to the business address on July 11th, but that it had been returned. He therefore sent it to Tim
12 Pilg's home address. Tim Pilg told Mr. Tilley about the pending sale and that he was working with other
13 people at Yamaha on the sale.

14 37. SF 17. The next day, July 29, 2008 Tim Pilg received a letter from Mr. Tilley. The letter
15 stated that Yamaha was not "amending, withdrawing or delaying" the Termination Notice and that Tim
16 Pilg should seek assistance from his own attorney if he had any questions.

17 38. SF 18. Later on July 29th, Tim Pilg sent Mr. Dawson an e-mail asking him why
18 Powerhouse received a Notice of Termination. Mr. Dawson forwarded Mr. Pilg's e-mail to Mr. Aiello
19 and Mr. Bishop, seeking advice on how to proceed. Mr. Dawson never responded to this e-mail, either by
20 telephone or otherwise.

21 39. SF 19. On approximately August 5, 2008 MDK mailed the completed Credit Application
22 Materials to Yamaha, where it was received the next day.

23 40. SF 20. On August 6, 2008 Tim Pilg sent another e-mail to Mr. Dawson (with copies to
24 Mr. Stout and Mr. Aiello). This e-mail stated that MDK had mailed the application to Yamaha and asked
25 Mr. Dawson to let Tim Pilg know when he received it. Mr. Dawson never responded to this e-mail, nor
26 did Mr. Stout or Mr. Aiello.

27 41. SF 21. The next day, Thursday August 7, 2008 Tim Pilg contacted his legal counsel,
28 Dennis D. Law, for the first time about the Notice of Termination. That same day Mr. Law called Mr.

1 Tilley and left a telephone message for him to return the call.

2 42. SF 22. On Friday, August 8, 2008, Richard Tilley sent another letter to Powerhouse, with
3 a copy to Mr. Law. This letter states that Powerhouse should have filed a protest to the Termination
4 Notice with the California New Motor Vehicle Board, and that because a protest had not been filed,
5 Powerhouse would cease being a Yamaha dealer.

6 43. SF 23. On August 8th, Mr. Law, Mr. Tilley returned Mr. Law's telephone call from the day
7 before. Mr. Tilley stated that Yamaha considered Powerhouse's dealership agreement to be terminated.
8 He further stated that as such Powerhouse had nothing to transfer to MDK. In response, Mr. Law asked
9 Mr. Tilley whether Yamaha would consider processing MDK's application regardless of whether the
10 Powerhouse dealership agreement was terminated or not for the reason that MDK may be a good dealer
11 prospect for that location. Mr. Tilley said he would speak to Yamaha management.

12 44. SF 24. On Monday, August 11, 2008, Mr. Tilley sent a letter to Mr. Law responding to his
13 question. The letter states Yamaha is "not interested" in entering into a new dealer agreement with MDK.

14 45. SF 25. On August 15th Powerhouse filed a protest with the California New Motor Vehicle
15 Board.

16 46. SF 26. On August 26th, Yamaha advised MDK and Powerhouse that the MDK application
17 was being returned to MDK without being processed, on the ground that Yamaha had terminated
18 Powerhouse's Dealer Agreement.

19 **ISSUES PRESENTED**

20 **Whether Yamaha has established it had a good faith belief that Powerhouse was in fact**
21 **going out of business (Veh. Code § 3060(a)(1)(B)(v))?**

22
23 **Whether Powerhouse has established the necessary elements to estop Yamaha from claiming**
24 **Powerhouse's protest is untimely?**

25 ///

26 ///

27 ///

28 ///

1 FINDINGS OF FACT³

2 PRELIMINARY FINDINGS

3 Mr. Pilg's Experience in the Industry

4 47. Mr. Pilg has been a Yamaha dealer since 1995.⁴ His first Yamaha dealership was in
5 Coalinga.⁵ Mr. Pilg acquired the Yamaha franchise in Paso Robles in 1998, through a buy/sell process.⁶
6 When he bought out the dealer in Paso Robles, Mr. Pilg closed the Coalinga dealership.⁷

7 48. The Powerhouse dealership also included other manufacturers' products.⁸

8 The Yamaha – Powerhouse Dealer Agreement

9 49. The parties entered into an updated Dealer Agreement on or about March 19, 2007.⁹

10 50. The Dealer Agreement provides that management may be changed with prior written
11 consent of Yamaha.¹⁰

12 51. The Dealer Agreement provides for termination if the dealer fails “to conduct its
13 operations in the ordinary course of business including closing of Dealer’s operations in any manner
14 inconsistent with what is customary for the same type of business in the same market area.”¹¹
15 Termination may also occur for “Any failure by Dealer to . . . maintain adequate lines of credit for
16 purposes of purchasing”¹²

17 52. Mr. Pilg knew that store closure is a ground for termination of a franchise.¹³

18 Mr. Pilg's Decision to Close Powerhouse

19 53. Mr. Pilg worked with a broker, beginning in June 2007, in an attempt to sell his business.¹⁴
20 He testified that he told the Yamaha District Manager prior to 2008, about his intent to sell the business.¹⁵

21
22 ³ The references to testimony, exhibits, or other parts of the record contained herein are examples of the evidence relied upon to
reach a finding, and are not intended to be all-inclusive.

23 ⁴ RT II, p. 95:1.

24 ⁵ RT II, p. 95:2-9.

25 ⁶ SF 3; RT II, p. 95:11-14; p. 20-23; Exh. R 4.

26 ⁷ RT II, p. 95:15-19.

27 ⁸ SF 3.

28 ⁹ SF 4; Exhs. P 1, R 1.

¹⁰ Exh. R 1, p. 4, sec. 7.1.

¹¹ Exh. R 1, p. 4, sec. 6.2(b).

¹² Exh. R 1, p. 4, sec. 6.2(e).

¹³ RT II, p. 112:20 – 113:12; Exh. R 34, p. 5, para. 22.

¹⁴ Exh. R 2.

¹⁵ RT II, p. 97:9-17.

1 He did not tell Mr. Dawson, his District Manager since January 2008, nor did he tell Rocky Aiello, the
2 Regional Business Manager, West Region, with whom Mr. Pilg had gone to high school, about his intent
3 to sell the business.¹⁶

4 54. From April 2008 to early June 2008, Mr. Pilg and Powerhouse's business consultant,
5 Michael Coffin, had dialogue with MDK Motorsports ("MDK") exploring a potential sale.¹⁷ Mr. Pilg
6 declined to provide certain necessary historical financial information to MDK, and the discussions
7 ended.¹⁸

8 55. On June 17, 2008, Powerhouse closed its doors.¹⁹ It did so because of declining sales and
9 the inability to maintain a positive cash flow.²⁰

10 56. The dealership never reopened.²¹

11 57. On June 17, 2008, Mr. Pilg contacted Mr. Dawson, the Yamaha District Manager, and
12 informed him of the closure.²² They had some discussion about a Voluntary Termination form, which
13 Mr. Dawson caused to be sent to Mr. Pilg on or about June 18, 2008.²³

14 58. The Voluntary Termination form was never returned by Mr. Pilg.²⁴

15 **Mr. Pilg's Decision to Enter Into a Buy/Sell Agreement with MDK**

16 59. On or about June 19 or June 20, 2008, Mr. Pilg called Mr. Stout, Yamaha's Wholesale
17 Credit Manager, and informed him that he had a potential buyer of the dealership.²⁵ In response to Mr.
18 Pilg's inquiry, Mr. Stout told him that the dealership could be sold, even though the doors
19 were closed, as long as Powerhouse had an "active" Dealer Agreement.²⁶

20 60. On or about June 25, 2008, Mr. Pilg notified Mr. Dawson that Powerhouse had an
21 agreement to be sold, but Mr. Pilg did not reveal the buyer to Mr. Dawson until June 26 or June 27,
22

23 ¹⁶ RT I, p. 145:7-25; RT II, p. 50:17-18; pp. 51:18 – 52:7.

24 ¹⁷ SF 5; Exh. R 3.

25 ¹⁸ RT I, p. 62:9-25; RT II, pp. 103:25 – 104:11.

26 ¹⁹ SF 6.

27 ²⁰ *Ibid.*

28 ²¹ SF 6; RT II, p. 107:10-11.

²² SF 6.

²³ RT II, pp. 105:24 – 106:11; Exh. R 11.

²⁴ RT II, p. 106:12-15.

²⁵ SF 7; RT II, pp. 175:21 – 176:20.

²⁶ SF 7; RT II, pp. 173:1 – 174:12; Exh. R 12.

1 2008.²⁷

2 61. MDK has a Dealer Agreement with Yamaha for a separate northern California location.²⁸

3 62. Each buy/sell process is individually evaluated by Yamaha, and the fact that MDK was
4 already a Yamaha dealer did not entitle it special consideration.²⁹

5 **The July 10, 2008, Meeting**

6 63. A meeting was held at the Powerhouse store between Mr. Dawson, representatives of
7 Powerhouse, and representatives of MDK on July 10, 2008.³⁰ One of the reasons Mr. Dawson attended
8 was to confirm that the dealership was closed.³¹ Mr. Dawson testified that he advised the parties that the
9 usual time for processing an application to purchase includes 6-8 weeks for the credit application and 6-8
10 weeks for the dealer documents.³²

11 64. Mr. Pilg testified that Mr. Dawson said the approval process could be 4-6 weeks.³³ Mr.
12 Pilg understood that the new buyer must be approved by Yamaha and GE Finance.³⁴

13 65. Mr. Dawson was to provide MDK with credit application forms and other written materials
14 necessary for MDK to seek Yamaha's consent to have MDK as the dealer in Paso Robles.³⁵ The credit
15 application materials were sent to MDK on July 15, 2008.³⁶

16 66. On July 18, 2008, Powerhouse and MDK signed a written Asset Purchase Agreement, and
17 a copy of the Asset Purchase Agreement was e-mailed to Mr. Dawson on July 19, 2008.³⁷ At the time the
18 Asset Purchase Agreement was submitted, Mr. Pilg had an active Dealer Agreement with Yamaha.³⁸

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21 ///

22 _____
23 ²⁷ SF 10; SF 11.

24 ²⁸ RT II p. 178:4-7.

25 ²⁹ RT I, p. 154:12-21; RT II, pp. 177:18-178:13; pp. 178:22-179:2; pp.182:2-11.

26 ³⁰ SF 12.

27 ³¹ RT I, p. 161:19-21.

28 ³² RT I, p. 156:19-23; pp. 209:20 – 210:19.

³³ RT II, p. 143:2-6; p. 161:6-13.

³⁴ Exh. R 4.

³⁵ SF 12.

³⁶ SF 13.

³⁷ SF 14; Exh. R 20.

³⁸ RT II, pp. 212:21-213.9.

1 **The Management Agreement**

2 67. A dealer can have anyone manage the dealership; the Yamaha Dealer Agreement requires
3 prior approval by Yamaha.³⁹

4 68. Mr. Pilg had closed Powerhouse on June 17, 2008.⁴⁰ He could have reopened it at any
5 time under his management or under a Yamaha-approved Management Agreement.⁴¹

6 69. On June 27, 2008, Mr. Dawson reminded Mr. Pilg about the two lengthy processes
7 involved in a sale, and he also suggested that perhaps MDK could operate under the Powerhouse dealer
8 number through a Management Agreement.⁴²

9 70. MDK first broached the idea of a Management Agreement at the July 10, 2008, meeting.⁴³

10 71. MDK provided Mr. Pilg with a sample Management Agreement, and Mr. Coffin worked
11 on it; however, Mr. Coffin testified he didn't understand the need for the Management Agreement since
12 the dealership would "reopen" under the buy/sell agreement.⁴⁴

13 72. Mr. Pilg was uncomfortable with a Management Agreement as it did not eliminate his
14 financial risk.⁴⁵

15 73. On July 29, 2008, Mr. Dennis Beaver of GE Finance advised Mr. Pilg that a Management
16 Agreement would not be acceptable.⁴⁶

17 **The Dealer Cancellation Request Form**

18 74. Yamaha utilizes a Dealer Cancellation Request form to gather information pertinent to
19 possible termination of a Dealer Agreement.⁴⁷ There is no ability to customize the form for a specific
20 situation -- it is a "one size fits all" form.⁴⁸

21 75. Mr. Dawson, who was traveling on business, transmitted information to Mr. Bishop at the
22

23 ³⁹ Exhs. P 1, page 4, para. 7.1, R 1, *ibid*.

24 ⁴⁰ SF 6.

25 ⁴¹ RT I, p. 159:14-23.

26 ⁴² Exh. R 13.

27 ⁴³ RT I, p. 70:2-14, p. 102:18-23; RT II, p. 147:15-23.

28 ⁴⁴ RT I, p. 134:3-135:9; Exh. R 21. Some buy/sells never come to fruition (such as the June 2008 discussions between Powerhouse and MDK [Exh. R 9]) and some are not approved.

⁴⁵ RT II, p. 108:12-25.

⁴⁶ RT II, p. 153:2-5; Exh. R 26.

⁴⁷ Exhs. P 8, R 14.

⁴⁸ RT II, pp. 26:21 – 27:9.

1 office, and Mr. Bishop filled out the form and signed it on July 10, 2008.⁴⁹ The form was approved by
2 Messrs. Aiello, Stout, and Tilley.⁵⁰

3 76. It is not the practice of Yamaha to process Voluntary Terminations and Termination
4 Notices simultaneously.⁵¹ When Mr. Pilg announced he was closing his dealership in June, a Voluntary
5 Termination form was sent to him, which he never returned.⁵² Mr. Dawson was at the dealership location
6 on July 10, 2008, and confirmed the dealership was closed.⁵³

7 77. Because Mr. Pilg had not signed the Voluntary Termination form, and because the
8 dealership remained closed, the decision was made not to drag Yamaha's feet any longer and to go
9 forward with the involuntary termination.⁵⁴

10 **The July 11, 2008 Notice of Termination**

11 78. On July 11, 2008, Richard J. Tilley, counsel for Yamaha, caused a letter regarding
12 "Termination of Dealer Agreement for All Product Lines" ("Termination Notice") to be sent to Mr. Pilg
13 at the address of the Powerhouse dealership.⁵⁵

14 79. At the time Mr. Tilley sent out the July 11, 2008, Termination Notice, he had reviewed the
15 Dealer Cancellation Request form and other information, including photographs.⁵⁶ Submission of a
16 buy/sell agreement does not cure contractual violations.⁵⁷

17 80. The letter was sent Certified Mail Return Receipt Requested and was returned to Mr.
18 Tilley as undeliverable.⁵⁸

19 **The July 24, 2008 Notice of Termination**

20 81. On or about July 24, 2008, Mr. Tilley sent a copy of the July 11, 2008, Termination
21 Notice, with a cover letter explaining why it was resent, to Mr. Pilg at his home address, and Mr. Pilg

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23 _____

24 ⁴⁹ RT II, pp. 24:23 – 25:13; Exh. R 14.

⁵⁰ RT II, pp. 174:13-174:20; Exhs. P 8, R 14.

⁵¹ RT II, p. 26: 9-12.

⁵² RT II, pp. 105:24 – 106:15; Exh. R 11.

⁵³ RT I, p. 161:19-21.

⁵⁴ RT II, p. 57:13-23.

⁵⁵ Exhs. P 9, R 15.

⁵⁶ Joint Exh. 1, pp. 13:24 – 15:25; p. 16:16-17; pp. 19:24 – 20:1.

⁵⁷ RT I, 170:3-14; RT II, p. 58:7-9; p. 174:10-12.

⁵⁸ SF 15; RT II, p. 186:4-8.

1 received this correspondence July 26, 2008.⁵⁹

2 82. Mr. Pilg testified that he discounted the Termination Notice as part of the buy/sell
3 process.⁶⁰ Mr. Pilg also testified that when he received the Termination Notice, he knew that termination
4 was a possibility.⁶¹

5 83. Mr. Pilg e-mailed the Termination Notice to Mr. Coffin on July 29, and Mr. Coffin
6 testified that he told Mr. Pilg to see an attorney.⁶²

7 84. On August 7, 2008, Mr. Pilg contacted his lawyer for the first time about the Termination
8 Notice.⁶³

9 85. Mr. Pilg filed a protest August 15, 2008.⁶⁴

10 **Communications between Mr. Pilg and Mr. Tilley**

11 86. On Monday, July 28, 2008, Mr. Pilg called Mr. Tilley to find out what the Termination
12 Notice was about.⁶⁵ Mr. Pilg told Mr. Tilley about the pending sale and that he was working with other
13 people at Yamaha on the sale.⁶⁶ Mr. Tilley told Mr. Pilg to contact an attorney.⁶⁷

14 87. On Tuesday, July 29, 2008, Mr. Pilg received a letter from Mr. Tilley stating that Yamaha
15 was not "amending, withdrawing or delaying" the Termination Notice and that Mr. Pilg should seek
16 assistance from his own attorney if he had any questions.⁶⁸

17 88. Yamaha deemed the Powerhouse Dealer Agreement terminated on August 11, 2008.⁶⁹

18 89. Mr. Tilley and Mr. Law had communications on August 8 and 11 concerning the status of
19 the Powerhouse dealership and MDK's application to become the Paso Robles dealer.⁷⁰

20 **Further Communications**

21 90. On July 29, Mr. Pilg contacted Mr. Dawson by e-mail concerning the Termination
22

23 ⁵⁹ SF 15; RT II, pp. 186:12-187:1; Exh. R 23.

24 ⁶⁰ RT II, p. 154:13-17.

25 ⁶¹ RT II, pp. 117:15-118:1.

26 ⁶² RT I, p. 78:4-22; p. 131:5-23; Exh. R 25.

27 ⁶³ SF 21.

28 ⁶⁴ SF 25.

⁶⁵ SF 16.

⁶⁶ *Ibid.*

⁶⁷ RT II, p. 187:5-17.

⁶⁸ SF 17; Exh. R 24.

⁶⁹ Exh. R 31.

⁷⁰ SF 22, 23, 24; Exhs. P 12, P 13, R 30, R 31.

1 Notice.⁷¹ Mr. Dawson forwarded the communication to Messrs. Aiello and Bishop; no one responded to
2 Mr. Pilg.⁷²

3 91. Mr. Pilg communicated by e-mail on August 6, 2008, to Messrs. Dawson, Stout, and
4 Aiello to advise them that MDK had mailed its application to Yamaha, and to request confirmation that
5 the application had been received.⁷³ No response was made to Mr. Pilg.⁷⁴

6 92. Messrs. Dawson and Aiello testified that once the legal department was involved, they did
7 not want to contact Mr. Pilg and risk confusing him.⁷⁵

8 **ANALYSIS**

9 **PURSUANT TO VEHICLE CODE SECTION 3060(A)(1)(B)(V), YAMAHA HAD A GOOD**
10 **FAITH BELIEF THAT THE MOTOR VEHICLE DEALER WAS, IN FACT, GOING OUT OF BUSINESS,**
11 **EXCEPT FOR CIRCUMSTANCES BEYOND THE DIRECT CONTROL OF THE MOTOR VEHICLE**
12 **DEALER OR BY ORDER OF THE DEPARTMENT**

13 93. Vehicle Code section 3060(a)(1)(B)(v) provides:

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

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

19 ... (B) Fifteen days before the effective date thereof setting forth the specific
20 grounds with respect to any of the following:

21 ... (v) Failure of the motor vehicle dealer to conduct its customary sales and service
22 operation during its customary hours of business for seven consecutive business days,
23 giving rise to a good faith belief on the part of the franchisor that the motor vehicle dealer
24 is in fact going out of business, except for circumstances beyond the direct control of the
25 motor vehicle dealer or by order of the department.

26 94. No evidence was presented of any circumstances beyond the direct control of Mr. Pilg on
27 behalf of Powerhouse which impacted his decisions at any time relevant to this action.

28 95. No evidence was presented that any order of DMV impacted the decisions of Mr. Pilg on
behalf of Powerhouse at any time relevant to this action.

⁷¹ SF 18.

⁷² SF 18.

⁷³ SF 20.

⁷⁴ SF 20.

⁷⁵ RT I, pp. 175:12-176:8; RT II, pp. 77:20-78:13.

1 96. Thus, Yamaha bears the burden to establish that it had a good faith belief that Powerhouse
2 was going out of business.⁷⁶

3 **Definition of "Good Faith Belief"**

4 97. The Vehicle Code does not define "good faith" or "good faith belief".

5 98. The California Uniform Commercial Code defines "good faith" as "... honesty in fact and
6 the observance of reasonable commercial standards of fair dealing." (UCC sec. 1201(b)(20).)

7 99. California Civil Jury Instruction Number 325, which deals with essential elements of
8 breach of the covenant of good faith and fair dealing, states: "In every contract or agreement there is an
9 implied promise of good faith and fair dealing. This means that each party will not do anything to
10 unfairly interfere with the rights of any other party to receive the benefits of the contract; however, the
11 implied promise of good faith and fair dealing cannot create obligations that are inconsistent with the
12 terms of the contract."⁷⁷

13 100. A maxim which provides a succinct description which could describe good faith is "Private
14 transactions are fair and regular." (Civil Code sec. 3545.)

15 101. In this situation, a "good faith belief" by Yamaha would include an impartial evaluation of
16 the facts available in a manner consistent with the Dealer Agreement.

17 **Definition of "Motor Vehicle Dealer"**

18 102. Vehicle Code section 426 defines "New motor vehicle dealer" by referencing Vehicle
19 Code section 285, which defines "Dealer". A dealer is a person. "Person" includes a corporation as well
20 as a natural person. (Corp. Code § 18.) The Dealer Agreement between Yamaha and Powerhouse lists
21 Powerhouse Motorsports Group, Inc. as the dealer.⁷⁸

22 ///

23 ///

24 ///

25 ///

26 _____
27 ⁷⁶ See, Ruling on Burden of Proof for Good Faith Belief, dated March 13, 2009.

⁷⁷ Judicial Council of California, Civil Jury Instructions (CACI), Series 300 Contracts.

⁷⁸ Exhs. P 1, R 1.

1 103. Powerhouse asks this Board to redefine “dealer”, arguing that Vehicle Code section
2 3060(a)(1)(B)(v) should read:

3 . . . giving rise to a good faith belief on the part of the franchisor that the motor
4 vehicle dealer [who is the franchisee] is in fact going out of business, **except [that if some**
5 **person or entity might possibly be approved to open a new franchise at the same**
6 **location, then the motor vehicle dealer who is the franchisee shall not be considered**
7 **to be going out of business,]. . . .**

8 104. Powerhouse’s arguments are based on the premise that “the motor vehicle dealer” cannot
9 be deemed to be going out of business if some other dealer takes over the dealership location. This does
10 not comport with the plain meaning of section 3060(a)(1)(B)(v), and the statute does not say anything
11 about potential purchasers.⁷⁹ As Mr. Dawson testified, when you close a K-Mart and you then open a
12 Wal-Mart at the same location, this is not a reopening.⁸⁰ K-Mart is out of business.

13 **Information Available to Yamaha that Powerhouse was going out of business**

14 105. “The question of whether a party acted in good faith can only be determined in the light of
15 the facts known to the party at the time.” (*Ketchu v. Sears, Roebuck and Co.* (1986, 6th Dist.) 208
16 Cal.App.3d 543; 587, rev. grtd. Feb. 5, 1987; rev. dismissed Dec. 7, 1989 and remanded to the 6th Dist.)

17 106. Initially, Mr. Pilg announced that Powerhouse was going out of business. Yamaha
18 provided Powerhouse with a Voluntary Termination form, which was not returned.

19 **Who at Yamaha Made the Decision**

20 107. The Dealer Cancellation Form was signed by Messrs. Bishop, Aiello, Stout, and Tilley.
21 Mr. Tilley testified that he makes the decision whether to use a 15-day or 60-day notice; after he drafts the
22 Termination Notice he sends it to involved parties for comment, and if there are no objections, he sends it
23 out.⁸¹ Mr. Dawson and Mr. Bishop testified that they are not decision makers.⁸²

24 108. Mr. Tilley made the legal determination that the facts supported a 15-day Termination
25 Notice.⁸³ Mr. Tilley read the Dealer Cancellation Request form.⁸⁴

26 ///

27 ⁷⁹ See, *Larry Menke, Inc. v. DaimlerChrysler Motors Co.* (2009, 4th Dist.) 171 Cal.App.4th 1088, 1093.

28 ⁸⁰ RT I, p. 160:8-12.

⁸¹ Joint Exh. 1, pp. 13:9-15:25.

⁸² RT I, p. 162:14-19; RT II, pp. 21:18 – 22:9.

⁸³ RT II, p. 192:2-10.

⁸⁴ RT II, p. 208:12-17.

1 **What Did Yamaha Know on July 11, 2008**

2 109. Mr. Pilg said he had closed his dealership, and he had not reopened Powerhouse.

3 110. Mr. Pilg said that he had a potential buyer in MDK and intended to enter into a buy/sell
4 agreement.

5 111. A buy/sell agreement does not serve to cure contractual violations.

6 112. Mr. Dawson and MDK had mentioned the possibility of Powerhouse reopening with MDK
7 as manager under a Management Agreement, but that had not occurred.

8 113. Yamaha knew that Powerhouse's credit line through GE had been terminated.⁸⁵

9 **What Did Yamaha Know on July 24, 2008**

10 114. When the July 11, 2008 Termination Notice was returned to Yamaha by the post office as
11 undeliverable, Mr. Tilley sent the Termination Notice again to Mr. Pilg's home address. At the time the
12 Termination Notice was resent, Yamaha knew:

- 13 ▪ Mr. Pilg had closed his dealership, and he had not reopened by himself.
- 14 ▪ Mr. Pilg had closed his dealership, and he had not reopened under a Yamaha-approved
15 Management Agreement.
- 16 ▪ An Asset Purchase Agreement had been signed and provided to District Manager Dawson.⁸⁶
- 17 ▪ No buy/sell had been approved by Yamaha.
- 18 ▪ A buy/sell does not serve to cure contractual violations.

19 **Conclusion**

20 115. Powerhouse contends that because Mr. Tilley and other Yamaha witnesses declined to
21 answer certain questions based on the attorney-client privilege, it is impossible to determine if Yamaha
22 had a good faith belief that Powerhouse was going out of business. However, there is no dispute that Mr.
23 Pilg had closed his business, and had not reopened it as of July 10, 2008, in violation of the Dealer
24 Agreement. That information, as well as the failure to maintain an adequate credit line, was available to
25 Mr. Aiello, the decision-maker. Mr. Aiello approved the Dealer Cancellation Request form, subsequently
26

27 ⁸⁵ Exhs. R 8, P 14.

28 ⁸⁶ SF 14. Mr. Tilley is not sure if he saw the Asset Purchase Agreement before sending the July 24, 2008 letter. Joint Exh. 1,
p. 22:17-20.

1 reviewed the July 11, 2008, Termination Notice letter, and did not submit comments to Mr. Tilley
2 indicating he felt anything was incorrect.

3 116. Based upon sufficient information available to him on the Dealer Cancellation Request
4 form – that Powerhouse had closed its business – and realizing that a proposed buy/sell, even if approved,
5 would not “reopen” Powerhouse’s Yamaha franchise, Mr. Aiello and Mr. Tilley could have a good faith
6 belief that Powerhouse was going out of business.

7 117. Powerhouse argues that it was not going out of business because the dealership would be
8 open under MDK following approval of the buy/sell. However, there are two weak points in that
9 argument: (1) it is the dealer, Powerhouse, the corporate entity which is a person, who is going out of
10 business – not the dealership location; and (2) approval of a buy/sell is not guaranteed.

11 118. Powerhouse was going out of business – whether it voluntarily closed the dealership or
12 whether it entered into a successful buy/sell to another corporate entity.

13 **POWERHOUSE HAS NOT ESTABLISHED ALL ELEMENTS OF ESTOPPEL IN ORDER TO**
14 **ESTOP YAMAHA FROM ASSERTING THAT POWERHOUSE’S PROTEST WAS UNTIMELY**

15 119. Powerhouse contends that it was the calculated intention of Yamaha to torpedo the sale of
16 the dealership to MDK by utilizing a 15-day notice of termination rather than a 60-day notice of
17 termination.⁸⁷ Powerhouse argues that Yamaha is estopped to claim that Powerhouse’s protest was
18 untimely filed.⁸⁸

19 120. Yamaha denies any plan to thwart the Powerhouse/MDK buy/sell, and points out that Mr.
20 Pilg was not prohibited from filing a protest on behalf of Powerhouse.⁸⁹

21 121. There are four elements of estoppel:

22 (1) the party to be estopped must be apprised of the facts; and

23
24 ⁸⁷ Vehicle Code section 3060 provides for two types of notice and protest periods. Vehicle Code section 11713.3 identifies
25 responsibilities of franchisors when a franchisee is attempting to sell a franchise.

26 ⁸⁸ Unlike some other California state boards which are permitted to accept late claims and appeals upon a showing of “good
27 cause”, the New Motor Vehicle Board has no such authority. “Sanctioning late filings would undercut that finality and create
28 uncertainty in the minds of franchisors as to whether they may treat their relationship with unsatisfactory franchisees as
concluded. We conclude the Legislature did not intend that the 10-day filing deadline be extended.” (*Sonoma Subaru, Inc. v.*
New Motor Vehicle Bd. (1987, 3rd Dist.) 189 Cal.App.13, 22. The Board may, however, consider equitable defenses raised by
the dealer in an evidentiary hearing. (*Automotive Management Group, Inc., supra*, at 1013.)

⁸⁹ RT II, p. 240:22-241:15.

1 (2) that party must intend that its conduct be acted upon, or must so act that the other party has a
2 right to believe that it was so intended; and

3 (3) the other party must be ignorant of the true state of facts; and

4 (4) the other party must rely on the conduct and suffer injury.

5 (See, for example: *Crestline Mobile Homes v. Pacific Finance Corporation* (1960) 54 Cal.2d 773, 778;
6 *Moore v. State Board of Control* (2003, 3rd Dist.) 112 Cal.App.4th 371, 384-385, citing *Longshore v.*
7 *County of Ventura* (1979) 25 Cal.3d 14, 28.)

8 122. "Estoppel may not be applied where any one of these elements is missing." (*Hair v. State*
9 *of California* (1991, 6th Dist.) 2 Cal.App.4th 321, 328.)

10 **Yamaha Must Be Apprised of the Facts**

11 123. Powerhouse must establish that Yamaha knew about its alleged plot to thwart the buy/sell.

12 124. Yamaha knew that it had sent a Termination Notice on July 11, 2008, and that it intended
13 to proceed with the termination process.

14 125. Yamaha could not know that there would be a mail delivery problem, and that the July 11,
15 2008, Termination Notice would not be delivered to Powerhouse for approximately two weeks.

16 126. Yamaha knew it was preparing to process the buy/sell documents and had an obligation to
17 do so pursuant to Vehicle Code section 11713.3 while Powerhouse was an active dealer.

18 127. Mr. Pilg had been advised by Mr. Stout that the buy/sell could be processed as long as
19 Powerhouse was an active dealer.

20 128. Mr. Braun directed people who reported to him not to meddle in buy/sells.⁹⁰

21 129. Mr. Aiello knew this was a challenging time in the motor sports industry, but the decision
22 not to put another dealer at the former Powerhouse location had nothing to do with a particular person or
23 entity.⁹¹

24 ///

25 ///

26 ///

27 ⁹⁰ RT I, pp. 38:3- 39:1.

28 ⁹¹ SF 24; RT II, p. 73:1-12.

1 Yamaha Must Intend that Its Conduct be Acted Upon, Or Must So Act that Powerhouse
2 Has A Right To Believe That It was So Intended

3 130. It is the position of Powerhouse that Yamaha had a duty to explain to Mr. Pilg, an
4 experienced motor vehicle dealer with a business consultant and an attorney, the manner in which the
5 Termination Notice and the processing of the buy/sell were or were not interconnected. Emphasis is
6 placed on the failure of Messrs. Dawson, Aiello, and Tilley to reply to communications from Mr. Pilg
7 after July 26.

8 131. “[S]ilence – even in the face of a duty to speak – does not automatically establish estoppel.
9 Since it is necessary to also show such things as an intention to induce reliance and actual justifiable
10 reliance, silence as the basis for estoppel usually requires a showing of special circumstances, such as a
11 confidential or fiduciary relationship or an undertaking to provide advice by one who claims to be
12 informed and knowledgeable in the matter.” (*Moore v. State Board of Control (supra* at p. 385, citing
13 *Driscoll v. City of Los Angeles* (1967) 67 Cal.2d 297, 308.)

14 132. Powerhouse has failed to establish that Yamaha had any duty to advise Mr. Pilg. Yamaha
15 made no affirmative statements and did not engage in any conduct that Mr. Pilg could reasonably rely on
16 in failing to file a timely protest.⁹² In fact, Mr. Tilley suggested to Mr. Pilg that he seek legal advice
17 during his July 28 telephone conversation with, and letter to, Mr. Pilg, and this negates any inference that
18 Yamaha was trying to lull Powerhouse into abandoning its protest rights.

19 133. The Termination Notice includes the statutorily mandated 12-point bold font advice
20 concerning the time within to file a protest.⁹³ Mr. Pilg testified that he did not calendar the time within
21 which to file a protest.⁹⁴

22 134. Mr. Dawson advised Mr. Pilg that buy/sell processing could take from 12-16 weeks. Even
23 though Mr. Pilg testified he heard Mr. Dawson say 4-6 weeks, there is still a lengthy time for the approval
24 process (which Mr. Pilg had previously gone through when purchasing the Paso Robles dealership).
25 Knowing this should not have made Mr. Pilg believe he should delay filing a protest on behalf of
26

27 ⁹² RT II, p. 190:14-16.

⁹³ Veh. Code section 3060; Exhs. P 9, R 15.

28 ⁹⁴ RT II, pp. 121:19 – 122:2.

1 Powerhouse.

2 135. There is no evidence that Yamaha misled Mr. Pilg or engaged in conduct upon which Mr.
3 Pilg could reasonably rely, that would have made Mr. Pilg delay filing a protest on behalf of Powerhouse.
4 Yamaha had no duty to speak; however, it did suggest that Mr. Pilg seek his own legal counsel.

5 **Powerhouse Must Be Ignorant of the True State of Facts**

6 136. Powerhouse contends that Mr. Pilg was ignorant of the true state of facts: Yamaha
7 allegedly intended to thwart the processing of the buy/sell agreement with MDK by serving the 15-day
8 Termination Notice. Yamaha denies this allegation.⁹⁵

9 137. It is apparent that Mr. Pilg was faced with a difficult decision which affected his family
10 and his employees. Nevertheless, he knew that closure of the dealership could result in a Termination
11 Notice, and he knew that reopening himself, or reopening with MDK under a Management Agreement,
12 would subject him to certain financial liabilities.

13 138. Mr. Pilg declined to be forthcoming with GE and with MDK concerning dealership
14 financial data which he possessed and this resulted in a hold placed on his credit line and the ending of the
15 first buy/sell discussions with MDK in June 2008.

16 139. Mr. Pilg knew from his conversation with Mr. Stout on June 19 or June 20 that Yamaha
17 would process the buy/sell as long as he had an active Dealer Agreement.

18 140. Mr. Pilg knew that the buy/sell had not been approved by July 26.

19 141. Mr. Pilg knew that no Management Agreement had been approved by Yamaha; Mr. Pilg
20 decided not to enter into the Management Agreement because he would still be financially responsible for
21 the monies he owed GE.⁹⁶

22 142. Mr. Pilg had a communication from Mr. Beaver at GE Finance, advising Mr. Pilg that a
23 Management Agreement was unacceptable; thus, Mr. Pilg knew that option was no longer available even
24 if he were interested.⁹⁷

25 143. Mr. Pilg knew that Yamaha was not going to amend, withdraw or delay the Termination
26

27 ⁹⁵ RT II, pp. 240:22-241:15.

28 ⁹⁶ RT II, p. 108:12-25.

⁹⁷ Exh. R 26.

1 Notice.

2 144. Mr. Pilg knew the Termination Notice could result in termination. Mr. Pilg concedes that,
3 right after closing the dealership, he knew the connection between closure and the fact he may not be able
4 to sell it, and the fact that the dealership could be terminated due to the closure, and when he got the
5 Termination Notice, he knew it was a possibility if Powerhouse did not file a timely protest.⁹⁸

6 145. Mr. Pilg got advice from Mr. Coffin on July 29 and from Mr. Tilley on July 28, well
7 within the time frame to permit him to file a timely protest, to seek legal advice from his own attorney.⁹⁹

8 146. The alleged plot by Yamaha remains just that – an unproven allegation. Even assuming,
9 for the sake of argument, that Mr. Pilg were unaware of the alleged plot, he had ample information about
10 the possible consequences of receiving a Termination Notice to enable him to make a timely decision to
11 file, or not file, a protest.

12 **Powerhouse Must Rely on Yamaha's Conduct to Its Injury**

13 147. Powerhouse must establish that Mr. Pilg relied upon Yamaha's conduct to its injury.

14 148. Mr. Tilley advised Mr. Pilg to seek his own counsel on July 28, 2008, but Mr. Pilg
15 delayed.

16 149. Mr. Pilg took the advice of MDK regarding the Termination Notice, which was incorrect.

17 150. Mr. Pilg relied on Mr. Coffin, who seemed to think that "reopening" under a Management
18 Agreement was the same as opening under a buy/sell.

19 151. Mr. Pilg was not prohibited by Yamaha from reopening the dealership himself.

20 152. Mr. Pilg knew on July 26 that there was no buy/sell approved.

21 153. Mr. Pilg's failure to file a timely protest on behalf of Powerhouse cannot be attributed to
22 actions by Yamaha.

23 **Conclusion**

24 154. Powerhouse contends that Mr. Pilg did not know he was involved in a legal process. This
25 contention, as well as the contention that a plan was concocted by Yamaha to thwart the buy/sell, is not
26 supported by the evidence. If Yamaha intended to induce Powerhouse to waive its protest rights, why

27 _____
28 ⁹⁸ RT II, pp. 117:15-118:1.

⁹⁹ RT I, p. 78:6-7.

1 would Mr. Tilley advise Mr. Pilg to consult with his own attorney?

2 155. Powerhouse has failed to establish evidence of all elements of estoppel, and Yamaha is not
3 estopped to claim the Powerhouse protest was untimely.

4 **DETERMINATION OF ISSUES**

5 1. Yamaha had a good faith belief that Powerhouse, a Yamaha new motor vehicle dealer in
6 Paso Robles, was going out of business, and use of the 15-day notice of termination was legally
7 supported.

8 2. Powerhouse has failed to establish all necessary elements of estoppel, and Yamaha is not
9 estopped to claim that Powerhouse's protest was untimely.

10 **PROPOSED ORDER**

11 After consideration of the pleadings, testimony, exhibits, and oral arguments of counsel, it is
12 hereby ordered that "Respondent's Motion to Dismiss Protest" is granted.

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

19 DATED: May 22, 2009

20 By:


21 MARYBELLE D. ARCHIBALD
22 Administrative Law Judge

23
24
25
26
27 George Valverde, Director, DMV
28 Mary Garcia, Branch Chief,
Occupational Licensing, DMV